IN THE SUPREME COURT OF THE STATE OF CALIFORNIA

No. S147345

IN RE TOBACCO II CASES

WILLARD BROWN, ET AL.,
Plaintiffs and Appellants,

v.

PHILIP MORRIS USA, INC., ET AL.,
Defendants and Respondents.

After an Opinion by the Court of Appeal, Fourth Appellate District, Division One Affirming an Order Decertifying a Class Action, San Diego Superior Court, Case No. 711400 Judicial Council Coordination Proceeding 4042, The Honorable Ronald Prager, Judge Presiding

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BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS AND RESPONDENTS

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INTRODUCTION AND SUMMARY OF ARGUMENT

California's Unfair Competition Law (UCL) contains a tension between public law and private law goals. On the one hand, the law encourages both individuals and government officials to challenge corporate misdeeds so as to protect the public from unfair, unlawful, and fraudulent behavior. On the other hand, the law encourages individuals to seek remedies for injuries done to them personally, a function usually found in tort law. While the legislative and judicial expansion of the Unfair Competition Law furthered the public law goals of the statute, publicized abuses galvanized voters into demanding a tightening of its provisions. With the enactment of Proposition 64, Californians rejected the expansive public law approach of the Law and imposed new standing and causation requirements that plainly reflect a private law viewpoint.

Therefore, the Court should consider the reliance factor in the context of achieving the private law goal of compensation and restitution rather than the overarching public goal of deterrence. Viewed in this light, Proposition 64's requirement that an individual bringing a lawsuit must show "injury in fact . . . as a result of" the defendant's fraudulent business practice or false advertising necessarily requires a showing of reliance on behalf of each plaintiff. *See* Bus. & Prof. Code §§ 17204, 17535. Because a class action must be comprised of individuals who could bring the lawsuit individually,

each member of the class must demonstrate reliance. Where the purported class is defined so as to require individual allegations of reliance (e.g., because the alleged misrepresentations occurred over a significant period of time, and/or changed over time), then these individual issues counsel against certification of the class. Because the court below correctly applied this analysis, its decision should be affirmed.

ARGUMENT

I

PROPOSITION 64 REJECTS THE PUBLIC LAW VIEW OF THE FORMERLY EXPANSIVE UNFAIR COMPETITION LAW

A. Prior to Proposition 64, California's UCL Tracked the "Public Law" Model of Tort Law and Consumer Protection Statutes

Beginning in the 1960s, both tort law and consumer protection statutes moved to a public law view of their functions. Forty years later, both the Legislatures and courts are reversing course. While some of the sources cited below refer only to tort law, and others cite only to consumer statutes modeled after the Federal Trade Commission, both forms of recovery tracked the same public policy arc from narrow avenues of private recovery to much broader, public-law oriented approaches and therefore may be considered in tandem. Michael S. Greve, *Consumer Law, Class Actions, and the Common Law*, 7 Chap. L. Rev. 155, 175 (2004). The pendulum for both also seems to have

reached the outermost public law extension and is in the process of swinging back to a state of the law where private individuals may seek recovery for injuries or harms suffered by themselves personally, while government takes the lead in averting or recovering for harms to the general public.

Under the public law approach, tort law and consumer protection statutes came to be viewed as far more than a method for resolving personal disputes; instead, the common law of tort and the consumer statutes were defined as an end-run around ineffective and underfunded government agencies in order to maximize the general public welfare and deter misconduct. *See* G. Edward White, *Tort Law in America: An Intellectual History* 178 (1985) (noting trend toward "conceiv[ing] of tort law as 'public law in disguise' " instead of being "concerned primarily with deterring and punishing blameworthy civil conduct"). Typical of this approach was the Supreme Court's statement in *Deposit Guaranty National Bank v. Roper*, 445 U.S. 326, 339 (1980), that "[t]he aggregation of individual claims in the context of a classwide suit is an evolutionary response to the existence of injuries unremedied by the regulatory actions of government." *See also Dolgow v. Anderson*, 43 F.R.D. 472, 481 (E.D.N.Y. 1968) (A class action "as a way of redressing group wrongs is a semi-public remedy administered by the lawyer in private practice.").

Scholars promoted the idea that "[t]he traditional account—under which tort law was understood as a set of rules and concepts, grounded in ordinary morality, for resolving disputes over alleged wrongs committed by A against B—was no longer obviously in tune with modern realities," such as the industrialized economy and the distance between manufacturer and consumer. John C. P. Goldberg, *Twentieth-Century Tort Theory*, 91 Geo. L. J. 513, 521 (2003). Thus, while the tort law tradition was limited to providing redress to injured parties, public law advocates recreated tort law as a public policy tool that leveraged private disputes to make public rules. *E.g.*, Charles Fried & David Rosenberg, *Making Tort Law: What Should Be Done and Who Should Do It* 13-32 (2003) (arguing that tort law should be used to achieve "socially optimal management of accident risk"); Sheila B. Scheuerman, *The Consumer Fraud Class Action: Reining in Abuse by Requiring Plaintiffs to Allege Reliance as an Essential Element*, 43 Harv. J. on Legis. 1, 30 (2006).

The public law model of torts then segued into consumer protection statutes, resulting in uniform acts that eliminated requirements such as proving fraudulent intent or reliance. "Implicit in the decision of these courts to abandon reliance is an acceptance of the 'public-law' version of torts." Sheila B. Scheuerman, *Reliance as an Essential Element*, 43 Harv. J. on Legis. at 30; Richard F. Dole, *Merchant and Consumer Protection: The Uniform Deceptive Trade Practices Act*, 76 Yale L.J. 485, 495 (1967); Elizabeth A.

Dalberth, *Unfair and Deceptive Acts and Practices in Real Estate Transactions: The Duty to Disclose Off-Site Environmental Hazards*, 97 Dick. L. Rev. 153, 158 (1992) ("[T]he elements of UDAP statutes are easier to prove than the elements of common law fraud because many do not require proof of intent to defraud, reliance, actual damage, or even actual sale."). By defining the injury suffered by the class of consumers at this level of abstraction, the consumer fraud statutes thus further the policy goals of public law. Anthony J. Sebok, *Pretext, Transparency and Motive in Mass Restitution Litigation*, 57 Vand. L. Rev. 2177, 2208 (2004).

California's UCL, prior to 2004, followed this model. Prior to Proposition 64, the Legislature and the courts consistently loosened the UCL to allow plaintiffs to proceed without meeting the basic standing rules that California law normally required. *See, e.g., Stop Youth Addiction, Inc. v. Lucky Stores, Inc.*, 17 Cal. 4th 553, 570 (1998) ("[W]henever the Legislature has acted to amend the UCL, it has done so only to *expand* its scope, never to narrow it."). The UCL allowed almost any individual, regardless of whether he or she suffered any injury, to bring an action on behalf of him or herself, a representative class, or the general public. *Id.* at 561. Although the UCL permitted class action claims, plaintiffs chose instead to avoid the procedural safeguards normally required in California class actions—adequacy, commonality, numerously, and superiority—by bringing their claim in a

"representative" capacity. *Compare* Code Civ. Proc. §§ 382, 284 *with* Bus. and Prof. Code § 17204.

B. Deficiencies in the Public Law Approach

The public law approach does not require reliance by the plaintiff because it wants to maximize the number of cases challenging alleged misrepresentations that could harm individual consumers. But there is an alternative means of addressing these harms explicitly set out in the statute: Public agencies are intended to address public harms. "[G]overnment enforcement has the comparative advantage in articulating and applying a consumer protection policy that addresses these public harms. Because the government has substantial control over the selection of cases, it can direct a coherent body of law via both regulation and litigation." Scheuerman, *Reliance as an Essential Element*, 43 Harv. J. on Legis. at 37.

For example, a state attorney general can take into account existing agency regulations and policy preferences when deciding whether to pursue litigation. Individual plaintiffs' lawyers, however, have a different set of incentives that often fail to consider the regulatory scheme or policy preferences beyond their own personal biases. In *Avery v. State Farm Mutual Automobile Ins. Co.*, 746 N.E.2d 1242, 1247, 1254 (Ill. App. Ct. 2001), *aff'd in part and rev'd in part*, 835 N.E.2d 801 (Ill. 2005), for example, plaintiffs' lawyers filed a nationwide class action against State Farm, alleging that the use

of non-original equipment manufacturer ("non-OEM") parts during repairs violated the Illinois Consumer Fraud and Deceptive Practices Act, even though at least forty states had enacted regulations or statutes expressly permitting the use of non-OEM parts as a means of reducing insurance premiums. The plaintiffs' lawyers in *Avery* essentially usurped the roles of the state insurance commissioner and the state attorney general in deciding to sue State Farm for actions it had taken in compliance with state law.[1]

There are numerous public policy concerns with a statutory regime that encourages public law actions borne out of alleged individual wrongs, without any element of causation/reliance required. If manufacturers must pay compensation not simply to their actual victims but to all purchasers, the lawsuit results in over-deterrence and subjects defendants to excessive liability. Indeed, "[p]unishing every error in judgment regardless whether it has caused harm might result in excessive liability and could lead not only to overbearing and discriminatory enforcement, but also to a fearful and overcautious society." David Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 Harv. L. Rev. 849, 882 (1984); *Freeman & Mills, Inc. v. Belcher Oil Co.*, 11 Cal. 4th 85, 109 (1995) ("[C]ourts must be cautious not to fashion remedies which overdeter

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[1] The $1.18 billion judgment against State Farm was reversed by the Illinois Supreme Court. 835 N.E.2d at 818.

the illegitimate and as a result chill legitimate activities."). Finally, allowing misrepresentation claims to proceed without any showing of reliance creates inefficient incentives by allowing the consumer to feign ignorance of information they actually have. *See* Goldberg, *Twentieth-Century Tort Theory*, 91 Geo. L. J. at 550-51; *see* Scheuerman, *Reliance as an Essential Element*, 43 Harv. J. on Legis. at 41. Thus,

> [w]hile state attorneys general should be able to stop deceptive conduct by obtaining injunctive relief against a business before consumers are misled, individuals who never saw, heard, or relied upon the conduct that allegedly injured them should not be able to bring imaginary claims. If the allegedly deceptive conduct did not influence the plaintiff by affecting his or her decision to purchase the product, there should be no private right of action. To do otherwise would eviscerate the fundamental distinction between private rights of action, which are based on harm to an individual, and public enforcement of a law, which may not be.

Victor E. Schwartz & Cary Silverman, *Common-Sense Construction of Consumer Protection Acts*, 54 U. Kan. L. Rev. 1, 52 (2005).

C. Proposition 64 Rejects the Older Model by Imposing Strict Standing and Causation Requirements on Private Litigants

The private pursuit of misrepresentation class actions was largely as a result of government agencies failing to enforce existing laws prohibiting certain trade practices, plus the "public law" theory that found increasing traction among judges and lawyers. Richard L. Cupp, Jr., *State Medical Reimbursement Lawsuits after Tobacco: Is the Domino Effect for Lead Paint*

Manufacturers and Others Fair Game?, 27 Pepp. L. Rev. 685, 691 (2000) (noting wide range of "copycat" litigation after the state attorneys general announced the tobacco settlement).

Times have changed with regard to both these factors. Government agencies and state attorneys general are tenacious in their pursuit of corporate wrongdoing, while the public law theory of torts has receded in light of its excesses. In keeping with the new circumstances, Proposition 64 distinguishes between the standards for public enforcement and the standards that should govern a private damages claim. *See* Scheuerman, *Reliance as an Essential Element*, 43 Harv. J. on Legis. at 33. California voters concluded that the statute was too prone to abuse and needed serious reform. After the state Legislature repeatedly failed to address voters' concerns (*see* Mathieu Blackston, Comment, *California's Unfair Competition Law—Making Sure the Avenger Is Not Guilty of the Greater Crime*, 41 San Diego L. Rev. 1833, 1847-48 (2004) (detailing failed legislative attempts)), they enacted Proposition 64, which transformed the UCL back into a private law statute. *See United Investors Life Ins. Co. v. Waddell & Reed, Inc.*, 125 Cal. App. 4th 1300, 1303 (2005) (After Proposition 64, "[t]he authority of a person to file suit on behalf of the general public absent injury in fact and loss of money or property has been abrogated."). Under Proposition 64, a UCL plaintiff now must show that

he "has suffered injury in fact and has lost money or property as a result of such unfair competition." Bus. & Prof. Code § 17204.

Even with the new focus on standing and causation, no one questions that tort law serves certain public functions. Through the imposition of damages via judgments and settlements, private misrepresentation cases deter manufacturer misrepresentations. But government agencies have been specifically charged with that very objective.[2] Duplicating this public function by permitting loosely constructed yet massive class actions is an inefficient distribution of resources. The enactment of Proposition 64 reflects Californians' view that a "public law" vision of torts/consumer protection is unnecessary where true public law, i.e., government enforcement, exists.

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[2] This is not to suggest that government agencies are themselves immune from the potential for abuse by targeting specific industries for reasons of political pressure. *See, e.g.*, Victor E. Schwartz, et al., *Tort Reform Past, Present and Future: Solving Old Problems and Dealing with "New Style" Litigation*, 27 Wm. Mitchell L. Rev. 237, 258 (2000) (Potential targets include "HMOs, automobiles, chemicals, alcoholic beverages, pharmaceuticals, Internet providers, 'Hollywood,' video game makers, and even the dairy and fast food industries.").

II

EACH MEMBER OF A CLASS ALLEGING A UCL CLAIM MUST DEMONSTRATE INDIVIDUAL RELIANCE AS A CONDITION TO SHOWING INJURY "AS A RESULT OF" A MISREPRESENTATION

A. Reliance Is a Necessary Precondition to a Private UCL Claim

Thus UCL as amended by Proposition 64 did away with the broad individual "personal representative" provision of and explicitly imported the requirements of Code of Civil Procedure Section 382, which authorizes class actions "when the question is one of a common or general interest, of many persons, or when the parties are numerous, and it is impracticable to bring them all before the court." The class action mechanism is nothing more and nothing less than a device for collectively litigating individual substantive claims. *Madrid v. Perot Systems Corp.*, 130 Cal. App. 4th 440, 461 (2005). "'The definition of a class cannot be so broad as to include individuals who are without standing to maintain the action on their own behalf. Each class member must have standing to bring the suit in his [or her] own right.'" *Collins v. Safeway Stores, Inc.*, 187 Cal. App. 3d 62, 73 (1986); *see also Henry Schein, Inc. v. Stromboe*, 102 S.W.3d 675, 693-94 (Tex. 2002) ("The procedural device of a class action eliminates the necessity of adducing the same evidence over and over again in a multitude of individual actions; it does not lessen the quality of evidence required in an individual action or relax

substantive burdens of proof."). Class certification does not serve to enlarge substantive rights or remedies. "Altering the substantive law to accommodate procedure would be to confuse the means with the ends—to sacrifice the goal for the going." *City of San Jose v. Superior Court*, 12 Cal. 3d 447, 462 (1974).

As a practical matter, damages sought under the UCL cannot be "caused" by a defendant's misrepresentation without reliance on the statement. In other words, if the defendant's statement did not influence the plaintiff's decision to purchase the product, then it did not cause her any harm. *Group Health Plan, Inc. v. Philip Morris Inc.*, 621 N.W.2d 2, 13 (Minn. 2001); *accord, e.g., Hageman v. Twin City Chrysler-Plymouth Inc.*, 681 F. Supp. 303, 308 (M.D.N.C. 1988) ("To prove actual causation, a plaintiff must prove that he or she detrimentally relied on the defendant's deceptive statement or misrepresentation.") (citing *Pearce v. Am. Defender Life Ins. Co.*, 343 S.E.2d 174, 180 (N.C. 1986)); *Feitler v. Animation Celection, Inc.*, 13 P.3d 1044, 1047 (Or. Ct. App. 2000) (holding causal element of misrepresentation claim requires reliance by the consumer).

Presuming reliance/causation in a consumer fraud act case also runs counter to a principal purpose underlying the use of presumptions. In *Sikes v. Teleline, Inc.*, 281 F.3d 1350 (11th Cir. 2002), the court refused to presume

reliance in a RICO class action involving a 900-number fraud claim, explaining:

> A presumption is generally employed to benefit a party who does not have control of the evidence on an issue. . . . In the case at hand, [defendant] AT&T has no evidence regarding whether the plaintiffs "relied" upon misrepresentations. The plaintiffs themselves are in control of this information. It would be unjust to employ a presumption to relieve a party of its burden of production when that party has all the evidence regarding that element of the claim.

Id. at 1362; *see also id.* at 1364 (Because each plaintiff may be the only person "with critical information about the content of the ad upon which he relied . . . [i]ndividual issues will therefore predominate over common issues."). The same reasoning applies to marketing cases based on a variety of misrepresentations that occurred over a large time span. Only each individual plaintiff knows what he or she saw, heard, and in fact relied upon in deciding to buy cigarettes or mouthwash[3] or a Big Mac.[4] Where the pertinent evidence lies solely with the plaintiffs, it makes no sense to presume reliance in favor of those plaintiffs.

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[3] *Pfizer Inc. v. Superior Court*, 45 Cal. Rptr. 3d 840, 141 Cal. App. 4th 290, *grant and hold* order (Nov. 1, 2006).

[4] *See Pelman ex rel. Pelman v. McDonald's Corp.*, 396 F.3d 508 (2d Cir. 2005). *See generally* Joseph P. McMenamin, et al., *Not the Next Tobacco: Defenses to Obesity Claims*, 61 Food & Drug L.J. 445 (2006) (exhaustive review of all the elements that can result in obesity).

The Pennsylvania Supreme Court so held in *Weinberg v. Sun Co.*, 777 A.2d 442, 446 (Pa. 2001), when it rejected a class action brought under the Pennsylvania Unfair Trade Practices and Consumer Protection Law (PUTP) against a producer of high-octane gasoline because individual questions of fact predominated over common ones. The court held that "[t]he [PUTP] clearly requires, in a private action, that a plaintiff suffer an ascertainable loss *as a result* of the defendant's prohibited action." *Id.* The court clarified this holding: "That means, in this case, a plaintiff must allege reliance, that he purchased [the high-octane gasoline] because he heard and believed [Defendant's] false advertising that [the high-octane gasoline] would enhance engine performance." *Id.*

In a UCL class action, the element of reliance provides the necessary connection between the plaintiff's loss and the alleged injustice by the defendant. *See generally* Ernest J. Weinrib, *Causation and Wrongdoing*, 63 Chi.-Kent L. Rev. 407 (1987) (arguing that causation both identifies the victim and provides moral reason for requiring wrongdoer to compensate the victim). Without it, there is no injury, and no claim.

B. In the Absence of Reliance, Businesses Experience Immense Pressure to Settle

As a practical litigation matter, eliminating reliance as an element of a misrepresentation case minimizes the showing needed to obtain certification and consequently increases the likelihood of an early settlement. *See*

Scheuerman, *Reliance as an Essential Element*, 43 Harv. J. on Legis. at 39; Richard A. Nagareda, *The Preexistence Principle and the Structure of the Class Action*, 103 Colum. L. Rev. 149, 152-53 (2003) ("Class settlements aspire to operate as a kind of privatized mini-legislation—a vehicle by which the dealmakers may fashion a binding peace for a constellation of wrongs allegedly suffered by a cross-segment of the populace."). Such a result leads both to under-deterrence and over-deterrence.[5] The potential for under-deterrence is that the settlement may allow misrepresentations to stay on the market with little to no penalty for the manufacturer and no real redress for the consumer. *Id.* As the Rand Corporation's Institute for Civil Justice noted, early settlement can avoid full discovery, and the full extent of the defendant's wrongdoing is never exposed. Deborah R. Hensler, et al., *Class Action Dilemmas: Pursuing Public Goals for Private Gain* 79-80, 242 (2000) (noting that "class action attorneys were sometimes simply interested in finding a settlement price that defendants would agree to—rather than in finding out what class members had lost [and] what defendants had gained .").

Even where a consumer class action settles with a monetary award to the plaintiffs, these settlements often require class members to jump through procedural hoops. Because many individual plaintiffs fail to navigate the proper procedures, the defendant ends up paying far fewer claimants than the

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[5] The problem of over-deterrence is discussed in Section I.B., *supra*.

number entitled to receive compensation. *See* Gail Hillebrand & Daniel Torrence, *Claims Procedures in Large Consumer Class Actions and Equitable Distribution of Benefits*, 28 Santa Clara L. Rev. 747, 748-49 (1988). Thus,

> where the plaintiff class numbers in the thousands or millions, each with a relatively small claim, equitable distribution of benefits presents a special challenge. The evidence on claims rates in such cases suggests that claims procedures standing alone are extremely unlikely to accomplish the goal of distributing benefits fairly among the entire class.

Id. at 750-51. The low claims rate reduces the monetary penalty inflicted upon the defendant and thus lessens any deterrent function of the settlement. Moreover, these suits do not even achieve the compensatory goal because the low claims rates mean that most consumers do not receive any compensation at all. *See* Scheuerman, *Reliance as an Essential Element*, 43 Harv. J. on Legis. at 41.

Additionally, because class members have difficulty overseeing the plaintiff's lawyer, reducing enforcement costs creates risks that class members' claims will be settled prematurely in return for an award of inflated attorney fees. *See, e.g.*, John C. Coffee, Jr., *The Regulation of Entrepreneurial Litigation: Balancing Fairness and Efficiency in the Large Class Action*, 54 U. Chi. L. Rev. 877, 883-89 (1987); John C. Coffee, Jr., *Understanding the Plaintiff's Attorney: The Implications of Economic Theory for Private Enforcement of Law Through Class and Derivative Actions*, 86 Colum. L. Rev. 669, 679-84, 688-89 (1986).

The power of settlement extends far beyond a single case or even a single industry. When enough financial and political pressure is brought to bear against an unpopular corporate defendant, it becomes irrelevant that the corporation's business is legal and the plaintiffs' legal grounds for recovery are weak. Bryce A. Jensen, *From Tobacco to Health Care and Beyond—A Critique of Lawsuits Targeting Unpopular Industries*, 86 Cornell L. Rev. 1334, 1337 (2001). Thus, expansive class action certifications in tobacco cases are leveraged by the plaintiffs' bar to mass claims again lead paint manufacturers, pharmaceutical companies, HMOs, and fast food restaurants. *Id.* The strategy appears to be to use aggressive rhetoric to discredit the targeted industry and inspire other plaintiffs to file similar suits in as many hospitable jurisdictions as can be found. Industry defendants finding themselves challenged in multiple courts are likely to choose the cheaper route of settlement over more costly litigation, with all the uncertainty and possible windfall verdict that might entail. *Id.* at 1369-70 (citations omitted).

CONCLUSION

The Unfair Competition Law, as amended by Proposition 64, reflects a whole new approach to individual suits brought under the statute. Proposition 64 demonstrated Californians' dissatisfaction with the type of public law UCL formerly represented. By imposing standing and reliance requirements with teeth, Californians declared that the function of the UCL

was to remedy wrongs (compensation) not the overriding public goal of deterrence. The newly-refocused UCL simply does not contemplate the type of public law approach the plaintiffs seek in this case. In compliance with the provision that an individual must show injury in fact "as a result of" corporate misconduct, each member of the class must demonstrate that it relied on the alleged misrepresentations.

The decision below should be *affirmed*.

DATED: March 22, 2007.

Respectfully submitted,

DEBORAH J. LA FETRA

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Attorney for Amicus Curiae
Pacific Legal Foundation

CERTIFICATE OF COMPLIANCE

Pursuant to California Rule of Court 8.204(c)(1), I hereby certify that the foregoing BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION IN SUPPORT OF DEFENDANTS AND RESPONDENTS is proportionately spaced, has a typeface of 13 points or more, and contains 3,996 words.

DATED: March 22, 2007.

DEBORAH J. LA FETRA

DECLARATION OF SERVICE BY MAIL

I, Janice Daniels, declare as follows:

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