



Entered on Docket
December 11, 2009

Hon. Linda B. Riegle
United States Bankruptcy Judge

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Attorneys for Defendant
STANLEY E. FULTON

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF NEVADA**

In Re:	)	CASE NO.:	BK-S-06-10725 LBR
USA COMMERCIAL MORTGAGE COMPANY,	)	Chapter 11	
Debtor.	)	BK-S-06-10725 LBR	
In Re:	)	BK-S-06-10726 LBR	
USA CAPITAL REALTY ADVISORS, LLC	)	BK-S-06-10727 LBR	
Debtor.	)	BK-S-06-10728 LBR	
In Re:	)	BK-S-06-10729 LBR	
USA CAPITAL DIVERSIFIED TRUST DEED)		
FUND, LLC)		
Debtor.	)	Jointly Administered	
In Re:)		
USA CAPITAL FIRST TRUST DEED FUND,)	Adversary No. 08-01132	
LLC)		
Debtor.)		
In Re:)		
USA SECURITIES, LLC)		
Debtor.)		

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1	Affects:)	FINDINGS OF FACT, CONCLUSIONS OF
	<input type="checkbox"/> All Debtors)	LAW AND RECOMMENDATIONS
2	<input type="checkbox"/> USA Commercial Mortgage Company	)	REGARDING (1) DEFENDANT'S MOTION
	<input type="checkbox"/> USA Capital Realty Advisors, LLC	)	FOR SUMMARY JUDGMENT; (2)
3	<input checked="" type="checkbox"/> USA Capital Diversified Trust Deed Fund, LLC	)	PLAINTIFF'S MOTION FOR PARTIAL
	<input type="checkbox"/> USA Capital First Trust Deed Fund, LLC	)	SUMMARY JUDGMENT; AND (3)
4	<input type="checkbox"/> USA Securities	)	DEFENDANT'S COUNTERMOTION FOR
		)	SUMMARY JUDGMENT
5	_____ USA CAPITAL DIVERSIFIED TRUST DEED)	
6	FUND, LLC,)	
)	
7	Plaintiffs,)	
)	
8	vs.)	
)	
9	STANLEY E. FULTON,)	
)	
10	Defendant.)	
	_____)	

12 Defendant Stanley E. Fulton's ("Defendant" or "Fulton") Motion for Summary Judgment,
 13 Plaintiff USA Capital Diversified Trust Deed Fund, LLC's ("Plaintiff" or "DTDF") Motion for
 14 Partial Summary Judgment, and Defendant Stanley E. Fulton's Countermotion to Plaintiff's
 15 Motion for Partial Summary Judgment, (collectively the "Motions") came on for hearing on
 16 September 3, 2009 at 9:30 a.m. Steven Katzman, John O'Reilly and Timothy O'Reilly appeared
 17 on behalf of Defendant and Eric Madden and Michael Yoder appeared on behalf of Plaintiff.

19 This Court, having considered the Motions along with the Oppositions, Replies,
 20 Declarations, exhibits and supporting documents submitted in support thereof, and having heard
 21 the arguments of counsel made at the hearing on September 3, 2009, now therefore makes the
 22 following findings of fact, conclusions of law and recommendations under Federal Rule of Civil
 23 Procedure 52 and Federal Rule of Bankruptcy Procedure 7052.

FINDINGS OF FACT

26 1. In February, 2001, Fulton was solicited by Joseph D. Milanowski to loan USA
 27 Investment Partners ("USAIP") five million dollars. At this time, USACM, DTDF, and USAIP
 28 were commonly known to be operating collectively under the name USA Capital. Furthermore,

1 USAIP was represented as the wholly owned subsidiary of USACM and USACM served as the
2 exclusive loan servicer and loan originator for DTDF. USACM, DTDF and USAIP had
3 overlapping management. Fulton testified in his Declaration on file with this Court that USAIP
4 was a holding company owned by Tom Hantges and Joe Milanowski. Given the amount of the
5 loan, Fulton retained, Lionel Sawyer & Collins (“LS&C”), to represent him and to assist in
6 negotiating, reviewing and properly documenting the loan.
7

8 2. On or about February 15, 2001, the loan was executed and Mr. Fulton loaned
9 USAIP five million dollars (the “Fulton-USAIP Loan”).

10 3. The maturity date of the Fulton-USAIP Loan was February 13, 2002.

11 4. The Fulton-USAIP Loan was guaranteed by USA Commercial Mortgage
12 (“USACM”) doing business as USA Capital (“USA Capital”) and the principals of USAIP and
13 USACM, Joseph Milanowski and Thomas Hantges (the “USA Capital Principals”). At the time of
14 the Fulton-USAIP Loan, USAIP was represented in the prospectus of Diversified Trust Deed Fund
15 (“DTDF”) as the wholly owned subsidiary of USACM. The Fulton-USAIP Loan was further
16 secured by a collateral assignment of a 6 million dollar promissory note from USACM to Reno
17 South Meadows, LLC (“RSM”). According to the income tax returns filed by South Meadows
18 Associates, LLC (“SMA”) and K-1 forms issued to the owners, over the relevant time frame, RSM
19 was the largest equity holder in SMA, owning a 33.3% interest. RSM was designated on the tax
20 returns as the tax matters partner, authorized to act on behalf of SMA.
21

22 5. As a result of the Fulton-USAIP Loan, a Uniform Commercial Code Financing
23 Statement Form 1 was filed listing USACM and USAIP as debtors.
24

25 6. The wire transfer of funds in the amount of five million dollars, from Fulton, took
26 place on February 16, 2001. USAIP was the entity that received the \$5 million transfer of funds
27 from Fulton.
28

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1 7. On February 20, 2001, three of the five million dollars from the Fulton-USAIP Loan
2 were transferred by USAIP to USACM. DTDF did not receive any of the proceeds for the Fulton-
3 USAIP Loan.

4 8. On or about November 28, 2001, Fulton assigned his \$500,000 interest in a
5 USACM-originated loan to DTDF in exchange for a \$500,000 check from DTDF. On or about
6 February 20, 2002 Fulton assigned his \$500,000 interest in another USACM-originated loan to
7 DTDF in exchange for another \$500,000 check from DTDF.

8 9. The Fulton-USAIP Loan matured on February 13, 2002 and therefore the entire
9 principal amount of the Fulton-USAIP Loan became due and owing on the same date. On or about
10 February 20, 2002 Fulton participated in a meeting with Milanowski after contacting Milanowski
11 about repayment of the Fulton-USAIP Loan. Fulton testified that the following occurred at this
12 meeting:
13

14 [In that meeting I said, "I want the money, this \$5 million you owe me," and
15 Joe had said...something like, "Well, you'll work with us or you'll have to
16 chase us." I think those were Joe's words. And I believe I responded, "Well,
17 I'm not going to do either one of those. I'm going to have my money, get my
18 money, or I'll have your business license."

19 10. Soon thereafter, Fulton again retained the assistance of LS&C to negotiate and
20 secure payment. Counsel for USA Capital negotiated with LS&C terms of repayment, which
21 required USACM to make five payments of \$1 million each on the following dates: (a) March 11,
22 2002; (b) March 15, 2002; (c) April 15, 2002; (d) May 15, 2002; and (e) June 15, 2002. As a
23 result, LS&C forwarded to counsel for USACM wire transfer instructions.

24 11. On or about March 11, 2002, Milanowski directed a \$1million wire transfer from
25 South Meadows Apartments, LLC ("SMA") to Fulton's brokerage account as the first payment on
26 the Fulton-USAIP Loan. This transfer was reflected on Fulton's account statements as originating
27
28

1 from "SOUTH MEA." All previous wire transfers from USACM had appeared on Fulton's
2 account statement as coming from "USA COMMERCIAL M."

3 12. On or about March 15, 2002, Milanowski directed another \$1 million wire transfer
4 from SMA to Fulton's brokerage account as the second payment on the Fulton-USAIP Loan. This
5 transfer also was reflected on Fulton's account statements as originating from "SOUTH MEA."
6 Fulton testified that he understood that these "SOUTH MEA" transfers came from one of the
7 entities within the "vast group of companies," not from USACM itself.

9 13. On or about June 15, 2002, Milanowski directed a \$1 million wire transfer from
10 USACM to Fulton's brokerage account as the fifth payment on the Fulton-USAIP Loan. This
11 transfer was reflected on Fulton's account statements as originating from "USA COMMERCIAL
12 M."

14 14. Fulton demanded that USACM pay late fees and default interest in connection with
15 the Fulton-USAIP Loan. Specifically, on July 10, 2002, LS&C sent a letter to USACM
16 demanding payment of more than \$650,000 in late fees and default interest.

17 15. On or about August 16, 2002, Milanowski directed a \$250,000 wire transfer from
18 DTDF to Fulton's brokerage account to pay the 5% late fee incurred by USAIP in connection with
19 the Fulton-USAIP Loan. This transfer was reflected on Fulton's account statements as originating
20 from "USA CAPITA."

21 16. Unbeknownst to Fulton, DTDF paid back \$2.25 million of the USAIP-Fulton Loan
22 on April 15, 2002, May 15, 2002 and August 13, 2002 (collectively, the "DTDF Transfers"). Each
23 of the wire transfers constituting the DTDF Transfers reflected on Fulton's statement indicated that
24 the DTDF Transfers came from "USA CAPITA."

25 17. Fulton did not make any further investments with USACM or USAIP after obtaining
26 repayment of the Fulton-USAIP Loan.
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1 18. The fact that the money was designed as having come from “USA Capita” is not
2 sufficient to make a reasonable person know that it could have been stolen property because “USA
3 Capita” could have been “USA Capital.”

4 19. Due to the relationship between SMA and RSM the fact that payments are
5 designated as coming from “SOUTH MEA” on March 11, 2002 and March 15, 2002 is not
6 sufficient to make a reasonable person know that the DTDF Transfers could have been stolen
7 funds and not coming from appropriate parties. Further, given the relationship between RSM and
8 SMA as referenced in ¶ 4 above, it was reasonable to conclude that the payments had come from a
9 party authorized to make such payment under the Fulton-USAIP Loan.

10 20. Fulton provided value to USAIP as defined under NRS 112.220(1) for the DTDF
11 payments.

12 21. The Value that Mr. Fulton provided under NRS 112.220(1) was “reasonably
13 equivalent” as Mr. Fulton lent five million dollars and received five million dollars in return,
14 consistent with the terms of the Fulton-USAIP Loan.

15 22. The Fulton-USAIP Loan was a commercial transaction and USA Commercial
16 Mortgage, when operating, was charging large sums for late fees on, amongst other things, loans.
17 As a result, reasonably equivalent value was tendered for the \$250,000 late fee received by Mr.
18 Fulton on August 13, 2002.

19 23. Sufficient facts are not present in the record to date that create a genuine issue of
20 material fact or to permit a reasonable jury to find that Fulton did give any indirect benefit,
21 constituting value, to DTDF under the synergy theory.

22 24. Although Fulton was the initial transferee of the DTDF Transfers, there is nothing in
23 the record for summary judgment to demonstrate that Fulton knew the DTDF Transfers came from
24 DTDF.

1 25. There is no evidence establishing that Fulton had any form of actual knowledge that
2 the DTDF Transfers could have been stolen property.

3 26. Under the facts of the case, there are no circumstances by which a reasonable person
4 could have known or caused a reasonable person to know that the DTDF Transfers could have
5 constituted stolen property pursuant to NRS 41.580 as:

6 a. Consistent with general business practice, USA Capital conducted
7 business by and through a number of entities who have related affiliates and
8 subsidiaries. As to certain USA Capital entities, Diversified Trust Deed Fund had a
9 prospectus and USA Commercial Mortgage was regulated by the State of Nevada;

10 b. As evident by the people who invested in the Diversified Trust Deed
11 Funds through USA Capital, hundreds of people trusted Joseph Milanowski and
12 Thomas Hantges;

13 c. Mr. Fulton also trusted Mr. Milanowski as he was a financial advisor
14 with whom he had conducted ten million dollars in transactions;

15 d. Mr. Fulton had an attorney from a reputable firm, LS&C, who
16 reviewed the records associated with the Fulton-USAIP loan;

17 e. At no time, prior to the filing of the lawsuit, was Mr. Fulton told that
18 any of the DTDF Transfers came from DTDF;

19 f. The funds Mr. Fulton received to pay back the principal of the
20 Fulton-USAIP loan were not designated as having come from DTDF;

21 g. The fact that the DTDF Transfers were designated as “USA Capita”
22 in Mr. Fulton’s financial statements is not sufficient to make a reasonable person
23 know that it could have been stolen property because “USA Capita” could have been
24 USA Capital;
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h. A reasonable person who receives money from a business entity isn't required to examine the check or the transfer to see what account it was drawn on;

i. USA Capital's rebooking of the DTDF Transfers to the 1090 Loan several months after the last payment to Mr. Fulton was unbeknownst to Fulton;

j. The Waiver of Indictment, Criminal Information, or Criminal Docket for Case 2:09-cr-00291-RLH-PAL-1 of Mr. Joseph Milanowski (Doc.112) is not sufficient to prove Mr. Fulton knew anything and is not binding against Mr. Fulton; and

k. It is not sufficient to make a reasonable person know that property could be stolen by the fact one is paid after he has made a demand for payment. If it was sufficient, then anybody who received money in this economy could be sued under NRS 41.580 for receiving stolen property if it just so happened not to have come from the legal entity with whom the agreement was originated. There is no reason to make that assumption. For example, one could legitimately presume the person borrowed the money.

27. Plaintiff has not and will not be able to prove by clear and convincing evidence, the minimal applicable burden of proof, that Fulton withheld property under circumstances that make it a violation of Subsection 1 of NRS 205.275.

28. The findings herein have no impact on whether Fulton acted in good faith as required for a good faith transferee defense, including the defense provided under NRS 112.220(1). NRS 41.580 has a different standard than NRS 112.220(1).

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CONCLUSIONS OF LAW

A. Applicable to All Pending Motions for Summary Judgment

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3 1. The findings of fact are incorporated into the conclusions of law to the fullest extent
4 possible as if they were fully set forth herein.

5
6 2. Summary judgment is appropriate where “the pleadings, depositions, answers to
7 interrogatories, and admissions on file, together with the affidavits, if any, show that there is no
8 genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter
9 of law.” Fed. R. Civ. P. 56(c) (made applicable in this proceeding by Fed. R. Bankr. P. 7056).

10 3. In assessing whether the non-moving party has raised a genuine issue, its competent
11 evidence is to be believed, and all justifiable inferences are to be drawn in its favor. *Anderson v.*
12 *Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). However, “the mere existence of a scintilla of
13 evidence is insufficient to create a genuine issue of material fact.” *Id.* at 252.

14
15 4. When the moving party has carried its burden under Rule 56(c), its opponent must
16 do more than simply show that there is some metaphysical doubt as to the material facts. . . . Where
17 the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party,
18 there is no genuine issue for trial. *Matsushita Electrical Industry Co. v. Zenith Radio Corp.*, 475
19 U.S. 574, 586-87 (1986).

20
21 5. Where a claim or defense is factually implausible, the opposing party must present
22 “more persuasive evidence than would otherwise be necessary in order to show that there is a
23 genuine issue for trial.” *Blue Ridge Ins. Co. v. Stanewich*, 142 F.3d 1145, 1147 (9th Cir. 1988).

24 6. At the summary judgment stage, facts are viewed in the light favorable to the
25 nonmoving party “only if there is a ‘genuine’ dispute as to those facts.” *Scott v. Harris*, 550 U.S.
26 372, 380 (2007). “Where the record taken as a whole could not lead a rational trier of fact to find
27 for the nonmoving party, there is not genuine issue for trial.” *Id.*
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1 **B. Conclusions Regarding Reasonably Equivalent Value**

2 1. Plaintiff has alleged a fraudulent transfer claim pursuant to NRS 112.180(1)(a),
3 which sets forth that a transfer made or obligation incurred by a debtor is fraudulent as to a
4 creditor, whether the creditor's claim arose before or after the transfer was made or the obligation
5 was incurred, if the debtor made the transfer or incurred the obligation: (a) With actual intent to
6 hinder, delay or defraud any creditor of the debtor. Plaintiff has not alleged or claimed for
7 avoidance of a constructively fraudulent transfer including those pursuant to NRS 112.180(1)(b)
8 and NRS 112.190(1) .

10 2. A constructively fraudulent transfer claim under NRS 112.180(1)(b) requires that
11 the value be provided to the debtor. Specifically, NRS 112.180(1)(b) provides as follows: "A
12 transfer made or obligation incurred by a debtor is fraudulent as to a creditor, whether the
13 creditor's claim arose before or after the transfer was made or the obligation incurred, if the debtor
14 made the transfer or incurred the obligation . . . "[w]ithout receiving a reasonably equivalent value
15 in exchange for the transfer or obligation" NRS 112.180(1)(b) (emphasis added).
16

17 3. Similarly, a constructively fraudulent transfer claim under NRS 112.190(1) requires
18 that the value be provided to the debtor. NRS 112.190(1) provides as follows: "A transfer made or
19 obligation incurred by the debtor is fraudulent as to a creditor whose claim arose before the transfer
20 was made or the obligation incurred if the debtor made the transfer or incurred the obligation
21 without receiving a reasonably equivalent value in exchange for the transfer or obligation and the
22 debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or
23 obligation." NRS 112.190(1) (emphasis added).
24

25 4. A defense to a claim under NRS 112.180(1)(a) is available pursuant to NRS
26 112.220(1), which provides: "A transfer or obligation is not voidable under paragraph (a) of
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1 subsection 1 of NRS 112.180 against a person who took in good faith and for a reasonably
2 equivalent value or against any subsequent transferee or obligee.”

3 5. NRS 112.170(1) defines Value being given for a transfer or an obligation if, in
4 exchange for the transfer or obligation, property is transferred or an antecedent debt is secured or
5 satisfied, but value does not include an unperformed promise made otherwise than in the ordinary
6 course of the promisor’s business to furnish support to the debtor or another person.
7

8 6. The plain language of NRS 112.220(1) and NRS 112.170(1) shows value to the
9 debtor is not a prerequisite to the good-faith defense of §112.220(1). In other words, the statutes
10 do not require that the value must be provided to the debtor when an actual fraudulent transfer is
11 alleged pursuant to NRS 112.180(1)(A) and 11 USC §544. In determining whether the value
12 tendered was reasonably equivalent, the purpose of the payments must be examined. In the instant
13 matter, Fulton was paid in accordance with the terms of the Fulton-USAIP Loan.
14

15 7. Cases such as *In re Lucas Dallas, Inc.*, 185 B.R. 801, 807 (B.A.P. 9th Cir. 1995) and
16 *S.E.C. v. Resource Development Int’l, LLC*, 487 F.3d 295 (5th Cir. 2007) are factually
17 distinguishable and apply to cases involving a constructively fraudulent transfer.

18 8. DTDF did not receive any direct or indirect value under NRS 112.220(1) from
19 Fulton or otherwise in exchange for the DTDF Transfer. Nor did DTDF receive any direct or
20 indirect benefit from Fulton in exchange for the DTDF Transfers.
21

22 **C. Conclusions Regarding Receipt of Stolen Property**

23 1. NRS 41.580 provides that if property has been taken from its owner by larceny,
24 robbery, burglary, embezzlement, theft or any other offense that is a crime against property and
25 another person buys, receives, possesses or withholds the property under circumstances that make
26 such conduct a violation of subsection 1 of NRS 205.275, the owner of the property may bring a
27 civil action against the person who bought, received, possessed or withheld the property and may
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1 recover treble the amount of any damage the owner has suffered, together with his costs in the
2 action and a reasonable attorney's fee.

3 2. In Nevada, civil cases must be proven by clear and convincing evidence on
4 allegations of fraud and imposition of punitive damages. At the very least, a clear and convincing
5 standard would apply to a civil claim under NRS 41.580.

6 3. NRS 205.275(1) provides that a person commits an offense involving stolen
7 property if the person, for his own gain or to prevent the owner from again possessing his property,
8 buys, receives, possesses or withholds property: (a) knowing that it is stolen property; or (b) under
9 such circumstances as should have caused a reasonable person to know that it is stolen property.

10 4. As to the reasonable person standard as set forth in NRS 205.275(1)(b), it is not
11 under circumstances that should have caused a reasonable person to believe it was stolen property.
12 The standard is what should have caused a reasonable person to know that it was stolen property.
13
14 See NRS 205.275(1)(b).

15 5. In examining these statutes, we must look at the Nevada Supreme Court's holding in
16 *Wiechers v. Sheriff, Washoe County*, 543 P.2d 1347 (Nev. 1975). In *Wiechers*, the Nevada
17 Supreme Court reversed a lower court's determination that probable cause existed to conclude the
18 defendant violated the Receipt of Stolen Property Criminal Statute. In *Wiechers v. Sheriff, Washoe*
19 *County*, 543 P.2d 1347 (Nev. 1975), the Court found that there was insufficient evidence
20 supporting the determination of probable cause that the defendant knowingly acquired stolen
21 engines, despite the testimony of two witnesses who stated that they stole automobiles, removed
22 the engines and sold stolen engines to defendant. The Court held that the "record is barren of any
23 inference or suggestion that [defendant] was implicated in any manner in, or with, the . . . theft
24 ring; and, in fact, it affirmatively shows that he had no knowledge that the engines had been stolen.
25 . . . Furthermore, [defendant] paid for the stolen engines in the ordinary course of business with
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1 his 'regular' business checks. *Id.* Similarly, Fulton performed the Fulton-USAIP commercial loan
2 in his ordinary course of business and did nothing to hide the transaction.

3 6. This Court, after evaluating all facts set forth herein, concludes there are insufficient
4 facts to establish Mr. Fulton knew or should have caused a reasonable person to know the DTDF
5 Transfers could have been stolen property.
6

7 **RECOMMENDATIONS**

8 1. Defendant's Motion for Summary Judgment (DE #72) should be granted.
9 Specifically, summary judgment should be granted in favor of Fulton on the NRS 41.580 claim.

10 2. Defendant's Countermotion for Partial Summary Judgment (DE #92) should be
11 granted. Specifically, summary judgment should be granted in favor of Fulton on the issue of
12 whether reasonably equivalent value was given under NRS 112.220(1).
13

14 3. Plaintiff's Motion for Partial Summary Judgment (DE #80) should be granted in part
15 and denied in part. Specifically, summary judgment should be granted in favor of DTDF on the
16 issues of whether: (a) the DTDF Transfers involved property belonging to DTDF; and (b) Fulton
17 was the initial transferee of the DTDF Transfers under 11 USC 550(a)(1). Summary Judgment for
18 DTDF should be denied on the issue of whether reasonably equivalent value was given under NRS
19 112.220(1).
20

21 4. Given the Court's recommendation to grant Defendant's Motion for Summary
22 Judgment based upon the findings and conclusions above, it is not necessary for this Court to
23 determine whether Plaintiff's claim under NRS 41.590 is barred by the applicable limitations
24 period, the doctrine of *pari delicto* or is unconstitutional. These issues are preserved, if necessary,
25 for the district court.

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1 DATED this _____ day of December 2009.

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UNITED STATES BANKRUPTCY COURT JUDGE

PREPARED AND SUBMITTED:

O'REILLY LAW GROUP, LLC

BIENERT, MILLER, WEITZEL & KATZMAN

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