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ALAMEDA COUNTY

August 26, 2021

CLERK OF
THE SUPERIOR COURT
By Milagros Cortez, Deputy

CASE NUMBER:

RG21106490

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12 *Attorneys for Plaintiff and Aggrieved Employees,*
13 *on behalf of the State of California*

SUPERIOR COURT OF CALIFORNIA**COUNTY OF ALAMEDA**

14 ERWIN ANTONIO LEON LOPEZ, on behalf
15 of the State of California and Aggrieved
16 Employees,

17 *Plaintiff,*

18 v.

19 KELLERMEYER BERGENSONS SERVICES,
20 LLC, and DOES 1 through 50, inclusive

21 *Defendant.*

Case No.: RG21106490

**FIRST AMENDED COMPLAINT FOR
PENALTIES PURSUANT TO SECTIONS
2699(a) and (f) OF THE CALIFORNIA
PRIVATE ATTORNEYS GENERAL ACT**

1 Plaintiff Erwin Antonio Leon Lopez (“Plaintiff”), on behalf of the State of California and
2 Aggrieved Employees, and complains and alleges as follows:

3 **INTRODUCTION**

4 1. Plaintiff brings this Labor Code Private Attorneys General Act (“PAGA”)
5 enforcement action behalf of the State of California to collect statutory penalties as a result of
6 Defendant Kellermeyer Bergensons Services, LLC (“Defendant”) systematic violations of
7 California labor law with respect to Defendant’s current and former non-exempt hourly workers
8 in the State of California (“Aggrieved Employees”).

9 2. This PAGA action against Defendant challenges its policies and practices of (1)
10 failing to compensate employees for all hours worked, including minimum wage and overtime
11 pay owed; (2) failing to provide employees accurate, itemized wage statements; (3) failing to
12 timely pay employees wages owed upon the termination of employment; and (4) engaging in
13 unfair business practices in violation of California Business and Professions Code §§ 17200, *et*
14 *seq.*

15 3. Plaintiff and Aggrieved Employees are current and former hourly, non-exempt
16 employees who have worked for Defendant in California. Kellermeyer Bergensons Services,
17 LLC (“KBS”) is headquartered in Oceanside, California and is North America’s largest
18 privately-owned facility services provider. KBS has locations throughout the state of California
19 and is licensed to conduct business in California. On information and belief, Defendant KBS has
20 over 75,000 client locations and over 4,000 total employees on a national scale with
21 approximately eighty-five locations in California.

22 4. Plaintiff worked as a non-exempt janitor in San Jose, California from
23 approximately September 2020 until February 2021. Plaintiff’s hourly rate of pay was \$18.00
24 per hour. While his shifts varied in length, Plaintiff typically was scheduled to work
25 approximately eight (8) hours per shift and five (5) shifts per week. On average, Plaintiff was
26 scheduled to work 40 hours per week. However, as a result of off-the-clock work performed,
27 Plaintiff worked more than forty (40) hours in a week or more than eight (8) hours in a day.

1 5. Pursuant to a uniform, company-wide policy and practice, Defendant denied
2 Plaintiff and the Aggrieved Employees proper compensation for all hours worked. Plaintiff and
3 Aggrieved Employees were regularly required to spend at least approximately one to three
4 minutes before the beginning of every shift going through temperature and identification (“ID”)
5 checks and then walking to a phone to clock in for his scheduled shift, all while off-the-clock.
6 This time spent undergoing temperature and ID checks, and spent walking to and from the
7 temperature and ID check to the time-clock phone located approximately 25-30 feet away from
8 those temperature and security check points, goes unrecorded and uncompensated, even though
9 it should be compensated at minimum wage and/or overtime rates under California law, giving
10 rise to minimum wage and overtime violations. Upon information and belief, Defendant’s
11 institute a similar policy and practice of requiring Plaintiff and Aggrieved Employees to undergo
12 temperature checks and ID checks and spend time walking while off-the-clock that results in
13 thousands of Aggrieved Employees being unpaid for time spent subject to the control of
14 Defendant while off-the-clock.

15 6. As this time spent undergoing temperature checks, ID checks and walking is
16 performed off-the-clock, all of this time goes uncompensated.

17 7. Furthermore, Plaintiff and the Aggrieved Employees were not paid for all of their
18 work performed during the month of January 2021, including their time spent working on-the-
19 clock. Plaintiff and other Aggrieved Employees asked KBS on several occasions when they were
20 going to be paid for the work they had performed. On information and belief, KBS assured them
21 the pay would be issued as soon as possible; however, over approximately four (4) weeks went
22 by without payment for hours worked in January 2021. Plaintiff and other Aggrieved Employees
23 still have not been paid for all of their time worked during this time period.

24 8. Plaintiff, on behalf of the State of California, seeks to recover penalties and
25 reasonable attorneys’ fees for violations of California law as alleged herein, pursuant to Sections
26 2699(a).

1 **PARTIES**

2 9. Plaintiff and Aggrieved Employees are current and former non-exempt employees
3 working for Defendant throughout the State of California.

4 10. Plaintiff is an individual over the age of eighteen, and at all times mentioned in
5 this Complaint was a resident of the State of California.

6 11. Plaintiff was employed by KBS from approximately September 2020 until
7 February 2021. Plaintiff worked for Defendant as a janitor in San Jose in the County of Santa
8 Clara.

9 12. Defendant Kellermeyer Bergensons Services, LLC (“KBS”) is an Ohio
10 corporation with its headquarters located in Oceanside, CA, and is registered to do business in
11 California.

12 13. Defendant does business in the State of California, including but not limited to
13 their reliance on California’s labor market to secure the services of hourly workers. Plaintiff is
14 informed, believes, and thereon alleges that Defendant employs non-exempt employees
15 throughout California.

16 14. During the relevant times, Defendant has employed Plaintiff and the Aggrieved
17 Employees.

18 15. At all relevant times, Defendant has done business under the laws of California,
19 and have employed Aggrieved Employees in this judicial district. Defendant is a “person” as
20 defined in Labor Code § 18 and Business and Professions Code § 17201. Defendant is also an
21 “employer” as that term is used in the Labor Code, and IWC Wage Orders.

22 **JURISDICTION AND VENUE**

23 16. This Court has jurisdiction over Plaintiff’s claims for penalties pursuant to the
24 PAGA. The Court also has jurisdiction over Defendant because Defendant does business in the
25 State of California, is authorized to do business in California, and is registered with the California
26 Secretary of State.

1 17. Venue is proper in this judicial district pursuant to Code of Civil Procedure §§ 393
2 and/or 395.5. Defendant conducts business, employ Aggrieved Employees, and have jobsites in
3 this County, namely in San Leandro, CA. Venue is proper in this County pursuant to Code of
4 Civil Procedure § 395(a). On information and belief, Defendant resides in the State of California.

5 **FACTUAL ALLEGATIONS**

6 18. Defendant owns and operates facility service and commercial cleaning services
7 throughout the United States with approximately eighty-five locations in California. Defendant
8 provides janitorial services including contract cleaning, floor care, technical services, and
9 integrated facility support services. On information and belief, Defendant employs thousands of
10 hourly non-exempt workers similarly situated to Plaintiff across these facilities.

11 19. Plaintiff worked as a non-exempt janitor in San Jose, California from
12 approximately September 2020 until February 2021. His duties included general cleaning and
13 sanitizing throughout the building.

14 20. Defendant employs non-managerial employees in the State of California and
15 uniformly classifies them as non-exempt.

16 21. Pursuant to a uniform, company-wide policy and practice, Defendant denied
17 Plaintiff and the Aggrieved Employees proper compensation for all hours worked. Plaintiff and
18 Aggrieved Employees were required to spend time before the beginning of every shift going
19 through temperature and ID checks and then walk to a phone to clock-in for his scheduled shift,
20 all while off-the-clock. This time spent undergoing temperature and ID checks and spent
21 walking to clock-in goes unrecorded and uncompensated, even though it should be compensated
22 at minimum wage rates and/or overtime rates under California law, giving rise to minimum wage
23 and overtime violations.

24 22. Upon information and belief, Defendant institutes a similar policy across other
25 locations where employees are regularly required to spend time before the beginning of every
26 shift going through temperature and ID checks and then walking to a phone to clock-in for their
27 scheduled shifts. Such off-the-clock time is subject to the control of Defendant. This time spent
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1 undergoing temperature and ID checks and spent walking to clock-in goes unrecorded and
2 uncompensated, giving rise to minimum wage and overtime violations.

3 23. Furthermore, Plaintiff and the Aggrieved Employees were not paid for all of their
4 work performed during the month of January 2021. On information and belief, Plaintiff and other
5 Aggrieved Employees asked KBS on several occasions when they were going to be paid for the
6 work they had performed. On information and belief, KBS assured them the pay would be issued
7 as soon as possible; however, approximately four (4) weeks went by from when Plaintiff notified
8 Defendant that he had not received any pay for his hours worked in January 2021 until Plaintiff's
9 termination of employment in February 2021.

10 24. As a result of this off-the-clock work, Plaintiff and Aggrieved Employees are not
11 adequately compensated for all hours worked at their regular rate or at the applicable overtime
12 rates.

13 25. Defendant fails to account for "off-the-clock" work in the total hours worked in a
14 given work week. As a result, when Plaintiff and Aggrieved Employees work more than forty
15 hours in a workweek, Defendant fails to pay them one and one-half times their regular hourly
16 rate for all overtime hours worked in violation of California law.

17 26. Similarly, Plaintiff and Aggrieved Employees are often denied overtime for all
18 work performed in excess of eight (8) hours per day or 40 hours per week in violation of
19 California law.

20 27. This time spent undergoing Defendant's temperature and ID checks benefits
21 Defendant because it ensures employees work in a safe, healthy, and productive environment and
22 guards against theft, liability, and/or other security concerns that may impact Defendant's overall
23 production. Plaintiff and Aggrieved Employees have been harmed as a direct and proximate result
24 of Defendants' unlawful conduct because they have been deprived of wages owed for work they
25 performed and from which Defendants derived a direct and substantial benefit.

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1 28. Plaintiff is informed, believes, and thereon alleges that the same temperature and
2 ID check system and timekeeping policies and practices are used across all of Defendant's
3 facilities.

4 29. As a result of these policies and/or practices, Defendant denies Plaintiff and
5 Aggrieved Employees overtime premiums resulting from the off-the-clock work.

6 30. Defendant's failure to record all hours worked also results in a failure to provide
7 Aggrieved Employees, including Plaintiff, accurate itemized wage statements as required by
8 California law. The wage statements are inaccurate because they do not include all hours worked
9 and all wages properly owed, including minimum wages and overtime wages.

10 31. Further, Defendant has not provided Aggrieved Employees, including Plaintiff,
11 whose employment has ended, with full timely payment of all wages owed at the end of their
12 employment. As these workers are owed wages for off-the-clock work performed, and these
13 amounts were not timely paid following Plaintiff and Aggrieved Employee's separation from
14 employment, Defendant fails to pay all wages due upon termination in accordance with Labor
15 Code §§ 201-203.

16 32. Defendant's method of paying Plaintiff and Aggrieved Employees was willful and
17 was not based on a good faith and reasonable belief that their conduct complied with California
18 law.

19 33. Defendant's conduct was willful, carried out in bad faith, and caused significant
20 damages to non-exempt hourly employees in an amount to be determined at trial.

21 34. On March 15, 2021, pursuant to Labor Code § 2699.3(a)(1) and (2), Plaintiff
22 served the California Labor and Workforce Development Agency with notice of his intention to
23 file a PAGA action for violations of Labor Code §§ 204 (failure to compensate for all hours
24 worked); 226.3 (failure to provide timely and compliant itemized wage statements); 201-203,
25 225.5, and 256 (failure to timely pay all wages owed during employment and following separation
26 from employment), and California Business and Professions Code §§ 17200, *et seq* (engaging in
27 unfair business practices). More than sixty-five days have passed without notice from the LWDA.

1 Plaintiff satisfied the administrative prerequisites to commence this civil action in compliance
2 with § 2699.3(a).

3 35. On June 17, 2021, pursuant to Labor Code § 2699.3(a)(1) and (2), Plaintiff served
4 the California Labor and Workforce Development Agency with notice of his intention to file an
5 amended PAGA action for violations of Labor Code § 204 (failure to compensate for all hours
6 worked); § 510 (failure to pay overtime wages); §§ 1194 and 1197 (failure to pay minimum
7 wage); §§ 226 and 226.3 (failure to provide timely and compliant itemized wage statements); §§
8 201-203, 225.5, and 256 (failure to timely pay all wages owed during employment and following
9 separation from employment), and California Business and Professions Code §§ 17200, *et seq*
10 (engaging in unfair business practices). More than sixty-five days have passed without notice
11 from the LWDA. Plaintiff satisfied the administrative prerequisites to commence this civil action
12 in compliance with § 2699.3(a).

13 36. Pursuant to Section 2699(a), Plaintiff will seek civil penalties pursuant to each
14 provision of the Code that provides for a civil penalty to be assessed and collected by the Labor
15 and Workforce Development Agency or any of its departments, divisions, commissions, boards,
16 agencies, or employees, including but not limited to those Labor Code provisions referenced
17 above, as well as Sections 225.5, 226.3, and 256 of the California Labor Code. To the extent a
18 provision of the Labor Code does not provide for a civil penalty, the Plaintiff will seek civil
19 penalties pursuant to California Labor Code Section 2699(f). Plaintiff served Defendant's
20 registered agent with a courtesy copy of the notice via certified mail.

21
22 **FIRST CAUSE OF ACTION**
Penalties Pursuant to § 2699(a) of the Private Attorneys General Act

23 37. Plaintiff re-alleges and incorporates the foregoing paragraphs as though fully set
24 forth herein.

25 38. Labor Code § 2699(a) provides:

26 Notwithstanding any other provision of law, any provision of this code that
27 provides for a civil penalty to be assessed and collected by the Labor and
28 Workforce Development Agency or any of its departments, divisions,

1 commissions, boards, agencies or employees, for a violation of this code,
2 may, as an alternative, be recovered through a civil action brought by an
3 aggrieved employee on behalf of himself or herself and other current or
4 former employees.

5 39. Labor Code §§ 201 and 202 require employers to immediately pay wages earned
6 and unpaid to an employee that is discharged, and to pay an employee who quits within 72 hours
7 after he or she quits, at the latest.

8 40. Labor Code § 203 provides, in relevant part:

9 If an employer willfully fails to pay, without abatement or reduction, in
10 accordance with Sections 201, 201.5, 202, and 205.5, any wages of an
11 employee who is discharged or who quits, the wages of the employee shall
12 continue as a penalty from the due date thereof at the same rate until paid
13 or until an action therefore is commenced; but the wages shall not
14 continue for more than 30 days.

15 41. Labor Code § 256 provides: "The Labor Commissioner shall impose a civil
16 penalty in an amount not exceeding 30 days pay as waiting time under the terms of Section 203."

17 42. Labor Code § 225.5 provides that every person who unlawfully withholds wages
18 due any employee in violation of Section 212, 216, 221, 222, or 223 shall be subject to a civil
19 penalty of \$100 for any initial violation for each failure to pay each employee and \$200 for each
20 subsequent violation, or any willful or intentional violation, for each failure to pay each employee.

21 43. Labor Code § 226(a) provides:

22 Every employer shall, semimonthly or at the time of each payment of
23 wages, furnish each of his or her employees, either as a detachable part
24 of the check, draft, or voucher paying the employee's wages, or
25 separately when wages are paid by personal check or cash, an accurate
26 itemized statement in writing showing (1) gross wages earned, (2) total
27 hours worked by the employee, except for any employee whose
28 compensation is solely based on a salary and who is exempt from
payment of overtime under subdivision (a) of Section 515 or any
applicable order of the Industrial Welfare Commission, (3) the number
of piece-rate units earned and any applicable piece rate if the employee
is paid on a piece-rate basis, (4) all deductions, provided that all
deductions made on written orders of the employee may be aggregated
and shown as one item, (5) net wages earned, (6) the inclusive dates of
the period for which the employee is paid, (7) the name of the employee
and his or her social security number, (8) the name and address of the

1 legal entity that is the employer, and (9) all applicable hourly rates in
2 effect during the pay period and the corresponding number of hours
3 worked at each hourly rate by the employee. The deductions made from
4 payments of wages shall be recorded in ink or other indelible form,
5 properly dated, showing the month, day, and year, and a copy of the
6 statement or a record of the deductions shall be kept on file by the
7 employer for at least four years at the place of employment or at a central
8 location within the State of California.

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13 44. Labor Code § 226.3 provides:

14 Any employer who violates subdivision (a) of Section 226 shall be
15 subject to a civil penalty in the amount of two hundred fifty dollars
16 (\$250) per employee per violation in an initial citation and one thousand
17 dollars (\$1,000) per employee for each violation in a subsequent citation,
18 for which the employer fails to provide the employee a wage deduction
statement or fails to keep the records required in subdivision (a) of
Section 226. The civil penalties provided for in this section are in
addition to any other penalty provided by law.

19 45. Labor Code § 510(a) provides:

20 Eight hours of labor constitutes a day's work. Any work in excess of
21 eight hours in one workday and any work in excess of 40 hours in any
22 one workweek and the first eight hours worked on the seventh day of
23 work in any one workweek shall be compensated at the rate of no less
24 than one and one-half times the regular rate of pay for an employee. Any
25 work in excess of 12 hours in one day shall be compensated at the rate of
26 no less than twice the regular rate of pay for an employee.

27 46. Labor Code §§ 1194 provides: "[A]ny employee receiving less than the legal
28 minimum wage or the legal overtime compensation applicable to the employee is entitled to
recover in a civil action the unpaid balance of the full amount of this minimum wage or overtime
compensation, including interest thereon, reasonable attorney's fees, and costs of suit."

47. Labor Code §§ 1197 provides: "The minimum wage for employees fixed by the
commission or by any applicable state or local law, is the minimum wage to be paid to employees,
and the payment of a lower wage than the minimum so fixed is unlawful."

48. Plaintiff seeks civil penalties pursuant to Labor Code § 2699(a) for each failure by
Defendant, as alleged above, to timely pay all wages owed to Plaintiff and Aggrieved Employees

1 in compliance with Labor Code §§ 201-202, and to pay wages owed at the end of employment to
2 Plaintiff and Aggrieved Employees in compliance with Labor Code § 203.

3 49. Plaintiff also seeks civil penalties pursuant to Labor Code § 2699(a) for each
4 failure by Defendant, alleged above, to provide Plaintiff and Aggrieved Employees an accurate,
5 itemized wage statement in compliance with Labor Code § 226(a).

6 50. Plaintiff also seeks civil penalties pursuant to Labor Code § 2699(a) for each
7 violation of Labor Code §§ 510 and 1194, alleged above, as well as any other provision regulating
8 hours and days of work in any order of the IWC.

9 51. Plaintiff also seeks civil penalties pursuant to Labor Code § 2699(a) for each
10 violation of Labor Code § 1197, alleged above, in failing to pay minimum wages.

11 52. Pursuant to Labor Code § 2699.3(a)(1) and (2), on March 15, 2021, Plaintiff
12 provided the Labor and Workforce Development Agency (“LWDA”) with notice of his intention
13 to file this claim. More than sixty-five days have passed without notice from the LWDA. Plaintiff
14 satisfied the administrative prerequisites to commence this civil action in compliance with §
15 2699.3(a).

16 53. Pursuant to Labor Code § 2699.3(a)(1) and (2), on June 17, 2021, Plaintiff
17 provided the LWDA with notice of his intention to file this amended action. More than sixty-
18 five days have passed without notice from the LWDA. Plaintiff satisfied the administrative
19 prerequisites to file this First Amended Complaint in compliance with § 2699.3(a).

20 54. Plaintiff seeks the aforementioned penalties on behalf of the State, other
21 Aggrieved Employees, and himself as set forth in Labor Code § 2699(g)(i).

22 55. Defendant is liable to Plaintiff, Aggrieved Employees, and the State of California
23 for the civil penalties set forth in this Complaint, with interest thereon. Plaintiff is also entitled
24 to an award of attorneys’ fees and costs as set forth below.

25 56. Wherefore, Plaintiff requests relief as hereinafter provided.

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SECOND CAUSE OF ACTION
Penalties Pursuant to § 2699(f) of the Private Attorneys General Act

57. Plaintiff re-alleges and incorporates the foregoing paragraphs as though fully set forth herein.

58. Labor Code § 2699(f) provides:

For all provisions of this code except those for which a civil penalty is specifically provided, there is established a civil penalty for a violation of these provisions, as follows: . . . (2) If, at the time of the alleged violation, the person employs one or more employees, the civil penalty is one hundred dollars (\$100) for each aggrieved employee per pay period for the initial violation and two hundred dollars (\$200) for each aggrieved employee per pay period for each subsequent violation.

59. Labor Code § 200 defines wages as “all amounts for labor performed by employees of every description, whether the amount is fixed or ascertained by the standard of time, task, piece, commission basis or method of calculation.”

60. Labor Code § 204(a) provides that “[a]ll wages ... earned by any person in any employment are due and payable twice during each calendar month....”

61. IWC Wage Orders 5-2001(2)(K) define hours worked as “the time during which an employee is subject to the control of an employer, and includes all the time the employee is suffered or permitted to work, whether or not required to do so.”

62. Labor Code § 1198 makes it unlawful for employers to employ employees under conditions that violate the Wage Order.

63. To the extent than any violation alleged herein does not carry penalties under Labor Code § 2699(a), Plaintiff seeks civil penalties pursuant to Labor Code § 2699(f) for Plaintiff and Aggrieved Employees each pay period in which he or she was aggrieved, in the amounts established by Labor Code § 2699(f). Plaintiff seeks civil penalties under Labor Code § 2699(f) for Defendant’s violations of Labor Code §§ 201-203, 204, 510, 225.5, 226, 226.3, 256, 1194, and 1197.

64. Pursuant to Labor Code § 2699.3(a)(1) and (2), on March 15, 2021, Plaintiff provided the LWDA with notice of his intention to file this claim. More than sixty-five days have

1 passed without notice from the LWDA. Plaintiff satisfied the administrative prerequisites to
2 commence this civil action in compliance with § 2699.3(a).

3 65. Pursuant to Labor Code § 2699.3(a)(1) and (2), on June 17, 2021, Plaintiff
4 provided the LWDA with notice of his intention to file this amended action. More than sixty-
5 five days have passed without notice from the LWDA. Plaintiff satisfied the administrative
6 prerequisites to file this First Amended Complaint in compliance with § 2699.3(a).

7 66. Plaintiff seeks the aforementioned penalties on behalf of the State, other
8 Aggrieved Employees, and himself as set forth in Labor Code § 2699(g)(i).

9 67. Defendant is liable to Plaintiff, Aggrieved Employees, and the State of California
10 for the civil penalties set forth in this Complaint, with interest thereon. Plaintiff is also entitled
11 to an award of attorneys' fees and costs as set forth below.

12 68. Wherefore, Plaintiff requests relief as hereinafter provided.

13 **PRAYER FOR RELIEF**

14 WHEREFORE, Plaintiff prays for relief as follows:

- 15 1. For the Court to declare, adjudge, and decree that Defendant has violated the
16 California Labor Code as alleged herein;
 - 17 2. For an order awarding the State of California, Plaintiff, and Aggrieved
18 Employees civil penalties provided under the PAGA;
 - 19 3. For an award of reasonable attorneys' fees as provided by the California Labor
20 Code § 2699(g)(1); California Code of Civil Procedure §1021.5; and/or any other
21 applicable law;
 - 22 4. For interest on penalties awarded as provided by applicable law;
 - 23 5. For all costs of suit; and
 - 24 6. For such other and further relief as this Court deems just and proper.
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1 Dated: August 26, 2021

Respectfully submitted,

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3
4 Carolyn Hunt Cottrell
5 Caroline N. Cohen
6 Heather G. Fuchs
7 SCHNEIDER WALLACE
8 COTTRELL KONECKY LLP

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11 Attorneys for Plaintiff and Aggrieved Employees,
12 on behalf of the State of California
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