

**UNITED STATES BANKRUPTCY COURT
DISTRICT OF MAINE**

In re:)	
)	Chapter 11
Montreal Maine & Atlantic Railway Ltd.,)	Case No. 13-10670
)	
Debtor.)	
)	

**OBJECTION OF WHEELING AND LAKE ERIE RAILWAY COMPANY
TO THE UNITED STATES OF AMERICA’S MOTION FOR AN ORDER
(1) DETERMINING THE ALLOCATION OF THE PURCHASE PRICE FOR
DEBTOR’S ASSETS; AND (2) ENFORCING ORDER APPROVING CARVE-OUT,
AND REQUEST FOR DECLARATORY RELIEF**

NOW COMES Wheeling and Lake Erie Railway Company (“Wheeling”) and objects to the Motion of the United States of America, through the Department of Transportation, Federal Railroad Administration (the “FRA”) for an order (1) determining the allocation of the purchase price for the Debtor’s assets; and (2) enforcing order approving carve out (the “FRA Motion”) [D.E. # 1025]. Further, in connection with this Objection, Wheeling requests certain declaratory relief as to the Travelers’ Settlement Proceeds as described *infra* in § C. In support of this Objection and the request for declaratory relief, Wheeling states as follows:

SUMMARY OF ARGUMENT

In this Objection, Wheeling requests dismissal of the FRA Motion for the following reasons:

- In the FRA Motion, the FRA seeks payment of money, and an adjudication of its rights with respect to certain assets and funds of money in the possession of the Trustee. A request for relief of this type must be made in an adversary proceeding, not a contested matter, pursuant to Rules 7001 *et. seq.* of the Federal Rules of Bankruptcy Procedure.
- The FRA seeks an order of this Court affecting the disposition of the proceeds of the Trustee’s settlement with Travelers Insurance Company of America. Those proceeds, and Wheeling’s claim of a security interest therein, are the subject of an Order of this Court dated April 15, 2014. That Order is currently on appeal to the

Bankruptcy Appellate Panel for the First Circuit. The pendency of this appeal divests this Court of any jurisdiction over these settlement proceeds, and the Court lacks authority to enter any order authorizing disbursement of such proceeds.

- If, notwithstanding the lack of subject matter jurisdiction and the improper use of a contested matter, this Court nevertheless determines to consider the relief requested in the FRA Motion, any order authorizing disbursement of the Traveler's settlement proceeds must be conditioned upon (i) the return of such proceeds to Wheeling should a final order enter validating Wheeling's security interest therein, and (ii) the continued retention of this Court's jurisdiction over the FRA and such proceeds in order to enforce the return thereof.
- Denial of the FRA Motion, and ordering the continued escrow of the Traveler's settlement proceeds serves not only the interests of Wheeling, but the interests of all creditors of the estate, because preservation of these proceeds will assure that Wheeling will not be required to file and pursue a superpriority claim under Section 507(b) of the Bankruptcy Code with respect to such proceeds.

ARGUMENT

A. This Contested Matter Must Be Dismissed Because The Relief Requested By The FRA Can Be Adjudicated By The Court Only In An Adversary Proceeding Brought Pursuant To Rule 7001 Of The Federal Rules Of Bankruptcy Procedure.

The FRA Motion seeks an order of this Court (1) determining the allocation of the purchase price for the Debtor's assets, realized by the Debtor in its recent sale of substantially all of its operating assets, and (2) ordering the Debtor to pay to the FRA funds held by the Debtor arising out of (i) the asset sale; (ii) the Debtor's receipt of payments for so-called "45G tax credits" (other than those amounts required to be paid to Wheeling); and (iii) the Debtor's receipt of insurance proceeds from the Travelers Insurance Company of America, resulting from a settlement of the Debtor's pre-petition business interruption losses (the "Travelers' Settlement"). *See* FRA Motion, generally. The FRA Motion clearly seeks relief of the kind described in Rule 7001 of the Federal Rules of Bankruptcy Procedure. That Rule provides in pertinent part as follows:

An adversary proceeding is governed by the rules of this Part VII. The following are adversary proceedings:

(1) a proceeding to recover money or property, other than a proceeding to compel the debtor to deliver property to the trustee, or a proceeding under § 554(b) or § 725 of the Code, Rule 2017, or Rule 6002;

(2) a proceeding to determine the validity, priority, or extent of a lien or other interest in property, other than a proceeding under Rule 4003(d);

...

(7) a proceeding to obtain an injunction or other equitable relief, except when a chapter 9, chapter 11, chapter 12, or chapter 13 plan provides for relief;

....

(9) a proceeding to obtain a declaratory judgment relating to any of the foregoing;

The requests for relief made by FRA in the Motion fall squarely within one or more of the above categories. As described in Rule 7001(1), the FRA is unequivocally seeking to “recover money” from the Debtor¹. The FRA also seeks a determination, within the meaning of Rule 7001(2), of “the validity, priority or extent of [its] lien or other interest in property” of the Debtor, specifically (a) cash held by the Debtor resulting from the sale of its assets; (b) cash held by the Debtor in escrow constituting funds from the Traveler’s Settlement; and (c) cash held by the Debtor from its sale of the 45G tax credits². The FRA Motion requests that the

¹ The FRA is not seeking relief that falls into any exception to Rule 7001(1) – *i.e.*, it is not seeking to compel a debtor to deliver property to a trustee, or in a proceeding under 11 U.S.C. § 554(b) of the Code (relating to abandonment of burdensome property) or under 11 U.S.C. § 725 of the Code (relating to distribution of property of the estate to holders of priority, unsecured claims and other junior claims and interests); or under Rule 2017 (examination of Debtor’s transactions with its attorneys) or under Rule 6002 (accounting by prior custodian of estate)).

² Wheeling does not object, on the merits, to the requested determination of FRA’s rights to proceeds from the sale of assets of the Debtor, or to its rights as to that portion of the 45G Tax Credit payment in excess of the amount required to be turned over to Wheeling, by virtue of this Courts Order Approving Chapter 11 Trustee’s Motion for Order Approving Compromise and Settlement With Wheeling & Lake Erie Railway Company dated July 25, 2014 [D.E. 1047].

Court both determine and adjudicate FRA's possessory and other legal rights in and to these funds of money as well as order the Debtor to pay them over to the FRA. As discussed below, Wheeling disputes FRA's claimed unconditional right to payment of the Traveler's Settlement funds, and asserts that payment of any portion of the Traveler's Settlement to FRA must be conditioned upon the following: (i) The Court's determination that FRA's interest in the Traveler's Settlement is subject to Wheeling's claim to a prior security interest in and to such funds; and (ii) the retention of continued jurisdiction of this Court over the FRA such that FRA shall be subject to an order of this Court requiring the repayment of such funds to Wheeling should Wheeling be determined, by final order, to have a valid, enforceable and prior security interest therein. These required conditions all relate directly to the FRA's request, as set forth in the Motion, for the determination of the nature and extent of its rights in and to, in particular, the Traveler's Settlement. Further they all relate to the FRA's request for the payment of money and therefore implicate Bankruptcy Rule 7001(1).

Finally, the FRA – and Wheeling by virtue of its requests for relief – seek both declaratory and injunctive relief, which relief is necessarily implicated by the FRA's requests for determination of its rights in and for possession of the subject funds as described above, and Wheeling's objections and requests for relief outlined below. As such the requests for relief of both FRA and Wheeling fall squarely within the ambit of Bankruptcy Rules 7001(7) and 7001(9) and therefore must be adjudicated in an adversary proceeding. The FRA Motion must be dismissed, because the relief sought therein by FRA is available only in an adversary proceeding, commenced pursuant to Bankruptcy Rule 7001.

B. This Court Lack's Jurisdiction To Enter An Order With Respect To The FRA Motion Because Wheeling's Pending Appeal Of the Travelers' Order Divests This Court of Jurisdiction Over the Travelers Settlement Proceeds.

Regardless of the proper procedural format for the relief requested in the FRA Motion, this Court has no jurisdiction, and no authority to enter any order with respect to the Traveler's Settlement. It is axiomatic in the federal court system, that once an appeal of an order has been filed, the trial court ceases to have jurisdiction in the matter, lacks any authority to enter any order that would purport to deal with the subject of the appeal, and lacks authority to adjudicate or determine the merits of the appeal. *See e.g., Griggs v. Provident Consumer Disc. Co.*, 459 U.S. 56, 58 (1982) ("The filing of a notice of appeal is an event of jurisdictional significance – it confers jurisdiction on the court of appeals and divests the district court of its control over those aspects of the case involved in the appeal"); *Whispering Pines Estates, Inc. v. Flash Island, Inc. (In re Whispering Pines Estates, Inc.)*, 366 B.R. 752, 757-58 (B.A.P. 1st Cir. 2007) (holding that an appeal of an order confirming a Chapter 11 plan divested the bankruptcy court of jurisdiction to determine a motion for relief from stay involving property dealt with in the Chapter 11 plan that was the subject of an appeal); *Needham Street Inv. Trust v. FBI Distrib. Corp. (In re FBI Distrib. Corp.)*, 267 B.R. 655, 656 (B.A.P. 1st Cir 2001) (citing *Aetna Cas. & Sur. Co. v. Markarian (In re Markarian)*, 228 B.R. 34, 47 (B.A.P. 1st Cir. 1998)).

The *Whispering Pines* case, decided by the Bankruptcy Appellate Panel for the First Circuit, is on all fours with the instant matter and controls the outcome. In that case, after the debtor, *Whispering Pines Estates*, filed a Chapter 11 petition, its primary secured creditor – *Flash Island* – filed a liquidating Chapter 11 plan. 369 B.T at 754. The plan contemplated the appointment of a liquidating trustee to market and sell the property. *Id.* It also had a provision that provided that if the liquidating trustee did not successfully market the property within a

given time frame, then the secured creditor would be granted relief from stay to exercise its rights against the real property. *Id.* Over the objection of the debtor, the bankruptcy court confirmed the secured creditor's liquidating plan with certain revisions not here material (the "Confirmation Order"). The debtor filed a timely appeal to the Bankruptcy Appellate Panel ("BAP"). *Id.* at 755. While the appeal was pending, the secured creditor filed a motion from relief from stay with the bankruptcy court seeking leave to foreclose on its collateral. *Id.* The motion for relief from stay was granted. *Id.* at 755-56. The debtor appealed the order granting relief from stay (the "MRS Order") and, because of the impending foreclosure sale, the BAP held an expedited argument. *Id.* at 756. Following oral argument, the BAP stayed the MRS Order pending further action of the panel. *Id.*

Two months later, the BAP issued the *Whispering Pines* decision which held that the Bankruptcy Court had improperly exercised jurisdiction over the secured creditor's relief from stay motion and that it had no power to issue the MRS Order. *Id.* at 761. More specifically, the BAP held that "the subject matter under the appeal of the Confirmation Order is so closely related to the Stay Relief Motion that entry of the Stay Relief Order impermissibly interfered with the Debtor's rights in its appeal." *Id.* at 759. In other words, both the appeal of the Confirmation Order and the MRS Motion dealt with the same issue: the secured creditor's demand for sale and disposition of the real property owned by the debtor and subject to the secured creditor's mortgage. *Id.* Because the two matters were "intimately related," this Panel held that the pending appeal of the Confirmation Order divested the Bankruptcy Court of jurisdiction over the secured creditor's motion for relief from stay. *Id.* at 759-60.

It is noteworthy that in *Whispering Pines Estates*, there was apparently no stay in place at the time that the secured creditor requested and obtained the MRS Order following the appeal

of the Confirmation Order. 269 B.R. at 754. Nevertheless, even in the absence of a stay, the BAP held that the Bankruptcy Court had no authority to deal with the property that was also the subject of a pending appeal to the BAP. *Id.* at 761 (“[T]he panel concludes that the bankruptcy court did not have jurisdiction to enter the [MRS Order] when while the Confirmation Order was on appeal.”).

The *Whispering Pines Estate* case is directly analogous to this one and must control the outcome here. The Travelers Settlement is both the subject of the FRA Motion (and/or any superceding adversary proceeding) and the current appeal to the Bankruptcy Appellate Panel, the filing of which preceded the FRA Motion. In the terms used by the Bankruptcy Appellate Panel, the subject of both the pending appeal and the FRA Motion are “intimately related”. *Whispering Pines*, 369 B.R. at 759. This divests the trial court of any jurisdiction to deal with the property that is the subject of the appeal, and this is true even if there are no judicial stays in effect. In short, under controlling BAP authority in this Circuit, this Court has no further jurisdiction over the Traveler’s Settlement, and it must remain in escrow pending decision of the BAP³.

C. Any Payment Of The Traveler’s Settlement To FRA Should Be Conditioned Upon A Determination By This Court that Payment Is Subject To The Prior Security Interest of Wheeling, and That FRA And The Traveler’s Settlement Shall Remain Subject To The Jurisdiction Of This Court to Order Repayment Of The Same To Wheeling If A Final Order Determines That Wheeling Has A Valid, Enforceable And Perfected Security Interest Therein.

Should the Court, contrary to controlling authority, determine to entertain any request for relief with respect to the Traveler’s Settlement, then, at a minimum, it must take steps to assure that there will be no interference with the power of the BAP to render effective relief.

³ Similarly, any order that this Court might enter in a proper adversary proceeding must preserve and leave unaffected the jurisdiction of the appeals courts and its power to adjudicate the merits.

The FRA's request for unconditional disbursement of the Traveler's Settlement is entirely inappropriate, unwarranted and contrary to law.

It is undisputed that the FRA's interest in the Traveler's Settlement is subject to Wheeling's prior claim of a security interest therein. The subordinate nature of FRA's interest is expressly set forth in the Second Carve-Out Order which granted FRA a security interest in this asset. To be sure, this Court has entered its Order, dated April 15, 2014, holding that Wheeling does not have a valid, perfected or enforceable security interest therein. That Order, however, is not a final order, it is currently on appeal, and there has been no final adjudication of the matter. As such, FRA's interest in the Traveler's Settlement remains subject to Wheeling's prior claims and it will continue to remain subject to those claims until the matter is resolved by a final order – which may well validate those claims.

In the FRA Motion, the FRA proclaims, without any supporting authority, that because there is no stay in effect with respect to the pending appeal, it is unconditionally entitled to an order of this Court authorizing it to take possession of the money. *See* FRA Motion at fn. 3.

This is erroneous, both as to the Court's subject matter jurisdiction to enter such an order (see discussion in Section B above) and as to the merits of this contention. The FRA confuses the absence of a stay with entitlement to an adjudication on the merits. The fact that there is no stay in effect does not divest Wheeling of its secured claim, nor does it divest the Bankruptcy Appellate Panel or the First Circuit or this Court of their jurisdiction to further adjudicate and enforce Wheeling's security interest, should it be determined to be valid and enforceable as a matter of law. *See e.g., Klein v. Civale & Trovato (In re Lionel Corp.)*, 29 F.3d 88, 91 (2nd Cir. 1994) (holding that "appellate courts may reinstate liens that have been wrongly terminated by lower courts even where intervening creditors have acquired an interest in the subject

property”); *General Electric Credit Corp. v. Nardulli & Sons, Inc.*, 836 F.2d 184459, US 189 (affirming District Court decision reinstating creditor liens vacated by bankruptcy court) (3rd Cir. 1988); *In re Sun Country Dev., Inc.* 746 F.2d 406, 407 at fn., 1 (5th Cir., 1985). The lack of a stay simply means that there is no Court order that *prohibits* disbursement of the Travelers’ Settlement. It does not mean that there is a Court order that authorizes it or that there must be a Court order that authorizes it (if it did mean this, the FRA Motion would be unnecessary). Nor does it mean that any disbursement of the Traveler’s Settlement funds authorized by this Court can be made in derogation of either the jurisdiction of the appellate courts or Wheeling’s substantive rights – which is precisely the subject of the pending appeal.

Given the foregoing (and assuming that the Court believes that it is appropriate to proceed with adjudication of the FRA Motion in the absence of subject matter jurisdiction and in the context of a contested matter), Wheeling seeks a determination and declaratory judgment by this Court pursuant to 28 U.S.C. § 2201 that any disbursement of the Traveler’s Settlement must be made subject to Wheeling’s claimed prior security interest in and to that fund, and shall remain subject to that claimed security interest until there is a final adjudication of Wheeling’s rights. In addition, Wheeling seeks a determination and declaratory judgment by this Court that it shall retain jurisdiction over the Traveler’s Settlement and FRA, such that if Wheeling is determined, by final order, to have a valid, enforceable and perfected security interest in and to the Traveler’s Settlement, that FRA shall be ordered to repay the same to Wheeling.

D. The Imposition of the Conditions Requested By Wheeling On Disbursement Of The Traveler’s Settlement To FRA Also Protects The Estate From Loss.

Wheeling’s request that any disbursement of the Traveler’s Settlement to be made to FRA be subject to the condition that the funds be returned, should a final order validating Wheeling’s security interest therein be entered, serves Wheeling’s interests, or course, as well

as the requirement that this Court not enter any order that might interfere with the jurisdiction of the appellate courts. But it should also be noted that the requested conditions also serve the interests of the estate and its creditors as a whole. This is because if the Traveler's Settlement were disbursed to FRA, and the FRA then for some reason failed or refused to timely return it after entry of a final order validating Wheeling's security interest, Wheeling would have a superpriority administrative claim against the estate, for the amount that it disbursed to FRA. In other words, by granting the relief requested in the FRA Motion, the estate would be saddled with an administrative (superpriority) liability it does not have today, to fund the Wheeling claim, and that liability would harm creditors, such as accident victims, because it would have to be satisfied out of assets that would otherwise be available for distribution to such creditors.

The escrow account that currently holds the Traveler's Settlement was established as a means to provide adequate protection to Wheeling with respect to its interest in those settlement proceeds. Absent the escrow, the Traveler's Settlement would be cash derived from a pre-petition asset (the Travelers' insurance policy) that the Debtor or the Trustee could use by compliance with the provisions of § 363 of the Bankruptcy Code. In lieu of permitting such use under § 363 and to protect Wheeling's interests the Court – with the consent of all parties in interest – ordered on December 24, 2013 that the funds to be held in escrow pending further order of the Court (the "December 24, 2013 Order"). The Court's December 24, 2013 Order brings into play § 507(b) of the Bankruptcy Code, which provides:

(b) If the trustee, under section 362, 363, or 364 of this title, provides adequate protection of the interest of a holder of a claim secured by a lien on property of the debtor and if, notwithstanding such protection, such creditor has a claim allowable under subsection (a)(2) of this section arising from the stay of action against such property under section 362 of this title, from the use, sale, or lease of such property under section 363 of this title, or from the granting of a lien under section 364(d) of this title, then such creditor's claim under such subsection shall have priority over every other claim allowable under such subsection.

By the December 24, 2013 Order, the Trustee established a means for adequate protection of Wheeling's interest in certain cash of the estate, cash which, but for that Order, the estate could use under Section 363 of the Code. If the Debtor, with or without the permission of the Court, now uses those funds, *i.e.*, disburses them from the escrow account to FRA in partial satisfaction of FRA's secured claim, it must take into account the possibility that Wheeling would ultimately prevail in its appeal. In that event, the Trustee will have used cash now in escrow, pursuant to § 363, and will have deprived Wheeling of the adequate protection of its collateral as provided by the escrow account. In this circumstance, Wheeling would have a claim under § 507(b) of the Bankruptcy Code, which would be payable from otherwise encumbered assets, ahead of all other administrative creditors of the estate (*e.g.*, the accident victims). In other words, by paying the Traveler's Settlement over to the FRA today, the Trustee takes the risk that it will be obligated to dip into unencumbered assets to satisfy Wheeling's resulting § 507(b) claim. If the Trustee holds the Traveler's Settlement, it will ultimately be distributed to either FRA or Wheeling, and neither party would have any administrative claim payable from other, unencumbered assets of the estate.

The unnecessary and harmful outcome occasioned by creating a potential § 507(b) superpriority claim can be avoided entirely by denying the FRA's request for disbursement of the Traveler's Settlement, or by entry of an order that any disbursement shall be made subject to the following conditions: (i) it is subject to Wheeling's security interest, if ultimately validated by entry of a final order; (ii) it is subject to repayment, to Wheeling, should such order validating Wheeling's rights be entered; and (iii) that the Travelers' Settlement and the FRA remain subject to the jurisdiction of this Court, pending the final outcome of the appeal, to enforce the obligation to return the Traveler's Settlement.

E. Summary.

Based on all of the foregoing, Wheeling objects to the improper use of a contested matter to adjudicate the issues presented by the FRA Motion, and further objects to any payment of the Traveler's Settlement to FRA. The request for payment of the Traveler's Settlement and the conditions under which such payment should be disbursed, if authorized by the Court, are all matters that are squarely within the scope of Bankruptcy Rule 7001, requiring commencement of an adversary proceeding. Should the Court authorize such payment, however, Wheeling respectfully requests that payment be conditioned as set forth above, so that Wheeling's interest in the Traveler's Settlement can be adequately protected, and further, so that no order issued by this Court could be allowed to affect the jurisdiction of the appellate courts.

RESPONSES REQUIRED BY D.Me. LBR 9013-1(f)

1. Wheeling admits the allegation made in ¶ 1 of the FRA Motion.
2. Wheeling admits the allegation made in ¶ 2 of the FRA Motion.
3. Paragraph 3 of the FRA Motion contains legal conclusions to which no response is required. To the extent a response is required, Wheeling denies the conclusions made therein.
4. Wheeling states that the terms of the Carve-Out and the Carve-Out Order speaks for themselves and therefore no response is required to the allegations made in ¶ 4 of the FRA Motion.
5. Wheeling states that the terms of the Carve-Out speak for themselves and therefore no response is required to the allegations made in ¶ 5 of the FRA Motion.
7. [sic] Wheeling states that the terms of the Carve-Out speak for themselves and therefore no response is required to the allegations made in ¶ 7 of the FRA Motion.
8. Wheeling admits the allegation made in ¶ 8 of the FRA Motion.
9. Wheeling admits that as part of the Camden financings described in ¶ 8 of the FRA Motion, the FRA was granted additional adequate protection of its collateral, as set forth in the First Financing Order and the Second Financing Order.

10. Wheeling admits the allegation made in ¶ 10 of the FRA Motion.

11. Wheeling states that the terms of the Closing Authorization Order speak for themselves and therefore no response is required to the allegations made in ¶ 11 of the FRA Motion.

12. Wheeling states that the terms of the Closing Authorization Order and the APA speak for themselves and therefore no response is required to the allegations made in ¶ 4 of the FRA Motion.

13. Wheeling lacks information necessary to opine on the truth and veracity of the allegations made in ¶ 13 of the FRA Motion and therefore denies the same.

14. Wheeling admits that the First Interim Application states that the Trustee received the Sales Proceeds and that a portion of those were Proceeds were disbursed for various purposes. Wheeling also admits that the First Interim Application states that following those disbursements, the Trustee held the Net Escrow Sale Proceeds. Wheeling lacks first-hand information necessary to opine on the truth and veracity of the allegations made in ¶ 14 of the FRA Motion and therefore denies the same.

15. Wheeling admits the allegations made in ¶ 15 of the FRA Motion.

16. Paragraph 16 of the FRA Motion contains argument and legal conclusions to which no response is required; to the extent a response is required, Wheeling denies the same.

17. Paragraph 17 of the FRA Motion contains legal conclusions to which no response is required; to the extent a response is required, Wheeling denies the same.

18. Wheeling states that the terms of the Carve-Out speak for themselves and therefore no response is required to the allegation made in ¶ 18 of the FRA Motion related to the same. Paragraph 18 of the FRA Motion also contains argument and legal conclusions to which no response is required; to the extent a response is required, Wheeling denies the same.

19. Wheeling states that the terms of the Closing Authorization Order speak for themselves and therefore no response is required to the allegation made in ¶ 19 of the FRA Motion related to the same. Paragraph 18 of the FRA Motion also contains argument and legal conclusions to which no response is required; to the extent a response is required, Wheeling denies the same.

CONCLUSION

WHEREFORE, for all of the foregoing reasons, Wheeling respectfully requests that the Court enter an Order:

A. Denying the FRA Motion; and

B. Granting such other relief as the Court deems just and appropriate.

Dated: August 1, 2014

/s/ George J. Marcus

George J. Marcus

David C. Johnson

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CERTIFICATE OF SERVICE

I, Holly C. Pelkey, hereby certify that I am over eighteen years old and that I caused a true and correct copy of the above document to be served upon the parties electronically at the addresses set forth on the Service List set forth below on 1st day of August, 2014.

/s/ Holly C. Pelkey

Holly C. Pelkey
Legal Assistant

Mailing Information for Case 13-10670

Electronic Mail Notice List

The following is the list of **parties** who are currently on the list to receive email notice/service for this case.

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