

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

ENTESAR OSMAN KASHEF, *et al.*,

Plaintiffs,

-against-

BNP PARIBAS S.A., BNP PARIBAS S.A.
NEW YORK BRANCH, and BNP PARIBAS
US WHOLESALE HOLDINGS, CORP.,

Defendants.

No. 1:16-cv-03228-AKH-JW

Hon. Alvin K. Hellerstein

Status conference requested

**PLAINTIFFS' MOTION TO ENFORCE DEFENDANTS' GUILTY PLEA
AGREEMENTS AND UNSEAL JUDICIAL DOCUMENTS**

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“Defendants’ actions . . . provided support to governments that threaten both our regional and national security and, in the case of Sudan, a government that has committed flagrant human rights abuses and has known links to terrorism.”

- Judge Schofield, *United States v. BNP Paribas*, Plea Hearing (July 9, 2014)¹

INTRODUCTION

Before the Court is an unsealing dispute that raises two related questions. After pleading guilty to the criminal conspiracy at the heart of this case, can Defendant BNP Paribas S.A. (Head of the BNPP Group²) now contradict its pleas and present defenses inconsistent with its guilt? And should it be permitted to seal or redact documentary evidence of its crimes on that basis?

On July 9, 2014, BNPP pleaded guilty to conspiring with designated state-sponsors-of-terrorism Sudan, Iran, and Cuba to undermine U.S. sanctions put in place to deter support for terrorism and human rights abuses. At the time, all three nations were on the United States list of state sponsors of terrorism.³

Anticipating follow-on civil suits, BNPP agreed in its criminal plea that it could not “through its attorneys, partners, agents, or employees,” contradict “in whole or in part” its guilty pleas and admissions, or raise defenses “in any civil proceedings brought by private parties in the United States” that are *inconsistent with* its guilty pleas and admissions.⁴ Nevertheless, BNPP has

¹ Ex. 6, *United States v. BNP Paribas*, Hearing Tr. (July 9, 2014), Doc. No. 66, 14-cr-00460-LGS, Doc. 66, at 34.

² The term “BNPP” refers to BNP Paribas S.A. and all branches, business lines, and subsidiaries of the BNPP Group, through which Defendant BNP Paribas S.A. violated the U.S. sanctions on Sudan, Iran, and Cuba as “directed from high levels of the Bank’s group management.” ECF No. 458-1, Consent Order Under N.Y. Banking Law § 44, *In re BNP Paribas, S.A. New York Branch*, New York State Dept. of Financial Services, June 29, 2014, at ¶ 3.

³ Sudan was designated by the United States as a State Sponsor of Terrorism in 1993, Iran in 1984, and Cuba in 1982. See <https://www.state.gov/wp-content/uploads/2020/06/Country-Reports-on-Terrorism-2019-2.pdf>

⁴ See Ex. 2, Letter from Preet Bharara, United States Attorney for the Southern District of New York, *et al.* to Karen Patton Seymour, Esq., Sullivan & Cromwell LLP, *United States v. BNP Paribas, S.A.*, dated June 27, 2014 (“DOJ Plea Agreement”), at 8 (emphasis added); Ex. 3, Plea Agreement Between BNP Paribas SA and the District Attorney of the County of New York dated June 30, 2014 (“DANY Plea Agreement”), at ¶ 22.

repeatedly violated its plea agreements, as set forth in Exhibit 1 (“Table of BNPP’s Denials of Incontestable Facts Admitting to Willful Financing of Atrocities”).

Now, BNPP seeks to seal criminal evidence in the latest revisionist effort to shirk its conviction. During the September 27, 2023 hearing on the pending Motion for Summary Judgment and Motion for Class Certification, the Court ruled that the names of sanctioned individuals on the U.S. terrorism list should not be redacted.⁵ The Court deferred further rulings and directed the parties to meet and confer on whether any other judicial records should be sealed.⁶ The Parties have done so and have reached an impasse.

It has become clear in this dispute—as in BNPP’s summary judgment motion and class certification opposition, *see* Ex. 1—that BNPP is contradicting its guilty pleas and raising defenses inconsistent with its guilt. Specifically, BNPP now claims that documentary evidence of its criminal conspiracy with state sponsors of terrorism does not “reflect ‘evidence of criminal conduct’” and it argues its crimes are irrelevant to Plaintiffs’ claims for complicity in Sudan’s atrocities.⁷

BNPP cannot unwind, in whole or in part, its guilty pleas and seal documents on that basis. By attempting to deny the criminality of its conduct, BNPP has violated its plea agreements. By disputing the relevance and dispositive effect of its criminal conviction, BNPP defies the findings of two courts. At the district court level, in accepting BNPP’s plea, Judge Schofield found that BNPP “not only flouted US foreign policy” but also, “in the case of Sudan,” “provided support to” “a government that has committed flagrant human rights abuses and has known links to

⁵ Ex. 10, *Kashef v. BNP Paribas*, Hearing Transcript (September 27, 2023), at 48:13-24.

⁶ *See id.* at 5:8; 49:7-9.

⁷ *See* Ex. 7, March 7, 2024 Email from Oliver Engebretson-Schooley to Kristen Nelson (“Email from BNPP’s counsel”); *see also* ECF No. 467, Def’s Ltr Response to Pls’ Mot. To Seal (Aug. 21, 2023) (“Def’s Response”), at 4.

terrorism.”⁸ At the appellate court level, the Second Circuit held that “Plaintiffs’ causes of action arise out of the same occurrence as the criminal prosecution[.]” *Kashef v. BNP Paribas S.A.*, 925 F.3d 53, 62 (2d Cir. 2019).⁹ The Second Circuit further held that, by pleading guilty, BNPP “conceded that it had knowledge of the atrocities being committed in Sudan and of the consequences of providing Sudan access to U.S. financial markets.” *Id.* at 56.

Plaintiffs respectfully request that this Court enforce BNPP’s guilty plea agreements and order the unsealing of the disputed exhibits with redactions applied only to (1) the names of individuals not sanctioned by the U.S. government and (2) transactions unrelated to BNPP’s dealings with sanctioned state sponsors of terrorism: Sudan, Iran, and Cuba.

Plaintiffs also request that the Court bar BNPP from any further contradiction of its pleas and strike all present statements or representations by BNPP, its attorneys, agents, officers, and employees that contradict or are inconsistent with its guilty pleas and their underlying factual foundation.¹⁰ The Court should also foreclose BNPP from asserting any defense based on any facts that contradict or are inconsistent with those pleas and factual admissions.

Plaintiffs respectfully request a status conference with the Court to address this dispute.

BACKGROUND

The bulk of the documents in this case come from the sister criminal proceedings. Pursuant to the protective order (ECF No. 245), the briefs and exhibits for the summary judgment and class certification motions were filed under seal. Plaintiffs have moved to unseal certain judicial

⁸ Ex. 6, Plea Hearing Tr. at 34:4-9 (emphasis added).

⁹ Disregarding the Second Circuit’s holding that Plaintiffs’ claims arise from BNPP’s criminal conspiracy, BNPP contends that “Plaintiffs again mistakenly conflate BNPP’s guilty plea for violation of U.S. sanctions, with Plaintiffs’ claims” *See* ECF No. 467, Def’s Response at 4.

¹⁰ As set out in the appended Ex. 4, Federal Stipulated Statement of Facts (“SSOF”), dated June 28, 2014, and Ex. 5, New York Factual Statement, dated June 30, 2014.

documents (ECF No. 455). As instructed by the Court at the September 27, 2023 hearing, the parties have met and conferred on what redactions are required to protect the identities of individuals not sanctioned by the U.S. government.¹¹ The parties have agreed on those redactions. But BNPP has raised a new stumbling block that echoes positions taken in its summary judgment and class certification papers which are inconsistent with its criminal plea.¹² It insists on sealing direct and *modus operandi* evidence on the scope, scale, and control of its convicted conspiracy with the terrorist states of Sudan, Iran, and Cuba.

The disputed documents are 1) five documents detailing BNPP's financial transactions with Sudan, Cuba, and Iran (referenced as "Appendix B" documents), and 2) six internal reviews of BNPP's financial transactions with Sudan that were produced to various state and federal agencies (referenced as "Appendix C" documents). *See* Ex. 7, Email from BNPP's counsel; Ex. 8 ("Table of the Parties' position on redactions and sealing").

ARGUMENT

I. BNPP Cannot Dispute the Unlawfulness or Relevance of its Convicted Conspiracy and is not Entitled to Seal Documents on this Basis.

Under *Lugosch v. Pyramid Co. of Onondaga*, 435 F.3d 110, 121 (2d Cir. 2006), summary judgments exhibits are "as a matter of law" "judicial documents to which a strong presumption of

¹¹ Pursuant to the Court's ruling, redactions should be applied to individuals' names except for Specially Designated Nationals whose names should not be redacted. *See* Ex. 10, Hearing Transcript at 48:13-24.

¹² *See e.g.* Pls.' Opp. to Defs.' Mot. Summ. J., ECF No. 482 ("MSJ Opp."), at 3 (BNPP "attempts repeatedly to deny the admitted facts from its criminal plea (in violation of its obligations to the U.S. government)"); Pls.' Reply in Supp. of Mot. for Class Cert., ECF No. 481, at 13 ("Even in the face of its guilty plea taking responsibility for BNPP Suisse, BNPP works to detach itself from its subsidiary's conduct[.]"). *See generally*, MSJ Opp. at 102-03 (arguing "BNPP is estopped from denying its guilty plea admissions," citing *Gelb*, 798 F.2d at 43 ("a party other than the Government may assert collateral estoppel based on a criminal conviction.")).

access attaches[.]”¹³ Per *Lugosch* and the Court’s individual rules,¹⁴ all transactional records that relate to BNPP’s conspiracy—and hence to Plaintiffs’ claims—should be unsealed, with redactions applied only to unsanctioned individuals’ names and to transactions unrelated to the state sponsors of terrorism which BNPP supported: Sudan, Iran, and Cuba.

A. Appendix B – *Modus Operandi* Documents.

In its latest contradiction of its guilty pleas, BNPP claims that its transactional entries with Iran (Appendix B) do not “reflect ‘evidence of criminal conduct’” and are “unrelated to the parties’ motions.” See Ex. 7, Email from BNPP’s counsel. To the contrary, BNPP’s transactions with Iran and Cuba relate to the parties’ summary judgment briefing precisely because they “show identity through a common *modus operandi*.” See *United States v. Carlton*, 534 F.3d 97, 101 (2d Cir. 2008).

BNPP has put the identity of the conspiracy’s ringleader into issue by insisting it was not the entity responsible for the criminal conduct—in direct violation of its guilty pleas. See, e.g., Defs.’ Mem. in Supp. of Summ. J. (“MSJ”), ECF No. 484, at 39 (bringing forth the defense that a parent corporation “cannot be held liable for the actions of its subsidiaries” and arguing that “BNP Paribas was only responsible for a miniscule amount of oil export transactions”); ECF No. 435-98, First Expert Report of Christoph Müller dated Jan. 6, 2023, at ¶ 140 (“[REDACTED]” BNP Paribas S.A.).¹⁵ Because BNPP has disputed it was the conspiracy’s ringleader, evidence on Iranian and Cuban transactions

¹³ The same treatment extends to exhibits filed in connection with class certification. See *McKoy v. Trump Corp.*, No. 18-Civ.-9936-LGS, 2024 WL 449979 at *1 (S.D.N.Y. Feb. 6, 2024) (“[E]xhibits related to motions for class certification are judicial documents”).

¹⁴ Rule 4.A, Individual Rules of the Honorable Alvin K. Hellerstein, United States District Court Southern District of New York, effective December 20, 2023.

¹⁵ Over Plaintiffs’ objection, BNPP improperly designated the entirety of its own Rule 30(b)(6) witness deposition and the overwhelming majority of its expert reports as confidential or highly confidential. Accordingly, quotes from those materials are redacted herein, and Plaintiffs request the Court to overrule such designations and order the unsealing of expert reports and depositions of its representatives. ECF No. 245, Stipulation and Protective Order Regarding Confidential Discovery Material dated June 28, 2021, at ¶ 11.

are relevant as they show the “existence of a pattern,” *Carlton*, 534 F.3d at 102, overseen at BNPP headquarters in Paris, of which the Sudan scheme was one common part.¹⁶

These *modus operandi* documents should be unsealed, and redactions should only be applied to transactions that do not involve BNPP’s sanctioned clients and co-conspirators.¹⁷ *First*, the Court previously ruled that sanctioned individuals should be made public; the same should apply to transactions with sanctioned entities. *Second*, disclosure is all the more important because this is evidence of crimes. BNPP cannot deny its conduct was criminal. *See* Ex. 2, DOJ Plea Agreement at 1; Ex. 6, Plea Hearing Tr. at 34:9-11 (Judge Schofield, in accepting BNPP’s plea, found that “the severity of the defendant’s conduct more than warrants the criminal charge to which [] it has pleaded.”). These records show the business relationship with Iran that formed one basis of BNPP’s pleas.¹⁸ Because BNPP has no legitimate commercial interest in shielding crimes from public view, it cannot override the strong presumption of public access to this *modus operandi* evidence. *See Goodman v. Genworth Fin. Wealth Mgmt.*, 881 F. Supp. 2d. 347, 355 (E.D.N.Y. 2012) (“Deceptive, illegal or fraudulent activity simply cannot qualify for protection as a trade secret.”).

B. Appendix C – Transactional Evidence of BNPP’s Financial Support of Sudan.

BNPP seeks to seal from public scrutiny its illicit transactions with Sudan (Appendix C). BNPP previously withheld, from the government and the Plaintiffs, the vast majority of the actual

¹⁶ *See e.g.* MSJ Opp. 25 (“After the merger, BNPP France maintained . . . [and] ratified its agreements with the Regime, and perpetuated its predecessors’ conspiracies with Sudan, Iran, and Cuba without interruption, using its branch in New York to launder billions.”); *see also* Ex. 4, SSOF at ¶¶ 17-18; Ex. 3, DANY Plea Agreement at ¶ 2.

¹⁷ In Exhibits 9(a)-9(e), Plaintiffs have highlighted proposed redactions to the Appendix B documents.

¹⁸ BNPP admitted to conspiring with Iran, by, among other things, “processing U.S. dollar transactions” involving “Iranian Controlled Company 1” and “knowingly, intentionally and willfully process[ing]” U.S. dollar payments involving an Iranian oil company, in violation of Executive Orders 12957, 12959, and 13059 issued pursuant to IEEPA, a punishable crime pursuant to Title 50, section 1705 of the United States Code. Ex. 4, SSOF at ¶¶ 8-10, 42-48.

transactional data of its dealings with Sudan. And it admitted that despite having received legal opinions in 2006 identifying “potential sanctions-violative conduct,” “BNPP failed to provide the Government with meaningful materials . . . until May 2013,” which “significantly impacted the Government’s ability to bring charges against responsible individuals” Ex. 4, SSOF at ¶ 72.

Instead, it produced records from its internal investigations—drafted by its lawyers and consultants—that summarize a subset of transactions. Ironically, after failing to cooperate with the U.S. government criminal investigation for years, BNPP now pretends that this—the core evidence of its illicit Sudan transactions—is unrelated to Plaintiffs’ claims. *See* ECF No. 467, Def’s Response at 4. And it claims that disclosing its own work product would “reveal[] law enforcement and regulatory investigation procedures.” *See* Ex. 7, Email from BNPP’s counsel.

BNPP stretches the notion that banks should self-police beyond acceptable norms. These transaction reviews were not drafted by law enforcement or prosecutors. They do not contain, much less reveal, investigation procedures or findings. What they do contain are the self-serving efforts of BNPP’s counsel to label tens of billions of dollars in transactions with Sudan as ‘permissible.’ The U.S. government disagreed, forcing BNPP to admit that its multi-year effort to launder U.S. dollar transactions for Sudan through internal book-to-book transfers was unlawful.

BNPP cannot now deny the unlawfulness, or relevance, of its criminal conduct. *Lugosch* applies with even more force to the transaction records in Appendix C (1) because they are evidence of crimes and (2) because—as proof of billions in financial support to the genocidal regime—they will be central to the public’s understanding of the Court’s ultimate rulings on summary judgment and class certification. Moreover, any claim that BNPP has commercial or privacy interests in hiding its attorney’s work product is belied by this Court’s prior ruling that BNPP “did waive the privilege” as to these very documents, by producing them to state and federal

agencies without “an explicit, mutual agreement that they would remain confidential.” ECF No. 343, Order from Judge Willis at 14. Indeed, Magistrate Judge Willis has already rejected the same arguments made in FOIA and FOIL litigation that BNPP reprises here. *See id.* at 13-14.

II. The Court Should Enforce BNPP’s Guilty Pleas and Bar BNPP From Making Any and All Further Contradictions or Inconsistent Representations of Those Pleas.

BNPP’s latest attempt to escape its guilty pleas is an affront to the fundamental principles underlying “truthful and complete” admissions of wrongdoing. The plea agreements dictate that BNPP cannot “contradict in any proceeding, the facts contained in the Factual Statement” or dispute “the acceptance of responsibility by BNPP.” Ex. 3, DANY Plea Agreement at ¶¶ 7, 22-23; *in accord with* Ex. 2, DOJ Plea Agreement at 8. Nor can BNPP raise defenses “in any civil proceedings brought by private parties in the United States” that are not “consistent with the provisions above.” Ex. 2, DOJ Plea Agreement at 8. “Any such authorized or approved contradictory statement by BNPP, its present or future attorneys, partners, agents, or employees shall constitute a material breach” of the plea agreements. *Id.*; *in accord with* Ex. 3, DANY Plea Agreement at ¶ 22.

BNPP’s pleas largely answer the key questions for complicity liability under Article 50.1 of the Swiss Code of Obligations—which is why it is important that BNPP be barred from disavowing its plea admissions. These key questions include: did the Sudanese government commit human rights abuses against the disfavored Black African population from which the Class springs? Did BNPP know, or should it have known, that Sudan was committing these abuses and using funds in furtherance of these atrocities? Did BNPP, through affirmative evasive devices, provide financial support to the regime it knew was committing these abuses? Was the more than \$20 billion that BNPP willfully laundered to the regime—more than Sudan’s entire military

budget—a foreseeable cause that contributed to the abuses being perpetrated in the same manner, magnitude, and duration?

The sealed evidence at dispute is probative of these points and should not be impermissibly concealed. BNPP’s repeated violations of its plea agreement obligations are set forth in Exhibit 1. The worst offenses are highlighted below.

Contradiction 1: BNPP now denies it knew the Sudanese government committed mass atrocities and human rights abuses.

When it pleaded guilty, BNPP admitted the Government of Sudan was “supporting international terrorism and committing human rights abuses,” and that BNPP’s employees “recognized” it was doing so. *See* Ex. 4, SSOF at ¶¶ 3-4, 17, 20.

Yet now BNPP claims these abuses were not illegal because they were “public acts of a foreign sovereign[.]” Defs.’ Reply in Supp. of Mot. for Summ. J., ECF No. 485 (“MSJ Reply”) at 2, 14. The Second Circuit dismissed this nonsensical argument and held genocide and other human rights abuses are not a “valid” “official act.” *Kashef*, 925 F.3d at 60-62.

Contradiction 2: BNPP denies that its financial conspiracy knowingly supported the Government of Sudan in its human rights atrocities.

It is incontestable that in pleading guilty to violating U.S. sanctions BNPP understood that its willful transactions were linked to human rights abuses and terrorism. Ex. 6, Plea Hearing Tr. at 34. BNPP’s own Rule 30(b)(6) representative candidly explained under oath that, “what we did, what we pled guilty to, there is no dispute in its supporting the Sudanese government, which was using funds to support terrorism and committing human rights abuses.” Deposition of Danny Cozine dated Aug. 11, 2022, ECF No. 422-49 (“Cozine Dep.”) at 123:11-15.

Yet now BNPP seeks to distort its role by asserting that “there is not a straight line between sanctions and human rights abuses,” MSJ Reply at 20, and there isn’t “any link between any of the BNPP Defendants’ financial transactions and any injury suffered by Plaintiffs,” MSJ at 3.

Contradiction 3: BNPP denies it intentionally violated U.S. sanctions.

BNPP plead guilty to “knowingly, intentionally, and willfully” violating U.S. sanctions. *See* Ex. 4, SSOF at ¶¶ 14, 41. In pleading guilty, BNPP admitted that these sanctions were driven by the Sudanese regime’s human rights abuses and terrorism, Cozine Dep. at 107:12-18, by halting Sudan’s access to the U.S. financial system, Ex. 4, SSOF at ¶¶ 3-4, 17-18, 41.

Yet now BNPP tries to proclaim that its “[REDACTED]” Expert Report of Teresa Pesce dated Jan. 6, 2023, ECF No. 435-91 (“Pesce Rep.”) at ¶ 60, and that BNPP “[REDACTED]”, *id.* at ¶ 25.

Contradiction 4: BNPP denies that without its conspiracy, Sudan would not have had access to U.S. financial markets and the U.S. dollars it required.

In pleading guilty, BNPP admitted that Sudan needed access to U.S. dollars to run its economy and profitably engage in global oil transactions. *See* Cozine Dep. at 109:20-23, 110:8-20, 117:23-118:1. BNPP also admitted that but for its conspiracy, Sudan would not “otherwise . . .” have had the means of doing so. *See* Ex. 4, SSOF at ¶ 41.

Yet now BNPP brushes aside the admitted fact that “the GOS would not otherwise be able to obtain . . . funds without BNP Paribas deciding to break the law” as “Plaintiffs’ theories that do not hold true.” *See* MSJ at 24. And it maintains that if it hadn’t helped Sudan commit its crimes, “[REDACTED]” Pesce Rep. at ¶ 18.

Contradiction 5: BNPP denies that it undermined any deterrent effect of the U.S. embargo to defund Sudan’s human rights abuses and terrorism.

BNPP admitted it “significantly undermin[ed] the U.S. embargo” on Sudan, “from 2002 up through and including 2007[.]” *See* Ex. 4, SSOF at ¶¶ 17-18. BNPP’s 30(b)(6) witness testified that in pleading guilty, BNPP admitted that the U.S. embargo’s [REDACTED] [REDACTED] [REDACTED], *see* Cozine Dep. at 116:4-16; 106:18-107:18. And BNPP agreed that this deterrent purpose [REDACTED] *Id.* at 116:10-16.

Yet now BNPP turns around and proffers contradicting expert testimony claiming the embargo was causally insignificant by claiming that it wasn’t until [REDACTED] [REDACTED],” Expert Report of Gary Hufbauer dated Jan. 5, 2023, ECF No. 435-71 (“Hufbauer Rep.”) at ¶¶ 12, 28-42, 141, and by questioning the “[REDACTED] [REDACTED],” Hufbauer Rep. at ¶¶ 81-85, 140, at preventing human rights abuses—eliding the fact that BNPP willfully violated these sanctions, rendering them ineffective.

CONCLUSION

In sum, these contradictions and inconsistencies by BNPP, its attorneys, agents, officers, and employees violate the prohibition of its plea agreements that it shall not raise defenses “in any civil proceedings brought by private parties in the United States[.]” *See* Ex. 2, DOJ Plea Agreement at 8; *in accord with* Ex. 3, DANY Plea Agreement at ¶¶ 7, 22. The Court should not countenance such disregard of guilty pleas taken under oath.

BNPP cannot dispute its conspiracy with Sudan, its knowledge of Sudan’s human rights atrocities, its own responsibility linked to this conspiracy, and the admitted fact that but-for BNPP’s financial support, Sudan would not have had the billions in illicit U.S. dollars to perpetrate its human rights abuses. *See Digilytic Int’l FZE v. Alchemy Fin., Inc.*, No. 20-CV-4650 (ER), 2023

WL 4288154, at *7 (S.D.N.Y. June 30, 2023); *Gelb v. Royal Globe Ins. Co.*, 798 F.2d 38, 43 (2d Cir. 1986) (noting that a criminal defendant sued by a private party is barred from relitigating any issue determined adversely to him in a related criminal proceeding).

Accordingly, the Court should order that the disputed summary judgment and class certification exhibits be filed on the public docket, with redactions applied only to the names of individuals not sanctioned by the U.S. government and to entries unrelated to BNPP's dealings with sanctioned state sponsors of terrorism: Sudan, Iran, and Cuba. Plaintiffs also respectfully request that the Court bar BNPP, its attorneys, agents, officers, or employees from asserting any statements or representations that contradict or are inconsistent with its guilty pleas and underlying Factual Statements. At an appropriate time, Plaintiffs will file a pretrial motion *in limine* to strike all such statements or representations in the record or course of proceedings in this matter.

A status conference is requested.

Dated: March 25, 2024

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