

UNITED STATES
ENVIRONMENTAL PROTECTION AGENCY

BEFORE THE ADMINISTRATOR

In the Matter of:)
)
Reckitt Benckiser LLC, et al.)
)
EPA Reg. Nos. 3282-3, 3282-4, 3282-9,)
3282-15, 3282-65, 3282-66, 3282-74,)
3282-81, 3282-85, 3282-86, 3282-87,)
and 3282-88; Application Nos. 3282-RNU)
and 3282-RNL)

FIFRA Docket No. 661

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RESPONDENT'S MOTION FOR ADDITIONAL DISCOVERY
OF RECKITT BENCKISER LLC

The Assistant Administrator for Chemical Safety and Pollution Prevention ("Respondent") moves for additional discovery of petitioner Reckitt Benckiser LLC ("Reckitt"), pursuant to 40 C.F.R. § 164.51 and in accordance with the Prehearing Order dated February 10, 2014.

Respondent has conferred with the other parties in regard to this motion. Reckitt has authorized Respondent to report thea Reckitt is reviewing EPA's discovery motion, and is prepared to inform the Court if the parties reach agreement on discovery, or if there are any outstanding discovery requests that require action by the court. User and Retailer Petitioners are reviewing the information request and have no position at this time. The intervenors West Harlem Environmental Action, Natural Resources Defense Council, American Bird Conservancy, Center for Biological Diversity, Defenders of Wildlife, and Sierra Club have no objection to this motion.

Further review and discussions may result in Reckitt has agreeing to provide information satisfying some or all of the discovery requests below, but the outcome cannot be predicted. In order to expeditiously conclude this additional discovery phase of the proceeding, Respondent urges the Tribunal to grant in full the document discovery requested below, with the understanding that ongoing discussions among the parties may result in disclosures of subsets of, or alternatives to, the requested information that Respondent accept as satisfying the discovery order in whole or in part.

I. Requested Document Discovery

Respondent moves for discovery of the documents described in this section I.

Respondent proposes that Reckitt be required to provide to Respondent copies of the responsive documents specified above within 30 days after the Administrative Law Judge's ("ALJ") order granting this discovery motion, or at such other time as the ALJ considers appropriate. For each document produced in response to a request for documents, Respondent proposes that Reckitt be required to indicate on the document, or in some other reasonable manner, the numbered request to which it responds. If the response to any of the following discovery requests would require additional documents to be produced in order to be complete, comprehensible or non-misleading, Respondent proposes that Reckitt be required to include such additional documents as are necessary.

A. Definitions

1. The words "and," "and/or" and "or" shall each be deemed to refer to both their conjunctive and disjunctive meanings, being construed as necessary to bring within the scope of the discovery request all information and documents which would otherwise be construed as being outside the request..

2. The word “any” shall mean “each and every” and “all” as well as “any one,” and “all” shall mean “any and all.”
3. “Document” includes every item and form of data encompassed by the broad definition set forth in Federal Rule of Civil Procedure 34(l). Document shall mean the original, all copies and drafts of papers and writings of every kind, description and form, and all mechanical: magnetic media and electronic recordings, records and data of every kind, description and form, and all photographs of every kind. Document also includes files, folder tabs, and labels appended to or containing any documents.
4. “NOIC” means the February 5, 2013 Notice of Intent to Cancel Registrations of, and Notice of Denial of Applications for, Certain Rodenticide Bait Products.
5. “Non-target” means any animal or animal species (including humans and other mammals, birds, reptiles and amphibians) that was not the intended target of a rodenticide application.
6. “Owners/managers of multi-unit housing/dwellings” means any owner, manager, and any employee, agent or person acting on their behalf, of any apartment, dormitory, hotel, hospital, or other facility providing short- or long-term accommodations.
7. “Person” means any natural person, corporation, partnership, joint venture, limited liability company, proprietorship, governmental or business entity.
8. “Product” means a rodenticide product distributed and sold pursuant to a particular EPA registration number, or, in regard to traps and other devices, any distinct retail sale unit.
9. “Product presentation” means any retail unit of a pesticide product that distinguishable by its packaging or size from other retail units sold under the same EPA registration number. For example, the 1.5 ounce and 3 ounce retail units of d-CON Mouse Prufe II, EPA Reg. No. 3282-65, would be two distinct product presentations.
10. “Reckitt” means Reckitt Benckiser LLC Inc., and any division, branch, department, region, business, parent, subsidiary, or affiliate thereof; any corporate predecessor or successor thereof; or any person acting or purporting to act on its behalf, including all present and former officers, directors, investors, employees, agents, managers, representatives, field representatives, personnel, attorneys, consultants, experts, investigators or other persons.
11. The words “relates to” or “relating to” shall mean and include the following terms: regards, describes, involves, compares, correlates, mentions, connected to, refers to, pertains to, contradicts, or compromises.
12. “Residential consumer” means any purchaser or user of rodent control products or services, other than owners/managers of multi-unit housing/dwellings, non-residential

commercial users (e.g., retail, services, manufacturing), pest control operators, agricultural users, or government employees.

13. "Rodent control products" means rodenticide baits, rodenticide tracking powders, mechanical traps, glue boards, etc.
14. "Rodenticide" means bait products intended for use in rodent control and containing any of the following active ingredients: brodifacoum, bromadiolone, bromethalin, chlorophacinone, cholecalciferol, difenacoum, difethialone, diphacinone (and its sodium salt), warfarin (and its sodium salt), or zinc phosphide.
15. Words in the singular include the plural, and vice versa.

B. Specific Discovery Requests, and Reasons Therefore

1. All documents in Reckitt's possession, custody or control concerning the volume of sales of each rodenticide product sold in product presentations of 8 pounds or less by product presentation size during the years 1999 through 2013.
2. All documents in Reckitt's possession, custody or control concerning the quantities of products containing second generation anticoagulants sold during the years 1999 through 2013.

Rationale for discovery requests 1 and 2: Many of Reckitt's registrations allow sale in a range of sizes, which are reasonably expected to appeal to different market sectors. For example, EPA Reg. No. 3282-81 can be sold in 3 ounce, 12 ounce and 3 pound units.

Although pesticide producers are required to report annual pesticide production on a per-registration basis pursuant to FIFRA section 7, these reports do not generally distinguish different product presentations within a single registration. Neither do the FIFRA section 7 production reports indicate how much is sold in particular geographic areas, e.g., urban-suburban-rural, sunbelt versus northern states, arid west versus moist east. Absent Reckitt's voluntary disclosure of the requested information, this information is not reasonably obtainable except through discovery. The products of these discovery requests would have

significant probative value regarding the quantities of rodenticide products relevant to this proceeding that are used by residential consumers versus commercial and agricultural users, which in turn is relevant to the risks posed by rodenticide products at issue in this proceeding.

3. All documents in Reckitt's possession, custody or control concerning the average, mean or nominal dimensions of individual pellets, bits, granules, etc., in products subject to the NOIC, and concerning the range and/or distribution of those dimensions.
4. All documents in Reckitt's possession, custody or control concerning the average, mean or nominal mass of individual pellets, bits, granules, etc., in products subject to the NOIC, and concerning the range and/or distribution of those parameters.
5. All documents in Reckitt's possession, custody or control concerning the formulation and composition of the bait in each NOIC product.

Rationale for discovery requests 3, 4 and 5: EPA's records concerning the registrations of the products subject to the NOIC contain very little detail about the sizes or weights of the individual bait pellets, bits, granules, etc., or about the bait composition other than the active ingredient concentration. It is reasonable to expect that their manufacturer has some standards for its bait production, if only for quality control purposes. Absent Reckitt's voluntary disclosure of the requested information, this information is not reasonably obtainable except through discovery. The products of these discovery requests would have significant probative value regarding the likelihood and consequences of consumption of rodenticide products subject to the NOIC, which in turn is relevant to the risks posed by rodenticide products at issue in this proceeding.

6. All documents in Reckitt's possession, custody or control concerning the types of retail establishments (e.g., grocery stores, hardware stores, farm stores) where products subject to the NOIC are sold, and/or the quantities of each such product distributed to and/or sold from each type of retail establishment.
7. All documents in Reckitt's possession, custody or control concerning the types of retail establishments (e.g., grocery stores, hardware stores, farm stores) where Reckitt's products containing second generation anticoagulants are sold, and/or the quantities of each such product distributed to, and/or sold from, each type of retail establishment.

Rationale for discovery requests 6 and 7: Based on previous communications with Reckitt, Respondent anticipates that one disputed issue in this proceeding will be the extent to which residential consumer use of second generation anticoagulants products adversely affect non-target wildlife, versus use by other users. As the predominant manufacturer and marketer of second generation anticoagulants products in the United States, Reckitt's sales and distribution patterns are highly relevant to this issue. It is unlikely that Reckitt could attain, or maintain, its position as the predominant marketer of residential consumer rodenticides without collecting and analyzing information regarding the sales performance of the various rodenticide products in different retail outlets. Absent Reckitt's voluntary disclosure of the requested information, this information is not reasonably obtainable except through discovery. The products of these discovery requests would have significant probative value regarding the quantities of rodenticide products relevant to this proceeding that are used by residential consumers versus commercial and agricultural users, which in turn is relevant to the risks posed by rodenticide products at issue in this proceeding.

8. All documents in Reckitt's possession, custody or control concerning questionnaires, surveys, focus groups, etc., regarding the extent to which residential consumers purchase rodent control products at different types of retail establishments (e.g., grocery stores, hardware stores, farm stores).

9. All documents in Reckitt's possession, custody or control concerning questionnaires, surveys, focus groups, etc., regarding the extent to which owners/managers of multi-unit housing/dwellings purchase rodent control products at different types of retail establishments (e.g., grocery stores, hardware stores, farm stores).
10. All documents in Reckitt's possession, custody or control concerning questionnaires, surveys, focus groups, etc., regarding the extent to which non-residential commercial users (e.g., retail, services, manufacturing) purchase rodent control products at different types of retail establishments (e.g., grocery stores, hardware stores, farm stores).
11. All documents in Reckitt's possession, custody or control concerning questionnaires, surveys, focus groups, etc., regarding the extent to which pest control operators purchase rodent control products at different types of retail establishments (e.g., grocery stores, hardware stores, farm stores).
12. All documents in Reckitt's possession, custody or control concerning questionnaires, surveys, focus groups, etc., regarding the extent to which agricultural users purchase rodent control products at different types of retail establishments (e.g., grocery stores, hardware stores, farm stores).

Rationale for discovery requests 8 through 12: Based on previous communications with Reckitt, Respondent anticipates that this proceeding will involve disputes about where different categories of users obtain rodent control products. It is unlikely that Reckitt could attain, or maintain, its prominent position in the rodenticides market without collecting and analyzing information regarding the rodenticide purchasing behaviors of residential and other consumers. Absent Reckitt's voluntary disclosure of the requested information, this information is not reasonably obtainable except through discovery. The products of these discovery requests would have significant probative value regarding the effect of the market segregation system envisioned in EPA's 2008 Risk Mitigation Decision, and alternatives thereto.

13. All documents in Reckitt's possession, custody or control concerning questionnaires, surveys, focus groups, etc., regarding the extent to which different rodent control products (including non-chemical rodent control products) are used by residential consumers, why they choose them, and/or how they use them (including events triggering a decision to apply, frequency of application, location of application, quantity applied, and whether different rodent control products might be used simultaneously).

14. All documents in Reckitt's possession, custody or control concerning questionnaires, surveys, focus groups, etc., regarding the extent to which different rodent control products (including non-chemical rodent control products) are used by owners/managers of multi-unit housing/dwellings, why they choose them, and/or how they use them (including events triggering a decision to apply, frequency of application, location of application, quantity applied, and whether different rodent control products might be used simultaneously).
15. All documents in Reckitt's possession, custody or control concerning questionnaires, surveys, focus groups, etc., regarding the extent to which different rodent control products (including non-chemical rodent control products) are used by non-residential commercial users (e.g., retail, services, manufacturing), why they choose them, and/or how they use them (including events triggering a decision to apply, frequency of application, location of application, quantity applied, and whether different rodent control products might be used simultaneously).
16. All documents in Reckitt's possession, custody or control concerning questionnaires, surveys, focus groups, etc., regarding the extent to which different rodent control products (including non-chemical rodent control products) are used by pest control operators, why they choose them, and/or how they use them (including events triggering a decision to apply, frequency of application, location of application, quantity applied, and whether different rodent control products might be used simultaneously).
17. All documents in Reckitt's possession, custody or control concerning questionnaires, surveys, focus groups, etc., regarding the extent to which different rodent control products (including non-chemical rodent control products) are used by agricultural users, why they choose them, and/or how they use them (including events triggering a decision to apply, frequency of application, location of application, quantity applied, and whether different rodent control products might be used simultaneously).
18. All documents in Reckitt's possession, custody or control concerning questionnaires, surveys, focus groups, etc., regarding the circumstances in which residential consumers would be more or less likely to rely on professional pest control services.

Rationale for discovery requests 13 through 18: Based on previous communications with Reckitt, Respondent anticipates that one disputed issue in this proceeding will be how residential consumers and other rodenticide users apply rodenticides. It is unlikely that Reckitt could attain, or maintain, its position as the predominant marketer of residential consumer rodenticides without collecting and analyzing information regarding the

practices and habits of residential and other consumers regarding rodenticide use. Absent Reckitt's voluntary disclosure of the requested information, this information is not reasonably obtainable except through discovery. The products of these discovery requests would have significant probative value regarding how the rodenticide products relevant to this proceeding are used by residential and other consumers, which in turn is relevant to the risks posed by rodenticide products at issue in this proceeding.

19. All documents in Reckitt's possession, custody or control concerning the market share (in terms of both numbers of units and costs) of rodenticide baits, mechanical traps, glue boards, and other rodent control products in the overall rodent control market and in major sectors of the rodent control market (residential consumers, multi-unit housing dwelling owners/managers, non-residential commercial users (e.g., retail, services, manufacturing), and pest control operators).¹
20. All documents in Reckitt's possession, custody or control concerning questionnaires, surveys, focus groups, etc., regarding what residential consumers or other users are willing to pay for rodent control services and/or rodent control products.
21. All documents in Reckitt's possession, custody or control concerning per unit production costs for each rodenticide product sold in product presentations of 8 pounds or less during the years 2009 through 2013, or during the last 5 years of production if production ceased during 2009-2013.
22. All documents in Reckitt's possession, custody or control concerning profits from sales of each rodenticide product sold in product presentations of 8 pounds or less during the years 2009 through 2013, or during the last 5 years of production if production ceased during 2009-2013.
23. All documents in Reckitt's possession, custody or control concerning profits from sales, by month from the date of registration, for each of the following products: EPA Reg. Nos. 3282-98, 3282-99, 3282-100, 3282-101, 3282-102, 3282-103, and 3282-110.
24. All documents in Reckitt's possession, custody or control concerning current per unit production costs for each of the following products: EPA Reg. Nos. 3282-98, 3282-99, 3282-100, 3282-101, 3282-102, 3282-103, and 3282-110.
25. All documents in Reckitt's possession, custody or control concerning per unit production costs for rodent traps during the years 2009 through 2013.

¹ It is not necessary to address agricultural use for purposes of this request.

26. All documents in Reckitt's possession, custody or control concerning proceeds profits from sales of rodent traps during the years 2009 through 2013.

Rationale for discovery requests 19 through 26: Based on previous communications with Reckitt, Respondent anticipates that one disputed issue in this proceeding will be the cost of producing consumer-use rodenticides conforming to the EPA's 2008 Risk Mitigation Decision. It is unlikely that Reckitt could attain, or maintain, its position as the predominant manufacturer and marketer of residential consumer rodenticides without collecting and analyzing information regarding both the production costs of its products and the price they can command in the retail market. Absent Reckitt's voluntary disclosure of the requested information, this information is not reasonably obtainable except through discovery. The products of these discovery requests would have significant probative value regarding the economic costs of rodenticide products at issue in this proceeding.

27. All documents in Reckitt's possession, custody or control concerning calls, letters, emails, or other communications concerning adverse effects of rodenticides, exclusive of those reported to EPA pursuant to FIFRA section 6(a)(2). This request is not limited to rodenticide products registered to Reckitt.
28. All documents in Reckitt's possession, custody or control concerning calls, letters, emails, or other communications concerning non-target (including human, pests and wildlife) exposures to rodenticides whether or not the exposure was associated with a particular adverse effect, exclusive of those reported to EPA pursuant to FIFRA section 6(a)(2). This request is not limited to rodenticide products registered to Reckitt.
29. All documents in Reckitt's possession, custody or control concerning rodenticide incidents reported in aggregate form to EPA pursuant to FIFRA section 6(a)(2).
30. All documents in Reckitt's possession, custody or control concerning how information regarding adverse effects is received or recorded, or concerning how the company responds to information regarding adverse effects of rodenticides.

Rationale for discovery requests 27 through 30: Out of the universe of possible information “regarding unreasonable adverse effects” of pesticides that falls within the broad scope of FIFRA section 6(a)(2), EPA’s regulations at 40 C.F.R. part 159 define a subset of adverse effects information that must be routinely submitted by all pesticide registrants. Although information that falls outside the reporting criteria of part 159 is generally not needed by EPA in the routine course of administering FIFRA, such information may provide additional detail that is relevant to this proceeding. In addition, because questions concerning whether and how non-target exposures occur are central to this proceeding, information concerning non-target exposures is important even where no overt harms are evident. Reckitt is likely to have received adverse effects information that did not meet the reporting criteria of part 159, or that only met the criteria for reporting in aggregate form. The unreported information, and information regarding Reckitt’s procedures regarding adverse effects information, may be relevant to this proceeding. This information could be obtained from Reckitt pursuant to 40 C.F.R. 159.195(c), however, because the need for this information arises from the instant proceeding, Respondent believes that it is more efficient – for both Reckitt and Respondent – and therefore more reasonable, to include these requests within this motion for additional discovery. The products of these discovery requests would have significant probative value regarding rodenticide exposures and the adverse effects caused by rodenticide products at issue in this proceeding.

31. In regard to any rodent population or rodenticide resistance model(s) Reckitt intends to rely upon in this proceeding, all documents in Reckitt’s possession, custody or control concerning the values of the parameters used in the model, the sources of such values, and the rationale for selecting such values.

32. In regard to any rodent population or rodenticide resistance model(s) Reckitt intends to rely upon in this proceeding, all documents in Reckitt's possession, custody or control containing a description, explanation or flow chart of how the model works, or that explain or describe the parameters used in the model, or that identify the values of such parameters or the rationale for choosing parameter values.

Rationale for discovery request 31 and 32: Documents included in Reckitt's prehearing exchange (e.g., PRX 2-76, PRX 618) indicate that Reckitt intends to introduce into evidence the results of one or more rodent population or rodenticide resistance models. The documents exchanged to date are notably lacking in specifics regarding the parameters used in the models. Parameters of particular interest include, but are not limited to, assumptions regarding the size of the initial population, adult survival, juvenile survival, fecundity and dominance. The absence of this information impairs meaningful review and critique of the reported results that Reckitt presumably intends to rely on in this proceeding. Therefore, the product of this discovery requests would have significant probative value. Absent Reckitt's voluntary disclosure of the requested information, this information is not reasonably obtainable except through discovery.

33. All documents in Reckitt's possession, custody or control concerning studies, tests or analyses of the efficacy or product performance of rodenticide products, exclusive of those previously reported to EPA.
34. All documents in Reckitt's possession, custody or control concerning studies, tests or analyses of the efficacy or product performance of rodent traps.

Rationale for discovery requests 33 and 34: Documents included in Reckitt's prehearing exchange (e.g., PRX 2-71) indicate that it has been testing rodenticide products, both its own and those of competitors, and that it intends to use those studies it considers performance failures in support of its position in this proceeding. However, it is not clear

how many such studies have been conducted, or whether the reported studies are representative of all such studies. The absence of this information impairs meaningful review and critique of the reported results that Reckitt presumably intends to rely on in this proceeding. Therefore, the product of this discovery requests would have significant probative value. Absent Reckitt's voluntary disclosure of the requested information, this information is not reasonably obtainable except through discovery.

35. Personal communications between James McCluskey and Robin Cantor regarding the listing of health care resources used for potential or known poisoning incidents, including communications of May 14, 2013. (Cited by Cantor PRX 544 at footnote 84.)
36. E-mail correspondence between Ahana Brutlag and Robin Cantor, explaining veterinary treatment for clinical poisoning, including the "Scenario-based approach" that provides blended costs based on a typical vs. rare scenario of treatment, and including March 25, 2013 correspondence, explaining treatment for clinical poisoning, including the "Scenario-based approach" that provides blended costs based on a typical vs. rare scenario of treatment. (Cited by Cantor PRX 544 at footnote 89, Table 21 fn. 2.)
37. Expert Report of Dr. Bradford D. Gessner: Public Health Consequences of Household Rodent Infestation, 2014 ("2014 Gessner Report" cited in PRX 544 at footnote 56, Table 12).
38. Dr. Carolyn Meyer, "Predicting Changes in Days of Rodent Infestation using Population Models: Effects on Rodent Populations of Canceling Consumer Use of Second Generation Anticoagulant Rodenticides," Mar. 2014. (Cited by Cantor PRX 544 at footnote 52.)
39. March 14, 2014, Report of Applied Safety and Ergonomics, Inc. (Referenced in "Reckitt Benckiser LLC Rodenticide Labeling Evaluation, Phase 2 Final Report," April 3, 2014, PRX 593, at page 2).
40. Personal communications between Alan Buckle and Carolyn Meyer, regarding efficacy of rodenticides. (Cited in Meyer PRX 618 at page 19).
41. Personal communication between Michael Kohn and Carolyn Meyer, regarding resistance to rodenticides. (Cited in Meyer PRX 618 at page 21).
42. Buckle, A. 2014. Comparative Efficacy of Rodenticides: Impacts and Implications of the United States Environmental Protection Agency's Proposal to Cancel Registrations of

Certain Rodenticide Products containing Second Generation Anticoagulants. (Cited in Meyer PRX 618, passim)

Rationale for discovery requests 35 through 42: These documents were cited in documents prepared by or for Reckitt for use in this proceeding and included in Reckitt's prehearing exchange, and are therefore presumptively relevant and of significant probative value.

Respondent has been unable to obtain copies through other sources. Absent Reckitt's voluntary disclosure of the requested information, this information is not reasonably obtainable except through discovery.

II. Withheld Documents

To extent Reckitt refuses to produce any responsive document on the basis of a claim of privilege, Respondent proposes that Reckitt be required to identify the date, author, addressee, persons receiving copies, type of document or information (letter, report, memorandum, etc.), title if any, description of the subject matter addressed in the document, number of pages, the specific privilege(s) claimed and the factual basis therefore. If any document responsive to a document request was, but is no longer in Reckitt's possession, custody or control, or was known to Reckitt but is no longer in existence, Respondent proposes that Reckitt be required to state what disposition was made of it or what became of it.

III. Deferral of Interrogatories

Respondent expects that interrogatories of opposing witnesses will be needed unless there is an agreement between the parties or an order of the ALJ providing for the exchange of written direct testimony (or possibly other documents fully describing the scope and substance of the

witnesses' expected testimony) at least three weeks before witnesses are scheduled to testify.

The parties are presently discussing this matter, so Respondent proposes to defer any request for interrogatories at this time, but respectfully reserves the right to move for additional discovery in the event that neither an agreement between the parties nor a ruling by the ALJ appears likely to provide Respondent adequate and timely detail as to the scope and substance of witnesses' expected testimony.

IV. Conclusion

For the reasons specified above, the information Respondent seeks by this motions for additional discovery is not otherwise obtainable and has significant probative value in this proceeding. Respondent's motion for additional discovery will not necessarily delay the proceeding, because both Reckitt's compliance with the additional discovery order and Respondent's review of the discovery products can proceed in parallel with other hearing preparation activities. Moreover, as no schedule has been set for the next steps in this proceeding, there are no proximate events or deadlines that could be delayed. Finally, even if the proposed additional discovery were to cause a delay, such delay would be reasonable given the relevance of the information sought to the merits of this case.

For the reasons presented above, Respondent's proposed document discovery will not unreasonably delay the proceeding, and seeks information that is not otherwise obtainable and has significant probative value to this proceeding. Accordingly, Respondent's motion for additional discovery meets the criteria of 40 C.F.R. § 164.51(a) and (c), and should be granted.

Respectfully submitted,

5/5/2014
Date



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CERTIFICATE OF SERVICE

I hereby certify that the original and one copy of *Respondent's Motion For Additional Discovery of Reckitt Benckiser LLC* were filed with the Headquarters Hearing Clerk, and a copy hand delivered to the office of:

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