



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

JUL 17 2003

Benjamin L. Ginsberg, Esquire
Patton Boggs, LLP
2550 M Street, N.W.
Washington, D.C. 20037-1350

RE: MUR 5199
Bush-Cheney 2000, Inc. and
David Herndon, as Treasurer

Dear Mr. Ginsberg:

Based on a complaint filed with the Federal Election Commission on April 27, 2001, and information supplied by you on behalf of your clients, Bush-Cheney 2000, Inc. and David Herndon, as Treasurer, the Commission, on March 20, 2003, found that there was reason to believe Bush-Cheney 2000, Inc. and David Herndon, as Treasurer, violated 2 U.S.C. §§ 434(b)(2)(J), 434(b)(4)(G) and (I), 434(b)(3)(G), and 434(b)(6)(A), and instituted an investigation of this matter.

After considering all the evidence available to the Commission, the Office of the General Counsel is prepared to recommend that the Commission find probable cause to believe that violations have occurred.

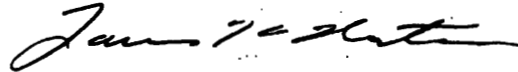
The Commission may or may not approve the General Counsel's recommendation. Submitted for your review is a brief stating the position of the General Counsel on the legal and factual issues of the case. Within 15 days of your receipt of this notice, you may file with the Secretary of the Commission a brief (ten copies if possible) stating your position on the issues and replying to the brief of the General Counsel. (Three copies of such brief should also be forwarded to the Office of the General Counsel, if possible.) The General Counsel's brief and any brief which you may submit will be considered by the Commission before proceeding to a vote of whether there is probable cause to believe a violation has occurred.

If you are unable to file a responsive brief within 15 days, you may submit a written request for an extension of time. All requests for extensions of time must be submitted in writing five days prior to the due date, and good cause must be demonstrated. In addition, the Office of the General Counsel ordinarily will not give extensions beyond 20 days.

A finding of probable cause to believe requires that the Office of the General Counsel attempt for a period of not less than 30, but not more than 90 days, to settle this matter through a conciliation agreement.

Should you have any questions, please contact Tracey L. Ligon, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,



Lawrence H. Norton
General Counsel

Enclosure
Brief

65-15348-100

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2
3 **BEFORE THE FEDERAL ELECTION COMMISSION**
4

5 In the Matter of)

6) MUR 5199

7 Bush-Cheney 2000, Inc. and)
8 David Herndon, as Treasurer)
9)

10
11 **GENERAL COUNSEL'S BRIEF**
12

13 **I. INTRODUCTION**
14

15 The central issue in this matter is whether Bush-Cheney 2000, Inc. and David Herndon,
16 as Treasurer ("the Respondents"), had a legal obligation under the Federal Election Campaign
17 Act of 1971, as amended ("the Act"), to report recount receipts and disbursements to the Federal
18 Election Commission ("the Commission"). The general rule is that if a recount fund is
19 established as a part of a political committee, the receipts and disbursements of the account will
20 be reportable transactions of the political committee, within the categories of "other receipts" and
21 "other disbursements." *See* 2 U.S.C. § 434(b)(2)(J) and 2 U.S.C. §§ 434(b)(4)(G) and (I); *see*
22 *also* Advisory Opinions 1998-26 and 1978-92. The Respondents established the recount fund as
23 a part of Bush-Cheney 2000, Inc. Therefore, the Respondents were required to report the receipts
24 and disbursements from its recount effort to the Commission.

25 **II. BACKGROUND FACTS**
26

27 In the wake of the recount following the 2000 presidential election, the Respondents
28 formed a recount fund to raise funds and pay costs associated with the recount and election
29 contest. The Respondents admit that they established the recount fund "as a part of Bush-Cheney
30 2000, Inc.," a federal political committee. Response to the Complaint, p. 2. For its entire
31 lifespan -- from mid-November 2000, until approximately November 2001 -- the recount fund

1 existed only as an account established as a part of, and conducted within, Bush-Cheney 2000,
2 Inc.¹ The Respondents never reported the receipts and disbursements of the recount fund to the
3 Commission.² In July 2002, twenty months after the inception of the recount fund, the Respondents
4 registered the account and filed reports with the Internal Revenue Service ("IRS"). On July 15,
5 2002, the Respondents filed a Political Organization Notice of Section 527 Status Form with the
6 IRS, and on July 27, 2002, filed disclosure reports with the IRS reflecting the financial activity of
7 the recount fund. The Internal Revenue Code ("the Tax Code") imposes reporting and disclosure
8 requirements on political organizations that have tax-exempt status under the Tax Code and
9 receive or expect to receive \$25,000 or more in gross receipts in any taxable year. *See* 26 U.S.C.
10 § 527. Under the Tax Code, such an organization must file a Political Organization Notice of
11 Section 527 Status form with the IRS within twenty-four hours after the date on which the
12 organization was established, and must also file periodic reports disclosing its "contributions"
13 and "expenditures."² 26 U.S.C. § 527.

14 The Democratic National Committee filed a complaint with the Federal Election
15 Commission ("the Commission") on April 27, 2001, alleging that Bush-Cheney 2000, Inc., and
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¹ According to a news article, the recount fund was shut down in November 2001, at which time \$270,000 in surplus funds were transferred to the Republican National Committee ("RNC"). Scott Lindlaw, *Bush-Cheney Recount Fund Shifts \$270,000 to GOP in Parting Gift*, The Associated Press, Dec. 29, 2001. Disclosure reports filed by the RNC reflect that it received \$270,000 from the "Bush-Cheney Recount Fund" on November 30, 2001. A disclosure report filed by the recount fund with the IRS shows a disbursement of \$270,000 to the "RNC State Elections Committee."

² The Tax Code exempts political committees under the Act from the Section 527 filing requirements. 26 U.S.C. §§ 527(i)(6) and (j)(5)(A). Specifically, the Code states that its filing requirements "shall not apply to any person required (without regard to this subsection) to report under the Federal Election Campaign Act of 1971 (2 U.S.C. § 431 *et seq.*) as a political committee." 26 U.S.C. §§ 527 (i)(6) and (j)(5)(A).

David Herndon, as Treasurer ("the Respondents"), violated provisions of the Act. On March 20, 2003, the Commission found reason to believe that the Respondents violated 2 U.S.C. §§ 434(b)(2)(J) and 434(b)(4)(G) and (I) by failing to report the Committee's recount receipts and disbursements with the Commission, and violated 2 U.S.C. §§ 434(b)(3)(G) and 434(b)(6)(A) by failing to itemize its recount receipts and disbursements, where appropriate.

III. ARGUMENTS

A. The Respondents violated 2 U.S.C. § 434(b)(2)(J) and 2 U.S.C. §§ 434(b)(4)(G) and (I) by failing to report the receipts and disbursements of the recount fund to the Commission.

An authorized committee of a candidate for Federal office must report the following categories of receipts: (i) contributions from persons other than political committees; (ii) contributions from the candidate; (iii) contributions from political party committees; (iv) contributions from other political committees; (v) total contributions; (vi) transfers from other authorized committees of the same candidate; (vii) loans; (viii) federal funds received under Chapter 95 and Chapter 96 of Title 26 of the U.S. Code; (ix) offsets to operating expenditures; (x) other receipts; and (xi) total receipts. 11 C.F.R. § 104.3(a)(3)(i)-(xi) (implementing regulations for 2 U.S.C. § 434(b)(2)(A)-(K)) (emphasis added); *see* 2 U.S.C. § 434(b)(2)(A)-(K).

An authorized committee of a candidate for Federal office must report the following categories of disbursements: (i) operating expenditures; (ii) transfers to other committees authorized by the same candidate; (iii) repayment of loans; (iv) for an authorized committee of a candidate for the office of President, disbursements not subject to the limitations of 11 C.F.R. § 110.8 (concerning dollar limits on expenditures); (v) offsets; (vi) other disbursements; and (vii) total disbursements. 11 C.F.R. § 104.3(b)(2)(i)-(vii) (implementing regulations for 2 U.S.C. § 434(b)(4)(A)-(I)) (emphasis added); *see* 2 U.S.C. § 434(b)(4)(A)-(I).

1 The Commission applied these statutory and regulatory provisions to the operation of
2 recount funds in Advisory Opinions 1998-26 and 1978-92. In Advisory Opinion 1978-92, the
3 requester queried whether a separate recount committee, organized and operated to fund a
4 recount effort, would be required to report receipts and disbursements to the Commission. The
5 Commission concluded that such a "separate organizational entity" would not become a political
6 committee since its receipts and disbursements would not be contributions or expenditures;³ and
7 thus, such an organization would not be required to file reports with the Commission. In
8 contrast, however, the Commission explained that if a federal political committee establishes any
9 bank account for recount purposes, the receipts and disbursements of that account would be
10 reportable transactions of the committee, within the categories of "other receipts" and "other
11 disbursements."

12 Subsequently, in Advisory Opinion 1998-26, the Commission again opined on the
13 application of the Act and regulations to a recount fund. The Commission confirmed that "a
14 principal campaign committee receiving donations designated for [recount purposes] should
15 establish a separate bank account and the receipts and disbursements of the account would be
16 reportable transactions of the committee, within the categories of "other receipts and other
17 disbursements" respectively," citing 2 U.S.C. §§ 434(b)(2)(J) and (4)(G); 11 C.F.R.
18 §§ 104.3(a)(3)(x) and (b)(2)(vi).

19 In this matter, it is clear that the recount fund was formally a part of Bush-Cheney 2000,
20 Inc., a federal political committee, and operated as such. First, the Respondents admit that the
21 recount fund was a part of Bush-Cheney 2000, Inc. Second, the Commission's audit and

³ Donations and payments made with respect to a recount of the results of a federal election are exempted from the definition of "contribution" and "expenditure." See 11 C.F.R. §§ 100.7(b)(20) and 100.8(b)(20).

1 investigation establish that during the general election campaign, the Respondents held a bank
2 account designated "Bush-Cheney 2000, Inc. – Media." After the election, however, the
3 Respondents used this existing account for recount activities, and simply redesignated the
4 account the "Bush-Cheney 2000, Inc. – Recount Fund."

5 Third, the Commission's audit and investigation revealed that, rather than operating
6 independently, the recount fund cooperated with the Respondents' other accounts, consistent
7 with its status as "a part of Bush-Cheney 2000, Inc." Response to the Complaint, p. 2. For
8 example, the recount fund exchanged financial support with the general election committee. In
9 its audit of Bush-Cheney 2000, Inc., the Commission found that the recount fund made in-kind
10 contributions to the general election account, Bush-Cheney 2000, Inc., totaling \$288,437 for
11 salary and overhead expenses incurred between November 11, 2000 and December 7, 2000. In
12 addition, audit workpapers show that the Respondents used a total of \$204,548.41 of general
13 election funds for recount purposes, and subsequently reimbursed those funds from recount
14 funds.⁴

15 Moreover, the recount fund used the same payroll account as the general election
16 committee. Specifically, during the general election campaign, the Respondents routinely
17 transferred funds from its general election account to a separate payroll account to cover payroll
18 costs associated with the general election. After the general election, the Respondents used their
19 payroll account in the same manner for payroll costs associated with its recount activities. The
20 Respondents then routinely transferred funds from their recount fund to their payroll account to
21 cover payroll costs associated with the recount.

⁴ Documentation supporting these findings include the Respondents' bank records, canceled checks, and vendor files.

1 Finally, on the Section 527 Status Form filed with the IRS (Form 8871), the Respondents
2 listed the name of the filing organization as "Bush-Cheney 2000, Inc. (Recount Fund)." In
3 addition, Form 8871 requires the filing organization to list "related entities."⁵ The Committee
4 listed as "related entities" Bush for President, Inc., the Bush-Cheney 2000 Compliance
5 Committee, Inc., and the Bush/Cheney Presidential Transition Foundation Inc. The
6 Respondents' omission of Bush-Cheney 2000, Inc. from the list of "related entities," together
7 with the inclusion of Bush-Cheney 2000, Inc. in the name of the filing organization, is further
8 evidence that the recount fund was a part of the political committee. Because the recount fund
9 was a part of a federal political committee, the Respondents were required to report
10 the recount receipts and disbursements to the Commission. *See* 2 U.S.C. § 434(b)(2)(J) and
11 2 U.S.C. §§ 434(b)(4)(G) and (I); *see also* Advisory Opinions 1998-26 and 1978-92.

12 Respondents argue that Advisory Opinions 1978-92 and 1998-26,⁶ are not binding
13 because this matter involves a publicly-funded presidential campaign, which is materially
14 distinguishable from the privately-financed senatorial campaigns to which Advisory Opinions
15 1978-92 and 1998-26 were issued. *See* Response to the Complaint, pp. 3-5; *See* Additional
16 Factual and Legal Material in Response to the Commission's Analysis Supporting Reason to
17 Believe, pp. 4-5. Specifically, Respondents state that campaigns which receive funding from the
18 Treasury of the United States operate under their own statutory scheme and implementing

⁵ The form instructions state that an entity is a "related entity" if the organization and that entity have: "(a) significant common membership or (b) substantial common direction or control." *See* General Instructions to Form 8871.

⁶ As noted, *supra*, in Advisory Opinions 1998-26 and 1978-92, the Commission held that a separate organizational entity established solely for purposes of funding a recount effort would not become a political committee and would not be required to file disclosure reports, but if a federal political committee establishes any bank account for recount purposes the receipts and disbursements of those accounts would be reportable transactions of the committee, within the categories of "other receipts" and "other disbursements."

1 regulations that make their operation different from campaigns for the United States Senate and
 2 House of Representatives, and argue that this unique statutory and regulatory scheme and the
 3 receipt of public funding make these campaigns materially distinguishable from a congressional
 4 or senatorial campaign that is funded by private donations, citing by comparison *Colorado*
 5 *Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 611-612 (1996). See Response
 6 to the Complaint, p. 3. The Respondents also argue that the Commission's precedents "limit a
 7 presidential campaign's ability to rely on advisory opinions to fill gaps in the regulatory regime,"
 8 citing *Statement of Reasons for the Audits of the Dole and Clinton Presidential Campaigns*
 9 issued by then Commissioner Darryl R. Wold. See Response to the Complaint, p. 1.; Additional
 10 Factual and Legal Material in Response to the Commission's Analysis Supporting Reason to
 11 Believe, p. 5.

12 This matter does not involve "gaps" in the pertinent regulatory regime. The reporting
 13 provisions of the Commission's regulations apply equally to publicly-funded presidential
 14 campaigns and senatorial campaigns in all material respects. While presidential campaigns and
 15 senatorial campaigns must file their respective reports on different forms, see 11 C.F.R. § 104.2,
 16 both must adhere to the same requirements regarding the contents of disclosure reports, see 11
 17 C.F.R. § 104.3; *Federal Election Commission v. National Conservative Political Action*
 18 *Committee*, 470 U.S. 480, 491 (1985) ("FECA applies to all Presidential campaigns, as well as
 19 other federal elections, regardless of whether publicly or privately funded").⁷ Furthermore, as a
 20 condition precedent to receiving public funds, the Respondents agreed to comply with the

⁷ In addition to adhering to the reporting requirements set forth at 11 C.F.R. § 104.3(a) and (b), authorized committees of presidential campaigns must also file separate reports to disclose different general election activities. See 11 C.F.R. § 9006.1; Explanation and Justification for 11 C.F.R. § 9006.1; 45 Fed. Reg. 43377 (June 27, 1980)(provision intended to facilitate accurate accounting of the use of public funds, and is in addition to requirements at 11 C.F.R. § 104.3(a) and (b)).

1 reporting requirements of the Act and the Commission's regulations. *See* 11 C.F.R. § 9003.1;
 2 Letter of Candidate Agreements and Certifications. Thus, as stated previously, because the
 3 recount fund was a part of a federal political committee, the Respondents were required to report
 4 the recount receipts and disbursements to the Commission.

5 The Respondents, however, did not disclose recount receipts and disbursements to the
 6 Commission. Rather, the Respondents filed disclosure reports with the IRS, and now point to the
 7 IRS filings and the availability of information on the IRS website to support their claim that this
 8 enforcement case is a matter of form over substance.

9 The Respondents' filing with the IRS does not in any way affect their reporting
 10 requirement with the Commission. Congress established the Commission and the Internal
 11 Revenue Service for different purposes, *see* 2 U.S.C. § 437c(b), *cf.* 26 U.S.C. § 7803, and their
 12 respective reporting forms request different information.⁸ As long as a political committee is
 13 legally obligated to file disclosure reports with the Commission, the act of filing information
 14 with a different governmental agency will not satisfy the disclosure requirements under the Act.⁹
 15 Moreover, although the Respondents apparently disclosed some financial information on the
 16 campaign website, the Commission has never permitted a political committee to satisfy the Act's

⁸ For example, under the Code, a political organization must report expenditures made to a person *if* the aggregate amount of expenditures to that person during the calendar year equals or exceeds \$500. 26 USCA § 527(j)(3)(A). In contrast, under the Act, a political committee must report, *inter alia*, the total amount of *all* expenditures, and itemize expenditures made to a person in an aggregate amount or value in excess of \$200 within the calendar year in 2000, and within the election cycle beginning in 2001. Further, the Code requires political organizations to report only persons who made contributions in an aggregate amount of \$200 or more during the calendar year. 26 USCA § 527(j)(3)(B). Under the Act, a political committee must include in its report the total amount of *all* contributions received, itemizing contributions made by a person that aggregate in an amount of \$200 or more within the calendar year in 2000, and within the election cycle beginning in 2001. 2 U.S.C. § 434(b)(2)-(3).

⁹ The Commission does not permit political committees to satisfy reporting requirements under the Act by filing with other governmental agencies. For example, while some state agencies require political committees to disclose financial activity, the Commission nevertheless requires all political committees to file disclosure reports with the Commission in accordance with the Act.

1 reporting obligations by choosing to disclose information through other, unofficial means. *See*
2 MUR 3721 (Commission rejected argument by Perot '92 Committee that Commission's
3 reporting requirements were obviated by media coverage of candidate's statements that he
4 planned to personally finance his campaign).

5 Indeed, it does not appear that the IRS filing was either required or timely. The Tax Code
6 exempts political committees under the Act from the Section 527 filing requirements. 26 U.S.C.
7 § 527(i). Even if the recount fund had reporting obligations with the IRS, the Respondents
8 apparently did not timely comply with those requirements.¹⁰ The Respondents filed reports with
9 the IRS disclosing financial activity of the recount fund on the last day of an IRS amnesty
10 program that allowed out-of-compliance groups to turn in reports and avoid substantial fines.
11 These reports were filed twenty months after the inception of the recount fund and eight months
12 after it ceased operation.

13 The Respondents also question the timing in processing this matter, suggesting that the
14 Commission's actions may have been politically motivated. *See* Additional Factual and Legal
15 Material in Response to the Commission's Analysis Supporting Reason to Believe, pp. 1-2. This
16 is an ironic argument given that on May 21, 2001, the Respondents themselves requested that the
17 Commission hold the matter in abeyance pending resolution of the audit of Bush-Cheney 2000,
18 Inc. In a letter dated May 21, 2001, the Respondents stated that the requested stay "will permit
19 the audit to proceed in an orderly manner and the audit staff and the Campaign to work through

¹⁰ A political organization subject to the periodic reporting requirements under the Internal Revenue Code may choose to file on a monthly basis or on a quarterly/semi-annual basis, but must file on the same basis for the entire calendar year. 26 U.S.C. § 527. A political organization that chooses to file monthly must file reports not later than the 20th day after the end of the month, except in an election year, the organization shall not file the reports regularly due in November and December, but file a pre-election report and a post-election report instead. 26 U.S.C. § 527(j)(2)(B). If a political organization chooses not to file on a monthly basis, it must file semi-annual reports in non-election years and quarterly reports plus a pre-election and a post-election report in election years. 26 U.S.C. § 527(j)(2)(A).

1 these novel legal issues.” While the Commission formally denied the request, Respondents got
2 what they wanted. On December 23, 2002, the Commission approved the Final Audit Report on
3 Bush-Cheney 2000, Inc., et al., and less than three months later, on March 20, 2003, the
4 Commission made its reason to believe findings in this matter.

5 The Respondents further suggest that there is some impropriety in the Commission
6 addressing in an enforcement matter an issue that the Commission did not address in the audit of
7 Bush-Cheney 2000, Inc. See Additional Factual and Legal Material in Response to the
8 Commission’s Analysis Supporting Reason to Believe, pp. 1-2. There is no requirement that the
9 Commission address issues arising under the Act in an audit conducted pursuant to Title 26 of
10 the United States Code, although the Commission *may* do so. See 11 C.F.R. § 9007.1(a), (c)(1)
11 and (d)(2). Here again, the Commission’s actions served to benefit the Respondents. The
12 Commission did not consider the reporting issues involved in this matter in the context of the
13 audit. Thus, the Commission did not prejudice the Respondents by addressing in a public forum
14 an issue that would not generate a repayment pursuant to 26 U.S.C. § 9007(b), and, consequently,
15 did not require consideration in the audit context.

16 Finally, it bears noting that the Respondents chose to conduct the recount activities
17 through Bush-Cheney 2000, Inc., and reaped certain benefits in doing so. For example, as noted
18 above, the Respondents were able to use Bush-Cheney 2000, Inc.’s payroll account to pay
19 recount payroll. With these benefits go the commensurate statutory requirement that political
20 committees disclose all receipts and disbursements. 2 U.S.C. §§ 434(b)(2)(A)-(K) and
21 434(b)(4)(A)-(I). Inasmuch as the Respondents failed to report Bush-Cheney 2000, Inc.’s
22 recount receipts and disbursements to the Commission, this Office is prepared to recommend that
23 the Commission find that there is probable cause to believe that Bush-Cheney 2000, Inc. and

David Herndon, as Treasurer, violated 2 U.S.C. § 434(b)(2)(J) and 2 U.S.C. §§ 434(b)(4)(G) and (I).

B. The Respondents violated 2 U.S.C. § 434(b)(3)(G) and 2 U.S.C. § 434(b)(6)(A) by failing to itemize the receipts and disbursements of the recount fund, where appropriate.

Pursuant to the Act and the Commission's regulations, a political committee must report, *inter alia*, the identification of each person who provides any dividend, interest, or other receipt to the committee in an aggregate value or amount in excess of \$200 within the calendar year in 2000, and within the election cycle beginning in 2001, together with the date and amount of any such receipt. 2 U.S.C. § 434(b)(3)(G); 11 C.F.R. § 104.3(a)(4)(vi). The requirement that the committee report the "identification" of such contributors means the committee must report, in the case of an individual, his or her full name; mailing address; occupation; and the name of his or her employer; and, in the case of any other person, the person's full name and address. 11 C.F.R. §§ 100.12 and 104.3(a)(4)(vi).

Political committees must also report, *inter alia*, the name and address of each person who has received a disbursement that falls within the "any other disbursement" category in an aggregate amount or value in excess of \$200 within the calendar year in 2000, and within the election cycle beginning in 2001, together with the date, amount, and purpose of any such disbursement. 2 U.S.C. § 434(b)(6)(A); 11 C.F.R. § 104.3(b)(4)(vi). In addition, the Respondents were required to itemize their recount receipts and disbursements when the receipt or disbursement was of an aggregate amount or value of \$200 within the calendar year in 2000, and within the election cycle beginning in 2001. 2 U.S.C. §§ 434(b)(3)(G) and 434(b)(6)(A); 11 C.F.R. §§ 104.3(a)(4)(vi) and 104.3(b)(4)(vi). Because the Respondents failed to itemize,

1 where appropriate, the receipts and disbursements of the recount fund, this Office is prepared to
2 recommend that the Commission find that there is probable cause to believe that Bush-Cheney
3 2000, Inc. and David Herndon, as Treasurer, violated 2 U.S.C. §§ 434(b)(3)(G) and
4 434(b)(6)(A).

5 **III. GENERAL COUNSEL'S RECOMMENDATIONS**

- 6
7 1. Find probable cause to believe that Bush-Cheney 2000, Inc. and David Herndon, as
8 Treasurer, violated 2 U.S.C. § 434(b)(2)(J) and 2 U.S.C. § 434(b)(4)(G) and (I).
9
10 2. Find probable cause to believe that Bush-Cheney 2000, Inc. and David Herndon, as
11 Treasurer, violated 2 U.S.C. § 434(b)(3)(G) and 2 U.S.C. § 434(b)(6)(A).
12
13
14

15 7/17/03
16 Date

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