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UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF NEW YORK

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In re:	:	
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DYNEGY DANSKAMMER, L.L.C.,	:	Chapter 11
DYNEGY ROSETON, L.L.C., HUDSON	:	
POWER, L.L.C., DYNEGY NORTHEAST	:	Case No. 11-38111 (CGM)
GENERATION, INC, DYNEGY HOLDINGS,	:	
LLC,	:	
	:	
	:	
Debtors.	:	
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	:	
DYNEGY DANSKAMMER, L.L.C.,	:	
	:	Adversary Proceeding No. 12-____
Plaintiff,	:	
	:	
v.	:	
	:	DEBTOR’S COMPLAINT
	:	
PEABODY COALTRADE	:	
INTERNATIONAL LTD.,	:	
	:	
Defendant.	:	
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Plaintiff Dynegy Danskammer, L.L.C. (“Danskammer” or “Plaintiff”), a debtor in the above-captioned chapter 11 case,¹ by and through its undersigned counsel, hereby files this Complaint against Peabody COALTRADE International Ltd. (“PCIL” or “Defendant”). Plaintiff

¹ The Debtors, together with the last four digits of each Debtor’s federal tax identification number, are: Dynegy Holdings, LLC (8415); Dynegy Northeast Generation, Inc. (6760); Hudson Power, L.L.C. (none); Dynegy Danskammer, L.L.C. (9301); and Dynegy Roseton, L.L.C. (9299).

reserves the right to amend this Complaint to supplement the claims for relief included herein.

In support of the requested relief, Plaintiff alleges, upon knowledge with respect to its own acts, and upon information and belief as to all other matters, as follows:

NATURE OF THE COMPLAINT

1. This is an action for breach of contract for damages or, in the alternative, for anticipatory repudiation and liquidated damages and other relief arising out of Defendant's failure to deliver a shipment of coal for loading at a port in Venezuela for transportation to the United States on a vessel hired by Plaintiff. As a result of Defendant's unlawful conduct and breach as alleged herein, Plaintiff has suffered damages in an amount to be proven at trial.

JURISDICTION AND VENUE

2. This is an adversary proceeding commenced by Danskammer seeking damages from PCIL for breach of contract or anticipatory repudiation under New York law.

3. This Court has original jurisdiction under 28 U.S.C. § 1334(b) over this civil proceeding relating to the underlying case arising under the Bankruptcy Code.

4. This adversary proceeding is a core proceeding pursuant to 28 U.S.C. § 157(b) and thus this Court has the power to enter final findings of fact and conclusions of law, subject to review pursuant to 28 U.S.C. § 158.

5. Venue of this adversary proceeding in this district is proper pursuant to 28 U.S.C. §§ 1408–1409.

THE PARTIES

6. Plaintiff Danskammer is a Delaware limited liability company, a subsidiary of Dynegy Holdings, LLC, and a debtor in these Chapter 11 cases. Since 2001, Danskammer has operated the Danskammer Generating Station in Newburgh, New York, which uses coal as a primary fuel.

7. Upon information and belief, Defendant PCIL is a private company organized under the laws of England and Wales and a subsidiary of Peabody Energy Corporation, with its offices at 65 Woodridge Road, Guilford, Surrey, UK, GU1 4RD.

FACTUAL BACKGROUND

The Coal Contract

8. On January 1, 2008, Danskammer entered into a Contract for Sale and Purchase of Guasare Steam Coal (the “Coal Contract”) with PCIL. PCIL agreed to sell and deliver, and Danskammer agreed to purchase and receive, coal produced by Carbones Del Guasare (“CdG”) in the Mina Paso Diablo in Zulia State, Venezuela (the “Mine”).

9. The Coal Contract designates the BulkWayuu Floating Storage Transfer Station at Lake Maracaibo, Venezuela as the port where PCIL will load the coal shipments onto a vessel arranged by Danskammer to transport the coal (the “Loading Port”). (Coal Contract §§ 1.2(l), 7.1.) PCIL must provide a safe berth or anchorage for the vessel. (*Id.* § 7.1(a).)

10. The coal supplied by PCIL must meet certain specifications in size, moisture, composition, and heating value; if a shipment exceeds certain tolerances (“rejection limits”), Danskammer has the right under the Coal Contract to reject the shipment, or accept the shipment and negotiate a price adjustment with PCIL. (*Id.* §§ 5.1–.3.)

11. Under the Coal Contract, either party may declare force majeure for any cause beyond the reasonable control of either party, including a disruption in the operations of the Mine. (*Id.* § 10.1.) In the event of a force-majeure condition, the party claiming force majeure must notify the other party not more than ten days after the condition occurs and may then declare force majeure, which relieves that party from liability for delays, interruptions, or failures of performance resulting from the force-majeure event. (*Id.* § 10.2.)

12. The Coal Contract provides that it “shall be construed in accordance with the laws of the State of New York, United States of America, without regard to its conflict of laws” doctrine. (*Id.* art. XVII.)

PCIL’s Repeated Failures to Perform

13. On numerous occasions since the Coal Contract’s execution, PCIL has failed to timely and completely perform its obligations under the agreement, repeatedly delaying coal shipments or declaring force majeure.

14. For example, in late 2008, PCIL repeatedly delayed the scheduled laycan² for a coal shipment and further advised Danskammer on multiple occasions that the coal available for the delayed laycans would exceed the rejection limits established under the Coal Contract. As a result of this process, a shipment originally scheduled for November 11–20, 2008 was not completed until January 25, 2009.

15. Similarly, after accepting a laycan of February 18–27, 2009 for the next shipment, PCIL advised Danskammer that labor issues at the Mine would prevent it from delivering that shipment. As a result of this change, PCIL agreed to cover any demurrage³ charges incurred by Danskammer to the shipowner; however, Danskammer was able to reroute the vessel and avoid any demurrage costs.

16. In April 2009, the parties scheduled an upcoming coal shipment for a laycan of May 12–21, 2009. Danskammer then selected a vessel to receive the shipment during that time period. PCIL then informed Danskammer that CdG had rejected the vessel without

² A “laycan” is the period during which the vessel that will receive a coal shipment is expected to arrive at the Loading Port. (Coal Contract § 1.2(i).)

³ “Demurrage” is money paid by a vessel’s charterer if the time to load or unload the vessel at port takes longer than agreed in the charterer’s contract with the shipowner.

justification, and agreed to cover any costs associated with the cancellation. As a result, PCIL paid Danskammer \$87,048.50 in costs incurred by Danskammer as a result of the cancellation.

17. In January 2010, the parties scheduled a March 8–17, 2010 laycan. At PCIL’s request, they delayed it to March 18–27 because of equipment problems at the Mine. In February, PCIL requested a further delay to May 14–23. In March, PCIL advised Danskammer that no shipments would be loaded for any customer until June as a result of equipment and coal quality problems at the mine. PCIL then declared force majeure, but acknowledged that the previously scheduled laycan was not covered by the force-majeure declaration, and paid Danskammer \$569,291.51 in replacement coal costs incurred as a result of the lost shipment.

The 2010 Amendment of the Coal Contract

18. On August 24, 2010, Danskammer and PCIL executed a Letter Agreement amending the Coal Contract (the “Letter Agreement”) to require that:

[A]ny Type 1 coal (such Coal to meet the specifications of the Contract) offered for delivery must be available for loading at the load port and [PCIL] shall have delivered written assurance to [Danskammer] that such coal will be held for delivery to [Danskammer] before [Danskammer] will arrange for shipping. Any time periods specified for [Danskammer]’s arranging shipping for such shipments under the Contract shall be waived.

Letter Agreement at 1.

19. The Letter Agreement stated that this amendment was necessary in light of the problems caused by the force majeure conditions at the Mine, described above. (*Id.* at 1.)

PCIL’s 2011 Breach of the Coal Contract

20. On July 11, 2011, Victor Soto of PCIL emailed Gina Guajardo of Danskammer to propose laycan dates for the two coal shipments remaining under the Coal Contract: October 25–November 3, 2011 for the penultimate shipment, and November 14–23, 2011 for the final shipment.

21. Guajardo emailed Soto on October 5, 2011 to confirm that the final shipment, for which PCIL had suggested a laycan of November 14–23, was awaiting delivery, writing: “Could you advise if all is in order for our second lifting (Nov 14-23). Please advise so we may begin allocating freight to it.”

22. The next day, Soto responded: “CDG reviewed its mining plan and all is in order as far producing [sic] the coal for your next vessel under laycan Nov 14-23, 2011.” Accordingly, Guajardo responded that Danskammer would arrange shipping. Danskammer then arranged for the cargo ship MV Bahama Spirit to travel the Loading Port and receive the coal shipment.

23. On October 14, Guajardo emailed Soto to inform him that Danskammer needed to delay the late-November laycan until November 20–29. On October 17, Soto responded that the loading window had been adjusted as Danskammer requested. On agreeing to this laycan, Soto said nothing to indicate that the coal was not available at the Loading Port and being held for delivery to the MV Bahama Spirit when the vessel arrived.

24. On October 27, Andrea Yarbrough of Danskammer emailed Soto to advise him that the MV Bahama Spirit had encountered delays and to ask whether the laycan could be further adjusted to November 29 to December 8. Soto again replied that the laycan had been adjusted as requested, and again said nothing to indicate that the coal was not available at the Loading Port and being held for delivery to the MV Bahama Spirit when the vessel arrived.

25. Three weeks later, on November 17, after the parties had exchanged further correspondence about billing and logistics, and after the MV Bahama Spirit was already en route to the Loading Port, PCIL finally notified Danskammer that the coal was not in fact being held at the Loading Port for delivery to Danskammer on November 29. PCIL stated that

rains and vessel congestion had impacted production of coal for the MV Bahama Spirit cargo and that CdG expected that the coal would be available for inspection *at the Mine* on November 30.

26. On November 23, Danskammer specifically asked PCIL to “advise how much coal is currently available for lifting at the port.” PCIL never answered this question. Instead, on November 23, 27, and 28, and December 1, PCIL further delayed the expected dates for inspection and loading of the coal, blaming the weather and delays at the Mine. PCIL did not declare force majeure on any of these dates.

27. On November 28, PCIL invoiced Danskammer for \$1,992,245.00 for the final coal shipment, further representing that the delivery would be made as agreed. Danskammer paid this invoice in full on December 1.

28. On December 5, upon arriving at the Guaranao Pilot Station, the MV Bahama Spirit tendered Notice of Readiness (“NOR”) to load the shipment as required by the Coal Contract. At 7:00 a.m. on December 6, PCIL accepted the MV Bahama Spirit’s NOR. However, despite accepting the NOR, PCIL made no coal available for loading.

29. On December 13, PCIL proposed to replace the coal it was supposed to deliver for shipment with coal of such low quality that Danskammer would have been entitled under the Coal Contract to reject the shipment outright. On December 16, in an attempt to mitigate the demurrage damages it was incurring as a result of the MV Bahama Spirit having to wait to load the shipment, Danskammer sent PCIL proposed price and quality requirements necessary for Danskammer to accept this out-of-specification coal. PCIL simply forwarded Danskammer’s requirements to its supplier, and never formally accepted or rejected Danskammer’s proposal, despite repeated requests from Danskammer for an update.

30. Finally, on December 20, after the MV Bahama Spirit had been sitting empty for two weeks waiting for PCIL to make coal available for loading, PCIL delivered notice declaring force majeure under the Coal Contract based on a declaration of force majeure from its supplier, CdG. CdG's declaration stated that its force-majeure condition resulted from rain disrupting coal transport on the road connecting the Mine to the Loading Port. As a result, Danskammer had no choice but to release the MV Bahama Spirit on December 20 without PCIL delivering any coal, even out-of-specification coal, for loading. PCIL's and CdG's force-majeure declarations both lasted until January 9, 2012.

31. On December 21, Danskammer demanded immediate repayment of the \$1,992,245.00 it had prepaid for the coal shipment that was never delivered. PCIL finally repaid that amount on January 3, 2012.

32. On January 19, 2012, Alex Baliff, Managing Director of PCIL, sent a letter to Danskammer admitting that PCIL had failed to hold the final shipment of coal for delivery to Danskammer, and asserting that PCIL was not required to do so under the Letter Agreement. He wrote that "the October 6, 2011 assurances provided by [PCIL] related specifically to your request to schedule a vessel for an earlier laycan of November 14 – 23. The coal was available and the vessel could have been loaded, had [Danskammer]'s vessel arrived and loaded on time during this original declared laycan period." (Letter from Alex Baliff to Managing Director, Dynegy Coal Trading & Transportation, LLC (Jan. 19, 2012) ("January 19 Letter") at 1.) He went on to assert that it was "clearly unreasonable for [Danskammer] to have assumed that coal would continue to be dedicated and stockpiled at the loading port for [Danskammer]'s benefit for two extended delayed laycan periods. [PCIL] was under no

obligation to maintain a stockpile specifically dedicated to [Danskammer] at the loading port related to the twice delayed laycan and shipment.” (*Id.* at 2.)

33. On February 3, 2012, in response to Mr. Baliff’s letter, Danskammer requested that PCIL provide evidence that coal meeting the Coal Contract’s specifications had been available for loading at the Loading Port during the period from November 14–23, in light of Soto’s November 17, 2011 email stating that the coal was in fact *not* at the Loading Port and being held for delivery to Danskammer. (Letter from Shannon Brown, Managing Director, Dynegy Coal Trading & Transportation, LLC to Victor Soto (Feb. 3, 2012) at 2 n.2.). PCIL never provided any support for its assertion that coal had been available from November 14–23.

COUNT I

Breach of Contract and Damages

34. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 33 above and incorporates them into this Count as if fully set forth herein.

35. The Coal Contract, as amended by the Letter Agreement, requires that
[A]ny Type 1 coal (such Coal to meet the specifications of the Contract) offered for delivery *must be available for loading at the load port* and [PCIL] shall have delivered *written assurance to [Danskammer] that such coal will be held for delivery to [Danskammer] before [Danskammer] will arrange for shipping.*

(Letter Agreement at 1 (emphasis added).)

36. The express purpose of the Letter Agreement was to avoid situations like those that had occurred in 2008, 2009, and 2010, when scheduled shipments were repeatedly cancelled or delayed at the last minute, resulting in harm to Danskammer in the form of coal replacement costs and penalties owed to shipowners.

37. On October 6, 2011, PCIL purported to comply with its obligations under the amended Coal Contract when it notified Danskammer via email that “all [was] in order” with

the December 2011 coal shipment. Relying on PCIL's representation, Danskammer incurred the expense of arranging for shipping.

38. PCIL's January 19 Letter represented that there was — at some point between October 6 and November 17 — coal “dedicated and stockpiled at the loading port” for delivery to Danskammer as the final shipment under the Coal Contract. (January 19 Letter at 2.) However, after two *mutually agreed-upon* adjustments to the laycan dates for the final shipment under the contract, PCIL unilaterally — and without any notice or warning to Danskammer — stopped holding that coal for delivery to Danskammer. (*See id.* at 1 (“The coal was available and the vessel could have been loaded, had [Danskammer]'s vessel arrived and loaded . . . during this original [November 14–23] declared laycan period.”).) The clear implication of PCIL's letter is that the coal that PCIL had been holding for Danskammer at the Loading Port had instead been sold and delivered to another customer.

39. PCIL's conduct, in first assuring Danskammer that the final shipment was available for loading at the load port and that such coal was being held for delivery to Danskammer, and then selling the coal dedicated to that shipment to a third party such that it was not available for delivery to Danskammer's vessel, constituted a breach of the Coal Contract as amended by the Letter Agreement. Contrary to PCIL's assertions in the January 19 Letter, the two laycan adjustments — to which PCIL agreed without protest or reservation — did not relieve it of its obligation under the Letter Agreement to hold the coal shipment at the Loading Port for delivery to Danskammer. The Letter Agreement requires, without qualification, that “coal . . . offered for delivery *must be available for loading at the load port* and [that PCIL] shall have delivered *written assurance to [Danskammer] that such coal will be held for delivery to [Danskammer].*” (Letter Agreement at 1 (emphasis added).) The Letter Agreement does not

create an exception to these obligations for delayed laycan dates, let alone dates that are delayed by the parties' mutual agreement. In fact, it expressly provides that "[a]ny time periods specified for [Danskammer]'s arranging shipping for such shipments under the Contract *shall be waived.*" (*Id.* at 1 (emphasis added).)

40. Because — contrary to PCIL's October 6 assurances and in violation of the Letter Agreement — the coal for the final shipment was neither "available for loading at the load port" nor "held for delivery to [Danskammer]," PCIL materially breached the amended Coal Contract.

41. As a result of PCIL's breach of the amended Coal Contract, Danskammer suffered the following damages, in an amount to be proven at trial, but not less than the sum of:

42. \$389,151.00 in demurrage under Danskammer's vessel contract resulting from the extended time that the MV Bahama Spirit waited to load coal that PCIL never delivered; and

43. The difference between the market price of the coal at the time of PCIL's non-delivery and the contract price for a quantity of coal equal to the undelivered coal shipment, together with any incidental and consequential damages, less expenses saved in consequence of the non-delivery.

44. Additionally, PCIL's material breach of the amended Coal Contract, which substantially impaired the value of the Coal Contract, served to terminate the Coal Contract as of the date of the breach.

COUNT II

Anticipatory Repudiation and Liquidated Damages

45. Plaintiff repeats and realleges the allegations set forth in paragraphs 1 through 44 above and incorporates them into this Count as if fully set forth herein.

46. Even if PCIL's failure to deliver the final coal shipment in December 2011 did not terminate the Coal Contract, PCIL's subsequent conduct has constituted an ongoing anticipatory repudiation of the parties' agreement.

47. Since PCIL's and CdG's force-majeure notices were lifted on January 9, 2012, PCIL has repeatedly and expressly disclaimed any duty to comply with its obligation under the 2010 Letter Agreement to "deliver written assurance to [Danskammer] that such coal will be held for delivery to [Danskammer] *before* [Danskammer] will arrange for shipping." (Letter Agreement at 1 (emphasis added).) Rather, PCIL has repeatedly insisted that Danskammer first nominate a date range for delivery — which would require Danskammer to "arrange for shipping" — *before* PCIL will certify that any coal will be available and held for delivery to Danskammer, in clear breach of the Letter Agreement.

48. For example, on February 15, 2012, Soto wrote to Danskammer to assert that, "[i]n order for [PCIL] to schedule the vessel and ship the remaining coal under the Agreement, it will first be necessary for Danskammer to nominate a laycan period for the remaining shipment." (Letter from Victor H. Soto to Managing Director, Fuels, Oils and Emissions (Feb. 15, 2012) at 1.)

49. Similarly, on February 28, Soto wrote to Danskammer that it "must unequivocally provide th[e] laycan in order for the mine to hold this laycan open for your shipment. . . . Upon your nomination of a laycan, we will advise if the mine can accommodate

that new date(s).” (Letter from Victor H. Soto to Managing Director, Fuels, Oils and Emissions (Feb. 28, 2012) at 1.) Soto’s statement demonstrates that PCIL has no intention of obtaining the required coal from its supplier unless and until Danskammer arranges for shipping, in violation of the clear terms of the Letter Agreement.

50. As PCIL is well aware, it is impossible for Danskammer to nominate a laycan period without first “arrang[ing] for shipping,” which the Letter Agreement does not require Danskammer to do until *after* coal is available for loading at the Loading Port *and* PCIL has provided written assurances that the coal is being held for delivery to Danskammer. PCIL’s repeated, express refusal to secure coal for shipment to Danskammer and then provide written assurances that the coal will be held for delivery at the Loading Port until *after* Danskammer nominates a laycan — a complete inversion of the order of events required by the Letter Agreement — constitutes an anticipatory repudiation of the Coal Contract, and thus terminates the parties’ agreement.

51. Accordingly, Danskammer is entitled to recover damages from PCIL, in an amount to be proven at trial, but not less than the sum of the difference between the market price of the coal at the time when the Danskammer learned of PCIL’s anticipatory repudiation and the contract price for the coal shipment, plus any incidental and consequential damages, less expenses saved in consequence of the PCIL’s anticipatory repudiation.

52. Additionally, if the Coal Contract was not terminated by PCIL’s failure to provide the shipment in December 2011, PCIL owes Danskammer the following categories of damages expressly provided for in the Coal Contract:

Demurrage

53. The Coal Contract expressly provides for demurrage payments, *i.e.*, liquidated damages resulting from the use of a vessel for longer than the time agreed upon by the parties. Section 7.3 states that:

[Danskammer] shall comply with the Shipping Regulations [for the Loading Port] for the purpose of calculating demurrage If, after the completion of loading, [PCIL] has used more Laytime hours than allowed under the Shipping Regulations, then [PCIL] shall pay demurrage to [Danskammer] at a rate of US\$ 20,000.00 per day pro rata for partial days.

Coal Contract § 7.3.

54. PCIL has acknowledged that it owes Danskammer demurrage under the Coal Contract for the time period that the MV Bahama Spirit spent sitting at the Loading Port before PCIL declared force majeure. On February 10, 2012, Soto stated via email that PCIL, in consultation with CdG, had calculated a total of \$212,590.82 in demurrage.

55. CdG and PCIL's demurrage calculations were deficient, however, in a number of respects. The total demurrage charge under the Coal Contract and Shipping Regulations is not \$212,590.82, but \$289,160.00, which represents the contractual demurrage rate of \$20,000 multiplied by the number days (pro rata for partial days) that the MV Bahama Spirit spent waiting for PCIL to deliver coal for loading after the end of the laycan window. PCIL arrived at the lower figure by improperly deducting certain time periods from the total overage period. PCIL incorrectly deducted time for the MV Bahama Spirit to prepare for loading and to cross from the Guaranao Pilot Station (where it was anchored) to the Loading Port in Lake Maracaibo — neither of which occurred because PCIL never made any coal available for loading on the MV Bahama Spirit. PCIL also improperly calculated the end of the overage

period for which demurrage was due by deducting the time it took for the MV Bahama Spirit to get under way following PCIL's declaration of force majeure.

Dead Freight

56. The Coal Contract also provides that PCIL must compensate Danskammer if a vessel is loaded with "a shortage of Coal," *i.e.*, "the negative difference between the actual tonnage loaded minus the tonnage declared to be loaded aboard the Vessel by the master prior to arrival at the Loading Port." (Coal Contract § 7.2.) PCIL must pay "US\$ 21.00 for each net ton of such shortage," which is denominated "dead freight." (*Id.* § 7.2.)

57. Prior to the MV Bahama Spirit's arrival at the Loading Port, the vessel's master declared that the vessel would be able to load 31,300 metric tons of coal (as reflected in the parties' communications and the prepayment invoice sent by PCIL to Danskammer). However, PCIL delivered no coal whatsoever to the MV Bahama Spirit. Thus, "the actual tonnage loaded" was zero, and the difference between "the actual tonnage loaded" and "the tonnage declared to be loaded" was 31,300 net tons. Accordingly, the total dead freight payment due to Danskammer from PCIL under the Coal Contract is \$657,300.00, and Danskammer has incurred damages in that amount caused by PCIL's conduct.

PRAYER FOR RELIEF

WHEREFORE, by this Complaint Plaintiff Danskammer prays for judgment and an order awarding the following relief:

- (a) pursuant to Count I, damages in an amount to be proven at trial, but not less than the sum of:
 - (i) \$389,151.00 in demurrage to the shipping company resulting from the time the MV Bahama Spirit sat waiting for PCIL to deliver coal between the end of the laycan and PCIL's declaration of force majeure; and

- (ii) the difference between the market price of the coal at the time of the non-delivery and the contract price for the coal shipment, together with any incidental and consequential damages, less expenses saved in consequence of the non-delivery; or
- (b) in the alternative, pursuant to Count II, damages in an amount to be proven at trial, but not less than the sum of:
 - (i) the difference between the contract price for the final coal shipment that was not delivered and the market price of that coal at the time of PCIL's anticipatory repudiation of the contract;
 - (ii) \$289,160.00 in demurrage charges under Section 7.3 of the Coal Contract; and
 - (iii) \$657,300 in dead freight charges under Section 7.2 of the Coal Contract; and
- (c) such other and further relief as this Court deems just, proper, fair, and equitable under the circumstances.

Dated: New York, New York
June 4, 2012

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