



FEDERAL ELECTION COMMISSION
WASHINGTON, D.C. 20463

DEC 02 2011

Lawrence M. Noble
Skadden, Arps, Slate, Meagher & Flom LLP
1440 New York Avenue, NW
Washington, DC 20005

RE: MUR 6455
General Electric Company PAC and Marie
Talwar, in her official capacity as treasurer
General Electric Company

Dear Mr. Noble:

On February 23, 2011 and July 18, 2011, the Federal Election Commission notified your above-named clients and you, respectively, of a complaint and an amended complaint alleging violations of certain sections of the Federal Election Campaign Act of 1971, as amended. On November 30, 2011, the Commission found, on the basis of the information in the complaint and the amended complaint, and information provided by you, that there is no reason to believe that General Electric Company PAC and Marie Talwar, in her official capacity as treasurer, and General Electric Company violated 2 U.S.C. § 441a(a)(2)(A). Accordingly, the Commission closed its file in this matter.

Documents related to the case will be placed on the public record within 30 days. See Statement of Policy Regarding Disclosure of Closed Enforcement and Related Files, 68 Fed. Reg. 70,426 (Dec. 18, 2003) and Statement of Policy Regarding Placing First General Counsel's Reports on the Public Record, 74 Fed. Reg. 66132 (Dec. 14, 2009). The Factual and Legal Analysis, which explains the Commission's finding, is enclosed for your information.

If you have any questions, please contact Tracey L. Ligon, the attorney assigned to this matter, at (202) 694-1650.

Sincerely,

Roy Q. Luckett
Acting Assistant General Counsel

Enclosure
Factual and Legal Analysis

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**FEDERAL ELECTION COMMISSION
FACTUAL AND LEGAL ANALYSIS**

RESPONDENTS: General Electric Company

MUR: 6455

General Electric Company PAC
and Marie Talwar, in her official
capacity as Treasurer

I. INTRODUCTION

This matter was generated by a complaint and amended complaint filed with the Federal Election Commission by Peter J. Vroom alleging violations of the Federal Election Campaign Act of 1971, as amended ("the Act"), by General Electric Company and General Electric Company PAC and Marie Talwar, in her official capacity as Treasurer.

II. FACTUAL AND LEGAL ANALYSIS

The complaint and amended complaint allege that Penske Truck Leasing Co., L.P. PAC and Michael A. Duff, in his official capacity as treasurer ("Penske PAC"), made 2010 primary and general election contributions to the campaign of James Gerlach that exceeded the limitations of the Act, by \$2,500 because Penske PAC and General Electric Company PAC and Marie Talwar, in her official capacity as treasurer ("GEPAC"), were affiliated and, therefore, shared a single contribution limit. *See* Complaint, p. 1; Amended Complaint, p. 1. This allegation runs counter to Advisory Opinion 2009-18, in which the Commission concluded that Penske PAC and GEPAC were disaffiliated. The complaint alleges, however, that Penske PAC obtained the conclusion in Advisory Opinion 2009-18 by providing the Commission with "misleading and incomplete information." Complaint, p. 1; *see* Amended Complaint, p. 1.

A. Background

Penske Truck Leasing Co., L.P. ("Joint Venture") is a partnership organized under Delaware partnership law. The business of the partnership is the renting, leasing, and servicing of tractors, trailers, and trucks to third-party users and acting as a contract and common motor carrier. Brian Hard is the President and Chief Executive Officer of the Joint Venture. Penske PAC is the Joint Venture's separate segregated fund ("SSF").

Prior to 2009, General Electric Capital Corporation, through a number of its subsidiaries, owned as limited partners a majority interest in the Joint Venture, with the remainder owned by Penske Truck Leasing Corporation ("Penske") and various other affiliates of Penske Corporation. The majority ownership by the General Electric companies required General Electric's SSF, GEPAC, and the Joint Venture's SSF, Penske PAC, to share contribution limits as affiliated committees. Advisory Opinion Request 2009-18, p. 2. On March 28, 2009, the General Electric companies divested themselves of a majority interest in the Joint Venture.

Subsequently, the Joint Venture, Penske, and Penske PAC sought an advisory opinion from the Commission, in which the Commission concluded that "Penske PAC and GEPAC may disaffiliate because the GE limited partners have divested themselves of majority ownership status and relinquished majority control of the Joint Venture Advisory Committee to the Penske affiliates." See Advisory Opinion 2009-18. Penske PAC and GEPAC each filed an Amended Statement of Organization on July 30, 2009, and August 4, 2009, respectively, reflecting that the two entities were no longer affiliated.

During the 2009-2010 election cycle, GEPAC and Penske PAC made the following contributions to the James Gerlach for Congress Committee and Michael A. Dehaven, in his official capacity as treasurer:

Date of Contribution	Primary Election	General Election
GEPAC		
03/12/2009	\$ 500	
02/11/2010	\$1,000	
08/24/2010		\$1,000
Penske PAC		
03/31/2010	\$1,000	
05/11/2010	\$4,000	
07/29/2010		\$2,500
09/22/2010		\$2,500
Total:	\$6,500	Total: \$6,000

The complaint and amended complaint allege that the Joint Venture, Penske, and Penske PAC provided misleading information and failed to disclose critical information to the Commission in connection with Advisory Opinion 2009-18. Specifically, the complaint alleges that Penske PAC and GEPAC failed to disclose "critical information" to the Commission in connection with Advisory Opinion 2009-18, including:

- that Roger Penske is the only "non-independent" member of the General Electric Board of Directors, precisely because of the numerous business interests he holds with General Electric;
- that General Electric loaned the majority of the funds to Penske PAC in order for Penske to make the additional ownership purchases from General Electric;
- information about the magnitude of the revolving line of credit - \$7.5 billion;
- that Penske is wholly dependent upon General Electric's financing for its survival and is unable to obtain credit from other sources as the result of its credit rating and enormous debt to General Electric;
- details of the revolving credit agreement to substantiate their claims of the changes made; and that the changes they refer to in the July 27, 2009, appeal¹ for ending the

¹ The complainant incorrectly refers to Advisory Opinion 2009-18, which was issued on July 27, 2009, as an "appeal" of a previous decision, apparently viewing an initial staff draft submitted to the Commission for its consideration as a decision of the Commission.

loan agreement between General Electric and Penske are not scheduled to take place until the year 2018.

The amended complaint contains the following assertions, which, according to the complainant, address information contained in Penske PAC's Advisory Opinion Request 2009-18 that is "inaccurate, incomplete and misleading:"

- GE continues to control Penske Truck Leasing's operations and finances;
- Penske did coordinate PAC contributions with General Electric;
- Penske's explanation to the FEC of the non-involvement of GE in the creation of the Joint Venture is at odds with its own record;
- Penske failed to properly identify that Roger Penske, a General Electric board member and Brian Hard, a General Electric Capital Corporation officer, serve as two of the three advisory committee members representing the Penske Truck Leasing General Partner;
- Penske failed to identify that Brian Hard, Penske Truck Leasing President and CEO, also serves as a Director of the Penske Corporation – the recipient of hundreds of millions of dollars in General Electric investments.
- Penske failed to report that Roger Penske's son, a Penske Corporation board member, also serves as a board member of Ares Capital Corporation, the manager of a \$5.1 billion investment fund primarily funded by General Electric;
- Penske concealed and/or misrepresented numerous financial relationships existing between Penske Corporation, the parent of Penske Truck Leasing, and General Electric entities.

In response to the complaint, Penske PAC, Penske Truck Leasing Co., L.P., and Brian Hard (collectively "Penske PAC Respondents"), argue that Penske PAC did not make an excessive contribution because it is not affiliated with GEPAC. Response of Penske PAC Respondents dated April 4, 2011, pp. 1-2, 6. Penske PAC Respondents further explain that in Advisory Opinion 2009-18, the Commission made its determination that Penske PAC and GEPAC were disaffiliated based on a full and robust analysis of the affiliation issue, and that the complaint provides no basis for the Commission to revisit its decision. Response of Penske PAC Respondents dated April 4, 2011, pp. 2, 6. Specifically, Penske PAC Respondents state that the Commission had all of the facts necessary for a full affiliation analysis, including Roger Penske's overlapping directorship and the substantial size of the

revolving credit line. Response of Penske PAC Respondents dated April 4, 2011, p. 6.

Penske PAC Respondents further assert that what the complaint identifies as “facts” not considered by the Commission were a matter of public record at the time the Commission rendered its decision or are simply incorrect. *Id.*

In support of its assertion that allegations contained in the complaint are “simply incorrect,” Penske PAC Respondents have provided a sworn affidavit of Michael A. Duff, Senior Vice President and General Counsel of Penske Truck Leasing Co., L.P., and treasurer of Penske PAC. Response of Penske PAC Respondents dated April 4, 2011, Appendix A. Contrary to allegations contained in the complaint, Penske PAC Respondents and Duff assert that: (1) General Electric Company did not loan the funds necessary for Penske Corp. and related entities to make the additional ownership purchase in March 2009 that reduced General Electric Company’s ownership below 50%; Response of Penske PAC Respondents dated April 4, 2011, p. 7; Affidavit of Michael A. Duff ¶ 4 (April 1, 2011); (2) the changes to the revolving credit agreement between Penske Truck Leasing Co., L.P. and General Electric Company are not delayed until 2018; *Id.*; Duff Aff. ¶ 6; and (3) Penske Truck Leasing Co., L.P. is not wholly dependent upon General Electric Company for financing and could obtain financing from sources other than General Electric Company. *Id.*; Duff Aff. ¶ 5.

In response to the complaint, General Electric Company and GEPAC (collectively “GEPAC Respondents”) argue that Advisory Opinion 2009-18, permitting the respondents to disaffiliate, was based on a complete description of all relevant facts, and that, therefore, GEPAC cannot be found to have violated the Act by relying on the opinion when it made contributions to Rep. Gerlach’s campaign. Response of GEPAC Respondents dated April 4,

2011, p. 4. Consequently, GEPAC Respondents request that the Commission find no reason to believe a violation occurred and dismiss the matter in its entirety. *Id.*

In response to the amended complaint, the GEPAC Respondents argue that the amended complaint "consists of previously made allegations and unsupported conjecture, all of which are irrelevant" and do "not undermine the FEC's determination that GEPAC and Penske PAC are no longer affiliated, nor provide reason to believe a violation has occurred." Response of GEPAC Respondents dated August 9, 2011, p. 4. Similarly, the Penske PAC Respondents argue that the amended complaint adds nothing material to the complaint. Response of Penske PAC Respondents dated August 4, 2011, p. 1.

B. Analysis

Under the Act, a multicandidate political committee, such as Penske PAC and GEPAC, may not contribute more than \$5,000 to a candidate's authorized political committee with respect to any election for Federal office. 2 U.S.C. § 441a(a)(2), *see* 2 U.S.C. § 431(8)(A)(i); 11 C.F.R. § 100.52(d)(1). The Act and Commission regulations provide that political committees, including SSFs, which are established, financed, maintained, or controlled by the same corporation, labor organization, person, or group of persons, including any parent, subsidiary, branch, division, department, or local unit thereof, are affiliated. *See* 11 C.F.R. §§ 100.5(g)(2) and 110.3(a)(1)(ii). Contributions made to or by such political committees are considered to have been made to or by a single political committee. 2 U.S.C. § 441a(a)(5); 11 C.F.R. § 100.5(g)(2) and 110.3(a)(1). In ascertaining whether committees are affiliated, the Commission examines various circumstantial, non-exhaustive factors in the context of the overall relationship to determine whether one sponsoring organization has

established, financed, maintained, or controlled the other sponsoring organization or committee.² See 11 C.F.R. §100.5(g)(4)(ii).

The question raised by the allegations in this matter is whether the Commission relied on “misleading and incomplete information” in making its determination in Advisory Opinion 2009-18 that Penske PAC and GEPAC are disaffiliated. See Complaint, p. 1. If this is the case, then the advisory opinion would be of no effect, and Penske PAC and GEPAC would

² The circumstantial factors include, but are not limited to:

- Whether one sponsoring organization owns a controlling interest in the voting stock or securities of another sponsoring organization;
- Whether a sponsoring organization or committee has the authority or ability to direct or participate in the governance of another sponsoring organization or committee;
- Whether a sponsoring organization or committee has the authority or ability to hire, appoint, demote or otherwise control the officers or other decision-making employees of another sponsoring organization or committee.
- Whether a sponsoring organization or committee has common or overlapping membership with another sponsoring organization or committee which indicates a formal or ongoing relationship;
- Whether a sponsoring organization or committee has common or overlapping officers or employees with another sponsoring organization or committee which indicates a formal or ongoing relationship;
- Whether a sponsoring organization or committee has any members, officers, or employees who were members, officers, or employees of another sponsoring organization or committee which indicates a formal or ongoing relationship or the creation of a successor entity;
- whether a sponsoring organization or committee provides goods in a significant amount or on an ongoing basis to another sponsoring organization or committee;
- whether a sponsoring organization or committee causes or arranges for funds in a significant amount or on an ongoing basis to be provided to another sponsoring organization or committee;
- whether a sponsoring organization or committee had an active or significant role in the formation of another sponsoring organization or committee; and
- whether the sponsoring organizations or committees have similar patterns of contributions or contributors which indicate a formal or ongoing relationship.

See 11 C.F.R. § 100.5(g)(4)(ii); 11 C.F.R. § 110.3(a)(3)(ii).

not be able to rely on it for the proposition that they are disaffiliated.³ Thus, the contributions made by Penske PAC to the Gerlach committee in excess of the \$5,000 contribution limitation, *i.e.*, \$2,500, would constitute excessive contributions.

In order to assess the assertion that the Commission relied on misleading and incomplete information in making its determination in Advisory Opinion 2009-18, the Commission considered the allegations contained in the complaint and amended complaint in turn. First, the complaint alleges that "GE/Penske failed to inform the Commission that Roger Penske is the only 'non-independent' member of the General Electric Board of Directors, precisely because of the numerous business interests he holds with GE." However, contrary to this assertion, Advisory Opinion 2009-18 identifies Mr. Penske as an overlapping decision maker between the Joint Venture and GE companies, and notes that he sits on the GE Board of Directors. *See* Advisory Opinion 2009-18, pp. 7-8. Thus, the respondents appear to have accurately identified Mr. Penske's role with both entities.

The complaint further alleges that "GE/Penske failed to inform the Commission that GE loaned the majority of the funds to Penske in order for Penske to make the additional ownership purchases from GE," Complaint, p. 3. However, the complaint provides no information to support this claim, and the Penske PAC Respondents assert, in contrast, that "GE did not loan the funds necessary for Penske Corp and related entities to make the additional ownership purchase in March 2009 that reduced GE's ownership below 50%." Response of Penske PAC Respondents, p. 7; Duff Aff. ¶ 4. In any event, Penske PAC

³ The Commission's response to an advisory opinion request constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in the request. *See* 2 U.S.C. § 437f. In each advisory opinion, the Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in the advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity.

provided the Commission with information that the GE line of credit was the Joint Venture's primary source of financing and that it was ongoing.

In addition, the complaint alleges that "GE/Penske failed to inform the Commission of the magnitude of the revolving line of credit - \$7.5 billion." Complaint, p. 3. However, in Advisory Opinion 2009-18, the Commission determined that the newly-renegotiated terms of the line of credit between GE Capital Corporation and the Joint Venture may be seen as part of the process by which the Joint Venture was separating from the GE companies.⁴ Advisory Opinion 2009-18, p. 9. This conclusion was not affected by the specific amount of the line of credit. Indeed, the Commission did not question the actual size of the credit line, but was fully aware of its significance, noting that the Joint Venture's primary source of financing was the revolving line of credit held by GE Capital Corporation.⁵ Advisory Opinion 2009-18, p. 9.

The complaint further maintains that "GE/Penske PAC failed to inform the Commission that Penske is wholly dependent upon GE's financing for its survival and is

⁴ The magnitude of the line of credit is relevant to 11 C.F.R. § 100.5(g)(4)(ii)(H), *i.e.*, whether a sponsoring organization or committee causes or arranges for funds in a significant or on an ongoing basis to be provided to another sponsoring organization or committee. 11 C.F.R. § 100.5(g)(4)(ii)(H). The Commission has concluded in prior advisory opinions that disaffiliated companies may maintain some customer-supplier relationships. *See* Advisory Opinion 2000-28 (ASHA), 2003-21 (Lehman Brothers), 2004-41 (CUNA Mutual), 2007-13 (United American Nurses), and 1996-42 (Lucent Technologies). The provision of funding or goods and services between the companies in these prior advisory opinions was either not in significant amounts or represented arm's length transactions at commercially reasonable rates, and the Commission recognized that those "transactions, rather than illustrating the continued affiliation of the two organizations, instead can be seen as part of the process to establish the independence and separation of [an entity] from its organizational parent." Advisory Opinion 2007-13 (United American Nurses) quoting Advisory Opinion 2007-28 (American Seniors Housing Association).

⁵ When asked for additional information about the line of credit during the pendency of Advisory Opinion 2009-18, Penske PAC Respondents stated that the revolving line of credit was the Joint Venture's primary source of financing; that the terms of the credit line changed when the GE limited partners became minority owners of the Joint Venture; and that, "except for the rates, the nature of the contractual agreement is now much more akin to agreements with third party lenders, with affirmative and negative covenants, events of default, reporting obligations, etc., and General Electric Capital Corporation has rights in the future to reset the rates to market rates and to make the Joint Venture refinance the debt with third-party lenders." See e-mail Supplement to Advisory Opinion Request 2009-18 dated July 2, 2009.

unable to obtain credit from other sources as the result of its credit rating and enormous debt to GE.” Complaint, p. 3. Penske PAC Respondents specifically deny this allegation. *See* Response of Penske PAC Respondents, p. 7; Duff Aff. ¶ 5. As noted above, the Commission clearly recognized and took into account that the credit line provided by GE was the Joint Venture’s “primary source of financing.” *See* Advisory Opinion 2009-18, p. 3.

The complaint also alleges that “GE/Penske failed to provide the FEC with the details of the revolving credit agreement to substantiate their claims of the changes made.” Complaint, p. 3. However, Penske PAC provided the Commission with extensive details regarding the changes made to the credit agreement. *See* Advisory Opinion Request, p. 12; *see also* Penske PAC Comment on OGC Draft of Advisory Opinion 2009-18 dated July 27, 2009.

Finally, the complaint alleges that “GE/Penske failed to inform the Commission that the changes they refer to in [Advisory Opinion 2009-18] for ending the loan agreement between GE and Penske are not scheduled to take place until the year 2018.” Complaint, p. 3. However, the Penske PAC Respondents assert that this allegation is simply incorrect, *i.e.*, the respondents assert that the changes to the revolving credit agreement are not delayed until 2018. Response of Penske PAC Respondents dated April 4, 2011, p. 7; Duff Aff. ¶ 6. Notably, the Penske entities informed the Commission that they expected GE Capital to exercise its rights to reset the loans to market rates and require Penske to refinance the outstanding loans with third parties, but that “no timetable had been set.” Advisory Opinion Request, p. 12. Moreover, the Commission acknowledged that the credit agreement remained in effect and was the primary source of financing for the Joint Venture, and nevertheless

concluded that Penske PAC and GEPAC were disaffiliated, without regard for when the loan agreement would end. *See* Advisory Opinion 2009-18, p. 10.

The amended complaint, purporting “to address information” contained in Advisory Opinion Request 2009-18 that the complainant knows “from personal experience to be inaccurate, incomplete, and misleading,” asserts that GEPAC “continues to control Penske Truck Lea[s]ing’s Operations and Finances.” Amended complaint, p. 1. Specifically, the amended complaint states that Penske PAC’s statement in Advisory Opinion Request 2009-18 that GEPAC, as a minority limited partner of the Joint Venture, was not involved in its management decisions and regular operations is “completely contradictory with [his] own personal experiences resulting from numerous meetings, phone conversations and e-mail exchanges” with senior executives of the Joint Venture. *Id.* However, the amended complaint fails to include any specific details or documentation, *e.g.*, affidavits or copies of e-mail exchanges, to support this assertion and, significantly, fails to provide the date of the activity. In this regard, the GEPAC respondents maintain that it can be assumed that any such personal involvement by the complainant took place prior to his termination as President and CEO of the Truck Renting and Leasing Association (“TRALA”) on July 8, 2009 – three weeks prior to the issuance of the Advisory Opinion 2009-18 concluding that GEPAC and Penske PAC may disaffiliate – because thereafter he was not at TRALA to observe any of the alleged activity.⁶ Response of GEPAC Respondents dated August 9, 2011, p. 5. We do not have information to the contrary.

⁶ Brian Hard, President and CEO of the Joint Venture, was a TRALA officer and board member. The complainant states that his employment at TRALA was terminated “without cause” by Mr. Hard after the complainant initiated an investigation of conflicts of interest, undisclosed business relationships, and securities fraud among members of TRALA’s governance. Complaint, p. 3.

The amended complaint further asserts that Penske PAC coordinated contributions with GEPAC. Amended complaint, p. 2. Specifically, the complainant states that, in his former position as President and CEO of TRALA, which ended on July 8, 2009, prior to the issuance of Advisory Opinion 2009-18, he would sometimes request Penske PAC's assistance in providing campaign contributions for certain campaigns that the "industry wished to support," and that in some cases those "contributions were then coordinated and/or procured through GEPAC." *Id.* This assertion does not provide any new information because Penske PAC acknowledged in Advisory Opinion Request 2009-18 that it coordinated contributions with GEPAC "to the extent necessary to comply with the shared contributions limits applicable to affiliated committees." Advisory Opinion Request 2009-18, Page 7. Nor does the assertion indicate that the coordination between Penske PAC and GEPAC extended beyond the stated parameter, or continued after Penske PAC and GEPAC were determined to be disaffiliated.

The amended complaint alleges that Penske PAC's representation to the Commission that the General Electric limited partners were not involved in the joint venture's actual creation is contradicted by media reports. Amended complaint, p. 3. In support of this allegation, the amended complaint cites a media report that states that Penske Corporation and the General Electric Capital Corporation "had agreed to combine their truck leasing subsidiaries into a joint venture" and that "Penske must exercise its option to buy Hertz's 50 percent share before the *new joint venture* is formed (italics added)." Amended complaint, p. 3. The media report's announcement of a pending new joint venture, however, does not negate the pre-existence of a differently composed joint venture. In fact, a Penske webpage entitled "How Did We Get Here, The History of Penske" states that in 1982 Penske entered

into a joint partnership with Hertz Truck Division, and in 1988 Penske purchased Hertz's remaining share of the joint venture and formed a partnership with General Electric. *See* <http://www.gopenske.com/penske/history.html> (last visited August 24, 2011). Thus, the media report does not contradict Penske PAC's representation that the General Electric limited partners were not involved in the joint venture's actual creation.

The amended complaint further alleges that Penske PAC failed to properly identify members of the Penske advisory committee. This assertion is without merit because Penske PAC identified each member of the advisory committee in an attachment to Advisory Opinion Request 2009-18. *See* Advisory Opinion Request, p. 131.

Finally, the amended complaint asserts that during the advisory opinion process, Penske PAC failed to inform the Commission that individuals who serve on the Board of Directors of the Penske Corporation, the Joint Venture's parent corporation, also serve as officers or directors of other entities that receive significant funding from General Electric. *See* Amended Complaint, pp. 5-8. In relevant part, the factors considered to determine whether committees are affiliated include whether a sponsoring organization or committee provides goods, or causes or arranges for funds to be provided, in a significant amount or on an ongoing basis to another sponsoring organization or committee. *See* 11 C.F.R. § 100.5(g)(4)(ii)(G), and (H); 110.3(a)(3)(ii)(G) and (H). Therefore, the allegation that General Electric provides significant funding to entities that are not a sponsoring organization or committee, *i.e.*, "other entities that receive significant funding from General Electric," does not appear to factor into an affiliation analysis. *See* 11 C.F.R. § 100.5(g)(4)(i).

Based on all of the foregoing, the allegation that the Commission relied on misleading and incomplete information in rendering Advisory Opinion 2009-18 appears to be without

merit. Therefore, as determined in Advisory Opinion 2009-18, Penske PAC and GEPAC are properly disaffiliated and the Penske PAC contributions at issue were not excessive.

Consequently, the Commission found that there is no reason to believe that General Electric Company, or General Electric Company PAC and Marie Talwar, in her official capacity as treasurer, violated 2 U.S.C. § 441a(a)(2)(A). Accordingly, the Commission closed the file in this matter.

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