



NEWS

A Publication of the
California Receivers Forum



Richard Ormond

Welcome Message from the CRF Chair

Get Involved and Stay Involved

It is a great honor to be this year's CRF State Board Chair, following in the footsteps of many of my own personal teachers, mentors, idols, and friends. As you know, I am a big cheerleader for the CRF and the reason is simple: I have benefited so much from this organization in so many ways. As Chair, my goal is to ensure that all our members feel the same way and that they Get Involved and Stay Involved.

2022 Challenge to Members

As an organization we face many challenges, and I am hopeful that all of us, as members of a professional organization (or as Bob Mosier likes to say a "Guild"), do not take the CRF for granted. There are two important duties for us to achieve as members: (1) we should attend every meeting and education seminar so that we can all benefit from the network we have created; and, more importantly, (2) we must always be on the lookout for new members so that we continue to expand that network and also so we can identify future leaders of the organization.

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Distressed Hotels: The Balloon That Never Popped... or Will It?

BY DENNIS GEMBERLING*

The COVID-19 pandemic has had a devastating effect on hospitality. Of all the industries affected, few were faced with more systemic constraints than hospitality and travel. Even once government-enforced travel bans were lifted, discretionary travel slowed to a crawl.

No offer, no matter how enticing, will get someone in an airplane, onto a cruise ship, or into a hotel if they regard it as a potential death sentence. Travel spending declined 42% in 2020, amounting to a loss of nearly \$200 billion.¹ Hotels ended the year with a 43% occupancy decline.

In March, April, and December 2020

alone, total job losses related to hotel closures and layoffs totaled nearly nine million.² Thousands of hotels around the United States closed due to COVID-19. However, this has not resulted in the cataclysmic transformation of the industry many predicted.

No less a source than the American Hotel & Lodging Association had dire warnings that up to 50% of all U.S. hotels could close without further federal assistance.³ Yet, even as the political will to help Americans in need has disappeared, mass closures have never materialized.

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Publisher's Comments

BY ROBERT P. MOSIER*

First and foremost, we congratulate **Richard Ormond** for his ascent to Chairman of the California Receivers Forum. We are pleased to lead off this issue with a welcome message from Mr. Ormond. The next most important item on the CRF horizon is Loyola IX, which will take place in Newport Beach, California on April 28, 2022 (opening dinner at the Pacific Club that evening) followed by a full day (Friday, April 29th) seminar with multiple panels including a Judges' panel and a Judge's keynote speech.

Next, I would like to recognize all our advertisers who make this publication possible, and in particular, those who have taken full-and-half-page ads. The full-pagers are an impressive list of real estate related services that includes: Phil Seymour (the Seymour Group, real estate brokers and a continuing aid to receivers); Braun Brokerage (auctions and valuations); and Geffen Real Estate (Orit Gadish, Broker/Owner). In the half-page category, the category of services is expanded to include Buchalter, a full-service law firm with decades of experience with receivers; Ervin, Cohen & Jessup LLP, also a law firm with some of our heaviest hitters when it comes to insight and experience; FRES or Fiduciary Real Estate Services; and Michael Kasolas Company, a Certified Public Accountant. We greatly appreciate our other advertisers that include National Franchise Sales, Douglas Wilson, Coldwell Banker Commercial Realty - Eric Sackler & Associates, Perry Group International, and lastly our tombstone advertisers - an opportunity to talk about recent cases. Thanks advertisers and I look forward to seeing everyone at Loyola IX in the OC. RPM



Robert P. Mosier

***Robert P. Mosier** is a Southern California receiver and trustee and principal of Mosier & Company, Inc., a firm that has specialized in managing and turning around troubled companies for more than 25 years.

Editor's Comments

BY KATHY BAZOIAN PHELPS*



Kathy Bazoian Phelps

***Kathy Bazoian Phelps** is Partner at Raines Feldman LLP, Los Angeles, and the co-author of *The Ponzi Book: A Legal Resource for Unraveling Ponzi Schemes*. She frequently represents receivers and trustees.

In times of economic uncertainty, distressed hotels, environmental hazards, and cannabis are all very real parts of society. *Receivership News* and our receiver community are here to help navigate around sticky issues like these. **Dennis Gemberling's** article, "Distressed Hotels: The Balloon that Never Popped . . . or Will It?" addresses the ramifications of the pandemic on the hospitality industry. The "Environmental Hazards: Understanding Receivership Relief Options" article by **Ryan Baker** discusses the creative use of receivers in remediating messy situations. The article by **Peter Ingersoll**, "Cannabis Receivership Expert Witness: Roles, Scenarios and Outcomes" takes a new look at how a cannabis receivership expert witness can assist in several aspects of a receivership case. Be sure to check out all of these substantive articles in this issue, including the profile of **Michael Brumbaugh**.

Receivership News is also thankful to **Peter Davidson** for his always useful Ask the Receiver column, to **Chad Coombs** for Tax Talk, and **Michael Muse-Fisher** for Heard in the Halls. Our regular columnists offer us useful tips, educational content, and community information to keep as all in the loop.

We look forward to seeing everyone at the Loyola IX Symposium in April. Please let us know of any topics you wish to write about or read about for future newsletters. Kathy



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Young Professionals Committee and Recruitment

To that end, the YPC, Young Professionals Committee, was recently expanded statewide. Its goal is to identify newer practitioners in our field from all professions and bring them together for social events and to put on education seminars. It has been the biggest source of recruitment in the Los Angeles/Orange County Chapter for the past five years and many of its members are not only on the councils of their local chapters but are also members of the State Board. Please use the YPC as a recruitment tool when you come across someone that you feel would benefit from the CRF.

We are always seeking new and dynamic members. And our best recruiters are our members... that's you! When you are in court, at a real estate sale, a networking event, etc., please wear the CRF on your sleeve. Word of mouth is our best recruitment tool, and we need all of our members to make an effort to bring in new folks to our "club." The rewards are exponential for you and for the organization.

Technology Committee

We have an amazing library of articles (through this magazine, *Receivership News*), an extended library of prior presentations (audio, video, and written materials) and, of course, twenty years of Loyola Conference binders (which I personally revisit on a regular basis). What we don't have is a central website for members to easily scan and access these materials and presentations.

As my first initiative as CRF Chair, the board instituted our first Technology Committee with the goal of updating our website to 2022 standards, creating a "members only" login to access the extended library, member benefits and other helpful tools (such as our directory, a communications portal to message members, and much more). We are also exploring the creation of a phone (app)lication, so you can access our most relevant information straight from your smartphone. We are really excited to get working on these projects and, of course, we welcome your input and suggestions. Feel free to email us at hollie@olsenmgmt.com with any suggestions or ideas.

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One year after the most significant impacts of COVID-19, the picture looks quite different.

In April of 2021, leisure and hospitality took the lead for the highest job gains in the nation.⁴ After a loss of about 61,000 jobs in January, March and April saw a total of 574,000 net jobs. Of those, 40,000 jobs were added directly to accommodations, the #2 growth sector for that period.

The pandemic remains an ongoing and volatile situation. It is impossible to predict how the emergence of the new Omicron variant may affect travel plans. However, it is clear the decimation of America's stock of distressed hotels, long predicted, has not come to pass.

Strong Signs of Recovery Show a Brighter Future for Hotels

As recently as late November of 2021, commercial real estate research platform CoStar noted that pre-inflation, U.S. hotel rates are keeping pace with demand.⁵ Occupancy continues to lag behind 2019 levels but reached a high of 62.9% in October, some 8.8% behind October 2019.

Likewise, U.S. hotel revenue per available room was down 7.6%, some \$84.75. But the average daily rate had climbed 1.2%, to \$134.78, a significant increase. Average daily rate growth is strong, even among less desirable midweek occupancies – they rose to 57% compared to 74% weekend occupancies.

What is more, 2021's spring and summer numbers saw robust improvement despite the challenging public health environment and a "summer surge" attributed to the more transmissible Delta variant.⁶ The pace of bookings has increased to the point where hotel lending is beginning to recover.

Hotel CMBS delinquencies have declined nearly to pre-pandemic levels, enabling a sharp increase in industry lending.⁷ Small leisure hotels in desirable beachfront areas have been strongly represented in new lending and many are reporting performance above their 2019 levels.

Hotel delinquencies reached their peak in December 2020, a level of 18.4%. As of August, they had fallen to 11.56%. Even at the highest peak of distress, it was still lower than delinquency rates during the Great Recession: Delinquencies reached 21% in September 2021.

On paper, the era of distressed hotels is over. Against all odds, distressed hotels stand out as the bubble that has never

popped. But as there are still significant forces standing in the way of a complete recovery, it is important to understand the remaining risks – and how they could play out in 2022.

Why Has the U.S. Hotel Recovery Bucked Predictions from Top Analysts?

Not all of the factors enabling low delinquency rates among hotels will last. As benefits related to COVID-19 subside, the industry could still face significant turmoil. That may include some of the financial upheavals that have, until now, been staved off through unusual cooperation with and by lenders.

The key factors that have kept hotels afloat include:

1. The Large Number of Paycheck Protection Plan (PPP) Loans

Of all those who took advantage of the Paycheck Protection Loan program available through the Small Business Administration, restaurants and hotels were the largest beneficiaries. Together, they drew about \$18 billion in PPP loans.⁸ Hospitality represented 18% of PPP loans issued by February 2021.

It is worthwhile to note that, when used for their intended purpose, PPP loans function as grants. They do not represent future obligations on hotels' balance sheets. The program required comprehensive documentation of business finances but had no other drawbacks that would reduce participation.

This substantial cash infusion combined with a sharp workforce reduction no doubt contributed a great deal to hotels' resilience, even among those with marginal performance going into the crisis. However, the PPP program is firmly in the rearview window and no additional help of the kind is forthcoming.

2. Generous Mortgage and Loan Forbearances

Mortgage and loan forbearances have been commonplace during the pandemic, whether backed by state and federal programs or lenders' own emergency policies. This has given many borrowers 6-12 months to catch up on their payments, leaving them free to focus on operational transformation in the meantime. An increasing number of hotels, however, will soon find that time is up.

3. Investor Cash and Capital

Where there are opportunities, investors are never far away. Such has been the case in the hotel industry, even with the high perceived risk early in the pandemic. A great deal of

WELCOME MESSAGE...

Continued from page 3.

Education Seminars

CRF members connect with monthly calls designed to keep you informed with developments in the rapidly changes receivership world. The next State Call Connect is scheduled for Tuesday, April 20th from 12:00 -1:00 pm via Zoom. Click here to connect <https://receivers.org/call-connect-042021>. Other educational events are hosted throughout the year. Check the website receivers.org for updates.

LOYOLA IX

And on April 28-29, we are hosting our showcase conference Loyola IX Symposium in Orange County at the Hyatt Regency, Orange County Airport. Please make sure to register and get your hotel booked. We have an amazing group of panelists, sponsors and hosts and you're not going to want to miss our showcase event. If you are interested in attending, sign up here <https://receivers.org/loyola9/> and if you're interested in sponsoring, please contact <https://receivers.org/loyola9/become-a-sponsor>.

FINALLY... Please Let us Know Your Ideas!

I will always leave my proverbial "door" open to all of our members and would love to hear your ideas for the CRF going forward. The CRF was founded in 1994 and it is up to all of us to ensure that it continues to evolve and grow intelligently. Feel free to reach the State Board at the following email address amy@olsenmgmt.com and we will make sure one of our State Board members gets back to you timely.

Thank you again for all of your continued support and enthusiasm, I look forward to a very productive 2022 and beyond.

Richard P. Ormond, 2022

State Board Chair, California Receivers Forum

Richard Ormond is the 2022 California Receivers Forum State Chair. He is a shareholder at Buchalter, APC and he is the founder of Ejudicate.com, an online dispute resolution platform. He can be reached at rormond@buchalter.com



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DISTRESSED HOTELS...

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capital was made available to buy hotels, energizing borrowers with capital even if their hotel value remained stagnant. In many cases, property values rose due to the high demand to buy hotels.

There Is Still Time for a Distressed Hotel Crisis to be Realized in 2022

Together, the influence of these factors on hotels' strategic picture went far beyond expectations. Now, lenders' patience is running out and federal emergency assistance is a thing of the past. This makes the new year of 2022 the potential flashpoint when financial distress begins to overwhelm hotels. If so, the first signs could be coming this winter, as new pandemic concerns lead to a winter travel slowdown, followed by lender forbearances expiring, and cash reserves from prior federal loan money all but dried up. Whether Receivers and their legal and real estate professionals see the impact and hotel receivership activities pick up may depend on the geographic locations of the hotels as much as anything. California hotels unlike their counterparts in other states have experienced higher occupancies, continued robust leisure travel, and an abundance of investor capital which may give pause to a lender

looking to foreclose as a potential default remedy. At the same time, these combined economic conditions offer debtors and lenders a way out of an inevitably distressed hotel asset that a receivership could manage and sell to make everyone financially whole in the end.

- 1, 2 Impact of COVID-19 on the Hospitality Industry and Implication for Operations and Asset Management, *Boston Hospitality Review*, June 2021
- 3 COVID-19's Impact on the Hotel Industry, *AH&LA*, November 2020
- 4 The Latest on Hotel Reopenings and Closings Due to Covid-19, *Northstar Meeting Group*, April 5, 2021
- 5 How the US Hotel Recovery Appears Different Than Past Cycles, *Hotel News Now*, November 22, 2021
- 6 Hotels Stride Closer to Recovery, Hurdles Left to Clear, *Hotel Management*, September 13, 2021
- 7 Hotel Lending Environment Recovers Alongside the Industry, *Hotel News Now*, October 14, 2021
- 8 Restaurants and Hotels Draw \$18B in PPP Loans, The Highest of Any Industry, *Restaurant Business*, February 11, 2021

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Environmental Hazards: Understanding Receivership Relief Options

BY RYAN BAKER*

Environmental issues can appear at many points within a property's ownership lifecycle. In many cases, the contamination is caused through no fault of the current property owner and can be traced back to former tenants or owners. Environmental contamination can be underlying for many years without ever being discovered, particularly as regulatory agencies have heightened their protocols and threshold limits in recent years. For example, a Phase II Environmental Site Assessment performed just a couple of decades ago would not have caught contaminants now overseen by regulating agencies, such as perchloroethylene, a common solvent used for dry cleaning and metal degreasing. A Phase II of years past would test only a site's soil, and not soil vapors; a change that causes problems today for owners who are now liable for newly detected contaminants.

Such contaminated sites may number as many as half a million nationally, according to estimates reported by CCIM (Certified Commercial Investment Members), with billions of dollars in property value that can be affected by these circumstances.

Receivership as a Creative Solution

Scenarios involving environmental remediation can present added layers of complexity for lenders who hold deeds of trust against contaminated properties, namely due to the risks and liability involved. Secured lenders are wary of foreclosing or becoming too involved with properties with environmental contamination, lest they end up in the chain of title and become the bearer of the often costly cleanup liability. Cleanup raises many questions from costs, to conforming with the California Environmental Quality Act (CEQA), to how long the cleanup may take.

A receiver can be a powerful tool in multiple ways. California Civil Procedure Code § 564(c) provides authority for a receiver to complete a property inspection and determine the presence and scope of hazardous substances and remedy the contamination allowing for consideration of next steps.

Further, a receiver can, if properly executed, spearhead the environmental remediation process, engaging with

regulators and signing necessary paperwork to enact the cleanup, without taking on the personal liability risk. To do so, it is extremely important any remediation work undertaken by the receiver be done pursuant to a court order that explicitly approves the receiver's remediation activities. When done under the auspices of the Court, California Rule of Court 3.1179 provides that a receiver is an agent of the Court and, as such, is entitled to quasi-judicial immunity – meaning not subject to the liability stemming from owning or operating a contaminated property as long as the actions of the receiver were carried out pursuant to the Court's orders.

In essence, a receiver is a creative solution that can shield liability associated with the property and mitigate risk while getting the property to a state where it may be sold, refinanced, or foreclosed upon.

Common Types of Environmental Remediation

There are numerous types of environmental contaminants, but generally with commercial and industrial properties they involve the following:

- **Perchloroethylene (PERC)**, or "PCE," is a common solvent used for dry cleaning and for decades has been used by many U.S. dry cleaners;
- **Petroleum hydrocarbon** is a contaminant commonly found around gas stations, due to the presence of chemical compounds related to the underground storage of gasoline and other materials;
- **Trichloroethylene (TCE)** is a halogenated aliphatic organic compound which, due to its unique properties and solvent effects, has been widely used as an ingredient in industrial cleaning solutions and as a universal degreasing agent.

Vetting and hiring the right environmental remediation consultant is critical to the success of the receivership. There are many remediation organizations, but hiring the one with the right experience, expertise, and knowledge, assists the receiver to cost-effectively and efficiently remediate the contamination.

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Another key player in environmental remediation scenarios is the local regulatory agency that will need to inspect and certify the property's state with respect to the presence of contaminants. In California, the main regulatory agencies are the California Regional Water Quality Control Board and the Department of Toxic Substance Control which will need to issue a No Further Action (NFA) letter to certify that remediation has been satisfied. Receivers also should note that California Civil Code §1471 and Water Code § 13307.1 allow the Water Board to require deed restrictions on properties in lieu of additional cleanup measures. Developing a relationship with the regulatory agency – where the receiver acts transparently and actively communicates progress and status updates – is paramount to developing

the trust needed to efficiently find the quickest path to a NFA letter.

The Role of the Receiver and Possible Outcomes

There are several possible endings to the receiver's work remediating environmental contaminants. These include:

Foreclosure, note sale, or a borrower refinance. In some instances, the receiver's work is to remediate the property to a point where the path to an NFA is clear, but not yet obtained, and the risk has been minimized. At this point, the lender may be comfortable foreclosing, or another lender may be sufficiently confident to buy the note or, less frequently, the borrower is able to refinance the loan with another lender.

Sale of the Property by the Receiver. In other scenarios, the receiver's assignment includes authority from the Court to sell the property to a third party. In these cases, the property typically needs to be close to an NFA or else the buyer will expect a significant discount on the purchase price to make up for the risk being taken on.

In either case, the goal is always to get a No Further Action certification from the regulatory authority that indicates remediation is complete to a satisfactory level. In partial remediation cases, the goal is to understand what is needed to get to that point, how long it will likely take, and what costs are anticipated for a future owner/lender.

While receivership assignments always carry their own unique challenges, environmental remediation scenarios need to be approached with an added level of consideration. This is of particular importance as environmental protection continues to remain in the spotlight both federally and on the state level. Maintaining familiarity with area remediation experts and requirements will assist receivers to effectively fulfill their duties.



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*Ryan Baker is Vice President of Douglas Wilson Companies. The company provides a wide range of specialized business, fiduciary, workout and real estate services throughout the country.



Ryan Baker

Cannabis Receivership Expert Witness: Roles, Scenarios and Outcomes

BY PETER INGERSOLL, CCIM



Practical Needs of the Cannabis Enterprise

For receivers or bankruptcy attorneys with no experience in cannabis, enlisting the help of a cannabis receivership expert witness supports the formation of a successful cannabis receivership. A cannabis receivership expert witness can highlight key economic, operational, and regulatory issues in drafting the cannabis receivership petition for the state court. Having all operational and financial issues reviewed and considered enhances the drafting of the language to secure a full scope of the authority needed to fulfill your obligations as a cannabis receiver.

A cannabis receivership expert witness can review operating agreements, leases, royalty, management and employment agreements, company organization structures, PPMs, and other documents associated with any capital raises and the formation of the business; and can render an opinion on whether the terms were or are reasonable and customary or whether they were or are flawed in some way.

What Is a Cannabis Receivership?

Unlike the products sold by traditional business, cannabis is categorized as a Scheduled Drug by the DEA, hence cannabis businesses are prohibited from filing bankruptcy in any Federal Court to restructure lease terms, shed debt, put litigation on hold, or arrange to recapitalize the business.

This designation leaves cannabis investors, creditors, and company founders without a way to methodically settle the disputes of a cannabis company nearing insolvency – except through lawsuits and counterclaims, which will likely destroy the business. Burdened with creditor claims, investor and founder disputes, and without access to working capital, even a licensed and compliant cannabis business may collapse.

A state-level cannabis receivership – in those states that allow it, like California, Oregon, Washington, and Massachusetts – is a valuable tool for investors, creditors, and cannabis company founders to mitigate damage from protracted legal battles that will limit or negate a company's profitability.

The role of a cannabis receivership expert witness is (1) to help the receiver settle all disputes and recapitalize the company, or (2) to help the receiver position the assets for auction to pay, creditors, investors, and the cannabis receiver's fee under a court-approved distribution agreement.

Rules vary from state to state.

The Three Scenarios of Cannabis Receiverships

- 1). **Investor Lawsuits.** Michael Muse-Fisher, a receivership attorney with the Buchalter law firm in Sacramento, says, "Oftentimes the investors want to right the ship because they think current management is doing a poor job. However, merely doing a poor job by management may not be a sufficient reason for courts to grant the appointment of a receiver when sought by an investor. Often, evidence of malfeasance (such as theft or self-dealing) may be required."
- 2). **Too Much Debt.** Blake Alsbrook, a veteran cannabis receiver with Ervin Cohen & Jessup LLP in Beverly Hills, says, "Receiverships are sought by creditors because they're trying to get their money back related to a default on an investment gone wrong."
- 3). **Founder Infighting.** Kevin Singer, president of Receivership Specialists in San Diego, indicates that he often sees "partners fighting over the control and management of the business."

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Sometimes all three of these types of disputes are happening simultaneously and frequently without written and/or signed governing documents, such as corporate bylaws, partnership, or LLC operating agreements. In many instances, it is unclear who owns what. A cannabis receivership expert witness can offer an opinion on the most likely reasons the business failed, including whether malfeasance had a role in its demise, or whether the failure was simply based on a misguided business model or other reason.

The Cannabis Receiver's Authority

Any authority given to a cannabis receiver is granted by the state court located in the appropriate jurisdiction.

The drafting of the petition by the cannabis receiver to create the receivership must be performed with care and an understanding of the specific needs of the cannabis business, the extent of the claims versus value and viability of the business, any cannabis licensing transfer issues, all local and state cannabis regulations, unpaid taxes, local or state compliance violations that must be addressed, any off-balance-sheet transactions, hidden debt or hidden investors, accuracy of cash levels and inventory control – just to name a few potential issues.

Once appointed, a cannabis receiver has the authority to hire an accountant or other professionals to sort out the books, count the cash, and verify inventory and other assets to provide financial reports to the court, the creditors, and all parties of interest – including an opinion of value. A cannabis receiver will often hire an operations manager and/or onsite managers to oversee the company's day-to-day operations, thereby safeguarding all assets and protecting the business for the benefit of creditors. A cannabis receivership expert witness can work alongside a receiver or attorney with no cannabis experience to outline the operational and business needs to be drafted into the receivership petition and can also review financial statements, audit operations, and, if there is enough financial information, give an opinion of value of the cannabis enterprise.

Blake Alsbrook states, "A neutral receiver, directed by the court, can be a stabilizing force for a business to steady the ship while the individual creditors and owners settle their litigation."

Securing the Receiver's Fee

Even though the cannabis receiver's fee is senior to that of other lienholders, the economic viability of the cannabis company in question is very important.

With the court's authority, a cannabis receiver can negotiate with creditors, landlords, investors, and founders to find workable solutions. Unlike in a bankruptcy proceeding, a cannabis receiver cannot force a settlement upon any of the parties, but rather acts as a clearinghouse to organize claims against the business and mediate among rival factions. If all attempts to reach an agreement fail, the only option is to auction the assets – assuming the assets still have any value. While a cannabis receiver cannot revive a dead company, he or she can often mitigate economic collapse and return a viable company to solid financial footing. A cannabis receivership expert witness can be

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utilized to create a recapitalization and reorganization plan to be implemented during receivership and continued after sale to maximize the value of the asset.

In summary, a receiver's powers can be quite broad, depending on what authority the court grants. Armed with this authority, it is this cannabis receiver's job to balance the interests of the parties involved and reach a solution that will staunch the bleeding red ink and preserve the value of the business.

The Cannabis Receivership End Game

If the business is still viable, a receiver can help get the business back on track – sometimes in better shape than when the cannabis receivership appointment was approved by the court.

If the cannabis business cannot be saved – due to the inability of current management to strike an agreement with creditors or investors, or for any other reason – and the

assets still have value, the next step is to sell the assets as quickly as possible for the highest price. This happens via a court-supervised auction to pay the creditors a portion of what they are owed, usually on a pro rata basis.

REFERENCES

A big thank you to the following individuals for allowing me to interview them for this article.

- 1) Michael Muse-Fisher, with Buchalter
- 2) Blake Alsbrook, with Ervin Cohen & Jessup, LLP
- 3) Kevin Singer, founder of Receivership Specialists

**Peter Ingersoll is a cannabis real estate and investment thought leader. Managing director and cannabis product chair of the first national real estate firm to embrace cannabis as legitimate investment sector. Expertise in cannabis including financing, investments, 1031 exchanges, sale-leasebacks, partner disputes, receiverships, investor disputes, and unregistered securities litigation. Former Series 65 registered investment advisor. Graduate of Wharton School – University of Pennsylvania.*



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PROFESSIONAL PROFILE:

Michael Brumbaugh

BY HOLLIE GRIMALDI FLORES



Mike Brumbaugh is the owner and president of MBI Consulting Group, Inc. (MBI) with over 30 years of experience in the real estate development, construction, and lending/finance industry. His knowledge provides a comprehensive and cost-effective approach as a court appointed Receiver

to rents and profits, equity, post-judgment, and health and safety code receiverships. As a Licensed Professional Fiduciary for both Probate and Trust administration, Mike has been an expert witness, court-appointed provisional director, and a partition referee. He serves as a director of the Sacramento Valley Chapter of CRF and has been a Licensed Professional Fiduciary since 2015.

Why did you decide to pursue work as a Receiver?

I got a call from an attorney/friend who said he had a half-developed condominium project that needs to be completed. He represented a bank that wanted to finish out the project, but they needed someone with construction and development experience who could oversee the completion of the entire project. He said he needed a receiver and I said, "What's a receiver?" I had limited knowledge at that time. I went out and did some due diligence and that conversation prompted me to become a Licensed Professional Fiduciary.

What qualities do you possess that make you a good Receiver?

That's a loaded question! I think it is primarily my knowledge and expertise in running a business and also my background in real estate development and construction.

What do you like about the role of Receiver?

It's challenging. Every case is different. I enjoy problem solving and I enjoy trying to find all the answers that are out

there- the solutions that are going to create the best recovery for the receivership itself. Finding solutions for both sides that work out well.

And the flipside, what do find to be the most challenging or least rewarding part?

Post judgement receiverships can be a bit challenging if the defendants hide money or assets. It becomes a challenge to find those assets to turn those into cash so the plaintiffs can be made whole. Unfortunately, often times they are not made whole. My experience is that it can be pretty tough when defendants have squandered assets and you end up looking for assets that may not be there.

I should tell you I had blond hair when I started as a receiver, I now have white hair. Part of that is experience and part of that is the job!



The Brumbaugh Family

Why are you involved with CRF?

As soon as I got the call from my attorney friend, I thought maybe I should do some research. I typed in "Receivership," and California Receivers Forum popped up. I went to the 2009 conference at Loyola, met several people and then got involved in the Sacramento Chapter. I enjoyed it and everyone was so helpful.

The knowledge and expertise of the other receivers and attorneys that you meet is immeasurable. The *Receivership News*

Continued on page 15...

PROFESSIONAL PROFILE...

Continued from page 14.



On the slopes. Mike taught each of his daughters and all the grandchildren to ski.

Receiver and family is a priority. When not on the job, look for him on the slopes of the Sierra Nevada.

articles and updated information and the conferences keep you fresh and knowledgeable as things change. It helps you understand what you need to know so you are doing the best job you can as a receiver.

What are you doing when you are not working?

I've been skiing since I was six years old. I have three grown daughters and eight grandchildren. I taught my kids and every one of my grandkids how to ski. However, much to my chagrin, some of my grandchildren prefer snowboarding.

Married for 48 years, Brumbaugh continues to enjoy his work as a



Mike and Becky relaxing on a family vacation.

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Ask The Receiver

BY PETER A. DAVIDSON*

Q I was a receiver in a state court health and safety case. I have been sued by a third party who is unhappy with the outcome. I sold the property involved to a developer, who will be building a homeless shelter next to plaintiff's business. Plaintiff's sister, who owned the property, got nothing from the sale. The sister is also suing me. Can they do that? I thought I have judicial immunity.

A The federal courts have repeatedly held that, so long as they were acting within the scope of their order of appointment, receivers have quasi (also called derived) judicial immunity. Recently, the Third Circuit joined the First, Second, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits so holding. See *Trinh v. Fineman*, 9 F. 4th 235 (3rd Cir. 2021). See also, 75 C.J.S. Receivers §184 (2021).

Receivers in state court also have quasi-judicial immunity, although there does not appear to be a reported California case that explicitly so holds. There are, however, a number of unreported cases that do. See *Gruntz v. Wiley*, 2009 WL 4264343 (2009) ["Gruntz"]; *Haider v. Speier*, 2012 WL 4101944 (2012) ["Haider"]; *Palmieri v. LaBella*, 2016 WL 3876524 (2016). See also *Asset Managements Systems, Inc. v. White, Zuckerman, Warsavsky & Luna*, 2002 WL 724925 (2002) (court appointed referee).

In *Gruntz*, Wiley was actually a court-appointed special master. Gruntz, however, contended Wiley acted as a receiver and, therefore, had liability for not having purchased workers compensation insurance for Gruntz's business, an asset in the divorce case in which Wiley was appointed. The court held, assuming Wiley was acting as receiver, he had quasi-judicial immunity "because (1) multiple federal circuit courts have concluded the same; (2) California courts often rely on federal courts when examining immunity issues; and (3) in accord with the *Howard* court '[w]e are persuaded that the approach of the federal courts is consistent with the relevant policy considerations of attracting to an overburdened judicial system the independent services and expertise upon which that system necessarily depends.'" *Gruntz* at *3 (citations omitted).

The reference to *Howard* is *Howard v. Drapkin*, 222 Cal. App. 3d 843, 901 (1990) where the court, citing federal cases holding that receivers and the court appointees have quasi-judicial immunity, held: "Thus, we believe it appropriate that these 'nonjudicial persons who fulfill quasi-judicial functions intimately related to the judicial process' should be given absolute quasi-judicial immunity for damage claims arising from their performance of duties in



connection with the judicial process." (citations omitted).

In *Haider*, Speier had been appointed referee in a partition action, but he also under-took actions as a receiver. The defendant sued Speier contending he committed fraud and conspiracy by agreeing with the other party to inflate his fees; using fraudulent billings; fraudulent accountings related to the property's sale; and delaying the sale so he could obtain more rental income. The court held that because the complaint was directed at acts "performed solely within the course of Speier's court-appointed work as the referee and/or receiver *** quasi-judicial immunity... acts as an absolute bar to Haider's claims..." *Haider* at * 34. The court quotes *Regan v. Price*, 131 Cal. App. 4th 1491,1495 (2005), stating that "The privilege of judicial immunity applies not only to judges, but to all persons who act in a judicial capacity, such as court commissioners and court-appointed referees performing subordinate judicial duties." *Haider* at *4. It also cites to *Howard*, *supra*. And states such immunity includes receivers. *Id.*

The interesting aspect of the three cases is that in each, the receiver raised the immunity issue by filing a motion to strike the complaint pursuant to C.C.P. § 425.16, commonly known as the anti-SLAPP (strategic lawsuit against public participation) statute. Using the anti-SLAPP statute to challenge suits against a receiver has a number of advantages. First, resolution is put on a fast track. The motion to strike takes precedence over virtually all other proceedings, generally requiring the motion to be filed within 60 days after service of the complaint, with the "merits" hearing to take place with 30 days thereafter (unless the court's calendar requires a later hearing). C.C.P. § 425.161(f). Second, discovery is stayed from the filing of the motion until it is decided, except on a noticed motion for "good cause." C.C.P. § 425.16(g). Third, if the receiver shows the claims arise from protected activity covered by the statute, the burden shifts to the plaintiff to establish there is a "probability" of prevailing on the merits of the claims. In effect, it becomes a reverse summary judgment motion that

Continued on page 17...

requires the plaintiff, at the very beginning of the case, to demonstrate he or she has a legally and factually sufficient claim that is substantiated by competent, admissible evidence. C.C.P. § 425.16(b)(1) & (2). Protected activity is defined, in part, as including “any written or oral statement or writing made before a ...judicial proceeding...” or “any written or oral statement or writing made in connection with an issue under consideration or review by a ...judicial body...” C.C.P. § 425.16(e). The statute specifically states; “this section shall be construed broadly.” C.C.P. § 425.16(a). Finally, if the receiver’s motion to strike is successful, not only is the complaint dismissed, with no right to amend, but the receiver is entitled to his or her attorney’s fees and costs incurred in defending the action. If the receiver is unsuccessful, the plaintiff is not entitled to attorney’s fees, unless the court finds the motion to strike was “frivolous or is solely intended to cause unnecessary delay.” C.C.P. § 425.16(c).

In *Haider*, the court found the complaint arose from protected activity because it arose from Speier’s actions in the partition case and was “directed at those types of acts performed within the course of Speier’s court approved work as the referee and/or receiver in the...action.” *Haider* at *3. In *Gruntz* the court noted there was no dispute that the first prong (protected activity) of the anti-SLAPP analysis was met. *Gruntz* at *2. In each case the burden then switched to the plaintiff to establish, by competent, admissible evidence, “a probability that he or she will prevail on the claim.” C.C.P. § 425.16(b)(1). Neither could do so in the face of the courts’ conclusions that the receiver had quasi-judicial immunity.

When bringing an anti-SLAPP motion to strike, a receiver should not rely only on the immunity defense, but should also raise any other applicable legal defense and privilege, because the plaintiff must establish probability of prevailing on the merits. These could include, as the court in *Haider* held, the litigation privilege (Civil Code § 47(b)(2)), which would cover any written or oral communications relating to the receiver’s performance of his or her duties (*Haider* at *4); statute of limitations; and, if the plaintiff was a party in the receivership case, *res judicata* with regard to any of the receiver’s acts specifically approved or ratified by the court, which may include the court’s approval of the receiver’s final account and report, approval of final fees and discharge of the receiver.

A The defendant is correct that the Code of Civil Procedure requires the applicant seeking the *ex parte* appointment of a receiver to post a bond. C.C.P. § 566(b). There are actually two possible bonds, beside the bond the receiver may have to post, because most receivership orders include injunctions prohibiting the defendant, or others, from taking certain actions (i.e. collecting rents, interfering with the receiver, transferring assets, etc.). C.C.P. § 529(a) states, in part: “On granting an injunction, the court or judge must require an undertaking on the part of the applicant to the effect that the applicant pay to the party enjoined any damages...if the court finally decides that the applicant was not entitled to the injunction.” Because both statutes use the word “must”, bonds are required, unless the court or the parties specifically waive them. Note: bonds are not statutorily required for a temporary restraining order, but courts have discretion to require them. *City of South San Francisco v. Cypress Lawn Cemetery Assn.*, 11 Cal. App. 4th 916, 920 (1992) (“Notwithstanding that it is ‘a restraint of the same nature as an injunction’ a TRO stands on a different statutory footing and can be valid in the absence of a posted security. The Supreme Court has, however, repeatedly stated that ‘the better practice would be to require an undertaking upon the granting of such an interim restraining order.’” (citations omitted).

Irrespective of the clear statutory commands, the defendant is wrong in its contention that your appointment is void, because there is a statutory exception. C.C.P. § 995.220 states that, “Notwithstanding any other statutes” including statutes seeking the “issuance of a restraining order or injunction, appointment of a receiver...” certain listed public entities and officers are not required to give a bond and are to be treated as if they did. The listed entities include the State of California and any agency, department, division, commission, or board of the state. It also includes the “people of the state.” So if actions are brought on behalf of the “People of the State of California,” which is how many criminal and civil enforcement cases are brought, they also are exempt. The statute also applies to a county, city or district or public authority or agency, and as one might expect, the United States or an instrumentality or agency of the United States.

Q I was appointed receiver, on an *ex parte* basis, in a fraud case filed by a state agency. One of the defendants is contending my appointment is void because no *ex parte* bond was ever filed. Is this correct?

*Peter A. Davidson is a Partner of Ervin Cohen & Jessup LLP a Beverly Hills Law Firm. His practice includes representing Receivers and acting as a Receiver in State and Federal Court.



Peter A. Davidson



Debt Modifications

BY CHAD C. COOMBS*

Should a receiver, such as an equity receiver in a receivership of a large business, seek to modify any of the terms of an existing debt, even if just to alter the timing of payments or adjust the interest rate, one of the first things the receiver should do is obtain tax guidance. The problem is that when a debt modification is considered significant for income tax purposes, the modification is deemed to be a taxable exchange of the old debt for a new, modified debt.¹ Depending on the facts and circumstances, such a deemed debt-for-debt exchange could result in harsh tax consequences for both the debtor and the creditor.

The debtor, for example, could immediately recognize cancellation of debt income which is treated as ordinary income. The deemed debt-for-debt exchange could also create original issue discount² which the debtor would accrue and deduct over the remaining life of the debt, but even this deduction could be reduced by certain limits on interest expense deductions.³

On the other side, the creditor could immediately recognize a gain or loss on the debt, but any loss on the debt might not produce a measurable tax benefit (which could depend on the nature of the loss and the creditor's other tax circumstances). And the creditor must accrue as ordinary income any original issue discount created on the deemed debt-for-debt exchange.

Receivers need to be mindful of such potential tax consequences when altering a debt, especially in receiverships of individuals and taxable entities such as C corporations for which the receiver is responsible for filing the income tax returns and paying taxes.⁴ Receivers of tax flow-through entities such as S corporations or partnerships also need to proceed cautiously when a debt is modified. Depending on the nature of the receivership, a receiver may want to avoid negative tax consequences to the owners. Moreover, an S corporation or a partnership could itself incur an income tax on such transactions. For example, in California, an S corporation is subject to a 1.5% state income tax on California source income. And a partnership may be subject to income tax under the new partnership audit rules.⁵

For cancellation of debt income, the good news is that there are certain exclusions from tax that could apply.⁶ One such exclusion is the insolvency exception whereby an individual or corporate debtor (including an S corporation) does not recognize cancellation of debt income to the extent that it is insolvent, that is, its total liabilities exceed the fair market value of its assets immediately before the



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discharge of the debt. If the debtor is a partnership, the exclusion only applies at the partner level as any cancellation of debt income would flow-through to the partners. Thus, the partners to whom the cancellation of debt income is allocated must be insolvent.

Even if the insolvency exception applies, it comes at a price. The debtor (or partner) must reduce certain tax attributes, such as any net operating loss carryovers or the tax bases of its assets, at the beginning of the next tax year. In such case, the debtor could lose valuable tax attributes it may later need to avoid taxes, and thus the timing of a debt modification could be important.

But what changes to a debt potentially trigger such tax consequences? The first step is to determine whether the proposed actions constitute a modification of the debt. In general, a modification is any alteration of a legal right or obligation.⁷ However, a debt modification does not include an agreement to forbear from taking action to collect on the debt for up to two years after the debtor's initial default and any additional time in which the parties negotiate in good faith or the debtor is in a bankruptcy or similar case such as a receivership.⁸

The next step is to determine whether the debt modification is significant as only significant debt modifications result in a deemed debt-for-debt exchange. The tax regulations provide certain safe harbors for how far one can go before a modification is deemed significant.⁹ These safe harbors include changes in payment due dates, interest rates, obligors, the recourse nature of the debt and security for the debt. Debt modifications not covered by a safe harbor are deemed significant only if, based on all facts and circumstances, the legal rights or obligations that are altered and the degree to which they are altered are economically significant.¹⁰

In any case, due to the complexity of the debt modification rules and potential tax consequences, a receiver should call upon a tax adviser once any negotiations begin and certainly before any agreement is reached and even seek court approval of the debt modification or instructions if appropriate or helpful. Such tax review and court approval can help protect the receiver and avoid unwanted surprises.

¹ Treasury Regulation Section 1.1001-3.

² A simple example of original issue discount is a savings bond that one purchases for \$25 and which provides for a single payment of \$100 at maturity. The \$75 difference is original issue discount.

³ See Internal Revenue Code Section 163(j).

⁴ See Internal Revenue Code Section 6012(b) and Treasury Regulation Section 1.6012-3 regarding the filing obligations for receivers of corporations and individuals. See Internal Revenue Code Section 6151(a) and 28 U.S.C. Section 960 regarding a receiver's obligation to pay taxes reported on returns the receiver is required to file. Under 31 U.S.C. Section 3713, the receiver may also be personally liable in certain circumstances for failing to pay such federal income taxes.

⁵ See Coombs, Partnership Audit Rules Bring Changes for Receivers and Partners, California Receivership News, Issue 69, p.18 (Summer 2020).

⁶ Internal Revenue Code Section 108.

⁷ Treasury Regulation Section 1.1001-3(c).

⁸ Treasury Regulation Section 1.1001-3(c)(4).

⁹ Treasury Regulation Section 1.1001-3(e)(2)(6).

¹⁰ Treasury Regulation Section 1.1001-3(e)(1).



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On The Road Again: California Receiverships In A Shifting Landscape

The rescheduled Loyola IX Symposium will be held April 28-29, 2022, at the Hyatt Regency John Wayne Airport in Orange County. The theme of the Symposium this year is *On The Road Again: California Receiverships In A Shifting Landscape*. The high caliber programs at the conference will focus on the impact of COVID-19 on the receivership industry and recent developments and case law impacting receiverships in California.

We are kicking off the conference with a Welcome Dinner on Thursday, April 28, 2022, and we are excited to welcome back **Chris Thornberg**, founder of Beacon Economics, as our Keynote Speaker following the dinner. Chris is an expert in economic and revenue forecasting, regional economics, economic policy, and labor and real estate markets. He became nationally known for forecasting the subprime mortgage market crash that began in 2007 and was one of the few economists on record to predict the global economic recession that followed. We are looking forward to hearing his discussion about how the economic implications of COVID-19 are expected to affect our industry moving forward.

We are excited to announce our new Keynote Speaker on Friday April 29th, will be the **Honorable Judge Mitchell L. Beckloff**. Judge Beckloff was featured in *Receivership News* in December 2020. You can read more about him by following this link. <https://receivers.org/recnews/ArticlePage.php?id=406&keywords=>

Judge Beckloff will undoubtedly deliver a great presentation with lots for us to think about.

As originally scheduled, two titans in the receivership industry, **Doug Wilson** and **Joel Weinberg**, will also be discussing their analysis of receiverships as a result of COVID-19, where they see the industry headed, and what areas are likely to see the most impact and increase on the need for receiverships as a result of COVID-19.

Other programs will include, among other things, a discussion on cannabis-related receiverships, partnership disputes and partition actions, post-judgment and family law receiverships, receiverships in the hospitality industry, and restructuring debt and equity receiverships.

For those new to the industry or looking for a refresher, we are also including a Receiverships 101 session, going over basics that all receivers need to know.

The Symposium will also feature more than ten sponsored luncheon table discussions on a variety of contemporary topics for newer or veteran receivers and their counsel.

We will close out the Symposium with a fun, Mexican Fiesta. Enjoy great music, fun games and delicious food and drink while networking with colleagues, sponsored by the Receivers Young Professionals. Be sure to register for the Loyola IX Symposium today at <https://receivers.org/loyola9/>.

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Heard in the Halls: NOTES, OBSERVATIONS, AND GOSSIP RELAYED

BY MICHAEL J. MUSE-FISHER*

Welcome to the latest edition of *Heard in the Halls*. Please provide your snippets of news, questions or comments about receivership issues or the professional community by telephone, mail, fax, or email to: Michael J. Muse-Fisher at Buchalter, A Professional Corporation, 500 Capitol Mall, Suite 1900, Sacramento, CA 95814; Phone: (213) 891-0700; Fax: (213) 896-0400; Email: mmuse-fisher@buchalter.com



Here is what we have *Heard in the Halls* ...

- **Loyola IX Symposium – My God It’s Really Happening.** As a result of the Omicron surge, Loyola IX Symposium was rescheduled for April 28-29, 2022 at the same location, the Hyatt Regency, John Wayne Airport, so mark your calendars. The California Receivers Forum, in Conjunction with Loyola Law School of Los Angeles, is proud to bring back the mother of all Receivership Events, after a year absence due to COVID-19. The topics will be far ranging, and the presenters are some of the best in the industry, including a panel of esteemed judges who oversee Receivership Courts in California. This is a must-attend event, and Registration is open, so make sure to sign up at <https://receivers.org/>.
- **Thank You, Good Sir – A Heartfelt Thank You to the Outgoing Chair of the CRF, Gerard Keena.** The CRF is eternally grateful for **Gerard Keena’s** efforts as the Chair of the Board of the CRF over the last year, as he helped steer CRF to new heights, even in spite of the difficulties created by COVID-19. Gerard is the President of Bay Area Receivership Group, with extensive experience as a receiver, with specialties in property management and business transactions. He will still be involved with the Board, but if you have not reached out to him to say “thank you,” in your own way, he can be reached at gkeena@bayarearg.com.
- **Ormond Killed the Radio Star.** Taking over as the new Chair of the Board of the CRF is the one, the only, **Richard Ormond**, the litigator and receiver extraordinaire, twice voted as having the best hair in all of the CRF. Out of the gates, Mr. Ormond has stated that one of his primary goals is to update the CRF’s technology footprint to benefit practitioners, vendors, and servicers of the California Receivership world. If you have any ideas or input on accomplishing this hefty task, or if you just want to congratulate Richard on the new role, feel free to email him at ROrmond@buchalter.com.
- **Get to Know the Receivers and Their Teams:** Everyone in the California Receivership world knows of Douglas Wilson Companies (DWC). Mr. Wilson, after all, is one of the preeminent receivers in California. But you may not know one of the new (and relatively rare mustacheless) faces at DWC, **Daniel Miggins**. Daniel joined DWC in July 2021, as the Director of Business Development, and has already become an invaluable member of the CRF, taking an active role in planning the Loyola IX Symposium and assisting with the development of new members for the CRF. Daniel has an extensive background in Residential and Commercial Real Estate. His expertise spans the entire value chain within the capital markets, from origination through workouts and special servicing. Send Daniel a “welcome” note, at dmiggins@douglaswilson.com.
- **Spread the Word:** Know someone thinking about getting started in receivership work? Steer them to **www.receivers.org** to order a past Loyola program 4-disc DVD set for \$75 teaching receivership basics and including sample pleadings.

***Michael J. Muse-Fisher** is a Shareholder at Buchalter, A Professional Corporation. Mr. Muse-Fisher specializes in creditor’s rights, real estate disputes, corporate and partnership disputes, copyright and trademark disputes, cannabis law, and alternatives to bankruptcy. Representative clients include regional and national lending and financial institutions, state and federal receivers, and companies ranging from family-owned operations to Fortune 500 corporations.



Michael J. Muse-Fisher



California
Receivers
Forum

*On the Road Again:
California Receivership In A Shifting Landscape*



**WHY ATTEND LOYOLA IX
EDUCATIONAL SYMPOSIUM**

- **LEARN** new strategies that lead to better business results
- **HEAR** from CA judges their thoughts on receiverships
- **EARN** up to 8 hours of MCLE credit
- **ENGAGE** with industry experts and build valuable business relationships

new date • new keynote • register now

*Loyola IX is Presented in Conjunction with
Loyola Law School of Los Angeles*



Loyola Law School
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**Loyola
IX**

April 28-29, 2022

Hyatt Regency
John Wayne Airport
4545 MacArthur Blvd.
Newport Beach
California 92660



**Welcome Dinner
with Economist
Christopher Thornberg**



**New Keynote Speaker:
Hon. Mitchell L. Beckloff**

**Register today at:
www.receivers.org/loyola9**



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