No. 10-1417

IN THE

Supreme Court of the United States

FEIN, SUCH, KAHN & SHEPARD, P.C.,

Petitioner,

v.

DOROTHY RHUE ALLEN, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
United States Court of Appeals for the Third Circuit

RESPONDENT DOROTHY RHUE ALLEN'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether a communication to a consumer's attorney from a debt collector seeking payment of unlawful fees is actionable under § 1692f(1) of the Fair Debt Collection Practices Act, which prohibits collecting or attempting to collect unlawful fees.

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INTRODUCTION

Attempting to collect unlawful fees or expenses from a debtor violates 15 U.S.C. § 1692f(1), a subsection of the Fair Debt Collection Practices Act (FDCPA). The question in this case is whether a debt collector can be held liable under § 1692f(1) if its attempt to collect unlawful fees is sent to a debtor's attorney, rather than to the debtor directly.

Focusing on language unique to § 1692f(1) and limiting its holding to that subsection, the Third Circuit held that collection requests sent to the debtor's attorney are not exempt from that provision. No circuit has reached a contrary result.

Petitioner's allegation of a circuit split relies on decisions from the Seventh and Ninth Circuits that address different provisions of the FDCPA. Those Circuits, like others, recognize that different provisions of the Act involve distinct obligations, restrictions, and liability standards. And the Seventh and Ninth Circuits' cases addressing § 1692f(1) indicate that, if those circuits were presented with a § 1692f(1) claim like Respondent's, they would reach the same outcome as the decision below. In any event, those courts have not addressed the question, and there is no conflict for this Court to resolve.

STATEMENT OF THE CASE

Foreclosure Proceedings

In 1976, Dorothy Rhue Allen purchased a home. Thirty years later, when she was unable to make her final mortgage payment, her lender attempted to foreclose on her house. App. 3, 36. Petitioner Fein, Such, Kahn and Shepard, P.C. (FSKS) agreed to prosecute the foreclosure action and in May 2007 filed a lawsuit

against Allen in New Jersey Superior Court. App. 3, 17-18.

Allen's attorney, Roger C. Mattson, requested from FSKS a statement of the loan balance and additional charges due. In response, FSKS sent a letter specifying $5,797.45 as the amount owed. This total comprised $3,425.31 purportedly owed to the lender (consisting of a balance of $408.18 plus escrow and fees), along with attorney fees and costs of $2,372.14 to be paid directly to FSKS. App. 18, 37.

Later that same day, FSKS sent a second letter, itemizing the $2,372.14. App. 3, 18. Although FSKS routinely prosecutes New Jersey foreclosures,[1] it sought many impermissible fees and costs, including "$910 in attorney fees when court rule permits only $15.43, $335 for searches when court rule permits only $75, $160 for recording fees when the actual fee was only $60, and $475 for service of process when statute and court rule limit reimbursement to $175." App. 4; *see also* App. 19, 38-39. The attorney fees were also greater than those actually incurred. *Id*.

Allen filed her answer and included a class-action counterclaim and third-party complaint against FSKS and her lender for violating the FDCPA and state law. App. 3-4, 60-84. She alleged that the defendants inflate their profits by collecting fees not authorized by applicable law or loan documents. App. 65. The lender and FSKS moved to dismiss the counterclaim and third-party complaint, but before the court reached those motions, the lender released the mortgage and

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[1] *See* http://www.feinsuch.com/lawyer-attorney-1345112.html (last visited July 25, 2011).

moved to dismiss the foreclosure action with prejudice. App. 4, 18-19. The Superior Court then dismissed Allen's claims without prejudice. App. 4, 19.

District Court Proceedings

Allen filed suit against FSKS and the lender in the United States District Court for the District of New Jersey. App. 4, 19, 34-59. She alleged that by charging fees and costs exceeding those permitted by law and those actually incurred, FSKS violated 15 U.S.C. § 1692e(2), which prohibits false representations about the character of any debt and services rendered by a debt collector, and § 1692f(1), which prohibits the collection of amounts not authorized by law or agreement. App. 19, 47, 49. The complaint also included more general allegations of unfair, deceptive, and harassing behavior, which the district court construed as claims under the "general application" provisions of § 1692d (harassing, oppressive, and abusive conduct), § 1692e (use of false, deceptive, or misleading representations), and § 1692f (use of unfair or unconscionable means). App. 4, 19-20, 45-49.

FSKS moved to dismiss the claims against it, asserting that a communication from a debt collector to a consumer's attorney is not actionable under the FDCPA. App. 4, 23.[2] The district court held that "the language of §§ 1692d, 1692e, and 1692f does not support per se immunity for statements made to attorneys." App. 27. Following *Evory v. RJM Acquisitions Funding L.L.C.*, 505 F.3d 769 (7th Cir. 2007), the court then "evaluate[d] statements made only to a

[2] The lender also moved to dismiss. The district court did not reach that motion, App. 32, and it is not at issue here.

debtor's attorney from the perspective of the competent attorney, not the least sophisticated consumer." App. 28. The court concluded that none of FSKS's overcharges and false statements would deceive a competent attorney representing a debtor, and dismissed Allen's claims against FSKS. App. 30-31.

Third Circuit Proceedings

Allen appealed. During oral argument "Allen conceded … that her FDCPA claims were predicated only upon alleged violations of 15 U.S.C. § 1692f(1)," despite the inclusion of other "specific and general FDCPA allegations in her Complaint." App. 4. With this clarification, the Third Circuit reversed the dismissal of Allen's claims.

Highlighting that the case addresses only the scope of § 1692f(1), the court began by stating the question presented in the case as "whether a communication from a debt collector to a consumer's attorney is actionable under the [FDCPA], 15 U.S.C. § 1692f(1)." App. 3; *see* App. 9 ("As noted above, the issue here is whether § 1692f(1) governs communications from a debt collector to a consumer's attorney, such as FSKS's letters to Allen's attorney.").

The court examined the language of § 1692f(1), explaining that "[t]he focus of § 1692f is on the conduct of the debt collector." App. 9. "Indeed, § 1692f(1) prohibits 'unfair or unconscionable means,' regardless of the person to whom the communication was directed." *Id*. The FDCPA defines a communication as "'the conveying of information regarding a debt directly *or indirectly* to any person through any medium.'" App. 9 (quoting § 1692a(2)) (emphasis added by opinion). The court noted that a "communication to a consumer's attorney is undoubtedly an indirect

communication to the consumer." *Id*. (citing *Evory*, 505 F.3d at 773). The court further explained that the conduct proscribed by § 1692f(1) "includes attempted collection as well as actual collection," under its plain language. App. 8 (quoting § 1692f).

The court also emphasized the harmony between its plain-text interpretation of § 1692f(1) and the statute as a whole. Creating a non-textual exemption for communications to attorneys, it explained, would undermine the statute's design. "The FDCPA is a strict liability statute to the extent it imposes liability without proof of an intentional violation." App. 10 (citing § 1692k); *see id*. ("The characterization of the FDCPA as a strict liability statute is generally accepted.") (citing cases). "If an otherwise improper communication would escape FDCPA liability simply because that communication was directed to a consumer's attorney, it would undermine the deterrent effect of strict liability." *Id*.

In reversing the district court, the Third Circuit expressed no disagreement with *Evory*. Rather, the appellate court explained that *Evory*'s standard is inapplicable to claims based on § 1692f(1):

> In this case, the District Court sub silentio concluded that a communication from a debt collector to a consumer's attorney was generally covered by the FDCPA but that it is to be analyzed from the perspective of a competent attorney. The District Court, however, did not have the benefit of Allen's concession that her claims were predicated only upon § 1692f(1), which defines the collection of an unauthorized debt as a per se "unfair or unconscionable" debt collection method. The only inquiry under

> § 1692f(1) is whether the amount collected was expressly authorized by the agreement creating the debt or permitted by law, an issue we leave for the District Court.

App. 10-11.

The court "express[ed] no opinion as to whether Allen has alleged a viable claim. If the agreement does not expressly authorize or state law does not permit the amounts sought, Allen has stated a viable claim under § 1692f(1)." App. 12.

REASONS FOR DENYING THE WRIT

I. The Circuits Are Not Divided On Whether Communications To Attorneys Are Exempt From § 1692f(1).

Only two circuits—the Third and Fourth—have addressed whether § 1692f(1) prohibits communications to debtors' attorneys seeking to collect unlawful fees. Both have answered in the affirmative. *See* App. 3; *Sayyed v. Wolpoff & Abramson*, 485 F.3d 226, 229 (4th Cir. 2007). FSKS seeks to portray a conflict with the Seventh and Ninth Circuits, but neither has addressed § 1692f(1). And the holdings and reasoning of the cases on which FSKS relies, all of which involve other provisions of the Act, are consistent with the decision below.

A. Seventh Circuit Case Law Does Not Conflict With The Decision Below.

Relying on *Evory*, Petitioner argues that it would prevail in the Seventh Circuit. *Evory*, however, did not involve § 1692f(1). *Evory* comprised four consolidated cases that presented nine questions under the FDCPA. 505 F.3d at 771. Three of the cases did not

involve any part of § 1692f. *Id.* at 777-78. In the fourth case:

> The defendant debt collector did not send either the lawyer or his client the written notice required by section 1692g, but instead sent the lawyer a letter that the plaintiff characterizes as coercive because it threatened to dispose of property of the plaintiff that had a purely sentimental value.... The plaintiff doesn't explain which subsection of section 1692 the threat violates, but it could well violate d, e, f, or indeed all three.

Id. at 777. Although the court viewed this conduct as a possible violation of § 1692f's general prohibition, the conduct clearly does not violate subsection (1), and the opinion does not mention that subsection.

Moreover, *Evory*'s analysis of other FDCPA provisions supports the decision below. The opinion states that debt collectors cannot "threaten, make false representations to, or commit other abusive, deceptive, or unconscionable acts against a consumer's lawyer, in violation of sections 1692d, e, or f." *Id.* at 773. These sections "do not designate any class of persons, such as lawyers, who can be abused, misled, etc., by debt collectors with impunity." *Id.*

Further, *Evory* recognizes that where a communication to a lawyer results in the same violation as a communication to a debtor, it is actionable. Applying a "competent lawyer" standard to § 1692e's proscription of any "false, deceptive, or misleading representation," the opinion states that some representations that are "deceptive" or "misleading" to a debtor may not be so to a lawyer, and would not be actionable. *Id.* at 774-75. "A false claim of fact," by contrast, "may be

as difficult for a lawyer to see through as a consumer…. Such a misrepresentation would be actionable whether made to the consumer directly, or indirectly through his lawyer." *Id.* at 775.

As the Seventh Circuit has held in other cases, § 1692f(1) prohibits even the *attempt* to collect unlawful amounts. *Seeger v. AFNI, Inc.*, 548 F.3d 1107, 1111-14 (7th Cir. 2008) (affirming summary judgment against collector under § 1692f(1) solely because requested fees were unauthorized; not inquiring into likelihood of actual collection); *Shula v. Lawent*, 359 F.3d 489, 492-93 (7th Cir. 2004) (same). Accordingly, whereas whether a communication is "misleading" depends on its capacity to mislead, which in turn varies with the recipient, *Evory*, 505 F.3d at 774-75, whether a communication is an "attempt to collect" an amount, § 1692f(1), does not similarly vary with the recipient's savvy.

The decision below is not in conflict with *Evory*. As to the scope § 1692f(1), *Evory* is simply inapposite. *See* App. 10-11.

FSKS also relies on *O'Rourke v. Palisades Acquisition XVI, LLC*, 635 F.3d 938 (7th Cir. 2011), but that decision actually highlights the harmony between the Seventh Circuit and the decision below. *O'Rourke* reaffirmed the holding of *Tinsley v. Integrity Financial Partners, Inc.*, 634 F.3d 416 (7th Cir. 2011), that the definition of "consumer" under § 1692c does not include a consumer's lawyer. Limiting the definition of "consumer" under that section is entirely consistent with recognizing that communicating with a lawyer is "indirectly" communicating with the debtor, and thus may violate *other* sections of the Act. *See Tinsley*, 634 F.3d at 419 ("This conclusion is consistent with

Evory, which did not concern § 1692c."). Indeed, *Tinsley* approvingly cited the decision below. *Id*. at 416. And in *O'Rourke*, the court reaffirmed that the Act's prohibitions extend "to some statements made to a consumer's attorney." 635 F.3d at 943; *see id*. at 944 (holding that statements to *judges* cannot be "misleading" under § 1692e because judges, unlike attorneys, "do not have a special relationship with consumers").

In short, the Seventh Circuit's decisions are consistent with the decision below. And although that court has not addressed the question presented here—whether communications to lawyers are actionable under § 1692f(1)—its cases suggest that it would treat Allen's claim exactly as the Third Circuit did.[3]

B. Ninth Circuit Case Law Does Not Conflict With The Decision Below.

Petitioner's claim of a split with the Ninth Circuit rests on *Guerrero v. RJM Acquisitions LLC*, 499 F.3d 926 (9th Cir. 2007), which does not address § 1692f(1). Guerrero poses no conflict with the decision below.[4]

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[3] The Seventh and Third Circuits recognize identical requirements for violations of § 1692f(1). *Compare Turner v. J.V.D.B. & Assocs., Inc.*, 330 F.3d 991, 996 (7th Cir. 2003) ("Whether the collection of a debt violates § 1692f(1) depends solely on two factors: (1) whether the debt agreement explicitly authorizes the charge; or (2) whether the charge is permitted by law."), *with* App. 11 ("The only inquiry under § 1692f(1) is whether the amount collected was expressly authorized by the agreement creating the debt or permitted by law.").

[4] The only portion of *Guerrero* involving any part of § 1692f (although not subsection (1)) was a claim about allegedly confusing letters sent directly *to the debtor*. "The district court con-

(*Footnote continued*)

Guerrero concerned a letter to the debtor's lawyer, sent in response to a letter from the lawyer threatening FDCPA litigation, that allegedly violated § 1692e by claiming that the defendant was not subject to the Act, and § 1692g(b) by including a sentence purportedly suggesting the letter was a continued effort to collect the debt without verifying it. *Id.* at 929. The court held "that the responsive letter to counsel, and not to his client … was not a prohibited collection effort and did not violate §§ 1692g(b) or 1692e." *Id.* at 934.

The opinion demonstrates that analysis of liability standards under the FDCPA—including the question whether communications to an attorney are actionable—is conducted on a provision-by-provision basis. Admittedly, the court used language that, quoted in isolation, suggests it was exempting attorney-directed communications from the entire statute, *e.g.*, *id.* at 939, and it expressed the view that the Act is superfluous once a debtor retains counsel. *Id.* at 929, 937 n.6. But *Guerrero* individually analyzed the text and purpose of both §§ 1692e and 1692g(b) before concluding that the communication was not actionable under either provision.

Specifically, examining the language of § 1692g(b), the court observed: "Section 1692g(b)'s repeated emphasis on the 'consumer,' along with the Act's clear distinction between consumer and attorney, compel the conclusion that a collection effort must be aimed directly to the consumer himself to be prohibited by § 1692g(b)." *Id.* at 936. The court noted that, unlike

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strued this claim as alleging violations of §§ 1692d, 1692e, and/or 1692f." *Id.* at 933-34.

other provisions, § 1692g(b) specifically references the consumer and debt collector but no one else. *Id*. at 937.[5]

Regarding § 1692e, the court agreed with dicta in *Kropelnicki v. Siegel*, 290 F.3d 118 (2d Cir. 2002), involving the "provision also at issue here," that "misrepresentations to attorneys" are not actionable under that section. 499 F.3d at 937 (quoting *Kropelnicki*, 290 F.3d at 127).

Thus, notwithstanding the decision's broad language, *Guerrero*'s holding rests on close examination of individual FDCPA provisions. And *Guerrero* did not involve any claims under § 1692f(1), much less a § 1692f(1) claim based on communications to an attorney.

In fact, the Ninth Circuit's decisions on § 1692f(1), like the Seventh Circuit's, suggest that it would handle Allen's claim just like the decision below did. Two post-*Guerrero* decisions, each involving direct communications with debtors, have addressed § 1692f(1). Both treat that subsection as an unqualified prohibition that is violated by attempts to collect unlawful amounts. *See McCollough v. Johnson, Rodenburg & Lauinger, LLC*, 637 F.3d 939, 949-50 (9th Cir. 2011) (affirming summary judgment against collector for violating § 1692f(1) by filing a lawsuit seeking unauthorized fees; inquiring only into the legality of the fees and not into the complaint's effect on the debtor or its likelihood of success); *Reichert v. Nat'l Credit Sys., Inc.*, 531 F.3d 1002, 1004-05 (9th Cir. 2008)

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[5] Even before addressing whether attorney-directed communications are actionable, the court had already held the plaintiff's § 1692g(b) claim meritless. *Id*. at 931-32.

(same, addressing requests made in demand letters).[6] Thus, the Ninth Circuit has neither confronted the question presented here nor adopted an interpretation of § 1692f(1) that suggests it would make a difference whether an attempt to collect an unauthorized charge was sent to a debtor or to his attorney.

II. The Third Circuit's Interpretation of § 1692f(1) Is Correct.

A. Petitioner reads the FDCPA to exempt lawyer communications indiscriminately across the Act. That reading is incompatible with provisions that specifically address communications to "any person." *See, e.g.*, § 1692d(5) (prohibiting telephone calls "to annoy, abuse, or harass any person at the called number"); § 1692d(1) (prohibiting "use or threat of violence" against "any person").

Moreover, the Act elsewhere explicitly exempts communications to attorneys, which shows that Congress did not intend for attorney communications to be excluded across the board. "[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983). Specifically, § 1692c(b) states that a debt collector generally may not communicate, in connection with the col-

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[6] In a third case, also involving communication directly with a debtor, the plaintiff claimed to have been charged usurious interest, potentially violating § 1692f(1) and other sections, but the court found the plaintiff had not been charged usurious interest and did not discuss § 1692f(1). *Donohue v. Quick Collect, Inc.*, 592 F.3d 1027, 1030-31 (9th Cir. 2010).

lection of any debt, "with any person other than the consumer" and specified third parties, including "his attorney." Thus communications that would violate § 1692c(b) if directed at the consumer's neighbor or family member can legally be directed at his attorney. This explicit exemption would be superfluous if the Act generally, albeit silently, immunized communications to attorneys from all sections.

B. The text of § 1692f(1) itself resists FSKS's reading.[7] By prohibiting, without exception in the text, collection and attempted collection of unlawful amounts, § 1692f(1) differs from provisions that require a specified intent on the part of the collector, *e.g.*, § 1692d(5) ("Causing a telephone to ring … with intent to annoy, abuse, or harass"), or the achievement of a particular effect on the recipient, *e.g.*, § 1692d(2) (prohibiting "use of … language the natural consequence of which is to abuse the hearer or reader"). The conduct addressed in § 1692f(1) is proscribed regardless of the debt collector's intent or method, which is why courts examine only the legality of the amounts sought, not the method used to obtain them. *See McCollough*, 637 F.3d at 949-50 (9th Cir.); *Seeger*, 548 F.3d at 1110 (7th Cir.).

As the Third Circuit recognized, § 1692f(1) on its face applies "regardless of the person to whom the communication was directed." App. 9. In contrast,

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[7] This Court has made clear that the plain language of the FDCPA governs. *See Heintz v. Jenkins*, 514 U.S. 291, 297 (1995) (discounting legislator's statement in favor of "the plain language of the Act"); *id.* at 295 (rejecting plea to "nonetheless read the statute as containing an implied exemption" for lawyers). Strikingly, Petitioner has nothing to say about the text of § 1692f(1).

other prohibitions, even within § 1692f, focus on communications directly with the consumer. *E.g.*, § 1692f(7) ("Communicating *with a consumer* regarding a debt by post card"); § 1692f(8) ("Using any language or symbol, other than the debt collector's address, on any envelope *when communicating with a consumer*") (emphases added).

FSKS argues that because a lawyer is more likely than the consumer to recognize that fees being sought are unauthorized and to prevent his client from paying them, the Act does not prohibit attempts to collect unlawful fees through a debtor's lawyer. But § 1692f(1) prohibits even the "attempt" to collect unlawful fees, as the Third Circuit noted. App. 8; *accord McCollough*, 637 F.3d at 949-50 (9th Cir.); *Seeger*, 548 F.3d at 1110, 1115 (7th Cir.); *Sayyed*, 485 F.3d at 228-29 (4th Cir.); *Miller v. Wolpoff & Abramson, L.L.P.*, 321 F.3d 292, 308 (2d Cir. 2003). Holding FSKS immune because its demand was less likely to succeed when it sent the letter to an attorney than it would have been if the letter went to Allen directly would erase the phrase "or attempt to collect" from the text.

C. Ignoring these considerations, FSKS's textual argument is devoted entirely to a point as obvious as it is irrelevant: that the Act "distinguishes between a debtor and her attorney." *See* Pet. 21-26. It does not follow that communicating with a debtor's attorney is not "indirectly" communicating with the debtor, § 1692a(2). *See* App. 9; *Evory*, 505 F.3d at 773; *Sayyed*, 485 F.3d at 232. Even FSKS concedes that attorneys are "intermediaries" between collectors and debtors. Pet. 21, 24.

Nor does distinguishing between debtors and attorneys call into doubt that sending a statement to a debtor's attorney, requesting the payment of certain amounts, is an "attempt to collect" those amounts. § 1692f(1). If "litigating" is "simply one way of collecting a debt," *Heintz*, 514 U.S. at 297, then contacting opposing counsel and requesting particular amounts to end a debt-collection lawsuit is equally so. The Third Circuit has absolutely not "concluded that a consumer and her attorney are indistinguishable under the FDCPA," Pet. 17, and that conclusion is not required for its holding.

FSKS also incorrectly claims that the decision below creates an "expansion of the Act's coverage." Pet. 30. In reality, the decision has but one result: recognition that the Act prohibits debt collectors from attempting to collect unlawful amounts, whether or not the debtor has an attorney. Declining to infer an unwritten exception to § 1692f(1) respects that provision's unqualified decree that collecting or attempting to collect unauthorized fees violates the Act.

Furthermore, the decision below, taken "to its logical extreme," does not imply that communications sent to any third party are actionable. Pet. 31. The Third Circuit's view about when a communication is an "attempt to collect" under § 1692f(1) is informed and limited by § 1692a(2)'s definition of "communication," which includes "indirect" communications. Under this approach, only communications directly to the consumer or indirectly to persons, such as "a consumer's attorney," who "stand in the consumer's shoes," are actionable. *O'Rourke*, 635 F.3d at 943 (discussing scope of § 1692e).

Finally, FSKS argues that lawyers who represent debtors would easily see through the overcharges it sent to Allen's attorney. Pet. 28. Of course, one might expect a law firm like FSKS that routinely prosecutes mortgage foreclosures in New Jersey to be equally familiar with state law, raising the question why it requested numerous dramatically excessive overcharges. The FDCPA seeks not only to shield consumers from injury but also to "insure that those debt collectors who refrain from using abusive debt collection practices are not competitively disadvantaged." 15 U.S.C. § 1692(e). As the Third Circuit emphasized, exempting debt collectors from § 1692f(1) when the debtor has counsel would allow collectors to try to obtain unlawful amounts with impunity, frustrating the Act's deterrent function. App. 10. The costs of ensuring compliance with § 1692f(1) would be shifted entirely to debtors' counsel, and inevitably some collectors would succeed in extracting illegal payments. This outcome would give sloppy and unethical debt collectors an advantage over those that follow the law.

There is no reason for courts to impose this result when the text of the Act does not. And there is no reason for this Court to intervene when the lower courts have not divided on the question.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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