

STATE OF NORTH CAROLINA **FILED** IN THE GENERAL COURT OF JUSTICE
 COUNTY OF WAKE 2014 NOV 13 PM 2: 35 SUPERIOR COURT DIVISION
 CIVIL ACTION NO.: 14-CVS-_____

WAKE COUNTY, C.S.C.

STATE OF NORTH CAROLINA,

Upon the relation of,

Patrick L. McCrory, individually and in his official capacity as GOVERNOR OF THE STATE OF NORTH CAROLINA; James B. Hunt, Jr.; and James G. Martin,

Plaintiffs,

v.

Philip E. Berger, in his official capacity as PRESIDENT PRO TEMPORE OF THE NORTH CAROLINA SENATE; Thomas R. Tillis, in his official capacity as SPEAKER OF THE NORTH CAROLINA HOUSE OF REPRESENTATIVES; and, in their official capacities as members of the Coal Ash Management Commission, Harrell Jamison Auten III; Tim L. Bennett; D. Allen Hayes; Scott Flanagan; Rajaram Janardhanam; and Lisa D. Riegel,

Defendants.

COMPLAINT FOR DECLARATORY JUDGMENT, INJUNCTIVE RELIEF AND RELIEF IN THE NATURE OF QUO WARRANTO

Plaintiffs, current and former governors of the State of North Carolina, by and through their undersigned attorneys, allege, upon knowledge of all facts known and upon information and belief as to all other matters, the following:

INTRODUCTION

1. The North Carolina Constitution vests the Governor with the “executive power of the State,” Art. III, sec. 1, and obliges the Governor to “take care that the laws be faithfully executed,” Art. III, sec. 5(4). These provisions reflect a carefully crafted division of powers

between the legislative and executive branches: the General Assembly legislates and the Governor implements such legislation. This division of powers guards “against a gradual concentration of the several powers in the same department,” a particularly acute concern with regard to the legislature, which poses the greatest risk of unduly encroaching upon its coordinate branches. The Federalist No. 51, at 289-90 (James Madison) (Clinton Rossiter ed., 1961).

2. Under the statutory provisions that are the subject of this action, the General Assembly has upset the constitutional division of powers, particularly the allocation of power between the legislative and executive branches, in several respects. First, the General Assembly has established an entity responsible for administering the laws that is “independent” of the executive branch. Second, the General Assembly has vested itself with the power to administer the laws through its usurpation of the Governor’s constitutional authority and obligation to appoint officials serving on entities responsible for implementing legislation. Third, the General Assembly has compelled the Governor to issue an executive order, infringing upon a core executive power constitutionally reserved to the Governor. Such legislation threatens the republican form of government to which this State has been committed for over 200 years and, therefore, does not pass constitutional muster.

3. Accordingly, the Governor seeks a declaratory judgment that these statutory provisions violate the Separation-of-Powers Clause, the Executive Power Clauses and the Appointments Clause of the North Carolina Constitution. N.C. Const. Art. I, sec. 6; Art. III, sec. 1, Art. III, sec. 5(4), Art. III, sec. 5(8). The Governor further seeks entry of an injunction prohibiting the General Assembly from appointing members of executive branch boards and commissions responsible for administering the laws and barring the Defendants unconstitutionally appointed by the General Assembly to executive branch boards and

commissions from carrying out any of the powers delegated to members of such entities. The Governors further seek entry of an order removing such Defendants from such positions.

PARTIES

4. The State of North Carolina is a sovereign State of the United States of America, with its capital and seat of government in Raleigh, Wake County, North Carolina.

5. Plaintiff Patrick L. McCrory (the “Governor”) is the 74th Governor of the State of North Carolina and is a resident of Wake County, North Carolina.

6. Plaintiff James B. Hunt, Jr. (“Hunt”) served as the 69th and 71st Governor of the State of North Carolina and is a resident of Wilson County, North Carolina.

7. Plaintiff James G. Martin (“Martin,” and collectively with the Governor and Hunt, the “Governors” or the “Plaintiffs”) served as the 70th Governor of the State of North Carolina and is a resident of Iredell County, North Carolina.

8. Defendant Philip E. Berger (“President Berger”) is the President Pro Tempore of the North Carolina Senate and is a resident of Rockingham County, North Carolina.

9. Defendant Thomas R. Tillis (“Speaker Tillis”) is the Speaker of the North Carolina House of Representatives and is a resident of Mecklenburg County, North Carolina.

10. Defendant Harrell Jamison Auten III (“Auten”) was appointed to the Coal Ash Management Commission (the “Coal Ash Commission”) by the General Assembly upon the recommendation of President Berger and is a resident of Mecklenburg County, North Carolina.

11. Defendant Tim L. Bennett (“Bennett”) was appointed to the Coal Ash Commission by Speaker Tillis and is a resident of Wake County, North Carolina.

12. Defendant Scott Flanagan (“Flanagan”) was appointed to the Coal Ash Commission by the General Assembly upon the recommendation of President Berger and is a resident of Rockingham County, North Carolina.

13. Defendant D. Allen Hayes (“Hayes”) was appointed to the Coal Ash Commission by the General Assembly upon the recommendation of President Berger and is a resident of Wake County, North Carolina.

14. Defendant Rajaram Janardhanam (“Janardhanam”) was appointed to the Coal Ash Commission by Speaker Tillis and is a resident of Mecklenburg County, North Carolina.

15. Defendant Lisa D. Riegel (“Riegel,” and collectively with Auten, Bennett, Flanagan, Hayes and Janardhanam, the “Appointee Defendants”) was appointed to the Coal Ash Commission by Speaker Tillis and is a resident of Wake County, North Carolina.

JURISDICTION AND VENUE

16. As explained more fully below, an actual, justiciable controversy exists between the Governor and Defendants. The Governor, therefore, is entitled to bring this action under the Declaratory Judgment Act, N.C. Gen. Stat. § 1-253, *et seq.*, to obtain a determination of his rights under the North Carolina Constitution.

17. Having received satisfactory security to indemnify the State against all costs and expenses which may accrue in consequence of the action in nature of quo warranto, the Attorney General has granted the Governors leave to bring such action in the name of the State. The Governors, therefore, are entitled as citizens and taxpayers of the State of North Carolina to bring an action under N.C. Gen. Stat. §§ 1-515 to -516, to seek removal of persons unlawfully holding and exercising state-wide public offices. *State ex rel. Freeman v. Ponder*, 234 N.C. 294, 301-02 (1951) (holding that an action under N.C. Gen. Stat. § 1-516 “may be brought and

prosecuted . . . in the name of the State upon the relation of a private person, who is a citizen and taxpayer of the jurisdiction where the officer is to exercise his duties and powers”).

18. This Court has jurisdiction over the parties pursuant N.C. Gen. Stat. §§ 1-75.3 and 1-75.4.

19. Venue in this Court is proper pursuant to N.C. Gen. Stat. §§ 1-77 and 1-82.

ALLEGATIONS COMMON TO ALL CLAIMS

Oil and Gas Commission

20. The Energy Modernization Act, which comprehensively revised North Carolina’s approach to developing and regulating the State’s energy resources, became law on June 4, 2014. 2014 Session Law 4.

21. Among other provisions, the Energy Modernization Act provided for creation of the Oil and Gas Commission, effective as of July 31, 2015, to facilitate and regulate the development of North Carolina’s oil and gas resources, in accordance with the Oil and Gas Conservation Act. § 143B-293.1(a); 2014 Session Law 4, §§ 5-6.

22. The Oil and Gas Commission is endowed with the power to (1) “adopt rules necessary to administer the Oil and Gas Conservation Act pursuant to G.S. 113-391” and (2) “to make determinations and issue orders pursuant to the Oil and Gas Conservation Act to (i) regulate the spacing of wells and to establish drilling units as provided in G.S. 113-391; (ii) limit and prorate the production of oil or gas, or both, from any pool or field for the prevention of waste as provided in G.S. 113-394; (iii) classify wells for taxing purposes; and (iv) require integration of interests as provided in G.S. 113-393.” § 143B-293.1(b). The Oil and Gas Commission also is endowed with the authority to remit environmental penalties imposed by the

Department of Energy and Natural Resources (“DENR”), if, among other reasons, DENR improperly applied statutory factors in imposing such penalties. § 143B-293.6.

23. The Oil and Gas Commission consists of nine members, three of whom are appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate, three of whom are appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives, and three of whom are appointed by the Governor. § 143B-293.2(a1).

24. The Governor may remove members of the Oil and Gas Commission only “for misfeasance, malfeasance, or nonfeasance,” as those terms are used in Section 143B-13 of the North Carolina General Statutes. § 143B-293.2(c)(1).

25. Except for vacancies that arise when the General Assembly is not in session, vacancies on the Oil and Gas Commission are filled by the authority making the original appointment of the vacating member. § 143B-293.2(c)(1)-(2).

Mining Commission

26. The Energy Modernization Act also provided for creation of the North Carolina Mining Commission (the “Mining Commission”), effective as of July 31, 2015, to implement statutes governing the development and regulation of North Carolina’s mining resources. § 143B-290; 2014 Session Law 4, §§ 5-6.

27. The Mining Commission has the power to (1) “act as the advisory body to the Governor pursuant to Article V(a) of the Interstate Mining Compact;” (2) “hear permit appeals, conduct a full and complete hearing on such controversies and affirm, modify, or overrule permit decisions made by [DENR] pursuant to G.S. 74-61”; and (3) “promulgate rules necessary to

administer the Mining Act of 1971, pursuant to G.S. 74-63 [and] the Control for Exploration for Uranium in North Carolina Act of 1983, pursuant to G.S. 74-86.” § 143B-290(1).

28. The Mining Commission consists of seven voting members: the chair of the North Carolina State University Minerals Research Laboratory Advisory Committee, two individuals appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate, two individuals appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives, and two individuals appointed by the Governor. § 143B-291(a1).

29. The Governor may remove members of the Mining Commission only “for misfeasance, malfeasance, or nonfeasance,” as those terms are used in Section 143B-13 of the North Carolina General Statutes. § 143B-291(d).

30. Vacancies on the Mining Commission are filled by the authority making the original appointment of the vacating member. *See* § 143B-293.2(b)-(c).

31. After the Energy Modernization Act was enacted, the Governor and his staff repeatedly expressed concern to Speaker Tillis, President Berger and their staffs that provisions in proposed and ratified legislation—most significantly, provisions authorizing the General Assembly to appoint members of executive branch entities responsible for administering the laws, like the Oil and Gas and Mining Commissions—infringed on powers constitutionally reserved to the Governor.

Proposed Medicaid Board

32. Despite these efforts, the General Assembly, under the leadership of Speaker Tillis and President Berger, proposed and enacted additional legislation vesting the General Assembly with powers constitutionally reserved to the Governor.

33. In particular, the Senate passed legislation that would create the Board of the Department of Medical Benefits (the “Medicaid Board”) to oversee the Medicaid and NC Health Choice programs. H.B. 1181, 2013-14 Session § 10 (as passed by Senate July 24, 2014).

34. Among other powers, the Medicaid Board would: (1) “[a]dminister and operate the Medicaid and NC Health Choice programs;” (2) hire staff to manage the Medicaid and NC Health Choice programs and set compensation for Medicaid and NC Health Choice program employees; (3) “[e]nter into contracts for the administration of the Medicaid and NC Health Choice programs, as well as manage such contracts;” (4) establish “[b]usiness policy,” “[s]trategic plans” and an “[o]perational budget and assumptions” for the Medicaid and NC Health Choice programs; and (5) “[a]pprove expenditures to be charged or allocated to the Medicaid program by other State departments or agencies.” *Id.*

35. The Medicaid Board would consist of seven voting members, two of whom would be appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate, two of whom would be appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives, and three of whom would be appointed by the Governor. *Id.*

36. Appointees to the Medicaid Board would “serve at the pleasure of the appointing authorities and the appointing authorities [would] fill any vacancies.” *Id.*

37. The House of Representatives did not act on the Medicaid reform bill before it adjourned on August 20, 2014.

Coal Ash Commission

38. Also in spite of the Governor’s expressed concerns regarding legislative encroachment on the executive branch, on August 20, 2014 the General Assembly enacted the

Coal Ash Management Act, N.C. Gen. Stat. § 130A-309.200, *et seq.* The Coal Ash Management Act, which became law on September 20, 2014, established a comprehensive plan for managing coal combustion residuals. 2014 Session Law 122.

39. The Coal Ash Management Act created the Coal Ash Commission to oversee the management of coal combustion residuals and the closure and remediation of coal combustion residuals surface impoundments. § 130A-309.202.

40. Section 130A-309.202(n) declares the Coal Ash Commission “shall be administratively located in the Division of Emergency Management of the Department of Public Safety. The Commission shall exercise all of its powers and duties independently and shall not be subject to the supervision, direction, or control of the Division or Department.”

41. The Coal Ash Commission has two primary powers: (1) it reviews and approves or rejects classifications of coal ash residuals surface impoundments drafted by DENR, which prioritize such impoundments for purposes of closure and remediation, § 130A-309.211(c), and (2) it reviews and approves or rejects plans for closure of coal combustion residuals surface impoundments submitted by the owners of such impoundments and initially reviewed by DENR, § 130A-309.212(d). The Coal Ash Commission must exercise these powers in accordance with criteria set forth in the Act. §§ 130A-309.211(c) and -309.212(d)

42. The Coal Ash Commission consists of nine members, three of whom are appointed by the General Assembly upon recommendation of the President Pro Tempore of the Senate, three of whom are appointed by the General Assembly upon recommendation of the Speaker of the House of Representatives, and three of whom are appointed by the Governor. § 130A-309.202(b).

43. The Governor may remove members of the Coal Ash Commission only “for misfeasance, malfeasance, or nonfeasance,” as those terms are used in Section 143B-13 of the North Carolina General Statutes.

44. Vacancies on the Coal Ash Commission occurring as a result of resignation, dismissal, death or disability are filled by the authority making the original appointment of the vacating member. *See* § 130A-309.202(d).

45. Section 130A-309.202(j) declares that “[t]he Governor, by executive order, shall promulgate criteria regarding conflicts of interest and disclosure thereof for determining the eligibility of persons” to serve on the Coal Ash Commission.

46. Effective September 22, 2014, the General Assembly, upon the recommendation of President Berger, appointed Mr. Auten to the Coal Ash Commission for a term expiring June 30, 2020, Mr. Hayes to the Coal Ash Commission for a term expiring June 30, 2016 and Mr. Flanagan to the Coal Ash Commission for a term expiring June 30, 2018. 2014 Session Laws 116, § 1.6(a)-(c).

47. Effective September 22, 2014, Speaker Tillis appointed Mr. Bennett to the Coal Ash Commission for a term expiring on June 30, 2018 and Mr. Janardhanam to the Coal Ash Commission for a term expiring on June 30, 2020. 2014 Session Laws 116, § 2.42(a)-(b).

48. Effective October 9, 2014, Speaker Tillis appointed Ms. Riegel to the Coal Ash Commission for a term expiring on June 30, 2020.

49. An actual, genuine and real controversy exists between the Governor and President Berger and Speaker Tillis as to the General Assembly’s authority to create an entity responsible for administering the laws that is independent of the executive branch because the

General Assembly has created an entity responsible for administering the laws that is independent of the executive branch.

50. An actual, genuine and real controversy exists between the Governor and the Defendants as to the Governor's authority to execute the laws because the General Assembly has enacted legislation vesting itself with the authority to appoint members of executive boards and commissions responsible for implementing legislation, impermissibly infringing upon the powers and obligations reserved by the North Carolina Constitution to the Governor.

51. An actual, genuine and real controversy exists between the Governor and Speaker Tillis and President Berger as to whether the North Carolina Constitution entrusts the Governor with exclusive authority over the issuance and content of executive orders because the General Assembly has enacted a statute requiring that the Governor issue an executive order.

52. On November 10, 2014, the Governors tendered security to the Attorney General sufficient to indemnify the State against any costs and expenses which may accrue in consequence of the action in the nature of quo warranto.

53. On November 12, 2014, the Attorney General of the State of North Carolina granted the Governors leave to bring an action in the name of the State to remove individuals unlawfully appointed by the General Assembly to executive branch boards and commissions.

COUNT I – DECLARATORY JUDGMENT
(Violation of North Carolina Constitution – Creation of “Independent” Entity To Administer the Laws)

54. The allegations of paragraphs 1 through 53 are incorporated herein by reference and realleged as if fully set forth herein.

55. Article I, section 6 of the North Carolina Constitution provides: “The legislative, executive and supreme judicial powers of the State government shall be forever separate and distinct from each other” (the Separation-of-Powers Clause”).

56. The Supreme Court of North Carolina has recognized separation of powers as a “cornerstone” of our state government, holding that the State “strictly adheres” to the principle of separation of powers. *State ex rel. Wallace v. Bone*, 304 N.C. 591, 599 (1982).

57. Article III, section 1 of the North Carolina Constitution provides: “The executive power of the State shall be vested in the Governor,” and Article III, section 5(4) of the North Carolina Constitution provides: “The Governor shall take care that the laws be faithfully executed” (collectively, the “Executive Power Clauses”). These provisions vest executive power, including the power to implement legislation, in the Governor.

58. An actual, genuine and real controversy exists between the Governor and President Berger and Speaker Tillis as to the General Assembly’s authority to create an entity responsible for administering the laws that is independent of the executive branch because the General Assembly has created an entity responsible for administering the laws that is independent of the executive branch.

59. By creating an entity responsible for executing the laws that is independent of the executive branch, Section 130A-309.202(n) of the Coal Ash Management Act violates the Separation-of-Powers Clause and Executive Power Clauses of the North Carolina Constitution.

60. Pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, the Governor asks the Court to enter a judgment declaring that statutes creating boards and commissions responsible for administering the laws that are independent of the executive branch are unconstitutional on their face.

COUNT II – DECLARATORY JUDGMENT
(Violation of Separation of Powers – Legislative Appointments to Executive Branch Boards and Commissions)

61. The allegations of paragraphs 1 through 60 are incorporated herein by reference and realleged as if fully set forth herein.

62. The Separation-of-Powers Clause of the North Carolina Constitution provides: “The legislative, executive and supreme judicial powers of the State government shall be forever separate and distinct from each other.”

63. The Supreme Court of North Carolina has recognized separation of powers as a “cornerstone” of our state government, holding that the State “strictly adheres” to the principle of separation of powers. *State ex rel. Wallace v. Bone*, 304 N.C. 591, 599 (1982).

64. The Executive Power Clauses of the North Carolina Constitution provide that “[t]he executive power of the State shall be vested in the Governor,” and that “[t]he Governor shall take care that the laws be faithfully executed.” These provisions vest executive power, including the power to implement legislation, in the Governor.

65. An actual, genuine and real controversy exists between the Governor and the Defendants as to the Governor’s authority to appoint members of executive branch boards and commissions responsible for administering the laws because the General Assembly has enacted legislation vesting itself with the authority to appoint members of such boards and commissions.

66. By delegating to the General Assembly the power to appoint members of executive branch boards and commissions responsible for administering the laws, the Energy Modernization Act and the Coal Ash Management Act violate the Separation-of-Powers Clause of the North Carolina Constitution.

67. Pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, the Governor asks the Court to enter a judgment declaring that statutes authorizing the General Assembly to appoint members of executive branch boards and commissions responsible for administering the laws are unconstitutional on their face.

COUNT III – DECLARATORY JUDGMENT
(Violation of Appointments Clause – Legislative Appointments to Executive Branch Boards and Commissions)

68. The allegations of paragraphs 1 through 67 are incorporated herein by reference and realleged as if fully set forth herein.

69. Article III, section 5(8) of the North Carolina Constitution provides: “The Governor shall nominate and by and with the advice and consent of a majority of the Senators appoint all officers whose appointments are not otherwise provided for” (the “Appointments Clause”).

70. An actual, genuine and real controversy exists between the Governor and the Defendants as to the Governor’s authority to make appointments to executive branch boards and commissions responsible for administering the laws because the General Assembly has enacted legislation vesting itself with the authority to appoint members of executive boards and commissions responsible for administering the laws and, pursuant to such legislation, has made appointments to such boards and commissions.

71. By delegating to the General Assembly the power to appoint members of executive branch boards and commissions responsible for administering the laws, the Energy Modernization Act and the Coal Ash Management Act violate the Appointments Clause of the North Carolina Constitution.

72. Pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, the Governor asks the Court to enter a judgment declaring that statutes authorizing the General Assembly to appoint members of executive branch boards and commissions responsible for administering the laws are unconstitutional on their face.

**COUNT IV – DECLARATORY JUDGMENT
(Violation of Separation of Powers – Executive Orders)**

73. The allegations of paragraphs 1 through 72 are incorporated herein by reference and realleged as if fully set forth herein.

74. The Separation-of-Powers Clause of the North Carolina Constitution provides: “The legislative, executive and supreme judicial powers of the State government shall be forever separate and distinct from each other.”

75. The Supreme Court of North Carolina has recognized separation of powers as a “cornerstone” of our state government, holding that the State “strictly adheres” to the principle of separation of powers. *State ex rel. Wallace v. Bone*, 304 N.C. 591, 599 (1982).

76. The Executive Power Clauses of the North Carolina Constitution provide that “[t]he executive power of the State shall be vested in the Governor,” and that “[t]he Governor shall take care that the laws be faithfully executed.” These provisions vest executive power, including the power to implement legislation, in the Governor.

77. An actual, genuine and real controversy exists between the Governor and the Speaker Tillis and President Berger as to whether the North Carolina Constitution entrusts the Governor with exclusive authority over the issuance and content of executive orders because the General Assembly has ratified a statute requiring that the Governor issue an executive order.

78. By requiring that the Governor issue an executive order, Section 130A-309.202(j) of the Coal Ash Management Act violates the Separation-of-Powers Clause and Executive Powers Clauses of the North Carolina Constitution.

79. Pursuant to N.C. Gen. Stat. § 1-253, *et seq.*, the Governor asks the Court to enter a judgment declaring that a statutory provision compelling the Governor to issue an executive order is unconstitutional on its face.

COUNT V – PERMANENT INJUNCTION

80. The allegations of paragraphs 1 through 79 are incorporated herein by reference and realleged as if fully set forth herein.

81. Legislation authorizing the General Assembly to appoint members of executive branch boards and commissions that administer the laws violates the Separation-of-Powers Clause and Appointments Clause of the North Carolina Constitution.

82. Because legislation authorizing the General Assembly to appoint members of executive branch boards and commissions responsible for administering the laws is facially unconstitutional, the Governor is entitled to permanent injunctive relief, pursuant to North Carolina Rule of Civil Procedure 65, prohibiting the General Assembly from appointing members of executive branch boards and commissions responsible for administering the laws and prohibiting the Defendants unconstitutionally appointed by the General Assembly to executive branch boards and commissions from carrying out any of the powers delegated to members of such entities.

COUNT VI – RELIEF IN THE NATURE OF QUO WARRANTO

83. The allegations of paragraphs 1 through 82 are incorporated herein by reference and realleged as if fully set forth herein.

84. The Appointee Defendants have been unconstitutionally appointed to positions on the Coal Ash Commission, an executive branch commission responsible for executing the laws.

85. Pursuant to N.C. Gen. Stat. § 1-514, *et seq.*, the Governors ask this Court to remove the Appointee Defendants from the Coal Ash Commission.

WHEREFORE, the Plaintiffs pray for the following relief:

A. an order and judgment declaring unconstitutional Section 130A-309.202(n) of the Coal Ash Management Act providing that the Coal Ash Commission exercises its powers independently and without the supervision, direction or control of the executive branch;

B. an order and judgment declaring that statutes authorizing the General Assembly to appoint members of executive branch boards and commissions responsible for administering the laws are unconstitutional on their face, and enjoining the General Assembly from appointing members of executive branch boards and commissions responsible for administering the laws;

C. an order and judgment declaring unconstitutional the Appointee Defendants appointment as members of the Coal Ash Commission and removing such individuals from office;

D. an order and judgment declaring unconstitutional the provision of Section 130A-309.202(j) of the Coal Ash Management Act requiring the Governor to issue an executive order;

E. an order and judgment taxing the costs of this action against the Defendants; and

F. any other monetary and equitable relief this Court deems just and appropriate.

This 11th day of November, 2014.

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