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7 **UNITED STATES DISTRICT COURT**  
8 **EASTERN DISTRICT OF CALIFORNIA**  
9

10 EMERY I. FRANKLIN,

11 Plaintiff,

12 v.  
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14 UNITED STATES,

15 Defendant.  
16

CASE No. 1:10-cv-00142-LJO-MJS (PC)

FINDINGS AND RECOMMENDATIONS  
(1) DENYING DEFENDANT'S MOTION  
FOR SUMMARY JUDGMENT, (2)  
DENYING PLAINTIFF'S MOTION FOR  
SUMMARY JUDGMENT AND SUMMARY  
ADJUDICATION, (3) DENYING  
DEFENDANT'S COUNTER-MOTION  
FOR SANCTIONS, (4) DENYING  
PLAINTIFF'S MOTION TO STRIKE

(ECF Nos. 53, 62, 63, 68)

FOURTEEN (14) DAY OBJECTION  
DEADLINE

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19 **I. PROCEDURAL HISTORY**

20 Plaintiff Emery I. Franklin is a federal prisoner proceeding pro se and in forma  
21 pauperis in this Federal Tort Claims Act ("FTCA") personal injury action arising from a  
22 motor vehicle accident. (ECF No. 1.) The action proceeds on Plaintiff's second  
23 amended complaint for negligence against the United States. (ECF No. 13.)

24 Plaintiff filed a motion for summary judgment/adjudication of liability. (ECF No.  
25 53.) Defendant filed opposition and a counter-motion for sanctions (asserting Plaintiff  
26 misrepresented facts in his motion). (ECF No. 63.) Plaintiff filed a reply (ECF No. 65)  
27 and opposition to the counter-motion for sanctions. (ECF No. 66.) Defendant replied.  
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1 (ECF No. 74.)

2 Defendant filed its own motion for summary judgment.<sup>1</sup> (ECF No. 62.) Plaintiff  
3 filed opposition (ECF No. 67) and moved to strike supporting declarations of Duncan  
4 and Ray as inadmissible. (ECF No. 68.) Defendant replied. (ECF No. 75.)

5 The motions are now deemed submitted. Local Rule 230(f).

6 **II. SUMMARY OF SECOND AMENDED COMPLAINT**

7 On December 17, 2008, Plaintiff was returning to United States Penitentiary,  
8 Atwater ("Atwater") from an outside medical procedure. (ECF No. 12 at 4.) Plaintiff was  
9 a passenger in a Bureau of Prisons (BOP) van driven by Paul Lehman, an Atwater  
10 Correctional Officer. (Id.) The van collided head-on with another vehicle. (Id.)

11 Plaintiff claims Lehman was speeding and driving recklessly. (Id.)

12 After the impact, Plaintiff was in pain and could not move. (Id.) Lehman lifted  
13 Plaintiff and put him in the chase car. (Id. at II; ECF 70 at 99.) Plaintiff was transported  
14 back to prison and then by ambulance to the hospital. (Id.)

15 The collision caused blunt force trauma, injured Plaintiff's tailbone, and fractured  
16 a vertebrae. The injuries have limited Plaintiff's prison employment opportunities. (Id.)

17 Plaintiff filed a claim with the BOP, Western Region on January 2, 2009. His  
18 claim was denied on April 27, 2009. (Id.) On May 15, 2009, Plaintiff filed an appeal that  
19 was denied by BOP's counsel on October 29, 2009. (Id.; ECF 70 at 102.)

20 Plaintiff seeks monetary damages against the United States, the sole Defendant.

21 **III. SUMMARY JUDGMENT STANDARD**

22 Any party may move for summary judgment, and the Court shall grant summary  
23 judgment if the movant shows that there is no genuine dispute as to any material fact  
24 and the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(a);  
25 Washington Mutual Inc. v. U.S., 636 F.3d 1207, 1216 (9th Cir. 2011). Each party's  
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27 <sup>1</sup> Pursuant to Woods v. Carey, 684 F.3d 934 (9th Cir. 2012) and Rand v. Rowland, 154 F.3d 952 (9th Cir.  
28 1998), Defendant notified Plaintiff of his rights, obligations and methods for opposing Defendant's motion.  
(ECF No. 62 at 2:3-3:7.)

1 position, whether it be that a fact is disputed or undisputed, must be supported by (1)  
2 citing to particular parts of materials in the record, including but not limited to  
3 depositions, documents, declarations, or discovery; or (2) showing that the materials  
4 cited do not establish the presence or absence of a genuine dispute or that the  
5 opposing party cannot produce admissible evidence to support the fact. Fed. R. Civ. P.  
6 56(c)(1). While the Court may consider other materials in the record not cited to by the  
7 parties, it is not required to do so. Fed. R. Civ. P. 56(c)(3); Carmen v. San Francisco  
8 Unified School Dist., 237 F.3d 1026, 1031 (9th Cir. 2001).

9 In resolving cross-motions for summary judgment, the Court must consider each  
10 party's evidence. Johnson v. Poway Unified School Dist., 658 F.3d 954, 960 (9th Cir.  
11 2011). Plaintiff bears the burden of proof at trial, and to prevail on summary judgment,  
12 he must affirmatively demonstrate that no reasonable trier of fact could find other than  
13 for him. Soremekun v. Thrifty Payless, Inc., 509 F.3d 978, 984 (9th Cir. 2007).  
14 Defendant does not bear the burden of proof at trial and in moving for summary  
15 judgment, he need only prove an absence of evidence to support Plaintiff's case. In re  
16 Oracle Corp. Securities Litigation, 627 F.3d 376, 387 (9th Cir. 2010).

17 If the moving party meets its initial responsibility, the burden then shifts to the  
18 opposing party to establish that a genuine issue as to any material fact actually does  
19 exist. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986). The  
20 opposing party must demonstrate that the fact in contention is material, i.e., a fact that  
21 might affect the outcome of the suit under the governing law, Anderson v. Liberty Lobby,  
22 Inc., 477 U.S. 242, 248 (1986); Thrifty Oil Co. v. Bank of Am. Nat'l Trust & Sav. Ass'n,  
23 322 F.3d 1039, 1046 (9th Cir. 2002); T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors  
24 Ass'n, 809 F.2d 626, 630 (9th Cir. 1987), and that the dispute is genuine, i.e., the  
25 evidence is such that a reasonable jury could return a verdict for the nonmoving party.  
26 Long v. County of Los Angeles, 442 F.3d 1178, 1185 (9th Cir. 2006).

27 The evidence of the opposing party is to be believed, Anderson, 477 U.S. at 255,  
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1 and all reasonable inferences that may be drawn from the facts placed before the court  
2 must be drawn in favor of the opposing party. Matsushita, 475 U.S. at 587, citing United  
3 States v. Diebold, Inc., 369 U.S. 654, 655 (1962). Nevertheless, inferences are not  
4 drawn out of the air, and it is the opposing party's obligation to produce a factual  
5 predicate from which an inference may be drawn. Richards v. Nielsen Freight Lines,  
6 602 F.Supp. 1224, 1244–45 (E.D. Cal. 1985), affirmed 810 F.2d 898, 902 (9th Cir.  
7 1987).

8 The evidence produced on summary judgment need not be in a form that is  
9 admissible, but the evidence must be capable of being converted into admissible  
10 evidence at trial. Jones v. U.S. 2013 WL 1289863 at \*2 (D.D.C. March 31, 2013); see  
11 e.g., Richards v. Option One Mortgage, No. 08 Civ. 0007(PLF) 2009 WL 2751831, at \*1  
12 n.3 (D.D.C. August 28, 2009) (hearsay statement may be converted into admissible  
13 evidence if a witness with personal knowledge can testify to the statement at trial).

#### 14 **IV. ANALYSIS**

##### 15 **A. Defendant's Counter-Motion for Sanctions**

16 The court may impose sanctions where an affidavit or declaration is submitted in  
17 bad faith, Fed. R. Civ. P. 56(h), prejudicing the opposing party. Grube v. Lau Indus.,  
18 Inc., 257 F.3d. 723, 731 (7th Cir. 2001). Additionally, the court may impose sanctions  
19 where a declaration includes contentions that are unwarranted or unsupported and thus  
20 objectively unreasonable. Fed. R. Civ. P. 11; See Business Guides, Inc., v. Chromatic  
21 Communications Enterprises, Inc., 498 US 533, 551 (1991).

22 Defendant contends Plaintiff's motion for summary judgment deliberately  
23 misleads the Court by omitting facts of Westin Patterson's involvement in the accident  
24 and his settlement with Plaintiff; mischaracterizing certain of Defendant's responses to  
25 requests for admissions; and failing to completely disclose the Merced Police  
26 Department Traffic Collision Report ("Collision Report").

27 Plaintiff contends he did disclose the state lawsuit against Patterson in the  
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1 second amended complaint and did not conceal the settlement and argues that  
2 sanctions are inappropriate.

3 The undersigned recommends Defendant's motion for sanctions be denied. The  
4 state court settlement, referenced in § I of the second amended complaint, is not only  
5 not dispositive of Plaintiff's claim in this action, but it is of questionable relevance.  
6 Negligence and liability on the part of one of two drivers in a two car accident does not  
7 negate negligence and liability on the part of the other. The settlement is not a final  
8 judgment on the merits of Plaintiff's claim against Defendant. No res judicata or  
9 collateral estoppel effect is accorded the settlement in this action. Rest.2d Judgments §  
10 17; see Adams v. California Dep't of Health Servs., 487 F.3d 684, 688–89 (9th Cir.  
11 2007); see also Owens v. Kaiser Found. Health Plan, Inc., 244 F.3d 708, 713 (9th Cir.  
12 2001).

13 Nor does the settlement charge Plaintiff with any admission of non-liability on the  
14 part of Defendant's agent, Lehman. See Brown v. Pacific Elec. Ry. Co., 79 Cal.App. 2d.  
15 613, 616 (Cal. Ct. App. 1947) (evidence of settlement with a third party, in the absence  
16 of other proof, shows no more than the diligence of one party to buy its peace with  
17 another).

18 Though reference to such facts would have gone far to bolster Plaintiff's  
19 credibility in the eyes of the Court, he has no specific obligation to include unfavorable,  
20 questionably admissible, facts, and there is no specific evidence he acted unreasonably  
21 or to deceive. Any perceived mischaracterization of evidence is just as likely attributable  
22 to his inexperience with legal processes. See Riddick v. Summit House, Inc., 835  
23 F.Supp. 137, 146 (S.D.N.Y. 1993) (Rule 11 sanctions not warranted where no factual  
24 misstatements made).

25 **B. Plaintiff's Motion to Strike Declarations**

26 A party may object to supporting materials on grounds of admissibility. Fed. R.  
27 Civ. P. 56(c)(2). "An affidavit or declaration used to support or oppose a motion must be  
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1 made on personal knowledge, set out facts that would be admissible in evidence, and  
2 show that the affiant or declarant is competent to testify on the matters stated.” Fed. R.  
3 Civ. P. 56(c)(4); Bieghler v. Kleppe, 633 F.2d 531, 533 (9th Cir. 1980).

4 Plaintiff moves to strike the declarations of Duncan and Ray (to the effect that  
5 Lehman was traveling at only 30 mph) on grounds they are hearsay, not made on  
6 personal knowledge and from questionable sources who received settlement payments  
7 from Patterson’s insurance company. (Mot. Strike, ECF 68, ¶¶ 2, 3, 10; ECF No. 70 at  
8 7.)

9 These objections should be overruled. Ray and Duncan, on-duty BOP officers,  
10 were present and observed firsthand the travel of the BOP van immediately prior to the  
11 accident. (Duncan Decl., ECF 62-3 at ¶ 6; Ray Decl., ECF 62- 5 at ¶ 7.) These  
12 statements are not hearsay. Fed. R. Evi. 801(c). Plaintiff’s suggestion these witnesses  
13 are biased and not credible goes to the weight, not the admissibility of their testimony.

14 **C. Cross-Motions for Summary Judgment<sup>2</sup>**

15 1. Federal Tort Claims Act Standard

16 The FTCA provides a remedy for individuals seeking relief against federal actors  
17 for tort claims. 28 U.S.C. § 1346. “The FTCA allows federal inmates to sue the United  
18 States for injuries sustained while incarcerated. 28 U.S.C. § 2674. The FTCA specifies  
19 that the liability of the United States is to be determined “in accordance with the law of  
20 the place where the [allegedly tortious] act or omission occurred.” Rhoden v. United  
21 States, 55 F.3d 428, 430 (9th Cir. 1995), quoting 28 U.S.C. § 1346(b). The FTCA  
22 waives sovereign immunity only where local law would make private person liable in tort  
23 under like circumstances. U.S. v. Olson, 546 U.S. 43, 46 (2005); see Richards v. United  
24 States, 369 U.S. 1, 11 (1962) (“Thus, we conclude that a reading of the statute as a  
25 whole, with due regard to its purpose, requires application of the whole law of the state  
26 where the act or omission occurred.”); Taylor v. United States, 821 F.2d 1428, 1433 (9th  
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28 <sup>2</sup> Parties’ evidentiary objections are overruled unless otherwise indicated.

1 Cir. 1987) (“The extent of the government's liability is a matter of federal law (28 U.S.C.  
2 §§ 1346(b), 2674), albeit determined according to state standards.”).

3 Under California law a public employee is liable for injury to a prisoner  
4 “proximately caused by his negligent or wrongful act or omission.” Cal. Gov’t Code §  
5 844.6(d). “The elements of a negligence cause of action are: (1) a legal duty to use due  
6 care; (2) a breach of that duty; (3) the breach was the proximate or legal cause of the  
7 resulting injury; and (4) actual loss or damage resulting from the breach of the duty of  
8 care.”<sup>3</sup> Brown v. Ransweiler, 171 Cal.App.4th 516, 534 (Cal. Ct. App. 2009).

9 California follows a pure comparative negligence rule where a party’s negligence  
10 is compared to the combined negligence of all tortfeasors, whether or not joined as  
11 parties, and reduced proportionately. American Motorcycle Assn v. Superior Court of  
12 Los Angeles County, 20 Cal.3d 578, 590 (Cal. 1978).

13 An act is a proximate or legal cause of an injury if it is a necessary antecedent of  
14 an event. PPG Industries, Inc. v. Transamerica Ins. Co., 20 Cal. 4th 310, 315 (Cal.  
15 1999). Under California law an act must be a substantial factor in bringing about the  
16 injury; an act is not a substantial factor if the harm would have been sustained even if  
17 the actor had not been negligent. Rutherford v. Owens-Illinois, Inc., 16 Cal. 4th 953,  
18 968-69 (Cal. 1997), as modified on denial of reh’g, (Oct. 22, 1997). If a substantial  
19 factor, the act or omission need not be the sole cause of harm. Gonzalez v. Derrington,  
20 56 Cal. 2d 130, 133 (Cal. 1961).

21 Even when the state law supplies a substantive rule of decision, the Ninth Circuit  
22 uses the federal standard for measuring whether the evidence is sufficient to raise a fact  
23 question. That test inquires whether evidence in its entirety would rationally support a  
24 verdict for Plaintiff, assuming evidence viewed most favorably to Plaintiff. Bieghler, 633  
25 F.2d at 533.

26 Summary judgment is rarely granted in negligence actions. Hughes v. American

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28 <sup>3</sup> Every person is responsible for injuries to another by his or her want of ordinary care. Cal. Civ. Code § 1714(a).

1 Jawa, Ltd., 529 F.2d 21, 23 (8th Cir. 1976). Issues of negligence, due care, and  
2 causation usually require jury resolution of competing inferences. Majano v. United  
3 States, 469 F.3d 138, 140-41 (D.C. Cir. 2006); Goodman v. Staples The Office  
4 Superstore, LLC, 644 F.3d 817, 823-24 (9th Cir. 2011). Only when the evidence in  
5 support of the motion shows clearly the moving party would be entitled to directed  
6 verdict were the case to proceed to trial, should the motion be granted. Bieghler, 633  
7 F.2d at 533. See also Iolab Corp. v. Seaboard Sur. Co., 15 F.3d 1500, 1506, fn.4 (9th  
8 Cir. 1994) (causation is normally a question of fact for the jury and becomes an issue of  
9 law only where under the undisputed facts reasonable minds could not differ on the  
10 outcome).

## 11 2. Negligence Causation

12 Defendant contends it is entitled to summary judgment because Plaintiff does not  
13 have competent evidence that its agent Lehman was a cause of the accident and  
14 Plaintiff's injuries. The accident, according to Defendant, was caused entirely by  
15 Patterson, who admitted one hundred percent liability for the accident in settling  
16 Plaintiff's state law negligence suit against him for ten thousand dollars.<sup>4</sup> Defendant  
17 submits as evidence the declarations of Ray, Duncan, Lehman, and Patterson, and the  
18 Collision Report, to support its claims that: Patterson crossed into the northbound lane  
19 and collided head-on with the BOP van; neither driver had time to react; the vehicles  
20 came to rest in the northbound lane; Lehman was not speeding or driving recklessly and  
21 not cited; Patterson was cited for unsafe speed.

22 Plaintiff contends he is entitled to summary judgment or adjudication of liability in  
23 his favor because Lehman was speeding and driving recklessly and played a causative  
24 role in the harm Plaintiff suffered. In support, Plaintiff submits his affidavits and  
25 deposition testimony as to speed and recklessness, and circumstantial evidence from  
26 Defendant's discovery responses (i.e., that Lehman had another medical run at 2:00  
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28 <sup>4</sup> Merced Superior Court Case Number CV001457.

1 p.m.) to support the claim that Lehman was rushing, speeding and driving recklessly  
2 and swerving into the oncoming lane at the time of the accident. Plaintiff notes the  
3 Collision Report includes an estimate by “witness 1” that the BOP van was traveling 40  
4 mph in a 30 mph zone. (Collision Report at 2.)

5 Plaintiff also claims that following the accident Lehman negligently grabbed him  
6 and dragged him from the van to the chase car in a manner that caused further pain  
7 and injury.

8 a. The Accident

9 Given the admissions of Patterson and, to the extent admissible, the opinions  
10 and conclusions of the investigating police officer, it is questionable whether a jury  
11 would attribute liability for the accident to Lehman.<sup>5</sup> However, **there is evidence** before  
12 this Court that Lehman was speeding, driving recklessly, and even swerving into the  
13 oncoming lane immediately before the accident. There apparently is one witness,  
14 identified in the Collision Report as Officer Duncan, who concluded that Lehman was  
15 speeding; he can be expected to so testify or to try to explain away the statement  
16 attributed to him. There also is circumstantial evidence that Lehman had an incentive to  
17 be, and therefore may have been, driving fast. Such evidence, if believed, could justify a  
18 jury finding Lehman negligent and a proximate cause of Plaintiff’s injuries.

19 In short, the evidence, even though not evenly weighted, is in conflict. That  
20 conflict must be resolved by the jury and cannot be resolved by the Court on summary  
21 judgment. There is a genuine dispute of fact as to whether Lehman drove negligently  
22 and contributed to the accident and to Plaintiff’s injuries. PPG Industries, Inc., 20 Cal.  
23 4<sup>th</sup> at 310.<sup>6</sup>

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25 <sup>5</sup> Neither party has demonstrated, for purposes of the instant motions, that the Collision Report is capable  
26 of conversion into admissible evidence at trial and the undersigned expresses no opinion thereon. See  
27 Jones, 2013 WL 1289863 at \*3; see also Beech Aircraft Corp. v. Rainey, 488 U.S. 153, 162 (1988)  
(requiring factually based conclusions or opinions in public records); Desrosiers v. Flight International of  
Florida, Inc. (156 F.3d 952, 962 (9th Cir. 1998) (court need not admit under Rule 803(8) opinions which  
are untrustworthy).

28 <sup>6</sup> A breach of a duty imposed by law is within the definition of negligence, Elsner v. Uveges, 34 Cal. 4th

1                   b.       Moving Plaintiff after the Accident

2           The undersigned also finds a genuine dispute of fact as to whether Lehman  
3 moved Plaintiff from the BOP van in a manner breaching a duty of care<sup>7</sup> and thereby  
4 played a part in the harm caused to Plaintiff.

5           Plaintiff offers his affidavit that immediately after the accident he told Lehman “I’m  
6 in pain and can’t move. Call an ambulance!” (ECF No. 70 at 113), that Lehman grabbed  
7 [him] by the arm and said “come on” . . . and that he pulled [Plaintiff] up out of the seat”  
8 and dragged Plaintiff to the chase car while Plaintiff was “crying in pain” (Id.), leaving  
9 Plaintiff in more pain that he had been before Lehman grabbed him. (Id.).

10           Defendant Disputes these claims. (Patterson Decl. at ¶ 4.)

11                   c.       Summary

12           Each party has failed to rebut the other’s evidentiary showing with evidence that  
13 would rationally support a verdict in its favor on the issue of causation.<sup>8</sup> Anderson, 477  
14 U.S. at 248. The competing evidence and inferences require jury resolution. Hughes,  
15 529 F.2d at 23. Defendant’s motion for summary judgment should be denied. Plaintiff’s  
16 motion for summary judgment/adjudication should be denied.

17 **V.       LEGAL CONCLUSIONS AND RECOMMENDATIONS**

18           Sanctions against Plaintiff are not appropriate.

19           The declarations of Ray and Duncan are not inadmissible on grounds of hearsay,  
20 lack of personal knowledge, and lack of reliable source.

21           There is a genuine dispute of material fact as to negligence and causation such  
22 that the cross-motions for summary judgment should be denied.

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24 915, 929 (Cal. 2004), such that failure to conform to that standard is negligence per se, i.e., duty and  
25 breach established. Law v. Shoate, 178 Cal.App.2d 739, 743 (Cal. Ct. App. 1960). See also Lawson v.  
26 Superior Court, 180 Cal.App.4th 1372, 1389 (Cal. Ct. App. 2010) (a jailer has a special relationship with a  
prisoner which creates a duty of care).

27 <sup>7</sup> See Lawson, 180 Cal.App.4th at 1389.

28 <sup>8</sup> The undersigned declines to reach the balance of parties’ arguments and evidence and no opinion is  
expressed thereon.

1 The undersigned recommends that:

- 2 1. Defendant's counter-motion for sanctions (ECF No. 63) be DENIED;  
3 2. Plaintiff's motion to strike (ECF No. 68) be DENIED;  
4 3. Defendant's motion for summary judgment (ECF No. 62), be DENIED; and  
5 4. Plaintiff's motion for summary judgment (ECF No. 53) be DENIED.

6 These findings and recommendations will be submitted to the United States  
7 District Judge assigned to the case, pursuant to the provisions of Title 28 U.S.C. §  
8 636(b)(1). Within fourteen (14) days after being served with these findings and  
9 recommendations, the parties may file written objections with the Court. The document  
10 should be captioned "Objections to Magistrate Judge's Findings and  
11 Recommendations." A party may respond to another party's objections by filing a  
12 response within fourteen (14) days after being served with a copy of that party's  
13 objections. The parties are advised that failure to file objections within the specified time  
14 may waive the right to appeal the District Court's order. Martinez v. Ylst, 951 F.2d 1153  
15 (9th Cir. 1991).

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19 IT IS SO ORDERED.

20 Dated: August 20, 2013

21 /s/ Michael J. Seng  
22 UNITED STATES MAGISTRATE JUDGE  
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