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PRECEDENT OF THE T.T.A.B.

UNITED STATES PATENT AND TRADEMARK OFFICE
Trademark Trial and Appeal Board
P.O. Box 1451
Alexandria, VA 22313-1451

Mailed: May 4, 2009

Concurrent Use No. 94002108
Concurrent Use No. 94002111
Concurrent Use No. 94002157

La Tapatia Tortilleria, Inc.
(Serial Nos. 76511983,
76510072 and 76625200-DESIGN
OF A WOMAN-94002108 and
94002157)

v.

Gruma Corporation, assignee of
La Tapatia Norcal, Inc.,
joined as party defendant
(Serial No. 76515436-DESIGN
OF A WOMAN--94002111)

Concurrent Use No. 94002121

La Tapatia Tortilleria, Inc.
(Serial No. 76510073-LA
TAPATIA)

v.

Gruma Corporation, assignee of
La Tapatia Norcal, Inc.,
joined as party defendant
(Serial No. 76515435-LA
TAPATIA)

v.

Bimbo Bakeries, USA, Inc.

(Registration No. 2094085-LA
TAPATIA and Design and
Registration No. 2094086-LA
TAPATIA-both cancelled)

Cancellation No. 92041003

Gruma Corporation, assignee of
La Tapatia Norcal, Inc.,
joined as party plaintiff

v.

La Tapatia Tortilleria, Inc.
(Registration No. 2092391-LA
TAPATIA)

Cancellation No. 92041012

Gruma Corporation, assignee of
La Tapatia Norcal, Inc.,
joined as party plaintiff

v.

La Tapatia Tortilleria, Inc.
(Registration No. 2093293-LA
TAPATIA)

Before Quinn, Holtzman and Walsh,
Administrative Trademark Judges.

By the Board:

These cases are now before the Board to determine the sufficiency of the concurrent use applicants' showing of entitlement to registration of their respective trademark applications for the mark LA TAPATIA and for design marks depicting a woman. There are six related proceedings before the Board, which we address in this order. The concurrent use applicants are La Tapatia Tortilleria, Inc. ("LTT") and

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Gruma Corporation ("Gruma"). Bimbo Bakeries, USA, Inc. ("Bimbo") is an excepted user named by LTT in connection with some of its applications, as discussed *infra*. Although the cases are not all consolidated, they involve the same parties, related marks and similar issues. In view thereof, we have exercised our discretion to issue a single order relating to all the cases.

Both Gruma and Bimbo acquired their respective rights in their marks from predecessor companies. Bimbo's predecessor is Flores Brothers Mexican Foods, Inc. ("Flores"), the original owner of Reg. Nos. 2094085 and 2094086. Gruma is the assignee of La Tapatia Norcal, Inc. ("Norcal"), the original owner of trademark application serial Nos. 76515436 and 76515435.

Gruma and LTT's showing of entitlement to concurrent use registrations has been presented in the following filings:

1. LTT's "Stipulated Motion Re: Consent to Concurrent Use and Request for Summary Disposition," filed October 11, 2007 in concurrent use proceeding No. 94002121.
2. LTT's "Second Stipulated Motion Re: Consent to Concurrent Use and Request for Summary Disposition," filed July 11, 2007 in concurrent use proceeding Nos. 94002108, 94002111 and 94002157.

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3. Gruma's "Addendum To Second Stipulated Motion Re: Consent to Concurrent Use and Request for Summary Disposition," filed October 16, 2007 in concurrent use proceeding Nos. 94002108, 94002111 and 94002157.

A brief overview of the cases is pertinent to the decision herein. We first address prior concurrent use proceeding No. 94001069, concluded in 1997 between LTT and Flores. Next, we discuss the marks involved in the present concurrent use proceedings and the territories claimed by LTT and Gruma. Finally, we review Gruma and LTT's recent submissions showing their entitlement to concurrent use registrations. Our decision to grant the requested concurrent use registrations follows.

I. Prior Concurrent Use Proceeding No. 94001069

In 1997, LTT and Flores concluded concurrent use proceeding No. 94001069 involving four trademark applications comprising the word LA TAPATIA [which may be translated into English as "a woman from Jalisco (Guadalajara), Mexico"].¹ In that case, the Board


¹ Following the conclusion of concurrent use proceeding No. 94001069, the parties' applications issued as concurrent use registrations. Bimbo's registrations are:

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established the parties' respective territorial rights to the marks. LTT was granted registration of its marks for the entire United States except for the states of Arizona and Utah, four counties in Nevada, and a portion of southern California roughly defined as south and east of Stateline, Nevada passing through Buellton California to the Pacific Ocean. Flores was granted concurrent registration of its marks for the states of Arizona and Utah, the above-defined southern territory in California, and the four named counties in Nevada.

The four registrations have since been cancelled under either Section 7 or Section 8 of the Trademark Act. Accordingly, they are not evidence of any presently existing rights. Expired registrations merely constitute evidence that the registrations issued. See *Action Temporary*



Reg. No. 2094085 for the mark  and No. 2094086 for the mark LA TAPATIA for "chicharrones (fried pork skins), tortillas, tostadas, taco shells, masa (corn dough)." LTT's registrations are: Reg. No. 2093922 for the mark LA TAPATIA TORTILLERIA INC. SINCE 1944 KEEP REFRIGERATED FLOUR



TORTILLAS PRICE and Design  and No. 2092361 for the mark LA TAPATIA TORTILLERIA INC. SINCE 1944 TORTILLAS ING: CORN, WATER

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Services Inc. v. Labor Force Inc., 870 F.2d 1563, 10 USPQ2d 1307, 1309 (Fed. Cir. 1989) ("[A] canceled registration does not provide constructive notice of anything"); and TBMP § 704.03(b)(1).

II. Concurrent Use Proceeding Nos. 94002108, 94002111 and 94002157

These proceedings were consolidated because they involve the same parties, LTT and Gruma, and similar marks. The marks do not include the words LA TAPATIA. Instead, they involve the designs depicted below (the "Design Marks"):



The first design (from the left) is that depicted in trademark applications serial Nos. 76511983 and 76510072, which have been filed by LTT.² The middle design is that

& LIME KEEP REFRIGERATED CORN and Design



for "tortillas and tortilla chips."

² Ser. No. 76511983 has been applied for "Mexican food products, namely-- corn and flour tortillas, tortilla chips," and Ser. No. 7651007 has been applied for "Mexican food products, namely, pork

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depicted in trademark application serial No. 76625200 and is also owned by LTT.³ The design on the right is that depicted in trademark application serial no. 76515436. It is owned by Gruma.⁴

Gruma recites LTT as a concurrent user in its application. LTT has named Gruma as a concurrent user in its application. Gruma and LTT have divided the territorial rights to use their respective Design Marks as follows.

LTT claims:

The entire United States except that part of the State of California north of a line generally described as beginning at the California/Nevada state line and running due west from the Nevada border to the intersection of State Highway 99 and Monte Vista Avenue, then in a generally southwest direction in a straight line to the intersection of Interstate Highway 5 and Fink road, then in a generally southeast direction along Interstate Highway 5, then due west through the intersection of county Road G13 and State Highway 25 to the Pacific Ocean; and the City of Turlock, California, as is now and hereafter legally bounded.

Gruma claims:

rinds and chicharrones; Mexican food products, namely, taco shells, tostada shells, Mexican pastry, masa in the nature of tortilla dough and tamale dough, and wraps."

³ Ser. No. 76625200 has been applied for "Mexican food products, namely-- corn and flour tortillas, tortilla chips."

⁴ Ser. No. 76515436 has been applied for "Mexican food products, namely, pork rinds and dried beans; Mexican food products, namely, corn tortillas, flour tortillas, tortilla chips, corn

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The geographic area consisting of that part of the State of California north of a line generally described as beginning at the California/Nevada state line and running due west from the Nevada border to the intersection of State Highway 99 and Monte Vista Avenue, then in a generally southwest direction in a straight line to the intersection of Interstate Highway 5 and Fink Road, then in a generally southeast direction along Interstate Highway 5, then due west through the intersection of County Road G13 and State Highway 25 to the Pacific Ocean, provided however, that the City of Turlock, California, as is now and hereafter legally bounded, is not and never shall be part of such geographic territory and excluding the remainder of the United States.

These four applications are pending final determination of the sufficiency of LTT and Gruma's showing of entitlement pursuant to Section 2(d) of the Trademark Act.

III. Concurrent Use Proceeding No. 94002121

This proceeding involves the parties' respective trademark applications for the word mark LA TAPATIA.

LTT seeks registration of the mark LA TAPATIA for "Mexican food products, namely, pork rinds and chicharrones; Mexican food products, namely, masa in the nature of tortilla dough and tamale dough, and wraps."⁵

Gruma seeks registration of the mark LA TAPATIA for "Mexican food products, namely, pork rinds and dried beans;

dough for tortillas and tamales, tostadas, Mexican spices, Mexican pastries, Mexican breads, rice, salsa and corn flour."

⁵ Ser. No. 76510073.

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Mexican food products, namely, corn tortillas, flour tortillas, tortilla chips, corn dough for tortillas and tamales, tostadas, Mexican spices, Mexican pastries, Mexican breads, rice, salsa and corn flour."⁶

Gruma recites LTT as a concurrent user in its application. LTT has named Gruma and Bimbo (Flores' successor) as exceptions to its use of the mark LA TAPATIA, as prior concurrent use proceeding No. 94001069 between LTT and Flores restricted LTT's right to use the mark LA TAPATIA throughout the entire United States.

Gruma's statement of territorial rights to the mark LA TAPATIA is unchanged from the statement of territorial rights it claims with respect to the Design marks.

LTT's statement of territorial rights, on the other hand, is narrower than its statement of territorial rights with respect to the Design Marks due to the fact that LTT has named Bimbo as an additional excepted user.

LTT states two exceptions to its claims in its application for the mark LA TAPATIA. First, with respect to Gruma, LTT claims (as in the other cases):

The entire United States except that part of the State of California north of a line generally described as beginning at the California/Nevada state line and running due west from the Nevada border to the

⁶ Ser. No. 76515435.

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intersection of State Highway 99 and Monte Vista Avenue, then in a generally southwest direction in a straight line to the intersection of Interstate Highway 5 and Fink road, then in a generally southeast direction along Interstate Highway 5, then due west through the intersection of county Road G13 and State Highway 25 to the Pacific Ocean; and the City of Turlock, California, as is now and hereafter legally bounded.

Secondly, with respect to Bimbo, LTT excepts from its territory, the following:

the States of Arizona and Utah; the area within the State of California, south and east of a straight line commencing in the geographical center of Stateline, Nevada and extending in a westerly direction toward the geographical center of Buellton, California until it reaches the eastern border of Santa Barbara County, California, and then extending in a southerly direction along the eastern border of Santa Barbara County, California until it reaches the Pacific Ocean; and the counties of Clark, Nye, Lincoln, and Esmeralda in the State of Nevada.

Generally, then, with respect to the mark LA TAPATIA, Gruma claims northern California, LTT claims middle California, and Bimbo is named as an excepted user by LTT for southern California, the states of Arizona and Utah, and four counties in Nevada. The rest of the United States is claimed by LTT.

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IV. Cancellation Proceeding Nos. 920941003 and 92041012

In separate proceedings, Gruma filed petitions to cancel two registrations for the mark LA TAPATIA owned by LTT, on the ground that they have not been geographically restricted to exclude the territory claimed by Gruma.⁷ The registrations have been restricted in acknowledgment of Bimbo's rights as determined in prior concurrent use proceeding No. 94001069. In its answer, LTT acknowledges Gruma's right to use the mark LA TAPATIA in northern California.

The cancellation actions have been suspended pending the final disposition of the concurrent use proceedings.

V. Discussion

Section 2(d) of the Trademark Act provides for the issuance of concurrent registrations for the same or similar marks to more than one person "under conditions and limitations as to the mode or place of use of the marks or the goods on or in connection with which such marks are used, ... when [such persons] have become entitled to use such marks as a result of their concurrent lawful use in

⁷ Reg. No. 2092391 for the mark LA TAPATIA for "tortillas, tortilla chips, taco shells, tostada shells, Mexican pastry;" and Reg. No. 2093923 for the mark LA TAPATIA TORTILLAS GORDITAS FLOUR



and Design

for "tortillas and tortilla chips."

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commerce..." See Trademark Rule 2.99(e); TBMP § 1100 et. seq. (2d ed. rev. 2004).

As concurrent use applicants, Gruma and LTT must establish their entitlement to the registrations they seek. To do this, they must show that concurrent use of their respective marks will not result in confusion despite the similarity of the marks and the overlap of goods to which the marks are applied. LTT must further show that use of its mark LA TAPATIA will not cause confusion with Bimbo's marks.

Turning first to the interface between LTT and Gruma, we note that LTT and Gruma previously informed the Board that while they recognized each other's exclusive right to use their mark in the territory as herein specified, they intended to engage in sub-licensing activities. The Board sought clarification of the parties' intent with respect to licensing, and additionally required the parties to indicate how they intended to prevent confusion and how they intended to handle any cross-advertising that may occur.

In response, LTT and Gruma submitted as an attachment to their Stipulated Motions, a copy of an "Amendment to Mutual Release and Settlement Agreement" executed May 17, 2007, wherein each party has agreed to additional restrictions governing the use of their marks. Generally,

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these are that each party will make its management aware of its obligations under the concurrent use agreements; each party will monitor the other's activities for compliance with their agreed-upon territorial restrictions; all packaging bearing any involved mark shall include a legend indicating which party is the source of the product; and each party shall avoid advertising their respective marks in the territory of the other party. To the extent any advertising is likely to spill over into the other's territory, the parties agree it will always display an express disclaimer of affiliation with the other party, its related companies, or any licensees.

Both the Stipulated Motion filed October 11, 2007 in proceeding No. 94002121 and the Second Stipulated Motion filed July 11, 2007 in the consolidated proceedings clarify the licensing aspect of the parties' agreement. LTT states, in its brief, that each party is licensed to use the marks "only under a highly restricted procedure that allows the licensor owner to control the standard of quality of the goods sold, limits the types and number of uses that may be made of the Mark, requires advance notice of such intended use to the other party, and allows the other party the opportunity to satisfy the use itself in order to avoid the use by the other party." *LTT's Second Stipulated Motion*, p.

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5. Moreover, neither party has the right "to grant sub-licenses to third parties outside of their respective geographical territory and any sub-licenses granted within the party's geographical territory are restricted to use within such territory." *Ibid.*

Gruma also advises the Board that LTT has granted it a license to use "the LA TAPATIA marks" outside California in the following area: "the entire United States with the exception of the States of Arizona and Utah and the counties of Clark, Nye, Lincoln and Esmeralda in the State of Nevada." Gruma submits that "the cross-licensing of the LA TAPATIA trademarks between [LTT and Gruma] cannot result in a likelihood of confusion because the licenses contain quality control provisions sufficient to constitute each licensee a related company of the licensor." *Addendum to Second Stipulated Motion*, p. 2.

Finally, the parties point to four years of concurrent use without confusion and note that the boundary line in California that separates their territories goes through a sparsely populated area of the state. In addition, we note that the Design Marks, while containing similar versions of the "Jalisco woman," are not identical.

The burden of proof in a concurrent use proceeding is upon the applicant to establish facts which would show,

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prima facie, that there is no likelihood of confusion arising from the concurrent use of similar marks in the parties' respective geographical areas. See *In re Beatrice Foods Co.*, 429 F.2d 466, 166 USPQ 431 (CCPA 1970); and *Handy Spot Inc. v. J.D. Williams Co., Inc.*, 181 USPQ 351 (TTAB 1974). The primary concern of the Board in determining whether and to what extent a registration is to be granted is the avoidance of any likelihood of confusion.

While we are not totally free from doubt, upon careful consideration of the submissions filed by both parties in support of their right to concurrent use registrations, the Board is persuaded that under the circumstances of this case, concurrent use by the parties of their involved marks will not, in fact, be likely to cause confusion, mistake, or to deceive.

Moreover, while stipulated agreements between parties are not binding on the Board, there can be no better assurance of the absence of a likelihood of confusion, mistake or deception than the parties' promises to avoid any activity which might lead to such confusion. See *Amalgamated Bank of New York v. Amalgamated Trust & Savings Bank*, 6 USPQ2d 1305 (Fed. Cir. 1988) (great weight must be given to agreements between parties who are most familiar with use in marketplace and who are most interested in

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precluding confusion); *In re N.A.D. Inc.*, 754 F.2d 996, 224 USPQ 969 (Fed. Cir. 1985); *In re E.I. duPont de Nemours & Co.*, 476 F.2d 1357, 177 USPQ 563 (CCPA 1973); and *In re Beatrice Foods, Co.*, *supra*.

For the above reasons, we hold that LTT and Gruma have shown their entitlement to the registrations sought vis-à-vis each other. With respect to the geographic territory in which Bimbo has exclusive rights, we first note that no part of Gruma's territory is contiguous with Bimbo's, and Gruma's territory was ceded to LTT as part of the decision in the prior concurrent use proceeding between LTT and Flores (No. 94001069). Accordingly, the rights to be determined herein as relates to Bimbo do not involve Gruma.

For the reasons discussed below, we hold that LTT has also shown its entitlement to the registrations sought vis-à-vis Bimbo. As assignee from Flores of the two registrations for the mark LA TAPATIA involved in prior concurrent use proceeding (No. 94001069), Bimbo stands in the shoes of Flores. Although the registrations have since been cancelled, Bimbo's common law rights to use the marks were not extinguished thereby, and Bimbo remains as an excepted user in concurrent use proceeding No. 94002121.

Because Bimbo does not own a pending trademark application or existing registration, it was incumbent upon

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Bimbo to answer the notification of the concurrent use proceeding if Bimbo desired to claim any territory more extensive than that acknowledged in LTT's application. See Trademark Rules 2.99(d)(2) and 2.99(d)(3). Bimbo did not answer the Board's institution notice. Accordingly, judgment was entered against Bimbo.

"While judgment will be entered against any user required to file an answer where no such answer has been filed, applicant will remain with the burden of proving entitlement to registration." Trademark Rule 2.99(d)(3). LTT has proven its entitlement to registration vis-à-vis Bimbo. In the earlier concurrent use proceeding, the Board found that there was no likelihood of confusion deriving from concurrent use of the mark LA TAPATIA (by LTT) and the marks LA TAPATIA and LA TAPATIA and Design (by Flores). Here, the marks are the same and the territories are unchanged from those established in the earlier proceeding. Thus, LTT has shown its entitlement to registration vis-à-vis Bimbo on the basis of the Board's decision in prior concurrent use proceeding No. 94001069. See TBMP § 1107 (2d ed. rev. 2004).

VI. DECISION

Applicant LTT is entitled to registration of the mark LA TAPATIA, Ser. No. 76510073, for "Mexican food products,

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namely, pork rinds and chicharrones; Mexican food products, namely, masa in the nature of tortilla dough and tamale dough, and wraps" for the area comprising:

The entire United States except the States of Arizona and Utah; and the counties of Clark, Nye, Lincoln, and Esmeralda in the State of Nevada; and that part of the State of California:

(a) north of a line generally described as beginning at the California/Nevada state line and running due west from the Nevada border to the intersection of State Highway 99 and Monte Vista Avenue, then in a generally southwest direction in a straight line to the intersection of Interstate Highway 5 and Fink road, then in a generally southeast direction along Interstate Highway 5, then due west through the intersection of county Road G13 and State Highway 25 to the Pacific Ocean; and the City of Turlock, California, as is now and hereafter legally bounded; and

(b) the area within the State of California, south and east of a straight line commencing in the geographical center of Stateline, Nevada and extending in a westerly direction toward the geographical center of Buellton, California until it reaches the eastern border of Santa Barbara County, California, and then extending in a southerly direction along the eastern border of Santa Barbara County, California until it reaches the Pacific Ocean.

Applicant LTT is entitled to registration of the Design



Marks

, Ser. Nos. 76511983 and 76510072, and

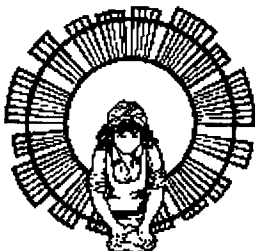
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, Ser. No. 76625200, for "Mexican food products, namely-- corn and flour tortillas, tortilla chips, pork rinds and chicharrones, taco shells, tostada shells; Mexican pastry, masa in the nature of tortilla dough and tamale dough, and wraps" for the area comprising:

The entire United States except that part of the State of California north of a line generally described as beginning at the California/Nevada state line and running due west from the Nevada border to the intersection of State Highway 99 and Monte Vista Avenue, then in a generally southwest direction in a straight line to the intersection of Interstate Highway 5 and Fink road, then in a generally southeast direction along Interstate Highway 5, then due west through the intersection of county Road G13 and State Highway 25 to the Pacific Ocean; and the City of Turlock, California, as is now and hereafter legally bounded.

Applicant Gruma is entitled to registration of the mark LA TAPATIA, Ser. No. 76515435, and the Design Mark



, Ser. No. 76515436, for "Mexican food products, namely, pork rinds and dried beans; Mexican food

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products, namely, corn tortillas, flour tortillas, tortilla chips, corn dough for tortillas and tamales, tostadas, Mexican spices, Mexican pastries, Mexican breads, rice, salsa and corn flour" for the area comprising:

That part of the State of California north of a line generally described as beginning at the California/Nevada state line and running due west from the Nevada border to the intersection of State Highway 99 and Monte Vista Avenue, then in a generally southwest direction in a straight line to the intersection of Interstate Highway 5 and Fink Road, then in a generally southeast direction along Interstate Highway 5, then due west through the intersection of County Road G13 and State Highway 25 to the Pacific Ocean, provided however, that the City of Turlock, California, as is now and hereafter legally bounded, is not and never shall be part of such geographic territory and excluding the remainder of the United States.

Reg. Nos. 2092391 and 2093923, owned by LTT, will be geographically restricted to the area comprising:

The entire United States except the States of Arizona and Utah; and the counties of Clark, Nye, Lincoln, and Esmeralda in the State of Nevada; and that part of the State of California:

(a) north of a line generally described as beginning at the California/Nevada state line and running due west from the Nevada border to the intersection of State Highway 99 and Monte Vista Avenue, then in a generally southwest direction in a straight line to the intersection of Interstate Highway 5 and Fink road, then in a generally southeast direction along Interstate Highway 5, then due west through the intersection of county Road G13 and State Highway 25 to the Pacific Ocean; and

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the City of Turlock, California, as is now and
hereafter legally bounded; and

(b) the area within the State of
California, south and east of a straight line
commencing in the geographical center of
Stateline, Nevada and extending in a westerly
direction toward the geographical center of
Buellton, California until it reaches the
eastern border of Santa Barbara County,
California, and then extending in a southerly
direction along the eastern border of Santa
Barbara County, California until it reaches
the Pacific Ocean.

Inasmuch as LTT's registrations will be restricted as
set forth above, Cancellation Nos. 92041003 and 92041012 are
hereby dismissed as moot.

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