

THE UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA

COGNEX CORPORATION

Plaintiff,

v.

VCODE HOLDINGS, INC., VDATA  
LLC, ACACIA RESEARCH  
CORPORATION d/b/a ACACIA  
TECHNOLOGIES GROUP and  
VERITEC INC.,

Defendants.

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Civil Action No. 06-cv-1040

Hon. Joan N. Ericksen, presiding  
Magistrate Judge: Jeanne J. Graham

**ACACIA’S MEMORANDUM IN OPPOSITION TO  
COGNEX’S MOTION FOR LEAVE TO AMEND ITS FIRST  
SUPPLEMENTAL COMPLAINT**

**INTRODUCTION**

After two years of litigation and on the eve of trial, Cognex is seeking to add two elements of damages not previously asserted in this litigation. In the proposed amended complaint, Cognex seeks to add Paragraph “J” to the Prayer for Relief, which claims “special, general and punitive damages to Cognex due to Acacia’s defamation.” The request for “special” damages is new, as is the request to seek punitive damages. Cognex not only wants to *amend* its pleading to assert these new theories at the eleventh hour, but asks the Court to *determine the amount of damages*. Cognex’s motion should be denied for at least four reasons.

- The motion is untimely. The parties are poised for trial and the deadline for amendments to the pleadings expired fourteen months ago.
- Cognex's request is improper in that it asks the Court to usurp the role of the jury and award damages without a trial.
- Cognex has not offered a shred of legal support for its claim that its attorneys fees and Defendants' profits may be recovered as punitive or "special" damages.
- Cognex failed meet the high standard of proof required under Minn. Stat. §§ 549.20 and 549.191 to seek punitive damages.

For these reasons, Cognex's motion for leave to amend its complaint should be denied.

### **FACTUAL BACKGROUND**

#### **A. Cognex Has Not Sought Punitive or Special Damages in the Two Years This Lawsuit Has Been Pending**

Cognex commenced this action on March 13, 2006, over two years ago. *See* Complaint, Docket No. 1. In December 2006, Cognex amended its complaint to assert the claim for defamation presently before the Court. *See* First Supplemental Complaint, Docket No. 94. In its First Supplemental Complaint, Cognex asserted that its "reputation in the relevant business community had been harmed," and sought "an award of presumed damages to Cognex due to Acacia's defamation."

*See id.*, Paragraph 75 and Prayer for Relief, Paragraph J. Cognex did not ask permission to seek punitive damages.

**B. Cognex Did Not Seek Special or Punitive Damages.**

Defendants sought discovery concerning Cognex's damages claim and propounded an interrogatory asking Cognex to "identify with specificity all damages that Cognex contends that it is entitled to recover from the defendants in this lawsuit." Exhibit A to Friedemann Dec., Interrogatory No. 6. Consistent with its complaint, Cognex indicated that it was seeking "presumed" damages allegedly resulting from the defamation. *See id.* Cognex did not disclose any "special damages" or itemize any attorneys fees being sought as a result of the alleged defamation. *See id.*

On June 26, 2007, shortly before the close of discovery, Defendants deposed Charles Pollak, the lawyer who signed Cognex's interrogatory answers concerning its alleged damages. Pollak testified that he was "not prepared to identify any damages" resulting from the alleged defamation. Exhibit B to Friedemann Dec., page 25-26. When questioned about Cognex's answer to Interrogatory Number 6 referenced above, Pollak agreed that presumed damages were "the only damages that Cognex has alleged so far." Exhibit B to Friedemann Dec., page 29.<sup>1</sup>

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<sup>1</sup> Cognex later designated Mr. Pollak to testify on its behalf under Fed. R. Civ. P. 30(b)(6) concerning its damages claim. Cognex was unable to identify any damages that it had incurred when it amended its complaint to pursue a defamation claim. Exhibit C to Friedemann Dec., page 27.

Cognex never supplemented its answers to interrogatories to identify any special damages and never itemized any attorneys fees it was seeking as defamation damages. Friedemann Dec., ¶ 7.

On January 11, 2008, well after discovery closed, Cognex supplemented its initial disclosures under Rule 26(a)(1). Although Cognex referenced “special” damages at that time, Cognex did not itemize its claimed damages or mention punitive damages. *See* Exhibit E to Friedemann Dec.

**C. Cognex Seeks to Assert New Damages Theories on the Eve of Trial.**

Now, on the eve of trial, Cognex seeks different elements of damage on its defamation claim: punitive and “special” damages. Cognex characterizes the attorneys fees incurred in this patent case as “special” damages and asks the Court to (1) allow it to amend its complaint to seek special damages, and (2) award the “special” damages (i.e. fees) Cognex says it incurred. Similarly, Cognex requests that the Court give it permission to seek punitive damages and award punitive damages consisting of Cognex’s attorneys fees and Defendants’ profits.<sup>2</sup>

**D. The Deadline for Motions to Amend Expired Fourteen Months Ago.**

Cognex is seeking to add new claims well after the deadline established in the Court’s scheduling order. The deadline for motions to amend the pleadings was

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<sup>2</sup> In its brief, Cognex claims that it is entitled to recover licensing fees Acacia obtained from third parties on a theory of “unjust enrichment.” Neither the existing complaint nor the proposed amended complaint asserts a claim for unjust enrichment. *See* First Supplemental Complaint, Docket No. 94, and Proposed Second Amended and Supplemental Complaint, Docket No. 301.

April 19, 2007. Pretrial Scheduling Order, Exhibit D to Friedemann Dec., p. 6. The Court set June 27, 2007 -- almost one year ago -- as the deadline to complete discovery. *Id.*, p. 1. The case was ready for trial on January 14, 2008. *Id.*, p. 7.

**E. The Court Already Rejected Cognex's Claim for Attorneys Fees as Defamation Damages.**

Although Cognex's request to seek "special" damages is new, Cognex's claim that its attorneys fees are damages resulting from the alleged defamation is not. The Court considered and rejected Cognex's claim when it ruled on the parties' summary judgment motions. In particular, the Court stated the following:

Cognex, without citation to any legal authority, also asserts it has sufficiently established economic damages by demonstrating the amount of attorneys fees and costs it had to incur in proceeding with the instant declaratory judgment action in the face of Acacia's defamatory statements. Cognex asserts Acacia's statements compelled Cognex to see this litigation through to completion, which made it impossible for Cognex to negotiate a reasonable settlement with Defendants. In the absence of legal support, the Court rejects Cognex's argument.

May 19, 2008 Order, p. 61, n. 18.

Undeterred, Cognex now wants to amend its complaint to seek its attorneys fees as punitive and "special" damages.

**ARGUMENT**

**I. COGNEX'S MOTION FOR PERMISSION TO SEEK PUNITIVE DAMAGES SHOULD BE DENIED.**

**A. Cognex's Motion is Untimely.**

Cognex's motion is extremely untimely. Purporting to "appreciate" that punitive damages must be expressly pled under Minnesota law, Cognex asks the

Court for leave to amend to add its punitive damages claim under Federal Rules of Civil Procedure 15(a) and (b). What Cognex fails to appreciate, however, is that the extreme untimeliness of its motion is fatal to its request.

Where the time for both the amendment of pleadings and for the completion of discovery have long since expired, the propriety of a motion for leave to amend “is most properly considered within the framework of Rule 16(b), Federal Rules of Civil Procedure.” *Luigino’s, Inc. v. Pezrow Co., Inc.*, 178 F.R.D. 523, 525 (D. Minn. 1998) (quoting *Alholm v. American S.S. Co.*, 167 F.R.D. 75, 77 (D. Minn. 1996)). Under Rule 16(b), a Court’s Scheduling Order “shall not be modified except upon a showing of good cause and with the judge’s consent.” Fed. R. Civ. P. 16(b).

Scheduling orders are important tools in controlling litigation. *Luigino’s*, 178 F.R.D. at 525 (citing *Rouse v. Farmers State Bank of Jewell*, 866 F. Supp. 1191 (N.D. Iowa 1994)). A scheduling order “is not a frivolous piece of paper, idly entered, which can be cavalierly disregarded by counsel without peril.” *Id.* Indeed, “[a]s unwieldy caseloads, and congested Court calendars, continue to plague the practical utility of Federal Court litigation, ‘scheduling orders have become increasingly critical to the district court’s case management responsibilities’ and the capacity of such Orders to sensibly advance litigation to the point of Trial must be responsibly preserved.” *Archer Daniels Midland Co. v. Aon Risk Servs., Inc.*, 187 F.R.D. 578, 581 (D. Minn. 1999) (quoting *Luigino’s*, 178 F.R.D. at 525). For these reasons, the good cause standard of Rule 16(b) “is an exacting one,” requiring the

moving party demonstrate that the schedule could not have been met despite the party's diligence. Fed. R. Civ. P. 16, Advisory Committee's Notes (1983).

In *Luigino's*, the plaintiff sought leave to amend its complaint to add a claim for punitive damages less than 11 months after the deadline for the amendment of pleadings had passed. *Luigino's*, 178 F.R.D. at 524. The court, finding that the plaintiff had the evidence that was the basis of its claim for 17 months prior to seeking leave, denied the motion as untimely because the plaintiff could offer "no justification for its extreme dereliction." *Id.* at 525-26. The court continued, finding that if an amendment of the pleadings can be considered timely where the plaintiff has had the information undergirding its claim for such a protracted period of time, "then the good cause showing of Rule 16(b) is an apparition, and our role in facilitating the 'just, speedy, and inexpensive' resolution of civil disputes, would be figmental." *Id.* at 526.

Here, Cognex is asking the Court to render Rule 16(b) meaningless. Cognex cannot demonstrate any good cause justifying its extreme delay. Tellingly, Cognex does not even address the issue in its brief.

Cognex has asserted six allegedly defamatory actions on the part of Acacia, the last of which allegedly occurred in May 2005. See Cognex Brief, p. 12. Cognex had the evidence it presents to the Court in support of its request to seek punitive damages no later than July 9, 2007, when it took Tisha Stender's deposition. Acacia produced the bulk of its documents to Cognex on April 26, 2007, well before the close of discovery.

Moreover, Cognex knew the facts forming the basis of its motion only two months after it commenced this action 27 months ago. In support of its motion, Cognex recounts two separate conversations its in-house Patent Counsel, Arthur J. O'Dea, had with Cognex's customers in early May during which those customers told Mr. O'Dea of Ms. Stender's alleged conduct. See Cognex Brief, p. 11-12. Cognex also points out that within ten days of Mr. O'Dea's discussions, Cognex's Vice President for Legal Affairs notified Acacia of the discrepancy it now alleges is defamatory. Id. at p. 13. All of these conversations occurred in early May 2006 – over 25 months ago. If Cognex had acted with reasonable diligence, it could have brought its motion before discovery closed on July 30, 2007, but Cognex failed to do so.

Cognex makes no attempt to explain its tardiness and has no reasonable excuse for delaying so long before seeking leave to amend. Cognex's motion is untimely and should be denied.

**B. Cognex Cannot Meet the Statutory Burden Necessary to Seek Punitive Damages.**

Federal courts in Minnesota require the same pleading procedure for punitive-damages claims as are required for pleading punitive-damages claims in Minnesota's state courts. *Ulrich v. City of Crosby*, 848 F. Supp. 861, 866 (D. Minn. 1994).

Minnesota Statutes §§ 549.191 and 549.20 (2007) require Cognex to meet a high standard before it may seek punitive damages. Specifically, Minn. Stat. §



549.20, subd. 1, permits a punitive damages claim only upon a clear and convincing standard proving a deliberate disregard of another's rights or safety:

Punitive damages shall be allowed in civil actions ***only*** upon ***clear and convincing*** evidence that the acts of the defendant show ***deliberate disregard*** for the rights or safety of others.

A defendant has acted with deliberate disregard for the rights or safety of others if the defendant has knowledge of facts or intentionally disregards facts that create a high probability of injury to the rights or safety of others and:

- (1) deliberately proceeds to act in conscious or intentional disregard of the high degree of probability of injury to the rights or safety of others; or
- (2) deliberately proceeds to act with indifference to the high probability of injury to the rights or safety of others.

Minn. Stat. § 549.20, subd. 1 (2007) (emphasis added).

In seeking to assert a punitive damages claim, Cognex must first obtain leave of the Court based upon a prima facie showing of entitlement. Minn. Stat. § 549.191; *Ulrich*, 848 F. Supp. at 867 (D. Minn. 1994). The Court should not look at Cognex's allegations in a vacuum. Rather, the Court should view the record in its entirety, including evidence contrary to Cognex's allegations. *Ulrich*, 848 F. Supp. at 875. The quantum of proof necessary to grant Cognex's motion, however, is not prima facie evidence; rather, it is clear and convincing evidence.

Applying this standard, "the trial court is to do more than 'rubber stamp' the allegations in the motion papers." *Swanlund v. Shiman Indus. Corp., Ltd.*, 459 N.W.2d at 154 (quoting *Shekta v. Kueppers, Kueppers, Von Feldt & Salmen*, 454 N.W.2d 916, 918 n.1 (Minn. 1990)). The Court must independently ascertain

*whether there exists clear and convincing evidence* that the defendants acted with a *deliberate disregard* of the plaintiff's rights. See *Ulrich*, 848 F. Supp. at 867 (D. Minn. 1994) (“[P]unitive damages may only be awarded when a defendant’s conduct reaches a threshold level of culpability.”); *Swanlund*, 459 N.W.2d at 156.

Cognex does not set forth sufficient factual allegations to cross the threshold of clear and convincing evidence that Acacia deliberately disregarded Cognex’s rights. In fact, there is no concrete assertion that Acacia acted with intentional indifference to Cognex’s rights.

**C. Acacia Is Not Liable for the Allegedly Defamatory Statements of Its Employee.**

While the burden for seeking punitive damages is high, the burden for seeking punitive damages from an employer for the acts of its employees is even higher. An employer may be liable for its employees’ defamatory conduct only in limited circumstances. Minn. Stat. § 549.20, subd. 2. Punitive damages can properly be awarded against a master or principal because of an act done by an agent only if the plaintiff can establish that:

- (a) the principal authorized the doing and the manner of the acts;
- (b) the agent was unfit and the principal deliberately disregarded a high probability that the agent was unfit;
- (c) the agent was employed in a managerial capacity with authority to establish policy and make planning level decisions for the principal and was acting in the scope of that employment; or
- (d) the principal or a managerial agent of the principal, described in clause (c), ratified or approved the act while knowing of its character and probable consequences.

Minn. Stat. § 549.20, subd. 2(a)-(d).

While Cognex does not address § 549.20., subd. 2, it is clear that Cognex could not establish that clauses (a) or (b) apply. Thus, punitive damages may be awarded against Acacia for Ms. Stender's conduct only if Cognex can establish that: (1) Ms. Stender was employed in a managerial capacity with authority to establish policy and make planning level decisions for Acacia and was acting within the scope of her employment, or (2) Acacia or a "managerial agent" of Acacia, ratified or approved Ms. Stender's statements while knowing of their character and probable consequences. Because Cognex has presented no evidence that Ms. Stender was employed in a managerial capacity with authority to establish policy on behalf of Acacia and because Acacia never ratified or approved Ms. Stender's statements while knowing of their character and probable consequences, Cognex cannot establish that punitive damages could properly be awarded against Acacia for Ms. Stender's alleged conduct. Nor has Cognex pled any factual allegations in its latest amendment, which is another fatal flaw in its claims.

**1. Ms. Stender was not employed in a managerial capacity with authority to establish policy on behalf of Acacia.**

In order to award punitive damages against the employer for the acts of its employee on the theory that the employee had the authority to establish policy and make planning level decisions on behalf of the employer, the plaintiff must establish that the employee had policy-establishing and planning-level decision-making authority. Minn. Stat. § 549.20, subd. 2(c); *Baufield v. Safelite Glass Corp.*, 829 F. Supp. 285, 286 (D. Minn. 1993). It is not enough that the employee merely

is employed in a managerial position. *Baufield*, 829 F. Supp. at 286. Unless the employee has the specific policy-establishing and planning-level authority, the employer may not be held liable in punitive damages for the employee's conduct. *Id.*

Cognex has offered no evidence that Ms. Stender had authority to establish policy and make planning level decisions. Therefore, Cognex fails the test provided in Minn. Stat. § 549.20, subd. 2(c), as a matter of law.

**2. Acacia did not approve or ratify Ms. Stender's allegedly defamatory acts.**

An employer may be liable for punitive damages stemming from its employee's conduct if it "ratified or approved" the employee's act while knowing of the act's character and probable consequences. Minn. Stat. 549.20, subd. 2(d). To succeed on this theory, the plaintiff must establish that the employer, either expressly or impliedly, ratified its employee's actions. *Baufield*, 829 F. Supp. at 286-87. Unless the plaintiff presents evidence showing that the employer knew, or should have known, that the employee's conduct was defamatory, the employer's actions with respect to the allegedly defaming employee after it learns of the employee's conduct are "immaterial." *Id.* at 287.

Cognex has presented no evidence, and has made no factual allegations, that Acacia, or a managerial agent of Acacia, ratified or approved of the allegedly defamatory conduct at issue in Cognex's motion. Indeed, Cognex has presented no evidence that Acacia was even aware of Ms. Stender's allegedly defamatory

conduct when it was occurring. The only evidence Cognex presents regarding Acacia's knowledge of the allegedly defamatory conduct is a May 11, 2006 email sent by Cognex's Vice President for Legal Affairs to Acacia's General Counsel regarding the origin of the Letter of Intent to purchase the Veritec patents. *See* Cognex Brief, p. 13. That email, however, does nothing more than present Cognex's position that the letter was not originated by Cognex. It does not notify Acacia of any allegedly defamatory conduct on the part of any Acacia employee.

Moreover, even if the May 11, 2006 email somehow put Acacia on notice of Ms. Stender's acts, Cognex does not allege that a single defamatory act occurred after May 11, 2006. Cognex has no evidence that the allegedly defamatory conduct continued after that date and so, has no evidence that Acacia ever ratified or approved of Ms. Stender's conduct. To the contrary, even considering Cognex's evidence in a light most favorable to Cognex, not a single allegedly defamatory act occurred after Cognex contacted Acacia regarding the Letter of Intent. Thus, Cognex has not presented any evidence suggesting that Acacia was aware of, or should have been aware of, any of the allegedly defamatory conduct. Without such knowledge, Acacia could not have approved or ratified that conduct. Accordingly, Ms. Stender's actions may not be imputed to Acacia for purposes of punitive damages. Minn. Stat. § 549.20, subds. 1, 2(d).

Cognex has fallen short of the required evidentiary standards established by the Legislature to prevent unmeritorious claims for punitive damages. It has also failed to make these necessary factual allegations to support the claim for punitive

damages in this latest proposed amendment, thus subjecting it to dismissal under Rule 12(b)(6), even if allowed.

**D. Cognex's Motion Asks the Court to Decide a Question of Fact Properly Reserved for the Jury.**

Even if Cognex had: (1) filed its motion to amend in a timely manner (which it did not); (2) met the Minnesota Legislature and state courts' high threshold for seeking punitive damages (which it has not and cannot); and (3) shown that the allegedly defamatory conduct of Ms. Stender could be imputed to Acacia (which it has not and cannot), Cognex's request that this Court take the extraordinary step of awarding Cognex its alleged damages at the summary judgment stage still must be rejected.

In Minnesota, the questions of whether to award punitive damages, and if so, the amount to be awarded, are "almost exclusively within the province of the jury." *Stuempges v. Parke, Davis, & Co.*, 297 N.W.2d 252, 259 (Minn. 1980) (citing *Hammersten v. Reiling*, 115 N.W.2d 259, 266 (Minn.), *cert. denied*, 371 U.S. 862 (1962)); *Thompson v. Hughard*, 664 N.W.2d 372, 377 (Minn. Ct. App. 2003) (finding that a determination that the prima facie evidence standard has been met does not take the question of whether to award punitive damages away from the jury); *see Barry v. Edmunds*, 116 U.S. 550, 565 (1886) ("[I]t is the peculiar function of the jury" to set the amount of punitive damages). The court's responsibility is to review the fact-finder's award under a reasonableness standard, not to determine the award in the first instance. *Ray v. Miller Meester Advertising, Inc.*, 664 N.W.2d

355, 371 (Minn. Ct. App. 2003), *review granted, aff'd*, 684 N.W.2d 404 (Minn. 2004); Minn. Stat. § 549.20, subd. 5 (“Judicial review. The court shall specifically review the punitive damages award in light of the factors set forth in subdivision 3 and shall make specific findings with respect to them.”)

Cognex suggests, without support, that this Court should award Cognex a “substantial amount” of punitive damages. Under Minnesota case law and the controlling statute, however, the determination of whether Cognex receives any punitive damages and if so, how much, are questions for the jury. The Court should deny Cognex’s unabashed attempt to usurp the jury’s power.

## **II. COGNEX’S REQUEST TO AMEND ITS COMPLAINT TO SEEK ITS ATTORNEYS FEES AS “SPECIAL DAMAGES” SHOULD BE DENIED.**

### **A. Cognex Presents No Legal Support for its Motion.**

Cognex’s request to seek special damages is the same argument in a new package. Cognex opposed Defendants’ motion for summary judgment motion on Cognex’s defamation claim on the grounds that its attorneys fees are recoverable damages. The Court rejected the argument because Cognex did not present any legal support for it. *See* May 18, 2008 Order, p. 61. Cognex now asks the Court to allow it to seek its attorneys’ fees as “special” damages.

Again, however, Cognex presents no legal support for its position. Cognex has not cited a single case where *any* court in *any* jurisdiction has allowed a defamation plaintiff to recover its attorneys fees as damages, whether characterized as presumed damages or special damages. Indeed, allowing a defamation plaintiff

to recover its attorneys fees as damages would undermine the “American rule” that generally makes each litigant responsible for its own fees. *OnePoint Solutions, LLC v. Borchert*, 486 F.3d 342, 352 (8th Cir. 2007) (“Under the American rule, each party is responsible for paying its own attorney’s fees unless there is a specific contractual provision or statutory authorization to shift the fees to an adversary.”).

Cognex’s claim also fails for lack of causation. Ms. Stender’s statements were not a “substantial factor in bringing about” the fees Cognex incurred pursuing this case, as required to establish defamation damages. *See Longbehn v. Schoenrock*, 727 N.W.2d 153, 160 (Minn. Ct. App. 2007) (“A defamatory statement is the legal cause of any actual and special pecuniary loss only if it is the “substantial factor in bringing about the harm.”).

The Court should reject Cognex’s motion as futile; Cognex has presented no legal authority supporting its request that the Court award attorneys fees as an element of defamation damages.

**B. Cognex’s Motion is Untimely.**

Cognex’s motion is also untimely. “Special” damages are a different category of damages than “presumed” damages. In the context of a defamation claim, “special” harm is “the loss of something having economic or pecuniary value,” as opposed to general damages, which may be recovered for harm to the plaintiff’s reputation. *Longbehn*, 727 N.W.2d at 160; *see also Surgidev Corp. v. Eye Technology, Inc.*, 625 F. Supp. 800, 806 (D. Minn. 1986) (distinguishing between special and presumed damages). If an item of special damage is claimed,



*“it must be specifically stated” in the complaint.* Fed. R. Civ. P. 9(g) (emphasis added).

The deadline for amending pleadings expired fourteen months ago, and discovery closed eleven months ago. The Court disposed of the majority of the case on summary judgment and invited the parties to file motions “concerning the remaining claims so as to minimize delay in seeking appellate review.” May 19, 2008 Order, p. 63. It would prejudice Defendants to respond to Cognex’s new claim for “special” damages at this late date.

If Cognex wanted to seek its attorneys fees as “special damages” resulting from the alleged defamation, it should have sought that relief when it amended its complaint in December 2006 and provided discovery concerning the alleged damages. It would be highly prejudicial to allow Cognex to amend its complaint to add a new element of damages when Defendants would not have the opportunity to conduct discovery concerning the claim.

**C. Cognex is Asking the Court to Improperly Usurp the Role of the Jury.**

Just as with Cognex’s claim for punitive damages discussed above, Cognex is asking the Court to permit it to amend its complaint to pursue new damages theories *and* act as fact finder on the new theory. Cognex’s motion should be denied for the same reasons discussed above with respect to its motion for permission to seek punitive damages.

**CONCLUSION**

For the foregoing reasons, Cognex's motion for leave to amend its First Supplemental Complaint [Docket No. 291] should be denied.

Respectfully submitted,

Dated: June 20, 2008

s/ Lora Mitchell Friedemann

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