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Case No. 21-10449

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

In the Matter of: Highland Capital Management, L.P.,

Debtor.

NexPoint Advisors, L.P.; Highland Capital Management Fund Advisors, L.P.; Highland Income Fund; NexPoint Strategic Opportunities Fund; Highland Global Allocation Fund; NexPoint Capital, Incorporated; James Dondero; The Dugaboy Investment Trust; Get Good Trust,

Appellants,

v.

Highland Capital Management, L.P.,

Appellee.

MOTION OF APPELLANTS NEXPOINT ADVISORS, L.P. AND HIGHLAND CAPITAL MANAGEMENT FUND ADVISORS, L.P. TO RECALL AND STAY MANDATE

Direct Appeal from the United States Bankruptcy Court for
the Northern District of Texas, the Honorable Stacey G.C. Jernigan

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I. INTRODUCTION

Appellants NexPoint Advisors, L.P. and NexPoint Asset Management, L.P. (together, the "Advisors") respectfully move this Court to recall the prematurely issued mandate in this appeal. The mandate appears to have been issued without knowledge or consideration of the Funds' (defined below) petition for rehearing, the panel's decision to grant that petition, the panel's withdrawal of its initial opinion, and the publication of an amended opinion. *See In re Highland Cap. Mgmt., L.P.*, ___ F.4th ____, No. 21-10449, 2022 U.S. App. LEXIS 25107 (5th Cir. Sept. 7, 2022). The Advisors also ask for a stay of the mandate, in the interests of justice, while they petition for certiorari.

II. ARGUMENTS & AUTHORITIES

The Advisors respectfully make two requests: (1) the Court should recall its prematurely issued mandate in this action; and (2) the Court should stay issuing its mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The Advisors address these requests in turn.

A. THE MANDATE SHOULD BE RECALLED BECAUSE IT ISSUED PREMATURELY[1]

The Court issued its original opinion on August 19, 2022. Rehearing was sought by Highland Income Fund, NexPoint Strategic Opportunities Fund, Highland

[1] The Advisors respectfully request that the Court take judicial notice of prior proceedings and opinions in this Appeal. *See In re Deepwater Horizon*, 934 F.3d 434, 440 (5th Cir. 2019).

Global Allocation Fund, and NexPoint Capital, Inc. (together, the "Funds") on September 2, 2022. This Court granted rehearing, vacating its prior opinion, and issued a new opinion on September 9, 2022, *In re Highland Cap.*, 2022 U.S. App. LEXIS 25107, at *2 (the "Amended Opinion").

Prior to the closing of the parties' fourteen-day window to petition for rehearing, the Clerk issued the mandate just five calendar days after publication of the Amended Opinion. As a result, the case was remanded "to the Bankruptcy Court for further proceedings in accordance with the opinion of this Court." Mandate at p. 2. In the interests of justice, and to preserve Appellants' rights, the Advisors respectfully submit that the mandate should be recalled.

Federal appellate courts retain jurisdiction over appeals until a mandate issues. *Charpentier v. Ortco Contractors*, 480 F.3d 710, 713 (5th Cir. 2007). These courts do, however, possess the "inherent power to recall their mandates." *Goodwin v. Johnson*, 224 F.3d 450, 459 (5th Cir. 2000); *Nat'l Sur. Corp. v. Charles Carter & Co.*, 621 F.2d 739, 741 (5th Cir. 1980). In the Fifth Circuit, mandates "will not be recalled except to prevent injustice." 5TH CIR. R. 41.2. *But see Cole v. Carson*, 957 F.3d 484, 486 (5th Cir. 2020) (Ho, J., dissenting from denial of rehearing en banc) (finding "good cause or unusual circumstances" necessary to recall a mandate to modify or vacate a judgment, but not so "to stay further proceedings pending Supreme Court review").

When entertaining a motion to recall, the Court balances two countervailing interests: "the interest in 'preventing injustice' in the case at hand, and the interest in maintaining the finality of the judgment already rendered in the case. Assessing the relative weights of these competing considerations and determining whether the overall balance warrants recalling the mandate lies within the court's sound discretion." *United States v. Montalvo Davila*, 890 F.3d 583, 586 (5th Cir. 2018) (citation and brackets omitted).

Though recalling a mandate is not routine, "this court has recalled and modified its mandates" "[o]n a number of occasions." *Hall v. White*, 465 F.3d 587, 593 (5th Cir. 2006). Such is the case because "[t]his court retains jurisdiction over its mandates to prevent injustice." *Ferrell v. Estelle*, 573 F.2d 867, 868 (5th Cir. 1978); *see LULAC v. City of Boerne*, 675 F.3d 433, 439 n.7 (5th Cir. 2012). Although the prevention of injustice is no lax standard, relatively minor occurrences have been held to satisfy this standard. *See, e.g.*, *Lee v. Coahoma Cnty.*, 37 F.3d 1068, 1068 (5th Cir. 1993) (recalling the mandate to "correct[] a typographical error in the opinion"). In fact, of all the reasons that justify recalling a mandate, the "clearest" one is "correct[ing] clerical mistakes." *Greater Bos. Television Corp. v. FCC*, 463 F.2d 268, 278 (D.C. Cir. 1971).

The issuance of the mandate here was a ministerial and clerical error by the Clerk. When the Court granted the Funds' petition for panel rehearing, "a new

judgment after the rehearing" should have been entered, and the mandate should have issued "within the normal time after entry of *that* judgment." FED. R. APP. P. 41(b) advisory committee's note to 1998 amendment (emphasis added); *see* SUP. CT. R. 13.3 (explaining that when a federal-appellate court grants a petition for rehearing, "the time to file [a] petition for a writ of certiorari . . . runs from the date of . . . the subsequent entry of judgment"). At such time, a new fourteen-day window to file a petition for rehearing or motion for stay of the mandate should have commenced. *See* FED. R. APP. P. 40(a)(1), 41(c); *see also, e.g.*, *Sanchez v. R. G. L.*, 761 F.3d 495, 499 & n.1 (5th Cir. 2014) (demonstrating that multiple, successive petitions for panel rehearing may be filed and granted).

Unfortunately, this mandate issued before the closing of the fourteen-day window, seemingly shortening this Court's jurisdiction (and the appellate rights of the parties) absent an order of the Court. This "clerical error" constitutes one of the "exceptional circumstances" in which an appellate court should recall its mandate. *See N. Cal. Power Agency v. NRC*, 393 F.3d 223, 225 (D.C. Cir. 2004) (recalling mandate where clerk erroneously entered clerk's order dismissing case and transmitting order in lieu of formal mandate). Indeed, the Appellants were preparing to, and would have, filed a motion to stay issuance of the mandate within the new fourteen (14) day period, when the Clerk's issuance of the mandate occurred, catching them off guard.

The circumstances are all the more exceptional because not recalling the mandate will likely affect the litigants' appellate rights moving forward. *See In re Greene Cnty. Hosp.*, 835 F.2d 589, 591 (5th Cir. 1988). Appellee has already asserted an equitable-mootness defense. *See* Appellee's Mot. to Dismiss Appeals as Equitably Moot 16–26; Appellee's Reply Br. in Support of Mot. to Dismiss Appeals as Equitably Moot 7–17. And while that defense has proved unsuccessful at this stage in this Court, *In re Highland Cap.*, 2022 U.S. App. LEXIS 23237, at *13–19, Appellee's rush in the Bankruptcy Court following the premature mandate further demonstrates that racing towards equitable mootness before Appellants can fully exercise their appellate rights remains a primary strategy.

Indeed, and although the Advisors would vigorously argue against the application of equitable mootness, it is not an unlikely scenario that the Advisors' petition for certiorari may be undercut by post-appeal proceedings in the Bankruptcy Court that have already begun and could result in the reorganization plan soon becoming "substantially consummated" or otherwise too far implemented to enable meaningful appellate review. *See In re Manges*, 29 F.3d 1034, 1039–41 (5th Cir. 1994). At that point, even if the Supreme Court were to grant the writ of certiorari, hear the case, and clarify the law in a manner favorable to Appellants, Appellee will be able to argue equitable mootness backed by an additional year or so of eggs that

may need to be unscrambled.[2] *See id.* at 1039; *see also In re Sneed Shipbuilding, Inc.*, 914 F.3d 1000, 1002 (5th Cir. 2019).

Neither do interests of finality weigh against the Advisors' request here, as they ask well within the time to petition for certiorari and before any legitimate reliance on the premature mandate could be claimed.

Because the Clerk erred by prematurely issuing the mandate, and because such error is likely to diminish the Advisors' appellate rights, *see In re Manges*, 29 F.3d at 1039, the Advisors respectfully ask the Court to recall the mandate in this action.

B. THE MANDATE SHOULD BE STAYED

The Court should stay its mandate pending the filing of a petition for a writ of certiorari in the Supreme Court. The applicable rules specifically contemplate such a request, *see United States v. Perez*, 110 F.3d 265, 266 n.3 (5th Cir. 1997), and this Court should grant it because the petition will "present a substantial question" and "good cause for a stay" exists, FED. R. APP. P. 41(d)(1).

[2] The Advisors respectfully note that the Circuit Justice who would consider an application of stay in this action has vocalized particular skepticism regarding the doctrine of equitable mootness. *See, e.g.*, *Nordhoff Invs., Inc. v. Zenith Elecs. Corp.*, 258 F.3d 180, 192 (3d Cir. 2001) (Alito, J., concurring) ("[E]quitable mootness . . . can easily be used as a weapon to prevent any appellate review of bankruptcy court orders confirming reorganization plans. It thus places far too much power in the hands of bankruptcy judges."); *see also* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 17–19 (11th ed. 2019) ("Before seeking a stay from the Supreme Court or from a single Justice, a stay must first be requested from the court below or a judge thereof.").

Though Rule 41(d)(1)'s requirements are vague, there are "well-established standards for granting a stay of a mandate pending disposition of a petition for certiorari." *Baldwin v. Maggio*, 715 F.2d 152, 153 (5th Cir. 1983).

> To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay.

Hollingsworth v. Perry, 558 U.S. 183, 190 (2010). The Advisors address each factor in turn.

1. The Advisors Have Sufficient Grounds for a Successful Petition for Certiorari

There can be no disagreement that the core issue here—whether a federal court may grant non-debtor liability releases as part of a Chapter 11 reorganization plan—is "sufficiently meritorious to grant certiorari." *See id.* This issue falls squarely within one of the Supreme Court's considerations in reviewing a cert petition: "[t]here is a long-standing conflict among the Circuits that have ruled on the question." *In re Purdue Pharma, L.P.*, 635 B.R. 26, 89 (S.D.N.Y. 2021); *see In re Highland Cap.*, 2022 U.S. App. LEXIS 25107, at *29–30 (describing the split); *see also* SUP. CT. R. 10(a). This fact alone is sufficient to demonstrate the "certworthiness" of the Advisors' forthcoming petition.

Moreover, the legal question at issue is of considerable significance to the federal judiciary and the public at large. *See NLRB v. Pittsburgh S.S. Co.*, 340 U.S. 498, 502 (1951). The current state of affairs leaves "debtors and their creditors to guess" whether these releases are permissible under bankruptcy law, which substantially impacts the development and finalization of reorganization plans; further, it should not "be the case that their availability, or lack of same, should be a function of where a bankruptcy filing is made," *i.e.*, this matter "ought to be uniform throughout the country." *In re Purdue Pharma*, 635 B.R. at 89, 115; *see In re Davis Offshore, L.P.*, 644 F.3d 259, 262 n.2 (5th Cir. 2011) ("Allowing [equitable mootness] to override [a] statutory protection seems dubious.").

In that respect, it is true that the panel limited the exculpations contained the plan of reorganization here, but the panel arguably affirmed various other injunctive and "gatekeeping" provisions in the plan that have the practical effect of exculpating the very persons that the panel ruled could not be exculpated.[3] Additionally, the Advisors respectfully submit that the panel's decision to leave in place wholesale

[3] The question of the panel's ruling with respect to the plan's injunctive and gatekeeping provisions is disputed. In post-remand filings before the Bankruptcy Court, the Appellee has argued that the panel left completely intact all of the plan's injunctive and gatekeeping provisions. *See* Bankruptcy Case (19-34054), *Motion to Conform Plan,* at Docket No. 3503. The Advisors and the Funds, on the other hand, have argued that the panel's opinion clearly deleted or reformed such provisions in order to apply only to the persons the panel ruled could legally be exculpated. *See id*. at Docket No. 3539 (Funds' objection) and Docket No. 3551 (Advisors' objection). The Bankruptcy Court has yet to address this dispute, although a hearing has been set for October 20, 2022.

exculpations of the "Independent Board" exceeds any permissible exculpation, as these individuals were not the "debtor" and they were not even directors of the Appellee; instead being directors of the Appellee's general partner.

Furthermore, the Appellee is a registered investment advisor, subject to the Investment Advisers Act of 1940 (15 U.S.C. § 80b-1 *et seq.*) and its enforcement regulations (17 C.F.R. § 275.0-2 *et seq.*). However, the plan enjoins actions seeking remedies for—and indeed exculpates the debtor and its control persons from—*future* violations of federally-imposed fiduciary duties under the securities laws. *See Transamerica Mortg. Advisors, Inc. v. Lewis*, 444 U.S. 11, 17 (1979) ("[Advisers Act §] 206 establishes federal fiduciary standards to govern the conduct of investment advisers." (internal quotation marks omitted)); *SEC v. Cap. Gains Rsch. Bureau, Inc.*, 375 U.S. 180, 191 (1963) ("The Investment Advisers Act of 1940 thus reflects a congressional recognition of the delicate fiduciary nature of an investment advisory relationship." (internal quotation marks omitted)).

The Advisors respectfully submit that nothing in the Bankruptcy Code authorizes a release of individuals from federal securities laws or for the exculpation of *future violations* of law. Neither does any precedent of this Circuit or the Supreme Court. Indeed, the issue of whether an Article I bankruptcy judge can effectively immunize individuals from and against federal securities laws enacted by Congress and enforced by Article III courts is a serious Constitutional issue in its own right.

Fundamental issues of due process are also implicated. Non-debtor liability releases end the game before it begins—individuals and other litigants may have causes of action arise against non-debtors after a Chapter 11 petition is filed and, because of these releases, will be unable to file suit. *See, e.g.*, Lindsey D. Simon, *Bankruptcy Grifters*, 131 YALE L.J. 1154, 1171 n.80 (2022). Nor is it any comfort that the Bankruptcy Court can specifically authorize an individual to assert his or her cause of action, because such individual must first prove the existence of "a colorable claim" and the Bankruptcy Court has "sole and exclusive jurisdiction" to decide that issue. ROA.160. Again, an Article I court with no federal securities jurisdiction, sitting without a jury, and after the bankruptcy case is completed and closed, will determine whether a non-debtor has a "colorable" claim against a non-debtor under federal securities laws. The Advisors respectfully submit that such judicial overreach is unprecedented.

Grave matters of individual and Constitutional rights are implicated by the issue of non-debtor liability releases, which only makes the issue at hand even more likely to be considered "certworthy."

2. The Prospects Before the Supreme Court Are More Than Fair

The Advisors' challenge regarding the scope of a bankruptcy court's discharge powers certainly meets this Circuit's fair-prospects standard. The panel's opinion in this case goes to great lengths explaining the limits of those powers and

the reasons for them, before giving short shrift to the notion that the Independent Directors nonetheless fall within the category of non-debtors who may be exculpated (reasoning, without meaningful support, that, "[l]ike a debtor-in-possession, the Independent Directors are entitled to all the rights and powers of a trustee"). Moreover, a similar appeal is currently pending before the Second Circuit. *See In re Purdue Pharma, L.P.*, No. 22-110 (2d Cir.). Undeniably the issue of nonconsensual third party releases is one of national importance that is currently ripe for review.

Additionally, both within and outside the bankruptcy context, the Justices are wholly skeptical of locating statutory rights not specified in the statutory text. The Supreme Court's bankruptcy jurisprudence has affirmed the comprehensiveness of the Bankruptcy Code. *See RadLAX Gateway Hotel, LLC v. Amalgamated Bank*, 566 U.S. 639, 645 (2012); *In re Purdue Pharma*, 635 B.R. at 37 ("Given the frequency with which this issue arises, the time has come for a comprehensive analysis of whether authority for such releases can be found in the Bankruptcy Code—that 'comprehensive scheme' devised by Congress for resolving debtor-creditor relations."). Nothing in the Bankruptcy Code permits the Independent Directors' continued exculpation.

Absent statutory authority, this cuts against the bankruptcy principles endorsed by the Supreme Court. *See Norwest Bank Worthington v. Ahlers*, 485 U.S.

197, 206 (1988); *see also, e.g.*, *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465 (2017) (Breyer, J.) ("The importance of the priority system leads us to expect more than simple statutory silence if, and when, Congress were to intend a major departure. Put somewhat more directly, we would expect to see some affirmative indication of intent if Congress actually meant to make structured dismissals a backdoor means to achieve the exact kind of nonconsensual priority-violating final distributions that the Code prohibits in Chapter 7 liquidations and Chapter 11 plans." (citation omitted)).

Moreover, the Supreme Court has made two statutory-interpretation points clear that are particularly relevant to this matter.[4] For one, the Justices have frequently endorsed the canon of *expressio unius*, which is applicable here considering the Bankruptcy Code does not even mention the possibility of exculpation for persons like the Independent Directors. *See* 11 U.S.C. § 524(e); *see also, e.g.*, *Jennings v. Rodriguez*, 138 S. Ct. 830, 844 (2018) ("That express exception to detention implies that there are no other circumstances under which aliens detained under § 1225(b) may be released." (emphasis omitted)).

Additionally, and importantly, the Supreme Court recently confirmed that "in certain extraordinary cases, both separation of powers principles and a practical

[4] Judge McMahon further states that the general/specific canon of construction applies here. *See In re Purdue Pharma*, 635 B.R. at 111–12; *see also, e.g.*, *United States v. Moss*, 872 F.3d 304, 313–14 (5th Cir. 2017).

understanding of legislative intent" requires specific indication of "'clear congressional authorization' for the power" called upon. *West Virginia v. EPA*, 142 S. Ct. 2587, 2609 (2022). Whether the Bankruptcy Code permits the exculpation of non-debtors in Chapter 11 proceedings is an exemplar of a "major question"—the ramifications of empowering an Article I tribunal the authority to subvert the Article III rights of litigants without their consent would be a major development, to say the least. The Supreme Court has stated that "[e]xtraordinary grants" of authority are "rarely accomplished through 'modest words,' 'vague terms,' or 'subtle devices,'" which is particularly noteworthy here because *no statutory text* grants this extraordinary authority, let alone even hints at it. *See id.*; *Gulf Fishermens Ass'n v. Nat'l Marine Fisheries Serv.*, 968 F.3d 454, 460 (5th Cir. 2020) (Duncan, J.) ("[C]ourts like to say 'Congress does not hide elephants in mouseholes.'" (quoting *Chamber of Com. v. U.S. Dep't of Lab.*, 885 F.3d 360, 376 (5th Cir. 2018))).

Third-party, non-consensual releases in Chapter 11 proceedings are of such undeniable importance and significance to bankruptcy law that one would "expect more than simple statutory silence if, and when, Congress [intended this] major departure." *Czyzewski v. Jevic Holding Corp.*, 580 U.S. 451, 465 (2017).

3. Irreparable Harm Is Likely Should a Stay Not Be Granted

Finally, were the Court to deny the Advisors' request for stay, there can be little doubt that "irreparable harm will result." *Hollingsworth*, 558 U.S. at 190.

Irreparable harm is "harm 'that cannot be adequately measured or compensated by money and is therefore often considered remediable by injunction.'" *Anyadike v. Vernon Coll.*, No. 7:15-cv-00157-O, 2016 U.S. Dist. LEXIS 3161, at *32 (N.D. Tex. Jan. 11, 2016) (quoting IRREPARABLE INJURY, BLACK'S LAW DICTIONARY (10th ed. 2014)). Here, the likelihood that this action becomes equitably moot steadily increases with time, and involuntarily losing appellate rights is an unquantifiable harm.

With each passing day, the Bankruptcy Court, at Appellee's behest, pushes this action ever closer to equitable mootness—notwithstanding the Advisors' vigorous objections otherwise. *See In re Manges*, 29 F.3d at 1039. Appellee has attempted to upend Appellants' rights via this approach before, and Appellee's hurry on remand before the Bankruptcy Court demonstrates the desire to (once again) eradicate appellate rights under the equitable-mootness doctrine, a doctrine under which an Article III court refuses "to entertain a live appeal over which [it] indisputably possess[es] statutory jurisdiction and in which meaningful relief can be awarded." *In re Cont'l Airlines*, 91 F.3d 553, 571 (3d Cir. 1996) (en banc) (Alito, J., dissenting); *see In re City of Detroit*, 838 F.3d 792, 812 (6th Cir. 2016) (Moore, J., dissenting) ("The problem with equitable mootness is not only that it cuts off entirely the right to appeal to an Article III court, but that 'it effectively delegates the power to prevent that review to the very non-Article III tribunal whose decision is at issue'

because ‘bankruptcy courts control nearly all of the variables’ that are considered in assessing whether an appeal is equitably moot.” (citation omitted)).

Litigants losing their appellate rights without their consent—simply because a tribunal believes “effective relief on appeal” is “impractical, imprudent, and therefore inequitable,” *Mac Panel Co. v. Va. Panel Corp.*, 283 F.3d 622, 625 (4th Cir. 2002)—is a bewildering result that plainly constitutes a deprivation of litigants’ rights.[5] To demonstrate that the harm here is not irreparable, Appellee must necessarily concede that there is no set of circumstances as to the proceedings currently before the Bankruptcy Court that will equitably moot this action.

The Advisors seek nothing more here than a full opportunity to request the Supreme Court’s intervention in a long contested and divisive area of the law, and absent a stay pending the filing of a petition for a writ of certiorari in the Supreme Court, the Advisors may be permanently deprived of their rights to appeal. Irreparable harm will therefore likely result absent a stay of the mandate. For these reasons, the Advisors respectfully request that this Court stay its mandate.

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[5] Worth noting, the Advisors have filed the instant motion to help bolster the case against equitable mootness in this action. *See In re Thorpe Insulation Co.*, 677 F.3d 869, 881 (9th Cir. 2012) (“A failure to seek a stay can render an appeal equitably moot.”).

III. CONCLUSION

This Court should recall and stay the mandate pending the timely filing and disposition of a petition for a writ of certiorari and any further proceedings in this Court.

RESPECTFULLY SUBMITTED this 7th day of October, 2022.

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CERTIFICATE OF CONFERENCE

The undersigned hereby certifies that he discussed the relief requested herein with counsel for the Appellee, John Morris Esq. and Jeffrey N. Pomerantz, Esq., but that, as of this filing, neither responded to whether the Appellee opposes said relief and, therefore, this Motion is presented as OPPOSED.

By: /s/ Davor Rukavina
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that, on this the 7th day of October, 2022, a true and a correct copy of the foregoing document was served on the counsel of record listed below via electronic service:

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE LIMITATION, AND TYPE-STYLE REQUIREMENTS

1. This motion complies with the type-volume limitation of Fed. R. App. P. 27(d) because this brief contains 3,740 words.

2. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this motion has been prepared in a proportionally spaced typeface using Microsoft Office Word in Times New Roman, 14 pt. font.

Dated: October 7, 2022.

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