IN THE SUPREME COURT
OF THE
STATE OF SOUTH DAKOTA

RYAN NOVOTNY,
Plaintiff and Appellee,

vs.

SACRED HEART HEALTH SERVICES,
a South Dakota Corporation d/b/a
AVERA SACRED HEART HOSPITAL, AVERA
HEALTH, a South Dakota Corporation,
Defendants and Appellants,

and

ALLEN A. SOSSAN, D.O., also known
as ALAN A. SOOSAN, also known as
ALLEN A. SOOSAN, RECONSTRUCTIVE
SPINAL SURGERY AND ORTHOPEDIC
SURGERY, P.C., a New York
Professional Corporation, LEWIS
& CLARK SPECIALTY HOSPITAL, LLC, a South
Dakota Limited Liability
Company,
Defendants and Appellees.

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CLAIR ARENS and DIANE ARENS,
Plaintiffs and Appellees,

vs.

CURTIS ADAMS, DAVID BARNES,
MARY MILROY, ROBERT NEUMAYR,
MICHAEL PIETILA and DAVID WITHROW,
Defendants and Appellants,

and

ALAN A. SOOSAN, also known as

Nos. 27615 (CIV 14-235),
27626 (CIV 15-167),
27631 (CIV 15-167)

BRIEF FOR AARP
AS AMICUS CURIAE

ALLEN A SOOSAN, also known as
ALLEN A. SOSSAN, D.O., SACRED
HEART HEALTH SERVICES, a South
Dakota Corporation d/b/a AVERA
SACRED HEART HOSPITAL, AVERA
HEALTH, a South Dakota Corporation,
MATTHEW MICHELS, THOMAS BUTTOLPH,
DOUGLAS NEILSON, CHARLES CAMMOCK,
LEWIS & CLARK SPECIALTY HOSPITAL,
LLC, a South Dakota Limited Liability
Company, DON SWIFT, DAVID ABBOTT,
JOSEPH BOUDREAU, PAULA HICKS, KYNAN
TRAIL, SCOTT SHINDLER, TOM POSCH,
DANIEL JOHNSON, NUETERRA HEALTHCARE
MANAGEMENT, and VARIOUS JOHN DOES and
VARIOUS JANE DOES,
Defendants and Appellees.

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CLAIR ARENS and DIANE ARENS,
Plaintiff and Appellee,

vs.

LEWIS & CLARK SPECIALTY HOSPITAL, LLC,
a South Dakota Limited Liability Company,
Defendant and Appellants,

and

ALLEN A. SOSSAN, D.O., also known
as ALAN A. SOOSAN, also known as
ALLEN A. SOOSAN, RECONSTRUCTIVE
SPINAL SURGERY AND ORTHOPEDIC
SURGERY, P.C., a New York
Professional Corporation, SACRED HEART
HEALTH SERVICES,
a South Dakota Corporation d/b/a
AVERA SACRED HEART HOSPITAL, AVERA
HEALTH, a South Dakota Corporation, DON
SWIFT, D.M., KYNAN TRAIL, M.D., CURTIS
ADAMS, DAVID BARNES, THOMAS
BUTTOLPH, MARY MILROY, DOUGLAS
NEILSON, ROBERT NEUMAYR, MICHAEL

PIETILA, CHARLES CAMMOCK, DAVID WITHROW, VARIOUS JOHN DOES, and VARIOUS JANE DOES, Defendants and Appellees.	

BRIEF FOR AARP AS AMICUS CURIAE IN SUPPORT OF APPELLEES

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STATEMENT OF INTEREST

AARP is a nonprofit, nonpartisan membership organization dedicated to representing the needs and interests of people age 50 and older. A high proportion of older adults live in South Dakota, as people age 50 and over comprise 34 percent of the state.[1] This Court's decision will significantly impact older South Dakotans because older adults use a greater amount of hospital services than other populations and suffer the most medical malpractice incidents.[2]

AARP supports the establishment and enforcement of laws and policies designed to protect the rights of older adults to obtain legal redress when they have been victims of medical harm, neglect or abuse. Through its charitable affiliate, AARP Foundation, AARP has filed amicus curiae briefs in courts throughout the country to promote greater transparency and accountability in the health care system.

SUMMARY OF ARGUMENT

The court should affirm the decision below finding a crime-fraud exception to the peer review privilege. The recognition of a crime-fraud exception strikes a reasonable balance between preserving the goals of the peer review privilege and providing patients with a limited waiver to hold hospitals and peer review committee members accountable for injurious, malicious conduct. The peer review privilege should not shield hospitals and physicians on peer review committees from accountability when their actions do not meet peer review goals of improving health care.

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1 Agency on Aging, *South Dakota Policy Academy State Profile*, (June 2012), http://www.aoa.gov/AoA_Programs/HPW/Behavioral/docs2/South%20Dakota.pdf.

2 Ctrs. for Disease Control & Prevention, *National Hospital Discharge Survey: 2010 Table – Number and Rate of Hospital Discharges* (2010), http://goo.gl/16Oy9w; Jeffrey M. Rothschild & Lucian L. Leape, AARP Pub. Policy Inst., *The Nature and Extent of Medical Injury in Older Patients* 13, 23, 26, 29 (2000), http://assets.aarp.org/rgcenter/health/2000_17_injury.pdf.

Hospitals have a duty to safeguard patients from incompetent and dangerous physicians. This duty is extremely important to older people because they use a greater amount of hospital services and suffer the most malpractice incidents. When hospitals flout this duty and a patient suffers injury, the hospitals should be held accountable to both deter future misconduct and redress the injury. Patients need access to extrinsic evidence, including evidence that the peer review privilege statute may bar from disclosure, to bring successful cases under these circumstances.

The crime-fraud exception ensures that patients, including older people, have access to the evidence they need to bring successful actions when the peer review privilege is no longer fulfilling its purpose of improving health care. Allowing for a crime-fraud exception strengthens the privilege because it ensures that the privilege is only being applied to improve health care and not to circumvent the courts. The court below set a high threshold for when this limited waiver would apply, requiring that patient-plaintiffs first establish fraud, deceit, illegality or other improper conduct on the part of the hospitals and physicians before the exception could apply. This high threshold ensures that the peer review privilege governs disclosure unless egregious circumstances warrant a limited waiver. Thus, recognizing the crime-fraud exception serves the interests of justice.

ARGUMENT

I. The Court Should Uphold the Trial Court's Decision Finding a Crime-Fraud Exception To the Peer Review Privilege Because It Strikes the Appropriate Balance Between Preserving the Goals of the Peer Review Privilege And Providing Patients With a Limited Waiver To Hold Health Care Providers Accountable for Injurious, Improper Conduct.

On October 15, 2016, the trial court ruled that South Dakota's peer review confidentiality privilege was subject to a "crime-fraud" exception. *Lammers v. Sossan et al*, Civ. No. 13-456,

slip op. at 22 (S.D. Oct. 23, 2015) [hereinafter, references to the decision below will be denoted as, "Circuit Court Opinion, p._."] Thus, the plaintiffs could have access to certain peer review information after they first established a *prima facie* case of fraud and deceit. *Id.* at 25.

The purpose of protecting peer review materials, including physician credentialing materials, is to encourage physicians to engage in rigorous quality assurance without the fear of retaliatory lawsuits. David L. Johnson and Ellis Lord, *Paring Peer Review: Implications of the Tennessee Supreme Court's Decision in Lee Medical Inc. v. Beecher,* 46 Tenn. B.J. 20 (Nov. 2010). However, the fundamental purpose of the peer review privilege is eroded where hospitals and members of peer review committees no longer use it to improve quality of care, but instead use it as a shield to avoid liability for their wrongful conduct. The crime-fraud exception remedies this abuse of the privilege by allowing a limited waiver under egregious circumstances which patients can then use to access the evidence needed to hold providers accountable for their wrongful conduct and resulting harm.

A. The Peer Review Privilege Should Not Shield Hospitals And Physicians From Accountability When Their Actions Do Not Meet Peer Review Goals of Improving Health Care.

Recognizing the crime-fraud exception permits effective peer review while preventing hospitals from abusing the privilege to conceal evidence of fraud, deceit, and other improper conduct. Peer review is the process by which the medical profession evaluates services and qualifications of physicians as a means to improve the quality of health care. Kenneth R. Kohlberg, *The Medical Peer Review Privilege: A Linchpin for Patient Safety Measures*, 86 Mass. L. Rev. 157 (2003). Credentialing is a type of peer review whereby members of the hospital committees review applications of new physicians to ensure that only competent practitioners treat patients in their hospitals. SDCL § 36-4-43 (defining peer review activities as

including the grant of clinical privileges to provide health care services at a licensed health care facility); *see also* Craig W. Dallon, *Understanding Judicial Review of Hospital's Physician Credentialing and Peer Review Decisions*, 73 Temp. L. Rev. 597, 598-99 (2000). Peer review credentialing is one of the primary means by which hospitals promote safe and high-quality patient care and serves as the first line of protection for patient safety. Sallie Theime Sanford, *Candor After Kadlec: Why, Despite the Fifth Circuit's Decision, Hospitals Should Anticipate An Expanded Obligation To Disclose Risky Physician Behavior,* 1 Drexel L. Rev. 383, 416-417 (2009).

Peer review privilege is premised on the theory that quality of care would improve if physicians governed themselves through open review of each other's qualifications and competency without fear of reprisal in the form of lawsuits. Susan O. Scheutzow, *State Medical Peer Review: High Cost But No Benefit - Is It Time for a Change?*, 25 Am. J. L. & Med. 7, 8 (1997). As such, every state provides protection to various degrees to the members and work materials of peer review committees. *Id.* These protections address the scope of privilege, confidentiality, and immunity from liability. *Id.*

State statutes governing the peer review privilege often protect peer review participants from liability and bar conversations and materials of the peer review committee from discovery. *See e.g., Hassan v. Mercy American River Hospital*, 74 P.3d 726 (Cal. 2003)(holding peer review privilege created by California statute is not absolute, but rather limited to conversations meant to aid in an evaluation). However, state courts have not uniformly interpreted peer review privilege as absolute. In particular, courts in other jurisdictions have narrowly construed the peer review privilege, balancing the benefits of the privilege with evidentiary needs in litigation. *See e.g., Munroe Regional Medical Center, Inc. v. Rountree*, 721 So.2d 1220 (Fla. App.

1998)(determining that information available from otherwise original sources is not privileged merely because it was presented during a peer review proceeding); *Missouri ex. rel. Boone Retirement Center, Inc. v. Hamilton*, 946 S.W.2d 740 (Mo. 1997)(privileging only records created within quality assurance committee).

Consistent with other states, South Dakota peer review statutory provisions taken as a whole are not absolute. *See e.g.,* SDCL § 36-4-25, 36-4-26.1, 36-4-42, 36-4-43. For example, the South Dakota statute contemplates that some members of hospital professional committees may act with malice, SDCL § 36-4-25, and consequently, only provides immunity from liability for acts of members of professional peer review committees performed within the scope of the functions of the committee if the committee member: (1) acts without *malice*, (2) has made a reasonable effort to obtain facts of the matter under consideration, and (3) acts in reasonable belief that the action taken is warranted by those facts. SDCL § 36-4-25 (emphasis added). This provision illustrates the strong public policy that physicians are not immune from liability when they act with malice or without a reasonable belief that the action taken is warranted by the facts. *Id.*

As South Dakota's statute provides that committee members that act with malice are not immune from liability, the information needed to prove a case to hold them accountable for their actions should also not be privileged and non-discoverable. After all, a determination of whether a peer review committee member is entitled to immunity would naturally require extrinsic evidence of the motive and knowledge of the committee member.

But South Dakota's peer review confidentiality does not expressly grant access to this information. *See* SDCL § 36-4-26.1. The peer review confidentiality provision provides that proceedings, records, reports, statements, minutes, or any data of a peer review committee are

not subject to disclosure or discovery and are not admissible as evidence in any court, except if a physician seeks information upon which a decision of his staff privileges was based or if he is seeking information in his defense. *Id.* While it does not apply to the patient-plaintiff, defining access to information about staff credentialing as an express exception to the peer review privilege underscores the legislature's position that this information is discoverable under certain circumstances.

Reading the two peer review provisions together leads to the following conclusions: (1) the legislature did not want individuals who acted with malice to be immune from liability; (2) in certain situations, such as credentialing, there are exceptions to the peer review privilege; and (3) South Dakota's peer review provisions are inconsistent. Interpreting the peer review discovery privilege as absolute would deny the patient-plaintiff's ability to obtain the evidence necessary to hold providers that acted maliciously accountable, contrary to the legislature's intent. The peer review privilege is not intended to be a tool to shield hospitals and physicians from all liability, but rather a tool to promote an environment focused on improving health care and patient safety. Thus, recognizing a crime-fraud exception to peer review provisions remedies any apparent inconsistency in the provisions. It ensures that patients have access to the information needed to hold hospitals and physicians accountable for wrongful conduct while preserving the confidentiality where peer review is being used to improve health care. Moreover, it ensures that hospitals and physicians do not abuse the privilege to avoid liability when they have acted in bad faith.

Privileges in other contexts recognize a crime-fraud exception to maintain the integrity of the privilege and the legal process. *See e.g.,* Circuit Court Opinion, p. 19-23. For example, the crime-fraud exception is a well-established exception to the attorney-client privilege. Under the

exception, a client's communication to her attorney isn't privileged if she made it with the intention of committing or covering up a crime or fraud. *United States v. Zolin*, 491 U.S. 554, 563 (1989). The spousal privilege recognizes a joint-participant exception, where marital communications are not privileged where testifying spouse was an active participant in, or in furtherance of, a criminal activity. *State v. Wichey*, 388 N.W.2d 893 (S.D. 1986). The crime-fraud exception to the priest-penitent privilege has also been recognized, where the application of the exception turns on whether the communication related to spiritual guidance. *Mockaitis v. Harcleroad*, 104 F.3d 1522, 1532 (9th Cir. 1997).

Moreover, courts in states with privilege provisions similar to South Dakota's have narrowly interpreted their states' peer review discovery privilege so as to maintain the integrity of the peer review process. In *Moretti v. Love*, the Rhode Island Supreme Court required a hospital to provide answers to interrogatories regarding the loss of staff privileges. 592 A.2d 855, 856 (R.I. 1991). Similar to the South Dakota statute, Rhode Island's peer review statute provided that neither the proceedings nor the records of peer review boards were discoverable, save litigation arising out of the imposition of sanctions on a physician. R.I. Gen. Laws § 23-17-25 (1998).

The Rhode Island Supreme Court ruled that the peer review statute did not protect information related to the loss of hospital staff privileges from disclosure. *Moretti*, 592 A.2d at 858. The court determined that the public would not be served if the peer review privilege was used to shield wrongful conduct:

> The public purpose is not served...if the privilege created in the peer-review statute is applied beyond what was intended and what is necessary to accomplish the public purpose. The privilege must not be permitted to become a shield behind which a physician's incompetence, impairment, or institutional malfeasance resulting in medical malpractice can be hidden from parties who have suffered because of such incompetence, impairment, or malfeasance.

Id. at 857-58.

Similarly, here, the peer review privilege should not be used as a shield to avert injured patients from obtaining necessary information once it is established that the improper motives guided the hospitals' actions that resulted in patient harm. Such result would damage the integrity of the peer review privilege and shields bad actors from being held accountable for the life-changing damage they caused. The crime-fraud exception to the peer review privilege resolves this injustice.

B. Patients Should Have Access to the Information Necessary to Pursue a Successful Lawsuit When They Are Injured As a Result of a Hospital's Flouting Its Duty to Safeguard Patients from Incompetent and Dangerous Physicians.

Most states recognize that hospitals have a duty to safeguard their patients from incompetent and dangerous physicians. *See Larson v. Wasemiller*, 738 N.W.2d 300, 306-307 (Minn. 2007) (listing states that recognize hospital's duty to patients). When hospitals breach that duty, they should be held liable under the tort of negligent credentialing, among other causes of action, for negligently granting staff privileges to incompetent physicians to treat patients at their facilities. *Id.* The tort of negligent credentialing is based on the theory that hospitals owe a duty to their patients to appropriately monitor the quality of care provided by their staff physicians and to grant privileges only to qualified practitioners. Sallie Theime Sanford, *Candor After Kadlec: Why, Despite the Fifth Circuit's Decision, Hospitals Should Anticipate An Expanded Obligation To Disclose Risky Physician Behavior,* 1 Drexel L. Rev. 383, 423-424 (2009) (discussing the development of the doctrine in various jurisdictions). Over 30 states recognize this tort. *Larson v. Wasemiller*, 738 N.W.2d at 306-307.

South Dakota should join these other states. As the Washington State Supreme Court reasoned in *Pedroza v. Bryant,* 677 P.2d 166 (Wash. 1984), "[t]he hospital's role is no longer limited to furnishing of physical facilities and equipment" and it "is in a superior position to monitor and control physician performance." *Id.* at 169. Therefore, "[f]orcing hospitals to assume responsibilities for their corporate negligence may also provide those hospitals a financial incentive to insure the competency of their medical staffs." *Id.*

In addition to negligent credentialing, a hospital's actions surrounding their credentialing and retention of an incompetent and dangerous physician can implicate other causes of action, such as fraudulent misrepresentation, fraudulent concealment, and conspiracy. This is particularly true where the hospitals tell patients that a physician is one of the world's best, when all the while they know he was deemed to be unfit to practice medicine and have been receiving complaints about his conduct. Regardless of the cause of action, patients cannot bring a successful case if they do not have access to the evidence needed to prove their claim. This is why the crime-fraud exception is so critical to improving patient safety and remedying patient harm.

Ensuring that injured patients have the ability to hold hospitals and physicians accountable for their wrongful acts meets the goal of improving health care by serving both deterrent and remedial functions: (1) hospitals will improve their actions related to physician credentialing and retention processes because they fear that not doing so will result in monetary and reputational loss from litigation; and (2) patients will receive legal redress for their injuries. *See, e.g., Pedroza v. Bryant*, 677 P.2d at 170 ("The most effective way to cut liability insurance costs is to avoid corporate negligence."); *Elam v. Coll. Park Hosp.,* 183 Cal. Rptr. 156, 165 (Cal. Ct. App. 1982) (stating that imposing corporate liability encourages hospitals to "oversee the

competence of their medical staff" with the intent to further "the health care interest of the patient").

Injured patients need access to the necessary evidence to bring a successful case. Here, the crime-fraud exception allows access to that information. The peer review privilege was not intended to conceal facts and shield wrongful conduct, or prevent a patient or their advocate from learning how an injury occurred. Nor did the legislature intend for the privilege to be used as a vehicle to commit a fraud on the court. Without access to critical information, patients will have no way to advocate for themselves when they suffer debilitating injuries from an incompetent physician that received privileges despite the hospital's knowledge of his/her incompetence. Such a result will be contrary to South Dakota's strong public policy of protecting older adults from abuse and improving health care.

Older South Dakotans are particularly vulnerable to the impact of this decision because of their heavy reliance on the health care system. South Dakota has a high proportion of older adults, with people age 50 and over comprising 34 percent of the state. Agency on Aging, *South Dakota Policy Academy State Profile*, 1 (June 2012), http://www.aoa.gov/AoA_Programs/HPW/Behavioral/docs2/South%20Dakota.pdf.. Adults aged 65 and older are twenty percent more likely than adults aged 18 to 44 to have visited a health professional in the past year. *See* Ctrs. for Disease Control & Prevention, *Summary Health Statistics for U.S. Adults: National Health Interview Survey, 2012*, at 95 tbl. 33 (2014), http://goo.gl/1abcJF. Similarly, adults aged 65 and older are four times more likely than persons aged 15 to 44 to receive in-patient hospital treatment. Ctrs. for Disease Control & Prevention, *National Hospital Discharge Survey: 2010 Table – Number and Rate of Hospital Discharges* (2010), http://goo.gl/16Oy9w.

Older Americans' high utilization rate for healthcare services puts them at greater risk of harm resulting from medical care. Thirteen percent of Medicare beneficiaries hospitalized in 2008 experienced a serious adverse event—e.g., an event prolonging their hospitalization, requiring life-sustaining intervention, or resulting in permanent harm or death—during their stay. *See* Office of the Inspector Gen., Dep't of Health & Human Servs., OEI-06-09-00090, *Adverse Events in Hospitals: National Incidence Among Medicare Beneficiaries*, at ii (2010), https://goo.gl/opFO6V. Relative to the rest of the population, adults aged 65 and older are more likely to be misdiagnosed or underdiagnosed (receive a delayed diagnosis) by doctors and twice as likely to be victims of serious medical error. Jeffrey M. Rothschild & Lucian L. Leape, AARP Pub. Policy Inst., *The Nature and Extent of Medical Injury in Older Patients* 13, 23, 26, 29 (2000), http://assets.aarp.org/rgcenter/health/2000_17_injury.pdf. Altogether, older Americans' high level of interaction with the healthcare system imposes significant institutional and individual financial costs and exposes them to potential serious physical harm.

Older adults are most vulnerable to hospital credentialing and retention decisions because of their disproportionate use of health services, high population in South Dakota, and chronic medical conditions. Without the crime-fraud exception, they will have an impossible hurdle to jump to obtain the necessary evidence needed to prove their case when they are harmed by hospitals' actions related to hiring and retaining incompetent physicians. Quality assurance functions protected by peer review privilege serve an important function. However, hospitals and other providers cannot be allowed to act contrary to the peer review's goals, then turn around and use the peer review privilege to cloak evidence needed to hold them accountable. Such use of the peer review privilege does not comport with the statute's purpose, does not improve health care, and undermines hospitals' accountability for their bad acts.

C. The Integrity of the Peer Review Process Would Remain Intact With a Crime-Fraud Exception To the Privilege Because the Patient-Plaintiff Must Meet a High Threshold Before the Exception Will Apply.

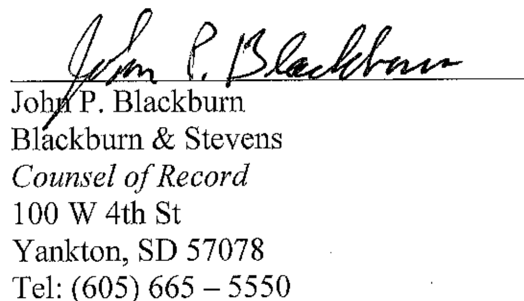
This Court's recognition of the crime-fraud exception would enhance the integrity of the peer review statute. The crime-fraud exception would only apply in circumstances where the injured patient could first establish a *prima facie* case of fraud, deceit, or other improper conduct. Circuit Court Opinion, p. 23-25. This high threshold guarantees that the crime-fraud exception would only apply to the cases where the peer review privilege no longer meets its fundamental purpose to improve health care, but instead is serving as a shield to avoid accountability.

CONCLUSION

This case has far-reaching implications for South Dakota residents, including older adults who use a greater amount of health care services and suffer the most malpractice incidents. As the peer review statute was intended to improve health care, this Court should find that the crime-fraud exception strikes an appropriate balance between protecting peer review material when appropriate and empowering patients to obtain evidence when they are the victims of malice, bad faith, and other improper conduct. The trial court's decision should be upheld.

Dated: April 18, 2016

Respectfully submitted,



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I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished, via electronic mail, to the following on this Monday, April 18, 2016:

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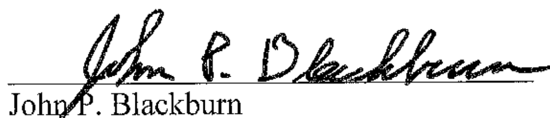

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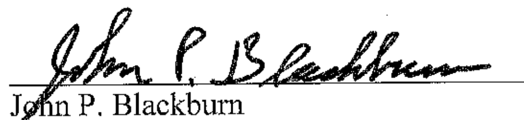
CERTIFICATE OF COMPLIANCE WITH RULE 15-26A-66

I certify that the foregoing amicus curiae brief of AARP has been prepared using proportionally spaced typeface, Times New Roman 12 point font. The word-processing system used to prepare the brief indicates that there are a total of 3,510 words and 19,885 characters in the body of the brief, excluding the cover page, table of contents, table of authorities, certificate of service, and certificate of compliance.



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