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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

JAIMIE POTTS, individually and on behalf of all others similarly situated,

Plaintiffs,

vs.

NEUTROGENA CORPORATION, a Delaware corporation and DOES 1-50, inclusive,

Defendants.

Case No.: 2:20-cv-06323

(Los Angeles County Superior Court Case No. 20STCV15638)

NOTICE OF REMOVAL OF ACTION PURSUANT TO 28 U.S.C. SECTIONS 1332, 1441, 1446 AND 1453

(28 U.S.C. §§ 1332(D), 1441, 1453)

[Declarations of Tina S. French and Lisa Hillier filed concurrently]

TO THE CLERK OF THE UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORIA:

PLEASE TAKE NOTICE that, pursuant to 28 U.S.C. §§ 1332, 1441, 1446, and 1453, Defendant Johnson & Johnson Consumer Inc., formerly known as, and Successor in Interest to Neutrogena Corporation ("Defendant"), hereby removes this action from the Superior Court of the State of California, County of Los Angeles, to the United States District Court for the Central District of California, being the federal district embracing the place where the case is pending. Removal is proper because this is a putative nationwide class action "brought in a State court of which the district courts of the United States have original jurisdiction." 28 U.S.C. §§ 1441(a) & 1453(b). Specifically, this action satisfies the jurisdictional prerequisites of the Class Action Fairness Act ("CAFA"). Minimal diversity exists because Defendant is at all times relevant herein a corporation duly organized and existing under the laws of the State of New Jersey, with its principal place of business in Skillman, New Jersey, and therefore a citizen of New Jersey, and the putative nationwide class includes citizens of other states who purchased the Neutrogena products at issue in this action. Additionally, the amount in controversy exceeds CAFA's $5 million jurisdictional minimum. This removal is timely because it has been filed within thirty days of the date that there was a defective attempt to serve Defendant with the summons and complaint. *See* 28 U.S.C. §§ 1446(b).

I. BACKGROUND

A. Timeliness of Removal

On April 22, 2020, Jaimie Potts commenced this action by filing a Class Action Complaint ("Complaint") in the Superior Court of the State of California, County of Los Angeles, entitled *Jaimie Potts v. Neutrogena Corporation*, No. 20-STCV15638. On June 19, 2020, a First Amended Class Action Complaint ("First Amended Complaint") was then filed in the Superior Court of the State of

California, County of Los Angeles, similarly entitled *Jaimie Potts v. Neutrogena Corporation*, No. 20-STCV15638, even though it purported to add new claims as well as three additional named plaintiffs and putative class representatives, Kim Mileszko, Christina Luka, and Rebeca Gonzalez. *See* First Amended Complaint, at p.1.[1] Pursuant to 28 U.S.C. § 1446(a), the Complaint and the First Amended Complaint are attached hereto respectively as Exhibits A and B, and copies of all other process, pleadings, and orders purportedly served upon Defendant in this action, along with other documents in the state court file, are attached as Exhibit C.

As used herein, "Plaintiffs" refers to Jaimie Potts, Kim Mileszko, Christina Luka, and Rebeca Gonzalez. A true and correct copy of the Summons and Complaint is attached hereto as Exhibit A. A true and correct copy of the First Amended Complaint is attached hereto as Exhibit B. Like the original Complaint, the First Amended Complaint erroneously names Neutrogena Corporation as defendant even though that corporation was merged into Johnson & Johnson Consumer Inc., which is successor in interest and therefore the proper party defendant in the action.

On June 18, 2020, Plaintiffs attempted to serve "Neutrogena Corporation" by delivering a copy of the Summons and First Amended Complaint to its former agent for service, which refused the service. This Notice is timely because it was filed within thirty days of attempted service of process on Defendant. 28 U.S.C. § 1446(b); *see also Murphy Bros., Inc. v. Michetti Pipe Stringing, Inc.*, 526 U.S.

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[1] Plaintiffs' caption in the removed state-court action is erroneous in several respects. First, the caption to the First Amended Complaint lists only Plaintiff Jaimie Potts, and omits the added Plaintiffs Kim Mileszko, Christina Luka, and Rebeca Gonzalez. Second, the First Amended Complaint's caption also erroneously lists as the Defendant "Neutrogena Corporation," which, as alleged herein, was merged into Johnson & Johnson Consumer Inc. For removal purposes only, the caption of the instant removal petition tracks Plaintiffs' caption in the removed state court action.

344, 347-48 (1999) (holding "that a named defendant's time to remove is triggered by simultaneous service of the summons and complaint, or receipt of the complaint, 'through service or otherwise,' after and apart from the service of the summons, but not by mere receipt of the complaint unattended by any formal service").

Written notice of the filing of this Notice of Removal and the removal of the state court action is being served on Plaintiffs through their counsel of record, the law firm of Finkelstein & Krinsk, LLP. Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being promptly filed with the Clerk of the Superior Court of the State of California, County of Los Angeles.

B. The Parties

Plaintiffs are residents and citizens of the states of California, New Jersey, New York, and Florida. *See* First Amended Complaint, ¶¶ 12-15. Plaintiff Jaimie Potts is a resident of Los Angeles County and a citizen of the State of California. *Id.*, ¶ 12. Plaintiff Christina Luka is a resident of Burlington County and a citizen of the State of New Jersey. *Id.*, ¶ 13. Plaintiff Kim Mileszko is a resident of Erie County and a citizen of the State of New York. *Id.*, ¶ 14. Plaintiff Rebeca Gonzalez is a resident of Broward County and a citizen of the State of Florida. *Id.*, ¶ 15. In their First Amended Complaint, Plaintiffs seek certification of a "Nationwide Class" as well as a "California Subclass," a "New Jersey Subclass," a "New York Subclass," and a "Florida Subclass." *Id.*, ¶ 45. Thus, for purposes of the minimal diversity requirement under the Class Action Fairness Act, the citizenship of Plaintiffs and all putative class members necessarily includes citizens of all 50 States. *Id.*

Johnson & Johnson Consumer Inc. is the successor in interest to Neutrogena Corporation, by virtue of a merger. As reflected in the attached Declaration of Tina S. French ("French Decl.") filed concurrently with this Notice, Neutrogena Corporation was converted into an LLC and thereupon was merged into the

predecessor of Johnson & Johnson Consumer Inc. in 2015, and surrendered its right to transact business in California that same year. *See* French Decl., ¶ 4, Exhibits 1-5. Although the original Complaint and the First Amended Complaint both incorrectly name Neutrogena Corporation as the defendant party in this action, Neutrogena Corporation does not presently exist and, instead, is part of Johnson & Johnson Consumer Inc. The First Amended Complaint alleges that Neutrogena Corporation "is a subsidiary of Johnson & Johnson" with its principal place of business located in Los Angeles, California. First Amended Complaint, ¶ 9. In actuality, the proper party defendant in this action is Johnson & Johnson Consumer Inc., which is incorporated in the State of New Jersey and has its principal place of business located in Skillman, New Jersey. *See* French Decl., ¶ 5 & Exhibit 6. Accordingly, for purposes of minimal diversity under the Class Action Fairness Act, Defendant is a citizen of New Jersey for purposes of this Notice of Removal. But even assuming *arguendo* that Neutrogena Corporation still existed as a California corporation, the Class Action Fairness Act's minimal diversity requirement still would be satisfied, as alleged below.

C. Plaintiffs' Putative Nationwide Class Action Complaint

In their First Amended Complaint, Plaintiffs allege that Defendant engaged in misleading business practices with respect to the labeling and advertising of seven "makeup remover cleansing towelettes sold by Neutrogena," First Amended Complaint, ¶ 2, which shall be referred to herein as the "Products."[2]

[2] As used herein, "Products" refers to the seven cleansing towelette products identified by Plaintiffs in the First Amended Complaint. These seven Products are identified as: "Ultra-Soft Makeup Remover Wipes for Waterproof Makeup"; "Makeup Remover Cleansing Towelettes – Fragrance Free"; "Neutrogena Naturals Purifying Makeup Remover Cleansing Towelettes"; "Makeup Remover Cleansing Towelettes-Night Calming"; "Deep Clean Oil-Free Makeup Remover Cleansing Wipes"; "Deep Clean Purifying Micellar Cleansing Towelettes"; and "Makeup Remover Cleansing Towelettes-Hydrating." First Amended Complaint, ¶ 2.

Plaintiff Potts alleges that she purchased one or more of the Products at a local Costco store "for her daughter," which when used allegedly caused her daughter to develop "adverse skin reactions," including a rash and skin irritation. First Amended Complaint, ¶ 12. Plaintiff Mileszko alleges that she purchased one or more of the Products for her daughter, who developed dry skin, bumps, and adverse skin reactions around the areas she used the Product. *Id*., ¶ 13. Plaintiff Luka alleges that she wears contact lenses and purchased the "Ultra Soft" Product from her local Target store, but then claims to have suffered adverse skin reactions in the areas she used the Product. *Id*., ¶ 14. Plaintiff Gonzalez alleges that she purchased one of the Products at her local Costco but experienced adverse skin reactions in the areas in which she used the Product. *Id*., ¶ 15.

Plaintiffs allege that the Products' labels and marketing were misleading because they failed to contain adequate warnings of the potential for adverse skin interactions. *Id*., ¶¶ 16, 21-29, 36-38, 40-44. Despite the alleged adverse skin reactions, Plaintiffs allege that they would consider purchasing the Products again if Defendant "warned that the [Products] were not suitable for all skin types, a pre-use patch test was recommended, and consumers were advised to cease use and consult a physician if the [sic] experienced adverse skin conditions after using the [Products]." *Id*., ¶ 16.

Plaintiffs also variously allege that certain representations on the Products' labeling, or in product marketing, were misleading or deceptive. *Id*., ¶¶ 1, 18-20, 22, 30-35. Plaintiffs allege that Defendant knew of customer complaints about adverse reactions and skin irritation, but failed to include adequate warnings of those risks on the Products' labeling. *Id*., ¶¶ 25-27, 37-39. According to Plaintiffs' allegations, "a substantial number of users will be harmed by using the [Products]" in the absence of the warnings Plaintiffs say should be given, *id*., ¶ 37; "a significant percentage of consumers will have a harmful reaction" without a warning that they "undergo a proper preliminary skin test" to "determine the

suitability" of the Products for them before use *id*., ¶ 41; and "the Cleansing Towelette products cause an unacceptable and unreasonable rate of adverse reactions amongst the general population," *id*., ¶ 42.

The First Amended Complaint alleges that, in the absence of the claimed misstatements and omissions, Plaintiffs and putative class members "would not have been misled into purchasing [the] products or would have paid significantly less for them." *Id*., ¶ 67; *see also id.*, ¶¶ 92, 107, 117, 141, 144, 174. Plaintiffs also seek "restitution" with respect to the amount that Plaintiffs and all putative class members paid to purchase the products. *Id*., ¶¶ 78, 95, 109, 118.

The First Amended Complaint asserts ten claims, including: (1) violation of California's Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750, *et seq*. ("CLRA"); (2) violation of California's False Advertising Law, Cal. Bus. & Prof. Code §§ 17500, *et seq*. ("FAL"); (3) violation of the unlawful prong of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq*. ("UCL"); (4) violation of the unfair prong of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq*. ("UCL"); (5) violation of the fraudulent prong of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200, *et seq*. ("UCL"); (6) violation of New York General Business Law §§ 349, *et seq*.; (7) violation of New Jersey Revised Statutes §§ 56:8-1, *et seq*.; (8) violation of Florida Statutes §§ 501.201, *et seq*.; (9) negligent omission; and (10) unjust enrichment. *See* First Amended Complaint, ¶¶ 55-179.

Plaintiffs propose to serve as class representatives of (a) a "Nationwide Class," comprised of all persons "nationwide" who purchased the products for personal use; and/or (b) Subclasses in California, New Jersey, New York, and Florida, comprised of all persons in those states who purchased the Products for personal use. *Id.*, ¶ 45. In connection with its allegations seeking certification of a putative nationwide class, the First Amended Complaint alleges that its proposed class is so numerous that it perhaps includes "millions" of persons across the

country who have purchased the Products. *Id*., ¶ 46 ("thousands, perhaps millions, of consumers have purchased Neutrogena Cleansing Towelette products").

In its Prayer for Relief, the Complaint seeks, *inter alia*, certification of its proposed Nationwide Class and/or California, New Jersey, New York, and Florida Subclasses; an award to Plaintiffs and all putative class members of "actual damages, punitive and exemplary damages, restitution, and/or disgorgement, to the extent allowed under law"; injunctive relief; pre- and post-judgment interest; and an award of "attorneys' fees" and costs of suit. *Id*., Prayer for Relief, at pp. 36-37.

II. CAFA JURISDICTION

This action is removable to this Court because federal jurisdiction exists over Plaintiffs' claims pursuant to the Class Action Fairness Act. Federal diversity jurisdiction exists over Plaintiffs' claims pursuant to the Class Action Fairness Act of 2005, Pub. L. 109-2, 119 Stat. 4 (2005) ("CAFA"), codified in various sections of Title 28 of the United States Code, including 28 U.S.C. sections 1332(d) and 1453. CAFA became effective on February 18, 2005, and applies to civil actions commenced on or after that date, including this action.

CAFA was enacted to enlarge federal jurisdiction over proposed class actions, including specifically putative nationwide class actions, such as this action. *See*, *e.g*., *Broadway Grill, Inc. v. Visa Inc*., 856 F.3d 1274, 1276 (9th Cir. 2017) (Congress enacted CAFA's provisions "to ensure that large class action cases are heard in federal court").

CAFA provides that a class action against a non-governmental entity may be removed if: (1) the number of proposed class members is not less than 100; (2) there is requisite "minimal" diversity of citizenship among the parties; and (3) the aggregate amount in controversy exceeds $5 million, exclusive of interest and costs. 28 U.S.C. §§ 1332(d)(2), 1332(d)(5) & 1453(b). All of CAFA's removal requirements are satisfied in this case.

As confirmed by U.S. Supreme Court precedent and CAFA's legislative

history, any doubts should be resolved in favor of federal removal jurisdiction. *See, e.g.*, *Dart Cherokee Basin Operating Co. v. Owens*, 574 U.S. 81, 89 (2014) (holding that "no antiremoval presumption attends cases invoking CAFA, which Congress enacted to facilitate adjudication of certain class actions in federal court"); S. Rep. 109-14, at 43 (2005) ("Overall, [CAFA] is intended to expand substantially federal court jurisdiction over class actions. Its provisions should be read broadly, with a strong preference that interstate class actions should be heard in a federal court if properly removed by any defendant."); *id*. at 35 (explaining that the intent of CAFA "is to strongly favor the exercise of federal diversity jurisdiction over class actions with interstate ramifications"). Indeed, the Ninth Circuit has recognized that, in light of the Supreme Court's holding in *Dart Cherokee Basin Operating Co.*, there no longer exists any presumption against federal jurisdiction or in favor of remand when courts decide CAFA jurisdictional questions. *Arias v. Residence Inn by Marriott*, 936 F.3d 920, 922 (9th Cir. 2019). Moreover, the Ninth Circuit has repeatedly confirmed that the "removing defendant's notice of removal 'need not contain evidentiary submissions" but only plausible allegations of the jurisdictional elements." *Id*. (quoting *Ibarra v. Manheim Investments, Inc.*, 775 F.3d 1193, 1197 (9th Cir. 2015)).

A. The Putative Classes, Including Plaintiffs' Proposed Nationwide Class, Involve Over 100 Class Members.

As noted above, Plaintiffs' First Amended Complaint proposes a Nationwide Class as well as California, New York, New Jersey, and Florida Subclasses. *See* First Amended Complaint, ¶ 45. Although Defendant does not concede that Plaintiffs have defined any proper classes or that any such classes can be certified, the number of members of the class proposed by Plaintiffs is not less than 100. Indeed, the First Amended Complaint alleges that membership in Plaintiffs' proposed classes includes the "thousands, perhaps millions, of consumers [who] have purchased Neutrogena Cleansing Towelette Products." Complaint, ¶ 45.

Accordingly, the classes proposed by Plaintiffs in the First Amended Complaint exceed 100 members, and the first requirement to CAFA removal is satisfied. *See* 28 U.S.C. § 1332(d)(5)(B).

B. CAFA's Minimal Diversity of Citizenship Requirement Is Met.

CAFA's second requirement – minimal diversity – is also readily satisfied in this putative nationwide class action. This requirement is met if "any member of a class of plaintiffs is a citizen of a State different from any defendant." 28 U.S.C. § 1332(d)(2)(A); *see also Broadway Grill, Inc. v. Visa Inc.*, 856 F.3d 1274, 1276 (9th Cir. 2017) ("Under CAFA there is sufficient diversity to establish federal diversity jurisdiction so long as one class member has citizenship diverse from that of one defendant.").

Defendant is a citizen of New Jersey, which should control for purposes of CAFA removal. The Complaint, however, erroneously alleges that Neutrogena has its principal place of business in Los Angeles, California. For CAFA removal purposes, minimal diversity is established assuming *arguendo* that Defendant's citizenship includes New Jersey and California. While Plaintiffs allege that they are citizens of California, New Jersey, New York, and Florida, their proposed nationwide class necessarily includes citizens of all 50 states. Accordingly, the proposed nationwide class includes persons who are citizens of States that are different from Defendant's citizenship, whether that citizenship is New Jersey and/or California. As a result, CAFA's minimal diversity requirement is satisfied.[3]

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[3] CAFA contains a number of exceptions which, when applicable, prevent the exercise of jurisdiction over a class action, even where that class action meets CAFA's threshold requirements triggering diversity jurisdiction. It is the plaintiff's burden, however, to demonstrate that an exception applies. *See, e.g.*, *Serrano v. 180 Connect, Inc.*, 478 F.3d 1018, 1023-24 (9th Cir. 2007) (requiring party seeking remand to demonstrate applicability of the "home state" and "local controversy" exceptions to CAFA). Both the home state and local controversy exceptions require that at least two-thirds of the putative class members be citizens of the same state as the defendant. *See* 28 U.S.C. §§ 1332(d)(4)(A) (local

C. The Amount In Controversy Exceeds $5 Million

CAFA's third and final requirement is satisfied because "the matter in controversy exceeds the sum or value of $5,000,000, exclusive of interests and costs." 28 U.S.C. § 1332(d)(2). Although Defendant disputes liability and damages as well as the propriety of class certification in this case, Plaintiffs' allegations and prayer for relief, irrespective of their merits, place in controversy an aggregate amount greater than CAFA's $5 million jurisdictional threshold. *See Dart Cherokee Basin Operating Co.*, 574 U.S. at 89 (holding that "a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold").

The First Amended Complaint does not include a demand for any specific sum of monetary relief. But, on behalf of its proposed nationwide class and/or its proposed California, New Jersey, New York, and Florida Subclasses, it does seek "an order awarding Plaintiffs and the members of the Class actual damages, restitution and/or disgorgement." First Amended Complaint, Prayer for Relief, ¶ C, at p. 36. As set forth below, the sum or value of the monetary and equitable relief sought by Plaintiffs for themselves and the putative class members exceeds $5 million, exclusive of interest and costs.

The U.S. Supreme Court has held that "a defendant's notice of removal need include only a plausible allegation that the amount in controversy exceeds the jurisdictional threshold." *Dart Cherokee Basin Operating Co.*, 574 U.S. at 89.

The amount in controversy is the "'amount at stake in the underlying litigation.'" *Fritsch v. Swift Transportation Co. of Arizona, LLC*, 899 F.3d 785,

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controversy), 1332(d)(4)(B) (home state). Here, Plaintiffs have not alleged, and cannot establish, that any particular percentage of the members of the proposed nationwide class are California citizens. Because the products at issue in this action were sold throughout the United States, the putative nationwide class is not primarily comprised of California citizens and no exception to CAFA applies here.

793 (9th Cir. 2018) (citation omitted). It "is determined by the complaint operative at the time of removal and encompasses all relief a court may grant on that complaint if the plaintiff is victorious." *Chavez v. JPMorgan Chase & Co*., 888 F.3d 413, 417-18 (9th Cir. 2018). As the Ninth Circuit has held, "a court must include future attorneys' fees recoverable by statute or contract when assessing whether the amount-in-controversy requirement is met." *Fritsch,* 899 F.3d at 794 (citing cases); *accord*, *Arias*, 936 F.3d at 922.

Courts focus on "the reality of what is at stake in the litigation," and defendants may use "reasonable assumptions" in their amount-in-controversy allegations and proof under any "theory of damages exposure." *Ibarra v. Manheim Investments, Inc.*, 775 F.3d 1193, 1197-98 (9th Cir. 2015) (defendants may proffer "evidence combined with reasonable deductions, reasonable inferences, or other reasonable extrapolations"; in contrast, "mere speculation and conjecture, with unreasonable assumptions," will not suffice); *see also Scott v. Cricket Commc'ns, LLC*, 865 F.3d 189, 196 (4th Cir. 2017) (allegations in defendant's removal petition may appropriately rely on "reasonable estimates, inferences, and deductions" in satisfying CAFA's amount-in-controversy requirement).

Here, there can be no genuine dispute that CAFA's $5 million amount-in-controversy requirement is satisfied. Indeed, Plaintiffs' demand for restitution on behalf of the First Amended Complaint's proposed Nationwide Class and California, New Jersey, New York, and/or Florida Subclasses, in itself, exceeds CAFA's $5 million threshold. The Complaint asserts three UCL claims under California Business and Professions Code sections 17200 *et seq*., which have a four-year statute of limitations. *See* Cal. Bus. & Prof. Code § 17208. On these claims, the First Amended Complaint seeks an award of "restitution," including an award of "the full purchase price paid by customers" both in California and "Nationwide." First Amended Complaint, ¶¶ 80, 93-94, 97, 109, 111, 118.

As set forth in the Declaration of Lisa Hillier ("Hillier Decl."), filed concurrently herewith, total nationwide retail sales since April 22, 2017 of the seven Products at issue in this action, in the aggregate, substantially exceed the jurisdictional threshold of $5 million. Hillier Decl., ¶ 11. In the aggregate, the revenue to Defendant for the total number of these products sold in fiscal 2018 and 2019 alone exceeds $100 million nationwide. *Id*. Accordingly, CAFA's $5 million jurisdictional threshold is met. The aggregated value of the "claims of the individual class members" in the Complaint, and relief sought therein, "exceed the sum or value of $5,000,000.00." 28 U.S.C. § 1332(d)(2).

III. VENUE

Plaintiffs' state court action was commenced in the Superior Court of the State of California for the County of Los Angeles, and pursuant to 28 U.S.C. §§ 84(c), 1441(a), 1446(a) and (b), and 1453(b), may be removed to this United States District Court for the Central District of California, which embraces Los Angeles County within its jurisdiction.

IV. NOTICE

Pursuant to 28 U.S.C. § 1446(d), a copy of this Notice of Removal is being contemporaneously filed with the Clerk of the Superior Court for the State of California for the County of Los Angeles and served upon Plaintiff.

V. CONCLUSION

For the foregoing reasons, this Court has removal jurisdiction over this action under 28 U.S.C. §§ 1441(a) and 1453(b) because minimal diversity exists, the amount in controversy exceeds $5 million, and this Notice has been filed within thirty days of Plaintiffs' attempt to serve Defendant with the Complaint. *See* 28 U.S.C. § 1446(b). As such, Defendant, the sole named defendant in the above-titled action, respectfully removes this action from the Superior Court of the State of California, County of Los Angeles (LASC Case No. 20STCV15638), to

this United States District Court for the Central District of California, pursuant to 28 U.S.C. §§ 1332, 1441, 1446 and 1453.

Dated: July 16, 2020

CARLTON FIELDS, LLP
Mark A. Neubauer
Steven B. Weisburd
Stephanie Chau

By: */s/ Mark A. Neubauer*
MARK A. NEUBAUER

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