SUPERIOR COURT, STATE OF CALIFORNIA
COUNTY OF SANTA CLARA

Department 2, Honorable Drew C. Takaichi, Presiding
Farris Bryant, Courtroom Clerk

191 North First Street, San Jose, CA 95113
Telephone 408.882-2120

To contest the ruling, call (408) 808-6856 before 4:00 P.M.

LAW AND MOTION TENTATIVE RULINGS
DATE: May 13, 2021 TIME: 9:00 A.M.

PREVAILING PARTY SHALL PREPARE THE ORDER OR AS OTHERWISE STATED BELOW

(SEE RULE OF COURT 3.1312 - PROPOSED ORDER MUST BE E-FILED BY COUNSEL AND SUBMITTED PER 3.1312(C))

EFFECTIVE JULY 24, 2017, THE COURT NO LONGER PROVIDES OFFICIAL COURT REPORTERS FOR CIVIL LAW AND MOTION HEARINGS. SEE COURT WEBSITE FOR POLICY AND FORMS.

All persons entering Department 2 must observe appropriate social distancing protocols and must wear face coverings, unless the Court authorizes otherwise.

The public may access hearings in this department. Please check the court website for the public access phone number. State and local court rules prohibit recording a court proceeding without a court order. This includes all persons listening on the public access line.

TROUBLESHOOTING TENTATIVE RULINGS

If do not see this week's tentative rulings, they have either not yet been posted or your web browser cache (temporary internet files) is accessing a prior week's rulings. "REFRESH" or "QUIT" your browser and reopen it, or adjust your internet settings to see only the current version of the web page. Your browser will otherwise access old information from old cookies even after the current week's rulings have been posted.

LINE #	CASE #	CASE TITLE	RULING
LINE 1	17CV314752	*Subhodip Mukherjee vs Zenyx, Inc*	Order of examination. Parties/counsel must wear face coverings and practice social distancing. Clerk of the court will administer oath to defendant.
LINE 2	20CV367612	*Tsvetan Ivanov Torbov vs Kari Bowyer et al*	After consideration of plaintiff Tsventan Ivanov's ("plaintiff") response/request for continuance and defendant JPmorgan Chase Bank N.A.'s reply, plaintiff's request for continuance is GRANTED, and defendant's demurrer is continued to August 19, 2021, 9:00 a.m., Dept. 2

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LAW AND MOTION TENTATIVE RULINGS

LINE 3	18CV336806	*Gregory Belcher vs Paul Greenfield*	The motion to quash prior alleged service of process of third amended complaint on defendant Derald Kenoyer ("defendant"), filed January 28, 2021 is GRANTED. However, plaintiff's notice of non-opposition/opposition and proof of service filed May11, 2021 evidences service of process of summons and third amended complaint on defendant on May 1, 2021. The requests for sanctions and to dismiss defendant from the action are DENIED.
LINE 4	18CV339556	*William Garrett vs HCL AMERICA, INC. et al*	Click line 4 for tentative ruling.
LINE 5	17CV310448	*Timothy Nguyen vs Phuong Pham et al*	Motions in lines 5 through 8 – counsel to appear at hearing and confirm whether proceeding with Mr. Janoff as discovery referee or Rule 4 mediator. Motions continued to case management conference June 22, 2021 10:00 a.m. Dept. 2 for setting if necessary.
LINE 6	17CV310448	*Timothy Nguyen vs Phuong Pham et al*	See line 5.
LINE 7	17CV310448	*Timothy Nguyen vs Phuong Pham et al*	See line 5.
LINE 8	17CV310448	*Timothy Nguyen vs Phuong Pham et al*	See line 5.
LINE 9	18CV329015	*Stronghold Engineering Incorporated vs City of Monterey*	Motion will be taken under submission.
LINE 10	20CV364701	*Kulwinder Walia vs Timothy Chey et al*	Motions to compel in lines 10 and 11 are continued by court; parties to participate in informal discovery conference ("IDC") with Judge Overton. Counsel/party to appear by CourtCall to schedule next court date and IDC.
LINE 11	20CV364701	*Kulwinder Walia vs Timothy Chey et al*	See line 10.

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LAW AND MOTION TENTATIVE RULINGS

LINE 12	19CV344620	*South Bay Piping Industry Labor Management Trust vs Pacific Plumbing & Sewer Service, Inc.*	Click line 12 for tentative ruling.
LINE 13	20CV372805	*SI 38, LLC et al vs MICHAELS STORES, INC. et al.*	Click line 13 for tentative ruling.
LINE 14	21PR189328	*In the Matter of Aidan Marshall*	Parent-guardian ad litem to appear (by CourtCall or in person).
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Case Name: *Garrett v. HCL America, Inc., et al.*
Case No.: 18CV336806

According to the allegations of the complaint, in May 2015, plaintiff William Garrett ("Plaintiff") is an African-American of Christian faith, and was employed as a Track Lead for defendant HCL America Inc. ("HCL"). (See complaint, ¶¶ 9, 11-12.) HCL provides independent contractor services, such as security, to Micron Technology, Inc. ("Micron"), a manufacturer of computer chips. (See complaint, ¶ 10.) On April 13, 2018, Plaintiff received a complaint of harassment and bullying from a Muslim Pakistani subordinate of his by a Sikh Indian supervisor at Micron. (See complaint, ¶ 13.) On April 18, 2018, Plaintiff forwarded his subordinate's complaint to Plaintiff's supervisor, Prakash Jayapal, a Sikh Indian, for investigation. (See complaint, ¶ 14.) By the next day, April 19, 2018, Plaintiff's subordinate apprised Plaintiff that Micron had reprimanded the harassing and bullying Sikh and Indian employee, and that, in turn, the harassing and bullying employee confronted Plaintiff's subordinate to reprimand him and intimidate him from filing a formal complaint. (See complaint, ¶¶ 15.) By May 6, 2018, Plaintiff was made aware that his subordinate was indeed intimidated from filing a formal complaint and such that he was now denying and repudiating the initial allegations that he had previously communicated to Plaintiff. (See complaint, ¶ 16.) In late June 2018, Mr. Jayapal informed Plaintiff that HCL would be terminating Plaintiff. (See complaint, ¶ 18.)

Plaintiff's forwarding of the complaint of harassment and bullying on account of race and religion was protected activity and Plaintiff suffered retaliatory adverse employment action in violation of FEHA. (See complaint, ¶¶ 17, 19-23.) Plaintiff pursued and exhausted his administrative remedies and received right-to-sue letters from the EEOC and the DFEH. (See complaint, ¶ 24.) On December 7, 2018, Plaintiff filed a complaint against HCL and Doe defendants, asserting causes of action for retaliation in violation of FEHA and wrongful termination in violation of public policy.

On March 20, 2019, HCL moved to compel arbitration. On July 3, 2019,[1] the Court [Hon. Arand] granted the motion and stayed the action, "to permit plaintiff William Garrett and HCL to arbitrate their disputes in according with the terms of the Arbitration Agreement." (July 3, 2019 order re: HCL's motion to compel arbitration, p.2: 9-11.)

On July 30, 2020, Plaintiff filed document entitled "amendment to verified complaint for damages, to insert Micron Technology, Inc. as true name of Doe defendant no. 1." Micron moves to quash the summons and putative Doe amendment to the complaint.

MOTION TO QUASH

Micron moves to quash service of the summons and putative Doe amendment to the complaint on the grounds that the Court lacks jurisdiction over Micron and the putative Doe amendment because the Court entered an order staying the entire action pending the conclusion of

[1] The order was signed on July 3, 2019; however, it was not filed until July 11, 2019.

arbitration between Plaintiff and HCL and Plaintiff did not obtain an order lifting the stay to amend the complaint to name Micron as a new party to the action; and, Plaintiff has not satisfied the requirements of Code of Civil Procedure section 474 to add Micron as a Doe defendant in this action and, given that failure and the fact that the claims alleged against Micron do not relate back to the filing of the original complaint on December 7, 2018, the statutes of limitations have expired on the claims alleged against Micron.

In opposition, Plaintiff concedes that the action has been stayed, and that the Court should stay all proceedings in this court case until after a final award in the arbitration against HCL. (See Pl.'s opposition to motion to quash ("Opposition"), p.6:14-16.) Plaintiff also argues that: the identification of Micron as Doe 1 has not violated section 474, the amendment to the complaint is not time-barred because of spoliation of evidence, unclean hands, the late discovery rule, equitable tolling and the court-ordered stay of court proceedings from the date of the mandatory arbitration order through the final disposition of the arbitration.

In reply, Micron asserts that: Plaintiff appears to concede that he filed his Doe amendment during a court-ordered stay that forbids prosecution of the case against Micron until the arbitration is resolved, effectively admitting that his amendment is void because the Court lacks jurisdiction over Micron; Plaintiff does not argue that he was actually ignorant of the facts establishing a cause of action against Micron and thus, claims against Micron should be dismissed; the delayed discovery rule does not apply as *Williams v. City of Belvedere* (1999) 72 Cal.App.4th 84, required Plaintiff to file the administrative claim supporting his Doe amendment by July 30, 2019—one year after his employment ended; the unclean hands defense does not apply to save Plaintiff's claims because it is a defensive doctrine and Plaintiff does not, in any event, cite to any alleged conduct by Micron to support any application of the defense; equitable tolling does not apply because Micron is not a party to the arbitration, the HCL arbitration gave Micron no notice of the claims against Micron, the arbitration did not allow the parties to resolve any claims between Micron and Plaintiff, and there can be no discovery in connection with Micron as it is not a party to the arbitration. (See Micron's reply brief, pp.1:21-28, 2:1-28, 3:1-25, 4:1-28, 5:1-24, 6:1-28, 7:1-3.)

Here, the parties agree that the action is stayed. Micron asserts that the stay of the action is applicable as to the Doe amendment. Accordingly, the Court continues the hearing on its motion to quash until the conclusion of the arbitration.

The Court will prepare the Order.

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Case Name: *South Bay Piping Industry Labor Management Trust v. Pacific Plumbing & Sewer Service, Inc.*
Case No.: 19CV344620

On February 19, 2021, plaintiff South Bay Piping Industry Labor Management Trust ("plaintiff") filed the present motion for leave to file first amended complaint ("FAC"). Defendant Pacific Plumbing & Sewer Service, Inc. ("defendant") opposes the motion.

On March 14, 2019, plaintiff filed complaint against defendant alleging one cause of action for violation of Labor Code section 1771.2, and seeking recovery of unpaid prevailing wages, statutory and/or civil penalties and attorneys' fees and costs.

Plaintiff asserts that information obtained through the litigation and discovery, and an agreement with defendant to limit the action to two construction projects, supports granting leave to file a FAC. It is asserted a FAC is necessary to clarify allegations and conform claims according to the information obtained. No trial has been set.

In opposition, defendant asserts that the court should abstain from ruling on the motion pending outcome of defendant's motion to consolidate the instant action with two related civil actions, including a designated complex case. It is asserted that the actions allege the same claims and seek the same damages. Defendant contends that plaintiff seeks to add claims in the instant action that are the subject of two other lawsuits. Should consolidation be granted, determination of leave to amend would be left to the court assigned the consolidated case, and would require the plaintiffs to coordinate their claims and abandon duplicate claims. It is further asserted that plaintiff delayed its discovery for two years, and now seeks leave to allege new claims not based on the same facts or theories asserted in the complaint. This will require defendant to incur additional time and expense in discovery, to its prejudice. Defendant also asserts that the proposed FAC does not state a proper or valid cause of action, and that Code of Civil Procedure section 597 bars the proposed amended pleading.

In reply, plaintiff asserts that the three actions contain "radically different" statute of limitations, primary theories, liability and affirmative defenses.

Considerations of similarity of parties, claims, and evidence, inconvenience of witnesses and parties, unnecessary expenditure of time, effort and resources, and prejudice to parties are weighed by the court in a motion for consolidation which is not before the court. The court declines to stay ruling on the motion pending the outcome of a motion to consolidate which the papers provide no information about a filing or setting for hearing. The court is not persuaded that staying decision is warranted.

Similarly, whether a proposed FAC is procedurally or substantively deficient is a determination made in connection with a demurrer or motion for summary judgment, motions that are not before the court. Code of Civil Procedure section 597 is not authority to make that determination in the present motion, but instead pertains to trial of special defenses pled in an answer where the court may proceed to trial of the special defense before trial of any other issue in the case.

A court may, after notice to the adverse party, allow amendment of any pleading at any time, even after commencement of trial. Code of Civil Procedure sections 473(a)(1) and 576. Courts are generally liberal in permitting amendments, as long as the statute of limitations has not expired and the opposing party will not be prejudiced, for example, by a delay in the trial, loss of critical evidence or added costs of trial preparation. It is not uncommon that new facts come to light as discovery progresses that may require an amendment of the pleadings.

Here, while the timeliness of the motion two years after commencement of the action is generally questionable, the Covid-19 pandemic was an unanticipated intervening event that mitigates the delay, and trial is not set such that defendant is prejudiced by delay of the trial. There is no assertion that a statute of limitations has expired or that evidence will be lost if leave to amend is granted. Increased costs to defendant from further discovery because of the FAC is a valid consideration.

After consideration of the policy of law and these factors, the court finds that the liberal policy of permitting amendments in this instance outweighs the claim of prejudice by defendant. The motion for leave to amend and file FAC is GRANTED. Leave is granted for 10 days from date of hearing.

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Case Name: *SI 38, LLC v. Michaels Stores, Inc.*
Case No.: 20CV372805

On March 9, 2021, Defendant Michaels Stores, Inc. ("defendant") filed the present motion to consolidate related cases or, in the alternative, stay unlawful detainer.

Summary of proceedings

The motion pertains to an unlawful detainer action, *SI 38, LLC v. Michaels Stores, Inc.*, Santa Clara County Superior Court case no. 20CV370596 ("unlawful detainer action") and the instant separate civil action. The actions are filed by plaintiff SI 38, LLC ("plaintiff") against defendant, in connection with the premises leased by plaintiff to defendant.

On or about November 30, 2005, defendant and plaintiff's predecessor in interest, FBJ Management, Inc., entered into a lease whereby defendant leased space in a shopping center at 20640 Homestead Road in Cupertino, CA ("original lease" and "premises" depending on context). The lease was for a term of 10 years with three five year options to extend.

Thereafter, the shopping center was sold twice, with two amendments to the original lease entered which collectively constitute the current lease ("lease"). Plaintiff is the current landlord under the lease.

The lease includes provisions for monthly payment of rent, minimum rent, and additional amounts for common area charges, real estate taxes, utilities and insurance.

According to the moving papers, paragraph 16.5 of the original lease provides in substance a 75% reduction in defendant's base rent if landlord violates certain prohibited use provisions, and the rent reduction continues so long as the violation exists ("paragraph 16.5"). On May 2, 2016, defendant provided notice to plaintiff's predecessors in interest of the then-landlord's violation of paragraph 16.5 - the leasing of space in the shopping center to restaurants or for food use. Defendant also notified plaintiff's predecessors in interest that it was invoking the remedy of a 75% reduction in defendant's rent under paragraph 16.5.

Thereafter, in 2017, the interests of plaintiff's predecessors in interest were transferred/assigned to plaintiff.

On June 18, 2020, plaintiff served defendant with a ten day notice to pay or quit for nonpayment of rent in full for the period of June 2019 through May 2020 ("notice to pay or quit") in the amount of $304,805 ("back rent"). The back rent is the reduced or abated amount of rent under paragraph 16.5 for the period in the notice to pay or quit.

Defendant did not pay plaintiff the alleged back rent and on September 22, 2020, plaintiff filed an unlawful detainer action. On October 28, 2020, plaintiff filed the instant ordinary civil action for breach of the lease and damages for unpaid rent for the period of November 1, 2016 to the present in the amount of $1,212,877, inclusive of back rent for the period in the notice to pay or quit. On November 25, 2020, plaintiff filed a first amended complaint ("FAC") eliminating from damages back rent under the notice to pay or quit.

Defendant asserts that the unlawful detainer action and ordinary civil action are indistinguishable, with the same parties, premises and lease, and identical charging allegations, claim of breach and questions of fact and law. Defendant asserts that plaintiff filed two actions to improperly use the summary proceeding of unlawful detainer when the substance of the dispute is not unlawful detainer. Defendant asserts that the two cases present precisely the factors warranting consolidation, to avoid two litigations over the same contract dispute, needless consumption of time and resources, risk of inconsistent rulings and prejudice to defendant of defending two lawsuits. Defendant further asserts that issues in connection with paragraph 16.5 are complex, and proceeding to determine those issues in a summary disposition would deprive defendant of due process.

In opposition, plaintiff asserts that it is entitled by statute to a prompt determination of possession, and that plaintiff had no choice but to file two actions, one to recover possession and back rent under the notice to pay or quit, and the second for unpaid rent due not otherwise recoverable in an unlawful detainer action. The two actions are therefore different and do not present identical causes of action or relief, and defendant has failed to present evidence sufficient for a grant of consolidation or stay. Plaintiff further asserts that a consolidation or stay of the unlawful detainer action is also unduly prejudicial to plaintiff because it would deny plaintiff's statutory right to prompt determination of possession.

Request for judicial notice

Defendant and plaintiff request judicial notice of plaintiff's complaint filed in the unlawful detainer action (defendant's RJN Ex. 1; plaintiff's Ex. A) and FAC filed in the instant action (defendant's Ex. 4; plaintiff's Ex. B). Defendant also requests judicial notice of complaint filed in the instant action (defendant's Ex. 2) and demurrer to complaint in the unlawful detainer action (Ex. 3). Judicial notice is GRANTED as to the existence of Exhibits 1 through 4 and Exhibits A and B. (See *Day v. Sharp* (1975) 50 Cal.App.3d 904, 914 (stating that "'a court cannot take judicial notice of hearsay allegations as being true, just because they are part of a court record or file… [a] court may take judicial notice of the existence of each document in a court file, but can only take judicial notice of the truth of facts asserted in documents such as orders, findings of fact and conclusions of law, and judgments'").

Evidence objections

Plaintiff objects to evidence submitted in support of defendant's motion contained in the declaration of defendant's counsel, David R. Sable, filed March 9, 2021.

Statements of a declarant in a declaration under penalty of perjury qualify as hearsay exceptions when offered in a motion. See Code of Civil Procedure section 2015.5. Admissibility of content in a declaration is tested under the same rules as oral testimony.

Objection No. 1. Ruling: Although declarant has personal knowledge, objection for lack of relevancy is SUSTAINED.

Objection No. 2. Ruling: Although there are portions of the statement which are factual and based on personal knowledge, the statement is intertwined with legal opinion and argument; therefore the objection for improper legal opinion and argumentative is SUSTAINED.

Objection No. 3. Ruling: the objection for hearsay as to the statement of plaintiff's counsel is SUSTAINED. Objection to the balance of the statement as improper legal opinion and argumentative is SUSTAINED.

Objection No. 4. Ruling: While there are portions of the statement which are factual and based on personal knowledge, the statement is intertwined with argument; therefore, the objection of argumentative is SUSTAINED.

Objection No. 5. Ruling: The statement is of relatively minor consequence, but is nevertheless argumentative and portions are improper legal opinion; the objection is therefore SUSTAINED.

Objection No. 6. Ruling: The objection that the statement is argumentative and portions are improper legal opinion is SUSTAINED.

Consolidation or stay; analysis

The court in exercise of discretion may consolidate actions involving common questions of law or fact. Code of Civil Procedure section 1048. The court considers the timeliness of the motion, expenditure of time and resources, and whether consolidation prejudices a party or results in a likelihood of confusing the issues.

The timeliness of defendant's motion is not disputed. The papers in support and opposition do not identify a concern of confusing the issues.

The two actions present common questions fact and law regarding application of paragraph 16.5 of the lease, the outcome which may be substantially dispositive of the actions. As such, there is an overlap of evidence that will result and certain witnesses appearing at two proceedings if the cases are not consolidated. A judgment entered in the unlawful detainer action has very limited res judicata effect, but may apply in the second action to common questions in connection with possession.[2] There will be additional expenditure of time and resources resulting from two actions. However, determination of the unlawful detainer action will provide opportunities for efficiency in the ordinary civil action and a potential platform for resolution of that litigation. Defendant asserts that the additional expenditure of time and resources is prejudicial if consolidation or stay of the unlawful detainer action is denied.

The above considerations are weighed with the prejudice to plaintiff if consolidation or stay is granted.

The prejudice to plaintiff is denial of the statutory priority of an expedited determination of possession of the premises. From plaintiff's perspective, it is further prejudiced by defendant remaining in possession while continuing to underpay rent.

Hong Sang Market v. Peng (2018) 20 Cal.App.5th 474 involved the question of whether judgment in an earlier unlawful detainer action that included back due rent for the period of the three day notice was res judicata in a later civil action for back due rent for a different period. The principles discussed differentiating the unlawful detainer action and separate civil action

[2] A judgment in an unlawful detainer action determines possession and claims incidental to possession.

are instructive here. "An unlawful detainer action is a summary proceeding designed to adjudicate the right of immediate possession; the only claims that are cognizable in such a proceeding are those bearing directly on the immediate right of possession" (internal citation omitted). *Id.* at pp. 490-91. Back due rent is a claim that a court has limited jurisdiction over in an unlawful detainer action (*Id.* at p. 491). When a landlord proceeds by way of a three day notice to pay or quit for nonpayment of rent, the landlord is limited to recovering rent that accrued within one year of the notice. Civil Code Section 1161(2). A landlord must file a separate ordinary civil action to recover rent due that falls outside the jurisdictional limit of the unlawful detainer action.

Plaintiff asserts that this is precisely the situation here. Plaintiff has filed the summary proceeding of unlawful detainer for possession of the premises and the related claim for back rent for the jurisdictional limited period. Plaintiff was required to file a second, ordinary civil suit for back rent for the period that is outside of the jurisdictional limit.

Defendant asserts in reply that the unlawful detainer action involves more than possession and back rent because to determine both issues requires interpretation of whether paragraph 16.5 is a liquidation of damages clause, is unreasonable, and unenforceable such that severance and reformation of the paragraph is required. It is asserted that this issue is complex and beyond the scope of issues properly heard in a summary unlawful detainer action. However, defendant does not specify the facts evidencing complexity or facts that require the interpretation asserted. Defendant also does not explain why interpretation of a lease provision that bears directly to back rent and possession cannot proceed in the lawful detainer action. There is no suggestion that additional discovery or further preparation is needed to try the interpretation issue.

In support, defendant cites several cases including *Martin-Bragg v. Moore* (2013) 219 Cal.App.4th 367 ("*Martin-Bragg*"), a matter involving an unlawful detainer action and ordinary civil action for back rent. The trial court denied the tenant's motion for consolidation, and proceeded to hear the tenant's claim of title to the real property in the unlawful detainer proceeding. The court of appeal reversed, finding that trying the complex issue of title in the unlawful detainer action, with its constrained summary proceedings, was an abuse of discretion. The expedited, summary proceeding was an unfair restriction of the party's right to a full trial. In *Martin-Bragg*, landlord and tenant had been in a long term domestic relationship, the property at issue had been in tenant's family long before his relationship with landlord, tenant had formed entities for his business, had used the property for collateral for large business loans, and ultimately transferred title in trust for the benefit of landlord and tenant's businesses. Additional issues involved use of the property, payment of expenses and improvements to the property, and accounting of funds used by landlord from tenant's business entities. The trial court acknowledged that the issue of title was complex, and questioned whether there was a true landlord-tenant relationship or a business operation mortgaged to provide loans to tenant's business. (*Id*. at p. 386)

The appellate court found that tenant's complex issue of title caused the proceeding to lose its summary character, and should not have been raised in the unlawful detainer action. The court found that the trial court should have either stayed the unlawful detainer action pending determination of title in the civil action or consolidate the two actions.

Martin-Bragg is distinguishable from the present matter in that (a) the issue asserted here for consolidation or stay is not a complex issue of title, but rather interpretation of a paragraph of the lease; (b) the evidence is insufficient to show that the interpretation issue is complex; (c) interpretation of paragraph 16.5 of the lease is proper in the summary proceeding to determine possession and the incidental issue of back rent, and (d) no additional discovery or preparation is needed. Ultimately, the interpretation of paragraph 16.5 amounts to determination of damages incidental to possession - rent due and unpaid pursuant to the notice to quit or pay.

Defendant's motion to consolidate the two actions or stay the unlawful detainer action is therefore DENIED.

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