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Litigation Committee response to the Ministry of Justice's Consultation Paper on *Court fees: proposals for reform*

The City of London Law Society ("CLLS") represents approximately 15,000 City lawyers through individual and corporate membership including some of the largest international law firms in the world. These law firms advise a variety of clients from multinational companies and financial institutions to Government departments, often in relation to complex, multi-jurisdictional legal issues.

The CLLS responds to consultations on issues of importance to its members through its 19 specialist committees. This response has been prepared by the CLLS Litigation Committee (the "Committee") and addresses the Ministry of Justice's Consultation Paper entitled *Court Fees: proposals for reform* (the "Consultation Paper").

General comments on the Consultation Paper

The Committee does not accept that the Consultation Paper makes out any case for increasing court fees in civil litigation.

The premise of the Consultation Paper is that civil court business should be grouped with family court business for the purpose of calculating court fees that will recover the total combined costs of the civil and family courts. HMCTS's Annual Report for 2012-13 (page 86) shows a deficit in civil and family business (after remissions) of £111,429,000, a figure repeated (subject to rounding) in paragraph 31 of the Consultation Paper. Unlike the Consultation Paper, HMCTS's Annual Report points out that 99% (or £109,934,000) of this deficit is attributable to family business. The deficit for civil business is negligible, at only £1,495,000.

The Consultation Paper proposes significant increases in fees for civil cases but only standardisation of fees - even reductions - in the family courts. The effect of the grouping proposed by the Consultation Paper is therefore to require those involved in civil court cases to subsidise the business of the family courts. The Committee does not consider that it is either fair or equitable to expect civil litigants to meet the costs of those involved in matters before the family courts.

Public and private law applications in the family courts in relation, for example, to children can raise acute social issues. These issues may justify keeping fees for some types of business in the family courts lower than the cost of the providing the service. So, for example, there may be a justification for reducing from £2155 to nil the fee payable on the hearing of an application by a local authority to take a child into care under section 31 of the Children Act 1989, as proposed in Annex A to the Consultation Paper, despite these cases inevitably using a considerable amount of court time. It is not possible to calculate from public statistics the loss of revenue to HMCTS that this change will cause, but a decision for social or political reasons to remove the fee for court hearings relating to children does not begin to justify passing the cost of those hearings, previously borne by local authorities, to civil litigants. If keeping the cost of family-related applications low is the right thing to do for society as a whole, society as a whole must bear the cost of that course of action. There is no logical or other reason for setting court fees in civil litigation by reference to a shortfall that arises in a distinct area of activity even if it is administered by the same governmental organisation.

Further, not all business in the family courts justifies a subsidy. A dispute over the financial aspects of a divorce is a dispute about money in the same way that a dispute over the assets in a trust, over sums due on a building contract or over damages for breach of contract is a dispute about money. There is no reason why the fees charged for this kind of family court business should be calculated differently from disputes about money in the civil courts, namely by reference to the sums in dispute with a view to securing full costs recovery from family business.

The Consultation Paper argues that there should be no hearing fees for private law family cases because such cases are "often brought by people going through difficult circumstances" (paragraph 67). However, the same may be equally true of people faced with litigation in the civil courts, whether that litigation concerns their homes, their jobs, their finances or anything else of vital importance to them. In civil matters, if these people cannot afford court fees, it is dealt with through the system of remissions. There is no reason why civil and family cases should be treated differently in this regard.

As a result, the Committee does not accept that there is any need to increase fees for civil litigation at all (beyond, perhaps, small increases to close the gap of £1,495,000 to the extent that this gap will not close over time through increased business or greater efficiencies in HMCTS). A civil justice system is essential to the proper functioning of a democratic society, and should not be used as a means to raise money from those unfortunate enough to find themselves involved in a dispute in order to subsidise a distinct area. The deficit in court fees arises in family court work, and should be addressed in the context of family business, not of civil litigation.

The Committee understands that the Government is proposing to change the method of allocation of court service indirect costs (eg the estate and IT). Currently, indirect costs are allocated according to the amount of court time that particular categories of

case use. A family case will typically use more court time than a civil case. The Government is proposing to change the allocation of indirect costs so that it is based instead on the volume of cases received in the courts because "all those who issue a court case benefit equally from the existence of the civil justice system and should share in contributing towards its indirect costs" (paragraph 38). The civil courts have a significantly higher volume of cases than the family courts and will thus have allocated to them a higher proportion of indirect costs.

In the Committee's view, this change in methodology is opportunistic and unjustifiable. Litigation as a whole might benefit from the intangible existence of the civil justice system, but, for example, the court service only provides court rooms for those cases that need them. Other cases do not benefit from the court service's physical estate. It is therefore inappropriate to allocate costs arising from the court estate to categories of case that do not use the estate. Estate, IT and other indirect costs should therefore continue to be allocated on the current basis.

Further, the proposals in the Consultation Paper, especially those in chapter 3, are inconsistent with the Ministry of Justice's goal of promoting the UK's legal services sector, as set out in, for example, *Plan for Growth: Promoting the UK's Legal Services Sector* (May 2011) and *UK Legal Services on the International Stage: Underpinning Growth and Stability* (March 2013). Court fees might, in themselves, be a relatively small part of the cost to a foreign party of litigating in England, but overtly increasing fees to a level far in excess of the costs involved in order to subsidise unrelated parts of the justice system does not send a message that the courts of England and Wales welcome international business. The more than sixfold increase in court fees proposed for higher value cases potentially makes court fees an issue that litigants must consider and will not promote the competitiveness of the English legal services sector. Even disregarding international parties, loading additional costs on to businesses in order to meet social costs unrelated to those businesses cannot, in the Committee's view, be justified.

The Committee also wishes to record its concern generally about the lack of information and explanation in the Consultation Paper. The Consultation Paper lacks transparency because, for example, it does not state that the shortfall in court fees arises almost wholly from family cases, it does not explain that its solution to this under-recovery is for civil court business to subsidise family court business and it does not analyse the costs of family business. Still less does the Consultation Paper seek to justify its proposal that those involved in civil law cases should subsidise those involved in family law cases. The policy questions are not properly identified.

As a result of these failures, and contrary to the Government's *Consultation Principles*, insufficient information is included in the Consultation Paper to enable stakeholders to make informed comments. It is, for example, impossible from the information in the Consultation Paper to assess the appropriate level of court fees for family business. The Consultation Paper does not explain what aspects of family business give rise to the deficit. Is it primarily public law applications or is it private

law applications? If private law applications, what kind of applications? Detailed information is required in order to consider how the chronic under-recovery in the family courts should be addressed.

Instead of explaining and analyzing the issues, the Consultation Paper is primarily directed to the question of how much more money can be raised from civil litigation and, in particular, from commercial litigation. The Government is, for most disputes, the monopoly supplier of dispute resolution services. HM Treasury points out in *Managing Public Money* (paragraph A6.1.11) that great care should be taken in setting fees when the public sector has a naturally dominant position. In the Committee's view, it is inappropriate for the Government to seek to exploit the courts' near monopoly position by using them as a means to raise money, especially in an area as vital to the functioning of civil society as a whole as the justice system.

All the Committee's comments below in relation to the specific questions in the Consultation Paper are subject to this general point that no increase in court fees for civil litigation is justified.

Question 1: *What do you consider to be the equality impacts of the proposed fee increases (when supported by a remissions system) on court users who have protected characteristics? Can you provide any evidence or sources of information that will help us to understand and assess those impacts?*

See above.

Question 2: *Do you agree with the premise of a single issue fee of £270 for non-money cases?*

The Committee does not object in principle to a change in the issue fee for non-money cases in the manner proposed, but it is not possible to assess from the information in the Consultation Paper whether the figure of £270 is appropriate or, indeed, how it has been calculated.

The actual cost to the court service of the issue of a claim form or other initiating document is minimal. There is no judicial involvement or other consideration of the contents or merits of the document or the claim set out in the document. An official merely applies a stamp to a document prepared by the claimant and, in some cases, arranges to post the claim form to the defendant. The only explanation in the Consultation Paper for the figure of £270 proposed for this service is that "those who issue a court case benefit equally from the existence of the civil justice system as a whole and should share in contributing to its indirect costs" (paragraph 38). The Consultation Paper does not explain how this benefit is or can be quantified or, indeed, what proportion of the total cost of the court system is recovered through issue fees. In these circumstances, it is impossible to assess whether £270 is an appropriate figure.

In this connection, the Committee notes that HMCTS's Annual Report for 2012-13 indicates that 1,706,099 cases were "received" in the civil and family courts in 2012-13. For this number of cases to generate an income of £610 million (paragraphs 32 and 45 of the Consultation Paper), total fees of £358 per case are required. On this basis, the issue fee of £270 proposed represents 76% of the total fees required from each case. Issue fees will cover the lion's share of the fees needed by the civil and family court system as a whole to meet its costs.

Taking the figures in HMCTS's Annual Report for 2012-13 for civil business alone, 1,428,195 civil cases were "received" in the civil courts in 2012-13; the expenditure on civil cases was £337,807,000. Total fees of £237 per case are therefore required to meet the costs of providing the civil court service. The fee of £270 proposed in the Consultation Paper therefore represents a subsidy of £33 (or 14%) even before any other fees payable in the course of litigation are taken into account.

Further, Annex A to the Consultation Paper indicates that the figure of £270 set out in paragraph 54 of the Consultation Paper will apply only in the County Courts (itself an increase of 54%, from £175), whereas the fee in the High Court will remain at £465. No explanation is offered for this difference (indeed, no reference is even made to this difference in the body of the Consultation Paper). If the methodology in setting fees is grouping across processes (paragraphs 40 and 53), it is hard to see why the issue cost in the High Court should be higher than in the County Court. In any event, it pushes the proportion of court costs recovered from issue fees higher even than the 114%, or 76%, referred to above.

Question 3: *Do you agree with the proposed fee levels for money claims? In particular, do you agree with the proposal to charge the same fee for claims issued through the Claims Production Centre that would be charged for applications lodged online.*

The cost of issuing a claim form for £100 is the same to the court service as the cost of issuing a claim form for £100 million. If the approach set out in HM Treasury's paper *Managing Public Money* (paragraph A6.1.3 - "fees for services should generally be charged at cost") were to be applied, it would require there to be a fixed fee for the issue of all claim forms, no matter the amount involved.

However, the Committee accepts that there is a justification for a mildly graduated charging scheme in order to avoid low value claims being charged a disproportionate fee, as well as to avoid loading additional debt in the form of court costs on those who may already be in financial difficulties. Whether the banding proposed in the Consultation Paper is appropriate (eg the fee proposed for a claim of £5001 is more than double the fee for a claim of £5000) or the absolute figures are apposite is impossible to assess without considerably more information than is provided by the Consultation Paper. For example, how many claim forms are issued within each band? What is the weighted average issue fee per claim form? What proportion of total fees is and should be recovered from the issue fee? Subject, however, to the

answer to Question 4 below, the Committee sees no fundamental objection to small increases in issue fees for money claims.

The Committee also sees no objection to a reduction for claims issued through the CPC provided that the reduction is justified by reduced costs to the court service.

Question 4: *Do you agree with the removal of allocation and listing fees in all cases?*

The Committee does not object to the removal of allocation and listing fees and the resulting increase in issue fees. This would have the effect of increasing the proportion of the court service's costs recovered from fees payable on the issue of proceedings and thus of placing a higher premium on the availability of the civil justice system as a whole rather than on the actual use of the court system made by individual litigants. In this regard, the Committee notes that, of the 1,394,230 County Court claims issued in 2012 (excluding insolvency), only 151,120, or 10.8%, were allocated to a track (see *Court Statistics Quarterly, Main Tables*). The proposal in the Consultation Paper therefore increases the fees charged in all cases for the benefit of the 10.8% of cases that actually progress beyond close of pleadings.

Question 5: Do you agree that small claims track hearing fees should be maintained at their current levels, which are below cost?
Question 6: Do you agree that small claims track hearing fees should be maintained at their current levels, which are below cost?
Question 7: Do you agree with the proposals to abolish the refund of hearing fees when early notice is given that a hearing is not required?

The Committee agrees with these proposals.

Question 8: Do you agree with the proposals to retain the current fee levels for private law family proceedings and divorce, and the proposal no longer to charge a fee for non-molestation and occupation orders? Please comment on all or any of these processes.

For the reasons set out above, the Committee is highly sceptical about this proposal. The deficit in court fees arises from under-charging by the family courts and must be addressed, if at all, in the context of the family courts. Whatever fee structure is adopted for the family courts, it is neither fair nor equitable to impose any shortfall in fees arising in the family courts on users of the civil courts.

Question 9: Do you agree with the standardisation of the fee for Children Act cases, and with the proposal that there should only be one up-front fee for public law family cases?
Question 10: Do you agree with the standardisation of general application fees and fees for applications within family proceedings?

See above.

Question 11: *Do you agree with the proposed fee levels for judicial review cases?*
Question 12: *Do you agree with proposals to increase the fee for an application for grant of probate to full cost levels?*
Question 13: Do you agree with the proposed fee levels for cases taken to the Court of Appeal?
Question 14: Do you agree with the government's proposed changes to the fees charged in the Court of Protection?

The Committee has no objection to the changes proposed.

Question 15: *Do you have any further comments to make on the government's cost recovery plans?*

The Committee has set out its general comments above. The Committee considers that the premise underlying the Government's cost recovery plans, namely that the civil courts should subsidise the family courts, is neither fair nor equitable. The Consultation Paper does not analyse the issues adequately and does not provide a satisfactory way forward. The Government should consider the position afresh.

Questions 16: Do you agree that the fee for issuing a specified money claim should be 5% of the value of the claim?
Question 17: Do you agree that there should be a maximum fee for issuing specified money claims, and that it should be £10,000?

The Committee does not agree that the fees for specified money claims should be calculated as a percentage of the claim. For the reasons set out above, the Committee considers that there is no justification for charging enhanced fees for specified money claims.

Further, there is no logical basis for charging a higher fee to a litigant bringing a debt claim for £1 million than to another litigant bringing a damages claim for the same amount. Similarly, if the parties are arguing over title to land worth £1 million or over financial arrangements of this magnitude in a divorce, there is no reason in principle why they should pay lower court fees than someone pursuing a debt of £1 million. The service they all receive will be the same; the fee should also be the same.

The Committee also considers that banded fees are simpler to administer than a percentage figure, which would require fees running into pence and fractions of pence. The Consultation Paper does not suggest that the current system is unworkable.

At the top of the band (or percentage), the issue raised is in substance what the cap on issue fees should be. If the proposal in Annex A of the Consultation Paper is adopted, the cap will be £1870, an increase of 12% from the current figure. This already represents a significantly enhanced fee because the cost of issuing a high value claim is the same as issuing a low value claim and is, in itself, minimal. Some higher value claims may go on to use considerable court resources, but many will

not. The charging structure for issue fees therefore already appears to depart appreciably from HM Treasury's guidelines in *Managing Public Money*.

In *Managing Public Money,* HM Treasury warns that great care should be taken where public sector suppliers are in a naturally dominant position (paragraph A6.1.11). For most disputes, the court system is the monopoly supplier of dispute resolution services. Most claimants have no choice where they litigate. They must either litigate in the English courts or they must give up their claims altogether.

A civil justice system is an essential feature in any democratic society, not simply a means to raise money, whether from businesses or from individuals. The Committee does not consider that the Ministry of Justice should seek to exploit the courts' near monopoly position by imposing the extreme form of regressive taxation proposed in the Consultation Paper because of a perception that those who issue high value claims can afford to pay high fees or because higher fees supposedly "better reflect the value of the proceedings" to those involved. Those who issue high value claims already pay substantially in excess of the actual cost of the service they receive; increasing the fees still further in the extravagant manner proposed in the Consultation Paper is neither fair nor equitable.

At a broader level, if the Government believes that it is providing a commercial service and is entitled to charge for the value it considers that it offers, then significantly enhanced fees might be begin to be justified if those paying these fees received a significantly enhanced service. The service provided to court users is, however, currently too often far below an acceptable standard, and there is no suggestion that the income from enhanced fees would be applied to remedy this position. Indeed, the Committee would not suggest that particular litigants should be able to buy a higher standard of judicial service through the payment of increased fees.

See also Question 20 below regarding the international position.

Question 18: Do you believe that unspecified claims should be subject to the same fee regime as specified money claims? Or do you believe that they should have a lower maximum fee of £5000?

The Committee sees no reason why unspecified money claims should be treated differently from specified money claims. In particular, the Committee can see no reason why the maximum figure should be different.

Question 19: Is there a risk that applying a different maximum fee could have unintended consequences?

The Committee does not agree that the maximum fee for unspecified money claims should differ from the fee for money claims.

Question 20: *Do you agree that it is reasonable to charge higher court fees for high value commercial proceedings than would apply to standard money claims?*

The Committee does not agree.

Contrary to the question posed, the proposal in the Consultation Paper is not to increase fees for commercial cases but to increase fees for cases started in the courts sitting in the Rolls Building. Cases started in the courts sitting in the Rolls Building are not homogeneous and, in particular, are far from exclusively commercial. For example, the largest component of the Rolls Building is the Chancery Division, which undertakes, according to Lord Justice Briggs, a "uniquely varied workload", ranging from wills and succession, trusts, confidentiality, landlord and tenant, insolvency and guardianship, as well as commercial litigation (*Chancery Modernisation Review: Final Report*, paragraph 1.40). Even if a case could be made for increasing charges to commercial organisations (which, for the reasons set out in this response, the Committee does not consider that it can), the Rolls Building cannot be treated as a proxy for commercial cases.

Nor does the existence of a new court building offer a reason to raise fees. The Rolls Building is a more attractive court venue than, for example, the old St Dunstan's House in Fetter Lane (which was wholly unacceptable), but the efficiencies offered by a new building should provide a means to reduce court costs, not to increase them.

In any event, the Committee can see no reason to surcharge commercial litigants, the majority of whom are British businesses. They receive the same service as other litigants. Where other litigants cannot afford court fees, remission is available, but that does not justify charging extravagantly higher fees to those who, it is perceived, might be able to pay higher fees. Using commercial disputes as a means to raise money will not provide the right environment for business and commerce to flourish, which even the Consultation Paper (paragraph 1) accepts is an essential function of the courts.

As we have said, most litigants have no choice where they start proceedings. The cases in which litigants have a choice where to start proceedings are generally international cases. The courts in England and Wales have historically been relatively successful in the international competition for dispute resolution services, but they cannot be complacent, as *Plan for Growth: Promoting the UK's Legal Services Sector* (May 2011) noted. For example, the QMC/PWC arbitration survey cited in the Consultation Paper found that 52% of respondents prefer arbitration as the means to resolve international disputes, while only 28% prefer the courts. The number of cases commenced in the Commercial Court in 2012 was less than half the number started in 1996; over the same period, the number of arbitrations started before the ICC and the LCIA more than doubled. The English courts therefore face considerable competition, both from arbitration and from other national courts.

The English courts now even face considerable competition in areas where they have traditionally been dominant, such as financial services. This competition comes

from, for example, Prime Finance in The Hague (an arbitration provider, which has enjoyed support from the Dutch government), as well as new courts in the DIFC and traditional competitors such as the New York courts. In this regard, the Committee notes that paragraph 18 of the Consultation Paper suggests that English court fees offer a comparative advantage over other national courts, but that paragraph fails to mention that English court fees are already significantly higher than those of New York, England's principal competitor amongst the jurisdictions listed in that paragraph.

In these circumstances, the Committee sees no justification for taking the risk of undermining the relative success of the English legal system by treating court fees in general – and court fees paid by international parties in particular - as a means of raising money. Many international parties may be able to afford the higher fees proposed, but a more than sixfold increase in fees will make the level of court fees a subject that lawyers must discuss with their international clients, will not encourage parties to litigate in England and will inevitably offer a marketing opportunity to England's competitors. Any increase on this scale will send a message that the UK Government does not wish to encourage litigation services in England and Wales and, in particular, foreign commercial litigation.

Question 21: We would welcome views on the alternative proposals for charging higher fees for money claims in commercial proceedings. Do you think it would be preferable to charge higher fees for hearings in commercial proceedings? Question 22: Could the introduction of a hearing fee have unintended consequences? What measures might we put in place to ensure that the parties provided accurate time estimates for hearings, rather than minimize the cost? Question 23: If you prefer Option 2 (a higher maximum fee to issue proceedings), do you think the maximum fee should be £15,000 or £20,000? Question 24: Do you agree that the proposals for commercial proceedings are unlikely to damage the UK's position as the leading centre for commercial dispute resolution? Are there other factors we should take into account in assessing the competitiveness of the UK's legal services?

The Committee is opposed to both the options proposed in the Consultation Paper for reasons already explained.

As stated above, cases in the Rolls Building cannot be seen as a proxy for commercial cases, but, in any event, it is inconsistent with the Ministry of Justice's stated goal of promoting the UK's legal services sector to impose a huge rise in the fees for litigating in England, far above the costs involved. The fact that international litigants can, in the main, afford to pay enhanced fees will not encourage foreign parties to come to the English courts. Why should international litigants bring claims in a country the government of which sees them merely as a means to raise money?

Parties commonly choose English law to govern their contracts because, amongst other reasons, they regard dispute resolution before the English courts as acceptable

and thereby provide work in drafting those contracts. If dispute resolution before the English courts is less attractive, the result may be that fewer contracts will be governed by English law, with less work for English lawyers. At issue is not, therefore, merely income from litigation but income from the preparation of contractual documents for international projects that are currently governed by English law but which, if the English courts are less attractive, may migrate to New York or other laws.

The Committee is also concerned about the impression that hearing fees may give to some litigants, namely that they are paying for their judge. This may affect their attitude to the judge and what they consider that they are entitled to expect from the court. It may also encourage them to opt for arbitration, thereby reducing income to the court system - if they have to pay for the judge's time, why not choose arbitration, where they also have to pay for the decision-maker but may have the ability to select at least one of those who will decide the case? Indeed, the cost of arbitration is often seen as one factor that encourages parties to use the courts. If court costs are seen to be calculated on the same basis, courts will lose that advantage.

There are also practical objections to daily hearing fees. The Consultation Paper seeks to reduce the complexity of the fee charging structure (eg by removing allocation fees and increasing issue fees to compensate for this), but the addition of fees dependent on the length of a hearing will have the reverse effect. Lawyers will feel under pressure to keep estimates low, with the potential need to collect further fees when hearings overrun. Indeed, Lord Justice Briggs' *Chancery Modernisation Report: Final Report* records that almost half of all trials in the Chancery Division exceed their estimated times and, where they do so, it is on average by 47.6% (paragraph 2.7). The collection of hearing fees will, therefore, prove complex and costly.

Charging according to the length of a hearing also has an element of randomness about it. A hearing before some judges might take less than a day, but a hearing before others could take significantly longer. Should parties pay extra because the particular judge allocated to hear their case has not read the papers in advance or does not manage the hearing rigorously? Trials in the English courts are already extremely lengthy by international standards. Imposing a daily fee will only serve to emphasise the length and resulting cost.

If it were necessary to impose extra fees on cases that make greater use of court resources, these fees should not be confined to litigation in particular courts, still less in particular court buildings, but should be general in application. In that scenario, the Committee would favour additional graduated fees at later stages of proceedings (eg the first case management conference, listing and the pre-trial review) calculated on the same basis as issue fees.

Question 25: Do you agree that the same fee structure should be applied to all money claims in the Rolls Building and at District Registries? Question 26: What other measures should we consider (for example, using the Civil Procedure Rules) to target fees more effectively to high-value commercial proceedings while minimizing the risk that the appropriate fee could be avoided? Question 27: Should the fee regime for commercial proceedings also apply in the Mercantile Court?

Charging differential fees for proceedings in courts sitting in the Rolls Building is, in the Committee's view, wrong in principle. These questions illustrate why it is also impracticable. For example, the court system allows proceedings to be started in any part of the system - high value commercial cases can be started in a County Court or the Queen's Bench Division. There is no means to prevent parties starting proceedings in whatever court they choose, whether or not their motive is to reduce the fees payable. If a defendant then applies successfully to move the proceedings to, say, the TCC, who should pay the additional fee required - the defendant, who wants the move, or the claimant, who does not? What if the court requires a transfer of its own motion and contrary to the wishes of the parties?

Further, who should be liable to pay a daily fee - the claimant(s) or the defendant(s)? If there is a claim and a counterclaim, how should the daily fees be allocated between the parties? If a case estimated to last ten days settles after the first day or only takes seven days, will there be a rebate?

Question 28: Do you agree that the fee for a divorce petition should be set at £750?

See above.

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THE CITY OF LONDON LAW SOCIETY
Litigation Committee

Individuals and firms represented on this Committee are as follows:

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