COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT

No. 12487

BUFFALO-WATER, LLC

Plaintiff-Appellant,

v.

FIDELITY REAL ESTATE COMPANY, LLC,

Defendant-Appellee.

Sua Sponte Transfer
from Appeals Court

BRIEF OF *AMICUS CURIAE* GREATER BOSTON REAL ESTATE BOARD

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STATEMENT OF INTEREST AND IDENTITY OF THE *AMICUS CURIAE*

The Greater Boston Real Estate Board, founded in 1889, is the oldest real estate trade association in America. Comprised of over 12,000 individuals and companies, the Greater Boston Real Estate Board membership is involved in developing, managing, buying, selling, leasing, and financing both commercial and residential real estate. The organization has a diverse membership, comprised of large publicly traded companies, some of which are the largest national producers of commercial, rental, and for sale properties, as well as many smaller locally owned businesses. The Real Estate Board's mission is to be a strong advocate for private property interests, and advance practical and productive land use policy initiatives in Massachusetts, and New England.

The Greater Boston Real Estate Board and its members have a vital interest in maintaining the current standard for judicial review of commercial real estate appraisals. It is in the interest of the Greater Boston Real Estate Board and its members, and the fair administration of justice, that the views of

the *Amicus Curiae* be presented in order to contribute to this Court's full consideration of all aspects of the issues raised in this case.

I. ISSUE PRESENTED

In the context of an appraisal, whether judicial review should be limited to cases involving actual "fraud, corruption, dishonesty, or bad faith;" whether, or to what extent, judicial review should be available for claims involving nondisclosure or concealment of a conflict of interest or bias on the part of an appraiser.

II. STATEMENT OF THE CASE AND FACTS

Amicus Curiae adopts the Statement of the Case and Statement of the Facts as presented in the Brief of Defendant-Appellee Fidelity Real Estate Company, LLC ("Appellee Brief").

III. INTRODUCTION

The commercial real estate market plays an integral role in the health and growth of the Commonwealth's economy. An efficient and functioning market for commercial real estate ensures that the economic and social benefits of commercial properties are realized, not only for owners, but for those whose interests intersect with commercial properties,

including tenants, employees, customers, and neighboring communities.

Parties to commercial real estate transactions often contract for the determination of a property's value – and therefore price – to be determined by a third-party appraiser. When they do, contracting parties must be able to rely on the enforceability of the appraiser's opinion. The Supreme Judicial Court's decision in *Eliot v. Coulter* – which has been the law of the Commonwealth for over 70 years – adequately and effectively achieves that end by limiting judicial review of appraisals in commercial real estate transactions to instances of "fraud, corruption, dishonesty, or bad faith." 322 Mass. 86, 91 (1947).

This Court has now asked whether the high standard set by the *Eliot* Court should be lowered, and a new disclosure scheme implemented. It should not. As was the case here, a third-party appraisal may inevitably leave one party disgruntled, but absent "fraud, corruption, dishonesty, or bad faith" – the type of conduct that would necessarily taint the appraisal process – allowing judicial review of contracted-for appraisals for other reasons will only

inject uncertainty, delay, and unreliability into the commercial real estate market.

When sophisticated parties contract at arm's length for an appraisal of a commercial property's value, absent the circumstances encompassed in the *Eliot* standard, judicial review is unwarranted. Appraisers, like other professionals, are bound by professional and ethical standards that safeguard a neutral appraisal process, and the *Eliot* standard has served as an effective enforcement mechanism for that neutrality for nearly three quarters of a century. Lowering the *Eliot* standard would only give a second bite at the valuation apple for a disgruntled party, or allow that party to leverage the threat of litigation to negotiate a better price.

Allowing appraisals to be more readily challenged – even when there is no allegation that the appraisal process was intentionally tainted – indefinitely delays the closing of transactions pending judicial review, creating lack of clarity around ownership rights that harms not only the parties to the transaction, but tenants, service providers, and others connected to the property.

For these reasons and those set forth below, *Amicus Curiae* respectfully states that judicial review of commercial real estate appraisals should continue to be limited to cases involving actual "fraud, corruption, dishonesty, or bad faith."

IV. ARGUMENT

A. An Efficient and Functioning Commercial Real Estate Market Relies on the Finality and Enforceability of Contracted-for Appraisals.

Commercial real estate has long played an integral role in the Commonwealth's economy. Today, the plethora of cranes dotting Boston's skyline reflect the continued vitality and expansion of the market. It is a market that extends far beyond Boston – from Springfield to Worcester to Everett to Fall River, the revitalization and investment in smaller cities relies on the development and repurposing of commercial properties. And it is an industry that directly and indirectly impacts not only parties to transactions and those employed in the commercial real estate industry, but business owners that are tenants in commercial properties, communities that rely on those businesses, and countless others.

Commercial real estate transactions, and the issue presented here, implicate unique concerns that

arise when two commercial parties negotiate to have a property's value – and therefore price – determined by a third-party appraiser. These issues are separate and distinct from the purchase and sale of residential properties, especially single-family homes, where third-party appraisals are not used to determine price.[1] This brief, and the *Eliot* standard, therefore do not implicate the residential market.

1. Commercial Real Estate Transactions Involve Sophisticated Parties and Complex Negotiations.

Commercial properties span a wide gamut, from office buildings to retail space to multi-use properties, often with unique and complicating characteristics, like the historical significance of the Winthrop Building in this litigation. *See* Appellee Brief 12 n1. The buyers and sellers of commercial real estate in the Commonwealth, many of whom are *Amicus Curiae's* members, are sophisticated entities and some of the largest national participants in the commercial real estate market. Buyers and sellers are represented by experienced counsel and

[1] The residential housing market is also governed by independent bodies of law, including robust state and federal regulations protecting home buyers and mortgage borrowers.

transactions are negotiated at arm's length. Transactions are often complex, involving multiple sources of funding, extensive due diligence, and heavily negotiated contract terms.

2. Confidentiality is Paramount in Commercial Real Estate Transactions.

Negotiating and consummating a commercial real estate transaction inevitably involve the disclosure of highly confidential and commercially sensitive business information. Businesses have legitimate reasons for wanting to protect such information from competitors, and in some instances, from the public. Even the simple fact that a party is looking to acquire or sell a commercial property may be headline news that parties have sound and appropriate business reasons to withhold from the public for a period of time. Amazon's pursuit of a site for its second headquarters is just one recent high profile example. There can be no dispute that it is with good reasons that buyers and sellers of commercial property oftentimes strictly limit the information they disclose to each other, as well as to the public.

For similar reasons of maintaining confidentiality and anonymity, the use of special

purpose entities is also prevalent in the commercial real estate market. Parties may use special purpose entities to purchase or sell commercial property to maintain the confidentiality of a party's identity. Special purpose entities are also used for other legitimate business reasons, including to avoid being charged a premium based solely on an acquiring party's name recognition or identity, to avoid premature disclosure of future business plans, or to avoid disclosing to competitors where a business believes market opportunities exist. Under the *Eliot* standard, parties are able to maintain confidentiality using special purpose entities because required disclosures may be narrowly tailored to ensure the integrity of the appraisal at issue. Adopting a lower standard that requires broader disclosure may put the legitimate use of special purpose entities at risk.

3. The Finality and Enforceability of Appraisals Are Critical to the Commercial Real Estate Market.

An appraisal is the delegation to a third-party to determine the value of a property. *Eliot*, 332 Mass. at 90.[2] As a determination of value – and

[2] Appraisals can serve other purposes in connection with the acquisition of a loan, a refinancing, or a

therefore price – an appraisal is often the most essential element of a commercial transaction.

It is common practice in the commercial real estate market for parties to enter into a contract with an option for one party to purchase a property in the future. At the time of contracting, the parties cannot know what will happen to the property's value between entering an agreement and the exercise of that option. In these circumstances, it is standard practice for parties to contract to have the future purchase price determined by a third-party appraisal conducted after the exercise of the option. That is precisely what happened in this case.

Where parties contract for an appraisal to determine value, the smooth transfer of legal rights and responsibilities between the contracting parties requires that the parties be able to rely on the finality and enforceability of that appraisal. If a party who is disgruntled with the outcome of an appraisal has easy recourse to challenge it, the goals of efficiency and finality, which are among the very

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tax assessment. This brief concerns the use of commercial real estate appraisals in the context of determining the value of property in a real estate transaction.

reasons parties contract for appraisals in the first place, will be undermined. Notably, for active market participants, the party on the receiving end of an appraisal deemed favorable one day is just as likely to be on the end of an appraisal deemed unfavorable in the future. This is the very nature of delegating the determination of value to a third-party.

When an appraisal is challenged, and the closing of a transaction is delayed pending judicial review of the appraisal process, harm may befall not only the parties to the transaction, but others directly and tangentially connected to the property and transaction, including tenants. Harm to third parties naturally flows from the lack of clarity regarding ownership rights that inevitably occurs when an otherwise consummated commercial real estate transaction is called into question by a party seeking judicial review of an appraisal. This is what the *Amicus Curiae* understands happened in this litigation – the Winthrop Building transaction was set to close on May 25, 2017 at a purchase price set by the contracted-for appraisal process. Appellee Brief 18. Unhappy with the appraisal, Appellant Buffalo-Water 1, LLC filed a complaint two days before the transaction

was to close, seeking a declaration that the agreed upon appraisal was "invalid and nonbinding" because of a failure to disclose a possible conflict of interest. *Id.* at 19.

Here, and in comparable situations, the ownership rights of the commercial property are thrown into question. Not only are the parties to the transaction left in a state of flux, tenants and vendors may experience turmoil as litigation over an appraisal creates uncertainty concerning which party owes duties to tenants and others, and which party collects rents. It can be unclear which party is responsible for the maintenance and upkeep of the building, and the often significant costs associated therewith. It can be unclear which party is responsible for utility payments and other third-party services provided to the commercial property. Parties may also be less willing to invest in the building to stay competitive in the market. A recent profile of the Lever House, a landmark 21-story tower in New York City, highlights the concrete reality of the difficulties that can arise from uncertain ownership rights. In the case of the Lever House, uncertain ownership rights have led to a cascade of difficulties for tenants and owners:

> The perception of difficulties at the property has become a self-fulfilling prophecy. Prospective tenants have begun to steer clear, further eroding finances and likely making the twin hurdles of refinancing the property and extending the leasehold harder to clear. Its second floor—at 34,056 square feet, the largest space in the property—has sat vacant for more than a year. Leasing brokers familiar with availability said tenants won't commit long term to the floor because of the uncertainty over who will control the building. . . .
>
> "We are now in a limbo period," observed leasing broker Michael Cohen, tristate president of Colliers International. "Any tenant that will want to sign a long-term lease for this building is going to have to spend a good deal of money to fit out their premises. They'll want assurances that their lease won't be disturbed, and right now that's not possible to provide." . . .
>
> [T]he drama has set Lever House back in a competitive market. Several office buildings on the avenue, including 280 Park Ave., have been renovated, and a luxury office tower is being raised at 425 Park Ave. A block east, the Saudi Arabian owner of 550 Madison Ave. plans to make it into a luxury office building with premium rents. Upgrades that would keep Lever House at the apex of the market have been impossible, given the circumstances.[3]

Instead of finality and a clear transfer of rights and obligations between seller and buyer, difficulties like those plaguing the Lever House can last for years

[3] Daniel Geiger, From Profit to Peril on Park Avenue, Crain's New York business, May 8, 2018, *available at* http://www.crainsnewyork.com/article/20180508/REAL_ESTATE/180509911/from-profit-to-peril-on-park-avenue-lever-house-faces-a-reckoning.

as a property sits in a state of limbo pending the resolution of litigation.

B. Continuing to Limit Judicial Review of Commercial Real Estate Appraisals to Instances of "Fraud, Corruption, Dishonesty, or Bad Faith" Sufficiently Safeguards Parties' Interests While Promoting an Efficient and Functioning Commercial Real Estate Market.

The current standard for seeking judicial review of commercial real estate appraisals correctly limits review to instances where an alleged wrong has actually tainted the appraisal at issue. *See Eliot*, 322 Mass. at 90. From a business and a public policy perspective, this limited review makes sense.

1. Commercial Real Estate Appraisals Are Distinct from Arbitrations.

A commercial real estate appraisal is a delegation to a third-party to determine value. In this respect, commercial real estate appraisals are distinct from arbitrations, and the standards for judicial review of appraisals necessarily differ from those of arbitrators' awards. *Eliot*, 322 Mass. at 89. Arbitrations are quasi-judicial proceedings that resolve a controversy, and therefore implicate the heightened concerns associated with judicial proceedings. It is a distinction this Court recognized in *Eliot*, and which still holds true today:

> There is a clearly recognized distinction between the arbitration of a controversy and a contract one term of which calls for the ascertainment by designated persons of values, quantities, losses or similar facts.

322 Mass at 90 (citation omitted). Other jurisdictions recognize the same distinction between arbitrations and appraisals. *See, e.g.*, *Farmers Auto Ins. Ass'n v. Union Pac. R.R. Co.*, 768 N.W.2d 596, 607 (Wis. 2009) ("The court's role is not to determine whether the third party [appraisers] accurately valued the item (as if the court itself could do a better job), but whether the third party experts understood and carried out the contractually assigned task. The obvious point of contracting for an appraisal process is to keep a jury or court out of that decision. Courts have an obligation to enforce this aspect of an agreement between the parties by asserting only limited power to review appraisal awards."); *see also Calais Co., Inc. v. Ivy*, 303 P.3d 410, 416-17 (Alaska 2013) (collecting cases). These differences are even more stark in the commercial real estate context, where the terms of an appraisal process are routinely heavily negotiated and result in an agreement to delegate the determination of a key contractual element – value, and ultimately price – to a third-

party. By doing so, parties contract for finality in determining value, allowing commercial real estate transactions to move forward efficiently.

2. The *Eliot* Standard Correctly Allows for Judicial Review Where a Commercial Real Estate Appraisal Process Has Been Intentionally Tainted.

The *Eliot* standard balances procedural safeguards with the necessity for finality in an efficient and functioning commercial real estate market. If an appraisal process has been intentionally tainted by actual "fraud, bad faith, corruption, or dishonesty," an aggrieved party has judicial recourse. But, allowing judicial review based solely on alleged "nondisclosure" of a conflict of interest or bias – regardless of whether the alleged conduct is even personal to the appraiser – would upset the efficient functioning of the commercial real estate market without any meaningful benefit. Manufacturing a claim of undisclosed bias unrelated to the appraiser or appraisal at issue, after all, is not difficult, especially given the size and complex nature of many of the businesses engaging in commercial real estate transactions. The same holds true for firms that employ appraisers, many of which, like Cushman &

Wakefield, are international companies that provide services in almost all aspects of the commercial real estate market,[4] and may be less inclined even to participate in the appraisal market under a heightened disclosure regime. *See infra* Part III.C.

Maintaining the *Eliot* standard avoids unnecessary risks and costs associated with litigation at the end, or after the close, of a commercial real estate transaction. Allowing sophisticated parties to more readily challenge appraisals – that they have contracted for at arm's length – would inject uncertainty and risk into transactions that outweigh any benefit to the contracting parties or the appraiser. *See also infra* Part 2.C.

3. Requiring Greater Disclosure by Law Would Be Contrary to Established Industry Practice and Not Commercially Reasonable.

Maintaining the *Eliot* standard is consistent with the efficient and just functioning of the commercial

[4] Cushman & Wakefield Services, *available at* www.cushmanwakefield.com/en/services (listing categories of services provided by Cushman & Wakefield, including asset services, capital markets, consulting, global occupier services, leasing, and valuation & advisory). Moreover, Cushman & Wakefield employs 48,000 people, has 400 offices in 70 countries, and had $6.9 billion in revenue in 2017. Cushman & Wakefield, About Us, *available at* www.cushmanwakefield.com/en/about-us.

real estate market. In addition to upsetting the reliability and finality of appraisals, allowing judicial review where there is only alleged "nondisclosure" of a potential conflict of interest on the part of the appraiser's firm – and not the individual appraiser – would require upfront levels of disclosure that are not commercially reasonable, and in some instances, impossible. In many instances, such expanded disclosure requirements would necessarily extend to buyers and sellers of commercial properties – like *Amicus Curaie's* members – who would have to disclose reciprocal information to allow an appraiser to conduct the correspondingly more burdensome conflicts check.

Established industry practice for selecting an appraiser includes disclosures by the contracting parties and the proposed appraiser sufficient to allow parties to determine if there is any conflict of interest with the individual appraiser performing the work. *See, e.g.*, Appellee Brief 14-15. These disclosures – consistent with the *Eliot* standard – aim to identify conflicts with the individual appraiser, and are therefore correctly focused on the appraiser's ability to perform an unbiased appraisal.

By asking the Court to allow judicial review based solely on an "appearance of bias," Appellant Brief 2, Appellant seeks to require a level of disclosure that far exceeds current industry practice. Here, for example, the contracted-for disclosures (which reflect industry standards) only required disclosures specific to the individual appraiser. Appellant Brief 14-15, 18-19. And Appellant does not allege that the individual appraiser in this case had any actual or potential conflict that should have been disclosed. Instead, Appellant alleges a "possible conflict" based on a national contract entered into between Appellee Fidelity and a different Cushman & Wakefield entity than the one that employed the individual appraiser – a contract that Appellant does not even allege the individual appraiser was aware of. *Id.* In other words, Appellant asserts that to avoid potential judicial review of an appraisal, the appraiser, and likely the parties, must make disclosures at an institution-wide level that may bear no relation to the appraiser performing the work.

Even if this level of disclosure had meaningful benefit, appraisers are unlikely to be equipped to make the level of disclosure contemplated by the issue

presented. Unlike law firms, which operate under a long-standing ethical obligation to maintain client records and systems sufficient to identify conflicts of interest, appraisal firms do not necessarily maintain client lists sufficient to identify and disclose every possible business dealing with a contracting party regardless of whether the potential conflict relates to the appraisal at issue. Maintaining the *Eliot* standard, and the levels of disclosure that flow from that standard, is consistent with commercial practices and should not be disturbed.

The *Eliot* standard also promotes the often critical and heightened confidentiality interests of all parties to commercial real estate transactions. *See supra* Part III.A.3. The current level of disclosure is limited to the appraisal and appraiser at issue, and mitigates the need to disclose commercially sensitive and confidential information that has no relevance to that appraisal. It also allows for the legitimate use of special purpose entities where confidentiality concerns are of even greater significance. *See id.*

C. Allowing Judicial Review Based on a Claim of "Nondisclosure" of a Conflict of Interest Upsets the Balance Struck by the Current Standard without any Meaningful Benefit.

The *Eliot* standard adequately addresses the concerns of parties to commercial real estate transactions – namely that an appraisal process must not be tainted by the intentional misconduct of an appraiser. A standard that allows for judicial review where there is a claim only of "nondisclosure," as Appellant advocates for, would be overbroad without any meaningful benefit. It would allow an unhappy party to seek judicial review regardless of whether the alleged nondisclosure has any bearing or impact on the appraisal process. The mere appearance of a possible conflict of interest or bias based on others at the appraiser's firm is not a guarantee or even a reasonable indication that this separate business relationship affected the appraisal process.

Appraisers, like other professionals, act in accordance with professional and ethical standards that safeguard a neutral appraisal process. In accord with these standards, established industry practice requires disclosure only where an individual appraiser has an actual conflict of interest that could

interfere with the neutrality of the appraisal process. The *Eliot* standard is consistent with this industry practice, and has served as an effective safeguard of appraisal neutrality for nearly three quarters of a century.

Under *Eliot*, aggrieved parties already have an actionable claim if an appraiser's failure to disclose a conflict is the result of fraud, corruption, dishonesty, or bad faith. Lowering the *Eliot* standard – without any indication that the standard has failed to protect the integrity of the commercial appraisal process – would allow disgruntled parties to invoke judicial review, or threaten to invoke judicial review, as a means of causing delay and uncertainty in pursuit of gaining leverage to negotiate a more favorable price than the one set by the contracted-for appraisal.

Parties to commercial real estate transactions are sophisticated, in almost all instances represented by counsel, and able to protect themselves. They are also free to contract for broader disclosures if desired or warranted under the specifics of any transaction. For example, the alleged undisclosed conflict of interest here is a national representation

contract Appellee Fidelity entered into with a Cushman & Wakefield entity (not the one that employed the appraiser at issue), and Appellant does not allege that the appraiser was even aware of the contract. Appellee Brief 18. Nonetheless, Appellant could have required potential appraisers to disclose not only their own, personal business relationships with Fidelity or the property, but also those of their employer firm or entities related to their employer firm. Such disclosures – had the parties agreed to and been able to provide them – would have revealed the national representation agreement. But these sophisticated parties chose not to ask for this enhanced disclosure, and there is no reason to undue their contractual bargain, or to insert disclosure requirements into the parties' contract with Cushman & Wakefield that they chose not to insert themselves.

A broader disclosure scheme would also be nearly impossible to implement in instances where clients are undisclosed or protected by confidentiality agreements. The legitimate use of special purpose entities may also be severely curtailed as parties may be forced to disclose the very information the special purpose entity was designed to protect, regardless of

its relevance to an individual appraiser's ability to conduct an impartial and independent appraisal. Adopting the standard in the issue presented may also lead to the perverse result of parties not negotiating for appraisals in order to protect identities or avoid disclosure of highly confidential information.

Abandoning the *Eliot* standard also risks diminishing the available pool of high quality appraisers. The experience of an appraiser – especially in a particular geographic area and with specific types of property – is a prime consideration of buyers and sellers of commercial real estate. A broader disclosure standard could deter appraisers with the most relevant experience for certain projects by forcing the appraisers to choose between (1) identifying and disclosing business relationships with the parties, including for the appraiser's employer and its affiliates, regardless of confidentiality concerns, and (2) choosing not to accept the engagement.

Such a diminishment of high quality appraisers would hurt the commercial real estate industry writ large, and would have an outsized impact in smaller real estate markets across the Commonwealth where the

pool of high quality appraisers may already be small, and likely very small for the type of historic building at issue here, or for other types of properties that require specialized knowledge of the local real estate market.

D. Maintaining the Current Standard is Consistent with the Practice in Other States.

Like Massachusetts, other jurisdictions allow judicial review of appraisals only where there is a showing of fraud, bad faith, or another wrong that actually affects the appraisal process. In New York, for example, where a contract created a three-member appraisal panel, with "the agreement of two of the panel constituting a binding and conclusive decision," an appeals court held that the appraisal "should not be set aside except for fraud, bias or bad faith." *Rice v. Ritz Assoc.*, 88 A.D. 2d 513, 514 (N.Y. App. Ct. 1982), aff'd 447 N.E.2d 58 (N.Y. 1983). New York courts have consistently followed the holding in *Rice*. *See, e.g.*, *Johnson Kirchner Holdings, LLC v. Galvano*, 150 A.D.3d 1001, 1002 (N.Y. App. Ct. 2017) ("An appraisal will not be set aside absent proof of fraud, bias, or bad faith.").

Delaware courts similarly only allow judicial

review where a contracted-for appraisal process is intentionally tainted by the wrongs of one party:

> Where, as here, (i) a contract written by one party (ii) says that that party will make a payment based on a formula, (iii) the formula says that an input into the formula will be determined by an appraiser, and (iv) the party making the payment gets the contractual right to select the appraiser, the parties have clearly agreed to be bound by that appraiser's professional judgment. **Unless the party unhappy with the appraiser's judgment can show that the appraised market value resulted from a concerted course of bad faith action between the appraiser and the other party—i.e., a breach of contract by a party—or that the appraiser's result was otherwise tainted by the contractually improper conduct of the other party (such as intentionally providing the appraiser with false information to taint the valuation), the parties are stuck with what they bargained for.** The lack of room for law-trained judicial second-guessing makes sense because such unschooled second-guessing undercuts the parties' choice to have an expert on the relevant property type perform the task.

Senior Housing Capital, LLC v. SHP Senior Housing Fund, LLC, No. 4586-CS, 2013 WL 1955012, at *3 (Del. Ch. May 13, 2013) (emphasis added).

V. CONCLUSION

For the foregoing reasons, *Amicus Curiae* submits that in the context of an appraisal, judicial review should be limited to cases involving actual "fraud, corruption, dishonesty, or bad faith," and judicial

review should not be available for claims merely alleging nondisclosure of a conflict of interest or bias on the part of an appraiser.

Respectfully submitted,

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Certificate of Service

I hereby certify that two copies of the foregoing brief were served upon counsel of record for each party by express mail on September 17, 2018.

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