

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

ANTONIO PRADO,	)	Case No. 09-4419 SC
	)	
Plaintiff,	)	ORDER RE: DEFENDANT'S MOTION
	)	FOR SUMMARY ADJUDICATION AND
v.	)	PLAINTIFF'S MOTION TO
	)	AUGMENT OR FOR LEAVE TO
ALLIED DOMEQ SPIRITS AND WINE	)	<u>CONDUCT DISCOVERY</u>
GROUP DISABILITY INCOME POLICY,	)	
	)	
Defendant.	)	
_____	)	
	)	
LIBERTY LIFE ASSURANCE COMPANY OF	)	
BOSTON,	)	
	)	
Real Party in Interest.	)	
_____	)	

I. INTRODUCTION

Plaintiff Antonio Prado ("Plaintiff") brought this action against the Allied Domecq Spirits and Wine Group Disability Income Policy ("Defendant" or "the Plan"), alleging a failure to extend disability benefits in accordance with the Plan and the Employee Retirement Income Security Act of 1974 ("ERISA"), 28 U.S.C. § 1132. The Real Party in Interest is the Plan Administrator, Liberty Life Assurance Company of Boston ("Liberty"). Now before the Court are two fully briefed motions. Liberty filed a Motion for Summary Adjudication on the Applicable Standard of Review. ECF Nos. 21 ("Liberty's Mot."), 27 ("Opp'n to Liberty's Mot."), 32 ("Liberty's Reply"). Plaintiff filed a Motion for an Order Directing Defendant

1 to Augment the Administrative Record and for Leave to Conduct  
2 Discovery. ECF Nos. 25 ("Pl.'s Mot."), 29 ("Opp'n to Pl.'s Mot."),  
3 34 ("Pl.'s Reply"). Pursuant to Civil Local Rule 7-1(b), the Court  
4 finds the motions suitable for determination without oral argument.  
5 Because they were filed concurrently and involve overlapping legal  
6 issues, the Court rules on both motions in this Order. For the  
7 following reasons, the Court GRANTS IN PART and DENIES IN PART  
8 Plaintiff's Motion and GRANTS Liberty's Motion for Summary  
9 Adjudication on the Applicable Standard of Review.

10  
11 **II. BACKGROUND**

12 Plaintiff was injured on September 2, 2003 while employed by  
13 Allied Domecq Spirits and Wine ("Allied"). Compl. ¶ 4. Plaintiff  
14 applied for long-term disability under Allied's disability plan.  
15 Id. ¶ 5. Under the Plan, claimants receive funds for up to twenty-  
16 four months if an injury renders them unable to work in their "own  
17 occupation," and receive payments beyond that time period if they  
18 are unable to work in "any occupation" for which they are  
19 reasonably qualified. Padway Decl. Ex. C ("Cert. of Coverage") at  
20 SPD006-007.<sup>1</sup>

21 Liberty denied Plaintiff's claim. Compl. ¶ 5. In 2005,  
22 Plaintiff filed suit, alleging failure to extend benefits under a  
23 plan covered by ERISA. Id. This Court granted summary judgment  
24 for Plaintiff. Prado v. Allied Domecq Spirits and Wine Group  
25 Disability Income Policy, No. 05-2716, 2008 WL 191985 (N.D. Cal.  
26 Jan. 22, 2008) ("Prado I"). The Court found that because Liberty  
27 acted both as the plan administrator and the funding source for

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<sup>1</sup> Laurence Padway ("Padway"), counsel for Plaintiff, filed a  
Declaration in support of Plaintiff's Motion. ECF No. 26.

1 benefits, it operated under a structural conflict of interest. Id.  
2 at 5. The Court found that this conflict of interest, as well as  
3 other factors, supported its finding that Liberty abused its  
4 discretion in denying Plaintiff's claim. Id. at 20. The Court  
5 found that Plaintiff was unable to perform his "own occupation" for  
6 the first twenty-four months of his injury, and remanded the matter  
7 to the Plan for a determination on whether Plaintiff should receive  
8 benefits beyond the twenty-four month period due to an inability to  
9 perform "any occupation." Id. at 21. Following remand, the Plan  
10 denied Plaintiff's claim, finding insufficient objective evidence  
11 of a disability. Compl. ¶ 6.

12 In this second suit, Plaintiff brings three causes of action:  
13 (1) review of denial of ERISA benefits; (2) violation of California  
14 Insurance Code Section 10111.2; and (3) failure to produce records  
15 under 29 U.S.C. § 1332. As to this third cause of action,  
16 Plaintiff claims that Liberty was obligated to make available  
17 certain documents during his claim review and failed to do so, and  
18 that as a consequence Plaintiff is entitled to fees. See Compl.

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20 **III. LEGAL STANDARD**

21 **A. Summary Adjudication**

22 A court may grant summary adjudication -- also known as  
23 partial summary judgment -- if there is no genuine dispute of  
24 material fact as to a portion of a claim or issue and the moving  
25 party is entitled to judgment as a matter of law. Fed. R. Civ. P.  
26 56(c), Lies v. Farrell Lines, Inc., 641 F.2d 765, 769 n. 3 (9th  
27 Cir. 1981).

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1           **B. Standard of Review**

2           ERISA benefits determinations are to be reviewed de novo  
3 unless the language of the plan documents give the administrator  
4 discretionary authority to determine eligibility for benefits or to  
5 construe the terms of the plan. Met. Life Ins. Co. v. Glenn, 128  
6 S. Ct. 2343, 2348 (2008). Where an administrator has retained  
7 discretionary authority, abuse of discretion is the appropriate  
8 standard of review. Id. A plan administrator that also acts as  
9 the funding source for benefits operates under a "structural"  
10 conflict of interest. Abatie v. Alta Health & Life Ins. Co., 458  
11 F.3d 955, 965 (9th Cir. 2006). Such a conflict "must be weighed as  
12 a factor in determining whether there is an abuse of discretion."  
13 Glenn, 128 S.Ct. at 2348. This leads to an abuse-of-discretion  
14 standard "tempered by skepticism commensurate with the plan  
15 administrator's conflict of interest." Abatie, 458 F.3d at 959.

16           **C. Evidence Beyond the Administrative Record**

17           A court's abuse-of-discretion review of an ERISA claim denial  
18 is generally limited to the record before the plan administrator.  
19 Jebian v. Hewlett-Packard Co. Emp. Benefits Org. Income Prot. Plan,  
20 349 F.3d 1098, 1110 (9th Cir. 2003). However, if the denial is  
21 made by an administrator operating under a conflict of interest,  
22 the court has discretion to permit discovery beyond the  
23 administrative record into the nature, extent, and effect of this  
24 conflict on the administrator's decision-making process. Welch v.  
25 Met. Life Ins. Co., 480 F.3d 942, 949-50 (9th Cir. 2007). In  
26 addition, an administrator's failure to follow a procedural  
27 requirement may permit evidence outside the administrative record.  
28 Abatie, 458 F.3d at 972-73.

1 **IV. DISCUSSION**

2 **A. Standard of Review**

3 Plaintiff advances two arguments that de novo review is the  
4 proper standard of review. First, Plaintiff argues that Liberty  
5 has not established that the Plan documents give it discretion to  
6 determine claim eligibility. Opp'n to Liberty's Mot. at 1.

7 Liberty counters that this Court determined that the Plan  
8 conferred discretion to Liberty in Prado I and suggests collateral  
9 estoppel should bar Plaintiff from relitigating this issue.  
10 Liberty's Reply at 2. "Under the judicially-developed doctrine of  
11 collateral estoppel, once a court has decided an issue of fact or  
12 law necessary to its judgment, that decision is conclusive in a  
13 subsequent suit based on a different cause of action involving a  
14 party to the prior litigation." U.S. v. Mendoza, 464 U.S. 154, 159  
15 (1984). In Prado I, this Court found that the plan documents gave  
16 Liberty discretion to determine claim eligibility, and thus abuse-  
17 of-discretion review was proper. See Prado I, No. 05-2716, 2006 WL  
18 3388572 (N.D. Cal. Nov. 22, 2006). Because this identical issue  
19 was both decided and actually litigated in Prado I and was  
20 necessary to its final judgment, the Court's earlier finding will  
21 control in this action.

22 Plaintiff's second argument is that de novo review is the  
23 proper standard because Liberty failed to deny the claim within the  
24 deadlines provided by U.S. Department of Labor regulations. Opp'n  
25 to Liberty's Mot. at 6. Plaintiff cites Jebian, 349 F.3d at 1107,  
26 for the proposition that "where the Plan fails to decide the claim  
27 within the appropriate time limit, the claim is deemed denied and  
28 de novo review results." Id. Under 29 C.F.R. § 2560.503-

1 1(i)(1)(i) and (i)(3)(i), a plan administrator reviewing an appeal  
2 of a benefit denial must notify the claimant of its decision within  
3 forty-five days of receipt of the claimant's appeal request. If  
4 special circumstances require additional time, the administrator is  
5 permitted a forty-five-day extension if, within the first forty-  
6 five days, it notifies the claimant that additional time is  
7 necessary and indicates the special circumstances necessitating the  
8 extension. Id. Plaintiff alleges that Liberty did not send  
9 Plaintiff an extension notice that provided the "special  
10 circumstances" necessitating the extension until September 23, 2009  
11 -- fifty-eight days after Liberty received Plaintiff's appeal.  
12 Opp'n to Liberty's Mot. at 3-6. Plaintiff claims that under  
13 Jebian, this violation necessitates de novo review. Id.

14 Liberty counters that Plaintiff quotes Jebian out of context,  
15 and that even if Liberty committed minor procedural violations, de  
16 novo review would be improper. Liberty's Reply at 8-9. Liberty  
17 claims it sent two letters before the September 23, 2009 letter in  
18 which it notified Plaintiff that additional time would be  
19 necessary, and argues that while the "special circumstances" were  
20 not explicitly stated in these letters, they could be reasonably  
21 inferred from the conduct of the parties. Liberty's Mot. at 5-7.

22 The Court finds three major differences between the case at  
23 hand and Jebian. First, in Jebian, the delay was considerably  
24 longer, involving "[o]ne hundred nineteen days of 'radio silence.'"   
25 349 F.3d at 1107. Here, if one assumes all facts in favor of  
26 Plaintiff, the delay is twelve days. The correspondence between  
27 parties during this time demonstrates the sort of "ongoing, good  
28 faith exchange of information between the administrator and

1 claimant" that renders a procedural error "inconsequential" and  
2 does not mandate de novo review. Id. Second, in Jebian, the  
3 plan's conduct violated not only Department of Labor regulations,  
4 but also the terms of the plan itself, and the Ninth Circuit  
5 stressed that this was a factor in its determination that de novo  
6 review applied. Id. at 1106 n.6. Plaintiff does not allege that  
7 Allied's plan contains similar language. Third, Jebian's holding  
8 rests on a Department of Labor regulation requiring claims not  
9 decided within the time limitations to be "deemed denied." Id. at  
10 1103 n.5. The "deemed denied" language has since been excised from  
11 these regulations. See 29 C.F.R. § 2560.503-1(h).

12 For the foregoing reasons, Jebian is distinguished, and abuse  
13 of discretion is the appropriate standard of review. In Prado I,  
14 the Court also found that Liberty's joint roles as plan  
15 administrator and payee constituted a structural conflict of  
16 interest, and the Court considered this conflict in determining  
17 whether Liberty had abused its discretion. Prado I, 2008 WL  
18 191985. Because this issue was decided and actually litigated in  
19 Prado I and was necessary to its final judgment, Liberty is  
20 estopped from arguing no conflict existed. Thus, the Court will  
21 apply the abuse-of-discretion standard in reviewing Liberty's claim  
22 denial, tempering this review with skepticism commensurate with  
23 Liberty's conflict of interest.

24 **B. Evidence Beyond the Administrative Record**

25 During Liberty's assessment of Plaintiff's appeal, Plaintiff  
26 made several requests for additional information from Liberty to  
27 "prepare an appropriate appeal." Gray Decl. Ex. B ("Apr. 12, 2009  
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1 Letter").<sup>2</sup> Plaintiff's April 12, 2009 letter is a four-page,  
2 single-spaced document requesting a number of documents. Id. In  
3 response, Liberty wrote: "We do not agree with your interpretation  
4 of the scope of Liberty's disclosure obligations under ERISA and we  
5 are unable to respond to your extensive requests for information."  
6 Gray Decl. Ex. C ("Apr. 30, 2009 Letter"). Plaintiff made another  
7 request for information during the appeal, and this was also denied  
8 by Liberty. See Gray Decl. Ex. G ("Sept. 6, 2009 Letter"), Ex. J  
9 ("Sept. 23, 2009 Letter").

10 Now, Plaintiff seeks an order requiring Liberty to augment the  
11 administrative record with much of the same information, or, in the  
12 alternative, to allow Plaintiff to conduct discovery. See Pl.'s  
13 Mot. The documents Plaintiff seeks fall into two broad and  
14 overlapping categories: (1) documents Plaintiff claims are relevant  
15 to show the nature, extent, and effect of Liberty's conflict of  
16 interest; and (2) documents Plaintiff argues he was entitled to  
17 receive during the claim determination process under Department of  
18 Labor regulations. The Court will discuss both categories in turn.

19 1. Documents Relevant to Liberty's Structural Conflict  
20 of Interest

21 While a district court generally limits its abuse-of-  
22 discretion review of a benefits denial to the administrative  
23 record, the court may, in its discretion, permit discovery of the  
24 nature, extent, and effect of an administrator's structural  
25 conflict of interest. Welch, 480 F.3d at 949-50. Plaintiff claims  
26 he has made requests that are calculated to uncover "bias of the  
27 consulting physicians," "financial interest of the claims

28 \_\_\_\_\_  
<sup>2</sup> Lisa Gray ("Gray"), appeal review consultant for Liberty, filed a  
Declaration in support of Liberty's Motion. ECF No. 23.



1 adjusters," and "the economic effect of discretionary clauses"  
2 (that is, whether Liberty denies more claims when it retains  
3 discretion than when it does not). Pl.'s Reply at 6-9. Plaintiff  
4 seeks, among other things, Liberty's policies and procedures "to  
5 ensure that similarly situated claimants are treated alike," the  
6 number of total reports that the physicians who reviewed  
7 Plaintiff's claim have performed for Liberty on other appeals, and  
8 the number of these reports that were favorable and unfavorable to  
9 the granting of benefits. Pl.'s Mot. at 10-11. Plaintiff  
10 identifies several recent cases where courts permitted discovery  
11 into this type of evidence. See Taylor v. SmithKline Beecham  
12 Corp., 629 F. Supp. 2d 1032 (C.D. Cal. 2009), Santos v. Quebecor  
13 World Longer Term Disability Plan, 354 F.R.D. 643 (E.D. Cal. 2009).

14 Liberty admits that "the Court may consider evidence outside  
15 the administrative record for the limited purpose of deciding the  
16 nature, extent, and effect on the decision making process of any  
17 conflict of interest." Opp'n to Pl.'s Mot. at 11. However,  
18 Liberty argues that the scope of Plaintiff's discovery exceeds the  
19 permissible bounds "in that it calls for documents outside the  
20 administrative record on which Liberty Life did not rely to reach  
21 its claim determination; which call for exposure of how and why  
22 Liberty Life's claims decisions were made and whether they were  
23 'correct' and which are neither relevant nor admissible to evaluate  
24 whether Liberty Life abused its discretion or the merits of its  
25 claim determination." Id. at 12. Liberty makes a number of other  
26 objections, including claiming that Plaintiff "calls for private,  
27 trade secret, proprietary and/or confidential commercial  
28 information regarding defendant's processes, operations, work, or

1 apparatus which has not been made public and may have the effect of  
2 causing harm to defendant's competitive position." Id. The Court  
3 finds these objections too broad, too nebulous, and too  
4 unsubstantiated to rule on them in this Order. Liberty must make  
5 its objections during discovery consistent with the Federal Rules  
6 of Civil Procedure and this district's Civil Local Rules.

7 The Court holds that Plaintiff is entitled to conduct limited  
8 discovery into the nature, extent, and effect of Liberty's conflict  
9 of interest on its decision-making process. The Court stresses,  
10 however, that this Order is not a fishing license. Plaintiff must  
11 "conduct discovery in a way that is limited to specific and  
12 meaningful information and that does not result in harassment  
13 through burdensome responses." Id. at 13.

14 2. Documents Plaintiff Argues Liberty Was Obligated to  
15 Produce During Its Claim Assessment

16 Plaintiff seeks an order compelling Liberty to augment the  
17 administrative record with documents Plaintiff requested and did  
18 not receive during Liberty's claim determination, or to permit  
19 discovery of these documents. In addition to the above-mentioned  
20 evidence of Liberty's conflict of interest, Plaintiff seeks:

21 1. The Hiram Walker and Sons Long Term  
22 Disability Plan, Plan number 507 and any  
amendments thereto.

23 2. The insurance policy issued by Liberty  
24 Mutual to insure the Plan, and the application  
for the policy, and any amendments thereto;

25 3. Any writing by which the Plan has  
26 delegated discretion to determine eligibility  
27 for benefits to Liberty Life Assurance Company  
of Boston ("Liberty").

28 4. All writings which establish that the Plan  
has complied with 29 C.F.R. § 2560.503-1(b)(5),

1 and all writings by which the Plan has complied  
2 with that section.

3 3. [sic] All administrative policies and  
4 procedures and the documents which (1) contain  
5 the standards for how Liberty evaluates  
6 disability claims; (2) contain standards for  
7 how Liberty evaluates impairment due to chronic  
8 pain, (2) contain the medical basis for those  
9 standards (3) conveys those standards and how  
10 they are used to the adjusters and (4)  
11 evaluates whether the adjusters comply with  
12 those standards.

13 4. All writings "relevant" to Mr. Prado's  
14 claim, as that term is defined in 29 C.F.R. §  
15 2560-503-1(m)(8);

16 Pl.'s Mot. at 1.

17 Plaintiff claims he is entitled to these documents under 29  
18 C.F.R. § 2560.503-1(h)(2)(iii), which states:

19 [T]he claims procedures of a plan will not be  
20 deemed to provide a claimant with a reasonable  
21 opportunity for a full and fair review of a  
22 claim and adverse benefit determination unless  
23 the claims procedures . . . [p]rovide that a  
24 claimant shall be provided, upon request and  
25 free of charge, reasonable access to, and  
26 copies of, all documents, records, and other  
27 information relevant to the claimant's claim  
28 for benefits.

Section (m)(8) defines what is "relevant to the claimant's claim"  
as any information that:

(i) Was relied upon in making the benefit  
determination;

(ii) Was submitted, considered, or generated in  
the course of making the benefit determination,  
without regard to whether such document,  
record, or other information was relied upon in  
making the benefit determination;

(iii) Demonstrates compliance with the  
administrative processes and safeguards  
required pursuant to paragraph (b)(5) of this  
section in making the benefit determination; or

(iv) . . . constitutes a statement of policy or  
guidance with respect to the plan concerning

1 the denied treatment option or benefit for the  
2 claimant's diagnosis, without regard to whether  
3 such advice or statement was relied upon in  
4 making the benefit determination.

5 Plaintiff suggests Liberty's failure to produce this  
6 information during the claim review constitutes a procedural error.  
7 Pl.'s Mot. at 6-8. "When a plan administrator has failed to follow  
8 a procedural requirement of ERISA, the court may have to consider  
9 evidence outside the administrative record." Abatie, 458 F.3d at  
10 972-73. "For example, if the administrator did not provide a full  
11 and fair hearing, as required by ERISA, 29 U.S.C. § 1133(2), the  
12 court must be in a position to assess the effect of that failure  
13 and, before it can do so, must permit the participant to present  
14 additional evidence." Id. at 973.

15 Liberty claims that the two documents it produced -- the Group  
16 Disability Income Policy and the Certificate of Coverage -- are the  
17 only plan documents. Opp'n to Pl.'s Mot. at 6-8. To authenticate  
18 these documents and support this statement, Liberty filed a  
19 declaration of Carolyn McNerney ("McNerney"), the Plan's assistant  
20 corporate secretary. McNerney Decl. ¶¶ 3-5.<sup>3</sup> Plaintiff objects to  
21 the McNerney declaration, claiming that Liberty did not identify  
22 McNerney as a potential witness in its initial Rule 26 disclosures,  
23 and that McNerney "does not disclose her relationship to Allied  
24 Domecq, does not claim to be the Plan Administrator, does not  
25 identify who the Plan Administrator might be and provides no basis  
26 for her conclusion that she is authorized to authenticate these two  
27 documents as constituting the Plan." Opp'n to Liberty's Mot. at 2.

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<sup>3</sup> McNerney filed a declaration in support of Liberty's Motion. ECF  
No. 22.

1 Under Rule 37 of the Federal Rules of Civil Procedure, a party  
2 that fails to identify a witness as required by Rule 26(a) or 26(e)  
3 may not use that information or witness to supply evidence on a  
4 motion, at a hearing, or at a trial, unless the failure was  
5 substantially justified or is harmless. Liberty claims that  
6 McNerney's "identity and the need for her declaration had not been  
7 determined at the time Defendant prepared its initial disclosure,  
8 and she has now been added to a supplemental initial disclosure."  
9 Liberty's Reply at 3. Liberty does not address Plaintiff's other  
10 challenges, including that McNerney failed to substantiate her  
11 claim that she is authorized to authenticate the plan documents.  
12 The Court finds this failure to disclose McNerney is neither  
13 justified nor harmless, and SUSTAINS Plaintiff's objection.

14 Plaintiff argues that it is entitled to Plan documents not  
15 disclosed to challenge Liberty's claim that the documents provide  
16 Liberty with discretion to determine claims, and also because  
17 "[s]ometimes discrepancies exist between the Plan, the insurance  
18 policy, and other plan documents. . . . [Plaintiff] is entitled  
19 to the document which is most favorable to his position." Pl.'s  
20 Mot. at 8. While Plaintiff is estopped from relitigating the  
21 discretion issue, Plaintiff must have all the Plan documents to  
22 properly litigate this action. Similarly, the Court needs these  
23 documents, as well as any policies guiding Liberty's decision-  
24 making, to determine if Liberty abused its discretion in denying  
25 Plaintiff's claims. For these reasons, Plaintiff is permitted to  
26 conduct discovery of the Plan documents and all information  
27 relevant to his claim under 29 C.F.R. § 2560.503-1(m)(8).

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1 **V. CONCLUSION**

2 For the foregoing reasons, the Court GRANTS Real Party in  
3 Interest Liberty Life Assurance Company of Boston's Motion for  
4 Summary Adjudication on the Applicable Standard of Review, and  
5 holds that the standard of review is abuse of discretion tempered  
6 with skepticism commensurate with Liberty's conflict of interest.  
7 The court GRANTS IN PART AND DENIES IN PART Plaintiff Antonio  
8 Prado's Motion for Order Directing Defendant to Augment the  
9 Administrative Record and for Leave to Conduct Discovery.  
10 Plaintiff's motion to augment is DENIED; Plaintiff's motion for  
11 leave to conduct discovery is GRANTED. Plaintiff may seek in  
12 discovery from Liberty the full set of Plan documents, all of  
13 Liberty's administrative procedures which relate to the handling of  
14 disability claims, and all other information relevant to  
15 Plaintiff's claim. Plaintiff may also conduct limited discovery  
16 into the nature, extent, and effect of Liberty's conflict of  
17 interest on its decision-making process. Parties shall appear for  
18 a status conference in Courtroom No. 1, 17th Floor, United States  
19 Courthouse, 450 Golden Gate Avenue, San Francisco, California, on  
20 November 15, 2010 at 10:00 a.m. Parties shall file a joint case  
21 management statement seven days prior to the hearing.

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23 IT IS SO ORDERED.

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25 Dated: August 2, 2010

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UNITED STATES DISTRICT JUDGE

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