No. 24-2379

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

OPPENHEIMER & CO., INC.,

Plaintiff-Appellee,

v.

STEVEN MITCHELL, DORI MITCHELL, JEROME HOPPER, AND LORI HOPPER,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Washington
No. 2:23-cv-00067-MJP
Hon. Marsha J. Pechman

UNOPPOSED BRIEF OF AMICUS CURIAE PUBLIC INVESTORS ARBITRATION BAR ASSOCIATION IN SUPPORT OF APPELLANTS

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STATEMENT OF INTEREST OF THE AMICUS CURIAE, PIABA

Public Investors Advocate Bar Association ("PIABA") is a bar association comprised primarily of attorneys who represent members of the investing public. The mission of PIABA is to promote the interests of, and to help protect the investing public. PIABA also advocates for public education regarding investment fraud and industry misconduct. PIABA often issues comment letters regarding FINRA rule changes, provides testimony to government agencies and Congress, and files *amicus* briefs on a variety of issues pertaining to the protection of the investing public—the very people and businesses who provide corporations with the capital needed to drive economic activity in the United States. Particularly relevant to this case, PIABA members often represent victims of fraudulent investment schemes, also known as Ponzi schemes, in instances where such schemes are perpetrated by investment professionals who are associated with financial industry members.

This brief was not authored in whole or in part by counsel for appellants. Moreover, no funding was provided by appellants or any other group or individual to fund the preparation or submission of this brief. Finally, both appellants and appellee consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

FINRA Rule 12200, which defines a "customer" for the purposes of determining the arbitrability of disputes between the investing public on one hand, and broker-dealers on the other, is crafted in an exceptionally broad manner so as not to limit the ability of investors to hold Wall Street firms liable for not only their own malfeasance but also for their failure to adequately supervise the licensed investment professionals (typically referred to as "associated persons") they hire to provide securities-related services to the investing public. The present dispute turns on whether or not a FINRA–registered brokerage firm can avoid arbitration of disputes with investors arising out of the firm's alleged violations of its duty supervise its associated persons in their conduct vis-à-vis such investors, in instances where those associated persons enlist the help of agents to aid in their securities violations and deal with investors through such agents rather than directly.

The lower court in this matter acknowledged the well–established jurisprudence, which sets forth two key principles; (i) firms have an obligation to supervise their associated persons, including those persons' outside business activities, and (ii) an investor need not have a direct relationship with a firm in order for that firm to be required to arbitrate disputes with such investor arising out of its failure to supervise its associated persons; rather, it suffices for the investor to have a relationship with the firm's associated person. However, the court interpreted such

relationship in an overly narrow manner and improperly ruled that the Appellants could not arbitrate their claims against Appellee, arising from misconduct by Appellee's associated person, because Appellants dealt with Appellee's associated person through sub-agents, rather than "directly." See *Oppenheimer & Co. v. Mitchell*, No. C23-67 MJP, 2024 U.S. Dist. LEXIS 63215, at *7 (W.D. Wash. Apr. 5, 2024). This is a novel – and unreasonable – interpretation of the definition of "customer." No such distinction between a direct and indirect relationship has been established in prior jurisprudence, nor is one warranted in this context.

Finally, this brief highlights how the lower court's decision sets a dangerous precedent in which a firm's obligations to supervise its advisors can be obviated by the firm's associated person's use of agents to conduct unlawful activity. The lower court's decision risks creating perverse incentives for securities firms and their associated persons, whereas firms may not avoid arbitration of claims brought by investors arising out of an investment fraud perpetrated by the firms' associated person so long as the fraud is small enough in scale that the associated person recruits victims directly, but may be able to avoid arbitration once their associated person's investment fraud grows sufficiently large that the associated person can no longer recruit victims alone and resorts to sub-agents to help do so.

ARGUMENT

I. Investment Professionals Such as Woods, Who Are Affiliated with, and Under the Oversight of, Financial Industry Members Such as Appellee, Are Particularly Well Positioned to Victimize Members of the Investing Public, and Often Do So Through Sub-Agents.

The fact pattern before this Court is unfortunately not unusual: disreputable investment professionals such as Appellee's former advisor, John Woods, affiliated and working under the ostensive supervision of financial industry firms, sometimes take advantage of the trust reposed in them by their customers – many of whom are retirees or relying upon their investment professional to advise them about their retirement savings – and recruit those customers to invest in fraudulent investment programs, also known as Ponzi schemes. Such disreputable investment professionals are particularly well situated to recruit victims to a fraudulent investment program, because they hold those victims trust in matters related to investments and have experience selling various investment products.

This is what happened here. Appellants are victims of a Ponzi scheme that was created and overseen by Appellee's former advisor, Woods. 1-ER-5. Woods's Ponzi scheme resulted in the loss of millions of dollars of invested capital by victims of the scheme. 2-ER-36. Specifically, Woods, while he was in the employ of Appellee, improperly purchased a registered investment adviser firm, Southport Capital ("Southport"), which he used to orchestrate an extensive and unlawful operation that recruited innocent investors, including Appellants, into a decade-long

Ponzi scheme known as the Horizon Equity Fund ("Horizon") – a fund that was also controlled by Woods. Kuglar Decl., ¶ 4 (SEC Complaint), p. 2.

As often happens in a Ponzi scheme, once the fraud reaches a certain scale, the perpetrator may become unable to continue to personally recruit new victims while also overseeing the scheme, and resorts to the help of agents who assist with investor recruitment as well as other operational aspects of the fraud. This is what happened here: Woods – whose scheme grew to over $110 million and hundreds of victims, see Kuglar Decl., ¶ 4 (SEC Complaint), p. 2. – hired agents such as Michael Mooney to help him recruit additional victims. See Declaration of Michael Mooney, Dckt #34.[1]

During the relevant period, Woods was an associated person of Appellee and held himself out to the investing public as such. 2-ER-211. Upon the collapse of Horizon, Appellees sought to pursue claims in FINRA arbitration against Appellant, arising out of Appellant's alleged failure to adequately supervise Woods.

II. FINRA Rule 12200 Is Exceptionally Broad and Designed to Allow the Investing Public Access to FINRA's Arbitration Forum in Instances of Securities–Related Misconduct by a Firm's Associated Person vis-à-vis Investors, Without Regard as to Whether Such Misconduct Occurs Directly or Through Agents.

[1] *Oppenheimer & Co. v. Mitchell*, No. C23-67 MJP, 2024 U.S. Dist. LEXIS 63215 (W.D. Wash. Apr. 5, 2024).

The outcome of this case turns on whether Appellee's duty to arbitrate disputes pursuant to FINRA Rule 12200 includes the obligation to arbitrate disputes in which its failure to supervise its advisor led to harm to that advisor's customers who dealt with the advisor through the advisor's agent, rather than directly. The applicable jurisprudence within this circuit and elsewhere indicates that the answer to that question is "yes." Furthermore, there is no reasonable reason to draw a distinction as to arbitrability of claims – as the lower court did – between instances where an investor deals directly with a firm's associated person and instances where the investor deals with that associated person indirectly, through an agent.

FINRA Rule 12200 requires financial industry members such as Appellee to arbitrate disputes under the FINRA Code (the "Code") if -

- Arbitration under the Code is either:

  (1) Required by a written agreement, or

  (2) Requested by the customer;

- The dispute is between a customer and a member or associated person of a member; and

- The dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company.

FINRA Rule 12200.

As a general rule, federal courts have a longstanding deference to "policy favoring arbitration agreements.'" *Howsam v. Dean Witter Reynolds, Inc*., 537 U.S. 79, 83, 123 S. Ct. 588, 154 L. Ed. 2d 491 (2002) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp*., 460 U.S. 1, 24-25, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). Moreover, as shown below, Rule 12200 is painted with an especially broad brush so as to allow the investing public, denoted as "customers," the opportunity to arbitrate disputes against FINRA members as a result of said members' violations of FINRA Rules, federal and state laws, and common law, without distinguishing between investors who deal with the members' associated persons directly or through agents.

When defining "customers", the General Provisions section of the FINRA Rules simply states that "[t]he term 'customer' shall not include a broker or dealer." R. 0120(g). As the FINRA Rules do not provide another definition of the term "customer", the definition from the General Provisions section should apply. See *Multi-Financial Securities Corp. v. King,* 386 F.3d 1364, 1368 (11th Cir. 2004). When Rule 12200 was proposed, the addition of the words "of a member" after the word "customer" was explicitly rejected because it would "narrow the scope of claims that are required to be arbitrated under the Customer Code." Order Approving Proposed Rule Change to Amend NASD Arbitration Rules for Customer Disputes. 72 Fed. Reg. 4574,4579 (2007).

District courts in this Circuit have stated that the term customer "should not be too narrowly construed, nor should the definition upset the reasonable expectations of FINRA members." *Herbert J. Sims & Co. v. Roven*, 548 F.Supp.2d 759, 764 (N.D.Cal.2008). Further, district courts in this Circuit have rejected a narrow interpretation of the term "customer" and have cited the Eleventh Circuit's *King* with approval:

> The *King* court declined to limit the definition of a customer to require a direct relationship with the NASD member. … The Eleventh Circuit in *King* specifically noted other NASD rules provided more information about who is a customer but nevertheless determined it need not look to extrinsic evidence to decide whether King was a customer because the definition of customer as one who is not a broker or dealer was unambiguous.

Viyella v. Fundacion Nicor, 2020 U.S. Dist. LEXIS 34300, *17 (*citations omitted*).

Other circuit courts around the country have adopted similarly broad definitions of the word "customer" as it applies to the arbitrability of disputes between member firms and the investing public. For example, the Sixth Circuit has held that "establishing a customer relationship with the associated person of a FINRA member firm does not require that the investor directly open an account with the firm. See, e.g., *Vestax Sec. Corp. v. McWood*, 280 F.3d 1078, 1081 (6th Cir. 2002) ("The [FINRA] Code of Arbitration Procedure . . . creates the right of parties to compel a[ ] member firm to arbitrate even in the absence of a direct transactional relationship with the firm.").

The Second Circuit has similarly "rejected [the] argument that the investors must have opened accounts with [the FINRA member firm] to be its customers")." *John Hancock Life Ins. Co. v. Wilson*, 254 F.3d 48, 59 (2d Cir. 2001).[2] Courts within this Circuit have found the *John Hancock* decision to be compelling given FINRA's decision not to amend its definition of a "customer" in the wake of the decision:

> Certainly FINRA was aware that this decision would be considered authoritative and followed widely because it came from the Second Circuit, a court known for its expertise in this area. If FINRA felt that *John Hancock* was contrary to the intent of Rule 12200, one would expect FINRA to alter the Rule to avoid *John Hancock*. But the Rule has remained unchanged in the 15 years since *John Hancock* was decided.

Axa Advisors, Ltd. Liab. Co. v. Lee, No. 1:15-cv-137-BLW, 2016 U.S. Dist. LEXIS 10684, at *8 (D. Idaho Jan. 27, 2016).

For purposes of arbitrability under Rule 12200, "[a] customer of an associated person of the member is a customer of the member." *Berthel Fisher & Co. Fin. Servs., Inc. v. Frandino*, 2013 U.S. Dist. LEXIS 68455, 2013 WL 2036655, *5 (D. Ariz. 2013). The Second Circuit has similarly held that "[FINRA Rule 12200] requires a FINRA member to arbitrate disputes with its 'customers' ***or the 'customers' of its 'associated persons.'***" (emphasis added). *Citigroup Global*

[2] See also, *NYLIFE Sec. LLC v. Suarez*, No. CV 21-6276 FMO (SKx), 2021 U.S. Dist. LEXIS 247737, at *10-11 (C.D. Cal. Dec. 29, 2021).

Markets Inc. v. Abbar, 761 F.3d 268, 274 (2d Cir.2014). Indeed, this rule has been restated numerous times by courts across the country, including in this district.[3]

[3] See, e.g., *Chelsea Morgan Sec., Inc. v. Rappaport*, 3 F. Supp. 3d 791, 793 (C.D. Cal. 2014) ("the Rappaports were customers of Duggins who, in turn, was an associated person of Chelsea. The Rappaports have requested arbitration. Arbitration has therefore been requested by a "customer" within the meaning of the rule, and the requirement of subsection one of Rule 12200 is satisfied."); *O.N. Equity Sales Co. v. Cui*, 2008 U.S. Dist. LEXIS 6828 at *8 (N.D. Cal. 2008) ("The Court thus finds that Maria Cui was a 'customer' of Lancaster during the period when Lancaster was an 'associated person' of [the broker-dealer firm] … Accordingly, Maria Cui is a customer entitled to demand arbitration …."); *O.N. Equity Sales Co. v. Wallace*, 2007 U.S. Dist. LEXIS 84945, 11 (S.D. Cal. 2007) (ONESCO must arbitrate the investor's failure to supervise claims arising out of Lancaster's activities while he was an associated person of ONESCO); *NYLIFE Sec. LLC v. Suarez*, No. CV 21-6276 FMO (SKX), 2021 WL 10366006, at *5 (C.D. Cal. Dec. 29, 2021) ("In short, the court finds that defendants were Long's customers, and therefore plaintiff's customers, for purposes of FINRA Rules 12100 and 12200."); *First Allied Sec., Inc. v. Carrier*, No. 4:20-CV-3456, 2020 WL 7658067, at *5 (S.D. Tex. Nov. 19, 2020) ("Because Defendants purchased securities from a registered representative of Plaintiff, they are 'customers' under FINRA Rule 12200."); *Next Fin. Grp., Inc. v. GMS Mine Repair & Maint., Inc.*, No. 3:19-CV-168, 2020 WL 924209, at *4 (W.D. Pa. Feb. 26, 2020) ("Here, Defendant is a customer of Plaintiff because Defendant purchased investment services from Simanski, an associated person of Plaintiff."); *Viyella v. Nicor*, No. 19-25094-CIV, 2020 WL 977481, at *6 (S.D. Fla. Feb. 28, 2020) ("Again, the *King* court declined to limit the definition of a customer to require a direct relationship with the NASD member."); *First Montauk Sec. Corp. v. Four Mile Ranch Dev. Co.*, 65 F.Supp.2d 1371, 1380–81 (S.D.Fla.1999) (finding an investor was a customer of an NASD firm, when his account was maintained at a different brokerage firm, but a representative of the member firm managed the investor's account); *Washington Square Sec., Inc. v. Sowers*, 218 F. Supp. 2d 1108, 1117 (D. Minn. 2002) ("When a broker is alleged to have committed fraud and other wrongdoing, it is quite conceivable that monies would be misappropriated or wrongly invested, and would therefore not travel through Washington Square's regular accounts."); *Lincoln Fin. Advisors Corp. v. Healthright Partners, LP*, No. 2:09CV650 DAK, 2010 WL 322141, at *3 (D. Utah Jan. 25, 2010) (compelling arbitration in "a classic 'selling away' case" where a Lincoln associated person solicited investments away from the firm without Lincoln's knowledge or

To determine whether an investor is a customer of a firm's associated person, courts in this circuit have turned to a two-part test: (1) "the nature of the dealings or services between the associated person and the investor"; and (2) "whether the associated person represented that he was acting on behalf of a FINRA member, or the investor perceived as much." *NYLIFE Sec. LLC v. Suarez*, 2021 U.S. Dist. LEXIS 247737, at *10 (C.D. Cal. Dec. 29, 2021).

In the financial services industry, unlawful and/or unethical behavior on the part of a firm's associated persons is often conducted through intentionally obscured means, which require the firm to proactively monitor their associated persons'

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involvement); *Sparks v. Saxon Invs., LLC*, No. 2:09CV151DAK, 2009 WL 2886029, at *4 (D. Utah Sept. 3, 2009) (investors "are customers under the applicable NASD Rules because it is undisputed that they were customers of the [representative], and that [the representative] was an associated person with [the member]."); *Daugherty v. Washington Square Securities, Inc.*, 271 F.Supp.2d 681, 689 (W.D.Pa. 2003) (determining that the plaintiffs were customers within the meaning of Rule 10301(a) because a registered representative of a NASD-member firm sold them financial products); *Summit Brokerage Servs., Inc. v. Cooksley*, No. CA 02–11137 AO, 2002 WL 31478190 (Fla.Cir.Ct. Nov. 1, 2002) ("[B]y dealing with [the firm's] registered representative, [the investor] became a customer of that firm for purposes of NASD arbitration obligations."); *WMA Securities Inc. v. Ruppert*, 80 F.Supp.2d 786, 789 (S.D. Ohio 1999); *The O.N. Equity Sales Co. v. Pals*, 509 F.Supp.2d. 761, 769 (N.D. Iowa 2007); *The O.N. Equity Sales Co. v. Venrick*, 508 F.Supp.2d 872, 875–76 (W.D. Wash. 2007); *The O.N. Equity Sales Co. v. Thiers*, No. 07–305, 2008 U.S. Dist. LEXIS 3765, at *10–11, 2008 WL 110603 (D. Ariz. Jan. 10, 2008); *The O.N. Equity Sales Co. v. Rahner*, No. 07–1323, 2007 U.S. Dist. LEXIS 90197, at *17–18, 2007 WL 4258642 (D. Colo. Nov. 30, 2007); *The O.N. Equity Sales Co. v. Gibson*, 514 F.Supp.2d. 857, 864 (S.D. W.Va. 2007); *The O.N. Equity Sales Co. v. Samules*, No. 07–1091, 2007 U.S. Dist. 90332, at *15–16 (M.D. Fla. Nov. 30, 2007); *O.N. Equity Sales Co. v. Hoegler*, No. CIV.A.07-2703(FLW), 2008 WL 304924, at *3 (D.N.J. Jan. 28, 2008).

outside business activities. It is for this reason that, "[u]nder the FINRA Rules, there is no exemption from the obligation to arbitrate claims based upon an assertion that the activities of the associated person were unknown to the firm or were outside the normal scope of the relationship." *White Pac. Sec., Inc. v. Mattinen*, No. 12 cv 151 YGR, 2012 U.S. Dist. LEXIS 37753, at *14 (N.D. Cal. Mar. 19, 2012). The court in *White Pac.* found that, "even if the FINRA-member broker-dealer was not involved directly as the account issuer or as a participant in the transaction giving rise to the dispute, the broker-dealer may still be required to arbitrate claims arising from the conduct of its 'associated person' involved in the transaction." *Id.*

Other courts in this district have taken a similarly broad view of the circumstances that require a FINRA member firm to arbitrate disputes with customers of an associated person – even in the absence of a relationship between those customers and the firm – and have rejected attempts by member firms to avoid arbitration by arguing that they did not sanction the associated person's activities:

> Courts have routinely found the requirement that the dispute arise from a FINRA member's business activities is satisfied when the investor's arbitration claims are based on a theory of negligent supervision. … Moreover, plaintiff's position implies a "**limitation of the business activities requirement [that] risks blocking claimants from initiating FINRA arbitrations on selling away or negligent supervision claims because those claims necessarily involve activity not explicitly sanctioned by the FINRA member**."

NYLIFE Sec. LLC, 2021 U.S. Dist. LEXIS 247737, *13-14 (*citations and quotations omitted*) (*emphasis in the original*).

Notably, none of these authorities distinguish between customers of the associated person who dealt with the associated person directly, and those customers who dealt with the associated person through an agent of the associated person. The rule is clear: so long as an investor is a customer of the associated person – without regard as to whether such customer relationship is established through direct or indirect dealings – the associated person's firm must arbitrate securities-related disputes with that investor. A distinction between a "direct" and indirect customer relationship running from the investor to the associated person would undermine this rule and also run afoul of basic agency principles: it is black letter law in California and across the country that a principal's actual or ostensive agent who deals with third parties within the scope of the agency binds the principal. See e.g. *Associated Creditors' Agency v. Davis*, 13 Cal. 3d 374, 399-400; *Tomerlin v. Canadian Indem. Co.*, 61 Cal. 2d 638, 643-644; *Bryant v. Carter*, 2023 Cal. Super. LEXIS 107889, *49; see also Cal Civ Code § 2295 ("An agent is one who represents another, called the principal, in dealings with third persons.").

Upon determining that Woods acted through an agent while dealing with Appellants, the lower court should have found that Appellants were customers of Woods, hence that they were entitled to arbitrate disputes with Woods' member firm, Appellee. This is because the duty to arbitrate in this context arises out of Appellee's own duty to supervise its agent, Woods's securities-related activities, without regard

of whether those securities-related activities were conducted directly or through an agent, see *White Pac. Sec., Inc.*, 2012 U.S. Dist. LEXIS 37753, *supra.*, and without regard as to whether or not they were sanctioned by the firm. See *NYLife Sec. LLC*, 2021 U.S. Dist. LEXIS 2477377, *supra*.

III. The District Court's Ruling Sets an Undesirable Precedent in Which Member Firms Can Avoid Their Supervisory Duties So Long as Their Associated Persons Use Agents to Commit Securities Violations.

The lower court's ruling creates a loophole through which firms like Appellee could avoid their duties to supervise their associated persons in all instances in which those associated persons employ agents to aid in their unlawful ventures and securities violations. Perversely – given that disreputable investment professionals like Woods tend to perpetrate Ponzi schemes personally while those schemes are small, and eventually delegate much of the investor recruiting to agents once the scheme grows in size and they are no longer able to personally handle all aspects of the operation – the lower court's ruling would benefit investors in smaller fraudulent schemes, while harming investors in larger, more harmful schemes. The handful of victims of a hypothetical $1 million Ponzi scheme perpetrated by an investment professional could seek redress in arbitration against that professional's firm, while the much larger number of victims of a hypothetical $100 million Ponzi scheme perpetrated by an investment professional who had to use agents to recruit victims would not be able to seek redress against that professional's firm.

Specifically as to Woods and Horizon, the lower court's ruling would allow a number of Horizon investors who dealt with Woods directly to pursue claims in arbitration against Appellee, while denying the same ability to many other Horizon investors who dealt with Woods indirectly, once his scheme grew so large that he had to delegate some of the investor recruiting to his agents. Such a result is not only unfair; it is absurd and against public policy.

CONCLUSION

For the foregoing reasons, PIABA respectfully submits that the district court's decision granting Appellee's motion for summary judgment and permanent injunction and denying their cross motion for summary was in error and should be reversed.

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STATEMENT OF RELATED CASES
PURSUANT TO CIRCUIT RULE 28-2.6

The undersigned attorney or self-represented party states the following:

[X] I am unaware of any related cases currently pending in this court.

[ ] I am unaware of any related cases currently pending in this court other than the case(s) identified in the initial brief(s) filed by the other party or parties.

[ ] I am aware of one or more related cases currently pending in this court. The case number and name of each related case and its relationship to this case are:

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CERTIFICATE OF COMPLIANCE

The undersigned attorney or self-represented party states the following:

This brief contains 4,585 words, excluding the items exempted by Fed. R. App. P. 32(f). The brief's type size and typeface comply with Fed. R. App. P. 32(a)(5) and (6).

I certify that this brief *(select only one)*:

[ ] complies with the word limit of Cir. R. 32-1.

[ ] is a **cross-appeal** brief and complies with the word limit of Cir. R. 28.1-1.

[X] is an **amicus** brief and complies with the word limit of Fed. R. App. P. 29(a)(5), Cir. R. 29-2(c)(2), or Cir. R. 29-2(c)(3).

[ ] is for a **death penalty** case and complies with the word limit of Cir. R. 32-4.

[ ] complies with the longer length limit permitted by Cir. R. 32-2(b) because *(select only one)*:

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[ ] complies with the length limit designated by court order dated _____.

[ ] is accompanied by a motion to file a longer brief pursuant to Cir. R. 32-2(a).

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CERTIFICATE OF SERVICE

I hereby certify that on this 18th day of July 2024, I electronically filed the foregoing Amicus Curiae Brief with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

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