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D5 Coalition
980 N. Michigan Avenue, Suite 1120
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Re: Nonprofit Organizational Demographic Information Collection

Dear Colleagues,

In an effort to facilitate greater transparency, GuideStar, in conjunction with D5, has begun the process of collecting and publishing nonprofit board and employment statistics for gender, race, sexual orientation, and disability as part of the GuideStar Exchange. Before doing so, and in response to specific questions generated both internally and by participating organizations, D5 and GuideStar have requested a legal opinion regarding the legality and potential liability created by their proposal. Kindly accept this letter as this firm's response to your request.

In considering your request, I have conducted a non-exhaustive review of statutory, regulatory, and case law from across the United States, as well as legal opinions and publications on this and related subjects. My opinions and recommendations are informed by that research. Particularly in the developing field of equal protection as applied to LGBT employment issues, however, congress as well as state and local legislatures are rapidly passing new laws and, as a result, these opinions should be reconsidered over time. Moreover, state and local governments have passed and continue to pass laws and ordinances that supplement federal legislation; governors are signing executive orders; and courts across the country are reinterpreting existing statutes. In short, it is impossible to synthesize a single rule that is applicable to nonprofits across the United States. Where distinctions in the law afford greater protections in some locations, I have attempted to tailor my recommendations and opinions to fit the most protective rules. Given the variation across jurisdictions, I

strongly suggest that individual participating organizations should consult with local counsel instead of relying on the general conclusions articulated here or on GuideStar's website.

With that caveat, my conclusion is that the demographic tool hosted on the GuideStar website **is unlikely to create liability for participating organizations**. My reasons for reaching this conclusion are given below. In addition to this overarching opinion, you have also asked me to answer the following questions: (1) [Is it illegal to collect demographic information about employees?](#) (2) [Isn't there a risk that by collecting demographic information, nonprofits may accidentally expose employees' private information?](#) (3) [Are nonprofits who are forced to discipline or terminate employees at greater risk of suit if they participate in the demographic tool hosted on the GuideStar website?](#) and (4) [Is it legal to aggregate employees with diverse disabilities into a single class for reporting purposes?](#) My general conclusion is that each of these concerns are unfounded where employers collect data on employees and board members using the format outlined in the demographic tool hosted on the GuideStar website in the version as of March 4, 2015. The rationales underpinning these conclusions are also given below.

I. Introduction.

As a general matter, there is broad consensus in the legal community that:

Beyond pluralistic goals, diverse governance positions nonprofits for better organizational performance. Decisions about organizational mission, strategic direction, and implementation activities and assessment of client-consumer satisfaction and organizational performance are critical governance matters. The decision-making process improves as nonprofits adopt a more pluralistic composition and break the bonds of groupthink.¹

In other words, most legal thinkers agree that diversity of participation, including in the nonprofit sector, allows organizations to most efficiently carry out their

¹ Faith Rivers James, *Nonprofit Pluralism and the Public Trust: Constructing A Transparent, Accountable, and Culturally Competent Board Governance Paradigm*, 9 Berkeley Bus. L.J. 94, 137 (2012).

mission.² In spite of that consensus, however, diversity remains out of reach for many nonprofits. On the contrary, in 2007, the Urban Institute reported that more than half of small and rural nonprofit public charities had no minority directors.³ In contrast, the same study found women to be heavily represented in smaller charities, but to make up just twenty-nine percent of directorships at major nonprofit organizations.⁴ A more recent study indicates that board diversity remains “predominantly Caucasian” and that larger organizations continue to “have a smaller percentage of women[.]”⁵

In 2007, to address this issue, the California state legislature introduced Assembly Bill 624.⁶ As originally introduced, the bill would require “a private foundation with assets over \$250M to collect specified ethnic and gender data pertaining to its governance and grantmaking.”⁷ An amendment to the Bill required disclosure of the sexual orientation of board members and grant recipients as well.⁸ The Bill went on to require that data about the diversity of the private foundations’ board and grantees be made public on the private foundations’ websites.⁹

Assembly Bill 624 drew praise from some quarters,¹⁰ and criticism as “unwarranted government intrusion” from others.¹¹ In particular, the bill was resisted

² Cf., Regina F. Burch, *Worldview Diversity in the Boardroom: A Law and Social Equity Rationale*, 42 Loy. U. Chi. L.J. 585, 626 (2011) (“cultural cognition theory, corporate social responsibility theories and strategies, and critical race theory may shed new light on the value of board diversity in the broad sense and strategies to achieve diversity.”); see, also, Kimberly D. Krawiec, *Building the Basic Course Around Intra-Firm Relations*, 34 Ga. L. Rev. 785, 807 (2000).

³ Francie Ostrower, *Nonprofit Governance in the United States: Findings on Performance and Accountability from the First National Representative Study*, Urban Institute 6 (2007).

⁴ James, at 137.

⁵ *Nonprofit Governance Index*, BoardSource (2010).

⁶ 2007 CA A.B. 624 (Coto).

⁷ *Id.*, Legislative Counsel’s Digest.

⁸ *Id.*, as amended, Jan. 23, 2008.

⁹ *Id.*

¹⁰ See, e.g., Pablo Eisenberg, *Foundations Should Be Required to Disclose Data on Diversity*, *The Chronicle of Philanthropy* (May 1, 2008).

¹¹ See, e.g., *Foundation Diversity Bill is Intrusive and Ineffective*, *The Chronicle of Philanthropy*, (Feb. 1, 2008); *California Bill on Foundation Diversity Misses the Point*, *The Chronicle of Philanthropy* (Feb. 22, 2008).

most strongly by some of the largest grantmakers in the state. Ultimately, in order to defuse further legislative action, the William and Flora Hewlett Foundation, Annenberg Foundation, David and Lucile Packard Foundation, Ahmanson Foundation, Weingart Foundation, and The California Endowment all entered into an agreement with the Bill's sponsor, and pledged a total of \$38 million to "minority-led, nonprofit organizations throughout the state of California. . . helping over 2000 nonprofit grassroots organizations."¹² As a result of the agreement, the Bill was dropped.

Legal writers, however, have continued to urge that greater "transparency in board demographic diversity information is an important tool in the effort to create a more inclusive nonprofit sector. Disclosure of demographic data can provide the impetus for nonprofits to become more diverse."¹³ Where government action was rejected as too intrusive, there have been calls for GuideStar, instead, to take up this task.¹⁴ Perhaps as a result of this pervasive sentiment,¹⁵ important employers in the for-profit sector like Bank of America, IBM, and J.P. Morgan Chase are already voluntarily implementing similar policies. As of the date of this letter, GuideStar has also already successfully published demographic data from 900 voluntary participants in the nonprofit sector.

I. Background: Title VII, the ADA, and State Law.

A collection of laws referred to as Title VII is the protective framework that has the widest application to the proposed demographic portion of the GuideStar Exchange. Title VII prohibits, among other things, discrimination in the workplace on the basis of race, color, religion, sex, or national origin.¹⁶ Specifically, Title VII provides that an

¹² Atkins, Avis & Aguilar, Orson, *A Promise to Diverse Communities: Summary of the Foundation Coalition's Efforts*, The Greenlining Institute, (Jun. 2012), at 7.

¹³ James, at 137.

¹⁴ "Utilizing monitoring entities, such as GuideStar, observers can use diversity governance information to assess the potential governance capabilities of these nonprofit entities." *Id.*

¹⁵ "Academic and public interest in board diversity has grown in recent years and female and minority representation on boards--while still far below their numbers in the population and the workforce--has grown along with it." Lissa Lamkin Broome & Kimberly D. Krawiec, *Signaling Through Board Diversity: Is Anyone Listening?*, 77 U. Cin. L. Rev. 431, 462 (2008).

¹⁶ 42 U.S.C. § 2000e-2

employer may not “fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual’s race, color, religion, sex, or national origin.”¹⁷

Since the demographic questionnaire allows participating organizations to offer information regarding disabled employees, the Americans with Disabilities Act is also relevant. That Act prohibits employers from discriminating against individuals “in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment.”¹⁸

Both Title VII¹⁹ and the Americans with Disabilities Act,²⁰ however, limit their protections to employees, and offer limited or no protection to employers. Participation in a nonprofit’s board does not necessarily mean that an individual loses the protection of anti-discrimination law,²¹ but there are virtually no statutory protections for board members who do not have some other role within a nonprofit.²² As a result, this letter principally considers liability based on discrimination against employees, which term includes board members who may also carry out employee duties within a participating organization.

Until recently, there was little or no federal protection from employment discrimination based on sexual orientation. Some states acted to fill this gap, either through their state legislatures or by executive order. In states that have failed to act,

¹⁷ *Id.*

¹⁸ 42 U.S.C. § 12112.

¹⁹ 42 U.S.C. § 2000e-2.

²⁰ 42 U.S.C. § 12112.

²¹ “The mere fact that a person has a particular title – such as partner, director, or vice president – should not necessarily be used to determine whether he or she is an employee or a proprietor.” *Clackamas Gastroenterology Associates, P. C. v. Wells*, 538 U.S. 440, 450 (2003).

²² *Owens v. S. Dev. Council, Inc.*, 59 F. Supp. 2d 1210, 1216 (M.D. Ala. 1999) *aff’d sub nom. Owens v. S. Dev. Council*, 228 F.3d 415 (11th Cir. 2000) (nonprofit’s board of directors not employees where they performed no traditional employee duties, were engaged in fulltime employment elsewhere, and reported to no other person within the nonprofit).

certain municipalities have passed anti-discrimination measures. The result was that the state of LGBT anti-discrimination laws varies widely across the United States. For instance, California,²³ Colorado,²⁴ Connecticut,²⁵ Delaware,²⁶ Hawaii,²⁷ Illinois,²⁸ Iowa,²⁹ Maine,³⁰ Maryland,³¹ Massachusetts,³² Minnesota,³³ Nevada,³⁴ New Hampshire,³⁵ New Jersey,³⁶ New Mexico,³⁷ New York,³⁸ Oregon,³⁹ Rhode Island,⁴⁰ Vermont,⁴¹ Washington,⁴² and Wisconsin⁴³ each have enacted laws that prohibit employment discrimination on the basis of sexual orientation. Other states have passed less sweeping protections, or have had similar protections put in place by executive order or court decision. In other states, municipalities have acted on their own to prevent discrimination at a local level; Pennsylvania, for instance, has no state-wide law prohibiting discrimination on the basis of sexual orientation in private-sector employment, but the City of Philadelphia has passed a local ordinance that that does.⁴⁴

²³ Cal. Gov't Code § 12940.

²⁴ Colo. Rev. Stat. Ann. § 24-34-402.

²⁵ Conn. Gen. Stat. Ann. § 46a-60.

²⁶ Del. Code Ann. tit. 19, § 711.

²⁷ Haw. Rev. Stat. § 378-2.

²⁸ 775 Ill. Comp. Stat. Ann. 5/1-102.

²⁹ Iowa Code Ann. § 216.6.

³⁰ Me. Rev. Stat. tit. 5, § 4572.

³¹ Md. Code Ann., State Gov't § 20-606.

³² Mass. Gen. Laws Ann. ch. 151B, § 4.

³³ Minn. Stat. Ann. § 363A.08.

³⁴ Nev. Rev. Stat. Ann. § 613.330.

³⁵ N.H. Rev. Stat. Ann. § 354-A:6.

³⁶ N.J. Stat. Ann. § 10:5-12.

³⁷ N.M. Stat. Ann. § 28-1-7.

³⁸ N.Y. Exec. Law § 296.

³⁹ Or. Rev. Stat. Ann. § 659A.030.

⁴⁰ R.I. Gen. Laws Ann. § 28-5-7.

⁴¹ Vt. Stat. Ann. tit. 21, § 495.

⁴² Wash. Rev. Code Ann. § 49.60.030.

⁴³ Wis. Stat. Ann. § 111.31.

⁴⁴ Philadelphia Fair Practices Ordinance § 9-1104.

In *Complainant v. Foxx*, however, the EEOC radically revised its previous treatment of discrimination on the basis of sexual orientation.⁴⁵ Specifically, in *Foxx*, the EEOC concluded that sexual orientation discrimination:

. . . is sex discrimination because it necessarily entails treating an employee less favorably because of the employee's sex. For example, assume that an employer suspends a lesbian employee for displaying a photo of her female spouse on her desk, but does not suspend a male employee for displaying a photo of his female spouse on his desk. The lesbian employee in that example can allege that her employer took an adverse action against her that the employer would not have taken had she been male.⁴⁶

In other words, it is now illegal in every jurisdiction to discriminate against employees on the basis of their sexual orientation.

The application of this new standard will raise difficult questions in the future. It is unclear, for instance, whether transgender employees will receive the same protections. It is similarly unclear what circumstances would create a 'compelling' reason to justify discrimination based on sexual orientation and identity. Finally, in spite of the *Foxx* decision, many local and state ordinances remain in effect, and may offer *greater* protections than those afforded by federal law. The recently proposed – and rejected – HERO campaign in Austin Texas is just one notable example. As a result of the unsettled nature of this field, coupled with the uneven patchwork of local laws, I strongly recommend that employers consult with local counsel to determine the exact contours of employment law in their state and municipality.

II. Is it illegal to collect demographic information about employees?

In the majority of situations, it is well-settled that “generalized initiatives to increase the racial diversity of a workplace, **including the keeping of racial demographic statistics**, meant to enable an organization to effectively service an increasingly diverse customer base are lawful, to say nothing of the laudable goal of

⁴⁵ No. 0120133080, 2015 WL 4397641 (E.E.O.C. July 15, 2015).

⁴⁶ *Id.*; see, also, *EEOC Extends Workplace Protections to Gay & Lesbian Employees*, 129 Harv. L. Rev. 618 (Dec. 2015).

expanding the horizons of opportunity for more and more members of this great pluralistic society.”⁴⁷ My own research has uncovered not one instance in which collection of demographic data relevant to employees or board members has resulted in liability for the employer absent clear misconduct that occurred in addition to that collection. In fact, the good-faith collection of such demographic data has, in one instance I have discovered, resulted in a *reduction* in damages paid out for unrelated corporate misconduct.⁴⁸ Simply put, it is my conclusion that the collection of the information proposed is not improper.

Concerns have been raised that collection of information related to sexual orientation in particular may be illegal. My research does not support this conclusion. Instead, as noted above, the EEOC now treats discrimination on the basis of orientation identically with discrimination on the basis of gender; since there is no rule prohibiting the collection of information related to gender, there is no reason to believe that LGBT employees enjoy *greater* protections based on their orientation.

III. Isn't there a risk that by collecting demographic information, nonprofits may accidentally expose employees' private information?

There has also been concern that collecting and publishing information regarding sexual orientation may result in the improper disclosure of sensitive information, 'outing' colleagues who would otherwise prefer their sexual orientation to remain private or who actively conceal that they are LGBT.⁴⁹ While I laud the sensitivity the

⁴⁷ *Roy v. Soar Corp.*, No. CIV.A. 13-2846, 2014 WL 4209549, at *7 (E.D. Pa. Aug. 25, 2014) (emphasis added); citing, *Reed v. Agilent Technologies, Inc.*, 174 F. Supp. 2d 176, 187 (D. Del. 2001).

⁴⁸ *Bryant v. Aiken Reg'l Med. Centers Inc.*, 333 F.3d 536, 548-49 (4th Cir. 2003) (“ARMC voluntarily monitored departmental demographics as part of an ongoing effort to keep the employee base reflective of the pool of potential employees in the *549 area. These widespread anti-discrimination efforts, the existence of which appellee does not dispute, preclude the award of punitive damages in this case. As the Court noted in *Kolstad*, giving protection from punitive damages to employers who make good-faith efforts to prevent discrimination in the workplace accomplishes Title VII's objective of motivat[ing] employers to detect and deter Title VII violations.”).

⁴⁹ In general, employees' gender and ethnicity are difficult to conceal; sexual orientation is different from other characteristics in this respect.

question shows, I have concluded that the concern underlying the question has no legal basis.

By way of background, my research has revealed no statute or ordinance that penalizes actors that 'out' closeted LGBT individuals. Indeed, in virtually all circumstances, there is no legal protection against being 'outed.'⁵⁰ There are, however, a small number of cases in which courts have signaled that heterosexual plaintiffs may file defamation suits when they were incorrectly 'outed' as gay.⁵¹ I have also discovered a similarly small number of cases in which courts have recognized, under rare circumstances, an invasion of privacy claim for LGBT individuals who are 'outed' without their consent.⁵²

Ultimately, however, this concern is irrelevant to the information to be posted on the GuideStar Exchange for two reasons. First, GuideStar's demographic tool does not collect individualized data, so there is no risk that a participating organization could accidentally publicize an employee's sexual orientation to the Exchange. This protection is reinforced by GuideStar's detailed best-practices for data collection, which require that employees complete surveys anonymously.

Second, the demographic tool only asks participating organizations to provide information on how board members and employees *publicly self-identify*. Employees

⁵⁰ See, generally, Adam J. Kretz, *The Right to Sexual Orientation Privacy: Strengthening Protections for Minors Who Are "Outed" in Schools*, 42 J.L. & Educ. 381, 415 (2013); also, Hilary E. Ware, *Celebrity Privacy Rights and Free Speech: Recalibrating Tort Remedies for "Outed" Celebrities*, 32 Harv. C.R.-C.L. L. Rev. 449, 488 (1997).

⁵¹ *Moricoli v. Schwartz*, 361 N.E.2d 74, 75 (Ill. App. 1977). The ongoing validity of this decision is questionable, since a defamation plaintiff would be required to show that the imputation of homosexuality caused damage to his reputation of such a degree that he was entitled to a judgment and monetary award; the court itself noted that "in view of the changing temper of the times such presumed damage to one's reputation" is increasingly unlikely. *Id.* at 76.

⁵² *Greenwood v. Taft, Stettinius & Hollister*, 663 N.E.2d 1030, 1036 (Oh. App. 1995) (finding potential invasion of privacy claim for gay employee against employer who disclosed sexual orientation information to third-parties); *Diaz v. Oakland Tribune, Inc.*, 139 Cal. App. 3d 118, 136, (Cal. App. 1983) (trans student successfully filed suit against newspaper that outed her); but, see *Nguon v. Wolf*, 517 F. Supp. 2d 1177, 1199 (C.D. Cal. 2007) (finding no violation of state or common law where a school principal inadvertently outed a minor student to her parents).

and board members who do not publicly self-identify as LGBT – or who limit their public self-identification as LGBT to certain audiences – should not list themselves as LGBT for purposes of the Exchange. Alternatively, employees providing information to participating organizations for submission to the Exchange are free to decline to answer this or other questions that they are uncomfortable with. Simply put, the proposed questionnaire and best practices do not risk ‘outing’ stakeholders because only stakeholders who are already ‘out’ should publicly self-identify as LGBT.

IV. Are nonprofits who are forced to discipline or terminate employees at greater risk of suit if they participate in the demographic tool on the GuideStar website?

Some have suggested that collecting demographic information about employees and board members might create liability if an employee reveals that he is a member of a suspect class and, thereafter, is disciplined or terminated. The specific concern is that discipline that follows an employee’s self-identification could be confused with discipline that is *caused* by the employee’s revelation that he belongs to a suspect class. While this is a fair concern, it is my belief that the many benefits associated with appropriate data-collection practices outweigh the *de minimis* hazards associated with this issue.

Preliminarily, as noted above, the demographic tool includes an explanation of data-collection best practices, and recommends that employers collect employee demographic information anonymously.⁵³ This best-practice encourages employee privacy, but also prevents employers from learning information that could form the basis for inappropriate discrimination. Courts have recognized that anonymous collection practices can insulate employers from even the appearance of impropriety and, accordingly, this alone may be sufficient to defeat the *post hoc ergo propter hoc* argument.⁵⁴

⁵³ “An employer cannot intentionally discriminate against an individual on the basis of race if he is unaware of that individual’s race.” *Philbrick v. Holder*, 583 F. App’x 478, 483 (6th Cir. 2014).

⁵⁴ *Simmons v. Am. Tel. & Tel., Inc.*, No. 96CIV.2844(MBM)(LB), 1998 WL 751659, at *8 (S.D.N.Y. Oct. 28, 1998) *aff’d sub nom. Simmons v. AT & T Corp.*, 182 F.3d 901 (2d Cir. 1999) (“AT & T hiring managers did not have access to age or race data through ECOS.

In addition to this layer of protection, many of the characteristics that the demographic questionnaire asks employers to collect are of a kind that would normally already be known by an employer. Most employers, for instance, already know the gender of their employees. Thus, it would be difficult for an employee to file suit against an employer on the theory that the employee was terminated when his employer learned, for the first time, that he was male. Indeed, because the questionnaire is only seeking information about how employees publicly self-identify, it should be impossible for employers to learn information while tabulating survey results that the employee has not already publicly disclosed. Therefore, less observable characteristics like sexual orientation and certain disabilities should also come as no surprise to employers.

For many firms, moreover, the process of collecting demographic data is already a federal requirement. The EEOC, for instance, requires employers with 100 or more employees to collect, file, and retain information regarding their employees' race and gender.⁵⁵ My research has revealed no case in which merely collecting demographic information about employees has created liability for an employer.⁵⁶ On the contrary, as noted above, I have instead discovered at least one instance in which an employer's collection of demographic data resulted in a reduction in liability in an unrelated employment action.⁵⁷ Given the extremely limited circumstances in which collecting anonymous and voluntarily supplied data about employees' public self-identification could lead to liability, counterbalanced against the recognized benefits such collection offers and potential for a reduction in liability, I ultimately conclude that the likelihood of a material increase in liability is small.⁵⁸

If they did not have that data, no reasonable jury could infer that the managers denied her positions based on those factors.”)

⁵⁵ 29 C.F.R. § 1602.7.

⁵⁶ *Hall v. Kutztown Univ. of Pennsylvania State Sys. of Higher Educ.*, No. CIV. A. 96-4516, 1998 WL 10233, at *39 (E.D. Pa. Jan. 12, 1998) (Collection of demographic information coupled with affirmative action policy not discriminatory against white males).

⁵⁷ *Bryant*, 333 F.3d at 548-49.

⁵⁸ Importantly, this analysis presupposes that employers are *not* discriminating against employees based on characteristics reported in GuideStar's questionnaire. Employers who propose to use data collected through this survey in order to winnow out employees who are members of protected classes may avoid scrutiny for a short time for all the reasons given above, but are unlikely to ultimately avoid liability.

V. Is it legal to aggregate employees with diverse disabilities into a single class for reporting purposes?

A final concern that has been raised is that it may be inappropriate to aggregate employees as “disabled” without acknowledging the variation in types and severities of disability. While I agree that collecting more granular information would have value, I see no basis for the imposition of liability as a result of the proposed aggregation. On the contrary, the ADA imposes a similarly aggregated definition of disability:

The term “disability” means, with respect to an individual (A) a physical or mental impairment that substantially limits one or more major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment.⁵⁹

Major life activities include, but are not limited to caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.⁶⁰ Major life activities also include major bodily functions, such as functions of the immune system, normal cell growth, digestive, bowel, bladder, neurological, brain, respiratory, circulatory, endocrine, and reproductive functions.⁶¹ Disabilities are defined to exist even where they are ameliorated by medication, prosthetics, or reasonable accommodations, but do not include impairments that are remedied by the use of ordinary eyeglasses or contact lenses.⁶² Based on the broad federal definition of disability, I see no reason that merely collecting data on employees who publicly self-identify as “disabled,” without soliciting more detailed information, would create liability for a participating company.

VI. Conclusion.

On the basis of my research, I see no likely material increase in liability for participating organizations who ask board members, full and part-time employees, or volunteers to voluntarily provide anonymous demographic information based on their

⁵⁹ 42 U.S.C. § 12102(1).

⁶⁰ *Id.* at § 12102 (2)(A).

⁶¹ *Id.* at § 12102 (2)(B).

⁶² *Id.* at § 1202 (4)(E).

own public self-identification. The proposed best-practices for information collection offered by GuideStar and D5 through the demographic tool hosted on the GuideStar website should protect organizations that employ those practices carefully and in good-faith. In the event you have additional questions, I look forward to the opportunity to research and respond to them.

Yours,



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