

Court File No.

05-CV-283048CP

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

EDWARD JOSEPH

Plaintiff

- and -

QUIK PAYDAY INC., QUIK PAYDAY, INC.,
DAVID M. DUNKLEY AND LINDA MILLER

Defendants

(PROCEEDING UNDER THE CLASS PROCEEDINGS ACT, 1992)

STATEMENT OF CLAIM

TO THE DEFENDANTS:

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the Plaintiff. The claim made against you is set out in the following pages.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyers or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this statement of claim is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LEGAL AID OFFICE.

Date January 28, 2005 Issued by J. Grant
Local Registrar

Address of
court office: 393 University Ave., 10th Floor
Toronto, Ontario M5G 1E6

TO: QUIK PAYDAY INC.
3000, 700 – 9th Avenue S.W.
Calgary, AB
T2P 3V4 Canada

QUIK PAYDAY, INC.
87 East 1400 North
Logan, Utah
84341 U.S.A.

c/o Representative for Service
Oyen Wiggs Green & Mutala
Suite 480, The Station
601 West Cordova St.
Vancouver, BC
V6B 1G1 Canada

DAVID M. DUNKLEY
89 East 1400 North
Logan, Utah
84341 U.S.A.

or 609 Meadowlook Ln.
Smithfield, Utah
84335 U.S.A.

LINDA MILLER
2111 Centre St. N.W.
Calgary, AB
T2E 2T2 Canada

CLAIM

1. The Plaintiff claims:

- (a) an Order pursuant to the *Class Proceedings Act, 1992*, certifying this action as a class proceeding and appointing Edward Joseph ("Mr. Joseph") as representative Plaintiff for the Class (defined in para. 14, below);
- (b) a declaration that any and all fees and charges charged by Quick Payday Inc. to the members of the Class in relation to a Payday Loan (defined in para. 2, below) constitute interest within the meaning of section 347 of the *Criminal Code*, including:
 - (i) the charge of \$25.00 per \$100.00 borrowed;
 - (ii) the rollover fees of \$25.00 per \$100.00 borrowed;
 - (iii) the \$20.00 late administration fee; and
 - (iv) additional interest at the purported rate of 25% per annum on overdue loans.
- (c) a declaration that since Quik Payday Inc. was incorporated it has charged, and all the Defendants have received, interest at a criminal rate from the members of the Class in respect of Payday Loans, contrary to section 347 of the *Criminal Code*, including each of:
 - (i) the charge of \$25.00 per \$100.00 borrowed;
 - (ii) the rollover fees of \$25.00 per \$100.00 borrowed;
 - (iii) the \$20.00 late administration fee and additional interest at the purported rate of 25% per annum; and
 - (iv) aggregate Interest on each Payday Loan.
- (d) a declaration that the Defendants wrongfully, maliciously and unlawfully conspired with each other to charge and receive interest at a criminal rate in respect of Payday Loans made with members of the Class;

- (e) a declaration that Quik Payday Inc. has breached its contract with the members of the Class by charging and/or receiving and/or not refunding Interest (defined in para. 3, below) in excess of the criminal rate;
- (f) a declaration that the Defendants have been unjustly enriched at the expense of Mr. Joseph and the other members of the Class;
- (g) a declaration that the Defendants hold all Interest paid by the Class members in respect of Payday Loans during the Class period (defined below) in a constructive trust for the benefit of Mr. Joseph and the other members of the Class;
- (h) a declaration that the Defendants are not entitled to retain the Interest they received in relation to Payday Loans during the Class period, and must disgorge the Interest to the Class;
- (i) an equitable tracing order for the aggregate Interest on all Payday Loans advanced by the Defendants to the Class members during the Class period;
- (j) damages in the amount of the aggregate of all Payday Loans including principal and Interest paid by the members of the Class, or alternatively, in the amount equal to the total Interest charged and/or received on all Payday Loans, and an accounting thereof or, in the further alternative, in such amount as this honourable court deems just and equitable;
- (k) a declaration that each agreement for a Payday Loan between Quik Payday Inc. and a Class member is illegal and void and unenforceable in whole or in part, and a declaration that each Class member who has a Payday Loan with the Defendants that is overdue or outstanding at the date of certification of this action as a class proceeding is not required to repay such Payday Loan in whole or in part;

- (l) in the alternative to (k), a declaration that the provisions in each Payday Loan agreement between the Defendants and members of the Class that provide for the payment of Interest are illegal, void and unenforceable, and are severed from the other terms of the Payday Loan agreement;
- (m) punitive damages in the amount of \$30,000,000.00, or such other sum as this Honourable Court deems appropriate;
- (n) an interim, interlocutory, and permanent injunction restraining the Defendants from charging Interest in a manner that violates the *Criminal Code*;
- (o) an interim injunction prohibiting the Defendants from distributing the Interest on all Payday Loans advanced by the Defendants, or any part thereof, to any person, until the disposition of the trial of the common issues or further order of the court;
- (p) pre-judgment and post-judgment interest at the rate of 59% per annum, or, alternatively, at such other rate fixed by the Court pursuant to the *Courts of Justice Act*;
- (q) the costs of administering the plan of distribution of the judgment in this action;
- (r) costs of this proceeding on a full indemnity basis; and
- (s) such further and other relief as this Honourable Court deems appropriate.

Overview

2. Quik Payday Inc. ("Quik Payday") offers short term personal loans over the internet ("Payday Loans"). Payday Loan applications are made and approved electronically. Funds are advanced by automatic deposits to and repaid by automatic

withdrawals from the borrower's bank account. Quik Payday advances Payday Loans of up to \$500.00 and charges a flat fee of \$25.00 per \$100.00 borrowed. The term of the Payday Loan is 4 to 18 days ending on the borrower's next payday. Borrowers may "extend" the loan ("rollover") for a further charge of \$25.00 per \$100.00 originally borrowed ("rollover fees"). The maximum duration of a rollover is a further 4-18 days ending on the borrower's next payday, after the original due date. If a Payday Loan is not repaid when due, the Defendants levy a further \$20.00 late fee and charge additional interest at the purported rate of 25% per annum.

3. Each of the initial \$25.00 per \$100.00 borrowed, the rollover fees, the \$20.00 late fee, the interest on overdue accounts, and any and all other fees charged by Quik Payday are "interest" as defined in the *Criminal Code* (collectively, "Interest").

4. The Interest charged by the Defendants on Payday Loans grossly exceeds the criminal rate of 60%. This is a proposed class proceeding for damages and other relief arising from Interest charged on Quik Payday's Payday Loans.

5. The members of the Class are entitled to, *inter alia*, damages in the aggregate amount of principal and Interest for all Payday Loans advanced since Quik Payday commenced operations or, alternatively, in the aggregate amount of all Interest charged and received on all Payday Loans since Quik Payday commenced operations. Any Payday Loans that remain outstanding are illegal and unenforceable and, therefore, do not have to be repaid by the members of the Class.

6. Substantial punitive damages are warranted in this case because the Payday Loan agreements are intentionally misleading and worded in such a way as to

intentionally deceive the Class with respect to the actual cost of borrowing, and regarding the lawfulness of the charges imposed. Indeed, Quik Payday's standard form agreement for a Payday Loan states expressly that:

in no event shall the total payment to the Lender...exceed the maximum payment permitted under Section 347 of the *Criminal Code* (Canada)

and that

the Lender shall at the request of the Borrower refund to the Borrower an amount equal to the amount by which such interest exceeds the criminal rate.

7. The Defendants have knowingly violated the *Criminal Code* and have attempted to shift the burden of remedying their criminal conduct onto the members of the Class by purporting to require the borrowers to demand a refund of charges imposed by the Defendants in excess of the criminal interest rate provisions. Such conduct is deserving of the condemnation of this Honourable Court through an award of substantial punitive damages.

The Parties

8. Mr. Joseph is an individual who resides in Navan, Ontario.

9. Quik Payday is an Alberta Corporation that offers Payday Loans over the internet to individuals throughout Canada. It was established in or about 1997.

10. Quik Payday, Inc. ("Quik Payday U.S.A.") is a Utah corporation that offers Payday Loans over the internet to individuals throughout the United States. It commenced carrying on business in or about 1999, under the name "Quik Check Financial Inc." Quik Payday U.S.A. directly or indirectly receives a portion of the

Interest received by Quik Payday in respect of Payday Loans made between Quik Payday and the Class.

11. David M. Dunkley (“Dunkley”) is an officer, director and the sole shareholder of Quik Payday and Quik Payday U.S.A. Dunkley is the directing mind of Quik Payday and Quik Payday U.S.A. and operates them as a single business enterprise. Dunkley resides in North Logan, Utah.

12. Linda Miller (“Miller”) is an officer and director of Quik Payday. Miller resides in Calgary, Alberta.

13. At all material times Dunkley and Miller (the “individual defendants”) have been the directing minds of Quik Payday. Dunkley is the directing mind of Quik Payday U.S.A. They caused Quik Payday to enter into the Payday Loans with the Class members at criminal interest rates. They have also directed the corporate defendants to make payments to them from the Interest received, and at all times knew such payments were the proceeds of a crime.

14. The Defendants have conspired together to charge and receive Interest on Payday Loans from individuals in Canada at rates that contravene section 347 of the *Criminal Code*, and have thereby also breached s. 462.31(1) of the *Criminal Code*.

The Class

15. Mr. Joseph brings this action under the *Class Proceedings Act, 1992* on behalf of a class consisting of all persons in Canada who have taken a Payday Loan from Quik

Payday (the "Class"), at any time from the date of incorporation of Quik Payday to the date of certification of this action as a class proceeding (the "class period")

Payday Loans from Quik Payday

16. The application and approval process for a Payday Loan from Quik Payday takes place primarily over the internet. The borrower visits Quik Payday's website at www.quickpayday.ca. There is a link on the website that directs U.S. customers to the American portion of the website, to thereby facilitate Payday Loans to American customers by Quik Payday U.S.A.

17. Individuals in Canada seeking to obtain a Payday Loan from Quik Payday for the first time must complete and submit a new membership application, reproduced below, which consists only of the individual's first and last name, e-mail address and answers to five yes or no questions.

Apply for your Quik Payday loan now!

First Name:	<input type="text"/>	Last Name:	<input type="text"/>
E-Mail:	<input type="text"/>	Confirm E-Mail:	<input type="text"/>
Yes	No		
<input type="checkbox"/>	<input type="checkbox"/>	Have you been employed with the same company for 3 consecutive months?	
<input type="checkbox"/>	<input type="checkbox"/>	Do you take home at least 1,000 dollars a month after taxes?	
<input type="checkbox"/>	<input type="checkbox"/>	Do you have an open and valid checking account?	
<input type="checkbox"/>	<input type="checkbox"/>	Do you have more than two outstanding Payday loans?	
<input type="checkbox"/>	<input type="checkbox"/>	Do you have Direct Deposit?	
<input type="button" value="Apply Now >>"/>			

18. Once the basic information is submitted on the application form, the borrower is required to fax to Quik Payday's specified fax number a voided cheque, his or her most recent monthly bank statement, his or her two most recent pay stubs, and a copy of his or her photo ID. Notification of approved membership applications or declination are delivered via e-mail. Once approved, customers are Quik Payday "members", and may request a Payday Loan in the amount of \$100, \$200, \$300, \$400 or \$500 by completing a loan application form on-line.

19. Loan applications are approved by Quik Payday electronically, the loan agreement is completed electronically and the loan funds are electronically deposited directly into the borrower's bank account.

20. On the due date, the Payday Loan principal and Interest are withdrawn directly by Quik Payday from the borrower's account.

21. In addition to authorizing direct withdrawal of the principal amount of the loan plus \$25.00 per \$100.00 borrowed, the Quik Payday Loan agreement stipulates that the borrower may send money orders to "Quik Payday, 87 East 1400 North, Logan, Utah 84341", the registered address for Quik Payday U.S.A. No Canadian address is provided for direct payments. Quik Payday U.S.A. therefore has received and continues to receive Interest in respect of Canadian Payday Loans.

22. If the borrower does not wish to repay the Payday Loan on his or her next payday, he or she has the option of extending the loan until the following payday, a rollover. The Defendants charge a rollover fee of \$25.00 per \$100.00 borrowed.

23. In the event that there are insufficient funds in the borrower's account on the due date and there is no rollover of the loan, the Defendants charge a further \$20.00 late administration charge and commence accruing additional interest at the rate of 25% per annum.

The Defendants Charge Interest at a Criminal Rate

24. Section 347 of the *Criminal Code* makes it an offence to charge or receive interest at a "criminal rate". "Criminal rate" is defined in section 347(2) as "an effective annual rate of interest calculated in accordance with generally accepted actuarial practices and principals that exceeds 60% on the credit advanced under an agreement or arrangement".

25. "Interest" is defined in section 347(2) of the *Criminal Code* as:

the aggregate of all charges and expenses, whether in the form of a fee, fine, penalty, commission or other similar charge or expense or in any other form, paid or payable for the advancing of credit under an agreement or arrangement, by or on behalf of the person to whom the credit is or is to be advanced, irrespective of the person to whom any such charges and expenses are or are to be paid or payable, but does not include any repayment of credit advanced or any insurance charge, official fee, overdraft charge, required deposit balance or, in the case of a mortgage transaction, any amount required to be paid on account of property taxes;

26. The fees, rollover fees, late payment fees and interest are all Interest as defined by the *Criminal Code*.

27. On all Payday Loans to the members of the Class, the Defendants charge and/or receive Interest in excess of 60%. Quik Payday charges a flat fee of \$25.00 per \$100.00 borrowed. It charges a rollover fee of a further \$25.00 per \$100.00 borrowed.

It charges a \$20.00 late fee and additional interest at the rate of 25% per annum. The effective annual rate of interest charged by Quik Payday to members of the Class is not disclosed by Quik Payday. However, on the website link for U.S. customers, the Defendants have posted their calculation of the annual percentage rate (calculated in accordance with Regulation Z, s. 226.7 of the laws of the United States of America) for its payday loans offered to U.S. customers, on which Quik Payday U.S.A. charges \$20.00 per \$100.00 borrowed. The annual percentage rate disclosed by the Defendants for their U.S. customers is set out in the following chart:

		<i>Loan Amounts available depending on your earnings & approval</i>				
		\$100	\$200	\$300	\$400	\$500
<i>Term in Days</i>	<i>Annual Percentage Rate</i>	<i>Finance Charge</i>				
4	1825.00%	\$20	\$40	\$60	\$80	\$100
5	1460.00%	\$20	\$40	\$60	\$80	\$100
6	1216.67%	\$20	\$40	\$60	\$80	\$100
7	1042.86%	\$20	\$40	\$60	\$80	\$100
8	912.50%	\$20	\$40	\$60	\$80	\$100
9	811.11%	\$20	\$40	\$60	\$80	\$100
10	730.00%	\$20	\$40	\$60	\$80	\$100
11	663.64%	\$20	\$40	\$60	\$80	\$100
12	608.33%	\$20	\$40	\$60	\$80	\$100
13	561.54%	\$20	\$40	\$60	\$80	\$100
14	521.43%	\$20	\$40	\$60	\$80	\$100
15	486.67%	\$20	\$40	\$60	\$80	\$100
16	456.25%	\$20	\$40	\$60	\$80	\$100
17	429.41%	\$20	\$40	\$60	\$80	\$100
18	405.56%	\$20	\$40	\$60	\$80	\$100

28. The effective annual interest rate charged by Quik Payday for Payday Loans in its Canadian operations is even higher than the American APR published by the Defendants, set out above.

29. By the Defendants' own calculations, under no circumstances is the Interest charged by Quik Payday to the Class at less than the criminal rate. The Defendants have and continue to knowingly charge a criminal rate of interest and have received illegal Interest in relation to all of the Payday Loans they have advanced since Quik Payday commenced carrying on business in Canada.

Mr. Joseph's Payday Loans

30. In or around April 2004, Mr. Joseph applied online for a Payday Loan from Quik Payday. He filled in the necessary information on the online application form and faxed copies of the requisite documents to Quik Payday. He received e-mail confirmation that he had been approved for a \$300.00 Payday Loan from Quik Payday. Quik Payday indicated that the sum of \$300.00 would be deposited electronically into Mr. Joseph's chequing account and that on the due date the sum of \$375.00 would be withdrawn from that account by Quik Payday.

31. The funds never materialized in Mr. Joseph's account. Quik Payday did not make the electronic deposit. However, on or about April 7, 2004 the sum of \$375.00 was automatically withdrawn by Quik Payday from Mr. Joseph's chequing account. Mr. Joseph contacted Quik Payday and informed it of this. On or about April 12, 2004 Quik Payday electronically deposited the sum of \$300.00 into Mr. Joseph's account. It retained the Interest charge of \$75.00 despite the fact that it failed to advance the credit as promised.

32. In or around May 2004, Mr. Joseph applied for a second Payday Loan from Quik Payday. He was approved and on May 27, 2004 and Quik Payday deposited the

principal sum of \$500.00 into Mr. Joseph's chequing account. Quik Payday charged the sum of \$25.00 per \$100.00 borrowed for a total Interest charge of \$125.00. On or around June 2, 2004 Quik Payday attempted to withdraw the sum of \$625.00; however, there were insufficient funds in Mr. Joseph's account and the transaction was denied by Mr. Joseph's bank. Quik Payday levied the \$20.00 late payment administration fee and on June 18, 2004 endeavoured to withdraw the sum of \$645.00 from Mr. Joseph's account. Again, there were insufficient funds. Mr. Joseph denies that either the principal or Interest is payable to Quik Payday, as the Payday Loan is illegal and was formed by Quik Payday for the primary purpose of charging and receiving criminal interest in contravention of the *Criminal Code*.

Defendants' Liability

33. Since the dates of their respective incorporations, the corporate Defendants have profited illegally at the expense of Mr. Joseph and other members of the Class. Quik Payday and Quik Payday U.S.A. have charged and received Interest at a criminal rate, contrary to the provisions of the *Criminal Code*.

34. The individual Defendants have conspired with the corporate Defendants, as referenced above. They have received payments of salary, bonuses, dividends, directors fees, and other remuneration (the particulars of which are not known by the Plaintiff, but are known by the Defendants) knowing such payments to be the proceeds of a crime, having been obtained or derived directly or indirectly from a breach of s. 347 of the *Criminal Code*.

35. The aforesaid payments were made by the corporate Defendants to the individual Defendants, at the direction of the individual Defendants and with the intent to conceal or convert the illegal Interest. The Defendants have therefore breached s. 462.31(1) of the *Criminal Code* and the individual Defendants must disgorge all payments received by them that are derived directly or indirectly from the Interest paid on Payday Loans by the Class.

36. On behalf of the Class, Mr. Joseph claims that the Payday Loans are illegal and unenforceable and claims damages being the aggregate of all Payday Loans, including principal and Interest paid or payable by the members of the Class.

37. In the alternative, Mr. Joseph claims damages in the amount of the aggregate Interest paid or payable by the members of the Class on Payday Loans.

Unjust Enrichment, Restitution and Constructive Trust

38. The aggregate amount of Interest received by the Defendants from the members of the Class is not known to the plaintiff but is known to the Defendants. The Defendants have been unjustly enriched by the receipt of this sum from the members of the Class.

39. The members of the Class have suffered a corresponding deprivation.

40. There is no juristic reason for the Defendants to retain the Interest. The Defendants should not be allowed to retain the Interest, as they received it in direct contravention of the *Criminal Code*.

41. The Defendants hold the Interest pursuant to a constructive trust for the benefit of the Class. The Class is therefore entitled to an accounting and restitution of the Interest paid to the Defendants.

42. In the alternative, Mr. Joseph pleads that justice and good conscience requires the Defendants to hold the Interest in trust for the members of the Class.

43. The Defendants are constituted as constructive trustees in favour of the members of the Class because, *inter alia*:

- (a) the integrity of the marketplace would be undermined if the court did not impose a constructive trust;
- (b) the members of the Class have suffered a loss and the Defendants have been unjustly enriched;
- (c) the Interest was paid in such circumstances that the Defendants may not, in good conscience, retain it;
- (d) the Interest was derived from arrangements or agreements which required payment to the Defendants of interest at a criminal rate;
- (e) the Defendants received the Interest contrary to the provisions of the *Criminal Code*;
- (f) there are no factors which rendered the imposition of a constructive trust unjust in this case.

Unpaid Payday Loans are Illegal, Void and Unenforceable

44. All members of the Class who have Payday Loans with the Defendants that are outstanding or overdue, in whole or in part, are not required to pay the Defendants any

sums allegedly owing, including principal or Interest, because the purpose and intent of the Payday Loans is to charge, and receive from the Class, Interest at a criminal rate, contrary to the provisions of the *Criminal Code*. Alternatively, the members of the Class with outstanding Payday Loans with the Defendants are only required to repay the principal and are not required to repay any Interest associated with the Payday Loans.

Punitive or Exemplary Damages

45. The Payday Loan agreements are intentionally misleading, and worded in such a way as to intentionally deceive the Class with respect to the actual cost of borrowing that they incur when entering into a Payday Loan and the lawfulness of the Interest charges.

46. The conduct of the Defendants in advancing Payday Loans to the members of the Class on terms which contravene the *Criminal Code* and by receiving, or attempting to receive, Interest in contravention of the *Criminal Code*, pursuant to contracts that are materially misleading in nature and which were intended to and, in fact, did exploit the economic vulnerability of the members of the Class, including Mr. Joseph, and which, on their face, purported to shift the burden of remedying the Defendants' criminal conduct onto the members of the Class, is conduct of such a high-handed and scandalous nature that it offends the moral standards of the community and is deserving of the condemnation of this Honourable Court by an award of punitive and/or exemplary damages. On behalf of the Class, the Plaintiff seeks punitive and/or exemplary damages in the amount of \$30,000,000.00, or such other sum as this Honourable Court deems appropriate.

Administration Costs

47. Further, Mr. Joseph and the other members of the Class are entitled to recover as damages or costs, in accordance with the *Class Proceedings Act*, the costs of administering the plan for distribution of the judgment in this action.

General

48. The Plaintiff, on behalf of the members of the Class, pleads and relies on the provisions of the *Class Proceedings Act, 1992*, R.S.O. 1992, c.6, the *Criminal Code of Canada*, R.S.C. 1985, c.C-46, and the *Courts of Justice Act*, R.S.O. 1990, c.43.

Service Outside of Ontario

49. This originating process may be served on the Defendants Quik Payday, Quik Payday U.S.A., David M. Dunkley and Linda Miller without Court Order outside Ontario in that the claim is:

- (a) in respect of a contract made in Ontario (Rule 17.02(f));
- (b) in respect of a tort committed in Ontario (Rule 17.02(g));
- (c) in respect of damages sustained in Ontario arising from a tort or breach of contract wherever committed (Rule 17.02(h));
- (d) for an injunction ordering a party to refrain from acting in Ontario (Rule 17.02(i));
- (e) these Defendants are necessary and proper parties to the proceeding (Rule 17.02(o));
- (f) against a person carrying on business in Ontario (Rule 17.02(p)).

50. Mr. Joseph proposes that this action be tried at Toronto, Ontario.

January 28, 2005

**PALIARE ROLAND ROSENBERG
ROTHSTEIN LLP**

Barristers
Suite 501
250 University Ave.
Toronto, ON M5H 3E5

Margaret Waddell (LSUC #29860U)
Tel: (416) 646-4329
Fax: (416) 646-4301

Odette Soriano (LSUC #37326J)
Tel: (416) 646-4306
Fax: (416) 646-4307

Solicitors for the Plaintiff

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