THE STATE OF SOUTH CAROLINA
In The Court of Appeals

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APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Judge



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Appellate Case No.: 2015-000263

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Oak Pointe Homeowners' Association, Inc.,.....Respondent,

v.

Mackenzie E. Peffley,..... Appellant.

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# FINAL REPLY BRIEF OF APPELLANT

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## STATEMENT OF ISSUES

I. **Did the lower court err in granting the Respondent summary judgment on the Appellant's negligent misrepresentation claim, where the Respondent told the Appellant something false and the Appellant relied on that false statement to her detriment?**

II. **Where the Respondent, a property owners' association, has not been empowered by the government to fine its members, and the lower court did not determine as a matter of law that it can, did the lower court err in granting summary judgment to the Respondent on the basis of covenant language purporting to permit the Respondent to impose fines?**

III. **Where the record showed the Respondent breached its covenants with the Appellant, did the lower court err in granting the Respondent's summary judgment motion as to the Appellant's claims for breach of contract and breach of contract accompanied by fraudulent act?**

IV. **Where there was a scintilla of evidence and more that the Respondent slandered the Appellant's title by recording in the land records a document it knew to contain false information, did the lower court err in granting the Respondent's summary judgment motion on the Appellant's slander of title claim?**

V. **Where the Respondent has set itself up to systematically purport to fine its members, was it error for the lower court to grant summary judgment on the Appellant's Unfair Trade Practices Act claim?**

VI. **Was it error for the lower court to grant summary judgment on the Appellant's libel claim, where that ruling was based on an erroneous, straitened reading of the Appellant's pleading at odds with the Rules of Civil Procedure?**

## ARGUMENT

Appellant, Mackenzie E. Peffley (hereinafter "Peffley") submits this brief in reply to that submitted by the Respondent, Oak Pointe Homeowners' Association, Inc. (hereinafter "the Association"). Peffley will attempt to limit this reply brief to addressing the major flaws in the Association's argument and to responding to assertions newly made by the Association in its brief, including ones offered as proposed additional sustaining grounds. See I'On, L.L.C. v. Town of Mt. Pleasant, 338 S.C. 406, 418 n. 6, 526 S.E.2d 716 (2000) (appellant may address additional sustaining ground arguments in reply brief). Peffley does not respond to every contention made by the Association because some responses would simply duplicate what is in her appellant's brief.

### I. The Association asks the court to disregard the standard of review and examine the record in the light most favorable to the Association. To do so would be incorrect as a matter of law.

This is an appeal of grants of summary judgment to the Association below. (R. pp. 1-6, 9.) The Association, not Peffley, was the party that made the summary judgment motion that was partially granted. (R. pp. 1, 39-41.) Accordingly, the Association is not entitled to have any inferences drawn in its favor in this appeal, nor was it below; rather, as is well-known, "[a]ll ambiguities, conclusions, and inferences arising from the evidence must be construed most strongly *against* the moving party." Nelson v. Charleston County Parks & Recreation Comm., 362 S.C. 1, 605 S.E.2d 744 (Ct. App. 2004)(emphasis added). An appellate court reviewing a grant of summary judgment must view "the evidence and all reasonable inferences . . . in the light most

favorable to the non-moving party." Englert, Inc. v. LeafGuard USA, Inc., 377 S.C. 129, 133-34, 659 S.E.2d 496, 498 (2008).

Despite this standard, the Association makes the following statements in its brief:

> Relying on Appellant's representation that she had paid the debt in full, Laurel [the Association's president] responded that Appellant [would be] "reimbursed."
>
> . . .
>
> . . . it was [Peffley's] own misrepresentation to Respondent that cause Respondent to offer her a reimbursement.
>
> . . .
>
> . . . Respondent never represented to Appellant that her account was paid in full. . . . Laurel never made any representation related to the Appellant's account balance. Laurel merely responded that Appellant would be reimbursed for any overpayment. Laurel's statement amounts only to a promise to refund any overpayment to Appellant if, in fact, Appellant overpaid the balance owed after the June 2010 non-compliance fine was removed from her account.
>
> . . .
>
> It is clear from the totality of the evidence that Laurel's statement that Appellant would receive a reimbursement was merely a statement Appellant would receive a reimbursement of any overpayment made on her account.
>
> . . .
>
> Laurel . . . confirmed that any overpayment would be reimbursed. It is clear that Laurel's email was merely confirming the procedural mechanism by which any overpayment would be handled. There is no evidence that Laurel possessed any special knowledge with respect to Appellant's balance or payment that would

> impose upon her a duty of care with regard to her response. Certainly Laurel was not in possession of such information at 10:00 o'clock in the evening while having a casual email conversation with Appellant.
>
> . . .
>
> Appellant knew or should have known that . . . additional charges had been added to her balance. Appellant provided no evidence that she made any attempt to confirm the current balance due before or after remitting payment.
>
> . . .
>
> . . . Respondent charged interest as required by the contract.
>
> . . .
>
> . . . [Peffley] provided no evidence that the Association failed to set a due date, thus failing to trigger the right to charge interest on those assessments.
>
> On that date [presumably, the date of the recording of the notice of lien], Appellant's balance included $490.00 of assessments and $375.00 for attorney's fees, leaving $5.83 interest.
>
> . . . the lien was accurate at the time of the filing.
>
> [Peffley] similarly did not present any evidence regarding any of [the Association's] procedures, much less that those procedures create a potential for repetition.

(Initial Brief of Respondent pp. 4, 5, 6, 7, 8, 9, 10, 11, 13, 15, 17, 19.)

For this court to agree with any of these statements would require the court to disregard the summary judgment review standard, because each one of these statements is an inference drawn in favor of the Association, the party that moved for summary judgment. To base a ruling for the Association in this appeal on any of the Association's characterizations of the factual record would contravene established

precedent of the Supreme Court of South Carolina and would be incorrect as a matter of law. S.C. Const. Art. V, § 9 (decisions of the Supreme Court bind the Court of Appeals as precedents). Peffley is entitled to this court's application of the correct standard of review.

The Association attempts to get this court to agree with its characterization of the record, which is the only way it sees itself prevailing in this appeal. That is because, when the true standard of review is applied, the record shows that reversal of the lower court is mandated. Peffley asks the court to remember that the Association is contending about each one of the statements from its brief above either that 1) the statement is true as a matter of law, 2) that the statement is the characterization of the record that most favors Peffley, or 3) both. These contentions by the Association are not supported by a reading of the record that conforms to the required standard of review. It is telling that the Association has to pin its arguments on an interpretation of the record that flies in the face of this court's standard of review.

## II. The Association misapprehends the law on what satisfies the "pecuniary interest" element of negligent misrepresentation.

The Association writes that "[n]either Laurel [its president] nor Appellant [sic: Respondent?] received any pecuniary benefit by referring Appellant's account to an attorney for legal action when her payment was not received by the final deadline on March 7, 2011[,]" in what seems to be an attempt to argue that the record lacks evidence of the element of negligent misrepresentation that the stating party have a pecuniary interest in making the statement. The Association has misapprehended the law in this regard. (Initial Brief of Respondent p. 8.)

With regard to the tort of negligent misrepresentation, our Supreme Court has held that "[a] duty to exercise reasonable care in giving information exists when the defendant has a pecuniary interest in the transaction." Gilliland v. Elmwood Properties, 301 S.C. 295, 301, 391 S.E.2d 577, 580 (1990) (quoting Winburn v. Insurance Co., 287 S.C. 435, 441, 339 S.E.2d 142, 146 (Ct. App. 1985).

Expounding upon the precepts noted in Gilliland, this court has noted the following:

> Not every statement made in the course of commercial dealings is actionable at law. A mere statement of opinion, commendation of goods or services, or expression of confidence that a bargain will be satisfactory does not give rise to liability in tort. Winburn v. Insurance Co. of North America, supra (opinion that mechanic was "good" and that adjuster had faith in him); Randall v. Smith, 136 Ga. App. 823, 222 S.E.2d 664 (1975) (assurance that vehicle was in good condition and suitable for driving). However, if the defendant has a pecuniary interest in making the statement and he possesses expertise or special knowledge that would ordinarily make it reasonable for another to rely on his judgment or ability to make careful enquiry, the law places on him a duty of care with respect to representations made to plaintiff. Hedley Byrne & Co. Ltd. v. Heller & Partners Ltd., [1964] A.C. 465. *Proof that the statement was made in the course of the defendant's business, profession, or employment is sufficient to show he has a pecuniary interest in making it, although he receives no consideration for it.*

AMA Mgmt. Corp. v. Strasburger, 309 S.C. 213, 222-23, 420 S.E.2d 868, 874 (Ct. App. 1992) (emphasis added).

It is not necessary that the Association, much less Ms. Laurel, have received any "pecuniary benefit" from anything in order for the Association to have had a pecuniary interest in making the express statement that Peffley would be reimbursed

and the inferable representation that she had not just fully paid but also overpaid the Association. (Initial Brief of Respondent p. 8.) The statement was made by the Association, through its chief officer, its president, in the course of the Association conducting its business of collecting assessments from the Oak Pointe property owners. The Association had a pecuniary interest in the statement. AMA Mgmt. Corp. v. Strasburger, 309 S.C. at 223. The Association has not argued that AMA Management Corporation should be overruled.

### III. Peffley did not misrepresent anything to the Association's president. Viewed in the light most favorable to Peffley, the record reveals that the Association, through its president, made a material misrepresentation to Peffley, one it never corrected.

Contrary to the Association's argument, Peffley did not misrepresent anything to the Association or its president. Instead, particularly when examined in the required light most favorable to Peffley, Peffley stated to the Association, through its president, that she had paid all amounts the Association had ever told her were due. (R. pp. 88, 97-98, 110-12.) Nothing in the record indicates that Peffley was ever told until 2013, when this action was brought, that the Association had incurred any attorneys' fees concerning what had been the outstanding amount. (R. pp. 88-89, 106, 110-12.)

Through its president Ms. Laurel, the Association did, however, make a material misrepresentation to Peffley, and one it never corrected: that she would be reimbursed, which is necessarily, when viewed in the light most favorable to Peffley, a representation that Peffley was correct to say that she had not just paid but also overpaid the Association. (R. p. 79 ln. 8-25, p. 81 ln. 5-18, p. 83 ln. 11-19, pp. 88, 97-98, 106, 110-12.) Even if one were to give the Association the benefit of the doubt and assume that the Association was somehow unaware at the time of its president's

statement that it had incurred attorney's fees and would be passing them on to Peffley, once it became aware of those facts, it was then under a duty to clarify and to disclose the whole truth to Peffley. Little v. Brown & Williamson Tobacco Corp., 243 F. Supp. 2d 480, 507 (D.S.C. 2001) ("'[o]ne may deceive, though he says nothing which is itself untrue', as '[t]he telling of but part of the truth may sometimes effectually mislead"); Manning v. Dial, 271 S.C. 79, 245 S.E.2d 120 (1978) (defendant stood in fiduciary relationship to plaintiff, and as such he had a duty to disclose all relevant facts when purchasing plaintiff's stock); Jacobson v. Yaschik, 249 S.C. 577, 155 S.E.2d 601 (1967) (nondisclosure becomes fraudulent when it is the duty of the party having knowledge of the facts to uncover them to the other); Anthony v. Padmar, Inc., 320 S.C. 436, 465 S.E.2d 745 (Ct. App. 1995)(parties in fiduciary relationship must fully disclose to each other all known information that is significant and material, and when this duty to disclose is triggered, silence may constitute fraud). Under the summary judgment standard, however, the Association is not even entitled to the benefit of such a doubt.

The Association further argues the following:

> It is clear that Laurel's email was merely confirming the procedural mechanism by which any overpayment would be handled. There is no evidence that Laurel possessed any special knowledge with respect to Appellant's balance or payment that would impose upon her a duty of care with regard to her response. Certainly Laurel was not in possession of such information at 10:00 o'clock in the evening while having a casual email conversation with Appellant.

(Initial Brief of Respondent p. 9.)

First, the party at issue is the Association, not Laurel. The Association is perhaps the only party in the world that would *always* have "special knowledge with

respect to [an Association member]'s balance or payment that would impose upon [it] a duty of care with regard to [its] response" to an Association member concerning what, if anything, the member owed the Association. (Initial Brief of Respondent p. 9.) Second, Laurel fits that bill as well – as the president of the Association, she is in a position to have such special knowledge. (R. pp. 88, 106.) Third, the law is that "if the defendant has a pecuniary interest in making the statement and he possesses expertise or special knowledge that would ordinarily make it reasonable for another to rely on his judgment or *ability to make careful enquiry*, the law places on him a duty of care with respect to representations made to plaintiff." AMA Mgmt. Corp., 309 S.C. at 222-23 (emphasis added). As the Association's chief officer, Laurel possessed the ability to make a careful inquiry into whether Peffley had actually overpaid all amounts the Association claimed to be owed. (R. pp. 88, 106.) The Association certainly had that ability. The fact that Laurel chose not to undertake any such inquiry does not assist the Association in arguing summary judgment was properly granted on the negligent misrepresentation claim. Indeed, the Association president's choice to make the representation to Peffley without verifying it first only provides more evidence that the Association made the statement negligently.

The record, viewed properly, contains a scintilla of evidence and more to support Peffley's negligent misrepresentation claim, and the court should reverse the lower court's erroneous grant of summary judgment on this claim.

## IV. Viewed in the light most favorable to Peffley, the record indicates the Association violated the covenants contract.

Nothing in the Association's argument contradicts the undisputed facts from the record. On page 23 of the declaration of covenants attached to Kadar's affidavit in

this case, it states that "[a]ny assessments not paid within thirty (30) days after *the due date* shall bear interest *from the due date* at the rate of sixteen percent (16%) per annum or the highest rate allowed by law, whichever is higher." (R. p. 135 (emphasis added).) Here, the Association never gave Peffley a due date by which to pay the fines it levied against her from 2011 forward. (R. p. 79 ln. 21 through p. 80 ln. 1, pp. 88-89, 110-12.) The Association never gave her any advance notice of the imposition of the fines at all. (R. p. 79 ln. 21 through p. 80 ln. 1, pp. 88-89, 110-12.) But the Association charged her interest on them. (R. pp. 14-15, 89-90, 112.)

Article IX § 1 of the restrictive covenants at issue provides for various remedies the Association has if assessments are not paid within 30 days after their due dates, including foreclosure of a lien for unpaid assessments. (R. pp. 135-36.) In the light most favorable to Peffley, this implies that all assessments have due dates and that the Association cannot avail itself of these default remedies until the assessments are past due. (R. pp. 135-36.)

Despite the Association's attempt to conflate two very different things, we are not talking about the due dates for annual assessments. (Initial Brief of Respondent pp. 12-13.) The Association charged Peffley interest on the fine amounts and sued her to collect the fines and that interest, as is undisputed. (R. pp. 14-15, 89-90, 110-12.) This violates the covenants. (R. pp. 135-36.) That is a breach of contract.

## V. Viewed in the light most favorable to Peffley, the record shows the notice of lien document was false and known to the Association to be false at the time the Association recorded it.

The Association has no business contending that the notice of lien document it recorded in the land records was true at the time it recorded it, and certainly no business

making that contention in the face of a standard of review that requires this court to view the evidence in the light most favorable to Peffley. Just look at the dates:

1) March 14, 2011 – Peffley sends the Association a check for the full $490.00 it had told her she owed it;
2) March 14, 2011 – Peffley emails the Association's president to tell her about that payment;
3) March 14, 2011 – The Association's president responds, acknowledging the payment, acknowledging that Peffley had actually overpaid the Association, and stating that Peffley would be reimbursed;
4) March 17, 2011 – Association receives Peffley's $490.00 check;
5) March 21, 2011 – Association's attorney signs notice of lien;
6) March 23, 2011 – Association finally gets around to depositing Peffley's check; and
7) March 23, 2011 – Association records the notice of lien with the incorrect amount stated on it.

The Association, having represented that Peffley did not owe the Association what it stated in the land records she did and having recorded a document stating that she owed a fine she had already paid, *did* act with reckless disregard for Peffley's rights in making this statement in the land records; thus, there is at least a scintilla of evidence of falsity and of malice here. (R. pp. 14-15, p. 79 ln. 8-21, p. 83 ln. 22 through p. 84 ln. 2, pp. 88, 97-98, 110-12.)

Viewed in the light most favorable to Peffley and with all reasonable inferences drawn in her favor, the record contains at least a scintilla of evidence that the

Association's notice of lien was false and was known to the Association to be false at the time that it recorded the document in the land records, thus publishing those statements to the world.

## VI. A notice of lien is not a pleading.

The Association makes the perplexing argument that its notice of lien is somehow privileged under the law that provides that "relevant pleadings, **even if defamatory**, are absolutely privileged and cannot form the basis of an action for slander of title." (Initial Brief of Respondent p. 15 (emphasis in original).) This is a perplexing argument, as the notice of lien is not a pleading, and no lawsuit existed at the time of its recording for it to have even theoretically been a pleading *in.*

We know that the notice of lien is not a pleading because we have a Rule of Civil Procedure that states the pleadings that are allowed in the courts of common pleas in South Carolina, as follows:

> Pleadings. There shall be a complaint and an answer; and a reply to a counterclaim denominated as such; an answer to a cross-claim, if the answer contains a cross-claim; a third-party complaint, if a person who was not an original party is summoned under Rule 14, and there shall be a third-party answer, if a third-party complaint is served. No other pleadings shall be allowed, except that the court may order a reply to an answer or a third-party answer; and there may be a reply to affirmative defenses as provided in Rule 8(c).

Rule 7(a), SCRCP.

Nothing even remotely similar to a notice of lien is listed in Rule 7(a), SCRCP. In fact, the express declaration that "[n]o other pleadings shall be allowed" is dispositive on this point. Rule 7(a), SCRCP. Also, a notice of lien is not *like* what is listed in Rule 7(a). "It is elementary that the principal purpose of pleadings is to inform

the pleader's adversary of legal and factual positions which he will be required to meet on trial" of the case. Shirley's Iron Works, Inc. v. City of Union, 743 S.E.2d 778, 785 (S.C. 2013) (quoting S.C. Nat'l. Bank v. Joyner, 289 S.C. 382, 387, 346 S.E.2d 329, 332 (Ct. App. 1986)). The pleadings allowed by Rule 7(a) do that. A notice of lien, particularly one filed at a time in which no lawsuit exists or was apparently even contemplated, as here, simply cannot fulfill that function. A pleading and a notice of lien are, as they say, different animals.

"Wrongfully recording an unfounded claim against the property of another generally is actionable as slander of title." Huff v. Jennings, 319 S.C. 142, 149, 459 S.E.2d 886, 891 (Ct. App. 1995). If recording a notice of lien were privileged from liability, Huff could not be the law. The Association does not argue that this court should overrule Huff.

## VII. The Association, like most other property owners' associations, is regularly engaged in trade or commerce, and its actions here were in trade and commerce, particularly when viewed in the light most favorable to Peffley.

The Association tries to argue that it is not engaged in trade or commerce for purposes of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* (the UTPA). Poppycock. The Association's very purpose is to provide services to its members, in exchange for which the members pay it annual assessments. (R. pp. 106, 114, 120-23, 126-29.) However misguided they might be on their legal justification, the Association's attempts to fine its members, like Peffley, are attempts to ensure present and future compliance with the covenants, a service the Association exists to provide.

For purposes of the UTPA, "'[t]rade' and 'commerce' shall include the . . . distribution of *any services* and any property, tangible or intangible, . . . and *any* other article, commodity or *thing of value* wherever situate, and shall include any trade or commerce directly or indirectly affecting the people of this State." S.C. Code Ann. § 39-5-10(b) (emphasis added). This court has held that "[t]he statute's use of the words 'shall include' clearly suggests the legislature did not intend to limit 'trade' and 'commerce' to only the listed transactions." Baker v. Chavis, 306 S.C. 203, 208-09, 410 S.E.2d 600, 603 (Ct. App. 1991). "[T]he UTPA 'should be given a liberal construction.'" McTeer v. Provident Life and Accident Ins., 712 F. Supp. 512, 515 (D.S.C. 1989) (quoting Connolly v. People's Life Ins. Co., 294 S.C. 355, 359, 364 S.E.2d 475, 477 (Ct. App. 1988)).

Plainly, and certainly in the light most favorable to Peffley, the Association is engaged in trade and commerce for UTPA purposes.

**VIII. That the Association's policies and procedures create the potential for repetition of its unfair and deceptive acts is plain to see from the record, particularly when viewed in the light most favorable to Peffley.**

The Association contends Peffley demonstrated no potential for repetition of the Association fining people, i.e. unlawfully taking on the mantle of a government and issuing criminal punishments to its members. The South Carolina Supreme Court has stated that demonstrating the potential for an unfair trade practice's repetition is a demonstration of the requisite "adverse effect on the public interest." Crary v. Djebelli, 329 S.C. 385, 388, 496 S.E.2d 21 (1998). The Court has "specifically declined" to hold that such potential for repetition must be demonstrated by any particular means and has stated that "each case must be evaluated on its own merits." Id.

As discussed in Peffley's brief, the covenants at issue provide that fining is something the Association can do to *any* of its members who violate the covenants. (R. pp. 129-30.) The Association's procedures demonstrate a potential for this practice to be repeated.

**IX. The Association has conceded that Peffley is correct that the Association lacks any legal power to fine and that the "assessments for non-compliance" constitute unenforceable contractual penalties in any event. Accordingly, the Association has agreed that the lower court's basis for granting summary judgment on several claims was incorrect.**

In its brief, the Association does not even discuss Peffley's arguments in her brief on the inability of the Association to exercise the government's fining power and similarly does not discuss the South Carolina law cited and argued by Peffley that prohibits enforcement of contractual penalties. The Association appears to have conceded that the Association's claimed power to levy fines does not exist and that the "assessments for non-compliance" fail to meet the requirements of what makes an enforceable liquidated damages provision different from an unenforceable penalty. First Union Nat. Bank v. FCVS Communications, 321 S.C. 496, 502, 469 S.E.2d 613, 617 (Ct. App. 1996) (where respondent fails to respond to issue in respondent's brief, court may treat failure to respond as concession that appellant is correct).

As discussed in Peffley's appellant's brief, the lower court's order appears to base its summary judgment rulings in favor of the Association on Peffley's UTPA and slander of title claims on a determination that property owners' associations in South Carolina have the power and authority to fine their members. (R. pp. 2, 5.) In granting summary judgment on the UTPA claim, the circuit court ruled that the Association was entitled to summary judgment because "the contract between the parties [the covenants]

specifically authorizes the [Association] to take these actions." (R. p. 2.) In granting summary judgment on Peffley's slander of title claim, the circuit court ruled that the Association "was entitled to levy and collect all sums contained in its notice of lien." (R. p. 5.)

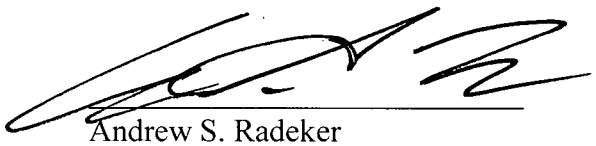
The Association seems to agree that the lower court's reasoning was wrong as to its rulings on Peffley's claims for slander of title and violation of the UTPA. With regard to those rulings, the Association has staked its entire claim on what it argues in its brief and has abandoned the argument that property owners' associations are empowered to fine their members under South Carolina law. Since, as noted above, the Association's arguments in its brief do not support the lower court being affirmed, the Association has made an important concession.

Neither the trial court's reasoning nor the Association's arguments support summary judgment being affirmed on these claims, and Peffley is entitled to reversal.

## CONCLUSION

The Association's arguments do not stand up to scrutiny. When the court applies the summary judgment standard to the record, it is plain that the lower court should not have granted summary judgment, and that the lower court's grant of summary judgment on these claims should be reversed and the claims remanded for trial.

Respectfully submitted,



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CERTIFICATE OF COUNSEL

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I certify that the foregoing brief complies with Rule 211(b), SCACR.

Respectfully submitted,

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June 28, 2016