

1 FACTS

2 1. Overview.

3 Federal Bureau of Investigation Special Agent (SA) Nate Elias
4 authored an affidavit in support of a Federal application for
5 authorization to intercept two telephones, (209) 324-9449 and (209)
6 669-7404, that were being used by defendant Robert C. Holloway,
7 hereinafter R. Holloway, that was presented to Federal District Judge
8 Oliver W. Wanger on or about September 7, 2007. This affidavit is
9 attached hereto as Government's Exhibit 1.

10 The affidavit explained that R. Holloway and members of the
11 Holloway Criminal Enterprise, the Target Subjects, were engaged in
12 certain criminal activity named in the affidavit. Govt. Exh. 1, p.
13 6-7.

14 The affidavit sets forth background information concerning the
15 Hells Angels Motorcycle Club (HAMC) and information regarding the
16 establishment of a Modesto chapter. Id. at 21-23. Included in the
17 background section of the affidavit is the connection between the
18 HAMC, other outlaw motorcycle gangs (OMGs), and motorcycle shops in
19 their respective areas. Id. at 24.

20 The background section contains information concerning R.
21 Holloway and his connection to current and retired members of law
22 enforcement in Stanislaus and Merced counties leading investigators
23 to suspect that R. Holloway was privy to inside, confidential, and
24 law enforcement sensitive information. Id. at 24-44.

25 2. Probable Cause for Target Telephones 1 and 2: 9/7/2007.

26 Between 1999 and 2003, motorcycles and a Harley Davidson engine
27 being shipped by Road Dog Cycle (RDC) and destined for Finland and
28 Japan were seized by law enforcement. The investigation at this

1 point led ICE SSA Matt Rice to believe that R. Holloway and RDC were
2 selling and exporting stolen motorcycles and stolen motorcycle parts
3 to countries where they were worth considerably more than in the
4 United States and where they may escape detection. Id. p. 45-46.

5 Information concerning R. Holloway's association with HAMC
6 member Randy Picchi was received from an untested informant. The
7 information was that Picchi and R. Holloway were storing chemicals to
8 make methamphetamine was received from this informant who reported to
9 be a methamphetamine cook for the HAMC. Id. 46. Picchi has been
10 previously convicted of controlled substances offenses. A parole
11 search at Picchi's residence yielded a piece of paper with the
12 notation 'Road dog Cycle' along with R. Holloway's cell number,
13 Target Telephone 1, and the number for the RDC business line, Target
14 Telephone 2. MSM, a cutting agent frequently found at
15 methamphetamine labs and places where controlled substances are
16 prepared for distribution was also found. Id. at 47.

17 In July 2005, a second untested CI (CI#2) reported to
18 investigators that approximately three years prior, the CI was asked
19 by an unidentified third party to deliver controlled substances
20 obtained from Randy Picchi for subsequent distribution. CI#2 was
21 paid \$1,000 to deliver a box, he was told contained a carburetor, to
22 Road Dog Cycle. CI#2 had worked at RDC in the past. Based on the
23 amount CI#2 was paid, CI#2 believed either the box or carburetor
24 contained a controlled substance. When CI#2 delivered the
25 carburetor, the unidentified person who received the carburetor said
26 it was, "a very special part." Id. at 48-49.

27 On or about October 5, 2004, Richard Baptista reported to the
28 Stanislaus County Sheriff's Department that he was the victim of a

1 car jacking (SCSD case S04-39461 and SCDA case 05-DA-0082) and that
2 R. Holloway as well as Anthony Fantacone were the perpetrators. Id.
3 at 47. Baptista reported that R. Holloway forced him to sign a piece
4 of paper giving him (Holloway) the truck in lieu of the money
5 Baptista owed him. The matter was investigated by the then
6 Undersheriff Myron Larson, a friend of R. Holloway's and no charges
7 were ever submitted to the Stanislaus County DA's Office for filing.
8 Shortly after reporting the incident to Larson, Baptista received a
9 threatening telephone call from R. Holloway. Id. at 48.

10 Two ATF undercover agents (UCA) went to RDC and met with R.
11 Holloway. While there, the UCAs noted HAMC paraphernalia inside RDC.
12 R. Holloway told the UCAs that the government was watching them and
13 that his phones were tapped. He also told them that there were so
14 many methamphetamine labs in the area, they should pay him tax. Id.
15 at 50. They overheard R. Holloway telling someone during a telephone
16 conversation being had over his cellular telephone that he 'sent that
17 one to Japan.' R. Holloway invited them to a party that was
18 sponsored by the HAMC Nomads chapter. While at the party, R.
19 Holloway introduced them to "Boston", Jus Brothers MC president. He
20 told them that he (Holloway) was the one to talk to about exports.
21 The UCAs returned to RDC approximately six weeks later to pick up a
22 motorcycle that RDC was repairing, a card legitimizing the UCAs cover
23 story was missing and R. Holloway vouched for "Boston" and the Jus
24 Brothers MC. Id. at 52.

25 An investigation was conducted by DMV regarding RDC and R.
26 Holloway re-titling three motorcycles by having duplicate VIN numbers
27 issued. The VIN numbers were already in use issued to motorcycles
28 that had current and valid registrations, and the motorcycles had all

1 been purchased at RDC. R. Holloway admitted to shipping one of the
2 motorcycles to Japan and disassembling two of them. A CHP Officer
3 was identified as doing all three of the VIN verifications. R.
4 Holloway had tried to register the motorcycles using the cloned VIN
5 numbers through the Los Banos DMV with the help of the CHP officer
6 conducting the verifications and a now former DMV employee. It is
7 interesting to note that the Los Banos DMV office is in Merced county
8 and RDC is located in Stanislaus county. The investigation resulted
9 in the matter being submitted to the Stanislaus County DA's Office
10 but charges had not been filed at the time of the writing of the
11 affidavit. Id. at 53.

12 Pen registers were initiated by the FBI in June 12, 2006 and a
13 review of the tolls showed that the target telephones were in contact
14 with numbers current FBI investigations. Some of the investigations
15 involved outlaw motorcycle gangs and three of the investigations
16 international shipping companies. Id. at 54.

17 An untested CI, CI#6, told investigators he was asked by R.
18 Holloway to assist in transporting four kilograms of methamphetamine.
19 R. Holloway became upset with CI#6 when he was advised that CI#6 did
20 not have a motorcycle and told CI#6 not to come around looking for a
21 job if he wasn't ready to 'roll'. Id. at 55.

22 On September 8, 2006, Confidential Witness (CW) #1 saw R.
23 Holloway, Brent Holloway, and Danny Dugranrut meet with HAMC members
24 Kellon (Kelly) Brenton, Angelo Jacobo and Michael Pleasant at RDC.
25 CW#1 saw Brent give Brenton cash for motorcycle parts. R. Holloway
26 shut his office door in order to talk to Brenton and Pleasant in
27 private. Id. at 57.

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1 Robert Dominguez reported to the Modesto Police Department that
2 he was threatened while at a RDC party. He was called 'rat' and
3 'snitch' presumably arising out of a matter where Dominguez was a
4 victim/witness and several HAMC members went to prison. Dominguez
5 was chased from the party by approximately 100 of the OMG party
6 guests. CW#1 heard R. Holloway say that once he found out who
7 Dominguez was, he'd 'take care of him.' Id. at 58.

8 In January 2007, R. Holloway was overheard talking on his
9 cellular telephone at a swap meet to a person who had a motorcycle
10 for sale. R. Holloway told him that his 'new Japanese guy' might be
11 interested. R. Holloway also talked about sending motorcycles to
12 Japan using Yoshi, a target subject, and a connection in Japan. Id.
13 65-66.

14 R. Holloway and Brent Holloway went to the National Powersports
15 auction in February 2007 where they purchased multiple motorcycles.
16 Prior to going to the auction, R. Holloway told Brent to look for
17 certain models of wrecked motorcycles. The affiant theorized that
18 these wrecked motorcycles allowed R. Holloway to build a custom
19 motorcycle using stolen parts then obtain a cloned title. Id. at 68-
20 69.

21 CW1 told investigators that R. Holloway was in possession of a
22 frame where the neck had been removed and replaced with another neck
23 in such a manner that is a violation of state and federal law.
24 Information from CWs was received this frame and other items were to
25 be transported to Bakersfield. Surveillance saw retired police
26 officer Robert Finley transport two motorcycles in a trailer to a
27 business in Bakersfield that, due to the way it was painted, may be
28 affiliated with the HAMC. Surveillance saw Finley and others

1 unloading a frame that matched the description given by CW#1. Id. at
2 73. Items including a vehicle loaded with parts, boxes, motorcycles,
3 and the previously described frame were loaded into a cargo shipping
4 container. While this activity was taking place there were numerous
5 calls between Finley and R. Holloway's cellular telephone. This
6 shipping container was driven to Los Angeles and loaded on the MS
7 Eagle to be shipped overseas. Id. at 75. Customs officials opened
8 the container and found two automobiles, three motorcycles, one
9 motorcycle frame, and numerous parts. One of the motorcycle frames
10 had what appeared to be an altered identification number. The frame
11 and two of the motorcycles had no record on file and the third
12 motorcycle was listed as 'salvaged' when a DMV records check was
13 done. The container was sealed and allowed to ship so as not to
14 alert anyone to the existence of the investigation. Id. at 77.

15 CW#2 spoke to Ronald Badertscher who stated that he ships
16 motorcycles overseas and he has stamps to alter identification
17 numbers to make them look like original factory Harley Davidson
18 numbers. Badertscher said he regularly does business with RDC. He
19 further told CW#2 that he will stuff a shipping container full of
20 miscellaneous items so as to avoid detection of the contraband he is
21 shipping. Between March 23, 2007 and April 2, 2007, there were 9
22 calls between Badertscher's two telephones and RDC. The
23 aforementioned container left Bakersfield on March 29, 2007. There
24 were 150 calls over a 13 month period of time, July 2006 and August
25 2007, between Badertscher's telephone and the target telephones.

26 CW#1 asked R. Holloway for extra work and was told that he could
27 do collections as R. Holloway had people who needed to get 'socked'.
28 In May, 2007, R. Holloway asked CW#1 if he could make collections for

1 him and that he had someone he wanted beaten up over a \$2,000 debt
2 owed to RDC. Id. at 80.

3 In May 2007, Bill Litt told CW#2 that he had purchased a
4 motorcycle from RDC but the CHP would not register it due to problems
5 with the VIN, which appeared to CW#2 to be re-stamped. Eventually,
6 the CHP seized the two engine cases as part of their investigation.
7 Litt told CW#2 two different stories - that the motorcycle was
8 purchased from Aguirre's, and that it was purchased from a Harley
9 Davidson dealership in San Jose. A RDC employee, Brian Hannah, told
10 CW#2 that Litt had come to RDC, spoken with R. Holloway and Holloway
11 told him not to tell the CHP or anyone that the motorcycle had been
12 purchased from RDC. Per Hannah, R. Holloway told Litt that he would
13 buy him another set of engine cases. Id. at 83.

14 In June 2007, a Fresno HAMC chapter member came into RDC and
15 asked R. Holloway for clean title to a Harley Davidson that was
16 reported as stolen. R. Holloway was overheard telling him that he
17 had a stamp that could change the numbers and he could register it as
18 a special construction motorcycle. Later that day, CW#1 discussed
19 with R. Holloway getting a motorcycle for "cheap" inferring it to be
20 stolen. R. Holloway offered to assist him and said he had a stripped
21 almost brand new motorcycle that was missing the frame and engine
22 case - which contains the numbers- had been removed. R. Holloway
23 offered to assist him with this but told him he had to stay out of
24 the exchange and that the motorcycle could not be at RDC. Id. at 88.
25 On June 29, 2007, utilizing target telephone 1, R. Holloway told CW#1
26 that he would do the VIN verification for him when CW#1 expressed
27 concern over registering a stolen motorcycle. Id. at 91. At the
28 time the motorcycle was being delivered, surveillance officers saw

1 Merced HAMC chapter president Ray Heffington and a prospect in the
2 truck making the delivery. After they left, R. Holloway had CW#1
3 come back and they loaded the parts into CW#1's truck. R. Holloway
4 and CW#1 discussed where to look for VIN numbers on the motorcycle
5 parts. CW#1 said he knew it was the "red and white" meaning HAMC
6 making the delivery and R. Holloway told him that the only other
7 one's it could have been were the East Bay Dragons, who wanted him to
8 buy ten bikes a week from them. Id. at 94. Based on numbers
9 observed on the motorcycle, the parts were determined to have come
10 from a Harley Davidson purchased by and registered Donald Foster in
11 Fresno, CA. Id. at 101. The loan payments were current and the
12 motorcycle was not reported as stolen.

13 Between June 2006 and August 277, there were numerous calls to
14 and from telephones subscribed to or used by HAMC members and others
15 involved in the buying and selling of stolen motorcycles noted in the
16 pen register information received. Id. at 105-106. Also noted in
17 reviewing the pen register information for the same period of time,
18 the target telephones were in contact with telephones associated with
19 active and retired law enforcement officers: Robert Finley, Capt.
20 Raul DeLeon, Rick Gilstrap, Myron Larson, Robert Buettler, Joe Tyler
21 and Lawrence Mejia.

22 3. Necessity for Interception.

23 Agent Elias states that based upon his experience and on
24 information provided to him by other agents and law enforcement
25 officers involved in this investigation, the use of telephones is
26 considered the most efficient and timely way to facilitate and
27 conduct such a complex criminal enterprise.

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1 The affidavit sets forth that the pen register information have
2 helped confirm that R. Holloway is cautious in conducting his
3 business. For example, TT#1 -the cellular phone - receives
4 disproportional amount of incoming calls while the outgoing calls are
5 made on TT#2. Id. at 108. Also noted by the affiant is that R.
6 Holloway was at one time an investigator who conducted long term
7 narcotics investigations, so he would be acutely aware of the
8 investigative techniques utilized by law enforcement. Id. at 109.
9 It became apparent that R. Holloway was shielding himself by
10 utilizing law enforcement contacts to gain information.

11 Agent Elias states that it is necessary to intercept wire and
12 electronic communications over Target Phones because the
13 investigation to date had not revealed the extent of the criminal
14 enterprise being operated by R. Holloway, D.B.A. Road Dog Cycle,
15 members of the Hells Angels Motorcycle Club, and other Target
16 Subjects, named and as yet unnamed. Although previous criminal
17 investigations had been developed which demonstrate on-going criminal
18 activity on the part of BR. Holloway, D.B.A. Road Dog Cycle, members
19 of the Hells Angels Motorcycle Club, and other Target Subjects, named
20 and as yet unnamed, investigators had yet to fully identify the
21 extent of the criminal organization, to include possible law
22 enforcement corruption, and the totality of the ongoing criminal
23 activity. Id. at 109.

24 Agent Elias explained that the interception of wire and
25 electronic communications over the Target Phones is necessary because
26 traditional investigative techniques have been tried and failed or
27 appear reasonably unlikely to succeed if tried, or too dangerous to
28 be tried. Agent Elias opined that the goals of the investigation,

1 namely, (a) full extent of the participation of the Target Subjects,
2 their sources of stolen motorcycles and motorcycle parts, their
3 transporters, their financiers, their distributors, and their
4 customers in the Named Offenses; (b) dates, times, and places for
5 commission of their criminal enterprise of trafficking stolen motor
6 vehicles, motor vehicle parts and other Named Offenses, (c) the
7 location, receipt, administration, control, management and
8 disposition of stolen motor vehicles and motor vehicle parts, the
9 proceeds, and the items used to alter the identification numbers of
10 stolen motorcycles and stolen motorcycle parts used in the continuing
11 criminal enterprise and other Named Offenses; and (d) nature, scope,
12 places and methods of operation, could not be met without
13 interception. Id. at 111.

14 The agent then described each of the investigative techniques
15 and their applicability to this investigation.

16 A. Physical Surveillance. Id. at 111-13.

17 Although many hours of surveillance was conducted during the
18 course of the investigation as detailed in the affidavit, it has
19 produced limited results. Agent Elias explained that one factor that
20 limited the effectiveness of the physical surveillance was the fact
21 that R. Holloway and Robert Finley are former law enforcement
22 officers and they are savvy to surveillance, and they are familiar
23 with and employ counter-surveillance techniques. Id. at 112.
24 Additionally, Agent Elias states that the benefit of physical
25 surveillance is limited in that it is often difficult to determine
26 the legitimacy of the activities of those being surveilled without
27 interception. Id.

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1 Further, even if co-conspirators were to be seen by agents, this
2 would not be sufficient to link these individuals to either the
3 telephone numbers they are using to conduct their continuing criminal
4 enterprise of trafficking stolen motorcycles and motorcycle parts
5 business, and/or other Named Offenses. Additionally, the areas in
6 which illicit activities were observed, did not lend themselves to
7 covert surveillance. The town of Denair, CA, the City of Turlock
8 and the rural area of Stanislaus County, of which the criminal
9 enterprise most specifically operated in, are small communities in
10 which the locals know who belongs there and who does not. This made
11 covert surveillance extremely difficult and Agent Elias stated that
12 this would jeopardize the investigative objectives. Id. at 113.

13 B. Use of Confidential Informants and Sources. Id.

14 Even though the FBI used confidential witnesses, they did not
15 have the ability to infiltrate the organization to the point that the
16 goals of the investigation could be satisfied. While these sources
17 by their very position provide information, they are not currently
18 involved in the criminal enterprise such that a full picture could be
19 obtained. Even though CW#1 worked at RDC, that still was not enough
20 to satisfy the goals. Often times, as noted in the affidavit, R.
21 Holloway would speak to others, notably HAMC members, behind closed
22 doors and CW#1 was not privy to that information. Additionally, the
23 risk to these confidential witnesses is great. During a December 14,
24 2006, consensually recorded conversation with a confidential witness,
25 R. Holloway discussed with the confidential witness the recent event
26 of the arrest of a law enforcement officer and said to the source
27 that he thought the officer was "smart enough to know that there
28 could be serious consequences" if he "talked." Id. at 114. Also,

1 the HAMC has a history of retaliating against cooperating defendants
2 therefore, over the years law enforcement historically has not been
3 successful in developing productive cooperating defendants. No
4 informants as to the money laundering aspect of the investigation had
5 been developed. Id. As such, Agent Elias stated that the use of
6 cooperating witnesses or further interviews is not presently an
7 alternative to the electronic surveillance and interception.

8 Additionally, there were no cooperating co-defendants that were
9 developed during the investigation. Although HAMC member Randy
10 Picchi was arrested and pleaded guilty, there was not a cooperation
11 clause nor did he offer to cooperate. He provided no information
12 regarding the target subjects and in fact disclosed that R. Holloway
13 was named in some of his court documents. Given this, Agent Elias
14 felt that Picchi should not be approached to cooperate in order to
15 maintain the confidential nature of the investigation. Id.

16 For those reasons, Agent Elias concluded that the further use of
17 a confidential witnesses would not successfully achieve all the goals
18 of the investigation.

19 C. Use of Undercover Agents. Id. at 115.

20 Although undercover agents (UCA) from ATF were utilized, their
21 effectiveness was limited. While R. Holloway introduced them to
22 several OMG members at a party as noted in the affidavit, that was
23 the extent of their activity. There was not at the time of the
24 submission of the affidavit an opportunity to introduce additional
25 UCAs. It was Agent Elias' experience that members of the Holloway
26 CE, HAMC members, other outlaw motorcycle gang members, and drug
27 traffickers became invariably suspicious of anyone with whom they had
28 not dealt with before, someone they had not seen participating in

1 criminal activity or using narcotics, and especially anyone whom they
2 had not known for a long period of time. It was not feasible in
3 Agent Elias' opinion to insert a UCA and expect that person to have
4 meaningful access to high ranking member of the HAMC, or members of
5 R. Holloway's criminal enterprise. Id.

6 For those reasons, Agent Elias concluded that the further use of
7 a UCA would not successfully achieve all the goals of the
8 investigation.

9 D. Use of the Grand Jury. Id. at 115-16.

10 Bringing individuals into the grand jury without knowing that
11 they would be willing to cooperate, would reveal the existence of an
12 investigation and the risk of such disclosure could cause the targets
13 to cease using there telephones, their criminal activity, or to
14 become more secretive of their activities. With the scope of the
15 conspiracy not fully known at that point, the granting of immunity to
16 witnesses would be unwise and premature. Additionally, given the
17 nature of the investigation at that point, the road blocks and the
18 leaks, a grand jury subpoena would only serve to broadcast to the
19 targets the existence of the investigation and that would be would be
20 unwise as well as unproductive.

21 The agent concluded that the use of grand jury subpoenas and
22 immunity, would likely produce evidence and could even in impede the
23 government's investigative objectives.

24 E. Use of Search Warrants. Id. at 116-17.

25 Agent Elias explained while some locations has been identified,
26 all the locations were not presently known to the investigators. It
27 was determined during the investigation through obtaining recorded
28 conversations with R. Holloway, that he consciously used numerous

1 resources to avoid detection. The affidavit documented these
2 resources to include current and former law enforcement contacts,
3 private investigators, as well as fear and intimidation associated
4 with R. Holloway's use of and association with HAMC members. The
5 execution of search warrants at the locations identified at the time
6 would only serve as a confirmation that their activities were being
7 investigated and undermine any further gathering of evidence as to
8 additional locations and unidentified co-conspirators.

9 F. Pen Registers, Trap and Trace, and Telephone Toll
10 Records. Id. at 117-18.

11 Agent Elias explained that the investigation was using pen
12 registers and analyzing toll records to obtain telephone information
13 of the target subjects. However, use of such device can confirm the
14 a contact between two telephones and not the identity of the
15 participants. Nor can the fact of a telephone contact prove that the
16 contact was regarding matters that were criminal in nature. As a
17 historical rather than a "real time" tool, the usefulness is limited.

18 G. Trash Covers. Id. at 118.

19 Agent Elais concluded that attempting to seize and search the
20 trash at RDC would not be productive due to its location at the main
21 intersection in the business district of a rural community.
22 Additionally, R. Holloway's residence is located at the end of a
23 dead-end road in a rural country road. Both locations are such that
24 detection would almost be certain resulting in the targets being
25 alerted and the investigation compromised.

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1 commonsense approach in examining the totality of the circumstances
2 for the probable cause analysis. United States v. Tham, 960 F.2d
3 1391, 1395 (9th Cir. 1992).

4 The decision of a court that there is probable cause to issue an
5 order authorizing electronic surveillance is entitled to substantial
6 deference, and a motion to suppress does not prompt de novo review.
7 Rather, the question raised by a motion to suppress is whether the
8 issuing court had a "substantial basis" for concluding that probable
9 cause existed:

10 [A]fter-the-fact scrutiny by courts of the
11 sufficiency of an affidavit should not take the
12 form of de novo review. A magistrate's
13 "determination of probable cause should be paid
14 great deference by reviewing courts" ... Reflecting
15 this preference for the warrant process, the
16 traditional standard for review of an issuing
17 magistrate's probable cause determination has been
18 that so long as the magistrate had a "substantial
19 basis for... conclud[ing]" that a search would
20 uncover evidence of wrongdoing, the Fourth
21 Amendment requires no more.

17 Gates, 462 U.S. at 236; Massachusetts v. Upton, 466 U.S. 728, 729
18 (1984) ("[t]he task of a reviewing court is not to conduct a de novo
19 determination of probable cause, but only to determine whether there
20 is substantial evidence in the record supporting the magistrate's
21 decision to issue the warrant.").

22 To establish probable cause that R. Holloway was utilizing the
23 target telephones to discuss stolen motorcycle trafficking as well as
24 the other named offenses, Agent Elias reviewed the reports generated
25 by law enforcement agencies, the history of the investigation in
26 which he had been involved, the results achieved thus far, and set
27 forth his experience and training in working these types of
28 investigations. He then described the contents of the telephone

1 conversations, placing them in context in light of the investigation
2 and his training and experience.

3 The defendant objects to the statement of probable cause in a
4 long, rambling diatribe complaining that R. Holloway's character as
5 well as the HAMC was maligned and that Agent Elias' the assertions
6 were not grounded in fact. At one point, the defendant claims that
7 the affidavit acknowledges that there was no evidence that the HAMC
8 was starting a Modesto chapter. Defendant's Motion, at p. 16.

9 Contrary to the defendant's assertions, the affidavit states at p.
10 22:

11 Information provided from unproven sources has
12 indicated that efforts are underway to form a Modesto
13 Chapter of the HAMC. Both Danny Dugranrut and Randy
14 Picchi have been reported to possess a red and white
15 "MODESTO" rocker patch which would be placed on the
16 leather vest or jacket to signify the HAMC Chapter to
17 which the wearer is an "official" member. On
18 February 06, 2007, a HAMC "prospect" Ronald C.
19 Monahan III was stopped while riding a motorcycle and
20 contacted by Modesto Police Department (MPD)
21 officers. The prospect reported to have been a
22 Merced Chapter prospect for the past seven (7)
months. On his person, officers located a list which
included members names, birth dates and "in-dates,"
or anniversary date, to the HAMC. Included in this
list were known members of both the HAMC Merced
Chapter and HAMC Nomads Chapter. Information of this
type is an indicator to your Affiant that the effort
to form a Modesto Chapter of the HAMC is current and
ongoing. It is unknown at this time the formal
status of this effort, the extent of the membership
numbers, leadership titles and suspected
organizational structure.

23 Additionally, a Modesto bottom rocker was found during the service of
24 a search warrant at Danny Dugranrut's residence. Id. at 50. The
25 association between R. Holloway, RDC and the HAMC is fully detailed
26 throughout the affidavit.

27 The defense claims that the assertions regarding the Internal
28 Affairs investigation are baseless and that testimony during the

1 detention hearing showed that Inv. Kirk Bunch was not employed by the
2 county at the time of Holloway's separation thus his statements are
3 unattributed hearsay. Def. Motion at 17. Although the inquiry
4 regarding the validity if the affidavit focuses on the four corners
5 of the document, the government notes that the internal affairs log
6 from 1983, Exhibit 18, received during Robert Holloway's detention
7 re-hearing held in September 2008 shows an entry for Bob Holloway,
8 complainant: Sgt. Tom Hardin, type of complaint: desk break-in, and
9 disposition: sustained. Such a finding certainly defeats the
10 assertion that Inv. Bunch's statements are 'unattributed hearsay.'

11 In reviewing the affidavit as a whole, sets forth probable cause
12 to believe that R. Holloway and the other targets were engaged in the
13 conduct alleged and that the communication facilities listed were
14 being used in the commission of these offenses. The conversation on
15 June 25, 2007 over target telephone #1 clearly related to the
16 trafficking of stolen motorcycle parts. CW#1 expressed that CW#1
17 intended to buy the inferred stolen motorcycle but was concerned as
18 how to legally register a stolen motorcycle. R. Holloway assured
19 CW#1 that there was nothing to worry because he does it "all the
20 time." R. Holloway said it was easy to do and that, "I'll do the VIN
21 verification for you." Bob Holloway ended the telephone conversation
22 by assuring that it was not a problem and that he would help CW1 out
23 with it, telling CW1, "I got you covered, buddy."

24 Courts considering wiretap applications are allowed to rely upon
25 the reasonable interpretations given by experienced law enforcement
26 affiant-agents as to the code, slang or obtuse language used by those
27 persons engaged in allegedly conspiratorial communications. In
28 United States v. Fury, 554 F.2d 522, 530 (2nd Cir. 1977), the

1 detective had interpreted eight conversations as indicating
2 discussions of stolen property. The Court found that the
3 conversations, while "somewhat ambiguous at times," could be
4 reasonably interpreted to indicate what the detective interpreted
5 them to be. Especially in light of what the investigation had
6 already disclosed and the conversations obtained under interception
7 of another defendant's telephone, there was ample demonstration of
8 probable cause. Id. As explained in United States v. Massino, 605
9 F.Supp. 1565, 1573 (S.D.N.Y. 1985):

10 Even though defendants propose innocent
11 explanations for several of the conversations
12 relied upon in the affidavit, the role of a
13 reviewing court in examining the existence of
14 probable cause is not to seek proof beyond a
15 reasonable doubt of involvement in the alleged
16 activity. Not only must the experience of an
17 expert affiant in examining evidence which might
18 appear non-incriminating to a lay person be given
19 certain deference, see Texas v. Brown, 460 U.S. 730
20 (1983), but :

21 ... courts have long recognized that
22 in the context of eavesdropping, an otherwise
23 ambiguous conversation may serve as a predicate for
24 probable cause so long as it is reasonably
25 interpreted. United States v. Aloi, 449 F.Supp.
26 698, 736 (E.D.N.Y. 1977).

27 The information detailed in the affidavit along with the
28 interpretation of the telephone calls made utilizing the target
29 telephones show that R. Holloway and the target subjects were engaged
30 in the distribution of stolen motorcycle parts as well as the other
31 listed offenses.

32 **B. NECESSITY.**

33 Section 2518(1)(c) requires a wiretap application to contain "a
34 full and complete statement as to whether or not other investigative
35 procedures have been tried and failed or why they reasonably appear

1 to be unlikely to succeed if tried or to be too dangerous." 18
2 U.S.C. § 2518(1)(c). A judge may authorize a federal wiretap when he
3 or she determines on the basis of the facts submitted by the
4 applicant that normal investigative procedures (1) have been tried
5 and have failed; or (2) reasonably appear to be unlikely to succeed
6 if tried; or (3) appear to be too dangerous to attempt. 18 U.S.C. §
7 2518(3)(C). This requirement, known as the necessity requirement,
8 exists to ensure that investigators use the tool of electronic
9 surveillance "with restraint" and not as the "initial step in
10 criminal investigations." United States v. Giordano, 416 U.S. 505,
11 515 (1974).

12 The Ninth Circuit has narrowly construed the Giordano "initial
13 step" prohibition, holding that "law enforcement officials need not
14 exhaust every conceivable alternative before obtaining a wiretap."
15 United States v. Maguire, 307 F.3d 1192 (9th Cir. 2002); United
16 States v. Brone, 792 F.2d 1504, 1506 (9th Cir. 1986). The burden
17 imposed by this provision is "not great" and adequacy is to be tested
18 "in a practical and common sense fashion." United States v. Smith,
19 31 F.3d 1294, 1297 (4th Cir. 1994); United States v. Smith, 893 F.2d
20 1573, 1582 (9th Cir. 1990).

21 The defendant disputes that the wiretaps were necessary, arguing
22 that a degree of success resulting from employment of normal
23 investigative means that the continued use of those and other such
24 methods would have sufficed - or at least should have been given a
25 chance to succeed. However, a judge must "determine that ordinary
26 investigative techniques employing "a normal amount of resources"
27 have failed to make the case within "a reasonable period of time."
28 United States v. Bennett, 219 F.3d 1117, 1122 (9th Cir. 2000). The

1 government need not exhaust every conceivable investigative technique
2 to show necessity, which should be interpreted in a practical and
3 commonsense fashion. Id. The Ninth Circuit has consistently held
4 that the wiretap statute "does not mandate the indiscriminate pursuit
5 to the bitter end of every non-electronic device as to every
6 telephone and principal in question to a point where investigation
7 becomes redundant or impractical or the subjects become alerted and
8 the entire investigation aborted by unreasonable insistence upon
9 forlorn hope. Id. The mere attainment of some degree of success
10 during law enforcement's use of traditional investigative methods
11 does not alone serve to extinguish the need for a wiretap. Id. at
12 1122.

13 The Ninth Circuit has reiterated a "common sense approach" to
14 necessity and reaffirmed that "law enforcement officials need not
15 exhaust every conceivable alternative before obtaining a wiretap."
16 United States v. Fernandez, 388 F.3d 1199, 1235-36 (9th Cir. 2004)
17 modified, 425 F.3d 1248 (9th Cir. 2005) (quotation omitted). "What
18 is required is a showing that in the particular investigation normal
19 investigative techniques employing a normal amount of resources have
20 failed to make the case within a reasonable period of time." United
21 States v. Spagnuolo, 549 F.2d 705, 710 (9th Cir. 1977). This Court
22 "uses a standard of reasonableness to evaluate the government's good
23 faith effort to use alternative investigative means or its failure to
24 do so because of danger or low probability of success." Fernandez,
25 388 F.3d at 1236 (quoting United States v. Canales-Gomez, 358 F.3d
26 1221, 1225 (9th Cir. 2004) .

27 Furthermore, if normal investigative means cannot reveal the
28 entire scope of the trafficking or racketeering enterprise, including

1 sources, customers, and details of operation, necessity for
2 wiretapping has been demonstrated. Canales-Gomez, 358 F.3d at 1226.
3 Hence, when normal investigative procedures have been successful in
4 developing evidence against only some of the key members of the
5 targeted conspiracy, necessity for a wiretap still exists where the
6 objective of the investigation is to discover the full scope of the
7 illegal enterprise. Fernandez, 388 F.3d at 1226; United States v.
8 McGuire, 307 F.3d 1192, 1197 (9th Cir. 2002). A wiretap is also
9 necessary if:

10 it gives the government the ability to "develop an
11 effective case." By "an effective case" we meant
12 evidence of guilt beyond a reasonable doubt, not
13 merely evidence sufficient to secure an indictment...
14 . The government's possession of evidence sufficient
15 to indict some conspirators does not bar it from
16 seeking evidence against others.

17 McGuire, 307 F.3d at 1198 (citations omitted). Indeed, the court has
18 held that:

19 [T]he government is to be commended for its
20 interest in wiretap evidence, which, compared to
21 the word of an informant either in the field or in
22 court, is the gold standard when it comes to
23 trustworthy evidence. The truth-seeking function
24 of our courts is greatly enhanced when the
25 evidence used is not tainted by its immediate
26 informant source and has been cleansed of the
27 baggage that always comes with them. Moreover,
28 wiretap evidence out of the mouths of defendants
29 is valuable corroboration of informant testimony.
30 Such evidence serves also to ensure that what
31 investigators are being told by informants is
32 accurate, a very valuable function that guards
33 against the indictment of the innocent.

34 Canales-Gomez, 358 F.3d at 1227. As set forth above, Agent Elias'
35 affidavit contained a full and complete statement of necessity, and
36 explained why each of these traditional techniques would not
37 accomplish the goals of the investigation.

38 //

1 As noted above, to demonstrate necessity, it is not necessary
2 that law enforcement attempt to utilize every conceivable
3 investigative technique as to every target prior to obtaining a
4 wiretap. Fernandez, 388 F.3d at 1235-36. Instead, the affidavit
5 must provide a full and complete statement of what other
6 investigative procedures have been tried sufficient to demonstrate
7 that normal investigative techniques have been tried and failed or
8 reasonably appear unlikely to succeed or to be too dangerous. See 18
9 U.S.C. §§ 2518 (1) (c), 2518 (3) (c). Indeed, the "'necessity'
10 requirement can be satisfied by a showing in the application that
11 ordinary investigative procedures, employed in good faith, would
12 likely be ineffective in the particular case." McGuire, 307 F.3d at
13 1196.

14 In this case, Agent Elias' sufficiently explained that specific,
15 traditional techniques had either been tried or reasonably appeared
16 unlikely to succeed or too dangerous. The defendant, however,
17 attacks Agent Elias' conclusions in regards to three such
18 investigation techniques: (1) confidential sources; (2) undercover
19 agents; and (3) the use of pen registers and trap and trace devices.

20 As set forth above, CW#1 was able to gain employment at RDC thus
21 putting CW#1 in a unique position to make observations that could not
22 have otherwise be made. While this infiltration was a valuable
23 source of information regarding the activities of R. Holloway and the
24 target subjects, it did not and could not provide the entire scope of
25 the operation. In fact as set forth in the affidavit, many of the
26 meetings were held behind closed doors thus freezing CW#1 out.
27 Additionally, when the motorcycle was delivered by HAMC president Ray
28 Heffington and the HAMC prospect, R. Holloway made CW#1 leave the

1 shop due to a lack of trust. These instances highlight the
2 limitations on the usefulness of CW#1.

3 The fact that one source of information provided useful
4 information against the target subjects, however, does not obviate
5 necessity. Canales-Gomez, 358 F.3d at 1226. ("The government need
6 not show that informants would be useless in order to secure a
7 court-authorized wiretap."). Instead, even if an informant can help
8 an investigation, if use of that informant will not accomplish all of
9 the goals of the investigation, necessity for the wiretap exists.
10 Id.

11 The defendant further argues no effort was made to exploit the
12 further use of undercover agents. However, Agent Elias stated that
13 their effectiveness was not developed further in the investigation.
14 Agent Elias further stated that in his experience experience in this
15 investigation that members of the Holloway CE, HAMC members, other
16 outlaw motorcycle gang members, and drug traffickers become
17 invariably suspicious of anyone with whom they have not dealt with
18 before, someone they have not seen participating in criminal activity
19 or using narcotics, and especially anyone whom they have not known
20 for a long period of time. Here, Agent Elias indicated that this
21 organization had given agents no indication during the investigation
22 that they operated differently from organizations investigated
23 previously in this regard. In addition, the Ninth Circuit has never
24 held that an agent must try to introduce an undercover agent or an
25 informant into an organization in order to demonstrate necessity.
26 United States v. Staves, 383 F.3d 977, 982 (9th Cir. 2004) (upholding
27 necessity where "introducing an undercover agent likely would have
28 been dangerous or impossible because [the defendant] would have been

1 suspicious of anyone new[.]"). Here, Agent Elias stated in the
2 affidavit that the undercover agents were used with some degree of
3 success but that they could take the investigation no farther. The
4 defendants assertions that they would have continued to be successful
5 due to their being in a position to see Randy Picchi hug at a public
6 event is absurd.

7 The defense alleges that search warrants were used in the course
8 of the investigation putting into question the assertions that search
9 warrants should not be used. What the defense did not state was that
10 the search warrants on the target subjects were served on February,
11 2008 well after the interceptions were terminated.

12 That the agents met with some limited success at the outset of
13 the investigation through the use of confidential informants and
14 physical surveillance, they should not have been permitted to employ
15 wire surveillance. This theory defies logic. The statute requires
16 that there be a complete disclosure of other law enforcement
17 techniques that have been attempted. If the statute was to be so
18 interpreted, wire surveillance would never be available, because the
19 mere recitation of other investigative techniques used would preclude
20 a finding of necessity for the use of wire surveillance.

21 When normal investigative procedures have been successful in
22 developing evidence against only some of the key members of the
23 targeted narcotics conspiracy, necessity for a wiretap still exists
24 where the objective of the investigation is to discover the full
25 scope of the drug enterprise. See, e.g., United States v.
26 Echavarria-Olarte, 904 F.2d 1391, 1396 (9th Cir. 1990), cert. denied,
27 514 U.S. 1090 (1995); United States v. Bailey, 607 F.2d 237, 242 (9th
28 Cir. 1979), cert. denied 445 U.S. 934 (1980); United States v.

1 Sandoval, 550 F.2d 427, 430 (9th Cir. 1976), cert. denied, 434 U.S.
2 879 (1977); see also United States v. Commito, 918 F.2d 95, 98 (9th
3 Cir.), cert. denied, 502 U.S. 879 (1991) (applying same rule to
4 criminal associates and precise methods of racketeering); United
5 States v. Martinez, 588 F.2d 1227, 1232 (9th Cir. 1978). As the
6 Ninth Circuit explains:

7 We have consistently upheld findings of necessity
8 where traditional investigative techniques lead
9 only to apprehension and prosecution of the main
10 conspirator, but not to apprehension and
11 prosecution of suppliers, major buyers, or other
12 satellite conspirators.

13 United States v. Torres, 908 F.2d 1417, 1422 (9th Cir. 1990). In
14 Torres, the court upheld an affidavit in which the agent attested
15 that wire surveillance was necessary to identify, investigate, and
16 prosecute the suppliers, co-distributors, and major customers. The
17 affidavit indicated that the defendants used counter-surveillance,
18 subpoenas would alert them to the investigation, informants and
19 undercover agents could not ascertain the identity of suppliers, and
20 the informants tips were not sufficient to constitute admissible
21 evidence.

22 The defendant there claimed that the success already achieved in
23 the investigation and continued use of traditional means would have
24 or should have been given a chance to succeed. The Court relied upon
25 United States v. Baker, 589 F.2d 1008, 1013 (9th Cir. 1979):

26 Government investigators, subject to evaluation by
27 the courts on similar bases, are entitled to use
28 reason and common sense in the performance and
29 documentation of their investigations to support
30 applications for wiretaps. The statute does not
31 mandate the indiscriminate pursuit to the bitter
32 end of every non-electronic device as to every
33 telephone and principal in question to the point
34 where the investigation becomes redundant or

1 impractical or the subjects may be alerted and the
2 entire investigation aborted by unreasonable
insistence upon forlorn hope.

3 See also, United States v. Commito, 918 F.2d 95, 98 (9th Cir.
4 1990) ("[a]n investigative agency is not required to exhaust all
5 possible investigative techniques before resorting to a
6 wiretap") (citation omitted); United States v. Brown, 761 F.2d 1272,
7 1275 (9th Cir. 1985) (the necessity requirement is not intended to
8 limit the use of a wiretap to a last resort investigative tool);
9 United States v. Webster, 734 F.2d 1048, 1055 (5th Cir. 1984) (courts
10 will not invalidate a wiretap order because defense lawyers are able
11 to suggest post factum some investigative technique that might have
12 been used and was not).

13 As discussed, the affidavit contained a discussion of the use of
14 many traditional investigative techniques, the successes and failures
15 of those techniques with respect to this investigation, and the
16 limitations of those techniques for further investigation. This
17 Court has made clear that, even where an investigation using
18 traditional techniques has been fruitful, wire surveillance may be
19 necessary to achieve the further goals of the investigation. United
20 States v. Bailey, 607 F.2d 237, 242 (9th Cir. 1979). Here, the
21 affidavit stated that normal investigative techniques had been
22 unsuccessful in achieving the objectives of the investigation. Thus,
23 the affidavits successfully demonstrated that the use of confidential
24 witnesses, undercover agents, and physical surveillance was
25 insufficient to provide complete information about the identities of
26 all the coconspirators or the nature and extent of their criminal
27 activity. Wire surveillance was therefore necessary.

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1 C. AFFIDAVITS DATED OCTOBER 9, 2007, NOVEMBER 2, 2007, AND
2 NOVEMBER 30, 2007.

3 The affidavits for Continued Authorization to Intercept Wire
4 Communications dated October 9, 2007, November 2, 2007 and November
5 30, 2007 are attached hereto as Government's Exhibits 2, 3, and 4.

6 Utilizing the principles of law set forth above, a review of
7 these affidavits show that there was sufficient probable cause and
8 showing of necessity to uphold the continued interception of wire
9 communications.

10 D. GOOD FAITH RELIANCE.

11 In United States v. Leon, 468 U.S. 897 (1984), the Supreme Court
12 established a good faith exception that excepts from suppression
13 evidence executing officers seized in reasonable reliance on a
14 warrant, later invalidated, issued by a neutral magistrate. Leon,
15 468 U.S. at 922.

16 The majority of courts that have addressed the issue have held
17 that the Leon good faith exception applies in the wiretap context.
18 See, e.g., United States v. Moore, 41 F.3d 370, 376 (8th Cir. 1994)
19 (good faith doctrine required that suppression of wiretap evidence be
20 denied, despite defect in order allowing electronic surveillance);
21 United States v. Malekzadeh, 855 F.2d 1492, 1497 (11th Cir. 1988)
22 (Leon applied to wiretap affidavit that was devoid of deliberately
23 false or recklessly false information); United States v. Baranek, 903
24 F.2d 1068, 1071-72 (6th Cir. 1990) (recognizing that Congress
25 intended federal wiretap law to incorporate Fourth Amendment evidence
26 suppression doctrines). See also United States v. Brewer, 204 Fed.
27 Appx. 205, 207 (4th Cir. 2006). But see United States v. Rice, 478
28 F.3d 704 (6th Cir. 2007) (Leon exception does not apply in wiretap

1 context).

2 Rice was wrongly decided as that decision was predicated on a
3 misreading of Congressional intent concerning the application of
4 Fourth Amendment jurisprudence to wiretap cases. Congress made clear
5 that it did not intend "to press the scope of the suppression role
6 beyond present search and seizure law." S. Rep. No. 90-1097 (1968),
7 as reprinted in 1968 U.S.C.C.A.N. 2112, 2185. The Rice panel focused
8 on one word ("present") in one phrase in the Congressional history to
9 argue that Congress intended the suppression remedy to be broader for
10 statutory violations than for constitutional violations. Rice, 478
11 F.3d at 713 (citing S. Rep. No. 90-1097 (1968), as reprinted in 1968
12 U.S.C.C.A.N. 2112, 2185). The panel's interpretation is
13 implausible; by finding that Congress intended to "incorporate only
14 what Fourth Amendment jurisprudence existed at the time of the Act's
15 passage * * * and nothing more," Rice, 478 F.3d at 714, the panel
16 pressed the statutory suppression role beyond search and seizure law.
17 A finding that Leon's good faith exception to the exclusionary rule
18 applies in the wiretap context is faithful to Congressional intent.
19 Moreover, the panel opinion in Rice is the first and only decision
20 rejecting Leon's applicability in the federal wiretap context.

21 In enacting the wiretap statute, Congress clearly intended for
22 the statute to be applied consistently with constitutional
23 requirements. See United States v. Bianco, 998 F.2d at 1126
24 (Congress did not intend for the wiretap statute "to press the scope
25 of the suppression role beyond [then] present search and seizure
26 law") (quoting S. Rep. No. 1097, 90th Cong., 2d Sess. 96 (1968),
27 reprinted in 1968 U.S.C.C.A.N. 2112, 2185); Moore, 41 F.3d at 376.
28 In 1984, search and seizure law was modified by the Supreme Court in

1 Leon. Congress, in an effort to keep the wiretap statute in line
2 with the new developments in Fourth Amendment law, amended subsection
3 2518(10) in 1986 to add a paragraph limiting the statute's remedies
4 and sanctions to non-constitutional violations of the chapter, so
5 that in the event a violation of constitutional magnitude occurs,
6 "the court involved in a subsequent trial will apply the existing
7 Constitutional law with respect to the exclusionary rule." S. Rep.
8 99-541, 99th Cong., 2d Sess.1986 (1986), reprinted in 1986
9 U.S.C.C.A.N. 3555, 3577; 18 U.S.C. § 2518(10)(c). Probable cause is
10 a constitutional requirement that has been incorporated into Title
11 III. See S. Rep. 90-1097, 90th Cong., 2d Sess.1968 (1968), reprinted
12 in 1968 U.S.C.C.A.N. 2112 (legislative history reveals that Congress
13 intended Title III to adopt constitutional requirements of a warrant
14 and probable cause); Giordano, 416 U.S. at 526 (section 2518(10)
15 (a)'s reference to communications "unlawfully intercepted" must
16 incorporate some constitutional violations including, for example,
17 lack of probable cause). Thus, when wiretap evidence is challenged
18 because it was obtained pursuant to a warrant that lacked probable
19 cause, a reviewing court is not limited to the statute's suppression
20 remedy but may also look to Leon's good faith exception to the
21 exclusionary rule.

22 In United States v. Ippolito, 774 F.2d 1482, 1485 (9th Cir.
23 1985), the Court squarely rejected the contention that the statutory
24 exclusionary provisions applicable to wiretap evidence preclude
25 application of identified exceptions to the Fourth Amendment
26 exclusionary rule. Instead, the Ippolito Court held that the holding
27 of Franks v. Delaware, 438 U.S. 154 (1978) - that evidence seized
28 pursuant to a search warrant would not be suppressed on the basis of

1 false statements or omissions in the application, unless they were
2 intentional and material - was equally applicable to wiretaps.
3 Accord United States v. Bianco, 998 F.2d 1112, 1126 (2d Cir. 1993);
4 United States v. Miller, 116 F.3d 641 (2d Cir. 1997).

5 The Court's analysis in Ippolito strongly suggests that the good
6 faith exception of Leon also applies to wiretaps. The principle
7 articulated in Leon is analogous to the holding of Franks, and serves
8 the same purpose of declining to suppress evidence where suppression
9 would serve no deterrent purpose. The Bianco Court specifically
10 cited Leon as one of the exceptions to the exclusionary rule that it
11 had in mind in concluding that Fourth Amendment principles apply to
12 the statutory exclusion provisions relating to wiretap evidence.
13 Bianco, 998 F.2d at 1126; see also United States v. Baranek, 903 F.2d
14 1068, 1071-72 (6th Cir. 1990) (recognizing that Congress intended
15 federal wiretap law to incorporate Fourth Amendment evidence
16 suppression doctrines).

17 Were the affidavits invalid, which the Government does not
18 concede, the evidence may properly be received under the good faith

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1 exception to the exclusionary rule.

2 CONCLUSION

3 The defendant's motion to suppress the evidence acquired from
4 Agent Elias' wire interception should be denied.

5 Dated: May 22, 2009

Respectfully submitted,

6 LAWRENCE G. BROWN
Acting United States Attorney

7
8 By: /s/
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