No. 21-CI-004795

JEFFERSON CIRCUIT COURT
DIVISION TEN (10)
BUSINESS COURT DOCKET
JUDGE ANGELA MCCORMICK BISIG

WEN-PARKER LOGISTICS, INC.
and WPL BROKERAGE, INC. PLAINTIFFS

vs.

ORDER REGARDING
MOTION TO DISMISS

TWO CANOES, LLC and MESH GELMAN DEFENDANTS

* * * * *

This matter is before the Court on a Motion to Dismiss filed by Defendants Two Canoes, LLC ("Two Canoes") and Mesh Gelman ("Gelman") (collectively, "Defendants") on November 18, 2021. Plaintiffs Wen-Parker Logistics, Inc. ("WPL") and WPL Brokerage, Inc. ("WPLB") (collectively, "Plaintiffs") filed a Response on January 7, 2022. Defendants filed a Reply on January 28, 2022.

The Court heard oral argument on March 11, 2022. The Honorable Mark S. Fenzel and the Honorable Kevin L. Chlarson represented Plaintiffs. The Honorable Michael G. Goldberg, the Honorable Lara Kasten Hoffman, and the Honorable David S. Kaplan represented Defendants. The matter now stands submitted. The Court, having considered the written memoranda, oral argument, record in the case, and being otherwise sufficiently advised, rules as follows.

BACKGROUND

This is a contract dispute. Plaintiff WPL is a New York corporation engaged in the business of handling end-to-end cargo transportation for its customers. WPL's wholly owned subsidiary Plaintiff WPLB is a Kentucky corporation that handles custom clearances related

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functions for importers. WPL's principal place of business is in Elmont, New York, while WPLB's principal place of business is in Louisville, Kentucky.

Beginning in June or early July 2020, Plaintiffs and Defendant Two Canoes began negotiations for Plaintiffs to handle shipments of Two Canoes' personal protective equipment ("PPE") to the United States. During this process, Defendant Gelman completed and signed a WPL Credit Application. Immediately before Gelman's signature on the Application appears the statement "[w]e . . . hereby make this unconditional promise to pay and personally guarantee the payment of each invoice upon said invoice due date."

WPL ultimately determined from subsequent credit checks that Two Canoes was not credit worthy. WPL thus contends that the statement immediately before Gelman's signature on the Credit Application is a personal guaranty given WPL's concerns regarding Two Canoes' creditworthiness.

On July 21, 2020 Gelman executed a WPLB document entitled "Terms and Conditions of Service" (the "July 2020 Terms"). These July 2020 Terms state that they are "a legally binding contract." They further provide that "[i]n the event [WPLB] renders services and issues a document containing Terms and Conditions governing such services, the Terms and Conditions set forth in such other document(s) shall govern those services."[1] However, the July 2020 Terms also state that "[t]hese terms and conditions of service may only be modified, altered or amended in writing signed by both [Parties]; any attempt to unilaterally modify, alter or amend same shall be null and void." Finally, the July 2020 Terms also include a forum selection clause providing

[1] While WPLB's logo appears at the top of the July 2020 Terms, the contract makes clear that both WPLB and its related companies, including WPL, are parties to the agreement. However, for ease of reference, the Court will simply refer to WPLB when referring to the contract's terms.

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that any actions relating to services performed by WPLB shall only be brought in the federal or state courts of Kentucky.

Plaintiffs began shipping goods for Two Canoes in August 2020. The Parties exchanged numerous emails in connection with Plaintiffs' work. Each email included a line beneath the signature block stating that the work was performed subject to Plaintiffs' terms and conditions of services, which the emails indicated could be accessed in documents on Plaintiffs' web site. Unlike the July 2020 Agreement's Kentucky forum selection clause, the web site documents (the "Web Site Terms") provide that disputes will be resolved in the federal and state courts of New York. Defendants contend such documents were on Plaintiffs' website as early as October 2020, though Plaintiffs assert the documents were not finalized until May 2021.

On or about June 12, 2021, the Parties terminated their business relationship. Plaintiffs contend Defendants failed to pay Plaintiffs' invoices, while Defendants allege those invoices were inaccurate and included charges for services never agreed to by Defendants as well as charges in excess of the agreed upon rates. Defendants further allege that after termination of the relationship, Plaintiffs seized three containers of Defendants' PPE and ultimately sold those goods to its customers without crediting Defendants for the resulting funds received.

Plaintiffs brought this Action seeking more than $2 million in alleged unpaid invoices and other damages. Defendants now move to dismiss for lack of jurisdiction, improper venue, and failure to state a claim upon which relief can be granted.

1. *Defendants' Argument*

Defendants argue that the July 2020 Terms provided Plaintiffs with a right to unilaterally change the terms of the Parties' agreement, and that Plaintiffs in fact exercised that right when they posted the Web Site Terms substituting a New York forum selection clause for the earlier

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Kentucky forum selection clause. Defendants therefore contend the New York forum selection clause now controls and thus this case should proceed in New York rather than in Kentucky. Defendants further assert any ambiguity in the July 2020 Terms must be construed against Plaintiffs as drafters of the contracts in order to avoid the inequity of allowing Plaintiffs to choose between the two forum selection clauses.

Defendants further argue it would be unfair and unreasonable to litigate this Action in Kentucky. First, Defendants maintain litigation here would be inconvenient given that Wen-Parker and Two Canoes are both located in New York, as are the witnesses and relevant evidence, and because the dispute has no nexus with Kentucky. Defendants also assert it would not be unfair or unreasonable to enforce the New York forum selection clause because Plaintiffs unilaterally selected that jurisdiction, directed payments to New York bank accounts, and have officers, employees, and a principal place of business in New York. Defendants similarly maintain it would not be difficult to develop proof outside Kentucky and litigate in New York, and that New York courts are capable of addressing the dispute.

Defendants further argue the claims against Mesh Gelman must be dismissed because Gelman did not sign a personal guaranty but rather simply a credit application. Defendants note that the Credit Application contains references and bank information for Two Canoes rather than Gelman individually, and was in any event denied by Plaintiffs. Defendants also assert that even if the document was a personal guaranty, it fails to comply with KRS 371.065 because it does not refer to the instrument being guaranteed and does not set forth either the maximum aggregate liability or date of termination. Defendants also maintain that Gelman completed the Credit Application in a representative rather than personal capacity and therefore cannot be held personally liable on the alleged guaranty. Finally, Defendants argue Plaintiffs' unjust

enrichment claim must be dismissed because no such claim lies where the terms of an express contract control.

2. *Plaintiffs' Argument*

Plaintiffs argue that the Web Site Terms did not supersede the July 2020 Terms because the July 2020 Terms could only be modified, altered or amended in writing signed by both Parties. Plaintiffs further assert that the Web Site Terms were not intended to apply to Two Canoes, but rather only to new customer arrangements. Plaintiffs also contend the Web Site Terms were not finalized until May 2021, when Plaintiffs had been providing services to Two Canoes for more than ten months.

Plaintiffs also maintain that the Web Site Terms are simply a standard industry document controlling issues "arising from the carriage" of ocean cargo, and that the invoice disputes at issue here therefore are not controlled by that document in any event. Plaintiffs assert that the invoice disputes are governed instead by the Credit Application and Terms and Conditions signed by Gelman.

Plaintiffs further argue it would not be unfair or unreasonable to litigate their claims in this Court. More particularly, Plaintiffs assert there is no disparity in bargaining power between the parties, Kentucky has an interest in the enforcement of agreements of Kentucky parties, and Defendants have not shown litigation here would for all practical purposes deprive them of their day in court.

Plaintiffs also argue that Gelman signed a personal guaranty that is enforceable against him in his personal capacity. Plaintiffs contend the requirements set forth in KRS 371.065 are limited to guaranties not appearing on the face of the instrument guaranteed, and thus do not apply to Gelman's guaranty because it appears on the face of the Credit Application itself.

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Finally, Plaintiffs assert they may properly plead their unjust enrichment claim as an alternative to a breach of contract claim at this stage of the proceedings, and that Defendants may later move for summary judgment if they believe a contract controls every dispute at issue here.

OPINION

1. *Civil Rule 12.02*

Civil Rule 12.02(f) provides that a defense may be made by motion for "failure to state a claim upon which relief can be granted." In reviewing a motion to dismiss for failure to state a claim, "the pleadings should be liberally construed in a light most favorable to the plaintiff and all allegations taken in the complaint to be true." Littleton v. Plybon, 395 S.W.3d 505, 507 (Ky. App. 2012). The Court "should not grant the motion unless it appears the pleading party would not be entitled to relief under any set of facts which could be proved in support of his claim." Edmonson County v. French, 394 S.W.3d 410, 413 (Ky. App. 2013).

CR 12.02 also provides that a party may move for dismissal due to lack of jurisdiction. In considering whether such a dismissal is warranted, "the trial court, in addition to considering the material allegations in the complaint and construing them as true, is free to hear evidence regarding jurisdiction and to rule on that issue before trial, resolving factual disputes when necessary." Berthelsen v. Kane, 759 S.W.2d 831, 832 (Ky. App. 1988).

2. *Applicable Forum Selection Clause*

Under Kentucky law, a contractual forum selection clause is enforceable so long as the chosen forum would not be "'unfair or unreasonable.'" Aries Entm't, LLC v. Puerto Rican Ass'n for Hispanic Affairs, Inc., 591 S.W.3d 850, 855 (Ky. App. 2019). The interpretation of a contract is a question of law for the Court. Maze v. Bd. of Dirs. for the Commonwealth Postsecondary Educ. Prepaid Tuition Trust Fund, 559 S.W.3d 354, 363 (Ky. 2018). In

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considering the meaning of a contract, the Court must construe the agreement "'as a whole, giving effect to all parts and every word in it if possible.'" Big Sandy Co., L.P. v. EQT Gathering, LLC, 545 S.W.3d 842, 845 (Ky. 2018). Additionally, the Court's interpretation "'should be made in such a way as to make the promises mutually binding on all parties unless such a construction is wholly negated by the language used.'" Id.

Similarly, the Court should avoid an interpretation that would render the contract illusory, *i.e.* merely "'an expression cloaked in promissory terms, but which, upon closer examination, reveals that the promisor has not committed himself in any manner.'" Maze, 559 S.W.3d at 367; id. at 368 (interpreting contract to avoid finding of a merely illusory agreement); see also M & G Polymers USA, LLC v. Tackett, 574 U.S. 427, 440 (2015) ("[T]he illusory promises doctrine . . . instructs courts to avoid constructions of contracts that would render promises illusory . . . ."). Such illusory contracts are unenforceable because an empty promise cannot serve as consideration. Maze, 559 S.W.3d at 367 ("'Where an illusory promise is made, that is, a promise merely in form, but in actuality not promising anything, it cannot serve as consideration.'").

Here, Defendants contend Plaintiffs had a unilateral and unfettered right to change the provisions of the July 2020 Terms because that agreement states "[i]n the event [WPLB] renders services and issues a document containing Terms and Conditions governing such services, the Terms and Conditions set forth in such other document(s) govern those services." See Motion, Gelman Aff., Ex. A at 1. Defendants further contend Plaintiffs exercised that right when they posted the Web Site Terms substituting a New York forum selection clause for the Kentucky forum selection clause. However, such a construction of the July 2020 Terms would render them wholly illusory insofar as it would mean Plaintiffs could unilaterally change those terms at any

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time and thus in effect agreed to nothing at all. Such an interpretation must be avoided if possible.

A useful comparison is found in Maze. There, the Commonwealth contracted with the plaintiff under a program designed to allow participants to lock in tuition rates for future attendance at Kentucky public universities. Maze, 559 S.W.3d at 360. The contract included a provision incorporating the terms of relevant program statutes and regulations "'as may be amended from time to time.'" Id. at 361.

After the parties entered the contract, the General Assembly did in fact amend the referenced statutes to impose new limitations on a student's use of the lower tuition rate, with retroactive effect. Id. at 361-62. The plaintiff brought suit seeking a declaration that the statutory amendments were unenforceable. The trial court agreed but the Court of Appeals reversed, interpreting "the applicable contracts as expressing the parties' agreement that subsequent amendments to the governing statutes and regulations would change the terms and conditions of their existing contracts." Id. at 362.

The Supreme Court then reversed the Court of Appeals because, among other things, the Court of Appeals' interpretation of the contract rendered it illusory:

> If the . . . contract is interpreted as allowing the state to alter its obligation at the will of the legislature, as suggested by the Court of Appeals and the Appellees, the commitment made by the Commonwealth to plan participants "is not a promise . . . [t]he promise is an illusion." . . .
>
> "Where an illusory promise is made, that is a promise merely in form, but in actuality not promising anything, it cannot serve as consideration. Even if it were recognized by law, it would impose no obligation, since the promisor always has it within his power to keep his promise and yet escape performance of anything detrimental to himself or beneficial to the promissee. In such cases, the promisor may perform or not, solely on the condition of his whim, his promise will not serve as consideration."

> *If, as Appellees assert, the state as the contracting entity has reserved unto itself unlimited discretion to alter its promise of performance for any reason, then it has made no promise that can serve as consideration.*

Id. at 367-68 (emphasis added). To avoid such an interpretation, the Supreme Court instead looked to other provisions of the contract and adopted an interpretation that the state could amend the contract only to protect the tuition program's favorable tax treatment. Id. at 368.

Similarly, in the present case accepting Defendants' interpretation of the July 2020 Terms would mean Plaintiffs had unilateral and unlimited authority to change the terms of that contract at their whim. While at first blush the provision relied upon by Defendants appears to suggest this may be the case, a closer examination reveals otherwise. First, the provision states that different Terms and Conditions will apply "in the event [WPLB] renders services." Motion, Gelman Aff., Ex. A at 1. However, the July 2020 Terms already involve Plaintiffs rendering services. It would be nonsensical for this contract for Plaintiffs to render services to include a term addressing what will happen "in the event" Plaintiffs render services—particularly a provision stating that wholly different terms might govern if Plaintiffs perform. Thus, it is apparent the provision concerns instances where Plaintiffs might perform *other* services beyond the scope of those contemplated by the July 2020 Terms.

Second, the limitation of the provision to *other* services Plaintiffs might perform is also evident in its statement that different Terms and Conditions will govern "*such* services." Id. (emphasis added). Similarly, the provision's concluding statement that this other document will govern "*those* services" again suggests a reference to services distinct from those within the scope of the July 2020 Terms. Id. (emphasis added). Finally, the July 2020 Terms' later statement that they "may only be modified, altered or amended in writing signed by both Customer and Company" makes little sense if Plaintiffs in any event have the unilateral right to

change the terms, but makes much more sense if in fact the earlier provision merely addresses instances in which Plaintiffs might provide services other than those contemplated by the July 2020 Terms.

Thus, in examining the language of both the provision relied upon by Defendants and the contract as a whole, the Court does not find that Plaintiffs had unilateral authority to change, alter, or amend the July 2020 Terms. Rather, such changes had to be in writing and signed by both Parties. Such an interpretation not only comports with the plain language of the contract, but also avoids an interpretation that would render it illusory. As such, the inclusion of a New York forum selection clause in the Web Site Terms did not affect the July 2020 Terms, and the Kentucky forum selection clause therefore continues to apply and is enforceable so long as it is not unfair or unreasonable.

3. *Enforceability of Kentucky Forum Selection Clause*

As noted above, forum selection clauses are enforceable under Kentucky law provided they are not unfair or unreasonable. Aries Entm't, 591 S.W.3d at 855. Such clauses "'are prima facie valid' . . . and 'the burden rests on the movant to prove that enforcement is unreasonable.'" Id. In considering whether the chosen forum would be unfair or unreasonable, courts consider a number of factors including 1) inconvenience of holding trial in the contractual forum; 2) disparity of bargaining power; 3) the interest of the state in the lawsuit; 4) the law governing formation and construction of the contract; 5) residences of the parties; 6) where the contract was executed and performed; and 7) location of the relevant parties and witnesses. Id. at 856.

In weighing these factors, the Court does not find that litigation of this Action in the courts of the Commonwealth would be unfair or unreasonable. First, to be unfair, inconvenience

must rise to a level "'so serious as to deprive [the complainant] of [his] opportunity for a day in court.'" Id. at 858. Indeed,

> "the party seeking to escape his contract [must] show that trial in the contractual forum will be so gravely difficult and inconvenient that he will for all practical purposes be deprived of his day in court. Absent that, there is no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain."

Id. Defendants have made no showing of inconvenience approaching this high bar.

Second, there was no disparity of bargaining power as all parties are sophisticated business entities and persons. Third, Kentucky has more than a minimal interest in the suit given that WPLB is a Kentucky corporation whose contractual rights and obligations are at issue. Id. at 857 ("Kentucky has a strong public interest in ensuring parties abide by their bargains."). Fourth, the July 2020 Terms provide that they are to be governed by Kentucky law.

Fifth, while three of the parties may be resident elsewhere, at least one party, WPLB, is a Kentucky corporation with its principal place of business here. As such, the contract was also at least partially performed in Kentucky and at least some relevant witnesses and evidence may be located here. The Court also notes that modern technology and the availability of depositions may alleviate inconvenience arising from the location of witnesses and evidence outside of Kentucky. See id. at 858 ("Witnesses can be deposed, . . . eliminating expensive travel to a foreign courtroom."). Thus, in weighing the relevant considerations the Court does not find that litigation in Kentucky would be unfair or unreasonable. Accordingly, the Kentucky forum selection clause is enforceable and Defendants' Motion to Dismiss on grounds of the New York forum selection clause is DENIED.

4. *Personal Guaranty*

While the Court finds that litigation may proceed in Kentucky, it also finds that Plaintiffs' claims against Mesh Gelman for breach of a personal guaranty must be dismissed. The relevant language of the alleged guaranty relied upon by Plaintiffs states that "*[w]e . . .* hereby make this unconditional promise to pay and personally guarantee the payment of each invoice upon said invoice due date." Motion, Gelman Aff., Ex. B (emphasis added).[2] The provision also later states "*we* will be responsible for all interest, fees, and costs associated with the collection of *our* account." Id. (emphasis added).

The use of the plural "we" and "our account" in these terms makes plain that the guaranty is made by Two Canoes rather than Gelman individually. Quite simply, Gelman is a single individual who would be indicated by the pronoun "I" rather than "we." Similarly, the account at issue is held by Two Canoes rather than Gelman individually, and thus the use of the plural possessive "our" to modify account again indicates that the plural pronouns used in the provision refer to Two Canoes rather than Gelman individually. Accordingly, because the language of the provision plainly indicates that Gelman agreed to the guaranty terms in a representative capacity on behalf of Two Canoes rather than individually on behalf of himself, Defendants' Motion to Dismiss the claim for breach of the personal guaranty against Gelman is GRANTED.[3]

5. *Unjust Enrichment*

Finally, the Court does not find that dismissal of Plaintiffs' unjust enrichment claim is warranted at this time. Defendants correctly assert that a party may not recover on a claim for

[2] The alleged guaranty is central to Plaintiffs' Complaint and the Court may therefore consider it without converting the present Motion to one for summary judgment. Complaint ¶ 17; Netherwood v. Fifth Third Bank, Inc., 514 S.W.3d 558, 563-64 (Ky. App. 2017).

[3] The Court also notes that even if Gelman had signed in his individual capacity, the guaranty would nonetheless still be unenforceable given that Plaintiffs denied the Credit Application upon which it appears.

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unjust enrichment where there is a controlling contract. Furlong Dev. Co., LLC v. Georgetown-Scott County Planning and Zoning Comm'n, 504 S.W.3d 34, 40 (Ky. 2016) ("[U]njust enrichment is unavailable when the terms of an express contract control."). This rule is premised on the familiar precept that an equitable remedy such as unjust enrichment is unavailable where a party has a viable remedy at law. Superior Steel, Inc. v. Ascent at Roebling's Bridge, LLC, 540 S.W.3d 770, 778 (Ky. 2018) ("Because unjust enrichment is rooted in equity and 'law trumps equity,' courts frequently note that 'unjust enrichment is unavailable when the terms of an express contract control.'") (citation omitted).

However, as a corollary, a party may recover on an unjust enrichment claim even if a contract is alleged, provided that no legal remedy can be obtained on the contract. See id. at 779-82 (holding that where defendant's conduct prevented plaintiff from recovering under contract with third party, plaintiff had no viable contractual remedy and could recover on theory of unjust enrichment). Such circumstances arise, for example, "'when a valuable performance has been rendered under a contract that is invalid, or subject to avoidance, or otherwise ineffective to regulate the parties' obligations.'" Id. at 779. In such instances, "'the statement that there can be no unjust enrichment in contract cases is plainly erroneous.'" Id. (emphasis removed).

Here, a determination that the contract alleged by Plaintiffs is valid and controlling, that Plaintiffs thus have a viable remedy at law, and that Plaintiffs therefore may not pursue their equitable unjust enrichment claim would be premature. While such a determination would of course limit Plaintiffs to their breach of contract claim, it is beyond the scope of the Court's consideration on a motion to dismiss which accepts as true the allegations of the Complaint. Littleton, 395 S.W.3d at 507. As discovery proceeds, the facts may demonstrate that the alleged

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contract *is* valid and controlling, in which case Plaintiffs will be limited to their breach of contract claim. Or discovery may show that the contract is *not* valid and controlling, in which case Plaintiffs may be entitled to recover on their unjust enrichment claim. Thus, at this early stage, in the present posture of a Rule 12 motion and before an opportunity to complete discovery, the Court cannot say that under no circumstances would Plaintiffs be entitled to recover on their unjust enrichment claim.

Moreover, CR 8.05 provides that a party may "state as many separate claims . . . as he has *regardless of consistency* and whether based on legal or on equitable grounds or on both." CR 8.05(2) (emphasis added). Thus, parties may plead alternative theories of recovery, even if those theories are inconsistent. Smith v. Isaacs, 777 S.W.2d 912, 915 (Ky. 1989) ("Nor are we concerned any longer because pleadings assert alternative or inconsistent theories. This is now permitted by CR 8.05(2)."). Accordingly, the Court finds that although Plaintiffs have pled the existence of a contract, they may nonetheless proceed with their unjust enrichment claim—at least until such time, if any, that the contract alleged by Plaintiffs is found to be valid and controlling. CR 8.05(2); see also Davis v. Davis, 489 S.W.3d 225, 229 (Ky. 2016) ("Having determined that [plaintiff] is entitled to pursue a claim under common law contract principles, it logically follows that she also be entitled to pursue all equitable claims and remedies available at common law. This includes a claim for unjust enrichment . . . ."); Barrick v. James, 312 Ky. 463, 227 S.W.2d 909, 910-11 (1949) ("The general rule is that . . . a plaintiff may declare on both an express and implied contract and recover on either."); Son v. Coal Equity, Inc., 122 Fed. Appx. 797, 802 (6th Cir. 2004) ("[W]e believe that the *quantum meruit* claim should remain as an alternative theory available to the plaintiff, at least until the contract claim is concluded. To

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hold otherwise might prove to be premature. . . ."). Accordingly, Defendants' Motion to Dismiss the unjust enrichment claim is DENIED.

ORDER

WHEREFORE, IT IS HEREBY ORDERED AND ADJUDGED that Motion of the Defendants, Two Canoes, LLC and Mesh Gelman, is **GRANTED IN PART** and **DENIED IN PART**.

Defendants' Motion to Dismiss Plaintiffs' claim against Gelman for breach of personal guaranty is **GRANTED** and the claim **DISMISSED WITH PREJUDICE**. The remainder of Defendants' Motion to Dismiss is **DENIED**.

IT IS SO ORDERED this ____ day of _____, 2022.

/s/ HON. ANGELA MCCORMICK. BISIG
electronically signed
4/8/2022 10:50:26 AM ET

JUDGE ANGELA MCCORMICK BISIG
DIVISION TEN (10)
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cc: Mark S. Fenzel
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