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Spring 2024

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President's Podium—Brian Ramm

Hello again, and welcome to the Spring FBA Northern District of Ohio Newsletter! It's only been a few months since we published the Winter Newsletter, but the good weather is once again upon us, the leaves are on the trees, grass is growing at an alarming rate, baseball is in full swing, and the Cavs are in the playoffs!



Looking back on some of our significant events we shared together since our last publication:

March 28, 2024—The New FBA Developing Connections Committee Inaugural Happy Hour was a great success—we had many regular board members attending, but also a good number of members enjoying the festivities as well. The goal of meeting new people with different legal backgrounds was achieved by many, and we learned how to make it even better in the future.

April 4, 2024—Brown Bag Luncheon with The Honorable Judge James E. Grimes Jr., United States Magistrate Judge, U.S. District Court for the Northern District of Ohio. Excellent turnout with a nice audience mix of law students, young practitioners, and certain "more experienced" members of the bar. It really was a wonderful insight into Judge Grimes's view of the practice of law, his expectations of those who appear before him, and additional benefits such as his capacity as a mediator.

April 29, 2024—The Greater Cleveland Bench-Bar Memorial Program—a moving ceremony celebrating the lives of those we lost this year. I was proud and honored to have a role in this wonderful gathering of families, lawyers, and judges from wide and varied backgrounds.

May 2, 2024—Northern District of Ohio Advisory Group 25th Anniversary Meeting—As President of the FBA, I was invited to join this group, and I was impressed by the number of FBA members that have such prominent roles in this critically important group. I was humbled to attend, and I am looking forward to participating on behalf of our membership.

Speaking of looking forward, please join us on May 24 for the following event: Introduction to Federal Practice and New Lawyer Training Seminar. This informative seminar covers federal practice in the Northern District of Ohio, topics discussed include: the role of the magistrate judge; court programs, accessing court information and electronic filing; local rules and practice; and electronic courtrooms. Participants who have completed the course and otherwise met the requirements of Local Rule 83.5 will be sworn in to practice in the Northern District of Ohio immediately following the seminar. A tour of the courthouse will also follow the program.

Friday, May 24, 2024
Time: 9:00 a.m. - 12:25 p.m.
Carl B. Stokes U.S. Court House - Courtroom 19A
Registration starts at 8:30 a.m.

As always, our editors are looking for content for upcoming issues, and this forum is a wonderful opportunity to publish and enhance your professional resume. I can't wait to see more of you in person at our various events. Please continue to monitor our LinkedIn, Facebook, Instagram, and our website for upcoming events.

Thanks, Brian

TRIAL ACADEMY ANNOUNCEMENT

This year's Trial Academy program will involve opening statements and closing arguments. It is a twoday program. The dates of the program are September 27 and October 7, 2024. The hallmark of the Trial Academy's programs is to teach and present trial skills in NITA-like fashion — teach, model, and then do. Day 1 (September 27) of the program is devoted to presenting to the students best practices and techniques in constructing and delivering opening statements and closing arguments, and then having faculty members model and demonstrate them in an interactive environment. This year's faculty, like in past years, will include highly experienced and accomplished trial lawyers. Day 2 (October 7) of the program, which coincides with the annual State of the Court luncheon, culminates with each student making an opening statement and closing argument in federal court before a sitting Federal or State court Judge. No other local trial program in the Northern District of Ohio offers this amazing opportunity for young lawyers, or for more experienced lawyers looking to brush their trial advocacy skills in a live courtroom setting. Perspective and feedback provided by the judges is an invaluable learning experience. In be-tween Day 1 and 2 of the program, each student will be assigned and work with a faculty member to help in constructing a persuasive opening statement and closing argument. too provides an invaluable learning experience and promotes ongoing professional relationships within the Bar. The program is lim-ited to 24 students. A waiting list will be maintained. Scholarship opportunities are available for qualified students. C.L.E. will include 1.0 hour of ethics. If you have any questions about this year's Trial Academy program, or would like to learn more about it, please feel free to contact Rick Hamilton (rhamilton@ubglaw.com), Alexandra Dattilo (adattilo@walterhav.com, Abbey Brown (abrown@calfee.com). We look forward to seeing or vou there!

Jacqueline A. Johnson, Chairperson of the Diversity Committee for the FBA Northern District of Ohio has been selected to be inducted into the Cleveland State University Law School (CSU/LAW) Hall of Fame on Nov. 1, 2024. Jacqueline is the First Assistant of the Federal Public Defender Office for the Northern District of Ohio and a 1983 graduate of CSU/LAW. According to Dean Lee Fisher, the CSU/LAW Hall of Fame was created to honor exceptional leaders who have contributed to the past, present, and/or future success and reputation of CSU/LAW. The inductees include living and deceased alumni and community leaders and former faculty, deans, and staff.

FBA's 2024 LEADERSHIP SUMMIT

FBA-NDOH President Brian Ramm and President-Elect Jeremy Tor attended the FBA's 2024 Leadership Summit in Washington D.C. on behalf of our chapter. The Leadership Summit was held from March 20-23 and was jam packed with training and development sessions. Pictured below are FBA National President Jonathan O. Hafen (at the podium), FBA-NDOC Board Member and Past-President Aaron Buloff, and the renowned cherry blossoms, which were in full bloom for the summit.











The United States District Court for the Northern District of Ohio

FOR IMMEDIATE RELEASE April 1, 2024

Judge Sara Lioi, Chief Judge of the United States District Court for the Northern District of Ohio, announced that Reuben J. Sheperd, Esq. was sworn in today to serve an eight-year term as a United States Magistrate Judge in Cleveland, Ohio. He succeeds Magistrate Judge Thomas M. Parker, who retired effective March 24, 2024.

Magistrate Judge Sheperd recently served as Administrative Law Judge in the Akron, Ohio Office of the Social Security Administration. Prior to that appointment, he was a sole practitioner in private practice, primarily as a criminal defense attorney, in Cleveland, Ohio, from January 2007 to June 2016. Magistrate Judge Sheperd also held the position of Program Manager at Vocational Guidance Services in Cleveland, Ohio, from January 2002 to January 2007, and has served in various positions with the City of Cleveland from November 1992 to January 2002.

Magistrate Judge Sheperd received his B.A. from Miami University in Oxford, Ohio, in 1992, and his J.D. from Case Western Reserve University School of Law in Cleveland, Ohio, in 1995.

Chief Judge Lioi said, "Magistrate Judge Sheperd's diverse legal experience makes him uniquely qualified to serve on the federal bench. We are grateful that he has chosen to continue his career in public service in the Northern District of Ohio."

The United States District Court for the Northern District of Ohio has court locations in Cleveland, Akron, Toledo, and Youngstown and serves 6 million citizens in the 40 northernmost counties in Ohio.

CONTACT: Sandy Opacich, Clerk of Court

(216) 357-7068



MONDAY, APRIL 29, 2024 | NOON CLEVELAND METROPOLITAN CONFERENCE CENTER

Introduction of Judges Sandy Opacich

Clerk of Court, U.S. District Court, Northern District of Ohio

Welcome

The Honorable Sara Lioi

Chief Judge, U.S. District Court, Northern District of Ohio

Opening Remarks

The Honorable John J. Russo

President, Cleveland Metropolitan Bar Association Judge, Cuyahoga County Common Pleas Court

Remarks

The Honorable Kathleen A. Keough

Administrative & Presiding Judge, Eighth District Court of Appeals

The Honorable Michelle D. Earley

Administrative & Presiding Judge, Cleveland Municipal Court

The Honorable Brendan J. Sheehan

Administrative & Presiding Judge, Cuyahoga County Common Pleas Court

Recognition of Decedents

Brian N. Ramm

President, Federal Bar Association, Northern District of Ohio Chapter

Delanté Spencer Thomas

President,
Norman S. Minor Bar Association

Rebecca Ruppert McMahon

Chief Executive, Cleveland Metropolitan Bar Association

Matthew D. Besser

President-Elect, Cleveland Metropolitan Bar Association

Reflections

Reverend Joanna D'Agostino

Senior Minister, Lakewood Congregational Church

Closing Remarks

The Honorable Sara Lioi

Reception to Follow

2024 Greater Cleveland Bench-Bar Memorial Program Recognition of Decedents are listed on the following page.

2024 Greater Cleveland Bench-Bar Memorial Program Recognition of Decedents:

Elizabeth Anderson Harold Babbit

The Honorable Randolph Baxter

William C. Behrens

Amanda Mae Miller Boutton

Don P. Brown Donald E. Caravona Charles H. Cleminshaw Ronald L. Coleman

Sheree Collins

Patrick M. Flanagan

Gerald E. Fuerst Timothy J. Gauntner Richard P. Goddard

Gerald S. Gold

Robert N. Gudbranson Kenneth M. Haneline

The Honorable Patricia A. Hemann

Stephen D. Hobt Michael T. Honohan Donald E. Howard Nancy Kelley Marjorie Kitchell Richard C. Klein Peter J. Krembs

Angelo F. Lonardo

William C. McCoy

Brian R. McGraw

Robert A. McNew

G. Christopher Meyer

Kenneth R. Millisor

Kenneth R. Montlack

Lizabeth A. Moody

Ronald M. Mottl

Martin J. Murphy

Spencer Neth

Joel I. Newman

Donald Hazard Powers

David J. Rossi, Sr.

The Honorable Michael J. Russo

Joseph Schneider Gregory D. Seeley Catherine W. Smith

John L. Sterling

The Honorable Ronald J. Suster

Emily Sweeney Gabriel S. Szabo David J. Tocco Robert V. Traci Michael K. Wager

Alan D. Wright

Articles

Hidden in Plain Sight: A Tactic to Frontload Factual Defenses

Michael D. Meuti, Partner, Benesch Michael Silverstein, Managing Associate, Benesch

Civil litigation is inefficient, often brutally so. Lawyers and judges alike search for ways to eliminate—or at least alleviate—obstacles to efficient justice. This article proposes a rarely tried method to do just that. It won't work in all cases, but we believe it could work in many more cases than its current use suggests.

The method in question is alleging in an Answer the specific facts supporting a defense and asking the court to require the plaintiff to respond to those allegations in a reply to the Answer—a procedure that neither of us learned in law school, and of which we were only recently reminded. This step is authorized by an obscure provision hiding in plain sight: Rule 7(a)(7) of the Civil Rules.

Litigators, especially those on the defense side, know two things: litigation is expensive, and defeating meritless claims can take a long time.

We are both civil litigators at a large firm. Most of our work is on the defense side. Our experience, and that of countless other defense-side litigators, reflects that even when a defendant has a rifle-shot factual defense defeating the claim, litigation can drag on for years. In federal court, resolution of a motion to dismiss occurs, at the median, 203 days after the complaint is filed. At a minimum, that time frame represents over three months of delay between the motion and the resolution. During that interregnum, depending upon when a discovery order issues, expensive discovery could be in full swing.

The median time to resolve a motion for summary judgment is, unsurprisingly, significantly longer: 533 days from the filing of a complaint. And summary-judgment motions generally aren't filed until after discovery—the most expensive part of litigation—concludes.

Clever lawyers on the plaintiffs' side can use these timelines to maximize settlement leverage. If they avoid fact-based defenses through artful pleading, they give defendants few tools to press their fact-based defenses early.

The usual tactics of front-loading a factual defense have a mixed record of success.

In some cases, the factual defense can be framed as an inability to establish standing, permitting a challenge to subject-matter jurisdiction. For example, our firm recently won a case for L.L. Bean using this exact strategy. *See Lenzi v. L.L. Bean, Inc.*, No. 23-CV-06117-FPG, 2023 WL 8237484 (W.D.N.Y. Nov. 28, 2023). There, the plaintiff alleged that she bought a particular pair of boots, and that purchase was the fulcrum of her claims. L.L. Bean's records, however, showed that the purchase at issue could not have happened. Those records, of course, fall outside the four corners of the complaint, so the court could not consider them on a Rule 12(b)(6) motion to dismiss. But they showed that the plaintiff had suffered no injury, and thus lacked standing, so we attached them to a Rule 12(b) (1) motion to dismiss for lack of subject-matter jurisdiction. And that motion succeeded, allowing our client to defeat the meritless claim before costly—and needless—discovery.

But if a jurisdictional challenge is unavailable—including in state court, where injury-in-fact may not even be required—defendants find themselves at the trial judge's whim. The familiar rules do not create reliable offramps:

Rule 12(c). Even though a motion for judgment on the pleadings can be used to litigate an affirmative defense early, courts addressing those motions still must accept the non-moving party's factual allegations as true. So a Rule 12(c) motion is unlikely to prevent discovery.

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Rules 16(a) & 56. Defendants could seek to minimize discovery costs by asking for staged discovery, so they can tee up an early summary-judgment motion on the meritorious defense. But judges are often disinclined to phase discovery based upon a defense attorney's promise of efficiency. Worse, many judges apply a "one-MSJ" rule, whereby they will entertain only one Rule 56 motion by a party, which makes an early MSJ on a discrete issue particularly risky. And even if the court can be convinced, other discovery will likely continue while the early MSJ remains pending.

Rule 12(d). Alternatively, a defendant could move to dismiss, attaching the relevant evidence and asking the judge to convert the motion under Rule 12(d) to a motion for summary judgment. But many judges are loath to use this procedure, instead opting to deny the motion for relying on outside-the-pleadings evidence. And even if the judge converts the motion, Rule 12(d) entitles a plaintiff to discovery necessary to address the motion.

In light of these obstacles to efficient resolution, the prospect of incurring significant discovery costs can spur defendants to pay to settle even meritless claims. Some defendants with a rock-solid factual defense will conclude that it is economically rational to pay the ransom rather than to press their defense.

So what can a lawyer do when defending a claim that is ultimately meritless, but pleaded well enough to survive a motion to dismiss?

An underutilized rule—Rule 7(a)(7)—offers a potential solution.

Another path exists: A defendant can answer, alleging the specific facts that support its defense and attaching documentary evidence, and ask the court to require a response to those allegations. *See* Fed. R. Civ P. 7(a)(7) (proper pleadings may include, "if the court orders one, a reply to an answer"); Ohio R. Civ. P. 7(A) ("the court may order a reply to an answer"). If the plaintiff admits the facts supporting the defense, the defendant can move for judgment on the pleadings under Rule 12(c).

This procedure is rarely invoked. Answers typically do not require responses. As a result, both litigants and courts often treat them as throw-away pleadings, paying little attention to any factual allegations appearing in the answer, since Rule 8(b)(6) deems those unresponded-to allegations "denied or avoided." That attitude doesn't have to reign. Defendants can use their answers to substantively allege the facts supporting their defenses—both failures of elements and affirmative defenses—and Rule 7(a)(7) authorizes courts to order plaintiffs to respond to those allegations via a responsive pleading called a "reply" to the answer.

Defendants ordinarily must move the court to order such a reply. Courts have discretion as to whether to order a reply, and generally require a "substantial reason" to do so. Wright & Miller, Federal Practice & Procedure § 1185. That said, a reply is appropriate "if an additional pleading would serve a legitimate function." *Id.*

Avoiding unnecessary discovery and expense for the parties, and unnecessary proceedings for the court, should meet that standard. Imagine a scenario where a consumer plaintiff seeks to plead around a statute-of-limitations defense by asserting that the plaintiff lacked notice of the alleged violation until sometime within the limitations period, but the defendant's records include correspondence from the plaintiff, outside the limitations period, complaining about the problem at issue in the complaint. In some instances, an email to plaintiffs' counsel containing the record will induce a dismissal. But if that tactic fails, the defendant should answer, pleading a statute-of-limitations defense, and alleging the specific facts establishing the plaintiff's knowledge of her claim outside of the limitations period. Concurrent with the answer, the defendant should move the court to invoke Rule 7(a)(7), and order the plaintiff to reply to the affirmative defense and admit or deny those allegations. Avoiding the waste of the court's and the parties' resources should meet the substantial-reason standard, as an admission would permit the defendant to move for judgment on the pleadings relying upon plaintiff's responses to the affirmative defense. Even if this strategy does not lead to a successful defense, it could significantly narrow the issues for discovery.

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Of course, courts may still be reticent to order a reply. The case law interpreting and applying Rule 7(a)(7) is admittedly thin. Indeed, in our combined 25 years of litigating, we have never seen a party invoke Rule 7(a)(7). Under current case law, the strategy is most-commonly invoked to support public officials' qualified-immunity defenses. *E.g., Ahmed v. City of Natchez, MS,* No. 5:21-CV-58-DCB-RHWR, 2024 WL 268426, at *3 (S.D. Miss. Jan. 24, 2024) (citing *Schultea v. Wood*, 47 F.3d 1427, 1433–34 (5th Cir. 1995)); *id.* at *9 (ordering reply); *Decou-Snowton v. Parish*, No. CV 21-1302, 2022 WL 4245492, at *12 (E.D. La. Sept. 15, 2022). But there is little reason to reserve the Rule for qualified-immunity cases.

Instead, we urge parties and courts to consider Rule 7(a)(7) in any cases where applying the rule could advance the aims of fairness and efficiency. If a defendant can assert with particularity the facts giving rise to a meritorious affirmative defense, a court may be more convinced to order a reply to these particular facts. Showing the court the defendant's cards strongly suggests there is a substantial reason justifying a reply: it will end the case and reach the correct result. If a factual defense can win now, the Court should require the plaintiff to respond to it. If it declines, it will need to explain why; and as more litigators adopt this tactic, the case law addressing it will become more robust. With time, where answers set forth compelling factual defenses, we are confident that opinions ordering Rule 7(a)(7) replies will be more persuasive than the ones on the other side.

Ads, Announcements & Membership Benefits

Introduction to Federal Practice Seminar

Friday, May 24, 2024 Time: 9:00 a.m. - 12:25 p.m.

Carl B. Stokes U.S. Court House - Courtroom 19A

Registration starts at 8:30 a.m.

This seminar satisfies Local Rule 83.5 Admission of Attorneys to Practice in the Northern District of Ohio.

Join us for this informative seminar covering federal practice in the Northern District of Ohio. Topics discussed include: the role of the magistrate judge; court programs, accessing court information and electronic filing; local rules and practice; and electronic courtrooms.

Participants who have completed the course and otherwise met the requirements of Local Rule 83.5 will be sworn in to practice in the Northern District of Ohio immediately following the seminar.

A tour of the courthouse will also follow the program.

Total of 2.25 hours of credit.

New Lawyer Training Seminar

Friday, May 24, 2024
Time: 1:00 p.m. - 4:25 p.m.
Carl B. Stokes U.S. Court House - Courtroom 19A
Registration starts at 12:45 p.m.

Course Description:

This seminar will provide new attorneys with training on law office management, professional conduct and relationships, and client fund management. It fulfills the three hours of NLT classroom instruction on professionalism, law office management, and client fund management required by the Ohio Supreme Court of all newly admitted

Ohio attorneys.

Total of 3.00 credit hours.

Please click here for registration fees and more.





The Federal Bar Association Northern District of Ohio Chapter

cordially invites you to join your colleagues, summer associates, legal interns and federal law clerks from law firms, the federal and state courts and government offices for the

2024 Summer Associate Reception

Thursday, July 11, 2024 - 5:00 p.m. - 7:30 p.m. House of Blues 308 Euclid Avenue, Cleveland, OH 44114

Don't miss out on your opportunity to:

- * Network with federal judges and federal practitioners*
 - * Learn more about the Federal Bar Association *
 - * Enjoy a fine selection of drinks and appetizers *

Please register your RSVP by July 5, 2024

Registration Fees are as follows: Law students/legal interns/summer associates/federal law clerks: complimentary

FBA Member - \$10.00 Non-member - \$25.00 Firm Sponsorship - \$495

FBA, Northern District of Ohio Chapter Phone: (440) 226-4402 or E-mail: <u>admin@fba-ndohio.org</u> PO Box 14760, Cleveland, Ohio 44114

We are always looking for firm sponsorships for this event. Please click <u>here</u> for more information on firm sponsorship.

Annual Meeting & Convention

September 5, 2024 - September 7, 2024

Save the Date

The Kansas and Western District of Missouri Chapter is excited to host the FBA 2024 Annual Meeting & Convention in Kansas City, MO.

Continue to check this page for updated information.

- CLE sessions will feature a variety of legal topics that peak the interest of attorneys in a focused practice area, or want to expand their knowledge in other specialties;
- Celebrate the accomplishments of FBA members during three awards luncheons and welcome the FY25 National President on Saturday's Installation Luncheon;
- Embrace what's unique about the local city with evening social events, including the WWI Museum on Thursday night.

SAVE THE DATES

October 07, 2024 - State of the Court Luncheon; Installation of Board Officers

October 24, 2024 - Bankruptcy Bench Bar Retreat

Join the New FBA Law Clerk Directory!

The Judiciary Division's Federal Judicial Law Clerk Committee launched the first searchable national database of current and former federal law clerks who opt-in to the directory. The Law Clerk Directory, which is accessible only by FBA Members, serves as a robust resource to maintain contact between judges and former clerks, creates bridges for law students to learn more about federal clerkships and the application process, and connects practitioners with current and former clerks for networking opportunities.

The FBA encourages all former and current clerks to opt-in to the directory and has created a page to allow you to easily input your clerkship information. If you are a current or former federal law clerk and wish to be included in the directory, log into www.fedbar.org and follow these instructions.

Select "Update My Profile"

Select "My Clerkship" from the right-hand navigation ("My Account Links")

Select "+ Add"

Complete the form contents and select "Save"

Note: Leave the End Year blank if you are currently in a clerkship or if the end year is undetermined

To enter additional clerkships, simply repeat the process. You can also edit entries if needed. The details you enter will then be visible in the Law Clerk Directory. If you ever decide to opt out of the directory, simply select "Edit Demographics" from your "My Profile" page, check the box at the bottom labeled "Law Clerk Directory opt-out" and then select "Save". For further assistance entering your clerkship information, you can access these <u>instructions</u> <u>with screenshots</u>.

To use the new Law Clerk Directory, login to your profile at www.fedbar.org with your email and password. You will see several search options available including the following: Clerk Name, Judge Name, Jurisdiction, State, and Year(s) of Clerkship. Search results will display clerk name, email, state, and jurisdiction. For additional details, including the Judge's name and the relevant start and end years, select the clerk's name.

If you have questions about accessing or joining the directory, please email sections@fedbar.org

Federal Bar Association

www.fedbar.org | (571) 481-9100 | fba@fedbar.org

FBA-NDOH Calendar of Events:

May 15, 2024 FBA-NDOH Board Meeting

May 24, 2024 Introduction to Federal Practice and

New Lawyer Training Seminars

June 19, 2024 FBA-NDOH Board Meeting

July 11, 2024 FBA-Summer Associate Reception

July 17, 2024 FBA-NDOH Board Meeting

We add events to our calendar often so please check our website for upcoming events that may not be listed here.





STATEMENT OF THE FEDERAL BAR ASSOCIATION BOARD OF DIRECTORS ON JUDICIAL INDEPENDENCE

Judicial independence, free of external pressure or political intimidation, lies at the foundation of our constitutional democracy. An independent judiciary needs to remain free of undue influence from the legislative and executive branches and to remain beholden only to the maintenance of the rule of law and the protection of individual rights and personal liberties. We affirm the right to challenge a judge's ruling for reasons based in fact, law or policy. However, when robust criticism of the federal judiciary crosses into personal attacks or intimidation, it threatens to undermine public confidence in the fairness of our courts, the constitutional checks and balances underlying our government and the preservation of liberty.

The Federal Bar Association is comprised of over 19,000 public and private sector lawyers practicing in our federal courts, halling from all fifty states and the U.S. Territories. The Federal Bar Association is a non-partisan professional organization created to promote the sound administration of justice and integrity, quality and independence of the judiciary.



Our Chapter supports the FBA's SOLACE program, which provides a way for the FBA legal community to reach out in small, but meaningful and compassionate ways, to FBA members and those related to them in the legal community who experience a death, or some catastrophic event, illness, sickness, injury, or other personal crisis. For more information, please follow this link:

http://www.fedbar.org/Outreach/SOLACE.aspx

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INTER ALIA is the official publication of the Northern District of Ohio of the Federal Bar Association.

If you are a FBA member and are interested in submitting content for our next publication please contact James Walsh Jr., Andrew Rumschlag or Nathan Nasrallah no later than July 15, 2024

Next publication is scheduled for Summer 2024.

FBA-NDOH Officers

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