

UNITED STATES OF AMERICA  
Before The  
SECURITIES AND EXCHANGE COMMISSION

**ADMINISTRATIVE PROCEEDING**  
**File No. 3-20801**

**In the Matter of**

**DF GROWTH REIT II, LLC,**

**Respondent.**

**RESPONDENT DF GROWTH REIT II, LLC'S**

- (1) RESPONSE TO THE DIVISION'S MOTION FOR SUMMARY DISPOSITION;**
- (2) SUGGESTION OF MOOTNESS; AND**
- (3) MOTION FOR AN ORDER VACATING THE TEMPORARY SUSPENSION ORDER CURRENTLY IN EFFECT**

June 21, 2022

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## **I. INTRODUCTION**

All adversarial legal proceedings, no matter how straightforward or complex, and no matter how amicably opposing counsel interact, inevitably take some period of time to resolve. During that time period, it is almost equally inevitable that intervening events will fundamentally change the nature – and perhaps even the relevance – of the question originally before the Court. Such is the case here. In this Rule 258 proceeding, the Court was tasked by the Commission to answer only one question: whether the Commission’s order temporary suspending Respondent’s Regulation A Offering should be vacated or made permanent.

Since the Commission instituted this administrative proceeding – indeed, just within the past week – the seemingly simple question before the Court has become unanswerable, however, because the relevant Offering has been permanently terminated as of June 17, 2022. Thus, there is no longer any Regulation A Offering that could possibly be suspended, either temporarily or permanently, obviating the very purpose of this proceeding.

For this reason, as well as the reasons discussed in greater detail below, Respondent DF Growth REIT II, LLC, (“Respondent” or “REIT II”) respectfully (1) submits the following Suggestion of Mootness and Response to the Division’s Motion for Summary Disposition, (2) moves this Court, pursuant to 17 C.F.R. 201.531(b) (“Rule 531(b)”), for an order vacating the temporary suspension currently in effect, and (3) deny the Division’s Motion for Summary Disposition in its entirety.

## **II. RELEVANT BACKGROUND**

Arguably, many aspects of REIT II – such as its business model, its several thousand individual investors, its management structure, its ongoing efforts to acquire and improve multifamily real estate projects across the country for the benefit of its shareholders, and, of

course, its current legal and regulatory issues – are necessarily complex. By contrast, as with the applicable legal precedent, the few facts that are relevant to the only question currently before this Court are strikingly simple:

1. On January 21, 2021, REIT II filed an amended Regulation A offering statement on Form 1-A/A (together with the related Offering Circular, “the Offering Statement”)<sup>1</sup> with the Commission under the Securities Act of 1933 (“Securities Act”). According to the Offering Statement, REIT II sought to raise up to \$50 million by offering and selling Class A Investor Shares to individuals and entities in a Tier 2 offering under Regulation A (“the Offering”). On the cover page of its Offering Statement, REIT II unambiguously disclosed a material term of the Offering: “The Offering will end upon the earlier of (1) the date we have sold \$50,000,000 of Class A Investor Shares (*i.e.*, all the securities we are offering), (2) the date two years after it begins, or (3) *the date we decide to end it.*” (Emphasis added.)

2. On January 29, 2021, the Commission formally qualified REIT II’s Offering Statement, allowing REIT II to go forth and raise money by offering and selling its unregistered Class A Investor Shares to the general public. REIT II did just that.

3. On January 13, 2022, the Commission issued a Formal Order of Investigation, authorizing the staff of the Division of Enforcement (“the Division”), among other things, to conduct “a private investigation … to determine whether a suspension order pursuant to Rule 258 of Regulation A … should be issued to suspend the ability of REIT II to rely on the Regulation A

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<sup>1</sup> Pursuant to Rule 323 of the Rules of Practice, official notice may be taken of any matter in the public official records of the Commission, such as EDGAR. See 17 C.F.R. 201.323. See also *Positron Corporation*, 2015 SEC Lexis 442 n.14 (Feb. 5, 2015). Accordingly, Respondent asks this Court to take judicial notice of all documents cited in this pleading that are in the EDGAR system.

exemption.” Pursuant to Rule 262(a)(7), while the Rule 258 investigation ordered by the Commission was pending, REIT II was automatically disqualified from offering or selling unregistered securities under Regulation A. In other words, since about January 13, 2022, REIT II’s Offering has been temporarily suspended by operation of law. *See* 17 C.F.R. 230.262(a)(7).

4. On March 16, 2022, the Commission issued an “Order Temporarily Suspending Exemption Pursuant to Section 3(b) of the Securities Act of 1933 and Rule 258 of Regulation A Thereunder, Statement of Reasons for Entry of Order, and Notice of Opportunity for Hearing” (“March 16 Order”). In the March 16 Order, the Commission indicated that, based on information reported to it by the Division’s staff, it was ordering that, “pursuant to Rule 258(a)..., that the exemption of REIT II under Regulation A be, and hereby is, temporarily suspended.” In the same Order, however, the Commission specifically noted that its “decision to issue this temporary suspension under the ‘reason to believe’ standard is not a final determination about the availability of the exemption.” Additionally, the Commission provided REIT II with an opportunity to request an administrative hearing specifically and only “for the purpose of determining whether this order should be vacated or be made permanent[.]” REIT II promptly availed itself of that opportunity, and an administrative proceeding is currently scheduled to take place in mid-July 2022.

5. On June 3, 2022, the Division filed a Motion for Summary Disposition, asking the Court in this administrative proceeding to “permanently suspend REIT II from its continued use of Regulation A” without holding a hearing to considering any evidence and testimony from REIT II.

6. On June 17, 2022, by its terms, REIT II’s Regulation A Offering was permanently terminated, effective immediately. *See* 17 CFR 230.152(d)(2)(iv). That same day, REIT II publicly announced the termination of the Offering by filing both a Form I-U and an Offering Supplement on EDGAR. (For the convenience of the Court, copies of these filings are attached as Exhibit A

and Exhibit B.)

### **III. ARGUMENT**

As described above, only a very few indisputable facts are relevant to only question that the Commission has put before this Court. In the March 16 Order, the Commission temporarily suspended REIT II's Regulation A Offering and instructed this Court to determine just one thing: whether the Commission's temporary suspension of the Offering should be vacated or made permanent. About three months later, on June 17, 2022, the Offering was permanently and immediately terminated by its own terms. Because the only remedy available in this Rule 258 administrative proceeding would be to permanently suspend the Offering, and there is no Offering left to suspend either temporarily or permanently, counsel respectfully submits that this Court has no alternative but to dismiss this administrative proceeding.

Likewise, where, as here, the terms of this Court's initial decision cannot, and thus do not, make the Commission's temporary suspension permanent, Rule 531(b) requires this Court to "issue a separate order setting aside, limiting, or suspending the temporary [suspension] then in effect." *See* 17 C.F.R. 201.531(b). As discussed below, pursuant to Rule 531(b), an order simply vacating the temporary suspension that is current in effect seems most appropriate.

#### **A. The Termination Of REIT II's Offering Was Both Legal And Immediate**

Remarkably, the Commission itself acknowledged just last year that, "Existing rules under the Securities Act do not clearly define commencement or completion with respect to exempt and registered offerings...". *See Facilitating Capital Formation and Expanding Investment Opportunities by Improving Access to Capital in Private Markets*, 86 FR 3496, 3514 (January 14, 2021). Accordingly, in January 2021, the Commission addressed this problem by issuing new Rules

152(c) and 152(d), which set forth specific criteria indicating that a given type of offering had commenced or had terminated.<sup>2</sup> *See id.*

According to Rule 152(d)(2)(iv), a Regulation A Offering is deemed terminated or completed on, among other things, the third anniversary of the date it was qualified “*or any earlier date on which the offering terminates by its own terms.*”<sup>3</sup> (Emphasis added.) Echoing Rule 152(d)(2)(iv), the cover page of REIT II’s Regulation A Offering Statement explicitly stated: “The Offering will end upon the earlier of (1) the date we have sold \$50,000,000 of Class A Investor Shares (i.e., all the securities we are offering), (2) the date two years after it begins, or (3) *the date we decide to end it.*” (Emphasis added.) Accordingly, and consistent with Rule 152(d)(2)(iv), REIT II’s Regulation A Offering was permanently terminated by its own terms, effective immediately, on June 17, 2022, “the date [REIT II] decide[d] to end it.”

REIT II recognizes that, by allowing a Regulation A offering to terminate “by its terms,” effective immediately, Rule 152(d)(2)(iv) is something of an anomaly among Commission regulations. More commonly, rules and regulations promulgated by the Commission regarding withdrawals and/or terminations in various contexts typically impose restrictions and /or waiting

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<sup>2</sup> Rule 152 does not appear among other rules regarding Regulation A, *see* 17 C.F.R. 230.251-230.263, or any other specific exemption. However, it specifically references Regulation A, and explains in detail how to determine when a Regulation A offering has commenced and then has terminated. Moreover, were there any doubt whether Rule 152 applies to Regulation A, Rule 251(c) incorporates Rule 152 by reference into the Regulation A rules. *See* 17 C.F.R. 230.251(c).

<sup>3</sup> Notably, the Commission’s proposed rules defining the termination of a Regulation A offering did not include the italicized and underlined provision; according to the release accompanying the final rulemaking, “[I]n response to a commenter’s suggestion, we have also further clarified that a Regulation A offering may terminate on any earlier date on which the offering terminates by its terms.” *See* 86 FR 3496 at 3516.

periods.<sup>4</sup> Indeed, the Division may claim that the immediately effective termination of REIT II’s Regulation A offering was only nominally “by its terms,” because the relevant terms broadly vest substantial discretion in REIT II and its manager to determine the best date to terminate the Offering. (It bears noting that these terms appeared on the cover page of the Offering Statement and attracted no questions from the Commission reviewer who qualified the Offering Statement on January 29, 2021.) However, REIT II’s investors chose to give it broad discretionary authority to determine when to terminate the Offering, and it is essential to respect that choice; it certainly is not the Division’s place to paternalistically second-guess the wisdom of such substantive terms.

**B. Because The Offering Has Been Terminated, The Only Resolution To This Case Is Dismissal**

Despite extensive research, REIT II’s Counsel has been unable to find any relevant cases addressing the consequences of terminating a Regulation A offering during a pending Rule 258 proceeding. Accordingly, it appears that this situation is unprecedented.

However, the Commission and this Court have regularly confronted essentially the same issues in a closely analogous situation: Administrative proceedings brought pursuant to Section 12(j) of the Securities Exchange Act of 1934 to determine whether the registration of a given issuer’s securities should be revoked due to that issuer’s failure to file periodic reports. In a

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<sup>4</sup> The Commission often will: (a) disallow the withdrawal of documents (say, an offering statement) that is the subject of an administrative proceeding, *see, e.g.*, 17 C.F.R. 230.259(a); (b) impose a 90-day period before certain termination filings (for example, a Form 15 voluntarily terminating the registration of an issuer’s securities) become effective, *see, e.g.*, 17 C.F.R. 240.12(g)-4 (Form 15 takes effect 90 days after filing); (c) permit a regulated entity (such as a national securities exchange) to withdraw its registration on the condition that for five years, it maintain and produce all of its books and records upon request, *see Order Granting OneChicago, LLC's Request To Withdraw From Registration as a National Securities Exchange*, 86 FR 10140 (Feb. 18, 2021); and (d) allow an individual to withdraw her investment adviser registration effective upon filing the requisite forms, but mandate that the “investment adviser registration will continue for a period of 60 days after acceptance solely for the purpose of commencing a proceeding [against him or her] under 15 U.S.C. 80b-3(e),” *see* 17 C.F.R. 275.203-2(c).

considerable number of such Section 12(j) proceedings, the issuer filed a Form 15 to voluntarily deregister its securities before the Commission revoked their registration. Once the Form 15 became effective (90 days after it was filed), the registration of the securities was terminated. In Section 12(j) proceedings, “The only remedy available where an issuer has failed to file required periodic reports is either the revocation or suspension of its registered securities. The fact that this is the only relief the Commission can order is probably why the Commission has consistently dismissed Section 12(j) proceedings against Respondents who [by filing a Form 15 in time] no longer have a class of securities registered under Section 12(g) of the Exchange Act.” *See VoiceIQ N/K/A Yoho Resources, Inc.*, Initial Decision Release No. 405 (Oct. 22, 2010).

The caselaw addressing this situation is remarkably extensive and uniformly reaches the same conclusion<sup>5</sup> – once the registration of the securities has been terminated, no meaningful remedy is available, and the Section 12(j) proceeding must be dismissed.<sup>6</sup> Applying the same

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<sup>5</sup> Within this case history, there are two lines of precedent. (Regardless of which line of authority this Court adheres to, the outcome in this proceeding is the same.) When an issuer files a Form 15 to deregister its securities, there is a 90-day period before the registration of its securities are actually terminated. *See* 17 C.F.R. 240.12g-4. For most of the past two decades, when an issuer subject to Section 12(j) proceedings filed a Form 15, the Division would file a motion to dismiss the proceeding, which either this Court or the Commission (or both) would reflexively grant. *See, e.g., World Associates, Inc.*, Initial Decision Release No. 59034 (Dec. 1, 2008); *SGI International et al.*, Initial Decision Release No. 66389 (Feb. 13, 2012). More recently, however, the Commission has opted to expedite the Section 12(j) proceedings specifically in order to revoke the registration of the issuer’s securities before the end of the 90-day period. *See, e.g., Validian Corp.*, Initial Decision Release No. 94949 (May 19, 2022); *NxChain, Inc.*, Initial Decision Release No. 87652 (Dec. 3, 2019). Because REIT II’s termination of its offering was effective immediately (i.e. on June 17, 2022), any distinction is irrelevant.

<sup>6</sup> *See, e.g., Swissinso Holding, Inc.*, Initial Decision Release No. 90516 (Nov. 24, 2020); *Blink Techs., Inc.*, Initial Decision Release No. 1134, (May 11, 2017); *Earth Dragon Res., Inc.*, Initial Decision Release No. 786 (May 5, 2015); *Aqua Soc'y, Inc.*, Initial Decision Release No. 439 (Nov. 3, 2011); *Secured Digital Applications, Inc.*, Exchange Act Release No. 64533 (May 23, 2011). *Largo Vista Grp., Ltd.*, Initial Decision Release No. 486, (May 3, 2013); *Aegis Assessments, Inc.*, Exchange Act Release No. 67360 (July 6, 2012) (noting that the “Division of Enforcement did not disagree with [the law judge’s] decision to wait ninety days . . . to allow” the Form 15 to

analysis to this matter, because REIT II has permanently terminated its Regulation A Offering, this Court can offer no meaningful relief under Rule 258 and thus should dismiss this proceeding.

The Commission's March 16 Order expressly states that the purpose of this administrative proceeding is to determine whether the temporary suspension order should be vacated or made permanent, a question which has been rendered unanswerable as there is no longer any Offering to suspend. The Division may argue that, if the Court dismisses this proceeding on these grounds, REIT II will have unfairly managed to avoid the collateral consequences of a permanent suspension order, as well as the collateral estoppel effects of judicial fact-finding. However, as the Commission itself expressly states in its March 16 Order, the purpose of this Rule 258 administrative proceeding is to determine whether REIT II's Regulation A Offering should be permanently suspended. Neither the Division nor this Court has the authority to expand the scope of this proceeding beyond that established in the original March 16 Order. *See In the Matter of Lexington Res., Inc., Grant Atkins, & Gordon Brent Pierce*, Initial Decision Release No. 379 (June 5, 2009) (*citing* 17 C.F.R. 201.200(d)) ("The Commission has not delegated its authority to administrative law judges to expand the scope of matters set down for hearing beyond the framework of the original [order].") Moreover, exploiting a narrowly focused administrative proceeding purely in the interest of generating particular collateral consequences is unseemly, disingenuous, and a misuse of this Court's time and authority.

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become effective); *see also Hartcourt Cos.*, Exchange Act Release No. 68686 (Jan. 18, 2013); *Expleo Solutions, Inc.*, Exchange Act Release No. 78638 (Aug. 22, 2016) (dismissing Section 12(j) proceeding against respondent that had filed Form 15 after OIP was instituted and therefore no longer had a class of securities registered under Section 12(g)); *Ruby Creek Res., Inc.*, Exchange Act Release No. 76060 (Sept. 30, 2015) (same).

The Division may also argue that the termination of REIT II’s Regulation A Offering, effective on June 17, 2022, while this proceeding is pending “constitutes a ‘loophole,’ an ‘end around,’ and a “fire escape” and raises unspecified ‘programmatic concerns.’” See *VoiceIQ N/K/A Yoho Resources, Inc.*, Initial Decision No. 405 (Oct. 22, 2010). Regardless, however, as explained in *VoiceIQ*, dismissing this proceeding is necessary because, quite simply, there is no Offering left in place to suspend and no other remedy available.

**C. Pursuant To Rule 531(b), This Court Should Issue A Separate Order Vacating The Temporary Suspension Order Currently In Effect**

Pursuant to Rule 531(b), “If any temporary [suspension] shall not become permanent under the terms of the initial decision, the hearing officer shall issue a separate order setting aside, limiting or suspending the temporary [suspension] then in effect in accordance with the terms of the initial decision.” See 17 C.F.R. 201.531(b). In this case, because the Court does not have any remedies available that would address the question posed by the Commission in its March 16 Order, this Court should issue an order vacating the temporary suspension currently in effect.

Vacating the Commission’s March 16 Temporary Suspension Order fundamentally comports with the interests of justice because, as the Commission itself acknowledged in that Order, the temporary suspension was only issued under the “reason to believe standard” and was not intended to be a final determination of the availability of the Regulation A exemption for REIT II’s Offering.

**D. The Division’s Motion For Summary Disposition Should Be Denied In Its Entirety**

This pleading, and particularly its Suggestion of Mootness, aims to address the overarching outcome-determinative issue in this case, thereby responding to the Division’s Motion for Summary Disposition. For the foregoing reasons, the Division’s Motion for Summary Disposition

should be denied in its entirety. Should this Court disagree with Respondent's Suggestion of Mootness, however, Respondent respectfully requests the opportunity to prepare a substantive Brief in Opposition to the Motion for Summary Disposition within two weeks of the Court's response.<sup>7</sup>

#### **IV. CONCLUSION**

For the reasons discussed herein, REIT II respectfully requests that this Court (1) dismiss this administrative proceeding because, given that the relevant Offering has been terminated, no meaningful relief is available; (2) issue a separate Order vacating the temporary suspension currently in effect; and (3) deny the Division's Motion for Summary Disposition in its entirety.

DATED: June 21, 2022

Respectfully submitted,

By:   
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*Co-Counsel for Respondent DF Growth REIT II, LLC*

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<sup>7</sup> Pursuant to the briefing schedule agreed to by both parties, Briefs in Opposition to Motions for Summary Disposition were due on June 20, 2022. However, as June 20, 2022, was a Juneteenth, a new federal holiday, the deadline automatically rolled over to the next business day, June 21, 2022. See 17 C.F.R. 201.104.

**In the Matter of DF Growth REIT II, LLC**

Administrative Proceeding File No. 3-20801

**CERTIFICATE OF SERVICE**

Pursuant to Commission Rule of Practice 151 (17 C.F.R. 201.151), I certify that the attached:

**RESPONDENT DF GROWTH REIT II, LLC'S (1) RESPONSE TO THE DIVISION'S MOTION FOR SUMMARY DISPOSITION; (2) SUGGESTION OF MOOTNESS; AND (3) MOTION FOR AN ORDER VACATING THE TEMPORARY SUSPENSION ORDER CURRENTLY IN EFFECT**

was served on June 21, 2022, upon the following parties as follows:

The Honorable Carol Fox Foelak (By electronic email only)  
Administrative Law Judge  
U.S. Securities and Exchange Commission  
100 F. Street, N.E.  
Washington, D.C. 20549  
[alj@sec.gov](mailto:alj@sec.gov)

Jennifer C. Barry (By electronic email only)  
Stephen Kam  
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*Counsel for the Division of Enforcement*

*Leslie Hakala*

Dated: June 21, 2022

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*Co-Counsel for Respondent DF Growth REIT II, LLC*

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**UNITED STATES  
SECURITIES AND EXCHANGE COMMISSION  
Washington, D.C. 20549**

**FORM 1-U**

**CURRENT REPORT PURSUANT TO REGULATION A OF THE SECURITIES ACT OF 1933**

**June 17, 2022**

(Date of Report (Date of earliest event reported))

**DF GROWTH REIT II, LLC**

(Exact name of registrant as specified in its charter)

<b>Delaware</b> (State or other jurisdiction of incorporation or organization)		<b>85-26000369</b> (IRS Employer Identification Number)
<b>750 B Street Suite 1930 San Diego, CA</b> (Address of principal executive offices)		<b>92101</b> (Zip Code)

**(858) 430-8528**

Registrant's telephone number, including area code

**Class A Investor Shares**

(Title of each class of securities issued pursuant to Regulation A)

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**Item 9. Termination of Offering**

The cover page of the DF Growth REIT II, LLC (the “Company”)<sup>1</sup>’s Regulation A Offering Circular dated January 19, 2021, states: “The Offering will end on the earlier of (1) the date we [the Company] have sold .... all the securities we [the Company] are offering, (2) the date two years after it begins, or (3) *the date we [the Company] decide to end it.*” (Emphasis added.)

Pursuant to the terms of the Offering as set forth above, the Company’s Regulation A Offering has been permanently terminated, effective immediately. See 17 C.F.R. § 230.152(d)(2)(iv).

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**SIGNATURES**

Pursuant to the requirements of Regulation A, the issuer has duly caused this report to be signed on its behalf by the undersigned, thereunto duly authorized, on June 17, 2022.

**DF Growth REIT II, LLC**

By: DF Manager, LLC  
As Manager

By: DiversyFund, Inc.  
As Manager

By /s/Craig Cecilio  
Craig Cecilio, Chief Executive Officer

DATED: June 17, 2022

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## 253G2 1 ea161597-253g2\_dfgrowth2.htm OFFERING CIRCULAR

Filed Pursuant to 17 CFR §230.253(g)(2)

File No. 024-11394

**OFFERING CIRCULAR SUPPLEMENT NO. 5****Date of Original Offering Circular: January 19, 2021****June 17, 2022****DF GROWTH REIT II, LLC**

750 B Street  
Suite 1930  
San Diego, CA 92101  
(858) 430-8528  
[www.DiversyFund.com](http://www.DiversyFund.com)

This document (the “Supplement”) supplements the Offering Circular of DF Growth REIT II, LLC, (the “Company”) dated January 19, 2021 (the “Offering Circular”). Unless otherwise defined in this Supplement, capitalized terms in this Supplement have the meanings given to them in the Offering Circular.

The purpose of this Supplement is to provide additional information that is not in the Offering Circular.

**Termination of Offering**

The cover page of the Company’s Offering Circular states: “The Offering will end on the earlier of (1) the date we [the Company] have sold .... all the securities we [the Company] are offering, (2) the date two years after it begins, or (3) *the date we [the Company] decide to end it.*” (Emphasis added.)

Pursuant to the terms of the Offering as set forth above, the Company’s Regulation A Offering has been permanently terminated, effective immediately. See 17 C.F.R. § 230.152(d)(2)(iv).

\* \* \*

This Supplement is not complete without, and may not be delivered or used except in connection with, the Offering Circular, including all of its Exhibits, amendments, and prior supplements.

We might further amend or supplement the Offering Circular from time to time by filing additional amendments or supplements. You should read the entire Offering Circular, as amended or supplemented, before deciding whether to invest.

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