

2004

Mark Technologies Corp., a California Corporation, and Mark Jones, Plaintiffs/  
Appellants, vs. Utah Resources International Inc., a Utah Corporation, John Fife, David Fife, Lyle D. Hurd, Jr., Gerry Brown, individuals, Defendants/  
Appellees : Reply Brief

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

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MARK TECHNOLOGIES CORP., a  
California Corporation, and MARK  
JONES,

Plaintiffs/Appellants,

vs.

UTAH RESOURCES  
INTERNATIONAL, INC., a Utah  
Corporation, JOHN FIFE, DAVID FIFE,  
LYLE D. HURD, Jr., GERRY BROWN,  
individuals,

Defendants/Appellees.

**REPLY BRIEF OF APPELLANTS**

Court of Appeals No. 20041103-CA

District Court No. 980900576

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Appeal from the Judgment and Order of the Third Judicial  
District Court of Salt Lake County, State of Utah, Honorable Joseph C. Fratto

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## TABLE OF CONTENTS

|  |    |
|--|----|
| TABLE OF CONTENTS .....  | i  |
| TABLE OF AUTHORITIES .....   | ii |
| STATEMENT OF ADDITIONAL FACTS .....  | 1  |
| ARGUMENT .....   | 6  |
| I.    THE TRIAL COURT ERRED BY FAILING TO CONSIDER THE<br>DEFENDANTS’ DILIGENCE IN ATTEMPTING TO UNWIND URI<br>FROM MGO AS THE TOUCHSTONE OF ITS “BEST EFFORTS”<br>ANALYSIS .....                                      | 6  |
| A.    The Law In Utah And Other Jurisdictions Does Not Support The<br>Trial Court’s Application Of A “Best Efforts” Standard Which Is<br>The Functional Equivalent Of The Less Exacting “Good Faith”<br>Standard ..... | 7  |
| B.    The Settlement Agreement Itself Does Not Demonstrate That The<br>Trial Court Applied The Correct “Best Efforts” Standard .....   | 9  |
| II.   THE RECORD SHOWS THAT THE TRIAL COURT CLEARLY ERRED<br>IN ITS FACTUAL FINDING THAT DEFENDANTS EXERCISED<br>THEIR BEST EFFORTS .....  | 12 |
| III.  THE TRIAL COURT INCORRECTLY AWARDED ATTORNEYS FEES<br>TO THE DEFENDANTS AS THE PREVAILING PARTY ON THE<br>“BEST EFFORTS” CLAIM .....   | 12 |
| CONCLUSION .....   | 15 |
| CERTIFICATE OF DELIVERY .....  | 16 |

## **TABLE OF AUTHORITIES**

### **Cases**

|  |                |
|--|----------------|
| <i>Beraha v. Baxter Health Care Corp.</i> , 956 F.2d 1436 (7th Cir. 1992) . . . . .                              | 7, 8           |
| <i>Carlson Distributing Co. v. Salt Lake Brewing, Co.</i> , 95 P.3d 1171 (Utah App. 2004) .                      | 7, 8           |
| <i>Highland Constr. Co. v. Stevenson</i> , 636 P.2d 1034 (Utah 1981) . . . . .                                   | 12, 13, 14, 15 |
| <i>Hughes Communications Galaxy, Inc. v. United States of America</i> , 47 Fed Cl. 236 (Fed. Cl. 2000) . . . . . | 11             |
| <i>Macksey v. Egan</i> , 633 N.E.2d 408 (Mass.App.Ct. 1994) . . . . .  | 9              |
| <i>Nat'l Data Payment Sys. v. Meridian Bank</i> , 212 F.3d 849 (3d Cir. 2000) . . . . .                          | 7              |
| <i>Triple-A Baseball Club Assocs. v. Northeastern Baseball, Inc.</i> , 823 F.2d 214 (1st. Cir. 1987) . . . . .   | 8              |
| <i>Western Geophysical Co. v. Bolt Assoc.</i> , 584 F.2d 1164 (2d Cir. 1978) . . . . .                           | 8              |

### **Other**

|   |   |
|---|---|
| Black's Law Dictionary 152 (7th ed. 1999) . . . . . | 8 |
|---|---|

## **STATEMENT OF ADDITIONAL FACTS**

Without restating the facts set forth in their principal brief, Appellants provide the following supplemental facts in response to the factual allegations set forth in the Defendants' brief.

### **Groundwork Laid For Unwinding URI and MGO**

Defendants dedicate a substantial portion of their statement of the facts to their contention that the unwinding of URI and MGO presented complex matters which needed to be carefully resolved before the unwinding could occur. However, the record is clear that every significant matter related to the unwinding had been resolved by October of 1996, two years prior to the settlement agreement that ultimately accomplished the unwinding.

Even though it was not a party to the Settlement Agreement, MGO was motivated to complete its unwinding from URI as soon as possible. (R. at 3465; Transcript at 397.) On October 4, 1996, J. Michael Bennion ("Bennion"), the officer of MGO responsible for the unwinding, met with Ladd Eldredge ("Eldredge"), an employee of URI, to discuss the financial ramifications and liabilities the unwinding would present. (R. at 3465; Transcript at 395-396.) In a letter dated October 5, 1996, Bennion reported to John Morgan ("Morgan"), the CEO and Chairman of MGO, on his meeting with Eldredge and summarized each of the relevant issues related to the unwinding. (R. at 15; Plaintiffs' Exhibit 10.) Bennion testified that during his meeting with Eldredge, he learned that

MGO owed URI money to pay for MGO's interest in various partnership assets, but that MGO never disputed those debts and that such debts never became a contention which hindered the unwinding process. (R. at 3465; Transcript at 397-399.) In short, there is no dispute that following the October 4, 1996 meeting, URI and MGO understood the financial liabilities of each party, and were fully prepared to proceed with the unwinding.

#### Twenty Months Of Silence

After meeting with Eldredge in October of 1996, URI suddenly and inexplicably broke off all communication with MGO for a period of twenty-months. Bennion testified that after the meeting with Eldredge, URI never contacted him to seek information or to propose further negotiations. (R. at 3465; Transcript at 400.) Bennion stated that at one point during URI's silence, he was instructed by MGO's board of directors to contact URI in an attempt to resuscitate the unwinding issue and work toward its completion. (R. at 3465; Transcript at 403-404.) Bennion wrote a letter to URI inquiring about the unwinding but never receive a response. (R. at 3465; Transcript at 404.)

In addition to ignoring MGO's requests regarding the unwinding, URI was also ignoring the issue internally. Jenny Morgan, a member of URI's board of directors testified that through 1996 and 1997 URI's board gave no attention to the issue of unwinding from MGO and that the issue was "put off, rebuffed or ignored or not addressed." (R. at 3465; Transcript at 454.) Plaintiffs submitted into evidence the minutes from URI's board meetings that were held from June 5, 1996 through November

11, 1998 and the first time the URI board ever discussed the unwinding with MGO occurred on February 17, 1998. (R. at 15; Plaintiffs' Exhibit 5a-aa.) At that board meeting, the Defendants did not discuss any efforts that had been made during the prior two years or set forth any plan to actually accomplish the unwinding. (R. at 15; Plaintiffs' Exhibit 5w.) Instead, the board simply passed a resolution authorizing Fife and the officers of URI to use their best efforts to complete the wind up of the MGO contracts. (R. at 15; Plaintiffs' Exhibit 5w.) The fact that the board's first mention of the unwinding was a resolution permitting Fife and the officers to use their "best efforts" is evidence that Defendants had not dedicated any effort, let alone their "best efforts," to the unwinding prior to that point. Without even considering the question of "best efforts," it was not until February of 1998, sixteen months after the October 4, 1996 meeting, that the Defendants began to exercise any efforts at all to address the unwinding.

#### URI/MGO Partnership Assets

As a partial explanation for their extended period of inactivity, Defendants attempt to establish that various assets of the URI/MGO partnership posed complex matters which needed to be carefully resolved before the unwinding could occur. In particular, Defendants suggest that the Service Station Partnership and Southgate Partnerships "presented unique challenges" that required considerable time to resolve. (Defendants' Brief at 12.) This allegation is false and contradicted by the factual record.

First, Defendants allege that the Service Station Partnership presented extensive environmental law issues due to an underground storage tank which had leaked, thereby affecting the financial liabilities of the parties. For purposes of the unwinding, however, the liability for any potential environmental cleanup was irrelevant. All parties agreed that MGO was a limited partner in the Service Station Partnership, and therefore, MGO was not responsible for any costs or liabilities beyond its capital contribution. (R. at 3465; Transcript at 389-390.) The only issue the Service Station Partnership presented with regards to the unwinding was whether MGO owed any money to URI for payments that had not been made. This determination was not complicated especially considering MGO's willingness to complete the unwinding. Accordingly, the Service Station Partnership's liability for an environmental cleanup was not germane to URI's unwinding from MGO.

Second, Defendants allege that the dissolution of the Southgate Partnerships presented an obstacle to completing the unwinding. (Defendants' Brief at 12.) This allegation is also erroneous. Resolution of the Southgate Partnership boiled down to assigning a one-third interest in a 6.6 acre plot of land to MGO. This was the extent of the negotiations necessary to resolve this issue for purposes of the unwinding. Accordingly, the Southgate Partnership was not a complex sticking point that required a twenty-month delay to resolve.

Defendants' contention that the URI/MGO partnership assets were an obstacle to the URI-MGO unwinding is not supported by the factual record. However, even if this Court were to assume for purposes of this appeal that the Service Station Partnership and Southgate Partnerships did present complex issues which hindered the unwinding process, the Defendants have failed to present any evidence that they addressed these issues in an attempt to resolve the problems. Plaintiffs contend that this failure further demonstrates the Defendants' failure to use their "best efforts" in attempting to facilitate the URI-MGO unwinding.

#### The Morgan Factor

Defendants also allege that a substantial amount of time was necessary to effectuate the unwinding because Fife was required to expend a great deal of time allaying Morgan's fears concerning the unwinding. (Defendants' Brief at 13-14.) However, the evidence is clear that Morgan was not only anxious to see the unwinding take place, but that he also held Fife in the highest esteem and trusted him. In a letter to MGO's officers and directors dated September 19, 1996, Morgan states that "we are working hard to get all the matters settled between URI and MGO" and that "[i] honestly believe we are making good headway in this matter." (R. at 15; Plaintiffs' Exhibit 9.) Morgan continued,

One of the greatest things we have going for us now, as I view it, is a guy by the name of John Fife. He not only obtained his MBA out of Harvard University Business School; but he is a leader who works so well with

people; and he seems to be a completely fair and reasonable and capable person.

(R. at 15; Plaintiffs' Exhibit 9.)

In light of this letter and the corroborating testimony of Bennion, Fife's gratuitous and vague statements regarding the need to build a relationship with Morgan are unpersuasive. Where Fife could not point to a single specific meeting or conversation with Morgan that served the purpose of overcoming Morgan's fears about Fife or the unwinding, the great weight of the evidence supports only the conclusion that the delay was due to neglect and not to any other purpose.

### **ARGUMENT**

#### **I. THE TRIAL COURT ERRED BY FAILING TO CONSIDER THE DEFENDANTS' DILIGENCE IN ATTEMPTING TO UNWIND URI FROM MGO AS THE TOUCHSTONE OF ITS "BEST EFFORTS" ANALYSIS.**

In their brief, the Defendants argue that the trial court applied the correct legal standard for determining "best efforts" where: (1) the law in Utah and other jurisdictions supports the trial court's conclusions of law, and (2) the Settlement Agreement itself demonstrates that the trial court applied a correct standard of "best efforts." Plaintiffs contend that the Defendants' arguments fail on both counts

**A. The Law In Utah And Other Jurisdictions Does Not Support The Trial Court's Application Of A "Best Efforts" Standard Which Is The Functional Equivalent Of The Less Exacting "Good Faith" Standard.**

In order to differentiate between the usual contractual duty of "good faith" and the more exacting standard of "best efforts," a court must look to the diligence a party has exercised in its attempt to fulfill its obligation. *See Nat'l Data Payment Sys. v. Meridian Bank*, 212 F.3d 849, 854 (3d Cir. 2000). Courts have crafted this distinction to avoid the muddling of the "best efforts" and "good faith" standards, a trap to which many courts have fallen victim. *See Beraha v. Baxter Health Care Corp.*, 956 F.2d 1436, 1445 (7th Cir. 1992). In this case, the trial court erred by failing to consider the Defendants' diligence, or lack thereof, as the touchstone of its "best efforts" analysis, thereby rendering its analysis as the functional equivalent of the less exacting standard of "good faith."

Defendants cite *Carlson Distributing Co. v. Salt Lake Brewing, Co.*, 95 P.3d 1171 (Utah App. 2004), in support of their contention that the trial court applied the correct "best efforts" legal standard. In *Carlson*, this Court rejected an objective analysis of "best efforts" which simply juxtaposes the capability and efforts of an "average, prudent, [and] comparable party" to the capability and efforts of the party whose conduct is at issue. *Id.* at 1179. This Court held that the "best efforts" standard is primarily a subjective one which does not compare one party's capabilities to that of another. *Id.* at 1179.

Plaintiffs agree that pursuant to *Carlson* the “best efforts” standard is subjective in nature and that courts should look to the particular circumstances of the party to determine whether it has exercised its best efforts. However, this Court’s decision in *Carlson* did not provide any guidance regarding how a court differentiates between actions which qualify as “best efforts” and those that merely satisfy the standard of “good faith.” Accordingly, Plaintiffs contend that when applying this subjective standard, a court must look to the degree of diligence a party has exercised to determine whether it has truly put forth its “best efforts.” A subjective analysis which fails to consider how diligently a party has acted is nothing more than the application of a “good faith” standard, which only judges the subjective intent of a party, rather than the diligence with which it has acted.

In this case, the Defendants have alleged that the trial court “did not apply a ‘good faith’ standard.” (Defendants’ Brief at 21.) However, the Defendants have failed to explain why other courts such as the Seventh Circuit in *Beraha*, the First Circuit in *Triple-A Baseball Club Assocs. v. Northeastern Baseball, Inc.* 823 F.2d 214, 225-226 (1st. Cir. 1987), and the Second Circuit in *Western Geophysical Co. v. Bolt Assoc.*, 584 F.2d 1164, 1170-1171 (2d Cir. 1978) have all held that “best efforts” requires that a party exercise “due diligence.” As noted in its principal brief, by its very definition “best efforts” means the “diligent attempts to carry out an obligation.” Black’s Law Dictionary 152 (7th ed. 1999)(emphasis added.) Diligence is the touchstone of the “best efforts”

analysis and requires that a party “put its muscles to work to perform with the full energy and fairness that the promises and reasonable implications of the contract require.”

*Macksey v. Egan*, 633 N.E.2d 408, 414 (Mass.App.Ct. 1994).

In this case, the trial court conducted a subjective analysis that looked to the Defendants’ intent and the reasonableness of its actions rather than scrutinizing the Defendants’ diligence, or lack thereof, in the fulfillment of its contractual obligation to unwind from MGO. Accordingly, the trial court committed an error of law by effectively muddling the “best efforts” standard with that of “good faith.”

**B. The Settlement Agreement Itself Does Not Demonstrate That The Trial Court Applied The Correct “Best Efforts” Standard.**

Defendants argue that because there was no time frame assigned to the unwinding provision of the Settlement Agreement, the mere fact that URI and MGO were ultimately unwound is sufficient to establish that the trial court applied the correct “best efforts” standard. This argument mistakes the nature of the Defendants’ obligation under the Settlement Agreement as well as the Plaintiffs’ claim.

While Plaintiffs acknowledge that other provisions of the Settlement Agreement may have set forth specific time limitations, Plaintiffs do not agree that the absence of a time frame from the unwinding provision alters the nature of the “best efforts” standard.

Plaintiffs contend that even in the absence of a stated time frame, the Defendants were obligated to use their “best efforts” to accomplish the URI-MGO unwinding from the time the Settlement Agreement was entered into until the unwinding was completed.

The obligation was not limited to a period of sixty days or “immediately following the [c]losing” as other provisions of the Settlement Agreement were. Additionally, the Settlement Agreement did not impose a time frame for the URI-MGO unwinding because one of the key players in the unwinding, MGO, was not a party to the Settlement Agreement and was therefore not required to cooperate in the unwinding or use its best efforts to do so.

In paragraphs 1.a and 1.b, the “best efforts” provisions applied exclusively to each of the parties to the Settlement Agreement. Each party was contractually obligated to use their “best efforts” and the time frames were included as an impetus for the parties to fulfill their obligations to each other. However, in the case of the unwinding provision, MGO was not a party to the Settlement Agreement, and was therefore not required to abide by its provisions. Therefore, a time frame for the completion of the unwinding would be futile where MGO was under no obligation to even cooperate with URI. Accordingly, the Defendants’ obligation with respect to the unwinding provision was not to actually accomplish the unwinding, but rather, to exercise their “best efforts” in an attempt to do so.

Mindful of the Defendants’ obligation, the Plaintiffs have only sought to enforce the benefit of the bargain they received by way of the Settlement Agreement, namely, that Defendants diligently exercise their best efforts to accomplish the URI-MGO unwinding, not that the unwinding actually take place or that it take place within a given time frame.

In *Hughes Communications Galaxy, Inc. v. United States of America*, 47 Fed Cl. 236 (Fed. Cl. 2000), the Court of Federal Claims held that under a best efforts contract, the promisor is required to use its best efforts to fulfill its obligation; if, despite its best efforts, the promisor cannot meet the contractual requirements, the other party has obtained precisely what is bargained for, namely, the promisor's best efforts.

In this case, the Defendants have mistakenly assumed that Plaintiffs are seeking to impose a time frame on the unwinding provision or trying to "re-write the contract to include a term that could have been included, but was not." (Defendants' Brief at 22-23.) This is not the case. Plaintiffs are simply seeking the benefit of what they bargained for as part of the Settlement Agreement, namely, that Defendants exercise their best efforts in attempting to accomplish the URI-MGO unwinding. The fact that the unwinding occurred only evidences that the unwinding was possible and that MGO was a willing participant. However, where Defendants' contractual obligation was to use their "best efforts," the question of whether a time frame for the unwinding's completion was included or whether the unwinding ultimately occurred is irrelevant to the Defendants' obligation. The only relevant question is whether the Defendants actually used their "best efforts" to accomplish the unwinding. Plaintiffs contend that where the Defendants only began to exercise their "best efforts" to work towards the URI-MGO unwinding after the Plaintiffs' filed their lawsuit, that the Defendants failed in their "best efforts" obligation.

II. THE RECORD SHOWS THAT THE TRIAL COURT CLEARLY ERRED IN ITS FACTUAL FINDING THAT DEFENDANTS EXERCISED THEIR BEST EFFORTS.

The best evidence in this case of the trial court's failure to apply the correct legal standard for determining "best efforts" is the court's factual finding that the Defendants had in fact exercised their "best efforts." Had the trial court considered diligence as the essence of its analysis, it would have held that Defendants failed to use their "best efforts" to unwind URI and MGO where MGO was a motivated and anxious partner to the unwinding.

The arguments and facts set forth in the Plaintiffs' principal brief along with the Statement of Additional Facts as contained in this reply brief, adequately address the question of whether the trial court erred in holding that the Defendants used their "best efforts." Defendants have advanced no argument and presented no facts which contradict the overwhelming weight of the evidence that URI ignored the unwinding issue for a period of twenty-months and even rebuffed MGO's attempts to address the issue. As set forth in those arguments and statements of fact, the trial court erroneously found that Defendants exercised their "best efforts."

III. THE TRIAL COURT INCORRECTLY AWARDED ATTORNEYS FEES TO THE DEFENDANTS AS THE PREVAILING PARTY ON THE "BEST EFFORTS" CLAIM.

Utah law is clear that a party is deemed a prevailing party if the opposing party's tardy compliance with an obligation comes as a result of a lawsuit. *Highland Constr. Co.*

*v. Stevenson*, 636 P.2d 1034, 1038 (Utah 1981). In their brief, Defendants argue that *Highland* is not applicable to this case because the Defendants have not admitted any liability to the Plaintiffs as the Defendant in *Highland* did and where they argue there is no temporal connection between the filing of the Plaintiffs' lawsuit and the URI-MGO unwinding. Both of these arguments should be rejected by this Court.

In *Highland*, Highland Construction brought an action against Stevenon, the general contractor and utilities subcontractor, for damages allegedly caused by defective constructive plans and unreasonable delays. *Id.* at 1034. Highland Construction was deemed the prevailing party in that action because 164 days after the lawsuit was filed, Stevenson admitted liability and paid Highland Construction damages in the exact amount it had sued for. *Id.* at 1038. The Utah Supreme Court held that since the debt was long overdue when it was paid by Stevenson, and since the debt was paid only after Highland Construction filed its lawsuit, that Highland Construction was indeed the prevailing party. *Id.*

Defendants attempt to distinguish *Highland* on the grounds that Defendants have not admitted that they failed to use their "best efforts," whereas in *Highland*, Stevenson admitted his liability. However, the key factor in *Highland* was not the admission of liability, but rather, the payment of the damages long overdue to Highland Construction. Similarly in this case, Plaintiffs should be considered the "prevailing party" for purposes of the fee award where as a result of filing their lawsuit, the Defendants began to comply

with their overdue duty to exercise “best efforts.” Whether Defendants admit they used their “best efforts” or not is irrelevant, the key factor is whether the Defendants began to use their “best efforts” only after the Plaintiffs’ lawsuit was filed. As extensively briefed in the Plaintiffs’ principal brief, the record in this case is clear that only after Plaintiffs’ filed their lawsuit to enforce the Settlement Agreement did the Defendants begin to exercise their “best efforts” to accomplish the URI-MGO unwinding. Accordingly, *Highland* is applicable in this case, and pursuant to its reasoning, Plaintiffs should be considered the “prevailing party” for purposes of their claim.

Defendants also argue that *Highland* is in applicable where Stevenson paid the fine within 164 days of the suit being filed, whereas in this case the URI-MGO windup occurred eleven months after the Plaintiffs filed suit. Plaintiffs contend that the relevant time frame this Court should look to is not the time between the filing of the Plaintiffs’ lawsuit and the ultimate URI-MGO unwinding as the Defendants suggest, but rather, the time that elapsed between the filing of the Plaintiffs’ lawsuit and the beginning of the Defendants’ exercise of their “best efforts.” As stated earlier, the Plaintiffs’ suit sought not to compel the URI-MGO unwinding, but rather, the fulfillment of the Defendants’ contractual obligation to use their “best efforts.” When this Court looks at the appropriate time frame, there was a lapse of approximately thirty days in this case between the time the Plaintiffs filed their suit and the first sign that the Defendants’ began to use their best efforts to accomplish the unwinding.

If Highland Construction was deemed the prevailing party for causing the payment of damages due within 164 days of filing its complaint, the trial court erred in not considering the Plaintiffs the prevailing party where Defendants began to use their “best efforts” within thirty days after the Plaintiffs filed their complaint which sought to compel the Defendants to use their “best efforts.”

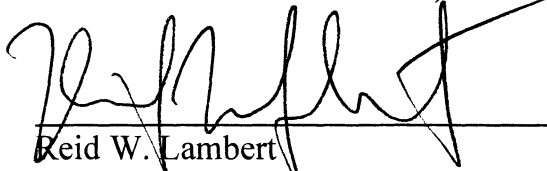
Defendants’ argument that *Highland* is inapplicable in this case should be rejected. Plaintiffs contend that where the Defendants only began to display any diligence in their attempt to unwind URI and MGO after the Plaintiffs filed their lawsuit seeking enforcement of the “best efforts” provision, that according to *Highland*, Plaintiffs should be considered the prevailing party for purposes of their “best efforts” claim.

### **CONCLUSION**

For the aforementioned reasons, Plaintiffs respectfully ask this Court to reverse the decision of the trial court on the Plaintiffs’ “best efforts” claim and award attorneys fees to the Plaintiffs as the prevailing party accordingly.

DATED this 10<sup>th</sup> day of April, 2006.

**WOODBURY & KESLER, P.C.**



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**CERTIFICATE OF DELIVERY**

I hereby certify that on the 10<sup>th</sup> day of April, 2006, I mailed a true and correct copy of the foregoing REPLY BRIEF OF APPELLANTS postage prepaid, by First-Class U.S. Mail to the following:

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