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17 **IN THE UNITED STATES DISTRICT COURT**
18 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

19 MALIBU MEDIA, LLC,
20
21 Plaintiff,

22 vs.

23 JOHN DOE subscriber assigned IP
24 address 76.126.99.126,
25
26 Defendant.

27 And All Related Cross-Actions

) Case No.: 3:15-cv-04441-WHA
)
) **DEFENDANT JOHN DOE 76.126.99.126'S**
) **NOTICE OF MOTION TO COMPEL AND**
) **MOTION TO COMPEL FURTHER**
) **RESPONSES TO DEPOSITION**
) **QUESTIONS**
)
) DOE IP address 76.126.99.126
)
) FRCP §37(a)
)
) Hon. William Alsup
) Hearing Date: Thursday, December 22, 2016
) Hearing Time: 8:00 AM
)
) **ORAL ARGUMENT REQUESTED**

28 //

NOTICE OF MOTION

TO ALL COUNSEL AND THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE:

Pursuant to the Federal Rules of Civil Procedure (FRCP) and the inherent power of this Court, the Defendant, JOHN DOE subscriber assigned IP address 76.126.99.126, (hereafter referred to as “Defendant” or “John Doe”) hereby moves that this Court to compel Plaintiff Malibu Media, Inc. (“Plaintiff” or “Malibu”) pursuant to FRCP 37 and Local Rule 37-3 to provide *further* verified responses to a variety of Defendant’s questions related to the allegedly infringed works that Plaintiff stipulated to answering on the records during the deposition of Colette Pelissier Field (“Field”). Field was Plaintiff’s FRCP 30(b)(6) designee.

In the alternative, Defendant requests Field be ordered to resume her deposition upon proper notice, with Plaintiff ordered to pay all expenses incurred to continue the deposition.

This motion will be heard on **Thursday, December 22, 2016**, at 8:00 am in Courtroom 8, 19th Floor, United States Courthouse, 450 Golden Gate Avenue, San Francisco, CA 94102 before the Hon. William Alsup.

The basis for this motion to compel is as follows:

- a. In order to save time, Plaintiff requested Defendant have Field provide information about each of the allegedly infringed works provided after the deposition;
- b. The parties stipulated to this on July 27, 2016, with those responses to be verified;
- c. Defendant’s counsel has repeatedly conferred with Plaintiff’s counsel to obtain proper verified responses from Field; and
- d. As of the filing of this Motion, Plaintiff has still not provided further verified responses to the questions as stipulated to, more than three months later.

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This motion will be based on this notice, the memorandum of points and authorities, documents in this Court’s docket, documents judicially noticeable, the declarations provided, and any oral argument presented at the hearing.

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1 **MEMORANDUM OF POINTS AND AUTHORITIES**

2 **I. INTRODUCTION**

3 This motion concerns certain questions related to the allegedly infringed works
4 (“Works”). On July 8, 2016, Defendant served an Amended Notice of Deposition to Plaintiff,
5 which was directed to Plaintiff’s FRCP Rule 30(b)(6) designee to cover five topics. [Edmondson
6 Decl, Exhibit 1]. This was to be the Person Most Knowledgeable deposition (“PMK Depo”) of
7 Plaintiff, and was to cover the following topics:

- 8 a. The parties who designed, created, implemented and monitor the data collection system
which recorded the infringing transactions;
- 9 b. Verification of the infringements;
- 10 c. Distribution of the subject movies, ownership of the Copyright of the subject movies,
authorship of the subject movies; and
- 11 d. Settlements entered into regarding the subject movies;
- 12 e. Settlements entered into regarding all movies that Plaintiff owns and has alleged
infringement against third parties.

13
14 On July 27, 2016, the PMK Depo was held in Pasadena, California, with Field designated
15 by Plaintiff as its PMK on the five enumerated topics. During the PMK Depo, Defense counsel
16 began to inquire about each of the Works via a series of questions. [Edmondson Decl, Exhibit 2,
17 page 89:18-20]. Those questions primarily regarded the following: development of the film,
18 preproduction of the film, production of the film, post-production of the film, distribution of the
19 film, licensees of the film, the copyright application for the film, depositing of copies with the
20 Copyright Office, use of the talent in the films, the script for the film, similarity to other films,
and the music for the film. [Edmondson Decl, Exhibit 2, page 90:2-25 to page 97:1-22].

21
22 After working through these questions as to five of the 23 Works, Plaintiff’s counsel
23 suggested the information be added at a later point in order to save time. [Edmondson Decl,
24 Exhibit 2, page 115:12-21]. Defense counsel agreed to this request, and the parties stipulated to
25 this agreement on the record, in which Plaintiff agreed to provide verified responses to these
26 questions for the remaining Works. [Edmondson Decl, Exhibit 2, page 116:1-12].

1 Defense counsel has since requested verified responses to the remaining questions on
 2 numerous occasions. As of the date of filing the instant Motion, Plaintiff has yet to provide any
 3 responses, verified or otherwise, to the questions, necessitating this Motion. As more fully
 4 explained below, the questions are relevant to Plaintiff's case and the affirmative defenses pleaded
 5 by Defendant. As such, Defendant respectfully requests the Court grant this Motion and order
 6 Plaintiff to provide further verified responses to the deposition questions.

7 8 **II. FACTUAL BACKGROUND**

9 Plaintiff alleges copyright infringement using the BitTorrent Protocol. [See Complaint,
 10 Dckt 1]. Plaintiff claims infringement of 23 of its pornographic movies by Defendant, collectively
 11 the Works. The titles of the allegedly infringed works are as follows [Dckt 39-1]:

- | | | |
|----|---|-----------------------------------|
| 12 | 1. <i>Dripping Pleasures</i> | 13. <i>Morning Tryst</i> |
| 13 | 2. <i>A Fucking Hot Threesome</i> | 14. <i>Unbelievably Beautiful</i> |
| 14 | 3. <i>A Deep Awakening</i> | 15. <i>Backstage</i> |
| 15 | 4. <i>Vacation Fantasy</i> | 16. <i>Summertime Lunch</i> |
| 16 | 5. <i>Romantic Memories</i> | 17. <i>Starting Over</i> |
| 17 | 6. <i>Ibiza Love</i> | 18. <i>Side by Side</i> |
| 18 | 7. <i>Pretty Back Door Baby</i> | 19. <i>Infinite Luvv</i> |
| 19 | 8. <i>Carmen Leila Christmas Vacation</i> | 20. <i>Lovers Lane</i> |
| 20 | 9. <i>Young Passion</i> | 21. <i>Romp At The Ranch</i> |
| 21 | 10. <i>Be With Me</i> | 22. <i>Sexy In The City</i> |
| 22 | 11. <i>Enjoy My Backdoor</i> | 23. <i>Back For More</i> |
| 23 | 12. <i>Yours Forever</i> | |

24 The deposition of Plaintiff's PMK was held on July 27, 2016, during which a series of
 25 questions about each individual work was to be asked. Defendant was able to work through these
 26 series of questions as to *Dripping Pleasures*, *A Fucking Hot Threesome*, *A Deep Awakening*, and
Vacation Fantasy. Defense counsel began inquiring as to *Romantic Memories*, but only asked a
 few of the questions before the parties stipulated to Plaintiff providing the responses off of the
 deposition record in a verified format. The questions as to each subject are outlined below.

1 Status of All Discovery

2 The parties have exchanged written discovery, and Defendant has taken two depositions.
3 Plaintiff has several pending subpoenas, which Defendant has moved to quash. Defendant's
4 deposition is set for November 18, 2016. Defendant has currently designated five expert witnesses
5 and Plaintiff has designated two.

6
7 Status of Settlement

8 The parties attended a settlement conference but could not resolve this matter. Defendant
9 has also served a Rule 68 offer on Plaintiff, which has since expired.

10
11 **III. STANDARD**

12 Pursuant to the recently revised FRCP 26(b)(1), a party may "obtain discovery regarding
13 any non-privileged matter that is relevant to the party's claim or defense and proportional to the
14 needs of the case, considering the importance of the issues at stake in the action . . . the importance
15 of the discovery in resolving the issues, and why the burden or the expense of the proposed
16 discovery outweighs its likely benefit." FRCP 26(b)(1). If the court determines that the proposed
17 discovery is outside the scope permitted by Rule 26(b)(1), the court "must limit the frequency or
18 extent of the discovery otherwise allowed." FRCP 26(b)(2)(C)(iii).

19
20 **IV. ARGUMENT**

21 Simply put, discovery is far broader than admissibility. Now, there are limits, with
22 relevancy being the primary outer boundary. In this case, the questions at issue in this Motion are
23 relevant to the claims and defenses in this case. As such, these deposition questions need to be
24 properly responded to as if they were in fact asked at the deposition.

25 That is, these are not interrogatories, these are questions Plaintiff stipulated to answering
26

1 in a verified manner. To-date, Plaintiff has yet to provide a verification to any of its answers, and
2 other responses are clearly inadequate as described below.

3 The numbering is based upon the columns in Plaintiff's document entitled 04441 –
4 NCA70 – Chart – FOR PRODUCTION. [Edmondson Decl, Exhibit 3]. The questions are based
5 upon the letter dated August 13, 2016, Meet and Confer re: Deposition – Local Rules 37-1(a) -
6 Failure to Provide Written Deposition Questions under Oath. [Edmondson Decl, Exhibit 4]. The
7 responses by Plaintiff are based upon the information in Plaintiff's document entitled 04441 –
8 NCA70 – Chart – FOR PRODUCTION. [Edmondson Decl, Exhibit 3]. The further responses are
9 based upon the letter dated November 2, 2016, from Plaintiff's counsel. [Edmondson Decl,
10 Exhibit 5].

11
12 **A. Questions, Responses & Reasons for Further Response**

13 Question No. 9: Who created the copyright application?

14 Unverified Response to No. 9: Plaintiff's Attorney at the time or Brigham Field and
15 Colette Pelissier.

16 Unverified Further Response to No. 9: Plaintiff's Attorney, Emilie Kennedy; Brigham
17 Field or Colette Pelissier.

18 Reason for Further Response to No. 9: First, since we are dealing with copyrights, the
19 application for the copyright is 100% relevant to the claims of infringement. Here, the
20 name(s) of the person who created the copyright application would provide the names of
21 witnesses that could be deposed. We then have the issue with the specific response,
22 because we do not know who did it. Which of Plaintiff's attorneys would it be at a
23 minimum, and in general Plaintiff should be able to determine who exactly created the
24 application. Again, if there was a defect in the application, this could defeat Plaintiff's
25 claims, as one of Defendant's affirmative defenses regards inequitable conduct before the
26 Copyright Office.

FRCP 26(b)(2) proportionality: Providing this information is not burdensome to Plaintiff
as any organization that creates such a bulk of copyrighted material would need a way to
keep the copyright information organized. Defendant merely requests that Plaintiff look
up information which the Plaintiff has easy access to.

Question No. 11: The names of the performers on the film?

Unverified Response to No. 11: Plaintiff objects on the basis that this request seeks
information that is neither relevant nor likely to lead to the discovery of admissible
evidence. Plaintiff objects on the basis that this request seeks confidential business
information pursuant to FRCP 26(c). Plaintiff further objects on the basis that this request

1 seeks information the disclosure of which would invade Plaintiff's (sic) and the actors' privacy rights.

2 Unverified Further Response to No. 11 (listed as 10 in Plaintiff's letter): Plaintiff
3 maintains all of its objections. Firstly, the privacy rights of the actors and actresses are not
4 and were not Colette Pelissier's to waive. The actors and actresses in Plaintiff's movies
5 perform under pseudonyms for a reason, one of the most compelling reasons for this
6 decision is rooted in legitimate concerns for their safety. Plaintiff can think of few things
7 more dangerous than making public the true names of actors and actresses starring in adult
8 films. In as much as the Defendant in this case has expressed a desire to "[stalk] women,
9 or worse" (see screenshot below [omitted]), Plaintiff has deep concerns in making this
10 information available to Defendant or his counsel. All information that Defendant seeks
11 to obtain from the actresses and actors in Plaintiff's films, (i.e., dates and times of
12 production and existence of contractual agreements) is available from other sources and
13 indeed such information has already been supplied to Defendant.

14 Reason for Further Response to No. 11: As to relevance, the names of the performers are
15 names of witnesses to the production. Defendant is entitled to be able to have the names
16 of all witnesses, or as FRCP 26(a)(A)(i) states, "the name ... of each individual likely to
17 have discoverable information[.]" As some performers in the film industry receive an
18 ownership stake in their films, Defendant is entitled to discover this to be able to ensure
19 the proper transfer of any copyrights, and in general to ensure all copyright holders have
20 consented to this action.

21 Further, originality and similarity are key issues in this case, which alone could defeat the
22 claims of infringement if it is demonstrated these films lacked originality or were similar
23 to other works. Here, the performers would hold key details as witnesses to the production
24 of the work, such as what direction they were given, what the script said, if anything, and
25 how similar it was to other works they performed in. Given some of these films were
26 filmed in other countries, there may be conflict of laws issues related to who could own
the copyright.

In regards to the confidential business information, it is inconceivable that the names of
performers who make adult films intended for publication to the public could somehow
be confidential. Similar to a trade secret or attorney-client privilege, once the confidential
information goes to a third-party, there is no longer a trade secret or privilege. Then, even
were there some initial privilege, by this suit and Plaintiff's claims, the privilege is waived
or is outweighed by the need for the defendant to obtain discovery.

FRCP 26(b)(2) proportionality: Providing this information is not burdensome to Plaintiff
as any organization that creates such a bulk of copyrighted material would need a way to
keep the copyright information organized. Defendant merely requests that Plaintiff look
up information which the Plaintiff has easy access to.

Lastly, as to privacy, what privacy would this invade given these people performed in a
pornographic film destined to be published? If Plaintiff has a contract with these
performers that guarantees privacy, then produce it *in camera* for review. As it is, Plaintiff
provided the names for some of the performers in the deposition without any such
objection before Defendant agreed to truncate the deposition. It would be unfairly
prejudicial to Defendant to allow Plaintiff to now provide less detail than it would have at
the deposition.

1 Question No. 13: How much did you pay the performers?

2 Unverified Response to No. 13: Plaintiff objects on the basis that this request seeks
3 information that is neither relevant nor likely to lead to the discovery of admissible
4 evidence. Plaintiff objects on the basis that this request seeks confidential business
5 information pursuant to FRCP 26(c). Plaintiff further objects on the basis that this request
6 seeks information the disclosure of which would invade Plaintiff's (sic) and the actors'
7 privacy rights.

8 Unverified Further Response to No. 13 (listed as 12 in Plaintiff's letter): In as much as
9 Defendant failed to provide reasons for further response, Plaintiff maintains all of its
10 objections.

11 Reason for Further Response to No. 13: As to relevance, some performers in the film
12 industry receive an ownership stake in their films, and as such Defendant is entitled to
13 discover this to be able to ensure the proper transfer of any copyrights, and in general to
14 ensure all copyright holders have consented to this action.

15 In regards to the confidential business information, such information is clearly
16 discoverable in an action on copyright. Plaintiff's response ignores a basic tenet of
17 copyright litigation: that a defendant is in fact allowed to discover the profits on the
18 allegedly infringed works. 17 U.S.C. 504(b). Any profit calculation would require a
19 deduction for expenses, and the payments to the performers would be an expense. Then,
20 even were there some initial privilege, by this suit and Plaintiff's claims, the privilege is
21 waived or is outweighed by the need for the defendant to obtain discovery.

22 FRCP 26(b)(2) proportionality: Providing this information is not burdensome to Plaintiff
23 as any organization that creates such a bulk of copyrighted material would need a way to
24 keep the copyright information organized. Defendant merely requests that Plaintiff look
25 up information which the Plaintiff has easy access to.

26 Lastly, as to privacy, what privacy would this invade given these people performed in a
pornographic film destined to be published? If Plaintiff has a contract with these
performers that guarantees privacy, then produce it *in camera* for review. As it is, Plaintiff
provided the names for some of the performers in the deposition without any such
objection before Defendant agreed to truncate the deposition. It would be unfairly
prejudicial to Defendant to allow Plaintiff to now provide less detail than it would have at
the deposition.

19 Question No. 15: Did any actors or actresses get residuals for acting in the film?

20 Unverified Response to No. 15: Plaintiff objects on the basis that this request seeks
21 information that is neither relevant nor likely to lead to the discovery of admissible
22 evidence. Plaintiff objects on the basis that this request seeks confidential business
23 information pursuant to FRCP 26(c). Plaintiff further objects on the basis that this request
24 seeks information the disclosure of which would invade Plaintiff's (sic) and the actors'
25 privacy rights.

26 Unverified Further Response to No. 15 (listed as 14 in Plaintiff's letter): Plaintiff
maintains all of its objections. Defendant has not alleged why the answer given to this
question during the deposition of Colette Pelissier was insufficient. Notwithstanding any
objections and without waiving same, Plaintiff answers that its actors' do not receive
residuals for their appearances in Plaintiff's films.

Reason for Further Response to No. 15: As to relevance, some performers in the film

1 industry receive an ownership stake in their films, and as such Defendant is entitled to
2 discover this to be able to ensure the proper transfer of any copyrights, and in general to
ensure all copyright holders have consented to this action.

3 In regards to the confidential business information, such information is clearly
4 discoverable in an action on copyright. Plaintiff's response ignores a basic tenet of
5 copyright litigation: that a defendant is in fact allowed to discover the profits on the
allegedly infringed works. 17 U.S.C. 504(b). Any profit calculation would require a
6 deduction for expenses, and the payments to the performers would be an expense. Then,
even were there some initial privilege, by this suit and Plaintiff's claims, the privilege is
7 waived or is outweighed by the need for the defendant to obtain discovery.

8 FRCP 26(b)(2) proportionality: Providing this information is not burdensome to Plaintiff
as any organization that creates such a bulk of copyrighted material would need a way to
9 keep the copyright information organized. Defendant merely requests that Plaintiff look
up information which the Plaintiff has easy access to.

10 Lastly, as to privacy, what privacy would this invade given these people performed in a
11 pornographic film destined to be published? If Plaintiff has a contract with these
performers that guarantees privacy, then produce it *in camera* for review. As it is, Plaintiff
12 responded during deposition without any such objection. It would be unfairly prejudicial
to Defendant to allow Plaintiff to now provide less detail than it would have at the
deposition.

13 Question No. 18: Is the film similar to any of your other films?

14 Unverified Response to No. 18: Plaintiff objects on the basis that this question is
ambiguous. Plaintiff does not know what criteria Defendant is using to measure the
15 similarities between various films. Notwithstanding the foregoing objection and without
waiving same, Plaintiff avers that this work is similar to Plaintiff's other works because
they are all adult content.

16 Unverified Further Response to No. 18 (listed as 17 in Plaintiff's letter): Plaintiff
maintains all of its objections. Defendant has not provided reasoning as to why Plaintiff's
17 response to this question was insufficient. Plaintiff further objects that this question calls
for a legal conclusion. Notwithstanding any objections and without waiving same Plaintiff
18 answers that its works are original within the meaning of the Copyright Act: each of
Plaintiff's films depicts different actors, different scenes, different directors, and different
19 creative input. See *Feist Publications v. Rural Telephone Service Co.*, 499 U.S. 340 (1991).
See *Id* at 358, "the originality requirement is not particularly stringent. A compiler may
20 settle upon a selection or arrangement that others have used; novelty is not required.
Originality requires only that the author make the selection or arrangement independently
21 (i.e., without copying that selection or arrangement from another work), and that it display
some minimal level of creativity."

22 Reason for Further Response to No. 18: As noted above, originality and similarity are key
23 issues in this case, which alone could defeat the claims of infringement if it is
demonstrated these films lacked originality or were similar to other works. Similarity goes
24 to the veracity of Fields at her deposition and to the copyrightability of the works at issue.
Feist Publications v. Rural Telephone Service Co., 499 U.S. 340 (1991). See *id.* at 361
25 ("To establish infringement, two elements must be proven: (1) ownership of a valid
copyright, and (2) copying of constituent elements of the work that are original."); see
26

1 also *Seven Arts Filmed Entm't Ltd. v. Content Media Corp.*, 733 F.3d 1251, 1254 (9th
2 Cir.2013). This makes the inquiry relevant.

3 FRCP 26(b)(2) proportionality: Plaintiff has intimate knowledge of all of the films it has
4 produced, and through the deposition testimony was able to note similarities as the four
5 films the parties were able to work through. Defendant simply cannot review all of the
6 films, as they are copyrighted works and Defense counsel does not possess a license to
7 review all of the films. Finally, this is information that was to be provided at the
8 deposition, so it cannot be more burdensome to provide the information now than it was
9 at the deposition.

10 Attached as Exhibit 7 to the Declaration of J. Curtis Edmondson is a Statement in Support
11 of Defendant's Motion to Compel Further Responses ("Statement"). This Statement outlines the
12 above questions and responses as to each of the Works.

13 **B. Verifications**

14 As noted above, Plaintiff stipulated to providing responses to the above questions. Further,
15 Plaintiff stipulated that those responses would be verified:

16 MR. EDMONDSON: Well, so stipulated, for the record. Counsel will -- I
17 will provide Counsel with a list of questions for each movie.

18 MR. MOSESI: Good.

19 MR. EDMONDSON: And then if Counsel will verify the responses to those
20 questions?

21 MR. MOSESI: Yes. Of course. So stipulated.

22 MR. EDMONDSON: Stipulated. Thank you.

23 Edmondson Decl, Exhibit 2, page 116:1-8.

24 To-date, Plaintiff has not provided a verification to its responses to these questions.
25 Plaintiff did provide an unsigned verification on September 2, 2016, when it provided document
26 04441 – NCA70 – Chart – FOR PRODUCTION. [Edmondson Decl, Exhibit 6].

27 **C. Conferrals (Civil L.R. 37-1(a))**

28 As more fully outlined in the Declaration of J. Curtis Edmondson, Defense counsel sent
29 numerous conferrals to Plaintiffs' counsel concerning these unverified deposition question

1 responses. The first was an email on July 28, 2016, requesting the verified responses. [Edmondson
 2 Decl, Exhibit 8]. Further emails were sent on August 6 and August 30. [Edmondson Decl,
 3 Exhibits 9 & 10]. Another letter was sent on or about October 24, 2016. [Edmondson Decl,
 4 Exhibit 11]. Defense counsel has repeatedly requested verified further responses, or even verified
 5 responses in general, to no avail.

6 7 **IV. CONCLUSION**

8 As explained *supra*, Defense counsel has repeatedly requested verified responses
 9 to the above questions. Plaintiff has refused to do so, despite it stipulating on the record that it
 10 would in fact provide verified responses to the questions. Defense counsel only agreed to shorten
 11 the PMK Depo at Plaintiff's request, in exchange for these verified responses. If Plaintiff would
 12 prefer, Defense counsel is willing to set a second session of the PMK Depo in order to finish these
 13 questions (Nos. 9, 11, 13, 15, and 18), provided it is at Plaintiff's expense.

14 Otherwise, the questions are relevant to issues in the case, and the information is within
 15 Plaintiff's knowledge. Plaintiff's objections are without merit, or were largely not raised during
 16 the deposition. This later point provides the appearance that the lack of proper, verified responses
 17 is some sort of gamesmanship designed to frustrate the discovery process.

18 Therefore, Defendant respectfully requests the instant Motion be granted, and Plaintiff be
 19 ordered to provide verified responses consistent with the reasoning above. It is further requested
 20 such responses by due within ten (10) days of entry of the order.

21 The specific Works to which the further responses are requested are:

- | | | |
|----|---------------------------------|---------------------------------|
| 22 | • <i>Romantic Memories</i> | • <i>Yours Forever</i> |
| 23 | • <i>Ibiza Love</i> | • <i>Morning Tryst</i> |
| 24 | • <i>Pretty Back Door Baby</i> | • <i>Unbelievably Beautiful</i> |
| 25 | • <i>Carmen Leila Christmas</i> | • <i>Backstage</i> |
| 26 | • <i>Young Passion</i> | • <i>Summertime Lunch</i> |
| | • <i>Be With Me</i> | • <i>Starting Over</i> |
| | • <i>Enjoy My Backdoor</i> | • <i>Side by Side</i> |
| | | • <i>Infinite Luvv</i> |

- *Lovers Lane*
- *Romp At The Ranch*

- *Sexy In The City*
- *Back For More*

Respectfully submitted,

Dated: November 15, 2016

/s/ J. Curtis Edmondson
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