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No. \_\_\_\_\_

ORIGINAL

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SUPREME COURT, U.S.

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IN THE  
SUPREME COURT OF THE UNITED STATES

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MARK JOUBERT

*Petitioner*

v.

TODD MILEY

*Respondent*

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On the Petition for Writ of Certiorari  
To the United States Court of Appeals  
From Supreme Judicial Court of Massachusetts

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**PETITION FOR WRIT OF CERTIORARI**

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Dated: March 8, 2022

## QUESTIONS PRESENTED

- I. May a state court establish an attorney-client relationship that will restrict an individual's liberty under the Fourteenth Amendment to pursue a long non-legal business?

## **LIST OF PARTIES**

1. MARK JOUBERT. Plaintiff and Petitioner.
2. TODD MILEY, Defendant and Respondent.

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## **PETITION FOR WRIT OF CERTIORARI**

The Petitioner, Mark Joubert, Petitioner, proceeding pro-se, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the Massachusetts Court of Appeals, rendered in these proceedings on June 17, 2021.

The federal and state courts have issued conflicting decisions on an issue of federal law and constitutional interpretation.

### **OPINIONS BELOW**

#### **State Court:**

The Massachusetts Court of Appeals reversed in part and affirmed in part the opinion of Judge Frison's Superior District Court of Massachusetts. The order denied all counterclaims of action for failure to prove damages presented by Defendant and upheld the finding of an attorney client relationship between the parties. The opinion of the Appeals court was the highest court to review the merits of the case and is reprinted and appears at Appendix D, 54a to the petition and is unpublished.

The opinion of the Justice Frison affirmed all counterclaims by the Defendant and established an attorney client relationship after trial. The opinion of the Superior Court of Massachusetts appears at Appendix B, 3a to the petition and is unpublished.

### **JURISDICTION**

The original order of the Appeals Court of Massachusetts was entered on June 17, 2021. A timely Motion for Reconsideration was timely filed and denied on June 20, 2021. The Supreme Judicial

Court of Massachusetts denied a FAR application on August 2, 2021. A. 116a.

The jurisdiction of this Court is invoked under 28 U.S.C. sec 1257(a).

**CONSTITUTIONAL AND STATUTORY  
PROVISIONS INVOLVED**

Title III of the Rules of Procedure of the Commonwealth of Massachusetts:

U.S. Const. Amend. XIV, sec 1:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of law; or deny to any person within its jurisdiction the equal protection of the laws.

**STATEMENT OF THE CASE**

Respondent filed a complaint against petitioner with the Massachusetts Board of Bar Overseers in 2012. In 2013 the Office of Bar Counsel issued its Recommendation stating that petitioner and respondent were engaged in a business relationship and not engaged in an attorney-client relationship.

Petitioner filed his Complaint against defendant Miley in 2014. A trial was held in the Worcester Superior Court on December 18, 19, 20, and 21st of 2017 before the Honorable Shannon Frison. The Superior Court endorsed its Findings of Fact and Rulings of Law on February 12, 2018.

Plaintiff filed his Notice to Appeal the Judgment on February 27, 2018. Defendant's Post trial Motion for Attorney's Fees and Costs was held on August 24, 2018.

Plaintiff filed his Notice of Appeal on August 24, 2018.

Plaintiff filed his Motion to Vacate on December 19, 2018.

Plaintiff filed his Motion to Appeal. Appellant's Brief was filed with the Appeals court on July 19, 2020. Oral arguments were heard by the Appeals Court on March 4, 2020. The Appeals Court issued its Decision on June 8, 2021. The Appeals Court reversed all of respondent's counterclaims in favor of petitioner but found that petitioner was at all relevant times an attorney-client relationship existed between the parties. Appellant filed a Motion to Reconsider, specific to the existence of an attorney-client relationship and collateral estoppel with the Appeals Court on June 2021. The Appeals Court denied the Motion after consideration on June 20, 2021.

### **STATEMENT OF THE FACTS**

Mark Joubert respectfully approaches the Supreme Judicial Court and requests a further appellate review of the lower court's findings an attorney-client relationship existed between the parties. The Court's rational is flawed in establishing an attorney-client relationship at the time the parties engaged in a joint venture. First, the court's assertion that a single act of representation that comprised of writing a letter to an auction house approximately one year prior to a

joint venture was enough to establish a perpetual attorney-client relationship that would continue for as long as the Respondent wished it to. The concept of legal representation in perpetuity violates the canons of the rules of professional responsibility, case law, or any statutes. Miley was unable to articulate a single instance where Petitioner performed any legal service after the auction letter from a year before but testified that he gave petitioner many assignments to read and evaluate scholarly science-based newspaper clippings and various articles in solar related magazine. Both the Superior Court and the Appeals Court disregarded the testimony of both Joubert and Miley regarding Petitioner's denials of performed a single legal service after the auction letter and Respondent's assertions that petitioner's research was solely science based not legally related. Respondent testified he invited Petitioner to become an officer in a corporation he wished to create. Almost a year later the respondent dissolved the corporation. After several months of conversations between the petitioner and the respondent concerning the compensation to the petitioner for the work petitioner performed, respondent filed a complaint against petitioner with the Massachusetts Board of Bar Overseers.

The Board of Bar Overseers, Office of Bar Counsel, investigated the respondent's claims, which included witness statements, interviews, and the same exhibits presented and accepted at trial. After completing their investigation of respondent's claims, the Office of Bar Counsel issued its Recommendation and stated that the parties were not engaged in an attorney-client relationship and

characterized the parties as in a "business relationship". (App. A, 1a) Pursuant to Bar Counsel Rule 2.10, the respondent had 14 days to appeal its Recommendation. The Respondent testified that he did not appeal the Bar counsel's Recommendation at any time, therefore concluding the matter. In 2014, the petitioner filed a lawsuit against respondent alleging breach of contract inter alia. The respondent filed his answer and counterclaims alleging the existence of an attorney-client relationship during the time of the corporation and other various causes of action. Petitioner filed his Answer to the Respondent's counterclaims including petitioner's affirmative defenses, which included, that respondent's Counterclaim the Petitioner was his attorney during the period of the corporation is barred by collateral estoppel, is barred by the Recommendation issued by Bar Counsel, a quasi-judicial tribunal, and is therefore, barred by lack of an attorney-client relationship. The Superior Court negated the testimony and evidence that supported collateral estoppel. The Massachusetts Appeals Court also, negated Bar Counsel's Recommendation as well as the doctrine of collateral estoppel and asserted that an attorney-client relationship existed. Neither the Superior Court nor the Appeals Court provided any legal standard to support its finding of an attorney-client relationship between the parties though the standard distilled by *DeVaux* has been the legal standard used in Massachusetts and many other courts throughout the United States. *DeVaux v. American Home Assur. Co.*, 387 Mass. 814, 817-818 (1983). An attorney-client relationship existed despite petitioners reasoned application of the accepted elements set forth in *Devaux*. Both Courts

simply focused on the fact the petitioner acting in his own self-interest and in his capacity as respondent's attorney in contrast to the respondent's specific invitation to include the petitioner as an officer and director of a corporation respondent decided to form based on the advice and insistence of the solar company.

At trial, Miley based his belief that Joubert was his attorney: (1) Joubert received mail at Miley apartment house where Joubert was residing; (2) Joubert was his attorney because "*he was going somewhere*". When asked where was Joubert going? Miley had no coherent or articulable answer. (3) "*Maybe I can't justify it.*" *DeVaux* requires more than a plaintiff's personal belief to establish an implied attorney-client relationship. An attorney-client relationship may be implied "when (1) a person seeks advice or assistance from an attorney, (2) the advice or assistance sought pertains to matters within the attorney's professional competence, and (3) the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance.... In appropriate cases the third element may be established by proof of detrimental reliance, when the person seeking legal services reasonably relies on the attorney to provide them and the attorney, aware of such reliance, does nothing to negate it." *DeVaux v. American Home Assur. Co.*, 387 Mass. 814, 444 N.E.2d 355, 357 (1983). There is no reasonable basis to find an attorney client relationship existed at that time. Even if a fact finder wished to manipulate and stretch what Joubert's assistance entailed to include something legal-based, this was an area that Joubert had not held himself out to be a practitioner.

Therefore, there is even less in the record that can be assuaged to create the third element the *DeVaux* standard require and that is that Miley relied upon Joubert advice or assistance to his detriment. Miley failed to establish any conduct by Joubert that Miley relied on to Miley's detriment. Therefore, the attorney-client relationship cannot be established using the *DeVaux* standard and absent from the record is any other standard the court considered to locate any semblance of an attorney-client relationship. These facts — whatever else they may prove — do not fit within the *DeVaux* integument. There is simply no plausible basis for implying an agreement to give legal advice or assistance. Phrased in the alternative idiom of *DeVaux*, the tendered proof is inadequate to support a finding that Sheinkopf "reasonably relie[d] on the attorney [Saltiel] to provide" legal services or that "the attorney, aware of such reliance, d[id] nothing to negate it." *Sheinkopf v. Stone*, 927 F.2d 1259, 1266 (1st Cir. 1991). Borrowing from the prose of *Sheinkopf*, on this "chiaroscuro record", no reasonable factfinder could conclude either that Miley's purported reliance on Joubert for "legal" as opposed to "voltaic cells and third phase wiring" information gathering was of any specie reasonably considered to be legal advice nor was it remotely reasonable that Joubert should have been aware that Miley would so rely. A reasonable businessman in Miley's shoes might have assumed that Joubert had become his solar farm guru, his business partner, his science adviser, or even his fogleman — but no reasonable businessman would have assumed, on these facts, that Joubert had become his attorney. (*Id.*) Here, the uncontroverted



testimony shows that Miley never explicitly requested Joubert to represent him, never sought any legal advice from Joubert, and was never billed for services. To paraphrase *Robertson*, Miley's claim is, essentially, that he thought Joubert represented him but that he failed to communicate his thought to anyone, Joubert included, until well after the Miley dissolved the corporation.

The Appeals Court dismissed each of Miley's counterclaims because inter alia, Miley suffered no damages throughout the party's dealings. (App. C, 41a) Likewise, the Trial Court and Appeals Court establishment of an attorney-client relationship must be overturned because the record failed to provide any reasonable facts to support any other finding applying the *DeVaux* standard or a substitute standard.

#### **REASONS FOR GRANTING THE WRIT**

The Massachusetts Court of Appeals, the Court of last resort, has decided an important federal question in a way that conflicts with the decisions of the United States Supreme Court.

#### **INTRODUCTION**

This case involves a 28 U.S.C. sec 1257(a) petitioner who's being unfairly denied the merits of his FAR-Application reviewed by the Supreme Judicial Court of Massachusetts.

In 2013, the Massachusetts Board of Bar Overseers ("Board") denied the Respondent Miley's request for disciplinary action against Joubert and found no evidence to suggest that an attorney-client relationship existed between Joubert, Petitioner, and Miley, Respondent. The Respondent allowed the

Board of Bar Overseers decision to stand without invoking the appeals available to Respondent thus, failing to exhaust the remaining administrative remedies to challenge through appeal the Board's Recommendation. The Respondent accepted that the Board's opinion which was that the attorney-client relationship between the parties at the time of their brief joint venture did not exist. Further, the Board informed Respondent Miley that if he wished to appeal the Board's finding he may do so and provided the procedures for appeal. The Respondent failed to appeal the Board's Recommendation thus, collaterally estopping him from seeking re-litigation of the same set of facts and evidence in another court action for failure to exhaust all available administrative remedies.

Joubert filed his only post judgment motion pursuant to Mass. Civ. P. Rule 60 in December 2018. The Rule 60(b)(2) Motion to vacate did not raise any new claims but instead pointed out perceived errors in the district court's reasons for finding in favor of the Defendant Miley. The perceived errors raised could not have been raised prior to the court's order and were raised to provide the court an opportunity to reconsider and correct flaws in its reasoning before Joubert proceeded to the Appeals Court in Massachusetts. This approach has been previously recognized by this Court. See *United States v. Dieter*, 429 U.S. 6, stating the purpose of Rule 60 allows the court to correct its own errors, sparing the parties and appellate courts the burden of unnecessary appellate proceedings. The Superior Court denied this motion without hearing.

Joubert timely filed his Motion to Appeal the Judgment to the Massachusetts Court of Appeals on

August 24, 2018. The Appeals Court heard Oral Arguments on March 4, 2021. Joubert met his burden that the lower Court's decision was clearly erroneous and that Judge Frison abused her discretion and made errors of law. The decision and opinion of the court of Appeals Court entered on June 8, 2021. The decision overturned all the lower court's decisions with one exception. (App. C, 41a). The Appeals Court affirmed the existence of an attorney-client relationship but failed to provide any reasoned basis for establishing the existence of an attorney-client relationship. Joubert filed a Motion to Reconsider its findings with the Appeals Court regarding the attorney-client relationship. The Appeals Court denied the Motion to Reconsider on June 20, 2021. (App. D, 71a).

Joubert timely filed a FAR Application with the Supreme Judicial Court of Massachusetts on June 28, 2021. The application for review was denied on August 2, 2021. (App. E, 123a).

Joubert timely filed this Writ for Certiorari.

**I. CERTIORARI IS APPROPRIATE TO REVIEW A STATE COURT DECISION WHEN IT CLEARLY VIOLATES THE DOCTRINE OF COLLATERAL ESTOPPEL THEREBY VIOLATING A PERSON'S DUE PROCESS PROTECTION UNDER THE LAW.**

It is well settled in both the state and federal constitutions that individuals have the right to due process protections under the law. In the courts denial of Petitioners affirmative defense, collateral estoppel, the court has violated Joubert, Petitioner's due process. "A fundamental precept of common law adjudication embodied the related doctrines of

collateral estoppel and res judicata is a right, question of fact distinctly put in issue and directly determined by a court of competent jurisdiction ... cannot be disputed in a subsequent suit between the same parties." *Montana v. United States*, 440 U.S. 147, 153 (1979).

The underlying issue was raised by Miley, Respondent to the Massachusetts Board of Bar Overseers, the enforcement arm of the Supreme Judicial Court in Massachusetts responsible for reviewing the conduct of attorney. The Board of Bar Overseers investigates, and disciplines attorneys licensed in Massachusetts when appropriate. The agency follows specific investigative procedures to determine the allegations against an attorney. Upon request of the complainant there is an appeal process to unsatisfactory decisions made by the Board. Respondent did not oppose or appeal the decision by the Board; therefore, the opinion must stand. The Board's investigation determined that no attorney-client relationship existed it was in fact a business partnership that was formed. (App. A, 1a).

When determining whether collateral estoppel is applicable the court must apply a two-step analysis. First, the court must determine whether the agency, court, or tribunal employs court-like investigation, inquiry and standards similar to the judicial court. The Board of Bar Overseers meets the criteria necessary to invoke collateral estoppel. The courts instance that an attorney-client relationship existed between the parties is identical to the fact decided by the Board of Bar Overseers. Therefore, the court should be precluded litigating is fact any further. (*Fidler v. Eastman Kodak Co.*, 714 F.2d 192 (1st Cir. 1983).

The Court must determine whether the findings relied upon are "the product of full litigation and careful decision." *Home Owners Fed. Sav, Loan Ass'n v. Northwestern Fire Marine Ins. Co.*, *supra* 455. The findings of the Board of Bar Overseers relied upon a thorough investigation and its careful decision to ensure that Joubert, Petitioner and Miley, Respondent were not engaged in an attorney-client relationship. Miley, Respondent allowed the opinion of the Board of Bar Overseers to stand although he had additional remedies available to him through the internal and external appeal process of the Board of Bar Overseers.

There are no circumstances that warrant re-litigation of the issue. The strong and oft-stated public policy of limiting each litigant to one opportunity to try his case on the merits. *Home Owners*

Further, courts have also imposed issue exhaustion requirements in the adjudication context in the absence of an underlying statute or regulation requiring it and this is applicable to judicial arms, such as the various Boards of bar Overseers. The Supreme Court early on characterized the "general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but has erred against objection made at the time appropriate under its practice" as one of "simple fairness," emphasizing that issue exhaustion promotes orderly procedure and good administration by offering the agency an opportunity to act on objections to its proceedings.[9] But questions about the common law application of the doctrine were later raised in *Sims v. Apfel*, U. S. Supreme Court, 530 U.S. 103, 69 Soc. Sec. Rep. Serv.

415 (2000) where the Court held that a judicial issue exhaustion requirement was inappropriate on review of the Social Security Administration's informal, non-adversarial adjudicatory benefit determinations, reasoning that "the desirability of a court imposing a requirement of issue exhaustion depends on the degree to which the analogy to normal adversarial litigation applies in a particular administrative proceeding." The Massachusetts Board of Bar Overseers provides several Board levels for aggrieved plaintiffs. When the Board renders its '*Recommendation*' the plaintiff may elect to timely request an appeal to the BBO panel and if the plaintiff wishes to appeal an unfavorable review, the plaintiff may appeal to the single justice of the Supreme Judicial Court.

**II. CERTIORARI IS APPROPRIATE TO REVIEW A STATE COURT DECISION WHEN THAT DECISION VIOLATES A PERSON'S DUE PROCESS PROTECTION PREVENTING THEM THE FUNDAMENTAL RIGHT TO PURSUE AN OCCUPATION.**

The Massachusetts Superior Court's decision prohibits Joubert, Petitioner the right to pursue an occupation based on his formal training and previous employment as an attorney. Petitioner alleges that he has an un-enumerated right to pursue an occupation outside the legal field as a fundamental right. The court has held under *Washington v. Glucksberg*, 521 U.S. 702 (1997) that an un-enumerated right is fundamental when that right is, "deeply rooted in [the] Nation's history and tradition." The right to pursue employment is governed by both state and federal laws and deeply rooted in the history and traditions of US history.

Any infringement on the right to pursue an occupation that is legal in all other aspects is a violation of an un-enumerated right. The right to pursue an occupation free governmental agencies and judicial interference is deeply rooted in history. The court's decision infringes on Joubert, Petitioner's freedom to contract and enter into a non-legal joint venture with another solely based on his professional licensure. This infringement violates petitioner's due process, this violation requires review in this court.

Joubert maintains that he had and has a right to seek any lawful means of employment. Simply by virtue of being a licensed attorney does not prevent a person from seeking employment other than in the legal profession. To forbid an attorney from pursuing employment outside the practice of law constitutes as effective a restraint on freedom of association as the forms of governmental action in the cases above were thought likely to produce upon the particular constitutional rights there involved.

**III. CERTIORARI IS APPROPRIATE TO REVIEW A STATE APPELLATE COURT DECISION WHEN THAT DECISION VIOLATES DUE PROCESS BY FAILING TO APPLY THE CORRECT STANDARD OF REVIEW.**

The courts failed to apply the appropriate standard of review required in evaluating the nature of error and the significance of error, constituting a clearly erroneous finding regarding the establishment of an attorney-client relationship, opting to not even address trial testimony or exhibits, instead it failed to acknowledge glaring facts in favor of adopting the trial judge's conclusion

and expressing its baseless conclusions shrouded an inaccurate depictions of the actual evidentiary record. Joubert, Petitioner asks the Court to address the following issue: (I) whether, as a matter of law, the judge erred in finding that Joubert, because he was a licensed attorney was in fact Miley's Attorney during the time the two parties were engaged in a joint business venture. judgment of the trial judge, entered in this nonjury case on November 14, 1984, is governed by Mass. R. Civ. P. 52 (a), 365 Mass. 816 (1974), which provides that "[f]indings of fact shall not be set aside unless clearly erroneous." "A finding is 'clearly erroneous' when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States v. United States Gypsum Co.*, 333 U.S. 364, 395 (1948). This court must also examine the findings and rulings to make sure that the conclusions are not inconsistent with legal standards. *Marlow v. New Bedford*, 369 Mass. 501, 508 (1976).

#### IV. ATTORNEY-CLIENT RELATIONSHIP

The courts violated the Petitioners due process in failing to evaluate the facts of the case and apply them to the standards developed in case law necessary to create an attorney client relationship. Case law both state and federal require courts fine clearly articulate three elements when establishing an attorney client relationship. *Devaux v. Am. Home Assurance Co.*, 387 Mass. 814, 817-18 (1983) (quoting *Kurtenbach v. Tekippe*, 260 N.W.2d 53, 56 (Iowa 1977)). In creating an attorney client relationship in this case, the court's rational creates a perpetual attorney client relationship



between parties. Petitioner wrote a letter for Respondent for return of an auction deposit. The auction house returned the deposit, thereby terminating the attorney client relationship. A year later the parties discussed and entered a joint venture for solar panels. The first element in establishing the attorney client relationship requires the attorney perform legal work. Respondent conducted all negotiations regarding the contract between the solar panel company and the joint venture. Petitioner was responsible for scientific research regarding creating and maintaining a solar farm. The parties jointly filed Articles of Incorporation and its documents, left with and under the control of the Respondent until he mailed them to the Secretary of State.

The second element of the *DeVaux* standard requires the legal assistance sought be within the attorney's professional competence. Although the court alleges legal assistance was conducted none of the Petitioners actions were within his legal background education or practice but instead concentrated on his undergraduate work as a science major. The advice or assistance must pertain to the professional's discipline for a professional-client relationship to arise in a business relationship with an attorney, for example, will not suffice to create an attorney-client relationship. *Sheinkopf v. Stone*, 927 F.2d 1259, 1266 (1st Cir. 1991).

The third element of the *DeVaux* standard is that the attorney expressly or impliedly agrees to give or actually gives the desired advice or assistance. *Cesso v. Todd*, 92 Mass. App. Ct. 131, 135 (2017) and the attorney-client relationship "can be implied from the conduct of the parties" "this

element may be established by proof of detriment reliance, when the person seeking by proof of detrimental reliance..." Respondent's testimony established he did not seek nor receive legal advice or opinion for Petitioner. Additionally, he did not rely on any advice of Petitioner with the exception of scientific advice. Respondent's unstated "reliance" on a professional's services will not lead to the creation of an implied professional-client relationship where there is no request from the plaintiff seeking professional advice or assistance. *Int'l Strategies Group v. Greenberg Traurig, LLP*, 482 F.3d 1, 9-10 (1st Cir. 2007); *Fanaras Enters., Inc. v. Doane*, 423 Mass. 121, 125 (1996); *DaRoza v. Arter*, 416 Mass. 377, 382 (1993).

Under Massachusetts law, the doctrine of foreseeable reliance is limited to instances "where the defendant knew that the plaintiff would rely on his services." *Page*, 445 N.E.2d at 154 (quoting *Rae v. Air-Speed, Inc.*, 386 Mass. 187, 435 N.E.2d 628, 631 (1982)). As we have already indicated, there is no probative evidence showing that Joubert knew or should have known that Miley was relying on him for legal counsel. Indeed, fully conscious that Miley was regularly represented in business transactions by another law firm, Bowditch and Dewey, a reasonably prudent attorney in Joubert's position would logically have assumed, given the lack of any contrary indication, that appellant was receiving legal advice about the joint venture from that firm.

The court violated due process by failing to recognize that a licensed attorney can engage in legal activities including creating a business because he not required or forced to only engage in the practice of law after receiving his license.

## CONCLUSION

This Writ for Certiorari should be granted because this case raises issues that affect not only members of the legal profession that wish to pursue alternate professions but this issue has a much farther ramifications that cannot avoid interference with other professional who wish to pursue careers beyond a single interest. In addition, this case raises serious concerns relating to the access to due process for all litigants who may wish to rely on established doctrines such as collateral estoppel and other doctrines deeply rooted in American jurisprudence.

Respectfully submitted,

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Dated: March 8, 2022