No. 10-56739

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

JOHN DOE I; JOHN DOE II; JOHN DOE III, INDIVIDUALLY AND ON BEHALF OF PROPOSED CLASS MEMBERS; AND GLOBAL EXCHANGE,

Plaintiffs-Appellants,

v.

NESTLÉ, U.S.A., INC.; ARCHER-DANIELS-MIDLAND COMPANY; AND CARGILL INCORPORATED,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA, CASE NO. C-05-5133-SVW
THE HONORABLE STEPHEN V. WILSON, UNITED STATES DISTRICT JUDGE

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FOREIGN TRADE COUNCIL, THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE ORGANIZATION FOR INTERNATIONAL INVESTMENT IN SUPPORT OF THE PETITION FOR REHEARING AND REHEARING *EN BANC*

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CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

The National Foreign Trade Council is a nonprofit corporation organized under the laws of the State of New York. It has no parent company and has issued no stock.

The National Association of Manufacturers is a nonprofit corporation organized under the laws of New York. It has no parent company and has issued no stock.

The Organization for International Investment is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent company and has issued no stock.

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IDENTITY, INTEREST AND SOURCE OF AUTHORITY [1]

Identity: The Chamber of Commerce of the United States of America ("Chamber") is the world's largest federation of businesses and associations. The Chamber represents three-hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members before the courts, Congress and the Executive Branch.

The National Foreign Trade Council ("NFTC") is the premier business organization advocating a rules-based world economy. Formed in 1914 by a group of American companies, NFTC and its affiliates now serve more than 250 member companies.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 states. Manufacturing

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[1] Pursuant to Federal Rule of Appellate Procedure 29(c)(5), *amici* certify that no party's counsel authored this brief in whole or in part. Furthermore, no party, no party's counsel and no person – other than *amici*, their members or their counsel – contributed money that was intended to fund the preparation or submission of this brief.

employs nearly 12 million men and women, contributes more than $1.8 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth.

The Organization for International Investment ("OFII") represents the U.S. operations of many of the world's leading global companies, which insource millions of American jobs. OFII promotes policies that facilitate global investment in the United States and advocates for fair, non-discriminatory treatment of U.S. subsidiaries of foreign companies, including laws and regulations that respect their separate corporate identities.

Interest: *Amici* have a direct and substantial interest in the issues presented by this appeal. Numerous members have been – and may continue to be – targeted by lawsuits asserting liability under the Alien Tort Statute ("ATS"), 28 U.S.C. § 1350. Over the past two decades, U.S. and foreign companies have been named as defendants in hundreds of ATS lawsuits, many of which have been filed in this Circuit. Unless the panel's published opinion is vacated, especially in light of its

unprecedented "profit equals purpose" rule regarding the *mens rea* for accessorial liability, the deluge of ATS lawsuits, especially in this Circuit, will worsen.

Amici take no position on the factual allegations in this case and unequivocally condemn forced labor practices. The question at bar, though, is not whether such wrongs occurred. Instead, the only legal question before this Court is whether a U.S. statute can be stretched beyond its explicit and intended scope – one that the Supreme Court repeatedly has limited – to sweep up ordinary overseas business transactions involving commercial goods that violate neither international nor U.S. law.

Amici can offer a unique and helpful perspective on that issue. They have participated repeatedly in cases before the Supreme Court and other federal courts involving the ATS's reach. These include appearances before other federal appellate courts that have issued opinions conflicting with the panel decision in this case, *see, e.g.*, *Balintulo v. Daimler AG*, 727 F.3d 174 (2d Cir. 2013); *Presbyterian Church of Sudan v. Talisman Energy, Inc.*, 582 F.3d 244 (2d Cir. 2009), as well as prior appearances in this litigation.

Source of Authority: Federal Rule of Appellate Procedure 29(a) and this Circuit's Rule 29-2(a) authorize the filing of this brief. All parties have consented to the filing.

ARGUMENT

The panel's published opinion warrants plenary review. In addition to the reasons given by Appellees, *amici* offer two reasons why the panel's decision addresses matters of "exceptional importance."[2] Fed. R. App. P. 35(b)(1)(B).

First, the panel announced an unprecedented – and unsupportable – standard for the *mens rea* required to state an ATS claim predicated on principles of accessorial liability.[3] The panel assumed (without deciding) that the defendant must have the "purpose" of facilitating the alleged violation but, then, linked proof of that "purpose" with a defendant's alleged goals to lower costs and maximize profits. That line of reasoning – inferring the required "purpose" from a defendant's alleged profit-seeking motive – finds no support in principles of international law and squarely conflicts with the decisions of other federal appellate courts that have applied the "purpose" standard, including a very recent decision of the Second Circuit. *See Mastafa v. Chevron Corp*., No. 10–5258–cv,

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[2] In their brief, Appellees also challenge the panel's holdings on corporate liability under the ATS and the *actus reus* standard for claims predicated on a theory of accessorial liability. *See* Petn. at 16-19. *Amici* fully endorse Appellees' position on these issues but, mindful of their obligation under this Circuit's Advisory Committee Note to Rule 29-1, do not retread that ground in this brief.

[3] This holding assumes, of course, that accessorial liability is available in claims arising under the ATS. While *amici* believe that such liability is unavailable, they do not press that point in this brief.

2014 WL 5368853, at *16 (2d Cir. Oct. 23, 2014) ("Plaintiffs' allegations that defendants intentionally flouted the sanctions regime for profit … are irrelevant to the *mens rea* inquiry … ."). Unless corrected, the panel's standard exposes businesses to the risk of liability for any commercial relationship in countries alleged to have engaged in human rights violations, even when that relationship is entirely lawful as a matter of customary international law and American foreign economic policy.

Second, the panel announced an unprecedented rule regarding the interplay between the ATS and the presumption against extraterritoriality. While purporting not to reach any conclusion regarding whether the Supreme Court's decision in *Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659 (2013), bars the ATS claims in this case, the panel's decision gravely distorts *Kiobel*'s extraterritoriality analysis of ATS claims by stating that a plaintiff can maintain an ATS suit without alleging that the conduct that is the "focus" of the ATS violation occurred in the United States. The panel's reasoning cannot be squared with *Kiobel*'s statement that "the presumption against extraterritoriality applies to claims under the ATS, and [ ] nothing in the statute rebuts that presumption," *Kiobel*, 133 S. Ct. at 1669. *See also Daimler AG v. Bauman*, 134 S. Ct. 746, 763 (2014) (citing *Kiobel* for the

proposition that the "presumption against extraterritorial application controls claims under the ATS").

Nor can it be reconciled with the *Kiobel*'s extensive reliance on *Morrison v. National Australia Bank Ltd.*, 561 U.S. 247 (2010)—a case that held that the presumption against extraterritoriality can be overcome only where the conduct that is the "focus" of the underlying wrong occurred in the United States. *See Kiobel*, 133 S. Ct. at 1669 (citing *Morrison* to support the proposition that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application.").

The panel's view on extraterritorial application of the ATS also clashes with the decisions of several other federal appellate courts (especially the Second and Eleventh Circuits) that have refused to entertain ATS claims lacking a sufficient domestic nexus. *See Cardona v. Chiquita Brands Int'l, Inc.*, 760 F.3d 1185 (11th Cir. 2014); *Chowdhury v. Worldtel Bangladesh Holding, Ltd.*, 746 F.3d 42 (2d Cir. 2014).

While each of these two holdings in the panel's decision is "exceptionally important" in its own right, collectively they accentuate the need for immediate plenary review. Considered together, the panel's diluted *mens rea* standard and its

muddled extraterritoriality analysis risk making this Circuit a magnet for ATS litigation. Rather than engaging in the "vigilant doorkeeping" over ATS claims mandated by the Supreme Court, *see Sosa v. Alvarez-Machain*, 542 U.S. 692, 729 (2004), the panel opinion throws the door wide open and invites a new wave of post-*Kiobel* ATS claims in this Circuit.

I. The Panel's Unprecedented *Mens Rea* Standard Lacks Any Foundation In International Law, Conflicts With the Decisions of Other Federal Appellate Courts, and Potentially Subjects Companies To ATS Claims Whenever They Participate In Foreign Markets.

Earlier in these proceedings, the parties sparred over whether "purpose" or "knowledge" supplied the governing *mens rea* standard for ATS claims predicated on accessorial liability. The panel's original order compounded confusion over the issue by specifying a purpose standard that did not require proof of specific intent and, thus, was the equivalent of a knowledge test. *Doe I v. Nestle USA, Inc.*, 738 F.3d 1048 (9th Cir. 2013). Having abandoned that position, the panel's revised opinion disavowed any need to decide between "specific intent" and "purpose" because, in its view, the allegations here "satisfy the more stringent purpose standard." *See* Petition for Rehearing and Rehearing *En Banc* ("Petn.") Add. A at 22. The panel rested this conclusion on an "inference that the defendants placed increased revenue before basic human welfare, and intended to pursue all options

available to reduce their cost for purchasing cocoa." *Id.* Linking proof of "purpose" to an inference from a defendant's profit motive creates a new and unprecedented *mens rea* standard for accessorial liability under the ATS – one lacking any foundation in international law, clashing irreconcilably with the decisions of other federal appellate courts, and setting a dangerous precedent for companies doing business in foreign countries.

Although the Supreme Court clearly has instructed that "international law" must guide consideration about the "scope of liability for violation of a given norm," *Sosa*, 542 U.S. at 732 n. 20, the panel's coupling of purpose with a defendant's profit motive finds no support in international law. An overwhelming array of international law authorities describe the purpose standard (and proof of it) without any indication that a defendant's "profit motive" had any relevance to the *mens rea* determination. *See, e.g.*, *United States v. von Weizsaecker (the Ministries Case)*, *in* 14 *Trials of War Criminals Before the Nuremberg Military Tribunals Under Control Council Law No. 10* at 662 (1997) (holding that bank officer who loaned funds to borrower would not be criminally liable because he lacked purpose of supporting borrower's commission of crime). *See generally Khulumani v. Barclay Nat'l Bank Ltd.*, 504 F.3d 254, 275-77 (2d Cir. 2007) (Katzmann, J., concurring) (exhaustively canvassing international law sources on the meaning of

the "purpose" requirement for accessorial liability under international law). Given the dearth of support for the panel's decision, it is hardly surprising that from the moment the panel announces this standard until the end of the section addressing *mens rea*, the panel's revised opinion does not cite a single, solitary source of authority in international law to support this line of reasoning. *See* Petn. Add. A at 22-26. Indeed, the entire remainder of this section only cites four cases: two of which it distinguishes and two of which do not even concern the "purpose" standard under international law.

Not only does the panel's conception of the "purpose" standard lack any support under international law, it also clashes with other federal appellate courts' application of that standard. Both the Second Circuit and the Fourth Circuit have applied the "purpose" standard to reject ATS claims against corporations based on their alleged aiding and abetting of human rights violations *even where the corporations arguably stood to profit from their activities*. *See Mastafa*, 2014 WL 5368853, at *16; *Aziz v. Alcolac, Inc.*, 658 F.3d 388, 401 (4th Cir. 2011); *Talisman Energy*, 582 F.3d at 260-64. In *Aziz* the plaintiffs alleged that the corporate defendant placed export-restricted chemicals "into the stream of international commerce with the purpose of facilitating the use of said chemicals in the manufacture of chemical weapons …." 658 F.3d at 401. Similarly, in *Talisman*,

the plaintiffs proffered evidence that the corporate defendant engaged in activities that "generally accompany any natural resource development business or the creation of any industry," especially in a war-torn region like Sudan. 582 F.3d at 261 (citation and internal quotations omitted).

The panel attempted to distinguish *Aziz* and *Talisman* on the ground that the corporations in those cases "had nothing to gain from the violations of international law." Petn. Add. A at 23. But as Judge Rawlinson correctly recognized, *id.* at 37, neither case supports the distinction that the panel attempts to draw. Despite the commercial incentives of the companies to engage in the alleged conduct in both cases (and, thus, to look beyond the alleged human rights violations committed by other actors), the federal appellate courts in both cases, applying the "purpose" standard, declined to find that the corporations exhibited *mens rea* necessary to support an ATS claim. While the panel purported to utilize the same *mens rea standard* utilized in *Aziz* and *Talisman*, the panel's *application* of that standard cannot be reconciled with actual holdings of those two federal appellate decisions.

Finally, the panel opinion ignored the serious "practical consequences" of its decision. *See Sosa*, 542 U.S. at 732-33 (requiring federal courts to consider the "practical consequences of making [a cause of action] available to litigants in the

federal courts") (footnote omitted). As Judge Rawlinson recognized, "profit-seeking is the reason most corporations exist." In pursuit of this objective, corporations naturally seek to lower their costs and to explore new markets for their products. In a globalized economy, these profit-seeking opportunities will inevitably arise in countries around the world. To equate this activity, inherent in all corporations, with the *mens rea* required for accessorial liability under the ATS "would completely negate the constrained concept of ATS liability contemplated by the Supreme Court in *Sosa*." Petn. Add. A at 42.

If permitted to stand, the panel's opinion opens the door to ATS claims relating to virtually any market in which human rights violations are alleged to have occurred. Every company doing business in those markets, whether as a purchaser of raw materials or seller of goods, will be vulnerable to ATS claims because the mere *fact* of their participation in those markets would, under the panel's view, support an *inference* that the company has the requisite *mens rea* to support on ATS claim predicated on accessorial liability.[4]

[4] While the panel attempts to limit its "profit equals purpose" rule by stressing the Appellants' alleged market share and their lobbying activities, those two factors, for reasons explained by Appellants in their Petition, do not supply a defensible a limiting principle. *See* Petn. at 12-16.

In sum, rehearing should be granted due to the "exceptional importance" of the panel's *mens rea* standard – one that lacks support in international law, clashes with the views of other federal appellate courts, and does not heed the Supreme Court's caution to consider a liability rule's "practical consequences."

II. The Panel's Treatment of the Extraterritoriality Presumption Conflicts with the Supreme Court's Decision in *Kiobel* and the Decisions of Other Federal Appellate Courts Applying *Kiobel*.

Following the first oral argument in *Kiobel*, the Supreme Court ordered the parties to file supplemental briefs addressing the following question:

> Whether and under what circumstances the [ATS] allows courts to recognize a cause of action for violations of the law of nations occurring within the territory of a sovereign other than the United States.

132 S. Ct. 1738 (2012). In answer to this question, the Court held that ATS claims do not "reach conduct occurring in the territory of a foreign sovereign." *Kiobel*, 133 S. Ct. at 1674.

To support this conclusion, the Court relied heavily on its prior decision in *Morrison*, 561 U.S. 247. *Morrison* had held that Section 10 of the Securities Act of 1933 did not reach alleged fraud in connection with the sale of a security on a

foreign exchange because the "focus" of the statute concerned solely transactions taking place on United States exchanges. After canvassing the text, history and purposes of the ATS, the Supreme Court in *Kiobel* concluded that "the presumption against extraterritoriality applies to claims under the ATS, and that nothing in the statute rebuts that presumption." 133 S. Ct. at 1669.

Having concluded that the presumption against extraterritoriality applies to ATS claims, the Supreme Court went on to address the level of domestic conduct necessary for the ATS to apply. Again citing *Morrison*, the Supreme Court explained held that "even where the claims touch and concern the territory of the United States, they must do so with sufficient force to displace the presumption against extraterritorial application." *Id.*

The panel's extraterritoriality analysis clashes with *Kiobel*. The panel declares that the presumption against extraterritoriality "has no direct application to ATS claims" but, merely, that "general principles underlying the presumption against extraterritoriality apply to ATS claims." Petn. Add. A at 29. While the panel cited language from *Kiobel* to support this conclusion, *see* 133 S. Ct. at 1665, the panel misapprehended that language. Nothing in *Kiobel* suggested that application of the principles (as opposed to "direct application") required a looser standard. *See also Morrison*, 561 U.S. at 261 ("Rather than guess anew in each

case, we apply the presumption *in all cases*, preserving a stable background against which Congress can legislate with predictable effects.") (emphasis added). Even if there were some material difference between "direct application" of the presumption against extraterritoriality and the application of its underlying principles, any difference would counsel in favor of a *stricter* rather than looser test for the quantum of US-based conduct necessary to state an ATS claim. *Kiobel* recognized as much when it noted that the concerns underpinning the presumption against extraterritoriality – namely "unintended clashes between our laws and those of other nations" and the "danger of unwanted judicial interference in the conduct of foreign policy" – are "magnified in the context of the ATS, because the question is not what Congress has done but instead what courts may do." 133 S. Ct. at 1664 (citation omitted). *See also Balintulo*, 727 F.3d at 187-88 ("[T]he ATS places federal judges in an unusual lawmaking role as creators of federal common law … [and thereby] elevates 'the danger of unwarranted judicial interference in the conduct of foreign policy.'") (quoting *Kiobel*, 133 S. Ct. at 1664). Thus, Judge Rawlinson was quite right in her separate opinion when she announced that "a question not left open regarding the reach of the ATS was the presumption against the extraterritorial applications of the statute." Petn. Add. A at 43.

Just like Judge Rawlinson, several federal appellate courts have applied the presumption against extraterritoriality to ATS claims without suggesting at a material distinction between "direct application" of the presumption and its "principles." For example, the Eleventh Circuit in *Cardona* relied on the presumption against extraterritoriality, as articulated in *Kiobel* and *Morrison*, to order dismissal of ATS claims against an American company and predicated on its alleged conduct in Colombia. Echoing *Kiobel*, the Eleventh Circuit held "that the ATS does not apply extraterritorially," 760 F.3d at 1191, and found that the defendant's identity as an American company (as opposed to the foreign company in *Kiobel*) "does not lead us to any indication of a congressional intent to make the statute apply to extraterritorial torts," *id.* at 1189. Similarly, in *Chowdhury*, the Second Circuit applied the presumption against extraterritoriality to bar an ATS claim where the underlying conduct took place in Bangladesh. 746 F.3d at 49-50.

Apart from the confusion created by the panel's suggested difference between "direct application" of the presumption and its principles, the panel's extraterritoriality analysis clashes with *Kiobel* in another respect. The panel holds that *Kiobel*'s "touch and concern" requirement "did not incorporate *Morrison*'s focus test." Petn. Add. A at 30. After it delinked the two tests, the panel granted

Appellants leave to amend their complaint to show that "part of the conduct underlying their claims occurred in the United States." Petn. Add. A at 31.

Kiobel, of course, supports no such distinction. As noted above, it cited *Morrison* when it articulated the "touch and concern" requirement. When doing so, it did not draw any express distinction between the "touch and concern" requirement and *Morrison*'s requirement that the conduct that is the "focus" of the underlying wrong occurred in the United States. Thus, Judge Rawlinson was correct when she rejected the majority's decoupling of *Kiobel* from *Morrison*: "Why else would the Supreme Court direct us to *Morrison* precisely when it was discussing claims that allegedly 'touch and concern' the United States?" Petn. Add. A at 45. *See also Mastafa*, 2014 WL 5368853, at *10 ("Drawing upon the guidance provided by the Supreme Court in *Morrison* and *Kiobel* and by this Court in *Balintulo*, a clear principle emerges for conducting the extraterritoriality-related jurisdictional analysis required by the ATS: that the 'focus' of the ATS is on conduct and on the location of that conduct.").

Like Judge Rawlinson (but unlike the panel majority), other federal appellate courts have respected the link between *Morrison* and *Kiobel* and refused to grant comparable relief when, as in this case, the alleged international law violation took place outside the United States. *See, e.g., Baloco v. Drummond Co.*, 767 F.3d

1229 (11th Cir. 2014). In *Baloco*, the Eleventh Circuit rejected precisely the relief that the panel granted here – leave to amend the complaint. *Id.* at 1239. The plaintiff's in *Baloco* alleged that an officer of the defendant (an American company) "obtained consent in Alabama" from the company "to provide substantial support to the [primary tortfeasor]." *Id.* at 1236. Despite this allegation, the Eleventh Circuit found that these allegations fell "short of the minimum factual predicate warranting the extraterritorial application of the ATS." *Id.* Rather, "[f]urther amendment of the complaint would be futile because it would not allege conduct *focused* in the United States to a degree necessary to overcome the presumption against extraterritoriality." *Id.* at 1239 (emphasis added). The Eleventh Circuit derived this "focus" requirement by linking *Kiobel* to principles announced in *Morrison*, including the proposition that "the extraterritoriality inquiry turns on where the transaction that is the *focus* of the statute occurred." *Id.* at 1237. Thus, under the Eleventh Circuit's approach, the mere fact that "part of the conduct underlying their claims occurred in the United States" would neither support Appellants' ATS claims nor justify leave to amend the complaint unless that conduct was "*focused* in the United States to a degree necessary to overcome the presumption against extraterritoriality." That panel's contrary conclusion cannot be squared with *Baloco*.

That conclusion, moreover, risks opening the floodgates to ATS claims against American companies. By delinking *Kiobel*'s "touch and concern" requirement from *Morrison*'s "focus" requirement, the panel potentially allows any allegation of domestic conduct to overcome the presumption against extraterritoriality even if the conduct that is the "focus" of the tort occurred overseas. Plaintiffs can always allege that a company ratified, approved or oversaw the alleged acts from its headquarters, and so the effect of the panel's rule inevitably will have its greatest impact on companies based in the United States. *Morrison* warned that the presumption against extraterritoriality "would be a craven watchdog indeed if it retreated to its kennel whenever *some* domestic activity is involved in the case." 561 U.S. at 266. The panel's lax interpretation of *Kiobel*'s "touch and concern" requirement, unless corrected, orders the retreat that *Morrison* – and *Kiobel* – sought to prevent.

In sum, rehearing should be granted due to the "exceptional importance" of the panel's extraterritoriality analysis. Its weakening of the presumption in ATS cases and its decoupling of *Kiobel*'s touch-and-concern requirement from *Morrison*'s focus test are inconsistent with *Kiobel* itself as well as the decisions of other federal appellate courts that have more faithfully applied *Kiobel*'s teachings.

CONCLUSION

For the foregoing reasons, the petition for rehearing and rehearing *en banc* should be granted.

Respectfully submitted,

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October 27, 2014

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October 27, 2014 /s
Peter B. Rutledge

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I, Peter B. Rutledge, certify that on October 27, 2014, the attached BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE NATIONAL FOREIGN TRADE COUNCIL, THE NATIONAL ASSOCIATION OF MANUFACTURERS AND THE ORGANIZATION FOR INTERNATIONAL INVESTMENT IN SUPPORT OF THE PETITION FOR REHEARING AND REHEARING *EN BANC* was filed electronically with the clerk of the Court of the United States Court of Appeals for the Ninth Circuit using the appellate CM/ECF system.

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