IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

In re:	
EXTRACTION OIL & GAS, INC., *et al.*,[1]	
Debtors.	
GRAND MESA PIPELINE, LLC, and the FEDERAL ENERGY REGULATORY COMMISSION,	Civil Action No. 20-cv-01411-CFC Civil Action No. 20-cv-01521-CFC
Appellants,	Civil Action No. 20-cv-01412-CFC Civil Action No. 20-cv-01506-CFC
v.	Civil Action No. 20-cv-01564-CFC
EXTRACTION OIL & GAS, INC.	Bankruptcy Case No. 20-11548 (CSS) Bankruptcy BAP No. 20-43 Bankruptcy BAP No. 20-44 Bankruptcy BAP No. 20-52 Bankruptcy BAP No. 20-53 Bankruptcy BAP No. 20-56
Appellee.	

APPELLEE EXTRACTION OIL & GAS, INC.'S RESPONSE IN OPPOSITION TO APPELLANTS GRAND MESA PIPELINE, LLC AND THE FEDERAL ENERGY REGULATORY COMMISSION'S JOINT MOTION FOR CERTIFICATION OF A DIRECT APPEAL OF BANKRUPTCY COURT ORDERS TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

Pursuant to Federal Rules of Bankruptcy Procedure 8006(f)(3) and 9006(a)(1)(C), Appellee Extraction Oil & Gas, Inc. (Extraction) respectfully submits

[1] The Debtors in these chapter 11 cases, along with the last four digits of each Debtor's federal tax identification number, are: Extraction Oil & Gas, Inc. (3923); 7N, LLC (4912); 8 North, LLC (0904); Axis Exploration, LLC (8170); Extraction Finance Corp. (7117); Mountaintop Minerals, LLC (7256); Northwest Corridor Holdings, LLC (9353); Table Mountain Resources, LLC (5070); XOG Services, LLC (6915); and XTR Midstream, LLC (5624). The location of the Debtors' principal place of business is 370 17th Street, Suite 5300, Denver, Colorado 80202.

this response in opposition to the joint motion for certification of a direct appeal to the Third Circuit (Motion) filed by Appellants Grand Mesa Pipeline, LLC (Grand Mesa) and the Federal Energy Regulatory Commission (FERC) (collectively, Appellants). *See* 20-cv-01411 Dkt.21; 20-cv-01412 Dkt.21; 20-cv-01506 Dkt.11; 20-cv-01521 Dkt.20; 20-cv-01564 Dkt.13. In that Motion, Appellants request immediate Third Circuit review of five appeals (two from Grand Mesa and three from FERC) involving the same two Bankruptcy Court orders. That Motion and those appeals, however, suffer from numerous defects and vehicle problems, rendering a direct appeal inappropriate.

To begin, only a few days after Appellants filed their Motion, Grand Mesa and Extraction finalized a settlement agreement, which the Bankruptcy Court approved on December 21, 2020. That settlement agreement obviates Grand Mesa's appeals.[2] Although it is conceivable that FERC may attempt to prosecute all five appeals addressed in the Motion in Grand Mesa's absence, there are serious questions as to whether FERC would have standing to do so—an issue that the Bankruptcy Court never considered. As a result, if this Court were to grant the Motion, the Third Circuit would first have to resolve an issue that the Bankruptcy Court did not so much as mention in the orders certified for a direct appeal. If the

[2] Extraction anticipates that Grand Mesa will soon terminate its appeals pending in this Court.

Third Circuit is to review a "judgment, order, or decree," 28 U.S.C. §158(d)(2), on an accelerated basis, as the Motion requests, it is preferable to provide a judgment, order, or decree that actually examines potentially dispositive questions.

Beyond that obvious flaw, the Motion fails to establish that a direct appeal is appropriate. Among other things, (1) Appellants base their Motion on bankruptcy rules that are no longer even in force; (2) it is not even clear which question(s) Appellants would like the Third Circuit to answer; (3) at least one of the nearly ten potential questions appears to implicate another appeal that Grand Mesa filed in this Court, but of which Appellants do *not* seek immediate Third Circuit review (and, indeed, of which they never even acknowledge the existence); (4) Appellants never mention that another party has also filed two appeals raising the same ultimate issue as their own appeals, but that other party is not seeking (and evidently opposes) immediate Third Circuit review; and (5) one of the two orders that Appellants want the Third Circuit to review does not even include a formal written opinion addressing all relevant issues.

In short, Appellants' request for certification of a direct appeal faces roadblocks at every turn. This Court should accordingly deny the Motion and resolve these appeals (and other pending appeals arising from Extraction's bankruptcy) in the ordinary course and in a single decision. Then, following this Court's review, a party may seek review in the Third Circuit to the extent necessary.

BACKGROUND

1. Extraction is an independent exploration-and-production company that is focused on the acquisition, development, and production of oil, natural gas, and natural gas liquids reserves in the Rocky Mountain region. *See* D.I.1023 at 5. In recent years, Extraction faced significant challenges from volatility in the commodities markets—volatility that the COVID-19 pandemic and tensions between OPEC and Russia only exacerbated in 2020. *See id.* Accordingly, on June 14, 2020, Extraction voluntarily filed for Chapter 11 bankruptcy. *See* D.I.1.

2. Pursuant to 11 U.S.C. §365, Extraction thereafter moved to "reject" certain executory contracts—*i.e.*, contracts under which "performance" remains "due to some extent on both sides." *NLRB v. Bildisco & Bildisco*, 465 U.S. 513, 522 n.6 (1984). As relevant here, on June 15, 2020, Extraction moved to reject two "transportation service agreements" (TSAs) between it and Grand Mesa, which addressed the shipment of crude petroleum on Grand Mesa pipelines. *See* D.I.14. Likewise, on August 11, 2020, Extraction moved to reject two similar TSAs involving two other parties: Platte River Midstream, LLC and DJ South Gathering, LLC (Platte River/DJ South). *See* D.I.412.

3. Grand Mesa, Platte River/DJ South, and FERC opposed these rejection efforts. In particular, Grand Mesa filed a motion arguing that, before rejection could proceed, Extraction first had to obtain approval from FERC. Grand Mesa's motion

contended that Chapter 11's automatic-stay provision, *see* 11 U.S.C. §362, did not prohibit such a proceeding before FERC and that, regardless, good cause existed to lift the automatic stay. *See* D.I.364. FERC filed a five-page statement in support of Grand Mesa's lift-stay motion, *see* D.I.653, and Platte River/DJ South filed a similar statement, *see* D.I.644.

4. Aside from Grand Mesa's lift-stay motion, Grand Mesa and Platte River/DJ South also filed separate objections to Extraction's rejection motions (and Platte River/DJ South also filed a joinder to Grand Mesa's objection). *See* D.I.363; D.I.482; D.I.655. FERC did not submit any filings in support of those objections.

5. In their objections, Grand Mesa and Platte River/DJ South asserted, among other things, that Extraction could not lawfully reject the TSAs because those contracts contained covenants running with the land under Colorado law—an issue, they insisted, that required adversary proceedings in the Bankruptcy Court to resolve. *See, e.g.*, D.I.363 at 5-6, 31-38; D.I.482 at 2; D.I.655 at 2-3, 20-21. Consistent with those demands, Extraction initiated adversary proceedings and sought summary judgment on the claim that the TSAs did not contain covenants running with the land under Colorado law. *See Extraction Oil & Gas, Inc. v. Grand Mesa Pipeline, LLC*, Adv. Pro. No. 20-50816; *Extraction Oil & Gas, Inc. v. Platte River Midstream, LLC*, Adv. Pro. No. 20-50833.

6. The Bankruptcy Court ruled in Extraction's favor on all of these rejection-related issues. First, in a bench ruling that it subsequently clarified in part with a letter ruling, the court denied the lift-stay motion, explaining, among other things, that "[i]t would be a violation of [the bankruptcy courts'] exclusive jurisdiction over the rejection of executory contracts for FERC to purport to decide the [rejection] issue." D.I.770 at 2; *see also* D.I.781. Next, the court granted summary judgment to Extraction in the adversary proceedings, concluding—in two substantially similar decisions—that neither the Grand Mesa nor the Platte River/DJ South TSAs contained covenants running with the land that impeded rejection. *See* Adv. Pro. No. 20-50816 D.I.45; Adv. Pro. No. 20-50833 D.I.54. Finally, the court gave full authorization for Extraction to reject both the Grand Mesa and Platte River/DJ South TSAs, reasoning, among other things, that §365 of the Bankruptcy Code compelled that result "even if the TSAs contain covenants running with the land, which they do not," and also concluding that Extraction had satisfied the necessary standards for rejecting the TSAs. D.I.942 at 19.

7. In eight separate notices of appeal, the parties appealed from these rejection-related rulings.[3] First, Grand Mesa and FERC appealed from the

[3] There are two other appeals. Elevation Midstream, LLC filed one of them, and that appeal also arises from an adversary proceeding. *See* No. 20-cv-01456. Extraction, however, is in the midst of reaching a settlement agreement that would result in the dismissal of that appeal; accordingly, that appeal is not discussed here. Platte River/DJ South filed the other appeal only last week. *See* D.I.1470. Extraction is still considering whether to seek consolidation of that new appeal with the eight appeals discussed here and reserves all rights to seek such relief.

Bankruptcy Court's ruling denying Grand Mesa's lift-stay motion, *see* D.I.864; D.I.866, giving rise to Case Nos. 20-cv-01411 and 20-cv-01412 in this Court. Second, Grand Mesa and Platte River/DJ South appealed from the Bankruptcy Court's adversary-proceeding rulings, *see* Adv. Pro. No. 20-50816 D.I.53; Adv. Pro. No. 20-50833 D.I.64, giving rise to Case Nos. 20-cv-01458 and 20-cv-01457 in this Court. Finally, Grand Mesa, Platte River/DJ South, and FERC appealed from the Bankruptcy Court's contract-rejection rulings, *see* D.I.1016; D.I.1048; D.I.1084; D.I.1138, giving rise to Case Nos. 20-cv-01521, 20-cv-01532, 20-cv-01506, and 20-cv-01564 in this Court.

8. On December 7, 2020, Grand Mesa and FERC (without providing any advance notice to Extraction) filed a motion to consolidate their five appeals—namely, their two appeals of the lift-stay rulings (20-cv-01411 and 20-cv-01412) and their three appeals (one by Grand Mesa and two by FERC) of the contract-rejection rulings (20-cv-01506, 20-cv-01521, and 20-cv-01564). That consolidation motion did not acknowledge Grand Mesa's adversary-proceeding appeal or Platte River/DJ South's adversary-proceeding or contract-rejection appeals.

9. On December 11, 2020, Extraction filed both a response to Appellants' consolidation motion and a cross-motion regarding consolidation, which argued that the Court should consolidate all eight rejection-related appeals arising from Extraction's bankruptcy, not merely a subset of them. *See* 20-cv-01411 Dkt.22; 20-

cv-01412 Dkt.14; 20-cv-01458 Dkt.12; 20-cv-01506 Dkt.12; 20-cv-01521 Dkt.21; and 20-cv-01564; *see also* 20-cv-01457 Dkt.24; 20-cv-01532 Dkt.29.

10. On December 11, 2020, Appellants—but, again, not Platte River/DJ South—filed the instant Motion, which seeks immediate Third Circuit review of their lift-stay and contract-rejection appeals. In that Motion, which relies on "Federal Rule of Bankruptcy Procedure 8001(f)" as authority, Appellants assert that the Third Circuit should answer "several related questions." Mot.1-2, 10. Those questions "includ[e]," but apparently are not necessarily limited to, "whether the Bankruptcy Court erred by precluding FERC from exercising its statutory mandate in respect of the impact of the Debtors' proposed rejection of the TSAs on the public interest, consistent with the United States Court of Appeals for the Sixth Circuit's decision in *In re FirstEnergy Solutions Corp. v. FERC*, 945 F.3d 431 (6th Cir. 2019)." Mot.10. They also include another question that contains two subsidiary questions: "whether the bankruptcy court applied the incorrect standard in granting the motion to reject: (i) whether the bankruptcy court erred by applying the business judgment standard in granting the motion to reject; and (ii) whether the bankruptcy court erred in determining the 'heightened scrutiny,' public interest standard announced in *In re Mirant Corp*., 378 F.3d 511, 524 (5th Cir. 2004) and its progeny is not 'warranted' in this case." Mot.11. And they also include at least six other "related[]" questions, one of which—styled as question "(e)"—is "whether the

Bankruptcy Court erred in determining the TSAs do not contain covenants running with the land, and ruling that, even if they did, such covenants are contractual in nature and may be rejected." *Id.* at 11 n.5.

11. Approximately one week after Appellants filed the Motion, on December 19, 2020, Extraction and Grand Mesa finalized a settlement agreement that obviates Grand Mesa's appeals. *See* D.I.1427. The Bankruptcy Court approved that settlement agreement in an order dated December 21, 2020. D.I.1464.

ARGUMENT

12. As a general matter in bankruptcy appeals, a district court reviews a bankruptcy court's orders, judgments, or decrees before a court of appeals. *See* 28 U.S.C. §158(a), (d)(1). Under 28 U.S.C. §158(d)(2), Congress has authorized parties to seek direct review to a court of appeals by (as relevant here) first obtaining certification from a bankruptcy court or district court, and then—if certification is granted—petitioning the court of appeals for permission to proceed with the direct appeal. Here, the many complications inherent in Appellants' request for immediate Third Circuit review render its Motion exceptionally flawed. Accordingly, the Court should deny the Motion and instead adjudicate these appeals (and the other pending appeals arising from Extraction's bankruptcy) in the first instance.

13. The first and most obvious complication with Appellants' Motion is that, in the intervening days since Appellants filed it, Grand Mesa and Extraction

finalized a settlement agreement, which the Bankruptcy Court has now approved. *See* D.I.1464. In light of that settlement, and the imminent dismissal of Grand Mesa's appeals in accordance with the settlement, Grand Mesa no longer has any basis to pursue any appeals in any court, let alone a basis to obtain immediate Third Circuit review.

14. Although FERC may conceivably attempt to litigate the appeals addressed in the Motion in Grand Mesa's absence, it is debatable whether it would have standing to do so, to say the least. After all, the lift-stay appeals addressed in the Motion concern the Bankruptcy Court's denial of *Grand Mesa*'s *lift-stay motion*, and the contract-rejection appeals addressed in the Motion concern the Bankruptcy Court's authorization for Extraction to reject *Grand Mesa's TSAs over Grand Mesa's objection*.[4] In other words, whatever "injury" FERC believes it has suffered here has always flowed from Grand Mesa's asserted injury, and Grand Mesa will no longer assert any injury moving forward. That being so, if this Court were to certify a direct appeal, FERC alone would prosecute it, and the Third Circuit would have to resolve a threshold question about FERC's standing that the Bankruptcy Court never

[4] The Bankruptcy Court's contract-rejection order also authorized Extraction to reject the Platte River/DJ South TSAs. But Platte River/DJ South does not support immediate review before the Third Circuit. *See* ¶20, *infra*.

even considered. The far better course is for this Court to address that issue in the first instance.[5]

15. Even setting aside the complications engendered by the settlement agreement, however, the Motion fails to demonstrate that immediate Third Circuit review is appropriate.

16. The Motion starts off on the wrong foot in claiming that "the Court has authority to certify a direct appeal in this matter" pursuant to "Federal Rule of Bankruptcy Procedure 8001(f)." Mot.1, 11-12. Rule 8001(f), however, does not exist—and has not for six years. Instead, a request for certification of direct appeal is actually governed by Rule 8006. *See* Fed. R. Civ. P. 8006. And under Rule 8006, it is no longer true that a "district court has the authority to certify an appeal so long as the request is made within 60 days of entry of the judgment and the certification is filed after the Clerk of the Bankruptcy Court transmits the completed record for appeal to the District Court," as the Motion asserts. Mot.12. To the contrary, Rule 8006 "modifie[d] the former rule" and no longer links a district court's certification authority to "docketing" in the district court. Fed. R. Bankr. P. 8006 advisory

[5] The Motion repeatedly references an "analogous, ongoing case" in the Fifth Circuit. Mot.3; *see also id.* at 4, 9, 15. Significantly, however, in that ongoing case, FERC sought immediate Fifth Circuit review of a bankruptcy court's contract-rejection ruling in the *absence* of the primary party that opposed rejection (that is, in the absence of the parties like Grand Mesa and Platte River/DJ South here), and after that party raised concerns to the Fifth Circuit regarding FERC's standing, the Fifth Circuit *refused to authorize a direct appeal*, leaving the district court to resolve the appeal in the first instance. *See FERC v. Ultra Res., Inc.*, No. 20-90045 (5th Cir. Dec. 9, 2020); *see also* Proposed Opp. to Pet'n for Direct Appeal at 2-3, 9-10, *FERC v. Ultra Res., Inc.*, No. 20-90045 (5th Cir. filed Nov. 23, 2020); Reply at 1-2, 13, *FERC v. Ultra Res., Inc.*, No. 20-90045 (5th Cir. filed Dec. 8, 2020).

committee's note to 2014 amendment. Thus, notwithstanding that Appellants, as movants, bear the burden, the Motion fails to establish that this Court has the authority to provide the relief that it seeks. And having failed to establish that authority in their Motion, Appellants may not rehabilitate that flaw by raising new arguments in their reply. *See, e.g.*, *United States v. Heatherly*, No. 19-2424, 2020 WL 7295052, at *11 (3d Cir. Dec. 11, 2020) (holding that an appellant "forfeit[s]" "arguments" "[b]y not developing [them] properly" in an "opening brief"); *Avaya Inc., RP v. Telecom Labs, Inc.*, 838 F.3d 354, 418 (3d Cir. 2016) ("[T]he black-letter rule is that '[w]e will not revive a forfeited argument simply because' an appellant finally develops 'it in its reply brief.'" (first alteration added)).

17. Nor is that Appellants' only misstep with respect to the federal Bankruptcy Rules. Rule 8006 further requires any request for certification of a direct appeal to identify the "question presented" "itself"—that is, the question that the court of appeals will answer. Fed. R. Bankr. P. 8006(f)(2)(A)-(B). The questions presented in the Motion, however, are unclear at best, mystifying at worst. The first question appears to ask whether the Bankruptcy Court erred "consistent with" a Sixth Circuit decision. *See* ¶10, *supra*. The second question, which itself contains two subsidiary questions, appears to involve a contract-rejection issue—whether the Bankruptcy Court should have applied a more stringent standard than the "business judgment" standard—that this Court (when it resolved the emergency motion for

stay pending appeal of the contract-rejection order filed by Platte River/DJ South) has already concluded is immaterial given that the Bankruptcy Court applied a more stringent standard anyway. *See* 20-cv-01532 Dkt.25 at 10 ("Appellants did not acknowledge that the Bankruptcy Court did consider the higher standard, but nonetheless found that Extraction still prevailed."). The Motion then identifies six other "related[]" questions in a footnote. *See* ¶10, *supra*. And it is not even clear whether this list of approximately ten related questions is exhaustive or illustrative. *See* Mot.10 ("Appellants both seek to raise several related questions for appellate review, *including* …." (emphasis added)).

18. Appellants' certification request nebulously raising some ten questions for review stands in stark contrast with the successful certification request that Appellants repeatedly reference (and is a critical basis of their Motion, Mot.4, 15, 18), which presented a single, discrete, and intelligible question for review. *See, e.g.*, *Rockies Express Pipeline LLC v. Ultra Res., Inc.*, Nos. 20-cv-2306, 20-cv-2847, 20-cv-3043 (S.D. Tex. Oct. 20, 2020), ECF No. 47 at 12 ("Whether bankruptcy courts may authorize rejection of a FERC-jurisdictional contract under the Bankruptcy Code without a separate proceeding for FERC to review that rejection, determine whether abrogation or modification of the contract is warranted, or issue findings regarding FERC's view of the public interest, such that the bankruptcy court here properly allowed Ultra to reject the TSA."). Appellants' failure to identify a

discrete question for review by the Third Circuit also reinforces that this Court should decide their appeals in the first instance, which would help crystallize the appellate issues for the Third Circuit, rather than leaving it for the Third Circuit to sort out.

19. Making matters worse, the Motion also fails to mention that Grand Mesa has filed *another* appeal in this Court (the adversary-proceeding appeal) that involves the same ultimate issue (the propriety of contract rejection) as the five appeals discussed in the Motion. That omission is even more perplexing considering that at least one of the many "related" questions presented in the Motion squarely implicates that adversary-proceeding appeal. *See* Mot.11 n.5 (identifying one of the "related[]" questions as "whether the Bankruptcy Court erred in determining the TSAs do not contain covenants running with the land, and ruling that, even if they did, such covenants are contractual in nature and may be rejected"). Although the Bankruptcy Court's contract-rejection order discusses the covenants issue, too, it repeatedly cross-references the adversary-proceeding order. *See, e.g.*, D.I.942 at 12 ("The Rejection Counterparties [including Grand Mesa] contend that the TSAs contain 'covenants that run with the land' and, thus, cannot be rejected. The Court has previously held on summary judgment in two adversary proceedings brought by [Extraction] against the Rejection Counterparties (at their insistence) that the TSA's do not contain covenants that run with the land." (footnote omitted)); *see also*

D.I.942 at 12 n.32, 18 n.57. The Motion never explains how the Third Circuit could conduct the kind of plenary review of the contract-rejection order that it requests, *see* Mot.19, when that order adopts by reference a separate order over which the Third Circuit would lack jurisdiction.

20. There is still more. The Motion not only pretends as though Grand Mesa's adversary appeal does not exist; it does the same for the two appeals filed by Platte River/DJ South, which also address the same ultimate issue as the five appeals referenced in the Motion. As explained, one of the Platte River/DJ South appeals is from an adversary-proceeding order that is largely identical to the order in the adversary proceeding between Grand Mesa and Extraction. And the other Platte River/DJ South appeal is from the contract-rejection order—the *same* contract-rejection order that Appellants want this Court to certify for a direct appeal (and an order that repeatedly cross-references both the Platte River/DJ South and Grand Mesa adversary-appeal orders, *see* D.I.942 at 12 & n.32, 18 n.57). Significantly, however, Platte River/DJ South evidently does *not* support certification. Hence, if this Court were to certify a direct appeal, a party directly affected by the Bankruptcy Court's contract-rejection order—in fact, given the settlement agreement between Grand Mesa and Extraction, the *only* remaining party directed affected by the contract-rejection order—would not even have a seat at the Third Circuit table. That dynamic has nothing to recommend it.

21. Yet another vehicle problem arises from the nature of the lift-stay order that Appellants seek to appeal directly to the Third Circuit. As the Motion itself recounts, "[o]n October 2, 2020, the Bankruptcy Court ruled from the bench, denying Grand Mesa's motion, and 'clarif[ied]' the ruling in a letter dated October 4, 2020." Mot.9. Put another way, one of the two orders that Appellants want the Third Circuit to immediately review does not even involve a formal, written opinion that addresses all relevant issues. Before the Third Circuit addresses the lift-stay issue, this Court should present it with a single written decision.

22. As the foregoing illustrates, Appellants' request to certify a direct appeal to the Third Circuit of their numerous appeals suffers from all manner of procedural defects and vehicle problems.[6] The Court should therefore deny that request and instead resolve all rejection-related appeals arising from Extraction's bankruptcy in a single decision, after which the parties may seek review in the Third Circuit to the extent necessary.

[*Remainder of page intentionally left blank*]

[6] To be clear, procedural defects and vehicle problems are just the beginning of the flaws in Appellants' request. For instance, Appellants assert that certification is warranted under 28 U.S.C. §158(d)(2)(A)(ii) to resolve "conflicting decisions." *See* Mot.16-18. For purposes of that statute, however, "conflicting decisions" refers to conflicting bankruptcy-court decisions within the same circuit, conflicting district-court decisions within the same circuit, or conflicting decisions of two panels within the same circuit. *See* 1 *Collier on Bankruptcy* ¶5.06[4][c] (16th ed. 2020); *see also, e.g.*, *In re Aerogroup Int'l, Inc.*, No. BR 17-11962 (CSS), 2020 WL 757892, at *4 (D. Del. Feb. 14, 2020). The Motion never identifies such a conflict.

Dated: December 28, 2020
Wilmington, Delaware

/s/ *Richard W. Riley*

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Certificate of Service

I, Richard W. Riley, certify that on December 28, 2020, I caused an electronic filed copy of the (i) foregoing document using the Court's CM/ECF which reflects that an electronic notification of filing was served on all registered users of the CM/ECF System that have requested such notification; and (ii) a copy to be served overnight delivery on the party listed below.

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