

ORIGINAL

THE SUPREME COURT OF OHIO

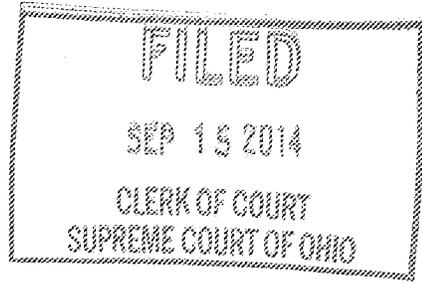
CINCINNATI BAR ASSOCIATION, : Case No.: 2013-1984

Relator,

-vs.-

GEOFFREY P. DAMON,

Respondent.



MOTION FOR RECONSIDERATION FILED BY RESPONDENT

NOW COMES Respondent Geoffrey P. Damon, and pursuant to Rule 18.2 of the Rules of Practice of the Supreme Court of Ohio, respectfully moves this Court to Reconsider its decision of permanent disbarment of Respondent, as it based upon a procedural error and has significant substantive errors, which warrant reconsideration of the decision. A concise memorandum follows to which this Court's attention is respectfully drawn.

Respectfully Submitted, 0079224

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MEMORANDUM

I. Standard for Reconsideration

This Court has the power to reconsider its decisions pursuant to Rule 18.2 of the Rules of Practice of the Supreme Court of Ohio. The test generally applied is whether the motion for reconsideration calls to the attention of the Court an obvious error in its decision or raises an issue for the Court's consideration that was either not considered at all or was not fully considered by the Court when it should have been. *Columbus v. Hodge* (1987), 37 Ohio App. 3d 68, 68; *Matthews v. Matthews* (1981), 5 Ohio App. 3d 140, 143, 5 OBR 320, 450 N.E. 2d 278 (both discussing standard for reconsideration in the appellate context). In *Matthews*, this Court stated, "[t]he test generally applied is whether the motion for reconsideration calls to the attention of the court an obvious error in its decision or raises an issue for our consideration that was either not considered at all or was not fully considered by us when it should have been." *Id*; see, also, *Erie Ins. Exchange v. Colony Dev. Corp.* (2000), 136 Ohio App.3d 419, 421, 736 N.E.2d 950; *Corporex Dev. & Constr Mgmt., Inc. v. Shook, Inc.*, Franklin App. No. 03AP-269, 2004-Ohio-2715, ¶4.

II. Procedural Error

This Court relied heavily upon the testimony of Attorney Joseph Butkovich regarding the alleged amount of restitution, to arrive at the conclusion that the amount of restitution was "unknown." This finding occurred because the Panel permitted testimony regarding the alleged amount of restitution, an amount which was part of an exhaustive and extensively negotiated Stipulation of Facts. In a case, in which an attorney's license is at stake it is highly prejudicial to allow

the Stipulation of Facts regarding the amount of restitution to be utterly disregarded by the witness, Counsel for the Relator, the Cincinnati Bar Association, the Panel and this Court.

As a matter of Ohio law, it has long been held that formal stipulations of fact submitted to a tribunal are in the nature of a special verdict by a jury, being the equivalent of proof made by both parties. *Ish v. Crane* (1862), 13 Ohio St. 574, 579-580; *Garrett v. Hanshue* (1895), 53 Ohio St. 482, 495, 42 N.E. 256; *Ramsey v. Ernoko, Inc.* (1991), 74 Ohio App. 3d 749, 754, 600 N.E.2d 701. "Thus, the stipulation performs the same function as [a] factual determination rendered by a jury upon conflicting evidence." *State v. F.O.E. Aerie* (1988), 38 Ohio St. 3d 53, 54, 526 N.E.2d 66; *see also Hickey v. City of Toledo*, 143 Ohio App. 3d 781, 788, 758 N.E.2d 1228, 1233, 2001 Ohio App. LEXIS 2664, 13-14 (Ohio Ct. App., Lucas County 2001).

This Court's acceptance of this procedural error, permitting evidence which contradicted and invalidated the Stipulation of Facts, constitutes a procedural error and basis for reconsideration of its decision.

As a remedy, Respondent had requested a remand to the Board for further findings to arrive at an agreed upon amount of restitution, all of Respondent's files were litigation files in which counsel entered an appearance of record with the Court. In a case in which an attorney's license is at stake, this procedural error was used to invalidate what had been an extensively negotiated restitution amount, in which the Butkovich firm had engaged a CPA/ Attorney to review the files, deposits and bank statements. Relator did not call the CPA/Attorney, John Mueller as a witness. Respondent reasonably relied upon the Stipulation of

Facts to be accepted by the Panel and by this Court in accordance with Ohio law cited above. This has not occurred. Rather, the Stipulation has been ignored and the restitution amount was testified to as being unknown even though a negotiated Stipulation of Facts regarding the restitution had been entered into by counsel for the Relator and the Respondent.

The assumption that Respondent has attempted to skirt his obligations with respect to any amount of restitution due and owing to the Butkovitch firm is not correct. Rather, Respondent has asked for an opportunity to arrive at the true and accurate amount which will make the whole by requesting a remand to determine appropriate restitution. For these reasons, Respondent respectfully requests reconsideration.

III. Substantive Error

A. The treatment of Respondent's failure to maintain time and billing records as tantamount to theft of client funds is in error.

Respondent requests that the Court reassess its findings that the failure to maintain accurate time and billing records equates with theft of client funds. Contrary to this finding, Respondent submits that Respondent's case is similar to the facts of *Disciplinary Counsel v. Squire*, 130 Ohio St. 3d 368, 368, 2011-Ohio-5578, P1, 958 N.E. 2d 914, 917, 2011 Ohio LEXIS 2798, 1 (Ohio 2011). In *Disciplinary Counsel v. Squire*, the attorney failed to hold client funds separate from his own property and misappropriated client funds for his own benefit, claiming that the withdrawals were advances on his attorney fees. He failed to maintain adequate records documenting client funds entrusted to him, and engaged in business relationships with clients without notifying them of the

conflicts of interest inherent in those relationships. He engaged in conduct involving dishonesty, fraud, deceit, or misrepresentation, and knowingly made false statements of material fact during the course of the disciplinary proceeding. Accordingly, the attorney repeatedly violated his professional duties and responsibilities. Although the attorney's practice of more than 25 years without disciplinary action militated against the presumptive sanction of permanent disbarment, the character evidence, all of which related to the early part of the attorney's career, did not warrant further deviation from that sanction. Therefore, the appropriate sanction for the attorney's misconduct was an indefinite license suspension. Moreover, while this Court has made much of the amount of restitution still unpaid, this Court has long-standing precedent which stands for the proposition that restitution not having been fully does not preclude reinstatement as a lawyer.

In *Cleveland Bar Assn. v. Gay* (2002), 94 Ohio St. 3d 404, 2002 Ohio 1051, 763 N.E.2d 585, this Court found that a lawyer had qualified for reinstatement after an indefinite suspension, notwithstanding that a bankruptcy court had discharged the \$ 50,000 malpractice judgment the Court had ordered him to pay as restitution. This Court excused the lawyer's compliance with the order because of Section 525(a), Title 11, U.S. Code, which prohibits a governmental unit from refusing to renew a license or other similar grant for the reason that the applicant has sought bankruptcy protection or has not paid a debt that was discharged. *Id.* at 405, 763 N.E.2d 585. *Accord Dayton Bar Assn. v. Gerren*, 110 Ohio St. 3d 297, 2006 Ohio 4482, 853 N.E.2d 302. *See Toledo Bar Ass'n v. Hales*, 120 Ohio St.3d 340, 346, 2008-Ohio-6201, P25, 899 N.E. 2d 130,

137, 2008 Ohio LEXIS 3261, 15-16 (Ohio 2008). In this case, Respondent has not discharged the restitution debt and is still working to pay that obligation; this should militate in favor of an indefinite suspension for Respondent, rather than the ultimate sanction of permanent disbarment.

The Relator and this Court have treated the instant case as one of both a felony conviction and the theft of client funds. Respondent has acknowledged the conduct underlying the felony conviction and has worked to make restitution. However, Respondent respectfully submits that this is not a case of theft of client funds. Rather, while Respondent admittedly violated ethical rules dealing with proper timekeeping and return of client funds, it was never his intent to collect and keep fees for work which was not performed. Although some may not agree with his strategies or legal theories, the Respondent never intended to swindle his clients and the evidence submitted establishes this fact. For these reasons, Respondent respectfully requests reconsideration.

B. This Court has imposed a sanction which is disproportionate to the misconduct of the Respondent.

Indefinite suspension is the appropriate sanction for the Respondent's misconduct. Permanent disbarment is disproportionate to the misconduct and is inconsistent with recent precedent of this Court. The Respondent requests that the sanction imposed be proportionate to the misconduct and that it be consistent with sanctions approved by this Court in recent disciplinary matters which were not addressed at oral argument of this case.

(i) Cincinnati Bar Ass'n v. Kellogg

In *Cincinnati Bar Ass'n v. Kellogg*, 126 Ohio St. 3d 360, 360, 2010-Ohio-3285, P1,933 N.E.2d 1085, 1086, 2010 Ohio LEXIS 1715, 1 (Ohio 2010), the attorney was convicted of money laundering and other crimes.

The Relator, Cincinnati Bar Association objected to the recommendation of a two-year suspension as a sanction. In entering an indefinite suspension, the Supreme Court accepted the findings that the attorney had violated Ohio Code Prof. Resp. DR 1-102(A)(3), (4), (5), Ohio Code Prof. Resp. DR 7-102(A)(7), (8), and Ohio Code Prof. Resp. DR 7-109(A). The attorney in this case engaged in conduct involving dishonesty and moral turpitude. Kellogg had acted with a dishonest or selfish motive, and had engaged in multiple offenses of misconduct. Despite a guideline sentencing range of 235 to 293 months, and a probation office's recommendation of a 188-month sentence, the trial court sentenced respondent to one year and one day in federal prison, making him eligible for a 15 percent reduction in his prison time. He was released to a halfway house in August 2009, and upon the expiration of the remainder of his prison term in November 2009, began serving a three-year period of supervised release. In *Kellogg*, the Board concluded that respondent's conduct, all of which occurred prior to February 1, 2007, violated DR 1-102(A)(3) (prohibiting a lawyer from engaging in illegal conduct involving moral turpitude), HN2 1-102(A)(4) (prohibiting a lawyer from engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), HN3 1-102(A)(5) (prohibiting a lawyer from engaging in conduct prejudicial to the administration of justice), 7-102(A)(7) (prohibiting a lawyer from counseling or assisting his client in conduct that the lawyer knows to be illegal or fraudulent) 7-102(A)(8) (prohibiting a lawyer from

knowingly engaging in illegal conduct), and 7-109(A) (prohibiting a lawyer from suppressing any evidence that he or his client has a legal obligation to reveal or produce).

This Court accepted these findings of misconduct by Attorney Kellogg. Further, this Court reviewed the relevant factors including the ethical duties that the lawyer violated and the sanctions imposed in similar cases. *Stark Cty. Bar Assn. v. Buttacavoli*, 96 Ohio St.3d 424, 2002 Ohio 4743, P 16, 775 N.E.2d 818. In making a final determination, this Court also weighed evidence of the aggravating and mitigating factors listed in Section 10(B) of the Rules and Regulations Governing Procedure on Complaints and Hearings Before the Board of Commissioners on Grievances and Discipline ("BCGD Proc.Reg."). *Disciplinary Counsel v. Broeren*, 115 Ohio St. 3d 473, 2007 Ohio 5251, P 21, 875 N.E.2d 935. Because each disciplinary case involves unique facts and circumstances, this Court not limited to the factors specified in the rule and may take into account "all relevant factors" in determining which sanction to impose. BCGD Proc.Reg. 10(B).

In *Kellogg*, Respondent both conspired to commit and committed money laundering by assisting in the creation of two trusts designed to protect \$ 14 million of Warshak's assets--the ill-begotten gains of the company's "continuity program"--from the FTC and future lawsuits by its customers. By instructing an employee to "get rid of" a misbranded product housed in the company's warehouse, Kellogg also set in motion a scheme to conceal evidence of the company's misdeeds from federal investigators. This conduct involving dishonesty and moral turpitude violated the very laws that respondent took an

oath to uphold. As for aggravating factors, the board determined that respondent acted with a dishonest or selfish motive, although he apparently did not benefit financially from his actions, and that he engaged in multiple offenses of misconduct. BCGD Proc.Reg. 10(B)(1)(b) and (d). And in mitigation, the board found that respondent has no prior disciplinary record, has made some efforts to rectify the consequences of his misconduct, has been cooperative in the disciplinary proceedings, has established that he is a person of good character, despite his criminal convictions, and has been penalized by the criminal justice system for his misconduct. BCGD Proc.Reg. 10(B)(2)(a), (c), (d), (e), and (f). The board also considered that respondent has accepted responsibility for his actions and has expressed remorse.

The Board recommended that a two-year suspension, with six months stayed, beginning on January 15, 2009, the date that respondent began serving his prison sentence. In *Kellogg*, this Court stated that “while we may defer to the expertise of the panel or board, accepting their findings of misconduct or their recommended sanctions for misconduct, as the ultimate arbiter of misconduct and sanctions in disciplinary cases, we are not required to do so.” *Disciplinary Counsel v. Kelly*, 121 Ohio St. 3d 39, 2009 Ohio 317, P 11, 901 N.E.2d 798, citing *Cincinnati Bar Assn. v. Powers*, 119 Ohio St. 3d 473, 2008 Ohio 4785, P21, 895 N.E.2d 172. In *Kellogg*, the Relator, the Cincinnati Bar Association cited a number of cases, in which this court had permanently disbarred attorneys who had engaged in money laundering and other comparable crimes. This Court found that “even when there is a presumption in favor of permanent disbarment, that presumption may be rebutted by evidence in mitigation.” citing with

approval *Disciplinary Counsel v. Smith*, 101 Ohio St. 3d 27, 2003 Ohio 6623, P 9, 800 N.E.2d 1129 ("Absent any mitigating factors, disbarment is the appropriate sanction for an attorney's misappropriation of client funds"); *Disciplinary Counsel v. Hunter*, 106 Ohio St. 3d 418, 2005 Ohio 5411, P 42, 835 N.E.2d 707 (Moyer, C.J., dissenting) ("by definition, a presumptive sanction of disbarment does not preclude the application of mitigation. That is, the presumption in favor of disbarment in the case of theft from clients is a rebuttable one").

This Court went on to distinguish the cases which the Relator had cited to justify the imposition of an indefinite suspension as follows:

In *Toledo Bar Assn. v. Cook*, 114 Ohio St. 3d 108, 2007 Ohio 3253, 868 N.E.2d 973, numerous aggravating factors--including respondent's prior disciplinary record for self-dealing, her deceptive explanations for her actions, and her failure to recognize how her actions violated the ethical standards for lawyers or why those standards even exist--weighed in favor of a more severe sanction, but there were no mitigating factors warranting leniency. In *Disciplinary Counsel v. Bein*, 105 Ohio St.3d 62, 2004 Ohio 7012, 822 N.E.2d 358, respondent had engaged in a pattern of criminal conduct over a five-year period, showed no remorse, downplayed his role in the criminal conspiracy, caused significant financial harm to the victims of his thefts and conspiracy, and was motivated by financial gain. Moreover, relator did not learn about the respondent's federal convictions until six years after the respondent was sentenced. *Id.* at P 4, 5, 8, 12. The only mitigating factors weighing in favor of leniency were the respondent's lack of a prior disciplinary record, his cooperation during the disciplinary process, and the imposition of other penalties in his criminal case. *Id.* at P 9. And in [1090] *Cincinnati Bar Assn. v. Banks* (2002), 94 Ohio St. 3d 428, 2002 Ohio 1236, 763 N.E.2d 1166, the respondent failed to participate in the disciplinary proceedings against him, and he knowingly gave materially false testimony on four separate occasions during his criminal trial in federal court. Of the cases cited by relator, the related cases of *Disciplinary Counsel v. Jones* (1993), 66 Ohio St.3d 74, 1993 Ohio 101, 609 N.E.2d 150, and *Disciplinary Counsel v. Williams* (1993), 66 Ohio St. 3d 71, 609 N.E.2d 149, are perhaps the most analogous to the case at bar. Those respondents engaged in a conspiracy to launder more than \$ 50,000 that they believed to be the proceeds from the sale of illegal drugs. In permanently disbaring Jones, we acknowledged the mitigating evidence that he had initiated the scheme due to economic hardship and that he had submitted numerous letters attesting to his good character.

But we also noted that Jones's active participation in the laundering scheme and his "belief that his conduct did not involve moral turpitude" were aggravating factors. We also disbarred Williams for his participation, despite evidence that he had cooperated with the government, that he had accepted responsibility for his crime, and that he was the least culpable participant in the scheme. But recently, in *Disciplinary Counsel v. Gittinger*, 125 Ohio St. 3d 467, 2010 Ohio 1830, 929 N.E.2d 410, we imposed an indefinite suspension on an attorney convicted of money laundering and conspiracy to commit bank fraud, based in part upon a condition in the respondent's federal criminal sentence that prohibited him from practicing law during his five-year term of supervised release. Here, based upon the seriousness and severity of respondent's crimes, we agree that his misconduct warrants a greater sanction than the board has recommended. We observe that despite federal guidelines recommending a sentence of 19 to 24 years in prison, respondent served only ten and one-half months, seven and one-half months in prison and three months in a halfway house, and is currently serving three years of supervised release. If we were to impose the board's recommended sanction, respondent could resume the practice of law more than two years before the expiration of that supervised release. But even if we were to accept relator's arguments that we should reject two factors that the board considered mitigating--namely respondent's leukemia diagnosis, which relator argues should be rejected because it has not been causally linked to respondent's criminal conduct, and respondent's acceptance of responsibility for his actions, which relator questions, arguing that respondent tried to minimize his culpability--the mitigating factors in this case would still weigh in favor of a sanction less severe than permanent disbarment. In particular, we note that respondent has assisted the company's bankruptcy trustee in his efforts to sell the company as a going concern, which preserved the jobs of more than 200 innocent employees. Respondent also cooperated with a federal investigation of the legal firm that drafted the trusts and provided counsel to the company. Moreover, the letters and testimony offered by respondent demonstrate that he is known for his honesty and integrity, despite his criminal convictions, and that the conduct leading to his convictions was an aberration, rather than the norm. BCGD Proc.Reg. 10(B)(2)(c), (d), and (e). Based upon the foregoing, we conclude that the appropriate sanction for respondent's misconduct is an indefinite suspension.

See Cincinnati Bar Ass'n v. Kellogg, 126 Ohio St. 3d 360, 362-365, 2010-Ohio-3285, P11-P26, 933 N.E. 2d 1085, 1088-1091, 2010 Ohio LEXIS 1715, 5-14 (Ohio 2010).

Justice O'Donnell wrote a dissent in *Kellogg*, in which he characterized Kellogg's conduct as follows:

I respectfully dissent. The appropriate sanction for this level of misconduct is disbarment. As the majority opinion recounts, respondent did not plead guilty but rather contested the charges and was found guilty by a jury of two counts of conspiracy to commit money laundering, two counts of money laundering involving \$ 14 million, and conspiracy to obstruct official proceedings before two federal agencies, the Federal Trade Commission and the Food and Drug Administration. The federal sentencing guidelines suggest a prison sentence for such conduct of 20 to 25 years. Respondent served less than one year. Despite mitigation, our role is to protect the public from lawyers who fail to adhere to the highest ethical standards, not coddle offending attorneys. Respondent's conduct is the epitome of disrespect for the system of justice he swore to uphold. Accordingly, I would disbar respondent for this conduct. *Cincinnati Bar Ass'n v. Kellogg*, 126 Ohio St. 3d 360, 366, 2010-Ohio-3285, P27-P28, 933 N.E.2d 1085, 1091, 2010 Ohio LEXIS 1715, 14-15 (Ohio 2010). The majority of this Court however found that the above-referenced misconduct to be an aberration and found that an indefinite suspension was a sufficient and appropriate sanction for Attorney Kellogg.

See *Cincinnati Bar Ass'n v. Kellogg*, (Dissenting Opinion, O'Donnell, J.)

The Respondent herein respectfully submits that Respondent had had a clean disciplinary record until the events of 2009 and 2010 resulted in the ensuing disciplinary and criminal matters. As such Respondent submits that his conduct was an aberration analogous to the situation in *Kellogg*. Further, Respondent Damon was prosecuted by the law firm for a probationable state law theft offense, for which Respondent has paid and continues to pay restitution payments. The harm in *Kellogg* cannot be calculated as it part of a massive fraud involving Steve Warshak; "Warshak was the founder of Berkeley Premium Nutraceuticals, a Cincinnati company that sold a wide range of supplements but made most of its money on one blockbuster product: Enzyte. Warshak sold countless men on the simple idea that happiness was just a little blue pill away.

His pill had a six-letter name, just like the prescription drug it was designed to evoke. But unlike Viagra, Enzyte was “natural” and could be ordered without a prescription in the privacy of one’s home. At last year’s trial, prosecutors alleged that Warshak had exploited that desire for privacy to bilk his customers out of more than \$100 million. The scam was simple, they alleged: Get a customer’s credit card number by offering a free sample (pay only the postage!), then charge the card again for more product than the customer ever ordered. Enzyte was marketed to men who didn’t want to go to the doctor, the government argued, and thus were likely to be ashamed of their sexual inadequacy. Warshak figured he could steal from these customers with minimum risk, prosecutors said; embarrassment would keep them from complaining. See GQ, *The Rise and Fall of the Cincinnati Boner King*, by Amy Wallace, pp 1-2. Attorney Kellogg provided legal assistance to Warshak. Attorney Kellogg was not permanently disbarred by this Court.

Respondent’s conduct was not on the same scale as that of Kellogg, who received a federal prison sentence, although far less than that which the Federal Sentencing Guidelines called for. Respondent respectfully submits that permanent disbarment is disproportionate in view of this precedent in which Attorney Kellogg was given an opportunity at reinstatement, the same opportunity Respondent is seeking here.

(ii) Ohio State Bar Assn v. McCafferty

In the case of former Cuyahoga County Judge Bridget McCafferty, the former judge was accused of lying to FBI agents and being involved in swaying

outcomes for political associates and giving special consideration to high-ranking politicians. McCafferty was convicted of lying to FBI agents. In *Ohio State Bar Association v. McCafferty*, Slip Opinion No. 2014-Ohio-3075, the headnote of the decision includes the following:

Judges – Misconduct – Felony convictions – Lying to FBI Agents – Conduct prejudicial to administration of justice – Conduct adversely reflecting on fitness to practice law – Violation of rules of Code of Judicial Conduct, including those prohibiting noncompliance with law and abuse of prestige of office – Indefinite suspension imposed, without credit for time served under interim felony suspension, to begin when term of federal supervised release is completed.

This matter was decided July 17, 2014 by this Court. Respondent respectfully submits that his punishment and sanction should be proportionate and consistent with that of Kellogg referenced above and with the sanction imposed upon former Judge McCafferty. Respondent's conduct involved a probationable theft offense for which Respondent has been paying restitution for over one year. Both Kellogg and McCafferty committed more serious federal offenses for which imprisonment was required under the Federal Sentencing Guidelines. By way of contrast, Respondent's conviction of theft required a probationary sentence under the Ohio Revised Code.

C. Conclusion

Respondent in this case has never been previously sanctioned until this matter arose in 2010. Respondent has been licensed in the State of Ohio since 1984 and in good standing until the interim felony suspension in May of 2013, a period of twenty-nine years. Respondent's conduct was an aberration, just as in Kellogg. And Respondent has taken and continues to take steps to remedy the misconduct. Respondent requests that this Court reconsider the sanction in

view of matters raised herein. The procedural error in which a Stipulation of Facts was disregarded, leaving Respondent to address an unanticipated evidentiary issue while attempting to represent himself pro se. The substantive issues in which the Court characterized poor time and billing practices with theft of client funds. And the disproportionate penalty for the Respondent's misconduct in view of other more egregious disciplinary matters which resulted in indefinite suspensions. Respondent requests reconsideration and the imposition of an indefinite suspension as a sufficient and appropriate sanction to address Respondent's misconduct.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I have sent the Original and twelve copies of the foregoing Motion for Extension of Time to File Objections and Supporting Brief to the Clerk of the Supreme Court of Ohio and that I have served a true and accurate copy of the foregoing upon the following counsel of record this 15th day of September, 2014 via First Class U.S. Mail service, postage prepaid:

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