Case No. S246444

IN THE

SUPREME COURT OF CALIFORNIA

ALLEN KIRZHNER

Plaintiff and Appellant,

v.

MERCEDES-BENZ USA, LLC

Defendant and Respondent.

FROM A DECISION BY THE COURT OF APPEAL
FOURTH APPELLATE DISTRICT
DIVISION THREE
CASE NUMBER G052551

ANSWER TO PETITION FOR REVIEW BY MERCEDES-BENZ USA, LLC

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I.

INTRODUCTION

This Answer Brief by Respondent Mercedes-Benz USA, LLC ("MBUSA") addresses the Petition for Review filed by Appellant Allen Kirzhner ("Appellant"). Like most cases, this case is important to the litigants, but closely examined, it simply presents an issue of statutory interpretation such that review by this Court is not necessary "to secure uniformity of decision or to settle an important question of law" within the meaning of Rule 8.500(b) of the California Rules of Court. Indeed, Appellant has readily conceded in his Petition for Review (at 17-18) that "there is no case law directly contradicting the Court of Appeal's conclusions here…".

To this end, both the trial court and the Court of Appeal first properly determined that *post-sale vehicle registration fees* are not recoverable by a consumer like Appellant who seeks restitution under the Song-Beverly Consumer Warranty Act (the "Act" or "Song-Beverly Act")[1] because, first, they are not within the plain meaning of the statutory language found in Civil Code section 1793.2(d)(2)(B).[2] In interpreting this language and affirming the trial court, the Court of Appeal concluded that the "registration fees"

[1] Civil Code §§ 1790, et seq.

[2] Civil Code § 1793.2(d)(2)(B) states: "In the case of restitution, the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer, including any charges for transportation and manufacturer-installed options, but excluding nonmanufacturer items installed by a dealer or the buyer, and including any collateral charges such as sales or use tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer."

identified in section 1793.2(d)(2)(B) "do not include all registration fees that a buyer pays over the course of the lease," and are limited only to "fees paid in conjunction with the original purchase or lease transaction." (Opinion at 3.)[3] The Court of Appeal aptly reasoned, by close examination of the statutory language specifying that the amount of restitution shall be equal to "the actual price paid or payable by the buyer," that "registration fees" for successive years cannot be a "'collateral charge' because they are incurred and paid after the initial purchase or lease." (Opinion at 5, emphasis added.) In other words, the statutory meaning is clear that "restitution" is simply refunding the purchase price paid in exchange for the vehicle.

The net result is that the Plaintiff's bar, who routinely attempt to present and seek the totality of registration fees paid from the date or purchase/lease up until the time of trial or settlement of the case, are now precluded from doing so. The temporal limitation on recovery of registration fees expressed in the Court of Appeal's opinion, which to date had been lacking any appellate guidance, further serves to eliminate what has been an impediment to early resolution of these cases where the typical costs of owning and maintaining a motor vehicle are frequently tacked onto the claim, which are typically resolved via Code of Civil Procedure Section 998 offers or by other means.

Second, the Court of Appeal's opinion also clarifies, as a matter of statutory construction, what constitutes an "incidental damage" under Civil Code Section 1793.2(d)(2)(B). The Court of Appeal correctly concluded that incidental damages are

[3] A copy of the Court's unpublished opinion and the order granting publication are attached to this Answer as Exhibits 1 and 2 respectively.

"costs incurred as a result of a vehicle being defective," (Opinion at 6), and appropriately declined Plaintiff's attempt to broaden incidental damages beyond "the standard cost of owning any vehicle" – including for example, costs for gas, car washes or oil changes – would "open up a 'Pandora's box' of potential costs for which a defendant would need to pay in restitution in these cases," which is beyond the pale of the statutory scheme in which the Legislature intended to be remedial and limited to the costs associated with the new vehicle purchase only. (Opinion at 5-6.)

MBUSA, along with the multiple other manufacturers/distributors of new motor vehicles in California, have been forced to regularly litigate this issue unnecessarily because Plaintiffs in lockstep routinely demand reimbursement for standard ownership or vehicle operation costs such as liability insurance, oil changes and regular maintenance, car washes, and tire replacement, even though the consumer has obviously received the benefit of such items during the period the vehicle was used. As explained by the Court of Appeal in *Mitchell v. Blue Bird Body Co*. (2000) 80 Cal.App.4th 32, 35-40, the restitutionary remedy under the Song-Beverly Consumer Warranty Act is intended to restore the *status quo ante*; not to provide a windfall to the consumer. The Court of Appeal's Opinion is consistent with this well-established principle, and review is not necessary "to secure uniformity of decision or to settle an important question of law."

II.

FACTUAL BACKGROUND/STATEMENT OF THE CASE

A. The Complaint and MBUSA's Answer

On September 11, 2014, Appellant filed a complaint against MBUSA in the Superior Court of the State of California for the County of Orange, alleging various violations of the Act. (AA 1.)[4] Appellant leased a 2012 Mercedes-Benz C250W ("vehicle") on June 6, 2012. (AA 52-54).

B. Settlement Of The Case

On March 2, 2015, MBUSA served Appellant with an Amended Section 998 Offer to Compromise under the Code of Civil Procedure (the "Offer"), which stated in pertinent part as follows:

> 1. Pursuant to California Civil Code § 1793.2(d)(2)(B), in exchange for the subject vehicle, MBUSA offers to make restitution in an amount equal to the actual price paid or payable by the Plaintiff, including any charges for transportation and manufacturer-installed options, but excluding non-manufacturer items installed by a dealer or the Plaintiff, and including any collateral charges such as sales or use tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer, less reasonable mileage offset in accordance with Civil Code Section 1793.2(d)(2)(C), all to be determined by court motion if the parties cannot agree.
>
> […]
>
> Additionally, in connection with the above alternative offers to compromise, MBUSA will pay Plaintiff a sum equal to the aggregate amount of costs and expenses, including attorney's fees based on actual time expended determined by the court to have been reasonably incurred by the buyer in connection with the commencement and prosecution of this action pursuant to Civil Code § 1794(d), to be determined by court if the parties cannot agree.

[4] The record consists of Appellant's Appendix filed in lieu of the Clerk's Transcript ("AA").

(AA 18 – 19.)

The Offer's first paragraph tracked Section 1793.2(d)(2)(B) of the Act and did not contain any specific monetary amounts, which could "be determined by court motion if the parties cannot agree." (AA 18-19).

Appellant accepted the Offer on April 2, 2015. (AA 16 – 22.)

On May 15, 2015, the trial court entered Judgment, with the accepted Offer as an exhibit. (AA 23 – 27.) The Judgment also contained no specific dollar amounts. (AA 23 – 27.)

The parties having failed to reach resolution, moved for determination of the amounts due under Paragraph 1 of the Offer, which was heard on July 9, 2015. (AA 28 – 57.) In the motion, Appellant sought a total of $54,900.39 in damages under the terms of the 998 Offer, *of which $680 represented post-lease subsequent year registration for 2013, 2014 and 2015*. (AA 28 – 40; 63.)

On August 28, 2015, the trial court determined, *inter alia*, that MBUSA owed Appellant's lease down payment (not disputed) of $1,867.58, which included $101.00 in lease-itemized first-year (2012) registration and titling fees. (AA 52;161). However, MBUSA did not owe any sum representing the post-lease subsequent year registration fees for 2013, 2014, and 2015, a claim totaling $680. (AA 162 – 164, 174 – 175.) Specifically, after citing the relevant statute (Civil Code section 1793.2(d)(2)(B)), the trial court stated as follows:

> According to the court's independent research, the registration fees under the statute, do not include all registration fees that a buyer pays over the course of the lease. See *Robbins v. Hyundai Motor America* (C.D. Cal.App. Aug. 7, 2014) 2014 WL 4723505 at *4; *Robertson v. Fleetwood Travel Trailers of California, Inc.* (2006) 144 Cal.App.4th 785, 813. Thus, the requested fees by plaintiff are not part of the restitution remedy. (AA 163).

Appellant's appeal followed via a Notice of Appeal filed in September 1, 2015. (AA 176-178.)

C. The Appeal

On appeal, MBUSA explained in its Respondent's Brief that the Act imparts certain core tenets, and that the trial court did not err in declining to award Appellant the post-lease subsequent year registration fees for 2013, 2014, and 2015, a claim totaling $680. More specifically, and as outlined by MBUSA in its Respondent's Brief, the Act provides consumers with a replacement or restitution remedy at the car buyer or lessee's election where a manufacturer is unable to service or repair a new motor vehicle to conform to an express warranty after a reasonable number of attempts. Should the consumer opt for the restitution remedy, the Act expressly provides that the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer or lessee in exchange for the vehicle—in other words, like a retail return for any other consumer product, the buyer returns the vehicle to the manufacturer for his/her money back. The Act also authorizes repayment of additional costs over and above the "sticker price" that must be paid at the time of the initial purchase or lease for the consumer to drive the vehicle off the lot at that time, such as license fees, registration fees, sales taxes and transportation charges ("collateral charges").

Finally, the Act further allows recovery of any other costs causally related to the breach of express warranty, such as towing, rental cars, repair costs and the like ("incidental damages"), distinguished from the customary costs of mere lease, ownership, operation and maintenance of a motor vehicle. The Act provides nothing else.

MBUSA also explained that by the Act's express language, the "restitution" remedy is tethered to the actual price paid or payable by the consumer *at the time of the vehicle purchase or lease*. Since the Act's purpose is to restore the consumer to the *status quo ante* in exchange for the vehicle, it was not intended not to cover the full tab for a buyer's ownership, operation, use and maintenance which are normal costs regardless of any breach of express warranty. Otherwise stated, just because a motor vehicle buyer prevails under the Act does not also entitle him/her to an additional windfall of every conceivable cost of operating a motor vehicle ranging from subsequent year registration costs to liability/collision insurance, maintenance, fuel, highway tolls, carwashes and parking fees.

D. <u>The Court Of Appeal's Opinion</u>

Following oral argument, the Court of Appeal issued an unpublished decision on November 27, 2017, affirming the trial court's order denying Appellant's inapt request for recovery of post-sale vehicle registration fees. The Court of Appeal held, as a matter of statutory construction, that "the [trial] court properly determined section 1793.2(b)(2)(B) does not require payment of vehicle registration *renewal* fees and related costs incurred after the initial purchase or lease." (Opinion at 2, italics in original.)

The Court of Appeal subsequently issued an order certifying the opinion for publication on December 13, 2017, following receipt of amicus letters from the Association

of Southern California Defense Counsel, Bowman and Brooke, and the Civil Justice Association of California requesting publication.[5]

In affirming the trial court, the Court of Appeal explained that the "registration fees" identified in Section 1793.2(d)(2)(B) "do not include all registration fees that a buyer pays over the course of the lease" and are necessarily limited only to "fees paid in conjunction with the original purchase or lease transaction." (Opinion at 3.) In reaching this conclusion, the Court of Appeal reasoned -- by reference to the express statutory language specifying that the amount of restitution shall be equal to "the actual price paid or payable by the buyer" -- that "registration fees" for successive years cannot be a "'collateral charge' because they are incurred and paid after the initial purchase or lease." (Opinion at 5, emphasis added.)

Finally, as a matter of statutory construction, the Court of Appeal concluded that the registration fees at issue were not an "incidental damage" under Civil Code section 1793.2(d)(2)(B), because an "incidental damage" is a "cost incurred as a result of a vehicle being defective," and "[s]uch is not the case with vehicle registration renewal fees which are more accurately characterized as a standard cost of owning any vehicle. (Opinion at 6.) Further, permitting recovery as incidental damages "the standard cost of owning any vehicle" – including for example, costs for gas, car washes or oil changes – would "open up a 'Pandora's box' of potential costs for which a defendant would need to pay in restitution in these cases," which is beyond the pale of the statutory scheme in which the

[5] A fourth amicus letter requesting publication was also submitted by Clark Hill LLP.

Legislature intended to be remedial and limited to the cost(s) associated with the new car purchase only. (Opinion at 5-6.)

III.

ARGUMENT

A. Supreme Court Review Is Unnecessary Because The Issues Presented Are Not Review Worthy

The subject appeal concerned the trial court's determination of the amounts due under MBUSA's offer to compromise pursuant to Code of Civil Procedure Section 998, following entry of judgment. Because the terms of MBUSA's 998 Offer mirrored the applicable statutory provisions under the Act, the appeal arises from the trial court's interpretation of the statute and therefore raises a pure question of law that was subject to independent ("*de novo*") review on appeal. See *Aryeh v. Canon Business Solutions, Inc.* (2013) 55 Cal.4th 1185, 119.

Since the 1905 inception of the California Courts of Appeal, this Court has made it clear that its function is not to ensure that those courts achieve the right or best results in a particular case. Rather, this Court's role is "to secure harmony and uniformity in the [Court of Appeal's] decisions, their conformity to the settled rules and principles of law, a uniform of decision throughout the state, a correct and uniform construction of the Constitution, statutes, and charters, and in some instances a final decision by the court of last resort of some doubtful or disputed question of law." *People v. Davis* (1905) 147 Cal. 346, 348; see also, Calif. Rules of Court, rule 8.500(b)(1).

None of these reasons for Supreme Court review are present here. The Court of Appeal's opinion arises out of an issue of pure statutory interpretation such that review by

this Court is not necessary "to secure uniformity of decision or to settle an important question of law" within the meaning of Rule 8.500(b) of the California Rules of Court, and Appellant has himself openly conceded "there is no case law directly contradicting the Court of Appeal's conclusions here . . .." (Petition for Review at 17-18.)

Despite this concession, Appellant strains mightily to articulate a review-worthy issue by turning the circumstances of the appeal at issue into a purported "opportunity to settle two extremely important questions that arise in virtually every single lemon law case." (Petition for Review at 7.) *To wit*: (1) whether a motor vehicle manufacturer who repurchases a consumer's vehicle is obligated to reimburse all registration fees paid by the consumer, or merely the vehicle's first year's registration only; and, (2) whether the "incidental damages to which the buyer is entitled under Section 1794" are limited to "costs incurred as a result of a vehicle being defective." (*Ibid.*)

It is no wonder these purported questions have never been addressed by a California appellate court before because the statutory scheme and the applicable case law are clear.

B. The Court of Appeal Correctly Interpreted Civil Code § 1793.2(d)(2)(B) To Exclude Post Sale Registration

As noted *infra*, the statute at issue provides, in pertinent part, that:

> In the case of restitution, **the manufacturer shall make restitution in an amount equal to the actual price paid or payable by the buyer**, . . . including any collateral charges such as sales or use tax, license fees, registration fees, and other official fees, plus any incidental damages to which the buyer is entitled under Section 1794, including, but not limited to, reasonable repair, towing, and rental car costs actually incurred by the buyer.

Civil Code § 1793.2(d)(2)(B) (emphasis added).

Preliminarily, this section's basic premise is a manufacturer buys back a qualifying defective vehicle in exchange for what the buyer paid for it, subject to what the statute in limited fashion further allows. Concerning the phrase "actual price paid or payable by the buyer" and the term "collateral charges," which is further defined by the following phrase, "such as sales or use tax, license fees, registration fees, and other official fees," it is plainly evident that: (1) the "registration fees" identified in Section 1793.2(d)(2)(B) are necessarily limited in a temporal sense only to fees paid by the buyer/lessee in connection with the original purchase or lease transaction; and, (2) "registration fees" for successive years cannot be a "collateral charge" because they are incurred and paid after the initial purchase or lease. In other words, the basic premise is the manufacturer pays the buyer back what is ordinarily stated on the vehicle purchase agreement.

Pursuant to Civil Code section 3534, "[p]articular expressions qualify those which are general." This concept, also known by its Latin name *ejusdem generis*, states that where a non-exhaustive list is given, other items urged to be within the class of members should share the characteristics of those expressly included. See, e.g., *Campbell v. Bd. Of Dental Examiners* (1975) 53 Cal.App.4th 283, 285, disapproved on other grounds by *California Teachers Ass'n. v. San Diego Cmty. Coll. Dist.* (1981) 28 Cal.3d 692. Application of this concept to the list of "collateral charges" recoverable under the statute suggests that other charges recoverable under this section should share characteristics with those expressed, and as such, a manufacture is only obligated to reimburse the vehicle's first year's registration only.

In *Mitchell v. Bluebird Body Co.*, *supra*, the appellate court had cause to interpret Section 1793.2(d)(2) with respect to the plaintiff's claim for finance interest under the Act. Although the court noted that the Act did not expressly list finance charges as an item of recovery, it noted that the Act expressly characterized the refund remedy as "restitution" which was "intended to restore 'the *status quo ante* as far as is practicable.'" 80 Cal.App.4th at 36. Lastly, the Court concluded:

> "A more reasonable construction is that the Legislature intended to allow a buyer to recover the entire amount *actually expended for a new motor vehicle*, including paid finance charges, less any of the expenses expressly excluded by the statute…"

Id. at 37. By parity of reasoning, it follows that restoration of the *status quo ante* does not include reimbursement of registration fees for successive years beyond the vehicle's first year, and requiring post-sale reimbursement would result in a windfall to the consumer.

Other than simply citing to the relevant provisions of the Act itself, Appellant cites no case law favoring his interpretation of the statute at issue. That is because there is none.

While MBUSA does not quarrel with the *Murillo*[6] Court's reaffirmation that the Act is a "remedial measure" enacted "for the benefit of consumers," nowhere did it hold that a prevailing consumer was entitled to every penny expended in the normal ownership and operation of a motor vehicle beyond what the Legislature has allowed as "restitution" of the purchase price expended to buy it. Indeed, *Murillo* did not even address the specific statutory provision at issue in this case.

[6] *Murillo v. Fleetwood Enterprises, Inc.* (1998) 17 Cal.4th 985.

Appellant's citation to *Jiagbogu v. Mercedes-Benz USA* (2004) 118 Cal.App.4th 1235 is similarly misplaced. That case likewise did not involve the issue of what *restitution* a prevailing buyer was entitled to under the Act. Instead, it only dealt with the issue of whether a manufacturer/distributor could also deduct an "equitable" mileage offset for continued vehicle use in addition to what the Act specifically allowed. The Court said no, and held there was no further offset for use available other than what the Act clearly stated.

Like this case, *Jiagbogu* only dealt with a statutory interpretation of the Act's offset provision (section 1793.2(d)(2)(C)). Nowhere did that Court hold that a prevailing buyer under the Act is entitled to every penny expended for the operation, maintenance and use of a motor vehicle. Instead, it has held that the Act's allowance of a statutory mileage offset foreclosed the manufacturer's right to claim back an "equitable offset" for continued use of the vehicle. See, e.g. Civil Code § 1793.2(d)(2)(C). In other words, the Act *already allows* a buyer to "free use" of the vehicle at the manufacturer's expense beyond the time of the first nonconformity. There, the Court of Appeal refused to add to it. Whether or not a buyer does or does not have vehicle problems does not mean such costs would not have been incurred. To the contrary, such costs, like the registration costs at issue here, were necessary regardless. Accordingly, not only does *Jiagbogu* not assist Appellant here, but recognizes that the Legislature already provides a balanced approach.

C. Post-Sale/Lease Registration Fees Are Not Within the Scope of "Incidental Damages" Under the Act

As a matter of statutory construction, the Court of Appeal also correctly concluded that the registration fees at issue were not an "incidental damage" under Civil Code Section

1793.2(d)(2)(B), because an "incidental damage" is a "cost incurred as a result of a vehicle being defective," and "[s]uch is not the case with vehicle registration renewal fees which are more accurately characterized as a standard cost of owning any vehicle." (Opinion at 6.) The Court of Appeal further reasoned that permitting recovery as incidental damages "the standard cost of owning any vehicle" – including for example, costs for gas, car washes or oil changes – would "open up a 'Pandora's box' of potential costs for which a defendant would need to pay in restitution in these cases," which is beyond the pale of the statutory scheme in which the Legislature intended to be remedial and limited to the cost(s) associated with the new car purchase only. (Opinion at 5-6.)

To support his argument, Appellant references the Act's damages provision, Civil Code Section 1794(b), which allows Commercial Code section 2715 "incidental damages" in certain circumstances. His initial opening brief devoted less than one full page to the issue. Appellant is again wrong.

At the onset, Civil Code Section 1790.3 provides that "the provisions of [the Act] shall not affect the rights and obligations of parties determined by references to the Commercial Code except that, where the provisions of the Commercial Code conflict with the rights guaranteed to buyers of consumer goods under the provisions of [the Act], the provisions of [the Act] shall prevail." See also, *Krotin v. Porsche Cars North America, Inc.* (1995) 38 Cal.App.4th 298, 301.

Both the Act itself and case law recognize limits in application of a Commercial Code enacted to govern the sale of *commercial* goods between merchants in arm's length transactions and here – a sale of a motor vehicle to a "*non-commercial*" buyer. See, e.g.

Bishop v. Hyundai Motor America (1996) 44 Cal.App.4th 750, 756 [court recognized distinctions between Commercial Code provisions applicable only to *commercial* transactions between merchants, thereby declining to apply and thus limited damages of "cover", "loss of use", "emotional distress" and other "consequential damages" in a Song-Beverly Act case involving a *non-commercial buyer*]. In this regard, the Act itself addresses "incidental damages" insofar as Section 1793.2(d)(2)(B) provides for recovery of "incidental damages" with a non-exhaustive more restrictive and balanced list, such as "reasonable repair, towing and rental car costs actually incurred by the buyer." However, subsequent year registration costs (or insurance, fuel, highway tolls, oil changes, car washes, maintenance, parking fees, etc.) are not on that list. Nor should they be.

Instead, in order to prevail in showing that an item of damages qualifies as "incidental damages," a plaintiff has the burden to prove that: (a) the expense was actually charged, (b) the expense was reasonable, and (c) the defendant's breach of warranty or other violation of the Act was a substantial factor in causing the expense. CACI 3242. Thus, just as "collateral charges" are causally related to the initial purchase and the purchase price, "incidental damages" must be causally related to the alleged breach of warranty. Registration fees incurred in the years subsequent to the purchase however, are in no sense incurred as a result of a manufacturer's breach and therefore do not satisfy the elements of CACI 3242. Accordingly, to the extent Appellant suggests that the Commercial Code governs in a pure *commercial* setting, both the Act itself and existing case law holds otherwise in cases under the Act. Again, as referenced above, the Act itself already allows a buyer a "windfall" to continue driving the vehicle after the first substantial nonconformity

until the manufacturer ultimately repurchases the vehicle "free of charge". See, e.g. *Jiagbogu, supra.* Accordingly, the Court of Appeal correctly declined to provide a further windfall involving the ordinary costs of operating and maintaining a motor vehicle. Whether or not the buyer drives a "lemon" vehicle or a different one, the buyer still has to incur costs of operating and maintaining a motor vehicle, whichever one it is.

In sum, Appellant cannot argue, much less prove, that MBUSA's breach of warranty or other violation of the Act caused or was a substantial factor in causing the three subsequent years' worth of vehicle registration fees. Plaintiff still would have been required to pay these charges regardless of whether he had a legitimate lemon law claim.

IV.

CONCLUSION

For the foregoing reasons, this Court should deny Appellant's Petition for Review.

Respectfully submitted,

DATED: February 1, 2018

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By: _____
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CERTIFICATE OF WORD COUNT

I, Jon D. Universal, hereby certify as follows:

I am appellate counsel for Respondent Mercedes-Benz USA, LLC. According to the word processing program I used to prepare this Answer, the Answer (excluding tables, this certificate, and any attachments) is 4660 words long.

DATED: February 1, 2018

Jon D. Universal

PROOF OF SERVICE

STATE OF CALIFORNIA, COUNTY OF PLACER

I am employed in the County of Placer, State of California. I am over the age of 18 and not a party to the within action. My business address is 2240 Douglas Blvd., Suite 290, Roseville, California 95661.

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STATE OF CALIFORNIA
Supreme Court of California

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Lower Court Case Number: **G052551**

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