

# Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

SJC-13110

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KELLIE PEARSON AND THE LAW OFFICES OF MARK BOOKER  
PLAINTIFFS

V.

THOMAS M. HODGSON, IN HIS OFFICIAL CAPACITY AS  
SHERIFF OF BRISTOL COUNTY, AND  
SECURUS TECHNOLOGIES, INC.  
DEFENDANTS

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ON CERTIFICATION FROM THE FEDERAL DISTRICT COURT  
FOR THE DISTRICT OF MASSACHUSETTS  
C.A. NO. 18-CV-11130-IT

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**REPLY BRIEF OF DEFENDANT  
THOMAS M. HODGSON, IN HIS OFFICIAL CAPACITY AS  
SHERIFF OF BRISTOL COUNTY**

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September 3, 2021

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## **ARGUMENT**

### **I. The 2009 Act Authorized Covered Sheriffs to Keep Future Revenues from Inmate Telephone Service**

Plaintiffs primarily make two arguments in their brief, neither of which holds water. First, Plaintiffs argue that the relevant language of the 2009 Act<sup>1</sup> means only that in 2009 the covered Sheriffs could retain then-existing funds that had been received from civil process, inmate telephone and commissary funds. Second, Plaintiffs contend that even if the 2009 Act authorized the retention of such revenue by the covered Sheriffs, it does not authorize the collection of such revenues. Both arguments are inconsistent with the clear intent of the Legislature, as evidenced by the plain language of the 2009 Act, read in its entirety, and its legislative history.

#### **A. The Plain Language of the 2009 Act Authorizes the Sheriff to Enter into the 2011 Contract with Securus**

Plaintiffs are wrong when they argue that the 2009 Act did nothing more than permit the Sheriff to keep the money from inmate telephone service that was already in his possession as of 2009. The Sheriff's

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<sup>1</sup> Defined terms used in this Reply have the same meaning as in the Sheriff's opening brief.

authority to enter into the 2011 Contract for inmate calling (and the 2015 Amendment) derives from the 2009 Act, specifically Section 12(a), which states that "revenues of the office of sheriff in Barnstable, Bristol, Dukes, Nantucket, Norfolk, Plymouth and Suffolk counties for civil process, inmate telephone and commissary funds shall remain with the office of the sheriff." (Hodgson Br. Add. 105 (2009 Act § 12(a)).)

Section 12 of the 2009 Act contains several provisions relating to sources of funds for the covered Sheriffs' offices, and these provisions must be read and understood as a whole. Subsection 12(a), the operative grant of authority, expressly identifies three sources of income that the Legislature preserved for the covered Sheriffs' offices: "revenues ... for civil process, inmate telephone and commissary funds shall remain with the office of the sheriff." *Id.*

Subsection 12(b) identifies other potential sources of revenue for the covered Sheriffs' offices that the Legislature *may* preserve for the covered Sheriffs' subject to a requirement of an annual conference: "each sheriff's office shall annually confer" with the Legislature about "efforts to

maximize and maintain grants, dedicated revenue accounts, revolving accounts, fee for service accounts and fees and payments from the federal, state, and local governments" and about "which revenues shall remain with the sheriff's office." (Hodgson Br. Add. 105 (2009 Act § 12(b)).)

Subsection 12(c) allows Sheriffs who have "developed a revenue source derived apart from the state treasury" to "retain that funding to address the needs of the citizens within that county." (Hodgson Br. Add. 106 (2009 Act § 12(c)).)

The Legislature's use of the terms "revenue" in subsections (a), (b) and (c) and "remain" in subsections (a) and (b) should be understood to have the same meanings in each subsection. *Clark Equip. Co. v. Mass. Ins. Insolvency Fund*, 423 Mass. 165, 168 (1996) ("Where the Legislature uses the same words in several sections which concern the same subject matter, the words 'must be presumed to have been used with the same meaning in each section.'") (*quoting Ins. Rating Bd. v. Commissioner of Ins.*, 356 Mass. 184, 188-89 (1969)). In each subsection, "revenue(s)" can only mean an ongoing source of income, and not an existing pool of cash-on-hand. And "remain" can only

mean that the covered Sheriffs' offices may keep the income they collect, rather than turn it over to the state treasury.

When read as a whole, the plain meaning of Section 12 is clear: subsection 12(a) enumerates the three sources of ongoing income that the Legislature determined could be collected and kept by the covered Sheriffs' offices without the need for an annual conference (i.e., civil process, inmate telephone, and commissary), while subsection 12(b) identifies potential sources of income collected by the covered Sheriffs' offices that required an annual conference with the Legislature concerning whether such revenues would be kept by the covered Sheriffs' offices or turned over to the state treasury (i.e. grants, dedicated revenue accounts, revolving accounts, fee for service accounts, and fees and payments from other governmental entities). The requirement in subsection 12(b) to "annually confer" with the Legislature about dedicated revenue accounts, for example, would make no sense if the Legislature intended the word "revenue" to mean cash-on-hand in 2009 rather than an ongoing source of income. Similarly, subsection 12(a) would also make no sense if the Legislature intended future

revenues from civil process and commissary, on the one hand, to be treated differently from future revenues from telephone services, on the other.

Plaintiffs' interpretation of Section 12(a) seeks to replace the term "revenues" with another word, such as "funds," "cash-on-hand," or "money." It is commonly understood that "revenue" refers to an income stream, while funds, cash-on-hand, or money would refer to an asset. Webster's Third New International Dictionary defines "revenue" as, among other things, "c: the annual or periodical yield of taxes, excises, customs, duties, and other sources of income that a nation, state, or municipality collects and receives into the treasury for public use : public income of whatever kind." Webster's Third New Int'l Dictionary 2051 (1993). Similarly, Black's Law Dictionary defines "revenue" as "1. Income from any and all sources; gross income or gross receipts. 2. The total current income of a government, however derived; esp., taxes. ... 5. A source of income. - Also termed revenue stream." "Revenue," Black's Law Dictionary (11th ed. 2019). The Legislature's use of the term "revenues"

in Section 12 shows that it was referring to a stream of income, not to existing cash-on-hand.

Notably, if the Legislature had intended Section 12 to refer only to cash-on-hand, it knew how to say so. G.L. c. 37 § 22 contains a provision that requires Sheriffs to account annually for funds received and turn over certain funds then in its possession to county treasurers. (Pls. Br. Add. 78 (G.L. c. 37 § 22).) ("Each sheriff shall keep an account of all fees and money received by virtue of his office, and, except as otherwise provided, shall annually, on or before June fifteenth, render to the county treasurer a sworn account thereof and, except as provided in section seventeen, pay him the same.") In doing so, the Legislature refers to existing funds as "fees and moneys received," a phrase that plainly refers to cash that has already been received. But in Section 12 of the 2009 Act, rather than use the phrase "fees and money received," the Legislature uses "revenues," which reflects an ongoing stream of income.

B. The Legislative History of 2009 Act Is Consistent with the Sheriff's Interpretation of the Act, not Plaintiffs' Interpretation

In their brief, Plaintiffs contend that it would "strain credulity" to think that the Legislature intended to treat the seven counties governed by the 2009 Act differently than other counties. (Pls. Br. 16.) But that is exactly what the legislative history reveals.

The failed 2008 Bill, which did not garner sufficient Legislative support to pass, would have provided for a complete transfer of the seven Sheriffs' offices to the Commonwealth without the retention of revenue from inmate calling and other sources of income. At that time, the 2008 financial crisis was eroding the funding for the non-abolished Sheriffs' offices. The budgets for non-abolished Sheriffs' offices depended in part on receiving a statutorily mandated percentage of revenue derived from the collection of deeds excise tax. (Hodgson Br. Add. 144; J.A. 445 (Report of the Special Commission).) When commercial and residential real estate sales plummeted in late 2008, the non-abolished Sheriffs' offices projected significant budget shortfalls. *Id.* Prior to proposing the 2009 Act,

Governor Patrick engaged in "extensive discussion" with the seven covered Sheriffs about the fiscal crisis they were facing. (J.A. 768 (Letter from Deval Patrick to State Senate and State House of Representatives (Jan. 28, 2009).)

The 2009 Act resulted from those discussions and the particular economic crisis during which they took place. Consistent with its legislative history, the 2009 Act reflects the exact sort of compromise often reflected in acts of government. The provisions of Section 12(a), (b), and (c) each address sources of ongoing revenue for the covered Sheriffs' offices that were specifically included to mitigate the risk of those offices having to repeat the drastic budget cuts caused by the 2008 financial crisis.

**II. The 2009 Act Satisfies This Court's Requirement, Stated in *Souza*, that the Legislature Authorize the Sheriff's Conduct**

Plaintiffs' brief focuses on this Court's decision on *Souza*, but nothing about the 2011 Contract and 2015 Amendment conflicts with that decision. See *Souza v. Sheriff of Bristol Cty.*, 455 Mass. 573 (2010).

In *Souza*, this Court addressed whether the Sheriff's office exceeded its authority in

implementing an "Inmate Financial Responsibility Program" ("IFR Program"). Under the IFR Program, inmates were charged a "cost of care" fee and other fees for services including medical care, haircuts, and GED testing. *Souza*, 455 Mass. at 574. The program was intended to partially "defray[ ] the cost of incarceration, while still maintaining quality programs and services." *Id.*

The Sheriff argued at the time that he was authorized to charge the challenged fees pursuant to his broad authority to operate and administer the county correctional institutions under G.L. c. 126 § 16. *Id.* at 584. This Court disagreed and observed that there was already a comprehensive statutory scheme in place "concerning the fees that may be imposed by sheriffs and the use of inmate funds." *Id.* This Court found that the fees in the IFR Program were not among those expressly permitted and were inconsistent with the existing statutory scheme. *Id.* at 584-86.

This case, unlike *Souza*, is not about the "Sheriff's authority to impose fees on incarcerated persons." (Pls. Br. 18.) In material contrast to the fees at issue in *Souza*, the Sheriff is not imposing

fees on inmates for telephone service and is not deducting any amounts from inmate accounts relating to inmate telephone service. Indeed, Plaintiffs here concede that there are no fees imposed on incarcerated persons under consideration in this case. (Pls. Br. 47 (“It is undisputed that telephone calls made by persons in Bristol County correctional facilities, which are all outgoing calls, are paid for exclusively by the recipients of those calls.”).) Rather, the cost of telephone calls is incurred by call recipients, who pay that cost to Securus, a private telecommunications carrier.

Moreover, the 2011 Contract and 2015 Amendment fit well within the existing statutory scheme. The 2009 Act expressly contemplates the existence of inmate telephone services and that there would be revenues associated with those services. The Sheriff’s office is required to provide inmates with “reasonable access to public telephones.” (Add. 22 (103 Mass. Code Regs. 948.10).) It is required to maintain a policy governing certain aspects of the telephone services provided, including permitted length of the calls, limitations on phone calls, and an indication of who pays for those calls. *Id.* To

provide telephone services consistent with that policy, the Sheriff's office contracted with Securus, a company specializing in providing calling services in correctional facilities. And it did so in a manner that complied with the Commonwealth's procurement policies and subject to the Commonwealth's standard contractual Terms and Conditions. (Hodgson Br. 9-11.)

Plaintiffs assert that it would be a "strange conclusion" if the seven Sheriffs covered by the 2009 Act could contract for telephone service and receive site commissions, but others cannot. (Pls. Br. 41.) But in fact, other state and county correctional institutions can and do collect site commissions. For non-covered Sheriffs, regulations provide for the collection of "commissions ... that are derived from inmate calling," and in facilities administered by the Department of Corrections, those site commissions derived from inmate telephone service are "returned to the General Fund of the Commonwealth." (Add. 20 (103 Mass. Code Regs. 482.06(6).)

Plaintiffs argue that the Sheriff is trying an "end-run around *Souza* by rerouting invalid fees through Securus." (Pls. Br. 21.) But Securus is not collecting telephone fees and simply passing them back

to the Sheriff's office. The 2011 Contract (and 2015 Amendment) between the Sheriff's office and Securus was privately negotiated and not directly tied to any fees paid by call recipients. The Sheriff's office does not "receive[] funds that Securus collected from the recipients of inmates' calls." (J.A. 199 (Mem. & Order on Mot. to Dismiss).)

**III. Under *Souza*, No Statutory Authority Other than the 2009 Act is Necessary to Contract for Telephone Service**

Finally, Plaintiffs contend that even if the 2009 Act authorized the Sheriff to "retain" revenue derived from inmate telephone service, it did not separately authorize the Sheriff to "collect" the revenue in the first place. (Pls. Br. 37.)

Plaintiffs' creative argument flips *Souza* on its head. The plaintiffs in *Souza* did not challenge the Sheriff's authority to contract with third parties to provide for the services at issue in that case or even to receive revenue from any such third parties. Rather, the only issue in dispute in *Souza* was whether the Sheriff had authority to charge inmates a fee for providing those specific services. *Souza*, 455 Mass. at 586. Here, the statutory authority in Section 12(a) to keep revenues received from inmate telephone

service necessarily encompasses a Legislative approval of collecting those revenues in the first place. Moreover, under *Souza*, there would be no basis to challenge the Sheriff's authority to contract for inmate telephone services at all. Calling services are a basic need in a correctional facility, and the requirement for county facilities to provide such services is codified at 103 Mass. Code Regs. 948.10. (See Add. 22 (103 Mass. Code Regs. 948.10).) This specific requirement imposed on the Sheriff aligns with the generalized requirement imposed by Section 15 of the 2009 Act, which provides the Sheriff with the obligation of administrative and operational control over the correctional facilities. (Hodgson Br. Add. 108 (2009 Act § 15).) At most, Plaintiffs could argue that revenues received from inmate telephone service should be turned over to the state treasury, but Section 12(a) provides that those revenues "remain with the office of the sheriff."

**CONCLUSION**

For these reasons and those expressed in his opening brief, Defendant Sheriff Thomas M. Hodgson respectfully requests that this Court find that the Legislature, through the provisions of 2009 Mass. Legis. Serv. Ch. 61 (S.B. 2119), authorized the BCSO to raise revenues for the Office of the Sheriff through inmate calling service contracts.

Respectfully submitted,  
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# **ADDENDUM**

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482.05: continued

Foreign National. Any person who is not a U.S. citizen, including resident aliens who have a resident alien registration card.

Global Access Number. A telephone number, designated by the Deputy Commissioner of the Prison Division, and available for use by all inmates housed within the Department of Correction.

Inmate Telephones. Telephones designated for the exclusive use of inmates.

PIN Number. An authorized personal identification number (PIN) assigned to each inmate for use with inmate telephones.

Special Status Inmates. Inmates, detainees and/or civil commitments held with special, specific conditions of custody, which statuses include, but are not limited to, disciplinary detention, administrative segregation, protective custody/special housing unit, a Departmental disciplinary unit, or inmates on awaiting action status. Said inmates may be housed in general population, depending on the custody conditions under which he or she is being held.

Superintendent. The chief administrative officer of a correctional institution.

Telephone Monitoring. The monitoring and/or recording of telephone conversations of an inmate.

482.06: Institution Procedures for Inmate Telephone Access and Use

(1) General. Each Superintendent shall develop procedures to insure that inmates have access to telephones. Access should be regulated in such a manner as to provide for the orderly and safe use of telephones by inmates.

(2) Inmate Telephone Use. Each Superintendent shall make arrangements to have an adequate number of inmate telephones available for inmate use. Institution business telephones shall not be used for inmate telephone contact except in emergency or unusual situations (*e.g.*, seriously ill family member or oral arguments for Court hearings) and then only with the permission of the Superintendent or a designee. Outgoing telephone calls only shall be allowed, subject to the conditions authorized by 103 CMR 482.00.

(3) Inmate Telephone Restrictions.

(a) Inmate telephone calls shall be placed as either a collect call or a pre-paid debit call, all utilizing an automated operator. A transfer of money from personal funds to a debit phone account must be done prior to making debit calls. All international calls shall be debit calls.

(b) Direct dialed calls, three way or conference calling and calls to 411, 800, 900, 550, 976 or other multiple long distance carriers are prohibited, except upon the approval of the Commissioner.

(c) Inmates may be allowed a total of 15 telephone numbers authorized for use in conjunction with the inmate's PIN. Five of these numbers shall be reserved for attorney telephone numbers.

(d) All inmate telephone calls, except calls to pre-authorized attorney telephone numbers, a foreign national's pre-authorized telephone number for his or her consular officer or diplomat, pre-authorized clergy telephone numbers and pre-authorized licensed psychologist, social worker and/or mental health professional telephone numbers are subject to telephone monitoring.

(e) All inmate telephone calls are subject to duration limits, or other restrictions such as authorized calling hours as determined by procedures developed by the Superintendent of each institution.

(f) All inmate telephone calls require positive call acceptance by the called party prior to the call being connected. Passive acceptance of inmate calls may be allowed with the approval of the Deputy Commissioner of the Prison Division, Director of Administrative Services, or Superintendent. The telephone system shall use a pre-recorded name to announce who the call is from.

482.06: continued

(g) All inmate telephone calls to the North American Dialing Plan shall contain a pre-recorded announcement identifying that the collect call is originating from an inmate at a Massachusetts Department of Correction (institution) shall indicate that the call is subject to being recorded, and shall indicate that any attempt to access a three-party line or conference call will cause the system to immediately disconnect the call. This announcement may be played at various intervals during all telephone calls subject to monitoring and/or recording.

(h) An inmate's telephone privileges, with the exception of attorney telephone calls or a foreign national's call to his or her consular officer or diplomat, may be suspended or curtailed pending either disciplinary action, administrative action, or as part of a disciplinary sanction.

(4) Suspension of Inmate Telephone Use. A Superintendent or a designee may suspend telephone usage by the inmate population on an emergency basis when, in the Superintendent's opinion, telephone use by the entire inmate population presents a threat to the institution's security. After 24 hours, the Superintendent or designee, if necessary, shall authorize a continuation of the suspension of telephone use, to be reviewed every 24 hours thereafter and reauthorized as necessary.

(5) International Debit Calling. Inmates shall be allowed to call five international numbers in addition to the ten personal numbers that can be called collect/debit. International debit calling is permitted to areas where North American Dialing Plan collect calls cannot be completed. Prior to placing any international calls, the inmate must complete an Inmate International Debit Request Form to transfer money from his/her personal account to a debit account for the purpose of placing an international telephone call. The inmate is responsible to pay for the call prior to the call being completed.

(6) Commissions. All Commissions received that are derived from inmate calling shall be returned to the General Fund of the Commonwealth. This shall be done on a monthly basis by the Director of Administrative Services.

(7) Reports detailing all receipts and expenditures of inmate telephone commissions shall be kept on file by the Director of Administrative Services.

482.07: Inmate Telephone Use for Court, Attorney Contact, Consular Officer/Diplomat Contact, Pre-approved Ordained Clergymen Contact, and Licensed Psychologist, Social Worker, and/or Mental Health and Human Service Professionals Contact

(1) Telephone calls to pre-authorized attorney, consular officer/diplomat numbers, or the Global Access numbers, shall not be suspended or curtailed except in accordance with 103 CMR 482.06(4) or 482.08. Telephone calls to pre-authorized attorney numbers, consular officer/diplomat numbers, or the Global Access numbers, shall not be subject to telephone monitoring or recording.

(2) Inmates shall be allowed to make unmonitored and unrecorded collect/debit telephone calls to their designated and pre-approved ordained clergymen, pre-approved and licensed psychologists, social workers, and/or mental health and human service professionals.

No clergyperson employed by the Department of Correction and no professional employed by the Department, or contracting to provide services on behalf of the Department, may be designated by an inmate, nor shall such individuals be pre-approved for Pin number purposes.

In order to complete the pre-approval process, the inmate must provide a designation of the clergyperson or professional and a letter from the clergyperson or professional attesting to the professional relationship that exists with the inmate. The Superintendent may require additional documentation as necessary.

482.08: Telephone Access and Use for Special Status Inmates

(1) Disciplinary Detention. Inmates confined in disciplinary detention shall not have access to a telephone, except to directly contact a court, an attorney, or a consular officer/diplomat, unless authorized by the Superintendent or a designee. Inmates placed in disciplinary awaiting action status shall have telephone access to include two personal telephone calls per week lasting 15 minutes in duration. In addition, disciplinary awaiting action inmates shall have access to a telephone to directly contact a court, attorney or his/her consular officer or diplomat.

948.08: Reading of Non-privileged Correspondence

Written policy and procedure shall provide that the Sheriff/facility administrator may authorize the reading of non-privileged mail when in his opinion, such action is necessary to maintain security or order in the county correctional facility or protect the physical safety of an individual. Such reading of mail shall be properly recorded.

948.09: Disapproval of Non-privileged Correspondence

Written policy and procedure shall govern the disapproval of inmate correspondence and contain, at a minimum, the following:

(1) Non-privileged correspondence shall be disapproved only to prevent interference with facility goals of security, safety, order or rehabilitation. Disapproval shall not be based upon an employee's personal views of the merit of such correspondence.

(2) The Sheriff/facility administrator, or designee, may disapprove for mailing or receipt by an inmate non-privileged correspondence, the contents of which fall as a whole or in significant part, into any of the following categories:

- (a) information or materials which could clearly and reasonably be expected to encourage the use of physical violence or group disruption of facility operations;
- (b) threats of blackmail or extortion;
- (c) plans for sending contraband in or out of the facility;
- (d) plans to escape;
- (e) plans for activities in violations of Sheriff's Office or facility regulations, orders, or policies;
- (f) criminal activity or plans for criminal activity;
- (g) coded messages which are not reasonably decipherable by the reader;
- (h) descriptions of the making of any weapon, explosive, poison, or destructive device; and
- (i) sexually explicit material or material which features nudity which by its nature or content poses a threat to the security, good order, or discipline of the institution; and
- (j) any publications that may interfere with the treatment and rehabilitation process at that institution.

(3) If any non-privileged correspondence is disapproved for mailing or receipt, a written notice stating one or more of the reasons set forth in 103 CMR 948.09(2)(a) through (j) shall be sent to the inmate (outgoing mail) or to the originator and the inmate (incoming mail). The notice shall inform the inmate or the originator of the right to appeal the decision in writing to the Sheriff/facility administrator.

948.10: Telephone Privileges

Written policy and procedure shall govern inmate access to a public telephone and shall provide for the following:

(1) Reasonable access to public telephones including:

- (a) specific hours of telephone availability;
- (b) length of calls;
- (c) any limitations on phone calls; and
- (d) responsibility of payment for call.

(2) Procedures for receiving emergency phone calls for inmates, notification of such calls, and response to such calls.

(3) The Sheriff/facility administrator shall ensure that a procedure is developed to notify the inmates of the monitoring of inmate telephones. This procedure shall be posted next to all inmate telephones.

REGULATORY AUTHORITY

103 CMR 948.00: M.G.L. c. 124, § (1), (c), (d) and (q); c. 127, §§ 1A and 1B.

**CERTIFICATE OF COMPLIANCE  
PURSUANT TO RULE 16(k) OF THE  
MASSACHUSETTS RULES OF APPELLATE PROCEDURE**

I hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R. A. P. 16 (a) (13) (addendum);

Mass. R. A. P. 16 (e) (references to the record);

Mass. R. A. P. 18 (appendix to the briefs) and;

Mass. R. A. P. 20 (form and length of briefs, appendices, and other documents).

I further certify that the foregoing brief complies with the applicable length limitation in Mass. R. A. P. 20 because it is produced in the monospaced font Courier New at size 12 with one and a half-inch margins and contains 14 total non-excluded pages prepared with Microsoft Word 2013.

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**CERTIFICATE OF SERVICE**

Pursuant to Mass. R. A. P. 13(d), I the undersigned, do hereby certify, under the penalties of perjury, that a copy of the foregoing document has been served electronically on all parties or their representatives in this action as listed below this third day of September, 2021:

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