23-1190

United States Court of Appeals for the Federal Circuit

ACLR, LLC,

Plaintiff-Appellant,

v.

UNITED STATES,

Defendant-Appellee.

Appeal from the United States District Court of Federal Claims
in Case No. 1:15-cv-00767-PEC
(Hon. Patricia E. Campbell-Smith, Judge)

REPLY BRIEF FOR PLAINTIFF-APPELLANT

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INTRODUCTION

ACLR submits this Reply Brief in response to the Government's Brief and in support of ACLR's opening brief arguments.[1] This appeal arises from the United States Court of Federal Claims' ("CFC") application of a retroactive constructive termination for convenience to ACLR's plan year 2007 and 2010 duplicate payment audits under its Part D RAC Contract with CMS. There is no precedent for the application of a retroactive constructive termination for convenience on a contingency fee contract where a contractor such as ACLR is left with no compensation for the costs it incurred in connection with those audits. In the CFC's initial ruling, the CFC premised its retroactive constructive termination for convenience on the fact that ACLR was entitled to compensation for the retroactive constructive termination for convenience under the Part D RAC Contract, but ultimately decided to preclude ACLR from obtaining any compensation. Appx5120. As the Government correctly points out, constructive termination is a "judge-made doctrine" (Appellee Br. at 42) and that doctrine should not be applied in this case for the reasons set forth by ACLR. This Court should grant ACLR's requested relief in this appeal.

[1] The Government's Brief is cited as "Appellee Br." and ACLR's opening Brief is cited as "AppInt. Br."

The Government overlooks and avoids addressing many of the undisputed facts underpinning ACLR's arguments in this appeal. For example, the Government continues its efforts to obfuscate and misdirect the tribunals in this case into believing that the terms and conditions of the OY1 SOW executed in a contract modification on December 31, 2013, somehow justifies CMS's actions in regard to ACLR's PWS executed three years earlier on January 13, 2011. ACLR performed two separate and distinct duplicate payment recovery audits under the mutually exclusive terms and conditions of ACLR's PWS and the subsequent SOW. To clarify, ACLR's plan year 2007 duplicate payment audit was performed in accordance with the PWS and the plan year 2010 duplicate payment audit was performed in accordance with the SOW. Finally, the Government makes no attempt to explain how its misleading statements of impending recovery audits mandated by the Affordable Care Act to both the public and Congress (AppInt. Br. at 17) don't establish a breach of the duty of good faith and fair dealing with ACLR who, among other things, relied on such representations with the mistaken belief that CMS was honoring the Part D RAC Contract.

The Government offers no facts to dispute the following:

1. CMS had no intention of honoring ACLR's contracted PWS at contract award;

2. CMS did not notify ACLR of CMS intent to not honor the PWS until ACLR completed its review of the plan year 2007 duplicate payment audit;

3. ACLR could only be remunerated for its Part D RAC Contract efforts by recovering improper payments;

4. CMS precluded ACLR from recovering improper duplicate payments for both the plan year 2007 and 2010 duplicate payments audits; and

5. The Government's position is that a retroactive termination for convenience does not require that a contractor be compensated for the costs it incurred in a contingency fee contracting arrangement.

In sum, ACLR's position is that the CFC erred in ignoring relevant undisputed facts and misapplying constructive termination for convenience case law to allow the Government to evade the spirit and letter of its contractual bargain with ACLR. The CFC's rulings have left ACLR without just compensation on the basis that the Government can retroactively terminate a contingency fee contract without consideration for the contractor's efforts because the contractor did not anticipate some future retroactive constructive termination for convenience and proactively track detailed costs on a project-by-project basis.

ARGUMENT

1. Given The Underlying Facts Of This Case, The CFC Erred In Not Granting ACLR Summary Judgment On Its Plan Year 2007 Duplicate Payment Breach Of Contract Claim and Imposing A Retroactive Constructive Termination For Convenience.

The Government acknowledges that the doctrine of constructive termination for convenience cannot apply when the Government entered into a contract with no intention of fulfilling its promises. Appellee's Br. at 22. The evidence establishes that the Government entered into the Part D RAC Contract and, in particular, the PWS with no intention of fulfilling the Government's promises. AppInt. Br. at 22-24. The Government acknowledges that the CFC "did not decide the merits of the breach claim." Appellee Br. at 24.

The Government falsely states that ACLR referenced "various email and deposition statements of agency contractor personnel to support its assertion" in reference to ACLR's plan year 2007 duplicate payment audit breach claims. Appellee Br. at 20. The emails and depositions statements referenced by ACLR were CMS employees (Appx3722, Appx3725, Appx3730) and ACLR is unaware of any CMS practice to place contractors in CMS director, contractor officer or contracting officer representative ("COR") positions. Applnt. Br. at 22-23.

The Government's argues that the CFC's retroactive constructive termination for convenience was appropriate and that this Court should ignore the applicability of *Horn & Assocs., Inc. v. United States*, 140 Fed. Cl. 142 (2017).

Appellee Br. at 24. According to the Government, *Horn* is "wholly inapplicable" because "Horn does not involve a constructive termination for convenience" as "Horn is a breach case and was decided on that basis." Appellee Br. at 24. The Government argues that any jurisprudence or undisputed evidence raised or cited by ACLR does not apply and expects the Court to blindly accept the Government's contentions.

Similar to ACLR, the contractor in *Horn* was a recovery audit contractor. In each case, the contractor argued that the Government hindered the ability of each of these contractors to recover improper payments.[2] While there are factual differences to each of these cases, those differences present a greater challenge to the Government in this case. The Improper Payments Elimination and Recovery Act of 2010 ("IPERA") governed the actions in *Horn* while both IPERA and the Affordable Care Act governed the actions under the Part D RAC Contract. Additionally, the identification of improper payments in *Horn* required additional reviews at NASA's payment centers as the electronic payment data was insufficient to ascertain impropriety. *Horn*, 140 Fed. Cl. at 148. Here, no such ambiguity exists.

[2] In *Horn & Assocs., Inc. v. United States*, 123 Fed. Cl. 728, 788 (2015), the court found that "[g]iven all the obstacles NASA employees put in plaintiff's path during contract performance, including the failures to cooperate and to collect overpayments identified by plaintiff which were documented in the trial record, there must be a way to review plaintiff's breach allegations."

Prescription drug medications are subject to a myriad of federal laws such as Title 21 of the Code of Federal Regulations, the Controlled Substances Act of 1971, and the Health Insurance Portability and Accountability Act ("HIPAA"). These laws require the accurate and uniform documentation of PDE data where the failure of any entity to comply is a direct violation of 42 U.S.C. §1320d-2, national standards outlined in 45 C.F.R. §162.1102, and HIPAA. Finally, the CFC acknowledged that unlike the contractor in *Horn*, ACLR's "PWS does not expressly require approval by CMS for data audit activity undertaken by plaintiff." Appx5109. The CFC in *Horn* did not impose a retroactive constructive termination for convenience to the detriment of the contractor probably as a result of evidence establishing a breach based upon delays and hindering the ability to perform a contract. *See Horn & Assocs., Inc. v. United States*, 140 Fed. Cl. 142 (2017).

The Government fails to explain how CMS's actions pertaining to the contracting of Booz Allen Hamilton ("BAH") to supplant ACLR's implementation of the Part D RAC Contract and CMS Director Moreno's testimony that she intended to deprive, not hinder, ACLR of any form of compensation related to ACLR's contract execution efforts until BAH had completed the development and implementation of the Part D RAC program. Appx1028, Appx1249-1250. For example, the Government attempts to mislead this Court into believing that BAH was the "validation contractor" rather than the contractor hired by CMS to

implement the Part D RAC Contract and subvert the PWS with a new statement of work. Appellee Br. at 30. As the Government well knows, BAH was not the validation contractor. The Government expressly represented that "CMS contracted with Livanta LLC (Livanta) on September 30, 2011, to serve as the data validator for the Part D RAC" (Appx3763) where such validation efforts were not incorporated into the Part D RAC Contract until modification three on January 31, 2012. Applnt. Br. at 9. As early as January 2011, CMS tasked BAH to develop the SOW to govern the Part D RAC Contract process rather than the PWS. Applnt. Br. at 7; Appx3722-3723. This action took place prior to ACLR's Part D RAC Contract kick-off meeting on February 23, 2011 (Appx27) and CMS's contracting with the data validation contractor. Appx4409.

The Government acknowledges that the CFC held that the Government's cancellation of the plan year 2007 duplicate payment audit was "questionable and invalid." Appellee Br. at 24. The Government then attempts to justify its actions by focusing on other audits rather than the plan year 2007 duplicate payment audit at issue. Appellee Br. at 9 and 26. The Government contends that these other audits "show[] that the Government did not interfere with ACLR's ability to complete contracts." Appellee Br. at 26. The Government's argument is unavailing when viewed in the proper factual context. The Government did not allow ACLR to proceed with the plan year 2007 duplicate payment audit in 2011 under the PWS.

Following Modification 000003 requiring "deviation from the PWS as written" (Applnt. Br. at 29), CMS's subsequent modifications in 2012 and 2013 directed audits for three issues -- excluded providers, unauthorized prescribers, and controlled substances (DEA schedule refill errors). Appx2723-2724. During the 2014 and 2015 SOW period, the only new audit approved by CMS was the plan year 2010 duplicate payment audit which was terminated, *See id.* In 2014 and 2015, CMS only permitted ACLR's audit of additional years for the three previously approved audit issues and denied all of ACLR's newly submitted audit issues. *Id.* The Government's attempt to inflate audit counts conducted by ACLR is misleading. The totality of the recovery for the minimal audits that ACLR was allowed to proceed with throughout the seven years of the Part D RAC Contract represents less than 0.35% of the $5.4 billion in Part D improper payments identified by the Department of Health and Human Services for one year in 2007. Appx1725. These facts further evidence the Government's interference with ACLR's ability to complete the Part D RAC Contract.

The CFC ignored the removal of the PWS as the work statement governing ACLR's performance under the task order in a ruling that determined the "contract was fully performed on both sides." Appx5115. The Government rationalizes that the Government and ACLR resolved the PWS issue by "mutually agreeing to replace the PWS with the SOW, which was effectuated via a bilateral contract modification."

Appellee Br. at 27. This cannot be the case given that the CFC ruled there was a retroactive constructive termination for convenience of the plan year 2007 duplicate payment audit that, by its very nature, occurred prior to any coerced agreement by ACLR to enter into a subsequent modification. Therefore, ACLR was precluded by the Government from performing the Part D RAC and PWS as it related to the plan year 2007 duplicate payment audit before any subsequent contract modification. The Government also does not address the differences related to multiple year contracts and renegotiation requirements in modifications and multi-year contracts not requiring options. Applnt. Br. at 29. The evidence before the CFC established that a retroactive constructive termination should not have been invoked here given the underlying facts, including the Government's intent to not allow ACLR to perform the PWS and the Government's breach of the PWS. Accordingly, the CFC erred when it failed to grant ACLR summary judgment on its breach of contract claim with respect to the plan year 2007 duplicate payment audit.

2. The Court Erred In Granting Summary Judgment To The Government On ACLR's Breach Of Duty Of Good Faith And Fair Dealing Claims.

ACLR's appeal seeks to reverse the CFC's grant of summary judgment to the Government on ACLR's breach of duty of good faith and fair dealing claim. In response, the Government contends there is no evidence supporting ACLR assertions of "CMS's purported interference, hindrance and lack of cooperation in

connection with the 2007 and 2010 audits, the Government's hiring of a validation contractor (Booz Allen Hamilton)[3], and CMS's delays and process changes to the [] 2010 audit." Appellee Br. at 30. The overwhelming evidence is to the contrary.

CMS's efforts to delay, hinder, and deprive ACLR of its efforts to recover fees association with billions of dollars in Part D improper payments (Appx4393-4394, Applnt. Br. at 3 and 7) are established through the testimony of CMS Director Moreno. In short, Ms. Moreno testified in her deposition that ACLR would be unable to recover improper payments or collect fees until the program had been implemented in a manner that was satisfactory to CMS (Applnt. Br. at 23), that BAH was engaged to assist in the development of the Part D RAC program as least as early as January of 2011 (Appx1028; Appx3722-3723) and did not notify ACLR that it would not be able to recover improper payments in 2011. Appx1030. The Government has also acknowledged that Ms. Moreno had oversight of BAH who was engaged to develop the Part D RAC program and statement of work (Appx3722-3733).

The Government has often repeated the factually unsupported fantasy that "CMS found the PWS unworkable and sought to revise it." Appellee Br. at 8. There is no evidence, nor does the Government cite any evidence, that the PWS was unworkable. Even if the Government could identify such evidentiary support, such

[3] This characterization of BHA is inaccurate as discussed above.

evidence could only imply that CMS considered the PWS a contractual document. As late as November 2011, COR Dorsey informed ACLR that the PWS was simply a proposal and not approved by CMS (Appx2748, Appx1301-1305). Applnt. Br. at 6. However, CO Theresa Shultz acknowledged that the Part D RAC Contract "was awarded with the acceptance of the PWS." (Appx1352). How can the Government maintain that CMS was executing the Part D RAC Contract in good faith when CMS personnel were unaware the Part D RAC Contract even existed?

ACLR documented multiple instances of CMS's interference, hindrance and lack of cooperation, which were ignored by the CFC. Applnt. Br. at 34-36, Appx110-116. While ACLR does not consider the uniqueness of the spotted owl in the *Precision Pine & Timber, Inc. v. United States*, 142 Fed. Cl. 778 (2010) ruling or the lease arrangements in *Dotcom Associates I, LLC v. United States*, 112 Fed. Cl. 594 (2013) to have the same direct application to CFC's ruling in ACLR's contingency fee contract, *Dotcom* stated:

> A breach of the implied covenant of good faith and fair dealing may be found when the government undertakes a sovereign action 'specifically designed to reappropriate the benefits the other party expected to obtain' under a contract. *Precision Pine*, 596 F.3d at 829 (citing *Centex*, 395 F.3d at 1311); *see also Fireman's Fund Ins. Co. v. United States*, 92 Fed. Cl. 598, 677 (2010).

Dotcom Associates I, LLC, 112 Fed. Cl. at 599-600 (2013).

From the outset, as articulated in the Part D RAC Contract's original Statement of Objectives, ACLR operated under the presumption that its contract was statutorily required:

> Section 6411(b) of the Affordable Care Act expanded the use of the statutory 1893 Recovery Audit Contract provisions to utilize RACs under the Medicare Integrity Program to identify underpayments and overpayments and recoup overpayments under the Medicare program associated with medications for which payment is made under Part D of Title XVIII of the Social Security Act. The effective date for this provision is December 31, 2010.

(Appx2943).

Additionally, ACLR understood that "revisions in legislation or regulations which may be enacted or implemented during the period of performance of this contract and are directly applicable to the performance requirements of this contract" (Applnt. Br. at 5), could result in the modification of the Part D RAC Contract. ACLR also knew that the benefit of the bargain for 2011 base year of the Part D RAC Contract was "$5.4 billion in Part D improper payments." Applnt. Br. at 3. What ACLR did not know was that CMS would willfully and deliberately ignore the mandates of IPERA and the Affordable Care Act, hire another contractor to develop the Part D RAC program, and that ACLR would not be able to recoup the plan year 2007 duplicate payment overpayments ACLR identified or any other portion of the $5.4 billion in improper payments available during the initial base period of the Part D RAC Contract. As the Government did not notify ACLR of the separate

development of a statement of work to replace the PWS or the Government's determination to eliminate ACLR's ability to recoup monies in accordance with the PWS, ACLR conducted the plan year 2007 duplicate payment audit and identified a total of $313,808,241 improper payments that would have resulted in $23,535,616 in contingency fees. Appx2424-2425, Appx2430. It was not until after ACLR's receipt of BAH's draft SOW on December 9, 2011 (Appellee Br. at 8, Applnt. Br. at 6 & 7) and the removal of the PWS in a subsequent modification of the part D RAC Contract on January 31, 2012 (Appx1504-1524, Appx 1529-1530, Appx5109, Applnt. Br. at 10, 23, and 56), that ACLR understood the full impact of the elimination of the PWS.

As outlined by ACLR, the PWS and SOW contained significantly different audit approaches. Applnt. Br. at 5 and 11-12. The PWS included audit teams conducting data and documentation audits reviewing all PDE records to determine duplicate and other improper payments, without interference or approval by CMS (Appx1206-1214, Appx1218, Appx 5109, Applnt. Br. at 5). The SOW "explicitly required CMS approval for any audit conducted by plaintiff and set forth a process by which plaintiff was to request that approval." Appx5109. Additionally, the SOW required a data validation contractor for review of all improper payment data and changed timelines for conducting audits and receiving payment. Applnt. Br. at 11-12. Despite ongoing efforts by the Government to conflate the two, both the PWS

and SOW differed in their application to the two duplicate payment audits at issue here:

ACLR Requirements	PWS 2007 Audit	SOW 2010 Audit
Hire Audit Teams (20-25 personnel)	**YES**	**NO**
Develop Audit Methodology for the RAC	**YES**	**NO**
Receive CMS Approval for Audit Issues	**NO**	**YES**
Develop Stakeholder Communications	**YES**	**NO**
Develop Reporting Requirements	**YES**	**NO**
Develop Collection Protocols	**YES**	**NO**
Perform Data Validation	**NO**	**YES**

(Appx7128).

Additionally, the SOW articulated an appeal process that increased RAC payment timelines from 55 days to over 400 days, far in excess of the customary commercial practices deemed permissible by this Court in *CGI Federal Inc. v. United States*, 779 F.3d 1346 (Fed. Cir. 2015). The duplicate payment audits at issue should be viewed within the context of the applicable contractual documents.

A. Plan year 2007 duplicate payment audit

It is undisputed that CMS's actions on November 30, 2011 were contrary to the express terms of the PWS. The Government advances a narrative that ACLR's

recovery audit efforts were somehow deficient because ACLR "did not submit any documentation" and that an independent entity had not "validated ACLR's findings." Appellee Br. at 10. These assertions are without merit. It is well established that the PWS neither required or contemplated the submission of such documentation to CMS nor the independent validation of ACLR findings. Appx7128. The Government and the CFC ignored both testimony and documentary evidence that CMS found the duplicate payment process to be technically acceptable and sound. Applnt. Br. at 6. For example, Merri-Ellen James of CMS wrote in an email to ACLR on October 4, 2011 "Your duplicate payment methodology looks sound." Appx2545.

The Government's also complains that "ACLR continued analyzing 2007 PDE records for potential duplicate payments, *after the audit had been terminated by the contracting officer*." Appellee Br. at 10-11. For its contention that the plan year 2007 duplicate payment audit was terminated in November 2011, the Government merely references Desiree Wheeler ordering "ACLR to 'cease all efforts pertaining to the issuance of demand letters to plan sponsor[s].'" Appellee Br. at 10. Ceasing the issuance of demand letters was not a termination of the audit and a stop work order was never issued. ACLR was responsible for collection of improper payments under the Part D RAC Contract, including the recovery of improper duplicate payments. Appx1116, AppInt. Br. at 5. ACLR rightfully

proceeded with the plan year 2007 duplicate payment audit efforts based on the presumption that CMS would comply with its obligations under the PWS. The statements by CMS on November 30, 2011 indicated that CMS would work with ACLR to resolve any concerns CMS had about the plan year 2007 duplicate payment audit. CMS told ACLR "I think you hear the contracting officer and program personnel telling you that you know, we don't think that's in the best interest for you to do that, so I think we all stand by that that we don't think it's in the best interest for you do that until we work out all of the issues to be resolved." Appx3342. The Government's argument is factually baseless.

ACLR proceeded to identify a total of $313,808,241 potential duplicate payments and claimed $23,535,616 in contingency fees on December 7, 2011. Appx2425, Appx2430, Appellee Br. at 11. It was not until December 9, 2011, upon receipt of the draft SOW, that ACLR had an understanding that that CMS would not honor the Part D RAC Contract.

B. Plan year 2010 duplicate payment audit

With respect to the plan year 2010 duplicate payment audit, the CFC ruled that "based on the language of the contract - defendant had the right to terminate any portion of it for defendant's sole convenience." Appx5113. In making its ruling, the CFC considered the Government's assertions that the ACLR failed to utilize the revised methodology, the data validation contractor found errors, that CMS had

concern with the validity of the audit results and acted in contravention of the contract terms. Appx5111. The CFC, however, did not consider ACLR's evidence of CMS's delays in approving the audit, CMS's deviation from SOW requirements by requiring additional reviews and eliminating the 2011 and 2012 audit periods, CMS extending contracted deadlines, and CMS applying unapproved audit methodologies in direct contravention of 42 C.F.R. §423.2600. Applnt. Br. at 13-14, Appx4171, Appx545, Appx590. The CFC also failed to address CMS's lack of attempting to cure audit deficiencies identified by ACLR. Appx1665. Under federal law and in accordance with HIPAA requirements for the electronic submission of claims for payment (42 U.S.C. § 1320d-2), the Department of Health and Human Services adopted national standards promulgated by the National Council for Prescription Drug Programs. 45 C.F.R. §162.1102. Part D plan sponsors and applicable intermediaries were required to comply with these standards. *See* 42 C.F.R. §423.120(c)(2). Had the CFC considered ACLR's evidence, the CFC should not have concluded that ACLR's good faith and fair dealing claim was premised on the same factual allegations as ACLR's breach claims, and, given the evidence, denied the Government's motion for summary judgment. Appx5120.

3. The CFC Erred In Holding That ACLR Is Not Entitled To Compensation For A Percentage Of The Contract Price.

In response to ACLR's argument that the CFC erred in holding that ACLR was not entitled to compensation for a percentage of the contract price, the

Government argues that ACLR waived this argument. Appellee Br. at 39. Even if ACLR did not expressly seek compensation for a percentage of the contract price in its motion for summary judgment, the CFC's ruling eliminated ACLR's opportunity to pursue such compensation at trial. Appx7204-7205. Since the Government did not move for summary judgement on this issue, at most, the CFC should have only ruled that for purposes of ACLR's motion for summary judgment, ACLR was not entitled to obtain compensation for a percentage of the contract price in connection with the motion for summary judgment. The CFC's ruling that ACLR is excluded from pursuing such recovery was erroneous and should be reversed.

4. ACLR's Standard Record Keeping System

ACLR appeals the CFC's granting of summary judgment to the Government with respect to the issue of ACLR's standard record keeping system. In response to ACLR's arguments, the Government posits that under FAR 52.212-4(l) a contractor who is operating under a contingency fee contract that was retroactively constructively terminated some ten years later should have maintained "contemporaneous" time "records reflecting the hours its officers and employees worked on particular audits, tasks, or projects under the contract." Appellee Br. at 50. As discussed in ACLR's brief, contemporaneous time sheets reflecting billings to particular projects are not mandated by FAR 52.212-4(l). The Government then baldly asserts that "few, if any of plaintiff's exhibits, showed costs allocated to the

2007 and 2010 audits." Appellee Br. at 50. The Government's assertion simply disregards the extensive evidence ACLR had reflecting its costs in connection with the plan year 2007 and 2010 duplicate payment audit. AppInt. Br. at 46-47.

The Government also argues that because ACLR described itself as a "firm employing recovery audit professionals," it was "inexcusable" for ACLR not to employ a contemporaneous time recording system. Appellee Br. at 54. FAR 52.212-4(l) does not require a heightened standard simply because of the contractor's background and the nature of the contract, which was not a "cost" reimbursement contract. If this was the case, the standard should be reduced for ACLR given CMS's delay in making any reimbursement to ACLR.

The Government then brazenly mischaracterizes ACLR's evidence by misrepresenting that "ACLR dumped a bag of invoices upon the trial court' bench, including invoices for ammunition, alcohol and birthday presents, expecting the court to sort it out." Appellee Br. at 57. The Government's representation is wrong. One exhibit to be offered by ACLR was a schedule evidencing ACLR's general and administrative expenses for the base period of the Part D RAC Contract. Appx.6340. Another exhibit contained check registries generated from Quickbooks and exported into Excel and described all of ACLR's plan year 2007 duplicate payment audit general and administrative costs. Appx6341-6343. Finally, ACLR offered as an exhibit a collection of invoices most of which supported the two prior referenced

exhibits. Appx6345-6810. As the Government well knows, ACLR was not seeking reimbursement for each and every invoice within the latter referenced exhibit. Appx6341-6343. At trial, ACLR had sufficient evidence to present its general and administrative costs through its exhibits and the testimony of Mr. Mucke, but has been precluded from doing so by the CFC's ruling with respect to ACLR's standard record keeping system. This ruling and the other CFC rulings should be reversed.

CONCLUSION

For the reasons set forth in this Reply Brief and ACLR's initial Brief, this Honorable Court should award ACLR the relief sought in its initial Brief.

Respectfully submitted,

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