

IN THE CIRCUIT COURT OF THE TENTH JUDICIAL CIRCUIT,  
IN AND FOR POLK COUNTY, FLORIDA

CASE NO.: 2015-CA-004499

PETER JOLLY, an individual, VICTOR DESTREMPS,  
an individual and ANNETTE BROWN, an individual.

Plaintiffs,

v.

ASSOCIATION OF POINCIANA VILLAGES, INC., a  
Florida not-for-profit corporation, AVATAR PROPERTIES  
INC, a Florida corporation, and  
POINCIANA VILLAGE ONE ASSOCIATION, INC., a Florida  
not-for-profit corporation.

Defendants.

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**THIRD AMENDED COMPLAINT**

COMES NOW, Plaintiffs, PETER JOLLY, an individual, VICTOR DESTREMPS an individual and ANNETTE BROWN, an individual, by and through the undersigned attorney, and files this Third Amended Complaint against Defendants, ASSOCIATION OF POINCIANA VILLAGES, INC., (hereinafter “APV”), AVATAR PROPERTIES INC., (hereinafter “AVATAR”), and POINCIANA VILLAGE ONE ASSOCIATION, INC., (hereinafter “VILLAGE ONE), and in support thereof states such:

1. This is an action for breach of contract and breach of fiduciary duty, and preliminary injunction with damages exceeding \$75,000 exclusive of interest, costs, and attorney’s fees.

### **The Parties**

2. Plaintiff, Peter Jolly, is the owner of the property located at 440 Acacia Tree Way, Kissimmee, Florida 34758. Peter Jolly is a member of APV and Village One and resident of Osceola County, Florida.

3. Plaintiff, Victor Destremps, is the owner of Lot 12, Block 2141, Poinciana Neighborhood 1, Village 5, with a parcel ID of R25-26-28-6138-2141-0120, and also a member of APV and resident of Osceola County, Florida.

4. Plaintiff, Annette Brown, is the owner of Lot 11, Block 2091, Poinciana Neighborhood 1, Village 5, with a parcel ID of R25-26-28-6138-2091-0110, and also a member of APV and resident of Osceola County, Florida.

5. Defendant, APV, is the Association of Poinciana Villages, Inc., the master homeowner's association, with its principle place of business located at 401 Walnut St., Kissimmee, Polk County, Florida 34759.

6. Defendant, AVATAR, is the developer of the Poinciana Villages properties (Polk and Osceola) with its principle place of business at 201 Alhambra Circle, 12<sup>th</sup> Floor, Coral Gables, Florida 33134.

7. Defendant, VILLAGE ONE, is Poinciana Village One Association, Inc., with a principle place of business located at 401 Walnut St., Kissimmee, Polk County, Florida 34759.

### **Venue and Jurisdiction**

8. Venue and jurisdiction is proper in Polk County, Florida.

9. Defendants are the current master homeowner's association, (APV), sub-homeowner's association, (Village One) and developer, (AVATAR), of the properties subject to this Complaint that are located in Polk and Osceola County, Florida.

10. The actions giving rise to this Complaint occurred in Polk County, Florida.

### **General Allegations**

#### **Conditions Precedent**

11. Plaintiff has complied with all conditions precedent pursuant to this matter.

12. Plaintiff served upon Defendants, APV and Village One, Inc., the statutory offer to mediate in accordance with 720.311 on April 20, 2016. Mediation subsequently occurred with Plaintiffs, APV and Village One, resulting in an impasse.

#### **Avatar and the 1985 Agreement**

13. Defendant, AVATAR PROPERTIES INC., the developer, has refused to turn over control to the Association per the terms of the 1985 Agreement Section 4. (**Attached Exhibit A- 1985 Agreement**)

14. Paragraph 7 of the 1985 Agreement “binds” all present and future owners of property in Poinciana to the 1985 Agreement as such; the Plaintiffs are party to the contract, not just third party beneficiaries.

15. In the alternative, Plaintiffs have standing to bring claims against all parties of the 1985 Agreement as Plaintiffs are expressly named as third party beneficiaries in paragraph 6 and the third party beneficiary designation is applied to all present and future owners per the terms of paragraph 7 of the 1985 Agreement.

#### **Wrongful Removal of Village 4 Property from the APV**

16. In November of 2011, the APV Executive committee held a meeting to discuss the partial removal of Village 4 from the APV, also known as Solivita. Present at this meeting was Tony Iorio, Mary Emerson, Mr. Bowen, then APV manager Jeanette Coughenour and Dennis Getman.

17. Solivita was originally created as Village 10 by way of carving out parcels that were defined as being part of Village 4.

18. The meeting minutes show that the discussion encompassed the complete removal of Village 4 and Village 10 from the APV. (**Exhibit B- Meeting minutes from November 2011 Executive Committee Meeting.**)

19. In order to achieve this outcome a Mr. Bowen verbally waives the 1985 Agreement, completely disregarding and in violation of paragraph 9, Amendments, to the 1985 Agreement.

20. Not only does the Executive Committee wrongfully attempt to verbally waive the 1985 Agreement, the minutes actually show they are concerned with objectors to their violation of the 1985 Agreement.

21. Paragraph 9 of the 1985 Agreement states: “Amendments: This Agreement may not be modified or terminated except by written amendment duly executed by all parties hereto, *with the consent of three fourths (3/4) of the directors or trustee-directors of each Association.*”[Emphasis Added]

22. In contradiction to the meeting minutes in November of 2011, Village 4 partially remained within the APV as a 40 acre lot, as is evidenced by the recording of an improper amendment to the 1985 Agreement and Poinciana Article of incorporation in Osceola and Polk county in January of 2012. (**Exhibit C- Meeting Minutes from Dec 2011, Exhibit D & Exhibit E**)

23. No amendments to the 1985 Agreement were consented to in compliance with paragraph 9 of the 1985 Agreement, between November 2011 and January 2012 approving the removal of parcels or property from Village 4 in January of 2012.

24. No votes were recorded by the various Villages Directors approving any amendments to the 1985 Agreement between November 2011 and January 2012 for the partial or full removal of Village 4.

25. No meeting minutes exist evidencing the decision to change the prior, November 2011 meeting decision from full removal of Village 10 and Village 4 to only a partial removal of Village 4.

26. The APV and Avatar wrongfully removed parcels from Village 4 in violation of the 1985 Agreement by failing to achieve the approval of 3/4 of the Directors of the various Villages Boards.

27. Rather than removing Village 4 in its entirety, Village 4 was only partially removed specifically for Avatar to maintain its seat on the Board of Directors of the APV as a representative of Village 4.

28. The APV failed to provide notice to its members for the November 2011 Executive committee meeting as is required when a final decision is to be made. As such, the APV intentionally prevented objections (as is mentioned in the minutes) and silenced the voices of its members.

#### **Defendants Failure to Notice Meetings**

29. On December 16, 2015 the Village One Board held a Special Meeting that was not properly noticed, nor approved by quorum of the Directors per the by-laws of the APV or Chapter 720.306(d)(5) Florida Statutes. (**Exhibit F – APV By-Laws and Articles of Incorporation**)

30. A majority of the Board Members, who are Anthony Iorio, unofficial Director Felix Gratopp and Jerry Ayala of Poinciana Village One Association called for a Special

Meeting of the Board of Directors at The Administration Office, 401 Walnut Street Poinciana, Florida 34759, on December 16, 2015, in an attempt to remove Mr. Jolly (President) and Ms. Welsh-Cousins (Vice-President) from their position as Village One board officers.

31. Article V of the Village One By-Laws states that "the Manager shall give to each member entitled to vote at such meeting, written or printed notice stating the time and place of the meeting, and in the case of special meeting, the purpose or purposes for which the meeting is called, either by mail or by presenting it to him [her] personally or by leaving it at his [her] residence or usual place of business."

32. Notification must be delivered to every member "[n]ot less than ten days nor more than ninety days before the date of every member's meeting."

33. The Village One Board member's procedure for calling for this special meeting failed to provide notice to the President of Village One, Mr. Jolly and the Vice President of Village One Mrs. Welsh.

#### **Defendants Breach of By-Laws <sup>1</sup>**

34. Prior to 2010, APV Board Elections were to be every year with one, two or three year terms. In 2010 this changed to two and four year terms and then later to all four year terms in 2014.

35. At an APV Board meeting on October 13, 2015 the Board voted to extend voting hours from 7am to 7pm, out of compliance with how the governing documents require elections to be administered.

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<sup>1</sup> Plaintiffs are aware that challenges to election conduct are subject to arbitration before the Department of Business and Professional Regulation. All allegations herein involving election conduct are NOT for purposes of challenging the election conduct, but rather facts in support of the breach of contract and breach of fiduciary duty claims, but nonetheless, impossible to allege without reference to the election conduct.

36. APV does not have the authority to conduct or modify election procedures on behalf of the other Villages without the consent of the Village's Board.

37. According to Article IX of the Villages Articles of Incorporation, the Directors of each Village will serve 3 year terms with 1/3 of the Directors being up for re-election each year with a 3 year rotation beginning in the year 2000. This was not done.

38. The Village By-Laws state that "Election Day is the second Tuesday in January." The following year Election Day for the Villages was held on January 12, 2016. APV changed the date of the Elections for the Villages to February 9, 2016 without the Villages consent.

39. Previously, there was an election of all the individual Village Boards on February 11, 2014 at which time Avatar and Felix Gratopp gave themselves four year terms extending into 2018 without the knowledge of the Board resident members. Their terms were not up until the end of 2014 and there should have been an election for 2015, but there were no Village Board elections in 2015.

40. The Minutes for the Master Board Officer Meeting of February 12, 2015 are also missing, evidence of another violation of the Village One and APV By-laws.

### **Financial and Fiduciary Duties Breached**

41. On August 16, 2015 Executive Committee members Peter Jolly and Victor Destremps called for an Emergency Meeting since the Avatar representatives of the APV Board did not attend the August 11, 2015 meeting to discuss the budget, the possibility of filing for bankruptcy and firing First Service Residential (hereinafter FSR) for failing to attend to their fiduciary responsibilities.

42. Financial records were requested by Mr. Jolly (President of APV Master Board and President of Village One) on multiple occasions from FSR prior to the August 16, 2015 meeting and met with no response from FSR.

43. Section 5 – Powers, of the By-Laws provides that the “business and affairs of the APV shall be managed by the APV Board. The APV Board shall keep full and fair accounts of all its business.”

44. Mr. Jolly was obligated to take action where the APV Board failed to investigate or to “keep full and fair accounts of all its business.”

45. Compounding the lack of response from FSR to the APV Board’s request for financial documents, Mr. Jolly’s concerns also went ignored by the three Avatar Board members. The three resident Board members, influenced by Avatar and FSR, intentionally did not show up to the Regular Board Meeting held on August 11, 2015 with an agenda of discussing the fiduciary breaches and financial discrepancies of FSR and Avatar.

#### **Injunctive Relief Claim**

46. On May 5, 2016, APV mailed all of its members a bill allegedly for “2016 Cypress Woods Annual Maintenance Cost” in the amount of \$232.34 Dollars. (**Exhibit G**)

47. APV and Village One have failed to comply with Marketable Record Title Act (MRTA) by not renewing or reviving their covenants, conditions and restrictions (CC&R’s) as is required by Fla. Stat. 720 and 712.

48. Fla. Stat. 712.05(1) states in part that a “person claiming an interest in land or a homeowners’ association desiring to preserve a covenant or restriction may preserve and protect the same from extinguishment by the operation of this act by filing for record, during the 30-year



period immediately following the effective date of the root of title, a written notice in accordance with this chapter.” [Emphasis Added]

49. APV and Village One’s failure to revitalize or renew their CC&R’S as required under and per the procedures set forth in Fla. Stat. 712 under MRTA has statutorily extinguished the deed restrictions on the properties within Poinciana under the APV, as well as APV’s authority to collect and assess fees and assessments from its members.

50. APV and VILLAGE ONE no longer have the authority to collect fees, make assessments or to enforce any covenants, conditions or restrictions against their members because APV and VILLAGE ONE have not renewed or rejuvenated their CC&R’S per the procedures set forth in Fla. Chapter 712.

51. APV and Village One continue to attempt to not only to collect fees and assessments from its members, but is also continuing on with enforcement actions to compel its members to pay the fees and assessments or face foreclosure.

52. APV and Village One have in the past and continue in the present to sell off illegitimate debt wrongfully imposed on its members to law firm collection agencies that eventually foreclose on the member’s homes by further exacerbating and greatly inflating the wrongfully assessed and unlawfully compelled fees and assessments imposed on the members of the APV and Village One.

**COUNT I – BREACH OF CONTRACT BY DEFENDANT APV**

53. Plaintiffs hereby re-allege and incorporate by reference the allegations in paragraphs 1- 52 as though fully set forth in this cause of action.

54. Plaintiffs and Defendants entered into valid, binding and enforceable contract. **(Attached Exhibit A – 1985 Agreement); (Attached Exhibit F- APV By-laws and Articles of Incorporation)**

55. Defendant, APV materially breached the 1985 Agreement when APV wrongfully removed from the APV, parcels of Village 4 in January of 2012 without properly achieving the votes necessary from the various Village Directors consenting to such amendment to the 1985 Agreement.

56. APV materially breached its By-laws, Articles of Incorporation and Fla. Stat. 720 by failing to provide notice to its members of the Executive Committee meeting held in November of 2011 during which final action was taken to remove a portion of Village 4 from the APV.

57. APV materially breached its By-laws and Articles of Incorporation by its continuous and repetitive failure to provide proper and timely notice to its members of multiple Board meetings over the years.

58. Plaintiffs have been damaged by Defendants' wrongful removal of the Village 4 parcels, failure of the APV to provide proper notice to various multiple Board and committee meetings resulting in an amount of monetary damage to Plaintiffs to be determined at trial.

**WHEREFORE**, Plaintiffs request that this Honorable Court find Defendant APV liable for breach of contract, award Plaintiffs damages in excess of \$75,000 dollars, exclusive of attorney's fees, costs and interest and for any other and such relief as this Court may deem just proper or equitable.

## **COUNT II - BREACH OF FIDUCIARY DUTY BY DEFENDANT APV**

59. Plaintiffs hereby re-allege and incorporate by reference the allegations in paragraphs 1- 52 as though fully set forth in this cause of action.

60. Defendant, APV, owed Plaintiffs a fiduciary duty of care as expressly stated in pertinent part in Fla. Stat. 720.303(1): “The officers and directors of an association have a fiduciary relationship to the members who are served by the association.”

61. Defendant APV, (the master homeowner’s association), and Plaintiffs, (all of the owners of parcels under the APV), share a relationship whereby Plaintiffs repose trust and confidence in Defendant, APV, and APV has undertaken such trust and assumed the duty to advise, counsel and protect Plaintiffs.

62. Defendant’s breached their fiduciary duty of care owed to Plaintiffs when APV willfully and intentionally excluded the members from their right to provide meaningful input and exercise their collective control over decisions to be made by the APV.

63. Defendant, APV in conjunction with Avatar and the Board of Village One, purposefully manipulated the placement of Directors on the Board of the APV, as well as the other individual Village Boards and wrongfully influenced their respective votes to maintain control of the APV and all of the various individual Village Boards, thus intentionally silencing its member’s voices.

64. Plaintiffs were damaged by Defendant’s breach of fiduciary duty of care owed to Plaintiffs in an unknown sum of money lost due to be determined at trial.

**WHEREFORE**, Plaintiffs request that this Honorable Court find Defendant APV liable for breach of fiduciary duty, award Plaintiffs damages in excess of \$75,000 dollars, exclusive of

attorney's fees, costs and interest and for any other and such relief as this Court may deem just proper or equitable.

**COUNT III – BREACH OF THIRD-PARTY BENEFICIARY CONTRACT BY**  
**DEFENDANT APV**

65. Plaintiffs hereby re-allege and incorporate by reference the allegations in paragraphs 1- 52 as though fully set forth in this cause of action.

66. In the alternative, if Plaintiffs are found not to be parties to the 1985 Agreement, Plaintiffs plead as third-party beneficiaries of the 1985 Agreement.

67. Defendants and a third party entered a valid, binding and enforceable contract.

**(Exhibit A- 1985 Agreement)**

68. Plaintiffs are not parties to the contract.

69. The parties to the contract (APV, Avatar and all of the individual Poinciana Villages, to include Village One) intended that the contract primarily or directly benefit plaintiffs or a class of parties of which plaintiffs are a member, more specifically, “all present and future owners of property within Poinciana.” ¶ 6 and ¶ 7 of the 1985 Agreement.

70. Defendant APV materially breached the contract when APV wrongfully removed parcels of Village 4 from the APV in January of 2012 without properly achieving the votes necessary from the various Village Directors consenting to such amendment to the 1985 Agreement.

71. Plaintiffs were damaged by Defendant's breach of third party beneficiary contract in an unknown sum of money due to be determined at trial.

**WHEREFORE**, Plaintiffs request that this Honorable Court find Defendant APV liable for breach of third-party contract, award Plaintiffs damages in excess of \$75,000 dollars,

exclusive of attorney's fees, costs and interest and for any other and such relief as this Court may deem just proper or equitable.

**COUNT IV – BREACH OF CONTRACT BY DEFENDANT AVATAR**

72. Plaintiffs hereby re-allege and incorporate by reference the allegations in paragraphs 1- 52 as though fully set forth in this cause of action.

73. Plaintiffs and Defendants entered into valid, binding and enforceable contract.

**(Attached Exhibit A- 1985 Agreement)**

74. Defendant, Avatar, materially breached the contract by failing to turn over control of the APV to its members as required in paragraph 4 of the 1985 Agreement, by failing to comply with paragraph 3 of the 1985 Agreement which prohibits Avatar's participation in the dissolution of Village 10 and the partial dissolution of Village 4, removing land from the effects of the APV restrictions, and failing to properly amend the 1985 Agreement when Avatar took part in wrongfully removing parcels/acreage/land from Village 4 in 2011-2012.

75. Plaintiffs have been damaged by Defendants breach of contract in an unknown sum of money to be determined at trial.

**WHEREFORE**, Plaintiffs request that this Honorable Court find Defendant AVATAR liable for breach of contract, award Plaintiffs damages in excess of \$75,000 dollars, exclusive of attorney's fees, costs and interest and for any other and such relief as this Court may deem just proper or equitable.

**COUNT V – BREACH OF THIRD PARTY BENEFICIARY CONTRACT BY  
DEFENDANT AVATAR**

76. Plaintiffs hereby re-allege and incorporate by reference the allegations in paragraphs 1- 52 as though fully set forth in this cause of action.

77. In the alternative, if Plaintiffs are found not to be parties to the 1985 Agreement, Plaintiffs plead as third-party beneficiaries of the 1985 Agreement.

78. Defendants and a third party entered a valid, binding and enforceable contract.

**(Exhibit A- 1985 Agreement)**

79. Plaintiffs are not parties to the contract.

80. The parties to the contract (APV, Avatar and all of the individual Poinciana Villages, to include Village One) intended that the contract primarily or directly benefit plaintiffs or a class of parties of which plaintiffs are a member, more specifically, “all present and future owners of property within Poinciana.” ¶ 6 and ¶ 7 of the 1985 Agreement.

81. Defendant, Avatar, materially breached the contract by failing to turn over control of the APV to its members as required in paragraph 4 of the 1985 Agreement, by failing to comply with paragraph 3 of the 1985 Agreement which prohibits Avatar’s participation in the dissolution of Village 10 and the partial dissolution of Village 4, removing land from the effects of the APV restrictions, and failing to properly amend the 1985 Agreement when Avatar took part in wrongfully removing parcels/acreage/land from Village 4 in 2011-2012.

82. Plaintiffs have been damaged by Defendants breach in an unknown sum of money to be determined at trial.

**WHEREFORE**, Plaintiffs request that this Honorable Court find Defendant AVATAR liable for breach of third-party contract, award Plaintiffs damages in excess of \$75,000 dollars, exclusive of attorney’s fees, costs and interest and for any other and such relief as this Court may deem just proper or equitable.

**COUNT VI – BREACH OF CONTRACT BY DEFENDANT VILLAGE ONE**

83. Plaintiffs hereby re-allege and incorporate by reference the allegations in paragraphs 1- 52 as though fully set forth in this cause of action.

84. Plaintiffs and Defendants entered into valid, binding and enforceable contracts.  
**(Exhibit I- Village One By-laws and Articles of Incorporation.)**

85. Defendants materially breached the contracts when Defendant Village One failed to provide proper and timely notice for the special Board meeting on December 16, 2015 for which Mr. Jolly was removed as Village One President and Ms. Welsh-Cousins was removed from her position as Vice-President.

86. Plaintiffs have been damaged by Defendants breach of the By-laws and Articles of Incorporation in an unknown monetary to be determined at trial.

**WHEREFORE**, Plaintiffs request that this Honorable Court find Defendant VILLAGE ONE liable for breach of contract, award Plaintiffs damages in excess of \$75,000 dollars, exclusive of attorney’s fees, costs and interest and for any other and such relief as this Court may deem just proper or equitable.

**COUNT VII - BREACH OF FIDUCIARY DUTY BY DEFENDANT VILLAGE ONE**

87. Plaintiffs hereby re-allege and incorporate by reference the allegations in paragraphs 1- 52 as though fully set forth in this cause of action.

88. Defendant Village One owed Plaintiffs a fiduciary duty of care as expressly stated in pertinent part in Fla. Stat. 720.303(1): “The officers and directors of an association have a fiduciary relationship to the members who are served by the association.”

89. Defendant Village One, the individual homeowner’s association under the APV, and Plaintiffs, all of the owners of parcels under the Village One homeowner’s association, share

a relationship whereby Plaintiffs repose trust and confidence in Defendant, Village One, and Village One has undertaken such trust and assumed the duty to advise, counsel and protect Plaintiffs.

90. Defendant's breached their fiduciary duty of care owed to Plaintiffs when Village One willfully and intentionally excluded the members from their right to provide meaningful input and exercise their collective control over decisions to be made by the Village One.

91. Defendant, Village One in conjunction with Avatar and APV, purposefully manipulated the placement of Directors on the Board of Village One and wrongfully influenced their respective votes to maintain control of the Village One Board thus intentionally silencing its member's voices.

92. Plaintiffs were damaged by Defendant's breach of fiduciary duty of care in an unknown monetary amount to be determined at trial.

**WHEREFORE**, Plaintiffs request that this Honorable Court find Defendant VILLAGE ONE liable for breach of fiduciary duty, award Plaintiffs damages in excess of \$75,000 dollars, exclusive of attorney's fees, costs and interest and for any other and such relief as this Court may deem just proper or equitable.

**COUNT VIII – PRELIMINARY INJUNCTION AGAINST DEFENDANT APV**

**AND DEFENDANT VILLAGE ONE**

93. Plaintiffs hereby re-allege and incorporate by reference the allegations in paragraphs 1- 52 as though fully set forth in this cause of action.

94. There is a substantial likelihood of success on the merits of Plaintiff's claim in Count VIII as Defendant APV and VILLAGE ONE no longer have the authority to collect fees



and assessments from its members or to enforce its covenants, conditions and restrictions because they have failed to renew or revive their CC&R's under MRTA under Fla. Stat. 712.

95. Plaintiffs lack any adequate remedy at law.

96. Plaintiffs will incur irreparable harm absent the entry of an injunction if APV and VILLAGE ONE continue to attempt to collect unlawful fees and assessments as APV and VILLAGE ONE will, as they have done in the past, attempt to wrongfully initiate collection actions and eventually will foreclose on its members' homes for failure to pay unlawful fees and assessments.

97. Injunctive relief will serve the public interest as a great public harm will be done to the thousands of members of the APV and VILLAGE ONE if APV and VILLAGE ONE continue to unlawfully collect assessments and fees and further attempts of collection eventually leading to foreclosure on the homes of those members that have not paid are permitted to continue.

98. Injunctive relief will serve the public interest as a great public harm will be done to the thousands of members of APV and VILLAGE ONE if APV and VILLAGE ONE continue to enforce their covenants conditions and restrictions that have since expired under MRTA and have not been renewed or rejuvenated, thus resulting in wrongful additional fees and penalties against each of their respective members.

**WHEREFORE**, Plaintiffs request that this Honorable Court Order a preliminary injunction against Defendant APV and VILLAGE ONE from collecting any fees and/or enforcing any covenants, conditions and restrictions against their respective members until APV and VILLAGE ONE have rejuvenated their CC&R's under MRTA per Chpt. 712 Fla. Stat., and for any other and such relief as this Court may deem just proper or equitable.

**CERTIFICATE OF SERVICE**

I hereby certify that on this \_\_\_\_\_ day of November, 2016, a true and correct copy of the foregoing was furnished to the following:

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