

# GRAIN DELIVERY CONTRACTS

*The good, the bad and the ugly*

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Law Society  
of Saskatchewan



# PRESENTATION OVERVIEW

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- Types of Grain Contracts
- Contract Formation
- Contract Terms
  - Essential terms
  - Grading
  - Non-essential terms
  - “Act of God”
- Default / Termination
- Nation Grain and Feed Association



# TYPES OF GRAIN CONTRACTS

## Grain contracts as a spectrum



Production  
Contracts



Mixed  
Contracts



Delivery  
Contracts





# TYPES OF GRAIN CONTRACTS

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## Production versus Delivery

Determining where a contract lands on the spectrum will inform the obligations and liabilities of the parties. The contractual terms will indicate the type of contract

Knowing what contract you are entering into is critical for a party's ability to manage risk. Understanding this risk is essential to surviving the fluctuating grain market and avoiding litigation





# TYPES OF GRAIN CONTRACTS

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## Production versus Delivery

The essential obligation on opposite ends of the spectrum are:

- **Grain production contracts** requires the producer to grow, harvest, and deliver a select crop
- **Grain delivery contracts** are focused on the “seller” getting any grain that meets the essential terms of the contract to the buyer





# TYPES OF GRAIN CONTRACTS

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## Production versus Delivery

### Indicia of a Production Contract:

- It states it is a Production Contract
- Specifies that the producer will grow the grain
- Specifies the land on which the grain is produced
- Specifies yield per acre
- Does not contain a discount schedule
- Samples taken “at harvest”
- Contains an “Act of God” clause
- Buyer provides the seed in closed loop arrangement



# TYPES OF GRAIN CONTRACTS

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**Caselaw: *Ps International Canada Corp. v Palimar Farms Inc.*, 2017 SKCA 78  
[Palimar Farms]**

[51] ... There are many features of the Palimar contract indicating and confirming that the lentils in question were to be produced by Palimar, not purchased by it from third parties: (a) the contract is styled as being a “production” contract, (b) the “Quantity” clause refers to a specific acreage and yield per acre, (c) the “Price” clause refers to “FOB Farm”, and (d) in the “Notes” section, there is reference to samples being taken “at harvest” and to a right of first refusal “from these acres”.

[52] In short, it is entirely clear that the contract contemplated the lentils in issue would be grown by Palimar.





# TYPES OF GRAIN CONTRACTS

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## Production versus Delivery

Indicia of a Delivery Contract:

- Does not specify who grows the grain
- Does not specify plots of land where grain is to grow
- No “Act of God” clause



# TYPES OF GRAIN CONTRACTS

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**Caselaw: *JGL Commodities Ltd. v Puddell Farms Ltd.*, 2018 SKQB 345  
[Puddell Farms]**

**[16] The Contract did not reference any specific crop, field, land location, number of acres to be dedicated to the Contract, yield per acre, existing grain harvested in a prior season, or any other specific details that required Puddell Farms to provide durum to JGL from any specific growing crop, storage bin or any other specific source. Mr. Froehlich was aware Puddell Farms had a growing crop of durum that Puddell Farms planned to use to fulfil its obligations under the Contract but that plan did not matter to Mr. Froehlich because it was irrelevant to JGL where the durum came from. Puddell Farms could satisfy its obligations under the Contract by providing 816 metric tonnes of durum obtained from any source. The Contract was a deferred delivery contract not a production contract.**



# What to do with Mixed Contracts?

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- Mixed contracts can be something that is negotiated
- However this means certain terms might need to be modified
- Consider the difference between an Act of God clause that completely indemnifies a Producer from any delivery versus an Act of God clause that simply releases liability for shortfall
- A mixed contract could contemplate a tiered pricing scheme based on yield
- Most important in mixed contracts is to clearly state the Parties' obligations and risks. This will require some thought about long term issues that could arise



# TYPES OF GRAIN CONTRACTS

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## Production versus delivery: is all about who takes the risk

### Palimar Farms

[54] This aspect of the Can-Oat decision is distinguishable from the situation at hand. Significantly, and as the trial judge recognized at paragraph 107 of his decision, the Can-Oat contract expressly allocated the risk of non-performance, i.e., the failure to deliver oats of the contracted quality and quantity, to the farmer. In those circumstances, it would indeed have been unfair to allow the farmer to escape all liability under the contract of sale while, at the same time, profiting from the delivery of his production to a different buyer. That is not the situation here.

**Seaboard's contracts with Palimar and Marc Agra are silent on the question of the allocation of the risk of an inability to produce the lentils called for under the contract.**



# CONTRACT FORMATION

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## Issues to consider

- Was there *consensus ad idem*
- Are there any issues regarding capacity?
- Did any issue arise regarding acceptance?
- What about conscionability?



# CONTRACT FORMATION

## Consensus ad Idem

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In order for a contract to exist there must be a *consensus ad idem*, or a meeting of the minds, with regard to the essential terms

(*Jans* at para 34; *Tether v Tether*, 2008 SKCA 126 at para 62, [2009])

*Jans estate v Jans*, 2020 SKCA 61 [Jans]

A contract is only formed when three criteria are met from the perspective of an objective bystander:

- (a) the parties intended to contract;
- (b) the parties reached agreement on all essential terms; and
- (c) the essential terms are sufficiently certain.



# CONTRACT FORMATION

## CAPACITY

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It has been long established that a plaintiff alleging lack of capacity bears the onus of proving that point.

There are no “halfway houses” a party either has capacity or does not.

(See: *Van de Geer Estate v. Penner*, 2006 SKCA 12; *The Imperial Loan Company, Limited v Stone*, [1892] 1 Q.B. 599 at p. 601; Michael Furmston, Cheshire, Fifoot and Furmston’s Law of Contract, 14th ed. (Markham: Butterworths LexisNexis, 2001) at p. 497)

Whether a party is incapable of understanding the nature of a contract must be determined at the time of contracting

Factors to consider:

- Age
- Health
- Injury



# CONTRACT INFORMATION

## ACCEPTANCE

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What constitutes acceptance?

- A Signature
- Verbal agreement
- Text messages
- Conduct

Saint John Tug Boat Co. Ltd. v. Irving Refining Ltd. [1964] SCR 614 [*Tug Boat*]

- In Tug Boat the court had to determine the validity of a contract that had no express acceptance
- The court considered the conduct of the parties to determine on a objective reasonable standard if the parties intended to be bound
- *“Mere failure to disown responsibility to pay compensation for services rendered is not of itself always enough to bind the person who benefited”*
- The court in Tug Boat found a contract did exist as it was clear by the conduct that the parties intended to be bound and continued to conduct their business as if the contract was valid and binding



## CONTRACT FORMATION

### ACCEPTANCE

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#### Tip:

Tell your clients to execute their contracts, and make sure that they follow up if the other side doesn't execute it.



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# UNCONSCIONABILITY

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*Uber v Heller* 2020 SCC 16

1. Inequality of bargaining power and
2. A resulting improvident bargain

*Input Capital Corp. v Gustafson*, 2021 SKCA 56 (after the Uber decision)

[33] ... Considering the general bargaining context at issue, there is nothing special or significant about a farmer experiencing financial difficulty while, at the same time, entering a grain delivery contract. Moreover, the Trial Decision did not identify any evidence to suggest that financial circumstances had impaired Gustafson Farms' "ability to freely enter or negotiate a contract" or had compromised its "ability to understand or appreciate the meaning and significance of the contractual terms".

[41] ... Gustafson Farms had invoked the doctrine of unconscionability in an attempt to "escape from a contract when their circumstances are such that the agreement now works a hardship upon them"





# CONTRACT TERMS

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## Essential Terms:

- Parties
- Price
- Property
  - *Type of grain*
  - *Quantity*
  - *Quality*
  - *Delivery details*



# CONTRACT TERMS

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*Jans Estate v Jans*, 2020 SKCA 61

[35] In a contract involving land, the essential terms are certainty of parties, certainty of price and certainty of property: “it must contain all the essential terms of the contract and must show that the parties have agreed to those terms ... The essential terms are the parties, the property and the price” (McKenzie at 313). **If these essential terms are found but the contract is framed in broad language then it is considered an open contract and a court may imply the remaining terms to prevent the contract from being void for incompleteness or uncertainty:** *Open Door* at para 34, *Canadian Pacific Hotels Ltd. v Bank of Montreal*, 1987 CanLII 55 (SCC), [1987] 1 SCR 711 at para 44, and *M.J.B. Enterprises Ltd. v Defence Construction (1951) Ltd.*, 1999 CanLII 677 (SCC), [1999] 1 SCR 619 at para 27



# FINDING CONTRACTUAL TERMS

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## ***Sunrise Foods International Inc. v MGM Specialty Livestock Ltd.,*** **2020 SKQB 312 [Sunrise Foods]**

The court in Sunrise Foods had to determine if the parties entered into a grain delivery contract and if so under what terms. The court looked at the conduct of parties including text messages to determine the following:

1. Intention to contract (Yes)
2. Parties (Sunrise and MGM)
3. Property (30,000 bu of Durum)
4. Price (\$7.20 per bu)
5. Other terms (Delivery time and place)

The standard form contract was not accepted by the Producer and therefore the above essential terms governed without the General Terms and Conditions





# GRADING GRAIN

Grading can have a significant impact on the parties

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**The grade can be considered a condition precedent in a production contract**

Example contract term:

*#2 CANADA - Subject To Sample Acceptance*

**Poor grading could result in a discount purchase**

Example contract term:

*Acceptance of such quality parameters, or any quality parameters other than those specified in this Contract, will be at Buyer's discretion and subject to Buyer's applicable premiums, discounts or other applicable elevation charges in effect at the time of delivery of the Product.*



# GRADING GRAIN

## Does poor grading frustrate the contract?

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### Production Contracts:

In *Palimar Farms (QB)* the court identified the contract being a production contract with the grade being a condition precedent. However the court also said the delivery of a different grade then considered in the contract is radically different from what the parties agreed to.

- *[106] Accordingly, in my view, the supervening event in this case created a radical change, such that the contract was frustrated.*

### Delivery Contracts:

In *Puddell Farms* the court found the contract was for delivery and included a discount schedule. The court determined this type of contract should not be easily found to be frustrated.

- *[58] The agreement in this matter is a deferred delivery contract not a production contract. ... From a policy perspective, such contracts should not be easily found to have been frustrated.*



# GRADING

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## Caselaw: Can-Oat Milling Ltd. Partnership v. Hagmann, 2004 SKCA 97

The court of appeal has also considered the legal principal of frustration as it applies to grain contracts and provided two reasons why it cannot apply:

- 21 *The learned trial judge correctly concluded the contracts were not discharged for frustration. Frustration cannot apply for at least two reasons. First, as the trial judge pointed out, the contracts contemplated the possibility that Mr. Hagmann would not be able to fulfill his obligations and placed the risk of such loss on him. Second, Mr. Hagmann sold all his oats to another company for more than he would have received from Can-Oat. In such circumstances, it would be unjust to find the contracts to be frustrated.*



# CONTRACT TERMS

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## Example Non-Essential Terms

### Set-Off

- Allows a party with multiple contracts to set-off amounts owing by amount defaulted on

### Act of God

- A way of allocating risk. Any uncontrollable act that restricts a party from performing their obligations

### Liquidated Damages

- A genuine pre-default estimate of damages





# ACT OF GOD

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## Who accepts the risk of crop failure?

An Act of God provision is rarely available in delivery contracts but can be negotiated in. This provision shifts the risk from the producer to the buyer and will likely reflect a decrease in contract price.



# ACT OF GOD

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## Caselaw: Rinn v. Parent Seeds Ltd., 2001 MBCA 90

[14] The plaintiffs argue that an act of God clause cannot be implied in the oral black bean contract that was negotiated on January 5, 1999, and that, in any event, “frost in Manitoba is not an Act of God as it is foreseeable.” Those arguments, however, overlook the circumstances of this case, in which the plaintiffs contracted to deliver particular black beans grown on their lands using seed purchased by them from the defendant. In these circumstances, the principle in the oft-quoted case and still respected case of *Howell v. Coupland* (1876), 1 Q.B.D. 258 (C.A.), applies. **The common law doctrine of frustration will apply where the parties have a common understanding as to the identity of the source of the goods and they perish without any fault on the part of either party.**





# ACT OF GOD

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## Example Act of God clause

### Act of God

“If the producer does not have or cannot deliver the Contracted Commodity due to an Act of God (including: severe flooding, hail, fire, drought, excess moisture, wind, excessive heat, insect damage, plant disease, frost, or snow), the producer must notify The Company within X days of such event and no later than (\*date). The producer must prove to The Company’s satisfaction that the Act of God event limited the tonnes produced or the quality produced such that the producer no longer has or cannot deliver the quantity of tonnes contracted, or a quality that The Company is willing to accept. If these conditions are met to The Company’s satisfaction, The Company will cancel the contract at no cost to the producer.”





# DEFAULT / TERMINATION

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## Liquidated Damages

If a party fails to perform their obligations, the contract might contemplate liquidated damages. Such a provision must be a genuine pre-default estimate of damages that would arise from the party's default and not a penalty



# DEFAULT / TERMINATION

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## Liquidated Damages Caselaw

### ***Terra Grain Fuels Inc. v Babich, 2009 SKQB 465 [Terra Grain]***

In Terra Grain, the court needed to determine the validity of a liquidated damages clause which calculated at \$10 a tonne or spot price if posted to replace the grain. The Plaintiff never posted a spot price.

- [21] Where a contract expressly states that the parties have agreed upon a genuine pre-estimate of liquidated damages, courts have upheld the agreement unless it is clear that the stipulated damages constitute an unconscionable penalty. ...
- [22] The plaintiff essentially argues that because it failed to post a spot price, the amount it can recover is unreasonably low and therefore the liquidated damages clause is unenforceable as a penalty. However, agreements for liquidated damages have regularly been enforced when the loss caused by breach proves to be greater than the amount fixed by the agreement.
- The court upheld the liquidated damages clause as a genuine pre-estimate of damages and awarded the Plaintiff only \$8,710.40. (Spot prices at the time to replace would have resulted in \$75,200.00 in damages to replace the grain)



# DEFAULT / TERMINATION

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## *The Sale of Goods Act*

### **s. 50 Damages for non-delivery**

- (1) Where the seller wrongfully neglects or refuses to deliver the goods to the buyer the buyer may maintain an action against the seller for damages for non-delivery.
- (2) The measure of damages is the estimated loss directly and naturally resulting in the ordinary course of events from the seller's breach of contract.
- (3) Where there is an available market for the goods in question the measure of damages is prima facie to be ascertained by the difference between the contract price and the market or current price of the goods at the time or times when they ought to have been delivered or if no time was fixed then at the time of the refusal to deliver.



# DEFAULT / TERMINATION

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## Caselaw: *Puddell Farms*

[70] JGL did not enter into one single replacement contract to purchase exactly 816 metric tonnes of replacement durum. Instead, it entered into numerous contracts around the same time period in the course of its business. Those durum purchases are set out in the purchase contracts contained in Exhibit P-2. The dates of those purchase contracts approximate the date range of when delivery was due under the Contract. The average price of durum in those contracts was \$462.90 per metric tonne. JGL suggested this average price should be used to calculate its damages. JGL did not seek to use the weighted average price of \$467.50 per metric tonne or the highest price of \$486.86 per metric tonne.

[72] Applying the average price of \$462.90, subtracting the Contract price of \$268.23, and multiplying the difference by 816 metric tonnes results in a damages calculation of \$158,850.72.



## Other Considerations

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- Parties might want to rely on industry standard terms and conditions to govern their grain contracts
- National Feed and Grain Association (“NFGA”) have a set standard of trade rules for various types of contracts:
- Grain; Feed; Barge; Barge Freight; and Secondary Rail Freight ([https://imis.ngfa.org/members/tr/Trade\\_Rules\\_Overview/ngfa/Trade\\_Rules/Trade\\_Rules\\_Overview.aspx](https://imis.ngfa.org/members/tr/Trade_Rules_Overview/ngfa/Trade_Rules/Trade_Rules_Overview.aspx))



# NGFA Grain Trade Rules

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# NGFA Grain Trade Rules

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## Rule 28. Failure to Perform

### (A) Seller's Non-Performance

If the Seller finds that he will not be able to complete a contract within the contract specifications, it shall be his duty at once to give notice of such fact to the Buyer by telephone confirmed by subsequent written communication. The Buyer shall then, at once elect either to:

- (1) agree with the Seller upon an extension of the contract; or
- (2) buy-in for the account of the Seller, using due diligence, the defaulted portion of the contract; or
- (3) cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day.

If the Seller fails to notify the Buyer of his inability to complete his contract, as provided above, the liability of the Seller shall continue until the Buyer, by the exercise of due diligence, can determine whether the Seller has defaulted. In such case it shall then be the duty of the Buyer, after giving notice to the Seller to complete the contract, at once to:

- (1) agree with the Seller upon an extension of the contract; or
- (2) buy-in for the account of the Seller, using due diligence, the defaulted portion of the contract; or
- (3) cancel the defaulted portion of the contract at fair market value based on the close of the market the next business day.



# NGFA Grain Trade Rules

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By implementing the NGFA trade rules, parties will be obligated to resolve disputes through arbitration

## **Rule 29. Arbitration**

Where a transaction is made subject to these rules in whole or in part, whether by express contractual reference or by reason of membership in this Association, then the sole remedy for resolution of any and all disagreements or disputes arising under or related to the transaction shall be through arbitration proceedings before the National Grain and Feed Association pursuant to the NGFA® Arbitration Rules; provided, however, that at least one party to the transaction must be a NGFA member entitled to arbitrate disputes under the NGFA Arbitration Rules.





# NGFA Arbitration Decisions

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Case Number 2830: Parrish & Heimbecker Ltd v TSM Winny AG Ltd.

- The above arbitration decision involved a Saskatchewan Producer and Buyer.
- The Grain Purchase Order was not signed by the Producer and later on the Producer expressed his intention not to be bound by the Contract
- The Buyer cancelled the contract and sent a buy-in invoice to the Producer for \$1.20 per bushel difference





# NGFA Arbitration Decisions

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Case Number 2830: Parrish & Heimbecker Ltd v TSM Winny AG Ltd.

- The arbitration board reviewed rule 3 which states that once confirmation of the contract is provided that a party immediately notifies the other of any disagreement with the confirmation received
- Due to the “default” wording in rule 28, the arbitrators found that P&H had acted outside of the rules by cancelling the contract since the deliver window had not concluded and the producer did not express his inability to complete the contract





# NGFA Arbitration Decisions

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APPEAL Case 2830 – Parrish & Heimbecker Ltd v TSM Winny AG Ltd.

- After receiving an unfavorable ruling, P&H appealed the decision
- The 5 panel appeal board granted the appeal. The decision was based on P&H's Purchase agreement that superseded the NGFA rules. The Purchase agreement granted P&H the discretion in determining when a producer defaults.
- The appeal board awarded replacement costs of grain and administrative fees as set out in the contract



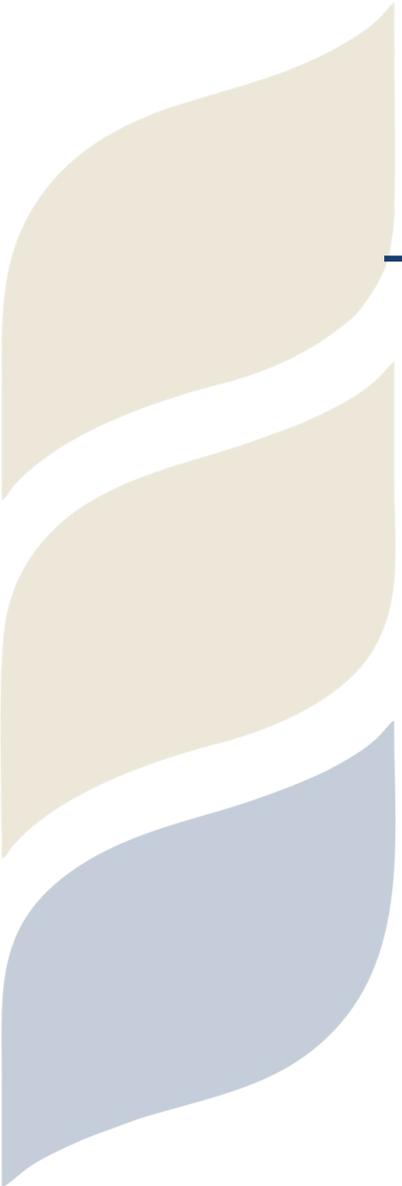
# Enforcement of Arbitration

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*Parrish & Heimbecker Ltd. v TSM Winny AG Ltd*, 2020 SKQB 348

- P&H brought a subsequent application in Saskatchewan Queen's Bench to have the NGFA award recognized and enforced
- TSM resisted the application on three grounds: no agreement in writing to arbitrate, an original copy of the agreement to arbitrate was not filed, and the scope of the issues presented to the NGFA appeals committee.
- The court found that the respondent's positions had no merit although the order could only issue once a copy of the agreement was filed





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# Q&A





# THANK YOU

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