UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

INTERNATIONAL ASSOCIATION OF
MACHINISTS, DISTRICT LODGE 160,
LOCAL LODGE 289,

and

Cases: 19-CD-502;
19-CD-506

SSA MARINE, INC.,

and

INTERNATIONAL LONGSHORE AND
WAREHOUSE UNION.

CHARGING PARTY'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER

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Charging Party SSA Marine, Inc. ("SSA") submits this Brief in support of its Exceptions to the decision of Administrative Law Judge William Kocol ("ALJ") dated May 8, 2012 in accordance with Section 102.42 of the National Labor Relations Board's Rules and Regulations.[1]

The ALJ's Decision and Order dismissing the Complaint in this 8(b)(4)(ii)(D) matter is without precedent and contrary to existing Board law and sound labor policy, and should be reversed by the Board in its entirety.

I. STATEMENT OF THE CASE

SSA provides stevedoring (*i.e.*, cargo-handling) and related services in ports all around the world, including the Puget Sound-area marine terminals near Seattle, Washington. (Stip. p. 2, par. 5.) SSA is also an employer-member of the Pacific Maritime Association ("PMA"). (Stip. p. 3, par. 7.) For purposes of collective bargaining, the PMA "represents approximately 50 for-profit stevedore companies, marine terminal operators and maintenance contractors at waterfront facilities in Washington, Oregon, and California." (Stip. p. 3, par. 7.) The PMA is, and at all relevant times has been, an employer engaged in commerce within the meaning of Sections 2(2), (6) and (7) of the Act. (Stip. p. 3, par. 9.)

Prior to July 1, 2008, and pursuant to its collective bargaining agreement with the International Association of Machinists ("IAM"), SSA assigned its maintenance and repair work in the Puget Sound-area to employees represented by the IAM. (Stip. p. 4, par. 13.) However, in July 2008, the PMA "entered into a contract with the ILWU giving maintenance and repair work at all 'new' terminals to employees represented by the ILWU." *(Id.)*

After July 2008, the Port of Seattle completed construction of Terminal 91 as a new passenger cruise facility. (Ex. J, p. 2.) Pursuant to the ILWU-PMA agreement, SSA assigned the "maintenance and repair of its stevedoring and terminal service power equipment while [SSA is] present at Terminal 91 in Seattle, Washington to employees who are represented by the

[1] Citations in this Brief shall be as follows: to the ALJ's Decision "ALJD [Page]: [Lines]; to the Complaint: "Compl. Par. [Number]; to the parties' *Stipulation* : (Stip., p. __, par.__)., and citations to the exhibits attached to the *Stipulation* will appear as (Ex.____), with specific page and paragraph numbers to follow, if appropriate.

ILWU," rather than employees represented by the IAM. (*Id.* at p. 4, par. 13.)

On July 22, 2011, the National Labor Relations Board made a jurisdictional award of the "maintenance and repair of [SSA's] stevedoring and terminal service power equipment while present at Terminal 91 in Seattle, Washington [the "disputed work"] to employees who are represented by the ILWU." Subsequent to that decision, the IAM refused to withdraw and disclaim its contractual pursuit of a pay-in-lieu monetary remedy with respect to the assignment of the disputed work to the ILWU.

The IAM's pursuit of a "pay-in-lieu" arbitral remedy for the same work the NLRB awarded to a different Union clearly undermines the 10(k) award, and violates Section 8(b)(4)(ii)(D) of the Act, as alleged in the Complaint. Indeed, the law in this area is well-established:

> [E]ven if a union has an arguably meritorious contractual claim to the work in dispute, it violates the Act if it continues to pursue the contractual claim after the Board issues a 10(k) award allowing the work to be assigned to employees represented by a different union.

Grazzini Brothers & Company, 315 NLRB 520, at 522 (1994) (*citing*, *inter alia*, Ironworkers Local 433 (Otis Elevator), 309 NLRB 273 (1992); Ironworkers Local 433 (Swinerton Co.) 308 NLRB 756 (1992); Roofers Local 30 (Gundle Construction), 307 NLRB 1429, enf'd 1 F. 3d 1419 (3d Cir. 1993); and Laborers Local 261 (Skinner, Inc.), 292 NLRB 1035 (1989)).

However, in an opinion essentially bereft of relevant legal authority, the ALJ found that the IAM's post-10(k)-award pursuit of the monetary pay-in-lieu remedy for work already awarded by the Board to the ILWU in this case does not "subvert the Board's 10(k) decision." ALJ Opinion, pg. 7, line 23], and dismissed the Complaint in its entirety. In doing so, the ALJ turned a blind eye to existing Board law with respect to the IAM's attempted "disclaimer" of the work while continuing to pursue the "in lieu of" pay claims, and by making up his own definition of unlawful "coercion" which is contrary to the clear language of 8(b)(4)(ii)(D). His decision wrongly deprives SSA of the protections that automatically attach to any other Employer in commerce that is trapped in a jurisdictional dispute and that invokes the Board's jurisdictional

dispute-resolution procedures for help with the work assignment.

To arrive at this odd result, the ALJ's Decision takes an inappropriate detour through 10(k) territory, and suggests that the assignment of disputed work in this case was the result of collusion between the ILWU, SSA and even the NLRB itself. The following are examples of some of the ALJ's peculiar and improper comments about the 10(k) process:

- "But the manner in which the Board has fulfilled it(s) [sic] obligations under Section 10(k) may be contributing to the creation of jurisdictional disputes such as the one in this case." ALJD p. 8, 17-19.

- "This is so because although the Board applies a multifactor test in determining who should get the work, the result is always the same - the Board awards the work to the labor organization to whom the Employer has most recently assigned the work." ALJD p. 8, 19-20.

- "One may read the first few sentences of the 10(k) award to ascertain to whom the employer has assigned the work most recently and then read no further for the Board will certainly assign the work to that organization." Id., 22-24.

- "So it did not require any extensive legal analysis for SSA, PMA and ILWU to feel confident that the Board would uphold their decision to take the work away from employees represented by" the IAM. Id., 24-26

Regardless of the ALJ's incorrect, personal views about the Board's manner of resolving 10(k) disputes, the bona-fides of the underlying 10(k) award may not be re-litigated in this unfair labor practice proceeding.[2]

Ultimately, the ALJ's hostility for the Board's 10(k) procedures and the specific work assignment in this case improperly infected his decision, and led to his dismissal of the

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[2] *See* Standard Drywall, Inc., 357 NLRB No. 160 (2011), at p. 3, fn 12: "The Respondents renew their arguments that they should be permitted to litigate in this proceeding certain threshold issues decided [in the underlying 10(k)], including whether there was an agreed-upon method for resolving the jurisdictional disputes and whether SDI and Carpenters engaged in collusion regarding the assignment of the disputed work. It is well-settled that threshold issues are not subject to relitigation after a 10(k) award); accord Longshoremen ILWU Local 6 (Golden Grain Macaroni Co.), 289 NLRB 1, fn. 4 (1988) ("The Board will not . . . relitigate threshold matters that are not necessary to prove an 8(b)(4)(D) violation.")

Complaint. The Board should correct the ALJ's mistakes and creation of law based upon a viewpoint contrary to the language of the statute and clear Board and court precedent, and reverse the ALJ's decision in its entirety.

II. QUESTIONS PRESENTED

1. Whether the IAM can maintain its contractual claim for a "pay-in-lieu" monetary award adverse to the Board's 10(k) Decision and Award after the issuance of a 10(k) award simply by disclaiming its interest in the work assignment?

2. Whether the IAM's otherwise unlawful maintenance of its monetary grievances are rendered "non-coercive" by a private reimbursement agreement between SSA and its multi-employer bargaining representative?

III. ARGUMENT

A. The ALJ Erred by Finding that the IAM's post-10(k) Maintenance of its Pay-in-Lieu Grievances to be Lawful, Based On the Union's Disclaimer of the Actual Work Assignment.

Once the Board awarded the maintenance and repair work to employees represented by the ILWU through its 10(k) procedures, the IAM was required to disclaim and abandon its pursuit of its monetary "pay-in-lieu" grievances concerning that same work. See, e.g. Otis Elevator Company, 309 NLRB 273 (1992), at 274 ("time-in-lieu claims, including awards, that conflict with , and are filed or pursued subsequent to, a 10(k) award violate Section 8(b)(4)(ii)(D)." This well-established rule rests "on the undisputed proposition that a Board 10(k) award takes precedence over any conflicting arbitral award" and that allowing the losing party in a 10(k) dispute to pursue payments for work the Board awarded to employees other than those involved in the grievance necessarily subverts the Board's 10(k) award. Id.; *see also* E.P. Donnelly, Inc. 357 NLRB No. 131 (2011), at p. 4 ("a 10(k) award takes precedence over contrary claims and determinations . . . ."). Thus, Section 8(b)(4)(ii)(D) makes it an unfair labor practice for a labor organization to exert "*any* form of economic pressure of a compelling or restraining nature" in order to undermine an award of work pursuant to Section 10(k). United Technologies, 309 NLRB 273, at 282 (1992) (emphasis added).

In this case, the ALJ attempted to chop away at the finality and sovereignty of the Board's 10(k) award by improperly limiting the scope of unlawful post-award conduct by the losing party, opining that "it is well-settled that after the Board issues its 10(k) award a union may not *continue to obtain the disputed work by requiring an employer to pay monetary damages until it does so*." ALJD p. 8, 33-35 (emphasis added). However, the Board has explicitly rejected the ALJ's contention that a work-assignment motivation is a necessary component of an 8(b)(4)(ii)(D) violation: "It is well-established that a union's lawsuit to obtain work awarded by the Board under Section 10(k) to a different group of employees, OR monetary damages in lieu of the work, has an illegal objective . . . and violates Section 8(b)(4)(ii)(D). EP Donnelly, *supra*, at p. 2.

What is more, the Board has already answered the ALJ's question as to "what about the circumstances here, where Respondent has clearly and unequivocally renounced the disputed work and seeks only damages for SSA's breach of contract?" The answer is that a Union's disclaimer of the disputed work is of no legal significance.

Gundle Lining Construction, 307 NLRB 1429 (1992) is directly on point. In that case, competing Unions, Roofers Local 30 and Laborers Local 172, sought to perform certain landfill installation work- "the placement of high-density polyethylene panels" for the Employer. Id., at 1429, fn. 1. Following some limited picketing activity in support of its claim for the disputed work, on November 14, 1989, the Roofers filed a grievance which claimed that the Employer "should have hired journeymen roofers through [its] hiring hall." Id., at 1429. As a remedy for the alleged breach of contract, the Roofers sought "backpay for those individuals not hired at the landfill site." Id. By letter dated January 4. 1990, the Roofers "informed the Board's Regional Office . . that it was not claiming the work at the Landfill, and that it was specifically disclaiming such work." Id., at 1435. The letter also indicated that the Union "would continue to pursue monetary damages from Gundle for breach of its collective bargaining agreement." Id. On June 20, 1990, the Board through a 10(k) proceeding, awarded the disputed work to "employees who were represented by the Laborers" Id., at 1430. .However, the Roofers Union refused to

abandon its pursuit of breach of contract remedies against the Employer, even after the issuance of the adverse 10(k) award. Id., at 1429.

The Board held that the maintenance of the breach of contract lawsuit for monetary damages after the issuance of the adverse 10(k) award was unlawful, even though the Union had specifically disclaimed any attempt to obtain the work in dispute, and described in detail the dangers of a contrary result:

> The danger is that it gives unions little incentive to resolve jurisdictional disputes peacefully. A union can picket, and if that coercion succeeds in quickly obtaining the work the union will have achieved its objective in short order. If the affected Employer files an 8(b)(4)(D) charge with the Board, however, the union may then , as the Respondent did here purport to "disclaim" the work by announcing that it no longer seeks to have its members assigned to the job. It will merely seek to have them paid for the job . . . .Unions with any kind of contract claim to the work- and often in our 10(k) cases both competing unions have an arguable contractual claim to it- would be free to try picketing or other coercion first and use grievances and lawsuits as a fallback.

Id., at 1430. The Board then concluded that "under Board precedent that is justified by considerations of policy," the Respondent Union, despite the fact that it had disclaimed the work, "violated Section 8(b)(4)(D) by refusing to withdraw its lawsuit to enforce an arbitration award requiring [the Employer] to compensate workers represented by the Roofers for work performed by the laborers after the Board issued its 10(k) decision." Id.

Thus, a Union that is not awarded disputed work is JUST AS forbidden under 8(B)(4)(ii)(D) from "disclaiming" the work assignment and pursuing money damages in a breach of contract action as it is from suing to actually obtain the work. "[T]he pursuit of a .breach of contract suit [for pay-in-lieu] that directly conflicts with a section 10(k) determination has an illegal objective . . ."). EP Donnelly, *supra*, p, 2, fn 5 (*citing* Small v. v. Plasterers Local 200 , 611 F.3d 493 (9th Cir. 2010); United Slate, Tile & Composition Roofers Local 30 v. NLRB, 1 F.3d 1419, 1426 (3d Cir. 1993)).

B. The ALJ Erred by Holding That The IAM's Pay-in-Lieu Grievance Does Not Constitute Unlawful Economic Coercion.

Once the ALJ's erroneous reliance on the IAM's incomplete "disclaimer" is stripped away, the undisputed facts of this case fit squarely within the parameters of the established rule of law that "even if a union has an arguably meritorious contractual claim to the work in dispute, it violates the Act if it continues to pursue the contractual claim after the Board issues a 10(k) award allowing the work to be assigned to employees represented by a different union." Grazzini Brothers & Company, 315 NLRB 520, at 522-523 (1994). By the same token, "a union's failure to withdraw a pending grievance . . . after a 10(k) award has issued also violates the Act. Id., at 523, fn. 9.

Section 8(b)(4)(ii)(D) prevents a labor organization from using "any form of economic pressure to force or require an employer to assign particular work to one group of employees rather than another." Otis Elevator, *supra*, *citing* AGC of California v. NLRB, 514 F.2d 433, 438-439 (9th Cir. 1975). This unlawful economic coercion includes a Union's refusal to withdraw a grievance regarding the disputed work after an adverse 10(k) award has been issued. Otis Elevator, *supra.* at p. 274, fn. 7, *citing* Georgia Pacific II, 291 NLRB 89, at 94 (emphasis added), in which the Board held:

> Although the union was not found in violation of the Act for having filed in-lieu claims prior to the award, the cease-and-desist order required it to withdraw any claims in conflict with the award and to reimburse the companies against which the grievances had been filed for any claims paid following the issuance of the Board's 10(k) determination.

The filing or maintenance of conflicting monetary claims is unlawful since the Board's 10(k) award takes precedence over any conflicting arbitral award, and allowing the losing party to a 10(k) dispute to pursue payments for work that the Board awarded to employees other than those involved in the grievance necessarily subverts the Board's 10(k) award. See, e.g. Grazzini Bros., *supra*, at 523 [citations omitted]. Furthermore, it makes no difference whether the IAM seeks payment for work performed *before* the Board's 10(k) determination: The issue is not *when* the work was performed, but whether the claims for "pay-in-lieu" were pursued *after* an adverse

Board 10(k) determination covering the work subject to those claims has been made. Id. Therefore, once the 10(k) decision was issued by the Board awarding the disputed work to the ILWU, the IAM's failure and refusal to withdraw its pay-in-lieu grievance for work performed prior to the issuance of the decision constitutes unlawful economic coercion, in clear conflict with the Board's 10(k) award.

As a final attempt to buttress the dismissal of the Complaint, the ALJ erroneously concluded that SSA was not "restrained or coerced" by the IAM's unlawful refusal to withdraw its pay-in-lieu grievance because PMA "has agreed to indemnify SSA of any costs arising from its breach of contract." ALJD pg. 9, 10-11. As indicated above, section 8(b)(4)(ii)(D) of the Act makes it an unfair labor practice ("ULP") for a labor union "to threaten, coerce, or restrain any person engaged in commerce where in either case an object thereof is forcing or requiring any employer to assign particular work to employees in a particular labor organization or in a particular trade, craft, or class rather than to employees in another labor organization." (emphasis added).

The Judge's conclusion is fatally flawed because there is no distinction between SSA and PMA for purposes of the Board's section 8(b)(4)(ii)(D) charge. Although SSA is the "employer" of the affected employees, the Act's definition of the term "employer" also includes "any person acting as an agent of an employer, directly or indirectly." 29 U.S.C. §152(2); *see also* Laborers 190 (AMCAT), 306 NLRB 93, ("The purpose of Congress in enacting section 8(b)(4)(D) was to protect *any* employer against which a union acts unlawfully to force reassignment of work.") [Emphasis retained.] PMA serves in precisely such a capacity. PMA is the certified bargaining agent for SSA in its relationship with the ILWU and has been found by the Board to have the authority to bind SSA under the coast-wide labor agreement with the ILWU, even if SSA were opposed to such a decision or obligation. (*See, e.g.,* NLRB v. Hartman, 774 F.2d 1376 (9th Cir. 1985) [partially enforcing a Board order which had concluded that an employer committed a section 8(a)(5) ULP when it refused to comply with a collective bargaining agreement negotiated by its multiemployer representative, and observing that "[a]n employer who is a member of a

multi-employer bargaining association is bound by an agreement negotiated by the association."].)

Moreover, the Board has long recognized the crucial role PMA plays in maintaining peaceful labor relations between the ILWU and West Coast waterfront employers. A generation ago, in a discussion of its 1938 decision that recognized the ILWU as the bargaining representative for West Coast longshore workers, Shipowners Association of the Pacific Coast, 7 NLRB 1002, the Board stated that it:

> [W]as cognizant then, as it is now, that employers in the shipping industry on the Pacific Coast have a direct and vital interest in the terms and conditions of employment for longshoremen. The history of labor relations in that industry has been fraught with extraordinary problems, which have extended beyond the customary employer-employee relationship. All members of PMA have given that agency the authority to act as their agent and PMA, in turn, is clearly the agent of employers employing longshoremen. In this particular industry the community of interest of the participating employers is unmistakable.

ILWU (California Cartage Co.), 208 NLRB 994, 997 (1974), *aff'd,* 515 F.2d 1018 (D.C. Cir. 1975), *cert. denied*, 424 U.S. 942 (1976).

The ALJ's conclusion, which is completely unsupported by case law, that the IAM is free to bring unlawful economic pressure to bear against the PMA, while at the same time forbidden from pursuing the same monetary relief against SSA, is clearly at odds with decades of Board law regarding the precedence of 10(k) awards, and PMA's history of representing waterfront employers like SSA in their bargaining relationship with the ILWU. Thus, for reasons both statutory and practical, PMA is as much the unlawful direct object of IAM's "coercion" as SSA is, regardless of any private indemnification agreement or arrangement.

Indeed, the ALJ's unsupported conclusion runs counter to the accepted standard for determining that union conduct violates Section 8(b), which requires only a *tendency* to coerce or restrain. (See Steelworkers Local 1397, 240 NLRB 848 (1979) (observing that under section 8(b)(1) "[t]he test of misconduct is not what [a union official] may have subjectively intended by his comments, nor whether any employee was, in fact, coerced or intimidated by the remarks.

Rather, the test is whether the alleged offender engaged in conduct which tends to restrain or coerce employees in the rights guaranteed them in the Act."); see also Clear Pine Mouldings, 268 NLRB 1044 (1984) (holding that striking employee need only engage in picket-line misconduct that "reasonably tended to coerce" in order to lose right to reinstatement).

The Board's conclusions in cases such as Skinner, Grazzinni Bros., and Sea-Land Services, Inc. v. ILWU, Local 13, 939 F.2d 866 (9th Cir. 1991) that a union's failure to withdraw a pending grievance following a 10(k) determination constitutes coercion reveal that the Board's threshold for finding coercion post-10(k) is especially low. Neither actions of a particularly compelling or restraining nature nor actions tending to coerce are required. Any action inconsistent with the 10(k) award constitutes unlawful coercion.

C. The ALJ's Decision Inappropriately Undermines The Boards Assignment of the Work

As the Board observed in Grazzinni Bros., 315 NLRB at 523, "[t]he purpose of prohibiting pursuit of such [pay in lieu] claims after a 10(k) award is to prevent the undermining of the" the Boards assignment of the work. "Section 10(k) was included in the Act to provide a final resolution to the dispute over which group of employees are entitled to the work at issue." Id. Given the undisputed fact that the IAM still has not withdrawn its grievance over the very work assignment that the Board ordered last year (i.e. the assignment to the ILWU-represented employees) it is impossible to conclude that the Board's work assignment has not be undermined.

D. There is No Merit to the ALJ's Erroneous Conclusion that the Indemnification Agreement Somehow Alleviates the Unlawful Coercive Effects

An employer establishes "coercion" when it can show that a union has engaged in acts of a compelling or restraining nature; or, acts that have a mere tendency to coerce; or, acts that are simply inconsistent with the outcome of a Board 10(k) award. See, Clear Pine Mouldings, 268 NLRB 1044 (1984). SSA satisfies the "coercion" requirement under any of these three formulations. Even assuming that SSA could recover its arbitration-related losses without any

delay under the indemnification agreement between PMA and SSA, the practical impact of participating in the arbitration process (*e.g.*, the substantial period of time SSA's managers and employees would spend preparing for and attending the hearing, not to mention the impact of having an arbitration award issued against it) and having to be indemnified by its bargaining agent compels the conclusion that the IAM has engaged in 'economic pressure of a compelling or restraining nature' that the Act condemns. These acts are also, by definition, inconsistent with the Board's decision to award the disputed work to the ILWU. AGC of California, *supra*, at 438-439.

Indeed, if the IAM's theory was correct and the presence of an indemnification agreement between PMA and SSA precludes a finding of coercion, then the end result is not only that SSA is treated less favorably for having the foresight to protect itself against the financial risks associated with union jurisdictional disputes, but also that the IAM would be free to press its claims for damages with respect to work that the Board has determined was never rightfully within its jurisdiction. Such a result is clearly at odds with sections 10(k) and 8(b)(4)(ii)(D).

Finally, PMA's agreement to indemnify SSA for losses associated with the ILWU-IAM jurisdictional dispute is irrelevant as a matter of law. None of the Board's prior rulings suggests that an indemnification agreement would preclude a finding that a union has engaged in coercive conduct by continuing to pursue an arbitration remedy.

Alternatively, the existence of such an indemnification agreement should be considered by the Board in a subsequent compliance proceeding as evidence of mitigation of damages by SSA, rather than as evidence related to whether or not there is liability for an unfair labor practice.

IV. CONCLUSION

Pursuant to proceedings under Section 10(k) of the Act initiated by SSA, the NLRB has awarded the disputed work performed by employees of SSA to employees represented by the ILWU. The IAM's refusal to disclaim and withdraw any and all pending monetary claims against SSA as a result of the assignment of that work to employees represented by the ILWU

subverts the 10(k) award, and constitutes unlawful coercion under the Act.

The Charging Party respectfully requests that the Board reverse the ALJ's unfounded dismissal, and require the IAM to cease its unlawful coercive economic activity, require the withdrawal of all pending grievances related to the disputed work, and require the IAM to undertake all affirmative relief necessary to remedy its unfair labor practices alleged in this proceeding.

DATED: June 12, 2012

Respectfully submitted,

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UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

SSA MARINE through its related company SSA PACIFIC

and Cases: 19-CD-502/506

INTERNATIONAL ASSOCIATION OF MACHINISTS
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LOCAL LODGE 289, AFL-CIO

Proof of Service

I hereby certify that on June 12, 2012, I caused the original of the foregoing Petitioners' **CHARGING PARTY'S BRIEF IN SUPPORT OF EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION AND ORDER** to be filed with the National Labor Relations Board via e-filing to:

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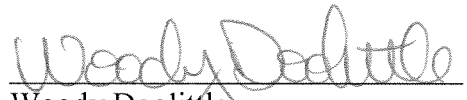
I declare under penalty of perjury under the laws of the State of California and the United States of America that the foregoing is true and correct.

Executed on June 12, 2012, at San Diego, California.



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