

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

YAMAHA GOLF CAR COMPANY,
Petitioner,

v.

CLUB CAR, LLC,
Patent Owner.

IPR2017-02141 (Patent 7,239,965 B2)¹
IPR2017-02142 (Patent 7,239,965 B2)
IPR2017-02143 (Patent 7,480,569 B2)
IPR2017-02144 (Patent 7,480,569 B2)

Before JOSIAH C. COCKS, CARL M. DEFRANCO, and
ROBERT L. KINDER, *Administrative Patent Judges*.

KINDER, *Administrative Patent Judge*.

DECISION
Granting Petitioner's Requests for Rehearing
37 C.F.R. § 42.71

¹ This Decision addresses issues common to all cases and to each respective request for rehearing; therefore, we issue a single Decision to be entered in each case. The parties are not authorized to use this style heading for any subsequent papers.

IPR2017-02141 and IPR2017-02142 (Patent 7,239,965 B2);
IPR2017-02143 and IPR2017-02144 (Patent 7,480,569 B2)

I. BACKGROUND

IPR2017-02143

Yamaha Golf Car Company (“Petitioner”) filed IPR2017-02143 pursuant to 35 U.S.C. §§ 311–19 to institute an *inter partes* review of claims 1–20 of U.S. Patent No 7,480,569 B2, issued on January 20, 2009 (Ex. 1002, “the ’569 patent”). Paper 1² (“Pet.”). Club Car, LLC (“Patent Owner”) filed a Preliminary Response. Paper 9 (“Prelim. Resp.”). Pursuant to our request (Paper 12), the parties each filed a supplemental claim construction brief. *See* Paper 13 (Patent Owner’s brief), Paper 15 (Petitioner’s brief).

On April 4, 2018, we issued a decision on institution stating that “we determine that Petitioner has not established a reasonable likelihood of prevailing on its assertion that any of claims 1–20 of the ’569 patent are unpatentable.” Paper 17, 30 (“Decision” or “Dec.”). Petitioner filed a request for rehearing pursuant to 37 C.F.R. §§ 42.71(c)-(d) on May 4, 2018. Paper 19 (“Rehearing Request” or “Req. Reh’g”).

IPR2017-02144

Petitioner’s IPR2017-02144 seeks review of claims 11, 12, and 17–19 from the ’569 patent. *See* IPR2017-02144, Paper 17, 7. On April 4, 2018, we issued a decision on institution, but only instituting trial for claim 12 of the ’569 patent. *See id.* at 17. Petitioner filed a request for rehearing on April 18, 2018, alleging the Board “summarily and improperly resolved material and genuine factual disputes concerning the disclosure of the ‘894 Provisional against YGC in derogation of 37 C.F.R. § 42.108(c).” IPR2017-02144, Paper 19, 1.

² Citations, unless otherwise noted, are to papers and exhibits in IPR2017-02143.

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IPR2017-02141

Petitioner filed IPR2017-02141 pursuant to 35 U.S.C. §§ 311–19 to institute an *inter partes* review of claims 1–28 and 31–33 of U.S. Patent No 7,239,965 B2, issued on July 3, 2007 (Ex. 1002, “the ’965 patent”). IPR2017-02141, Paper 1. Club Car, LLC (“Patent Owner”) filed a Preliminary Response. *Id.*, Paper 8.

On April 3, 2018, we issued a decision on institution stating that “we determine that Yamaha has not established a reasonable likelihood of prevailing on its challenges that any of claims 1–28 and 31–33 of the ’965 patent are unpatentable.” *Id.*, Paper 17, 22. Petitioner filed a request for rehearing pursuant to 37 C.F.R. §§ 42.71(c)–(d) on May 3, 2018. Paper 19.

IPR2017-02142

Petitioner’s IPR2017-02142 seeks review of dependent claims 4, 5, 10, 14, 15, 19, 20, 27, 29, and 30 of the ’965 patent. *See* IPR2017-02142, Paper 17, 4. On April 3, 2018, we issued a decision on institution, but only instituting trial for claim 20 of the ’965 patent. *See id.* at 16. Petitioner filed a similar request for rehearing on April 17, 2018, alleging the Board “summarily and improperly resolved material and genuine factual disputes concerning the disclosure of the ’894 Provisional against YGC in derogation of 37 C.F.R. § 42.108(c).” IPR2017-02142, Paper 19, 1.

II. STANDARD OF REVIEW

The party challenging a decision in a request for rehearing bears the burden of showing the decision should be modified. 37 C.F.R. § 42.71(d). A request for rehearing “must specifically identify all matters the party believes the Board misapprehended or overlooked, and the place where each matter was previously addressed.” *Id.* Upon a request for rehearing, the

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decision on a petition will be reviewed for an abuse of discretion. 37 C.F.R. § 42.71(c). An abuse of discretion may be indicated if a decision is based on an erroneous interpretation of law, if a factual finding is not supported by substantial evidence, or if the decision represents an unreasonable judgment in weighing relevant factors. *See Star Fruits S.N.C. v. U.S.*, 393 F.3d 1277, 1281 (Fed. Cir. 2005).

III. ANALYSIS

One set of arguments made by Petitioner in each proceeding persuades us to grant Petitioner's requests for rehearing and institute trial in IPR2017-02141 and IPR2017-02143. In the IPR2017-02142 and IPR2017-02144 proceedings, which have already been instituted as to one claim, Petitioner's requests for rehearing convince us to institute as to all claims and all grounds set forth in each petition. In particular, in order to deny institution, or partially institute, we were confronted with competing testimony of witnesses offered as experts, as well as competing prior art translations, and we resolved at least one disputed issue of material fact in favor of Patent Owner to deny each petition. *See* Dec. 17–20. Our own regulation, however, cautions against such an approach at the institution phase of a proceeding stating, “a genuine issue of material fact created by . . . testimonial evidence [filed by Patent Owner] will be viewed in the light most favorable to the petitioner solely for purposes of deciding whether to institute an *inter partes* review.” 37 C.F.R. § 42.108(c).

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A. IPR2017-02143 – Anticipation of Claim 1 by the '053 Unexamined Application³

Petitioner contends that issues of material fact have been “created by conflicting expert testimony,” and that such issues should be resolved during trial. Req. Reh’g 8. In order to deny institution of claim 1 as anticipated by the '053 Unexamined Application, we examined competing witness testimony and agreed with Patent Owner’s declarant that the disclosed caddie cart was not a golf cart as claimed. *See* Dec. 18 (giving weight to Mr. DeLozier’s testimony (Ex. 2004 ¶¶ 20, 27–29) as to the distinction between a “caddie cart” and a “golf cart”). Petitioner’s witness, Mr. Breen testified to the contrary that “[a]s an embodiment of the ‘electric vehicle,’ the ‘053 Unexamined Application discloses a ‘golf cart.’” Ex. 1001 ¶ 409 (quoting Ex. 1003 ¶ 2). Because the conflicting testimony creates a genuine issue of material fact, we should have viewed the material fact in the light most favorable to Petitioner solely for purposes of deciding whether to institute an *inter partes* review. *See* 37 C.F.R. § 42.108(c).

Petitioner points out that in order for us to render our Decision, we also had to rely on “Patent Owner’s poor translation of the ‘053 Prior Art.” Req. Reh’g 12; *see* Ex. 2002. Indeed, as part of our analysis of whether claim 1 was anticipated by the '053 Unexamined Application, we determined that the reference does not disclose a “golf cart,” but instead

³ Japanese Unexamined Patent Application Publication No. H9-128053 B2, filed November 1, 1995, published May 16, 1997 (Ex. 1009, Ex. 1003 (Petitioner’s translation), Ex. 2001 (Patent Owner’s translation), “the '053 Unexamined Application”).

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discloses a “caddie cart,” which we determined to be a different type of vehicle. Dec. 16–19.

In order to arrive at the factual determination that the ’053 Unexamined Application does not disclose a “golf cart,” we had to rely on the English translation of the ’053 Unexamined Application.⁴ The parties offer competing translations for the ’053 Unexamined Application. *See* Exs. 1003 ¶ 2 (“golf cart”), 2001 ¶ 2 (“caddie cart”), 2003. To reach our determination, we necessarily resolved a factual dispute by crediting Patent Owner’s translation⁵ over Petitioner’s translation. According to our regulation, we should have treated the translation dispute as creating a genuine issue of material fact as to the nature of the vehicle disclosed in the ’053 Unexamined Application, and, thereafter, viewed the disputed fact in

⁴ As noted in the Decision on Institution, “[t]he parties first dispute the proper translation for certain passages in the ’053 Unexamined Application. Petitioner contends the ’053 Unexamined Application’s ‘electric transport vehicle’ is properly translated as a ‘golf cart’ (Ex. 1003 ¶ 2), while Patent Owner contends the proper translation is a ‘caddie cart’ (Ex. 2001 ¶ 2).” Dec. 17.

⁵ Patent Owner’s translation (Exhibit 2001) does not appear to have been properly certified. Our rules require that “[w]hen a party relies on a document or is required to produce a document in a language other than English, a translation of the document into English and an affidavit attesting to the accuracy of the translation must be filed with the document.” 37 C.F.R. § 42.63(b). A foreign translation should be accompanied by an affidavit (i.e., sworn oath before a notary public), or otherwise meet the requirements set forth in 37 C.F.R. § 1.68. *See Becton, Dickinson and Co. v. B. Braun Melsungen AG*, IPR2017-01589, 7–8 (Jan. 12, 2018) (Paper 8) (“*Requirements for Affidavit under 37 C.F.R. §§ 42.2 and 42.63(b)*”); *compare* Ex. 1003, 18 (Petitioner’s translation with the language required by § 1.68). Patent Owner may correct this deficiency during trial.

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the light most favorable to Petitioner solely for purposes of deciding whether to institute an *inter partes* review. *See* Dec. 18; 37 C.F.R. § 42.108(c).

Petitioner’s remaining analysis for claim 1, as supported by the testimony of Mr. DeLozier, persuades us that at this stage of the proceeding, and viewing all disputed material facts in a light favorable to Petitioner, Petitioner presents a reasonable likelihood of prevailing. *See* Pet. 24–28. Specifically, Petitioner sets forth a reasonable likelihood that claim 1 is anticipated by the ’053 Unexamined Application. *Id.*

Institution of All Claims and Grounds for IPR2017-02143

Based on a review of the record now before us, we grant Petitioner’s request for rehearing in IPR2017-02143 and institute review of claim 1, as well as all challenged claims set forth in each ground of unpatentability. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348 (2018) (holding that a decision to institute under 35 U.S.C. § 314 may not institute on less than all claims challenged in the petition). Specifically, we institute review based on the following grounds and claims as set forth in the Petition:

Reference(s)	Basis	Claim(s) Challenged
’053 Unexamined Application	§ 102(a)	1–3 and 6–9
’053 Unexamined Application	§ 103(a)	4 and 8–10
’053 Unexamined Application and ’918 Publication	§ 103(a)	1–4 and 6–10
’053 Unexamined Application, ’918 Publication, ’496 Unexamined Application, and ’605 Unexamined Application	§ 103(a)	5, 11, and 12 ⁶

⁶ Petitioner’s chart (Pet. 3) lists claim 20 for this ground, but Petitioner’s later analysis is directed to claim 12 and not claim 20. *See* Pet. 39, 43.

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'388 Patent	§ 102(a)	13 and 14
'388 Patent	§ 103(a)	15
'388 Patent and '918 Publication	§ 103(a)	13–15
'388 Patent, '918 Publication, '053 Unexamined Application, and '496 Unexamined Application	§ 103(a)	17–20
'388 Patent, '918 Publication, '053 Unexamined Application, and '605 Unexamined Application	§ 103(a)	16

See Dec. 7; Pet. 3–4.

B. IPR2017-02144 – Anticipation of Claim 11 of the '569 patent by the '918 Publication⁷

At issue in IPR2017-02144 was whether challenged claim 11 of the '569 patent was entitled to priority and adequately disclosed by the '894 Provisional.⁸ Claim 11 requires “disabling golf cart movement towards the predetermined area further comprises disabling golf cart movement except in a reverse direction,” and Petitioner contends that this limitation was not adequately supported in the '894 Provisional. Petitioner argues that we improperly weighed competing expert testimony at this phase of the proceeding to resolve the disputed issue in favor of Patent Owner. Specifically, Petitioner argues:

⁷ U.S. Patent Publication No. 2006/0052918 A1, filed March 18, 2003, published March 9, 2006 (IPR2017-02144, Ex. 1003, “the '918 Publication”).

⁸ The '569 patent claims priority from U.S. Provisional Application No. 60/440,894 (“the '894 Provisional”), filed January 17, 2003. IPR2017-02144, Ex. 1002, (60), 1:6–9.

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[Petitioner’s] expert offered testimony that a POSITA would not understand the ‘894 Provisional to adequately convey that the inventors possessed the claimed subject matter requiring stopping (or preventing forward motion) as a cart-control action based on the cart’s bearing or projected path, and instead merely disclosed cart control actions based on present location (or proximity). Breen Decl., Ex. Y1001, ¶¶ 74-76. The Decision, however, dismissed that testimony and instead exclusively credited the conflicting testimony of Club Car’s expert over YGC’s expert, thereby, in derogation of 37 C.F.R. § 42.108(c), summarily resolving against YGC an important, contested issue of material fact regarding whether a POSITA would understand from the disclosure of the ‘894 Provisional that the inventors were in possession of the claimed subject matter. *See* Dec. at 12 (citing Club Car’s expert report for conclusion that there is no difference between the claim and disclosure from a “functional standpoint”); cf. Breen Decl., Ex. Y1001, ¶ 76 (YGC’s expert opining that “there is no disclosure along these lines at all in the ‘894 Provisional.”).

IPR2017-02144, Paper 19, 7–8. Based on the record before us, we agree with Petitioner that “genuine issues of material fact [were] created by conflicting expert testimony – such as disputes regarding a POSITA’s understanding of the disclosure in the ‘894 Provisional,” and therefore, according to § 42.108(c), we should have resolved these disputed factual issues in favor of Petitioner at the institution phase of the proceeding.

Petitioner’s remaining analysis for claim 11 in IPR2017-02144, as supported by the testimony of Mr. DeLozier, persuades us that at this stage of the proceeding, and viewing all disputed material facts in a light favorable to Petitioner, Petitioner presents a reasonable likelihood of prevailing. *See* IPR2017-02144, Paper 1, Pet. 16–22 (analysis of claims 6, 10, and 11). Specifically, Petitioner sets forth a reasonable likelihood that claim 11 is anticipated by the ‘918 Publication. *Id.*

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Institution of All Claims and Grounds for IPR2017-02144

Based on a review of the record now before us, we grant Petitioner’s request for rehearing in IPR2017-02144 and institute review of claim 11, as well as all challenged claims set forth in each ground of unpatentability. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348 (2018) (holding that a decision to institute under 35 U.S.C. § 314 may not institute on less than all claims challenged in the petition). Specifically, we institute review based on the following grounds and claims as set forth in the Petition:

Reference	Basis	Claim(s) Challenged
’918 Publication	§ 102(e)	11
’918 Publication	§ 103(a)	12 ⁹ and 17–19

C. IPR2017-02141 – Anticipation of Claim 1 of the ’965 patent by the ’053 Unexamined Application

Petitioner’s request for rehearing in IPR2017-02141, specifically for claim 1 as anticipated by the ’053 Unexamined Application, is similar to that examined above for IPR2017-02143. Specifically, Petitioner contends that the Board “repeatedly resolved material factual disputes against YGC in derogation of 37 C.F.R. § 42.108(c),” and that such issues should be resolved during trial. IPR2017-02141, Paper 19, Req. Reh’g 1. For the

⁹ On April 27, 2018, Club Car (Patent Owner) filed a statutory disclaimer under 35 U.S.C. § 253 for claim 12 of the ’569 patent. *See* IPR2017-02144, Paper 22, Exhibit B (Disclaimer of claim 12). Because claim 12 has been disclaimed, we need not issue a final written decision addressing the patentability of this claim.

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same reasons set forth above, and as explained below, we likewise grant Petitioner's Request for Rehearing in IPR2017-02141.

In order to deny institution of claim 1 as anticipated by the '053 Unexamined Application, we examined competing witness testimony and agreed with Patent Owner's declarant. *See id.* at 9 ("Decision improperly adopted the incorrect view advanced by Club Car's expert that the *only* problem addressed by the invention is due to the weight of the cart and does not implicate unmanned carts"); 12 ("Club Cart's expert only worked from an incorrect, unreliable, misleading translation"). Because the conflicting testimony creates a genuine issue of material fact, we should have viewed the material fact in the light most favorable to Petitioner solely for purposes of deciding whether to institute an *inter partes* review. *See* 37 C.F.R. § 42.108.

In addition, as part of our analysis of whether claim 1 was anticipated by the '053 Unexamined Application, we had to rely on an English translation of that reference. As argued by Petitioner, our "Decision adopted the translation of [a key] portion of the '053 Prior Art submitted by Club Car, and rejected that submitted by YGC." *Id.* at 11. The issues with Patent Owner's translation of this reference are noted above. Accordingly, we should have treated the disputed translations as creating a genuine issue of material fact and thereafter viewed the disputed fact in the light most favorable to Petitioner solely for purposes of deciding whether to institute an *inter partes* review. *See* 37 C.F.R. § 42.108(c).

Petitioner's remaining analysis for claim 1, as supported by the testimony of Mr. DeLozier, persuades us that at this stage of the proceeding, and viewing all disputed material facts in a light favorable to Petitioner,

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Petitioner presents a reasonable likelihood of prevailing. *See* IPR2017-02141, Paper 1, Pet. 24–28. Specifically, Petitioner sets forth a reasonable likelihood that claim 1 is anticipated by the '053 Unexamined Application. *Id.*

Institution of All Claims and Grounds for IPR2017-02141

Based on a review of the record now before us, we grant Petitioner's request for rehearing in IPR2017-02141 and institute review of claim 1, as well as all challenged claims set forth in each ground of unpatentability. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348 (2018) (holding that a decision to institute under 35 U.S.C. § 314 may not institute on less than all claims challenged in the petition). Specifically, we institute review based on the following grounds and claims as set forth in the Petition:

Ground	Reference(s)	Challenged Claim(s)
§ 102(a)	'053 Application	1, 3–5, 7, 11, 12, 16
§ 103(a)	'053 Application	4, 13, 16, 18, 19
§ 103(a)	'053 Application and '918 Publication	1, 3–5, 7, 11–13, 16, 18, 19
§ 103(a)	'053 Application, '918 Publication, and '496 Application	8
§ 103(a)	'053 Application, '918 Publication, and '605 Application	2, 6, 17
§ 103(a)	'053 Application, '918 Publication, '496	9, 10, 14, 15, 20 ¹⁰

¹⁰ On April 27, 2018, Club Car (Patent Owner) filed a statutory disclaimer under 35 U.S.C. § 253 for claim 20 of the '965 patent. *See* IPR2017-02142, Paper 22, Exhibit A (Disclaimer of claim 20). Because claim 20 has been disclaimed, we need not issue a final written decision addressing the patentability of this claim.

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Ground	Reference(s)	Challenged Claim(s)
	Application, and '605 Application	
§ 102(a)	'388 Patent	21, 22, 28
§ 103(a)	'388 Patent	23
§ 103(a)	'388 Patent and '918 Publication	21–23, 28
§ 103(a)	'388 Patent, '918 Publication, '053 Application, and '496 Application	26, 27, 31, 32
§ 103(a)	'388 Patent, '918 Publication, '053 Application, '496 Application, and '605 Application	24, 25, 33

D. IPR2017-02142 – Anticipation of Claim 19 of the '965 patent by the '918 Publication

Similar to the analysis of claim 11 in IPR2017-02144, discussed above, in IPR2017-02142 we examined whether challenged claim 19 requiring “disabling golf cart movement except in a reverse direction,” was entitled to priority and adequately disclosed by the '894 Provisional. *See* IPR2017-02142, Paper 17, Dec. 11–12.

Petitioner similarly argues that we improperly weighed competing expert testimony at this phase of the proceeding to resolve the disputed issue. IPR2017-02142, Paper 19, Req. Reh'g 12–14. Specifically, Petitioner argues:

[T]he Decision improperly resolves against YGC a genuine dispute of material fact between the parties' respective experts

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regarding whether a POSITA would understand from the disclosure of the '894 Provisional that the inventors were in possession of the claimed subject matter. *See* Dec. at 12 (citing Club Car's expert report for conclusion that there is no difference between the claim and disclosure from a "functional standpoint"); cf. Ex. Y1001, ¶ 55 (YGC's expert opining that "there is no disclosure along these lines at all in the '894 Provisional.").

Id. at 14. Similar to our analysis above, we agree with Petitioner that genuine issues of material fact were created by conflicting expert testimony and we should have resolved these disputed factual issues in favor of Petitioner at the institution phase of the proceeding.

Petitioner's remaining analysis for claim 19 in IPR2017-02142, as supported by the testimony of Mr. DeLozier, persuades us that at this stage of the proceeding, and viewing all disputed material facts in a light favorable to Petitioner, Petitioner presents a reasonable likelihood of prevailing. *See* IPR2017-02142, Paper 1, Pet. 16, 31–37 (analysis of claims 11, 18, and 19). Specifically, Petitioner sets forth a reasonable likelihood that claim 19 is anticipated by the '918 Publication. *Id.*

Institution of All Claims and Grounds for IPR2017-02142

Based on a review of the record now before us, we grant Petitioner's request for rehearing in IPR2017-02142 and institute review of claim 19, as well as all challenged claims set forth in each ground of unpatentability. *See SAS Inst., Inc. v. Iancu*, 138 S. Ct. 1348 (2018) (holding that a decision to institute under 35 U.S.C. § 314 may not institute on less than all claims challenged in the petition). Specifically, we institute review based on the following grounds and claims as set forth in the Petition:

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Ground	Reference	Challenged Claims
§ 102(e)	'918 Publication	4, 5, 14, 19, 27
§ 103(a)	'918 Publication	10, 15, 20, ¹¹ 29, 30

III. CONCLUSION

For the foregoing reasons, Petitioner's requests for rehearing are granted in each of: IPR2017-02141 (Paper 19), IPR2017-02142 (Paper 19), IPR2017-02143 (Paper 19), and IPR2017-02144 (Paper 19). In each proceeding we institute review based on all grounds asserted covering all claims challenged, except for those two claims that have been disclaimed.

IV. ORDER

For the foregoing reasons, it is,

ORDERED that Petitioner's requests for rehearing are granted: IPR2017-02141 (Paper 19), IPR2017-02142 (Paper 19), IPR2017-02143 (Paper 19), and IPR2017-02144 (Paper 19); and,

FURTHER ORDERED that, pursuant to 35 U.S.C. § 314(a), an *inter partes* review of all challenged claims of the '965 patent and the '569 patent is hereby *instituted*, and notice is hereby given of the institution of a trial as to all challenged claims on all grounds set forth in each Petition.

¹¹ On April 27, 2018, Club Car (Patent Owner) filed a statutory disclaimer under 35 U.S.C. § 253 for claim 20 of the '965 patent. *See* IPR2017-02142, Paper 22, Exhibit A (Disclaimer of claim 20). Because claim 20 has been disclaimed, we need not issue a final written decision addressing the patentability of this claim.

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