IN THE SUPREME COURT OF OHIO

BARCLAY PETROLEUM, INC.,	:	
	:	
Plaintiff-Appellant,	:	Case No. 2017-1387
	:	
v.	:	On Appeal from the Hocking County
	:	Court of Appeals, Fourth Appellate District
MATHEW BAILEY, TRUSTEE OF THE BAILEY FAMILY TRUST DATED 1/12/2007, *et al*.,	:	(No. 16CA14)
	:	
	:	
Defendants-Appellees.	:	

BRIEF OF AMICI CURIAE OHIO OIL AND GAS ASSOCIATION AND SOUTHEASTERN OHIO OIL AND GAS ASSOCIATION IN SUPPORT OF PLAINTIFF-APPELLANT BARCLAY PETROLEUM, INC.

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INTRODUCTION

By its decision below, the Fourth District concluded that a lessor under an oil and gas lease is not estopped from asserting that the lease expired during his ***predecessors'*** ownership of the property. The court reached its holding notwithstanding undisputed evidence that the predecessor owners regarded their lease as valid, and moreover, eagerly solicited and accepted household gas, along with the lessee's ongoing labor and investment to deliver that gas, during a time when the lease experienced a pause in commercial sales of oil and gas.

The Fourth District's decision raises a dangerous precedent. If estoppel is not available to lessees under oil and gas leases, the same way that it is available to every other contracting party or property owner in the state, then nothing dissuades lessors from inviting and accepting lessees to invest years of labor and resources for the lessor's benefit, only to turn around whenever a more lucrative leasing opportunity arises and declare that the lease had been expired all along. And even where a lessor is subjectively and objectively satisfied with the lessee's performance under the lease (as is the case here), nothing prevents a successor owner from second-guessing that relationship at a later date.

But contrary to the Fourth District's holding, courts in Ohio and in other major producing jurisdictions have held that equitable estoppel, or, its relative, quasi-estoppel, bars a lessor from claiming that a lease expired in the face of evidence that the lessor invited the lessee to expend its own time and labor for the lessors' benefit or evidence that the lessor accepted benefits inconsistent with an expiration claim during a time that the lease's habendum clause was not otherwise being maintained. This Court should follow the reasoning of these decisions, reverse the Fourth District and hold that in Ohio, equitable estoppel and quasi-estoppel may bar a lessor from claiming that an oil and gas lease expired under its habendum clause and that such doctrines bar the lessors' claim under the facts of this case.

INTERESTS OF *AMICI CURIAE*

The Ohio Oil and Gas Association ("OOGA") is a statewide trade association whose more than 2,000 members engage in the exploration, development, and production of oil and natural gas in Ohio. Its membership includes small independent producers and major energy companies, as well as Ohio contractors, service and supply companies, manufacturers, utilities, accountants, insurers, engineers, and landowners. OOGA's mission includes protecting, promoting, fostering, and advancing the common interest of those engaged in all aspects of the Ohio crude oil and natural gas producing industry. The Southeastern Ohio Oil and Gas Association ("SOOGA") is a non-profit organization comprised of nearly 400 local producers and businesses involved in oil and gas operations in southeastern Ohio and northern West Virginia. Since established in 1978, SOOGA has addressed issues and concerns unique to the Mid-Ohio River Valley. It believes that the local oil and gas industry plays a vital role in continued economic growth and development of this geographic area and nationwide. OOGA and SOOGA monitor Ohio litigation involving oil and gas law and occasionally participate as amicus curiae in select cases that address issues of special importance to their members. This case represents one of those cases.

The oil and gas lease lies at the heart of Ohio's oil and gas industry, and like other contracting parties, producers must make critical business decisions in reliance on the validity of their agreements with landowners. But the question of whether an oil and gas lease remains valid often involves a highly fact-specific inquiry. A lease can be producing in "paying quantities," for example, and therefore remain in full force and effect, even when there is a pause in commercial sales. And, as in the case here, lease parties will often continue to treat their lease as valid and ongoing, and perform their lease obligations accordingly, notwithstanding an

interruption in production. Given that reality, fundamental principles of equitable estoppel and quasi-estoppel are necessary to recognize and give effect to the parties' relationship, as evidenced by their actions and course of dealing with one another.

Without the ability to assert equitable estoppel and quasi-estoppel, amici's members will face uncertainty as to the validity of their leases, and more so, they could not adequately protect those leases from being opportunistically challenged on the basis of events that may have occurred years earlier. As such, amici urge this Court to confirm that lessees faced with lease expiration claims can assert that such defenses apply here.

STATEMENT OF FACTS

Amici adopt the statement of facts set forth by Appellant in its merit brief.

ARGUMENT

I. Appellant's First Proposition of Law:

> Where a landowner expressly represents that providing free gas is sufficient to hold an oil and gas lease, thus inducing the leaseholder to expend time and money ensuring a steady supply of that gas, the landowner is estopped from claiming the lease terminated during the acceptance of that free gas.

A. Estoppel applies to oil and gas leases the same as it does to contract and property rights generally.

The Fourth District's decision eliminates estoppel as a defense to oil and gas lease expiration claims. But there is nothing particular about oil and gas leases that would immunize such agreements from the doctrine of estoppel. It is true that "[o]il and gas leases are said to be unique, as they 'seemingly straddle the line between property and contract.'" *Chesapeake Exploration, L.L.C. v. Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, 45 N.E.3d 185, ¶ 41. Such instruments "are contracts, and the terms of the contract with the law applicable to such terms, must govern the rights and remedies of the parties." *Harris v. Ohio Oil Co.*, 57 Ohio St. 118, 129, 48 N.E. 502 (1897). And oil and gas leases also create a property interest, *Buell* at ¶ 42, in

the form of a fee simple determinable interest in the oil and gas. *Kramer v. PAC Drilling Oil & Gas, LLC*, 197 Ohio App.3d 554, 2011-Ohio-6750, 968 N.E.2d 64, ¶ 11 (9th Dist.); *Baxter v. Res. Energy Exploration Co.*, 2015-Ohio-5525, 57 N.E.3d 188, ¶ 31 (11th Dist.). But under either contract or property law, ***estoppel can prevent a lessor under an oil and gas lease from asserting its expiration.***

As to the former, courts have long recognized that estoppel can prevent a contracting party from denying the contract's validity. *See, e.g., United States Rolling Stock Co. v. Atlantic & G. W. R. Co.*, 34 Ohio St. 450 (1878) ("The defendant has, by its silence and acquiescence in, and acting under, the contract, estopped itself, and especially by the accounting thereunder had, from denying its validity."); *London & Lancashire Indemn. Co. v. Fairbanks Steam Shovel Co.*, 112 Ohio St. 136, 147 N.E. 329 (1925), paragraph one of the syllabus ("When an ultra vires contract has been fully executed by one party thereto, and the other party has received the benefit of the contract, both parties being private corporations for profit, the party which has received the benefit is estopped to question the validity of the contract."). Accordingly, estoppel principles that govern contractual relationships generally apply to oil and gas leases as well.

Moreover, estoppel applies with equal force to ownership claims to property and, specifically, applies to bar a reversionary interest owner from asserting the automatic reversion of a determinable property interest contrary to the claims of the determinable interest holder:

> When the defeasible estate is labeled a fee simple determinable, the defense of estoppel should also be available to the former owner of the defeasible estate if he substantially changes his position in reliance on a representation—either express or implied—by the owner of the possibility of reverter that he does not intend to assert his rights under the special limitation after the terminating event has occurred.

Stoebuck and Whitman, *The Law of Property*, Section 2.7, at 57 (3d Ed.2000).[1] *See also Mitchell v. Simms*, 63 S.W.2d 371 (Tex.Comm.App.1933) (acknowledging oil and gas lease creates determinable property interest and applying estoppel to preclude asserting of automatic expiration); *Wilson v. Xander*, 182 W.Va. 342, 387 S.E.2d 809 (1989).

Consistent with these background principles, Ohio courts recognize that estoppel will apply under appropriate circumstance to bar a lessor from asserting the expiration of an oil and gas lease. *See, e.g., Rayl v. East Ohio Gas Co.*, 46 Ohio App.2d 175, 348 N.E.2d 390 (9th Dist.1975); *Goodwill v. Columbia Gas Transm. Corp.*, 5th Dist. Holmes No. CA-415, 1990 Ohio App. LEXIS 3716 (Aug. 15, 1990); *Lock v. Ridgeway*, 5th Dist. Knox No. 86-CA-15, 1987 Ohio App. LEXIS 6151 (Mar. 6, 1987).[2] And under the indisputable material facts here, estoppel should bar the Defendants from claiming that their lease expired.

B. The prior lessors' representations and conduct estops the current lessors from asserting that their lease expired for lack of commercial production during the period of time that the prior lessors owned the subject property.

Equitable estoppel "precludes recovery 'when one party induces another to believe certain facts exist and the other party changes his position in reasonable reliance on those facts to

[1] Countrywide jurisprudence has long recognized that estoppel can bar a claimant from asserting ownership in property contrary to that claimant's conduct or representations. *See* 2 Tiffany, *Real Property*, Section 546, at 2135 (2d Ed.1920) ("[T]he true owner of land who stands by and sees another, under the belief that he has the unencumbered title to the land, make expenditures for improvements thereon, may be under such a duty to inform the person in possession of the true state of the title as to be thereafter estopped from asserting any rights in the land.").

[2] Courts in other producing jurisdictions agree. *Brannon v. Gulf States Energy Corp.*, 562 S.W.2d 219 (Tex.1977); *Hodges v. Harrell*, 173 Ark. 210, 293 S.W. 25, 29 (1927); *Parten v. Webb*, 205 La. 799, 18 So.2d 198 (1944)*; Xander* at 344; *Walter v. Ashland Oil & Refining Co.*, 300 Ky. 43, 46, 187 S.W.2d 425 (1945) ("So far as we are aware, in every instance in which the lessee has accepted the past due rental, or in which he has suffered the lessee to drill after the time had expired within which the lessee was required to drill, we have accepted the construction adopted by the parties and applied the rules of waiver and estoppel."); Brunini, *Estoppel, Adoption, and Ratification Affecting Oil, Gas and Mineral Leases, Pooling and Unitization Agreements*, 9 Proc. Ann. Inst. On Oil & Gas L. & Tax'n 165 (1958) (collecting authorities) (available on HeinOnline).

his detriment.'" *Glidden Co. v. Lumbermens Mut. Cas. Co.*, 112 Ohio St.3d 470, 2006-Ohio-6553, 861 N.E.2d 109, ¶ 52, quoting *State ex rel. Chavis v. Sycamore City School Dist. Bd. of Edn.*, 71 Ohio St.3d 26, 641 N.E.2d 188 (1994). For example, courts apply estoppel where one party to a contract misleads the other to make expenditures or improvements on another's property. *See, e.g., Monroe Bowling Lanes v. Woodsfield Livestock Sales*, 17 Ohio App.2d 146, 147, 244 N.E.2d 762 (7th Dist.1969).

Accordingly, where a lease is for an extended period not producing in commercial quantities for purposes of maintaining its habendum clause, thereby potentially triggering the lease's termination—but the lessor induces the lessee to undertake further labor or expense on the leasehold, or knowingly acquiesces to such undertaking—estoppel will bar the lessor from claiming that the lease expired. *See, e.g., Ridgeway*, 1987 Ohio App. LEXIS 6151 (awarding summary judgment to lessee where the undisputed evidence showed that lessor never informed lessee that she considered a lease to be forfeited or terminated due to lack of production and lessee expended substantial money into re-working the well); *Cadillac Oil & Gas Co. v. Harrison*, 196 Ky. 290, 294, 244 S.W. 669 (1922) (finding that ***even if the lease had previously expired***, if the landowner acquiesced to drilling at the expense of the lessee, "***they [would not] be allowed to claim or have a forfeiture of the lease because to do so would be contrary to the fundamental principles of equitable estoppel***.") (emphasis added); *Hodges*, 173 Ark. at 220, 293 S.W. 25, 29 ("By permitting [lessee] to enter upon said lease and begin the drilling of a well without taking any steps to prevent him from doing so, we hold that [lessors] waived the right to insist upon a forfeiture and a cancellation of the lease as to this particular 40 acres.").

Here, the representations and conduct of the prior lessors, Darrell and Janet Lucas (the "Lucases") estop the successor lessors, Mathew and Lora Bailey (the "Baileys"), from

maintaining that their lease with Barclay expired during the time that the Lucases owned the property. Defendants do not dispute the facts giving rise to that estoppel:

- The Lucases, believing the supply of household gas was the "***most important***" benefit of their lease, reached an understanding with Barclay that the provision of household gas was itself sufficient to hold the lease without regard to the level of commercial oil and gas sales.[3]

- Based on the understanding reached with the Lucases, Barclay furnished the Lucases with household gas **until the time that the Baileys purchased the property in November 2012.**[4]

- Barclay bore all of the labor and expense associated with providing the Lucases with household gas. And when any interruptions arose, Mr. Lucas would immediately phone Barclay's owner to complain.[5] Barclay, in turn, would jump to resolve the issue, sometimes the same day.[6]

- One or more of the three wells on the Lucases' property reported no commercial sales of oil or gas in a number of years between 2000 and 2012, and all three wells experienced a gap in commercial sales for ***three years*** between ***2010 and 2012***.[7] According to the Fourth District's reasoning, an oil and gas lease like the one here expires "when there is no oil or gas produced for ***two years or more***."[8] Therefore, under the Fourth District's reasoning**,** the triggering point for the lease's expiration ***would have occurred sometime before the Baileys purchased the property.***

- ***But even during the years when no production was sold from the wells***, the Lucases not only subjectively regarded their lease as valid and effective[9] but also eagerly accepted household gas *and* continued to make affirmative demands on Barclay to invest more labor and money into ensuring their supply of household gas.[10] In fact, ***in 2012*** (the same year that the Baileys bought the property),

[3] R. 107, Exs. to Barclay's Cross-MSJ, Ex. 4, PI. Hr'g Tr. at 17:12-18.
[4] R. 107, Exs. to Barclay's Cross-MSJ, Ex. 2, L. Lucas Dep. ("L. Lucas Dep. at 18:2-5") ([The supply of household gas "never ceased. It's always been there.").
[5] L. Lucas Dep. at 21:3-5; 9-10.
[6] *Id.* at 16:5-8.
[7] Opinion, 2017-Ohio-7547 ("Opp."), ¶¶ 3-5.
[8] *Id.* ¶ 21. For purposes of this appeal, amici take no position on the soundness of the Fourth District's determination that a two-year gap in commercial sales would have triggered the expiration of an oil and gas lease as a general matter, because under the specific facts of this case, the Baileys are estopped from raising that claim.
[9] L. Lucas Dep. at 20:13-16, 17-20.
[10] *Id.* at 18:2-5.

> ***Mr. Lucas once again sought Barclay's assistance***, this time to lay a new flow line from the gas well to his home, and Barclay dutifully complied.[11]

Given these indisputable facts, estoppel must preclude the Baileys[12] from asserting that all along the lease had, in fact, terminated. *E.g., Eggleson v. McCasland*, 98 F.Supp. 693, 696 (E.D.Okla.1951) ("By acquiescing in the acts of the lessees in the development of this field, and making no claim that the lease was forfeited, but by every act of theirs indicating the lease was in full force and effect, [lessors] obtained an advantage which they sought to capitalize at the expense of the lessees."); *Ridgeway*, 1987 Ohio App. LEXIS 6151 at *2-3 ("It is undisputed that [the lessor] never informed the [lessee] that she considered the lease to be forfeited or terminated. The details as to all of the work and expense that were done [by lessee] under these circumstances are unimportant. What is important is that it is undisputed that they were done without protest."); *Haner v. MacCorkle*, 109 W.Va 762, 764, 158 S.E. 500 (1930) (applying estoppel "[i]n view of the plaintiff's failure to protest the drilling of the well, at great expense to the lessee."). To hold otherwise would sanction oil and gas lessors to induce lessees to invest time and resources to the benefit of the lessors, and then—whenever a more lucrative leasing opportunity arises—claim that the lease had been expired all along.

[11] R. 107, Exs. to Barclay's Cross-MSJ, Ex. 4, PI. Hr'g. Tr. at 44:24, 45:1:11.

[12] Because the Lucases would have been estopped from claiming the lease's expiration, as the Lucases' successors, the Baileys are likewise estopped. *See* 42 Ohio Jurisprudence 3d, Estoppel Section 66 ("An estoppel binds not only the party but also all persons in privity with the party. This includes * * * privies in estate, and privies in law * * * and all who take the party's estate by contract.").

II. Appellant's Second Proposition of Law:

Where a landowner accepts benefits under an oil and gas lease without reserving its rights to assert that the lease has terminated, the landowner is thereafter quasi-estopped from claiming that the lease terminated prior to the acceptance of benefits.

A. Quasi-estoppel will bar a lessor from asserting that an oil and gas lease expired if the lessor's claim is inconsistent with the lessor's acceptance of benefits under the lease.

While the Lucases owned the property, including during the years that their lease experienced a pause in commercial sales, Barclay provided the Lucases with household gas and supplied the labor and expense necessary to ensure delivery of that gas. Because the Lucases freely solicited and accepted those benefits, quasi-estoppel precludes the Baileys, as the Lucases' successors, from asserting that the lease expired during the Lucases' ownership of the property.

A party who accepts the benefits of a contract or transaction will be estopped to deny the obligations imposed on it by the same contract or transaction." *RWS Bldg. Co. v. Freeman*, 4th Dist. Lawrence No. 04CA40, 2005-Ohio-6665, ¶ 19; *Chubb v. Ohio Bur. of Workers' Comp.*, 81 Ohio St.3d 275, 1998-Ohio-628, 690 N.E.2d 1267 (state employee estopped from claiming classified status when the employee accepts appointment to an unclassified position and accepts the benefits of that unclassified position). This formulation of estoppel, which dispenses with the elements of knowledge and reliance requirements of "technical estoppel," is sometimes referred to as "quasi-estoppel." *Hampshire Cty. Trust Co. v. Stevenson*, 114 Ohio St. 1, 14-17, 150 N.E. 726 (1926); 42 Ohio Jurisprudence 3d, Estoppel Section 66. *See also Dayton v. Sec. Assoc. v. Avutu*, 105 Ohio App.3d 559, 563, 664 N.E.2d 954 (2d. Dist.1995) (the doctrine of quasi-estoppel "should be applied so as to promote the ends of justice.").

Accordingly, a lessor may be estopped from maintaining that an oil and gas lease expired through the lessor's inconsistent acceptance of benefits. *See Rayl*, 46 Ohio App.2d 175, 179, 348 N.E.2d 390; *Goodwill*, 1990 Ohio App. LEXIS 3716; *Quadrant Exploration, Inc. v. Greenwood*,

4th Dist. Washington No. 82X29, 1983 Ohio App. LEXIS 14550 (Aug. 15, 1983); *Litton v. Geisler*, 80 Ohio App. 491, 76 N.E.2d 741 (4th Dist.1945).[13]

B. Because the prior lessors solicited and accepted benefits under the lease during their ownership of the property, including during the years in which no commercial sales occurred, the current lessors are estopped from claiming that the lease expired.

As a function of their lease relationship, Barclay furnished the Lucases with the benefit of free household gas, along with all of the labor and expense necessary to deliver that gas, up until the day that the Baileys purchased the property. In soliciting and accepting those benefits for years—including, significantly, during the years that Barclay reported no commercial sales under the lease—the Lucases acted inconsistently with the position that the lease had expired.

Nevertheless, the Fourth District rejected applying quasi-estoppel to these facts, reasoning no inconsistency existed between the Lucases' conduct and a claim that the lease expired "because in the case sub judice the Lucases were entitled to benefit from the gas produced from their property, ***regardless of the validity of the lease***." Opp. ¶ 30 (emphasis added). The Fourth District is mistaken: had the Lucases claimed that their lease expired (of course, they did not), that claim ***would*** be inconsistent with their willing acceptance of cost-free household gas, as well as their conduct in ***soliciting and accepting Barclay's continued labor and investment*** on the property.

Contrary to the unsupported assertion by the Court of Appeals at Paragraph 30, the Lucases' right to a supply of house gas from Barclay's wells and to demand Barclay's labor and

[13] These decisions are in accord with other oil and gas producing jurisdictions. *See, e.g., Brannon*, 562 S.W.2d at 222 ("[L]ate payment and acceptance of annual rentals provided for in an oil and gas lease has the effect of reviving the lease as though it had never terminated."), citing *Mitchell*, 63 S.W.2d 371; *Ohio Fuel Oil Co. v. Greenleaf*, 84 W.Va. 67, 99 S.E. 274 (1919); *Walter*, 300 Ky. 43, 46, 187 S.W.2d 425 ("In every instance in which the lessee has accepted the past due rental, or in which he has suffered the lessee to drill after the time had expired within which the lessee was required to drill, we have accepted the construction adopted by the parties and applied the rules of waiver and estoppel.").

capital in maintaining that supply are ***contractual rights*** that exist ***by virtue of the lease*** and ***only*** during the lease's duration. *See, e.g.,* 4 Eugene Kuntz, *Law of Oil & Gas,* Section 53.6 (2018) ("Under the modern form of free gas clause, the lessor is entitled to free gas only as long as the gas is produced in paying quantities and sold off the premises or the lease is capable of producing gas in paying quantities."); *see also Kramer*, 197 Ohio App.3d 554, 2011-Ohio-6750, 968 N.E.2d 64, ¶ 18 ("To terminate the free gas covenant by surrender, [the lessee] would have to surrender the entire contract, at which time the entire 'lease shall become absolutely null and void.'"). Therefore, had the lease expired during the time that the Lucases owned the property—***as the Fourth District's decision assumes***—the Lucases' contractual right to receive gas from Barclay's wells, along with the added benefit of Barclay's labor and expense to maintain the gas supply, would have likewise ended.

True, had the lease expired, the Lucases would have become the reversionary owners of the oil and gas estate. *See Buell*, 144 Ohio St.3d 490, 2015-Ohio-4551, 45 N.E.3d 185, ¶ 77. But their ownership of the oil and gas estate would not itself permit the Lucases to draw gas from ***Barclay's*** wells which, under Ohio law, would either be plugged or transferred, through duly-executed documents, to the Lucases for household use subject to their willingness to accept total responsibility for its equipment, including maintenance, plugging and related obligations.[14] And without a lease in place, the Lucases would no longer be entitled to demand that Barclay expend its own labor and capital to repair their gas line, as the Lucases continued to do in 2012.

The acceptance of similar benefits under an oil and gas lease, like delay rental payments or gas storage payments, have routinely estopped lessors from claiming the lease's expiration.

[14] *See* R.C. 1509.31(A) (providing that after the transfer of a well to a landowner, the landowner becomes responsible for compliance with R.C. Chapter 1509, including well plugging and restoration).

See, e.g., Brannon, 562 S.W.2d 219; *Smith v. Steckman Ridge, LP*, 38 F. Supp. 3d 644, 656 (W.D.Pa.2014) *aff'd*, 590 Fed.Appx. 189 (3d. Cir. 2014) ("[T]he Smiths accepted substantial payments under the lease, and equity now demands that they remain bound by their agreement. Thus, even if the lease was forfeited in 2007, it is now enforceable against the Smiths because they are estopped from contesting the lease's validity."). Like these other benefits, the delivery of household gas, coupled with the lessee's labor and capital expended to repair and maintain that gas supply, comprise valuable benefits that ***only*** arise through a viable oil and gas lease. The Lucases' eagerness to solicit and accept these benefits until the day that the Baileys bought the property is inconsistent with any claim that the lease had expired during their ownership. *See Rayl*, 46 Ohio App.2d 175, 179, 348 N.E.2d 390 (by accepting quarterly payments and free gas under oil and gas lease and related gas storage agreement, the lessors "act[ed] in a manner inconsistent with the attempted termination of the agreement."). Therefore, as a matter of indisputable fact, quasi-estoppel would bar the Lucases from asserting the lease's expiration and thus bars the Baileys from raising that same claim.

CONCLUSION

For the foregoing reasons, amici urge the Court to reverse the Fourth District and hold that equitable estoppel and quasi-estoppel can bar a lessor from pursuing a lease expiration claim under the appropriate circumstances and that these doctrines bar the Defendants' claim in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Amici Curiae Ohio Oil and Gas Association and Southeastern Ohio Oil and Gas Association in Support of Appellant Barclay Petroleum, Inc. was served via e-mail pursuant to S.Ct.Prac.R. 3.11(C)(1) this 18th day of April, 2018.

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