No. 97-31199

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

WILLIS-KNIGHTON MEDICAL CENTER,
Plaintiff-Appellant,

v.

CITY OF BOSSIER CITY, ET AL,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF LOUISIANA

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE IN SUPPORT OF APPELLANT

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STATEMENT OF INTEREST

The United States and the Federal Trade Commission (FTC) are principally responsible for enforcing the federal antitrust laws. This case presents an issue concerning the scope of immunity from the antitrust laws for municipalities (and private parties) under the state action antitrust doctrine. The resolution of this issue

directly affects the government's enforcement responsibilities, as well as enforcement of the antitrust laws by private parties. Accordingly, the United States and the FTC have a strong interest in the proper determination of this appeal.

QUESTION PRESENTED

Whether the district court erred in holding the alleged anticompetitive conduct of a municipality and its medical center to be immune from the federal antitrust laws as state action without even considering whether that conduct was pursuant to a state policy to displace competition, on the ground that anticompetitive conduct was foreseeable in light of state statutes authorizing the medical center to contract, advertise, plan and otherwise act like a private market participant.

STATEMENT OF THE CASE

1. Willis-Knighton Medical Center ("WKMC") opened a new hospital ("WKBHC"), which competed with the Bossier Medical Center ("BMC"), owned and operated by the City of Bossier City ("the City"). R.1-2 (Compl., prelim. statement).[1] Within months of the opening, WKMC sued the City, BMC, and four BMC-affiliated physicians, seeking injunctive relief for violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2. It alleged that BMC and the physician-

[1]Because WKMC's complaint was dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P., we treat its allegations as true. Green v. State Bar of Texas, 27 F.3d 1083 (5th Cir.1994).

defendants had collectively acted to restrict competition between WKBHC and BMC by (a) entering into "so-called 'employment' contracts that . . . preclude[d] those physicians from practicing at [WKBHC]," R.5 (Compl. ¶9); (b) entering into "inflated practice and asset purchase contracts . . . in order to require exclusive referrals and admissions to BMC," R.4 (Compl. ¶6b); (c) adopting various policies and protocols "to prevent admissions to [WKBHC] and referrals to physicians" who rented offices at WKBHC, id. (Compl. ¶6c); and (d) other means.

2. A Magistrate Judge recommended that plaintiff's Sherman Act claims be dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P., on the ground that the challenged conduct constitutes "state action" immune from the Sherman Act. R.308. The Magistrate Judge reasoned that certain Louisiana statutes authorized BMC to take the challenged actions. These statutes authorized certain hospitals or hospital districts to develop market strategies and strategic plans, acquire and maintain offices and other facilities, advertise, and enter into contracts "'to offer, provide, promote, establish, or sell any hospital health service.'" R.299-300, citing La. R.S. 46:1071-1077, quoting La. R.S. 4:1077. The Magistrate Judge observed that the "primary purpose of these statutes is to level the competitive playing field between public and private hospitals," id. at 302, i.e., to remove impediments to competition otherwise applicable to public hospitals. Nonetheless, citing Martin v.

Memorial Hospital at Gulfport, 86 F.3d 1391 (5th Cir. 1996), the Magistrate Judge explained that state authorization renders a municipality's conduct immune from the federal antitrust laws as state action if "in light of the conduct authorized by the statute, anticompetitive conduct is foreseeable." Id. at 303.[2] The Magistrate Judge found the anticompetitive conduct to be foreseeable and therefore immune. Id. at 303-04. As the Magistrate Judge noted, this approach to state action immunity is "quite broad. It arguably allows a municipality to engage in anticompetitive conduct in any area in which municipalities are authorized by the Legislature to enter contracts, or to otherwise participate as players in the private market." Id. at 305-06.

The district court (Stagg, J.) concurred with the Magistrate Judge's findings and dismissed the case for the reasons stated in the Report and Recommendation. R.350.

SUMMARY OF ARGUMENT

Relying on "principles of federalism and state sovereignty," the Supreme Court has long held that the Sherman Act does not apply to "anticompetitive restraints imposed by the States 'as an act of government.'" City of Columbia v.

[2]The Magistrate Judge limited that principle to instances in which the state statutory scheme addresses "an identifiable subject matter." R.304 n.4. The principle would therefore not result in immunity if the statutory scheme merely provides a general authority to govern municipal affairs.

Omni Outdoor Advertising, 499 U.S. 365, 370 (1991), quoting Parker v. Brown, 317 U.S. 341, 352 (1943). Municipalities, however, are not sovereign, and they may claim "state action" immunity from the Sherman Act for particular conduct only if they can "demonstrate that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.'" Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38-39 (1985), quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413 (1978).

The state statutes cited by the Magistrate Judge reveal no such policy to displace competition in the hospital services markets in which WKBHC and BMC compete. As the Magistrate Judge acknowledged, these statutes were designed to "remove impediments to competition on the part of public hospitals" resulting from their status as public agencies and "level the competitive playing field between public and private hospitals." R.302. The state's policy was plainly to increase reliance on market forces in the hospital industry by making public hospitals more like private ones, permitted to use ordinary business powers. There is not the slightest indication in either the express terms of the state statutes or the nature of the authority granted that the state intended to accomplish or authorize municipalities to accomplish the opposite result -- the displacement of market

forces by greater reliance on some form of government control. Thus, in legislating to remove impediments to competition by public hospitals, the state surely has not clearly articulated a state policy to displace competition by regulation, monopoly public service, or anything else.

Relying primarily (but incorrectly) on this Court's decision in Martin v. Memorial Hospital at Gulfport, 86 F.3d 1391 (5th Cir. 1996), the Magistrate Judge concluded that the conduct alleged in this case constitutes "state action" because the legislature's delegation of authority to engage in ordinary commercial behavior -- to contract, to advertise, to engage in marketing and strategic planning, and to operate and lease medical office buildings -- rendered it "foreseeable" that these activities would be carried out in an anticompetitive manner. This reasoning robs of meaning the Supreme Court's repeated admonitions that the sine qua non of the state action doctrine is a state policy to displace competition, as a sovereign act of government. The Magistrate Judge's reasoning would allow subordinate political subdivisions participating in commercial markets to nullify the procompetitive national policy embodied in the Sherman Act in the absence of any state policy determination that anticompetitive conduct serves the public interest. Indeed, the Magistrate Judge's reasoning affords immunity even if, as in this case, the state has acted to promote competition rather than displace it. The decision below is not

supported by Martin, in which, this Court said, there was a clear state policy decision to authorize the alleged conduct and displace competition; it cannot be reconciled with the state action doctrine.

Although amici believe that the district court erred in dismissing the complaint on the ground that the conduct alleged was state action, we express no view as to the ultimate merits of this case. A decision that the challenged conduct is subject to the Sherman Act does not imply that the conduct violates that Act.[3] Thus, we do not rule out the possibility of summary proceedings on remand.[4]

ARGUMENT

I. State Action Immunity Protects A Municipality Only When It Acts Pursuant to State Policy to Displace Competition

In Parker v. Brown, 317 U.S. 341 (1943), the Supreme Court determined that statutes do not limit the sovereign states' autonomous authority over their own officers, agents, and policies in the absence of clear congressional intent to do so, and it found no such intent in the language or legislative history of the Sherman

[3]We note, moreover, that Congress has significantly limited the potential for private treble damage awards against municipalities for violations of the federal antitrust law. See Local Government Antitrust Act, 15 U.S.C. 34-36.

[4]Further development of the factual record below, short of a trial on the merits, conceivably could establish that the only provable conduct is procompetitive rather than anticompetitive and so does not violate the antitrust laws even if not immune, or perhaps even that the provable portion of the alleged conduct would be immune under a proper state action analysis.

Act. Id. at 351. Accordingly, it held that when a "state in adopting and enforcing [a] program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government[,] . . . the Sherman Act did not undertake to prohibit" the restraint, id. at 352. Thus, the states are free to adopt and implement policies that depart from the policies of the Sherman Act.[5] Subordinate political subdivisions such as municipalities, on the other hand, "are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign." Town of Hallie v. City of Eau Claire, 471 U.S. 34, 38 (1985).

States may choose to implement their policies through municipalities, and so municipal conduct undertaken "pursuant to state policy to displace competition with regulation or monopoly public service" also may qualify as "state action" exempt from the federal antitrust laws. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413 (1978) (plurality opinion); Hallie, 471 U.S. at 38-39. As a result, the states may "administer state regulatory policies free of the inhibitions of the federal antitrust laws," Lafayette, 435 U.S. at 415, even when municipalities implement them.

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[5]States do not have unlimited freedom to do so. See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980) (affirming order not to enforce state law because of conflict with policies of the Sherman Act). The boundaries of that freedom are not at issue here.

The mere fact that municipal conduct falls within its authority under state law, however, does not necessarily entitle the municipality to immunity; to qualify as state action that is immune from the Sherman Act, municipal conduct must be undertaken pursuant to a state policy to displace competition in favor of an alternative means of promoting the public interest. Thus, the Court held in Community Communications Co. v. Boulder, 455 U.S. 40, 55 (1982), that municipal regulation of cable television authorized under general home rule authority did not constitute state action for antitrust purposes, because state policy was neutral as to that regulation.

Even explicit state authorization of conduct constituting a Sherman Act violation does not suffice for immunity unless that authorization clearly evidences a state policy to displace competition as the primary means of directing the economy to the common benefit. Hallie, 471 U.S. at 39 ("the State may not validate a municipality's anticompetitive conduct simply by declaring it to be lawful"). Accordingly, in Hallie, the Court emphasized that the municipality must prove not only its authority to act, but also "that a state policy to displace competition exists." Id. The defendant city in Hallie was alleged to have violated the antitrust laws by refusing to supply sewage treatment facilities outside its borders except to those who agreed to become annexed to the city. The Court

reviewed state statutes that showed the city was authorized to do precisely that. Id. at 41; see also id. at 44-45 n.8. It found that municipal action to be immune because the state was not neutral as to the challenged anticompetitive effect; state statutes clearly provided for the kind of monopoly public service the municipality was alleged to have imposed. Id. at 43.

The state need not follow any particular formula in expressing its intent to displace competition; indeed, it need not even refer expressly to anticompetitive effects if it is clear from the nature of the policy the state has articulated that it contemplates such an outcome. See Hallie, 371 U.S. at 43. The municipal conduct at issue in Hallie was a refusal to supply sewage treatment facilities outside its borders except to those who agreed to become annexed to the city. Id. at 41, 44-45 n.8. The state statute did not refer to competition, but it authorized the city to refuse to provide sewage treatment to adjacent unincorporated areas unless they agreed to annexation, with obvious effects on sewage collection and transportation services competing with the city's. After reviewing "the statutory structure in some detail," id. at 41, the Court found it "clear that anticompetitive effects logically would result from this broad authority to regulate." Id. at 42. Thus, the Court concluded, "the statutes clearly contemplate that a city may engage in anticompetitive conduct. Such conduct is a foreseeable result of empowering the

City to refuse to serve unincorporated areas." Id. Quoting New Motor Vehicle Board v. Orrin W. Fox Co., 439 U.S. 96, 109 (1978), the Court observed that the state scheme in Hallie "inherently 'displace[d] unfettered business freedom.'" 471 U.S. at 42.

Similarly, in City of Columbia v. Omni Outdoor Advertising, Inc., 499 U.S. 365 (1991), the Court emphasized that the issue as to state action immunity did not end with the conclusion that the city had not exceeded its authority under state law; rather, "the Parker defense also requires authority to suppress competition -- more specifically, 'clear articulation of a state policy to authorize anticompetitive conduct' by the municipality in connection with its regulation." 499 U.S. at 372, quoting Hallie, 471 U.S. at 40. The challenged municipal ordinance restricting the size, spacing, and location of new billboards was immune because the state had clearly articulated a policy to rely on zoning rather than competitive market forces to regulate billboards. Id. at 373. Although the state legislature had not specifically stated that it expected municipalities to use their zoning powers to limit competition, the Court found "suppression of competition" to be the "foreseeable result" of what the statute authorized because "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition." 499 U.S. at 373.

In short, the critical question in applying the test for state action immunity to municipal conduct authorized by state law is whether the state has decided to displace competition (or at least has decided to authorize municipalities to choose to do so), as an act of government to which federalism principles demand deference. To evidence such a decision sufficiently, the state law need not set forth in detail all the anticompetitive consequences that it contemplates, but it must clearly articulate a public policy that intrinsically departs from the Sherman Act's competitive model. In the absence of such a state policy, the conduct of a nonsovereign political subdivision, even if that conduct falls within its authority under state law, does not constitute state action for purposes of the Sherman Act.

II. The Court Below Erred by Holding Conduct Immune from the Sherman Act in the Absence of a State Policy to Displace Competition

a. The court below did not determine that the challenged conduct, allegedly designed to prevent competition between a public and a private hospital, was pursuant to a state policy to displace such competition. To the contrary, it recognized that the policy behind the relevant statutes was actually one of increasing competition between public and private hospitals, R.301-02, not by more regulation or monopoly public service, but by "remov[ing] impediments to

competition on the part of public hospitals by stipulating that certain laws normally applicable to state agencies do not apply to such hospitals." Id. at 302.

Despite the absence of a state policy to displace competition between municipal and private hospitals, the Magistrate Judge decided that the defendant could claim state action immunity for the conduct alleged because "in light of the conduct authorized by the statute, anticompetitive conduct is foreseeable." Id. at 303. The Magistrate Judge, however, did not use the term "foreseeable" as it has been used in the Supreme Court's state action decisions, to mean that the nature of the authorized conduct itself -- such as regulation (Omni) or monopoly public service (Hallie) -- demonstrated that the state legislature must have contemplated that competition would be displaced, i.e., that the authorized conduct would have anticompetitive effects. To the contrary, here the state authorized a municipal hospital only to undertake functions -- entering into contracts, advertising, engaging in marketing and strategic planning, and operating and leasing medical office buildings -- that are routinely carried out by economic actors in freely competitive markets without anticompetitive consequences. None of these powers implies any departure from the Sherman Act's competitive model in the markets in which hospitals compete.

Indeed, the Magistrate Judge did not find that the nature of the authority granted the public hospitals clearly evidences a state contemplation of an alternative policy to competition in hospital services markets. Nor did he discern a state policy of regulating the market by allowing municipal hospitals to engage in conduct that the antitrust laws forbid to private hospitals. To the contrary, he specifically concluded that "the primary purpose of these statutes is to level the competitive playing field between public and private hospitals." R.302.

The Magistrate Judge found it foreseeable that state law would have anticompetitive effects only in the sense that allowing a public hospital to compete in the marketplace on an equal footing with private firms may give it the same incentive as other market participants to behave anticompetitively. As the Magistrate Judge acknowledged, this line of reasoning has "broad" consequences. R.305. It would transmute a state decision to allow a municipality to compete on equal terms with private firms in a competitive market into a special license to violate the antitrust laws with immunity, and thereby to limit the very competition the state intended to foster.

Accepting such a perverse outcome would divorce the state action doctrine from its roots in "principles of federalism and state sovereignty." See Omni, 499 U.S. at 370, Parker, 317 U.S. at 352. The lower court's rationale would allow

nonsovereign, subordinate entities independently to decide -- without any state policy to displace competition -- not to abide by the federal antitrust laws when participating in competitive markets. This result has nothing to do with deferring to state sovereignty and is, moreover, flatly inconsistent with the Supreme Court's repeated admonitions that even a sovereign state may not immunize the conduct of nonsovereign actors simply by declaring that they need not obey the Sherman Act. See Parker; Hallie.

In enacting the Sherman Act, "Congress mandated competition as the polestar by which all must be guided in ordering their business affairs." Lafayette, 435 U.S. at 406. Despite the differences between publicly and privately owned enterprises, that fundamental national policy applies equally to municipal participants in competitive markets. Emphasizing the "impact which local governments, acting as providers of services, may have on other individuals and business enterprises with which they interrelate as purchasers, suppliers, and sometimes, as here, as competitors," id. at 403, the Court rejected the argument that public enterprises are generally exempt from the Sherman Act, a position to which it has consistently adhered in its subsequent decisions.

Although the Court has held that municipalities, unlike private defendants, need not be actively supervised by the state in carrying out a state policy to

displace competition, that conclusion rested on the assumption that state action immunity would be available to the municipality only if it was acting pursuant to a clearly articulated state policy, which would serve to protect the public. When combined with the protections afforded by the political process, a sufficiently clear articulation of state policy adequately protects the public interest. Hallie, 471 U.S. at 46-47. By contrast, allowing a nonsovereign entity a license to violate the federal antitrust laws when the state has merely authorized participation in a competitive market "would impair the goals Congress sought to achieve by those laws . . . without furthering the policy underlying the Parker 'exemption.'" Lafayette, 435 U.S. at 415.

Moreover, the lower court's reasoning has the potential to undercut state policy as well as federal law. See Hallie, 471 U.S. at 47 (noting that the requirement that a municipality act pursuant to state policy provides protection against the danger that the municipally owned enterprise "will seek to further purely parochial interests at the expense of more overriding state goals"). Automatically affording municipalities immunity from the Sherman Act when the state has sought to promote competition by authorizing their participation on an equal basis in competitive markets interferes with the state's ability to implement its policies. As the Supreme Court observed in rejecting a broad claim of state

action immunity in FTC v. Ticor Title Insurance Co., 504 U.S. 621, 635 (1992), "[i]f the States must act in the shadow of state-action immunity whenever they enter the realm of economic regulation, then our doctrine will impede their freedom of action, not advance it."

b. The Magistrate Judge apparently believed that his conclusion was compelled by this Court's decision in Martin v. Memorial Hospital at Gulfport, 86 F.3d 1391, 1393 (5th Cir. 1996), see R.300, 303-05, but it plainly was not. Unlike the Magistrate Judge here, the Martin court found that Mississippi had articulated a state policy to displace competition. Moreover, Martin, decided on a full summary judgment record, involved alleged suppression of competition among doctors treating end state renal disease (ESRD) within the walls of a single municipally owned hospital in Mississippi, not competition between hospitals, as is alleged here. In finding that there was a state policy to displace competition by allowing contractual exclusivity as an alternative means of controlling the practice of medicine within an individual hospital, the Court emphasized that the state had authorized the specific type of contract at issue.

> [T]he Mississippi Code does not merely provide general authority for the hospital to enter contracts. . . . The very purpose of the statutory authorization is to enable the hospital to displace unfettered competition among physicians in the performance of critical operations such as chronic dialysis in ESRD units so as to promote efficiency of health care

> provision, reduce the hospital's supervisory burden, and control its exposure to liability.

86 F.3d at 1400 (emphasis added).[6]

The Magistrate Judge in this case made no finding of a similar purpose to displace competition, and in any event such a finding would not immunize all the alleged conduct. As the Magistrate Judge observed, the statutes at issue here were intended to permit public hospitals to act more like private hospitals -- private firms -- than would otherwise be possible under state law. Private firms organize their internal activities by means other than marketplace competition. Indeed, "[t]he firm is best defined for purposes of economic analysis as the area of operations within which administration, rather than market processes, coordinates work."[7] In authorizing a municipal hospital to act more like a private firm, the state might possibly have intended to authorize it to coordinate its internal activities through administration rather than marketplace competition, to permit it to make its

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[6]The Martin court did not explain its reasons for concluding that the purpose of the statutory authorization was to enable a hospital to displace competition among physicians, and those reasons are not apparent to us. The Court did state that the Mississippi legislature authorized "a hospital to enter an exclusive contract with a single individual," 86 F.3d at 1399 (emphasis added)," which may provide some support for the conclusion, but the relevant statute does not mention exclusivity, see Miss. Code Ann. § 41-13-35(5)(g), reprinted at 86 F.3d at 1399 n.1.

[7]Robert H. Bork, The Antitrust Paradox 227 (1978), citing R. Coase, The Nature of the Firm, 4 Economica (n.s.) 386 (1937), the classic statement of this proposition. The leading modern statement and detailed elaboration is Oliver E. Williamson, The Economic Institutions of Capitalism, esp. 3-4 (1985).

own operations more efficient by conventional business means. But that is a far cry from authorizing a municipal hospital to regulate or eliminate competition in the marketplace within which it competes with other hospitals. Nothing suggests that the Court in Martin would have found the Mississippi statutes in that case or the Louisiana statutes in this case to embody a policy to displace competition between hospitals with regulation or monopoly public service. Consequently, there is no reason to believe that the Court would have found a scheme to limit competition between hospitals immune from scrutiny under the Sherman Act.

The Magistrate Judge also relied on Independent Taxicab Drivers' Employees v. Greater Houston Transportation Co., 760 F.2d 607 (5th Cir.), cert. denied, 474 U.S. 903 (1985). R303. There, a group of taxicab operators and owners challenged the award to a competing taxi company of an exclusive concession for passenger service at a municipally owned airport. This antitrust challenge was thus not to the suppression of competition between airports, and thus not like the allegations of illegal conduct in this case. Instead, the challenge there, like that in Martin, was to the suppression of competition between taxi companies for passengers within the boundaries of a single municipally owned airport in Texas.

In finding antitrust immunity, the Court in Independent Taxicab pointed to a statute authorizing the city to enter contracts conveying the "privilege" of

providing services at the airport and providing for the city to fix the fees for that service. 760 F.2d at 610, citing Tex. Rev. Civ. Stat. Ann. art. 46d-4. Such a statute plainly contemplates precisely the challenged conduct, an exclusive grant of the privilege to provide a particular service subject to regulation; this is merely an aspect of what the Court characterized as "the state's broad allocation of authority to the City to run its own airport." Id. at 611. And if that were not enough to provide antitrust immunity, another state statute "vested extensive regulatory discretion in its cities over the taxicab industry," 760 F.2d at 610, including the power to "'regulate, license and fix the charges and fares,'" id., quoting Tex. Rev. Civ. Stat. Ann. art. 1175(21), and the city had "for years seen fit to exercise this discretion." Id. at 610 n.6. In short, significant aspects of competition in the taxicab industry had been displaced by regulation, pursuant to state policy. There were, therefore, two bases for finding a state policy to displace competition by regulation or monopoly public service in Independent Taxicab: state policy to control important elements of competition through regulation, and state policy to permit a municipal airport to provide for control of the provision of services within its boundaries by contract rather than competition.[8]

[8]Neither statute specifically mentions state intent to displace competition. But the suppression of competition is plainly the foreseeable result of what the statutes authorized. Like zoning, price regulation and the award of exclusive concessions "regularly ha[ve] the effect of preventing (continued...)

Nothing in either Martin or Independent Taxicab even hints at the lower court's broad rule of state action immunity, barren of any concern for the state's choice of an alternative to competition. All that Martin and Independent Taxicab have in common with this case is state authorization to enter into contracts. That is not enough to shield the conduct alleged here from scrutiny under the Sherman Act, in the absence of any basis to conclude that the state legislature has adopted a policy to displace competition among hospitals as a sovereign act of government.

(...continued)
normal acts of competition." Omni, 499 U.S. at 373.

CONCLUSION

The district court's order dismissing the case on the ground that the conduct alleged is immune from the federal antitrust laws under the state action doctrine should be reversed, and the cause should be remanded for further proceedings.

Respectfully submitted.

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February 1998

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