

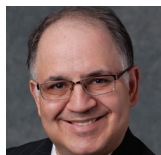


ACCRUED INTEREST

A Finance Newsletter from Haynes and Boone, LLP

AUGUST 2016

EDITOR



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Haynes and Boone has Finance professionals resident in offices across the globe. This edition of *Accrued Interest* focuses on some of our newest partners and counsel who are resident outside of our Dallas and New York offices. Their talents have further broadened both the depth of experience and geographic scope evident in our Finance practice. In our partner spotlight, we introduce you to Neal Kaminsky, an experienced Finance Partner who has joined our Houston office in the last year. In addition, we are extremely excited about our new foray into the English legal market to be undertaken in connection with our merger with the London firm Curtis Davis Garrard LLP (CDG), which we discuss from a finance perspective in a featured article below. Take a break from the summer heat and cool off with the August edition of *Accrued Interest*.



London Merger to Establish In-House English Law Finance Capability

Recently, Haynes and Boone announced that it is finalizing a merger with London-based law firm Curtis Davis Garrard LLP (“CDG”). While Haynes and Boone’s Finance Practice has in the past undertaken many English-law based transactions with the capable assistance of trusted correspondents in the London legal market, this merger will provide the firm with in-house English law capability to permit the firm to manage such transactions more seamlessly.

Haynes and Boone Managing Partner Tim Powers recently said, “We are taking this trans-Atlantic voyage because our clients’ transactions and disputes routinely cross national borders, particularly in the energy...and financial services fields. “Powers referred to CDG as “a firm of the first order,” with 20 lawyers focusing on providing advice to the shipbuilding and offshore oil and gas industries, both in the context of transactional representation and dispute resolution. Powers added, “London is a particularly important market for the firm because English law represents the dominant choice of governing laws for cross-border transactions.”

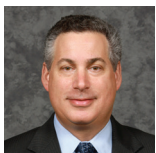
Finance Section Chair Craig Unterberg is extremely excited about the increased capabilities that have been brought to the firm via the CDG merger and the prospects for the future. “We work on a

significant amount of cross-border and international transactions,” said Unterberg, “this allows us to create immediate synergies among attorneys in various offices to more efficiently handle these complex transactions.” Unterberg further commented, “We believe this merger gives us a significant presence in the London market, and we plan to bring in additional Finance attorneys to broaden that presence.”

Gil Porter, Co-Chair of Haynes and Boone’s Projects Practice Group resident in the New York Office is similarly enthused about the opportunities the London merger will provide for the firm’s Finance, and particularly Project Finance, practices. “We have been looking for the right opportunity to enter the London market for some time, with a view toward expanding our English law capabilities in the Finance realm,” said Porter. “We think this is the perfect fit, both in terms of practice compatibility, attorney skill sets and firm culture.”

Over the next six to 12 months, Haynes and Boone will be working hard to integrate the attorneys from CDG into the larger firm. The firm hopes that clients will take the opportunity to meet these stellar new members of the firm and learn about the expanded capabilities they represent. As Tim Powers stated, “We found the perfect fit in CDG, a firm that will help us, in an increasingly globalized economy, provide our clients with the level of experience and service with which they are accustomed.”

ATTORNEY SPOTLIGHT



Neal
Kaminsky

Neal Kaminsky – Partner

A New but Experienced Face in our Houston Finance Practice

Haynes and Boone’s Neal Kaminsky loves being a finance lawyer. “It’s incredibly gratifying to bring parties together to close a complex financing

transaction where borrower and lender walk away from the table satisfied,” said Neal recently, discussing his broad practice, which includes commercial lending, energy and real estate finance.

Neal, who is resident in Haynes and Boone’s Houston office, joined the firm as a lateral partner in the fall of 2015 and has hit the ground running, closing a number of cutting edge transactions shortly after arriving at the firm. “I’ve loved the synergies created by my having joined Haynes and Boone,” he commented. “I’ve been very quickly integrated into a deep and well-recognized finance practice and have found, as I expected, that my new partners exhibit a very high level of professionalism, integrity and enthusiasm for the practice.”

In a recent transaction, Neal and other Haynes and Boone lawyers represented an international financial institution on certain U.S. financing aspects of a significant cross-border corporate transaction. In connection with this transaction, Neal was involved in the structuring and negotiation of a complex escrow arrangement involving funds associated with a foreign tax arising from the sale of the subject assets. Representing the client required significant experience in a variety of areas within finance. The breadth of Neal’s background made him a perfect candidate to represent this sophisticated firm client.

Neal loves the intricacies of business, and is considered by clients and peers alike as a very business savvy finance lawyer. Corporate officers and bankers turn to him regularly for his acumen and advice. Said Neal, “If I hadn’t become a lawyer, I would likely have become involved in corporate management of some sort. I have always enjoyed working with others in a business setting and helping to improve an organization’s efficiencies and operations.”

When he’s not working with firm clients on innovative financings, Neal loves to spend time with his wife and three children. His kids are now getting old enough to learn sports like tennis and golf, which he enjoys

playing with them. In addition to playing golf, Neal is also a running enthusiast. He's a high energy guy who loves his work and can't wait for opportunities to work with new clients on exciting state of the art transactions.

New FinCEN Rules: Customer Due Diligence to Prevent "Criminals, Kleptocrats, and Others" from Hiding "Ill-Gotten Proceeds"



Steven H.
Epstein

Kit
Addleman

As part of the Obama Administration's continuing efforts to curb money laundering and other international corruption, on July 11, 2016 the final rules on Customer Due Diligence

Requirements for Financial Institutions issued by the Financial Crimes Enforcement Network ("**FinCEN**") became effective.¹ The rules were issued in final form in early May of 2016, and are required to be fully implemented by covered financial institutions by May 11, 2018. FinCEN has [published answers](#) to frequently asked questions regarding the Final Rule.

The rules are intended to close a significant hole in the existing regulatory scheme by requiring banks, securities broker-dealers, mutual funds, and futures commission merchants and introducing brokers in commodities (collectively, "**covered financial institutions**") to obtain, verify and record the identity of the beneficial owners of their legal entity customers. The desire is to eliminate the ability of "criminals, kleptocrats, and others looking to hide ill-gotten proceeds" from accessing the financial system anonymously by means of creating legal entities to hide their individual identities.

The stated purpose of the new regulations is to assist law enforcement in financial investigations, prevent evasion of the existing anti-money laundering sanctions, assist covered financial institutions in better

assessing risk, facilitate tax compliance and advance the compliance of the U.S. with international efforts to curb money laundering and other wrongdoing.

Core Elements of Due Diligence

In promulgating these new rules, FinCEN identifies four core elements that should be explicitly required as components of proper anti-money laundering due diligence. They include (1) customer identification and verification; (2) beneficial ownership identification and verification; (3) understanding the nature and purpose of customer relationships to develop a customer risk profile, and (4) ongoing monitoring for reporting suspicious transactions and, on a risk-basis, maintaining and updating customer information. Promulgation of these final rules is intended to make these requirements explicit to the extent they were not in the past.

FinCEN has the legal authority to promulgate these rules under the Bank Secrecy Act to guard against money laundering. They require that all covered financial institutions establish and maintain written procedures that are reasonably designed to identify the beneficial owners of their legal entity customers. Of course, essential to the development of these procedures is an understanding of how the terms "legal entity customers" and "beneficial owners" are defined in the new rules.

Beneficial Ownership Requirements

There is a two-prong test for the definition of "beneficial owner" that covers both ownership and control. Any individual that owns at least 25 percent of the equity interests in a legal entity customer will qualify as a beneficial owner who must be identified under the new regulations. If no person owns at least 25 percent of the equity interests in a legal entity customer, then no person would be required to be identified under the ownership prong. Thus, the greatest possible number of persons to be identified under this prong would be four.

The second prong of the “beneficial owner” definition covers control and requires that, for each legal entity customer, a single individual be identified who has “significant responsibility to control, manage, or direct a legal entity customer, including an executive officer or senior manager or any other individual who regularly performs similar functions.” This controlling manager or officer would be subject to identification and appropriate diligence regardless of the number of persons who qualified for scrutiny under the ownership prong. The regulation also allows for some flexibility, permitting financial institutions discretion to identify additional beneficial owners under the control prong, as appropriate, “based on risk.”

The final rule indicates that a covered financial institution may rely on the information supplied by the legal entity customer regarding the identity of its beneficial owner or owners “provided it has no knowledge of facts that would reasonably call into question the reliability of such information.” The covered financial institution would be expected to undertake diligence in the event that it had knowledge that made it believe the information provided was inaccurate or incomplete. In providing this standard, FinCEN acknowledges that the customer may be the only source of this information available to the covered financial institution.

Legal Entity Customer Defined

The term “legal entity customer” is defined in the new regulations to mean a corporation, limited liability company, or other entity that is created by the filing of a public document with a Secretary of State or similar office, a general partnership, and any similar entity formed under the laws of a foreign jurisdiction, that opens an account. Accordingly, this definition would include limited partnerships and business trusts that are created by a filing with a state office. It would not, however, include sole proprietorship or unincorporated associations since, as the analysis in the Federal Register indicates, “neither is an entity

with legal existence separate from the associated individual or individuals that in effect creates a shield permitting an individual to obscure his or her identity.”

There are, however, a myriad of exceptions to the definition of “legal entity customer”-- many based on the fact that such entities already require the type of beneficial owner disclosure that is being required under the new regulatory scheme. These include, but are not limited to: (1) financial institutions regulated by a Federal or State bank regulator; (2) entities that have their common stock listed on the New York or American Stock Exchange or NASDAQ; (3) issuers of any class of securities registered under the Securities Exchange Act of 1934 or that are required to file reports thereunder; (4) investment companies registered with the SEC under The Investment Company Act of 1940; (5) investment advisers registered with the SEC under the Investment Advisers Act of 1940; (6) exchanges or clearing agencies or any other entities registered with the SEC under the Securities Exchange Act of 1934; (7) any entity, commodity pool operator, commodity trading advisor, retail foreign exchange dealer, swap dealer or major swap participant registered with the CFTC; (8) public accounting firms registered under Sarbanes-Oxley; (9) bank holding companies or savings and loan holding companies; (9) insurance companies regulated by a state; (10) financial market utilities designated under Dodd-Frank; and (11) certain foreign entities, including, without limitation, foreign financial institutions established in a jurisdiction where the applicable regulator maintains beneficial ownership information regarding such institution.

“Account” Definition Excludes ERISA Accounts

In defining the term “account” for purposes of the rules, FinCEN tied the definition to the existing definition of “account” provided for in the CIP rules, and expressly made it clear that accounts opened for the purpose of participating in an employee benefit plan under ERISA would be specifically excluded,

“inasmuch as accounts established to enable employees to participate in retirement plans under ERISA are of extremely low money laundering risk.”

Model Compliance Certification

The final rule requires that a covered financial institution promulgate and maintain appropriate procedures to identify and verify beneficial owners of legal entity customers at the time of account opening. While no specific documentation is required, FinCEN has created a model certification form that complies with the necessary requirements and has been attached to the Rules as Appendix A to 31 CFR Part 1010.230. [View the full text](#) of the final rules, including the model compliance certification.

Risk-Based Due Diligence

The rules also require that each covered financial institution develop a customer risk profile based upon the information obtained from its customer during the account opening process. This risk profile, which will include, but not be limited to, the beneficial ownership information now required under the rules, must be used by the institution on an ongoing basis to assess the activities of the customer and to determine when suspicious activity is occurring that would require the financial institution to prepare a suspicious activity report.

These new rules were initially proposed by FinCEN in 2014 and have been part of an arduous approval process. In establishing these rules, FinCEN states that it has been cognizant of the considerable legal, clerical and operational requirements that will be necessary to implement these rules, and accordingly has provided for a two-year implementation period. Full compliance will be required on May 11, 2018. In the interim, covered financial institutions may wish to confer with counsel knowledgeable about the new regulations to insure proper and timely compliance.

California's One Action Rule: A Cautionary Tale for Energy Lenders



Laura S.
Martone

Anthony W.
Pierotti

It may be surprising to some that the state of California ranks third in the nation in crude oil production, behind only Texas and North Dakota.¹ Accordingly, it should be no surprise that

many energy lenders have exposure to loans secured by oil and gas assets located there. At least a handful of exploration and production (E&P) companies with California assets have filed for bankruptcy protection in the last two years and there may be more to come as commodity prices have yet to fully recover.

Lenders that have taken real property security in California likely recall there is something unique about this type of collateral. California's so-called “One Action Rule” is often mentioned by counsel during the drafting stage of the loan documents and then fades to the background as the loan runs its course. However, as lender groups organize to discuss forbearances, workouts and strategic options, they should be mindful of the operation of this rule because, in some cases, violations can result in the loss of a lender's real property collateral located in California.

California's One Action Rule

California's “One Action Rule” is found in Section 726(a) of the California Code of Civil Procedure and provides that: “[t]here can be but one form of action for the recovery of any debt or the enforcement of any right secured by mortgage upon real property...which action shall be in accordance with the provisions of this chapter.”² The purpose of this rule is twofold. It requires a secured creditor to bring a single action to enforce its real property security for the underlying debt. In addition, it also embodies the “security first rule,” which, according to the Supreme Court of California, is “hornbook law” in the state. The “security first” aspect of the One Action Rule requires a secured creditor to proceed first against the real property collateral before

seeking a money judgment against the borrower.

The One Action Rule can be raised by an obligor as an affirmative defense to require the creditor to foreclose on the real property collateral before seeking a money judgment against that obligor. However, it can also be used as a sanction against a secured lender for violating the rule, resulting in the loss of the real property security. This is based on the theory that, by not first foreclosing on the real property security, the lender made an election of remedies and therefore waived its rights in respect of the security.³

It must be noted that oftentimes, although there is real property collateral located in California, the principal loan documents are governed by the laws of another state. This may lead one to question whether the One Action Rule does, or even should, apply to such a transaction. California jurisprudence on this issue needs to develop further before we have a definitive answer to these questions. However, the One Action Rule, including its “security first” principle, have been described as “fundamental” and grounded in the public policy of the state. Accordingly, it is unclear whether the California courts or legislature will consistently permit parties to contract around the rule by choosing the law of another state to govern their loan documents. In the interim, lenders should carefully navigate the boundaries of the rule and be conscious of it in any transaction where real property collateral is located in the state of California.

What Actions Violate the Rule?

Each of the following has been found to be a creditor’s “one action” for purposes of the One Action Rule, after which the creditor cannot seek recourse to any remaining real property collateral:

1. judicial foreclosure of only a portion of the real property securing a debt;
2. recovery of a money judgment on the debt; and
3. pre-judgment attachment of assets not constituting collateral.

Importantly, the California Supreme Court has also

held that, although not technically an “action” within the meaning of the One Action Rule, a bank’s setoff against the unpledged bank accounts of a customer in (partial) satisfaction of an obligation that was secured by real property, nevertheless violated the “security first” principle of the One Action Rule. In that case, the bank set off approximately \$3,000 from the obligor’s accounts against a total outstanding debt of around \$1,000,000. Because the obligation was secured by real property collateral that was not first exhausted, the court held that the setoff amounted to a waiver of the bank’s security interest in the real property – an alarming result for the lender, considering it lost its security in return for a 0.3% recovery via setoff.⁴

What Should Lenders Do?

The potential for such a devastating result gives rise to questions as to how to prevent loss of one’s rights in collateral by inadvertent or unwitting application of the One Action Rule. In the first instance, loan documents in transactions involving a lending group that are secured by any California real property should prohibit the lenders, along with any hedge providers or other creditors that share in the collateral, from taking enforcement actions, including exercising setoff rights, without first obtaining the consent of the administrative agent. This allows the administrative agent to retain control of the exercise of any enforcement actions, police compliance with the One Action Rule, and obtain local counsel advice if necessary before any action is undertaken.

The question of whether setoff in particular is permissible often comes up in the context of E&P loans where the collateral for the loan also secures hedges provided to the borrower and other obligors by the lenders, their affiliates, or even third parties. If a hedge is terminated and the hedge provider owes the borrower a cash termination payment, can the hedge provider set that amount off against amounts owed by the obligors under the loan documents? Can hedge providers set off against separate collateral that is not shared with the lender group if they are owed a payment by the borrower under the hedge agreement? We think the

prudent course of action is to subject these hedge providers to the same restrictions that are applicable to the lender group in the loan documents when it comes to the One Action Rule, so that each potential action can be closely analyzed at the relevant time under the loan documents and then existing legal authority.

Additionally, as a loan secured by California real property approaches workout, foreclosure or bankruptcy, the administrative agent and its counsel should consistently remind the lender group and any other secured creditors not only of the restrictions imposed by the One Action Rule, but also the severe consequences that could arise if they are not complied with strictly. The administrative agent and lenders should also work closely with California licensed counsel to make sure that any actions they are contemplating do not violate the One Action Rule. Of course, of utmost importance is retention of the security, but value also lies in not providing the borrower or any junior creditors with leverage in negotiations based on lender actions that could be seen as falling into the “gray area” of the One Action Rule.

The bottom line is that lenders holding distressed loans secured by California real property should not ignore the One Action Rule. It must be taken into account in strategizing in respect of their possible remedies, as the ramifications for a miscalculation under the rule could be catastrophic.

Laura Martone, a recent California transplant, is a member of the Texas and New York bars and is currently sitting for the California bar. Anthony Pierotti has been a member of the California bar for almost three decades.

An Umbrella in the Rain: Protection Through Use of the Forbearance Agreement



Neal
Kaminsky

Most of us remember one of the lessons taught to us by our parents – always take an umbrella when rain is threatened. During a financial storm, such as the current oil and gas market downturn, many borrowers find themselves encountering financial stress and defaults. As a result, borrowers and lenders may reach for the forbearance agreement as a figurative umbrella to provide protection during such difficult times. This article will discuss the fundamentals of forbearance agreements and a few practical tips for the borrower and lender to consider when using them.

Because of the current downturn in the oil and gas industry, many exploration and production companies and service providers to the oil and gas industry are in financial stress as a result of the significant drop in commodity prices and resulting production cuts. The vast majority of these companies have entered into financing transactions over the past few years of increased U.S. oil and gas production as a result of improved and increased exploration and drilling activities. In some ways, these companies were, or have become, the victims of their own success. Those credit facilities were underwritten and based on a set of financial performance criteria widely accepted in the general marketplace. However, the tide turned, and as a result, many of these same companies have failed to comply with, or are projected in the very near term to have trouble complying with, the payment requirements or financial covenant requirements provided for in these agreements.

Forbearance agreements do not waive defaults, but rather maintain their existence while allowing the parties to continue the lending transaction under a set of specific terms and conditions – a sort of yellow-caution flag. In these cases, so long as no other or new defaults arise, the lender will agree to forbear (or pause) from the exercise of rights and remedies

¹ U.S. Energy Information Administration, March 2016.

² Although the statute refers only to mortgages, it is equally applicable to deeds of trust.

³ In addition to the One Action Rule, secured creditors must take into account the various “anti-deficiency” rules that also exist under California law in determining how to proceed with enforcement of the secured obligations.

⁴ See *Security Pacific National Bank v. Wozab*, 51 Cal. 3d 991 (1990).

that would otherwise apply under such conditions for a period of time typically no more than 120 days or so (usually not too much longer than a quarterly reporting period) to allow the borrower to assess and address certain operational and situational issues with the business. In many circumstances, this will be a sufficient period of time for the borrower to refinance the credit or close a transaction that will involve a payoff of the troubled financing.

Forbearance agreements come in many forms, but typically contain the following common elements:

- (a) acknowledgments by the borrower and guarantors (collectively, the obligors) as to the existence and continuation of the “live” defaults and the lender’s right to cease funding, accelerate the debt and foreclose liens; confirmation of the outstanding principal balances of the loan facilities and any overadvance or overformula balance; acknowledgment of the enforceability of the loan documents and the perfection of the lender’s liens; reaffirmation of the obligors’ obligations under the loan documents; acknowledgements that the obligors will derive direct and/or indirect benefit from the forbearance; and acknowledgment that the lender has performed its obligations under the loan documents;
- (b) agreements as to the financial terms of the forbearance, such as interest rate (which may be different from the original interest rate under the loan documents); forbearance fee; a reduction to, or permanent cessation of, the lender’s commitment to extend additional credit; lender’s discretion over any subsequent advances or credit extensions; new prepayment requirements; reduction of overadvance or overformula balances; and possibly additional limitations upon use by the obligors of proceeds, of asset sales or other dispositions;
- (c) additional covenants restricting the obligors, including additional or more frequent financial

reporting; the appointment of a restructuring officer; cessation of certain financial covenants and/or the maintenance of certain new covenants or liquidity requirements; cash dominion or lockbox arrangements; requirements that the obligors raise additional equity or subordinated debt; cessation of payments on subordinated debt; cessation of any otherwise permitted dividends or distributions; and maintenance of strict compliance with the other covenants in the loan documents;

- (d) conditions to closing and effectiveness of the forbearance, including satisfactory results of any required appraisals, field exams and lien searches; execution and delivery of additional lien documents or replacement notes or guaranties from additional obligors (taking into consideration that the forbearance period may extend more than 90 days after new liens or new guaranties for purposes of preference analysis in the bankruptcy context);
- (e) representations and warranties by the obligors, such as due authorization of the forbearance agreement and documents required to be executed and delivered: no additional default other than the forbearance defaults; no litigation affecting the loan documents or other material litigation; and a bring down of the representations and warranties contained in the loan documents as of the date of the forbearance;
- (f) an enumeration of subsequent events of default that will terminate the forbearance period and/or that could result in the lender’s availing itself of all rights and remedies available to it regardless of the forbearance arrangement, including breach of covenants or requirements set out in the forbearance agreement, or the occurrence of new or additional events of default enumerated in the loan documents; and
- (g) releases by the obligors of claims against lender (which would include a full release of claims and

waiver of defenses by the obligors for any acts or omissions occurring prior to the effectiveness of the forbearance agreement), and indemnities by the obligors in favor of lender with respect to claims, losses or damages arising prior the forbearance agreement, in each case usually memorialized as a reaffirmation and bring down to what is already contained in the loan documents.

Prior the lender entering into the forbearance agreement it will want to conduct post default due diligence to ensure, among other things, that its liens have properly been perfected and the loan documents otherwise do not contain any discrepancies or deficiencies that could create a material impediment to their enforcement and the realization of remedies by lender. Such due diligence may include a documentation review by counsel, lien searches to confirm lien filings, and appraisals of fixed and capital assets. Additionally, the lender may conduct a review of other instruments evidencing other indebtedness or preferred capital, such as intercreditor or subordination agreements. In the event that the borrower has incurred other senior or junior indebtedness, the lender will want to review the intercreditor or subordination terms to make sure that any restricted payments of, or lien securing, such indebtedness, have been, and are being, addressed, controlled and perhaps blocked in the manner provided in such arrangements.

There are many different kinds of umbrellas to deal with different kinds of downpours. Similarly, different forbearance arrangements can be put into place to accomplish varying goals. Prior to drafting and finalizing a forbearance agreement and related documentation, it's important to establish a plan and a strategy to successfully implement that plan. Is the distress resulting from an industry-wide downturn or is it more situational to the borrower? Has the

borrower lost a meaningful portion of its market share and can it be rehabilitated? A material dilution of accounts receivable or a material deterioration of liquidity, an increased cash-burn and an ability (or inability) to scale down the business will be some of the leading indicators of whether the lender will use the forbearance as an opportunity to (a) permit the borrower to work through its problems or to raise junior capital and/or refinance the credit, or (b) shore up the lender's position and prepare for more serious events, such as a bankruptcy or forced liquidation. In addition to conducting a documentation review, the lender will want to take a fresh look at its sources of repayment (*i.e.*, cash flow from operations, liquidation of collateral, guarantor support, if any) as it formulates its strategy. These decisions will not be made in isolation however – the lender will be subject to regulatory oversight and loan portfolio considerations, for example, while on the other hand, the borrower will be under pressure from its stakeholders, capital and other debt providers, trade creditors, and industry counterparties.

Technology has provided meteorologists with enhanced tools to predict with greater probability, and better prepare the public for, significant rainstorms. Similarly, lenders now have more tools available to them than ever to sound the distressed credit alarm bells. In certain circumstances, the forbearance agreement can be an effective tool in providing cover during a distressed credit transaction – striking the proper balance between giving the borrower the time it needs to clean its house, while giving the lender a bit more certainty in its use of the tools available to it to modulate its credit and manage its risk during a turbulent period. Being able to carefully evaluate and diagnose the circumstances is critical to designing and implementing the plan, and being prepared for the next rainstorm.

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We'd like to hear your feedback and suggestions for future newsletters. Please contact:



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