

CAUSE NO. CI62105

Port Freeport,	§	Eminent Domain Proceeding
<i>Plaintiff,</i>	§	
	§	
v.	§	in the County Court at Law No. 3
	§	
Henry Jones, et al.,	§	
<i>Defendants.</i>	§	of Brazoria County, Texas

**DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT
(PUBLIC REDACTED VERSION)**

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Ex. #	Description	Restricted
1	Port business development memo (February 28, 2019)	Yes
2	CEO update to Port commission (November 14, 2019)	Yes
3	Minutes of Port commission meeting authorizing condemnation (October 10, 2019)	No
4	Lease for subject property (November 6, 2023)	Yes
5	Transcript of second deposition of Phyllis Saathoff as Port representative (July 24, 2026)	Yes
6	East End acquisitions information memo (April 20, 2020)	Yes
7	Trip preparation memo for Del Monte meeting (2018)	Yes
8	Port-Del Monte email chain (2018)	Yes
9	Port-Del Monte letter of intent (September 27, 2018)	Yes
10	Port email chain re Del Monte (June 2019)	Yes
11	CEO update to Port commission (June 26, 2019)	Yes
12	Port email chain re Del Monte (September 2019)	Yes
13	Draft Port-Del Monte lease (February 18, 2020)	Yes
14	Memo re business development activity (Nov. 12, 2020)	Yes
15	Port-NAS unsigned letter of intent (December 15, 2020)	Yes
16	Port-NAS letter of intent (August 10, 2023)	Yes
17	Port-NAS email chain (December 2020)	Yes
18	<i>Fresh Del Monte, Freeport Warehouse LLC, and Port Freeport Unveil 80,000-Square-Foot Cold Chain Facility to Enhance Gulf Coast Logistics</i> (May 12, 2025)	No
19	Scheduling emails re Del Monte (April 2018)	No

20	PIDP grant application (2023)	No
21	TxDOT grant application (2021)	No
22	Photo of warehouse	No
23	Hearing Transcript (July 21, 2026)	No
24	Declaration of Paul E. Kent, Ph.D.	No

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Introduction

This is a condemnation case filed by Port Freeport to take land in Freeport’s historic old neighborhood. It began in December 2020, but for five years it proceeded on legally defective petitions. The Port’s pleaded explanation of what it would do with the land, in full, was the “development of business and industries.”¹ It later testified that it “d[id] not have a specific plan.”² As the landowners have explained, this was a deliberate attempt to conceal the nature of the taking.³

Eventually, the Court of Appeals held the explanation insufficient. The Port had to explain the specific use so that the courts could decide whether it was permissibly public or impermissibly private:

The Port’s CEO threw out many possible uses for the Landowners’ property, once it belonged to the Port: it could be used for offices, warehouses, roads, storage, inspections, staging for trucks, or refrigerated facilities. The facilities could be built by the Port, or by partnerships, or by businesses that sell food to Kroger or HEB, or by some other private entity. “Private property cannot be imperiled with such nonchalance.” Some of those uses might satisfy the Constitution’s public use mandate, but some might not; we cannot determine where this taking falls unless we know what use is intended.⁴

The Port responded, in 2026, by finally disclosing what was built on the land: a “cross-docking and cooling warehouse.”⁵ That’s a large, refrigerated space in which

¹ Pl.’s Original Pet. Condemn. 3 (Dec. 30, 2020); Pl.’s 1st Am. Pet. 2–3 (Apr. 29, 2021).

² Defs.’ Partial MSJ, Ex. A 21:24–22:16 (Sept. 1, 2023).

³ *See generally* Defs.’ Resp. Pl.’s Mot. Strike Witnesses (July 20, 2026).

⁴ *See Jones v. Port Freeport*, 722 S.W.3d 754, 761 (Tex. App.—Houston [14th Dist.] 2025, no pet.) (footnote and citation omitted).

⁵ Pl.’s 3d Am. Pet. 10 (Feb. 27, 2026).

goods (like bananas) are unloaded from shipping containers, stored, and then repacked for trucks to take them to retailers (like grocery stores). It was designed and built, and is operated, by the stevedoring partner of the Del Monte fruit company.⁶ Effectively, the facility *was* built for a “private entity” that “sell[s] food to Kroger.”⁷

The Port has now moved for summary judgment on the right to take.⁸ That motion should be denied. The first half consists of thin procedural arguments; the rest fails on the merits. Set aside that the motion is both premature and unsupported by record citations. This case should proceed because there are *at least* disputes of material fact favoring the landowners, or even conclusive evidence in their favor. Even on the preliminary record, a jury could easily find that this warehouse is not for the public’s use, but Del Monte’s. To quote the Port CEO’s own summary, much of the Port’s

[REDACTED]

[REDACTED]⁹

Argument

I. The Port’s Procedural Arguments Are Wrong.

Before getting to that, however, there are the Port’s three procedural arguments. Those are, first, that the landowners stipulated away their private-use defense in 2022; second, that the landowners could not challenge the use after 2021; and, third, that the landowners did not properly raise their constitutional argument. As to the first two, the

⁶ *Id.*; Ex. 1 at PF003369.

⁷ *Jones*, 722 S.W.3d at 761.

⁸ Pl.’s MSJ (July 9, 2026).

⁹ Ex. 2 at PF004732.

Port has litigated for years, both in this Court and the Court of Appeals, without ever raising these simple and purportedly dispositive legal points. *See* Port MSJ (Sept. 1, 2023); Appellee Br., *Jones v. Port Freeport*, No. 14-23-00948-CV (Tex. App.—Houston [14th Dist.] Apr. 29, 2024). By now, that should constitute waiver. *See generally LaLonde v. Gosnell*, 593 S.W.3d 212 (Tex. 2019) (holding that a similar procedural right was impliedly waived by litigation conduct). Regardless, both the former arguments are wrong. And the third argument was foreclosed by the Court of Appeals.

A. The landowners’ four-year-old statement of contested facts isn’t preclusive.

The Port first argues that the landowners’ “stipulation as to the only issue of contested fact is conclusive.” Port MSJ 10–11. By this it means “Defendants’ Statement of Contested Issues of Fact” from October 2022, which reflected that “the proper amount of just compensation” was “the sole known contested factual issue.” *Id.*, Ex. J. But, at the time, this *was* an accurate statement (not a stipulation) that to the landowners only one fact issue was “known.” In 2022, the landowners could not have known there were fact issues bearing on public use, because, as the Court of Appeals later held, the Port “failed to plead a public use with specificity.” 722 S.W.3d at 759. Even eight months after the statement, the Port did not “cure its failure through discovery.” *Id.* at 761. (A *year* later, once the landowners learned that there *were* questions about use, they made a point of stipulating on value while “maintain[ing] and reserv[ing] their right-to-take challenges.” Port MSJ, Ex. P.)

There is no reason that an accurate statement from 2022 should bar a defense based on new facts—especially when the Port concealed those facts for years. *See*

generally Defs.’ Resp. Pl.’s Mot. Strike Witnesses (July 20, 2026). Nor does the Port discuss a case enforcing waiver in even remotely similar circumstances. Rather, even when there *are* mistakes by counsel, the rule is (and always has been) to “favor the determination of cases on their merits rather than on harmless procedural defaults.” *In re Euless Pizza, LP*, 702 S.W.3d 543, 547–48 (Tex. 2024) (per curiam) (requiring the chance to amend admissions made on “incomplete” information, despite arguable “insufficient attention to detail”); *Paschall v. Penry*, 18 S.W. 154 (Tex. 1892) (ordering withdrawal of a judicial stipulation induced by a party’s misrepresentation). The 2022 statement is thus irrelevant to this case as it exists in 2026.

B. There’s no statute of limitations on a private-use defense.

The Port next argues that the condemnation is automatically valid because the Port is a navigation district, and a “proceeding of a district ... is conclusively presumed ... to be valid ... if ... the second anniversary of the effective date of the act or proceeding has expired.” Tex. Water Code § 60.004(a). That is, the Port voted to condemn in 2019, it’s been more than two years, so there’s nothing the landowners can do. *See* Port MSJ 12; *see also* Ex. 3 at PF000439.

But this argument just ignores the second half of the statute, which lists two applicable exceptions. For one, the statute doesn’t apply to “a matter that on the second anniversary of the effective date of the act or proceeding ... is involved in litigation if the litigation ultimately results in the matter being held invalid by a final court judgment.” Tex. Water Code § 60.004(b)(3). Here (regardless of when private use was raised) the ultimate decision to condemn *was* involved in litigation within two years because the Port filed this case in 2020. *See* Pl.’s Original Pet. Condemn. (Dec. 30, 2020). Second,

the statute also doesn't apply to "an act or proceeding that was void at the time it occurred." Tex. Water Code § 60.004(b)(1). Unconstitutional condemnations fit the bill. *See Lone Star Gas Co. v. City of Fort Worth*, 98 S.W.2d 799, 801 (Tex. [Comm'n Op.] 1936) (recognizing that unlawful condemnations are void); *see also, e.g., Ex parte E.H.*, 602 S.W.3d 486, 494 (Tex. 2020) (explaining that court proceedings to enforce an unconstitutional act are "void *ab initio* and as a legal reality, never existed at all"). Indeed, if these exceptions did not apply, the Port could simply authorize a condemnation, wait two years to file (or file and hide the use for two years), and then win automatically no matter how unlawful the taking. Essentially, the Port is arguing, without any supporting cases, that *landowners* need to preemptively file defensive suits before condemnations even occur. That novel proposition is wrong.

C. The landowners did not need to challenge the statute.

Finally, in its last procedural argument, the Port writes that the landowners' private-use defense somehow fails because they did not challenge the constitutionality of the condemnation statute outright. The Court of Appeals already rejected this argument, and that disposition controls. *Jones*, 722 S.W.3d at 762 n.6 ("The Landowners' challenge is that the Port's taking of their property does not itself satisfy the Constitution's public use requirement, not that section 62.107 is unconstitutional."); *see also, e.g., City of Houston v. Precast Structures, Inc.*, 60 S.W.3d 331, 337–39 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (op. on reh'g) (explaining law of the case).

II. The Port’s Motion Also Fails to Prove That There Are No Genuine Issues of Material Fact.

Because there’s nothing to the Port’s procedural arguments, the question becomes whether the Port has established “that no genuine issue of material fact exists.” Tex. R. Civ. P. 166a(h)(2). It has not.

A. The Port fails to cite the record.

To start, the Court should, in its discretion, deny the motion simply because it does not “cite, quote, or” really even “otherwise direct the trial court to the evidence.” *Walker v. Eubanks*, 667 S.W.3d 402, 410 (Tex. App.—Houston [1st Dist.] 2022, no pet.). The Port does summarize its exhibits at the end of its brief. *See* Port MSJ 24–27. But it never cites the record. And this Court should not have to “sift through a voluminous file,” *Walker*, 667 S.W.3d at 409, to figure out which of the Port’s assertions are supported, and to what degree, and which are just attorney argument. After all, the point of a motion for summary judgment is not to *assert* that facts are settled, but to “establish” it. Tex. R. Civ. P. 166a(a)(1). Courts regularly reject summary-judgment motions with “globally stated facts,” and they do it when the record is far smaller than the 443 pages of exhibits the Port now offers. *Walker*, 667 S.W.3d at 410–11 (collecting cases). This Court should do the same.

B. There are at least fact disputes bearing on public use.

If the Court does reach the record, the Port’s motion should be denied on that ground, too. Even as the record currently stands, a jury could easily find facts that dispositively favor the landowners.¹⁰

i. Legal standards

Start with the substantive test. The Port argues that the landowners can prevail only if they show that the condemnation is “fraudulent, in bad faith, or arbitrary and capricious.” Port MSJ 16–17 (citation omitted). That’s wrong. The Port’s judge-made standard dates to decades ago. And in response to the abuse upheld in *Kelo v. City of New London*, 545 U.S. 469 (2005), in which homes would be transferred to private businesses, Texans constitutionally limited eminent domain in 2009. There is thus an explicitly open question whether the Port’s standard was abrogated. *KMS Retail Rowlett, LP v. City of Rowlett*, 593 S.W.3d 175, 193–94 (Tex. 2019). Justice Blacklock has explained why it was. *Id.* at 194–201 (Blacklock, J., dissenting). And, here, the Court of Appeals never mentioned the Port’s preferred standard; it said that the relevant test comes right from the plain text of the 2009 amendment:

(a) No person’s property shall be taken, damaged, or destroyed for or applied to public use without adequate compensation being made, unless by the consent of such person, and only if the taking, damage, or destruction is for:

(1) the ownership, use, and enjoyment of the property, notwithstanding an incidental use, by:

¹⁰ Indeed, the preliminary evidence suggests that a reasonable jury could find *only* for the landowners, so the landowners may well file their own motion for summary judgment.

(A) the State, a political subdivision of the State, or the public at large; or

(B) an entity granted the power of eminent domain under law; or

(2) the elimination of urban blight on a particular parcel of property.

...

(b) In this section, “public use” does not include the taking of property under Subsection (a) of this section for transfer to a private entity for the primary purpose of economic development or enhancement of tax revenues.

Jones, 722 S.W.3d at 759–60 (quoting Tex. Const. art. I, § 17).¹¹

As for the summary-judgment test, that’s the usual one. “To obtain a traditional summary judgment ... , a movant must produce evidence showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. The nonmovant may raise a genuine issue of material fact by producing more than a scintilla of evidence establishing the existence of the challenged element. ... [The Court] take[s] as true all evidence favorable to the nonmovant and indulge[s] every reasonable inference and resolve[s] any doubts arising from such evidence in the nonmovant’s favor.” *City of Houston v. Perez*, ___ S.W.3d ___, 2026 WL 2123605, at *2 (Tex. App.—Houston [14th Dist.] July 23, 2026, no pet. h.) (cleaned up).

Putting the standards together: if the landowners can offer more than a scintilla of evidence that neither the Port nor the public at large owns, uses, and enjoys the warehouse, the Port’s motion should be denied. This they can easily do.

¹¹ This amendment also abrogates *Atwood v. Willacy County Navigation Dist.*, 271 S.W.2d 137, 142 (Tex. Civ. App.—San Antonio 1954, writ ref’d n.r.e.), a case that the Port raised at the Court of Appeals. See Appellee Br. 18–19, *Jones v. Port Freeport*, No. 14-23-00948-CV (Tex. App.—Houston [14th Dist.] Apr. 29, 2024).

ii. Neither the Port nor the public owns, uses, and enjoys the warehouse.

To begin, the Port’s agreement with a private subsidiary of North American Stevedoring¹² is enough to resolve this case. NAS owns the warehouse for the [REDACTED] term of the agreement. Ex. 4 at 9 (“Tenant shall own all of the leasehold improvements ... subject to a future fee estate”); *id.* at 14–15 (term). NAS pays for maintenance and utilities. *Id.* at 25–26. The agreement itself says that “the right to use the Leased Premises” belongs to NAS. *Id.* at 23. The Port even pleaded that it negotiated for “operation” of the warehouse by a private entity. Pl.’s 3d Am. Pet. 10. So the Port does not own or use the warehouse.

Similarly, the agreement by itself shows that the public neither uses nor enjoys the warehouse. The Port claims that “the warehouse is open and available for use by any member of the public at large with a need for chilled cross-dock transloading services,” such that it’s “similar to common carrier pipelines.” Port MSJ 8. But the Port provides no citation for this claim. And [REDACTED]

[REDACTED] And even if NAS did let parties other than Del Monte use the warehouse, [REDACTED]

¹² The landowners use NAS to refer to North American Stevedoring and a chain of related entities, including Pacific Stevedoring, Gulf Stevedoring, and Freeport Warehouse LLC, which is the entity that technically owns the warehouse. *See* NAS’s Mot. Quash Subpoena 2 (July 14, 2026) (“NAS (and its affiliated entities) is a private commercial entity engaged in the development and operation of cargo handling and logistics facilities at the Port of Freeport. Among other operations, NAS developed and constructed the approximately 80,000-square-foot refrigerated cross-dock facility ... NAS operates the facility”); Ex. 1 at PF003369; Ex. 5 at 33:10–34:1; Ex. 4 at PF003624.

[REDACTED]

[REDACTED] See
Crosstex NGL Pipeline, L.P. v. Reins Rd. Farms-1, Ltd., 404 S.W.3d 754, 761–62 (Tex.
App.—Beaumont 2013, no pet.) (explaining common-carrier status). [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]¹³

The best that can be said for the Port is that it will own the land, *see* Port MSJ 21–22, but that argument is insufficient for a few reasons. The Port still does not own the *warehouse* (except for a reversionary interest that will take [REDACTED] to realize). And even if the Port owned *all* the property, that would say nothing about use and enjoyment. Moreover, the fact of a lease didn’t matter in *Kelo*, 545 U.S. at 476 n.4, 478 n.6, and the 2009 amendment was meant to offer *greater* protection to landowners, *KMS*, 593 S.W.3d at 193. If even *Kelo* didn’t treat a lease as a “get out of private use” card, this Court certainly shouldn’t under the more protective standard in Texas.

In sum, there is at least a genuine dispute over whether the Port or public owns and uses the land. The warehouse is owned by a private business, operated by a private business, and open only to private customers. That is enough to deny the Port’s motion.

¹³ This stands in contrast to two Port-owned areas sometimes used for cross-docking that *are* open to all shippers. *Id.* at 37:22–38:9.

iii. The warehouse is not a core Port activity.

And even if it weren't, the remaining record would easily raise material fact disputes. For instance, there is a fact dispute over whether locating a warehouse on Port land is for the convenience of private shippers rather than a benefit to the Port.

One of the Port's witnesses now claims that "[c]argo must be received, sorted, inspected, held, and staged on land before it can move inland or be loaded aboard a vessel. ... Without sufficient, contiguous, improved backland area behind its wharves, a seaport cannot load and load [sic] vessels efficiently." Port MSJ, Ex. A ¶ 5. But there is much more than a scintilla on the other side, too. The landowners' expert (who holds a Ph.D. in maritime economics and has advised on some 230 port projects in 55 countries) testifies to the opposite: "The function of this facility could be performed at a range of locations, including off-port sites." Ex. 24 ¶ 20. In his expert view, "the facility at issue is best characterized, from a port-planning and operational standpoint, as a private facility for the convenience of a particular shipper." *Id.* Similarly, in deposition, the Port testified that Chiquita operates a cross-docking warehouse more than five miles *off* Port property. Ex. 5 at 18:6–14, 32:2–9. Really, it's not clear that even the Port believes what it's saying. One of its summaries of acquisitions in the old neighborhood was clear that the land was for [REDACTED]." Ex. 6 at 1.¹⁴ So if, as seems likely, the facts are that the land is not for a core function of a port, then a jury could conclude that the real

¹⁴ And at a July 21 hearing, Port counsel offered to "stipulate" that "these kinds of warehouses do not have to be located across the street from the docks, that they can be located miles away and they don't even need to be on port land and they don't need to be acquired by government entities for them to be constructed." Ex. 23 at 29:12–20.

user of the land is Del Monte. *See also* Ex. 5 at 21:11–14 (agreeing that warehousing at the Port provides “[e]fficiency, security, [and] reduced costs” to the shipper).

iv. The warehouse was created by private companies and is used by private companies.

The jury could similarly conclude that Del Monte (or NAS) uses and enjoys the property because much of the historical evidence says so.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED] When the warehouse opened, in May 2025, the Port boasted on its website that Del Monte and NAS cut the ribbon. Ex. 18. A Del Monte vice president explained that partnering with the Port and NAS “enables us to enhance the service standards our customers expect.” *Id.* at 1. Today, Google Maps shows the Del Monte logo on the building:



See Ex. 22; Ward Decl. ¶ 6. Del Monte uses the warehouse; [REDACTED]

[REDACTED] and the Port knows of no other customers, Ex. 5 at 32:21–33:6. So there is more than a scintilla of evidence that this warehouse is used by a private company.¹⁵

v. The warehouse is primarily for economic development.

Because there is at least a genuine dispute about who owns and uses the land, the Court should deny the Port’s motion under Article I, Section 17(a). It need not reach Section 17(b), which prohibits “transfer to a private entity for the primary purpose of

¹⁵ Really the evidence is so strong that the landowners would likely win under pre-2009 Texas law. *See, e.g., Est. of Waggoner v. Gleghorn*, 378 S.W.2d 47, 49 (Tex. 1964) (“The economic use of such property will undoubtedly be facilitated ... but the public interest is not otherwise served in any way[.]”); *Maher v. Lasater*, 354 S.W.2d 923, 926 (Tex. 1962) (“The simple fact is that the Commissioners Court of Brooks County has entered an order which, if given effect, will, on the facts in this case, take petitioners’ land for the private benefit of respondent Lasater.”); *Phillips v. Naumann*, 275 S.W.2d 464, 467 (Tex. 1955) (“[T]he jury found that the Commissioners’ Court acted primarily for the purpose of benefiting Naumann, and that it did not deem the opening of the road of any substantial public importance.”); *cf. KMS*, 593 S.W.3d at 188 (upholding taking that was concededly public but for alleged private motive); *City of Austin v. Whittington*, 384 S.W.3d 766, 780 (Tex. 2012) (same where private benefit was “incidental”). The landowners would likely win under *Kelo* itself. *Cf.* 545 U.S. at 478 (relying on there not being “identifiable” transferees at the time of the taking).

economic development.” But on that point, too, there’s a fact issue. To be sure, the Port argues (again without citation) that “[a]ny ‘economic development or enhancement of tax revenues’ resulting from the Port’s project is incidental.” Port MSJ 23–24. But there is far more than a scintilla of evidence showing the opposite.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

■ And there’s much more than that. Even the earliest negotiations with Del Monte were conducted by the Port’s “Director of Business and Economic Development,” Ex. 19, and the Port explicitly listed the warehouse as a “Business and Economic Development Activity,” Ex. 14 at 4. At the meeting when the Port authorized condemnation, the Port’s CEO began her pitch by noting that “the last economic impact study reflects the great things that the Port is doing for the community ... by impacting more than 150,000 jobs and providing substantial income that is spent in the community.” Ex. 3 at ’436. A Port commissioner similarly “noted that one question that has been posed to him is what jobs are created.” *Id.* at ’438. Later, in seeking a federal grant to help fund the warehouse and other projects, the Port touted that the projects “provide a direct economic development benefit to the Houston-Galveston region, including contributing local jobs to the Freeport community.” Ex. 20 at ’294. A similar request to a state program likewise emphasized that “[t]his project will both

attract new business and retain existing business thereby supporting and creating jobs in the local community and statewide.” Ex. 21 at ’356. And at the ribbon-cutting, the Chairman of the Port boasted that “[w]e are proud to welcome this addition to our port community and its positive economic impact on the region.” Ex. 18 at 1. There is thus a fact dispute about whether the primary purpose of the taking was economic development.

C. Discovery is ongoing.

Finally, if the Court believes that these fact issues do not overcome summary judgment, the Court should still deny the Port’s motion as premature. As to private use, discovery is still ongoing. So far, the landowners have received documents from the Port and deposited it. But they have not yet taken any discovery from NAS or Del Monte, they have not yet inspected the warehouse, and their expert has thus not reviewed any of that further discovery. *See* Ward Decl. ¶ 9. If necessary, the landowners request “additional time to secure evidence” as allowed by Rule 166a(d)(3).

Conclusion

At bottom, the Port’s procedural arguments fail. On the merits, even an incomplete record shows there are at least disputes of fact, and likely dispositive evidence favoring the landowners. Every indication is that the government wants to expropriate land so that a private company can more easily sell bananas. That’s prohibited by the Texas Constitution, and the motion should be denied.

RESPECTFULLY SUBMITTED this 30th day of July, 2026.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served via electronic case filing, email, and/or hand delivery on July 30, 2026, to the following counsel of record:

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