

**ONTARIO
SUPERIOR COURT OF JUSTICE
COMMERCIAL LIST**

B E T W E E N:

**BRIDGING FINANCE INC.,
as agent for SPROTT BRIDGING INCOME FUND LP**

Applicant

- and -

THOMAS CANNING (MAIDSTONE) LIMITED and 692194 ONTARIO LIMITED

Respondents

IN THE MATTER OF AN APPLICATION PURSUANT TO SUBSECTIONS 47(1) AND
243(1) OF THE *BANKRUPTCY AND INSOLVENCY ACT*, R.S.C. 1985, c. B-3, AS
AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990,
c. C.43, AS AMENDED

**FACTUM OF THE 2016 GROWERS
Request for Payment out of the Holdback Funds**

Motion Returnable September 27, 2017

DATE: September 15, 2017

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Lawyers for the 2016 Growers

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Court File No. CV-17-11773-00CL

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FACTUM OF THE 2016 GROWERS

PART I – OVERVIEW

1. The Court will consider the submissions of the parties at the hearing on September 27, 2017 with respect to the disposition of the \$1.2 million reserve (the “holdback funds”) being held by the Receiver.
2. The Receivership Order of Justice Conway dated June 21, 2017 provided that claims set out in the Affidavit of James Clark sworn June 20, 2017, filed in this proceeding by the Ontario Farm Products Marketing Commission (the “Commission”), may have entitlement to the holdback funds.
3. The claims of the 2016 Growers for compensation for losses suffered as a result of the failure by Thomas Canning (Maidstone) Limited (“Thomas Canning”) to take

delivery of tomatoes as required by production contracts with the 2016 Growers are among the claims set out in the Affidavit of James Clark.

4. The 2016 Growers were participants in the hearing process being held by the Commission in connection with an Order issued to Thomas Canning that would have required Thomas Canning as a condition of its vegetable processing licence to make a financial settlement with the 2016 Growers. However, the Commission's hearing process was cancelled as a result of the court-approved sale of the assets of Thomas Canning.

5. The 2016 Growers submit that it would be fair and equitable in the circumstances of the court-approved sale of the assets of Thomas Canning by the Receiver that the Court order that all or part of the holdback funds be payable to them.

PART II – FACTS

6. The 2016 Growers had contracts with Thomas Canning to produce tomatoes for processing in the 2016 Growing Season.

Affidavit of Ian S. Wright sworn September 15, 2017, Exhibit "A" – Statement of Claim of the 2016 Growers, Exhibit "E" – Document Brief of the 2016 Growers.

Affidavit of James Clark sworn June 20, 2017 at paras. 11, 12.

7. While Thomas Canning took delivery of some tomatoes, it refused delivery of most of the tomatoes produced by the 2016 Growers under the contracts, resulting in significant financial losses to the growers.

Affidavit of Ian S. Wright sworn September 15, 2017, Exhibit "A" – Statement of Claim of the 2016 Growers.

Affidavit of James Clark sworn June 20, 2017, paras. 11, 12.

8. The 2016 Growers commenced a court action against Thomas Canning for damages arising from the breach of contract.

Affidavit of Ian S. Wright, sworn September 15, 2017, para. 4.

9. The 2016 Growers are listed as creditors of Thomas Canning in the Notice and Statement of the Receiver dated June 30, 2017.

Affidavit of Ian S. Wright sworn September 15, 2017, para. 5, Exhibit "B" – Notice and Statement of the Receiver.

10. Thomas Canning was licensed by the Commission as a processor of vegetables under Licence No. 1994-18. On April 13, 2017, the Commission issued an order to Thomas Canning requiring Thomas Canning, *inter alia*, to make a financial settlement with the 2016 Growers as a condition of its licence.

Affidavit of James Clark sworn June 20, 2017, paras. 11, 12, Exhibit "D" – Commission Order dated April 13, 2017.

11. The Commission's Order was to take effect May 1, 2017. Thomas Canning requested that the order be suspended pending an opportunity to make submissions regarding the terms of the order.

Affidavit of James Clark sworn June 20, 2017, para. 16.

12. Without knowledge of this court proceeding, the Commission accepted the request by Thomas Canning and eventually scheduled an oral hearing for June 28, 2017. Thomas Canning was ordered to submit a business plan for making settlement with the 2016 Growers one week prior to the hearing.

**Affidavit of James Clark sworn June 20, 2017, paras. 16, 17.
Affidavit of Ian S. Wright sworn September 15, 2017, para. 7, Exhibit "D" – Notice of Hearing.**

13. The 2016 Growers retained counsel to represent them in the Commission hearing process, and filed a Document Brief with the Commission as contemplated in the Notice of Hearing.

Affidavit of Ian S. Wright sworn September 15, 2017, para. 8, Exhibit "E" – Document Brief of the 2016 Growers.

14. On June 21, 2017, counsel for the Commission attended before and made submissions to Justice Conway in this proceeding with respect to the ongoing Commission hearing process and Thomas Canning's vegetable processing licence.

15. Justice Conway granted the Approval and Vesting Order requested by the Applicant that approved the proposed sale of Thomas Canning's assets, and also granted an order appointing Richter as Receiver and authorizing the Receiver, on the closing of the sale transaction, to distribute the net sale proceeds to the Applicant "subject to a \$1,200,000 reserve, the entitlements and priority of claims to which reserve (including those claims set out in the Affidavit of William Thomas sworn June 20, 2017 and/or the Affidavit of James Clark sworn June 20, 2017) shall be subject to further Order of this Court."

Receivership Order of Justice Conway dated June 21, 2017, para. 24.

16. The claims of the 2016 Growers, which resulted in the Order issued by the Commission to Thomas Canning in April, 2017, are claims set out in the Affidavit of James Clark.

Affidavit of James Clark sworn June 20, 2017, paras. 8, 11, 12, 23, and 29.

17. The Endorsement made by Justice Conway on June 21, 2017 also specifically addressed the Commission hearing process, providing that "None of this affects the

proceeding before the Commission on June 28th, to which [counsel for the Receiver] will be attending via conf. call”.

Endorsement of Justice Conway dated June 21, 2017.

18. However, on June 23, 2017, the Commission adjourned the June 28, 2017 hearing until such time as it would have confirmation that the sale of the assets of Thomas Canning had closed. The Chair of the Commission, James Clark, also issued a letter on June 30, 2017 explaining the reasons for the adjournment and advising the tomato producer and processor industry of the Receivership Order and the holdback funds.

Affidavit of Ian S. Wright sworn September 15, 2017, paras. 9, 10, Exhibit “F” – Notice of Adjournment, Exhibit “G” – Letter from James Clark.

19. On July 28, 2017, the Commission cancelled the Thomas Canning licence hearing process altogether, advising that the sale of the assets had closed on July 7, 2017, and that, because the Thomas Canning licence had expired, the hearing would not proceed.

Affidavit of Ian S. Wright sworn September 15, 2017, para. 11, Exhibit “H” – Notice of Cancellation of Hearing.

20. As a result of the cancellation of the Commission hearing process and the expiry of the Thomas Canning licence, the 2016 Growers have lost the benefit of the Commission’s pending April, 2017 order against Thomas Canning that required the submission of a business plan for making settlement of the 2016 Growers’ claims.

21. The 2016 Growers also incurred legal costs thrown away in connection with the aborted Commission hearing process.

**Affidavit of Ian S. Wright sworn September 15, 2017, para. 12,
Exhibit "I" – Legal Services Account.**

PART III – SUBMISSIONS

22. Justice Conway ordered that the determination of the entitlement to and priority of claims to the \$1,200,000 reserve from the proceeds of the sale of the Thomas Canning assets may include consideration of the claims set out in the Affidavit of James Clark sworn June 20, 2017. Those claims include the damages claims of the 2016 Growers against Thomas Canning.

***Supra*, para. 15.**

23. It is submitted that the 2016 Growers are entitled to a portion of the reserve in recognition of the loss of their opportunity to obtain compensation from Thomas Canning through the Commission hearing process and the Commission order.

24. On the review of a sale by a court-appointed receiver, the Court should consider whether the sale process has been fair and equitable, and whether the interests of all parties, including those of unsecured creditors, have been taken into account. It is the responsibility of the Court to ensure that there has been no unfairness in the working out of the sale process.

Royal Bank of Canada v. Keller & Sons Farming Ltd. (2016), 397 D.L.R. (4th) 573 (Man. C.A.), 2016 CarswellMan 147 at para. 14.

25. It is submitted that the Court should have regard to the interests of the 2016 Growers in the determination of entitlement to payments from the \$1.2 million holdback funds ordered by Justice Conway.

26. Justice Conway expressly did not intend that the Commission process should be affected by the approved sale of assets, but did contemplate that the claims set out in

the Affidavit of James Clark, including the claims of the 2016 Growers, could give rise to an entitlement to a share of the holdback funds.

Supra, paras. 15, 17.

27. It is submitted that a fair and equitable distribution of the reserve funds must include payment to the 2016 Growers. They were participants in the statutory Commission process through which their interests as growers for a licensed processor of vegetables were to be protected. However, the Commission process was aborted directly as a result of the court-approved sale of assets, leaving the 2016 Growers without recourse through the Commission.

Supra, para. 19.

28. But for the sale of the assets, it is submitted that the Commission hearing process would have resulted in a business plan by Thomas Canning to settle the claims of the 2016 Growers as required by the April, 2017 Commission order.

29. The 2016 Growers are requesting a share of the \$1.2 million reserve in compensation for and proportional to their respective losses suffered as a result of Thomas Canning's breach of the 2016 production contracts.

30. Further, and at the very least, the 2016 Growers request that their legal costs of the Commission process and in respect of these proceedings be paid out of the \$1.2 million reserve.

Supra, para. 21.

PART IV – ORDERS SOUGHT

31. The 2016 Growers request the following relief from the Court:

- (a) An order that the 2016 Growers are entitled to payments out of the holdback funds in compensation for their respective losses suffered as a result of Thomas Canning's breach of the 2016 production contracts;
- (b) An order that the legal costs incurred by the 2016 Growers in the Commission process and in respect of these proceedings be reimbursed from the holdback funds; and,
- (c) Such further and other relief as this Honourable Court may allow.

ALL OF WHICH IS RESPECTFULLY SUBMITTED.

Dated at London, Ontario this 15th day of September, 2017.



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2016 MBCA 46
Manitoba Court of Appeal

Royal Bank of Canada v. Keller & Sons Farming Ltd.

2016 CarswellMan 147, 2016 MBCA 46, 265 A.C.W.S. (3d) 664, 330
Man. R. (2d) 12, 397 D.L.R. (4th) 573, 39 C.B.R. (6th) 219, 675 W.A.C. 12

**Royal Bank of Canada, (Plaintiff) Respondent and Keller &
Sons Farming Ltd. and Keller Holdings Ltd., (Defendants)**

Shilo Farms Ltd. and Marcus Keller, Appellants and Ernst & Young Inc., in its capacity as Receiver of the undertaking, property and assets of the Debtors, and not in its personal capacity, (Applicant) Respondent

Freda M. Steel, Diana M. Cameron, Janice L. leMaistre J.J.A.

Heard: May 2, 2016

Judgment: May 2, 2016

Docket: AI 16-30-08585

Counsel: R.W. Schwartz, for Appellant, Shilo Farms
F.J. Trippier, A.K. Anjoubault, for Appellant, M. Keller
J.M.J. Dow, for Respondent, Royal Bank of Canada
A.J. Stacey, R.A. McFadyen, for Respondent, Ernst & Young
D.E. Swayze, for Prospective Purchasers, Spud Plains Farms Ltd.

Subject: Contracts; Corporate and Commercial; Insolvency; Property

Headnote

Debtors and creditors --- Receivers — Conduct and liability of receiver — Rights

Receiver accepted offer from A group over offer of S Ltd. respecting sale of debtor companies' lands, buildings and related irrigation infrastructure — Motion judge approved sale to A group — S Ltd. appealed — Appeal dismissed — Offer by S Ltd. to pay unsecured creditors over time and out of future profits was unrealistic when best possible offer would still result in shortfall to secured creditors — Secured creditors were only parties with material and direct commercial interest in proceeds of sale and it was reasonable for receiver not to take into account portion of offer by S Ltd. that dealt with unsecured creditors — Receiver had authority to deal with all assets and receivables of debtors — Receiver had authority to sell property, and it was entitled to take steps it considered necessary to carry out sale process — It was within receiver's discretion to consider pending litigation with appellant company, along with sale price of land, and conclude that it was better to take higher amount for land offered by A group and pursue outstanding claims against appellant company than to accept proposed settlement offered by appellant company — Motion judge reasonably concluded that receiver canvassed market for land in open, fair and transparent manner.

Table of Authorities

Cases considered by *Freda M. Steel J.A.*:

Business Development Bank of Canada v. Paletta & Co. Hotels Ltd. (2012), 2012 MBCA 115, 2012 CarswellMan 727, 288 Man. R. (2d) 129, 564 W.A.C. 129, 5 C.B.R. (6th) 334 (Man. C.A.) — referred to

Crown Trust Co. v. Rosenberg (1986), 60 O.R. (2d) 87, 22 C.P.C. (2d) 131, 39 D.L.R. (4th) 526, 67 C.B.R. (N.S.) 320 (note), 1986 CarswellOnt 235 (Ont. H.C.) — referred to

Royal Bank v. Soundair Corp. (1991), 7 C.B.R. (3d) 1, 83 D.L.R. (4th) 76, 46 O.A.C. 321, 4 O.R. (3d) 1, 1991 CarswellOnt 205 (Ont. C.A.) — referred to

Shape Foods Inc. (Receiver of), Re (2009), 2009 MBQB 171, 2009 CarswellMan 312, 54 C.B.R. (5th) 224, 241 Man. R. (2d) 235 (Man. Q.B.) — referred to

Skyepharm PLC v. Hyal Pharmaceutical Corp. (2000), 2000 CarswellOnt 466, 47 O.R. (3d) 234, 130 O.A.C. 273, 15 C.B.R. (4th) 298 (Ont. C.A.) — referred to

Towers Ltd. v. Quinton's Cleaners Ltd. (2009), 2009 MBCA 81, 2009 CarswellMan 375, [2010] 1 W.W.R. 246, 245 Man. R. (2d) 70, 466 W.A.C. 70 (Man. C.A.) — referred to

APPEAL from *Royal Bank of Canada v. Keller & Sons Farming Ltd.* (2016), 2016 MBQB 77, 2016 CarswellMan 346 (Man. Q.B.), by unsecured creditor of approval of sale of debtor companies' lands, buildings and related irrigation infrastructure.

Freda M. Steel J.A.:

1 This is an appeal from the decision of the motion judge approving the request of Ernst & Young Inc. (the Receiver) for the sale of Keller lands, buildings and related irrigation infrastructure equipment (the Keller Lands) to Spud Plains Farms Ltd., A&A Farms Ltd., TA Farms Ltd. and A&M Potato Growers Ltd. (collectively referred to as the Adriaansen Group).

2 Shilo Farms Ltd. (Shilo), an unsecured creditor and unsuccessful bidder, and Marcus Keller, the sole shareholder of the defendant debtor companies, an unsecured creditor, and also the general manager of Shilo, appeal from that decision.

3 Fundamentally, the appellants argue that the sale process was not fair or equitable. They argue that the integrity of the process of bidding was tainted. It is submitted that the Receiver "muddied the waters" by asking Shilo to make an offer that included a settlement offer for outstanding disputed claims.

4 At a later stage in the modified sale and investor solicitation process, the Receiver asked the Adriaansen Group and Shilo to resubmit improved offers. Specifically, the Receiver asked Shilo to make an offer that included an amount related to certain disputed claims between the Receiver and Shilo. The Adriaansen Group made an offer for the land and, as well, advised the Receiver that, if successful, it would be reselling a parcel of the Keller Lands known as Parcel 4. Depending on the amount obtained on the resale, it was possible for the Receiver to obtain further proceeds from that resale.

5 Shilo made an improved offer that included an amount of \$700,000 as a settlement of the disputed claims. Shilo also indicated it would make arrangements to repay amounts owing to the defendants' unsecured creditors over time out of future profits. It is this additional amount, submitted by Shilo for settlement of the claims, that was the subject of much of Shilo's submissions opposing the sale in the Court below and in this Court.

6 While the offers were relatively close, the Receiver accepted the offer from the Adriaansen Group, explaining that the amount offered by the Adriaansen Group was higher than the offer of Shilo when the settlement amount was removed from the Shilo offer. The Adriaansen Group offer for the land alone was \$300,000 higher than the Shilo offer. The Receiver decided that, upon acceptance of the Adriaansen Group offer, it could then still realize on the claims against Shilo, the claims estimated at \$1,100,00 by the Receiver, even though the realization of those claims might very well

include litigation and the necessity to incur additional legal fees. The Receiver also noted a potential to further increase the proceeds depending on the subsequent reselling of Parcel 4 of the Keller Lands.

7 Shilo submits that the Receiver's request to Shilo that it include an amount for settlement of the outstanding disputes created an unfair process. In other words, it was a mistake on the Receiver's part to say to Shilo that its bid would be more favourably received by the Receiver if it included an amount to settle outstanding claims by the Receiver against Shilo. As well, it is argued that the Receiver was acting outside of its authority. The Receiver only had the authority to deal with the land itself, not extraneous claims.

8 Keller argues that the Receiver did not consider the interests of all the parties, particularly those of the unsecured creditors, and the offer to pay the unsecured creditors 20 cents on the dollar over time out of future profits.

9 The appeal of Shilo and Keller must, out of necessity, also consider the question as to whether they have standing to appeal. Standing is a pre-requisite to opposing a sale approval motion. See *Skyepharm PLC v. Hyal Pharmaceutical Corp.* (2000), 130 O.A.C. 273 (Ont. C.A.); and *Shape Foods Inc. (Receiver of), Re*, 2009 MBQB 171, 241 Man. R. (2d) 235 (Man. Q.B.). At the motion, because of the exigencies of time, the Court heard from both parties on the merits of their motion and decided the matter on those merits, despite the Court's final decision that neither party had standing.

10 In this Court, the appellants argue that they have standing to challenge the decision of the Receiver and, hence the decision of the motion judge. Shilo argues that it has standing as a result of its status as an unsuccessful bidder for the property, and also as an unsecured creditor. Keller argues that he has standing as an unsecured creditor, as well as a shareholder of the defendant debtor companies.

Standard of Review

11 The motion judge owed the decision of the Receiver significant deference. While it is the duty of the court to ensure the integrity of the process, it is not appropriate for the court to go into the minutia of that process. The court's role in reviewing the sale process in receiverships is not to second guess the receiver's business decisions, but rather to critically examine the procedural fairness in negotiations and bidding so as to ensure that the integrity of the process is maintained. The court should not intervene in the decision of the receiver except in an exceptional case. See *Royal Bank v. Soundair Corp.* (1991), 46 O.A.C. 321 (Ont. C.A.); and *Crown Trust Co. v. Rosenberg* (1986), 60 O.R. (2d) 87 (Ont. H.C.) at pp 109, 111.

12 The decision of the motion judge was an exercise in judicial discretion and is entitled to deference in this Court. We will intervene only if the motion judge exercising his discretion, erred in law, misapprehended the evidence in a material way or was clearly wrong. See *Business Development Bank of Canada v. Paletta & Co. Hotels Ltd.*, 2012 MBCA 115 (Man. C.A.) at para 8, (2012), 288 Man. R. (2d) 129 (Man. C.A.); and *Towers Ltd. v. Quinton's Cleaners Ltd.*, 2009 MBCA 81 (Man. C.A.) at para 25, (2009), 245 Man. R. (2d) 70 (Man. C.A.).

Decision

13 We have some sympathy for the appellants' argument as to standing. That is, if unsecured creditors are unable to challenge the process, who will speak on their behalf? While a party must have a material interest that has been affected in order to establish standing, the question of what constitutes a material interest will vary depending on the facts of the case. It may be, as was argued, that the unfairness of the process itself prevented the party from obtaining a material interest in the sale process. In any event, this is not the case to pursue that argument because, even if we disagreed with the motion judge and felt that either or both parties should have standing, we do not see a ground for appellate intervention in the final decision.

14 When reviewing a sale by a court-appointed receiver, among other duties, the court should be concerned primarily with protecting the interests of the creditors. However, it is also an important consideration that the sale process should be fair and equitable, and the interests of all parties be taken into account; this includes the interests of the unsecured

creditors. There is no question that it is the responsibility of the court to ensure the efficacy and integrity of the process by which offers are obtained, and to ensure that there has been no unfairness in the working out of that process. See *Soundair Corp.*

15 However, the offer to pay unsecured creditors over time out of future profits is not realistic when the best possible offer would nonetheless result in a shortfall to secured creditors. Given the outstanding amounts owing to the secured creditors, and the amounts that would be generated from the sale of assets, there will inevitably be a significant shortfall in this case. As a result, the secured creditors are the only parties with a material and direct commercial interest in the proceeds of the sale. Thus, it was reasonable for the Receiver not to take into account the portion of the offer dealing with unsecured creditors.

16 There is some dispute as to whether Shilo knew that there would be a shortfall to the secured creditors. Whether or not the company knew this, it also stated in its affidavit that it would not have changed the offer. We do not see how that affected the integrity of the process.

17 Second, with respect to the fairness of the sale process, the motion judge held that since the Receiver was dealing with a prospective purchaser, Shilo, with which it had outstanding claims, this was an efficient way to proceed in wrapping up other aspects of the receivership, and possibly obtaining an increased overall bid. Moreover, the amount that Shilo did offer for the Keller Lands was not as high as the offer put forward by the Adriaansen Group, if the amount proposed for settlement was taken out. The motion judge held that the Receiver was entitled to conclude that taking more money for the land, and taking the risk of suing for the entire amount owing in the disputed claims with Shilo, was a better option than taking less for the land and settling the disputed claims.

18 In addition, the Receiver had the authority to deal with all assets and receivables of Keller & Sons Farming. The Receiver was granted authority to sell property in the order granted by Schulman J on October 8, 2015. That order gave the Receiver the right to sell by negotiating such terms and conditions as it saw fit and to consider, evaluate and, if it deemed appropriate, settle claims relating to the defendants.

THIS COURT ORDERS that the Receiver is hereby empowered and authorized, but not obligated, to act at once in respect of the Property and, without in any way limiting the generality of the foregoing, the Receiver is hereby expressly empowered and authorized to do any of the following where the Receiver considers it necessary or desirable:

...

(g) to settle, extend or compromise any indebtedness owing to or by the Defendants;

...

(j) to market any or all of the Property, including advertising and soliciting offers in respect of the Property or any part or parts thereof and negotiating such terms and conditions of sale as the Receiver in its discretion may deem appropriate.

19 We believe that Shilo's argument interprets the power of the Receiver too narrowly. The second order (February 8, 2016) allowed the Receiver to take such steps as it considered necessary in carrying out the sale process.

THIS COURT ORDERS AND DECLARES that the Receiver is authorized and directed to continue to implement the Sales Process, subject to further order of the Court, and to take such steps as it considers necessary or desirable in carrying out the Sales Process, including entering into an auction agreement with Ritchie Bros. Auctioneers (Canada) Ltd. ("Ritchie") with respect to the equipment of Keller & Sons Farming Ltd.

20 Consequently, it was within the Receiver's discretion to consider pending litigation, along with a sale price of the land, and to ultimately conclude that it was better to take a higher amount for the land and pursue the outstanding

claims against Shilo, than to accept the proposed settlement. Whether someone else would have decided differently is irrelevant. It is clearly not an improvident bargain.

21 The motion judge specifically addressed each of the relevant criteria and found on the facts that the Receiver had fully canvassed the market for the Keller Lands in an "open, fair and transparent manner to all potential interested purchasers" (at para 28). That decision was reasonable, given the evidence before him. We see no error in such a conclusion, certainly no error that is clearly wrong.

22 The appeal is dismissed with costs.

Appeal dismissed.

**BRIDGING FINANCE INC.,
as agent for SPROTT BRIDGING INCOME FUND LP**

Applicant

v.

**THOMAS CANNING (MAIDSTONE) LIMITED
and 692194 ONTARIO LIMITED**

Respondents

**ONTARIO
SUPERIOR COURT OF JUSTICE**

PROCEEDING COMMENCED AT
TORONTO, ONTARIO

**FACTUM OF THE 2016 GROWERS
Motion returnable September 27, 2017**

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