IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

FLORENCE WALLACE, ET AL.	:	**CONSOLIDATED TO:**
	:	
Plaintiffs,	:	**CIVIL ACTION NO. 3:09-cv-0286**
	:	
v.	:	
	:	(JUDGE CAPUTO)
ROBERT J. POWELL, ET AL.	:	
	:	
Defendants.	:	

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

WILLIAM CONWAY, ET AL.	:	
	:	
Plaintiffs,	:	CIVIL ACTION NO. 3:09-cv-0291
	:	
v.	:	
	:	(JUDGE CAPUTO)
MICHAEL T. CONAHAN, ET AL.	:	
	:	
Defendants.	:	

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

H.T., ET AL.	:	
	:	
Plaintiffs,	:	CIVIL ACTION NO. 3:09-cv-0357
	:	
v.	:	
	:	(JUDGE CAPUTO)
MARK A. CIAVARELLA, ET AL.	:	
	:	
Defendants.	:	

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IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

SAMANTHA HUMANIK,	:	
	:	
Plaintiffs,	:	CIVIL ACTION NO. 3:09-cv-0630
	:	
v.	:	
	:	(JUDGE CAPUTO)
MARK A. CIAVARELLA, JR., ET AL.	:	
	:	
Defendants.	:	

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BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR
LEAVE TO AMEND MASTER COMPLAINT FOR CLASS ACTIONS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

Other Authorities

TABLE OF CONTENTS

TABLE OF EXHIBITS

I. INTRODUCTION

On August 27, 2009, Plaintiffs filed a Motion for Leave to File an Amended Master Complaint for Class Actions ("Master Complaint") requesting this Court's permission to amend the Master Complaint pursuant to Federal Rule of Civil Procedure 15(a) and M.D. Pa. Local Rule 15.1. (*See* Doc. No. 250.) The Court and Defendants will be better informed of the factual basis for Plaintiffs' claims, and Plaintiffs' claims will rest on additional factual support, if Plaintiffs are permitted to supplement the current allegations in the Master Complaint to include the following:

(1) Recently obtained information about a state audit conducted by the Bureau of Financial Operations ("BFO") of Defendant PA Child Care, LLC (PA Child Care) and its contract with Defendant Luzerne County as reported in the BFO's January 11, 2008 letter to the Office of Children, Youth, and Families (the "BFO letter") and in the attachments to the BFO letter, together attached hereto as Exhibit "A." These documents reveal the BFO's findings of improper contract negotiations and sweetheart contractual terms that generated grossly excessive profits from public funds. (*See* Proposed Am. Compl. ¶¶ 671-97.)

(2) More specific allegations that the Luzerne County District Attorney and Public Defender, as county policy-makers, acted with deliberate indifference to the rights of the juvenile Plaintiffs, thereby subjecting Luzerne County to liability under 42 U.S.C. § 1983 "by participating in and sanctioning . . . illegitimate proceedings [in Ciavarella's courtroom] that failed to comply with the mandates of the United States Constitution, the Pennsylvania Juvenile Act, or the Pennsylvania Supreme Court Rules of Juvenile Court Procedure." (*Id.* ¶ 728.)

(3) The recent plea agreements, withdrawals of pleas, and negotiations in the criminal investigations related to this case. (*Id.* ¶¶ 731, 733.)

(4) The facts underlying Special Master Arthur E. Grim's Second and Third Interim Reports and Recommendations to the Pennsylvania Supreme Court, which he submitted pursuant to his authority granted by the Supreme Court as part of its King's Bench proceedings recommending *vacatur* and expungement for all youth who appeared before Ciavarella between 2003 and May 2008. (*Id.* ¶¶ 737-39.)

For the reasons set forth below, none of the Third Circuit's articulated bases for denial of amendment exist here. Accordingly, Plaintiffs' Motion should be

granted and Plaintiffs should be permitted to file their proposed Amended Master Complaint.

II. RELEVANT FACTUAL AND PROCEDURAL BACKGROUND

On June 25, 2009, Plaintiffs filed a Master Complaint, consolidating the factual allegations and claims on behalf of the class-action Plaintiffs in Case Nos. 09-0291 and 09-0357. (*See* Doc. No. 136.) On July 27, 2009, Luzerne County filed a Rule 12(b)(6) Motion to Dismiss All Claims Against It and a Brief in Support of its Motion. (*See* Doc. Nos. 218 and 219.) In these papers, and in subsequent communications, Luzerne County maintains that Plaintiffs have "just one (1) factual allegation" directed at Luzerne County in the Master Class Action Complaint. (*See* Doc. No. 218, at 2); *see also* Letter from Tim Myers, Esquire, counsel for Luzerne County, to Daniel Segal, Esquire (Aug. 6, 2009) ("Out of the five hundred and thirty seven (537) paragraphs of factual allegations in the Amended Class Action Complaint, there is just one (1) factual allegation directed at Luzerne County."), attached hereto as Exhibit "B."

A. The BFO Letter And Allegations Against Luzerne County

After the filing of the Master Complaint, Plaintiffs obtained the BFO letter detailing the BFO's audit of PA Child Care. Specifically, the BFO conducted an audit of PACC for the 2004-2005 fiscal year exposing inappropriate contractual terms and excessive profits generated by the contract between PA Child Care and

Luzerne County. Such revenues allowed Defendant Robert Powell, as co-owner of PA Child Care, to take profit distributions and pay off the former judges who violated the constitutional rights of juveniles. In February 2007, the BFO released a draft audit report, which evoked self-serving letter responses and meetings with officials and attorneys for both Luzerne County and PA Child Care. The BFO audit reports also exposed troubling information about Luzerne County officials entering contracts with PA Child Care without following proper state and federal regulations thus allowing excessive amounts of public money to be paid to the private detention center yielding improper and excessive profits. The BFO's specific findings, which have been incorporated into Plaintiffs' proposed Amended Master Complaint, include, *inter alia*, the following:

(1) The lease negotiated by Luzerne County with PA Child Care projected an exorbitant profit of 34% for PA Child Care in 2004, which was much higher than profits permitted by governmental regulations requiring the County to perform a cost analysis to ensure PA Child Care would earn a "fair and reasonable" profit interpreted by the BFO to be 10%.

(2) PA Child Care's projected profit of $1.6 million dollars for 2004 on its face shows that Luzerne County failed to perform the required analysis or simply disregarded the regulations.

(3) In 2003, Luzerne County paid $2.3 million under the lease with PA Child Care. This amount exceeded the projected cost of depreciation and interest of $686,333.00 (if Luzerne County owned the facility) and, thus, was unreasonable under OMB Budget Circular A-87, Attachment B, Section 38(d), an accepted benchmark for determining rent.

(4) The BFO determined that the contract was a capital lease and therefore PA Child Care should reimburse State and Federal agencies *$1.6 million* annually of the $2.3 million that was paid.

(5) Luzerne County officials who negotiated the lease agreed to a non-standard placement agreement that lacked usual audit rights and also obligated the County to pay for the day of discharge. This is inconsistent with several sections of the Pennsylvania Code Chapter 3170.11(b) and previous placement agreements for Luzerne County juveniles.

(*See* Proposed Am. Compl. ¶¶ 691-93.)

Relying on the information contained in the BFO letter, Plaintiffs added new allegations against Luzerne County into their proposed Amended Master Complaint; these new allegations show how actions by Luzerne County officials fit into the scheme culminating in the violations of juveniles' constitutional rights and

payoffs to Conahan and Ciavarella as described in the Complaints.[1] On the basis of these newly added allegations, a reasonable jury could easily conclude that the leases and other agreements between PA Child Care and Luzerne County were part of the *quid pro quo* alleged in the Complaints. *Cf. Evans v. United States*, 504 U.S. 255 (1992) (affirming a public official's conviction of extortion in violation of the Hobbs Act because the government properly showed the public official obtained a payment, to which he was not entitled, knowing that the payment was made in return for official acts).[2] The newly added allegations based on the BFO letter thus increase the number of allegations against Luzerne County, fit Luzerne County into the scheme described in the Complaints, and strengthen the allegations of the previously alleged *quid pro quo* between other Defendants.

Additionally, in response to Luzerne County's motion to dismiss, Plaintiffs added allegations clarifying their basis for alleging, pursuant to *Monell v. Department of Social Services*, 436 U.S. 658 (1978), that Luzerne County violated 42 U.S.C. § 1983. Specifically, Plaintiffs added allegations that:

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[1] Plaintiffs did not, however, amend the Master Complaint to add new claims against Luzerne County.

[2] Justice Kennedy concurred stating: "The official and the payor need not state the quid pro quo in express terms, for otherwise the law's effect could be frustrated by knowing winks and nods. The inducement from the official is criminal if it is express or if it is implied from his words and actions, so long as he intends it to be so and the payor so interprets it." *Id*. at 274.

> County actors with responsibility for ensuring the lawful and constitutional operation of the Luzerne County juvenile court – including, but not limited to, the Luzerne County District Attorney and the Luzerne County Public Defender, both County decision makers – routinely, and as a matter of custom, practice, and policy, acted outside the law and with deliberate indifference to constitutional rights of the plaintiffs by participating in and sanctioning these illegitimate proceedings that failed to comply with the mandates of the United States Constitution, the Pennsylvania Juvenile Act, or the Pennsylvania Supreme Court Rules of Juvenile Court Procedure.

(Proposed Am. Compl. ¶ 728; *see also id.* ¶¶ 818-29 (reflecting similar amendments to Count VIII against Luzerne County).) These newly added allegations thus clarify Plaintiffs' *Monell* claim against Luzerne County.

B. Proceedings In The Related Criminal Cases

Also since Plaintiffs filed the Master Complaint, various Defendants in this action have entered and withdrawn guilty pleas related to the events underlying Plaintiffs' Complaints in this action. Most importantly, on July 30, 2009, Judge Kosik rejected Conahan's and Ciavarella's plea agreements. In a memorandum accompanying his Order, he recognized "the Government's abundance of evidence of [Ciavarella's] routine deprivation of children's constitutional rights by commitments to private juvenile facilities he helped to create in return for a 'finder's fee' in direct conflict of interest with his judicial roles." Mem. and Order, No. 09-28, at 4 (July 30, 2009). The new allegations reflecting these recent events likewise strengthen Plaintiffs' allegations of a *quid pro quo* scheme.

C. Proceedings In The Pennsylvania Supreme Court

Finally, since Plaintiffs filed the Master Complaint, there have been major developments in the Pennsylvania Supreme Court proceedings seeking equitable relief for the youth who appeared before Ciavarella from 2003 through May 2008. Specifically, on August 12, 2009, Special Master Grim issued his Third Interim Report and Recommendations to the Pennsylvania Supreme Court recommending, *inter alia*, that all delinquency adjudications between 2003 and May 2008 that occurred before former judge Ciavarella be vacated.[3]

* * *

The amended Case Management Order entered on June 22, 2009 recognizes the need for prospective amendments in the pleadings and allows Plaintiffs to file motions for amendments until September 10, 2009. (*See* Doc. No. 132 at ¶ 8.) In accordance with that Order, Plaintiffs filed a Motion for Leave to File an Amended Master Complaint for Class Actions on August 27, 2009 and attached a proposed Amended Master Complaint for Class Actions, and a red-lined version, as required

[3] Special Master Grim further recommended that he individually review the few remaining cases "in which the juvenile has not received final discharge from commitment, placement, probation . . . or in which the juvenile has not paid all fines, restitution, and fees assessed against him/her" to determine an appropriate resolution. *See* Third Interim Report and Recommendations of the Special Master at ¶ B.1.2, attached to the proposed Amended Master Complaint for Class Actions as Exhibit "O."

by the Federal Rules of Civil Procedure and Local Rules. (*See* Doc. Nos. 250 and 251.)

III. LEGAL ARGUMENT

Federal Rule of Civil Procedure 15 provides, in pertinent part, that "a party may amend the party's pleading only by leave of court . . . and leave shall be freely given when justice so requires." Fed. R. Civ. P. 15(a). Courts should generally grant leave to amend "[i]n the absence of any apparent or declared reason – such as undue delay, bad faith or dilatory motive on the part of the movant, repeated failure to cure deficiencies by amendments previously allowed, undue prejudice to the opposing party by virtue of the allowance of the amendment, futility of the amendment, etc." *Forman v. Davis*, 371 U.S. 178, 182 (1963); *see also Adams v. Gould Inc.*, 739 F.2d 858, 864 (3d Cir. 1984), *cert. denied*, 469 U.S. 1122 (1985) (holding that amendment should be allowed under "liberal pleading philosophy" unless there is undue delay, bad faith or prejudice because of delay). "A liberal, pro-amendment ethos dominates the intent and judicial construction of Rule 15(a)(2)." James Wm. Moore, *Moore's Federal Practice* § 15.14[1] (3d ed. 2009).

The Third Circuit Court of Appeals has stated that "prejudice to the non-moving party is the touchstone for the denial of an amendment." *Cornell & Co. v. Occupational Safety & Health Review Comm'n*, 573 F.2d 820, 823 (3d Cir. 1978). "In the absence of substantial or undue prejudice, denial . . . must be based on bad

faith or dilatory motives, truly undue or unexplained delay, repeated failures to cure the deficiency by amendments previously allowed, or futility of amendment." *Lorenz v. CSX Corp*., 1 F.3d 1406, 1414 (3d. Cir. 1993)(citing *Heyl & Patterson Int'l, Inc. v. F.D. Rich Housing of the V.I., Inc*., 663 F.2d 419, 425 (3d Cir. 1981)).

Because, as set forth below, none of the bases for denial exist here, Plaintiffs' Motion to amend should be granted.

A. Plaintiffs' Proposed Amendment Will Not Cause Undue Delay Or Undue Prejudice

This is Plaintiffs' first request to amend the Master Complaint, and it was made well within the time period allotted by this Court. It therefore cannot constitute "undue delay," and the proposed amendment clearly imposes no "undue prejudice" on Defendants. In analyzing whether an amendment to the pleadings is warranted, the concept of undue delay is inextricably woven with the concept of prejudice. *See Boileau v. Bethlehem Steel Corp*., 730 F.2d 929, 939 (3d Cir. 1984).

In order to determine whether there is undue delay, the court must look at the motives for the moving party not filing sooner, as well as the prejudicial effect on the defendant. *See Adams*, 739 F.2d at 868. Defendants cannot argue that amending the Master Complaint constitutes undue delay because Plaintiffs filed the original Master Complaint less than three months ago and this case is still in the earliest stages of litigation. Moreover, the Court expressly gave Plaintiffs until September 10, 2009 to request leave to amend the pleadings. Plaintiffs' motives

are well-founded – Plaintiffs simply seek to add to the Master Complaint facts that have come to light and information about proceedings that have occurred after their filing of the Master Complaint. Plaintiffs were obviously unable to include these allegations when they filed the Master Complaint and could not reasonably be said to have been in a position to have filed the Proposed Amended Complaint any earlier in the litigation. Plaintiffs seek this amendment in light of the Supreme Court's decision in *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949-50 (2009) (intimating a heightened pleading standard and emphasizing that a plaintiff must plead "sufficient factual matter" and must show "that the allegations of his or her complaint[] are plausible"). Therefore, Plaintiffs cannot be accused of causing undue delay at this early stage of the litigation.

Just as importantly, Defendants cannot argue that they will be unduly prejudiced if Plaintiffs are permitted to amend their Master Complaint. The question of prejudice focuses on whether the amendments place an unfair burden on the opposing party. *Adams*, 739 F.2d at 868. Prejudice does not result merely from a party's having to incur additional counsel fees; nor does it result from a delay in the movement of the case. *Id*. at 869. Prejudice under Rule 15 "means undue difficulty in prosecuting [or defending] a lawsuit as a result of a change in tactics or theories on the part of the other party." *Deakyne v. Commissioners of Lewes*, 416 F.2d 290, 300 (3d Cir. 1990).

The prejudice factor thus requires the Court to focus on the effect of the amendment on the Defendants. At this time, in this case, none of the Defendants have filed responsive pleadings and very limited discovery has been conducted. In fact, Luzerne County (the Defendant most affected by the proposed amendments), as well as eight other Defendants, have not produced any documents to date. Additionally, this is the first proposed amendment sought by Plaintiffs, and Plaintiffs' request is made within the time ordered by the Court. Finally, and importantly, PA Child Care, Powell, and Luzerne County cannot claim to be prejudiced by newly added allegations pertaining to the BFO letter because these Defendants had full knowledge of the audit and its findings as early as 2004, as described within the letter itself and as evidenced in the correspondence between counsel for PA Child Care and Luzerne County.

Based on these circumstances, Plaintiffs' proposed amendments do not cause the required prejudice: the amendments do not impose an "unfair burden" on Defendants in litigating this case, nor will Defendants experience "undue difficulty" in defending the lawsuit moving forward. Plaintiffs simply seek to create a more complete record of the factual basis for their allegations and to support their allegations with specific and pertinent facts. Thus, given the current procedural posture of this case, Defendants' full knowledge of the proposed amended allegations, the fact that the Master Complaint has not previously been

amended, and the absence of any identifiable prejudice, the Court should permit Plaintiffs to amend the Master Complaint.

B. Plaintiffs Do Not Seek For Leave To Amend In Bad Faith Or With A Dilatory Motive

Secondly, Plaintiffs' Motion for Leave to Amend must be granted because the proposed amendments are not sought in bad faith. Indeed, it is apparent from the face of the proposed Amended Master Complaint that Plaintiffs' request is in good faith. The inclusion of newly discovered facts – a majority of which are found in the BFO letter – were unknown to Plaintiffs until after the filing of their Master Complaint. Additionally, Plaintiffs' request seeks to make the pleading as specific and complete as possible in order clearly lay out the facts and so that Defendants are fully aware of the basis for Plaintiffs' claims as the litigation proceeds. *See generally Iqbal*, 129 S. Ct. 1937. Therefore, given the complete absence of evidence of bad faith, Plaintiffs' Motion for Leave to Amend should be granted.

C. Plaintiffs' Motion To Amend Cannot Be Denied For Repeated Failure To Cure Deficiencies by Previous Amendments

Third, Plaintiffs' requested amendment cannot be denied for "repeated failures to cure deficiencies by previous amendments" because this is Plaintiffs first request to amend the Master Complaint. Moreover, this Court has not found any deficiencies in Plaintiffs' pleading. Additionally, particularly with respect to

their claim against Luzerne County, Plaintiffs' proposed amendments clarify Plaintiffs' *Monell* claim against Luzerne County, lessening the likelihood that the Court will, in the future, find deficiencies in Plaintiffs' pleading. Because the Court has not identified deficiencies to cure and because Plaintiffs have not requested any previous amendments to the Master Complaint, Plaintiffs' Motion should granted.

D. Plaintiffs' Proposed Amendments Are Not Futile

In the absence of any undue prejudice in this case, Plaintiffs' motion to amend should not be denied for futility. With respect to the standard to be applied, some district courts have recognized that "the rule applied in this Circuit permits an amendment, *regardless of its legal insufficiency*, as long as it is not frivolous." *Jenn-Air Prods. v. Penn Ventilator Inc.*, 283 F.Supp. 591 E.D. Pa. 1968) (emphasis added), *cited in Med. Accessories Ctr. Inc. v. Sharplan Lasers, Inc.*, No. 87-7402, 1991 WL 171433, at *3 (E.D. Pa. Aug. 29, 1991) (applying the lesser standard to the plaintiffs' motion for leave to amend to "clarify their claims and to add a new defendant"); *see also Mathews v. Kidder, Peabody & Co., Inc.*, 947 F. Supp. 180, 189 (W.D. Pa. 1996) (not explicitly applying the Rule 12(b)(6) standard in connection with a motion for leave to amend seeking only to add new plaintiffs and new factual allegations, rather than new claims). While other courts, "[i]n

assessing 'futility,' . . . appl[y] the same standard of legal sufficiency as applied under Rule 12(b)(6)," *Shane v. Fauver*, 213 F.3d 113, 115 (3d Cir. 2000) (citations omitted),[4] that standard is less relevant here, where Plaintiffs do not seek to add new claims, but simply seek to add new factual allegations in support of their previously pled claims.

In this case, whatever standard is used, the proposed amendments are not futile. First, the proposed amendments are obviously not frivolous. Second, even applying the Rule 12(b)(6) standard, Plaintiffs' claims relying on the newly pled facts are sufficient to state a claim upon which relief can be granted under Rule 12(b)(6). In the proposed Amended Master Complaint, Plaintiffs add facts relevant to their claims against PA Child Care, Luzerne County, Powell, Mericle, Conahan, and Ciavarella and clarify their substantive allegations against Luzerne County. As described above, the proposed Amended Master Complaint specifically defines the Luzerne County District Attorney and Luzerne County Public Defender as

[4] When considering a motion to dismiss under Rule 12(b)(6), of course, a court must "accept all factual allegations as true, construe the complaint in the light most favorable to the plaintiff, and determine whether, under any reasonable reading of the complaint, the plaintiff may be entitled to relief." *Fowler v. UPMC Shadyside*, __ F.3d __, No. 07-4285, 2009 WL 2501662 at *5 (3d Cir. Aug. 18, 2009) (quoting *Phillips v. County of Allegheny*, 515 F.3d 224, 233 (3d Cir. 2008)); *see also Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1950 (2009) ("When there are well-pleaded factual allegations, a court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.").

County actors with responsibility for ensuring the lawful and constitutional operation of the Luzerne County juvenile court. (*See* Am. Master Complaint ¶ 728.) The Amended Master Complaint further alleges that the Luzerne County District Attorney and Luzerne County Public Defender, as county actors, acted outside the law as a matter of custom, practice, and policy by routinely disregarding and denying Plaintiffs' constitutional rights over the course of five years, thus giving rise to the County's liability. (*Id*.; *see also* ¶¶ 818-29). Accordingly, taking all the well-pleaded facts in the proposed Amended Master Complaint as true, and viewing them in the light most favorable to Plaintiffs as the Court is required to do, Plaintiffs' Motion for Leave to Amend must be granted.[5]

[5] It is worth noting, too, that futility is not the absolute test for allowing Plaintiffs to amend the Master Complaint – the Third Circuit has found that "prejudice to the non-moving party is the touchstone for denial of an amendment." *Lorenz*, 1 F.3d at 1414. Thus, any colorable argument of futility – even if there were one – would be outweighed by the indisputable conclusion that Defendants are not prejudiced by Plaintiffs' proposed amendments.

IV. CONCLUSION

In light of Rule 15(a)'s requirement of liberality in granting leave to amend pleadings, because the circumstances of this case do not create a justifiable reason for this Court to deny Plaintiffs' Motion for Leave to File an Amended Master Complaint, and for the other reasons set out above, Plaintiffs' motion should be granted.

Respectfully Submitted,

/s/ Sol Weiss
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Dated: September 10, 2009

CERTIFICATE OF COMPLIANCE WITH WORD-COUNT LIMIT

I, Sol Weiss, hereby certify that the foregoing brief complies with the word limit pursuant to Local Rule 7.8(b)(2). Relying on the word-count feature of Microsoft Word, the brief and accompanying pages contain 4,235 words in total.

/s/ Sol Weiss
Sol Weiss

Dated: September 10, 2009

CERTIFICATE OF SERVICE

I, Adrianne Walvoord , hereby certify that, on this 10th day of September, 2009, the foregoing brief in support of Plaintiffs' Motion for Leave to File an Amended Master Complaint for Class Actions was filed and made available via CM/ECF to all counsel of record. Additionally, the foregoing brief was served by First Class mail upon the following:

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