IN THE SUPREME COURT OF OHIO

ERIC MATHER, et al.	:	Case No. 2016-1812
Appellees	:	
	:	On Appeal from the Hamilton County Court
	:	of Appeals, First Appellate District
v.	:	
	:	Court of Appeals Case Nos. C-1600638
	:	C-1600639
	:	C-1600662
	:	C-1600663
MARK MATHER, et al.	:	
	:	
Appellants	:	

APPELLEE ERIC MATHER'S MEMORANDUM IN RESPONSE TO APPELLANTS' MEMORANDUM IN SUPPORT OF JURISDICTION

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This Case Does Not Involve A Substantial Constitutional Question Or A Matter Of Public Or Great General Interest

A. Introduction.

After Appellant Mark Mather allowed his former lawyer, Steve Robison, to produce thousands of pages of privileged communications to Appellee Eric Mather in response to a subpoena in June and July, 2015 – and *after* Mark himself subsequently produced some of the same privileged documents to the parties on November 6, 2015, the trial court declared that the attorney-client privilege had been waived.[1] The trial court announced his decision from the bench on November 13, 2015. With respect to Mark, the trial court characterized this November 6, 2015 voluntary production as "icing on the cake:"

> But the fact of the matter remains is that for the - this is just icing on the cake of kind of where we were headed anyway, and I might as well just make the decision now. With regard to Robison, the attorney-client has been waived. There just isn't any question about it.

Based upon that oral decision, for the next seven months, Eric and the other parties liberally used the privileged documents in depositions, dispositive motions, and other filings. And during those seven months of extensive use, Mark never objected. He did not seek an immediate appeal. To the contrary, he even declared (in a December 1, 2015 lay witness disclosure) that Robison *would be testifying* concerning the areas where the trial judge had found a waiver:

> Mr. Robison is an attorney who has knowledge of relevant facts. By identifying him as a potential lay witness, Defendants did not intend to waive the attorney-client privilege *beyond the extent of the previous waiver found by the Court.* (Emphasis added).

[1] In this family business dispute, because most of the parties share the same surname, the parties will be referred to by their first names. Furthermore, the Appellants, Mark and his so-called "businesses," in which he claims an interest, will be referred to in the singular as "Mark."

On June 20, 2016, the trial court journalized its November oral decision in the underlying cases ("the June 20 Decisions.") But even with the attorney-client privilege in tatters around him, Mark did not immediately appeal. Instead, ten days later, on June 30, he allowed Eric and his sisters, Barb and Christine, to depose Robison for an entire day about his prior representation of Mark. During that deposition, they referred extensively to the privileged documents that Robison had produced (without any objection from Mark) the year before.

Mark only appealed the June 20 Decisions *after* he heard Robison's testimony. Robison testified that Mark surreptitiously transferred his siblings' money into what has been ominously called as *"the goo"* – an accounting hole that Mark and another Mather brother created to fund other businesses, avoid taxes, and hide assets. Such testimony led to Mark's change of heart about the privilege he had once so casually and intentionally waived through the Robison subpoenas, his November 6 document dump, and the disclosure of Robison as a witness on privileged matters.

The First Appellate District dismissed Mark's appeal of the June 20 Decisions for lack of a final, appealable order. Mark now characterizes that decision as a departure from RC 2505.02(B)(4) and Ohio authority. He urges this Court to exercise jurisdiction because (1) this action involves a matter of public or general interest; and (2) it raises substantial (but unidentified) constitutional questions.

Under R.C. 2505.02(B)(4), appellate courts generally have jurisdiction over interlocutory appeals of orders compelling the production of privileged material *before* that material is disclosed to an adverse party. Ohio courts allow interlocutory appeals in those limited circumstances because once the privileged materials are disclosed, the proverbial bell "cannot be unrung." *Burnham v. Cleveland Clinic* (Ohio 2016), 2016 WL 7115886, 2016-Ohio-8000, ¶¶24-

25 (observing that without an immediate interlocutory appeal before the disclosure of privileged or protected information, there is no way to "adequately undo the extrajudicial harm done to those interests by disclosure"); *Summit Park Apts., LLC v. Great Lakes Reins.* (Ohio App. 10 Dist. 2016), 49 N.E.3d 363, 2016-Ohio-1514, ¶11 (observing that an order requiring the production of privileged information is immediately appealable because "disclosure cannot be retroactively prevented or retracted"); *Branche v. Motorists Mut. Ins. Co.* (Ohio App. 11 Dist. 2016), 2016 WL 3067810, 2016-Ohio-3238, ¶5 (recognizing that interlocutory appeal of order *compelling* production of privileged documents is "narrow exception" to rule that discovery orders are not final or appealable).

This case is different. Unlike the decisions above, where the courts allowed an immediate interlocutory appeal to protect against the irreparable damage of disclosure, that disclosure has already occurred in this case. Because of Mark – who did not utter a word as he watched Robison empty his files to Eric, the parties already have the Robison documents. And they have used them for months. *Without Mark's objection.* In short, the First Appellate District was correct because there is no immediate danger to protect against.

This case is unworthy of discretionary review. These circumstances are so rare – that they are unlikely to ever be replicated. The public interest would be better served through cases that have broader implications. Furthermore, the best lesson from this case is something Ohio litigants already know: *Only timely objections can protect the privilege.* Civ. R. 26(B)(1); *Surovec v. LaCoutuere* (Ohio App. 2 Dist. 1992), 82 Ohio App.3d 416, 421, 617 N.E.2d 501.

B. This Case Does Not Present A Question Of Public Or General Interest.

Mark first asks the Court to review this issue as a question of "public or great general interest." Under that high standard, Mark must show that this case presents "principles the

settlement of which is of importance to the public as distinguished from the parties." *Williams v. Rubich* (Ohio 1960), 171 Ohio St.253, 253-54, 168 N.E.2d 876.

1. This Court Just Decided *Burnham*.

He cannot meet that burden. First, this Court just decided *Burnham v. Cleveland Clinic* on December 7, 2016. (Ohio 2016), 2016 WL 7115886, 2016-Ohio-8000. There, the Court held that an order requiring the production of information protected by the attorney-client privilege is a final, appealable order. *Id*., ¶2. The crucial distinction between this case and *Burnham* is that here, Eric already possess (and uses) the privileged documents. Mark overlooks that difference. In asking the Court to apply *Burnham*, he does not explain how this Court's return to that case – just weeks after its release – would benefit the public interest.

Furthermore, even if this case was exactly like *Burnham* (which it is not) – and even if the First Appellate District erroneously dismissed Mark's appeal (which it did not), those circumstances would not merit jurisdiction. Ohio courts now have *Burnham's* guidance. Under such circumstances, mere error by an appellate court would only affect these litigants.

2. This Case Is A Factual Outlier.

Second, this case is so factually unique that its circumstances are unlikely ever to be replicated. As a result, if it accepted jurisdiction, this Court would be deciding a very narrow issue of interest only to Mark – and not to Ohioans generally. Future litigants would not benefit because they would never find themselves in the same unlikely circumstances.

Eric subpoenaed Robison in late May, 2015. Eric also served Mark with these document subpoenas when he sent them to Robison. But Mark never objected to them as privileged.

Instead, after service of the subpoenas, Mark watched as Robison produced approximately 4,000 pages of privileged documents in three waves over almost six weeks. As

Eric received these documents from Robison, he sent them to Mark. But even Mark's contemporaneous receipt of disc upon disc of Robison documents did not trigger an objection or a motion for a protective order.

During the fourth week of Robison's production, Eric stated in a motion to compel that Mark had waived the privilege. Eric even quoted from the Robison material in that motion. But not even those (privileged) excerpts – in a public document – caused Mark to act. Even though the attorney-client privilege must be "jealously guarded," Mark did nothing. *Silverstein v. Fed. Bur. of Prisons* (D. Col. 2009), 2009 WL 4949959, *8 ("The confidentiality of communications covered by the privilege 'must be jealously guarded by the holder of the privilege.'")

Almost six weeks after Eric served the Robison subpoenas, Eric's counsel told Mark's counsel that he was still "sorting through the documents provided by Mr. Robison." But just as before, Mark did not claim privilege in response.[2]

Instead, Mark finally raised the issue in a memorandum filed in mid-July, 2015 – forty-seven days after the Robison subpoenas (and 4,000 pages of Robison documents later.) By then, Eric had reviewed Robison's file and produced it to his sisters and the other litigants. But even in Mark's memorandum, the attorney-client broken privilege was not a priority. Mark waited until the very last sentence to ask the trial court (1) to seal Eric's motion to compel – since it had Robison emails attached to it; and (2) to order Eric to return the attached Robison emails. Mark's memorandum did not request the return of the thousands of pages of other (unattached) Robison documents that had been produced over six weeks without objection.

The trial court subsequently conducted a hearing on Mark's waiver. But before the court could issue a decision, on November 6, 2015, Mark unexpectedly produced thousands of pages

[2] At the time, Mark was represented by different counsel. The trial court just granted Mark's current counsel leave to withdraw in these underlying cases.

of additional documents to his siblings and even to his (non-party) mother. His voluntary disclosure included multiple Robison emails that were the subject of the trial court's hearing.

After this voluntary disclosure, the trial court decided (from the bench on November 13, 2015) that the attorney-client privilege with Robison had been waived. Guided by this oral decision, for the next seven months, the parties liberally used the Robison documents in depositions, dispositive motions, and other filings. During those seven months, Mark did not object to the use of these documents on privilege grounds. He did not seek an immediate appeal to halt that use.

Eric, Barb, and Christine even deposed Robison about his prior representation of Mark on June 30, 2016 – ten days after the entry of the June 20 Decisions. But as before, Mark did not object. Mark's appeal came only after he heard Robison's testimony.

Mark's appeal is doomed by the unique factual morass that he created. For this case to meet the jurisdictional threshold, there must be some probability that some future Ohio litigant will find itself in similar circumstances. Otherwise, this issue is only of interest to Mark.

But just to recite the facts is to acknowledge that they will *never* be repeated. How many future litigants will ignore subpoenas that threaten the disclosure of allegedly privileged information; fail to object or to seek a protective order in response to that threatened production; do nothing (but watch) as they receive the allegedly privileged information from the adverse party; and voluntarily produce privileged information to parties and non-parties alike? Then, after the trial court declares the privilege waived, how many future litigants will allow the adverse parties to use the privileged information extensively for months in the litigation – before finally deciding to appeal? Because this case is so fact-specific, this Court's review would only be of interest to Mark. This case is an oddity – a factual outlier unworthy of review.

3. Ohio Jurisprudence Will Survive The Entry.

Third, Mark claims that if the First Appellate District's entry "remains a part of Ohio jurisprudence," Ohio litigants will be left without appellate recourse. This argument is an overstatement – as shown by even the most cursory review of the entry. (That entry is so short that only cursory reviews are possible.) While the intermediate court correctly dismissed Mark's interlocutory appeal, even if it had not, the sparse, four-sentence entry poses no danger. The appellate court did not provide any rationale for its decision. If the same issue ever arose again, the generic entry would be useless to future litigants and judges.

4. Inadvertent Disclosure Has Nothing To Do With This Case.

Faced with difficult facts, Mark frames his waiver(s) as "inadvertent disclosure." He sprinkles that phrase around to pique the Court's interest. Otherwise, he is left only with a case where multiple, inexplicable waivers occurred.

Inadvertent disclosure has nothing to do with the decisions of the trial court or the First Appellate District. Although early in the case, in December, 2014, Mark produced Robison documents to Eric in Mark's initial responses to discovery, that production was unrelated to the many, independent waivers that followed over the next 18 months. Inadvertent disclosure is a non-issue. The trial court did not even mention it in the June 20 Decisions.

C. There Is No Constitutional Question.

Mark also argues that this case involves a substantial constitutional question. But he has not met his burden under S.Ct.Prac.R. 7.02(C)(2) – which requires him to provide "a *thorough explanation*" of his argument. Merely citing to a section of the Ohio Constitution (without argument) is not a thorough explanation. But even if Mark had devoted pages to this issue, the Court would still have to decline jurisdiction. Because Mark did not raise any constitutional

issues below, he cannot raise them for the first time here. *Zimmerman v. Morris Plan Bank* (Ohio 1925), 113 Ohio St. 703, 150 N.E. 920.

Statement Of Pertinent Facts

A. The Underlying Cases.

This action arises from a family business dispute among six Mather siblings: Eric, Barb, Christine, Gretchen Heltman, Mark, and Pete Mather. This dispute spawned four Hamilton County cases. Of these four cases, the trial court formally consolidated three (referred to in the singular as "the 2014 Case"). With respect to the fourth case ("the 2013 Case"), the trial court treated it as consolidated with the 2014 Case for pretrial proceedings.

The allegations of the underlying cases are immaterial at this point. Generally, the 2013 Case involves Mark and Pete's breach of an agreement to redeem Eric's interest in an entity owned by the three brothers. The 2014 Case arises from Mark and Pete's hijack of the family inheritance (in the form of valuable Butler County real estate) through fraud – and their attempts to enrich themselves at their siblings' expense.

B. Without Objection, Eric, Barb, And Christine Secured The Robison Communications And Have Used Them Extensively In This Litigation.

After Mark identified Robison as a fact witness, Eric served Robison with document subpoenas on May 29, 2016. In the absence of an objection from Mark, Robison produced his files to Eric in three installments – beginning on June 12; continuing on July 1; and ending on July 6, 2015. Eric forwarded these documents to Mark as he received them. But not even Mark's receipt of 4,000 pages of privileged Robison documents triggered a response from Mark.

Eric cited Mark's waiver of the Robison privilege in a June 26, 2015 motion to compel in the 2013 Case. That motion even quoted from the privileged material. Similarly, in an early July, 2015 email, Eric's counsel told defense counsel that he was still in the process of "sorting

through the documents provided by Mr. Robison." These references did not trigger an objection from Mark.

Mark finally raised the issue in a July 15, 2015 memorandum in the 2013 Case. But his objection was half-hearted. Instead of requesting the return of *all* of the Robison documents, Mark only asked the trial court (1) to seal Eric's June 26, 2015 motion to compel – since Robison emails were attached to it; and (2) to order Eric to return the attached Robison emails.

The trial court subsequently conducted a hearing on whether the Robison privilege had been waived. But on November 6, 2015, before the court issued its decision, Mark suddenly produced thousands of pages of documents (including Robison emails) to the parties and even to his (non-party) mother.

On November 13, 2015, the trial court decided from the bench that the privilege had been waived. He characterized Mark's November 6 voluntary production as "icing on the cake."

Following this oral decision, for the next seven months, the parties liberally used the Robison emails in the litigation. Mark even disclosed Robison as a lay witness. In that December 1, 2015 disclosure, he indicated that Robison *would be testifying* concerning the subject matter where the trial court had found a waiver.

On June 20, 2016, the Court entered the June 20 Decisions. But even then, Mark did not attempt to protect the privilege or seek an appeal. Instead, on June 30, 2016, ten days *after* the June 20 Decisions, Eric, Barb, and Christine deposed Robison. His entire prior representation of Mark and Pete was the subject of an all-day examination. And as with the prior depositions, the Appellees referenced a number of allegedly privileged emails. Mark did not object to any of the questioning or exhibits on privilege grounds. He only appealed the trial court's decisions after he heard Robison's testimony.

Argument

Proposition of Law No. 1 (As Stated By Appellants):
An Order Declaring That The Attorney-Client Privilege Has Been Waived And/Or That Privileged Documents Were Not Inadvertently Produced, And That Such Documents And The Information Contained Therein Therefore Can Continue To Be Used During Discovery And At Trial By Opposing Parties, Is A Final Order Under R.C. 2505.02(B)(4), Thereby Conferring Jurisdiction Over The Issue To The Court Of Appeals Under Article IV, Section 3(B)(2) Of The Ohio Constitution.

A. Unlikely Facts Beget Convoluted And Unnecessary Propositions Of Law.

Mark's proposition of law is confusing – probably because it is the product of unlikely facts. No new rule is needed. If parties object to the production of privileged information *before disclosure*, they will not find themselves in Mark's position. If those objections are overruled, they can pursue an immediate interlocutory appeal before production. *Burnham*, ¶¶24-25.

B. The Bell Cannot Be Unrung.

The First Appellate District was correct. The June 20 Decisions are not final, appealable orders. Ohio courts allow appeals from orders *compelling* the production of privileged documents – because once those documents are produced, "the proverbial bell cannot be unrung." *Summit Park Apts., LLC*, ¶11. But this case is entirely different. Here, there was no order to compel; and the parties have extensively used the Robison documents in the litigation for seven months. Since the danger of immediate disclosure did not exist, there was no basis for an interlocutory appeal to protect against disclosure. "The proverbial bell" was rung long before Mark's after-the-fact appeal. *Id.* (observing that an order requiring the production of privileged information is immediately appealable because "disclosure cannot be retroactively prevented or retracted"); *Burnham*, ¶¶24-25; *Williamson v. Recovery Ltd. P'ship* (Ohio App. 10 Dist. 2016, 2016 WL 1092354, 2016-Ohio-1087, ¶8 ("Because the proverbial bell cannot be unrung *after* the privileged information has been released, orders requiring the production of privileged material

are final and appealable.")(dismissing appeal where underlying order did not require "*immediate* production.")(emphasis added.)

C. A Discovery Order *Compelling* Production Can Be Appealed Only In Limited Circumstances.

1. RC 2505.02(B)(4) Must Be Satisfied.

R.C. 2505.02(B)(4) provides for the special interlocutory appeals of discovery orders compelling production. Under that statute, to be final and appealable, a discovery order must first be a "provisional remedy." If it is, a court must next assess RC 2505.02(B)(4)'s two additional factors. They state that an order granting or denying a 'provisional remedy' is final and appealable (1) "*only* if it has the effect of "determin[ing] the action with respect to the provisional remedy and prevent[ing] a judgment in the action in favor of the appealing party with respect to the provisional remedy" *and* (2) "[t]he appealing party would not be afforded a meaningful or effective remedy by an appeal following final judgment as to all proceedings, issues, claims, and parties in the action." R.C. 2505.02(B)(4). *Id.* (emphasis in original).

2. The June 20 Decisions Are Not "Provisional Remedies."

First, Mark must demonstrate that the June 20 Decisions are "provisional remedies." RC 2505.02(B)(4). RC 2505.02(A)(3) defines that term. It states that a "provisional remedy" is a "proceeding ancillary to an action, including, but not limited to, a proceeding for a preliminary injunction, attachment, [or] *discovery of privileged matter…."* In *Colombo v. Mismas Law Firm, LLC,* the court observed that this definition of "provisional remedy" is "extremely narrow[ ] …." (Ohio App. 11 Dist. 2015), 2015 WL 100216, 2015-Ohio-812, ¶22.

By that definition, the June 20 Decisions are not provisional remedies. They do not order the "*discovery* of privileged matter." Nor do they "*compel[]* the disclosure of confidential or privileged" information. *Heinrichs v. 356 Registry, Inc.* (Ohio App. 10 Dist. 2013), 2013 WL

5407044, 2013-Ohio-4161, ¶13. To the contrary, they do not order the discovery of anything. Instead, the June 20 Decisions simply declare that the attorney-client privilege with respect to the *already-produced* Robison documents had been waived.

3. The June 20 Decisions Do Not Determine The Action Or Deny Mark Effective Relief.

Even if the June 20 Decisions were provisional remedies under RC 2505.02(A)(3), Mark cannot meet RC 2505.02(B)(4)'s other two requirements. He cannot show (1) that the June 20 Decisions "determine [the] action" with respect to the provisional remedy; and (2) that Mark could not secure meaningful or effective relief on the issue following final judgment.

In assessing these factors, Oho courts focus on whether disclosure has occurred. *(Has the bell already been rung?)* In concentrating on disclosure, courts understand that once privileged information is produced, the rationale for a special interlocutory appeal – the irreversible harm that accompanies production – is lost. *Summit Park Apts., LLC*, ¶11.

Thus, Ohio courts have determined that a party compelled to immediately produce privileged information must have an avenue for interlocutory review. This case is obviously different. The June 20 Decisions do not order discovery of any privileged documents. In fact, since Eric and his sisters already possessed the documents at issue since last November, there was nothing for the trial court to compel. Furthermore, not only do Eric, Barb, and Christine possess the allegedly privileged information, they have been using it in the litigation since November, 2015 – when the trial court ruled from the bench. Thus, the post-production inability to "unring the bell" – which has led courts to allow interlocutory appeals – is not a concern here.

In addition, Mark cannot ignore that on November 6, 2015, prior to the November 13 decision from the bench, he produced privileged information to his siblings, and even to his mother. To continue with the metaphors common to any discussion of RC 2505.02(B)(4), with

that act, Elvis truly left the building. Mark cannot rely on RC 2505.02(B)(4) as the basis for this appeal given his extensive and voluntary production.

D. Mark's Authority Supports Eric.

Mark relies primarily on four cases for his argument: *Byrd v. U.S. Xpress, Inc.* (Ohio App. 1 Dist. 2014), 2014-Ohio-5733 *Shaffer v. OhioHealth Corporation* (Ohio App. 10 Dist. 2004), 2004 WL 35725, 2004-Ohio-63; *Tucker v. Compudyne Corporation* (Ohio App. 8 Dist. 2014), 18 N.E.3d 836, 2014-Ohio-3818; and *Air-Ride, Inc. v. DHL Express* (Ohio App. 12 Dist. 2008), 2008 WL 4766832, 2008-Ohio-5669. But as set forth below, this authority supports Eric.

1. *Byrd*.

Mark cites *Byrd* throughout his memorandum. He even acknowledges that in *Byrd*, the court determined that it had jurisdiction over an interlocutory order because without an appeal, "confidential documents will be produced and shared" and "will result in the disclosure of information that colorably constitutes trade secrets." *Byrd*, ¶¶13-16. This is exactly Eric's point. *Byrd is standard "bell cannot be unrung" case.* It only supports Eric's argument – that RC 2505.02(B)(4) permits a special interlocutory appeal when the trial court's discovery orders will result in the irreversible disclosure of confidential or privileged documents.

2. *Shaffer*.

Mark cites *Shaffer* on page 10. But tellingly, he does not explain its purported significance. In that case, the plaintiff's complaint referred "in very general terms" to legal opinions. *Id.*, ¶3. Privileged materials were *not* disclosed to third parties. The defendant moved to strike the broad paragraphs from the complaint. He also requested a protective order "against discovery" and disclosure of any privileged materials. *Id.*, ¶3. When the trial court denied these motions, the defendant promptly appealed in order to protect privileged information from *future*

discovery and disclosure. Thus, *Shaffer* supports Eric. Just as in *Byrd*, the *Shaffer* court only had jurisdiction over the interlocutory order allowing further discovery of privileged information because the defendant was attempting to halt "irreparable disclosure."

3. *Air-Ride*.

Mark also cites *Air-Ride, Inc*. But that court never determined whether it had jurisdiction under RC 2505.02(B)(4). This Court has stated that an appellant must affirmatively demonstrate each of the three RC 2505.02(B)(4) requirements, but there is no indication that was ever done in *Air-Ride*. *Smith*, 2015-Ohio-1480, ¶8.

Furthermore, *Air-Ride* involved the inadvertent disclosure of just one two-page email — and whether that one document should be returned. In contrast, the instant case involves thousands of pages of Robison documents that were produced pursuant to subpoena and used in this litigation without objection. As previously explained, this is not inadvertent disclosure.

4. *Tucker*.

Tucker also supports Eric. That court never assessed whether it had jurisdiction under RC 2505.02(B)(4). As with *Air-Ride, Tucker* provides no guidance on that dispositive issue. Second, in *Tucker*, the trial court denied the defendant's request for a protective order (with respect to a single 17-page document) after conducting an *in camera* inspection. Thus, *Tucker* is exactly like *Byrd* and the other cases. RC 2505.02(B)(4) jurisdiction was clearer because – without an appeal – the defendant faced the immediate public disclosure of the document.

E. Any Appeal Is Moot.

Finally, Mark's actions (and inactions) since the trial court's November 13, 2015 oral decision moot the appeal. Even if the First Appellate District had jurisdiction *and* somehow decided that Mark did not waive the privilege *before* the decision from the bench, no court can

ignore what followed. Since November, 2015, Mark permitted his siblings to use the Robison communications in this litigation for seven months. If there was no waiver prior to the trial court's decision, there certainly was one in the months that followed.

Conclusion

For the foregoing reasons, the Appellee, Eric Mather, respectively requests that the Court decline jurisdiction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy of the foregoing has been sent via email and regular US Mail this 6th day of January, 2017, to the following:

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