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IN THE SUPREME COURT OF IOWA

No. 21-0014

DOLLY INVESTMENTS, LLC,
Plaintiff-Appellant,

vs.
MMG SIOUX CITY, LLC, DALE MAXFIELD and MAXFIELD MANAGEMENT GROUP, LLC,
Defendant-Appellees.

APPEAL FROM THE WOODBURY COUNTY DISTRICT COURT

THE HONORABLE JEFFREY A. NEARY
PRESIDING JUDGE

APPLICATION FOR FURTHER REVIEW

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the Court of Appeals erred in holding that the nonpayment of rent cannot be a material breach until after the notice and cure period has passed?

II. Whether the Court of Appeals erred in affirming the District Court's finding that Plaintiff was the first to materially breach the lease between Plaintiff and Defendant by reentering and taking possession of the property after Defendant's breach but prior to giving notice and an opportunity to cure?

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STATEMENT SUPPORTING FURTHER REVIEW

Further review is sought in this case because it involves an important question of law that has not been, but should be, settled by this Court. Iowa R. App. P. 6.1103(b)(2). This case involves a breach of contract in the context of a commercial lease and whether a breach can be material if a contractual notice and cure period has not yet run. Defendant-Appellee was a commercial tenant that discontinued operating the Golden Corral restaurant in Sioux City, Iowa and ceased making rent payments to Plaintiff-Appellant in June 2019, who owned the building and underlying real estate at the time. Defendant-Appellee placed a "closed" sign on the door and informed the local newspaper that it would not reopen. Defendant-Appellee never communicated this intent to Plaintiff-Appellant. Once Plaintiff-Appellant learned the restaurant had closed by way of the news reports, Plaintiff-Appellant reentered and took possession of the property.

The District Court had originally held that the Plaintiff-Appellant was owed fifteen and one-half (15½) months of lease payments from June 2019 through the date of trial, September 2020. App. 78. However, on reconsideration, the District Court reduced the award to just one-half month's rent, determining that Plaintiff-Appellant was the first party to materially breach the lease because it reentered the restaurant without first allowing the tenant notice and an opportunity to cure its breach. App. 103. In so holding, the District Court relied upon an Eighth Circuit

Court of Appeals case, which was interpreting Delaware law. App. 101–103. The Court of Appeals, relying on the same Eighth Circuit case and a decision of the Eleventh Circuit Court of Appeals interpreting Pennsylvania law, affirmed. Ct. App. Ruling at 7, 10.

Enumerated grounds for review by this Court include cases in which an important question of law, has not been, but should be, settled by this Court. Iowa R. App. P. 6.1103(b)(2). Another of the character of cases which merit further review includes cases which "present[] an issue of broad public importance that the supreme court should ultimately determine." Iowa R. App. P. 6.1103(b)(4). The categories provided by the rule are not intended to be controlling or exhaustive. Iowa R. App. P. 6.1103(b). Because of the importance of the unsettled issue of Iowa law presented by this case, the broad public policy implications of the rule of law handed down by the Court of Appeals, and for all other reasons provided herein, this Court should grant further review of this matter. *See* Iowa R. App. P. 6.1103.

Plaintiff-Appellant can find no Iowa authority, prior to the decision rendered by the Court of Appeals, which provides that nonpayment of rent in a commercial lease cannot ripen into a material breach until after the notice and cure period has passed. Both the District Court and Court of Appeals relied on authorities from other jurisdictions to arrive at this conclusion. *See* App. 101–103; Ct. App. Ruling at 7, 10. Defendant-Appellee has cited no such Iowa case law either. Whether

nonpayment of rent by a commercial tenant, particularly on the facts as presented here[1], can amount to material breach, prior to the notice and cure period expiring, is an important question of law. *See* Iowa R. App. P. 6.1103(b)(2). This Court should grant review.

The issue presented by this case is also one of broad public importance. *See* Iowa R. App. P. 6.1103(b)(4). Were it permitted to stand, the decision of the Court of Appeals would have wide-ranging impacts on commercial property owners in the State of Iowa. Iowa business owners would not be able to protect their property even after a commercial tenant has defaulted under a lease, vacated the premises, and publicly announced that they will no longer be operating the business.

This particular case shines a light of the continuing economic ripple effects of COVID-19 and further indicates why commercial property owners should not be hamstrung when attempting to re-open shuttered businesses.[2] Additionally, the holding of this case could be extended to all commercial agreements that include notice and cure provisions. As such, this Court should grant further review, reverse

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[1] Defendant-Appellee announced to the public it was permanently closing but never disclosed this intention to Dolly. App. 129:10–130:1; 318–321. Defendant-Appellee left the Golden Corral property in disarray. App. 203:23–204:6. Issues related to Defendant-Appellee's delinquent payment of rent and property taxes went back many months prior to the nonpayment of rent and ceasing of operations in June 2019.
[2] Plaintiff-Appellant was finally able to reopen its restaurant on June 20, 2021, just over two years after Defendant-Appellee discontinued operations.

the Court of Appeals and the District Court's ruling on reconsideration, and reinstate the District Court's ruling of October 14, 2020.

STATEMENT OF THE CASE

In December 2016, Leon and Marina Reingold (hereinafter "the Reingolds") purchased the Golden Corral restaurant located at 5230 Sergeant Road, Sioux City, Iowa, subject to an existing lease. App. 2. The restaurant was leased to Defendant-Appellees, MMG Sioux City, LLC, Dale Maxfield, and Maxfield Management Group, LLC (hereinafter collectively referred to as "MMG"), which operated the Golden Corral restaurant. App. 3.

The lease, dated March 1, 2016, was for a fifteen (15)-year term, with two (2) consecutive five (5) year tenant renewal options to follow. App. 9 at ¶ 2.1. The lease was a triple-net lease. App. 22 at ¶ 25.23. On June 28, 2019, the Reingolds transferred the property to Plaintiff-Appellant Dolly Investments, LLC (hereinafter "Dolly"), an entity in which Leon and Marina each own a 50% stake. App. 3; 185:25–186:5.

Issues arose in late 2018 and continued into 2019, as MMG made delayed rent payments to Dolly and became delinquent in its property tax obligations. *See generally* App. 324–328. In June 2019, MMG failed to tender the full amount owed for June's rent. App. 3. The outstanding balance was $9,375.00. App. 3. On June 9, 2019, MMG responded, not by tendering the amount in rent owed, but instead by

informing Dolly that MMG was considering ceasing operations at the Sioux City Golden Corral and was attempting to find another franchisee to take its place and assume the lease. App. 332. Dolly responded by requesting the rent payment be made in full before discussing the possibility of subleasing. App. 331. Dolly again contacted MMG, on June 19, 2019, requesting that the overdue rent be paid. App. 322. MMG responded by informing Dolly that it could not pay the overdue rent at that time. App. 322.

Unbeknownst to Dolly, prior to its June 19, 2019 correspondence with Dolly, MMG had already ceased operations of the Golden Corral restaurant. App. 318–321. An article in the June 17, 2019 Sioux City Journal confirmed that the restaurant would be permanently closing, per Dale Maxfield on behalf of MMG. App. 318–321. Despite the sign on the door reading "closed for remodel," Maxfield confirmed the restaurant would not be reopening. App. 319–320. MMG did not communicate its intentions to cease operating the Golden Corral restaurant to Dolly. *See* App. 129:10–130:1. Dolly only learned that the Golden Corral was closing through its lender, who observed the Golden Corral was closed, read the article in the Sioux City Journal, and notified the Reingolds. App. 129:10–130:1.

Mr. Reingold, understandably concerned over the status of the property, came to Sioux City on June 25, 2019 to inspect the property. App. 171:10–13. Upon arriving, Mr. Reingold found the property in disarray. App. 203:23–204:6. Mr.

Reingold secured the property to prevent further damage. App. 203:23–204:6. Dolly subsequently sent MMG a Notice to Cure Default on July 3, 2019. App. 314–315. MMG never cured the default or responded to the notice. When MMG's default went uncured, Dolly sent a notice terminating the lease on August 22, 2019. App. 316–317.

On October 14, 2020, District Court Judge Jeffrey Neary entered a ruling finding that MMG materially breached the lease agreement App. 78. "MMG's nonpayment of the required monthly lease payment for the month of June 2019 is material. The continued nonpayment of the lease payments likewise is material." App. 75. The court entered judgment in favor of Dolly in the amount of $290,625.00, representing fifteen and one-half (15½) months of lease payments from June 2019 through the time of trial. App. 78. The District Court also awarded Dolly its attorney fees. App. 79.

On October 28, 2020, MMG filed a Motion to Reconsider, which Dolly timely resisted. App. 92–99. On December 7, 2020, the District Court granted MMG's motion. App. 101–106. The District Court reversed course and found that MMG's failure to pay the June 2019 was not a material breach. App. 103. Rather, the nonpayment of rent would constitute a material breach only after Dolly complied with the notice and cure provisions of the lease and MMG's failure was not cured. App. 103.

In so holding, the District Court relied upon *Matrix Grp. Ltd., Inc. v. Rawlings Sporting Goods Co.*, 477 F.3d 583 (8th Cir. 2007). App. at 101 (describing *Matrix* as "instrumental in the Court's conclusions"). The *Matrix* case was not cited by either party in connection with the Motion to Reconsider. *See* App. 92–99. The *Matrix* decision, applying Delaware law, held that a prior breach by the other party to a trademark license agreement did not justify the non-breaching party's failure to comply with the termination provisions of agreement, including a notice and cure provision. *Id.* at 588–90. The *Matrix* decision did not involve commercial leases or real estate. *Id.* The party which failed to comply with the notice and cure provision never provided the other party any notice and cure period. *See id.*

Applying the reasoning from *Matrix*, the District Court concluded that the first material breach occurred when Dolly reentered the Golden Corral premises without the notice and cure period having first run. App. 103. Dolly's award for its breach of contract claim was reduced to only include one half-month's rent for June 2019, which amounted to $9,375.00. App. 104.

On December 15, 2021, the Iowa Court of Appeals affirmed the District Court's ruling on MMG's Motion to Reconsider. Ct. App. Ruling at 10. The Court of Appeals relied on *Matrix* and a case interpreting Pennsylvania law to reach the conclusion that nonpayment of rent by a tenant is not a material breach until the notice and cure period has run. Ct. App. Ruling at 7 (citing *Matrix Grp. Ltd., Inc.*,

477 F.3d at 589; *Alliance Metals, Inc., of Atlanta v. Hinely Indus., Inc.*, 222 F.3d 895, 903 (11th Cir. 2000). Neither the *Matrix* case nor the *Alliance* case involved lease agreements, and neither case was decided under Iowa law.

BRIEF IN SUPPORT OF THE REQUEST FOR FURTHER REVIEW

I. The Court of Appeals erred when holding that the nonpayment of rent cannot be a material breach until after the notice and cure period has passed.

MMG materially breached the lease when it failed to pay the rent which was owed for June 2019. The materiality of MMG's breach was confirmed when it closed the Golden Corral restaurant and abandoned the property without notifying Dolly. The relevant factors in determining materiality of a breach, as determined under the Restatement (Second) of Contracts, which has been adopted in Iowa, are:

> (i) to what extent the non-breaching party will be deprived of the benefit it reasonably expected; (ii) the difficulty the non-breaching party may have proving damages; (iii) the possibility that the breaching party will suffer forfeiture; (iv) the likelihood that the breaching party will cure its failure; and (v) the degree that the breaching party's behavior comported with standards of good faith and fair dealing.

Van Oort Constr. Co. v. Nuckoll's Concrete Serv., Inc., 599 N.W.2d 684, 692 (Iowa 1999). Proper consideration of these factors reveals that MMG's actions, predating June 25, 2019, amounted to material breach. The District Court, in its initial ruling, agreed. App. 75.

Weighing the relevant factors as identified by the Restatement (Second) of Contracts and Iowa law and considering the totality of the circumstances shows that

MMG materially breached the agreement when it failed to pay the rent due in June 2019. Dolly was not the first party to materially breach the lease when it reentered the property on June 25, 2019. MMG's actions prior to June 25, 2019—including regular delinquent payments of rent and property taxes, closing the restaurant without informing Dolly, and leaving the premises in disarray—plainly amounted to material breach of the lease agreement. *See* Restatement (Second) of Contracts § 241.

In reaching an alternate result, both the District Court on reconsideration and the Court of Appeals relied upon *Matrix* and *Alliance Metals*. Neither case interprets Iowa law. *Matrix Grp. Ltd., Inc.*, 477 F.3d at 589 (Delaware law); *Alliance Metals, Inc., of Atlanta*, 222 F.3d at 903 (Pennsylvania law). Neither case involves a determination of rights and remedies under a lease agreement. *Id.* Each are federal decisions in which the Court could find no relevant caselaw in the applicable state to support the proposition that a prior material breach relieves the other party of the notice and cure provisions under the contract. *See id*. As such, those cases are purely speculative as to what the law in the State of Delaware or Pennsylvania might require and have no bearing whatsoever on what rule the State of Iowa should adopt. Additionally, in both of those cases, the notice to cure default was never sent before the contract was finally terminated. *Id.* The Court of Appeals should have distinguished the present case from those two cases based on the facts alone,

specifically, that Plaintiff-Appellant did send a Notice to Cure Default on July 3, 2019, and Defendant-Appellee never cured the default. App. 314–317.

Unlike the Courts in *Matrix* and *Alliance Metals*, this Court is the final arbiter of what the relevant law of the State of Iowa is and what it should be. While notice and cure provisions in commercial leases serve necessary purposes and often impact the remedies that can be sought by the property owner, such provisions should not be read in isolation, nor should they be an absolute defense to tenant misconduct. As encompassed by the entirety of the lease, the purpose of the contract between Dolly and MMG was for MMG to operate the Golden Corral restaurant and pay rent to Dolly. *See* App. 291–307. MMG had clearly abandoned this purpose and any intention it may have had to follow through with its commitments under the lease prior to June 25, 2019, by closing the business and informing the local newspaper, but not Dolly, that the closure would be permanent. *See* App. 318–321.

In another context—for example, if the restaurant had continued operating or if the tenant had not previously defaulted—the landlord may be required to follow the notice and cure provisions prior to reentering and taking possession of the property. However, the District Court and the Court of Appeals adopted a position that does not allow consideration of the circumstances and would treat every breach the same in requiring the property owner to wait for the cure period to run, regardless of the conduct of the tenant. *See* Ct. App. Ruling at 7–8.

Under these facts, Dolly providing MMG notice and an opportunity to cure would have been futile. The penalty for Dolly's failure to do so prior to reentering the property should not be a finding that it was the first to materially breach the lease. The District Court reversing course on reconsideration and the Court of Appeals affirming the same resulted in Dolly being denied over $280,000.00 in rent which was owed. Under a guise of strict compliance with the terms of the lease, this result is punitive as to Dolly, the party who had complied fully under the lease prior to June 25, 2019. Dolly was merely securing its investment when it reentered the Golden Corral restaurant after coming to inspect the premises and finding them in a poor and abandoned condition.

Dolly requests that this Court give this matter further review and hold that, under the circumstances presented in this case, MMG was the first party to materially breach the lease. The actions taken by MMG prior to June 25, 2019 were so egregious as to render null and void Dolly's continuing obligations under the lease, including any notice and cure requirements. MMG had already discontinued its fundamental obligation under the lease prior to June 25, 2019—MMG was no longer occupying the space, paying rent, or operating the Golden Corral restaurant. The Court of Appeals erred in relying on authorities from other jurisdictions to hold that MMG's breach was not material, in the absence of MMG being given notice and an opportunity to cure its breach. *See* Ct. App. Ruling at 7, 10.

The rule adopted by the Court of Appeals would have a substantial effect on commercial property owners and other parties to a commercial contract in the State of Iowa by requiring them to follow notice and cure provisions even in extraordinary circumstances. *Id.* The Court of Appeals gave no consideration to the circumstances that caused Defendant-Appellee's breach to be material at the time of the nonpayment of rent, namely that the tenant had abandoned the property and that the tenant had made prior late payments of rent and property taxes. Indeed, the Court of Appeals did not give any consideration to those other facts because it adopted a rule under which it could not consider them. *Id.*

This Court should reverse the Court of Appeals' ruling and adopt a test using the Restatement factors discussed in Sections 241 and 242, which considers the materiality of the breach and the right to cure in light of other materiality factors. Restatement (Second) of Contracts §§ 241, 242 (1981). An uncured breach should be considered material if the other factors point toward materiality, regardless of whether the contract includes a notice and opportunity to cure. Plaintiff-Appellant respectfully requests that further review be granted, that the Court of Appeals decision and the District Court's ruling on reconsideration be reversed, and that the District Court's original ruling, in which it found a material breach at the time of Defendant-Appellant's nonpayment of rent, be reinstated.

II. Because MMG was the first party to breach the lease, the October 14, 2020 ruling of the District Court should be restored.

This Court, upon granting further review, should reinforce the Restatement's multi-factor test for determining material breach, even when a contract includes notice and cure provisions. Under the Restatement test, which has been adopted in Iowa, the issue of materiality is very fact-dependent and "is necessarily imprecise and flexible." Restatement (Second) of Contracts § 241 cmt. a (1981). The first two factors to consider (the extent of the deprived benefit and difficulty in proving damages) are interrelated, as the difficulty in proving with sufficient certainty the amount of loss necessarily affects the adequacy of compensation. *Id.* at cmt. c. When weighing the possibility of the breaching party suffering forfeiture, a breach is less likely to be considered material if it occurs after substantial performance under the contract and is more likely to be considered material if it occurs prior to substantial performance. *Id.* at cmt. d. The probability that the failure will later be cured, often informed by the financial weakness of the other party suggesting an inability to cure, is also relevant to the determination of materiality. *Id.* at cmt. e.

In the context of a lease agreement, a delay in payment of rent has frequently been found to be a material breach.[3] Iowa courts have found that where the tenant

[3] *See, e.g.*, *Rubloff CB Machesney, LLC v. World Novelties, Inc.*, 844 N.E.2d 462 (Ill. App. Ct. 2006); *Camalier & Buckley, Inc. v. Sandoz & Lamberton, Inc.*, 667 A.2d 822 (D.C. 1995); *Elliott v. S. Isle Food Corp.*, 506 A.2d 147 (Conn. App. Ct. 1986).

has previously been delinquent in rent payments and the landlord demands strict compliance going forward, the tenant cannot rely on the landlord's prior forbearances to argue that the breach is not material if he again fails to tender the rent due. *Beck v. Trovato*, 150 N.W.2d 657, 659 (Iowa 1967).

When the party in breach attempts to cure their default, this demonstrates good faith and points against a finding that the breach is material. *Kiriakides v. United Artists Commc'ns, Inc.*, 440 S.E.2d 364, 367 (S.C. 1994). Conversely, when the tenant to a lease contract has previously been late on the rent and the landlord requested strict compliance with the terms of the lease in the future, another delayed rent payment is more likely to be found to be material. *Rubloff CB Machesney, LLC*, 844 N.E.2d at 466–67. Failure to pay property taxes which the tenant is obliged to pay under the lease, like a failure to pay the rent when due, may alone constitute a material breach. *Bolon v. Pennington*, 432 P.2d 274, 275 (Ariz. App. Ct. 1967).

The relevant factors in the determination of materiality point in favor of a finding that MMG materially breached the lease when it did not make payment in full of the rent due for June 2019. Dolly was deprived of the ultimate benefit it expected when contracting, as over eleven years remained on the lease when MMG was in breach. As correctly pointed out by the District Court in its initial Ruling, determining future damages in a commercial lease case is difficult, particularly with the impact the COVID-19 pandemic has had and promises to continue to have on

Dolly's ability to re-lease the property. App. 72. Thus, the possibility of adequate compensation factor points towards a material breach.

As MMG's breach occurred relatively early in the life of the agreement, three years into its fifteen-year lease term, and MMG enjoyed the benefit of occupying the premises, finding that MMG's breach was material would not amount to forfeiture. Moreover, by simply abandoning the property and reporting to the media, and not its landlord, that the Golden Corral would be permanently closing, MMG demonstrated a failure to comport to the standards of good faith and fair dealing.

On the issue of the likelihood of MMG curing its breach, MMG's actions in abandoning the property and informing the public of the permanent closure of the Golden Corral restaurant point definitively against such likelihood. *See* Proceedings at 160:24–161:16 (Reingold testifying that his bank, Northwest Bank, located near the Golden Corral, informed him that the property was "abandoned"); App. 318–321. MMG's financial difficulties and attempts to sub-lease the property, as communicated to Dolly, further indicated that MMG was unlikely to cure its failure. A tenant vacating the premises gives the indication that the tenant is unlikely to cure its breach, which, in turn points towards the breach being material. *See Van Oort Constr. Co.*, 599 N.W.2d at 692; Restatement (Second) of Contracts § 241 (1981).

When one party materially breaches a contract, the other party's duties under the contract are excused. *See, e.g.*, *Van Oort Constr. Co.*, 599 N.W.2d at 688. One

of Dolly's requirements under the lease between it and MMG was that Dolly was to provide MMG notice and the opportunity to cure any breaches by MMG. *See* App. 298. It is pursuant to breach of this lease term, the Court of Appeals held, that Dolly was the first party to materially breach the lease, meaning Dolly was only entitled to one-half month's rent for June of 2019. Ct. App. Ruling at 10.

However, as described above, the Court should adopt the rule of the Restatement under which the totality of the circumstances may be considered in determining whether a breach was material. Restatement (Second) of Contracts §§ 241, 242 (1981). The totality of the circumstances in this case demonstrates that MMG materially breached the lease prior to Dolly's alleged breach in reentering and taking possession of the property on June 25, 2021. This results in Dolly being excused from complying with the notice and cure provisions when it reentered the property on June 25, 2021. *See Van Oort Constr. Co.*, 599 N.W.2d at 688.

Because Dolly was not required to comply with the notice and cure requirements and MMG had already materially breached the lease, the Court of Appeals' holding that Dolly was the first to materially breach the lease should be reversed. MMG materially breached the lease no later than June 17, 2019, when it publicly announced it was shutting the doors of the Golden Corral restaurant. This means the District Court properly awarded damages in its original ruling of October 14, 2020, in which it awarded Dolly the rent which was owed from June 2019

through the time of trial. This Court should grant further review, reverse the Court of Appeals, and reinstate the District Court ruling of October 14, 2020.

CONCLUSION

The Court of Appeals erred in adopting a rule that requires strict compliance with notice and cure provisions under a lease and does not allow consideration of the Restatement factors for determining whether a prior breach is material. This Court should grant further review to consider an unsettled and important issue under Iowa law, namely whether the holdings of *Matrix* and *Alliance* should be adopted in the State of Iowa and extended to commercial lease agreements , establishing a rule that a breach cannot be material until a contractual notice and cure period has run. This Court should reject the holdings of those cases and the Court of Appeals, which do not permit consideration of all of the circumstances enumerated by the Restatement (Second) of Contracts when deciding whether a breach was material. Because of the errors in the Court of Appeals decision, further review should be granted, the Court of Appeals decision should be reversed, and the District Court's ruling of October 14, 2020 should be reinstated.

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CERTIFICATE OF COMPLIANCE

Plaintiff-Appellant pursuant to Iowa Rules of Appellant Procedure 6.1103(4)(a), hereby certifies that this brief contains 4,307 words of a 14-point proportionally spaced Times New Roman font and it complies with the 5,600-word maximum permitted length of the brief.

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CERTIFICATE OF FILING

I, the undersigned, hereby certify that I will electronically file the attached Plaintiff-Appellant Application for Further Review with the Clerk of the Supreme Court by using the EDMS filing system.

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PROOF OF SERVICE

I, the undersigned, hereby certify that I did serve the attached Plaintiff-Appellant's Application for Further Review on all other parties electronically utilizing the EDMS filing system, which will provide notice to:

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ATTORNEY'S COST CERTIFICATE

The undersigned attorney does hereby certify that the actual cost of preparing the foregoing Plaintiff-Appellant's Application for Further Review was the sum of $0.00 exclusive of service tax, postage, and delivery charges.

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