





1 duplicative government proceedings, double recovery and piling on of penalties; force  
2 the parties to litigate issues on multiple fronts; and would violate the fundamental rights  
3 of Samsung. Accordingly, the Motion should be DENIED.

4 **II. BACKGROUND**

5 **A. Factual Background<sup>1</sup>**

6 Defendant KEPCO Mangilao Solar, LLC (“KEPCO”) is the owner of the Mangilao  
7 Solar Project (“Project”), located on Lot 1-R3 Tract 1541, Sasayan, Mangilao, Guam. *See*  
8 SAC at ¶ 3. Samsung is engaged in earth moving and construction on the Project. *Id.* at  
9 ¶ 4. (KEPCO and Samsung are hereinafter referred to collectively as “Defendants”). The  
10 Project is located within the Sasayan Valley, which is the site of Marbo Cave and allegedly  
11 includes an aquifer and a number of sites designated by the Guam State Historic  
12 Preservation Office (“GHPO”), within the Department of Parks and Recreation, as  
13 archaeologically and culturally significant. *Id.* at ¶¶ 5, 9, 10, 13, 37, 38. Marbo Cave is  
14 located on a site identified by GHPO as Site 66-04-0024, which is directly adjacent to the  
15 Project site. *Id.* at ¶ 41.

16 Defendants were required to seek – and received – approvals from GHPO, Guam  
17 Environmental Protection Agency (“GEPA”) and Department of Public Works (“DPW”)  
18 as part of the permitting process for the Project. *Id.* at ¶¶ 15, 16, 39, 45. In September  
19 2017, Defendants were responsible for the submission of an Archaeological Monitoring  
20 and Discovery Plan (“AMDP”) to GHPO, which GHPO approved. *Id.* at ¶¶ 40, 45.  
21 Defendants were required to comply with the AMDP under the terms of their  
22 construction permit. *Id.* at ¶ 45. Defendants also had a duty to implement erosion and  
23 sediment controls according to best management practices and local regulations. *Id.* at ¶  
24 18. Thus, Defendants submitted an Erosion and Sediment Control Plan (“E&SC Plan”)  
25 to GEPA, which GEPA approved. *Id.* at ¶¶ 15-16.

26 \_\_\_\_\_  
27 <sup>1</sup> The factual allegations set forth in Plaintiff’s proposed SAC are taken as true solely for the purposes of  
28 this Motion.







1 resolution of the dispute; or (iii) prevent the plaintiff from bringing a timely action in  
2 another jurisdiction.” Block v. First Blood Assocs., 988 F.2d 344, 350 (2d Cir. 1993).

3 **IV. THE OAG’S PROPOSED AMENDMENTS TO THE COMPLAINT ARE**  
4 **FUTILE BECAUSE THEY WOULD NOT SURVIVE A MOTION TO DISMISS**

5 **A. The Legislature Has Established a Comprehensive Statutory Scheme to**  
6 **Address Alleged Violations of Permit Conditions, Including Erosion**  
7 **Control and Historic Preservation, Thereby Creating An Exclusive**  
8 **Administrative Remedy**

9 All five of the claims for relief in the SAC are based on the OAG’s allegations that  
10 Defendants failed to follow the AMDP and ES&C and as a result damaged Guam’s  
11 natural and cultural resources based on their “unauthorized” construction activities. *See,*  
12 *e.g.*, SAC at ¶¶ 46-52, 57, 59, 62-63, 65-67, 76-77, 79-87. However, the OAG is preempted  
13 from asserting these claims because the violations upon which they are based are the  
14 subject now of pending administrative enforcement actions under Guam’s  
15 comprehensive regulatory scheme granting enforcement powers and jurisdiction to the  
16 appropriate agencies of the Government of Guam.

17 The doctrine of preemption is well established in federal law<sup>2</sup> and has been  
18 applied to facts analogous to this case. For example, in Kyoei Kaiun Kaisha, Ltd. v. M/V  
19 Bering Trader, the Washington Western District Court concluded that the Ninth Circuit  
20 would join the Second, Fourth and Fifth Circuits and hold that the Federal Water  
21 Pollution Control Act preempts common law claims asserted by the federal government,  
22 including negligence and nuisance. 760 F. Supp. 174, 175, 177 (W.D. Wash. 1991). As the  
23 court explained, “An act of Congress will preempt federal common law when the act  
24 ‘speaks directly’ to a question or ‘addresses’ a problem which had previously been settled

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25 <sup>2</sup> See, e.g., Middlesex County Sewerage Auth. v. Nat’l Sea Clammers Ass’n, 453 U.S. 1, 22, 101 S. Ct. 2615,  
26 2627 (1981) (holding “the federal common law of nuisance in the area of water pollution is entirely pre-  
27 empted by the more comprehensive scope of the [Federal Water Pollution Control Act]”); also, United  
28 States v. Dixie Carriers, Inc., 627 F.2d 736, 742 (5th Cir. 1980) (providing “[i]n the absence of a clearer  
indication from Congress that the government may obtain recovery under additional theories, we conclude  
that the balanced and comprehensive scheme [] provides the exclusive remedy for the government”).

1 by appeal to federal common law." *Id.* at 175. Accordingly, the court dismissed the  
2 government's common law claims. *Id.* at 177.

3 The same principle applies under state law:

4 Where a right not existing at common law is created by  
5 statute, and a statutory remedy for its violation is provided,  
6 the statutory remedy is exclusive and no other remedy may  
7 be pursued. Where the Legislature has provided a  
comprehensive remedial scheme, there is a strong indication  
that the legislature intended the remedy to be exclusive.

8 Mahoney v. Crocker Nat'l Bank, 571 F. Supp. 287, 293 (N.D. Cal. 1983) (citations omitted);  
9 *see also* Van Baale v. City of Des Moines, 550 N.W.2d 153, 155 (1996) ("Where the  
10 legislature has provided a comprehensive scheme for dealing with a specified kind of  
11 dispute, the statutory remedy provided is generally exclusive."). In accord, our Guam  
12 Supreme Court recognized that statutory remedies can be exclusive and preempt  
13 common law claims in certain circumstances. *See* Hemlani v. Hemlani, 2015 Guam 16,  
14 ¶¶ 29-31 (providing the UCC provides exclusive remedies precluding recovery through  
15 common law breach of contract); *also*, Benavente v. Taitano, 2006 Guam 20, ¶¶ 10-12  
16 (providing the statutory remedy under the election law is exclusive and renders common  
17 law claims unavailable).

18 Here, the Guam Legislature provided a comprehensive scheme and defined  
19 powers for dealing with disputes regarding environmental protection, historical object  
20 and site protection and construction permit violations. Guam's Environmental  
21 Protection Act provides:

22 It is hereby declared to be the public policy of this territory of  
23 Guam that a high quality environment be maintained at all  
24 times to guarantee an enjoyable life for all people at present  
25 and in the future, and that environmental degradation of the  
26 quality of land, water and air by any pollutants, including all  
27 physical, chemical and biological agents, should not be  
28 allowed.



1 To these ends, it is the purpose of this Act to provide a united,  
2 integrated and comprehensive territory-wide program of  
3 environmental protection and to provide a framework to  
4 fulfill that task.

4 10 GCA § 45102.

5 GEPA is responsible for the implementation of, among others, the Water Pollution  
6 Control Act ("WPCA"). 10 GCA § 45105. The WPCA declares that "the policy of the  
7 Government of Guam" is "to provide a comprehensive program in the public interest for  
8 the prevention, abatement and control of new or existing water pollution [and] to provide  
9 effective means for the carrying out and enforcement of such program." 10 GCA § 47102.  
10 GEPA is expressly directed to "develop and adopt a comprehensive program for the  
11 prevention, control, and abatement of pollution from the waters of the territory" and "to  
12 receive complaints and make investigations in relation thereto." 10 GCA § 47104. The  
13 GEPA administrator has the sole power to "issue, modify revoke orders for the abatement  
14 of pollution or to require the adoption of such remedial measure." 10 GCA § 47105(c).

15 Thus, in accordance with its rulemaking authority, GEPA has promulgated  
16 regulations relative to the WPCA, including the Guam Soil Erosion and Sediment Control  
17 Regulations ("GSESCR"). See 22 GAR §§ 10101, et seq. These regulations specifically  
18 deal with the issues raised in the SAC, as the express purpose of the GSESCR is "to control  
19 accelerated soil erosion and the resulting sedimentation of the waters of the territory." 22  
20 GAR § 10102(a). It is these regulations that form the basis of the OAG's allegations with  
21 respect to Defendants' duty "to take certain measures to prevent soil erosion." See SAC  
22 at p. 1. However, enforcement of these regulations is "as provided in 22 GCA Chapter  
23 46, relative to Water Pollution Control."<sup>3</sup> 22 GAR § 10103. The statutory remedy under  
24 the WPCA is comprehensive and exclusively granted to GEPA, not the OAG:

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26 <sup>3</sup> The Guam Water Pollution Control Act was enacted in its present form as 10 GCA Chapter 47 by P.L. No.  
27 17-87.

1 Whenever the agency has reason to believe that a violation of  
2 any provision of this Act, or rule or regulation pursuant  
3 thereto, has occurred, it may cause written notice to be served  
4 upon the alleged violator or violators. The notice shall specify  
5 the provision of this Act or rule or regulation alleged to be  
6 violated, and the facts alleged to constitute a violation thereof,  
7 and may include an order that necessary corrective action be  
8 taken within a specified time.

9 10 GCA § 47109(a).

10 With respect to historic site preservation, Executive Order 89-9 of the Territory of  
11 Guam, entitled "Adopting Procedures for Preserving Historic Sites," unequivocally  
12 provides that "the Department of Parks and Recreation shall be the primary enforcement  
13 agency for historic preservation concerns." Accordingly, 21 GCA Chapter 77 establishes  
14 the Department of Parks and Recreation as "responsible for the accomplishment of the  
15 provisions of this Chapter and Chapter 76 of this Title." 21 GCA § 77102. Guam's  
16 Legislature has further determined that "the Guam Historic Resources Division within  
17 the Department of Parks and Recreation...shall be responsible for establishing a  
18 comprehensive historic preservation program for Guam," and that "[t]he [GHPO] shall  
19 administer the comprehensive program for historic preservation, restoration and  
20 presentation prescribed by 21 GCA § 76103." 21 GCA §§ 77301, 77303.

21 The specific procedures by which the GHPO can initiate an enforcement action are  
22 established under Guam's Administrative Adjudication Law:

23 A hearing to determine whether an authority, license  
24 privilege or right should be conditioned, limited, suspended  
25 or revoked shall be initiated by filing an accusation. The  
26 accusation shall be a written statement of charges which shall  
27 set forth in ordinary and concise language the acts or  
28 omissions with which the respondent is charged and the  
statutes and regulations which the respondent is alleged to  
have violated.

5 GCA § 9201.

1 Last, the OAG alleges Defendants violated the conditions of permits approved by  
2 DPW. See SAC at ¶¶ 15-16. However, the enforcement authority for “willful departure  
3 from or willful disregard of plans or specifications in any material respect” is  
4 comprehensively and exclusively granted to the CLB, not the OAG. See 29 GAR § 1446.  
5 Nothing in the statutes or rules governing contractors allows for the OAG to circumvent  
6 the regulatory scheme and pursue its own action for alleged violations of those rules.

7 The Legislature adopted 21 GCA §§ 70100 *et seq.* as the comprehensive scheme  
8 regulating contractors, like Defendants, and created the CLB to enforce that scheme. The  
9 CLB has itself interpreted the primary intent of the Legislature in creating the Board to  
10 be “the protection of the public health, safety and general welfare in dealing with persons  
11 engaged in the construction industry, and the affording to the public of an effective and  
12 practical protection against the incompetent, inexperienced, unlawful and unfair  
13 practices of contractors with whom they may contract.” 29 GAR § 1402.

14 Under Chapter 70, the CLB is the administrative agency tasked with the authority  
15 to, “[e]nforce this Chapter and rules and regulations adopted pursuant thereto” and  
16 “[s]uspend *or* revoke any license for any cause prescribed by § 70116 *or* for any cause for  
17 suspension *or* revocation prescribed by the rules and regulations. 21 GCA § 70103(b) and  
18 (c). The CLB is specifically tasked with investigating “for compliance with the rules and  
19 regulations of the Board and the provisions of this Chapter” and “may issue citations to  
20 acting contractors, licensed or unlicensed, in violation of the provisions of this Chapter  
21 and rules promulgated pursuant to the requirements of the Administrative Adjudication  
22 Law.” 21 GCA §§ 70109-70109.1 and Guam Administrative Rules (“GAR”) Title 25,  
23 Chapter 12 and Title 29, Chapter 1, Article 4. The CLB may also, “in addition to any other  
24 remedies available, apply to a judge of the Superior Court for a preliminary and/or  
25 permanent injunction.” 29 GAR § 1405.

1           Based on the foregoing, the SAC is futile in its entirety. The cultural resources and  
2 natural resource damage claims (Counts I and III) assert violations of rights that do not  
3 exist at common law but were created by statute. The statutes and administrative rules  
4 governing these issues, 21 GCA Chapter 76 and the WPCA, provide remedies for their  
5 violations, which are exclusive, and no other remedy may be granted. With respect to  
6 the nuisance and negligence claims (Counts IV and V), there is a comprehensive scheme  
7 for dealing with alleged failures to implement erosion control measures and preserve  
8 historic sites during a construction project, as described above, and thus there is clear  
9 indication that the Legislature intended for the statutory remedies to be exclusive.  
10 Therefore, the OAG's right to assert such common law claims has been abrogated by  
11 statute. And, as discussed in Section C below, Count III for "hindering public access" is  
12 not a valid claim for relief. Because the OAG has failed to assert any claims that would  
13 survive a motion to dismiss, the SAC is futile, and the Motion should be denied.

14           **B. The Government Has Failed To Exhaust Its Administrative Remedies**

15           The OAG in this action attempts to assert civil claims based upon the same alleged  
16 conduct that is already subject to administrative action by GEPA, DPR's GHPO, DPW  
17 and CLB, which violates the doctrine of exhaustion of administrative remedies. "The  
18 doctrine of exhaustion of administrative remedies is well established in the jurisprudence  
19 of administrative law. The doctrine provides that no one is entitled to judicial relief for a  
20 supposed or threatened injury until the prescribed administrative remedy has been  
21 exhausted." Barrett-Anderson v. Camacho, 2015 Guam 20, ¶ 31. "[E]ven where the  
22 administrative remedy may not provide the specific relief sought by a party or resolve all  
23 the issues, exhaustion is preferred because agencies have the specialized personnel,  
24 experience and expertise to unearth relevant evidence and provide a record which a court  
25 may review." Barrett-Anderson v. Camacho, 2015 Guam 20, ¶ 31.

1           With respect to Count I, the OAG asserts a claim for “Cultural Resource Damage  
2 in violation of 21 GCA § 76511.” This statute is found within Title 21, Chapter 76  
3 (Historical Objects and Sites) and provides, in relevant part:

4                   (a) A certificate of approval must be issued by the Guam  
5 Historic Preservation Officer before any action affecting  
potential historic sites or objects is undertaken[.]

6                   ...  
7                   (b) The Guam Historic Preservation Officer shall have the  
8 authority to prohibit activities listed in subsection (a) and may  
9 issue cease work orders on projects when there is evidence of  
10 adverse impact or potential destruction of cultural or  
historical features on the property. In the event that there is  
no alternate recourse in protecting or salvaging the cultural or  
historical significance of the property, the decision of the  
Guam Historic Preservation Officer to deny issuance of a  
permit or to cease work on projects shall prevail.

11                   (c) Higher authority shall not override the decision of the  
12 Guam Historic Preservation Officer, except through  
13 procedures adopted pursuant to Subsection (d) of this  
14 Section. If work has already begun where items of cultural or  
15 historical significance have been disturbed, the developer  
shall be responsible for the restoration of the property to its  
original form and the burden of expense shall be on the  
developer.

16                   (d) The problems of projects with potential impact on cultural  
17 or historic features may be resolved by the Guam Historic  
18 Preservation Officer through agreement or mitigation. Such  
19 resolution may include, but need not be limited to, project  
20 redesign, relocation, curation and display of cultural  
resources, and land dedication to the Guam Preservation  
Trust. The Guam Historic Preservation Review Board shall  
develop the criteria for resolution of any controversial finding  
in accordance with the Administrative Adjudication Law.

21 21 GCA § 76511.

22           Nothing in this section confers authority upon the OAG to bring a claim against a  
23 private party for alleged “cultural resource damage.” To the contrary, the statute  
24 provides that GHPO and the Guam Historic Preservation Review Board alone have the  
25 authority to deny the issuance of a permit or cease work on projects. The OAG will likely  
26 argue it may bring Count I pursuant to GCA § 76113, which provides the OAG “may  
27  
28

1 maintain an action in the Superior Court for declaratory and equitable relief .... for the  
2 protection of a historic property and the public trust therein." However, "the language  
3 of [a] statute cannot be read in isolation, and must be examined within its context . . .  
4 [which] includes looking at . . . other related statutes," Barrett-Anderson v. Camacho,  
5 2015 Guam 20, ¶ 24 (citation omitted). Here, the authority to enforce the Historical  
6 Objects and Sites chapter has been delegated to an agency, thus prohibiting the OAG  
7 from enforcing the chapter prior to the exhaustion of administrative remedies.

8 Moreover, the OAG prays for a "[d]eclaration that Defendants' unauthorized acts  
9 damaged, demolished, and or altered historic sites and objects." See SAC at p. 13. But,  
10 the law is clear that "the doctrine of exhaustion of administrative remedies may not be  
11 circumvented by bringing . . . actions for declaratory relief." Barrett-Anderson v.  
12 Camacho, 2015 Guam 20, ¶ 24, 2015.

13 Irrespective of how the OAG has identified its claims for relief in form, the  
14 substance of the entire SAC is based upon the same alleged underlying foundation of  
15 misconduct that is already subject to enforcement actions by GEPA, DPR's GHPO and  
16 CLB. See Exhibit "1" (GEPA Notice of Violation alleging numerous violations of the  
17 Guam Soil Erosion and Sediment Control Regulations, 22 GAR Chapter 10); Exhibit "2"  
18 (DPR Notice of Violation alleging disturbance and destruction historic site and possible  
19 human remains, failure to adhere to AMDP, and failure to implement measures to  
20 prevent runoff water); and Exhibit "3" (CLB Accusation and Statement of Charges  
21 incorporating GEPA's allegations and alleging violations of 21 GCA Chapter 70),  
22 attached to Declaration of Counsel for Samsung filed contemporaneously herewith.<sup>4</sup>

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23 <sup>4</sup> While "a court should generally convert a Rule 12(b)(6) motion to one for summary judgment if it  
24 considers matters outside of the pleadings ... the court is permitted, under exceptional circumstances, to  
25 deviate from this general rule by considering evidence outside the pleadings when deciding a Rule 12(b)(6)  
26 motion if those facts are integral to the complaint and relied upon by the plaintiff." Ukau, 2016 Guam 18  
27 at ¶ 8. Judicial notice of adjudicative facts is mandatory under Rule 201 of the Guam Rules of Evidence  
where the facts are "not subject to reasonable dispute" and "capable of accurate and ready determination  
by resort to sources whose accuracy cannot reasonably be questioned." 6 GCA Appx. A, Rule 201. Further,  
a court may take judicial notice of matters of public record where the records may be central to determining

1 Because the OAG has failed to exhaust its administrative remedies, the proposed  
2 amendment is futile, and the Motion should be denied. See DFS Guam L.P. v. A.B. Won  
3 Pat Int'l Airport Auth., 2020 Guam 20, ¶ 63 (citation omitted) (explaining failure to  
4 exhaust presents a complete defense to a plaintiff's claims).

5  
6 **C. Count III for "Hindering Public Access" Is Futile Because It Is Not A  
Valid Claim For Relief**

7 The OAG's proposed third cause of action alleges Defendants hindered public  
8 access "in violation of 21 GCA § 62112." This section of Guam's subdivision law does not  
9 create a cognizable cause of action, and thus this amendment is futile. The statute simply  
10 establishes the public's right to pass unhindered over a public right of way, establishes  
11 the grant of such right of way upon approval of the Department of Land Management,  
12 provides that DPW has oversight responsibility for the development of public rights of  
13 way, clarifies that a subdivider may not retain special property rights, and authorizes  
14 "any landowner whose property is served by that right of way [to] take the necessary and  
15 reasonable measures to maintain that portion of the easement that immediately abuts his  
16 property." 21 GCA § 62112. The statute does not create on behalf of the Attorney General  
17 a valid cause of action for alleged property damage. *But see* SAC at p. 13 (praying for  
18 finding that Defendants are liable for all reasonable costs incurred in cleaning up  
19 adjoining properties and public access ways).

20 As a threshold issue, to the extent the OAG seeks to assert a claim on behalf of  
21 adjoining landowners, it has no standing to do so. The doctrine of *parens patriae* only  
22 allows a State to bring suit on behalf its citizens when the State:

23  
24  
25 a determinative issue. Taitano v. Calvo Fin. Corp., 2009 Guam 9 ¶ 31. Accordingly, judicial notice of these  
26 facts is warranted here because they are all "not subject to reasonable dispute" and "capable of accurate  
27 and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Further,  
these facts are a matter of public record, "are integral to the complaint," and relate to allegations "relied  
upon by the plaintiff."

1 (1) alleges injury to a substantial portion of its population;

2 (2) articulates an interest separate from the interests of  
3 particular private parties; and

4 (3) expresses a quasi-sovereign interest.

5 Chimei Innolux Corp., 659 F.3d at 847.

6 In Alfred L. Snapp & Son, Inc. v. Puerto Rico, the United  
7 States Supreme Court reviewed the purpose of the *parens*  
8 *patriae* doctrine, which allows the State to bring an action to  
9 protect its "quasi-sovereign interest in the health and well-  
being-both physical and economic-of its residents in general."  
458 U.S. 592, 607, 102 S. Ct. 3260, 73 L. Ed. 2d 995 (1982).

10 Haw. ex rel. Louie v. Bristol-Myers Squibb Co., No. 14-00180 HG-RLP, 2014 U.S. Dist.  
11 LEXIS 97323, at \*14-15 (D. Haw. July 15, 2014).

12 Here, the OAG has not alleged injury to a substantial portion of Guam's  
13 population, but instead merely articulated the same interest as that of particular private  
14 parties, namely, those living near Lot 5354-3A-4-2. See SAC at ¶¶ 20-21. Indeed, the  
15 statute itself only references particular landowners "whose property is served by that  
16 right of way." 21 GCA § 62112. Regardless, there is simply no authority that allows the  
17 OAG to bring a claim for property damage under this statute. See SAC at ¶ 2 (alleging  
18 only that the OAG has authority to abate public nuisances on behalf of the Government  
19 and to seek declaratory and equitable relief). In fact, the OAG's claim for damages based  
20 on the alleged damage to the public access is no different than its fifth cause of action for  
21 negligence. See, e.g., *id.* at ¶¶ 73 and 77 (alleging Defendants created or permitted a  
22 condition that resulted in water and soil being discharged into the public access and  
23 failed to implement measures to prevent damage to public access). For the reasons  
24 discussed in Section IV.A above, the OAG is barred from asserting this common law  
25 claim for negligence, because it has been abrogated by the exclusive statutory remedies.



1  
2 **V. THE PROPOSED AMENDMENT WILL UNDULY PREJUDICE**  
3 **DEFENDANTS**

4 In the event the Court does not find the amendment futile, it should nevertheless  
5 deny the Motion because the amendment is unduly prejudicial to Defendants. As stated  
6 above, the Defendants are already subject to four separate enforcement actions by GEPA,  
7 DPR's GHPO, DPW and CLB for identical claims and allegations set forth in the SAC.  
8 Allowing the OAG to assert new claims based on the same alleged violations will require  
9 Defendants to expend significant additional resources to conduct discovery and prepare  
10 for trial, all the while it must simultaneously defend against four separate agency actions.  
11 In addition to substantially burdening Defendants, the SAC also creates the potential for  
12 inconsistent results, duplicative government proceedings and a piling on of penalties that  
13 far exceed those contemplated by the Legislature. The Court should deny the Motion  
14 and allow the agency actions to proceed to their conclusion to avoid this undue prejudice.

15 **VI. CONCLUSION**

16 For these reasons stated above, Defendant respectfully requests that the Court  
17 DENY the Plaintiff's Motion to Amend its First Amended Complaint.

18 DATED: Hagatna, Guam, February 17, 2022.

19 

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