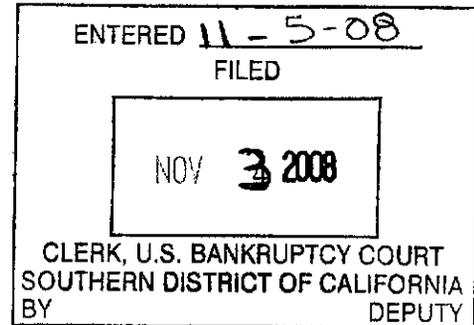


1 **WRITTEN DECISION - NOT FOR PUBLICATION**



10 UNITED STATES BANKRUPTCY COURT

11 SOUTHERN DISTRICT OF CALIFORNIA

12 In re: Carole Sue Williams,

13 Debtor.

14 } BK. No. 08-01245-LA13

15 } MEMORANDUM DECISION

16

17

18 Creditor Union Bank of California ("Union") filed two proofs of claim in the

19 chapter 13 case of debtor Carole Williams ("Debtor"). In each case, the proof of claim

20 contained personally identifying information, social security numbers of Debtor and her

21 deceased husband, in violation of this Court's Bankruptcy General Order No. 168 dated

22 November 24, 2003 (the "General Order") and Federal Rule of Bankruptcy Procedure 9037

23 ("Rule 9037"). Debtor's counsel took prompt and appropriate action to protect Debtor. In

24 both cases, they filed a motion to restrict public access and obtained an order thereon.

25 Debtor also initiated Order to Show Cause proceedings requesting sanctions under

26 section 105 of the Bankruptcy Code¹ in relation to Union's public information disclosure.

27 _____

28 ¹ References to code sections herein refer to Title 11 of the United States Code, unless otherwise specified.

1 After consideration of Debtor's sanctions requests, the Court determined to award monetary
2 sanctions in an amount sufficient to compensate Debtor for reasonable and appropriate costs
3 and fees she incurred in connection with Union's violation of the General Order and
4 Rule 9037 and in an amount sufficient to allow Debtor to obtain a copy of and to monitor
5 her credit report for a year in order to provide some ability to address any identity theft
6 issues arising as a result of Union's improper disclosure of personal information.

7
8 **FACTS**

9 1. Union filed Claim number 4 ("Claim 4") on March 3, 2008. It thereafter filed
10 Claim number 5 ("Claim 5"), which expressly stated that it amended Claim 4, on March 13,
11 2008.² It is undisputed that the Claims violated the General Order and Rule 9037 as both
12 contained personally identifying information of the Debtor – her social security number and
13 that of her deceased husband.

14 2. On March 4, 2008, in response to the filing of Claim 4, Debtor filed a one
15 page Emergency Motion to Restrict Public Access. (Docket No. 13) The Court entered an
16 Order Approving this motion on March 6, 2008. (Docket No. 14)

17 3. On March 14, 2008, in response to the filing of Claim 5, Debtor filed a two
18 page Emergency Motion to Restrict Public Access and Application for Order to Show Case
19 (sic) and Discovery which attached an 11 page discovery request. (Docket No. 16) The
20 discovery was not specific to this case, and, instead, sought discovery related to Union's
21 general policy and procedures in relation to proofs of claim.

22 4. On March 14, 2008, Debtor also filed an objection to Claim 5 and a
23 voluminous request for judicial notice that attaches the General Order and a listing of
24 404 Union proofs of claim filed since enactment of the General Order ("J N Request").
25 (Docket Nos. 17 and 18) The J N Request does not contain a copy of any claim, but alleges
26 that the majority of the listed claims contain personally indentifying information. The claim
27

28 ² Claim 4 and Claim 5 are referred to herein collectively as the "Claims."

1 objection seeks disallowance of Claim 5 on technical grounds and based on the private
2 information disclosure.

3 5. The Court entered a second Order Granting Motion to Restrict Public Access
4 on March 17, 2008. (Docket No. 19) This order required a hearing on the OSC request.

5 6. The Debtor thereafter filed the following:

6 a. Application for Order to Show Cause filed on April 4, 2008, docketed
7 as "Notice of Hearing Application for Order to Show Cause." This document indicated a
8 hearing date of May 20, 2006. (Docket No. 26)

9 b. Notice of Hearing and Motion filed on May 19, 2008. This document
10 indicated a hearing date of June 24, 2008. It attached an application for order to show cause
11 identical to Docket No. 26 except for the hearing date in the caption. (Docket No. 38)

12 c. Application for Order to Show Cause filed on May 21, 2008. The first
13 page of this document is identical to Docket No. 38. The remainder of the document, while
14 identical to Docket Nos. 38 and 26 in most respects, also contains clearly erroneous
15 information as it refers to "Vermont" not Union and utilizes erroneous dates. The exhibit
16 pages for this document are blank. (Docket No. 40)

17 d. Notice of Hearing filed on May 21, 2008. This Notice in all material
18 detail duplicates the notice given via Docket No. 38, except that the service date is two days
19 later. Both notices properly notify Union of a hearing on the Order to Show Cause on
20 June 24, 2008. (Docket No. 41)

21 7. The two motions restricting public access are short. The first contains seven
22 lines of text, while the second contains 24 lines. The second motion also attaches an
23 11 page discovery request seeking interrogatory responses, admissions, and document
24 production. The Court finds that this discovery was not necessary to obtain restriction of
25 public access to Debtor's private information. Instead, it appears designed to aid Debtor in
26 the "class action" that Debtor's counsel apparently initiated or considered initiating. (Docket
27 Nos. 13 and 16)

28

1 8. The orders restricting public access, the second of which also required an
2 order to show cause hearing, were also very succinct. (Docket Nos. 14 and 19)

3 9. The OSC applications are form documents that largely mirror documents filed
4 in other cases. In the OSC applications, Debtor references this Court's order in *In re*
5 *Jacobson*, Case No. 08-00277. The Statement in Support of Sanctions filed in the *Jacobson*
6 case and the OSC application in this case are quite similar and, indeed, are identical in
7 significant respects. Further, as the May 21, 2008 OSC application indicates, this "form"
8 OSC application was also apparently filed in a case involving "Vermont." The Court thus
9 finds that the preparation of the OSC applications in this case did not involve the creation of
10 new documents or require significant new legal research or analysis unique to this case. The
11 Court also finds that the "pseudo class action" aspects of the May 21, 2008 OSC application
12 were unnecessary to protect Debtor's private information and to obtain an appropriate
13 sanction in connection therewith given the actions of Union as described below.

14 10. In response to the order to show cause and otherwise in response to notice that
15 it filed personally identifying information in the public record, Union took immediate
16 proactive action as evidenced by the Declaration of Natalie D. Wilhelm (Docket No. 51) and
17 the Declaration of Lance D. Knox ("Knox Declaration"; Docket No. 52), both filed on
18 June 4, 2008. These documents evidence that the posting of personally identifying
19 information was not malicious, that Union quickly recognized the gravity of the problem,
20 and that Union, prior to any order from this Court on the OSC applications, took appropriate
21 proactive steps to purge the public record of this information and to make as certain as
22 reasonably possible that further improper disclosure of personally identifying information in
23 other cases would not occur.

24 11. Notwithstanding this fact, the Court concluded that Union intended the actions
25 which resulted in a violation of the General Order and Rule 9037 and, as a result, that the
26 Court should exercise its discretion to award compensatory sanctions equal to reasonable
27 attorneys' fees and costs otherwise payable by the Debtor in connection with Union's
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1 disclosure of personal information and to provide identity theft oversight to Debtor. As a
2 result, this Court set this matter for further briefing and hearing. (Docket No. 55)

3 12. In support of her request for attorneys' fees and costs, Debtor filed the
4 Declaration of Michael Doan on July 4, 2008 ("First Doan Declaration"). (Docket No. 62)
5 Debtor sought fees of \$2,362.35 and costs of \$36.00.

6 13. Union opposed Debtor's requested fees and costs to the extent they exceeded
7 \$536.00. (Docket No. 64)

8 14. Mr. Doan filed a supplemental declaration on August 25, 2008 ("Supplemental
9 Doan Declaration"). (Docket No. 73)

10 15. As discussed above, the First Doan Declaration requested fees of \$2,362.35
11 and costs of \$36.00. Mr. Doan requested compensation for four hours and 20 minutes of
12 work at \$450.00 per hour, one hour and thirty minutes of work at \$250.00 an hour, and
13 30 minutes of general office support. The First Doan Declaration does not attach
14 contemporaneous time records. In all cases except one, the time entries list even hour or
15 half hour time increments. At least one entry appears to lump multiple emails and phone
16 correspondence into a single one hour entry. The First Doan Declaration contains no detail
17 regarding the requested cost reimbursement. (Docket No. 62)

18 16. The First Doan Declaration also refers to his "recent numerous motions to
19 restrict public access to confidential information in proofs of claims." (Docket No. 62)

20 17. The Supplemental Doan Declaration also fails to attach any contemporaneous
21 time information, but provides some narrative detail. Mr. Doan emphasizes that he filed
22 two motions, filled out court forms, researched "numerous proofs of claim over a five year
23 period as evidenced in the request for judicial notice" and that he personally encountered
24 significant problems uploading the documents. It also discusses Mr. Bush's travel and
25 attendance time at hearing, but fails to discuss the fact that Mr. Bush also appeared on other
26 matters on the hearing date. Finally, it states that Debtor's counsel has not charged for
27 support staff time – which makes the Court wonder what the general office support charge
28 set forth in the First Doan Declaration includes. (Docket No. 73)

1 In this case, Union does not argue that its actions do not justify sanctions – and the
2 Court agrees. Instead, it objects solely to the amount of the sanction Debtor requests. In its
3 last word on this topic, Union objects to compensatory sanctions only to the extent they
4 exceed \$875.95.³

5 After careful consideration of the facts against the background of relevant law, the
6 Court exercises its discretion to award a compensatory sanction of \$875.95.

7 **A. The Court Will Not Exercise Its Discretion To Award Coercive Sanctions.**

8 Given Union's proactive steps to date, the Court concludes that it is unnecessary to
9 sanction Union in any amount over and beyond an appropriate compensatory sanction.
10 Arguing against Union in relation to coercive sanctions is the fact that such disclosure
11 occurred twice in this case. Militating in Union's favor is the fact that it responded
12 appropriately and acted proactively and promptly. It accepted responsibility for its actions
13 and agreed to payment of up to \$875.95 in compensatory sanctions.⁴ The Court will not
14 exercise its discretion to award a coercive sanction where the contemnor's conduct
15 convinces the Court that such a sanction is unnecessary to compel future adherence to the
16 law.

17 **B. A Reasonable Compensatory Sanction Is Appropriate In Relation To**
18 **Attorneys' Fees and Costs.**

19 This Court agrees that a compensatory sanction is appropriate in this case, but
20 disagrees with Debtor as to the amount. While this Court applauds the proactive actions of
21 Debtor's counsel in alerting the Court and Union to the public disclosure of personally
22 identifying information, the Court believes that it is inappropriate to sanction Union in the
23 full amount of the alleged attorneys' fees. As a result, the Court in its discretion determines
24

25 ³ Although, Union does object to allocation of \$139.95 of this amount to credit oversight services.

26 ⁴ The Court also acknowledges that there is an inherent and self-imposed sanction for the violations
27 of the General Order and Rule 9037 – the need to retain counsel and to pay counsel's bills not only
28 to defend itself in the Bankruptcy Court, but also to train its employees so as to avoid problems in
the future. Union conducted workshops led by outside counsel prior to hearing on the OSC. Knox
Declaration ¶ 5(b). Union also authorized overtime to clear up problems in other cases. *Id.* at
¶ 5(e).

1 that sanctions in the amount of \$736.00 are appropriate on account of Debtor's liability for
2 reasonable attorneys' fees and costs. Union does not oppose this award.

3 The Court is well aware that in awarding sanctions it should not award an amount in
4 excess of that which it would require the Debtor to pay; the Court has the power to
5 compensate for actual harm and the sanction should be compensatory not punitive. In this
6 context, the Court having reviewed the "fee application," a term the Court uses loosely,
7 consisting of Mr. Doan's two declarations, concludes that under no circumstances would the
8 Debtor, on this record and under these facts, be required to pay her attorneys the full amount
9 of the fees they request. If the Court would not require the Debtor to pay the requested
10 amount under section 330, then any award above what the Debtor would be required to pay
11 is not compensatory – it is punitive. The Court's analysis in this regard is two-fold.

12 The first question in this case is what was necessary to protect Debtor's personally
13 identifying information and to address Union's misdeeds. A one page motion and a two
14 page order were sufficient to expunge Claim 4. A two page motion, including an order to
15 show cause request, and another two page order allowed expungement of Claim 5 and
16 resulted in an order to show cause hearing. Debtor's discovery, J N Request relating to
17 hundreds of cases other than the one at hand, and apparent class action and overt claim
18 objection efforts were not improper, but in the opinion of the Court represented either
19 overkill or efforts not properly compensable as a compensatory sanction in this case.
20 Similarly, the lengthy documents filed in relation to the OSC after the original short request
21 were of questionable – if any – necessity. One, as already discussed, was nothing but a
22 recycled form pleading unchanged from a previous case except as to the caption. The other
23 two identical documents, while more competently conformed and word processed for filing
24 in this case, provide little if anything helpful to the Court or even relevant to this Court's
25 decision. The OSC request is largely an attempt to justify other recoveries and/or a class
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1 action. The Court, again, sees full compensation for this effort as inappropriate for award as
2 a sanction.⁵

3 In short, Union's actions justify some sanction, but do not justify compensation for
4 attorneys' fees clearly in excess of the amount necessary to protect Debtor's personal
5 information and to appropriately obtain sanctions.

6 Having determined that Debtor's sanction request includes a request for
7 compensation in relation to legal work beyond that appropriate for inclusion in this sanction
8 award, the Court must now determine the appropriate level of compensation in relation to
9 the legal work reasonably necessitated by Union's public information disclosure. The Court
10 believes in this regard that the Ninth Circuit analysis in *Eliapo v. Devin Derham-Burk (In re*
11 *Eliapo)*, 468 F.3d 592 (9th Cir. 2006) is instructive. In *Eliapo*, the Ninth Circuit confirmed
12 the appropriateness of the use of presumptive fee guidelines for "ordinary chapter 13 cases."
13 *Id.* at 601. While an attorney may file a fee application in any chapter 13 case, given that
14 the guideline fee is "presumed" to be the reasonable one under section 330 in a routine or
15 typical case, the burden is on the debtor's attorney to overcome the presumption with
16 evidence that the case is atypical. *Id.* at 602. No such evidence exists in this case.

17 The presumptively reasonable fee for "routine motions" is \$450.00. *See*, Bankruptcy
18 General Order No. 173 and United States Bankruptcy Court Southern District of California
19 Guidelines Regarding Chapter 13 Attorneys' Fees, effective January 14, 2008. While
20 initially, the motions to restrict public access filed by Debtor's counsel required research and
21 were "novel" such that a billable hour lodestar assessment would be appropriate,⁶ they have

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23 ⁵ The Court can best make its point by way of example. If a party's property is damaged by the
24 actions of another, the injured party may be entitled to rectify the damage and recover the cost of
25 repair. However, the injured party can only recover such costs to the extent reasonable; it cannot
recover the cost for a full set of power tools where a hammer and screwdriver were sufficient to the
task.

26 ⁶ Debtor's counsel emphasizes that this Court previously made a larger award in another case
27 involving improper disclosure of personal information. *See*, May 19, 2008 OSC application at ¶ 54
28 and Ex. C. At the time of the *Jacobson* sanction request, Debtor's counsel had not filed numerous
motions in relation to public information disclosure, and Debtor's counsel utilized and developed
documents in an area that was novel. Since that case, the Debtor's counsel has used largely similar
documents in other cases. *See, e.g.* May 21, 2008 OSC application referring to Vermont. Even in

1 ceased to be so at this time. Indeed, in his Declaration Mr. Doan emphasizes that he has
2 brought such motions many times. First Doan Declaration at ¶ 6. In fact, the paradigm of a
3 "routine" or "non-novel" motion is one where counsel can utilize form documents which
4 require little if any customization between the cases and where the party responding to the
5 motion does not seriously oppose. Here the documents consisted of extremely short and
6 unopposed motions to restrict access and short orders thereon and "form" OSC applications
7 that seek relief much broader than that deemed appropriate by this Court. There was no
8 opposition to the motions to restrict access, no opposition to the request for sanctions, and
9 meritorious opposition to the requested amount of sanctions.

10 As a result, this Court believes that \$450.00, or the "presumptive" fee for a routine
11 motion, is an appropriate "reasonable fee" that could be charged to the Debtor in this case.
12 This amount is appropriately increased by \$100.00 to take the nominal additional work on
13 the second motion into account,⁷ \$150.00 for the fees requested in preparing and presenting
14 fee information, and \$36.00 for costs.⁸ As a result, the Court believes a total award of
15 \$736.00 for fees and costs is an appropriate level of compensatory sanction in relation to
16 fees. This is the maximum the Court would require the Debtor to pay for services directly
17 related to personal information disclosure on this record. To require Union to pay more
18 would be to fine Union – not compensate the Debtor.

19 Further, even if this Court decided to depart from the presumptively reasonable
20 standard, it would not exercise its discretion to award sanctions as requested by Debtor's
21 counsel as its fee request fails to comply with the U.S. Trustee Guidelines and, in particular,
22 fails to provide contemporaneous and appropriately detailed time records in connection with

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24 the original case, however, where the Court believed the matter to be "novel," the Court assessed
25 sanctions such that one lender paid only \$500.00. The other lender paid a larger compensatory
26 sanction and was subject to potential coercive sanction as it did not act proactively to either
27 acknowledge or rectify its error. *Id.*

28 ⁷ A second presumptive fee is not appropriate in a case such as this where the Debtor can largely
duplicate the written work and entirely duplicate hearings and negotiations. The poor quality of
certain of this work (*See*, May 21, 2008 OSC application) and the fact that Debtor' counsel has been
able to utilize documents prepared in another case also justify this Court in determining that a full
\$450.00 fee award on the second motion is not reasonable as a sanction payable by Union.

⁸ Union does not contest this cost award, and the Court, thus, awards it notwithstanding the lack of

1 this case. Thus, the Court would not award "lodestar" fees on this record even if otherwise
2 inclined to do so as the record fails to support the reasonableness of these fees.

3 Debtor's counsel provides alleged time entries relating to this case, but does not give
4 the date on which the work was allegedly performed. These snapshot entries are not the
5 contemporaneous records required by the U.S. Trustee Guidelines for Reviewing
6 Applications for Compensation and Reimbursement of Expenses Filed Under 11 U.S.C.
7 § 330 (the "UST Guidelines"). *See*, UST Guidelines D (5).

8 Further, their "reasonableness" and "accuracy" is seriously in question since in all but
9 one case the entries reflect either hour or half hour increments. In bankruptcy cases, fees
10 must be billed on a tenth of an hour billing basis. *Id.* The records presented to this Court
11 indicate that tenth of an hour billing increments were not utilized given the prevalence of
12 hour and half hour increments. In such a case, the Court reasonably assumes an inaccuracy
13 that justifies fee reduction or disallowance.

14 Other problems with these billing records also occur. While Mr. Doan is entitled to
15 charge whatever rate he wishes, the higher the rate, the more billing judgment must be
16 exercised to ensure that work that can capably be performed by a biller with a lower rate is
17 so billed. Mr. Doan's billing rate is excessive given the nature of much of the work he
18 performed – creation of routine documents that are based in whole or in part on forms,
19 completion of court forms, and uploading (electronic filing) of documents. The failure to
20 exercise appropriate billing judgment justifies a reduction in fees.

21 Further, while the lack of detail in Debtor's fee request makes it impossible to say
22 exactly what Debtor's counsel did to justify their fee request, it appears that Debtor requests
23 fees for services not required to protect Debtor's personal information and to obtain an OSC
24 from this Court. In the Second Declaration, Mr. Doan refers to services not required to
25 protect his clients (research on Union's proofs of claim in unrelated cases) and a review of
26 the record evidences other such services (promulgation of discovery and the Claim 5
27 objection). It is impossible from the billing records given to parse out precisely how

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detail supporting the request.

1 Debtor's counsel spent the hours for which Debtor requests compensation and to determine
2 how to award fees using a lodestar rate analysis, but the evidence establishes that at least
3 some of the requested fees relate to services where the Court would find the services to be
4 inappropriate for inclusion in a sanctions analysis.

5 The brief record set forth by the law firm raises other questions as well. The
6 reference to "general office support" looks suspiciously like general overhead. This entry is
7 insufficient to justify any award.

8 Finally, the Court notes that in the absence of detailed billing records, it is impossible
9 for the Court to sift through the entries related to Mr. Doan for phone and email
10 correspondence to determine whether some or all of this phone and email correspondence
11 related to matters other than the matters directly before this Court and appropriate for
12 consideration in connection with Union's violation of the General Order and Rule 9037.
13 Mr. Doan's declaration makes clear that Union is being pursued on a "class action" basis.
14 Further, Mr. Doan also objected to Union's claim. Where the Court cannot make an
15 accurate assessment of actual relevant fees based on the poor quality of the records provided
16 by an attorney, the attorney should not expect and cannot receive compensation in the full
17 amount requested.

18 **C. A Reasonable Compensatory Sanction In Relation To Debtor's Need For**
19 **Credit Protection Is Also Appropriate.**

20 The Court will also order Union to pay Debtor \$139.95 so that Debtor can pay for a
21 copy of her credit report and acquire some asset protection services for a one year period.
22 Debtor is entitled to monitor credit after Union's serious personal information disclosure,
23 and this award allows Debtor some peace of mind in this regard.

24 The Court has reviewed the Union opposition in this regard, but feels Union's
25 opposition is not well taken. First, the Debtor included a request for this relief in the
26 OSC applications. Union was on notice that this was an issue. Second, while this was not
27 an express issue anticipated for discussion at the August 25, 2008 hearing, Debtor was free
28 to raise it given its inclusion in the OSC applications. Further, Union, while perhaps

1 surprised when this issue re-emerged on the 25th, was not prejudiced; the Court allowed
2 Union additional time for briefing and has carefully considered the brief provided. Finally,
3 having disposed of Union's due process arguments, the Court also determines that this
4 award should be made notwithstanding Union's arguments on the merits of the award.
5 Perhaps it is true that services like LifeLock are overused by an increasingly paranoid public
6 and that this paranoia is fueled by LifeLock advertising, but in this case Debtor has a
7 legitimate reason for concern and should be provided a tool – however meager – to monitor
8 credit.

10 CONCLUSION

11 The Court has broad discretion as to the award of sanctions so long as the Court does
12 not exceed the ceiling established by *Dyer*. Given its full review of the facts of this case,
13 however, the Court is well satisfied that the award of \$875.95 is reasonable and appropriate.

14 In summary, the Court concludes that the presumptive fees for a routine motion,
15 provides an appropriate basis for sanctions calculation on these facts. The Court also notes
16 that there are serious problems with the evidence submitted in this case in support of any
17 alternative fee. As a result, sanctions to compensate Debtor for reasonable costs and fees
18 incurred in connection with Union's public information disclosure should be awarded as
19 follows:

- 20 1. Attorneys' fees for initial public disclosure motion and related sanction request
21 \$450;
- 22 2. Additional attorneys' fees in relation to second public disclosure motion and
23 related sanction request \$100;
- 24 3. Attorneys' fees for "fee application" \$150; and
- 25 4. Costs \$36.00.

26 In addition, this Court finds it reasonable to require Union to pay for one credit report
27 and one year of credit monitoring in order to allow the Debtor to determine whether there
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1 are any negative events due to the dual disclosure of personally identifying information. It
2 is reasonable for the Debtor to request this information given that private information was
3 made public by Union. This determination results in an additional sanction award of
4 \$139.95.
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6 The Court will enter an order consistent with this ruling forthwith.
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8 DATED: November 3, 2008
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10 LAURA S. TAYLOR, JUDGE
11 United States Bankruptcy Court
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