IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Realcomp II, Ltd.,	)	
Petitioner	)	
v.	)	**No. 09-4596**
Federal Trade Commission,	)	
Respondent.	)	

Petitioner's Motion for Partial Stay of Order Pending Appeal

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Petitioner Realcomp II, Ltd. ("Realcomp") under F.R.A.P. 18 moves for entry of an Order partially staying the terms of the Final Order of the Federal Trade Commission ("FTC") (Exhibit 1) *In the Matter of Realcomp II, Ltd., a corporation,* Docket No. 9320, entered on the 30th day of October, 2009, pending review of the Final Order by this Court, stating as follows:

1. The Final Order directs Realcomp to cease and desist from adopting or enforcing any policy, rule, practice or agreement that denies, restricts or interferes with the ability of Realcomp members (who are real estate agents and brokers) to enter into lawful real estate listing agreements, including so-called "Exclusive Agency" agreements, with sellers of property. Realcomp is required to modify its website operations, amend its rules and regulations, provide each member with a copy of the Order, communicate directly with each Member to inform them of the amendments to Realcomp's rules and regulations, and post the Order on its website, along with a statement directing any website user to the Order. Realcomp previously repealed its "Search Function Policy" as well as the definitional requirement that "Exclusive Right to Sell" listings be full-service brokerage agreements. Realcomp does not seek to stay the Order insofar as it would prohibit Realcomp from reversing those actions.

Deadlines for compliance by Realcomp with the Final Order are February 7, 2010, and April 8, 2010.

2. Under 16 C.F.R. § 3.56, Realcomp filed a Motion for Partial Stay of Order Pending Appeal to the FTC on December 8, 2009. The FTC denied the Motion by Order of January 7, 2010. On December 31, 2009, Realcomp filed a Petition for Review of the Final Order with this Court.

3. Realcomp is a membership organization of real estate agents and brokers in Southeastern Michigan. (For simplicity, we will generally refer to Realcomp's members as "brokers.") Realcomp's member brokers compete with one another to provide residential brokerage services to customers. Exhibit 2, Initial Decision, Finding of Fact 80. (Finding of Fact hereafter referred to as "F"). Most Realcomp members are full service brokers; however, Realcomp's membership is not limited to full service brokers, and brokers who offer limited services listing contracts may, and do, become Realcomp members. Exhibit 2, Initial Decision F164.

4. Realcomp's primary member service is its multiple-listing service (MLS). A MLS is an information exchange for residential property listings. Exhibit 2, Initial Decision F14. Its purpose is to bring together brokers representing buyers with brokers representing sellers. Exhibit 2, Initial Decision F103. The Realcomp MLS online system allows members access to the Realcomp MLS from any computer with internet access. Exhibit 2, Initial Decision F180. Individuals who are not Realcomp members, for example, individual home sellers,

cannot access the MLS – it is a member service. Exhibit 2, Initial Decision F106-F108, F289.

5. Most of Realcomp's members do business from time to time as both "listing brokers" (representing the seller of a property) and "cooperating brokers" (assisting prospective buyers of a property). Exhibit 2, Initial Decision F82.

6. Realcomp adopted three policies that became the subject of the FTC's complaint against Realcomp, one of which remains the focus of this proceeding. The policies concerned so-called "Exclusive Agency" listing agreements, under which the listing broker acts as an exclusive agent of the property owner in the sale of the property, but under which the property owner retains the right to sell the property without further assistance from (or compensation to) the listing broker. Exhibit 2, Initial Decision F58. Exclusive Agency listings are distinguished from "Exclusive Right to Sell" listings, under which the property owner appoints a real estate broker as his or her exclusive agent for a designated period of time, to sell the property on the owner's stated terms, and agrees to pay the broker a commission when the property is sold, whether by the listing broker, the owner or another broker. Exhibit 2, Initial Decision F51.

7. Cooperating brokers, who bring the home buyer to the transaction, typically are paid for their role in a transaction from the commission otherwise payable to the listing broker. Exhibit 2, Initial Decision F40. Consequently,

Exclusive Right to Sell listings present better compensation opportunities for cooperating brokers than Exclusive Agency listings, because in the latter case, the home seller has the option to sell without a broker and in such a case, would be the *de facto* competitor of any cooperating broker. See Exhibit 2, Initial Decision F608.

8. Realcomp provides listings from the MLS to certain approved public websites, which are Realtor.com (the website of the National Association of Realtors); Realcomp's own web site, called MoveInMichigan.com.; and its Internet Data Exchange ("IDX"), through which its members can put listings on their own websites. Exhibit 2, Initial Decision F119-120, F210-211.

9. In 2001 Realcomp adopted the "Website Policy" which stated that Realcomp would not disseminate Exclusive Agency listings to the approved public websites. Exhibit 2, Initial Decision F355. This did not affect the listings on Realcomp's MLS as at no time did Realcomp restrict Exclusive Agency listings from being listed on its MLS. Exhibit 2, Initial Decision F181, F433. Realcomp also adopted a "Search Function Policy" that removed Exclusive Agency listings from the default search mode on the Realcomp MLS, but not the MLS itself, and a related definitional requirement (the "Minimum Service Requirement") that a listing agreement had to provide certain minimum services in order to be treated as an Exclusive Right to Sell listing. Exhibit 2, Initial Decision F361, F374.

Neither of those are issues as Realcomp has eliminated the Search Function Policy and the Minimum Service Requirement. Exhibit 2, Initial Decision F370 and F375.

10. The FTC issued its Complaint against Realcomp on October 10, 2006, alleging that Realcomp violated Section 5 of the FTC Act. The Complaint specifically challenged the Website Policy, the Search Function Policy, and the Minimum Service Requirement.

11. The FTC's Chief Administrative Law Judge ("ALJ"), Stephen McGuire, held hearings over a period of eight days in June, 2007. He heard live testimony from eight witnesses and admitted into evidence deposition testimony excerpts from 28 witnesses, as well as over 800 exhibits. In an extensive opinion (the "Initial Decision") issued December 10, 2007, Judge McGuire found that none of the challenged Realcomp policies violated Section 5 of the FTC Act. The Complaint accordingly was dismissed. (Exhibit 2.)

12. The FTC's Complaint Counsel appealed the Initial Decision to the Commission. Argument was heard on appeal April 1, 2008. The FTC issued its Final Order and Opinion on October 30, 2009, reversing and vacating the Initial Decision of the ALJ as described above. Realcomp previously (in 2007) repealed the Search Function Policy and the Minimum Service Requirement. Accordingly, Realcomp does not object to, and does not seek to stay, the Final Order insofar as it applies to those discontinued policies.

13. In determining whether to grant a stay pending appeal, this Court considers the four factors that traditionally govern the granting of a preliminary injunction. See *Frisch's Restaurant, Inc., v. Shoney's, Inc.*, 759 F.2d 1261, 1263 (6th Cir. 1985); *In re DeLorean Motor Co.*, 755 F.2d 1223, 1228 (6th Cir. 1985). The factors are: (1) the likelihood that the party seeking the stay will prevail on the merits of the appeal; (2) the likelihood that the moving party will be irreparably harmed absent a stay; (3) the prospect that others will be harmed if the court grants the stay; and (4) the public interest in granting the stay. *Michigan Coalition of Radioactive Material Users, Inc. v. Griepentrog*, 945 F.2d 150, 153 (6th Cir. 1991).

These factors are not pre-requisites that must be met, but are interrelated considerations that must be balanced together. *Id.*, at 153. The four factors are not rigidly applied or weighed equally, and no one factor is determinative. *Hilton v. Braunskill*, 481 U.S. 770, 777 (1987); *CityFed Financial Corp. v. Office of Thrift Supervision*, 58 F.3d 738, 746 (D.C. Cir. 1995) (strength of one factor may outweigh "rather weak" arguments in other areas); see, also, *Washington Metropolitan Transit Comm'n v. Holiday Tours, Inc.*, 559 F.2d 841, 843-835 (D.C. Cir. 1977) (granting stay notwithstanding movant's inability to prevail on one factor).

14. Petitioner may demonstrate a likelihood of success on the merits by raising questions going to the merits that are so serious, substantial, difficult, and

doubtful as to make them a fair ground for litigation and thus for more deliberate investigation. *Six Clinics Holding Corporation, II v. Cafcomp Systems, Inc.*, 119 F.3d 393, 402 (6th Cir. 1997)

15. The Commission's Opinion (Exhibit 3) acknowledges that a multiple listing service such as Realcomp is an efficient form of joint venture. Exhibit 3, Opinion at p. 2. This case concerns rules governing how such a joint venture will operate. This case does not involve a naked restriction by members of an association as to how each of them will do business, nor a restriction on what members of a joint venture will do outside the venture.

Under the Sherman Act, rules governing the operation of a joint venture that do not restrict how the members do business outside the joint venture are analyzed under the Rule of Reason. *SCFC ILC, Inc. v. Visa USA*, Inc., 36 F.3d 958, 970 (10th Cir. 1994). In *United States v. Realty Multi-Lis*t, 629, F.2d 1351, 1367 (5th Cir. 1980), the court warned that "we must be cautious to determine whether conduct whose apparent purposes, standing alone, might warrant per se treatment are reasonably connected to an integration of productive activities or other efficiency-creating activity in such a manner as to require an inquiry into the net competitive effects under the rule of reason." An essential aspect of Rule of Reason analysis is proof "that within the relevant market, the defendants' actions have had substantial adverse effects on competition, such as increases in price, or

decreases in output or quality. ..." *United States v. Visa USA Inc*., 344 F.3d 229, 238 (2nd Cir. 2003).

Here, the Commission eschewed this standard, concluding instead that the Website Policy is, in reality, a price restraint and, as such, fell into the category of "inherently suspect" conduct not entitled to Rule of Reason analysis, but rather capable of condemnation under a "quick look" analysis. Exhibit 3, Opinion at pp. 15-16. The Commission relies on *Polygram Holding, Inc*., 136 FTC 310 (2003), *aff'd*, *PolyGram Holding, Inc. v. FTC*, 416 F.3d 329 (D.C. Cir. 2005). The Commission's approach is incorrect as a matter of law and presents a serious and substantial issue for appeal.

The Website Policy is not a price restraint. (The FTC's Complaint Counsel so conceded at trial. Tr. 1898-99, Exhibit 4.) It is a rule concerning whether the Realcomp MLS will actively promote Exclusive Agency listings on public websites in a manner that would promote non-member home sellers who are in direct competition with dues-paying member brokers. The Website Policy does not pertain to the prices charged by any broker, the advertising of prices, or any variable directly affecting price or the method by which price is determined. It does not present circumstances in which one can legitimately determine the Policy's effect "in the twinkling of an eye" as is required for a truncated analysis. *NCAA v. Bd. of Regents*, 468 U.S. 85, 109 n.39 (1984).

The Commission's attempt to push the Website Policy closer to the *per se* condemnation afforded price-fixing agreements contravenes well-understood principles of antitrust law. "*Per se* rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to render unjustified further examination of the challenged conduct." *NCAA v. Board of Regents*, 468 U.S. 85, 103-04 (1984). An inquiry into competitive effects must be "meet for the case, looking to the circumstances, details, and logic of a restraint. The object is to see whether the experience of the market has been so clear, or necessarily will be, that a confident conclusion about the principal tendency of a restriction will follow from a quick (or at least quicker) look, in place of a more sedulous one." *California Dental Association v. FTC*, 526 U.S. 756, 780-81 (1999).

Polygram concerned an express agreement between joint venture partners to refrain from discounting practices outside of the joint venture – a price restraint. Its framework may make sense for analyzing that type of agreement, but it provides no good analogy to the Realcomp Website Policy.

Numerous courts have found the Commission's "quick look" approach to be inappropriate under similar facts to those presented here. *See, e.g., Madison Square Garden, L.P. v. National Hockey League*, 270 F. App'x 56 (2nd Cir. 2008) ("quick look" analysis inappropriate to analyze the league's ban on team

independent websites, holding that "the likelihood of anticompetitive effects is not so obvious that 'an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets.'"); *Brookins v. International Motor Contest Assn.*, 219 F.3d 849, 854 (8th Cir. 2000) (auto racing body's rules, allegedly precluding use of the plaintiff's transmission, were "not the kind of 'naked restraint' on competition that justify foregoing the market analysis normally required in Section 1 rule-of-reason cases."); *Craftsman Limousine v. Ford Motor Co.*, 491 F.3d 380, 388-393 (8th Cir.), cert. denied, 128 S.Ct. 654 (2007) (rejecting the use of quick-look to analyze a prohibition on certain limousine builders advertising in trade publications).

This Court and other Circuits have rejected truncated Rule of Reason (or expanded *per se*) analysis in situations where the effects of the challenged conduct are unclear and where the courts have little or no experience in predicting such effects. *See, e.g.*, *Expert Masonry, Inc. v. Boone County*, 440 F.3d 336, 343-44 (6th Cir. 2006) ("only if a restraint clearly and unquestionably falls within one of the handful of categories that have been collectively deemed per se anticompetitive can a court be justified in failing to apply an appropriate economic analysis to make this determination"); *Worldwide Basketball & Sport Tours, Inc. v. NCAA*, 388 F.3d 955 (6th Cir. 2004) (an abbreviated or quick-look analysis is appropriate

only where "an observer with even a rudimentary understanding of economics could conclude that an arrangement in question would have an anticompetitive effect on customers and markets"); *Continental Airlines, Inc. v. United Airlines, Inc.*, 277 F.3d 499 (4th Cir. 2002) (rejecting quick look analysis of carry-on luggage size restrictions where lower court had not considered the unique architecture of the airport and failed to recognize plausible procompetitive justifications for restriction); *Law v. NCAA*, 134 F.3d 1010, 1018 (10th Cir. 1998) (analyzing NCAA rule limiting compensation of coaches under rule of reason); *Sullivan v. NFL*, 34 F.3d. 1091, 1102 (1st Cir. 1994) (certain restraints by joint ventures may render the joint activity more efficient). Even an authority relied upon by the Commission describes the truncated "inherently-suspect" analysis as a "murky and unclear" area of the law. *Detroit Auto Dealers Ass'n v. FTC*, 955 F.2d 457, 472 (6th Cir. 1992).

16. To the extent the Opinion purports to go beyond a quick look, the Commission was required to show "that within the relevant market, the defendants' actions have had substantial adverse effects on competition, such as increases in price, or decreases in output or quality. ..." *United States v. Visa USA Inc.*, 344 F.3d at 238. The evidence does not support any such conclusion, as Judge McGuire found. The conflicting interpretations of the record in the Opinion and

the Initial Decision evidence serious and substantial questions for review on appeal. Among the more significant of these issues include:

- The Opinion relies almost entirely on "indirect" evidence of anticompetitive effects, rather than "direct" evidence. Exhibit 3, Opinion at pp. 35-43; pp. 43-47. This is a critical deficiency in the Commission's analysis. The direct evidence heavily favors Petitioner. For example, the record contains extensive and essentially uncontroverted testimony by the brokers upon whose testimony the Commission otherwise relies that their businesses have prospered economically notwithstanding the purported effects of the Website Policy. All of the brokers who testified for Complaint Counsel admitted that their businesses are growing in the face of a difficult housing market. Exhibit 2, Initial Decision, F465-F468.

The ALJ specifically found that "despite Michigan's economic downturn, agents offering Exclusive Agency listings are thriving in southeast Michigan." Exhibit 2, Initial Decision, at p. 59. His conclusions were detailed and specific based on the evidence presented and an assessment of its credibility: "The totality of the evidence in this case, empirical and otherwise, establishes that Realcomp's Website Policy, despite its anticompetitive nature, has not resulted in measurably significant competitive effects." Exhibit 2, Initial Decision at pp. 121-122.

- The Opinion instead credits and relies heavily upon indirect evidence presented through the testimony of Complaint Counsel's economic expert, Dr. Darrell Williams. Exhibit 3, Opinion at pp. 44-47. The Opinion disregards extensive record evidence casting serious doubt on Dr. Williams' credibility and the validity of his conclusions. Exhibit 2, Initial Decision, F489, F493, F517-F518, F522-F530, F533-F536. Dr. Williams did not estimate *any* price or other effects directly attributable to the Website Policy. He did not investigate whether sellers of residential properties who used discount listings on the Realcomp MLS received higher or lower sale prices for their properties. Exhibit 2, Initial Decision, F571-F575. Dr. Williams did not analyze the effect of Realcomp's restrictions on the number of days that homes remain on the market before sale, or whether commission rates on full-service listings are higher when multiple listing services impose restrictions in the nature of the Website Policy. *Id.*

Dr. Williams ultimately repudiated one of his own exhibits, testified that he was inexpert in the statistical software used to produce the analyses to which he testified, and ultimately relied on a technical manual for the software that he had never seen prior to his testimony in an effort to rehabilitate himself. Exhibit 5, Tr. 1724-28, 1741-42, 1756-60. Dr. William's testimony did not meet the legal standards for reliability, *e.g.*, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999*)*;

Daubert v. Merrell Dow Pharmaceuticals, Inc., 509 U.S. 579, 589 (1993), and the Commission's reliance on that testimony is entitled to no deference upon appeal.

- The Administrative Law Judge concluded that this evidence did not provide credible support for the Complaint; in particular pointing out Dr. Williams' flawed analysis. Exhibit 2, Initial Decision at pp. 118-119.

- Realcomp presented credible arguments that the Website Policy addresses a free-riding problem and a bidding disadvantage for Realcomp members acting as cooperating brokers. Exhibit 2, Initial Decision at F629. The Initial Decision concluded that Realcomp's explanations of the Website Policy were credible and not pretextual. Exhibit 2, Initial Decision at pp. 126-127.

The Commission's rejection of these arguments is based on a fundamental mischaracterization of the economics of the MLS. Realcomp was not created to help property owners who wish to procure their own buyers. As Judge McGuire correctly observed, home sellers who sign Exclusive Agency listing agreements (by definition) do not pay a cooperating broker commission if they find their own buyer – and therefore have an economic incentive to act as their own cooperating broker. Exhibit 2, Initial Decision at p. 121. This group of home sellers competes directly with Realcomp members on the cooperating broker side of the sale equation, and (but for the Website Policy) would receive the benefits derived from Realcomp's advertising of properties on the Approved Websites, but make no

payment to Realcomp for the services received. Exhibit 2, Initial Decision at p. 121.

Contrary to the Commission's view, Exhibit 3, Opinion at pp. 29-32, it is irrelevant whether or not the Exclusive Agency listing broker pays dues to Realcomp. When an Exclusive Agency home seller receives the benefit of Realcomp's promotional services to find his or her own buyer in competition with cooperating brokers, the seller receives a benefit that is paid for in part by competing cooperating brokers. That is a free-riding benefit regardless of whether any listing brokers also paid for part of that benefit. The Commission's conclusion is wrong as a matter of economics and as a matter of fact.

The Administrative Law Judge, having heard the evidence, found the economic evidence to be credible, explaining that the Website Policy was narrowly crafted with a precompetitive justification of addressing the free riding problem and reasonably necessary to the competitive needs of Realcomp. Exhibit 2, Initial Decision at p. 126.

17. Where the Commission overturns the findings of fact and conclusions of law of a hearing examiner, this conflict is to be considered by a reviewing court. *American Cyanamid Co. v. FTC*, 363 F.2d 757, 772 (6th Cir. 1966). A difference of opinion between the ALJ and the Commission on the same facts illustrates both the complexity and the difficulty of a case. *Detroit Auto Dealers Ass'n v. FTC,*

955 F.2d 457, 466 (6th Cir. 1992). The findings of the Commission will be scrutinized more closely when the Commission has overruled, and substituted its findings for those of its ALJ. *Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005), cert. denied, 548 U.S. 919 (2006). This is particularly so when the Commission has substituted its assessments of witness credibility for those of the ALJ, as the Commission effectively has done here. *Id.* at 1069-71; *Universal Camera v. N.L.R.B.*, 340 U.S. 474, 487-88, 496 (1951).

18. For purposes of ascertaining the harm that would result in the absence of a stay, the Court must presume that the Commission's decision was incorrect. *Packwood v. Senate Select Committee on Ethics*, 510 U.S. 1319, 1319 (1994).

19. A party demonstrates irreparable injury where an order would cause marketplace confusion and loss of goodwill, and where costly steps would have to be taken to restore prior market conditions if the order is reversed on appeal. *California Dental*, 1996 FTC LEXIS 277 at *7. A party may suffer irreparable harm through a loss of reputation and business opportunities. *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992). These conditions will exist for Realcomp's members in the absence of a stay. Realcomp's resources will be used to advertise properties from which Realcomp members will derive no opportunity to compete for sales or commissions. The Realcomp membership will be subsidizing home sellers who compete with them. Lost sales opportunities cannot

be warehoused and put back in inventory at a later date, and the injury to Realcomp's members is incapable of objective determination. *See Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 19-20 (1st Cir. 1996) (vendor selling items primarily on wedding registries would be irreparably damaged from "lost sales of other registry items, alienation of future registrants, and harm to its reputation").

20. The value and goodwill of the Realcomp MLS will be impaired through the inevitable confusion resulting from changing the MLS operating rules twice if the Order is not stayed but Realcomp prevails on appeal. Realcomp also will incur programming and system testing costs to comply with the Order, as well as notification costs, and will incur them twice as well. Individual members of Realcomp will be separately affected because, in order to preserve the marketing objectives of the Website Policy, they will need to modify their individual brokerage websites to filter exclusive agency listings (which they can lawfully do), and they will be put to this expense twice as well if the Order is not stayed. There is, of course, no compensation for any of these costs to respondents who prevail in governmental enforcement actions. *Finer Foods, Inc. v. U.S. Dept. of Agriculture*, 274 F.3d 1137, 1140 (7th Cir. 2001).

Karen Kage, the Executive Director of Realcomp, attested to the existence of the losses if the Final Order is not stayed. Ms. Kage observes that, in particular,

smaller brokers will not have the means or opportunity to avoid being placed at a significant competitive disadvantage in what is already a particularly challenging and vulnerable economic time for realtors in southeastern Michigan. Exhibit 6, Affidavit of Karen Kage.

21. At root, the Commission's Order holds that the challenged Website Policy has impaired the ability of certain discount or limited service brokers to compete against traditional full-service brokers. Yet, the record contains extensive and essentially uncontroverted testimony by the brokers who testified for the Commission that they have prospered economically notwithstanding the putative hindrance upon their ability to market their listings. Likewise, as noted, no broker credibly testified that the challenged policies prevented them from competing or prevented entry into the market.

Because the Commission asserts that harm to consumers flows directly from the effects of the Realcomp Website Policy on the activities of discount brokers, the testimony of those brokers demonstrates that neither private parties nor the public interest will be harmed if a stay is granted. Whatever effects the Commission believes in theory might flow from the Website Policy, the evidence in the case indicates that the risks of actual harm during the pendency of appeal are speculative and in all probability non-existent.

22. The length of time elapsed in the decision of this matter would contradict any argument that an immediate cessation of the challenged Website Policy is necessary to avert public or private harm. The Commission's Order is dated 1,076 days after the Complaint filed against Realcomp, and 597 days after appeal of Judge McGuire's Initial Decision was heard by the Commission. The Website Policy remained in force throughout this period (as noted, the Search Function Policy, which is not at issue in this Motion, was repealed in 2007) and the Commission did not at any point seek to enjoin its continued enforcement during the pendency of proceedings. The extraordinary delay in rendering a decision in this matter belies any argument that the public interest cannot tolerate further delay for a well-grounded appeal, particularly in light of Petitioner's strong likelihood of prevailing on appeal.

WHEREFORE, Petitioner, Realcomp II, Ltd., requests that this Court stay the Final Order of the FTC dated October 10, 2009, other than paragraph 5 of Part II thereof, during the pendency of the appeal filed in this Court.

Respectfully submitted,

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Dated: January 28, 2010

Certificate of Service

I certify that on January 28, 2010, the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by placing a true and correct copy in the United States mail, postage prepaid, to their address of record.

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