IN THE SUPREME COURT OF ALABAMA
NO. 1200230

EX PARTE: JEFFERSON COUNTY BOARD OF EDUCATION, et al.

Petitioner,

RE: *ALABAMA LOCKERS, LLC V. JEFFERSON COUNTY BOARD OF EDUCATION*
Jefferson County Circuit Court
01-CV-2020-902676

CORRECTED PETITION FOR WRIT OF MANDAMUS TO THE 10th JUDICIAL CIRCUIT COURT, JEFFERSON COUNTY (BIRMINGHAM DIVISION)

Andrew E. Rudloff
BISHOP, COLVIN, JOHNSON & KENT, LLC
1910 First Avenue North
Birmingham, Alabama 35203
P: (205) 251-2881
F: (205) 254-3987
E: arudloff@bishopcolvin.com
Attorney for Petitioner

January 20, 2021

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STATEMENT OF THE CASE

A.
Nature of the Case

Alabama Lockers, LLC, is in the business of performing upkeep on lockers in schools. It is run by a former employee of the Jefferson County Board of Education. It sued the Board for supposedly breaching one or more contracts, and for allegedly committing a number of ill-defined violations of the competitive bid requirements in Ala. Code §§16-13B-1 *et seq.* ("the Bid Law"). Compensatory damages, prospective equitable relief, and payment of attorneys' fees were all among the types of things that were demanded of the Board in the complaint.

It is no surprise that from the Board's perspective, Alabama Lockers' suit has many, many flaws. One of those flaws is bigger than the others though. The Board, as an entity, may raise the doctrine of sovereign immunity in Article I, Section 14, of the Alabama Constitution as a defense ("immunity"). Immunity was raised as a defense before the trial court, below. And, further still, no exception was ever pled. All of this adds up to one thing: Immunity divested the trial court of subject matter jurisdiction over what claims *were* pled.

This Court's well-established, long-settled immunity precedent provides that in this situation, dismissal is not just warranted; it is required. Dismissal, however, was not granted at the pleading stage. Accordingly, the Board – with the utmost respect and deference for the trial court and its efforts – reluctantly but appropriately seeks a writ of mandamus here. This Court should issue the writ, directing the trial court to dismiss Alabama Lockers' complaint under Ala. R. Civ. P. 12(b)(1).

B.
Course of Proceedings and Disposition

1. Alabama Lockers sued.

In July 2020, Alabama Lockers sued the Board. (App. A.) As best one can tell, Alabama Lockers pled three claims: one for breach of contract; and two for purported violations of the Bid Law. On the former, Alabama Lockers first alleged a "principal of Mortimer Jordan High School [ ] signed a contract" in June 2013 for the Alabama Lockers to perform certain locker work at the school in 2013, 2014, and 2015. (App. A, p. 2, ¶10.) Then, in July 2014, the "principal at Fultondale High School [supposedly] obtained approval [for Alabama Lockers to provide locker services] at his [sic] school." (Id., p. 5, ¶35.) The same principal allegedly

asked Alabama Lockers to service Fultondale later in June 2015, too. (Id., p. 5, ¶43.)

According to Alabama Lockers, all of its direct coordination *with the principals* – who were employed by the Board at schools operated by the Board – melded into an enforceable contract *with the Board.* (Id., p. 10, ¶¶82-84.) In other words, despite the requirement in Ala. Code §16-8-4 that a majority of the Board's members must vote on a course of action for *the Board* to act, the Board was supposedly bound, contractually, by the principals. The Board, Alabama Lockers says, then proceeded to breach the contract (or contracts) by failing to pay in full or in part for services rendered at the schools. So, Alabama Lockers claims that the Board owes it about $3,700 in contract damages. (App. A, p. 10, ¶¶82-84.)

Alabama Lockers also pled two other claims for which larger sums were sought. The Bid Law requires that public entities, like the Board, invite service providers to submit competitive bids for work where the value of the work will exceed a monetary threshold. Ala. Code §§16-13B-1 *et seq.* Competitive bids for locker service work system-wide were invited for the first time in the spring of 2014. Alabama Lockers alleged

that the Board violated unspecified parts of the Bid Law during bidding, which culminated in Alabama Lockers losing the bid to a competitor and missing out on the work. (*See* App. A, pp. 2-3, 9-10; ¶¶12-15, ¶85-86.) It demanded $76,500 in compensatory damages as a result. (Id., p. 10, ¶85.)

Similarly, Alabama Lockers alleged that when the Board re-bid the locker service work in the spring of 2017, unspecified parts of the Bid Law were violated then, too. (Id., pp. 7, 10; ¶¶56, 86, c.) It demanded $10,846 for these additional violations. (Id., p. 10; ¶86, d.)

2. The Board moved to dismiss on alternative grounds.

In response to the suit, the Board moved to dismiss under Ala. R. Civ. P. 12(b)(1) (lack of subject matter jurisdiction) and, alternatively, under Ala. R. Civ. P. 12(b)(6) (failure to state a claim). (App. B; *see also* App. E, pp. 2, 4 (labeling arguments alternatives)). The motion was opposed and briefed. (App. D, E.)

3. The trial court entered its Order.

Once the motion was ripe, the trial court acted timely and in due course. A telephone hearing was held in November 2020. (*See* App. C.) No legal arguments were waived there, and, at the trial court's request,

the parties submitted proposed orders for review and consideration.[1] Then, on December 7, 2020, the trial court entered an Order. (App. F.) The Order reads:

> This matter comes before the Court on the Defendant's Motion to dismiss, *pursuant to Rule 12(b)(6) of the Ala. R. Civ. P.* A telephonic hearing was held on this matter on November 17, 2020. Both parties appeared by and through able counsel.
>
> After due consideration, the Court finds that the Plaintiff has stated a claim upon which can be granted.
>
> It is therefore ORDERED, ADJUDGED, and DECREED that the Defendant's Motion to Dismiss is hereby **DENIED.** The parties are hereby notified that this Court will again entertain the issues presented by the instant motion at the time for the filing of dispositive motions.
>
> This matter is hereby set for Status Review on **February 16, 2021 at 8:30 A.M.**

(Id.) (emphasis original) (italics added) (hereafter "the Order").

4. The Board answered and took steps to try to avoid the mandamus petition.

A few days later, the Board, in an abundance of caution, answered and preserved its immunity defense and jurisdictional challenge. (App. G, p. 11, ¶90).

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[1] The parties' proposed orders were not made part of the record.

Then, on December 21, 2020, the Board filed a submission styled, "Defendant's Motion for Clarification re: December 7, 2020 Order Denying Motion to Dismiss." (App. H.) There, the Board explained that the Order left the threshold issues of immunity and subject matter jurisdiction unresolved to the parties' detriment, and "request[ed] that the [trial court] clarify the Order to either grant or deny the motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction." (Id., p. 2.) To date, Alabama Lockers has not responded to that motion, and that motion has not been ruled on, either.

C.
Statement Regarding Timing of the Petition

A mandamus petition seeking review of a trial court's order must be filed within "a reasonable time" of when the order is entered. Ala. R. App. P. 21(a)(3). Generally, "the presumptively reasonable time" is the same as the time to appeal. Id. Here, the "presumptively reasonable time" is "42 days (6 weeks) of the date of entry of" the Order – i.e., by January 19, 2021. Id.; Ala. R. App. P. 4(a)(1).[2] The Board has filed this petition within that window.

[2] January 18, 2021 is a "legal holiday," and the "presumptively reasonable time" period is thus extended to January 19, 2021 – i.e., "the

The Board calls attention to the timing of the petition here, though, because the trial court has admittedly never *expressly* denied the Board's motion to dismiss under 12(b)(1). That, however, is precisely part of the problem. The trial court only: expressly denied the Board's alternative argument under 12(b)(6); "notified" the parties that it "will again entertain the issues presented by the instant motion at the time for the filing of dispositive motions"; and set the matter for a status review in February 2021. (App. F.)

The trial court did not expressly state or otherwise indicate in the Order any intent to issue a separate ruling resolving the Board's jurisdictional challenge *before* the time for dispositive motions.[3] So, the Board asked on December 21, 2020 that the trial court clarify the Order to "grant or deny the motion to dismiss under Rule 12(b)(1) for lack of subject matter jurisdiction." (App. H, p. 2.) Again, that has not been done.

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end of the next day that is not a Saturday, Sunday, or legal holiday …." Ala. R. App. P. 26(a).

[3] Again, the Order styled and limited the Board's motion to dismiss as a motion "pursuant to Rule 12(b)(6) of the Ala. R. Civ. P" – rather a motion made pursuant to 12(b)(1) *and* 12(b)(6). (*Cf.* App. B and E *with* App. F.)

This is not the first time that this Court has faced this scenario – i.e., where a definitive ruling on an important, threshold point has not been entered, has been denied, or has been deferred. For instance, in *FMR Corp. v. Howard,* the defendant moved to compel arbitration. 227 So.3d 444 (Ala. 2017). The trial court stated it would not compel arbitration "at this time," but suggested that it would take the demand up later. Id. at 447-48. That worked a detriment to the defendant, which wanted to arbitrate, not litigate. The defendant appealed, and the plaintiff argued that the order was not final. This Court disagreed and reversed, noting that "[b]y not granting [the plaintiff's] motion to compel arbitration, the trial court 'effectively and substantively' denied the motion …." Id. at 448, citing *Southland Quality Homes, Inc. v. Williams,* 781 So.2d 949, 952 (Ala. 2000).

The same situation exits here, and there is no good reason to distinguish *FMR Corp.* from the mandamus context. Thus, when it declined to express the jurisdictional challenge or deferred it altogether, the trial court "effectively and substantively" denied the Board's motion to dismiss under 12(b)(1). Id. The Board has, therefore, filed this mandamus petition to obtain redress, and it has done so in the

presumptively reasonable time period running from entry of the Order. Ala. R. App. P. 4(a)(1); 21(a)(3).[4]

II.
Statement of Undisputed Facts

Rule 21(a) of the Alabama Rules of Appellate Procedure requires "[a] statement of the facts necessary to an understanding of the issues presented by the petition." Ala. R. App. P. 21(a)(1)(C). There are, simply put, many underlying facts over which the parties disagree – for example, whether *the Board* ever contracted with Alabama Lockers at any time.

For purposes of this petition only, though, the "facts necessary to understanding the issues presented" are truly limited. They are imbedded in the Board's Statement of the Case (and its subsections) in Section I, above. Additionally, they include one, undisputed point: The

[4] To be sure, the Board acknowledges that its request for clarification has been pending since December 21, 2020, and that the ensuing holidays and pandemic circumstances have likely made action by a busy trial court more difficult. The Board is also mindful that it is possible to file a mandamus petition too early. *See, e.g., Ex parte Adams,* 168 So.3d 40 (Ala. 2014) (failure to rule no motion to compel and for sanctions within two weeks of motion's filing was not a constructive refusal to act). But a decision to wait to seek a petition until *after* the "presumptively reasonable time" period running from entry of the Order has passed could, conceivably, if not actually, jeopardize the Board's ability to obtain redress via mandamus.

Board is a "county board of education" created under Ala. Code §§16-8-1, *et seq*. (App. A, p. 2, ¶7; G, p. 2, ¶7.) These facts, when considered in relation to what claims Alabama Lockers asserted in the complaint against the Board, are all that are needed for this Court to decide and grant the petition.

III.

STATEMENT OF THE ISSUE

> Under Article I, Section 14, of the Alabama Constitution, "the State of Alabama shall never be made a defendant in any court of law or equity." ALA. CONST. ART. I, §14 (1901). A county school board is a local agency of the State. Where a plaintiff has only pled claims for breach of contract and Bid Law violations against a county school board, as an entity, does the immunity granted by Article I, Section 14, apply and divest the trial court of subject matter jurisdiction over those claims?

IV.
REASONS WHY THE WRIT SHOULD ISSUE

Mandamus is an extraordinary remedy. To obtain it, a petitioner must show a clear legal right to the order sought, an imperative duty on the respondent accompanied by a refusal to grant the order, lack of an adequate alternative, and proper invocation of the Court's jurisdiction. *Ex parte Jackson Cnty Bd. of Edu.,* 164 So.3d 532, 533-34 (Ala. 2014), citing *Ex parte Wood,* 852 So.2d 705, 708 (Ala. 2002).

A party may use a mandamus petition to obtain review of an order denying a motion to dismiss. Id. at 534; *see also Ex parte Richardson,* 957 So.2d 1119, 1124 (Ala. 2006) (holding mandamus is proper where subject matter jurisdiction is lacking). But, in conducting that type of review, the Court still applies the same standard that it would apply in

reviewing such a denial under normal circumstances. *See Jackson,* 164 So.3d at 534; *see also Ex parte Wilcox Cnty Bd. of Edu.,* 285 So.3d 765, 773 (Ala. 2019). Thus, "[a] ruling on a motion to dismiss is reviewed without a presumption of correctness"; the Court accepts "the allegations of the complaint as true"; the issue is whether the plaintiff *may* prevail, not whether the plaintiff *will* prevail; and the Court must construe all doubts regarding the sufficiency of the complaint in the claimant's favor. Id.; *Ex parte Ala. Dep't of Transp.,* 978 So.2d 17, 20-21 (Ala. 2007) (citations and quotations omitted).

This case presents a unique situation where a writ is not only needed, but warranted. This is so even under the deferential standard that controls at the pleading stage. The writ should issue because immunity applies and no exception was pled. So, even if the complaint is analyzed under the motion to dismiss standard and facts construed in Alabama Lockers' favor, the core issues are clear, and the trial court lacked subject matter jurisdiction over what claims were alleged against the Board.

1. The Board has a clear legal right to a dismissal order, because the Board *may* assert immunity, the Board *did* assert immunity, and no exception to immunity was pled.

a. Immunity is a jurisdictional bar to suit.

The starting premise here is that "the State of Alabama shall never be made a defendant in any court of law or equity." ALA. CONST. ART. I, §14. This is a constitutional, jurisdictional bar to suit. *Ala. State Univ. v. Danley,* 212 So.3d 112, 127 (Ala. 2016). And, where no subject matter jurisdiction exists, the only option available is to dismiss the complaint. *Jackson,* 164 So.3d at 536; *accord Ex parte Ala. Peace Officers' Standards & Training Comm.,* 275 So.3d 527 (Ala. 2018) (immunity precludes complaint amendment); *Ex parte Ala. Dep't of Trans.,* 6 So.3d 1126, 1128 (Ala. 2008) (same); *Ex parte Blankenship,* 893 So.2d 303, 306-307 (Ala. 2004) (same); *cf. Wilcox,* 285 So.3d at 784 (distinguishing multi-party complaint).

b. A county school board may raise immunity.

In *Ex parte Hale Cnty Bd. of Edu.,* this Court reasserted what can be colloquially termed a "super precedent" in Alabama immunity law: A county school board is a "local agency" of the State; it is "clothed in constitutional immunity from suit." 14 So.3d 844, 848 (Ala. 2009). In

Hale, a unanimous panel of this Court issued a writ of mandamus directing the trial court to dismiss a breach-of-contract claim against a county school board, because immunity shielded the board. Id. at 848. Mincing no words, this Court described the school board's shield as "absolute." Id. An earlier case, *Kimmons v. Jefferson Cnty Bd. of Edu.,* may have suggested otherwise. 85 So. 774 (1920). But in *Hale* this Court poignantly – and pointedly – rejected *Kimmons;* it was described as a decision that was not only flawed, but one that did damage by fostering "significant confusion." 14 So.3d at 848.

Hale was not the first time this Court extended immunity to a county school board, *see, e.g., Louviere v. Mobile Cnty Bd. of Edu.,* 670 So.2d 873, 877 (Ala. 1995), and it certainly was not the last time, either. In a situation virtually identical to this one, this Court applied *Hale* in *Ex parte Jackson Cnty Bd. of Edu.,* another breach-of-contract suit against a county school board. 164 So.3d 532, 535-36 (Ala. 2014). There, the county school superintendent signed a purchase order for a contractor to perform certain gym renovations, and the contractor started the work on the gym in reliance on the order. Id. at 533. Then, the Alabama Building Commission stepped in and ordered the contractor to stop,

because the Commission had not approved the work. Id. The contractor billed the school board for work performed, but the contractor was not paid. Id. The contractor sued *the school board,* claiming breach of contract and damages in excess of $90,000. Id. The school board moved to dismiss on immunity grounds. Id. The trial court permitted the contractor to amend its complaint and denied the motion to dismiss. Id. On appeal, this Court found immunity applied, found the trial court had no authority to allow amendment, and issued a writ directing dismissal of the suit. Id. at 535-36; *see also Ex parte Phenix City Bd. of Edu.,* 109 So.3d 631 (Ala. 2012) (immunity bars quantum meruit claim).

In short, this Court's approval of *Hale* over the last decade has been steadfast. And, this Court, in *Jackson,* cemented *Hale* as "sound" precedent. 164 So.3d at 535.[5]

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[5] True to form, this Court has reaffirmed *Hale* no fewer than six times in 11 years – most recently in a unanimous decision in March 2019. *See Wilcox,* 285 So.3d at 775 ("County boards of education are State agencies for purposes of State immunity."); *see also, e.g., Jackson,* 164 So.3d at 534-35; *Phenix City,* 109 So.3d 631; *Bd. of Sch. Comm'rs of Mobile Cnty v. Weaver,* 99 So.3d 1210, 1217 (Ala. 2012); *Ex parte Montgomery Cnty. Bd. of Edu.,* 88 So.3d 837, 842 (Ala. 2012); *Colbert Cnty Bd. of Edu. v. James,* 83 So.3d 473, 479 (Ala. 2011); *Ex parte Monroe Cnty Bd. of Edu.,* 48 So.3d 621, 625 (Ala. 2010); *accord Ex parte Wilcox Cnty Bd. of Edu.,* 279 So.3d 1135, 1141-42 (Ala. 2018) ("Therefore, the Board is absolutely immune from suit, as it is considered an agency of the State.").

c. Immunity bars what claims were pled.

Here, Alabama Lockers sued the Board for breach of contract (or contracts) and violations of the Bid Law in 2014 and 2017, respectively.[6] *Hale* and the cases that have followed it – particularly, *Jackson* – set forth a set of clear rules that apply and control. Under those rules, immunity bars what claims Alabama Lockers pled against the Board.[7]

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[6] In its complaint, Alabama Lockers also labels the Bid Law claims as claims for "unfair advantage [ ]" or "unfair business practices." (*See* App. A, p. 10, ¶85 and p. 10, ¶c.). But those added labels do not matter, because they do not change the immunity analysis. Additionally, it merits mention that an unsuccessful bidder, like Alabama Lockers, cannot recover money damages even if a Bid Law violation is proven. Rather, an unsuccessful bidder's remedy is limited. Ala. Code §16-13B-11 ("Any … bona fide unsuccessful bidder on a particular contract shall be empowered to bring a civil action … to enjoin execution of any contract entered into in violation of this chapter."); *see, e.g., Crest Const. Corp. v. Shelby Cnty Bd. of Edu.,* 612 So.2d 425, 428-432 (Ala. 1992) (confirming not only that the county school board did not violate competitive bid law, but also that trial court correctly dismissed the contractor's damage claim); *see also, e.g., accord Vinson Guard Service, Inc. v. Retirement Sys. of Ala.,* 836 So.2d 807 (Ala. 2002) ("The remedy provided by the Competitive Bid Law is a limited one."); *Jenkins, Weber and Associates v. Hewitt,* 565 So.2d 616, 618 (Ala. 1990) (affirming trial court's grant of summary judgment because competitive bid law did not afford money damages). This was one of several arguments that the Board raised in its alternative argument for dismissal under Rule 12(b)(6). (*See* App. B, pp. 8-10.)

[7] Exceptions exist. *Jackson,* 164 So.3d at 535-36 (exceptions "adequately address … concerns that, with regard to the enforcement of contractual obligations, granting a county board of education sovereign immunity is

2. Immunity is a jurisdictional bar to suit. Since immunity applies, the trial court was duty-bound to dismiss what claims were pled.

For all of the reasons in Section IV.1., above, immunity divested the trial court of subject matter jurisdiction over what claims were pled. So, the trial court was duty-bound to dismiss under 12(b)(1). *See Jackson,* 164 So.3d at 536. Dismissal was not granted, despite the imperative duty. (*See* App. F.) Instead, the breadth of the Board's motion and the Court's analysis were unnecessarily narrowed to 12(b)(6), and the jurisdictional challenge raised via 12(b)(1) was, in this Court's words, "effectively and substantively" denied.

3. The Board lacks another, adequate remedy.

The Board lacks an alternative remedy, let alone an adequate one. *See Wilcox,* 279 So.3d at 1140 (remedy of traditional appeal from denial of motion to dismiss or summary judgment is inadequate where immunity applies or trial court lacks subject matter jurisdiction). If the writ does not issue here, the Board will be compelled to proceed to discovery and otherwise incur costs in litigating a case where, legally, no

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unjust"). But even if one of the narrow exceptions was properly pursued, it still would not enable an unsuccessful bidder to recoup money damages where such damages are not available at law. *See* fn. 8, *supra.*

subject matter jurisdiction has been invoked or exists. Further still, the Board will be forced to do so until such time that dispositive motions may be filed and ruled on, as the trial court indicated is the intended course. (App. F.)

4. The trial court has "effectively and substantively" denied the Board's motion under 12(b)(1), and mandamus is appropriate where no subject matter jurisdiction exits.

Finally, a request for a writ of mandamus must be made by filing a mandamus petition "with the clerk of the appellate court having jurisdiction thereof …." Ala. R. App. P. 21(a). This Court held long ago that "mandamus will lie to compel the dismissal of a claim that is barred by" immunity. *See Blankenship,* 893 So.2d at 305. This Court has reaffirmed that rule time and again; indeed, it did so just last year in another public school case. *See Wilcox,* 285 So.3d at 774-75; *see also Wilcox,* 279 So.3d at 1141; *Jackson,* 164 So.3d at 535-36. Since the trial court has "effectively and substantively" denied the Board's motion to dismiss under 12(b)(1), a writ of mandamus is the appropriate remedy. This Court may grant that writ.

V.
CONCLUSION

The Board has met the requirements that must be met to obtain the extraordinary relief of mandamus, and, thus, for the writ to issue. Immunity divests the trial court of subject matter jurisdiction over what claims were pled by Alabama Lockers. And, in the absence of jurisdiction, dismissal was mandatory – not discretionary. Accordingly, the Board – with the utmost respect and appreciation for the trial court and its efforts – requests issuance of a writ of mandamus directing dismissal pursuant to 12(b)(1).

Dated: January 20, 2021

Respectfully submitted,

s/ Andrew E. Rudloff
Andrew E. Rudloff
BISHOP, COLVIN, JOHNSON & KENT, LLC
1910 First Avenue North
Birmingham, Alabama 35203
P: (205) 251-2881
F: (205) 254-3987
E: arudloff@bishopcolvin.com
Attorney for Petitioner

CERTIFICATE OF COMPLIANCE

This Petition for Writ of Mandamus complies with the word limit of Alabama Rule of Appellate Procedure 21 because this petition contains 4,805 words.

This petition complies with the typeface and style requirements of Alabama Rule of Appellate Procedure 32(7) because it has been prepared in a justified spaced typeface using Microsoft Word in 14 point Century Schoolbook font.

s/ Andrew E. Rudloff
Andrew E. Rudloff
Attorney for Petitioner

CERTIFICATE OF SERVICE

I hereby certify that I have on January 20, 2021, electronically filed the foregoing Corrected Petition for Writ of Mandamus and Appendices with the Clerk of Court using the Court's electronic filing system and that I have served a copy of the foregoing by U.S. Mail, properly addressed to the following:

Hon. Donald E. Blankenship
Jefferson County Circuit Judge
Jefferson County Courthouse, Room 360
716 Richard Arrington, Jr. Blvd. N.
Birmingham, AL 35203

John D. Saxon, Esq.
Karli B. Guyther, Esq.
John D. Saxon, P.C.
2119 3rd Avenue North
Birmingham, AL 35203
Attorneys for Respondent,
Alabama Lockers, LLC

Respectfully submitted,

s/ Andrew E. Rudloff
Andrew E. Rudloff
Attorney for Petitioner

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