



U.S. District Court  
Southern District of California  
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CASE: 06553-CV #00029

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SOUTHERN DISTRICT OF CALIFORNIA

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**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF CALIFORNIA**

ASSOCIATION OF WOMEN WITH  
DISABILITIES ADVOCATING  
ACCESS, SUING ON BEHALF OF  
TANIA AZEVEDO AND ITS  
MEMBERS; and TANIA AZEVEDO,  
an individual,

Plaintiffs,

vs.

HINTZA MULUBRHAN D.B.A. PJS  
MARKET & DELI; HINTZA,  
MULUBRHAN; HABTEMARIAM,  
ABEBA, TRUST; and DOES 1  
THROUGH 10, inclusive,

Defendants.

CASE NO. 06-CV-553 H (CAB)

**ORDER DENYING  
PLAINTIFFS' MOTIONS  
FOR PARTIAL SUMMARY  
JUDGMENT AND FOR THE  
ISSUANCE OF A  
PRELIMINARY  
INJUNCTION AND  
DENYING WITHOUT  
PREJUDICE PLAINTIFFS'  
MOTION FOR  
CONDITIONAL APPROVAL  
OF CLASS ACTION  
CERTIFICATION**

On March 14, 2006, Plaintiffs Association of Women With Disabilities  
Advocating Access and Tania Azevedo filed a complaint against Defendants  
Mulubrham Hintza, Abeba Habtemariam and Habtemariam Abeba Trust d/b/a PJ's  
Market & Deli alleging several causes of action under the Americans with Disabilities

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1 Act and corresponding state statutes. (Doc. No. 1.) On May 24, 2006, Defendants  
2 filed a counterclaim.<sup>1</sup> (Doc. No. 7.) On June 8, 2006, Plaintiffs filed a first amended  
3 complaint. (Doc. No. 11.) Plaintiffs filed a motion seeking conditional approval of  
4 class action certification on June 14, 2006. (Doc. No. 14.) That same day, Plaintiffs  
5 also filed another motion for partial summary judgment and for the issuance of a  
6 preliminary injunction. (Doc. No. 19.) Defendants filed oppositions to Plaintiffs'  
7 motions on July 17, 2006. (Doc. Nos. 24, 25.) On July 21, 2006, Defendants' filed  
8 replies. (Doc Nos. 27, 28.) The Court submits the motions on the papers without oral  
9 argument pursuant to Civil Local Rule 7.1(d)(1). For the reasons stated below, the  
10 Court DENIES Plaintiffs' motions for conditional approval of class action certification,  
11 partial summary judgment, and for the issuance of a preliminary injunction.

### 12 **Background**

13 Defendants own and operate PJ's Market and Deli, a small convenience grocery  
14 store. (First Amended Complaint ("FAC") at ¶ 3.) Plaintiff Association of Women  
15 with Disabilities Advocating Access is an organization dedicated to the causes of  
16 women with disabilities. (Pls.' Mot. Summ. J. & Prelim. Inj. ("Mot."), Decl. of Tania  
17 Azevedo ("Azevedo Decl.") at ¶ 1.) Defendant Azevedo is a local resident with  
18 cerebral palsy who requires the use of an electric wheelchair for mobility. (Id.)  
19 According to Plaintiff Azevedo's declaration, she often researches the accessibility of  
20 a store before patronizing it. (Id.) She states in her declaration that when she  
21 researched Defendants' store, she determined that she would have difficulty accessing  
22 it because the store allegedly was not fully accessible to disabled persons. (Id. at ¶ 2.)

23 Defendant Mulubrham Hintza states in his declaration that during his twenty  
24 years of operation as owner of PJ's Deli & Market numerous disabled customers have  
25 frequented his store. (Mot., Decl. of Theodore Pinnock ("Pinnock Decl."), Ex. A, Decl.  
26 of Mulubrhan Hintza ("Hintza Decl.") at ¶ 2.) Hintza maintains that he has always

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27  
28 <sup>1</sup> Defendants improperly styled their counterclaims as "crossclaims." See Federal Rule of Civil Procedure 13.

1 offered curbside assistance to any customer who is not able to access the store. (*Id.*)  
2 Hintza states that his store is not in a popular place, and that his business has been  
3 struggling for the past few years. (*Id.* at ¶¶ 5, 7.)

#### 4 Discussion

### 5 **2. Plaintiff's Motion for Summary Judgment**

#### 6 **A. Legal Standard**

7 Federal Rule of Civil Procedure 56(c) states that summary judgment is  
8 appropriate if the "pleadings, depositions, answers to interrogatories, and admissions  
9 on file, together with the affidavits, if any, show that there is no genuine issue as to any  
10 material fact and that the moving party is entitled to judgment as a matter of law." Fed.  
11 R. Civ. P. 56(c).

12 The party moving for summary judgment bears the initial burden of establishing  
13 an absence of a genuine issue of material fact on issues where the non-moving party  
14 will bear the burden at trial. Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986).  
15 Once the moving party meets the requirements of Rule 56, the burden shifts to the party  
16 resisting the motion, who "must set forth specific facts showing that there is a genuine  
17 issue for trial." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 256 (1986). "The mere  
18 existence of a scintilla of evidence in support of the non-moving party's position is not  
19 sufficient." *Id.* at 252. Thus, the non-moving party cannot oppose a properly  
20 supported summary judgment motion by "rest[ing] on mere allegations or denials of  
21 his pleadings." *Id.* at 256. Genuine factual issues must exist that "can be resolved only  
22 by a finder of fact because they may reasonably be resolved in favor of either party."  
23 *Id.* at 250. If the non-moving party fails to make a sufficient showing of an element of  
24 its case, the moving party is entitled to judgment as a matter of law. Celotex, 477 U.S.  
25 at 325. "Where the record taken as a whole could not lead a rational trier of fact to find  
26 for the nonmoving party, there is no genuine issue for trial." Matsushita Elec. Indus.  
27 Co. v. Zenith Radio Corp., 475 U.S. 574, 587 (1986) (internal citation omitted).

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1           When ruling on a summary judgment motion, the Court must examine all the  
2 evidence in the light most favorable to the non-moving party. Id. The Court does not  
3 engage in credibility determinations, weighing of evidence, or drawing of legitimate  
4 inferences from the facts; these functions are for the trier of fact. Anderson, 477 U.S.  
5 at 255.

6           **B. Analysis**

7           As an initial matter, the Court notes that it is difficult to discern exactly on which  
8 causes of action Plaintiffs seek summary judgment based on Plaintiffs' papers.  
9 Specifically, it appears that some text was transported from papers filed in other cases.  
10 For instance, in their first amended complaint, Plaintiffs' refer to a single defendant  
11 who owns a hotel. (FAC at 5.) As the facts of this case indicate, this case involves a  
12 convenience grocery store owned by two defendants. Additionally, apparent conflicts  
13 exist between Plaintiffs' motion for summary judgment and their first amended  
14 complaint. In their motion, Plaintiffs' state they are seeking summary judgment on all  
15 their "claims except causes of action three and four" and later there is a heading that  
16 states: "Defendants Discriminated Against Plaintiffs Because They Failed to Remove  
17 Architectural Barriers From Their Place of Public Accommodation." (Mot. at 2, 12.)  
18 However, in the first amended complaint, the cause of action based on architectural  
19 barriers is listed as "Claim III." Nonetheless, the Court will address it as it is addressed  
20 by Plaintiffs in the body of their motion.

21           Therefore, the Court will construe the motion on the basis that Plaintiffs' seek  
22 summary judgment on Plaintiffs' claim based on Defendants' alleged failure to remove  
23 architectural barriers, Defendants' counterclaims and Plaintiffs' state law claims.  
24 Based on the arguments and evidence presented by the parties, the Court concludes that

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1 at this early stage of the proceedings prior to the Early Neutral Evaluation Conference,  
2 summary judgment is not appropriate.<sup>2</sup>

3 **i. Defendants' Alleged Failure to Remove Architectural Barriers**

4 Plaintiffs allege claims against Defendants under Title III of the Americans with  
5 Disabilities Act, 42 U.S.C. § 12181 et seq. ("ADA" or "Title III"). Plaintiffs first move  
6 for summary judgment on their cause of action related to Defendants' alleged violation  
7 of 42 U.S.C. § 12182(b)(2)(A)(iv) because of their failure to remove architectural  
8 barriers from their store. Title III requires that existing places of public  
9 accommodation remove such architectural barriers to access that are "readily  
10 achievable." 42 U.S.C. § 12182(b)(2)(A)(iv). "Readily achievable" is defined as  
11 "easily accomplishable and able to be carried out without much difficulty or expense."  
12 42 U.S.C. § 12181(9). Factors for courts to consider in determining whether an action  
13 is readily achievable are provided in 28 C.F.R. § 36.104: (1) the nature and cost of the  
14 action required; (2) among others, the overall financial resources of the site involved,  
15 the effect on the expenses and resources of the site, the impact on the operation of the  
16 site, and legitimate safety requirements; (3) the geographic separateness, and the  
17 relationship between the entity and any parent corporation; (4) if applicable, the  
18 financial resources of any parent corporation or entity; and (5) if applicable, the type  
19 of operations of any parent corporation. 28 C.F.R. § 36.104.

20 The parties differ as to whether the proposed modifications to Defendants'  
21 establishment are readily achievable. According to Plaintiffs' expert, Naradin  
22 Mohomed, the lack of signage, slope of entrance, accessible counters and path of travel  
23 are structural in nature and constitute architectural barriers. (Mot., Decl. of Naradin  
24 Mohomed ("Mohomed Decl.")). Mohomed states that, in his opinion, all proposed  
25 changes are readily achievable. (Id. at ¶ 35.) This includes Mohomed's belief that  
26

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27 <sup>2</sup> Many cases efficiently resolve at the Early Neutral Evaluation Conference without the  
28 unnecessary accumulation of attorney's fees and costs. If the Court ultimately reaches a decision on  
fees and costs, the confusing nature and apparent transportation of text from papers filed in other cases  
by Plaintiff should be taken into account.

1 Defendants could install a fully compliant ramp at the entrance to their store for under  
2 \$20,000. (Id.)

3 Defendants' expert, Paul L. Bishop, submitted a report indicating his belief that  
4 Defendants' store is in compliance with the ADA. (Defs.' Opp. Pls.' Mot. Class  
5 Certification, Decl. of David Warren Peters ("Peters Decl."), Ex. K ("Bishop Report").)  
6 The Bishop Report notes one exception to full compliance, the steepness of the  
7 entrance ramp. (Id.) However, the Bishop Report concludes that a compliant ramp  
8 would not be readily achievable given the small confines of the store. (Id.)  
9 Furthermore, Defendants contend that such a ramp would cost them \$50,000 or more.  
10 (Hintza Decl. at ¶ 8.) According to Hintza, the business has been struggling in recent  
11 years, leaving them with insufficient financial resources to make such an alteration to  
12 their establishment. (Id. at ¶ 7.)

13 Furthermore, Title III provides that where the removal of a barrier is not readily  
14 achievable, an existing place of public accommodation must make its goods or services  
15 available through "alternative methods if such methods are readily achievable." 42  
16 U.S.C. § 12182(b)(2)(A). Accompanying regulations to the statute provide examples  
17 of such alternative methods to barrier removal: providing curb service or home  
18 delivery, retrieving merchandise from inaccessible shelves or racks, and relocating  
19 activities to accessible locations. 28 C.F.R. § 36.305(b).

20 Plaintiffs contend that, assuming a ramp is not found to be readily achievable,  
21 installing the AmAble Buzzer system as an alternative method is readily achievable.  
22 Defendants do not seem to contradict this, although Hintza states in his declaration that  
23 they anticipate installing a similar bell system together with appropriate signage at the  
24 front of the store. (Hintza Decl. at ¶ 9.) Indeed, a photograph attached to Defendants'  
25 ex parte application to extend the hearing date indicates that the signage is already  
26 affixed in two places in a front window of the deli. (Defs' App. Extend Dates, Ex. A.)  
27 Furthermore, Defendants' state that they offer curbside assistance to their disabled  
28 customers, which is an accepted alternative method. See 28 C.F.R. § 36.305(b).

1 Therefore, it appears that at a minimum Defendants have offered an alternative method  
2 to accommodate disabled persons wishing to patronize their store. Accordingly, based  
3 on the conflicting opinions of the two experts regarding the compliance of Defendants'  
4 store and whether some alterations would be readily achievable, the Court DENIES  
5 Plaintiffs' motion for summary judgment as to this cause of action. See Matsushita  
6 Elec. Indus., 475 U.S. at 587.

7 **ii. Defendants' Counterclaims**

8 The Court notes that Plaintiff Azevedo is a 2002 graduate of the University of  
9 San Diego. (Azevedo Decl. at 12.) Her stated objective on her curriculum vitae  
10 included in her declaration is that would like to become a writer. (Id.) Defendants seek  
11 an injunction against Plaintiff Azevedo from soliciting the names of individuals who  
12 have encountered access impediments at area locations for a commission from  
13 Plaintiffs' counsel. Defendants attached a website posting by Plaintiff Azevedo in  
14 which she solicits information on area locations that could be potential defendants for  
15 lawsuits such as this. (Defs' Opp. Pls.' Mot. Class Certification, Decl. of David  
16 Warren Peters ("Peters Decl."), Ex. B ("Azevedo web posting").) The Azevedo web  
17 posting states that she had just received a new job that awarded her a commission for  
18 every potential defendant she could find. (Id.) Defendants assert such an arrangement  
19 is in violation of California Rule of Professional Conduct 1-320 that generally prohibits  
20 the sharing of legal fees between attorneys and non-attorneys. See Cal. R. Professional  
21 Conduct 1-320. The Court agrees this would violate the California Rules of  
22 Professional Conduct if true.

23 Plaintiff Azevedo, however, contends that she posted the solicitation on the web  
24 without authorization of Plaintiffs' counsel. (Azevedo Decl. at ¶ 5.) She also asserts  
25 that she mistakenly believed the word "commissions" to mean "damages" and that she  
26 mistakenly used the phrase "new job" to refer to her current attorney-client  
27 relationship. (Id.) Plaintiff Azevedo states in her declaration that Plaintiffs' counsel  
28 instructed her to remove the posting once he became aware of it. (Id.)



1           The Court declines to issue an injunction against Plaintiff Azevedo at this time.  
2    See Bernhardt v. Los Angeles County, 339 F.3d 920, 931-32 (9th Cir. 2003) (noting  
3    that injunctive relief is an “extraordinary” equitable remedy that requires courts to pay  
4    special attention to public consequences when exercising their discretion). The Court  
5    notes, however, that Defendants may pursue discovery related to this issue, if they so  
6    choose. Defendants may also renew their request for a preliminary injunction or other  
7    relief at a later time.

8           Plaintiffs also move for summary judgment on Defendants’ counterclaims.  
9    Specifically, Plaintiffs’ seek summary judgment on Defendants’ claim for declaratory  
10   relief that the property is in compliance with applicable access laws. (Counterclaim at  
11   ¶ 6.) Defendants contend that they have made all changes that are “readily achievable.”  
12   (Id. at ¶ 14.) Questions of fact exist regarding the status of Defendants’ compliance  
13   with the relevant ADA statutes making summary judgment premature at this time. As  
14   noted above, the parties dispute the extent to which Defendants’ store is ADA  
15   compliant, as well as whether some of the proposed alterations are readily achievable.  
16   Accordingly, the Court DENIES Plaintiffs’ motion for summary judgment as to  
17   Defendants’ counterclaims at this time.

18                   **iii. State Law Claims Under California Civil Code §§ 51 and 54.3**

19           Finally, Plaintiffs move for summary judgment on their corresponding state law  
20   claims. According to California Civil Code sections 51 and 54.3, any violation of the  
21   Americans with Disabilities Act is a violation of these sections. Plaintiffs assert that  
22   summary judgment is proper as to these two sections because Defendants have violated  
23   42 U.S.C. § 12182(b)(2)(A)(iv) – namely that there is no signage, a steep slope at the  
24   entrance, a high counter, an inaccessible path of travel, and there is no alternative  
25   method of accessing Defendant’s goods.

26           Because violations under these state statutes are alleged by Plaintiffs based on  
27   corresponding violations under the ADA, the Court concludes that summary judgment  
28   as to these state claims is also premature. As stated above, construing the evidence in

1 the light most favorable to Defendants, questions of fact exist as to whether violations  
2 under the ADA occurred. Accordingly, the Court DENIES Plaintiffs' motion for  
3 summary judgment as to these causes of action.

## 4 **2. Plaintiff's Motion for Preliminary Injunction**

### 5 **A. Legal Standard for Preliminary Injunction**

6 To meet the standard for a preliminary injunction, Plaintiff must demonstrate  
7 "either: (1) a combination of probable success on the merits and the possibility of  
8 irreparable harm; or (2) that serious questions going to the merits are raised and the  
9 balance of hardships tips in [their] favor." Preminger v. Principi, 422 F.3d 815, 822-23  
10 (9th Cir. 2005). These two tests are not inconsistent and represent extremes of a single  
11 continuum. Walczak v. EPL Prolong, Inc., 198 F.3d 725, 731 (9th Cir. 1999).  
12 Therefore, the greater the hardship to plaintiff, the less probability of success need be  
13 shown. Id.

### 14 **B. Analysis**

15 Plaintiffs seek a preliminary injunction to require Defendants to provide  
16 alternative temporary wheelchair access to Defendants' store while this litigation is  
17 pending. Furthermore, Plaintiffs seek to have the Court order Defendants to install the  
18 AmAble Buzzer/Big Bell system, a specific buzzer system that would allow a disabled  
19 person to notify Defendants of their presence and desire to patronize the store without  
20 actually entering the establishment.

21 As noted above, the parties have demonstrated that questions of fact exist.  
22 Therefore, Plaintiff has failed to demonstrate a probability of success on the merits.  
23 Plaintiffs have also failed to demonstrate that they will suffer irreparable harm or that  
24 the balance of hardships tip in their favor should the Court not issue a preliminary  
25 injunction. Defendants state that they have made or are planning to make several  
26 adjustments to better accommodate disabled persons wishing to shop at their store.  
27 (Hintza Decl. at ¶ 9.) If Plaintiffs wish to patronize Defendants store again while this  
28 litigation is pending, they may avail themselves to Defendants' curbside assistance or

1 other means of accommodation. Therefore, the Court does not conclude that Plaintiffs  
2 will suffer irreparable injury nor that the balance of hardships tip in their favor.  
3 Accordingly, the Court DENIES Plaintiffs' motion for a preliminary injunction.

4 **3. Plaintiff's Motion for Conditional Approval of Class Action Certification**

5 Plaintiffs move for certification of a class action group. Under Federal Rule of  
6 Civil Procedure 23(b)(2), a class action may be maintained where the prerequisites of  
7 Rule 23(a) are met and "the party opposing the class has acted or refused to act on  
8 grounds generally applicable to the class . . . ." Fed. R. Civ. P. 23(b)(2). The  
9 prerequisites of class certification under Fed. R. Civ. P. 23(a) are: numerosity,  
10 commonality, typicality, and adequate representation. Fed. R. Civ. P. 23(a); Hanlon  
11 v. Chrysler Corp., 150 F.3d 1011, 1019 (9th Cir. 1998). A proposed class is  
12 sufficiently numerous if "joinder of all members is impracticable." Fed. R. Civ. P.  
13 23(a)(1); see also Gen. Tel. Co. Employment Opportunity Comm'n, 446 U.S. 318, 330  
14 (1980) (holding that 15 plaintiffs is insufficient); see also Harik v. California Teachers  
15 Ass'n, 326 F.3d 1042, 1051 (9th Cir. 2003). The commonality requirement is met  
16 where "there are questions of law or fact common to the class." Fed. R. Civ. P.  
17 23(a)(2) The typicality requirement is met where "the claims or defenses of the  
18 representative parties are typical of the claims or defenses of the class . . . ." Fed. R.  
19 Civ. P. 23(a)(3). The typicality and commonality factors tend to merge together.  
20 Armstrong v. Davis, 275 F.3d 849, 866 (9th Cir. 2001) (citing Gen. Tel. Co. v. Falcon,  
21 457 U.S. 147, 157 n.13 (1982)). While typicality and commonality are generally  
22 considered together, typicality is satisfied when "each class member's claim arises from  
23 the same course of events, and each class member makes similar legal arguments to  
24 prove the defendant's liability." Armstrong, 275 F.3d at 869 (internal citation omitted).  
25 Nonetheless, "the crux of both requirements is to ensure that . . . the class claims are  
26 so interrelated that the interests of the class members will be fairly and adequately  
27 protected in their absence." Id. (internal citation omitted). Finally, the adequacy  
28 requirement is satisfied where "the representative parties will fairly and adequately

1 protect the interests of the class.” Fed. R. Civ. P. 23(a)(4). Adequacy requires the  
2 court to examine two questions: “(1) do the named plaintiffs and their counsel have any  
3 conflicts of interest with other class members[,] and (2) will the named plaintiffs and  
4 their counsel prosecute the action vigorously on behalf of the class?” Lerwill v.  
5 Inflight Motion Pictures, Inc., 582 F.2d 507, 512 (9th Cir. 1978)).

6 At present, Plaintiffs have failed to carry their burden of establishing that the  
7 proposed class meets the requirements of Federal Rule of Civil Procedure 23(a).  
8 Plaintiffs have failed to demonstrate that Plaintiffs claims are typical of those of the  
9 class. While it is difficult for the Court to discern precisely the specific claims alleged  
10 by Plaintiffs, it seems that the first amended complaint presents rather unique  
11 circumstances underlying Plaintiff Azevedo’s causes of action. For instance, Plaintiff  
12 Azevedo asserts that her decision whether to take advantage of public services and  
13 patronize places of public accommodation often depends on such individualized factors  
14 as her mood and her needs. (FAC at 7.) She further states that her use of accessible  
15 ramps is often dictated by her fear of tipping backwards, and therefore often avoids  
16 them all together. (Id.) Furthermore, Defendants contend that Plaintiff Azevedo is the  
17 first person to voice concerns about the accessibility of their store. (Hintza Decl. at ¶  
18 2.) Defendant Hintza maintains that several disabled persons have shopped at their  
19 store, and that they have provided delivery or curbside assistance to individuals upon  
20 request. (Id.) Because Plaintiff Azevedo has raised individualized concerns, the Court  
21 does not conclude on the present record that Plaintiff Azevedo’s claims will be typical  
22 of other class members.

23 Second, Plaintiffs have failed to demonstrate that the proposed class is  
24 sufficiently numerous. Plaintiffs provide no information regarding an approximate  
25 number of people that may be affected by the alleged violations of ADA law. Plaintiff  
26 merely relies on the fact that there are many people in the United States who use  
27 wheelchairs or have other physical limitations. (Mot. Class Certification, Decl. of  
28 Theodore Pinnock (“Pinnock Decl.”) at ¶ 17.) Without more, the Court is unable to

1 conclude that Plaintiffs have met their burden of demonstrating numerosity considering  
2 the location and size of the store. (See Hintza Decl. at ¶ 5.)

3 Accordingly, based on the totality of the circumstances presented by the parties  
4 at this time, the Court concludes that Plaintiffs have failed to meet their burden to  
5 justify class certification. Therefore, the Court DENIES without prejudice Plaintiffs'  
6 present motion for conditional class action certification.

7 **Conclusion**

8 Based on the above, the Court **DENIES** Plaintiffs' motions for partial summary  
9 judgment and for the issuance of a preliminary injunction. The Court also **DENIES**  
10 without prejudice Plaintiffs' motion for conditional approval of class certification.

11 IT IS SO ORDERED.

12 Dated: 8/1/06

13   
14 MARILYN L. HUFF, District Judge  
15 UNITED STATES DISTRICT COURT

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21 COPIES TO:

22 \*\*Magistrate Judge Bencivengo

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