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Record No. 7438

In the Supreme Court of Appeals of Virginia at Richmond

JOHN G. KOLBE, INCORPORATED

v.

CHROMODERN CHAIR COMPANY, INCORPORATED

FROM THE LAW AND EQUITY COURT OF THE CITY OF RICHMOND

RULE 5:12—BRIEFS

§5. Number of Copies. Twenty-five copies of each brief shall be filed with the clerk of this Court and three copies shall be mailed or delivered by counsel to each other counsel as defined in Rule 1:13 on or before the day on which the brief is filed.

§6. Size and Type. Briefs shall be nine inches in length and six inches in width, so as to conform in dimensions to the printed record, and shall be printed in type not less in size, as to height and width, than the type in which the record is printed. The record number of the case and the names and addresses of counsel submitting the brief shall be printed on the front cover.

HOWARD G. TURNER, Clerk.

IN THE

Supreme Court of Appeals of Virginia

AT RICHMOND

Record No. 7438

VIRGINIA:

In the Supreme Court of Appeals held at the Supreme Court of Appeals Building in the City of Richmond on Tuesday the 10th day of March, 1970.

JOHN G. KOLBE, INCORPORATED,
Plaintiff in error,

against

CHROMODERN CHAIR COMPANY, INCORPORATED,
Defendant in error.

From the Law and Equity Court of the City of Richmond
Robert L. Young, Judge

Upon the petition of John G. Kolbe, Incorporated, a writ of error is awarded it to a judgment rendered by the Law and Equity Court of the City of Richmond on the 20th day of November, 1969, in a certain motion for judgment then therein depending, wherein the said petitioner was plaintiff and Chromodern Chair Company, Incorporated, was defendant; upon the petitioner, or some one for it, entering into bond with sufficient security before the clerk of the said court below in the penalty of $300, with condition as the law directs.

RECORD

* * * * *

page 12 } LAW AND EQUITY COURT
of the
CITY OF RICHMOND
Richmond, Virginia
23219

October 21, 1969

George R. Humrickhouse, Esq.
Williams, Mullen & Christian
510 United Virginia Bank Building
Richmond, Virginia 23219

Robert E. Shepherd, Jr., Esq.
Steingold, Shepherd & Steingold
1615 Seven Hundred Building
Richmond, Virginia 23219

Re: John G. Kolbe, Incorporated
-v-
Chromodern Chair Company,
Incorporated

Gentlemen:

Jurisdiction is claimed under Va. Code Sec. 8-81.2 (a) (1). In my opinion, the so-called "solicitation plus" test is still the rule under this sub-section. Quite apart from the fact that this alleged "cause of action" arose out of a contract to ship goods directly from California to North Carolina, I do not find from the evidence that the activities of the defendant in Virginia were such as to satisfy the above test.

Draft of an order sustaining the Plea in Abatement may be presented.

Yours very truly,

Robert Lewis Young

* * * * *

page 13 }

* * * * *

ORDER

On October 20, 1969, came the plaintiff by counsel and the defendant by counsel on the Plea in Abatement filed by the defendant; and after hearing evidence and argument by counsel, the Court, upon consideration whereof, and for the reasons stated in the memorandum of this Court dated October 21, 1969, is of the opinion that the plea should be sustained; therefore it is

Ordered that the Plea in Abatement of defendant is sustained and this action is dismissed, to which ruling the plaintiff by counsel objects and excepts.

Enter:

R. L. Y.
Nov. 20, 1969

* * * * *

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* * * * *

NOTICE OF APPEAL AND ASSIGNMENT OF ERROR

John G. Kolbe, Incorporated, hereby gives notice of its appeal to the Supreme Court of Appeals of Virginia from a final judgment entered against it in this action on the 20th day of November, 1969; and files this, its appeal, together with the following Assignment of Error:

The court erred in sustaining the plea in abatement and dismissing this action. Dated the 23rd day of December, 1969.

John G. Kolbe, Inc.

By Geo. E. Allen
Counsel for John G. Kolbe, Inc.

Received And Filed
Dec 24 1969

Teste: Luther Libby, Jr., Clerk
By Edw. G. Kidd D. C.

Eugene P. Minkel

* * * * *

The deposition of Eugene P. Minkel taken at the instance of counsel for the defendant pursuant to notice hereto attached, at 10:00 a.m., September 30, 1969, at 4920 South Soto Street, Los Angeles, California, before Charles K. Bell, a Notary Public for the County of Los Angeles, State of California, an officer qualified to administer oaths in the State of California, pursuant to rules of the Supreme Court of Appeals of Virginia.

* * * * *

APPEARANCES:

For The Plaintiff:
George R. Humrickhouse, Esq.
Williams, Mullen & Christian (Not present)
State Planters Bank Building
Richmond, Virginia

For The Defendant:
Steingold, Shepherd & Steingold
1615 Seven Hundred Building
Richmond, *Mirginia* 23219
and
Valensi, Rose and Gerstenfeld
by Sidney R. Rose, Esq.
8665 Wilshire Boulevard
Beverly Hills, California

* * * * *

Dep.
page 3 } EUGENE P. MINKEL, a witness for the defendant, of lawful age, being duly sworn by Charles K. Bell, a notary public for the State of California, County of Los Angeles, testified as follows:

EXAMINATION

By Mr. Rose:
Q. State your name for the record.
A. Eugene P. Minkel.

* * * * *

Eugene P. Minkel

Dep.
page 5 }

* * * * *

Q. Mr. Minkel, by whom are you employed?
A. Chromodern Chair Company.
Q. For how long have you been so employed?
A. Approximately five and a half years.
Q. Have your duties been substantially the same throughout that period?
A. Yes, they have.
Q. Would you describe your duties and responsibilities in your employment with Chromodern Chair Company.
A. I am Executive Secretary to the President. One of the functions of this duty is to handle all representatives outside of the State of California; handle all dealer inquiries or assist dealers in any way possible to understand
Dep. our merchandise; and accept any orders that a
page 6 } dealer might call in to me.
Q. Is this with reference to business from out-of-State sources?
A. Yes, it is.
Q. And by out-of-State I mean out of California.
A. Yes, outside the State of California.
Q. With reference to the State of Virginia, have you had on behalf of Chromodern Chair Company occasion to use or designate any representative of Chromodern Chair Company in Virginia?
A. No representative has been designated. There have been preliminary discussions from time to time, but that is as far as it has gone.
Q. For clarification purposes, and by way of background, the business of Chromodern Chair Company is the manufacture of commercial seating products, chairs, tables and related items, is that correct?
A. That is correct.
Q. You also understand, do you not, that the pending lawsuit in which this deposition is being taken, arises out of a sale by Chromodern Chair Company to the plaintiff, John G. Kolbe, Inc., of 150 chairs?
A. Yes, I understand that.
Q. Now, with reference to the business of Chromodern Chair Company, has Chromodern sold any chairs
Dep. or other products of Chromodern to any customer

page 7 } other than John G. Kolbe, Incorporated, in the State of Virginia?

A. Yes.

Q. And what is the aggregate amount of all sales made by Chromodern to customers in the State of Virginia?

A. In the State of Virginia, approximately $8500, that I have had contact with over the last five and one half years.

Q. In preparing for this deposition, did you have occasion to search through the records of Chromodern in this regard?

A. Yes, I did.

Q. And you found sales aggregating a total of approximately $8,000?

A. That is correct.

Q. What was the amount of the sale to John G. Kolbe, Incorporated?

A. The sale to John G. Kolbe, Inc. amounted to $4,275.

Q. And therefore the total sales by Chromodern in the State of Virginia for the period during the past five years was $8,000 approximately, of which approximately one half or $4,275, was to John G. Kolbe, Inc. with reference to the disputed order in this lawsuit?

A. That is correct.

Dep. page 8 } Q. With reference to the *Kilbe* order, did you have any personal contact with the receipt and acceptance of the order by Chromodern Chair Company?

A. If I may ask a question, what do you mean by personal contact?

Q. Did you handle any part of the transaction?

A. Yes, I did.

Q. You did this on behalf of Chromodern Chair Company?

A. Yes, I did.

Q. Would you explain and state what you did, and how the order was received.

A. The first contact I had with the order was by phone call from Mr. Glenn McDonald on October 8th wherein he told me he could obtain an order for approximately 150 chairs if we could supply the particular model, type of upholstery material and frame finish that the dealer wanted. I told Mr. McDonald we could. Since the particular model was in our catalog, I accepted his verbal order for the quantity of 150 of Chromodern Model 1154/SB chairs, upholstered in rawhide black with a satin chrome frame finish to be shipped to the Officers Open Mess, Marine Corps Air Force Base, New River, Jacksonville, North Carolina.

Eugene P. Minkel

Mr. McDonald indicated to me that the dealer was a John G. Kolbe, Incorporated. He would get me a confirming order in the mail from John G. Kolbe.

Dep. page 9 } Q. Did you in fact receive a confirming order?
A. Yes, I did. I received the confirming order two days later.

Q. I show you now a document on the stationery of John G. Koble, Incorporated, stating in the upper right-hand corner, "Our Order No. A 2784" and bearing the title Purchase Order, and ask you if you recognize this document.

A. Yes, I do.

Q. What is that?

A. This is the confirmation of the phone order given to me by Mr. McDonald.

Q. Was that received at Chromodern in the United States Mail?

A. Yes, it was.

Q. And when I say at Chromodern, I mean the office in Vernon, California.

A. Yes, that is correct.

Q. Does Chromodern have administrative offices anywhere other than in Vernon, California?

A. No, they do not.

Q. Chromodern has not had administrative offices anywhere other than in Vernon, California, during the time in question, is this correct?

A. This is correct.

Dep. page 10 } Q. I note at the bottom of the document or purchase order that you have just identified is a stamp in red stating, "Received October 10, 1968," and ask if you know anything about that?

A. Yes, I do. This is our normal procedure for dating mail when it reaches our office.

Q. So that received-stamp and the date were impressed on the purchase order when it was received at the Chromodern office?

A. That is correct.

Q. For purposes of identification in this proceeding, may this purchase order be marked Defendant's Exhibit A.

(Whereupon document entitled Purchase Order No. A 2784 from John G. Kolbe, Inc. was marked Defendant's Exhibit A and attached hereto.)

Q. Now, the purchase order indicates, does it not, the place of shipment for the delivery of the chairs?

A. Yes, it does.

Q. Where is that?

A. Ship to: Officers Open Mess, M.C.A.F., New River, Jacksonville, North Carolina.

Q. So the order in question was at all times for delivery out of the State of Virginia to North Carolina?

A. That is right.

Q. Was this order eventually shipped?

A. Yes, it was.

Dep. page 11 } Q. Where was it shipped?

A. This was shipped to Officers Open Mess, Marine Corps Air Force Base, New River, Jacksonville, North Carolina, as evidenced by the original copy of the bill of lading.

Q. I show you now what purports to be that bill of lading which you have just described, and which is dated November 8, 1968, at Los Angeles, California, showing a shipment from Chromodern Chair Co. consigned to Officers Open Mess, Marine Corps Air Force Base, New River, Jacksonville, North Carolina, and ask if this is the bill of lading to which you refer?

A. That is correct.

Mr. Rose: May the bill of lading be marked for identification Defendant's Exhibit B.

(Whereupon Bill of Lading dated November 8, 1968, was marked Defendant's Exhibit B and attached hereto.)

Q. Were any of the chairs which were the subject of the order in question shipped by Chromodern to any destination other than North Carolina?

A. No, they were not.

Q. I notice on Exhibit A, which has been identified by you, that there is a pencil interlineation and crossing out in the middle of the purchase order, and ask you to explain that, if you can.

Dep. page 12 } A. Yes.

Q. First, is that in your handwriting?

A. These are my notations on the side.

Q. And the crossed out portion?

A. The cross out was done by me.

Q. All right, will you explain that, please.

A. The order was, "Additional brace on front of side of chair." I crossed this out, of course, so that it would not

appear on our production factory order when written, for it is not a proper wording for describing this particular chair. The model number 1154 is constructed with two side braces between the two leges on each side. In fact, I spoke to Mr. Glenn McDonald on October 11th, brought this to his attention, and as memory serves me, I said, "Glenn, this is haphazardly written; the model number 1154 only has side bracing. If front bracing were to be put on, the chair would never stack, which is one of the fundamental purposes of the model 1154, so that it will stack up 12 or 13 units high."

Q. What did he say?

A. He said, "Gene, you are correct; they probably did not interpret the picture right. Please proceed with the normal model 1154.

Q. Did you then proceed with the order?

A. Yes.

Dep. page 13

Q. Did Chromodern forward any confirmation in writing with respect to this order, or acknowledge this?

A. From recollection and normal procedure, I would say, yes.

Q. I show you now a document entitled "Acknowledgment", on the stationery of Chromodern Chair Company, which is a carbon copy, and ask you if you recognize this document.

A. Yes, I do.

Q. The document is addressed to John G. Kolbe, Inc. as purchaser, and I ask you if this is the acknowledgment that Chromodern prepared in connection with the order in question in these proceedings.

A. Yes, it is.

Q. And what was done with the original of that acknowledgment?

A. The original of this acknowledgment would undoubtedly have gone out to Kolbe, John G. Kolbe, Incorporated.

Q. By mail?

A. By mail.

Q. That would be the normal practice and procedure?

A. This is our normal practice.

Mr. Rose: May the acknowledgment be marked for identification Defendant's Exhibit C.

(Whereupon Acknowledgment was marked Defendant's Exhibit C and attached hereto.)

Eugene P. Minkel

Dep. page 14 } Q. By Mr. Rose: With reference to the acknowledgment form just identified by you as Defendant's Exhibit C, is there any indication on that document regarding the destination to which the order is to be delivered or shipped?

A. Yes, there is.

Q. What is that?

A. The order is to be shipped to Officers Open Mess, Marine Corps Air Force Base, New River, Jacksonville, North Carolina.

Q. Now, with reference to the order and sale that you have identified with reference to John G. Kolbe, Inc., I show you now a carbon copy of a Chromodern invoice, number C8961, designating as purchaser, John G. Kolbe, Inc., and showing a balance of $4,275.00 as a sales price, and ask you if you recognize this document?

A. Yes, sir, I do.

Q. What is that document?

A. This is a copy of invoice issued on their purchase order number A 2784, dated November 8, which coincides with the date of the bill of lading.

Q. Which was our Exhibit B in this deposition, is that correct?

A. That is correct.

Q. What was done with the original of this invoice?

A. The original and one copy would be mailed to John G. Kolbe, Incorporated.

Dep. page 15 } Q. And that again is in accordance with the normal practice of Chromodern?

A. This is our normal practice.

Q. Was the invoice paid?

A. Yes, it was.

Q. The full $4,275.00?

A. The full amount, yes, sir.

Mr. Rose: May the invoice just described be marked as Defendant's Exhibit next in order.

(Whereupon invoice No. C 6961 from Chromodern Chair Company to John G. Kolbe, Inc. was marked Defendant's Exhibit D and attached hereto.)

Q. By Mr. Rose: Has Chromodern during the past five years ever solicited business from John G. Kolbe, Inc. through any employee of Chromodern?

A. No.

Q. Has Chromodern Chair Company at any time during the past five years had any employee in the State of Virginia?

A. No.

Q. Has Chromodern Chair Company had during the past five years at any time any sales representative in the State of Virginia?

A. No.

Dep. page 16

Q. Has Chromodern Chair Company during the past five years at any time maintained any office in the State of Virginia?

A. No, they have not.

Q. Has Chromodern Chair Company at any time in the past five years had any telephone facility in the State of Virginia?

A. No, they have not.

Q. Has Chromodern Chair Company during the past five years carried on newspaper advertising in the State of Virginia?

A. No, they have not.

Q. Has Chromodern Chair Company during the past five years had any telephone listing or advertising in telephone directories in the State of Virginia?

A. No, they have not.

Q. Did Chromodern Chair Company have any kind of written agreement or understanding in writing with Mr. McDonald?

A. No, we have not.

Q. Has Chromodern Chair Company at any time in the past five years used or rented any automobile vehicle in the State of Virginia?

A. No, we have not.

Q. Has any officer, director or employee of Chromodern Chair Company made any trip to or in the State of Virginia in the past five years?

Dep. page 17

A. No.

Q. Has Chromodern Chair Company during the the past five years had any showroom in the State of Virginia?

A. No, we have not.

Q. Has Chromodern Chair Company at any time in the past five years had any warehouses in the State of Virginia?

A. No, we have not.

Q. Has Chromodern Chair Company at any time in the

Eugene P. Minkel

past five years maintained any inventory or storage of goods in the State of Virginia?

A. No, we have not.

Q. Has Chromodern Chair Company during the past five years participated in any trade show or exhibit in the State of Virginia?

A. No, we have not.

Q. Has Chromodern Chair Company during the past five years conducted any advertising in the television or radio media?

A. No.

Q. Has Chromodern Chair Company during the past five years used, rented or occupied any offices or office facilities in the State of Virginia?

A. No, we have not.

Q. Other than the sale to Kolbe, which is the subject of this proceeding, and which is in the amount of $4,275.00, and the approximately $4,000.00 in other sales to customers in Virginia, has Chromodern Chair Company had any contact whatsoever with anyone or any firm in the State of Virginia during the past five years?

Dep. page 18

A. Purely from memory I would say no.

Q. And you are the person at Chromodern who would have the responsibility for any contacts with out-of-state sales or business?

A. That is correct.

Q. Has Chromodern Chair Company had any licenses issued with reference to the State of Virginia within the past five years?

A. No, we have not.

Q. Has Chromodern Chair Company received or obtained any permits with reference to the State of Virginia?

A. No, we have not.

Q. Have any of the employees, officers, directors, or agents of Chromodern Chair Company lived in the State of Virginia during the past five years?

A. No.

Q. Did Mr. McDonald handle any transaction for Chromodern Chair Company other than the Kolbe sale at any time?

A. No, he did not.

Q. Has Chromodern Chair Company ever paid or reimbursed anyone for travel expense or other expense with reference to business in the State of Virginia?

Eugene P. Minkel

Dep. page 19 } A. No, we have not.

Q. Was Mr. McDonald under any obligation or direction from Chromodern Chair Company to obtain any minimum sales volume for Chromodern?

A. No.

Q. Has anyone other than personnel of Chromodern at Vernon, California, had authorization to accept orders on behalf of Chromodern in the State Virginia?

A. No.

Q. And your answer would be for any time during the past five years during which you have been associated with Chromodern?

A. Exactly.

Q. With respect to orders received or obtained by Chromodern, is there any customary practice or procedure regarding the method or acceptance by Chromodern of its orders?

A. Yes.

Q. What is that procedure?

A. The procedure, of course, is that we must have a written order in our possession before we start processing any merchandise.

Q. Is the order accepted by anyone other than personnel at Chromodern in Vernon, California?

A. No.

Q. How is that acceptance made?

Dep. page 20 } A. That acceptance is made by submitting an acknowledgment to the dealer, after the normal practice of, first of all, approving credit, and then writing up the order on our production order form, of which a copy goes to the dealer.

Q. And when you refer to an acknowledgment form, you refer to a form substantially the same as that on which Defendant's Exhibit C was prepared?

A. That's right.

Q. And until that acknowledgment is prepared and forwarded to the customer, the order has not been accepted, is that correct?

A. That is correct.

Q. The acknowledgment forms are prepared, are they not, at Chromodern's offices in Vernon?

A. Yes, they are.

Q. Do any sales representatives of Chromodern prepare or have authority to prepare acknowledgment forms?

A. No, they do not.

J. A. Kolbe

Q. Is your answer the same for the period during which you have been associated with Chromodern Chair Company?
A. That is correct.

* * * * *

Trial Proceedings, when heard on October 20, 1969 before Honorable R. L. Young, Judge, without a jury.

APPEARANCES:

Williams, Mullen & Christian
By: George R. Humrickhouse, Esq.
Samuel W. Hixson, III, Esq.
Attorneys, of counsel for the plaintiff

Steingold, Shepherd & Steingold
By: Robert E. Shepherd, Jr., Esq.
Attorney, of counsel for the defendant

* * * * *

page 2 }

* * * * *

J. A. KOLBE, being first duly sworn in behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

By Mr. Humrickhouse:
Q. Please state your name and present position?
A. My name is J. A. Kolbe, President of John G. Kolbe, Inc., 1605 Brook Road, Richmond.
Q. That Company is the plaintiff in this suit, is it not?
A. Yes, sir.
page 3 } Q. What is the nature of your business?
A. We sell equipment for operations, serving and preparing food and beverages; in other words, dining room and kitchen equipment, commonly known as restaurant equipment.
Q. Mr. Kolbe, in the course of your business have you had any correspondence with or had any dealings with Chromodern Chair Company in Los Angeles, California?
A. Yes, we have.

Q. When did the business or the relations begin?

A. Well, the relation probably began late in December of 1967 or early 1968 when we requested catalogue information. It started late in the year when we were supplied catalogue information by their representative and in about—

Q. Just a minute. I show you what purports to be a catalogue of Chromodern; will you tell me whether you received that?

A. Yes, we did.

Q. From whom did you receive it?

A. We received this from Mr. William Conklin, the Chromodern representative.

By the Court:

Q. Is he a local Virginia manufacturer's agent, or something, or who is he?

page 4 } A. Mr. Conklin is a manufacturer's representative who has Virginia as part of his territory for this Company.

By Mr. Humrickhouse:

Q. Mr. Kolbe, I believe you have got a little notation on the outside of that catalogue, "Check October 3, 1968," or something like that, is that correct?

A. Yes, sir.

Q. Will you state to what that refers?

A. This simply refers to the date at which this catalogue went through our files and was checked up to date for prices and other current information.

Q. I hand you what purports to be a copy of a letter transmitting that catalogue. Is that the letter that accompanied the catalogue when you got it?

A. This is a form letter that did accompany this and/or other catalogues which we subsequently received.

Mr. Humrickhouse: We would like to file that as an exhibit, Your Honor.

(The said letter was marked and filed as Plaintiff's Exhibit No. 1.)

Q. Since that time have you received sheets up-dating the catalogue?

A. Yes, sir.

J. A. Kolbe

Q. I hand you two of them, will you state when they were received?

page 5 } A. One has no postmark; one was postmarked July 15, 1969. We received others which were discarded; still have some.

Q. Did there come a time when you purchased some chairs from Chromodern? If so, state what your files disclose and what you know about the purchase?

A. We purchased some chairs from Chromodern on one of our official order forms which was sent to them, I believe, early in October. The chairs were shipped in November to the Officers' Mess at the Marine Corps Air Station at Jacksonville, North Carolina.

Q. I show you the order form. It is marked Plaintiff's Exhibit No. 1, Your Honor. It was filed with the discovery deposition. We can file another copy.

The Court: That one is all right.

Mr. Humrickhouse: We would like to file that.

(The said order form was marked and filed as Plaintiff's Exhibit No. 2.)

By Mr. Humrickhouse:

Q. All right, sir.

A. The chairs were shipped to the customer. They were subsequently examined by the customer—

Q. Let's don't go into any substance of the suit. Were they rejected or accepted?

page 6 } A. They were rejected by the customer.

Q. And, as a result of that, this suit was instituted?

A. Yes, sir.

Q. Have you paid for the chairs?

A. Yes, we have.

Q. I show you what purports to be a copy of an invoice and ask you from whom that was received and to whom it was directed?

A. It was received from Chromodern and directed to John G. Kolbe, Inc.

Q. How much did you pay on that invoice?

A. We paid $4,275.00 less a cash discount of $42.75.

Q. For how many chairs?

A. 150 chairs.

J. A. Kolbe

Mr. Humrickhouse: We would like to file that, Your Honor, as Plaintiff's Exhibit No. 3.

(The said copy of an invoice was marked and filed as Plaintiff's Exhibit No. 3.)

Q. Did you deal directly with Chromodern in California or through some other person?
A. I think that depends on what you mean by "deal," Mr. Humrickhouse. We were solicited for business for
page 7 } that Company through their representative. We sent our purchase order directly to them, which is the customer or the people we deal with.
Q. Who was that order sent through?
A. Mr. MacDonald.
Q. What is his full name?
A. Mr. Glenn MacDonald.
Q. What is his address?
A. Leonard Parkway, Richmond.

By the Court:
Q. I thought you ordered them direct.
A. We sent the order directly to the manufacturer, Your Honor.

By Mr. Humrickhouse:
Q. Did you send it in the mail or give it to Mr. MacDonald?
A. To the best of my knowledge it was sent directly to the manufacturer.
Q. You were not present when that happened?

By the Court:
Q. What part did Mr. MacDonald play in it?
A. Mr. MacDonald actually physically wrote the order up with a description of the chairs.
Q. What is his capacity with the defendant com-
page 8 } pany, do you know?
A. I am not prepared to say, Your Honor.

Mr. Humrickhouse: He is here, Your Honor, and he will be able to explain it, I think.

By Mr. Humrickhouse:
Q. Mr. MacDonald, to your knowledge, tried to get orders from you from time to time for Chromodern products?

A. Yes, sir.
Q. Have you dealt with Mr. MacDonald for this line or any other line?
A. Yes, sir.
Q. Over what period of time?
A. Over a period of 10, 12 years.
Q. Prior to October, 1968 had Mr. MacDonald tried to sell you anything for Chromodern?
A. He did not try to sell me personally or me specifically anything.
Q. To your knowledge had he tried to sell the firm?
A. I do not have any knowledge of that.

Mr. Humrickhouse: We have no further questions of Mr. Kolbe.

page 9 } CROSS EXAMINATION

By Mr. Shepherd:
Q. Mr. Kolbe, as I understand your testimony, these chairs were purchased for the Officers' Open Mess at a Marine Corps Base in North Carolina?
A. Yes, sir.
Q. And the order was being handled through Kolbe, is that correct?
A. Yes, sir.
Q. The Club purchased the chairs from John G. Kolbe? Where was the order for these chairs sent?
A. Well, to the best of my knowledge, Mr. Shepherd, it was sent to Chromodern.
Q. Where is Chromodern located?
A. Los Angeles, California.
Q. Were the chairs to be shipped by Chromodern to North Carolina?
A. Yes, sir.
Q. Did the chairs ever come to Kolbe here in Richmond?
A. Not until after they were rejected by the customer.
Q. In other words, the chairs were sent directly from Chromodern to the Marine Corps Base in North
page 10 } Carolina?
A. Yes, sir.
Q. I refer you to Plaintiff's Exhibit No. 3 which is, I believe, the invoice in this matter; does the invoice indicate how the freight was to be handled on this?
A. It was added to the invoice and we paid it, I believe. There was an allowance, however, if I recall correctly.

J. A. Kolbe

Q. I refer you to Plaintiff's Exhibit No. 2 which was the purchase order, does this purchase order indicate the manner in which the transaction was to be handled? In other words, was it FOB factory?

A. I couldn't tell you without looking at it, Mr. Shepherd. This order was not handled by me personally. Before I could answer that I would have to look at the purchase order.

The Court: Look at that. (Indicating)

A. (Continuing) It was to be handled FOB factory.

By Mr. Shepherd:

Q. As I understand it, the chairs were to be shipped from California, not from any warehouse or anything from Virginia?

A. I assumed they would be shipped from California.

Q. So, as far as you know, the chairs never came into Virginia until after they were rejected by the

page 11 } ultimate purchaser?

A. Not unless they happened to pass through Virginia on a freight line.

Q. What contact have you personally had with any manufacturer's representatives that would handle the Chromodern line or any employees of the Chromodern, other than this particular transaction?

A. I have had none, other than in a general way, with Mr. MacDonald and with Mr. Conklin.

Q. And this would be what, solicitation of orders by them?

A. Yes, sir.

Q. And I believe that the catalogue that you have, and to which you have referred, was sent to you directly by Chromodern, is that correct?

A. This particular catalogue was delivered to us in person by Mr. Conklin. We did have others which came by mail.

Q. And these others were accompanied with correspondence similar to Plaintiff's Exhibit No. 1, is that correct?

A. This was a form letter.

Q. It was just a form letter that says, "To Dealer," right?

A. Right.

page 12 } Q. This is the only purchase, to your knowledge, that Kolbe has made from Chromodern?

A. Yes, sir.

Q. Now would Mr. MacDonald and Mr. Conklin—I believe you indicated that you had dealt with them on other occasions, is that correct?

A. Yes, sir.

Q. Do they represent Chromodern exclusively or do they handle other lines that Kolbe would be interested in?

A. They handle other lines that we would be interested in.

Q. Do you happen to know, of your knowledge, of your own knowledge, whether they are employees of Chromodern or manufacturer's representatives, that would handle Chromodern as well as other manufacturers?

A. I can only say they were handling Chromodern. As far as the products of other manufacturers, I have no idea what their transactions were.

The Court: A manufacturer's agent is an independent agent one day and a contractor the next day, it depends on which day you catch him.

Mr. Shepherd: That is all I have.

page 13 } REDIRECT EXAMINATION

By Mr. Humrickhouse:

Q. Mr. Kolbe, some reference has been made to freight. I show you a letter. Would you describe this letter and file it as an exhibit, please?

A. This was a letter dated March of 1968 in which we wrote to Chromodern and referred to a catalogue which we had recently received from them and questioned the matter of freight since freight from the West Coast is usually higher than competitive lines would be from the East Coast and asked them if they had any special arrangements for handling freight and this reply was received on the bottom of our letter, signed by Mr. Eugene Minkel of the Chromodern Company, and in it he says that they are presently compiling data on freight to the East Coast and plan to provide some adjustments on freight by setting up a new discount schedule. "This should be completed by the last week of this month."

Mr. Humrickhouse: We would like to file that, if Your Honor please.

(The said letter was marked and filed as Plaintiff's Exhibit No. 4.)

Q. I hand you a letter dated December 14, 1967 to which is attached an advertisement from Chromodern. Would you explain where the letter came from and the ad-
page 14 } vertisement?

A. Well, this advertisement, to the best of my knowledge, was clipped from a trade magazine which goes to dealers and it states that Chromodern has a new catalogue and they are looking east for their distribution and as a result of this we wrote to them for a catalogue.

Q. What does the bottom of the ad say, right under the name?

A. It says "Representatives in all principal cities."

* * * * *

W. GLENN MacDONALD, being first duly sworn, testified in behalf of the plaintiff, as follows:

DIRECT EXAMINATION

By Mr. Humrickhouse:

Q. State your name, residence and occupation?

A. W. Glenn MacDonald, 4621 Leonard Parkway; Manufacturer's Representative.

page 15 } Q. That is Richmond, Virginia?

A. Richmond, Virginia.

Q. Mr. MacDonald, what, if anything, did you have to do with the sale of chairs to the New River Officers, Mess at Jacksonville through Kolbe, Chromodern chairs? Tell His Honor what you had to do with the sale?

Q. I sold the—I was with the representative of the Kolbe Company and was instrumental in the Open Mess buying chairs, Chromodern chairs through Mr. Kolbe. I also wrote the order for the chairs.

By the Court:

Q. Who was the representative of the Company?

A. Of the Chromodern Company? I was acting as representative for Chromodern Company at that time.

Q. You said there was another gentlemen present, who was he?

A. Mr. Conklin was representative after that time.

By Mr. Humrickhouse:

Q. You said there was another representative in North Carolina?

A. That was a salesman for the John Kolbe Company, Your Honor.

Q. Explain how you represented Chromodern in this particular, Mr. MacDonald?

W. Glenn MacDonald

page 16 } A. In this particular case—I might preface my remarks by saying that they had been after me to represent Chromodern. In fact, they sent me about 35 to 50 of those big heavy catalogues down to my home. Now this was before, oh, I would say, May of 1968—

Q. Just a minute. I hand you a letter from Chromodern. I ask whether you received it or not?

A. Yes, sir, I did.

Q. Will you read it?

A. It says, "Glenn MacDonald, 4621 Leonard Parkway, Richmond, Virginia. Dear Glenn, I am very sorry you could not take our line. We have very good reception from all of our dealers. Mr. William Conklin of Ellicott City, Maryland will represent us. Will you please give him the catalogues and literature we sent to you.

"Should you be in Los Angeles at any time, please stop by and say Hello. Sincerely yours, Chromodern Chair Company, Eugene Minkel, Executive Secretary."

Q. And the date of that?

A. June 1, 1968.

Mr. Humrickhouse: We would like to file that as a Plaintiff's Exhibit, Your Honor.

(The said letter was marked and filed as Plaintiff's Exhibit No. 6.)

page 17 } By Mr. Humrickhouse:

Q. They asked you to take it on and you didn't do it?

A. They asked me to take the line and represent them and I refused to do it.

Q. How did you happen to make this sale?

A. Because I was in North Carolina, in Jacksonville at the time, and I knew they were interested, the Open Mess was interested in buying chairs and that they were interested in the Chromodern chair.

Q. Did you get in touch with Chromodern?

A. I called Mr. Minkel on the phone and he told me to go ahead and, if possible, make the sale and to represent them on that particular sale.

Q. Then you said you wrote the order; where was that done?

A. That was done at the John Kolbe Company on Brook Road in Richmond, Virginia.

Q. When it was written up, what was done with it?
A. It was mailed, I mailed it.
Q. Who mailed it?
A. If I recall correctly, I mailed it.
Q. Did you receive any further communication from them with reference to this transaction?
page 18 } A. Did I receive any further information?
Q. From Chromodern?
A. I did not receive—after this sale was made I did not receive any further information from them but I contacted them after the chairs were shipped.
Q. I show you what purports to be a copy of a letter written by them to Mr. Kolbe on February 4, 1969, with attached envelope, and ask you if you received that?
A. No, sir, I did not receive a copy of this.
Q. The envelope there doesn't indicate you received it.
A. I don't recall—this says, "Glenn MacDonald," but I don't recall having received it.

Mr. Humrickhouse: I have no further questions.

CROSS EXAMINATION

By Mr. Shepherd:
Q. Mr. MacDonald, you stated that you were a manufacturer's representative?
A. That is correct.
Q. Do you represent more than one company?
A. Yes, sir.
Q. Approximately how many companies do you represent?
A. I represent, altogether, about five.
page 19 } Q. Now, as I understand your testimony, you had been asked by defendant Chromodern to represent them on several occasions, is that correct?

The Court: By one of them.
A. No, I was offered the position as their representative on two or three different occasions.

By Mr. Shepherd:
Q. Did any of these occasions take place within the State of Virginia?
A. No, sir, they took place in New York, took place in Chicago.
Q. This was while you were attending trade shows?

W. Glenn MacDonald

A. This was National Hotel and Restaurant Shows.

Q. You never agreed to handle this line, is that correct?

A. I never agreed to handle this line.

Q. Do you recall about what date this transaction took place in Jacksonville, North Carolina?

A. If I recall, I think it was the latter part of September of 1968, to the best of my knowledge.

Q. And you were down there at the time, when they were considering the purchase of some chairs?

A. Yes, sir.

page 20 } Q. And I believe you stated there was also a representative present from Kolbe, is that correct?

A. Yes, sir; in fact, he and I met together there.

Q. And was the Board of the Open Officers' Mess meeting in regard to making a decision on the purchase of some chairs?

A. They were.

Q. At that time you testified there was interest in the Chromodern chairs?

A. That is true.

Q. So at that time you called Mr. Minkel, is that the party?

A. Mr. Eugene Minkel, that is correct.

Q. Where is he located?

A. Los Angeles.

Q. You told him at that time that they had expressed some interest in the chairs and could you represent them as far as this purchase?

A. I asked him if I could represent them, Chromodern, on this particular sale. That was before I had received this letter about Bill being appointed.

Q. And he authorized you to sell them?

A. He authorized me to complete the sale, if possible, that I would be paid commission on the sale.

page 21 } Q. You would be paid a commission on it?

A. All manufacturer's representatives work on a commission basis, the majority of them.

Q. Your compensation on this was to be a commission, based upon a particular percentage of the sale?

A. It is a percentage of the sale, that is true.

Q. Was a decision made by the Officers' Open Mess regarding the purchase of these chairs at that time?

A. The decision was made—before I left Jacksonville, according to the Lieutenant, the decision was being made to give Kolbe the job for the Chromodern chairs.

W. Glenn MacDonald

Q. I believe there was some question about the Officers' Open Mess could not deal with the manufacturer directly and they had to go through a dealer, is that correct?

A. Not that I know of. I don't know of that particular ruling. Some dealers will not sell Open Mess accounts, I don't know.

Q. But you had to come to Richmond to Kolbe in order to have the order placed, is that correct?

A. Not necessarily. I came back, living in Richmond and calling on the Kolbe Company quite often and trying to be of service to them—now their salesmen received the order from the Open Mess who relayed it to the home office and I called on them and they gave me the order, me

page 22 } representing Chromodern at that time, gave me the order and I wrote the order up.

Q. The order was then mailed to Chromodern, is that correct?

A. The order was mailed to Chromodern.

Q. Do you know of your own knowledge whether Chromodern accepted this order?

A. Well, I would assume that they did, I was told they were shipped.

Q. But did you have authority to accept the order yourself or did it have to be mailed to Chromodern for acceptance or rejection?

A. I had the authority to accept the order from the Kolbe Company or have the Kolbe Company mail it direct, either way, but in most instances they give the manufacturer's representative the order and the manufacturer's representative usually mails the order in.

Q. But how would you know whether the order had been accepted by Chromodern or not? Did you have authority to accept the order and make the credit investigation and things of that nature?

A. That is not the duty of a manufacturer's representative. I will say this, I know the order was accepted because—that they shipped the chairs, and I talked with

page 23 } Mr. Minkel after the chairs had been received in Jacksonville.

Q. Did you receive any acknowledgement of the order from Chromodern?

A. No, sir.

Q. First you knew they had been accepted was when you learned they had been shipped, is that correct?

A. No, I won't say that. I will say that the first time I

knew they had been shipped was after they had been rejected by the Open Mess.

Q. Have you ever had any contact with employees of Chromodern within the State of Virginia?

A. Not in the State of Virginia, no.

Q. Did you at any time receive any compensation from Chromodern other than what you were supposed to receive as a commission on this sale?

A. In fact, I haven't received any commission on this sale.

Q. But you received no other compensation from Chromodern?

A. No.

Q. Did Chromodern at any time pay any sort of travel allowances or reimburse you for any expenses?

A. No, sir.

page 24 } Q. Did Chromodern at any time authorize you to place any sort of advertising for them in the State of Virginia?

A. No, because I refused to accept the position to represent them. As I stated previously, they sent me all these catalogues and all of that, but I turned the catalogues over to Mr. Conklin.

Q. So your only representation of Chromodern was as to this specific transaction, is that correct?

A. That is true.

Q. And you consider that after you had mailed the order to Chromodern you were no longer representing Chromodern, is that correct?

A. At that time—I wouldn't say so, but after I received the letter from Chromodern appointing Mr. Conklin as representative for them, then I had no more dealings with Chromodern.

Q. Were you representing Chromodern at any point during 1969?

A. No, sir.

Q. Did Chromodern—was there any sort of written contract or agreement between you and Chromodern?

A. None whatsoever.

Q. Was there any minimum sales requirement that was placed on you by Chromodern?

page 25 } A. No, sir. I only acted for Chromodern in this particular sale as their representative.

Q. Would you have any authority to make investigations regarding the credit of Kolbe or any other purchaser?

A. No, sir, that is not usually the manufacturer's representative's duty.

Q. Were there any particular rules or regulations laid down by Chromodern to govern your activities representing them?

A. (No answer.)

Q. Do you know whether any of the merchandise of Chromodern, regarding this transaction, was stored in Virginia or handled on an FOB basis?

A. The order was taken FOB factory, if I recall.

Q. So that you, in this transaction, which was the only time you ever represented Chromodern, you were representing them as a manufacturer's representative and not as an employee?

A. I was representing them on this particular sale as an employee, might say an employee of the Chromodern Company, acting as their representative.

Q. And your only compensation was to be based on a commission, is that correct?

A. That is true.

page 26 } Mr. Shepherd: That is all.

REDIRECT EXAMINATION

By Mr. Humrickhouse:

Q. Mr. MacDonald, would you look at Exhibit—the letter from Chromodern regarding the employment of Mr. Conklin? Is that when you first learned that they had appointed Mr. Conklin?

A. Yes, sir.

Q. Weren't you mistaken when you said that the transaction at this time took place before you were notified Mr. Conklin represented them?

A. That was—I am glad you brought that up; it was, because—

Q. At this time, Mr. Conklin was representing them but you asked them for a commission, didn't you?

A. That is true, because at that time—the reason I might explain that, if you would like—

Q. I just wanted to be sure the record was straight because we were talking about October and June.

A. That is right, you are absolutely correct, absolutely correct.

Mr. Humrickhouse: That is all.

(Witness excused.)

page 27 } *MALCOM* BROOKS, being first duly sworn in behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

By Mr. Humrickhouse:

Q. Please state your name and occupation?

A. *Malcom* Brooks, John G. Kolbe Company, Inc., buyer for John G. Kolbe Company, Inc.

Q. What, if anything, did you have to do with the purchase of chairs from Chromodern Chair Company in Los Angeles for the Officers' Mess in Jacksonville, North Carolina?

A. Signed the purchase order.

Q. Where did you sign the purchase order and who was present?

A. Mr. Glenn MacDonald was present. In fact, he wrote the order himself. It was signed at the offices of John G. Kolbe Company in Richmond, Brook Road, City of Richmond.

Q. What was done with it?

A. As well as I recall, the order was given to Mr. MacDonald and he mailed it.

Q. There is another copy of it in evidence but I will show it to you, I think it is No. 1, if Your Honor please. I show you Plaintiff's Exhibit No. 2 and ask you if that is a copy of the order that you signed?

page 28 } A. This is a copy of the purchase order.

Mr. Humrickhouse: No further questions.

CROSS EXAMINATION

By Mr. Shepherd:

Q. This particular purchase order is signed by you for John G. Kolbe?

A. That is correct.

Q. Does Mr. MacDonald's name appear on here anywhere?

A. It does not.

Q. Now was this transaction to be shipped directly or was it to go through Kolbe?

A. To be shipped direct.

Q. And I believe that you were invoiced directly by Chromodern on this transaction?

A. That is correct.

Q. Have you had any other dealings with Chromodern as a buyer for Kolbe other than this specific transaction?

A. I have not.

Mr. Shepherd: That is all I have.

(Witness excused.)

page 29 } WILLIAM R. CONKLIN, being first duly sworn in behalf of the plaintiff, testified as follows:

DIRECT EXAMINATION

By Mr. Humrickhouse:

Q. Please state your name, residence and present occupation?

A. William R. Conklin, 3410 Font Hill Drive, Ellicott, Maryland; I am a manufacturer's representative.

Q. State what a manufacturer's representative does?

A. A manufacturer's representative represents a given manufacturer to people in the trade for the purpose of selling their merchandise to those people.

Q. Were you ever or are you now a representative of Chromodern Chair Company?

A. I was a representative of Chromodern. I am no longer a representative of Chromodern.

Q. I hand you a letter which purports to be your appointment as representative and ask you if you can identify it?

A. Yes, I do.

Mr. Humrickhouse: If Your Honor please, it is two pages long and I would just like for him to read one
page 30 } paragraph of it, then we will file it. I have no objection to him reading it all.

Q. Would you read the paragraph in which you were appointed the representative?

A. (Reading) "Confirming your representation, you will have territory of State of Maryland, except City of Baltimore, State of Virginia, North Carolina and South Carolina."

Mr. Humrickhouse: We would like to file that as a Plaintiff's Exhibit, Your Honor.

William R. Conklin

(The said letter was marked and filed as Plaintiff's Exhibit No. 7.)

Q. Following receipt of that letter did you get catalogues of Chromodern?
A. Yes.
Q. From whom?
A. From Glenn MacDonald.
Q. The gentleman who just testified?
A. Right.
Q. And what did you do after that, in the State of Virginia, with reference to Chromodern?
A. Well, I had to solicit business on behalf of Chromodern.
Q. Throughout the entire State?
A. Yes.
page 31 } Q. Did you ever call on Kolbe?
A. Yes, sir.
Q. Did you ever get any business from them?
A. One order.
Q. Sir?
A. That one order.
Q. What one order?
A. The order that came from Camp Lejeune.
Q. And you got an acknowledgement of the order for these chairs we have been talking about, then?
A. Yes, sir.
Q. I hand you what purports to be an acknowledgement and ask you to file it as an exhibit.
A. Right, that is the order.

(The said acknowledgement was marked and filed as Plaintiff's Exhibit No. 8.)

Q. After you were appointed the representative for Chromodern, did you advise them anything about Kolbe?
A. Yes, I did.
Q. And how did you do that?
A. I advised them that I had contacted them, that we were setting them up as a dealer and to send the catalogues to carry them as a minimum discount until they got a floor stock.
page 32 } Q. This was when?
A. July 1, 1968.

Mr. Humrickhouse: We would like to file that as an exhibit, Your Honor.
Mr. Shepherd: Did he say Kolbe? I thought the letter was Atlantic.

A. There are two of them.

Mr. Humrickhouse: We want the one about Kolbe. This is the wrong one. One referred to Kolbe and one to Atlantic. I just handed you the wrong one.

(The said letter was marked and filed as Plaintiff's Exhibit No. 9.)

By Mr. Humrickhouse:

Q. Did you do other business for Chromodern in the Commonwealth of Virginia?

A. Yes.

Q. Are you still their representative?

A. No.

Q. When did you discontinue?

A. I discontinued with them in April of this year.

Q. Do you know whether they have a representative at this time?

A. No, I don't.

page 33 } Q. Going back to the question of business you had in the Commonwealth of Virginia, I show you part of your file and ask you if it indicates sales to other persons in the Commonwealth?

A. Yes, it does.

Q. Would you tell us the date of sales and amounts and to whom the sales were made?

A. One in April of 1969 to Atlantic Equipment Corporation in Norfolk, for $8.10; there is one to William P. Schwartz in February, 1969, for $18.00; and there is another one here of the same date for $988.00.

Q. Where is Schwartz located?

A. Roanoke, Virginia. There is another one dated November 18, 1968, from Atlantic Equipment Company, Norfolk, for $791.00 and there is another Atlantic Equipment Company, Norfolk, dated October 15, 1968, for $1,617.00; and another from the William P. Schwartz Company in Roanoke, dated November 12, 1968 for $24.50.

Q. Tell His Honor what you would do in calling on a customer as a manufacturer's representative?

A. That is a hard question. Normally—

Q. Well, we must know.

A. Normally, you talk to the people and show them the merchandise that you are trying to sell to them. If possible,

page 34 } you have worked with users of the merchandise, trying to convince—

William R. Conklin

The Court: I am not so much interested in the selling technique. You wrote the orders and sent them in for approval?

A. Yes, the orders are accepted by the factory at the factory's discretion.

Mr. Humrickhouse: That is all.

CROSS EXAMINATION

By Mr. Shepherd:

Q. All right, now, at this time were you handling other lines besides Chromodern?

A. Yes, sir.

Q. And you would solicit orders in Virginia as well as in these other areas, is that correct?

A. Correct.

Q. The orders would be sent to Chromodern and would you make the credit investigation and determine whether the order was to be accepted or not, or would Chromodern?

A. No, Chromodern.

Q. Chromodern would make this decision?

A. Yes.

Q. What means of compensation was handled between you and Chromodern?

page 35 } A. Commission on sales.

Q. You were to be paid a commission on the sales?

A. Right.

Q. Did you receive any other compensation whatsoever?

A. No.

Q. Did you receive any sort of allowance toward an office or an automobile or anything of that nature?

A. No.

Q. Were any of your expenses for travel in Virginia or these other states paid by Chromodern?

A. No.

Q. Were you authorized to place any telephone listing or listing in any directory in the name of Chromodern in the State of Virginia?

A. No.

Q. Did you do any advertising in the State of Virginia for Chromodern?

A. No.

William R. Conklin

Q. Were any bank accounts or safety deposit boxes opened for Chromodern in the State of Virginia?
A. No.
Q. Do you recall what the total of these particular sales were that you just referred to?
page 36 } A. No, I didn't total them.

Mr. Shepherd: Could I refer him to those purchase orders again?
Mr. Humrickhouse: Can you use your copies? You can use mine if you want to.

By Mr. Shepherd:
Q. Would you read off the amounts?

The Court: He has done that.

A. You just want the amounts? $24.50; $8.10; $18.00; $988.50; $791.00; $1,617.00.
Q. Were you authorized to enter into any contract for the sale of equipment for Chromodern?
A. No.
Q. Were the invoices on these transactions sent to you or did Chromodern invoice the purchasers directly?
A. I am not sure on all of those orders. Sometimes orders are directed to me and then I will forward them on to the factory. This, of course, especially if there is a matter of special pricing or things like this which normally I will clear through the factory in behalf of the dealer with whom I am doing business. These orders, I can't tell, because it is too long ago.
Q. I am referring to invoices rather than the orders; would the invoices be sent directly to these pur-
page 37 } chasers?
A. Individually.
Q. They were not sent through you to be forwarded to dealers?
A. No.
Q. And I believe you have stated that you discontinued handling the Chromodern line in April of this year?
A. That is right.
Q. And do you not know whether there is any representative?
A. No, I don't.

William R. Conklin

Q. And were you living in Maryland at the time?
A. Right.

* * * * *

A Copy—Teste:

Howard G. Turner, Clerk.

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