IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF DELAWARE

CRYSTALLEX INTERNATIONAL CORPORATION, Plaintiff, v. BOLIVARIAN REPUBLIC OF VENEZUELA, Defendant.	C.A. No. 17-mc-151-LPS

NON-PARTIES PHILLIPS PETROLEUM COMPANY VENEZUELA LIMITED AND CONOCOPHILLIPS PETROZUATA B.V.'S OPENING BRIEF REGARDING CONDUCT OF PDV HOLDING, INC. SHARE SALE

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Interested non-parties Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata B.V. (together, "ConocoPhillips") respectfully submit this opening brief regarding the proper procedures for the Court to adopt for conducting any sale of the shares of the Delaware corporation PDV Holding, Inc. ("PDVH") owned by Petróleos de Venezuela S.A. ("PDVSA"), in this or any other similar PDVSA creditor action.

PRELIMINARY STATEMENT

As the Court is aware, ConocoPhillips is interested in this action because of ConocoPhillips' judgment against PDVSA and pending motion for a writ of *fieri facias* against the PDVH shares in *Phillips Petroleum Co. Venezuela Ltd., et al. v. Petróleos de Venezuela, S.A., et al.,* Case No. 19-mc-00342-LPS (D. Del.) (the "ConocoPhillips Fi Fa Action"). The parties to the ConocoPhillips Fi Fa Action agree that ConocoPhillips should be permitted to participate in this briefing, as set forth in their most recent joint status report in that case (*see* D.I. 17 in 19-mc-00342). ConocoPhillips therefore respectfully submits this brief for the Court's consideration pursuant to the Court's May 22, 2020 Order in this case (*see* D.I. 174 in 17-mc-00151).

The applicable Delaware and federal law grants the Court the authority and the broad discretion to design and implement procedures for the judicial sale of the PDVH shares. In the exercise of such discretion, the Court is guided by the twin objectives of maximizing the value received from the sale of the shares while ensuring fairness to the stakeholders.

Given the nature of the asset to be sold, a simple Sheriff's (or U.S. Marshals') execution sale on the courthouse steps would not yield anything approaching a fair price. The owner of the stock, PDVSA, is wholly owned by the Bolivarian Republic of Venezuela ("Venezuela"). The corporation issuing the stock, PDVH, indirectly owns the large U.S. refiner CITGO Petroleum

Corporation and its affiliates, and the stock itself is currently "blocked property" under regulations of the Treasury's Office of Foreign Assets Control ("OFAC").

To maximize the value received in a judicial sale of privately held stock of this sort under these circumstances, the Court should adopt procedures designed to approximate a genuine market transaction, to be carried out in a manner that protects the interests of the buyer, of PDVSA as shareholder, and of PDVSA's mature creditors, including ConocoPhillips. At a minimum, any sale should be informed by valuation analyses conducted by independent experts and should be overseen by a receiver or similar special master or special commissioner appointed by the Court and charged with carrying out the sale and preventing diminution in value in the interim. The transaction would also need to be conditioned, carefully, on authorization from OFAC or the lifting of sanctions regulations. Further, to the greatest extent possible and to realize the highest price, the transaction itself and ultimate buyer of the shares should be immunized from subsequent legal attack by current and future PDVSA and Venezuela creditors.

The Court does not need to build this process from scratch. Instead, as detailed further below, the Court should look to certain established procedures from the bankruptcy context as a guide for advancing the objectives of any judicial sale here.

SUMMARY OF ARGUMENT

1. The Court has broad discretion to conduct the share sale in a manner designed to maximize value, including the discretion to appoint a receiver or similar official to manage the sale process.

2. In the exercise of that discretion, the Court should adopt certain procedures that have proven effective in the context of bankruptcy sales.

FACTS

On August 9, 2018, the Court granted a motion by Crystallex International Corp. ("Crystallex") for an order authorizing a writ of *fieri facias* against PDVSA's PDVH shares, aiming to eventually satisfy a judgment for approximately US $1.2 billion in favor of Crystallex and against Venezuela. D.I. 78. The writ was served on PDVH on August 24, 2018. D.I. 95. Further action was later stayed pending PDVSA and Venezuela's appeals from that decision to the Third Circuit and then pending disposition of their subsequent petition to the U.S. Supreme Court for *certiorari*.

On January 28, 2019, the U.S. Treasury Secretary designated PDVSA a "Specially Designated National" under Executive Order 13850, prohibiting unlicensed transactions in PDVSA property.

In the meantime, on August 23, 2018, ConocoPhillips obtained a judgment against PDVSA and two of its subsidiaries, for approximately US $2 billion, from the U.S. District Court for the Southern District of New York. On November 26, 2019, ConocoPhillips registered that judgment with this Court pursuant to 28 U.S.C. § 1963 and moved for a writ of *fieri facias* against the PDVH shares (*see* D.I. 2 in 19-mc-00342-LPS). ConocoPhillips' motion for the writ remains pending.

PDVSA owns 100% of the shares of PDVH. PDVH owns 100% of the shares of CITGO Holding, Inc. ("CITGO Holding"). CITGO Holding owns 100% of the shares of CITGO Petroleum Corporation (and affiliates), which in turn together own substantial refinery, terminal and pipeline assets throughout the United States (together, "CITGO").

The current value of PDVSA's equity in PDVH is highly uncertain. Over recent years, the enterprise value of CITGO has been variously estimated to be as high as between US $5 and $9 billion (*see, e.g.*, Exs. A, I, J to D.I. 125). But the CITGO assets and equity have also been

purportedly highly encumbered through various transactions, including some that are still subject to avoidance actions pending before this Court.[1] Further, in July 2019, in connection with a debt offering, CITGO Holding disclosed it then had US $1.843 billion in cash or cash equivalents on hand.[2] Of course, the OFAC sanctions and continued uncertainty regarding the political situation in Venezuela will also weigh on any valuation of the PDVH shares.

ARGUMENT

I. THE COURT HAS BROAD DISCRETION TO DESIGN ANY SALE TO MAXIMIZE VALUE RECEIVED

The Court's authority to conduct a post-judgment sale of the PDVH shares begins with Rule 69 of the Federal Rules of Civil Procedure. That Rule invokes state law post-judgment devices but also retains the application of pertinent federal statutes. The Rule provides:

> A money judgment is enforced by a writ of execution, unless the court directs otherwise. The procedure on execution—and in proceedings supplementary to and in aid of judgment or execution—must accord with the procedure of the state where the court is located, *but a federal statute governs to the extent it applies*.

Fed. R. Civ. P. 69(a)(1) (emphasis added).

Whether Delaware law or substantive federal law (or a combination of both) applies to this post-judgment sale of PDVSA's shares in PDVH depends upon whether applicable state law is deemed to provide for a *judicial* sale or an *execution* sale. For merely an execution sale, Delaware statutes and procedures (or an approximation of them in federal court)[3] would ordinarily govern.

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[1] *See, e.g.*, *ConocoPhillips Petrozuata B.V., et al v. Petróleos de Venezuela, S.A. et al.,* 16-cv-904 (D. Del. Oct. 6, 2016); *ConocoPhillips Petrozuata B.V., et al v. Petróleos de Venezuela, S.A. et al.,* 17-cv-28 (D. Del. Jan. 10, 2017).

[2] *See* Citgo Holding, Inc., Preliminary Offering Memorandum at 21 (July 18, 2019) (prospectus for $1.37 billion Senior Secured Notes, due 2024).

[3] Where state law dictates some specific procedure in connection with execution on a judgment, federal courts are nonetheless entitled to some flexibility in adapting the procedures to the federal context. *See, e.g., Mitchell v. Lyons Prof'l Servs., Inc.*, 727 F. Supp. 2d 120, 123-125 (E.D.N.Y. 2010) (collecting cases). State rules "which make sense only when applied in state courts need not be imported into federal practice." *Anderson v. Tucker*, 68 F.R.D. 461, 462 (D. Conn. 1975).

See United States v. Branch Coal Corp., 390 F.2d 7, 9 (3d Cir. 1968) ("Rule 69(a) has been interpreted as precluding the application of federal procedures . . . to execution sales"). On the other hand, federal statutes give federal courts broad discretion to determine the procedures for any judicial sale under the Court's supervision. *See id.* at 10 ("Congress has authorized the federal judiciary to use sound discretion in setting the terms and conditions for judicial sales") (citing 28 U.S.C. §§ 2001, 2004).

The difference between a judicial sale and an execution sale is that a judicial sale is conducted through orders of the court and subject to confirmation by the court, whereas an execution sale may be completed unilaterally by a judgment creditor (unless a party to the sale complains to the court). In *Yazoo & M.V.R. Co. v. City of Clarksdale*, 257 U.S. 10 (1921), the Supreme Court explained that judicial sales are "made under order or decree of the court and requiring confirmation by the court for their validity," whereas execution sales "issue by mere *praecipe* of the judgment creditor . . . and only come under judicial supervision on complaint of either party." *Id*. at 19.

A sale of a debtor's equity securities under the governing state law 8 *Del. C.* § 324 is a *judicial* sale because it must both be made and confirmed by orders of the court. Section 324(a) provides that the shares be sold "*upon an order issued therefor by the court*." Section 324(c) observes three times how the sale must be "*confirmed*" by the court. *See* 8 *Del. C.* § 324(c) ("[i]f, after sale made *and confirmed*, a certified copy of the order of sale and return and the stock certificate, if any, be left with any officer or director . . . Such sale, returned *and confirmed*, shall transfer the shares . . . The court which issued the levy *and confirmed the sale* shall have the power

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It is not necessary for federal courts in applying state law to the execution of a judgment to apply "every jot and tittle" of state procedural law. *Resolution Tr. Corp. v. Ruggiero*, 994 F.2d 1221, 1226 (7th Cir. 1993).

to make an order compelling the corporation, the shares of which were sold, to issue new certificates . . .") (emphases added).

As a result, because state law provides for a judicial sale of shares of stock, the Court has broad discretion under federal law to determine how to conduct that sale. In this case, 28 U.S.C. §§ 2001 and 2004 apply because the PDVH shares are "personalty." *See* 28 U.S.C. § 2004 ("Any personalty sold under any order or decree of any court of the United States shall be sold in accordance with section 2001 of this title, unless the court orders otherwise"); 8 *Del. C*. § 159 ("The shares of stock in every corporation shall be deemed personal property").

Section 2001, read through section 2004's reference to personal property, provides that the PDVH shares may be sold "as the court directs." 28 U.S.C. § 2001(a) ("shall be sold . . . at a public sale . . . *as the court directs*" (emphasis added)). Section 2004 by itself authorizes the Court to either follow section 2001 or to "order[] otherwise." 28 U.S.C. § 2004. Consequently, the Court has broad discretion to determine the manner for conducting the sale. *See, e.g.*, *Branch Coal Corp.*, 390 F.2d at 10 ("There can be no doubt that Congress has authorized the federal judiciary to use sound discretion in setting the terms and conditions for judicial sales").

II. THE COURT MAY APPOINT A RECEIVER OR SIMILAR OFFICIAL TO MANAGE THE SALE PROCESS

Among the mechanisms the Court could employ in the exercise of its discretion is the appointment of a receiver or another similar official to manage the sale process. While judgment enforcement receiverships are fairly unusual in modern federal court practice, they are plainly available. As the Sixth Circuit has explained, "receiverships are increasingly rare. The realm of bankruptcy encompasses the vast majority of cases involving receivership, and in that realm Congress has spoken by setting forth broad and detailed statutes to guide federal courts in the disposition of such cases." *Liberte Capital Grp., LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir.

2006). Nonetheless, "[t]here remains a class of cases . . . in which the federal courts may exercise their equitable powers and institute receiverships over disputed assets in suits otherwise falling within the federal court's jurisdiction, but which fall outside the statutory bankruptcy proceedings or other legislated domain." *Id.* This is one of those cases.

Federal Rule of Civil Procedure 66 governs an action in which the appointment of a receiver is sought, and provides that "the practice [of] administering an estate by a receiver or a similar court-appointed officer must accord with the historical practice in federal courts." Historical and current practice in federal courts permits the appointment of a receiver to conduct an orderly sale of property attached pursuant to court process. *See, e.g.*, *Koontz v. N. Bank*, 83 U.S. 196, 200 (1872); *S.E.C. v. Hardy*, 803 F.2d 1034, 1040 (9th Cir. 1986).

Pursuant to Rule 66 and the general equitable powers of a district court, receivers and similar officials have historically been used to aid district courts in the enforcement of their judgments. Courts have appointed receivers when usual remedies at law have proven inadequate, such as when an execution on a judgment has been issued but returned unsatisfied. *See, e.g., Santibanez v. Wier McMahon & Co.*, 105 F.3d 234, 241 (5th Cir. 1997) ("receivership may be an appropriate remedy for a judgment creditor . . . who has had execution issued and returned unsatisfied, or who proceeds through supplementary proceedings pursuant to Rule 69"); *Pittsburgh Equitable Meter Co. v. Paul C. Loeber & Co.*, 160 F.2d 721, 728 (7th Cir. 1947) ("Since very early days, courts of equity have appointed receivers at the request of judgment creditors when execution has been returned unsatisfied."); Charles A. Wright, et al., 12 *Federal Practice and Procedure* § 2983 (3d ed. Apr. 2020).

A judgment against PDVSA will almost certainly not be satisfied through ordinary means, providing ample grounds for appointment of a receiver. Ultimately, "[r]eceivership is an equitable

remedy and a receiver will be appointed when the most speedy and perfect administration of justice and the rights of the parties interested in the property will be best secured by such action." *View Crest Garden Apartments, Inc. v. United States*, 281 F.2d 844, 849 (9th Cir. 1960) (internal quotation omitted). Appointment of a receiver or similar court-appointed official to conduct the sale process is appropriate here, particularly given the likelihood that PDVSA, PDVH, and CITGO will not voluntarily cooperate in any sale process.

This situation would particularly benefit from the receivership remedy because it permits the consideration of the interests of not only the original parties, but of other parties, such as ConocoPhillips, a multi-billion dollar creditor of PDVSA and Venezuela. Receivers have long been employed "to assist the court in protecting and preserving, *for the benefit of all parties concerned*, the properties in the court's custody." *Zacarias v. Stanford Int'l Bank, Ltd.*, 945 F.3d 883, 896 (5th Cir. 2019) (quoting *Crites, Inc., v. Prudential Ins. Co. of Am.*, 322 U.S. 408, 414 (1944)) (emphasis added); *View Crest Garden Apartments*, 281 F.2d at 849 (receiver can accommodate interests of all interested parties).

This longstanding authority includes the authority to consolidate all proceedings against the receivership property before the court which appointed the receiver, creating an orderly process for all claims against the property to be heard. *See Liberte Capital Grp., LLC*, 462 F.3d at 551. In aid of that process, the receivership court is empowered to issue an injunctive order barring any persons from asserting claims against the property in the control of the receiver other than in the receivership court, not unlike the automatic stay imposed by the Bankruptcy Code. *See, e.g.*, *S.E.C. v. Wencke*, 622 F.2d 1363, 1368-1370 (9th Cir. 1980).

The Court's powers in appointing a receiver include the power to grant the receiver appropriate authority to construct and manage an orderly sale process that permits the sale of

PDVH's shares for the maximum price. *See Hardy*, 803 F.2d at 1037 (noting that the court appointing the receiver can "determine the appropriate action to be taken in the administration of the receivership"). For example, in *S.E.C. v. Helms*, 2015 WL 11255450 (W.D. Tex. July 2, 2015), in order to effectuate a sale of certain oil and gas interests, the receiver was permitted to engage an expert firm "specializing in oil and gas divestitures, to market and conduct an auction for the sale" of the interests. *Id.* at *1. That firm "created an online 'data room' containing informational and due diligence materials" on the oil and gas interests to effectuate their proper auction and sale. *Id*. Other examples abound.[4] As described below, the Court can and should authorize a receiver or similar official to undertake the necessary steps to conduct a robust sale process.

III. THE COURT SHOULD ADOPT CERTAIN PROCEDURES FROM THE BANKRUPTCY CONTEXT

While a judicial sale in aid of execution on a judgment, managed by a receiver, is not governed by the Bankruptcy Code, certain principles and mechanics of bankruptcy proceedings are instructive in guiding the process here. As the Sixth Circuit has observed, sales of complex assets in district court proceedings are increasingly rare due to the availability of bankruptcy. *Liberte Capital Grp.*, 462 F.3d at 551. But in bankruptcy proceedings, sales of complex assets are extremely common. Every year, many billions of dollars in assets are sold under the auspices of bankruptcy courts, ranging from small items of personal property to large going-concern businesses. These sales are widely viewed as a fair, transparent, and value-maximizing method

[4] *See, e.g.*, *S.E.C. v. Am. Capital Invs., Inc.*, 98 F.3d 1133, 1137 (9th Cir. 1996) (allowing the receiver to market and sell eight real properties); *Lawsky v. Condor Capital Corp.*, 154 F. Supp. 3d 9, 12 (S.D.N.Y. 2015) (giving a receiver "broad discretion to handle and manage all aspects of [the corporation's] business," including effectuating sales of the corporation's loan portfolios after successful bidding processes); *Fleet Nat'l Bank v. H & D Entm't, Inc.*, 926 F. Supp. 226, 231−39 (D. Mass. 1996) (permitting the receiver to retain accounting and brokerage services to aid in creating bidding processes for the sale of four radio stations); *S.E.C. v. W.L. Moody & Co.*, 374 F. Supp. 465, 467 (S.D. Tex. 1974) (appointing a receiver to "marshal and liquidate" a bank's assets).

for disposing of property of bankruptcy estates. Some of the same goals that have led to the development of modern bankruptcy sale procedures are equally important here, where the asset being disposed of will require intensive due diligence, is of international significance, and may be diminished in value if not properly managed.

Bankruptcy courts have long used public auctions to conduct sales. The procedures that have developed to conduct these auctions are generally not codified or the subject of formal rulemaking; rather, common features have emerged over time in the context of complex Chapter 11 cases, and are always subject to case-by-case modification. Fundamentally, a bankruptcy auction is a competitive process designed to ensure maximization of value, while ensuring fairness to the debtor, potential purchasers and creditors. In crafting a sale process here, the Court can look to the procedures used in bankruptcy sales for guidance on how best to accomplish those same goals. Some of the key features of bankruptcy sales are described below, but there are many others that will eventually need to be considered.

Officer and Professionals to Manage the Sale Process and Bidding Procedures. In a bankruptcy sale, the bankruptcy trustee, or more commonly, the debtor-in-possession acting in the role of trustee, manages the sale process. This role is critical in order to facilitate all of the moving parts of a sale, including formulating bidding procedures (subject to court approval), negotiating the form of purchase agreement, providing access to information and management, conducting the auction, and generally moving the process forward. In order to do this, the trustee or debtor-in-possession generally retains a slate of professionals, including attorneys, investment bankers, and industry-specific advisors, in order to carry out a value-maximizing process.

Here, of course, there is no official currently in place charged with managing such a complex sale process. However, for all the reasons described above, the Court has ample authority

to appoint such an official, and to authorize that official to hire the appropriate professionals in order to conduct a robust sale process. Each of the features of a bankruptcy sale described below are nearly impossible to replicate without such an official.

Creation of a Due Diligence Process. For ordinary auctions on the courthouse steps, participants can and sometimes do purchase items essentially sight unseen. That may be acceptable for an automobile or a house. But in situations where what is ultimately being purchased is the ownership of a going-concern business worth potentially billions of dollars, but also potentially subject to billions of dollars in liabilities, a sight unseen sale is unrealistic. Before any bidder would be willing to pay a significant sum for the PDVH shares, they will need access to significant amounts of due diligence, including non-public information of CITGO, which is not a publicly-held company. Given the nature of PDVH's business and the possibility that some interested bidders may be in the same industry, the ability to close on any bid will also depend on satisfaction of regulatory and antitrust requirements.

Creating an appropriate diligence process may be particularly challenging in the event that any one or more of PDVSA, PDVH or CITGO does not voluntarily cooperate with that process. Federal Rule of Civil Procedure 69(a)(2) provides that "[i]n aid of the judgment or execution, the judgment creditor or a successor in interest whose interest appears of record may obtain discovery from any person—including the judgment debtor—as provided in these rules or by the procedure of the state where the court is located." Fed. R. Civ. P. 69(a)(2). "The rules governing discovery in postjudgment execution proceedings are quite permissive." *Republic of Argentina v. NML Capital, Ltd.*, 573 U.S. 134, 138 (2014). Appropriate use of these tools and others may be necessary.

Appropriate Marketing. As noted, a core feature of a modern bankruptcy sale is that the bankrupt company, as debtor-in-possession or through its trustee, markets itself to potential purchasers before the auction. The company's investment banker generally leads this function. Extensive marketing is critical to ensure that any potentially interested purchasers are found and able to put their best foot forward, so that the highest and best price for the assets can be achieved. This marketing period, along with the diligence process, needs to be open for a sufficient period of time to ensure that maximum value is obtained.

Consultation Rights. In a bankruptcy proceeding, in addition to the debtor-in-possession or trustee, other interested parties are frequently given a seat at the table in the sale process, such as an official committee of unsecured creditors or equity holders, a provider of debtor-in-possession financing, or a major secured creditor. Here, in the event a sale process gets underway, the rights of ConocoPhillips should be taken into account, as Crystallex's interests may diverge from those of ConocoPhillips.

Conduct of the Auction. A bankruptcy auction can be conducted before the court, or, as is more customary, at the offices of the debtor-in-possession's or trustee's counsel, with a court reporter present. Following the conclusion of the auction, after the estate's professionals have selected the highest and best bid, the parties return to the court for approval of a final order of sale. A similar procedure can be employed for an auction here.

Purchaser Protections. The Bankruptcy Code provides a core protection for the purchaser of assets at a bankruptcy sale: Section 363(m) provides that so long as the purchaser acted in good faith, "The reversal or modification on appeal . . . of a sale . . . does not affect the validity of a sale or lease . . . unless such . . . sale . . . [was] stayed pending appeal." 11 U.S.C. § 363(m). This protection is critical to securing the "best price." *See In re Gucci*, 126 F.3d 380, 387 (2d Cir. 1997)

("without this assurance of finality, purchasers could demand a large discount for investing in a property that is laden with the risk of endless litigation as to who has rights to estate property"). This provision of the Bankruptcy Code is similar to long-standing equitable protections for purchasers at judicial sales. These protections were recognized by the Supreme Court in *Gray v. Brignardello*:

> And, although the judgment or decree may be reversed, yet, all rights acquired at a judicial sale, while the decree or judgment were in full force, and which they authorized, will be protected. It is sufficient for the buyer to know, that the court had jurisdiction and exercised it, and that the order, on the faith of which he purchased, was made and authorized the sale. With the errors of the court he has no concern.

68 U.S. 627, 634 (1863).

The foregoing points illustrate just some of the many procedures that bankruptcy courts have developed to facilitate value-maximizing sale processes. If a sale process proceeds, the Court should appoint an appropriate official to take charge of the sale process with the power to invoke the sorts of tools regularly employed to sell assets in bankruptcy and provide appropriate guidance to the Court.[5]

[5] The same considerations pertain under Delaware law. The goal under state law procedures is value maximization, and the Court retains broad discretion in determining how to achieve that in a way tailored to the specific circumstances present. *See In re Interstate Gen. Media Holdings, LLC*, 2014 WL 1697030, at *7 (Del. Ch. Apr. 25, 2014) ("The issue before this Court is a narrow one: how should IGM be dissolved and liquidated? General American and Intertrust are in agreement that IGM should be liquidated in a manner that maximizes the value of its Members' ownership interest in the Company. It is settled Delaware law, however, that there is 'no single blueprint' for maximizing the value of an entity through a sale. Therefore, determining the value maximizing process by which an entity should be liquidated is both a fact-intensive and fact-specific endeavor that must be tailored to the particular circumstances and realities in which the entity is operating."); *see also Andrikopoulos v. Silicon Valley Innovation Co., LLC*, 120 A.3d 19, 21 (Del. Ch. 2015), *aff'd*, 142 A.3d 504 (Del. 2016) (noting the court's broad discretion in the context of a Delaware receivership appointed under 8 *Del. C.* § 291).

CONCLUSION

For the foregoing reasons, ConocoPhillips respectfully requests that the Court exercise its discretion to appoint an appropriate official in order to facilitate an appropriate sale process for the PDVH shares.

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