SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF ALBANY

OWNER OPERATOR INDEPENDENT DRIVERS ASSOCIATION, *et al.*,	:	
	:	**Index No.: 5551-13**
Plaintiffs,	:	**RJI No.: 01-13-111950**
	:	**Hon. James H. Ferreira**
v.	:	
NEW YORK STATE DEPARTMENT OF TAXATION AND FINANCE, *et al.*,	:	
Defendants.	:	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR FINAL APPROVAL OF: (1) SETTLEMENT AGREEMENT; (2) APPLICATION FOR ATTORNEYS' FEES, EXPENSES, CLASS REPRESENTATIVE AWARDS, AND *CY PRES* DISTRIBUTION; AND (3) CLASS DISTRIBUTION PLAN

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I. INTRODUCTION

Plaintiffs submit this memorandum of law in support of their motion, pursuant to NY CPLR 908, for an order granting final approval to the Settlement Agreement executed between Plaintiffs and Defendants on September 21, 2016.

On November 15, 2016, the Court granted preliminary approval to the Settlement Agreement; Plaintiffs' Application for Attorneys' Fees, Expenses, Class Representative Awards, and *Cy Pres* Distribution; the Proposed Class Notice; and the Class Distribution Plan. Subsequently, Class Counsel provided notice to class members in accordance with the Court's order. Of the more than 111,000 class members, *none* raised any objections, and only four opted out of the settlement. Moreover, all of the class members who contacted Class Counsel regarding the proposed Settlement Agreement merely sought incidental information about the case—such as what the class notice meant and what their expected refund amount was—or desired to inform Class Counsel their address had changed.

By any measure, the reaction of the class to the proposed Settlement Agreement has been overwhelmingly positive, and serves to confirm that the settlement meets all criteria for final approval. The $44.4 million settlement provides a practically complete refund of the wrongfully-collected registration and decal fees underlying this case, plus interest, subject to attorneys' fees and expenses. The settlement is fair, adequate, reasonable, and in the best interest of the class. Plaintiffs therefore respectfully request that the Court grant their motion for final approval.

II. BACKGROUND

Plaintiffs' October 14, 2016 Memorandum in support of their Motion for Preliminary Approval [hereinafter "Plaintiff's Motion for Preliminary Approval"] provides a detailed

discussion of the procedural history of the case and the details of the proposed Settlement Agreement. The essential terms of the proposed Settlement Agreement are as follows:

(a) Settlement Amount – Defendants agreed to pay $44,429,596.00 ("Settlement Payment") to resolve the class-wide damages claims in this matter, and Plaintiffs have agreed to the dismissal of all damages claims against Defendants, with prejudice, subject to the provisions of the Settlement Agreement. (Settlement Agreement at ¶¶ 1-3, copy attached as Exhibit A to accompanying Affidavit of Daniel E. Cohen, Esq. [hereinafter "Cohen aff"].)

(b) Attorneys' Fees and Expenses – The Parties agreed that Plaintiffs would seek an award by the Court of attorneys' fees and expenses to be paid out of the Settlement Payment prior to distribution of tax refunds to class members from the class common fund ("Common Fund"). (*Id.* at ¶ 4.) The attorneys' fees would be requested on a percentage of recovery basis in the sum of twenty-five percent (25%) of the Common Fund, or $11,107,399.00, plus previously incurred and currently estimated future expenses of $500,000.00, for a total award of $11,607,399.00. (*Id.*). Defendants agreed to take no position on Plaintiffs' request for attorneys' fees. (*Id.*)

(c) Incentive Awards – The Settlement Agreement provides for the payment of $1,500 as an Incentive Award to each of the four Individual Named Plaintiffs, for a total of $6,000, to be paid prior to distribution of refunds to class members from the Common Fund. (*Id.* at ¶ 5.)

(d) Undeliverable Funds – The Settlement Agreement provides that on or before sixty (60) days from the conclusion of the Class Distribution Plan, any undeliverable or unclaimed settlement funds shall be used to pay, in the following priority: (1) any previously unreimbursed expenses incurred by Plaintiffs; (2) attorneys' fees expended after the Court's final approval of the Settlement Agreement; (3) a *cy pres* distribution to the OOIDA Foundation, Inc., a not-for-profit charitable organization subject to the provisions set forth in IRS Section 501(c)(3). (*Id.* at ¶ 6.)

III. ARGUMENT

At the final approval stage, the Court must determine if the proposed Settlement Agreement is "fair, adequate, reasonable, and in the best interest of class members." (*Klein v Robert's Am. Gourmet Food, Inc.*, 28 AD3d 63 [2d Dept 2006].) It is well established that "agreements of compromise are generally favored by the courts," (*Weil v Weil*, 227 AD 378, 385 [1st Dept 1929]), and this policy is "'particularly [apt] in the class action context.'" (*Wal-Mart Stores, Inc. v Visa U.S.A., Inc.*, 396 F3d 96, 116 [2d Cir 2005], quoting *In re PaineWebber Ltd. P'ships Litig.*, 147 F3d 132, 138 [2d Cir 1998].)

The proposed Settlement Agreement in this case is eminently fair, adequate, reasonable, and in the best interest of class members. First, notice of the proposed Settlement Agreement was delivered in accordance with the Court's November 15, 2016 Order, and the successful delivery rate (91%) exceeded the average successful delivery rate in class actions generally. Moreover, the reception by the class to the proposed Settlement Agreement has been decidedly positive. Not a single class member lodged an objection, and only four class members opted out of the settlement. (Affidavit of Bailey Hughes at ¶¶ 16-17 [hereinafter "Hughes aff"]; Cohen aff at ¶ 32.) Class Counsel received several dozen phone calls and email messages from class members, all of which merely desired to inform Class Counsel of address changes or sought more information about the settlement. (Cohen aff at ¶ 29.) Class Counsel were able to satisfactorily answer all of the questions they received. (*Id.*) Second, the Settlement Agreement is the result of good-faith, arm's-length negotiations over a lengthy period of time. (*Id.* at ¶ 11, 15.) Third, the Settlement Agreement has been ratified by experienced counsel, including counsel for the State of New York (*Id.* at ¶¶ 14-15.) Fourth, the terms of the proposed Settlement Agreement provide a practically complete refund for class members, plus interest, subject to attorneys' fees and expenses. (*Id.* at

¶ 13.) It is unlikely that class members could achieve a better recovery through further litigation, and even if they could, the cost of doing so would likely exceed the amount they would be able to recover. In sum, every factor supports final approval of the Settlement Agreement.

A. PLAINTIFFS PROVIDED NOTICE IN ACCORDANCE WITH NEW YORK LAW AND THE REACTION OF THE CLASS TO THE PROPOSED SETTLEMENT HAS BEEN POSITIVE

CPLR 904(c) gives the Court broad discretion in directing the form and manner of notice to be given to class members. "Although the statute requires court approval of the notice, it does not, with few exceptions, dictate the contents of the notice." (*Vickers v Home Fed. Sav. & Loan Assn. of E. Rochester*, 56 AD2d 62, 65 [4th Dept 1977] [interpreting CPLR 904], citing 2 Weinstein-Korn-Miller, NY Civ Prac par 904.07, p 9-89; *accord Colt*, 155 AD2d at 160 [interpreting CPLR 908].) In this instance, the Court approved a procedure by which a comprehensive notice of the proposed Settlement Agreement was mailed to every class member at the address the class members themselves had provided to the State of New York when they paid the registration and decal fees. (Hughes aff at ¶ 9; Cohen aff at ¶ 27.) In so doing, Class Counsel utilized a computerized database ("Class Listing"), provided directly to them by the State of New York, which included the names and addresses of class members, along with their tax identification numbers (Hughes aff at ¶ 9; Cohen aff at ¶ 27.)

In accordance with New York law, the class notice informed class members of the pending action, the composition of the class, the terms of the proposed Settlement Agreement, the right to object or opt out and the procedure by which to do so, the time limits for objecting or opting out, and the details of the Fairness Hearing, including its date, time, and location. (Cohen aff at ¶ 25; *see Colt*, 155 AD2d at 160; *Vickers v Home Fed. Sav. & Loan Assn. of E. Rochester*, 56 AD2d 62, 65 [4th Dept 1977].) In addition, Class Counsel's class administration agent, First Class, Inc. ("First Class") established a website where class members could learn more about the case, and

where several documents pertinent to the case were posted, including the Settlement Agreement, the class notice, the Court's January 22, 2016 Decision & Order & Judgment, Plaintiffs' Motion for Preliminary Approval, and the Court's Order granting that motion. (Hughes aff at ¶ 7.)

Before mailing notice to the class, First Class "followed its standard practice of processing the list through the Coding Accuracy Support System (CASS) and the NCOA (National Change of Address) update process of the U.S. Postal Service and the Canada Post," which allowed First Class to correctly format and update any addresses for which the postal agencies were able to provide updated or corrected information. (*Id.* at ¶ 10.) On December 20, 2016, notice was mailed to 111,116 class member addresses.[1] (*Id.* at ¶ 12.) As of February 10, 2017, 9,997 notices had been returned as undeliverable with no forwarding address or further information provided by the U.S. Postal Service or Canada Post. (*Id.* at ¶ 14.)

The notice procedure was successful, with a delivery rate of approximately 91%.[2] This rate is above average and on the high end of the range suggested by the Federal Judicial Center, which suggests that "[i]t is reasonable to reach between 70-95% [of the class]. A study of recent published decisions showed that the median reach calculation on approved notice plans was 87%." (*See* Federal Judicial Center, *Judges' Class Action Notice and Claims Process Checklist & Plain Language Guide* 3 [2010], available at http://www.fjc.gov/public/pdf.nsf/lookup/NotCheck.pdf/$file/NotCheck.pdf [accessed February 13, 2017].) The approximately 9% of notices that were returned as undeliverable correspond to just $1,020,866.71, or approximately 3.1% of the Net Common Fund.[3] (Cohen aff at ¶ 32.) Additionally, the Class Administrator has been able to find

[1] The Class Listing includes 111,117 entries; however, one entry was an exact duplicate and was removed from the Class Administrator's mailing list. (Hughes aff at ¶ 11.)

[2] 9,997/111,116 = 8.99%.

[3] 1,020,866.71/32,816,197.00 = 3.11%.

new addresses for 1,814 of the class members whose notices were returned as undeliverable. (*Id.* at 32; Hughes aff at ¶ 19.) Plaintiffs intend to remit refund checks to the new addresses following final approval of the proposed Settlement Agreement (Cohen aff at 32),[4] resulting in a successful refund rate of over 92% of the class.

The efforts of Class Counsel and First Class readily satisfy the due process requirement that "individual notice must be provided to those class members who are identifiable through reasonable effort." (*See Eisen v Carlisle and Jacquelin*, 417 US 156, 175 [1974] [interpreting Fed Rules Civ Pro rule 23]; *see also* Hughes aff at ¶ 22.) Plaintiffs began with a list of addresses that the class members themselves had provided when they registered their vehicles with the State of New York. Then, following customary procedure (*see* Hughes aff at ¶ 10; *see also* 1 McLaughlin on Class Actions § 5:80 (13th ed) [Oct. 2016]), First Class cross-checked this list of addresses against databases maintained by the U.S. Postal Service and Canada Post to ensure that the addresses were updated and accurate. The method of notice and the high rate of successful mailings were more than adequate to allow class members to file objections to the proposed Settlement Agreement or to alert the Court to any additional considerations that had not been submitted by counsel. (*See Avena v Ford Motor Co.*, 85 AD2d 149, 155 [1st Dept 1982].)

Several dozen class members called the toll-free number listed on the class notice and website and left voicemail messages for Class Counsel; as of February 15, 2017, Class Counsel had received 70 voicemails from the toll-free number, as well as several emails and calls made directly to The Cullen Law Firm. (Cohen aff at ¶ 30.) Nearly all of the class members who contacted Class Counsel sought basic information about the suit, and several called solely to update their address. (*Id.*) Class Counsel submits that it answered all inquiries expeditiously and

[4] Because the deadline for receiving opt-out notices and objections has passed, mailing notices to these addresses would provide few, if any, benefits, and any benefit would likely be outweighed by the cost of mailing.

satisfactorily. (*Id.*) As of February 10, 2017, no class member had objected to the proposed Settlement Agreement, and only four had opted out. (Hughes aff at ¶¶ 16-17; Cohen aff at ¶ 32.) The high degree of success in mailing notice to the class members, coupled with the absence of any opposition to the proposed Settlement Agreement, provides compelling evidence of the settlement's fairness.

B. THE SETTLEMENT IS THE RESULT OF GOOD-FAITH, ARM'S-LENGTH NEGOTIATIONS

The Settlement Agreement did not easily come to fruition. From the inception of the suit, Plaintiffs and Defendants strongly advocated for their respective positions. After Plaintiffs were granted summary judgment on the issue of liability, Plaintiffs were permitted additional discovery to determine the scope of damages. Class Counsel and the New York Attorney General reviewed massive amounts of data and engaged in several months of intense negotiations before finally agreeing on the terms of the Settlement Agreement.

"A 'presumption of fairness, adequacy, and reasonableness may attach to a class settlement reached in arm's-length negotiations between experienced, capable counsel after meaningful discovery.'" (*Wal-Mart Stores*, 396 F3d at 116, quoting *Manual for Complex Litigation, Third*, § 30.42 [1995], *cited with approval in Fiala v Metropolitan Life Ins. Co., Inc.*, 27 Misc 3d 599 [Sup Ct, NY County 2010].) The instant Settlement Agreement is a true compromise reached after a lengthy period of litigation, free from collusion or any indication that Class Counsel have done anything but diligently and zealously pursue the best interests of the class. Again, the absence of a single objection from a class of over 100,000 members underscores this conclusion.

C. THE SETTLEMENT HAS BEEN RATIFIED BY EXPERIENCED COUNSEL

"Approval of the settlement by experienced counsel and the participation in the negotiations . . . by a government agency committed to the protection of the public interest and its

endorsement of the agreement are additional factors which weigh heavily on the side of approval of the settlement." (*Wellman v Dickinson*, 497 F Supp 824, 830 [SD NY 1980], *affd* 682 F2d 355 [2d Cir 1982], *cert denied sub nom. Dickinson v Securities & Exch. Commn.*, 460 US 1069 [1983], *cited with approval in State of N.Y. v Philip Morris, Inc.*, 179 Misc 2d 435, 439 [Sup Ct, NY County 1998], *affd* 693 NYS2d 36 [1st Dept 1999].)

In this case, lead Class Counsel, The Cullen Law Firm, PLLC, specializes in class action law with an emphasis on civil rights actions on behalf of truck owner-operators, and the attorneys who have represented Plaintiffs in this matter have extensive experience in complex civil litigation. (Cohen aff at ¶¶ 5, 8, 14; *see also* Plaintiffs' Motion for Preliminary Approval at 10 & accompanying affidavits.) Class Counsel, guided by their familiarity with the legal and factual issues presented in this matter and their experience in complex class action cases, zealously negotiated with Defendants to achieve the maximum possible refund for class members under applicable law. Moreover, Class Counsel negotiated the Settlement with the Office of the New York Attorney General, which has agreed to the terms of the Settlement. These factors "invest the settlement with a presumption of validity." (*See Philip Morris*, 179 Misc 2d at 451.)

D. THE SETTLEMENT AMOUNT IS FAIR, ADEQUATE, AND REASONABLE

"[D]etermining the adequacy of a proposed settlement generally involves balancing the value of that settlement against the present value of the anticipated recovery following a trial on the merits, discounted for the inherent risks of litigation." (*Id.* at 73.) In determining whether to approve a class settlement:

> The most important factor is the strength of the case for plaintiffs on the merits, balanced against the amount offered in settlement . . . . In this connection, the judgment of counsel to plaintiffs (the class representatives) must be considered as well as the extent of support from interested parties and the presence or absence of good faith bargaining. The nature of any questions of law and issues of fact is also a factor for consideration.

(*State of West Virginia v Pfizer & Co.*, 314 F Supp 710, 740 [SD NY 1975], *affd* 440 F2d 1079 [2d Cir 1971], *cert den sub nom. Cotler Drugs v Pfizer & Co.*, 404 US 871, *cited with approval in Klurfeld v Equity Enters., Inc.*, 79 AD2d 124, 135 [2d Dept 1981]; *see also Matter of Colt Indus. Shareholder Litig*, 155 AD2d 154, 160 [1st Dept 1990].)

In this instance, the Settlement Amount constitutes a substantially complete refund of the illegally collected fees underlying this suit under *McKesson Corp. v. Div. of Alcoholic Beverages* (496 US 18 [1990]). As Class Counsel earlier explained in their motion for preliminary approval:

> At minimum, it is an eminently fair compromise that guarantees the class members a meaningful recovery in the face of uncertainty and delay. The Settlement Agreement amount of $44.4 million reasonably takes into account the Plaintiffs' likelihood of success in recovering the full amount, the delay inherent in a complex legal battle, the unpredictability of protracted litigation, and the prospect of a smaller recovery. In short, the Settlement provides a decisive recovery in the form of a substantial refund to every class member, plus interest. And it provides refunds to class members, in cash, *immediately*.

(Plaintiffs' Motion for Preliminary Approval at 9.)

Even in the absence of a settlement on such favorable terms, there would be no guarantee of a greater recovery at trial, and any potential improvement in the amount of damages obtained would likely be offset by: (1) the likelihood of receiving a lower award, (2) the delay inherent in any further litigation, and (3) the possibility of an appeal, exacerbating each of the first two factors. (*See Rosenfeld v Bear Stearns & Co., Inc.*, 237 AD2d 199, 200 [1st Dept 1997] [approving a class settlement because, *inter alia*, "the cost of establishing . . . [additional] damages would likely exceed the amount recovered"].)

Moreover, as established in Plaintiffs' Motion for Preliminary Approval, the proposed Settlement Agreement provides for a reasonable award of attorneys' fees based on the percentage of recovery approach, which is widely used by federal and state courts in New York. (*See* Plaintiffs' Motion for Preliminary Approval at 11-20 & accompanying affidavits; *see also Michels*

v Phoenix Home Life Mut. Ins. Co., 1997 WL 1161145, *31 [Sup Ct, NY County, Jan. 7, 1997, No. 95/5318]; *In re MetLife Demutualization Litig.*, 689 F Supp 2d 297, 357 [ED NY 2010]; *Savoie v Merchs. Bank,* 166 F3d 456, 460 [2d Cir 1999]; *Wal-Mart Stores*, 396 F3d at 121.) Because of the magnitude and complexity of the litigation, the difficulty and uncertainty of recovery, and the fact that Plaintiffs did not benefit from any prior judgment in this matter, the reasonable proportion of the award sought by Class Counsel is justified and reasonable. Finally, and again, no class member voiced any objection to the amount of the proposed fee award. (Cohen aff at ¶ 32; Hughes aff at ¶ 16.)

IV. DISTRIBUTION PLAN

As explained in Plaintiffs' Motion for Preliminary Approval, Defendants have provided Plaintiffs with a database that includes all information necessary to calculate and distribute refunds to individual class members. (Cohen aff at ¶ 28.) Plaintiffs' database expert has identified each registration and decal fee payment made by every class member during the entirety of the settlement period, from June 1, 2009 to March 8, 2016. (*Id.*) Following the deduction of attorneys' fees, expenses, and incentive awards, Plaintiffs propose to allocate refunds for Series 20 in the amount of $12.11 per truck, Series 21 in the amount of $13.15 per truck, and Series 22 in the amount of $11.55 per truck.[5] (*See* Plaintiffs' Motion for Preliminary Approval at 25 & accompanying affidavit of Brian Kim at ¶¶ 17-26.)

Defendants have agreed to pay the Settlement Amount no later than 120 days after the Court grants final approval to the proposed Settlement Agreement. (Settlement Agreement at ¶

[5] In addition to the refunds for registration and decal fees, the Settlement Amount includes a total of $5,336.96 to refund charges for replacement certificates of registration and $74.10 to refund charges for duplicate decals. (Plaintiffs' Motion for Preliminary Approval at 25 & accompanying affidavit of Brian Kim at ¶ 27.) The *de minimis* individual refund amounts for replacement certificates and duplicate decals have been calculated using the formula detailed in Plaintiffs' memorandum in support of preliminary approval. (*Id.*)

1.)[6] Once the Settlement Amount is delivered to Class Counsel, it will be deposited into an escrow fund held by Class Counsel. (Cohen aff at ¶ 35.) Class Counsel has made arrangements with First Class to assist in the processing, printing and mailing of individual class member refunds. (*Id.*)

The class notice, as approved by the Court, informed motor carriers that they are required to reimburse or pass through refunds to independent owner-operators in instances where the taxes were initially paid by, or charged back to, the owner-operators. This practice is consistent with prior tax refund cases handled by Class Counsel, in which courts have required such reimbursement, because the owner-operator had actually incurred the cost of the tax payments. (Cohen aff at ¶¶ 23-24.) As earlier noted, no class member objected to any portion of the proposed Settlement Agreement, including the pass-through requirement. (*Id.* at ¶ 31; Hughes aff at ¶ 16.) To ensure compliance with this requirement, Plaintiffs proposed in their Motion for Preliminary Approval, and propose again here, that a Verification Form be completed by all class members who receive refunds in instances where the taxes were initially paid by, or charged back to, owner-operators employed by the class member. A copy of the Verification Form is attached as Exhibit E to the accompanying affidavit of Daniel E. Cohen. The Court granted preliminary approval to this distribution procedure and no class member objected. (Cohen aff at ¶ 32; Hughes aff at ¶ 16.)

The Settlement Agreement provides that upon the conclusion of the distribution of refunds to class members from the Common Fund, any undeliverable or unclaimed settlement funds shall be used to pay, in the following priority: (1) any previously unreimbursed expenses incurred by Plaintiffs; (2) attorneys' fees expended after the Court's final approval of the Settlement Agreement; (3) a *cy pres* distribution to the OOIDA Foundation, Inc., a not-for-profit charitable

[6] The Settlement Agreement specifies that if payment is not made by this deadline, Plaintiffs may file a motion seeking post-judgment interest. (Settlement Agreement at ¶ 1.)

organization subject to the provisions set forth in IRS Section 501(c)(3). (Settlement Agreement at ¶ 6.) Again, there were no objections to this plan. (Cohen aff at ¶ 32; Hughes aff at ¶ 16.)

Plaintiffs propose the following schedule[7] for distribution of the Settlement Fund:

Event	Deadline
Payment of Settlement Amount[8] by Defendants	On or before 120 days following entry of the Court's Order granting final approval
Deadline for class members to cash settlement checks[9]	90 days following date on which checks are mailed to class members
Deadline for mediation and receipt of verification forms & excess funds[10]	6 months following date on which checks are mailed to class members
Distribution of undeliverable funds according to the Settlement Agreement and the Court's Order granting final approval	30 days following deadline for mediation and pass-through of funds to owner-operators
Plaintiffs' final report to the Court regarding disbursement of Settlement Fund due	30 days following redistribution of undeliverable funds

V. CONCLUSION

Every factor before the Court supports final approval of the proposed Settlement Agreement. For the reasons stated above, and in Plaintiffs' memorandum in support of their

[7] *See* Cohen aff at ¶ 35.

[8] Pursuant to the Settlement Agreement, the refund amount due to those who opted out of the class shall be deducted from the Settlement Amount and withheld by Defendants. (Settlement Agreement at ¶ 8.) The total refund amount due to the four class members who provided valid opt-out notices is $123.00. (Cohen aff at ¶ 31.) Subtracting this amount from the total Settlement Amount yields a net Settlement Amount of $44,429,473.00.

[9] This deadline is designed to achieve finality and to provide a proper accounting. Any checks left uncashed after 90 days can reasonably be assumed to be undeliverable.

[10] As specified by the class notice as approved by the Court, those class members who are required to complete Verification Forms must reimburse their owner-operators and return any funds they were unable to pass through no later than 6 months after the date the refund payment was sent to the class member. The class notice further stated that all disputes regarding the reimbursement of owner-operators shall be referred to a mediator designated by the Court, and that any disputes must be received in writing by the Class Administrator no later than 6 months after the date the refund payment was sent to the class member.

motion for preliminary approval, Plaintiffs respectfully request that the Court enter an Order and Final Judgment granting the following:

(1) Final approval of the Settlement Agreement;

(2) Final approval of Plaintiffs' application for attorneys' fees, expenses, incentive awards and *cy pres*;

(3) Approval of the proposed plan for distribution of the Settlement Fund; and

(4) Such other and further relief as the Court may award.

A form Proposed Order and Final Judgment are submitted herewith.

Dated: February 21, 2017
Albany, New York

Respectfully submitted,

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