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IN THE

Supreme Court of the State of Delaware

STATE OF DELAWARE, *ex rel.* MATTHEW P. DENN,
Attorney General of the State of Delaware
Plaintiff-Below, Appellant,

v.

HOMETOWN AMERICA COMMUNITIES, INC.,
a Delaware Corporation,
Defendant-Below, Appellee,

NO. 194, 2016

APPEAL FROM THE SUPERIOR COURT OF
THE STATE OF DELAWARE, C.A. NO. S15C-11-015-ESB

REPLY BRIEF OF PLAINTIFF-BELOW, APPELLANT STATE OF DELAWARE EX REL. MATTHEW P. DENN, ATTORNEY GENERAL OF THE STATE OF DELAWARE

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August 25, 2016

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PRELIMINARY STATEMENT

One of the more notable aspects of the Answering Brief is Hometown America's ongoing failure to acknowledge the role it played, through counsel, in how the Complaint's allegation of Hometown America's ownership of the Communities came to be: nowhere does Hometown America explain the obvious inconsistency between (1) its litigation claim that it does not own the Communities, and (2) its counsel's contrary representation to the State shortly before the Complaint was filed.[1]

Regardless of the nature of counsel's misrepresentation—*i.e.*, as an honest mistake or a deliberate lie—the State should not be penalized for relying upon it when drafting the Complaint. If Hometown America's own counsel had an honest but mistaken understanding of Hometown America's ownership of the Communities, the State cannot be faulted for naming Hometown America as the defendant, and then, when Hometown America subsequently denies ownership, asking for an opportunity to take discovery rather than blindly accepting that Hometown America's current position is correct. On the other hand, if counsel knew the representation was untrue when he made it, that is a false statement of material fact in violation of Delaware Lawyers' Rule of Professional Conduct 4.1, and it would be inequitable to allow Hometown America to benefit from that deception with a for-prejudice dismissal.

Either way, Hometown America seems to be playing a game of "gotcha"—having deceived the State with what is, at best, a grossly negligent misrepresentation, it now demands that this Court let it enjoy the fruits of that deception, *i.e.*, a for-prejudice dismissal. Such a result is neither fair nor just.

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[1] *See* A058 (letter); Response to Mot. to Dismiss ¶ 6 (A050); Opening Br. ("OB") at 28.

ARGUMENT

I. DISMISSAL OF THE COMPLAINT WAS ERROR BECAUSE HOMETOWN AMERICA FAILED TO MEET ITS BURDEN TO SHOW THAT THE STATE CANNOT ESTABLISH "UNDER ANY REASONABLY CONCEIVABLE SET OF CIRCUMSTANCES SUSCEPTIBLE OF PROOF" THAT HOMETOWN AMERICA IS AN "OWNER" OF THE COMMUNITIES AS DEFINED UNDER DELAWARE LAW

A. The Complaint's Allegation That Hometown America Owns the Communities Satisfies the Notice Pleading Standards of Superior Court Civil Rule 8

As this Court has stated, "Delaware is a notice pleading jurisdiction."[2] As a result, "the threshold for the showing a plaintiff must make to survive a motion to dismiss is low."[3] Under Superior Court Civil Rule 8, a pleading meets that low threshold if it contains a "short and plain statement" of the claims asserted.[4] Averments shall be "simple, concise and direct," and "[n]o technical forms of pleadings or motions are required."[5] Therefore, "a plaintiff need not plead specific facts to state an actionable claim";[6] rather, "for a complaint to survive a motion to dismiss, it need only 'give general notice of the claim asserted.'"[7] Ultimately, "[a]ll pleadings shall be construed so as to do substantial justice."[8]

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[2] *Doe v. Cahill*, 884 A.2d 451, 458 (Del. 2005) (citing *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003)).

[3] *Id.*

[4] Super. Ct. Civ. R. 8(a).

[5] Super. Ct. Civ. R. 8(e)(1).

[6] *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003).

[7] *Doe*, 884 A.2d at 458 (citing *Ramunno v. Cawley*, 705 A.2d 1029, 1034 (Del. 1998)).

[8] Super. Ct. Civ. R. 8(f). *See also In re Benzene Litig.*, 2007 WL 625054, at *6 (Del. Super. Feb. 26, 2007) ("[A]s they initiate the case, plaintiffs need not be concerned that they will be drawn into lengthy 'battles' over the form of their statement of the claim, or that they will be expected to plead all of the facts of the claim that discovery may later reveal.") (discussing Super. Ct. Civ. R. 8).

The Complaint, with its averment that Hometown America is an owner of the Communities, meets this threshold. Paragraph 8 of the Complaint plainly and concisely alleges that Hometown America "owns three manufactured housing communities in Delaware," and proceeds to identify those communities.[9] The Complaint thus gives fair notice of the State's contention that Hometown America is an owner of the Communities, and thus "shifts to the defendant the burden to determine the details of the cause of action by way of discovery for the purpose of raising legal defenses."[10]

Hometown America makes two arguments in its Answering Brief in an effort to evade Delaware's plaintiff-friendly notice pleading rules, and both fail. Hometown America's first argument is that the State's "simple assertion of ownership" does not give fair notice that the State contends Hometown America is a "community owner" within the meaning of 25 *Del. C.* § 7003(4).[11] According to Hometown America, the State failed to provide fair notice by alleging Hometown America "owns three manufactured housing communities," but apparently would have given fair notice had it identified Hometown America "as a 'community owner.'"[12] This argument fails for several reasons. *First*, the argument that the State's syntax choice of "owns three manufactured housing communities" is not fair notice that the State was referring to "community owner" ignores the basic dictionary definition of "owner" as "a person

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[9] A008. *See also* OB at 19-21.

[10] *VLIW Tech.*, 840 A.2d 606, 611 (quoting *Klein v. Sunbeam Corp.*, 94 A.2d 385, 391 (Del. 1952)).

[11] AB at 24.

[12] *Id.*

who owns."[13] *Second*, Hometown America did not claim lack of fair notice below; rather, it argued instead that Hometown America is clearly not the proper defendant because it "is not one of the community owners."[14] In other words, Hometown America understood below what claim was being asserted against it, and argued that the State had the wrong party. *Third*, the two causes of action asserted against Hometown America, violations of 25 *Del. C.* §§ 7006(b)(2) and 7042(c),[15] can only be asserted against community owners, so the Complaint's allegation that Hometown America "owns three manufactured housing communities" can only reasonably be construed to refer to ownership within the meaning contemplated by those statutes.

Hometown America's second attempt to evade Delaware's long-standing notice pleading standards is to ignore them entirely: according to Hometown America, "just as fatal to the State's argument, is the fact that there are **no** specific facts in the Complaint" regarding Hometown America's ownership of the Communities.[16] This contention flies in the face of this Court's statement in *VLIW Technology* that "a plaintiff need not plead specific facts to state an actionable claim."[17] Hometown America uses the exact same words as did this Court in *VLIW Technology*—"specific facts"—but to assert, without citation to any supporting authority, the exact opposite

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[13] *Definition of "Owner,"* Dictionary.com (based on the Random House Dictionary 2016), http://www.dictionary.com/browse/owner (last visited Aug. 24, 2016).

[14] *See* Mot. to Dismiss at ¶¶ 4-9. Hometown America's repeated use of the term "community owner" in its Motion to Dismiss shows that Hometown America understood in the proceedings below that the State's allegation that Hometown America "owns three manufactured housing communities" was an allegation that Hometown America was a "community owner." Only now, on appeal, does Hometown America pretend otherwise.

[15] *See* Compl. ¶¶ 30-51 (A015-A019).

[16] AB at 24. *See also* AB at 22 (alleging the State "failed to allege specific facts...").

[17] *VLIW Tech., LLC v. Hewlett-Packard Co.*, 840 A.2d 606, 611 (Del. 2003).

of what the *VLIW* Court held. Try as it might, Hometown America cannot simply reinvent its preferred version of Delaware law out of whole cloth.[18] As long as the Complaint fairly and succinctly alleged that Hometown America is an owner of the Communities, which it did, dismissal as a matter of law was legal error.

B. Hometown America Had the Burden of Proof On Its Rule 12(b)(6) Motion and Failed to Meet It

The burden of proof on a Rule 12(b)(6) motion lies with the movant.[19] Specifically, it is the movant's burden to demonstrate "with reasonable certainty that a plaintiff would not be entitled to the relief sought under any set of facts which could be proven to support the action."[20] It is also the movant's burden to demonstrate there are no "reasonably conceivable set of circumstances susceptible of proof" that would enable the plaintiff to recover.[21] Here, that means Hometown America, and not the State, bore the heavy burden of proof to obtain a dismissal with prejudice of the claims against it.

In the Opening Brief, the State demonstrated how Hometown America failed to meet that burden. Hometown America advanced only one argument for why it was not the proper defendant: that it is not the title owner of the Communities in Kent

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[18] Hometown America erroneously accuses the State of citing no legal authority for the State's contention that the State was not required to plead specific facts or actual evidence as to Hometown America's ownership of the Communities. *See* AB at 23. In fact, the relevant legal authority can be found on pages 16-17 and 19-20 of the Opening Brief.

[19] *See, e.g.*, *Appriva S'holder Litig. Co., LLC v. EV3, Inc.*, 937 A.2d 1275, 1284 (Del. 2007); *Loudon v. Archer-Daniels-Midland Co.*, 1996 WL 74730, at *2 (Del. Ch. Feb. 20, 1996) (citing *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1104 (Del. 1985), and interpreting Chancery Rule 12(b)(6)), *aff'd*, 700 A.2d 135 (Del. 1997).

[20] OB 16 (citing *Rabkin v. Philip A. Hunt Chem. Corp.*, 498 A.2d 1099, 1104 (Del. 1985)).

[21] OB 17 (citing *VLIW Tech.*, 840 A.2d at 611).

County and Sussex County property records.[22] The State pointed out that the definition of "community owner" is broader than that claimed by Hometown America, and thus Hometown America had the burden to establish that it was not, and could not be, any of the entities defined by Delaware law as a "community owner."[23] The State also pointed out that Hometown America had failed to do so—*i.e.*, had failed to establish that it was not "a lessor, sublessor, park owner or receiver of 2 or more manufactured home lots offered for rent," and that it was not a person "other than a lender not in possession, who directly or indirectly receives rents for 2 or more manufactured home lots offered for rent and who has no obligation to deliver such rents to another person."[24]

In its Answering Brief, Hometown America makes no attempt to demonstrate that it has met that burden. On the contrary, Hometown America denies that it has any burden at all,[25] and continues to insist, in utter defiance of the plain language of 25 *Del. C.* § 7003(4), that only the title owner listed in county property records can be a "community owner."[26] Hometown America attempts to turn Rule 12(b)(6) pleading standards on their head by laying all of the supposed blame at the State's feet: according to Hometown America, the State's allegation of ownership is "conclusory" and thus the State is at fault for not including "specific supporting factual allegations" in or "attach[ing] supporting documents" to the Complaint.[27] These arguments fail for

[22] OB at 20-22.

[23] *Id.*

[24] *Id.*

[25] AB at 22-23.

[26] AB at 11 n.5, 13, 19 n.10.

[27] AB 19-20.

the reason noted above—Delaware law does not require plaintiffs to plead specific facts or attach supporting documents in order for an allegation as to a person's status to be deemed well-pleaded.[28]

One other argument made by Hometown America in its Answering Brief is that the Rent Increase Notices supposedly "negate" or "refute" the State's allegation of ownership *as a matter of law*.[29] This is untrue. In order for the Rent Increase Notices to negate as a matter of law the State's allegation that Hometown America owns the Communities, the Rent Increase Notices would have to establish conclusively that the claims are doomed to failure, such as might be the case when a stockholder plaintiff alleges that a proxy statement failed to disclose a material fact, and consideration of the proxy statement can conclusively determine whether the fact was actually disclosed.[30] Here, however, the State did not allege in the Complaint that the Rent

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[28] *See* OB at 22 n.31 (discussing *Anderson v. Airco, Inc.*, 2004 WL 1874688, at *2 (Del. Super. Aug. 13, 2004). Indeed, the degree to which Hometown America misapprehends Delaware law on what needs to be pleaded to survive a Rule 12 motion is demonstrated by this Court's opinion in *Desert Equities, Inc. v. Morgan Stanley Leveraged Equity Fund II, L.P.*, 624 A.2d 1199 (Del. 1993). In that case, the plaintiff's claim turned on whether the defendant had exercised certain discretion in a reasonable fashion, and the plaintiff's sole allegation about the defendant's motivation was that "the General Partner has willfully, wrongfully and in bad faith excluded plaintiff from participating in three or more Fund II investments in retaliation for plaintiff's lawsuit against various Morgan defendants." *Id.* at 1203. This Court reversed the Court of Chancery's grant of judgment on the pleadings, finding that those bare allegations of motivation were "without more, sufficient to withstand a Rule 12(c) motion," because "the trial court was required to accept as true the allegations that the General Partner had acted in bad faith and in a retaliatory manner or, at the very least, was required to infer such from the allegations in the complaint." *Id.* at 1206. As the Court noted, whether the plaintiff would be able to prove its case "is for another day." *Id.*

[29] AB at 21, 25. This assumes, for argument's sake, that it was proper for the court below to consider the Rent Increase Notices without affording the State an opportunity to take discovery on the ownership question. This brief explains, *infra* at 9-11, why that assumption is incorrect.

[30] *See, e.g., In re Santa Fe Pacific Corp. S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995) ("It was certainly proper to consult the Joint Proxy to analyze the disclosure claim because the operative facts relating to such a claim *perforce* depend upon the language of the Joint Proxy. Thus, the document is used not to establish the truth of the statements therein, but to examine only what is disclosed."); *see also In re GM (Hughes) S'holder Litig.*, 897 A.2d 162, 169-70 (Del. 2006) (discussing *Santa Fe*).

Increase Notices establish Hometown America's status as a community owner, so the Rent Increase Notices cannot disprove as a matter of law the Complaint's allegation of Hometown America's ownership status. Moreover, the Rent Increase Notices are silent as to Hometown America's status as a lessor, a sublessor, a receiver, or a "person, other than a lender not in possession, who directly or indirectly receives rent for 2 or more manufactured home lots offered for rent and who has no obligation to deliver such rents to another person"—each a status that would qualify Hometown America as a "community owner"—and because of that silence the Rent Increase Notices cannot resolve as a matter of law whether Hometown America is a "community owner."

II. DISMISSAL OF THE COMPLAINT WAS ERROR BECAUSE THE COURT BELOW CONSIDERED AMBIGUOUS EVIDENCE OUTSIDE THE COMPLAINT TO DECIDE THE MOTION TO DISMISS AND WAS REQUIRED TO GIVE THE STATE AN OPPORTUNITY TO TAKE DISCOVERY ON THE ISSUE BEFORE DECIDING THE MOTION

A. The Rent Increase Notices Were Outside the Four Corners of the Complaint for Purposes of the Allegation of Hometown America's Ownership of the Communities

In the Opening Brief, the State explained that the court below erred in considering the Rent Increase Notices because the notices do not meet this Court's stringent, limited exception to the general rule prohibiting consideration of material outside the four corners of a complaint on a motion to dismiss.[31] The State explained that the Rent Increase Notices were not integral to the claim that is the subject of Hometown America's motion to dismiss—whether the State named the wrong party—and that the Rent Increase Notices were not relied upon in the Complaint for purposes of identifying Hometown America as an owner of the Communities under 25 *Del. C.* § 7003(4).[32] The State also demonstrated that the court below relied upon the Rent Increase Notices for the truth of their contents, not simply to determine what they said, and improperly made factual determinations regarding those contents.[33] Thus, the State noted, the Motion to Dismiss should have been converted into a motion for summary judgment, and the State should have been afforded an opportunity to take discovery on the ownership issue.[34]

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[31] OB at 25-26 (discussing *In re Santa Fe Pacific Corp. S'holder Litig.*, 669 A.2d 59, 69-70 (Del. 1995).

[32] OB at 26.

[33] *Id.*

[34] *Id.*

In its Answering Brief, Hometown America denies all of the foregoing. It claims that the Rent Increase Notices were integral to the claims asserted and incorporated by reference into the Complaint,[35] and denies that the court below relied upon the Rent Increase Notices for the truth of their contents.[36] These arguments fundamentally misunderstand both the incorporation-by-reference doctrine and what it means to rely upon a document for the truth of its contents.

As to the former issue—whether the Rent Increase Notices were incorporated by reference or integral to claims asserted in the Complaint—Hometown America fails to discuss the authorities cited in the Opening Brief, including this Court's opinion in *Santa Fe*, which establish that extrinsic documents do not become incorporated into a complaint for *all* purposes simply because a complaint mentions or cites those documents for *some* purposes.[37] Doing so, this Court has held, is improper because it "reaches well beyond the justification for the exception and leads to anomalous results."[38] The same is true here: the Complaint does, of course, cite to and discuss the Rent Increase Notices, but not to contend that Hometown America owns the Communities. Accordingly, although the Rent Increase Notices might be incorporated into the Complaint for *some* purposes—*i.e.*, the purposes for which they were cited and discussed—they are decidedly not, as a matter of Delaware law, incorporated into the Complaint to contend that Hometown America owns the Communities.

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[35] AB at 26-31.

[36] AB at 31-32.

[37] *See* OB at 26.

[38] *Santa Fe*, 669 A.2d at 70.

As to the latter issue—whether the Court below improperly relied upon the Rent Increase Notices for the truth of their contents—Hometown America insists that the court below "did not accept or reject the truthfulness of the statements made in the notices," but merely held that "what was stated in those documents . . . did not support the conclusory allegations the State was making."[39] This is false. The opinion below shows that the Superior Court considered and evaluated the truth of the contents of the Rent Increase Notices, crediting the identification of the Hometown LLCs in the closing as relevant to the factual question of ownership, while simultaneously dismissing Hometown America's trademarked logo on the first page as "nothing more than marketing."[40] The court below not only considered the Rent Increase Notices for the truth of their contents, it improperly determined whether certain parts of the Rent Increase Notices should be given greater weight than others.[41]

B. The Rent Increase Notices Are Ambiguous as to Hometown America's Status as an Owner of the Communities

In the Opening Brief, the State demonstrated that it was also improper for the Superior Court to consider the Rent Increase Notices because, under Delaware law, an ambiguous document cannot be relied upon by a trial court as the basis for a Rule 12(b)(6) dismissal.[42] As the State explained, the Rent Increase Notices, interpreted in

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[39] AB at 32.

[40] Opinion at 6.

[41] Stated another way, if a court needs to answer only one question to resolve a motion to dismiss—"*was something said?*"—it may be appropriate to consider the contents of an extrinsic document to answer that question. But if the court needs to answer two questions to resolve the motion—"*was something said?*" and "*was it true?*"—then consideration of the contents of that document to dismiss a complaint, without the opportunity for discovery, becomes improper. *See* n.30, *supra* (citing *Santa Fe*, 669 A.2d at 69, and *In re GM (Hughes) S'holder Litig.*, 897 A.2d at 169-70).

[42] OB at 27-28.

a light most favorable to the State, are ambiguous on the question of whether Hometown America is an owner of the Communities under 25 *Del. C.* § 7003(4).[43]

In its Answering Brief, Hometown America denies that the Rent Increase Notices are ambiguous, insisting that they "could not be clearer."[44] In doing so, Hometown America repeatedly claims that it is clear from the contents of the Rent Increase Notices that the notices were "authored" and "sent" by each of the Hometown LLC entities.[45] This is false—the Rent Increase Notices do not identify who authored them, nor do they identify who sent them. There is nothing in the Rent Increase Notices identifying who drafted the language used in the Rent Increases Notices, who printed the notices, who addressed the envelopes, who applied the postage, or who placed them in the mail. In fact, the Rent Increase Notices for each of the Communities contain strikingly similar language, suggesting that the letters have a common author.[46] Whether that author was Hometown America, common counsel for the Hometown LLCs, or someone else, is a question of fact that cannot be determined at this time. The Rent Increase Notices do not identify their authors or senders, nor do they establish conclusively that Hometown America is not an "owner" of the Communities, notwithstanding Hometown America's protestations to the contrary.

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[43] *Id.*

[44] AB at 33.

[45] *Id.*; *see also* AB at 2, 4, 5, 6, 8, 16.

[46] *Compare* A065-A066 *with* A077-A078 *and* A080-A081.

C. The County Property Records Do Not Compel a Different Result on a Motion to Dismiss

In its Answering Brief, Hometown America resurrects an argument not addressed by the court below, asserting that dismissal is appropriate because Kent County and Sussex County online property ownership records conclusively demonstrate that Hometown America is not a "community owner" because it is not the title or record owner of the Communities.[47] This argument fails for two reasons.

First, as the State noted below, the county property records do not conclusively establish, as a matter of law, that Hometown America is not an owner of the Communities within the meaning of 25 *Del. C.* § 7003(4). At most, the county property records *might* establish that Hometown America is not the title or record owner, but the definition of "community owner" in 25 *Del. C.* § 7003(4) is broader than that, and one can be a "community owner" even if one is not the title or record owner of the land.[48] Thus, the county property records do not establish, conclusively or otherwise, that Hometown America is not a "community owner." And "community owner," as defined in 25 *Del. C.* § 7003(4), rather than title or record owner, is the relevant definition for this lawsuit.[49]

Second, as the State also argued below, the county property records do not compel dismissal of the Complaint: the county property records are outside the four corners of the Complaint and, therefore, could not be considered or relied upon by the

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[47] AB at 11 n.5, 19 n.10.

[48] *See* OB at 18-21; *see also* Response to Mot. to Dismiss ¶¶ 4-6 (A049-A050).

[49] It bears repeating that Hometown America has never explained the basis for its claim that the *only* entity that can be deemed a "community owner" under 25 *Del. C.* § 7003(4) is the title or record owner of a community, or how that claim can be squared with the plain language of the definition.

court below when it decided the Motion to Dismiss, especially not when the State was denied an opportunity to take discovery.[50] Frankly, the county property records do not meet this Court's stringent, limited exception to the general rule prohibiting consideration of material outside the four corners of a complaint on a motion to dismiss. As the State has shown, Hometown America relies upon the county property records to prove the truth of their contents (*i.e.*, to prove who is the title or record owner of the Communities).[51] Furthermore, the county property records were neither incorporated by reference into the Complaint, nor relied upon in the Complaint for the purpose of identifying Hometown America as an owner of the Communities under 25 *Del. C.* § 7003(4).[52] As a result, even if Hometown America had raised the issue below, the Superior Court could not have properly considered the county property records, and certainly could not have relied upon them to dismiss the Complaint without giving the State an opportunity to take discovery on Hometown America's ownership of the Communities.

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[50] Response to Mot. to Dismiss ¶ 6 (A050).

[51] Of course, as the State has also shown, even if the county property records are relied upon to prove of the truth of their contents, they do not prove enough, because the definition of "community owner" includes more than just the title or record owner.

[52] OB at 25-26.

CONCLUSION

For the reasons set forth in this brief and the Opening Brief, this Court should reverse the judgment of the Superior Court.

Respectfully submitted,

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