UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT
Case Nos.: 14-2156 and 14-2251

State of North Dakota, Industrial Commission of North Dakota, Lignite Energy Council, Basin Electric Power Cooperative, The North American Coal Corporation, Great Northern Properties Limited Partnership, Missouri Basin Municipal Power Agency d/b/a Missouri River Energy Services, Minnkota Power Cooperative, Inc.,

Appellees/Cross-Appellants,

v.

Beverly Heydinger, Commissioner and Chair, Minnesota Public Utilities Commission, David C. Boyd, Commissioner, Minnesota Public Utilities Commission, Nancy Lange, Commissioner and Vice Chair, Minnesota Public Utilities Commission, Dan M. Lipschultz, Commissioner, Minnesota Public Utilities Commission, Betsy Wergin, Commissioner, Minnesota Public Utilities Commission, and Mike Rothman, Commissioner, Minnesota Department of Commerce, each in his or her official capacity,

Appellants/Cross-Appellees.

APPELLEES' OPPOSITION TO APPELLANTS' MOTION TO DISMISS CROSS-APPEAL

Appellees/Cross-Appellants State of North Dakota, Industrial Commission of North Dakota, Lignite Energy Council, Basin Electric Power Cooperative, The North American Coal Corporation, Great Northern Properties Limited Partnership, Missouri Basin Municipal Power Agency d/b/a Missouri River Energy Services, and Minnkota Power Cooperative, Inc. (collectively, "Appellees") respectfully submit this opposition to the Motion to Dismiss Appellees' Cross-Appeal filed by Appellants/Cross-Appellees Beverly Heydinger, Commissioner and Chair, Minnesota Public Utilities Commission, David C. Boyd, Commissioner, Minnesota Public Utilities Commission, Nancy Lange, Commissioner and Vice Chair, Minnesota Public Utilities Commission, Dan M. Lipschultz, Commissioner, Minnesota Public Utilities Commission, Betsy Wergin, Commissioner, Minnesota Public Utilities Commission, and Mike Rothman, Commissioner, Minnesota Department of Commerce, each in his or her official capacity (collectively, "Appellants").

BACKGROUND

Appellees' Amended Complaint in this action asserts several separate claims challenging the constitutionality of Minn. Stat. § 216H.03, subd. 2(2)-(3), including separate causes of action alleging that these statutory provisions violate

the Commerce Clause of the U.S. Constitution (Count I)(ECF No. 9, ¶¶ 85-98),[1] as well as the Supremacy Clause of the U.S. Constitution because these provisions are preempted by the Clean Air Act (Count II)(*id.*, ¶¶ 99-103) and the Federal Power Act (Count III)(*id.*, ¶¶ 104-118), respectively. Each of these claims are pleaded as separate counts, and each of these claims constitute a separate, standalone basis for relief sought by Appellees in this case.

Appellees moved for summary judgment seeking a declaration that Minn. Stat. § 216H.03, subd. 2(2)-(3) is an unconstitutional violation of the Dormant Commerce Clause, arguing in the alternative that, *inter alia*, Minn. Stat. § 216H.03 violates the Extraterritoriality Doctrine and fails the *Pike* balancing test. (ECF No. 137, pp. 24-34) Additionally, Appellees asked the District Court to declare that Minn. Stat. § 216H.03 is an unconstitutional violation of the Supremacy Clause based on Appellees' separate claims that the statute it is preempted by the Federal Power Act and the Clean Air Act, respectively. (*Id.*, pp. 34-46)

The District Court held that Minn. Stat. § 216H.03, subd. 3(2)-(3) is an unconstitutional violation of the Extraterritoriality Doctrine of the Dormant Commerce Clause. (ECF No. 210, pp. 31-47) Consequently, the District Court

[1] Appellees' references to ECF document numbers herein relate to the filings in the District Court proceedings, Civil File No. 11-CV-3232-SRN-SER.

chose not to address the Appellees' alternative argument that the statute violates the Dormant Commerce Clause under the *Pike* analysis. (*Id.*, p. 32)

Further, the District Court held that Appellees' separate claims that the statute is preempted by the Federal Power Act and the Clean Air Act, respectively, were moot and denied Appellees' Motion for Summary Judgment as to those two separate claims. (*Id.*, p. 27 & n.9 and p. 48)

Thereafter, the District Court entered final Judgment in accordance with its order, and that Judgment included the denial of Appellees' motion for summary judgment as to their separate claims that the statute violates the Supremacy Clause because it is preempted by the Federal Power Act and the Clean Air Act. (ECF No. 211, pp. 1-2)

The District Court also declined to award relief on Appellees' claim for attorneys' fees and nontaxable costs pursuant to 42 U.S.C. § 1988(b), holding that "[b]ecause Plaintiffs did not raise the issue of attorneys' fees in their summary judgment motion papers, the Court, in its discretion, declines to award Plaintiffs their attorneys' fees." (ECF No. 21, pp. 47-48) Thereafter, the District Court entered Judgment providing that "Plaintiffs are not awarded their attorneys' fees incurred in this action." (ECF No. 211, p. 2)

Appellants commenced this appeal challenging the District Court's Judgment that granted relief to Appellees based on their Dormant Commerce

Clause claim. (ECF No. 219) Thereafter, Appellees filed their cross-appeal, pursuant to which Appellees seek to modify the District Court's Judgment to obtain a declaration that Minn. Stat. § 216H.03 violates the Supremacy Clause of the United States Constitution because it is preempted by the Federal Power Act, Minn. Stat. § 216H.03 violates the Supremacy Clause of the United States Constitution because it is preempted by the Clean Air Act, and Appellees are entitled to recover their attorneys' fees and nontaxable costs incurred in this action. (ECF No. 224)

ARGUMENT

Appellees properly filed a cross-appeal to obtain the full measure of relief they seek in this lawsuit, and to ensure their rights to appellate review are fully protected, in two basic respects.

First, Appellees are entitled to cross-appeal the District Court's Judgment denying their motion for summary judgment on their separate and independent claims seeking a declaration that Minn. Stat. § 216H.03, subd. 3(2)-(3) is an unconstitutional violation of the Supremacy Clause of the U.S. Constitution because it is preempted by the Federal Power Act and the Clean Air Act, respectively. Appellees seek to modify the District Court's Judgment to enlarge the declaratory relief to provide that the statute is an unconstitutional violation of the Supremacy Clause, separate and apart from the Dormant Commerce Clause.

Appellees seek to ensure that they will have standing and the Court will have jurisdiction to allow Appellees to obtain the relief they seek pursuant to these separate claims.

Second, Appellees seek to modify the District Court's Judgment that they "are not awarded their attorneys' fees incurred in this action." To the extent this part of the Judgment is deemed by this Court to constitute a ruling on the merits as to Appellees' claim for an award of their attorneys' fees and nontaxable costs pursuant to 42 U.S.C. § 1988(b), then Appellees seek to modify that part of the District Court's Judgment in order to obtain a ruling from this Court that Appellees are entitled to an award of their reasonable attorneys' fees and nontaxable costs.

I. APPELLEES MAY PROPERLY FILE CROSS-APPEALS IN ORDER TO PRESERVE THEIR RIGHTS TO SEEK THE MODIFICATION OF DISTRICT COURT JUDGMENTS THAT MAY EXPAND THEIR RIGHTS AND/OR LESSEN THE RIGHTS OF THEIR ADVERSARY.

It is well settled that a cross-appeal is necessary and appropriate where a party attempts to either enlarge its rights or lessen its adversary's rights. *Gross v. FBL Serv., Inc.*, 588 F.3d 614, 621 (8th Cir. 2009); *Smith v. Sullivan*, 982 F.2d 308, 314 (8th Cir. 1992); *Bethea v. Levis Strauss and Co.*, 916 F.2d 453, 456 (8th Cir. 1992). In the absence of a timely cross-appeal, the appellate court lacks jurisdiction to provide an appellee with such relief. *See, e.g., Int'l Ore & Fertilizer Corp. v. SGS Central Serv., Inc.*, 38 F.3d 1279, 1285-86 (2nd Cir. 1994).

Given that case law does not clearly define when a party is seeking to enlarge its rights and/or lessen the other party's rights, respected commentators in this Circuit have written that a cross-appeal is well-advised where the district court grants relief to an appellee as to some, but not all, of its claims:

> What if the appellee was denied some relief by the district court, but is still perfectly content with the overall result below—should it ever file a cross appeal? The answer is yes, if the appellee would want to challenge any of the trial court's orders or judgments in the event the appellant were partly or wholly successful on appeal. Such a cross-appeal is known as a "protective" or "conditional" cross-appeal. *See e.g. Bethea*, 916 F.2d at 456 ("protective" cross-appeal); *Farmland Indus. v. Morrison-Quirk Grain Corp.*, 54 F.3d 478, 483 (8th Cir. 1995) ("conditional" cross-appeal).
>
> For example, *if a plaintiff-appellee prevails on the first of two claims, and receives all damages sought, it may still need to file a protective cross-appeal concerning the second claim, because a reversal on the first claim will leave it without any recovery*. The appellee will not be able to challenge the adverse decision on the second claim if it has not filed a cross-appeal. *Cf. Bethea*, 916 F.2d at 465.

Herr, Magnuson, Vasaly & Gans, *8th Circuit Appellate Practice Manual*, 6-201 (6th ed. 2013)(emphasis added).

"In a protective cross-appeal, a party who is generally pleased with the judgment and would have otherwise declined to appeal, will cross-appeal to insure that any errors against [appellee's] interests are reviewed so that if the main appeal results in modification of the judgment [appellee's] grievances will be determined as well." *Hartman v. Duffey*, 19 F.3d 1459, 1465 (D.C. Cir. 1994). "The theory for allowing a conditional cross-appeal is that as soon as the appellate court

decides to modify the trial court's judgment, that judgment may become adverse to the cross-appellant's interests and thus qualify as fair game for an appeal." *Id.* (citing 15A Charles A. Wright, *Federal Practice and Procedure*, § 3902 p. 78 (2d Ed. 1992); *Jones & Laughlin Steel Corp. v. Johns-Manville Sales Corp.*, 626 F.2d 280, 290 (3d Cir. 1980); *Hilton v. Mumaw*, 522 F.2d 588, 603 (9th Cir. 1975); *School Bd. v. Malone*, 762 F.2d 1210 (4th Cir. 1985); *Am. Mart Corp. v. Joseph E. Seagram & Sons, Inc.*, 824 F.2d 733 (9th Cir. 1987). The United States Supreme Court has reaffirmed the need for a cross-appeal before an appellate court may alter a judgment in appellee's favor. *Greenlaw v. U.S.*, 554 U.S. 237 (2008).

Accordingly, it is perfectly appropriate for appellees to file cross-appeals from denials of summary judgment or adverse rulings on some claims in cases in which they have obtained summary judgment on other claims, *see, e.g., General Mills Operations, LLC v. Five Star Custom Foods, Ltd.*, 703 F.3d 1104, 1111 (8th Cir. 2013)(appellee cross-appealed district court's grant of summary judgment in favor of appellant on appellee's breach of warranty claim in appellant's appeal from district court's grant of summary judgment in favor of appellee on its breach of contract case); *Beachwalk Homeowners Ass'n v. Gen. Star. Indem. Co.*, 76 Fed.Appx. 494, 495 (4th Cir. 2003)(appellees filed cross-appeal asserting district court erred in not granting summary judgment on the additional grounds raised in their motion); adverse jury verdicts on particular claims where they have prevailed

on other claims that involved essentially the same damages under different theories of recovery, *see, e.g., University Computing Co. v. Lykes-Youngstown Corp.,* 504 F.3d 518, 548 & n.44 (5th Cir. 1974)(appellee cross-appealed adverse jury verdicts on two claims that "involved essentially the same damages under different theories of recovery" as favorable jury verdicts on two other claims in which appellee had prevailed and from which appellant had appealed); or denials of summary judgment on defenses that would have otherwise barred claims on which appellees had prevailed on the merits. *See, e.g., Minnesota ex rel. N. Pac. Ctr., Inc. v. BNSF Ry. Co.*, 686 F.3d 567, 575 (8th Cir. 2012)(appellee cross-appealed district court's denial of summary judgment on statute of limitations grounds in appeal from summary judgment in appellee's favor on the merits); *Hillstrom v. Kenefick,* 484 F.3d 519, 530 (8th Cir. 2007)(same); *Tracinda Corp. v. DaimlerChrysler AG,* 502 F.3d 212, 246 (3d Cir. 2007)(same).

II. APPELLEES HAVE PROPERLY CROSS-APPEALED IN ORDER TO OBTAIN A MODIFICATION OF THE JUDGMENT, AND SEEK A DECLARATION BY THIS COURT, THAT MINN. STAT. § 216H.03, SUBD. 3(2)-(3) IS AN UNCONSTITUTIONAL VIOLATION OF THE SUPREMACY CLAUSE AS IT IS PREEMPTED BY THE FEDERAL POWER ACT AND/OR CLEAN AIR ACT.

Appellants' Motion to Dismiss Appellees' Cross-Appeal confuses and conflates the distinction between seeking to affirm a judgment by arguing alternative grounds for affirmance on the one hand, and seeking to modify a

judgment so as to expand a party's rights or lessen the rights of that party's adversary. This is a unique case because it involves both of these situations, and therefore it is important for the Court to recognize this distinction.

Appellants commenced this appeal from the District Court's Judgment which, *inter alia*, granted declaratory relief in favor of Appellee and imposed injunctive relief as to Appellants and their successors in office based on the District Court's ruling that Minn. Stat. § 216H.03, subd. 3(2)-(3) is an unconstitutional violation of the Dormant Commerce Clause of the U.S. Constitution. The District Court based its ruling on the Extraterritoriality Doctrine of the Dormant Commerce Clause. Appellees are entitled to argue for affirmance of the Judgment, asserting alternative arguments for affirmance based on the Extraterritoriality Doctrine or based on the *Pike* balancing test because Appellees made both of these arguments to the District Court as alternative grounds for summary judgment in support of their Dormant Commerce Clause claim. Appellees do not need to file a cross-appeal in order to argue for affirmance of the Judgment based on these alternative arguments as to the Dormant Commerce Clause.

In contrast, Appellees separately seek to modify the District Court's judgment on the grounds that the District Court did not declare the statute to be an unconstitutional violation of the Supremacy Clause of the U.S. Constitution. Again, Appellees brought separate claims asserting violations of the Supremacy

Clause because the statute is preempted by the Federal Power Act and the Clean Air Act, respectively. Appellees' prayer for declaratory relief based on these separate claims is not merely arguing in the alternative for affirmance of the Judgment. Instead, Appellees seek to modify the District Court's Judgment to obtain a declaration that the statute violates the Supremacy Clause. Such a modification of the District Court's Judgment would expand Appellees' rights and necessarily lessen the rights of the Appellants.

The cross-appeal will be particularly significant if Appellants are otherwise successful in their appeal of the District Court's Judgment that the statutory provisions violate the Dormant Commerce Clause. If that were to occur, Appellees' cross-appeal seeking a modification of the Court's Judgment to declare the statute is unconstitutional under the Supremacy Clause based on Appellees' separate claims that the statute is preempted by the Federal Power Act and the Clean Air Act would necessarily expand Appellees' rights and lessen Appellants' rights.

Appellants rely exclusively on cases in which a party was seeking affirmance of the district court's favorable judgment on its claims based on *alternative arguments*. This case law only applies to the part of this appeal involving the Dormant Commerce Clause. Here, Appellees seek affirmance of the District Court's favorable judgment that the statutory provisions violate the

Dormant Commerce Clause by asserting *alternative arguments* for affirmance, i.e., the statute violates the Extraterritoriality Doctrine and, alternatively, it fails under the *Pike* analysis. However, separate and apart from the alternative arguments for affirmance of the Judgment on their Dormant Commerce Clause claim, Appellees also seek to modify the District Court's judgment to obtain relief based on Appellees' *separate claims* that the statute should be declared unconstitutional as a violation of the Supremacy Clause because the provisions are preempted by the Federal Power Act and the Clean Air Act, respectively.

Accordingly, because Appellees have asserted separate and independent claims for relief based on this distinct constitutional provision, and because they seek to modify the District Court's Judgment as to these separate and independent claims, the present case is materially different from the three cases Appellants have cited where there were no distinct claims but instead the appellees were merely making alternative arguments to support the favorable judgments. *See Ashanti v. City of Golden Valley,* 666 F.3d 1148, 1151 (8th Cir. 2012)(considering doctrine of res judicata as additional grounds for affirmance); *Lloyd v. Hardin County, Iowa,* 207 F.3d 1080, 1083 (8th Cir. 2000)(considering alternative bases for why plaintiff was not a "qualified individual" under the ADA); *Smith v. Johnson and Johnson,* 593 F.3d 280 (3d Cir. 2010)(considering alternative statutory exemptions raised in defense to claim for overtime pay under the FLSA); *see also Spirtas Co. v.*

Nautilus Ins. Co., 715 F.3d 667, 670 (8th Cir. 2013)(allowing consideration of insuring clause where district court had granted judgment based on exclusion that precluded coverage).

In those cases cited and relied upon by Appellants, the "alternative grounds for affirmance" approach disposed of the need for a cross-appeal because the appellees were simply seeking affirmance of the favorable judgment on their claims based on alternative arguments. However, Appellants' case law does not support the separate and distinct proposition that entirely discrete constitutional claims fall within the rubric of "alternative grounds for affirmance." The cross-appeal is thus proper. *Cf. Haitain Refugee Center, Inc. v. Baker*, 949 F.2d 1109, 1110 (11th Cir. 1991)(dissolving injunction initially granted based on First Amendment claim and holding that cross-appeal was necessary to argue injunction was supported by a separate Administrative Procedures Act claim).

Here, Appellees are seeking affirmance of the District Court's favorable Judgment as to their Dormant Commerce Clause claim by asserting alternative arguments relating to that particular claim. As noted, in the District Court proceedings, Appellees made arguments based on the *Pike* balancing test, as an alternative to the Extraterritoriality Doctrine, for summary judgment. But Appellees are also seeking to modify the District Court's Judgment in order to obtain declaratory relief on their separate claims that the statute is unconstitutional

under the Supremacy Clause because these provisions are preempted by the Federal Power Act and the Clean Air Act, respectively. "[T]he rule that a cross-appeal must be filed to secure a favorable modification of the judgment is stated and applied in many settings." 15A Wright, Miller & Cooper, *Federal Practice & Procedure* § 3904, pg. 196 (2d ed. 1991)(collecting cases); *see also id.* at 197-98 (collecting cases illustrating need for cross-appeal in order to seek, *inter alia*, obtain additional damages or costs; alter the disposition of a counterclaim or setoff; challenge an attorneys' fees award; or modify dismissal without prejudice into a dismissal with prejudice). Here, Appellees have filed their cross-appeal to modify the District Court's judgment as to their preemption claims so that the Judgment will be changed from stating, "denied as moot," to read, "granted, Minn. Stat. § 216H.03, subd. 3(2)-(3) violates the Supremacy Clause because the statute is preempted by the Federal Power Act and the Clean Air Act."

III. APPELLEES HAVE PROPERLY CROSS-APPEALED TO PRESERVE THEIR RIGHTS TO MODIFY THE DISTRICT COURT'S JUDGMENT REGARDING THEIR CLAIM FOR AN AWARD OF REASONABLE ATTORNEYS' FEES AND NONTAXABLE COSTS.

The District Court's Memorandum Opinion and Order and Judgment both state that Appellees are not awarded their reasonable attorneys' fees and nontaxable costs incurred in this matter. (ECF No. 210, pp. 47-48 & 211, p. 2) This claim was neither briefed nor argued in connection with the parties'

cross-motions for summary judgment, which were the subject of the District Court's Memorandum Opinion and Order and Judgment. Accordingly, Appellees subsequently timely filed a Motion for Attorneys' Fees and Nontaxable Costs pursuant to Fed. R. Civ. P. 54(d)(2) and Local Rule 54.3(b). (ECF No. 212)

Appellees do not believe that the District Court's Memorandum Opinion and Order and Judgment that is the subject of the instant appeal constituted a ruling on the merits with respect to their claim for an award of reasonable attorneys' fees and nontaxable costs under 42 U.S.C. § 1988(b). (ECF No. 213) However, Appellants have taken the position that the District Court did, in fact, deny Appellees' claim for an award of attorneys' fees and costs on the merits. For example, Appellants objected to Appellees' post-judgment Motion for Attorneys' Fees and Nontaxable Costs, stating as follows: "This Court has entered an order denying attorneys' fees in this case and explicitly stating that 'Plaintiffs are not awarded their attorneys' fees incurred in this case'. . . . There is no basis for Plaintiffs' motion for attorney fees and related nontaxable expenses." (ECF No. 215) Thereafter, Appellants filed a Memorandum in Opposition to Plaintiffs' Motion for Attorneys' Fees and Nontaxable Costs stating, *inter alia*, "[d]espite an Order from this Court exercising its discretion to deny fees, (Apr. 18, 2014 Mem. Op. and Order (Doc. No. 210) at 47), Plaintiffs brought a Motion for Attorneys' Fees and Nontaxable Costs. The Court agreed to reconsider the issue. . . ." (ECF No. 235, p. 2)

Appellants' position as to the District Court's previous "ruling" on Appellees' claim for an award of reasonable attorneys' fees and costs incurred in this matter demonstrate why it is necessary for Appellees to assert a cross-appeal as to their claim for attorneys' fees and costs.

First, as noted, Appellants have taken the position that the District Court ruled on the merits on this particular claim when it filed the Memorandum Opinion and Order, and that the Judgment adjudicated the merits of Appellants' claim for attorneys' fees and costs. (ECF No. 215) If Appellants are correct, then Appellees have properly filed their cross-appeal from the Judgment to obtain appellate review of the District Court's disposition of their claim for attorneys' fees and costs. *See, e.g., Laitram Corp. v. NEC Corp.,* 115 F.3d 947, 955 (8th Cir. 1997)(appellee properly cross-appealed denial of attorneys' fees); *Anderson v. Douglas County,* 4 F.3d 574, 579 (8th Cir. 1993)(same); *Applied Innovations, Inc. v. Regents of Univ. of Minn.,* 876 F.2d 626, 638 (8th Cir. 1989)(same); *Lackawanna Leather Co. v. United Food & Commercial Workers Int'l Union, AFL-CIO, Dist. Union No. 271,* 706 F.2d 228, 232 (8th Cir. 1983)(same); *cf. Neosho R-V Sch. Dist. v. Clark,* 315 F.3d 1022, 1031 (8th Cir. 2003)(appellee cross-appealed denial of expert witness fees).

Second, Appellants have characterized Appellees' current Motion for Attorneys' Fees and Nontaxable Costs now pending in the District Court as a

motion for "reconsideration." (ECF No. 235, p. 2) If the Court were to agree with Appellants in this regard, then Appellees would be limited to only seeking possible review of a ruling on a motion for reconsideration if it had not properly and timely filed its cross-appeal of the underlying Judgment.

Ultimately, Appellees needed to file their cross-appeal to ensure that their rights to full and fair appellate review as to the claim for attorneys' fees and nontaxable costs are fully protected.

CONCLUSION

For the above-stated reasons, Appellees respectfully request the Court to deny Appellants' Motion to Dismiss the Cross-Appeal in all respects.

Dated: July 21, 2014

s/Thomas H. Boyd

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UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

CERTIFICATE OF SERVICE

State of North Dakota, Industrial Commission of North Dakota, Lignite Energy Council, Basin Electric Power Cooperative, The North American Coal Corporation, Great Northern Properties Limited Partnership, Missouri Basin Municipal Power Agency d/b/a Missouri River Energy Services, Minnkota Power Cooperative, Inc. v. Beverly Heydinger, Commissioner and Chair, Minnesota Public Utilities Commission, David C. Boyd, Commissioner, Minnesota Public Utilities Commission, Nancy Lange, Commissioner and Vice Chair, Minnesota Public Utilities Commission, Dan M. Lipschultz, Commissioner, Minnesota Public Utilities Commission, Betsy Wergin, Commissioner, Minnesota Public Utilities Commission, and Mike Rothman, Commissioner, Minnesota Department of Commerce, each in his or her official capacity

Appeal Nos.: 14-2156 and 14-2251

I hereby certify that on July 21, 2014, I electronically filed the following:

1. Appellees' Opposition to Appellants' Motion to Dismiss Cross-Appeal

With the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

Dated: July 21, 2014

s/Thomas H. Boyd

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