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IN THE MATTER OF: PERCHLORATE CONTAMINATION AT A 160-ACRE SITE IN THE RIALTO AREA	SWRCB/OCC File A-1824 RIALTO'S PRE-HEARING MOTIONS AND DECLARATION OF JULIE E. MACEDO (Gov. Code § 11450.30; Wat. Code § 1100; Code Civ. Proc. § 2025.420)

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I. INTRODUCTION

The City of Rialto ("Rialto") submits the following prehearing motions: (1) all relevant discovery taken in the related and parallel federal litigation, *City of Rialto, et al. v. United States Department of Defense, et al.*, Case No ED CV 04-00079 PSG (SSx) (the "federal litigation"),[1] including deposition transcripts and documents produced in discovery, should be admissible in the State Water Resources Control Board hearing process pursuant to statute, including but not limited to, California Government Code §11513, the California Evidence Code §1291, and the California Code of Civil Procedure §2025.620 ("Motion I"); (2) deposition subpoenas served by the alleged dischargers named in R8-2005-0053 should be quashed, or, in the alternative, limited in scope ("Motion II"); (3) the deadline for submission of PowerPoint or other visual media should be extended to March 20, 2007 ("Motion III"); and (4) the submission of certain materials, such as complete copies of deposition transcripts, should be allowed in electronic form ("Motion IV").

II. FACTUAL BACKGROUND

On January 21, 2004, City of Rialto and Rialto Utility Authority filed an action against a number of defendants, including the alleged dischargers and parties to the hearing Goodrich Corporation ("Goodrich"), Pyro Spectaculars, Inc. ("Pyro") and related Emhart entities ("Emhart") to recover response costs under CERCLA

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[1] The federal litigation is comprised of four actions which were consolidated under the Rialto caption on or about January 26, 2007 (City of Rialto, et al., v. U.S. Department of Defense, et al., ED CV 04-00079 VAP (SSx) ("Rialto action"); Goodrich Corporation v. Emhart Industries, Inc., et al., ED CV 04-00759 VAP (SSx) ("Goodrich action"); Fontana Water Company, et al., v. West Coast Loading Corporation, CV 05-01519 VAP (SSx) ("Fontana action"); and City of Colton v. American Promotional Events, Inc. et al., ED CV 06-01319 SGL (JCRx) ("Colton III"). A true and correct copy of the consolidation order is attached as Exhibit A to the Declaration of Julie E. Macedo ("JEM Declaration"). The plaintiffs in the federal litigation seek contribution or cost recovery under various legal theories, arising from expenses stemming from perhclorate and TCE contamination in the Rialto and surrounding areas. The Rialto, Goodrich, and original Colton actions (City of Colton v. American Promotional Events, Inc.-West, et al., CV 05-01479 JFW (SSx) ("Colton action")) were coordinated for the purposes of discovery.

(42 U.S.C. §§ 9607 and 9613), injunctive relief under RCRA (42 U.S.C. §§ 6901 et seq.), and damages under various state law theories for Defendants' contamination of Plaintiffs' groundwater. JEM Declaration, ¶3; Exhibit B. During the more than three year course of the federal litigation, over 250 depositions have been taken and hundreds of thousands of documents have been produced. JEM Declaration, ¶4. A substantial portion of this discovery relates to the liability of Goodrich, Pyro and Emhart. Id.

Because events underlying Rialto's Complaint occurred in the 1940s and decades following, it has been the practice for over two years that depositions of aged and/or infirm witnesses have priority. In addition, existing Case Management Orders in the federal litigation require the parties to meet and confer regarding witness and counsel availability instead of allowing the unilateral noticing of depositions under the Federal Rules of Civil Procedure. JEM Declaration, ¶ 5; Exhibit C. Despite this practice, Goodrich, Emhart and Pyro have recently subpoenaed the deposition testimony of more than ten witnesses they claim are necessary prior to the hearing scheduled to begin on March 28, 2007. Id., ¶¶6-9; Exhibits D-K.

Goodrich, Emhart and Pyro have attempted to manipulate the federal litigation in an attempt to gain greater discovery rights in the State Board proceeding. On February 27, 2007, Goodrich served a notice of deposition with attached federal court subpoena for the depositions of Kurt Berchtold and Kamron Saremi, employees of the Santa Ana Regional Water Quality Control Board ("Regional Board"), for March 8 and March 9 and 15, 2007, respectively. There was no subpoena attached which would comply with the State Water Resources Control Board ("State Board") procedures.

On the same date, Emhart served notice of federal subpoenas, without State Board issued subpoenas, issued to Gerard Thiebault and Robert Holub, of the Regional Board, for March 8 and March 9 and 10, 2007, respectively. On

March 2, 2007 Emhart served notice, in the same manner, of the deposition of William Schroeder for March 15, 2007. Mr. Schroeder appears to be a former employee of the City of Rialto Fire Department, but no attempt was made to contact attorneys for the City of Rialto regarding accepting service. JEM Declaration; ¶8; Exhibit H.

On February 27, 2007, Pyro also served notice of subpoenas issued in the federal litigation and subpoenas purportedly issued in the State Board proceeding, on the State Board form, but executed by an attorney for Pyro, for the depositions of Gary Lass, Steve Van Stockum, and Richard Roberts on March 14, March 7, and March 9, respectively.

During a meet and confer teleconference on March 2, 2007, attorneys for Emhart and Goodrich admitted that they are seeking to take these depositions now in order to obtain discovery for the State Board hearing. JEM Declaration, ¶10. However, attorneys for the dischargers declined to withdraw the federal subpoenas, even though there are more than forty parties in the consolidated four actions, the consolidated cases have not even had its initial meeting of counsel, and no demonstration that the witnesses sought deserve priority status because of age or infirmity; in short, the federal subpoenas are for no other purpose than to try to subject the parties to an additional set of rules and provide the dischargers with more than one opportunity to depose these witnesses, once before the State Board hearing and again, at a proper time, if any, during the federal litigation. JEM Declaration; Exhibit K at 4:6 – 5:9. Goodrich further clarifies that the federal deposition and the deposition in the state board proceedings "will begin simultaneously" and the federal depositions will then be suspended (not concluded) at the end of one day. JEM Declaration; Exhibit K at 7:17-23. Attorneys for Emhart state that:

> the immediacy of these depositions is driven by the truncated state board proceeding which we're all suffering under and if we did not have the state

board proceeding the federal subpenas and the federal discovery would proceed in a more orderly fashion but because of the state board proceeding we necessarily certainly the parties to it necessarily need to conduct some discovery either under the guise of the state board subpena rules and/or the federal litigation....

In short, more than eleven depositions have been noticed for the next two weeks, as the parties are preparing for the State Board hearing. Goodrich, Pyro and Emhart did not seek permission from the State Board to undertake this discovery, and now the attorneys for the Regional Board and Rialto have to take action to quash the improper subpoenas or seek protective orders. As is discussed herein, Goodrich, Pyro and Emhart are not *entitled* to this discovery. Nor are they entitled to choose the rules of evidence to govern discovery proceedings. Finally, they are not entitled to violate the witnesses' rights to be deposed once and only once in a particular matter. Attorneys for the Regional Board and Rialto are taking the necessary steps to quash the improper federal subpoenas; the Regional Board is seeking that the subpoenas improperly served on the State Board form but without State Board approval are similarly quashed.

MOTION I:

III. DISCOVERY TAKEN AND SUBMITTED IN FEDERAL LITIGATION SHOULD BE ADMITTED

A. DEPOSITION TRANSCRIPTS IN THE FEDERAL LITIGATION ARE PROPER EVIDENCE FOR THE STATE BOARD TO CONSIDER AND SHOULD BE ADMITTED

In anticipation of motions of the alleged dischargers by other parties to the hearing procedure to exclude validly admissible evidence, Rialto submits the following in support of its position that all relevant discovery previously taken in the federal litigation be admitted.

As an adjudicative proceeding, the hearing is governed by Section 11513 of the Government Code, 23 Cal. Code Regs, §§ 648(b), 648.5.1 (adjudicative proceedings "will be conducted in accordance with the provisions and rules of evidence set forth in Government Code Section 11513"). Section 11513 provides:

> (c) The hearing need not be conducted according to technical rules relating to evidence and witnesses, except as hereinafter provided. *Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs*, regardless of the existence of any common law or statutory rule which might make improper the admission of the evidence over objection in civil actions.
>
> (d) Hearsay evidence may be used for the purpose of supplementing or *explaining other evidence* but over timely objection shall not be sufficient in itself to support a finding *unless it would be admissible over objection in civil actions*... (emphasis added)

The hearing officer is granted broad discretion regarding control over the proceedings and evidence thereto:

> The presiding officer may waive any requirements in these regulations pertaining to the conduct of adjudicative proceedings including but not limited to the introduction of evidence, the order of proceeding, the examination or cross-examination of witnesses, and the presentation of argument, so long as those requirements are not mandated by state or federal statute or by the state or federal constitutions. 23 Cal. Code Regs, § 648(b).

The Notice of Hearing expressly provides that "Depositions will be accepted without the deponent's personal appearance, to the extent consistent with the California Evidence Code." Notice of Hearing, p. 4. This statement is consistent with both Government Code Section 11513 and the discretion granted to the Hearing Officer.

All relevant transcripts of depositions conducted in the federal litigation are admissible under Government Code section 11513 because they are "the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." Federal litigation is without doubt a serious affair. Deposition transcripts are a record of reliable testimony given under oath, with an attorney present, and most have been reviewed and signed by the deponents. Any

concerns over the truth and accuracy of such testimony are alleviated by the deponent's own signature verifying the accuracy of such testimony on the transcript itself and there is no need for the deponent to personally appear at the hearing to again affirm the truth and accuracy of the testimony.

As is discussed briefly herein, and which will be thoroughly demonstrated in Rialto's March 13, 2007 submission, there is ample evidence for the Hearing Officer to find the alleged dischargers liable under the Water Code. Relevant deposition transcripts taken in the federal litigation are admissible for supplementing and explaining other evidence to be considered by the Hearing Officer, such as public records or statements against interest by the alleged dischargers. In addition, there are a large number of deposition transcripts that are admissible for any purpose and are sufficient to support a finding, consistent with the California Evidence Code.

Pursuant to the California Evidence Code depositions taken in the federal litigation or pursuant to a validly issued subpoena are admissible for any purpose pursuant to the former testimony exception to the hearsay rule[2]. Former testimony includes "testimony given under oath in . . . a deposition taken in compliance with law in another action...." Evid. Code, § 1290, emph. added.[3] Rialto may introduce deposition transcripts into evidence against Goodrich, Pyro and Emhart provided the witnesses are unavailable:

> . . . former testimony is not made inadmissible by the hearsay rule if the declarant is unavailable as a witness and: ...[t]he party against whom the former testimony is offered was a party to the action or proceeding in which the testimony was given and had the right and opportunity to cross-examine the declarant with an

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[2] "Hearsay evidence" is "[a] . . . evidence of a statement that was made other than by a witness while testifying at the hearing and that is offered to prove the truth of the matter stated. (b) Except as provided by law, hearsay evidence is inadmissible. (c) This section shall be known and may be cited as the hearsay rule." (Evid. Code, § 1200.)

[3] An "action" includes any proceeding. Evid. Code, § 120.

> interest and motive similar to that which he has at the hearing.

Evid. Code, § 1291(a)(2). Code of Civil Procedure Section 2025.620(c)(3) also provides:

> Exceptional circumstances exist that make it desirable to allow the use of any deposition in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court.

This section is applicable under Government Code Section 11513(d), because it defines "admissibility" in a California civil action.

Evidence Code Section 240, which defines witness "unavailability," provides a witness is unavailable if deceased or unable to attend the hearing because an existing physical or mental illness or infirmity or the attendance of the witness cannot be compelled. Depositions of all deponents who are deceased or too ill to attend, or who reside outside the Board's subpoena power, are thus admissible for any purpose. The Board may only issue subpoenas to residents of California at the time the subpoena is issued.

Water Code, § 1086 ("No witness shall be compelled to attend as a witness before the board under this division out of the county in which he resides, unless the distance is less than 150 miles from his place of residence to the place of hearing, except that the board, upon affidavit of any party showing that the testimony of such witness is material and necessary, may indorse on the subpoena an order requiring the attendance of such witness.") Moreover, the California Supreme Court has held section 240(a) is not an exclusive or exact list of circumstances under which a witness will be deemed legally unavailable, and should not be strictly interpreted as such. *People v. Reed,* 13 Cal.4th 217, 227-28 (1996).

Under the Code of Civil Procedure if the deponent resides more than 150 miles from the place of hearing, is unavailable, cannot be compelled to testify or:

> (C) *Exceptional circumstances* exist that make it desirable to allow the use of any deposition in the interests of justice and with due regard to the importance of presenting the testimony of witnesses orally in open court . . (7) When an action has been brought in any court of the United States or of any state, and another action involving the same subject matter is subsequently brought between the same parties or their representatives or successors in interest, all depositions lawfully taken and duly filed in the initial action may be used in the subsequent action as if originally taken in that subsequent action. A deposition previously taken may also be used as permitted by the Evidence Code. Code Civ. Proc., § 2025, emphasis added.

Thus, the deposition of any deponent residing more than 150 miles of the hearing location, or who is unavailable, should be admitted.

In addition, Goodrich, Emhart and Pyro, all parties to the federal litigation, had the right to question, and a meaningful opportunity and similar interest and motive, to cross-examine all relevant deponents at their depositions. The parties' positions are similar, in that they are seeking to avoid liability relevant to the 160-acre parcel in Rialto, both in the Board proceeding and the federal litigation. *See People v. Ogen,* 168 Cal.App.3d 611, 617 (1985)(finding former testimony of an unavailable witness may be admitted even where different standards of proof are applicable to the two proceedings)(citation omitted). Counsel for the parties were present, lodged objections and questioned the deponents directly. Rialto is not aware of any objections that counsel have lacked sufficient time to prepare for any depositions, and given the importance of preservation of the aged witnesses' testimony and other testimony concerning the parties' potential liability, a thorough cross-examination would be expected, especially given the advanced age of certain deponents to fully test recollection and to preserve the record. Even where deponents were not aged or of ill health, a similar motive existed given that the testimony concerns the parties' liability. Moreover, the motive and interest to cross-examine the declarant must be *similar* but *not identical. See People v. Lepe* (1997) 57 Cal.App.4th 977, 984 [holding defendant's motive to cross-examine

witness need not be identical for preliminary hearing testimony of unavailable witness to be introduced at trial], citation omitted.

Similarly, the Hearing Officer has discretion to allow use of deposition transcripts in the interest of justice under the Code of Civil Procedure Section 2025.620(c)(3) when viewed in conjunction with Government Code Section 11513(d) [hearsay evidence may be used for the purpose of explaining other evidence, if admissible over objection in a civil action]. Depositions taken in the federal litigation clearly fall within the scope of Code of Civil Procedure Section 2025.620(g) [deposition taken in an action brought in any court of the United States may be used in a subsequent action].

Note also that under Code of Civil Procedure Section 2025.620(b), depositions of persons who were officers, directors and employees of the named parties at the time of the deposition in the federal action are directly admissible.

Moreover, exceptional circumstances exist which make it desirable to admit all depositions previously taken in the federal litigation. The Notice of Hearing expressly states that "It is in the best interest of all participants and the public who reside in the Rialto area that the hearings pertaining to this matter proceed in a fair, expeditious, and cost-effective manner." Notice at p. 1. Given the voluminous amount of depositions already taken, and the numerous witnesses who have supplied testimony regarding the liability of Goodrich, Emhart and Pyro, to call each of these witnesses to again provide the same testimony, after they have already given such testimony under oath and been subject to cross-examination, imposes an undue, costly burden on the deponents, the Board, all parties, the public and the limited resources of each. The hearing simply could not be conducted in the time allotted if each of these deponents were re-called to testify. It is in the best interests of all concerned, given the exceptional circumstances here that all depositions previously taken in the Rialto litigation be admissible for any purpose.

Accordingly, the Hearing Officer should rule to clarify that the provisions of the Government Code §11513, Evidence Code §1291, and Code of Civil Procedure §2025.620(b), (c), (d), (e), and (g) are applicable to his Hearing and allow the admissibility of certified copies of depositions taken in the Rialto federal litigation.

B. DOCUMENTS AND DISCOVERY PREVIOUSLY PRODUCED IN THE FEDERAL LITIGATION SHOULD BE ADMITTED

The documents produced by the named Dischargers and their discovery responses in the federal litigation is equally reliable evidence, and should be admitted. Discovery produced pursuant to the Federal Rules of Civil Procedure, Case Management Orders and all applicable law in a federal action is the "sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs." Gov. Code, § 11513. To the extent this evidence is relevant it should admitted for any purpose.

MOTION II:

IV. SUBPOENAS FOR DEPOSITION TESTIMONY RECENTLY ISSUED BY PARTIES TO THE HEARING SHOULD BE QUASHED

A. Quashing The Issued Subpoenas Does Not Violate Due Process

There is no due process guarantee or right to conduct prehearing discovery. In an administrative proceeding:

> due process is satisfied as long as the [offending property owner] receives adequate notice of the nature of the alleged nuisance and a meaningful opportunity to respond to the charges against him. It is not necessary that he receive the full panoply of procedural protections accorded in a judicial trial, such as the ability to cross-examine witnesses under oath, to subpoena witnesses, or to engage in discovery.

Mohilef v. Janovici, 51 Cal. App. 4th 267, 276 (1996). "Generally, there is no due process right to prehearing discovery in administrative hearing cases, and particularly no constitutional right to take depositions." *Cimarusti v. Superior Court,* 79 Cal. App. 4th 799, 808 (2000). Rather, the scope of discovery is governed by

agency discretion and statute. *Id.* at 808-809, citations omitted. Where, as here, the hearing will be conducted in accordance with the Administrative Procedure Act, pursuant to Government Code section 11513, the statutory procedures are "sufficient to satisfy petitoners' due process rights." *Ibid.*

Here, unlike depositions previously taken in the federal litigation, there is no statutory provision or instruction in the Notice of Public Hearing regarding any procedures for additional discovery. The parties do not have a right to seek additional discovery, including by deposition. Furthermore, in this manner, the State Board hearing is more narrow than the federal litigation; there will be evidence to support a finding of a release by the named dischargers or not. There is no need to allow discovery, evidence or testimony regarding the possible negligence or liability of other parties. Apportionment of liability, an issue in the federal litigation, is not an issue in the State Board proceeding. None of the subpoenas issued by the named dischargers could lead to exculpatory evidence, and therefore do not seek relevant evidence.

For example, with respect to the subpoenas issued by Pyro, the subpoenaed witnesses are represented by the County of San Bernardino and could have evidence related to the operation of the McLaughlin Pit, and the Regional Board's regulation of it. The Regional Board's regulation of parties not named in the amended CAO *currently at issue* is completely irrelevant. While the parties may be allowed to introduce exculpatory evidence, if any, narrowly tailored to prove their innocence, evidence to prove the liability of o*ther parties* or *persons* is inappropriate and a waste of the State Board's time and the parties' resources. Pyro cannot exculpate itself by introducing evidence of another party's negligence, nor is it proper to object to its inclusion in the amended CAO in this manner. The Board has discretion to investigate the persons it chooses. Agencies have broad discretion to determine the parties and violations they investigate. *See Hogen v. Valley Hosp.,* 147 Cal. App. 3d 119, 123 (1983); *Spear v. Board of Med.*

Examiners, 146 Cal. App. 2d 207 (1956). These depositions, then, are irrelevant to the hearing commencing on March 28, 2007 and the subpoenas should be quashed by the Hearing Officer.

Rialto respectfully requests that these deposition subpoenas be quashed.

B. In the Alterative, The State Board Should Issue a Protective Order with Regard to the Numerous Deposition Subpoenas that Were Served Last Week

In the event depositions pursuant to the subpoenas issued by the parties on State Board forms go forward, there should be reasonable limits placed on the noticing parties. For example, the noticing parties should have to make some offer of proof as to what relevant and admissible evidence these witnesses may have. Jeffrey Dintzer, counsel for Goodrich, responding to a request by Rialto for an offer of proof as to the purposes of these depositions, stated during March 2, 2007's Meet and Confer:

> ...I don't really want to go into all of the work product that I have as to why these individuals are relevant to these proceedings needless to say there have been numerous documents produced in this litigation, countless documents that have been produced in this litigation that bear the names of the individuals who are subject of these depositions that go back in historical record and I don't really think I need to say more than that.

JEM Declaration, Exhibit K at 23:6-15. The noticing parties have also noticed the depositions in the federal litigation and attempt to use the litigation as a subterfuge. Instead of complying with the Board's procedures, the parties instead attempt to take advantage of the more liberal discovery rules in federal court to take depositions to which they would not be entitled in the proceeding before the State Board. By noticing depositions simultaneously in the federal litigation and in the State Board proceedings, Goodrich, Emhart and Pyro are intentionally creating confusion regarding which procedures and rules of evidence apply to the

depositions. These depositions should only be taken, if allowed by the State Board, pursuant to the State Board's procedures. Any depositions in federal court should be brought separately and proceed at a later time in accordance with all federal rules and prior agreements of the parties to the federal litigation. Goodrich, Emhart and Pyro want to have their cake and eat it too. Moreover, beginning federal depositions on such a shortened time frame arguably prejudices every other party to the federal litigation.

C. Transcripts of Depositions Taken Pursuant to Subpoenas Issued Solely in the Federal Litigation Should Not be Admitted Pending Resolution of Rialto's Motion to Quash, Modify and/or for Protective Order Regarding Such Subpoenas, to be Brought in Federal Court

It is Rialto's understanding that the Regional Board Advocacy Team intends to promptly bring a motion in federal court to quash, modify and/or for a protective order relating to the deposition subpoenas issued in the federal action. The federal court has jurisdiction to issue such orders, and until such motion is resolved, the State Board should not admit or consider in evidence transcripts of these depositions. By issuing these subpoenas through the federal litigation, the noticing parties are attempting to take advantage of the time it will take to hear any motion regarding the depositions and sneak them in under the wire in the hearing procedure, or possibly to delay the hearing dates. The noticing parties have admitted the purpose is to obtain evidence for the State Board hearing.

The State Board has requirements for the taking of depositions, which should be followed. Defendants should not be allowed to make an end run around these requirements.

MOTION III:

V. REQUEST FOR POWERPOINT SUBMISSION DEADLINE TO BE EXTENDED TO MARCH 20, 2007

Rialto respectfully requests that the deadline for visual displays (described in the Hearing Notice at p. 5) be extended to March 20, 2007, to allow for the oral presentation of parties to include rebuttal evidence. This would prevent piecemeal submissions of the parties' visual media related to their cases-in-chief submitted on March 13, 2007 and additional rebuttal slides (or other visual media) submitted on March 20, 2007. It would allow the visual media to more accurately reflect the parties' expected presentations at the hearing, after they have had a chance to review the opposing parties' evidence. Since the March 13, 2007 deadline must include the parties' documents, testimony, and exhibits, the parties' receive adequate notice of the anticipated arguments and evidence against them.

MOTION IV:

VI. REQUEST FOR ELECTRONIC SUBMISSION OF BACKGROUND MATERIALS

Rialto joins in the Advocacy Team's February 27, 2007 request that certain materials, including the balance of deposition transcripts that are not cited by the parties' briefs, be submitted electronically. It makes no economical or practical sense for parties, including a number of public agencies and/or environmental groups, to incur the expense of photocopying and producing an enormous quantity of written materials when instead the copying costs could be minimized by the parties exchanging hard copies of briefs and accompanying exhibits, but exchanging electronic copies of other documents.

VII. CONCLUSION/PROPOSED ORDER

For the foregoing reasons, Rialto's prehearing motions should be granted and the following relief ordered:

Motion I: certified copies of deposition transcripts and true and correct copies of documents obtained through discovery in the federal litigation should be deemed admissible in the State Board hearing;

Motion II: the subpoenas recently issued by Goodrich, Emhart and Pyro should be quashed;

Motion III: the PowerPoint submission deadline should be extended to March 20, 2007; and

Motion IV: the exchange and submission of background materials can be handled electronically.

Dated: March 5, 2007.

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