IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

AUTOMATION MIDDLEWARE SOLUTIONS, INC.,	§	**CASE NO. 2:15-cv-00898-RWS**
	§	**PATENT CASE**
Plaintiff,	§	
	§	
v.	§	
	§	
INVENSYS SYSTEMS, INC. AND SCHNEIDER ELECTRIC USA, INC.,	§	
	§	
Defendants.	§	
AUTOMATION MIDDLEWARE SOLUTIONS, INC.,	§	**CASE NO. 2:15-cv-00899-RWS**
	§	**PATENT CASE**
Plaintiff,	§	
	§	
v.	§	
	§	
YOKOGAWA ELECTRIC CORPORATION, AND YOKOGAWA CORPORATION OF AMERICA,	§	
	§	
Defendants.	§	
AUTOMATION MIDDLEWARE SOLUTIONS, INC.,	§	**CASE NO. 2:15-cv-01266-RWS**
	§	**PATENT CASE**
Plaintiff,	§	
	§	
v.	§	
	§	
EMERSON PROCESS MANAGEMENT, LLLP FISHER-ROSEMOUNT SYSTEMS, INC., ROSEMOUNT, INC., EMERSON INDUSTRIAL AUTOMATION USA INC., EMERSON INDUSTRIAL AUTOMATION USA LLC AND EMERSON PROCESS MANAGEMENT POWER & WATER SOLUTIONS, INC.,	§	
	§	
Defendants.	§	

AUTOMATION MIDDLEWARE SOLUTIONS, INC.,	§	
	§	**CASE NO. 2:15-cv-01269-RWS**
	§	**PATENT CASE**
Plaintiff,	§	
	§	
v.	§	
	§	
ROCKWELL AUTOMATION, INC. AND ROCKWELL AUTOMATION TECHS., INC.,	§	
	§	
Defendants.	§	

AUTOMATION MIDDLEWARE SOLUTIONS, INC.,	§	
	§	**CASE NO. 2:15-cv-01982-RWS**
	§	**PATENT CASE**
Plaintiff,	§	
	§	
v.	§	
	§	
MITSUBISHI ELECTRIC CORP., MITSUBISHI ELECTRIC U.S. HOLDINGS, INC. AND MITSUBISHI ELECTRIC AUTOMATION, INC.,	§	
	§	
Defendants.	§	

AUTOMATION MIDDLEWARE SOLUTIONS, INC.,	§	
	§	**CASE NO. 2:15-cv-01539-RWS**
	§	**PATENT CASE**
Plaintiff,	§	
	§	
v.	§	
	§	
KOLLMORGEN CORPORATION AND DANAHER CORPORATION,	§	
	§	
Defendants.	§	

AUTOMATION MIDDLEWARE SOLUTIONS, INC.,	§	
	§	**CASE NO. 2:15-cv-01771-RWS**
	§	**PATENT CASE**
Plaintiff,	§	
	§	
v.	§	
	§	
YASKAWA AMERICA, INC., YASKAWA ELECTRIC CORP. AND VIPA USA, INC.,	§	
	§	
Defendants.	§	

AUTOMATION MIDDLEWARE SOLUTIONS, INC.,	§	**CASE NO. 2:15-cv-01977-RWS**
	§	**PATENT CASE**
Plaintiff,	§	
	§	
v.	§	
	§	
BOSCH REXROTH CORPORATION AND BOSCH REXROTH AG,	§	
	§	
Defendants.	§	

DEFENDANTS' REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS PURSUANT TO RULE 12(b)(6) BASED ON PATENT INELIGIBLE SUBJECT MATTER UNDER *ALICE* AND SECTION 101

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I. INTRODUCTION

AMS's concession that the invention claimed in the patents merely "translate[s] commands" between a commander (the application program) that speaks one "language" and recipients (motion control devices) that speak one or more different languages is *fatal* in Step 1. ECF No. 118 at 5. AMS does not rebut Emerson's showing that using translation to control motion, mechanical or otherwise, is a longstanding, pre-computer concept that is fundamental in the annals of human progress.[1] AMS absolutely did not invent the elements of the claims, including primitive/non-primitive correlation of motion control functions to device drivers–all were either ubiquitous or described in the patents as *pre-existing*. AMS also fails to counter the fact that *both* humans and computers were often controlling "motorized mechanical devices," *id*. at 2, including with the *aid of translation,* long before AMS's now-expired patents. AMS's patents are directed to an abstraction because some *literally* claim the *idea* of translating by using component functions correlated to driver functions by reference to primitive/non-primitive motion components.[2] This idea is so abstract that the patents simply and generally instruct a human to write the software to translate. Finally, the AMS patents are directed to an abstract idea, because they neither claim nor deliver any actual improvement in computer technology, functionality or performance.

More importantly, use of primitive/non-primitive motion components and selection of specific device drivers cover *the entire field* of automated motion control. The preemption

[1] Since Moses came down from the Mount, there has been a need to translate a "high-level" command to a lower level language.

[2] As noted in Emerson's Motion, using common reference points as a means to communicate is a well-known abstraction in the history of mankind. ECF No. 50 at 14-15 (citing exhibits). However, not every asserted claim relies on such components.

concerns underlying *Alice* are directly implicated.[3] Incentive for others to innovate is extinguished. The risk has become reality–the transparent target of this litigation campaign is any distributed control system that translates commands to devices using OPC[4], *an industry standard* for decades. *See e.g.*, ECF No. 89 at 12, 14-17.

The patents similarly fail Step 2, because in return for broad preemption they fail to deliver an inventive concept that is *significantly more* than a patent on the abstract concept. In *Alice,* the Supreme Court stated no less than *six* times that the Constitution demands "practical assurance that the process is more than a drafting effort designed to monopolize the [abstract idea] itself." *Alice Corp. Pty. Ltd. v. CLS Bank Int'l*, 134 S. Ct. 2347, 2350-51 (2014) (citations omitted). *See also, id*. at 2351, 2357–2360. In that regard, the patents here are as bad as it gets. AMS fails to identify a qualifying inventive concept that is significantly more.

II. ARGUMENT

A. AMS Misstates Emerson's Burdens and the Standard of Review

Neither the statutory presumption of validity, 35 U.S.C. § 282(a), nor the concomitant clear and convincing evidence standard of proof applies to *Alice* claims. *See, e.g., Ultramercial, Inc. v. Hulu, LLC*, 772 F.3d 709, 720-21 (Fed. Cir. 2014) (Mayer, J., concurring) ("no presumption of eligibility attends the section 101 inquiry."); *TNS Media Research, LLC v. Tivo Research & Analytics, Inc*., No. 11Civ 4039 (SAS), 2016 WL 817447, at *10 (S.D.N.Y. Feb. 22, 2016) (same); *Wireless Media Innovations, LLC v. Maher Terminals, LLC*, 100 F. Supp. 3d 405,

[3] AMS concedes broad preemption: "factory robots that paint automobiles on an assembly line; precision cutting and bending equipment that forms aerospace components; and robotically controlled lasers that cut tissue in microscopic surgical procedures." ECF No. 118 at 3. The prior constructions of terms such as "primitive" (core) and "non-primitive" (everything else) refute any argument that the AMS patents do not present immense preemption dangers. *See, infra*.

[4] OPC, known as the "standard-bearer for data interoperability in a wide range of industries" is a widely accepted twenty-plus year old industrial communication standard that enables the exchange of data between multi-vendor devices and control applications without any proprietary restrictions. Holtshouser Decl., Ex. PP.

411 (D.N.J. 2015) ("subject matter will not be afforded a presumption of eligibility"). If AMS's argument had merit, it fails to explain why the Supreme Court has not once mentioned it in its abstract idea jurisprudence, including *Alice*. Regardless, Emerson has overcome a presumption and satisfied a high burden.[5]

AMS cites no authority for its claim that Emerson must *disprove* the significance of every imaginable claim construction. ECF No. 118 at 29. Given its failure to identify *any* claim term for which construction would alter the outcome of this motion, AMS's argument is a red herring.[6] This Court recently adopted a U.S. Magistrate Judge's rejection of a similar argument: "to the extent a patentee contends a full claim construction proceeding is necessary prior to determining validity, it is the burden of the patentee to *come forward and specifically identify* the claim terms and proposed constructions that would affect the § 101 inquiry." *Rothschild Location Techs. LLC v. Geotab USA, Inc.*, No. 6:15-cv-682-RWS-JDL, 2016 WL 3584195, at *4 (E.D. Tex. Jan. 4, 2016), *R&R Adopted*, 2016 WL 2847975 (E.D. Tex. May 16, 2016). The claims here have been construed twice before (Holtshouser Decl., Exs. QQ and RR) and AMS embraces those constructions in opposing Emerson's motion to transfer. ECF No. 39 at 1, 9-12. Judgment on the pleadings is warranted.[7]

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[5] "[T]he 'clear and convincing' standard is an *evidentiary standard* that applies 'only to the resolution of factual disputes, and not to resolution of pure issues of law.'" *Nextpoint, Inc. v. Hewlett-Packard Co*., No. 15 C 8550, 2016 WL 3181705, at *6 (N.D. Ill. June 8, 2016) (citations omitted) (emphasis added)*; see also*, *Microsoft Corp. v. i4i Ltd. P'ship*, 564 U.S. 91, 114-115 (2011) (Breyer, J., concurring) ("[m]any claims of invalidity rest...not upon factual disputes, but upon how the law applies to facts as given," and courts should keep the standard "within its proper legal bounds.").

[6] U.S. District Judge Gilstrap of this district has adopted a sensible procedure that requires a patentee to identify claim terms relevant to *Alice* motions–if AMS were correct, Judge Gilstrap's procedure would not be permissible. *See*, "Standing Order Regarding Motions Under 35 U.S.C. 101 and Accompanying Certifications."

[7] The extrinsic evidence, capable of judicial notice, provides historical context, and does not contradict the pleadings and, thus, does not transform this motion into a Rule 56 motion. *See,*

B. *Alice* Step One: The Patents Are Directed to an Abstract Idea

AMS's Response reads as if *Alice* never happened, s*ee*, ECF No. 118 at 10-15 (discussing at length *pre-Alice* cases), but it can't ignore the vast body of case law applying the *Mayo/Alice* two-step inquiry. The overwhelming weight of authority, even in the realm of computer technology, focuses on the *purpose*s of the patents in determining if they are "directed to" an abstract idea in Step 1. *See, e.g.*, *Rothschild Location Techs.*, 2016 WL 2847975 at *2-3 (post-*Enfish* adoption of R&R invalidating patent, claiming GPS devices communicating through a server regardless of formatting incompatibilities, as directed to abstract idea of address retrieval; Magistrate Judge correctly considered "the purposes that the [patent] sought to solve, as articulated in the specification"); *Mobile Telecomms. Techs., LLC v. BlackBerry Corp.*, No. 3:12-cv-1652-M, 2016 WL 2757371 (N.D. Tex. May 12, 2016) (two-way coding of electronic communications between a network operations center and a mobile unit).

Here, AMS concedes that all five (5) asserted patents, which share a common specification, are directed to the very abstract idea articulated in Emerson's motion: translation of a command into a language that the device carrying out the command understands. ECF No. 118 at 5.[8] AMS's latest Complaint similarly describes the purpose as "allow[ing] an application program to *communicate* with any one of a group of supported hardware devices." ECF No. 89 at 11 (emphasis added). Unfortunately for AMS, the specification does not support its current spin[9] (no doubt a reaction to *Enfish*, *infra*) on the objective of the patents. The specification never once

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Lovelace v. Software Spectrum Inc., 78 F.3d 1015, 1017-18 (5th Cir. 1996) (citing FED. R. EVID. 201(f) ("Judicial notice may be taken at any stage of the proceeding."). Moreover, this Court is free to look no further than the pleadings, which here include the patents. *Rothschild Location Techs.*, 2016 WL 2847975, at *2-3.

[8] Emerson did not identify six different abstract ideas as AMS claims. ECF No. 118 at 15-16. Despite different phrasing, the basic purpose and idea is the same and AMS concedes it.

[9] AMS's diagram of the "old way" in its Response is not found in the patents or the Complaint; it is contradicted by the specification which described the prior art practice of selecting "drivers" which spoke the language of the application program. *See, e.g.*, ECF No. 50-2 at 2:62-67.

states that the objective is to make a better computer, solve a problem unique to computing or improve the functionality of computers. Instead, its focus is on *using* computers to implement motion control and specifically improve the *experience of the human application software programmer*. *See, e.g.,* '897 patent[10] (ECF No. 50-2) at 1:5-6 ("facilitates the creation of hardware independent motion control software"); 3:18-20 (improving motion control); 3:25-34 ("allow[ing] creation" of motion control software, "hide the complexities of programming for multiple hardware configurations from the high-level programmer"; make additions of hardware occur "easily"; and creation of "industry standard high-level programming environments"). *See also, id*. 3:63 ("isolates the programmer from complexities"); 4:47 (same); ECF No. 50 at 28-29 (patentee's references to "software designer" in IPR proceedings). Later patents added "communication" to the list of purposes. '058 patent (ECF No. 89-1) at 3:52-62. Each of these so-called purposes is centered on the abstract idea of translation.

Not surprisingly, AMS relies on *Enfish, LLC v. Microsoft Corp.*, No. 2015-1244, 2016 WL 2756255 (Fed. Cir. May 12, 2016), but *Enfish* actually supports finding that AMS's patents are directed to an abstract idea. In *Enfish*, computer database organization was the heart of the problem. Two prior art databases suffered from specific, articulated deficiencies, which were uniquely related to the computer environment. The *Enfish* patents specifically sought to eliminate those deficiencies and disclosed a highly specific new database structure. The specification claimed that the new database achieved specific improvements in computer functionality, including "increased flexibility, faster search times, and smaller memory

[10] AMS criticizes Emerson's reference to the '897 patent, Claim 1, because it is not asserted. AMS fails to advise this Court that its infringement contentions were *not served* until May 23, 2016, three weeks *after* Emerson filed the instant motion. Holtshouser Decl., Ex. SS. Regardless, the claim is representative. AMS fails to point to any appreciable difference, for *Alice* purposes, between the '897 patent claim 1 and any other representative claim.

requirements." *Id.* at *6. Therefore, the *Enfish* panel correctly held that the patents were directed to "improvement in the functioning of a computer", *id*. at *7, rather than using a computer to implement a well-known "method of organizing human activity". *Alice*, 134 S. Ct. at 2356.

Rather than being directed to new computer technology solutions to uniquely computer technology problems, the AMS patents represent garden-variety computer-implementation of a near-timeless human and industrial activity–translating language to control motorized mechanical devices.[11] The problem of commands being in one language and the final hands-on controller understanding another language is not a uniquely computer problem that was not being solved prior to these patents. It *was* being solved by programmers writing application software in a way that certain devices could understand to execute commands. Moreover, AMS does not dispute that the division of motion components into primitive and non-primitive functions was well-known[12] before the patents; the inventors did not discover or invent such functions. ECF No. 118 at 25. Both the claims and the specification bear no resemblance to the specificity found significant in *Enfish*. AMS's patents do not claim improvements in computer functionality and do not articulate such improvements in the specification. AMS does not even argue that its patents improve computer performance. In the parlance of *Enfish*, AMS's patents merely claim "generalized steps to be performed on a computer using conventional computer activity." *Id*. (citations omitted). Unlike in *Enfish*, the AMS patents are directed to the mere *idea* of use of a translating intermediary with nothing more than standard computer and automation techniques

[11] AMS's charge that Emerson overgeneralizes the "invention" lacks merit. ECF No. 118 at 16. It is hard to overgeneralize what is already so general. AMS attempts to cloak the simple idea of translation in technical jargon and obtuse syntax. By simple but accurate analogy, a robot can be taught to dance by telling it what to do movement by movement ("move hip to left") or as a sequence of movements combined into one command ("do the twist").

[12] For example, a 1994 publication in the file history of the '058 patent disclosed the use of core component functions and breaking motion down into simpler parts to enable device independence. Holtshouser Decl., Ex. TT.

that are germane to motion control. AMS does not even claim a *specific method of translation*– the claims are only generalized statements combining pre-existing primitive/non-primitive motion components and selection of applicable drivers. There is also no explicit claim in the specification to improving the functioning of the computer.

Emerson's position is further supported by post-*Enfish* decisions. Just days after *Enfish*, in *TLI Commc'ns LLC v. AV Auto., LLC*, No. 2015-1372, 2016 WL 2865693 (Fed. Cir. May 17, 2016), the Federal Circuit found ineligible a patent for uploading digital photos from a mobile device to a computer. The same analysis of the patent in *TLI* in Step 1 is fully applicable here. *Id.* at *3-5 (no specific improvement in computer functionality; no structural problem; no new physical device; descriptions of claims in purely generic, functional terms; hardware is "merely a conduit" for performance of the abstraction). Similarly, in *Bascom Global Internet Servs., Inc. v. AT&T Mobility LLC*, No. 2015-1763, 2016 WL 3514158 (Fed. Cir. June 27, 2016), the Federal Circuit again found that a patent covering filtering Internet content was directed to an abstract idea (filtering content) in Step 1, in part because the claims were not "unambiguously directed to an improvement in computer capabilities." *Id*. at *5.[13] At the district court level there have now been approximately 16 post-*Enfish* Step 1 analyses; in *all* but one of these[14] the patents were found to be directed to an abstract idea (and ultimately patent-ineligible). This has been true even when the patent involved purported improvements to the functioning of computers. *See, e.g.*, *Kinglite Holdings, Inc. v. Micro-Star Int'l Co. Ltd.*, No. CV 14-03009 JVS(PJWx), slip op. at 1

[13] *Bascom* ultimately found patent-eligibility based on a "specific, discrete" innovation in Step 2. *Id*. at *7. AMS's citation to numerous pages of the prior *Markman* orders does not establish that the patents here were directed to improving computer functionality. ECF No. 118 at 19.
[14] *Audio MPEG, Inc. v. HP Inc.*, No. 2:15-cv-00073 HCM-RJK, slip op. at 8-12 (E.D.Va. July 1, 2016), ECF No. 159 (patents solved a well-known problem; directed to specific, *new way* to encode and decode digital audio using *specific* format that allows realistic reproduction with *minimal data*). Holtshouser Decl., Ex. UU.

(C.D. Cal. July 6, 2016) (software patent on computer authentication technology) (Holtshouser Decl., Ex. VV); *White Knuckle Gaming, LLC v. Elec. Arts Inc.*, No. 1:15-cv-150-JNP-PMW, 2016 WL 3129133 (D. Utah June 2, 2016) (allow software parameter updating); *Visual Memory LLC v. NVIDIA Corp.*, No. 15-789-RGA, 2016 WL 3041847 (D. Del. May 27, 2016) (three-tier computer memory hierarchy to enable quick access to variables of current operating program). Finally, in *Rothschild* this very Court rejected objections, post-*Enfish*, to a Magistrate Judge's recommendation to find a patent ineligible where it related to software enablement of remotely entering, storing and sharing addresses between GPS devices communicating with each other.

C. *Alice* Step Two: The Patents Do Not Claim An Inventive Concept That Is Significantly More

AMS devotes most of its brief to Step 1 and it is not entirely clear what AMS claims is an inventive concept.[15] This is because its patents disclose only conventional technology. Emerson's Motion presented arguments on the lack of inventiveness of numerous features of AMS's patents and AMS largely fails to respond. Selection of drivers was certainly not inventive. The Asserted Patents acknowledge that drivers were a "common programming practice." ECF No. 50-2 at 2:62-67. The specification even describes *selecting* a driver as an "administrative step." *Id.* at 4:49-54. *See also*, Holtshouser Decl., Ex. TT (device independence and choosing a particular driver). AMS, saddled with these intrinsic admissions, contends that *selection* of a particular driver makes the abstract idea "significantly more," as required by *Alice*. The argument is non-sense: a translating scheme between commander (plant operator) and

[15] AMS's response treats Step 2 as if it is simply a novelty test. "[W]ell-understood, routine, conventional activit[y]" is *insufficient* to transform an abstract idea into patent-eligible subject matter. *Alice Corp.*, 134 S.Ct. at 2359 (emphasis added). Use of the concept of sufficiency means that mere novelty is not enough. Numerous post-*Alice* courts have made clear that rather than a novelty test, Step 2 requires balancing the scope of preemption of the abstract idea in the field of use against the contribution to technological improvement. *See, e.g.*, *Mobile Telecomms.*, *supra*, at *5-6 (cases cited therein).

device (one of many valves) *has to select* the associated driver to receive the translated command (close half-way), else motion cannot occur.[16] By analogy in a system of telephone communication the caller dials a number and the intermediary phone company has to switch to (select) the recipient's line for communication to occur. Selection is not "significantly more."

AMS also cites the use of primitive/non-primitive operations, a limitation of some, but not all, of the asserted claims. Labeling operations as "primitive" or "non-primitive", labels already in use in computer coding parlance, *(see, e.g.,* ECF Nos. 50 at 26-27 and 52-3, 53-1, 53-2, 54-8, 54-9), added nothing new to motion control. *See* Holtshouser Decl., Ex. TT ("break the request down into simpler operations"). Even AMS's Patents acknowledged "base incremental steps" as part of Prior Art. ECF No. 89-4 at 3:5. A primitive operation is a basic motion operation and every form of motion control must use it. A non-primitive operation has been effectively construed to mean *everything else*. *See,* Holtshouser Decl., Exs. QQ at 19 and RR at 27. In other words, AMS's so-called "invention" is the use of basic operations AND EVERYTHING ELSE–the broadest possible preemption. Every company needs to use base operations (primitive) because those are the core operations of the motion control device, and combining operations into a non-primitive operation (subroutine), is what software programmers have done for *their speed and convenience* for decades prior to the Asserted Patents. As the R&R adopted by this Court in *Rothschild* held, solutions which "simply relate to ease, accuracy, and efficiency benefits achieved when any fundamental or well-known concept is implemented on a computer device . . . [are] . . . insufficient to confer patentability." *Rothschild Location Techs.*,

[16] AMS also argues that in the printing scenario, one is not selecting from "a plurality" of drivers. ECF No. 118 at 24. AMS assumes one printer. Yet, in the real world of multiple printers (devices), the only way a computer can print a document is to select a driver for the desired printer. It can hardly be considered "significantly more" to select the driver for the object printer.

2016 WL 3584195, at *6. Moreover, making life easier for software programmers is hardly a technological concept.

An example illustrates the ubiquity of AMS's alleged inventive concept: a motion control device (a printer's[17] stepper motor) moves a printer head to a location X,Y by "Go To X", then "Go To Y" (primitive operations) by a linear move or "Go To X,Y" (non-primitive operation) by a contour move; or vice versa. AMS cannot own the concept of base and combination operations (*all* movement operations) without something that is "significantly more." In the realm of language translation, the primitive/non-primitive translation scheme is not an inventive concept; it is the motion control equivalent of the Latin alphabet. The preemption risk is not answered by AMS: what devices can be controlled by means other than primitive/non-primitive functions?

AMS also seems to suggest that the inventors' recognition that "all motion control devices perform 'motion control operations'" was inventive. ECF No. 118 at 26. This can hardly be characterized as a revelation in the field such that AMS is entitled to patents that preempt such a huge swath of an idea that is fundamental to human and computer technology progress. It is particularly uninventive where the Asserted Patents posit only the idea of translating motion control operation communication and rely on a human software designer to write the specific code necessary to convert from a high level application program language to the language of particular motion control devices by writing code and then selecting individual drivers for each device. ECF No. 89-1 at 7:15-60. *See also*, ECF No. 50-2 at Claim 17 ("developing a set of software drivers, where (i) each software driver is developed for a motion control device").

III. CONCLUSION

Emerson respectfully requests that the Fourth Amended Complaint be dismissed.

[17] AMS's claim that a printer is not a motion control device is ludicrous; it conflicts with the contrary admission in the specification. *See*, ECF No. 118 at 23 and ECF No. 89-4 at 2:65-3:11.

Dated: July 11, 2016

Respectfully submitted,

By: /s/ Rudolph A. Telscher, Jr.

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CERTIFICATE OF SERVICE

I hereby certify that on this 11th day of July, 2016, the foregoing was filed electronically with the Clerk of Court and to be served via the Court's Electronic Filing System upon all counsel of record.

/s/ Rudolph A. Telscher, Jr.

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