

IN THE SUPERIOR COURT OF FULTON COUNTY
STATE OF GEORGIA

LARRY MILLER,

*

AND

*

STANLEY HAMBRICK,

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Plaintiffs,

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CIVIL ACTION NO. _____

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vs.

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**THE CITY OF ATLANTA,
GEORGIA,**

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Defendant.

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**COMPLAINT FOR DECLARATORY JUDGMENT, PERMANENT INJUNCTION,
ATTORNEY'S FEES, AND OTHER RELIEF**

This is a civil rights lawsuit in which Plaintiffs seek to vindicate their fundamental right to earn an honest living free from unreasonable and anticompetitive government restrictions. The City of Atlanta has violated that right by handing over *all* public-property vending in the city to a single private company. As that company moves into various areas of the city, existing public-property vendors must either rent a kiosk for thousands of dollars per year or quit their careers altogether. By entering into this contract, the City both overstepped its limited grant of authority and violated the Georgia Constitution.

PARTIES

1. Plaintiff Larry Miller is a citizen of Georgia and a resident of Marietta.
2. Mr. Miller has vended in the City of Atlanta for 30 years.
3. Mr. Miller is a longstanding public-property vendor outside of Turner Field in Atlanta.
4. Plaintiff Stanley Hambrick is a citizen of Georgia and a resident of Atlanta.

5. Mr. Hambrick is a public-property vendor outside of Turner Field who has vended for more than twenty years.

6. Defendant City of Atlanta is a municipality chartered, organized, and created under the laws of the State of Georgia.

JURISDICTION

7. Plaintiffs incorporate Paragraphs 1 through 6 by reference.

8. At all times pertinent to this action, the acts complained of have occurred in or are occurring in Atlanta, Fulton County, Georgia.

9. This action arises under Article I, Section I, Paragraph I of the Georgia Constitution (Due Process); Article III, Section VI, Paragraph V(c)(1) of the Georgia Constitution (Anti-Monopoly Provision); Article I, Section II, Paragraph I of the Georgia Constitution (Non-Delegation Doctrine); and Ga. Code § 9-4-1 to -10. Accordingly, this Court has subject matter jurisdiction over this action, and venue properly lies in this Court.

FACTS

The City of Atlanta's Previous Vending Ordinance.

10. Plaintiffs incorporate Paragraphs 1 through 9 by reference.

11. The City of Atlanta previously regulated public-property vending—i.e., vending that takes place on the sidewalk or otherwise on the public right of way—by granting individual vendors a license that would let them operate from a particular location.

12. The previous version of Section 30-1405 of the Atlanta Code of Ordinances listed twelve different Districts around the City that collectively contained 101 vending locations.

13. In order to become a public-property vendor, the previous version of Section 30-1408 required an individual to submit an application along with a \$50 nonrefundable application fee.

14. This application asked, among other things, what vending location the applicant desired, the size of the applicant's proposed vending station, and the names of the people who the applicant would potentially employ as assistant vendors.

15. Once the application was approved, the City of Atlanta would designate at what location the vendor could operate.

16. The City of Atlanta would then charge an annual permit fee to the vendor that varied from \$50 to \$250 depending on what goods and/or services the applicant wished to offer to the public.

17. A vendor had the option under the previous Code of renewing his or her vending permit and vending location on an annual basis so long as he or she did not violate any of the laws and rules specified in the previous Section 30-1434.

The City of Atlanta's New Vending Ordinance.

18. On September 8, 2008, Defendant City of Atlanta, through its governing authority, enacted Ordinance No. 08-O-1220 (the "Ordinance").

19. Section 1 of the Ordinance repealed Chapter 30, Article XXIII, Division 1 and Division 2 of the Atlanta Code of Ordinances, which had previously governed public-property vending in Atlanta.

20. Section 2 of the Ordinance adopted new language for Article XXIII, Division 1 and Division 2, of Chapter 30.

21. This new language begins by stating that the City of Atlanta's authority to grant an exclusive franchise in public-property vending flows from its powers under its Charter to "[1] regulate or restrict the manufacture, sale, lease, rental, use, or solicitation of personal property by licenses, bonds, permits, or other regulatory methods and [2] [to] allow or decline the use of public spaces and right of way to offer such items to the public." Section 30-1400.

22. Section 30-1402(b) of the Ordinance goes on to state that “[t]he right to manage vending on public property may be contracted to private persons or entities” and that “[a] public vending management contract may provide that the public vending management company be allowed the exclusive right to vend on public property within a specified area of the city or the entire city.”

23. Although the City of Atlanta may under the Ordinance give a public vending management company the exclusive right to vend, Section 30-1409(c) also gives that company the right “to employ personnel or choose the persons with whom it wishes to contract for the operation of public vending sites.” In other words, the company with an exclusive franchise to vend may subcontract that right to individual vendors.

24. Section 30-1405(a) of the Ordinance states that the City of Atlanta Department of Public Works “shall create a public vending location map to specify the location of all vending sites existing as of the date of this ordinance.”

25. Section 30-1405(b) provides that “[p]ublic vending sites which are permitted under the terms of a public vending management contract shall be added to the public vending location map.”

26. Once a public vending management company moves into an area where vending locations already exist, “such locations shall not be permitted at the conclusion of the term of the permit for the prior existing location.” Section 30-1405(c).

27. Once the existing vending locations in an area cease to exist, the existing vendors must either leave or “obtain the written approval of the public vending contractor” to continue operating. Section 30-1402(a)(iii).

28. A vendor who obtains the public vending management company’s written approval and receives a vending permit from the city must operate his or her kiosk in accordance

with the rules set out by the public vending management company. *See* Sections 30-1404(c), -1407(4).

29. Section 30-1404(c) states that failing to follow the rules laid out by the public vending management company “shall be sufficient cause for the [company] to request that the permit be revoked by the license and permits unit or by the public vending management company.”

30. Section 30-1407(4) likewise states that vendors who participate in the public vending management program must follow the operating protocols that the company has laid out and that “[v]iolations of operating protocols . . . are grounds for revocation of the permit.”

31. On September 2, 2008, the City Council adopted Resolution 08-R-1209 (the “Resolution”), which authorized the mayor to enter into an exclusive vending contract with U.K.–LaSalle LLC, a subsidiary of General Growth Properties, Inc. (GGP).

32. The bottom of the first page of the Resolution states that the City of Atlanta is entitled to receive the greater of \$125,000 per annum or five percent of the annual advertising revenue arising from the contract.

33. The first page of the Resolution also specifies that the term of the exclusive agreement will be twenty years.

34. Pages six and seven of the Resolution provide that the City of Atlanta may terminate the agreement for convenience. In such an event, the Resolution states that the public vending management contract shall specify the method of calculating the money damages to be paid to GGP.

The City of Atlanta Signs Over All Public Property Vending

35. On June 30, 2009, representatives from the City of Atlanta and U.K.–LaSalle LLC signed Contract FC-600700095, Public Vending Management Program (the “Contract”).

36. In the Contract, the city “grants [GGP] the exclusive right to occupy and use all public property vending sites which meet the requirements of the Atlanta City Code.” Contract § 1.3.

37. The Contract states, however, that “existing public property vendors shall be permitted to apply . . . to participate in [GGP’s] program.” *Id.* at § 1.3.

38. Exhibit F to the Contract is a series of maps displaying locations for use in the public vending management program that the City of Atlanta Department of Public Works preapproved.

39. Exhibit F shows 29 approved locations surrounding Turner Field that GGP may install kiosks upon for use in the public vending management program.

40. Two of these potential kiosk locations in Exhibit F are either adjacent to or directly upon the locations where Plaintiffs currently operate their vending stands.

41. Under Exhibit A to the Contract, entitled Scope of Services, GGP is to develop a merchandise strategy that “should complement and not compete with existing ‘bricks & mortar’ retailers in the areas of the vending units.” Contract, Ex. A § 2.1.3.

42. The Contract also specifies that GGP is to develop a launch plan and begin implementing the program in Downtown Atlanta and around Turner Field, among other locations.

43. The Contract gives GGP the power to “develop[] and enforc[e] the rules under which vendors will operate.” *Id.* at § 2.1.6.

44. The Scope of Services section to the Contract gives examples of expected rules. *Id.*

45. The Contract, however, does not require GGP to adopt any of these examples.

46. The Contract does not give the City of Atlanta any power to approve or disapprove of the rules that GGP chooses.

47. The Contract requires that the City undertake reasonable efforts to verify that vendors in areas controlled by the public vending management contract have valid permits. *Id.* at § 2.1.8.

48. The Contract also requires that the City “shall promptly respond to report of unlicensed vendors illegally operating in the vicinity of areas licensed to [GGP] and take reasonable action to cause such unlicensed vendors to cease operation.” *Id.* at § 2.1.8(b).

49. Under the Contract, GGP is to provide regular progress reports about the program launch. *Id.* at § 3.0.

50. GGP is also required by the Contract to provide monthly reports that discuss the number of vending locations, the number of vending sites per location, the types of vending structures at each site, and the current monthly lease/license rate for each site. Exhibit A, Scope of Services, § 3.0.

51. Upon information and belief, GGP has not provided these reports to the City.

Phase I of the Public Vending Management Program

52. In the fall of 2009, the City of Atlanta and GGP commenced with the first phase of the public vending management program.

53. As part of Phase I, GGP built approximately 20 kiosks in Downtown Atlanta, including the area around Woodruff Park.

54. Upon information and belief, the existing vendors in the Phase I area either had to apply to GGP to enter the public vending management program or cease operations once GGP began constructing the kiosks.

55. Those applicants who GGP selected for inclusion in the public vending management program had to agree to rent a kiosk from GGP at rates that ranged from \$500 to \$1,685 per month.

56. Upon information and belief, sixteen existing vendors were either unwilling to enter the first phase of the public vending management program or were not selected by GGP for inclusion in the program.

57. Upon information and belief, many of these sixteen vendors have either left the City of Atlanta or work in occupations other than vending.

Phase II of the Public Vending Management Program

58. The second phase of the public vending management program is to include, in part, 13 kiosks on the public sidewalks outside of Turner Field.

59. Phase II was originally scheduled to begin in 2010 but was delayed for unknown reasons.

60. On April 26, 2011, David Bennett, Senior Policy Advisor for City of Atlanta Mayor Kasim Reed, testified before the Atlanta City Council Public Safety Committee.

61. Mr. Bennett testified that an impasse between GGP and the Atlanta Braves had been resolved and that attorneys for GGP expressed to Mr. Bennett that it wishes to proceed with Phase II of the program “this year.”

62. Mr. Bennett then stated that under this timetable, GGP may begin construction in late summer with it being the “September time frame when you would see actual units theoretically appear.”

63. Under the plans as explained by Mr. Bennett, GGP would likely ask for ten permits.

64. Mr. Bennett also noted that while the existing vendors have the right to be “considered” for the public vending management program, the existing vendors have no right of first refusal and that GGP may grant or not grant existing vendors’ applications as it sees fit.

65. On July 15, 2011, Plaintiff Larry Miller returned from a one-week break in the baseball season due to the Major League All-Star game.

66. Mr. Miller discovered a spray-painted outline for a vending kiosk in front of his vending location, indicating that GGP will commence building the kiosks in the immediate future.

67. Mr. Miller had not seen this outline before the one-week break began.

68. On July 20, 2011, Mr. Miller discovered nine other kiosk outlines in the area surrounding Turner Field.

INJURIES TO PLAINTIFFS

Larry Miller

69. Plaintiffs incorporate Paragraphs 1 through 68 by reference.

70. Mr. Miller’s vending stand is located on the western side of Hank Aaron Drive S.E. in the area formerly known as District 6, which surrounds Turner Field.

71. Mr. Miller has operated his vending business at this location for approximately ten years.

72. Mr. Miller’s vending stand is located in an area that the Contract designates as part of “Phase II.”

73. Mr. Miller’s current vending permit will expire on December 31, 2011.

74. Mr. Miller’s stand sells licensed sports memorabilia and novelty apparel as well as prepackaged snacks and beverages.

75. Mr. Miller's stand is open during the baseball season when the Atlanta Braves play a game at Turner Field.

76. The Atlanta Braves play 81 games at home during the regular baseball season.

77. The Atlanta Braves baseball season begins in early April and concludes in late September to late October, depending on whether the team makes the playoffs.

78. Mr. Miller's business model requires that he purchase sports memorabilia year-round.

79. Mr. Miller frequently begins purchasing sports merchandise for the upcoming baseball season shortly after the current season ends in September.

80. If Mr. Miller's vending business is allowed to continue operating from its current location, he will begin purchasing goods in October 2011 to sell from April to September of 2012.

81. Mr. Miller employs approximately six secondary vendors who help him set up and run the vending stand.

82. Mr. Miller and the secondary vendors he employs frequently sell from three of the stand's four sides due to the high volume of pedestrian traffic on the sidewalk.

83. Mr. Miller pays all the taxes and fees that his vending stand is required to under law.

84. Section 30-1405 of the Ordinance states that if GGP constructs kiosks in the area surrounding Turner Field, Mr. Miller will not be able to renew his vending permit at his current location for calendar year 2012.

85. Should GGP construct kiosks in the Turner Field area, Mr. Miller will only be able to continue vending by signing a contract with GGP and renting a kiosk from the company.

86. Mr. Miller does not want to rent a kiosk. He feels that the kiosks would be particularly unfeasible at Turner Field because the kiosks are open on only one side, thereby severely limiting the number of customers who can view his merchandise.

87. Mr. Miller does not wish to rent a kiosk at the cost of thousands of dollars per year or be subject to the vending rules that GGP may promulgate; he simply wants to continue operating his business as he has for more than a decade.

88. But for the Ordinance, Resolution, and Contract, Mr. Miller would renew his vending permit at his current location at a cost of \$250.

89. Mr. Miller will be forced to close his vending business permanently should he be forced to either rent a kiosk or leave.

90. The closure of Mr. Miller's vending stand would force him to terminate the six secondary vendors who he currently employs.

91. The closure of Mr. Miller's business would leave him with thousands of dollars of sporting apparel and other merchandise.

92. Mr. Miller's vending business is his family's primary source of income.

93. If Mr. Miller's vending business is forced to close, he would be left without a job and would have to quickly find another job to replace his lost income.

Stanley Hambrick

94. Plaintiffs incorporate Paragraphs 1 through 93 by reference.

95. Mr. Hambrick owns and operates a vending stand on the eastern side of Hank Aaron Drive S.E. in the area formerly known as District 6, which surrounds Turner Field.

96. Mr. Hambrick's current vending permit will expire on December 31, 2011.

97. Mr. Hambrick's vending stand is located in an area that the Contract designates as part of "Phase II."

98. Mr. Hambrick's stand sells licensed sports souvenirs and memorabilia.
99. Mr. Hambrick employs approximately six secondary vendors who help him buy merchandise, set up the vending stand, and sell merchandise to the public.
100. Mr. Hambrick's business model calls on him to purchase merchandise throughout the year.
101. Mr. Hambrick frequently begins purchasing sports merchandise for the upcoming baseball season shortly after the current season ends in September.
102. If Mr. Hambrick's vending business is allowed to continue operating from its current location, he will begin purchasing goods in September 2011 to sell from April to September of 2012.
103. Mr. Hambrick's business often requires that he plans one to two years in advance.
104. Section 30-1405 of the Ordinance states that if GGP constructs kiosks in the area surrounding Turner Field, Mr. Hambrick will not be able to renew his vending permit at his current location for calendar year 2012.
105. Should GGP construct kiosks in the Turner Field area, Mr. Hambrick will only be able to continue vending by signing a contract with GGP and renting a kiosk from the company.
106. Mr. Hambrick does not want to rent a kiosk. He feels that the kiosks would be particularly unfeasible at Turner Field because the kiosks are open on only one side, thereby severely limiting the number of customers who can view his merchandise.
107. Mr. Hambrick does not wish to rent a kiosk at the cost of thousands of dollars per year or be subject to the vending rules that GGP may promulgate; he simply wants to continue operating his business as he has for more than twenty years.
108. But for the Ordinance, Resolution, and Contract, Mr. Hambrick would renew his vending permit at his current location at a cost of \$250.

109. Mr. Hambrick will be forced to close his vending business permanently should he be forced to either rent a kiosk or leave.

110. The closure of Mr. Hambrick's vending stand would force him to terminate the secondary vendors whom he currently employs.

111. The closure of Mr. Hambrick's business would leave him with thousands of dollars of sporting apparel and other merchandise.

112. Mr. Hambrick's vending business is his family's primary source of income.

113. If Mr. Hambrick's vending business is forced to close, he would be left without a job and would retire rather than find another job.

COUNT I
(Violation of Atlanta Charter)

114. Plaintiffs incorporate Paragraphs 1 through 113 by reference.

115. The Georgia Supreme Court held in 2005 that “[a] municipality has no inherent power; it may only exercise power to the extent it has been delegated authority by the state.” *H.G. Brown Family LP v. City of Villa Rica*, 607 S.E.2d 883, 885 (Ga. 2005).

116. Municipalities in Georgia, including the City of Atlanta, have only those powers expressly granted to them by charter and those necessarily incident to powers expressly granted. *Porter v. City of Atlanta*, 384 S.E.2d 631, 632 (Ga. 1989).

117. The Georgia Supreme Court has held that certain delegations of power, including the power to grant exclusive franchises, must be expressly granted. *Macon Ambulance Service, Inc., v. Snow Properties, Inc.*, 127 S.E.2d 598, 601 (Ga. 1962).

118. The Georgia General Assembly has not granted Atlanta any express power to grant an exclusive franchise in public vending.

119. Because the City of Atlanta lacks the power to grant an exclusive contract over all public-property vending, the Ordinance, Resolution, and Contract that purport to authorize such an exclusive arrangement are *ultra vires* and void.

COUNT II
(Violation of Georgia Constitution—Anti-Monopoly Provision)

120. Plaintiffs incorporate Paragraphs 1 through 119 by reference.

121. Article III, Section VI, Paragraph V of the Georgia Constitution provides that “the General Assembly shall not have the power to authorize any contract or agreement which may have the effect of or which is intended to have the effect of defeating or lessening competition, or encouraging a monopoly, which are hereby declared to be unlawful and void.”

122. Article III, Section VI, Paragraph V’s admonition against the establishment of monopolies extends to actions by municipal corporations.

123. Through the Ordinance, the City of Atlanta authorized an exclusive franchise in public-property vending.

124. The Resolution and Contract grant GGP an exclusive franchise over all public-property vending in the City of Atlanta.

125. The exclusive franchise the City of Atlanta granted to GGP, is a monopoly under Georgia law.

126. Because no other public-property vendors may work without first getting GGP’s permission, the Ordinance, Resolution, and Contract have the effect of lessening competition.

127. The City of Atlanta, in enacting the Ordinance and Resolution, and in entering into an exclusive contract with GGP, violated the Georgia Constitution’s prohibition on the establishment of monopolies.

128. Article I, Section II, Paragraph V of the Georgia Constitution states that “[l]egislative acts in violation of this Constitution or the Constitution of the United States are void, and the judiciary shall so declare them.”

129. Because the Ordinance and Resolution authorize an exclusive franchise in public-property vending, and because the Contract grants that exclusive franchise to GGP, each is void under the Georgia Constitution.

COUNT III
(Violation of Georgia Constitution—Non-Delegation Doctrine)

130. Plaintiffs incorporate Paragraphs 1 through 129 by reference.

131. Article I, Section II, Paragraph I of the Georgia Constitution provides that “[p]ublic officers are the trustees and servants of the people and are at all times amenable to them.”

132. Article I, Section II, Paragraph II of the Georgia Constitution provides that “[t]he people of this state have the inherent right of regulating their internal government. Government is instituted for the protection, security, and benefit of the people; and at all times they have the right to alter or reform the same whenever the public good may require it.”

133. Article III, Section I, Paragraph I of the Georgia Constitution provides that “[t]he legislative power of the state shall be vested in a General Assembly which shall consist of a Senate and a House of Representatives.”

134. Section 1-103 of the Charter of the City of Atlanta states that “[a]ll legislative powers of the city are hereby vested in the council.”

135. The Contract that the City of Atlanta entered into with GGP grants that private company sole discretion to decide whether an individual may vend on public property.

136. Although Section 30-1435 of the Ordinance gives applicants with a right to appeal the City of Atlanta’s denial of a vending permit, neither the Ordinance nor the Contract provides applicants with any way to appeal a denial by GGP.

137. The Contract that the City of Atlanta entered into with GGP, while stating that “it is important that the vending management company maintain transparent decision criteria for selecting vendors, placing them in vending locations and determining lease/license rates for those locations,” Contract, Ex. A § 2.1.4, does not provide for any objective criteria that GGP must follow when making those decisions.

138. The Contract states that “[GGP] will be responsible for developing and enforcing the rules under which vendors will operate.” *Id.* at § 2.1.6.

139. Although the Contract gives some examples of “expected rules,” it does not require GGP to enact any of those rules. Instead, the Contract gives GGP total discretion to implement any rules it deems fit.

140. The City of Atlanta, in entering into the contract with GGP, delegated its police power to a private company while not putting any limits on how that power is to be exercised.

141. The vending contract between the City of Atlanta and GGP amounts to an unconstitutional delegation of governmental power.

COUNT IV
(Violation of Georgia Constitution—Due Process)

142. Plaintiffs incorporate Paragraphs 1 through 141 by reference.

143. Article I, Section I, Paragraph I of the Georgia Constitution provides that “[n]o person shall be deprived of life, liberty, or property except by due process of law.” Among the liberties secured by this provision is the right to earn an honest living in the occupation of one’s choice, free from unreasonable government regulation.

144. Plaintiffs Larry Miller and Stanley Hambrick have peacefully conducted their vending operations for over twenty years each.

145. In turning all public-property vending in the city over to a single private company, the City of Atlanta's actions exceed any legitimate and rational public health and safety concerns about public-property vending.

146. The Contract that the City of Atlanta entered into with GGP threatens to unreasonably and arbitrarily restrict Plaintiffs' ability to pursue their chosen occupation. Thus, the contract violates the due process guarantee of the Georgia Constitution.

**COUNT V
(Declaratory Judgment)**

147. Plaintiffs incorporate Paragraphs 1 through 146 by reference.

148. Plaintiffs are entitled to a declaratory judgment that the Ordinance, Resolution, and Contract are void and without effect because the ends of justice require that such a declaration should be made pursuant to Ga. Code § 9-4-2 and there exists a substantial and justiciable controversy with regard to Plaintiffs' rights as guaranteed by the Georgia Constitution.

**COUNT VI
(Preliminary and Permanent Injunction)**

149. Plaintiffs incorporate Paragraphs 1 through 148 by reference.

150. Plaintiffs have no adequate remedy at law or otherwise for the harm and damage that will be done to them if they are unable to renew their vending permits or otherwise continue to vend at their current locations due to the provisions of the Contract, Resolution, and Ordinance.

151. Plaintiffs' businesses will suffer immediate and irreparable harm as a result of the Defendant's improper and unconstitutional actions.

WHEREFORE, Plaintiffs pray for the following relief:

A. That the Court declare that Ordinance No. 08-O-1220, Resolution 08-R-1209, and the Contract for Public Vending Management Program, FC-600700095, exceed the City of Atlanta's charter powers and are void and without effect;

B. That the Court declare that Ordinance No. 08-O-1220, Resolution 08-R-1209, and the Contract for Public Vending Management Program, FC-600700095, violate Article III, Section VI, Paragraph V of the Georgia Constitution;

C. That the Court declare that Ordinance No. 08-O-1220, Resolution 08-R-1209, and the Contract for Public Vending Management Program, FC-600700095, violate Article I, Section II, Paragraph I of the Georgia Constitution;

D. That the Court declare that Ordinance No. 08-O-1220, Resolution 08-R-1209, and the Contract for Public Vending Management Program, FC-600700095, violate Article I, Section I, Paragraph I of the Georgia Constitution;

E. That the Court order a preliminary and permanent injunction barring the City of Atlanta from preventing Plaintiffs from continuing to operate from their current locations;

F. That Plaintiffs be awarded their reasonable attorneys' fees and costs in this action pursuant to Ga. Code. § 13-6-11; and

G. That Plaintiffs receive such other and further relief as this Court deems just and proper.

RESPECTFULLY SUBMITTED this ___ day of _____, 2011.

By: _____

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