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United States District Court,
S.D. New York.
ST. PAUL FIRE & MARINE INSURANCE COMPANY, Plaintiff,
v.
NOVUS INTERNATIONAL, INC., Defendant.

No. 09 Cv. 01108(BSJ)(THK).
Dec. 28, 2011.

Memorandum and Order

BARBARA S. JONES, District Judge.

***1** The parties in this case are an insurer, St. Paul Fire & Marine Insurance Company ("St.Paul"), and their insured, Novus International, Inc. ("Novus"). On November 1, 2007, St. Paul executed and delivered a policy of marine insurance, policy number OC09000930, (the "Policy") to Novus in New York, New York. The crux of the parties' dispute is the extent to which the Policy requires St. Paul to provide full coverage for losses sustained by Novus at a warehouse in Des Moines, Iowa in June 2008. Novus has filed a motion to transfer venue to the United States District Court for the Eastern District of Missouri. The parties have also filed cross-motions for summary judgment. The Court now decides all three motions. For the reasons discussed, Novus' motion to transfer venue is denied, Novus' motion for summary judgment is denied, and St. Paul's cross-motion for summary judgment is granted.

BACKGROUND

St. Paul is a nationwide insurance company with its headquarters in Minnesota. Novus is an agricultural biochemical company with its headquarters in Missouri. In 2007, Novus solicited bids for a marine insurance policy through its insurance consultant and broker, Marsh. The insured interests included worldwide transit losses and warehouse coverage for twenty-nine specified domestic and international locations. St. Paul's Ocean Marine Division in New York responded to this bid, and negotiated the Policy that was ultimately issued on November 1, 2007. The initial policy period for the Policy was November 1, 2007 through October 31, 2008.

The Policy begins with a "Table of Contents" which describes the first thirty pages of the Policy as the "Millennium Cargo Policy" (the "Ocean Cargo Policy"). In relevant part, the Ocean Cargo Policy contains an "Accumulation Clause" which states:

> Should there be an accumulation of the interests insured hereunder beyond the limit(s) of liability expressed elsewhere in this policy by reason of any interruption of transit or circumstances beyond the control of The Insured's corporate risk manager or equivalent, or by reason of any casualty, or at a transshipping point, or on a connecting conveyance. This Insurer shall, provided notice of such accumulation is given to This Insurer as soon as practicable after it becomes known to The Insured's corporate risk manager or equivalent, hold covered such excess interest and shall be liable for the full amount at risk, but in no event shall This Insurer's liability exceed twice the limit of liability set forth in Sub–Clause 13.1.[FN1]
>
> FN1. Sub-clause 13.1 of the Policy states "Unless otherwise agreed, This Insurer shall not be liable under this policy for more than 10,000,000 per any conveyance, connecting conveyance, craft or at any place at any time."

In the pages following the signature block for the Ocean Cargo Policy, the Policy also included an endorsement entitled "Warehouse Coverage".

The "Warehouse Coverage" endorsement was listed as "Endorsement No. 5", "Attached to and forming part of Policy No.: OC09000930". Endorsement No. 5 states:

> The policy to which this endorsement is attached is extended to cover goods and/or merchandise and/or property (i) of The Insured or (ii) held by it in trust or on commission or on consignment or sold but not delivered or removed or on joint account with or belonging to others for which The Insured may be liable in the event of loss pending shipment, transshipment, reshipment or otherwise, while

> stored at the locations identified herein, subject to a $25,000 deductible per loss for bulk liquid storage locations, and the following terms and valuation ... This Insurer shall not be liable for more than $2,000,000 at any one location at any one time, except as specified below.

***2** A table listing several warehouse locations was included in the pages which followed this language and the separate signature block for Endorsement No. 5. This table listed as four separate columns the "Warehouse Location," "Notes", "Products", and "Limit of Liability". The sixth warehouse listed in this table was "PDM Distribution Services, Inc." (the "PDM Warehouse"), a warehouse located in Des Moines, Iowa. The listing for the PDM Warehouse reflects "$2,000,000" in the "Limit of Liability" column.

From prior to the Policy's commencement date to June 2008, Novus' inventory began to build up at the PDM Warehouse. This build up was the result of Novus' decision to store additional product at the PDM warehouse. Specifically, employees at Novus made the decision to move product to the PDM Warehouse in response to problems at other warehouses and Novus' failure to meet sales forecasts. Although various individuals at Novus were aware of this build up at the PDM Warehouse, Novus' Chief Financial Officer and designated "corporate risk manager", John Wade, remained unaware of the build up until the product was damaged in June 2008.

In June 2008, during the initial period prescribed by the Policy, the PDM Warehouse was subject to a flood which caused an alleged $5,065,448.79 of damages to Novus' insured product (the "PDM Warehouse Loss"). In the aftermath of the flood. Wade became aware of the accumulation of product at the PDM warehouse and on July 1, 2008, Wade sent a formal notice to St. Paul regarding this accumulation at the PDM Warehouse beyond the limits of liability (the "PDM Warehouse Claim").

To date, St. Paul has paid Novus $2,000,000 for its claims related to the flooding at the PDM Warehouse in June 2008. St. Paul has refused to pay additional monies to Novus because it argues that it has already fulfilled its coverage responsibilities under the Policy. In February 2009, St. Paul filed the Complaint in the present action, seeking declaratory judgment that it had satisfied its obligations to Novus under the Policy.

St. Paul proposes several arguments in support of its request for declaratory judgment. St. Paul's first argument is that Novus' PDM Warehouse Loss is not covered at all because the Policy only provides coverage for goods in transit. Since the damaged product was not in transit, St. Paul argues that it has no obligation to insure for Novus' loss. As a second argument, St. Paul asserts that the Policy's Accumulation Clause does not apply to Novus' PDM Warehouse Loss because the Accumulation Clause itself applies only to goods in transit. Third, St. Paul argues that it has satisfied its obligations related to the PDM Warehouse because the Policy's Warehouse Coverage endorsement limits coverage for this location to two million dollars, an amount which the parties agree has already been paid by St. Paul. Finally, St. Paul argues that even assuming the PDM Warehouse Loss was covered by the Policy's Accumulation Clause, Novus notified St. Paul of the product accumulation too late to meet the terms of the clause.[FN2] As a result, St. Paul argues that it has no further obligation to insure for Novus' loss beyond the two million it has already paid.

> FN2. Since the Court finds that the part of the PDM Warehouse Claim in excess of $2 million is not covered by the Policy, the Court need not reach St. Paul's argument that Novus notified St. Paul too late to trigger coverage under the Policy.

***3** In response to St. Paul's Complaint, Novus filed an Answer and its own Counterclaim seeking damages for breach of contract in the amount of $3,600,790.38 or such other amount to be proven at trial; an award of costs expended by Novus in the present action; and such other and further relief as the Court deems proper.

MOTION TO TRANSFER VENUE

Legal Standard

The initial inquiry in deciding a motion to transfer venue, under 28 U.S.C. §1404(a), is " 'whether the case could have been brought in the proposed transferee district.' " *Eres N.V. v. Citgo Asphalt Refining Co.*, 605 F.Supp.2d 473, 478 (S.D.N.Y.2009)

(citation omitted). This requirement is satisfied here because the parties are diverse and Novus has its headquarters in Missouri, which is the district in which it now seeks to transfer the case. *See* 28 U.S.C. §1391.

Having found the threshold requirement satisfied, the Court considers the following factors to determine whether transfer is warranted:

> (1) the convenience of witnesses; (2) the convenience of parties; (3) the location of relevant documents and the relative ease of access to sources of proof; (4) the locus of the operative facts; (5) the availability of process to compel the attendance of unwilling witnesses; (6) the relative means of the parties; (7) the comparative familiarity of each district with the governing law; (8) the weight accorded to plaintiff's choice of forum; and (9) judicial economy and the interests of justice.

See Eres N.V., 605 F.Supp.2d at 478–79 (citation omitted).

In deciding whether to transfer venue, "District courts have broad discretion in making determinations of convenience under Section 1404(a) and notions of convenience and fairness are considered on a case-by-case basis." *See Krulisky v. Bristol–Myers Squibb Co.*, No. 10 Civ. 8700(DLC), 2011 WL 2555963, *l–4, *1 (S.D.N.Y. Aug. 7, 2009) (citations omitted). "There is no rigid formula for balancing these factors and no single one of them is determinative." *Samson Lift Techs. v. Jerr–Dan Corp.*, No. 09 Civ. 2493(RJH), 2009 WL 2432675, *l–5, *1 (S.D.N.Y. Aug. 7, 2009) (citations omitted).

Analysis

The Court now examines in turn each of the factors for consideration in its transfer analysis. With respect to the first and second factor, the convenience of the parties or witnesses as a whole does not recommend a transfer. Although Novus is headquartered in Missouri, it appears that many of the key witnesses from its insurance broker Marsh and St. Paul's Ocean Marine Division are all located in New York. A transfer is not appropriate merely to shift the burden of inconvenience from one party to the other. Here, a transfer would save some parties and witnesses traveling from Missouri, only to force other witnesses to travel from New York. The third factor is also not compelling in this case because records are easily portable. Additionally, relevant documents are located in both Missouri and New York. *Navigators Management Co. Inc,, v. St. Paul Fire and Marine Ins. Co.*, No. 06 Civ. 599(LBS), 2006 WL 3317030 *1–6, *5 (S.D.N.Y. Nov.9, 2006). Turning to the fourth factor, the locus of the operative facts, the Court disagrees with Novus that the key events affecting this litigation occurred outside New York. The Policy was solicited, negotiated, executed and delivered in New York by Novus' insurance broker, Marsh. In addition, all interactions between Marsh and St. Paul were made through St. Paul's Ocean Marine Division, which is located in New York. It therefore cannot be said that the operative facts occurred exclusively in the Eastern District of Missouri, which weighs against transferring the case. The fifth and sixth factors of consideration are irrelevant to this case, as both parties are sophisticated corporations, and any witnesses are likely to be either employees or agents of the parties. The seventh and ninth factors are similarly irrelevant. Both the Eastern District of Missouri and the Southern District of New York would be able to deal competently with this matter, and the interests of justice would be equally served in either forum. Finally, with regards to the eighth factor, although St. Paul has an interest in litigating in its chosen forum, this choice of forum deserves less deference here because St. Paul has filed suit away from its home state. This fact notwithstanding, St. Paul has nonetheless chosen a forum with substantial connections to this litigation.

***4** Examining the factors in total, the Court reaches the conclusion that this litigation has substantial connections to both proposed venues. In light of this assessment, the Court finds that Novus has not met its burden of making a "clear-cut showing that a transfer is in the best interests of the litigation." *Sills v. Ronald Reagan Presidential Found., Inc.*, No. 9 Civ. 1188(GEL), 2009 WL 1490652 at *1–13, *11 (S.D.N.Y. May 27, 2009). Accordingly, Novus' request to transfer venue is denied, and the Court proceeds to deciding the motions for summary judgment.

CROSS–MOTIONS FOR SUMMARY JUDGMENT

While the motion to transfer venue was pending before this Court, the parties each filed motions for summary judgment on their respective Complaint and Counterclaim. The Court now turns to both of these

motions.

Standard of Review

Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a). The moving party bears the initial burden of "demonstrat[ing] the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Although all reasonable inferences and ambiguities must be drawn or resolved in favor of the nonmoving party, "[u]nless the nonmoving party offers some hard evidence showing that its version of the events is not wholly fanciful, summary judgment is granted to the moving party." *See, e.g., Miner v. Clinton County, New York*, 541 F.3d 464, 471 (2d Cir.2008) (alteration in original) (citation omitted).

Since the Policy at issue in this case is for marine cargo insurance, general federal maritime law applies. *See Advani Enter. ., Inc. v. Underwriters at Lloyds*, 140 F.3d 157, 161 (2d Cir.1998). In deciding whether the Policy entitles either party to the judgment they are seeking, however, "[f]ederal maritime law requires us to determine the scope and validity of the marine insurance policy provisions involved ... by using state law." *Id.* at 162 (citations omitted). St. Paul has argued that this Court should apply New York law to its inquiry, while Novus has argued that Missouri law should apply. In light of the fact that Missouri and New York law differ substantively with respect to judicial interpretation of insurance contracts, this Court finds that a choice-of-law analysis is warranted. *See Harris v. Provident Life and Acc. Ins. Co.*, 310 F.3d 73, 81 (2d Cir.2002) ("The first step in any choice of law inquiry is to determine whether there is an actual conflict between the laws invoked by the parties.").

Choice of Law

In conducting its choice-of-law analysis, this Court relies on federal choice-of-law rules. *Advani Enter., Inc.*, 140 F.3d at 162. Under federal choice-of-law rules, the Court's consideration includes an assessment of: (1)any choice-of-law provision contained in the contract; (2) the place where the contract was negotiated, issued, and signed; (3) the place of performance; (4) the location of the subject matter of the contract; and (5) the domicile, residence, nationality, place of incorporation, and place of business of the parties." *Id.*

***5** Based on its choice-of-law analysis, this Court finds that New York law should apply to the instant proceedings. With respect to the first factor, the Policy did not contain an explicit choice of law provision. The Policy did state, however, in a section labeled "Suit Against Insurer": "This Insurer agrees that any action or proceeding against This Insurer for the recovery of any claim under or by virtue of this insurance shall not be barred if commenced within the time prescribed therefore in the statutes of the State of New York." This Policy reference to the statutes of limitation imposed by New York law, although not dispositive, would appear to weigh in favor of the application of New York law. The second factor clearly weighs in favor of applying New York law, as the contract was solicited, negotiated, issued, and signed in New York. With respect to the third factor, Novus argues that this factor favors the application of Missouri law because the premiums were billed in Missouri and the claim on the policy was made in Missouri. The fourth factor of the analysis is not instructive in this case. Although Novus has argued that this factor should weigh in favor of Missouri, since Missouri is one of the locations that products were shipped to and from, the Court finds these arguments unavailing. The Policy insured losses occurring at numerous domestic and international locations, with the salient location being a warehouse located in Iowa. The location of the insured subject matter would therefore not present a significant factor in favor of Missouri over New York. Novus additionally argues that the fifth factor also weighs in favor of applying Missouri law because Novus' domicile and place of business are in Missouri, whereas St. Paul has its corporate headquarters in Minnesota. The Court finds that, in light of the fact that interactions between the parties occurred almost exclusively in New York, these arguments in favor of Missouri are not dispositive. Although Novus itself is located in Missouri, it relied entirely on its New York insurance broker, Marsh, to manage its relationship with St. Paul. As a result, all communications and interactions between Novus and St. Paul occurred through Marsh's New York office and individuals in St. Paul's Marine Insurance Group, which is also located in New York. Given the significant contacts with New York, and the relatively limited nature of the contacts with Missouri, this Court finds application of New York law to be appropriate.

New York Insurance Law

It is well established under New York law that the insured bears the burden of showing that an insurance policy covers the loss. *MBIA Inc. v. Federal Ins. Co., et al.,* Nos. 10–0355–cv(L); 10–0386–cv(con); 10–0356–cv (XAP), 652 F.3d 152, 2011 WL 2583080 *1–17, *4 (2d Cir. July 1, 2011).

In determining whether the insured has sufficiently met its burden, the Court must itself interpret the insurance policy terms. "The initial interpretation of a contract is a matter of law for the court to decide." *Morgan Stanley Group Inc. et al. v. New England Ins. Co. et al.,* 225 F.3d 270, 275 (2d Cir.2000) (citation omitted). The threshold question that must be addressed by the Court as part of this inquiry is whether the terms of the insurance contract are ambiguous. *Id.* "[T]he language of a contract is not made ambiguous simply because the parties urge different interpretations." *Safeway Envtl. Corp. v. American Safety Ins. Co.,* No. 08 Civ. 6977(WHP), 2010 WL 331693 *l–5, *3 (S .D.N.Y. Jan. 28, 2010). The Court must instead consider a word or phrase ambiguous when it "could suggest more than one meaning when viewed objectively by a reasonably intelligent person who has examined the context of the entire integrated agreement and who is cognizant of the customs, practices, usages and terminology as generally understood in the particular trade or business." *Parks Real Estate Purchasing Group, et al. v. St. Paul Fire and Marine Ins. Co.,* 472 F.3d 33, 42 (2d Cir., 2006).

***6** Since "a contract may be ambiguous when applied to one set of facts but not another," "ambiguity is detected claim by claim." *Morgan Stanley Group Inc. et al.,* 225 F.3d at 278. In the Court's assessment of whether the contract is ambiguous as applied to the claim, the Court "should not find the language ambiguous on the basis of the interpretation urged by one party, where that interpretation would strain the contract language beyond its reasonable and ordinary meaning." *Federal Ins. Co. v. American Home Assur. Co.,* 639 F.3d 557, 568 (2d Cir.2011). "When the [policy] provisions are unambiguous and understandable, courts are to enforce them as written." *Parks Real Estate Purchasing Group, et al.,* 472 F.3d at 42.

Discussion

As an initial matter, the parties agree that the Warehouse Endorsement provides coverage for the PDM Warehouse Claim. The language of the Warehouse Endorsement is extremely clear, however, that the coverage provided by the terms of the endorsement shall not exceed $2 million. Indeed, it is undisputed that this $2 million has already been paid to Novus by St. Paul. Having established this initial scope of coverage under the Warehouse Endorsement, the Court now examines whether the Policy entitles Novus to any further coverage.

In order for Novus to be insured for its PDM Warehouse Claim beyond $2 million, the Court must first address whether the Warehouse Endorsement should be considered a separate and distinct policy from the Ocean Cargo Policy. The Court finds that, as written, the Warehouse Endorsement and the Ocean Cargo Policy must be read together as a unified policy. Although St. Paul takes pains to argue that the Warehouse Endorsement and the Ocean Cargo Policy must be read as separate and distinct, the plain language of the Policy states otherwise. The first line of the Warehouse Endorsement is bold italicized text which states ***"Attached to and forming part of Policy No.: OC09000930"*** (emphasis in original). The wording of the Endorsement also refers to the Ocean Cargo Policy in language that can only be read as attaching the two policies to one another. (e.g. "The policy to which this endorsement is attached is extended ..."; "... Strikes, Riots and Civil Commotions Endorsement contained elsewhere in this policy"; "The deductible found elsewhere in this policy ..."; "... shall be valued as per Policy Clause No. 10 [clause within the Ocean Cargo Policy]".) Reading the Warehouse Endorsement as an extension to the Ocean Cargo Policy is additionally consistent with the plain language of the Ocean Cargo Policy itself. The Ocean Cargo Policy's "Attachment" clause references that there are storage locations insured under the Policy: "This policy is continuous and covers ... on all goods and/or merchandise and/or property in storage at *locations insured under this policy ...*" (emphasis added). Since specific insured locations are mentioned nowhere in the Policy other than in the Warehouse Endorsement, the Ocean Cargo Policy's own terms support a reading of the policy and its endorsement as a single document. Furthermore, the cases cited by St. Paul to support the proposition that an Ocean Cargo Policy may never cover warehouse risks are either unpersuasive or can easily be distinguished from the broader con-

tractual terms at issue in the present action.

***7** Having determined that the Ocean Cargo Policy and the Warehouse Endorsement must be read as a unified document, the Court now turns to the Accumulation Clause, the clause that Novus argues applies to its PDM Warehouse Claim. The Accumulation Clause provides coverage where there has been "an accumulation of the interests insured hereunder beyond the limit(s) of liability expressed elsewhere in this policy". This coverage therefore explicitly includes interests "beyond the limit(s) of liability expressed elsewhere" in the Policy. Since the Court interprets the Ocean Cargo Policy and the Warehouse Endorsement as one cohesive policy, the Court reads the clear language of "interests insured hereunder" as extending the Accumulation Clause to the interests insured by the Warehouse Endorsement. Since the terms of the Accumulation Clause state that coverage under the clause exceeds the limits expressed elsewhere in the Policy, the Court reads the plain meaning of the Policy as providing for coverage of the insured warehouses beyond the express limits stated in the Warehouse Endorsement. The Court's inquiry does not end, however, with its finding that the clear language of the Policy extends the Accumulation Clause's coverage to the interests insured by the Warehouse Endorsement. Coverage under the Accumulation Clause is limited to accumulation "by reason of any interruption of transit or circumstance beyond the control of The Insured's corporate risk manager or equivalent, or by reason of any casualty ..." In order for Novus' PDM Warehouse Claim to be covered under the Policy, the accumulation of product must be due to an "interruption of transit," or a "circumstance beyond the control" of Novus' "corporate risk manager or equivalent", or "by reason of any casualty." [FN3]

> FN3. Citing language from the decision in *Chemical Bank v. Affiliated FM Ins. Co.*, 970 F.Supp. 306, 329 (S.D.N.Y.1997), St. Paul has argued that the Accumulation Clause necessarily applies only to accumulation arising from transit risks. St. Paul's argument fails to acknowledge, however, that the accumulation clause in the policy at issue in *Chemical Bank* differed materially in its coverage language. The accumulation clause examined by the Court in Chemical Bank *limited* coverage to: "an accumulation of interests beyond the limits expressed in this policy *by reason of any interruption of transit beyond the control of the Assured ..." Id.* (*emphasis added*).

Novus does not claim that the accumulation of product at the PDM Warehouse was due to either transit interruptions or casualty. Novus instead argues that the accumulation of product due to: (1) product being moved to the PDM Warehouse from poorly performing warehouses; and (2) Novus' failure to meet sales forecasts should be considered "circumstances beyond the control" of its corporate risk manager, John Wade. In support of its argument, Novus states that "Mr. Wade was not involved with and had no control over the decisions to transfer product from Houston and St. Louis or to store the new product lines at the PDM Warehouse." Novus further argues that, "[a]s Mr. Wade had no control over the factors that caused the accumulation of goods at the PDM Warehouse, the accumulation was by reason of circumstances beyond his control."

The Court finds that Novus' alternative interpretation of the Policy, so as to include coverage for the circumstances of the PDM Warehouse Claim, "strain[s]" the Policy's language "beyond its reasonable and ordinary meaning". *Federal Ins. Co.*, 639 F.3d at 568. Novus' interpretation conflates circumstances in which Wade did not exercise control with those that were "beyond his control." The fact that Novus operational employees failed to properly notify Wade of the accumulation,[FN4] and that Wade himself did not pursue other avenues for obtaining this information,[FN5] does not transform Novus' intentional accumulation of product into a fortuitous circumstance that the parties intended would be covered by the Policy. *See National Union Fire Ins. Co. of Pittsburgh, PA. v. the Stroh Co., Inc.*, 265 F.3d 97, 111 (2d Cir.2001) ("[D]amages that flow directly and immediately from the insured's intentional act cannot be considered accidental or fortuitous.") (citations omitted). To read the Policy otherwise, as Novus suggests, would potentially render all of the Policy's coverage limits meaningless. Accordingly, the Court finds that the language of the Accumulation Clause is clear on its face that the parties did not intend for the Policy to cover the PDM Warehouse Claim. *Parks Real Estate Purchasing Group, et al.*, 472 F.3d at 42 ("New York insurance law provides that an insurance contract is interpreted to give effect

to the intent of the parties as expressed in the clear language of the contract ... When the provisions are unambiguous and understandable, courts are to enforce them as written.") (citations omitted).

> FN4. Wade testified at his deposition that, "[i]f there was a significant change in the value of the inventory at a location, it was my expectation that I would be notified of that."
>
> FN5. Wade testified at his deposition that his own staff had access to the internal database that provides information regarding warehouse inventory levels.

***8** For all of the aforementioned reasons, the Court finds that the Policy's clear language does not provide Novus with coverage for its PDM Warehouse Claim under the Accumulation Clause. The Court therefore finds that the Warehouse Endorsement is the only clause under the Policy that covers Novus' PDM Warehouse Claim. Since coverage under the Warehouse Endorsement is clearly and expressly limited to $2 million for the PDM Warehouse, and the parties agree that this sum has already been paid by St. Paul to Novus, the Court finds that St. Paul has satisfied its obligations to Novus with respect to the PDM Warehouse Claim.

CONCLUSION

Novus' motion to transfer venue is denied. Novus' motion for summary judgment is denied. St. Paul's motion for summary judgment is granted. The Court declares that: St. Paul's payment of the $2 million location limit fulfills its obligations under the Policy and that Novus is entitled to nothing further for its claimed loss.

SO ORDERED:

S.D.N.Y.,2011.
St. Paul Fire & Marine Ins. Co. v. Novus Intern., Inc.
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