

THE STATE OF NEW HAMPSHIRE

ROCKINGHAM, SS

SUPERIOR COURT

No. 215-2022-CV-00167

Steven Rand, et al.

v.

State of New Hampshire

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**MOTION TO EXCLUDE PLAINTIFFS' SUPPLEMENTAL DISCLOSURES,  
INCLUDING DISCLOSURES IN SUPPORT OF EXPERT TESTIMONY**

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The State of New Hampshire, by and through the Office of the Attorney General, moves to exclude certain of Plaintiffs' supplemental disclosures as evidence from the trial in *Contoocook Valley School District v. State*, 213-2019-CV-00069, specifically late-disclosed documents produced by Plaintiffs, which are in part supplemental disclosures in support of Plaintiffs' expert testimony. In support of this motion, the State states as follows:

**Introduction**

1. This case is set for trial on September 30, 2024. However, for the first time, less than two weeks before trial, Plaintiffs divulged nearly 300 pages of documents that Plaintiffs intend to use in their case in chief at trial.
2. Making matters worse, Plaintiffs have stated that they intend to use some of the documents to support one of their expert's opinions at trial. Yet, despite repeated requests by the State, Plaintiffs have failed to even identify those specific documents or explain how their prior expert disclosures comport with Plaintiffs' surprise production of documents on the eve of trial.
3. This is the definition of trial by surprise. Discovery has been closed for more than a year and a half. Plaintiffs' experts submitted reports in December 2022 and were deposed more

than a year ago in July 2023. Plaintiffs cannot reasonably claim these eleventh-hour disclosures are proper, and there is no conceivable reason why the documents should not have been discovered and produced long ago.

4. Allowing Plaintiffs to bootstrap this evidence into their case at the last minute presents serious prejudice because it deprives the State of the opportunity to conduct meaningful discovery into the late-disclosed materials. The State has little to no context for the documents and no opportunity to pursue written discovery requests relating to the materials or to question Plaintiffs' fact and expert witnesses about the materials except for the first time on cross-examination at trial.

5. The State promptly asked Plaintiffs to identify which of the late-disclosed documents are purported supplemental expert disclosures, but Plaintiffs have not provided any meaningful explanation.

6. Plaintiffs' undue delay in producing these documents or otherwise supplementing their disclosures should not be rewarded by allowing them to introduce the evidence at trial through witnesses—including expert witnesses—that the State, due to Plaintiffs' own conduct, has been deprived the opportunity to meaningfully examine on the withheld materials. Doing so would unduly burden and unfairly prejudice the State in exercising its right to probe information supporting Plaintiffs' claims and test Plaintiffs' witnesses' knowledge of the information in advance of trial.

7. Accordingly, the State respectfully requests that the Court exclude Plaintiffs from introducing the documents at trial; preclude Plaintiffs' witnesses, including its experts, from

testifying to or relying upon the information in the documents; and exclude any undisclosed expert opinions that in any way rely on the information in the documents.<sup>1</sup>

### **Background**

8. Discovery closed on February 17, 2023. Plaintiffs disclosed their experts on December 6, 2022, and produced two of those experts' reports that same day and one a week later. The parties never formally sought to extend the February 17, 2023 discovery deadline. Once the trial was continued to September 2023, however, the parties did agree to allow certain events to occur outside of the discovery period to accommodate schedules (which included defense counsel trying the *ConVal* matter in April and May 2023) and to facilitate preparation for trial in this case.

9. On July 6, 2023, Plaintiffs disclosed to the State their preliminary proposed witness list, which included Mr. Freeman, their other expert, and several fact witnesses. Plaintiffs' retained expert Mr. Freeman was deposed on July 13, 2023. The State's experts were deposed on July 20 and August 2, 2023.

10. On April 25, 2024, the Court issued an order lifting the stay in this case, granting in part and denying in part the State's motion for summary judgment, denying Plaintiffs' motion for partial judgment on the pleadings, and scheduling a two-week bench trial to commence on September 30, 2024. In entering these rulings, the Court specifically observed that Plaintiffs had represented, through counsel, that discovery was complete. *See* April 25, 2024 order at p. 4 ("the Court is mindful that (as the plaintiffs confirmed during the March 22, 2024 hearing) discovery in this matter is already complete.").

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<sup>1</sup> The State is concurrently filing an Expedited Motion to Continue Trial, which if granted, would give the State time to conduct the necessary discovery and analysis of the new documents and obviate the need to exclude the late-produced materials as requested by this Motion to Exclude.

11. Following this order, Plaintiffs have continued to operate as if discovery was not in fact closed. For example, Plaintiffs propounded numerous subpoenas duces tecum on several state officials on July 30—just two months before trial—seeking the production of thousands of pages of documents that were purportedly contained on the Department of Education and Department of Revenue Administration websites. Each agency, in conjunction with the Department of Justice, has worked diligently to identify and compile the documents, several of which were not on either agency’s website. Yet at the trial management conference, Plaintiffs’ counsel indicated for the first time that they were not, in fact, seeking production of the documents in question despite propounding subpoenas duces tecum. *But see* Black’s Law Dictionary at 1563 (9th ed.) (defining a subpoena duces tecum “[a] subpoena ordering the witness to appear in court and *to bring specific documents, records, or things*” (emphasis added)).

12. Similarly, Plaintiffs formally disclosed four additional fact witnesses for the first time in their witness list, which they filed on September 3. Plaintiffs had, for over a year, indicated that they may try to call certain witnesses from the *ConVal* trial, and the State repeatedly asked for the identities of these witnesses. Yet the State did not learn of the identities of the witnesses until those names appeared in a filing on August 12, and the State was not formally provided those witnesses’ names prior to receiving the witness list. The State separately moved *in limine* to exclude these witnesses, and the Court denied that motion. While the State respects the Court’s ruling, it disagrees that it suffered no prejudice due to these late disclosures. In any event, these disclosures are part of a larger pattern of Plaintiffs informing the State of the evidence they intend to rely on at trial well outside of the discovery period, after the State’s motion for summary judgment was briefed and resolved, and in the immediate leadup to trial.

13. In keeping with this pattern, the specific documents at issue here were disclosed to the State for the first time on September 17, 2024, when counsel for Plaintiffs provided the State with “additional exhibits that are not publicly available (excluding documents that were previously provided to the State).” *See* Exhibit 1 (September 17, 2024 email from Plaintiffs’ counsel).

14. Plaintiffs’ counsel also stated that “a few documents in this production are recently received supplemental disclosures for our expert, John Freeman.” *Id.* However, Plaintiffs have failed to identify which of these documents they intend to use to support Mr. Freeman’s testimony, in spite of multiple requests by the State to do so. Plaintiffs’ counsel has stated only that the production involving Dr. Freeman “includes documents that were all listed on our exhibit list filed shortly before the trial management conference.” *See* Exhibit 2 (September 20, 2024 email from Plaintiffs’ counsel). This is not a meaningful explanation, and it leaves the State guessing as to which Bates-labeled documents are actually Plaintiffs’ supplemental disclosures.

15. Moreover, Plaintiffs have not explained, despite the State’s requests, whether these documents support Dr. Freeman’s previously disclosed opinions or if they are in service of new opinions that were not disclosed as part of Plaintiffs’ expert disclosure.

16. Despite this history, the September 17, 2024 document production contained nearly 300 documents (RAND00000394 – RAND00000673) that Plaintiffs have never identified to the State as documents they intend to use at trial, never previously disclosed or produced to the State, or even suggested that any such documents would be forthcoming until dumping the documents on the State less than two weeks before trial. To be clear, these documents are not

generated or published by the State, and the State has never been made aware of the documents until the September 17, 2024 production.

17. A cursory review of the documents shows they contain detailed information relating to, among other things: specific school district programming and curricula; budgets and budget summaries; handwritten notes relating to budgeting materials; collective bargaining agreements; tax bills<sup>2</sup>; staffing data; enrollment data; salary data; building improvement plans; school calendars; school board presentations; resumes; and additional PowerPoints and spreadsheets of information relating to specific school districts. The documents also appear to contain information specifically relevant to the background and experience of Plaintiffs' fact witnesses—information produced *on or after* the depositions of certain of these same fact witnesses, such as that of Dr. Jennifer Dolloff (taken on September 13, 2024 and concluded with a short examination on September 20, 2024) and Anette Blake (taken on September 17, 2024).

### **Discussion**

18. New Hampshire courts “have long recognized that justice is best served by a system that reduces surprise at trial by giving both parties the maximum amount of information.” *Boissy v. Chevion*, 162 N.H. 388, 396, 33 A.3d 1109, 1116 (2011) (citing *Figlioli v. R.J. Moreau Cos.*, 151 N.H. 618, 626, 866 A.2d 962 (2005)). “It has long been recognized that discovery is an important procedure for probing in advance of trial the adversary's claims and his possession or knowledge of information pertaining to the controversy between the parties.” *Scotsas v. Citizens Ins. Co. of N. J.*, 109 N.H. 386, 388, 253 A.2d 831, 832 (1969).

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<sup>2</sup> Plaintiffs' counsel previously indicated that Plaintiffs may be producing additional tax bills. However, at no point until the September 17, 2024 production did Plaintiffs actually produce the tax bills or even disclose the nature of the information contained therein.

19. “[A] party must without awaiting a discovery request, provide to the other parties . . . a copy of all documents, electronically stored information, and tangible things that the disclosing party has in his or her possession, custody or control and may use to support his or her claims or defenses, unless the use would be solely for impeachment.” Super. Ct. Civ. R. 22(a)(2).

20. “Each party has a duty to supplement that party's initial disclosures promptly upon becoming aware of the supplemental information.” Super. Ct. Civ. R. 22(c). “A party who fails to timely make the disclosures required by [Super. Ct. Civ. R. 22] may be sanctioned as provided in Rule 21.” Super. Ct. Civ. R. 22(d).

21. Under Rule 21, the Court has discretion to impose sanctions against a party for engaging in discovery abuse, including, but not limited to, “an evidence sanction that prohibits the offending party from introducing certain matters into evidence.” Super. Ct. Civ. R. 21(d)(2)(C).

22. Moreover, with respect to expert disclosures, parties are entitled to know the substance of the facts and opinions about which experts are expected to testify, and the basis of those opinions. *J & M Lumber & Const. Co. v. Smyjunas*, 161 N.H. 714, 723, 20 A.3d 947, 956 (2011) (citations omitted). “A party's failure to supply this information should result in the exclusion of expert opinion testimony unless good cause is shown to excuse the failure to disclose.” *Id.* “This policy of disclosure applies even when a known factual witness acts as an expert.” *Wong v. Ekberg*, 148 N.H. 369, 372, 807 A.2d 1266, 1269 (2002) (citation omitted).

23. In this case, there is no excuse for Plaintiffs’ late disclosure.

24. Despite the parties’ agreement to allow limited discovery to occur beyond the February 17, 2023 deadline, nothing in the parties’ negotiations have contemplated last-minute

disclosure of documents for use at trial, and especially not documents used to support expert testimony.

25. Plaintiffs cannot reasonably argue that their disclosures are proper. The materials are not newly discovered evidence, but rather evidence that should have been provided well in advance of the February 2023 discovery deadline. Even if Plaintiffs argued they only “recently received” these documents from their clients or from their experts, it is no excuse for waiting until two weeks before trial to disclose them to the State.

26. Likewise, Plaintiffs’ have no excuse for failing to provide the supplemental disclosure of expert materials until more than 21 months after Dr. Freeman was disclosed and more than a year after the State deposed him.

27. There is no event or new discovery of information that Plaintiffs can point to that would precipitate the need for such a late disclosure. The late disclosure is apparently nothing more than a last-ditch attempt by Plaintiffs to shore up their case with evidence produced out of thin air for the first time.

28. In short, Plaintiffs have failed to meet their duty to timely supplement their initial disclosures in this case under Rule 22, including their expert disclosures required under RSA 516:29-b.

29. Plaintiffs’ failure deprives the State from meaningful access to the information with enough time to review and analyze the information, probe the information for its relevance to the claims and defenses at issue, conduct discovery of the information, and prepare for trial. In other words, the State will be forced to enter trial without ever having the opportunity to test the relevance and import of the information.

30. Similarly, because the information is also being used to support Plaintiffs' expert's testimony, the State is also forced to enter trial without a full understanding of Dr. Freeman's opinions and the basis for those opinions, and will be forced to learn for the first time at trial how the documents provide a basis for Mr. Freeman's opinions.

31. Thus, the risk of prejudice that the State will invariably face as a result of allowing the evidence to be introduced at trial far outweighs any reason Plaintiffs could possibly offer as their failure to disclose the information until thirteen days before trial.

32. Accordingly, the Court should exclude Plaintiffs from introducing at trial the documents it produced to the State on September 17, 2024. Likewise, the Court should exclude any of Plaintiffs' witnesses, including its experts, from testifying to or relying upon the information contained in the September 17, 2024 production.

WHEREFORE, the State respectfully requests that this Honorable Court:

A. Issue an order precluding Plaintiffs from introducing at trial the documents it produced to the State on September 17, 2024 (RAND00000394 – RAND00000673); precluding any of Plaintiffs' witnesses, including its experts, from testifying to or relying upon the information contained in the September 17, 2024 production; and excluding any undisclosed expert opinions that in any way rely on the information in the September 17, 2024 production; and

B. Grant such other and further relief as justice may require.

Respectfully submitted,

STATE OF NEW HAMPSHIRE

By its attorney,

JOHN M. FORMELLA  
ATTORNEY GENERAL

Date: September 23, 2024

By: /s/ Samuel RV Garland  
Anthony J. Galdieri, No. 18594  
Solicitor General  
Samuel Garland, No. 266273  
Senior Assistant Attorney General  
Rory S. Miller, No. 278226  
Attorney  
New Hampshire Department of Justice  
1 Granite Place South  
Concord, NH 03301  
Phone: (603) 271-3658  
E-mail: samuel.rv.garland@doj.nh.gov

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing motion was sent via the Court's electronic filing system to all parties of record.

Date: September 23, 2024

/s/ Samuel RV Garland  
Samuel RV Garland.

# Exhibit 1

**From:** [King, Kim](#)  
**To:** [Miller, Rory](#); [Garland, Samuel](#); [Galdieri, Anthony](#)  
**Cc:** [Tsier, Alice](#); [Michael-Anthony Jaoude](#); [Andru Volinsky](#)  
**Subject:** Rand Production 003-005  
**Date:** Tuesday, September 17, 2024 9:08:43 PM

**EXTERNAL:** Do not open attachments or click on links unless you recognize and trust the sender.

Dear all:

We have previously provided Plaintiffs' publicly available exhibits via weblinks; we are providing here those additional exhibits that are not publicly available (excluding documents that were previously provided to the State).

Please refer to the following share site link to access the production:  
<https://amsfs.whitecase.com/ngdox/workspaces/08460289-2636-4b8a-a191-53712c3408ba/c7e3fc45-4292-41ae-825f-1fdce8f67cd3>

Note a few documents in this production are recently received supplemental disclosures for our expert, John Freeman.

You should now have access to all of Plaintiffs' exhibits. We anticipate receiving the same from the State at your next opportunity.

Best regards,  
Kim

**Kim King** | Associate  
T +1 212 819 8344 M +1 917 348 4976 E [kim.king@whitecase.com](mailto:kim.king@whitecase.com)  
White & Case LLP | 1221 Avenue of the Americas | New York, NY 10020-1095

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# Exhibit 2

**From:** [Andru Volinsky](#)  
**To:** [Garland, Samuel](#); [King, Kim](#)  
**Cc:** [Galdieri, Anthony](#); [Michael-Anthony Jaoude](#); [Miller, Rory](#); [Munich, John R.](#); [Tsier, Alice](#); [Warr, J. Nicci](#); [patricia.tomasky@stinson.com](mailto:patricia.tomasky@stinson.com)  
**Subject:** Re: Rand Production 003-005  
**Date:** Friday, September 20, 2024 8:51:15 AM

**EXTERNAL:** Do not open attachments or click on links unless you recognize and trust the sender.

Sam, I have added Kim king at White And Case to this email. She will be your point of contact in the effort to identify whatever documents you need.

I didn't want to write this until I confirmed my recollection. The Further production involving John Freeman includes documents that were all listed on our exhibit list filed shortly before the trial management conference. I know that Michael J repeatedly asked to meet with the two teams to discuss exhibits in conjunction with the trial management conference on September 4. Your team did not respond to the request. As a consequence, we did not know you were unable to locate the further Freeman production until yesterday.

Once again, I suggest that a reversion to the prior level of cooperation on this case would be to the benefit of the state and the plaintiffs.

Thanks, Andy



**Andru Volinsky**

attorney, 160 Law, PLLC  
603.491.0376 | [andruvolinsky@gmail.com](mailto:andruvolinsky@gmail.com)

PO Box 1181            160LawPLLC.com  
Concord, NH 03302

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On Thu, Sep 19, 2024 at 9:13 AM Garland, Samuel <[Samuel.RV.Garland@doj.nh.gov](mailto:Samuel.RV.Garland@doj.nh.gov)> wrote:

Andy,

I don't understand this response. You've produced nearly 300 pages of documents for the

first time 13 days before trial. You've done so despite Mike's representation to me and Rory on a call several weeks ago that the only documents you intended to rely on other than the ones you'd already produced were the documents on NHEd and DRA websites, which are subject to our discussions related to the stipulation. Now, Kim has represented that "a few documents in this production are recently received supplemental disclosures for our expert, John Freeman." Dr. Freeman was disclosed more than 21 months ago and deposed more than a year ago. I don't think our entitlement to know which of documents we've received for the first time less than two weeks before trial are "recently received supplemental disclosures" is a question of "cooperation." I reiterate my request and ask that you identify the documents by bates number. I also ask you to advise whether this "supplemental" production in connection with Dr. Freeman reflects new opinions/reasoning not previously disclosed in his report or deposition testimony and, if not, which portions of Dr. Freeman's report the supplemental documents relate to. We reserve all rights with respect to this production.

You should already have copies of the documents listed on our exhibit list because they are part of the discovery from ConVal that we produced to you back in August 2022. If you'd like a courtesy copy of that production, we're happy to prepare one. If you believe there are documents on our list that we haven't produced, please let us know. Know, too, that we're working to amend our exhibit list in a way that will significantly reduce the total number of exhibits in light of the witnesses that have been disclosed and the documents on your list, and we will provide you the amended list as soon as we have it finalized. We will also be uploading our exhibits onto CaseLines, and I understand your side will have access to that upload. We're also actively working to identify which documents on our list we want to be subject to the stipulation, and it's hard to understand how we've been dilatory in providing you with those documents given that we just reached an agreement in principle on the stipulation Monday night.

I also don't understand the accusation that we've been uncooperative. We've asked to depose two of your fact witnesses. We've accommodated those witnesses' schedules and held one deposition after hours. We've made clear when specific dates don't work for us (and at times had to reiterate this). We've chosen to eschew taking the depositions of the four "ConVal" witnesses whose identities we didn't learn about until mid-August and who were never formally identified to us by name until we received your witness lists. You have unilaterally limited the depositions in ways that the superior court rules don't contemplate, and we've largely accommodated that as well. The notion that our team's basic efforts to understand what your witnesses might say at trial are somehow an attempt to "run out the clock" is not supported by anything that's actually happened during the depositions.

We share the desire to cooperate and agree it should be a two-way street. But we don't agree with the characterizations or accusations in your email and we don't think they're warranted or helpful.

Thanks,  
Sam

Sam Garland

Senior Assistant Attorney General

Chief, Civil Litigation Unit

N.H. Department of Justice

[1 Granite Place](#)

[Concord, NH 03301](#)

(603) 271-3650

[samuel.rv.garland@doj.nh.gov](mailto:samuel.rv.garland@doj.nh.gov)

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**From:** Andru Volinsky <[andruvolinsky@gmail.com](mailto:andruvolinsky@gmail.com)>

**Sent:** Wednesday, September 18, 2024 12:40 PM

**To:** Garland, Samuel <[Samuel.RV.Garland@doj.nh.gov](mailto:Samuel.RV.Garland@doj.nh.gov)>

**Cc:** Galdieri, Anthony <[Anthony.J.Galdieri@doj.nh.gov](mailto:Anthony.J.Galdieri@doj.nh.gov)>; King, Kim <[kim.king@whitecase.com](mailto:kim.king@whitecase.com)>; Michael-Anthony Jaoude <[mjaoude@hselaw.com](mailto:mjaoude@hselaw.com)>; Miller, Rory <[Rory.S.Miller@doj.nh.gov](mailto:Rory.S.Miller@doj.nh.gov)>; Munich, John R. <[john.munich@stinson.com](mailto:john.munich@stinson.com)>; Tsier, Alice <[alice.tsier@whitecase.com](mailto:alice.tsier@whitecase.com)>; Warr, J. Nicci <[nicci.warr@stinson.com](mailto:nicci.warr@stinson.com)>; [patricia.tomasky@stinson.com](mailto:patricia.tomasky@stinson.com)

**Subject:** Re: Rand Production 003-005

**EXTERNAL:** Do not open attachments or click on links unless you recognize and trust the sender.

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Sam, we are happy to cooperate in sharing exhibits and deposing witnesses, etc. However, cooperation is a two-way street. We do not yet know which defense exhibits you want to make subject to our stipulation. We do not yet know what any of your trial exhibits are. We propose dates and times for depositions that you have requested and for which we are accommodating you voluntarily. Yet, our suggested dates and times are ignored, and then, in an obvious fashion, your deposing lawyers attempt to “run out the clock” on the time our witnesses have given up from their busy schedules for these voluntary depositions. It is my sincere hope that these are all mere oversights and that, you are extremely busy, as are we. However, the state and your outside counsel must begin to rectify these shortcomings in cooperation ASAP. We’ll convene our team and respond to the request you’ve made in this

string in the near future. Thank you, Andy.



**Andru Volinsky**

attorney, 160 Law, PLLC

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On Wed, Sep 18, 2024 at 12:34 PM Garland, Samuel <[Samuel.RV.Garland@doj.nh.gov](mailto:Samuel.RV.Garland@doj.nh.gov)> wrote:

Thank you, Kim. I'm copying John Munich, Nicci Warr, and Patricia Tomasky; can you please include them going forward?

Can you please identify for us which of these documents are Dr. Freeman's supplemental disclosures? Additionally, could you provide us courtesy copies of the previously produced documents and confirm that they are the same documents that we received in your February 15 and March 6, 2023 productions?

Thanks again,

Sam

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**From:** King, Kim <[kim.king@whitecase.com](mailto:kim.king@whitecase.com)>

**Sent:** Tuesday, September 17, 2024 9:08 PM  
**To:** Miller, Rory <[Rory.S.Miller@doj.nh.gov](mailto:Rory.S.Miller@doj.nh.gov)>; Garland, Samuel <[Samuel.RV.Garland@doj.nh.gov](mailto:Samuel.RV.Garland@doj.nh.gov)>; Galdieri, Anthony <[Anthony.J.Galdieri@doj.nh.gov](mailto:Anthony.J.Galdieri@doj.nh.gov)>  
**Cc:** Tsier, Alice <[alice.tsier@whitecase.com](mailto:alice.tsier@whitecase.com)>; Michael-Anthony Jaoude <[mjaoude@hselaw.com](mailto:mjaoude@hselaw.com)>; Andru Volinsky <[andruvolinsky@gmail.com](mailto:andruvolinsky@gmail.com)>  
**Subject:** Rand Production 003-005

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You should now have access to all of Plaintiffs' exhibits. We anticipate receiving the same from the State at your next opportunity.

Best regards,

Kim

**Kim King** | Associate

T [+1 212 819 8344](tel:+12128198344) M [+1 917 348 4976](tel:+19173484976) E [kim.king@whitecase.com](mailto:kim.king@whitecase.com)

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