**No. 24-1678**

# In the
# United States Court of Appeals
## for the Sixth Circuit

SINGH RX, PLLC d/b/a SRX SPECIALTY CARE PHARMACY, and AMAN DEEP SINGH,

*Plaintiffs-Appellants*

V.

SELECTIVE INSURANCE COMPANY OF SOUTH CAROLINA, AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA,

*Defendants-Appellees*

**On Appeal from the United States District Court**
**for the Eastern District of Michigan at Detroit**

# BRIEF OF APPELLEE AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA

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UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

# Disclosure of Corporate Affiliations and Financial Interest

Sixth Circuit
Case Number: 24-1678 Case Name: Singh RX, et. al. v. Selective, et. al.

Name of counsel: Michele A. Chapnick

Pursuant to 6th Cir. R. 26.1, American Casualty Company of Reading, Pennsylvania
*Name of Party*
makes the following disclosure:

1. Is said party a subsidiary or affiliate of a publicly owned corporation? If Yes, list below the identity of the parent corporation or affiliate and the relationship between it and the named party:

CNA Financial (publicly traded) owns The Continental Corporation, which owns Continental Casualty Company, which owns American Casualty Company of Reading, PA.

2. Is there a publicly owned corporation, not a party to the appeal, that has a financial interest in the outcome? If yes, list the identity of such corporation and the nature of the financial interest:

No.

CERTIFICATE OF SERVICE

I certify that on January 14, 2025 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

s/ Michele A. Chapnick
Gregory, Meyer & Chapnick, P.C.

This statement is filed twice: when the appeal is initially opened and later, in the principal briefs, immediately preceding the table of contents. See 6th Cir. R. 26.1 on page 2 of this form.

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## FED. R. APP. 34(a)(1) & 6 Cir. R. 34(a) STATEMENT REGARDING ORAL ARGUMENT

Oral argument is not likely to assist this Court. This is a straight-forward insurance contract coverage action presenting limited issues to be determined under well-established Michigan contract construction principles. The facts necessary for resolution of the appeal are undisputed. Appellant's Brief does not present novel or complicated arguments. This Court can and should summarily affirm the District Court's judgment. Nevertheless, should the Court grant Singh's request for oral argument, American Casualty requests an equal opportunity to be heard at oral argument.

## STATEMENT OF JURISDICTION

Plaintiffs-Appellants' Statement of Jurisdiction is neither correct nor complete. Plaintiffs-Appellants first incorrectly identify the Final Judgment from which the appeal is taken. The District Court issued an Opinion and Order granting summary judgment to the Defendants-Appellees on July 10, 2024. (Opinion & Order, R. 77, PageID #2264-2295) The District Court's Final Judgment pursuant to that Opinion and Order was likewise entered July 10, 2024. (R. 78, PageID #2296) As to the basis for District Court's diversity jurisdiction, the parties are diverse because Aman Singh, who is the sole member of Singh RX, PLLC, is a citizen and resident of the State of Michigan (2d Amend. Complt. ¶2, R. 22, PageID #1454), and

Singh RX, PLLC is a professional limited liability company formed in Michigan with its principal place of business in Michigan (*id*. ¶3). Defendant-Appellee Selective Insurance Company of South Carolina is a corporation formed in the State of Indiana with its principal place of business in New Jersey. (Selective Ans. to 2d Amend Complt., ¶4, R. 27, PageID #1480) Defendant-Appellee American Casualty Company of Reading, PA ("American Casualty") is a corporation formed in the State of Pennsylvania with its principal place of business in Illinois. (AC Ans. to 2d Amend. Complt. ¶5, R.36, PageID #1582) The remainder of Plaintiffs-Appellants' jurisdictional statement is correct and complete.

## COUNTER-STATEMENT OF THE ISSUES PERTAINING SOLELY TO DEFENDANT-APPELLEE AMERICAN CASUALTY[1]

I. Whether the District Court properly granted summary judgment to Defendant-Appellee American Casualty because the underlying First Amended Complaint against Plaintiffs-Appellants does not satisfy any of the required elements to qualify as a covered "claim" under the Professional Liability Policy Defendant-Appellee American Casualty issued to Plaintiffs-Appellants, where the underlying action was not brought by natural persons who received professional services from

[1] Plaintiffs-Appellants have appealed from the District Court's grant of summary judgment and final order dismissing the action against both Defendants-Appellees. American Casualty's Principal Brief addresses only the issues, facts, and arguments pertaining to Singh's action against American Casualty.

Plaintiffs-Appellants and did not allege that that natural persons suffered injury or property damage or loss of use of tangible property as required by the Policy such that Defendant-Appellee American Casualty has no duty to defend Plaintiffs-Appellants against the underlying action?

Plaintiffs-Appellants say "No."

Defendant-Appellee American Casualty says "Yes."

The District Court held "Yes."

II. Whether the District Court properly granted summary judgment to American Casualty where the American Casualty Professional Liability Policy is not illusory because it does provide for circumstances under which Defendant-Appellee may have a duty to defend Plaintiffs-Appellants against claims that satisfy the Policy's terms?

Plaintiffs-Appellants say "No."

Defendant-Appellee American Casualty says "Yes."

The District Court held "Yes."

## COUNTER-STATEMENT OF THE CASE

### A. The Underlying *Janssen* Action Against Singh

This is a liability insurance coverage dispute. Plaintiffs-Appellants Singh RX, PLLC d/b/a SRX Specialty Care Pharmacy and Aman Deep Singh (hereinafter collectively "Singh") sought a defense under the Professional Liability Policy (the

"Policy") that Defendant-Appellee American Casualty Company of Reading, PA ("American Casualty") issued to Singh with respect to an underlying lawsuit filed against Singh in the Eastern District of New York by Janssen Sciences Ireland Unlimited Company, Janssen Products, LP, and Johnson & Johnson (collectively "Janssen"), styled as *Janssen Sciences Ireland Unlimited Company, et al. v. Safe Chain Solutions, LLC, et al*., No. 1:22-cv-01983.[2]

The *Janssen* First Amended Complaint ("FAC") avers that Janssen Sciences Ireland Unlimited Company is a private unlimited company organized under the laws of Ireland (*Janssen* FAC, R 1-5, PageID #445, ¶20). Janssen Products, LP is a limited partnership organized under New Jersey law. (*Id.,* PageID #445, ¶9). Johnson & Johnson is a corporation organized under New Jersey law. (*Id*., PageID #445, ¶18).

The *Janssen* action is premised on Singh's alleged knowing and/or intentional improper purchase, distribution and/or dispensing of a counterfeit Janssen-branded and trademarked HIV medication called SYMTUZA®. (*Id*. PageID #441-442, 444-445, ¶1-7, 16-17) According to the *Janssen* FAC, SYMTUZA® is a complete, single-tablet, once-a-day medication that contains an entire HIV combination

[2] The instant parties' respective dispositive motions and the District Court's decision were all premised on the allegations made in Janssen's First Amended Complaint. (R 1-5, PageID #440-487) Though Janssen subsequently filed a Second Amended Complaint (see Janssen 2d AC, R 17-3, PageID #1136), that pleading's allegations against Singh and the relief sought are the same as the First Amended Complaint and in no manner affected the issues or grounds for decision in the instant action.

therapy regimen in a single pill. (*Id.* PageID #454-455, ¶59-63) By contrast, "PREZCOBIX®, which is what Singh and others are alleged to have falsely and knowingly purchased, distributed and dispensed as SYMTUZA® with a false pedigree and labeling, must be used with "at least one other antiretroviral medication." (*Id*., *see also* PageID #459, ¶91-95) Janssen further alleges Singh continued to purchase the counterfeit products through January 2022, long after Singh was informed the products were counterfeit. (*Id.* PageID #470, ¶158)

In his deposition, Mr. Singh testified that Singh did not dispense any medication to Janssen or otherwise provide any professional services to Janssen. (Singh dep tr, ln. 79:2-18, R 58-1, PageID #1863) Singh did not dispute this testimony below and does not do so on appeal. The *Janssen* FAC does not allege or intimate otherwise. Nor does it allege or imply that Janssen's claims are based on injuries sustained by any individuals to whom Singh dispensed counterfeit medication or that Janssen is suing on any such individuals' behalf.

Instead, the *Janssen* FAC asserts causes of action against Singh for:

- Federal trademark infringement (*Janssen* FAC, R 1-5, PageID #475-476, ¶¶181-195);
- Federal false description and designation of origin in commerce (*id.* PageID #477-478, ¶¶196-202);
- Federal false advertising (*id.* PageID #478-480, ¶¶203-210);
- Federal dilution of mark (*id.* PageID#480-481, ¶¶211-219);
- New York dilution of mark and injury to business reputation (*id.* PageID #481-482, ¶¶ 220-225);
- New York deceptive business practices (*id.* PageID #482, ¶¶ 226-229);

- Common-law unfair competition (*id.* PageID #482-483, ¶¶ 230-234); and
- Common-law unjust enrichment (*id.* PageID #483, ¶¶ 235-237).

As to Singh, the *Janssen* FAC's Prayer for Relief seeks:

- A permanent injunction against, among other things, selling both genuine and counterfeit Janssen medication, using or infringing on any Janssen marks, unfairly competing, and representing that Singh is associated with Janssen, and
- An award of statutory, actual or threefold damages, costs and attorneys' fees, disgorgement of ill-gotten profits, pre-judgment and post-judgment interest and punitive damages of not less than $25 million. (*Id.* PageID #483-486)

## B. The American Casualty Professional Liability Policy

American Casualty issued a Professional Liability Policy (the "Policy") No. HPG-0656305643) to "Singh Rx LLC," effective March 26, 2021 to March 26, 2022. (Policy, R.1-3, PageID #247) The Policy consists of, *inter alia*, Common Policy Conditions which contain a number of universally applicable definitions. (*Id*., PageID #249-254) The Policy contains only one coverage part – the "Healthcare Providers Professional Liability Coverage Part" ("PL Coverage Part").[3] (*Id,*. PageID #247, 255-262) The PL Coverage Part also contains additional definitions (*id.*, PageID #258) and four Coverage Agreements (*id.*. PageID #255). It is undisputed that only two Coverage Agreements are implicated here – the Professional Liability

[3] The Policy also contains various coverage extensions which are not implicated in this action.

Coverage Agreement ("PL Coverage Agreement") and the Personal Injury Coverage Agreement ("PI Coverage Agreement").

The PL Coverage Part states:

> We have the right and duty to defend any **claim** that is a **professional liability claim**, **Good Samaritan Claim, personal injury claim** or **malplacement claim**. We will:
>
> A. do this even if any of the charges of such **claim** are groundless, false or fraudulent; and
> B. investigate and settle any **claim**, as we feel appropriate.
>
> Our payment of the applicable limit of liability ends our duty to defend or settle. We have no duty to defend any **claims** not covered by this Coverage Part. *Policy,* [III. Defense and Settlement, *Id*., PageID #257-258]

The Professional Liability Coverage Agreement in the PL Coverage Part states:

> **A. PROFESSIONAL LIABILITY**
> We will pay all amounts, up to the Professional Liability limit of liability stated on the **certificate of insurance**[4], that **you** become legally obligated to pay as a result of a **professional liability claim** arising out of a medical incident by **you** or by someone for whose **professional services you** are legally responsible. [*Id.,* PageID #255]

"Professional services" are defined in the Common Policy Conditions in pertinent part as:

> Those services for which **you** are licensed, certified, accredited, trained or qualified to perform within the scope of practice recognized by the regulatory agency responsible for maintaining the standards of the profession(s) shown on the **certificate of insurance** and which **you** perform as, or on behalf of, the **named insured**[.]

[4] Bolded words appearing in the quoted policy text are all specifically defined terms or phrases in the Policy. While they remain bolded here, as originally presented in the Policy itself, they will be identified later in this Brief by quotation marks.

[*Id.,* PageID #253]

A "professional liability claim" is "a 'claim' arising out of a 'medical incident.'" (*Id.* PageID #258) "Medical incident" is defined as:

> Any act, error or omission in your providing **professional services** which result in **injury** or **damage**. (*Id.*).

The Personal Injury Coverage Agreement states:

> **C. PERSONAL INJURY LIABILITY**
> We will pay all amounts, up to the **Personal Injury** Liability limit of liability stated on the **certificate of insurance**, that you become legally obligated to pay as a result of a **personal injury claim** arising out of **personal injury.** [*Id.,* PageID #255]

A "personal injury claim" is "a 'claim' arising out of 'personal injury.'" (*Id.,* PageID #258). "Personal injury" is defined as:

> **[I]njury** arising out of one or more of the following offenses committed in the conduct of **your professional services**:
>
> 1. testimony given at or arising out of inquests;
> 2. malicious prosecution;
> 3. false arrest, detention, imprisonment, wrongful entry or eviction or other invasion of the right of private occupancy;
> 4. libel, slander or other disparaging materials;
> 5. a violation of an individual's or entity's right to privacy;
> 6. **assault**, battery, mental anguish, mental shock or humiliation;
> 7. misappropriation of advertising ideas, trade secrets, or style of doing business; or
> 8. infringement of patent, copyright, trademark, trade name, trade dress, service mark, service name, logo, title or slogan. [*Id*., PageID #253]

The Policy's Common Policy Conditions Definitions section states "Injury" has the meaning set forth in each individual coverage part. (*Id*., PageID #252) The

PL Coverage Part defines "Injury" for purposes of the entire coverage part as "bodily injury, sickness, disease, mental or emotional distress sustained by a person, or death." (*Id*., PageID #258) "Damage" is defined in the Common Policy Conditions as:

> 1. physical injury to tangible property, including all resulting loss of use of that property; or
> 2. loss of use of tangible property that is not physically injured. [*Id*. PageID #252]

Most important to this action, the Policy was issued with an incorporated Endorsement entitled "The Amended Definition of Claim Endorsement Health Care Provider Professional Liability, General Liability and Workplace Liability Coverage Parts" (the "Endorsement"). The Endorsement very specifically delineates the meaning of and what constitutes a "claim" that might trigger American Casualty's duty to defend Singh. The Endorsement states it "forms a part of and is for attachment to the Policy issued by the designated Insurers," and that it "takes effect on the effective date of said Policy at the hour stated in said Policy…." (*Id*., PageID #275) The Endorsement further states in pertinent part:

> It is understood and agreed that the Policy is amended as follows:
>
> Solely as respects the Professional Liability Coverage Part… the **COMMON CONDITIONS**, the section entitled **DEFINITIONS**; *the definition of "**claim**" is deleted in its entirety and replaced as follows:*
>
> **"Claim**" means a demand for money or services alleging **injury or damage**. **Claim** also means the filing of a suit or the starting of

> arbitration proceedings naming **you** and alleging **injury** or **damage**. However, no demand for money or services alleging **injury** or **damage** or filing of suit or starting of arbitration proceedings naming **you** and alleging **injury** or **damage** is a **claim** unless such demand is made, such suit is filed or such arbitration proceeding is started:
>
> A. *As respects the Professional Liability Coverage Part*:
>
> 1. *by a natural person to whom you or someone for whom you are legally liable, provided **professional services**, but solely for such natural person's **injury** or **damage***; or
>
> 2. by such natural person's family member, legal guardian or estate, but solely for **injury** or **damage**[.] [*Id.* PageID.275. (Emphasis added.)]

As stated in the Endorsement itself, it deletes the definition of "claim" for purposes of the entire PL Coverage Part, the Common Policy Conditions, and all Definitions and replaces it with a different definition. The superseding definition of "claim" is the only definition of "claim" used in the Common Policy Conditions (including the definitions set forth therein) and the PL Coverage Part, which includes all of that coverage part's definitions as well as both the Professional Liability and Personal Injury Liability Coverage Agreements.

## C. Singh's Breach of Contract and Declaratory Judgment Action

Singh instituted this action for breach of contract and a declaratory judgment (Singh 2d Amend. Complt., R. 22, PageID #1453-1470) after American Casualty and Singh's commercial general liability insurer, Selective Ins. Co. of S.C., both denied Singh's tenders of defense under the respective insurers' policies. As Singh admits (6th Cir. R. 28, PageID #16-17), American Casualty denied a defense

principally on the grounds that the *Janssen* action did not assert a "claim" as required by the American Casualty Policy (under both the PL or PI Coverage Agreements) because the action: (1) was not brought by a natural person or a natural person's family member, legal guardian, or estate; (2) Janssen does not allege that Singh provided "professional services" to Janssen; and (3) Janssen does not seek any damages from Singh that qualify as either injury or damage as those terms are defined in the Policy. (8/24/2022 Cvg. Decision, R. 61, PageID #2058-2064) American Casualty also asserted that a number of exclusions precluded coverage (*Id*. PageID #2064-2065), though it did not premise its subsequent Motion for Summary Judgment on such exclusions.

All three parties to the instant *Singh* action filed dispositive motions. While Singh's motions were presented in the alternative – under Fed. R. Civ. P. 12(c) or 56 (R. 61, PageID #2038-2040), Singh attached exhibits extraneous to the pleadings to its motions. The respective Defendants' motions were brought pursuant to Fed. R. Civ. P. 56. (Selective MSJ, R. 60, PageID #1867; Amer. Cas. MSJ, R. 58, PageID #1820) With Singh's consent (MSJ Tr., R. 87, PageID #2315-16), the District Court treated all the motions as cross-motions for summary judgment so as to consider the extraneous material. (MSJ Op & Order, R. 77, PageID #2271)

The District Court granted American Casualty's Motion for Summary Judgment and denied Singh's. In its July 10, 2024, Opinion and Order, the Court first

held that the superseding definition of "claim" in the Endorsement required all claims to be brought by natural persons and this definition applied to both the Professional Liability and Personal Injury Coverage Agreements in the PL Coverage Part, as well as the Common Policy Conditions and Definitions which were all incorporated into the PL Coverage Part. (R.77, PageID #2290-91) It was undisputed that none of the Janssen Plaintiffs were natural persons as required by the controlling superseding definition of "claim." Consequently, the Court held that there was no possible coverage under the clear Policy terms. (*Id*., PageID #2292)

The District Court further rejected Singh's assertion that the Policy somehow contained "conflicting" definitions of "claim" because, according to Singh, the definition of "personal injury" did not include a definition of "claim" while the definition of "claim" was incorporated into the term "personal injury claim." The Court held that "Reading the policy as a whole, it requires—as an element of 'personal injury claims'—that an underlying 'claim' or lawsuit be filed by a natural person." (*Id.,* PageID #2291-92)

Finally, the District Court rejected Singh's assertion that the Policy was "illusory." The Court held the superseding definition of "claim" simply clarified the intended scope of coverage but it did not eliminate coverage under the PL Coverage Part altogether. Thus, under Michigan law, the Policy was not "illusory." (*Id.,*

PageID #2293-94) The District Court entered Judgment pursuant to its Opinion and Order on July 10, 2024. (R. 78, PageID #2296)

Singh filed this appeal on August 7, 2024. (Notice of Appeal, R. 79, PageID #2298-2299) Singh raises the very same arguments on appeal as it presented below.

## SUMMARY OF THE ARGUMENT

Singh's appeal arguments regarding the grant of summary judgment to American Casualty (which are identical to those Singh presented below) are unavailing. As amended by the Endorsement, the American Casualty Policy states American Casualty will defend Singh only against "claims." The Policy clearly delineates what constitutes a "claim." The suit must: (1) be filed by a natural person; (2) to whom Singh provided "professional services;" and (3) the suit must be solely for such natural person's "injury" or "damage." (Policy Endorsement, R. 1-3, PageID #275). This definition applies to all actions falling within the purview of *both* the Professional Liability and Personal Injury Coverage Agreements which are part of the Professional Liability Coverage Part. This definition must, as a matter of law, be read and applied consistently throughout the Policy, as must all other Policy terms. The underlying *Janssen* action does not qualify as a "claim" under the Policy. The *Janssen* action was not brought by any natural persons. The *Janssen* action does not allege that Singh provided professional services to the underlying Janssen Plaintiffs. the *Janssen* action does not seek to impose liability for any natural

person's "injury" or "damage" as those terms are defined in the Policy. Coverage for the *Janssen* action is not even arguably possible. The District Court therefore correctly held American Casualty has no duty to defend Singh and that American Casualty was entitled to summary judgment.

The District Court also properly held that the American Casualty Policy is not "illusory" under Michigan law. Quite the contrary. There are ample circumstances under which a suit or other proceeding might trigger American Casualty's duty to defend Singh under both the Professional Liability and Personal Injury Coverage Agreements within the Professional Liability Coverage Part. The District Court's July 10, 2024, Opinion and Order granting summary judgment to American Casualty on this ground and, consequently the Court's final Judgment (R. 78, PageID #2296), should therefore be affirmed.

## ARGUMENT

### A. Standard of Review

Singh appeals the grant of summary judgment to American Casualty pursuant to Fed. R. Civ. P. 56. Singh has, however, omitted the appellate standard of review from its Brief. This Court reviews a trial court's grant or denial of summary judgment *de novo. Road Sprinkler Fitters Local Union No. 669, U.A. AFL–CIO v. Dorn Sprinkler Co.,* 669 F.3d 790, 793 (6th Cir. 2012). There is also no dispute that Michigan substantive law governs this diversity action. *Klaxon Co. v. Stentor Elec.*

*Mfg. Co.*, 313 U.S. 487, 496, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941). As respects American Casualty, the District Court and this Court are presented with only questions of law. There is no dispute over the material facts. This includes the allegations made against Singh in the controlling (for purposes of this action) *Janssen* First Amended Complaint ("FAC") (R.1-5, PageID #440-487) and the portions of Plaintiff Aman Singh's deposition testimony cited and relied upon by American Casualty in support of its summary judgment motion. (See generally tr., R. 58-1, PageID #1844-1865).

**B. Controlling Michigan Contract Construction Rules**

- Interpretation of an insurance policy is a question of law for the Court. Michigan treats insurance contracts in the same manner as other contracts. *Rory v. Continental Ins. Co.,* 473 Mich. 457, 461, 703 N.W.2d 23 (2005). Thus, an insurance policy must be read as a whole to determine and effectuate the parties' intent. *McKusick v. Travelers Indem. Co.,* 246 Mich. App 329, 332, 632 N.W.2d 525 (2001).

- Where, as here, the policy is clear, courts are bound by the specific language set forth in the agreement because an unambiguous contract reflects the parties' intent as a matter of law. *In re Smith Trust,* 480 Mich. 19, 24, 745 N.W.2d 754 (2008). The plain meaning of a term or provision will not be perverted merely for the purpose of benefiting the insured, regardless of his expectations. *Wilkie v. Auto-Owners Ins. Co.*, 469 Mich. 41, 59, 62-63, 664 N.W.2d 776 (2003).

- "[T]he judiciary is without authority to modify unambiguous contracts or rebalance the contractual equities struck by the contracting parties because fundamental principles of contract law preclude such subjective post hoc judicial determinations of "reasonableness" as a basis upon which courts may refuse to enforce unambiguous contractual provisions." *Rory, supra* at 461. "[C]ourts are to enforce the

agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy." *Wilkie, supra* at 51.

- When, as here, terms are clearly defined in the policy, the court must accord those terms their contractually-stated meaning and it must do so consistently throughout the contract. *Farm Bureau Mut. Ins. Co. of Mich. v. Nikkel*, 460 Mich. 558, 567, 596 N.W.2d 915 (1999).

- An insurer is free to define or limit the scope of coverage as long as the policy language fairly leads to only one reasonable interpretation and is not in contravention of public policy. *Raska v. Farm Bureau Mut. Ins. Co.,* 412 Mich. 355, 361-62, 314 N.W.2d 440 (1982). An insurance company cannot be found liable for a risk it did not assume. *Group Ins. Co. of Mich. v. Czopek,* 440 Mich. 590, 597, 489 N.W.2d 444 (1992).

## C. Michigan Law Governing the Duty to Defend

Under longstanding Michigan law, an insurer is not required to defend an action when coverage for the theories of liability is not arguably possible. *Protective Nat'l Ins. Co. v. City of Woodhaven*, 438 Mich. 154, 159, 476 N.W.2d 374 (1991). The duty to defend "arises only with respect to insurance afforded by the policy." *Am. Bumper & Mfg. Co. v. Hartford Fire Ins. Co.*, 452 Mich. 440, 450, 550 N.W.2d 475 (1996). Thus, "[i]f the policy does not apply, there is no duty to defend." (*Id.*) This is because Michigan courts do "not hold an insurance company liable for a risk it did not assume." *Frankenmuth Mut. Ins. Co. v. Masters*, 460 Mich. 105, 111, 595 N.W.2d 832 (1999). Further, once it is determined there is no duty to defend, it follows that there can be no duty to indemnify. *Scott v. State Farm Fire & Cas. Co.*, 86 F. Supp. 3d 727, 733 (E.D. Mich. 2015) ("The duty to defend is broader than the

duty to indemnify, … therefore, if no duty to defend arises pursuant to the policy's terms, the more limited duty of indemnification cannot be imposed by that policy.") (Internal citations omitted.)

### D. The District Court Properly Granted Summary Judgment To American Casualty Because The Policy's Singular Definition Of "Claim" Precludes Coverage Entirely For All Allegations Made In The Underlying *Janssen* Action

The *Janssen* action does not qualify as a "claim" under the American Casualty Policy. It does not satisfy any of the three requirements to be a "claim" or trigger American Select's duty to defend. The District Court therefore properly held American Casualty has no duty to defend Singh. Its judgment must be affirmed.

#### 1. The Endorsement's superseding definition of "claim" applies to all suits falling within the purview of both the Professional Liability and Personal Injury Coverage Agreements.

A suit must satisfy the Endorsement definition of "claim." If it does not, American Casualty has no duty to defend Singh. This is so regardless of whether the PL or PI Coverage Agreement is implicated. The subject Policy was purchased and issued with the incorporated Endorsement which changed the base policy terms.

Under Michigan law, an endorsement to an insurance contract becomes part of the contract. *Tiano v. Aetna Cas. & Sur.,* 102 Mich. App. 177, 184, 301 N.W.2d 476 (1980). Endorsements *supersede* base policy language. Insurers are free to limit coverage, including through endorsements. *Raska,* 412 Mich. at 361-62; *Besic v.*

*Citizens Ins. Co. of the Midwest*, 290 Mich. App. 19, 26, 800 N.W.2d 93 (2010) ("[E]ndorsements by their very nature are designed to trump general policy provisions."); *see also 455 Cos, LLC v. Landmark Amer. Ins. Co*., No. 16-10034, 2017 WL 3215197, *6 (E.D. Mich. July 28, 2017).

The Endorsement precludes coverage for the underlying action because it replaces the definition of "claim" for purposes of *both* Coverage Agreements as well as the Common Policy Conditions and definitions within the controlling PL Coverage Part. The Endorsement itself plainly states that it amends "the Policy," "it forms a part of" the Policy, and that it "takes effect on the effective date of said Policy…." (R. 1-3, PageID #275) The Endorsement title even states it provides an "amended definition of claim" for the "Professional Liability Coverage Part." (*Id*.) The Endorsement also states this replacement definition of "claim" applies to the Common Policy Conditions, to the Policy Definitions, and to the *entire* PL Coverage Part. The Endorsement's first sentence states:

> Solely as respects the Professional Liability Coverage Part… the COMMON CONDITIONS, the section entitled DEFINITIONS; *the definition of "claim" is deleted in its entirety and replaced* as follows…. [*Id*. Emphasis added.]

The second paragraph also expressly states that "no demand, suit or proceeding alleging injury or damage is a claim unless" it meets the Endorsement's definition of a claim. (*Id*.) Subparagraph A then specifically sets

forth the changed definition of "claim" applicable to the entire PL Coverage Part: "As respects the Professional Liability Coverage Part: …" (*Id*.) The superseding definition of "claim" is the only definition of "claim" used in the PL Coverage Part. The PL Coverage Part encompasses both professional liability and personal injury claims. Therefore, all suits implicating the PL and/or PI Coverage Agreements must satisfy the amended definition of "claim."

The Policy language mandates such construction. So does Michigan law. "Claim" is a defined policy term. The superseding definition of "claim" is clear and unambiguous. Singh does not assert otherwise. The term must therefore be enforced as written. A court is without authority to deviate from the policy's unambiguous terms. *Wilkie*, 469 Mich. at 59, 62-63. Michigan law also requires that policies be read as a whole, *Auto-Owners Ins Co v. Churchman,* 440 Mich. 560, 566, 489 N.W.2d 431 (1992). A defined term's meaning remains consistent throughout the document. *Nikkel*, 460 Mich. at 596 (citing *Czopek*, 440 Mich. at 596); *Citizens Ins. Co. v. Pro-Seal Svc. Grp*., 477 Mich. 75, 83-84, 730 N.W.2d 682 (2007); *see also Auto Owners Ins. Co. v. Jefferso*n, No. 247579, 2004 WL 2125882 (Mich. Ct. App. Sept. 23, 2004), *lv den* 472 Mich. 916 (2005) (defined terms cannot be defined differently in various portions of the policy). Abiding by these rules of construction leads to only one conclusion. The *Janssen* FAC does not allege a "claim."

**2. There are no "conflicting" provisions within or between the PL Coverage Part, the Common Policy Conditions or any Coverage Agreement.**

Singh's arguments concerning supposed inconsistencies and "conflict" within the Policy (6th Cir. R. 28, PageID #27, 34-35) ignore plain policy language and definitions and the foregoing contract construction rules. The District Court properly rejected them.

There is no basis to apply the interpretive principle of *generalia specialibus non derogan* as Singh asserts. (6th Cir. R. 28, PageID #35) First, the requirement that there be a "claim" is not a general term in conflict with any other term, be it general or specific. The Endorsement's superseding definition of "claim" is part of, and incorporated into, the *entire* PL Coverage Part and all its sub-parts. Again, this includes the PL *and* PI Coverage Agreements, as well as the Common Policy Conditions and all definitions. Each one of these provisions incorporates the *same* defined terms. (See, e.g., R. 1-3, PageID #253, 258) This reading is required by the Endorsement language itself (as previously established), the rule that the Policy be read as a whole, and the rule that a defined term must be accorded the same meaning throughout the policy, *Nikkel, supra.* This construction is reinforced by the fact the Endorsement is clearly identified as a "Common Policy Form & Endorsement." (R. 1-3, PageID #248)

Singh's concoction of a separate, let alone "more specific" "Personal Injury Coverage Form" that defines "claim" differently (6th Cir. R. 28, PageID #35) is made of whole cloth. There is none. So, too, is the notion of supposedly "conflicting" "injury," "personal injury," and "personal injury claim" definitions or application. The meaning of "injury" remains the same throughout the Policy, including for purposes of "personal injury and personal injury claim. It is defined as a person's bodily injury, sickness, disease, mental or emotional distress, or his/her death. (R.1-3, PageID #258) No other Policy definition, term, phrase or provision alters that definition. The Common Policy Conditions' definition of "Personal Injury" (*id*. PageID #253) expressly *incorporates* the term "injury" (and thus its defined meaning) and simply states "personal injury" is an "injury" that arises out of one or more of a list of offenses. "Personal Injury Claim" simply means an actual "claim" that is made by a natural person arising out of the injury that allegedly occurred because of Singh's commission of one of those offenses. (*Id*. PageID #258)[5]

In short, the Policy simply does not contain different or conflicting definitions of any term, including the term "claim." That term's superseding and controlling

[5] Even the Policy Exclusions employ and apply the defined terms consistently. For example, while Singh attempted to portray it otherwise below (see Pl Reply, R. 71, PageID #2246), V. Exclusions, N. (R. 1-3, PageID #261) states the Policy does not pay for any "claims" arising out of acts "that happened before the effective date of this policy." This Exclusion continues to employ the *same* policy definitions (they are bolded as in every other policy provision where they are employed) as does every other Policy provision.

definition applies to all actions. Since the underlying *Janssen* action does not satisfy the definition of "claim" (irrespective of which Coverage Agreement it might fall under), the analysis ends there. American Casualty has no duty to defend. The District Court properly rejected Singh's attempt to rewrite the Policy and so should this Court. *Rory*, 473 Mich. at 461.

**3. Janssen is not a Natural Person.**

The superseding definition of "claim" first requires that the "suit is filed by a natural person." The Janssen entities are not "natural persons." Singh has *never* disputed this fact and it makes no effort to argue otherwise on appeal. In fact, Singh's arguments are entirely premised on the assumption that the Janssen Plaintiffs are *not* natural persons.

Although the term "natural person" is undefined within the Policy, a court applying Michigan law must accord the term its commonly understood meaning which Michigan courts derive from lay dictionaries. *Pro-Seal Svc. Grp.*, 477 Mich. at 84. A natural person is "a human being as distinguished from a person (as a corporation) created by operation of law. https://www.merriam-webster.com/legal/natural%20person. Each of the Janssen Plaintiffs is a corporation or limited partnership – all entities created by law, not human beings.

Janssen Sciences describes itself in the underlying FAC as "a private unlimited company organized under the laws of Ireland" and avers Johnson &

Johnson is its "ultimate parent." (*Janssen* FAC ¶20, R. 1-5, PageID #445) Johnson & Johnson avers it is "a public corporation organized under the laws of the State of New Jersey" and as "a multinational holding company." (*Id.* at ¶18) Janssen Products avers it is "a limited partnership organized under the laws of the State of New Jersey" and as "an indirect subsidiary of Johnson & Johnson." (*Id.* at ¶19) Michigan, New Jersey, and Irish law all identify these entities as business entities created by law and legally separate and distinct from any of their human shareholders or members. See M.C.L. §450.1106(1) (corps.); N.J.S.A. §14A:1-2.1(g) (corps.); Ireland Companies Act 2014, Part 19 (unlimited cos.); M.C.L. §449.1101(8) (limited p'ships); RULPA §42:2A-5.g (limited p'ships); *Bourne v. Muskegon Circuit Judge,* 327 Mich. 175, 191, 41 N.W.2d 515 (1950) (corporations are separate legal entities from shareholders); *Chisholm v. Chisholm Constr. Co*., 298 Mich. 25, 30-31, 298 N.W. 390 (1941) (limited partnerships are distinct legal entities from their human partners).

As the District Court held (Op & Order, R.77, PageID #2291-92), since none of the Janssen entities is a natural person, the *Janssen* FAC simply cannot qualify as a "claim" under the Policy. "Coverage" is not even arguably possible. Singh cannot carry its burden of demonstrating "the underlying claims fall within the terms of the policy." *Heniser v. Frankenmuth Mut. Ins.*, 449 Mich. 155, 172, 534 N.W.2d 502

(1995). American Casualty has no duty to defend Singh and summary judgment in American Casualty's favor must be affirmed.

**4. <u>The Janssen action does not allege a "claim" because it does not allege "injury" or "damage" as defined by the Policy.</u>**

The District Court did not need to and did not reach this issue, but Singh injects it into its Principal Brief. (6th Cir. R. 28, PageID #40-42) It is nonetheless an additional ground to affirm.

The PL Coverage Part's original (R. 1-3, PageID #252) and the Endorsement's superseding definition (*Id*., PageID #275) of "claim" both require that every suit "allege 'injury' or 'damage.'" The superseding Endorsement definition of "claim" further requires that "the suit is filed … by a natural person … *for* such natural person's 'injury' or 'damage.'" (*Id*. Emphasis added.) As previously noted, the Policy's Common Policy Conditions defines "Injury" as having "the meaning set forth in each individual coverage part." (*Id*., PageID #252) The sole "coverage part" at issue in this matter is the PL Coverage Part. The PL Coverage Part defines "Injury" as: "bodily injury, sickness, disease, mental or emotional distress sustained by a person, or death." (*Id*., PageID #258) Like "claim," this is the *only* definition of "injury" in and applicable to the entire PL Coverage Part (be it for professional liability or personal injury claims). There is no other or different definition of this term whether it is referred to alone or as part of another term or phrase. Its meaning remains consistent throughout the Policy. *Nikkel*, 460 Mich. at 567; *Tomaszewski*,

180 Mich. App. at 619-620; *Jefferson*, 2004 WL 2125882 at *1 (all holding it is error to assign defined terms any different meaning depending on where they appear in the policy).

The *Janssen* FAC does not allege or seek damages for "bodily injury, sickness, disease, mental or emotional distress sustained by a person, or death." Instead, it only seeks:

- An injunction against, among other things, selling both genuine and counterfeit Janssen medication, using or infringing on any Janssen marks, unfairly competing, and representing that Singh is associated with Janssen, and
- An award of statutory, actual or threefold damages, costs and attorneys' fees, disgorgement of ill-gotten profits, pre-judgment and post-judgment interest and punitive damages of not less than $25 million. [*Janssen* FAC, Prayer, R.1-5, PageID #483-486]

Singh does not assert otherwise. There is no genuine issue of material fact on this issue. It is immaterial which of the Coverage Agreements is at issue. Under the Endorsement, *neither* applies if no "injury" has been alleged.

There is also no dispute the *Janssen* FAC does not allege "damage." Like Commercial General Liability policies, the Policy here restricts "damage" to property damage. "Damage" means either "physical injury to tangible property, including all resulting loss of use of that property" or "loss of use of tangible property that is not physically injured." (R.1-3, PageID #252) Singh concedes the *Janssen* FAC seeks only "an award for economic damages." (6th Cir. R. 28, PageID #33) That concession comports with established Michigan law holding that economic or

business losses are not "property damage." *Fitch v. State Farm Fire & Cas. Co.,* 211 Mich. App. 468, 474 (1995) (economic or business losses do not constitute "property damage" and do not give rise to a duty to defend or indemnify); *Driven Software, Inc. v. Massachusetts Bay Ins. Co.,* 856 F. Supp. 314, 318 (E.D. Mich. 1993). (no duty to defend or indemnify against claims seeking only economic damages and injunctive relief and no loss of or injury to tangible property)

Therefore, even if any of the Janssen Plaintiffs was a "natural person," (which they indisputably are not), the action does not allege a claim for "injury" or "damage." Summary judgment was properly granted to American Casualty.

**5. The *Janssen* action does not assert a "claim" because it does not allege or seek recovery for injury or damage to a natural person to whom Singh provided "professional services."**

The underlying *Janssen* FAC does not allege that Singh provided "professional services" *to* Janssen. This is yet another ground on which to affirm summary judgment for American Casualty.

Again, the Endorsement requires that a suit be "by a natural person to whom…you [Singh]… provided professional services…." (R. 1-3, PageID #275) As previously established, this required element of a "claim" applies to both the PL and PI Coverage Agreements. Singh does not argue otherwise. The prepositional phrase "to whom" *requires* that the indirect object (the natural person) have been provided the professional services by Singh. Janssen alleges no

such thing. Instead, the FAC avers only that Singh knowingly bought counterfeit products from others, and knowingly dispensed counterfeit products to others, but *not to* Janssen. (See, e.g., *Janssen* FAC, R. 1-5, PageID #441-442, 444-445, ¶1-7, 16-17, PageID #459, ¶91-95, PageID #470, ¶158) Aman Singh has admitted Singh did not provide any pharmacy services *to* Janssen. (Singh dep. tr., 79:2-18, R. 58-1, PageID #1863) Since the underlying action does not satisfy the definition of a "claim," there is no possibility of coverage and thus no duty to defend. *Protective Nat. Ins*., 438 Mich. at 159.

Singh's effort to avoid this conclusion by reimagining the permitted scope of the practice of pharmacy is unavailing.[6] Singh did not and is not alleged to have rendered *any type* of service to Janssen. Since that is the dispositive issue, no further analysis is necessary.

Singh's logic and arguments are also self-defeating under the terms of the American Casualty Policy.[7] No one disputes that the Policy identifies Singh as a

[6] The District Court did not need to reach the issue of what constitutes a "professional service" under the American Casualty Policy because it has never been disputed that there is no allegation even inferring Singh rendered any type of service to Janssen. This Court likewise does not need to address Singh's arguments.

[7] Singh's effort to conflate the broader definition of professional services under the policies issued by Defendant-Appellee Selective and Michigan law addressing professional services exclusions in commercial general liability policies (6th Cir. R. 28, PageID #46) is equally unavailing. The Defendants' respective policies are unique contracts with entirely different terms. They must be enforced according to their own written terms. *Rory v. Continental Ins. Co*., 473 Mich. at 468-470.

pharmacist firm (R. 1-3, PageID #247) or that Singh's "professional services" includes the practice of pharmacy. (PL Policy def of "professional services," *id.*, PageID #253). Singh cites the Michigan Public Health Code, M.C.L. §333.17707(8), as delineating the permitted scope of the practice of pharmacy. (6th Cir. R. 28, PageID #38-39) But Singh then attempts to expand the statutory definition of pharmacy practice and the scope of its "professional services" for purposes of the American Casualty Policy to include the knowing purchase and distribution of counterfeit/misbranded drugs as alleged in the *Janssen* FAC simply because the alleged conduct involved a drug. (6th Cir. R. 28, PageID #39) This effort flies in the face of the very Code on which Singh relies. Even accepting the notion that the statutory definition of the practice of pharmacy includes the dispensing of prescription drugs, the Michigan Public Health Code does not authorize Singh's alleged dispending of counterfeit drugs. The Code *prohibits* it. *See* M.C.L. §333.17764.

In the end though, since there is no genuine issue of material fact that Singh never dispensed any drugs *to* Janssen or provided any other kind of service *to* Janssen, there is simply no arguable coverage under the American Casualty Policy. It is *this* issue which is dispositive. The *Janssen* FAC is not a "claim" and American Casualty has no duty to defend Singh under the terms of its Policy.

## E. The District Court Properly Held The Policy Is Not Illusory

The District Court also correctly rejected Singh's assertion that the Endorsement rendered the Policy "illusory." (Op. & Order, R. 77, PageID #2293-94) The superseding definition of "claim" simply means the Policy's coverage is limited to matters brought by natural persons who received professional services from Singh and who allegedly suffered injury or damage as a result of the professional services Singh provided to him or her. The *Janssen* action is none of those things. It is an action by business entities which never received any professional services from Singh for purely economic damages and other relief. The Policy is not "illusory" simply because it does not "cover" this particular type of action.

"An 'illusory contract' is one in which one party gives as consideration a promise that is so insubstantial as to impose no obligation. The insubstantial promise renders the agreement unenforceable." *Cincinnati Ins. Co. v. Hall*, No. 308002, 2013 WL 3107640, *5 (Mich. Ct. App. June 20, 2013). Under well-established Michigan law, an insurance policy may not be stricken as illusory "if there is any manner in which the policy could be interpreted to provide coverage." *Id.; see also Amir v. AmGuard Ins. Co.*, 606 F. Supp.3d 653, 668 (E.D. Mich 2022) ("Under its plain language, the endorsement at issue here provides coverage in several circumstances…. Accordingly, the endorsement is not illusory."); *Lattimore-*

*Wiegand v. State Farm Mut. Auto. Ins. Co.*, No. 13–12194, 2013 WL 5592891, *3 (E.D. Mich. 2013) ("As long as there is 'any manner in which the policy could be interpreted to provide coverage,' the challenged policy provision is not illusory."). Michigan law is equally clear that a policy is not rendered illusory simply because the insured expected different coverage or misconstrued coverage. *Ile ex rel. Est. of Ile v. Foremost Ins. Co*., 493 Mich. 915, 823 N.W.2d 426 (Mem.) (2012).

Contrary to Singh's assertions, there are multiple types of actions which could potentially trigger the duty to defend under the Policy. This is so even under the Personal Injury Coverage Agreement. Nothing in the Policy requires patients to bring business tort claims as Singh asserts. (6th Cir. R. 28, PageID #33)

For example, "professional liability claims" for purposes of the Professional Liability Coverage Agreement include those by natural persons arising out of a "medical incident." The latter term is defined as "any act, error or omission in [Singh's] professional services which result in 'injury' or 'damage.'" (R. 1-3, PageID #253, 258) Consequently, subject to all Policy terms, conditions and exclusions, actions by natural persons or their representatives for injuries resulting from Singh's alleged errors or omissions in, for example, the preparation or dispensing of prescriptions drugs or giving of pharmaceutical advice might trigger the duty to defend.

While a personal injury claim under the Personal Injury Coverage Agreement must also be one brought by or on behalf of a natural person to whom the Singh provided pharmacy services ("professional services"), "personal injury" and "personal injury claims" encompass far more than the so-called "business torts" to which Singh seeks to limit them. Personal injuries which could support a personal injury claim also arise out of the insured's conduct in connection with:

1. testimony given at or arising out of inquests;
2. malicious prosecution;
3. false arrest, detention, imprisonment, wrongful entry or eviction or other invasion of the right of private occupancy;
4. libel, slander or other disparaging materials;
5. a violation of an individual's or entity's right to privacy;
6. assault, battery, mental anguish, mental shock or humiliation…[*Id*.]

The types of personal injury claims listed in 1-6 are not "business torts," or actions that can only be brought by business entities. Natural persons can bring claims for assault, mental anguish, etc. arising out of all manner of Singh's rendering of professional pharmacy services. A patient or his or her relatives could, for example, quite conceivably bring a claim for mental anguish caused by Singh's negligent advice, or selection, compounding, storage, or dispensing of drugs. A suit by a natural person could allege Singh's violation of privacy rights allegedly caused by improper maintenance of personal health information.

The very definition of "professional services" itself negates Singh's illusory coverage argument. The Policy definition of "professional services" includes more

than just preparing and dispensing drugs. It also includes "services while acting in the [pharmacy] profession as a member of a formal accreditation, standards review, or similar professional board or committee, including the directives of such board or committee." (R. 1-3, PageID #253) Personal Injury claims could therefore be by or on behalf of natural persons for malicious prosecution, libel, slander, violation of an individual's privacy rights, mental anguish or humiliation stemming from the insured's involvement with a professional board or committee.

In short, there are many claims by natural persons which could fall within the Professional Liability or Personal Injury Coverage Agreements' purview (absent application of Policy exclusions, etc.). The District Court therefore properly held the Policy is not "illusory." *Hall*, 2013 WL 3107640 at *5; *Amir,* 606 F. Supp.3d at 668.

## CONCLUSION AND RELIEF REQUESTED

For the foregoing reasons, the District Court's July 10, 2024 Judgment effectuating its Opinion and Order granting American Casualty's Motion for Summary Judgment and denying Singh's dispositive motion should be affirmed and this action dismissed with prejudice as against American Casualty.

Dated: January 14, 2025

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## CERTIFICATE OF COMPLIANCE

The undersigned certifies that the foregoing Brief of Defendant-Appellee American Casualty Company of Reading, PA ("American Casualty") complies with the type-volume limitation of Fed. R. App. P. 32(a)(7) because it contains 7,689 words, excluding the parts of the brief exempted by Fed. R. App. 32(a)(7)(B) and 6 Cir. R. 32(b)(1).

The undersigned further certifies that this brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and (6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word Version 2010 in 14-point Times New Roman Font.

Dated: January 14, 2025

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# ADDENDUM

## DESIGNATION OF RELEVANT LOWER COURT DOCUMENTS PERTAINING TO AMERICAN CASUALTY

| DOCUMENTS | NO. | PAGE ID |
|---|---|---|
| American Casualty Policy | 1-3 | 247-302 |
| Janssen First Amended Complaint (E.D. NY, No. 1:22 cv-01983-BMC) | 1-5 | 440-487 |
| Singh 2d Amend. Complt. | 22 | 1453-1470 |
| Amer. Cas. MSJ | 58 | 1819-1865 |
| Singh dep tr. | 58-1 | 1843-1865 |
| Singh Mot. For Jt. on Pleadings or for Summary Jt. Against Amer. Cas. | 61 | 2026-2065 |
| Amer. Cas. Oppos. To Singh Mot. | 66 | 2131-2053 |
| Singh Oppos. to Amer. Cas. MSJ | 68 | 2176-2200 |
| Amer. Cas. Reply to MSJ | 70 | 2234-2241 |
| Singh Reply to Mot. For Jt. on Pleadings or for Summary Jt. Against Amer. Cas. | 71 | 2242-2247 |
| Dist. Ct. Opinion & Order | 77 | 2264-2295 |
| Final Judgment | 78 | 2296 |

| **DOCUMENTS** | **NO.** | **PAGE ID** |
|---|---|---|
| Notice of Appeal | 79 | 2298-2299 |
| MSJ Hearing Tr. | 87 | 2312-2344 |

**CERTIFICATE OF FILING AND SERVICE**

I hereby certify that on this 14th day of January, 2025, pursuant to 6 Cir. R. 25, I caused the foregoing to be served electronically on the following through the Court's efiling system: Adam Kutinsky, Pratheep Sevanthinathan and Erin J. Rodenhouse.

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