Court File No. CV-17-589016-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED AND IN THE MATTER OF A PLAN OF COMPROMISE OR ARRANGEMENT OF BANRO CORPORATION, BANRO GROUP (BARBADOS) LIMITED, BANRO CONGO (BARBADOS) LIMITED, NAMOYA (BARBADOS) LIMITED, LUGUSHWA (BARBADOS) LIMITED, TWANGIZA (BARBADOS) LIMITED AND KAMITUGA (BARBADOS) LIMITED

FACTUM OF VR GLOBAL PARTNERS, L.P.

(Plan Sanction Motion)

MARCH 23, 2018

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FACTUM OF VR GLOBAL PARTNERS, L.P.

PART I: OVERVIEW

1. VR Global Partners, L.P. ("**VRGP**") objects to the sanction of the proposed Amended Consolidated Plan of Compromise and Reorganization of the Applicants dated March 9, 2018 (the "**Amended Plan**") on the grounds that it is not fair and reasonable.

2. The issue raised by VRGP's objection is whether it is fair and reasonable for a plan to provide different consideration for the compromise of identical debt. VRGP, and other members of the Affected Secured Class, are to receive Class B Common Shares (which have no voting rights) in exchange for the compromise of their Secured Notes. Two holders of those very same Secured Notes – Gramercy and Baiyin – are to receive Class A Common Shares (which have voting rights) in exchange for the compromise of their Secured Notes.

3. The Class A and Class B Shares have distinct economic and legal rights, and they are likely to have different economic values as a result.

4. The Applicants, Gramercy and Baiyin are unable to cite any case in which different consideration was granted for the compromise of the same debt. Such a position is not supported by any case law, provides for the inequitable treatment of identically situated creditors, and is contrary to the principles of what is fair and reasonable on plan sanction. It would also set a dangerous precedent for future cases.

5. The only justification provided for this inequitable treatment is to avoid the unquantified "cost and expense" of holding shareholders' meetings and the implementation of the "Minority Governance Rights" for which there is no evidence before this Court as to why such a structure

could not be achieved through other means such as a shareholders' agreement. These reasons cannot justify the unprecedented inequitable treatment proposed for holders of the Secured Notes.

6. For a plan to be "fair and reasonable", creditor treatment must be equitable. In this case, creditors with the same debt and security are being compromised and receiving different consideration. This treatment is inequitable and the Amended Plan before this Court is not fair and reasonable.

PART II: FACTS

7. VRGP is a holder of $19,368,000 in principal amount of the Secured Notes and is part of the "Affected Secured Class", as defined in the Amended Plan. The Amended Plan provides that two holders of the same Secured Notes within the Affected Secured Class – Baiyin Nonferros Group Company ("**Baiyin**") and Gramercy Funds Management LLC ("**Gramercy**") – are to receive Class A Common Shares in full and final settlement of their Affected Secured Claims.[1] The Amended Plan then provides that every other Affected Secured Creditor is to receive Class B Common Shares in full and final settlement of their Affected Secured Claims.[2]

8. Notably, despite the many capacities in which Baiyin and Gramercy sit in the Applicants' capital structure, the Amended Plan specifically provides that Baiyin and Gramercy are receiving the Class A Common Shares as a compromise of their Affected Secured Claims.

9. On March 9, 2018, the Applicants filed the Amended Plan which, among other things, amended the definition of Class B Common Shares.

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[1] Amended Plan, s. 4.1(a), attached as Schedule "A" to Sanction Order, Applicants' Motion Record ["**Applicants' MR**"], Tab 1, Exhibit "A", p. 31.

[2] Amended Plan, s. 4.1(b), attached as Schedule "A" to Sanction Order, Applicants' MR, Tab 1, Exhibit "A", p. 31.

10. Under the Amended Plan, Class A Common Shares carry the right to vote at any meeting of shareholders. After the amendment, the Amended Plan provides that the Class B Common Shares are to have "economic rights that rank *pari passu* to those attached to the Class A Common Shares in respect of all dividends, distributions and other payments", however such shares are subject to the Newco Share Terms and do not have the right to vote at any meeting of shareholders. Also as a result of the amendments, the Class B Common Shares convert to voting shares upon the earlier of: (i) Newco completing an Exit Transaction and (ii) 42 months following the Implementation Date. [3]

PART III: LAW AND ARGUMENT

11. VRGP submits that the Amended Plan is not fair and reasonable for the following reasons:

(a) The consideration provided to Gramercy and Baiyin in their capacity as holders of the Secured Notes is materially – both economically and legally – different and more valuable than the consideration being provided to other holders of Secured Notes for the same debt.

(b) Providing different and better consideration for the compromise of the identical debt is not supported by any case law and is contrary to the principles of what is "fair and reasonable".

(c) The creditors' vote and the Monitor's support are not determinative of whether the Amended Plan ought to be sanctioned. The Court must determine whether creditors

[3] Amended Plan, Schedule "A", attached as Schedule "A" to Sanction Order, Applicants' MR, Tab 1, Exhibit "A", p. 51.

are being treated equitably; the Amended Plan provides for unprecedented inequitable treatment and is not fair and reasonable.

A. The consideration is economically and legally different

12. The Applicants assert that the "economic rights" of the Class A and the Class B Common Shares are the same, and the voting restrictions "are more form than substance".[4] VRGP respectfully submits that if that were the case, a contested sanction hearing would not be necessary and all members of the Affected Secured Class would now be given equal treatment.

13. There is no authority cited, and no principled basis articulated, for the assertion that simply obtaining the same dividends and distributions makes two classes of shares economically or legally equal. The right to vote is a fundamental legal right attaching to a share that directly impacts its value. At its simplest, it is reasonable to assume that a purchaser would pay less for a non-voting share than a voting share, and the Applicants and the Supporting Parties have not provided evidence to the contrary.

14. For example, the previous share structure of TELUS Corp. consisted of non-voting shares and common shares that were identical except for the right to vote. Non-voting shareholders had the same rights to the payment of dividends as well as any other distribution, and were also equally entitled to receive notice of, attend and be heard at all general meetings, and to receive all notices of meetings, information circulars and other information from TELUS[5] (notably, rights that the Class B Shareholders in this case would not have). The sole distinguishing characteristic between

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[4] Factum of the Applicants and the Requisite Consenting Parties dated March 20, 2018 [**Applicants' Factum**] at para. 46.
[5] *TELUS Corp. v. CDS Clearing and Depository Services Inc.*, 2012 BCSC 1919 at para. 11, Respondent's Book of Authorities [**"Respondent's BOA"**], Tab 1.

the two classes of TELUS shares was the right to vote. Based solely on this difference, the non-voting shares traded at a discount to the trading price of the common shares.[6]

15. In the case before this Court, the Class A Shares and the Class B Shares have that same distinguishing characteristic, along with additional important differences such as the right to obtain information from Newco. Solely on their face, the Class A and Class B Shares have different rights that a shareholder would typically expect to receive and would therefore have a different value.

16. The Applicants and Supporting Parties' attempts to try to diminish the impact of the difference between the two Classes of Shares are without merit:

Applicants and Supporting Parties' submission	**Relevant considerations**
Baiyin and Gramercy will hold over 74% of Newco shares and have effective control, so the calling and holding of shareholder meetings "would cost unnecessary cost and expense".[7]	There is nothing to indicate that Baiyin and Gramercy will always vote together on all matters, or that those two entities will always hold over 74% of Newco shares. Depriving the other holders of the Secured Notes from having voting shares deprives them of the ability to potentially influence governance and other material decisions customarily decided by shareholders, including whether or not to approve an Exit Transaction and at what price. An assumption cannot be made that another shareholder could never impact a corporate decision in the future, or that shareholdings (and voting blocks) will never change.

[6] *Ibid* at paras. 12 & 270, Respondent's BOA, Tab 1.
[7] Applicants' Factum at paras. 7(a) & 46(b).

	The cost and expense of holding a shareholders' meeting cannot be a reason to justify inequitable treatment. If this was accepted, there would never be any need to give voting shares to minority shareholders because every company would like to save "cost and expense". There is also no evidence before the Court quantifying the proposed cost savings.
Under Cayman law, Class B Shareholders can vote on any amendments to Newco's articles that are materially adverse to the Class B Shareholder.[8]	There is no evidence before this Court on the applicable Cayman law. VRGP cannot confirm nor deny that the Class B Shareholders would have such a vote on an amendment to Newco's articles. However, VRGP notes that on a plain reading of the *Cayman Companies Law,* the term "materially adverse" does not appear in the statute. In any event, having the ability to vote on amendments that are "materially adverse" is not the same as having a voting share. It does not allow the holder to potentially influence corporate decisions, and does not address the fact that the share is likely to be valued at a discount to a voting share. In addition, it is unclear what "materially adverse" would mean in any given circumstance under Cayman law.
The Class B voting restrictions are "to assist in implementing certain governance provisions of Newco".[9]	For reasons unclear to VRGP, Baiyin and Gramercy appear unwilling to use a shareholders' agreement to implement their governance provisions and instead have denied equitable treatment to VRGP (and the other Affected Secured Creditors).

[8] Applicants' Factum at paras. 7(c)(iii) & 46(c)(iii).
[9] Applicants' Factum at paras. 6 & 45.

	By depriving all other holders of Secured Notes of a vote for up to 3.5 years, Baiyin and Gramercy will have more valuable shares with many additional rights, which is significantly more than the Applicants' characterization of "implementing certain governance provisions".
The Class B Shares will become voting shares upon the earlier of 42 months after Plan Implementation, or the occurrence of an Exit Transaction.[10]	VRGP views this recent amendment to the Amended Plan as an admission that the Class B Shares are materially different and an attempt to try to make the difference less apparent. However, it does not change the inequitable treatment of the holders of Secured Notes. It also does not change the fact that the Shares would be non-voting for up to 3.5 years during which significant corporate decisions, including governance and the price of an Exit Transaction, could be approved without any influence or knowledge of the Class B Common Shareholders. If the suggestion is that the Class B Shares are essentially equal because they will eventually become voting, it begs the question as to why they cannot be voting on Plan Implementation.

17. A share is a bundle of various economic and legal rights, the totality of which results in a value. In this case, the proposed economic and legal rights of the Class A and Class B Shares are materially different and distinct. Merely because the Class A and Class B Shares have *some* common rights does not make them the same for purposes of assessing whether providing different consideration to compromise the same debt is equitable.

[10] Applicants' Factum at paras. 7(c)(ii) & 46(c)(ii).

B. Different consideration for identical debt is inequitable

18. Pursuant to the Amended Plan, the Class A and Class B Common Shares are being provided in full and final settlement of the Affected Secured Claims. The Amended Plan specifically provides that Baiyin and Gramercy are receiving the Class A Common Shares solely for the compromise of their Affected Secured Claims, and not for any other debt or compromise.[11] For the compromise of the *identical* debt, VRGP and other members of the Affected Secured Class are instead receiving Class B Common Shares.[12]

19. The Applicants cite cases for the general propositions that a plan need not provide the exact same recovery for all creditors and, while creditor treatment must be equitable, equitable treatment is not necessarily equal treatment.[13] However, the Applicants cite no case, and VRGP is aware of no such case, where a creditor obtained different treatment for the compromise of the same debt with the same security rights. The Applicants and the Supporting Parties cite six cases to try to justify the differential treatment under the Amended Plan; as set out below, each of these cases is based on significantly different facts and none of the cases are a precedent for the relief sought before this Honourable Court. Put simply, the Applicants and Supporting Parties are trying to use statements made in distinguishable cases to support the differential treatment, but if the Amended Plan before this Court were sanctioned, it would be new law.

20. *Canwest Global* is cited for the proposition that a plan need not provide the same recoveries for all creditors.[14] In that case, the Court was considering the unequal distribution

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[11] Amended Plan, s. 4.1(a), attached as Schedule "A" to Sanction Order, Applicants' MR, Tab 1, Exhibit "A", p. 31.
[12] Amended Plan, s. 4.1(b), attached as Schedule "A" to Sanction Order, Applicants' MR, Tab 1, Exhibit "A", p. 31.
[13] Applicants' Factum at para. 43.
[14] Applicants' Factum at para. 43.

between *two different classes*: the Noteholder class was to obtain substantially more recovery than the class of Ordinary Creditors.[15] In addition, no one was opposing sanction on that basis.[16]

21. *Sammi Atlas, Re Air Canada* and *Re Lutheran Church* are all cited for the proposition that equitable treatment is not necessarily equal treatment.[17]

(a) In *Sammi Atlas,* no one was opposing the Plan being sanctioned (a creditor was seeking to change the way its claims were being calculated under the Plan only) and no issue was raised whatsoever about differential treatment for similarly situated creditors.[18] In addition, the Plan provided for better recoveries for smaller creditors – i.e. a convenience class – not worse recoveries as is proposed here.

(b) *Air Canada* was considering whether certain agreements should be approved under the CCAA, not a plan, and cites *Sammi Atlas* for general principles.[19] The benefits provided to one of the creditors under an agreement was in consideration of new financing provided; no debt of any creditor was compromised under the agreement.

(c) In *Lutheran Church,* in the context of considering an allegation that Convenience Creditors unfairly skewed the vote, the Court noted that Convenience Creditors were being paid out in full rather than becoming NewCo shareholders which would have made the number of NewCo shareholders 2600 rather than 1000.[20] VRGP is not being paid out in full like the Convenience Creditors (and is instead receiving

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[15] *Re Canwest Global Communications Corp.*, 2010 ONSC 4209 at para. 22, Applicants' Book of Authorities ["**Applicants' BOA**"], Volume 1, Tab 6.
[16] *Ibid* at para. 30, Applicants' BOA, Volume 1, Tab 6.
[17] Applicants' Factum at para. 43.
[18] *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. S.C.J.) at para. 6, Applicants' BOA, Volume 1, Tab 5.
[19] *Re Air Canada*, 2004 CarswellOnt 469 (Ont S.C.J. Commercial List) at paras. 1 & 9, Applicants' BOA, Volume 1, Tab 10.
[20] *Re Lutheran Church*, 2016 ABQB 419 at paras. 151-156, Applicants' BOA, Volume 1, Tab 11.

worse treatment), and there is no suggestion that there would be anywhere close to an additional 1600 shareholders in this case. In addition, it is well recognized that "convenience classes" are a unique circumstance and convenience payouts in CCAA proceedings are not uncommon.[21] No such facts exist in this case.

22. *Armbro Enterprises* and *Re Uniforet inc.* are cited for the proposition that "it is not unfair or unreasonable for the only creditor to continue to advance funds and finance the proposed re-organization [to] receive some additional incentive to support the Plan."[22]

(a) In *Armbro Enterprises,* the creditor receiving additional consideration – RBC – was put in its own class for purposes of voting (creditors were classified into three groups: Secured, Unsecured and RBC).[23] This was not a case of a creditor receiving different consideration for the compromise of the same debt within the same class.

(b) In *Uniforet,* the creditor receiving additional recovery – Jolina – was a member of a number of different classes under the Plan. Importantly, Jolina was provided with the same consideration *within each class* as compared to other members of the same class. It was not given different treatment than other creditors in the same class.[24]

23. The Applicants and Supporting Parties present no case that supports the relief sought on this Motion. There is no case before this Court where identically situated creditors were given different consideration for the compromise of the identical debt. Instead, courts have stated that one "measure of what is 'fair and reasonable' is the extent to which the proposed plan treats

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[21] *Ibid* at para. 155, Applicants' BOA, Volume 1, Tab 11.
[22] Applicants' Factum at para. 50.
[23] *Re Armbro Enterprises Inc.* (1993), 22 C.B.R. (3d) 80 (Ont. S.C.J. Gen Div, In Bankruptcy) at para. 9, Applicants' BOA, Volume 1, Tab 12.
[24] *Re Uniforêt inc.*, 2003 43 C.B.R. (4th) 254 (Cour supérieure du Québec) at paras. 12, 19 & 23, Applicants' BOA, Volume 1, Tab 13.

creditors equally in their opportunities to recover, *consistent with their security rights*, and whether it does so in as non-intrusive and as non-prejudicial a manner as possible."[25] While cases have recognized that the treatment of all creditors need not be equal, that has never been in the context of creditors with the same security rights. Approving the Amended Plan would be creating new law.

24. Parties holding identical debt reasonably expect to receive the same consideration for the compromise of that identical debt. The Amended Plan in this case proposes to treat the compromise of identical debt unequally, in an intrusive and prejudicial manner. Such a situation can only be described as inequitable and contrary to what is fair and reasonable.

C. The majority vote and the Monitor's support

25. For plan sanction, the CCAA requires the Court to determine whether the Amended Plan is "fair and reasonable". As described by Justice Blair: "Fairness is the quintessential expression of the court's equitable jurisdiction...and 'reasonableness' is what lends objectivity to the process."[26]

26. The outcome of the vote of creditors and the support of the Monitor are two important considerations; however, they are not determinative and cannot usurp the authority of the Court to independently assess the fairness and reasonableness of the Amended Plan. As the Ontario Court of Appeal highlighted, while a plan can bind all creditors to its terms, it can "do so only where the proposal can gain the support of the requisite 'double majority' of votes *and* obtain the sanction

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[25] *Olympia & York Developments Ltd. v. Royal Trust Co.*, 1993 CarswellOnt 192 (Ont. S.C.J. Gen Div). [*Olympia & York*] at para. 50, Applicants' BOA, Volume 1, Tab 9 [emphasis added]; *Re Skeena Cellulose Inc.*, 2003 BCCA 344 [*Skeena Cellulose*] at para. 39, Respondent's BOA, Tab 2.

[26] *Olympia & York* at para. 28, Applicants' BOA, Volume 1, Tab 9; also cited in *Re Canadian Airlines Corp.*, 2000 ABQB 442 [*Canadian Airlines*] at para. 94, leave to appeal denied 2000 ABCA 238, affirmed 2001 ABCA 9, leave to appeal to SCC refused July 12, 2001, Applicants' BOA, Volume 1, Tab 4.

of the court on the basis that it is fair and reasonable."[27] "The sanction of the court of a creditor-approved plan is not to be considered as a rubber stamp process. Although the majority vote that brings the plan to a sanction hearing plays a significant role in the court's assessment, the court will consider other matters as are appropriate in light of its discretion."[28]

27. The majority vote in this case ought not be determinative of the legal issue before this Court nor can it justify the inequitable treatment between holders of the same security rights.

28. The Monitor's recommendation in this case is also important but should be viewed in context. The Monitor is not, and ought not be, an expert in matters relating to valuing securities, which is key to the fair and reasonable analysis in the circumstance where shares with different rights are proposed to be issued to creditors with identical debt. While the Monitor's recommendation is an important factor, it cannot be determinative particularly in these circumstances.

29. The Monitor indicates that the bifurcation into voting and non-voting shares was *required* by Baiyin and Gramercy as an integral part of their support of the Amended Plan.[29] However, the fact that two creditors required inequitable treatment is not an answer to whether the Amended Plan is fair and reasonable. Moreover, VRGP respectfully submits that it would be disingenuous for Baiyin and/or Gramercy – each of which has a significant existing economic interest in the

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[27] *Re Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587 at para. 68, Applicants' BOA, Volume 1, Tab 14 [emphasis in original].

[28] *Canadian Airlines* at para. 96, Applicants' BOA, Volume 1, Tab 4; *Skeena Cellulose* at para. 39, Respondent's BOA, Tab 2. See also *Re Clayton Construction Co.*, 2010 SKQB 429 at paras. 12-14, Respondent's BOA, Tab 3: "...the requisite two-thirds majority does not, in and of itself, mean that the court will sanction the plan of compromise. Approval is discretionary...If the requisite majority supports the plan, it does not bar a creditor from objecting to the plan and providing cogent reasons for so doing."

[29] Fourth Report of the Monitor dated March 14, 2018 at para. 104.

Applicants – to suggest that they would be unwilling to support any plan that treats all holders of Secured Notes equitably.

30. VRGP is making a limited and principled objection to an unprecedented and inequitable proposal. The only justification that has been provided for such inequity is to facilitate the implementation of the "Minority Governance Rights", for which there is no evidence that they could not be implemented another way (including by way of a shareholders' agreement), and the unquantified additional "cost and expense" of holding shareholders' meetings in the future. This simply cannot justify going outside the bounds of equitable treatment under a plan, and is not treating creditors equitably "consistent with their security rights...in as non-intrusive and as non-prejudicial a manner as possible."[30]

31. The purpose of the CCAA is to "enable compromises to be made for the common benefit of the creditors and of the company."[31] To achieve that purpose, "it is often necessary to permit a requisite majority of each class to bind the minority to the terms of the plan, *but the plan must be fair and reasonable.*"[32] The Amended Plan fails this basic test. To approve it would not only leave all members of the Affected Secured Class other than Gramercy and Baiyin with less valuable consideration in exchange for the same debt, but it would also set a dangerous new precedent that would open the door to fundamentally changing the principles of treatment of creditors under the CCAA.

PART IV: ORDER SOUGHT

32. VRGP requests that this Court refuse to sanction the Amended Plan as currently proposed.

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[30] *Olympia & York* at para. 50, Applicants' BOA, Volume 1, Tab 9.
[31] Per Chief Justice McEachern as cited in *Olympia & York* at para. 32, Applicants' BOA, Volume 1, Tab 9.
[32] *Ibid*, Applicants' BOA, Volume 1, Tab 9.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 23rd day of March, 2018.

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SCHEDULE "A"

LIST OF AUTHORITIES

1. *TELUS Corp. v. CDS Clearing and Depository Services Inc.*, 2012 BCSC 1919.
2. *Re Canwest Global Communications Corp.*, 2010 ONSC 4209.
3. *Re Sammi Atlas Inc.* (1998), 3 C.B.R. (4th) 171 (Ont. S.C.J.).
4. *Re Air Canada*, 2004 CarswellOnt 469 (Ont S.C.J. Commercial List).
5. *Re Lutheran Church*, 2016 ABQB 419.
6. *Re Armbro Enterprises Inc.* (1993), 22 C.B.R. (3d) 80 (Ont. S.C.J. Gen Div, In Bankruptcy).
7. *Olympia & York Developments Ltd. v. Royal Trust Co.*, 1993 CarswellOnt 192 (Ont. S.C.J. Gen Div).
8. *Re Skeena Cellulose Inc.*, 2003 BCCA 344.
9. *Re Canadian Airlines Corp.*, 2000 ABQB 442.
10. *Re Metcalfe & Mansfield Alternative Investments II Corp.*, 2008 ONCA 587.
11. *Re Clayton Construction Co.*, 2010 SKQB 429.

SCHEDULE "B"

RELEVANT STATUTES

Nil.

Court File No. CV-17-589016-00CL

IN THE MATTER OF THE *COMPANIES' CREDITORS ARRANGEMENT ACT*, R.S.C. 1985, c. C-36, AS AMENDED

AND IN THE MATTER OF A PLAN OF COMRPROMISE OR ARRANGEMENT OF BANRO CORPORATION, BANRO GROUP (BARBADOS) LIMITED, BANRO CONGO (BARBADOS) LIMITED, NAMOYA (BARBADOS) LIMITED, LUGUSHWA (BARBADOS) LIMITED, TWANGIZA (BARBADOS) LIMITED AND KAMITUGA (BARBADOS) LIMITED

ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST

Proceeding commenced at Toronto

FACTUM OF VR GLOBAL PARTNERS, L.P.
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