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IN THE UNITED STATES BANKRUPTCY COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

In re:	:	**Chapter 11**
MF GLOBAL HOLDINGS LTD., et al.,	:	**Case No. 11-15059 (MG)**
Debtors	:	**(Jointly Administered)**
MF GLOBAL HOLDINGS LTD., as Plan Administrator, and MF GLOBAL ASSIGNED ASSETS LLC,	:	
Plaintiffs,	:	
v.	:	
ALLIED WORLD ASSURANCE COMPANY, LTD, IRON-STARR EXCESS AGENCY LTD., IRONSHORE INSURANCE LTD., STARR INSURANCE & REINSURANCE LIMITED., and FEDERAL INSURANCE COMPANY,	:	**Adv. Proc. No. 16-01251 (MG)**
Defendants.	:	

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT ALLIED WORLD ASSURANCE COMPANY, LTD'S OPPOSITION TO APPLICATION OF THE BAR ORDER AND *BARTON* DOCTRINE

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INTRODUCTION[1]

When Plaintiffs purchased an insurance policy from Allied World in Bermuda, they agreed to arbitrate in Bermuda any disputes concerning the policy, and to refer any dispute regarding the validity, scope and enforceability of the arbitration agreement to the arbitration tribunal and the Supreme Court of Bermuda. No one can seriously contest the Bermuda Court's jurisdiction to hear such a dispute, or Allied World's fundamental right to seek relief in support of the Bermuda arbitration (including enforcement of the Bermuda arbitration agreement) from the Bermuda Court. Plaintiffs cannot properly invoke this Court's August 10, 2016 injunction (D.I. 2282) (the "Bar Order") or the *Barton* doctrine to evade or frustrate the Bermuda action. In so arguing, Plaintiffs fundamentally misuse that order and doctrine, ignoring their underlying purposes and proper applications.

ARGUMENT[2]

I. ALLIED WORLD DID NOT VIOLATE THE BAR ORDER

The purpose of a bar order is to ensure finality of a settlement and to avoid further contribution and indemnification liability for settling parties. The Bar Order at issue here is no different. As described by Plaintiffs, the purpose of the Bar Order was to: (1) "protect the Settlement from collateral attacks;" and (2) protect the settling parties from exposure to "further liability." D.I. 2271, ¶¶ 38, 46. It did so, in relevant part, by precluding the Bermuda Insurers from: (1) challenging the "Reasonableness of Settlement;" and (2) bringing claims such as

[1] Allied World does not consent to the entry of final orders or judgment by the bankruptcy court. See Wellness Int'l Network, Ltd. v. Sharif, 135 S. Ct. 1932, 1948 (2015) (parties may only consent to a bankruptcy court's constitutional jurisdiction knowingly and voluntarily). By filing this memorandum of law at the request of the Court, Allied World does not waive its right to contest personal jurisdiction, subject matter jurisdiction, service of process, or its right to arbitrate. See Adv. Dkt. 13, 14 and 37. (References herein to docket entries are the same as those identified in this Adversary Complaint).

[2] Allied World incorporates, as if fully set forth herein, its Memorandum of Law In Support of Defendant Allied World Assurance Company, Ltd's Opposition to Order To Show Cause and its Memorandum of Law In Opposition to Order to Show Cause Dated Dec. 29, 2016, which was submitted to this Court under seal on January 3, 2017. See Adv. Dkt. 28. The facts and abbreviations in those memoranda are relied upon for purposes of this memorandum.

"contribution, indemnity, or comparative fault (however denominated and on whatever theory), arising out of or related to the MF Global Actions." D.I. 2282, ¶ 7. Allied World has not violated the Bar Order because it has not challenged the Reasonableness of Settlement or brought claims such as contribution, indemnity or comparative fault.

The contractual arbitration dispute between Allied World and MFGAA does not involve an attack on the Reasonableness of Settlement. "The Stipulation and Agreement of Settlement defines "Reasonableness of Settlement" to mean that the Settlement and amounts paid toward the Settlement are reasonable, and that the amounts paid by the underlying E&O insurers constitute proper exhaustion. See D.I. 2271-2, at 22. Allied World does not challenge the settlement's reasonableness or the exhaustion of the underlying E&O layers.[3]

Indeed, the Settlement and Bar Order were entered with full knowledge that Allied World would not contribute its E&O limits to the Settlement and would pursue coverage arbitration.[4] The Settlement addressed the fact that Allied World denied coverage under its E&O Policy by having the Individual Insureds assign any rights to proceeds under the Bermuda Policies to MFGAA, and making provisions in the event that full policy limits are not recovered from the Bermuda Insurers. See, e.g., D.I. 2271-2, §§ 1(c) (i), (vi)-(vii). Moreover, the Settlement

[3] Although the Excess E&O insurers initially raised exhaustion, now that the underlying reinsurers have paid their full limits, Allied World no longer asserts exhaustion as a coverage defense. Plaintiffs' assertion that Allied World is precluded from asserting that its own Policy precludes coverage, by contesting insurability under its own Policy, or any other coverage defense available in law, equity, or under the terms of its Policy, is unsupported by the terms of the Stipulation and Agreement of Settlement and Bar Order. Indeed, when approving the Settlement, this Court confirmed that the Bermuda Insurers were on notice that the Bar Order would preclude them from challenging the "Reasonableness of Settlement" only and did not indicate that those insurers would be precluded from challenging whether coverage is available under the terms of their policies. See D.I. 2284, Hr'g Tr. 12:21-13:1. Nor did Plaintiffs assert at the approval hearing that a Bar Order would preclude such coverage defenses. Plaintiffs failed even to mention to the Court that there were Bermuda arbitration clauses or a pending demand for a Bermuda Arbitration.

[4] Plaintiffs had many months' notice of Allied World's denial and coverage arbitration before they drafted the Bar Order. Plaintiffs were on notice that Allied World declined to make its E&O limits available for a settlement by May 2015. Plaintiffs were on notice that Allied World initiated arbitration, pursuant to the terms of its Policy, by February 2016. Plaintiffs did not provide Allied World with any "notice" of any bar on Allied World's ability to contest either the Reasonableness of Settlement or exhaustion until a May 3, 2016 draft was circulated. See Kerstein Aff. at I.

acknowledged that "litigation" **or "arbitration"** would be brought either "**by or against**" Allied World to resolve this coverage dispute. Id. (emphasis added). Accordingly, the Bar Order not only anticipates, but expressly permits, coverage actions, including arbitration, by authorizing: (1) "any and all actions reasonably necessary to consummate the Global Settlement, including, without limitation, any payments under certain insurance policies required under the Settlement Agreement . . .;" and (2) claims by MFGAA, or other Plaintiffs, against the Bermuda Insurers to recover under the Bermuda Policies. See D.I. 2882, ¶¶ 3, 8. There is no prohibition in the Bar Order—much less a "clear and unambiguous" one—against the Bermuda proceedings, or evidence that Allied World violated the Bar Order. In fact, this Court already declined to hold the Bermuda Insurers in contempt of the Bar Order, finding that "**the Bar Order did not clearly and unambiguously prohibit the filing of the Bermuda Action**." See Adv. Dkt. 35 at 10 (emphasis added).

Nor has Allied World violated the Bar Order by bringing claims such as "contribution, indemnity, or comparative fault (however denominated and on whatever theory), arising out of or related to the MF Global Actions." D.I. 2282, ¶ 7. Allied World's contract dispute in Bermuda has nothing to do with contribution, indemnity or comparative fault. Whether Allied World contributes to the Settlement will have no impact on the settling insurers. Plaintiffs specifically contemplated and provided for the fact that Allied World was not contributing its limits in the approved Settlement. See D.I. 2271-2, §§ 1(c) (i), (vi)-(viii). Any "notice" on Allied World's part of the Bar Order is beside the point because the Bar Order does not prohibit the pending Bermuda Arbitration or the ASI action. Plaintiffs' own dispute about whether the word "claims" as used in the Bar Order has the same meaning as "claim" under the Bankruptcy

Code is a concession that the purported violation is not clear, and, therefore, cannot be a basis for violation of the Bar Order or for contempt.[5]

II. ALLIED WORLD HAS NOT VIOLATED THE *BARTON* DOCTRINE

The *Barton* doctrine protects estates in bankruptcy, and their court-appointed officers, from defending certain actions in another forum without the bankruptcy court's permission. See Barton v. Barbour, 104 U.S. 126, 127-29 (1881); In re Gen. Growth Prop., Inc., 426 B.R. 71, 74 (Bankr. S.D.N.Y. 2010). The purpose of the *Barton* doctrine is to allow the bankruptcy court to oversee only matters that threaten to interfere with claims of creditors or the administration of the estate, or allege wrongdoing against a court-appointed officer in its official capacity. See, e.g., Lebovits v. Scheffel (In re Lehal Realty Assocs.), 101 F.3d 272, 276-77 (2d Cir. 1996) (*Barton* doctrine applied to suit against trustee for personal liability in official capacity); Growth Prop., 426 B.R. at 73-75 (*Barton* doctrine applied to suit against trustee for personal liability in official capacity for failure to respond to a take-over bid which would directly interfere with the administration of the estate). The *Barton* doctrine is inapplicable here because the Bermuda Proceedings neither interfere with creditors' claims or the administration of the estate,[6] nor allege wrongdoing of a court-appointed officer in its official capacity.[7]

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[5] Plaintiffs' argument over the meaning of "claims" is irrelevant, where there is no violation of the Bar Order in the first place. In any event, indemnification for costs and attorneys' fees is not unambiguously a "claim." See Parker v. Metro. Water Reclamation Dist., 782 F. Supp. 387, 388 (N.D. Ill. 1992) ("liability, claims, and demands" is not broad enough to include attorneys' fees where release failed to explicitly mention the term).

[6] As described in the Memorandum of Law in Support of Defendant Allied World Assurance Company, Ltd's Motion to Compel Arbitration (Adv. Dkt. 13-1) and the Memorandum of Law in Support of Defendant Allied World Assurance Company, Ltd's opposition to Memorandum Opinion and Temporary Restraining Order (Adv. Dkt. 37), the claims in the Adversary Proceeding (and the Bermuda action) are non-core.

[7] Plaintiffs' reliance on Lawrence v. Goldberg, 573 F.3d. 1265 (11th Cir. 2009) is misplaced. In Lawrence, the court approved the Trustee's lawyers and investigator to assist the Trustee in discharging his duty to locate estate assets. There, the court found the lawyers, investigators and creditors that financed the Trustee's efforts "functioned as the equivalent of court appointed officers." Id. at 1270. The plaintiff's claims directly challenged defendants' conduct in the Chapter 7 proceedings, for example, by alleging that the Trustee's lawyers "wrongfully obtain[ed] orders authorizing the filing of *ex parte* pleadings". Id. at 1268. Plaintiffs do not assert similar facts here.

The Bermuda Proceedings do not interfere with creditors' claims or the administration of the estate, in part, because the "estate" does not hold title to any proceeds available under the Allied World E&O Policy.[8] MFGH is the only relevant "estate," and, although MFGH was an insured under the Allied World Policy, MFGH does not allege to have an outstanding covered claim under the Allied World E&O Policy. Without a covered claim outstanding under the Policy, the Plan Administrator could have no interest in the proceeds of the Allied World Policy.[9] Plaintiffs implicitly agree because, in this Adversary Proceeding, the only coverage Plaintiffs seek is for losses allegedly suffered by MFGI and the Individual Insureds, not by the estate, MFGH.[10] Accordingly, even if there were coverage (which Allied World disputes) MFGAA is now the only entity that is allegedly entitled to recover any proceeds available under the Allied World Policy.[11]

[8] This Court never determined that any proceeds available under the Allied World E&O Policy are property of the MFGI or MFGH estate. In In re MF Global Holdings Ltd.,469 B.R. 177 (Bankr. S.D.N.Y. 2012), the parties disputed whether the proceeds of the policies were property of the estates and the Court stated: "Because the Court concludes that reasonable defense costs should be paid on behalf of the Individual Insureds whether or not the policy proceeds are property of the estates, **the Court need not resolve at this time the issue whether policy proceeds are property of the estates**." Id. at 187 (emphasis added). The Court further ruled that the Individual Insureds could have access to the E&O policies because they "'**were obtained for the protection of' the Individual Insureds and are 'not a vehicle for corporate protection**.'" Id. at 193 (internal quotation marks and citations omitted) (emphasis added). In In re MF Global Holdings Ltd., 515 B.R. 193, 203-4, 207 (Bankr. S.D.N.Y. 2014) the Court concluded that the proceeds of the D&O policies were not property of the estates, given that the debtor did not have an outstanding covered claim, and for that reason declined to retain jurisdiction to oversee the defense costs to be paid out of the D&O policy. In any event, the Court's decisions on that issue were written before MFGAA was assigned all proceeds available under the Policy, making those decisions inapplicable on this issue.

[9] See In re MF Global Holdings Ltd., 515 B.R. at 203 ("'Where a liability insurance policy includes entity coverage, but there are no covered [claims] outstanding, courts have generally held that the insurance proceeds are not property of the estate.'" (quoting In re Downey Fin. Corp., 428 B.R. 595, 604 (Bankr. D. Del. 2010))).

[10] See, e.g., Adv. Dkt 1, at ¶¶ 14 n.8, 15, 22, 36, 40, 65, 70, 101, 104-106, Prayer for Relief. See also Kerstein Aff., ¶¶ 4-7, 8-14. Although Plaintiffs reference the Litigation Trust Claims in their Brief, in an attempt to implicate MFGH, as Plaintiffs told this Court, the Litigation Trust claims are not covered by the E&O policies, but rather under the D&O Policies. See Kerstein Aff., ¶ 14 ("the Litigation Trust's claims are payable only out of the D&O policies while the MFGAA claims apply to both" the D&O and E&O policies).

[11] This insurance coverage dispute does not involve a disagreement over ownership of the Policy, or proper distribution of policy proceeds (matters over which this Court would have *in rem* jurisdiction). In stark contrast, this dispute concerns whether Allied World is liable under the Allied World Policy (a claim that this Court did not retain jurisdiction over). See Adv. Dkt. 37 (addressing why the Court did not retain subject matter jurisdiction over the coverage claims).

MFGAA is not the "estate," or the Plan Administrator.[12] MFGH is the Plan Administrator. Although MFGH is a court-appointed officer, the Bermuda contract dispute does not concern MFGH in that official capacity. A Plan Administrator acts as a court-appointed officer only with respect to the powers, rights and causes of action that were granted and transferred to it under the Plan. The Plan authorized MFGH to act as Plan Administrator only for the property of the Debtors' estates that re-vested with the Debtors. See D.I. 1382, at Article XI.A. As explained above, MFGH does not hold title to and is not pursing any right to and is not pursuing any recover proceeds under the Allied World Policy, and accordingly, MFGI's and the Individual Insured's alleged claims for coverage, which were allegedly assigned to and are being pursued by MFGAA, were not included in the Debtors' schedule of retained causes of action. See D.I. 1283, at Exhibit IV.G. As a result, when the Court confirmed the Plan in April 2013, (a) the claims for coverage were not transferred to, or re-vested in, MFGH under the Plan, and (b) MFGH, as Plan Administrator, in its official capacity, was not granted any rights to prosecute the claims for coverage. Even if MFGH were prosecuting a coverage claim under the Allied World Policy, it would not be acting in its official capacity.[13] Allied World is not aware of any court

[12] Although this Court approved the Sale and Assumption Agreement, and retained jurisdiction to "interpret[] or implement[]" its Order approving the Sale and Assumption Agreement, contrary to Plaintiffs assertion, that Order does not appoint MFGAA as an officer of this Court. See Kerstein Aff., ¶ 6. Indeed, MFGAA includes (non-Debtor Members). Because this dispute does not concern interpretation or implementation of the Court's Order approving the Sale and Assumption Agreement, that Order does not bring this dispute within this Court's jurisdiction.

[13] For this reason, Plaintiffs' reliance on Smith v. ACE Ins. Co., a District of Arizona case concerning the *Barton* doctrine, is misplaced. In Smith v. ACE Ins. Co. (In re BCE W., L.P.), 2006 U.S. Dist. LEXIS 62772, at *3-5 (D. Ariz. Aug. 31, 2006)), "[v]ia the settlements, the Trustee received an assignment of the former directors' and officers' rights against ACE Insurance Company, Ltd.," and it was the Trustee who pursued the claims against ACE in the adversary proceeding the U.S. Bankruptcy Court. ACE Ins. Co. v. Smith (In re BCE W., L.P.), 2006 U.S. Dist. LEXIS 67761, at *3 (D. Ariz. Sep. 20, 2006). Hence the Trustee in ACE, unlike MFGH, was sued in its official capacity in the Bermuda action, a reason for the ACE court's application of the *Barton* doctrine. The only reason MFGH is involved in the Bermuda Action is because it inserted itself into this Adversary Proceeding. Plaintiffs do not allege that MFGH (in its official capacity) has and is pursuing any rights, title or interest to any proceeds that may be available under the Allied World Policy. Moreover, the ACE court's decision to affirm a *Barton* violation was in error. Given the principles behind *Barton*, the ACE court's finding that the claims at issue were non-core should have precluded any application of *Barton*.

providing *Barton* doctrine protection for claims asserted against putative court-officers acting in their personal capacities. Nor is Allied World is not aware of any case applying the *Barton* doctrine where: (1) a lawfully instituted coverage arbitration was instituted against an entity that is not a court-appointed officer; (2) the proceeds at issue are not part of the estate; and (3) no court-appointed officer was sued it its official capacity.

Accordingly, Allied World has not violated the *Barton* doctrine.

III. ALLIED WORLD SHOULD NOT BE HELD IN CONTEMPT OR SANCTIONED

For the reasons discussed above, Allied World respectfully submits that it has not violated the Bar Order or the *Barton* doctrine. However, in the event that the Court concludes that either the Bar Order or the *Barton* doctrine has been violated (which Allied World disputes), Allied World submits that its pursuit of arbitration in Bermuda does not justify a finding of contempt or sanctions.

To find contempt, the Second Circuit requires that:

> (1) the order the contemnor failed to comply with is clear and unambiguous, (2) the proof of noncompliance is clear and convincing, and (3) the contemnor has not diligently attempted to comply in a reasonable manner.

Paramedics Electromedicina Comercial, Ltda. v. GE Med. Sys. Info. Techs., Inc., 369 F.3d 645, 655 (2d Cir. 2004).[14] A "clear and unambiguous order" is one that is "specific and definite enough to apprise those within its scope of the conduct that is being proscribed." N.Y. State Nat'l Org. for Women v. Terry, 886 F.2d 1339, 1352 (2d Cir. 1989) (internal quotation marks and citation omitted). In other words, the "order is one that leaves no uncertainty in the minds of those to whom it is addressed, who must be able to ascertain from the four corners of the order

[14] In light of Paramedics, an anti-suit injunction issued by a Bermuda court, in support of a Bermuda arbitration agreement, should not be offensive or alien in this Circuit.

precisely what acts are forbidden." King v. Allied Vision, Ltd., 65 F.3d 1051, 1058 (2d Cir. 1995) (citations and quotations marks omitted).

Allied World respectfully submits that neither the Bar Order nor the *Barton* doctrine unambiguously prohibited Allied World's initiation of the Bermuda Arbitration, or the ASI proceedings to protect its arbitration, given that neither the Bar Order nor the *Barton* doctrine specifically precludes those actions. To the contrary, Allied World reasonably interpreted the Bar Order and the *Barton* doctrine not to preclude its Bermuda Arbitration or ASI proceedings. Indeed, this Court has already found that "the Bar Order did not clearly and unambiguously prohibit the filing of the Bermuda Action" and has already declined to hold the Bermuda Insurers in contempt of the Bar Order for initiating the action. See Adv. Dkt. 35 at 10. Likewise, for the reasons stated above, at the very least, the *Barton* doctrine does not clearly and unambiguously apply here. Indeed, its application on the facts here is unprecedented. Under the circumstances, a contempt finding is unjustified.

Further, in issuing its TRO, the Court made "clear" that "at this stage of this case, the Court is not enjoining the Bermuda Insurers from prosecuting the case they filed in the Bermuda Court". Id. at 32. The Bermuda ASI Action is for a permanent injunction barring the defendants there from suing instead of arbitrating. Allied World understood all of its actions in Bermuda, following the entry of the TRO, to be consistent with the Court's statement.[15]

To the extent the Court finds that Allied World is in contempt (which it disputes), sanctions are not warranted. The Second Circuit requires "willful" contempt for an award of

[15] For the same reasons, Allied World did not violate this Court's TRO. Much of the argument in Plaintiffs' papers appears to relate to Allied World's purported violation of the TRO. Because the Court stated that it did not want further briefing on that issue, we do not address it here, but note that for many of the same reasons Allied World's conduct is not contumacious, its conduct did not violate the TRO. Moreover, the *Barton* doctrine focuses on the initiation of a proceeding outside of the bankruptcy court. Therefore, nothing that happened subsequent to the initiation of the Bermuda action, including the December filings in Bermuda, is relevant to whether a violation of the *Barton* doctrine occurred.

sanctions. See In re Chemtura Corp., 2016 Bankr. LEXIS 4056, at *71 (Bankr. S.D.N.Y. Nov. 23, 2016) ("Contempt requires a showing of maliciousness or a lack of a good faith") (internal quotation marks and citations omitted); In re Velo Holdings, Inc., 500 B.R. 693, 700 (Bankr. S.D.N.Y. 2013) ("A bankruptcy court may hold a party in contempt and award sanctions after that party has willfully violated a court order"). There is no showing of willfulness here given Allied World's understanding that the *Barton* doctrine and Bar Order are inapplicable and Allied World's belief that it complied with the Court's permission to "prosecute" its ASI.

Sanctions "may not be imposed as a purely punitive measure." Paramedics, 369 F.3d at 657. Rather, "some proof of loss must be present to justify [the] compensatory aspects" of a sanction, which "should be correlated with the loss incurred." Id. at 658; see also Manhattan Indus. v. Sweater Bee by Banff, Ltd., 885 F.2d 1, 5 (2d Cir. 1989) (monetary sanctions are awarded to compensate the injured party for past non-compliance with order), cert. denied 494 U.S. 1029 (1990); In re BCE West, 2006 U.S. Dist. LEXIS 67761, at *36-37 (movants submitted proof of their expenses incurred in litigating the out-of-forum case before the Court imposed any sanctions); Dula v. Amereon, Ltd., 2004 U.S. Dist. LEXIS 13231, at *2 (S.D.N.Y. July 15, 2004) (granting sanctions for attorneys' fees only after court ordered movants to provide "detailed time records setting forth the legal fees and costs" incurred (citation and quotation marks omitted)). Plaintiffs have made no showing of any specific damages they suffered as a result of the Bermuda Proceedings, let alone sanctions for $20 million. Under the circumstances, monetary sanctions are not justified.

Nor are any harsher sanctions, such as striking pleadings or default, warranted. Those sanctions are "drastic" and are rarely appropriate. See, e.g., Hanover Ins. Co. v. Vt. Mut. Ins. Co., 2014 U.S. Dist. LEXIS 78431, at *5 (N.D.N.Y. June 10, 2014) (citations omitted) (striking

party's pleadings and entering default judgments are "drastic remedies which should generally only be used when lesser sanctions would be inappropriate") (citations omitted); Valentini v. Citigroup, Inc., 2013 U.S. Dist. LEXIS 116473, at *11 (S.D.N.Y. Aug. 16, 2013) ("Extreme sanctions, such as striking a pleading or entering judgment against the offending party, are 'pungent, rarely used, and . . . [a] judge should employ [them] only when she is sure of the impotence of lesser sanctions.'" (quoting Ocello v. White Marine, Inc., 347 F. App'x 639, 641 (2d Cir. 2009))). Given Allied World's lack of willfulness, the harshest sanctions should be unavailable.

IV. THERE IS NO PERSONAL JURISDICTION OVER ALLIED WORLD AND SERVICE OF PROCESS WAS IMPROPER

Allied World incorporates the arguments made in its Motion to Dismiss for Lack of Personal Jurisdiction and Improper Service and its Opposition to Memorandum Opinion and Temporary Restraining Order. See Adv. Dkt. 13 and 37.

CONCLUSION

For the foregoing reasons, Allied World respectfully requests that the Court find that Allied World has not violated the Bar Order or the *Barton* doctrine, and that the Court decline to hold Allied World in contempt of court.

Dated: New York, New York

January 11, 2017

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