IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Securities and Exchange Commission, Applicant, v. Securities Investor Protection Corporation, Respondent.	)	MISC. NO. 11-MC-678-RLW

SECURITIES INVESTOR PROTECTION CORPORATION'S OPPOSITION TO MOTION TO INTERVENE

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INTRODUCTION

On July 24, 2012, Richard Cheatham filed a motion to intervene and to "suspend" the Court's July 3 Opinion—three weeks after the fact. Although he provides no documentary evidence in support of his assertions, Cheatham contends that brokers from the Stanford Group Company ("SGC") purchased Stanford International Bank, Ltd. ("SIBL") CDs for him without his knowledge, and that the SEC failed to consider the "atypical" nature of these CD purchases in pursuing its case. The Court should reject Cheatham's thirteenth-hour motion for three separate and independent reasons.

First, intervention must be "timely," Fed. R. Civ. P. 24, and Cheatham's request is anything but. Cheatham provides no reason whatsoever why his request should be considered at this stage of the case, especially when there is a "presumption that post-judgment motions to intervene will be denied." *Associated Builders & Contractors, Inc. v. Herman*, 166 F.3d 1248, 1257 (D.C. Cir. 1999). The purpose of Rule 24 intervention is to preserve judicial economy by encouraging similar claims to be joined and pursued together, *see Wash. Elec. Coop., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 922 F.2d 92, 97 (2d Cir. 1990)—whereas allowing intervention at this point would *create* inefficiencies and thus contravene what the rule was designed to promote.

Second, a proposed intervenor must have a legally recognized "interest relating to the property or transaction that is the subject of the action," Fed. R. Civ. P. 24(a)(2)—and Cheatham does not. After all, this litigation is about whether ***the SEC*** may compel SIPC to liquidate the various Stanford entities. Nothing in 15 U.S.C. § 78ggg(b) permits participation by individual investors, and allowing intervention would undercut the careful delineation between the SEC, SIPC and private plaintiffs that the Supreme Court articulated in *SIPC v. Barbour*, 421 U.S. 412,

425 (1975). Indeed, a ruling allowing the investing public to intervene as of right once the SEC elects to proceed under Section 78ggg(b) would take control over such litigation out of the SEC's and SIPC's hands—in direct contravention of *Barbour* itself.

Finally, Cheatham's motion must be rejected because the SEC adequately represents his interests. *See* Fed. R. Civ. P. 24(a)(2) (intervention not allowed if "existing parties adequately represent [the putative intervenor's] interest"). The SEC brought this case on behalf of investors like Cheatham, and its incentives in doing so were squarely aligned with his own. The only reason that Cheatham provides to justify intervention is that the SEC purportedly ignored his "atypical" facts. The problem for Cheatham, however, is that he admits that he gave his brokers discretionary authority to invest on his behalf, and that the CDs they purchased are being held for him by the Stanford Trust Company and not the broker-dealer—all of which is entirely consistent with the SEC's stipulated facts. None of this provides grounds for Cheatham to intervene, much less to demand the "suspension" of the Court's July 3 Opinion.

ARGUMENT

I. CHEATHAM DOES NOT MEET THE REQUIREMENTS FOR INTERVENTION AS A MATTER OF RIGHT UNDER RULE 24.

Federal Rule of Civil Procedure 24(a) states that, "[o]n timely motion," a party may intervene as a matter of right where he "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede [his] ability to protect [his] interest, unless existing parties adequately represent that interest." Thus, "[a]s paraphrased by the D.C. Circuit, the rule indicates that an applicant's right to intervene depends on '(1) the timeliness of the motion; (2) whether the applicant claims an interest relating to the property or transaction which is the subject of the action; (3) whether the applicant is so situated that the disposition of the action may as a practical

matter impair or impede the applicant's ability to protect that interest; and (4) whether the applicant's interest is adequately represented by existing parties.'" *Envtl. Def. v. Leavitt*, 329 F. Supp. 2d 55, 65-66 (D.D.C. 2004) (quoting *Fund for Animals, Inc. v. Norton*, 322 F.3d 728, 731 (D.C. Cir. 2003)).

Cheatham does not and cannot satisfy any of these requirements. His motion is not timely, having been brought ***after*** this Court entered judgment ending the case. Nor does Cheatham have a legally recognized interest that the law protects, because SIPA's structure and purposes demonstrate that only the SEC (not private plaintiffs) may sue under 15 U.S.C. § 78ggg(b). Finally, intervention as of right is neither necessary nor appropriate where, as here, one of the parties adequately represents the proposed intervenor's interests.

A. Cheatham's Motion Is Untimely.

As a threshold matter, Cheatham's motion fails because Rule 24(a) requires requests to intervene to be "timely." "[T]imeliness is to be judged in consideration of all the circumstances, especially weighing the factors of time elapsed since the inception of the suit, the purpose for which intervention is sought, the need for intervention as a means of preserving the applicant's rights, and the probability of prejudice to those already parties in the case." *United States v. Am. Tel. & Tel. Co.*, 642 F.2d 1285, 1295 (D.C. Cir. 1980) (citing *Moten v. Bricklayers Int'l Union*, 543 F.2d 224, 228 (D.C. Cir. 1976)).

All of this weighs squarely against Cheatham's position. Over ***six months*** have passed since the SEC began these expedited proceedings, and Cheatham's motion offers nothing to explain why he could not have sought to intervene earlier. Cheatham does not claim that he lacked knowledge of the parties' dispute, nor could he, given the widespread media coverage about it (even before the SEC filed suit). Courts have not hesitated to deny intervention after the

passage of similar lengths of time.[1] *See, e.g.*, *Famous Joe's Pizza, Inc. v. Vitale*, 2011 WL 2693276, at *2 (S.D.N.Y. June 29, 2011) (denying intervention "[b]ecause Thomas waited nearly five months to file"); *Weyend v. Hubman Foundation*, 2007 WL 3377162, at *1 (E.D. Tex. June 28, 2007) (denying intervention because "[t]his case has been pending for over six months").

More importantly, however, Cheatham waited to intervene until ***after this Court had already dismissed the case with prejudice***. Under these circumstances, the D.C. Circuit has concluded that intervention is presumptively untimely and should be denied. *See Associated Builders & Contractors, Inc.*, 166 F.3d at 1257 ("A motion for 'intervention after judgment will usually be denied where a clear opportunity for pre-judgment intervention was not taken.'") (quoting *Dimond v. D.C.*, 792 F.2d 179, 193 (D.C. Cir. 1986)); *see also id.* (noting the "presumption that post-judgment motions to intervene will be denied"); *Moten v. Bricklayers, Masons & Plasterers Int'l Union of Am.*, 543 F.2d 224, 227-28 (D.C. Cir. 1976) (denying motion to intervene and holding that "cases in this Circuit permitting post-judgment intervention should not be controlling where clear opportunity for pre-judgment intervention … was not taken"); *Rubin v. Islamic Republic of Iran*, 270 F.R.D. 7, 11 (D.D.C. 2010) (noting that "[t]his Circuit has … made clear that [a] motion for intervention after judgment will usually be denied") (internal quotation marks and citation omitted); *Democratic Senatorial Campaign Comm. v. Fed. Election Comm'n*, 918 F. Supp. 1, 4-5 (D.D.C. 1994) ("The Court finds that the NRSC's motion to intervene as a party, filed four days after the final judgment in this action, is untimely.").

This makes sense. After all, the purpose of intervention is to permit the intervenor's perspective to be considered while the litigation is pending, in order to promote judicial efficiency and avoid multiple bites at the apple. *See Mass. Sch. of Law v. United States*, 118

[1] Cheatham's motion to intervene is untimely even if compared to the date of the parties' stipulations rather than the SEC's initial filings. Cheatham waited over four months from the date of the stipulations and until well after the ultimate adjudication of the case before seeking to intervene.

F.3d 776, 783 n.5 (D.C. Cir. 1997) (describing efforts to enter proceedings after judgment as "inexcusabl[e] neglect" given that intervention before judgment would have permitted consideration of the intervenors' position in the first instance). And Cheatham's delay is made even more unreasonable by the fact that he offers no explanation for it whatsoever. *See Associated Builders & Contractors*, 166 F.3d at 1257 (denying intervention where movant had "offered no reason … why [he] could not have sought intervention prior to judgment"); *E. Ky. Welfare Rights Org. v. Schultz*, 1974 WL 506, at *1 (D.D.C. Jan. 28, 1974) ("The untimeliness of the AHA's request as well as its failure to give adequate justification for any delay is most apparent…. The reasoning presented by the Association for resting … until after an opinion had been rendered before seeking an appearance is wholly unacceptable.").

If anything, Cheatham's request to "suspend" the Court's July 3 Order would delay the ultimate resolution of this litigation and require a wasteful and unnecessary expenditure of party and judicial resources. *See Perles v. Kagy*, 394 F. Supp. 2d 68, 75 (D.D.C. 2005) ("Had Fay intervened at any point in the five years prior to judgment being entered, this issue could have been litigated. To raise the issue now, after the parties in the case and the Court have relied on the understanding that the funds were being held in trust for Kagy would unduly prejudice the parties and delay the case."). This is why courts strictly enforce Rule 24's timeliness requirement rather than allowing putative intervenors to lie in wait and see if they like the outcome of the case.

B. Cheatham Does Not Have A Legally Protected Interest That Will Be Impaired By This Court's July 3, 2012 Order.

In addition to being untimely, Cheatham's motion fails for the straightforward reason that he lacks "an interest relating to the property or transaction that is the subject of the action" here. Fed. R. Civ. P. 24(a)(2). Intervention requires a legally protectable interest, not just "*any* interest

the applicant can put forward." *S. Christian Leadership Conference v. Kelley*, 747 F.2d 777, 779 (D.C. Cir. 1984) (emphasis in original). Cheatham does not and cannot demonstrate a legally recognized interest that the law protects.

In particular, this case is not about whether Cheatham has been defrauded or whether he has claims against his SGC brokers. Instead, this case concerns whether the ***SEC*** can compel SIPC to initiate a liquidation and what standards should apply to such disputes. There is no question that only the SEC, not private plaintiffs, can even bring a proceeding under 15 U.S.C. § 78ggg(b). As that provision explains:

> In the event of the refusal of SIPC to commit its funds or otherwise to act for the protection of customers of any member of SIPC, ***the Commission*** may apply to the district court of the United States in which the principal office of SIPC is located for an order requiring SIPC to discharge its obligations under this chapter and for such other relief as the court may deem appropriate to carry out the purposes of this chapter.

15 U.S.C. § 78ggg(b) (emphasis added). As the Supreme Court held in *SIPC v. Barbour*, nothing in that provision allows participation by private plaintiffs, and "the overall structure and purpose of the SIPC scheme" would be "incompatible with such an implied right." 421 U.S. at 421; *see also id.* at 425 ("[W]e are unable to agree with the proposition that the customers of a member broker may sue to compel the SIPC to perform its statutory functions."); *In re Adler, Coleman Clearing Corp.*, 1998 WL 551972, at *31 (Bankr. S.D.N.Y. Aug. 24, 1998) ("[T]here is no private right of action available to a SIPA customer to compel SIPC to exercise its statutory rights and obligations. Private actions would defeat SIPA's statutory scheme ….") (citations omitted).

As the Court therefore observed in its July 3, 2012 Opinion, "persons claiming to be customers of a broker dealer do not have an implied right of action under the [SIPA] to compel [SIPC] to exercise its statutory authority for their benefit." (July 3, 2012 Mem. Op. and Order

(Dkt. 34) (citation omitted)). And as Cheatham himself has conceded, "individual customers of SGC ***have no private right of action to enforce their SIPC insurance claims*** unless SIPC voluntarily acknowledges those claims by instituting a receivership proceeding involving its member broker dealer or unless the SEC forces it to do so in a proceeding such as this one." (July 24, 2012 Mem. in Support of Mot. To Intervene (Dkt. 36-1) at 5-6 (emphasis added)).[2]

At bottom, Cheatham cannot use Rule 24 intervention to circumvent what *Barbour* commands. *See Barbour*, 421 U.S. at 425 ("Instead of enlisting the aid of investors in achieving that purpose, Congress imposed upon the SEC, the exchanges, and the self-regulatory organizations the obligation to report to the SIPC any situation that might call for its intervention."). The Supreme Court itself has held that disputes over compelling a liquidation are to be litigated between the SEC and SIPC. Because Cheatham lacks the right to sue on those matters, he cannot claim to have a legally protected interest in the litigation before the Court. *Cf. SEC v. Prudential Secs. Inc.*, 136 F.3d 153, 160 (D.C. Cir. 1998) ("[A]ppellants have no legally protected interest in enforcing the terms of the consent decree. Hence, they have no right to intervene in the proceedings between the Commission and Prudential to enforce the decree.").

C. Cheatham's Interests Are Adequately Represented By The Parties.

Finally, Cheatham cannot intervene because his interests are adequately represented by the parties to this litigation. As the movant, Cheatham "bear[s] the burden of demonstrating that the plaintiffs will inadequately represent [his] interests," and, to do so, "'must produce something more than speculation as to the purported inadequacy.'" *Aref v. Holder*, 774 F. Supp. 2d 147,

[2] Cheatham also mischaracterizes SIPA as "insurance" (*see* Mem. in Support of Mot. to Intervene at 1 ("As noted in the Order, beneficiaries of SIPC *insurance* are precluded from individually enforcing SIPC's obligation to them….") (emphasis added))—when SIPC in fact administers a program limited by law pursuant to a particularized statutory regime. *See In re Bernard L. Madoff Inv. Secs. LLC*, 654 F.3d 229, 239 (2d Cir. 2011); *SEC v. Albert & Maguire Sec. Co.*, 560 F.2d 569, 572 n. 2 (3d Cir. 1977); *In re Stratton Oakmont, Inc.*, 2003 WL 22698876, at *5 (S.D.N.Y. Nov. 14, 2003).

172 (D.D.C. 2011) (quoting *Moosehead Sanitary Dist. v. S.G. Phillips Corp*., 610 F.2d 49, 54 (1st Cir. 1979)). "[T]he courts have been quite ready to presume that a government defendant will 'adequately represent' the interests of all private defenders of the statute or regulation unless there is a showing to the contrary. And while there are various ways to show that state representation is not adequate, the burden of overcoming the presumption is on the would-be intervenor." *Mass. Food Ass'n v. Mass. Alcoholic Beverages Control Comm'n*, 197 F.3d 560, 567 (1st Cir. 1999)); *see also Envtl. Def. Fund, Inc. v. Higginson*, 631 F.2d 738, 740 (D.C. Cir. 1979) ("[A] state that is a party to a suit involving a matter of sovereign interest is presumed to represent the interests of all its citizens.").

Cheatham, however, makes no allegations that his interests diverge from the SEC's, because they plainly do not. The SEC purports to have brought this case for putative "customers," including Cheatham himself. *See Barbour*, 421 U.S. at 425; *In re Adler*, 1998 WL 551972, at *31. Indeed, the SEC sought precisely the same relief as Cheatham ultimately seeks in his motion to intervene: an order compelling SIPC to initiate a liquidation proceeding. *Cf. SEC v. Qualified Pensions, Inc.*, 1998 WL 29496, at *4 (D.D.C. Jan. 16, 1998) (denying intervention in light of adequate representation because "[the SEC] is statutorily commissioned to represent the interests of individual investors in the public at large, such as applicants").

Nor can Cheatham support his position by claiming that the SEC overlooked the "atypical" facts of his purchase of SIBL CDs, because—even on its own terms—the position he describes is squarely consistent with the stipulated facts that the parties presented for the benefit of the Court. While Cheatham contends that he was unaware that his brokers purchased SIBL CDs using his funds and that he "did not authorize those transactions," he admits that he had already "grant[ed] discretionary investment authority to [his brokers] in their capacity as

registered representatives of SGC." (Mem. in Support of Mot. to Intervene at 4.) Under these circumstances, it is irrelevant that Cheatham did not personally undertake to "open an account with SIBL, write a check that was deposited into SIBL accounts, or authorize that money 'be wired to SIBL for the purpose of … purchasing CDs," (*id.* at 2) (internal quotation marks omitted), because he admits that he granted his brokers discretionary authority to take those very same actions on his behalf. Moreover, because Cheatham admits that the CDs he purchased are not held in custody for him by his brokers at SGC, he cannot have a "customer" claim against them. (*See id.* at 4.)

Even if Cheatham's circumstances were "atypical," none of this would be relevant to whether the SEC adequately represents his interests. After all, the SEC was entitled to make strategic decisions about how to present its case (including whether to stipulate to certain facts, what facts to stipulate to, and how to frame the issues for the Court). Cheatham's disagreement with the SEC on this score does not support a finding of inadequacy under Rule 24. "If disagreement with an existing party over trial strategy qualified as inadequate representation, the requirement of Rule 24 would have no meaning." *Butler, Fitzgerald & Potter v. Sequa Corp.*, 250 F.3d 171, 181 (2d Cir. 2001); *see also Bradley v. Milliken*, 828 F.2d 1186, 1192 (6th Cir. 1987) ("A mere disagreement over litigation strategy or individual aspects of a remediation plan does not, in and of itself, establish inadequacy of representation.").[3]

[3] Cheatham has not requested permissive intervention under Rule 24(b), nor can he. *First*, like motions for intervention as of right under Rule 24(a), motions to intervene under Rule 24(b) must be timely. *Leavitt*, 329 F. Supp. 2d at 66. *Second*, Cheatham does not have "a claim or defense that has a question of law or fact in common with the main action." *Id.* As discussed above, Cheatham does not have a right to sue under Section 78ggg(b) or any other provision of SIPA at all, let alone "claim[s] or defenses" in common with the SEC's suit here. *Finally*, Cheatham has no unique expertise to provide to the Court that would weigh in favor of permissive intervention. As discussed above, Cheatham's situation is not "atypical," and the SEC fully represents his interests. *See* 6 Daniel R. Coquillette *et al.*, Moore's Fed. Practice § 24.10(2)(c) (3d ed. 2006) ("Courts are understandably reluctant to grant permissive intervention to an applicant when interests are already fully represented by one of the existing parties.").

II. EVEN IF INTERVENTION WERE GRANTED, CHEATHAM'S REQUEST THAT THIS COURT "SUSPEND THE MEMORANDUM OPINION AND ORDER OF JULY, 3, 2012" SHOULD BE DENIED.

Finally, even if intervention were warranted, this Court should deny Cheatham's request that this Court "suspend the Memorandum Opinion and Order of July, 3, 2012." (Mem. In Support of Mot. to Intervene at 1 (capitalization modified)). While the basis for Cheatham's demand is far from clear, he seems to imply that he would file a Rule 59 motion if his Motion to Intervene were granted. Rule 59 motions, however, "are disfavored" and warranted only if "the movant establishes 'an intervening change of controlling law, the availability of new evidence, or the need to correct clear error or manifest injustice.'" *Roane v. Gonzales*, 832 F. Supp. 2d 61, 64 (D.D.C. 2011) (quoting *Lightfoot v. D.C.*, 355 F. Supp. 2d 414, 421 (D.D.C. 2005)). None of those factors is present here, and, as a result, there is no basis for "suspend[ing]" this Court's Order dismissing the SEC's Application with prejudice.[4]

As an initial matter, Cheatham's allegedly "atypical" facts—even if they were truly "atypical"—cannot form the basis for relief under Rule 59. Rule 59 authorizes reconsideration of a judgment only on the basis of ***new*** evidence, meaning evidence that "is newly discovered or previously unavailable despite the exercise of due diligence." *Niedermeier v. Office of Baucus*, 153 F. Supp. 2d 23, 29 (D.D.C. 2001) (citing *Alton & S. Ry. Co. v. Bhd. of Maint. of Way Emps.*, 899 F. Supp. 646, 648 (D.D.C. 1995)). The evidence here, however, was available to the SEC, which has had access to documents from the Texas receiver in charge of the Stanford entities for years. And it was admittedly available to Cheatham—who nevertheless waited until after judgment to intervene. *See Swedish Am. Hosp. v. Sebelius*, 2012 WL 640796, at *4 (D.D.C. Feb. 29, 2012) (Rule 59 may not be used as "a vehicle for presenting theories or arguments that could

[4] The D.C. Circuit has emphasized that "[m]anifest injustice does not exist where ... a party could have easily avoided the outcome, but instead elected not to act until after a final order had been entered." *Davis v. D.C.*, 413 F. App'x. 308, 311 (D.C. Cir. 2011) (internal quotation marks and citation omitted).

have been advanced earlier"); *Kattan v. D.C.*, 995 F.2d 274, 276 (D.C. Cir. 1993) ("[A] losing party may not use a Rule 59 motion to raise new issues that could have been raised previously."); *W.C. & A.N. Miller Cos. v. United States*, 173 F.R.D. 1, 3 (D.D.C. 1997) ("A Rule 59(e) motion is not a second opportunity to present argument upon which the Court has already ruled, nor is it a means to bring before the Court theories or arguments that could have been advanced earlier.").

In any event, Cheatham's arguments also fail even on their own terms because—as discussed above—the "facts" that he alleges (with no documentary support) are entirely consistent with the SEC's and thus not "new" at all. Although Cheatham contends that his brokers purchased SIBL CDs without asking him in advance, he admits that he had already given them discretionary investment authority—and never objected even after receiving account statements identifying the investments that were made. *See In re Klein, Maus & Shire, Inc*., 301 B.R. 408, 419 (Bankr. S.D.N.Y. 2003) ("If trades were unauthorized, it was incumbent upon the Claimants to complain in writing and on a timely basis. The confirmation and account statements that the clearing broker sent to them gave them ample notice of their duty to complain.… A timely written complaint by the Claimants of unauthorized trading would have been proof that unauthorized trading had occurred."). Cheatham also admits that the CDs he purchased are not held in custody for him by his brokerage or any other SIPC-member firm, so he cannot have a "customer" claim against them. (*See* Mem. in Support of Mot. to Intervene at 4.) Cheatham's factual allegations are consequently identical to the SEC's in all material respects and thus provide no basis for reconsideration of this Court's Opinion.

CONCLUSION

For the foregoing reasons, SIPC respectfully requests that this Court deny Cheatham's motion to intervene.

Dated: August 22, 2012

Respectfully submitted,

/s/ Eugene F. Assaf

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August, 2012, I served the Securities Investor Protection Corporation's Opposition to Richard R. Cheatham's Motion To Intervene and To Suspend the Memorandum Opinion and Order of July 3, 2012 as follows:

1. By ECF to the following:

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2. By email and by depositing in the United States mail on the following:

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/s/ Eugene F. Assaf

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Securities and Exchange Commission, Plaintiff/Applicant, v. Securities Investor Protection Corporation, Defendant/Respondent.	Misc. No. 11-MC-678-RLW

[PROPOSED] ORDER DENYING MOTION TO INTERVENE AND TO SUSPEND THE MEMORANDUM OPINION AND ORDER OF JULY 3, 2012

Upon consideration of Richard R. Cheatham's Motion To Intervene and To Suspend the Memorandum Opinion and Order of July 3, 2012 (Docket No. 36), the Securities Investor Protection Corporation's opposition to the same, and for other good cause shown, it is hereby **ORDERED** that the Motion To Intervene and To Suspend the Memorandum Opinion and Order of July 3, 2012 is **DENIED.**

IT IS SO ORDERED.

_____
HON. ROBERT L. WILKINS
UNITED STATES DISTRICT JUDGE

Date: _____

Oppositions and Replies

1:11-mc-00678-RLW SECURITIES AND EXCHANGE COMMISSION v. SECURITIES INVESTOR PROTECTION CORPORATION **CASE CLOSED on 07/03/2012**

CLOSED

U.S. District Court

District of Columbia

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RESPONSE re [36] MOTION to Intervene filed by SECURITIES INVESTOR PROTECTION CORPORATION. (Attachments: # (1) Text of Proposed Order)(Assaf, Eugene)

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