

Kim v. ConAgra: The Federal Circuit Upholds a Crumby Claim Construction

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I. OVERVIEW

The Food and Drug Administration (FDA) was concerned. Studies began to show that potassium bromate, a widely used component in breadmaking, was a potential carcinogen.¹ In response, the FDA encouraged the baking industry to seek alternatives.² Yoon Ja Kim (Kim), a food chemist, formulated a composition to serve as a safe alternative to potassium bromate.³ Kim was issued a U.S. patent for a Potassium Bromate Replacer (PBR) compound on April 23, 1996.⁴ However, after the patent was issued, Kim alleged that an error occurred during prosecution of this patent and filed a reissue application.⁵ Kim obtained the reissue patent, U.S. Patent No. Re. 36,355 (the ’355 patent), on October 26, 1999.⁶

Kim filed suit in the United States District Court for the Northern District of Illinois against ConAgra Foods, Inc. (ConAgra), a large food retailer and the owner of the brand name “Healthy Choice”⁷ on April 9, 2001. Kim alleged that the Healthy Choice Natural Wheat, 7-Grain, and Whole Grain recipes infringed claims five and ten of the ’355 patent.⁸ ConAgra, Kim claimed, had induced the infringement by stipulating that licensees of the Healthy Choice brand name follow the infringing recipes.⁹ ConAgra counterclaimed, seeking a declaratory judgment of

1. Yoon Ja Kim v. ConAgra Foods, Inc., 465 F.3d 1312, 1316 (Fed. Cir. 2006).
2. *Id.*
3. *Id.*
4. *Id.* at 1316; see U.S. Patent No. 5,510,129 (filed Sept. 19, 1994).
5. *Kim*, 465 F.3d at 1316. Utilization of this compound strengthens dough, contributes to fine crumb grain, increases loaf volume, and improves shelf life. *Id.*
6. *Id.*
7. *Id.*
8. *Id.* at 1316-17. Kim alleged the 7-Grain and Whole Grain products infringed claim ten of the ’355 patent. *Id.* at 1316. In addition, she alleged the Natural Wheat product infringed claim five. *Id.*
9. *Id.*

invalidity and noninfringement of the '355 patent on June 30, 2003.¹⁰ After ConAgra's motion for summary judgment was denied, the case proceeded to a jury trial.¹¹ Both parties moved for a judgment as a matter of law (JMOL) after the opposing party's case concluded.¹² The district court judge reserved ruling on both motions.¹³

The jury, on October 13, 2004, found that claims five and ten were not invalid and that ConAgra nonwillfully induced infringement of claim ten of the '355 patent.¹⁴ ConAgra renewed its motion for a JMOL, which led to the district court's finding that claim ten was not infringed.¹⁵ The district court later entered its final judgment on April 28, 2005, finding that the '355 patent was not invalid but not infringed.¹⁶

Kim appealed the noninfringement judgment, and ConAgra cross-appealed the judgment that the '355 patent was not invalid.¹⁷ The United States Court of Appeals for the Federal Circuit affirmed the district court's ruling and *held* that while the '355 patent was not invalid, the accused recipes did not infringe claims five or ten, and thus ConAgra did not induce infringement of the patent. *Yoon Ja Kim v. ConAgra Foods, Inc.*, 465 F.3d 1312 (Fed. Cir. 2006).

II. BACKGROUND

The patent statute imposes liability both directly and indirectly for patent infringement.¹⁸ Direct infringement occurs when a party "makes, uses, offers to sell, or sells any patented invention, within the United States or imports into the United States any patented invention."¹⁹ Indirect infringement occurs in two ways under the patent statute. Inducement of infringement imposes liability under § 271(b) on "[w]hoever actively induces infringement of a patent."²⁰ The second category of indirect infringement, contributory infringement, is laid out in § 271(c).²¹

10. *Id.* at 1317.

11. *Id.* ConAgra's motion for summary judgment alleged invalidity under the recapture rule. *Id.*

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. 35 U.S.C. § 271 (2000).

19. *Id.* § 271(a).

20. *Id.* § 271(b).

21. *Id.* § 271(c).

A patent is infringed if the accused product or process contains each element of any one claim of the patent.²² The Federal Circuit generally employs a two-step method in determining patent infringement.²³ First, the claim is constructed, or interpreted, by the court.²⁴ This claim construction is then applied to the alleged infringing products or processes.²⁵ While these two steps are not always completely independent of each other, this Note focuses solely on the primary step of claim construction.²⁶

Claim construction is a legal conclusion, and therefore the Federal Circuit reviews lower courts' claim constructions *de novo*.²⁷ While both parties will submit claim constructions that support their respective side, the Federal Circuit has asserted that it has authority to adopt claims independently.²⁸ Thus, the court's duty is to interpret the claims consistently, even if that interpretation is not one proffered by the parties.

In an early landmark case of claim construction, *Autogiro Co. of America v. United States*,²⁹ the United States Court of Claims outlined the guidelines by which the claims of a patent should be interpreted. Specifically, the court held that the "[c]laims are best construed in connection with the other parts of the patent instrument and with the circumstances surrounding the inception of the patent application."³⁰ The *Autogiro* court made use of three parts of the patent to derive the meaning of the claim: the specification, the drawings, and the prosecution history.³¹

22. See *Mycogen Plant Sci., Inc. v. Monsanto Co.*, 61 F. Supp. 2d 199, 242 (D. Del. 1999).

23. See *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1454 (Fed. Cir. 1998).

24. *Id.* ("First, the court determines the scope and meaning of the patent claims asserted . . .").

25. *Id.* ("[T]hen the properly construed claims are compared to the allegedly infringing device . . .").

26. See *Pall Corp. v. Hemasure Inc.*, 181 F.3d 1305, 1308 (Fed. Cir. 1999) (describing convenience to court in concentrating on asserted claims of the patent in construction).

27. *Markman v. Westview Instruments, Inc.*, 517 U.S. 370, 372 (1996) ("[T]he construction of a patent . . . is exclusively within the province of the court.").

28. See *Exxon Chem. Patent, Inc. v. Lubrizol Corp.*, 64 F.3d 1553, 1556 (Fed. Cir. 1995) ("[T]he judge's task is not to decide which of the adversaries is correct. Instead the judge must independently assess the claims, the specification, and if necessary the prosecution history, and relevant extrinsic evidence, and declare the meaning of the claims.").

29. 384 F.2d 391, 395-96 (Ct. Cl. 1967). The United States Court of Claims is now the United States Court of Federal Claims.

30. *Id.* at 397. The court urged that "[t]he Alice-in-Wonderland view that something means whatever one chooses it to mean makes for enjoyable reading, but bad law." *Id.*

31. *Id.* at 391-401. The court used the term "File Wrapper" to indicate "prosecution history." *Id.*

The *Autogiro* approach was further refined by the Federal Circuit in *Markman v. Westview Instruments*.³² In addition to holding that claim interpretation was strictly a question of law, the *Markman* court set forth the modern approach to claim interpretation.³³ The court asserted that, in addition to the specification and prosecution history, extrinsic evidence can be used to interpret the claims of a patent.³⁴ Such extrinsic evidence includes any material outside the patent language and its respective prosecution history, including dictionaries, inventor testimony, and treatises.³⁵

In *Vitronics v. Conception, Inc.*, the Federal Circuit expressed limitations on the use of extrinsic evidence in claim interpretation.³⁶ There, the court held that extrinsic evidence “may be used only to help the court come to the proper understanding of the claims; it may not be used to vary or contradict the claim language. Nor may it contradict the import of other parts of the specification.”³⁷ The Federal Circuit further clarified the *Vitronics* court’s discussion of extrinsic evidence in *Pitney Bowes, Inc. v. Hewlett-Packard Co.*³⁸ There, the court observed that *Vitronics* did not exclude the use of extrinsic evidence when the patent is clear.³⁹ Rather, it held that extrinsic evidence should not be relied on to *contradict* the meaning of the claims after “thoughtful examination” of the intrinsic evidence.⁴⁰

The Federal Circuit in recent years has taken a side-step from the *Markman* approach by prominently employing dictionaries in claim interpretation.⁴¹ In *Texas Digital Systems, Inc. v. Telegenix, Inc.*, the court indicated that the ordinary meaning of a term should not be treated as extrinsic evidence.⁴² Rather, it should be taken as the primary meaning of the word unless compelling evidence proves otherwise.⁴³ The court

32. 52 F.3d 967 (Fed. Cir. 1995), *aff’d*, 517 U.S. 370 (1996).

33. *Id.* at 979-81 (citing *Autogiro*, 384 F.2d at 396-98).

34. *Markman*, 52 F.3d at 980-81.

35. *Id.*

36. 90 F.3d 1576 (Fed. Cir. 1996).

37. *Id.* at 1584 (internal citations omitted).

38. 182 F.3d 1298 (Fed. Cir. 1999).

39. *Id.* at 1308.

40. *Id.*

41. *See, e.g.*, *Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1459 (Fed. Cir. 1998) (en banc) (adopting a dictionary definition of the word “to” in claim construction); *Schumer v. Lab. Computer Sys., Inc.*, 308 F.3d 1304, 1311 (Fed. Cir. 2002) (adopting a dictionary definition of the word “or” in claim construction).

42. 308 F.3d 1193, 1203 (Fed. Cir. 2002).

43. *Id.* at 1204.

warned that referring to the patent language and prosecution history first could overlimit the claims.⁴⁴

Texas Digital introduced a distinctly different approach to claim construction from *Markman* and, thus, created a duality in the Federal Circuit. The two competing theories recently clashed in *Phillips v. AWH Corp.*⁴⁵ In *Phillips*, the Federal Circuit, sitting en banc, attempted to clarify the appropriate approach and lasso the two-headed hydra of claim construction jurisprudence.⁴⁶ The majority upheld the *Markman* approach, holding that a claim should first be interpreted in light of the intrinsic evidence.⁴⁷ Extrinsic evidence, including dictionary definitions, should be considered within the *context* of the intrinsic evidence.⁴⁸ In addition, the court noted that while the concern of overlimiting claims in *Texas Digital* was valid, the resulting methodology placed too much reliance on extrinsic evidence.⁴⁹ This reliance, the Federal Circuit reasoned, resulted in diminishing the role of the patent specification as a “check” on the dictionary meaning of a claim term.⁵⁰ The dissent, penned by Judge Mayer with Judge Newman joining, expressed the futility of claim construction as a pure legal issue, devoid of factual interpretation.⁵¹ Instead of proffering an appropriate legal standard, the dissent suggested that claim construction be a finding of fact, reversible only in the instance of clear error by the trial court.⁵²

The *Phillips* court’s restatement of the *Markman* standard was recently applied in *Nystrom v. TREX Co.*⁵³ *Nystrom* was a rehearing of a Federal Circuit holding decided prior to *Phillips*.⁵⁴ The claim construction in *Nystrom* involved the interpretation of the term “board” in a patent claim pertaining to construction material.⁵⁵ The Federal Circuit’s first ruling adopted the ordinary, dictionary meaning of the term “board” to encompass both “a piece of cut wood . . . and a similarly-shaped item made of a rigid material.”⁵⁶ However, in the post-*Phillips*

44. *Id.*

45. 415 F.3d 1303 (Fed. Cir. 2005) (en banc).

46. *Id.* at 1313-24.

47. *Id.* at 1319.

48. *Id.*

49. *Id.* at 1320.

50. *Id.*

51. *Id.* at 1331 (Mayer, J., dissenting) (“Indeed, there can be no workable standards by which the court will interpret claims so long as we are blind to the factual component of the task.”).

52. *Id.* at 1330-34.

53. *Nystrom v. TREX Co.*, 424 F.3d 1136 (Fed. Cir. 2005).

54. *See Nystrom v. TREX Co.*, 374 F.3d 1105 (Fed. Cir. 2004).

55. *Id.* at 1111.

56. *Id.* at 1112.

rehearing, the Federal Circuit held that the patent specification and prosecution history limited the term “board” to “wood cut from a log.”⁵⁷ It appears at first blush that the second *Nystrom* ruling consecrated the Federal Circuit’s return to the *Markman* approach.

The patentee has the ability to act as her own lexicographer by defining claim terms in the specification and/or prosecution history.⁵⁸ This allows the patentee to define the term in a way that differs from the ordinary meaning of the word.⁵⁹ The patentee wishing to be her own lexicographer must express this intent clearly within the description section of the patent.⁶⁰ As one would expect, determining her intention from the language within the description proves to be a difficult task.⁶¹

III. THE COURT’S DECISION

In the noted case, the Federal Circuit performed a *Markman* analysis of claims five and ten of the ’355 patent and affirmed the district court’s claim interpretation of a PBR as a compound which performs essentially the same function in breadmaking as potassium bromate.⁶² The court next upheld the district court’s JMOL in favor of ConAgra in regard to the noninducement of infringement of claims five and ten of the ’355 patent.⁶³ The court also held that the ’355 patent was not invalid due to improper recapture or statutory bars of anticipation or obviousness.⁶⁴ Judge Schall dissented in part, disagreeing with the majority’s claim construction and suggesting that PBR should be read as a “slow acting oxidant that is functional throughout the entire manufacturing process” (“slow acting oxidant”).⁶⁵ Schall recommended

57. *Nystrom*, 424 F.3d at 1143.

58. *See* *CCS Fitness, Inc. v. Brunswick Corp.*, 288 F.3d 1359, 1366 (Fed. Cir. 2002) (“[T]he claim term will not receive its ordinary meaning if the patentee acted as his own lexicographer and clearly set forth a definition of the disputed claim term in either the specification or prosecution history.”).

59. *See* *Phillips v. AWH Corp.*, 415 F.3d 1303, 1316 (Fed. Cir. 2002) (“[O]ur cases recognize that the specification may reveal a special definition given to a claim term by the patentee that differs from the meaning it would otherwise possess.”).

60. *Merck & Co. v. Teva Pharms. USA, Inc.*, 395 F.3d 1364, 1370 (Fed. Cir. 2005).

61. *See* *E-Pass Techs., Inc. v. 3Com Corp.*, 343 F.3d 1364, 1369 (Fed. Cir. 2003) (“[I]n determining whether a statement by a patentee was intended to be lexicographic, it is important to determine whether the statement was designed to define the claim term or to describe a preferred embodiment.”).

62. *Yoon Ja Kim v. ConAgra Foods, Inc.*, 465 F.3d 1312, 1317-19 (Fed. Cir. 2006).

63. *Id.* at 1319-20.

64. *Id.* at 1320-26.

65. *Id.* at 1326 (Schall, J., dissenting).

that the case be remanded to decide the infringement issue based on his claim construction.⁶⁶

The court began by examining the claim construction performed by the district court.⁶⁷ The jury had been instructed that “[t]o infringe one of the claims of the ’355 Patent, a bread must (a) contain ingredients in the proportions in [the asserted claims] and . . . the [invention] must perform essentially the same function in the production of that bread as would potassium bromate.”⁶⁸ Kim refuted this claim construction, arguing that a PBR is merely a composition that is present in the breadmaking process when potassium bromate is not.⁶⁹

The court began by reviewing the district court’s claim construction de novo, turning first to the ’355 patent’s specification to define the claim’s language.⁷⁰ While the specification did not explicitly define PBR, the court found that the PBR indeed functioned as an oxidant.⁷¹ Oxidants, the specification stated, strengthen dough during the breadmaking process.⁷² The specification further stated that the PBR is useful in that it is “*effective and functional* throughout the entire manufacturing process.”⁷³ Reading the claim against this backdrop, the court concluded that the PBR “must be functional.”⁷⁴ Thus, the court found that the district court had not erred in its claim construction.⁷⁵

The Federal Circuit next turned to the issue of induced infringement.⁷⁶ Kim argued that even under the district court’s claim construction, ConAgra induced infringement of claims five and ten of the ’355 patent.⁷⁷ The court began its determination of this issue with an

66. *Id.* at 1329.

67. *Id.* at 1317 (majority opinion).

68. *Id.* (citation omitted). In addition, the jury was instructed that potassium bromate is “a slow acting oxidant once commonly used in the breadmaking process. Its *function* . . . is to strengthen the dough, increase loaf volume, and contribute to fine crumb grain.” *Id.* at 1318 (citation omitted).

69. *Id.*

70. *Id.*

71. *Id.* The specification stated “the potassium bromate replacer provided in the present invention is a more effective oxidant than potassium bromate.” *Id.* (citing ’355 patent, col. 3, ll. 1-2).

72. *Id.* (citing ’355 patent, col. 1, ll. 22-27).

73. *Id.* (citing ’355 patent, col. 1, ll. 57-60).

74. *Id.*

75. *Id.* It bears mention that the majority rejected the dissent’s proffered claim construction because the definition was not proposed by either party. *Id.* at 1319. Even if they had, the claim construction does not explicitly “require that the [PBR] must necessarily be a slow acting oxidant, only that particular potassium bromate replacers perform that function.” *Id.* (citing ’355 patent, col. 2, ll. 25-33).

76. *Id.*

77. *Id.*

examination for an underlying instance of direct infringement, starting with claim ten.⁷⁸ It was undisputed that the ConAgra 7-Grain and Whole Grain recipes included the claimed ingredients in the proportions prescribed in claim ten.⁷⁹ The issue here, the court noted, was whether these ingredients, as present, met the functionality limitation.⁸⁰ Claim ten included the language “consisting essentially of,” which precludes infringement if there are additional ingredients present in the accused product “that materially affect the basic and novel properties of the invention.”⁸¹

ConAgra supplied expert witness testimony, asserting that the additional ingredients did, indeed, affect functionality.⁸² Kim, who qualified as an expert witness, offered testimony to the contrary.⁸³ However, the court found Kim’s testimony unpersuasive because her determination was not supported with examinations or tests of the accused products.⁸⁴ This lack of support, in turn, convinced the court that the additional ingredients materially affected the functionality of the invention in claim ten.⁸⁵ Because Kim failed to support a finding of infringement, the court upheld the district court’s JMOL in favor of ConAgra in regard to claim ten.⁸⁶

The court made a similar determination regarding claim five.⁸⁷ Both parties conceded that the accused Natural Wheat recipe contained ingredients in the proportions espoused in claim five of the ’355 patent.⁸⁸ Claim five, like claim ten, contained the language “consisting essentially of,” thereby allowing use of the invention along with additional ingredients which materially affect the functionality of the invention.⁸⁹ Kim once again offered her testimony as an expert witness asserting that the additional ingredients did not affect functionality.⁹⁰ The court, again, deemed Kim’s testimony to be unsupported due to lack of actual test data on the accused product.⁹¹

78. *Id.*

79. *Id.*

80. *Id.*

81. *Id.* at 1320.

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. *Id.* at 1319-20.

90. *Id.* at 1319.

91. *Id.*

The court then turned to ConAgra's invalidity argument regarding the asserted claims of the '355 patent.⁹² ConAgra alleged that Kim improperly recaptured material surrendered during the prosecution of the original patent.⁹³ The patent examiner had initially rejected the reissue application for violating the rule against recapturing material.⁹⁴ The reissue patent '355 was granted after Kim made amendments to claims not relevant to this case.⁹⁵ After ultimately finding these amendments did not include previously surrendered material, the court upheld the district court's JMOL in favor of Kim regarding invalidity based on recapture.⁹⁶

Lastly, the court upheld the district court's finding that the jury's verdict of no invalidity was supported by substantial evidence.⁹⁷ According to the court, ConAgra failed to provide clear and convincing evidence that the '355 patent was either anticipated by, or obvious in light of, the prior art.⁹⁸ The court concluded by affirming the district court's decision in its entirety.⁹⁹

Judge Schall dissented in regard to the district court's claim construction of the '355 patent.¹⁰⁰ Schall reasoned that the prosecution history and specification of the '355 patent revealed that Kim acted as her own lexicographer in defining the PBR as a "slow acting oxidant that is functional throughout the entire manufacturing process."¹⁰¹ In addition, Schall noted that the majority's claim construction relied almost entirely on the background section of the '355 patent, failing to take into account the other portions of the specification or prosecution history.¹⁰² He concluded that the intrinsic record's repeated definition of the PBR as a "slow acting oxidant" outweighed the majority's reliance on a small portion of the specification.¹⁰³ Schall concluded that since Kim acted as her own lexicographer, her definition of the PBR as a "slow acting oxidant" should stand.¹⁰⁴ Thus, Schall recommended vacating the district

92. *Id.*

93. *Id.*

94. *Id.* at 1321.

95. *Id.* at 1320-21.

96. *Id.* at 1320-24.

97. *Id.* at 1324.

98. *Id.* at 1324-26.

99. *Id.* at 1326.

100. *Id.* (Schall, J., dissenting).

101. *Id.*

102. *Id.* at 1328.

103. *Id.* at 1329.

104. *Id.*

court's judgment and remanding the case for determination of infringement based on his claim construction.¹⁰⁵

IV. ANALYSIS

The Federal Circuit's decision is suspect on two grounds. As a preliminary matter, the majority was hasty to discount the dissent's proffered analysis on the basis that it was not proposed by either party. The court remarked that while it possessed the authority to adopt such constructions, it should be hesitant to do so.¹⁰⁶ However, the majority's cited case law does not support this "hesitation." On the contrary, the Federal Circuit in *Exxon v. Lubrizol* noted that while either side may well offer the correct construction, it is unlikely these are not the correct constructions.¹⁰⁷ The judge's duty is to determine the correct claim construction using the proper legal standard as opposed to deciding which adversary is correct.¹⁰⁸ In the present case, however, the majority merely chose between the two party's proposed claims, ignoring the strong possibility of a correct claim construction lying within a *Phillips* analysis of the patent's intrinsic evidence.

Second, and more importantly, the majority's "hesitation" quite possibly led to its failure to view the claims in light of the intrinsic evidence as a whole. The dissent was correct in determining that Kim intended to be her own lexicographer. Kim showed her intent to define the PBR as a "slow acting oxidant" in several sections of the written description. This is abundantly clear in the abstract, wherein she states: "The potassium bromate replacer essentially comprises ascorbic acid, food acid, and/or phosphate. *It is a slow acting oxidant that is functional throughout the entire manufacturing process.*"¹⁰⁹ Similar definitions occur throughout the specification.¹¹⁰ The prosecution history also reveals this intent, as Kim distinguishes the compound in that it "acts as a slow acting oxidant; thus, it is a potassium replacer."¹¹¹

105. *Id.*

106. *Id.* at 1319 (majority opinion).

107. *Exxon Chem. Patents, Inc. v. Lubrizol Corp.*, 64 F.3d 1553, 1556 (Fed. Cir. 1995) ("It may well be that in some cases one side or the other will offer the correct claim interpretation to the judge. More often, however, it is likely that the adversaries will offer claim interpretations arguably consistent with the [intrinsic evidence] that produce victory for their side.").

108. *See id.*

109. *Kim*, 465 F.3d at 1326 (Schall, J., dissenting) (citing '355 patent, abstract).

110. *See id.* at 1326-27.

111. *Id.* at 1328. Kim notes that another compound "does not act as a slow acting oxidant . . . thus it is not a potassium bromate replacer." *Id.*

By ignoring the possibility for a claim construction outside those proposed by the parties, the majority overlooks Kim's clear intent to define the PBR as a "slow acting oxidant." While the majority retroactively addressed the dissent's proffered claim construction, it did so incorrectly. The majority correctly noted that claim seven's use of the words "slow acting oxidant" gave rise to a "presumption that the limitation in question is not present in the independent claim."¹¹² However, the majority extended this presumption to its conclusion, tersely stating that the "prosecution history does not compel a different construction."¹¹³ This was clearly false in light of the evidence presented by the dissent.

While the Federal Circuit attempted to make claim construction consistent under *Phillips*, it remains a practice that is somewhat variable in nature. However, the majority failed to do its duty by merely considering the claim constructions proposed by the two parties. This narrow view evinced itself through their analysis, casting doubt on the idea that Kim acted as her own lexicographer. Because the court was only looking for Kim to define the PBR as one of two things, it missed the obvious and evident third option, which was discovered by the dissent and supported by clear and convincing evidence. If the Federal Circuit truly strives to maximize consistency in claim construction, it cannot condone the majority's judicial oversight in *Kim*.

Adam D. Swain*

112. *Id.* at 1319 (majority opinion) (citing *Phillips v. AWH Corp.*, 415 F.3d 1303, 1315 (Fed. Cir. 2005) (en banc) (citation omitted)).

113. *Id.*

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