

## Breach of Fiduciary Duty: Texas

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A Q&A guide to state law on breach of fiduciary duty in Texas. This guide addresses the elements of a claim for breach of fiduciary duty, pleading requirements, potential remedies, defenses, applicable standards of proof and causation, and related claims that litigants often bring when asserting a breach of fiduciary duty claim.

### Elements of Breach of Fiduciary Duty

#### 1. What are the elements of a claim for breach of fiduciary duty in your jurisdiction?

In Texas, the elements of a claim for breach of fiduciary duty are:

- The defendant owed a fiduciary duty to the plaintiff.
- The defendant breached its duty.
- The defendant:
  - proximately caused the plaintiff's damages by breaching the duty;
  - benefitted from the breach; or
  - received fees or other compensation from the plaintiff.

(See *First United Pentecostal Church v. Parker*, 514 S.W.3d 214, 220 (Tex. 2017) (requiring proximate cause showing to recover actual damages); *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 873 (Tex. 2010); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 201 (Tex. 2002) (fiduciary may be required to disgorge any profits received as a result of the breach); *Burrow v. Arce*, 997 S.W.2d 229, 240 (Tex. 1999) (breaching fiduciary may be required to disgorge some or all of the fees received from the plaintiff); *Anderton v. Cawley*, 378 S.W.3d 38, 51-52 (Tex. App.—Dallas 2012, no pet.) (plaintiff must establish that the defendant breached its fiduciary duty to the plaintiff); *Priddy v. Rawson*, 282 S.W.3d 588, 599-600 (Tex. App.—Houston [14th Dist.]

2009, pet. denied) (the plaintiff must prove that it was the defendant's fiduciary).)

#### 2. What are the ways in which a formal or express fiduciary relationship can be formed in your jurisdiction?

Under Texas law, a formal fiduciary relationship is created as a matter of law when parties enter into certain types of relationships, such as:

- Attorney-client.
- Partnership.
- Trustee.

(*Bombardier Aerospace Corp. v. SPEP Aircraft Holdings, LLC*, 572 S.W.3d 213, 220 (Tex. 2019) (fiduciary duties arise as a matter of law with some formal relationships); *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 199 (Tex. 2002); see also *Jang Won Cho v. Kun Sik Kim*, 572 S.W.3d 783, 796 (Tex. App.—Houston [14th Dist.] 2019, no pet.) (courts look to agreement between parties when assessing whether formal fiduciary relationship exists).)

#### 3. Does your jurisdiction have any statutes that impose fiduciary duties on certain types of relationships (for example, directors of a corporation)? If so, please list some of the more common types of fiduciary relationships in your jurisdiction and the corresponding statute(s).



Yes. Several Texas statutes contain provisions on fiduciary duties that can arise in the relationships between, for example:

- General partners (Tex. Bus. Orgs. Code Ann. § 152.205 (a partner's duty of loyalty)).
- Taxpayers and the state (Tex. Tax. Code Ann. § 111.016 (requiring taxpayers who receive money for the benefit of the state to hold the funds in trust)).
- Condominium board members and unit owners (Tex. Prop. Code Ann. § 82.103(a) (holding each officer or member of a condominium board liable as a fiduciary of the unit owners for the officer or member's acts or omissions)).
- Trustees and trust beneficiaries (Tex. Prop. Code Ann. §§ 113.051 to 113.058 (imposing fiduciary duties concerning the management and investment of trust assets)).
- Executor or administrator of an estate and the estate beneficiaries (Tex. Est. Code Ann. § 351.101 (imposing fiduciary duties regarding management of an estate's assets)).

**4. Does your jurisdiction recognize fiduciary relationships that may arise based on the facts or circumstances of a case (for example, implied or informal fiduciary relationships)? If so, what is the standard that courts in your jurisdiction use to determine whether a fiduciary relationship exists based on the facts or circumstances of a case?**

Yes. Texas courts recognize the existence of informal fiduciary relationships, which may arise where one person trusts in and relies on another even if no formal relationship exists (see, for example, *Jang Won Cho v. Kun Sik Kim*, 572 S.W.3d 783, 794 (Tex. App.—Houston [14th Dist.] 2019, no pet.)). An informal fiduciary relationship may arise out of a moral, social, domestic, or purely personal relationship of trust and confidence (*Ritchie v. Rupe*, 443 S.W.3d 856, 892 n. 63 (Tex. 2014) (noting that the existence of this type of fiduciary relationship is generally a question of fact)).

Mere subjective trust does not create an informal fiduciary relationship (*Trostle v. Trostle*, 77 S.W.3d 908, 914 (Tex. App.—Amarillo 2002, no pet.)). Instead, the plaintiff must prove that the parties' dealings continued long enough that the plaintiff was justified in relying

on the defendant to act in the plaintiff's best interest (*Baldinger v. Schoettmer*, 2001 WL 185554, at \*4 (Tex. App.—Dallas 2001, no pet.) (not designated for publication); *Carr v. Weiss*, 984 S.W.2d 753, 765 (Tex. App.—Amarillo 1999, pet. denied)).

Courts consider several factors when determining whether the plaintiff's reliance on the defendant creates an informal fiduciary relationship, including:

- A familial relationship between the parties (*Young v. Fawcett*, 376 S.W.3d 209, 214 (Tex. App.—Beaumont 2012, no pet.)).
- A friendship between the parties (*Kalb v. Norsworthy*, 428 S.W.2d 701, 705 (Tex. App.—Houston [1st Dist.] 1968, no writ)).
- The length of the parties' relationship (*Lee v. Hasson*, 286 S.W.3d 1, 14-15 (Tex. App.—Houston [14th Dist.] 2007, pet. denied)).
- Whether the plaintiff relied on the defendant for support (*Gray v. Sangrey*, 428 S.W.3d 311, 316 (Tex. App.—Texarkana 2014, pet. denied)).
- The plaintiff's advanced age and poor health (*In re Estate of Whipple*, 2013 WL 1641414, at \*4-5 (Tex. App.—San Antonio Apr. 17, 2013, pet. denied) (mem. op.)).
- Evidence of the plaintiff's trust in the defendant (*Gray*, 428 S.W.3d at 316).

In the context of business transactions, the alleged fiduciary relationship must exist prior to, and apart from, the agreement at issue in the underlying lawsuit (*Willis v. Donnelly*, 199 S.W.3d 262, 277 (Tex. 2006)).

## Pleading Breach of Fiduciary Duty

**5. What is the pleading standard for a claim for breach of fiduciary duty in your jurisdiction?**

Under Texas law, a claim for breach of fiduciary duty is subject to the general fair notice standard for pleading (Tex. R. Civ. P. 45(b) and 47(a)). Courts consider whether the opposing party can determine from the pleading the nature and basic issues of the controversy and what testimony will be relevant (*First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 224 (Tex. 2017) (the fair notice standard measures whether the pleadings provide the opposing party sufficient information to enable it to prepare a defense or response)).

### 6. If a heightened pleading standard applies to a claim for breach of fiduciary duty in your jurisdiction, what is the standard that a plaintiff must meet? Does this heightened standard apply when pleading all types of fiduciary relationships, or only when pleading certain types of fiduciary relationships (for example, implied or informal fiduciary relationships)?

Texas courts do not apply a heightened pleading standard to claims for breach of fiduciary duty.

## Remedies for Breach of Fiduciary Duty

### 7. What types of damages are available for breach of fiduciary duty in your jurisdiction?

Depending on the case, various types of damages may be available under Texas law for a breach of fiduciary duty claim, such as:

- Economic damages, including:
  - out-of-pocket losses (*First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 221 (Tex. 2017) (plaintiff must provide causation evidence of actual damages); *Guerrero v. Salinas*, 2006 WL 2294578, at \*12 (Tex. App.—Corpus Christi, Aug. 10, 2006, no pet.) (mem. op.); *Carr v. Weiss*, 984 S.W.2d 753, 769-70 (Tex. App.—Amarillo 1999, pet. denied); *Duncan v. Lichtenberger*, 671 S.W.2d 948, 953 (Tex. App.—Fort Worth 1984, writ ref'd n.r.e.); and
  - lost profits (*Salas v. Total Air Servs., LLC*, 550 S.W.3d 683, 695 (Tex. App.—El Paso 2018, no pet.) (lost profits are available when the plaintiff shows that the loss is the natural and probable consequence of the defendant's breach of fiduciary duty); *Miller v. Argumaniz*, 479 S.W.3d 306, 311 (Tex. App.—El Paso 2015, pet. denied)).
- Mental anguish damages that are the foreseeable result of the defendant's breach (*Douglas v. Delp*, 987 S.W.2d 879, 884-85 (Tex. 1999) (mental anguish damages are not available if they result from economic loss caused by the defendant's breach of fiduciary duty); *Wells Fargo Bank, N.A. v. Militello*, 2017 WL 2645430, at \*15 (Tex. App.—Dallas June 20, 2017) (mem. op.), vacated in part, 2017 WL 3015726 (Tex. App.—Dallas July 17, 2017, pet denied) (mem. op.)).

- Exemplary damages if the harm resulted from the defendant's fraud, malice, or gross negligence (Tex. Civ. Prac. & Rem. Code Ann. § 41.003; *ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 880 (Tex. 2010); *McCullough v. Scarbrough, Medlin & Assocs, Inc.*, 435 S.W.3d 871, 911 (Tex. App.—Dallas 2014, pet. denied)).

### 8. What types of equitable relief are available for breach of fiduciary duty in your jurisdiction?

In cases involving breach of fiduciary duty, money damages may ultimately be an insufficient remedy, or a plaintiff may need to seek interim relief before final judgment. In these cases, a plaintiff may seek a variety of equitable relief (as applicable) for a breach of fiduciary duty claim under Texas law, including, for example:

- Disgorgement of profits or forfeiture of fees that the defendant obtained as a result of its breach of duty (*ERI Consulting Eng'rs, Inc. v. Swinnea*, 318 S.W.3d 867, 872-73 (Tex. 2010)).
- Forfeiture of compensation paid by the plaintiff for the defendant's services (Tex. Prop. Code Ann. § 114.008(a)(8); *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 220-21 (Tex. 2017)).
- Forfeiture of contractual consideration (*ERI Consulting Eng'rs, Inc.*, 318 S.W.3d at 873 (when fiduciary's breach of its duty also amounts to fraudulent inducement, the court may order return of contractual consideration regardless of whether actual damages are proven); *Swinnea v. ERI Consulting Engineers, Inc.*, 481 S.W.3d 747, 753 (Tex. App.—Tyler 2016, no pet.)).

Other equitable remedies for breach of fiduciary duty include:

- Imposition of a constructive trust on proceeds, funds, or property obtained as a result of the breach (*KCM Fin. LLC, v. Bradshaw*, 457 S.W.3d 70, 87-88 (Tex. 2015)).
- Rescission of a contract resulting from a breach (*Miller v. Miller*, 700 S.W.2d 941, 949 (Tex. App.—Dallas 1985, writ ref'd n.r.e.)).

There are several equitable remedies available if a trustee breaches its fiduciary duty, including:

- Injunction, suspension, or removal of the trustee (Tex. Prop. Code Ann. § 113.082 (removal); Tex. Prop. Code Ann. § 114.008(a)(6) (suspension); and Tex. Prop. Code Ann. § 114.008(a)(2) (injunction)).
- An accounting (Tex. Prop. Code Ann. § 113.151).

- Appointment of a receiver to take possession of trust property and administer the trust (*In re Estate of Hoskins*, 501 S.W.3d 295, 305–06 (Tex. App.—Corpus Christi 2016, no pet.)).

### Defenses to Breach of Fiduciary Duty

#### 9. What are the common defenses that a defendant may assert in response to a breach of fiduciary duty claim in your jurisdiction?

Common defenses asserted in response to a breach of fiduciary duty claim under Texas law include:

- The applicable four-year statute of limitations bars the claim (see Question 12).
- The plaintiff's delay in bringing the suit bars any requests for equitable relief for the breach of fiduciary duty (*Garcia v. Garza*, 311 S.W.3d 28, 40 (Tex. App.—San Antonio 2010, pet. denied)).
- The business judgment rule protects the defendant from liability for breach of fiduciary duty (see Question 10).
- The plaintiff abandoned the business opportunity that the defendant took advantage of (*Ameristar Jet Charter, Inc. v. Cobbs*, 184 S.W.3d 369, 374 (Tex. App.—Dallas 2006, no pet.)).
- The parties' contract disclaimed that a fiduciary duty was owed (see *Strebel v. Wimberly*, 371 S.W.3d 267, 283 (Tex. App.—Houston [1st Dist.] 2012, pet. denied) (breach of fiduciary duty claim barred by contractual provision that general partner owed no fiduciary duties to limited partners)).
- The action is barred under the Texas Citizens Participation Act because the plaintiff's petition is based on, related to, or in response to the exercise of the defendant's right to freely speak, petition, or associate (Tex. Civ. Prac. & Rem. Code Ann. § 27.003(a)).
- For claims against trustees:
  - the plaintiff acquiesced in the alleged breach after being fully and fairly informed (*Langford v. Shamburger*, 417 S.W.2d 438, 446-47 (Tex. App.—Fort Worth 1967, writ ref'd n.r.e.), disapproved of on other grounds by *Texas Commerce Bank v. Grizzle*, 96 S.W.3d 240 (Tex.2002)); and
  - an exculpatory provision of a trust instrument modifies the trustee's duties (Tex. Prop. Code Ann. § 114.007; *Goughnour v. Patterson, Tr. of Deborah Patterson Howard Tr.*, 2019 WL 1031575, at \*6 (Tex. App.—Tyler Mar. 5, 2019, pet. denied) (mem. op.)).
- As to corporations and business entities:
  - the shareholders ratified the transaction at issue (*DeNucci v. Matthews*, 463 S.W.3d 200, 213 (Tex. App.—Austin 2015, no pet.); *Lifshutz v. Lifshutz*, 199 S.W.3d 9, 21-22 (Tex. App.—San Antonio 2006, pet. denied));
  - the corporation lacked the financial ability to take advantage of the business opportunity at issue (*Landon v. S&H Mktg. Grp.*, 82 S.W.3d 666, 681 (Tex. App.—Eastland 2002, no pet.)); and
  - an exculpatory provision exists in the company's certificate of formation, partnership agreement, or other instrument (Tex. Bus. Orgs. Code Ann. § 7.001).

#### 10. How does your jurisdiction define and apply the business judgment rule? Are there statutes or regulations that govern the business judgment rule in your jurisdiction?

A corporation's management may assert the business judgment rule as a defense to a breach of fiduciary duty claim by the corporation. The rule generally protects corporate officers and directors (who owe fiduciary duties to the corporation) from liability for acts within the honest exercise of business judgment and discretion (*Tex. Outfitters Ltd., LLC v. Nicholson*, 572 S.W.3d 647, 654 n.9 (Tex. 2019)). If the rule applies, the defendant is not liable to the corporation for actions taken for the corporation's benefit that are alleged to be "unwise, inexpedient, negligent, or imprudent" (*Sneed v. Webre*, 465 S.W.3d 169, 178 (Tex. 2015) (quoting *Pace v. Jordan*, 999 S.W.2d 615, 623 (Tex. App.—Houston [1st Dist.] 1999, pet. denied)).

The business judgment rule does not protect fiduciaries from liability for acts that are dishonest, fraudulent, or self-dealing. In addition, the rule does not apply in an action for breach of fiduciary duty brought by a shareholder against an officer of a closely held corporation. (*Lowry v. Tarbox*, 537 S.W.3d 599, 616 (Tex. App.—San Antonio 2017, pet. denied).)

There is no statute or regulation governing the business judgment rule.

### 11. Are there any doctrines, rules, or other authorities in your jurisdiction that may prevent a plaintiff from recovering damages or asserting a claim for both breach of fiduciary duty and another type of claim (for example, breach of contract)?

Where a plaintiff alleges damages arising solely from the nonperformance of an underlying contract, the economic-loss rule may bar recovery for a breach of fiduciary duty claim under Texas law. The economic-loss rule generally prevents recovery in tort for economic losses if the plaintiff's only damages were caused by the defendant's failure to perform under a contract. (*Stauffacher v. Coadum Capital Fund 1, LLC*, 344 S.W.3d 584, 591 (Tex. App.—Houston [14th Dist.] 2011, pet. denied).)

The plaintiff may request damages in tort resulting from the defendant's breach of fiduciary duties and damages for breach of contract. However, if the plaintiff prevails under both theories, they must elect to recover either tort or contract damages. (*Bruce v. Cauthen*, 515 S.W.3d 495, 516 (Tex. App.—Houston [14th Dist.] 2017, pet. denied); *Stauffacher*, 344 S.W.3d at 591.)

### 12. What is the statute of limitations for asserting a breach of fiduciary duty claim in your jurisdiction? When does the statute of limitations period begin to run for a breach of fiduciary duty claim in your jurisdiction?

Under Texas law, the statute of limitations for breach of fiduciary duty claims is four years (Tex. Civ. Prac. & Rem. Code Ann. § 16.004(a)(5)). The limitations period begins to run on the date the breach causes injury (*Ward v. Stanford*, 443 S.W.3d 334, 346 (Tex. App.—Dallas 2014, pet. denied)).

### 13. Are there any doctrines, rules, or other authorities that courts in your jurisdiction may apply to toll or suspend the statute of limitations period for a breach of fiduciary duty claim?

In Texas, the discovery rule may toll the statute of limitations for breach of fiduciary duty claims. The rule applies where a plaintiff's injury is inherently undiscoverable and the evidence of injury is objectively verifiable (*Moczygemba v. Moczygemba*, 466 S.W.3d 212, 216 (Tex. App.—San Antonio 2015, pet. denied)). If the rule applies,

the plaintiff's cause of action is tolled until the plaintiff knows, or should have known through reasonable diligence, the facts giving rise to the claim (*Computer Assocs. Int'l, Inc. v. Altai, Inc.*, 918 S.W.2d 453, 455 (Tex. 1996)).

Additionally, the limitations period may be tolled if the defendant fraudulently concealed the defendant's breach. To invoke the fraudulent concealment doctrine, a plaintiff must prove that the defendant:

- Had actual knowledge of the breach.
- Intended to conceal the wrong from the plaintiff.
- Concealed the wrong from the plaintiff.

(*Dernick Res., Inc. v. Wilstein*, 312 S.W.3d 864, 878 (Tex. App.—Houston [1st Dist.] 2009, no pet.)). The doctrine only applies if the plaintiff's reliance on the defendant's deception was reasonable. If the doctrine applies, the limitations period is tolled until the plaintiff discovers or reasonably should have discovered the defendant's fraud or the facts giving rise to the cause of action. (*Davenport v. Adu-Lartey*, 526 S.W.3d 544, 555 (Tex. App.—Houston [1st Dist.] 2017, pet. denied)).

## Proving Breach of Fiduciary Duty

### 14. What is the standard of proof that a party seeking to prove a breach of fiduciary duty claim must satisfy in your jurisdiction? Are there circumstances under which a defendant may have the burden of proof on one or more elements of a breach of fiduciary duty claim in your jurisdiction?

Generally, the party asserting breach of fiduciary duty has the burden of proving the claim by a preponderance of the evidence (*Willis v. Donnelly*, 199 S.W.3d 262, 269 (Tex. 2006) (noting that jury instructions required breach of fiduciary duty claim to be proven by preponderance of the evidence)).

However, if the alleged breach involves a transaction between parties to a fiduciary relationship, Texas courts impose a presumption of unfairness which shifts the burden to the fiduciary (*Collins v. Smith*, 53 S.W.3d 832, 840 (Tex. App.—Houston [1st Dist.] 2001, no pet.)). If the presumption of unfairness applies, the fiduciary is required to present evidence of good faith and that the transaction was fair, honest, and equitable (*Webre v. Black*, 458 S.W.3d 113, 118-19 (Tex. App.—Houston [1st Dist.] 2015, no pet.)).

The presumption also shifts the burden of persuasion, requiring that the fiduciary prove both:

- The fiduciary made reasonable use of the confidence placed in the fiduciary.
- The underlying transaction was fair, honest, and equitable to the plaintiff.

(*Nat'l Plan Adm'rs, Inc. v. Nat'l Health Ins. Co.*, 150 S.W.3d 718, 733 (Tex. App.—Austin 2004), *rev'd on other grounds*, 235 S.W.3d 695 (Tex. 2007); *Sorrell v. Elsey*, 748 S.W.2d 584, 586 (Tex. App.—San Antonio 1988, writ denied).)

Courts consider several factors when determining the fairness of the transaction, such as:

- Whether there was full disclosure regarding the transaction.
- The adequacy of any consideration.
- Whether the beneficiary received independent advice.
- Whether the fiduciary benefitted at the expense of the beneficiary, and whether the benefit was significant considering the circumstances existing at the time of the transaction.

(*Lee v. Hasson*, 286 S.W.3d 1, 21 (Tex. App.—Houston [14th Dist.] 2007, pet. denied) (noting that the jury was asked to make findings that tracked Texas Pattern Jury Charge § 104.2).)

### 15. If causation is an element of a breach of fiduciary claim in your jurisdiction, what is the applicable standard for proving the causation element?

When seeking actual damages under Texas law, the plaintiff must show that the defendant's breach of fiduciary duty proximately caused the plaintiff's damages (*Ochoa-Bunsow v. Soto*, 587 S.W.3d 431, 444 (Tex. App.—El Paso 2019, pet. denied)). Proximate cause includes causation in fact and foreseeability (*Bos v. Smith*, 556 S.W.3d 293, 303 (Tex. 2018)). Causation in fact requires proof that the defendant's breach of fiduciary duty was a substantial factor in bringing about plaintiff's injury, without which the injury would not have occurred (*Finger v. Ray*, 326 S.W.3d 285, 291 (Tex. App.—Houston [1st Dist.] 2010, no pet.); *Prudential Ins. Co. of Am. v. Jefferson Assocs.*, 896 S.W.2d 156, 161 (Tex. 1995)). Foreseeability requires a showing that the danger created by the breach should have been

anticipated by a person of ordinary intelligence (*Bos*, 556 S.W.3d at 303).

A plaintiff is not required to establish proximate cause to obtain equitable relief, such as disgorgement or forfeiture of fees (see Question 8). This is because, for breach of fiduciary duty claims, equitable relief is not designed to compensate the plaintiff for loss, but to deter and discourage the fiduciary from breaching its duties in the first instance. This differs from an award of damages, which requires evidence that the defendant's actions were causally related to the plaintiff's loss. (*First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, 221 (Tex. 2017).)

## Related Claims

### 16. Does your jurisdiction recognize claims for aiding and abetting a breach of fiduciary duty? If so, what are the elements of the claim?

Although the Texas Supreme Court has not formally recognized a cause of action for aiding and abetting a breach of fiduciary duty, several Texas appellate courts have recognized this cause of action (see *Hendricks v. Thornton*, 973 S.W.2d 348, 372 (Tex. App.—Beaumont 1998, pet. denied) (stating that liability for aiding and abetting a breach of fiduciary duty is "settled law"); but see *First United Pentecostal Church of Beaumont v. Parker*, 514 S.W.3d 214, (Tex. 2017) (noting that the Texas Supreme Court has not expressly recognized a cause of action for aiding and abetting a breach of fiduciary duty)).

A third party who knowingly participates in the breach of a fiduciary duty may be liable as a joint tortfeasor for aiding and abetting the breach (*Sw. Tex. Pathology Assocs., L.L.P. v. Roosth*, 27 S.W.3d 204, 208 (Tex. App.—San Antonio 2000, pet. dismissed)). To establish liability, the plaintiff must prove that the third party knew of the fiduciary relationship and knowingly participated in a breach of that relationship (*Cox Tex. Newspapers, L.P. v. Wootten*, 59 S.W.3d 717, 722 (Tex. App.—Austin 2001, pet. denied)). However, there is no liability for actions that the third party has a legal right to take (*Baty v. Protech Ins. Agency*, 63 S.W.3d 841, 863 (Tex. App.—Houston [14th Dist.] 2001, pet. denied)).

## Miscellaneous

**17. Are there other significant things that litigants should know when asserting or defending a breach of fiduciary duty claim in your jurisdiction that the above questions do not cover?**

No.

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