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**UNITED STATES BANKRUPTCY COURT  
SOUTHERN DISTRICT OF NEW YORK**

**In re**

**Chapter 7**

**KOLLEL MATEH EFRAIM, LLC a/k/a  
MATEH EPHRAIM, LLC, a/k/a KOLEL  
MATEH EFRAIM,**

**Case No. 04-16410 (SMB)**

**Debtor.**

**ROBERT L. GELTZER, as Chapter 7  
Trustee of the Estate of Debtor KOLLEL  
MATEH EFRAIM, LLC, a/k/a MATEH  
EPHRAIM LLC, a/k/a KOLEL MATEH  
EFRAIM,**

**Adv. Proc. No. 08-01265 (SMB)**

**Plaintiff,**

**-against-**

**JACK LEFKOWITZ and ABRAHAM  
STEINWURZEL,**

**Defendants.**

**PLAINTIFF-TRUSTEE'S MEMORANDUM OF LAW IN OPPOSITION  
TO DEFENDANTS' MOTION TO DISMISS THE TRUSTEE'S COMPLAINT**

## PRELIMINARY STATEMENT

This Memorandum of Law is submitted on behalf of Robert L. Geltzer, as Chapter 7 Trustee (the “Trustee”) of the debtor Kollel Match Efraim, LLC, a/ka/ Match Ephraim, LLC, a/k/a Kolel Match Efraim (the “Debtor”), in opposition to the motion of the defendants Jack Lefkowitz (“Lefkowitz”), the Managing Member of the Debtor, and Abraham Steinwurz, the Manager of the Debtor (“Steinwurz,” and collectively with Lefkowitz, the “Defendants”), to dismiss the Trustee’s Complaint in this adversary proceeding, which seeks substantial monetary damages against the Defendants by reason of their breaches of their fiduciary duties owed to the Debtor and the Debtor’s estate.

The detailed factual allegations set forth by the Trustee in the Complaint<sup>1</sup> center upon an occupancy agreement (the “Occupancy Agreement”) entered into between Helen-May Holdings LLC (“Helen-May”), the owner of certain real estate, commonly known as the Meadows Resort, located in Cohecton, New York (the “Meadows Property”), and the Debtor, as the contract vendee under a contract with Helen-May to purchase that property. Under the Occupancy Agreement, the Debtor was permitted to occupy the Meadows Property pending the closing of the purchase thereof, but in the event it continued to occupy the property beyond the agreed to closing date without consummating that purchase, it was obligated, among other things, to pay to Helen-May \$1,500.00 for each day of such additional occupancy.

As alleged in the Complaint, notwithstanding that the Debtor did not close upon the purchase contract by the stipulated date, not only did the Defendants cause the Debtor to continue to occupy the Meadows Property for more than three additional years, but during the entire time of the Debtor’s occupancy, the Defendants allowed Steinwurz, as well as third

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<sup>1</sup> Curiously, a copy of the Trustee’s Complaint is not included as an exhibit to the Defendants’ motion papers. Accordingly, a copy of that pleading is annexed as Exhibit 1 to the accompanying Affirmation of Robert A. Wolf, Esq., counsel to the Trustee (the “Wolf Affirmation”).

parties, to use and occupy the property without paying anything to the Debtor for such use. In particular, for each of the four summers of 2004-2007, in abrogation of the terms of the Occupancy Agreement, and without the consent of this Court or of Helen-May, the Defendants permitted Steinwurzle to operate a camp for teenage boys at the premises,<sup>2</sup> without requiring Steinwurzle or the camp to pay a single cent to the Debtor for such use.

Accordingly, as further alleged in the Complaint, the Defendants knowingly and intentionally deprived the Debtor of any funds with which to pay to Helen-May (i) any of the \$1,500.00 per day charges under the Occupancy Agreement, or (ii) the monthly adequate protection payments which this Court directed that the Debtor pay to Helen-May, resulting in this Court's entry of a judgment in favor of Helen-May and against the Debtor in the amount of \$245,779.00. Consequently, by reason of the Defendants' malfeasance, Helen-May has filed a proof of claim against the estate that sets forth; a secured claim for the judgment amount of \$245,779.00; a Chapter 11 administrative claim in excess of \$3 million based upon the \$1,500.00 per day charges and other alleged charges under the Occupancy Agreement; and unliquidated Chapter 11 administrative damage claims for alleged physical injury to the Meadows Property caused by the camp operation and for financial and other damages as well.

As will be discussed in the Argument section of this brief, *infra*, the detailed allegations in the Trustee's Complaint, which upon the instant motion to dismiss must be deemed true, more than adequately plead a cognizable claim for fiduciary duty breaches on the part of the Defendants. Based upon the limited amount of documentation and information thus far available to the Trustee, including the testimony of the Defendants given in Bankruptcy Rule 2004 examinations, but without the benefit yet of discovery in this particular adversary proceeding, the

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<sup>2</sup> As set forth in the Complaint, Steinwurzle testified at his Bankruptcy Rule 2004 examination in this bankruptcy case that one of Lefkowitz's sons attended the camp for one of the summers.

Trustee has alleged sufficient facts to support a claim that the Defendants violated their duties to act in good faith and with the degree of care required of them under New York's Limited Liability Company Law. (See Point I, *infra*.)

As will also be demonstrated *infra*, Defendants' protestations to the contrary, pursuant to the Second Circuit's explicit ruling in Mediators, Inc. v. Manney (In re The Mediators, Inc.), 105 F.3d 822 (2d Cir. 1997), and to its progeny, the Trustee clearly has standing to assert a claim against the Defendants for their breaches of fiduciary duty. (See Point II, *infra*.)

Defendants cannot hide behind the "business judgment" rule to avoid liability for their conduct. As will be discussed below, the "business judgment" rule cannot serve as a basis for dismissal of an action where, as here, the complaint contains allegations of grossly irresponsible actions on the part of the defendants, undertaken for self-serving purposes, that smack of bad faith, and, subject to discovery, even suggest fraud. (See Point III, *infra*.)

Finally, Defendants' argument that the Occupancy Agreement precluded the Debtor from collecting any income for the use of the Meadows Property by third parties is utterly specious, and belied by the very terms of that document. The Occupancy Agreement explicitly stated that the Meadows Property was to "be operated in accordance with its present use only," i.e., as a hotel resort. Nothing contained in that Agreement authorized the Debtor to allow a camp for teenage boys to be operated by Steinwurzle upon the premises, nor did the Debtor or the Defendants ever seek or obtain the authorization of this Court or the consent of Helen-May for such a camp operation. In permitting such an unauthorized use of the Property, without even requiring any payments to the Debtor for such use, while Helen-May's claims against the Debtor for the \$1,500.00 per day charges under the Occupancy Agreement and for the Court-imposed

adequate protection obligations were aggregating in the millions, Defendants clearly engaged in bad faith and blatantly breached their fiduciary duties. (See Point IV, *infra*.)

Thus, for the reasons to be discussed more fully below, Defendants' motion to dismiss the Trustee's Complaint should be denied.

## **THE KEY FACTUAL ALLEGATIONS IN THE COMPLAINT**

The key factual allegations in the Complaint that serve as the factual predicates for the Trustee's cause of action against the Defendants for their breaches of their fiduciary duties -- which allegations, pursuant to the case law cited in Point I, *infra*, must be accepted as true for purposes of the Defendants' dismissal motion -- are set forth below.

### **The Parties**

On or about July 26, 1999, the Debtor, under the name, Match Ephraim LLC, was organized as a limited liability company under the laws of the State of New York. The Debtor was in the business of, among other things, the facilitation of real estate development and investments. (Complaint at ¶11.)<sup>3</sup>

From the time it was first organized, through and including the Debtor's filing of its initial Chapter 11 bankruptcy petition on October 4, 2004, Lefkowitz was the sole member -- and thus the Managing Member -- of the Debtor, which operated under the name Match Efraim LLC. (Id. at ¶12.)

On or about August 1, 1999, Steinwurzle became the Manager of the Debtor and had managerial duties with respect to the Debtor, which duties, as described in an affidavit dated May 21, 2007, submitted by Steinwurzle in the Debtor's bankruptcy case (the "Steinwurzle Affidavit), included, "managing the Debtor, paying its account payables, and helping raise funds for the Debtor." (Id. at ¶13.) A copy of the Steinwurzle Affidavit, cited to in this regard in the Complaint, is annexed to the Wolf Affirmation as Exhibit 2.

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<sup>3</sup> As set forth above, a copy of the Complaint is annexed to the accompanying Wolf Affirmation as Exhibit 1.

### **The Meadows Property Contract**

On or about April 29, 2004, a contract of sale (the “Contract,” a copy of which is annexed to Defendants’ motion papers as Exhibit A) for the Meadows Property was entered into between Helen-May as seller and an individual named Aron Fixler (“Fixler”) as purchaser. (Id. at ¶14.) On or about May 18, 2004, Fixler assigned his interest in the Contract to the Debtor. (Id. at ¶15.)

On or about the June 1, 2004, the closing date set forth in the Contract, the Debtor informed Helen-May that it would be unable to close at that time due to a lack of funds. (Id. at ¶17.)

On or about June 3, 2004, Helen-May and the Debtor executed the Occupancy Agreement (a copy of which is annexed to the Defendants’ motion papers as Exhibit B) that set forth terms for the Debtor’s occupancy of the Meadows Property, pending an adjourned closing of the sale thereof to the Debtor under the Contract. The Occupancy Agreement included provisions, among others: (i) authorizing the Debtor’s occupancy of the Meadows Property, pending a closing of the sale pursuant to the Contract; (ii) extending the closing date under the Contract to September 27, 2004; (iii) making the Debtor responsible for payment of Helen-May’s carrying charges with respect to the Meadows Property while the Debtor occupied the same prior to the sale; (iv) increasing the downpayment pursuant to the Contract from \$100,000 to \$140,000; and (v) imposing a fee, for the Debtor’s failure to close on the new closing date of September 27, 2004, of \$1,500.00 for each day of its continued occupancy of the Meadows Property past the new September 27, 2004 closing date. (Id. at ¶18.)

The Debtor commenced its occupancy of the Meadows Property under the Occupancy Agreement in or about June 2004. (Id. at ¶20.)

On or about September 22, 2004, Helen-May and the Debtor executed a letter agreement (the “Extension Agreement”), which included the following relevant terms: (i) a further extension of the closing date under the Contract until November 29, 2004; and (ii) provision for the payment by the Debtor of an additional sum of \$20,250 upon delivery of the executed Extension Agreement and another \$20,250 on or before October 27, 2004. (Id. at ¶22.)

On or about September 29, 2004, counsel for the Debtor sent correspondence to counsel for Helen-May indicating that a check representing the first payment due under the Extension Agreement had been sent, but that payment on that check would be stopped due to an issue regarding the actual acreage of the Meadows Property. (Id. at ¶23.)

### **The Debtor’s Bankruptcy and Its Continued Occupancy of the Meadows Property**

On or about October 4, 2004 (the “Petition Date”), the Debtor filed a Chapter 11 bankruptcy petition in the Court under the caption, In re Kollal Match Efraim LLC, Case No. 04-16410 (the “Bankruptcy Case”). (Id. at ¶24.)

On or about November 24, 2004, the Debtor filed a second Chapter 11 petition with this Court, under the caption, In re Match Ephraim LLC d/b/a Kollal Match Efraim, LLC, Case No. 04-17525, which was purportedly filed as a correction to its first petition. By Order dated November 27, 2006, this Court dismissed the second bankruptcy case and ordered that the caption of this Bankruptcy Case be amended to its current form. (Id. at ¶24 and fn. 1 thereto.)

Subsequent to the Petition Date, and subsequent to November 29, 2004, the date specified for closing in the Extension Agreement, the Debtor continued to occupy the Meadows Property, even though it failed to close by that date. (Id. at ¶25.)

At some time subsequent to the Petition Date, Bankruptcy Judge Blackshear ordered from the bench that the Debtor pay to Helen-May \$5,000 per month for the Debtor's use and occupancy of the Meadows Property. In or about May 2005, the Debtor ceased making the regular monthly \$5,000 use and occupancy payments called for under Judge Blackshear's order. (Id. at ¶26-27.)

On or about June 12, 2005, Helen-May filed a motion with this Court seeking, among other things, a lifting of the automatic stay so as to permit Helen-May to evict the Debtor from the Meadows Property and, in the event the Debtor continued to occupy the Meadows Property, the payment of fair market rent, estimated by Helen-May to be \$12,000 per month, for the Debtor's use and occupancy, pursuant to 11 U.S.C. 362(d)(3)(B). (Id. at ¶28.)

At a hearing before this Court on or about July 20, 2005, Chief Bankruptcy Judge Bernstein ruled from the bench that, effective July 1, 2005, the Debtor, for its continued occupancy of the Meadows Property, would be obligated pay adequate protection payments to Helen-May of \$11,677 per month, plus real estate tax payments as they became due on the property, which taxes equaled \$1,876 per month. Therefore, the monthly adequate protection payments due to Helen-May by the Debtor pursuant to Chief Judge Bernstein's directive totaled \$13,553 per month (the "Adequate Protection Payments"). (Id. at ¶29.)

At the July 20, 2005 hearing, it was Helen-May's contention that the Adequate Protection Payments were to be paid in addition to the \$1,500 per day fee set forth in the

Occupancy Agreement for the Debtor's continued occupancy of the Meadows Property. (Id. at ¶30.)

As set forth further, *infra*, the Debtor fell into significant arrears with respect to its obligations to make the Adequate Protection Payments, owing to the facts that the Defendants caused the Debtor to continue to occupy the Meadows Property, and permitted the use of the premises by parties free of charge, including allowing Steinwurzle to operate a summer camp there for teenage boys each summer without paying a penny to the Debtor for that operation.

On or about April 25, 2007, Judge Bernstein issued an Order in accordance with his oral ruling at the July 20, 2005 hearing that directed the Debtor to make the Adequate Protection Payments to Helen-May in the amount of \$13,553 per month, and also ordered that the Debtor pay to Helen-May within 30 days the amount of \$210,120, representing the \$284,613 of Adequate Protection Payments in arrears owed from July 2005 until April 2007, less a credit of \$74,493, which was the limited amount of Adequate Protection Payments the Debtor had paid during that period. (Id. at ¶31.)

The Debtor failed to make the \$210,120 payment of the Adequate Protection Payments in arrears as directed by the Court. Accordingly, on or about May 14, 2007, Helen-May moved by Order to Show Cause for an order, among other things, lifting the Bankruptcy Code's automatic stay with respect to the Meadows Property and holding the Debtor in contempt for failing to make the Adequate Protection Payments in arrears. (Id. at ¶32.)

In opposition to Helen-May's request to hold the Debtor in contempt, Steinwurzle, in his capacity as Manager of the Debtor, submitted the Steinwurzle Affidavit (Exhibit 2 to the Wolf Affirmation), stating therein that "the Debtor simply does not have the funds available to pay" the Adequate Protection Payments. Further, Steinwurzle stated, "the

Debtor has subsisted on insider loans and donations from its congregation. At the present time the Debtor has an account balance of \$61.73.” Indeed, as will be further detailed below, the Debtor did not collect any rental payments, or other payments, from those who occupied and/or used portions of the Meadows Property during the more than three-year period in which the Debtor was in possession thereof. (Id. at ¶33.)

On or about June 5, 2007, this Court entered an Order (the “Lift Stay Order”) lifting the automatic stay as to Helen-May, thereby allowing Helen-May to exercise all of its rights and remedies with respect to the Meadows Property. (Id. at ¶35.)

On or about June 15, 2007, Helen-May sent the Debtor a Ten-Day Notice to Quit and Vacate (the “Quit Notice”), which stated, among other things, that Helen-May had terminated the Occupancy Agreement and that the Debtor must surrender its possession of the Meadows Property by June 26, 2007. The Debtor did not cease occupancy of the Meadows Property within the ten-day period set forth in the Quit Notice; rather, the Defendants caused the Debtor to continue its occupancy of the Meadows Property and proceeded to allow Steinwurzle to operate his camp for yet another summer without having to pay any rent to the Debtor. (Id. at ¶¶36 and 48.)

On or about August 10, 2007, while the Defendants were allowing Steinwurzle to operate his camp rent-free, this Court entered an Order and Judgment (the “Judgment”) granting Helen-May a judgment against the Debtor in the amount of \$245,779.00, representing the Adequate Protection Payments in arrears up to that date. No portion of that Judgment amount was ever paid by the Debtor to Helen-May. (Id. at ¶¶37 and 48.)

Pursuant to the Lift Stay Order, on or about August 27, 2007, Helen-May initiated a proceeding (the “Eviction Proceeding”) in the Justice Court of the Town of Cocheton,

Sullivan County, New York, to evict the Debtor from its occupancy of the Meadows Property. Upon being served with the petition in the Eviction Proceeding, the Debtor not only continued its occupancy of the Meadows Property without collecting any rent or other income therefrom, but it made a motion to dismiss the Eviction Proceeding. (Id. at ¶38.)

The Bankruptcy Case continued under Chapter 11 of the Bankruptcy Code until it was converted to a case under Chapter 7 by Order of this Court dated October 25, 2007. As of the date of the conversion of the Bankruptcy Case, the Debtor continued to be in occupancy of the Meadows Property, again without collecting any rent or other income therefrom. (Id. at ¶39.)

On or about, November 20, 2007, subsequent to the Trustee's appointment as Chapter 7 trustee, the Trustee and Helen-May entered into a stipulation in the Eviction Proceeding whereby the Trustee consented to the eviction of the Debtor from the Meadows Property. (Id. at ¶40.)

Notwithstanding the Debtor's occupancy of the Meadows Property, through on or about November 20, 2007, the date of the stipulation in the Eviction Proceeding, the Debtor failed to make any payments to Helen-May for (i) any portion of the Judgment amount, (ii) any portion of the \$1,500.00 per day fee provided for under the Occupancy Agreement, or (iii) any other Adequate Protection Payments or other payments relating to its occupancy of the Meadows Property subsequent to the Judgment. (Id. at ¶41.)

### **The Debtor's Possession of the Meadows Property**

During the entirety of the nearly three and one-half (3-1/2) years of the Debtor's occupancy of the Meadows Property, while the Debtor was failing to make the aforesaid payments to Helen-May, the Defendants knowingly and intentionally caused the Debtor to

permit the use of the Meadows Property by several groups, without collecting any payment for such use. (Id. at ¶¶42-48.)

In the summer of 2004, shortly after the Debtor's occupancy of the Meadows Property had commenced, the Debtor let out rooms at the premises on a nightly and/or weekly basis to families and individuals as a weekend retreat. Contrary to the statement in the Debtor's Chapter 11 petition that the Debtor earned \$300,000.00 in income in the year 2004, Defendant Lefkowitz testified at his Bankruptcy Rule 2004 examination in this case, taken on January 30, 2008, that none of the "few hundred thousand dollars" paid by those who used the premises for those purposes were collected by the Debtor; rather those payments were made directly to various vendors and suppliers. (Id. at ¶43.) A copy of the pertinent portion of Lefkowitz's testimony in that regard, referred to in the Complaint, is included in Exhibit 3 to the Wolf Affirmation at pages 175-178 of said Exhibit.

Also in the summer of 2004, Defendants knowingly and intentionally allowed the Meadows Property to be used to operate a summer camp for Jewish boys aged 13 to 15 years old (the "Camp"). According to the testimony of Lefkowitz at his Bankruptcy Rule 2004 examination, in the summer of 2004 there were 25 to 30 such boys who attended the Camp, whose director was Steinwurzle. (The pertinent portion of that testimony of Lefkowitz referred to in the Complaint is included in Exhibit 3 to the Wolf Affirmation at pages 178-179 of that Exhibit.) Defendants knowingly and intentionally permitted such use of the Meadows Property by the Camp without requiring the Camp or Steinwurzle to pay anything to the Debtor for such use. (Id. at ¶44.)

In the summer of 2005, Defendants again knowingly and intentionally allowed the Meadows Property to be used to operate the Camp, which remained under the direction of

Steinwurzle. As set forth in the Complaint, according to the testimony of Lefkowitz at his Bankruptcy Rule 2004 examination taken in this case on January 30, 2008, in the summer of 2005 there were approximately 50-60 boys who attended the Camp. (The pertinent portion of that testimony of Lefkowitz referred to in the Complaint is included in Exhibit 3 to the Wolf Affirmation at pages 205-206 of that Exhibit.) Once again, while the Debtor was failing to meet its monetary obligations under the Occupancy Agreement or to pay any of the Court-ordered Adequate Protection Payments, Defendants knowingly and intentionally permitted such use of the Meadows Property by the Camp without requiring the Camp or Steinwurzle to pay anything to the Debtor for such use. (Id. at ¶45.)

Defendants caused this irresponsible scenario to be repeated once again in the summer of 2006, when they again knowingly and intentionally allowed the Meadows Property to be used to operate the Camp, which remained under the direction of Steinwurzle, again without requiring the Camp or Steinwurzle to pay anything to the Debtor for such use. (Id. at ¶46.)

And even in the face of (i) this Court's April 25, 2007 Order requiring the Debtor to pay Helen-May the \$210,120.00 of Adequate Protection Payments in arrears<sup>4</sup>; (ii) the continuing accrual of the \$1,500.00 per day charge under the Occupancy Agreement; and (iii) Helen-May's service upon the Debtor of the Quit Notice on or about June 15, 2007 (Id. at ¶36), the Defendants caused this same scenario to be repeated yet again in the summer of 2007, permitting Steinwurzle to operate the Camp once again without requiring the Camp or Steinwurzle to pay anything to the Debtor for that use. (Id. at ¶48.) Also, as alleged in the Complaint, Defendant Steinwurzle testified at his Bankruptcy Rule 2004 examination in this case

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<sup>4</sup> As set forth above, the Debtor's continued failure to pay those Adequate Protection Payments resulted in this Court's entry of a judgment in favor of Helen-May and against the Debtor in the amount of \$245,779.00 on August 10, 2007. (Id. at ¶37.)

that one of Lefkowitz's sons attended the Camp that summer. (Id. at ¶51[a].)<sup>5</sup> Moreover, during the summer of 2007, Defendants knowingly and intentionally allowed families and individuals to stay at the Meadows Property as a weekend retreat. No money was collected by the Debtor for that use of the Meadows Property either. (Complaint at ¶47.)

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<sup>5</sup> A copy of the pertinent portion of Steinwurzels testimony in that regard is included as Exhibit 4 to the Wolf Affirmation at pages 145-146 of that Exhibit. Furthermore, in his own Bankruptcy Rule 2004 examination testimony, Lefkowitz admitted that he did not pay any fee for his son to attend the Camp. See Wolf Affirmation, Exhibit 3 at pages 206-207. Similarly, in testifying at his examination about the Camp he operated at the premises in the summer of 2004, Steinwurzels admitted that he and his family stayed up at the premises that summer and received "free room and board." Wolf Affirmation, Exhibit 4 at pages 28-29.

## **ARGUMENT**

### **POINT I**

#### **THE TRUSTEE'S COMPLAINT STATES A VALID CLAIM FOR RELIEF AND THEREFORE THE DEFENDANTS HAVE FAILED TO MEET THE STRICT CRITERIA NECESSARY TO WARRANT A DISMISSAL OF THE TRUSTEE'S COMPLAINT UNDER RULE 12(B)(6) OF THE FEDERAL RULES OF CIVIL PROCEDURE**

Fed. R. Civ. P. 8(a), made applicable to this adversary proceeding by Bankruptcy Rule 7008, provides that "a pleading that states a claim for relief must contain ... (2) a short and plain statement of the claim showing that the pleader is entitled to relief. . ."

Fed. R. Civ. P. 12 provides, in relevant part, as follows:

(b) ... Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion ... (6) failure to state a claim upon which relief can be granted ...

A motion under Fed. R. Civ. P. 12(b)(6) tests the legal sufficiency of a complaint to ensure that it meets with the requirements of Fed. R. Civ. P. 8(a), which requires a short and plain statement that the pleader is entitled to relief. See Crazy Eddie, Inc. v. Antar, (In re Crazy Eddie, Inc.), 89B 11313-11457 (TLB), 1992 Bankr. LEXIS 2018, at \*10 (Bankr. S.D.N.Y. Dec. 17, 1992). A motion to dismiss a complaint must be denied unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him/her to relief. See Conley v. Gibson, 355 U.S. 41, 45-46 (1957).

When reviewing a motion to dismiss, the court must take all well plead factual allegations as true and such allegations must be viewed in a light most favorable to the plaintiff. See Geltzer v. Crossroads Tabernacle (In re Rivera), 214 B.R. 101, 104 (Bankr. S.D.N.Y. 1997). Accordingly, doubt as to a party's ability to prove his/her case is not a sufficient reason to

dismiss his complaint for failure to state a claim upon which relief can be granted. See Raine v. Lorimar Prods. Inc., 71 B.R. 450, 453 (Bankr. S.D.N.Y. 1987) (citing Walker Distrib. Co. v. Lucky Lager Brewing Co., 323 F.2d 1, 4 (9th Cir. 1963); Carnivale Bag Co. v. Slide-Rite Mfg. Corp., 395 F. Supp. 287, 291 (S.D.N.Y. 1975); Myers v. United States, 162 F. Supp. 913, 914 (N.D.N.Y. 1958)).

Moreover, where, as in this case, the Trustee has been appointed subsequent to the occurrence of numerous of the events relevant to his/her Complaint and accordingly, he/she does not have firsthand knowledge of those events, and has not yet had the opportunity in the adversary proceeding to take discovery of the opposing parties and of third parties, the Trustee should be afforded even more leeway in his/her pleadings, cf., Barr v. Charterhouse Group Int'l, Inc. (In re Everfresh Beverages, Inc.), 238 B.R. 558 (Bankr. S.D.N.Y. 1999).

In any event, in the instant case, the allegations contained in the Trustee's Complaint are more than sufficient to sustain his breaches of fiduciary duties claim against the Defendants. As is further detailed below, the Trustee's cause of action asserted against the Defendants is supported by significant detail in the Complaint that more than adequately sets forth a viable claim for relief.

Managing members and managers of limited liability companies, like the Defendants here, owe fiduciary duties to their companies. Under New York law, the manager of a limited liability company has a duty of care and must “perform his or her duties as a manager, including his or her duties as a member of any class of managers, in good faith and with that degree of care that an ordinarily prudent person in a like position would use under similar circumstances.” N.Y. Ltd. Liab. Co. Law § 409(a) (2008) (“LLCL”). Defendants Lefkowitz and Steinwurz do not dispute that, as, respectively, the Managing Member and the Manager of the

Debtor, they owed it such fiduciary duties. Indeed, Defendants concede in their moving brief that “managers of limited liability companies [are] subject to the same standards of care as directors of business corporations.” See Defendants’ Memorandum of Law at 8 (citing In re Die Fliedermaus LLC, 323 B.R. 101, 110 (Bankr. S.D.N.Y. 2005)).

To establish that Defendants breached their fiduciary duties, the Trustee need only “establish that the offending parties’ actions were ‘a substantial factor’ in causing an identifiable loss.” F.D.I.C. ex rel. First N.Y. Bank for Bus. v. Bober, No. 95 Civ. 9529 (JSM), 2003 WL 21976410, at \*1 (S.D.N.Y. Aug. 19, 2003). “[B]reaches of [] fiduciary [duty] in any context comprise a special breed of cases that often loosen normally stringent requirements of causation and damages.” Milbank, Tweed, Hadley & McCloy v. Boon, 13 F.3d 537, 543 (2d Cir. 1994); Northwestern Nat’l Ins. Co. v. Alberts, 769 F. Supp. 498, 506 (S.D.N.Y. 1991) (“A plaintiff alleging breach of fiduciary duty ... is not required to meet the higher standard of loss or proximate causation.”). “The reason for this rule” is that “this type of action is not merely to compensate the plaintiff for wrongs committed ... [but also] ‘to prevent them, by removing agents and trustees all inducement to attempt dealing for their own benefit in matters which they have undertaken for others ...’” Bober, 2003 WL 21976410, at \*1 (quoting Gibbs v. Breed, Abbott & Morgan, 271 A.D.2d 180, 710 N.Y.S.2d 578, 584 (1st. Dep’t 2000)).

This inquiry often raises factual questions which normally are not properly resolved on a motion to dismiss. RSL Commc’n PLC v. Bildirici, No. 04-cv-5217 (KMK), 2006 U.S. Dist. LEXIS 67548, at \* 14 (Bankr. S.D.N.Y. Sept. 14, 2006); Malin v. XL Capital Ltd, No. 3:03 Civ. 2001 (PCD), 2005 WL 2146089, at \*4 n.5 (D. Conn. Sept. 1, 2005); F.D.I.C. v. Bober, No. 95 Civ. 9529 (JSM), 2002 WL 1929486, at \*3 (S.D.N.Y. Aug. 22, 2002).

The Defendants, when acting on behalf of the Debtor, owed it fiduciary duties to exercise the care, diligence and skill that a reasonably prudent person in a like position would exercise under comparable circumstances, and with a view to the Debtor's and the estate's best interests. Instead, the Defendants operated the Debtor in a manner that was economically unreasonable, turning a blind eye to the Debtor's best interests in order to serve their own.

As set forth in the Complaint, Defendants knowingly, intentionally and recklessly caused the Debtor to continue in occupancy of the Meadows Property for more than three years, at an overwhelming cost to the Debtor and the Debtor's estate, including charges of \$1,500.00 per day, as provided in the Occupancy Agreement, together with the Adequate Protection Payment obligations imposed upon the Debtor by this Court, while failing to collect a single cent from the Steinwurzle – directed Camp or from third parties whom it permitted to use the premises, so that the Debtor could pay any of those charges and obligations. (Complaint ¶¶ 18; 26, 29 and 31.) Worse yet, Defendants deliberately chose to continue these grossly irresponsible actions even after the Debtor failed to make the Adequate Protection Payments to Helen-May required by this Court's July 2005 and April 2007 Orders (Complaint ¶¶ 27-29, 31-32), and after the Debtor was served by Helen-May with the Quit Notice and the Eviction Proceeding papers. (Complaint ¶¶ 35, 38.) In fact, it was not until November 2007, after the case had been converted to one under Chapter 7, and only after the Trustee had been appointed, that the Trustee, not the Defendants, caused the Debtor's estate to surrender possession of the Meadows Property and thereby stopped the bleeding once and for all. (Complaint ¶¶ 39-40.) However, by that time, the Defendants had caused overwhelming damage to the Debtor's estate, resulting in Helen-May's filing of its proof of claim in this case, comprised of a secured claim for \$245,779.00 pursuant to the Judgment awarded by this Court, a Chapter 11 liquidated

administrative claim in excess of \$3 million, and an unliquidated Chapter 11 administrative claim for potentially millions more. (Complaint ¶ 51[c].)

The Trustee's allegations that Defendants knowingly and intentionally permitted the use of the Meadows Property by the Camp and others rent-free, and that they and family members personally benefited from such rent-free use, to the substantial financial detriment of the Debtor and the Debtor's estate, set forth a viable claim for breaches of fiduciary duty. Defendants do not and cannot contend that it was within the scope of the Debtor's business purpose to provide such free usage of the Meadows Property. That Defendants caused the Debtor and the estate to incur staggering liability in allowing such use was at a minimum grossly irresponsible, and, indeed, strongly suggestive of fraud, as discovery may confirm. In any event, Defendants clearly failed to perform their duties to the Debtor "in good faith and with that degree of care which an ordinarily prudent person in a like position would use under similar circumstances." See LLCL § 409(a). In short, the Trustee's Complaint sets forth more than sufficient detail to defeat Defendants' motion to dismiss, even without the Trustee having yet had an opportunity to conduct discovery in this adversary proceeding.

## POINT II

### **THE TRUSTEE AS STANDING TO PURSUE HIS CLAIM FOR BREACHES OF FIDUCIARY DUTY AGAINST DEFENDANTS**

Defendants make the disingenuous argument that the Trustee does not have standing to assert breach of fiduciary duty claims against them. Their contention flies in the face of the Second Circuit's ruling in In re The Mediators, Inc., 105 F.3d 822, 826-27 (2d Cir. 1997), which remains firmly established law today, that "a bankruptcy trustee, suing on behalf of the debtor under New York law, may pursue an action for breach of fiduciary duty against the debtor's fiduciaries." (Citing In re Keene Corp., 164 B.R. 844, 853 (Bankr. S.D.N.Y. 1994)).

Recognizing that they cannot simply ignore this clearly established legal principle, Defendants attempt to circumvent it by arguing that it does not apply in this adversary proceeding. In alleged support, they rely on the holding of Shearson Lehman Hutton, Inc. v. Wagoner, 944 F.2d 114, 118 (2d Cir. 1991), that "when a bankrupt corporation has joined with a third party in defrauding its creditors, the trustee cannot recover against the third party for the damage to the creditors." As is plain, Wagoner has no bearing here where the Trustee's claim is asserted not against a third party, but against the Debtor's fiduciaries themselves. See, e.g., Mediators, 105 F.3d at 827 (applying Wagoner only after explaining that the claims at issue were asserted against third parties and not the debtor's fiduciaries themselves); Grubin v. Rattet (In re Food Mgmt. Group, LLC), 380 B.R. 677, 693 (Bankr. S.D.N.Y. 2008) ("Wagoner ... may bar an estate representative's recovery from a third party malfeasant where the debtor is also at fault"). Defendants themselves even appear to recognize that Wagoner is unavailing for their purposes, stating that it is not sufficient to bar the Trustee's claims "*by itself*." (See Defendants' Memorandum of Law at 5 [emphasis in original].)

Aware that Wagoner does not support their cause, Defendants completely divorce Wagoner's holding from its context and argue that the Trustee lacks standing because the Debtor is estopped from bringing claims against Defendants since they – as, respectively, the Managing Member and the Manager of the Debtor – necessarily ratified their own wrongdoing on behalf of the Debtor. In other words, Defendants argue that they are the Debtor, and that their own wrongful conduct therefore bars the Trustee from asserting claims on its behalf. Such an unprecedented misappropriation of Wagoner is foreclosed by the clear distinction between claims against the debtors' fiduciaries and claims against third parties drawn by the Second Circuit in Mediators, accompanied by its unequivocal pronouncement that a “bankruptcy trustee ... may pursue an action for breach of fiduciary duty against the debtor's fiduciaries.” 105 F.3d at 827.

Not surprisingly, Defendants do not offer a single case in support of their argument in which a bankruptcy trustee was barred from bringing claims against fiduciaries of the Debtor (as opposed to third parties) on this ground. Likewise, the other cases that Defendants attempt to fuse with Wagoner to advance their novel argument provide no support. In fact, those cited cases by Defendants only clarify that it is the individuals who have engaged in malfeasance that are the ones estopped from bringing claims in the name of the corporation or derivatively. In Diamond v. Diamond, 307 N.Y. 263, 266 (1954), the court held that a shareholder who conspired with a corporation's only other shareholder to “mulct the corporation of money and property,” could not bring a claim either derivatively or in the name of the corporation against her co-conspirator for redress of the wrongs they committed jointly. See also Martindale v. Gleasman, No. 07-CV-6517, 2008 U.S. Dist. LEXIS 49846, at \*15 (W.D.N.Y. June 27, 2008) (“a shareholder is estopped from challenging, either individually or through a

derivative action, any corporate policy which he approved”); Macnish-Lenox LLC v. Simpson, 2007 N.Y. Misc. LEXIS 7138, at \*17 (Sup. Ct. Kings Cty. 2007) (“shareholder who participated in the challenged activity or ‘did not oppose the challenged actions’ is estopped”); Blake v. Blake, 225 A.D.2d 337, 638 N.Y.S.2d 632 (1st Dep’t 1996) (“[p]laintiff is estopped personally from complaining about the transaction”). None of the cases cited by Defendants stand for the proposition that the company itself or a bankruptcy trustee on its behalf are barred from pursuing claims against the company’s fiduciaries to recover for the harm they visited upon the company.

Defendants want to have their cake and eat it too. In their motion papers, they argue that their control of the Debtor was so complete that they and the company were essentially identical, and then proceed in bootstrap fashion to contend that their own wrongful acts against the Debtor prohibit the Trustee from pursuing them for any such wrongs. On the other hand, Defendants seek to readily avail themselves of the protections afforded by the corporate form in an attempt to shield themselves from personal liability. However, the law does not permit them to have it both ways. Either the Debtor is a separate entity distinct from the Defendants and with its own rights to pursue claims against those who have caused it harm, or, the Debtor is just a fiction and Defendants are personally liable for all debts and obligations that have accrued in its name. Assuming that Defendants are not advocating the latter, their argument lends their position no support. And, regardless, the law of New York and the Second Circuit is clear that the Trustee has standing to bring claims for breach of fiduciary duty against the Managing Member and the Manager of the Debtor.

Furthermore, the Trustee has standing to bring his claim against Defendants because Defendants’ wrongful post-petition conduct constitutes a breach of their fiduciary duties for which the Trustee has standing to recover on behalf of the Debtor’s estate. Upon the filing of

a Chapter 11 petition, the managers of the debtor in possession owe fiduciary duties to the creditors and the estate. In re Harp, 166 B.R. 740, 746 (Bankr. N.D. Ala. 1993) (“Chapter 11 debtors-in-possession ... have fiduciary responsibilities to unsecured creditors and other parties in interest requiring them to act in the capacity of a bankruptcy trustee. Breach of these fiduciary responsibilities can result in personal liability.”); In re E. Paul Kovacs & Co., 16 B.R. 203, 206 (Bankr. D. Conn. 1981) (ordering conversion to Chapter 7 because principal of debtor in possession was using its assets to benefit his other corporations in violation of the duties he owed the debtor); Whyte v. Williams, 152 B.R. 123, 127 (Bankr. N.D. Tex. 1992).

A chapter 7 trustee has standing to bring claims for post-petition breaches of fiduciary duties owed to the debtor in possession. Bezanson v. Thomas (In re R & R Associates of Hampton), 402 F.3d 265 (1st Cir. 2005) (claims for breach of fiduciary duty by debtor’s lawyers’ “belonged to the bankrupt estate, and [the chapter 7 trustee], as the successor to the debtor in possession and representative of the estate, plainly is entitled to pursue whatever legal claims belonged to the estate”); see also Food Management Group, 380 B.R. at 697 (“[s]everal cases from courts in other circuits, as well as a bankruptcy decision from this district, either hold or suggest that the Wagoner rule does not bar a trustee from bringing suit for post-petition misconduct by the debtor’s principals or representatives”).

In summary, the Trustee has standing to bring his claim against Defendants for both their pre-petition and post-petition self-serving conduct that was in blatant violation of their fiduciary duties to the Debtor and to the Debtor’s estate.

### POINT III

#### **THE BUSINESS JUDGMENT RULE DOES NOT BAR THE TRUSTEE'S CLAIM AGAINST DEFENDANTS**

Generally, the business judgment rule precludes judicial inquiry into the actions of company fiduciaries, so long as their actions were taken in good faith and after reasonable investigation. Auerbach v. Bennett, 47 N.Y.2d 619, 629, 419 N.Y.S.2d 920, 926 (1979). However, "[T]he business judgment doctrine is misapplied when it is extended to provide protection to corporate board members where there is an abundance of evidence strongly suggesting breach of fiduciary duty." Hanson Trust, PLC v. ML SCM Acquisition, Inc., 781 F.2d 264, 274 (2d Cir. 1986). "[T]he exercise of fiduciary duties by a corporate board member includes more than avoiding fraud, bad faith and self-dealing." Id. "Directors must exercise their `honest judgment in the lawful and legitimate furtherance of corporate purposes.'" Id., citing Auerbach, 47 N.Y.2d at 629, 419 N.Y.S.2d at 926.

"[T]he business judgment doctrine is misapplied when it is extended to provide protection to corporate board members where there is an abundance of evidence strongly suggesting breach of fiduciary duty...." Hanson, 781 F.2d at 274. Accordingly, "where the allegations of a complaint sufficiently suggest that directors or officers acted in bad faith, the question cannot be decided on a motion to dismiss." Lippe v. Bairnco Corp., 230 B.R. 906, 917 n6 (Bankr. S.D.N.Y. 1999); see also Stern v. General Electric Co., 924 F.2d 472, 477 (2d Cir. 1991) (noting that "[u]nlike allegations of fraud ... an allegation of bad faith would not need to be supported by particular factual statements").

In Kittay v. Atl. Bank (In re Global Service Group LLC), this Court addressed claims brought by the bankruptcy trustee against "insider defendants" for breaching their fiduciary duties. 316 B.R. 451, 464-65 (Bankr. S.D.N.Y. 2004). The trustee alleged that the

insider defendants continued the debtor's operation while it was insolvent, but did not allege that the insider defendants did so for their own benefit or in bad faith. Id. at 465. This Court explained that continuing the operation of the debtor while it was insolvent did not in and of itself constitute a breach of fiduciary duty, and allegations of bad faith or fraudulent intent were needed to overcome a motion to dismiss. Id. at 461, 465. Importantly, the Court suggested that if the trustee's complaint had contained allegations that the insider defendants continued the debtor's operation "as a means of siphoning the Debtor's funds for their individual benefit," the claims would be legally sufficient. Id. at 465. Accordingly, while the Court dismissed the claims, it granted the trustee leave to replead them. Id.

Unlike the deficient assertions in the Global complaint, allegations of the Defendants' bad faith permeate the Complaint here. The Complaint alleges that the Defendants personally benefited from the free use of the Meadows Property, including through Steinwurzle's rent-free use of the property for four consecutive summers to operate a Camp that one of Lefkowitz's sons attended.<sup>6</sup> (Complaint at ¶ 51[a].) The Complaint further alleges that Defendants enjoyed those personal benefits at the expense of the Debtor and the Debtor's estate, knowingly causing the Debtor to expose itself to claims by Helen-May under the Occupancy Agreement and this Court's Order and Judgment aggregating several million dollars. (See Complaint at ¶¶ 18, 29-31, 51[c].) And, as set forth in the Trustee's Complaint, Defendants continued to do so long after the Debtor was in bankruptcy proceedings, after Helen-May had commenced the Eviction Proceeding, and even after this Court had entered the Judgment against the Debtor for \$245,779.00 of unpaid Adequate Protection Payments.

(Complaint ¶¶ 25, 28, 31.)

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<sup>6</sup> Moreover, as set forth above, Steinwurzle testified at his Bankruptcy Rule 2004 examination that during at least one of those summers, he and his family enjoyed free room and board at the premises. Wolf Affirmation, Exhibit 4 at pages 28-29.

Indeed, as alleged in the Complaint, Steinwurzlel stated in an affidavit dated May 21, 2007 that “the Debtor simply does not have the funds” to make the Adequate Protection Payments for its continued occupancy of the Meadows Property, which this Court ordered the Debtor to pay. (Complaint ¶ 33.) Yet, Steinwurzlel’s own recognition of the Debtor’s insolvency did not keep Lefkowitz and him from allowing Steinwurzlel and his Camp to enjoy free use of the Meadows Property during the ensuing summer – while subjecting the Debtor to additional liability with each passing day. (Complaint ¶ 48.) These allegations, more specific and substantive than the ones alleged by the trustee in Global Service Group, are adequate to overcome the business judgment rule and Defendants’ motion. They are especially sufficient under the more liberal pleading standard applicable here where the Trustee has not yet had the benefit of taking discovery in the adversary proceeding, and the allegations are based upon the limited amount of information he was able to obtain subsequent to his appointment. Everfresh Beverages, supra.

## POINT IV

### **THE OCCUPANCY AGREEMENT, WHICH DEFENDANTS CAUSED THE DEBTOR TO VIOLATE, PROVIDES NO DEFENSE TO THEIR BREACHES OF THEIR FIDUCIARY DUTIES**

#### **A. Defendants Caused the Debtor to Breach the Occupancy Agreement by Permitting the Operation of the Camp and Cannot Claim in Good Faith that Concern for Breaching the Occupancy Agreement Excused Their Breaches of Their Fiduciary Duties**

In the final argument offered in support of their motion, Defendants argue that their failure to rent or lease the Meadows Property for profit cannot constitute a breach of their fiduciary duties because renting or leasing the Meadows Property would have constituted a breach of the Occupancy Agreement and the Contract. Defendants offer no legal authority in support of this argument and altogether fail to explain how it would save their motion even if it were accurate. In any event, the argument falls flat because Defendants, by allowing for the operation of a camp without permission from Helen-May, breached the very same provisions in the Occupancy Agreement and Contract behind which they now attempt to hide. They cannot now argue in good faith that they did not collect income from the Meadows Property for fear that doing so would constitute a breach of agreements they had already contravened.

As Defendants note, the Occupancy Agreement required that Kolllel operate the Meadows Property “in accordance with its present use only.” (Exhibit B to Defendants’ motion papers, Occupancy Agreement at page 1.) Additionally, the Occupancy Agreement required that Kolllel “obtain all permit, licenses and permission required to operate under [its] own name” and provide Helen-May with any such permits for review and approval in advance. *Id.* And, as Defendants note, the Contract prohibited Kolllel from assigning its rights to the Meadows

Property without Helen-May's express written permission. (Exhibit A to Defendants' motion papers, Rider to Contract of Sale at ¶ 36.)

Defendants fail to mention that, at the time the Occupancy Agreement and the Contract were executed, the "present use" of the Meadows Property referred to in the Occupancy Agreement was not as a camp, but as a resort hotel. In this regard, the Occupancy Agreement expressly refers to the premises in the subject "Re" line at the outset of the agreement as the "Meadows Resort." Defendants never obtained the requisite permit or approval for the Camp, nor did they ever seek or obtain the consent of this Court to operate the Meadows Property as a camp. Moreover, by allowing the Camp to use the Meadows Property, Defendants effectively assigned their right to occupy the property in violation of the prohibition on assignment in the Contract. Had Defendants caused the Debtor to continue the "present use" and operate the Meadows Property in the same manner as it had been operated previously, i.e., as a resort hotel, they would have generated some income for the Debtor with which to make the Adequate Protection Payments and pay the charges under the Occupancy Agreement. Instead, they irresponsibly allowed an unauthorized Camp to use the Meadows Property free of charge, in violation of the Occupancy Agreement, the Contract and their own fiduciary duties to the Debtor.

**B. Defendants Could Have Avoided Significant Harm by Simply Surrendering Occupancy of the Meadows Property**

Even assuming *arguendo* that Defendants legitimately believed that the Occupancy Agreement and the Contract actually prohibited them from collecting rent or income for the use of the Meadows Property, nothing in those agreements prohibited Defendants from terminating the Occupancy Agreement and surrendering possession of the Meadows Property, while still retaining their alleged rights as contract vendee under the Contract. By not doing so

after the closing failed to take place as scheduled and the Contract became a subject of dispute, Defendants breached their fiduciary duties by recklessly and irresponsibly continuing to allow for the rent-free use of the Meadows Property, for more than three years and for their own self-serving purposes, at the expense of the Debtor and the Debtor's estate – subjecting the Debtor and the estate to continually increasing claims for the \$1,500.00 a day charges under the Occupancy Agreement, and the monthly Adequate Protection Payment obligations imposed upon it by this Court -- all without collecting a single cent from the Camp for the use of the property over four consecutive summers, or from any other uses of the property.

As set forth in the Complaint, the Defendants caused the Debtor to remain in possession of the Meadows Property under the Occupancy Agreement long after the filing of the Chapter 11 bankruptcy petition on October 4, 2004 and the passage of the stipulated closing date pursuant to the Contract. (Complaint at ¶ 25.) Defendants kept the Debtor in occupancy of the Meadows Property after it stopped making the monthly use and occupancy payments required by Judge Blackshear's order in May 2005 and after it failed to make the Adequate Protection Payments in arrears required by this Court's Order issued on April 25, 2007. (Complaint at ¶¶ 27, 31.) Indeed, it was not until after this case was converted to a Chapter 7 proceeding and the Defendants were no longer in control of the Debtor that the Trustee caused the surrender of the estate's possession of the Meadows Property, as of on or about November 20, 2007. (Complaint at ¶ 40.) At any time prior to the conversion of the case, Defendants simply could have surrendered possession and stopped the bleeding, while at the same time preserving their alleged rights as contract vendee under the Contract to purchase the Meadows Property. They did not.

In summary, Defendants' argument that the Occupancy Agreement prohibited the Debtor from collecting income from the use of the Meadows Property is a spurious one, and in

any event falls far short of justifying their reckless and irresponsible conduct in failing to cause the Debtor to surrender possession and thereby avoid multimillion dollar damage to the Debtor and the Debtor's estate.

**CONCLUSION**

For the reasons set forth above, the Trustee respectfully submits that this Court should deny the Defendants' dismissal motion in all respects.

Dated: New York, New York  
September 8, 2008

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