

42 F.3d 942, 63 USLW 2492, 18 Employee Benefits Cas. 2825, Pens. Plan Guide (CCH) P 23905R
(Cite as: **42 F.3d 942**)



United States Court of Appeals,
Fifth Circuit.
Rebecca T. HUBBARD and Jim Hubbard,
Plaintiffs-Appellants,
v.
BLUE CROSS & BLUE SHIELD ASSOCIATION,
et al., Defendants,
Blue Cross & Blue Shield Association, Defendant-
Appellee.

Nos. 92-2903, 92-2908.
Jan. 12, 1995.

Beneficiary under ERISA-regulated health benefits plan brought state law fraudulent inducement claims in state court against corporation administering licensing of “Blue Cross” and “Blue Shield” registered trademarks, alleging that insured relied upon guidelines promulgated by corporation to make determinations as to whether medical treatments were excluded from coverage and that corporation distributed advertisements designed to promote insurer as honest and forthright company. Corporation removed case to federal court. The United States District Court for the Southern District of Texas, [Norman W. Black](#), Chief Judge, entered summary judgment in favor of corporation on both of beneficiary's claims, and appeal was taken. The Court of Appeals, [DeMoss](#), Circuit Judge, held that: (1) beneficiary's secret guidelines claim was preempted by ERISA; (2) ERISA provided no remedy with respect to secret guidelines claim; and (3) beneficiary's advertising claim was not preempted by ERISA.

Affirmed in part; reversed and remanded in part.

West Headnotes

[1] Removal of Cases 334 **25(1)**

334 Removal of Cases

334II Origin, Nature, and Subject of Controversy

334k25 Allegations in Pleadings

334k25(1) k. In General. **Most Cited**

Cases

Ordinarily, preemption of state law by federal law is defense to plaintiff's state law claim and, therefore, cannot support federal removal jurisdiction under the well-pleaded complaint rule.

[2] States 360 **18.7**

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.7 k. Occupation of Field. **Most**

Cited Cases

Complete preemption exists when federal law occupies an entire field, rendering any claim plaintiff may raise necessarily federal in character.

[3] Removal of Cases 334 **25(1)**

334 Removal of Cases

334II Origin, Nature, and Subject of Controversy

334k25 Allegations in Pleadings

334k25(1) k. In General. **Most Cited**

Cases

Because ERISA preemption is so comprehensive, it can provide sufficient basis for removal to federal court even though it is raised as a defense, notwithstanding the well-pleaded complaint rule. Employee Retirement Income Security Act of 1974, § 2 et seq., as amended, **29 U.S.C.A. § 1001** et seq.

[4] Federal Courts 170B **595**

170B Federal Courts

170BVIII Courts of Appeals

170BVIII(C) Decisions Reviewable

170BVIII(C)2 Finality of Determination

170Bk585 Particular Judgments, Decrees or Orders, Finality

170Bk595 k. Summary Judgment;

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Judgment on Pleadings. [Most Cited Cases](#)

Court of Appeals reviews summary judgment de novo, under the same standard employed by district court, affirming if there is no genuine issue of material fact and movant is entitled to judgment as a matter of law. [Fed.Rules Civ.Proc.Rule 56\(c\)](#), 28 U.S.C.A.

[5] Labor and Employment 231H 407

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(A) In General

231Hk407 k. Preemption. [Most Cited](#)

Cases

(Formerly 296k22)

States 360 18.51

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.45 Labor and Employment

360k18.51 k. Pensions and Benefits.

[Most Cited Cases](#)

State law causes of action are barred by ERISA's preemption clause if state law claim addresses area of exclusive federal concern, such as the right to receive benefits under terms of ERISA plan, and claim directly affects relationship between the traditional ERISA entities-employer, plan and its fiduciaries, and participants and beneficiaries. Employee Retirement Income Security Act of 1974, § 514(a), as amended, 29 U.S.C.A. § 1144(a).

[6] Labor and Employment 231H 407

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(A) In General

231Hk407 k. Preemption. [Most Cited](#)

Cases

(Formerly 296k22)

States 360 18.51

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.45 Labor and Employment

360k18.51 k. Pensions and Benefits.

[Most Cited Cases](#)

Language of ERISA preemption clause is deliberately expansive. Employee Retirement Income Security Act of 1974, § 514(a), as amended, 29 U.S.C.A. § 1144(a).

[7] Labor and Employment 231H 407

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(A) In General

231Hk407 k. Preemption. [Most Cited](#)

Cases

(Formerly 296k22)

States 360 18.51

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.45 Labor and Employment

360k18.51 k. Pensions and Benefits.

[Most Cited Cases](#)

For purposes of ERISA's preemption clause stating that ERISA supersedes any state laws insofar as they may "relate to" any employer benefit plan, state cause of action "relates to" employee benefit plan whenever it has connection with or reference to such a plan. Employee Retirement Income Security Act of 1974, § 514(a), as amended, 29 U.S.C.A. § 1144(a).

[8] Labor and Employment 231H 407

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(A) In General

231Hk407 k. Preemption. [Most Cited](#)

Cases

(Formerly 296k22)

States 360 18.51

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360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.45 Labor and Employment

360k18.51 k. Pensions and Benefits.

Most Cited Cases

ERISA preempts state law cause of action brought by plan beneficiary against plan insurer alleging improper processing of claim for plan benefits. Employee Retirement Income Security Act of 1974, § 514(a), as amended, 29 U.S.C.A. § 1144(a).

[9] Insurance 217 ☞1117(3)

217 Insurance

217III What Law Governs

217III(B) Preemption; Application of State or Federal Law

217k1102 Particular Laws or Activities

217k1117 Employee Benefits

217k1117(3) k. Health Care Benefits.

Most Cited Cases

(Formerly 184k31)

States 360 ☞18.15

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.15 k. Particular Cases, Preemption or Supersession. **Most Cited Cases**

State law fraudulent inducement claim by beneficiary under ERISA regulated health benefits plan that corporation administering licensing of “Blue Cross” and “Blue Shield” registered trademarks generated and disseminated to insurer guidelines or criteria and that insurer looked to and relied upon these guidelines to make determinations concerning whether specific medical treatments were excluded from coverage “related to” employee benefit plan and, therefore, was preempted by ERISA. Employee Retirement Income Security Act of 1974, § 514(a), as amended, 29 U.S.C.A. § 1144(a).

[10] Labor and Employment 231H ☞643

231H Labor and Employment

231HVII Pension and Benefit Plans

231HVII(K) Actions

231HVII(K)3 Actions to Enforce Statutory or Fiduciary Duties

231Hk643 k. In General. **Most Cited**

Cases

(Formerly 296k83.1)

ERISA provided no remedy with respect to state law fraudulent inducement claim by beneficiary under ERISA-regulated health benefits plan that corporation administering licensing of “Blue Cross” and “Blue Shield” registered trademarks generated and disseminated to insurer guidelines or criteria and that insurer relied upon these guidelines to make determinations concerning whether specific medical treatments were excluded from coverage. Employee Retirement Income Security Act of 1974, § 2 et seq., as amended, 29 U.S.C.A. § 1001 et seq.

[11] Insurance 217 ☞1117(3)

217 Insurance

217III What Law Governs

217III(B) Preemption; Application of State or Federal Law

217k1102 Particular Laws or Activities

217k1117 Employee Benefits

217k1117(3) k. Health Care Benefits.

Most Cited Cases

(Formerly 184k31)

States 360 ☞18.15

360 States

360I Political Status and Relations

360I(B) Federal Supremacy; Preemption

360k18.15 k. Particular Cases, Preemption or Supersession. **Most Cited Cases**

ERISA did not preempt state law fraudulent inducement claim by beneficiary under ERISA-regulated health benefits plan that corporation administering licensing of “Blue Cross” and “Blue Shield” registered trademarks distributed advertisements designed to promote insurer as honest and

forthright company, that beneficiary relied upon images created by such advertising and was thereby induced to acquire services of insurer, and that beneficiary was damaged by advertising in that she relied on assurances of quality coverage and, thus, chose not to procure other insurance coverage to insure that expensive medical treatments for cancer could be paid for. Employee Retirement Income Security Act of 1974, § 514(a), as amended, 29 U.S.C.A. § 1144(a).

[12] Federal Courts 170B 14.1

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk14 Jurisdiction of Entire Controversy; Pendent Jurisdiction

170Bk14.1 k. In General. Most Cited

Cases

Federal district court may entertain state law claims pursuant to its supplemental jurisdiction provided that claims arise from case or controversy over which district court had original jurisdiction. 28 U.S.C.A. § 1367.

[13] Federal Courts 170B 18

170B Federal Courts

170BI Jurisdiction and Powers in General

170BI(A) In General

170Bk14 Jurisdiction of Entire Controversy; Pendent Jurisdiction

170Bk18 k. Validity or Substantiality of Federal Claims and Disposition Thereof. Most Cited Cases

When all federal claims are dismissed, district court enjoys wide discretion in determining whether to retain jurisdiction over the remaining state law claims.

*944 Jeff Murphrey, Tekell, Book & Matthews, Houston, TX, for appellants.

Denise A. Bretting, Daniel J. Sheehan, Jr., Sheehan, Young & Culp, P.C., Dallas, TX, for appellee.

Appeal from the United States District Court for the Southern District of Texas.

Before JONES and DeMOSS, Circuit Judges, and SCHWARTZ, District Judge.^{FN*}

FN* District Judge for the Eastern District of Louisiana, sitting by designation.

DeMOSS, Circuit Judge:

Plaintiff Rebecca Hubbard^{FN1} was a beneficiary under a group insurance policy regulated by the Employee Retirement Income Security Act (“ERISA”).^{FN2} This appeal concerns whether Hubbard's state-law fraudulent inducement claims brought against a third party other than the insurer are preempted by ERISA. We hold that one of Hubbard's claims is preempted by ERISA and that the other claim is not preempted. We therefore AFFIRM the district court's entry of judgment in favor of the defendant on one claim, and REMAND the other claim back to the district court.

FN1. The original plaintiffs were Rebecca Hubbard and her husband, Jim Hubbard. For convenience this opinion uses the designation “Hubbard.”

FN2. 29 U.S.C. § 1001 *et seq.* (West 1985 & Supp.1994).

BACKGROUND

Hubbard's employer, Texas A & M Research Foundation, provided an ERISA-regulated health benefits plan to its employees. Coverage was provided by Blue Cross and Blue Shield of Texas (“Blue Cross of Texas”), an entity not a party to this lawsuit. While Hubbard was a beneficiary under the health plan, she contracted cancer.^{FN3} After Blue Cross of Texas refused to provide coverage for certain requested cancer treatments, Hubbard sued defendant-appellee Blue Cross and Blue Shield Association (“the Association”) in the district court of Brazos County, Texas.^{FN4} Hubbard claims that (1) the Association generated and dis-

seminated secret policy interpretation “guidelines” which were followed by Blue Cross of Texas in denying coverage for Hubbard's treatment, and that the Association willfully concealed such guidelines from Hubbard, thereby fraudulently inducing her to participate in the Blue Cross of Texas plan rather than procuring other, adequate, health coverage; and (2) the Association disseminated advertisements in Texas that portrayed Blue Cross of Texas “as an honest and forthright company that would never engage in deceptive trade practices,” thus fraudulently inducing her into participating in the “unsuitable” Blue Cross of Texas plan. Hubbard claimed that both acts by the Association were in violation of the Texas Deceptive Trade Practices Act, [TEX.BUS. & COM.CODE ANN. § 17.41 et seq.](#) (“DTPA”), [Texas Insurance Code Article 21.21 et seq.](#), and the Texas common law of fraud. Hubbard also alleged malpractice against her physician, Richard A. Smith of Brazos County, Texas, claiming he negligently failed to diagnose the cancer.

FN3. This was the second time Mrs. Hubbard had contracted cancer. She had a bout with breast cancer in the early 1980s, but that cancer had been pronounced cured well before she entered into the Blue Cross of Texas plan.

FN4. The insurer, Blue Cross of Texas, and the defendant-appellee, Blue Cross and Blue Shield Association, are separate legal entities despite their similar names. The Association is incorporated in Illinois and is the trademark corporation that administers the licensing of the “Blue Cross” and “Blue Shield” registered trademarks. The Association did not issue the Hubbards' insurance policy and did not have the right or power to make coverage decisions under that policy.

The insurer, a Texas corporation, was never a party to this lawsuit. Hubbard settled her coverage dispute with Blue

Cross of Texas in a separate action. That settlement provided for a payment of \$12,500 to be divided among Hubbard, her minor children and her attorney. *Blue Cross & Blue Shield of Texas, Inc. v. Hubbard*, Civ. No. 3-91CV2651-R (N.D.Tex. May 4, 1993) (final judgment approving settlement agreement).

[1][2][3] The Association removed the case to federal district court, contending that ***945** Hubbard's state-law claims were completely preempted by ERISA.^{**FN5**} The plaintiffs and defendant Smith moved to remand the case to Texas state court. After initially denying both motions, the court remanded the Hubbard's claims against Smith, but refused to remand their case against the Association.

FN5. Ordinarily, preemption of state law by federal law is a defense to a plaintiff's state law claim, and therefore cannot support federal removal jurisdiction under the “well-pleaded complaint” rule. “Complete preemption,” in contrast, exists when the federal law occupies an entire field, rendering any claim a plaintiff may raise necessarily federal in character. *See Franchise Tax Board v. Construction Laborers Vacation Trust*, 463 U.S. 1, 24, 103 S.Ct. 2841, 2854, 77 L.Ed.2d 420 (1983). Because ERISA preemption is so comprehensive, it can provide a sufficient basis for removal to federal court even though it is raised as a defense, notwithstanding the “well-pleaded complaint” rule. *See Metropolitan Life Ins. Co. v. Taylor*, 481 U.S. 58, 66, 107 S.Ct. 1542, 1547-48, 95 L.Ed.2d 55 (1987).

On October 8, 1992, the district court granted summary judgment in favor of the Association on both of Hubbard's claims. The district court's four-page order concluded that all of the plaintiff's state-law fraudulent inducement claims were completely preempted by ERISA.^{**FN6**} This appeal followed.

FN6. The district court also stated an alternate basis for its judgment, finding that “Plaintiffs have failed to set forth in their first amended complaint a factual basis for their state claims.”

STANDARD OF REVIEW

[4] We review a summary judgment de novo, under the same standard employed by the district court, affirming if there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. *FED.R.CIV.P. 56(c)*; *United Fire and Cas. Co. v. Reeder*, 9 F.3d 15, 16 (5th Cir.1993); *Hibernia Nat. Bank v. Carner*, 997 F.2d 94, 97 (5th Cir.1993).

ERISA PREEMPTION

[5][6][7] The preemption clause in ERISA states that ERISA “shall supersede any and all State laws insofar as they may now or hereafter relate to any employer benefit plan.” 29 U.S.C. § 1144(a) (expressly excepting two situations not applicable here). State law causes of action such as Hubbard's are barred by § 1144(a) if (1) the state law claim addresses an area of exclusive federal concern, such as the right to receive benefits under the terms of an ERISA plan; and (2) the claim directly affects the relationship between the traditional ERISA entities—the employer, the plan and its fiduciaries, and the participants and beneficiaries. *Weaver v. Employers Underwriters, Inc.*, 13 F.3d 172, 176 (5th Cir.1994); *Memorial Hosp. System v. Northbrook Life Ins. Co.*, 904 F.2d 236, 245 (5th Cir.1990). The language of the ERISA preemption clause is deliberately expansive, and has been construed broadly by federal courts. *Corcoran v. United Healthcare, Inc.*, 965 F.2d 1321, 1328-29 (5th Cir.1992). A state cause of action relates to an employee benefit plan whenever it has “a connection with or reference to such a plan.” *Id.* at 1329 (citing *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96-97, 103 S.Ct. 2890, 2899-2900, 77 L.Ed.2d 490 (1983)).

Hubbard makes two basic claims of fraudulent inducement. She first alleges that the Association issued, and concealed, secret coverage guidelines

(“the secret guidelines claim”). Her second claim alleged fraudulent inducement in connection with the Association's advertisements for Blue Cross of Texas (“the advertisement claim”).^{FN7} If neither claim is preempted by ERISA, then the district court lacks subject matter jurisdiction, because both claims arise under state law and there is no diversity of citizenship. If there is no federal jurisdiction, the case must be remanded to Texas state court.

FN7. According to Hubbard's petition, both of these courses of conduct by the Association are actionable under the Texas DTPA, the Texas Insurance Code and the Texas common law of fraud.

However, we hold that Hubbard's claim involving the “secret guidelines” is preempted by ERISA, thus a federal question exists on that claim and the district court's exercise of jurisdiction was proper. Entry of summary judgment for the Association on that claim was also correct because ERISA provides no remedy. We hold that Hubbard's second claim, involving the Association's advertising,^{*946} is not preempted by ERISA. We reverse the summary judgment as to the advertising claim and remand that part of the case so that the district court may exercise its discretion as to whether to accept supplemental jurisdiction pursuant to 28 U.S.C. § 1367 or remand the advertising claim to state court.

“SECRET GUIDELINES” CLAIM

[8][9][10] Hubbard alleged that the Association “generated and disseminated to [Blue Cross of Texas] certain guidelines or criteria pertaining to how [Blue Cross of Texas] would interpret the terms ‘experimental’ and ‘medically necessary.’ ”

“[Blue Cross of Texas] looked to and relied upon certain criteria and guidelines promulgated by [the Association] in order to make determinations concerning whether specific medical treatments were or were not excluded from coverage by the above-noted policy language ... in effect, [the As-

sociation] added verbiage to the definitions of the aforementioned terms found in the insurance policy.”

It is clear that ERISA preempts a state law cause of action brought by a plan beneficiary against the plan insurer alleging improper processing of a claim for plan benefits. *Memorial Hospital*, 904 F.2d at 245. We have also held that ERISA preempts state law claims of fraud, breach of contract or negligent misrepresentation that have the effect of orally modifying the express terms of an ERISA plan and increasing plan benefits for participants or beneficiaries who claim to have been misled. *Id.* at 245. Hubbard's “secret guideline” claim was brought against a third party, the Association, rather than against the insurer. However, the essence of Hubbard's claim is that her benefits under the plan were improperly denied. Resolution of this claim would require an inquiry into (1) whether the Association generated and disseminated guidelines; (2) whether Blue Cross of Texas knew about those guidelines; (3) whether Blue Cross of Texas employed the alleged guidelines in Hubbard's case; and (4) whether the guidelines materially affected the determination of non-coverage in Hubbard's medical treatment. Such questions are intricately bound up with the interpretation and administration of an ERISA plan. Accordingly, we hold that the “secret guideline” claim relates to an employee benefit plan and is preempted by ERISA. See *Corcoran v. United Healthcare Inc.*, 965 F.2d 1321, 1334 (5th Cir.) (holding that ERISA preempted state law claims against a non-ERISA entity, the utility review administrator for its decision that affected a benefit determination under the ERISA plan). Because ERISA provides no remedy on these facts, the district court correctly granted summary judgment in favor of the Association on Hubbard's secret guideline fraudulent inducement claim.

ADVERTISING CLAIM

Hubbard also alleged that the Association “distributed advertisements designed to promote Blue Cross [of Texas] as an honest and forthright

company that would never engage in deceptive trade practices.” Hubbard claimed that she “relied upon the images created by such advertising and [was] thereby induced to acquire the services of Blue Cross [of Texas].” Hubbard claims that she was damaged by the advertising in that she relied on the assurances of quality coverage and thus chose not to procure other insurance coverage to insure that the expensive medical treatments that she needed could be paid for.

[11] Hubbard relies heavily on our holding in *Perkins v. Time Ins. Co.*, 898 F.2d 470, 473 (5th Cir.1990), which also involved fraudulent inducement allegations against a third-party, non-ERISA entity. In *Perkins*, the plaintiff claimed that an insurance agent fraudulently induced him to surrender his previous insurance coverage and elect to participate in a new ERISA plan. The agent falsely assured the plaintiff that the new policy would cover his daughter's impending treatment for congenital eye defects. In fact, the treatment was not covered under the policy because the eye problem was an excluded pre-existing condition. *Perkins*, 898 F.2d at 472. We held that, although the claim against the insurer, Time Insurance, was preempted by ERISA, the claim against the insurance agent was not preempted.

*947 “While ERISA clearly preempts Perkins' claims as they relate to Time, the same cannot be necessarily said, however, as regards [the insurance agent]'s solicitation of Perkins, which allegedly induced him to forfeit an insurance policy that covered his daughter's condition for one that did not. While ERISA clearly preempts claims of bad faith as against insurance companies for improper processing of a claim for benefits under an employee benefit plan, and while ERISA plans cannot be modified by oral representations, we are not persuaded that his logic should extend to immunize agents from personal liability for their solicitation of potential participants in an ERISA plan prior to its formation.”

Perkins, 898 F.2d at 473. Thus, *Perkins* held

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that a state law fraudulent inducement claim against a third party other than an ERISA entity is not preempted by ERISA if it does not implicate the plan's administration of benefits or "affect the relations among the principal ERISA entities (the employer, the plan fiduciaries, the plan and the beneficiaries)." *Id.* We reaffirmed the *Perkins* rationale in *Memorial Hospital*, 904 F.2d at 247, where we stated that courts are less likely to find preemption when the claim merely affects relations between an ERISA entity and an outside party, rather than between two ERISA entities. *Memorial Hospital*, 904 F.2d at 249 (citing *Perkins*, 898 F.2d at 473; *Sommers Drug Stores Co. Employee Profit Sharing Trust v. Corrigan Enterprises, Inc.*, 793 F.2d 1456, 1467 (5th Cir.1986), cert. denied, 479 U.S. 1034, 107 S.Ct. 884, 93 L.Ed.2d 837 (1987)). Therefore, we hold that Hubbard's advertising claim is not preempted by ERISA.

[12][13] In light of this holding, we remand the advertising claim to the district court so that the court can exercise its discretion either to (1) accept supplemental jurisdiction over the state law claim or (2) decline jurisdiction and remand the claim to state court. A federal district court may entertain state law claims pursuant to its "supplemental jurisdiction," provided that the claims arise from the case or controversy over which the district court had original jurisdiction. *See* 28 U.S.C. § 1367; *Welch v. Thompson*, 20 F.3d 636, 644 (5th Cir.1994). When all federal claims are dismissed, the district court enjoys wide discretion in determining whether to retain jurisdiction over the remaining state law claims. *Welch*, 20 F.3d at 644; *Burns-Toole v. Byrne*, 11 F.3d 1270, 1276 (5th Cir.1994) (both upholding district courts' refusal to exercise jurisdiction); *see also Rodriguez v. Pacificare of Texas, Inc.*, 980 F.2d 1014, 1017-18 & n. 3 (5th Cir.1993) (upholding district court's exercise of supplemental jurisdiction over non-preempted state law claims when other state law claims by plaintiff were preempted by ERISA).

CONCLUSION

Therefore, for the reasons stated in this opinion, we hold that Hubbard's secret guideline claim is preempted by ERISA, and that her claim alleging fraud in the Association's advertising was not preempted. We therefore AFFIRM the district court's entry of judgment in favor of the defendant on the secret guideline claim, and REMAND the advertising claim back to the district court so that the court can exercise its discretion as to whether to accept jurisdiction or remand to state court.^{FN8}

FN8. We expressly do not rule on the sufficiency of the pleading of Hubbard's state law claims in this opinion since that issue is not ripe for determination until the district court rules regarding pendent jurisdiction.

AFFIRMED in part, REVERSED and REMANDED in part.

C.A.5 (Tex.),1995.

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