

**IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF OKLAHOMA**

CHIEFTAIN ROYALTY COMPANY, )  
KELSIE WAGNER TRUSTEE OF THE )  
KELSIE WAGNER TRUST, AND )  
KELSIE WAGNER SUCCESSOR )  
TRUSTEE OF THE WADE )  
COSTELLO TRUST )

Plaintiffs, )

v. )

MARATHON OIL COMPANY, )

Defendant. )

Case No. 6:17-cv-00334-SPS

*(Removed from District Court of  
LeFlore County, State of  
Oklahoma, Case No. CJ-17-146)*

**MEMORANDUM OF LAW IN SUPPORT OF CLASS REPRESENTATIVES' MOTION  
FOR APPROVAL OF CASE CONTRIBUTION AWARD**

Class Representatives Chieftain Royalty Company, Kelsie Wagner as Trustee of the Kelsie Wagner Trust, and Kelsie Wagner as Successor Trustee of the Wade Costello Trust (hereinafter, “Class Representatives”), by and through their counsel of record, submit the following memorandum of law in support of their *Motion for Approval of Case Contribution Award*.

## I. SUMMARY OF THE ARGUMENT

In connection with Class Representatives’ request for approval of the Settlement<sup>1</sup> in the above-captioned Litigation, Class Representatives respectfully move the Court for a Case Contribution Award of \$75,000 from the Gross Settlement Fund, as compensation for their valuable time, effort, and assistance throughout this Litigation, which culminated in a Settlement with a total value of at least \$32.05 million.<sup>2</sup> This award is proportional to the contributions of Mr. Robert Abernathy (on behalf of Chieftain Royalty Company, “Chieftain”) and Ms. Wagner, and it is supported by their respective Declarations demonstrating their time and effort, as well as the risk and burden they incurred. *See* Declaration of Robert Abernathy (“Abernathy Decl.”); Declaration of Kelsie Wagner (“Wagner Decl.”); Declaration of Geoffrey P. Miller in Support of the Stipulation and Agreement of Settlement, Class Counsel’s Application for Attorneys’ Fees, Reimbursement of Litigation Expenses, Class Representative’s Request for Case Contribution Award, and Notice Of Proposed Settlement (“Miller Decl.”); Affidavit of Michael J. Weeks (on

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<sup>1</sup> All capitalized terms not otherwise defined herein shall have the meanings given to them in the Stipulation and Agreement of Settlement dated December 11, 2018 (the “Settlement Agreement”), a copy of which was attached as Exhibit 1 to Plaintiff’s *Memorandum of Law in Support of Plaintiff’s Motion to Certify the Settlement Class for Settlement Purposes, Preliminarily Approve Class Action Settlement, Approve Form and Manner of Notice and Set Date for Final Approval Hearing* (Doc. No. 70-1).

<sup>2</sup> *See* Affidavit of Barbara Ley (“Ley Affidavit”), attached as Exhibit 4 to Class Representatives’ *Memorandum of Law in Support of Class Representatives’ Motion for Final Approval*, at ¶3.

behalf of class member Pagosa Resources, LLC); Affidavit of Phil Steffano (on behalf of class member Provident Energy, Ltd.); Affidavit of Roger K. Brown (on behalf of class member Omega Royalty Co., LLC); and the Affidavit of Michael Starceovich.

Therefore, and for the reasons below, Chieftain Royalty Company, Kelsie Wagner as Trustee of the Kelsie Wagner Trust, and Kelsie Wagner as Successor Trustee of the Wade Costello Trust respectfully request the Court grant their *Motion for Approval of Case Contribution Award* (the “*Motion*”).

## II. FACTUAL AND PROCEDURAL SUMMARY

In the interest of time and judicial economy, Class Representatives will not recite the factual and procedural background of this Litigation. Instead, Class Representatives respectfully refer the Court to the Memorandum of Law in Support of Class Representatives’ Motion for Final Approval, the Declaration of Robert N. Barnes and Patrick M. Ryan on Behalf of Class Counsel, the pleadings on file, and any other matters of which the Court may take judicial notice, all of which are respectfully incorporated by reference as if set forth fully herein. *See New Mexico ex rel. Richardson v. Bureau of Land Mgmt.*, 565 F.3d 683, 702 n. 21 (10th Cir. 2009) (court may take judicial notice of its own files and records).

## III. ARGUMENT

In recognition of the time, effort, risk and burden Mr. Abernathy and Ms. Wagner incurred to produce such a significant result for the Settlement Class, Mr. Abernathy and Ms. Wagner seek case contribution awards of \$50,000 and \$25,000, respectively, from the Gross Settlement Fund. As demonstrated below, this request is fair, reasonable, and adequate and should, therefore, be granted.

**A. The Parties Have Agreed Federal Common Law Controls the Case Contribution Award**

The Parties here contractually agreed that the Settlement Agreement shall be governed *solely* by federal common law with respect to certain issues, including the case contribution award:

*To promote certainty, predictability, the full enforceability of this Settlement Agreement as written, and nationwide application*, the Parties agree that this Settlement Agreement shall be *governed solely by any federal law* as to due process, class certification, judgment, collateral estoppel, res judicata, release, settlement approval, allocation, *case contribution award*, the right to and reasonableness of attorneys' fees and expenses, and all other matters for which there is federal procedural or common law, including federal law regarding federal equitable common fund class actions. For any such matters where there is no federal common law, Oklahoma state law will govern.

Settlement Agreement at ¶11.8.

The Parties' decision to contractually agree that federal common law controls the case contribution award should be enforced. *See* Miller Decl. at ¶39. Indeed, the Tenth Circuit has recognized parties' freedom to contract regarding choice of law issues and also the fact that courts typically honor the parties' choice of law:

Absent special circumstances, courts usually honor the parties' choice of law because two 'prime objectives' of contract law are 'to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract.

*Boyd Rosene & Assocs., Inc. v. Kansas Mun. Gas Agency*, 174 F.3d 1115, 1121 (10th Cir. 1999) (citing Restat. 2d of Conflict of Laws, § 187, cmt. e (2nd 1988)). Further expanding on this freedom to contract, the Restatement of Conflict of Laws states:

These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligations.

Restat. 2d of Conflict of Laws, § 187, cmt. e (2nd 1988); *see also Williams v. Shearson Lehman Bros.*, 917 P.2d 998, 1002 (Okla. Ct. App. 1995) (concluding that parties' contractual choice of law should be given effect because it does not violate Oklahoma's constitution or public policy); *Barnes Group, Inc. v. C & C Prods., Inc.*, 716 F.2d 1023, 1029 n.10 (4th Cir. 1983) ("Parties enjoy full autonomy to choose controlling law with regard to matters within their contractual capacity.").

Put simply, litigants are free to select the choice of law that will govern decisions regarding interpretation and enforcement of a settlement agreement and all matters relating to thereto. Here, in light of the fact that this is a multi-state class action, governed by Federal Rule of Civil Procedure 23, and a case over which this Court has jurisdiction because of the application of the Class Action Fairness Act, the parties contractually chose to apply federal common law to all matters regarding the reasonableness and fairness of the settlement, including but not limited to, the issue of any Class Representative incentive award.

**B. The Case Contribution Award Is Reasonable Under Federal Common Law.**

Federal courts regularly give incentive awards to compensate named plaintiffs for the work they performed—their time and effort invested in the case. *See, e.g., UFCW Local 880-Retail Food v. Newmont Mining Corp.*, 352 Fed. Appx. 232 (10th Cir. 2009) ("Incentive awards [to class representatives] are justified when necessary to induce individuals to become named representatives...Moreover, a class representative may be entitled to an award for personal risk incurred or additional effort and expertise provided for the benefit of the class.");<sup>3</sup> *Laredo Fee*

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<sup>3</sup> *Newmont* held the district court did not abuse its discretion in denying an incentive award to a *pro se* objector because: (i) his objections did not confer a benefit on the class, (ii) he did not incur any risk, "nor could he, since his participation as an objector began after a settlement was reached and a common fund was created" (*id.* at 236), and (iii) his objections to class counsel's attorneys' fees were "general and lacking in meaningful analysis" (*id.* at 237).

Order at 9 (*Chieftain Royalty Co. v. Laredo Petro., Inc.*, No. CIV-12-1319 (W.D. Okla. May, 13, 2015)) (case contribution awards are meant to “compensate class representatives for their work on behalf of the class, which has benefited from their representation.”) (citing *In re Marsh ERISA Litig.*, 265 F.R.D. 128, 150 (S.D.N.Y. 2010)); *Fankhouser v. XTO Energy, Inc.*, No. CIV-07-798-L, 2012 U.S. Dist. LEXIS 147197, at \*9-10 (W.D. Okla. Oct. 12, 2012) (incentive awards totaling \$100,000 from \$37 million fund); *Allapattah Servs., Inc. v. Exxon Corp.*, 454 F. Supp. 2d 1185, 1218 (S.D. Fla. 2006) (1.5% of \$1.06 billion fund, equaling \$15,900,000 to be split amongst nine class representatives and stating “[t]here is ample precedent for awarding incentive compensation to class representatives at the conclusion of a successful class action.”); *In re Linerboard Antitrust Litig.*, 2004 WL 1221350, at \*18-19 (E.D. Pa. June 2, 2004) (finding “ample authority in this district and in other circuits” for total incentive awards of \$125,000); *In re Lorazepam & Clorazepate Antitrust Litig.*, 205 F.R.D. 369, 400 (D.D.C. 2002) (“Incentive awards are not uncommon in class action litigation and particularly where . . . a common fund has been created for the benefit of the entire class.”); *Enter Energy Corp. v. Columbia Gas Transmission Corp.*, 137 F.R.D. 240 (S.D. Ohio 1991) (awarding \$300,000 to class representatives, equaling .93% of current cash portions of settlement and approximately .53% of estimated present value); *In re Dun & Bradstreet Credit Servs. Customer Litig.*, 130 F.R.D. 366, 373-74 (S.D. Ohio 1990) (\$215,000 in incentive awards from \$18 million fund); *Cobell v. Salazar*, 679 F.3d 909, 922-23, (D.C. Cir. 2012) (district court did not err in finding that lead plaintiff’s “singular, selfless, and tireless investment of time, energy, and personal funds to ensure survival of the litigation [merited] an incentive award”); *Rodriguez v. West Publ’g Corp.*, 563 F.3d 948, 958 (9th Cir. 2009) (“Incentive awards . . . are intended to compensate class representatives for work done on behalf of the class. . . .”).

In *Chieftain Royalty Co. v. EnerVest Energy Institutional Fund XIII-A, L.P.*, 861 F.3d 1182 (10th Cir. 2017), the Tenth Circuit reversed and remanded a district court order that granted an incentive award to the class representative to be paid out of the common fund, finding that the record did not contain sufficient evidence to support the percentage incentive award in that case of 0.5%. *EnerVest* is currently on remand to the district court. However, regardless of the ultimate outcome in *EnerVest*, the opinion is wholly inapplicable here because that case dealt with the application of state law choice of law principles while the parties here, unlike in *EnerVest*, contractually agreed that federal common law controls the case contribution award. Moreover, *EnerVest* is factually distinguishable because the record in this matter provides ample support for Class Representatives' request for a Case Contribution Award. Although incentive awards can be percentage-based or dollar-based,<sup>4</sup> Mr. Abernathy and Ms. Wagner seek a flat dollar award reasonably based on their hours spent on the litigation, and not a percentage-based award, as was requested and awarded by the district court in *EnerVest*.<sup>5</sup>

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<sup>4</sup> *EnerVest* noted that “the weight of authority apparently disfavors percentage-based awards.” 861 F.3d at 1196. However, Oklahoma federal and state courts routinely award percentage-based incentive awards. See, e.g., *Laredo* Fee Order at 10 (finding a 1% case contribution award “to be fair and reasonable”); Miller Decl. at ¶90; *EnerVest*, 861 F.3d at 1196 (recognizing that a percentage calculation can be used to check an award for excessiveness by reference to the percentage of the fund it represents).

<sup>5</sup> Moreover, even under *EnerVest*—which cited and relied upon studies by Class Representatives' expert here, Professor Geoffrey P. Miller—incentive awards are still viable, and in fact, are “not uncommon.” 861 F.3d at 1192 (citing Theodore Eisenberg & Geoffrey P. Miller, *Incentive Awards to Class Action Plaintiffs: An Empirical Study*, 53 UCLA L. Rev. 1303 (2006)). There, the Tenth Circuit (1) rejected a claim that incentive awards evidence a conflict of interest (*id.* at 1196, n.7) and (2) rejected the idea that a relationship with counsel evidences some type of impermissible conflict (*id.* at 1191, n.5). Also, even though the Tenth Circuit applied Oklahoma state law to determine the appropriate amount of the incentive award, it recognized a “marked increase in the frequency of incentive awards, with the rate approaching 80% by 2011.” *Id.* at 1192

The services for which incentive awards are given typically include “monitoring class counsel, being deposed by opposing counsel, keeping informed of the progress of the litigation, and serving as a client for purposes of approving any proposed settlement with the defendant.” Newberg § 17:3. The award should be proportional to the contribution of the plaintiff. *See Phillips v. Asset Acceptance, LLC*, 736 F.3d 1076, 1081 (7th Cir. 2013) (if the lead plaintiff’s services are greater, her incentive award likely will be greater); *Rodriguez*, 563 F.3d at 960 (incentive award should not be “untethered to any service or value [the lead plaintiff] will provide to the class”); Newberg § 17:18.

Here, Mr. Abernathy and Ms. Wagner seek awards of \$50,000 and \$25,000, respectively. This request is supported by the abundant evidence submitted by Mr. Abernathy and Ms. Wagner, including their own declarations, the Miller Declaration, and the affidavits of absent class members. *See* Newberg § 17:12 (evidence might be provided through “affidavits submitted by class counsel and/or the class representatives, through which these persons testify to the particular services performed, the risks encountered, and any other facts pertinent to the award.”). This evidence demonstrates Mr. Abernathy and Ms. Wagner are seeking reasonable payment for reasonable time expended on services that were helpful and non-duplicative to the litigation.

Mr. Abernathy has extensive experience on matters related to oil and gas mineral interests. *See* Abernathy Decl. attached as Exhibit 1 to the *Final Approval Memorandum*, ¶ 3. Mr. Abernathy

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(citing Newberg § 17:7). In applying Oklahoma state law in *EnerVest*, the Tenth Circuit did not find that the amount awarded by the district court was unsupportable on its face; instead, it simply held that more evidence of the class representative’s time and rate was required. *Id.* at 1196-97. Moreover, the Tenth Circuit did not hold that percentage-based incentive awards are never allowed. And, the Tenth Circuit relied on federal common law (e.g., *Cobell v. Salazar*, 679 F.3d 909, 922-23 (D.C. Cir. 2012) because the Court found “Oklahoma Supreme Court has not addressed incentive awards nor have we been directed to or found any opinions by lower courts of that state.” *Id.* at 1195-96. As such, the result under federal common law or Oklahoma state law is likely the same.

is the President and founder of Chieftain Royalty Company (“Chieftain”). Chieftain actively purchases producing and non-producing mineral and royalty interests in eleven states and owns hundreds of mineral and royalty interests in over 12,000 acres. Mr. Abernathy received a B.A. from Tulane University and a Juris Doctorate from Oklahoma City University School of Law. He is licensed to practice law in Oklahoma where he practiced for over 20 years, specializing in oil and gas, real estate, bankruptcy and probate law. He is a nationally recognized speaker on royalty ownership issues and he has spent over 11 years speaking to thousands of mineral interest owners around the country on all aspects of mineral ownership, including estate planning and Oklahoma Corporation Commission rulings and regulations. He is a former board member of the National Association of Royalty Owners (NARO) and president of the Oklahoma chapter. Mr. Abernathy is also a founding member of the American Royalty Council, and he is a co-founder and Manager of Acorn Royalty Company, which is active in the SCOOP and STACK plays in Oklahoma. *See* Abernathy Decl., at ¶ 3.

Ms. Wagner also has extensive experience in matters related to oil and gas mineral interests. *See* Wagner Decl. attached as Exhibit 2 to the *Final Approval Memorandum*, at ¶ 4. Ms. Wagner attended the University of Texas earning a B.B.A. in history. Ms. Wagner is the Trustee of the Kelsie Wagner Trust and the Successor Trustee of the Wade Costello Trust, and she manages a portfolio of royalty interests that have been in her family for four generations. The two Trusts have owned multiple royalty interests in Oklahoma and elsewhere for many years including interests in wells operated by Marathon, Apache, Vitruvian, Casillas Operating, LLC, TEP, Newfield, Sanguine Gas Exploration, LLC, and Chesapeake. Ms. Wagner owns minerals in 17 counties throughout Oklahoma, including Garvin, Grady, Stephens, Carter, McClain, Beckham, Cleveland, Dewey, Ellis, Greer, Lincoln, Logan, Oklahoma, Pottawatomie, Roger Mills,

Seminole, and Woods. The Kelsie Wagner Trust's interests are contained in roughly 20,075 gross acres and 1,075 net mineral acres. Similarly, the Wade Costello Trust's interests are contained in roughly 20,075 gross acres and 875 net mineral acres. Ms. Wagner relies on the income she receives from actively managing these mineral interests and has received royalty payments from these companies for several years.

As demonstrated by their respective Declarations, Mr. Abernathy dedicated approximately 175 hours to this Litigation and Ms. Wagner dedicated approximately 100 hours to this Litigation. *See* Abernathy Decl., at ¶ 17 and Wagner Decl., at ¶ 18. These hours were spent collecting documents for production, reviewing emails and draft pleadings from Class Counsel, consulting and/or meeting with Class Counsel, traveling to and from meetings and hearings, and attending mediation. *Id.* All of these efforts were necessary and beneficial to the Litigation and the ultimate Settlement. *Id.* Moreover, Mr. Abernathy and Ms. Wagner will continue to work on behalf of the Settlement Class in the coming weeks and months, including through the Final Fairness Hearing and, if approved, assisting with administration of the Settlement. Mr. Abernathy and Ms. Wagner will also incur additional time in the event of an appeal, conferring with Class Counsel and reviewing additional pleadings. However, even if Mr. Abernathy and Ms. Wagner never worked another hour on this case, their respective requests of \$50,000 and \$25,000 would be reasonable.

Indeed, Mr. Abernathy and Ms. Wagner were heavily involved in all aspects of the Litigation. They actively and effectively fulfilled their obligations as representatives of the Settlement Class, complying with all reasonable demands placed upon them during the prosecution and settlement of this Action, and they provided valuable assistance to Class Counsel. *See* Wagner Decl., at ¶¶ 8 - 10 and Abernathy Decl., at ¶¶ 7 - 9. Mr. Abernathy has worked with Class Counsel since before the inception of this Litigation, and his active participation has contributed

significantly to the prosecution and resolution of this case. *Id.* In addition, Mr. Abernathy and Ms. Wagner have produced documents, reviewed pleadings, motions and other court filings, communicated regularly with Class Counsel, reviewed expert analysis on damages, attended the formal mediation session in person, and actively participated in the negotiations that led to the settlement of this Action. *See* Wagner Decl., at ¶¶ 8 - 10 and Abernathy Decl., at ¶¶ 7 - 9;

Mr. Abernathy and Ms. Wagner were never promised any recovery or made any guarantees prior to filing this Litigation, nor at any time during the Litigation. *See* Wagner Decl., at ¶ 19 and Abernathy Decl., at ¶ 18. In fact, Mr. Abernathy and Ms. Wagner understand and agree that such an award, or rejection thereof, has no bearing on the fairness of the Settlement and that it will be approved and go forward no matter how the Court rules on his request. *Id.* In other words, Mr. Abernathy and Ms. Wagner fully support the Settlement as fair, reasonable, and adequate, even if they are awarded no case contribution award at all. *Id.* Neither Mr. Abernathy nor Ms. Wagner has any conflicts of interest with Class Counsel or any absent class member. *Id.* Finally, multiple absent Class Members executed affidavits supporting Mr. Abernathy's and Ms. Wagner's respective requests for a Case Contribution Award. *See* the Affidavit of Michael J. Weeks (on behalf of class member Pagosa Resources, LLC); the Affidavit of Phil Steffano (on behalf of class member Provident Energy, Ltd.); Affidavit of Roger K. Brown (on behalf of class member Omega Royalty Co., LLC); and the Affidavit of Michael Starcevich.

Because Mr. Abernathy and Ms. Wagner have dedicated their time, attention, and resources to this Litigation, they are entitled to the requested Case Contribution Award. *See* Joint Class Counsel Decl. at ¶¶ 83-88. Mr. Abernathy respectfully requests the Court award him a Case Contribution Award of \$50,000 and Ms. Wagner respectfully requests the Court award her a Case

Contribution Award of \$25,000 to reflect the important role that each played in representing the interests of the Settlement Class and in achieving the substantial result reflected in the Settlement.

**C. The Case Contribution Award Is Reasonable Under Oklahoma State Law Even if *EnerVest* is Applicable.**

Even if this Court decided not to enforce the Parties' express agreement that federal common law controls the case contribution award and apply Oklahoma state law instead, Oklahoma law strongly supports incentive awards, particularly in royalty underpayment class actions such as this. In fact, Oklahoma state courts routinely grant percentage-based incentive awards to class representatives, which historically are much larger than the modest flat amount sought here. *See, e.g., Fitzgerald Farms, LLC v. Chesapeake Operating, L.L.C.*, No. CJ-2010-38, 2015 WL 5794008, at \*9 (Okla. Dist. Ct. Beaver Cty. July 2, 2015) ("The incentive award sought is consistent with such awards in other cases. Oklahoma courts have typically awarded class representatives in royalty owner class actions approximately 1-2% of the settlement. . . [collecting cases] . . ."); *Velma-Alma Indep. Sch. Dist. No. 15, v. Texaco, Inc.* No. CJ-2002-304, District Court of Stephens County, Oklahoma (2005) (awarding 1-2% of total settlement amounts); *Robertson v. Sanguine, Ltd.*, No. CJ-02-150, District Court of Caddo County, Oklahoma (2003) (awarding 1% class representative fee); and *Continental Resources, Inc. v. Conoco, Inc.*, No. CJ-95-739, District Court of Garfield County, Oklahoma (2005) ("Court awards to Class Representatives of 1% of the common fund are typical in these types of actions, with some awards approaching 5% of the common fund.").

As such, Mr. Abernathy's request for an incentive award of \$50,000 and Ms. Wagner's request for an incentive award of \$25,000 are fair and reasonable under Oklahoma state law for the same reasons they are fair and reasonable under federal common law and supported by the same evidence of reasonableness. *See generally* Abernathy Decl.; Wagner Decl.; Miller Decl.;

Affidavit of Michael J. Weeks (on behalf of class member Pagosa Resources, LLC); the Affidavit of Phil Steffano (on behalf of class member Provident Energy, Ltd.); the Affidavit of Roger K. Brown (on behalf of class member Omega Royalty Co., LLC); the Affidavit of Michael Starceovich; and Joint Class Counsel Decl. at ¶¶ 83-88.

#### IV. CONCLUSION

For the foregoing reasons, Mr. Abernathy and Ms. Wagner respectfully request the Court enter an order granting approval of a Case Contribution Award to Mr. Abernathy in the amount of \$50,000 and a Case Contribution Award to Ms. Wagner in the amount of \$25,000.

**DATED: February 8, 2019**

Respectfully submitted,

*s/Patrick M. Ryan*

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**COUNSEL FOR PLAINTIFFS**

**CERTIFICATE OF SERVICE**

I hereby certify that on February 8, 2019, I electronically transmitted the attached document to the Clerk of the Court using the ECF System for filing. Based on the records currently on file, the Clerk of the Court will transmit a Notice of Electronic Filing to the following ECF registrants:

Guy S. Lipe – [glipe@velaw.com](mailto:glipe@velaw.com)  
Jay P. Walters – [jwalters@gablelaw.com](mailto:jwalters@gablelaw.com)

*s/Patrick M. Ryan*  
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