COMMONWEALTH OF MASSACHUSETTS
SUPREME JUDICIAL COURT
Docket No.: SJC-09780

THE HANOVER INSURANCE COMPANY,
Plaintiff-Appellee,

v.

RAPO & JEPSEN INSURANCE SERVICES, INC., and
ARBELLA MUTUAL INSURANCE COMPANY,
Defendants-Appellants,

and

PAUL V. BRENNAN, JR., and
INSURANCE MANAGEMENT ASSOCIATES, INC.,
Defendants.

On Appeal From A Discovery Order
Of The Suffolk Superior Court

Brief of Amicus Curiae Boston Bar Association

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I. INTEREST OF AMICUS

The Boston Bar Association ("the BBA") is the nation's oldest bar association and is the direct successor to the association founded in 1761 by Boston lawyers including John Adams. Its mission is to advance the highest standards of excellence for the legal profession, to facilitate access to justice, and to serve the community at large.

The BBA strives for legal excellence by providing legal education programs for its members. Through its many pro bono programs and activities, the BBA also serves the local community by increasing access to justice.

From its early beginnings, the BBA and its members have played active roles in government and public service, have participated in legal and policy discussions and debates, and have served as a resource for the Commonwealth's judicial, legislative, and executive branches of government.

The BBA has long maintained that the attorney-client privilege is integral to the professional practice of law and to the administration of justice. Allowing clients to communicate candidly with their

lawyers enables clients to secure meaningful access to the justice system. Legal representation is impaired if lawyers and their clients cannot communicate openly with parties with common interests. The BBA supports the recognition of the common interest doctrine as an exception to waiver of the attorney client privilege, and supports implementation of the doctrine in a practical manner avoiding unnecessary formalities.

II. STATEMENT OF THE ISSUE

The BBA adopts the Statement of the Issue as set forth in the brief of the Arbella Mutual Insurance Company.

III. STATEMENT OF THE CASE AND STATEMENT OF THE FACTS

The BBA adopts the Statement of the Case and the Statement of the Facts as set forth in the brief of the Arbella Mutual Insurance Company.

IV. SUMMARY OF THE ARGUMENT

The common interest doctrine has been recognized by the federal courts, as well as the vast majority of states. Indeed, the BBA is unaware of any appellate court in this country that has declined to recognize it. Massachusetts should continue to recognize the common interest doctrine as well because it advances important public policy aims such as the economical

and expeditious resolution of litigation. Not recognizing the doctrine would severely curtail parties' ability to coordinate claims or defenses on shared issues because all related communications could become discoverable.

In recognizing the doctrine, Massachusetts should follow the majority rule and require only some commonality of interests. Because two or more parties will rarely have identical interests, requiring complete identity of interests would severely limit the utility of the doctrine. Furthermore, Massachusetts should not require unnecessary and frequently impractical formalities such as a written agreement or express client approval.

V. ARGUMENT

A. Massachusetts courts should recognize the common interest doctrine

Massachusetts should follow the overwhelming majority of other states, as well as the federal courts, by recognizing the common interest doctrine. That doctrine permits parties with common interests to share communications protected by the attorney client privilege or the attorney work product doctrine without waiving applicable immunity from disclosure.

See, e.g., Ken's Foods, Inc. v. Ken's Steak House, Inc., 213 F.R.D. 89, 93 (D. Mass. 2002). It promotes the efficient resolution of litigation by facilitating the sharing of information and division of labor among counsel working towards a common goal. The doctrine also aids effective advocacy because it ensures that counsel will have access to additional relevant information when advising a client. Furthermore, recognition of the doctrine as adopted elsewhere would not only honor the reasonable expectations of parties in pending matters, but also permit counsel to plan a course of action for multi-jurisdictional proceedings subject to harmonious ground rules.

1. The common interest doctrine promotes economical and efficient resolution of litigation.

Our judicial system seeks to secure "the just, speedy and inexpensive determination of every action." Mass. R. Civ. Pro. 1. The common interest doctrine advances this goal by promoting cooperation and sharing of information among counsel for the efficient resolution of litigation.

"Whether an action is ongoing or contemplated, whether the jointly interested persons are defendants or plaintiffs, and whether the litigation or potential

litigation is civil or criminal, the rationale for the joint defense rule remains unchanged: persons who share a common interest in litigation should be able to communicate with their respective attorneys and with each other to more effectively prosecute or defend their claims." In re Grand Jury Subpoenas, 902 F.2d 244, 249 (4th Cir. 1990).

If the rule is recognized, two or more parties with common interests need not engage in duplicative efforts, whether those be interviewing potential witnesses on joint issues, researching potential defenses that could apply to multiple parties, or drafting motions and other filings of common application. See, e.g., United States v. McPartlin, 595 F.2d 1321, 1337 (7th Cir. 1979) (defendants' shared trial preparation activities aimed at discrediting government witness were protected by common interest privilege), cert. den. 44 U.S. 833 (1979).

Because the doctrine applies not only to attorney-client communications, but also to materials protected by the attorney work product doctrine, parties with common interests are able to share such materials as strategy documents and drafts of motions.

See, e.g., In re Sunrise Sec. Litig., 131 F.R.D. 274, 379 (E.D. Pa. 1989) (no waiver when work product is shared with party having common interests).

The resulting division of labor among counsel permits more focused legal and factual development more likely to assist the tribunal in proper adjudication of the matter. In addition, the common interest doctrine enables parties collectively to focus the court's attention upon a single or smaller number of potentially dispositive common issues, rather than the multifaceted defenses or claims that different litigants might assert. If enabled to share information without waiving privilege or attorney work product protection, parties with common interests can collaborate on a common strategy for the efficient resolution of the litigation.

2. Sharing of information with similarly interested parties advances effective advocacy

A central purpose of the attorney client privilege is to facilitate the provision of legal advice. See Upjohn v. United States, 449 U.S. 383 (1981). The common interest doctrine serves this purpose as well.

The common interest doctrine first emerged from cases in which one attorney acts for two or more clients. Edna S. Epstein, The Attorney-Client Privilege and the Work-Product Doctrine at 196-197 (4th Ed. 2001). In such a situation, communications between the parties and their shared attorney are privileged as to third parties. Id.; see also Beacon Oil Co. v. Perelis, 263 Mass. 288, 293 (1928); North River Ins. Co. v. Philadelphia Reins. Corp., 797 F. Supp. 363, 366 (D.N.J. 1992); International Ins. Co. v. Newmont Mining Corp., 800 F. Supp. 1195, 1196 (S.D.N.Y. 1992).

The common interest doctrine, however, should not be limited to cases of joint representation by a single attorney or firm. The decision whether to enter into a joint representation should not be driven by the parties' ability to share information. The common interest doctrine permits parties to obtain the benefit of maintaining the privileged nature of information shared for common purposes without losing the benefits of individual representation.

The common interest doctrine enhances effective advocacy in a myriad of situations where parties with some common interests have separate counsel. It

applies equally to plaintiffs as to defendants. See, e.g., Sedlacek v. Morgan Whitney Trading Comp, Inc., 209 F.R.D. 475 (D. Utah 2001); Schachar v. American Academy of Ophthalmology, Inc., 106 F.R.D. 187, 192-193 (N.D.Ill. 1985). For example, in environmental cases when two or more parties perform clean-up of a contaminated site, they may rely on the common interest doctrine in order to share research and strategy pertaining to potential claims against non-participating parties.

The protection of the common interest doctrine also enhances the legal advice provided to individual clients. Access to information about evidence and legal theories to be presented by other parties permits attorneys to advise the client more effectively and to craft a legal strategy that works best in that framework. Operating without such information may cause counsel to prepare a strategy that clashes with that of other parties with similar interests, increasing the likelihood of an adverse outcome as well as increasing the number of contested issues that the tribunal will have to resolve.

3. Recognizing the common interest doctrine would be consistent with federal law and the law of the majority

of other states, as well as with lower court decisions in Massachusetts

The federal courts have long recognized the common interest doctrine. See, e.g., United States v. Bay State Ambulance & Hosp. Rental Serv. Inc., 874 F.2d 20, 28 (1st Cir. 1989); United States v. Melvin, 650 F.2d 641, 645-646 (5th Cir. 1981); McPartlin, 595 F.2d at 1336; In the Matter of Grand Jury Subpoena, Etc., 406 F. Supp. 381 (S.D.N.Y. 1975). The great majority of states, including all appellate courts that have considered the question, have done so as well, either by judicial decision or statutory rule of evidence. See, e.g., Ariz. Indep. Redistricting Comm'n v. Fields, 75 P.3d 1088, 1099-1101 (Ariz. Ct. App. 2003); Lipton Realty, Inc. v. St. Louis Hous. Auth., 705 S.W.2d 565, 570 (Mo. Ct. App. 1986); In re Rules of Prof'l Conduct & Insurer Imposed Billing Rules & Procedures, 2 P.3d 806, 821 (Mont. 2000); Aetna Cas. & Sur. Co. v. Certain Underwriters at Lloyd's London, 676 N.Y.S.2d 727, 732 (N.Y. Sup. Ct. 1998). See also Katharine Traylor Schaffzin, An Uncertain Privilege: Why the Common Interest Doctrine Does Not Work and How Uniformity Can Fix It, 15 B.U.

Pub. Int. L.J. 49, 52 n.7, 61 n.39 (2005) (collecting authorities).

For a number of reasons, Massachusetts should be consistent with these other jurisdictions. Consistency with the laws of other jurisdictions and the federal courts would allow attorneys to protect their clients' interests early in the dispute when the ultimate forum may be unknown. For example, if litigation is threatened against two parties with similar interests but the suit could be filed in state or federal court, it would be difficult for attorneys to address common issues in the interim if there were uncertainty as to whether the communications would be discoverable.

Furthermore, rejection of the common interest doctrine would disturb the reasonable expectations of parties and counsel. In innumerable cases currently pending in Massachusetts courts, parties have entered into joint defense or common interest agreements and exchanged privileged information pursuant thereto. These agreements likely have been based, at least in part, on the fact that this Court has noted the existence of the common interest doctrine, see Society of Jesus of New England v. Commonwealth, 441 Mass.

662, 665-66 (2004), and the Massachusetts trial courts have already enforced it. See, e.g., Rhodes v. AIG Domestic Claims, Inc., 20 Mass. L. Rptr. 491, 2006 Mass. Super. LEXIS 19, *28 (Mass. Super. Ct. 2006); Am. Auto. Ins. Co. v. J.P. Noonan Transp., 12 Mass. L. Rptr. 493, 496 (Mass. Super. Ct. 2001). See also Proposed Mass. Rules of Evid. 502(b)(3)(July 1980). If the common interest doctrine is not recognized, many attorney-client communications made with the reasonable expectation of confidentiality may become exposed to discovery.

4. Not recognizing the common interest doctrine would severely limit litigants' ability to coordinate any joint defense or prosecution because all communications related thereto could be discoverable

As noted above, the common interest doctrine enables parties to share information and coordinate strategy without exposing privileged communications or attorney work product to disclosure. If Massachusetts were to decline to recognize the doctrine, any coordination of a joint defense or prosecution would be made much more difficult. Attorneys' files could become the target of subpoenas during litigation. Further, attorneys might be regularly required to give

depositions about their communications with other counsel, transforming counsel's role as advocate to one of witness.

B. Massachusetts should recognize the common interest doctrine when there is some commonality of interests between parties

The Commonwealth should apply the common interest doctrine when there is some commonality of interests between parties. Complete identity of interests should not be required for two main reasons: First, two parties will rarely, if ever, have exactly identical interests in litigation. Second, the policy considerations underlying the common interest doctrine, discussed in Section A, supra, do not require identical interests. Rather, a protected communication must relate to a common interest, but the "interests of the separately represented clients need not be entirely congruent." Restatement (Third) of the Law Governing Lawyers § 126(1) at Comment e (Proposed Final Draft 1996). Indeed, the United States Supreme Court's Advisory Committee on proposed federal rules of evidence specifically noted that a

complete commonality of interests is not required.[1] See McPartlin, 595 F.2d at 1337 (citing 2 J. Weinstein, Evidence 503-52 (1977)).

Although early iterations of the common interest doctrine required identical legal interests, the doctrine has relaxed over time, with courts requiring only similar interests. See Paul R. Rice, Attorney Client Privilege: The Eroding Concept of Confidentiality Should Be Abolished, 47 Duke L.J. 853, 878-880 (1998). Courts thus apply the common interest doctrine even where parties have some contemporaneous conflicting interests, so long as some interests are common. See United States v. McPartlin, 595 F.2d at 1337 ("privilege protects pooling of information for any defense purpose common to the participating defendants") (emphasis added); Holland v. Island Creek Corp., 885 F. Supp. 4, 6 (D.D.C. 1995).

Indeed, one court has found sufficient common interests to apply the doctrine to information shared by opponents in pending litigation. See Visual Scene, Inc. v. Pilkington Bros., 508 So.2d 437, 441-442 (Fla.

[1] The proposed rules relating to privileges were not ultimately adopted, as Congress left the crafting of privileges to the courts. See Fed. R. Evid. 501.

Dist. Ct. App. 1987). Visual Scene, a distributor of non-prescription sunglasses, sued a photochromic glass distributor, Pilkington Brothers, and its wholly owned subsidiary, Chance Pilkington, as well as a glass processor, Metro Corp., alleging that Chance supplied defective glass blanks to Metro and that Metro had negligently processed the glass. Id. at 439. In defense, Metro asserted that the glass supplied by Chance was indeed defective. As Metro and Visual Scene were both advancing arguments that Chance supplied defective glass, they shared materials related to that argument. In quashing an order compelling production of the materials, the court held, "To extend the common interest privilege to parties aligned on opposite sides of the litigation for another purpose is not inconsistent with any policy underlying the attorney-client privilege and merely facilitates the representation of the sharing parties by their respective counsel." Id. at 441-442.

Likewise, in McPartlin, two defendants, Ingram and McPartlin, faced charges of wire fraud and conspiracy. 595 F.2d at 1327. A key prosecution witness was William Benton, an unindicted co-conspirator. Id. Ingram and McPartlin had individual

defenses that conflicted with each other; however, they had a shared interest in discrediting Benton. Id. at 1335. The Seventh Circuit held that statements McPartlin made to an investigator hired by Ingram's attorney to challenge the truth of diary entries made by Benton were protected by the common interest doctrine even though the parties' defenses were otherwise mutually contradictory. Id. at 1336. That ruling furthered the purpose of permitting parties to divide trial preparation tasks on shared issues. Without the application of the common interest doctrine, Ingram and McPartlin would have engaged in duplicative efforts, each looking for a means by which to discredit Benton. Furthermore, Ingram could not have benefited from the knowledge McPartlin had as to the truth of Benton's diary entries and vice versa.

The same rule applies in the civil context as well. Bankruptcy courts frequently find that the debtor and committee of unsecured creditors have a common interest in maximizing the debtor's estate, even though the debtor is otherwise adverse to the creditors and the creditors are adverse to each other. See, e.g., In re Kaiser Steel Corp., 84 B.R. 202, 205 (Bankr. D. Colo. 1998); In re Mortgage and Realty

Trust, 212 B.R. 649, 653 (Bankr. C.D. Cal. 1997); In re Megan-Racine Assocs., Inc., 189 B.R. 562 (Bankr. N.D.N.Y. 1995).

Massachusetts should follow these various authorities in not requiring complete commonality because parties rarely have identical interests. Even two defendants who are advancing the exact same defense may have divergent interests to some degree. While some courts have continued to require identical interests, no court has defined what exactly an "identical interest" is. See An Uncertain Privilege, 15 B.U. Pub. Int. L.J. at 69-70. As a result, whether interests are in fact sufficiently similar for application of the doctrine varies dramatically between courts. Compare Hewlett-Packard v. Bausch & Lomb, 115 F.R.D. 308, 310-312 (N.D. Cal. 1987) (disclosure of patent attorney's opinion letter to prospective purchaser of one of patent owner's divisions protected by common interest doctrine as parties would have identical interests if litigation arose), with Cheeves v. Southern Clays, Inc., 128 F.R.D. 128, 130 (M.D. Ga. 1989) (no common interest protection because defendant did not share identical legal interests with two entities to which it sold its

assets since at the time of disclosure the parties were on opposing sides of an arm's length transaction). Thus, requiring complete identity of interests would essentially eliminate the value of the doctrine by creating uncertainty as to when identical interests exist.

C. A written agreement should not be required as a matter of law

In order to protect communications under the common interest doctrine, parties must prove an agreement to engage in a joint effort and to keep their communications confidential. Ken's Foods, 213 F.R.D. at 93; see also Martin F. Murphy, Sharing Secrets: Thinking About Joint Defense Agreements, 46 B. B.J. 31 (Sept.-Oct. 2002). Massachusetts should not, however, require that the parties reduce the agreement to writing.

Many state and federal courts, including the District of Massachusetts, do not require a written agreement to apply the common interest doctrine. See, e.g., Ken's Foods, 213 F.R.D. at 93; Power Mosfet Technologies v. Siemens AG, 206 F.R.D. 422, 425 (E.D. Tex. 2000); Restatement (Third) of the Law Governing Lawyers § 126, Comment C ("[e]xchanging communications

may be predicated on an express agreement, but formality is not required"); see also An Uncertain Privilege, 15 B.U. Pub. Int. L.J. at 81-82.

Written agreements should not be required because they are not necessary in every instance and a requirement of a writing in all cases would result in unnecessary drafting. In many circumstances a joint defense agreement is already inherent in previous agreements between the parties. For example, a liability insurance policy's cooperation, duty to defend, and consent-to-settlement clauses imply that the counsel for the insured will share his or her work product with the insurer to some degree. See Couch on Insurance 3d, § 250:19 (2006) (majority view that communications between insurer and insured are protected by attorney-client privilege because insurer contractually bound to defend insured and insured contractually bound to cooperate). If litigation does ensue, the parties should be able to share privileged materials pursuant to the earlier agreement; execution of a second agreement specifically covering the particular litigation should be unnecessary.

Furthermore, requiring a written agreement in every case would increase the costs of litigation,

since at least some attorney time (presumably billable to the client) is required to draft, review, and execute any written agreement.

In addition, the rapid pace of litigation often makes a written joint defense agreement impractical. For example, defendants opposing a motion for a temporary restraining order often have very little time to prepare for a hearing. Counsel rarely will have time to draft a joint defense agreement before sharing work product and privileged information needed to defeat the motion. Defendants in such circumstances should not be precluded from the benefits of shared information simply because there is not time to develop a written agreement. Further, it is in the Court's interest to ensure that defendants have the ability to explore all potential defenses to extraordinary relief through candid discussion of facts and legal theories, so as to minimize the likelihood of improvident interlocutory injunctions.

As a general proposition, oral agreements may be enforced and the requirement of a writing (such as for the sale of land, Mass. Gen. Laws c. 183, § 3) is an exception. See, e.g., Coady v. Wellfleet Marine Corp., 62 Mass.App.Ct. 237, 248 (2004) (oral contract

enforceable when outside Statute of Frauds). Oral agreements may be proven by affidavit, as was done in this case. Whether the circumstances and certainty of a writing merit its additional expense in a particular case should be left to the judgment of counsel.

In cases currently pending in Massachusetts, parties have exchanged information pursuant to joint defense agreements that do not exist in written form. These parties have relied on the fact that at least one published state trial court decision, the United States District Court for the District of Massachusetts, and the United States Court of Appeals for the First Circuit all have recognized the common interest doctrine without requiring a written agreement. Rhodes, 2006 Mass. Super. LEXIS at *32 (recognizing that defendants implicitly entered joint defense agreement); Ken's Foods, 213 F.R.D. at 93 (written agreement not a prerequisite for invoking common interest doctrine); United States v. Bay State Ambulance & Hosp. Rental Serv. Inc., 874 F.2d 20, 28 (1st Cir. 1989). Requiring a written agreement would make communications pursuant to these oral agreements discoverable. Massachusetts should honor reasonable

expectations by upholding the enforceability of oral common interest agreements.

D. The necessity for and terms of a joint defense agreement are strategic decisions for which express client approval should not be required per se

As oral agreements may be a practical necessity, so too are agreements made by counsel before or without the client's personal participation. Generally speaking, the decision to enter into a common interest or joint defense agreement is a strategic consideration, responsibility for which should rest with the attorney. There may well be instances (for example, in the defense of criminal litigation) where the lawyer's general obligations of professional responsibility may require client input into the decision whether to make a common interest agreement and whether to share factual information pursuant to such an agreement. Express client approval of a joint defense or common interest agreement, however, should not be a required element before the client can obtain the protection of the common interest doctrine. In other words, clients should not lose the protection of the doctrine if their lawyers make a common interest agreement without

their advance approval (for example, because of inability to reach the client in a timely way, or because the disclosure related to attorney work product rather than likely client testimony).

Within the attorney-client relationship, certain fundamental decisions must be made by the client; however, most strategic decisions are left to the attorney to make in consultation with the client. See Restatement (Third) of the Law Governing Lawyers, § 21, Comment e. Thus the decisions as to which witnesses to call at trial or whether to investigate certain defenses rest with counsel, who consult with the client to the degree necessary in the circumstances. Com. v. Conley, 43 Mass.App.Ct. 385, 391 (1997). Similarly, on the civil side, counsel makes strategic decisions such as which individuals to depose, while essential decisions such as whether to settle the case must be made by the client. Mass. R. Prof'l Conduct 1.2(a).

A joint defense or common interest agreement and the use of the common interest doctrine fall within the strategic decisions that should be made by the attorney. See generally United States v. Schwimmer, 892 F.2d 237, 244 (2d Cir. 1989) (express client

consent not listed among elements required to prove joint defense agreement; agreement upheld where attorneys agreed to cooperate on common issues and client spoke with co-defendant's attorney after being instructed to do so by his own attorney); Intex Recreation Corp. v. Team Worldwide Corp., 471 F.Supp. 2d 11, 15-16 (D.D.C. 2007) (same).

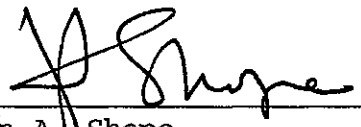
Put another way, the attorney should be deemed to have authority to make a common interest agreement on behalf of the client. The attorney-client relationship is, of course, an agent-principal relationship. See Manfredi v. O'Brien, 282 Mass. 458, 461 (1933); Ratshesky v. Piscopo, 239 Mass. 180, 186 (1921). As agent, the attorney has authority to act on the client's behalf. See Hafler v. Zotos, 446 Mass. 489, 498 (2006); MacDonald v. Gough, 326 Mass. 93, 97 (1950). Entering into a joint defense or common interest agreement deemed necessary by counsel to further the client's interests logically falls within the scope of the attorney's authority. See generally Mass. R. Prof'l Conduct 1.6(a) (confidential client information must be kept confidential "except for disclosures that are impliedly authorized in order to carry out the representation").

As a practical matter, any requirement of specific client approval of a common interest agreement could unfairly injure the interests of unsophisticated clients. Some clients may not be able to understand or appreciate the need for a joint defense agreement. These individuals should not be denied the advantages of the doctrine simply because they cannot understand why they should enter into such an agreement. For instance, counsel may enter a joint defense agreement solely for the purpose of sharing drafts of legal briefs into which the client may have little, if any, input and of which the client may have little understanding. In fact, requiring that counsel consult with and get the approval of the client before entering into such an agreement would add an unnecessary complication.

VI. CONCLUSION

Massachusetts should follow the great majority of jurisdictions and recognize the common interest doctrine because of the important public policy goals it advances. In recognizing the doctrine, Massachusetts should require only some commonality of interests and should not require a written agreement or express client consent for the doctrine to apply.

Respectfully submitted,



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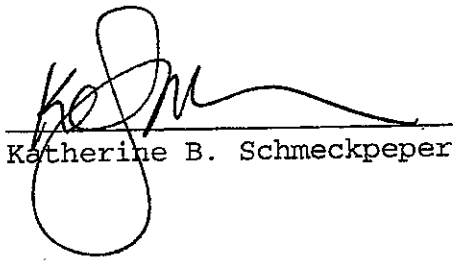
CERTIFICATION OF COUNSEL

I, Katherine B. Schmeckpeper, pursuant to Rule 16(k) of the Rules of Appellate Procedure, hereby certify that the foregoing Brief of Amicus Curiae The Boston Bar Association complies with the rule of the Court pertaining to the filing of the brief.



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CERTIFICATE OF SERVICE

I, Katherine B. Schmeckpeper, hereby certify that on April 20, 2007 I served two copies of the attached Brief of Amicus Curiae of the Boston Bar Association on the following by first class mail:

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