

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA**

COMMODITY FUTURES TRADING COMMISSION)

Plaintiff,)

v.)

CHRISTOPHER SMITHERS, PROSPERITY
CONSULTANTS, INC., and JACK SMITHERS,)

Defendants.)

Case No.)

COMPLAINT FOR A
PERMANENT INJUNCTION,
OTHER EQUITABLE RELIEF,
AND CIVIL MONETARY
PENALTY)

05-80592

CIV - HURLEY

ZHOPKINS

I.

SUMMARY

1. Between June 2002 and March 2004, Christopher Smithers ("Chris Smithers"), Jack Smithers, and Prosperity Consultants, Inc. ("PCI") solicited more than \$511,594.36 from at least thirty-five clients to trade in commodity futures contracts in violation of the Commodity Exchange Act, as amended (the "Act"), and Commission Regulations promulgated thereunder ("Regulations"). Chris and Jack Smithers acted as Commodity Trading Advisors ("CTAs"), both individually and on behalf of PCI, a financial consulting firm they operated from June 2002 to September 2003.

2. Chris Smithers enticed clients to invest with him or PCI with misleading statements of promises of large profits and guaranteed returns through the purchase and sale of commodity futures contracts. In some instances, Chris Smithers encouraged clients to send him a check so that he could deposit the funds in a commodity interest account. On other occasions, Chris Smithers encouraged clients to open their own commodity interest accounts with Futures Commission Merchants ("FCMs"), and then Chris Smithers managed the client accounts with

Jack Smithers. Once a client made an initial deposit, Chris and Jack Smithers induced the client to deposit additional funds by misrepresenting the account's performance and fabricating trades to indicate profits.

3. Client funds delivered to Chris Smithers were deposited into one of two checking accounts in either Chris Smithers' or PCI's name, where they were withdrawn as cash, used for personal expenses, sent to other clients as purported returns on their investment, or paid to Chris or Jack Smithers in the form of checks. Some of the funds were used to purchase futures contracts through registered FCMs under accounts in the name of PCI or individual clients.

4. Of the \$361,793.75 in client funds directly invested with Chris and Jack Smithers during the relevant time period, only \$198,000 was actually used to purchase futures contracts. Of the \$149,800.61 in client funds invested with PCI, only \$113,500 was actually traded. Aside from one month's profit of \$1,400, Chris and Jack Smithers realized consistent losses in both the PCI trading accounts and individual client accounts that they managed. Chris Smithers placed unauthorized trades and haphazardly traded accounts into deficits in a matter of hours, bringing account balances into the negative. All the while, Chris Smithers represented to clients that their accounts were trading profitably and even returned payments to some clients on their purported profits out of other clients' funds for the purpose of concealing trading losses and proposed defendants' misappropriation.

5. In a further effort to keep clients from learning the truth about their account balances, Chris and Jack Smithers lied to at least one investor about the client's ability to view his account performance on-line and blamed any mismanagement of funds on the FCMs. Chris and Jack Smithers used clients' losses as an opportunity to solicit additional funds from clients with hopes of making up prior losses. Finally, Chris and Jack Smithers failed to disclose to some

clients that (1) Chris Smithers previously had been sued by the Commission for solicitation fraud, resulting in a permanent injunction barring him from trading commodity futures contracts, and (2) over 90% of the clients of Chris Smithers' previous firm lost money.

6. Through the conduct described above, defendants Chris and Jack Smithers, as CTAs, engaged in solicitation fraud by making material omissions and misrepresentations to induce clients to purchase and sell commodity futures contracts, in violation of Sections 4o(1)(A) & (B) of the Commodity Exchange Act, as amended ("Act"), 7 U.S.C. § 6o(1)(A) & (B). PCI is vicariously liable for the fraudulent conduct of Chris Smithers pursuant to Section 2(a)(1)(B) of the Act because Chris Smithers was acting as an officer of PCI.

7. In addition, through the conduct described above, defendant Chris Smithers has engaged in the fraudulent misappropriation of client funds in violation of Sections 4o(1)(A) & (B) of the Act, 7 U.S.C. §§ 6o(1)(A) & (B).

8. Chris Smithers' solicitation of new clients and trading on behalf of clients was in violation of a Final Judgment and Order of Permanent Injunction and Equitable Relief entered by the U.S. District Court for the Southern District of Florida in Commodity Futures Trading Commission v. Matrix Trading Group, Inc., David Wedeen, and Christopher Smithers, Civil Action No. 00-8880-CIV-ZLOCH (S.D. Fla. Oct. 3, 2002) (the "2002 Order"), which permanently enjoined Chris Smithers from, among other things, engaging in any commodity-related activity, soliciting clients, and directing or causing to be executed trades or contracts on behalf of his clients. Chris Smithers' solicitation of new clients and trading on behalf of clients in violation of the 2002 Order also constitutes a violation of Section 6c of the Act, 7 U.S.C. § 13a-1 (2002).

9. Defendant Chris Smithers, while acting as a CTA, solicited, accepted and received funds from existing and prospective clients in his own name for the purpose of investing in commodity futures in violation of Section 4.30 of the Regulations, 17 C.F.R. § 4.30 (2004).

10. Accordingly, the Commodity Futures Trading Commission (the "Commission") brings this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1 (2002), to enjoin the Defendants' unlawful acts and practices and to compel their compliance with the Act. In addition, the Commission seeks disgorgement of the Defendants' ill-gotten gains, restitution to clients, civil monetary penalties and such other relief as this Court may deem necessary or appropriate.

II.

JURISDICTION AND VENUE

11. The Commodity Exchange Act, as amended, 7 U.S.C. § 1 et. seq. (the "Act"), prohibits fraud in connection with the trading of commodity futures contracts and options and establishes a comprehensive system for regulating the purchase and sale of such futures contracts and options. This Court has jurisdiction over this action pursuant to Section 6c of the Act, 7 U.S.C. § 13a-1, which authorizes the Commodity Futures Trading Commission to seek injunctive relief against any person whenever it shall appear that such person has engaged, is engaging, or is about to engage in any act or practice constituting a violation of any provision of the Act or any rule, regulation or order thereunder.

12. Venue properly lies with this Court pursuant to Section 6c(e) of the Act, 7 U.S.C. § 13a-1(e) (2002), in that defendants are found in, inhabit, or transact business in this district, and the acts and practices in violation of the Act have occurred, are occurring, or are about to occur within this district, among other places.

13. Unless restrained and enjoined by this Court, the Defendants are likely to continue to engage in the acts and practices alleged in this Complaint and similar acts and practices, as more fully described below.

III.

THE PARTIES

14. Plaintiff Commission is an independent federal regulatory agency charged with the administration and enforcement of the Act, 7 U.S.C. §§ 1 et seq., and the regulations promulgated thereunder.

15. Defendant Christopher Smithers resides in Florida. Chris Smithers was registered with the Commission as an Associated Person of nine different introducing brokers between 1994 and 2001. Chris Smithers has not been registered in any capacity since 2001 and is barred from registration by the 2002 Order.

16. Defendant Jack Smithers is believed to reside at 13 Lochwick Rd., Palm Beach Gardens, Florida 33418. Jack Smithers was registered with the Commission as an Associated Person of three different firms for part of 2000, part of 2001, and from 2003-2004. Jack Smithers is the father of Chris Smithers.

17. Defendant Prosperity Consultants, Inc. ("PCI") was incorporated in the State of Florida on June 10, 2002. Its principal place of business was located at 11380 Prosperity Farms

Rd., Palm Beach Gardens, Suite 110B, Florida. Incorporation documents identify Christopher Smithers as a director of the company. PCI was dissolved on September 19, 2003.

IV.

FACTUAL BACKGROUND

A. A Previous Court Order Prohibits Chris Smithers from Engaging In Any Commodity-Related Activity

18. On October 3, 2002, the United States District Court for the Southern District of Florida issued a Final Judgment and Order of Permanent Injunction and Equitable Relief against Chris Smithers and others. In the 2002 Order, Chris Smithers was found to have fraudulently solicited clients in violation of certain provisions of the Act and Regulations. Specifically, the court found that Chris Smithers committed fraud by making misleading statements in his telephone sales solicitations which: (a) misrepresented the likelihood of profiting from the purchase of commodity options; (b) failed to adequately disclose the risk inherent in the purchase of commodity options; and (c) misrepresented and overstated the performance record of Smithers' firm to clients. In addition, the court found that Smithers committed similar violations at a firm where he was previously employed.

19. The 2002 Order, among other things, permanently enjoined Chris Smithers from engaging in any commodity-related activity, including the solicitation of new clients, and from trading commodity futures and options on futures on behalf of any other person or entity.

B. Chris Smithers Has Continued To Solicit Clients, Trade Client Funds, and Engage In Commodity-Related Activity in Violation of the 2002 Order

Solicitation and Trading Activity at PCI

20. From June 2002 through July 2003, Defendant Chris Smithers solicited approximately fifteen clients to invest in commodity futures through PCI, a consulting firm that

Chris Smithers claimed to own with his father, Jack Smithers. During this time, Chris and Jack worked at PCI's principal office at 11380 Prosperity Farms Rd., Suite 110B, in Palm Beach Gardens, Florida. From June 2002 until October 2002, clients deposited \$149,800.61 with PCI for investing in commodity futures.

21. After October 2002, when the 2002 Order was issued, and through July 2003, Chris Smithers continued to solicit clients to invest in commodity futures through PCI. All the while, Jack Smithers participated with Chris Smithers in managing the client accounts and soliciting clients' funds. Chris and Jack Smithers held themselves out to clients as a team in which Jack provided much of the financial analysis to assist Chris Smithers with trading decisions and managing client accounts. Chris Smithers told at least one client that because he lost his license, Chris had to trade through Jack Smithers using an on-line account in Jack's name.

Additional Solicitation and Trading Activity by Chris and Jack Smithers

22. In addition, from May 2003 until March 2004, Defendant Chris Smithers solicited at least 22 clients to invest in commodity futures contracts by opening trading accounts that he would trade and manage personally. Chris Smithers solicited at least one client through the local chapter of Alcoholics Anonymous ("AA"). Chris Smithers earned the trust of this client by serving as his "sponsor" in the AA program.

23. During the May 2003 to March 2004 time period, Chris Smithers solicited at least \$191,793.75 in funds from the aforementioned 22 clients, two of whom were also clients of PCI, for the purpose of trading futures.

24. In addition to the \$191,793.75 solicited by Chris Smithers to be traded by him, at least one client was encouraged to open an account with an FCM under his own name that Chris

Smithers, along with Jack Smithers, would manage. Between May and December 2003, this client deposited \$170,000 in accounts under his name at two FCMs. Believing that Chris and Jack Smithers were trading on his behalf and in his best interest, the client shared his on-line passwords with them. Chris and Jack Smithers accessed, traded, and managed the account on-line. Chris Smithers occasionally called the FCM, pretending to be the client, to inquire about particular trades.

25. Chris Smithers charged one or more clients a 50% commission fee on profits only. In addition, Chris Smithers told one or more clients that for \$300 per week, Jack Smithers would serve as a financial consultant and assist in managing the client's account. One or more clients paid Jack Smithers a consulting fee of \$300 per week.

C. Chris Smithers Misappropriated Client Funds

26. During the June 2002 through July 2003 time period, Chris Smithers told most clients to send funds directly to PCI. Chris Smithers purported to use these funds for S&P e-mini and gold futures contracts. Once received, however, the funds were not used as promised. Instead, client funds were deposited into an ordinary checking account in the name of Prosperity Consultants, Inc. During this time period, PCI bank records indicate that clients deposited \$149,800.61 to invest in commodity futures. Of the funds deposited, \$113,500 were traded in PCI accounts at a registered FCM, but only between June 2002 and October 2002. The remaining funds were used for either business or personal expenses, meals, or issued in check payments to Chris Smithers, Jack Smithers or other individuals, or withdrawn as cash.

27. As a signatory on the PCI account, Chris Smithers was responsible for the management and movement of funds.

28. Trading records indicate that aside from the initial month's profit of \$1,426 in June 2002, PCI consistently lost money and eventually depleted its account in October 2002. Despite these losses, however, PCI wired \$48,083.02 in funds from its trading account to its bank account and distributed only \$9,170 to clients as supposed profits or returns on their investment.

29. During the May 2003 to March 2004 time period, clients were told to send funds directly to Chris Smithers. Like before, Chris Smithers purported to use these funds for the purchase and/or sale of S&P e-mini futures contracts. Once received, these funds were deposited into an ordinary joint checking account shared by Chris Smithers ("Smithers Account"). Of the \$191,793.75 in funds received from at least twenty-two clients, only \$28,000 was wired to a FCM account in the name of one client. The remaining funds were spent on personal items, meals, gambling, or directed to the defendants. Chris Smithers withdrew \$105,230 in cash and issued payments to Jack Smithers and Camille Smithers, Jack's wife. Some funds totaling \$40,975 were returned to clients.

30. As a signatory on the Smithers Account, Chris Smithers was responsible for the management and movement of funds.

D. The Defendants Fraudulently Solicited Clients To Purchase Futures Contracts

Misrepresentations and Material Omissions Regarding Past Trading Performance

31. In his solicitation of prospective clients both at PCI and individually, Chris Smithers informed clients that he was a trader by profession and that he had been very successful trading commodities in the past, both for himself and for others. Chris Smithers promised earnings of up to \$100,000 per year by investing in S&P e-mini and gold futures contracts and spoke of a trading system he had that guaranteed 80-90% returns.

32. Chris Smithers represented to clients that he managed the accounts along with Jack Smithers. Jack Smithers assisted Chris Smithers in managing client accounts, sometimes holding himself out as a consultant to clients. Jack Smithers routinely provided trading analysis and advice to Chris Smithers. Jack and Chris Smithers held themselves out to clients as a team committed to successfully managing client funds.

33. The representations set forth in paragraph 31 were false in that:

a. PCI's trading records indicate that aside from one month's profit of \$1,426, PCI consistently lost money during the time it traded between June and October 2002;

b. Of the \$191,793.75 directly invested with Chris Smithers between May 2003 until March 2004, only \$28,000 was traded and only for the benefit of one client, resulting in a total trading loss.

c. After October 2002, Chris Smithers was prohibited by the 2002 Order from trading commodities or soliciting clients to trade on their behalf because he was found to have committed fraud.

d. Prior to October 2002, Chris Smithers worked for a number of IBs, including Matrix Trading Group, where he was a Principal, Vice President, and Compliance Officer. During the period from July 1998 to July 2000, ninety-two percent of all Matrix accounts lost money, resulting in approximately \$3.2 million in client losses.

34. Chris Smithers knew the representations set forth in paragraph 31 were false or was reckless with regard to their truthfulness.

35. After October 2002, Chris Smithers did not disclose that he had been sued by the Commission for fraud, was subject to a permanent injunction prohibiting him from engaging in

any commodity related activity either for himself or on behalf of others pursuant to the 2002 Order, and most of his clients at Matrix Trading Group lost money.

36. To the contrary, Chris Smithers informed one or more clients that due to a “trading infraction imposed by the CFTC,” Chris Smithers was unable to open an account in his own name, but instructed the client instead to open an account in the client’s name that Chris and Jack Smithers could manage. Consequently, Chris Smithers knew or was reckless in failing to disclose to his clients the material information set forth in paragraph 35.

Misrepresentations Regarding Existence and Performance of Client Accounts

37. After clients initially provided funds, Chris and Jack Smithers, in an effort to conceal the fraud, told clients that their accounts were making money and fabricated trades to indicate trading activity that resulted in large profits. Although Chris Smithers told clients that they could only sustain minimal losses, Chris Smithers’ trading activity resulted in consistent losses both for PCI trading accounts and the one client account that he managed along with Jack Smithers.

38. In an effort to prevent clients from learning the truth about their account performance, Chris and Jack Smithers lied about the clients’ ability to access account activity online and blamed mismanagement of funds on the FCMs. Chris and Jack Smithers used trading losses as an opportunity to solicit additional funds by promising the clients they would make-up the loss.

39. The representations set forth in paragraphs 37 and 38 regarding the Smithers’ clients’ trading accounts were false in that:

- a. The Smithers’ clients were not making money. Instead any trading that did occur resulted in overall losses. Moreover, the account into which the client funds were

deposited was not a trading account, but an ordinary checking account at a Florida bank branch of Fidelity Federal Bank & Trust. Only a portion of client funds were sent to any bank, financial institution, or other facility that would indicate the existence of trading, and those limited funds were sent only on behalf of one client.

b. Fabricated trades are not actual trades, and as such cannot result in large profits. Thus, because the vast majority of client funds were not traded, but were spent on personal living expenses, meals, gambling, or withdrawn in cash, the fabricated trades concealed from the Smithers' clients the actual use of their funds. Some of the funds were also returned to clients as purported returns on investments or a partial withdrawal of funds, in a manner akin to a "ponzi scheme."

40. Chris and Jack Smithers knew that the statements set forth in paragraphs 37 and 38 were false or were reckless with regard to their truthfulness. Moreover, throughout the relevant time period, Chris and Jack Smithers failed to disclose to clients that their funds would not be used or managed as promised or that their funds would be used in furtherance of a fraudulent scheme.

41. For at least one trading account opened by a client in his own name, Chris Smithers accessed the account on-line without permission, and placed unauthorized trades. On at least one occasion, Chris Smithers brought an account balance into the negative in a matter of hours, despite representing a positive account performance to the client.

V.

VIOLATIONS OF THE COMMODITY EXCHANGE ACT

COUNT ONE

CTA FRAUD IN VIOLATION OF SECTION 4o OF THE ACT

42. The allegations set forth in paragraphs 1 through 41 are realleged and incorporated herein by reference.

43. Section 1a(6) of the Act, 7 U.S.C. § 1a(6), defines a CTA as any person who, *inter alia*, for compensation or profit, engages in the business of advising others, either directly or through publications, writings, or electronic media, as to the value of or the advisability of trading in any contract of sale of a commodity for future delivery made or to be made on or subject to the rules of a contract market.

44. Chris Smithers directly solicited clients to invest in commodity futures both individually and on behalf of PCI. He claimed to be a seasoned and successful trader and promised clients large profits and guaranteed returns in exchange for compensation and profit. Through the activity set forth in paragraphs 20-41, Chris Smithers acted as a CTA.

45. Jack Smithers directly solicited clients to invest in commodity futures on behalf of PCI, and provided trading analysis for clients solicited by Chris Smithers. Through the activity set forth in paragraphs 20-41, Jack Smithers acted as a CTA.

46. Section 4o(1) of the Act, 7 U.S.C. § 6o(1), makes it unlawful for a CTA, whether registered or not, by use of the mails or any means or instrumentality of interstate commerce, directly or indirectly – (A) to employ any device, scheme, or artifice to defraud any client or participant or prospective client or participant; or (B) to engage in any transaction, practice, or course of business which operates as a fraud or deceit upon any client or prospective client.

47. During the relevant time period, Defendants Chris Smithers and Jack Smithers made material misrepresentations and omitted material facts including, but not limited to, the misrepresentations and omissions set forth in Paragraphs 31 through 41, which they employed to defraud their clients and which also operated as a fraud or deceit upon clients, in violation of Section 4o(1)(A) and (B) of the Act.

48. During the relevant time period, the Defendant Chris Smithers engaged in a transaction, practice or course of business which operated as a fraud or deceit upon clients and prospective clients by misappropriating funds received from clients, in violation of Section 4o(1)(A) and (B) of the Act, 7 U.S.C. § 6o(1)(A) and (B). PCI is vicariously liable for Smithers' fraudulent conduct pursuant to Section 2(a)(1)(B) of the Act because Smithers was acting as an officer of PCI.

49. Each material misrepresentation or omission, each act of misappropriation, and each act that operated as a fraud during the relevant time period, including but not limited to those specifically alleged herein, is alleged as a separate and distinct violation of Section 4o(1) of the Act.

COUNT TWO

VIOLATION OF A PREVIOUS COURT ORDER IN VIOLATION OF SECTION 6c OF THE ACT

50. The allegations set forth in paragraphs 1 through 41 are realleged and incorporated herein by reference.

51. Chris Smithers' activities that constitute violations of the 2002 Order also violate Section 6c of the Act, 7 U.S.C. § 13a-1 (2002), in that he has engaged, is engaging, or is about to engage in any act or practice constituting a violation of an order issued under the Act and Regulations.

52. Each violation of the 2002 Order and Sections 6c of the Act, including but not limited to those specifically alleged herein, constitutes a separate and distinct violation of the Court's 2002 Order and of Section 6c of the Act.

COUNT THREE

IMPROPER RECEIPT OF CLIENT FUNDS
IN VIOLATION OF SECTION 4.30 OF THE REGULATIONS

53. The allegations set forth in paragraphs 1 through 41 are realleged and incorporated herein by reference.

54. During the relevant time period, Defendant Chris Smithers, as a CTA, solicited, accepted and received funds from existing and prospective clients in his own name for the purpose of investing in commodity futures in violation of Section 4.30 of the Regulations, 17 C.F.R. § 4.30.

VI.

RELIEF REQUESTED

Wherefore, the Commission respectfully requests that this Court, as authorized by Section 6c of the Act, 7 U.S.C. § 13a-1, and pursuant to its own equitable powers:

- A. Enter an order of permanent injunction prohibiting the Defendant Chris Smithers and any other person or entity associated with him, including any successor thereof, from:
1. engaging in conduct in violation of the 2002 Order, as well as Sections 4o(1) and 6c of the Act, 7 U.S.C. §§ 6o(1) and 13a-1 (2002), and Regulations 4.30 (2004);

2. engaging in any commodity-related activity, including soliciting new clients.
- B. Enter an order of permanent injunction prohibiting the Defendant Jack Smithers and any other person or entity associated with him, including any successor thereof, from:
1. engaging in conduct in violation of Sections 4o(1) of the Act, 7 U.S.C. §§ 6o(1) (2002);
 2. engaging in any commodity-related activity, including soliciting new clients.
- C. Enter an order of permanent injunction prohibiting the Defendant PCI and any other person or entity associated with them, including any successor thereof, from:
1. engaging in conduct in violation of Sections 4o(1) of the Act, 7 U.S.C. §§ 6o(1) (2002);
 2. engaging in any commodity-related activity, including soliciting new clients.
- D. Enter orders of permanent injunction restraining and enjoining Defendants and all persons insofar as they are acting in the capacity of their agents, servants, successors, assigns, and attorneys, and all persons insofar as they are acting in active concert or participation with them who receive actual notice of such order by personal service or otherwise, from directly or indirectly:
1. Destroying, mutilating, concealing, altering or disposing of any books and records, documents, correspondence, brochures, manuals, electronically

stored data, tape records or other property of Defendants, wherever located, including all such records concerning Defendants' business operations;

2. Refusing to permit authorized representatives of the Commission to inspect, when and as requested, any books and records, documents, correspondence, brochures, manuals, electronically stored data, tape records or other property of Defendants, wherever located, including all such records concerning Defendants' business operations; and
3. Withdrawing, transferring, removing, dissipating, concealing or disposing of, in any manner, any funds, assets, or other property, wherever situated, including but not limited to, all funds, personal property, money or securities held in safes, safety deposit boxes and all funds on deposit in any financial institution, bank or savings and loan account held by, under the control, or in the name of Defendants.

E. Enter an order directing Defendants and any successors thereof to disgorge, pursuant to such procedure as the Court may order, all benefits received including, but not limited to, salaries, commissions, loans, fees, revenues and trading profits derived, directly or indirectly, from acts or practices which constitute violations of the Act as described herein, including pre-judgment interest thereon from the date of such violations;

F. Enter an order directing Defendants to make full restitution to every client whose funds were received by them as a result of acts and practices which constituted

violations of the Act and Regulations, as described herein, and interest thereon from the date of such violations;

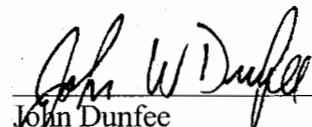
- G. Enter an order assessing a civil monetary penalty against each Defendant in the amount of not more than the higher of \$130,000 or triple the monetary gain to the defendant for each violation by Defendant of the Act or Regulations;
- H. Enter an order directing that Defendants make an accounting to the court of all their assets and liabilities, together with all funds they received from and paid to clients and other persons in connection with commodity futures or options transactions or purported commodity futures or options transactions, and all disbursements for any purpose whatsoever of funds received from commodity transactions, including salaries, commissions, interest, fees, loans and other disbursements of money and property of any kind;
- I. Enter an order requiring Defendants to pay costs and fees as permitted by 28 U.S.C. §§ 1920 and 2412(a)(2); and

J. Order such other and further remedial ancillary relief as the Court may deem appropriate.

Dated: 6/29/05

Respectfully submitted,

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