Docket #0258 Date Filed: 8/17/2020

UNITED STATES BANKRUPTCY COURT
WESTERN DISTRICT OF NORTH CAROLINA
CHARLOTTE DIVISION

In re ALDRICH PUMP LLC, *et al.*,[1] Debtors.	Chapter 11 Case No. 20-30608 (Jointly Administrated)

THE OFFICIAL COMMITTEE OF ASBESTOS PERSONAL INJURY CLAIMANTS' OBJECTION TO THE MOTION OF THE DEBTORS FOR AN ORDER AUTHORIZING THEM TO PERFORM UNDER CERTAIN INTERCOMPANY AGREEMENTS WITH NON-DEBTOR AFFILIATE

The Official Committee of Asbestos Personal Injury Claimants (the "Committee") of Aldrich Pump LLC ("Aldrich") and Murray Boiler LLC, ("Murray," together the "Debtors"), by and through its undersigned counsel, respectfully submits this objection (the "Objection") to the *Motion of the Debtors for an Order Authorizing Them to Perform Under Certain Intercompany Agreements with Non-Debtor Affiliate* [Dkt. No. 26], dated June 18, 2020 (the "Intercompany Services Motion").[2] In support of the Objection, the Committee respectfully states as follows:

PRELIMINARY STATEMENT

The Debtors filed this case on June 18, 2020 (the "Petition Date")—barely 50 days after they were formed—purportedly to resolve newly-acquired asbestos liabilities and fund a section 524(g) trust pursuant to a chapter 11 plan.[3] On May 1, 2020, the Debtors and their predecessors

[1] The Debtors are the following entities (the last four digits of their respective taxpayer identification numbers follow in parentheses): Aldrich Pump LLC (2290) and Murray Boiler LLC (0679). The Debtors' address is 800-E Beaty Street, Davidson, North Carolina 28036.

[2] Capitalized terms used but not defined herein shall have the meanings ascribed to them in the Intercompany Services Motion as applicable.

[3] *See Declaration of Ray Pittard in Support of First Day Pleadings* [Dkt. No. 27] (the "Pittard Declaration"), at 5-6; *Declaration of Allan Tananbaum in Support of Debtors' Complaint for Injunctive and Declaratory Relief, Related Motions, and the Chapter 11 Cases* [Adv. Pro. 20-03041, Dkt. No. 3] (the "Tananbaum Declaration," together with the Pittard Declaration, the "First Day Declarations").

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underwent a paper restructuring transaction by moving to Texas (for less than a day) to utilize Texas's divisive merger statute (the "2020 Corporate Restructuring") in order to foist decades' (and most likely hundreds of millions of dollars') of asbestos-related personal injury liabilities onto newly created entities with no independent business operations and relatively few assets.

Following the recent playbook, Old Trane and Old IRNJ followed a restructuring scheme that impacts ***only*** the asbestos personal injury claimants; all of Old Trane's and Old IRNJ's other creditors, trade claimants, and contract counterparties are being paid in full, in the ordinary course, by entities that are not only not in bankruptcy, but also protected by a preliminary injunction. The asbestos personal injury claimants are the only creditors who are not receiving compensation from Old Trane and Old IRNJ—and now purportedly, the Debtors—for their claims and injuries.

As part of the 2020 Corporate Restructuring, the Debtors entered into certain agreements with non-debtor affiliate New Trane Technologies. Pursuant to these agreements, New Trane Technologies agreed to provide legal, financial, and administrative services to Aldrich (the "Aldrich Services Agreement") and Murray (the "Murray Services Agreement," and together with the Aldrich Services Agreement," the "Services Agreements").[4] The Intercompany Services Motion also seeks approval of a secondment agreement (the "Secondment Agreement," and collectively with the Services Agreements, the "Intercompany Agreements") whereby New Trane Technologies provides certain employees to the Debtors.

The Intercompany Services Motion must be denied because it is a premature effort to approve certain agreements that form an integral part of the 2020 Corporate Restructuring. The

[4] The Intercompany Services Motion does not request to continue agreements (e.g. services, secondment) between the Debtors' subsidiaries (200 Park, Inc. and ClimateLabs LLC) and New Trane Technologies because the Debtors are not parties to those agreements. *Intercompany Services Motion*, fn. 6. Accordingly, the Intercompany Services Motion does not permit the Debtors to perform under intercompany agreements with 200 Park, Inc. or ClimateLabs LLC.

Committee intends to conduct due diligence into the entirety of the 2020 Corporate Restructuring—including the formation and operation of the Debtors—and should not be limited in such review by approval of the Intercompany Services Motion. Further, the relief sought by the Debtors does not satisfy section 363 of the Bankruptcy Code and the Intercompany Agreements do not provide adequate protections to the Debtors or to the asbestos personal injury claimants (that the Debtors knew would be) impacted by these agreements. Finally, the Services Agreements and Secondment Agreement are being utilized both defensively—the need to have the necessary employees and services without wasting estate assets—and offensively—as justification for granting a preliminary injunction and providing New Trane Technologies and the other Protected Parties with an indefinite payment holiday while the Debtors' bankruptcy cases are pending.

OBJECTION

I. THE INTERCOMPANY AGREEMENTS DO NOT REPRESENT ORDINARY COURSE AGREEMENTS ENTITLED TO PROTECTION PURSUANT TO 11 U.S.C. § 363(c)

The Intercompany Agreements are not "ordinary course" transactions, even if such agreements were previously approved in *In re DBMP LLC*, No. 20-30080 (Bankr. W.D.N.C. Jan 23, 2020) ("*DBMP*") and *In re Bestwall LLC*, No. 17-31795 (Bankr. W.D.N.C. Nov. 2, 2017) ("*Bestwall*"). The Intercompany Agreements formed a central component of the 2020 Corporate Restructuring and are set up such that the Debtors are completely dependent upon New Trane Technologies—one of the Protected Parties that stands to benefit most from the 2020 Corporate Restructuring and the Debtors' bankruptcy cases—for administrative, financial, employee, human resources, and monetary (through the Funding Agreement) support. Although section 363(c)(1) of the Bankruptcy Code allows the "use property of the estate in the ordinary course of business *without notice or a hearing*," 11 U.S.C. § 363(c)(1) (emphasis added), the Debtors must satisfy the Fourth Circuit's two-pronged "ordinary course" analysis:

> (1) was the post-petition transaction common practice in the debtor's industry; and
> (2) could a creditor reasonably expect the debtor to enter into such a transaction.

In re Merry-Go-Round Enters., Inc., 400 F.3d 219, 226 (4th Cir. 2005); *Bowers v. Motor Speedway, Inc. (In re Se. Hotel Props. Ltd. P'ship)*, 99 F.3d 151, 158 (4th Cir. 1996).

Further, it is the Debtors that must demonstrate that the transaction satisfies both prongs of the above test in order to be considered "ordinary course." *Phoenix Am. Life Ins. Co. v. Devan*, 308 B.R. 237, 241 (D. Md. 2004), *aff'd sub nom. Merry-Go-Round Enters.*, 400 F.3d at 219.

Here, the Debtors cannot meet their burden, a fact the Debtors' tacitly acknowledge through the filing of the Intercompany Services Motion. The Intercompany Agreements are not ordinary course transactions pursuant to section 363(c)(1) because the Debtors fail to show that (1) the Intercompany Agreements entered into as part of the 2020 Corporate Restructuring are common practice in the Debtors' industries; and (2) that the asbestos claimants, the only creditors in this case, could reasonably expect that the Debtors would enter the Intercompany Agreements.

First, the Debtors fail to meet the "common practice in the debtor's industry" prong, also known as the "horizontal test." *See In re Roth Am., Inc.*, 975 F.2d 949, 952 (3d Cir. 1992); *In re Dana Corp.*, 358 B.R. 567, 576 (Bankr. S.D.N.Y. 2007) ("The inquiry deemed horizontal is whether, from an industry-wide perspective, the transaction is of the sort commonly undertaken by companies in that industry."). The Debtors cite no industry in support of their Intercompany Services Motion. Rather, the Debtors simply cite to *DBMP* and *Bestwall* as examples of "common practice in the industry." At no point, however, do the Debtors advise this Court that the intercompany services agreements in *DBMP* and *Bestwall* were entered only after the Committee requested—and the respective debtors agreed to—certain modifications and protections. Here, the Debtors have failed to include the very protections that were agreed to in the *DBMP* intercompany

agreement order—an order entered only about forty-five (45) days before the Debtors filed their bankruptcy petitions.

Here, the Debtors are an affiliate of Trane Technologies plc ("Trane Parent"), "a global climate innovator that brings efficient and sustainable climate solutions to buildings, homes and transportation."[5] Therefore, the Debtors are more appropriately viewed within the context of the heating, cooling, and air conditioning industry—an industry that the Debtors simply ignore when seeking approval of the Intercompany Agreements. Unlike other intercompany agreements that may exist between a debtor and certain of its affiliates, the Intercompany Agreements cannot be considered "common practice in the industry" because the Debtors *never negotiated* the Intercompany Agreements. Old Trane and Old IRNJ imposed the Intercompany Agreements on the Debtors in connection with the 2020 Corporate Restructuring; the Debtors did not even exist when the 2020 Corporate Restructuring documentation was prepared. The individuals signing the Intercompany Agreements on behalf of the Debtors—Manlio Valdes and Amy Roeder—hold significant positions with the contract counterparty, New Trane Technologies. Mr. Valdes is listed as Vice President, Product Management, The Americas at New Trane Technologies; Ms. Roeder is listed as Director, Finance – Enterprise Information Technology and Legal.

The "employees" seconded to the Debtors from New Trane Technologies pursuant to the Secondment Agreement are seconded solely to address the Debtors' newly acquired asbestos-related personal injury liabilities and perform the litigation functions necessary to manage those liabilities. The seconded employees do not provide any services to the Debtors' operating non-debtor subsidiaries. In fact, the Debtors' operating subsidiaries have separate services agreements

[5] Trane Technologies plc, Quarterly Report Q2 2020 (Form 10-Q) (July 29, 2020), at 7 *available at* https://investors.tranetechnologies.com/financial-information/financial-summary/default.aspx.

with New Trane Technologies. Therefore, the Intercompany Agreements serve no underlying business purposes to the Debtors. Coupled with the fact that the Intercompany Agreements were only entered into forty-eight (48) days prior to the filing,[6] nothing about the agreements should be considered "ordinary course."

Second, the Debtors' continued performance under the Intercompany Agreements fail to meet the "creditor expectation" prong, also known as the "vertical" prong. Courts have noted that the "vertical component, examines the debtor's actions from the standpoint of his creditors." *See Poff v. Poff Constr., Inc. (In re Poff Constr., Inc.)*, 141 B.R. 104, 106 (W.D. Va. 1991) (noting that a debtor's "borrowing post-petition should have come as no surprise to the creditors" when it had borrowed from the same party for the previous six years); *In re James A. Phillips, Inc.*, 29 B.R. 391, 394 (Bankr. S.D.N.Y. 1983) ("the touchstone of 'ordinariness' is thus the interested parties' reasonable expectations of what transactions the debtor-in-possession is likely to enter in the course of its business."). In this case, the Debtors provide no evidence that the asbestos claimants, the only creditors in this case, should reasonably expect that the Intercompany Agreements would be imposed on the Debtors as part of the 2020 Corporate Restructuring. The Intercompany Agreements do not provide the Debtors with a benefit by assisting in the operation of the Debtors' non-debtor subsidiaries and do not provide the Debtors—or their creditors—with the protections that two third-parties would expect to receive during arms-length negotiations.

In short, considering the unique nature of the Debtors' Intercompany Agreements—and the Debtors' tacit acknowledgement that the Intercompany Agreements are not "ordinary course"

[6] The Services Agreements and Secondment Agreement are both the "Second Amended and Restated" versions, indicating there were additional modifications in the lead-up to the filing. *Intercompany Services Motions*, Exs. B-D

transactions—this Court should find that the Debtors failed to meet the two-prong test for "ordinary course" utilized by the Fourth Circuit.

II. CONTINUATION OF THE INTERCOMPANY AGREEMENTS SHOULD BE DENIED OR THE TERMS MODIFIED BECAUSE THE CURRENT INTERCOMPANY AGREEMENTS ARE NOT A REASONABLE EXERCISE OF THE DEBTORS' BUSINESS JUDGMENT PURSUANT TO 11 U.S.C. § 363(b)

Section 363(b) of the Bankruptcy Code provides, in relevant part, that a debtor-in-possession "after notice and a hearing, may use, sell, or lease, other than in the ordinary course of business, property of the estate . . . ." 11 U.S.C. § 363(b)(l). Under applicable case law in this and other circuits, a debtor's use of assets must be "a reasonable exercise" of its business judgment pursuant to section 363(b) of the Bankruptcy Code. *See, e.g., In re MCSGlobal Inc.*, 562 B.R. 648, 654 (Bankr. E.D. Va. 2017) ("Courts generally look to the trustee's business judgment in analyzing asset sales under Section 363(b)"); *In re Century Drive LHDH, LLC, 2010 WL 1740560*, *2 (Bankr. E.D.N.C. Apr. 28, 2010) ("In reviewing a proposed . . . transaction under this section [363(b)], the court should consider whether the debtor-in-possession has exercised sound business judgment such that approval of the proposed course of action is warranted.").

The relief requested by the Intercompany Services Motion—especially approval of the Secondment Agreement—should be denied because the Debtors have failed to detail the steps undertaken to establish business judgment. The only justification provided by the Debtors is an explanation that dividing workers between entities would distract the seconded employees from focusing on and "pursuing the reorganization process."[7] *See* Tananbaum Decl. at ¶ 40 (describing the Secondment Agreement). The Debtors likely cannot offer any better explanation, because

[7] If the Court finds that approval of the Secondment Agreement is appropriate, the Debtors should be estopped from arguing that seconded employees would be diverted on non-debtor matters as support for the preliminary injunction. The Debtors cannot argue that seconded employees are both an exercise of "reasonable business judgment" while also arguing the same seconded employees through the Intercompany Agreements are distracted and diverted when discussing the preliminary injunction.

there is none. The Debtors did not participate in the negotiation of the Intercompany Agreements and likely had little say in the initial list of seconded employees. The Debtors have not—and indeed, likely cannot—demonstrate that they are exercising their business judgment in seeking approval of, or performing under, the Intercompany Agreements.

III. EVEN IF THE COURT DETERMINES APPROVAL OF THE INTERCOMPANY SERVICES MOTION IS APPROPRIATE, CERTAIN MODIFICATIONS TO THE INTERCOMPANY AGREEMENTS AND THE PROPOSED ORDER ARE REQUIRED

Even if continuing the Secondment Agreement and Service Agreements with New Trane Technologies would be beneficial, the current terms are not a reasonable exercise of the Debtors' business judgment and must be modified. At a minimum, any order approving the Intercompany Agreements must address the following:

- **Termination Provisions:** In each of the Services Agreements, New Trane Technologies has the right to terminate, potentially leaving the Debtors without a service provider. *Service Agreements*, § 1(b). In the Secondment Agreement, only the Debtors can unilaterally terminate. *Secondment Agreement*, § 4(a). The Debtors do not provide any justification for this distinction and the Service Agreements should be modified to reflect the more favorable termination provision in the Secondment Agreement.
- **Dispute Resolution Provisions:** Given the multiple, overlapping roles that the Debtors' senior personnel have at both New Trane Technologies and the Debtors, the dispute resolution provisions must be modified so that the Debtors have an independent representative in case of disputes. Otherwise, it is conceivable that the individuals representing the Debtors will actually be conflicted between serving the Debtors and serving New Trane Technologies. For example, the Service

Agreements provide that to the extent there is a dispute between the Debtors and New Trane Technologies, the Debtors have their "representatives" resolve the dispute. If that does not resolve the dispute, it is elevated to the "highest executive officer," followed by the "board." *See generally Service Agreements*, § 6. Where, as here, many of these representatives, executive officers, and board members wear two hats, the Court should suspend the dispute resolution procedures for the duration of these bankruptcy cases and order that all disputes will be heard and resolved by the Bankruptcy Court.

- **Copies of Invoices:** Copies of the corresponding invoices for the monthly fees paid by the Debtors pursuant to the Intercompany Agreements should be provided to the Committee. Committees perform vital duties, such as overseeing the administration of the case. *In re Fas Mart Convenience Stores, Inc.*, 265 B.R. 427, 432 (Bankr. E.D. Va. 2001). Considering the Intercompany Agreements are central to the Debtors' operations, Committee monitoring of the invoices between the Debtors and New Trane Technologies would be appropriate. In this regard, the proposed form of order should be modified (as it was in *DBMP*) to add the following procedures:

> As soon as practicable after the end of each calendar month, the Debtors shall send to (a) counsel to the ACC and (b) counsel to the official representative of future asbestos personal injury claimants, once appointed (together with the ACC, the "Notice Parties"), by e-mail, copies of all monthly invoices issued pursuant to the Services Agreements (each, a "Monthly Invoice"), which invoices will summarize the services provided during the applicable month, along with reasonable detail supporting any third-party out-of-pocket expenses. The following procedures shall apply:
>
> (a) If any Notice Party has objections to, or concerns about, any amounts included in a Monthly Invoice, the objecting Notice Party (the "Objecting Party") will provide the Debtors' counsel with a

written statement identifying with specificity its objections or concerns (each, a "Written Statement") not later than 14 days after delivery of the Monthly Invoice. The Debtors and the Objecting Party thereafter will work in good faith to seek resolution of any objections or concerns raised by the Objecting Party in a Written Statement.

(b) If the Debtors and the Objecting Party are unable to resolve the concerns outlined in the Written Statement within 14 days after the Debtors' receipt of the Written Statement, or such longer period that may be agreed upon in writing by the Debtors and the Objecting Party, the Objecting Party may file a motion seeking a determination of these issues by the Court (a "Determination Motion"). A Determination Motion shall be filed by the later of (a) 21 days after delivery of the Written Statement to the Debtors or (b) seven days after the Debtors and the Objecting Party agree that they cannot come to a resolution of the issues raised in the Written Statement.

(c) Pending resolution of a Determination Motion, the Debtors shall pay only the portion of the applicable Monthly Invoice (if any) that is not subject to an objection. In the absence of a Written Statement and a subsequent Determination Motion, all Monthly Invoices issued in connection with the Services Agreements shall be deemed approved and may be paid by the Debtors without further order of the Court. For the avoidance of doubt, all invoices issued in connection with the Secondment Agreement may be paid by the Debtors without further order of the Court.

Similar provisions were approved in the Court's *Amended Order Authorizing the Debtor to Perform Under Certain Intercompany Agreements with Non-Debtor Affiliates*, *In re DBMP LLC*, Case No. 20-30080 [Dkt. No. 204] (entered Mar. 17, 2020).

- **Seconded Employees' Duties Are to the Debtors and Should Not Be Limited by the Provider:** Because of the significant overlap in roles, any proposed order must provide that the seconded employees will be held to work in the best interests of the Debtors, and not any other non-Debtor affiliate or other Protected Party that the seconded employee is employed by. Further, the Debtors should have the

ability to request whatever employee assistance is necessary to complete tasks required by the bankruptcy or order by the Court. Again, this Court ordered similar protections in *DBMP*. The following language should be added:

> Nothing in the Secondment Agreement shall be construed to limit the number of Seconded Employees available to either or both Debtors should such employees be needed by the Debtors, in their business judgment, or ordered by the Court after notice and a hearing.
>
> The Seconded Employees will not work on any matters for the Debtors' non-debtor affiliates that relate to the Debtors or their chapter 11 cases. In addition, the Seconded Employees at all times will act in the best interest of the Debtors, including in the event of an actual or potential conflict between the Debtors and any of its non-debtor affiliates.

- **The Committee should be granted authority to raise challenges under the Intercompany Agreements:** Based on the Debtors' structure, the overlapping ownership, and the overlapping employees, officers, members, and directors, the Committee is concerned that certain disagreements between the Debtors and New Trane Technologies will not be pursued. The Court should enter an order that grants the Committee standing to raise any issue arising under the Intercompany Agreements, if the Debtors refuse to raise or fail to prosecute the issue.

IV. THE INTERCOMPANY AGREEMENTS, IF APPROVED, SHOULD NOT BE USED OFFENSIVELY TO SUPPORT THE PRELIMINARY INJUNCTION

The Debtors argue that the Debtors' legal personnel would be distracted without a preliminary injunction and be required to participate in formulating "defense strategies, attending depositions, reviewing documents, preparing witnesses, and engaging in any number of other litigation-related tasks." *Motion of the Debtors for an Order (I) Preliminarily Enjoining Certain Actions Against Non-Debtors, or (II) Declaring that the Automatic Stay Applies to Such Actions, and (III) Granting a Temporary Restraining Order Pending a Final Hearing*, Adv. Proc. No. 20-03041 [Dkt. No. 2], at 30 (citing Tananbaum Decl. ¶ 39). The Debtors continue, stating that the

"Debtors' personnel who will play key roles in the Debtors' reorganization would be required to spend substantial time managing and directing the activities involved in the day-to-day defense of these lawsuits." *Id.* (citing Tananbaum Decl. ¶ 40).

Significantly, the Debtors neglect to point out that the very personnel they say will be distracted without the preliminary injunction include all of those seconded from New Trane Technologies—the Chief Legal Officer and other personnel in the legal department—pursuant to the Secondment Agreement. The Debtors seek to use the seconded employees as both a sword—that it is these individuals needed for the bankruptcy proceedings—and a shield—that these same individuals would be distracted if additional tasks are required. The Debtors never question whether additional staff could be seconded to address these concerns or whether New Trane Technologies can locate additional personnel within its vast corporate enterprise who could address potential litigation without involving the Debtors. The Debtors, New Trane Technologies, Old Trane, and Old IRNJ should not be permitted to have it both ways—New Trane Technologies cannot determine the individuals to be seconded only to then cause the Debtors to argue that those same individuals would be distracted without further relief from this Court.

V. THE COMMITTEE'S OBJECTION IS TIMELY FILED

The Debtors filed the Intercompany Services Motion on the Petition Date. On July 7, 2020, this Court entered the *Order Appointing the Official Committee of Asbestos Personal Injury Claimants* [Dkt. No. 147] appointing the Committee. The Debtors set the Intercompany Services Motion for hearing on July 14, 2020; the same day, the Committee filed its *Reservation of Rights with Respect to the Motion of the Debtors for an Order Authorizing Them to Perform under Certain Intercompany Agreements with Non-Debtor Affiliate* [Dkt. No. 166]. Subsequently, the Court entered orders extending the deadline by which the Committee may object to the Intercompany Services Motion through and including August 17, 2020. *See Second Agreed Order Extending*

Time for Asbestos Committee to Seek Reconsideration of Certain Orders [Dkt. No. 178] (entered July 21, 2020); *Third Agreed Order Extending Time for Asbestos Committee to Seek Reconsideration of Certain Orders* [Dkt. No. 209] (entered Aug. 4, 2020). Therefore, the Objection is timely filed.

RESERVATION OF RIGHTS

24. The Committee expressly reserves all rights with respect to challenging the 2020 Corporate Restructuring, the relationship(s) between the Debtors and their non-Debtor affiliates, and the validity, propriety, jurisdiction, and venue of the Debtors' bankruptcy cases.

CONCLUSION

WHEREFORE, for the reasons set forth herein, the Committee requests that the Court (a) either (i) DENY the Motion; or (ii) CONDITIONALLY GRANT the Motion by (1) restricting the Debtors from arguing that the services and employees provided pursuant to the Intercompany Services Agreements will be irreparably harmed without a preliminary injunction; (2) providing that the approval of the Intercompany Services Motion shall not be argued by the Debtors, or any other Protected Party, as a basis for challenging the Committee's review of the 2020 Corporate Restructuring; (3) requiring the Debtors to submit all disputes with New Trane Technologies directly to the Court for resolution; (4) requiring that all Seconded Employees at all times will act in the best interest of the Debtors, including in the event of an actual or potential conflict between the Debtors and any of their non-debtor affiliates; (5) providing that the Secondment Agreement shall not be construed to limit the number of Seconded Employees available to the Debtors should such employees be needed by the Debtors, in their business judgment, or as ordered by the Court after notice and a hearing; (6) requiring that the Debtors provide copies of all monthly invoices issued pursuant to the Services Agreements summarizing the services provided during the applicable month, along with reasonable detail supporting any third-party out-of-pocket expenses

to the Committee pursuant to certain procedures previously approved in other asbestos bankruptcy cases in this District; and (7) providing the Committee with standing to raise issues under the Intercompany Agreements if the Debtors either refuse to raise or fail to prosecute the issue; and (b) grant such other and further relief as is just and proper.

Dated: Charlotte, North Carolina
August 17, 2020

/s/ Glenn C. Thompson

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