IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH DAKOTA
SOUTHERN DIVISION

KENNETH G. DIFFERENT HORSE, *et al.*,	)	
Plaintiff,	)	Case No. 09-cv-4049-LLP
v.	)	
KENNETH L. SALAZAR, Secretary of the Interior, *et al.*,	)	
Defendants.	)	

DEFENDANTS' REPLY MEMORANDUM
IN SUPPORT OF MOTION TO DISMISS

Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(7), Defendants moved to dismiss this suit, in which Plaintiffs, individual tribal members, have brought a class action seeking a declaratory judgment that the Department of the Interior ("Interior") has failed to distribute monies from the Black Hills Judgment Funds (hereinafter "Funds") to the individual members, and seeking disgorgement and allocation of the monies in the Funds to Plaintiffs. *See* Defendants' Motion to Dismiss and Memorandum in Support of Motion to Dismiss (June 30, 2009) (hereinafter "Defs.' Opening Br."); *see also* Pls.' Compl. at 9-10. In Defendants' opening brief, the federal government argued: 1) Plaintiffs have failed to identify an applicable waiver of the United States' sovereign immunity; 2) Plaintiffs lack standing under Article III because they have not identified an injury-in-fact that derives from an action by the Defendants and individual members cannot bring claims for Funds Interior holds on behalf of the Tribes of the Sioux

Nation;[1/] 3) Even if justiciable, Plaintiffs' claims are not yet ripe as no determination has been made to distribute the Funds to individual tribal members; and 4) Plaintiffs have failed to join the necessary Tribes of the Sioux Nation, who are themselves immune from suit, and thus, cannot be joined, necessitating dismissal of this action. *See generally id.*

In response, Plaintiffs claim the Declaratory Judgment Act provides the mechanism by which they can bring their claims in this Court, that the Plaintiffs as a class have suffered injury based on class members dying before receiving an apportionment of the Funds, their claims are ripe based on their characterization of being harmed on a daily basis by the Funds not being distributed and the Tribes are not necessary parties because they have not requested distribution of the Funds and never will. *See* Plaintiffs' Brief in Response to Defendants' Motion to Dismiss and Failure to Join Indispensable Parties (August 11, 2009) (hereinafter "Pls.' Resp. Br."); *see also* Plaintiffs' Response to Defendants' Motion to Dismiss for Lack of Jurisdiction and to Join Indedispensable (sic) Parties (August 11, 2009) (hereinafter "Pls.' Resp.").

Nothing in Plaintiffs' Response or Response Brief changes the simple fact that Plaintiffs bear the burden of proving jurisdiction in federal district court and have failed to carry their burden. Plaintiffs still have not set forth an applicable waiver of sovereign immunity. And, as individual members, they have no vested interests in the Tribes' Funds and cannot establish Article III standing. Likewise, Plaintiffs have failed to show how their case is ready for adjudication at this time, considering there is no use and distribution plan for the Tribes' Funds,

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[1/] Plaintiffs list the following eight Tribes as comprising the Sioux Nation: the Cheyenne River Sioux Tribe, Crow Creek Sioux Tribe, Lower Brule Sioux Tribe, Oglala Sioux Tribe, Rosebud Sioux Tribe, Santee Sioux Tribe, Sioux Tribe of the Fork Peck Reservation, and Standing Rock Sioux Tribe. *See* Pls.' Compl. ¶ 28 (second of two paragraphs numbered as "28") (hereinafter "Tribes").

and Plaintiffs' remedy lies with the political processes of their respective Tribes. Moreover, Plaintiffs' attempt to characterize the Tribes' positions, regarding not wanting distribution of the Black Hills Judgment Funds, as intransigent does not refute the fact that the Tribes have sovereign immunity, all of the Tribes are necessary for the adjudication of the issues presented and not all of the Tribes have waived that immunity for purposes of this lawsuit. The Court, therefore, should dismiss Plaintiffs' Complaint.

ARGUMENT

I. PLAINTIFFS HAVE NOT IDENTIFIED AN APPLICABLE WAIVER OF SOVEREIGN IMMUNITY, A SEPARATE STATUTORY CAUSE OF ACTION OR AN APPLICABLE REMEDY.

The waiver of sovereign immunity relied upon by Plaintiffs (the Little Tucker Act) provides a waiver of sovereign immunity only for monetary damages claims, which are less than $10,000. *See* 28 U.S.C. § 1346(a)(2). Accordingly, Defendants argued the Little Tucker Act does not provide the requisite waiver of sovereign immunity because Plaintiffs seek declaratory and equitable relief, and the face of Plaintiffs' Complaint does not provide evidence that the claims are within the statutory limit. *See* Defs.' Opening Br. at 8-10. In response, Plaintiffs claim they do not know if they meet the statutory damages amount because "Defendants have the enrollment information" and have not provided the information to Plaintiffs. Plaintiffs also claim the Declaratory Judgment Act (28 U.S.C. § 2201) provides jurisdiction for this Court to hear their claims. *See* Pls.' Resp. Br. at 3-5.

Plaintiffs have not shown how the Little Tucker Act applies to them or waives the Federal Defendants' sovereign immunity. Once jurisdiction is challenged, the burden lies with the plaintiff to show jurisdiction exists. *See FW/PBS, Inc. v. Dallas*, 493 U.S. 215, 231 (1990),

overruled in part on other grounds by City of Littleton v. Z. J. Giffs D-4, LLC., 541 U.S. 774 (2004) (holding that the burden is on the party seeking to exercise jurisdiction clearly to allege facts sufficient to establish jurisdiction); *see also Falkirk Mining Co. v. Japan Steel Works, Ltd.*, 906 F.2d 369, 373 (8th Cir. 1990) ("Once a defendant has challenged a federal court's jurisdiction, the plaintiff bears the burden of proving that jurisdiction exists."). When the federal government is named as a defendant, the United States' consent to suit is a prerequisite of federal court jurisdiction. *See United States v. Mitchell*, 463 U.S. 206, 212 (1983); *see also United States v. Nordic Village, Inc.*, 503 U.S. 30, 33–34 (1992). A failure to identify a waiver of sovereign immunity warrants dismissal for lack of jurisdiction pursuant to Rule 12(b)(1). *See Brown v. United States*, 151 F.3d 800, 803–04 (1998). Here, Plaintiffs have failed to identify an applicable waiver. Additionally, Plaintiffs do not cite any positive source of law requiring the Defendants to distribute the Funds to Plaintiffs. *See Fisher v. United States*, 402 F.3d 1167, 1172 (Fed. Cir. 2005). And fundamentally, the Declaratory Judgment Act only provides for an equitable remedy, which cannot be twinned with the Little Tucker Act's waiver of sovereign immunity for money damages. In short, Plaintiffs have failed to correctly plead their case.[2/] This Court should dismiss Plaintiffs' Complaint.

Instead of falling within the relief provided by the Little Tucker Act, Plaintiffs seek per

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[2/] And to be clear, the Administrative Procedure Act ("APA") does provide a waiver of sovereign immunity for agency inaction. *See* 5 U.S.C. § 706. Plaintiffs, here, cannot remedy their pleading failures by amending their Complaint to include an APA claim because: 1) they still have not identified a positive source of law requiring Interior to distribute the Funds to them and 2) as discussed below, they do not have a vested interest in, nor are they currently beneficiaries of the Funds.

capita equitable disgorgement or distribution of the Funds.[3/] *See* Pls.' Compl. ¶ 45; *see also* Pls.' Resp. Br. at 4 (stating "the individual Plaintiffs are seeking their pro rata or per capita distribution of judgment monies."); *see also id.* at 9 ("Plaintiffs are merely seeking a declaratory judgment."). As discussed in Defendants' opening brief, the waiver of sovereign immunity found in the Little Tucker Act does not provide for equitable relief. *See* Defs.' Opening Br. at 8-9 (citing *Lee v. Thornton*, 420 U.S. 139, 140 (1975) (per curiam) (no declaratory or injunctive relief); *Richardson v. Morris*, 409 U.S. 464, 465–66 (1973) (per curiam) (no equitable relief); *Doe v. United States*, 372 F.3d 1308, 1312–14 (Fed. Cir. 2004)).

Moreover, the Little Tucker Act limits this Court's jurisdiction to claims of money damages for less than $10,000. *See* Defs.' Opening Br. at 10 (citing 28 U.S.C. § 1346(a)(2)). And absent an allegation alleging damages of $10,000 or less, Plaintiffs have failed to invoke Little Tucker Act jurisdiction. *See Leveris v. England*, 249 F. Supp. 2d 1, 4 (D. Me. 2003) (dismissing because "[plaintiff] has declined to specify the amount of back pay he anticipates recovering, although he had been on notice that the amount in likely to be material to jurisdiction."); *see also Shaw v.Gwatney*, 795 F.2d 1351, 1356 (8th Cir. 1986). Here, instead of alleging that any recovery by the individuals would be under $10,000 or stating how their claims fall within the Little Tucker Act, Plaintiffs launch an ad hominian attack that the Defendants have refused to provide tribal enrollment information. *See* Pls.' Resp. Br. at 4.

First, Plaintiffs have not formally sought any such information from Defendants in this

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[3/] "Per capita payment" means "that aspect of a [use and distribution] plan which pertains to the individualization of the judgment funds in the form of shares to tribal members or to individual descendants." 25 C.F.R. § 87.1(l). Even though Plaintiffs apparently are only seeking "distribution of only the accrued interest," *see* Pls.' Resp. Br. at 9, the analysis remains the same.

case. Nor do they allege any instances in which the Plaintiffs made such a request of the government and the government did not respond. In other words, Plaintiffs' inflammatory allegations are baseless. Second, Plaintiffs' premise that Defendants are the keepers of tribal enrollment information is incorrect. In general, Tribes (as sovereign nations) are responsible for determining the criteria for membership, deciding who fits those criteria and for the preparation and maintenance of enrollment rolls. Importantly, Federal courts do not have jurisdiction over tribal membership and enrollment questions. *See Santa Clara Pueblo v. Martinez*, 436 U.S. 49 (1978); *see also Smith v. Babbitt*, 100 F.3d 556, 558 (8th Cir. 1996) (federal court lacked jurisdiction in dispute challenging distribution of per capita gaming proceeds as the dispute was solely about intratribal membership determinations).[4/] In short, Plaintiffs have failed to meet their burden of demonstrating federal court jurisdiction under the waiver of sovereign immunity found within the Little Tucker Act.

Further, and contrary to Plaintiffs' assertion that the Declaratory Judgment Act provides for its claims here, Plaintiffs must have a statutory waiver of the Federal Defendants' sovereign immunity (which as discussed above, they do not) and a statute providing a cause of action. The Declaratory Judgment Act, upon which Plaintiffs rely, only provides a remedy; it is not itself a source of positive law providing a cause of action against the United States. *See Fidelity & Cas.*

[4/] Even though not cited to by Plaintiffs, the Secretary of the Interior can under certain circumstances (none of which apply here) "cause a final roll to be made of the membership of any Indian tribe . . . for the purpose of segregating the tribal funds . . . ." *See* 25 U.S.C. § 163; *see also* 25 C.F.R. Part 61 (providing for the Secretary to compile rolls of Indians pursuant to certain statutory authority; the regulations do not apply where the tribe has responsibility for the roll); *see also* 25 C.F.R. Part 87 (providing for use and distribution of Indian judgment funds). But, in any of the aforementioned situations in which the Secretary would establish such a roll, the Secretary would seek the membership information from the tribe.

Co. v. Reserve Ins. Co., 596 F.2d 914 (9th Cir. 1979) (holding the Declaratory Judgment Act does not itself confer federal subject-matter jurisdiction). Moreover, even assuming arguendo that the Plaintiffs have set forth a waiver of the United States' sovereign immunity, the Declaratory Judgment Act cannot be twinned with a waiver of sovereign immunity that only provides for money damages (the Little Tucker Act). *See Qiu v. Chertoff*, 486 F.Supp.2d 412 (D.N.J. 2007) (holding the district court lacked jurisdiction to consider claims for monetary damages against the government because the Declaratory Judgment Act provides only equitable remedies).

Plaintiffs also make an unabashed plea that "'equity and good conscience' require this Court to accept jurisdiction." *See* Pls.' Resp. Br. at 9. As the Eighth Circuit has stated, "Courts are not free to extend or restrict waivers of sovereign immunity beyond what Congress intended." *See Manypenny v. United States*, 948 F.2d 1057, 1063 (8th Cir. 1991). Further, Plaintiffs argue that only a judicial forum is available to distribute the Funds. *See* Pls.' Resp. Br. at 9-11. Plaintiffs' remedies lie with their respective Tribes or with Congress, and not with this Court. Plaintiffs can lobby Congress for a use and distribution plan. *See Lone Wolf v. Hitchcock*, 187 U.S. 553 (1903) (holding Congress has plenary authority over Indian affairs). Or, Plaintiffs can vote for tribal leadership who support distribution of the Funds. Regardless, Plaintiffs have failed to identify a waiver of sovereign immunity that allows for their claims against the federal government to be heard in this Court.

II. PLAINTIFFS HAVE NOT DEMONSTRATED STANDING UNDER ARTICLE III BECAUSE THE BLACK HILLS JUDGMENT FUNDS ARE TRIBAL PROPERTY.

As discussed in Defendants' opening brief, Plaintiffs have also failed to demonstrate Article III standing because they are not the beneficiaries of the Funds, and as such they cannot claim an injury based on the Funds not being distributed. *See* Defs.' Opening Br. at 10-13. In response, Plaintiffs advocate their belief, without any legal support, that the Black Hills Judgment Funds belong to them, they have been injured by the Funds not being distributed to them and the Tribes are simply "political subdivisions created for the benefit of the individual Indians who are enrolled members." *See* Pls.' Resp. Br. at 5-6; Pls.' Resp. ¶ 8. As explained in Defendants' Opening Brief, Interior currently holds the Black Hills Judgment Funds in trust for the benefit of the Tribes of the Sioux Nation, not Plaintiffs. *See* Defs.' Opening Br. at 11 (citing 25 C.F.R. § 87.11 and Winter Decl. ¶ 3). Plaintiffs provide no factual support to the contrary. Plaintiffs simply cannot set forth an injury for monies to which they have no vested interest. *Accord Hoopa Valley Tribe v. United States*, 86 Fed Cl. 430, 436 (2009) (plaintiffs cannot establish injury as they cannot be injured by distribution of monies to which they have no rights).

The Great Sioux Nation's suits seeking compensation for the taking of the Black Hills and extinguishment of their aboriginal title were actions for compensation on behalf of a common tribal entity, the Great Sioux Nation. *Accord Delaware Tribal Business Comm. v. Weeks*, 430 U.S. 73, 85 (1977); *Fort Sill Apache Tribe v. United States*, 477 F.2d 1360, 1362 (Ct. Cl. 1973); *Minnesota Chippewa Tribe v. United States*, 315 F.2d 906, 913-914 (Ct. Cl. 1963). As the Supreme Court has explained:

> It was th[e] tribal entity, represented . . . before the Indian Claims Commission [by a representative party], that suffered from the United States' breach, and both the

> Commission award and the appropriation by Congress were the means of compensating that tribal entity for the wrong done to it. Indeed, the Indian Claims Commission is not empowered to hear individuals' claims, but may only adjudicate claims held by an "Indian tribe, band, or other identifiable group." 25 U.S.C. Sections 70a, 70i

See Weeks, 430 U.S. at 85 (additional citation omitted). Here, as in *Weeks*, the claims brought before the ICC by the Great Sioux Nation belonged to the tribal entities. Accordingly, here, the Black Hills Judgment Funds, "the means of compensating that tribal entity," are "tribal property" in which "individual Indians (hold) no vested rights." *Id.* 430 U.S. at 85.

Currently, no use and distribution plan exists for the judgment Funds Plaintiffs seek to disgorge, let alone a plan that entitles them to a portion of the Funds.[5/] *See* Winter Decl. ¶ 4. And it is sheer speculation that at some point in the future Plaintiffs may be given some beneficial interest in, or distribution from, the Funds. It is entirely possible that a use and distribution plan, whether collectively or specific to each Tribe, could keep beneficial interest wholly in the Tribe(s) for purposes of Tribal programs or economic development. Thus, to the extent Plaintiffs' concern derives from the fact no Funds have been distributed, Plaintiffs lack a vested interest in the Funds necessary to demonstrate any injury.

Plaintiffs argue that because they are only seeking to have the accrued interest in the Funds distributed, any tribal claim to the monies will be protected. *See* Pls.' Resp. Br. at 9. Plaintiffs' claimed injury ignores the beneficial interest the Tribes of the Sioux Nation currently

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[5/] The distribution of Tribal funds from court judgments or settlements is determined by an applicable Congressionally-approved plan for use and distribution. *See* 25 U.S.C. § 1401(a); *see also* 25 C.F.R. § 87.11 (requiring funds be invested until use and distribution plan in place). Such a use and distribution plan here would determine whether there will be per capita distributions to any tribal members. *See, e.g.,* 25 U.S.C. § 1300d–2 (per capita distribution of judgment funds for Mississippi Sioux Tribes); Winter Decl. ¶ 5.

hold in the funds, and that the individual members do not currently have any vested interests in the Funds, to either the principal or the interest. *Accord Seneca Constitutional Rights Org. v. George*, 348 F. Supp. 51, 59 (W.D. N.Y. 1972) (it has long been "established that a tribe has full authority to use and dispose of tribal property and that no individual Indian has an enforceable right in the property."); *see also Holt v. Comm'r*, 364 F.2d 38, 41 (8th Cir. 1966).

Moreover, distribution of the interest to the individual members could affirmatively harm the Tribes' interest. One of the guidelines the Secretary must follow (were there to be a use and distribution plan for the Funds) requires that "a significant portion of such funds shall be set aside and programed to serve common tribal needs, educational requirements, and such other purposes as the circumstances of the affected Indian tribe may justify . . . ." *See* 25 U.S.C. § 1403(b)(5). Here, what monies (from either the interest or principal) would remain invested for the benefit of the Tribes is unclear, meaning one possibility is that the entire principal would remain invested, with all distributions to the Tribes (and any authorized per capita distributions) coming from the accrued interest.

And even assuming Plaintiffs have set forth an injury-in-fact from not having the Funds distributed to them, they cannot trace Plaintiffs' claims to the Defendants because, as discussed above, their argument lies with the Tribes. Accordingly, the disagreement within the respective Tribes and amongst different Tribal members as to whether to accept distribution of the Funds does not establish standing or make Plaintiffs' claims ripe here. *See* Pl.'s Resp. Br. at 8. And it is extremely rare for courts to interfere with internal tribal matters. *See Milam v. Dep't of the Interior*, 10 Indian L. Rep. 3013, 3015 (D.D.C. 1982) (ordinarily, disputes "involving intratribal controversies based on rights allegedly assured by tribal law are not properly the concerns of

federal courts"); *Wheeler v. Swimmer*, 835 F.2d 259, 261 (10th Cir. 1987) (declining to hear action involving challenge to tribal election); *Runs After v. United States*, 766 F.2d 347, 352 (8th Cir. 1985) (how a tribe addresses tribal funds involves the interpretation of tribal law, which is not within the jurisdiction of the district court).

III. PLAINTIFFS' CLAIMS ARE NOT RIPE BECAUSE CONGRESS HAS NOT YET CREATED A DISTRIBUTION PLAN CALLING FOR DISBURSEMENT OF FUNDS TO TRIBAL MEMBERS.

Plaintiffs claim their case is ripe based on the passage of time, *see* Pls.' Resp. Br. at 7 (stating "[i]f not now; when? Twenty-eight (28) more years from now?"), and that they have been harmed from the Funds not being distributed because enrolled members of the Tribes have died before receiving monies from the Funds. *Id*. The passage of time does not trump Article III's requirement of withholding judicial review "until an administrative decision has been formalized and its effects felt in a concrete way by the challenging parties." *Ohio Forestry Ass'n v. Sierra Club*, 523 U.S. 726, 733 (1998) (quoting *Abbott Labs. v. Gardner*, 387 U.S. 136, 148-49 (1967)).

As discussed in Defendants' Opening Brief, Plaintiffs' claimed injury -- and in their view the requisite harm for ripeness purposes -- rests entirely on the premise that they already have a vested interest to the Funds. Contrary to Plaintiffs' belief, Plaintiffs' claim to the monies within the Funds is entirely contingent upon several future developments. *Accord Texas v. United States*, 523 U.S. 296, 300 (1998) (stating a claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all."). First, Plaintiffs' claimed harm assumes that a use and distribution plan for the judgment Funds monies already exists and includes provisions for per capita distribution. There is no use and

distribution plan in place for the Funds. *See* Winter Decl. ¶ 5. And the portion of the Funds, if any, required to be distributed on a per capita basis has not been decided. Plaintiffs also assume all the Funds should or will be distributed to tribal members. But, it is entirely possible that one or all of the Tribes could decide to put the monies towards tribal programs as opposed to distributing to individuals. Second, Plaintiffs' claimed injury assumes that the Department of the Interior is ignoring the non-existent use and distribution plan. Indeed, prior to distribution of a use and distribution plan, there are no vested rights that have ripened into a justiciable injury. *See LeBeau v. United States*, 474 F.3d 1334 (Fed. Cir. 2007), *cert. denied* 127 S. Ct. 3013 (2007). Plaintiffs' claimed injury is nothing more than speculative and their claims are not ripe.

IV. WHERE A COMPLAINT SEEKS DISTRIBUTION OF TRIBAL PROPERTY IN THE ABSENCE OF THE TRIBES, THE COURT SHOULD DISMISS PURSUANT TO RULE 19.

As discussed in Defendants' opening brief, Plaintiffs requested distribution of the Tribes' Funds (their trust corpus) without the Tribes' presence, makes the Tribes necessary parties to this lawsuit. *See* Defs.' Opening Br. at 16-23 (applying Federal Rule of Civil Procedure, Rule 19 to the facts here). In response, Plaintiffs argue that "although the tribes may be claiming an interest in the monies; that claim, in and of itself arises as a result of the enrollment of the individual Indians." *See* Pls.' Resp. Br. at 7-8. Contrary to Plaintiffs' interpretation, the Tribes are sovereign nations with a government-to-government relationship with the United States. And Plaintiffs' argument, which does not recognize the sovereign nature of the Tribes, misses the entire point as to why this Court must dismiss this case because the Tribes are absent: Tribes are governments with sovereign immunity, and that sovereign immunity cannot be waived without specific instruction from Congress or by the Tribes. *See Okla. Tax Comm'n v. Citizen Band*

Potawatomi Indian Tribe of Okla., 498 U.S. 505, 509 (1991); *Pit River Home & Agric. Coop. Ass'n v. United States*, 30 F.3d 1088, 1100 (9th Cir. 1994). Here, Plaintiffs' claims directly impact the necessary Tribes and Tribal property, and thus, tribal sovereign immunity alone warrants dismissal. *See Pembina Treaty Comm. v. Lujan*, 980 F.2d 543, 545– 46; *Clinton v. Babbitt*, 180 F.3d 1081, 1090 (9th Cir. 1999); *Quileute Indian Tribe v. Babbitt*, 18 F.3d 1456, 1460–61 (9th Cir. 1994) ("[W]hen the necessary party is immune from suit, there may be 'very little need for balancing Rule 19(b) factors because immunity itself may be viewed as the compelling factor.'").

Plaintiffs also respond that the Tribes "have shown little interest in the monies . . . . Thus, making them not indispensable parties." *See* Pls.' Resp. Br. at 8. Regardless of whether the Tribes choose to take the monies, that choice does not negate the fact the Tribes are the beneficiaries of the monies or that the Tribes are necessary in an action that requests a court to dispose of that property. *Accord Pembina Treaty Comm.*, 980 F.2d at 546 (holding that "[t]he tribe obviously has an interest in [the trust disbursement process]"); *Makah Indian Tribe v. Verity*, 910 F.2d 555, 558 (9th Cir. 1990) ("A fixed fund which a court is asked to allocate may create a protectable interest in beneficiaries of the fund.") (citation omitted).

CONCLUSION

Based on the foregoing and its opening motion, Defendants respectfully request the Court grant Defendants' motion and dismiss Plaintiffs' Complaint.

Respectfully submitted this 25th day of August, 2009.

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