IN THE CHANCERY COURT FOR DAVIDSON COUNTY, TENNESSEE

HENRY HODGES,	)	
	)	
Plaintiff,	)	
v.	)	
	)	**No. 22-1440-III**
LISA HELTON, in her official capacity As Tennessee's Interim Commissioner Of Correction	)	
	)	
DR. KENNETH WILLIAMS, in his Official capacity as Asst. Commissioner Of Clinical Services, Chief Medical Officer Tennessee Department of Correction	)	
	)	
Defendants.	)	

DEFENDANTS' CONSOLIDATED RESPONSE TO INTERVENORS' OPPOSITION TO DEFENDANTS' MOTION FOR PROTECTIVE ORDER[1]

Defendants hereby respond to the briefs submitted by the Proposed Intervenors, the Associated Press and The Nashville Banner (collectively "Intervenors"), in opposition to Defendants' Motion for Protective Order.

At the outset, Defendants wish to make clear that they do not oppose intervenors' ability to appear as third parties in this lawsuit, and likely, Defendants would not oppose any order that would unseal Plaintiff's medical records, so long as Defendants are given time to briefly review those records to ascertain whether they include any other categories of protected information, such as personally identifying information of medical providers. However, Tennessee Department of Correction ("TDOC") cannot and will not consent to ***any*** public disclosure of information related to the security of its facilities, whether it is already under this Court's seal or part of the information exchanged between the parties, and it seeks a protective order on that basis.

The Tennessee General Assembly has unequivocally determined the records TDOC asks

[1] Defendants do not oppose Intervenors Motions to Intervene and respond herein to the merits of the opposition.

this Court to protect are confidential and not subject to view by the public because they go to the heart of the security of institutions the State has a responsibility to protect. Through Tenn. Code Ann. § 10-7-504, the General Assembly has outlined the specific manner in which these materials can be exchanged by parties in civil litigation, but it has expressly prohibited their public disclosure. Intervenors do not mention Tenn. Code Ann. § 10-7-504 once in their analysis, nor do they mention the specific records sought to be protected by Defendants' motion. The materials Defendants seek to protect reside squarely within the statute and the well-established body of law in this area. A protective order will merely ensure that these records containing confidential information regarding prison security will be used only by the parties and the Court and will not be disseminated to the public. As such, the security records at issue should be subject to a protective order of this Court.

Finally, as a threshold manner, the Court has stayed this case pursuant to the statutory mandate set forth in Tenn. Code Ann. 41-21-806, and accordingly, the Defendants submit that the Court cannot address Defendants' Motion for a Protective Order, or Intervenors' opposition, while the case is under a statutorily mandated stay.

LAW AND ARGUMENT

I. No Motion or Opposition May Be Heard While the Proceedings Are Stayed.

The stay ordered by the Court on December 12, 2022 mandates a complete pause of the entire legal proceeding before this Court. Where an inmate has failed to complete the grievance process, as Plaintiff has here, "the court shall ***stay*** the ***proceeding*** with respect to the claim…" Tenn. Code Ann. § 41-21-806(c). A "stay" means "the postponement or halting of a proceeding, judgment, or the like, [including], an order to suspend all or part of a judicial proceeding or a judgment resulting from that proceeding." Black's Law Dictionary (11th ed. 2019). "Proceeding" means "the regular and orderly progression of a lawsuit, including ***all acts and events*** between the

time of commencement and the entry of judgment." Black's Law Dictionary (11th ed. 2019) (emphasis added). The definition continues in even greater specificity: "As applied to actions, the term 'proceeding' may include — (1) the institution of the action; (2) the appearance of the defendant; (3) all ancillary or provisional steps, such as arrest, attachment of property, garnishment, injunction, writ of ne exeat; (4) the pleadings; (5) the taking of testimony before trial; (6) ***all motions made in the action*** …"

There is no debate regarding the plain legal meaning of these words. As one District Court in New York observed:

> "It requires no citation to authority to say that a judicial ***stay of proceedings means exactly what it says***: no formal actions, including further pleadings, discovery, or ***motion practice***, in the case are to be taken…"

Kyntec Corp. v. ITT Enidine, Inc., No. 14-CV-271A(F), 2016 WL 1611358, at *4 (W.D.N.Y. Apr. 21, 2016).

The effect of a stay is universally recognized. "[G]ranting a stay means putting these cases on total hold" or holding the action "in abeyance." *Quinn v. JPMorgan Chase Bank, N.A.*, No. 20-CV-4100 (JSR), 2020 WL 3472448, at *1 (S.D.N.Y. June 24, 2020); *Lenser v. McGowan*, 358 Ark. 423, 428, 191 S.W.3d 506, 509 (2004). Regardless of context, a stay halts the proceedings across the board. *See e.g.*, *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 10 (1983) (analyzing the notion of stayed proceedings in the abstention doctrine context to conclude that a stay places a party "effectively out of court"); *In re Cueva*, 371 F.3d 232 (5th Cir.2004) (holding that when proceedings are stayed, only an order of the bankruptcy court in adjacent proceedings can terminate the stay); *Cohen v. Salata*, 303 Ill. App. 3d 1060, 1065, 709 N.E.2d 668, 672 (1999) (holding that the trial court has no subject matter jurisdiction when a case is statutorily stayed and, thus, has no power to enter any orders during that time period).

Even a court of general equitable jurisdiction, such as this Honorable Court, lacks subject matter jurisdiction when its power to act in a particular matter has been divested by a statute of the General Assembly, as is the case under Tenn. Code Ann. § 41-21-806. "Courts presume that every word in a statute has meaning and purpose," and the words "stay" and "proceeding" set forth in § 41-21-806 "must be given their natural and ordinary meaning in the context in which they appear and in light of the statute's general purpose." *Johnson v. Hopkins*, 432 S.W. 3d 840, 848 (Tenn. Ct. App. 2013). The General Assembly clearly dictated that the entire proceeding should be stayed, not some part or portion of it. Neither the stay itself, nor its scope, once ordered, are discretionary in cases where an inmate has failed to exhaust the grievance process. And in mandating the stay of judicial proceedings, the General Assembly did not create any exceptions but instead required a complete stay of judicial proceedings.

Thus, ruling on the merits of the Motion for Protective Order during the pendency of a statutorily-mandated stay would belie the very purpose of that stay and, indeed, the statute itself. The Motion for Protective Order goes to the heart of issues central to the lawsuit. Considering whether to allow the public disclosure of confidential prison security video recordings and prison security logs—statutorily confidential records not subject to public disclosure in the first place—***before Plaintiff has even demonstrated that he is entitled to bring his claim*** would contradict the very purpose of the stay. *See, e.g., Pendleton v. Mills*, 73 S.W. 3d 115, 131 (Tenn. Ct. App. 2001) (affirming *dismissal* of prisoner's complaint where he failed to exhaust administrative remedies as required by Tenn. Code Ann. § 41-21-806(a)); Tenn. Code Ann. § 41-21-806(b) ("The court ***shall dismiss*** the claim if the inmate fails to file the claim before the thirty-first day after the date the inmate receives the final decision from the grievance committee."). *See also Roberson v. Lindenwood*, 2017 WL 2304697, at *2-3 (Tenn. Ct. App. 2017) (affirming dismissal of inmate's

action based on his failure to provide information regarding his prior litigation history as required by Tenn. Code Ann. § 41-21-805). If Plaintiff fails to satisfy his statutory obligations, then Plaintiff cannot demonstrate his entitlement to bring his claims, and this Court must dismiss the Complaint.

The clear intent of the General Assembly was to ensure an inmate completes the grievance process before his or her civil action can proceed. An adjudication of the pending Motion for Protective Order while a stay has been ordered would contravene this unambiguous purpose. The Court cannot consider whether to order the release of statutorily-protected records in this action until after Plaintiff has demonstrated he is entitled to bring his claim in Court. There is ***no prejudice*** to Plaintiff or Intervenors in waiting until this has happened. If, however, the Court were to proceed with ruling on the Motion for Protective Order and orders the release of all sealed records during the pendency of the stay, Defendants would be extremely prejudiced, as the Court would have ordered the release of statutorily-confidential records before the Plaintiff was even lawfully before this Court. And once the statutorily-confidential records are released, they cannot be un-released.

Intervenors have no grounds to request the Court ignore both its own stay order, the intent of the General Assembly, and the plain meaning of straightforward legal terminology. There is no prejudice to Intervenors because the stay does not bar their opposition; it simply requires it be heard when the stay is lifted after Plaintiff completes the grievance process. There is no exception to the statutory stay, and there is no exigency for Intervenors to ask the Court to invent one. There is no ambiguity in what a "stay" demands. For these reasons, Defendants' Motion for Protective Order should not be heard or adjudicated by the Court until after the stay is lifted.

II. Protective Order Standard of Review

"[T]he common law right of access to judicial records **is not absolute**." *In re Est. of Thompson*, 636 S.W.3d 1, 12 (Tenn. Ct. App. 2021). While it is true that Article I, Section 17 of

the Tennessee Constitution provides explicitly that "the courts shall be open," Tennessee courts have long recognized that:

> The presumption of openness may be overcome only by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest. The interest is to be articulated along with findings specific enough that a reviewing court can determine whether the closure order was properly entered.

In re NHC--Nashville Fire Litig., 293 S.W.3d 547, 560 (Tenn. Ct. App. 2008).

To protect confidential material from inappropriate disclosure, every court possesses "inherent supervisory authority over its own records and files" such that access may be denied under some circumstances, including when access would "promote public scandal or publication of libelous statements." *Thompson*, 636 S.W. 3d at 12 (quoting *In re Lineweaver*, 343 S.W.3d 401, 413 (Tenn. Ct. App. 2010)). As such, trial courts must balance the privacy of litigants against the public's right to access the courts and their records; however, "any restriction on public access to judicial proceedings and documents 'must be narrowly tailored to accommodate the competing interest without duly impeding the flow of information.'" *Id*. "This balance must be carefully struck." *Id*.

One method by which courts strike this delicate balance is through protective orders. *See Kocher v. Bearden*, 546 S.W.3d 78, 85 (Tenn. Ct. App. 2017) (citing *Ballard v. Herzke*, 924 S.W.2d 652, 658 (Tenn. 1996)) ("Protective orders strike a balance between [ ] public and private concerns."). "Protective orders are intended to offer litigants a measure of privacy, while balancing against this privacy interest the public's right to obtain information concerning judicial proceedings." *Kocher*, 546 S.W.3d at 86. In ordering certain materials be sealed, a trial court "relies on its inherent authority to seal its record[.]" *Bottorff v. Bottorff*, No. M2019-00676-COA-R3-CV, 2020 WL 2764414, at *8 (Tenn. Ct. App. May 27, 2020) (citing *Kocher*, 546 S.W.3d at

85 n.9).

A trial court's decision to seal its record is reviewed for an abuse of discretion. *Kocher v. Bearden*, No. W2017-02519-COA-R3-CV, 2018 WL 6423030, at *10 (Tenn. Ct. App. Dec. 5, 2018). Although the appellate courts review a trial court's order to seal its records for an abuse of discretion, "'[i]n light of the important rights involved, the ... decision is not accorded' the deference that standard normally brings." *Doe by Doe v. Brentwood Acad., Inc.*, 578 S.W.3d 50, 53 (Tenn. Ct. App. 2018) (quoting *Shane Group, Inc. v. Blue Cross Blue Shield of Michigan*, 825 F.3d 299, 306 (6th Cir. 2016)).

III. Tenn. Code Ann. § 10-7-504(m)(1) Prohibits Public Release of the Materials Intervenors Seek, and Mandates Issuance of a Protective Order by the Court.

Defendants have asked the Court to enter a protective order covering three sets of materials: (1) surveillance video of Riverbend Maximum Security Prison ("RMSI"), (2) Investigative Reports by the Tennessee Department of Correction, and (3) Logbooks from RMSI documenting inmate head counts, various security checks, and the times at which they all occur. Neither Intervenors oppositions speak directly to which records they believe should be public. The Nashville Banner's opposition goes as far to ask for a blanket unsealing of "every line of every page—and every second of every video." (Memorandum in Support of Opposition, at p. 14.)

Defendants have demonstrated why these three specific categories of materials should be subject to the requested Protective Order. The Tennessee General Assembly has categorically established a "legitimate need for privacy or confidentiality" of these materials. *In re NHC--Nashville Fire Litig.*, 293 S.W.3d at 573. Tenn. Code Ann. § 10-7-504(a)(8) and (m)(1) provides:

> "**All investigative records and reports** of the internal affairs division of the department of correction or of the department of youth development shall be treated as confidential and **shall not be open to inspection by members of the public**....

> Information and records that are directly **related to the security of any government building** shall be maintained as confidential and shall not be open to public inspection … Such information and records include, **but are not limited to**:
>
> […]
>
> (C) **Assessments of security vulnerability**;
>
> (D) **Information and records that would identify those areas of structural or operational vulnerability that would permit unlawful disruption to, or interference with, the services provided by a governmental entit**y;
>
> (E) **Surveillance recordings, whether recorded to audio or visual format, or both**…

Id. (emphasis added).

Moreover, the General Assembly did not leave wide open any occasions on which the statutory mandate of confidentiality for these records may be overridden. In fact, it expressly designated the manner in which these materials can be disclosed:

> "[I]f the recordings are relevant to a civil action or criminal prosecution, then the recordings may be released in compliance with a subpoena or an order of a court of record in accordance with the Tennessee rules of civil or criminal procedure. The court or administrative judge having jurisdiction over the proceedings **shall issue appropriate protective orders, when necessary, to ensure that the information is disclosed only to appropriate persons**…"

Tenn. Code Ann. § 10-7-504(m)(1)(E) (emphasis added).

Furthermore, the General Assembly has made clear that these protections afforded prison security video cannot be waived. *Id*. ("Release of any segment or segments of the recordings shall not be construed as waiving the confidentiality of the remaining segments of the audio or visual tape.").

Simply put, the statute mandates that the surveillance footage, investigation, and security logs Intervenors seek "***shall be maintained as confidential***," and to maintain this confidentiality,

in the context of civil litigation, a court ***"shall issue appropriate protective orders."*** The statute demonstrates the compelling interest the State has in maintaining the confidentiality of security information related to its prisons. However, to the extent that the parties have suggested further inquiry is necessary, Defendants have plainly provided the Court with cause to follow the statute.

First, the statute uses unambiguous and mandatory language in instructing Courts with jurisdiction to issue appropriate protective orders: ***shall*** is not a statutory term that allows for discretion. *Kingdomware Techs., Inc. v. United States*, 579 U.S. 162, 171 (2016) (determining that "shall" is "mandatory" and does not allow discretion); *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 35 (1998) (recognizing that "shall" is "mandatory" and "normally creates an obligation impervious to judicial discretion"); *Lee v. Franklin Special Sch. Dist. Bd. of Educ*., 237 S.W.3d 322, 333 (Tenn. Ct. App. 2007) ("The term 'shall' is mandatory"); *State v. Moore*, No. 6764, 1990 WL 120714, at *3 (Tenn. Crim. App. Aug. 22, 1990) ("The word "shall " is mandatory, the equivalent of "must" (quoting *Home Telegraph Co. v. Mayor and City Council of Nashville*, 118 Tenn. 1, 101 S.W. 770, 773 (1907)); *Austin v. Shelby Cnty*., 640 S.W.2d 852, 854 (Tenn. Ct. App. 1982) ("'[S]hall' means shall").

Second, Defendants have satisfied this basic showing and have "articulated a legitimate need for privacy or confidentiality." *See* Declaration of Ernest Lewis, at ¶¶ 6-7. Ernest Lewis, the Associate Warden of Security at RMSI, has addressed the clear and specific security concerns the prison's security videos depict, such as points of ingress and egress into some of the most sensitive areas of RMSI, the identities and actions of corrections officers and medical staff (who are not party to this lawsuit) handling some of the most sensitive matters at the facility, and the types of security equipment used by RMSI and the manner in which it is employed in the handling of dangerous and violent inmates or inmates in need of medical care. Moreover, the prison logs paint

a complete picture of how security checks and procedures are performed, including who does them, the increments in which they happen, and how they are recorded.

In asking the Court to ignore these legitimate security concerns, Intervenors force the Court to second-guess the sworn statements of the Associate Warden of Security for RMSI. There is simply no basis for the Court to entertain this request from Intervenors.

Intervenors, like Plaintiff, seek to litigate their own, subjective view of what is and is not a security risk for RMSI. Because the materials are squarely within the scope of Tenn. Code Ann. § 10-7-504, and because Defendants have satisfied the standard set forth in *In re NHC--Nashville Fire Litig*., the Court should grant Defendants' Motion.

IV. Even Apart from Tenn. Code Ann. § 10-7-504, the State Has a Compelling Interest in Protecting Video and Security Logs that Evidence Points of Ingress and Egress; the Frequency of Security Checks; and the Roles of Individual Corrections Officers in Maintaining Prison Security

It is well-settled law, including in the Sixth Circuit, that "prison security is a compelling state interest," and "deference is due to institutional officials' expertise in this area." *Hayes v. Tennessee,* 424 F. App'x 546, 554 (6th Cir. 2011) (citing *Cutter v. Wilkinson,* 544 U.S. 709, 717, 125 S. Ct. 2113, 2119, 161 L. Ed. 2d 1020 (2005)).

Courts find this compelling interest in prison security present when the State seeks protection of exactly the type of information at issue here – video surveillance and prison logs:

> Likewise, defendants urge that video surveillance footage from the prison should also be subject to a protective order because it depicts "the manner in which officers responded to the incidents at issue and the techniques used to gain control of [p]laintiff" and this information "could be used by inmates to create a disturbance or uprising, or attempt to escape." Again, I agree.
>
> Second Circuit case law concerning the protection of jail security footage is surprisingly scant. Nevertheless, in *McMillen v. Windham,* the United States District Court for the Western District of Kentucky granted a protective order with respect to video

> surveillance footage from a detention center. *McMillen v. Windham*, No. 3:16-CV-558-CRS, 2018 WL 652829, at *5 (W.D. Ky. Jan. 31, 2018). ***The court, conducting its own review of out-of-circuit case law, found support for the movant's argument that the detention center's safety concerns constituted sufficient good cause for the issuance of a protective order.*** "The Court is persuaded that to allow the production, dissemination, and use of the Lincoln Village video footage to be unrestricted could create security and safety risks to the current staff of that facility and to the public." Accordingly, the court entered a protective order limiting the usage of the footage for the purposes of the litigation at hand.
>
> This reasoning is persuasive. Defendants assert that allowing the dissemination of the video surveillance footage would put at risk the safety of corrections officers, other inmates, and the public. Like in McMillen, the court finds that there is good cause for a protective order preventing plaintiff disseminating the surveillance footage.

Harris v. Livingston Cnty., No. 14-CV-6260-DGL-JWF, 2018 WL 6566613, at *2–3 (W.D.N.Y. Dec. 13, 2018) (internal citations omitted).

The self-evident importance of keeping prison security video footage confidential is not unique to *Harris*; the standard approach of courts across the country when confronted with this issue has been to recognize the inherent sensitivity of the footage. *See, e.g.*, *Perasso v. Washington State Dep't of Corr*., No. 318CV05934BHSDWC, 2019 WL 2172857, at *2 (W.D. Wash. May 20, 2019) (holding a protective order was "appropriate to ensure prison security" because the evidence showed "***it is critical that offenders, their cohorts, and visitors not know the capabilities and the limitations of the DOC's surveillance systems*****"** to maintain the secure and orderly operation of a prison (emphasis added)); *Fourhorn v. City & Cnty. of Denver*, 261 F.R.D. 564, 569 (D. Colo. 2009) (granting protective order regarding jail documentation because "[a]mple caselaw addressing issues relating to jail or prison security and safety concerns reflects ***a broad policy against Court interference in matters which affect those concerns***" and "despite the presumption in favor of public access, [the Court found] that ***good cause [was] shown to maintain the***

confidentiality designation of the jail policies at issue" (emphasis added)); *Est. of Miller v. Michigan Dep't of Corr.*, No. 22-10934, 2022 WL 3153794, at *2 (E.D. Mich. Aug. 8, 2022) (granting protective order and stating "[w]hile it is true that the videos do not reveal other security measures and that they capture areas already visible to individuals present at [the prison], that hardly undermines Defendants' compelling interest in safety and security at the prison. As Defendants suggest, leaving these videos unsealed would give individuals outside the prison the ability to '***freeze images, slow playback, or zoom in to see details*** of the activities on camera that might not be apparent to the naked eye at full speed.' . . . ***So the Court finds that Defendants' interest in prison safety and security is compelling enough to merit sealing***."); *Sampel v. Livingston Cnty.*, No. 17-CV-06548-EAW-MJP, 2019 WL 6695916, at *3 (W.D.N.Y. Dec. 9, 2019) (holding the "surveillance videos produced by defendants are of a sensitive and confidential nature" because they "provide information (*i.e.*, the geographical layout of the jail, the location of the cameras, the view from the cameras) that could be used to exploit potential gaps in surveillance. As in *Harris*, the Court finds good cause for a protective order against the surveillance footage.").

There is no reason for the Court to deviate from this consistently recognized and compelling State interest in confidentiality.

This great weight of authority cuts against second-guessing the sworn testimony of Warden Lewis, who is both familiar with the sensitive security materials at issue and is tasked with providing assessments of the security concerns of the facility at issue.

As Warden Lewis has stated, and as is articulated again and again by courts across the country, the concern with public viewing of these videos extends beyond just those who may innocently encounter them in the news, but to those who may seek to exploit and utilize these materials for other nefarious purposes that would directly harm RMSI, its employees, and the

inmates housed there. Thus, the Court should recognize the long line of authority within the Sixth Circuit and across the country in concluding that Defendants have a compelling interest in protecting these video and security logs.

V. Intervenors Have No Legitimate Interest in the Public Dissemination of Confidential Prison Security Materials

Intervenors have not proffered any justification for weighing public disclosure over public safety. In *In re Secretary, Florida Department of Correction*, the Eleventh Circuit went so far as to reverse the trial court's denial of a protective order over "sensitive prison security and safety information," which included video footage, because the trial court ignored "the seriousness of the potential security and safety breaches" as well as "***the lack of harm to plaintiffs' case by having the [parties] handle the highly sensitive information***." *In re Sec'y, Fla. Dep't of Corr.*, No. 20-10650-J, 2020 WL 1933170, at *3 (11th Cir. Mar. 30, 2020). Ultimately, the Eleventh Circuit vacated the trial court's order denying the motion for a protective order and itself ordered that the motion be granted, wholly divesting the trial court of discretion over the matter.

Furthermore, to the extent Intervenors and Plaintiff suggest that a YouTube marketing video published several years ago that shows portions of the inside of the prison somehow waives the confidentiality of the security information at issue in this case, the statute expressly rejects such an absurd conclusion. Tenn. Code Ann. § 10-7-504(m)(1)(E) provides that "[r]elease of any segment or segments of the recordings ***shall not be construed as waiving the confidentiality of the remaining segments*** of the audio or visual tape."

This means that ***even if*** TDOC had publicly disclosed portions of the security video at issue ***in this case***, it could not, by statutory law, operate as a waiver of the confidentiality of the rest of the video. In other words, even partial disclosure of the evidence before the Court does not

defeat the confidentiality provisions of the statute. It would be unfeasible under the statute for the Court to conclude that TDOC's publication of an entirely separate marketing video would deprive TDOC of confidentiality altogether, not just in this case but in all cases in perpetuity.

The risk to prison security of allowing surveillance video and security logs to enter the public domain, forever accessible to all who wish to analyze it, is real, and one which Defendants implore this Court not to disregard.

CONCLUSION

This case is stayed, which means Defendants' Motion for Protective Order cannot move forward. The status quo should remain, with this motion and the oppositions to it heard only after the stay is lifted. Notwithstanding that the Motion cannot proceed, Defendants have already demonstrated that there exists no reason to disregard the clear and compelling statutory mandate of the Tennessee General Assembly that the materials in question be kept confidential, nor to ignore its dictate that the courts of this state must enter appropriate protective orders to ensure their confidentiality. The great weight of authority from across the country only goes to bolster the statute's unequivocal mandate. That Intervenors have ignored the statute in their opposition brief does not remove these materials from the statute's protection, nor diminish the fact that it is governing law. For these reasons, Defendants' motion for protective order should be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing pleading has been sent via e-mail on December 13, 2022, upon the following recipients:

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