

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT AND TRIAL APPEAL BOARD

HYUNAI MOTOR AMERICA, INC.
Petitioner

v.

Patent of CLEAR WITH COMPUTERS, LLC
Patent Owner

Case IPR 2013-00176
Patent 8,121,904

**PATENT OWNER PRELIMINARY RESPONSE TO
PETITION FOR *INTER PARTES* REVIEW OF U.S. PATENT
NO. 8,121,904
UNDER 35 USC §§ 311-319 AND 37 CFR §42.100 ET SEQ.**

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157 Cong. Rec. S1375 (Mar. 8, 2011)	1
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Exhibit List

- 2001 *Clear With Computers, LLC v. Hyundai Motor America, Inc.*, Docket No. 6:09cv479, Excerpt from Transcript of Trial, Afternoon Session, (U.S.D.C. ED Tex.), June 13, 2011.
- 2002 *Clear With Computers, LLC v. Hyundai Motor America, Inc.*, Docket No. 6:09cv479, Final Judgment, (U.S.D.C. ED Tex.), January 26, 2012.
- 2003 *Clear With Computers, LLC v. Hyundai Motor America, Inc.*, Appeal No. 2012-1291 (U.S.C.A. Fed. Cir.), Judgment, February 8, 2013.

Pursuant to 37 C.F.R. § 42.107(a) Patent Owner, Clear With Computers, LLC, (“CWC”) submits the following preliminary response to the Petition, setting forth reasons why no *inter partes* review should be instituted under 35 U.S.C. § 314.

1. Introduction

The Board should not institute *inter partes* review because Petitioner, Hyundai Motor America, Inc. (“HMA”) has not met the high standard¹ required by Patent Office regulations to demonstrate a reasonable likelihood

¹ The “reasonable likelihood” standard was intended by Congress to be a substantially higher barrier to patent validity challenges than the former “substantial new question of patentability” test used for *inter partes* reexaminations. See H.R. Rep. No. 112-98 (part 1) at 47 (2011) (“The threshold for initiating an *inter partes* review is elevated from ‘significant new question of patentability’ – a standard that currently allows 95% of all requests to be granted – to a standard requiring petitioners to present information showing that their challenge has a reasonable likelihood of success.”). Thus, the new standard makes *inter partes* review available only in exceptional cases where serious doubts about the patent’s validity are raised and a *prima facie* case has been established. See 157 Cong. Rec. S1375 (Mar. 8, 2011) (statement of Sen. Kyl (D-Ariz)).

that at least one of the claims challenged in the petition is unpatentable. 37

C.F.R. § 42.108(c).

2. Overview of and Background Concerning U.S. Patent 8,121,904

A. The ‘904 Patent.

U.S. Patent 8,121,904 (the “‘904 Patent”) describes an electronic proposal presentation system. ‘904 Patent at col. 1, ll. 20-26. Prior to the inventions claimed in the ‘904 Patent, many products, such as cars, were marketed to potential customers in preprinted, inflexible brochures. *Id.* at col. 1, ll. 41-54. However, selling products using such generic brochures was problematic for a number of reasons. For example, the generic brochure often contained too much information, outdated information, or information that a customer may not be interested in. *Id.* at col. 1, l. 55 – col. 2, l. 19. The ‘904 Patent is generally directed to the use of a computer-based system to dynamically create customized proposals for potential purchasers of a product. *Id.* at col. 2, ll. 20-29. The disclosed embodiments in the ‘904 Patent describe a computerized system that receives answers from customers, selects images and text based upon the customer’s answers, and integrates the images and text to generate a customized proposal for sale of the product. *Id.* at col. 2, ll. 30-47.

Thus, the invention described in the '904 Patent solves many of the problems associated with the traditional generic brochure.

B. Background Regarding the Present Dispute.

As alluded to by Petitioner, the 904 Patent is part of a family of patents that has a long history of licensing activities. In fact, the family of patents to which the '904 Patent belongs has been licensed by companies in the automotive industry, retail industry, photography industry and others. *Ex. 2001* at p. 12 (transcript p. 46, ll. 6-12). Indeed, “Literally, every significant automobile manufacturer selling cars in the United States has paid for a license to use CWC’s patent. Even Hyundai’s sister company, Kia, respected the [patent family] and paid for a license.” *Id.* at p. 15 (transcript p. 59, ll. 16-22). Petitioner, HMA, refused to license CWC’s patent portfolio and in a prior civil litigation, *Clear With Computers LLC v. Hyundai Motor America, Inc.*, Case No. 6:09 CV 479-LED (E.D. Tex), was found by a jury to infringe U.S. Patent 7,606,739 (the '739 Patent), the parent of the subject '904 Patent. *Ex. 2002* at p. 1. That judgment was affirmed on appeal, Appeal No. 2012-1291 (Fed. Cir. 2103). *Ex. 2003* at p. 2.

Petitioner now seeks to re-litigate many of the issues that have already been decided in connection with the '739 Patent in this forum, in effect using

the Board as a court of last resort. In doing so, however, Petitioner offers no new constructions of any disputed claim terms, no non-cumulative prior art references to apply against the claims, and no reasoned bases for the allegations of obviousness when applying these references. In short, the petition fails to demonstrate why this is an exceptional case in which serious doubts about the patent's validity are raised, thus warranting *inter partes* review.

3. Notice of Related Matters.

The '904 Patent is asserted in the following litigation: *Clear with Computers, LLC v. Hyundai Motor America, Inc.*, Case No. 6:12-cv-777-LED (E.D. Tex.). This litigation remains pending.

The '904 Patent is also the subject of IPR2013-00104, filed January 16, 2013, before the USPTO PTAB.

In addition, *Clear With Computers LLC v. Hyundai Motor America, Inc.*, Case No. 6:09 CV 479-LED (E.D. Tex), now Appeal No. 2012-1291 (Fed. Cir.), is a judicial proceeding involving the '739 Patent. After a jury trial, HMA was found to infringe the '739 Patent and that judgment was affirmed on appeal.

4. Claim Terms Requiring Construction

The '904 Patent has expired. The Board's review of the claims of an expired patent is similar to that of a district court's review. *In re Rambus, Inc.*, 694 F.3d 42, 46 (Fed. Cir. 2012). The principle set forth by the court in *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2005) (words of a claim "are generally given their ordinary and customary meaning" as understood by a person of ordinary skill in the art in question at the time of the invention) should be applied since the expired claims are not subject to amendment.

Although the claims of the '904 Patent have yet to be construed in the concurrent litigation, the terms of the '739 Patent and U.S Patent 5,615,342 (the '342 Patent), a grandparent of the present '904 Patent, were previously construed in prior litigations between the parties. Petitioner HMA has suggested using the constructions adopted by the district court in those prior litigations involving the '739 Patent and '342 patent for similar terms of the claims in the subject '904 Patent, Petition at pp. 20-22, however, in doing so Petitioner has not accurately represented those constructions. For example, although the district court construed the term "proposal" as "information intended for conveyance to a potential customer", Ex. 1009 at 7-8, Petitioner has represented the construction as "information intended for conveyance to a

customer”. Petition at p. 21. The Patent Owner has no objection to the Board adopting the same constructions of the terms as found by the district court, as they represent the “ordinary and customary meaning” of these terms as would be understood by a person of ordinary skill in the art at the time of the invention *Phillips, supra*, 415 F.3d at 1316, but disagrees with Petitioner’s modifications to same.

For the convenience of the Board, below is presented a summary of the Patent Owner’s proposed claim constructions, except for those for which a plain and ordinary meaning is appropriate, as adopted by the district court. *See Ex. 1009* at pp. 12-18.

Claims in which Term Appears	Claim Term for Construction	Proposed Construction
1, 4-5, 16, 21	proposal	information intended for conveyance to a potential customer
1, 6-8, 10-12, 17-21	database	a collection of logically related data stored together in one or more computerized files

1, 10-12, 19-21	static database	a database that is not alterable during generation of a composite visual output
1, 6, 7, 12, 17, 20, 21	active database	a database that is alterable based on user input
1, 4, 16, 21	selection device	computer code data structure

5. Argument

A. Nohmi Fails to Teach an Active Database as Recited in Claims 1 and 21.

The Petition alleges that Nohmi et al., “Multimedia Presentation Systems – Prototyping for electronic Catalogs”, 38th National Convention of the Information Processing Society of Japan (1989) (hereinafter “*Nohmi*”) (HMA Ex. 1001) teaches the “active database” feature recited in independent claims 1 and 21 of the ‘904 Patent. Petition at pp. 28, 44. This contention is wrong. Hence, no reasonable likelihood that Petitioner will prevail as to any of

the challenged claims exists.

Independent claims 1 and 21 each recite “an active database operatively connected to [a] selection device, [and configured to store a user’s product interests] [wherein the active database is configured to store information regarding the interests of a user obtained via the user interface]”. ‘904 Patent, claim 1 at col. 38, ll. 53-55; claim 21, col. 40, ll. 3-6. As discussed above, in the litigations involving other patents in this family the district court construed the term “active database” as “a database that is alterable based on user input”. *Ex 1009* at p. 12-13. *Nohmi* does not teach or suggest any such active database.

Nohmi describes a presentation system in which pages have embedded hyperlinks (which *Nohmi* refers to as “keys” or “natural icons” when they are included in an image), allowing users to navigate between objects directly. *Ex 1001* at p. 1. *Nohmi*’s Figure 2, reproduced here, illustrates this functionality.

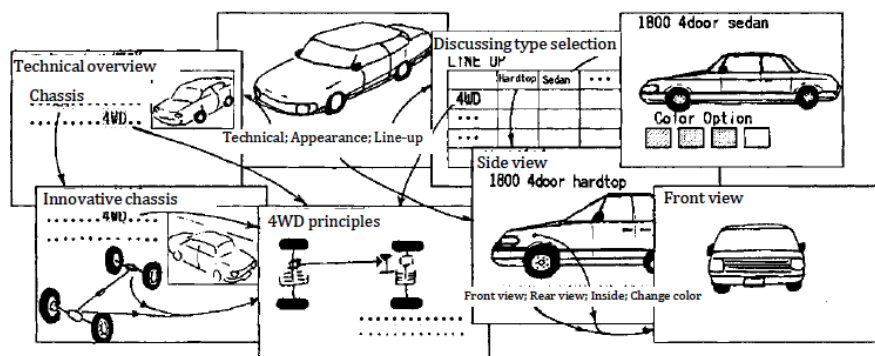


Figure 2: Outline of functions and image representation of a search

By associating keys and natural icons with various text and images, users may navigate between items of interest in the fashion customary to those familiar with hypermedia. *Id.* at p. 2.

The structure of individual pages is also discussed by *Nohmi*. In particular, pages are made up of a number of elements, including text, images, keys, captions, and menus with

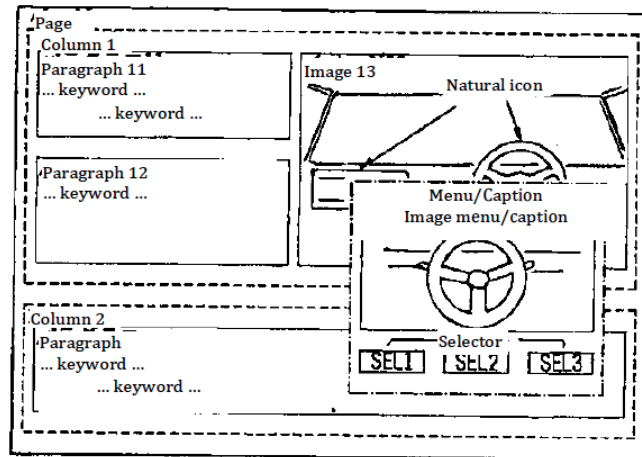


Figure 3: Page structure

selection elements. *Id.* This structure is illustrated in *Nohmi's* Figure 3.

“Multiple pages having the foregoing structure are each managed as independent objects”. *Id.* at pp. 2-3. Individual pages can be readily called up using a list structure (illustrated in *Nohmi's* Figure 4), in which a page may be specified by a pointer associated with a key. *Id.* at p. 3.

All of these pages are included on static media, specifically a CD-ROM. *Id.* at p. 1, and see *Petition* at 29. In fact, *Nohmi* is precisely concerned with distributing what was previously a hard copy catalog as a plurality of hypermedia pages on such read-only media. *Nohmi* at p. 1. In such a scheme,

there is no facility to store user input and no need to store user input. The pages are static pages and are not alterable by user input. When a user makes a color selection (as highlighted in the petition), *Nohmi* simply presents a page that has been processed so as to display the selected color. *Id.* at p. 1 (“Simulations for changing the color of the body”). Such transitory elements do not constitute a database, for they are not “stored”. CD-ROMs, by their very nature, cannot be written to once created.

Nowhere then does *Nohmi* describe altering any database information based on user input as is required for an active database. The pages stored on the CD-ROM before user interaction are the same pages that exist on the CD-ROM after user interaction. Indeed, this is the point of having a presentation system that uses CD-ROM media. See *Id.* at p. 1 (distinguishing the proposed presentation system from other multimedia databases).

In his declaration, Dr. Fox opines that the active database limitation is met by a record of a user’s selections. *Ex. 1012* at ¶ 78. Missing from this analysis is any showing of where *Nohmi* actually describes storing such a record. In fact, the user selections are all transitory, as shown in *Nohmi*’s Figure 2, above, and there is no storing of selections as hypothesized by Dr. Fox.

Regarding the key elements referred to in *Nohmi*’s section 3.3, it is clear

that *Nohmi* is referring to keys or natural icons (i.e., hyperlinks) that are included in pages when they

are stored on the CR-ROM media. This is readily evident from *Nohmi*'s Figure 2, where selection of a key such as

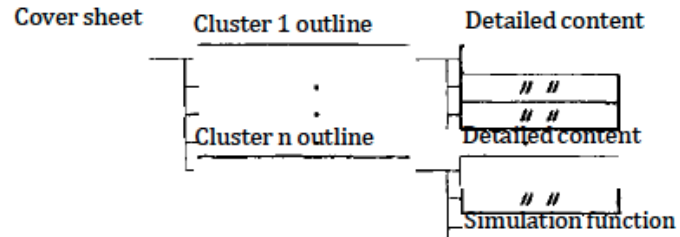


Figure 1: Media structure

“Chassis” calls the page that describes an “Innovative chassis”. Furthermore, *Nohmi* made this point quite clearly in Figure 1, showing the structured nature of the pages, as if they were included in a catalog book.

Thus, *Nohmi* fails to teach or suggest an “active database” as recited in each of the challenged independent claims. Accordingly, Petitioner cannot demonstrate any reasonable likelihood that it will prevail as to these claims (or any respective dependent claims) and this proposed institution of *inter partes* review proceedings should be denied.

B. *Nohmi* is Cumulative to References Already Considered by the USPTO in Connection with the ‘904 Patent.

During prosecution of the application which led to the ‘904 Patent, the USPTO examiner considered over 100 U.S. and foreign patent references and even more non-patent references, including those alleged by HMA to invalidate

the claims of the '793 Patent in the prior litigation. The teachings of *Nohmi* offer nothing new that has not already been considered in connection with the patentability of the present claims.

Consider, for example, the *Miyaoka* reference, "Image Processing in Presentation Systems", Journal of the Institute of Electronics, Information, and Communication Engineers, v. 74, no. 4, pp. 392-397 (April 1991), cited by Petitioner as Ex. 1003 and previously considered by the USPTO in connection with the patentability of the present claims. Petitioner's declarant, Dr. Fox, equates *Miyaoka* with *Nohmi*, *Ex. 1012* at ¶ 113, in part because of the overlapping authorship of the references. *Id.* In fact, *Miyaoka* is a paper by the same authors as the *Nohmi* reference, discussing the same system discussed in the *Nohmi* reference. The USPTO has already considered this subject matter in this precise context and determined that the present claims are patentable thereover. Thus, *Nohmi* is cumulative of references cited during that prosecution, and the Board should decline to institute *inter partes* review on this basis. *See* 35 U.S.C. 325(d) ("In determining whether to institute or order a proceeding under this chapter, chapter 30, or chapter 31, the Director may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the

Office.”), and 37 C.F.R. § 42.1(b).

C. The Petition Fails to Establish a Reasonable Likelihood that at Least One of Claims 1-8, 10, 12 and 14-17 is Unpatentable over Nohmi in View of Hill.

The Petition alleges that claims 1-8, 10, 12 and 14-17 are obvious under 35 U.S.C. § 103 in view of the combined teachings of *Nohmi* and *Hill* (Ex 1002). Petition at pp. 25 *et seq.* In doing so, Petitioner relies on *Nohmi* for teaching the “active database” limitation. As discussed above, this contention is false. Therefore, even if one were to combine the teachings of these references, one would not arrive at the claimed invention. Hence, no reasonable likelihood that Petitioner will prevail as to any of the challenged claims exists, *CFMT, Inc. v. Yieldup Int’l. Corp.*, 349 F.3d 1333, 1342 (Fed. Cir. 2003) (obviousness requires a suggestion of all limitations in a claim), and this proposed ground for institution of *inter partes* review proceedings should be denied.

D. The Petition Fails to Establish a Reasonable Likelihood that at Least One of Claims 9 and 18 is Unpatentable over Nohmi in View of Hill and Miyaoka.

The Petition alleges that claims 9 and 18 are obvious under 35 U.S.C. § 103 in view of the combined teachings of *Nohmi* and *Miyaoka* (Ex. 1003).

Petition at pp. 36 *et seq.* In doing so, Petitioner relies on *Nohmi* for teaching the “active database” limitation. As discussed above, this contention is false. Therefore, even if one were to combine the teachings of these references, one would not arrive at the claimed invention. Hence, no reasonable likelihood that Petitioner will prevail as to any of the challenged claims exists and this proposed ground for institution of *inter partes* review proceedings should be denied.

E. The Petition Fails to Establish a Reasonable Likelihood that at Least One of Claims 11 and 19 is Unpatentable over Nohmi in View of Hill and the Complete Car Care Cost Guide.

The Petition alleges that claims 11 and 19 are obvious under 35 U.S.C. § 103 in view of the combined teachings of *Nohmi*, *Hill* and *the Complete Car Care Cost Guide* (Ex 1004). Petition at pp. 39 *et seq.* In doing so Petitioner relies on *Nohmi* for teaching the “active database” limitation. As discussed above, this contention is false. Therefore, even if one were to combine the teachings of these references, one would not arrive at the claimed invention. Hence, no reasonable likelihood that Petitioner will prevail as to any of the challenged claims exists and this proposed ground for institution of *inter partes* review proceedings should be denied.

F. The Petition Fails to Establish a Reasonable Likelihood that at Least One of Claims 13 and 20 is Unpatentable over Nohmi in View of Hill and Von Kohorn.

The Petition alleges that claims 11 and 19 are obvious under 35 U.S.C. § 103 in view of the combined teachings of *Nohmi*, *Hill* and *Von Kohorn* (*Ex 1005*). Petition at pp. 41 *et seq.* In doing so Petitioner relies on *Nohmi* for teaching the “active database” limitation. As discussed above, this contention is false. Therefore, even if one were to combine the teachings of these references, one would not arrive at the claimed invention. Hence, no reasonable likelihood that Petitioner will prevail as to any of the challenged claims exists and this proposed ground for institution of *inter partes* review proceedings should be denied.

G. The Petition Fails to Establish a Reasonable Likelihood that Claim 21 is Unpatentable over Nohmi in View of Hill, Miyaoka, the Complete Car Care Guide and Von Kohorn.

The Petition alleges that claim 21 is obvious under 35 U.S.C. § 103 in view of the combined teachings of *Nohmi*, *Hill*, *Miyaoka*, *the Complete Car Care Guide* and *Von Kohorn*. Petition at pp. 43 *et seq.* In doing so Petitioner relies on *Nohmi* for teaching the “active database” limitation. As discussed above, this contention is false. Therefore, even if one were to combine the

teachings of these references, one would not arrive at the claimed invention.

Hence, no reasonable likelihood that Petitioner will prevail as to any of the challenged claims exists and this proposed ground for institution of *inter partes* review proceedings should be denied.

H. The Petition Fails to Establish a Reasonable Likelihood that at Least One of Claims 1-8, 10, 12, and 14-17 is Unpatentable over Nohmi in View of Hill and Miyaoka.

The Petition alleges that claims 1-8, 10, 12, and 14-17 are obvious under 35 U.S.C. § 103 in view of the combined teachings of *Nohmi*, *Hill* and *Miyaoka*. Petition at pp. 46 *et seq.* In doing so Petitioner substitutes the teachings of *Miyaoka* for those of *Nohmi* concerning the “active database” limitation. As discussed above, *Miyaoka* and *Nohmi* actually discuss the same endeavor. It was demonstrated that this endeavor does not include the “active database” limitation because there is no altering of any database information based on user input. The pages presented to a user and that are stored on a CD-ROM before any user interaction are the same pages that exit on the CD-ROM after user interaction. Hence, *Miyaoka* cannot cure the deficiencies of *Nohmi* and there is no reasonable likelihood that Petitioner will prevail as to any of the challenged claims exists and this proposed ground for institution of *inter partes*

review proceedings should be denied.

I. The Petition Fails to Establish a Reasonable Likelihood that at Least one of Claims 1-8, 10, 12 and 14-17 is Unpatentable over Nohmi in View of Hill and Kobayashi.

The Petition alleges that claims 1-8, 10, 12 and 14 are obvious under 35 U.S.C. § 103 in view of the combined teachings of *Nohmi*, *Hill*, and *Kobayashi* (*Ex. 1006*). Petition at pp. 48 *et seq.* In doing so Petitioner relies on *Nohmi* for teaching the “active database” limitation. As discussed above, this contention is false. Therefore, even if one were to combine the teachings of these references, one would not arrive at the claimed invention. Hence, no reasonable likelihood that Petitioner will prevail as to any of the challenged claims exists and this proposed ground for institution of *inter partes* review proceedings should be denied.

J. The Petition Fails to Establish a Reasonable Likelihood that at Least one of Claims 1-8, 10, 12, 14, 16 and 17 is Unpatentable over Nohmi in View of Roux.

The Petition alleges that claim 21 is obvious under 35 U.S.C. § 103 in view of the combined teachings of *Nohmi* and *Roux* (*Ex. 1007*). Petition at pp. 43 *et seq.* In doing so Petitioner relies on *Nohmi* for teaching the “active

database” limitation. As discussed above, this contention is false. Therefore, even if one were to combine the teachings of these references, one would not arrive at the claimed invention. Hence, no reasonable likelihood that Petitioner will prevail as to any of the challenged claims exists and this proposed ground for institution of *inter partes* review proceedings should be denied.

K. Petitioner Fails to Explain Why it Would be Necessary to Institute Proceedings on Multiple Redundant Grounds.

The Petition has specified redundant grounds of rejection for at least claims 1-8, 10, 12 and 14-17, but has failed to articulate any reasonable basis for the necessity of instituting proceedings on such bases. The PTAB has previously articulated two methods for handling redundancies. If any one ground can be determined to be “better from all perspectives, Petitioner should assert the stronger ground and not burden the Patent Owner and the Board with the other.” *Liberty Mutual Ins. Co. v. Progressive Casualty Ins. Co.*, CBM2012-00003, slip op., p. 12, ll. 14-16 (PTAB 2013). Alternatively, if the Petitioner requires multiple grounds be sustained with regard to the same claim, the Petitioner must set forth a clear description in the petition explaining why the grounds are not redundant. Specifically, the PTAB has required a “bi-

directional explanation” of why each ground is better in some respect than each other ground. For example, in a case of two redundant grounds: “[o]nly if the Petitioner reasonably articulates why each ground has strength and weakness relative to the other should both grounds be asserted for consideration.” *Id.* at p. 12, ll. 17-19. Here, this burden has not been met, hence, institution of proceedings on such multiple grounds would be inappropriate.

6. Conclusion

For at least the foregoing reasons, the Board should not institute *inter partes* review of the ‘904 Patent on the grounds proposed by Petitioner.

Respectfully submitted,

Dated: June 6, 2013

/Tarek N. Fahmi/

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing
PATENT OWNER PRELIMINARY RESPONSE
and its supporting exhibits were served on June 6, 2013, by filing this
document through the Patent Review Processing System as well as delivering,
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