

**SECOND JUDICIAL DISTRICT COURT  
COUNTY OF BERNALILLO  
STATE OF NEW MEXICO**

**No. CV-2003-2215**

**NEW MEXICO TRANSPORTATION UNION, et al.,**

**Plaintiffs,**

**vs.**

**CITY OF ALBUQUERQUE, et al.,**

**Defendants,**

**“REPLY” TO MOTION TO COMPEL DISCOVERY RESPONSES  
AND FOR SANCTIONS PURSUANT TO RULE 1-037**

Plaintiffs, a City of Albuquerque labor union, members of the bargaining unit represented by the Union, and its Chairman, present the following “Reply” to Defendants’ Response to Plaintiffs’ Motion to Compel Discovery Responses and for Sanctions.

Defendants’ answers to two sets of interrogatories (one to the City, one to Chief Administrative Officer James Lewis) and production in response to a set of requests for production were due no later than June 26, 2005. When no answers or responses had been received, Plaintiffs filed their motion to compel on July 8, 2005. This was brought to the Court’s attention at a hearing on an unrelated City motion on July 12, 2005, and the Court ordered the City to answer and respond to Plaintiffs’ discovery requests no later than July 18. An order was entered granting Plaintiffs’ Motion to Compel. The

City Defendants did not subsequently respond to Plaintiffs' Motion to Compel and for Sanctions, other than to supply incomplete and evasive answers and responses on July 18. With a hearing scheduled for August 3, 2005, Plaintiffs present the following "Reply" to their Motion, updating their motion to compel and for sanctions..

While Defendants did attempt some answers to Plaintiffs' Interrogatories and did partially respond to their Requests for Production, the answers and responses were incomplete, superficial, and uninformative. The Interrogatory answers were not verified. Plaintiffs' counsel avers that he nonetheless made good faith efforts to discuss the responses and their omissions with opposing counsel but that he was unsuccessful. A copy of the City's answers and responses is attached hereto:

### **I. Interrogatories to City of Albuquerque**

1. **Interrogatory No. 1** - Responding to a question about who answered or assisted in answering the following interrogatories, the City gave two names and omitted all the other information requested.

2. **Interrogatory No. 2** - In response to a question about the City's response to the first paragraph of the Amended Complaint, the City responded that City's answer to the Complaint "was incorrect" and "ask plaintiffs approval to amend their answer." In addition to not answering the interrogatory, Defendants are aware that responses to discovery request are not the proper forum for requesting leave to amend a pleading.

3. **Interrogatory No. 3** - The question posed to the City was "how the City Defendants have complied, or attempted to comply, with the obligations stated and admitted" in paragraphs 5, 6, 7, 8, 9, 10, and 11 of the Amended Complaint. Plaintiffs asked the City to "identify the individuals involved, describe the form and extent of alleged compliance, and provide specific dates of compliance with each of the obligations stated in paragraphs 5 to 11.

The City responded with respect to "paragraph 9 only." That response was incomplete and referred to "two memorandums . . . discussing the Employee Mediation

Program.” The City failed to attach or provide the two memoranda, and failed to respond with respect to any of the other paragraphs. According to the City, “(w)ith regards to the remaining questions, Defendant City is still attempting to gain the information requested. Once the information is received, this answer will be supplemented accordingly.”

Since the City has failed to respond to Interrogatory No. 3 in a timely or appropriate manner, even after the issuance of an Order compelling discovery responses, the Court should issue a further order compelling the City’s answer and should award sanctions or hold the City in contempt of Court for its failure to either respond or explain what efforts it has made to provide an answer.

4. **Interrogatory No. 5** - The City was asked to describe its actions and attempts to comply with “a Writ of Mandamus issued March 8, 2002, ordering the City to promptly reestablish its Personnel Board” and to provide support for its “contention that the City has ‘properly selected and appointed Personnel Board members’ and Chairpersons between January 1, 1998, and the present.” The City’s answer was that “(a)fter a diligent search, records to respond to this request could not be located. If any are located, this request will be supplemented.” The City’s “answer” is entirely insufficient and uninformative. If the City has no evidence to support its contentions, it should be required to say so. If the City does have any such evidence, it should be compelled to produce it immediately.

5. **Interrogatory No. 7** - Plaintiffs asked the City to identify each meeting, interview, or decision-making process concerning selection of City Personnel Hearing Officers and asked whether those meetings, interviews, or process took place in public or in closed and secret session(s). The City’s response, “See response to interrogatory no. 6,” which referred to documents, did not answer the questions about closed or open meetings or compliance with the Open Meetings Act. Again, the City should be compelled to answer completely, and sanctions should be awarded.

6. **Interrogatory No. 8** - This question asked for a description of “any and all actions, communications, or correspondence concerning the statements made to the Personnel Board on November 20, 2002, by NMTU’s representatives Bob Schwartz and Robert Gutierrez” as well as subsequent critical statements to the Personnel Board. The City’s response is merely that “(l)ogs of communications to the personnel board are destroyed after one year.”

The City’s answer to this question is both untruthful, unresponsive, evasive, and contemptuous. The Court should not condone such a response, which if true would suggest a criminal tampering with public records and a civil neglect of the City’s duties and obligations. The City should be severely sanctioned for its answer to this question.

7. **Interrogatory No. 9** - In response to a question about Transit Department employees who were terminated, suspended, or demoted, requesting information about the date, supervisor, referral to the Mediation Coordinator, and a statement of the reason for imposing discipline, and the type and length of discipline imposed, the City responds “(s)ee documents attached to request for production no. 1. Those documents consist only of logs of Personnel Board cases, provide none of the requested information, and are insufficient and unresponsive to the question.

8. **Interrogatory No. 10** - Plaintiffs asked the City to “describe any and all efforts to reinstate annual performance evaluations” asked the City to “identify the person(s) participating and identify any documents or records that support or provide evidence for the contention that such efforts took place.” The City’s “answer” is that “after a diligent search, records to respond to this request could not be located. If any are located, this request will be supplemented. Any documents concerning the employee work plan process that was initiated are being located and will be produced.”

The City again answers untruthfully, in that Plaintiffs are aware of at least one such effort in the past year that the City must have records of and which a “diligent” search would surely discover. Furthermore, no documents have been produced, and the City has failed to provide any information in response to this reasonable question. The City’s “answer” to this question is contemptuous, uninformative, unresponsive, and evasive. The City should be severely sanctioned for its failure to respond.

9. **Interrogatory No. 11** - The question concerns the policies, rules, guidelines, and administrative instructions that apply to the City’s alternative dispute resolution program applicable to Transit employees, including referrals to a Mediation Coordinator. The City’s answer is deliberately general, incomplete, non-responsive, and uninformative.

10. **Interrogatory No. 12** - Plaintiffs asked the City to discuss its policy and practice of only approving mediation when both sides agreed, and asked for specific details about that policy. The City’s answer was the same as to the previous interrogatory, and it was similarly incomplete, non-responsive, and uninformative.

11. **Interrogatory No. 13** - In response to a third question about the City’s mandatory mediation program, the City again refuses to answer the specific questions, gives a general answer, and avoids its duty to respond completely and in good faith to questions concerning one set of allegations and defenses in the case.

12. **Interrogatory No. 14** - This question asked the City to “list and describe any effort or attempt to hire or appoint an officer to administer the Merit System, in

accordance with the provision of the city Charter.” The City’s answer, that “(t)he Mayor appoints the chief Administration (sic) Officer to administer the merit system,” is unresponsive, incomplete, and fails to provide information relevant to the questions.

13. **Interrogatory No. 15** - Plaintiffs asked the City to discuss the times the Personnel board went into Executive (closed) Session, other than for the purpose of deliberating on a specific case, and asked for responses to specific questions about those closed meetings. The City refuses to supply the requested information, untruthfully claiming that “(t)here are no records of any Executive Session. Logs for the personnel board are only maintained for a period on (sic) one year and are then destroyed.”

The City’s response to this question is patently untrue, as Personnel Board logs were attached for 1998 to 2005 in response to Request for Production No. 1. Also, such logs would not show the information requested. Personnel Board minutes, however, should show the closed meetings, and are required by law (New Mexico Open Meetings Act) to document secret, closed meetings of the Personnel Board. Those records are required by law (a City Ordinance) to be archived and maintained by the City Clerk. The City’s response to this interrogatory is outrageous, frivolous, untruthful, and contemptuous. These answers should be severely sanctioned.

14. **Interrogatory No. 16** - The City was asked to list and describe cases remanded to the Personnel Board by any court or administrative body. Plaintiffs asked the City to identify the representatives of the parties, to whom the case was remanded, the dates, reason and action taken on remand. The City’s “answer” was only two names: Lawrence Baca and Anthony Pacheco. According to the City, “(o)ther cases relating to this interrogatory will be disclosed if and when located.” Once again, the City fails to make any effort to respond to the questions, fails to provide anything close to a complete response, and refuses to provide information that should be readily available to it. The City’s response to this question is contemptuous, irresponsible, and sanctionable.

15. **Interrogatory No. 17** - In this brief interrogatory Plaintiffs asked the City to “state the amount of budget allocated to legal and administrative support of the Personnel Board and support and/or enforcement of the Merit System Ordinance.” In response the City states that it “has not yet received this information from responsible departments. When the information is received, this interrogatory will be supplemented.”

As with the other interrogatories, these were submitted to the City on May 27, 2005, more than two months ago. The City has had ample time to secure the requested information from its “responsible departments.” Once again, the City’s failure to respond is negligent, irresponsible, useless, and contemptuous.

16. **Interrogatory No. 18** - Plaintiffs asked the City to discuss “the cost and method of re-establishing a system of performance evaluations . . . as required by the Merit System Ordinance.” The City’s response, as to the previous interrogatory, is that it “has not yet received this information from responsible departments.” Plaintiffs reaction to this City “response” is the same as their reaction to the City’s response to Interrogatory No. 17: negligent, irresponsible, useless, and contemptuous.

17. **Interrogatory No. 19** - The City was asked to “describe the City’s former discontinued system of annual City-wide performance evaluations” and give information about that system, including “reasons for ending the use of performance evaluations.” The City’s answer is that the “City is unable to obtain this information as it predates the current system and would require an examination of all City employee’s (sic) files.” This “answer” by the City is disingenuous, untruthful, useless, and contemptuous. The City should be sanctioned, in accordance with the provisions of Rule 1-037, for its failure to properly respond to this and other similar Interrogatories posed by Plaintiffs.

18. **Interrogatory No. 21** - This interrogatory asks the City to “list and identify each and every disciplinary action involving a termination, demotion, or suspension for more than five days in which an employee in the NMTU’s bargaining unit was required or requested to respond to charges at a predetermination hearing prior to or in the absence of a review of the case by the City’s Mediation Coordinator.” Such review is required by the Merit System Ordinance and Personnel Rule 902.2. The City responds by contending that if the Plaintiffs will produce the list requested, the City “can indicate if an individual from the list was referred for mediation.” The City falsely claims that “all other information is confidential.”

The City’s response to this question is devious, untruthful, and disingenuous. The City surely has departmental records which will indicate which disciplinary charges and cases were brought by the City against Transit employees and which, if any, were referred to the Mediation Coordinator as required by law. There is nothing “confidential” about this information, and the City’s refusal to answer this question is again negligent and contemptuous.

19. **Interrogatory No. 22** - Plaintiffs asked the City to state for each disclosed witness “fully and with specificity what that person is expected to testify about; what exhibits, documents, records, or information that person will rely on; what issue, claim, or defense that testimony is expected to be relevant to, and describe the knowledge and experience of the person. . . .” For each of the five persons listed as City witnesses, the City’s response is that the witness “has knowledge of the events alleged in Plaintiffs’ Complaint.”

The City answer to this interrogatory is patently defective and contemptuous. As sanction for the City's refusal to provide the requested and relevant information about its witnesses and their anticipated testimony the City should be barred from calling the witnesses at trial.

20. **Interrogatory No. 23** - For its final interrogatory to the City, Plaintiffs asked for identification of each and every exhibit, record, or document that the City anticipates using at trial. "For each such exhibit, record, or document, please state what claim or defense it is relevant to and describe and discuss that relevance fully and with specificity." The City's response to this question is to list three sets of documents: 1) City Charter, City's Personnel Rules and Regulations, Merit System Ordinance; 2) United Transportation Union Local 1745 Contract; and 3) Suspension documents on eight employees. No other information or explanation is provided

The City's response to this question is incomplete and generally useless and uninformative. As an appropriate sanction for the City's response to this question the City should be limited to using only the listed documents at the trial of this case.

## **II. Interrogatories to James Lewis**

21. **Interrogatory No. 4** - This interrogatory asks the City's Chief Administrative Officer what "knowledge or information" he has about "the City's selection, appointment, and contracting with Personnel Hearing Officers" including information about his "role in the process." Mr. Lewis is asked to state his opinion "about the legality and propriety of the selection process." Mr. Lewis responds by referring to the Merit System Ordinance. He gives no information about his role in the process, and he fails to answer the specific questions Plaintiffs asked. Mr. Lewis simply ignores the part of the question that asks for his opinion of the "legality and propriety of the selection process."

22. **Interrogatory No. 5** - Plaintiffs ask Mr. Lewis to "identify each and every audit or other report or other memoranda, correspondence, communication, or other records concerning the City's Merit System and the validity, integrity, or effectiveness of the City's personnel management process, etc." His answer says, in its entirety, "Audit report no. 01-125 is attached." Since Plaintiffs are aware of many documents responsive to this interrogatory, it is apparent that Mr. Lewis refuses to give a reasonably complete or correct response, and that no effort has been expended in attempting to locate and disclose documents and information responsive to this question.

23. **Interrogatory No. 7** - Mr. Lewis is asked whether he has "ever reviewed the operations of the City's Personnel Board, its Personnel Hearing Officers, or the

City's Human Resources Department with respect to the administration and management of the City's system of personnel management and/or the Merit System Ordinance." He is asked, if he did review "any such matters," for details of when and what information he learned. His response is that he "has reviewed" those matters, however he "is unable to remember the exact dates of these reviews" and he reveals no other information except that "all appeared to be in compliance."

24. **Interrogatory No. 8** - Plaintiffs ask for the identification of "any document, record, memo, correspondence, e-mail, or other communication between, among, to, or from you or anyone in your office or to or from the Mayor or anyone in his office concerning the City's Personnel Board, the Merit System Ordinance, or the handling of employee grievances of disciplinary matters since January 1, 1998." Mr. Lewis responds that "the only information concerning the personnel board contained within Defendant Lewis' office are the findings of the personnel board which are available for copying and inspection." Mr. Lewis' answer to this question is incomplete, misleading, disingenuous, and contemptuous. Plaintiffs did not ask what records were "contained with Defendant Lewis' office" and he does not know what "findings of the personnel board" Mr. Lewis is referring to. No such records were provided when counsel for Plaintiffs went to the City Legal Department to look at records in this case.

25. **Interrogatory No. 9** - Mr. Lewis is asked about communications or contacts with Mayor Chavez about the matters at issue in this lawsuit. He is also asked to tell what he knows about "the Mayor's knowledge or opinion of any problems" concerning the matters in this lawsuit, "stating the basis or reasons for your information, understandings, or opinions." Mr. Lewis states that he "does not specifically recall any such contact with Mayor Chavez," and he simply ignores the second part of the interrogatory. Mr. Lewis' answer is misleading, incomplete, and uninformative.

26. **Interrogatory No. 10** - This interrogatory asks about the dates of service and replacement of Personnel Board members. Mr. Lewis is asked to discuss the instances in which the provisions in the Ordinance for appointing or seating Board members were not followed, "and identify the dates and persons responsible for not complying with the ordinance." Mr. Lewis states only "See documents attached to Request for Production no. 3." Those documents do not answer the question.

27. **Interrogatory No. 11** - Plaintiffs ask Mr. Lewis to discuss his knowledge of the Writ of Mandamus ordering the City to reestablish its Personnel Board and to describe the evidentiary support he has "for the contention that the City has 'properly selected and appointed Personnel Board members.'" Mr. Lewis fails to answer the questions in this interrogatory, claiming only that the "Writ of Mandamus was issued

prior to my becoming CAO and I have no knowledge of the Writ of Mandamus except for its content itself.”

28. **Interrogatory No. 13** - Mr. Lewis is again asked a question about the selection of Personnel Hearing Officers, specifically what parts of any “meeting, interview, or decision-making process took place at a public meeting or was otherwise open to the public or concerned persons.” His response ignores the questions asked, and he fails to give any information whatsoever about the open or closed nature of the process and meetings.

29. **Interrogatories Nos. 14-16** - In these interrogatories Mr. Lewis is asked to address several aspects of the Plaintiffs’ allegations, yet in response to each he states that he either “has no personal knowledge” or that he “has no specific knowledge” about the question being asked. Since it is unknown what Mr. Lewis means by “personal knowledge” or “specific knowledge” and how Mr. Lewis is limiting his answers, Plaintiffs object to those answers. Also, Mr. Lewis ignores and disregards the questions included within these interrogatories.

30. **Interrogatory No. 17** - Plaintiffs ask Mr. Lewis about the appointment of an officer to administer the merit system, as provided in the City Charter. Mr. Lewis’ response, that the “Mayor appoints the CAO to administer the merit system” fails to properly or completely answer the questions, which include the request that Mr. Lewis give his “opinion of the legality and propriety of delegating the responsibility for overseeing the merit system to you.”

31. **Interrogatory No. 18** - This interrogatory asks Mr. Lewis to discuss the “budget allocated to legal and administrative support of the City’s Personnel Board and support and enforcement of the Merit System Ordinance.” Mr. Lewis is also asked his opinion about the allocation of budgetary resources, as well as other questions about his activity overseeing the merit system. His answer is that the “City has not yet received this information from responsible departments” and he says that when “the information is received, this interrogatory will be supplemented.” Mr. Lewis ignores most of the question; with respect to the receipt of information, with only a little over a month until the trial date, the CAO should not be permitted to delay and thwart pre-trial discovery and Plaintiffs’ preparation for trial. The City should be ordered to turn over materials and answers responsive to the questions and should be sanctioned for its failures to do so..

32. **Interrogatory No. 19** - For their final interrogatory to Mr. Lewis, Plaintiffs asked Mr. Lewis when and whether he “became aware of the initial Complaint and/or the filing of the First Amended Complaint in this case.” He is asked to “describe

any inquiry or action taken in response to or in an effort or attempt to alleviate any of the problems or concerns” addressed in the pleadings, identifying any and all persons involved or participating in those actions or efforts” and identifying any documents.

Mr. Lewis “object(ed) to this interrogatory as protected by the attorney/client privilege and as attorney work product.” There is nothing privileged about answers to this interrogatory; further Mr. Lewis has not identified any communications or contacts privileged under the attorney-client privilege rules. His answers to this question, like Mr. Lewis’ and the City’s answers to the other discovery requests in this case, are incomplete, useless and uninformative, and not in compliance with the rules of civil procedure.

### **III. Requests for Production**

Plaintiffs requested 18 categories or groups of records, encompassing the relevant records supporting or opposing the allegations in the Amended Complaint. The City produced limited records in four categories, making improper, contradictory, inane, and evasive objections or denials with regard to each other class or category of document requested. The City’s refusal and failure to comply with the rules of discovery is so pervasive that it would serve no purpose to list the requests and describe the City’s failure to provide records in response to each.

Plaintiffs’ counsel is aware of documents responsive to the requests for production which the City has neither objected to producing or produced. For example, with respect to records showing City attempts to comply with the Merit System Ordinance’s requirement of at least annual performance evaluations, Plaintiffs’ counsel has a relatively recent draft of proposed changes presented by the City’s Chief Financial Officer Gail Reese to Plaintiff Robert Gutierrez and other union officers which the City has not produced. With respect to referrals to the Mediation Coordinator, Plaintiffs have

e-mail messages on the subject which the Defendants have not produced and a letter from the City Personnel Board to Defendant James Lewis, which the City has also not produced. The City's responses to discovery also refer to two memoranda sent by Mr. Lewis to other City officials; these have also not been produced.

It is apparent, therefore, that the City has made little or no effort to gather or disclose records responsive to Plaintiffs' requests, even weeks after the deadline for production and even in the face of the Court's order compelling production of documents. Under these conditions, and with such severe and wide-spread failures to respond to interrogatories and requests for production, Plaintiffs preparation for trial and potential presentation of evidence at trial is severely prejudiced and compromised. Given such contemptuous and contumacious misconduct, the Court should award strong sanctions, even considering the possibility of a default judgment in favor of Plaintiffs.

#### **IV. Sanctions**

The City's failure to properly respond to Plaintiffs' reasonable interrogatory questions and requests for production of document have caused Plaintiffs to miss deadlines for filing dispositive motions and exhibit lists, have left Plaintiffs without the materials and evidence they need for trial, and have caused Plaintiffs to expend time and energy seeking compliance with the rules when they should be preparing for the trial.

Rule 1-037 (B) provides for failure to comply with an order compelling discovery that:

(2) If a party or an officer, . . . fails to obey an order under Rule 1-026 NMRA, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(a) an order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(b) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence;

(c) an order . . . rendering a judgment by default against the disobedient party;

(d) in lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders . . .

In lieu of any of the foregoing orders or in addition thereto, the court shall require the party failing to obey the order or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the court finds that the failure was substantially justified or that other circumstances make an award of expenses unjust.

Similarly, Rule 1-037 (D) provides for failure to respond to discovery that:

If a party . . . fails (2) to serve answers or objections to interrogatories submitted under Rule 1-033 NMRA, after proper service of the interrogatories; or (3) to serve a written response to a request for inspection submitted under Rule 1-034 NMRA, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure as are just, and among others it may take any action authorized under Subparagraphs (a), (b) and (c) of Subparagraph (2) of Paragraph B of this rule. In lieu of any order or in addition thereto, the court shall require the party failing to act or the attorney advising that party or both to pay the reasonable expenses, including attorney's fees, caused by the failure . . .

The relief set out in Rule 1-037(D), referred to above, includes (a) an order that the matters addressed in the interrogatories and requests for production:

shall be taken to be established for the purposes of the action in accordance with the claims of the party obtaining the order; (b) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting that party from introducing designated matters in evidence; (c) an order . . . rendering a judgment in default against the disobedient party.

The City initially failed to respond to Plaintiffs' discovery requests within the time allowed by the rules. The responses belatedly provided by the City are attached hereto. The City's discovery responses are incomplete or non-existent, evasive, untimely and misleading. Even though the Court's Order compelling the City's responses was filed prior to the time the responses were provided, Defendants continue making inappropriate and baseless objections.

For all the foregoing reasons, especially the delay caused by Defendants' misconduct and the obvious incompleteness and superficiality of the City's discovery responses, the Court should consider imposing all of the enumerated terms of relief set out in Rule 1-037(D), including an order refusing to allow the City to oppose Plaintiffs' claims or present any defenses or evidence in support of defenses not already disclosed, an order prohibiting the City from presenting witnesses in its defense, and an order granting a default judgment on liability against the City. The City's discovery failures are extensive and serious; the Court's award of sanctions should be no less extensive and serious.

A copy of the two sets of interrogatories and the set of requests for production that include the Defendants' responses are attached hereto. A hearing is presently set for August 3, 2005, at 10:05 a.m. Although Plaintiffs only asked for a limited time (15 minutes) to hear their Motion to Compel and for Sanctions, that was done before the City provided its partial and woefully incomplete responses. Accordingly, the Court is respectfully requested to make a preliminary ruling at that time, extend the deadline for Plaintiffs to submit their dispositive motions (which City attorney Michael Garcia states

he will not oppose), and set another hearing for the purpose of awarding appropriate sanctions against the City Defendants.

WHEREFORE, Plaintiffs request an order extending the time for Plaintiffs' filing of dispositive motions, extending the time for submission of exhibit lists, providing relief pursuant to Rule 1-037(D), and awarding appropriate sanctions for the City's failures to respond to Plaintiffs' discovery requests in accordance with Rule 1-037, NMRA, and the Court's Order compelling discovery responses.

Respectfully submitted,

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I hereby certify that a copy of the foregoing Motion was handed to Assistant City Attorney Michael Garcia on August 1, 2005.

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Paul Livingston