No. _____

In the Supreme Court of the United States

TODD BOWERS,

Petitioner,

v.

INTERNATIONAL BROTHERHOOD OF BOILERMAKERS, IRON SHIP BUILDERS, BLACKSMITHS, FORGERS, AND HELPERS AFL-CIO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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February 8, 2023

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QUESTIONS PRESENTED FOR REVIEW

Whether it was proper for a district court to maintain federal question jurisdiction upon Notice of Removal and Response in Opposition/Motion to Remand where Plaintiff's claims as set forth in his Complaint were based exclusively on state law and were not substantially dependent upon the collective bargaining allegedly giving rise to federal jurisdiction under Labor Management Relations Act ("LMRA").

Whether it was proper, upon assuming jurisdiction, for the district court to dismiss Plaintiff's claims based on LMRA preemption.

Whether, notwithstanding its dismissal under the LMRA, dismissal of Appellant's claims on state law grounds constitutes a violation of Appellants due process rights under the 14th Amendment.

LIST OF PARTIES

Petitioner:

1. Todd Bowers

Respondent:

1. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers AFL-CIO

CORPORATE DISCLOSURE STATEMENT

Petitioner is not a nongovernmental corporation or other corporate entity, and so is exempted from this requirement per U.S. Supreme Court Rule 29.6

STATEMENT OF RELATED PROCEEDINGS

United States District Court for the Northern District of West Virginia

Todd Bowers v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, AFL-CIO, 3:21-cv-00089-GMG (January 20, 2022)

United States Court of Appeals for the Fourth Circuit

Todd Bowers v. International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, AFL-CIO, Docket No. 22-1130 (November 10, 2022).

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This matter was originally filed in the Circuit Court of Berkeley County West Virginia, on February 19, 2021. *See Complaint*, JA14-19. Upon receipt of the Complaint, Respondent filed a Notice of Removal to remove the case to the U.S. District Court for the Norther District of West Virginia, alleging federal question jurisdiction and preemption based on section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a). *See Notice of Removal*, JA6-13. Defendant filed a timely objection to such removal. *See Plaintiff's Motion in Objection to Removal and Memorandum* (JA212-213). Thereafter, Respondent filed a motion to dismiss, which was granted by the District Court on January 20, 2022 (JA9-23). On February 8, 2022, Petitioner filed his Notice of Appeal to the 4th Circuit. After full briefing of the same, the United States 4th Circuit Court of Appeal issued an unpublished opinion on November 10, 2022 affirming the decision of the District Court. (App. 1-8). Petitioner now timely files his Petition for Certiorari before the United States Supreme Court within the ninety-day timeframe provided for under United States Supreme Court Rule 13(1) and 28 U.S.C. § 2101(c).

BASIS OF JURISDICTION

The date of the Opinion sought to be reviewed is November 10, 2022. (App. 1-8).

Jurisdiction over this matter is proper under 28 U.S.C. § 1254 because it seeks review of a final judgment from a United States Court of Appeals, to

wit, The United States Court of Appeals for the Fourth Circuit.

STATUTORY OR CONSTITUTIONAL PROVISIONS AT ISSUE

1. *United States Constitution, 14th Amendment*: 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 life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

2. *Labor Management Relations Act, 29 U.S.C. § 185(a)*: Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

3. W.Va. Code § 55-7-9: Any person injured by the violation of any statute may recover from the offender such damages as he may sustain by reason of the violation, although a penalty or forfeiture for such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of such damages.

STATEMENT OF THE CASE

Petitioner, Todd Bowers, claims in this matter revolve around a series of tortious, anti-competitive, and criminal acts taken by Defendant, the International Brotherhood of Boilermakers, Iron Ship Builders, Blacksmiths, Forgers, and Helpers, AFL-CIO ("IBB"), to damage Plaintiff's business following Plaintiff's 2017 withdrawal from a union agreement known as the Ohio Valley Agreement ("OVA").

Petitioner was a longtime union member of IBB through its Local Lodge 193 (now merged with IBB affiliate Local Lodge 45 to become Local 45/193), based in Baltimore Maryland, and, upon founding Elite Mechanical, entered into an agreement wherein IBB agreed to provide him certified boilermakers upon request on an as needed basis to engage in constructing, repairing or otherwise working on boilermakers at the various third party power plants and other facilities which contracted with Plaintiff for welding work. *Plaintiff's Complaint*, ¶ 3 (JA14-15). Plaintiff in turn agreed to make payments into Defendant IBB's pension and retirement programs under the terms mandating in the Ohio Valley Articles of Agreement ("The Ohio Agreement" or "The Agreement"). *Ibid*.

Gradually, Petitioner's welding business began to expand to include a greater variety of general welding work and less boilermaker work. *Id*. at ¶ 4 (JA15). Nevertheless, Petitioner continued utilizing IBB boilermakers for his business until late 2017, when he exited the Agreement. *Id*. at ¶ 5 (JA15).

Trouble between Petitioner and Respondent began when Local 45/193 discovered that Petitioner had hired a former boilermaker to work at his welding company. Respondent IBB was extremely upset that Petitioner had hired an individual who had been expelled from the union. *Id*. at ¶ 6 (JA15). These hostilities were significantly exacerbated when Petitioner pulled out of the Agreement in December of 2017 and no longer participated in any union activities. *Ibid*. Respondent's hostility increased further as Petitioner's business began to compete more and more often with Respondent's union members for non-boilermaker welding work, which made up a significant portion of the work performed by IBB union members due to the paucity of available boilermaker work in the region. *Id*. at ¶ 7 (JA15). On multiple occasions, meetings were held at IBB Local 45/193 wherein a major topic of discussion was what Respondent IBB was going to do about Plaintiff using non-union labor for his general welding business *Id*. at ¶ 8 (JA16).[1]

Thereafter, Petitioner asserts that Respondent engaged in multiple activities designed to harass, intimidate, and unlawfully extract funds for the explicit purpose of putting Plaintiff out of business. *Id*. at ¶ 9 (JA16). These acts included (a) procuring the prosecution of knowingly meritless lawsuits through IBB's pension funds and trusts subsidiaries, on knowingly false allegations in an inconvenient

[1] It is uncontested in this matter that the OVA applied only to boilermaker work – not to general welding work – and that Petitioner was under no legal obligation to employ only IBB members for his general welding business.

forum 1,000 miles away from all relevant parties; (b) demanding compensation and threatening further legal action for work engaged in post-2017 to which Respondent knew it had no right; (c) threatening and harassing Plaintiff's employees in an attempt to coerce them into leaving Petitioner's employ; and (d) falsely reporting Petitioner for violations to relevant oversight organizations. *Ibid.*

In response, Petitioner filed a Complaint in the Circuit Court of Berkeley County West Virginia, the county in which Petitioner and his business are located, on February 19, 2021. *See Complaint*, JA14-19. That Complaint asserted causes of action of Tortious Interference of Business, Abuse of Process, Intentional Infliction of Emotional Distress, and statutory violations of West Virginia's criminal extortion and harassment statutes, West Virginia Code § 61-2-13(a) and West Virginia Code § 61-2-9a, respectively. *Ibid.*

Upon receipt of the Complaint, Respondent removed the case to the U.S. District Court for the Norther District of West Virginia, alleging federal question jurisdiction and preemption based on section 301 of the Labor Management Relations Act ("LMRA"), 29 U.S.C. § 185(a). *See Notice of Removal*, JA6-13. Defendant filed a timely objection to such removal. *See Plaintiff's Motion in Objection to Removal and Memorandum*, JA212-213. Thereafter, Respondent filed a motion to dismiss, again arguing preemption under 29 U.S.C. § 185 for Petitioner's claims under Counts 1-3 and further arguing that criminal statutes under which Petitioner's Counts 4 and 5 were filed do not allow for a private cause of

action. Petitioner responded in opposition thereto on both counts, and requested that discovery be had before the Court made a ruling. *See Plaintiff's Response in Opposition to Defendant's Motion to Dismiss*, p. 4 (JA225).

On January 20, 2022, the District Court granted Respondent's Motion to Dismiss, finding that West Virginia's criminal statutes under which Petitioner brought counts four and five did not allow for a private cause of action, and further finding that all Plaintiff's claims were preempted under 29 U.S.C. § 185(a). *See Order of Dismissal*, App. 9-23. On February 8, 2022, Petitioner filed his Notice of Appeal to the 4th Circuit (JA292).

After full briefing of the same, the United States 4th Circuit Court of Appeal issued an unpublished opinion on November 10, 2022 affirming the decision of the District Court (App. 1-8). This Petition for Certiorari follows:

REASONS FOR GRANTING THE PETITION

I. STANDARD OF REVIEW

Questions of law are subject to de novo review on appeal. *See Diaz de Gomez v. Wilkinson*, 987 F.3d 359, 363 (4th Cir. 2021). All arguments below relate purely to questions of law and, as such, de novo review is the appropriate standard for adjudicating each of Appellant's Assignments of Error outlined below.

In evaluating the sufficiently of a complaint on a Rule 12(b)(6) motion to dismiss, a valid claim for relief "requires only a 'short and plain statement of

the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the… claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). A Plaintiff must allege facts sufficient to state all the elements of his or her claim. *Bass v. E.I Dupont de Nemours & Co.*, 324 F.3d 761, 765 (4th Cir. 2003).

II. THE 4TH CIRCUIT LACKED JURISDICTION BECAUSE APPELLANT'S CLAIMS AS SET FORTH IN THE COMPLAINT WERE BASED EXCLUSIVELY ON STATE LAW AND ARE NOT SUBSTANTIALLY DEPENDENT ON ANY COLLECTIVE BARGAINING AGREEMENT.

The 4th Circuit further erred in affirming the District Court's assumption of jurisdiction in this matter based on Appellee's assertion of federal question authority under 29 U.S.C. § 185(a).

In its original Suggestion in Support of Removal, Respondent argued that 29 U.S.C. § 185(a) of the LMRA conferred jurisdiction upon the District Court, even though Plaintiff raised no causes of action related to the LMRA, because Petitioner's state law claims "are substantially dependent on analysis of the collective bargaining agreement and thus are completely preempted by the LMRA," citing to *Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985); and further citing to *Foy v. Giant Food*, *Inc.*, 298 F.3d 284, 288 (4th Cir. 2002).

Petitioner, in response, filed an Objection to Removal (JA212-213), wherein he argued that none of his claims were "substantially dependent" upon an analysis of a collective bargaining agreement because none of his claims requires *interpretation* of that agreement. See *Lingle v. Norge Div. of Magic Chef,* 486 U.S. 399, 413 (1988) (emphasis added); *Caterpillar, Inc. v. Williams,* 482 U.S. 386, 394, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987).

Petitioner's Complaint alleges four categories of activity which it claims gives rise to the causes of actions alleged. At paragraph 9, its notes the following acts of Defendant which it claims were designed to harass, intimidate, and put him out of business:

A. Filing meritless lawsuits, through IBB's pension funds and trusts subsidiaries, on knowingly false allegations and in an inconvenient forum 1,000 miles away from all relevant parties and witnesses when a clearly more convenient forum existed;

B. Demanding compensation and threatening further legal action for work engaged in by Plaintiff post-2017;

C. Threatening and harassing Plaintiff's employees in an attempt to coerce them into leaving Plaintiff's employ;

D. Falsely reporting Plaintiff for violations to relevant oversight organizations.

See Complaint at ¶ 9 (JA16).

Only one of these actions, to wit, those described in part (a), relate to anything that might be considered as arising out of the Ohio Valley Agreement ("OVA") or dependent upon an interpretation of the OVA provisions cited by Defendant. However, even part (a) does not state or imply any dispute as to the meaning of the provisions of the OVA at articles 5 and 6. Rather, subparagraph (a) alleges that Defendant "knowingly" made "false allegations" in a "meritless lawsuit". As such, the allegation is not that Defendant made a good faith, though erroneous, effort to recover damages for actual perceived violations of the OVA, but rather that it knowingly engaged in a bad faith attempt to extract money from Plaintiff when it knew that its claimed violations had no basis in fact.

Respondent claimed, in its Suggestion in Support of Removal (JA9), at paragraph 7, that Petitioner's allegations of IBB's intent to put him out of business related to his hiring practices while he was still a member of the Agreement, and thereby were required to be submitted to arbitration. However, although there are certain facts that are alleged to have taken place in 2017, Petitioner at no point alleged in his Complaint that the tortious acts taken against him and his business occurred in 2017. In fact, all of the events alleged in paragraph 9 of the Complaint took place after his dissociation in December 2017. Nor can Petitioner's claims be fairly said to genuinely relate to his hiring practices for multiple reasons. First – there is no dispute between the parties that Petitioner was permitted to hire non-boilermakers for non-boilermaker activities like general welding. Second, these arguments amount to

an attempt by Respondent to reconfigure Petitioner's claims, as Petitioner's Complaint does not claim merely that he made hires which Defendant believed violated the Agreement, but, rather, that Respondent knew Petitioner was not violating the OVA but chose to move against him anyway because he represented competition in an unrelated sector for which Petitioner had never entered into any agreement with IBB (i.e. general, non-boilermaker welding work). *See Complaint* ¶ 4-6 (JA15).

In fact, the Complaint specifically alleges that Defendant did these things after Petitioner had withdrawn from the OVA in 2017. *Id*. at ¶ 6 (JA15). It further asserts that Respondent's actions were motivated by Petitioner's hiring of an ex-boilermaker to engage in *non-boilermaker welding work* - for which Appellee does not claim that Appellant maintained a contractual agreement with them - and subsequently ceasing to hire boilermakers for such general welding work (for which he, again, had no contractual obligation). Nowhere in Respondent's district court memoranda/suggestions do they claim that general, non-boilermaker welding work is potentially subject to the clauses identified as the basis for their preemption.

Respondent further, in its Reply Brief to the district court on Notice of Removal, introduced numerous new facts which were not contained in Petitioner's Complaint or any other pleading (Respondent never provided an Answer) upon which they wished the Court to uphold Removal. See *Suggestions In Opposition to Plaintiff's Misnamed Motion to Remand* (JA250-253), pp. 2-5. This is

improper. "The presence or absence of federal question jurisdiction is governed by the 'well-pleaded complaint rule,' which provides that federal jurisdiction exists ***only when a federal question is presented on the face of the plaintiff's properly pleaded complaint***." *Caterpillar, Inc. v. Williams*, **482 U.S. 386, 392 (1987)** (citing *Gully v. First National Bank,* 299 U.S. 109, 112-113 (1936)). (emphasis added). "The rule makes the plaintiff the master of the claim; he or she may avoid federal jurisdiction by exclusive reliance on state law." *Ibid*.

When determining whether a claim arises under federal law, a court will "examine the 'well pleaded' allegations of the complaint and ignore potential defenses: '[A] suit arises under the Constitution and laws of the United States only when the plaintiff's statement of his own cause of action shows that it is based upon those laws or that Constitution.'" *Beneficial Nat'l Bank v. Anderson*, 539 U.S. 1, 6 (2003) (jurisdiction upheld) (quoting *Louisville & Nashville R. Co. v. Mottley*, 211 U.S. 149, 152 (1908) (jurisdiction lacking)). Jurisdiction will not be supported by a federal question in a counterclaim (even if the counterclaim is compulsory). *Holmes Group, Inc. v. Vornado Air Circulation Sys., Inc.,* 535 U.S. 826, 831 (2002) ("[A] counterclaim—which appears as part of the defendant's answer, not as part of the plaintiff's complaint—cannot serve as the basis for 'arising under' jurisdiction."). Additionally, jurisdiction will not even be supported by a federal question raised by "allegations to support [the plaintiff's] own case that are not required by pleading rules." 13D Wright & Miller § 3566, p. 272 (discussing superfluous

allegations with example of the different allegations necessary in an action to clear a cloud on title versus an action to quiet title). *See also Rivet v. Regions Bank of La.*, 522 U.S. 470, 475 (1998)) ("The well-pleaded-complaint rule mandates that in assessing subject-matter jurisdiction, a federal court must disregard allegations that a well-pleaded complaint would not include—e.g., allegations about anticipated defenses.").

The District Court made no ruling on Appellant's Response in Opposition to Removal / Motion to Remand, and thereby provided no additional basis for its assumption of jurisdiction – which it plainly exercised by virtue of granting Appellee's Motion to Dismiss - beyond that argued by Respondent. The district court addressed the use of the OVA in adjudicating the motion to dismiss, citing to *Philips v. Pitt Cty. Mem'l Hosp.*, 572 F.3d 176, 180 (4th Cir. 2009), and *Blankenship v. Manchin*, 471 F.3d 523, 526 n.1 (4th Cir. 2006)) for the proposition that it is permitted to incorporate documents "attached to the motion to dismiss," which are "integral to the Complaint and authentic." However, the holding articulated in *Phillips* and *Blankenship* applied to 12(b)(6) motions only, and not to questions of jurisdiction upon Notice of Removal, which must apply the well-pleaded complaint rules. Thus, the district court, even if able to use such documents in adjudicating a motion to dismiss, would not be able to assume subject matter jurisdiction on this basis and should never have accepted jurisdiction to evaluate the same in the first place.

The Fourth Circuit, in addressing this issue, made a similar error as the district court by combining the jurisdictional argument as to Respondent's Notice of Removal with Respondents arguments for dismissal on Motion to Dismiss, and failed to specifically address or analyze the jurisdictional question outside of acknowledging that Petitioner raised subject-matter jurisdiction as an objection to removal. The 11/10/22 Decision of the 4th Circuit completely ignores the applicability of the well-pleaded complaint rule to the jurisdictional questions inherent in Respondent's claims on Notice of Removal, and further ignores the necessity of interpreting preemption narrowly. Instead, it treats the jurisdictional issues associated with Petitioner's Notice of Removal and the arguments on Motion to Dismiss as interchangeable, finding as follows:

> *Bowers's claims are "inextricably intertwined with consideration of the terms of" the OVA. His claim for tortious interference of business depends on whether he was violating the terms of the OVA's exclusive-referral provision and whether IBB was within its rights under the OVA's jobsite-access provision to talk to and try to convince his employees to leave. See J.A. 39 (exclusive-referral provision), 55 (jobsite-access provision). Resolution of this claim requires interpretation and application of these provisions. Bowers's abuse-of-process claim depends on whether IBB's funds filed meritless lawsuits, and that question is*

> *inextricably intertwined with consideration of the OVA's provisions governing employer contributions. See id. at 60–67. And Bowers's claim for intentional infliction of emotional distress closely parallels the claim that we held preempted in Foy: Such a claim "requires an inquiry into whether [IBB] was legally entitled to act as [it] did," which "can be determined only by interpreting the collective bargaining agreement." 298 F.3d at 288 (quotation marks omitted). Thus, the Labor Management Relations Act preempted Bowers's claims and established federal jurisdiction over his case.*

This argument does not address the specific jurisdictional issues asserted by Petitioner that any claims regarding the specific provisions of the OVA as discussed in the 4th Circuits above-quoted reasoning would be inappropriate for consideration at the Removal stage because they do not appear on the face of Petitioner's well-pleaded complaint. As such, it was error for the 4th Circuit to affirm the district Court's exercise of jurisdiction upon Notice of Removal.

III. THE 4TH CIRCUIT FURTHER ERRED IN FINDING THAT PETITIONER'S CLAIMS WERE PREEMPTED BY THE LMRA BECAUSE THE LMRA IS NOT INTEGRAL TO PETITIONER'S CLAIMS AND HIS COMPLAINT DOES NOT REQUIRE THE COURT TO INTERPRET THE OVA.

Respondent argued, on Motion to Dismiss, that Petitioner's claims are preempted by Section 301 of the Labor Management Relations Act ("LMRA"), and that Petitioner failed to comply with LMRA requirements, stating that "the tortious claims asserted by the Company are all preempted because the conduct alleged in the remaining causes of action is inextricably intertwined with the Ohio Valley Agreement." *See Suggestion in Support of Motion to Dismiss* (JA151), at 12. Both the District and Circuit Courts erred by affirming these arguments because, even notwithstanding the lack of jurisdiction, discussed above, the facts of the case do not meet the strict standard elucidated by Courts for substantial dependence.

The LMRA preempts state actions when they are (1) based upon a right conferred by a collective bargaining agreement; or (2) otherwise "substantially dependent [upon an] analysis" of such an agreement. *Lingle v. Norge Div. of Magic Chef*, 486 U.S. 399, 413, n.10 (1988); *Caterpillar, Inc. v. Williams*, 482 U.S. 386, 394, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987); *Firestone v. Southern California Gas Co.*, 219 F.3d 1063, 1066 (9th Cir. 2000).) A claim is "substantially dependent [upon an] analysis" of an agreement if it "requires ... interpretation" of the agreement. (*Lingle*,

supra, at 413, 108 S.Ct. 1877, 100 L.Ed.2d 410; *Firestone*, *supra*, at 1066.) Due in part to the presumption against federal preemption (*Fort Halifax Packing Co. v. Coyne* 482 U.S. 1, 21, 107 S.Ct. 2211 (1987)), the term "interpret" is "defined narrowly" (*Balcorta v. Twentieth Century – Fox Film Corp.*, 208 F.3d 1102, 1108 (9th Cir.2000)). "[T]he bare fact that a collective bargaining agreement will be consulted in the course of state-law litigation plainly does not require [preemption].' *Foy v. Giant Food, Inc.*, 298 F.3d 284, 287 (4th Cir. 2002) (quoting *Livadas v. Bradshaw*, 512 U.S. 107, 124, 114 S.Ct. 2068, 129 L.Ed.2d 93 (1994)). As such, an action will not be preempted just because the court, to resolve the state claim, needs to "consider," "refer to," or "apply" one or more terms of a collective bargaining agreement. *Soremekun v. Thrifty Payless*, *Inc.*, 509 F.3d 978, 991 (9th Cir. 2007); *Burnside v. Kiewit Pac. Corp.*, 491 F.3d 1053, 1060 (9th Cir. 2007).) Only if the court must "construe" disputed terms of the agreement will the claim be preempted. This rule of preemption empowers the federal courts to develop and apply a uniform body of federal common law governing the interpretation of collective bargaining agreements, which is thought to encourage collective bargaining. (*Lingle, supra*, at 403–404, n.3, 407, 108 S.Ct. 1877; *Livadas*, *supra*, 512 U.S. at 122, 114 S.Ct. 2068; *Allis – Chalmers Corp. v. Lueck*, 471 U.S. 202, 210–211 (1985)).

Respondent, in its Motion to Dismiss and reply brief, made a series of arguments designed to show that Petitioner's claims require an interpretation and construction of various portions of the OVA which was not included in or referenced by Petitioner's

pleadings but which Respondents attached to their Motion to Dismiss. Under Fed.R.Civ.P. 12(b), if matters outside the pleadings are presented to the court, a motion to dismiss for failure to state a claim "shall be treated as one for summary judgment and disposed of as provided in Rule 56.... [A]ll parties shall be given reasonable opportunity to present all material made pertinent to such motion by Rule 56." Fed.R.Civ.P. 12(b). When a party is aware that material outside the pleadings is before the court, that party is on notice that a Rule 12(b)(6) motion may be treated as a motion for summary judgment. *See Gay v. Wall*, 761 F.2d 175, 177 (4th Cir.1985). The party opposing such a motion must be given the right to file counter-affidavits or to pursue reasonable discovery. See *ibid*. This was not done.

However, in order to have the OVA considered on motion to dismiss, both Respondent and the district court invoked the *Phillips* and *Blankenship* cases, *supra*, for the holding that a court may consider documents outside the Complaint on a Motion to Dismiss without converting it to a motion for summary judgment "so long as [those] documents are integral to the complaint and authentic." However, it is erroneous to find that the OVA is "integral" to Plaintiff's Complaint, as the Complaint itself references the OVA only in discussing the timeline of events and does not depend on the OVA's existence for any claim asserted. In fact, Appellant's factual allegations could be completely rewritten without ever even mentioning the OVA at all, as Petitioner demonstrated to the 4th Circuit through a potential revised Complaint which might have been submitted had he been given the opportunity to do so

(and as was requested). *See* Petitioner's 4th Circuit Appeal Brief, p. 17. Petitioner noted in his perfected 4th Circuit Appeal that from his proposed reformulated factual allegations – which omits any mention of the OVA - can all of Appellant's causes of action asserted in its Complaint arise. Rather simply, the OVA cannot possibly be "integral" to Plaintiff's claims if the OVA can be completely written out of Plaintiff's complaint without affecting the nature of the Complaint or the causes of action which arise therefrom.

Respondent, in its briefings, studiously conflated any claim which, even obliquely, references an act which might have some relevance to an OVA provision as proving the OVA's integrality by utilizing the much vaguer "inextricably intertwined," language rather than the controlling "integral" language. The reason for this is obvious – no one could conceivably argue that the OVA is "integral" to Appellant's claims such that the Complaint is substantially dependent on the OVA for the existence of such claims. *See Allis-Chalmers Corp. v. Lueck*, 471 U.S. 202, 220 (1985). Instead, the Appellee uses the highly vague and subjective "inextricably intertwined" language from *Allis-Chalmers* despite the fact that it has clearly been modified since its introduction and is no longer the proper standard (*see IBEW, AFL-CIO v. Hechler*, 481 U.S. 851, 859, 107 S.Ct. 2161 (1987) (basing its decision to preempt state law on the need to interpret provisions of the relevant labor contract rather than any claim that the acts complained of are "inextricably intertwined"); *See also Caterpillar, Inc. v.*

Williams, 482 U.S. 386, 107 S.Ct. 2425, 96 L.Ed.2d 318 (1987)).

What's more, even if the OVA provisions inserted by Respondent were fairly considered by the district court in dismissing Petitioner's claims on a Rule 12(b)(6) motion, the claims within the Complaint do not require the Court to construe any portion of the OVA because the Complaint language itself pre-supposes that Respondent was aware that its claims for remuneration from Petitioner were false and pursued them anyway in a bad faith attempt to put Petitioner out of business. Paragraph nine of the active Complaint, which enumerates the tortious acts taken by Respondent, states unequivocally that Respondent utilized its trust affiliates to pursue "knowingly false allegations," and further knowingly "falsely reporting Plaintiff for violations to relevant oversight organizations." As such, Respondent's desire to hem the Court's analysis up in questions about whether Petitioner actually owed the moneys claimed or whether he was still technically a party to the OVA post-2017 is of no import to the question of whether the Complaint should survive a 12(b)(6) motion because the Complaint language itself, which is presumed true for 12(b)(6) purposes, already pre-supposes that Respondent had actual knowledge of the frivolous and false nature of their claims against Petitioner, and chose to bring them anyway. The extent to which Petitioner might be able to dispute this knowledge through the discovery process or through submission of affidavits which demonstrate some sort of ongoing technical obligation on Petitioner's behalf or failure by Petitioner to comply with any provision of the

OVA must be reserved for summary judgment and cannot be a basis for a dismissal under Rule 12(b)(6) based on the bad faith intent alleged in Petitioner's Complaint.

Finally, it would further be inappropriate to find Petitioner's complaint preempted by the LMRA, even notwithstanding the other issues articulated above, because the Court would not, at any time, need to interpret or construe the OVA, but would simply be required to apply its unambiguous terms. For instance, Respondent asserts in its Suggestion in Support of Motion to Dismiss and Reply to the same that the Court would need to construe Article 33 of the OVA (which governs termination of the agreement) to determine if Plaintiff was, in fact, still bound by its terms and requirements. See Respondent's 4th Circuit Response Brief, p. 7. This is in error, as the Court would not need to construe anything, but would simply need to read the language of Article 33 and apply its unambiguous terms. This is, by definition, basic application, rather than interpretation, pursuant to the *Lingle*, *Livadas*, *Burnside*, and *Payless* line of cases, *supra*. At no point has Defendant, in the proceedings below, identified any ambiguous terms in Article 33 which are ambiguous enough to require interpretation or construction by the Court.

Nor, for its part, did the District Court identify any clauses in the OVA which would require the interpretation or construction necessary for a finding of preemption, instead simply saying that "every count in Plaintiff's complaint is preempted by Section 301 because resolution of those claims is

substantially dependent on analyzing the terms of the OVA." See Order Granting Motion to Dismiss (App. 9-23). The district court made no distinction in its use of the word "analyzing" between the kind of analysis which would amount to basic application and the kind that would amount to construction or interpretation of ambiguous terms in the OVA, and identified no such term which would require interpretation.

The 4th Circuit, to its credit, did at least specifically reference certain portions of the OVA which it claimed would need interpretation, but their analysis falls short all the same because it identifies questions for which it claims the OVA's plain language would need to be consulted, rather than identifying any language or clauses from the OVA which would require construction and interpretation. As such, the 4th Circuit identifies only a basic need to "consult" with the OVA rather than a need to interpret it, which is manifestly insufficient to give rise to LMRA preemption.

IV. THE 4TH CIRCUIT ERRED IN FINDING THAT NO PRIVATE CAUSE OF ACTION EXISTS UNDER WEST VIRGINIA'S CRIMINAL STATUTES, AND, IN SO DOING, VIOLATED APPELLANTS DUE PROCESS RIGHTS UNDER THE 14TH AMENDMENT

This issue is subject to de novo review per *Diaz de Gomez v. Wilkinson*, 987 F.3d 359, 363 (4th Cir. 2021).

The 14th Amendment to the United States Constitution provides that "no State shall deprive

any person of life, liberty, or property without due process of law." Similarly, the West Virginia Constitution provides, at Article 3-11, that "No person shall be deprived of life, liberty, or property, without due process of law." The U.S. Constitutions Fifth Amendment contains an identical clause as well.

The U.S. Supreme Court has held that a property right exists wherever a benefit or entitlement is conferred either by law, policy, or contractual agreement. In *Board of Regents v. Roth*, 408 U.S. 564, 577 (1972), the Supreme Court held that "property interests… are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law – rules or understandings that secure certain benefits and that support claims of entitlement to those benefits."

W.Va. Code § 55-7-9 states that "Any person injured by the violation of *any statute* may recover from the offender such damage as he may sustain by reason of the violation, although a penalty or forfeiture of such violation be thereby imposed, unless the same be expressly mentioned to be in lieu of damages." (emphasis added).

W.Va. Code § 61-2-13 reads:

> *If any person threaten injury to the character, person or property of another person, or to the character, person or property of his wife or child, or to accuse him or them of any offense, and thereby extort money, pecuniary benefit, or any*

> *bond, note or other evidence of debt, he shall be guilty of a felony, and, upon conviction, shall be confined in the penitentiary not less than one nor more than five years. And if any person make such threat of injury or accusation of an offense as herein set forth, but fail thereby to extort money, pecuniary benefit, or any bond, note or other evidence of debt, he shall be guilty of a misdemeanor, and, upon conviction, shall be confined in jail not less than two nor more than twelve months and fined not less than $50 nor more than $500.*

W.Va. Code § 61-2-9A reads, in relevant part:

> *(a) Any person who engages in a course of conduct directed at another person with the intent to cause the other person to fear for his or her personal safety, the safety of others, or suffer substantial emotional distress, or causes a third person to so act, is guilty of a misdemeanor and, upon conviction thereof, shall be fined not more than $1,000, confined in jail for not more than six months, or both fined and confined.*
>
> *(b) Any person who harasses or repeatedly makes credible threats against another is guilty of a misdemeanor and, upon conviction thereof, shall be confined in jail for not more than six months, or fined not more than $1,000, or both fined and confined.*

As the language shows, neither West Virginia's extortion nor harassment statutes make any prohibition as to the civil recovery of damages, nor do they specify in any way that any penalties imposed there from are meant to be in lieu of other damages. As such, as a matter of black letter state law, Petitioner maintains a statutory property interest in recovering damages under § 55-7-9 for any injuries he suffers as a result of any violations of § 61-2-13 and § 61-2-9A.

The District Court's Order of dismissal ran afoul of the express West Virginia statutory law cited above, as well as the case of *Hurley v. Allied Chem Corp.*, 164 W.Va. 268, 278, 262 S.E.2d 757, 763 (1980), wherein the West Virginia Supreme Court set forth guidance on when a cause of action can be said to implicitly arise from a statute and the factors that a Court should consider in making that determination. Specifically, the *Hurley* court, at Syllabus Pt. 1 writes as follows:

> *The following is the appropriate test to determine when a State statute gives rise by implication to a private cause of action: (1) the plaintiff must be a member of the class for whose benefit the statute was enacted; (2) consideration must be given to legislative intent, express or implied, to determine whether a private cause of action was intended; (3) an analysis must be made of whether a private cause of action is consistent with the underlying purposes of the legislative scheme; and (4) such private*

> *cause of action must not intrude into an area delegated exclusively to the federal government.*

The *Hurley* Court made clear that these factors are based on the prior precedent handed down by the U.S. Supreme Court in *Cort v. Ash*, 422 U.S. 66, 78, 95 S.Ct. 2080 2089, 45 L.Ed.2d 26, 36-37 (1975). *See Hurley*, supra, 262 S.E.2d at 272 (quoting *Cort*, supra, 422 U.S. at 78).

Although the *Hurley* decision strangely omits any mention of § 55-7-9 in finding an implied cause of action, Petitioner submits that this omission must have been based on the fact that the common law *Hurley* factors themselves – taken largely from a prior decision by this Supreme Court in *Cort v. Ash* - were enough to confer jurisdiction without need for reliance on § 55-7-9. Nevertheless, § 55-7-9 remains good and valid law in West Virginia, and has never been abrogated, limited, or modified in any way. It is the law of the land upon which Petitioner had an unquestionable property right to a civil cause of action for violation of *any* statute which does not expressly limit civil liability as to the same.

The first Conclusion of Law reached by the District Court in its Order Granting Defendant's Motion to Dismiss was that West Virginia's Criminal Statutes do not allow for a private cause of action. In support of this conclusion, the Court relied almost exclusively on unpublished federal district court decisions of no dispositive or controlling precedential

value regarding West Virginia law.[2] *See Order Granting Defendant's Motion to Dismiss* (JA14-15), p. 5.

The 4th Circuit, for its part, also completely ignored W.Va. Code § 55-7-9 in reaching its decision, instead looking exclusively to the *Hurley* case for its authority to affirm the district court's findings. First and foremost, it is clear and obvious error, and a plain violation of Petitioner's due process rights under the 5th and 14th Amendments, to deprive him of his statutory property interests under § 55-7-9. However, an analysis of the question through the prism of the *Hurley* factors also demonstrates a clear right to civil relief on Petitioner's behalf, as follows:

Factor 1

First, it is plain that Petitioner would fall under the category of persons designed to be protected by the statutes, as both statutes are plainly intended to protect any individual who is the target of the prohibited conduct, and Plaintiff's complaint alleges that he has been the victim of both extortion and harassment.

For this reason, factor 1 falls in favor of a private cause of action as to both extortion and harassment.

Respondent, in its *Reply* on Motion to Dismiss (JA269-280), attempts to address and rebut Petitioner's analysis of the *Hurley* factors as

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[2] Specifically, the Court referenced *Horton v. Vinson*, No. 1:14-cv-192, 2015 WL 4774276, at*22 (N.D. W. Va. Aug. 12, 2015) and *Cunningham Energy, LLC v. Outman*, No. 2:13-cv-20748, 2013 WL 5274361, at *5 (S.D. W. Va. Sept. 18, 2013).

submitted in Appellant's prior response on Motion to Dismiss. Tellingly, Respondent left Factor 1 completely unaddressed. This is not surprising, as it is impossible to persuasively argue that Appellant would not be within the class of persons designed to be protected by criminal statutes in West Virginia.

Factor 2

The extortion statute contains no language which would indicate either an intent to create a private cause of action or an intent to deny one. As such, factor 2 is neutral as to the extortion statute. Appellee attempts to rebut this assertion by again citing to the unpublished district court opinion of *Cunningham*, *infra*, for the proposition that a private right action does lie as to the extortion statute "because there is no clear legislative intent to create a private right of action," within said extortion statute. 2013 WL 5274361, at *5. Plaintiff reiterates that an unpublished federal district court opinion cannot form a precedentially controlling basis for authority as to any matter of West Virginia state law, particularly when a long-standing state statute explicitly states precisely the opposite, as W.Va. Code § 55-7-9 reads, in part, "*Any person* injured by the violation of *any statute* may recover from the offender such damage as he may sustain by reason of the violation… unless the same be expressly mentioned to be in lieu of damages." As such, there is no need within the legislative schema to explicitly create a private right of action in every single statute ***because there is a separate statute that creates a right of action for violations of all statutes***, except where expressly stated otherwise. How the

Cunningham Court came to the opposite conclusion in the face of such explicit statutory authority is beyond Petitioner's comprehension, but it is certainly not incumbent upon this honorable Court to make the same blunder. Petitioner addresses the erroneous basis of *Cunningham's* rationale for finding no private right of action or intent to create the same more fully in the argument on the *Sartin* case, *infra*.

Additionally, the harassment statute contains language, which, while not expressly indicating the need for a private cause of action, clearly intends to expand the scope of enforcement beyond the language of the statute itself. At subsection (m), the statute authorizes various executive committees and governmental organizations to "promulgate legislative rules and emergency rules… establishing appropriate standards for the enforcement of this section…" W.Va. Code § 61-2-9A(m). Appellee, responding to this argument in its Reply brief, first criticized Appellant for failing to cite to any authority in support of this proposition (ignoring the fact that the language of a state statute is itself legal authority), and then, ironically enough, provides its own argument in rebuttal which is itself unsupported by any statutory or case authority, arguing that Appellant's interpretation is "illogical" because "Such a reading would make any statute that included rulemaking authority imply a right of action." *See Appellee's Reply Brief*, p. 3. Once again, Appellant reiterates in response that is § 55-7-9 which creates the private right of action for "any person injured by the violation of any statute," and that the language of 61-2-9A(m) does nothing at all to foreclose the remedies created through 55-7-9, and, in fact,

contains language at section (m) that suggests a broad and inclusive application of the same. As such, factor 2 weighs slightly in favor of a private cause of action as to harassment.

Factor 3

Factor 3 also inveighs in favor of a private cause of action for both the extortion and harassment statute. The underlying purpose of both statutory schemes is, very plainly, to prohibit and deter the conduct proscribed against therein and deter any commission of the same. A private cause of action authorizing a Plaintiff to seek compensation for deprivations which have resulted from the commission of any such act would be entirely consistent with this purpose.

Respondent argued that Factor 3 (misleadingly referred to as "element 3" in Appellee's Suggestion in Support of Motion to Dismiss (JA148) at p. 9) inveighs against finding a private right of action because, per the language of *Teets v. Miller*, 237 W.Va. 473, 480, 780 S.E.2d 1, 8 (2016), "West Virginia courts will glean legislative intent from the plain language of a statute." Of Course, had Respondent continued with this analysis to its logical conclusion, he might have applied this same *Teets* rule of statutory construction to § 55-7-9, and then read it in *pari materia* with the extortion and harassment statutes. *See State ex rel. Miller v. Locke*, 253 S.E.2d 540 (1979) ("It is well established in West Virginia that statutes which are not inconsistent with one another, and which relate to the same subject matter, are in *pari materia*. Statutes in *pari materia* should be read and construed together, the

primary purpose being to ascertain the intention of the Legislature."). *See also State ex rel. Slatton v. Boles*, 147 W.Va. 674, 130 S.E.2d 192 (1963); *State ex rel. Graney v. Sims*, 144 W.Va. 72, 105 S.E.2d 886 (1958); *State v. Hoult*, 113 W.Va. 587, 169 S.E. 241 (1933). Both the harassment and extortion statutes, when read in *pari materia* with § 55-7-9 (which is required when evaluating whether a private cause of action arises) suggest a legislative intent to allow for private causes of action because neither statute includes any language which would suggest that the criminal penalties described therein are "expressly mentioned to be in lieu of damages." This is what the plain language of § 55-7-9 requires, and no such express exemption can be found in either statute.

Factor 4

Obviously, neither extortion nor harassment are areas of law which have been delegated exclusively to the federal government, as each are dealt with at the state level in every state jurisdiction across the nation.

The 4th Circuit's application of the *Hurley* factors to the case bat bar is perfunctory at best. After quoting the four factors, the 4th Circuit spends one paragraph of two sentences addressing their application to the facts of the case at bar, saying only that:

> *Here, §§ 61-2-13(a) and 61-2-9a are criminal statutes "enacted for the protection of the general public;" they do not "expressly identif[y]" a class they*

> *intend to benefit. Id. at 761 (quotation marks omitted). Moreover, the plain language of these statutes—and other statutes in the same chapter—provides only for criminal penalties; neither the statutory text nor scheme suggests any intent to create a private cause of action. So, these criminal statutes do not create private causes of action. Counts Four and Five failed to state a claim.*

The 4th Circuit's reasoning here is wholly erroneous, and is so perfunctory and non-responsive as to border on a wholesale disregard of Petitioner's legal argument. They're suggestion that the criminal statutes at issue inveigh against finding a private cause of action because they were enacted for the benefit of the general public and do not expressly identify a class they intend to benefit amounts to a misinterpretation of factor one. Although it is true that the *Hurley* Court cited the Supreme Court in *Cort v. Ash*, which compared the specific class of beneficiaries created by an anti-discrimination law to the general public benefiting through a criminal statute (such that a specific group reference more strongly creates a cause of action than does a generalized protection of the public), this does not mean that criminal statutes inherently do not give rise to a private cause of action under *Hurley*. It remains true that Petitioner is within the class of beneficiaries intended for protection by the criminal extortion statutes because it is meant to protect any citizen who is being extorted or harassed by imposing criminal penalties to said extortion. Thus, at absolute worst, this statute inveighs mildly in favor of a

private cause of action because it must still be read in *pari materia* with § 55-7-9, which explicitly creates a private cause of action for *every* statute excepting those who specify otherwise. Similarly, the 4th Circuit's further argument that the statutory language of the extortion and harassment statutes fails to suggest any intent to create a private cause of action is, of course, belied by the very language of W.Va. Code § 55-7-9 itself, which expressly and unequivocally asserts that a private cause of action exists as to violation of "any" statute, save those which expressly prohibit the same. It is telling that the 4th Circuit, like so many other courts who have attempted to deny a private cause of action arising out of statute, made no effort whatsoever to address W.Va. § 55-7-9.

Petitioner's review of West Virginia precedent reveals one case wherein a civil cause of action for extortion was contemplated by the West Virginia Supreme Court. In *Machinery Hauling, Inc. v. Steel of West Virginia*, 384 S.E.2d 139 (1989), the Supreme Court adjudicated a certified question "concerning the effect of threats made by one party for the purpose of inducing contract concessions from the other." *Id*. at 140. There, Plaintiff sought damages for "extortionate demands," *Ibid*. The matter was then submitted to the Supreme Court on certified question, wherein, just as in the instant matter, Plaintiff argued that it had a right to proceed under a civil cause of action for extortion and the defendant arguing that it did not. Said the Court, "The Plaintiff argues that there is a cause of action under our criminal extortion statute… the defendants, on the other hand, argue that there is no general authority

that recognizes the right to recover civil damages for extortion," *Id.* at 140-41. Although the Court ultimately found that a cause of action could not arise under the circumstances of the case, it did so only because Plaintiff's claims failed to meet the elements of extortion under § 61-2-13, and refused to find that no civil cause of action could arise from said Statute. Said the Court:

> *[S]ince there was no threat in the legal sense, the facts would not appear to come within the statutory language of a threatened injury to the "character, person or property of another person." W.Va. Code, 61-2-13. In Black's Law Dictionary 1327 (5th ed.1979), a "threat" is defined as "[a] declaration of an intention to injure another or his property by some unlawful act." Iden v. Adrian Buckhannon Bank, 661 F. Supp. 234 (N.D.W.Va. 1987), modified, 841 F.2d 1122 (4th Cir. 1988); Schott v. People, 174 Colo. 15, 482 P.2d 101 (1971); State v. Schweppe, 306 Minn. 395, 237 N.W.2d 609 (1975). As we discuss in more detail later, the plaintiff had no continuing contract with Steel. As a consequence, Steel was free to place its haulage business wherever it chose. Its statement to the plaintiff did not constitute an unlawful act.*

Id. at 141.

As such, the West Virginia Supreme Court, even when given the ideal opportunity, made no

finding whatsoever that plaintiffs were prohibited, as a matter of law, from bringing a civil action based on a violation of the extortion statute, despite the Defendants specifically arguing that "there is no general authority that recognizes the right to recover civil damages for extortion." *Id*. at 141.

Although all of these arguments regarding West Virginia Code § 55-7-9 and the *Hurley* and *Steel* cases were clearly asserted and articulated before the District Court and the 4th Circuit (*See Plaintiff's Response in Opposition to Defendant's Motion to Dismiss, pp. 4-8* (JA225-229), and Appellant's 4th Circuit Appeal Brief (4th Cir. Dkt. 21). Both Courts' Orders ignores them entirely. Rather, the closest anyone thus far has gotten to providing an authoritative rebuttal to Appellant's argument regarding § 55-7-9 is when Respondent, in its Reply Brief (and also briefly in its *Suggestion in Support of Motion to Dismiss*), cited to *Sartin ex rel. Sartin v. Evans*, 186 W.Va. 717, 720, 414 S.E.2d 874, 877 (1991). However, a reading of *Sartin* shows that it does not inapposite to Appellant's arguments. Appellee, after citing to the same unpublished district Court case referenced by the District Court – *Cunningham*, *supra* –argues as follows:

> *Despite the fact that Cunningham is a federal case applying West Virginia law, the West Virginia Supreme Court of Appeals also long ago held that the statute cited only "provide[s] for a rebuttable prima facie presumption of negligence . . . ." Sartin ex rel. Sartin v. Evans, 186 W. Va. 717, 720, 414 S.E.2d*

> *874, 877 (1991). Then, the Court noted that the violation must have proximately caused the injury in order to be actionable. Id. So, it is clear that this statute only satisfies part of the common law negligence test.*

Defendant's Reply in Support of Its Motion to Dismiss, p. 2 (JA270).

However, even a cursory reading of *Sartin* shows that it does not stand for the proposition asserted by Respondent at all. Specifically, while *Sartin* does hold that § 55-7-9 creates a presumption of negligence for violation of a statute, at no point does the *Sartin* case suggest that this is *all* that § 55-7-9 does. In *Sartin*, the Plaintiff initiated a civil action relating to a car accident, contending that the Defendant was negligent for passing Appellant on the right, and further asserted that the combination of W.Va. Code § 17C-7-3 (prohibiting drivers from passing on the right), and W.Va. Code § 55-7-9 created a rebuttable presumption of negligence. *Id*. at 875. The *Sartin* Court agreed with Plaintiff/Appellant, and found that "Violation of a statute is prima facie evidence of negligence. In order to be actionable, such violation must be the proximate cause of the plaintiff's injury.'" *Id*. at Syl. Pt. 2 (quoting Syl. Pt. 1, *Anderson v. Moulder*, 183 W.Va. 77, 394 S.E.2d 61 (1990)). Critically, however, the *Sartin* decision does not in any way limit the applicability of § 55-7-9 to negligence claims only. Rather, the *Sartin* court discussed a presumption of negligence for violation of the relevant statute because the case itself was a negligence action. As

the Plaintiff did not raise violation of § 17C-7-3 as an independent cause of action, but rather only asserted a common law negligence tort, the Court was right to discuss the matter in the context of negligence. As such, *Sartin*, if anything, actually inveighs in favor of Petitioner's position.

CONCLUSION

Based on the above, Petitioner respectfully requests that this Honorable Court grant Petitioner's Petition for Writ of Certiorari, reverse the 4th Circuit on the arguments identified above, and remand the matter back to the District Court for discovery and trial.

Respectfully submitted,

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