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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

THE ESTATE OF RUBEN NUNEZ by
and through its successor-in-interest
LYDIA NUNEZ, ALBERT NUNEZ, and
LYDIA NUNEZ,

Plaintiffs,

v.

COUNTY OF SAN DIEGO, et al,

Defendants.

Case No.: 3:16-cv-01412-BEN-MDD

ORDER:
GRANTING IN PART AND DENYING IN PART PARTIES' MOTIONS IN LIMINE [Docs. 325, 326, 327]; BIFURCATING TRIAL; AND DENYING AS MOOT DEFENDANT HANSEN'S MOTIONS IN LIMINE [Doc. 324].

Plaintiffs, Defendant CPMG, and Defendant Jorge Naranjo together filed 30 motions in limine in preparation for trial set for June 4, 2019. [Docs. 325-327.] For the following reasons, the motions are **GRANTED IN PART AND DENIED IN PART.**¹

I. LEGAL STANDARD

Rulings on motions in limine fall entirely within this Court's discretion. *United States v. Bensimon*, 172 F.3d 1121, 1127 (9th Cir. 1999) (citing *Luce v. United States*, 469

¹ Defendant Sara Hansen filed 13 motions in limine. [Doc. 324.] Because Plaintiffs and Defendant Hansen filed a notice of settlement, [Doc. 393], Defendant Hansen's motions in limine are DENIED AS MOOT.

1 U.S. 38, 41-42 (1984)). Evidence is excluded on a motion in limine only if the evidence is
2 clearly inadmissible for any purpose. *Fresenius Med. Care Holdings, Inc., v. Baxter Int'l,*
3 *Inc.*, 2006 WL 1646113, at *3 (N.D. Cal. June 12, 2006). If evidence is not clearly
4 inadmissible, evidentiary rulings should be deferred until trial to allow questions of
5 foundation, relevancy, and prejudice to be resolved in context. *See Bensimon*, 172 F.3d at
6 1127 (when ruling on a motion in limine, a trial court lacks access to all the facts from trial
7 testimony). Denial of a motion in limine does not mean that the evidence contemplated by
8 the motion will be admitted at trial. *Id.* Instead, denial means that the court cannot, or
9 should not, determine whether the evidence in question should be excluded before trial.
10 *Id.*; *see also McSherry v. City of Long Beach*, 423 F.3d 1015, 1022 (9th Cir. 2005) (rulings
11 on motions in limine are subject to change when trial unfolds).

12 **II. PLAINTIFFS' MOTIONS IN LIMINE NOS. 1-6 [Doc. 327]**

13 **A. Motion No. 1 – Argument that the Patton Defendants Failed to Provide** 14 **Adequate Notice of Decedent's Condition or Caused His Death**

15 Plaintiffs seek to exclude evidence and argument that the Patton State Hospital
16 Defendants failed to provide adequate notice to the Central Jail (and CPMG's employees
17 at the Central Jail) of Ruben Nunez's condition via the Nursing Discharge Summary
18 ("NDS") or that the Patton Defendants somehow caused his death. In support, Plaintiffs
19 argue the law of the case precludes such argument because of the Court's findings in its
20 summary judgment order dismissing the Patton Defendants by holding "a jury could not
21 reasonably find the Nurse Defendants' documentation efforts to be so insufficient as to put
22 the Jail on notice of Mr. Nunez's condition." [Doc. 322, p. 21.]

23 "The law-of-the-case doctrine generally provides that 'when a court decides upon a
24 rule of law, that decision should continue to govern the same issues in subsequent stages
25 in the same case.'" *Askins v. U.S. Dep't of Homeland Security*, 899 F.3d 1035, 1042 (9th
26 Cir. 2018). "The doctrine applies most clearly where an issue has been decided by a higher
27 court[.]" *Id.* Importantly, "[t]he law of the case doctrine does not preclude a court from
28 reassessing its own legal rulings in the same case." *Id.* "For the doctrine to apply, the issue

1 in question must have been decided explicitly or by necessary implication in the previous
2 disposition.” *Pit River Home and Agr. Co-op. Ass’n v. United States*, 30 F.3d 1088, 1097
3 (9th Cir. 1994).

4 Defendant CPMG and Dr. Jorge Naranjo correctly argue that the law of the case
5 doctrine does not apply here. As Defendants contend, the Court did not explicitly rule the
6 NDS’s deficiencies had *no* bearing on the actions of the jail medical staff or were
7 inadequate to put Dr. Naranjo or CPMG on notice of Ruben Nunez’s medical needs.
8 Rather, the Court granted summary judgment for the Patton Defendants because it found,
9 “Without more, Plaintiffs have not carried their burden to show causation such that a
10 reasonable jury could find in their favor.” [Doc. 322, p. 20.] The Court’s granting of
11 summary judgment for the Patton Defendants because of Plaintiffs’ failure to offer
12 sufficient evidence showing causation or a lack of notice should not preclude Defendants
13 from presenting evidence at trial that the NDS was insufficient to provide them with
14 adequate notice. Because the law of the case doctrine does not apply, and to hold otherwise
15 might prevent Defendants from presenting an adequate defense, Plaintiffs’ motion is
16 **DENIED.**

17 **B. Motion No. 2 – References to Plaintiffs’ Settlement with the County**

18 Plaintiffs seek to exclude any references to the settlement they reached with the
19 County Defendants under FRE 408. Rule 408 bars the admission of settlement agreements
20 to prove liability. Plaintiffs further argue a settlement amount would lead to confusion and
21 undue prejudice at trial. Defendants do not oppose. The motion is **GRANTED.**

22 **C. Motion No. 3 – Expert Testimony for Failure to Comply with Rule 26**

23 Plaintiffs move to exclude Dr. Michael C. Fishbein as an expert witness because he
24 did not submit an expert report, as required by Rule 26(a)(2)(B). Rule 37(c) precludes a
25 party from using a witness or information at trial that was not properly disclosed “unless
26 the failure was substantially justified or harmless.” Because Defendants do not oppose,
27 the motion is **GRANTED.**

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1 **D. Motion No. 4 – Negative Character Evidence as to Ruben Nunez**

2 Plaintiffs contend that evidence of the Penal Code violations for which Ruben Nunez
3 was arrested, his arrest, prior convictions, and alleged history of drugs must be excluded
4 as not relevant and inadmissible under Rule 403. Defendants agree that evidence of Ruben
5 Nunez’s “prior arrests and convictions, as well as the specific charges made against him
6 prior to his commitment to Patton State Hospital, are irrelevant.” [Docs. 330, p. 6 and 329,
7 p. 5.] Defendants argue, however, that it would be impossible to not mention the following
8 facts: Mr. Nunez being charged with a crime, found incompetent to stand trial, committed
9 to Patton State Hospital for restoration of competency, and subsequently transferred to San
10 Diego Central Jail to attend a court hearing. The Court agrees, and the motion is
11 **GRANTED IN PART AND DENIED IN PART.** Evidence of Ruben Nunez’s specific
12 prior convictions and prior arrests, as well as the specific charges made against him prior
13 to his commitment to Patton State Hospital are excluded under Rule 403. As to evidence
14 that Ruben Nunez was charged with a crime, found incompetent to stand trial, committed
15 to Patton State Hospital for restoration of competency, and subsequently transferred to San
16 Diego Central Jail to attend a court hearing, the motion is **DENIED.**

17 **E. Motion No. 5 – Criminal History of Ruben’s Father, Albert Nunez**

18 Plaintiffs seek to exclude evidence of Albert Nunez’s criminal convictions for bank
19 robbery and his prior drug use history from the 1980s to 1990s. As to Albert Nunez’s
20 convictions, FRE 609(a)(2) provides that no conviction older than 10 years is admissible
21 unless (1) it satisfies FRE 403 and (2) the proponent gives adequate notice of an intent to
22 offer the conviction. Defendants respond that they do not intend to introduce evidence of
23 the *specific* crimes Albert Nunez committed. However, they oppose to the extent Albert
24 Nunez’s incarceration history is relevant to Albert Nunez’s relationship with his son to
25 support his state law wrongful death claim and his § 1983 claim for loss of familial
26 association.

27 In California, non-economic damages for wrongful death include “the loss of [the
28 decedent’s] love, companionship, comfort, care, assistance, protection, affection, society,

1 [and] moral support.” CACI 3291. As to Plaintiffs’ § 1983 claim for loss of familial
2 companionship, the Supreme Court has emphasized that “the mere existence of a biological
3 link does not merit equivalent constitutional protection.” *Wheeler v. City of Santa Clara*,
4 894 F.3d 1046, 1058 (9th Cir. 2018) (quoting *Lehr v. Robertson*, 463 U.S. 248, 262 (1983)).
5 Rather, “even biological parents must maintain consistent involvement in a child’s life and
6 participation in child-rearing activities for their relationship to be entitled to the Fourteenth
7 Amendment protections at issue.” *Id.* Thus, because Albert Nunez has put his parental
8 relationship at issue by both claiming its protection under the Fourteenth Amendment and
9 claiming non-economic damages for the loss of that relationship, evidence related to Albert
10 Nunez’s relationship with his son, including that he was incarcerated, may be admissible
11 at trial. Accordingly, the motion is **GRANTED IN PART**, only to exclude evidence of
12 Albert Nunez’s specific convictions. The motion is **DENIED** as to all other evidence.

13 **F. Motion No. 6 – Character Evidence as to Ruben’s Mother, Lydia Nunez**

14 Similarly, Plaintiffs seek to exclude evidence of Lydia Nunez’s substance abuse
15 problems and a guilty plea to a misdemeanor DUI from the 1960s or 1970s. Plaintiffs
16 contend that Lydia Nunez became sober on August 25, 1995 and has remained dedicated
17 to her sobriety for over twenty years, and thus, such evidence is not relevant and would
18 prejudice the jury. Defendant Naranjo responds that he does not seek to introduce evidence
19 of Lydia Nunez’s specific crimes. He argues, however, that Lydia Nunez’s history of
20 substance abuse while her son was growing up is relevant to the jury’s evaluation of their
21 relationship for her § 1983 loss of familial companionship claim and her claim for non-
22 economic damages for wrongful death. Accordingly, the motion is **GRANTED IN PART**,
23 only to exclude evidence of Lydia Nunez’s specific convictions. The motion is **DENIED**
24 as to all other evidence.

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1 **III. DEFENDANT CPMG'S MOTIONS IN LIMINE NOS. 1-8 & DEFENDANT**
2 **NARANJO'S NOS. 1-8 [Docs. 325, 326]²**

3 **A. Motion No. 1 – Other Litigation, Proceedings, or Disciplinary Act**

4 In essence, Defendants seek a blanket exclusion of all evidence “concerning other
5 lawsuits, proceedings, or disciplinary action to which CPMG, its independent contractors,
6 or its experts were a party.” [Doc. 325, p. 2.] Plaintiffs correctly respond that the motion
7 is vague and overbroad. Given the lack of specific evidence or testimony Defendants seek
8 to preclude, the Court cannot evaluate its admissibility.

9 Defendants do, however, specifically identify one document entitled, “Quality
10 Assurance/Quality Improvement July-September 2015 Audit Report.” This report reflects
11 an audit of patient cases from 2015, and Ruben Nunez’s case was briefly reviewed in the
12 document. The Report also states, “Provider 151 was informed of the inappropriateness of
13 not reviewing state hospital returnee.” Defendants contend this evidence is not admissible
14 under FREs 401, 402, 403, 404, and 407, as well as the California Evidence Code sections
15 787 (addressing character evidence) and 1151 (addressing subsequent remedial measures).
16 Contrary to Defendants’ raising FREs 401, 402, and 403, the Court finds the Report may
17 be relevant to show, for example, that Dr. Naranjo had a habit of not reviewing medical
18 records, contrary to the prevailing standard of care.

19 As to Defendants’ suggestion that the Report is an inadmissible subsequent remedial
20 measure under FRE 407, the Court disagrees. *See, e.g., Aranda v. City of McMinnville*,
21 942 F. Supp. 2d 1096, 1103 (D. Or. 2013) (explaining that a defendant’s internal
22 investigations and reviews might constitute the initial step toward identifying the need for
23 particular remedial action, but “they are not themselves excluded under Rule 407.”);
24 *Rigsbee v. City and Cnty of Honolulu*, 2019 WL 1102496, at *2 (D. Haw. Mar. 7, 2019
25 (same). “By its terms, [FRE 407] is limited to measures that would have made the harm
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28 ² Because Defendant CPMG and Naranjo’s motions in limine 1 through 8 are
virtually identical, the Court considers them together.

1 less likely to occur; it does not extend to post-incident investigations into what *did* occur.”
2 *Id.* Finally, because the Report may be relevant to show habit, FRE 405’s prohibition of
3 character evidence does not necessarily apply to exclude the Report. In sum, the Report
4 may be admissible at trial, making it an improper subject for a motion in limine. For the
5 previous reasons, the motion is **DENIED**.

6 **B. Motion No. 2 – Limit Expert Testimony Under Rule 26**

7 Defendants move to limit Plaintiffs’ expert, Dr. Gage, to testifying about the
8 opinions he expressed at his deposition or previously disclosed in compliance with Rule
9 26(a)(2)(B). Plaintiffs agree that expert testimony must be limited to the Rule 26 report
10 and to testimony provided during deposition. Because the Court finds this motion is
11 consistent with Federal Rule of Civil Procedure 26, the motion is **GRANTED**.

12 **C. Motion No. 3 – Preclude Legal Opinions from Expert Witnesses**

13 Defendants seek to preclude Dr. Gage from offering “legal opinions” at trial by
14 arguing that testimony concerning various terms Dr. Gage offered should be excluded,
15 including “negligence, gross negligence, minor departures from the standard of care,
16 substantial departures from the standard of care, egregious departures from the standard of
17 care, and complete and utter failure.” [Doc. 326, p. 6.] First, as an expert, Dr. Gage is
18 permitted to testify about the standard of care. Further, terms like “minor,” “substantial,”
19 and “egregious” are not necessarily legal terms. Finally, under FRE 704(a), “[a]n opinion
20 is not objectionable just because it embraces an ultimate issue.” To the extent Dr. Gage
21 attempts to offer legal conclusions at trial, Defendants may object. Here, however, the
22 Court finds a blanket exclusion of testimony concerning various terms is not warranted.
23 The motion is **DENIED**.

24 **D. Motion No. 4 – Exclude Evidence of \$250,000 MICRA Limit**

25 Plaintiffs are claiming non-economic damages for their medical negligence claims
26 against Defendants. The Medical Injury Compensation Reform Act (“MICRA”) limits
27 non-economic losses to \$250,000 in actions against healthcare providers. The parties do
28 not dispute that Defendants are healthcare providers and that the \$250,000 limit applies.

1 Thus, Defendants move to exclude evidence of the damages limit at trial. Plaintiffs respond
2 that they do not intend to raise the MICRA limit at trial but reserve the right to should
3 Defendants open the door. Plaintiffs, however, do not offer an example of how Defendants
4 might “open the door” in a way that testimony about MICRA’s damages limit would be
5 necessary. Because the Court finds the MICRA limit is not relevant and could improperly
6 influence the jury’s verdict, the motion is **GRANTED**. If Plaintiffs believe Defendants
7 have “opened the door,” however, they may seek the Court’s reconsideration.

8 **E. Motion No. 5 – Evidence of Liability Insurance**

9 Defendants move to exclude evidence of liability insurance. FRE 411 provides,
10 “Evidence that a person was or was not insured against liability is not admissible to prove
11 whether the person acted negligently or otherwise wrongfully.” Plaintiffs respond that they
12 do not intend to raise the issue, unless Defendants open the door, *e.g.*, by introducing
13 evidence of personal financial hardship or burden. Accordingly, the motion is **GRANTED**
14 insofar as this evidence is inadmissible for the parties’ case-in-chief.

15 **F. Motion No. 6 – Evidence Not Previously Produced**

16 Without specifying any particular evidence, Defendants request a blanket exclusion
17 of all evidence not previously produced. Plaintiffs respond that they do not intend to
18 introduce any evidence not previously identified in discovery but reserve the right to use
19 documents relevant to witnesses’ credibility on cross-examination. Because this motion
20 does not concern any specific evidence and is consistent with Federal Rules of Civil
21 Procedure 26 and 37, the motion is **GRANTED**.

22 **G. Motion No. 7 – Speculative Causation Testimony**

23 Again, without specifying any particular evidence, Defendants request a blanket
24 exclusion of any “speculative causation testimony” about Ruben Nunez’s death. Because
25 the Court is unclear about what evidence Defendants seek to exclude and thus, cannot
26 evaluate its admissibility, the motion is **DENIED**.

1 **H. Motion No. 8 – Expert Testimony About Personal Practices**

2 Defendants seek to exclude any expert testimony about the expert’s personal
3 practices in various circumstances, as opposed to what the standard of care in the
4 community requires. For California state law medical malpractice claims, California
5 competency rules apply. *Trujillo v. Cnty of Los Angeles*, 751 Fed. Appx. 968, 972 (9th
6 Cir. 2018). Thus, the expert testifying “must possess and use the learning, care and skill
7 normally possessed and exercised by practitioners of that specialty under the same or
8 similar circumstances.” *Liebsack v. United States*, 731 F.3d 850, 856-58 (9th Cir. 2013).
9 To the extent Defendants object to an expert’s testimony at trial, their objection is governed
10 by the Federal Rules of Evidence, not California evidentiary rules. Regardless, because
11 Defendants do not identify the particular testimony Defendants seek to exclude and the fact
12 that such testimony’s admissibility likely cannot be evaluated in a vacuum, the motion is
13 **DENIED.**

14 **IV. DEFENDANT NARANJO’S MOTIONS IN LIMINE NOS. 9-16 [Doc. 326]**

15 **A. Motion No. 9 – Medical Testimony by Plaintiffs and Lay Witnesses**

16 Defendant Naranjo seeks to exclude plaintiffs’ or other lay witnesses’ testimony that
17 is critical of Dr. Naranjo’s care and treatment. In support, Defendant Naranjo contends
18 such criticisms would not be relevant because opinions on medical standards of care are
19 particularly within the knowledge of experts, not lay persons, and would be prejudicial.
20 Plaintiffs respond that they do not anticipate either Lydia or Albert Nunez will provide
21 medical expert testimony, but because Defendant Naranjo has not identified any other
22 witnesses he contends should not offer medical testimony, Plaintiffs cannot respond. The
23 Court acknowledges that the underlying legal basis for the motion is valid, but because the
24 motion is vague and overbroad, it is **DENIED.**

25 **B. Motion No. 10 – Cumulative Expert Testimony**

26 Defendant Naranjo moves to exclude “cumulative expert testimony.” Plaintiffs
27 respond by joining the motion, noting that both defendants have designated Dr. Lev and
28 Dr. Smith and requesting that the Court limit the number of witnesses allowed to testify as

1 to specific areas of testimony. Because the parties do not identify which experts should be
2 struck and why, the Court is unable to evaluate the motion, and it is **DENIED**.

3 **C. Motion No. 11 – Plaintiffs’ Expert Testimony on Direct About Source**
4 **Material**

5 Defendant Naranjo moves for an order precluding all experts from testifying on
6 direct examination about source material, citing California evidence law that precludes
7 such material as inadmissible hearsay. Under *Erie Railroad Co. v. Thompkins*, 304 U.S.
8 64 (1938), the substantive law of the state applies to the state law causes of action. As
9 relevant here, however, “[m]ost evidentiary rules are procedural in nature, and the Federal
10 Rules of Evidence ordinarily govern.” *Feldman v. Allstate Ins. Co.*, 322 F.3d 660, 666 (9th
11 Cir. 2003). Defendant Naranjo has not demonstrated this particular evidentiary rule to be
12 so “intimately bound up with the state’s substantive decision making” that it must be given
13 full effect in federal court. *Id.* Thus, FRE 803, which directly conflicts with the California
14 rule, will govern and permits an expert to rely upon “[a] statement contained in a treatise,
15 periodical, or pamphlet” on direct examination. The motion is **DENIED**.

16 **D. Motion No. 12 – Motion to Bifurcate Re: Punitive Damages and Fees**

17 Defendant Naranjo next moves to bifurcate trial as to punitive damages and
18 attorneys’ fees. First, as Plaintiffs respond, the issue of attorneys’ fees under 42 U.S.C. §
19 1988 is not a jury question; it is a matter decided by the Court. Nonetheless, considering
20 the motion’s request for bifurcation as to liability and punitive damages, the Court is
21 persuaded that bifurcation is warranted. In support of bifurcation, Defendant Naranjo
22 argues that Plaintiffs will likely present evidence of his financial condition, which may
23 cause the jury to award punitives without first finding his conduct to be “malicious,
24 oppressive or in reckless disregard of the plaintiff’s rights.” Model Civ. Jury Inst. 9th Cir.
25 5.5 (2007). Rule 42(b) “confers broad discretion upon the district court to bifurcate at trial,
26 thereby deferring costly and possibly unnecessary proceedings.” *Hangarter v. Provident*
27 *Life and Acc. Ins. Co.*, 373 F.3d 998, 1021 (9th Cir. 2004). Here, the Court is persuaded
28 that the financial information raised by Defendant Naranjo is likely to take up at least some

1 time and could lead to jury confusion. Thus, the motion to bifurcate trial as to separate
2 liability and punitive damages phases is **GRANTED**.

3 **E. Motion No. 13 – Plaintiffs’ Experts Testimony About Witness Credibility**

4 Defendant Naranjo moves to preclude Plaintiffs’ experts from testifying about any
5 witness’s credibility. Plaintiffs respond that they have no objection, so long as the motion
6 applies to both sides. Accordingly, the motion is **GRANTED** and applies to all expert
7 witnesses.

8 **F. Motion No. 14 – Settlement Discussions and Offers of Settlement**

9 Defendant Naranjo moves to exclude evidence of settlement discussions and offers
10 of settlement. Plaintiffs have no objection. The motion is **GRANTED**.

11 **G. Motion No. 15 – Precluding Witnesses from the Courtroom**

12 Defendant Naranjo moves to exclude all non-party trial witnesses from the
13 courtroom during any proceedings where that individual is not on the witness stand
14 testifying. Because Plaintiffs have no objection and agree, the motion is **GRANTED** as
15 stated herein.

16 **H. Motion No. 16 – Objecting to CACI 430 and Proposing Alternative Special**
17 **Jury Instruction**

18 Defendant Naranjo moves in limine to propose a special jury instruction as an
19 alternative to CACI 430 (defining “substantial factor”). Specifically, Defendant Naranjo
20 contends CACI 430 does not reflect the appropriate standard for causation for Plaintiffs’
21 California medical malpractice and wrongful death claims, and thus, the Court should
22 instead give his proposed special jury instruction. Plaintiffs object, arguing the California
23 Court of Appeal has already rejected Defendant Naranjo’s very argument. On January 6,
24 2019, the parties submitted their proposed jury instructions to the Court, including
25 designating CACI 430 as an *agreed upon* instruction. Because Defendant Naranjo appears
26 to have abandoned his argument about giving the proposed special jury instruction instead
27 of CACI 430, the motion is **DENIED as moot**.

1 **V. CONCLUSION**

2 In summary, the Court rules as follows:

- 3 1. Plaintiffs' motion in limine number 1 is DENIED.
- 4 2. Plaintiffs' motion in limine numbers 2 and 3 are GRANTED.
- 5 3. Plaintiffs' motion in limine numbers 4, 5, and 6 are GRANTED IN PART AND
- 6 DENIED IN PART.
- 7 4. Defendant CPMG and Naranjo's motion in limine numbers 1, 3, 7, and 8 are
- 8 DENIED.
- 9 5. Defendant CPMG and Naranjo's motion in limine numbers 2, 4, 5, and 6 are
- 10 GRANTED.
- 11 6. Defendant Naranjo's motion in limine numbers 9, 10, 11, and 16 are DENIED.
- 12 7. Defendant Naranjo's motion in limine numbers 12, 13, 14, and 15 are GRANTED.
- 13 8. Defendant Sara Hansen's motion in limine numbers 1-13 are DENIED AS MOOT.

14 **IT IS SO ORDERED.**

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16 DATED: May 23, 2019

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18 HON. ROGER T. BENITEZ
19 United States District Judge
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