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February 24, 1997

The Honorable Thomas R. Phillips
Chief Justice, Supreme Court
Supreme Court Bldg.
P.O. Box 12248
Capitol Station
Austin, Texas 78711

RE: Court Rules Committee - Rules 86, 86a, 87 and 89

Dear Justice Phillips:

The Court Rules Committee has finally completed its suggested rule changes to the venue rules in view of the statute which the legislature past regarding venue. I am enclosing herewith the Court Rules Committee's suggested changes to Rule 86, 87, 89 and a new rule, 86a, which has been included. The Court Rules Committee requests that the court consider these suggested changes.

By copy of this letter, I am forwarding copies of these proposed rules to Luke Soules, Chairman of the Supreme Court Advisory Committee.

Sincerely,

By:

O. C. Hamilton, Jr.

OCH/sam

Enclosures

cc: Mr. Luther H. Soules, III (w/encl.)
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STATE BAR OF TEXAS

COMMITTEE ON COURT RULES

REQUEST FOR NEW RULE OR CHANGE OF EXISTING RULE

TEXAS RULES OF CIVIL PROCEDURE

I. Exact wording of existing rules:

Rule 86. Motion to Transfer Venue

1. Time To File. An objection to improper venue is waived if not made by written motion filed prior to or concurrently with any other plea, pleading or motion except a special appearance motion provided for in Rule 120a. A written consent of the parties to transfer the case to another county may be filed with the clerk of the court at any time. A motion to transfer venue because an impartial trial cannot be had in the county where the action is pending is governed by the provisions of Rule 257.

2. How to File. The motion objecting to improper venue may be contained in a separate instrument filed concurrently with or prior to the filing of the movant's first responsive pleading or the motion may be combined with other objections and defenses and included in the movant's first responsive pleading.

3. Requisites of Motion. The motion, and any amendments to it, shall state that the action should be transferred to another specified county of proper venue because:

(a) The county where the action is pending is not a proper county; or

(b) Mandatory venue of the action in another county is prescribed by one or more specific statutory provisions which shall be clearly designated or indicated.

The motion shall state the legal and factual basis for the transfer of the action and request transfer of the action to a specific county of mandatory or proper venue. Verification of the motion is not required. The motion may be accompanied by supporting affidavits as provided in Rule 87.

4. Response and Reply. Except as provided in paragraph 3(a) of Rule 87, a response to the motion to transfer is not required. Verification of a response is not required.

5. Service. A copy of any instrument filed pursuant to Rule 86 shall be served in accordance with Rule 21a.

Rule 87. Determination of Motion to Transfer

1. Consideration of Motion. The determination of a motion to transfer venue shall be made promptly by the court and such determination must be made in a reasonable time prior to commencement of the trial on the merits. The movant has the duty to request a setting on the motion to transfer. Except on leave of court each party is entitled to at least 45 days notice of a hearing on the motion to transfer.

Except on leave of court, any response or opposing affidavits shall be filed at least 30 days prior to the hearing of the motion to transfer. The movant is not required to file a reply to the response but any reply and any additional affidavits supporting the motion to transfer must, except on leave of court, be filed not later than 7 days prior to the hearing date.

2. Burden of Establishing Venue.

(a) In General. A party who seeks to maintain venue of the action in a particular county in reliance upon Section 15.001 (General Rule), Sections 15.011-15.017 (Mandatory Venue), Sections 15.031-15.040 (Permissive Venue), or Sections 15.061 and 15.062 (Multiple Claims), Civil Practice and Remedies Code, has the burden to make proof, as provided in paragraph 3 of this rule, that venue is maintainable in the county of suit. A party who seeks to transfer venue of the action to another specified county under Section 15.001 (General Rule), Sections 15.011-15.017 (Mandatory Venue), Sections 15.031-15.040 (Permissive Venue), or Sections 15.061 and 15.062 (Multiple Claims), Civil Practice and Remedies Code, has the burden to make proof, as provided in paragraph 3 of this rule, that venue is maintainable in the county to which transfer is sought. A party who seeks to transfer venue of the action to another specified county under Sections 15.011-15.017, Civil Practice and Remedies Code on the basis that a mandatory venue provision is applicable and controlling has the burden to make proof, as provided in paragraph 3 of this rule, that venue is maintainable in the county to which transfer is sought by virtue of one or more mandatory venue exceptions.

(b) Cause of Action. It shall not be necessary for a claimant to prove the merits of a cause of action, but the existence of a cause of action, when pleaded properly, shall be taken as established as alleged by the pleadings. When the defendant specifically denies the venue allegations, the claimant is required, by prima facie proof as provided in paragraph 3 of this rule, to support such pleading that the cause of action taken as established by the pleadings, or a part of such cause of action, accrued in the county of suit. If a defendant seeks transfer to a county where the cause of action or a part thereof accrued, it shall be sufficient for the defendant to plead that if a cause of action exists, then the cause of action or part thereof accrued in the specific county to which transfer is sought, and such allegation shall not constitute an admission that a cause of action in fact exists. But the defendant shall be required to support his pleading by prima facie proof as provided in paragraph 3 of this rule, that, if a cause of action exists, it or a part thereof accrued in the county to which

transfer is sought.

(c) Other Rules. A motion to transfer venue based on the written consent of the parties shall be determined in accordance with Rule 255. A motion to transfer venue on the basis that an impartial trial cannot be had in the courts where the action is pending shall be determined in accordance with Rules 258 and 259.

3. Proof.

(a) Affidavits and Attachments. All venue facts, when properly pleaded, shall be taken as true unless specifically denied by the adverse party. When a venue fact is specifically denied, the party pleading the venue fact must make prima facie proof of that venue fact; provided, however, that no party shall ever be required for venue purposes to support by prima facie proof the existence of a cause of action or part thereof, and at the hearing the pleadings of the parties shall be taken as conclusive on the issues of existence of a cause of action. Prima facie proof is made when the venue facts are properly pleaded and an affidavit, and any duly proved attachments to the affidavit, are filed fully and specifically setting forth the facts supporting such pleading. Affidavits shall be made on personal knowledge, shall set forth specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

(b) The Hearing. The court shall determine the motion to transfer venue on the basis of the pleadings, any stipulations made by and between the parties and such affidavits and attachments as may be filed by the parties in accordance with the preceding subdivision of this paragraph 3 or of Rule 88.

(c) If a claimant had adequately pleaded and made prima facie proof that venue is proper in the county of suit as provided in subdivision (a) of paragraph 3, then the cause shall not be transferred but shall be retained in the county of suit, unless the motion to transfer is based on the grounds that an impartial trial cannot be had in the county where the action is pending as provided in Rules 257-259 or on an established ground of mandatory venue. A ground of mandatory venue is established when the party relying upon a mandatory exception to the general rule makes prima facie proof as provided in subdivision (a) of paragraph 3 of this rule.

(d) In the event that the parties shall fail to make prima facie proof that the county of suit or the specific county to which transfer is sought is a county of proper venue, then the court may direct the parties to make further proof.

4. No Jury. All venue challenges shall be determined by the court without the aid of a jury.

5. Motion for Rehearing. If venue has been sustained as against a motion to transfer, or

if an action has been transferred to a proper county in response to a motion to transfer, then no further motions to transfer shall be considered regardless of whether the movant was a party to the prior proceedings or was added as a party subsequent to the venue proceedings, unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Rules 257-259 or on the ground of mandatory venue, provided that such claim was not available to the other movant or movants.

Parties who are added subsequently to an action and are precluded by this rule from having a motion to transfer considered may raise the propriety of venue on appeal, provided that the party has timely filed a motion to transfer.

6. There shall be no interlocutory appeals from such determination.

Rule 88. Discovery and Venue

Discovery shall not be abated or otherwise affected by pendency of a motion to transfer venue. Issuing process for witnesses and taking depositions shall not constitute a waiver of a motion to transfer venue, but depositions taken in such case may be read in evidence in any subsequent suit between the same parties concerning the same subject matter in like manner as if taken in such subsequent suit. Deposition transcripts, responses to requests for admission, answers to interrogatories and other discovery products containing information relevant to a determination of proper venue may be considered by the court in making the venue determination when they are attached to, or incorporated by reference in, an affidavit of a party, a witness or an attorney who has knowledge of such discovery.

Rule 89. Transferred if Motion is Sustained

If a motion to transfer venue is sustained, the cause shall not be dismissed, but the court shall transfer said cause to the proper court; and the costs incurred prior to the time such suit is filed in the court to which said cause is transferred shall be taxed against the plaintiff. The clerk shall make up a transcript of all the orders made in said cause, certifying thereto officially under the seal of the court, and send it with the original papers in the cause to the clerk of the court to which the venue has been changed. Provided, however, if the cause be severable as to parties defendant and shall be ordered transferred as to one or more defendants but not as to all, the clerk, instead of sending the original papers, shall make certified copies of such filed papers as directed by the court and forward the same to the clerk of the court to which the venue has been changed. After the cause has been transferred, as above provided for the clerk of the court to which the cause has been transferred shall mail notification to the plaintiff or his attorney that transfer of the cause has been completed, that the filing fee in the proper court is due and payable within thirty days from the mailing of such notification, and that the case may be dismissed if the filing fee is not timely paid; and if such filing fee is timely paid, the cause will be subject to trial at the expiration of thirty days after the mailing of notification to the parties or their attorneys by the clerk that the papers have been filed in the court to which the cause has been transferred; and if the filing fee is not timely paid, any court of the

transferee county to which the case might have been assigned, upon its own motion or the motion of a party, may dismiss the cause without prejudice to the refiling of same.

II. Exact wording of proposed rule:

The following amendments are proposed to Rules 86, 87 and 89 to conform these rules to the changes made to Chapter 15, Civil Practice and Remedies Code by the 74th Legislature. (Acts 1995, 74th Leg., ch. 138)

Rule 86. Motion to Transfer Venue

1. Time to File.

(a) ~~An objection to~~ A motion to transfer venue based on improper venue or inconvenient county is waived if not made by written motion filed prior to or concurrently with any other plea, pleading or motion except a special appearance motion provided for in Rule 120a.

(b) A written consent of the parties to transfer the case to another county may be filed with the clerk of the court at any time.

(c) A motion to transfer venue because an impartial trial cannot be had in the county where the action is pending is governed by the provisions of Rule 257.

2. How to File. The motion to transfer venue may be contained in a separate instrument filed concurrently with or prior to the filing of the movant's first responsive pleading or the motion may be combined with other objections and defenses and included in the movant's first responsive pleading.

3. Requisites of Motion.

(a) The motion to transfer venue, and any amendments to it, shall state that the action should be transferred to another specified county of proper venue because:

(1) The county where the action is pending is not a proper county;

(2) Mandatory venue of the action in another county is prescribed by one or more specific statutory provisions, which shall be clearly designated or indicated; or

(3) Maintenance of venue in the county of suit would be inconvenient.

(b) The motion to transfer venue shall specifically deny the plaintiff's pleaded venue facts believed not to be true, state the legal and factual basis for the transfer of the action,

request transfer of the action to a specific county of mandatory or proper venue, and plead venue facts that ~~which~~ would establish venue ~~as proper~~ in that county. Verification of the motion is not required. The motion may be accompanied by supporting affidavits as provided in Rule 87.

4. Response and Reply. Except as provided in paragraph 3(a) of Rule 87, a response to the motion to transfer is not required. Verification of a response is not required.

5. Service. A copy of any instrument filed pursuant to Rule 86 shall be served in accordance with Rule 21a.

86a. Objections to Multiple Plaintiffs and Intervening Plaintiffs Based Upon Venue

1. A motion to transfer timely filed by any defendant in a suit in which more than one plaintiff is joined challenges venue and the joinder of each plaintiff grounded on venue. Only one defendant needs to make such objection.

2. A motion to strike an intervening plaintiff based upon TEX. CIV. PRAC. & REM. CODE SEC. 15.003 is waived if not filed within twenty (20) days of service of intervenor's pleading on the objecting defendant. Only one defendant needs to object to the intervention of a plaintiff grounded on venue.

3. Each plaintiff to a lawsuit, whether joined initially or intervening, must establish venue as proper to that plaintiff independently of any other plaintiff or establish the elements of TEX. CIV. PRAC. & REM. CODE SEC. 15.003.

4. Except on leave of court each party is entitled to at least 45 days notice of a hearing on the motion under this rule. The determination of a motion under this rule shall be made promptly by the court and must be made in a reasonable time prior to commencement of the trial on the merits. The movant has the duty to request a setting on the motion.

Rule 87. Determination of Motions ~~to Transfer~~

1. Consideration of Motion.

Except on leave of court each party is entitled to at least 45 days notice of a hearing on the motion to transfer. The determination of a motion to transfer venue shall be made promptly by the court and ~~such determination~~ must be made in a reasonable time prior to commencement of the trial on the merits. The movant has the duty to request a setting on the motion to transfer. ~~Except on leave of court each party is entitled to at least 45 days notice of a hearing on the motion to transfer.~~

Except on leave of court, any response or opposing affidavits shall be filed at least 30 days prior to the hearing of the motion to transfer. The movant is not required to file a reply to the

response but any reply and any additional affidavits supporting the motion to transfer must, except on leave of court, be filed not later than 7 days prior to the hearing date.

2. Burden of Establishing Venue.

(a) In General.

(1) A party who seeks to maintain venue ~~of the action~~ in the ~~a particular~~ county of suit ~~in reliance upon Section 15.001 (General Rule), Sections 15.011 - 15.017 (Mandatory Venue), Sections 15.031-15.040 (Permissive Venue), or Section 15.061 and 15.062 (Multiple Claims), Civil Practice and Remedies Code,~~ has the burden of ~~to make~~ proof, as provided in paragraph 3 of this rule, that venue is proper ~~maintainable~~ in the county of suit.

(2) A party who seeks to transfer venue ~~of the action~~ to another specified county ~~under Section 15.001 (General Rule), Sections 15.011-15.017 (Mandatory Venue), or Sections 15.031-15.040 (Permissive Venue), or Section 15.061 and 15.062 (Multiple Claims), Civil Practice and Remedies Code,~~ has the burden of ~~to make~~ proof, as provided in paragraph 3 of this rule, that:

(A) venue is ~~maintainable~~ either proper or mandatory in the county to which transfer is sought; or

(B) venue is inconvenient in the county of suit under Section 15.002(b), Civil Practice and Remedies Code, and is proper in the county to which transfer is sought.

~~A party who seeks to transfer venue of the action to another specified county under Sections 15.011-15.017, Civil Practice and Remedies Code on the basis that a mandatory venue provision is applicable and controlling has the burden to make proof, as provided in paragraph 3 of this rule, that venue is maintainable in the county to which transfer is sought by virtue of one or more mandatory venue exceptions.~~

(b) Claim. For the purposes of a venue hearing it is not necessary to prove a claim. The existence of a claim is not a venue fact. Where all or a substantial part of the events or omissions giving rise to an alleged claim is a basis for venue being proper, it must be pleaded and proven pursuant to paragraph 3 of this rule. Whatever a party asserts in a motion to transfer venue shall not constitute an admission that a claim exists.

~~Cause of Action. It shall not be necessary for a claimant to prove the merits of a cause of action, but the existence of a cause of action, when pleaded properly, shall be taken as established as alleged by the pleadings. When the defendant specifically denies the venue allegations, the claimant is required, by prima facie proof as provided in paragraph 3 of this rule, to support such pleading that the cause of action taken as established by the pleadings, or a part of such cause of action, accrued in the county of suit. If a defendant seeks transfer to a county where the cause of action or a part~~

~~thereof accrued, it shall be sufficient for the defendant to plead that if a cause of action exists, then the cause of action or part thereof accrued in the specific county to which transfer is sought, and such allegation shall not constitute an admission that a cause of action in fact exists. But the defendant shall be required to support his pleading by prima facie proof as provided in paragraph 3 of this rule, that, if a cause of action exists, it or a part thereof accrued in the county to which transfer is sought.~~

(c) Other Rules.

(1) A motion to transfer venue based on the written consent of the parties shall be determined in accordance with Rule 255.

(2) A motion to transfer venue on the basis that an impartial trial cannot be had in the courts where the action is pending shall be determined in accordance with Rules 258 and 259.

3. Proof.

(a) Affidavits and Attachments. All venue facts, when properly pleaded, shall be taken as true unless specifically denied by the adverse party. When a venue fact is specifically denied, the party pleading the venue fact must make prima facie proof of that venue fact~~; provided, however, that no party shall ever be required for venue purposes to support by prima facie proof the existence of a cause of action or part thereof, and at the hearing the pleadings of the parties shall be taken as conclusive on the issues of existence of a cause of action~~. Prima facie proof is made when the venue facts are properly pleaded, and an affidavit~~;~~ and any duly proved attachments to the affidavit~~, are filed fully and~~ that state specifically the ~~setting forth the facts~~ supporting facts ~~such pleading~~ are filed. Affidavits shall be made on personal knowledge, shall ~~set forth~~ state specific facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify.

(b) The Hearing.

(1) The court shall determine the motion to transfer venue on the basis of the pleadings, any stipulations made by and between the parties and such affidavits and attachments as may be filed by the parties in accordance with the preceding subdivision of this paragraph 3 or of Rule 88.

(2) ~~(c)~~ If a claimant has adequately pleaded and made prima facie proof that venue is proper in the county of suit as provided in subdivision (a) ~~of paragraph 3~~, then the cause shall not be transferred but shall be retained in the county of suit, unless the movant establishes that transfer is proper ~~motion to transfer is based~~:

(i) on the grounds that an impartial trial cannot be had in the county where the action is pending as provided in Rules 257-259; ~~or~~

(ii) on an established ground of mandatory venue; or

(iii) on grounds of an inconvenient county as provided in Section 15.002(b), Civil Practice and Remedies Code. ~~A ground of mandatory venue is established when the party relying upon a mandatory exception to the general rule makes prima facie proof as provided in subdivision (a) of paragraph 3 of this rule.~~

(3) ~~(d)~~ In the event that the parties shall fail to make prima facie proof that the county of suit or the specific county to which transfer is sought is a county of proper venue, then the court may direct the parties to make further proof.

4. No Jury. All motions to transfer venue ~~challenges~~ shall be determined by the court without the aid of a jury.

5. ~~Motion for Rehearing~~ Further Motions to Transfer. If venue has been sustained as against a motion to transfer, or if an action has been transferred to a proper county ~~in response to~~ on a motion to transfer, then no further motions to transfer shall be considered from the movant or respondent ~~regardless of whether the movant was a party to the prior proceedings or was added as a party subsequent to the venue proceedings~~, unless the motion to transfer is based on the grounds that an impartial trial cannot be had under Rules 257-259, or on the ground of mandatory venue, provided that such ground ~~claim~~ was not available to the ~~other~~ movant when the original motion was filed ~~or movants~~. Newly added defendants may timely challenge venue.

~~Parties who are added subsequently to an action and are precluded by this rule from having a motion to transfer considered may raise the propriety of venue on appeal, provided that the party has timely filed a motion to transfer.~~

6. There shall be no interlocutory appeals from ~~such~~ any venue determination, except as provided by statute.

Rule 89. Transferred if Motion is Sustained

If a motion to transfer venue is sustained, the ~~cause~~ suit shall not be dismissed, but the court shall transfer said ~~cause~~ suit, together with all properly joined parties and claims, to the proper ~~court~~ county; and the costs incurred prior to the time such suit is filed in the court to which said ~~cause~~ suit is transferred shall be taxed ~~against the plaintiff~~ as costs of court to be determined by the court to which said suit is transferred. When the suit is governed by a mandatory venue provision, the suit shall be transferred to the county of mandatory venue. If more than one county is shown to be proper, the court shall transfer the suit to the more convenient county.

The clerk shall make up a transcript of all the orders made in said cause, certifying thereto officially under the seal of the court, and send it with the original papers in the cause to the clerk of the court to which the venue has been changed. Provided, however, if the cause be severable as to

parties defendant and shall be ordered transferred as to one or more defendants but not as to all, the clerk, instead of sending the original papers, shall make certified copies of such filed papers as directed by the court and forward the same to the clerk of the court to which the venue has been changed. After the cause has been transferred, as above provided for the clerk of the court to which the cause has been transferred shall mail notification to the plaintiff or his attorney that transfer of the cause has been completed, that the filing fee in the proper court is due and payable within thirty days from the mailing of such notification, and that the case may be dismissed if the filing fee is not timely paid; and if such filing fee is timely paid, the cause will be subject to trial at the expiration of thirty days after the mailing of notification to the parties or their attorneys by the clerk that the papers have been filed in the court to which the cause has been transferred; and if the filing fee is not timely paid, any court of the transferee county to which the case might have been assigned, upon its own motion or the motion of a party, may dismiss the cause without prejudice to the refiling of same.

III. Brief Statements of Reasons for Requested Changes

Rule 86.

In Section 1, "An objection to venue" has been changed to "a motion to transfer venue," which Professor Hazel suggests is the better term. "Inconvenient county" has been added as a basis to transfer venue to conform to Section 15.002(b), Civil Practice and Remedies Code.

Section 1 has been divided into three paragraphs (a) - (c) for easier reference as suggested by Professor Hazel.

Subparts (1) and (2) of Section 3 have been changed to clarify that denials of venue facts and venue facts supporting transfer to a county under the mandatory venue provisions should be set out in the motion to transfer. Subpart (3) is added to provide that motions to transfer based on convenience should state maintenance of venue in the county of suit would be inconvenient.

Rule 86a.

Rule 86a is new. This rule deals with multiple plaintiffs and intervening plaintiffs and is necessary to conform the venue rules to Section 15.003, Civil Practice and Remedies Code. The rule provides that a timely filed motion to transfer venue challenges the joinder of each plaintiff grounded on venue. If the court sustains the objection to the joinder of plaintiffs grounded on venue, the court should enter an appropriate order under Rule 41. The rule provides that an objection to intervening plaintiffs is timely if filed within 20 days of the service of the intervenor's pleading on the objecting defendant. If the court sustains the objection to the intervention based on venue, the court should enter an appropriate order under Rule 60.

Rule 87.

Section 2(a), currently consists of three sentences; the first two sentences have been subdivided into parts (1) and (2) for easier reference.

2(a)(1) has been changed to delete the numerous statutory references. It was felt these references were unnecessary. "burden to make proof" has been changed to "burden to proof." No substantive changes are intended by these changes. "Maintainable" has been changed to "proper." "Proper venue" is now defined by Section 15.001(b), Civil Practice and Remedies Code.

2(a)(2) has been amended to delete "of the action." This is intended as a non-substantive change, the language "of the action" was felt to be unnecessary.

2(a)(2) has also been amended to provide that a party seeking to transfer venue has the burden to show either (A) venue is proper or mandatory in the county to which transfer is sought; or, (B) transfer is proper under Section 15.002(b), Civil Practice and Remedies Code, the new convenience transfer provision.

The third sentence of the current 2(a) has been deleted. This sentence, which dealt with parties seeking to transfer under a mandatory venue provision has been combined into 2(a)(2)(A).

2(b) has been rewritten completely to simplify the rule and conform it to Section 15.002, Civil Practice and Remedies Code, which now provides that lawsuits shall be brought in the county where "all or a substantial part of the events or omissions giving rise to the claim occurred." The rule continues to provide that the existence of a claim is not a venue fact and that whatever a party asserts in a motion to transfer venue shall not constitute an admission that a claim exists.

The deleted language in Section 3(a) is considered superfluous in light of the change to Section 2(b). The changes to the final two sentences of Section 3(a), including the deletion of the word "fully," are nonsubstantive.

The second paragraph of Section 3(b), currently paragraph (c) is amended to add language conforming the rule to Section 15.002(b), Civil Practice and Remedies Code. The deleted language is considered superfluous. The headings (c) and (d) were deleted from the last two paragraphs of Section 3. These paragraphs deal with the hearing and thus are more appropriately a part of paragraph (b), entitled "The Hearing."

Section 5 is amended to conform to Section 15.0641, Civil Practice and Remedies Code, which provides that no act or omission by one defendant will operate to impair or diminish the right of any other defendant to properly challenge venue.

Rule 89.

The current rule taxes costs incurred prior to the transfer against the plaintiff is a motion to transfer is sustained. Under the old venue law a motion to transfer could only be sustained if the

plaintiff filed in an improper county. Since current law allows for a transfer to be sustained even if the plaintiff has filed in a proper county, it was felt that it would be more appropriate to allow the court to which the case is transferred to determine how these costs are to be taxed in accordance with Rule 125 et. seq.

Respectfully submitted,

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Dated: February 21, 1997