

BEFORE THE FEDERAL ELECTION COMMISSION

In the Matter of

Swift Boat Vets and POWs for Truth

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)  
) MURs 5511 & 5525

REPLY BRIEF OF RESPONDENT  
SWIFT BOAT VETS AND POWS FOR TRUTH

I. Introduction.

Swift Boat Vets and POWs for Truth ("SBVT" or "Respondent") hereby responds to the Office of General Counsel's Factual and Legal Analysis ("OGC Brief") in the above referenced matters. For the reasons set forth below, there is no basis in law or fact for proceeding with an investigation. The Federal Election Commission ("Commission") should find no reason to believe Respondent violated the Federal Election Campaign Act ("FECA") and dismiss these matters.

As demonstrated by the evidence and written answers, SBVT did not sponsor any communications containing express advocacy and did not coordinate any of its activities or communications with Bush-Cheney '04, Inc. ("BC 04") or the Republican Party. Therefore, the organization did not trigger political committee status or make excessive or prohibited in-kind contributions to BC 04 or the Republican Party. As such, there are no grounds to proceed.

II. Legal Analysis.

The Commission must review the evidence in this matter under the regulations and precedents in effect at the time of the transactions – namely, the express advocacy standard established under Buckley and reaffirmed under McConnell. The Commission cannot judge these allegations under regulations that did not become effective until January 2005, or under some other unsupported, novel legal theory. The Commission cannot, as a matter of law

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and practice, hold groups such as SBVT to a standard for which they did not have clear notice at the time of the transactions; to do so clearly violates the First Amendment. See Buckley v. Valeo, 424 U.S. 1, 41 n.48 (1976) (“In such circumstances, vague laws may not only ‘trap the innocent by not providing fair warning’ or foster ‘arbitrary and discriminatory application’ but also operate to inhibit protected expression by inducing ‘citizens to . . . steer far wider of the unlawful zone’ . . . than if the boundaries of the forbidden areas were clearly marked.”) (citations omitted). Under the rules in existence during calendar year 2004 – and even those that became effective in January 2005 – there is no legal or factual basis for proceeding with an investigation of this matter.

A. The Commission rejected in 2004 the same legal theories now relied upon by the OGC Brief.

The Bipartisan Campaign Reform Act of 2002 (“BCRA”) did not change the definitions of “contribution”, “expenditure” or “political committee”. Therefore, an unregistered organization triggers “political committee” status only if it makes more than \$1,000 in “expenditures” or receives more than \$1,000 in “contributions” as defined in FECA. Under Buckley v. Valeo, as affirmed by McConnell v. FEC, only disbursements for communications that expressly advocate the election or defeat of a clearly identified federal candidate are considered “expenditures” under FECA. McConnell v. FEC, 124 S.Ct. 619, 686-89 (2003) (“Interest groups, however, remain free to raise soft money to fund voter registration, GOTV activities, mailings, and broadcast advertising (other than electioneering communications).”); Buckley, 424 U.S. at 79-80 (holding that the definition of “expenditure” reaches “only funds used for communications that expressly advocate the election or defeat of a clearly identified candidate.”).

1. During 2004, the Commission explicitly rejected proposals to expand the definitions of “expenditure” and “political committee” as applied to unincorporated, unregistered 527s.

The Commission itself has repeatedly stated that unincorporated 527s such as SBVT are permitted to sponsor electioneering communications – subject to the disclosure requirements and source prohibitions – without triggering political committee status.

Electioneering Communications Brochure, Fed. Elec. Comm’n (June 2004)

(“Unincorporated, unregistered ‘527’ organizations may also make electioneering communications, subject to the disclosure requirements and the prohibition against corporate and labor funds.”) (emphasis added); see also Bradley A. Smith, Chairman, Federal Election Commission, Address before the Republican National Lawyers Association (March 19, 2004) (“Indeed, the rise of the 527s is exactly what Senator McConnell and other Republicans, during legislative debates over McCain-Feingold, had said would happen – soft money would simply change its address. . . . The law clearly does not require everyone involved in partisan political activity to register as a ‘political committee’ under the Act. . . .”).

Moreover, the legal theories contained in the OGC Brief were considered and rejected by the Commission. Specifically, the Commission rejected proposed rules that would have regulated communications by 527s that did not include express advocacy but did promote, attack, support or oppose (“PASO”) any federal candidate or political party:

The NPRM proposed to include in the definition of “expenditure” payments for communications that PASO any candidate for Federal office or that promote or oppose any political party . . . . In its consideration of Final Rules, the Commission considered and rejected two different versions of this rule.

Political Committee Status, Definition of Contribution, and Allocation for Separate Segregated Funds and Nonconnected Committees, 69 Fed. Reg. 68056, 68065 (2004); see OGC Brief 6-7.

Proposals to expand the definition of “political committee” by including a test to determine whether an organization’s “major purpose”<sup>1</sup> is to influence the nomination or election of a federal candidate were also rejected:

The comments raise valid concerns that lead the Commission to conclude that incorporating a “major purpose” test into the definition of “political committee” may be inadvisable. Thus the Commission has decided not to adopt any of the foregoing proposals to revise the definition of “political committee.” As a number of commenters noted, the proposed rules might have affected hundreds or thousands of groups engaged in non-profit activity in ways that were both far-reaching and difficult to predict, and would have entailed a degree of regulation that Congress did not elect to undertake itself when it increased the reporting obligations of 527 groups in 2000 and 2002 and when it substantially transformed campaign finance laws through BCRA. Furthermore, no change through regulation of the definition of “political committee” is mandated by BCRA or the Supreme Court’s decision in McConnell.

Id. Accordingly, the Commission repeatedly rejected proposals to expand the definition of “expenditure” beyond the express advocacy test established in Buckley and reaffirmed in McConnell. The expansive definitions of express advocacy and the application of a “major purpose” test in the OGC Brief directly contradict the Commission’s rulemaking proceedings on these subjects.<sup>2</sup> OGC Brief at 5-7.

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<sup>1</sup> One of the specific major purpose tests rejected by the Commission would have been satisfied by any organization registered with the IRS as a section 527 political organization, unless covered by one of several exceptions. See 69 Fed. Reg. 68065. Despite the Commission’s prior rejection of this legal theory, the OGC Brief cites SBVT’s status as a 527 as evidence of a major purpose to influence elections. OGC Brief at 6. Therefore, absent a finding that a communication contains express advocacy – and no SBVT communication contained express advocacy – any discussion of the “major purpose” of the organization is irrelevant.

<sup>2</sup> The Commission’s actions and statements are consistent with the intent of BCRA’s Congressional sponsors and supporters to preserve the ability of outside groups to engage in issue advocacy communications subject to the electioneering communications regulations. For example:

Senator McCain: “With respect to ads run by non-candidates and outside groups, however, the [Supreme] Court indicated that to avoid vagueness, federal election law contribution limits and disclosure requirements should apply only if the ads contain ‘express advocacy’.” 148 Cong. Rec. S2141 (March 20, 2002).

Senator Kohl: “This legislation does not ban issue advocacy or limit the right of groups to air their views. Rather, the disclosure provisions in the bill require these groups to step up and identify themselves when they run issue ads which are clearly targeted for or against candidates.” 147 Cong. Rec. S3236 (April 2, 2002).

2. The OGC Brief erroneously relies on a rule that did not go into effect until January 2005, long after the SBVT solicitations at issue were distributed.

The new rules revising the definition of “contribution” to include funds raised in response to a solicitation indicating that any portion of the funds will be used to support or oppose the election of a clearly identified federal candidate did not take effect until January 1, 2005. 69 Fed. Reg. 68056. In fact, the E&J explicitly states that any mailing similar to the one described in FEC v. Survival Education Fund, 65 F.3d 285 (2d Cir. 1995) – the case cited in the OGC Brief – was not subject to regulation until after the effective date of the new regulations. OGC Brief at 5.

The mailing described in FEC v. Survival Education Fund, if used following the effective date of these rules and modified to identify clearly a current Federal candidate, would trigger new section 100.57(a) and would require the group issuing the mailing to treat all the funds received in response to the mailing as “contributions” under FECA.

Id. at 68057 (emphasis added). Accordingly, as a matter of law, any funds raised in response to a solicitation similar to the ones described in the E&J during 2004 must not be treated as “contributions” for purposes of the determining whether an unregistered 527 has triggered political committee status.

3. None of SBVT’s communications contained express advocacy or otherwise directed their recipients to take any electoral action with respect to any federal candidate, including Senator Kerry.

Significantly, the OGC brief does not cite any SBVT advertisement or communication that contains express advocacy – because none exists. SBVT sponsored

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Senator Feingold: “Advocacy groups, on the other hand, are permitted to purchase what the bill calls ‘electioneering communications,’ as long as they disclose their expenditures and the major donors to the effort and take steps to prevent the use of corporate and union treasury money for the ads.” 145 Cong. Rec. S423 (January 19, 1999).

Accordingly, it is clear that BCRA’s sponsors did not intend to change the definitions of “contribution”, “expenditure” or “political committee” under FECA. There is no legal basis for expanding the definition of “expenditure” to include communications that do not contain express advocacy.

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advertisements designed to educate the general public about the effect Senator Kerry's anti-war activities and defamatory statements had on the men who served during the Vietnam War and on their families. The advertisements were also designed to defend the reputations of SBVT members and fellow Vietnam Veterans against Senator Kerry's slanderous statements in which he falsely accused them of being rapists, murders, and drug addicts. Testimony of John Kerry before the United States Senate, Committee on Foreign Relations (April 22, 1971). The advertisements contained first-hand accounts of events that occurred during the Vietnam War and descriptions of the effects Senator Kerry's anti-war actions and false war crimes accusations had on the men he served with and on their families.

Accordingly, SBVT was an organization formed because of, and focused on, responding to Senator Kerry's false accusations.<sup>3</sup> The First Amendment has its most urgent application to a group of War Veterans coming together to air advertisements for the purpose of responding to false accusations made against them by a government official (who happens to be a candidate for federal office). Since none of the SBVT's advertisements

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<sup>3</sup> The OGC Brief's prominent reliance on public statements taken out of context for its conclusion that SBVT's "activities and public statements have been exclusively geared toward criticizing John Kerry" is based on the misleading use of selective quotations and is legally irrelevant. OGC Brief at 2 (emphasis added). For example, Rear Admiral Roy Hoffmann "suddenly felt his honor challenged after finding himself as the bad guy in a presidential hopeful's biography." Hanna Rosin, "Unfriendly Fire," *Washington Post*, Oct. 3, 2004 at D1. Mr. Hoffmann's rationale for getting involved is best illustrated by his public statement evidencing his desire to defend his honor and the honor of those who served: "I couldn't bear that someone was betraying us and being a dastardly liar. If I can be any more plain than that, I don't know." *Id.* The excerpt of Alvin Horne's interview is also taken out of context, see OGC Brief at 2, because, in fact, he started his response to the question by explaining, "[I]t's an ad to tell the truth about Swift Boat Veterans For Truth's position about Senator Kerry's service and his words and actions following his leaving Vietnam" and correcting distortions of the truth out of "concern for those men who were under fire." <http://transcripts.cnn.com/transcripts/0408/06/pzn.00.html>. Thus, OGC's Brief ignores SBVT's public statements demonstrating that rather than having been "exclusively geared toward criticizing John Kerry", SBVT sought to educate the public concerning false statements and defend the dedication and honor of fellow soldiers and sailors who served in Vietnam. Even if these statements had the exclusive purpose of criticizing John Kerry - and they did not - the Commission recently considered and rejected several elaborate proposals to incorporate certain types of public statements into a specific major purpose test. Political Committee Status, 69 Fed. Reg. 11736, 11745 (2004). Thus, with no SBVT express advocacy communications to point to, reference to these public statements is immaterial.

contain express advocacy, none are "expenditures" or "contributions" under FECA and for the purpose of triggering political committee status.

B. SBVT did not coordinate its activities or communications with BC 04 or the Republican Party.

No information cited in the OGC Brief supports proceeding with an investigation of these matters with respect to the coordination allegations. Neither the alleged rally in Florida, nor Mr. Ken Cordier's limited appearance in three of SBVT's advertisements, justifies an investigation.

Under Commission regulations, a communication is not coordinated with a federal candidate or political party unless it satisfies a three part test: (1) payment by a third party, (2) satisfaction of one of four content standards, and (3) satisfaction of one of six conduct standards. 11 C.F.R. § 109.21(a). As discussed below, SBVT did not coordinate its activities or communications with BC 04 or the Republican Party and the Commission should vote to dismiss this matter.

1. The Florida rally fails the first and third prongs of the coordination test since SBVT did not pay for the rally or the flier publicizing the rally, and did not authorize, participate or have private advanced knowledge of it.

As stated in the written answers, SBVT did not pay for, organize, authorize, participate in, or have any involvement or advanced knowledge whatsoever of the August 21, 2004 rally in Alachua County, Florida. Ex. A. Nor did it obtain a permit for the event or ask or authorize anyone to obtain such a permit on its behalf.

Joe Ponder, a Vietnam Veteran who appeared in several SBVT advertisements, initially agreed to appear and speak at the rally. Mr. Ponder had been assured that the rally was a "pro-USA rally" for veterans and that it had no ties to BC 04 or the Republican Party, and was not a SBVT event. Ponder Aff. Ex. B ¶ 2. Mr. Ponder's appearance was never contemplated as being on behalf of SBVT and the appearance was never discussed with or

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authorized by SBVT's officers or Steering Committee. Id. ¶ 4. In addition, Mr. Ponder was never at any time an employee, representative or agent of SBVT. Id. When Mr. Ponder learned of the existence of an unauthorized flier suggesting that SBVT representatives were scheduled to appear at the event and that BC 04 and the Republican Party were involved in the event, he cancelled all plans to attend and alerted SBVT's Steering Committee that the organization's name was being used in an unauthorized manner. Id. ¶ 6.

Accordingly, there is no factual or legal basis for proceeding with an investigation of the Florida rally since it fails the first prong of the coordination analysis -- SBVT did not pay for the event or the flier. 11 C.F.R. § 109.21(a). It also fails the third prong -- the conduct standard -- because SBVT was not materially involved in the rally or the creation, production or distribution of the flier, and did not authorize that its name be used or know in advance that its name was being used. Id. §§ 109.21(a) & (d).

2. SBVT did not coordinate its communications with BC 04 through Ken Cordier.

Since Mr. Cordier did not possess or convey information concerning BC 04's plans, projects, activities, or needs, and was not materially involved in decisions regarding the content or other aspects of SBVT advertisements, the SBVT advertisements fail the third prong of the coordination analysis. See 11 C.F.R. § 109(d). Accordingly, the Commission must vote to take no further action and close the file in these matters.

As demonstrated by the attached affidavit, Mr. Cordier was never an official employee, independent contractor, or agent of BC 04 or the Republican Party. Rather, he simply served briefly as an unpaid, volunteer on the BC 04 Veterans National Steering Committee, an honorary title. Cordier Aff. Ex. C ¶ 2. This means that Mr. Cordier never possessed actual authority, either express or implied, on behalf of BC 04 to request or suggest a communication, make or authorize a communication, be materially involved in the



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decisions regarding a communication, to provide material information to assist another person in creating or distributing a communication, or to make or direct a communication based upon material information derived from BC 04. See 11 C.F.R. § 109.3(b).

Accordingly, Mr. Cordier did not qualify as an agent at any time for the purposes of the coordination analysis under Commission regulations.

Further, Ken Cordier did not know so could not convey any information regarding BC 04's plans, projects, activities or needs to SBVT. Id. ¶¶ 2 and 5. In no way did he ever serve as a conduit of information between the two organizations. In addition, the only information Mr. Cordier received from BC 04 in his capacity as a member of the campaign's Veterans National Steering Committee was publicly available information regarding the President's veterans and military defense policies. Id. ¶ 2. Mr. Cordier resigned his position on the BC 04 Veterans National Steering Committee before the SBVT advertisement in which he was featured aired. Id. ¶¶ 2 and 6.

Mr. Cordier's role in SBVT's advertisements was limited to answering SBVT's prepared questions during a videotaped interview. The questions focused on his personal experiences as a prisoner of war ("POW") during the Vietnam War, his reactions and feelings regarding Senator Kerry's anti-war activities and false accusations about American soldiers such as Mr. Cordier before the United States Senate, and the affect Senator Kerry's false statements had on him, his family and his fellow Vietnam veterans and POWs. Id. ¶ 3.

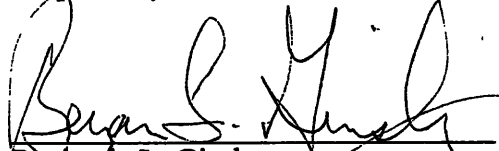
Mr. Cordier did not participate in designing the questions asked of him during the videotaped interview. He also did not play a role in determining the placement, timing or volume of any SBVT advertisement or communication. Id. ¶ 4. Mr. Cordier did not review any story-boards, scripts or rough-cuts of any SBVT before they were finalized, nor participate in editing any SBVT advertisements. Id.

Since SBVT did not coordinate any of its communications or activities with BC 04 or the Republican Party these communications and activities fail the third prong of the coordination analysis. 11 C.F.R. §§ 109.21(a) & (d). The Commission must vote to take no further action and close the file.

### III. Conclusion.

For all the foregoing reasons, there is no basis in law or fact for proceeding with an investigation of these matters and the Commission should vote to close the file. SBVT did not trigger political committee status under FECA or Commission regulations because none of its communications contained express advocacy and it did not solicit any "contributions". Moreover, SBVT did not coordinate any of its communications or activities with BC 04 or the Republican Party, including the August 21, 2004 rally in Alachua, Florida, or any of its television advertisements or other communications. Accordingly, the Commission must vote to close the file.

Respectfully submitted,



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May 6, 2005

In the Matter of )  
 ) MURs 5511 & 5525  
Swift Boat Vets and POWs for Truth )

Kenneth Cordier, being first duly sworn, states as follows:

2. During part of calendar year 2004, I served as an unpaid, volunteer member of the Bush-Cheney '04, Inc. ("BC 04") Veterans National Steering Committee. I was never an official employee, independent contractor, or agent of BC 04. In my honorary and volunteer capacity, the only information I received from the campaign was publicly available information regarding the President's veterans and military defense policies. I did not receive any information from the campaign regarding its election or communications plans, projects, activities or needs. In addition, I made one speech to a veterans group as a member of the National Steering Committee on June 19, 2004. I did not have any further contact with BC 04 until I called the campaign to resign my volunteer position on the National Steering Committee in August 2004.

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national representative of SBVT. The interview occurred on July 17, 2004 in Arlington, Virginia. I was interviewed for approximately fifteen minutes and asked a variety of questions regarding my personal experiences as a POW during the Vietnam War, my reactions and feelings regarding Senator Kerry's anti-war activities and false statements and accusations before the United States Senate, and the affect Senator Kerry's false statements and accusations had on my family and my fellow Vietnam Veterans and POWs. During this meeting of Swift Boat Vets and POWs, we also received media training and were given some rules of the road regarding participating in 527 activities (*e.g.*, no coordination with any federal candidate or political party). My travel and lodging expenses to attend this session were paid for by SBVT.

4. My involvement in the SBVT advertisements was limited to answering SBVT's prepared questions during a videotaped interview. I did not participate in designing the questions asked of me, or in determining the placement, timing or volume of any SBVT advertisement or communication. In addition, I did not review any story-boards, scripts, or rough-cuts of any advertisements before they were finalized, or participate in editing any SBVT advertisements.

5. I did not convey or use any of the information I received from BC 04 in the videotaped interview concerning my personal experiences during the Vietnam War and reactions to Senator Kerry's anti-war activities. I never told anyone at BC 04 of my involvement with SBVT and, as far as I know, no one at BC 04 knew of my participation in the SBVT ad until I informed them

6. On or around August 18, 2004, I received a call from SBVT informing me that a portion of my videotaped interview would be used in a SBVT television advertisement. By the time I received this phone call, the advertisement had been finalized

and I did not participate in any editorial or creative aspect of the advertisement. On August 20, 2004, I placed a courtesy call to David Castillo, my contact person on the BC 04 Veterans National Steering Committee, to let him know that I would be appearing in a SBVT advertisement. Mr. Castillo told me during the same call that the campaign would need to remove my name from the Steering Committee member list, and we agreed that we would have no further contact. Prior to the August 20, 2004 telephone call with David Castillo, I had not had any contact with BC 04 since my June 19, 2004 speech.

Further, the Affiant sayeth not.

Kenneth W. Cordier  
Kenneth Cordier

STATE OF TEXAS )  
COUNTY OF Dallas )

Sworn to and subscribed before me this 5 day  
of May, 2005

Carrie Lane Leenher  
Notary Public, State of Texas



My Commission Expires: 2/23/08

**BEFORE THE FEDERAL ELECTION COMMISSION**

In The Matter of  
Swift Boat Veterans and  
POWs for Truth

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MURs 5511 and 5525

**DECLARATION OF JOSEPH PONDER**

I, Joseph Ponder, hereby declare and state as follows:

1. I am over the age of eighteen years and currently reside in Keystone Heights, Florida. I make this Declaration in support of the Swift Boat Vets and POWs for Truth's ("SBVT") response to the Federal Election Commission's Reason to Believe finding in the above-captioned matter.
2. In August 2004, I agreed preliminarily to appear and speak in my individual capacity at an August 21, 2004 rally in Alachua County, Florida. When the invitation was extended to me, I was told explicitly that the event was a "pro-U.S.A" rally for veterans, and I was assured at that time that the event had no ties to the Republican Party, no ties to the Bush-Cheney campaign, and no ties to SBVT.
3. From the inception of my involvement with SBVT and with their message, SBVT's Steering Committee members ensured that I was fully aware of the relevant restrictions on activities of organizations registered under section 527 of the Internal Revenue Code. Specifically, from my very first meeting with him, Co-Chairman John O'Neill impressed upon me that the SBVT could not be involved in any event that had been organized or funded, even in part, by the Republican Party or by the Bush-Cheney campaign.
4. My potential appearance at the Alachua County rally was never contemplated as being an official appearance on behalf of SBVT because no such appearance had been discussed

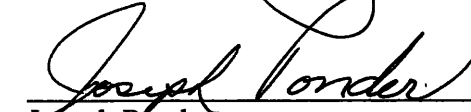
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or cleared with SBVT's officers or Steering Committee members, and because I was never an official employee, representative, or agent of SBVT at any time. SBVT's message was one in which I believed strongly in my capacity as an individual veteran of the Vietnam War, the capacity in which I had intended to speak at the rally.

5. I first learned of the existence of the unauthorized flier, falsely suggesting that representatives of SBVT were scheduled to appear and suggesting that the event also included "Alachua County Republicans" and "Alachua Bush-Cheney Committee," from watching the Hannity & Colmes television program on the Fox News Network during the evening of Friday August 20, 2004. The rally was to have occurred the next day.
6. Upon learning of this unauthorized flier, I immediately canceled all plans to attend and immediately alerted the members of SBVT's Steering Committee that SBVT's name had been usurped in an unauthorized manner. As a result, I did not attend the August 21, 2004 rally in Alachua County, Florida.
7. I never authorized or gave permission for the use of SBVT's name in the subject flier. Furthermore, I would not have had the authority to give such permission. To the best of my knowledge and understanding, only SBVT's officers or Steering Committee members would have had the authority to authorize use of the SBVT name in such a manner.

**VERIFICATION**

Pursuant to 28 U.S.C. § 1746, I verify under penalty of perjury that I have read the foregoing Declaration and it is true and correct. Executed this 3<sup>rd</sup> day of May, 2005.

  
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Joseph Ponder

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