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FILED
ALAMEDA COUNTY

OCT 02 2013

CLERK OF THE SUPERIOR COURT
By _____ Deputy
PILIPINO TUNGOHAN

7 Attorneys for Plaintiffs

8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF ALAMEDA

11 SUSAN FUTTERMAN, MEGAN
12 MORTENSEN, as individuals, individually
and on behalf of all others similarly situated,

13 Plaintiff,

14 v.

15 KAISER FOUNDATION HEALTH PLAN
16 INC., and DOES I through XX, inclusive,

17 Defendants.

) Case No. **RG 13697775**
)
) **CLASS ACTION**
) (Code of Civil Procedure § 382)
)
) **COMPLAINT FOR DAMAGES,**
) **INJUNCTIVE RELIEF AND**
) **DECLARATORY RELIEF**
) (Violations of Business and Professions Code
) Section 17200 et seq., Violations of the Unruh
) Civil Rights Act, Breach of the Covenant of
) Good Faith and Fair Dealing, Breach of
) Contract)

18
19
20 **INTRODUCTION**

21 1. Plaintiffs Susan Futterman and Megan Mortensen bring this class action against
22 Defendant Kaiser Foundation Health Plan for failure to provide adequate and timely access to
23 mental health services as required by California law.

24 **JURISDICTION AND VENUE**

25 2. This Court has jurisdiction over plaintiffs' claims because those claims are made
26 pursuant to California state law, to wit, California Business and Professions Code Section 17200
27 et seq., California contract laws, and the Unruh Civil Rights Act.

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3. Venue is proper in this Court because the defendant is incorporated in the State of California and has its headquarters in Oakland, California.

PARTIES

4. Plaintiff Susan Futterman is a resident of Pt. Richmond, California. She is the surviving spouse of Fred Paroutaud, who was a Kaiser member at the time of his death in June of 2012. Mr. Paroutaud paid a fee to Defendant in return for Defendant's promise to provide him with coverage for certain medical services, including mental health services. Ms. Futterman is the sole beneficiary of her late husband's estate.

5. Plaintiff Megan Mortensen is a resident of Long Beach, California. She is a former Kaiser member. She enrolled with Defendant in return for Defendant's promise to provide her with coverage for certain medical services, including mental health services.

6. Defendant Kaiser Foundation Health Plan, Inc. is incorporated in the State of California, is a resident of the State of California, and has its headquarters and principal place of business in Oakland, California, in the County of Alameda.

CLASS ACTION ALLEGATIONS

7. This action is brought by plaintiffs on behalf of themselves and others similarly situated as a class action pursuant to Code of Civil Procedure § 382.

8. The class consists of all current and former Kaiser members who have either been denied access to mental health services, dissuaded from pursuing mental health services, provided with delayed access to mental health services and/or provided with inaccurate and confusing information from Kaiser regarding mental health services available to them from October 2, 2009 to the present.

9. Numerosity: The potential members of the class are numerous, and joinder of all of the potential members is impracticable. Defendant has more than six million members throughout the State of California. The precise number of Kaiser members (and/or surviving beneficiaries) who fall within the class definition has not yet been determined but it is estimated to

1 exceed 1000 individuals.

2 10. Superiority/Risk of Separate Actions: Class action treatment is superior to any
3 alternative to ensure the fair and efficient adjudication of the controversy alleged herein. Such
4 treatment will permit a large number of similarly situated persons to prosecute their common
5 claims in a single forum simultaneously, efficiently and without the duplication of effort and
6 expense that numerous individual actions would entail. No difficulties are likely to be
7 encountered in the management of this class action that would preclude its maintenance as a class
8 action, and no superior alternative exists for the fair and efficient adjudication of this controversy.
9 The likelihood of individual class members prosecuting separate claims is remote, and individual
10 class members do not have a significant interest in controlling the prosecution of separate actions.
11 Additionally, the prosecution of separate actions by individual class members would create a risk
12 of inconsistent and varying adjudications concerning the subject of this action which, in turn,
13 would establish incompatible standards of conduct for defendant.

14 11. Commonality. Common questions of law and fact exist as to all members of the
15 class and predominate over any questions affecting only individual members of the class, thereby
16 making a class action superior to other available methods for the fair and efficient adjudication of
17 the controversy. Among the questions of law and fact common to plaintiffs and the class
18 members are whether, as alleged herein, defendant did the following:

19 a. Whether defendant failed to accurately monitor the capacity and availability
20 of its network to ensure that members are offered appointments within the regulatory
21 timeframes;

22 b. Whether defendant forced its members to endure appointment wait times
23 that exceed the length of time allowed by law;

24 c. Whether defendant provided inaccurate, misleading, and/or confusing
25 information to its members regarding the availability of mental health services;

26 d. Whether defendant otherwise denied services and/or dissuaded members
27 from pursuing services available to them.

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1 12. Typicality. The claims of the named plaintiffs are typical of the claims of the class
2 because they, like the other members of the class, sustained damages arising out of defendant's
3 actions in denying, dissuading, and/or delaying access to adequate mental health services in
4 violation of state law and/or out of defendant's actions in providing inaccurate or confusing
5 information regarding the availability and use of mental health services provided by defendant.

6 13. Adequacy of Representation. The named plaintiff will fairly and adequately
7 represent and protect the interests of the class members. Counsel who represent the plaintiff are
8 competent and experienced litigation attorneys with experience handling class actions.

9 14. Ascertainability. Although the specific identities of all of the class members are
10 not known at this time, the class is ascertainable from defendant's own records. Upon information
11 and belief, plaintiffs allege that defendant's own records will yield the identities of the class
12 members including *inter alia* records relating to requests or referrals for mental health services,
13 the type of services that were provided and when, the time lapse between the request for service
14 and when an appointment was offered, and whether any services were denied.

15 15. Defendant has acted in a manner generally applicable to the class, thereby making
16 appropriate final injunctive relief and corresponding declaratory relief with respect to the class as
17 a whole.

18 **FACTUAL ALLEGATIONS COMMON TO THE CLASS**

19 16. Defendant Kaiser Foundation Health Plan, Inc. is a part of Kaiser Permanente.
20 Kaiser Permanente is made up of three separate groups of entities: (1) Defendant Kaiser
21 Foundation Health Plan, Inc. ("Kaiser Health Plan"); (2) Kaiser Foundation Hospitals; and (3) the
22 regional Permanente Medical Groups.

23 17. Defendant Kaiser Health Plan, Inc. is a full service "health care service plan," as
24 defined by Health and Safety Code Section 1345. Defendant collects fees from or on behalf of
25 Kaiser "members" throughout the state of California in return for arranging for the provision of a
26 full range of health care services including but not limited to behavioral health, ambulatory care,
27 preventative services, hospital care, and skilled nursing.

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1 18. Defendant arranges for outpatient behavioral health services for its members
2 through its regional Permanente Medical Groups. The Permanente Medical Group, Inc.
3 (“TPMG”), a for-profit multi-specialty physician corporation, provides outpatient mental health
4 services to Defendant’s approximately 3.3 million members in Northern California. The Southern
5 California Permanente Medical Group (SPMG), a for-profit multi-specialty physician partnership,
6 provides most of the outpatient behavioral health services to Defendant’s approximately 3.5
7 million members in Southern California.¹

8 19. Defendant is subject to the Knox-Keene Health Care Services Act of 1975
9 (hereafter “Knox-Keene Act), codified in the California Health and Safety Code at Sections 1340
10 et seq., as well as the corresponding regulations promulgated pursuant to that act, which are
11 contained in title 28 of the California Code of Regulations.

12 20. Under the Knox-Keene Act, Defendant is required to provide coverage for the
13 diagnosis and medically necessary treatment of certain mental health conditions including *inter*
14 *alia* Schizophrenia, Schizoaffective disorder, Bipolar disorder (manic-depressive illness), Major
15 depressive disorders, Panic disorder, Obsessive-compulsive disorder, Pervasive developmental
16 disorder or autism, Anorexia nervosa, and Bulimia nervosa.

17 21. Under title 28, Section 1300.67.2.2 of the California Code of Regulations,
18 Defendant is required to provide timely access to mental health services for its members, defined
19 as follows:

- 20 • Within 48 hours of a request for an urgent care appointment for services that do not
21 require prior authorization,
- 22 • Within fifteen (15) business days of a request for an appointment with a specialist,
23 and
- 24 • Within ten (10) business days of a request for an appointment with non-physician
25 mental health care providers.

26
27
28 ¹ SPMG also subcontracts out to other entities some of its services to a limited number of Kaiser members
in the Palm Desert area.

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1 22. The regulation further requires Defendant to establish and maintain provider
2 networks, policies, procedures and quality assurance monitoring systems and processes sufficient
3 to ensure compliance with these timely access provisions. In other words, Defendant is obligated
4 to ensure that it has enough mental health professionals to provide timely access to services for its
5 members. The regulations also require Defendant to provide accurate and understandable
6 information to its members regarding the availability and use of mental health services provided
7 by the plan.

8 23. Under title 28, Section 1300.67(f)(8) of the California Code of Regulations,
9 Defendant is required to provide accurate and understandable information to its members
10 regarding the availability and optimal use of health care services provided by the plan.

11 24. Under title 28, Section 1300.70(a)(3) of the California Code of Regulations,
12 Defendant is required to monitor whether the provision and utilization of services meets the
13 professionally recognized standards of practice.

14 25. In or around late 2011 or early 2012, the California Department of Managed
15 Healthcare (DMHC) began conducting an investigation regarding Defendant Kaiser Health Plan's
16 compliance with the Knox-Keene Act and corresponding regulations.

17 26. After a lengthy investigation process, the DMHC came out with its final report in
18 or around March of 2013. The DMHC's March 2013 report concluded that Defendant Kaiser
19 Health Plan violated the Knox-Keene Act and corresponding regulations by *inter alia* failing to
20 accurately monitor the capacity and availability of its network to ensure that members are offered
21 appointments within the regulatory timeframes, resulting in appointment wait times that exceed
22 the length of time allowed by law and providing inaccurate, misleading, and/or confusing
23 information to its members regarding the availability of mental health services thereby dissuading
24 members from pursuing medically necessary care.

25 27. On or around May 22, 2013, the DMHC came out with another report concluding
26 that Defendant also violated provisions of the Knox-Keene Act and corresponding regulations
27 regarding *inter alia* its obligation to monitor whether the provision and utilization of its services
28 meets professionally recognized standards of practice.

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1 28. Plaintiff Susan Futterman's late husband, Fred Paroutaud, was a member of
2 Defendant Kaiser Health Plan. On or around April 28, 2012, Mr. Paroutaud suffered a psychotic
3 break at the age of 57 and he was arrested. He was released on Sunday, April 30, 2012 and
4 Plaintiff took him to see his regular doctor at Kaiser San Rafael on Monday, May 1, 2012. The
5 doctor directed Plaintiff to take her husband to the Kaiser emergency room, which she did. Later
6 that day, Kaiser transported him to a facility in Vallejo and placed him on a 72-hour hold.

7 29. During Mr. Paroutaud's stay in the Vallejo facility, he was diagnosed as having
8 bipolar disorder. He was released after 72 hours despite the fact that he was still suffering from
9 delusions. Kaiser proscribed medication and directed him to attend group therapy sessions four
10 times per week for the next six weeks. His group was made up largely of people recovering from
11 substance abuse and he told the facilitator that he felt uncomfortable in the group setting. Both
12 Mr. Paroutaud and Ms. Futterman made multiple requests for Kaiser to provide one-on-one
13 therapy services to Mr. Paroutaud and they were both incorrectly informed that Kaiser did not
14 provide one-on-one therapy.

15 30. Sometime after Mr. Paroutaud completed the initial six weeks of group therapy, he
16 stopped going to therapy, stopped taking his medication, and became non-responsive. In
17 approximately mid-June of 2012, Ms. Futterman made multiple calls to Kaiser to request an
18 appointment for her husband with his psychiatrist. Plaintiff repeatedly told Kaiser that she was
19 extremely worried about her husband, that he had become totally non-responsive, and that she did
20 not know what to do for him. She was informed that the psychiatrist was on vacation, that no one
21 was covering his patients while he was away, and that there was no way to get Mr. Paroutaud an
22 appointment until after the psychiatrist returned.

23 31. Kaiser never made the appointment that Ms. Futterman requested and on June 28,
24 2012, Mr. Paroutaud committed suicide. It was not until two weeks after her husband's death that
25 Ms. Futterman finally received a phone call from his psychiatrist. At that point, it was simply a
26 voicemail sending his condolences for Mr. Paroutaud's death.

27 32. Plaintiff Megan Mortensen was a member of Defendant Kaiser Health Plan when,
28 in February of 2011, her brother committed suicide. Ms. Mortensen experienced emotional

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1 difficulties coping with his death. Therefore, she contacted Kaiser's mental health office in
2 Tustin, California to request an appointment with a Kaiser therapist. She was told that she would
3 have to wait six weeks to see someone. Once she was finally able to see a therapist, she was
4 referred to group therapy and a psychiatrist for medication. She was told that it would take
5 another five weeks to see the psychiatrist. When she met with the psychiatrist, she expressed
6 concerns about the side effects of the medications and when the psychiatrist refused to change the
7 medications, she asked to make an appointment with a different psychiatrist. She was told that
8 she would have to wait for two more months to get another appointment with a psychiatrist.

9 33. After having been repeatedly forced to wait longer than allowed by law for therapy
10 and psychiatric appointments, Ms. Mortensen felt that she had no other choice but to seek mental
11 health services from providers outside of Kaiser. She paid out of pocket for therapy, psychiatry,
12 and medications until it became too expensive for her to maintain. On November 30, 2011, she
13 called Kaiser again and she again requested an appointment. She was told that she would receive
14 a return call the very next day to schedule an appointment. However, she waited six days for the
15 return call and never received one so she called again on December 6, 2011. At that time, she was
16 told that the very first appointment she could get would be January 16, 2012 – more than a month
17 away. Since she felt she had no other choice, she booked the appointment and hung up.

18 34. Ms. Mortensen did some research and learned about California's timely access law
19 (described above). She called Kaiser back and told the receptionist that making her wait that long
20 for an appointment violated the law. The receptionist said she had never heard of the timely
21 access law and that the only options available to Ms. Mortensen were to go to the emergency
22 room, complain to the member services department, or see a non-Kaiser provider.

23 35. Ms. Mortensen then called the member services department and was told that she
24 was correct and that she should not have been forced to wait so long for an appointment. Member
25 services promised to call her back with a sooner appointment. When they did call back, they
26 informed her that the only available appointment within a two week timeframe was at an office
27 that was 25 miles away.

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1 36. Plaintiffs are informed and believe and thereupon allege that other class members
2 have also been harmed by Defendant's failure to provide timely access to covered treatment for
3 mental health conditions.

4 **FIRST CAUSE OF ACTION**

5 (Violations of Business and Professions Code Section 17200 et seq.)

6 37. Plaintiffs re-allege and incorporate by reference each and every allegation set forth
7 in paragraphs 1 through 36 above.

8 38. Defendant Kaiser Health Plan engaged in, and continues to engage in, unlawful
9 and unfair business acts and practices prohibited by California Business & Professions Code
10 §17200, et seq. by engaging in the acts and practices described above, including but not limited to
11 failing to accurately monitor the capacity and availability of its network to ensure that members
12 are offered appointments within the regulatory timeframes, resulting in appointment wait times
13 that exceed the length of time allowed by law and by providing inaccurate, misleading, and/or
14 confusing information to its members regarding the availability of mental health services and
15 otherwise denying services and/or dissuading members from pursuing services available to them.

16 39. Plaintiffs have suffered injury in fact as a result of Defendant's unfair and unlawful
17 business acts and practices alleged herein and can therefore bring this action for relief pursuant to
18 California Business & Professions Code §17200, et seq., and can seek and obtain injunctive relief.

19 40. Plaintiffs have standing to pursue representative claims and relief on behalf of the
20 class members herein in that they meet the standing requirements of California Code of Civil
21 Procedure § 382 as set forth in their class action allegations in paragraphs 28-36 above.

22 41. Defendant engaged in unlawful and unfair business acts and practices, and unfair
23 competition, in violation of California Business and Professions Code § 17200 et seq. by
24 violating, *inter alia*, California Health and Safety Code Section 1374.72 as well as the California
25 Code of Regulations, title 28, sections 1300.67(f)(8) and 1300.67.2.2.

26 42. Defendant's course of conduct, acts, and practices in violation of California laws
27 mentioned in each paragraph above constitute separate and independent violations of § 17200 et
28 seq. of the California Business and Professions Code.

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1 43. The unlawful and unfair business practices and acts of defendant as described
2 above, have injured plaintiffs and members of the class. The harm to plaintiffs and the class
3 members outweighs the utility, if any, of defendant's acts and practices and, therefore, defendant's
4 actions described herein constitute an unfair business practice or act within the meaning of
5 California Business and Professions Code § 17200.

6 44. As a result of defendant's unlawful and unfair business acts and practices alleged
7 herein, plaintiff and the class are entitled to restitution constituting recovery of money and/or
8 property that is rightfully theirs and is in Kaiser's possession.

9 45. As a result of defendant's unlawful and unfair business acts and practices alleged
10 herein, plaintiff and the class are entitled to an order requiring defendant, its agents, servants, and
11 employees, and all persons acting, directly or indirectly, in concert with them, to restore and
12 disgorge all funds to each member of the class acquired by means of any act or practice declared
13 by this Court to be unlawful or unfair and therefore constitute unfair competition under § 17200 et
14 seq. of the California Business and Professions Code.

15 46. Money damages will not afford the class members adequate relief because
16 defendant continues to engage in the unlawful and unfair business practices alleged herein.

17 47. As a result of defendant's unlawful and unfair business acts and practices alleged
18 herein, plaintiffs and the class are entitled to injunctive relief pursuant to California Business &
19 Professions Code § 17203, consisting of a preliminary and/or permanent injunction enjoining
20 defendant and its respective successors, agents, servants, officers, directors, employees and all
21 persons acting in concert with it from pursuing the policies, acts and practices complained of
22 herein and prohibiting defendant from continuing such unfair and illegal business acts and
23 practices.

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SECOND CAUSE OF ACTION
(Violations of the Unruh Civil Rights Act)

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25
26 48. Plaintiffs re-allege and incorporate by reference each and every allegation set forth
27 in paragraphs 1 through 47 above.

28 ///

1 49. At all times relevant herein, Defendant was a business subject to the Unruh Civil
2 Rights Act.

3 50. Defendant discriminated against its members with severe mental health conditions
4 with regard to the provision of medical services by *inter alia* failing to accurately monitor the
5 capacity and availability of its network to ensure that members are offered appointments within
6 the regulatory timeframes, resulting in appointment wait times that exceed the length of time
7 allowed by law and by providing inaccurate, misleading, and/or confusing information to its
8 members regarding the availability of mental health services and otherwise denying services
9 and/or dissuading members from pursuing services available to them.

10 51. The mental health conditions of Plaintiffs and the other class members were a
11 substantial motivating reason for defendant's wrongful actions as described herein.

12 52. As a proximate result of Defendant's wrongful conduct as described herein,
13 plaintiffs and other class members have suffered and will continue to suffer damages including
14 but not limited to economic, physical, and/or emotional injuries.

15 53. As a further proximate result of Defendant's wrongful conduct as described herein,
16 plaintiffs and the class members were forced to expend legal fees and costs in an effort to obtain
17 the benefits due to them under the plan.

18 54. The actions alleged above by Defendant were done with malice, fraud and
19 oppression, and in reckless disregard of the rights of plaintiffs and the class, entitling them to
20 punitive damages.

21

22

THIRD CAUSE OF ACTION
(Breach of the Covenant of Good Faith and Fair Dealing)

23

24 55. Plaintiffs re-allege and incorporate by reference each and every allegation set forth
25 in paragraphs 1 through 54 above.

26

27 56. Every insurance policy contains an implied covenant of good faith and fair dealing
28 that neither party will do anything to injure the other party's right to receive the benefits to of the
agreement.

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1 57. Defendant issued insurance policies to its members, including Plaintiff's late
2 husband, Plaintiff Mortensen and other class members, in return for a fee. The policies are
3 contracts by which defendant is bound to provide timely access to mental health services in
4 accordance with the law.

5 58. Defendant breached the covenant of good faith and fair dealing by *inter alia* failing
6 to accurately monitor the capacity and availability of its network to ensure that members are
7 offered appointments within the regulatory timeframes, resulting in appointment wait times that
8 exceed the length of time allowed by law and by providing inaccurate, misleading, and/or
9 confusing information to its members regarding the availability of mental health services and
10 otherwise denying services and/or dissuading members from pursuing services available to them.

11 59. As a proximate result of Defendant's wrongful conduct as described herein,
12 plaintiffs and other class members have suffered and will continue to suffer damages including
13 but not limited to economic, physical, and/or emotional injuries.

14 60. As a further proximate result of Defendant's wrongful conduct as described herein,
15 plaintiffs and the class members were forced to expend legal fees and costs in an effort to obtain
16 the benefits due under the plan.

17 61. The actions alleged above by Defendant were done with malice, fraud and
18 oppression, and in reckless disregard of the rights of plaintiffs and the class, entitling them to
19 punitive damages.

20 **FOURTH CAUSE OF ACTION**
21 **(Breach of Contract)**

22 62. Plaintiffs re-allege and incorporate by reference each and every allegation set forth
23 in paragraphs 1 through 61 above.

24 63. Defendant issued insurance policies to its members, in return for a fee. The
25 policies are contracts by which defendant is bound to provide timely access to mental health
26 services in accordance with the law.

27 64. Defendant breached its contracts with plaintiffs and other Kaiser members by *inter*
28 *alia* failing to provide timely access to mental health services covered by the plan and in

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1 accordance with the law.

2 65. As a proximate result of Defendant's wrongful conduct as described herein,
3 plaintiffs and other class members have suffered and will continue to suffer damages under the
4 contract.

5 66. As a further proximate result of Defendant's wrongful conduct as described herein,
6 plaintiffs and the class members were forced to expend legal fees and costs in an effort to obtain
7 the benefits due under the plan.

8

9

REQUEST FOR RELIEF

10 Plaintiffs on behalf of themselves, the class they seek to represent, and all others similarly
11 situated who join in this action requests relief as follows:

- 12 a. Certification of this action as a class action;
- 13 b. Notice to the class;
- 14 c. Special damages, including economic and incidental damages, past and future;
- 15 d. For prejudgment interest and post judgment interest where warranted;
- 16 e. For general damages, including pain, suffering, mental injury, and emotional
17 distress, past and future;
- 18 f. For reasonable attorney fees, costs of suit, and statutory damages pursuant to Civil
19 Code § 52;
- 20 g. For reasonable attorneys fees pursuant to Code of Civil Procedure § 1021.5 on the
21 grounds that plaintiffs seek to enforce an important right affecting the public
22 interest, the successful pursuit of this case would confer a significant benefit upon
23 the general public and/or to a large class of persons, and the necessity and cost to
24 plaintiffs in bringing its private enforcement action outweighs their stake in the
25 action;
- 26 h. For costs or suit pursuant to Code of Civil Procedure §§ 1032-1034;
- 27 i. For punitive damages in an amount warranted under the law;
- 28 j. For injunctive relief requiring Defendant to provide timely access to mental health

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services in accordance with the law and to provide accurate and understandable information to its members regarding the mental health services available to them.
k. For such other and further relief, in law or equity, as this Court may deem appropriate and just.

DATED: October 2, 2013

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