

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

ARIOSIA DIAGNOSTICS, INC.,
Petitioner,

v.

ILLUMINA, INC.,
Patent Owner.

Case IPR2014-01093
Patent 7,955,794 B2

Before TONI R. SCHEINER, LORA M. GREEN, and ZHENYU YANG,
Administrative Patent Judges.

GREEN, *Administrative Patent Judge.*

DECISION ON PATENT OWNER'S MOTION TO
TERMINATE REEXAMINATION
37 C.F.R. § 42.5

BACKGROUND

Petitioner filed a Petition seeking *inter partes* review of claims 1–22 of U.S. Patent 7,955,794 B2 (“the ’794 patent”) on the following grounds:

References	Basis	Claims Challenged
Fan ¹	§ 102(a), (b), or (e)	1–22
Fan and Lizardi ²	§ 103(a)	1–22
Straus, ³ Rothberg, ⁴ and Walt ⁵	§ 103(a)	1–9 and 11–22

Decision on Institution (Paper 14), 4.

We determined that Petitioner had established a reasonable likelihood that claims 1–22 were anticipated by Fan, and we instituted trial on that challenge. *Id.* at 6–8. We determined also that Petitioner had not demonstrated a reasonable likelihood that claims 1–22 were rendered obvious by the combination of Fan and Lizardi, and also had not demonstrated a reasonable likelihood that claims 1–9 and 11–22 were rendered obvious by the combination of Straus, Rothberg, and Walt. *Id.* at 8–11.

In accordance with 37 C.F.R. § 42.73, we issued a Final Written Decision (Paper 69). We concluded that Petitioner had failed to demonstrate

¹ Fan et al. (“Fan”), Pub. No. US2002/0172946 A1, published Nov. 21, 2002 (Ex. 1004).

² Lizardi et al. (“Lizardi”), US 6,316,229 B1, issued Nov. 13, 2001 (Ex. 1005).

³ Straus, Pub. No. US 2003/0228599 A1, published Dec. 11, 2003 (Ex. 1006).

⁴ Rothberg et al. (“Rothberg”), US 6,274,320 B1, issued Aug. 14, 2001 (Ex. 1007).

⁵ Walt et al. (“Walt”), US 6,859,570 B2, issued Feb. 22, 2005 (Ex. 1008).

that Fan is prior art to the '794 patent, and thus failed to demonstrate by a preponderance of the evidence that claims 1–22 are anticipated by Fan. Paper 69, 16.

In addition, Petitioner filed a second Petition for *inter partes* review; IPR2015-01091. The nominal Petitioner in IPR2015-01091, Roche, is also a named real party-in-interest in the instant proceeding. *See* IPR2015-01091 Paper 18, 12. Although Roche may not have completed its acquisition of Ariosa by the filing date of the petition in the instant proceeding, Roche had announced the acquisition of Ariosa at least as early as December 2, 2014. IPR2015-01091, Ex. 2017. Trial was instituted in the instant proceeding on January 8, 2015; Roche, however, waited until April 24, 2015, to file its petition in IPR2015-01091. IPR2015-01091 Paper 18, 7. In denying institution in IPR2015-01091, we noted that although Roche was aware it might acquire Ariosa as early as June 2014, it waited until April 24, 2015 to file its petition in IPR2015-01091. *Id.* at 12. We noted further that by waiting so long, Roche had the advantage of the Patent Owner's response filed in the instant proceeding, as well as the cross-examination of Patent Owner's expert. *Id.* at 15. We, thus, concluded that the petition filed in IPR2015-01091 was an attempt to perfect the petition filed in the instant proceeding. *Id.*

In a conference call held on January 5, 2016, Patent Owner stated that Petitioner had filed three requests for *ex parte* reexamination of the '794 patent. Paper 68, 2. Patent Owner requested authorization to file a motion to terminate the reexaminations challenging the '794 patent. In response, we authorized Patent Owner to file a ten page motion requesting that the Board terminate the *ex parte* reexaminations, and we authorized Petitioner to file a

ten page opposition, to which Patent Owner could file a five page reply. *Id.* at 3.

Specifically, Petitioner filed three separate *ex parte* reexamination requests for the '794 patent before the final written decision was issued in this proceeding. Paper 72, 3.

Ex parte reexamination 90/013,666 (“the ’666 reexamination request”) was filed on 12/21/2015 (Ex. 2048). Ex parte reexamination 90/013,667 (“the ’667 reexamination request”) was filed on 12/29/2015 (Ex. 2049) and ex parte reexamination no. 90/013,671 (“the ’671 reexamination request”) was filed on 1/4/201[6] (Ex. 2050).

Id. at 3–4.

In the ’666 reexamination request, Petitioner asserts that the claims of the ’794 patent are anticipated or rendered obvious by Straus.⁶ Paper 72, 4. Specifically, Petitioner contends that claims 1–3, 5–9, 11, 13 and 14 are anticipated by Straus; claims 1–3, 5–9, 11, 13 and 14 are rendered obvious by Straus in view of Lizardi; claims 1–3, 5–9, 11, 13 and 14 are rendered obvious by Straus in view of Barany; claim 4 is rendered obvious by Straus in view of Fodor; claim 4 is obvious over Straus in view of Walt; claim 4 is rendered obvious over Straus in view of Lizardi and further in view of Fodor; claim 4 is rendered obvious over Straus in view of Lizardi and further in view of Walt; claim 4 is rendered obvious over Straus in view of Barany and further in view of Fodor; claim 4 is rendered obvious over Straus in view of Barany and further in view of Walt; claims 9, 11, and 13 are obvious over Straus in view of Rothberg; claims 9, 11, and 13 are obvious over

⁶ Straus, Pub. No. US 2002/0086289 A1, published Jul. 4, 2002. (Ex. 1002 in the ’666 reexamination request; Ex. 1004 to IPR2015-01091). This application to Straus is a parent application to Straus, Pub. No. US 2003/0228599 A1, relied upon by Petitioner in the instant proceeding.

Straus in view of Lizardi; claims 9, 11, and 13 are obvious over Straus in view of Lizardi and further in view of Rothberg; claims 9, 11, and 13 are obvious over Straus in view of Barany and further in view of Rothberg; claims 15–18, 21, and 22 are obvious over Straus in view of Walt; claims 15–18, 21, and 22 are obvious over Straus in view of Lizardi and further in view of Walt; and, claims 15–18, 21, and 22 are obvious over Straus in view of Barany and further in view of Walt. The '666 reexamination request,⁷ 4–10. It was determined that the '666 reexamination request raised a substantial new ground of patentability, and reexamination was ordered on March 2, 2016. '666 reexamination, Determination—Reexam Ordered, 5–12.

As to the '667 reexamination request, Petitioner asserts that the claims of the '794 patent are anticipated or rendered obvious by Shuber.⁸ As in the '666 reexamination request, Petitioner asserts that claims 1–9, 11, 13–18, 21, and 22 are anticipated by Shuber, or rendered obvious by multiple combinations of Shuber with other references, including Straus, Pub. No. US 2002/0086289 A1. The '667 reexamination request,⁹ 4–12. It was determined that the '667 reexamination request raised a substantial new ground of patentability, and reexamination was ordered on March 2, 2016. '667 reexamination, Determination—Reexam Ordered, 5–17.

Finally, Petitioner notes that the '671 reexamination relies primarily on the Fan reference, on which we instituted trial in the instant proceeding. Paper 72, 6. As in the '666 reexamination request, Petitioner asserts that claims 1–9, 11, 13–18, 21, and 22 are rendered obvious by multiple

⁷ Filed as Ex. 2048 in the instant proceeding.

⁸ Shuber, US 5,834,181, issued Nov. 10, 1998.

⁹ Filed as Ex. 2049 in the instant proceeding.

combinations of Fan with other references, including Straus, Pub. No. US 2002/0086289 A1. The '661 reexamination request,¹⁰ 4–11. It was determined that the '671 reexamination request raised a substantial new ground of patentability, and reexamination was ordered on March 18, 2016. '671 reexamination, Determination—Reexam Ordered, 5–15.

ANALYSIS

Patent Owner requests termination of the '666, '667, and '671 reexaminations of the '794 patent. Paper 72, 2. According to Patent Owner, Petitioner's "invalidity campaign (now five petitions and requests) is an improper attempt by the inventors of the '794 patent to invalidate their own patent (despite attesting to its validity in their assignments to Illumina) by evading the doctrine of assignor estoppel through the Patent Office. These are exactly the kind of excesses and abuses Congress wanted the Board to combat when Congress granted the Board the power to terminate co-pending proceedings under §§ 315(d) and 325(d)." *Id.* at 1 (reference omitted). Patent Owner asserts that the reexamination requests are duplicative of the issues presented in the instant proceeding and IPR2015-01091, and "are also an effort to delay further the infringement proceedings in the District Court." *Id.* at 2. In particular, Patent Owner notes that the "district court case between Illumina and Ariosa was stayed on February 2, 2015, pending the outcome" of the instant proceeding. *Id.* at 7–8.

Patent Owner asserts that we have the discretion to terminate the reexaminations under 35 U.S.C. § 325(d), as well as under 37 C.F.R.

¹⁰ Filed as Ex. 2050 in the instant proceeding.

42.122(a). *Id.* at 2. Patent Owner also cites to the legislative history of the AIA,¹¹ noting:

Congress intended for serial invalidity attacks that unduly multiply the proceedings to be terminated under §§ 315(d) & 325(d) and 37 C.F.R. § 42.122(a). The legislative history states that “[i]n the second sentence of section 325(d), the present bill also authorizes the Director to reject *any* request for *ex parte reexamination* or petition for post-grant or *inter partes* review on the basis that the same or substantially the same prior art or arguments previously were *presented* to the Office. This will prevent parties from mounting attacks on patents that raise issues that are substantially the same as issues that were already before the Office with respect to the patent.” Ex. 2056, 157 Cong. Rec. S1376 (Statement of Sen. Kyl) (emphasis added). “Under section 325(d), second sentence, however, the Office could nevertheless refuse a subsequent request for *ex parte reexamination* with respect to such an issue, *even if it raises a substantial new question of patentability*, because the issue previously was *presented* to the Office in the petition for *inter partes* or post-grant review.” *Id.* (emphases added).

Id. at 6–7.

Petitioner responds that “the Board has held not only that *ex parte* reexamination requests filed during IPRs may proceed, but that the co-dependency of multiple patent office proceedings is contemplated by the AIA.” Paper 73, 5. Petitioner cites *Game Show Network, LLC v. John H. Stephenson*, Case IPR 2013-00289, slip op. at 3 (PTAB March 21, 2014) (Paper 31), for the proposition that “the AIA contemplates the possibility of concurrent proceedings, as it gives the Director discretion to determine how the concurrent matters may proceed.” Paper 73, 5–6. According to Petitioner, that comports with the legislative history of the AIA, which

¹¹ Leahy-Smith America Invents Act, Pub. L. No. 112-29, 125 Stat. 284 (2011) (“AIA”).

recognizes that “substantial new questions of patentability can exist even when art has been previously considered or cited.” *Id.* at 6. Petitioner quotes (*id.*) the following legislative history:

[P]reviously considered prior art will not necessarily bar a request for reexamination The appropriate test to determine whether a ‘substantial new question of patentability’ exists should not merely look at the number of references or whether they were previously considered or cited but ***their combination in the appropriate context of a new light as it bears on the question of the validity of the patent.***

H.R. Rep. No. 107-120 at 3 (2001) (emphasis added by Petitioner) (Ex. 1055).

Section 325(d) states:

Multiple Proceedings.—Notwithstanding sections 135(a), 251, and 252, and chapter 30, during the pendency of any post-grant review under this chapter, if another proceeding or matter involving the patent is before the Office, the Director may determine the manner in which the post-grant review or other proceeding or matter may proceed, including providing for the stay, transfer, consolidation, or termination of any such matter or proceeding. In determining whether to institute or order a proceeding under this chapter, chapter 30, or chapter 31, the Director may take into account whether, and reject the petition or request because, the same or substantially the same prior art or arguments previously were presented to the Office.

Moreover, § 315(d) states:

Multiple Proceedings.—Notwithstanding sections 135(a), 251, and 252, and chapter 30, during the pendency of an inter-partes review, if another proceeding or matter involving the patent is before the Office, the Director may determine the manner in which the inter partes review or other proceeding or matter may proceed, including providing for the stay, transfer, consolidation, or termination of any such matter or proceeding.

We determine that, even if Petitioner may not be estopped under 35 U.S.C. § 315(e)(2) from pursuing certain of the grounds of unpatentability it is advocating in its *ex parte* reexamination request at the district court, *see Shaw Industries Group v. Automated Creel Sys.*, Nos. 15-1116, 15-1119, ___ F.3d ___, at*6-9 (Fed. Cir. Mar. 23, 2016), 35 U.S.C. §§ 315(d) and 325(d) gives us the discretion to terminate the *ex parte* reexamination of the '794 patent.

We have considered the legislative history cited by Petitioner, but that does not convince us otherwise. Specifically, § 315(d) states that “during the pendency of an inter-partes review, if another proceeding or matter involving the patent is before the Office, the Director may determine the manner in which the inter partes review or other proceeding or matter may proceed, including providing for the stay, transfer, consolidation, or termination of any such matter or proceeding.” That section of the statute does not refer to whether “the same or substantially the same prior art or arguments previously were presented to the Office.” Thus, while we may consider whether the same arguments were before us in the *inter partes* review proceeding, those considerations are not determinative of the analysis. We, therefore, turn to whether we should exercise that discretion to terminate the '666, '671, and '671 reexaminations.

According to Patent Owner, each of the reexamination requests are “based on a ground previously raised by Petitioners that has already been rejected by the Board.” Paper 72, 4. Specifically, Patent Owner argues as to the '666 reexamination that Petitioner first raised challenges based on Straus, Pub. No. US 2003/0228599 A1 in the instant proceeding, and we denied institution based on Straus, Pub. No. US 2002/0086289 A1, in

IPR2015-01091, as it raised substantially the same arguments in the instant proceeding. *Id.* As to Petitioner’s reliance on Shuber in the ’667 reexamination, Patent Owner argues that we denied institution over Shuber in IPR2015-00191 “because Petitioners did not ‘point specifically to differences between the teaching of Shuber and Fan’ or explain how the use of Shuber was not ‘in effect, a second chance for Ariosa to perfect the Petition it filed in IPR2014-01093.’” *Id.* at 5. Finally, as to the ’671 reexamination, Patent Owner notes that reexamination relies primarily on Fan, on which we instituted trial in the instant proceeding. *Id.* at 6. Patent Owner acknowledges, however, that Petitioner is relying on Fan in an obviousness context, rather than as an anticipatory reference. *Id.*

Patent Owner argues further that “allowing the reexamination requests to proceed would encourage a Petitioner to use multiple IPR proceedings as a foil to gain insight from the Board’s opinions, the experts’ deposition testimony, and Patent Owners’ arguments, and then retool their arguments in subsequent *ex parte* reexamination attacks.” *Id.* at 8. Patent Owner relied upon that rationale in part when we denied institution in IPR2015-01091. *Id.*

Finally, Patent Owner argues¹² that we should terminate the reexamination based on the doctrine of assignor estoppel. *Id.* at 10. Patent Owner contends:

¹² Note that Patent Owner argues also that Petitioner is also estopped from filing an *ex parte* reexamination. Paper 72, 9–10. The Federal Circuit has held, however, that “noninstituted grounds do not become a part of the IPR” and, thus, estoppel does not apply to those grounds in a subsequent court or Board proceeding. *HP, Inc. v. MPHJ Tech. Invs.*, No. 2015-1427, ___ F.3d ___, at *7 (Fed. Cir. Apr. 5, 2016); *Shaw Industries Group* at*6-9.

John Stuelpnagel and Arnold Oliphant are inventors of the '794 patent, assigned their interest in the '794 patent to Patent Owner for good and valuable consideration, and co-founded Petitioner Ariosa Diagnostics. Paper 31 at 56-57. These inventors are now attacking this same patent in *ex parte* reexamination proceedings. “Assignor estoppel is an equitable doctrine that prevents one who has assigned the rights to a patent (or patent application) from later contending that what was assigned is a nullity.” *Diamond Scientific Co. v. Ambico, Inc.*, 848 F.2d 1220, 1224 (Fed. Cir. 1988). The equities here favor finding that Petitioner Ariosa should be estopped from challenging the '794 patent in the reexaminations.

Id.

Petitioner responds that “Patent Owner’s Motion to terminate the Requests . . . is extraordinary: Patent Owner effectively insists that the existence of *inter partes* review petitions insulates the '794 patent from *any* other challenge before the Patent Office.” Paper 73, 1. Specifically, as to the instant proceeding, Petitioner argues that we instituted only on Fan, and denied institution over Straus on non-substantive grounds. *Id.* According to Petitioner, “although Straus is a matter of public record, the Board declined institution because Petitioner did not ‘submit a copy [of the Straus priority application] as an exhibit,’ even though Straus was a continuation of that priority application that did not contain new matter and thus shared the same specification.” *Id.* at 1–2.

Petitioner asserts further that Roche acquired Ariosa after this proceeding was instituted, and, thus, on April 24, 2015, filed a petition in IPR2015-01091 that included grounds over Straus, as well as over a new reference, Shuber. *Id.* at 2. Petitioner notes that we declined to institute trial in IPR2015-01091 “again on non-substantive grounds, deciding not to allocate the Board’s resources to the petition.” *Id.* Thus, Petitioner

contends, “the only ground that received substantive consideration and was subject to trial before the Board was an anticipation ground based on Fan,” and in that case, the status of Fan as prior art was the only issue addressed, and thus the merits of its arguments as to invalidity were not reached. *Id.* at 2–3. Thus, according to Petitioner, “[t]o date, the Office has not substantively considered any of the grounds which are presented in the Requests.” *Id.* at 3; *see also id.* at 6–7.

Petitioner asserts¹³ that it has “a statutory right to seek review of substantial new questions of patentability that have not been substantively considered by the Patent Office.” *Id.* Petitioner contends, “[w]here, as here, the grounds presented in an *ex parte* reexamination have not been fully and substantively considered, they are ‘new’ and do not duplicate any prior proceedings before the Office.” *Id.* at 7–8. According to Petitioner:

Post-grant trials are, above all, “a search for the truth.” *Edmund v. Semrock*, IPR2014-00599, Paper 44 at 4 (May 5, 2015). Here, the public interest favors allowing the Patent Office to determine whether the Requests present a substantial new question of patentability, and, if so, to conduct a full, substantive review. Patent Owner’s attempt to evade any substantive review of the art raised by Petitioner through an unprecedented request should be denied.

Id. at 9.

Finally, Petitioner contends that because assignor estoppel “is inapplicable to invalidity proceedings before the Patent Office, [thus] Patent Owner’s argument is without merit.” *Id.* at 10.

¹³ Petitioner also asserts that the motion is premature, as *ex parte* reexamination had not yet been ordered, Paper 73, 3–5, but as noted above, reexamination has been ordered in each of the ’666, ’667, and ’671 reexams.

After carefully considering the arguments presented by both parties, and after considering the totality of the circumstances, we exercise our discretion and terminate the '666, '667, and '671 reexaminations.¹⁴ We recognize that the prior art disclosures relied upon are somewhat different between the instant proceeding and the '666, '667, and '671 reexaminations, but, as we noted above, § 315(d) is not limited to whether “the same or substantially the same prior art or arguments previously were presented to the Office.” Moreover, § 325(d) is not triggered only when the prior art applied in other proceedings, such as the reexaminations here, is identical to the art on which trial was instituted in the instant proceeding. The statute is broader than that, stating that a petition may be denied when “substantially the same prior art *or* arguments previously were presented to the Office.” 35 U.S.C. § 325 (d) (emphasis added). The statute expressly contemplates denial of review when the art applied in two petitions is different, but the arguments are “substantially the same.” *Id.*

Petitioner raised patentability over the work of Straus initially in the instant proceeding, and then again in IPR2015-01091. In the instant proceeding, institution over Straus, Pub. No. US 2003/0228599 A1, was denied as Petitioner had failed to demonstrate a reasonable likelihood that Straus was prior art to the claims. Paper 14, 10–11. And in IPR2015-01091, institution over Straus, Pub. No. US 2002/0086289 A1, was denied, in part, on the basis that that Petitioner’s argument was substantially the same as the arguments presented in the instant proceeding, and Petitioner did not explain

¹⁴ Termination of the '666, '667, and '671 reexaminations is neither a resolution on the merits of any substantial new question of patentability, nor is it a determination of the patentability of any of the claims over the rejections on which reexamination was granted.

“why the Straus reference cited in the [IPR2015-01091] Petition” could not have been relied upon in the instant proceeding. IPR2015-01091, Paper 18,¹⁵ 14–15.

We denied institution over Shuber in IPR2015-01091, in part, because Petitioner did not address the difference between the teachings of Shuber and Fan, and because the Petition in that proceeding was “in effect, a second chance for Ariosa to perfect the Petition it filed in IPR2014-01093.” IPR2015-01091, Paper 18, 15. Finally, we did institute over Fan in the instant proceeding. And, contrary to Petitioner’s argument that “[t]o date, the Office has not substantively considered any of the grounds which are presented in the Requests” (Paper 73, 3), we did consider the merits of the challenge based on Fan and Lizardi, and determined that Petitioner had not demonstrated a reasonable likelihood that claims 1–22 were rendered obvious by that combination of references. Paper 14, 8–10. Petitioner again presents that combination in the ’671 request for reexamination, in combination with Straus, Pub. No. US 2002/0086289 A1. Ex. 2050, 5–6.

Thus, we have addressed Fan, Straus, and Shuber in the instant proceeding and in IPR2015-01091. Petitioner does not appear to have provided an explanation as to why it could not have presented its invalidity grounds challenging the ’794 patent in its requests for *ex parte* reexamination in the petition filed in the instant proceeding.

In addition, Petitioner waited almost until the final decision was due to be issued in the instant proceeding to file its requests for *ex parte* reexamination. The instant petition was filed on July 2, 2014, and trial was

¹⁵ We note that the Decision Denying Institution in IPR2015-01091 has been filed as Ex. 2047 to the instant proceeding.

instituted on January 8, 2015. Petitioner then waited until April 24, 2015 to file its petition in IPR2015-01091, as well as a motion for joinder to the instant proceeding. Petitioner subsequently waited until December 21 and 29, 2015, and January 4, 2016 to file its requests for *ex parte* reexamination, whereas we issued our final decision on January 7, 2016 in the instant proceeding. As we noted in our decision denying institution in IPR2015-01091, Petitioner has now had the benefit of Patent Owner's response in the instant proceeding, and has had the ability to cross-exam Patent Owner's experts. In addition, Petitioner also has the benefit of Patent Owner's additional briefing as to whether or not Fan is prior art to the claims of the '794 patent under the Federal Circuit's decision in *Dynamic Drinkware, LLC. v. National Graphics, Inc.*, 800 F.3d 1375 (Fed. Cir. 2015). Thus, Petitioner has had the opportunity to adjust its invalidity challenges based on information it obtained from previous challenges each time it attacks the claims of the '794 patent. *See, e.g., Office Patent Trial Practice Guide*, 77 Fed. Reg. 48756, 48759 (Aug. 14, 2012) (noting that a core function of identifying real parties-in-interest and privies is "to protect patent owners from harassment via successive petitions by the same or related parties, to prevent parties from having a 'second bite at the apple,'" and to protect the integrity of both the USPTO and Federal Courts by assuring that all issues are promptly raised and vetted."). Petitioner has provided no reason why it waited until December 2015 and January 2016 to file its requests for *ex parte* reexamination, using variations of art it cited in both the instant proceeding, and IPR2015-01091.

Finally, as to the issue of assignor estoppel, Petitioner does not contradict Patent Owner's statement that "John Stuelpnagel and Arnold

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Oliphant are inventors of the '794 patent, assigned their interest in the '794 patent to Patent Owner for good and valuable consideration, and co-founded Petitioner Ariosa Diagnostics” (Paper 72, 10). Thus, although we declined to apply the doctrine of assignor estoppel in the instant proceeding (Paper 14, 11–12), it is an issue that can be considered in the district court proceeding.

Therefore, considering the totality of the circumstances, we exercise our discretion and terminate *ex parte* reexamination Control. Nos. 90/013,666, 90/013,667, and 90/013,671.

ORDER

Accordingly, it is

ORDERED that *ex parte* reexamination Control Nos. 90/013,666, 90/013,667, and 90/013,671 are terminated; and

FURTHER ORDERED that a copy of this order shall be placed in the instant proceeding, as well as *ex parte* reexamination Control Nos. 90/013,666, 90/013,667, and 90/013,671.

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