

**ONTARIO
SUPERIOR COURT OF JUSTICE**

THE HONOURABLE
JUSTICE BELOBABA

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TUESDAY, THE 8TH
DAY OF NOVEMBER, 2016

B E T W E E N:

DANIEL LOCKING

Plaintiff

- and -

**RONALD MCCOWAN, ALLEN W. WEINBERG, JOSEPH FELDMAN,
MARC CHARLEBOIS, LAURA PHILP (A.K.A. LAURA PHELP, A.K.A.
LAURA PHILPS, A.K.A. LAURA PHILIP, A.K.A. LAURA PHILIPS),
and HOLYROOD HOLDINGS LIMITED**

Defendants

Proceeding Under the *Class Proceedings Act, 1992*

ORDER

THIS MOTION made by the Plaintiff for an order that this action be certified pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 was heard on November 8, 2016 at the Courthouse in Toronto, Ontario.

ON READING the Motion Record and Supplementary Motion Record for certification filed by the plaintiff and on hearing the submissions of the parties and on consent of the parties:

1. **THIS COURT ORDERS** that the within action be and is hereby certified as a class proceeding.

2. **THIS COURT ORDERS** that the Class is described as:

All persons and entities, wherever they may reside or be domiciled, who held units of Partners Real Estate Investment Trust ("Partners REIT") as of the close of trading on April 1, 2014, except for Excluded Persons.

Excluded Persons are the defendants and any entities owned or controlled by the defendants; past or present subsidiaries or affiliates of Partners REIT and Holyrood; and past or present officers, directors, senior employees, partners, legal representatives, heirs, predecessors, successors and assigns of the defendants and their immediate family members.

3. **THIS COURT ORDERS** that Daniel Locking be and is hereby appointed as the representative plaintiff.
4. **THIS COURT ORDERS** that the disputed common issues for the Class, to be adjudicated, are:

Breach of Trust

- a) Did the defendants Allen W. Weinberg ("Weinberg"), Joseph Feldman ("Feldman"), and Marc Charlebois ("Charlebois") (collectively, the "Trustees"), or some of them, have obligations to the Class Members, pursuant to section 10.5 and/or section 10.11 of the REIT's Declaration of the Trust? If so, what were those obligations and when were they owed?
- b) If the answer to (a) is yes in respect of Weinberg, did Weinberg fraudulently and dishonestly breach the terms of the trust? If so, how?
- c) If the answer to b) is no, did Weinberg commit a reckless breach of trust and, if so, how?
- d) If the answer to (a) is yes in respect of Feldman and/or Charlebois, did Feldman and Charlebois, or either of them, negligently breach any obligation they owed the Class Members pursuant to section 10.5 and/or s. 10.11 of the Declaration of Trust? If so, who negligently breached section 10.5 and/or s. 10.11 of the Declaration of Trust, when and how?

- e) If the answer to (d) is yes in respect of Feldman and/or Charlebois, do Feldman and/or Charlebois have a defence to liability under section 10.8 of the Declaration of Trust or otherwise?
- f) Can McCowan, as CEO of the REIT, be found liable for a breach of section 10.11 of the Declaration of Trust?
- g) If the answer to (f) is yes, did McCowan commit a breach of section of section 10.11 of the Declaration of Trust?
- h) If the answer to (f) is yes, is McCowan directly liable to the Class Members for the breach of section 10.11 of the Declaration of Trust?

Inducement of a Breach of the Declaration of Trust

- i) Did McCowan induce a breach of section 10.5 and 10.11 of the Declaration of Trust by the Trustees or some of them in respect of any obligations they owed to the Class Members? If so, how?

Knowing Assistance in Breach of Trust

- j) If the answer to (b) is yes, did any of the defendants McCowan, Laura Philp (“Philp”), or Holyrood Holdings Limited (“Holyrood”) knowingly assist Weinberg’s breach of trust? If so, who knowingly assisted such a breach and how?

Conspiracy

- k) Have the defendants Weinberg, McCowan, Philp, and Holyrood, or some of them, engaged in conduct that amounts to civil conspiracy?

Damages

- l) Did the Class Members suffer damages as a result of any breach of trust, knowing assistance, inducement, or conspiracy as alleged? If so, what, if any, are the damages that flow from each cause of action?
- m) Is an award of equitable compensation to the plaintiff and Class Members an appropriate remedy in respect of any breach of trust?
- n) Can the Court make an aggregate assessment of damages in favour of the Class Members as part of the common issues trial? If so, what is that assessment and which of the defendants are liable to pay damages to the Class Members?

- o) Should any of McCowan, Philp and Weinberg be ordered to pay punitive damages? If so, which defendant, and in what amount?

Vicarious Liability

- p) Is Holyrood vicariously liable or otherwise responsible for the acts of its officers, directors, agents, and employees, including Philp?

5. **THIS COURT ORDERS** that the Second Amended Litigation Plan is hereby approved in the form attached hereto as **Schedule A**.
6. **THIS COURT ORDERS** that notice of certification of this action as a class proceeding, substantially in in the form attached hereto as **Schedule B** (the “Notice”), is hereby approved.
7. **THIS COURT ORDERS** that the Notice shall be disseminated in accordance with the notice program described in paragraph 7 of the Second Amended Litigation Plan attached hereto as **Schedule A**.
8. **THIS COURT ORDERS** that a Class Member may opt out of the class proceeding only in accordance with the directions set out in the Notice, by no later than February 10, 2017 (the “Opt Out Deadline”). No person may opt out of this proceeding after the Opt Out Deadline and a person who opts out in accordance with the directions set out in the Notice by the Opt Out Deadline shall not be a Class Member on or after the date such person opts out of the proceeding.
9. **THIS COURT ORDERS** that Class Members may not opt out after the expiry of the Opt Out Deadline set out in paragraph 8 above.

10. **THIS COURT ORDERS** that ICPC shall serve on the parties and file with the court, within sixty (60) days of this Order, an affidavit confirming the Notice was delivered to the Class Members in accordance with paragraph 7 above.
11. **THIS COURT ORDERS** that by no later than 30 calendar days after the Opt Out Deadline, ICPC shall report to the Court the names and REIT unit holdings of all persons who have opted out of the proceeding.
12. **THIS COURT ORDERS** that, if the parties cannot resolve the matter of costs, they may make submissions in writing beginning with the plaintiff's submissions on or before the date of this Order to be followed by the defendant's submissions on or before November 14, 2016, and any reply submissions by the plaintiff on or before November 18, 2016.



THE HONOURABLE JUSTICE BELOBABA

SCHEDULE A

SECOND AMENDED LITIGATION PLAN

(AS OF MARCH 13, 2015; AMENDED AS OF AUGUST 10, 2016; FURTHER
AMENDED AS OF NOVEMBER 4, 2016)

Class Counsel

1. The plaintiff has retained *Investigation Counsel P.C. ("ICPC")* and *Siskinds LLP* ("*Siskinds*") (together, "Class Counsel") to prosecute this proposed class action. *ICPC* and *Siskinds* have ~~has~~ the requisite knowledge, skill, experience, and resources to prosecute the action to resolution.

The Composition of the Class

2. The plaintiff seeks to represent a class consisting of:

All persons and entities, wherever they may reside or be domiciled, who held units of Partners REIT as of the close of trading on April 1, 2014, except for Excluded Persons.

Excluded Persons are the defendants and any entities owned or controlled by the defendants; past or present subsidiaries or affiliates of Partners REIT and Holyrood; and past or present officers, directors, senior employees, partners, legal representatives, heirs, predecessors, successors and assigns of the defendants and their immediate family members.

Reporting and Communication

3. *ICPC* has posted information about the nature and status of this action on its website, www.investigationcounsel.com. That information will be updated regularly. Copies of important, publicly available court documents, court decisions, notices, documentation, and other information relating to the action are or will be accessible from the website. The website also

contains a communication webpage, a feature that permits putative class members to submit inquiries to *ICPC*, who will promptly respond.

Document Management

4. *ICPC* Class Counsel will use data management systems to organize, code and manage the documents produced by the defendants and all relevant documents in the plaintiff's possession. *ICPC* Class Counsel will seek the agreement of defendants' counsel to facilitate the electronic exchange of documents.

Insurance Information

4A. Within five (5) days of the date of the certification order, the plaintiff will ask the defendants to disclose to the plaintiff the amount(s) of coverage remaining under all applicable insurance policies and the defendants will make that request of the insurers.

Litigation Schedule

5. After disposition of the certification motion, absent agreement among counsel, the plaintiff will ask that that the defendants be required to deliver their statements of defence by November 30, 2016 and that the parties exchange affidavits of documents by January 31, 2017. Following documentary production, and absent agreement among counsel, the plaintiff parties will ask the court to set a litigation schedule for the remaining steps in the action. The plaintiff parties may ask from time to time that the litigation schedule be amended.

Notice of Certification of the Action as a Class Proceeding and the Opt-Out Procedure

6. If the action is certified as a class proceeding, the plaintiff proposes that a notice advising of the certification be circulated to advise class members, among other things, that:

- (a) the court certified the action as a class proceeding;
- (b) a person may only opt out of the class proceeding by sending a written election to opt out to the recipient designated by the court before a date fixed by the court;
- (c) a person may not opt out of the class proceeding after the date fixed by the court; and
- (d) if the common issues are resolved in favour of the class members, claimants may be required to file a claim and submit documentation to a designated person in order to be entitled to any compensation.

7. The plaintiff proposes that the notice advising of certification, in a form approved by the court, be distributed in the following manner:

- (a) posted by *ICPC* on its website in English and French;
- (b) provided by *ICPC* to any person who requests it;
- ~~(c) sent directly to the addresses of class members based on a list of names and addresses for Partners REIT unit holders to be provided by the defendant trustees of Partners REIT;~~
- ~~(d) posted by the defendant trustees in a prominent location on the main page of Partners REIT's website;~~
- ~~(e) disseminated as a Canada-wide press release through Canada NewsWire;~~
- ~~(f) published once in the national edition of the *Globe and Mail*, Report on Business section;~~
- ~~(g) published once in the national edition of the *National Post*, Financial Post section;~~
- ~~(h) published once in French in *La Presse*;~~
- ~~(i) published once in French in *Le Soleil*;~~

(h) sent electronically, in English and in French, by ICPC to the brokerage firms in Canada identified in Appendix 1 hereto asking them to email the Notice to the attention of their clients who owned units of Partners REIT as of the close of trading on April 1, 2014 where the brokerage firms have a valid email address for the Class Members. Where the brokerage firms do not have a valid email address for the Class Members, ICPC will provide hard copies of the Notice to the brokerage firms for mailing to such Class Members or, alternatively, obtain the names and addresses of such Class Members from the brokerage firms and mail copies of the Notice directly to such Class Members. The brokerage firms may cumulatively request up to \$5,000 in total for the expenses relating to the distribution of the notice to the Class Members. If the amounts submitted in aggregate exceed \$5,000, each brokerage firm's claim shall be reduced on a pro rata basis.

The Plaintiff's Experts

8. To date, the plaintiff has retained Cynthia Jones, an economist with Financial Markets Analysis, LLC, a valuation and economic consulting firm based in Princeton, New Jersey. She has been retained to provide an expert report on the efficiency of the market for trading in the units of Partners REIT and an estimate of aggregate damages.

9. ICPC has the expertise and resources to identify and retain appropriate expert assistance as the matter proceeds.

Refinement of Common Issues

10. Following the filing of statements of defence and the completion of discovery, the parties may seek an amendment of the order certifying this proceeding to deal with any necessary refinement to the common issues arising from those processes.

Dispute Resolution

11. The plaintiff is willing to participate in mediation or non-binding alternative dispute resolution efforts if the defendants are prepared to do so.

Expedited Hearing on Liability

12. The plaintiff parties reserves his right following documentary production and examinations for discovery to seek an expedited hearing on liability, including by way of a summary trial or motion for summary judgment.

Trial of the Common Issues

13. The plaintiff will seek the early appointment of the common issues trial judge to address issues of trial management in advance of the trial to ensure the orderly and efficient determination of the common issues.

14. The plaintiff will ask the court to hold the trial of the common issues within twelve (12) months of the completion of the examinations for discovery and the production of the information required by the undertakings and any motions.

15. To the extent possible, the plaintiff will ask the trial judge to apply sections 23 and 24 of the *Class Proceedings Act, 1992*, S.O. 1992, c.6 (the “CPA”) to the assessment of damages.

16. The plaintiff will also seek an order under section 26 of the *CPA* that the defendants pay into court, or some other appropriate depository, the total amount of the defendants' liability to the class.

Notice of the Resolution of the Common Issues

17. If the common issues, or some of them, are resolved in favour of the plaintiff, the court will be asked to:

- (a) settle the form and content of the notice of resolution of the common issues;
- (b) order that the notice of the resolution of the common issues be distributed to those class members who did not validly opt out;
- (c) determine the most efficient method of distribution of the damages under sections 23, 24, and 26 of the *CPA*; and
- (d) if necessary, set a date by which each class member may be required to file a claim.

18. The plaintiff will ask the court to order that the notice of resolution of the common issues be distributed substantially in accordance with the procedure set out in paragraph 7 above. This notice, to the extent possible, should be sent directly to each class member.

Claims Process If Aggregate Award of Damages

19. If the court at the common issues trial determines that damages can be determined on an aggregate basis and awards judgment accordingly, then the plaintiff will ask the court to appoint a claims administrator, with such rights, powers and duties as the court directs, to receive and evaluate claims in writing and to distribute the monetary award in the most efficient and cost-

effective manner in accordance with the protocols approved by the court pursuant to sections 24 and 26 of the *CPA*.

20. In order to simplify the claims process, the administrator will, wherever practical, utilize:

- (a) a paperless, electronic state-of-the-art web-based technology system which will include a secure database that is incorporated into the websites;
- (b) standardized claims forms and filing procedures; and
- (c) summary methods of introducing documentary evidence.

21. The types of records which shall constitute sufficient proof of a claim shall be specified in a protocol to be approved by the court and may include trading account statements, trade confirmation slips or other evidence confirming acquisition and disposition of units of Partners REIT.

22. The court will be asked to set a deadline by which class members must file their claims with the administrator.

23. Any person who does not file a claim with the administrator before the claims deadline will not be eligible to participate in the damages assessment procedure and will not be entitled to recover any damages without leave of the court.

24. If any claimant disagrees with the administrator's decision relating to eligibility or calculation of damages, the claimant may elect to have the administrator reconsider its decision within a time period fixed by the court.

25. The administrator's decisions will be final. There shall be no right of appeal from the administrator's decisions.

Process If Individual Issues Require Determination

26. If the court at the common issues trial determines that damages cannot be determined on an aggregate basis, then the plaintiff will ask the court to appoint a referee, with such rights, powers, and duties as the court directs, to receive and evaluate claims (including submissions and evidence) with respect to any outstanding individual issues and the assessment of damages, pursuant to section 25 of the *CPA*.

27. In order to simplify these determinations, the referee will, wherever practical, utilize:

- (a) a paperless, electronic state-of-the-art web-based technology system which will include a secure database that is incorporated into the websites;
- (b) standardized forms and filing procedures for evidence and submissions;
and
- (c) summary methods of introducing documentary evidence.

28. The types of evidence required for such determinations shall be specified in a protocol to be approved by the court and depend on the individual issues required for determination.

29. The court will be asked to set a deadline by which class members must file their submissions and evidence with the referee.

30. Any person who does not file a claim with the referee before the claims deadline will not be entitled to recover any damages without leave of the court.

31. If any claimant disagrees with the referee's decision relating to the determination of issues of liability and the claim is for an amount exceeding \$100,000, the claimant may appeal to the Ontario Superior Court of Justice in respect of such liability only within a time period fixed by the court.

32. Except as provided in paragraph 31, the referee's decision will be final and there shall be no right of appeal.

A. Small Claims (Under \$25,000)

33. The referee's determination of claims of less than \$25,000 requiring individual determination shall proceed in writing. The claimant will be required to file affidavit evidence setting out their evidence and any defendant may cross-examine an affiant on their affidavit by written interrogatories (in accordance with rule 35 of the *Rules of Civil Procedure*).

B. Summary Claims (\$25,000-\$100,000)

34. The determination of claims between \$25,000 and \$100,000 requiring individual determination shall proceed by analogy with the simplified procedure set out in rule 76 of the *Rules of Civil Procedure*.

35. The claimant will be required to file (a) an affidavit of documents prepared in accordance with rule 76.03; and (b) affidavit evidence relating to the individual issues remaining to be proven.

36. The referee may make decisions on the claims on the basis of the record, or may, in his or her discretion, conduct a summary trial of such claims in accordance with rule 76.12 of the *Rules of Civil Procedure*.

C. *Full Claims (Over \$100,000)*

37. The determination of claims over \$100,000 requiring individual determination shall require class members to:

- (a) serve on the defendants an affidavit of documents prepared in accordance with rule 30.03 of the *Rules of Civil Procedure*; and
- (b) attend for an oral examination for discovery (in accordance with rule 34), or provide answers to written interrogatories (in accordance with rule 35), as any defendant wishing to examine them may elect.

38. The referee may, in his or her discretion, make a decision on the individual issues based on the documentary and discovery evidence, or conduct a trial of such claims.

Orders Relating to ICPC Class Counsel's Fees and the Costs of Administration

39. After the trial of the common issues, the plaintiff will ask the court to approve an agreement respecting fees and disbursements of ICPC Class Counsel. To the extent that the approved fees, disbursements and GHST are not completely paid by the costs recovered from the

defendants, the unpaid balance shall be a first charge on the total recovery and paid before any distribution to the class members.

40. The plaintiff will ask the court to order that the defendants pay all administration costs, including the costs of all notices associated with the process and the fees and disbursements of the administrator and referee as these costs are incurred. Absent that court order, the plaintiff will seek an order that these costs be paid out of the total recovery after payment of ICPC-Class Counsel's fees and disbursements but before any distribution to the class members.

Further Orders Concerning This Plan

41. This litigation plan may be amended from time-to-time by directions given at case conferences or by further order of the court.

Effect of This Plan

42. This litigation plan shall be binding on all class members who do not opt out in accordance with the procedure directed by the court whether or not they make a claim under the litigation plan.

Appendix 1

- Assante (Assante Wealth Management (Canada) Ltd., Assante Financial Management Ltd. and Assante Capital Management Ltd.)
- BMO Nesbitt Burns Inc.
- Canaccord Genuity Corp
- CIBC World Markets Inc.
- Desjardins Securities Inc.
- Dundee Securities Ltd.
- Edward Jones (Limited Partnership)
- HollisWealth (Scotia Capital Inc.)
- HSBC Securities (Canada) Inc.
- Investors Group Securities Inc.
- National Bank Financial Inc.
- Raymond James Ltd.
- RBC Dominion Securities Inc.
- Scotia iTrade (Scotia Capital Inc.)
- Scotia McLeod (Scotia Capital Inc.)
- TD Waterhouse Canada Inc.

Schedule B

PARTNERS REIT CLASS ACTION

NOTICE OF CERTIFICATION

THIS NOTICE IS IMPORTANT TO YOU.

IT IS PUBLISHED BY ORDER OF THE ONTARIO SUPERIOR COURT OF JUSTICE.

This notice is directed to all persons and entities, wherever they may reside or be domiciled, who held units of Partners Real Estate Investment Trust ("Partners REIT" or the "REIT") as of the close of trading on April 1, 2014, other than Excluded Persons (the "Class" or "Class Members"). Excluded Persons are the defendants, described below, and any entities owned or controlled by the defendants; past or present subsidiaries or affiliates of Partners REIT and Holyrood Holdings Limited ("Holyrood"); and past or present officers, directors, senior employees, partners, legal representatives, heirs, predecessors, successors and assigns of the defendants and their immediate family members.

THE CERTIFICATION ORDERS

On November 8, 2016, the Ontario Superior Court of Justice (the "Court") certified the action *Locking v. McCowan et al.*, Court File No. CV-14-517117-00CP (the "Class Action") as a class proceeding and appointed Daniel Locking as representative plaintiff (the "Representative Plaintiff").

The defendants in the Class Action are Ronald McCowan ("McCowan"), Allen W. Weinberg ("Weinberg"), Joseph Feldman, Marc Charlebois, Laura Philp ("Philp") and Holyrood (collectively, the "Defendants").

The Class Action relates to the circumstances surrounding Partner REIT's decision to enter a transaction, announced on April 2, 2014 (the "Transaction"), for the purchase of certain Ontario properties from Holyrood.

On behalf of Class Members, the plaintiff alleges that the Transaction was contrary to applicable laws, including the REIT's Declaration of Trust and applicable rules of the Toronto Stock Exchange, because the vendor Holyrood was not dealing at arm's length with McCowan, then CEO of the REIT. It is further alleged that McCowan, Philp, Weinberg, and Holyrood conspired to enable McCowan to gain control of Partners REIT without seeking the required approval from unitholders. The action seeks to recover damages allegedly sustained to the Class Members' units of the RET as a result of the Transaction.

The certification order means that the Class Action may proceed to trial as a class action. Certification is a preliminary procedural matter. The merits of the claims in the Class Action, and the allegations of fact on which the claims are based, have not been finally determined by the Court. The Defendants deny that the claims in the action have merit.

DO NOTHING IF YOU WANT TO PARTICIPATE IN THE CLASS ACTION

Class Members who want to participate in the Class Action are automatically included and need not do anything at this time.

YOU MUST OPT OUT IF YOU DO NOT WANT TO PARTICIPATE IN THE CLASS ACTION

Class Members who do not want to participate in the Class Action must opt out. If you want to opt out of the Class Action, you must complete a signed letter stating that you elect to opt out of

the Partners REIT Class Action and the letter must provide all of the following information:

- (i) The number of units of Partners REIT you held as of the close of trading on April 1, 2014; AND
- (ii) Your name, address, telephone number, and signature. If you are submitting an opt-out request on behalf of a corporation or other entity, you must state your position and authority to bind the corporation or entity.

Your opt-out request must be sent by email, fax or mail to:

Investigation Counsel P.C.
Re: Partners REIT Class Action
350 Bay Street, Suite 300
Toronto ON M5H 2S6
Email:
partnersreitclassaction@investigationcounsel.com
Fax: 416-637-3445

In order for your opt out request to be valid, it must be postmarked or received no later than February 10, 2017 and it must contain all of the required information.

Each Class Member who does not opt out of the Class Action will be bound by the terms of any judgment or settlement, whether favourable or not, and will not be allowed to prosecute an independent action against any of the Defendants for any of the factual matters raised in the Class Action. If the Class Action is successful, you may be entitled to share in the amount of any award or settlement recovered. A Class Member who opts out will not be entitled to participate in the Class Action and will not be entitled to share in the amount of any award or settlement.

A minor or a mentally incapable Class Member cannot be opted out of the Class without permission of the Court. The Children's Lawyer

and/or the Public Guardian and Trustee, as applicable, must receive notice of such an opt-out request.

NO DIRECT COST TO YOU

The Representative Plaintiff has entered into a contingency fee retainer agreement with law firm Investigation Counsel P.C. which provides that counsel will be paid if the Class Action is successful or costs are recovered from the Defendants. If the action is successful, either through judgment on the common issues or by way of an approved settlement, the legal fees will be set by the Court, and the Court may order that these fees be paid out of the settlement proceeds or by the Defendants.

If the class action is not successful, you will NOT be responsible for any legal costs of the Class Action and will NOT have any other financial obligations because of the Class Action.

NOTICE TO BROKERS

Please deliver this notice by email no later than December 12, 2016 to your clients who held units of Partners REIT as of the close of trading on April 1, 2014, for whom you have valid email addresses. If you have affected clients for whom you do not have valid email addresses, please contact Investigation Counsel P.C. to obtain hard copies of this notice for the purpose of mailing the notice to those clients or provide Investigation Counsel P.C. with the mailing addresses of those clients and Investigation Counsel P.C. will mail the notices directly to those clients.

Brokerage firms may collectively request up to \$5,000 in total for the expenses relating to the distribution of this notice to Class Members. If the amounts submitted in aggregate exceed \$5,000, each brokerage firm's claim shall be reduced on a pro rata basis. Brokerage firms must submit an invoice to Investigation Counsel P.C. by January 13, 2017 to be eligible for reimbursement.

DANIEL LOCKING

v.

RONALD MCCOWAN et. al.

Plaintiff

Defendants

November 8, 2016

On consent, this action is certified as a class proceeding - as per this Order signed today. I am satisfied that all of the requirements in s 5(1) of the CPA have been satisfied.



**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceedings Under the *Class Proceedings Act, 1992*

Proceeding Commenced at Toronto

ORDER

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