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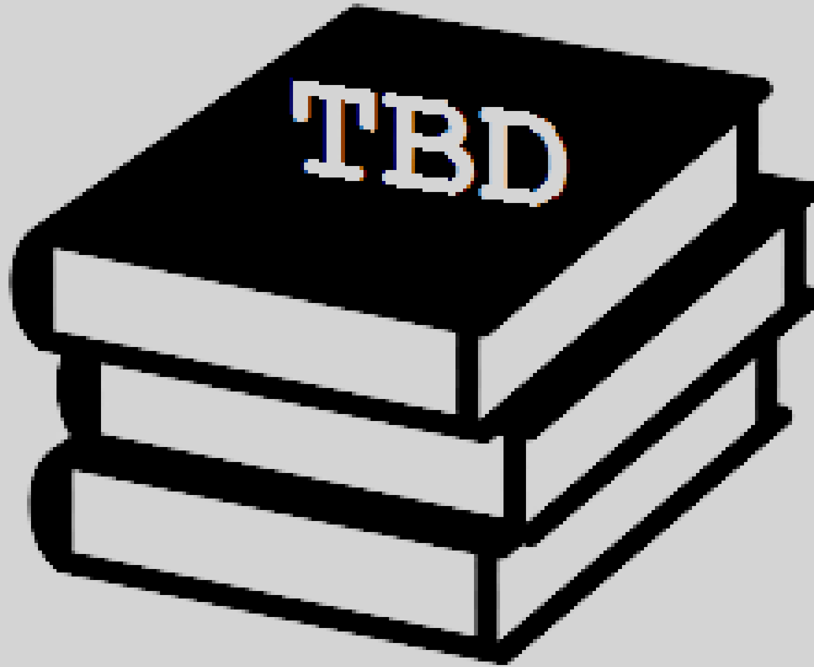

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IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT IN AND FOR
DUVAL COUNTY, FLORIDA CIVIL ACTION

HOUSTON STREET MANOR LIMITED PARTNERSHIP, a Florida limited partnership,

Plaintiff/Counter-Defendant,

v. CASE NO.: 2018-CA-5740- CV-F

CORE CONSTRUCTION SERVICES OF FLORIDA, LLC, a Florida limited liability company,

Defendant/Counter-Plaintiff.

_______________________________________/

CORE CONSTRUCTION SERVICES OF FLORIDA, LLC, a Florida limited liability company,

Defendant/Counter-Plaintiff,

v.

HOUSTON STREET MANOR LIMITED PARTNERSHIP, a Florida limited partnership; BANK OF AMERICA, N.A., a national banking association; and JACKSONVILLE HOUSING FINANCE AUTHORITY, a Florida corporation

Defendants.

_______________________________________/

DEFENDANT/COUNTER-PLAINTIFF'S RESPONSE TO PLAINTIFF/COUNTER-DEFENDANT'S, HOUSTON STREET MANOR LIMITED PARTNERSHIP, OBJECTION TO NOTICE OF PRODUCTION FROM NON-PARTY AND PLAINTIFF/COUNTER-DEFENDANT'S, HOUSTON STREET MANOR LIMITED PARTNERSHIP, MOTION FOR PROTECTIVE ORDER

CORE CONSTRUCTION SERVICES OF FLORIDA, LLC ("CORE"), by and through its undersigned counsel and pursuant to Fla. R. Civ. P. 1.280, Fla. R. Civ. P. 1.410 and Fla. Stat. §90.502,

ACCEPTED: DUVAL COUNTY, RONNIE FUSSELL, CLERK, 02/13/2020 03:47:39 PM

files this Response to Plaintiff/Counter-Defendant's, HOUSTON STREET MANOR LIMITED PARTNERSHIP ("HOUSTON"), Objection to Notice of Production from Non- Party Dated July 19, 2019 and as well as its Motion for Protective Order and states as follows:

I. INTRODUCTION

The underlying action involves the construction of an apartment complex known as Houston Street Manor located in Jacksonville, Florida ("Project"). CORE was the general contractor for the Project. HOUSTON is the owner of the Project and was obligated to pay CORE for the work it performed at the Project ("Obligations"). HOUSTON subsequently filed a claim against CORE alleging a breach of contract, slander of title, tortious interference with contractual relationship, and claims of fraudulent liens. CORE then filed its Amended Counterclaim foreclosing on its claim of lien and otherwise alleging breach of contract by HOUSTON, unjust enrichment, and breach of implied covenant of good faith and fair dealing. In response, HOUSTON filed its Answer and Affirmative Defenses to CORE's Amended Counterclaim.

In furtherance of discovery as to the matters at issue, CORE issued those certain Notice of Production from Non-Party Dated July 19, 2019 (collectively, "NPNPs") to Olympia Structures, LLC ("Olympia"), Beneficial Communities, LLC, ("Beneficial") and Risner Consulting Group, Inc. ("Risner") (collectively, "Third-Parties"). HOUSTON objected to the NPNP's on behalf of the Third-Parties and filed this Motion for Protective Order. The Third-Parties are unrelated business entities which provided *business/construction* services on the Project. Beneficial is a parent to HOUSTON. Upon information and belief, Olympia contracted with Beneficial, and not HOUSTON, to act as Project Manager on behalf of the owner. At one point during the Project construction, Olympia also took over responsibilities of the architect on the Project and performed contract administration duties. Risner, a separate legal entity, upon information and belief, contracted with Beneficial to provide Project auditor

services per the terms of the Construction Contract.

HOUSTON asserts that an agency relationship exists with Olympia, Beneficial, and Risner. Specifically, it asserts that these "third party professionals" manage HOUSTON's projects and in that process "consult with HOUSTON's legal counsel when necessary to protect HOUSTON's legal interests." Particularly, it asserts that Olympia at one point became the "secondary owner's representative." According to HOUSTON, the non-parties were responsible for the following: (a) contract modifications; (b) negotiations; and (c) project management when communicating with HOUSTON's counsel, Michael Wilson ("Wilson"). HOUSTON further asserts that CORE's subpoenas are objectionable because they seek all correspondence between HOUSTON and Olympia concerning claims against CORE on the project, "communications" between Olympia and Michael Wilson, Esq., Beneficial and Michael Wilson, Esq., Risner and Michael Wilson, Esq., and communications to and from Lenders to the Project and those prior to the contract execution. HOUSTON's position is that such documents are wholly irrelevant, and the request is harassing.

CORE requests this Court to deny HOUSTON's Objection/Motion for Protective Order because the discovery sought is germane to the claims asserted in the Complaint and Counterclaim, as well as issues of the underlying construction of the Project and each party's respective contractual obligations. The communications sought between the non-parties, and between the non-parties and Michael Wilson, Esq., were made for the purpose of constructing a project and during the course of construction, not necessarily related to provision of legal services and/or this litigation. In fact, HOUSTON has proffered zero admissible evidence that suggests that these communications were related to any pending or anticipated litigation. Furthermore, since HOUSTON is the Plaintiff in this action and forced CORE to defend itself and/or assert a

counterclaim, Plaintiff placed these communications at issue. HOUSTON should not be allowed to use the discovery process as both a shield and a sword.

A. Scope of Discovery

Parties have the broad right of discovery provided that the discovery sought is relevant to the pending matter and not protected by any recognized privilege. See Fla. R. Civ. P. 1.280. Should a party object to the scope of discovery sought and withhold discovery responses with claims of privilege or protection of trial preparation materials, the party "shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." *Id.*

Particularly, when a subpoena is issued to a third party seeking production, a liberal construction is to be given the requirement of relevancy in the Rules of Civil Procedure, Rule 1.410, which is to be considered *in pari materia* with Rule 1.350. *See Kennedy v. Kennedy*, 298 So.2d 525 (Fla. 2d DCA 1974). Should a court be required to compel the production from the non-party, wide discretion is given in the treatment of discovery problems, which will not ordinarily be disturbed unless a clear abuse of discretion is demonstrated. *Crystal Springs Water Company v. Atchinson*, 267 So.2d 694 (Fla. 2d DCA 1972).

B. Florida Rule of Civil Procedure 1.410 - Non-Party Objections

Olympia is not a party to this lawsuit. Under Rule 1.410, a non-party may object to a subpoena or move to quash only under narrow conditions. The Court may quash or modify a subpoena (1) if it is unreasonable and oppressive, or (2) condition denial of the motion on the advancement by the person on whose behalf the subpoena is issued of the reasonable cost of producing the books, documents, or tangible things. Fla. R. Civ P. Rule 1.410. A person

responding to a subpoena may object to discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue costs or burden.

A party to the lawsuit may assert objections on behalf of the non-party, but such objections must meet the non-party's burden of proving that the subpoena is unduly burdensome, unreasonable or oppressive. Although authority exists to allow a party to assert objections on behalf of a non-party, a subpoena cannot be quashed under Fla. R. Civ. P. 1.410 unless the Court finds that the subpoena is unreasonable or oppressive. The sufficiency thereof is a factual determination for the trial judge who is vested with broad judicial discretion. See *Sunrise Shopping Center, Inc. v. Allied Stores Corp.*, 270 So.2d 32 (Fla 4th DCA 1972).

C. Attorney Client Privilege – Fla. Stat. §90.502

HOUSTON objects to the production of documents or testimony from its alleged corporate representatives on the grounds that the documents or testimony sought is made to or from its agent(s) or to and from its attorney; despite this blanket assertion, not all communications with or to an attorney are considered protected by the attorney-client privilege. Simply because a business entity contracts with another business entity to perform services does not, as a matter of course, convert the other business entity into an "agent." Otherwise, every property manager or subcontractors would be converted into "agents" and allow a party to block relevant discovery. This is not the legislature's intent.

In Florida, the "subject matter test" governs whether the attorney-client privilege attaches to communications of its employees or agent and looks at the following criteria: (1) whether the communication would not have been made but for the contemplation of legal services; (2) the employee making the communication did so at the direction of his or her corporate superior; (3) the superior made the request of the employee as part of the corporations' effort to secure legal

advice or services; (4) the content of the communication relates to the legal services being rendered and the subject matter of the communication is within the scope of the employee's duties; and (5) the communication is not disseminated beyond those persons who, because of the corporate structure, need to know its contents. *Southern Bell Tel. & Tel. v. Deason*, 632 So.2d 1377, 1383 (Fla. 1994) (citing *Harper & Row Publishers, Inc. v. Decker*, 423 F.2d 487 (7th Cir. 1970), *aff'd per curiam by an equally divided court*, 400 U.S. 348 (1971); *Diversified Indus., Inc. v. Meredith*, 572 F.2d 596, 609 (8th Cir. 1977)). *See also Tomkins Indus., Inc. v. Warren Tech., Inc.*, 768 So. 2d 1125, 1125-26 (Fla. 3d DCA 2000) ("We hold that the communication in this case satisfies the test enunciated in *Southern Bell Tel. & Tel. v. Deason*, 632 So.2d 1377 (Fla. 1994), for determining whether a communication between corporate employees and corporate counsel is protected by the attorney-client privilege.") *Affordable Bio Feedstock, Inc. v. Darling Intern. Inc.*, 6:11-CV-1301-ORL-28, 2012 WL 5845007, at *4 (M.D. Fla. 2012)

The attorney-client privilege does not attach to all communications with Plaintiff's "representatives" merely because those "representatives" were attorneys. Generally, "[t]he attorney-client privilege attaches only to communications made in confidence to an attorney by that attorney's client for the purposes of securing legal advice or assistance." *In re Grand Jury Investigation (Schroeder)*, 842 F.2d 1223, 1224 (11th Cir. 1987). A communication with an attorney is not privileged unless the attorney is acting in a professional capacity as a provider of legal services. *Skorman v. Hovanian of Florida, Inc.,* 382 So.2d 1376, 1378 (Fla. 4th DCA 1980) ("[W]here a lawyer is engaged to advise a person as to business matters as opposed to legal matters, or when he is employed [sic] to act simply as an agent to perform some non-legal activity for a client, the authorities uniformly hold there is no privilege."). Additionally, "courts have found that communications are not privileged when the lawyer is retained to do tasks that nonlawyers can

also do." Federal Rules of Evidence Manual 501.02(5)(b). Even where communications are privileged, the underlying facts are discoverable. *Carnival Corp. v. Romero,* 710 So.2d 690, 695 (Fla. 5th DCA 1998) (citing *Upjohn Co. v. United States,* 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981)). Thus, the privilege "attaches only to confidential communications not intended to be disclosed to third persons who are not furthering the rendition of legal services." *Mobley v. State,* 409 So.2d 1031, 1038 (Fla. 1982)." *McWatters v. State,* No. SC07–51, 2010 WL 958069 at *17 (Fla. Mar.18, 2010). Unless HOUSTON can demonstrate that these representatives were acting in a legal capacity, HOUSTON cannot avail itself of the protections under attorney-client privilege.

HOUSTON contends that the third-party representatives consulted with Wilson on contract modifications, negotiations, and project management. At no point did HOUSTON identify specific communications which exceeded the scope of simple business matters necessary to complete the Project or that the advice sought was for a legal activity. The burden of establishing the attorney-client privilege rests on the party claiming it. *Southern Bell Tel. & Tel. v. Deason*, 632 So.2d 1377, 1383 (Fla. 1994). (citing *Fisher v. United States,* 425 U.S. 391, 96 S.Ct. 1569, 48 L.Ed.2d 39 (1976)); *Black v. State,* 920 So.2d 668, 671 (Fla. 5th DCA 2006). The party claiming the privilege "has the burden of establishing the existence of each element of the privilege." *Nelson v. Womble*, 657 So. 2d 1221, 1222 n.1 (Fla. 5th DCA 1995) (citing *Deason*, 632 So. 2d at 1383). *See also Gen. Motors Corp. v. McGee*, 837 So.2d 1010, 1031 (Fla. 4th DCA 2002) (noting that, to invoke the attorney-client privilege in the corporate context, a party must demonstrate all five *Deason* elements); *Fla. Sheriff's Self-Ins. Fund v. Escambia County.*, 585 So.2d 461, 463 (Fla. 1st DCA 1991) (noting that a party claiming privilege must "establish the existence of each element of the privilege in question"). *See also MapleWood Partners, L.P. v. Indian Harbor Ins. Co.*, 295 F.R.D. 550, 592 (S.D. Fla. 2013) ("Plaintiffs have failed to offer evidence that all of these allegedly

privileged communications were from an agent of Plaintiffs to or from Akerman Senterfitt attorneys specifically for the primary purpose of seeking legal advice, i.e., the communication would not have been made "but for" the contemplation of legal services. *Deason*, 632 So.2d at 1383.)

HOUSTON has not met its burden of establishing that the attorney client privilege attaches to some, or even any, of the communications being sought by CORE. Furthermore, because HOUSTON sued CORE and CORE was required to defend itself as to the issues of nonpayment and conduct in the administration of the project, HOUSTON is attempting to use the privilege to its advantage and disadvantage CORE.

The attorney-client privilege cannot be used both as a sword and a shield. *Willy v. Admin. Review Bd.,* 423 F.3d 483, 497 (5th Cir.2005). Additionally, "It is the rule in Florida that a party who bases a claim on matters which would be privileged, the proof of which will necessitate the introduction of privileged matter into evidence, and then attempts to raise the privilege so as to thwart discovery, may be deemed to have waived that privilege...." *GAB Bus. Servs., Inc. v. Syndicate 627,* 809 F.2d 755, 762 (11th Cir. 1987). As stated in *First S. Baptist Church of Mandarin, Fla. ., Inc. v. First Nat'l Bank of Amarillo,* 610 So.2d 452, 454 (Fla. 1st DCA 1992), "[i]f a party has injected into the litigation issues going to the very heart of the litigation, such party cannot avoid discovery into such issues by invoking the attorney-client privilege." To the extent that HOUSTON's knowledge of the basic facts and circumstances underlying its claims came from communications with counsel, it put those communications at issue—and waived any applicable privilege—by relying on those communications as the factual basis for its suit. *See, MCC Mgt of Naples, Inc. v. Arnold & Porter*, 2010 WL 1817585 *2 -4- (M.D. Fla.) (unpublished opinion).

D. <u>Work Product Privilege</u>

HOUSTON has also claimed that some, or all, of the communications from the Third-Parties to Wilson, and presumably any testimony relating thereto, are protected from disclosure as the communications should be deemed "work product." Notwithstanding this assertion, HOUSTON cannot claim that work-product privilege applies to the communications sought. CORE's use of the word "claim" does not transform the business communications at that time into work product simply because an issue arose after the communications were conducted. The work-product privilege is intended to protect documents and tangible things from discovery if they were prepared in anticipation of litigation. *See* Fla. R. Civ. P. 1.280(b)(3). *See also Winn-Dixie Stores, Inc. v. Nakutis,* 435 So. 2d 307 (Fla. 5th DCA 1983), *rev. denied,* 446 So. 2d 100 (Fla.1984). Certainly, HOUSTON cannot reasonably claim that all communications, throughout the duration of the Project, were in anticipation of litigation. Knowledge about general strategies and procedures is not work product.

HOUSTON failed to describe which specific communications they consider protected by work-product privilege. Furthermore, HOUSTON failed to allege that any of the communications being sought were prepared in anticipation of litigation. Further, HOUSTON has provided no privilege log to enable the Court to determine the substance, timing, or supposed content which would enable the Court to rule whether or not the communications were made in contemplation or anticipation of litigation.

E. <u>Requests</u>

1. Olympia

CORE requested the following: "(a) General Project Construction Documents: all Project documents from the entire file, reports, photos, inspection reports, or materials reflecting 'the

work', video tape recordings, job progress photos, engineering drawings, contracts between the entities, contracts with subcontractors, change orders, modifications, RFI's, changes to scope, scheduling, design documents, installation methods, materials, sequencing, photos and drawings as to as-builts, correspondence with architect or engineer regarding design, repair or maintenance, memoranda, reports, minutes, agendas, Olympia's review of change orders, punch lists, etc." None of these requests should be objectionable in that they are simply requesting general construction file documents, relevant to the Project construction and constitute evidence of HOUSTON's and Olympia's conduct during construction. All file documents not privileged should be discoverable and this Court should deny any protective order seeking otherwise.

CORE also requested communications, including documents between HOUSTON and Olympia, Olympia and CORE, Olympia and Forum Architecture & Interior Design, Inc., Olympia and the Lender, Olympia and Donald W. Paxton, Olympia and Michael K. Wilson, Esq., Broad & Cassel and Nelson Mullins Broad & Cassel. All these requests are limited to communications regarding the Project. The "Project" is defined as "the construction of the 72-unit apartment in Jacksonville, Florida known as Houston Street Manor."

Michael K. Wilson, Esq. was an attorney who allegedly provided entitlement, contract reviews, and business construction services for the Project, *to wit*: (a) contract modifications; (b) negotiations; and (c) project management advice which could be provided by any developer services professional. As discussed *supra*, the fact that an attorney is copied on communications or is providing business advice for construction of the project and not "legal services" in anticipation of litigation, these communications are not protected by attorney-client or work product privilege. To the extent that there are some or any documents in the possession of Olympia, that seek legal advice in anticipation of litigation, Olympia should be required to produce a

privilege log with the description and date (without disclosing the privileged content) and provide same for an in camera review.

Lastly, CORE requested documents relating to HOUSTON's Claims and Relevant to Defenses. Specifically, CORE requested the following documents relating to their defenses and Counterclaim, which HOUSTON placed at issue: Correspondence between HOUSTON and Olympia concerning "claims against CORE on the Project"; correspondence (from construction administration) reflecting Olympia's decision to not pay and withhold certification of CORE's pay applications on the Project; reports; analysis produced by any third party expert or consultant for HOUSTON or Olympia's benefit regarding the Project; documents reflecting amounts paid by HOUSTON to Olympia; complaints of improper or defective work by CORE; inspection of CORE's work; site visits or inspections concerning CORE's work.

HOUSTON filed a claim against CORE alleging a breach of contract, slander of title, tortious interference with contractual relationship and claims of fraudulent liens relating to the Project. CORE filed an Amended Counterclaim foreclosing on its claim of lien and otherwise alleging breach of contract by HOUSTON, unjust enrichment, and breach of the implied covenant of good faith and fair dealing. HOUSTON is asserting this Protective Order and objection and is fully aware of its claims in the underlying lawsuit and the affirmative defenses/counterclaim asserted by CORE to defend itself against the affirmative claims. As explained *supra*, HOUSTON cannot hide behind a shield of privilege to prevent the production of documents CORE requires to defend itself when HOUSTON effectively insulated itself from production by using third parties for the administration of the Project. Furthermore, nothing in the HOUSTON's Motion identifies specific documents or communications it believes qualifies for more than "business" advice so that the Court would be able to review same in camera. Olympia/HOUSTON has failed to meet its burden in proving that the documents requested by CORE

are privileged. Olympia/HOUSTON should be required to produce those documents which are not privileged.

2. Beneficial and Risner

CORE essentially requested the same documents from Beneficial and Risner as requested from Olympia. HOUSTON or the Third-Parties have failed to meet their burden in proving that any or all communications or documents sought are privileged. For the same reasons set forth above, CORE respectfully requests this Court to deny HOUSTON's objections and Motion for Protective Order and compel production of all non-privileged documents from Beneficial and Riser.

F. Conclusion

For the foregoing reasons, HOUSTON's Motion for Protective Order and Objections on behalf of the NPNP's should be denied. The Third-Parties should be required to produce all documents not deemed privileged and should likewise be required to produce a detailed privilege log identifying those documents which it deems privileged to enable an *in camera* review, if necessary.

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By: ______________________________
Aaron J. Pruss
Florida Bar No. 0015656

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 12th day of February, 2020, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the E-Portal Filing System and a copy of the same is being served this day ***via Email*** upon the following:

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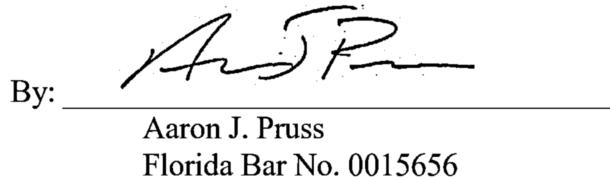

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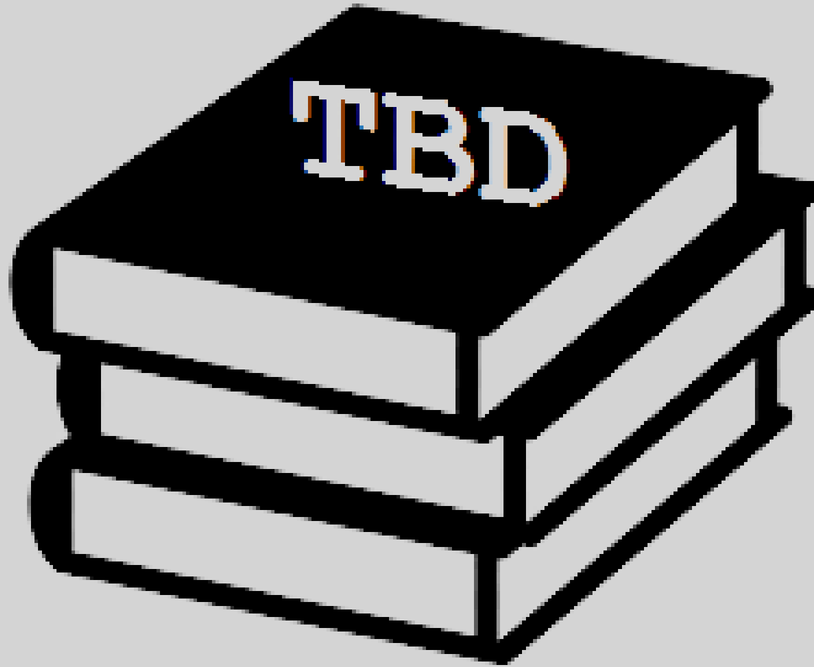

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