No. 12-1429

In The

Supreme Court of the United States

IMAD BAKOSS, M.D.,

Petitioner,

v.

CERTAIN UNDERWRITERS AT LLOYD'S LONDON SUBSCRIBING TO POLICY NO. 0510135,

Respondent.

On Petition For Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

BRIEF FOR SOUTHEASTERN LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITION FOR WRIT OF CERTIORARI

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INTEREST OF *AMICUS CURIAE*[1]

Southeastern Legal Foundation (SLF) is a nonprofit national constitutional public interest law firm and policy center that promotes the public interest in the proper construction and enforcement of the laws and Constitution of the United States in the courts of law and through public discourse. SLF advocates constitutional individual liberties, limited government, and the free enterprise system in its litigation cases and *amicus* participation in state and federal courts. Southeastern Legal Foundation supports the free enterprise system not only in the abstract but also on the ground as it relates to both businesses and individuals.

Arbitration clauses occur in many commercial contracts, and many of those clauses fall under the aegis of the Federal Arbitration Act (FAA), 9 U.S.C. § 1 *et seq.* The interpretation of those clauses, particularly that the interpretation comports with the expectations of both sophisticated and unsophisticated parties, is of paramount importance

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[1] Counsel of record for all parties received notice at least ten days prior to the due date of the intention of the SLF to file this brief. The parties have consented to the filing of this brief. Letters of consent from Counsel for Petitioner Bakoss and Respondents Certain Underwriters at Lloyd's, London accompany this brief. Pursuant to this Court's Rule 37.6, SLF and their counsel hereby represent that no party to this case, nor their counsel, authored this brief in whole or in part, and that no person other than SLF paid for or made a monetary contribution toward the preparation and submission of this brief.

to the smooth and fair functioning of our economic system.

In this case SLF is concerned with the interests of both sophisticated parties, such as large businesses that can afford specialized counsel, and less sophisticated parties, such as individuals or smaller businesses, which might be detrimentally affected by the majority rule. Although in any given transaction the interests of sophisticated parties and unsophisticated parties might clash, both parties have an interest in a legal framework that preserves the freedom of the parties to structure contracts, heeds their expectations, and doesn't unfairly advantage one over the other. SLF urges the Court to take up this case, not only to resolve the clear circuit split, but also to correct the instability and disproportional disadvantage to unsophisticated parties to contracts created through application of the federal common law definitions of arbitration by a majority of circuits and to adopt the interpretation by the minority of circuits who apply state-law definitions of arbitration.

SUMMARY OF ARGUMENT

This Court should grant certiorari to resolve the uncertainty created for parties to contracts containing alternative dispute resolution (ADR) provisions, to protect the ability of unsophisticated contracting parties to vindicate their rights, and to resolve the direct conflict in the application of state

law definitions of "arbitration" between the Courts of Appeals of the Second Circuits and seven other circuits (majority rule) and the Courts of Appeals of the Fifth and Ninth Circuits (minority rule).

The primary objective of contract interpretation is to ensure that contracts are enforced in accordance with their terms and with the parties' intent. Freedom of contract promotes anticipation of future contract disputes and advances agreement of which state's law will apply. This choice creates certainty and guides contract negotiations. For example, if the parties intend for an appraisal hearing to fall within the scope of "arbitration," the parties may choose California law. However, if they do not want an appraisal hearing to fall within the scope of an "arbitration" they may choose Texas law. Deferring to the parties' choice of state law fosters predictability and stability. A minority of circuits honor the contractual terms and the parties' intent when they defer to the chosen state law definition of arbitration. A majority of circuits defer to one of many federal common law definitions of arbitration, ignoring the objectives of contract interpretation and disregarding the contracting parties' meaningful choice. This undermines contracting parties' freedom of contract, and creates uncertainty in the negotiating room and inefficiencies in the court room.

Resolution of the circuit split will benefit unsophisticated parties as much, if not more, than sophisticated ones. Unsophisticated parties, often being one-shot players against a repeat-player,

approach ADR on uneven footing. While sophisticated parties may have sufficient resources to keep apprised of whether the applicable circuit court honors choice of law provisions or applies an ever-changing federal common law, unsophisticated parties likely do not. Thus, unsophisticated parties enter into contracts under the misconception that state law will govern those contracts and without knowledge that if a dispute arises, the court may apply a federal common law definition and require arbitration.

It is not often that divergent, perhaps clashing, interests of both sophisticated and unsophisticated contracting parties demand the same result, but this is such a case. By granting the writ of certiorari, this Court has an opportunity to reintroduce predictability into contract interpretation and reinforce the freedom of contract.

ARGUMENT

THE COURT SHOULD GRANT REVIEW TO SETTLE THE CIRCUIT SPLIT AND PROVIDE STABILITY TO INTERPRETATIONS OF CONTRACT WITH ADR PROVISIONS

I. The case presents an unendurable conflict between the Second Circuit and eight other circuits and the Fifth and Ninth's application of the definition of "arbitration" in ADR agreements

when conflicts arise between sophisticated parties.

The freedom of contract is essential to our commercial system and is not an interest to be taken lightly. Parties must be allowed to freely enter into contracts with full confidence that courts will enforce those contracts in accordance with their expectations. When faced with an issue of contract interpretation, the Court has relied on a freedom of contract theory, focusing on both the parties' intent and the agreed upon contractual terms. *See First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1995) (finding that whether an arbitrator may decide the question of arbitrability depends on the terms of the contract, and that the parties had not agreed to submit the question of arbitrability to the arbitrator). The Court awards the freedom of contract superiority over federal interests, such as resolving disputes in the quickest manner, and has explained that the basic objective in contract interpretation is to ensure that contracts "are enforced according to their terms" and "according to the intentions of the parties." *Id.* at 947. This objective and its inherent deference to contracting parties' intent are imperative to protecting the freedom to contract.

The empirical evidence suggests that sophisticated parties, those more likely to actively negotiate their contracts, are concerned with the quality of expertise in their dispute resolution. *See* Randall Thomas, et al., *Arbitration Clauses in CEO Employment Contracts: An Empirical and*

Theoretical Analysis, 63 Vanderbilt L. Rev. 959, 960 (2010). Necessarily the freedom of contract provides that parties may negotiate to include or to not include an arbitration clause, and that they may structure any future arbitration in advance of executing the contract. Where a jurisdiction is known for having efficient courts or for specializing in a particular kind of dispute, sophisticated parties are less likely to negotiate for arbitration. However, when the opposite is true, sophisticated parties are more likely to prefer arbitration, where arbitrator expertise is easily developed and procured.

"Arbitration is a matter of consent, not coercion, and parties are generally free to structure their arbitrations as they see fit." *Volt Info. Sciences, Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 470, 479 (1989). To avoid inevitable conflicts of law that arise in a federal system, sophisticated parties frequently include a provision memorializing the parties' agreement to apply a particular state's law to the execution and interpretation of the contract. These choice of law provisions are the best way to "protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract." [2]

[2] It has been argued that because vertical conflicts of laws are distinguishable from horizontal conflicts and the rationale described in the Restatement does not reach vertical conflicts, it is inapplicable in the case of federal preemption. *See Flores v. Am. Seafoods Co.*, 325 F.3d 904, 918–19 (9th Cir. 2003). This argument, however, neglects that even if the Restatement does not concern itself with vertical conflicts, the interests of

Restatement (Second) of Conflicts of Laws § 187, cmt. e (1971). The Court has recognized that freedom of contract includes the freedom to select applicable law and that the parties' choice of law should guide a court's interpretation of an arbitration clause.[3] *See Volt*, 489 U.S. at 470 (holding that the FAA did not preempt a California statute that stays arbitration pending related litigation specifically because the parties incorporated a California choice of law provision into the contract); *cf. Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (declining to apply state law only because the state law required by the choice of law provision directly conflicted with the law required by the arbitration clause).

Sophisticated parties expect that their contractual choices will be enforced in the manner intended. In circuits deferring to state law,[4] this expectation is met. But, in circuits deferring to

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contracting parties do not evaporate in the context of vertical conflicts.

[3] The inclusion of the inquiry into whether a federal rule would disrupt commercial relationships predicated on state law in the factors enumerated by *United States v. Kimbell Foods,* 440 U.S. 715, 728–29 (1979), suggests that consideration of the expectations of contracting parties, particularly with regard to state law, is appropriate in questions of federal preemption.

[4] The Fifth and Ninth Circuits look to relevant state law to define arbitration. *Portland GE v. U.S. Bank Tr. N.A.*, 218 F.3d 1085, 1086 (9th Cir. 2000); *Hartford Lloyds Ins. Co. v. Teachworth*, 898 F.2d 1058, 1062-63 (5th Cir. 1990).

federal common law,[5] the parties' choice of law is ignored, resulting in the evisceration of parties' freedom to contract the terms of a future dispute. Thus, it is no surprise that sophisticated parties negotiate for their contracts to be governed by the law of states located in the Fifth and Ninth Circuits. Theodore Eisenburg and Geoffrey P. Miller, *The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly Held Companies*,, 56 DePaul L. Rev 335, 359, Table 6 (2007); Richard R.W. Brooks & Sarah Sanga, *Commercial Arbitration Agreement Between Sophisticated Parties: An Empirical View* (Feb. 24, 2013), *available at* http://www.law.yale.edu/documents/pdf/cbl/Brooks Sanga2013.pdf (last visited July 11, 2013). Sophisticated parties want to ensure that should their contracts be litigated, the presiding court will enforce those contracts according to the terms and the parties' intent. The current circuit split robs

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[5] Eight other circuits, including the Second Circuit, disregard state law definitions of arbitration and instead permit federal judges to fashion a definition. *See* P.A. 8a; *see also Fit Tech, Inc. v. Bally Total Fitness Holding Corp.*, 374 F.3d 1, 6 (1st Cir. 2004); *Dluhos v. Strasberg*, 321 F.3d 365, 370 (3d Cir. 2003); *United States v. Bankers Ins. Co.*, 245 F.3d 315, 322 (4th Cir. 2001); *Evanston Ins. Co. v. Cogswell Props, LLC*, 683 F.3d 684 (6th Cir. 2012), *reh'g en banc denied* 10-2075 Docket (6th Cir., July 11, 2012); *Dow Corning Corp. v. Safety Nat'l Cas. Corp.*, 335 F.3d 742, 747-48 (8th Cir. 2003); *Salt Lake Tribune Publ'g Co., LLC v. Mgmt. Planning, Inc.*, 390 F.3d 684, 689 (10th Cir. 2004), *reh'g denied* 03-4256 Docket (10th Cir. Jan. 27, 2005); *Advanced Bodycare Solutions, LLC v. Thione Intl, Inc.*, 524 F.3d 1235, 1239 (11th Cir. 2008);

sophisticated parties of the confidence in any ability to do so.

The Fifth and Ninth Circuits honor contractual parties' choices and defer to the relevant state's definition of arbitration when the contract at issue contains a choice of law provision. *See Portland GE*, 218 F.3d at 1089-90 , (deferring to the parties' choice of law and applying Oregon's statutory definition of arbitration); *Wasyl, Inc. v. First Boston Corp.*, 813 F.2d 1579, 1582 (9th Cir. 1987) (deferring to the California state law definition of arbitration because the contract reflected the parties intent to apply California law); *Teachworth*, 898 F.2d at 1062 (deferring to the Texas definition of arbitration).

The differences between state law definitions of arbitration are significant. They represent real options open to contracting parties. For example, under California law, arbitration agreements include "valuations and appraisals and other proceedings." Cal. Code Civ. Proc. § 1280(a); *Kacha v. Allstate Ins. Co.*, 140 Cal. App. 4th 1023, 1031 (Cal. Ct. App. 4th Dist. 2006); *see also Doan v. State Farm Gen. Ins. Co.*, 195 Cal. App. 6th 1082, 1093 (Cal. Ct. App. 6th Dist. 2011). However, "[u]nder Texas Law, it is clear that an insurance appraisal which only determines the value of loss is not an arbitration." *Teachworth*, 898 F.2d at 1062. Deference to state law ensures that parties entering into insurance agreements have a concrete choice. Should they agree that California law will govern the contract, then any valuation or appraisal would be considered arbitration. But, if they choose Texas law, it would

not. Thus, circuits applying the minority rule preserve and protect freedom of contract.

On the other hand, circuits applying federal common law deprive contracting parties of *any* choice, and instead impose on them an incomplete and uncertain definition of arbitration. Federal common law embraces the *AMF* "essence of arbitration" standard. *AMF, Inc. v. Brunswick Corp.*, 621 F. Supp. 456 (E.D.N.Y. 1985). The *AMF* decision is "based heavily on a sketchy and hardly conclusive historical analysis of general meaning of the word 'arbitration'," but this incomplete analysis has nevertheless become influential in the federal common law definition of arbitration. Ian MacNeil *et al.*, *Federal Arbitration Law: Agreements, Awards, and Remedies Under the Federal Arbitration Act* (Little, Brown 1995). In addition to its incomplete analysis of the definition of arbitration, the *AMF* rationale defies precision and "lends itself to subjective and time consuming inquiries into whether a particular process is 'reasonably likely' to resolve a dispute, thus invoking arbitration law." Thomas J. Stipanowich, *The Arbitration Penumbra: Arbitration Law and the Rapidly Changing Landscape of Dispute Resolution*, 8 Nev. L.J. 427, 439-40 (2007).

The uncertainty inherent in a federal common law definition undermines the intent of parties that negotiate and contract for choice of law and arbitration provisions. The federal common law definition is static. Parties cannot anticipate how courts applying federal common law will interpret

the word arbitration. Where contracting parties in the Fifth and Ninth Circuits can decide whether they want an appraisal to be considered an arbitration (California law) or not (Texas law), a contracting party in circuits applying federal common law cannot. The best they can do is guess, which provides them no more confidence than tacking each federal common law definition on a wall, closing their eyes and throwing a dart to one.

The uncertainty caused by the circuit split and application of federal common is counterproductive to the federal interest in promoting arbitration. This is evidenced by the fact that a mere 11% of all contracts include an arbitration clause. Theodore Eisenberg & Geoffrey P. Miller, *The Flight From Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in the Contracts of Publicly, 56* DePaul L. R. 335 (2007). Sophisticated parties would prefer to litigate their conflicts in the courtroom where they can anticipate, based on prior case law, how the court will interpret the applicable contract.

II. The majority of circuits' application of the federal common law definition of "arbitration" disadvantages unsophisticated parties dealing with sophisticated parties.

Resolution of the circuit split in favor of deference to state law will benefit unsophisticated parties as much, if not more, than sophisticated ones. Where sophisticated parties' primary focus is protecting themselves from courts' encroachment on their

freedom to contract, unsophisticated parties' primary focus is protecting themselves from sophisticated parties. Their reasons may differ, but the end-goal for all contracting parties is the same – consistency in contract interpretation through the deference to state law definitions of arbitration.

While relatively few contracts entered into by only sophisticated parties contain ADR provisions, a majority of contracts entered into between a sophisticated party and an unsophisticated party contain ADR provisions. Theodore Eisenberg, *et al*, *Arbitration's Summer Soldiers: An Empirical Study of Arbitration Clauses in Consumer and Nonconsumer Contracts*, 41 U. Mich. J.L. Reform 871, 883 (2008) (noting a majority of employment and consumer contracts contain ADR provisions while very few material, non-labor, non-consumer contracts do). A significant number of unsophisticated parties assume that ADR provisions are economically efficient and result in faster resolutions than court proceedings and thus benefit them.[6] This assumption naïvely ignores the uneven

[6] Theodore J. St. Antoine, *Mandatory Arbitration: Why It's Better Than It Looks*, 42 U. Mich. J.L. Reform 783, 810 (2008) ("The vast majority of ordinary lower and middle income employees, with incomes less than $60,000 a year, cannot get access to courts to vindicate their contractual and statutory rights. . . .Their only practical hope is the generally cheaper, faster, and more informal process of arbitration."); Christopher R. Drahozal, *Arbitration Costs and Forum Accessibility: Empirical Evidence*, 41 U. Mich. J.L. Reform 813, 826 (2008) ("The majority (if not the substantial majority) of survey respondents (51%–89%) stated that arbitration was 'less expensive' or 'more cost effective' than litigation.").

bargaining power and availability of information during contract negotiations which may undermine any expected efficiencies.

The sophisticated party typically drafts the contract. Even when unintentional, the inclusion of an ADR provision results in the imposition of disadvantages on the unsophisticated party. This is because on the whole, sophisticated parties have more experience in ADR than unsophisticated parties. The advantage of being a repeat-player rather than a one-shot player can include expertise, access to specialist advocates, the ability to make informed selection of arbitrators, and the ability to influence ADR rules. *See* Lisa B. Bingham, *Employment Arbitration: The Repeat Player Effect*, 1. Emp. Rts. & Emp. Pol'y J. 189, 195 (1997). Empirical studies show that when the opposing party is a repeat player in cases, employees recover only 11% of their demand, whereas in non-repeat player cases they recover 48%. *Id.* at 210. This difference is statistically significant.

Further, asymmetries of information introduce inefficiencies into the market. Unsophisticated parties do not understand the significance of what is commonly referred to as "boilerplate language." Jean R. Sternlight, *Panacea Or Corp. Tool?: Debunking The Supreme Court's Preference for Binding Arbitration*, 74 Wash. U. L.Q. at 688 (1996). Because of this lack of understanding, the sophisticated party can impose a personally beneficial term that harms the unsophisticated party. This results in hidden costs to the contract.

A party's lack of information regarding the true costs to contract has the consequence of two inefficiencies - the quantity effect and the quality effect.[7] Because unsophisticated parties do not know the true cost to contract, they enter into more contracts than they would otherwise. *See id.* at 718. And, because unsophisticated parties do not understand the content of the contract, they enter into a contract that conflicts with their intent, needs and capabilities. *See id.*

Application of federal law definitions of arbitration exacerbates this asymmetry and inefficiency. When an unsophisticated party reads the word arbitration, he envisions what might be called classic arbitration – a hearing conducted by a neutral third party, where the parties are heard and submit evidence, and the neutral third party issues a final, binding decision or award. *See* Stipanowich, 8 Nev. L.J. at 436. An unsophisticated party perceives

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[7] Worse still, there are disincentives for unsophisticated parties to become more informed about their contracts. Professor Goldman notes that

> [o]ften the marginal cost of acquiring information about secondary contract terms exceeds the marginal benefits from such information. . . . Given the cost of professional advice relative to the purchase price of most consumer goods, purchasers would be acting irrationally if they incurred the costs required to fully comprehend contract terms.

See Lee Goldman, *My Way or the Highway: The Law and Economics of Choice of Forum Clauses in Consumer Form Contracts*, 86 Nw. U. L. Rev. 700, 717 (1992).

the neutrality and opportunity to be heard as a fair process. This perception perhaps bolsters the confidence and satisfaction of an unsophisticated party more than the actual outcome of the proceeding. *See* Bingham, 1 Emp. Rts. & Emp. Pol'y J. at 190 (1997). ("The procedural justice literature strongly suggests that the mere fact of a hearing before an impartial decision maker will enhance employees' satisfaction with the outcome, whether they win or lose."). The more ADR processes diverge from classic arbitration, the wider the gap between the information asymmetry becomes. The federal common law, under the influence of *AMF* and its progeny, has diverged quite far. *See AMF,* 621 F. Supp. at 460 ("An adversary proceeding, submission of evidence, witnesses and cross-examination are not essential elements to arbitration").

The Court has held that "ambiguities as to the scope of the arbitration clause itself must be resolved in favor of arbitration." *Volt*, 489 U.S. at 476. Resolving ambiguities in such a fashion could result in adoption of a definition of arbitration solely because it is the broader definition. Where the federal common law definition encompasses a proceeding that the chosen state law excludes, courts may interpret *Volt* as requiring use of the federal common law definition. However, in a subsequent decision, the Court made clear that principle cannot be divorced from the common law rule that ambiguities in a contract must be resolved against the drafter, "to protect the party who did not choose the language from an unintended or unfair result." *Mastrobuono,* 514 U.S. at 63. Because the majority

of "mandatory arbitration agreements are often presented on a take-it-or-leave-it basis [and] employers are free to structure arbitration in ways that may systematically disadvantage employees," employees and other unsophisticated parties are almost never the ones who chose the ambiguities regarding what constitutes arbitration. *Cole v. Burns Int'l Security Serv.*, 105 F.3d 1465 (D.C. Cir. 1997). Thus, this Court should construe the ambiguity in favor of the unsophisticated party's interests, which would almost always result in deferring to state law definitions of arbitration, particularly when federal common law would include proceedings differing from the "classic" arbitration.

The ever-shifting federal common law definition of arbitration introduces considerable uncertainty and makes preparing for ADR proceedings difficult. These difficulties are magnified for unsophisticated parties. Keeping apprised of the changing federal common law requires vast resources. While sophisticated parties may prefer to allocate their resources elsewhere, unsophisticated parties rarely even have the resources to commit. A one-shot player cannot be expected to follow the uncertain path of federal common law in the off-chance that it enters into a contract providing for arbitration. Requiring this of any contracting party, let alone an unsophisticated one, would be irrational to the point of ludicrous. *See* Goldman 86 Nw. Univ. L. Rev. at 717. Further, an unsophisticated party does not know that it should monitor the federal common law definition of arbitration. Rather, it would logically presume that the definition of arbitration would be

governed by the contract's choice of law provision. But, circuits applying federal common law disregard these choice of law provisions.

The asymmetric advantages of arbitration are compounded by deference that courts afford arbitration awards. FAA §10. Courts rarely overturn arbitral decisions and leave unsophisticated parties with no means of appealing an unfavorable decision. Section 10 of the FAA preserved this considerable deference to arbitrators' decisions. Courts will intervene and set aside his or her decision only in certain narrow circumstances. *First Options of Chicago, Inc*, 514 U.S. at 942; *see also Advest Inc. v. McCarthy*, 914 F.2d 6, 8 (1st Cir. 1990); *Stark v. Sandberg, Phoenix, & von Gontard*, 381 F.3d 793 (8th Cir. 2004) *cert denied* 54 U.S. 1027 (2005); *Wallace v. Buttar*, 378 F.3d 182, 189 (2d Cir. 2004).

Those very narrow circumstances are limited almost entirely to partiality or procedural misconduct by the arbitrator. Where a decision is predicated on an error of fact or law, which would be appealable if the error occurred in a trial court, the decision is inviolable absent procedural misconduct. As the definition of arbitration under federal common law gets farther from classic arbitration, there is less and less procedure to review. Even when a more sophisticated party has been able to develop a relationship with an arbitrator, evident partiality is exceptionally difficult to prove. *See e.g. Carmack v. Chase Manhattan Bank (USA)*, 521 F. Supp. 2d 1017, 1027 (N.D. Cal. 2007) (finding a party's regular use of arbitration provider in similar

disputes insufficient to demonstrate 'evident partiality'); *Andros Compania Maritima v. Marc Rich & Co.*, 579 F.2d 691, 701 (2d Cir. 1978) (evident paritiality did not exist in case in which arbitrator and the chief executive of a party had previous served together on 19 other arbitration panels); *but see Morelite Constr. Corp. v. New York City Dist. Council Carpenters Benefit Funds*, 748 F.2d 79, 84 (2d Cir. 1987) (father-son relationship between arbitrator and an officer of one of the parties did rise to the level of "evident partiality"). An unsophisticated party who is caught by surprise by the minimal procedure in an "essence of arbitration" proceeding, might incorrectly expect that he will get a more traditional hearing in a higher court. If he is under federal common law, he is out of recourse and out of luck.

CONCLUSION

For the foregoing reasons, *amicus curiae* urge the Court to grant the petition for writ of certiorari.

Respectfully submitted,

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