

REDACTED

VIRGINIA:

IN THE CIRCUIT COURT OF ALBEMARLE COUNTY

JOHN H. BIRDSALL et al.,

Plaintiffs,

v.

Case No. CL17000001-00

FOXFIELD RACING ASSOCIATION, INC., et al.,

Defendants.

MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT ON COUNT III¹

Plaintiffs ask the Court to grant summary judgment on Count III of their Second Amended Complaint, which deals with the removal of Foxfield Racing Association (“Foxfield Racing” or the “Association”) as trustee of the Foxfield Property and other assets held by the Association as a result of the Will of Mariann S. Tejada. Specifically, Plaintiffs ask the Court to grant them summary judgment on the relief sought in Paragraphs 88-90 of the Second Amended Complaint:²

88. An Order removing Foxfield Racing as trustee and appointing a special fiduciary to take possession of the trust property and administer the trust until such time as a new trustee can be appointed;

89. An Order requiring Defendants to convey all property held by Foxfield Racing to the special fiduciary, pending appointment of a new trustee, to which the property can then be conveyed;

90. An Order requiring Defendants to account for all assets of Foxfield Racing held in trust pursuant to the Will of Mrs. Tejada, as provided by Virginia Code § 64.2-792(B)(4).

¹ Consistent with the Protective Order entered in this case, this memorandum and accompanying exhibits are being filed in both redacted and unredacted versions, with the redacted version being filed publicly and the unredacted version being filed with the Clerk under seal and provided to Judge’s chambers.

² Other questions presented by the Second Amended Complaint include the amount of funds that Tom Dick should be required to disgorge and the amount of the judgment that should be entered against him. These are matters for another day. For now, the important thing is to prevent further losses by placing the trust assets into good hands.

STATEMENT OF UNDISPUTED FACTS

Plaintiffs incorporate their Statement of Undisputed Facts from their previously filed Memorandum in Support of Motion for Summary Judgment on Count I. The numbering below continues the sequence from that previous pleading:

15. Between March 2011 and December 2014, Benjamin Dick was the sole officer and director of Foxfield Racing. Tom Dick's Resps. to 1st RFA Nos. 1-2; Foxfield Racing Resps. to 1st RFA Nos. 1-2.³

16. In December 2014, Benjamin Dick appointed his brother, Defendant Thomas Dick ("Tom Dick"), to serve as Vice President and co-director of the Association. *Id.*

17. When Benjamin Dick died in August 2015, Tom Dick was left as the sole director of the Association and took the liberty of appointing himself as President and CEO of the Association; he did not replace Benjamin Dick with another co-director and has been the sole director since his brother's death. Amend. Comp. ¶ 38; Ans. ¶ 38.

18. Foxfield Racing Association has explored the prospect of selling its land from time to time. Statement of Defense Counsel, June 2, 2017 hearing at 16.

19. Indeed, Tom Dick has caused himself to be paid "consulting fees" during the time he has spent trying to sell the Association's land. *See* Exhibit 1 and its attachment, Exhibit K (ledger sheet, Bates number 2950).⁴ It is fair to infer that some of those fees were paid in connection with those efforts.

³ Although the March 2011 start date of Benjamin Dick's tenure as the sole officer and director of the Association does not appear in pleadings or admissions, it is not believed to be contested.

⁴ These payments and other payments to the Dick family are shown on ledger sheets of the Association, which are authenticated by "Defendants [Joint] Response to Plaintiffs Second Request for Admissions," filed with this memorandum as Exhibit 1. *See* Exhibit 1, ¶¶ 61-63 and Exhibit K.

20. Tom Dick claims the right to sell the Foxfield Property and to do with the proceeds as he sees fit, including taking the money for himself. Statement of Defense Counsel, Oct. 2, 2017 hearing at 19-20.

21. In October 2016, Tom Dick conferred with representatives of Frank Hardy Sotheby's International Realty to discuss development of the Foxfield Property, including the civil engineers and other team members who would be needed, at a per-lot development cost of \$30,000. See Exhibit 2 (FHSIR 41-45) (previously introduced into the record without objection as Exhibit B to Memorandum in Opposition to Defendants' Motion to Stay Discovery).

22. Reading the email chain from bottom (oldest) to top (newest), pages FHSIR 43-44 show the following:

- E-mail from K. Whipple at Waterstreet Studios to F. Hardy (Oct. 12, 2016) (providing "per lot development costs: \$30K per lot")
- E-mail from F. Hardy to T. Dick (Oct. 13, 2016) (relaying "response from Waterstreet Studios")
- E-mail from T. Dick to F. Hardy (Oct. 13, 2016) ("Good work. This is a start. Let's talk further about this [sic] hiring one of these firms.")

23. On January 16, 2017, Kennon Williams, a landscape architect, gave Tom Dick a report on his proposed development of the Foxfield Property, which would be re-named "Hermit Thrush." The report includes several subdivision scenarios, including one that would carve up the Foxfield Property into 17 separate lots. See Exhibit 3 (previously introduced into the record without objection as Exhibit C to Memorandum in Opposition to Defendants' Motion to Stay Discovery.)

24. In practice, Benjamin Dick and Tom Dick have treated the assets of the Foxfield Racing Association as if those assets were their own private property. See Undisputed Facts 25 through 28, *infra*.

25. Between January 1, 2011 (the “start date” used thus far for discovery purposes) and October 2017 (the last month reported through discovery), Benjamin Dick and Tom Dick caused the Association to pay [REDACTED] to [REDACTED] and members of the Dick family. These payments include the following:

- | | | |
|----|---|--------------------------|
| a. | To the Law Offices of Benjamin Dick: | [REDACTED] ⁵ |
| b. | As “Directors Fees” to Benjamin Dick: | [REDACTED] ⁶ |
| c. | As “Salary and Wages” to Benjamin Dick: | [REDACTED] ⁷ |
| d. | As “Salary and Wages” to Karen Dick: ⁸ | [REDACTED] ⁹ |
| e. | To “TJD Consulting” | [REDACTED] ¹⁰ |
| f. | As “Salary and Wages” to Brittany Dick: ¹¹ | [REDACTED] ¹² |
| | TOTAL | [REDACTED] |

26. Of the [REDACTED] itemized above, a total of [REDACTED] was paid after Tom Dick became a director and officer of the Association on December 31, 2014.¹³

- | | | |
|----|---------------------------------------|--------------------------|
| a. | To the Law Offices of Benjamin Dick: | [REDACTED] ¹⁴ |
| b. | As “Directors Fees” to Benjamin Dick: | [REDACTED] ¹⁵ |

⁵ See Exh. 1/Exh. K (ledger sheet, Bates number 2941)

⁶ See Exh. 1/Exh. K (ledger sheet, Bates number 2942)

⁷ See Exh. 1/Exh. K (ledger sheet, Bates number 2943-44)

⁸ Karen Dick is a member of the Dick family. Tom Dick’s Answers to First Requests for Admission (Exhibit 4) at 13, RFA 31. She is the wife of the late Benjamin Dick’s nephew.

⁹ See Exh. 1/Exh. K (ledger sheet, Bates number 2945-48)

¹⁰ See Exh. 1/Exh. K (ledger sheet, Bates number 2950)

¹¹ Brittany Dick is also a member of the Dick Family. Exhibit 4 at 13, RFA 33. She is the late Benjamin Dick’s daughter.

¹² See Exh. 1/Exh. K (ledger sheet, Bates number 2949)

¹³ See Exh. 1/Exh. K and ledger sheets identified in footnotes that follow.

¹⁴ See Exh. 1/Exh. K (ledger sheet, Bates number 2941)

¹⁵ See Exh. 1/Exh. K (ledger sheet, Bates number 2942)

c.	As "Salary and Wages" to Benjamin Dick:	██████████ ¹⁶
d.	As "Salary and Wages" to Karen Dick:	██████████ ¹⁷
e.	To "TJD Consulting"	██████████ ¹⁸
	TOTAL	██████████

27. There is no evidence that Benjamin Dick ever provided the Association a written statement or other explanation of the legal services for which he claimed payment, nor is there any other written statement or other explanation of the legal services for which he claimed such payment. Dick's Resps. to Pls.' 1st RFA Nos. 15-16 (Exhibit 4); Foxfield Racing's Resps. to 1st RFA Nos. 15-16 (Exhibit 5).¹⁹

28. After Tom Dick became a director of Foxfield Racing, he never objected to, questioned or investigated any payments made by Foxfield Racing to Benjamin Dick. Dick's Resps. to Pls.' 1st RFA No. 37 (Exhibit 4); Foxfield Racing's Resp. to 1st RFA No. 38 (Exhibit 5).

29. In addition to his efforts to sell the Foxfield Property, Tom Dick has sought to sell another parcel of land bequeathed to the Association in the Will. That parcel, located on Pantops Mountain, is the subject of a still-pending suit to quiet title brought by Tom Dick without notice to Plaintiffs, in which Plaintiffs have intervened. *In re Foxfield Racing Association, Inc.*, Case No. CL17-733.

¹⁶ See Exh. 1/Exh. K (ledger sheet, Bates number 2943-44)

¹⁷ See Exh. 1/Exh. K (ledger sheet, Bates number 2945-48)

¹⁸ See Exh. 1/Exh. K (ledger sheet, Bates number 2950)

¹⁹ Although these Requests for Admission focused on years 2011-14 (the years before Tom Dick became an officer and director), the pattern thus established is presumed to continue absent affirmative evidence to the contrary.

30. In connection with that proposed sale, Tom Dick advised this Court that if the sale were enjoined: “Foxfield Racing Association will negatively impacted because it *cannot access its capital by selling properties to generate income for ongoing business expenses* or access credit by placing liens on property to generate operating funds.” Aff. of Tom Dick, ¶ 16 (Jan. 16, 2017), attached to Def. Demurrer to Pls.’ Request for Temp. Injunction (served Jan. 19, 2017).

31. To the extent that Tom Dick’s evaluation of the financial condition of the Association may be accurate, it is largely the result of the improper payments made to various members of the Dick family.

STANDARD OF REVIEW

Plaintiffs adopt by reference the familiar standard for granting summary judgment found within their Memorandum in Support of Motion for Summary Judgment on Count I.

ARGUMENT

**The Undisputed Facts Show that Foxfield Racing Association,
While Under the Control of Benjamin Dick and Tom Dick,
Violated the Uniform Trust Code so as to Warrant Its Removal as Trustee.**

By seeking summary judgment on Count I, Plaintiffs have asked the Court to declare that the Will established a charitable trust in the assets bequeathed to Foxfield Racing and, more specifically, that: (a) the Foxfield Property and all proceeds derived from the use thereof are held in trust by Foxfield Racing, and (b) Foxfield Racing may not lawfully sell or use the Foxfield Property or any portion thereof, or any proceeds derived from the use thereof in a manner inconsistent with the purposes established in the Will, namely the continued perpetuation of the Foxfield Races and all of the related activities on its property.

If the Court grants the relief requested under Count I, the next question is what must be done in order to preserve the assets of the trust, and to ensure that they are not squandered, whether

by the sale of the Foxfield Property or by the misapplication of those assets to the personal benefit of Tom Dick, who now wholly controls the Association as its only officer and director. The centerpiece of any appropriate remedy must be to remove the Association as trustee and appoint a special fiduciary to take possession of the trust property and administer the trust until such time as a new trustee can be appointed. Such relief should be coupled with an Order requiring Defendants to convey all property held by the Association to the special fiduciary, pending appointment of a new trustee, to which the property can then be conveyed. In addition, the Court should order Defendants to account for all assets of the Association held in trust pursuant to the Will.

These steps are made necessary by the fact that the Association, while under the control of Benjamin Dick and Tom Dick, has violated its duties as trustee, as specified by the Uniform Trust Code. Nor should there be any doubt about the appropriateness of such relief. A plaintiff may properly request that a court remove or appoint a trustee of a trust. Va. Code § 64.2-712(B). This Court has authority and jurisdiction to remove a trustee where certain conditions are met, under Virginia Code § 64.2-759:

A. The Association should be removed as trustee for serious breach of trust under Virginia Code § 64.2-759(b)(1).

“A violation by a trustee of a duty the trustee owes to a beneficiary is a breach of trust.” Va. Code § 64.2-792(A). A trustee is dutybound to “administer the trust and invest trust assets in good faith, in accordance with its terms and purposes and the interests of the beneficiaries, and in accordance with [the Virginia Uniform Trust Code].” *Id.* § 64.2-763. Also among a trustee’s duties are duties of loyalty, *id.* § 64.2-764, impartiality, *id.* § 64.2-765, prudent administration, *id.* § 64.2-766, control and protection of trust property, *id.* § 64.2-771, and recordkeeping and identification of trust property, *id.* § 64.2-772, among other things. In all of this, “[a] trustee shall administer the trust solely in the interests of the beneficiaries.” *Id.* § 64.2-764.

For a breach of any of these duties to be deemed sufficiently “serious” to warrant the trustee’s removal under Va. Code § 64.2-759(b)(1), the breach need not “consist of a single act that causes significant harm or involves flagrant misconduct. A serious breach of trust may also consist of smaller breaches, none of which individually justify removal when considered alone, but which do so when considered together.” *See Hahn v. Robb (In re Estate of Robb)*, 21 Neb. App. 429, 437, 839 N.W.2d 368, 374 (2013) (quoting Unif. Trust Code § 706 cmt.).²⁰

A trustee can be removed if “[t]he trustee has committed a serious breach of trust[.]” Va. Code § 64.2-759(b)(1). The payment of over one million dollars to the Dick family, over less than six years, is a serious breach of the trust. Indeed, they treated the trust as their personal piggy bank. Most egregious of these payments are the hundreds of thousands of dollars paid to Benjamin Dick in “legal fees” without any explanation of the legal services for which those fees were paid. The lack of documentation, coupled with the size and regularity of the payment of fees, leads inevitably to the conclusion that the “legal fees” were simply a way of funneling money to Benjamin Dick on top of the salary and director fees that he arranged for the Association to pay him.

While those “legal fees” appear to have benefitted Benjamin Dick, rather than Tom Dick, it is clear that Tom Dick was a willing participant in the scheme. Once Tom Dick became an officer and director of the Association, he had a duty to make sure that the assets of the trust were properly handled. One such asset was the Association’s claim for recoupment of funds that were

²⁰ It is appropriate to reference cases in other states, decided under the Uniform Trust Code, as, “[i]n applying and construing this uniform act, consideration shall be given to the need to promote uniformity of the law with respect to its subject matter among states that enact it.” *See* Va. Code § 64.2-805. Similarly, “regular consultation of the Comments is crucial to achieving one of the chief goals of the Uniform Trust Code: to promote uniformity in application of the statute.” *See Burton v. Dolph*, 89 Va. Cir. 101, 114 (City of Norfolk 2014).

improperly paid to Benjamin Dick. But, as Tom Dick has admitted, he did nothing to investigate the matter or to press for the return – or even an accounting – of the fees. *See* Undisputed Fact 28, *supra*. On the contrary, Tom Dick allowed the payments to continue to his brother and, following his brother's death, began to take money himself for his consulting business, TJD Consulting.

When Tom Dick, as Foxfield Racing, is taking money from the trust for his consulting business or directing it to his brother, “it is not clear that he is acting solely for the benefit of the Trust beneficiaries.” *See In re Estate of Robb*, 21 Neb. App. at 439, 839 N.W.2d at 375-76. Moreover, his “determination of his own level of compensation places his interests directly at odds with” the beneficiaries and “constitute[s] a serious breach of trust.” *See id.* at 439, 839 N.W.2d at 376. When this conduct is “considered together” with the surrounding pattern of such payments, *see id.* at 437, 839 N.W.2d at 374 (quoting Unif. Trust Code § 706 cmt.), it is all the more serious.

Even if payments to TJD Consulting for valid consulting work did not give serious cause for concern, the payments at issue here include payments that Tom Dick took in order to further his scheme to sell the Foxfield Property, *see* Undisputed Fact 19, an action wholly inconsistent with the Will and to which trust assets cannot properly be diverted. Nor can there be any doubt that, before the plan was uncovered and this lawsuit filed, Tom Dick was planning to sell the Foxfield Property. This is shown by Tom Dick's October 2016 discussions with representatives of Frank Hardy Sotheby's International Realty and by the expenditure of funds to develop plans to convert the Foxfield Property into subdivision to be known as “Hermit Thrush.” *See* Undisputed Facts 21-23, *supra*.

In a half-hearted attempt to assure the Court that the Foxfield Property is not in danger of being diverted to private uses, defense counsel has sometimes suggested (albeit without evidence) that the proceeds from any such sale would be contributed to some charitable purpose related to steeplechase racing. Statement of Defense Counsel, June 2, 2017 Hearing at 16.²¹ But, this assurance is contradicted by Tom Dick's own insistence that there is no charitable purpose at work here. *See* Aff. of Tom Dick, ¶ 12 (Jan. 16, 2017), attached to Def. Demurrer to Pls.' Request for Temp. Injunction (served Jan. 19, 2017) ("The Foxfield Races are not conducted for charitable purposes.").

Moreover, even if the sales proceeds would be used in the manner counsel described, it would still violate the trust. Mrs. Tejada did not dedicate her property to benefit some *other* steeplechase race in some undisclosed and distant place. She dedicated it for "the perpetuation of the *Foxfield Races in Albemarle County*" and to benefit, first of all, "the people of *Albemarle County*" (the Will, at 1) (emphasis added). Mrs. Tejada's insistence on the maintenance of *these* races on *this* property is consistent with her burial on the Foxfield Property.

Moreover, to sell the Foxfield Property for development of a subdivision would destroy the valuable open space that the property provides. The enjoyment of such space – whether by neighbors or passers-by – is one of the "related activities" of the Foxfield Property, which the

²¹ THE COURT: If the property is sold and developed, hypothetically, does that money then go to Foxfield Racing Association?

MR. SUMMERS: Yes, Judge. But Foxfield Racing Association has every intention to follow the wishes of Ms. de Tejada's will, which is to establish a, a, I think 501(c) or a foundation where those monies would be deposited so they can continue promoting steeplechase races.

Will sought to preserve. Will, at 1. *See also* Will, at 4 (naming “preservation of open spaces” as a charitable objective).

How are these machinations solely in the interests of “the people of Albemarle County and their friends and visitors and [people] of Virginia who appreciate the equestrian sports, competition, and related activities”? They are not. And this, in itself, is a breach of the duty of loyalty. *See* Va. Code § 64.2-764. The seriousness of this breach is made plain by the fact that the trustee has sought to undermine the very purpose the bequest: the continued perpetuation of the Foxfield Races and all of the related activities on its property.

B. The Association should be removed as trustee for unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively, pursuant to Virginia Code § 64.2-759(b)(3).

Second, a trustee can be removed “[b]ecause of unfitness, unwillingness, or persistent failure of the trustee to administer the trust effectively [if] the court determines that removal of the trustee best serves the interests of the beneficiaries[.]” Va. Code § 64.2-759(b)(3). This criterion is met, not only because of the loss of money through “legal fees” and other money paid to the Dick family, but also because the liquid assets of the trust were drained to the point that the Association then set about to sell trust assets in order to make up for the misspent money. Undisputed Facts 29 & 30. This constitutes a “persistent failure of the trustee to administer the trust effectively.” Va. Code § 64.2-759(b)(3). Moreover, the Association’s removal as trustee “best serves the interests of the beneficiaries,” *id.*, as “provided in the terms of the trust,” *see id.* § 64.2-701 (“‘*Interests of the beneficiaries*’ means the beneficial interests provided in the terms of the trust.”), to wit: the continued perpetuation of the Foxfield Races and all of the related activities on its property.

According to Tom Dick, “Foxfield Racing Association will negatively impacted because it *cannot access its capital by selling properties to generate income for ongoing business expenses* or access credit by placing liens on property to generate operating funds.” Affidavit of Tom Dick, ¶ 16. To the extent that any such problem may exist, surely a major cause of that problem must be the actions of Ben and Tom Dick in draining off [REDACTED] dollars in “legal fees” and “consulting fees” over the years – again, proving the “persistent failure of the trustee to administer the trust effectively.” Va. Code § 64.2-759(b)(3). With *proper management* of the Foxfield Races, there would be no need to sell capital assets in order to pay ongoing business expenses and, further, this would best serve the “interests of the beneficiaries.” Tom Dick’s inability to properly manage the Foxfield Races is yet another reason to replace the trustee and further confirms the interests of the beneficiaries in doing so.²²

C. The Association should be removed as trustee due to a substantial change of circumstances, and because removal is in the interests of the beneficiaries and consistent with the material purposes of the trust, pursuant to Virginia Code § 64.2-759(b)(4).

A trustee can be removed if “[t]here has been a substantial change of circumstances . . . [and] the court finds that removal of the trustee best serves the interests of all of the beneficiaries and is not inconsistent with a material purpose of the trust, and a suitable co-trustee or successor trustee is available.” Va. Code § 64.2-759(b)(4). Under this broad mandate, there is no need to make any finding of fault. Indeed, this mandate reflects the conclusion of “the drafters of the UTC . . . that in situations where the personal link between the settlor and the trustee has been broken, the emphasis should turn to whether the particular trustee is appropriate to the

²² It should be noted that the [REDACTED] in “legal fees” revealed by discovery only goes back to January 2011. Pursuing discovery through earlier periods likely would reveal [REDACTED] in additional “legal fees” that Benjamin Dick paid to himself.

trust, not whether the trustee has committed particular acts of misconduct or is totally unfit[.]” See *In re McKinney*, 67 A.3d 824, 836 n.15 (Pa. Super. Ct. 2013) (quoting David M. English, *The UTC (2000) Significant Provisions and Policy Issues*, 67 Mo. L. R. 143, 199 (2002))). “Changed circumstances justifying removal of a trustee might include a substantial change in the character of the service or location of the trustee.” See *id.* at 836 (quoting Unif. Trust Code § 706 cmt.).

The fact that Mrs. Tejada’s longtime colleague, Benjamin Dick, has died and passed control of the Association to his brother, Tom Dick, is a sufficient basis for the Court to change trustees. As shown by Undisputed Fact 14, from Plaintiffs’ Memorandum in Support of Motion for Summary Judgment on Count I, Tom Dick was not involved in the Foxfield Races before Mrs. Tejada’s death, and he only met Mrs. Tejada “a single time,” in either 1982 or 1983, during a spring race, did not have any other oral communications with Mrs. Tejada at any time, and did not have any written communications with Mrs. Tejada at any time. This change in circumstances supports removal of the trustee. See, e.g., 67 A.3d at 837 (reversing trial court’s denial of removal of a trustee for “changed circumstances” where the beneficiaries “had a personal relationship with several key advisors who left” the entity trustee, and “[t]hose trusted advisors no longer service[d] [the beneficiaries’] trusts”). Moreover, Tom Dick does not live in the Charlottesville-Albemarle area, but lives in a different part of Virginia, making hands-on control of the Foxfield Property and the Foxfield Races difficult. See, e.g., *id.* (finding “a substantial change in circumstances” and removal of trustee warranted, where beneficiaries and trustee no longer resided in the same region). These facts make the appointment of a new trustee “not inconsistent with a material purpose of the trust” and in the best interest of

all the beneficiaries, *i.e.* “the people of Albemarle County and their friends and visitors and of Virginia who appreciate the equestrian sports, competition, and related activities. . . .” Will, at 1.

This Court also may remove a trustee to remedy a breach of trust, pursuant to Virginia Code § 64.2-792(b). In addition, under this same statute, the Court may appoint a special fiduciary to take possession of the trust property and administer the trust. This Court also has the authority to appoint a replacement trustee under the common law and applicable Virginia statutes. Va. Code §§ 64.2-100, 64.2-1404, and 64.2-1405(A)(vii)-(viii). Where the terms of a charitable trust do not designate a successor trustee or name specific charitable organizations, a circuit court may appoint a trustee at the request of any interested party if the original trustee is ineligible or for other good cause shown. Va. Code §§ 64.2-757(D)(3), and 64.2-1405(vii)-(viii).

CONCLUSION

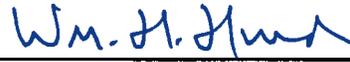
For the foregoing reasons, the Court should grant Plaintiffs summary judgment on the relief they seek in in Paragraphs 88-90 of the Second Amended Complaint:

88. An Order removing Foxfield Racing as trustee and appointing a special fiduciary to take possession of the trust property and administer the trust until such time as a new trustee can be appointed;

89. An Order requiring Defendants to convey all property held by Foxfield Racing to the special fiduciary, pending appointment of a new trustee, to which the property can then be conveyed; [and]

90. An Order requiring Defendants to account for all assets of Foxfield Racing held in trust pursuant to the Will of Mrs. Tejada, as provided by Virginia Code § 64.2-792(B)(4).

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