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Francisco Nunez and Union City Employees Association, Plaintiffs, v. City of Union City, Defendant.	SUPERIOR COURT OF NEW JERSEY HUDSON COUNTY CHANCERY DIVISION GENERAL EQUITY PART DOCKET NO.: CIVIL ACTION

PLAINTIFFS= MEMORANDUM OF LAW IN SUPPORT OF ITS APPLICATION FOR AN ORDER TO SHOW CAUSE WHY THE ARBITRATION AWARD SHOULD NOT BE VACATED

Of Counsel and on the Brief:

TY HYDERALLY, ESQ.

PRELIMINARY STATEMENT

Plaintiffs, Francisco Nunez ("Nunez") and the Union City Employees Association ("UCEA") (hereinafter collectively, the Aplaintiffs@), by way of this application seek injunctive and other relief against the defendant, City of Union City ("Union City" or "defendant").

Plaintiffs seek an Order vacating the March 23, 2005 Opinion and Award of Arbitrator, John Tesauro, in the underlying Arbitration, captioned, In the Matter of Arbitration between City of Union City and Union City Employees Association (Francisco Nunez/Vacation Award), PERC Docket AR-2004-667; a new arbitration with a panel of different arbitrators shall occur in a prompt fashion by the filing of a new grievance request by plaintiffs within thirty (30) days of the date of this Order; and the costs and fees of the initial arbitration shall not be charged to the Union.

STATEMENT OF FACTS

I. *PROCEDURAL HISTORY*

On or about March 2004, the UCEA filed grievance to arbitration before PERC requesting a panel of arbitrators as noted in the Opinion and Award of Arbitrator, John Tesauro (the "Award") at 4. Union City filed no opposition to this grievance. Further, although a panel of arbitrators was requested, the matter was heard by only Mr. John Tesauro. The grievance was confirmed and scheduled to occur in August 2004; however, even though counsel for the Union appeared for said arbitration as did the Union President and Nunez, Mr. Tesauro did not appear. Subsequently, the arbitration occurred on October 28, 2004 and November 22, 2004. The parties filed post hearing briefs and the matter was closed on January 3, 2005. Subsequently, counsel for plaintiffs contacted Tesauro's office numerous times in February and early March 2005 to inquire as to the status of the Award. Finally, on March 21, 2005, Arbitrator Tesauro's son returned these calls and stated that an Award would be forthcoming in the near future. On March 28, 2005, counsel for plaintiffs finally received the Award dated March 23, 2005.

This untimely Award ignored the fact that Union City filed no opposition to the PERC grievance. The Award also ignored the case law and refused to enforce the clear terms of the Agreement between the City of Union City and Union City Employees Association for January 1, 1999 through December 31, 2004 (the "Contract").

Thus, plaintiffs respectfully request that the Award be vacated and a rehearing before a panel of arbitrators be scheduled and that costs of the initial arbitration be not charged to plaintiffs.

LEGAL ARGUMENT

I. *LEGAL STANDARD*

The standard of review upon which a court may vacate an arbitration award are (a) the award was procured by corruption, fraud or undue means; (b) the arbitrator evidenced partiality or corruption; (c) the arbitrator was guilty of misconduct in refusing to hear pertinent and material evidence; or (d) the arbitrator exceeded or so imperfectly executed an award that it could not be considered definite. N.J.S.A. 2A:24-8.

Another ground is manifest disregard for the law.

II. *Opinion and Award violates the PERC rules and should be stricken on this basis as it was not rendered in a timely fashion*

PERC rules mandate that an Opinion and Award must be rendered within 45 days sof the date the hearing is closed. PERC 19:12-5.9. Thus, the Award had to be rendered by February 18, 2005 as the hearing was deemed closed on January 3, 2005.[1]

Plaintiffs contacted the Arbitrator several times to inquire when an Award would be rendered. These phone calls went ignored until March 21, 2005. It was not until March 28, 2005 that plaintiffs received the Opinion and Award dated March 23, 2005.

1 The last hearing date was on November 22, 2005 and thus no other testimony occurred or evidence was offered after this date. However, the parties were given until January 3, 2005 to submit Post Hearing Briefs and the record

Thus, on this ground alone, PERC's own rules require that the Opinion and Award be vacated. PERC 19:12-5.9 PERC 19:12-5.9. PERC's own rules have no requirement that a party must show prejudice due to the delay in receiving an Award and Opinion. *See* Id. Nonetheless, the subject of the arbitration was whether or not Nunez could take vacation. Nunez was in the market to purchase a home and had some opportunities working for the then President of the Dominican Republic. Although the job opportunities had since elapsed, Nunez still desired to go to take vacation to go to the Dominican Republic to purchase this home. Thus, Nunez anxiously awaited the decision of the arbitrator. Due to the delay in the ruling, Nunez may be precluded from purchasing his home in the Dominican Republic due to changes in the marketplace, changes in currency exchange, and the lack of availability of the house he desired to purchase.

III. *Although plaintiffs requested a grievance proceeding before a panel of arbitrators, PERC only provided one arbitrator to hear this grievance.*

IV. *Opinion and Award violates* N.J.S.A. 2A:24-8(c) and should be vacated on this basis.

No comment on ramifications of City's failure to Answer or Respond to the PERC grievance request.

V. *Opinion and Award should be vacated due to its manifest disregard of the law*

New Jersey has long recognized the power of courts to grant injunctive relief to prevent some threatening, irreparable harm, which should be averted until opportunity is afforded for a full and deliberate investigation of the case, in order to preserve the subject matter at risk. Crowe v. DeGioia, 90 N.J. 126,132 (1982) (*quoting*, Thompson v. City of Paterson, 9 N.J. Eq. 624, 625

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was closed on that date.

(E.&A. 1854)). A preliminary injunction is appropriate where the court is satisfied that there is a probable right and a probable danger that the right may be defeated unless an injunction is issued. United States v. Pavenick, 197 F.Supp. 257, 260 (D.N.J. 1961).

Accordingly, the Supreme Court of New Jersey has found that a preliminary injunction should issue when:

> (1) The temporary injunction is necessary to prevent irreparable harm;
> (2) The plaintiff has made a preliminary showing of a reasonable probability of ultimate success on the merits; and
> (3) The relative hardships to the parties have been considered by the Court and favor the granting of temporary relief to maintain the status quo Apending the final outcome.@

Crowe v. DeGioia, 90 N.J. 126, 132-134 (1982). In addition to these facts, the courts of this jurisdiction will consider the effect of the issuance of a preliminary injunction upon the public interest. *See* Zoning Bd. of Adjustment of Spartan Tp. v. Service Electrical Cable Television, 198 N.J. Super. 370, 379 (App. Div. 1985); Poff v. Caro, 228 N.J. Super. 370, 373 (Law Div. 1987). Viewed in the light of these established principles, discussed seriatim below, the facts of this matter clearly support the issuance of a temporary restraining order against defendants, pending a hearing on plaintiffs= request for a preliminary injunction.

II. TEMPORARY RESTRAINING ORDER AGAINST DEFENDANTS NECESSARY TO PREVENT IRREPARABLE HARM TO PLAINTIFFS

In establishing the requisite element of Airreparable injury,@ plaintiff need only show a Alikelihood@ of such harm. Thompson v. City of Paterson, 9 N.J. Eq. 624 (E.&A. 1854); *see*

Wyrough & Loser, Inc. v. Pelmer Laboratories, Inc., 376 F.2d 543 (3d Cir. 1967); Industrial Electronics Corp. v. Cline, 330 F.2d 480,483 (3rd Cir. 1964) (injunction should be granted if irreparable injury Awould possibly result@ if relief were denied). Much more than a mere likelihood of irreparable injury is present before this Court in the matter sub judice.

The harm that will result if the UCCs are not released is certain and clear. (Sapienza Cert. & 16). The harm is so imminent that Sapienza paid defendants one million and two hundred thousand dollars ($1,200,000) in order to obtain the release of the UCCs. (Sapienza Cert. &17). This payment should have resulted in the release of the UCCs in accordance with the Security Agreement. (Sapienza Cert. &18). This release would result in the lifting of all liens on the plaintiff companies= collateral, with the exception of the liens on the building held by the 500 Group Industrial, LLC. (Sapienza Cert. &19).

These liens are certainly not *de minim us* as defendants were granted a security interest in all Receivables, all Inventory, all Contract Rights, all Equipment, all General Intangibles, all Insurance Policies, all Trademarks, all Copyrights, all Licenses, all goodwill connected with the use of, and symbolized by any of, the Trademarks, Copyrights and licenses, all Instruments related to the foregoing, all Documents related to the foregoing, and

all Proceeds of any and all of the foregoing. (Hyderally Cert., Exhibit A2@, The Security Agreement, '4(a)). (Sapienza Cert. &28).

In fact, the numerous letters to the Escrow agent and to defendants make clear reference to the fact that plaintiffs will be materially and financially devastated if the UCCs are not released in a timely manner. (Hyderally Cert., Exhibits A3,7,8, and 9@). (Sapienza Cert.&21). This led to plaintiffs demanding in their letter of December 31, 2001, that the UCCs should be released no earlier than ten days from the date of the letter (due to the waiting requirements of the Security Agreement as noted in the Statement of Facts above) and no later than fifteen days from the date of their letter. (Hyderally Cert., Exhibit A3@).

Plaintiffs are currently attempting to finalize a lease agreement on a new building of approximately 144,000 square feet. (Sapienza Cert. &22). Sapienza anticipates signing this lease in approximately one week time. (Sapienza Cert. &23). However, in order to enter into this lease, plaintiffs will need to attain lines of credit from financial institutions. (Sapienza Cert. &24). Currently, plaintiffs have no lines of credit due to the UCCs. (Sapienza Cert. &24). Plaintiffs anticipate utilizing these lines of credit to pay the down payment on the

facility and to finance material improvements and modifications to the interior of the facility. (Sapienza Cert. &25). However, the financial institutions will not extend *any* lines of credit if plaintiffs= collateral is encumbered with the UCC liens. (Sapienza Cert. &26). Further, plaintiffs= operations in Florida and California will require lines of credit to sustain their growth. (Sapienza Cert. &27). Having encumbered collateral has significantly jeopardized plaintiffs= ability to sustain and expand these operations. (Sapienza Cert. &28). Indeed, as the Supreme Court of New Jersey has held, there is a presumption of irreparable injury where the business may lose an opportunity to a competitor or may simply lose an opportunity. *See* A. Hollander & Son, Inc. v. Imperial Fur Blending Corporation 2 N.J. 235, 249 (1949) (AWhere the employee through his employment has learned the business practices and methods of his employer which if disclosed to a competitor may result in irreparable injury to the complainant, the court may presume irreparable injury will ensue from the breach of the covenant.@ (Emphasis added)). Further, there is no alternate remedy to the release of the UCCs and monetary damages will not be adequate in addressing this issue. Thus, as harm Ais generally considered irreparable in equity if it cannot be redressed adequately by monetary

damages,@ injunctive relief is appropriate as plaintiff has no adequate remedy at law. Crowe v. DeGioia, *supra*, 90 N.J. at 132-133; Subcarrier Communications, Inc. v. Day, 299 N.J.Super. 634, 638, 691 A.2d 876 (App.Div.1997). Thus, plaintiffs respectfully submit that injunctive relief must issue. *See* Sampson v. Murray, 415 U.S. 61, 90, 39 L. Ed. 2d 166, 94 S. Ct. 937 (1974); Frank's GMC Truck Center v. General Motors Corp., 847 F.2d 100, 1092 (3rd Cir.1988); Del. River & Bay Auth. v. York Hunter Constr., 344 N.J. Super. 361, 365 (Ch. Div. 2001).

Moreover, here the court need not consternate over the issue of Alikelihood of irreparable injury@ because plaintiffs= actions in paying one million and two hundred thousand dollars ($1,200,000) clearly demonstrate the business necessity to expeditiously secure the release of the UCCs. Indeed, defendants= actions are the very evils which the common law and the Agreements were designed to protect against; and it is clear, beyond any doubt, that without this court=s protection, plaintiffs will continue to be irreparably damaged and harmed.

III. INJUNCTIVE RELIEF MUST BE GRANTED BECAUSE PLAINTIFFS HAVE A REASONABLE PROBABILITY OF SUCCESS ON THE MERITS

In addition to showing the likelihood of irreparable harm, a party seeking injunctive relief must make a preliminary showing that it has a reasonable probability of eventual success on the merits. Zoning Bd. of Adj. of Sparta Tp. v. Service Elec. Cable Television of New Jersey, Inc., *supra* 198 N.J.Super. at 379. That requirement is tempered by the principle that mere doubt as to the validity of the claim is not an adequate basis for refusing to grant injunctive relief. Crowe v. DeGioia, *supra*, 90 N.J. at 133. In the present case, it is not only highly likely under applicable law that plaintiffs will succeed on the merits of its claims against defendants B it is so clear that plaintiffs allege that defendants action to object to the release of the UCCs constitutes fraud.

The Security Agreement requires the following:

> The Secured Party hereby agrees that on such date as the Underlying Debt is reduced to five hundred fifty thousand dollars ($550,000) or less (the ARelease Date@), the Secured Party shall release its security interest in the Collateral and shall deliver, or cause to be delivered, to each Entity proper instruments (including UCC termination statements on Form UCC-3) acknowledging the termination of this security interest and the release of the Collateral... Upon the Release Date, the Granting Entities shall provide written notice to the Secured Party and the Escrow Agent, that the Underlying Debt is five hundred fifty thousand dollars ($550,000) or less. In the event that the Escrow Agent does not receive written notice from the Secured Party to the contrary on or prior to the date that is ten (10) days after its receipt of the written notice from the Granting Entities, the [*sic*] it shall release the Termination Statements to the Granting Entities.@
>
> (Hyderally Cert., Exhibit 2, The Security Agreement, ''5(d) and 5(d)(i)).

Even though it is beyond clear that the UCCs should have been released as evidenced by defendants= counsel=s letter of January 8, 2002, defendants acted in bad faith and committed fraud in sending out their letter of January 15, 2002, objecting to the release of the UCCs. (Hyderally Cert., Exhibit A6@, Walder letter of January 15, 2002). Defendants then evidenced clear intent in continuing and perpetuating the fraud in once again sending their letter of February 8, 2002

objecting to the release of the UCCs. (Hyderally Cert., Exhibit A10@, Walder letter of February 8, 2002). Even though plaintiffs wrote to defendants and clearly delineated the fact that they had no legal or factual reason to object to the release of the UCCs on several occasions and provided documents as enclosures, it is noteworthy that defendants maintained their fraudulent position even though they offered absolutely no reason why the UCCs should not be released. (Hyderally Cert., Exhibits A3, 6, and 7-10@; Sapienza Cert.&29). In fact, defendants= letter objecting to the release of the UCCs merely states ADear Al: I am responding since Jeff is hospitalized due to the flu, for the purpose of reiterating our objection to the release of the >Collateral.= In addition, the February payment has not been received by our clients. Thank you for your consideration.@ (Hyderally Cert., Exhibit A10@, Walder letter to Solecki of February 8, 2002).

The alleged February non-payment has nothing to do with the release of the UCCs. Nonetheless, defendants raise this red herring in an obvious attempt to obfuscate a clear issue and cover up the fact that they have offered, once again, no reason for objecting to the release of the UCCs. (Sapienza Cert.&30). It is this type of fraudulent behavior that violates the very core of good faith and fair dealing that mandates the granting of this application. (Sapienza Cert.&31). In fact, it is this type of incredulous behavior that is assisted by defendants= counsel that forces plaintiffs to state in their Verified Complaint that they may have a cause of action for the perpetuation of the fraud as against defendants= counsel. (Sapienza Cert. &32). Clearly, defendants simply desire to do whatever they can to hurt plaintiffs even if they are committing a fraud. (Sapienza Cert. &33). This desire in all likelihood emanates out of the extremely contentious and hostile litigation filed in 1999. (Sapienza Cert. &34). *See* Statement of Facts, *supra*.

Thus, due to the fact that not only is there a reasonable probability that plaintiffs will prevail, but also due to the fact that it is beyond clear that plaintiffs will prevail, plaintiffs respectfully submit that the requested relief is warranted. Crowe, supra, 90 N.J. at 137.

IV. *THE RELATIVE HARDSHIPS CLEARLY SUPPORT GRANTING INJUNCTIVE RELIEF*

Under the Agreements, Sapienza currently owes defendants $300,000. (Hyderally Cert., Exhibit A1@, Hyderally correspondence of January 14, 2002; Sapienza Cert. &35). The following independent collateral for this money is as follows: (i) Sapienza=s personal guarantee which is secured by the creation of a brokerage account which would and does contain at least cash and/or defined Securities of a value of at least five hundred and fifty thousand dollars ($550,000); (ii) a lien on the 500 Group Industrial, LLC building (with a current value of approximately $3.5 million and a mortgage of $1.8 million which results in an equity of $1.7 million); and (iii) a Life Insurance Policy in the amount of two million and four hundred thousand dollars ($2,400,000). (Hyderally Cert., Exhibit A2@, The Security Agreement, '' 3 and 4); (Sapienza Cert. &36).

It is due to the fact that substantial independent collateral existed that the parties negotiated and agreed as part of the Settlement of the underlying dispute that the UCCs would be released once the underlying debt was reduced to five hundred and fifty thousand dollars ($550,000) or less. (Sapienza Cert. &37).

The harm to the plaintiffs in not releasing the UCCs has been aptly demonstrated by reflecting the scope of the encumbrances/liens on the plaintiffs= financial resources and activities. (Sapienza Cert. &38). Further, under the Security Agreement, plaintiffs could not Asell, assign, transfer, encumber or otherwise dispose of any of the Collateral outside the ordinary course of

business without the prior written consent of the Secured Party,@ and Sapienza had to provide an aged Receivable report in a monthly fashion. (Hyderally Cert., Exhibit A2@, The Security Agreement, '' 4(f) and 4(g); Sapienza Cert. &39). Such obligations are highly intrusive to the confidential and proprietary nature of plaintiffs= business affairs and extremely time consuming and onerous. (Sapienza Cert. &40).

In assessing the propriety of injunctive relief, courts generally weigh the injury which the defendants would suffer, assuming the defendants are enjoined and then prevail at a final hearing, against the injury plaintiffs would suffer if no injunction issues and plaintiffs prevails. Crowe v. DeGioia, 90 N.J. at 132-134; Insolantite, Inc. v. United Electrical & Workers. 130 N.J. Eq. 506, 514 (Ch. 1941), *mod. on other grounds* 132 N.J. Eq. 613 (E. & A 1942).

In this case, the equities weigh heavily in favor of allowing for the release of the UCCs by granting the preliminary relief plaintiffs seek. Defendants' obligations are clear and certain. They have clearly violated their contractual and common law duties despite the plethora of correspondence and supporting documents sent to defendants and the Escrow Agent to prevent such actions from occurring. Despite receiving such clear correspondence, defendants have objected to the release of the UCCs. It is noteworthy that, to date, defendants have failed to offer *any* reason to support their objection to the release of the UCCs. Despite this blatant failure and disregard, defendants maintain their objection. Any hardship which Defendants might suffer as a result of a temporary restraining order, the same beings specifically denied, is far outweighed by the hardship to plaintiffs if preliminary relief is not granted. Indeed, any restraint would impose no hardship on defendants since plaintiffs only seek to protect its legitimate interest as outlined in the Security Agreement and the numerous letters to defendants and the Escrow Agent. Thus, the injunctive relief should be granted. *See* Crowe v. DeGioia, *supra*; Karlin v. Weinberg, 77 N.J. 408, 417-418, n.3.

RELIEF SOUGHT

In light of the foregoing, it is respectfully requested that this Court grant a Temporary Restraining Order granting the following: (1) Defendants be and hereby are forever restrained from objecting to the release of UCC termination statements on Form UCC-3 terminating the security interest in the following Collateral: all Receivables, all Inventory, all Contract Rights, all Equipment, all General Intangibles, all Insurance Policies, all Trademarks, all Copyrights, all Licenses, all goodwill connected with the use of, and symbolized by any of, the Trademarks, Copyrights and licenses, all Instruments related to the foregoing, all Documents related to the foregoing, and all Proceeds of any and all of the foregoing (collectively, the AUCCs@); (2) The Escrow Agent is hereby permitted and directed to release the UCCs to plaintiffs within five (5) days of the date of such Order; (3) Any requirements, limitations and or obligations reflected in the Security Agreements as they are defined in plaintiffs= moving papers on the UCCs are forever discharged and satisfied; (4) Defendants must allow an accounting of all monies received from plaintiffs in furtherance of the Settlement and General Release Agreement, Security Agreement, Ancillary Agreement, Consulting Agreements, Purchase Agreement, Pledge Agreement, Mortgage Subordination Agreement, and Personal Guaranty (collectively, the AAgreements@); (5) Defendants are precluded from taking any further actions towards withdrawing any monies from Whitman,

Brenner & Stark=s financial accounts in accordance with Del. River & Bay Auth. v. York Hunter Constr., 344 N.J. Super. 361, 365 (Ch. Div. 2001); (6) Plaintiffs are awarded a judgment against each and every defendant jointly and severally for the costs and attorneys= fees incurred in connection with this matter; (7) A disgorgement of profits related to the receipt of the $1.2 million payment on December 28, 2001 and defendants fraudulent objections which led to plaintiffs not receiving the UCCs in a timely manner; (8) A payment of lost interest to plaintiffs in paying the $1.2 million payment on December 28, 2001 and defendants fraudulent objections which led to plaintiffs not receiving the UCCs in a timely manner; (9) A payment of punitive and/or liquidated damages and/or compensatory damages emanating from plaintiffs not receiving the UCCs in a timely manner; and (10) Sanctions for failure to make payments.

DAMAGES AND EQUITABLE RELIEF

The granting of such relief is consistent with the terms of the Ancillary Agreement, '5.01 that requires that, AEach member of the Stuart Group, jointly and severally, agrees to indemnify and hold harmless each Entity and Sapienza (collectively, the ASapienza Indemnified Parties@ and individually, a ASapienza Indemnified Party@) from and against any

and all Losses and Indemnification Expenses incurred by any Sapienza Indemnified Party in connection with, resulting from or arising out of: (a) any breach by any Member of the Stuart Group of, or any other failure of any Member of the Stuart Group to perform, any of such Member of the Stuart Group=s covenants, agreements or other obligations contained in any Transaction Document [defined in the Agreements to include the Security Agreement]...@ (Hyderally Cert., Exhibit A1@, the Agreements).

Indemnification Expenses are defined to include any and all expenses reasonably incurred by any ... Sapienza Indemnified Party in connection with investigating, preparing, defending, bringing or prosecuting any claim, action, suit or proceeding (including without limitation court filing fees, court costs, arbitration fees or costs, witness fees and fees and disbursements of legal counsel, investigators, expert witnesses, accounts and other professionals) or by any other Person and legally required to be paid by any Stuart Indemnified Party or Sapienza Indemnified Party (including without limitation pursuant to such an Indemnified Party=s obligation to indemnify another Person). (Hyderally Cert. Exhibit A1@, the Agreements, the Ancillary Agreement '6.12).

Further, plaintiffs and defendants specifically acknowledged and greed that each other Awould be damaged irreparably in the event any of the provisions of this Agreement (other than the payment of money) are not performed in accordance with their specific terms or otherwise breached. Accordingly, each Party agrees that each other Party shall be entitled to an injunction or injunctions to prevent breaches of the provisions of this Agreement and to enforce specifically this Agreement and the terms and provisions hereof, in addition to any other remedy to which such Party may be entitled, at law or in equity.@ (Hyderally Cert. Exhibit A1@, the Agreements, the Ancillary Agreement '6.11).

Thus, if the Court agrees with plaintiffs= application, plaintiffs are entitled to recoupment of fees, costs, etc. as noted above.

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SERVICE OF PROCESS

The parties contractually agreed that service of process upon all defendants could be effectuated as follows:

a. by registered or certified mail, return receipt requested and postage prepaid; or

b. by delivery to a private courier service with overnight delivery requested, if the private courier service can provide documentation of proof of overnight service; or

c. personal service upon the defendants home or corporate address; or

d. by facsimile

to the following address:

Whitman, Brenner & Stark, LLC
60 Depeyster Avenue
Tenafly, New Jersey 07670

with a copy to:

Walder, Hayden & Brogan, P.A.
Attn: Justin P. Walder, Esq.
Five Becker Farm Road
Roseland, New Jersey 07068.

By: _____
Ty Hyderally, Esq.
For the Firm

DATED: **February 11, 2002**
PLACE: **Teaneck, New Jersey**

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