STATE OF INDIANA	)	IN THE MARION COUNTY SUPERIOR COURT
	)SS:	CIVIL DIVISION NUMBER FIVE
COUNTY OF MARION	)	CAUSE NUMBER 49D05-1405-PL-016895

THE STATE OF INDIANA, ex rel. HARMEYER,

Plaintiffs and *Qui Tam* Relator,

v.

THE KROGER CO., KROGER LIMITED PARTNERSHIP I, KRGP, INC., PAY LESS SUPER MARKETS, INC. and RALPHS GROCERY COMPANY

Defendants.

FILED

MAR 22 2018 (129)

Myla A. Eldridge
CLERK

ORDER GRANTING DEFENDANTS' MOTION TO DISMISS

Defendants filed a Motion to Dismiss on July 13, 2017. Having considered this motion, along with the briefs and oral argument regarding the same, the Court hereby finds that said Motion should be granted for the reasons stated below.

I. The Relator's Claims

In his Sixth Amended Complaint, Relator Michael Harmeyer asserts that he bought various items at grocery stores owned or operated by one or more of the Defendants for which he should have been assessed Indiana's 7% sales tax, but was not. (Sixth Amended Complaint ("SAC") ¶ 44). For purpose of Defendants' motion to dismiss, these allegations are to be taken as true. Relator argues that the Defendants' failure to collect this sales tax violated IC § 5-11-5.5-2(b)(6) and (8) of the Indiana False Claims and Whistleblower Protection Act (herein, the "Indiana False Claims Act" or "Indiana FCA"). (SAC ¶ 55). These provisions state:

> (b) A person who knowingly or intentionally:
>
> . . .
>
> (6) makes or uses a false record or statement to avoid an obligation to pay or transmit property to the state;

[or]

(8) causes or induces another person to perform an act described in subdivisions (1) through (6);

is, except as provided in subsection (c), liable to the state for a civil penalty of at least five thousand dollars ($5,000) and for up to three (3) times the amount of damages sustained by the state. In addition, a person who violates this section is liable to the state for the costs of a civil action brought to recover a penalty or damages.

The Indiana FCA permits citizens to bring civil lawsuits for fraud on behalf of the state in exchange for a percentage of any recovery. *See* IC § 5-11-5.5-1, et seq.; *United States ex rel. Martinez v. Rosenberg*, No. 2:11-cv-273, 2016 U.S. Dist. LEXIS 97763, at *2 (N.D. Ind. July 27, 2016). The statute is based upon the Federal False Claims Act (the "Federal FCA"), codified at 31 U.S.C. §§ 3729 – 3733. Because the Indiana FCA mirrors the federal False Claims Act "in all material respects," courts assess liability under the IFCWPA the same way they do under the federal law. *Kuhn v. Laporte Cty. Comprehensive Mental Health Council*, No. 3:06-CV-317 CAN, 2008 U.S. Dist. LEXIS 68737, at *7-8 n.1 (N.D. Ind. Sep. 4, 2008); *O'Shell v. Cline*, No. 1:10-cv-01660-LJM-DML, 2013 U.S. Dist. LEXIS 192776, at *14 (S.D. Ind. Nov. 20, 2013); *Doe v. Houchens Indus.*, No. 1:13-cv-00196-RLY-MJD, 2015 U.S. Dist. LEXIS 2403, at *4-5 (S.D. Ind. Jan. 9, 2015).

Defendants have moved to dismiss Relator's claims on two grounds. First, Defendants argue that these claims must be dismissed because Relator failed to plead them with particularity as required by Indiana Rule of Trial Procedure, T.R. 9(B) ("Rule 9(B)"). Second, Defendants argue that these claims must be dismissed because Relator has failed to plead a factual basis upon which one could infer scienter. Upon review of the parties' briefs and consideration of their oral arguments, the Court agrees with the Defendants.

II. Relator Has Failed to Satisfy the Requirements of Rule 9(B).

A. Rule 9(B)s Requires Particularized Pleading.

Because the Indiana FCA is an anti-fraud statute, Relator's claims are subject to Indiana's Rule 9(B), just as federal *qui tam* cases are subject to the identically-worded Federal Civil Rule 9(b). *See Continental Basketball Ass'n, Inc. v. Ellenstein Enterprises, Inc.*, 669 N.E.2d 134, 137-38 (Ind. 1996); *United States v. Indianapolis Neurosurgical Grp.. Inc.*, No. 1:06-cv-1778-JMS-DML, 2013 U.S. Dist. LEXIS 23610, at *7 (S.D. Ind. Feb. 21, 2013); *McKinney v. State*, 693 N.E.2d 65, 71 (Ind. 1998).

Rule 9(B) "requires that in all averments of fraud or mistake the circumstances constituting fraud or mistake shall be specifically averred." *Cunningham v. Assocs. Capital Servs. Corp.*, 421 N.E.2d 681, 683 n.2 (Ind. Ct. App. 1981). "A pleading which fails to comply with the special pleading requirements of T.R. 9(B) does not state a claim upon which relief can be granted or a sufficient defense." *Id.* at 683 n.2. "Like its federal counterpart, Rule 9(B) serves the objectives of [1] deterring groundless suits or 'fishing expeditions,' [2] protecting the reputations of defendants, and [3] providing defendants with sufficient information to enable them to prepare a defense." *Magic Circle Corp. v. Wilson*, 44 N.E.3d 841 (Ind. Ct. App. 2015); *Vicom, Inc. v. Harbridge Merch. Servs.*, 20 F.3d 771, 777 (7th Cir. 1994).

To comply with Rule 9(B), Relator was required to allege "the identity of the person who made the misrepresentation, the time, place and content of the misrepresentation, and the method by which the misrepresentation was communicated...." *United States ex rel. Leveski v. ITT Educ. Servs.*, No. 1:07-cv-867-WTL-JMS, 2010 U.S. Dist. LEXIS 137909, at *9 (S.D. Ind. May 12, 2010) (quoting *Windy City Metal Fabricators & Supply, Inc. v. CIT Tech. Fin. Servs., Inc.*, 536 F.3d 663, 668 (7th Cir. 2008)); *Cont'l Basketball Ass'n*, 669 N.E.2d at 138; 1 W. Harvey, Indiana

Practice § 9.2 at 542; *Cunningham*, 421 N.E.2d at 683 n.2 (same). In other words, Relator was required to describe the "who, what, when, where, and how" of the fraud. *United States ex rel. Lusby v. Rolls-Royce Corp.*, 570 F.3d 849, 853 (7th Cir. 2009) (internal quotation marks omitted); *see also Cincinnati Life Ins. Co. v. Beyrer*, 722 F.3d 939, 948 (7th Cir. 2013).

B. Relator Fails to Plead with Particularity

The Court agrees with Defendants that Relator has failed to plead with the particularity required by Rule 9(b). Because the Indiana FCA prohibits the making of false statements to the State of Indiana in order to conceal an obligation to the state, Relator was required to identify the individuals ***who made*** *these false statements. See United States ex rel. Morison v. Res-Care, Inc.*, No. 4:15-cv-00094-RLY-DML, 2017 U.S. Dist. LEXIS 15917, at *8-9 (S.D. Ind. Feb. 3, 2017) (dismissing a relator's complaint for failure to comply with Rule 9(b) because she "fails to identify who was responsible for submitting claims to Medicaid for reimbursement in the Evansville office"); *United States ex rel. Bannon v. Edgewater Hosp., Inc.*, No. 00 C 7036, 2005 U.S. Dist. LEXIS 8109, at *8 (N.D. Ill. Apr. 14, 2005) (relator failed to plead with particularity where complaint "does not associate specific sets of statements with particular agents of EMC"). Relator does not identify any individuals involved in the alleged fraud, much less the particular individuals who made the false statements allegedly giving rise to his claims.

Relator even fails to identify which corporate entities submitted or caused to be submitted false statements to Indiana, lumping these entities altogether as simply "Kroger." This does not satisfy the particularity requirements or Rule 9(b). *See Vicom, Inc. v. Harbridge Merch. Servs.*, 20 F.3d 771, 777-78 (7th Cir. 1994) (explaining that "the plaintiff who pleads fraud must 'reasonably notify the defendants of their purported role in the scheme'" and observing that "[w]e previously have rejected complaints that have 'lumped together' multiple defendants."); *Sears v. Likens*, 912

F.2d 889, 893 (7th Cir. 1990) (holding same); *Suburban Buick, Inc. v. Gargo,* No. 08 C 0370, 2009 U.S. Dist. LEXIS 46124, at *12 (N.D. Ill. May 29, 2009) (holding same); *United States v. Sanford-Brown, Ltd.*, 788 F.3d 696, 705 (7th Cir. 2015) (prohibition against lumping applies even when the defendants are "related corporations.").

Relator also does not identify what false statements were submitted to the state. The "actual presentment of a false claim is not simply a ministerial act, but the *sine qua non* of a False Claims Act violation." *United States ex rel. Tucker v. Nayak*, No. 06-cv-662-JPG, 2009 U.S. Dist. LEXIS 50274, at *7 (S.D. Ill. June 15, 2009) (citations and quotations omitted); *Urquilla-Diaz v. Kaplan Univ.*, 780 F.3d 1039, 1052 (11th Cir. 2015); *United States ex rel. Hebron v. Pfizer, Inc.*, No. 16-1805, 2017 U.S. App. LEXIS 1619, at *8 (1st Cir. Jan. 30, 2017). To plead a claim here, Relator was therefore required to identify with particularity at least one alleged false submission by Defendants to Indiana. *See, e.g., United States v. Ortho-McNeil Pharm., Inc.*, No. 03 C 8239, 2007 U.S. Dist. LEXIS 52666, at *13-16 (N.D. Ill. July 20, 2007) ("While West need not plead every false statement made by Defendants or every false claim made, he does not set forth the circumstances of any particular false statement or cite a single example of a false claim or a provider that made a false claim. . . . Accordingly, West has not pleaded with the required particularity the circumstances of his § 3729(a)(1) and (a)(2) claims."); *United States ex rel. Camillo v. Ancilla Sys.*, No. 03-CV-0024-DRH, 2005 U.S. Dist. LEXIS 17083, at *12 (S.D. Ill. Aug. 8, 2005) (dismissing FCA claims because relator failed to give "any specific examples of the fraudulent claims"); *Singer v. Progressive Care, SC*, No. 11-cv-02679, 2016 U.S. Dist. LEXIS 106454, at *17 (N.D. Ill. Aug. 11, 2016) ("a relator must plead at least some actual examples of false claims."). Relator failed to do so.

Instead of identifying a specific false claim, Relator states that "Kroger" was required to submit ST-103 forms to Indiana and then surmises that these would have been false. Courts sometimes excuse the failure to identify the submission of an actual false record or statement where the relator's position gives him "some indicia of reliability" as to what the defendant submitted, such as when the relator works in the billing department of the defendant. *See Abner v. Jewish Hosp. Health Care Servs.*, No. 4:05-cv-0106-DFH-WGH, 2008 U.S. Dist. LEXIS 61985, at *9 (S.D. Ind. Aug. 13, 2008). "Courts have found inadequate indicia of reliability where the relator is not directly involved in billing or does not allege personal knowledge of specific instances of fraudulent billing." *Id.* Relator does not allege that he was directly involved in the submission of Defendants' sales tax returns, or that he has personal knowledge regarding what Kroger submitted to Indiana. As an outsider to the fraud, he cannot satisfy this exception here.

Relator also fails to plead the date or time of the allegedly false statements, which he was required to do. *United States ex rel. Hanna v. City of Chi.*, 834 F.3d 775, 780 (7th Cir. 2016); *Cont'l Basketball Ass'n*, 669 N.E.2d at 138 (Rule 9(B) requires plaintiff to state with particularity the "circumstances of the fraud," which includes "the time...of the false representations."). Relator argues that Indiana's sales tax statute requires that sales tax returns be "no later than 20 days after the end of the month."[1] (SAC ¶ 39). It is not enough to suggest intervals at which false statements may have been made; Relator was required to plead actual dates when false statements were made. *Hanna*, 834 F.3d at 780 (relator filed to satisfy Rule 9(b) because he said "nothing more about timing" regarding false certifications other than "that the certifications were made

[1] Although Relator alleges that Indiana requires that these returns be filed each month, this is not entirely accurate. IC § 6-2.5-6-1(b) states that the "department may permit a person to divide a year into a *different number of reporting periods*." (Emphasis added).

yearly, 'typically in December.'"). Having failed to plead the who, what, and when of his fraud, Relator has failed to state a viable claim, even after six amendments to his complaint.

At the hearing on the motion to dismiss, Relator's counsel went beyond the allegations in his complaint, arguing that an unknown individual of unknown employ and unknown title not only committed fraud, but committed the crime of perjury, when he signed unidentified tax returns on unknown dates on behalf of an unidentified Defendant. The assertion of such speculative and inflammatory allegations, untethered to any particularized facts to support them, is precisely what Rule 9(B) was designed to prevent. As the Seventh Circuit Court of Appeals has explained, "fraud is frequently charged irresponsibly by people," *Ackerman v. Nw. Mut. Life Ins. Co.*, 172 F.3d 467, 469 (7th Cir. 1999), and "a public accusation of fraud can do great damage" to a defendant. *United States ex rel. Grenadyor v. Ukrainian Vill. Pharmacy, Inc.*, 772 F.3d 1102, 1105 (7th Cir. 2014). Rule 9(B)'s "heightened pleading requirement is a response to the great harm to the reputation of a business firm or other enterprise a fraud claim can do." *Borsellino v. Goldman Sachs Group, Inc.*, 477 F.3d 502, 507 (7th Cir. 2007) (internal quotation marks omitted). "Rule 9(b) ensures that a plaintiff have some basis for his accusations of fraud before making those accusations . . . ." *UniQuality, Inc. v. Infotronx, Inc.*, 974 F.2d 918, 924 (7th Cir. 1992). Thus, it is not enough for Relator to give the Defendants some general sense of what he is charging; Relator must also plead facts that demonstrate that his allegation of fraud is "responsible and supported, rather than defamatory and extortionate." *Payton v. Rush-Presbyterian-St. Luke's Med. Ctr.*, 184 F.3d 623, 627 (7th Cir. 1999). Relator has not done that here.

In *United States ex rel. Hanna v. City of Chi.*, 834 F.3d 775 (7th Cir. 2016), the Seventh Circuit noted that the relator had failed to allege the time, place, and method by which misrepresentations were made, and that he had pled some facts upon information and belief

without any allegations showing grounds for his suspicions. *Id.* at 779. But in the end the court noted the "real problem with Hanna's case" was that "the FCA is meant to encourage whistleblowing by insiders, and Hanna seems to have no insider knowledge." *Id.* This, ultimately, is the problem with Relator's claims here. He observed what he believed to errors in the collection of sales tax for certain categories of foods, and then speculated that someone, somewhere, sometime knowingly made false statements to Indiana about them. As an outsider to the company, he lacks any knowledge of whether this actually occurred. "Rule 9(b) fails 'in its purpose if conclusory generalizations . . . permit a plaintiff to set off on a long and expensive discovery process in the hope of uncovering some sort of wrongdoing.'" *See Hinds Cty. v. Wachovia Bank N. A.*, 2010 U.S. Dist. LEXIS 43202, at *45 (S.D.N.Y. Apr. 26, 2010) (quoting *Decker v. Massey-Ferguson, Ltd.*, 681 F.2d 111, 116 (2d Cir. 1982)).[2] "If it is usually easier to bring a qui tam fraud claim from the inside of a company rather than from the outside, that is not some accidental defect in the law but a natural consequence of Rule 9(b)." *United States ex rel. Berkowitz v. Automation Aids*, No. 13 C 08185, 2017 U.S. Dist. LEXIS 38457, at *22 (N.D. Ill. Mar. 16, 2017).

A court in Rhode Island considered similar claims by Relator against Rhode Island grocers and dismissed them for failure to plead with particularity. *State ex rel. Harmeyer v. Shaw's Supermarkets, Inc.*, Super. Ct. Nos. PC-2015-4895, PC-2015-4896, 2017 R.I. Super. LEXIS 90 (May 1, 2017). This Court does the same.

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[2] *See also United States v. Ortho-McNeil Pharm., Inc.*, No. 03 C 8239, 2007 U.S. Dist. LEXIS 52666, at *15 (N.D. Ill. July 20, 2007) (dismissing the relator's claims because it "seems as if [he] has filed suit based upon his suspicion that Defendants engaged in unlawful conduct with the hope that discovery will unearth some specific FCA violation"); *United States v. Safeway, Inc.*, No. 11-cv-3406, 2016 U.S. Dist. LEXIS 91378, at *4 (C.D. Ill. July 14, 2016) ("The heightened pleading standard requires the relator to make a more extensive investigation before bringing claims of fraud. That purpose would be frustrated 'by allowing a relator to make vague claims of fraud, and then permitting him to engage in discovery in the hope of uncovering enough specifics to adequately plead a case.' *U.S. ex rel. Liotine, v. CDW-Government, Inc.*, 2009 U.S. Dist. LEXIS 21555, 2009 WL 72058, at *1 (S.D. Ill. March 18, 2009).").

III. Relator Has Failed to Plead Scienter.

Indiana's FCA prohibits people and companies from "knowingly or intentionally" making a false record or statement to conceal an obligation to the state. IC § 5-11-5.5-2(b). It is not a strict liability statute; it requires actual scienter.[3] Thus, it is not enough for Relator here to assert that Defendants made mistakes or were negligent with regard to the collection of sales tax in Indiana.[4] He was required to "allege some factual basis from which scienter could be established." *United States ex rel. Roberts v. Lutheran Hosp.*, No. 1:97cv174, 1998 U.S. Dist. LEXIS 15791, at *26-29 (N.D. Ind. Apr. 17, 1998); *O'Brien v. Nat'l Prop. Analysts Partners*, 936 F.2d 674, 676 (2d Cir. 1991) ("[W]hile Rule 9(b) permits scienter to be demonstrated by inference, this 'must not be mistaken for license to base claims of fraud on speculation and conclusory allegations.' . . . . An ample factual basis must be supplied to support the charges.").

Relator has not alleged a factual basis for scienter here. He pleads no information concerning Defendants' actual knowledge in this case. He does not name any employees, much less recount any facts that show they were aware that his items were not charged sales tax, or that they should have been. He does not identify any employees who made statements to the State of Indiana about the collection of any sales tax, much less facts that would suggest they knowingly made false ones. In the end, Relator simply speculates that there was scienter; this is not enough to state a viable claim. *See, e.g., O'Brien v. Nat'l Prop. Analysts Partners*, 936 F.2d 674, 676 (2d

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[3] *See United States ex rel. Fowler v. Caremark RX, L.L.C.*, 496 F.3d 730, 743 (7th Cir. 2007) ("[Relator's position] would transform every inaccurate claim into a false claim and consequently replace the Act's knowledge requirement with a strict liability standard."); *United States ex rel. Crenshaw v. Degayner*, 622 F. Supp. 2d 1258, 1274 (M.D. Fla. 2008) ("The False Claims Act is not a strict liability statute.").

[4] *See, e.g., Williams v. C Martin Co.*, No. 07-6592, 2014 U.S. Dist. LEXIS 57265, at *21 n.3 (E.D. La. Apr. 24, 2014) ("[T]he FCA's scienter requirement is much higher than negligence."); *United States ex rel. Yannacopoulos v. Gen. Dynamics*, 652 F.3d 818, 832 (7th Cir. 2011) ("Innocent mistakes or negligence are not actionable under [the FCA]."); *Abner v. Jewish Hosp. Health Care Servs.*, No. 4:05-cv-0106-DFH-WGH, 2008 U.S. Dist. LEXIS 61985, at *15 (S.D. Ind. Aug. 13, 2008) ("Billing errors are not actionable, but material lies are actionable."); *United States ex rel. Garst v. Lockheed Martin Corp.*, 328 F.3d 374, 376 (7th Cir. 2003) ("the False Claims Act condemns fraud but not negligent errors or omissions.").

Cir. 1991) ("[W]hile Rule 9(b) permits scienter to be demonstrated by inference, this 'must not be mistaken for license to base claims of fraud on speculation and conclusory allegations.' . . . . An ample factual basis must be supplied to support the charges."); *United States ex rel. Stennett v. Premier Rehab. Hosp.*, No. 08-0782, 2011 U.S. Dist. LEXIS 22595, at *32 (W.D. La. Jan. 21, 2011); *Wood ex rel. United States v. Applied Research Assocs.*, 328 Fed. App'x 744, 750 (2d Cir. 2009).

Relator argues that he has identified "at least 1,400 products" that were sold in Indiana grocery stores that should have been taxed, and that this number suggests something more egregious than mere negligence. However, as Defendants note, it is impossible to know whether this is a substantial number of products without knowing the universe from which it is derived. If Defendants sold a half million products in Indiana during the relevant time, 1,400 items would be an error rate of less than .3%. A court may not infer scienter from this. *See, e.g., United States v. Warden*, 635 F.3d 866, 867 (7th Cir. 2011) (no reason to infer that error rate of 16% was more than negligence). Moreover, it is clear that a handful of potential classification errors account for a large number of the errors he claims. For example, Relator believes that Defendants made a mistake in classifying nuts; this accounts for approximately 130 items on his list. Relator believes that Defendants similarly should have classified certain popcorns as candies; approximately 50 items on his list are types of popcorn. Many of the issues seem to be of this variety. He has not alleged a comprehensive scheme to evade taxes on 1400 items; he has alleged mistakes regarding a smaller number of the many thousands of *types* of things sold.

Relator argues that because Defendants are large, sophisticated companies, they should have had the resources to do a better job collecting sales tax on the products he identifies. As Defendants point out, this is not intuitively true as a practical matter. Larger companies deal with

numerous systems, millions of products, thousands of suppliers, all changing every day, all of which makes it harder to achieve perfection. But for purposes of the motion before the Court, sophistication and size are not substitutes for scienter as a matter of law. *See Thulin v. Shopko Stores Operating Co., LLC*, 771 F.3d 994, 1000-01 (7th Cir. 2014) (allegations that a corporation "acted with reckless disregard . . . simply by virtue of its size, sophistication, or reach" fail to assert scienter because, although they "may suggest a possibility" the defendant "acted with reckless disregard," they do not nudge the claims "across the line from conceivable to plausible").

The nature of the fraud alleged in this case makes it particularly unlikely that there was any scienter in the absence of facts to suggest otherwise. Most frauds under false claims acts involve the defendant pocketing money or property that rightfully belongs to the government. Here, Relator does not allege that any of the Defendants collected sales tax owed to the state and kept it; Relator alleges that this money was never collected at all. The absence of any financial motive to commit the fraud alleged makes the allegation of scienter here implausible, as the Seventh Circuit explained in *United States ex rel. Lamers v. City of Green Bay*, 168 F.3d 1013 (7th Cir. 1999):

> Lamers really asks us to infer, based on a handful of technical violations committed by individual drivers in a complex new busing program, that GBT's management consciously orchestrated a campaign to deceive the FTA. To make such an inferential leap, at a minimum we would need some motive on the part of the City for the alleged deception. The City had no financial motive to violate the regulations because the types of violations alleged were not cost-saving. There simply is no reasonable inference that the City knowingly misrepresented its compliance in its 1994 Standard Assurances.

Id. at 1019. Indeed, the suggestion of scienter in this case is even less plausible than in *Lamers* because retailers in Indiana are entitled to keep a small percentage of sales tax they collect. Thus, not only did Defendants have no financial motive to engage in the alleged fraud, the alleged scheme in this case would have cost Defendants money.

In construing the Federal FCA, the Supreme Court recently called upon lower courts to ensure "strict enforcement" of the statute's "rigorous" scienter requirements. *Universal Health Servs. v. United States ex rel. Escobar*, 136 S. Ct. 1989, 2002 (2016). Although Relator purports to identify violations of Indiana's regulations concerning the application of sales tax to certain categories of product, courts require scienter precisely because false claims cases are supposed to remedy fraud, not serve as "vehicle[s] for punishing garden-variety . . . regulatory violations." *Id.* at 2003. Because Relator has failed identify an actual fraud here, his claims must be dismissed.

IV. Conclusion

For the foregoing reasons, and upon review of the parties' briefs and the oral argument regarding same, this Court grants Defendants' motion to dismiss.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED by this Court that the Defendants' Motion to Dismiss is **GRANTED**, and that Relator's claims are hereby dismissed with prejudice.

So ordered this 22nd day of March, 2018.

John M. T. Chavis, II, Judge
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Civil Division Number Five

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