IN THE UNITED STATES BANKRUPTCY COURT
FOR THE DISTRICT OF DELAWARE

In re VER TECHNOLOGIES HOLDCO LLC, *et al.*[1] Debtors.	Chapter 11 Case No. 17-11375 (KG) **Hearing Date: June 4, 2018 at 10:00 a.m.** **Objection Deadline: May 29, 2018 at 4:00 p.m.**

UNITED STATES TRUSTEE'S OMINBUS OBJECTION TO DISCLOSURE STATEMENT FOR THE JOINT CHAPTER 11 PLAN OF REORGANIZATION OF VER TECHNOLOGIES HOLDCO LLC AND ITS DEBTOR AFFILIATES PURSUANT TO CHAPTER 11 OF THE BANKRUPTCY CODE AND OBJECTION TO THE DEBTORS' MOTION TO APPROVE (I) ADEQUACY OF THE DISCLOSURE STATEMENT, (II) SOLICITATION AND NOTICE PROCEDURES, (III) FORMS OF BALLOTS AND NOTICES IN CONNECTION THEREWITH, (IV) CERTAIN DATES WITH RESPECT THERETO, AND (V) GRANTING RELATED RELIEF

Andrew R. Vara, the Acting United States Trustee for Region 3 ("U.S. Trustee"), through his undersigned attorneys, objects to the Disclosure Statement for the Joint Chapter 11 Plan of Reorganization of VER Technologies Holdco LLC and its Debtor Affiliates Pursuant to Chapter 11 of the Bankruptcy Code (the "Disclosure Statement," D.E. 185) and objects to the Debtors' Motion to Approve (I) Adequacy of the Disclosure Statement, (II) Solicitation and Notice Procedures, (III) Forms of Ballots and Notices in Connection Therewith, (IV) Certain Dates With Respect Thereto, and (V) Granting Related Relief (the "Solicitation Procedures Motion," D.E. 186)[2] and states as follows:

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, include: VER Technologies HoldCo LLC (7239); CPV Europe Investments LLC (2533); FAAST Leasing California, LLC (7857); Full Throttle Films, LLC (0487); Maxwell Bay Holdings LLC (3433); Revolution Display, LLC (6711); VER Finco, LLC (5625); VER Technologies LLC (7501); and VER Technologies MidCo LLC (7482). The location of the Debtors' service address is: 757 West California Avenue, Building 4, Glendale, California 91203.

[2] Terms shall have the same meaning given them in the Plan, Disclosure Statement or Solicitation Procedures Motion unless otherwise noted herein.

JURISDICTION

1. Under (i) 28 U.S.C. § 1334, (ii) applicable order(s) of the United States District Court for the District of Delaware issued pursuant to 28 U.S.C. § 157(a), and (iii) 28 U.S.C. § 157(b)(2), this Court has jurisdiction to hear and determine this objection.

2. Pursuant to 28 U.S.C. § 586(a)(3), the U.S. Trustee is charged with administrative oversight of the bankruptcy system in this District. Such oversight is part of the U.S. Trustee's overarching responsibility to enforce the laws as written by Congress and interpreted by the courts. *See United States Trustee v. Columbia Gas Systems, Inc. (In re Columbia Gas Systems, Inc.)*, 33 F.3d 294, 295-96 (3d Cir. 1994) (noting that the U.S. Trustee has "public interest standing" under 11 U.S.C. § 307 which goes beyond mere pecuniary interest); *Morgenstern v. Revco D.S., Inc. (In re Revco D.S., Inc.)*, 898 F.2d 498, 500 (6th Cir. 1990) (describing the U.S. Trustee as a "watchdog").

3. Pursuant to 28 U.S.C. § 586(a)(3)(B), the U.S. Trustee has the duty to monitor plans and disclosure statements filed in Chapter 11 cases and to comment on such plans and disclosure statements.

4. Under 11 U.S.C. § 307, the U.S. Trustee has standing to be heard on the Plan and Disclosure Statement and the issues raised in this objection.

PRELIMINARY STATEMENT

5. The Plan contemplates a merger of the Debtors with PRG. The Plan proposes to pay administrative, priority and DIP claims in full. The Pre-Petition Term Loan will receive a partial payment. Junior classes, including pre-petition unsecured claims, will receive little or no dividend.

6. The U.S. Trustee objects to approval of the Disclosure Statement and solicitation procedures for a variety of reasons, including but not limited to:

a. The Disclosure Statement does not contain "adequate information" about the value of the Debtors' assets being contributed to the Merger;

b. The proposed exculpation clause includes improper parties;

c. The proposed release provisions do not contain adequate opt out provisions;

d. The Plan does not provide adequate notice for parties in interest to object to the contents of the Plan Supplement;

7. The Plan contains broad release and exculpation provisions that are inconsistent with the Bankruptcy Code.

8. The proposed solicitation procedures propose to not serve parties entitled to be served with confirmation materials. The Plan Supplement deadlines will not afford an adequate opportunity to object to their contents.

STATEMENT OF FACTS

9. On April 5, 2018, the Debtors filed their petitions. All of the cases have been ordered jointly consolidated for administrative purposes. On April 12, 2018, the U.S. Trustee appointed an Official Committee of Unsecured Creditors.

10. On April 30, 2018, the Debtors filed the Plan (the "Plan," D.E. 184), the Disclosure Statement (D.E. 185), and the Solicitation Procedures Motion (D.E. 186).

11. Plan Section I.B.5 reads in pertinent part: "In the event of an inconsistency between the Plan and any other documents, schedules or exhibits contained in the Plan Supplement, such other document, schedule or exhibit shall control." The Debtors propose to

not file the Plan Supplement until Friday June 29, 2018, just prior to the Fourth of July (Plan Section I.A.107). The proposed plan objection deadline is July 6, 2018.

12. The Disclosure Statement contains Financial Projections for the merged entities (Exhibit C), a Liquidation Analysis (Exhibit D), and an enterprise Valuation Analysis of the merged entities (Exhibit E). None of the pleadings, however, disclose the enterprise value of the assets being contributed by the Debtors to the Merger, including any disclosure as to the Debtors' enterprise value independent of the Merger. Or, more simply put, to the extent the Merger can be viewed as a purchase by PRG of the Debtors' business as a going concern, the purchase price has not been disclosed.

13. The definition of Exculpated Parties (I.A.67) includes numerous non-estate fiduciaries including the pre-petition lenders, Catterton, PRG and a broad range of related parties including current and former directors and officers, current and former equity security holders, among others. The definition of Released Parties (I.A.134) is virtually identical. This provision is set forth in full at paragraph 31 below.

14. Article IX of the Plan proposes broad based release and exculpation provisions. The definition of Releasees (I.A.135) includes the following: "…(j) all Holders of Claims or Interests that vote to accept or are deemed to accept the Plan; …(l) all Holders of Claims or Interests that are deemed to reject the Plan that do not affirmatively elect to 'opt out' of being a released party by timely objecting to the Plan's third-party release provisions". This provision is set forth in full at paragraph 31 below.

15. The definition of Plan Supplement (Plan Section I.A.107) proposes to file the Plan Supplement seven days prior to the proposed Plan Objection Deadline of July 6, 2018. As proposed, this date is Friday June 29, 2018, shortly before the Fourth of July (Plan Section

I.A.107). However, Page 9 of the Disclosure Statement reads: "At least 10 days prior to the Confirmation Hearing the Debtors intend to file the Plan Supplement." The proposed Confirmation Hearing date is July 13, 2018, meaning the Plan Supplement will be filed on July 3, 2018 three days before the Plan Objection Deadline. The Solicitation Procedures Motion does not disclose a proposed date for the Debtors to file the Plan Supplement. The Plan Supplement will contain, among other things, the various documents essential to the Merger, including: "…(a) the New Organizational Documents; …(b) the Assumed Executory Contract/Unexpired Lease List; …(d) to the extent known, the identity of the members of the new board; …(h) any and all other documentation necessary to effectuate the Restructuring Transactions or that is contemplated by the Plan. As noted, the Plan provides that in the event of inconsistencies the Plan Supplement will control over the Plan.

16. The Solicitation Procedures Motion proposes to not send all required materials to parties who are impaired under the Plan. Some of the Confirmation Hearing Notices proposed in the Solicitation Procedures Motion do not contain the proposed release and injunction provisions as required by the applicable rules.

ARGUMENT

I. The Disclosure Statement Fails to Provide Adequate Disclosure

A. General Considerations

17. Section 1125 of the Bankruptcy Code prohibits solicitation of votes on a reorganization plan prior to court approval of a written disclosure statement, which contains "adequate information." *See* 11 U.S.C. § 1125(b).

18. "Adequate information" is defined in section 1125 as being:

> information of a kind, and in sufficient detail, as far as is reasonably practicable in light of the nature and history of the debtor and the condition of debtor's books and records, that would

> enable a reasonable hypothetical investor typical of holders of claims or interests of the relevant class to make an informed judgment about the plan, but adequate information need not include such information about any other possible or proposed plan.

11 U.S.C. § 1125(a)(1).

19. The disclosure statement requirements of Section 1125 are "crucial to the effective functioning of the federal bankruptcy system[;] . . . the importance of full and honest disclosure cannot be overstated." *Ryan Operations G.P. v. Santiam-Midwest Lumber Co.*, 81 F.3d 355, 362 (3d Cir. 1996) (*citing Oneida Motor Freight, Inc. v. United Jersey Bank* (*In re Oneida Motor Freight, Inc.*), 848 F.2d 414 (3d Cir. 1988)).

20. "Adequate information" under § 1125 is "determined by the facts and circumstances of each case." *See Oneida*, 848 F.2d at 417 (citing H.R. Rep. No. 595, 97th Cong., 2d Sess. 266 (1977)). The "adequate information" requirement is designed to help creditors in their negotiations with debtors over proposed plans. *See Century Glove, Inc. v. First Am. Bank*, 860 F.2d 94 (3d Cir. 1988).

21. Bankruptcy Code Section 506 (a) sets the standard for the valuation of assets: "Such value shall be determined in light of the purpose of the valuation and of the proposed disposition or use of such property, and in conjunction with any hearing on such disposition or use or on a plan affecting such creditor's interest." The Third Circuit has followed a flexible approach to valuation, depending upon the circumstances of the case. In the case of *In re Heritage Highgate*, 679 F.3d 132 (3d Cir. 2012), the Court applied the Debtor's going concern value in a Chapter 11 where the Debtor was being reorganized rather than liquidated. The Court stated: "The proper measure under §506(a) must, therefore be the collateral's fair market value because it is most respectful of the property's anticipated use." (679 F.3d at 142).

22. The Valuation Analysis attached as Exhibit E to the Disclosure Statement estimates the midpoint enterprise value of the Merged Entities to be $1.750 billion as of July 31, 2018. The value is stated as a conclusion without any factual support. Although Exhibit E describes the discounted cash flow and current market multiples valuation methodologies, the descriptions are general and provide no underlying data upon which the valuation is based. At a minimum the Exhibit should disclose and summarize the essential facts upon which the valuation is based and provide more than an unsupported conclusion.

23. The Valuation Analysis estimates that as of July 31, 2018 equity in the merged entity will be $569 million. As presented, the Valuation Analysis does not disclose the enterprise value being contributed to the Merger by the Debtors. The Liquidation Analysis may show what the creditors may receive if the Debtors cease operations and liquidate all assets but that is not respectful of the property's anticipated use and is not the Plan being proposed by the Debtors. The Financial Projections may show that the Plan is feasible, but only disclosure of the Debtors' enterprise value without regard to the Merger will show the value of the Plan for purposes of satisfying the best interest of creditors test, Bankruptcy Code Section 1129 (a)(7). This is the crucial missing fact in the more than 500 pages of pleadings.

24. The U.S. Trustee has made numerous other recommendations to the Debtors regarding revisions to the Disclosure Statement in addition to comments regarding the Exhibits, including the following:

a) To the extent the Debtors want documents other than the Plan to control inconsistencies, any such document should be included as an exhibit to the Plan, or the Plan be revised so that the Plan is the controlling document;

b) Longer notice of the Assumed Executory Contract/Unexpired Lease List;

c) The Notice of Confirmation Hearing should include all relevant third party release and related language as per FRBP 2002(c)(3).

B. The Plan Supplement Procedure Should Be Filed Earlier

25. The Debtors propose to file the Plan Supplement no later than seven days prior to the deadline to object to confirmation of the Plan. The definition of Plan Supplement identifies numerous documents including: "…(a) the New Organizational Documents; …(b) the Assumed Executory Contract/Unexpired Lease List; …(d) to the extent known, the identity of the members of the new board; …(h) any and all other documentation necessary to effectuate the Restructuring Transactions or that is contemplated by the Plan." The Debtors should include as an exhibit to the Plan any document they want to be germane to the Plan and then file the remainder of the Plan Supplement including the Unexpired Lease List no less than 10 days prior to the Plan Objection Deadline. The Court confirms a Plan, not a Plan Supplement. Parties in interest should have the opportunity to review and object to these materials in connection with confirmation. Holders of cure claims should have an adequate opportunity to review and respond to the Debtors' disclosures. Additional time will take into account the Fourth of July Holiday.

26. The Debtors have made inconsistent representations as to when they will file the Plan Supplement. Plan Section I.A.107 provides that the Plan Supplement will be filed seven days prior to the Plan Objection Deadline. This date is June 29, 2018. Page 9 of the Disclosure Statement, however, provides that the Plan Supplement will be filed at least 10 days prior to the Confirmation Hearing. This date is July 3, 2018. The Solicitation Procedures Motion is silent on this point. The proposed Notice of Assumption of Executory Contracts and Unexpired Leases, Exhibit 10 to the Solicitation Procedures Motion, provides for a July 6, 2018 objection deadline. The Debtors need to clarify precisely when they will file the Plan Supplement. To afford parties in interest an adequate opportunity to object to the contents of the Plan Supplement, including cure claim objections, the Plan Supplement should be filed no later than

10 days prior to the Plan Objection Deadline. Proposing to serve pleadings on the eve of or during a holiday week, with the objection deadline being the same week, is simply not adequate time under the circumstances.

II. Confirmation Issues

27. There are numerous ways in which the third party releases, the Debtor releases and exculpation provisions set forth in the Plan are contrary to the standards set forth by this Court in *In re Tribune Company*, 464 B.R. 126 (Bankr. D. Del. 2011), *In re Washington Mutual, Inc.*, 442 B.R. 314 (Bankr. D. Del. 2011), and other applicable law. Certain opt out mechanisms must also be clarified or amended before the voting solicitation process begins.

A. Third Party Releases

28. Some Courts in this District have determined that third party releases of non-debtors should be allowed provided that they are consensual. *See In re Wash. Mut., Inc.*, 442 B.R. 314, 352 (Bankr. D. Del. 2011), *citing, inter alia, In re Coram Healthcare Corp.*, 315 B.R. 321, 335 (Bankr. D. Del. 2004) (holding that the "Trustee (and the Court) do not have the power to grant a release of the Noteholders on behalf of third parties," and that such release must be based on consent of the releasing party); *In re Zenith Elecs. Corp.*, 241 B.R. 92, 111 (Bankr. D. Del. 1999) (holding that the release provision had to be modified to permit third parties' release of non-debtors only for those creditors who voted in favor of the plan); *In re Exide Techs.*, 303 B.R. 48, 74 (Bankr. D. Del. 2003) (approving releases which were binding only on those creditors and equity holders who accepted the terms of the plan).

29. Article IX of the Plan proposes broad based release and exculpation provisions. The definition of Releasees (I.A.135) includes the following: "…(j) all Holders of Claims or Interests that vote to accept or are deemed to accept the Plan; …(l) all Holders of Claims or Interests that are deemed to reject the Plan that do not affirmatively elect to 'opt out' of being a

released party by timely objecting to the Plan's third-party release provisions". To the extent the Debtors are not providing the Holders of Claims or Interests who vote for the Plan or who are deemed to accept the Plan with the ability to opt out of the proposed provisions, the Disclosure Statement and proposed solicitation procedure should not be approved.

30. To the extent the Debtors are requiring the Holders of claims or interests who are deemed to reject the Plan and who do not file an objection to the Plan if they do not desire to be bound by the third party release provision should be removed from the definition of Releasee. Claimants receiving nothing should not be required to affirmatively object to be excluded from the third party release provisions.

31. The Definitions of Exculpated Parties and Released Parties, read in full as follows:

> means, collectively, in each case in its capacity as such: (a) the Debtors, (b) the Reorganized Debtors; (c) the Prepetition ABL Agent; (d) the Prepetition Term Loan Agent; (e) the Prepetition ABL Lenders and each of the "Prepetition Secured Parties" as defined in the DIP Order; (f) the Prepetition Term Loan Lenders; (g) Catterton; (h) the DIP Agents; (i) the DIP Lenders and each other DIP Secured Party (as defined in the DIP Order); (j) PRG Inc., (k) PRG II, (l) PRG Holdings, (m) VER MergerCo, and (n) with respect to each of the Debtors, the Reorganized Debtors, and for each of the foregoing entities in clauses (a) through (m), such entity's current and former affiliates, and such entities' and their current and former affiliates' current and former directors, managers, members (including the Independent Member), officers, principals, equity holders, (regardless of whether such interests are held directly or indirectly), predecessors, participants, successors, and assigns, subsidiaries, affiliates, managed accounts or funds, and each of their respective current and former equity holders, officers, directors, managers, principals, shareholders, members, management companies, fund advisors, employees, agents, advisory board members, financial advisors, partners, attorneys, accountants, investment bankers, consultants, representatives, restructuring advisors, and other professionals; *provided* that a 2014 Transaction Party or its Representative shall not be an Exculpated Party unless such party has executed the Restructuring Support Agreement.

32. There are certain categories of persons and entities included among the Released Parties, such as the Debtors' directors, officers and employees, and similar members of the Debtors or PRG that the Third Circuit Court of Appeals and this Court have already determined are not entitled to non-consensual third party releases. *See Cont'l*, 203 F.3d at 215 ("[W]e have found no evidence that the non-debtor D & Os provided a critical financial contribution to the Continental Debtors' plan that was necessary to make the plan feasible in exchange for receiving a release of liability"); *Wash. Mut.*, 442 B.R. at 354 ("[T]here is no basis for granting third party releases of the Debtors' officers and directors , ... [as] [t]he only 'contribution' made by them was in the negotiation of the Global Settlement and the Plan, [which] activities are nothing more than what is required of directors and officers of debtors in possession (for which they have received compensation and will be exculpated) . . . ."); *In re Genesis Health Ventures*, Inc., 266 B.R. 606–07 (Bankr. D. Del. 2001) ("[T]he officers, directors and employees have been otherwise compensated for their contributions, and the management functions they performed do not constitute contributions of 'assets' to the reorganization."). The same logic is also applicable to third party releases of the Debtors' professionals who, like the Debtors' directors and officers, will be protected by the exculpation provision. *See Wash. Mut.*, 442 B.R. at 354.

33. The Debtors have the burden of justifying the validity of the non-consensual third party releases for each and every party to be released. Because an evidentiary predicate is necessary to approve the third party releases, the U.S. Trustee reserves argument on this issue until the record at the confirmation hearing is closed.

B. Debtors' Releases

34. The Plan provides releases by the Debtors and their estates of many non-debtor parties. Pursuant to this Court's decision in *Tribune*, 464 B.R. 126 (Bankr. D. Del. 2011), and

Washington Mutual, 442 B.R. 314 (Bankr. D. Del. 2011), among others, the five factors set forth in In re *Zenith Elecs. Corp.*, 241 B.R. 92, 110 (Bankr. D. Del 1999) and *In re Master Mortgage Inv. Fund, Inc.*, 168 B.R. 930, 937-38 (Bankr. W. D. Mo. 1994) should be considered to determine whether, notwithstanding § 524(e) of the Code, a plan may provide for releases by debtors of non-debtor entities. *See Tribune* 464 B.R. at 186; *Wash. Mut.*, 442 B.R. at 346; *In re Spansion*, 426 B.R. 114, 142-43, n. 47 (Bankr. D. Del. 2010); *In re Coram Healthcare Corp.*, 315 B.R. 321, 335 (Bankr. D. Del. 2004).

35. In the present cases, neither the Plan nor the Disclosure Statement address whether any of the *Zenith* factors are met for any of the parties who will receive releases from the Debtors or claimants. Absent a showing, and appropriate finding by the Court, that each proposed Released Party or Protected Party has made a substantial contribution to the Plan,[3] and that the other elements of *Zenith* have been met, the releases given by the Debtors render the Plan not confirmable.

36. The Debtors have the burden to establish whether the *Zenith* factors have been met as to each of the non-debtors who are the beneficiaries of the Debtor Releases. Because an evidentiary predicate is necessary to approve the Debtor Releases, the U.S. Trustee reserves argument on this issue until the record at the confirmation hearing is closed.

C. Exculpation

37. Plan Section IX.D. proposes to exculpate parties from conduct taking place during the case. The definition of Exculpated Parties should be revised to remove non-estate fiduciaries. The list of parties receiving exculpation should be limited to those parties who

[3] An example of a "substantial contribution" can be found in *Coram*, where this Court, after examining the *Zenith* factors, allowed the debtors to release noteholders who had contributed $56 million in funding to the plan, which funds allowed the debtors to repay in full all creditors other than the noteholders, as well as make a significant distribution to the debtors' shareholders. 315 B.R. at 335.

served in the capacity of estate fiduciaries, *i.e.*, the creditors' committee, its members, estate professionals and the Debtor's directors and officers. *See In re Indianapolis Downs, LLC,* 486 B.R. 286 (Bankr. D. Del. 2013); *In re Tribune Co.,* 464 B.R. 126, 189 (Bankr. D. Del. 2011)*; In re PTL Holdings, LLC*, 2011 WL 5509031 *12 (Bankr. D. Del. Nov. 10, 2011); *In re Washington Mutual Inc.*, 442 B.R. 314, 350 (Bankr. D. Del. 2011). See also *PWS Holding Corp,* 228 F.3d 224 (3d Cir. 2000).

III. Solicitation Procedures

38. FRBP 2002(a)(3) provides:

> "If a plan provides for an injunction against conduct not otherwise enjoined under the Code, the notice required under Rule 2002(b)(2) shall:
>
> (A) Include in conspicuous language (bold, italic, or underlined text) a statement that the plan proposes an injunction;
>
> (B) Describe briefly the nature of the injunction; and
>
> (C) Identify the entities that would be subject to the injunction."

39. Some, but not all, of the proposed notices or ballots contain the appropriate language, but many do not. The overall notice of confirmation hearing should contain all of the required language since every party in interest will be receiving notice of the confirmation hearing. The language could then be omitted from the other pleadings which, among other things, will comply with the Rules and save the Debtors printing and postage costs.

40. Bankruptcy Rule of Procedure 3017(d) requires:

> "…unless the court orders otherwise with respect to unimpaired classes of creditors or equity security holders- the debtor in possession, trustee, proponent of the plan, or clerk as the court orders shall mail to all creditors and equity security holders, and in a chapter 11 reorganization case shall transmit to the United States trustee, (1) the plan or a court approved summary of the plan; (2) the disclosure statement approved by the court; notice of the time within which acceptances and rejections of the plan may be filed; and (4) any other information as the court may

> direct, including any court opinion approving the disclosure statement or a court approved summary of the opinion."

The Debtors are proposing that claims and interests in classes deemed to reject the Plan receive only the notice of the confirmation hearing. Rule 3017(d) should be complied with and all deemed rejected claims or interests be served with pleadings required by Rule 3017(d).

CONCLUSION

41. The Disclosure Statement should not be approved, and the Plan should not be confirmed. The Disclosure Statement omits crucial valuation data which is at the heart of the required disclosures. The Debtors' propose to not file their Plan Supplement until seven days prior to the deadline to object to the Plan. This is too short a time period under the facts and circumstances of this case to afford parties in interest a fair opportunity to object to the contents of the Plan Supplement, including cure executory contract cure claims. The Plan contains non-consensual third party releases and exculpation provisions that are contrary to applicable law.

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42. The U.S. Trustee leaves the Debtors to their burden of proof and reserves any and all rights, remedies and obligations to, *inter alia*, complement, supplement, augment, alter and/or modify this objection, file an appropriate Motion and/or conduct any and all discovery as may be deemed necessary or as may be required and to assert such other grounds as may become apparent upon further factual discovery.

WHEREFORE, the U.S. Trustee respectfully requests that this Court issue an order denying approval of the Disclosure Statement, denying the Solicitation Procedures Motion, and/or granting such other relief as this Court deems appropriate, fair and just.

Dated: May 29, 2018
Wilmington, Delaware

Respectfully submitted,

ANDREW R. VARA
ACTING UNITED STATES TRUSTEE
Region 3

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