UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

In re DIGITAL MUSIC ANTITRUST LITIGATION	:	MDL Docket No. 1780 Assigned to: Judge Loretta A. Preska

PLAINTIFFS' CONSOLIDATED MEMORANDUM OF LAW IN OPPOSITION TO DEFENDANTS BERTELSMANN, INC.'S, SONY CORPORATION OF AMERICA'S AND TIME WARNER, INC.'S SUPPLEMENTAL MEMORANDA OF LAW

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Plaintiffs submit this consolidated brief in opposition to Defendants Bertelsmann, Inc.'s ("Bertelsmann"), Sony Corporation of America's ("Sony") and Time Warner, Inc.'s ("Time Warner") supplemental memoranda addressing issues specific to each.

I. Introduction

In the Second Amended Complaint,[1] Plaintiffs specifically set forth the circumstances under which Defendants conspired to fix prices in the Digital Music industry. The Complaint identifies the vehicles by which the conspiracy took place, the terms of the illegal agreements among the conspirators, and the actions taken to maintain those agreements.

In their supplemental memoranda, Time Warner, Bertelsmann and Sony each argue its dismissal is warranted because the Complaint does not sufficiently allege facts linking each of them to the conspiracy. Not only are these arguments baseless, but specific allegations as to each defendant are not required for a conspiracy claim to survive a motion to dismiss. These Defendants impermissibly ask the Court to determine they were not involved in the alleged conspiracy despite the numerous factual allegations concerning each in the Complaint. In short, Defendants seek a premature summary judgment ruling.

As set forth below in greater detail, the Complaint contains sufficient specific references to each Defendant's participation in the conspiracy. Plaintiffs allege that each Defendant, including Time Warner, Bertelsmann and Sony, joined the conspiracy and committed acts in furtherance thereof. Such allegations are set forth in specific detail and provide these Defendants with more than sufficient notice as to the nature of the claims

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[1] All paragraph citations are to Plaintiffs' Second Consolidated Amended Complaint ("Complaint").

against them as required by Rule 8(a) of the Federal Rules of Civil Procedure. Accordingly, the Defendants' arguments must be rejected.

II. Summary of Relevant Factual Allegations

The Complaint details Defendants' conspiracy to sell and distribute music at artificially inflated prices, identifies the conspiracy's time period and participants, the motive for the conspiracy, the market affected, the vehicles by which the conspiracy was effectuated and policed, the terms of the illegal agreements, and the injury caused by the conspiracy.[2] Further, although specific allegations as to each defendant are not required for a conspiracy claim to survive a motion to dismiss, the Complaint sets forth in detail Time Warner's, Bertelsmann's and Sony's involvement in the conspiracy. These Defendants have been given fair notice of the grounds upon which Plaintiffs' claims rest.

These three Defendants' participation in the conspiracy, as alleged in the Complaint, stems both from their own individual conduct and from their communications and partnerships with other major industry players named as Defendants. Specifically, the Complaint alleges Bertelsmann and Sony jointly own BMG Music Entertainment ("Sony BMG"), which operates the two companies' merged music operations. ¶21-23. Bertelsmann also partnered with Defendants Time Warner, via Time Warner's former wholly owned subsidiary Warner Music Group ("WMG"), and EMI to create the Internet Music seller "MusicNet." ¶72. Likewise, Sony partnered with Defendant Universal Music Group Recordings, Inc. ("UMG") to create MusicNet's counterpart Internet Music

[2] The Complaint's factual allegations are also extensively set forth in the Plaintiffs' memorandum in opposition to the Defendants' joint memorandum. These allegations are not repeated here and are incorporated by reference. *See* Plaintiffs' Mem. at *passim*.

seller "Duet," which was later renamed "pressplay." [3] ¶67. As alleged in the Complaint, Sony also, at some point, co-owned and controlled MusicNet. ¶¶58, 67.[4] These ventures provided channels for the Defendants to sell Digital Music directly to consumers. ¶¶59-60.

It was through these ventures that Bertelsmann, Sony and Time Warner (as well as the other Defendants) artificially inflated the prices of Digital Music and restrained trade in this market. Indeed, as alleged in the Complaint, MusicNet and pressplay were essentially nothing more than shell operations "co-owned and controlled by various defendants" used to exchange price information, police the cartel, and impose restrictive licensing arrangements that frustrated the growth of Internet Music. ¶¶67, 98. Through MusicNet and pressplay, the Defendants exchanged pricing information, terms of sale information; entered into revenue sharing agreements;[5] discussed and implemented most favored nation clauses in their distribution agreements; and otherwise conspired to fix the prices, quality and terms under which Internet Music would be sold. ¶¶67, 73-78, 85, 87, 89, 92-97, 118-119. "Eventually all the Defendants signed distribution agreements with

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[3] Sony argues that pressplay was launched not by Sony itself, but by another affiliate, Sony Music Entertainment Inc. *See* Supp. Mem. at 3 n.3. Resolution of this factual dispute is not proper at the motion to dismiss stage. The courts must accept all well-plead allegations in the complaint as true. *Erickson v. Pardus*, __ U.S. __, 127 S.Ct. 2197, 2200 (2007).

[4] Sony states that Paragraph 58 of the Complaint incorrectly alleges that it sold music to consumers "through [its] MusicNet joint venture." Again, this factual determination is not proper at this stage of the litigation. The Plaintiffs' allegations must be accepted as true. *See Erickson v. Pardus*, 127 S.Ct. at 2200.

[5] Under the revenue sharing agreements the Defendants, including Bertelsmann, Sony and Time Warner, were paid shares of the total revenue generated by MusicNet and pressplay, rather than receiving money on a per song basis, linking the Defendants financial interest in these ventures to the total sales of all labels, rather than its own market share, thus removing all incentive to gain market share by cutting prices and/or improving quality. ¶89.

MusicNet" and pressplay, allowing Defendants to "maintain prices at artificially high levels, eliminate[] competition among the Defendants in the pricing and terms of Internet Music sales and provide[] one of several forums in which the Defendants could discuss their general desires to restrain trade in Internet Music and come to agreements on the specifics." ¶¶67, 72, 98. The distribution agreements between these entities and the Defendants were a primary tool used to effectuate the Defendants' conspiracy.

The Complaint plainly explains how Bertelsmann, Sony, Time Warner and the other Defendants used MusicNet and pressplay to injure consumers and competing entities by forcing consumers to repurchase music, restricting the use of music on portable music players, and imposing restrictive licensing agreements. ¶¶75, 76, 79. Even when these Defendants and the others sold Internet Music to retailers or distributors they did not control, they agreed to "fix the terms of sale, including digital rights management ("DRM") and the prices at which they were sold." ¶69. As a result of this anticompetitive conduct, Internet Music was more expensive and less attractive to consumers, which, in turn, allowed Defendants to sell CDs at supracompetitive prices. ¶¶74, 82. Through their control of pressplay and MusicNet, as alleged in the Complaint, Bertelsmann, Sony and Time Warner were central participants in the conspiracy.

Additionally, the Complaint alleges Sony and Time Warner reaped further benefits pricing Internet Music at artificially inflated prices and unnecessarily restrictive terms by selling directly to consumers through their own online stores, Sony Connect and AOL Music Now, respectively. ¶¶60, 65. Further, the Complaint alleges Time Warner reaped unlawful gains through sales of "CDs directly to consumers using AOL and

through other channels."[6] ¶65. Finally, the Complaint alleges Bertelsmann's, Sony's and Time Warner's participation in and control of co-conspirator Recording Industry Association of America ("RIAA"). ¶¶34, 88. Like the MusicNet and pressplay ventures, the RIAA provides (and provided) another forum in which the Defendants communicate and set the terms of the conspiracy. *Id*. Moreover, as named Defendants (defined at ¶¶22, 23, 25), Bertelsmann, Sony and Time Warner's involvement in the conspiracy is explained explicitly throughout the Complaint. ¶¶66-122.

III. Argument

A. Motion to Dismiss Standards

For purposes of a motion to dismiss, "[f]actual allegations made in the complaint are assumed to be true, and all inferences are drawn in favor of the plaintiff." *Press v. Chemical Inv. Servs. Corp.*, 166 F.3d 529, 534 (2d Cir. 1999); *see also Erickson*, 127 S.Ct. at 2200 ("when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations contained in the complaint"). In *Bell Atl. Corp. v. Twombly*, U.S. __, 127 S.Ct. 1955 (2007), the Supreme Court reaffirmed that Sherman Act Section 1 (15 U.S.C. § 1) conspiracy claims are subject to notice pleading under Fed. R. Civ. P. 8(a), which requires only "'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Twombly*, 127 S.Ct. at 1964 (citation omitted). Pleading a conspiracy to restrain trade under Section 1 requires only "enough factual matter (taken as true) to suggest that an [anticompetitive] agreement was made" so that their claims could be characterized as "plausible." *Id*. at 1965.

[6] Time Warner correctly points out that the Complaint does not name AOL as a defendant. The allegations relating to AOL serve to elucidate Time Warner's motives and participation in the conspiracy.

A Section 1 complaint does not require detailed factual allegations. *Twombly*, 127 S.Ct. at 1974 ("we do not require heightened fact pleading of specifics"). Further, "in antitrust cases, where 'the proof is largely in the hands of the alleged conspirators,' *Poller v. Columbia Broadcasting*, 368 U.S. 464, 473 (1962), dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly." *Hosp. Bldg. Co. v. Trs. of Rex Hosp.*, 425 U.S. 738, 746 (1976). The Court should deny leave to amend after a dismissal only "[w]here it appears that granting leave to amend is unlikely to be productive." *Ruffolo v. Oppenheimer & Co.*, 987 F.2d 129, 131 (2d Cir. 1993).

B. The Complaint Sufficiently Links Time Warner, Bertelsmann and Sony to the Conspiracy

As outlined above, the Complaint sets forth these three Defendants' involvement in each stage of the conspiracy to restrain the availability and distribution of Digital Music, fix and maintain at artificially high and non-competitive levels the prices at which the Defendants sell Digital Music, impose unreasonably restrictive terms in the purchase and use of such music, and limit the quantities of such music sold. The Complaint contains clear and detailed allegations that Bertelsmann, Sony and Time Warner were key participants in the conspiracy among all the Defendants to artificially inflate the price of Digital Music and foreclose new market entrants. *See, e.g.*, ¶¶67-69, 72-112. Dismissal of these Defendants, therefore, is not warranted.

Bertelsmann, Sony and Time Warner's argument that Plaintiffs must allege their involvement in the conspiracy with greater specificity is not supported by Second Circuit case law. Authority from this District does not require plaintiffs to specify the individual

acts of each defendant in an antitrust conspiracy.[7] *See In re Nasdaq Market-Makers Antitrust Litig.*, 894 F.Supp. 703, 712 (S.D.N.Y. 1995) ("'An overt act need not be pleaded against each defendant, because a single overt act by just one of the conspirators is enough to sustain a conspiracy claim even on the merits.'"); *State of New York v. Cedar Park Concrete Corp.*, 665 F.Supp. 238 (S.D.N.Y. 1987) (denying motion to dismiss and finding that complaint contained sufficient allegations of conspiracy despite the fact that there were not specific allegations attributed to each of the defendants); *In re Magnetic Audiotape Antitrust Litig.*, No. 99-1580 (LMM), 2002 U.S. Dist. LEXIS 8366 (S.D.N.Y. May 9, 2002) (finding claims against certain defendants were adequate despite only one specific mention of each, and allegations that "defendants" met and agreed to fix prices were sufficient); *In re Currency Conversion Fee Antitrust Litig.*, 265 F.Supp.

[7] Bertelsmann and Sony cite a number of cases for the proposition that an antitrust conspiracy claim must be dismissed for failure to allege specific facts against each defendant. None of these cases stands for this proposition. Rather, in each case dismissal was granted on other grounds. *See Heart Disease Research Found. v. General Motors Corp.*, 463 F.2d 98, 100 (2d Cir. 1972) (complaint dismissed not because of insufficient allegations connecting the defendants to the alleged conspiracy, but because no facts were alleged whatsoever); *DM Research, Inc. v. College of Am. Pathologists*, 170 F.3d 53, 55-56 (1st Cir. 1999) (complaint dismissed because it contained "nothing more than unlikely speculations"); *TV Communications Network, Inc. v. Turner*, 964 F.2d 1022, 1025-27 (10th Cir. 1992) (complaint did not define relevant market, merely recited the language of the antitrust laws, and failed to provide a rational motive to conspire); *Pennsylvania ex rel. Zimmerman v. PepsiCo, Inc.*, 836 F.2d 173, 174 (3d Cir. 1988) (complaint failed to plead special standards in accordance with Soft Drink Interbrand Competition Act); *Ft. Wayne Telsat v. Entertainment & Sports Programming*, 753 F.Supp. 109, 113 (S.D.N.Y. 1990) (complaint dismissed because only one paragraph addressed concerted action in vague terms without any supporting facts); *Petrochem Insulation, Inc. v. N. Cal. & N. Nev. Pipe Trades Council*, No. C-90-3628 EFL, 1992 U.S. Dist. LEXIS 4564, at *17 (N.D. Cal. March 24, 1992) (antitrust claim dismissed predicated on violations of the National Labor Relations Act, which creates exemptions to antitrust liability, because application of the exemptions could not be determined based on plaintiff's allegations and because plaintiff failed to plead injury to competition; claim also contained no allegation of fraudulent concealment). These cases are clearly distinguishable from the Complaint, which, as detailed above, contains numerous, specific allegations concerning each Defendant's direct participation in the conspiracy.

2d 385, 420-21 (S.D.N.Y. 2003) (a complaint need only allege a factual circumstance to infer an antitrust conspiracy); and *Masters v. Wilhelmina Model Agency, Inc.*, No. 02-4911 (HB), 2003 U.S. Dist. LEXIS 698, at *11 (S.D.N.Y. Jan. 17, 2003) (denying motion to dismiss antitrust claims despite shortcomings in factual allegations as to specific defendants). The Complaint defines each Defendant[8] and their corporate relationship to other entities, and sets forth detailed information about each Defendant's role in the conspiracy. *See e.g.*, ¶¶21-29, 58-65, 67, 72-85, 94-96.

Even a case relied on by both Bertelsmann and Sony, *Invamed, Inc. v. Barr Labs., Inc.*, recognized this principle. 22 F.Supp. 2d 210, 221 (S.D.N.Y. 1998) (quoting *Cedar Park*, 665 F.Supp at 246-47). In *Invamed*, the "most alleged by [plaintiff]" was a mere restatement of the elements of conspiracy to monopolize and conspiracy in restraint of trade. 22 F.Supp.2d at 220-21. The plaintiff failed to allege that the defendants "'acted' in any way, whether pursuant to a conspiracy or not." *Id.* at 221 (citations omitted). Here, as explained above, the Complaint provides specific details about each of the named Defendants' concerted action. Plaintiffs have alleged that all Defendants participated in a single conspiracy to restrict the output of and fix both the prices and terms under which Digital Music would be sold, and Bertelsmann, Sony and Time Warner are specifically identified as Defendants and co-conspirators. Further, the details of the conspiracy are laid out in sufficient detail and corroborated by industry experts.

[8] Contrary to Bertelsmann's statements, the Complaint clearly defines Bertelsmann, Inc. as "Bertelsmann." ¶22. Bertelsmann also argues the Complaint's references to "defendant BMG" (*see* ¶¶62, 64) do not provide sufficient allegations to state a claim against Bertelsmann. Plaintiffs' claims against Bertelsmann, however, are not based solely on the Complaint's reference to "defendant BMG." Instead, as explained above, they are based on the allegations that specifically refer to Bertelsmann, as well as the allegations that pertain to all named Defendants, which include Bertelsmann. *See* ¶¶58, 67-69, 72, 74-76, 79, 82, 89, 92, 98-100.

See, e.g., ¶85 (findings from economist Roger Noll with respect to Defendants' anticompetitive activities).

Moreover, in analyzing the sufficiency of the allegations, the Court must view the Complaint as a whole, and not, as these Defendants suggest, allegation by allegation and Defendant by Defendant. *Magnetic Audiotape*, 2002 U.S. Dist. LEXIS 8366, at *14-*15 (citing *In re Nasdaq*, 894 F.Supp. at 713 and *Continental Ore Co. v. Union Carbide Carbon Corp.*, 370 U.S. 690, 699 (1962)). Here, the allegations against Bertelsmann, Sony and Time Warner, as well as the allegations of the conspiracy to which they are alleged to be conspirators, are sufficiently detailed and specific.

When the Complaint is viewed as a whole, as it must be, its allegations go far beyond "bare bones" conclusory and speculative statements and provide adequate notice to Defendants to withstand this motion to dismiss. *See Magnetic Audiotape*, 2002 U.S. Dist. LEXIS 8366, at *13-*15 (reviewing the claim against specific defendants in the context of the amended complaint as a whole, plaintiffs sufficiently alleged defendants were participants in a price fixing conspiracy); *Nasdaq*, 894 F.Supp. at 713 ("Viewing the Complaint's allegations as a whole, there is a sufficient basis to withstand this motion to dismiss and to provide defendants with notice of the sorts of activities and of the purpose of the conspiracy. . . "); *Three Crown Ltd. P'ship v. Caxton Corp.*, 817 F.Supp. 1033, 1047-48 (S.D.N.Y. 1993) ("The alleged facts, viewed as a whole, provide sufficient basis from which the elements in plaintiffs' Section 1 and 2 claims can be inferred" and noting "[t]he discovery process and other pre-trial procedures will provide whatever additional sharpening of the issues is necessary.") (internal citations and quotation omitted); *In re Vitamins Antitrust Litig.*, No. 99-197 (TFH), 2000 U.S. Dist. LEXIS 7397,

at *52-*59 (D.D.C. May 9, 2000) (finding defendants adequately linked to conspiracy and were provided fair notice when complaint identified all defendants, described the terms of the illegal agreement and actions taken to maintain the agreement); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 138 F.Supp. 2d 25, 27-28 (D. Me. 2001) (finding allegations that defendant CD distributors met at trade association meetings to establish policies to stabilize or increase prices adequate for pleading purposes).

C. The Joint Ventures Do Not Shield Defendants From The Antitrust Laws

The Defendants' argument concerning the inadequacy of the Plaintiffs' claims as they relate to the use of pressplay and MusicNet are addressed fully in the Plaintiffs' opposition to the Defendants' joint memorandum of law in support of its motion to dismiss and are incorporated by reference here. *See* Plaintiffs' Mem. at 42-43. In sum, it is not the existence or creation of these joint ventures that form the basis of the Plaintiffs' allegations. Rather, Plaintiffs allege the Defendants, including Bertelsmann, Sony and Time Warner, used those ventures as a means to implement their anticompetitive agreements.

Additionally, Bertelsmann's reliance on *Texaco, Inc. v. Dagher*, 547 U.S. 1 (2006), for the proposition that a joint venture's pricing activities are not presumed to be illegal, is overreaching. *Texaco* is clearly distinguishable from this action. In addition to the fact that it involved a summary judgment motion with a "'voluminous record documenting the economic justifications for creating the joint ventures,'" the Court presumed that the joint venture at issue was lawful because it was "approved by federal and state regulators" and the respondents did not contend it was a sham. 547 U.S. 6, n.1

(citation omitted). Whether the ventures in the Complaint received government approval, or whether Defendants misled the government about the purpose and operation of the joint ventures, is a question of fact not appropriate for determination of a motion to dismiss. Plaintiffs' allegations, which must be accepted as true for purposes of this motion to dismiss, demonstrate that pressplay and MusicNet's conduct extended to facilitating anticompetitive vertical and horizontal combinations and restraints that harmed consumers and independent labels.[9] ¶¶67-69, 72-75, 79, 85.

As discussed above, the facts alleged in the Complaint demonstrate that MusicNet and pressplay were not independent actors that made economically rational business decisions in the Digital Music market. These allegations show MusicNet and pressplay were mere puppets of Defendants, who made business decisions indicative of unlawful, concerted conduct.

D. Time Warner is Liable for the Conduct of WMG

Plaintiffs have alleged sufficient facts to hold Time Warner liable for the conduct of its wholly-owned subsidiary WMG. Courts in this District have held that a complaint contains sufficient facts to hold a parent corporation liable for the acts of its subsidiaries if it contains allegations concerning the parent corporation's exercise of dominion and control over the subsidiary. *See In re Alstom SA* Sec. Litig., 454 F.Supp. 2d 187, 213-16 (S.D.N.Y 2006) (holding Alstom and Alstom ATI liable for the conduct of their

[9] Bertelsmann's reliance on *Capital Imaging Assocs., P.C. v. Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 545 (2d Cir. 1993), is also unpersuasive. *Capital Imaging* involved a ***summary judgment motion*** that addressed whether the plaintiffs provided sufficient proof to show that the defendants actually engaged in an unlawful conspiracy, not just had the opportunity to do so. 996 F.2d at 545. Here, as explained above, the Complaint sets forth facts showing that Bertelsmann, along with the other named Defendants, engaged in an unlawful conspiracy to fix prices and restrain trade in the Digital Music market.

subsidiary corporation ATI). The Complaint alleges WMG was a wholly-owned subsidiary and an agent of Time Warner. *See* ¶¶25-26, 31-32, 65. Time Warner's ownership and control of WMG renders it liable for the conduct of WMG. *Id*.

As stated in further detail in Plaintiffs' opposition to Defendants' joint motion to dismiss, the Complaint contains specific facts concerning WMG's involvement in Defendants' anticompetitive conspiracy that are more than sufficient to hold WMG liable. Accordingly, the Complaint establishes WMG's involvement in the antitrust conspiracy, which resulted in consumers being charged inflated prices for Digital Music. *See* ¶¶65-99. Therefore, Time Warner should not be dismissed because the Complaint contains sufficient facts to hold it liable for the activities of its wholly-owned subsidiary WMG.

Time Warner cites several cases to support its assertion that Plaintiffs' allegations are insufficient to pierce the corporate veil. All but one of the cases cited are opinions from summary judgment and other motions on the merits, where discovery had presumably been taken.[10] Such cases are inapposite to a motion to dismiss, where the truth of plaintiffs' factual allegations must be accepted. Further, the only authority cited by Time Warner from a motion to dismiss – *Rosenberg v. Home Box Office, Inc.* – is easily distinguishable. *Rosenberg* was brought by a former executive of Home Box Office, Inc. ("HBO") for various claims arising from his termination. Plaintiff sued

[10] *See United States v. Bestfoods*, 524 U.S. 51 (1998) (post-trial motion); *Phoenix Canada Oil Co. v. Texaco, Inc.*, 658 F.Supp. 1061 (D. Del. 1987) (post-trial motion); *Billy v. Consol. Mach. Tool Corp.*, 51 N.Y.2d 152 (N.Y. 1980) (summary judgment motion); *Fletcher v. Atex, Inc.*, 68 F.3d 1451, 1457 (2d Cir. 1995) (summary judgment motion); *Mobil Oil Corp. v. Linear Films, Inc.*, 718 F.Supp. 260 (D. Del. 1989) (summary judgment motion); and *In re Foxmeyer Corp.*, 290 B.R. 229 (Bankr. D. Del. 2003) (bankruptcy proceeding discussing standard of proof required to pierce corporate veil).

HBO, individual HBO executives, and HBO's ultimate parent, Time Warner, Inc. In dismissing Time Warner, as well as three of the four causes of action, the Court noted that "the only allegation in the entire complaint specifically referring to Time Warner states: 'On information and belief, defendant [HBO] is a Delaware corporation and a subsidiary of defendant, Time Warner, Inc.'" *Rosenberg*, slip op. at 21. In contrast, Plaintiffs here have pled direct participation in, and conduct in furtherance of, the alleged conspiracy. Therefore, Time Warner's arguments should be rejected.

IV. Conclusion

For the forgoing reasons, and those detailed in the Plaintiffs' opposition to the Defendants' joint memorandum of law in support of its motion to dismiss, Plaintiffs respectfully request Defendants' motion, including those issues addressed by Time Warner, Bertelsmann and Sony's supplemental memoranda, be denied in its entirety.

Dated: New York, New York
September 13, 2007

Respectfully submitted,

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