

**UNITED STATES OF AMERICA  
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

**HONEYWELL INTERNATIONAL, INC.**

**and**

**Case 09-CA-327389**

**STEPHEN FERGUSON, an Individual**

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**COUNSEL FOR THE GENERAL COUNSEL'S ANSWERING BRIEF  
TO RESPONDENT'S EXCEPTIONS**

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## I. INTRODUCTION

This case is before the Board on Respondent Honeywell International, Inc.’s exceptions to Administrative Law Judge (ALJ) Christal Key’s decision. The Complaint, based on a charge filed by Stephen Ferguson on October 3, 2023, (GC Ex. 1(a) and 1(c))<sup>1</sup> alleges that certain provisions in Respondent’s employment and separation agreements violate Section 8(a)(1) of the Act.

Respondent develops, among other things, automated warehousing solutions. (Tr. 23:1-25, 24:21-24) Charging Party Stephen Ferguson began working for Respondent at its Mason, Ohio facility in June 2022 as a project manager. (Tr. 14:23-15:3-15, 27:4-7) On about June 4, 2022, prior to starting work, Ferguson was required to sign an “Employee Agreement Relating to Trade Secret, Proprietary and Confidential Information” (Employment Agreement) to work for Respondent. (Tr. 20:11-14) Ferguson signed the document. (Tr. 19-20; GC Ex. 2)

On or about July 14, 2023, after discharging Ferguson pursuant to a reduction in force, Respondent emailed him a memorandum with the subject “Employment Separation Agreement and Release” (Separation Agreement) offering him four weeks of severance and outplacement services in exchange for signing the Separation Agreement. (Tr. 28:21-29:12; GC Ex. 3).

In her decision, ALJ Key in applying *McLaren Macomb*, 372 NLRB No. 58 (2023), concluded that Respondent violated Section 8(a)(1) by unlawfully proffering the Separation Agreement to Ferguson, and that Respondent’s Employment Agreement contained unlawful

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<sup>1</sup>References to the transcript will be designated as (Tr. \_\_\_\_); references to General Counsel’s Exhibits will be designated as (GC Ex. \_\_\_\_); and references to the Administrative Law Judge’s Decision and Order will be designated as (ALJD \_:\_ which reflects the page and line number).

provisions related to confidentiality and violated the Act under *Stericycle*, 372 NLRB No. 113 (2023). (ALJD 9:22-23, 13:12-16).

Respondent argues in two of its nine exceptions that both *McLaren Macomb* (Exception 1) and *Stericycle* (Exception 2) should be overturned by the Board.

The General Counsel agrees with the Respondent that the Board should overturn *McLaren Macomb* and *Stericycle*. Regarding *McLaren Macomb*, the General Counsel proposes that the Board analyze severance agreements in a manner that is more consistent with the Board's longstanding policy favoring private resolution of workplace disputes. Specifically, the Board should find severance agreement provisions that waive Section 7 rights without being narrowly tailored to be unlawful, but only if they contain an *explicit* waiver. In the alternative, the Board should overrule *McLaren Macomb* and reaffirm *Baylor*, 369 NLRB No. 43 (2020) and *IGT*, 370 NLRB No. 50 (2020) as the standard for assessing whether the proffer of severance agreement provisions violates Section 8(a)(1).

The General Counsel also disagrees with the decision in *Stericycle, Inc.*, 370 NLRB No. 89 (2021), which introduced a problematic standard for determining the lawfulness of facially neutral workplace policies, and encouraged the reading of common workplace rules in a vacuum, in contradiction to long-standing Board law. In the General Counsel's view, that standard fails to strike the proper balance between protecting employees' Section 7 rights and safeguarding employers' legitimate business interests such as those at issue here involving an employer's need to protect trademark, proprietary, business strategies, and confidential information.

## II. STATEMENT OF CASE

### A. Applying *Stericycle*, the ALJ Found that Respondent's Confidentiality Provisions in the Employment Agreement were overbroad and unlawfully restricted employee rights under the Act. (Respondent's Exceptions 2, 4, 5, and 6)

Prior to beginning employment with Respondent, Ferguson was required to sign an "Employee Agreement Relating to Trademarks, Proprietary and Confidential Information." ALJ Key found that certain portions of the nine-page Employment Agreement were overbroad under *Stericycle*. (ALJD 9:22-23, 13:12-16, Exception 2). Specifically, the ALJ took issue with the following terms: "knowledge, data, information[,]" "compilations of data[,]" and "financial information, operating and cost data." (ALJD 7:34-35).

The ALJ held that the confidentiality provision in Respondent's Employment Agreement have a reasonable tendency to chill employees from exercising their Section 7 rights. (Exception 2, ALJD 9:22-23, 13:12-16). The relevant provisions are as follows:

**6. Honeywell's Confidential Information.** [...] I will not engage without the prior written consent of Honeywell's Law Department, either during the period of time I am/was employed by Honeywell or for a period of two (2) years following my Termination of Employment for any reason, in any activity or employment in the faithful performance of which it could be reasonably anticipated that I would use or disclose Honeywell's Confidential Information. [...]

I understand that I have the right to use or practice any skill or expertise generally associated with my employment but not special or unique to Honeywell, but that I do not have the right to use, practice or disclose Honeywell's Confidential Information for my own benefit or for the benefit of any third party. (GC Ex. 2 page 2-3)

"Confidential information" is defined in the Employee Agreement as:

[A]ny information of a confidential or secret nature that (a) relates to the business of Honeywell or to the business of any parent, subsidiary, affiliate, customer, or vendor of Honeywell, or any other party with whom Honeywell agrees to hold information of such party in confidence; (b) is not generally known to the public or to other persons in the industry; and (c) Honeywell has taken reasonable measures under the circumstances to protect from unauthorized use or disclosure. Confidential Information covered by this

Agreement means (i) trade secrets; (ii) proprietary information that does not rise to the level of a statutorily protectable trade secret that is made the property of Honeywell through positive operation of law in the form of this mutual agreement of the parties; or (iii) information that is otherwise legally protectable. Such Confidential Information includes, but is not limited to, assigned Inventions, knowledge, data, information, know-how, non-public intellectual property rights, including unpublished or pending patent applications and all related patent rights, techniques, formulae, processes, discoveries, improvements, ideas, conceptions, compilations of data, and developments, whether or not patentable and whether or not copyrightable. By way of example, Confidential Information includes: information that is not generally known in the industries in which Honeywell is engaged, which may be disclosed to me or Honeywell and that includes, without limitation, any information, whether patentable, patented or not, relating to, without limitation, existing or contemplated products, inventions, services, technology, ideal, concepts, designs, patters, processes, compounds, formulae, programs, devices, tools, compilations of information, methods, techniques, and including information relating to any research, research databases, development, manufacture, purchasing, engineering, know-how, business plans, marketing plans, sales or market methods, methods of doing business, customer lists, customer usages or requirements, the identities and competencies of Honeywell's employees, financial information, operating and cost data, or supplier information, which is owned or licensed by Honeywell or held by Honeywell in confidence. The foregoing are only examples of Confidential Information. (GC Ex. 2 at 6)

Specifically, the ALJ found that the terms “knowledge, data, information[,]” “compilations of data[,]” and “financial information, operating and cost data” in the definition of confidential information, “would reasonably be understood by an employee contemplating discussing their wages or benefits with a union representative or another employee to prohibit them from doing so. (ALJD 7:34-26; 8:1).

Respondent, in its brief in support of exceptions, argues that this confidentiality language is, “a standard-facially neutral provision that seeks to prevent employees from improperly using or disclosing Honeywell's trade secrets and other confidential information.” (Respondent's Exceptions Brief, p. 8).

Upon further review, the General Counsel agrees that a reasonable employee, when reviewing the Employment Agreement in its entirety, would not read the language in the confidentiality provision to restrict Section 7 activity. The Agreement that employees are asked

to sign at the outset of their employment is clearly meant to apprise employees of the restrictions on sharing or disclosing confidential business-related information, as is clear from the title of the document itself. Further, without any evidence of coercive effect, the mere inclusion of this otherwise common confidentiality language is not unlawful.

**B. Applying *McLaren Macomb*, the ALJ found that Respondent’s Separation Agreement was unlawful.**

ALJ Key found that three provisions of the twenty-two-page Separation Agreement, presented to Ferguson on July 14, 2023, had a reasonable tendency to interfere with Section 7 rights under *McLaren Macomb*: Confidentiality, Cooperation and Nondisclosure, and Non-Disparagement. This was so even though, as the ALJ noted, and unlike the facts of *McLaren*, the Separation Agreement at issue expressly permitted employees to file charges with the NLRB, cooperate in investigations, and included a savings clause. (ALJD at 10:39-42; 11:43-45; 12:38-42; and 13:12-16, Exception 1).

**i. Under extant Board law, the ALJ held that the Confidentiality, Cooperation and Nondisclosure, and Non-Disparagement provisions in Respondent’s Separation Agreement violated the Act under *McLaren Macomb*, and that the “savings clause” did not cure the unlawful provisions. (Respondent’s Exceptions 1, 3, 7, and 8)**

Pursuant to extant Board law, ALJ Key held that Respondent’s twenty-two-page Separation Agreement contains three overly broad provisions that have a reasonable tendency to interfere with Section 7 rights: 1) Confidentiality; 2) Cooperation and Nondisclosure; and 3) Non-Disparagement. (ALJD at 10:39-42; 11:43-45; 12:38-42; and 13:12-16, Exception 1). The provisions in the Separation Agreement are listed below:

**Confidentiality**

You agree not to disclose or cause any other person to disclose to third parties, including employees of the Company, the terms of this Agreement and Release; provided, however, that you have the right to disclose the terms of this Agreement and Release to your

spouse, your financial/tax advisor, your attorney, and in response to a governmental inquiry, including a governmental tax audit or a judicial subpoena, or as otherwise required by law. If you disclose the terms of this Agreement and Release to any of the foregoing, you agree to instruct such persons to maintain the confidentiality thereof. You understand that your breach of this confidentiality provision shall excuse the Company from performing further under this Agreement and Release. You agree that neither this Agreement and Release nor any version of this Agreement and Release shall be admissible in any forum as evidence against the Company or you except in a proceeding to challenge or enforce this Agreement and Release. This Agreement and Release does not constitute an admission of wrongdoing by either party.  
(GC Ex. 3 at 6)

The Separation Agreement also contains a savings clause which expressly provides as follows:

**Notwithstanding the foregoing, nothing in this Agreement and Release (or any exhibit or attachment thereto) is intended to or shall be construed to prevent you from (i) filing an administrative charge or otherwise communicating with or reporting possible violations of law to any federal, state or local government office, official or agency; or (ii) reporting any accounting, internal accounting control, or auditing matter to any federal regulatory agency, any federal law enforcement agency, any Member of Congress or any committee or subcommittee of Congress; and (iii) engaging in any activity protected by the Sarbanes Oxley Act (18 U.S.C. § 1514A) or the National Labor Relations Act.** (GC Ex. 3 at 4, emphasis in original)

The ALJ found that this confidentiality provision was unlawful because it, “prohibits the subject employee from discussing its terms with current or former coworkers who find themselves in a similar predicament of whether to accept the Severance Agreement.” (ALJD 10:21-25). The ALJ further found that the savings clause was contradicted by language in the confidentiality portion. (ALJD 10:35-39).

### **Cooperation and Nondisclosure**

In further exchange for the Consideration you receive under this Agreement and Release, you agree to cooperate fully with the Company in any matters that have given or may give rise to a legal claim against the Company, and of which you are knowledgeable as a result of your employment with the Company. This requires you, without limitation, to (i) make yourself available upon reasonable request to provide information and assistance to the Company on such matters without additional compensation, except for your out of pocket costs, (ii) maintain the confidentiality of all Company privileged information including, without limitation, attorney-client privileged communications and attorney work product, unless disclosure is expressly authorized by the Company’s Law

Department, and (iii) notify the Company promptly of any requests to you for information from any third party (excluding government entities), related to any pending or potential legal claim or litigation involving the Company, reviewing any such request with a designated representative of the Company prior to disclosing any such information, and permitting a representative of the Company to be present during any communication of such information.

**Nothing in this Agreement and Release prohibits you from reporting possible violations of federal law or regulation to any governmental agency or entity including, but not limited to, the Department of Justice, the Securities and Exchange Commission, the Congress, and any Inspector General, or making other disclosures that are protected under the whistleblower provisions of federal law or regulation. You do not need the prior authorization of the Law Department to make any such reports or disclosures and you are not required to notify the Company that you have made such reports or disclosures. (GC Ex. 3 at 5, emphasis in original)**

The ALJ concluded that, “[t]his language restricts employees from engaging in a wide swath of protected concerted or union activity related to providing information to assist an employee, union or other third party from investigating employment related legal claims.”

(ALJD 11:6-8).

### **Non-Disparagement**

At no time on or after the date hereof will you make any statement, publicly or privately (other than to your spouse and legal advisors), which would be disparaging (as defined below) to the Honeywell Group, businesses, management, products, customers, strategies, prospects, image, tradecraft, practices, office environment, culture, condition, or reputation or that of directors, employees, officers or members; *provided, however*, that nothing contained in any provision of this Agreement and Release shall preclude you from making any statement in good faith which is required by any applicable law or regulation or the order of a court or other governmental body or initiating or cooperating with any official government investigation.

For purposes of this Agreement and Release, the term “disparaging” shall mean any statement or representation (whether oral or written and whether true or untrue) which, directly or by implication, tends to create a negative, adverse or derogatory impression about the subject of the statement or representation or which is intended to harm the reputation of the subject of the statement or representation. (GC Ex. 3 at 5)

Judge Key found “[h]ere as in *McLaren*, there is no temporal scope for the prohibitions, and they prohibit statements related to an expansive group of entities and individuals.” (ALJD 11:37-39).

Respondent argues in its exceptions brief that these three provisions in the Separation Agreement should be read as a whole, including the savings clause, which makes it clear to employees that these provisions do not infringe on employees’ Section 7 rights.

The General Counsel agrees that the Separation Agreement, read in its entirety, is not unlawful, and that even if there were ambiguity as to the meaning of the provisions, the savings clause is sufficient to mitigate any concerns a reasonable employee would have. Further, without any evidence of coercive effect or unlawful application, the inclusion of these provisions would not result in a reasonable employee reading them to restrict their Section 7 rights. The General Counsel further argues that *McLaren Macomb* should be overturned as discussed below.

### III. ARGUMENT

The Board should overrule *McLaren Macomb*<sup>2</sup> and analyze severance agreements in a way that protects employees’ Section 7 rights while honoring the Board’s longstanding policy favoring private resolution of workplace disputes. To accommodate these goals, the Board should only find severance agreements, or their proffer, to be unlawful if they contain an *explicit* waiver of Section 7 rights that is not narrowly tailored. Respecting parties’ private agreements, unless they actually contain an explicit overly broad forfeiture of statutory rights, furthers the Board’s bedrock policy favoring private resolution of potential workplace disputes through

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<sup>2</sup> Chairman Murphy and Member Mayer have indicated that they would be open to overruling *McLaren Macomb* once they have a three-member majority. *Prime Communications, LP*, 374 NLRB No. 88, slip op. at 1 n.1 (2026).

settlements, enables parties to agree to commonplace clauses, and promotes agreements that benefit employees while protecting employers' legitimate business interests. *Cf. H. K. Porter Co. v. NLRB*, 397 U.S. 99, 108 (1970) (although not "absolute," freedom of contract is one of the "fundamental policies" under the Act). Although the General Counsel prefers this approach to returning to *Baylor* and *IGT*, if the Board is not persuaded by her proposal, it should be and return to those precedents.

Applying the General Counsel's proposed standard, the Board should conclude that the Respondent did not violate Section 8(a)(1) by proffering the Agreements because, read in totality, the Agreements are lawful, there was no evidence of any coercive effect or impact on any employee, and any ambiguity was corrected by the savings clause.

The General Counsel also urges the Board to overturn *Stericycle, Inc.*, 370 NLRB No. 89 and return to a more balanced and common-sense approach to facially neutral workplace policies that strike the proper balance between protecting employees' Section 7 rights and safeguarding employers' legitimate business interests.

#### **A. Severance Agreements Serve the Public Interest by Fostering Private Resolution of Disputes.**

As a critical starting point, the Board should evaluate severance agreements through the lens of its longstanding policy "favor[ing] 'private, amicable resolution of labor disputes, whenever possible.'" *S. Freedman & Sons*, 364 NLRB 1204 (2016), (quoting *Hotel Holiday Inn De Isla Verde*, 278 NLRB 1027, 1028 (1986)), *enforced mem. per curiam*, 713 F. App'x 152 (4th Cir. 2017), *overruled by McLaren Macomb*, 372 NLRB No. 58; *see Wallace Corp. v. NLRB*, 323 U.S. 248, 253-54 (1944) ("the Board has from the very beginning encouraged compromises and settlements"). Severance agreements commonly contain a broad release of claims against the employer as a quid pro quo for the severance payment because such agreements are a means of

avoiding potential litigation. *See Baylor*, 369 NLRB No. 43, slip op. at 3 (severance agreement included release of claims); *IGT*, 370 NLRB No. 50, slip op. at 1 (same); *Regal Cinemas*, 334 NLRB 304, 305 (2001) (same), *enforced*, 317 F.3d 300 (D.C. Cir. 2003); *Hughes Christensen Co.*, 317 NLRB 633, 633-34 (1995) (same), *enf. denied on other grounds*, 101 F.3d 28 (5th Cir. 1996); *Phillips Pipe Line Co.*, 302 NLRB 732, 732 (1991) (same); LHH, *Why Do Companies Offer Severance Packages?*, Feb. 13, 2025, <https://www.lhh.com/en-us/insights/why-companies-offer-severance-pay> (survey of human resources leaders shows that “reducing litigation risk remains an important factor in severance policies” and “[c]ompanies typically tie severance benefits to the signing of release agreements, helping protect the organization from potential legal challenges while ensuring departing employees receive meaningful support”). Thus, in the case of both potential and pending claims, the Board’s policy favoring private agreements helps parties achieve labor peace, the fundamental goal of the NLRA. *Cf. Independent Stave Co.*, 287 NLRB 740, 743 (1987) (settlements allow parties to side-step “the very risks that [the private parties] have decided to avoid,” allowing them to “reach an early restoration of industrial peace, which . . . is a fundamental aim of the Act”). Moreover, because they are designed for similar aims, the Board is often called upon to adjudicate the lawfulness of the same central provisions in settlement and severance agreement cases—such as a release of claims, confidentiality, and non-disparagement clauses—provisions that are included as standard practice in many settlement and severance agreements.<sup>3</sup> Accordingly, it is unsurprising that the

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<sup>3</sup> *See, e.g., Drafting a Settlement and General Release Agreement: Single Plaintiff Employment Dispute Checklist*, Practical Law Checklist 9-522-0993 (available on Westlaw) (listing common employment settlement agreement terms as including release of claims, confidentiality, and non-disparagement); *Breach of a Non-Disparagement Clause*, 13 Bus. & Com. Litig. Fed. Cts. § 144:42 (5th ed.) (“employment severance agreements . . . and contracts to settle pending litigation often include non-disparagement clauses”).

Board has applied its severance agreement case law when analyzing settlement agreements, and vice versa. *See, e.g., S. Freedman*, 364 NLRB at 1204 (in settlement context, relying on principles from severance cases, *Clark*, 336 NLRB 747 (2001), and *Metro Networks*, 336 NLRB 63 (2001)); *Shamrock*, 366 NLRB No. 117, slip op. at 3 n.12 (2018) (applying *S. Freedman* in severance context).

Moreover, as a practical matter, the Board's role in this area should be circumscribed. The Board should not view itself as the arbiter of every private agreement in the workplace that *could* be read to encompass Section 7 rights under the broadest possible interpretation. *See Alpha Beta Co.*, 273 NLRB 1546, 1547 (1985) (“[a]s an administrative agency the Board should not . . . seek to rule on every dispute that may fall within the letter of the Act”), *enforced sub nom. Mahon v. NLRB*, 808 F.2d 1342 (9th Cir. 1987). By inserting itself into private negotiations between parties, including the agreements at issue here, and finding common provisions to be universally unlawful, the Board does a disservice to the public. Scrutinizing severance clauses to such an extreme degree hurts employer interests, especially their ability to amicably resolve potential litigation, and employee interests by preventing them from entering into agreements they otherwise would have absent an overreading by a completely uninvolved party. Such agreements, which are negotiated as an employee exits a company, have common (often standard) industry provisions meant to avoid potential disputes unrelated to the NLRA. For example, employers understandably desire some post-employment protections from their former employees given that they no longer owe a duty of loyalty and may harbor ill will toward the company depending on the circumstances of their departure. *See Hawaii Tribune Herald*, 356 NLRB 661, 661-63 (2011) (*Jefferson Standard* concerns a “duty [of loyalty] possessed by current employees”), *enforced sub nom. Stephens Media, LLC v. NLRB*, 677 F.3d 1241 (D.C.

Cir. 2012); *Trustees of Boston University*, 224 NLRB 1385, 1409 (1976) (“wholly natural for an employee to react with some vehemence to an unlawful discharge”), *enforced*, 548 F.2d 391 (1st Cir. 1977); *see also Why Do Companies Offer Severance Packages?*, *supra* p. 10 (“In an era where company reputations can be made or broken on social media and employer review sites, how organizations treat departing employees significantly impacts their ability to attract future talent.”).

The Board’s hyper-scrutiny of severance agreements can also hurt employee interests, especially given that employees do not “view every employer document . . . through the prism of Sec[ti]on 7.” *IGT*, 370 NLRB No. 50, slip op. at 2 n.8. Departing employees often rely on severance payments to make ends meet during a potential gap in employment. *See Why Do Companies Offer Severance Packages?*, *supra* p. 10. An employer’s demonstrated willingness to offer severance agreements further provides current and prospective employees with peace of mind in uncertain economic times that they too would have a cushion if they experience job loss. *Id.* The Board’s hyper-regulation of severance agreements thus becomes an obstacle for parties trying to get the benefit of a deal that is not generally designed (and is not understood) to constitute a waiver of Section 7 rights.

**B. The Board Should Overrule McLaren Macomb and Only Find Severance Agreements, or their Proffer, to be Unlawful if they Contain an Explicit Waiver of Section 7 Rights that is Not Narrowly Tailored.**

**i. Waivers should be narrowly tailored.**

In light of these policies and practical concerns, the Board should overrule *McLaren Macomb* and only find severance agreements, or their proffer, to be unlawful if they contain an explicit waiver of Section 7 rights that is not narrowly tailored, and/or not supported by a sufficient savings clause. Under this approach, many common severance provisions would be

lawful. For example, a departing employee’s waiver of their own present NLRA rights would be narrowly tailored, and thus lawful. In contrast, a severance agreement that explicitly waives the departing employee’s Section 7 rights to assist other employees before the Board or file their own future claims would be overbroad and thus unlawful.

Indeed, the Board has long found its ability to effectively enforce the Act is infringed upon by overbroad employee waivers of the right to assist *other* employees with *their* claims. This Section 7 right—the right to cooperate with the investigation and prosecution of unfair labor practices—continues to be important at the post-employment stage. The Supreme Court has made clear that “all persons with information about [unfair labor] practices [must] be completely free from coercion against reporting to the Board” and that such freedom is necessary to protect the Board’s “channels of information from being dried up by employer intimidation of prospective complainants and witnesses.” *NLRB v. Scrivener*, 405 U.S. 117, 121-22 (1972) (quoting *Nash v. Fla. Indus. Comm’n*, 389 U.S. 235, 238 (1967)). Former employees often have valuable information to share with Board agents and are especially important resources when current employees are too afraid of possible retaliation to cooperate with the Board. *See, e.g., Flexsteel Industries*, 316 NLRB 745, 745, 749 (1995) (judge credited former employee witness because he had “no reason to lie” and noted that current employees must testify “adversely to their pecuniary interest”) (cited repeatedly for these propositions), *enforced mem.*, 83 F.3d 419 (5th Cir. 1996); *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 240 (1978) (“the danger of witness intimidation is particularly acute with respect to current employees—whether rank and file, supervisory, or managerial—over whom the employer, by virtue of the employment relationship, may exercise intense leverage”). Thus, the Board has found unlawful severance agreements barring employees from lending assistance to others’

claims, reasoning that such waivers did not arise from the facts giving rise to the settlements. For example, in *Metro Networks*, 336 NLRB at 64, 67 & n.20, the Board found, with former Chairman Hurtgen agreeing, that a non-assistance provision was unlawful because the promise not to “assist or otherwise participate, except as may be required by law, in any claim . . . [or] investigation . . . of any kind which relates to any matter that involves [the employer]” would have prohibited the employee from voluntarily assisting other employees with matters under the Act. Likewise, in *Clark*, 336 NLRB at 748, an inaptly named “confidentiality” provision in a severance agreement was found unlawful because it contained a ban on employees “voluntarily appear[ing] as a witness, voluntarily provid[ing] documents or information, or otherwise assist[ing] in the prosecution of any claims . . . against the company,” thereby barring them from assisting a Board investigation of a claim filed by another individual.<sup>4</sup>

Similarly, the Board has found that waivers were unlawfully overbroad if they waived the right to engage in *future* Section 7 activity. For example, in *Ishikawa Gasket America*, the employer violated Section 8(a)(1) based on language in a separation agreement prohibiting the employee from engaging in, among other things, “any conduct which is contrary to the [c]ompany’s interests in remaining union-free” for one-year post-employment. 337 NLRB 175, 175-76 (2001), *enforced*, 354 F.3d 534 (6th Cir. 2004). The Board explained that “future rights of employees as well as the rights of the public may not be traded away in this manner.” *Id.* at 176 (quoting *Mandel Security Bureau, Inc.*, 202 NLRB 117, 119 (1973)). The Board also considered a release of claims lawful where it pertained to existing or pending claims and did not

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<sup>4</sup> *Baylor* overruled and limited *Clark* and *Metro Networks* to the extent they held that non-assistance clauses are categorically unlawful, even absent unfair labor practices that reflect hostility to employee rights. 369 NLRB No. 43, slip op. at 2 n.6.

reach future incidents. *See, e.g., Phillips Pipe Line*, 302 NLRB at 732-33 (release lawfully waived right to file Board charge where it was “clear from the language of the release itself that it applies only to claims . . . resulting from circumstances predating the execution of the release”); *Coca-Cola Bottling Company of Los Angeles*, 243 NLRB 501, 502 (1979) (lawful settlement of employee suspension where release interpreted not to apply to future claims); *Mandel*, 202 NLRB at 119 (employer unlawfully conditioned reinstatement on forbearance from future charges and concerted activities).

Indeed, the Board narrowly construed a release of claims unless it was clear from the language and surrounding context that the release waived the filing of future claims over future incidents. Thus, in *First National Supermarkets*, the Board construed a release “narrowly” such that it was limited to past employment claims notwithstanding that it was “broadly worded.” 302 NLRB 727, 727 (1991). By its terms, the release waived “claims of any kind which are now pending or which could be filed in the future relating to or arising out of my total employment and my termination with [the employer].” *Id.* The Board observed that “the phrase ‘total employment’ may appear ambiguous in isolation” but that “its meaning becomes evident when examined in the context of the release itself, as well as the circumstances surrounding [the employee’s] discharge,” namely that it was proffered after a “lengthy dispute” over his discharge and vacation pay. *Id.* Given this context, the majority rejected the dissent’s view that “total employment” could be interpreted to mean claims arising during future reemployment. *Id.* at 727-28. The majority observed that the dissent’s interpretation “ignores the context in which releases are generally negotiated with a terminated employee,” namely, that an employer is “seeking final repose for all claims which have arisen out of any and all aspects . . . of the employment being concluded.” *Id.* Thus, it “would not be reasonable to conclude that the

parties, by signing the present release, intended to compromise the rights and obligations that would grow out of any future employment relationship.” *Id.* at 728. In justifying its narrow reading of the release, the Board relied on the fact that the Board had undertaken a similar approach in *Coca-Cola*, where it “implicitly interpreted a release providing ‘that no actions of any kind will ensue’ narrowly based on the entire document and the surrounding circumstances.” *Id.* at 727 (quoting *Coca-Cola*, 243 NLRB at 501-02).<sup>5</sup>

Under the General Counsel’s proposed standard, clauses that prohibit an employee from cooperating with the Board in others’ ULP cases—as in *Baylor*,<sup>6</sup> *Clark*,<sup>7</sup> and *Metro Networks*<sup>8</sup> or filing claims over future incidents—as in *Mandel*, 202 NLRB at 119 would be unlawful inasmuch as they constitute explicit waivers of Section 7 rights that are not narrowly tailored.<sup>9</sup>

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<sup>5</sup> This is consistent with the approach the Board employs when assessing whether the statutory right to bargain has been waived. *See, e.g., Metro. Edison Co. v. NLRB*, 460 U.S. 693, 709 (1983); *KOIN-TV*, 369 NLRB No. 61, slip op. at 2 n.5, 7-8 (2020) (applying clear and unmistakable waiver principles in assessing whether post-contract change was unlawful where relevant provisions did not survive expiration of the agreement), *enforced sub nom. NLRB v. Nexstar Broad., Inc.*, 4 F.4th 801 (9th Cir. 2021).

<sup>6</sup> The non-assistance provision in *Baylor* (included under the misleading heading “No Participation in Claims”) stated that the signatory “agrees that, unless compelled to do so by law, [he or she] will not pursue, assist or participate in any [c]laim brought by any third party against [employer].” 369 NLRB No. 43, slip op. at 1.

<sup>7</sup> The non-assistance provision in *Clark* (tucked inside in a paragraph entitled “Confidentiality”) stated: “You further agree that You will not . . . voluntarily appear as a witness, voluntarily provide documents or information, or otherwise assist in the prosecution of any claims . . . against the company.” 336 NLRB at 748, 761.

<sup>8</sup> The non-assistance provision in *Metro Networks* provided: “you agree not to sue or file a charge . . . in any forum or assist or otherwise participate, except as may be required by law, in any claim, arbitration, suit, action, investigation or other proceeding of any kind which relates to any matter that involves [the employer] . . . and that occurred on or before your execution of this [a]greement.” 336 NLRB at 64, 69.

<sup>9</sup> Should the Board adopt the proposed test, it should nevertheless reaffirm in an appropriate case that an otherwise facially lawful severance provision cannot be applied in an unlawful manner—

In this case, the Separation Agreement at issue provided not only a provision expressly permitting individuals to initiate or cooperate in government investigations, but also a savings clause which explicitly referenced the NLRA. The savings clause is proximate to the other provisions at issue in this matter as it is on the page immediately preceding the cooperation and nondisclosure, non-disparagement, and confidentiality provisions. The clause is also in bold font, ensuring that the provision is prominent to anyone reading the agreement. Additionally, the language is comprehensive and reinforces that there are no restrictions on *any* activity protected by the NLRA by stating that nothing in the agreement should be construed as preventing employees from “filing an administrative charge” with a government agency or “engaging in any activity protected by the ... National Labor Relations Act.” (GC Ex. 3 at 4) Finally, the savings clause is reinforced by the cooperation and nondisclosure provision that has additional language highlighting the right to report “possible violations of federal law...” thus making it abundantly clear that employees have the right to come to the Board.

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for instance, by using it as a basis to sue a signatory former employee for providing Board testimony.

**ii. McLaren Macomb should be overturned because it treats broadly-worded or ambiguous proscriptions as explicit waivers.<sup>10</sup>**

The *McLaren Macomb* standard sweepingly emphasizes the “broad scope and the wide protection to employees by Section 7” and that it is “through the lens of this broad grant of rights and the Board’s duty to protect them” that severance agreements should be scrutinized. 372 NLRB No. 58, slip op. at 6-7. That “lens,” however, effectively turns any severance clause into a waiver of statutory rights whenever it *could possibly* be read to encompass Section 7 activities. This is anathema to the Board’s longstanding policy favoring private settlement agreements, is contrary to the approach applied in *First National Supermarkets*, 302 NLRB at 727-28—a case that *McLaren Macomb* purportedly followed—and creates unnecessary obstacles to parties trying to get the benefit of a deal that was not designed or understood to constitute a waiver of Section 7 rights.

Specifically, in overturning *Baylor* and *IGT*, *McLaren Macomb* claimed a return to “long-standing precedent,” but it actually compounded an analytical error that emerged in earlier cases applying the narrowly-tailored-waiver standard. *Id.*, slip op. at 9. *McLaren Macomb* stated, without limitation, that “an employer violates Section 8(a)(1) of the Act when it proffers a severance agreement with provisions that would restrict employees’ exercise of their NLRA rights.” 372 NLRB No. 58, slip op. at 7. Applying that test, it found any provision that had a “chilling tendency on the exercise of Section 7 rights” to be overbroad and unlawful. *Id.* slip op.

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<sup>10</sup> The Board should also overturn *Metro Networks* and *Shamrock* to the extent they found broadly-worded but commonplace non-disparagement and confidentiality clauses to be unlawful independent of the other unfair labor practices in those cases, and the Board should readopt *S. Freedman* and *Shamrock* to the extent they held that confidentiality-of-contract-terms provisions were lawful.

at 8. Yet, before *Metro Networks*<sup>11</sup> and *Shamrock*,<sup>12</sup> those decisions never painted in such broad strokes. Rather, as set forth above, they held that an employer could lawfully condition a settlement or severance on an employee's waiver of Section 7 rights where the waiver was narrowly tailored to the facts giving rise to the agreement and the employee received a benefit for the waiver. *See, e.g., Coca-Cola*, 243 NLRB at 502. And this earlier precedent expressly cautioned against interpreting "broadly-worded" or "ambiguous" phrases "in isolation" and ignoring the context in which they were offered. *First National Supermarkets*, 302 NLRB at 727-28 (observing that in *Coca-Cola*, 243 NLRB at 501-02, the Board "implicitly interpreted a release providing 'that no actions of any kind will ensue' narrowly based on the entire document and the surrounding circumstances").

In its misapplication of longstanding precedent, the Board in *McLaren Macomb* effectively employed a work rule-type analysis to severance provisions. Although the Board denied using this framework in response to then-Member Kaplan's partial dissent, its work rule approach is apparent from its exacting scrutiny of each provision at issue in the case, assessing whether it could possibly be interpreted to restrict Section 7. *Id.*, slip op. at 10.

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<sup>11</sup> *Metro Networks* found a confidentiality-of-employment-information to be unlawfully proffered, seemingly independent of the fact that the employees had been unlawfully discharged. The nondisclosure clause in that case, 336 NLRB at 64, provided in relevant part that employees will not publicize or communicate to any entity "information concerning your employment" with the employer. Although the provision also contained a confidentiality-of-contract-terms provision, that was not the basis for the Board's finding that the paragraph was unlawful. *Id.* at 67 & n.18 (interpreting paragraph to prohibit employee from "communicating with anyone about his employment").

<sup>12</sup> *Shamrock* also found a common non-disclosure-of-confidential-business-information clause to be unlawfully proffered, as well as a commonplace non-disparagement clause, apparently independent of the other unfair labor practices in the case. The non-disclosure clause provided that the employee may not disclose any confidential or proprietary information, which it defined as including "personnel or corporate information." The non-disparagement provision stated that the employee may not make "disparaging" remarks that could be "detrimental" to the company. *Shamrock*, 366 NLRB No. 117, slip op. at 28-29.

Once this longstanding precedent is properly understood, it is clear that *McLaren Macomb* erred in concluding that a non-disparagement provision was unlawful despite it being a commonplace severance agreement provision that contained no explicit reference to Section 7 rights. The Board read its terms broadly—filtering them through the “lens of [the Act’s] broad grant of rights”—and finding they could be interpreted to encompass Section 7. *Id.*, slip op. at 6. Thus, the Board reasoned that the prohibition on making statements to employees or the public that “could disparage or harm the image of [the] [e]mployer” was unlawful because it could encompass a statement that the employer had violated the Act, “conduct regarding any labor issue [or] dispute,” or cooperation with a Board investigation “at any time in the future” because it lacked a temporal limitation. *Id.*, slip op. at 8. Tellingly, the Board reasoned that the provision was overbroad in that it failed to reference the Board’s standard in *NLRB v. Local Union No. 1229, International Brotherhood of Electrical Workers (Jefferson Standard)*, 346 U.S. 464, 477 (1953)—essentially creating a requirement that employers write the NLRA law into severance provisions that were not intended to reach Section 7 activities. 372 NLRB No. 58, slip op. at 8. In short, *McLaren Macomb*’s finding that a general non-disparagement clause was unlawful—one that did not reference clearly protected activities such as cooperating with an administrative agency or supporting employees in a labor dispute—is ripe for overruling.

*McLaren Macomb* also deviated from prior precedent in finding a confidentiality-of-contract-terms provision unlawful and should be overruled on this basis as well. ***Such a provision had never been held unlawful.*** Tellingly, *McLaren Macomb* overturned prior precedent (*S. Freedman*, 364 NLRB 1203, and *Shamrock*, 366 NLRB No. 117) to reach this result, undermining its assertion that its decision represented a “return to the approach followed by Board precedent before *Baylor*.” *Id.*, slip op. at 7, 9 n.48. Notably, *S. Freedman* construed a

confidentiality-of-contract-terms clause to be a “narrowly tailored,” “limited waiver” of the right to discuss discipline with coworkers in the context of an employee who was being reinstated and waiving his right to pursue the matter further through a grievance.<sup>13</sup> 364 NLRB at 1203-04. The Board found that clause lawful, specifically invoking the policy favoring the private resolution of labor disputes. *Id.* Following *S. Freedman*, the Board in *Shamrock* found lawful a confidentiality-of-contract-terms provision in a separation agreement since it did not waive the employee’s right to discuss his discharge. 366 NLRB No. 117, slip op. at 3 n.12, 29. Indeed, the Board recently observed that confidential settlement agreements may “facilitate the resolution of workplace conflicts and thus ‘further the Board’s policy of encouraging the peaceful, nonlitigious resolution of disputes.’” *Dish Network, LLC*, 370 NLRB No. 97, slip op. at 4 (2021) (quoting *Independent Stave*, 287 NLRB at 741). Accordingly, the Board should overrule *McLaren Macomb* and restore *S. Freedman* and *Shamrock* on this point.

Finally, by prioritizing departing employees’ Section 7 rights above all else, the *McLaren Macomb* Board ignored the basic tenet of appropriately accommodating Section 7 rights and private interests based on the nature and relative strength of the Section 7 right at issue. Pursuant to longstanding Supreme Court precedent, Section 7 rights are “not unlimited.” *Republic Aviation Corp. v. NLRB*, 324 U.S. 793, 797-98 (1945). Rather, they fall along a spectrum that requires balancing of the nature and strength of the respective Section 7 rights against legitimate employer interests. *Hudgens v. NLRB*, 424 U.S. 507, 522 (1976). In the context of settling claims—including settlements concurrent with the end of employment—the narrowly-tailored-waiver test reflects an appropriate balance between employees’ statutory rights and employers’

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<sup>13</sup> *S. Freedman* did not construe this broadly worded confidentiality-of-contract-terms clause to preclude the employee from providing information to the Board, distinguishing *Metro Networks* on this basis. 364 NLRB at 1204 & n.4.

legitimate interests, including “seeking final repose for all claims which have arisen out of any and all aspects . . . of the employment being concluded.” *First National Supermarkets*, 302 NLRB at 727-28.

Contrary to this case law, *McLaren Macomb* gave no weight to legitimate employer interests in entering into severance agreements, while finding the mere possibility of Section 7 infringement to be of sole, dispositive importance. As explained above, employer interests in maintaining industrial peace, resolving potential claims, protecting its reputation, and safeguarding its confidential and proprietary information are relatively strong. *See supra* pp. 9-11. To be sure, departing and former employees are statutory employees with Section 7 rights. *See, e.g., Briggs Manufacturing*, 75 NLRB 569, 570-71 (1947) (holding that “employee” as defined in Section 2(3) “covers . . . former employees of a particular employer”); *Eastex v. NLRB*, 437 U.S. 556, 564 (1978) (Section 2(3) “definition [of ‘employee’] was intended to protect employees when they engage in otherwise proper concerted activities in support of employees of employers other than their own”). However, their right to engage in protected concerted activities post-employment is comparatively low on the *Hudgens* spectrum because, generally speaking, they are no longer personally invested in improving the terms and conditions of employment at their former employer since any improved terms would not affect them. That said, as explained above, one Section 7 right is especially important at the post-employment stage—the right to cooperate with the investigation and prosecution of unfair labor practices. In this case, the provisions at issue expressly permitted individuals to initiate or cooperate with any official government investigation (“nothing contained in any provision of this Agreement and Release shall preclude you from . . . initiating or cooperating with any official government investigation”).

In effectively outlawing many commonplace severance clauses by failing to adequately balance employee and employer interests, *McLaren Macomb* gives undue weight to the right to engage in concerted activities post-employment while virtually ignoring legitimate employer interests. In contrast, the narrowly-tailored-waiver standard proposed by the General Counsel reflects a better balance. That standard will safeguard access to the Board, ensure that employees are not coerced into trading away future rights, and respect employers' legitimate interest in reaching private settlements that protect their businesses, including facing disparagement and defamation from prior employees as well as protecting business-related confidential information, while benefiting both parties.

For all these reasons, the Board should overturn *McLaren Macomb*—as well as *Metro Networks* and *Shamrock* to the extent they found broadly-worded but commonplace non-disparagement and confidentiality clauses to be unlawful independent of the other unfair labor practices in those cases—and readopt *S. Freedman* and *Shamrock* to the extent they held that confidentiality-of-contract-terms provisions were lawful. *See supra* pp. 13, 18-20.

### **C. The General Counsel's Proposed Standard is Preferable to *Baylor* and *IGT*.**

The General Counsel respectfully submits that the proposed approach outlined herein is preferable to the standard set forth in *Baylor* and *IGT*. While both would significantly narrow the circumstances in which the Board interjects itself into severance agreements, the General Counsel's standard has some distinct advantages. It is more consistent with longstanding precedent, namely, *Mandel*, 202 NLRB at 119, 122, which found that conditioning reinstatement on waiving the right to file future charges with the Board was unlawful notwithstanding that *all the other unfair labor practice allegations were dismissed*. Applying *Baylor*'s approach, that condition would have been lawful to proffer because there was “no reason to believe that the

[employer] harbor[ed] animus against Sec. 7 activity.” *Baylor*, 369 NLRB No. 43, slip op. at 2 n.6.<sup>14</sup> In addition, the General Counsel’s approach is more protective of the right to cooperate with the Board, which is a strong statutory right in this context, as explained above. The General Counsel’s proposed approach also recognizes that the proffer of a facially unlawful agreement—when combined with a valuable benefit such as a severance payment at a time when the departing employee could use a financial cushion—tends to encourage employees to accept the terms and nominally forfeit unwaivable rights. In any event, as a practical matter, there is little benefit in permitting employers to propose overbroad waivers to employees if those same waivers would be unlawful if signed and maintained. This is especially so if the overbroad waiver discourages employees from cooperating with the Board because it erects a barrier for the Board to ever learn of the violation.

Admittedly, *Baylor* rejected former General Counsel Peter Robb’s argument that settlement agreement precedent should be applicable in the severance agreement context. 369 NLRB No. 43, slip op. at 2 n.7. However, the General Counsel respectfully submits that the Board should revisit this conclusion. As to the argument in *Baylor* that severance agreements are not related to a labor dispute, as explained above, a primary purpose of severance agreements is to resolve potential labor-related claims, some of which may be on the precipice of litigation. Thus, many severance agreements do resolve potential labor disputes. Moreover, settlement and severance agreements contain many of the same standard terms and both have labor peace as

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<sup>14</sup> While it appears that the discriminatee in *Mandel* may have accepted the unlawful condition because he did, in fact, withdraw his charges, it is not entirely clear if he agreed to refrain from filing any future charges, and the Board’s decision certainly does not rely on his acceptance for finding it coercive within the meaning of Section 8(a)(1). 202 NLRB at 118-19 (supervisor promised that discriminatee would stop petitions, not discriminatee).

their goal. Accordingly, settlement and severance agreement principles and precedents align well. *See* Section IV.A. The *Baylor* Board’s observation that severance agreement provisions do not impact terms and conditions of employment is equally unpersuasive. *Id.* A severance agreement clause explicitly waiving Section 7 rights in an overbroad manner is no less chilling on a former employee’s willingness to participate in Board proceedings or assist the Board in its investigations than it would be in a settlement agreement context. In either case, an employee’s exercise of Section 7 rights comes at the potential cost of forfeiting the severance payment or being forced to defend against a costly employer lawsuit—significant disincentives notwithstanding that they do not affect employment terms.

**D. If the Board Does Not Adopt the General Counsel’s Proposed Standard, It Should Overturn *McLaren Macomb* and Return to *Baylor* and *IGT*.**

Although the General Counsel recommends that the Board adopt the proposed standard set forth herein, should the Board disagree, it should return to *Baylor* and *IGT* instead of continuing to apply *McLaren Macomb*. Despite their shortcomings, *Baylor* and *IGT* are more closely aligned with the Board’s policy favoring private agreements, they constrain the Board’s role in policing such agreements, and they allow employers to proffer severance agreements without undue concern about running afoul of the Act, thereby benefitting employees. Indeed, while *McLaren Macomb* reads severance provisions too broadly, the main strength of *Baylor* and *IGT* is that they respect the Board’s policy favoring private resolution of disputes, allowing employees and employers to offer and negotiate severance agreements without concern that a provision that does not reference Section 7 rights could result in an unfair labor practice. Because this represents a better balance of interests, returning to *Baylor* and *IGT* would be an improvement over current law should the Board decide not to adopt the General Counsel’s position.

**E. The Board should overturn *Stericycle* in favor of a balanced and common-sense approach.**

The Board is tasked with faithfully interpreting the Act by ensuring its enforcement remains within the parameters established by Congress. In this regard, the Board must strike a careful balance to safeguard employer and employee rights and interests simultaneously, without creating unnecessary conflict between them. When evaluating facially-neutral work rules, the Board should endeavor to preserve employees' rights to engage in Section 7 activities by prohibiting workplace policies that will genuinely coerce employees while empowering employers to maintain order, adhere to legal requirements, and foster productive environments.

Instead of striking that proper balance, *Stericycle* encourages the reading of common workplace rules in a vacuum by adopting an excessively broad interpretation of Section 7 at the expense of congressional intent. Congress never intended for the Act to prevent employers from upholding safe and harassment-free workplaces or penalize companies for doing so. By stretching the scope of Section 7 beyond its intended boundaries—and common sense—the ruling undermines the ability of employers to establish essential policies that protect employees' safety and maintain a respectful environment.

Indeed, *Stericycle* fails to recognize employers' statutory and legal duties under federal and state laws to maintain safe environments, investigate allegations of harassment, uphold respectful workplace standards and safeguard confidential and proprietary information. The *Stericycle* framework thereby creates a dilemma by forcing employers to either comply with various legal and regulatory requirements or risk having every workplace policy challenged as potentially violative of the Act, leaving employers unable to enforce essential workplace rules without facing legal uncertainty and litigation. The *Stericycle* framework has made it increasingly difficult for employers to draft workplace policies with certainty, as nearly any rule may now be

subject to challenge. This climate of regulatory uncertainty makes employers hesitant to uphold essential workplace standards for fear of having to litigate whether those standards could withstand Section 7 scrutiny under the broadest possible interpretation. Such uncertainty discourages investment while encouraging litigation and falls particularly hard on small businesses that may lack the resources to secure labor counsel.

For these reasons, the General Counsel urges the Board to overturn *Stericycle* in favor of a more balanced approach that effectuates congressional intent and promotes industrial peace.

#### IV. CONCLUSION

Based on the foregoing, the General Counsel respectfully requests that the Board overturn both *McLaren Macomb* and *Stericycle* and find that the Respondent's Employment and Separation Agreements did not violate the Act.

Respectfully submitted,

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## **CERTIFICATE OF SERVICE**

I hereby certify that a copy of the Counsel for the General Counsel's Answering Brief to Respondent's Exceptions in Case 09-CA-327389 was electronically filed via NLRB E-Filing System with the Executive Secretary of the National Labor Relations Board and served on the following parties listed below by regular and electronic mail on June 1, 2026.

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