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Conflicts

Articulating *Twombly*: The *Iqbal* Framework for the Lower Courts

By Jane E. Willis & F. Turner Buford

On May 18, 2009, the Supreme Court announced its decision in *Ashcroft v. Iqbal*,[1] a civil rights case in which the plaintiff alleged that federal government officials had unconstitutionally subjected him to brutal incarceration on the basis of his race, religion, or national origin. Writing for the five-member majority, Justice Kennedy applied the standard articulated two years ago by the Court in *Bell Atlantic Corp. v. Twombly*,[2] to reverse the Second Circuit's decision that the plaintiff's complaint was sufficiently "plausible" to withstand the defendants' motion to dismiss. In addition to whatever implications the case may have for civil rights law, the *Iqbal* case is significant because it contains the Supreme Court's first real exposition of the *Twombly* standard for stating a claim under Federal Rule of Civil Procedure 8. As such, the framework set forth in *Iqbal* will have broad application to all complaints filed in federal court and potentially significant effects on complaints in a number of areas of substantive law outside the antitrust (*Twombly*) and civil rights (*Iqbal*) contexts. Because *Twombly's* plausibility standard has to date not been uniformly embraced at the state court level, the *Iqbal* decision may also have implications for forum-selection decisions.

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Ashcroft v. Iqbal: New Pleading Standards and Motions to Dismiss

By Edward D. Johnson

More than two years ago, in *Bell Atlantic Corp. v. Twombly*,[1] the U.S. Supreme Court considered what a complaint must contain to survive a motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P. 12(b)(6). In doing so, *Twombly* construed the standard set more than 50 years earlier in *Conley v. Gibson* that such a motion to dismiss should be denied unless it appears "beyond doubt" that the plaintiff could "prove no set of facts in support of" the claim that would entitle the plaintiff to relief.[2] *Twombly* appeared to adopt a more movant-friendly standard, requiring a complaint to allege facts that, if proven, would support the relief requested *and* to show that the alleged facts were "enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)."[3]

The impact of *Twombly* was unclear. As noted by Justice Stevens's dissent in *Twombly*, the ultimate impact of the decision—including the breadth of its application—"is a question that [only] the future will answer."[4]

Earlier this year, in *Ashcroft v. Iqbal*,[5] the U.S. Supreme Court appears to have answered many of the unresolved issues raised by *Twombly*.

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Articulating *Twombly*

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The plaintiff in *Iqbal* was a Pakistani citizen and a practicing Muslim, who was arrested and detained as a person of "high interest" during the massive investigation launched by the FBI and the Justice Department in the wake of the 9/11 attacks. Mr. Iqbal eventually pled guilty to criminal charges of immigration fraud, but not before having been detained for some time in the Administrative Maximum Special Housing Unit of the Metropolitan Detention Center in Brooklyn, New York. There, according to the complaint, the plaintiff suffered numerous abuses, including painful beatings and unjustified restrictions on his attempted religious observances. After serving a prison sentence in connection with his guilty plea, Mr. Iqbal was returned to Pakistan. He subsequently filed a *Bivens* action in the U.S. District Court for the Eastern District of New York against a broad array of federal government officials whom he blamed for his allegedly unconstitutional mistreatment, including former FBI director Robert Mueller and former attorney general John Ashcroft. Specifically, Iqbal alleged that Mueller and Ashcroft had knowledge of and approved a policy of detaining persons of "high interest" to the 9/11 investigation in high-security prison facilities based solely on their religion, race, or national origin.[3]

Defendants Mueller and Ashcroft moved to dismiss the plaintiff's complaint on the ground of qualified immunity, arguing that the complaint failed to contain allegations sufficient to show the defendants' respective personal involvement in conduct that was clearly unconstitutional. Relying on the "no set of facts" standard embodied in *Conley v. Gibson*,[4] the district court denied the defendants' motion to dismiss. On appeal, the Second Circuit considered the case under the then newly decided *Twombly* "plausibility" standard and affirmed. The Supreme Court reversed.

Justice Kennedy's majority opinion began by stating that government officials entitled to qualified immunity "may not be held liable for the unconstitutional conduct of their subordinates under a theory of *respondeat superior*."[5] Justice Kennedy concluded that "purpose rather than knowledge is required" to impose liability on government officials charged with misconduct based on the actions of their subordinates.[6] The Court then turned to an analysis of the plaintiff's complaint under the *Twombly* "plausibility" standard, which the Court characterized as follows:

> To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. A claim has facial plausibility *when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged*. The plausibility standard is not akin to a probability requirement, but it asks for more than a sheer possibility that a defendant has acted unlawfully.
>
> Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief.[7]

The Court acknowledged that the facts recited in a complaint are to be assumed true, but distinguished facts from legal conclusions, which the Court said were not entitled to deference. Applying *Twombly*, according to the Court, is a matter of eliminating legal conclusions from a complaint and then determining whether the remaining factual allegations (assumed to be true) plausibly give rise to an entitlement to relief.

Using this framework to analyze Iqbal's complaint, the Court concluded that Iqbal's allegations that Mueller and Ashcroft "knew of, condoned, and willfully and maliciously agreed" to subject him to harsh confinement on the basis of his religion, race, or national origin, and that Ashcroft was the "architect" of this policy, and that Mueller was "instrumental" in implementing it, were all legal conclusions.[8] According to the Court, the only facts alleged by Iqbal were that the FBI under Mueller detained thousands of Arab Muslim men as part of its 9/11 investigation and that the policy of detaining such men in highly restrictive conditions was approved by Mueller and Ashcroft. The Court found that, standing alone, these facts were not enough plausibly to suggest that Muller and Ashcroft had approved the detention policy on the basis of the detainee's religion, race, or national origin. The alleged facts were certainly consistent with that explanation for the defendants' conduct, but the Court found that the facts were also consistent with, if not more likely explained by, the defendants' desire to hold terrorist suspects in the most secure conditions available. In sum, the plaintiffs' allegations were not enough.

Iqbal offers a framework in which to think about "plausibility" outside of the antitrust context.

Justice Souter, the author of the majority opinion in *Twombly*, wrote the dissent for the *Iqbal* minority. He was joined by Justice Breyer, who had voted with the majority in *Twombly*, and by Justices Stevens and Ginsberg, who had dissented in *Twombly* (a 7–2 decision). Justice Souter took issue with the majority's description of the standard for supervisory liability in a *Bivens* action (especially because Justice Souter perceived the defendants as having conceded in their briefs that they could be liable if the plaintiff could show that they had knowledge of a subordinate's discriminatory purpose). Justice Souter also contended that the majority had misapplied *Twombly* in that Iqbal's allegations were "neither confined to naked legal conclusions nor consistent with legal conduct."[9] According to Justice Souter, the majority's characterization of Iqbal's allegations as "conclusory" failed to take account of Iqbal's specific descriptions of the allegedly illegal program in his complaint. Justice Souter also argued that there

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was no principled distinction between the allegations that the majority labeled legal conclusions and those that it accepted as pleaded facts.

The Court's discussion and application of *Twombly* ensures that the *Iqbal* case will have implications beyond the scope of *Bivens* liability for government officials acting in a supervisory capacity. At a minimum, *Iqbal* confirms what most federal courts had already suspected: namely, that *Twombly* is not limited to the antitrust context, but instead applies to all civil complaints and therefore to all motions to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). The Supreme Court explicitly addressed this issue in *Iqbal*, holding that "[o]ur decision in *Twombly* expounded the pleading standard for all civil actions. . . ."[10]

In addition to confirming *Twombly*'s broad applicability, *Iqbal* also provided federal courts with instruction regarding how to measure the sufficiency of a complaint's allegations. According to the majority, application of *Twombly* requires that judges first sift through a complaint's allegations and purge those allegations in the complaint that amount to pure legal conclusions. Those factual allegations that survive must then be tested against *Twombly*'s plausibility standard, which asks what inferences can fairly be drawn from the conduct described in the complaint. If the specific factual allegations are merely consistent with, and not suggestive of, unlawful behavior, the plaintiff has not pleaded sufficient facts to survive a motion to dismiss. In further articulating the *Twombly* standard, the Court explicitly noted that judges should be guided by "common sense" and "judicial experience" in deciding which complaints pass muster.[11]

Whether the Court's method for assessing "plausibility" ultimately proves useful to courts seeking to apply *Twombly* or whether it merely recasts the "plausibility" inquiry as to the question whether a particular allegation is "legal" or "factual" remains to be seen. For now, *Iqbal* is significant in that it at least begins to offer courts a framework within which to think meaningfully about "plausibility" outside of the antitrust context. Given the facts of *Iqbal*, the decision may have an effect in cases where the law explicitly acknowledges that multiple explanations are possible for certain conduct, but attaches liability only to one—such as some forms of discrimination suits. Likewise, the *Iqbal* framework may be readily applied to cases where vicarious liability is sought against an entity that is in some way removed from the specific conduct at issue, such as a parent corporation or controlling shareholder, and also in cases involving claims of aiding and abetting or principal/agent relationships. Previously, applying *Twombly* outside of the antitrust context had been somewhat difficult (for example, what does an "implausible" breach of contract claim look like?). To the extent *Iqbal*'s formula for assessing "plausibility" makes *Twombly* easier to apply, it could expand *Twombly*'s substantive effects and empower judges to dismiss more cases with facially dubious allegations.

If the Supreme Court's further articulation of the "plausibility" standard causes more complaints to be scrutinized more closely by the federal courts, it may become increasingly significant that not all states have embraced *Twombly*'s "plausibility" inquiry as the appropriate standard for surviving a motion to dismiss and obtaining discovery. A handful of states, including Arizona, have explicitly rejected *Twombly*.[12] Other state courts have declined to adopt *Twombly* prior to an official ruling on the matter from their respective state supreme courts.[13] Still others have explicitly embraced *Twombly* and will presumably also follow *Iqbal*.[14] If federal courts begin to grant more motions to dismiss after *Iqbal*, it may cause counsel representing plaintiffs to consider more carefully the possible divergence in pleading standards when selecting a forum to bring an action.

Endnotes

1. 129 S.Ct. 1937 (2009).
2. 550 U.S. 544 (2007).
3. *See generally* Iqbal v. Ashcroft, 129 S.Ct. 1937, 1943–45 (2009). Iqbal did not challenge his arrest or initial confinement; rather, he only brought constitutional claims based on his ultimate detention at the Administrative Maximum Special Housing Unit.
4. 355 U.S. 41 (1957).
5. *Id.* at 1948.
6. *Id.* at 1949.
7. *Id.* at 1949 (internal quotation marks and citations omitted, emphasis added).
8. *Id.* at 1951.
9. *Id.* at 1960 (Souter, J., dissenting)
10. *Id.* at 1953 (internal quotation marks and citations omitted).
11. *Id.* at 1950 ("Determining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.").
12. *See, e.g.*, Cullen v. Auto-Owners Ins. Co., 189 P.3d 344, 345, 420 (Ariz. 2008); Colby v. Umbrella, Inc. 955 A.2d 1082, 1087 n.1 (Vt. 2008); Highmark W. Va., Inc. v. Jamie, 655 S.E.2d 509, 513 n.4 (W. Va. 2007).
13. *See, e.g.*, Crum v. Johns Manville, Inc., No. 2070869, 2009 WL 637260, *13 n.2 (Ala. Civ. App. Mar. 13, 2009) ("The United States Supreme Court's interpretation of the Federal Rules of Civil Procedure is not binding on this court's interpretation or application of the Alabama Rules of Civil Procedure. . . . Instead, this court is bound by the Alabama Supreme Court's interpretation of our Rules of Civil Procedure. Until such time as our supreme court decides to alter or abrogate . . . [*Conley*'s] standard, we are bound to apply it. . . ."); Holleman v. Aiken, 668 S.E.2d 579, 584 (N.C. App. 2008).
14. *See, e.g.*, Iannacchino v. Ford Motor Co., 888 N.E.2d 879, 890 (Mass. 2008) ("We agree with the Supreme Court's analysis of the *Conley* language . . . and we follow the Court's lead in retiring its use. The clarified standard for Rule 12(b)(6) motions adopted here will apply to any amended complaint that the plaintiffs may file.").

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Ashcroft v. Iqbal

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Twombly

Twombly involved an alleged violation of section 1 of the Sherman Act. Plaintiff Twombly alleged that defendant Bell Atlantic and other telecommunication companies violated the Sherman Act by allocating geographic markets (even though it was economically feasible for them to compete in these areas) and by passing up attractive opportunities in contiguous markets. Twombly asked the court to infer that because the companies did not enter into other markets, they had an agreement that violated the Sherman Act.

The district court granted Bell Atlantic's motion to dismiss for failure to "allege sufficient facts from which a conspiracy can be inferred." The court introduced a "plus factor," which required the plaintiff show that the defendants' actions would be against economic self-interest, meaning that there was a conspiracy between the companies. The court found that the plaintiff failed to show this "plus factor" and that the defendant's actions could have been motivated by something other than a conspiracy.[6]

Twombly appealed to the Second Circuit Court of Appeals, which reversed the district court. The Second Circuit held that the defendant failed to show that the plaintiff could prove no set of facts demonstrating that the conduct alleged was the product of collusion, rather than coincidence. Accordingly, and applying the *Conley v. Gibson* standard, the court vacated the dismissal.

The U.S. Supreme Court, in a 7–2 decision, reversed the Second Circuit and affirmed the district court's grant of the motion to dismiss for failure to state a claim. The Court asserted it was not requiring "heightened fact pleading of specifics," but did require enough facts "to state a claim to relief that is plausible on its face." The Court concluded that Twombly had not "nudged their claims across the line from conceivable to plausible," meaning the complaint had to be dismissed.

Before the district court, Twombly had alleged that telecommunication companies were in neighboring communities but still did not compete and relied on a chief executive's statement that moving into a competing company's market "might be a good way to turn a quick dollar but that doesn't make it right." Twombly relied on these incidents to show that it was possible for the companies to compete in the communities and the reason the companies were not competing was due to a conspiracy in violation of section 1 of the Sherman Act.

The Supreme Court first stated that, to show a section 1 claim, a plausibility standard applied: A plaintiff cannot rely solely on parallel conduct, which is circumstantial evidence. Instead, the plaintiff needs to allege facts, even if later proved to be false, to show some type of illegal agreement. A complaint that alleged parallel conduct (without more) is much "like a naked assertion of conspiracy" and, as such, subject to dismissal for failure to state a claim. Although a complaint need not contain detailed factual allegations, the plaintiff does have the obligation to provide the "grounds" of its "entitle[ment] to relief," which is more than mere labels and conclusions.

The Supreme Court reiterated that a motion to dismiss for failure to state a claim cannot be granted merely because the factual allegations are not believed. Instead, the factual allegations must be taken as true when evaluating a motion to dismiss. More pointedly, a plaintiff that has a "well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of the facts alleged is improbable, and 'that recovery is very remote and unlikely.'" That said, and although embracing *Conley*'s "no set of facts" standard, *Twombly* found that it is not up to the judge to turn a frivolous claim into a substantial one by imagining facts that are not present in the complaint.

In dissent, Justice Stevens adhered to the traditional view that the Federal Rules of Civil Procedure do "not require or even invite the pleading of facts." Citing *Conley*, Justice Stevens repeated that a "complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief."

The immediate impact of the *Twombly* decision was unclear. It was uncertain whether the *Twombly* standard only applied to antitrust cases or to all motions to dismiss for failure to state a claim and whether *Twombly* set forth a new pleading standard.[7] Moreover, the Supreme Court's per curiam decision just two weeks later in *Erickson v. Pardus*[8]—which reversed the granting of a motion to dismiss for failure to state a claim in a pro se plaintiff case using a standard similar to the *Conley* standard—raised further uncertainty about the scope of *Twombly*.[9] *Iqbal*, a May 2009 Supreme Court decision, provides a great deal of guidance in resolving these issues raised by *Twombly*.

Iqbal

Plaintiff Iqbal claimed constitutional violations by a federal actor pursuant to *Bivens v. Six Unknown Federal Narcotics Agents*[10] arising out of alleged actions by then–Attorney General John Ashcroft and the treatment of enemy combatants. Responding to Iqbal's allegation of purposeful and unlawful discrimination, Ashcroft filed a motion to dismiss for failure to state a claim and on qualified immunity grounds. The district court denied in part the defendant's motion to dismiss for failure to state a claim; the Second Circuit affirmed in part and reversed in part and the Supreme Court granted certiorari.[11]

After summarizing the procedural background, the Supreme Court found that Iqbal had to show that Ashcroft's own actions violated the Constitution. Construing *Bivens* narrowly, *Iqbal* found that a claim for invidious discrimination in violation of the First and Fifth Amendments required the plaintiff to "plead and prove that the defendant acted with discriminatory purpose." In addition, "purposeful discrimination requires more than 'intent as volition or intent as awareness of consequences.'" To state a claim, Iqbal had to plead substantial factual matters to show that Ashcroft adopted and implemented the policies at issue, not for a neutral reason but for "the purpose of discriminating on account of race, religion, or national origin."

Finding that the standards set forth in *Twombly* applied to Iqbal's complaint, the court stated that two principles provide the basis for *Twombly*. First, the court must accept as true all well-pleaded factual allegations in the complaint (but need not accept the truthfulness of legal conclusions). Second, only a complaint

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that states a plausible claim for relief can survive a motion to dismiss. When the complaint contains well-pleaded facts, the "court should assume their veracity and then determine whether they plausibly give rise to an entitlement to relief."

Explaining *Twombly*, the court wrote that the Twombly's complaint "flatly pleaded" that the defendants had entered into a conspiracy and as a result, the complaint set forth a "legal conclusion," was "deficient," and was not entitled to the assumption of truth. The court disregarded the "parallel conduct" claim in *Twombly* because, even if taken as true, parallel conduct did not plausibly suggest an unlawful agreement.

Applying this standard, Iqbal's complaint did not nudge his claims of invidious discrimination "across the line from conceivable to plausible." The allegations against Ashcroft, much like in *Twombly*, were nothing more than "formulaic recitation of the elements" of a constitutional discrimination claim. As such, the allegations were conclusions and are not entitled to be assumed to be true. It was not that the allegations were unrealistic or nonsensical, but as in *Twombly*, the allegations in *Iqbal* were conclusory in nature of respondent's allegations.

Going further, *Iqbal* held that *Twombly* was not limited to antitrust disputes. Such a narrow reading, the Court reasoned, would go against the Federal Rules of Civil Procedure. *Twombly* turned on the construction of Fed R Civ. P. 8, and not the underlying substantive law. Accordingly, *Iqbal* made plain that the *Twombly* analysis applies "in all civil actions and proceedings in the United States district courts."

In doing so, *Iqbal* makes it clear that *Twombly* applies to all cases governed by the Federal Rules of Civil Procedure. As such, *Iqbal* adds greatly needed clarity for addressing both pleading standards and the standards for a motion to dismiss for failure to state a claim in all civil cases in federal court.

Endnotes

1. 550 U. S. 544 (2007).
2. 355 U.S. 41, 45–46 (1957).
3. 550 U.S. at 555.
4. 550 U.S. at 570.
5. 129 S. Ct. 1937 (2009).
6. 550 U.S. at 552.
7. Samuel A. Thumma, *New Standards of Legal Sufficiency to Survive a Motion to Dismiss?* PP&D (ABA), Summer 2007, at 1, *reprinted in* Appellate Practice Journal (ABA), Winter 2008, at 10.
8. 127 S. Ct. 2197 (2007).
9. Samuel A. Thumma, *New Standards of Legal Sufficiency to Survive a Motion to Dismiss?* PP&D (ABA), Summer 2007, at 1, *reprinted in* Appellate Practice Journal (ABA), Winter 2008, at 10.
10. 403 U.S. 388 (1971)
11. 129 S. Ct. at 1945.

Model Rule 1.10

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Comment 9 specifies that the written notice should also:[14]

- describe the screened lawyer's former representation
- include statements from the screened lawyer and the firm that the client's material confidential information has not been disclosed or used in violation of the Model Rules.

Certify Actual Compliance to the Former Client

Comment 10 highlights the purpose of certifications: to assure the former client that the former client's confidential information has not been disclosed or misused, either before or after implementing the screen.[15] Beyond that, however, amended Model Rule 1.10 doesn't really specify what the certification should contain. Amended Model Rule 1.10 also does not identify any specific procedures for certifying actual compliance. A few state provisions, however, specify serving the former client affidavits attesting actual compliance, while others stipulate that the former client may seek judicial review or court supervision to ensure actual compliance.[16] As with the other unanswered aspects of Model Rule 1.10, careful lawyers seeking to invoke its protection will proceed cautiously, and issue a certification that is full and robust.

Conclusion

It is clear from the above discussion that although amended Model Rule 1.10 permits screening when a lawyer moves from one private law firm to another, it imposes some stringent requirements. Law firms seeking to take advantage of this rule should be sure that they are willing and able to fulfill these requirements and that they can demonstrate their ability to comply with screening should a tribunal require them to do so.

Endnotes

1. Seven Years into a Lawyer's Career, New Results from After the JD, Wave II, Researching the Law, an ABF Update, American Bar Foundation, Vol. 20, No. 2, Spring 2009 *available at* www.americanbarfoundation.org/uploads/cms/documents/abf_rl_spring09_final.pdf.
2. Leigh Jones, *ABA May Amend Ethics Rules on Conflicts*, The National Law Journal, (Feb. 2, 2009) *available at* www.law.com/jsp/article.jsp?id=1202427915603.
3. Jesse J. Jolland, *Recession causing lawyer layoffs at big firms*, The Seattle Times, (Apr. 13, 2009) *available at* http://seattletimes.nwsource.com/html/businesstechnology/2009031937_aplaidofflawyers.html.
4. Model Rules of Prof'l Conduct R. 1.11, cmt 4.
5. Chart on Lateral Lawyer Screening Status, www.abanet.org/cpr/ethics/screen-status.pdf (last visited Sept. 15, 2009).
6. Model Rules of Prof'l Conduct R. 1.10, cmt 7.
7. ABA Standing Comm. On Ethics and Prof'l Responsibility, Report 109, p. 14, *available at* www.abanet.org/leadership/2009/midyear/recommendations/109.pdf.
8. Healthnet Inc. v. Health Net, Inc., 249 F.Supp. 2d 755 (S.D. W.Va. 2003).
9. Model Rules of Prof'l Conduct R. 1.0, cmt 9.
10. Model Rules of Prof'l Conduct R. 1.10, cmt 7.
11. Susan R. Martyn, *Screens in the Courts: 2000–2009*, INTAPP Risk Bulletin, July 2009: Ethical Screening Requirements.
12. Model Rules of Prof'l Conduct R. 1.10, cmt 8.
13. Model Rules of Prof'l Conduct R. 1.10(a)(2)(ii).
14. Model Rules of Prof'l Conduct R. 1.10, cmt 9.
15. Model Rules of Prof'l Conduct R. 1.10, cmt 10.
16. *See e.g.*, Ma. Rules of Prof'l Conduct R. 1.10; Or. Rules of Prof'l Conduct R. 1.10(c); Wa. Rules of Prof'l Conduct R. 1.10.

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