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ARC AND AAA

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Recent developments in employment-law arbitration from 2022 and 2023

AN UPDATE ON CURRENT DECISIONS IN EMPLOYMENT-LAW ARBITRATION

Just like last year, employment arbitration was a hot topic in federal and California courts and in the California Legislature. (See *Recent Developments in Employment Arbitration Law from 2021 and 2022* by Stephen M. Benardo in the September 2022 issue of Advocate.) The newest cases regarding arbitration of PAGA claims are discussed in an excellent article by Tagore Subramanian in this edition of *Advocate*.

A.B. 51 and Labor Code section 432.6

A.B. 51 amended California Labor Code section 432.6 to, inter alia, prohibit employers from requiring employees to agree to mandatory arbitration of claims under the California Fair Employment and Housing Act ("FEHA") as a condition of employment. The Ninth Circuit first held in *Chamber of Commerce of the United States v. Bonta* (9th Cir. 2021) 13 F.4th 766, that the Federal Arbitration Act ("FAA") does not preempt A.B. 51.

On rehearing, in *Chamber of Commerce of the United States v. Bonta* (9th Cir. 2023) 62 F.4th 473, the same Ninth Circuit panel struck down A.B. 51's prohibition on mandatory arbitration of FEHA claims. The Ninth Circuit held A.B. 51's criminal provisions burden the formation of arbitration agreements enforceable under the FAA, stand as an obstacle to the FAA, and are therefore preempted by the FAA.

Thus, the preempted provisions of A.B. 51 are inapplicable to agreements subject to the FAA but remain applicable to agreements subject only to the California Arbitration Act ("CAA").

Transportation exemption

Section 1 of the FAA exempts from FAA coverage transportation workers engaged in foreign or interstate commerce.

In *Evenskaas v. California Transit, Inc.* (2022) 81 Cal.App.5th 285, at issue was the applicability of the rule of *Gentry v. Superior Court* (2007) 42 Cal.4th 443, a four-part test created by the California Supreme Court for determining whether class action waivers in arbitration agreements are enforceable. The *Gentry* Rule has been held preempted by the FAA, but still applies to arbitration agreements not covered by the FAA.

The *Evenskaas* court held that drivers for an employer providing paratransit services solely within Los Angeles County were nonetheless involved in interstate commerce because paratransit services are required by federal law and subject to federal control and regulation. Consequently, the FAA applied to their arbitration agreements, and the class action waiver therein was enforceable notwithstanding *Gentry*.

Stay pending appeal of *denial* of motion to compel arbitration

Defendants argue civil actions should be stayed pending appeal or the defendant will effectively lose its right to arbitration. Plaintiffs assert such appeals are used by defendants as a tactic to delay litigation for years.

In *Coinbase, Inc. v. Bielski* (June 23, 2023) 599 U.S. __, 2023 U.S. LEXIS 2636, the U.S. Supreme Court held in a 5-4 decision that a non-frivolous appeal of a district court's order denying a motion to compel arbitration automatically stays district court proceedings for the entire case. *Coinbase* resolves what was previously a circuit split where three circuits, including the Ninth Circuit, had held a stay was discretionary.

In California, Code of Civil Procedure section 916 provides generally that civil cases are stayed pending appeal. Section 916 covers appeal of the denial of a motion to compel arbitration. S.B. 365, pending in the legislature, would amend Code of Civil Procedure section 1294, subdivision (a) to add: "Notwithstanding Section 916, the perfecting of [an appeal of the dismissal or denial of a petition or motion to compel arbitration] shall not *automatically* stay any proceedings in the trial court during the pendency of the appeal."

Stay after motion to compel arbitration is *granted*

In *Forrest v. Spizzirri* (9th Cir. 2023) 62 F.4th 1201, the Ninth Circuit held that even though section 3 of the FAA provides for a stay after a motion to compel arbitration is granted, a district court has discretion to dismiss the case if all claims are subject to arbitration.

In *Leenay v. Superior Court* (2022) 81 Cal.App.5th 553, the trial court issued a stay of eight coordinated PAGA actions brought by individual plaintiffs against the same employer, pending the outcome of over 50 arbitrations against the employer brought by different employees on overlapping wage and hour claims. The court of appeal reversed, holding that under Code of Civil Procedure section 1281.4, a trial court only has authority to stay a civil action if an arbitration has been ordered between the *same parties* on an issue in the action.

Formation issues

To compel arbitration, the moving party must first establish the formation of a valid arbitration agreement. A common formation issue is the authenticity of the employee's signature. In both *Navas v. Fresh Venture Foods, LLC* (2022) 85 Cal.App.5th 626 and *Iyere v. Wise Auto Group* (2023) 87 Cal.App.5th 747, the trial courts found the employer failed to prove the employees signed the agreement. In *Navas*, the court of appeal affirmed the trial court, while in *Iyere*, the court of appeal reversed.

The same issue arises regarding electronic signatures. In *Trinity v. Life Insurance Company of North America* (2022) 78 Cal.App.5th 1111, the court of appeal affirmed the trial court's finding that the employer failed to prove the electronic signature was authentic. In *Perez v. Kaiser Foundation Health Plan, Inc.* (2023) 91 Cal.App.5th 645, a consumer arbitration case, the court of appeal affirmed the trial court's finding that the electronic signature was authentic.

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2023

In *Jackson v. Amazon.com, Inc*. (9th Cir. 2022) 65 F.4th 1093, plaintiff and defendant entered into an independent contractor agreement containing an arbitration provision stating the agreement could be modified by defendant upon notice to plaintiff if plaintiff continued to work thereafter. The Ninth Circuit affirmed the district court's denial of defendant's motion to compel arbitration, holding defendant had the burden to establish sufficient notice of the modification and failed to meet its burden when it neither produced the alleged email notice, nor submitted sufficient evidence of the contents of the email. The Ninth Circuit also held the fact that the modified agreement was available on defendant's app was not by itself sufficient notice.

Third-party defendants

In *Hernandez v. Meridian Management Services, LLC* (2023) 87 Cal.App.5th 1214, plaintiff entered into an arbitration agreement with one of her employers, but filed suit against six other "legally separate" but "functionally related" entities for whom she also worked, and not against the signatory employer who was party to the arbitration agreement. The six defendants moved to compel arbitration, and the trial court denied the motion. The court of appeal affirmed, finding none of the three legal bases for enforcement of an arbitration agreement by a nonparty had been established. Equitable estoppel was not established, primarily because plaintiff only sued the six defendants and gave up her right to pursue the signatory employer. Agency was not established because plaintiff did not allege joint employment and defendants failed to show they had authority to control the signatory employer. Third-party beneficiary status was not established because the six defendants failed to show that a motivating purpose of the agreement between plaintiff and the signatory employer was to benefit defendants.

Delegation clauses

Once a court finds a valid arbitration agreement that covers the plaintiff's claims, the court will decide whether any contract defenses preclude enforcement, unless the arbitration agreement contains a clear and unmistakable "delegation" provision that an arbitrator is to determine arbitrability. In *Nickson v. Shemran, Inc*. (2023) 90 Cal.App.5th 121, the court of appeal held a provision that "the arbitrator 'and not any' court, 'shall have exclusive authority' to resolve disputes regarding enforceability of the Agreement" constituted clear and unmistakable intent to delegate enforceability. Because the employee's allegations of unconscionability went to the agreement as a whole, and not specifically to the delegation clause, the delegation clause was enforced, and unconscionability issues were for an arbitrator to decide.

On the other hand, in *Beco v. Fast Auto Loans, Inc*. (2022) 86 Cal.App.5th 292, the court of appeal held a provision stating, "The agreement to submit to mediation and (if necessary) arbitration: [¶] . . . Covers any dispute concerning the arbitrability of any such controversy or claim" could be read to mean a specific substantive dispute or claim, not who decides whether the entire agreement is enforceable or unconscionable. Thus, the alleged delegation was not clear and unmistakable and not enforceable. The court also held that incorporation by reference of the American Arbitration Association ("AAA") Rules – which state that the arbitrator has "the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement" – does not meet the "heightened standard" of clear and unmistakable.

In *Los Angeles College Faculty Guild Local 1521 v. Los Angeles Community College District* (2022) 83 Cal.App.5th 660, the court of appeal held the trial court had authority to decide arbitrability where a collective bargaining agreement was silent on the issue of delegation, rejecting the employer's argument that an alleged past practice of delegating arbitrability to an arbitrator, combined with the breadth of the arbitration clause, was clear and unmistakable.

Unconscionability

The most common ground for challenging employment arbitration agreements is unconscionability. In *Navas v. Fresh Venture Foods, LLC* (2022) 85 Cal.App.5th 626, the court of appeal found the arbitration agreement unconscionable where the agreement: a) provided that the employee waived the right to bring an individual PAGA claim in any forum, b) was ambiguous regarding whether the employee had the right to self-representation in the arbitration hearing, and c) was "one-sided" because the list of "Covered Claims" only included claims an employee would bring and the employee was required to utilize the employer's internal complaint procedures that were not described.

In *Alberto v. Cambrian Homecare* (2023) 91 Cal.App.5th 482, the court of appeal held that a confidentiality agreement and an arbitration agreement entered into the same day as part of the employee's hiring should be interpreted together for purposes of compelling arbitration. Two provisions of the confidentiality agreement were substantively unconscionable: a) a non-mutual provision requiring the employee to consent to an immediate court injunction to protect confidential information while waiving the employer's need to obtain a bond or show irreparable harm and b) a prohibition on discussing "compensation and salary data" in conflict with California Labor Code section 232. The arbitration agreement's PAGA waiver was also unconscionable.

In *Mills v. Facility Solutions Group, Inc*. (2022) 84 Cal.App.5th 1035, the court of appeal held provisions regarding arbitration fees and costs were

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2023

unconscionable – the employee's filing fee could not be reallocated, the party causing a postponement had to pay the attendant costs, the appellant had to pay the costs of an arbitration appeal, the costs of any arbitration rehearing would be split evenly, and the arbitrator had authority to award attorneys' fees to the prevailing party on finding claims were "factually groundless" even if the applicable Labor Code statute includes a fee-shifting standard more favorable to employees. Other provisions were also unconscionable: a) only permitting most written discovery upon the arbitrator's finding of "substantial need," b) providing the limitations period for claims would not be tolled by the filing of a lawsuit, which conflicts with Code of Civil Procedure section 1281.12, and c) a PAGA waiver.

The *Mills* court also upheld the trial court's refusal to sever the substantively unconscionable provisions and enforce the agreement because unfairness "permeate[d]" the agreement. The *Mills* court, though, joined a growing number of California courts of appeal agreeing with the Ninth Circuit's statement in *Poublon v. C.H. Robinson Co*. (9th Cir. 2017) 846 F.3d 1251 that "California does not have a 'per se' rule that an arbitration agreement is permeated with unconscionability if more than one provision in an arbitration agreement is unconscionable."

In most employment arbitration cases, the court finds a low degree of procedural unconscionability based on finding the arbitration agreement is a contract of adhesion, prepared by the employer and presented to the employee on a take-it-or-leave-it basis, meaning the employee must establish a high degree of substantive unconscionability to defeat a motion to compel arbitration.

However, in *Beco v. Fast Auto Loans, Inc*. (2022) 86 Cal.App.5th 292, the court of appeal found a "moderate" degree of procedural unconscionability based on "economic pressure" where plaintiff was a low-wage, long-term employee who was pressured to sign the arbitration agreement on pain of termination. The court held several substantively unconscionable provisions of the agreement – an "unreasonable" limitations period of three months for all claims, a non-refundable $100 filing fee, a provision that the employer would pay arbitration fees for the first day of the arbitration but after that fees would be shared evenly absent a finding of undue hardship, and a provision that each side pay its own costs for attorneys, experts, witnesses, and expenses – were not cured by a provision "that required the arbitrator to tailor the remedy to governing law." A provision giving the arbitrator "authority to allow for appropriate discovery" was substantively unconscionable because the AAA Rules were not mentioned in the subparagraph regarding discovery.

In *Murrey v. Superior Court* (2023) 87 Cal.App.5th 1223, the court of appeal found a "heightened" degree of procedural unconscionability where: a) the arbitration agreement included a specific set of rules while also providing arbitration would proceed under the rules of an unnamed arbitration provider to be selected by the employer and b) the location of the arbitration would be a surprise. The agreement was substantively unconscionable because: a) each side was required to pay its own discovery costs, b) "presumptive" guidelines in the agreement set low default discovery limitations, c) there was a lack of mutuality because the agreement excluded intellectual property claims the employer was most likely to bring, d) the agreement was confusing as to whether the dispute resolution administrator was neutral or an agent of the employer, and e) there were limits on the arbitration hearing of five witnesses per side and two days in length.

The *Murrey* court also held substantively unconscionable a confidentiality provision in the agreement, finding confidentiality undermines employee confidence in the arbitration process and only benefits the employer by preventing future employees from proving a pattern and practice of discrimination. The *Murrey* court found California case law to the contrary is "out of step" with authority in other jurisdictions.

In *Fuentes v. Empire Nissan, Inc*. (2023) 90 Cal.App.5th 919 and *Basith v. Lithia Motors, Inc*. (2023) 90 Cal.App.5th 951, decided by the same panel, the court of appeal found a high degree of procedural unconscionability, but enforced the employment arbitration agreements upon finding no substantive unconscionability.

Fuentes and *Basith* involved essentially the same arbitration agreement held unconscionable in *OTO, L.L.C. v. Kho* (2019) 8 Cal.5th 111 ("*Kho*") and *Davis v. TWC Dealer Group, Inc*. (2019) 41 Cal.App.5th 662. In *Fuentes* and *Basith*, the majority disagreed with *Davis* and found the fact that the agreement was arguably incomprehensible – in *Fuentes* because of tiny and illegible font, in *Basith* because of prolix legalese – was not, under *Kho*, a basis to find substantive unconscionability, but only procedural unconscionability.

The majority also held the confusion created by multiple contracts and the lack of explanation regarding how to initiate arbitration were also grounds for only procedural, not substantive, unconscionability, and that the lack of an employer signature was only a formation issue. Upon finding that trade secret agreements entered into after the arbitration agreement still required the employer to arbitrate trade secret claims and that a provision allowing the employer to modify the agreement was subject to good faith and fair dealing, the majority held there was no substantive unconscionability.

In *Iyere v. Wise Auto Group* (2023) 87 Cal.App.5th 747, the court of appeal found an arbitration agreement was not substantively unconscionable, holding: a) a provision that the FAA governs the agreement does not conflict with California Labor Code section 925's prohibition on contracts that would deprive a California employee of the

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2023

substantive protection of California law, b) a provision giving the employer the right to choose between two arbitration providers named in the agreement is not unconscionable where "both providers are well recognized and respected," and there is no "evidence that arbitrators associated with one service tend to rule in favor of employers," and c) where an agreement is silent regarding the minimal requirements for mandatory arbitration of FEHA claims articulated in *Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, courts will infer those terms.

Public injunctive relief

In *Vaughn v. Tesla, Inc.* (2023) 87 Cal.App.5th 208, the employee sought an injunction under FEHA against his employer prohibiting acts of discrimination and harassment against Black and African American workers. The court of appeal held the rule of *McGill v. Citibank, N.A.* (2017) 2 Cal.5th 945 – which states that an arbitration agreement waiving a statutory right to seek a public injunction in any forum is against public policy and invalid – applies to public injunctions sought under FEHA. The *Vaughn* court also held the *McGill* Rule was not abrogated by the U.S. Supreme Court in *Viking River Cruises, Inc. v. Moriana* (2022) 142 S.Ct. 1906.

Waiver

In *Morgan v. Sundance, Inc.* (2022) 142 S.Ct. 1708, the U.S. Supreme Court held a party asserting waiver of the right to arbitrate does not have to show prejudice.

The California Supreme Court is set to decide whether prejudice is an element of waiver under California law in the pending case of *Quach v. California Commerce Club, Inc.* (2022) 78 Cal.App.5th 470, *review granted*, (Aug. 24, 2022) 297 Cal.Rptr.3d 592.

In *Hill v. Xerox Business Services, LLC* (9th Cir. 2023) 59 F.4th 457, the Ninth Circuit held, after *Morgan* – "[n]ow, the test for waiver of the right to compel arbitration consists of two elements: (1) knowledge of an existing right to compel arbitration; and (2) intentional acts inconsistent with that existing right." The Ninth Circuit held the test does not require the ability to compel arbitration, only knowledge of the right to do so.

In *Hill*, the class-action plaintiff employee had not signed an arbitration agreement, but many putative class members had, so while the employer knew of its right to compel arbitration, the employer could not move to compel until after class certification. The employer waived its right by, inter alia, failing to fully assert its right to arbitrate, participating in discovery, filing a motion for partial summary judgment, opposing plaintiff's class-certification motion, moving for reconsideration of district court rulings, and participating in a certification of questions of law proceeding in the Washington State Supreme Court, before filing a motion to compel arbitration eight years after the lawsuit was filed.

In *Armstrong v. Michaels Stores, Inc.* (9th Cir. 2023) 59 F.4th 1011, the Ninth Circuit held the defendant employer did not waive its right to arbitration because defendant consistently informed the court it intended to move to compel arbitration following discovery and its discovery requests were related to non-arbitrable claims. Although defendant waited one year to move to compel, it was only three months after the U.S. Supreme Court decided *Epic Systems Corp. v. Lewis* (2018) 138 S.Ct. 1612, which provided the basis for the motion.

In *Davis v. Shiekh Shoes, LLC* (2022) 84 Cal.App.5th 956, the court of appeal held the FAA applied, so no showing of prejudice was necessary. The court held the defendant employer waived its right to arbitration by waiting 17 months to move to compel, during which time defendant, inter alia, appeared for a case management conference, demanded and gave a time estimate for trial, engaged in multiple rounds of discovery, did not oppose plaintiff's multiple requests to continue trial, and stipulated it needed additional time to complete necessary discovery and prepare for trial.

In *Desert Regional Medical Center, Inc. v. Miller* (2022) 87 Cal.App.5th 295, the court of appeal held the employer waived its right to arbitration by, inter alia, filing a de novo appeal of a California Labor Commissioner ruling in favor of the employees at a *Berman* hearing, removing the de novo action to federal court, requesting the case be transferred to a different courtroom after remand, objecting to the employees' discovery, and requesting discovery sanctions, before moving to compel arbitration a year later.

In *Villareal v. LAD-T, LLC* (2022) 84 Cal.App.5th 446, the trial court denied the employer's motion to compel arbitration because the employer was doing business under a fictitious business name and had not executed, filed, and published a fictitious business name statement. Nearly one year later, while its appeal was pending, the employer registered its fictitious business name. The court of appeal held that under Business and Professions Code section 17918 the motion should have been abated until a fictitious business name was registered and that the FAA does not preempt this rule. The court of appeal remanded the case to the trial court to rule on whether the employer's delay in completing the registration constituted a waiver of the right to arbitration.

Failure to timely pay arbitration fees

Under Code of Civil Procedure sections 1281.97 and 1281.98, if the drafter of an employment or consumer arbitration agreement fails to pay within 30 days of invoice the fees and costs to initiate arbitration (1281.97) or continue the arbitration proceeding (1281.98), the drafter is in material breach of the agreement, is in default of the arbitration, and waives its right to compel arbitration. The other party then has the option to withdraw from arbitration, proceed in court, and seek sanctions under section 1281.99.

In three cases – *Gallo v. Wood Ranch USA, Inc.* (2022) 81 Cal.App.5th 621; *Espinoza v. Superior Court* (2022) 83 Cal.App.5th 761; and *De Leon v. Juanita's*

Journal of Consumer Attorneys Associations for Southern California
ADVOCATE
September 2023

Foods (2022) 85 Cal.App.5th 740 – courts of appeal held these statutes are not preempted by the FAA.

All three cases hold strict compliance with the statutes is required – 30 days means 30 days. (See *De Leon* [lack of delay or lack of prejudice is not a defense]; *Espinoza* [substantial compliance, unintentional nonpayment, or absence of prejudice is not a defense]; *Gallo* [lack of blame or lack of prejudice is not a defense].)

In *Williams v. West Coast Hospitals, Inc.* (2022) 86 Cal.App.5th 1054, a consumer arbitration case, the court held plaintiffs were not required to obtain a ruling from the arbitrator that defendant had failed to pay an invoice within 30 days as a prerequisite to withdrawing from arbitration and returning to court.

Subpoenas

In *McConnell v. Advantest* (2023) 92 Cal.App.5th 596, the court held that an arbitrator lacked authority under the CAA to issue subpoenas to require nonparty witnesses to produce documents prior to the arbitration hearing for discovery purposes. The *McConnell* opinion is fact specific: a) the arbitration agreement did not incorporate Code of Civil Procedure section 1283.05 or provide for issuance of such subpoenas, b) the arbitrator issued the subpoenas for a "hearing" limited to the purpose of producing documents one year before the hearing on the merits of the case, in a clear effort to circumvent the rule of *Aixtron, Inc. v. Veeco Instruments, Inc.* (2020) 52 Cal.App.5th 360 that the CAA does not give an arbitrator power to issue "prehearing discovery subpoenas," and c) *McConnell* is not an employment case. Nevertheless, attorneys should be aware that the authority of an arbitrator to issue subpoenas is more limited than the authority of a court, especially regarding prehearing subpoenas.

Motion or petition to vacate or confirm arbitration award

Where one party files a motion or petition to confirm an arbitration award, a party seeking to vacate or correct the award must comply with *both* Code of Civil Procedure section 1288.2's 100-day deadline from the date of the arbitration award *and* section 1290.6's 10-day deadline from the date of the filing of the petition to confirm, whether the pleading is a petition to vacate or a response to the petition to confirm.

In *Darby v. Sisyphian, LLC* (2023) 87 Cal.App.5th 1100, the employee filed a petition to confirm. The employer filed both a petition to vacate and a response to the petition to confirm within 100 days of the award, but more than 10 days after the petition to confirm. The court of appeal held the employer's arguments in both pleadings could not be considered, and the petition to confirm had to be granted.

In *Law Finance Group, LLC v. Key* (June 26, 2023) 2023 Cal. LEXIS 3531, the lender filed its petition to confirm more than 100 days after the award (within the four years allowed by Code of Civil Procedure section 1288), and the borrower filed her response seeking to vacate less than 10 days later. The borrower argued the timing of her filing was based on an agreement between the parties. The court of appeal held that while such an agreement is grounds for extending the 10 days under section 1290.6, the 100-day deadline of section 1288.2 is jurisdictional. The California Supreme Court held the 100-day deadline is *not* jurisdictional (expressly overruling dicta in *Darby*) and remanded to the court of appeal to determine whether equitable determinations excused the borrower's failure to file within 100 days.

In *Castelo v. Xceed Financial Credit Union* (2023) 91 Cal.App.5th 777, the arbitrator issued an award for the employer upon finding the employee had executed a release of her claims. The employee filed a motion to vacate, arguing the arbitrator had exceeded his powers by committing clear error of law in finding the release valid. The trial court also found the release valid and denied the motion to vacate. The court of appeal held that under *Pearson Dental Supplies, Inc. v. Superior Court* (2010) 48 Cal.4th 665, judicial review of the award was proper because the arbitrator made a ruling that prevented the employee from obtaining a ruling on the merits of her FEHA claim, but the court of appeal affirmed denial of the motion to vacate because the arbitrator and the trial court had correctly found the release valid.

In *Perez v. Kaiser Foundation Health Plan, Inc.* (2023) 91 Cal.App.5th 645, the arbitrator disclosed other pending cases against the respondent in which he was the arbitrator but did not disclose the results of those cases when they were later decided. The court of appeal held that under Code of Civil Procedure section 1281.9 an arbitrator does not have a duty to disclose post-appointment results of cases disclosed as pending at the time of appointment and affirmed the order confirming the arbitration award.

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021

The Ending Forced Arbitration of Sexual Assault and Sexual Harassment Act of 2021 provides, inter alia, that a person alleging sexual harassment or sexual assault in federal or state court, who is subject to a pre-dispute arbitration agreement, may elect whether to pursue claims in court or in arbitration. In *Murrey v. Superior Court* (2023) 87 Cal.App.5th 1223, the court of appeal confirmed the act does not apply retroactively to cases filed before its enactment.

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