

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO**

Civil Action No. 1:23-cv-00313-RM-KAS

FOX FACTORY, INC.,

Plaintiff,

v.

SRAM, LLC,

Defendant.

**SRAM, LLC’S MOTION TO STAY LITIGATION PENDING *INTER PARTES* REVIEW
AND INCORPORATED MEMORANDUM IN SUPPORT**

COMES NOW Defendant SRAM, LLC (“SRAM”), and hereby respectfully submits its Memorandum of Law in Support of its Motion to Stay Litigation pending *Inter Partes* Review (“IPR”) of U.S. Patent No. 9,739,331 (“the ‘331 patent”) and U.S. Patent No. 8,550,223 (“the ‘223 patent”).

I. INTRODUCTION

When IPR petitions are filed and a party moves to stay the litigation to allow the PTAB time to weigh in, this Court has consistently granted a stay to allow that process to take place. Recognizing the burden that patent litigation can place on courts, Congress statutorily created the IPR process as “at least a partial and, in some situations, a complete alternative to litigation of patent validity issues.” *Well Master Corp. v. Flowco Prod. Sols., LLC*, No. 21-CV-02145-CMA-KLM, 2022 WL 4129399, at *3 (D. Colo. Sept. 12, 2022). The IPR process, conducted by administrative patent judges within the Patent Trial and Appeal Board (“PTAB”) of the United

States Patent and Trademark Office (“PTO”), harnesses the expertise of these highly qualified individuals to provide an expeditious review of invalidity challenges and thereby relieve the burden on the Court and the parties during litigation. *See id.* at *4.

This litigation, involving two patents and twenty-three individual patent claims, and seeking construction of multiple claim terms therein, is an ideal case where a stay would benefit the Court and the parties. SRAM timely filed three IPR petitions (IPR2023-01301, IPR2023-01302, and IPR2024-00216) before the PTAB, challenging the validity of the *exact* patents and *exact* claims at issue in this case. The issues before the PTAB (the same issues before this Court) are substantive and voluminous. Indeed, the three petitions with accompanying expert reports and exhibits, are **2,949 pages** long.¹

Given the overlap between the patent claims and patent invalidity defenses in this litigation and the three IPR petitions, both the parties and this Court would be best served by staying this litigation pending a decision from the PTAB. As this Court knows, the proceedings before the PTAB are expedited, with strict regulatory timelines for both party response times *and* the PTAB’s decisions. 37 C.F.R. § 42.100(c) (final written decision to be issued within one year after IPR is instituted). Given the efficiencies to this litigation and the expertise that the PTAB has to offer, this case should be stayed pending a written decision issued by the PTAB in IPR2023-01301, IPR2023-01302, and IPR2024-00216.

¹ The petition for IPR2023-01301 (with expert report and exhibits) is 946 pages in length; the petition for IPR2023-01302 (with expert report and exhibits) is 1013 pages in length; and the petition for IPR2024-00216 (with expert report and exhibits) is 990 pages in length. For the convenience of the Court, SRAM has only attached hereto as Exhibits 1–3 the three petitions and not their individual exhibits.

II. BACKGROUND

As Fox’s initial Complaint alleges, SRAM’s first bicycle fork with a bleeder valve was launched “on or about October 5, 2021”—*over two years ago*. (ECF No. 1 ¶ 17.) Similarly, SRAM’s accused shocks have been on the market since 2022. Despite the Accused Products being in the market for some time, Fox did not file its initial Complaint until July 13, 2022, nor its First Amended Complaint (adding the ‘223 patent) until November 30, 2022. (ECF Nos. 1, 29.) In other words, the Accused Products have been on the market for well over a year at this point, and there has been no market disruption that could not otherwise be compensated for monetarily following a trial.

On March 16, 2023, this Court entered the operative Scheduling Order in this case, with fact discovery not set to close until March 7, 2024, expert discovery not set to close until May 9, 2024, and dispositive motions not due until June 6, 2024. (ECF No. 88 at 7–8.) A trial date has not been set, nor has a final pretrial conference been scheduled. (*Id.* at 9.) While claim construction briefing has been submitted, this Court has not yet construed any of the terms of either patent. Further, while depositions limited to the issues of the preliminary injunction were taken, no additional depositions have been taken since the Court’s denial of Fox’s motion for preliminary injunction—in other words, there have been no depositions relating to the ‘223 patent whatsoever and discovery is very much incomplete.

Consistent with the statutory requirements of 35 U.S.C. § 315(b), SRAM has challenged the validity of Fox’s ‘331 and ‘223 patents by filing IPR petitions (IPR2023-01301, IPR2023-01302, and IPR2024-00216) within one year of the initiation of this litigation asserting those patents. Fox filed its preliminary responses relating to the ‘331 IPRs on November 24, 2023, and its preliminary response to the ‘223 IPR is due by no later than February 29, 2024. As such, the

PTAB will decide whether to institute review of the ‘331 patent by no later than February 24, 2024, and the ‘223 patent by no later than May 29, 2024. *See Kamstrup A/S v. Axioma Metering AUB*, No. 19-cv-1669-WJM-SKC, 2019 WL 6296699, at *1 (D. Colo. Nov. 25, 2019) (citing 35 U.S.C. § 314(b)). Once instituted, the PTAB’s evaluation of each patent’s claims is prompt, with a final written decision required within one year from the date IPR is instituted. 37 C.F.R. § 42.100(c).

III. Standard for Granting Stays Pending *Inter Partes* Review

“Courts have the inherent power to stay proceedings to manage their dockets.” *Smith Sport Optics, Inc. v. Burton Corp.*, 601 F. Supp. 3d 936, 939 (D. Colo. 2022) (citing *Landis v. N. Am. Co.*, 299 U.S. 248, 254, 57 S.Ct. 163, 81 L.Ed. 153 (1936)). When determining whether to stay a case pending *Inter Partes* Review of the patent(s)-in-suit, the District of Colorado considers the following factors set forth in *eSoft, Inc. v. Blue Coat Sys., Inc.*:

- (1) whether a stay will simplify the issues in question and streamline the trial;
- (2) whether discovery is complete and whether a trial date has been set;
- (3) whether a stay would unduly prejudice the nonmoving party or present a clear tactical advantage for the moving party; and
- (4) whether a stay will reduce the burden of litigation on the parties and on the court.

505 F. Supp. 2d 784, 787 (D. Colo. 2007). In considering the factors, “[n]o one factor is determinative, and the totality of the circumstances are considered.” *Smith Sport Optics, Inc.*, 601 F. Supp. 3d at 939. Factors one and four of the stay considerations “are often considered together.” *Kamstrup A/S*, 2019 WL 6296699, at *2; *see also Well Master Corp*, 2022 WL 4129399, at *4 (analyzing the first and fourth factor as one). Accordingly, those factors are treated together herein.

IV. ARGUMENT

A. The First and Fourth Factors Strongly Favor A Stay as the IPR Will Likely Simplify the Issues on Patent Invalidity, Streamline the Trial, and Reduce the Burden of Litigation.

“When weighing [the first and fourth] factors, the Court evaluates ‘(1) the role of the [PTAB]’s expertise in determining claim validity and the assistance such determination will assist

the Court in its own analysis and (2) whether claims, arguments and defenses can be narrowed or entirely disposed of.” *Well Master Corp.*, 2022 WL 4129399, at *4 (quoting *Collect LLC v. Samsung Elecs. Co., Ltd.*, No. 19-CV-00438-CMA-MEH, 2020 WL 3425166, at *4 (D. Colo. June 23, 2020)). Where the claims and defenses can be narrowed or entirely disposed of, a stay would necessarily reduce the burden of litigation on the parties and the court, which is why these factors are considered together. *See, e.g., Smith Sport Optics, Inc.*, 601 F. Supp. 3d at 943; *see also Collect LLC*, 2020 WL 3425166, at *7.

1. The PTAB’s Expertise in Determining Claim Validity Will Assist the Court in its Own Analysis.

Fox has asserted **twenty-three** separate claims under two separate and highly technical patents in this action against at least eighteen different accused products. (Fox Am. Infringement Contentions, attached as Exhibit 4 hereto.) Further, even though Fox stated no claim construction was needed at the preliminary injunction briefing, Fox has sought claim construction of **thirteen** terms under the two patents. (ECF No. 123 at 1.) Those same twenty-three claims have been challenged by SRAM’s IPR Petitions. (*Compare* ECF No. 123, with Exhibits 1–3 (IPR2023-01301, IPR2023-01302, and IPR2024-00216 Petitions).) In those three IPRs, SRAM has raised **sixteen** different pieces of invalidating prior art patents, and the PTAB will need to consider not only whether Fox’s asserted claims are fully anticipated by **seven** of the patents raised therein, but also whether Fox’s asserted claims are otherwise rendered obvious by the **eleven** different prior art combinations raised in SRAM’s petitions.

As shown by the assertions in this case and the overlapping issues in the IPR petitions, this is a technical case, involving numerous claims under numerous patents, requiring claim construction of over a dozen terms and involving analysis of a significant amount of prior art to determine validity. It is therefore indisputable that, even if the patents are not found invalid, “the

Court will gain valuable expert insight as to the issues underlying claim validity” if it waits for the PTAB’s interpretation of the same claims at issue in this litigation. *Smith Sport Optics, Inc.*, 601 F. Supp. 3d at 941; *see also eSoft, Inc.*, 505 F. Supp. 2d at 787 (“[T]he specialized expertise the PTO can bring to bear on the question whether prior art undermines the validity of the patent’s claims would unquestionably help this court resolve Plaintiff’s case expeditiously, efficiently, and—most importantly—correctly.”); *Well Master Corp.*, 2022 WL 4129399, at *5 (“[I]f the PTAB grants the IPR petition, the Court will gain valuable expert insight as to the issues underlying claim validity for any claims that proceed in this litigation”). This Court has previously found that the administrative patent judges within the PTAB that consider IPRs are “experts” and “are more likely come to correct decisions regarding the validity of patent claims faster than would be achieved via litigation in district court.” *Smith Sport Optics, Inc.*, 601 F. Supp. 3d at 940; *see also Well Master Corp.*, 2022 WL 4129399, at *4 (“[T]hese experts within the PTO are more likely to come to correct decisions regarding the validity of patent claims faster than would be achieved via litigation in district court.”). As the *eSoft* court found, whatever the PTAB’s decision in the IPR, its analysis will necessarily aid the court’s analysis of the issues: *either* the asserted claims survive challenge, which Plaintiff may try to use to bolster its validity case² *or* the patent is rendered invalid in whole or in part, in which case “Plaintiff’s case will evaporate.” *eSoft, Inc.*, 505 F. Supp. 2d at 787–88.

Such is the case here where there is potentially *complete* overlap between the asserted claims and those challenged in the IPRs. If the PTAB accepts the petitions in whole or in part, this Court will have the benefit of experts in reading and analyzing technical patents like the ‘331 and

² To be clear, estoppel as to certain invalidity defenses will only apply if the PTAB issues a final written decision confirming patentability of certain claims.

‘223 patents and performing a thorough yet expedited analysis of the claims at issue to determine their validity. Whatever the PTAB’s decision, it will assist the Court: either the Court will have an expert analysis assessing the viability of certain of SRAM’s invalidity defenses or the case will “evaporate” in whole or in part because some or all of the claims asserted herein have been found to be invalid. As such, this factor weighs very heavily in favor of a stay.

2. *The Case May Be Narrowed or Entirely Disposed.*

As set forth above, there is potentially **complete** overlap between the claims asserted in this case (Claims 1–8 on the ‘331 patent and Claims 1–9, 11–15, and 19 on the ‘223 patent) and those challenged in the three IPRs. Consequently, a decision by the PTAB could (1) dispose of **all** of Fox’s claims (if SRAM succeeds in invalidating the asserted claims), (2) narrow the issues by invalidating **some** of the claims at issue, or (3) at the very least provide the court with the PTAB’s assessment of the viability of certain of SRAM’s invalidity defenses in this lawsuit. *See eSoft, Inc.*, 505 F. Supp. 2d at 787–88. In short, whether SRAM or Fox prevails in the IPRs, the Court wins because it can look to the PTAB’s expertise and analysis on the very issues asserted in this litigation. *See id.* at 786 (“Courts recognize that shifting the patent validity issue to the PTO has many advantages, including (1) all prior art presented to the court will have been first considered by the PTO, with its particular expertise; (2) the outcome of the reexamination many [*sic*] encourage a settlement; (3) issues, defenses, and evidence will be more easily limited in final pretrial conferences after a reexamination; and (4) costs will likely be reduced both for the parties and the court.”). Because there is a distinct possibility that the “claims, arguments and defenses” in this case would be “entirely disposed of,” or at least “narrowed,” which necessarily reduces the burden of litigation on the parties and the Court, this factor weighs strongly in favor of a stay.

Although the PTAB has not yet decided whether and to what extent it would grant review of SRAM's three IPR petitions, Courts in this District *routinely* grant stays even prior to the PTAB's acceptance of an IPR petition. *E.g., Smith Sport Optics, Inc.*, 601 F. Supp. 3d at 941 (granting motion to stay pending IPR when "[t]he PTAB ha[d] not granted Defendant's IPR petition"); *Well Master Corp.*, 2022 WL 4129399, at *5 (rejecting plaintiff's argument that "a request for a stay is premature because the PTO has not yet determined whether to institute IPR proceedings" and finding that "other courts in this district, including this Court, have granted motions to stay with the same procedural posture"); *Kamstrup A/S*, 2019 WL 6296699, at *2–3 (granting motion to stay prior to PTAB's acceptance of IPR petition).

Where, like here, the PTAB has not denied institution of review, courts will look to PTAB institution rates. *See, e.g., Personalis, Inc. v. Foresight Diagnostics Inc.*, No. 22-CV-01913-CNS-NRN, 2023 WL 371931, at *5 (D. Colo. Jan. 24, 2023). Where the institution rates indicate more probably than not the PTAB will grant review, then courts in this District have found this factor weighs in favor of a stay. *See id.* Thus, in *Personalis, Inc.*, the court granted a stay and found this factor weighed in favor of a stay where the institution rate per patent was 65% and per petition was 59%. *Id.* The court further noted that even "[i]f the PTAB denies all the petitions," the harm and delay would be minimal because "the litigation would 'go forward as normal with only a few months lost.'" *Id.* (quoting *Kamstrup A/S*, 2019 WL 6296699, at *2).

According to the USPTO database, since 2020, institution rates by petition and by patent have increased year-over-year. (See Exhibit 5, United States Patent and Trademark Office, *PTAB Trial Statistics, October 2023, IPR, PGR*, https://www.uspto.gov/sites/default/files/documents/ptab_aia_20231031.pdf.) Moreover, as of October 31, 2023, the 2024 trending institution rates by petition and by patent are 73% and 75%,

respectively, which suggests that an IPR review of the patent claims is probable. Indeed, these rates are higher than the institution rates in *Personalis, Inc.* where the court found this factor weighed in favor of a stay. *Id.*

For at least these reasons, the first and fourth factors weigh in favor of staying litigation pending IPR review.

B. The Second Factor Weighs in Favor of a Stay Because Discovery Is Not Complete and the Parties Have Not Set a Date for Trial.

Under the second *eSoft* factor, courts look to whether discovery has been completed, whether a trial date has been set, whether the parties have briefed summary judgment arguments, and the status of the final pretrial order, if any. *Smith Sport Optics, Inc.*, 601 F. Supp. 3d at 941 (citing *Broad. Innovation, L.L.C. v. Charter Commc'n*, No. 03-CV-2223-ABJ-BNB, 2006 WL 1897165, at *8 (D. Colo. July 11, 2006)). However, even “completion of discovery does not necessarily counsel against staying a patent infringement action.” *eSoft, Inc.*, 505 F. Supp. 2d at 788.

In *Smith Sport Optics, Inc.*, the court found that this factor weighed in favor of a stay where (1) discovery was underway, but had not yet closed; (2) there remained approximately 6 months before the close of expert discovery; and (3) there remained approximately 7 months before dispositive motions were due. 601 F. Supp. 3d at 942. The court there had denied a motion for preliminary injunction, but otherwise found that the case was “in a relatively early stage of the proceedings” and thus weighed in favor of a stay. *Id.*

Similar to the procedural posture of *Smith Sport Optics, Inc.*, where the court weighed this factor in favor of staying litigation, this case here is at an early stage. To date, although the parties have engaged in *some* discovery, numerous additional depositions will undoubtedly be required, especially relating to the ‘223 patent. Moreover, *fact* discovery is not set to close for nearly three

months and *expert* discovery is set to remain open for nearly 5 months—similar to the time remaining in the *Smith* case where the court found the case was “in a relatively early stage.” (ECF No. 88 at 7–8.) Additionally, dispositive motions are not due for nearly 6 months, which will undoubtedly require significant time and resources from both the parties and the Court given the number of claims at issue as well as SRAM’s defenses. *See, e.g., eSoft, Inc.*, 505 F. Supp. 2d at 789 (considering the time and resources that would be required to respond to and evaluate the summary judgment motions and finding that the PTAB’s determination of the IPR would “assuredly aid in the resolution of such motions” weighing in favor of a stay). Indeed, this Court has not even had to rule upon the substantial claim construction briefing yet, which would unquestionably be aided by the PTAB’s *inter partes* review. Finally, no trial date has been set, nor has a final pretrial conference even been scheduled—let alone a final pretrial order entered.

Accordingly, just like in *Smith*, this case is at a relatively early stage, which weighs strongly in favor of staying litigation.

C. The Third Factor Weighs in Favor of a Stay Because Mere Delay of the District Court Proceedings Does Not Unduly Prejudice Fox Nor Present a Tactical Advantage to SRAM.

In weighing the third *eSoft* factor, courts consider (1) whether a delay caused by a stay of litigation unduly prejudices the remedy to which the nonmoving party is entitled, if any; and (2) whether the movant unfairly gains a tactical advantage from any stay granted. *Well Master Corp.*, 2022 WL 4129399, at *6.

1. Delay Does Not Unduly Prejudice Fox.

“Courts frequently find that mere delay caused by IPR is not prejudicial.” *Smith Sport Optics, Inc.*, 601 F. Supp. 3d at 942; *see also Collect LLC*, 2020 WL 3425166, at *6; *Well Master Corp.*, 2022 WL 4129399, at *6. Rather, “IPR provides a *more efficient and timely* resolution to disputes of patent validity than can be achieved by litigation.” *Smith Sport Optics, Inc.*, 601 F.

Supp. 3d at 942 (emphasis added). Even if the IPR does not fully resolve a case, courts within this district have nevertheless found that with the benefit of the PTAB’s decision, “the Court is likely to be more efficient in its proceedings because of the [PTAB’s] expert findings.” *Collect LLC*, 2020 WL 3425166, at *6. Thus, this factor weighs in favor of a stay.

2. *SRAM Does Not Gain a Tactical Advantage From a Stay of These Proceedings.*

To determine whether SRAM obtains a tactical advantage from a stay of proceedings, courts consider the timing of the IPR petition filings. *Collect LLC*, 2020 WL 3425166, at *6.

In *Collect LLC*, the defendant filed its IPRs “nearly to the day, at the end of the 1-year statutory period for filing IPR requests[.]” *Id.* Nevertheless, the Court found that this factor did **not** weigh against a stay because of the plaintiff’s delay in filing a “finalized list” of asserted claims. *Id.* at *7. In that case, the IPRs were filed a few months after the finalized list was provided and the Court thus found that “[a]ny delay in making a filing of such magnitude, even if it creates a tactical advantage, cannot reasonably or fairly be attributed to [defendant.]” *Id.*; see also *Cocona, Inc. v. VF Outdoor, LLC*, No. 16-CV-02703-CMA-MLC, 2018 WL 10910847, at *8 (D. Colo. Mar. 19, 2018) (“The patent statute allows up to one year after service of the complaint in this case. This suggest that Congress found a year after service of an infringement complaint is generally a reasonable time period for an alleged infringer to decide whether to pursue IPR.”).³

³ Where a patent owner files a motion for leave to file an amended complaint asserting infringement of new patent claims, the one year limitation does not begin to run until patent owner files its amended complaint after the court granted patent owner leave to do so. See also *Watson Lab’ys, Inc. v. United Therapeutics, Corp.*, Case IPR2017-01622, Paper 9 at 6–9 (PTAB Jan. 11, 2018) (concluding that petitioner was not served with the complaint alleging infringement for purposes of § 315(b) until patent owner filed its amended complaint after the district court granted patent owner’s motion for leave to do so); see also *Aristocrat Techs., Inc. v. High 5 Games, LLC*, Case IPR2018-00529, Paper 8 at 13 (PTAB July 30, 2018) (“[M]ere delivery of a proposed amended complaint before the district court granted leave to file the amended complaint was not ‘service’ within the meaning of § 315(b)”).

Here, although SRAM waived service of Fox’s Complaint asserting infringement of the ‘331 patent on August 11, 2022 and Fox served its Amended Complaint asserting infringement of the ‘223 patent on November 30, 2022, it did not serve its operative Disclosure of Asserted Claims and Infringement Contentions until March 16, 2023. Thus, like in *Collect*, SRAM’s filing of the voluminous IPR Petitions was within several months of receiving detail on Fox’s operative infringement contentions, and any delay cannot be reasonably attributed to SRAM. This is especially the case considering not only the volume of the IPR filings, but also the necessity for expert review and preparation of expert declarations for each filing. Indeed, these are not short expert declarations, but are instead lengthy technical documents that cannot be created overnight. By way of example, Dr. Eric Wang’s declarations are 159 pages in IPR2024-00216, 175 pages in IPR2023-01302, and 137 pages in IPR2023-01301. Mr. Wesling’s declarations are 158 pages, 170 pages, and 135 pages, respectively. Needless to say, expert declarations consisting of hundreds of pages of technical opinions and based on review of extensive prior art material take significant time for the experts to prepare.

Even more importantly, Fox did not serve its final position on construction of claim terms until August 3, 2023, just a few weeks before SRAM filed the initial two IPRs. (*See* ECF No. 120.) SRAM had to wait until then to fully understand Fox’s claim construction position because, until then, Fox had been taking wildly different positions regarding the construction of the ‘331 patent. For example, in contrast to Fox’s purportedly *final* position clarified on August 3, 2023 and seeking construction of *three* different terms contained in claim 1 of the ‘331 patent, Fox (and its expert) had previously stated “*no claim terms* in claim 1 of the ‘331 patent require express construction.” (ECF No. 40-11 at 4 (emphasis added); *see also* ECF No. 71-2 at 4 (same); ECF No. 40 at 15 (“Claim 1 of the ‘331 patent does not require construction”); ECF No. 71 at 7–8

(“Claim 1 of the ‘331 patent does not require construction”); ECF No. 102 (“Plaintiff FOX Factory, Inc. hereby respectfully submits that claim 1 of the patent-at-issue (U.S. 9,739,331) is written clearly with no special scientific or technical terms that may require claim construction by the Court.”).) Fox’s latest position solidified SRAM’s invalidity claims as demonstrated by the fact that SRAM attached Fox’s position set forth in the Joint Disputed Claim Terms Chart as an exhibit to its Petitions and incorporated Fox’s claim construction position into its briefing.⁴ (*E.g.*, Exhibit 1 (IPR2023-01301 Petition), at 5–6, 12, 25–26, 33, and Ex. 1014 thereto.) This fact too supports a finding that there was no delay that can be attributed against SRAM.

Therefore, based on a totality of the circumstances, any delay should not weigh against granting a stay of this litigation.

V. CONCLUSION

Based on the foregoing, SRAM respectfully requests that this Court grant its Motion to Stay Litigation Pending IPR of the challenged claims of the ‘331 and ‘223 patents.

⁴ Even in its opening claim construction brief, Fox changed its claim construction position yet again, abandoning its attempt to transform the plain meaning of “air pressure” into “air,” as set forth in the parties’ Joint Disputed Claim Terms Chart. (ECF No. 120, at 13.) SRAM noted this latest change in Fox’s shifting claim construction positions in SRAM’s Opposing Claim Construction Brief. (ECF No. 124, at 13 n.8.)

Dated: December 18, 2023

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH D.C.COLO.LCivR 7.1

I hereby certify that on December 18, 2023, counsel for SRAM, LLC conducted a telephone conference with counsel for Fox Factory, Inc. regarding SRAM's Motion to Stay. The parties met and conferred but were unable to reach an agreement regarding the relief requested.

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CERTIFICATE OF SERVICE

I hereby certify that on December 18, 2023, the foregoing document was served upon counsel of record via the CM/ECF system to the following:

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