**SO ORDERED.**

**SIGNED this 5th day of March, 2024.**

LENA MANSORI JAMES
UNITED STATES BANKRUPTCY JUDGE

**UNITED STATES BANKRUPTCY COURT**
**FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**
**WINSTON-SALEM DIVISION**

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| In re: | ) | |
| | ) | |
| Michael Vincent Beverley, | ) | Case No. 19-50528 |
| | ) | Chapter 7 |
| Debtor. | ) | |
| | ) | |

**ORDER**
**GRANTING MOTION TO REOPEN CASE**

THIS MATTER came before the Court on the Motion to Reopen Case (Docket No. 25, the "Motion to Reopen") filed by the Debtor, Michael Vincent Beverley, and the objection (Docket No. 28, the "Objection") filed by Guaranty Solutions Recovery Fund 1, LLC (the "Creditor"). The Debtor seeks an order reopening this chapter 7 case to file motions to avoid judicial liens under 11 U.S.C. § 522(f), including one held by the Creditor. The Creditor opposes the request to reopen, arguing it would be unfairly prejudiced given the nearly-four-years that have elapsed since the Debtor's case was closed and the additional expenses it has accrued pursuing the judgment in the interim.

The Court held a hearing on the Motion to Reopen on February 14, 2024, at which Tommy S. Blalock, III, appeared on behalf of the Debtor and James K. Haney

appeared on behalf of the Creditor. The Debtor was not present at the hearing. Neither party requested an evidentiary hearing, instead submitting this matter for ruling on the papers, including any attached exhibits, as well as the arguments of counsel. The Court also takes judicial notice of the pertinent entries and papers of this case docket. *See* Fed. R. Bankr. P. 9017; Fed. R. Evid. 201(b)(2); *Anderson v. Fed. Deposit Ins. Corp.*, 918 F.2d 1139, 1141 n.1 (4th Cir. 1990).

For the reasons discussed below, the Court will overrule the Objection and grant the Motion to Reopen, conditioned upon the Debtor's payment of the attorney's fees and costs incurred by the Creditor that resulted from the Debtor's delay.

## JURISDICTION

The Court has jurisdiction over this contested matter under 28 U.S.C. § 1334. Under 28 U.S.C. § 157(a) and Local Civil Rule 83.11, the United States District Court for the Middle District of North Carolina has referred this proceeding to this Court. Motions to reopen a case are within a bankruptcy court's core jurisdiction as "matters concerning the administration of the estate" under 28 U.S.C. § 157(b)(2)(A). A bankruptcy court also has constitutional authority to enter final orders on motions to reopen, which are "based solely on an express provision of the Code, § 350(b), and judicially created bankruptcy law interpreting this provision[.]" *In re DeRosa-Grund*, 544 B.R. 339, 363 (Bankr. S.D. Tex. 2016).

## BACKGROUND FACTS

On May 24, 2019, the Debtor commenced the above-captioned case by filing a petition under chapter 7 of the Bankruptcy Code. At the time of filing, the Debtor owned real property located at 6680 Ridge Bluff Drive, Rural Hall, North Carolina (the "Real Property"), with a scheduled valued of $208,000. The Real Property was encumbered by a deed of trust in favor of Navy Federal Credit Union in the approximate amount of $183,500, and the Debtor claimed a homestead exemption in any remaining equity up to $34,434. (Docket No. 1).

On January 17, 2017, BMO Harris Bank, N.A. obtained a judgment in the Superior Court for Forsyth County against the Debtor and his company in the principal amount of $53,263.57. (Docket No. 28, Ex. A). Similar judgment liens were obtained by Mercedes-Benz Financial Services and Navy Federal Credit Union in the approximate amounts of $20,000 and $26,266 respectively. (Docket No. 1). There is no suggestion that the Debtor was unaware of those liens; his statement of financial affairs listed the number and closed status of the cases resulting in judgments, although the Debtor erroneously scheduled those creditors as unsecured on his schedule E/F. The Debtor received a discharge on August 29, 2019, and the case was closed on September 9, 2019, without the Debtor filing any motions to avoid judicial liens on the Real Property.

On July 6, 2023, nearly four years after the Debtor's discharge, BMO Harris Bank, N.A. assigned the judgment to the Creditor (Docket No. 28, Ex. B); the next month, the Creditor obtained a Notice of Right to Have Exemptions Designated,

indicating to the Debtor that it would proceed to collect on the judgment against the Real Property. After receiving the Notice, the Debtor contacted his former bankruptcy attorney, who indicated he was now in the process of retirement and unable to assist him. Through new counsel, the Debtor proceeded to file the Motion to Reopen on January 4, 2024. In his motion and supplemental briefing (Docket Nos. 25, 34), the Debtor maintains that the failure to file motions to avoid liens during the pendency of the case was the result of his previous counsel's mistake or negligence, that the Debtor moved quickly to reopen the case upon learning of the continued effectiveness of the judgments, and that the costs, if any, incurred by the Creditor in enforcing its lien were minimal. The Creditor, in contrast, argues that it would be unfairly prejudiced if this case is reopened, pointing to the Debtor's excessive delay in filing the Motion to Reopen as well as additional expenses it incurred in pursuing its judgment and the cost of an appraisal. (Docket No. 28).

## DISCUSSION

The Bankruptcy Code provides this Court with authority to reopen a closed case "to administer assets, to accord relief to the debtor, or for other cause." 11 U.S.C. § 350(b). The reopening of a closed case is discretionary and depends upon the circumstances of the individual case. *Hawkins v. Landmark Fin. Co. (In re Hawkins)*, 727 F.2d 324, 327 (4th Cir.1984); *see also In re Bianucci*, 4 F.3d 526, 528 (7th Cir. 1993); *In re Hamlett*, 304 B.R. 737, 740 (Bankr. M.D.N.C. 2003). Generally, reopening "does not afford the parties any substantive relief, but rather provides an opportunity to request further relief." *Horizon Aviation of Va., Inc. v. Alexander (In*

*re Alexander)*, 296 B.R. 380, 382 (E.D. Va. 2003). Nevertheless, a "[c]ourt should not reopen a case where no relief can be accorded to the parties and reopening would be a futile act." *In re Hancock*, No. 22-31936-KRH, 2023 WL 1849310, at *2 (Bankr. E.D. Va. Feb. 7, 2023) (collecting cases); *see also Thompson v. Commonwealth of Va. (In re Thompson)*, 16 F.3d 576 (4th Cir. 1994); *In re Kennedy,* No. 08-81687, 2016 WL 6649200, at *2 (Bankr. M.D.N.C. Apr. 6, 2016); *In re Locklair*, No. 03-50924, 2006 WL 1491440, at *2 (Bankr. M.D.N.C. May 18, 2006).

As the moving party, the Debtor has the initial burden of showing cause to reopen the case, *In re Rising*, No. 07-50123, 2015 WL 393416, at *2 (Bankr. M.D.N.C. Jan. 8, 2015) (citing *In re Arana*, 456 B.R. 161, 172 (Bankr. E.D.N.Y. 2011)), and must show "that one of the three grounds articulated in § 350(b) exists." *In re Lee*, 356 B.R. 177, 180 (Bankr. N.D.W. Va. 2006). Here, the Debtor seeks to reopen his case to avoid judicial liens under 11 U.S.C. § 522(f), and "[c]ourts have long held that avoidance of a judicial lien falls within the ambit of 'cause' to reopen a case, because it presents the potential for relief to the debtor." *In re McCoy*, 560 B.R. 684, 688 (6th Cir. B.A.P. 2016) (quoting *In re Oglesby*, 519 B.R. 699, 703 (Bankr. N.D. Ohio 2014)); *see also In re Clark*, 512 B.R. 906, 908 (Bankr. N.D. Ill. 2014) ("Avoiding a lien is a common reason to reopen a bankruptcy case.").

Although courts have generally taken a "permissive" approach to motions to reopen to avoid liens, and § 350(b) and § 522(f) do not contain deadlines to seek such relief, they have "incorporat[ed] an equitable defense akin to laches," meaning "a debtor may reopen the bankruptcy case to avoid a lien absent a finding of prejudice

to the creditor." *In re Bianucci*, 4 F.3d at 528 (collecting cases); *see also* 3 COLLIER ON BANKRUPTCY ¶ 350.03 (16th ed. 2023) ("Laches, a long delay in reopening the case, may be an equitable defense to a motion by the debtor to reopen to pursue a section 522(f) action.").[1] A judgment lienholder such as the Creditor can assert the defense of laches either to the reopening of the case itself or to the motion to avoid lien after the case is reopened. *Compare In re Dean*, No. 10-50773, 2016 WL 3766091, at *2 (Bankr. M.D.N.C. July 7, 2016) *with In re Oglesby*, 519 B.R. at 704. Regardless of the procedural posture, and despite the Debtor's initial burden of showing cause to reopen under § 350(b), the Creditor bears the burden of proof on the equitable doctrine of laches as the party asserting it. *See In re Dean*, 2016 WL 3766091, at *2; *In re Oglesby*, 519 B.R. at 704; *In re Nash*, No. 01-00205, 2002 WL 862464, at *4 (Bankr. D.D.C. May 6, 2002) (finding that the "[creditor] bears the burden of proof on the defense of laches, but the debtor, as the moving party, bears the burden of showing that reopening is otherwise justified").

"Laches requires proof of (1) lack of diligence by the party against whom the defense is asserted; and (2) prejudice to the party asserting the defense." *Miller v. Hooks*, 749 Fed. Appx. 154, 161 (4th Cir. 2018) (quoting *Costello v. United States*, 365 U.S. 265, 282 (1961)); *see also Cole v. Fifth Third Bank, Inc. (In re Cole)*, 521 B.R. 410, 413 (Bankr. N.D. Ga. 2014) ("[T]ime delay is relevant to the extent it

[1] The legislative history of § 350(b) explicitly recognizes the equitable doctrine of laches as a defense to a movant's attempt to reopen a case. *See* H.R. Rep. No. 595, 95th Cong., 1st Sess. 338 (1977); S. Rep. No. 989, 95th Cong., 2d Sess. 49 (1978), reprinted in 1978 U.S.C.C.A.N. 5787, 5835, 5963, 6294 ("Though the court may permit reopening of a case [to] exercise an avoiding power, laches may constitute a bar to an action that has been delayed too long.").

bears on the diligence of the debtor in seeking to reopen the case and any prejudice to the opposing creditor is the case were reopened.")); *In re Oglesby*, 519 B.R. at 706 (explaining that the debtor's delay was "unnecessary and unreasonable"); *In re Levy*, 256 B.R. 563, 567 (Bankr. D.N.J. 2000) (finding that the debtor's "delay was inexcusable"). The elements of lack of diligence, i.e., cause and length of delay, and prejudice "are a complimentary ratio," *Marshall v. Meadows*, 921 F. Supp. 1490, 1494 (E.D. Va. 1996) (citing *White v. Daniel*, 909 F.2d 99, 102 (4th Cir. 1990)), and have been viewed and applied by courts on a sliding scale, meaning "the greater the delay, the less the prejudice required to show laches, and vice versa." *White,* 909 F.2d at 102; *see also Smith v. Caterpillar, Inc.*, 338 F.3d 730, 734 (7th Cir. 2003) (stating that "the decision to apply laches rests on a sliding scale: the longer the plaintiff delays in filing her claim, the less prejudice the defendant must show in order to defend on laches"). As with determining whether to reopen a case, "whether laches bars an action depends upon the particular circumstances of the case," and "is primarily left to the sound discretion of the trial court[.]" *White*, 909 F.2d at 102.

Here, the Court must balance the length and reason for the Debtor's delay against the alleged prejudice to the Creditor. The gap between the closing of this case and the filing of the Motion to Reopen—over four years—is substantial and courts view extensive delays of this length unfavorably. *See, e.g.*, *In re Bianucci*, 4 F.3d at 527, 529 (describing a two-year delay between closing of the case and filing of the motion, including a five-month period in which the debtors had actual knowledge that the lien had not been avoided, as "an inordinate length of time"); *In*

*re Caicedo*, 159 B.R. 104, 107-08 (Bankr. D. Conn. 1993) (considering and ultimately declining to reopen a case after eight-year delay); *In re Berresford*, No. 08-62888, 2018 Bankr. LEXIS 297, at *4 (Bankr. N.D. Ohio Feb. 5, 2018) (noting the "inherent prejudice" accompanying an eight-year delay). As for the reason for the delay, multiple civil actions, including that of the Creditor's predecessor, were clearly listed on the Debtor's Statement of Financial Affairs as "concluded." The Debtor blames his prior attorney for the failure to file motions to avoid judgment liens but presented no evidence on the issue.

But regardless, "delay alone does not justify application of the equitable doctrine of laches." *In re Oglesby*, 519 B.R. at 705. The party asserting laches must also show it has been prejudiced in some manner and "delay in requesting the reopening of a case, standing alone, does not generally constitute prejudice." *In re Rising*, 2015 WL 393416, at *2 (citing *In re Male*, 362 B.R. 238, 242 (Bankr. E.D.N.C. 2007)); *In re Bianucci*, 4 F.3d at 528-29 (finding that "passage of time in itself does not constitute prejudice"). "Similarly, the loss of a creditor's security interest does not constitute prejudice because the denial of an 'accidental benefit' attained as consequence of a mistake by the debtors or their counsel is not detrimental to the creditor." *In re Dean*, 2016 WL 3766091, at *3 (citing *Hawkins*, 727 F.2d at 327). Rather, to prevent the reopening of a case to pursue lien avoidance, the party asserting laches must provide evidence of prejudice beyond the length of the delay and the loss of a security interest. *See In re Dean*, 2016 WL 3766091, at *3 (collecting cases).

At the hearing, Creditor's counsel argued that additional prejudice exists in the form of attorney's fees and expenses incurred in pursuing the judgment after the Debtor's bankruptcy case was closed, including costs associated with in-house research and due diligence, obtaining a title report, securing and serving the Notice of Right to Have Exemptions Designated, and preparing documentation for the anticipated sheriff sale. (Docket No. 36). Counsel estimated these costs to be between $1,000 and $2,000. Expenses incurred by a creditor as a direct result of a debtor's delay may lead a court to conclude, in its exercise of discretion, that the case should not be reopened. *See Hawkins*, 727 F.2d at 327; *In re Bradley*, 369 B.R. 147, 155 (Bankr. S.D.N.Y. 2007). Additionally, given the extended gap between the closing of the Debtor's case and the filing of the Motion to Reopen, the Creditor is potentially prejudiced by way of additional expenses incurred in obtaining a retrospective appraisal of the Real Property.[2] In defending against a motion to avoid lien, the Creditor may now be tasked with producing evidence of the Real Property's value as of the petition date in May 2019 and, depending on the circumstances of a given case, courts have found additional expenses associated with recreating retrospective appraisals to be evidence of prejudice in the context of a motion to reopen. *See, e.g.*, *In re Bradley*, 369 B.R. at 155 (stating "it is more likely that the

[2] Retrospective appraisals, which are "value opinion[s] effective as of a specified historical date." Appraisal Institute, THE DICTIONARY OF REAL ESTATE APPRAISAL 201 (6th ed. 2015). As some courts have noted, "[a] retrospective appraisal can present special challenges. Its accuracy may be tainted by the appraiser's knowledge of the market following the effective date of the appraisal… [and] by questions regarding the subject property on the effective date[.]" *Arthur Funk & Sons, Inc. v. Backenstoes* (*In re Backenstoes)*, No. 1:10-BK-04473MDF, 2012 WL 4793501, at *9 (Bankr. M.D. Pa. Oct. 8, 2012) (quoting *In re Clark*, No. 07-31044, 2009 WL 692167, at *11 (Bankr. M.D. Ala. Mar. 13, 2009)).

creditor will incur substantial expenses to obtain a historical appraisal regarding the value of the homestead property as of the filing date"); *In re Levy*, 256 B.R. at 566-67 (denying motion to reopen where debtor's delay was inexcusable and creditor would incur additional expenses in appraising property's value more than four years after the petition date); *In re Caicedo*, 159 B.R. at 107-108 (denying motion to reopen where creditor would incur additional expenses in securing retrospective appraisal going back eight years in time).

While the Court finds that the potential avoidance of the Creditor's judgement lien is cause to reopen the case under § 350(b), the Court also finds the Creditor has been prejudiced by the Debtor's delay in seeking to avoid its judgment lien. Specifically, the Creditor has incurred unnecessary fees and costs pursuing its judgment since the Debtor's case was closed and may face additional, delay-related expenses in defending against the expected motion to avoid lien. This is a sufficient showing of prejudice to constitute laches.

Even though the Creditor satisfies its burden of establishing laches, however, the Court retains great discretion in fashioning the appropriate equitable remedy. "Because laches is based on prejudice to the defendant, the bar it raises should be no broader than the prejudice shown." 1 D. Dobbs, LAW OF REMEDIES §2.4(4), p. 106 (2d ed. 1993). Therefore, "the bar of laches might be limited monetarily where the plaintiff's delay induces the defendant to make expenditures that he would not otherwise have made. In such case the plaintiff might be allowed a recovery, with an offsetting liability for the costs attributable to the delay period." *Id.* Under this

reasoning, courts have held that a finding of laches does not necessitate outright dismissal of claims or bar injunctive relief. *See, e.g.*, *SCA Hygiene Prods. Aktiebolag v. First Quality Baby Prods., LLC*, 807 F.3d 1311 (Fed. Cir. 2015) (observing, in the context of patent infringement, that while "estoppel bars the entire suit, laches does not"); *Pruitt v. City of Chicago*, 472 F.3d 925, 929 (7th Cir. 2006) (remarking that "prejudice is not an all-or-none affair" and "less severe consequence[s]" can be applied instead of outright dismissal); *Abraham v. Alpha Chi Omega*, 796 F. Supp. 2d 837 (N.D. Tex. 2011) (concluding, in the context of trademark infringement, that "a finding of laches and acquiescence does not require the Court to bar injunctive relief[,]" but "[t]he facts and circumstances of such a finding are certainly relevant to the Court's ultimate determination of what remedy is appropriate").

Bankruptcy courts have similarly opted, in their equitable discretion, to reopen closed cases to allow debtors to file motions to avoid liens despite evidence supporting a finding of laches. For example, while additional expense incurred from delay is sufficient evidence of prejudice weighing in favor of laches, because it "is monetary and quantifiable," courts have concluded that "it can be cured." *In re Miller*, No. 10-60847-MGD, 2014 WL 457907, at *1 (Bankr. N.D. Ga. Jan. 21, 2014). In such instances, numerous courts, including those within the Fourth Circuit, have found they may condition a debtor's right to reopen a case to pursue lien avoidance on the debtor's reimbursing the creditor for costs and attorney's fees incurred in enforcing its judgment after the bankruptcy case was closed. *See, e.g.*, *In re Bianucci*, 4 F.3d at 529 (finding "it may be permissible for a bankruptcy court to

condition reopening on reimbursement"); *In re Oglesby*, 519 B.R. at 706 (granting motion to reopen but conditioning relief on payment of creditor's fees and costs); *In re Webb*, 48 B.R. 454, 458 (Bankr. E.D. Va. 1985) (finding court can condition the right to relief in a post-discharge lien avoidance action on the payment of the creditor's costs and attorney's fees); *In re Abuharb*, No. 16-00903-5-DMW, 2016 WL 3402510, at *3 (Bankr. E.D.N.C. June 8, 2016) (awarding and conditioning lien avoidance on payment of a portion of the costs associated with the delay); 3 COLLIER ON BANKRUPTCY ¶ 350.03 (16th ed. 2023). Courts have also determined that the necessity of obtaining retrospective appraisals is not a per se bar to reopening a case; where the prejudice caused is monetary and curable, courts have allowed debtors to proceed with motions to avoid lien while requiring them to reimburse creditors for any additional costs attendant to obtaining the retrospective appraisal. *See In re Levy*, 256 B.R. at 566-67 ("If the delay had been excusable, the prejudice to [the creditor] might have been removed by requiring [the debtor] to pay the difference between the cost of a current appraisal and the cost of an appraisal as of the petition date more than four years ago."); *In re Berresford*, No. 08-62888, 2018 Bankr. LEXIS 297, at *5-6 (Bankr. N.D. Ohio Feb. 5, 2018) (allowing reopening more than eight years after discharge and case closing but requiring debtor to reimburse creditor twenty-five percent of any reasonable costs in obtaining a retrospective appraisal of the property); *In re Miller*, No. 10-60847-MGD, 2014 WL 457907, at *1 (Bankr. N.D. Ga. Jan. 21, 2014) (despite four-year delay in appraisal,

court allowed case to be reopened if debtor cured prejudice by paying creditor's costs of appraisal).

Based on the record before it, the Court finds that the proper exercise of its discretion in this case is to grant the Motion to Reopen conditioned upon the Debtor's reimbursement of the reasonable fees and costs the Creditor incurred as a result of the delay. While the nearly-four-year gap between the closing of the case and the filing of the Motion to Reopen is substantial, and the Creditor reasonably incurred fees and expenses pursuing collection, these costs are quantifiable and curable—Creditor's attorney described them as "not an enormous number"—and do not prejudice the Creditor so severely that the Debtor's Motion to Reopen should be barred completely. Similarly, while the delay may create additional appraisal costs, there is no indication that the potential prejudice cannot be cured. Moreover, the Debtor has offered to compensate the Creditor for actual costs incurred in its collection efforts. (Docket No. 34). Therefore, the Court will reopen the case but will condition the Court's consideration of a motion to avoid the Creditor's judicial lien on the Debtor's successful payment of the reasonable attorney's fees and costs incurred by the Creditor due to the delay.

Accordingly, IT IS HEREBY ORDERED that the Debtor's Motion to Reopen is GRANTED to the extent set forth below:

1. Case No. 19-50528 is hereby reopened; a chapter 7 trustee shall not be appointed.

2. The Court will hear and determine on the merits a motion to avoid the Creditor's judicial lien on the condition that the Debtor satisfies the reasonable attorney's fees and costs incurred by or on behalf of the Creditor in pursuing its judgment between the closing of the bankruptcy case and this Order, as well as the additional costs of obtaining a 2019 retrospective appraisal (to the extent the cost exceeds that of a present day appraisal) of the Debtor's real property at 6680 Ridge Bluff Drive, Rural Hall, North Carolina.

3. Within 14 days of this Order, the Creditor may file an affidavit, with any necessary supporting documentation, itemizing the reasonable attorney's fees and costs incurred by or on behalf of the Creditor in pursuing its judgment between the closing of the bankruptcy case and this Order.

    a) If the Creditor fails to timely file an affidavit, the Debtor will not be required to reimburse any fees and costs as a condition to the Court hearing and determining a motion to avoid the Creditor's lien.

    b) The Debtor must file any objection to the fees and costs requested in the affidavit within 7 days after it is filed. The Court may, in its discretion, rule on the objection without further notice or opportunity to be heard.

    c) The Debtor must pay the fees and costs of the Creditor within 14 days after the filing of the affidavit or the Court's order on any objection.

4. Within 14 days of the Debtor's filing of a motion to avoid the Creditor's judicial lien, the Creditor may file an affidavit, with any necessary supporting documentation, itemizing any additional cost of obtaining a 2019 retrospective appraisal (to the extent the cost exceeds that of a present day appraisal) of the Debtor's real property at 6680 Ridge Bluff Drive, Rural Hall, North Carolina.

    a) If the Creditor fails to timely file such affidavit, the Debtor will not be required to reimburse any additional cost of obtaining a 2019 retrospective appraisal as a condition to the Court hearing and determining a motion to avoid the Creditor's lien.

    b) The Debtor must file any objection to the additional cost requested in the affidavit within 7 days after it is filed. The Court may, in its discretion, rule on the objection without further notice or opportunity to be heard.

    c) The Debtor must pay the additional appraisal cost of the Creditor within 14 days after the filing of the affidavit or the Court's order on any objection.

5. If the Debtor does not pay the fees and costs of the Creditor in accordance with paragraphs 3 and 4 above, the Creditor may promptly notify the Court and any filed motion to avoid the Creditor's judicial lien will be denied as barred by laches.

6. Regardless of whether the Debtor pays the fees and costs, if the Debtor does not file a motion to avoid judicial lien within 60 days of this Order, then the case shall be re-closed without further notice or hearing.

**END OF DOCUMENT**

**PARTIES TO BE SERVED**

Michael Vincent Beverley

Case No. 19-50528

John Paul Hughes Cournoyer, Bankruptcy Administrator
*via cm/ecf*

Daniel C. Bruton, Trustee
*via cm/ecf*

Tommy S. Blalock, III on behalf of Debtor
*via cm/ecf*

Neil D. Jonas on behalf of Creditor PNC Bank, N.A.
*via cm/ecf*

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