UNITED STATES BANKRUPTCY COURT
DISTRICT OF DELAWARE

In re: ADVANTA CORP., *et al.*, Debtors.	Chapter 11 Case No. 09-13931 (KJC) (Jointly Administered) **Hearing Date: February 10, 2011 at 1:00 p.m.** **Objection Deadline: February 1, 2011 at 5:00 p.m.** **Re: Doc. Nos. 1037 and 1042**

OBJECTION OF LEAD PLAINTIFF, WESTERN PENNSYLVANIA ELECTRICAL EMPLOYEES PENSION FUND, TO DEBTORS' JOINT PLAN UNDER CHAPTER 11 OF THE BANKRUPTCY CODE

Lead Plaintiff, Western Pennsylvania Electrical Employees Pension Fund ("Western Pennsylvania" or "Lead Plaintiff"), in the securities class action entitled *Steamfitters Local 449 Pension Fund, Individually and On Behalf of All Others Similarly Situated v. Dennis Alter, et al.*, Civil Action No. 2:09-cv-4730-CMR (the "Securities Litigation"), filed in the United States District Court for the Eastern District of Pennsylvania (the "District Court"), on behalf of all persons (the "Securities Class") who purchased or otherwise acquired the Class A and/or Class B common stock of Advanta Corp. ("Advanta" or the "Debtor") between October 16, 2006 and January 30, 2008, inclusive (the "Class Period"), hereby submits this objection (the "Objection") to the Debtors' Joint Plan under Chapter 11 of the Bankruptcy Code, dated December 17, 2010 [Doc. No. 1037] (the "Plan")[1], and states the following:

BACKGROUND

1. On October 14, 2009, Steamfitters Local 449 Pension Fund ("Steamfitters") filed a putative class action complaint (the "Initial Complaint") in the District Court against Advanta and certain officers and directors of Advanta (the "Initial Non-Debtor Defendants").[2]

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[1] Capitalized terms shall have the meanings ascribed to them in the Plan, unless defined otherwise herein.

[2] Thereafter, three (3) additional class actions premised upon violations of ERISA (collectively, the "ERISA Litigation") were filed against Advanta and some of the Non-Debtor Defendants. In January 2010, those Non-Debtor Defendants in the Securities Litigation and the ERISA Litigation moved in the District Court to consolidate the Securities Litigation and the ERISA Litigation. On March 19, 2010, the consolidation motion was withdrawn.

2. On November 8, 2009 and November 20, 2009 (the "Petition Dates"), the Debtor and certain affiliated entities (collectively, the "Debtors") filed voluntary petitions for relief under Chapter 11 of the United States Bankruptcy Code (the "Bankruptcy Case") in the United States Bankruptcy Court for the District of Delaware.

3. On December 14, 2009, Western Pennsylvania filed a Motion seeking to be appointed Lead Plaintiff in the Securities Litigation.

4. On December 23, 2009, by virtue of the automatic stay, and in response to the District Court's Order to Show Cause Why Case Should Not Be Stayed, Steamfitters and Western Pennsylvania filed a Notice of Voluntary Dismissal dismissing the Securities Litigation as against Advanta without prejudice. The Securities Litigation is proceeding as against the Non-Debtor Defendants.

5. On May 11, 2010, Western Pennsylvania, as proposed Lead Plaintiff, filed a class proof of claim in the Bankruptcy Case in an amount not yet determined (the "Class Claim").

6. On June 4, 2010, the District Court entered an Order appointing Western Pennsylvania as Lead Plaintiff in the Securities Litigation.

7. On August 3, 2010, Western Pennsylvania, as Lead Plaintiff, filed an Amended Complaint for Violation of the Federal Securities Laws (the "Amended Complaint") in the Securities Litigation, alleging violations of §§10(b), 20(a) and 20A of the Securities Exchange Act of 1934 and Rule 10b-5 promulgated thereunder (the "Securities Laws"), against certain current and former officers and directors of Advanta (the "Non-Debtor Defendants"), including the Initial Non-Debtor Defendants named in the Initial Complaint. Motions to dismiss are currently pending in the District Court.

8. On November 2, 2010, the Debtors filed the initial Plan [Doc. No. 895] and Disclosure Statement [Doc. No. 896], together with the Motion for an Order Approving the Disclosure Statement and other relief [Doc. No. 899].

9. On December 7, 2010, Lead Plaintiff filed its Objection to the Disclosure Statement (the "Disclosure Statement Objection") [Doc. No. 979]. On December 13, 2010,

Debtors filed their Omnibus Reply [Doc. No. 1005] to various objections to the Disclosure Statement.

10. On December 17, 2010, the Court entered an Order, *inter alia*, approving the Disclosure Statement and scheduling a hearing on confirmation of the Plan for February 10, 2011 [Doc. No. 1042]. Certain of the objections set forth in Lead Plaintiff's Disclosure Statement Objection were resolved through agreed upon modifications to the Plan and the Disclosure Statement and agreements between the parties. Other objections were reserved for confirmation.

OBJECTION

11. Lead Plaintiff objects to confirmation of the Plan on the following grounds:

(a) the proposed protocol established in the AC Trust Agreement for the preservation and/or destruction of the Debtors' books, records or documents transferred to the AC Trust contains an inconsistency, fails to provide for adequate notice of the proposed destruction or disposal of the books and records and fails to address the preservation and/or disposal of those books and records, if any, retained by Reorganized Advanta or transferred to a party other than the AC Trust;

(b) the Plan should preserve the rights of Lead Plaintiff and the Securities Class to proceed with their claims against the Debtors to the extent of available insurance coverage, irrespective of any injunction, discharge or distribution under the Plan;

(c) notwithstanding modifications to the Plan, the Plan Injunction and Stay provision is ambiguous and improper, and must affirmatively exclude any claims of Lead Plaintiff and the Securities Class against the current Non-Debtor Defendants and any other non-Debtors.

12. Lead Plaintiff believes that in order for the Plan to be confirmable under the Bankruptcy Code, the Plan must be modified to satisfactorily address these objections.

A. The Plan Fails to Provide an Appropriate Mechanism for the Preservation or Destruction of Documents, Including Notice.

13. The Plan provides for the establishment of various Liquidating Trusts pursuant to the respective Liquidating Trust Agreements (the "LTAs"). Plan §5.4. Copies of the LTAs are to be furnished as part of the Plan Supplement (Plan, §1.145) at least ten (10) days prior to the deadline for voting on confirmation of the Plan. *See* Plan, §12.7. On January 22, 2011, the Debtors filed the Plan Supplement [Doc. No. 1121] which included, *inter alia*, the AC Trust Agreement. In response to the Disclosure Statement Objection addressing the preservation of documents, the Debtors stated (in their Omnibus Reply) that the Trust Agreements, to be filed as part of the Plan Supplement, will provide a mechanism for the Trustee's disposition of documents. While the AC Trust Agreement addresses the preservation, destruction or abandonment of assets of the Debtors, it fails to require notice of any proposed document destruction or abandonment, it fails to address at all documents transferred to other entities and it contains internal inconsistencies.

14. The Liquidating Trust Assets (Plan §1.13) are comprised of, *inter alia*, the AC Trust Assets, which encompasses all of Advanta's rights and assets, including Causes of Action and Books and Privileges relating to the Assets, Plan, §1.11. The Plan provides for the Debtors to transfer those Assets to the Liquidating Trusts to be administered by the Liquidation Trustee. Plan, §5.4(c) and (g)). Title to all Assets vests in the Liquidating Trusts. Plan, §5.4(c). Books and Privileges include the Debtor's books, records, all documents and communications of any kind, whether physical or electronic and all privileges attendant thereto. *See* Plan, §1.88.

15. Although the Debtors are compelled to maintain and preserve their Assets during the chapter 11 proceeding, any proposed document preservation protocol must provide for the preservation of the Debtors' Books and Privileges; *i.e.*, books, records and other documents, in any format (*e.g.*, electronic or hard-copy) (collectively, the "Documents") by Reorganized

Advanta, the applicable Trust and Trustee or such other transferee[3] post-confirmation. The document preservation protocol must prevent the destruction or abandonment of the Documents post-confirmation, especially because the Documents likely include critical information relevant to the Securities Litigation, as well as to the Class Claim.

16. Indeed, whether the Documents are retained by Reorganized Advanta or transferred to the Liquidating Trusts or to some other estate representative or third party, the Documents must be preserved or maintained so as to be available to parties in interest, especially if the Documents are not available elsewhere. To do otherwise prejudices the rights of Lead Plaintiff, members of the Securities Class and other parties in interest. At the very least, some mechanism for obtaining Court approval and providing notice and an opportunity to be heard by a court of competent jurisdiction must be established before any such Documents are abandoned, destroyed or rendered otherwise unavailable. Indeed, as a party to the Securities Litigation pre-petition, the Debtor is bound by the Private Securities Litigation Reform Act of 1995 to preserve documents. *See* 15 U.S.C. §78u-4(b)(3(C).

17. It is imperative that Reorganized Advanta, the Liquidating Trusts, the Liquidating Trustees or any third party transferee retain and preserve the Documents that may be potentially relevant to the claims asserted in the Securities Litigation, at least until such time as Lead Plaintiff is able to conduct and complete discovery, and that Lead Plaintiff be given reasonable notice of any proposed destruction or abandonment of the Documents and an opportunity to be heard before any such proposed destruction or abandonment is approved by court order.

18. Pursuant to the AC Trust Agreement, the AC Trustee shall not dispose of those books and records transferred to the Trust that are "reasonably likely to pertain to pending litigation in which the Debtors or their officers or directors are a party without further order of the Bankruptcy Court." AC Trust Agreement, §3.2(a)(x) and §3.5.

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[3] To the extent Documents are transferred to the Liquidating Trusts or other Entities, the Liquidating Trust, the Liquidating Trustees and the transferee must also be bound by any document preservation protocol approved by the Bankruptcy Court.

19. The AC Trust Agreement further provides that the books, records and other documents that were transferred to or created by the AC Trust shall be retained for two years following the dissolution of the AC Trust; thereafter, at the discretion of the AC Trustee, they may be destroyed. AC Trust Agreement, §7.2. Notwithstanding the foregoing, the AC Trustee must obtain approval of the Bankruptcy Court "before disposing of any books and records that are reasonably likely to pertain to pending litigation in which the Debtors or its (*sic*) *current or former* officers or directors are a party." AC Trust Agreement, §7.2 (emphasis added).

20. Thus, while §7.2 properly and expressly includes current or former officers or directors, §§3.2(a)(x) and 3.5 do not and, as a result, may be interpreted to refer only to current officers or directors. To avoid any doubt, the language of §§3.2(a)(x) and 3.5 should be amended to accurately reflect that it refers to current and former officers and directors. This will eliminate any inconsistency and ambiguity within the AC Trust Agreement.

21. Additionally, although Bankruptcy Court approval is properly required before books and records may be destroyed or otherwise disposed of, there is no requirement that (reasonable) notice of the destruction or disposal of books and records be given to parties in interest, including Lead Plaintiff. Notice and an opportunity to be heard must be provided and should be included in any protocol established and approved by the Court. Failure to provide such notice is prejudicial to Lead Plaintiff and other parties in interest.

22. Lead Plaintiff further objects to the apparent discretion of the AC Trustee to determine which books and records are "reasonably likely to pertain to pending litigation." Court approval should be required prior to any proposed destruction or abandonment of any and all books and records that are in any way related to the Securities Litigation, not just those that the AC Trustee may think "are reasonably likely to pertain to pending litigation."

23. The Debtors, the Liquidating Trusts, Liquidating Trustees, or such other potential transferee of the Documents, as the case may be, must be required to preserve the Documents, so that they are readily available for production if and when required, and must notify parties in

interest of their intention to destroy or abandon the Documents. Therefore, the Plan and/or any order confirming the Plan should include the following language:

> From and after the Effective Date, the Debtors, Reorganized Advanta, the Liquidating Trusts, the Liquidating Trustees, and any transferee of the Debtors' Documents (defined *infra*), as the case may be, shall preserve and maintain all of the Debtors' documents, files, books, records, electronic data (including, but not limited to, emails and email server back-up tapes) (collectively, the "Documents"), whether retained by Reorganized Advanta or any successor thereto, or transferred to the Liquidating Trusts or the Liquidating Trustees, pursuant to the Liquidating Trust Agreements, or to such other transferee pursuant to the Plan. Reorganized Advanta, any successors thereto, the Liquidating Trusts, the Liquidating Trustees and/or such other transferee shall not destroy or otherwise abandon any such Documents absent further order of this Court or such other court of competent jurisdiction after a hearing upon reasonable notice to parties in interest, including Lead Plaintiff, with an opportunity to be heard.

B. Lead Plaintiff and the Securities Class are Entitled to Proceed with their Claims Against the Debtors to the Extent of Available Insurance Coverage, Irrespective of any Injunction, Discharge or Distribution under the Plan, and the Plan should Preserve These Rights.

24. In response to the Disclosure Statement Objection addressing the D&O Insurance Policies, the Debtors identified their various D&O Insurance Policies, the amount of insurance for each policy and the priority of payments provision in the primary D&O Insurance Policy. The Plan provides that Allowed indemnification and reimbursement claims of the Debtors' current and former officers and directors shall be paid to the extent of applicable insurance coverage (Plan. §8.6(a)).[4] However the Debtor cannot dictate payment by any insurance carrier. To the extent the liability of these officers and directors is satisfied through insurance, it simply reduces any similar claim against the Debtor to the extent *bona fide*.[5] Lead Plaintiff maintains

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4 To the extent the proceeds of available and applicable insurance are inadequate to satisfy these officer and director claims for indemnification and reimbursement related to claims asserted in the Securities Litigation, the Plan purports to treat these claims as General Unsecured Claims. Such claims are subject to subordination under 11 U.S.C. §510(b) and should not be treated otherwise. The Debtors' reservation of their right to object to or subordinate such claims (Plan, §8.6(a)) is inadequate. These claims are not entitled to priority over other subordinated claims to the extent they seek indemnification for liability arising from the Securities Litigation.

5 To the extent the D&O Policies are determined to be executory contracts, they are deemed assumed and transferred to the applicable Liquidating Trust. Plan, §8.6(b).

that the Securities Class is entitled to look to the proceeds of such insurance for payment in connection with the claims asserted in the Securities Litigation and may, at least, pursue these Claims against the Debtors to the extent of such available insurance post-Confirmation. Because Lead Plaintiff may not have a direct action against the D&O insurance carriers under the D&O Policies, the proceeds of the D&O Policies may only be accessed through the pursuit of the claims asserted in the Securities Litigation. Accordingly, the Plan should not impact the rights of Lead Plaintiff or the Securities Class to pursue their claims against the Debtors to the extent of the proceeds of the D&O Policies.

25. Therefore, the Plan and any order confirming the Plan, should provide that:

> Nothing in the Plan, or in any Order confirming the Plan, shall preclude Lead Plaintiff and the Securities Class from pursuing their claims against the Debtors to the extent of available insurance coverage and proceeds. The Claims of Lead Plaintiff and the Securities Class against the Debtors, to the extent of available insurance, are preserved and not discharged by the Plan.

26. Additionally, the Debtors asserted in their Omnibus Reply to the Disclosure Statement Objection that to the extent the claims of the Lead Plaintiff and the Securities Class (the "Securities Claims") against the Debtors are subordinated, Lead Plaintiffs and the Securities Class cannot pursue the Securities Claims against the Debtors to the extent of available insurance until all senior claims have been paid in full or it is determined that there are no other claims against the available D&O Insurance Policies. There is no basis for such treatment and Lead Plaintiff disputes this proposition. Moreover, confirmation of the Plan should not be deemed an acknowledgement or approval of this proposition.

27. Debtors admit that this is a "modified plan of liquidation," yet refer to the Debtor as Reorganized Advanta. The reality is that the Debtors are liquidating and the fiction of a reorganization involving one entity to hold stock for purposes of taking advantage of tax losses should not offer the Debtors a discharge to which they would not otherwise be entitled as

liquidating debtors. *See* 11 U.S.C. §1141(d)(3)(A) (confirmation of a liquidating plan does not discharge a debtor). The Plan is silent as to any discharge of the Debtors.

C. Despite Some Clarification, the Plan Injunction and Stay Provision[6] is Ambiguous and Improper and Must Affirmatively Exclude any Claims of Lead Plaintiff and the Securities Class Against the Non-Debtor Defendants and any Other Non-Debtors.

i. The Bankruptcy Court Lacks Jurisdiction to Release and Enjoin the Prosecution of the Securities Claims Asserted in the Securities Litigation against Non-Debtors.

28. To the extent the Plan intends to release the claims or interests of Lead Plaintiff and/or the Securities Class or enjoin them from prosecuting those claims against the Non-Debtor Defendants, the Court must, as a threshold question, first determine whether or not it has jurisdiction to release non-debtors from liability to third parties and enjoin the prosecution of the Securities Litigation against the non-Debtors. The Third Circuit Court of Appeals in *Gillman v. Continental Airlines (In re Continental Airlines)*, 203 F.3d 203, 214, n. 12 (3d Cir. 2000), has expressed its concern "that the Bankruptcy Court apparently never examined its jurisdiction to release and permanently enjoin [the third party's] claims against non-debtors." While certain matters between non-debtor third parties affecting the debtor and the bankruptcy case may be within the subject matter jurisdiction of the Court, it is not without limits and the Court "cannot simply presume it has jurisdiction in a bankruptcy case to permanently enjoin third-party *class actions* against non-debtors." *Id.* (emphasis added).

29. Recently, the Second Circuit addressed the jurisdictional issue and upheld its earlier holding in the same case that a "'bankruptcy court only has jurisdiction to enjoin third-party non-debtor claims that directly affect the *res* of the bankruptcy estate.'" *Johns-Manville Corp. v. Chubb Indemnity Ins. Co. (In re Johns-Manville Corp.)*, 600 F.3d 135,152 (2d Cir. 2010) ("*Manville 2010*")(quoting *In re Johns-Manville Corp.*, 517 F.3d 52, 66 (2d Cir. 2008)

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6 While the Plan does not identify this provision as a "Release," it effectively constitutes a release of the Claims and Interests held by creditors and other parties in interest. Therefore, to the extent this provision does in fact release or attempt to release any claims of Lead Plaintiff against a non-Debtor, including the Non-Debtor Defendants, Lead Plaintiff asserts that this Objection is applicable.

("*Manville 2008*")). Such jurisdiction is statutory. *In re Combustion Engineering, Inc.*, 391 F3d. 190, 225 (3d Cir. 2004). As noted in the *Manville 2010* decision, *Manville 2008* held that "a bankruptcy court's *in rem* jurisdiction was insufficient to enjoin the [direct claim] based upon . . . legal theories that seek to impose liability on [the insurer] as a separate entity rather than on the policies." *Manville 2010*, 600 F.3d at 152. Thus, the nature of the third party claim against the non-debtor, whether it be direct or derivative, must be considered before the Court can exercise subject matter jurisdiction in connection with the non-debtor releases and injunctions in the Plan. The Securities Litigation asserts direct claims against non-debtor third parties over which the Court does not have subject matter jurisdiction.

ii. The Plan Injunction and Stay Provision is Unclear and, Therefore, Improper.

30. The Plan injunction and stay provision (Plan, §10.3) requires clarification to the extent it may impact the claims of Lead Plaintiff and the Securities Class against a non-Debtor. The Plan has been amended to state that "all Persons who have held, hold or may hold Claims or Equity Interests and all other parties in interest . . . are permanently enjoined from [*inter alia*] (i) commencing or continuing in *any* manner *any* action or other proceeding of *any* kind (whether directly, derivatively or *otherwise*) against the Debtors related to a Claim or Equity Interest." *Id.* (emphasis added). While Debtors have deleted "indirectly" from the parenthetical in §10.3(i), the inclusion of "otherwise" remains problematic, as it may be read as negating any carve-out of non-Debtor releases. Because the allegations asserted against the Non-Debtor Defendants in the Securities Litigation arise from the same operative facts as the Class Claim against the Debtor, the causes of action against the Non-Debtor Defendants may be construed as being subject to this improper permanent injunction. This provision is, at best, ambiguous, requires clarification and, therefore, should be modified. Indeed, if, as Debtors stated in their omnibus response to objections to the Disclosure Statement that it is not the Plan's intent to release non-Debtors, then that must be clearly stated in the Plan and in any Order confirming the Plan.

31. In the absence of language to the contrary, the Plan's injunction provision is improper as it may be interpreted to impact, enjoin, prohibit and/or preclude Lead Plaintiff from asserting claims in the Securities Litigation against non-Debtors or seeking discovery post-Effective Date. The Plan offers no basis for such broad and improper injunctive relief. *See* ¶¶32-33, *infra*. In order to avoid any doubt, the Plan should affirmatively provide that no non-Debtors are being released from claims by or liability to third parties, such as Lead Plaintiff and the Securities Class, and that Lead Plaintiff's ability to request and obtain relevant discovery is not enjoined in any way.

32. To the extent any of Lead Plaintiff's claims in the Securities Litigation may be subject to the Plan Injunction provision, the Plan Injunction is improper. *See Deutsche Bank AG London Branch v. Metromedia Fiber Network, Inc. (In re Metromedia Fiber Network, Inc.)*, 416 F.3d 136, 141-42 (2d Cir. 2005) (holding that non-debtor releases are proper only in rare cases and may be "tolerated only if the affected creditor consents"); *see also Continental*, 203 F.3d at 211(holding that a debtor must satisfy its burden of proof and establish through specific factual findings that non-debtor third-party releases are fair and necessary); *In re Genesis Health Ventures, Inc.*, 266 B.R. 591, 608 (Bankr. D. Del. 2001)(citing *Continental* for the proposition that "extraordinary circumstances [are] required to meet even the most flexible test for third party releases"); *In re Combustion Engineering*, 391 F. 3d 190, 236 (3d Cir. 2004) (holding in an asbestos injury case that 11 U.S.C. §105 may not be used to validate a non-debtor release where to do so trumps another Bankruptcy Code section). *See also In re Washington Mutual, Inc.*, Case No. 08-12229 (Bankr. D. Del., J. Walrath), opinion dated January 7, 2011, wherein Judge Walrath provides a lengthy analysis of the non-debtor releases under a chapter 11 plan and the need to consider the specific facts of a case before allowing such extraordinary relief. Opinion, at 61, *et seq*.

33. In the absence of consideration and creditor consent, non-debtor third-party release, injunction and exculpation provisions have been disallowed and rejected by this Court. *See, e.g., In re Exide Techs.*, 303 B.R. 48, 75 (Bankr. D. Del. 2003). Here, Lead Plaintiff and the

Securities Class do not consent to the injunction and resultant release provision under the Plan and are not receiving any consideration from the non-Debtor third parties who may benefit from these gratuitous provisions. Therefore, the following language should be included in the Plan and any Order confirming the Plan:

> Nothing in the Plan, the Plan Supplement, any document contained in the Plan Supplement, any amendment to the Plan or in any order confirming the Plan shall (i) affect, release, enjoin or impact in any way the prosecution of the claims asserted, or to be asserted, against any non-Debtor in the Securities Litigation or (ii) preclude Lead Plaintiff and/or the Securities Class from seeking discovery from the Debtors, Reorganized Advanta, the Liquidating Trusts or Trustees or such other transferee of the Debtors' Books and Privileges, or any other assets of the Debtors.

34. Whether the Plan releases and/or enjoins third-party claims against non-Debtors, including any of the claims asserted in the Securities Litigation, must be clarified. Lead Plaintiff should not be obliged to take the risk with respect to determining the extent of the Plan injunction provision or whether a Non-Debtor Defendant may claim it is provided shelter by virtue of the ambiguous language under the Plan.

CONCLUSION

35. Based on the foregoing, Lead Plaintiff respectfully requests that an order be entered (i) denying confirmation of the Plan unless the Plan is modified as set forth above and (ii) granting Lead Plaintiff such other and further relief as the Court deems just and proper.

Dated: February 1, 2011

CROSS & SIMON LLC

By: _____

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CERTIFICATE OF SERVICE

I, David G. Holmes, hereby certify that on this 1st day of February, 2011, I caused copies of the *Objection of Lead Plaintiff, Western Pennsylvania Electrical Employees Pension Fund, to Debtors' Joint Plan Under Chapter 11 of the Bankruptcy Code* to be served on the parties on the attached list in the manner indicated.

David G. Holmes (No. 4718)

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