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No. 61638-2-I

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

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In re the Marriage of:

TERESA FARMER,

Respondent,

v.

DANIEL J. FARMER,

Appellant.

APPEAL FROM THE SUPERIOR COURT
FOR ISLAND COUNTY
THE HONORABLE VICKIE CHURCHILL

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The wife's untimely, over-length brief is a tediously irrelevant rehash of all the "wrongs" she alleges the husband committed – and which the husband conceded, for purposes of this appeal. (App. Br. 1) It is apparent that the wife's only purpose is to prejudice this court against the husband in hopes of an affirmance of a punitive damage award that goes far beyond compensating her for her loss in the husband's conversion of stock options. The wife's desire to retain this windfall is understandable, as the trial court handed her something that she would never enjoy were she simply made whole – a guaranteed, risk-free rate of return that exceeds 30% per annum, when the court's equally punitive statutory interest award is taken into account.

The trial court relied on sheer speculation what the value of PACCAR stock might be six years after the judgment was entered in calculating its award; the current state of the economy is proof enough why no court has ever approved such an award of damages, especially in a case of conversion of publicly traded stock. This court must reject the wife's invitation to for the first time in this state approve an award of punitive damages for the tort of

conversion, vacate the judgment, and remand to a different judge for a proper calculation of damages as of the date of conversion.

II. REPLY ARGUMENT

A. **The Wife's Concessions On Appeal Require This Court To Vacate The Judgment And Remand To The Trial Court For A Proper Calculation Of Damages.**

The wife concedes “the appropriate measure of damages for a given cause of action is a question of law, reviewed de novo.” *Womack v. Von Rardon*, 133 Wn. App. 254, 263, ¶ 21, 135 P.3d 542 (2006) citing *Fisher Properties, Inc. v. Arden-Mayfair, Inc.*, 106 Wn.2d 826, 843, 726 P.2d 8 (1986) (Resp. Br. 35). Here, the trial court erred as a matter of law in failing to use the proper measure of damages, as it should have assessed damages on either the date of conversion or a reasonable time thereafter. *Marriage of Langham and Kolde*, 153 Wn.2d 553, 567, ¶ 31, 106 P.3d 212 (2005); *Brougham v. Swarva*, 34 Wn. App. 68, 77, 661 P.2d 138 (1983). Instead, the trial court erred by assessing damages based on speculation about the value of options long after the judgment was entered.

The wife does not in any way address or challenge the authority cited in the opening brief holding that the “absolute endpoint” for measuring damages is the day of the close of

evidence at trial, and that a plaintiff cannot choose, in hindsight, the date that she would have exercised stock options for purposes of calculating damages. *Roxas v. Marcos*, 89 Hawai'i 91, 969 P.2d 1209, 1270 (1998) (See App. Br. 16-18); *Scully v. U.S. WATS, Inc.*, 238 F.3d 497, 513 (3rd Cir. 2001) (App. Br. 22-24). Nor does the wife address appellant's argument that the trial court erred in using a discount rate less than a third the rate of return the trial court speculated PACCAR stock would enjoy over the next six years in establishing a "present value" for the damage award. (App. Br. 20-21) Finally, the wife does not challenge appellant's argument that the trial court erred in imposing statutory interest on the damage award when she would not have been entitled to "use" of the option proceeds until long after judgment was entered, given the court's presumptions about when she would have exercised the options. (App. Br. 24-25) These concessions on appeal require this court to vacate the judgment and remand to the trial court for a proper calculation of damages.

B. The Trial Court's Award Of Damages Was Punitive, Thus Prohibited, Because It Went Far Beyond Compensating The Wife For Her Loss.

Recognizing the trial court's award was indeed punitive, the wife asks this court to ignore our courts' long-held policy prohibiting

punitive damages, asserting that this court should affirm “even if it appears there was an element of punishment” in the award. (Resp. Br. 42) But “Washington does not have a policy of imposing punitive damages to punish and deter wrongdoing. Washington’s only expressed policy regarding punitive damages is that they are not favored.” **Fluke Corp. v. Hartford Accident & Indemnity Company**, 102 Wn. App. 237, 248, 7 P.3d 825 (2000), *aff’d* 145 Wn.2d 137, 34 P.3d 809 (2001). Ours courts have “consistently disapproved punitive damages as contrary to public policy.” **Dailey v. North Coast Life Ins. Co.**, 129 Wn.2d 572, 574, 919 P.2d 589 (1996). Punitive damages are a penalty generally reserved for criminal sanctions, as they “award the plaintiff with a windfall beyond full compensation.” **Dailey**, 129 Wn.2d at 574. And the cases that the wife erroneously claims that Washington allows for punitive damages in cases of “willful conversion with the showing of intentional bad faith or fraud” (Resp. Br. 42) simply do not support her argument.

It is a “long-standing rule” in Washington that punitive damages are prohibited “without express legislative authorization.” **Dailey**, 123 Wn.2d at 575. Many of the cases cited by the wife are timber cases, where RCW 64.12.030 authorizes punitive damages

in the form of “treble the amount of damages claimed or assessed” when a trespasser knowingly and willfully cuts timber. See **Grays Harbor County v. Bay City Lumber Co.**, 47 Wn.2d 879, 883, 289 P.2d 975 (1955); **Smith v. Shiflett**, 66 Wn.2d 462, 467, 403 P.2d 364 (1965); **Pearce v. G.R. Kirk Co.**, 92 Wn.2d 869, 873, 602 P.2d 357 (1979); **Bailey v. Hayden**, 65 Wash. 57, 60, 117 P. 720 (1911) (*all cited* Resp. Br. 42-43). Here, there is no legislative authority for punitive damages in a claim for the conversion of stock options. Therefore, punitive damages are prohibited. **Dailey**, 123 Wn.2d at 575.

The wife herself admits that the other authority she cites does not address “punitive damages in the way we think of them today unrelated to any specific measure of loss; rather the Court was making sure both that the victim was made whole (did ‘not suffer a loss because of the wrongful taking’ in the words of **Brougham**) and the wrongdoer got no benefit from the conversion.” (Resp. Br. 44) Some cases do recognize that there may be a different measure of damages depending upon whether a conversion was willful or by mistake, but none of these cases hold that punitive damages are allowed where the conversion is willful. To the contrary, our Supreme Court expressly held that “[u]nder the

law of this state, exemplary damages may not be allowed in an action for conversion” in *Parks v. Yakima Valley Production Credit Ass’n*, 194 Wash. 380, 395, 78 P.2d 162 (1938) (Resp. Br. 45, fn. 11).

In *Parks*, the Court recognized that the plaintiff may be entitled to the highest market price within a reasonable time after the property was taken in a case of willful conversion, but is limited to the market value at the time of conversion by mistake. 194 Wash. at 395; see also *E. E. Bolles Wooden-Ware Co. v. U.S.*, 106 U.S. 432, 433-34, 1 S.Ct. 398, 27 L.Ed. 230 (1882) (Resp. Br. 46) (acknowledging that measure of damages when conversion by mistake is the “value or property when first taken,” and in the case of willful conversion is the “full value” of the property) citing *Livingston v. Raywards Coal, Co.*, L.R. 5 App. Cas. 33 (H.L. 1880) (Resp. Br. 46); *In re Salmon Weed & Co.*, 53 F.2d 335, 339-40 (2nd Cir. 1931) (Resp. Br. 46-47) (acknowledging that in case of willful conversion, plaintiff may be entitled to the higher value between the date of conversion and a reasonable time after notice of the conversion).

This is precisely the measure of damages recited in the opening brief. (App. Br. 13-16) And as there is no evidence or

claim that appellant received any benefit that would not be returned to her with an award of the proceeds of the conversion, this factor could not justify the punitive damages standard advocated by the wife.

The *only* case cited by the wife that appears to allow punitive damages in a case of willful conversion is ***Beede v. Lamprey***, 64 N.H. 510, 15 A. 133 (1888) (Resp. Br. 46). But this 1888 New Hampshire case merely recites in *dicta* that if a defendant willfully converts timber of the plaintiff, “the value added by the wrong-doer, after conversion, is sometimes given as exemplary or vindictive damages.” ***Beede***, 15 A. at 135. As it happens, New Hampshire in any event allows punitive damages in civil cases where malice or fraud is involved. See ***Guardianship of Dorson***, 156 N.H. 382, 934 A.2d 545, 549 (2007) (“In addition to direct damages, courts may order consequential damages and punitive damages where malice or fraud is involved”). In Washington, to the contrary, punitive damages are prohibited even for “particularly egregious conduct.” ***McKee v. AT & T Corp.***, 164 Wn.2d 372, 401, ¶ 45, 191 P.3d 845 (2008).

That it took respondent over four months to come up with this ancient Yankee “authority” for punitive damages is proof

enough that there is no precedent for the trial court's award in this state. This court cannot affirm a damage award that the wife concedes and justifies on the basis of its punitive nature.

C. Damages Must Be Assessed At The Time Of Conversion Or A Reasonable Time Thereafter, Not Based On Speculation What The Price Of Stock Might Be Years After Judgment Is Entered.

1. The Trial Court Erred In Not Assessing Damages At The Time Of Conversion Or A Reasonable Time Thereafter, Before Judgment.

In *Langham*, the Supreme Court held that the proper measure of damages when the husband unilaterally exercised stock options awarded to the wife was the value of the options at the time of exercise. 153 Wn.2d at 567-68, ¶ 31. Appellant recognizes, as the wife points out (Resp. Br. 38-39), that the *Langham* Court did not directly address the issue presented here – the measure of damages when property temporarily increases in value after the conversion. Instead, the *Langham* Court noted that a “person whose property is converted may recover *at least* its value at the time of conversion.” 153 Wn.2d at 569, ¶ 33 (emphasis in original, citing *In re Salmon Weed & Co.*, 53 F.2d 335, 341 (2nd Cir. 1931)).

But this statement in *Langham* does not, as the wife claims (Resp. Br. 38-39), give the trial court *carte blanche* to calculate damages at any time for any amount above the “threshold” amount at the time of conversion. The wife also relies on the RESTATEMENT (FIRST) OF RESTITUTION § 151 (1937) to support her claim that under these circumstances, the proper measure of damages is “not limited.” (Resp. Br. 39) But *comment c* to the RESTATEMENT notes that any “higher value” is limited to “a reasonable time after the tortious conduct” – and may be awarded only if the aggrieved party can prove she would have sold the property at that time:

In such cases the person deprived is entitled to be put in substantially the position in which he would have been had there not been the deprivation, and this may result in granting to him an amount equal to the highest value reached by the subject matter *within a reasonable time after the tortious conduct.* This is done if he can prove that he probably would have made a sale while the subject matter was at its highest point in value.

RESTATEMENT (FIRST) OF RESTITUTION § 151 (1937), *comment c* at 601 (emphasis added) (see Arg. § C.2, *infra*).

The RESTATEMENT is consistent with other Washington cases considering the conversion of property with fluctuating value. *Brougham v. Swarva*, 34 Wn. App. 68, 77, 661 P.2d 138 (1983) (measure of damages for conversion is at most “the highest value

of the property wrongfully converted between the time of conversion and a reasonable time after victim learns of such conversion”) (*discussed at* App. Br. 15-16; Resp. Br. 39, 41); see also ***Hetrick v. Smith***, 67 Wash. 664, 670, 122 P.363 (1912) (“true measure of damages is the value of the stock at the time of conversion, or a reasonable time thereafter”) (App. Br. 13-14; Resp. Br. 36).

The wife also utterly fails to address ***Roxas v. Marcos***, 89 Hawai'i 91, 969 P.2d 1209, 1270 (1998) (*discussed at* App. Br. 16-17), which holds that when determining the “reasonable time” after the victim learns of the conversion for assessing damages, “the date of close of the evidence at trial would, as a matter of law, be the absolute end-point beyond which the ‘reasonable time’ cannot extend,” because market values “beyond that date would be unknowable to the trier of fact.” 969 P.2d at 1270. As the wife thus apparently concedes, the trial court could not instead base a damage award on speculation of what the value of the stock might be one to six years after the date of judgment, when the trial court assumed the wife would have exercised her stock options.

Here, the husband converted the stock options on August 14, 2006, when the split-adjusted price was \$54.984 per share¹. (CP 141, 157; FF XV, CP 10) When the husband admitted to exercising the options, and the wife was made aware of the conversion two months later on October 24, 2006 (CP 157, 163), the pre-split adjusted price was \$60.885. (<http://www.google.com/finance/historical?cid=423184&startdate=10%2F24%2F2006&enddate=10%2F24%2F2006>) And when the judgment was entered on April 14, 2008, the pre-split adjusted price was \$66.63. (<http://www.google.com/finance/historical?cid=423184&startdate=Apr+14%2C+2008&enddate=Apr+14%2C+2008>)

If the trial court was not required to calculate damages at the time of conversion under *Langham*, it should have calculated damages as of a reasonable time thereafter, but in any event before judgment was entered. What the trial court could not do was what it did here, calculating damages based on speculation that the stock would be worth \$102.21 to \$202.85 per share (CP 142) three to seven years after the wife learned of the conversion.

¹ The stock price at the time of exercise, adjusted for a 3:2 split that occurred October 10, 2007, would be \$36.656 today. All stock prices in this brief are calculated prior to this split in October 2007, consistent with the March 2007 report by Roland Nelson. (See CP 136-42)

2. The Trial Court Erred In Assessing Damages Based On Its Speculation of Value On The Day Before Each Option Was To Expire When There Is No Evidence That The Wife Would Or Could Have Exercised On Those Dates.

The wife simply cannot choose, in hindsight, the date that she would have exercised stock options for purposes of calculating damages. As noted in the RESTATEMENT, any award of damages based on a specific date in the future requires proof that the aggrieved party would have exercised the options on that day. See RESTATEMENT OF RESTITUTION § 151, *comment c* at 601 (aggrieved party entitled to highest value reached within reasonable time after tortious conduct “*if he can prove that he probably would have made a sale while the subject matter was at its highest point in value*”); see also **Gerstle v. Gamble-Skogmo, Inc.**, 478 F.2d 1281, 1305 (2nd Cir. 1973) (whether plaintiffs would have sold stock at its highest value is “too untenable and speculative to support an award of damages”) (citations omitted).

The wife also fails to address **Scully v. U.S. WATS, Inc.**, 238 F.3d 497 (3rd Cir. 2001) (*discussed* App. Br. 22-23), which rejected such an approach as “unduly speculative,” holding that the court cannot “accept a plaintiff’s after-the-fact assertion that he would have sold stock at a time that, in hindsight, would have been

particularly advantageous.” 238 F.3d at 512-13. The court reasoned that accepting this approach would provide a plaintiff with “more than the benefit of his bargain” from the stock options. 238 F.3d at 513.

The wife does not dispute that there was no basis for the trial court’s assumption when she would have exercised the stock options other than her “expert’s” mathematical calculations. (CP 136-42, 146) There was no evidence that the parties had historically exercised their stock options on the day before each grant expired, nor was there any evidence that the husband would remain employed at PACCAR through 2013 so the wife could do so.

Rorvig v. Douglas, 123 Wn.2d 854, 873 P.2d 492 (1994) (Resp. Br. 35) does not support the wife’s claim that the trial court could rely on a declaration of her “expert” witness, who speculated that the rate of return he calculated for the previous ten years would continue through the next six years, and predicted the net proceeds to the wife for each exercise. (CP 137, 142) Instead, ***Rorvig*** holds that while evidence of damages may be sufficient if “it affords a reasonable basis for estimating the loss,” it cannot “subject the trier of fact to mere speculation or conjecture.” 123 Wn.2d at 861; see

also *Larsen v. Walton Plywood Co.*, 65 Wn.2d 1, 19, 390 P.2d 677, 396 P.2d 879 (1964) (While expert testimony may be a sufficient basis for an award of damages, “their opinions must be based upon tangible evidence rather than upon speculation and hypothetical situations”) (*discussed at App. Br. 18-19*).

In *Rorvig*, the Supreme Court affirmed the trial court’s decision assessing damages in a slander of title action based on evidence of the interest incurred on the plaintiff’s mortgage debt while the memorandum recorded by the defendants, clouded plaintiff’s title. 123 Wn.2d at 861. The Court acknowledged that the interest incurred was the plaintiff’s actual loss due to defendant’s actions, and the evidence relied on in *Rorvig* to measure damages was not speculative or conjecture as it is here. Instead, as the Court stated, it was evidence that provided a “reasonably certain basis for determining damages under the facts of this case.” *Rorvig*, 123 Wn.2d at 861.

The trial court’s damage award here, in contrast, is based on projected prices of \$102.21 (for the year 2009) to \$202.85 (for 2013) (CP 142), calculated on the assumption that PACCAR stock would increase in value at a rate of 20.235% per annum over the next six years. (CP 137) The current market price proves that the

wife's speculative "evidence" of the price of PACCAR stock was exactly that – speculation. The wife's expert projected that PACCAR stock would be at \$102.21 on April 26, 2009, the day the first tranche of stock options would have expired. (CP 142) In reality, less than two months before the first expiration date, PACCAR is trading at a split-adjusted \$31.335².

The wife's utter failure to prove that she would have held and exercised the options as they expired is further complicated in this case by the fact that her ability to exercise the options depended entirely on the husband's continued employment at PACCAR through 2013. The husband's employment with Paccar was in fact terminated in mid-June 2008,³ and pursuant to the stock option agreement the wife would have been required to exercise her options within one to three months of the husband leaving his employment. (See CP 294, 312) During that period, the highest split-adjusted price per share was \$69.81,⁴ on June 19, 2008.

² Paccar closed at \$20.89 on March 9, 2009. The price quoted in the body of the brief reflects the pre-adjusted 3:2 stock split on October 10, 2007. (<http://www.google.com/finance?client=ob&q=NASDAQ:PCAR>)

³ Husband will provide testimony of his current employment status in his RAP 18.1(c) affidavit.

⁴ (<http://www.google.com/finance/historical?cid=423184&startdate=Jun+16%2C+2008&enddate=9%2F15%2F2008&start=50&num=25>)

The trial court erred in assessing damages based on its speculation of value on the day before each option was to expire when there is no evidence that the wife would or could have exercised on those dates.

3. The Trial Court Erred In Rejecting A Proposed Damage Calculation That Would Have Allowed The Wife To “Exercise” Her Options.

Without denying that the evidence relied on by the trial court was speculative, the wife argues that the trial court was entitled to accept and rely on this conjecture because the husband “offered no evidence to support an alternate method of calculating damages.” (Resp. Br. 35) This claim is simply and demonstrably false. The husband in fact proposed two other methods to assess damages that would have made the wife whole.

First, the husband proposed immediately distributing approximately \$170,000 to the wife – her share of the actual proceeds from the exercised stock options (CP 161) – consistent with the Supreme Court’s decision in *Langham* that the measure of damages for a conversion of stock options is the value of the options at the time of its exercise. 153 Wn.2d at 567-68, ¶ 31. Alternatively, and consistent with the wife’s claim for a “make whole remedy” (Resp. Br. 35), the husband proposed that the court

establish a procedure that would allow the wife to direct him to “exercise” her stock options on dates of her choice prior to the expiration of the options. (CP 161-62) As set out in the opening brief (App. Br. 26), the court rejected these proposals in order to punish the husband for his conversion.

On appeal the wife suggests that this court forgive the speculative nature of her evidence based on her claim that “there was no ready market-place benchmark to apply” in determining the value of the converted stock options. (Resp. Br. 36, fn. 8, *citing Hetrick v. Smith*, 67 Wash. 664, 122 P. 363 (1912)) This is absurd. PACCAR is publicly traded on NASDAQ; it can be readily valued on any day based on the daily market price of its stock. The court could determine with precision the proceeds the wife would have received had she exercised the stock options when the stock was at a particular price point, and the wife’s claim that the stock options had “no ready market-place benchmark” is sheer nonsense.

Finally, the wife asks this court to ignore all of the trial court’s errors based on her claim that the damage award resulted in a “make-whole remedy” for her. (Resp. Br. 37) But, the award did not make the wife “whole.” Instead, it gave her an improper “windfall of complete umbrella protection.” *Brougham v. Swarva*,

34 Wn. App. 68, 78, 661 P.2d 138 (1983). The trial court did not provide the wife with the “amount which [she] would have received if the contract been kept.” (Resp. Br. 36, *citing Rathke v. Roberts*, 33 Wn.2d 858, 865, 207 P.2d 716 (1949)) Instead, it gave her significantly more, improperly allowing the wife to entirely offload all of the risk of owning stock options and guaranteeing her a rate of return which no other stock option holder enjoys. Even if an innocent victim⁵, plaintiff is not entitled to such protection:

[While an] innocent victim should not suffer a loss because of the wrongful taking and withholding of his property. Neither should he be granted the windfall of complete umbrella protection by being awarded the highest possible valuation of the property from the time of its taking to the entry of judgment or its return.

Brougham, 34 Wn. App. at 78 (emphasis added).

In **Rathke**, the Supreme Court was faced with the question how to assess damages when defendant breached a contract with plaintiff for the purchase and installation of refrigeration equipment. The **Rathke** Court stated “[t]he primary aim in measuring damages is compensation, and this contemplates that damages for a tort should *place the injured person as nearly as possible in the*

⁵ And the wife here was hardly innocent. She had in fact herself secreted assets from the husband. See App. Br. 8, fn. 3 (*citing* CP 16-17, 157-59).

condition he would have occupied if the wrong had not occurred..." 33 Wn.2d at 865 (emphasis added). The Court as a consequence held that the proper measure of damages was the plaintiff's lost profits due to the breach, as determined by the price of the contract less the cost of performance. **Rathke**, 33 Wn.2d at 864.

Here, unlike in **Rathke**, the trial court's decision did not place the wife in nearly the same position she would have occupied had the husband not exercised the options. Instead, the trial court's decision significantly improved the wife's position by guaranteeing her a risk-free rate of return even though a stock option "neither extinguishe[s] all risk, nor guarantee[s] a profit." **Scully v. U.S. WATS, Inc.**, 238 F.3d 497, 513 (3rd Cir. 2001) (*discussed at App. Br. 22-23*).

The husband's proposal below would have better placed the wife in a position close to the one she would have been had the husband not exercised the stock options. To the extent the trial court was concerned about the wife's alleged lost "free will" to exercise her stock options (6/04/07 RP 29), it would have reinstated this "free will," while also properly requiring the wife to bear the same risk she would have otherwise had if she still owned the options. The trial court erred in rejecting a proposed damage

calculation that would have allowed the wife to “exercise” her options if she was not limited to the proceeds of conversion.

D. This Court Should Deny The Wife’s Request For Attorney Fees.

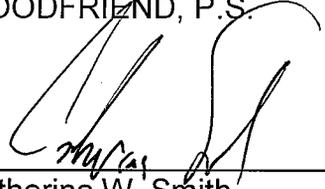
The wife claims that an award treble the amount the husband received from exercise of her options was necessary to “compensate” her for pursuing her rights. In fact, the wife was fully “compensated” for the cost of recovering her converted property when the trial court ordered the husband to pay all of her attorney fees at trial. (CP 14) The husband has not challenged that award on appeal because it was necessary to make the wife whole. But there is no basis for an additional award of attorney fees to the wife on appeal. The husband is not intransigent and has not acted in “bad faith” by bringing this appeal to challenge the trial court’s legal errors in assessing damages. Nor does the wife have the need for fees under RCW 26.09.140, having received nearly half a million dollars from the husband, who as a result of the trial court’s punitive damage award and his job loss does not have the ability to pay. This court should deny the wife’s request for attorney fees on appeal.

III. CONCLUSION

This court should vacate the judgment against the husband and remand to a different judge with directions to assess damages to the wife as of the date of conversion or some reasonable time thereafter, but under no circumstances after the date of judgment.

Dated this 9th day of March, 2009.

EDWARDS, SIEH, SMITH
& GOODFRIEND, P.S.

By: 

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Attorneys for Appellant

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on March 9, 2009, I arranged for service of the foregoing Reply Brief of Appellant, to the court and to the parties to this action as follows:

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DATED at Seattle, Washington this 9th day of March, 2009.

Carrie O'Brien

Carrie O'Brien

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