Nos. 13-4633 & 13-4743

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

JOHN COTTILLION, *et al.*,
Appellees/Cross-Appellants,
v.
UNITED REFINING COMPANY, *et al.*
Appellants/Cross-Appellees.

On Appeal from the United States District Court
for the Western District of Pennsylvania

BRIEF OF *AMICI CURIAE* THE AMERICAN BENEFITS COUNCIL, THE ERISA INDUSTRY COMMITTEE, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANTS/CROSS-APPELLEES

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Third Circuit Rule 26.1, *amici curiae* make the following disclosures:

(1) For non-governmental corporate parties, please list all parent corporations:

The American Benefits Council, the ERISA Industry Committee, and the Chamber of Commerce of the United States of America are non-profit organizations with no shareholders or parent corporations.

(2) For non-governmental corporate parties, please list all publicly held companies that hold 10% or more of the party's stock:

Not applicable.

(3) If there is a publicly held corporation which is not a party to the proceeding before this Court but which has a financial interest in the outcome of the proceeding, please identify all such parties and specify the nature of the financial interest or interests.

Not applicable.

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INTEREST OF *AMICI CURIAE*[1]

Amici represent some of America's largest employers and largest sponsors of employee benefit plans. They have a particular interest in the issues presented in this case because the district court's ruling will create uncertainty in the administration of plans, invite costly litigation, and discourage *amici*'s members from offering employee benefit plans. *Amici* thus seek to present this Court with the perspective of employers on the implications of the district court's ruling.

Amicus the American Benefits Council (the Council) is a broad-based, non-profit organization dedicated to protecting and fostering privately-sponsored employee benefit plans. The Council's members are primarily large U.S. employers that provide employee benefits to active workers and retirees. The Council's membership also includes organizations that provide services to employers of all sizes regarding their employee benefit programs. Collectively, the Council's members either directly sponsor or provide services to retirement and health benefit plans covering more than 100 million Americans.

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[1] Pursuant to Federal Rule of Appellate Procedure 29(a), *amici* state that all parties consent to the filing of this brief. Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* state that no party's counsel authored this brief in whole or in part; no party or party's counsel contributed money that was intended to fund preparing or submitting this brief; and no person—other than *amici*, their members, and their counsel—contributed money that was intended to fund preparing or submitting the brief.

Amicus the ERISA Industry Committee (ERIC) is a non-profit organization representing America's largest private employers sponsoring pension, savings, healthcare, disability, and other employee benefit plans that provide benefits to millions of active workers, retired persons, and their families nationwide.

Amicus the Chamber of Commerce of the United States of America (the Chamber) is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country.

SUMMARY OF ARGUMENT

The decision below flouts clear Supreme Court precedent regarding the deference owed to plan administrators, even after a first mistaken interpretation of a plan. The decision is even more problematic because it holds that an administrator's reinterpretation of a plan (rather than the formal action of the sponsor) can actually amend the terms of a plan, locking in prior, mistaken interpretations forever. For the reasons set forth below, *amici* urge the Court to vacate the district court's decision.

First, the decision below misapplies a long line of cases requiring courts to defer to an Employee Retirement Income Security Act (ERISA) plan administrator's reasonable interpretation of plan terms whenever a plan expressly

grants the plan administrator interpretive discretion. This deference arises from sound policy considerations, including that a plan administrator is better situated than a court to have an understanding of the plan sponsor's intent, is knowledgeable about prior plan interpretations, and is familiar with the day-to-day operations of the plan. The district court rejected the current interpretation of the plan administrator without any finding that such interpretation was arbitrary and capricious, or otherwise not entitled to deference. Instead, the district court substituted an interpretation urged by the plaintiffs and derived from the plan administrator's previous mistaken operation of the plan. This approach gives dispositive weight to a plan administrator's prior mistakes in plan operation, rather than the administrator's current reasonable interpretation of the plan, and cannot be reconciled with the Supreme Court's decision in *Conkright v. Frommert*, 559 U.S. 506 (2010).

Second, the district court compounded its error by finding that an administrator's reinterpretation of a plan to correct operational error constitutes an amendment for purposes of ERISA § 204(g), 29 U.S.C. § 1054(g)(1) (the anti-cutback provision). Thus, a plan administrator who operates the plan under a mistaken interpretation will be locked into that interpretation forever. This reasoning, which conflates the interpretation of a plan with the amendment of the

plan, is not only contrary to the plain language of ERISA § 204(g), but is also at odds with Third Circuit and Supreme Court precedent regarding plan amendments.

Third, the decision below fails to take account of the policy considerations underlying ERISA. Although Congress designed ERISA to ensure that pension plans actually deliver the benefits they promise, it was acutely aware that overregulation hurts pensioners. ERISA plans are voluntary, and judicial decisions that make their administration more expensive, unpredictable, or cumbersome discourage employers from offering pension plans in the first place. The framework used by the district court vastly increases the stakes associated with administrative error and puts benefit plans at risk.

Amici thus ask this Court to vacate the decision below and remand with instructions that the district court follow the Supreme Court's holding in *Conkright*—that an administrator's *current* interpretation of a plan is entitled to deference, even where the administrator has previously made an error in interpretation.

ARGUMENT

I. The District Court's Decision Cannot Be Reconciled With The Supreme Court's Holding In *Conkright*.

Beginning with *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101 (1989), the Supreme Court has repeatedly held that whenever a plan expressly gives the administrator the right to interpret and apply plan language, courts must defer to

the plan administrator's reasonable interpretations. *See id.* at 115. Since *Firestone*, the Supreme Court has consistently treated the deference owed to plan administrators as a fundamental ERISA principle. *See, e.g.*, *Metro. Life Ins. Co. v. Glenn*, 554 U.S. 105, 115 (2008) (holding that deference applies even in the presence of a systemic conflict of interest).

The Supreme Court recently reaffirmed the principle that deference is owed to a plan administrator's interpretation in *Conkright v. Frommert*, 559 U.S. 506 (2010). In *Conkright*, the question was whether a plan administrator was entitled to deference even where the administrator had previously adopted a different, incorrect interpretation. *Id.* at 509. The *Conkright* plan administrator initially advanced a "phantom account" method for benefits calculation, but the Second Circuit rejected that reading because the court concluded it was both arbitrary and failed to meet ERISA's notice requirements. *Id.* at 510. After the case was remanded to the district court, the plan administrator filed an affidavit with the court proposing a new interpretation of the plan. Instead of giving the plan administrator deference, the district court reviewed the terms of the plan *de novo* and adopted the approach urged by the plan participants. *Id.* at 511. The Supreme Court reversed, holding that where a plan administrator is owed deference by virtue of the plan's terms, a court may not interpose its own judgment, even where an administrator has previously adopted a different interpretation. *Id.* at 513.

In so holding, the Supreme Court recognized that ERISA plans are complex, and, as a result, mistakes in administration are inevitable. As the Court stated:

> People make mistakes. Even administrators of ERISA plans. That should come as no surprise, given that [ERISA] is "an enormously complex and detailed statute" . . . and the plans that administrators must construe can be lengthy and complicated.

Id. at 509 (citing *Mertens v. Hewitt Assoc.*, 508 U.S. 248, 262 (1993)). Accordingly, the Court instructed that even where a plan administrator's initial interpretation is rejected, courts should defer to the administrator's subsequent interpretation of the plan. *Id.* at 513. Specifically, the Court noted that "the interests in efficiency, predictability, and uniformity . . . do not suddenly disappear simply because a plan administrator has made a single honest mistake." *Id.* at 518.

Conkright thus stands for the proposition that if a plan administrator makes a mistake in interpreting the plan, the administrator must be afforded a fresh opportunity to make a different interpretation, and the administrator must receive "deference for subsequent related interpretations of the plan." *Id.* at 509; *see also Goletz v. Prudential Ins. Co. of Am.*, 383 F. App'x 193, 197 (3d Cir. 2010) (citing *Conkright* and noting that the Court "all but rejected" the notion that administrative error strips administrators of deference).[2]

[2] Under *Conkright*, where there is a finding of bad faith or "[m]ultiple erroneous interpretations of the same plan provision," a plan administrator may not be entitled to unlimited attempts at plan reinterpretation. 559 U.S. at 521. But those

Footnote cont'd on following page

The district court's decision cannot be reconciled with *Conkright*. The court did not give deference to the plan administrator's "subsequent related interpretation[] of the plan," even though the administrator discovered an error in its prior interpretation and secured the approval of the "subsequent related interpretation" from the Internal Revenue Service (IRS) through its Voluntary Compliance Program (VCP) prior to litigation. Instead of deferring to the plan administrator's "subsequent related interpretation," the court gave effect to an interpretation offered by the plaintiffs that matched the plan administrator's prior mistaken operation of the plan. The court held that this substitution was appropriate so long as the plaintiffs could show that the plan administrator's prior interpretation was "tenable and rational . . . under the arbitrary and capricious standard." *Cottillion v. United Ref. Co.*, Civ. A. No. 09-140E, 2013 WL 1419705, at *11 (W.D. Pa. Apr. 8, 2013) (JA 32).

The district court did not hold that the administrator's current interpretation was unreasonable. *Id.* Rather, the district court's reasoning was that the administrator violated ERISA's anti-cutback provision simply by switching from

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facts are not present here. The plan administrator in this case determined that it had made an error in failing to actuarially reduce benefits. *Cottillion v. United Ref. Co.*, Civ. A. No. 09-140E, 2013 WL 1419705, at *4–5 (W.D. Pa. Apr. 8, 2013) (JA 17–19). Under *Conkright*, the district court should have deferred to the plan administrator's new interpretation as set forth in its corrective filings and its litigation position.

what the court considered to be one reasonable interpretation of the plan to another. Although it is not necessary to determine whether the first interpretation was reasonable or not in order to correct the district court's ruling, in *amici*'s collective experience, the first interpretation was clearly inconsistent with the overwhelming practice of other plans on the same issue.

The district court's reasoning gets the *Conkright* analysis exactly backwards. *Conkright* puts the burden on plaintiffs to show that the plan administrator's *current* interpretation of the plan is arbitrary and capricious. It does not allow plaintiffs to revive a *prior* interpretation (and one that was corrected with the approval of the IRS) simply by showing it is *not* arbitrary and capricious. The fact that the district court chose to implement the plan administrator's previous interpretation, rather than the court's independent interpretation as in *Conkright*, is irrelevant—in both cases, the court substituted its preferred interpretation for the plan administrator's, and in both cases, that was improper. Indeed, deference to the plan administrator's interpretation in this case is even more clearly appropriate than it was in *Conkright*, where the plan administrator changed its interpretation only after judicial intervention. Here, the plan administrator was advised of its error and took every reasonable step available to correct it. The district court's decision flouts clear Supreme Court precedent by failing to afford the plan administrator the deference required by *Conkright*.

II. The District Court Incorrectly Held That The Reinterpretation Of A Plan Constitutes A Plan Amendment.

In failing to afford deference to the current interpretation of the plan administrator, the district court reasoned that the terms of an ERISA plan actually can be amended simply by an administrator's corrective interpretation in plan administration. The court concluded that "reinterpretation of a plan term to deny previously accrued benefits represents an 'amendment' of the plan to the same extent as a formal amendment." *Cottillion*, 2013 WL 1419705, at *7 (JA 24). This holding is inconsistent with the plain language of ERISA § 204(g), Third Circuit precedent, and the holdings of the Supreme Court.

ERISA § 204(g) states that "the accrued benefit of a participant under a plan may not be reduced by an amendment of the plan." 29 U.S.C. § 1054(g)(1) (omitting irrelevant language as to exceptions). In other words, once a participant is entitled to a vested benefit under a plan, the plan may not be amended to reduce that benefit. Although ERISA § 204(g) prevents *amending* a plan to cut back benefits, nothing prevents a plan administrator from returning to the express terms of the plan after discovering that he has mistakenly granted benefits greater than the plan permits. Plan amendment and plan interpretation are distinct functions. Under ERISA and *Firestone*, a plan administrator may be given the discretion to *interpret*—*i.e.*, to resolve ambiguities in—plan language and, under *Conkright*, the Supreme Court made it clear that such deference applies to correcting a prior

misinterpretation. The only limit placed on that discretion is that the interpretation may not be an arbitrary and capricious reading of the plan's terms. Amending a plan—*i.e.*, changing plan terms—is a separate, formal process performed by the plan sponsor, not the plan fiduciaries,[3] and is subject to a set of restrictions, including § 204(g), that do not apply to interpretations.[4]

The decision below confuses the roles of the sponsor and the plan administrator in a way that is intolerable under ERISA. Under ERISA, it is the role of the sponsor to set the terms of the plan, in which role the sponsor is free to act in its own self-interest—free from any fiduciary responsibility to the participants in the plan. By contrast, it is the role of the plan administrator to interpret and apply the terms of the plan. In doing so the plan administrator is subject to a strict fiduciary responsibility to act solely in the interests of the participants of the plan, with no regard for the interests of the sponsor. *See Hughes*

[3] A plan fiduciary does not have the authority to amend a plan under ERISA. A fiduciary must follow the terms of the plan, *see* ERISA § 404(a)(1)(D), 29 U.S.C. § 1104(a)(1)(D), and ERISA is clear that the plan must "identify[] the persons who have authority to amend the plan." ERISA § 402(b)(3), 29 U.S.C. § 1102(b)(3).

[4] In this case, the company reserved the power to amend in its plan language. The Supreme Court has explicitly held that such reservations of power are valid under ERISA. *See Curtiss-Wright Corp. v. Schoonejongen*, 514 U.S. 73, 84–85 (1995) (holding that a clause reserving the power of amendment to the company complies with ERISA § 402(b)(3)); *see also Firestone*, 489 U.S. at 112 ("The terms of trusts created by written instruments are 'determined by the provisions of the instrument as interpreted in light of all the circumstances and such other evidence of the intention of the settlor with respect to the trust as is not inadmissible.'" (citation omitted)).

Aircraft Co. v. Jacobson, 525 U.S. 432, 444 (1999) ("In general, an employer's decision to amend a pension plan . . . does not implicate the employer's fiduciary duties which consist of such actions as the administration of the plan's assets."); *Lockheed Corp. v. Spink*, 517 U.S. 882, 890 (1996) ("Plan sponsors who alter the terms of a plan do not fall into the category of fiduciaries."). This fundamental distinction between the proper roles and procedures with respect to plan amendments versus plan interpretations was flat-out ignored by the district court.

Although courts within the Third Circuit apply a more expansive reading than courts in many other circuits to the question of what may qualify as a plan amendment, this Court has never held that the reasonable reinterpretation of a plan to correct an error in application is a plan "amendment." The district court relied on four cases allowing for a broader definition of "amendment" for § 204(g) purposes.[5] But the factual distinctions in those cases render them inapplicable here. None of these cases involved an attempt to correct administrative error. And

[5] *See Cottillion*, 2013 WL 1419705, at *7 (JA 24–25) (citing *Hein v. FDIC*, 88 F.3d 210, 216 (3d Cir. 1996); *Hammond v. Alcoa, Inc.*, Civ. A. No. 07-1746, 2008 WL 5135671, at *8 (W.D. Pa. Dec. 4, 2008); *Zebrowski v. Evonik Degussa Corp. Admin. Comm.*, Civ. A. No. 10-542, 2012 WL 3962670, at *12 (E.D. Pa. Sept. 11, 2012); *Pieseski v. Northrop Grumman Corp.*, Civ. A. No. 01-993, 2002 WL 977449, at *6–7 (W.D. Pa. Apr. 22, 2002)).

in any event, this line of cases originated before, and cannot be reconciled with, the Supreme Court's decision in *Conkright*.[6]

A recent Second Circuit case is more on point. In *Kirkendall v. Halliburton, Inc.*, 707 F.3d 173 (2d Cir. 2013), *cert. denied*, 134 S. Ct. 241 (2013), the Second Circuit concluded that for purposes of § 204(g): "the word 'amendment' contemplates that the actual terms of the plan changed in some way, or that the plan improperly reserved discretion to deny benefits, and not, as claimed here, that an administrator made an incorrect factual determination." *Id.* at 184 (citations omitted).[7] In this case, the plan always remained the same and the only action being evaluated is the correction (through appropriate administrative action and clarifying plan language) of a prior inadvertent administrative error.

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[6] In *Zebrowski*, the plan administrator conditioned the receipt of cost of living adjustments on the forfeiture of significant accrued benefits. 2012 WL 3962670, at *12. In *Pieseski*, the plan administrator interpreted an otherwise illegal amendment as conferring the authority to eliminate substantial pension benefits. 2002 WL 97749, at *7. In both *Hammond* and *Hein* the court found § 204(g) inapplicable. *See Hammond*, 2008 WL 5135671, at *8 (noting that the plaintiff abandoned the "amendment by erroneous interpretation theory"); *Hein*, 88 F.3d at 217 ("Because the Plan is written in such a way that Hein could not satisfy the conditions for the subsidy during his employment at First Fidelity, ERISA § 204(g) is inoperative.").

[7] Although there was an actual plan amendment in 1995 clarifying the proper interpretation of the plan both before and after such clarification, the district court's holding that the amendment violated § 204(g) was based on its determination of which interpretation of the earlier plan terms was appropriate. *See Cottillion*, 2013 WL 1419705, at *11 (JA 32).

Accordingly, as this Court has held, plan administrators who make administrative errors are not barred from correcting those errors and properly applying their plans going forward. In *Vitale v. Latrobe Area Hospital*, 420 F.3d 278 (3d Cir. 2005), for example, this Court held that "[w]here an ERISA plan mandates a denial of benefits, the mere fact that administrators have in the past granted benefits is no reason to impose a straightjacket requiring them to do so forever." *Id.* at 286; *see also Foley v. Int'l Bhd. of Electrical Workers Local Union 98 Pension Fund*, 271 F.3d 551, 558 (3d Cir. 2001) (reversing the court below because "the district court's holding binds the Trustees to a result that was a consequence of poor administrative practices, that the Trustees later corrected"). This Court grounded its decision in *Vitale* in the terms of ERISA and the underlying policy interests at stake if plan administrators were forced to adhere to their previous, potentially erroneous decisions. 420 F.3d at 286.

The district court's decision below cannot be squared with this Court's holding in *Vitale*. In this case, the district court explicitly ordered the plan administrator to adhere to the previous operational approach, even though the administrator had determined that it was not the correct interpretation of the plan's terms. *See Cottillion v. United Ref. Co.*, Civ. A. No. 09–140E, 2013 WL 5936368, at *8 (W.D. Pa. Nov. 5, 2013) (ordering the plan administrator to "provide each class member who has reached their early retirement date with the opportunity to

immediately commence receiving an unreduced benefit"). In so doing, the district court transformed that mistaken plan interpretation into an enforceable plan term—something ERISA simply does not permit. The court made no suggestion as to what an administrator uncovering an incorrect prior interpretation can do to correct it. Instead, the court held that the corrected interpretation constituted an impermissible cutback amendment. The district court's holding, if accepted, could make it virtually impossible to correct a prior error or misinterpretation.

Amici's members' plan fiduciaries regularly interpret plan terms. This is an ordinary and necessary function of being a fiduciary. A plan administrator cannot follow the terms of the plan if every interpretive act may constitute an amendment. The district court's reasoning is not only contrary to the text and structure of ERISA, it also undermines the plan administration that goes on every day, for hundreds of thousands of ERISA-governed plans.

III. The District Court's Ruling Undermines The Public Policy Considerations Of *Conkright* And ERISA.

If the district court's ruling is allowed to stand, it will have the effect of discouraging employers from continuing to offer benefit plans to their employees. As the Supreme Court noted in *Conkright*, giving plan administrators discretion to interpret plan terms advances the public policy interest of encouraging employers to offer benefit plans. 559 U.S. at 517. Congress' objective in implementing ERISA was "to create a system that is [not] so complex that administrative costs,

or litigation expenses, unduly discourage employers from offering [ERISA] plans in the first place." *Id.* (alterations in original) (quoting *Varity Corp. v. Howe*, 516 U.S. 489, 497 (1996)). ERISA is meant to benefit employers and employees by ensuring a predictable set of liabilities, while ensuring that employees receive benefits according to the terms of their bargain.

Deference is key to this outcome. Deference encourages plaintiffs to seek internal administrative review, ensures uniformity of plan administration, and places the locus of decision-making with the party most familiar with the challenges of day-to-day plan operations. *See id.* In contrast, under the district court's ruling, any plan administrator who implements an ERISA plan runs the risk that an operational error will irrevocably alter an ERISA plan, increasing the uncertainty and costs of offering the plan.

The district court's decision to ignore the plan sponsor's participation in the IRS's VCP compounds this problem by undermining the primary tool plan sponsors can use to correct operational errors in plan administration. The purpose of the VCP, which is often a costly process, is to encourage employers to voluntarily correct such errors, which often benefits plan participants. Unless the VCP provides employers with some certainty that the correction ratified by the IRS finally resolves the employer's plan issue, employers will have little incentive to make such corrections, especially when their VCP submissions may form the basis

for subsequent litigation. To prevent an employer from implementing a voluntary compliance resolution consistent with the primary regulator's specific determination after review of the employer's submission (as the district court did), is to deter the public policy of prompt identification, reporting, and voluntary correction of plan errors.

Pension plan creation and maintenance is voluntary. Imposing additional costs on plan sponsors makes offering a pension plan less attractive. Operational error is common, especially because ERISA is "an enormously complex and detailed statute," and because many plans are similarly complicated. *Id.* at 509 (citation omitted). Good faith misinterpretations are common, and a ruling like the district court's, which bars administrators from fixing an operational error, undercuts public policy by discouraging employers from offering pension plans.

CONCLUSION

The district court's ruling dispenses with the deference required by Supreme Court precedent, is at odds with Third Circuit precedent, and applies a test that would radically increase the litigation expenses and uncertainty associated with ERISA plans. The decision should be vacated, and the case remanded for evaluation under a framework consistent with this Circuit's and the Supreme Court's ERISA precedent.

June 18, 2014

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), and Third Circuit Rule 31.1(c), the undersigned counsel for *amici curiae* certifies that this electronic brief:

(i) complies with the type-volume limitation of Rule 32(a)(7)(B), and 29(d) because it contains 4,044 words, including footnotes and excluding parts of the brief exempted by Rule 32(a)(7)(B)(iii);

(ii) complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of 32(a)(6) because it was prepared using Microsoft Office 2007 and is set in 14-point sized Times New Roman font;

(iii) is identical to the ten hard copies sent to the Clerk of the Court on June 18, 2014 via overnight courier service;

(iv) has been scanned with a virus detection program and no virus was detected.

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CIRCUIT RULE 28.3(D) CERTIFICATION

Pursuant to Circuit Rule 28.3(d), the undersigned counsel for *amici curiae* the American Benefits Council, the ERISA Industry Committee, and the Chamber of Commerce of the United States of America certifies that Craig C. Martin is a member of the bar of this Court.

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CERTIFICATE OF SERVICE

I, Craig C. Martin, hereby certify that on this 18th day of June 2014, I caused a true and correct copy of the foregoing to be filed electronically using the Court's CM/ECF system pursuant to Circuit Rule 25, causing a true and correct copy to be served on all counsel of record.

I further certify that, on June 18, 2014, ten identical hard copies of the foregoing brief were provided to a third-party courier for overnight delivery to the Clerk of the Court.

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