**UNITED STATES DISTRICT COURT**
**EASTERN DISTRICT OF NEW YORK**

WOMEN OF COLOR FOR EQUAL JUSTICE, et al.

Plaintiffs,

v.

THE CITY OF NEW YORK, MAYOR ERIC L. ADAMS, COMISSIONER ASHWIN VASAN, MD, PHD DEPARTMENT OF HEALTH AND MENTAL HYGIENE, DEPARTMENT OF EDUCATION, AND DOES 1-20

Defendants.

INDEX No.: 1:22 CV 02234-EK-LB

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' RENEWED APPLICATION FOR TEMPORARY RESTRAINING ORDER, PRELIMINARY INJUNCTION AND PRELIMINARY CLASS CERTIFICATION**

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## I SUMMARY OF FACTS

This request for emergency Temporary Restraining Order is necessitated by the New York Supreme Court's ruling in the case *George Garvey, et al. v. The City of New York, et al. Index No 85163/2022* (See Opinion attached as Exhibit A) wherein the court entered a declaratory judgment in an Article 78 injunctive relief case declaring two (2) of the nine (9) New York City (City) Covid-19 mandate orders by the Department of Health (DOH) are void as arbitrary and capricious; but, the legal basis for the ruling is based on a totally inaccurate assumption that the Commissioner for the Department of Health has full authority to mandate residents to submit to the medical treatment of immunization/vaccination, specifically the Covid-19 vaccine, which New York Public Health Law §206 and the New York Administrative Code §17-109 expressly state the Commissioner does not. Moreover, the ruling also concludes that employers (public or private) can prescribe/mandate the medical treatment of vaccines to their employees as a "condition of employment" or "pre-employment condition" so long as the prescription is included in a union agreement (which the City of New York is negotiating now with several unions) or in a pre-employment agreement. While the ruling was correct regarding the arbitrary and capricious application of the Vaccine Mandates (the court focused on the unfair treatment by the City of athletes and celebrities who the mandates where lifted from and between the vaccinated and unvaccinated), the ruling totally flies in the face of the substantive law articulated over 30 years ago in the Supreme Court's landmark ruling in *Cruzan v. Director, Missouri Dep't of Health*, 297 U.S. 261 (1990) (which held that competent individuals can refuse medical treatment), and conflicts with the Federal OSHA 1970 variance law, as well as New York State public health law and the City's Health law which places limits on the authority of the City's Health Commission. Therefore, the City and all private employers must be immediately enjoined from entering into any labor agreements or pre-employment agreements or offers that contain any vaccine requirement or medical treatment requirement as a condition of employment. This Court stated on September 13, 2022 that the notion that an employer had authority to require the medical treatment of a vaccine as a "condition of employment" was "preposterous."

The urgency is now because the City is now in negotiations with various labor unions representing City workers - many of the union agreement have or will expire – See Exhibit B – List of NYC Labor Union Agreements and See Exhibit C – Letter from NYC Office of Labor Relations and article regarding current negotiations. With the *Garvey* court's ruling, essentially the City has been given authority by the Court to include a vaccine mandate term in all the labor or pre-employment agreements. Plaintiffs and all similarly situated City and private sector employees are deeply afraid of this imminent action by the City because the City strong armed many of the labor unions to enter into illegal vaccine religious exemption agreements that violated the NLRB rule against bargaining the civil rights of employees. See Exhibit D Sanitation Religious Exemption Agreement, See Exhibit E SEIU Private sector Religious Exemption Agreement See Exhibit F – NLRB Rules on Prohibited Bargaining. Therefore, it is certain that the labor unions will again capitulate to the demands of the City because the City will point to the *Garvey* decision and the ruling in the *Broecker v. NY City Dept of Ed*, 572 F. Supp. 3d 878 (E.D. N.Y. 2021) case, which ruled without any evidence that the Vaccine Orders was a "condition of employment". While the *Broecker* court out of thin air declared the vaccine mandate a "condition of employment" which the City represented in its Motion to Dismiss and oral argument to this Court on September 13, 2022, the *Garvey* court pointed out that there was absolutely no evidence of any agreement to establish a condition of employment, essentially opining that if there was an agreement, then and only then would the condition of employment be valid.

The imminence of the City's action to codify the Vaccine Orders into labor union agreements as a condition and pre-employment condition is evidenced by the fact that hundreds, if not thousands of private employers have listed on Indeed that the Covid-19 vaccine is a pre-employment condition of employment. See Exhibit G - Indeed list of 4,155 jobs with the pre-condition. The U.S. Supreme Court's holding in the *Gade* decision -discussed below- expressly prohibits pre-employment safety conditions preempted by the OSHA regulations. See *Gade v. National Solid Wastes Management Assn*., 505 U.S. 88 (1992)

Moreover, the City must be stopped with an injunction because it will do anything to keep these mandates in place including make material misrepresentations to the courts. One day after this Federal Court carefully explained during the September 13, 2022, hearing that the City's claim that the Vaccine Orders where conditions of employment was "preposterous" the next day on September 14, 2022, the City made the same material representation to the *Garvey* Court in its Motion to Dismiss that lawsuit and in subsequent motions to that court that lead to the Garvey October 24th ruling. See Exhibit H – City Cross Motion to Dismiss. Because the City knew of the *Gade* Supreme Court ruling pre-empting pre-employment safety requirements and the City was put on full notice that this Court also rejected that claim, it is urgent that this Court immediate issue an injunction against the City to stop their fraudulent antics in the Court which is costing the thousands of City employees on LWOP.

The City also made the following "preposterous" claim in the *Garvey* case about its authority to determine how "best" to meet its duty to maintain a safe workplace, without regard to OSHA standards:

> The City, as a government employer, has a duty to maintain a safe workplace. See generally N.Y. Labor Law §27-a. The obligation of how best to do so is within the discretion of the employer. See New York State Inspection Sec. & law Enforcement Emples. Dist. Council, 82 v. Cuomo, 64 N.Y. 2d 233, 237-40 (1984).

See Exhibit H, City Cross Motion to Dismiss – only relevant parts.

Claims like this made to the state court is not only evidence that the City is acting like a crazy tyrannical government that thinks it can make up law and ignore federal law, but it is also evidence that an injunction must be issued immediate to stop this tyranny.

It is important to note, the ruling by the *Gravey* court only applies to staff in City operated or contracted residential and congregate settings and private sector employees, there are seven (7) other Vaccine Orders that the *Gravey* court decision does not apply to leaving all other City employees without a remedy and subject to different rulings by the various New York State Court judges. This is untenable!!!!

Furthermore, New York State Administrative Law Judges (ALJ) for the New York Department of Labor, which is responsible for enforcing OSHA health and safety regulations in the state of New York, have also ruled in unemployment appeals hearings that the City's Vaccine Orders are "conditions of employment" declaring them legitimate obligations of employees pursuant to a New York case *Matter of De Grego*, 39 N.Y.2d 180, 183, 383 N.Y.S.2d 250, 347 N.E.2d 611 [1976]. See Exhibit I – New York ALJ ruling that the Vaccine Mandate is a condition of employment- Page 2. Since the beginning of the year, Plaintiffs have been denied employment benefits because the ALJ's have ruled that Plaintiff/claimants can be denied their unemployment benefits if the claimant's conduct caused a "provoked discharge" by the employer wherein: 1) a "legitimate known obligation" existed, 2) that a Claimant transgressed; and 2) the transgression left the Employer no choice but to discharge him [or her]. Despite providing the ALJ's with sufficient evidence that the Vaccine Orders were not "legitimate obligations" of City employees, the ALJ's judges have also completely ignored federal law. See Exhibit J – ALJ Ruling, Page 5 – ALJ arbitrarily held that Vaccines Orders are not pre-empted by OSH Act.

Because the New York Courts along with the New York Department of Labor ALJ's are wrong on the issue that the Vaccine Orders are conditions of employment, an immediate decision is needed by this Court to stop the City and all private employers from violating federal law. If the City and private employers are allowed to move forward with codifying the vaccine order into its labor agreements or pre-employment agreements, Plaintiffs will have to continue to litigate for the protection of their rights, but rather in administrative labor law disputes which is unnecessary. Plaintiffs must not continue to be deprived of their First Amendment Free Exercise rights which Federal Courts have been charged to protect.

Plaintiffs also request that this Court also rule on all the pending motions for permanent injunctions against the City, the City's Motion to Dismiss and grant Plaintiffs a Preliminary/Conditional Class Certification pursuant to Fed. R.Civ.P. 23(a), Fed.R.Civ.P. 23(b)(1)((A)&(B), and Fed.R.Civ.P. Rules 23(b)(3). Plaintiffs have provide more than enough evidence in all its pleadings that Plaintiffs should prevail on the merits of their claims. Therefore, condition class certification is needed based on

the fact that continued inconsistent rulings in New York State court will establish incompatible standards of conduct by the City, which has already manifesting in the fact that the City exempted athletes and celebrities from the mandates and the *Garvey* judgement only applies to city employees working "City operated or contracted residential and congregate settings".

## II LEGAL ARGUMENT

Based on Plaintiffs prior motions submitted to this Court along with the facts and law presented herein, this Court must urgently answer the following legal questions in an injunction to prevent further injury to the constitutional and statutory rights of Plaintiffs and all who they represent:

Legal Question #1: Do employers (public or private) have the authority to prescribe and mandate medical treatments, including vaccines, for employees as a condition of employment or pre-employment requirement?

Legal Question #2: Do federal or state governments or municipalities have the authority to prescribe and mandate, without exception, medical treatments for all citizens within the public agency's jurisdiction?

Legal Question #3 Are employers (both public and private) mandated to provide employees with a safe workplace and remove all known workplace hazards?

Legal Question #4 Can employers (both public and private) contract away the duty to provide employees with safe workplace, and to remove all known workplace hazards?

It is imperative and urgent that this Federal Court issue a declaratory judgment and injunction that answers these questions to provide employers clear direction regarding the scope of their authority to address safety and health concerns in the workplace and in the general public sphere. Additionally, all employees and the general public have the right to have this Court protect their civil liberties, particularly their First Amendment free exercise right protected from overreach by public and private employers.

### A. Answer Legal Issue #1 - Medical Treatments, Including Vaccine Mandates Can Never Be Conditions of Employment

Plaintiffs in their Motion for Preliminary Injunction and Partial Motion for Summary Judgment have already explained that any employer that seeks to utilize an alternative safety method not authorized by OSHA must obtain a variance from OSHA before utilizing the new or alternative safety method. Plaintiffs also explained that vaccines, including the Covid-19 vaccine, are "medical treatments" not authorize by OSHA and will never be authorized by OSHA to mitigate the hazards caused by any communicable diseases, especially airborne communicable diseases, because vaccines do not remove the airborne hazard from the atmosphere, and it does not shield employees from exposure to the airborne hazard. While the answer to the Legal Question #1 based on the context in this case can be answered in the negative based on the mandates under OSHA as previously briefed, the question requires a more comprehensive analysis to support the negative response under all circumstances.

While the U.S. Supreme Court in *Cruzan v. Director, Missouri Dep't of Health*, 297 U.S. 261 (1990) held that competent individuals can refuse medical treatment -which establishes the right for individuals to choose what medical treatment they want for themselves that most states around the country support[1], that ruling is somewhat limited in the context wherein the medical condition of the plaintiff is not a condition that is a contagious/communicable disease that could expose others to the disease and risk possibly serious injury or death. Therefore, the legal question must and can only be answered by again looking to the OSH Act, which is an environmental law that controls the environment where communicable diseases can be transmitted. It is axiomatic and undisputed that communicable diseases can only be transmitted either through: 1) the atmosphere, 2) on surfaces within and outside public and or private building or through physical contact between persons. When the legal question is analyzed by focusing on "how" deadly communicable diseases are transmitted through those three (3) methods, this Court can now with 100% degree of certainly conclude that all

[1]

employers and legislators are not authorized to prescribe and mandate employees or the general public to submit to medical treatments like vaccines because medical treatments only directly affect the immune "response" in the human body and do absolutely nothing to eliminate the risk of "exposure" to and "transmission" of the disease particles that can exist in the atmosphere, on surfaces or on people. See ECF Doc #17-4 - Expert Affidavit of Dr. Montgomery and Hygienist Bruce Miller ECF Doc #17-5

It is axiomatic that the OSHA regulations provide the most effective methods for mitigating the risk of the transmission of ANY dangerous airborne hazard whether the hazard is a communicable disease like the deadly Ebola or airborne toxic chemical hazards that thousands of employees are exposed to on a daily basis in the construction industry, the oil industry, manufacturing, waste disposal industries. See Exhibit K – OSHA Toxix Hazards Guide It is obvious that the everyone in the entire world accepted the OSHA approved method of "working remote" and stay at home orders to mitigate against transmission of Covid-19; but now employers, including the City have refused to allow employees to continue to work remote as an OSHA approved method to prevent Covid-19 transmission. The CDC has declared that Covid-19 as an airborne virus is not going anywhere. Therefore, unless employers elect to daily perform airborne tests for the existence of the Covid-19 virus and all contagious airborne viruses in the atmosphere of their workplaces and spend the money to obtain equipment that remove hazardous viruses from the workplace atmosphere and surfaces, then remote work and providing OSHA approved equipment like Powered Air Purifying Respirators are available methods to employers that could have been provided for all City employees.

In summary, the answer to Legal Question #1 an #2 is NO, neither public or private employers can prescribe and mandate medical treatments of vaccines for employees as conditions of employment under any circumstance or situation, including a Pandemics, and specifically governments cannot mandate vaccines for the general public either under any circumstance because medical treatments of any kind do not create "safe" public spaces as outlined above.

### B. Answer Legal Issue #2 – No, Governments Cannot Mandate Medical Treatments of Vaccines for the General Public Based

While the City and other governments around the country who have also mandated the Covid-19 vaccines like the City, will point to the U.S. Supreme Court decision in the *Jacobson v. Massachusetts*, 197 U.S. 11 (1905) case as giving legislators authority to mandate vaccines for the general public, that case was decided 65 years before OSHA was enacted as the nations leading safety and health authority. Safety technology has so advanced since 1905 that *Jacobson* case is no longer good law or relevant, especially since the evidence provided in this case and discussed above clearly establish that vaccine medical treatments are incapable of stopping the transmission of any communicable disease.

Furthermore, the New York State decision in C.F. v. N.Y.C. Dep't of Health & Mental Hygiene, 139 N.Y.S.3d 273 (N.Y. App. Div. 2020) (the measles case) should also be overruled or limited by this Court's decision because that case never answered the question of whether the City of New York had authority to prescribe and mandate the general public to submit to the vaccine medical treatment. The issues before that court where:

1) the right to religious exemptions;
2) whether there was sufficient evidence of a dangerous measles outbreak to justify the orders;
3) whether the Commissioner failed to use the least restrictive means such as isolation and quarantine of infected individuals and ignored the risk of harm from the MMR vaccine; and
4) whether the Commissioner had authority to declare a person a nuisance.

Id. at , 278

The main focus of that case was on the issues around religious exemptions and the danger and/or efficacy of the measles vaccine and no argument was made regarding the New York State Public Health Law § 206 that prohibits adult vaccination mandates. No challenge was made to the authority of the City DOH Commissioner to issue a medical treatment vaccine. While the Court ruled that the

decision to issue the mandate was not arbitrary and capricious based contraction and death rates, no analysis was performed by the Court that answered the question of whether measles vaccines a capable to stopping transmission of the disease in the atmosphere, on surfaces or by physical contact, which no vaccine can do. Therefore, the ruling in that case is not binding precedent in this case to answer Legal Question #2. As was discussed in Plaintiffs Motion for Injunctive Relief, Replies and Motion for Partial Summary Judgment, the New Public Health Law § 206 and the City's Administrative Code unequivocally does not authority the Commissioner to issue adult immunization mandates and the only authorizes the Commissioner to make vaccines available through administrative methods and processes, similar to the OSHA regulations.

Furthermore, the issue of whether a law is "generally applicable" because a regulation applies to "all citizens" as described in the *Employment Division v. Smith*, 494 U.S. 872 (1990) is only relevant when analyzing whether a law or regulations is discriminatory, especially if a law discriminates based on religion. The rule of "general applicability" does not address whether there is legislative authority. The *Smith* Court ruling should be limited because it only addressed whether a criminal law that applied to everyone in Oregon discriminated based on religion. The case never focused on whether the legislature had authority to list religious peyote as a controlled substance subject to criminal prosecution. While in Plaintiffs prior motion for preliminary injunction pointed out that the City's mandate was not a law of general applicability like the *Smith* and the *CF* regulations, Plaintiffs raised that issue only to make the point that the City's Vaccine Orders where preempted because they only applied to the workplace and employees which is exclusively controlled by OSHA unless a variance is obtained. Plaintiffs do not argue and do not believe that this Court should support any argument that if the Vaccine Orders did in fact apply to all New York City residents that the DOH Commissioner had authority to issue a City-wide mandate based on the rule of "general applicability", because that rule is only relevant to address whether a legislation or regulation discriminates. The undisputed fact is that it is impossible for any vaccine to stop

transmission, which means no legislator - not even the President of the United States - has authority to mandate a medical treatment to mitigate a pandemic communicable disease.

### C. Answer to Legal Question #3 and #4 - Employers Cannot Negotiate Away OSHA Duties

For over 30 years it has been New York case law that some "subjects are excluded from collective bargaining as a matter of law. When an employer has a "non delegable statutory responsibility", those duties cannot be negotiated "where a specific statutory directive leaves no room for negotiation". See. *Matter of City of Watertown v State of N.Y. Pub. Empl. Relations Bd*., 95 N.Y.2d 73, 78–79, 711 N.Y.S.2d 99, 733 N.E.2d 171 (2000); see also Matter of Board of Educ. of City School Dist. of City of N.Y. v New York State Pub. Empl. Relations Bd. 75 N.Y.2d 660, 667, 555 N.Y.S.2d 659, 554 N.E.2d 1247 (1990). The Second Circuit further held in the case Doca v. Marina Mercante Nicaraguense, S.A., 634 F.2d 30, 1980 AMC 2401 (2nd Cir. 1980) that OSHA places non delegable duties on employers to maintain safe workplaces that cannot be bargained away through Union agreements.

Furthermore, the *Gade* U.S. Supreme Court also held that the OSH Act also pre-empts regulations or agreements that create a safety related "pre-condition" to employment – which the *Garvey* court does not object to. The *Gade* court expressly rejected the argument that the Illinois licensing acts did not regulate occupational safety and health at all, but were instead a "pre-condition" to employment. *Gade v. National Solid Wastes Management Assn*., 505 U.S. 88, 109 (1992) The Gade court held that "certification requirements [like vaccine certifications or passports] before an employee may engage in such work are occupational safety and health standards."

Currently, thousands of employers across the country are listing in their job recruitment announcements that "proof of Covid-19 vaccines" are required as a "pre-condition" to employment. See Exhibit G – Indeed Listing of Covid-19 Vaccine Required Jobs This conduct by all employers directly violates OSHA and the Supreme Courts ruling.

Therefore, an emergency and permanent injunction is absolutely necessary against the City and for all private employers requiring Covid-19 vaccine as a "pre-condition" to employment around the country.

## III PRELIMINARY/CONDITIONAL CLASS CERTIFICATION IS WARRANTED

Class representative Plaintiffs, seek class certification pursuant to Fed. R.Civ.P. 23(a), Fed.R.Civ.P. 23(b)(1)((A), to Fed.R.Civ.P. Rules 23(b)(3) to pursue claims for the damages, and on behalf of themselves and all persons similarly situated. Plaintiffs seek "conditional or preliminary" class certification" wherein Plaintiffs only need to make a modest factual showing that they were "were all similarly situated with respect to being subject to the same policy of being denied…compensation and whether a factual nexus exists among them." See *Jie Zhang v. Wen Mei, Inc*., No. 14–CV–1647, 2015 WL 6442545, at *5 (E.D.N.Y. Oct. 23, 2015) see also *Miranda v. Gen. Auto Body Works, Inc*., No. 17-CV04116, 2017 WL 4712218, at *2 (E.D.N.Y. Oct. 18, 2017) The Second Circuit has also recognized, that courts within it "have coalesced around a two step method" wherein the court must make an initial determination to send notice to potential opt-in plaintiffs who may be "similarly situated" to the named plaintiffs and make a modest factual showing that the potential opt-in plaintiffs together were victims of a common policy or plant that violated law. *Myers v. Hertz Corp*., 624 F.3d 537, 444 (2d Cir. 2010)

The Plaintiffs class claims are appropriate under Fed.R.Civ.P. 23(b)(1)((A) and can meet the modest low standard of conditional class certification outlined by the *Myer* court because prosecuting separate actions, like in the *Garey* case, by other similarly situated Plaintiffs against the City has already created inconsistent and varying adjudications that directly conflict with the Federal Law that predominates the issues in this case and those cases. The cases resolved by the Second Circuit and the New York State Courts – thus far- have established incompatible standards of conduct for the City because the ruling in this case, if this Court rules Plaintiffs favor, would prohibit the City from including vaccine mandates in its collective bargaining agreements with the Unions, and would prohibit City from ever issuing any vaccine mandate due to "conflict preemption" with the Federal OSH Act and with New York State law that prohibits adult vaccination and the prescribing of a medical treatment by employers.

The Class claims raise numerous common questions of fact or law applicable to all City and private sector employees which including:

a. Whether the Vaccine Orders are preempted by OSHA standards because the Vaccine Orders specifically targets City employees and forces "medical treatment of a vaccine" on employees in violation of OSHA authorized methods and New York State law;

b. Whether the enforcement of invalid Vaccine Orders violates the First Amendment, 42 U.S.C. §1983 and amount to religious discrimination and harassment pursuant to the New York City Human Rights Act.

All potential class members are easy to identify because they applied for an exemption from the Vaccine Orders and their request for exemption where denied and all were either: 1) terminated, 2) put on leave without pay or 3) received a denial of an exemption and took the vaccine out of fear of loosing their job. Class Certification is also appropriate under Federal Rules of Civil Procedure 23(b)(3) wherein the common issues identified above will predominate over any purely individual issues. Moreover, a class action is superior to other means for fairly and efficiently adjudicating the controversy. The claims of the named Plaintiffs are typical of the claims of the class in that the named Plaintiffs and class members have a private right of action under Section 1983, wherein: 1) the acts of the City of New York Department of Health under color of administrative health laws; (2) caused a deprivation of a constitutional or statutory right – in this case the classes First Amendment Free Exercise right to reject the medical treatment of a Covid-19 vaccine and classes statutory right to obtain OSHA approved safety measures of remote work and/or safety equipment, including a Powered Air Purifying Respirator in order to remain on the job safety; and (3) which caused a continuing irreparable injury along with monetary injury to the Class. *Monell v. Dep't of Social Servs*., 436 U.S. 658, 690-91, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978).

Furthermore, the named Plaintiffs claim where all forced to seek an unnecessary religious exemptions over and over again which subjected them to harassing interrogations regarding their religious practice of abstaining from the Covid-19 vaccine and subjected them to religious discrimination, which is also common to the class. Thus, the named Plaintiffs have the same interests and have suffered the same type of irreparably damages as the class members, including loss wages and benefits for being

placed on leave without pay and/or terminated due to their refusal to submit to the City's Vaccine Orders. Over 12,000 City employees who applied for religious or medical exemptions and thousands of private sector employees have been equally damaged by the City's nine (9) Vaccine Orders.

Because the City possesses a list and contact information for all City employees who applied for religious and medical exemptions from the Vaccine Orders, notice to the proposed Class can be completed fairly easily if this Court orders in its Injunction that the City provide the contact information for all City employees who requested religious and medical exemptions and appoint Women of Color for Equal Justice as Lead Counsel to manage the streamlined Class Notification. However, a separate order regarding notification of private sector employees will be necessary to develop a form notice appropriate under the Federal Rule 23.

It is clear from the *Gravey* ruling justice a conditional class certification is necessary to ensure that all injured City and private employees receive "equal justice".

## IV CONCLUSION

Plaintiffs respectfully requests the Court to grant its application for a temporary restraining order to stop the City and any private employer from entering into agreements that contain the vaccine mandate as a "condition of employment" or pre-condition of employment. Plaintiffs' further requests that the Court rule on its requests for preliminary or permanent injunction is granted and the revised proposed injunction attached to this renewed motion is entered. In the event an injunction is issued, Plaintiffs finally request that the Court grant conditional class certification so that all employees harmed by the City's mandates can receive equal justice.

Dated: October 26, 2022

Respectfully submitted,
/s/ Jo Saint-George

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