THE SUMMONS

Saginaw County Bar Association

REMEMBER & HONOR

Mark Thomas Mahlberg

Honorable Robert Edgar Bright

Robert Jack Krupka Sr.

Gary E Gottlieb

Kirk Ellsworth

Gary J. Goodman

Volume 37 **No. 08** **November 2020**

MEETING DATES FOR 2020/21

(Go to www.saginawbar.org for meeting updates)

Board Meeting

(All Board Meetings will be held via ZOOM until further notice 1st Wednesday of every month at 12:00 PM)

Pro Bono Committee Meeting

(All PB Meetings held via RING until further notice 3rd Tuesday of every month at 12:00 PM)

(If you want your committee meeting dates listed here, send them to Kelli Scorsone, Executive Director)

THE SUMMONS
SAGINAW COUNTY BAR ASSOCIATION

IN THIS ISSUE

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www.saginawbar.org

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PRESIDENT'S MESSAGE

By: Millicent E. Shek

Yard signs. Slogans. Fundraising. Debates. "Vote for me. I approve this message." We must be nearing November in an election year. Soon, nearly all Americans, with only a few specific exceptions, will have an opportunity to vote on issues and representatives. The right to vote is a significant development in human society and is the foundation of any democracy.

Voting was not always a right granted so broadly to Americans. The United States Constitution itself did not establish any right to vote from its signing in 1787 until 1870, except for Article 1, section 2, clause 1, which reads "The House of Representatives shall be composed of members chosen every second year by the people of the several states, and the electors in each state shall have the qualifications requisite for electors of the most numerous branch of the state legislature." So, the Constitution, originally written, left voting rights nearly entirely up to the states.

Reflecting their English colonial roots and the almost totally agrarian nature

In Memoriam

NONE

Please help the Memorial Committee make sure no member is forgotten. Contact SCBA office at 790-5285 or scba@saginawcounty.com regarding the passing of any Saginaw County Attorney.

Our thoughts and prayers go out to all those who lost loved ones to Coronavirus.

of early American society, states generally limited the right to vote to landowning or tax-paying American white men with few exceptions. The Preamble of United States Constitution makes clear its purpose is the creation of a government that will meet the needs of the American people. Modern America is far more diverse and urban than Colonial or 1790's America. Accordingly, the people of the United States, throughout time and through their representatives, have sought and successfully brought about greater degrees of inclusion, participation, and representation in the American political processes.

The Preamble acknowledges the Union's own imperfection, indicating that the Constitution is established also "in Order to form a more perfect Union." In seeking to form a more perfect Union, the Founding Fathers drafted a clause into the Constitution allowing for it to be amended, though not easily. To date, Congress has submitted 33 amendment proposals to the states, 27 of which were ratified and added as amendments to the US Constitution. The most prominent amendments relating to voting are as follows:

The Fifteenth Amendment (1870) – "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude."

Every election year has its own issues that are at the forefront. Sometimes it is the economy, maybe it is health care. The 1868 presidential election's biggest issue was black male suffrage. Following the American Civil War, Congress debated at great length the rights of Americans who were formerly slaves. The election of a Union Commanding General Ulysses Grant in 1868 convinced a majority of Republicans in congress that black male suffrage was important to the party's future.

The Nineteenth Amendment (1920) – "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of sex."

A suffrage proposal that eventually became the Nineteenth Amendment was introduced to and rejected by Congress as early as 1878. The National American Woman Suffrage Association argued that women's patriotic wartime contributions during World War I should be rewarded with political enfranchisement through suffrage. The National Woman's Party contributed to the movement with demonstrations like hunger strikes and marches. Both organizations are credited with creating the pressure that would eventually lead President Woodrow Wilson to declare his support for the suffrage amendment in 1918. It passed in 1919 and was ratified in 1920.

The Twenty-fourth Amendment (1964) – "The right of citizens of the United States to vote in any primary or other election for President or Vice President, for electors for President or Vice President, or for Senator or Representative in Congress, shall not be denied or abridged by the United States or any State by reason of failure to pay poll tax or other tax."

In the former Confederate Southern States, the right to vote in federal elections was conditioned on the

payment of a poll tax, effectively disenfranchising black American and poor voters. To this day, Arizona, Arkansas, Georgia, Louisiana, Oklahoma, South Carolina, and Wyoming have not ratified this amendment, with Mississippi going so far as to reject the amendment outright.

The Twenty-sixth Amendment (1971) – "The right of citizens of the United States, who are 18 years of age or older, to vote, shall not be denied or abridged by the United states or any state on account of age."

During the 1960s and in response to the Vietnam War military draft, a movement to lower the voting age began. "Old enough to fight, old enough to vote" was a common slogan. To date, only forty-three states have ratified this amendment.

The history of voting rights is a voluminous subject. Other legislation to consider:

Dawes Act, 1887 - granted citizenship and eligibility to vote for Native American men, although this was predicated on their disassociation from their tribe.

Indian Citizenship Act, 1924 - all Native Americans are granted citizenship and right to vote.

Seventeenth Amendment - gave voters the right to directly elect their state's federal senators.

Magnuson Act, 1943 - gave Chinese immigrants the right to citizenship and the right to vote.

Twenty-third Amendment - gave residents of Washington, D.C. the right to vote in US Presidential elections.

1962-1964 - "One man, one vote" electoral system established by three cases decided by the US Supreme Court under Chief Justice Earl Warren:

Baker v. Carr (1962) - enables federal courts to hear redistricting cases;

Wesberry v. Sanders (1964) - districts in the US House of Representatives must be approximately equal in population; and

Reynolds v. Sims (1964) - both houses of the electoral districts of state legislative chambers must be roughly equal in population.

Uniformed and Overseas Citizens Absentee Voting Act, 1986 - US Military and Uniformed Services, Merchant Marine, and other citizens living overseas, on US bases at home, abroad, or aboard ship are granted the right to vote.

★★★ Your vote matters. ★★★

The 1916 presidential election outcome was in doubt for several days. President Woodrow Wilson would defeat Supreme Court Justice Charles Hughes in an election that came down to California's electoral votes. President Wilson won California by 3,806 votes, thus winning him the election by a very narrow margin.

The 2000 presidential election was decided by one state, Florida. George Bush, after great contention, eventually was named the winner of Florida, and thus the winner of the election, by 537 votes.

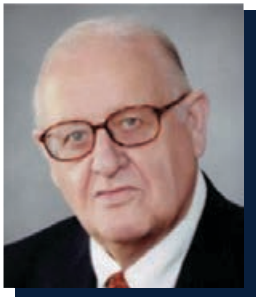
Michigan was unexpectedly won by President Trump in 2016. Donald Trump defeated Hillary Clinton by a margin of 0.23%. This amounts to 10,704 votes - the thinnest margin of victory of the 50 states in the 2016 presidential election.

Whether you decide to vote by mail or in-person, I take this opportunity to encourage participation in this, and every, election. Voting is not only your right but also your civic duty.

★★★★★

"Nobody will ever deprive the American people of the right to vote except the American people themselves and the only way they could do this is by not voting." – Franklin D. Roosevelt

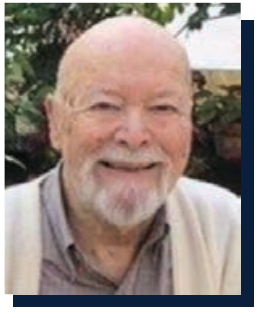
SCBA is known for its comradery and respect for all its members. An act that follows members throughout their legal career and even after death. Memorial Services are a practice long held by the members. Due to Coronavirus-19 a hold has been placed on these practices, but we promise we will get back to them as soon as we can. In the meantime, let's remember those we have lost this year,



Mark Thomas Mahlberg

Mark Thomas Mahlberg died following a brief illness on Monday, May 11, 2020. He graduated from the University of Michigan School of Law and had practiced law for more than 40 years.

Honorable Robert Edgar Bright



Judge Bright died on Friday, July 31, 2020. He was an honorable man of faith who served his God, his family and his country. Robert practiced law in Saginaw for several decades. He was Justice of the Peace in his early career and finished his last years as a District Judge for Saginaw County.

Robert Jack Krupka Sr.

Bob died on Sunday, August 9, 2020 in Saginaw. He obtained his law degree in general law at Wayne State. He worked at the National Labor Relations Board, then joined Wickes, and in 1974 went on to work for Cook, Nash, and Diebel Law from 1975-1983. In 1989 Bob opened his own law firm, until his retirement in 2018.

Gary E Gottlieb

Gary died Saturday, August 15, 2020. He was employed as a teacher at St. Charles Community High School from 1974-1986. He graduated from Cooley Law School in 1983. Gary then worked for Lawyer's Title and then owned and operated his own private law practice.

Gary J. Goodman

Gary died Thursday, December 5, 2019. He graduated Cooley Law School in 1977. He continued to practice law for over 30 years, working in private practice and for law firms around the county, most recently with LeFevre & LeFevre.

Kirk Ellsworth

Kirk died Thursday, April 23, 2020. He claimed he had lived the best life of anyone in the history of the world. Kirk graduated from Cooley Law School and is a founding member of Shinners & Ellsworth. He practiced law for 26 years.

SAGINAW COUNTY LAWYERS' AUXILIARY

By: Claudia J. Wallace

As you know from my past articles, I am not a journalist or even an adequate writer, but I do my best with what I have to work with. Each month that goes by it gets harder and harder to deliver any news from the SCLA. Good news is that we are still an organization and are carrying on the best we know how during these trying times. At this time we are conducting our meetings via Zoom like so many others. Jenn Jaffe and Carrie Burns have taken this on for us and so far, have done a mighty fine job! We will continue to do so until further notice.

After a lot of thought and consideration the SCLA regrets that we will not be holding our annual wreath and poinsettia sale this November. A word from the chair, Pat Moore, "It is out of an abundance of caution for our members and supporters that the SCLA is suspending our annual wreath and poinsettia fundraiser for 2020. We anticipate a robust sale next year and hope we can count on your long-time support in 2021." Boehler's Greenhouse will still have all their beautiful greeneries and poinsettias for sale and are having their Christmas Open House the first weekend in December. When the holidays are upon us, think of Boehler's. They never disappoint.

On behalf of the SCLA, we thank the Membership for their continued support now and into the future.

Optimism - hopefulness and confidence about the future or the successful outcome of something.

Let us share in this together.

SCBA EXECUTIVE DIRECTOR'S REPORT

By: Kelli Scorsone, Executive Director

LAW DAY 2021

The rule of law is the bedrock of American rights and liberties—in times of calm and unrest alike. The 2021 Law Day theme—*Advancing the Rule of Law, Now*—reminds all of us that we the people share the responsibility to promote the rule of law, defend liberty, and pursue justice.

What is the Rule of Law?

The rule of law is a set of principles, or ideals, for ensuring an orderly and just society. Many countries throughout the world strive to uphold the rule of law where no one is above the law, everyone is treated equally under the law, everyone is held accountable to the same laws, there are clear and fair processes for enforcing laws, there is an independent judiciary, and human rights are guaranteed for all.

#RuleofLaw

We the people – individuals, institutions, and governments – all play a role in maintaining the rule of law. SCBA stands with ABA for the rule of law.

Please contact me if you are willing to assist in the 2021 Law Program. I reached out to the schools and they are looking to us to provide an activity of some sort, it may not be Mock Trials yet, so we are open for your ideas.

2021 MEMBERSHIP DRIVE

SCBA Membership Dues – Due January 1st. You should be receiving your dues notice this month.

Thank you, loyal members, for sticking with us through 2020! We are showing our appreciation to you with one free SCBA logo face mask. We ordered extra that will go on sale this month.

It is Important to continue your membership. SCBA is a great local bar. It

was founded in 1859 by dedicated lawyers that came before you and has continued to be a strong bar with the great leadership. Please help keep it strong.

Your payment can be done online through our website, Saginawbar.org; or send a check by mail; or credit card. But **REMEMBER**, send your dues form to me, either by email or mail, I do need the information contained on it.

2020 CHRISTMAS PARTY

COVID has cancelled work, court, and many of our events this year – and now I feel it's cancelled Christmas. Sadly, your SCBA Board decided to cancel the Christmas Party. It, like all our other events won't take place this year in the wake of the increasing number of coronavirus infections.

The cancellation is disappointing, but necessary. It's regrettable, extremely regrettable, because it is one of our events that bring our members together. But studies show it is 10 times easier to transmit the virus inside as opposed to outdoors. And since our holiday event has us inside at a table elbow-to-elbow with friends, it could cause an upswing in cases.

Many things have changed this year, including changing holiday traditions for many of us. This annual tradition has drawn members young and old alike to cheerfully gather. But the Board is committed to hold only safe and welcoming events to protect the members.

UNITED STATES DEPARTMENT OF LABOR ISSUES PROPOSED INDEPENDENT CONTRACTOR RULE UNDER THE FAIR LABOR STANDARDS ACT

By: Logan Byrne
Masud Labor Law Group

Employers often use independent contractors for certain work rather than utilizing their own employees. Lawn care services are a perfect example. However, employers sometimes desire to use independent contractors for work more closely related to the employer's core business. In that regard, independent contractors can include sales representatives, engineers, bookkeepers, or workers supplied by a temp service to cover a short-term spike in orders for manufacturing goods produced by the employer. When classifying a worker as an independent contractor, the employer takes on risk that the independent contractor relationship may actually be a traditional employment relationship for which the employer bears the burden of adherence to various employment statutes such as workers compensation, healthcare, and unemployment coverage, along with various other worker protection statutes like non-discrimination, the payment of overtime, and union organizing rights. In regard to wage and hour concerns, it is not uncommon for a misclassification to result in substantial back pay to a would-be independent contractor reclassified as an employee upon review by the DOL or the federal courts.

On September 22, 2020, the United States Department of Labor ("DOL") issued a proposed rule which updates the test used to determine whether an employee is considered an independent contractor under the federal Fair Labor Standards Act ("FLSA"). The FLSA is the dominant federal wage and hour law requiring the payment of minimum wage and overtime to employees otherwise exempt from its application. The proposed rule is designed to streamline and clarify independent contractor classification determinations. The DOL indicated that "streamlining and clarifying the test to identify independent contractors will reduce worker misclassification, reduce litigation, increase efficiency, and increase job satisfaction."

The DOL's goal is laudable and its rewrite of the rule is much needed. The current rule, with its origins in the early 1950s, has become known as the "economic realities test" and has been understood as setting forth a seven factor test for determining whether a worker should be classified as an independent contractor or an employee. Unfortunately for employers, the application of the test has been anything but clear. It has fluctuated as to its factors

and has been modified over the years through a series of sometimes conflicting opinion letters of the DOL. Its inconsistent application has become a frequent source of confusion leading to misclassification suits under the FLSA. In contrast, and if adopted as a final rule without substantial adjustment, the DOL's new rule should provide a clear and predictable framework for employers to make independent contract classification determinations for wage and hour purposes.

The newly proposed rule has two key takeaways. First, as mentioned above, it adopts a streamlined economic realities test. Second, it drastically reduces the importance of any written contractual relationship or informal understanding between the parties as to the status of the worker and, instead, places the focus on the actual practices of the parties in the establishment and maintenance of their relationship.

The New Economic Realities Test:

The proposed rule revises the economic realities test by reducing its seven factors down to five for determining independent contractor status. From there, it further reduces the analysis to two "core factors" and three "guidepost factors." The proposed rule gives greater weight and primary emphasis to the two core factors and engages the guidepost factors when needed for resolving conflicts between the two core factors. The proposed factors are as follows, with the first two being the core factors and the final three being the guidepost factors:

(1) The nature and degree of the worker's control over the work;
(2) The worker's opportunity for profit or loss based on initiative or investment;
(3) The amount of skill required;
(4) The degree of permanence of the working relationship between the worker and the potential employer; and
(5) Whether the work is part of an integrated unit of production.

Notice and Comment:

For the proposed rule to become valid it must go through the notice and comment process. Once published on the Federal Register, the public has thirty days to review the proposed rule and submit comments. In this case, the public has until October 26, 2020 to submit formal comments. After the comment period, the DOL will issue a final rule that responds to the comments and justifies its position. Although it is possible that the comments will force the DOL to change its rule, the final rule will mostly likely be similar, if not almost identical, to the proposed rule. Once issued, employers should review the final rule to see if it is significantly different from the proposed rule.

Next Steps:

Once finalized, this new rule from the DOL may help businesses fend off misclassification suits under the FLSA and provide parties with more freedom to form flexible working relationships. While the new rule will not have binding effect on state wage and hour laws, it very well may have persuasive authority there as well.

For advice and consultation on how to comply with independent contractor and employee classification requirements, or any other employment law matter, employers are strongly encouraged to contact experienced labor and employment counsel.

BANKRUPTCY CASE NOTES

By: Jack Weinstein

A current bankruptcy hot topic is whether monthly Social Security income should be considered income for bankruptcy purposes. That issue was discussed in the case of Wayne and Reeda Meehean, Appellants, v Andrew Vara, US Trustee in the US District Court for the Eastern District of Michigan, Southern Division, Civil Action No. 20-CV-10380. The case was heard by District Court Judge Bernard A. Friedman. The issue was whether the US Trustee's (Trustee) Motion to dismiss debtors' Chapter 7 case pursuant to 11 USC §707(b)(3)(B) (totality of circumstances of debtors financial condition); and, if so, did debtors' abuse the bankruptcy system leading to the dismissal of their case?

Debtors had filed for Chapter 7 relief during April of 2019. They listed $5,842 in monthly income composed of $4,007 of Social Security benefits and $1,835 in pension income; and, $4,446 in monthly expenses. Debtors' listed $142,871 in secured debt (mortgage loan) and $43,100 in unsecured non-priority debt, mainly credit card obligations. Their assets consisted of their home and a boat totaling $157,500.

In July of 2019, the Trustee moved to dismiss their Petition under 11 USC §707(b)(3)(B) arguing that debtors' Social Security income should be considered in assessing debtors need for Chapter 7 bankruptcy relief. The Trustee had argued that if their Social Security income was considered, debtors could pay off all of their unsecured debt within 5 years; therefore, debtors should file for Chapter 13 relief. In short, the Trustee's argument was that "if the debtors attempt to obtain relief under Chapter 7 when they have the ability to pay their creditors with little or no adjustment to their expenses constitutes an abuse of the provisions of Chapter 7." Judge Friedman noted that courts are divided on the question as to whether or not Social Security income should be considered in analyzing 11 USC §707(b)(3).

Debtors' argued that their Chapter 7 Petition was not an abuse because Social Security income should not be considered in assessing the "totality of the circumstances of the debtors financial situation" as set for in 11 USC §707(b)(3)(B). Debtors cited 42

USC §407(a) which states that Social Security benefits are not subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law. Therefore, debtors argued that their Social Security benefits must be disregarded in determining whether they have the ability to pay their debts.

Judge Friedman cited the case of *In re Krohn*, 886 F.2d 123, 126 (6th Cir. 1989) wherein that court held that debtor's ability to pay his/her debts "alone may be sufficient to warrant dismissal". Judge Friedman stated that:

"The starting point is the statute itself. Section 707(b)(3)(B) permits the Bankruptcy Court to dismiss a Chapter 7 petition if, in that court's judgment, "the granting of relief would be an abuse of the provisions of this chapter" considering "the totality of the circumstances . . . of the debtor's financial situation." "Totality" is "as inclusive [a term] as it is possible to employ." *In re Riggs*, 495 B.R. 704, 716 (Bankr. W.D. Va. 2013). Congress chose to place only one limit on what the Bankruptcy Court may consider in evaluating a debtor's financial situation in determining whether, under §707(b)(3)(B), his/her Chapter 7 petition is abusive, namely, "the court may not take into consideration whether a debtor has made, or continues to make, charitable contributions . . . to any qualified religious or charitable entity or organization." Section 707(b)(1). With this single exception, §707(b)(3)(B) permits inquiry into the entirety of the debtor's "financial situation." This contrasts notably with the inquiry under §707(b)(2), which presumes abuse if the debtor's "current monthly income" (a term of art that is defined by the Bankruptcy Code to exclude Social Security benefits, *see 11 U.S.C. §101(10A)(B)(ii)(I)* exceeds a certain amount. If Congress had intended, in like manner, to exclude Social Security benefits from the §707(b)(3)(B) inquiry, it easily could have done so by adding the words "in light of his current monthly income" at the end of this subsection. Instead, Congress directed the Bankruptcy Court to evaluate abuse based on the "totality" of the debtor's financial situation with no such limitation. This suggests that the Bankruptcy Court should consider all of the debtor's income and expenses, as well as any other factors relevant to his/her financial situation."

The parties agreed that the leading Sixth Circuit case addressing §707(b)(3)(B) is *In re Krohn, supra*. Wherein that court held that:

Among the factors to be considered in deciding whether a debtor is needy is his ability to repay his debts out of future earnings. *Walton*, 866 F.2d at 984-85; *Kelly*, 841 F.2d at 914-15 (collecting cases). That factor alone may be sufficient to warrant dismissal. For example, a court would not be justified in concluding that a debtor is needy and worthy of discharge, where his disposable income permits liquidation of his consumer debts with relative ease. Other factors relevant to need include whether the debtor enjoys a stable source of future income, whether he is eligible for adjustment of his debts through Chapter 13 of the Bankruptcy Code, whether there are state remedies

with the potential to ease his financial predicament, the degree of relief obtainable through private negotiations, and whether his expenses can be reduced significantly without depriving him of adequate food, clothing, shelter and other necessities.

Then Judge Friedman went on to state:

"But as the Bankruptcy Court correctly noted, under 11 USC §1325(a)(3) it could have denied confirmation of such a plan for lacking good faith. Just as courts are divided as to whether Social Security income may be considered in determining abuse under §707(b)(3)(B), they are divided as to whether such income may be considered in determining good faith under §1325(a)(3). After surveying the conflicting case law on this issue, see *In re Meehean*, 611 B.R. at 588-92, the Bankruptcy Court concluded that Social Security income is properly considered in determining whether a Chapter 13 plan has been proposed in good faith, citing, among other cases, *In re Mains*, 451 B.R. 428, 434 (Bankr. W.D. Mich. 2011) ("[T]his court sees no reason why the Sixth Circuit would not take into consideration all of a debtor's income, including social security benefits, in considering the sincerity of his repayment plan regardless of whether those benefits were included or not under Section 1325(b)."). The Court finds no error in this analysis and affirms the Bankruptcy Court's ruling on this issue. Further, given the totality of the circumstances of debtors' financial situation in the present case, including the income they receive from Social Security benefits, the Bankruptcy Court did not err in concluding that debtors could have proposed a good-faith Chapter 13 plan that paid off all of their unsecured non-priority debt in less than five years, while a plan that proposed to pay none of this debt would have been rejected for lacking good faith."

Therefore, Judge Friedman concluded that the Bankruptcy Court had not committed factual error nor had it abused its discretion by including debtors' Social Security income as a component of their monthly income in deciding the trustee's dismissal motion per §707(b)(3)(B). Such income was properly considered, along with other relevant factors, in weighing whether or not debtors had abused the bankruptcy system pursuant to that section, as well as, the factor of "good faith" per §1325(a)(3).

SAGINAW COUNTY JURY TRIAL PLAN

The Saginaw County Jury Trial Plan includes an understanding that the first priority is the safety and security of all participants. The Plan calls for trials to be held off-site from the courthouse at the Dow Event Center. The entire trial process will take place at the Dow, from jury selection through deliberation and verdict. The facility will allow for proper social distancing, and also provides enough space for conducting the trial and juror placement.

Arrangements have been made with Sheriff William Federspiel for a contingent of armed deputies to be present during all proceedings. And on the days that hearings take place there will be no other events taking place at the Dow.

There will be no in-person viewing by the public. In order to comply with Supreme Court Administrative guidelines requiring the proceedings be made available to the public, we have contracted with a local video production company, Snow Productions, to livestream the proceedings via Zoom/ YouTube. There will be four cameras and six microphones used during the proceedings so that the judge, attorneys, and some witnesses will be able to be seen and heard.

Through the efforts of County Controller Robert Belleman, the costs for renting the Dow and for the livestreaming of the trial will be covered by CARES Act COVID-19 related funds. The agreements with Jon Block, general manager of the Dow, and Al Snow, owner of the production company covers forty (40) days of trials and other hearings. The first scheduled day of trial is set for November 9th.

Saginaw County Bar Association
Saginaw County Bar Association
Executive Director Kelli Scorsone
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