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17 **UNITED STATES DISTRICT COURT**
18 **NORTHERN DISTRICT OF CALIFORNIA, OAKLAND DIVISION**

21 MARCIANO PLATA, et al.,

22 Plaintiffs,

23 v.

24 GAVIN NEWSOM, et al.,

25 Defendants.

CASE NO. 01-1351 JST

**JOINT CASE MANAGEMENT
CONFERENCE STATEMENT**

Date: May 14, 2020

Time: 10:00 a.m.

Crtrm.: 6, 2nd Floor

Judge: Hon. Jon S. Tigar

1 The parties submit the following joint statement in advance of the May 14, 2020
2 Case Management Conference. The parties exchanged their respective sections at
3 approximately 2:10 p.m. today.

4 **I. PLAINTIFFS' STATEMENT**

5 As of just before 2:00 p.m. on Wednesday, May 13, 2020, 535 patients statewide
6 had been confirmed to have COVID-19 via testing.¹ These include 397 at the California
7 Institution for Men (CIM), an increase of approximately 150 from a week ago and 300
8 from two weeks ago. There have also been 116 cases at California State Prison – Los
9 Angeles County, 11 at California Men's Colony, seven at the California Institution for
10 Women, two at Centinela State Prison, and one each at North Kern State Prison and the
11 Substance Abuse Treatment Facility and State Prison. Nearly 90 cases at these prisons are
12 considered resolved. Twenty-seven patients, including 25 from CIM, are currently in an
13 outside hospital due to complications from their condition.

14 There were an additional four deaths from COVID-19 in the last week, bringing the
15 total to five. All deaths have been of patients from CIM who had serious medical
16 conditions that made them especially vulnerable to the disease. Four were housed in large
17 dorms when infected. One of those, a 65-year-old man, was scheduled to parole in just a
18 few months. Before being diagnosed he twice implored medical staff in writing to help
19 him get an early release due to myriad conditions, including severe breathing problems,
20 which made him especially susceptible to severe consequences from COVID-19. To
21 prevent more unnecessary deaths the Receiver and/or the Defendants must expedite review
22 and release or transfer of the medically vulnerable. Both the Receiver and Defendants
23 have authority to do so under Cal. Government Code section 8658, and the Receiver has
24 the authority under the Order of Reference to house individuals in medically appropriate

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27 ¹. This number, and the others reported here, derive from the CDCR/CCHCS "Population
28 COVID-19 Tracking" website, and include active in custody, released while active,
resolved, and deceased patients.

1 settings.

2 The seriousness of the situation at CIM cannot be overstated. In addition to the
3 deaths and the total number of confirmed cases, outbreaks have now been identified in all
4 four CIM facilities, and some housing units have deeply concerning percentages of
5 confirmed patients: in CIM-A's Mariposa Hall dorm, whose residents are nearly all
6 medical high risk, 79 of 124 patients tested were confirmed to have COVID-19. As of last
7 week, nearly 2,000 people at CIM were reportedly quarantined, and the Receiver's office
8 now says all high risk medical patients at the prison will be offered COVID-19 testing this
9 week. The widespread outbreaks have caused CIM to temporarily use six tents for housing
10 (with porta-potties and portable sinks located near the tents) and eight tents for medical
11 care. Further, due to large numbers of staff and other workers being out sick, the prison is
12 serving many people on many days cold box lunches in lieu of the hot breakfast and dinner
13 typically provided.

14 The inability to contain the virus at CIM demonstrates the need for immediate and
15 effective action, such as strengthening dorm cohorting efforts, the need for the removal of
16 the medically vulnerable from congregate housing areas, and delay in re-opening of CDCR
17 reception center intake and consequent re-starting of inter-prison transfers.

18 **A. Defendants and the Receiver must identify and appropriately house**
19 **people at risk of severe illness or death from COVID-19.**

20
21 COVID-19 is particularly dangerous for people who are elderly and those who are
22 immunocompromised or have certain health conditions. According to the U.S. Centers for
23 Disease Control and Prevention (CDC), those conditions include chronic lung disease,
24 serious heart conditions, diabetes, chronic kidney disease requiring dialysis and liver
25 disease, severe obesity and conditions that make one immunocompromised. Many people
26 with these conditions are currently housed in crowded congregate living areas in CDCR,
27 where they are at heightened risk of contracting the virus. As noted above, five people, all
28 with known medical conditions predisposing them to COVID complications, have died at

1 CIM since April 16th of COVID-related causes. More will almost certainly die if they
2 remain in the dorms where physical distancing is difficult.

3 Defendants have, to date, offered no strategy for identifying and safely housing
4 people who, because of age or underlying medical conditions, are particularly vulnerable
5 to severe illness or death if they contract COVID-19.

6 Following last week's Case Management Conference, at the Court's suggestion,
7 Plaintiffs on May 7, 2020, renewed our request for a housing plan for the medically
8 vulnerable. Plaintiffs had made similar requests on at least four occasions without success.
9 Plaintiffs initially requested a plan over a month ago, in a letter from Don Specter to Ralph
10 Diaz and Clark Kelso, but received no substantive response. Plaintiffs then filed two
11 emergency motions, both of which included a request for a plan. ECF Nos. 3219 at 27,
12 3219-6 at 2-3, 3266 at 9, 3266-4 at 2. Defendants' responses to both motions cited
13 COVID-related measures they had undertaken, but none of the measures listed addressed
14 Plaintiffs' request for a housing plan. ECF No. 3235 at 18-24 and ECF No. 3277 at 12-15.
15 Plaintiffs also raised this issue in a prior CMC statement. ECF No. 3294 at 3-4. Citing
16 CCHCS's April 3 *COVID-19: Interim Guidance for Health Care and Public Health*
17 *Providers*, Plaintiffs urged Defendants to develop a plan, noting that the Receiver has
18 advised Defendants they may place vulnerable people in special housing. *See* April 3
19 Guidance at 18 (ECF 3274-6 at 19). Defendants did not respond.

20 To date, Plaintiffs have received no substantive response to the May 7 letter.

21 To address the needs of the medically vulnerable a plan must include:

- 22 1. The identification of people who, because of their age or medical condition,
23 are at higher risk for severe illness if they contract COVID-19. We
24 understand CCHCS has already completed this step: on March 30, CCHCS
25 identified all people in custody with at least one of the risk factors listed
26 above. *See* ECF 3249 ¶ 3 & Exh. B.
- 27 2. Beginning with those housed in congregate living spaces (dormitories, tents,
28

1 gyms), medical staff should evaluate whether these individuals are housed
 2 appropriately, taking into account the severity of their conditions and
 3 medical needs. We believe this could be done by medical staff at the
 4 particular institution where the person is housed, but that CCHCS should
 5 issue guidance for this process.

- 6 3. A process by which CDCR re-houses those identified by medical staff as
 7 requiring safer housing.

8
 9 **B. Defendants' Dorm Social Distancing plan remains inadequate because**
 10 **newly-issued "guidelines" for minimizing risk during waking hours are**
 11 **too vague and there remains no plan to minimize the risk of harm to**
 12 **medically vulnerable patients.**

12 Defendants' Dorm Social Distancing plan, involving the creation of eight-person
 13 cohorts of bunks (with each cohort separated by at least six feet) or six feet of separation
 14 between all bunks in all congregate living areas, might be adequate if Defendants (1)
 15 complete all dorm rearrangements and transfers to other congregate living areas such that
 16 all complies with the Receiver's directive and their own guidance regarding bed and
 17 sleeping positions; (2) adequately protect those in the dorms during waking hours; and (3)
 18 adequately address the heightened risk to the medically vulnerable.

19 With regard to completing dorm rearrangements and transfers, Defendants this
 20 week provided an unsigned document asserting that the necessary cohorts or bunk
 21 separation in congregate living areas had been "established" at most prisons, but which
 22 also indicates the task remains unfinished at a half-dozen prisons and certain community-
 23 based facilities. Plaintiffs have asked Defendants about these matters. Plaintiffs will also
 24 need to monitor what has been done (see discussion below).

25 With regard to protecting those in the dorms during waking hours, we have
 26 repeatedly stated that the eight-person cohorting scheme as currently implemented leaves
 27 *Plata* class members at a serious risk of harm and does little to mitigate their exposure to
 28

1 COVID-19 if it enters their congregate living space, because the plan only separates
2 cohorts or people when asleep. ECF No. 3304 at 3 and ECF No. 3316 at 4-6. As indicated
3 in the last Joint Case Management Conference Statement, at that time, Defendants
4 considered it up to each individual class member to “practice physical distancing and to
5 take other precautions” to keep him or herself safe – thus assuming that every member of
6 the eight-person cohort would be doing the same. ECF No. 3314 at 3.

7 Defendants this week provided a May 11, 2020 memorandum issued by CDCR’s
8 Division of Adult Institutions Director Connie Gipson, titled “*Guidance for Daily Program*
9 *Regarding Social Distancing for Cell or Alternative/dorm style Housing of Eight Person*
10 *Cohorts*” (emphasis added). This memo was issued without input from Plaintiffs. The
11 May 11th memo does not adequately address the risk of harm during waking hours to those
12 in congregate living areas.

13 Abandoning their previous position that the eight-person cohorts were for “sleeping
14 hours” only, Defendants’ May 11th memo purports to extend the cohesiveness of each
15 cohort to waking hours and activities. But it fails on many levels. First, and most
16 fundamentally, this memorandum for the most part merely provides the prisons with
17 suggested goals that are entirely discretionary. The memo leaves each institution
18 independently “responsible for their daily operations [while] taking the . . . information
19 [included in the memo] into consideration.” Further, the guidelines provided are vague.
20 For example, they encourage social distancing rather than require prisons to establish clear
21 schedules that allow each cohort access to various programs and services at particular
22 times.

23 More fundamentally, Defendants’ May 11th memo advises the prisons to keep each
24 eight-person cohort together for activities only “when feasible.” Given the risk of harm
25 posed by COVID-19, excusing action simply because it is not easy or convenient is
26 inadequate. The memo similarly encourages institutions to “consider” options such as
27 canteen and package delivery if social distancing is not able to be achieved. Again,
28

1 Defendants give each institution broad discretion, and affirmative action is not required.

2 Also, with regard to cleaning – a key matter since individuals in congregate living
3 areas share, among other things, toilets and sinks regardless of how cohorted – the May
4 11th memo incorporates an April 8, 2020, memorandum titled “COVID-related Cleaning
5 Protocols for Institutions,” which requires that porters clean communal areas twice per
6 watch, *i.e.*, every four hours on average. Such minimal cleaning is entirely inadequate for
7 the toilets and sinks used by people from multiple cohorts throughout the day. It is further
8 inadequate if, as the memo suggests, each eight-person cohort showers separately. For
9 instance, many dorms at Avenal State Prison have a “temporary COVID capacity” of 192
10 individuals in cohorts of eight. This results in 24 cohorts, 10 of which would
11 presumptively need to access the shower any given day to allow for three showers per
12 week. The memo provides no instruction on how the common areas will be cleaned or
13 who will clean them after each eight-person cohort’s use.

14 In addition to all the above, Defendants’ May 11th memo does not contain any
15 binding standards or a method for ensuring accountability.

16 Plaintiffs have requested a meet and confer to review our concerns with Defendants
17 but have not yet received a response.

18 **Plaintiffs’ Monitoring Needs**

19 With regard to whether Defendants have arranged cohorts, bunks, and sleeping
20 arrangements in accord with the Receiver’s directives and CDCR guidance, Plaintiffs have
21 not received sufficient information to evaluate CDCR’s progress remotely. On April 20th,
22 we requested that Defendants “provide photos or video-recorded site visits of each of the
23 newly configured dormitories, in which staff measure the distances between cohorts, and
24 document access to programs, bathrooms and showers, medical/mental health services, and
25 meals.” ECF 3294 at 3. Defendants’ response thus far has been limited and unsatisfactory.
26 On April 24, we received a collection of photographs and diagrams of dormitories at 10
27 prisons. On May 7th, we received a collection of diagrams and photos for 20 additional
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1 prisons. We have not received any documents for four prisons.² And, the production for
2 many prisons has been incomplete: for example, CIM has 16 dorms, but we only received
3 photos/diagrams apparently corresponding to three of those dorms. Similarly, SATF has
4 dorms on A, B, F, and G yards, but we only received photos/diagrams for the dorms on F
5 and G yards. For CMC, which has 31 dorms, we received only a diagram of what appears
6 to be the second floor of the hospital building, and one photo.

7 Moreover, the documents produced do not permit us to adequately evaluate
8 CDCR's implementation of the physical distancing plan. Some diagrams reflect
9 measurements between bunks, but many do not. It is also unclear from many diagrams
10 whether people are assigned to both top and bottom bunks, and, in some instances, whether
11 a full wall or a half-wall (a "pony wall") is being used to separate bunks or cohorts.

12 We also have no way to determine whether the diagrams reflect what is actually
13 happening on the ground. We received a very limited number of photos. Some appear to
14 be of just a few beds within a larger housing unit, so we are unable to confirm, for
15 example, that bunks are empty as indicated in the diagram. Many photos are also not
16 labeled with a particular dorm name/number. Only three photos include a tape measure
17 stretched between bunks, but the numbers on the tape measure are illegible.

18 As discussed at the May 6th Case Management Conference, we have been unable to
19 conduct site visits to assess conditions regarding cohorting (or for efforts related to the new
20 May 11th memo) in person. On May 7th, CCHCS stated during a conference call that, from
21 a public health perspective, Plaintiffs' counsel could be allowed to visit the prisons in
22 person. However, we believe that in-person tours are not appropriate at this time. We are
23 bound by the shelter in place orders in Bay Area counties through June 1, and are also
24 concerned about whether physical distancing can be practiced while traveling, and
25 introducing multiple people into the prisons during our visits. Thus, on May 9th, we wrote

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27
28 ². The California Training Facility, Chuckawalla Valley State Prison, North Kern State
Prison, and Valley State Prison.

1 Defendants to request virtual site visits (via Zoom, FaceTime, etc.) of the key dormitories
2 and temporary housing spaces, beginning with CIM. We indicated we may request in-
3 person visits of other dormitories in June or thereafter, based on the available facts and
4 public health recommendations.

5 In the early afternoon on May 13th, shortly before this Statement was filed,
6 Defendants replied that they are evaluating their technological capabilities to determine
7 how to best facilitate the requested inspections, and suggesting a phone conference this
8 week to discuss logistics (we will schedule such a call). Defendants also said they will
9 make every effort to prioritize Plaintiffs' virtual inspection of CIM the week of May 18th.
10 We appreciate defendants' response, and hope such an inspection takes place.

11
12 **C. Potential resumption of Reception Center intake and inter-prison
13 transfers, and the need for vastly expanded COVID-19 testing**

14 On or about March 24, 2020, Secretary Diaz closed CDCR to intake for 30 days,
15 pursuant to authority granted him by the Governor's Executive Order N-36-20 of that date.
16 On April 24, Secretary Diaz extended that closure until May 25. The Secretary retains the
17 authority to extend the period for another 30 or more days but has apparently decided not
18 to do so: Defendants have informed Plaintiffs that they plan to reopen intake to new
19 admissions on May 26, 2020.

20 The resumption of intake without any additional releases will have two effects: first,
21 an immediate rise in CDCR's population from the two-month backlog, and second, an
22 increase in movement of people throughout the system, as the current Reception Center
23 population is transferred to other prisons and new people arrive from county jails to the
24 Reception Centers.

25 Plaintiffs believe that the rise in population and increase in movement will
26 significantly and unacceptably elevate the risk of transmission of COVID-19. The rise in
27 population will mean more overcrowding and consequent difficulties with packed dorms
28 and overflowing common areas. The implementation of cohorts in the dorms is already

1 troubled, as discussed above, and it is unclear how CDCR will accommodate potentially
2 thousands more people. There must be a detailed plan to do so, with metrics that assess
3 how many people can be allowed into the system, and a plan to cease intake as needed if
4 further serious outbreaks occur.

5 The increase in movement is also dangerous. The Receiver has stated, and
6 Plaintiffs agree, that the cessation of transfers system-wide has been a significant factor in
7 the apparent lack of significant disease outbreaks at many prisons. Once people living and
8 working in the prisons start transferring among them, the potential for more serious
9 outbreaks increases substantially.

10 The Receiver and his team have stated that a large expansion of CDCR's testing
11 capabilities is necessary to safely increase population and transfers. People must be tested
12 on arrival, in order to determine what risk they pose to those living and working in the
13 Reception Centers; they must be tested after Reception Center processing and before they
14 leave, to determine what risk they pose to people at the prisons where they will live; and
15 the prisons that accept this new population must have widespread testing done to
16 determine if there are currently outbreaks that will place the new arrivals (and current
17 residents) at risk of harm. The Receiver has sought to increase testing capacity by 10,000
18 per month. This additional testing capability must be secured and it must be demonstrated
19 that it provides adequate oversight before a resumption of movement can occur without
20 placing the Plaintiff class at an unacceptable risk of harm.

21 In sum, any increase in movement or population must come only when the system
22 is prepared to manage the additional risk involved. On May 8th, Plaintiffs requested to
23 meet and confer with Defendants about these concerns. On May 13th, we were informed
24 that we will be allowed to express our "collective thoughts" about the process to
25 Defendants on May 15 and are allowed to ask questions so long as they are submitted in
26 advance.

1 **D. Medical care and other matters related to COVID-19.**

2 The weekly phone conference with the Receiver and CCHCS's Chief Medical
3 Executive is scheduled for tomorrow (Thursday, May 14th) in the afternoon, and Plaintiffs
4 have provided questions and concerns in advance. In addition to the matters related to the
5 issues discussed above, we have asked to discuss COVID-19 testing developments and
6 plans.

7 **II. DEFENDANTS' STATEMENT**

8 Defendants' statement describes additional COVID-19 related measures CDCR has
9 taken since the last case management conference on May 6, 2020. In addition,
10 Defendants' statement provides a summary of additional information and documents they
11 have produced to Plaintiffs since the last conference.

12 **A. CDCR issued additional written guidance to all institutions reiterating
13 social distancing expectations pertaining to the eight-person cohorts.**

14 On May 11, 2020, CDCR issued a memorandum titled "COVID-19 guidance for
15 daily program regarding social distancing for cell or alternative/dorm style housing of
16 eight person cohorts." The memorandum set forth CDCR's expectations that each
17 institution must consider as they develop their daily operational programs during this
18 unprecedented pandemic. A copy of the memorandum was produced to Plaintiffs' counsel
19 on May 12, 2020. Specifically with respect to facilitating social distancing for eight-
20 person cohorts, the memorandum states that "[m]ovement for all dorm/gym housing with
21 eight-person pods should be cohorted as much as feasibly possible; in such fashion as to
22 not mix inmates with other cohorted groups, as well as not mixing inmates from different
23 housing units." With respect to feeding, the memorandum provides that "cohorted inmates
24 that are housed in the same cohort should walk together to the dining halls, maintaining
25 social distancing." With respect to ducats and shower and restroom use, the memorandum
26 provides that "when required to ducat in groups, ducat through housing cohorted inmates
27 as much as possible," and that "[c]ohorts may shower together, when feasible. Daily, staff
28 will remind and educate the inmate population to maintain social distancing standards and

1 disinfect between each us.” For dayrooms and recreation, the memorandum provides that
2 “[r]educed numbers [of inmates in dayrooms] to allow for increased social distancing may
3 result in no dayroom activities” and that yard time should be scheduled in a way to allow
4 “[o]ne housing unit/dorm at a time and in such fashion as to not mix inmates from one
5 housing unit with another housing unit or one exposed or infected group with another.” It
6 also provides that “[i]nmates housed in cohorted groups should go to yard together.”
7 Lastly, the memorandum provides that for the duration of the COVID-19 altered program,
8 verbal announcements shall be made several times a day through the public address system
9 to remind inmates to maintain at least six feet of social distancing and to wear masks.

10 **B. CIM set up eight tents to provide more space for medical services**

11 On or around May 9, 2020, CIM set up eight tents (*i.e.*, two tents on Facility A-yard,
12 one tent on Facility C-yard, and five tents on Facility D-yard) for additional space to
13 provide medical services to inmates. The purpose of these tents is to provide for greater
14 social distancing for both inmates and staff during medical encounters.

15 **C. Information and Documents CDCR has produced to Plaintiffs since**
16 **May 6, 2020**

17 On May 7 and May 8, 2020, CDCR produced various additional photos, floor plans,
18 and diagrams pertaining to dorms at approximately 20 institutions. In addition, CDCR has
19 completed its production of rosters with names of members of the Inmate Advisory
20 Councils from all 35 institutions. Further, on May 7, 2020, CDCR provided answers to
21 various questions raised by Plaintiffs’ counsel about changes in food services and kitchen
22 staff at CIM and LAC housing assignments. Also, on May 12, 2020, CDCR produced
23 various documents pertaining to the status of inmate transfers, a memorandum pertaining
24 to the availability of cloth barrier masks and hand sanitizer, and the above-referenced May
25 11, 2020 memorandum titled “COVID-19 guidance for daily program regarding social
26 distancing for cell or alternative/dorm style housing of eight person cohorts.”

27 Since May 8, 2020, Plaintiffs’ counsel has sent three separate requests to Defendants,
28

1 asking them to coordinate the following three separate meetings/calls with CDCR staff this
2 week: (i) a call to discuss various issues that may arise from Plaintiffs' perspective as a
3 result of the decision to resume intake of inmates from county jails (which is currently
4 scheduled to commence on May 26, 2020), (ii) a call with Connie Gipson, the Director of
5 CDCR's Division of Adult Institutions, to discuss unspecified questions about the above-
6 referenced May 11, 2020 COVID-19 guidance memorandum, and (iii) a call to discuss
7 Plaintiffs' request to schedule virtual tours of all dorms and temporary housing spaces at
8 CDCR's institutions, starting with a virtual tour of CIM this Friday, May 15, 2020.

9 Regarding Plaintiffs' request for a virtual tour, Plaintiffs' counsel suggested that a
10 very small group (*e.g.*, two people) facilitate the virtual tour by carrying a phone, laptop, or
11 tablet through each housing unit, and also requested that staff conducting the tour be
12 available to answer questions about the physical-distancing plan in the housing unit.
13 Plaintiffs' counsel further requested that these individuals have a measuring tape and
14 camera to take measurements and photographs during the virtual tour upon Plaintiffs'
15 counsel's request. Defendants are currently working with CIM to determine whether the
16 requested tour can be facilitated from a technical perspective and will further discuss the
17 request with Plaintiffs' counsel once this assessment is complete. Further, Defendants
18 believe that the Receiver should be consulted regarding any requests to conduct virtual
19 tours of prisons.

20 With respect to Plaintiffs' requests for multiple calls with CDCR staff, Defendants
21 acknowledge and respect Plaintiffs' right to obtain information from Defendants. And
22 Defendants are in the process of coordinating a call with Plaintiffs' counsel for later this
23 week or early next week to give them an opportunity to share their collective thoughts and
24 concerns about resuming intake of inmates from county jails. But the sheer number of
25 repeated, and at times duplicative³, requests to make CDCR staff available for in-person

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27
28 ³ Counsel for the plaintiffs in the *Armstrong* class action, which includes the Prison Law Office,
sent a very similar request for another virtual tour of CIM.

1 (or telephonic) questioning at short notice cannot be accommodated without diverting the
2 staff members' time and attention from other crucial COVID-19 related tasks. Therefore,
3 in lieu of two of the calls Plaintiffs' counsel requested this week, Defendants have asked
4 Plaintiffs to submit any questions they have in writing and Defendants will provide written
5 answers to their questions in a timely manner. And if Plaintiffs have any concerns,
6 thoughts, or proposals about ongoing COVID-19 related topics, Defendants request that
7 they submit them in writing for Defendants' consideration.

8
9 DATED: May 13, 2020

PRISON LAW OFFICE

10
11 By: /s/ Steven Fama

12 STEVEN FAMA
13 Attorney for Plaintiffs

14
15 DATED: May 13, 2020

XAVIER BECERRA
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16
17
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19 DAMON MCCLAIN
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23 DATED: May 13, 2020

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