

INDIANA COMMERCIAL COURT

STATE OF INDIANA)	IN THE LAKE COUNTY SUPERIOR COURT NO. 1
)	
COUNTY OF LAKE)	CAUSE NO.:
CHINA HARRIS, individually and on behalf of all others similarly situated,)	
)	
Plaintiff,)	JURY TRIAL DEMAND
)	
vs.)	
)	
CENTIER BANK.)	
)	
Defendant.)	

CLASS ACTION COMPLAINT

Plaintiff China Harris, on behalf of herself and all persons similarly situated brings this class action complaint against Centier Bank. (“CB” or “Bank”), and alleges the following:

INTRODUCTION

1. When consumers open a checking account with their bank, they have to enter into a standard contract written by the bank and its lawyers. All the bank has to do is honor the contract it wrote and comply with the terms it dictated.

2. CB promises its customers that if their account balance drops too low to cover a particular “item” or “transaction” such as a check, withdrawal, or electronic transaction, CB will charge the customer a single \$35 Return Items Fee (“NSF Fee”) per item. But as Ms. Harris and CB’s other customers have discovered, CB doesn’t abide by this promise. Instead, CB routinely charges its customers multiple NSF Fees for the same item, driving its customers’ account balances deeper into negative territory.

3. CB's customers have been injured by the Bank's improper practices to the tune of millions of dollars bilked from their accounts in violation CB's clear contractual commitments.

4. Ms. Harris, on behalf of herself and Class of similarly situated consumers, seeks to end CB's abusive and predatory practices and force it to refund all of these improper charges. She asserts a claim for breach of contract, including breach of the covenant of good faith and fair dealing, and seeks damages, restitution, and injunctive relief, as set forth more fully below.

PARTIES

5. China Harris is a resident of Calumet City, Illinois and holds an CB checking account.

6. Defendant CB Bank is engaged in the business of providing retail banking services to consumers, including Plaintiff and members of the putative Class. CB has its headquarters in Merrillville, Indiana and all of its branches are in Indiana. CB has more than \$4.5 billion in assets and provides banking services throughout Indiana.

JURISDICTION AND VENUE

7. This Court has jurisdiction over CB because CB is incorporated under the laws of the State of Indiana and has engaged in a continuous and systematic course of business in the State of Indiana by, *inter alia*, maintaining permanent offices in Indiana and offering banking products for sale to Indiana consumers.

8. This Court has jurisdiction over this action pursuant to Commercial Court Rule 2(E) because the dispute in this action centers on CB's business activities and obligations under the parties' contract.

9. Preferred venue lies in this County pursuant to Indiana Trial Rule 75(A)(1) because CT maintains its principal office in this County and the acts and omissions giving rise to this action occurred in this County.

10. Upon information and belief, more than two thirds of the members of the proposed class are citizens of Indiana and therefore removal would be improper.

FACTUAL BACKGROUND AND GENERAL ALLEGATIONS

I. CB CHARGES MORE THAN ONE FEE ON THE SAME ITEM

11. CB's Terms & Conditions ("Deposit Agreement"), attached as Exhibit A hereto, and Service Charge Listing for Clients ("Fee Schedule"), attached as Exhibit B hereto (collectively, "Account Documents") allow CB to charge a *single* \$35 NSF Fee or a *single* \$35 overdraft fee when an item is returned for insufficient funds or paid despite insufficient funds.

12. CB breaches its contract by charging more than one \$35 NSF Fee and/or overdraft fee on the same item, since the contract explicitly states—and reasonable consumers understand—that the same item can only incur a single NSF or overdraft fee.

13. CB's abusive practices are not standard within the financial services industry. Indeed, major banks like JP Morgan Chase—the largest consumer bank in the country—charge one NSF Fee per item, even if that item is resubmitted for payment multiple times.¹ And while some other banks engage in the same practices as CB, their members agree to terms authorizing the fee practice.

¹ As indicated by Chase's printed disclosures, an "item" maintains its integrity even if multiple processes are affected on it: "If we return the same item multiple times, we will only charge you one Returned Item Fee for that item within a 30-day period."

14. CB's Account Documents do not say that CB repeatedly charges customers multiple fees on a single item. To the contrary, the Account Documents indicate CB will only charge a single NSF Fee or overdraft fee on an item.

A. Plaintiff Harris's Experience.

15. In support of her claim, Plaintiff offers examples of fees that should not have been assessed against her checking account. As alleged below, CB: (a) reprocessed previously declined items; and (b) charged an additional fee upon reprocessing, for a total assessment of *\$70 in fees on each item*.

16. On April 3, 2017, Plaintiff Harris attempted a \$2.77 payment through PayPal.

17. CB rejected payment of that item due to insufficient funds in Plaintiff's account and charged her a \$35 NSF Fee for doing so. Plaintiff does not dispute this initial fee, as it is allowed by CB's Account Documents.

18. Unbeknownst to Plaintiff, and without her request to CB to reprocess the item, a week later, on April 10, 2017, CB processed the same item yet again, with CB labeling the transaction a RETRY PYMT on her statements. Again, CB returned the item unpaid and charged Plaintiff *another* \$35 NSF Fee for doing so.

19. In sum, CB assessed Plaintiff \$70 in fees in its effort to process a single \$2.77 payment.

20. Plaintiff understood the payment to be a single item as is laid out in CB's contract, capable at most of receiving a single NSF Fee (if CB returned it) or a single overdraft fee (if CB paid it).

21. Similarly, on March 22, 2017, Plaintiff Harris attempted a \$10.97 payment through PayPal.

22. CB rejected payment of that item due to insufficient funds in Plaintiff's account and charged her a \$35 NSF Fee for doing so. Plaintiff does not dispute this initial fee, as it is allowed by CB's Deposit Agreement.

23. Unbeknownst to Plaintiff, and without her request to CB to reprocess the item, on April 6, 2017, CB processed the same item yet again, with CB labeling the transaction a RETRY PYMT on her statements. Again, CB again returned the item unpaid and charged Plaintiff *another* \$35 NSF Fee for doing so.

24. In sum, CB assessed Plaintiff \$70 in fees in its effort to process a single \$10.97 payment.

25. Plaintiff understood the payment to be a single item as is laid out in CB's contract, capable at most of receiving a single NSF Fee (if CB returned it) or a single overdraft fee (if CB paid it).

B. The Imposition of Multiple Fees on a Single Item Violates CB's Express Promises and Representations.

26. CB's Account Documents state that the Bank will assess a single fee of \$35 for an item that is returned due to insufficient funds.

27. According to the Fee Schedule, at most a *single* fee will be assessed when an "item" is returned or paid into overdraft:

Return Items Fee - fees incurred for return of items resulting from insufficient funds. Insufficient funds may have resulted from transactions created by check, in-person withdrawal, or other electronic means.

Consumer	\$35.00
Commercial	\$37.00

Fee Schedule, Ex. B.

28. The same check, automatic bill payment, or other electronic payment on an account is not a new “item” each time it is rejected for payment then reprocessed, especially when—as here—Plaintiff took no action to resubmit the item.

29. The Deposit Agreement reiterates the promise that only a single fee will be assessed per “check,” “item” or “transaction”:

If a check, item or transaction is presented without sufficient funds in your account to pay it, we may, at our discretion, pay the item (creating an overdraft) or return the item for insufficient funds (NSF). We will not charge you a fee for paying an overdraft of an ATM or everyday debit card transaction if this is a consumer account and you have not opted-in to that service. The amounts of the overdraft and NSF fees are disclosed elsewhere, as are your rights to opt in to overdraft services for ATM and everyday debit card transactions, if applicable. We encourage you to make careful records and practice good account management. This will help you to avoid creating items without sufficient funds and potentially incurring the resulting fees.

Deposit Agreement, Ex. A at 3.

30. Even if CB reprocesses an instruction for payment, it is still the same item. The Bank’s reprocessing is simply another attempt to effectuate an accountholder’s original order or instruction. That is why the Bank promises that “you” can “avoid creating items without sufficient funds and potentially incurring the resulting fees.” *Id.* An “item” is thus created or avoided by the accountholder.

31. As alleged herein, Plaintiff took only a single action to make a single payment; she therefore created only one item and may be charged only a single fee.

32. As the disclosures described above show, Plaintiff never agreed that CB may assess multiple NSF Fees for an item that was returned for insufficient funds and later reprocessed one or more times and returned again.

33. In sum, CB promises that one \$35 NSF Fee or one \$35 overdraft fee will be assessed per item, and this must mean all iterations of the same instruction for payment. As such, CB breached the contract when it charged more than one fee per item.

34. A reasonable consumer would understand that CB's Account Documents permit it to assess an NSF Fee only once per "item."

35. Taken together, the representations and omissions identified above convey to customers that all submissions for payment of the same transaction will be treated as the same "item," which the Bank will either pay (resulting in an overdraft item) or return (resulting in a returned item) when it decides there are insufficient funds in the account. Nowhere do CB and its customers agree that CB will treat each reprocessing of a check or ACH payment as a separate item, subject to additional fees.

36. Customers reasonably understand, based on the language of the Account Documents, that the Bank's reprocessing of checks or ACH payments are simply additional attempts to complete the original order or instruction for payment, and as such, will not trigger additional NSF Fees. In other words, it is always the same item.

37. Banks like CB that employ this abusive multiple fee practice know how to plainly and clearly disclose it. Indeed, other banks and credit unions that do engage in this abusive practice require their accountholders to expressly authorize it—something CB never did.

38. For example, First Hawaiian Bank engages in the same abusive practices as CB, but at least currently discloses it in its online banking agreement, in all capital letters, as follows:

YOU AGREE THAT MULTIPLE ATTEMPTS MAY BE MADE TO SUBMIT A RETURNED ITEM FOR PAYMENT AND THAT MULTIPLE FEES MAY BE CHARGED TO YOU AS A RESULT OF A RETURNED ITEM AND RESUBMISSION.

Terms and Conditions of FHB Online Services, First Hawaiian Bank 40, <https://bit.ly/2KWMvTg>
(last accessed Jan. 28, 2021) (emphasis added).

39. Klein Bank similarly states in its online banking agreement:

[W]e will charge you an NSF/Overdraft Fee each time: (1) a Bill Payment (electronic or check) is submitted to us for payment from your Bill Payment Account when, at the time of posting, your Bill Payment Account is overdrawn, would be overdrawn if we paid the item (whether or not we in fact pay it) or does not have sufficient available funds; or (2) we return, reverse, or decline to pay an item for any other reason authorized by the terms and conditions governing your Bill Payment Account. **We will charge an NSF/Overdraft Fee as provided in this section regardless of the number of times an item is submitted or resubmitted to us for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the bill payment.**

Consumer Account Terms and Conditions, Klein Bank 4 (Jan. 2013), <https://bit.ly/2KVCKhI>
(emphasis added).

40. Central Pacific Bank, a leading bank in Hawai'i, states in its deposit account under the "MULTIPLE NSF FEES" subsection:

Items and transactions (such as, for example, checks and electronic transactions/payments) returned unpaid due to insufficient/non-sufficient funds ("NSF") in your account, may be resubmitted one or more times for payment, and a returned item/transaction fee will be imposed on you each time an item and transaction resubmitted for payment is returned due to insufficient/non-sufficient funds.

Deposit Account Agreement & Disclosure, Central Pacific Bank 5 (Mar. 22, 2019), <https://bit.ly/3chJ1WM>.

41. BP Credit Union likewise states: "We may charge a fee each time an item is submitted or resubmitted for payment; therefore, you may be assessed more than one fee as a result of a returned item and resubmission(s) of the returned item."

42. Regions Bank likewise states:

If an item is presented for payment on your account at a time when there is an insufficient balance of available funds in your account to pay the item in full, you

agree to pay us our charge for items drawn against insufficient or unavailable funds, whether or not we pay the item. If any item is presented again after having previously been returned unpaid by us, you agree to pay this charge for each time the item is presented for payment and the balance of available funds in your account is insufficient to pay the item.

Deposit Agreement, Regions Bank 18 (2018), <https://bit.ly/2L0vx6A>.

43. Andrews Federal Credit Union states:

You understand and agree that a merchant or other entity may make multiple attempts to resubmit a returned item for payment. Consequently, because we may charge a service fee for an NSF item each time it is presented, we may charge you more than one service fee for any given item. Therefore, multiple fees may be charged to you as a result of a returned item and resubmission regardless of the number of times an item is submitted or resubmitted to use for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the item. When we charge a fee for NSF items, the charge reduces the available balance in your account and may put your account into (or further into) overdraft.

Terms & Conditions, Andrews Federal Credit Union 17 (Aug. 2020), <https://bit.ly/3iXEdHb>.

44. Consumers Credit Union states:

Consequently, because we may charge a service fee for an NSF item each time it is presented, we may charge you more than one service fee for any given item. Therefore, multiple fees may be charged to you as a result of a returned item and resubmission regardless of the number of times an item is submitted or resubmitted to us for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the item.

Member Services Guide, Consumers Credit Union 5 (Apr. 2020), <https://bit.ly/3iVM1ta>.

45. Wright Patt Credit Union states:

Consequently, because we may charge a service fee for an NSF item each time it is presented, we may charge you more than one service fee for any given item. Therefore, multiple fees may be charged to you as a result of a returned item and represented regardless of the number of times an item is presented or represented to us for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the item.

Important Account Information, Wright Patt Credit Union 13 (July 2020), <https://bit.ly/39rH6wX>.

46. Railroad & Industrial Federal Credit Union states:

Consequently, because we may charge an NSF fee for an NSF item each time it is presented, we may charge you more than one NSF fee for any given item. Therefore, multiple fees may be charged to you as a result of a returned item and resubmitted to us for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the item.

Important Account Information for Our Members, Railroad & Industrial Federal Credit Union 2 (Aug. 1, 2019), <https://bit.ly/3t5ehhF>.

47. Partners 1st Federal Credit Union states:

Consequently, because we may charge a fee for an NSF item each time it is presented, we may charge you more than one fee for any given item. Therefore, multiple fees may be charged to you as a result of a returned item and resubmission regardless of the number of times an item is submitted or resubmitted to us for payment, and regardless of whether we pay the item or return, reverse, or decline to pay the item.

Consumer Membership & Account Agreement, Partners 1st Federal Credit Union 11 (Sept. 15, 2019), <https://bit.ly/39pDZWb>.

48. Members First Credit Union states:

We reserve the right to charge an Non-Sufficient Funds Fee (NSF Fee) each time a transaction is presented if your account does not have sufficient funds to cover the transaction at the time of presentment and we decline the transaction for that reason. **This means that a transaction may incur more than one Non-Sufficient Funds Fee (NSF Fee) if it is presented more than once . . .** we reserve the right to charge a Non-Sufficient Funds (NSF Fee) for both the original presentment and the representment[.]

Membership and Account Agreement, Members First Credit Union of Florida 3, <https://bit.ly/39rRJ2Y> (last visited Jan. 28, 2021).

49. Community Bank, N.A. states:

We cannot dictate whether or not (or how many times) a merchant will submit a previously presented item. You may be charged more than one Overdraft or NSF Fee if a merchant submits a single transaction multiple times after it has been rejected or returned.

Overdraft and Unavailable Funds Practices Disclosure, Community Bank 5 (Nov. 12, 2019), <https://bit.ly/3iY9dH2>.

50. RBC Bank states:

We may also charge against the Account an NSF fee for each item returned or rejected, including for multiple returns or rejections of the same item.

Service Agreement for Personal Accounts, RBC Bank 13 (Sept. 17, 2014), <https://bit.ly/3otUtko>.

51. Diamond Lakes Credit Union states,

Your account may be subject to a fee for each item regardless of whether we pay or return the item. We may charge a fee each time an item is submitted or resubmitted for payment; therefore, you may be assessed more than one fee as a result of a returned item and resubmission(s) of the returned item.

Membership and Account Agreement, Diamond Lakes Federal Credit Union, <https://bit.ly/39o2P94> (last visited Jan. 28, 2021).

52. Parkside Credit Union states,

If the Credit Union returns the item, you will be assessed an NSF Fee. Note that the Credit Union has no control over how many times an intended payee may resubmit the same check or other item to us for payment. In the event the same check or other item is presented for payment on more than one occasion, your account will be subject to an additional charge on each occasion that the item is presented for payment. There is no limit to the total fees the Credit Union may charge you for overdrawing your account.

Membership and Account Agreement, Parkside Credit Union 21 (Jan. 30, 2020), <https://bit.ly/3aaXfpG>.

53. CB provides no such disclosure. CB's members thus never agree that CB may charge multiple fees on an item and, in so doing, CB breaches its contracts with accountholders, engages in bad faith conduct, and deceives its accountholders.

C. The Imposition of Multiple Fees on a Single Item Breaches CB's Duty of Good Faith and Fair Dealing.

54. Parties to a contract are required not only to adhere to the express conditions in the contract, but also to act in good faith when they are vested with a discretionary power over the other party. In such circumstances, the party with discretion is required to exercise that power and discretion in good faith. This creates an implied promise to act in accordance with the parties' reasonable expectations and means that the Bank is prohibited from exercising its discretion to enrich itself and gouge its customers. Indeed, the Bank has a duty to honor transaction requests in a way that is fair to Plaintiff and its other customers and is prohibited from exercising its discretion to pile on ever greater penalties.

55. Here—in the adhesion agreements CB foisted on Plaintiff and its other customers—CB has provided itself numerous discretionary powers affecting customers' bank accounts. But instead of exercising that discretion in good faith and consistent with consumers' reasonable expectations, the Bank abuses that discretion to take money out of consumers' accounts without their permission and contrary to their reasonable expectations that they will not be charged multiple fees for the same transaction.

56. CB exercises its discretion in its own favor—and to the prejudice of Plaintiff and its other customers—when it defines “item” in a way that directly leads to more NSF Fees. Further, CB abuses the power it has over customers and their bank accounts and acts contrary to their reasonable expectations under the Account Documents. This is a breach of the Bank's implied covenant to engage in fair dealing and act in good faith.

57. By exercising its discretion in its own favor—and to the prejudice of Plaintiff and other customers—by charging more than one fee on a single item, CB breaches the reasonable

expectation of Plaintiff and other customers and in doing so violates the implied covenant to act in good faith.

58. It was bad faith and totally outside Plaintiff's reasonable expectations for CB to use its discretion to assess two or three NSF Fees and/or overdraft fees for a single attempted payment.

CLASS ACTION ALLEGATIONS

59. Plaintiff brings this action on behalf of herself and on behalf of all others similarly situated. The Class include:

All persons who, within the applicable statute of limitations period, were charged multiple fees for the same item in a CB checking account.

60. Excluded from the Class are CB and its subsidiaries, affiliates, and any entities in which it has a controlling interest, and each of the officers, directors, immediate family members, legal representatives, heirs, successors, or assigns of any such excluded party, the judicial officer(s) to whom this action is assigned, and the members of their immediate families.

61. Plaintiff reserves the right to modify or amend the definition of the proposed Class and/or to add a sub-class if necessary before this Court determines whether certification is appropriate.

62. The questions here are ones of common or general interest such that there is a well-defined community of interest among the members of the Class. These questions predominate over questions that may affect only individual Class members because CB has acted on grounds generally applicable to the Class. Such common legal or factual questions include, but are not limited to:

- a) Whether CB improperly charged multiple fees on an item;
- b) Whether any of the conduct enumerated above violates the parties' contract;
- c) Whether any of the conduct enumerated above violates the covenant of good faith and fair dealing; and

d) The appropriate measure of damages.

63. The members of the proposed Class are numerous such that joinder is impracticable. Upon information and belief, and subject to class discovery, the Class consists of thousands of members or more, the identities of whom are within the exclusive knowledge of and can be ascertained only by resort to CB's records. CB has the administrative capability through its computer systems and other records to identify all members of the Class, and such specific information is not otherwise available to Plaintiff.

64. It is impracticable to bring Class members' individual claims before the Court. Class treatment permits a large number of similarly situated persons or entities to prosecute their common claims in a single forum simultaneously, efficiently, and without the unnecessary duplication of evidence, effort, expense, or the possibility of inconsistent or contradictory judgments that numerous individual actions would engender. The benefits of the class mechanism, including providing injured persons or entities with a method for obtaining redress on claims that might not be practicable to pursue individually, substantially outweigh any difficulties that may arise in the management of this class action.

65. Plaintiff's claims are typical of the claims of the other members of the Class in that they arise out of the same wrongful business practices by CB, as described herein.

66. Plaintiff is more than an adequate representative of the Class in that Plaintiff has a CB checking account and has suffered damages as a result of CB's contract violations, CB's violations of the covenant of good faith and fair dealing, and CB's unjust enrichment. In addition:

- a) Plaintiff is committed to the vigorous prosecution of this action on behalf of herself and all others similarly situated and has retained competent counsel experienced in the prosecution of class actions and, in particular, class actions on behalf of consumers against financial institutions;
- b) There is no conflict of interest between Plaintiff and the unnamed members of the Class;

- c) Plaintiff anticipates no difficulty in the management of this litigation as a class action; and
- d) Plaintiff's legal counsel has the financial and legal resources to meet the substantial costs and legal demands associated with this type of litigation.

67. Plaintiff knows of no difficulty to be encountered in the maintenance of this action that would preclude its treatment as a class action.

68. CB has acted or refused to act on grounds generally applicable to each of the Class, thereby making appropriate final injunctive relief or corresponding declaratory relief with respect to the Class as a whole.

69. All conditions precedent to bringing this action have been satisfied and/or waived.

CAUSES OF ACTION

COUNT I

BREACH OF CONTRACT, INCLUDING BREACH OF THE IMPLIED COVENANT OF GOOD FAITH AND FAIR DEALING (On Behalf of Plaintiff and the Class)

70. Plaintiff repeats, realleges, and incorporates by reference each of the foregoing paragraphs as if fully set forth herein.

71. Plaintiff and CB contracted for checking account services, as embodied in the Deposit Agreement and Fee Schedule.

72. Defendant mischaracterized in the Account Documents its true NSF Fee practices and breached the express terms of the Account Documents.

73. No contract provision authorizes Defendant to charge more than one fee on the same item.

74. A covenant of good faith and fair dealing is implied in contracts between financial institutions and their members. The covenant of good faith and fair dealing constrains CB's discretion to exercise self-granted contractual powers.

75. This good faith requirement extends to the manner in which a party employs discretion conferred by a contract.

76. Good faith and fair dealing, in connection with executing contracts and discharging performance and other duties according to their terms, means preserving the spirit—not merely the letter—of the bargain. Put differently, the parties to a contract are mutually obligated to comply with the substance of their contract in addition to its form. Evading the spirit of the bargain and abusing the power to specify terms constitute examples of bad faith in the performance of contracts.

77. Subterfuge and evasion violate the obligation of good faith in performance even when an actor believes her conduct to be justified. A lack of good faith may be overt or may consist of inaction, and fair dealing may require more than honesty. Other examples of violations of good faith and fair dealing are willful rendering of imperfect performance, abuse of a power to specify terms, and interference with or failure to cooperate in the other party's performance.

78. Defendant has breached its contracts with Plaintiff and the Class through its NSF fee policies and practices as alleged herein.

79. CB breached the covenant of good faith and fair dealing through its NSF fee policies and practices as explained herein.

80. Plaintiff and members of the putative Class have performed all of the obligations on them pursuant to the Bank's agreements.

81. Plaintiff and members of the putative Class have sustained monetary damages as a result of each of Defendant's breaches.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff, individually and on behalf of the Class, demands a jury trial on all claims so triable and judgment as follows:

A. Certifying the proposed Class, appointing the Plaintiff as representative of the Class, and appointing counsel for Plaintiff as counsel for the Class;

B. Declaring that CB's policies and practices as described herein constitute a breach of contract and a breach of the covenant of good faith and fair dealing;

C. Enjoining CB from the wrongful conduct as described herein;

D. Awarding restitution of all fees at issue paid to CB by Plaintiff and the Class as a result of the wrongs alleged herein in an amount to be determined at trial;

E. Compelling disgorgement of the ill-gotten gains derived by CB from its misconduct;

F. Awarding actual and/or compensatory damages in an amount according to proof;

G. Awarding pre-judgment interest at the maximum rate permitted by applicable law;

H. Reimbursing all costs, expenses, and disbursements accrued by Plaintiff in connection with this action, including reasonable attorneys' fees, costs, and expenses, pursuant to applicable law and any other basis; and

I. Awarding such other relief as this Court deems just and proper.

Dated: January 29, 2021

Respectfully submitted,

/s/Lynn A. Toops

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