STATE OF NEW YORK
SUPREME COUNTY OF ALBANY

In the Matter of the Application of

PROTECT THE ADIRONDACKS! INC.,

Plaintiff-Petitioner,

for a Judgment Pursuant to Section 5 of Article 14 of the New York State Constitution, and CPLR Article 78,

AFFIDAVIT OF PHILIP G. TERRIE, Ph.D.

-against-

NEW YORK STATE DEPARTMENT OF ENVIRONMENTAL CONSERVATION and ADIRONDACK PARK AGENCY,

Defendants-Respondents.

STATE OF NEW YORK)
) SS.
COUNTY OF TOMPKINS)

Philip G. Terrie, Ph.D., being duly sworn, deposes and says that:

- 1. I live in Ithaca, New York. I also have a residence in Long Lake, New York. I am Professor Emeritus of American culture studies, English, and environmental studies at Bowling Green State University. An accurate copy of my current *curriculum vitae* is attached hereto as Exhibit A.
- 2. I make this affidavit in support of the motion for summary judgment by the Plaintiff in this case.

MY PROFESSIONAL QUALIFICATIONS AS AN EXPERT ON THE HISTORY OF THE ADIRONDACK FOREST PRESERVE

- 3. I have been researching, studying, and analyzing the history of the Adirondacks, including the constitutional history of the New York State Forest Preserve, for my entire professional life, over 45 years. I am familiar with this history and can speak about it with authority.
- 4. I received a Bachelor of Arts in English from Princeton University in 1970, and a Doctorate in American Civilization from George Washington University in 1979. My doctoral dissertation was entitled "The Adirondacks, From Dismal Wilderness to Forever Wild: A Case Study of American Attitudes toward Wilderness." While a graduate student, I published the article: "Urban Man Confronts the Wilderness: The Nineteenth-Century Sportsman in the Adirondacks," *Journal of Sport History 5* (Winter 1978).
- 5. I served as Assistant Curator for History at the Adirondack Museum in Blue Mountain Lake from 1971 until 1973, researching and writing on outdoor recreational and commercial activity in the Adirondacks. From 1973 until 1975, I taught English and Latin at Episcopal High School in Alexandria, Virginia.
- 6. From 1977 until 1979, while studying at George Washington University, I was a graduate teaching Fellow in the Department of English and American Studies.
- 7. In 1980, I became an Assistant Professor of American Culture Studies and English at Bowling Green State University. In 1986, I became an Associate Professor, and in 1992 I was promoted to Full Professor, which position I held until my retirement in 2007. Throughout my teaching career, I taught courses relating to the American environment and wilderness.
- 8. In 1994, I was a Fulbright Senior Lecturer in American Literature at the University of Málaga in Spain.

- 9. I taught as a McLellan Distinguished Visiting Professor of North Country History at the State University of New York-Plattsburgh in 2009 and as a National Endowment for the Humanities Distinguished Visiting Professor of History and Environmental Studies at the State University of New York-Potsdam in 2010. My courses included "Wilderness in the Adirondacks" and "The Adirondacks in American Environmental History."
- 10. I have published three books on aspects of the history of the Adirondacks. Forever Wild: Environmental Aesthetics and the Adirondack Forest Preserve, was published by the Temple University Press in 1985; it was republished in 1994 by the Syracuse University Press under the title: Forever Wild: A Cultural History of Wilderness in the Adirondacks. My second book, Wildlife and Wilderness: A History of Adirondack Mammals, was published by the Purple Mountain Press in 1993. My third book, Contested Terrain: A New History of Nature and People in the Adirondacks, was jointly published by the Adirondack Museum and Syracuse University Press in 1997, and a second, expanded edition was issued in 2008. Copies of the pertinent pages of the first edition of that book are attached hereto as Exhibit B (hereafter cited as Contested Terrain).
- 11. I have authored chapters or introductions for published works including *The Great Experiment in Conservation: Voices from the Adirondack Park* (Syracuse University Press, 2009); *The Adirondack Reader: Four Centuries of Adirondack Writing* (Adirondack Mountain Club, 2009); *Boats and Boating in the Adirondacks* (Adirondack Museum/Syracuse University Press, 1995); *A Century Wild: Essays Commemorating the Centennial of the Adirondack Forest Preserve* (Chauncy Press, 1985); *The Adirondack: Or Life in the Woods* (reprint, Harbor Hill, 1982); and *Peaks and People of the Adirondacks* (reprint, Adirondack Mountain Club, 1972, 1986).

- 12. Due to my expertise in the history of the Adirondacks, I was asked to write four articles concerning the history of the Adirondacks for *The Encyclopedia of New York*, published by Syracuse University Press in 2005. They are entitled "Adirondack Park," "Adirondack Park Agency," "Adirondacks," and "Louis Marshall." One of the articles, "Adirondacks," is the principal entry on this subject in the encyclopedia.
- 13. I have taught, lectured, and presented numerous papers and lectures on the history of the Adirondacks, including at the Adirondack Park Agency's 30th Anniversary Celebration (2003), at the Natural History Museum of the Adirondacks (2003), at the Adirondack Research Consortium (2003), at Siena College's Conference on New York History and Culture (1988), at the American Studies Association (1987), at the New York State Department of Environmental Conservation's Wilderness Roundtable (1986), at the New York State Forest Preserve's Centennial Symposium (1985), and at the Conference on New York History (1982).
- 14. I have written numerous refereed, or peer reviewed, articles on the history of the Adirondacks for scholarly journals such as *American Studies, Environmental Review, Journal of Forest and Conservation History, New York History,* and *Hudson Valley Regional Review.*
- 15. I have also written articles for Adirondack journals such as Adirondack Journal of Environmental Studies, Adirondack Explorer, Adirondack Life, and Adirondac.
- 16. In 1987, my chapter entitled, "Wasteland or Paradise: An Outline of American Attitudes Toward Wilderness," was published by the New York State Department of Environmental Conservation in *A Wilderness Roundtable: Proceedings*. The chapter was later reprinted in *Adirondac* in December 1988.
- 17. Adirondack Life magazine received the Silver Award by the International Regional Magazine Association for a trio of articles published in 2003 concerning Mount Marcy; of the

trio I authored "Romance and Reality." I was awarded the Kerr History Prize for best article in 1990 by the New York Historical Association in *New York History* for "Forever Wild Forever: The Forest Preserve Debate at the New York State Constitutional Convention of 1915."

- 18. I served as consultant to WCFE-TV from 1984 until 1985 for the documentary *Forever Wild* about the history of the New York State Forest Preserve, and again in 1998 for a documentary concerning the Park Centennial.
- 19. In 2008, I served as both consultant and on-film historian for the nationally broadcast documentary "The Adirondacks," produced by WNED-TV.
- 20. Because I am a recognized authority on Adirondack history, in 2011 I was retained as an expert witness by the New York State Department of Environmental Conservation (DEC) in the case of <u>Friends of Thayer Lake v. Phil Brown</u>. DEC is an intervenor-defendant in that case, and it is a defendant in this case.

THE PRELUDE TO THE CONSTITUTIONAL PROTECTION OF THE FOREST PRESERVE

- 21. Article 7, Section 7, of the New York State Constitution, written in the summer of 1894, approved by the voters in November of that year, and going into effect on 1 January 1895, is the origin of constitutional protection for the Forest Preserve. This was the culmination of many years of efforts to protect the forests of the Adirondacks and Catskills. <u>See Contested Terrain</u>, pp. 83-115 (Exhibit B).
- 22. The Forest Preserve was created by an act of the Legislature in 1885. This law stated that "the forest preserve shall be forever kept as wild forest lands." It also created a Forest Commission to manage the Forest Preserve for the state. This agency was the predecessor to the current defendant, the Department of Environmental Conservation. However, the Commission

immediately came under suspicion when one of the first people appointed to it was an Adirondack lumber baron. <u>See Contested Terrain</u>, pp. 95-96 (Exhibit B).

- 23. Despite the creation of the Forest Preserve and the Forest Commission, the destruction of the Adirondack forests continued apace. In 1892, the Adirondack Park was created, but this did little to add significant protection to the Forest Preserve. See Contested Terrain, pp. 96-102 (Exhibit B).
- 24. In 1893 the Legislature loosened the protection of the Forest Preserve by passing a law that allowed for the cutting and sale of timber on the state's lands. See my Forever Wild: A Cultural History of Wilderness in the Adirondacks, [Syracuse: Syracuse University Press 1994], pp. 100-107) (hereafter cited as Forever Wild). Copies of the pertinent pages of this book are attached hereto as Exhibit C.

THE ADOPTION OF THE FOREVER WILD PROVISION OF THE CONSTITUTION

- 25. The primary source on the convention in which the new Constitution was written is the Revised Record of the Constitutional Convention of the State of New York: May 8, 1894-September 29, 1894. Albany, NY: Argus, 1900 (hereafter cited as Revised Record 1894).

 Copies of the pertinent parts of the Revised Record 1894 are attached hereto as Exhibit D.
- 26. The reason that constitutional protection for the Forest Preserve was considered by the constitutional convention of 1894 was that New York's citizens believed that the Forest Commission, the state agency mandated to manage the Forest Preserve, was corrupt, incompetent, and indifferent to environmentally sound management of the public domain in the Adirondacks. A series of articles in the *New York Times* in 1889, for example, dwelt on the failure of the state to care adequately for the Forest Preserve, accusing state agents of conspiring

with loggers to cut, illegally, trees on state land (*New York Times*, Sept. 16, 18, 23, and 25, and Oct. 4 and 6, 1889).

- 27. Historians of this crucial period in Adirondack history--including Frank Graham, Jr., Eleanor Brown, and myself--agree that the move to constitutional protection was inspired by public apprehension about the failure of the state's legislative and executive branches to protect the state's forest preserves. See Contested Terrain, pp. 97-102 (Exhibit B); Forever Wild, pp. 100-107 (Exhibit D); Frank Graham, Jr., The Adirondack Park: A Political History [New York: Knopf, 1978], pp. 107-111, 120-127; Eleanor Brown, The Forest Preserve of New York State: The Great Adirondack and Catskill Public Forests, and Their Protection Through a Century of Conflict [Glens Falls, NY: Adirondack Mountain Club, 1985], pp. 34-35). Copies of the pertinent pages of these last two books are attached hereto as Exhibits E and F, respectively.
- 28. David McClure of the New York Board of Trade and Transportation was the primary author of what became, after a few wording changes and the incorporation of one amendment offered from the floor, Article 7, Section 7, of the 1894-95 Constitution. The initial language of this provision was:

All lands of the State, now owned, or hereafter acquired, constituting the forest preserves, as now fixed by law, shall be forever kept as wild forest lands; they shall not be sold, or exchanged, or taken by any corporation, public or private, nor shall the timber thereon be sold or removed. (*Revised Record 1894*, p. 124) (Exhibit D).

29. When McClure introduced this initial language of Article 7, Section 7, and began to explain its intent to the convention, he outlined a series of arguments that are critical to assessing what he had in mind (*Revised Record 1894*, pp.125-40) (Exhibit D). He emphasized that not

only would the lands of the Forest Preserve be forever owned by the state, but also the timber thereon could not be sold or removed. (*Revised Record 1894*, p. 141). He did not say that only the marketable logs would be thus protected; he said that "no part of the timber which is upon those lands" (emphasis added) (*Revised Record 1894*, p. 125) could be sold. He went on to declare that the protection of the Forest Preserve was "the only great and important subject, which at the inception of this Convention, demanded relief and action in the interests of the people of this State" (*Revised Record 1894*, p. 127).

- 30. The first argument that McClure advanced was the utter necessity to the "life, the health, safety, and the comfort not to speak of the luxury of the people of this State, that our forests should be preserved." (*Revised Record 1894*, p. 128) (Exhibit D). It should be noted that he said "our forests should be preserved." He did not distinguish between the forest in its complex integrity and large merchantable trees. Nor did he distinguish between live, dead or diseased trees. He also addressed the importance of Adirondack and Catskill forests to commercial transportation arteries—in other words, the watershed argument. (*Revised Record 1894*, pp. 131-134), but this was not the primary emphasis of his argument to his fellow delegates.
- 31. As he proceeded, he quoted at length from a speech previously delivered in the New York Assembly by Assemblyman George W. Smith of Herkimer: "This territory is vastly more valuable to the people of the state in its present condition that it can be by *any change*. "

 (emphasis added) (*Revised Record 1894*, p. 129) (Exhibit D). Smith, in addition to appreciating the aesthetic appeal of the untouched forest, did indeed note how essential intact forests were to the watershed. But he declared clearly that protecting this watershed depended on keeping the entire forest environment intact: it meant protecting "a vast spongy mass of vegetable matter made up of leaves, the needles and cones of the pine, the spruce, the hemlock, the balsam, and

other growths" (Revised Record 1894, p. 130). By including this description of what needed protection to serve the people of New York, McClure was clearly advocating complete preservation of all the elements of the forest, not just live trees large enough to yield marketable logs.

- 32. As McClure returned to and developed his own position, he asked "What is the value of these woods and why should we try to preserve them *intact*?" (emphasis added) (*Revised Record 1894*, p. 131) (Exhibit D). "Because they are *the woods*," he answered (emphasis added) (*Revised Record 1894*, p. 131). What are the "woods" good for, he asked. The first and thus the most important use he attributed to them was their value "as a great resort for the people of this State" (*Revised Record 1894*, p. 131). In other words, the recreational, spiritual value of the forest took precedence over, or at least enjoyed status equal to, watershed protection. Nowhere did McClure suggest that the spiritual attributes of the forest resided only in marketable trees.
- 33. The State, argued McClure, should never sell or exchange one acre of its forested land. More important for the current issue, he stressed that "We should not sell a tree or a branch of one" (*Revised Record 1894*, p. 139) (Exhibit D). Some people insist, he acknowledged, that "you can make the forests better by thinning out" some trees. In response, he said "But I say to you, gentlemen, no man has yet found it possible to improve upon the ways of nature" (*Revised Record 1894*, p. 139). An untouched forest, McClure was insisting, is the best. He also noted the importance of dead and dying trees in the Forest Preserve to the protection of the other trees, moisture retention and the health of the soil (*Revised Record 1894*, p. 139).
- 34. Up to that point, McClure had been emphasizing that the state should never contract with logging corporations for any trees on state land, arguing for a prohibition against selling or removing any trees. McClure convincingly made the case that this was unnecessary and

counterproductive. Then, delegate Goodelle of Onondaga County offered an amendment to McClure's original language, adding the words "or destroyed". Out of the many amendments to McClure's original proposal that were introduced, this was the only one to be approved by the convention. (*Revised Record 1894*, pp. 141, 157 (Exhibit D)). This addition became critical in later years as conservationists objected, on constitutional grounds, to dams that would have flooded parts of the Forest Preserve (See Roscoe C. Martin, *Water for New York: A Study in State Administration of Water Resources* [Syracuse: Syracuse University Press, 1960], pp. 147-52; Graham, *The Adirondack Park*, pp. 196-207) (Exhibit E). It is important to note this here because it added a prohibition on any kind of alteration of the forest.

- 35. The delegates also expressed their concerns about corruption in the Forest Commission and the inability of the Commission and the Legislature to protect the Forest Preserves.

 "Delegates to the constitutional convention became convinced that neither loggers nor the Forest Commission could be trusted on the Forest Preserve, and the consequence was a total ban on logging." Contested Terrain, p. 102 (Exhibit B). See also Revised Record 1894, pp. 138, 143-144, 155-156 (Exhibit D). Delegate E.A. Brown, in the midst of a lengthy description of the Commission's failings, said, to 'Applause', "I say sir, that it is necessary that something be done; I say sir, it is necessary to close the door ... and you must close it tight, and close it right away" Revised Record 1894, pp. 154-156.
- 36. After some wording and punctuation changes were made by McClure, the final language that the convention approved, which became Article 7, Section 7 of the new Constitution was:

The lands of the State now owned or hereafter acquired, constituting the forest preserves as now fixed by law, shall be forever kept as wild forest lands. They shall not be leased, sold or exchanged, or be taken by any corporation, public or

private, nor shall the timber thereon be sold, removed or destroyed. (Revised Record 1894, p. 158, 163).

This section was later renumbered, in 1938, as Article 14, Section 1. Various amendments have been made to it over the ensuing 122 years, but these two sentences remain intact.

WHAT DID "TIMBER" MEAN WHEN THE FOREVER WILD PROVISION WAS APPROVED?

- 37. I have been advised that it has been argued in this case by DEC that "timber," as used in Article 14, Section 1, means only those trees containing wood suitable for lumber or pulp, being live, healthy trees over 3" in diameter at breast height. What the delegates to the 1894 convention meant by "timber" is complicated and subject to misunderstanding, and DEC's argument is incorrect.
- 38. The nineteenth century produced a rich and extensive literature of sport and travel about the Adirondacks. The use of the word "timber" in this literature shows that it did not always mean only marketable trees. One of the best and most popular examples of this canon is Joel T. Headley's *The Adirondack: Or, Life in the Woods* (New York: Baker and Scribner, 1849). Describing the exploits of the famous guide John Cheney, Headley notes "his long stretches through the wood [sic], where the timber is so thick you cannot see an animal more than fifteen rods" (p. 76). Here Headley clearly describes the characteristically tangled, mixed understory of the Adirondack forest, not a stately array of tall, mature trees whose canopy stunts the growth of the understory. A copy of the pertinent page thereof is attached hereto as Exhibit G.
- 39. In the context of Adirondack logging in the 1890s, the assumption that "timber" meant only commercially valuable trees is incomplete and unpersuasive. To begin with, it ignores the fact that at the time the forever wild provision was adopted the primary (but not exclusive, of

course) objective of Adirondack loggers, and thus the primary threat to the stability, ecological health, and spiritual value of Adirondack forests was harvesting pulpwood for the manufacture of paper. Saw logs remained important, but pulpwood logging was at least equally significant.

Trees cut for pulpwood could be of any size. In addition, "in parts of the eastern Adirondacks, … the demands of the iron industry for charcoal led to ruinous clear cutting of hardwood forests." *Contested Terrain*, p. 87 (Exhibit B). This destructive activity removed trees of all sizes from the forests.

- 40. The 1892 Webster's International Dictionary defined "tree" as, among other things, "A piece of timber, or something commonly made of timber" and as "Wood; timber". Copies of the pertinent pages of this dictionary are attached hereto as Exhibit H.
- 41. Webster's, moreover, included among the definitions of "timber", "the body, stem, or trunk of a tree," and does not stipulate that "tree" means only a tree large enough to include commercially viable logs. It further declares that "stem" means more than merely the trunk; it is also "a little branch which connects a fruit, flower, or leaf with a main branch." Further, the "stem" is "that part of a plant which bears leaves." Webster's further identified "timber" as "woods or forest; wooded land," which would include all the constituents of a forested landscape, including small trees and shrubs. See Exhibit H.
- 42. I note further that the Webster's definition of "timber" states that it means, in addition to "that sort of wood which is proper for buildings," also wood suitable for "tools, utensils." Thus, even if we restrict the meaning of "timber" to wood of some commercial value, it does not mean only trees large enough to supply framing timbers or large boat timbers. See Exhibit H.
- 43. I also note that the Webster's definition of "timber" states that it is "usually said of felled trees, but sometimes of those standing." The lack of distinction between standing and felled trees

demonstrates a lack of distinction, as well, between living and dead trees. Both living and dead trees were embraced by the term "timber." See Exhibit H.

- 44. The inclusion of the word "stem" in the definition of "timber" is also important. In a scholarly work on the meanings in English of terms associated with forestry and woodlands, *An Historical Dictionary of Forestry and Woodland Terms* (Oxford, UK: Blackwell, 1991), N. D. G. James notes this of the word "stem": "In 1832 this was defined as: 'The body of a tree in all its stages of growth, from a seedling to that of a full grown tree" (p. 179). Copies of the pertinent pages of this book are attached hereto as Exhibit I.
- 45. Thus, it is impossible for DEC to argue convincingly that in 1894, when the forever wild provision was written and adopted, "timber" meant one, and only one, of several possibilities.

THE FOREVER WILD PROVISION WAS LEFT INTACT BY SUBSEQUENT CONVENTIONS

- 46. The next constitutional convention was held in 1915. For reasons unconnected to the Forest Preserve, this proposed Constitution was voted down by the people. But it is worth noting that the delegates overwhelmingly opted to use the exact language of 1894's Article 7, Section 7, in the proposed new Constitution that was voted on by the people in November 1915. Those arguing at the convention to amend or drop the provision were chiefly representatives of the logging industry, who insisted that the time had come for the state to permit scientific forestry on state land. The delegates rejected this argument.
- 47. The chief advocates for retaining Article 7, Section 7, in 1915 were the Association for the Protection of the Adirondacks, 1 attorney Louis Marshall, and state Conservation

¹ The Plaintiff in this case is the corporate successor to the Association for the Protection of the Adirondacks.

Commissioner J. S. Whipple. When Whipple stood up to defend Article 7, he mostly ignored the watershed argument and declared that the Forest Preserve was important to the people for recreational uses. This was the last time that delegates to a state constitutional convention argued seriously for introducing logging on the Forest Preserve. See my "Forever Wild Forever: The Forest Preserve Debate at the New York State Constitutional Convention of 1915," New York History 70 (July 1989).

- 48. In 1938 New Yorkers held another constitutional convention. The records of this convention are housed in the New York State Archives in Albany. I recently (June 2016) made a thorough examination of these records. The primary published source on the 1938 convention is the Revised Record of the Constitutional Convention of the State of New York, April Fifth to August Twenty-Sixth, 1938. Albany: J. B. Lyon, 1938 (hereafter cited as Revised Record 1938). Copies of the pertinent pages of the Revised Record 1938 are attached hereto as Exhibit J.
- 49. When the chair of the Conservation Committee, Judge Byron Brewster, presented his committee's proposals to the convention, he observed, "You will note that in this proposal there has been no change whatsoever with respect to the prohibitions upon the forest preserves, not even a comma has been changed" (*Revised Record 1938*, p. 1291) (Exhibit J). The delegates agreed: the language--and, by implication, the sentiments behind it--of the provision protecting the Forest Preserve as an *intact forest* as drafted in 1894 completely satisfied the 1939 delegates.
- 50. Two issues relevant to the Forest Preserve dominated the deliberations of the Conservation Committee: First were calls from deans and faculty at Cornell University and the Syracuse College of Forestry arguing for instituting scientific cutting on the Forest Preserve. But there was no support at the convention for state-sponsored logging on the Forest Preserve (Committee on the Conservation of the Natural Resources of the State, Public Hearing, June 23,

- 1938, Albany, New York State Archives, hereafter cited as *Public Hearing*). Copies of the pertinent pages thereof are attached hereto as Exhibit K.
- 51. Second, and more importantly, Conservation Commissioner Lithgow Osborne, a delegate, acknowledged that certain observers objected to departmental policy with respect to cutting trees to promote recreation (*Public Hearing*, pp. 7-11) (Exhibit K). For the last several decades, Osborne admitted, the Conservation Department had been pushing the boundary of Article 7, Section 7, cutting trees for campsites, trails, lean-tos, and other recreational facilities and that state policies with respect to cutting trees to promote recreation were "debatable" (*Public Hearing*, p. 10).
- 52. Osborne asked rhetorically, what sorts of recreation were permissible on the Forest Preserve and answered his question thus: "under recreational activities suitable to the environment of the forest preserve, I would list camping, hiking, sailing, rowing, skiing, riding, fishing, hunting and trapping. I would just as definitely exclude baseball, football, tennis, golf, bicycling, flying. In other words, things which primitive people did of necessity in a wilderness and which we do now for sport are to be encouraged in the forest preserve even when trees are to be destroyed in making them possible" (*Public Hearing*, p. 10) (Exhibit K). His casual assumption that cutting trees, to whatever extent his department deemed appropriate, was, as he explicitly acknowledged, problematic at the time and remains so today.
- 53. The current dispute originated in the 1930s. That this was the case was spelled out in a remarkable statement made to the Conservation Committee at the 1938 convention by Theodore Cross of Utica, clearly acknowledging the problem of the creeping willingness of the state to violate Article 7, Section 7: "the Constitutional provision has been warped and strained and stretched so that it is now hardly recognizable." Cross noted that the right to cut down a tree was

utterly denied to private citizens but that agents of the state did so with impunity. "Why should ... the New York State Conservation Commission be permitted to go upon the Forest Preserve to cut trees, to construct highways and to prepare public campsites?" (*Public Hearing*, Appendix P-3) (Exhibit K). Cross himself was in favor of changing the constitution so that state tree cutting would become legal, but what is noteworthy was his declaration that what the State was doing without such an amendment was illegal.

Thilip G. Terrie, Ph.D.

Sworn to before me this day of August, 2016.

Jennifer B. James Notary Public. State of New York Registration no. 01JO6314446

Qualified in Tompkins County Commission Expires 11/10/20

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