17-2692

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RADHA GEISMANN, M.D., P.C., individually and on behalf of all others similarly situated,
Plaintiff-Appellant,

v.

ZOCDOC, INC.,
Defendant-Appellee.

On Appeal from the United States
District Court for the Southern District of New York

BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PLAINTIFF-APPELLANT AND REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Public Citizen, Inc. is a nonprofit, nonstock corporation. It has no parent corporation, and because it issues no stock, there is no publicly held corporation that owns 10% or more of its stock.

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a consumer-advocacy organization founded in 1971, appears on behalf of its nationwide membership before Congress, administrative agencies, and courts, and works for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents consumer and worker interests in litigation, including as amicus curiae in cases in the United States Supreme Court and the federal courts of appeals.

Public Citizen has a long-standing interest in protecting individuals' ability to access the civil justice system and in the use of class actions in appropriate cases to facilitate such access. Those interests are threatened by overly broad arguments that courts lack subject-matter jurisdiction over the claims of class representatives and class members. Public Citizen is filing this brief to address the question whether a defendant can evade a class action by depositing with the court the maximum statutory damages the named plaintiff can receive and asking the court to enter judgment against it on the named plaintiff's individual claim, over the plaintiff's objections, before the court decides whether the case should proceed on behalf of a class. Public Citizen believes that the argument that a defendant's

[1] This brief is accompanied by a Motion for Leave to File as required by Federal Rule of Appellate Procedure 29(a)(3). No party's counsel authored this brief in whole or in part, and no party or party's counsel made a monetary contribution to fund the preparation or submission of this brief. No person or entity other than Public Citizen made a monetary contribution to the preparation or submission of this brief.

deposit of funds either moots the case or justifies entry of judgment on the named plaintiff's claim and dismissal of the class claims misunderstands basic mootness principles and, if accepted, would allow defendants to engage in procedural gamesmanship and thwart plaintiff classes from obtaining recoveries to which they are entitled.

BACKGROUND AND SUMMARY OF ARGUMENT

This case is one in a series that have come before this Court in recent years in which defendants have sought to evade class-wide liability by attempting to force payment on the named plaintiffs before the district court determines whether a class should be certified. First anticipating and then following the Supreme Court's decision in *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016), this Court has repeatedly rejected such efforts, including in its earlier decision in this very case, *Radha Geismann, M.D., P.C. v. ZocDoc, Inc.*, 850 F.3d 507 (2d Cir. 2017) (A23-40).

In the decision at issue in this appeal, the district court granted defendant ZocDoc's request to deposit funds under Federal Rule of Civil Procedure 67 in an amount that the court determined exceeded the amount named plaintiff Radha Geismann, M.D., P.C. (Geismann) could individually recover in statutory damages. The district court indicated that it believed that this deposit, along with an expression of consent by ZocDoc to have an injunction entered, would render

Geismann's individual claims moot. The court stated that "a defendant's full tender renders the action moot," A60, and that, once the defendant deposited the funds and consented to an injunction against it, "the relevant law ... will be the Constitutional requirement of a case or controversy." A63.

At the same time, the court permitted ZocDoc to file a motion for summary judgment in favor of Geismann in the amount of the deposited funds. After ZocDoc deposited the money, the district court granted ZocDoc's motion for summary judgment in Geismann's favor. The judgment stated that Geismann "shall recover from defendant ZocDoc, Inc. the sum of Twenty Thousand Dollars." A108. The judgment also enjoined ZocDoc from sending faxes to Geismann without prior written approval, ordered that the deposited funds be transmitted to Geismann, and dismissed Geismann's motion for class certification and all claims asserted on behalf of the class. A108-09.

This amicus curiae brief addresses two aspects of the district court's decision and judgment: its determination that a deposit can moot a plaintiff's claim, and its decision to enter judgment in Geismann's favor, over Geismann's objections. The district court erred on both accounts.

First, a claim is not moot unless "it is impossible for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald Co. v. Gomez*, 136 S. Ct. 663, 669 (2016) (quoting *Knox v. Serv. Employees Int'l Union*, 567 U.S.

298, 307 (2012)); *Geismann*, 850 F.3d at 513 (A36) (quoting *Knox*, 567 U.S. at 307). A deposit of funds does not make it impossible for a court to grant effectual relief. Indeed, after the funds were deposited here, the court proceeded to enter judgment in Geismann's favor—including an order entitling Geismann to recover funds and an injunction against ZocDoc sending Geismann faxes without prior approval—thereby *granting* Geismann effectual relief and demonstrating that the case was not moot.

Second, the district court should not have entered judgment in Geismann's favor, over its objections, without first deciding whether the case should proceed on behalf of a class. The Supreme Court instructed in *Campbell-Ewald* that a would-be class representative with a live claim "must be accorded a fair opportunity to show that certification is warranted." 136 S. Ct. at 672. By entering judgment for Geismann on its live individual claims without first considering class certification, the district court deprived Geismann of that fair opportunity. In the context of a class action, a judgment only on the named plaintiff's individual claims does not provide complete relief, and absent an agreement between the parties, "the district court should not enter judgment against the defendant if it does not provide complete relief." *Tanasi v. New Alliance Bank*, 786 F.3d 195, 200 (2d Cir. 2015).

ARGUMENT

I. ZocDoc's Deposit of Funds and Consent to an Injunction Did Not Moot Geismann's Individual Claims.

The district court suggested that, once ZocDoc deposited funds and consented to entry of an injunction against it, Geismann's individual claims would be moot. As the Seventh Circuit noted in addressing a nearly identical situation, however, "[m]ootness, plainly, is not the correct legal concept for the course of events that took place here." *Fulton Dental, LLC v. Bisco, Inc.*, 860 F.3d 541, 544 (7th Cir. 2017).

The doctrine of mootness, together with the related standing and ripeness doctrines, ensures that the federal courts adhere to the fundamental command of Article III that federal jurisdiction be limited to "Cases" and "Controversies." U.S. Const., art. III, § 2, cl. 1. The three justiciability doctrines ensure that federal courts do not "decide questions that cannot affect the rights of litigants in the case before them." *Chafin v. Chafin*, 568 U.S. 165, 172 (2013) (quoting *Lewis v. Continental Bank Corp.*, 494 U.S. 472, 477 (1990)). In particular, the mootness doctrine requires that parties "continue to have a personal stake in the outcome of the lawsuit" throughout its existence, *Lewis*, 494 U.S. at 478 (internal quotation marks and citations omitted), by requiring dismissal "when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome," *Already, LLC v. Nike, Inc.*, 568 U.S. 85, 91 (2013) (citation omitted).

A court may not, however, lightly conclude that a case is moot. The Supreme Court has repeatedly explained that a claim is not moot unless "it is *impossible* for a court to grant any effectual relief whatever to the prevailing party." *Campbell-Ewald*, 136 S. Ct. at 669 (emphasis added; citation omitted); *see also Decker v. Nw. Envtl. Def. Ctr.*, 568 U.S. 597, 609 (2013); *Chafin*, 568 U.S. at 172; *Knox*, 567 U.S. at 307. Likewise, this Court has recognized that a claim can only become moot when it is impossible for a court to grant relief. *See Geismann*, 850 F.3d at 513 (A36).

ZocDoc's deposit of funds with the district court did not deprive the court of the ability to grant effectual relief and therefore did not moot Geismann's claim. After the money was deposited, the district court retained the authority to order the funds to be released to Geismann, to order injunctive relief, and to enter judgment in Geismann's favor. Indeed, the defendant's strategy depended on the court's authority to issue such orders and judgment, without which there could be no argument that Geismann's claims had been satisfied. And the district court ultimately granted that very relief here: After ZocDoc deposited the money, the court entered judgment in Geismann's favor, decreeing that Geismann "shall recover from defendant ZocDoc, Inc. the sum of Twenty Thousand Dollars" and enjoining ZocDoc from sending faxes to Geismann without prior written permission. A108. "A decision that a certain amount of damages should be paid

and that an injunction should be entered is quintessentially a ruling on the merits of a case." *Fulton Dental*, 860 F.3d at 543.

The district court retained the ability to grant effectual relief to Geismann after the deposit in part because the deposit, on its own, had no impact on Geismann. Under Federal Rule of Civil Procedure 67—the federal rule under which ZocDoc sought leave to deposit the funds—"[m]oney paid into court under this rule must be deposited and withdrawn in accordance with 28 U.S.C. §§ 2041 and 2042 and any like statute." Fed. R. Civ. P. 67(b). In turn, 28 U.S.C. § 2042 provides that "[n]o money deposited under section 2041 of this title shall be withdrawn except by order of court." Accordingly, here, although the deposit order stated that the funds would be deposited "payable to the plaintiff to secure a $20,000 judgment," A66, Geismann could not receive the deposited funds absent an additional order from the court.

The deposit's failure on its own to provide Geismann with relief makes the situation in this case similar to *Campbell-Ewald*, in which the Supreme Court held that an unaccepted offer of judgment that, if accepted, would have satisfied the individual claim of the named plaintiff in an uncertified class action did not render the claim moot. The Court explained that an unaccepted offer provides a plaintiff with "no entitlement to … relief." 136 S. Ct. at 670. The claim of a plaintiff who has rejected such an offer stands "wholly unsatisfied," *id*. at 672, and the offer

accordingly neither deprives him of his "stake in the litigation," *id*. at 671, nor impairs "the court's ability to grant … relief," *id*. at 670 (quoting *Genesis Healthcare Corp. v. Symczyk*, 569 U.S. 66, 81 (2013) (Kagan, J., dissenting)). Thus, this Court held in the earlier appeal in this case that Geismann's claim could not be moot before Geismann had "been compensated in satisfaction of its claim." 850 F.3d at 514 (A37); *see id*. (noting that compensation in satisfaction of Geismann's claim "would require, at a minimum, its acceptance of a valid offer"). Likewise, after ZocDoc deposited the money, Geismann "remained emptyhanded," its claim stood unsatisfied, and the court remained able to grant effectual relief. *Campbell-Ewald*, 136 S. Ct. at 672.

The district court stated that the deposit and proposed injunctive relief would "invoke the hypothetical" discussed in *Campbell-Ewald*, A66, in which the Supreme Court declined to address "whether the result would be different if a defendant deposits the full amount of the plaintiff's individual claim in an account payable to the plaintiff, and the court then enters judgment for the plaintiff in that amount." 136 S. Ct. at 672. As the Seventh Circuit has explained, however, it is "inaccurate to say that the court's registry is 'an account payable to the plaintiff.'" *Fulton Dental*, 860 F.3d at 545 (quoting *Campbell-Ewald*, 136 S. Ct. at 672). "It is nothing like a bank account in the plaintiff's name—that is, an account in which the plaintiff has a right at any time to withdraw funds. As both Rule 67 and 28

U.S.C. §§ 2041 and 2042 recognize, funds can be withdrawn from the court's registry only under the control of, and with the permission of, the court." *Id.*

Moreover, rather than suggesting that a deposit of the full amount owed to a plaintiff moots the plaintiff's claim, *Campbell-Ewald*'s hypothetical suggests the opposite. That hypothetical discusses the possible effects of deposit *followed by an entry of judgment*. The Supreme Court's recognition of the possibility of entering judgment after a deposit indicates that the Supreme Court believed that depositing money would not itself moot a claim. No proposition is more fundamental than that a court cannot enter an enforceable judgment in a case over which it has no subject-matter jurisdiction, such as a case that is moot. As the Supreme Court has explained, "[w]ithout jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only function remaining to the court is that of announcing the fact and dismissing the cause." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (quoting *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514 (1868)); *see also* Fed. R. Civ. P. 12(h)(3) ("If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.").

Because of Article III's prohibition on entering judgment in moot cases, had ZocDoc's deposit in fact mooted Geismann's claim, the district court would not have been allowed to enter judgment in Geismann's favor; it would have been

required to dismiss the case for lack of jurisdiction and end the case there. *See Fulton Dental*, 860 F.3d at 543 ("If [the defendant's] deposit of money into the court's registry had the effect of mooting [the case], we would be in a strange situation: there would no longer be a case or controversy between the parties, and we would need to dismiss the action on that basis."). The only way for Geismann to receive the money that was deposited in the court, however, was by order of the court. If the district court had dismissed the case for lack of jurisdiction without entering judgment in Geismann's favor—as Article III would have required if the deposit had in fact rendered the case moot—Geismann's claim, paradoxically, would have been dismissed based on the notion that "full payment extinguishes the claim," A60, when it never would have received any payment at all. Article III does not require this nonsensical result.

The deposit of funds also did not moot Geismann's individual claims because Geismann's complaint sought injunctive relief, and, as the Court explained in its earlier decision in this case, a deposit "does nothing to satisfy the demand for injunctive relief." *Geismann*, 850 F.3d at 514 (A39). Nonetheless, the district court suggested that Geismann's complaint would become moot after the deposit as long as ZocDoc submitted "an unconditional consent" to entry of an injunction. A63. However, an expression of willingness to have an injunction entered does not itself provide the plaintiff with any relief. *See Chen v. Allstate Ins. Co.*, 819 F.3d 1136,

1146 (9th Cir. 2016) (explaining that defendant's "agreeing to an injunction on [plaintiff's] individual injunctive relief claim … do[es] not afford [plaintiff] any actual relief, and thus does not moot his individual claims for … injunctive relief"). Rather, the court must order the requested relief—that is, the injunction. And the court's undisputed ability to order that relief itself means that the expression of willingness to have the injunction entered did not moot the case. Here, the court's entry of an injunction requiring ZocDoc to refrain from sending faxes to Geismann without prior written approval demonstrates that ZocDoc's consent to have an injunction entered did not moot Geismann's claim for injunctive relief. Had the consent mooted the claim, the court would have lost jurisdiction, would have been required to dismiss the case as moot, and would not have been able to enter the injunction.

In short, because the deposit and consent to an injunction did not provide Geismann with full relief and it remained possible for the court to provide effectual relief, the deposit and consent did not moot the case. Thus, Geismann's individual claims remained live after ZocDoc deposited the funds and consented to an injunction.

II. The Deposit of Funds and Consent to an Injunction Did Not Justify Entering Judgment on Geismann's Individual Claims over Its Objections.

After ZocDoc deposited funds with the court, the district court entered judgment in Geismann's favor on its individual claims, ordering that Geismann "shall recover" $20,000 from ZocDoc and enjoining ZocDoc from sending Geismann faxes without express written prior approval. A108. The district court erred in entering that judgment for two reasons.

First, the district court's entry of judgment cannot be separated from its determination that a deposit and consent to an injunction can moot a claim. The court declared its belief that, once ZocDoc had deposited funds with the court and consented to an injunction, "the relevant law" governing ZocDoc's motion for summary judgment, "will be the Constitutional requirement of a case or controversy." A63. As explained above, that belief was incorrect, and the entry of judgment premised on an incorrect view of the law cannot somehow validate the error that led to it. As this Court stated in its previous decision in this case, "[t]he result in *Campbell-Ewald* cannot be avoided simply by entering a judgment effectuating an otherwise precluded dismissal." 850 F.3d at 513.

Second, regardless of its reasoning, the district court should not have entered judgment in Geismann's favor without first considering class certification. In *Campbell-Ewald*, after holding that an unaccepted offer of judgment does not moot

a claim, the Supreme Court made clear that, in a case brought as a class action, a district court should not, without a named plaintiff's consent, enter a judgment that would end the named plaintiff's individual case by providing it full relief without first providing the plaintiff a fair chance to show that the case should be litigated as a class action. The Supreme Court explained that because the "individual claim was not made moot by the expired settlement offer, that claim would retain vitality during the time involved in determining whether the case could proceed on behalf of a class." 136 S. Ct. at 672. "While a class lacks independent status until certified, … a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." *Id.* (citation omitted).

When the district court considered ZocDoc's motion for summary judgment, Geismann's claims were live; as explained above, the deposit and consent to an injunction did not render them moot. Accordingly, the district court should not have entered judgment on Geismann's live claim without first providing Geismann "a fair opportunity to show that certification is warranted." *Id.*; *see also*, *e.g.*, *Chen*, 819 F.3d at 1147 ("[W]hen a defendant consents to judgment affording complete relief on a named plaintiff's individual claims before certification, but fails to offer complete relief on the plaintiff's class claims, a court should not enter judgment on the individual claims, over the plaintiff's objection, before the plaintiff has had a

fair opportunity to move for class certification."); *Bais Yaakov of Spring Valley v. Graduation Source, LLC*, 167 F. Supp. 3d 582, 584 (S.D.N.Y. 2016) ("With a live claim remaining, this Court is bound by *Campbell-Ewald* to afford Plaintiff a fair opportunity to show that class certification is warranted."); *Brady v. Basic Research, LLC*, No. 13-CV-7169, 2016 WL 1735856, at *1 (E.D.N.Y. May 2, 2016) ("Entering judgment against Defendants over Plaintiffs' objections before Plaintiffs have had the opportunity to file a class certification motion as Defendants request would ignore the Supreme Court's holding."). However, rather than providing Geismann with the "fair opportunity to show that certification is warranted" that it "must be accorded," 136 S. Ct. at 672, the district court resolved the merits of Geismann's individual claims, entering judgment in its favor and terminating the case without first considering whether the case should proceed as a class action. Because *Campbell-Ewald* directs that a plaintiff in Geismann's situation be provided with the opportunity to show that class certification is warranted, this Court should vacate the district court's judgment and remand for the district court to consider class certification.

Although this Court has either affirmed entry of judgment in favor of a plaintiff or remanded for the district court to enter judgment when a defendant unconditionally consented to entry of judgment for the plaintiff's maximum recoverable damages in an individual action, it has never done so in the context of

a certifiable class action. For example, in *Leyse v. Lifetime Entertainment Services, LLC*, 679 F. App'x 44 (2d Cir. 2017) (summary order), on which the district court heavily relied, the district court denied class certification on the merits before entering judgment, and this Court affirmed that denial of class certification before affirming the entry of judgment. Thus, the Court did not affirm entry of judgment until after determining that certification was not warranted. In contrast, in *Kline v. Wolf*, 702 F.2d 400 (2d Cir. 1983), the Court vacated an entry of judgment that had been entered based on the defendants' offer to pay the plaintiffs all the money to which they claimed to be entitled in their individual suits, where the plaintiffs, who had been deemed inadequate class representatives, would have been entitled to reconsideration of their adequacy as class representatives if they established the defendants' liability at trial.

The idea that a court may enter judgment if a defendant has consented to the award of all the relief sought in a case is based on the recognition that "a court has discretion to halt a lawsuit by entering judgment for the plaintiff when the defendant unconditionally surrenders and only the plaintiff's obstinacy or madness prevents her from accepting total victory." *Genesis*, 569 U.S. at 85 (Kagan, J., dissenting). If the defendant has "thrown in the towel there is nothing left for the district court to do except enter judgment," and the plaintiff "is not entitled to keep litigating his claim simply because [the defendant] has not admitted liability."

McCauley v. Trans Union, LLC, 402 F.3d 340, 342 (2d Cir. 2005) (quotation marks and citation omitted).

In a proposed class action, however, a named plaintiff who rejects an offer of judgment that ignores the class claims is not being obstinate or mad, nor is he insisting on a trial that can have no effect on the final judgment. The plaintiff in a class action has an excellent reason for objecting to resolution of his individual claims prior to class certification: Such a resolution fails to satisfy a legitimate objective for which he has brought the action—obtaining relief for the injured class. *See Chen*, 819 F.3d at 1147 ("A named plaintiff exhibits neither obstinacy nor madness by declining an offer of judgment on individual claims in order to pursue relief on behalf of members of a class. … [The] named plaintiff acts sensibly by pursuing all of the relief sought in the complaint[.]").

Likewise, a defendant who offers only individual relief to the named plaintiff while ignoring the class claims has not offered "complete relief," *see Tanasi*, 786 F.3d at 200 ("[T]he district court should not enter judgment against the defendant if it does not provide complete relief."), nor has that plaintiff "thrown in the towel," *McCauley*, 402 F.3d at 342 (citation omitted). To the contrary, a defendant who offers relief only to the named plaintiff is conceding only a small part of the case. Instead of agreeing to fully satisfy the claims in the complaint, the defendant is seeking "to *avoid* a potential adverse decision, one that could expose

it to damages a thousand-fold larger than the bid [the plaintiff] declined to accept." *Campbell-Ewald*, 136 S. Ct. at 672 (emphasis added).

As then-Justice Rehnquist explained in his concurrence in *Deposit Guaranty National Bank v. Roper*, no rule of law requires "an individual seeking to proceed as a class representative … to accept a tender of only his individual claims." 445 U.S. 326, 341 (1980) (Rehnquist, J., concurring). "Acceptance need not be mandated under our precedents since the defendant has not offered all that has been requested in the complaint (*i.e.*, relief for the class) and any other rule would give the defendant the practical power to make the denial of class certification questions unreviewable." *Id.*; *see also Genesis*, 569 U.S. at 85 (Kagan, J., dissenting) (explaining that, although a court may enter judgment when a defendant unconditionally surrenders, "it may not take that tack when the supposed capitulation in fact fails to give the plaintiff all the law authorizes and she has sought," and "a judgment satisfying an individual claim does not give a [named plaintiff], exercising her right to sue on behalf of [a class], 'all that [she] has ... requested in the complaint'" (quoting *Roper*, 445 U.S. at 341 (Rehnquist, J., concurring))).

In the class-action context, once one puts aside the fallacy that an offer or deposit moots the plaintiff's claim, there is no basis for allowing a defendant to compel entry of a judgment in favor of an individual plaintiff as a means of

terminating prosecution of claims on behalf of a class. *See Genesis*, 569 U.S. at 85 (Kagan, J., dissenting) ("[Courts do not] have inherent authority to enter an unwanted judgment for [a plaintiff] on her individual claim, in service of wiping out her proposed [class] action."). To the contrary, a district court's decision to enter judgment in a named plaintiff's favor, over his objections, without considering class certification, is contrary to Rule 23, which "creates a categorical rule *entitling* a plaintiff whose suit meets the specified criteria to pursue his claim as a class action," *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398 (2010) (emphasis added), and calls for class certification to be decided at "an early practicable time after a person sues or is sued as a class representative," Fed. R. Civ. P. 23(c)(1)(A). Because nothing allows a court, "prior to certification, [to] eliminate the entire suit by acceding to a defendant's proposal to make only the named plaintiff whole," *Genesis*, 569 U.S. at 85 (Kagan, J., dissenting), the district court erred in entering judgment on Geismann's claim without first considering class certification, and the judgment should be vacated.

CONCLUSION

This Court should vacate the judgment in favor of Geismann, reinstate the class claims, and remand for consideration of class certification.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), Local Rule 32.1(a)(4)(A), and Local Rule 29.1(c) because it contains 4,369 words, excluding the parts of the brief exempted under Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief was prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman.

/s/ Adina H. Rosenbaum
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