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Secretary Committee on Rules of
Practice & Procedure
Administrative Office of
the United States Courts
One Columbus Circle NE
Washington, D.C. 20544

Re: Proposed Electronic Discovery Amendments to the Federal Rules of Civil Procedure

On behalf of the Association of the Bar of the City of New York (the "Association"), and through the efforts of the Association's Committees on Federal Courts, Information Technology Law, and Professional and Judicial Ethics, we respectfully submit these comments on the proposed amendments to the Federal Rules of Civil Procedure addressing discovery of electronic evidence.

The Association is one of the oldest and largest local bar associations in the United States, with a current membership of over 22,000 lawyers. The Association serves not only as a professional association, but also as a leader and advocate in the legal community on a local, state, national, and international level. The Association pursues its advocacy role through the work of over 170 committees. Among other activities, the Association's committees prepare comments for legislative bodies, regulatory agencies, and rule making committees on pending and existing laws, regulations, and rules that have broad legal, regulatory, practical, or policy implications. Further information regarding the Association can be found at its web site, http://www.abcny.org.

The Association is concerned that the proposed electronic discovery amendments to the Federal Rules of Civil Procedure will prove to be counterproductive, and we urge the Advisory Committee to withdraw this proposal in favor of further study of the issues raised in this letter and by other commentators. In brief, our concerns involve two broad issues.

First, the Federal Rules of Civil Procedure continue to migrate from a set of relatively simple rules that give courts wide latitude to apply broad principles justly and fairly, as

required in particular cases, to a regulatory regime that requires a detailed understanding of the interrelationships among not only the text of multiple rules, but also a system of "sub-textual" requirements buried in Advisory Committee commentary. In the context of electronic discovery, technologies continue to evolve faster than any fixed rules can be adapted to meet them. As the Advisory Committee stated in its August 3, 2004, report, "The fact that changes in technology will continue to occur, at speeds and in ways that we cannot predict, requires that we proceed with caution." Id. at 20. The current proposal sets certain procedures and standards at a finer level of detail than exists elsewhere in the Rules, see, e.g., Fed. R. Civ. P. 8, and we believe the federal courts, operating from broad principles, have proven quite capable of addressing and promptly resolving electronic discovery issues as they arise.

Second, these proposed amendments raise a host of specific issues, which we address in detail below. While we support the goal of the Advisory Committee to streamline the often complex and time-consuming issues presented by electronic discovery, we do not think these amendments accomplish that goal. To cite two particular items of concern, (i) the "safe harbor" proposal for Rule 37 imposes a new and different standard, in a discovery specific context, that appears at variance with the more general standards devised by the courts to deal with spoliation of evidence generally, see Section VI infra; and (ii) the provisions in proposed Rules 16(b)(6) and 26(b)(5), encouraging the "adoption of the parties' agreement for the protection against waiving privilege," will not increase efficiency because producing parties, under commonly applicable rules of professional responsibility, face a waiver of privilege as to third parties regardless of agreements reached in the action in which the production takes place, and because requesting parties remain subject to ethical obligations to review and return documents they know may be privileged, see Section III infra. Both of these proposals may well serve as traps for the unwary, producing collateral disputes over privilege, document preservation, and the attendant obligations upon counsel.

The Association recognizes that the Advisory Committee, and a number of commentators on the proposed amendments, see value in adopting these amendments in some form. Accordingly, we offer the following specific comments to assist the Advisory Committee in formulating any final recommendation it may issue. [1]

I. Early Discussion of E-Discovery Issues (Rule 16(b)(5), Rule 26(f) and Form 35).

The proposed amendments to Rules 16(b)(5), 26(f) and Form 35 would require the parties to address electronic disclosure and discovery issues in the context of the initial pre-trial conference and scheduling order. The Association agrees on the need to urge the court and the parties to address e-discovery issues at the earliest possible stages of discovery and discovery planning. However, this can be accomplished quite simply, through the addition of proposed Rule 16(b)(5).

[1] The Association's Committee on Federal Courts provided comments in response to the Discovery Subcommittee's 2003 inquiry regarding e-discovery issues. A copy of those comments can be found on the Association's website at http://www.abcny.org/pdf/report/Ctiy%20Bar%20Committee%20(Final%20Draft).pdf.

II. "Two -Tiered" Approach (Rule 26 (b)(2)).

The proposed amendment to Rule 26(b)(2) provides for a two-tiered approach to discovery of electronically stored information that a party identifies as "not reasonably accessible." The proposed amendment would add the following language to Rule 26(b)(2):

> A party need not provide discovery of electronically stored information that the party identifies as not reasonably accessible. On motion by the requesting party, the responding party must show that the information is not reasonably accessible. If that showing is made, the court may order discovery of the information for good cause and may specify terms and conditions for such discovery.

In our view, the "reasonably accessible" standard focuses on the wrong issue and will not establish a clear or workable standard for courts and litigants. The proper standard for all discovery – electronic or otherwise – should not relate to "access," but to the relative costs and burdens associated with the collection and production of information in the context of its importance to the issues in a particular case. To the extent that relative costs and burdens are the focus of the proposed "reasonably accessible" standard, then that standard adds nothing to the rules as currently drafted. Rule 26(b)(2) already sets out the factors a court should consider in determining whether otherwise permissible discovery should be limited by the court. Those factors provide adequate guidance and discretion to the courts in resolving issues related to the relative costs and burdens associated with all forms of discovery.[2]

To the extent the "reasonably accessible" standard focuses on something other than cost, it is unclear what is intended by the proposed rule. Moreover, the "two-tiered" approach of the proposed rule will unnecessarily complicate the discovery process and will almost certainly add layers of satellite litigation and delay discovery with no associated benefit. It will no doubt lead routinely to applications requiring judicial intervention to determine whether the information sought is "not reasonably accessible," whether the requesting party has demonstrated sufficient "good cause" to warrant production, and what terms and conditions should govern discovery ordered by the courts. While the parties wrangle, focus will be misdirected from the more significant issues of balancing the relative costs, burdens and benefits of the propounded discovery – precisely the issues that the existing proportionality rules are well-suited to tackle.

In the Association's view, there is no reason to believe that the current version of Rule 26(b)(2) is inadequate to deal with the very problems the proposed amendment is designed to address. Nevertheless, to the extent the Advisory Committee intends to adopt the "two-tiered" approach of the proposed amendments, the Association has the following comments:

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[2] The draft Advisory Committee Note to the proposed amendment to Rule 26(b)(2) identifies so-called "distinctive features" of electronically stored information, "including the volume of the information, the variety of locations in which it might be found, and the difficulty of locating, retrieving, and producing certain electronically stored information." Although ostensibly correct, we suggest that these features are not really distinctive, but are different only in degree rather than kind from the paper discovery issues previously addressed successfully in prior amendments to Rule 26(b)(2) that take into account the burden and expense of proposed discovery.

The "Reasonably Accessible" Standard Should Be Re-Focused. If the "reasonably accessible" standard – or its functional equivalent – is maintained in the final amendments, we believe the guidance provided by the draft Advisory Committee Note needs to be re-focused. In the Association's view, the current version of the Note places too much emphasis on a party's ability to "access" data manually, rather than the costs and burdens associated with (1) retrieving the data, (2) converting it into a useable form, and (3) producing it to the requesting party.

For example, the current version of the Advisory Committee Note states that electronically stored information will normally be considered "reasonably accessible" if it is "routinely accessed" by a party, but that "disaster recovery" copies of electronically stored information that need to be restored may not be because they can be "located, retrieved, or reviewed only with very substantial effort or expense." While this may be true in some cases, in other cases, the reverse may be true: the cost and expense of accessing "active" data may be greater than that of accessing backup tapes, depending on the technologies or volumes of data involved. It can take as little as a few hours to restore e-mail boxes from a Microsoft Exchange backup tape, but it could take days of programming and testing to extract relevant information from a live database server. In addition, active data that is "routinely accessed" may be so voluminous that, as a whole, it cannot be said to be "reasonable" to collect and search it.

We also note that having "reasonable accessibility" turn on whether electronic information is or is not "routinely accessed" may prove, in the future, to be an even less useful test than it is now, given changing technologies. For example, some companies are moving their "disaster recovery" information to large Storage Area Networks, which can be accessed in the same manner as a live server.

In sum, we do not believe the distinction between electronic information that is "routinely accessed" and electronic information that is not "routinely accessed" is particularly useful. Rather, we believe the primary determinant of whether electronic information is "reasonably accessible" should be the relative cost of (1) accessing the data in question, and (2) arranging it into a form in which it can meaningfully be reviewed and produced.[3]

[3] In establishing cost as the primary factor, the Advisory Committee Note should expressly acknowledge that the cost of "retrieving" electronically stored information is only one aspect of the relevant cost. In modern electronic discovery practice, once data is retrieved from a responding party's computer network, the volume of data is often so great that the data needs to be: (1) processed, including, for example, the elimination of duplicates and data falling outside a specified date range; and (2) uploaded into some litigation support review tool such as Concordance, Summation, Documatrix or an on-line review tool such as those hosted today by Kroll Ontrack or Applied Discovery. The data must be uploaded into such a tool to enable the complex task of attorney review for the determination of responsiveness, relevance and privilege. Reviewing counsel must often key-word search the data, which can only be effectively done after the data is loaded into a review tool. Moreover, only after the data is loaded into such a tool can it effectively be sorted, marked for privilege, evaluated for relevance, Bates-stamped and redacted. None of this key-word searching or litigation-support functionality can be effectively achieved when the data is in native format. These critical phases of processing and uploading have become the way most major electronic discovery is performed. The cost of this processing and uploading is often far more expensive than manually "accessing" the data because many of the technologies used by the litigation support review tools require (i) a conversion of the electronic documents into some other form, such as .tiff images or .pdfs, and (ii) the coding of those images into a searchable database. In making cost the primary factor in determining reasonable accessibility, the Advisory Committee should include the cost of data processing

We believe that cost is a common denominator that will serve as a more objective test of what is reasonably accessible, as opposed to the distinctions highlighted in the Committee Note, which are dependent on differences in responding parties' network architecture and on changing technologies. The Association therefore recommends a revision to the commentary to focus on cost as the principal determinant of reasonable accessibility.[4]

The "Good Cause" Determination Should Incorporate The Proportionality Factors. The proposed Rule 26(b)(2) states that by showing "good cause," a party may overcome the presumption that electronic data that is not "reasonably accessible" need not be produced. The draft Advisory Committee Note states that courts must assess "good cause" by comparing the requesting party's need for the information and the responding party's burden. The Note should state explicitly that, in analyzing a requesting party's allegation of good cause, courts should take into account the same factors that are now listed in current Rule 26(b)(2), including, but not limited to: (i) whether the discovery sought is unreasonably cumulative or duplicative; (ii) whether the information sought may be obtained from another source that is more convenient or less burdensome; (iii) whether the party seeking the electronic information has had ample opportunity through other discovery in the action to obtain the information sought; (iv) the needs of the case; (v) the amount in controversy; (vi) the parties' resources; (vii) the importance of the issues at stake in the litigation; and (viii) the importance of the proposed discovery in resolving the issues. To the extent "good cause" in the proposed rule means something other than the proportionality standards, the Note should explicitly so state and make clear that the proportionality standards will still apply.

The Notes Should Endorse Sampling As Part Of The Good Cause Showing. In the proposed Advisory Committee Note to proposed Rule 26, the Advisory Committee lists sampling as an example of a tool by which a court can manage the discovery process. The draft Advisory Committee Note states that sampling may be an appropriate method to "gauge the likelihood that relevant information will be obtained, the importance of that information, and the burden and cost of its production."

The Association believes that sampling can be an effective tool in saving time, money, and resources in the discovery process. While this tool could be used in several contexts, we believe that it could be particularly effective when a requesting party seeks the production of electronic information that is not reasonably accessible. The Notes should emphasize that, whenever appropriate, sampling should be considered as the first step in a good cause analysis. Because the test for good cause requires a balancing of the need for the requested information and the burden of producing it, sampling could provide the court a more objective basis for performing this balancing.

III. <u>Privilege Waiver (Amendments to Rules 16(b)(6) and 26(b)(5))</u>. The proposed amendment to Rule 16(b)(6) is designed to facilitate the "adoption of the parties' agreement for

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and uploading into a litigation support review tool. The cost of attorney review of those documents, however, should not be a factor in whether the documents are "reasonably accessible."

[4] While the Association believes that the relative cost of production should be the primary factor in the "reasonably accessible" determination, courts should also have the flexibility to consider additional factors, including the importance of any individual rights at stake, society's interests in the outcome of the case, and other public policy and private considerations.

the protection against waiving privilege." The proposed changes to Rule 26(b)(5)(B) would further provide:

> **(B) Privileged information produced**. When a party produces information without intending to waive a claim of privilege it may, within a reasonable time, notify any party that received the information of its claim of privilege. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies. The producing party must comply with Rule 26(b)(5)(A) with regard to the information and preserve it pending a ruling by the court.

The proposed amendment to Rule 16(b)(6) properly acknowledges the existence of claw back and other privilege waiver agreements that some parties implement during discovery. However, neither this rule nor the proposed amendment to Rule 26(b)(5)(B) address the more fundamental question of third-party waiver (nor could they, since a rule modifying an evidentiary privilege cannot be adopted unless it is approved by Congress under 28 U.S.C. § 2074(b)). While claw back agreements may be used to prevent waiver as to an adversary, in some jurisdictions even the inadvertent production of privileged material waives the privilege as to all third parties. *See, e.g., Hartford Fire Ins. Co. v. Guide Corp.*, 206 F.R.D. 249, 250-51 (S.D. Ind. 2001) ("While the parties might be able to bind themselves by agreeing to limit waivers resulting from inadvertent (or deliberate) disclosures, their agreement cannot limit waivers as to third parties."); 8 CHARLES A. WRIGHT, ARTHUR R. MILLER & RICHARD L. MARCUS, FEDERAL PRACTICE & PROCEDURE § 2016.2 (2d ed. 2004). Thus, despite the presence of a claw back agreement and the inadvertent waiver rule, cautious parties will still conduct a thorough privilege review before production. Indeed, they are ethically obligated to do so. *See, e.g.*, NYSBA No. 782 (2004) (protection of client confidences contained in metadata). Cautious parties will also be alert to the ethical obligations imposed on the recipients of inadvertently disclosed confidential information. *See, e.g.,* ABCNY No. 2003-4 (obligations upon receiving communication containing confidences not intended for recipient). For this reason, the proposed amendments are unlikely to lessen the costs or burdens of discovery in practice.[5]

Recognizing the limitations of the proposed amendments, the Association nonetheless supports them. The Association also supports their application to all forms of discoverable materials, not just to electronically stored information. Privilege waiver concerns apply to all discoverable materials, and the costs involved in reviewing for privilege pertain to both paper and electronic documents.

The Association suggests one revision to the proposed amendment to Rule 26(b)(5)(B). By requiring the recipient to return, sequester or destroy documents upon notice of the producing party's claim of privilege, the draft amendment suggests that the recipient would be precluded from submitting the document to the court for a ruling on privilege. The Association

[5] The proposed changes to Rule 26(b)(5)(B) also have the potential to become a trap for the unwary. The amendment does not protect against the possibility of a waiver resulting from inadvertent production of privileged information. The Association believes that the Advisory Committee should state this explicitly. The Advisory Committee comment should read, in words or in substance, that "Rule 26(b)(5)(B) does not address whether there has been a privilege waiver, either as to the parties in the litigation or as to any third party." The Advisory Committee Notes should further state that, in some jurisdictions, even the inadvertent production of privileged material waives the privilege as to all third parties.

recommends instead that the rule allow the recipient to submit the document, under seal, to the court as a basis from which to argue that the claimed privilege does not apply or has been waived.

The Association supports the consideration of privilege issues during the parties' initial conferences pursuant to proposed amendments to Rule 16(b)(6). The addition of this topic would prompt the court and the parties to address privilege concerns as early as possible.

IV. Requests For Production (Amendment To Rule 34(a)).

The Advisory Committee has proposed a revision to the scope of permissible requests for production to include electronic information. In relevant part, the proposed amendment provides:

> **(a) Scope.** Any party may serve on any other party a request (1) to produce…any designated electronically stored information or any designated documents (including writings, drawings, graphs, charts, photographs, sound recordings, images~~phonorecords~~, and other data or data compilations in any medium from which information can be obtained….

Although the Association agrees that it is appropriate to include electronic information expressly within the scope of discoverable information under Rule 34(a), it does not believe there is a need to establish electronic information as a category distinct from "document" to accomplish this goal. Moreover, the proposed language suggested by the Advisory Committee has the potential to create confusion between "documents" and "electronically stored information." The phrase "data…in any medium" clearly encompasses electronically stored information, which means, for example, that information on a hard disk would fall within both categories (*i.e.*, it is both "electronically stored information" and a "document"). At the same time, "writings" "drawings" "graphs" "charts" "photographs" "sound recordings" and "images" are each, today, created and stored electronically more often than not. This creates a potential for almost metaphysical confusion between the two categories (is a magnetic tape "electronically stored" while a record, which is stored using electricity rather than magnetism, is not?) with no discernible benefit.

The Association suggests that the rules should retain a single category of information – "document" – and that the phrase should be defined to include *both* "electronically stored information" *and* "data…in any form." There is no need for any express distinction in Rule 34.

V. Form of Production (Amendments to Rule 34(b)).

The Association suggests one modification to the proposed amendments to Rule 34(b). As revised, Rule 34(b) would allow the requesting party to specify the form of production for electronic information, expressly allow the responding party to object to the requested form, and provide a "default rule" for production in native format or electronically searchable form in the event no form of production is specified.

The "default rule " could prove problematic. On the one hand, converting large productions of electronically stored information into an electronically searchable format (such as searchable .tiff or .pdf files) could be extremely costly for the responding party.

On the other hand, receiving a large dump of electronic information in its native format could be useless to the requesting party absent significant expenditure of time and money to convert it into a useable form (indeed, in some cases, such as where the information is stored using licensed or proprietary software, the information would be completely useless).

The "default rule" would permit the responding party to choose a form of production if no form is specified in the request. A better solution would permit the responding party, in the event the request does not specify a form of production, to indicate the form of production it proposes to use in its Rule 34(b) written response. Absent objection, the responding party would produce its information in the manner specified in its Rule 34(b) response. If an objection were lodged, however, the parties (and, if necessary, the court) would resolve the matter. This alternative formulation would encourage resolution of form of production issues before significant costs were incurred in the actual production of documents.

VI. Safe Harbor (Amendment To Rule 37).

The Advisory Committee proposes to add a "safe harbor" for rule-based sanctions relating to "electronically stored information" through the addition of a new Rule 37(f). The proposed amendment provides:

> **(f) Electronically Stored Information.** Unless a party violated an order in the action requiring it to preserve electronically stored information, a court may not impose sanctions under these rules on the party for failing to provide such information if:
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> (1) the party took reasonable steps to preserve the information after it knew or should have known the information was discoverable in the action; and (2) the failure resulted from loss of the information because of the routine operation of the party's electronic information system.

The Association believes that the proposed "safe harbor" is ill-conceived. There is no reason to believe that courts and litigants are not equipped to deal with issues of spoliation and sanctions with existing tools provided by the common law of spoliation and the courts' inherent powers. The Association does believe that a substantial argument can be made in support of an amendment to the Federal Rules that: (1) provides an express textual basis for sanctions in the preservation and production context (outside the limited situations implicated by Rule 37(b) and the patchwork of other sanctions provisions scattered throughout the Rules) for all forms of discovery; (2) clarifies when the duty to preserve is triggered; and (3) sets forth the appropriate standard of care for production and preservation. Such an amendment would yield the benefits of

clarity and consistency to litigants and courts. Unfortunately, the proposed amendment to Rule 37 does none of these things.

Nor is the proposed amendment well-suited to accomplish its intended goal of providing litigants with a meaningful "safe harbor." As at least one commentator has noted, the "safe harbor" provided by the proposed amendment is illusory. *See* Comment no. 04-CV-066, 1/3/05 Ltr. from Gregory P. Joseph at 3, *available at* http://www.uscourts.gov/rules/e-discovery/04-CV-066.pdf. The Association agrees with this comment. The amendment is inexplicably limited in its application to sanctions "under these rules," and then only in situations where no court-imposed preservation order has been violated. Because the Federal Rules of Civil Procedure provide no express basis for sanctioning the failure to preserve and produce information absent violation of a discovery order,[6] as a practical matter the proposed amendment provides no "safe harbor" at all. The Association believes that any meaningful safe harbor must be part and parcel of a single rule that provides the standard for preservation and sanctions in the spoliation context generally. Litigants in the federal courts should be subject to one preservation rule.

Nevertheless, to the extent some form of a "safe harbor" limited to e-discovery is adopted, the Association suggests that it should not be limited to failures to produce electronic information resulting from "the routine operation of the party's electronic information system." This limitation emphasizes the wrong issue. By focusing on routine computer operations, the proposed rule would encourage parties to speed up the automatic deletion of data. By the same token, "safe harbor" protections will be unavailable in situations that truly deserve it – take, for example, the loss of computer data resulting from the events of September 11.

The Association also sees no reason to constrict the scope of the rule to "routine" computer operations. Sanctions should not apply to a party that satisfies the requisite standard of care, notwithstanding whether the information was destroyed as a result of "routine" computer

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[6] The Federal Rules of Civil Procedure do not define the duty to preserve. Nor do they provide a basis for sanctioning the failure to preserve or produce responsive documents (absent a court order). This is left to the courts' inherent power and the common law of spoliation. Rule 11 does not apply to discovery; Rule 37(a) provides for cost shifting in the context of a motion to compel; Rule 37(b) provides a basis for sanctioning a violation of discovery orders, but such sanctions are expressly carved out of the proposed "safe harbor"; Rule 37(d) applies only to written discovery; and Rule 37(g) relates to failure to participate in a Rule 26(f) conference. The only sanctions provision under the Rules to which the safe harbor would conceivably apply is Rule 37(c), which precludes a party that fails to disclose information required by Rules 26(a), 26(e)(1) and 26(e)(2) without "substantial justification" from using that information as evidence, and provides a basis for awarding other "appropriate sanctions." *See* Fed. R. Civ. P. 37(c)(1). The referenced rules do not have general applicability to the failure to preserve and produce responsive documents (for example, Rule 26(a)(1) requires no preservation or production of relevant documents – it only requires that a party produce or describe the location of documents that the party will use in its case, and then only if the party does not object to initial disclosures; Rule 26(a)(2) deals only with expert disclosures; and Rule 26(a)(3) requires only the "identification" of exhibits to be used at trial). Moreover, even to the extent there are limited circumstances in which a party that fails to preserve and produce electronically stored information would run afoul of Rule 37(c) – and that is by no means clear – the sanction provided under that Rule is ill-suited to the electronic discovery preservation/spoliation context for at least two reasons. First, by definition, if an electronic document is no longer available due to spoliation, the party who failed to preserve it would not be expected to attempt to use the document as "evidence at trial, at a hearing, or on a motion." *See* Fed. R. Civ. P. 37(c). Second, there is no reason to expect a court to employ "other appropriate sanctions" in the circumstances covered by the proposed safe harbor – *i.e.*, when a party has acted reasonably.

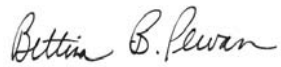
operations, a corrupted backup tape, a non-routine computer system "crash," a natural disaster, a terrorist attack, or any number of other ways in which data is destroyed. The relevant issue for purposes of sanctions is – and should remain – the degree of the party's culpability, not the precise manner in which the information is lost. An appropriate comment in the Advisory Committee Note could emphasize that the standard of care would be met in the ordinary case by destruction resulting from routine computer operations, among other examples.

Finally, the Advisory Committee should clarify that manual steps may be included within the definition of "routine computer operations." For example, an organization's computer system may be programmed to move emails from a live server to backup tapes after a specified period, and the backup tapes may then be scheduled for destruction or recycling. Such destruction or recycling is common, and may involve manual intervention by an individual working for the organization. There is little reason to distinguish between this process and an automatic deletion process simply because a human being is involved.

VII. Conclusion

The Association hopes that this letter proves helpful to the Advisory Committee in its consideration of the proposed changes to the Federal Rules. We are available to comment further, upon request, should the Advisory Committee find further comment helpful.

Very truly yours,



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