District Court Issues Preliminary Injunction in Business Groups' Challenge to New California Law Restricting Employment PDAA Use and Enforcement

By George H. Friedman, SAA Editor-in-Chief

A federal district court has issued a preliminary injunction staying California AB-51 implementation, pending final determination on the merits of a suit challenging the statute.

We had reported in SAAs 2019-48 (Dec. 18) & -47 (Dec. 11) that a coalition of business groups had filed suit in *Chamber of Commerce of the United States v. Becerra*, No. 2:19-at-01142 (E.D. Calif. Dec. 6, 2019), seeking declaratory and injunctive relief — based on Federal Arbitration Act ("FAA") preemption — to block the planned January 1, 2020 effectiveness of AB-51. The new law essentially bans mandatory arbitration of employment discrimination, sexual harassment, and wage law disputes. The statute also provides that an employer can't "threaten, retaliate or discriminate against, or terminate" an employee or job applicant who refuses to consent to waiver. There are both civil and criminal penalties for violations, but the law has some carve-outs seemingly included to avoid FAA and federal securities acts preemption. We later reported in SAA 2020-01 (Jan. 8) that a federal judge on December 30th temporarily enjoined AB-51's implementation. The Motion for a preliminary injunction was heard January 10 and we reported most recently in SAA 2020-02 (Jan. 15) that District Court Judge Kimberly Mueller extended the TRO to the end of January (although she clarified that it was limited to PDAAs covered by the FAA).

Preliminary Injunction Issued

We can now report that the Court on January 31 granted in full the request for a preliminary injunction enjoining the State from enforcing the new law. Specifically, the Minute Order provides that California is: "Enjoined from enforcing sections 432.6(a), (b), and (c) of the California Labor Code where the alleged 'waiver of any right, forum, or procedure' is the entry into an arbitration agreement covered by the [FAA]; and … from enforcing section 12953 of the California Government Code where the alleged violation of 'Section 432.6 of the Labor Code' is entering into an arbitration agreement covered by the FAA." Judge Mueller will issue a detailed written Order "in the coming days." As of press time, the Order had not been published.

*(ed: *We called this one. Our last editorial comment was: "We're betting on the Plaintiffs here." **As reported previously, the U.S. Chamber has a Webpage dedicated to this case.)*
(SAC Ref. No. 2020-05-02)

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District Court Grants TRO in Business Groups' Challenge to New California Law Restricting Employment PDAA Use and Enforcement

By George H. Friedman, SAA Editor-in-Chief

Just as it was about to go into effect, a federal judge enjoined the planned January 1, 2020 effectiveness of California AB-51, which essentially bans mandatory arbitration of employment discrimination, sexual harassment, and wage law disputes.

We reported in SAAs 2019-48 (Dec. 18) & -47 (Dec. 11) that a coalition of business groups had filed suit in *Chamber of Commerce of the United States v. Becerra*, No. 2:19-at-01142 (E.D. Calif. Dec. 6, 2019), seeking declaratory and injunctive relief based on Federal Arbitration Act ("FAA") preemption. Recall that, as we reported in SAA 2019-40 (Oct. 23), Governor Gavin Newsom signed AB-51. The new law doesn't expressly bar predispute arbitration agreements ("PDAA"), but amends Labor Code section 432.6(a) to provide: "A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit, or as a condition of entering into a contractual agreement, require any applicant for employment or any employee to waive *any right, forum, or procedure* for a violation of any provision of the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government Code) or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation" (emphasis added). The statute also states that an employer can't "threaten, retaliate or discriminate against, or terminate" an employee or job applicant who refuses to consent to waiver. There are both civil and criminal penalties for violations. The statute has some carveouts seemingly included to avoid Federal Arbitration Act ("FAA") and federal securities acts preemption.

The Legal Challenges Asserted

The groups' suit asserted that relief was needed because: "AB 51's limits on arbitration agreements conflict with federal law. Those limits are therefore preempted and invalid under the Supremacy Clause of the Constitution of the United States. Accordingly, Plaintiffs respectfully request that the Court (1) grant a declaratory judgment that AB 51 is invalid with respect to all arbitration agreements governed by the FAA and (2) issue an order permanently enjoining Defendants from enforcing it with respect to such arbitration agreements." The complaint focusing especially on the law's chilling effect on arbitration agreement use: "AB 51 singles out arbitration for disfavored treatment by imposing special restrictions on the formation of arbitration agreements, which do not apply to other types of contracts, and limit the ability of employers and workers to enter arbitration agreements. These requirements are not generally imposed to enter other provisions in employment contracts. Indeed, employers routinely condition employment on acceptance of other contractual terms…. AB 51 thus conflicts with –and also stands as an obstacle to — Congress's objectives in enacting the FAA. It is therefore preempted."

Court: Facts Support a TRO

On December 30th, District Court Judge Kimberly Mueller granted the TRO, finding that the plaintiffs: "have shown a likelihood of irreparable injury and that a restraining order is in the public interest…. Specifically, plaintiffs have raised serious questions regarding whether the challenged statute is preempted by the Federal Arbitration Act as construed by the United States Supreme Court…. Plaintiffs' argument that allowing the statute to take effect even briefly, if it is preempted, will cause disruption in the making of employment contracts also is persuasive … particularly given the criminal penalties to which violators of the law may be exposed. See Cal. Lab. Code § 433 ('Any person violating this article is guilty of a misdemeanor.')" (citations omitted). The Motion for a preliminary injunction will be heard January 10.

*(ed: *Again we can't say we are surprised. Our editorial comment in #40 said in part: "We suppose an argument can be made that the new law bars employers from enforcing the PDAAs, but in our view that would run afoul of the FAA. Stay tuned!" **The Court chided the plaintiffs for not acting sooner.*)

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The Other Shoe Drops: "Investor Choice Act" Finally Reintroduced in House and Senate. Would Amend 1934 Act and Investment Advisers Act of 1940 To Ban Mandatory Predispute Arbitration Agreements in Customer and Shareholder Relationships

By George H. Friedman, SAA Editor-in-Chief

It took a while, but joining the slew of anti-arbitration bills pending in Congress is the Investor Choice Act, *identical versions of which were introduced in the House and Senate in early December.*

We reported in SAA 2019-12 (Mar. 20) that House and Senate Democrats had reintroduced

several anti-mandatory arbitration bills in late February and early March, seeking to amend the Federal Arbitration Act ("FAA"), specific statutes like Dodd-Frank, or both. Most were reintroductions of bills that were not enacted by the last Congress. One of the old bills that had not yet been reintroduced was the *Investor Choice Act* ("ICA"), which would have amended the *Securities Exchange Act of 1934* and the *Investment Adviser Act of 1940* to ban the use of mandatory predispute arbitration agreements ("PDAA") by broker-dealers and investment advisers and would have guaranteed class action participation. We later reported in SAA 2019-15 (Apr. 17) that the ICA was reintroduced March 28 in the House. The bill, however, was never formally introduced. That's no longer the case, because S. 2992 (introduced by Sen. Jeff Merkley (D-OR)), and H.R. 5336 (introduced by Rep. Bill Foster (D-IL)), were introduced within days of each other in early December.

New Bills are Almost Identical to the Old ICA…

The newly-introduced ICA is nearly identical to the old one (H.R. 585). The caption describes the proposed ICA as intending "to amend the Securities Exchange Act of 1934 and the Investment Advisers Act of 1940 to prohibit mandatory pre-dispute arbitration agreements, and for other purposes." Specifically, the bills would declare it unlawful for BDs, funding portals, municipal securities dealers, or investment advisers: "to enter into, modify, or extend an agreement with customers or clients of that entity with respect to a future dispute between the parties that — (1) mandates arbitration for that dispute; (2) restricts, limits, or conditions the ability of a customer or client of that entity to select or designate a forum for resolution of that dispute; or (3) restricts, limits, or conditions the ability of a customer or client of that entity to pursue a claim relating to that dispute in an individual or representative capacity or on a class action or consolidated basis."

… But Different

This iteration of the ICA is essentially the same as the one introduced in the 115th Congress, except it adds a section amending the *Securities Act of 1933* to state: "A security may not be registered with the Commission if the issuer, in its bylaws, registration statement, or other governing documents mandates arbitration for any disputes between the issuer and the

shareholders of the issuer." The bills also prohibit issuers from including shareholder arbitration agreements in IPO subscription agreements.

Retroactivity with One Exception

If enacted, the changes would be retroactive, rendering void a preexisting non-conforming arbitration agreement, except that pending, ongoing arbitrations would be allowed to continue. Specifically, a PDAA "shall not be void … if arbitration required by that provision was initiated by any party on or before the date of enactment of this Act." While this carveout would avoid chaos in pending cases, as we've said before, we think retroactivity – invalidating existing arbitration agreements – invites challenges as an impermissible taking under the Constitution.

*(ed: *The original bills were analyzed by SAC Editor-in-Chief and Fordham Law Professor George H. Friedman, who wrote a guest SAC Blog post we published in March,* Democrats Introduce Several Anti-Mandatory Arbitration Bills. What You Need To Know. *More recently, the Bates Group on April 25 published a nice analysis,* Federal Legislators Target Mandatory Arbitration*, focusing on potential impact on the financial services industry and regulators, and how they are reacting. **The added provision barring shareholder PDAAs to us is an effort to address this year's flap over Johnson & Johnson's attempt to require arbitration to resolve shareholder disputes. See our coverage in SAA 2019-13 (Apr. 3). ***The forum designation clause is interesting. Of course, FINRA's Rules already bar class action waivers and permit customers to opt out of arbitration into class actions. ****The non-partisan Govtrack.us Website has not yet rated the chances of enactment, but we see them as very low.)* (SAC Ref. No. 2019-47-01)

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More Details on Two New California Laws Impacting Arbitration

By George H. Friedman, SAA Editor-in-Chief

As reported in SAA 2019-39 (Oct. 16), California Governor Gavin Newsom within days of each other signed into law two new statutes that will impact arbitration. As promised, here are more details.

The Governor signed into law AB-51, a bill essentially banning mandatory arbitration of employment discrimination, sexual harassment, and wage law disputes. Just three days later, he signed SB-707, a law that will impact arbitration fees and costs in consumer and employment cases, and address panel diversity. As we explain below, neither law is necessarily a complete "slam dunk" preemption candidate.

AB-51: A Limited Ban on Some PDAAs

AB-51 was introduced last March, passed by the legislature this summer, and signed by the Governor on October 10. The new law doesn't expressly bar predispute arbitration agreements ("PDAA"), but amends Labor Code section 432.6(a) to provide: "A person shall not, as a condition of employment, continued employment, or the receipt of any employment-related benefit, or as a condition of entering into a contractual agreement, require any applicant for employment or any employee to waive *any right, forum, or procedure* for a violation of any provision of the California Fair Employment and Housing Act (Part 2.8 (commencing with Section 12900) of Division 3 of Title 2 of the Government

Code) or this code, including the right to file and pursue a civil action or a complaint with, or otherwise notify, any state agency, other public prosecutor, law enforcement agency, or any court or other governmental entity of any alleged violation" (emphasis added). The statute also states that an employer can't "threaten, retaliate or discriminate against, or terminate" an employee or job applicant who refuses to consent to waiver.

AB-51: Preemption Avoidance Carveouts?

The statute has some carveouts seemingly included to avoid Federal Arbitration Act ("FAA") and federal securities acts preemption. From its introduction, the bill has had an SRO carveout: "This section does not apply to a person registered with a self-regulatory organization as defined by the Securities Exchange Act of 1934 (15 U.S.C. Sec. 78c) or regulations adopted under that act pertaining to any requirement of a self-regulatory organization that a person arbitrate disputes that arise between the person and his or her employer or any other person as specified by the rules of the self-regulatory organization." And the law provides that nothing contained in it "is intended to invalidate a written arbitration agreement that is otherwise enforceable under the Federal Arbitration Act (9 U.S.C. Sec. 1 et seq.)." Last, it does not invalidate existing PDAAs; it goes into effect January 1, 2020, for "contracts for employment entered into, modified, or extended" on or after that date.

AB-51: New Governor, New result

If this seems familiar, recall that as reported in SAA 2018-37 (Oct. 3), then-California Governor Jerry Brown vetoed AB 3080, a similar bill (*ed: with no FAA or existing PDAAs carveouts*). Governor Brown's Veto Message expressed his concerns that the proposed law was an FAA preemption candidate. As we correctly surmised in our past editorial comments, "We're guessing the sponsors expect a more favorable reaction from current Governor Gavin Newsom." What's also different this time around is the language recognizing the supremacy of the FAA and the statutory language exempting existing PDAAs. We asked SAC Board of Editors Member and long-time neutral Paul Dubow for his take on the new law: "The exception for contracts covered by the FAA is interesting. There are often situations

where draftspersons state that the contract will be covered by California law because they want to take advantage of provisions in California law outside of the arbitration field and they do so without thinking about California arbitration law. Will a contract that affects interstate commerce and would normally be subject to the FAA be covered by AB-51 because the contract specifies California law?"

SB-707: Focus on Arbitration Fees

This amendment to California's arbitration statute aims to address the "procedural limbo and delay workers and consumers face when they submit to arbitration, pursuant to a mandatory arbitration agreement, but the employer fails or refuses to pay their share of the arbitration fees." The bill's other aim is addressing "the alarming lack of diversity in the arbitration industry, which calls into question the ability of the industry to fairly adjudicate claims brought by an increasingly diverse work force in California." A staff analysis states that SB-707 (*ed: presented essentially* verbatim):

- Provides that, where any drafting party fails to pay the fees necessary to commence or continue arbitration, within 30 days after such fees being due to be tendered to the arbitrator, the drafting party is held to have materially breached the arbitration and is in default of the agreement.
- Gives consumers or employees several remedies in the event a drafting party breaches the arbitration agreement by failing to pay the arbitration costs and fees.
- Would permit, should the drafting party fail to pay the costs necessary to commence arbitration, the employee or consumer to remove the matter to court or move to compel the arbitration.
- Provides that, in the event that the drafting party fails to pay the fees or costs necessary to continue an arbitration currently in progress, the employee or consumer can move the matter to court, seek a court order compelling the payment of the fees, continue the arbitration and permit the arbitrator to seek collection of their fees, or pay the costs and fees and seek those fees from the drafting party at the conclusion of the arbitration regardless of the ultimate outcome.
- To deter drafting parties from failing to pay arbitration costs and fees in a timely manner,

this bill imposes mandatory monetary sanctions on any drafting party found to be in default of an arbitration agreement for failure to pay costs and fees, and permits the imposition of additional evidentiary, terminating, or contempt sanctions, as the court or arbitrator sees fit.

SB-707: Focus on Arbitrator Diversity

The bill's other aim is addressing "the alarming lack of diversity in the arbitration industry, which calls into question the ability of the industry to fairly adjudicate claims brought by an increasingly diverse workforce in California." How? The staff analysis says that SB-707: "Requires an arbitration company that administers, or is otherwise involved in a consumer arbitration, to also include in the required report the demographic data relative to ethnicity, race, disability, veteran status, gender, gender identity, and sexual orientation of all arbitrators as provided by the arbitrator." The effective date is not clear from the face of the bill; we assume it is immediate.

*(ed: *Given the FAA carveout in AB-51, one wonders to which situations the new law will apply? Many SRO employees are not included, nor are workers covered by an existing PDAA. And the part exempting PDAAs enforceable under the FAA seems to gut the prohibition on PDAAs entered into after January 1st. So, what's left? We suppose an argument can be made that the new law bars employers from enforcing the PDAAs, but in our view that would run afoul of the FAA. Stay tuned! **Dorsey & Whitney LLP, published in the October 17* JDSupra *an excellent, short analysis of AB-51, "Five FAQs on California's New Ban on Mandatory Arbitration Agreement." ***We reported in SAA 2019-29 (Jul. 31) on* Latif v. Morgan Stanley & Co., LLC*, No. 18cv11528 (S.D.N.Y. June 26, 2019), where the District Court held in a case of first impression that the FAA preempts a 2018 amendment to New York's arbitration statute – CPLR § 7515 – banning PDAAs covering sexual harassment claims. The Court, however, noted that a bill expanding the PDAA bar to employment discrimination claims in general was sitting on Governor Cuomo's desk, and "held" it preempted in advance of enactment. The Governor nevertheless signed the bill into law and it went into effect October 11. ****The first half of SB-707 to us is also an FAA preemption candidate, although the panel diversity data-gathering aspect seems fine to us. Recall that FINRA already publishes arbitrator (and mediator) panel demographics data.)* (SAC Ref. No.

2019-40-01)

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More on the Whistleblower Improvement Act, and Another Anti-Arbitration Bill is Introduced

By George H. Friedman, SAA Editor-in-Chief

We briefly mentioned in SAA 2019-37 (Sep. 25) that the bipartisan Whistleblower Programs Improvement Act *had been introduced in the Senate. As promised, here is more expansive coverage, along with an analysis of yet another anti-arbitration bill that has since been introduced.*

The *Whistleblower Programs Improvement Act* ("WPIA") (S. 2529) was introduced September 23 by Senate Finance Committee Chairman Charles Grassley (R-IA), and Senators Tammy Baldwin (D-WI), Richard Durbin (D-IL), and Joni Ernst (R-IA). The bipartisan legislation aims to expand Dodd-Frank's whistleblower protections – including the anti-mandatory predispute arbitration agreement ("PDAA") feature – to employees of

"an entity registered with, or required to be registered with, the Commission, a self-regulatory organization, or a State securities commission or office performing like functions…"

Protection for Dodd-Frank Whistleblowers

A small part of the wide-ranging bill immediately drew our attention. While Dodd-Frank section 922 bars mandatory PDAAs covering Sarbanes-Oxley ("SOX") whistleblower retaliation claims, it does not cover whistleblower claims brought under Dodd-Frank, and courts have consistently declined to so extend whistleblower protection. For example, we covered in #37 *Daly v. Citigroup*, No. 18-665 (2d Cir. Sep. 19, 2019), where the Court followed the Third Circuit's holding in *Khazin v. TD Ameritrade Holding Corp.*, 773 F.3d 488 (3d Cir. 2014), and held that Dodd-Frank does not bar arbitration of whistleblower claims asserted under that statute. The WPIA would extend Dodd-Frank's anti-arbitration protection to cover expressly Dodd-Frank whistleblowers. The text provides: "(1) WAIVER OF RIGHTS AND REMEDIES. The rights and remedies provided in this section may not be waived by any agreement, policy form, or condition of employment, including by a predispute arbitration agreement. (2) PREDISPUTE ARBITRATION AGREEMENT. No predispute arbitration agreement shall be valid or enforceable if the agreement requires the arbitration of a dispute arising under this section." There is currently no stated effective date.

Yet Another Bill to Curb PDAAs…

On September 27, Rep. Madeleine Dean (D-PA) introduced the *Ensuring Fair Legal Recourse for Private Student Loan Borrowers Act* (H.R. 4544), which would amend the *Truth in Lending Act* "to prohibit predispute arbitration agreements that force arbitration of disputes arising from private education loans, and for other purposes." Similar to almost all the anti-arbitration bills that have been introduced this year, the statute would be retroactive. This appears to be a companion bill to the *Justice for Student Borrowers Act* (H.R. 3764), which would amend the *Federal Arbitration Act* to ban PDAAs and class action waivers in private higher ed loan agreements.

A New Strategy?

As SAA Editor-in-Chief George Friedman observed in his SAC feature article, *Surprise! Some of the Anti-Arbitration Bills Introduced in Congress this Year May Actually Become Law (One Already Has),* these two bills target specific federal statutes. This is a sound tactic, given very clear and well-established SCOTUS jurisprudence holding that the FAA will prevail over another federal statute unless the latter expressly bars PDAAs (see *Epic Systems Corp. v. Lewis*, 138 S. Ct. 1612 (2018)).

*(ed: *Public Citizen wrote on September 23 praising the WPIA's introduction and urging that it be passed. **Although the nonpartisan www.GovTrack.us Website rates the WPIA's chances of enactment as only 3%, we think the odds are much higher. This bill already has bipartisan support that will only grow, and if passed by Congress, will we suspect get consideration by the President (although, on second thought, whistleblowers may not be his favorite group right now…).)* (SAC Ref. No. 2019-38-01)

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That Didn't Take Very Long: FAIR Act Approved by the House

By George H. Friedman, SAA Editor-in-Chief

Just days after being cued up for a possible vote, the Forced Arbitration Injustice Repeal (FAIR) Act of 2019 *was approved by the House of Representatives on September 20 by a mostly party-line vote.*

We reported in SAA 2019-36 (Sep. 18) that we believed the *FAIR Act* was lined up for a House vote by September 20, and we were confident there were more than enough votes to ensure passage. Turns out we were right on both predictions, with the House approving the Act on September 20 by a mostly party-line 225 – 186 vote that included Republican Reps. Matt Gaetz (FL) and Chris Smith (NJ). Two Democrats – Reps. Henry Cuellar (TX) and Collin Peterson (MN) – voted "no."

A Refresher

We reported in SAA 2019-12 (Mar. 20) that House and Senate Democrats introduced several anti-mandatory arbitration bills in late February and early March, chief among them the *FAIR Act* (H.R. 1423 and S. 610). If enacted, the *FAIR Act* would amend the Federal Arbitration Act ("FAA") to eliminate mandatory predispute arbitration agreements for disputes involving "consumer, civil rights, employment, and antitrust." It definitely covers brokers and investment advisers; bars class action/collective action waivers in or out of a predispute arbitration agreement; extends to "digital technology" disputes; reserves for court determination any arbitrability or delegation issues "irrespective of whether the agreement purports to delegate such determinations to an arbitrator;" and clearly extends to sexual harassment claims. One substantive amendment was approved just ahead of the House vote, adding to the text: "Nothing in this act shall be construed to prohibit the use of arbitration on a voluntary basis when consent is given after the dispute arises." The *FAIR Act* would be retroactive, applying to *claims* made after the effective date.

Senate Prospects

Now, it's off to the Senate where the outcome is less certain, but with passage not an impossibility. Why do we say this? We reported in SAA 2019-13 (Apr. 3) that the full Senate Judiciary Committee held an April 2nd hearing titled "Arbitration in America." Based on the comments and questions from Committee members – including Chairman Lindsey Graham (R-SC) and former Chairman Charles Grassley (R-IA) – it seems there may be Republican support for some changes focused on arbitration fairness. For example, Chairman Graham said: "The problems we will hear about today bother me.… What's good for business is not necessarily good for individuals.… It bothers me that when you sign up for a product or service you are giving away your rights. For the rest of this year this Committee will take a long and hard look at how arbitration can be improved. We will try to find some middle ground. We will find a way forward.… There have to be fairness standards." Also, readers may recall that Senators Graham and John Kennedy (R-LA) were the only two Republicans who voted against the 2017 Resolution nullifying the CFPB's arbitration rule. On the other hand, the *FAIR Act*'s Senate version is stuck at 34 co-sponsors – none from the Republican caucus.

Presidential Prospects

If the bill passes both houses, the President appears ready to veto it. The White House issued a September 17 Statement of Administration Policy stating that it "strongly opposes passage of H.R. 1423." The Statement cites several problems with the proposed law: "These blanket prohibitions will increase litigation, costs, and inefficiency, including by exposing the vast majority of businesses to even more unnecessary litigation. As written, the FAIR Act disregards the benefits of resolving disputes through arbitration, including lower costs, faster resolution, and reduced burden on the judiciary. By limiting contractual options, this bill would hurt businesses and the very consumers and employees it seeks to protect." Any ambiguity was eliminated by the closing sentence: "If H.R. 1423 were presented to the President in its current form, his advisors would recommend that he veto the bill." On the other hand, we're not absolutely certain of a Presidential veto of a bill viewed as pro-consumer; that might depend on how many Republican Senators vote "yea."

*(ed: *The nonpartisan www.GovTrack.us Website rates the chances of enactment as 3% – a 1% decline following House passage. **We continue to think that retroactive nullification of existing PDAAs invites legal challenges based on the Fifth Amendment's Takings Clause. ***We will certainly keep our eye on this one!)* (SAC Ref. No. 2019-37-01)

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