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INTRODUCTION

The following is Petitioner, Gerald Lechliter's, response to this Court's Order of September 19, 2023. Col. Lechliter initiated this writ proceeding to address one question: Should a veteran who represents himself have remote, read-only access to the Veterans Benefits Management System ("VBMS") so he can perfect his claim for benefits? Providing this kind of access to a self-represented claimant would put that claimant in the same position as a veteran who is represented by counsel or an accredited representative from a Veterans Service Organization ("VSO"). Denying a self-represented claimant this kind of access to VBMS puts that veteran at a distinct disadvantage.

After receiving briefs from Col. Lechliter and the Secretary, the Court asked the parties to address four questions. After considering the Court's questions, Col. Lechliter believes that the best course forward is suggested by the Court's second question: This matter should be remanded to the VA with instructions to the Agency to render an appealable decision. That decision should contain the specific factual and legal bases for the decision. In that way the parties and the Court can consider all the issues raised by the VA's actions with a complete record. Col. Lechliter respectfully suggests that the Court should order the VA to render its decision within 30 days of the Court's Order.

BACKGROUND

Gerald Lechliter retired from the U.S. Army as a colonel. *See* Exhibit A hereto, Declaration of Petitioner Gerald Lechliter at para 1& 2 (Nov. 29, 2023) ("Lechliter Decl.").

He is 80 years old and has a 100 percent disability rating from the Department of Veterans Affairs (“DVA” or “VA”).¹

The current matter arises from Col. Lechliter’s claim for benefits related to his service at Camp Lejeune, N.C. Col. Lechliter filed a claim for service-connection prostate cancer. Lechliter Decl. at para. 5. The Secretary denied that claim based on a telephonic compensation and pension examination by a VA contract medical examiner. Lechliter Decl. at para. 6. Col. Lechliter is in the process of appealing that decision to the Board of Veterans Appeals (“BVA”).

Col. Lechliter requested remote read-only access to VBMS so he could prepare his claim. The VA routinely grants accredited representatives, accredited attorneys, and non-accredited legal staff remote read-only access to VBMS for the same reasons that Col. Lechliter requested it here; to better prepare claims and appeals. Col. Lechliter was told that he could either receive a copy of his records on a compact disc that he could use at home or travel to a VA Regional Office (“VARO”) where he could review documents on VBMS on a VA terminal in a reading room.

The closest VARO to Col. Lechliter’s home is 88 miles away in Wilmington, DE. Lechliter Decl. at para. 16. A trip to that VARO would require Col. Lechliter to travel four hours roundtrip on busy streets and highways. Even if Col. Lechliter were willing to make that trek, it would be to no avail. That VARO does not have a terminal for veterans to access VBMS. The next closest VARO is in Philadelphia – 123 miles from Col. Lechliter’s

¹ In addition to his service-connected ailments, Col. Lechliter suffers from cardiac and orthopedic conditions that are not service connected.

home. Col. Lechliter would have to travel 3 hours each way to get there and back. Lechliter Decl. at para. 20. If he were willing to make that trip he was told he could access VBMS on a VA employee's laptop while the employee monitored his research. Lechliter Decl. at para. 19.

In an effort to obtain access to VBMS, Col. Lechliter spoke to VA employees in the Wilmington and Philadelphia ROs. In addition, he wrote to the VA Office of General Counsel. The VA has not provided Col. Lechliter with a written explanation for its decision to deny him access to VBMS. Lechliter Decl. at para. 19.

Faced with two bad choices, Col. Lechliter elected to receive a CD containing more than 10,000 pages of material. The CD had no table of contents, the documents were not in chronological order, and many of the documents were broken up into pieces and spread across the entire file. Lechliter Decl. at para. 9. In short, the VA gave Col. Lechliter incomplete information that was difficult (if not impossible) to use.

Moreover, the CD that the VA sent to Col. Lechliter is static. It is not updated as new documents are added to his file. For example, the CD does not include the report from the compensation and pension evaluation. That document forms the basis for the VARO's decision to deny service connection for Col. Lechliter's cancer. Without it, Col. Lechliter cannot prepare an appeal. It is possible for the VA to send an updated CD, but Col. Lechliter would have to conduct another meticulous review to separate the "gold dust from the chicken feed" and ensure that there are no other new documents sprinkled around in the file.

Given the VA's refusal to give Col. Lechliter remote read-only access to VBMS and VA's production of incomplete, unorganized material, Col. Lechliter filed a Petition for Extraordinary Relief on May 1, 2023. Col. Lechliter asked the Court to enter an order directing the Secretary to show cause why Col. Lechliter should not be given remote read-only access to VBMS or to provide such access immediately. The Secretary responded on June 1, 2023. On September 19, 2023, the Court issued an Order directing the parties to address specific questions.

Col. Lechliter was acting *pro se* from 2021 until the undersigned counsel entered an appearance.

ARGUMENT

I. Common Ground.

There are several things that are not in dispute. *First*, this Court has the power to enter an order, including extraordinary writs, in aid of its own jurisdiction. *Green v. McDonald*, 28 Vet. App. 281, 288 (2016); *see also Secretary's Response to Petition for Extraordinary Relief and Court Order Dated May 3, 2023*, at 2 (June 1, 2023) ("Sec'y Resp."). Importantly, that includes removing "obstacles to the ordinary process for review of veterans benefits decisions." *Love v. McDonough*, 35 Vet.App. 336, 346 (2022), cited in Sec'y Resp. at 3.

Second, making remote read-only access to VBMS system available to self-represented veterans would make it easier for them to perfect their claims. Although the Secretary does not address this issue in his response, it seems self-evident. In Col. Lechliter's case, it would allow him to review his file without having to spend hours in

transit from his home to a VARO or hours hunched over a computer sorting out documents needed for an appeal. His file would be organized chronologically just as it is in the VBMS and it would be “live” so that new documents are added as they are created and easily found.

Third, remote read-only access to VBMS should be secure. Col. Lechliter neither disputes that proposition, nor has he refused to get the necessary clearances. Moreover, it is technically possible for the VA to provide secure remote read-only access to veterans who represent themselves, just as the VA provides that access to representatives at VSOs and counsel and their staff.

II. The Court May Issue An Order Directing VA To Issue An Appealable Decision.

In his Response the Secretary argues that VA cannot give Col. Lechliter access to VBMS because doing so would raise security concerns, increase costs, and may violate the Privacy Act.² *Sec’y Resp.* at 7-13. The Secretary makes these claims without providing any factual support. The Secretary does not cite to a single security breach caused by access to VBMS. The Secretary does not say how much it costs to grant unaccredited legal assistants access to VBMS. The Secretary does not explain why a self-represented veteran cannot have access to third-party identifying information in his/her VBMS file.³ The

² The Secretary also argues that the Court lacks jurisdiction. *Sec’y Resp.* at 3-4. The Court’s Sept. 19, 2023 Order instructs the parties to assume that the Court has jurisdiction, so Col. Lechliter does not address that issue here.

³ Nor does the Secretary explain why and how third-party identifying information would get into a veteran’s file.

Secretary should provide this information in an appealable decision so that this Court (or any other reviewing court) can make a reasoned decision regarding this policy.

As noted, the Court has the authority to issue an order in aid of its jurisdiction. *Green v. McDonald*, 28 Vet. App. 281, 288 (2016). In this case, Col. Lechliter respectfully suggests that the best course would be for the Court to remand this matter to the VA ordering the Agency to provide a written decision setting out the reasons for denying Col. Lechliter remote read-only access to VBMS. The Court should direct the VA to cite specific facts related to Col. Lechliter's request that form the basis for its denial. This would include, but not be limited to the following: ***Any facts unique to Col. Lechliter that support the VA's decision.*** Is there something about Col. Lechliter that makes him a security risk?⁴

How much would it cost to allow self-represented claimants to have remote read-only access to VBMS. The Secretary all but concedes that he could provide Col. Lechliter with access to VBMS. *See Sec'y Resp.* at 7. The Secretary acknowledges that after ensuring compliance with all security requirements a personal identity verification badge may be issued.⁵ *Id.* The Secretary goes on to argue that providing 16.5 million veterans access to VBMS would be cost-prohibitive. This apocryphal claim has no support. The Secretary does not tell us how much it costs to provide remote read-only access to a single attorney,

⁴ Col. Lechliter held a Top Secret security clearance with access to special compartmented information when he retired. Lechliter Decl. at para. 3. If the United States can trust Col. Lechliter with state secrets, surely it can trust him with the "secrets" on VBMS.

⁵ In *Green* the Court was skeptical of the Secretary's assertion that accreditation "serves any security purpose." 28 Vet.App. at 294.

legal assistant or accredited representative. The Secretary does not say how many requests he receives from self-represented claimants for remote read-only access, let alone authority for the proposition that 16.5 million veterans want access to VBMS. The Secretary does not tell us how much it costs to provide remote read-only access to a single attorney, legal assistant or accredited representative.

How the Secretary's Privacy Act concerns are addressed when a self-represented claimant accesses VBMS from a VARO terminal, or is provided with information from VBMS by her attorney or VSO representative. The Secretary makes a point of stating that a self-represented claimant can access VBMS at terminals located in VARO reading rooms. If that is true (and Col. Lechliter's experience suggests it is not), how does the VA prevent a claimant from accessing the third-party identifying information the Secretary says is protected by the Privacy Act. This inconsistency should be explained.

How were the concerns expressed by the Secretary in his briefing in Carpenter v. McDonough, 34 Vet. App. 264 (2021) (which are similar to the concerns expressed in this case) addressed when the Secretary adopted regulations that permit unaccredited legal assistants to access VBMS.⁶ Three years ago the Secretary took the position that legal assistants should not have access to VBMS and this Court agreed. *Id.* Shortly after that the Secretary proposed and adopted new regulations allowing that access. What

⁶ It is worth noting that in *Green* the Secretary argued against the requested relief by claiming that providing unaccredited counsel with VBMS access would divert resources away from "improving VBMS and/or initiatives to provide claimants remote access to their electronic claims file via the internet." Sec'y's Supplemental Memorandum of Law, filed July 19, 2016, in *Green v. McDonald*, Case No. 16-740 (CAVC October 24, 2016).

happened to assuage those concerns? Why do self-represented claimants pose a greater risk to VBMS?

How is the VBMS system different from other VA-managed IT systems that veterans access (e.g., VA healthcare systems that contain medical records). VA administers secure systems that are accessible to veterans from their home computers. Why are those systems different? The VA offers veterans remote read-only access to confidential health information maintained by the VA (and therefore subject to both the Privacy Act and HIPPA) through [healthvet.gov](https://www.healthvet.gov). Why can't that same security technology be deployed to VBMS?

Knowing the Secretary's response to these would allow the parties to brief the issues raised here (e.g., whether the VA's policy is arbitrary and capricious, whether the VA's policy violates Col. Lechliter's right to due process), and would give the Court an opportunity to consider the issues raised in its September 19, 2023 Order on the basis of a complete record.

There is, however, one caveat. A remand order should direct the VA to provide a final appealable decision setting out these facts and any authority on which the VA relies to deny remote read-only access to self-represented claimants within 30 days of the date of the order. Col. Lechliter is, after all, 80 years old and while he is in generally good health, any delay by the VA could have the effect of extinguishing his claim.

III. The Court May Issue An Order Directing The VA To Show Cause Why The Court Should Not Grant The Relief Requested.⁷

An Order directing the Secretary to show cause why Col. Lechliter should not be granted remote read-only access would produce a result similar to the Order directing the VA to issue an appealable decision. The advantage of the Order directing the Secretary to issue an appealable decision is that it is a remand, not an extraordinary order, and, therefore, does not fall under the All Writs Act.

As noted the Secretary agrees that the Court has the authority to issue writs, including extraordinary writs, in aid of its jurisdiction. *Sec'y Resp.* at 2. The Secretary goes on to cite the three conditions for an extraordinary writ found in *Ramsey v. Nicholson*, 20 Vet. App 16, 21 (2006).

The Secretary makes two arguments: First, the Secretary claims that Col. Lechliter's access to his file is based on the Privacy Act and is unrelated to the process for the review of veterans benefits decisions. The Secretary also argues that while the Privacy Act guarantees a veterans access to his file, it does not "specify how much access must be giving." *Sec'y Resp.* at 4. The Secretary does not cite to authority that supports either of these arguments. Indeed, the problems that Col. Lechliter has encountered certainly fall into the category of obstacles to the process for review of a veterans benefits decision. If a self-represented claimant cannot have access to the complete record (something the VA lawyers have access to), how can she represent herself and how can the Court trust that it

⁷ As noted, Col. Lechliter requests that this matter be returned to the VA for an appealable decision that sets out the facts and the law on which the VA relies. Col. Lechliter will address the Court's remaining question to the best of his ability given the limited record.

is seeing all of the relevant issues and arguments that the adversarial system is designed to evoke. Moreover, the Privacy Act was not designed to give the Secretary absolute authority over what a claimant can and cannot access. The Secretary's rules for access must be grounded in a legitimate, fact-based assessment of the risks and benefits of that rule. *See generally, Chevron v. Natural Resources Defense Council*, 467 US 837 (1984). The Secretary has not provided Col. Lechliter or the Court with enough information to assess whether denying a self-represented claimant remote read-only access to VBMS is arbitrary and capricious.

The Secretary also argues that the Court cannot issue an order based on 28 U.S.C. § 1651 because Col. Lechliter cannot demonstrate that he has been denied access to his records. *Sec'y Resp.* at 5-6. In one sense the Secretary is right; Col. Lechliter did receive a CD that contained *some* of his records. If that is the Secretary's argument, it is specious. The Secretary has a duty to help veterans perfect their claims. *See generally* 38 U.S.C. § 5103A. Giving the veteran the haystack and urging her to find the needles does not satisfy that obligation. As discussed above, that is exactly what the VA has done to Col. Lechliter. And, the internal inconsistencies in the Secretary's position (*i.e.*, the Privacy Act makes it impossible to offer remote access but you can access the same information in a VA reading room or at your lawyer's office) gives the lie to his argument.

The three conditions set out in *Ramsey* are satisfied and the Court may issue a writ pursuant to 28 U.S.C. § 1651.

IV. The Court May Determine That The VA's Policy Violates Col. Lechliter's Right To Due Process Or Is Otherwise Invalid.⁸

As noted, the parties agree that the Court's jurisdiction extends to removing obstacles to the ordinary process for review of veterans benefits decisions. Certainly that includes due process. It is hard to imagine an obstacle to a genuine review of a benefits decision greater than a failure to provide a level playing field, including notice of all facts or records before the BVA.

The Federal Circuit recognized a veteran's right to due process in *Cushman v. Shinseki*, 576 F.3rd 1290 (Fed. Cir 2009). There the Circuit found that a veteran alleging a service connected disability has a due process right to fair adjudication of his claim. *Id.* at 1298. Given that holding and this Court's jurisdiction – including the authority to remove obstacles to the ordinary process for review of veterans benefits decisions – it is clear the Court can determine for itself whether the Secretary refusal to allow self-represented claimants access to VBMS constitutes a due process violation.

There is, however, an obstacle to that review: the VA has not provided Col. Lechliter with a final written decision denying him access to VBMS and setting out the reasons therefore. Under the doctrine of constitutional avoidance, the Court should consider whether the regulation is arbitrary and capricious before it reaches the constitutional question. *See generally, Ashwander v. Tenn. Valley Auth.*, 56 S.Ct 466

⁸ Col. Lechliter interprets this as a process question, not a substantive question. If the Court is interested in briefing on how this policy violates Col. Lechliter's right to due process under the Fifth Amendment, Col. Lechliter asks for leave to file a separate brief on that issue.

(1936); *Bond v. United States*, 134 S.Ct. 2077 (2014) (applying the Last Resort Rule). In short, the best course remains to direct the Secretary to issue a decision with the bases therefore, so the parties and the Court can fully consider the issues raised by the Secretary's policy.

V. **The Court May Review The Manner In Which VA Provides Access To Records**

Once again, there is no dispute that this Court may issue orders in aid of its jurisdiction. The VA concedes that jurisdiction includes the ordinary process for review of veterans claims. *Sec'y Resp.* at 3. Surely that includes the manner in which the VA provides claimants with access to their records. Indeed, that was the basis for this Court review of 38 C.F.R. §§ 1.600-.603 in the *Green* and *Carpenter* cases. In both cases the Court evaluated the reasonableness of the Secretary's policies and procedures related to accessing records. *See, Green* 28 Vet.App. at 295.

The VA argues that the Secretary has discretion to formulate a policy so long as the policy is not arbitrary and capricious. Assuming that is the correct standard, the Secretary has not provided the Court with a basis for determining that the regulation is well ground. Col. Lechliter has already discussed the holes in the Secretary's arguments about security, cost, and the Privacy Act. The Secretary should address those issues so the Court can, indeed, assess the reasonableness of the Secretary's policy.

CONCLUSION

For the reasons stated above, Col. Lechliter respectfully requests that the Court issue an order directing the Secretary to issue a final, appealable decision and setting out the

bases for that decision. Col. Lechliter further requests that to the extent the Secretary denies him remote read-only access to VBMS, that the Court direct the Secretary to respond to the questions set out in Section I above. Finally, Col. Lechliter asks the Court to direct the Secretary to issue his decision within 30 days of the Court's Order.

Respectfully submitted this 1st day of December, 2023.

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EXHIBIT A

codeword material. As head of the Current Intelligence Branch at the Assistant Chief of Staff for Intelligence, Headquarters, US Army Europe, I was one of two officers in Europe who had access to particular SCI reports. I had to read them and decide if the Commanding General for US Army Europe needed the information. If so, I had to go back to the originator for sanitization instructions to protect the source. I was also a presidential translator at the Washington-Moscow Direct Communications Link (“Hotline”) from 1987-1989 and headed the unit from 1994-1996. That duty required an additional clearance for executive privileged information. I finished my career as commander of a US-German classified unit with about 80 German civilian and military members and 10 U.S. civilian and military members.

5. On 15 August 2022, I filed a new disability claim with the Department of Veterans Affairs (VA) on a handwritten VA Form (VAF) 21-526EZ for prostate cancer electronically in my va.gov ebenefits folder. The claim was related to my duty at Camp Lejeune in 1969 as an enlisted Marine.

6. In July 2023 a VA contractor administered a telephonic compensation and pension examination for purposes of evaluating my claim. That doctor prepared a report that is cited by the VARO as a basis for its decision to deny my claim. The VARO decision was rendered on October 23, 2023.

7. I previously had submitted a Freedom of Information Act (FOIA)/Privacy Act (PA) request for a copy of my electronic VBMS compensation file (C-file) on 24 July 2022.

8. The VA responded to my FOIA/PA request on 6 February 2023 by sending

me a CD with documents in my VBMS.

9. New laptop computers, including mine, normally do not have a CD reader, and I had to purchase one to access the CD.

10. The CD contained 10,237 pages that were not organized chronologically but haphazardly like a shuffled deck of cards, and there was no table of contents. Many documents were fragmented with various parts found at different page numbers. Searching for a specific document was laborious and time consuming. There also was no way to determine when a VA official or which VA Regional Office (RO) entered a document in my VBMS.

11. I searched for my prostate cancer claim, using various search terms such as “21-526EZ.” The only claim I found using the search function was not the “Claim for PC.pdf” that I uploaded to my ebenefits folder on 15 August 2022. I found a six-page typed VAF 21-526EZ at pages 5096-5101 on the CD that I had received. This form clearly was not the VAF 21-526EZ in the “Claim for PC.pdf” that I submitted electronically on 15 August 2023.

12. On 18 April 2023, I called the VA help number at 800-827-1000 to inquire about the VAFs 21-527EZ and spoke with “Cheryl.” I told Cheryl that I could not find the handwritten VAF 21-527EZ in the VA’s FOIA/PA response with the search function, and she responded that it would not be in any a FOIA/PA response without any further explanation. I asked her to check the entries for 15 August 2022 in my VBMS, and she confirmed that both the typed and handwritten VAFs 21-527EZ were in my VBMS but had no explanation about the origin of the typed version. I pointed out that I never submitted

the typed version and gave no one at the VA the authority to sign a document electronically for me. I asked her to open the “Notes” function in my VBMS for the typed version and tell me which RO and RO official signed and entered it in my VBMS. She stated that VA Regional Office (RO) “327” (Louisville, KY) initially handled the claim and it now was at RO “499” (National Work Queue (NWQ)). She added that she could not determine from the Notes which RO and RO official entered the typed version.

13. I conducted a meticulous, time-consuming, page-by-page search of the CD which took about 90 minutes to find my handwritten claim submission at pages 4642-4656.

14. A comparison of the two VAFs 21-526EZ highlights the differences between the typed and handwritten versions and inaccuracies of the former: (a) the submitted form is hand printed while the form in my VBMS is typed; (b) on page 8 my middle initial is omitted on the typed VBMS document; (c) on page 9 under Section IV: Claim Information, the handwritten original submission in item 1 lists prostate cancer with the cause listed as contaminated water at Camp Lejeune diagnosed December 2021; the typed versions states “See attached”; (d) on page 10 the typed VBMS form has nothing entered for treatment location and erroneous dates for most recent “active” service dates since I was not on active duty on “10-01-1972” but in graduate school at the University of Pittsburgh, PA; my handwritten submission lists the present treatment and treatment facility and has the correct most recent active duty dates; (e) on page 11 in Section VI: Service Pay, the typed VBMS document has no entries; the original submission in items 24C, D, and 25 has the block for Army checked, \$8100 in retired pay listed, and my placement on the permanent disability retired list block checked, respectively; (f) the typed

VBMS form shows my direct deposit information while the original submission does not provide this information; and (g) on page 12 in Section VIII: Claim Certification and Signature, the VBMS form has an unauthorized electronic signature “//es//G LECHLITER” while my original submission has a handwritten “Gerald A. Lechliter” signature. I always electronically sign a document with the following: “/s/ Gerald A. Lechliter.” The handwritten VAF 21-526EZ is preceded by a 2000 medical report at page 4641 of the CD and followed by a 2017 FAX Cover Sheet at page 4657, highlighting the haphazard organization of the documents on the CD.

15. Previously, on November 19, 2021, I called the VA inquiry number 800-827-1000 and request an in-person review of my VBMS at an RO. I never received a response.

16. The closest RO to my home is 88 miles away in Wilmington, DE; it is my jurisdictional RO.

17. I had the email address of a Wilmington RO (WRO) official and sent her an email requesting an appointment to review my VBMS there. She was unresponsive until I sent an email citing provisions of the Privacy Act and the governing VA regulation-38 C.F.R § 1.577(a). She responded that she referred my request to the officer in charge (OIC). I requested the OIC’s contact information. She never responded, and I forwarded the chain of emails to the VA Privacy Office.

18. An officer there provided me the email addresses for two contacts, and I sent an email to both. Mr. Rodriguez of the Philadelphia RO (PRO) sent me an email, and, in response, I explained that I needed the answers to some questions before making an appointment. In another email, Mr. Rodriguez stated I would not have access to any open

claim information.

19. I received a telephone call from a Mr. Ross of the PRO who did not provide me contact information or his title. He told me the PRO does not have a dedicated IT terminal for veterans to use, and he would give me access through his laptop after using his logon protocol. He would monitor my use of his laptop. I also was informed that I would be limited to printing 25 pages. I requested a citation for this page limitation since I could find none in the Privacy Act, 38 C.F.R. § 1.577(a), or the WRO and PRO standard operating procedures. Mr. Ross was to get back to me in an email. I never received an email response and requested Mr. Ross's contact information from Mr. Rodriguez in an email. I never received a response. I then sent the information to the Privacy Office. An official there responded with the email address of two officials in the Office of the General Counsel who she stated could help me. I forwarded all the information there, but never received a response.

20. The PRO also has no dedicated veteran IT terminal, and I question why I was being forced to travel there-123 miles from my home-adding an approximate one hour to my one-way driving time.

21. I also had sent a 29 August 2022 email requesting a personal review of my VBMS. No RO official ever contacted me about an appointment to personally review my VBMS.

22. On 28 November 2021, I sent the VA a letter terminating my representation before the VA by the veterans' service organization, Disabled American Veterans, and have been self-represented since that date.

23. On 27 March 2023, I sent a detailed email to the VA Office of General Counsel (OGC) responsible for accrediting attorneys, agents, and representatives for remote access to their clients' claims files in various VA IT systems; I later forwarded this email to Ms. Beidleman at the OGC on 3 April 2023. I have not received any response from the OGC for accrediting me to have remote access.

24. I have been attempting to arrange an appointment at an RO to personally review my electronic claims record in VA IT systems unsuccessfully supra.

Dated: 29 November 2023.

Respectfully submitted,

/s/ Gerald A. Lechliter
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