

NASD OFFICE OF HEARING OFFICERS

DEPARTMENT OF ENFORCEMENT

Complainant,

v.

MICHAEL D. MCCLELLAN
(CRD No. 4369132)

Respondent.

Disciplinary Proceeding
No. E8A2004095001

Hearing Officer – AWH

DEFAULT DECISION

June 29, 2007

Formerly registered representative barred from association with any member firm in any capacity for recommending and effecting unsuitable transactions in a customer's account, in violation of NASD Conduct Rules 2310 and 2110, and failing to respond to Staff requests for information, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110.

Appearances:

Richard S. Schultz, Esq., for the Department of Enforcement.

No appearance by or for Michael D. McClellan.

DECISION

Background

On January 26, 2007, the Department of Enforcement ("Enforcement") filed the Complaint in this proceeding, alleging that Michael D. McClellan recommended and effected unsuitable transactions in a customer's account, in violation of NASD Conduct Rules 2310 and 2110, and failed to respond to Staff requests for information, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. McClellan failed to answer the Complaint. He also failed to file an Answer to the Second Notice of Complaint and Complaint that Enforcement filed on March 2, 2007. As a result, on May 4, 2007,

Enforcement filed a Motion for Entry of Default Decision. McClellan did not respond to that Motion. Pursuant to NASD Procedural Rules 9215(f) and 9269, the Motion will be granted, and the allegations in the Complaint, which is attached to this decision, will be deemed admitted.

Findings of Fact¹

The Respondent

McClellan first became registered with NASD in May 2001. As pertinent to the Complaint, from October 9, 2001, until February 2, 2005, he was registered as a General Securities Representative with NASD member firm Gregory, Zent & Swanson, Inc. ("Gregory, Zent"). McClellan is not currently associated with any NASD member firm.

Unsuitability of the Transactions

In May 2003, RK, a fifty year-old interested in saving for his retirement, opened an individual retirement account ("IRA") at Gregory, Zent, with McClellan as his broker. McClellan persuaded RK to deposit a total of approximately \$166,000, substantially all of RK's net worth, into the IRA: in June 2003, RK deposited \$110,123.44, the proceeds of his 401(k) account; in July 2003 RK deposited \$12,312.36, an annuity that he rolled over; and, in February 2004, he rolled over a pension account worth \$43,689.20.

Although RK's new account form showed the value of his securities to be between \$100,000 and \$150,000, and his net worth to be between \$150,000 and \$200,000, in fact, McClellan did not know RK's net worth. McClellan admitted to NASD investigators

¹ All findings of fact are based on the admitted allegations in the Complaint, the Declaration Supporting a Motion for Entry of Default Decision by Richard Schultz ("Declaration"), and the exhibits attached thereto. The transcript of McClellan's on-the-record testimony before NASD investigators on February 8, 2006 is designated as "Tr.," followed by the page number.

that, "I never asked what anybody's net worth was."² Moreover, McClellan claimed not to have known RK's investment objectives. He told investigators that he did not consider anything specific about each customer because he considered that his customers were all "in the same boat;" they knew what he was going to do with their accounts; and their funds were those they wanted to trade aggressively and for the short term.³ When told that one of RK's investment objectives was safety of principal, he said that, had he known that, he "wouldn't have traded like I did."⁴

From June 10, 2003, until August 20, 2004, McClellan recommended and effected a total of 329 purchases or sales of equity securities in RK's IRA.⁵ During that 14 month period, he never spoke to RK before trading. He said, "Yeah. I traded a lot, and I never called anybody. I didn't have to. I didn't have to get their approval."⁶

In about 67 instances, McClellan bought and then sold the same securities for RK's account in 30 days or less. He sold eight securities the same day or the day following their purchase. In one instance, he invested 12.3% of RK's portfolio in a speculative pharmaceutical company whose shares declined within two months from \$9.40 to \$2.30.

The annualized turnover rate in RK's account was 8.4, with an overall turnover rate of 10.51.⁷ The annualized cost-to-equity ratio was 20.19%, with an overall ratio of

² Tr. 122.

³ Tr. 135-36.

⁴ Tr. 71.

⁵ An additional 21 transactions were options transactions. RK had no experience investing in options.

⁶ Tr. 136.

⁷ The total cost of purchases divided by the average monthly investment. *See Looper & Co.*, 38 S.E.C. 294 (1958).

25.24%.⁸ The average holding period for the securities in the IRA was 47.27 days, and the weighted average holding period was 43.93 days.

Failure to Respond to Requests for Information

At the NASD Staff's request, McClellan appeared on February 8, 2006, for an on-the-record interview relating to his trading in RK's IRA. Following that appearance, on February 13, 2006, the Staff sent McClellan a letter requesting more information concerning RK's complaint and other matters that were discussed at the on-the-record interview. When McClellan failed to respond to that request, on March 7, 2006, the Staff sent him a second request to provide the same information. McClellan failed to respond to the second request, and, on March 14, 2006, the Staff sent him a "Final Request" letter, seeking the same information. McClellan failed to respond to the "Final Request."

Each letter request was issued pursuant to Procedural Rule 8210 and was mailed to McClellan by first class and certified mail to his residential address listed in the Central Registration Depository ("CRD address"). In his on-the-record interview, McClellan admitted that he lived at the CRD address to which the letter requests were mailed. The first class mailings were not returned to the Staff. The certified mailings returned to the Staff were marked "Return to Sender—Unclaimed."

Service of the Complaint

On January, 26, 2007, Enforcement served the Complaint and Notice of Complaint on McClellan via first class and certified mail at his last known residential address listed in the CRD (the address at which he admitted he lived), as well as an additional possible address that was also listed in the CRD. On March 2, 2007,

⁸ The cost-equity ratio is the percentage return that is necessary to make a profit in light of the fees associated with the trading activity. Here, for the 15 months involved, the account would have to earn a return of 25.24% in order to pay the commission costs.

Enforcement served the Second Notice of Complaint and Complaint on McClellan in the same manner. The first class mailings to the CRD Address were not returned, and the certified mailings to that address were returned, marked "Unclaimed." The first class mailings to the other CRD address were not returned, and the certified mailing receipts were returned, stamped "Vacant." McClellan failed to file an Answer to the Complaint.

Discussions and Conclusions

NASD Jurisdiction Over Formerly Associated Persons

Article V, Section 4 of the NASD By-Laws provides for a two-year period of retained jurisdiction over a formerly registered person after the effective date of the individual's termination of registration. During this period of retained jurisdiction, NASD may file a complaint based upon conduct that occurred while the individual was registered through a member firm, or based upon such person's failure to provide information requested pursuant to Procedural Rule 8210, if the request was made, and the complaint is filed, during the foregoing period of retained jurisdiction.

Enforcement filed the Complaint on January 26, 2007, within two years of the termination of McClellan's registration. The Complaint is based upon conduct which occurred while he was registered with an NASD member firm, as well as failures to respond to requests for information during the period of retained jurisdiction. Therefore, NASD has jurisdiction over this proceeding.

Respondent's Default

Enforcement properly served the Complaint on McClellan by sending it via first class and certified mail to both of his addresses listed in CRD. Pursuant to NASD Procedural Rule 9134, the mailings establish that he had valid constructive notice of the

Complaint. Because McClellan failed to respond to the Complaint, Procedural Rules 9215(f) and 9269 authorize entry of a default decision against him. Accordingly, the allegations in the Complaint are deemed admitted.

Unsuitable Transactions

A registered representative who exercises control over an account is deemed to have implicitly recommended the transactions that he executes in the account.⁹ Control may be established where, as here, the transactions were not specifically authorized by the customer, but were executed on the customer's behalf.¹⁰

NASD Conduct Rule 2310(a) requires that, in recommending the purchase or sale of a security, a registered person must have "reasonable grounds for believing that the recommendation is suitable for [the] customer, upon the basis of the facts, if any, disclosed by such customer as to his other security holdings and as to his financial situation and needs."¹¹ Moreover, NASD Conduct Rule 2310 encompasses a "fundamental responsibility for fair dealing" that a registered representative has to his or her customers.¹² A violation of Conduct Rule 2310 is also a violation of Rule 2110, in contravention of "just and equitable principles of trade."¹³

The suitability requirement of Conduct Rule 2310 is violated when the representative's recommendations are qualitatively unsuitable, *i.e.*, when they generate

⁹ *Clyde J. Bruff*, Exchange Act Release No. 40,583, 1998 SEC LEXIS 2266 (Oct. 21, 1998).

¹⁰ *DBCC v. Pinchas*, 1998 NASD Discip. LEXIS 59 (NAC June 12, 1998), *aff'd* Exchange Act Release No. 41,816, 1999 SEC LEXIS 1754, at ** 11-12 (Sept. 1, 1999).

¹¹ *See also District Bus. Conduct Comm. v. Kunz*, No. C3A96009 1999 NASD Discip. LEXIS 20, at *62 (NAC July 7, 1999) ("Conduct Rule 2310 provides that a representative may make only such recommendations as would be consistent with a customer's financial situation and needs."), *aff'd*, *Kevin D. Kunz*, Exchange Act Release No. 45,290, 2002 SEC LEXIS 104 (Jan. 16, 2002).

¹² *Klein*, Exchange Act Release No. 37,835, 1996 SEC LEXIS 2922, at **16-17 (Oct. 17, 1996) (citing *John M. Reynolds*, Exchange Act Release No. 30,036, 1991 SEC LEXIS 2725, at *10, n.13 (Dec. 4, 1991)).

¹³ *Daniel Richard Holland*, Exchange Act Release No. 46,269, 2002 SEC LEXIS 1909 (July 26, 2002).

excessive trading in the account in light of the customer's investment objectives and needs, or produce an undue concentration of speculative securities in the account.¹⁴ The Securities and Exchange Commission has held that "a turnover rate of 6 or a cost-to-equity ratio in excess of 20% generally indicates that excessive trading has occurred."¹⁵

Here, both the turnover rate and the cost-equity ratio exceed those parameters. There is no evidence that would justify that quantity of trading, given RK's age, financial situation, and investment objective to save for his retirement. Moreover, the concentration of 12.3% of RK's portfolio in a single high risk security is particularly unsuitable, in light of RK's financial position.¹⁶ Therefore, McClellan engaged in unsuitable trading in RK's account, in violation of Conduct Rules 2310 and 2110.

Failure to Respond to NASD Requests for Information

Procedural Rule 8210 authorizes NASD to require any person subject to its jurisdiction to provide information and testimony related to any matter under investigation. The Rule serves as a key element in NASD's oversight function and allows NASD to carry out its regulatory functions without subpoena power.¹⁷ When an

¹⁴ *Dep't of Enforcement v. Stein*, No. C07000003, 2001 NASD Discip. LEXIS 38, at *9 (NAC Dec. 3, 2001).

¹⁵ *Daniel Richard Howard*, 2002 SEC LEXIS 1909, at *8. See also, *David Wong*, Exchange Act Release No. 45,426, 2002 SEC LEXIS 339, at *14, n.18 (Feb. 8, 2002); *Peter C. Bucchieri*, 1996 SEC LEXIS 1331, at *11, n.11, citing *Mihara v. Dean Witter & Co., Inc.*, 619 F.2d 814, 821 (9th Cir. 1980); *Pinchas*, 1999 SEC LEXIS 1754, at *18.

¹⁶ *Clinton Hugh Holland, Jr.*, Exchange Act Release No. 36,621, 1995 SEC LEXIS 3452 (Dec. 21, 1995).

¹⁷ See, e.g., *Dep't of Enforcement v. Valentino*, No. FPI010004, 2003 NASD Discip. LEXIS 15, at *12 (NAC May 21, 2003), *aff'd*, 2004 SEC LEXIS 330 (Feb. 13, 2004) ("It is well established that because NASD lacks subpoena power over its members, a failure to provide information fully and promptly undermines NASD's ability to carry out its regulatory mandate.") (citation omitted); *Joseph G. Chiulli*, Exchange Act Release No. 42,359, 2000 SEC LEXIS 112, at *16 (Jan. 28, 2000) (noting that Rule 8210 provides a means for the NASD effectively to conduct its investigations, and emphasizing that NASD members and associated persons must fully cooperate with requests for information).

individual fails to respond to information requests, NASD's ability to perform its regulatory responsibilities is subverted.¹⁸

Pursuant to Procedural Rule 8210, notice of a request for information is considered received if the request is mailed or otherwise transmitted to the person's last known CRD address. Because Enforcement mailed the requests to McClellan's last known CRD address, he received valid constructive notice of the requests. McClellan's failure to respond in any way to those requests for information violated Procedural Rule 8210 and Conduct Rule 2110.

Sanctions

Enforcement seeks a bar for each charge in the Complaint. It does not seek the imposition of a fine for the violations, should McClellan be barred. Enforcement does not request restitution.¹⁹

For unsuitable recommendations, the NASD Sanction Guidelines recommend a fine of \$2,500 to \$75,000, and a lengthy suspension or bar for egregious violations of Conduct Rules 2110 and 2310.²⁰ McClellan's misconduct was egregious: over the course of 14 months, he recommended and effected 329 purchases or sales of equities in RK's account without having any reasonable basis for believing that the trades were suitable for RK. His misconduct was aggravated by the fact that he gave no consideration to, and was unaware of, RK's needs, financial situation, or investment objectives. Accordingly, a bar is the appropriate sanction for this violation.

¹⁸ *Joseph P. Hannan*, Exchange Act Release No. 40,438, 1998 SEC LEXIS 1955, at *9 (Sept. 14, 1998). Further, a violation of Procedural Rule 8210 is also a violation of Conduct Rule 2110, contravening "high standards of commercial honor." *Dep't of Enforcement v. Baxter*, No. C07990016, 2000 NASD Discip. LEXIS 3, at *25 (NAC, Apr. 19, 2000).

¹⁹ Under the circumstances, Enforcement has not presented any evidence of quantifiable loss in RK's account as a result of McClellan's trades.

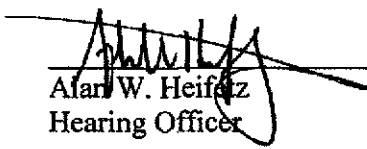
²⁰ NASD SANCTION GUIDELINES, p. 99 (2006 ed.).

For failing to respond in any way to requests for information made pursuant to Rule 8210, NASD Sanction Guidelines provide that a bar is the standard.²¹ There are no mitigating circumstances that would warrant a lesser sanction. Accordingly, McClellan will be barred in all capacities for failing to respond to requests for information made pursuant to Rule 8210.

Conclusion

Michael D. McClellan is barred from association with any member firm in any capacity for recommending and effecting unsuitable transactions in a customer's account, in violation of NASD Conduct Rules 2310 and 2110, and for failing to respond to Staff requests for information, in violation of NASD Procedural Rule 8210 and Conduct Rule 2110. The bars shall become effective immediately if this Decision becomes the final disciplinary action of NASD.

SO ORDERED.


Alan W. Heifetz
Hearing Officer

Copies to:

Michael D. McClellan *(via first class mail & overnight courier)*

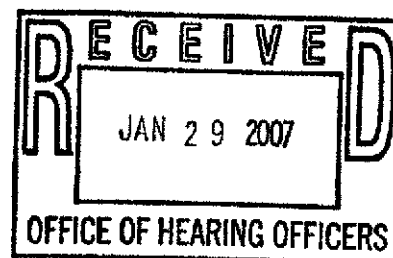
Richard S. Schultz, Esq. *(via first class & electronic mail)*

Mark P. Dauer, Esq. *(via first class & electronic mail)*

Rory C. Flynn, Esq. *(via first class & electronic mail)*

²¹ *Id.*, at 35.

**NASD
OFFICE OF HEARING OFFICERS**



DEPARTMENT OF ENFORCEMENT,

Complainant

vs.

MICHAEL D. McCLELLAN
Registered Representative
(CRD No. 4369132)

Respondent

**Disciplinary Proceeding
No. E8A2004095001**

Hearing Officer

COMPLAINT

Upon information and belief, Complainant alleges as follows:

SUMMARY

1. From on or about June 10, 2003, to on or about August 20, 2004, Michael D. McClellan ("McClellan") recommended and effected a total of 329 purchases or sales of equity securities transactions for the individual retirement account of RK, a member of the public, without having a reasonable basis for believing that the recommendations and resultant transactions were suitable for RK, based upon RK's age, net worth, liquid net worth, financial situation and investment objectives, in violation of NASD Conduct Rules 2110 and 2310.

2. On or about February 13, 2006, March 7, 2006, and March 14, 2006, the NASD Staff ("Staff") sent letters to McClellan, pursuant to and in accordance with NASD procedural Rule 8210 requesting information and documentation about the trading in RK's account, but McClellan failed to respond to the requests for information, in violation of NASD Conduct Rule 2110 and Procedural Rule 8210.

RESPONDENT

3. From on or about October 9, 2001 to on or about February 2, 2005, McClellan was registered as a General Securities Representative with Gregory, Zent & Swanson Inc. ("Member"), a member of NASD. McClellan is not currently associated with any member of NASD. Since this Complaint is filed within two years of the termination of McClellan's registration with the Member, McClellan is subject to the jurisdiction of NASD, pursuant to Article V, Section 4 of the NASD's By-Laws.

**FIRST CAUSE FOR COMPLAINT
NASD Conduct Rules 2110 and 2310 – Recommending and Selling Unsuitable Securities
Transactions to One Member of the Public by McClellan.**

4. Paragraphs number 1 through 3 above are re-alleged and incorporated herein by reference as paragraph 4.

5. During the time in question, RK was a member of the public who had an individual retirement securities account with the Member which was handled by McClellan.

6. In or about May 2003, when RK's individual retirement account was opened, he was 50 years old. The New Account Form that RK signed showed that RK had an annual income of \$20,000 to \$30,000, that he had a net worth of \$150,000 to \$200,000, and that he had securities holdings of \$100,000 to \$150,000.

7. RK's new account form showed that his investment objectives were to purchase securities for long term growth, short term trading and the safety of his principal. Prior to opening this individual retirement account, RK's investment experience was limited to stocks, which he had purchased through his 401(k) account with his former employer for about 10 years, and mutual funds that he had purchased over the past 16 years through other members of NASD.

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8. On or about June 10, 2003, RK deposited the proceeds of his 401(k) account, which totaled \$110,123.44, in to his individual retirement account. On or about July 15, 2003, RK rolled over an annuity that he owned with the Hartford Life Insurance Companies, valued at \$12,312.36, into his individual retirement account at the Member. On or about February 13, 2004, RK rolled over his pension account from Sherwin-Williams, RK's former employer, valued at \$43,689.20, into his individual retirement account with the Member.

9. From on or about June 10, 2003, to on or about August 20, 2004, McClellan recommended and effected a total of 329 purchases or sales of equity securities transactions for the individual retirement account of RK, which constituted excessive trading activity with an annualized turnover ratio of 8.4% (with an overall turnover ratio of 10.51%); an annualized cost-to-equity ratio (break-even return) of 20.19% (with an overall cost-to-equity ratio of 25.24%) and a average holding period of about 47 days and a weighted average holding period of about 44 days.¹ Eight of the equity securities were purchased and sold on the same day, or sold within one day after its purchase. Out of the 139 instances that McClellan purchased and sold securities for the account about 48% of the purchases were held for 30 days or less. Moreover, McClellan purchase 2,000 shares of a pharmaceutical company, called Genta Inc., which comprised 12.3% of RK's account on or about March 31, 2004. The price of the Genta, Inc. stock plummeted from its purchase price of \$9.40 on or about March 25, 2004, to \$2.30 on or about May 31, 2004, about two months later. Such recommendations and purchases and sales were made by McClellan without having a reasonable basis for believing that the recommendations and

¹ Of the 350 transactions that were effected in RK's account, 21 transactions were options transactions with the remaining 329 transactions being equity transactions. The analysis presented includes only the equities transactions.

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resultant transactions were suitable for RK, based upon RK's age, net worth, liquid net worth, financial situation and investment objectives.

10. The acts, practices and conduct set forth above constitute separate and distinct violations of NASD Conduct Rules 2110 and 2310 by McClellan.

**SECOND CAUSE FOR COMPLAINT
Conduct Rule 2110 and Procedural Rule 8210 - Failure to Respond to the Staff's Requests
for Information by McClellan.**

11. Paragraph numbers 1 through 10 above are re-alleged and incorporated herein by reference as paragraph 11.

12. On or about January 24, 2006, NASD staff ("Staff") sent to McClellan a request that he appear for an on-the-record ("OTR") interview scheduled for February 8, 2006, related to RK's complaint that McClellan recommended and effected unsuitable securities transactions to RK, based on his age, net worth, liquid net worth and financial situation, as noted in paragraphs 6 through 9 above, pursuant to and in accordance with the provisions of NASD Procedural Rule 8210. The request for information was sent by first class mail, by certified mail, return receipt requested, and by electronic mail to McClellan's address of record as contained in the records of the Central Registration Depository ("CRD Address"). McClellan appeared for the OTR interview on February 8, 2006. Based on the responses offered by McClellan, the Staff requested additional documents and information during McClellan's OTR interview.

13. On or about February 13, 2006, the Staff sent to McClellan a request letter that he provide documents that were discussed during the OTR interview, which included: a signed statement from a former customer that he previously referred to in a response to the Staff; notes in his possession relating to RK and another customer; electronic mail he sent or received related to his suspension and termination from the Member and RKs complaint that he recommended

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and effected unsuitable securities transactions to RK, based on his age, net worth, liquid net worth and financial situation, as noted in paragraphs 6 through 9 above, pursuant to and in accordance with the provisions of NASD Procedural Rule 8210. The request for information was sent by first class mail, by certified mail, return receipt requested, and by electronic mail to McClellan's CRD Address. The first class mailing was not returned to the Staff. The certified mailing was returned to the Staff marked "Return to Sender - Unclaimed."

14. On or about March 7, 2006, having received no response from McClellan, the Staff sent to McClellan a letter marked "Second Request," that he provide documents that were discussed during the OTR interview, which included: a signed statement from a former customer that he previously referred to in a response to the Staff; notes in his possession relating to RK and another customer; electronic mail he sent or received related to his suspension and termination from the Member and RKs complaint that he recommended and effected unsuitable securities transactions to RK, based on his age, net worth, liquid net worth and financial situation, as noted in paragraphs 6 through 9 above, pursuant to and in accordance with the provisions of NASD Procedural Rule 8210. The request for information was sent by first class mail, by certified mail, return receipt requested, and by electronic mail to McClellan's CRD Address. The first class mailing was not returned to the Staff. The certified mailing was returned to the Staff marked "Return to Sender - Unclaimed."

15. On or about March 14, 2006, having received no response from McClellan, the Staff sent to McClellan a letter marked "Final Request," that he provide documents that were discussed during the OTR interview, which included: a signed statement from a former customer that he previously referred to in a response to the Staff; notes in his possession relating to RK and another customer; electronic mail he sent or received related to his suspension and termination

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from the Member and RKs complaint that he recommended and effected unsuitable securities transactions to RK, based on his age, net worth, liquid net worth and financial situation, as noted in paragraphs 6 through 9 above, pursuant to and in accordance with the provisions of NASD Procedural Rule 8210. The request for information was sent by first class mail, and by certified mail, return receipt requested, to McClellan's CRD Address. The first class mailing was not returned to the Staff. The certified mailing was returned to the Staff marked "Return to Sender - Unclaimed."

16. McClellan failed to respond to each and all of the requests for documents and information described in paragraphs 13, 14 and 15 above, and the time for McClellan to respond has passed.

17. The aforementioned acts, practices and conduct constitute separate and distinct violations of NASD Conduct Rule 2110 and NASD Procedural Rule 8210 by McClellan.

PRAYER FOR RELIEF

WHEREFORE, Complainant respectfully requests:

- A. Findings of fact and conclusions of law that McClellan committed the violations charged and alleged herein;
- B. An order imposing sanctions upon McClellan in accordance with NASD Rule 8310;
- C. An order imposing such costs of any proceeding as are deemed fair and appropriate under the circumstances in accordance with NASD Rule 8330; and,

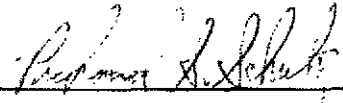
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D. An order imposing any other fitting sanction.

NASD DEPARTMENT OF ENFORCEMENT

January 26, 2007

Date


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