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A CASE FOR THE RECOGNITION OF THE CONCEPT OF "STOOD OFF" AS AN EMPLOYMENT / LABOUR PRACTICE IN NIGERIA

1. INTRODUCTION

It is the legitimate expectation of an employee that an employer will provide work and pay salaries as and when due. However, there are unfortunate periods where this expectation is temporarily suspended by an employer through the instrumentality of a practice called "Stood Off". For an employee, being "Stood Off" carries a feeling that is similar to an "Unpaid Leave" and it unsettles such an employee financially, making resort to litigation against an employer inevitable.

In Nigeria, the National Industrial Court of Nigeria ("**NICN**") raised questions about the practice of Stood Off and consequently declared the practice as unknown to Nigerian law and labour jurisprudence. This paper is principally directed at clearing the obscurities and misstatements that are evident in the above-mentioned legal conclusion reached by the NICN with respect to the practice of *Stood Off* in Nigeria.

2. WHAT IS "STOOD OFF"?

The practice of 'Stood Off' is an evolving practice in the employment/labour law lexicon in Nigeria[2] and it is better appreciated when described as "S*tood Off from work*". Interestingly, there are synonyms for "Stood Off" and some of them include "S*tood Down,*" "S*tand Down*" and "*Furlough*"[3]. 'Stood Off' has been identified by the

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2 The practice of 'Stood Off' has received better statutory delineation and attention in other jurisdictions. For example, in Australia, 'Stood Off' has been streamlined by Section 524 of the Fair Work Act 2009. In Nigeria, more legislative activism is needed to give definite form and progressive content to the length and breadth of the practice of 'Stood Off'.

3 The word, "Furlough," is another term used to describe the concept of 'Stood Off' in a number of jurisdictions and the said word came into increased usage since the start of the COVID-19

NICN not to be a "*permanent removal as envisaged in redundancy*" but a "*temporary suspension from ordinary duties though not disciplinary like suspension in the real sense of it*."[4] In practical terms, it refers to an employment/labour practice where a person is still an employee but has been directed to temporarily stop attending work and the employer is not duty bound to pay such an employee.[5] This happens when the employer is unable to provide work for the employee owing to a temporary emergency or other circumstances beyond the employer's control.

The practice of 'Stood Off' does not terminate or extinguish an employer-employee relationship; the legal relationship continues but the employment is "put on hold" in terms of work and payment until the temporary emergency or other circumstances beyond the employer's control withers away and meaningful work becomes available.[6] This invariably means that the affected employee's entitlements in the contract of employment are preserved as effective except the right to work or be paid[7] during the relevant period. Hence, the basic elements of the practice of *Stood Off* include the following: (i) the employee temporarily stops working owing to a

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Pandemic. See, Indeed Editorial Team, '*What is Furlough and How Does it Work?*' (Indeed, 25 July 2023) <https://au.indeed.com/career-advice/career-development/what-is-furlough> accessed 28 September 2024.
The concept of "Furlough" is well established in the United States of America (USA) and it has spread its tentacles to other jurisdictions, though with slight variations in practice. For example, in the United Kingdom (UK), the concept was introduced for the first time in the year 2020 through the Coronavirus Job Retention Scheme (CJRS), also known as "Furlough Scheme". In the Philippines, a furloughed employee is deemed to be placed on "floating status" and Article 301 of the Labor Code in Philippines provides a legal basis for the furlough process of an employee. In Canada, Section 30 of the Canada Labour Standards Regulations recognizes the concept of "Furlough" as "Temporary Lay-off" and sets out a procedure for its application.

4 Per Honourable Justice O. O. Oyewumi, J., in the case of Mr. Alex Ekeh v. Setraco Nigeria Limited, Unreported Judgment of the National Industrial Court, Abuja Judicial Division, in Suit No. NICN/ABJ/312/2020 delivered on 14th October 2022 (hereinafter referred to as "**Ekeh's Case**"). This Judgment can be accessed via <https://www.nicnadr.gov.ng/nicnweb/details.php?id=7465&p=Mr.%20Alex%20Ekeh%20-VS-%20Setraco%20Nigeria%20Limited> accessed on 4 August 2024.

5 Mai Sarkissian, '*How to Terminate a Stood Down Employee*' (Law Path, 27 May 2024) <https://lawpath.com.au/blog/how-to-terminate-a-stood-down-employee> accessed 2 August 2024.

6 Esha Kumar, '*What is Employee Stand Down*?' (Sprintlaw, 26 May 2020) <https://sprintlaw.co.uk/articles/what-is-employee-stand-down/> accessed 2 August 2024; Peninsula Personnel, '*What does it mean to be "Stood Down" from your job?*' (Peninsulapersonnel.com, 9 December 2021) <https://www.peninsulapersonnel.com.au/what-does-it-mean-to-be-stood-down-from-your-job/> accessed 2 August 2024.

7 It is important to state that 'Stood Off' may come in different colorations or strands, for example: (i) with no payment at all; (ii) with part payment; (iii) with stipends; (iv) with other entitlements intact; or (v) with only some entitlements. These colorations or strands are dependent on the form and content of the 'Stood Off' provision in a statute or in a Contract of Employment. It may also be dependent on the proof of its applicable form and content as a custom, usage or practice of a particular trade or industry.

temporary emergency or other circumstances beyond the employer's control;[8] (ii) the employee is not paid during the relevant period by the employer and if paid at all, it could take the form of part payment or stipends;[9] (iii) the employee is still in the employment of the employer;[10] and (iv) the employee enjoys certain contractual entitlements during the relevant period.[11]

An employee that is caught up with or affected by this employment/labour practice is described as a "Stood Off Employee" or a "Stood Down Employee".[12]

3. JUDICIAL ATTITUDE TOWARDS THE PRACTICE OF "STOOD OFF" IN NIGERIA

Two unreported cases of the NICN have greatly impacted, positively and negatively, the application of the concept of *Stood Off* as an employment/labour practice in Nigeria. The relevant facts, position of the parties, and the applicable holdings of the NICN in the two unreported cases are discussed below.

3.1 Mr. Chiadikaobi Ogmor Obiakara v. Mife Construction Nigeria Limited[13]

In **Obiakara's Case**, the Claimant was employed as Project Coordinator in 2016 on a Gross Monthly Salary of ₦450,000.00 and worked until the 31st day of October 2017, when he was disengaged from service by the Defendant via a letter titled "Stood Off". He was owed salaries for 7 months and this led to the institution of this case. The Defendant, on its part, contended that the youth restiveness by the host communities where the project was sited made it impossible for the contract to continue and it is in the light of this that the Claimant is not entitled to his claim being salary already due before he absconded of which half was paid to him.

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8 See, Section 17(1)(a) of the Labour Act; Ekeh's Case (n 4); Mai Sarkissian (n 5); Seek, '*What Does it Mean to be "Stood Down" From Your Job?*' (Seek.com, 9 September 2021) <https://www.seek.com.au/career-advice/article/what-does-it-mean-to-be-stood-down-during-covid-19> accessed 6 August 2024.

9 See, Peninsula Personnel (n 6). See also, Ekeh's Case (n 4) where the Defendant deducted an average of ₦35,000.00 per month from the Claimant's salary for 46 months via what it termed "Stood Off Deductions".

10 See, Esha Kumar (n 6); Mai Sarkissian (n 5); Philip Evangelou, '*What is Employee Stand Down and Why Do it?*' (Open Legal, 17 June 2021) <https://openlegal.com.au/employee-stand-down/> accessed 6 August 2024.

11 See, Peninsula Personnel (n 6); Esha Kumar (n 6); My Business, '*Standing Down Employees: What Does it Really Mean*?' <https://www.mybusiness.com.au/how-we-help/be-a-better-employer/getting-legal-advice/employer-guide-to-coronavirus/standing-down-employees> accessed 2 August 2024.

12 See, Mai Sarkissian (n 5).

13 Unreported Judgment in Suit No. NICN/PHC/59/2018 delivered by Honourable Justice Zaynab M. Bashir, J. of the National Industrial Court, Port Harcourt Judicial Division on 23rd October 2019 (hereinafter referred to as "**Obiakara's Case**"). This Judgment can be accessed via <https://lawcarenigeria.com/chiadikaobi-ogmor-obiakara-vs-mife-construction-nigeria/> accessed 2 August 2024.

Speaking on the legal existence of the practice of *Stood Off*, the Court,[14] had this to say:

> ... **the phrase 'stood off' is one that is unknown to labour practice** and the letter of employment issued to the Claimant makes no reference to such term. Neither does it make any clarification as to how the term is to operate nor the effect of same. In other words, the letter of employment did not provide for an agreement between the Claimant and the Defendant that under certain circumstances, he may be 'stood off' and at such period he would not be paid and may be recalled. The letter of appointment and the letter of 'stood off' also does not state for how long the Claimant is to be 'stood off'. ... though it cannot be said to be a letter of termination of employment in the usual sense of it, however, the letter has the effect of causing the Claimant temporary loss of employment in the sense that for an uncertain time, the Claimant would be out of employment. (Emphasis mine)

3.2 **Mr. Alex Ekeh v. Setraco Nigeria Limited**[15]

In **Ekeh's Case**, the Claimant was an employee of the Defendant and in the ordinary course of his duties, he sustained a workplace accident and reported same to the Defendant through the appropriate quarters. He thereafter took basic steps to seek medical treatment. The Claimant contended that the Defendant thereafter transferred him from its site in Bayelsa State to another site in Asaba, Delta State and subsequently issued him an inter-office Memorandum titled "Stood Off Letter" by which he was placed on what is termed "Stood Off" which term is unknown to Nigerian labour law. The Claimant further asserted that the Defendant deducted an average of ₦35,000.00 per month from his salary for the 46 months via what it termed "Stood Off Deductions" which was not contained in the Letter of Stood Off and which deductions were not communicated to him.

The Defendant, in response, stated that it did all that was necessary in providing safety equipment and that the injury suffered by the Claimant was as a result of his own negligence. Furthermore, the Defendant maintained that "Stood Off" is a concept/agreement customary to the Construction Industry whereby an employer who is still willing to retain the service of its employee, though there is no work, does so by placing such an employee on "Stood Off" and that the Claimant while on "Stood Off" never rendered any service to the Defendant but was still paid. Conclusively, the Defendant contended that its site in Asaba, Delta State was shut down due to the harsh economic reality and that "Stood Off" is a specie of Redundancy.

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[14] Per Honourable Justice Zaynab M. Bashir.

[15] See, Ekeh's Case (n 4).

Speaking on the legal existence and legality of the practice of *Stood Off*, the presiding judge,[16] held as follows:

> The question that should be asked is whether the said stood off is a permanent removal as envisaged in redundancy. The question is undoubtedly in the negative because the said stood off upon a perusal of Exhibit A is more like a temporary suspension from ordinary duties though note (sic) disciplinary like suspension in the real sense of it. **I am therefore of the view that the said stood off is not a specie of redundancy** as the defendant would want the Court to believe as it is not within the contemplation of redundancy under statutory or judicial authorities. **I am thus of the firm view that the said stood off is unknown to our law and labour jurisprudence**. .... As such, a contract may be illegal notwithstanding that it has not breached any criminal law. The practice of stood off cannot be backed by any law, or custom or any contract between the parties and as held supra thus, this Court finds it ultra vires and illegal notwithstanding that it did not breach any criminal law.[17] (Emphasis mine)

4. COMMENTARY

4.1 <u>Is "Stood Off" Unknown to Law and Employment Practice in Nigeria?</u>

The NICN, in both **Obiakara's Case** and **Ekeh's Case**, maintained that *Stood Off* is unknown to our law and labour jurisprudence. While it is admitted that the Labour Act[18] is silent on the use of the word "Stood Off", this practice is, with the greatest respect, not unknown to Nigerian law. At best, the NICN in both **Obiakara's Case** and **Ekeh's Case** should have declared the assertion of *Stood Off* by the respective Defendants as "not proved".[19]

Three instances under the Nigerian employment/labour practice show that the concept of *Stood Off* is recognised under Nigerian law and can be given effect in an employment relationship by a court.

4.1.1 Statutory Variant of 'Stood Off' (Section 17(1)(a) of the Labour Act)

The practice of *Stood Off* has been given statutory validation by the provisions of Section 17(1)(a) of the Labour Act which permits an employer to put on hold the payment of wages to an employee where, owing to a temporary emergency or other circumstances beyond the employer's control,[20] the employer is unable to provide work for the employee. However,

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16 Honourable Justice O. O. Oyewumi, J.

17 See, paragraphs 36 and 37 of the Judgment in Ekeh's Case (n 4).

18 Chapter L1, Laws of the Federation of Nigeria (LFN) 2004.

19 See, Section 121(c) of the Evidence Act 2011 (as amended) which provides that a fact is said to be "not proved" when it is neither proved nor disproved.

20 Examples of such circumstances include: (i) an industrial action (other than an industrial action organized or engaged in by the employer); (ii) a breakdown of machinery or equipment (if the employer cannot reasonably be held responsible for the breakdown); (iii) pandemic (like the

this variant of *Stood Off* is time-bound and not open-ended. Firstly, the duration of the *Stood Off* must not exceed one week or such longer period as an authorized Labour Officer may allow in a particular case. Secondly, the employee is entitled to those wages only on the first day of the period in question. This implies a statutory waiver of the outstanding wages for the remaining *Stood Off* period. Thirdly, the intervening circumstance necessitating the *Stood Off* must be one that makes the employer unable to provide work. This implies that if an employer can still provide work, then, the factual and legal need for *Stood Off* becomes premature.

The NICN, acknowledging the existence of the statutory variant of *Stood Off* in **Ekeh's Case**, commented as follows:

> *...where owing to temporary emergency, or other circumstances beyond the employer's control is for a period which shall not exceed one week the employee shall be entitled to those wages only on the first day of the period. The defendant in this case vide paragraph 12 admitted that Claimant was willing to work but the defendant had no work to be done. Failure of the defendant to provide the Claimant work lasted for years beyond the maximum one week and there is no evidence that such longer period of years was authorized by an authorized labour officer of the Federal Ministry of Labour and Productivity.*[21]

4.1.2 **Contractual Variant of 'Stood Off' (the Doctrine of *Pacta Sunt Servanda* and Section 7(1)(h) of the Labour Act)**

Section 7(1)(h) of the Labour Act permits an employer to include in a Contract of Employment, a written statement specifying "*any special conditions of the contract*". It is this author's view that the said "special conditions" permitted by statute can accommodate a provision or clause for "Stood Off" and once this is included in a Contract of Employment and accepted by the employee, it becomes binding upon the parties. This is in line with the doctrine of *pacta sunt servanda*[22] and Courts are enjoined to honour and respect it.[23] What this

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COVID-19 Pandemic); (iv) stay-at-home restriction, curfew or State of Emergency declared by government for public safety; and (v) a lengthy civil unrest (protest, riot or demonstrations) capable of impeding production, movement, distribution and/or supply of goods and services.

21 Per Honourable Justice O. O. Oyewumi, J., in Ekeh's Case (n 4), at paragraph 41 of the said Judgment.

22 To put the Latin phraseology in full, *pacta convent quae neque contra legis neque dolo malo inita sunt, omni modo observanda sunt* – meaning "contracts that have been entered into neither illegally nor with fraud must in all respects be observed." See the views of Honourable Justice M. A. Owoade, JCA, in the case of Benokam International Resources Limited v. The Hon. Commissioner, Ministry of Works & Transport, Akwa Ibom State & Ors. (2019) LPELR – 48523 (CA) at p. 21, paras. A – D.

implies is that a Contract of Employment should make reference to the term, "Stood Off", and should endeavour to make clarifications as to how the term is to operate and its effect, taking into cognizance the period that the employee would not be paid; the length of notice of *Stood Off* to be given to the employee; and the duration that it will take for the employee to be recalled.[24]

It is contended that this variant of *Stood Off* practice cannot be termed an "unfair labour practice" because an employer only elects to exercise a right (of 'Stood Off') that is vested in the parties by their own voluntary agreement which governs their employment relationship.[25] This is in sync with the position of the law that the Court will not concern itself with the reasonableness or otherwise of the contractual terms between the contracting parties except where such terms impose servile conditions on an employee.[26]

This view is further supported by the reasoning of the NICN in **Ekeh's Case**, as follows:

> **The defendant in my view can only place the Claimant on the said stood off if it was contemplated in the contract between the parties**. ... just like other contracts, contract of employment's creation and termination are subject to the general principle of contract.
>
> **… if Claimant was given Exhibit M it would have formed the basis of his relationship with the defendant**. **There is nothing in Exhibit M concerning the 'stood off' or that the Claimant can be placed on stood off by the defendant. Exhibit M did not equally define or explain or import stood off into the contract between the parties as stated earlier in this judgment**. It is safe to say that even if Claimant was

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23 Honourable Justice Niki Tobi, JSC, advanced this position in the case of Arjay Limited & Ors. v. Airline Management Support Limited (2003) LPELR – 555 (SC), when he held thus: "*The Court is bound to construe the terms of the contract or agreement and the terms only in the event of an action arising therefrom.*" See also, the following cases: Owoniboys Technical Services Limited v. UBN Limited (2003) 15 NWLR (Pt. 844) 545; Mazin Engineering Limited v. Tower Aluminum (1993) 5 NWLR (Pt. 295) 526; and Dalek Nigeria Limited v. OMPADEC (2007) 7 NWLR (Pt. 1033) 402.

24 These prescriptions were judicially laid down by the NICN in Obiakara's Case (n 13), per Honourable Justice Zaynab M. Bashir, J.

25 On the unsustainability of the argument of "unfair labour practice" in the exercise of a right vested in the parties by their own voluntary agreement, see the resounding views of Honourable Justice M. L. Garba, JCA, in the case of Oak Pensions Limited & Ors. v. Mr. Michael Oladipo Olayinka (2017) LPELR – 43207 (CA) at pp. 39 – 42, paras. G – B. The rationale behind this reasoning is that parties to a contract are allowed, within the law, to regulate their rights and their liabilities themselves. See the views of Honourable Justice C. A. Oputa, JSC, in the case of Sonnar (Nigeria) Limited & Anor. v. Partenreedri M. S. Norwind & Anor. (1987) LPELR – 3494 (SC) at p. 43, para. B.

26 See the views of Honourable Justice Amina Audi Wambai, JCA, in the case of Afrab Chem Limited v. Pharmacist Owoduenyi (2014) LPELR – 23613 (CA) at p. 28, para. D. The particular burden of proving "servile conditions" is on the employee. See, Section 136(1) of the Evidence Act, 2011 (as amended).

given the said Exhibit M, stood off is alien to the relationship between parties.[27] (Emphasis mine)

4.1.3 **Trade or Industry Custom Variant of 'Stood Off' (Pleading and Proving Stood Off as a Custom, Usage or Practice by Calling a Competent Witness in the Area of Trade)**

Even where *Stood Off* is not expressly stated in a Contract of Employment, it can still be applied by Courts in Nigeria as a custom, usage or practice within a given industry, trade or business if the party relying on it can plead and also lead credible evidence in proof of the said practice of 'Stood Off'.[28] This position is in harmony with the well-established rule that in so far as a custom or practice is not servile or in irreconcilable conflict with the terms of a written contract, a contract may be subject to terms that are implied by custom or trade usage.[29] This is because there are always implied terms in a contract of employment which are rooted in statute, custom, practice, public policy, or common law and which ensures that the Court makes the appropriate order whether asked for or not.[30]

Since *Stood Off*, a custom or practice widely used in the Construction Industry,[31] has not been judicially noticed by a superior court of record in Nigeria, cogent evidence of same has to be led by the party seeking to rely on

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27 Per Honourable Justice O. O. Oyewumi, J., in Ekeh's Case (n 4), at paragraphs 32 and 35 of the said Judgment.

28 See, Ardova PLC v. Mrs. Nkoloka Okechukwu (2022) LPELR – 59146 (CA) at p. 22, para. E, where Honourable Justice Patricia Ajuma Mahmoud, JCA, validated this position in the following words: "…*anyone who intends to rely on a particular custom or trade must specifically plead it and lead credible evidence in support*."

29 See the views of Honourable Justice O. O. Adekeye, JSC, in the case of Kaydee Ventures Limited v. The Hon. Minister of Federal Capital Territory & Ors. (2010) LPELR – 1681 (SC) at p. 60, paras. A – B. A similar position was expressed by Honourable Justice Amina Audi Wambai, JCA, in the case of Afrab Chem Limited v. Pharmacist Owoduenyi (2014) LPELR – 23613 (CA) at p. 28, paras. B – C and para. E, thus: "*In an employer-employee or master-servant relationship**, in addition to or to the exclusion of the express terms of the contract, the law imposes certain implied terms into the contract**. These implied terms may be either founded on statute**, by custom, by practice**, public policy…. **Where a term is permitted to be implied into a contract, the implied term has the same binding effect on the parties**.*" (Emphasis mine)

30 See the views of Honourable Justice Yargata Byenchit Nimpar, JCA, in the case of Frank Gboboh v. British Airways PLC (2016) LPELR – 40099 (CA) at pp. 13 – 14, paras. E – A. This position was concretized in the case of Bernard Ojeifo Longe v. First Bank of Nigeria PLC (2010) LPELR – 1793 (SC) at pp. 71 – 72, paras. F – A, where Honourable Justice O. O. Adekeye, JSC, commented thus: *"I must chip in at this stage that every contract of employment contains the terms and condition that will regulate the employment relationship such as terms on determination, notice, wages, benefits are usually contained in the expressed contract of service* ***or implied into it by common law and custom****."* (Emphasis mine)

31 This position is corroborated by the fact that the two available decisions (Obiakara and Ekeh's Cases) on the practice of 'Stood Off' in Nigeria were instituted against construction companies: Mife Construction Nigeria Limited and Setraco Nigeria Limited.

it. This will involve calling a witness who is aware of its existence and conversant with its operation in the Construction Industry.[32] This position is validated by the reasoning of the NICN in **Ekeh's Case**, thus:

> Besides **defendant would want this Court to believe that the said stood off is a custom born out of a concept/agreement in the Construction industry failed to put any such agreement or evidence of same before the Court. I am of the respected view that the custom of stood off has not been sufficiently proven in this case to be one applicable in the Construction industry**.[33] (Emphasis mine)

5. CONCLUSION

Contrary to the position taken by the NICN in the cases discussed above, the concept of *Stood Off* is not unknown to law and employment/labour practice in Nigeria. Nevertheless, employers must treat the practice of *Stood Off* with great caution due to its complexity and possible liabilities. Where an employee is wrongfully *Stood Off* from an employment, the Court may order the employer to pay up the due but unpaid salaries of such an employee for the period of the wrongful 'Stood Off'. Consequently, any employer that intends to rely on the practice of *Stood Off* must take steps to justify its application under any of the three afore-mentioned variations.

6. RECOMMENDATIONS

It is advisable for an employer to explore and possibly exhaust the following viable alternatives before resorting to the practice of Stood Off:

a) Accrued Paid Leave: An employer can reach an acceptable agreement with the employees for them to make use of their accrued paid leave entitlement in place of being *Stood Off* without pay.

b) Remote Work or Role Variation: Where the intervening condition is a temporary emergency or a pandemic, an employer can consider whether employees can work remotely or in an otherwise different role than usual before resorting to the practice of 'Stood Off'.

c) Pay-cuts: An employer can reach an acceptable agreement, in writing, with the employees for them to temporarily reduce working hours or days and take a pay-cut pending when the intervening condition ends.

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[32] See, Sections 16, 17, 18(1) & (2) and 73(1) of the Evidence Act 2011 (as amended).

[33] Per Honourable Justice O. O. Oyewumi, J., in Ekeh's Case (n 4), at paragraph 31 of the said Judgment.

d) Deferred Payment Option: In the event that it is impracticable for the employees to reduce their working hours or days, an employer can reach an acceptable agreement, in writing, with the employees to the effect that the pay-cut amount will be reimbursed at a future date.

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