IN THE APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

Docket Number 1-07-0088

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| Yuling Zhan | ) | |
| Plaintiff-Appellant, | ) | Appeal from the Circuit Court of |
| | ) | Cook County |
| V. | ) | |
| Napleton Buick Inc, | ) | Circuit Court No: 04 M1 23226 |
| n/k/a D'Andrea Buick Inc. | ) | Hon. Wayne D. Rhine presiding |
| Defendant - Appellee | ) | |

**PLAINTIFF – APPELANT'S MOTION TO STRIKE DEFENDANT'S BYSTANDER'S REPORT**

Plaintiff-Appellant Yuling Zhan, respectfully submits this Motion to Strike Defendant's Bystander's Report, and states:

**Defendant Fails to Comply With the July 10, 2007 Order of This Honorable Court**

1. On July 10, 2007, this Honorable Court issued an Order. It provides, in part, "each party shall prepare a Bystander's Report, supported by an affidavit attesting to the truthfulness of the Bystander's Report, and submit the Bystander's Report to the Clerk of the Circuit Court on or before July 23, 2007."
2. On July 24, 2007, Defendant's counsel Ms. Vorberg ("Vorberg") sent a fax to the Deputy Clerk of the Court below. See Exhibit A. The fax indicates she did not submit Defendant's Bystander's Report ("Report") to the Clerk or the

Deputy Clerk of the Court below on or before July 23 of 2007, and she did not submit an affidavit attached to the Report on or before the due date.

3. Since, in a couple of days, the Deputy Clerk of the Court below had to wait for Defendant's mail, the clerk office staff, in a rush, had no time to put all the documents in chronicle order on July 30 of 2007. And plaintiff could not create a list of page numbers of the supplemental record on that day, although that was important for her to work on the opening brief.
4. Here, a copy of Defendant's Report is incorporated as Exhibit B for the convenience of this Honorable Court. Notably, Defendant failed to provide any attestation as a party or from its witnesses.
5. In its submission, Defendant failed to incorporate its referenced trial exhibits into the Report; it provided an "affidavit" of its counsel, which was not notarized. As such, the "affidavit" shall be a nullity by all existing standards. See e.g. Roth v. Illinois Farmers Insurance Company 782 N. E. 2d 212, 216 (2002) citing Hough v. Weber, 202 Ill. App. 3d 674, 692 (1990).
6. Further, Defendant did not submit its February 15, 2007 Proposed Amendment to Plaintiff's Bystander's Report as part of the supplemental record. When Defendant abandons the specific filing, Plaintiff's Proposed Bystander's Report filed on January 5, 2005 should stand uncontested according to Rule 323(c).
7. And most important of all, Defendant, defying or ignoring the Order from this Honorable Court, has provided false statements and affirmative concealments in its Report, which will be detailed in the instant motion.

**Defendant's "Bystander's Report" And / Or the "Affidavit" Therein Should Be Stricken As A Matter of Law**

8. Since Defendant's counsel has no personal knowledge whatsoever on events happened before the instant suit was filed, it is improper for Vorberg to file an "affidavit" for Defendant or its witnesses Mr. D'Andrea and Mr. Early.

9. By submitting an "affidavit" of her own, Vorberg identified herself as a witness to testify on what happened during the trial. Illinois Rule of Professional Conduct (IRPC) 3.7, which is part of our Supreme Court Rules, generally prohibits such advocate/witness practice. See Jones v. City of Chicago, 610 F. Supp. 350, 354 (N. D. Ill. 1984)
10. And it is well established that, ordinarily, an attorney's affidavit cannot be used to supplement the record on appeal. See Silny v. Rorens, 73 Ill. App. 3d 638, 642-43; 392 N. E. 2d 267 (1st Dist. 1979).
11. A Bystander's Report should truly and fairly present the testimony, the evidence, and the rulings at the trial of the case. Angels v. Angelos, 35 Ill. App. 3d, 905, 342 N. E. 2d 748 (1st Dist. 1976). In this respect, Defendant's Report failed. Even for this reason alone, its Report should be stricken in its entirety.

**Defendant's Report Is Rife with Concealments And Falsehoods**

12. In the instant motion, the same abbreviations would be used as in plaintiff's opening brief: "A" for separate Appendix, "S" for supplemental record and "C" for Common law record.
13. Defendant's Report, as rambling and evasive as it could be, consists of 87 statements, yet about 70 of them contain affirmative concealments, material omissions and patent falsehoods, peppered with specious after-trial arguments. Plaintiff will give some examples in the following two major categories: concealment and falsehood.

**A. Affirmative Concealments in Defendant's Report**

14. At ¶25, Defendant referenced two plaintiff's exhibits – two versions of the Buyer's Guide, but it failed to incorporate either of them in its Report. From the time of the sale to the day of trial, Defendant has created four versions of a Buyer's Guide, (Plaintiff's motion filed on 12/13/06 at ¶¶17-22, S463-464 and exhibits incorporated therein). But even as of this day, Defendant has failed to submit a single sheet of a document with front and backside of an original Buyer's Guide. And during discovery, Defendant failed to provide

evidence to show it was Defendant routine business practice to create multiple versions of a Buyer's Guide for each car it sold, let alone to justify such practice.

15. At ¶79, Defendant devoted about half a page to what warranty terms Mr. D'Andrea thought it should be; at ¶80 Defendant contended after the subject sale, a specific salesman was fired or he quit. These are irrelevant arguments. After Defendant blocked plaintiff's discovery by refusing to produce names of all its salesmen, when Defendant failed to solicit a single salesperson to testify, all of plaintiff's testimonies about what happened during the sale should be taken as uncontested.
16. At the time of the sale, only WARRANTY box was marked on the Buyer's Guide, and Defendant failed to incorporate it into the sales document (Defendant's Report at ¶¶14 and 24). The salesmen convinced plaintiff that she could get a similar or better deal than that from CarMax (Plaintiff's Report at ¶¶14-25, S 8-9, A58-59). During trial Defendant's witnesses conceded they were not at the scene during the time of the sale (Defendant's Report at ¶¶53 and 65; Plaintiff's Report at ¶70, A65; and at ¶89, S17, A67). But at ¶65, Defendant asserted that "Mr. Early recalled that the Subject [sic.] vehicle had a 50% part and labor warranty." That is absurd.
17. At ¶63, Defendant referenced plaintiff's exhibits - two Odometer Statements, but it failed to incorporate either of them. The Odometer Statement dated October 6, 2003 (S37, A49) shows: (1) Defendant did not legally own the subject vehicle on September 4, 2003 according to 49 U. S. C. § 32702 (7); (2) Defendant violated 49 U. S. C. § 32705 (a)(3), when accepting an incomplete Odometer Form on October 6, 2003; (3) the specific Odometer Statement form was created for the purpose of title transfer, sent to the Office of Secretary of State, and the odometer reading of 24509 miles therein was falsified.
18. Defendant's statements at ¶ 55 and ¶¶63-64 demonstrate, at trial and in the Report, Mr. D'Andrea and Mr. Early, knowingly and willingly, concealed the

material information on who the real previous owner of the subject vehicle was; what their word of "wholesaler" meant, why a "wholesaler" would provide a Odometer Statement form, when and how the previous car title was transferred.

19. At ¶69, Defendant contended the car title was properly in Plaintiff's name. This is an evasive after-trial argument. In the instant case, some of the major issues are: whether Defendant had the car title at the time of the sale; whether Defendant owned the subject vehicle legally and financially at the time of the sale; and whether Defendant submitted falsified document to the Office of Secretary of State during the title transfer. During discovery, Defendant was compelled to produce, but it asserted Defendant was not in possession of related financial record (S323 at ¶13). That is fraudulent concealment.
20. At ¶81, D'Andrea concealed a material fact that it was the Defendant who towed back the vehicle, because Defendant was fully aware what problems the car had, and it knew or should have known the history of the subject vehicle. During discovery and at trial, Defendant refused to produce the name of its employee(s) who received plaintiff's phone calls, and Defendant refused to produce the name of its employee who ordered a towing company to tow back the car.
21. At ¶32, Defendant referenced plaintiff's exhibit – a copy of a fax and letter sent to Defendant (S28) on September 9, 2003, but it failed to incorporate it into its Report. In the fax and letter, plaintiff explicitly demanded Defendant to respond by fax within the next three days in order to solve the problem without a lawsuit (A36). But for more than one year, Defendant fails to do.
22. At ¶¶42 and 57, Defendant referenced plaintiff's exhibit – a trade-in ad Defendant sent to plaintiff (S30), but it failed to incorporate it into its Report. When answering plaintiff's Request for Admissions, among other numerous false responses, Defendant asserted a denial of an incontestable fact (C142 at ¶¶45-46). At trial, perjury continued as Defendant failed to make any correction

23. At ¶60 of its Report Defendant concedes, all of plaintiff's exhibits were admitted as evidence, but it failed to corporate another trial exhibit -- a "Thank you" note it sent to plaintiff (S31) into the Report. Beyond any reasonable dispute, the "Thank you" note and "trade-in" ad demonstrate Defendant had no intention to honor any warranty after it towed back the subject car, while boasting that plaintiff could do nothing about it.
24. At ¶46, Defendant and its counsel, knowingly and willingly, conceal that they did not have a legitimate reason to require car keys after the lawsuit had been filed. Defendant did not need to hold car keys in order to participate a joint inspection on the subject vehicle, neither its counsel needed to hold car keys in order to take part in settlement discussions.
25. At ¶¶9-10, Defendant purposely conceals that it demanded storage fees with an exact dollar figure at trial, counting from the first day it towed back the car to the day of trial. Such a fee had not been included anywhere in the sales documents. Even as of this moment, Defendant has failed to inform this Court that it did not provide a jurisdictional statement in its Counterclaim, it did not incorporate the claim into an Answer, and it had abandoned its Counterclaim by failing to present it at arbitration pursuant to our Supreme Court Rules 90(c) and 92(b).
26. It is remarkable that Defendant failed to incorporate its own trial exhibits into its Report, but referenced them at ¶46 – Vorberg's February 28 and March 9, 2005 letters addressed to plaintiff.
27. At trial, Vorberg knew that her letters contained inadmissible hearsay and patently fraudulent statements because plaintiff had pointed them out in her response and in court filings (Plaintiff's Complaint, A26 at ¶155, Exhibit at A52; Opening Brief at page 39). When Vorberg wrote the February 28, 2005 letter, suggesting that it was plaintiff who towed the car to Defendant's facility, the patent falsehood and bad faith were clear. When those letters dated February 28 and March 9, 2005 were presented as key "evidence" at arbitration and trial, it amounted to fraud on tribunal.

28. At ¶¶9 -10, ¶49 and ¶83, Defendant purposely concealed a material fact that the Defendant and its counsel requested a court order to "depose" the subject car in its Counterclaim (S127 (b)), they failed; but the vehicle was vandalized at Defendant's premise anyway (Defendant Answer to Interrogatory #13; S378).
29. At ¶82, Defendant concealed whether Mr. Caridi was Defendant's employee or a secretary of a repair shop during discovery, by providing two different addresses (Answer to Interrogatory #3, (b) at C232; Answer to Interrogatory #8 at S316); Here, Defendant covered up several material facts (1) without any procedure during the "forensic inspection", before doing anything else, Carid struggled with the subject car for half an hour, tried to jump-start the car with two chargers in a row, but he failed (Motion to Strike at ¶¶7-11, S139); (2) Defendant and its counsel labeled Caridi as "expert" or a "mechanic," but they failed to provide any of his qualification, (3) Defendant, refused and failed to submit a technical report on the "inspection" even it was compelled to do so during discovery. (4) Mr. Caridi refused or failed to testify for Defendant at trial.
30. At ¶83, Defendant intentionally concealed what objection therein plaintiff's counsel had asserted. As well known, it is extraordinary for an attorney to make a serious allegation that counsel of the other party, here in this case Ms. Vorberg, acted as a witness (Plaintiff's Report at ¶112, S 20, A70) unless the misconduct is indisputable.

### B. <u>Outright Falsehoods in Defendant's Report</u>

31. Defendant's statement at ¶66 is absurd. Plaintiff wrote her first letter to the Illinois Attorney General's Office on September 14, 2003 (S32). Under no circumstance Defendant could send plaintiff its response (S34) to the same governmental office on September 10, 2003. If by any chance, Defendant really means Early mailed the alleged September 10, 2003 letter (S29, A39) instead, that is also a deliberate false statement. Plaintiff has addressed this issue in detail at page 28 of her Opening Brief.

32. Defendant's statements at ¶67 contain part of Mr. Early's testimony. As demonstrated in plaintiff's Opening Brief at p 29, Early committed perjury at trial. No one can make or "attempt" to make phone calls without knowing the area code and telephone number he "attempted" to dial. Furthermore, it is incredible that Early would bother to "attempt", "at least 10 occasions to contact" plaintiff, but he failed to take one or two minutes to send plaintiff a fax as it had been expressly required. And Early can never tell what date and time his "attempts" occurred, and what is the result of his laborious "attempt" on "at least 10 occasions."
33. Early's statements at ¶68 amount to perjury as well, not only because Defendant refused to file a proper response during discovery, not only because Early failed to identify when that alleged communication happened, but also because under no circumstance plaintiff's insurance company could possibly be involved in a sales dispute between Defendant and plaintiff.
34. At ¶21 in its Report, Defendant put its own false statement into plaintiff's testimony by suggesting the Dealer "did conduct [the check-up] while she [plaintiff] was present." That is outrageous. During the sale, after plaintiff was induced to make a purchase decision, she was asked to finish the paper work in an office. It is uncontested that plaintiff did not go to Defendant's service department (Plaintiff's Report at 113, A70). And no one will believe Defendant could work on a car in an office room;
35. At ¶47, Defendant provided a perfect example to show how it could concoct a misleading and fraudulent story. It is a fact that plaintiff told Defendant the subject car was dangerous and Defendant promised to tow it back, it did not ask for car keys then; neither did it ask for car key when plaintiff called Defendant to make sure it did tow back the car. And as a matter of fact, plaintiff did not even knew who the driver of the tow truck was and what the exact time Defendant would tow back the car. The record shows that from the second day plaintiff sent Defendant a letter and fax, asking Defendant to respond by fax within three days, Defendant has ignored the specific

request ever since. And the indisputable truth is Defendant had never asked car keys for inspection of the subject car before the lawsuit was filed.

36. At ¶ 47, ¶59, ¶82 and in Vorberg's May 17, 2005 letter (S44; S67), which was identified as Defendant's exhibit, Defendant and its counsel mentioned April 11, 2005 "inspection" on the subject car. For several months before the trial, Defendant argued that the only thing happened during the "inspection" was someone "knocked on the gas tank," and at trial D'Andrea stated "there was no gas in the vehicle's tank on April 11, 2005." The trial judge had rejected such deliberate false statement before the trial, and Defendant's related "affirmative defense V" of "misuse" of the car was stricken on March 28, 2006 (Court order at ¶1, A133). In reality, when Defendant trashed the vandalized car in front of plaintiff's door on December 7 of 2006, the subject vehicle still had half tank of fuel. And as of this day, the subject car with fuel in the tank, on legal hold, is still available for Defendant's inspection.

37. In her May 17, 2005 letter (Exhibit 4 in Defendant's Report; S44; S67), Vorberg states; "Our expert mechanics is of the opinion that any stalling of the vehicle may have been due to an insufficient fuel in the vehicle." On this issue, Vorberg is hoist of her own petard. Her own words defeat her. At April 4, 2005 hearing, when plaintiff stated she did not misuse the car, excited after receiving the car keys, Vorberg concurred immediately by saying "That is right." (S139 at ¶9). At ¶58 in the Report, Mr. D'Andrea states that he has "no information concerning the cause of the subject vehicle stalling on the highway from any source." Such admission dooms Defendant and its counsel. Further, in its April 14, 2006 response to Interrogatory No. 10, Defendant had conceded that it had no evidence whatsoever to suggest "misuse of the car" (A110) Therefore, it would not be an overstatement that Vorberg committed fraud on court, when she disregarded her client's position, ignored the testimony from witnesses, but recycled a contention which had already been stricken, and presented hearsay or false evidence at trial.

38. At ¶39, Defendant contended that plaintiff "did not testify as to any other correspondence with the Illinois General's Office." Such a contention is wrong either in form or in substance. Vorberg's leading question during cross-examination at trial (Plaintiff's Report at ¶63, A64) shows Defendant knew the falsity of such an assertion. At ¶48 in the Report, Defendant goes one step further in providing deliberate false statements, by arguing that plaintiff testified she "did not mention the 'discrepancy' in any letters to the Illinois Attorney General,"" while its counsel is fully aware of what the truth is (Complaint at ¶57, A12, Exhibit O therein at A50-51).
39. The record shows Defendant's statement at ¶5 is false. Mr. Liu had always been listed as a witness for trial, and he was at the scene during the subject sale (C399, Exhibit B at ¶(2)). Here, there are two questions Defendant would not like to answer: (1) why Mr. D'Andrea and Early were allowed to testify, but Mr. Liu could not; (2) what was the maximum number, if any, of witnesses who could testify for each case at courtroom 1104 in 2006.
40. Defendant's statement at ¶7 is incredible, as Plaintiff's counsel definitely knew a trial was not a Rule 218 conference. From the moment plaintiff's counsel took the case, his attempt to conduct discovery had been blocked (A141). Further, plaintiff's counsel could not single out Mr. Holton, as he demanded Defendant to produce several names of witnesses in the Rule 237 Notice (C667). On the other hand, it was Judge Rhine who ordered Defendant to produce the name of the author of the alleged September 10 letter (7/10/06 Order at ¶5, A140).
41. At ¶¶13-14 and ¶¶19-20, Defendant suggested only one salesman at the scene during the subject sale. But its prior court paper defeats such contention (Defendant's Answer to Interrogatories # 5, S313).
42. Defendant's statement at ¶31, sounds like response, does not belong to a Report. Further, it is false: Defendant promised to tow back the car in the late evening of September 8, 2003, Mr. Edward O'Brien and plaintiff could not wait along the roadside all night, plaintiff had to make sure Defendant would do what it promised to do, not wait until the next day or later.

Defendant definitely knows who received the call and who arranged the tow, but chose to conceal related information during discovery.

43. At ¶44, Defendant devotes a lot words on an issuance bill in an attempt to raise after-trial arguments and provide misleading statements. Defendant knew there was nothing plaintiff could not explain; every bill was assumed to be paid; and Defendant did not ask for "cancelled check" during discovery and at trial, it would be frivolous to raise the non-existence issue in a Report.

44. No one can image what would have happened, had Vorberg examined Early with regard to the two Odometer Statement forms as Defendant suggested at ¶63. No one can figure out what question Vorberg could possibly ask to start the alleged examination. Defendant did not and could not voluntarily invite defeat at trial. In reality, it was plaintiff's counsel who performed the examination. As such, part of Defendant's statement at ¶60 and all assertions at ¶61 and ¶62 are false.

45. At ¶63, Defendant argued the mileage of 24520 on September 4, 2003 form (A48, S36) was higher (by six miles) than that (24509) on the October 6, 2003 form (A49, S37). The calculation is simple, but Defendant did it wrong. The record shows that Defendant admitted the odometer reading on June 16, 2003 was 24514 miles (A47; S483), while asserting it was 24510 miles, two months later on 8-21-03 (S331), then, Mr. D'Andrea and counsel Vorberg "affirmatively" stated "the reading was 24509 miles on October 6, 2003" (A115). The odometer cannot run backward by itself.

46. At ¶71, Vorberg submitted deliberate false statement again by arguing that, at trial, she "confused two witnesses" – "Hector Horitillo" and Henry Horton. The problem is how she can be "confused", while Judge Rhine, at retiring age, processed dozens of cases on each motion day, but he could remember the only name he ordered Defendant to produce (7/10/06 Order at ¶5, A140). And as Vorberg knew very well, a salesman's name was Poritillo (S313 Answer to Interrogatory #5; S315 Answer to Interrogatory #7; and S319, Vorberg's signature). There is simply no Mr. Horitillo in this case;

Also Defendant has asserted it is Early who created the purported September 10, 2003 letter (S443 and Opening Brief at page 29). As such, Vorberg cannot explain why she was "confused" one name of a key witness all the time, and Defendant shall have a duty to correct all its false statements in court papers while its counsel was frequently "confused."

47. At ¶71 and ¶72, Vorberg contended it was an "inadvertent error" when counsel provided "apparent misleading statements." No judge would stop a court proceeding simply an "inadvertent error" occurred at trial. Here, Vorberg has a duty to inform this Honorable Court how many "inadvertent errors" she had made when drafting all court papers, and as a start, how many such "inadvertent errors" existed in Defendant's Report.
48. At ¶¶73-76 and ¶78, Defendant provided more statements in ""inadvertent error." (1) Defendant suggested there was an "agreement" while it was Judge Rhine who set the terms of a settlement, as evidenced by Defendant's words "Judge Rhine offered suggestions." (2) The trial judge could not order to produce Mr. Horton, as suggested by Defendant at ¶74. The total number of testifying witness already reached three, and the trial judge knew Defendant did not list Holton as a witness in response to Interrogatory; further, if the Judge did render such an order, plaintiff's counsel would never assert objection as Defendant stated at ¶ 76. It was Vorberg who requested Holton to testify, (3) Holton did not testify as Defendant suggested at ¶78 because of plaintiff's objection
49. Defendant false statement at ¶77 barely deserves a comment. Not only plaintiff's counsel, but also the trial Judge knew plaintiff was going to file the Emergency Motion. The Judge was upset at the motion and the date of December 7, 2006 for hearing, because he would retire after December 1, 2006. The Judge had the discretion to hear the motion at any time before his retiring, but plaintiff had no other option and the December 7, 2006 was the earliest date available for a scheduled hearing and proper service. In the instant case, Defendant could file any motion, and request a next-day hearing (S306 and S307); but plaintiff could not do that.

50. At ¶86, Defendant launches an outrageous attack on plaintiff's counsel and his professional competence by providing fraudulent statements. The truth is whenever Mr. Carcili talked about Defendant's business practice, he would say: " I want to sell the Sears Tower, but I don't own it"; in his written comment on Vorberg's misconduct, he characterized it as "lying to the court." With leave of this Honorable Court, plaintiff is willing to submit pertinent evidence.
51. On December 1, 2006, the trial judge was going to retire. The case was predetermined (C662, A73; and Opening Brief at page 34); and the trial judge was upset at both parties for good or bad reasons; therefore, no one expected the trial judge, at the last moment of his career, would detail his reasoning on the "final judgment order." The absence of any comment on Defendant's Counterclaim evidences such a situation. In the entire Report, Defendant's counsel, on several occasions, put her own words into Mr. Carcili's and plaintiff's mouth. It is beyond dispute that at ¶87, Vorberg provided her own up-to-date contentions, most of which are absurd, under the name of a Judge. For example, Defendant already conceded that the subject car was dangerously defective by its action to tow it back, and this is a fact Defendant's counsel can do nothing about it. Without question, Defendant and its counsel dare not and did not say: "the car was not necessarily defective" in the two-year court proceedings, let alone a Judge.
52. At ¶86 and ¶87, among other wanton contentions, Defendant and its counsel asserted plaintiff's counsel "admitted the vehicle mileage had been overstated," and alleged that the trial judge stated "There were additional miles on the odometer statement than on the car." Here, they are insulting intelligence of a Judge, plaintiff's counsel and everyone else: Defendant admitted the registered mileage for the subject car on June 26, 2003 was 24514 miles (A47; S483). As such, if the odometer had not been disconnected, its reading should be more than 24514 miles two months later on September 4, 2003, even in the case that the previous owner sent the car to repair for the sole purpose to get rid of it; even in the case the repair

on June 26, 2003 was a complete failure, even in the case the subject car was towed to Defendant, and even in the case plaintiff was the only one who had a test-drive of the car. The September 4, 2003 Odometer Statement form (S36, A48) suggests the reading was 24520 miles whereas the October 6, 2003 form (S37, A49) shows 24509 miles, which demonstrates that either the odometer of the subject car had been rolled back, or the reading therein was falsified. When Defendant "affirmatively stated' that odometer reading on October 6, 2003 was 24509 miles in its response to Request for Admission of Facts (A115), when Defendant and its counsel contend in the Report that the mileage of the subject car is lower than either of the above-listed readings, the frivolous argument amounts to abuse of the judicial process. Even for this alone, Defendant and its counsel should be sanctioned under our Supreme Court Rule 375(b).

**Conclusion**

For the reasons stated herein, Defendant's Bystander's Report should be stricken in its entirety.

WHEREFORE, plaintiff respectfully prays this Honorable Court to grant this motion.

_____ _____

Date Appellant, pro se

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