

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW JERSEY

CELLCO PARTNERSHIP and NEW
YORK SMSA LIMITED PARTNERSHIP,
both D/B/A VERIZON WIRELESS,
Plaintiffs,

vs.

THE COUNTY OF MONMOUTH, NEW
JERSEY THE MONMOUTH COUNTY
BOARD OF COMMISSIONERS,
DIRECTOR THOMAS A. ARNONE, in his
official capacity and not as an individual,
DEPUTY DIRECTOR NICK DIROCCO,
in his official capacity and not as an
individual, COMMISSIONER SUSAN M.
KILEY, in her official capacity and not as
an individual, COMMISSIONER LILLIAN
G. BURRY, in her official capacity and not
as an individual, and COMMISSIONER
ROSS F. LICITRA, in his official capacity
and not as an individual,
Defendants

Civil Action No.
3:23-cv-18091-MAS-DEA

**MEMORANDUM OF LAW IN SUPPORT OF MOTION TO INTERVENE
BY BELMAR AGAINST 5G TOWERS, LAWRENCE REYNOLDS, ROSE
DAGANYA, MICHAEL USHAK, DAN RUBINETTI, PAUL M. ELIA,
MICHAEL AND MARY McHALE, AND CHILDREN'S HEALTH
DEFENSE**

INTRODUCTION

On September 7, 2023, Cellco Partnership and New York SMSA Limited Partnership, both d/b/a Verizon Wireless (“Verizon Wireless”), filed this action for declaratory and other relief against various County defendants (hereinafter “Defendants” or “County”). Stripped to the basics, Verizon seeks an order from this Court requiring the County to (1) agree to the placement of wireless facilities on county-owned right-of-way, allegedly pursuant to a “Right-of-Way Agreement” and (2) execute an landowner consent form that Verizon Wireless claims is a necessary prerequisite and part of Verizon Wireless’ application to the New Jersey Department of Environmental Protection (“NJDEP”) for a Coastal Area Facility Review Act (“CAFRA”) permit.¹ The County (through its counsel and the County Engineer) rejected Verizon Wireless’ request for placement pursuant to the Right-of-Way Agreement and refused to execute the landowner consent form.

Verizon Wireless alleges in its Complaint that the County’s denial of the facility placement request was legally erroneous or invalid, and its failure to execute the consent form is also legally erroneous or invalid and a breach of the Right-of-Way Agreement. The moving Intervenor disagree on both counts and move for party status as Defendant-Intervenor.

¹ Verizon Wireless does not, at this time, seek an order compelling issuance of a County “road opening” permit.

The Intervenors include individuals who live in the immediate vicinity of the proposed facilities and would be directly and specially affected by placement and operation. They have moved to intervene in this action. This memorandum of law supports that motion.

SUMMARY

The Intervenors are individuals who live and own property in the immediate vicinity of the Facility and will be directly and adversely affected if the Facility is constructed and goes into operation. The movant Intervenors fully participated below. The Court should allow them to intervene in the instant matter as a matter of right. This case will impair or impede the Intervenors' ability to protect their interests and they are not adequately represented by the County Defendants in connection with the instant matter. Even if the Intervenors may not intervene as a matter of right, they have a significant interest in the outcome of the instant litigation, in that they are persons who were parties below (among others) and would be affected by the outcome. They also have unique and additional claims that are not likely to be raised by the County Defendants.

Accordingly, this Court should permit the Intervenors to intervene pursuant to Fed. R. Civ. P. 24.

THE IDENTITY OF THE INTERVENORS

The Intervenors include individuals who live in the immediate vicinity of the proposed facilities.

A. Lawrence Reynolds is an individual residing at 201 9th Avenue in Belmar, New Jersey. This property is within 500-700 feet of one or more of the proposed wireless facilities. Lawrence Reynolds chose this location because of its proximity to the beach and Boardwalk and routinely go there for personal enjoyment and relaxation. Lawrence Reynolds also reveres the wildlife in general and the three listed species known to inhabit or frequent the area near the beach and Boardwalk. Lawrence Reynolds is legitimately concerned that the proposed project will destroy the view, aesthetics and local property values. Lawrence Reynolds will therefore suffer a special injury if the project is approved.

B. Rose Daganya is an individual residing at 201 9th Avenue, Belmar, New Jersey. Rose Daganya's residence is within 500-700 feet or less of one or more of the proposed wireless facilities. Rose Daganya has chosen to live at this location because of its proximity to the beach and Boardwalk and routinely goes there for personal enjoyment and relaxation. Rose Daganya also reveres the wildlife in general and the three listed species known to inhabit or frequent the area near the beach and boardwalk. Rose Daganya is legitimately concerned that the proposed project will destroy the view, aesthetics, and local property values. Rose is also

legitimately concerned that if the project is ultimately authorized the radiofrequency radiation emitted by the small wireless facilities will harm the environment and all wildlife in general and the three listed species in particular. Rose will therefore suffer a special injury if the project is approved.

C. Michael Ushak is an individual residing at 113 16th Avenue, Belmar, New Jersey. This property is within 300 feet or less of one or more of the proposed wireless facilities. Michael Ushak chose this location because of its proximity to the beach and Boardwalk and routinely goes there for personal enjoyment and relaxation. Michael also reveres the wildlife in general and the three listed species known to inhabit or frequent the area near the beach and Boardwalk. Michael Ushak is legitimately concerned that the proposed project will destroy the view, aesthetics and local property values. Michael Ushak is also legitimately concerned that if the project is ultimately authorized the radiofrequency radiation emitted by the small wireless facilities will harm the environment and all wildlife in general and the three listed species in particular. Michael Ushak will therefore suffer a special injury if the project is approved.

D. Dan Rubinetti is an individual residing at 214 8th Avenue, Belmar, New Jersey. This property is within 600 feet of one or more of the proposed wireless facilities. Dan Rubinetti chose this location because of its proximity to the beach and Boardwalk and routinely goes there for personal enjoyment and relaxation. Dan

Rubinetti also reveres the wildlife in general and the three listed species known to inhabit or frequent the area near the beach and Boardwalk. Dan Rubinetti is legitimately concerned that the proposed project will destroy the view, aesthetics and local property values. Dan Rubinetti is also legitimately concerned that if the project is ultimately authorized the radiofrequency radiation emitted by the small wireless facilities will harm the environment and all wildlife in general and the three listed species in particular. Dan Rubinetti will therefore suffer a special injury if the project is approved.

E. Paul M. Elia is an individual residing at 106 19th Avenue, Belmar, New Jersey. This property is within 200 feet of one or more of the proposed wireless facilities. Paul M. Elia chose this location because of its proximity to the beach and Boardwalk and routinely goes there for personal enjoyment and relaxation. Paul M. Elia also reveres the wildlife in general and the three listed species known to inhabit or frequent the area near the beach and Boardwalk. Paul M. Elia is legitimately concerned that the proposed project will destroy the view, aesthetics and local property values. Paul M. Elia is also legitimately concerned that if the project is ultimately authorized the radiofrequency radiation emitted by the small wireless facilities will harm the environment and all wildlife in general and the three listed species in particular. Paul M. Elia will therefore suffer a special injury if the project is approved.

F. Michael and Mary McHale are individuals that own property at 1707 Snyder Street, Belmar New Jersey. This property is within 400 feet or less of one or more of the proposed wireless facilities. Michael and Mary McHale chose this location because of its proximity to the beach and Boardwalk and routinely go there for personal enjoyment and relaxation. Michael and Mary McHale also revere the wildlife in general and the three listed species known to inhabit or frequent the area near the beach and Boardwalk. Michael and Mary McHale are legitimately concerned that the proposed project will destroy the view, aesthetics and local property values. Michael Mary McHale are also legitimately concerned that if the project is ultimately authorized the radiofrequency radiation emitted by the small wireless facilities will harm the environment and all wildlife in general and the three listed species in particular. Michael and Mary McHale will therefore suffer a special injury if the project is approved.

The foregoing individuals and other affected residents have joined together under the name of “Belmar Against 5G Towers.” This grassroots organization seeks to intervene in its representational capacity to represent all its members.

The individuals and others are also members of Intervenor Children’s Health Defense (“CHD”). Children’s Health Defense is a 501(c)(3) non-profit organization located at 852 Franklin Ave., Suite 511, Franklin Lakes, NJ 07417 and incorporated under the laws of California. Its mission is to end health epidemics by working

aggressively to eliminate harmful toxins in the human environment, hold those responsible accountable, and establish safeguards to prevent future harm through litigation, education, advocacy, and scientific research. CHD has 1,726 members in New Jersey, and 195 members in Monmouth County and seeks to intervene in and represent the interests of its affected members.

Several of the individuals participated in the proceedings before the County that gave rise to this matter. They joined with many others and presented written evidence and argument in opposition to the consents and permissions requested by Verizon Wireless. The County in large part agreed with the position taken in those materials. Verizon Wireless complains of the public's involvement and concern over this project in general, and specifically mentions meetings and statements at meetings held or attended by Belmar Against 5G members in Complaint ¶¶ 72-75 (& associated n. 28-29), ¶¶ 104-105 (& associated n. 32).

The Intervenors have the right to intervene as a matter of right, given that the disposition of this case will impair or impede the Intervenors' ability to protect their interests unless they are adequately represented in connection with the instant matter. *See* Fed. R. Civ. P. 24(a). Each individual movant Intervenor has a special injury that gives rise to standing. Belmar Against 5G Towers and CHD also seek to intervene and represent the interests of their other members, many of whom also have a special injury.

Even if the Intervenor may not intervene as a matter of right, they have a significant interest in the outcome of the instant litigation and “a claim or defense that shares with the main action a common question of law or fact.”

Assuming without conceding that 47 U.S.C. § 332(c)(7) applies in whole or in part and that Verizon Wireless has stated any state law claims, Intervenor meets the test for both “as a matter of right” and “permissive” intervention as to the alleged federal claims.

PROCEDURAL HISTORY

As of the date of this Motion the named Defendants have not filed a responsive pleading.

STANDARDS OF REVIEW

Motions to intervene are governed by Fed. R. Civ. P. 24. Motions to Intervene may be made as of right or by permission of the court. *See* Fed. R. Civ. P. 24(a) and (b). Whether motions made by right or by permission, motions must be timely, such that the original parties’ rights will not be prejudiced. *See* Fed. R. Civ. P. 24(a) and (b).

Motions to intervene by right must be permitted if the movant, “claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may, as a practical matter, impair or impede the movant’s ability to protect its interest unless existing parties adequately represent

that interest.” Fed. R. Civ. P. 24(a)(2). Intervention by right must be granted where the prospective intervenor establishes that:

... (1) the application for intervention is timely; (2) the applicant has a sufficient interest in the litigation; (3) the interest may be affected or impaired, as a practical matter by the disposition of the action; and (4) the interest is not adequately represented by an existing party in the litigation.” *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 314 (3d Cir. 2005) (quoting *Harris v. Pernsley*, 820 F.2d 592, 596 (3d Cir. 1987)).

Conforti v. Hanlon, 2023 U.S. Dist. LEXIS 56359, *9-10 (D.N.J. 2023).

In defining the contours of a “significantly protectable” legal interest under Rule 24(a)(2), the Third Circuit has held that: “the interest must be a legal interest . . . [and] [t]he applicant must demonstrate that there is a tangible threat to a legally cognizable interest to have the right to intervene.” *Id.* (internal citations omitted). The Court must “therefore determine whether the proposed intervenors are real parties in interest.” *Id.* Our courts liberally construe Rule 24(a) “in favor of intervention.” *Id.* (citing *NLRB v. Frazier*, 144 F.R.D. 650, 655 (D.N.J. 1992)).

Pursuant to Fed. R. Civ. P. 24(b), the Court may permit the parties to intervene to the extent that they have “a claim or defense that shares with the main action a common question of law or fact.” *See* Fed. R. Civ. P. 24(b)(1)(B). District courts have

...[d]iscretion to allow intervention “[o]n timely motion” where the movants “[have] a claim or defense that shares with the main action a common question of law or fact.” Rule 24(b)(1)(B). The decision of whether to grant or deny permissive intervention lies within the Court’s discretion. *Brody ex rel. Sugzdinis v. Spang*, 957 F.2d 1108, 1124 (3d

Cir. 1992). Courts also “consider various factors, including whether the proposed intervenors will add anything to the litigation and whether the proposed intervenors’ interests are already represented in the litigation.” *Worthington v. Bayer Healthcare LLC*, Civ. No. 11-2793, 2011 U.S. Dist. LEXIS 144369, 2011 WL 6303999, at *8 (D.N.J. Dec. 15, 2011) (citing *Hoots v. Pennsylvania*, 672 F.2d 1133, 1136 (3d Cir. 1982)). Finally, when considering whether to exercise its discretion and allow intervention under Rule 24(b), “the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties’ rights.”

Id. at *13. In considering a motion to intervene, the Court must accept as true non-conclusory allegations of the motion. *Madison Joint Venture LLC v. Chemo Rsch. S.L.*, 2021 U.S. Dist. LEXIS 262607, *8. (D.N.J. 2021).

LEGAL ARGUMENT

I. The Intervenor’s Motion Is Timely.

The Motion to Intervene is timely. The case is still freshly-filed and no action has been taken other than case-filing and service. A district court’s timeliness inquiry for both types of Rule 24 motions requires considering the totality of the circumstances arising from three factors:

(1) the stage of the proceeding; (2) the prejudice that delay may cause the parties; and (3) the reason for the delay.” *In re Cmty. Bank of N. Va.*, 418 F.3d 277, 314 (3d Cir. 2005); *In re Fine Paper Antitrust Litig.*, 695 F.2d 494, 500 (3d Cir. 1982) (treating the timeliness inquiry the same for both types of Rule 24 motions). These three factors are necessarily bound up in one another, *see, e.g., Mountain Top Condo. Ass’n v. Dave Stabbert Master Builder, Inc.*, 72 F.3d 361, 370, 33 V.I. 311 (3d Cir. 1995) (“[T]he stage of the proceeding is inherently tied to the question of the prejudice the delay in intervention may cause to the parties already involved.”), and we maintain “a general reluctance to dispose of a motion to intervene as of right on untimeliness grounds

because the would-be intervenor actually may be seriously harmed if not allowed to intervene,” *Benjamin ex rel. Yock v. Dep’t of Pub. Welfare of Pa.*, 701 F.3d 938, 949 (3d Cir. 2012).

Wallach v. Eaton Corp., 837 F.3d 356, 371-372 (3d Cir. 2016).

The Intervenors satisfy all three timeliness factors. The Intervenors filed their motion within 3 weeks after the Complaint was filed in this matter, even before the defendant County filed a responsive pleading. The prejudice to existing parties by intervention is *de minimus* to nonexistent because the Intervenors seek party status in the procedural infancy of the case. Given that the instant case remains in the early stages of litigation, little prejudice will obtain by virtue of intervention. *See Del. Riverkeeper Network v. United States Army Corps of Eng’rs*, 2010 U.S. Dist. LEXIS 152652, *3 (D.N.J. 2010) (“PRPA’s Motion is timely because the Complaint in this matter was only filed in November of 2009 and there have been no responsive pleadings filed thus far.”).

The harm to the Intervenors if this motion is denied is significant. If Plaintiff prevails the Intervenors will suffer direct injury to their property interests and their overriding concerns relating to the environment. As will be further explained in a forthcoming Motion to Dismiss, Plaintiff’s legal assertion that 47 U.S.C. § 332(c)(7)(B)(iv) and the FCC’s shot clock rules apply to the CAFRA permit process² would, if accepted by the Court, significantly inhibit the Intervenors’ procedural and

² See Complaint n. 29 and ¶¶ 76, 109-119.

substantive rights in any CAFRA case at the NJDEP. The County may or may not intend to address the full implications of Plaintiff's novel theory that the FCC rules preempt or repeal the Endangered Species Act and associated federal programs to protect listed species with known habitat immediately adjacent to the proposed tower sites, but Intervenors seek to appear in defense of those species and programs from Verizon Wireless' effort to render them nugatory as to wireless infrastructure and radiofrequency emissions impacts through its claims in this case.

Intervenors submitted evidence and argument below addressing environmental and visual impacts. They noted that the County's Master Plan seeks to "promote, and protect natural resources and significant natural features, unique areas, critical habitats, and the potential or known habitats of resident and migratory populations of rare, endangered, and threatened species..." Intervenors were among the parties opposing the requested action below, the challenged action was in Intervenors' favor, and the action before the Court would deprive Intervenors of the benefit of that favorable action. Furthermore, to the extent the defendant County might decide to no longer defend the decisions of the County, the Intervenors will lose any opportunity to be heard relative to this important, local issue.

II. Intervention As Of Right.

A. Intervenors' Interest In This Litigation.

Rule 24(a) requires that the prospective intervenor possess an interest relating to the property or transaction that is the subject of the litigation. “While the type of interest sufficient to sustain intervention as of right is not amendable to precise definition, a putative intervenor must show at a bare minimum that it has a ‘significantly protectable’ [...] interest that is ‘direct, not contingent.’” They satisfy this need if they are “real parties in interest.” *Mountain Top Condo. Ass’n*, 72 F.3d at 366. Nearby residents whose property interests will be directly affected meet that test since property rights are legal rather than general or indefinite. *Id.* at 367, *citing* 7C Wright, Miller & Kane, Federal Practice & Procedure § 1908, at 272-274.

Several of the individuals own property near the proposed project. They will directly suffer the adverse consequences from property value diminishment, loss of scenic views and enjoyment of the present composition of the Boardwalk. The Intervenors are also environmentally-conscious and contend that the project will have an adverse effect on the visual environment and nearby populations of rare, endangered and threatened species. The Intervenors have chosen to live in Monmouth County because of its diverse natural and scenic resources and seek to retain it in the face of Verizon Wireless’ efforts to degrade by placing unneeded and unwanted small wireless facilities on the Boardwalk. The Intervenors, therefore,

have a direct, protectable interest in this action since they directly benefitted from the County action and will suffer economic and environmental injury if the project proceeds.

B. Disposition Of The Action Would Impair Or Impede The Intervenor's Ability To Protect Their Property Interests.

An applicant for intervention as of right must be so situated that the disposition of the action *may* as a practical matter impair or impede the applicant's ability to protect that interest." Fed. R. Civ. P. 24(a) (emphasis added). The Intervenor's all own property impacted by the Facility and their ability to protect those properties will be substantially impaired or impeded if they not allowed to intervene.

C. The Intervenor's Interests Are Not Adequately Represented.

Finally, intervention by right requires a finding of "lack of adequate representation by existing parties." Fed. R. Civ. P. 24(a)(2). An intervenor need only show that representation may "possibly" be inadequate, not that it *is* inadequate. *Shipyards Assocs., L.P. v. City of Hoboken*, 2014 U.S. Dist. LEXIS 165786, *11 (D.N.J. 2014). (Defendant City had "delicate position as the entity with the police power to protect residents and the entity responsible for managing and interacting with municipal planning, zoning, and development interests" and may not retain "the political will to sustain a defense"; whereas the intervenors were "committed for the long term to a defense of the Ordinances and the concept of a public waterfront.")

The County defendants may not choose to raise all available defenses available to the County. To the extent that is correct several valid defenses (outlined in Part V, below) will not be asserted in this action unless intervention is allowed. Intervenors intend to raise those defenses. Further, the existing parties in this action do not adequately represent Intervenors' interest in the action because the County is not the direct legal representative of any of the individual Intervenors. The defendant County is exercising its state-law police power and its own property interests, and its defense of this action will relate to those interests only, perhaps in derogation of its more general *parens patriae* powers. Intervenors benefitted from the County's action but that outcome could be taken away through settlement that potentially binds the Intervenors in some fashion. Notably, Verizon Wireless appears to claim the prior settlement between Verizon Wireless and the Borough of Belmar binds the County and residents and derides alleged "coordination with the Borough" to "obstruct Verizon's deployment." Complaint ¶¶ 58-60, 72, 74 & n. 29, 78, 103-105.

The Complaint itself demonstrates that the Intervenors are real parties in interest. Verizon Wireless makes much of the local opposition largely organized and carried out by Belmar Against 5G Towers or its members. Complaint ¶¶ 72-75. Plaintiff asserts there is a "larger effort to stop Verizon" – presumably all driven by

the Intervenors. The Complaint itself makes plain that the Intervenors are “real parties in interest.”

D. Summary Of Intervention As Of Right.

The four elements necessary to allow intervention as of right under Rule 24(a) are present: the Intervenors Motion is timely, the Intervenors have a clear and concrete interest relating to the subject matter of this case, the Intervenors are at risk that this action may impair their ability to protect their interests and the Intervenors currently lack adequate representation by the existing parties, in that the County may inadequately represent their interests to the extent it softens, settles, or refuses to defend the instant matter.

III. Permissive Intervention Should Be Allowed Under Rule 24(b).

Fed. R. Civ. P. 24(b)(1)(B) allows Intervenors to intervene, at the Court’s discretion, if they have “a claim or defense that shares with the main action a common question of law or fact.” As set forth, *supra*, the Intervenors have standing and sufficient interest in the Order to warrant their interest and defense in same.

This action concerns, among other things, whether Verizon Wireless is subject to federal and state environmental laws and the County’s General Plan. If Verizon Wireless is immune there will be negative impacts on the Intervenors’ property and environmental interests. The questions posed by the defenses to be added by

Intervenors share common questions of fact and law and justify intervention because the additional defenses of Intervenors provide separate justifications for the Order.

The County Defendants may not adequately focus on an important but lurking legal issue: whether 47 U.S.C. § 332(c)(7)(B)(iv) and the FCC's "shot clock" rules preempt or repeal local, state and even federal environmental laws and programs arising under federal laws such as the Endangered Species Act ("ESA"), 16 U.S.C. § 1531 *et seq* and New Jersey state laws like the New Jersey Endangered and Nongame Species Conservation Act, N.J.S.A. 23:2A and various state and federal programs administered by the NJDEP. The Complaint asserts that CAFRA applications are subject to the Communications Act and FCC rule restrictions and procedural mandates. Intervenors have a special appreciation of the listed species that are known to frequent the project area and would be adversely affected by the project, and they appear to herein to defend those programs (and the listed species) against Plaintiff's preemption and repeal by implication effort.

Intervenors deny that this court has jurisdiction over Verizon Wireless' claims for various reasons. Intervenors will file a Motion to Dismiss by the deadline for defendant County's first responsive pleading to the complaint under Fed. R. Civ. P. 12. To the extent this court holds it does have subject matter jurisdiction the court will have jurisdiction over all of the defenses proposed to be added by Intervenors because they intimately relate to the claims made by Plaintiff.

Accordingly, the Court should, to the extent it does not allow intervention as of right under Fed. R. Civ. P. 24(a)(2), exercise its discretion because the requested intervention will significantly contribute to the full development of the underlying factual issues in the suit and to the just and equitable adjudication of the legal questions presented.

IV. Intervenors Should Be Considered Defendants.

Fed. R. Civ. P. 24(c) requires that the Intervenors must provide a pleading which “sets out the claim or defense for which intervention is sought.” Intervenors seek to be joined as Defendants but have not attached a pleading because Intervenors intend to file a Motion to Dismiss under Rule 12(b) of the Federal Rules of Civil Procedure. Specifically, Intervenors intend to raise the following defenses by motion, as allowed by Rule 12:

- A. Lack of subject-matter jurisdiction (47 U.S.C. 332(c)(7) not applicable to County action, in part);
- B. Lack of subject-matter jurisdiction (failure to exhaust administrative remedies);
- C. Failure to state a claim upon which relief can be granted; and
- D. Failure to join a party under Rule 19.

The Intervenors may raise the following defenses at the time any answer is due (if an answer is ultimately required): (i) waiver; (ii) estoppel; (iii) fraud; (iv) illegality; and (v) unclean hands. Further, Intervenors reserve the right to raise

additional defenses, bring counter-claims, and become a counter-plaintiff-in-intervention at the appropriate time for such claims to be filed.

CONCLUSION

For the foregoing reasons, Intervenors respectfully request that the Court (i) permit Intervenors to intervene and grant them full party status in the instant litigation; and (ii) grant such, other, further, and additional relief as the Court deems just and equitable.

Dated: Woodland Park, New Jersey
September 27, 2023

Respectfully submitted,
ANSELL GRIMM & AARON P.C.

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CERTIFICATION OF SERVICE

I hereby certify that this document filed through the CM/ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing.

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