

ORIGINAL

IN THE SUPREME COURT OF OHIO

U.S. BANK, N.A. as Trustee for CMLTI
2007-WFHE2

Plaintiff-Appellant

-vs-

ANTOINE DUVALL, et al.

Defendants-Appellees.

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Case No. 2011-0218

On Appeal from the Cuyahoga
County Court of Appeals, Eighth
Appellate District

Court of Appeals Case No.
CA -10-094714

MERIT BRIEF OF AMICI CURIAE DUANE AND JULIE SCHWARTZWALD IN
SUPPORT OF APPELLEES

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FILED
AUG 16 2011
CLERK OF COURT
SUPREME COURT OF OHIO

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INTRODUCTION

U.S. Bank wants Ohio courts to be open to any plaintiff foreclosing on a residential mortgage loan, even if that plaintiff is not presently a party to the loan. U.S. Bank asks this Court to depart from long-standing and well-founded precedent regarding who may commence a civil action in the State of Ohio. It wants the Court to hold that plaintiffs, or at least plaintiffs who are foreclosing on residential mortgage loans, do not need to possess a present, legally-identifiable interest in the subject matter of the suit prior to filing of the complaint. It even goes so far as to suggest that the requirement of standing to bring a lawsuit is an "unnecessary technicality" which hinders the determination of disputes on their merits.¹

U.S. Bank is joined in its request by *amici curiae* Federal National Mortgage Association ("Fannie Mae") and Federal Home Loan Mortgage Corporation ("Freddie Mac"). Fannie Mae and Freddie Mac are charged by Congress with providing liquidity to the secondary mortgage market in the United States. They claim that, were this Court to apply the rules applicable to all other plaintiffs in Ohio, they would be unable to fulfill their statutory mandate. Ironically, it is precisely because Fannie and Freddie skirted the rules of reasoned and prudent lending that the nation remains mired in its worst economic downturn since the Great Depression.

Although it is understandable that, as plaintiffs, U.S. Bank, Fannie Mae and Freddie Mac wish to have the courthouse doors open to them at all times, it is equally reasonable that Appellees, as defendants, want to ensure that, before they are summoned to Court to answer for an alleged wrong, the party filing the suit owns the right being enforced. This case isn't about

¹ *Brief of Appellant U.S. Bank, N.A. as Trustee for CMLTI 2007-WFHE2*, (filed 6/24/2011) p. 28 (hereafter referred to as "*Brief of U.S. Bank*").

whether banks need to be able to foreclose on defaulted loans; it is about whether all plaintiffs are equal under the law and must comply with the same requirements.

STATEMENT OF INTEREST OF AMICI CURIAE

Duane and Julie Schwartzwald are no strangers to the issue now before the Court. Indeed, they have both a discretionary appeal and a certified conflict pending before the Court. See *Federal Home Loan Mortgage Corp v. Schwartzwald*, Case No. 2011-1201 (discretionary appeal filed 7/14/2011) and *Federal Home Loan Mortgage Corp v. Schwartzwald*, Case No. 2011-1362 (notice of certified conflict filed 8/10/2011). By Decision and Entry dated July 27, 2011, the Greene County Court of Appeals certified the following question as a conflict pursuant to App. R. 25:

“In a mortgage foreclosure action, the lack of standing or a real party in interest defect can be cured by assignment of the mortgage prior to judgment.”

Although worded differently from the question certified by the Eighth District in the present case, the essential issue is the same – what must a foreclosing bank own in order to commence a foreclosure action in Ohio, and when must it own it.

Although the Court may accept one or both of the Schwartzwalds' pending appeals, there is no guarantee that the Schwartzwalds would ever get the chance to brief the issues to the Court. They feel that filing this merit brief as a friend of the court is the only way to ensure that the Court will be able consider their views on the issues presented. The Schwartzwalds thank the court for the opportunity to file this brief and hope their doing so assists in determination of the appeal.

ARGUMENT

Much of U.S. Bank's brief is dedicated to what interest a foreclosing bank need possess in the note and mortgage in order to have standing to foreclose. Generally, the Schwartzwalds do not quarrel with the principles advanced by the bank in that regard. Those requirements are of narrow interest, dealing only in the context of enforcement of notes and mortgages.

The Schwartzwalds are more interested in the general propositions of law advanced by U.S. Bank relating to the nature of standing. It seems that the bank is seeking to carve out an exception for the banking industry, freeing it from the rules which bind all other plaintiffs. That doesn't seem fair. Surely were the Schwartzwalds to sue U.S. Bank for some violation of law found in the bank's form credit card agreement, the bank would first ask whether the Schwartzwalds had obtained a U.S. Bank credit card with the offending terms. And it would be proper for it to do so. For if the Schwartzwalds were not parties to a credit card agreement with the bank, they would lack standing to assert such a claim.

And should the Schwartzwalds defend the filing of the suit notwithstanding their lack of standing on the grounds that they expect to obtain a U.S. Bank credit card in the near future, the bank would most assuredly declare the suit to be premature and demand its immediate dismissal. Under those circumstances, the bank would be right, for without standing, there is no dispute to resolve.

Fannie Mae and Freddie Mac advance a similar agenda. They espouse how important their roles are in the residential mortgage markets, yet fail to acknowledge that individuals like the Schwartzwalds are the ones who really make the system work. If Fannie and Freddie successfully argue anything, it is that they exist for the benefit of the nation's homeowners, not the other way around. Why then should their corporate interests be placed above Ohio's citizens

and the long-accepted principles of law applicable to all of Ohio's litigants? Why should the bar to entry into court be lowered for them, but not others?

It is for this reason that U.S. Bank's proposition -- that standing to enforce a note need not be established at the time of filing of the complaint, but may be "cured" prior to entry of judgment -- is so disturbing. It seeks to place one type of plaintiff over another. U.S. Bank, Fannie, and Freddie argue that their lawsuits are so important that technical niceties such as standing should not delay their day in court. This approach ignores the importance which standing has in the judicial process as a whole. The requirement of standing guards the courthouse doors, opening them only for real controversies, not prospective ones. It is a concept that is not dependent on the type of claim being presented or the type of person asserting such claim. Indeed, the concept of standing is so important it is an integral part of the constitutional grant of power to Ohio's common pleas courts. It is not a technicality, but rather a necessity.

Proposition of Law No. 1: A plaintiff's standing to bring a civil action is a prerequisite to invoking a common pleas court's jurisdiction and must be established at the commencement of the case.

1. Standing is a prerequisite to a trial court's consideration of the merits of a case.

Last December, this Court affirmed the long-accepted principle that standing is an absolute requirement to bringing a civil action in Ohio's courts when it stated:

Standing is a preliminary inquiry that must be made before a court may consider the merits of a legal claim. *Ohio Pyro, Inc. v. Dept. of Commerce*, 115 Ohio.St.3d 375, 2007-Ohio-5024, 875 N.E.2d 550, ¶ 27; *Cuyahoga Cty. Bd. of Commrs. v. State*, 112 Ohio.St.3d 59, 2006-Ohio-6499, 858 N.E.2d 330, ¶ 22. It is an issue of law, so we review the issue de novo. *Id.* at ¶ 23. To have standing, a party must have a personal stake in the outcome of a legal controversy with an adversary. ~~*Ohio Pyro*, ¶ 27. This holding is based upon the principle that "it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies."~~ *Fortner v. Thomas*

(1970), 22 Ohio St.2d 13, 14, 51 O.O.2d 35, 257 N.E.2d 371. See also Section 4(B), Article IV, of the Ohio Constitution.

An actual controversy is a genuine dispute between adverse parties. *State ex rel. Barclays Bank PLC v. Hamilton Cty. Court of Common Pleas* (1996), 74 Ohio.St.3d 536, 542, 660 N.E.2d 458; *Corron v. Corron* (1988), 40 Ohio.St.3d 75, 79, 531 N.E.2d 708. It is more than a disagreement; the parties must have adverse legal interests. Id; *Mid-American Fire & Cas. Co. v. Heasley*, 113 Ohio.St.3d 133, 2007-Ohio-1248, 863 N.E.2d 142, ¶ 9.

Kincaid v. Erie Ins. Co., 2010-Ohio-6036, 128 Ohio St.3d 322 Ohio 2010), at ¶¶9-10.

“[T]he question of standing depends upon whether the party has alleged such a 'personal stake in the outcome of the controversy,' [citation omitted] * * * as to ensure that 'the dispute sought to be adjudicated will be presented in an adversary context and in a form historically viewed as capable of judicial resolution.' [citation omitted].” *State ex rel. Dallman v. Court of Common Pleas, Franklin County*, (1973) 35 Ohio St.2d 176, 178-79 (quoting *Sierra Club v. Morton* (1972), 405 U.S. 727, 31 L.Ed.2d 636, 641. “Standing requires a demonstration of a concrete injury in fact, rather than an abstract or suspected injury.” *State ex rel. Consumers League of Ohio v. Ratchford* (1982), 8 Ohio App.3d 420, syll. ¶3.

Even in the face of such strong precedent supporting the requirement of standing, U.S. Bank insists on characterizing standing as an unnecessary technicality which stands in the way of it foreclosing as quickly as it wants. But standing is no technicality; it is a necessary component of a justiciable matter. And the presence of a justiciable matter is required before a common pleas court has jurisdiction to hear a case.

2. Art. IV, Sec. 4 of the Ohio Constitution limits the jurisdiction of common pleas courts to justiciable matters.

In 1968, the voters of Ohio passed what is called the Modern Courts Amendment to the Ohio Constitution. The Modern Courts Amendment, inter alia, granted this Court with the

authority to promulgate the Rules of Civil Procedure. It also altered the jurisdiction of Ohio's common pleas courts. Specifically, section 4 of Article IV of the Ohio Constitution was amended to read as follows:

(B) The courts of common pleas shall have such original jurisdiction over all justiciable matters and such powers of review of proceedings of administrative officers and agencies as may be provided by law.

This amendment was designed to restrict the power of common pleas courts to hear matters. *Village of Monroeville v. Ward* (1971), 27 Ohio St.2d 179, 181. The key words of the provision are "justiciable matters." The requirement of "justiciable matters" limits a common pleas court's original jurisdiction over only those cases which present real controversies. *Lundblad v. Celeste*, 772 F.2d 907, (6th Cir. 1985). "To be justiciable, a controversy must be grounded on a present dispute, not on a possible future dispute." *Kincaid*, supra, 2010-Ohio-6036, 128 Ohio St.3d, at ¶17. This concept requires an immediacy of conflicting interests such that the matter is presented in an adversarial setting. *State ex rel. Dallman v. Franklin Cty. Court of Common Pleas* (1973), 35 Ohio St.2d 176,179. As the Court stated in *Fortner v. Thomas* (1970), 22 Ohio St.2d 13, 14:

It has been long and well established that it is the duty of every judicial tribunal to decide actual controversies between parties legitimately affected by specific facts and to render judgments which can be carried into effect. It has become settled judicial responsibility for courts to refrain from giving opinions on abstract propositions and to avoid the imposition by judgment of premature declarations or advice upon potential controversies.

See also, Moore v. City of Middletown, 2010-Ohio-2962 ¶7.

For a matter to be justiciable, the plaintiff must have standing. *Kincaid*, supra, 2010-Ohio-6036, 128 Ohio St.3d, at ¶20; *Brinkman v. Miami University*, (Butler Co. Comm. Pleas 2005), 139 Ohio Misc. 114, 120, 2005-Ohio-7161 ¶13. Without a justiciable matter before it, a

common pleas court cannot enter a valid judgment. *State ex rel. Draper v. Wilder* (1945), 145 Ohio St. 447, syll. ¶2. A common pleas court's jurisdiction cannot be invoked just because there is a dispute, no matter how acrimonious. *State ex rel. Barclays Bank PLC v. Court of Common Pleas of Hamilton County, Ohio* (1996) 74 Ohio St.3d 536, syll ¶1. It takes two parties, with opposing interests which are legally recognized and capable of vindication. *Id.* syll ¶2. Without standing, there is no justiciable matter, and a plaintiff may not invoke the jurisdiction of an Ohio common pleas court. *Dallman, supra*, at p. 179; *Kincaid, supra* at ¶20.

Barclays, supra, is quite illustrative of the point even though it did not deal directly with the issue of standing. In that case, Barclays Bank sought a writ of prohibition from this Court directing the common pleas court to dismiss a case for lack of a justiciable matter, i.e. lack of subject matter jurisdiction. The writ was granted because the Court found that the common pleas court plaintiffs had failed to sue the proper party, i.e. the party with whom they had the real dispute. The Court ruled that, without the proper parties in the case – ones with adverse legal interests - there was no controversy to be resolved, and thus no subject matter jurisdiction. *Barclays, supra*, p. 542. This ruling, because of its nature (i.e. in prohibition) is a direct statement that the presence of a justiciable matter is required in order for the common pleas court to have subject matter jurisdiction.

As was succinctly stated in *Hirsch v. TRW, Inc.*, Cuyahoga Co. Case No 04-LW-0861, 2004-Ohio-1125

It follows that if the courts of common pleas' original jurisdiction is limited to "justiciable matters," the subject matter jurisdiction of the court -- that is, "the power to hear and decide a case on the merits," see *Morrison v. Steiner* (1972), 32 Ohio St. 86, paragraph one of the syllabus -- is directly limited to justiciable matters.

Id. at ¶11.

Although *Barclays* addressed the defendant side of the case caption, its pronouncement is

clear – both parties to a common pleas court case must have an interest in the case before the Court has jurisdiction. From the plaintiff's side of the case caption, that requirement is standing. And many Ohio courts have held as much.

Standing to prosecute a claim is a threshold question, one which "embodies general concerns about how courts should function in a democratic system of government." *State ex rel. Ohio Academy of Trial Lawyers v. Sheward* (1999), 86 Ohio St.3d 451, 469, "The question of standing is whether a litigant is entitled to have a court determine the merits of the issues presented." *Ohio Contractors Assn. v. Bicking*, 71 Ohio.St.3d 318, 320, 1994-Ohio-183, *see also*, *Ohio Pyro, Inc. v. Ohio Dept. of Commerce*, 2007-Ohio-5024, 115 Ohio St.3d 375, ¶27. Therefore, standing is an element of the court's jurisdiction. *Rickard v. Trumbull Township Bd. Zoning Appeals*, 11th Dist. No. 2008-A-0024, 2009-Ohio-2619, ¶35. *Helms v. Koncelik*, Franklin App. No. 08AP-323, 2008-Ohio-5073, ¶22 (stating that standing is a threshold jurisdictional issue); *Northland Ins. Co. v. Illuminating Co.*, Ashtabula App. No. 2002-A-0058, 2004-Ohio-1529, ¶17 (holding that a plaintiff's lack of standing to bring a suit necessitates dismissal of the case); *First Nat'l Bank v. Randal Homes Corp.*, Pike App. 05CA739, 2005-Ohio-6129 ¶11 (stating "the issue of standing is jurisdictional in nature and may be raised sua sponte by a court."). *In re Foreclosure of Parcel of Land Encumbered with Delinquent Tax Liens*, Lake App. No. 2007-L-02, 2007-Ohio-4377 ¶11 (holding that, without a current interest in the real property which was the subject of the case, a party had no standing to assert a claim regarding the property and the court was without jurisdiction to hear the claim).

Moreover, like subject matter jurisdiction generally, the issue of standing cannot be waived, and may be raised at any time. *Gildner v. Accenture, L.L.P.*, Franklin Co No. 09AP-167, 2009-Ohio-5335, ¶9 (citing *New Boston Coke Corp. v. Tyler* (1987), 32 Ohio.St.3d 216, 218).

Whereas, the defense of real party in interest is waived if not asserted, standing can not be waived.

3. Suster is not controlling law.

In its brief, U.S. Bank relies heavily on *State ex rel. Tubbs-Jones v. Suster*, (1998) 84 Ohio St.3d 70, for the proposition that a lack of standing is not jurisdictional in nature and therefore is waived if not timely asserted. The problem with this reliance is that *Suster* did not have the support of a majority of the justices of this Court. And a plurality decision which did not receive the support of four justices of the Supreme Court is not controlling law. *Kraly v. Vannewkirk* (1994), 69 Ohio St.3d 627, 633.

Suster was a four to three decision denying an application for writ of prohibition. The majority decision voted to deny the writ. And the main decision does, indeed, state that lack of standing challenges that capacity of the person to bring an action, not the subject matter jurisdiction of the court. *Suster*, at p. 77. Although there was a majority of justices which voted to deny the writ of prohibition, only three justices joined in that portion of the opinion which addressed whether standing was jurisdictional. Justice Cook, although voting with the majority on judgment and much of the opinion, expressly withheld support from that portion of the opinion relied upon by U.S. Bank. *Id.* at p. 79. Thus, that portion of the opinion was not a majority decision of the Court.

Indeed, three of the Court members joined in a dissent wherein they voted to grant the writ of prohibition. *Id.* p. 79-80. This is significant because the grant of a writ of prohibition is a judgment that the common pleas court patently lacks subject matter jurisdiction to proceed in the case. This means that these three justices found that standing is a prerequisite to the Court's exercise of subject matter jurisdiction. These three votes, together with Justice Cook's refusal to

concur with the majority opinion on the standing issue, means that a majority of the Court actually voted standing does involve the court's subject matter jurisdiction.²

4. Standing is not the same as Civ. R. 17 real party in interest status.

In reading the many cases regarding standing and real party in interest in the foreclosure context, it is clear that most courts and commentators conflate the concepts of "standing" and "real party in interest." Although in many instances the two ideas are similar, they are, in fact, distinct legal concepts. It is imperative to make the distinction clear before analyzing a particular set of facts.

In its brief, U.S. Bank drags the Court through a tortuous line of reasoning to establish a definition of "standing" which will meet its needs. It claims that there are three types of "standing." *U.S. Bank Brief*, pp. 25-27. One of those convenient definitions happens to coincide with "real party in interest" status found in Civil Rule 17. Of course, if U.S. Bank can persuade the Court that the relevant definition of standing is the same as Rule 17's "real party in interest" status, it can avail itself of the protection of that rule's "cure" provision. But the most that can be said for U.S. Bank's various definitions of "standing" is that each relates to a particular aspect of standing.

Standing is nothing more and nothing less than the present possession of a legally recognizable interest in a current dispute. It has both a qualitative elements and a temporal component. There must be competing interests of the parties, and those interests must be in present conflict.

In *Kincaid*, this Court addressed the "current dispute" part of the equation. Because the

² Because she did not explain her vote, we are left to speculate as to why Justice Cook did not support this portion of the decision, and still voted with the majority on judgment. It could be because she felt that the petitioner had failed to meet the other requirements for a writ of prohibition, such as establishing a lack of remedy by way of direct appeal.

plaintiffs had not been denied the insurance benefits they were suing over, this Court held that there was no current dispute. *Kincaid*, 2010-Ohio-6036, 128 Ohio St.3d, at ¶13. In *Ohio Pyro*, the Court ruled that Ohio Pyro lacked standing because it had no legally recognizable interest to protect. *Id.*, 115 Ohio St.3d , ¶¶28-30. A corporation's desire to protect its market share is not the type of interest that courts will recognize to establish standing. In this case, as in *Byrd, Jordan*, and *Gindele*, the courts of appeal held that the foreclosing party did not presently possess an interest in the dispute. These courts have merely stated that, in order to file a lawsuit to enforce a contract, the plaintiff must be a party to the contract.

All three requirements are needed to create a "justiciable matter." Without one of them, the case does not present a real dispute between the litigants. Without all these elements, a court is merely being asked to issue an advisory opinion.

Rule 17's "real party in interest" goes to whether the party suing is the one entitled to the relief sought. "To determine whether the requirement that the action be brought by the real party in interest is sufficed, courts must look to the substantive law creating the right being sued upon to see if the action has been instituted by the party possessing the substantive right to relief." *Shealy v. Campbell* (1985), 20 Ohio St.3d 23, 25. The party suing has to be the one who is directly benefited or damaged by the case's decision. *West Clermont Ed. Ass'n v. West Clermont Local Bd. of Ed.*, 67 Ohio App.2d 160, syll. ¶1(Clermont Co. 1980).

"The purpose behind the real party in interest rule is " * * * to enable the defendant to avail himself of evidence and defenses that the defendant has against the real party in interest, and to assure him finality of the judgment, and that he will be protected against another suit brought by the real party at interest on the same matter." *Shealy*, supra, at pp. 24-25 (citations omitted). For instance, if a beneficiary of a trust sues a third-party for waste of trust assets, the

beneficiary has standing to pursue the claim, i.e. he has been damaged, through his beneficial interest in the trust assets. The beneficiary is not, however, the real party in interest to pursue the claim. Only the trust's trustee, who holds legal title to the property, is the real party in interest. If the beneficiary prosecutes the claim to judgment, the defendant could face a similar suit from the trustee.

Put another way, those who are real parties in interest to vindicate a claimed right is a subset of those persons have standing to pursue that claim. All persons who are the real party in interest have standing, but not all those with standing are real parties in interest. Thus, the rule is that a defense of real party in interest is waived if not asserted, yet standing can be raised at any time in the proceeding. *Gildner v. Accenture, L.L.P.*, Franklin Co No. 09AP-167, 2009-Ohio-5335, ¶9 (citing *New Boston Coke Corp. v. Tyler* (1987), 32 Ohio.St.3d 216, 218).

It is this distinction between standing and real party in interest which is made in *Wells Fargo Bank v. Byrd*, 178 Ohio App.3d 285, 2008-Ohio-4603 (Hamilton Co. 2008) and *Wells Fargo Bank v. Jordan*, Cuyahoga App. 91675, 2009-Ohio-1092 (Cuyahoga Co. 2009) (jurisdiction denied 09/30/2009 Case Announcements, 2009-Ohio-5031, *Wells Fargo Bank, N.A. v. Jordan*, Case No. 2009-1030). See also, *Bank of New York v. Gindele*, (Hamilton Co. 2010) 2010-Ohio-542, ¶¶2-6. Those cases held that a real party in interest analysis can not occur until the plaintiff has standing to invoke the court's jurisdiction in the first place.

These rulings make sense. Standing is an absolute requirement for justiciability, and, therefore, cannot be waived. But the real party in interest rule is designed to protect defendants from multiple suits over the same alleged harm. It does not impact a court's jurisdiction, and therefore is merely a defense available to defendants.

5. Answering the certified question.

The question certified by the Eighth District has two parts to it – what interest must a foreclosing bank possess, and must that interest exist at the time the complaint is filed. As for the first part, the Court may define the required interest in any manner which makes sense given the law of negotiable instruments. Generally, Article 3 of the U.C.C. does not speak in terms of "ownership" of promissory notes. So perhaps "ownership" of the note and mortgage is not the best way to define what interest must be possessed. In that regard, the question is perhaps best answered in the negative.

The timing of possession of such an interest, however, is a different matter. That part of the question goes to the heart of a common pleas court's constitutional power to decide the case. Without standing there is no justiciable matter and a plaintiff may not invoke a common pleas court's jurisdiction. Therefore, as to the temporal component of the question, the answer is "yes." Whatever interest vests a plaintiff the right to enforce the contractual right at issue must exist at the time the case is filed.

CONCLUSION

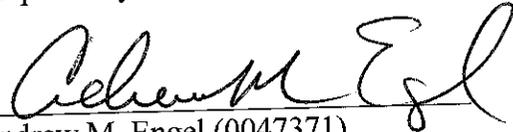
Lady Justice is always portrayed blindfolded. The nature of the parties involved in a given case is not relevant to the outcome of the dispute. Justice is to be dispensed to all in equal measure.

U.S. Bank wants the Court to do one of two things: 1) depart from the well-established rule that standing is a jurisdictional prerequisite to a courts determination of a case; or 2) modify the requirement of standing to favor foreclosing plaintiffs. The bank is supported by Fannie Mae and Freddie Mac who plainly demand special treatment because of who they are. They declaim that long-held rules of jurisprudence should yield to the realities of a complex system they

developed. They seek to place their interests well above those of Ohio's homeowners.

The Schwartzwalds suggest that Justice should remain blinded.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served by ordinary mail this 16th day of August 2011 upon:

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