IN THE SUPREME COURT OF FLORIDA

CASE NUMBER 96,384



FRANKENMUTH MUTUAL INSURANCE COMPANY, a Michigan Corporation,

Plaintiff- Appellant,



v.

ERNIE LEE MAGAHA, as Clerk of Court of Escambia County, Florida and as Successor to Joe A. Flowers, Comptroller, Escambia County, and ESCAMBIA COUNTY, FLORIDA,

Defendants-Appellees,

**ON CERTIFIED QUESTIONS FROM THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT (Case Number 98-2962)**

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# INITIAL BRIEF OF FRANKENMUTH MUTUAL INSURANCE COMPANY

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## CERTIFICATE OF TYPE SIZE AND STYLE

The text of this brief contains 14 point proportionately spaced Times New Roman.

## TABLE OF CONTENTS

PAGE

PAGE

PAGE

PAGE

PAGE

## TABLE OF CITATIONS

**CASES** **PAGE**

**CASES** **PAGE**

**CASES** **PAGE**

**CASES** **PAGE**



**CONSTITUTIONS**

**STATUTES** **PAGE**



OTHER AUTHORITY

## STATEMENT OF THE CASE AND THE FACTS

This suit was filed on September 6, 1995, to obtain a declaration of the validity of certain local government equipment financing leases owned by Frankenmuth Mutual Insurance Company ("Frankenmuth"). Vol. 1, Doc. 1. The suit was a result of the abolition of the office of Comptroller for Escambia County, Florida, by the Florida Legislature. Id. The Comptroller of Escambia County, Florida, originally signed the equipment financing leases, received and accepted the equipment subject to the leases, and arranged for the financing of the equipment subject to the leases. Vol. 1, Doc. 1, ¶¶ 2-4, 11; Vol. 2, Doc. 95 (Joseph A. Flowers, Nov. 1995 deposition) pp. 20, 31-32, 35-36, 73, 76-77, 86, 90, and 113-114.[1]

Once the Florida Legislature abolished the Comptroller's office, no entity expressly assumed responsibility for the obligations under the leases. Vol. 2, Doc. 94, (Stephans Affidavit) ¶ 17 (Claramunt Affidavit) ¶ 16. The equipment subject to the leases has been retained and used by Escambia County and Ernie L.

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[1] Factual statements supported by reference to a specific portion of the Complaint, unless otherwise noted, shall mean both the Appellees admitted the substance of the factual statement.

Magaha, the Clerk of the Circuit Court for Escambia County, Florida ("Magaha"), to perform governmental functions for the benefit of the county and its residents. Vol. 2, Doc. 93 (Appen. Doc. 7), pp. 2-3. Escambia County advised Frankenmuth prior to suit that it viewed the leases as void. Vol. 1, Doc. 1, ¶ 14. Frankenmuth brought suit against Escambia County and Magaha, as it deemed them to be responsible on the leases after the Comptroller's office was abolished.

While acting in his official capacity as Comptroller of Escambia County, Florida, Joe A. Flowers ("Flowers") entered into a Master Equipment Lease Agreement, together with Addendum One, with Unisys Leasing Corporation. Vol. 1, Doc. 1, ¶ 2. Under the Master Equipment Lease Agreement, specific equipment could then be leased and financed pursuant to separate lease schedules. Vol. 1, Doc. 1, Exh. A, ¶ 1. Flowers then entered into a lease schedule to finance the acquisition of a Unisys Model A-11 computer and related equipment. Vol. 1, Doc. 1, ¶ 2 & Exh. C. Next, Flowers entered into a lease schedule to finance the acquisition of a Unisys imaging system and related equipment. Vol. 1, Doc. 1, ¶ 3 & Exh. D. Finally, Flowers entered into a lease schedule to finance the acquisition of equipment to implement a wide area network with respect to the Model A-11 computer system and to refinance the Model A-11 computer system previously

leased. Vol. 1, Doc. 1, ¶ 4 & Exh. E. The Master Equipment Lease Agreement and all lease schedules entered into pursuant to the Master Equipment Lease Agreement are referred to collectively in this brief as the "Lease."

The office of Comptroller of Escambia County, Florida, was created by special act of the Florida Legislature in 1972.[2] Subsequent to execution of the Lease, the Florida Legislature abolished the Comptroller's office by special act effective August 1, 1995. The act abolishing the office of Comptroller of Escambia County made no specific provision for assumption or other satisfaction of liabilities or obligations incurred by the Comptroller.

The preamble to the act originally creating the Comptroller's office provided that the Comptroller would assume certain of the duties performed by the Clerk of the Circuit Court. This division of duties is specifically allowed by the Florida Constitution. Fla. Const. art. V, § 16, art. VIII, § 1(d). Although the act abolishing the Comptroller's office did not specifically so provide, it was inferred by Frankenmuth that upon abolition of the Comptroller's office the duties and responsibilities of the office are returned to the Clerk of the Circuit Court for

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[2] The acts of the Florida Legislature and the significant Florida constitutional and statutory provisions referenced in this Brief will be supplied to the Court in a separate pamphlet with the Reply brief.

Escambia County, Florida. Magaha, as Clerk of the Circuit Court, has admitted that duties of the Comptroller's office were returned to his office upon abolition of the Comptroller's office. Vol. 1, Doc. 13, p. 3.

The Board of County Commissioners of Escambia County, Florida, and Magaha entered into a Memorandum of Understanding dated July 27, 1995. Vol. 2, Doc. 93 (Appen. Doc. 7). In the Memorandum, the Board of County Commissioners agreed to operate, maintain, and manage the "data processing" function previously performed by the Comptroller's office. Vol. 2, Doc. 93 (Appen. Doc. 7), p. 2. Data processing was then defined to include the ownership, operation, and custody of the Unisys A-11 system, including system hardware and related peripheral devices. Id. Magaha, as the Clerk of the Circuit Court, was to maintain custody of and responsibility for the imaging system. Id. at p. 3. Although this equipment, which is subject to the Lease, was retained and used by Magaha and Escambia County, scheduled rental payments under the Lease were not made. Vol. 2, Doc. 94, (Stephans Affidavit) ¶ 17 (Claramunt Affidavit) ¶ 16.

Paragraph 21 of the Master Equipment Lease Agreement provides a mechanism by which a government lessee may terminate its obligation to make rental payments under the Lease for future fiscal years. Vol. 1, Doc. 1, Exh. A. This mechanism is commonly referred to as a "nonappropriation clause." The

nonappropriation clause requires written notice from the lessee that the lessee has been unable to obtain an appropriation of funds to pay rental payments under the Lease or a return of the equipment by lessee upon exhaustion of authorized funding. Id. at ¶ 21. There is no evidence in this case that either Flowers, Escambia County or Magaha provided appropriate notice to Frankenmuth or any other person or entity with respect to an intent not to appropriate funds under the Lease or that any of the equipment subject to the Lease was returned. The nonappropriation clause also contains a provision in which the lessee agrees, in the event of nonappropriation, not to substitute similar computer equipment for the balance of the appropriation period for which funds are not appropriated and for the succeeding appropriation period. Id.

Upon the close of discovery, Frankenmuth, Escambia County, and Magaha moved for summary judgment. Vol. 2, Doc. 92, 96, 103. The federal district court entered a summary judgment and declaration of contractual rights. Vol. 4, Doc. 140. In this order, the district court determined Escambia County ratified the Lease and ruled that Escambia County should be considered the lessee. Id. at p. 10. The court then declared the Lease valid, with the exception of the equipment nonsubstitution provision contained in the nonappropriation clause. Id. at pp. 17-18. The court expressly denied Frankenmuth's requested relief against Magaha. Id. at p. 17. The district court confirmed its rulings on motions for summary

judgment in the final judgment entered by the court on June 8, 1998. Supp. Vol. 1, Doc. 216.

Both Escambia County and Magaha contended the inclusion of the equipment nonsubstitution provision elevated the Lease to the status of bonded indebtedness with a maturity in excess of twelve months. Vol. 2, Doc. 96, pp. 20-23; Vol. 2, Doc. 103, p. 1. Escambia County and Magaha then argued that, because the Lease should be treated as bonded indebtedness, it required approval of the voters of Escambia County, Florida. Id. The district court agreed with this reasoning, but determined that the Lease was valid in the absence of the nonsubstitution provision. Vol. 4, Doc. 140, pp. 10-18. Accordingly, the court struck that provision from the Lease and determined the Lease was otherwise enforceable against Escambia County.

Both Escambia County and Magaha also argued before the district court that the Lease was not valid because Flowers failed to obtain approval from the County prior to entering into the Lease. Vol. 2, Doc. 96, pp. 19-20; Vol. 2, Doc. 103, p. 1. There being no dispute in the material facts presented to the district court on the issue of ratification, the court ruled on the totality of the evidence that the Lease was ratified by Escambia County. Vol. 4, Doc. 140, p. 10.

Frankenmuth initiated an appeal of the district court's final order with respect to its rulings on the motions for summary judgment. The appeal was taken both

with respect to certain of the district court's rulings as to Escambia County and with respect to the ruling as to Magaha's liability under the Lease. Escambia County filed a cross-appeal with the Eleventh Circuit. This case has been fully briefed to the Eleventh Circuit and oral argument before the Eleventh Circuit was held in June 1999. Subsequent to oral argument, the Eleventh Circuit certified the two questions now presented to this court.

## SUMMARY OF THE ARGUMENT

The Eleventh Circuit Court of Appeals has certified to this Court two questions, both of which center around the authority of the various Florida counties to enter into contracts. The first question certified addresses by what means ratification of a contract by a county can occur. A co-related question, which was not certified by the Eleventh Circuit but which may be properly addressed by this Court as it has been briefed by the parties, is the extent to which a Florida constitutional officer, such as the former Comptroller of Escambia County, Florida, has the independent authority to enter into contracts without first seeking approval from the County. The second question certified addresses the propriety of utilizing equipment nonsubstitution provisions in county leases.

A contract with a Florida county must be approved. There is no requirement in Florida law that approval be by "formal resolution." Florida courts have recognized that the acts intended by county commissioners may have to be gleaned from the totality of the circumstances presented in a particular case. Accordingly, reason and common sense must guide the courts in reviewing the actions of a county commission to determine whether a particular action or contract was approved or ratified. Based on the totality of facts presented to the federal district court in this case, that court correctly concluded that the actions taken by Escambia

County with respect to the Lease resulted in a ratification of the Lease by the County.

Also important to the inquiry presented in this case is whether Escambia County was required to approve the Lease prior to it becoming effective, as the Lease was executed by the former Comptroller for Escambia County, Florida. County Comptrollers are constitutional officers. They are granted a portion of the sovereign power, and the Comptroller has the authority to execute contracts in carrying out the duties of their office. This lawsuit was precipitated by the Florida Legislature's abolishment of the office of Escambia County Comptroller. Once a Comptroller's office is abolished, the duties and responsibilities of that office must return to the Clerk of the Circuit Court under the Florida Constitution. Since the Clerk of the Circuit Court of Escambia County, Florida, is the constitutional successor to the former Escambia County Comptroller, the Clerk of the Circuit Court should be responsible under the Lease.

Regardless of this Court's decision with respect to the independent power of the Comptroller to enter into the Lease, the second certified question is relevant, since Escambia County elected to take control over certain of the equipment subject to the Lease and since the federal district court found the Comptroller was acting as the County's agent when he entered the Lease. The second certified question can be answered in the negative, because a non-charter county, such as

## I. THE FIRST QUESTION CERTIFIED TO THIS COURT IS NOT DETERMINATIVE OF THIS CAUSE, AS THE FEDERAL DISTRICT COURT CORRECTLY DETERMINED THAT SECTION 125.031, FLORIDA STATUTES, DID NOT PREVENT RATIFICATION OF THE LEASE.

The first certified question, as phrased by the Eleventh Circuit, is misleading. Thus, it must first be recognized that section 125.031, Florida Statutes, does not require approval of a Board of County Commissioners for "certain lease purchase agreements." Rather, that section serves to restrict the otherwise broad home rule powers of a non-charter county to contract pursuant to the powers generally enumerated in section 125.01, Florida Statutes[3]. All contracts with Florida counties must be approved in some fashion, and a determination whether Escambia County ratified the Lease does not hinge on the application of section 125.031. In fact, the federal district court specifically addressed the application of section 125.031, and properly determined that section 125.031 did not prevent ratification of the Lease. Vol. 1, Doc. 22 , pp. 4-6.

[3] The home rule powers of a non-charter county are discussed further at pages 23 through 29 of this brief.

Since section 125.031 does not control ratification of the Lease and it is not determinative of this cause, this Court should decline to exercise jurisdiction over the first question posed by the Eleventh Circuit. See Fla. Const. art. V, § 3(b)(6) (1968). In the event the question is to be addressed by this Court in some form, the true question is simply whether Escambia County's actions served to ratify the Lease. But, it is also important that the first question certified by the Eleventh Circuit assumes that the County was required to approve the Lease in the first instance—a proposition with which Frankenmuth does not agree.

The first certified question assumes that the former Comptroller of Escambia County, Florida, lacked the independent authority as a constitutional officer to enter the Lease. This is an issue which has been briefed both to the federal trial and appellate courts, but which has not been directly answered. Since the issue has been briefed by the parties and the answer to the question may be determinative of the issues involved in this case, this Court should consider addressing this issue as well, even though it was not certified by the Eleventh Circuit. See Savona v. Prudential Ins. Co. of America, 648 So.2d 705 (Fla. 1995).

## II. REASON AND COMMON SENSE MUST GUIDE THE COURTS REVIEW OF ACTIONS TAKEN BY A FLORIDA COUNTY WHICH ARE CLAIMED TO RESULT IN RATIFICATION OF A CONTRACT OR OTHER ACTION.

Section 286.011(1), Florida Statutes, provides that county commission meetings are public meetings, and that resolutions or formal actions are not binding unless made at such meetings. Neither this section nor any case interpreting this section holds that a county cannot ratify a contract. Further, whether action taken at a county commission meeting is made clear by the record of the meeting is irrelevant, as the practical effect of a commission's actions can be considered in determining whether ratification of a matter has occurred. See Panama City v. T & A Utilities Contractors, 606 So.2d 744 (lst DCA 1992), rev. denied, 618 So.2d 211 (Fla. 1993) (thc court assumed that city manager lacked actual authority to terminate a contract, but concluded that City ratified the manager's act by awarding the contract to complete project there at issue after city manager explained that contractors were terminated); see also Ramsey v. City of Kissimmee, 149 So. 553 (Fla. 1933) (the rights of creditors dealing with local government cannot be prejudiced by neglect of local governing body to keep the proper minutes showing its own proceedings, and what was actually done by local governing body may be shown by evidence outside the record kept by the local governing body).

It is appropriate to use "reason and common sense" in determining what was intended by the actions of a local governing body. Panama City, 606 So.2d at 747. A reasonable and common sense review by a court of the totality of the actions undertaken by a unit of government when determining whether those actions permit a finding of ratification of some separate act or contract is likely the most definite standard which can be enunciated for the guidance of future courts.

When applying the standard of reason and common sense to the undisputed facts which bear on the issue of Escambia County's ratification of the Lease, it was clearly appropriate for the federal district court to determine ratification of the Lease had occurred. It is undisputed the following occurred with respect to the Lease and the equipment subject to the Lease[4]:

1. Comptroller Joe Flowers writes letter of August 3, 1993, to then Chairman of Escambia County Board of County Commissioners explaining that Comptroller's Office was developing a central data processing center for Escambia County. The letter noted

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[4] The referenced acts were summarized in a statement of material facts provided for the District Court's consideration in ruling on Motion for Summary Judgement as required by the District Court's Scheduling Order entered in this case. See Vol. 2, Doc. 99.

implementation of the plan began in September 1992 and was completed in February 1993 with the installation of the Unisys A-11 mainframe computer. Vol. 2, Doc. 95 (Joseph A. Flowers, Nov. 1995 deposition) pp. 32-33, & Exh. 41. The Unisys A-11 is subject to the Lease;

2. Joe Flowers writes correspondence dated May 26, 1994, to the then Chairman of Escambia County Board of County Commissioners to update the Board on Comptroller's work in establishing computer networks. Vol. 2, Doc. 95 (Joseph A. Flowers, Nov. 1995 deposition) pp. 34-35, & Exh. 42. The correspondence states that Comptroller's Office upgraded its computer system with its existing vendor, Unisys, to purchase hardware and software needed to implement a network. Flowers letter also questioned whether it would be wise for the County Commissioners to continue development of a network then under discussion by the County;

3. Minutes of County Commissioners meeting on May 26, 1994, show that the May, 1994, letter from Flowers was discussed. One Commissioner expressed disappointment the Board had taken steps with another consultant without integrating into an already instituted system in the County. Another Commissioner expressed concern that

the Comptroller's Office had undertaken the project without bringing the Board up to date on the details. Vol. 2, Doc. 93 (Appen. Doc. 1);

4. County Administrator's June 1994 report to the Board of County Commissioners noted that County Administrator's Office had met with Comptroller staff and *it was decided* the Board of County Commissioners departments should capitalize on Comptroller's information system and take advantage of the opportunity to participate in computer network as proposed by the Comptroller. Vol. 2, Doc. 93 (Appen. Doc. 2). Board of County Commissioners *voted in favor* of staff's position to proceed with development and implementation of Board of County Commissioners technology plan, as amended, at June 28, 1994, meeting of the Board. Vol. 2, Doc. 93 (Appen. Doc. 3);

5. Joe Flowers testified he made yearly budget requests to the Board of County Commissioners for the scheduled Lease payments and that the payments were always included in the budget approved by the Board. Vol. 2, Doc. 95 (Joseph A. Flowers, Nov. 1995 deposition) pp. 20, 31-32, 35-36, 73, 76-77, 86, 90, 113-114;

6. At a February 23, 1995, Board of County Commissioners forum there was a discussion regarding the Comptroller's computer

equipment. Vol. 2, Doc. 93, (Appen. Doc. 6). The County's then independent computer consultant suggested the Board obtain an alternate computer system. Id., p. 13. One Commissioner expressed concern that if a decision with respect to the system was not made soon, the County could be deemed to have ratified the existing system. Id., p. 16; and

7. A memorandum of understanding between the Board of County Commissioners and Ernie Lee Magaha, as Clerk of Court, and dated July 27, 1995, was executed. Vol. 2, Doc. 93 (Appen. Doc. 7). In the memorandum, the *Board agreed to operate, maintain, and manage the "data processing" function* previously performed by the Comptroller's Office. Data processing was then defined to include the ownership, operation, and custody of the Unisys A-11 system. Id., p. 2. The Clerk of Courts was to maintain custody of and responsibility for the imaging system. Id., p. 3.

The federal district court's ruling on summary judgment shows that the court considered carefully the actions taken by Escambia County with respect to the Lease. Vol. 4, Doc. 140, pp. 6-10. The district court clearly indicated to Escambia County in its prior ruling on Escambia County's Motion to Dismiss in this case that ratification of the Lease could occur if the proper factual showing was made. Vol.

1, Doc. 22, pp. 4-6. Applying a standard of reason and common sense, the undisputed facts show that ratification of the Lease by Escambia County occurred. On at least two occasions, the Escambia County Commission took action at public meetings which lead to the inescapable conclusion that the Commissioners were in favor of retaining and using the equipment subject to the Lease for the benefit of Escambia County and its citizens . See points 4 and 7 supra pp. 16 - 17.

## III. WHETHER RATIFICATION OF THE LEASE BY ESCAMBIA COUNTY OCCURRED IS IRRELEVANT, AS ERNIE L. MAGAHA, THE CLERK OF THE CIRCUIT COURT FOR ESCAMBIA COUNTY, FLORIDA, AND SUCCESSOR UNDER THE FLORIDA CONSTITUTION, TO THE FORMER COMPTROLLER OF ESCAMBIA COUNTY, FLORIDA, IS LIABLE FOR THE LEASE AFTER ABOLITION OF THE COMPTROLLER'S OFFICE BY THE FLORIDA LEGISLATURE.

The federal district court did not directly address, and neither did the Eleventh Circuit allude to in its certification opinion, the issue whether Joe Flowers, as Comptroller of Escambia County, Florida, had the independent authority to enter the Lease. In focusing on Escambia County's liability on the Lease, the district court held that Flowers merely acted as an agent for Escambia County in executing the Lease. A related issue raised by Frankenmuth was whether Flowers' constitutional successor in office, Magaha, became responsible for the

Lease.[5] The district court avoided this issue by stating simply that, because of its conclusions with respect to Escambia County, it would not address the issues presented by Frankenmuth as to Magaha. Vol. 4, Doc. 140, p. 17. This ruling was the basis for the district court granting summary judgment to Magaha, and the court found Magaha had no contractual obligation to Frankenmuth. Id. While this issue was not certified by the Eleventh Circuit, it was briefed and argued by the parties and Magaha is a party to the appeal pending before the Eleventh Circuit. This Court may wish to consider the issue of Flowers' independent authority to enter the Lease, as this issue could be determinative of the issues presented to this Court by the Eleventh Circuit.

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[5] While the Florida Legislature made no express provision for satisfaction of the outstanding obligations of the Comptroller's office when it abolished that office, the Florida Legislature cannot unilaterally extinguish the valid obligations of the Comptroller's office. U. S. Const. art. I, § 10; Fla. Const. art. I, § 10 (states shall make no law impairing obligations of contracts); State v. Leavins, 599 So.2d 1326 (Fla. 1st DCA 1992) (state may not abridge contract rights by passage of special legislation); Anders v. Nicholson, 150 So. 639, 641 (Fla. 1933) (constitutional restrictions on impairment of contract apply to contracts with states and municipalities).

Mr. Flowers testified that the Comptroller's office used computer equipment for many years prior to the Lease, and he further testified computer equipment was needed in the performance of his job. Vol. 2, Doc. 95 (Joseph A. Flowers, Nov. 1995 deposition), pp. 6-10. Case law in Florida strongly suggests that Flowers, while acting as Comptroller of Escambia County, Florida, had the necessary authority to undertake and assume obligations in his office that furthered his ability to fulfill the statutory and constitutional obligations of the office of Comptroller of Escambia County. See Ginsberg v. City of Daytona Beach, 137 So. 253 (Fla. 1931) (power of municipality to enter into contract and note to pay for improvement may be implied as a necessary incident to power conferred to construct the improvement); see also Alachua County v. Powers, 351 So.2d 32, 42 (Fla. 1977) (the Clerk of Circuit Court, the Comptroller's alter ego, is a county officer and is delegated a portion of the sovereign power); Times Publishing Co. v. Ake, 645 So.2d 1003 (2nd DCA 1994), aff'd, 660 So.2d 255 (Fla. 1995) (when the Clerk of the Circuit Court is performing the duties which may be delegated to a Comptroller, the Clerk is an "autonomous elected county officer"). If Flowers was an autonomous officer with sovereign powers, then approval of the Lease by Escambia County was not required.

Upon abolition of the Comptroller's office, the Clerk of the Circuit Court is constitutionally required to assume the duties delegated to the Comptroller. Fla.

Const. art. V, § 16; art. VIII, § 1(d). Magaha cannot question the fact the duties previously delegated to the Comptroller's office are returned to him as Clerk of the Circuit Court of Escambia County, Florida, upon abolition of the Comptroller's office. Indeed, Magaha admits that he is responsible for the former Comptroller's duties. Vol. 1, Doc. 13, p. 3.

Magaha cannot accept the duties and eschew the responsibilities and obligations created by the Comptroller's office prior to abolition of that office. The Lease states it is binding on the lessee's successors. Vol. 1, Doc. 1, Exh. A ¶ 34. Florida law also provides that the Lease is binding on Magaha as Flowers' successor in office. See Scherer v. Laborers' Int'l Union, 746 F.Supp. 73, 85 (N.D. Fla. 1988) (general rule on corporate mergers is surviving entity acquires all rights and assets and also becomes responsible for the liabilities and obligations of the merged entity); Gleason v. Leadership Housing, Inc., 327 So.2d 101 (Fla. 4th DCA 1976) (successor organization is estopped to take position inconsistent with that taken by its predecessor). Accordingly, Magaha, as the successor to the Comptroller of Escambia County, should be directly liable on the Lease.

## IV. THE ANSWER TO THE SECOND CERTIFIED QUESTION IS IN THE NEGATIVE, AS THE LEASE DOES NOT IMPLICATE THE PROVISIONS OF ARTICLE VII, SECTION 12 OF THE FLORIDA CONSTITUTION AND THE LEGISLATURE HAS NOT SEEN FIT TO RESTRICT THE USE OF NONSUBSTITUTION PROVISIONS IN CONTRACTS ENTERED INTO BY FLORIDA COUNTIES.

The simple answer to the second certified question is no, at least with respect to Florida counties. That conclusion is compelled by the existence of broad home rule powers for non-charter counties, see infra pages 23 through 29, and the fact ad valorem revenues were not pledged to service the Lease, which is recognized in the certified question. The provisions of Article VII, section 12 of the Florida Constitution have no direct bearing on the issue presented to this Court by the second certified question. Reaching this conclusion is complicated, however, by various bonding cases interpreting the provisions of the Constitution of 1885 and the current Constitution of 1968. The pertinent provision of the 1968 Constitution addresses financing where there is both a commitment of ad valorem taxes and the existence of an obligation maturing more than twelve months after issuance. Since ad valorem taxes are not pledged for servicing this Lease, Article VII, section 12 is not relevant and, likewise, the length of the obligation under the Lease is irrelevant for constitutional purposes.

Much has been written by all involved in this case regarding the powers of a Florida county to agree to equipment nonsubstitution provisions in lease agreements. The federal district court incorrectly determined that counties could not make use of equipment nonsubstitution provisions in lease agreements, and its rationale was rooted in its interpretation of Article VII, section 12 of the Florida Constitution. In discussing further the reasons why Article VII, section 12 is not violated by a county's use of an equipment nonsubstitution provision in a lease, it is important first to discuss the powers to contract granted to the individual counties by the State of Florida.

## V. NON-CHARTER COUNTIES IN FLORIDA ARE GRANTED BROAD POWERS OF SELF GOVERNMENT BY CHAPTER 125, FLORIDA STATUTES, AND THE POWER TO ENTER LEASES HAS NOT BEEN RESTRICTED SO AS TO EXCLUDE THE USE OF A NONSUBSTITUTION PROVISION IN A COUNTY LEASE.

Non-charter counties in Florida, such as Escambia County, have been granted broad powers of self government by the Florida Legislature in section 125.01, Florida Statutes. In Santa Rosa County v. Gulf Power Co., 635 So.2d 96 (1st DCA), cause dismissed sub nom., Escambia River Electric Coop., Inc. v. Santa Rosa County, 641 So.2d 1345 (Fla. 1994), rev. denied, 645 So.2d 452 (Fla. 1994), a case to which Escambia County was a party, the powers of a county to act

without specific approval from the Florida Legislature were addressed. The First District Court of Appeal held that counties are empowered to carry on county government pursuant to the powers enumerated under section 125.01, Florida Statutes, as long as they do not act inconsistently with other general or special laws.

Florida counties have been given an extremely broad grant of power by the Florida Legislature to enter into contractual obligations and to lease personal property. Fla. Stat. § 125.01(3)(a)(1995). With respect to counties, the Florida Legislature has seen fit to enact only a very general restriction on the ability to enter into leases, and the restriction addresses primarily the use of funds arising from ad valorem taxation as a payment source for certain leases. Fla. Stat. § 125.031 (1995). Nowhere is there a restriction on the inclusion or use of equipment nonsubstitution provisions in county leases.

Section 125.031, Florida Statutes, limits the otherwise broad powers of a county to contract by restricting counties to the use of leases with terms which do not exceed thirty years. A county's broad powers to contract are again confirmed by this provision, because a county is otherwise given the power when leasing to "make all other contracts or agreements necessary or convenient." Fla. Stat. § 125.031 (1995). When this provision is considered in light of a county's broad grant of home rule powers, section 125.031 represents an exceedingly broad confirmation by the Florida Legislature of a county's rights with respect to leasing.

Absent a pledge of ad valorem revenue to satisfy lease obligations, which, as noted by the second certified question, did not occur in this instance, there is no further legislative impediment to a county's broad home rule powers[6]. Thus, counties are free to exercise their business judgment, without judicial intervention, to enter into government equipment financing lease agreements containing equipment nonsubstitution provisions. See State v. City of Sunrise, 354 So.2d 1206 (Fla. 1978) (ultimate fiscal responsibility for decisions on governmental projects does not lie with the judiciary).

## VI. THE FLORIDA LEGISLATURE HAS SEEN FIT TO RESTRICT THE USE OF NONSUBSTITUTION PROVISIONS IN COUNTY SCHOOL BOARD LEASES, AND THIS COURT MUST NOT LEGISLATE ON THE ISSUE WHETHER COUNTIES SHOULD BE ALLOWED TO UTILIZE EQUIPMENT NONSUBSTITUTION PROVISIONS IN COUNTY LEASES.

Because Florida counties have broad powers to contract, and restrictions with respect to a county's ability to enter into leases are limited, this Court should find, based on the Santa Rosa County v. Gulf Power Company decision, that Escambia County had the authority to enter a lease with an equipment nonsubstitution provision. This finding is virtually compelled by the absence of an

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[6] The concerns raised by the Eleventh Circuit with respect to the Florida Constitution will be addressed at pages 29 through 39 of this brief.

express legislative prohibition to the contrary. In determining that no such legislative prohibition exists as to Florida counties, this Court should make reference to the statute specifically prohibiting school boards from reaching agreements containing nonsubstitution provisions, as this Court has adopted that approach to statutory interpretation in numerous other cases. Goldstein v. Acme Concrete Corp., 103 So.2d 202 (Fla. 1958) (in determining whether defendant was subcontractor for purposes of Florida Workmen's Compensation Act, court referred to Florida mechanics' lien statute definition of "materialmen," noting that chapters were *in pari materia* in a broad sense and that understanding of one could aid in the interpretation of the other); State ex rel. May v. Fussell, 24 So.2d 804 (Fla. 1946) (finding that separate statutory provisions relating to compensation of circuit court clerks, county judges, and justices of the peace were sufficiently related that they must be construed *in pari materia* in addressing county judge's request for payment of daily fee in attending court); Estate of Watkins v. Crawford, 75 So.2d 194 (Fla. 1954) (referring to numerous statutes and, in particular, Florida criminal statutes related to forgery, in interpreting provisions governing execution of will in Florida probate code).

The Florida Legislature specifically prohibited the use of nonsubstitution provisions in leases entered into by county school boards. Fla. Stat. § 235.056(2)(c)(2) (1995) (formerly § 235.056(3)(b)(2)). Although this legislation

was enacted in 1987, Ch. 87-284, 1987 Fla. Laws 1, the Florida Legislature has not seen fit to prohibit the use of such clauses in leases entered into either by Constitutional officers, such as a Comptroller or the Clerks of the Circuit Courts, or by counties.

Nonsubstitution provisions are widely used in state and local government finance leases, and the Florida Legislature was obviously aware of their use as early as 1987. The Florida Legislature has addressed the use of such provisions by school boards, but has not done so with respect to counties. If the Florida Legislature had intended to prohibit the use of nonsubstitution provisions in county leases, it would have enacted legislation specifically prohibiting the use of nonsubstitution provisions in county government lease transactions. The Legislature easily could have addressed the broad statutory authorizations for contracting or leasing by county government contained in section 125.01(3), Florida Statutes. But, neither this section nor section 125.031, Florida Statutes, contains any direct restriction on the use of nonsubstitution clauses in county leases.

The Florida Legislature has not seen fit to restrict the broad contracting powers of non-charter counties so as to prohibit the use of nonsubstitution provisions in leases. It goes against all concepts of appropriate statutory construction to presume that the Florida Legislature intended to prohibit use of

nonsubstitution provisions in county leases when the Legislature addressed only leases involving school boards. See 2A Sutherland, Statutory Construction § 51.02 (5th ed. 1992) ("where a statute, with reference to one subject contains a given provision, the omission of such provision from a similar statute concerning a related subject is significant to show that a different intention existed"); Water Quality Ass'n Employees' Benefit Corp. v. United States, 795 F.2d 1303, 1307-1308 (7th Cir. 1986) (citing 2A Sutherland § 51.02 in interpreting provisions of the tax code); see also Beach v. Great Western Bank, 692 So.2d 146 (Fla. 1997), aff'd sub nom., Beach v. Ocwen Federal Bank, 523 U.S. 410 (1998)(where a legislature uses a term in one section of a statute but omits it in another, the courts will not imply it where it has been excluded); Romero v. Shadywood Villas Homeowners Ass'n, Inc., 657 So.2d 1193 (Fla. 3rd DCA 1995) (in determining effect of later enacted statute, courts are required to assume legislature passed the later statute with knowledge of prior existing laws).

It is obvious the Florida Legislature knew of the existence of equipment nonsubstitution provisions in 1987 when it enacted legislation specifically prohibiting the use of such clauses in leases entered into by county school boards. Since there is neither a general law prohibiting all Florida counties nor a special law prohibiting Escambia County, in particular, from entering into a lease containing a nonsubstitution provision, it is apparent Escambia County in fact has

the power to enter leases containing such provisions based on the clear delegation of broad contracting authority by the Florida Legislature. See Santa Rosa County v. Gulf Power Co., 635 So.2d 96 (1st DCA), cause dismissed sub nom., Escambia River Electric Coop., Inc. v. Santa Rosa County, 641 So.2d 1345 (Fla. 1994), rev. denied, 645 So.2d 452 (Fla. 1994). It would be improper for the courts to create such an exception to the broad powers of Florida counties, particularly where the Legislature is aware of the issue yet has elected not to address it through the legislative process.

## VII. THE LEASE DOES NOT SEEK TO ENCUMBER OR PLEDGE THE POWER OF AD VALOREM TAXATION IN ORDER TO SATISFY LEASE INDEBTEDNESS, AND THE LEASE THEREFORE DOES NOT RUN AFOUL OF THE RESTRICTIONS CONTAINED IN THE FLORIDA CONSTITUTION ON THE CREATION OF INDEBTEDNESS WHERE THE AD VALOREM TAXING POWER IS PLEDGED.

The Florida Constitution provides that a county, in order to finance capital projects, may use certificates of indebtedness which are payable from ad valorem taxes and which mature more than twelve months after issuance, but only upon approval of the electorate of the county. Fla. Const. art. VII, § 12. The federal district court agreed with Escambia County that the existence of an equipment nonsubstitution provision in the Lease transformed the Lease into a certificate of

indebtedness which encumbered ad valorem taxes and which required prior approval of voters in Escambia County. Vol. 4, Doc. 140, p. 11. In reaching this determination, the court concluded that the risk of nonsubstitution would "morally compel" Escambia County to appropriate funds for Lease payments and that those funds undoubtedly would come from ad valorem tax dollars. Id. at pp. 13-16. These conclusions are neither legally correct nor supported by the record before the federal district court.

The federal district court overlooked an important provision in the Lease in reaching its conclusion that the Lease improperly encumbered ad valorem taxes. The Lease specifically provides that the Lease will be paid from legally available funds other than ad valorem taxes. Vol. 1, Doc. 1, Exh. B, ¶ 1. Further, the Lease provides that the lessor shall not be able to compel the levy of ad valorem taxes. Id. Based on the plain language of the Lease, the provisions of article VII, section 12 of the Florida Constitution have no bearing on this Court's decision. Since ad valorem taxes are not pledged for servicing this Lease, article VII, section 12 has no relevance. The pertinent provision of this section of the Florida Constitution addresses financing where there is both a commitment of ad valorem taxes and the existence of an obligation maturing more than twelve months after issuance. Where, as here, ad valorem taxes are not pledged, the length of the obligation is irrelevant.

This Court consistently has held that indebtedness created by a county does not violate constitutional restrictions on indebtedness where ad valorem taxes are not pledged to satisfy the debt. E.g., State v. Alachua County, 335 So.2d 554 (Fla. 1976) (approving pledge of state revenue sharing funds and racetrack funds to secure county bonds). State v. Alachua County highlighted the danger of taking the argument of an "indirect pledge" of ad valorem tax revenues to an illogical extreme. While acknowledging that pledges of non-ad valorem revenue might bring about an increase in ad valorem taxes, this Court reaffirmed that the Florida Constitution does not require a vote of the electorate prior to pledging non-ad valorem revenues. 335 So.2d at 558. This Court likewise has recognized that the issue whether an indebtedness has been validly incurred is entirely separable from the issue whether a county later attempts improperly to utilize ad valorem taxes to satisfy the indebtedness. Sanibel-Captiva Taxpayers Ass'n v. County of Lee, 132 So.2d 334, 339 (Fla. 1961).

**A. The federal district court erred in relying on County of Volusia v. State, a factually inapposite case, to determine the Lease caused a pledge of the ad valorem taxing power in violation of the Florida Constitution.**

In reaching the conclusion that the Lease had the effect of improperly pledging ad valorem tax dollars as a source of payment, the federal district court ignored the clear precedents of the Florida Supreme Court. The lower court instead

relied primarily on the holding in County of Volusia v. State, 417 So.2d 968 (Fla. 1982), an easily distinguishable case.

Two items of particular importance existed in County of Volusia which are not present in this case. They were:

1) Volusia County pledged all legally available sources of unencumbered county revenue other than ad valorem taxes in order to secure bonded indebtedness.

2) Volusia County further promised to do all things necessary to continue to receive the non-ad valorem revenue pledged as security.

Based upon these facts, this Court reasoned that the pledge of non-ad valorem revenue, coupled with the promise by the county to continue to receive non-ad valorem revenue, would inevitably lead to higher ad valorem taxes during the life of the bonds. This Court easily distinguished its prior holdings which allowed pledges of local revenue without voter approval, even though such pledges were acknowledged by the Court to have an "incidental effect" on the exercise of the ad valorem taxing power. County of Volusia v. State, 417 So.2d 968, 971 (Fla. 1982). The Court determined Volusia County's promises led to an inescapable conclusion —— ad valorem taxes would have to be increased to provide sufficient operating revenue to maintain the various programs and services generating the non-ad valorem revenues which were promised for repayment of the bonds. Bond

validation was then denied on the grounds that Volusia County was attempting to accomplish indirectly that which it could not do directly. 417 So.2d at 971-72.

Simply put, the Lease does not seek to encumber Escambia County's ad valorem revenue, and Frankenmuth has no ability under the Lease to compel a levy of ad valorem taxes. The Florida Supreme Court has repeatedly held that such an arrangement does not require the approval of the voting public. It was entirely up to Escambia County to determine whether to utilize ad valorem taxes in order to make the Lease payments, both before and after abolition of the Comptroller's office. Even assuming Escambia County utilized ad valorem taxes to make Lease payments, the Lease is not rendered invalid. Sanibel-Captiva Taxpayers Ass'n v. County of Lee, 132 So.2d 334, 339 (Fla. 1961); see State v. School Board of Sarasota County, 561 So.2d 549, 552 (Fla. 1990) (in determining lease obligations which were to be serviced in part by ad valorem taxation did not require voter approval, the Florida Supreme Court distinguished County of Volusia and relied on lease provisions allowing yearly nonappropriation, burdened only by lease remedies).

This Court has repeatedly condemned inquiries which focus on whether an obligation could affect ad valorem taxes. Rather, the Court has limited its inquiry to whether a pledge of ad valorem revenue occurred. The Lease here clearly states that ad valorem revenue is not pledged and that Frankenmuth has no ability to

compel a levy of the ad valorem taxing power. The resolution of this issue should end the inquiry into the funding source for this Lease, as this Court has made it clear that the ultimate fiscal responsibility for decisions on governmental projects does not lie with the judiciary. State v. City of Sunrise, 354 So.2d 1206 (Fla. 1978).

Although the federal district court acknowledged that the creation of local indebtedness requires a pledge of ad valorem tax dollars before the obligation runs afoul of Article VII, section 12 of the Florida Constitution, the court relied on a factually distinguishable case in order to reach the result that the nonsubstitution provision had the inevitable effect of encumbering ad valorem tax dollars. County of Volusia is absolutely inapposite to this case, and the federal district court's conclusions regarding a violation of Article VII, section 12 are clearly erroneous when viewed in light of cases such as State v. Alachua County. State v. Alachua County, 335 So.2d 554 (Fla. 1976) (approving pledge of state revenue sharing funds and racetrack funds to secure county bonds); see also, City of Palatka v. State, 440 So.2d 1271 (Fla. 1983) (pledge of revenue sources which accounted for 49% of the City's non-ad valorem revenues produced only incidental affect on the City's ad valorem taxing power and was held not sufficient to invoke the constitutional requirement of a referendum — distinguishing County of Volusia and citing Alachua County with approval); Murphy v. City of Port St. Lucie,

666 So.2d 879 (Fla. 1995) (distinguishing County of Volusia, and noting that voter approval is not required for bond validation where the potential impact on ad valorem taxation is incidental).

**B. The federal district court's rationale would require voter approval prior to incurring any debt which could have some effect on the levy of ad valorem taxes, even though that rationale has been rejected by the Florida Supreme Court in interpreting the relevant Florida Constitutional provision.**

In further support of its conclusion that an equipment nonsubstitution provision "may" render a nonappropriation clause illusory, thus requiring voter approval of the underlying transaction, the federal district court cited Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304 (Fla. 1971). Nohrr was a proceeding to validate bonds which had not been subjected to referendum. The bonds contained provisions creating a mortgage on property proposed to be developed which would allow the bondholders to foreclose in the event of a default. This Court struck the mortgage provision from the bonds because it determined the mortgage would "morally compel" a governing body with the power of ad valorem taxation to levy taxes to avoid foreclosure in the event bond payments could not be made from non-ad valorem revenue. In essence, Nohrr prohibited the granting of a security interest in a project based on a general

concern that a governmental body with the power to levy ad valorem taxes would step in to save a project. Yet, as will be discussed next, Nohrr is not determinative of any issue presented here.

In State v. School Board of Sarasota County, 561 So.2d 549 (Fla. 1990), this Court yet again highlighted that a pledge of ad valorem taxation is required before an obligation is "payable from ad valorem taxation" within the meaning of article VII, section 12 of the Florida Constitution. 561 So.2d at 552. Perhaps more importantly, the court noted that Nohrr was decided under the predecessor to article VII, section 12 of the 1968 Constitution. 561 So.2d at 553. The predecessor to that provision is article IX, section 6 of the Constitution of 1885, as amended in 1930.

Article IX, section 6 of the 1885 Florida Constitution required a vote of the electorate upon any proposed issuance of bonds by a county. Thus, the Constitution of 1885 applied to all county bonds, irrespective whether ad valorem revenue was proposed for repayment of the bonds. The 1968 Constitution, through article VII, section 12 opened up a field of county bonding which does not require approval of the electorate.

Article VII, section 12 of the 1968 Constitution requires a vote of the electorate for bonds issued to finance or refinance capital projects when the bonds are payable from ad valorem taxation and they mature more than twelve months after issuance. Even if Nohrr's prohibition of a security interest with right of

foreclosure in a project has any continued validity to an inquiry under this provision, it can only be in situations where county bonds are proposed to be repaid from ad valorem taxation and bond maturity is in excess of twelve months. That situation does not exist here.

Nohrr and its predecessors condemned only the granting of a mortgage and right of foreclosure on the physical properties to be financed. Nohrr v. Brevard County Educational Facilities Authority, 247 So.2d 304, 310-11 (Fla. 1971); see also Boykin v. Town of River Junction, 164 So. 558 (Fla. 1935). This was a logical restriction on government financing under article IX, section 6 of the 1885 Constitution, since granting a mortgage with right of foreclosure may suggest a guarantee of the underlying obligation. It is clear under the 1968 Constitution, however, that leases may require equipment be returned if lease obligations are not met. See State v. Brevard County, 539 So.2d 461 (Fla. 1989).

The federal district court did cite State v. Brevard County, 539 So.2d 461 (Fla. 1989). In State v. Brevard County there was approved a long-term lease purchase arrangement that included an "annual renewal option," which the district court characterized as similar to the annual nonappropriation clause in the Lease. Vol. 4, Doc. 140, p. 13. The federal court reasoned that the "annual renewal option" allowed Escambia County to maintain "full budgetary flexibility." The court then went on to conclude that the nonsubstitution provision denied Escambia

County "full budgetary flexibility" by rendering illusory the nonappropriation clause and compelling lease payments to avoid a penalty. This is simply a thinly veiled version of the federal district court's "moral compulsion" rationale which is based on that court's reading of Nohrr.

State v. Brevard County did not address the validity of equipment nonsubstitution provisions in county leases. While the state mentioned in its brief to this Court that Brevard County would be able to secure replacement equipment if the lease there at issue terminated, this Court never made any direct mention of this issue. Rather, the Court focused on whether ad valorem revenues would be impermissibly affected by that lease. In determining they would not, the court noted it had approved prior bond issues with a potentially far greater impact on ad valorem revenue. State v. Brevard County, 539 So.2d 461, 463 (Fla. 1989).

The inquiry into "moral compulsion" suggested by Nohrr is not an appropriate inquiry under the provisions of the 1968 Constitution. Further, even if "moral compulsion" is an appropriate standard, a nonsubstitution provision cannot be automatically equated with "moral compulsion." There is no blanket prohibition or limitation on the existence or type of contractual remedies that the parties may agree to in leases with Florida counties. See State v. School Board of Sarasota County, 561 So.2d 549, 552 (Fla. 1990) (in determining that lease obligations which were to be serviced in part by ad valorem taxation did not require voter

approval, the Florida Supreme Court relied on lease provisions allowing yearly nonappropriation, burdened only by lease remedies). To the contrary, Florida law strongly suggests that the nonsubstitution provision in this Lease is permissible when a county is the contracting party. See supra pp. 23 - 29.

Many governmental actions may have an "incidental effect" on the power of ad valorem taxation. When the imagined impact on ad valorem taxation is taken to its extreme, however, governmental bodies suffer in their ability to obtain the needed financing for governmental projects. Further, this type of "slippery-slope" reasoning conflicts with clear Florida Supreme Court precedent which requires a pledge of ad valorem tax revenue before the concerns in Article VII, section 12 of the Florida Constitution are triggered. The net effect of the federal district court's ruling is to determine that a lease provision which suggests any risk of producing an effect on the levy of ad valorem taxes is prohibited. Again, this is not in keeping with the Florida Supreme Court's clear precedent in this area, and none of the cases cited by the federal district court directly address an equipment nonsubstitution provision. Rather, all of the cases cited by the federal district court are distinguishable and are of little practical help in determining the result in this case.

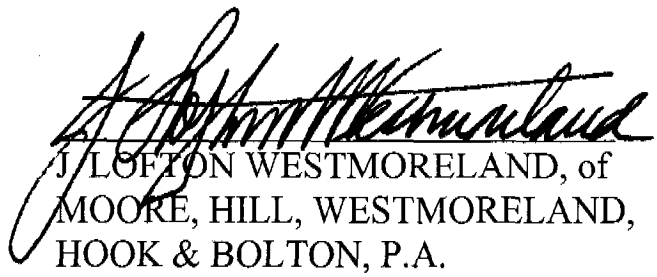
## CONCLUSION

For the reasons expressed in this brief, Frankenmuth Mutual Insurance Company respectfully requests that this Court respond to the questions certified by the Eleventh Circuit Court of Appeals as follows:

With respect to the first certified question, this Court should decline to respond to the question to the extent that the question relies solely on the provisions of section 125.031, Florida Statutes. Alternatively, the Court should determine that Joe Flowers, as Comptroller of Escambia County, Florida, had the independent authority to enter into the Lease here at issue without approval of the Escambia County Board of County Commissioners. In the event approval of the Lease by the Escambia County Board of County Commissioners was required, this Court should confirm that reason and common sense are the guidelines by which the actions of a county commission should be reviewed when determining whether ratification of a contract has occurred.

With respect to the second certified question, this Court should determine that, in the absence of a specific pledge of ad valorem tax dollars as a funding source, the broad home rule powers of a non-charter county permit those counties to enter into leases which contain nonsubstitution clauses as a remedy for nonappropriation under the lease.

Respectfully submitted,



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## CERTIFICATE OF SERVICE

I hereby certify that the original and seven copies of this brief were served on the Clerk for the Florida Supreme Court, Supreme Court Building, 500 South Duval Street, Tallahassee, Florida 32399-1927 by U. S. Mail, and that a copy of this brief was served on David Tucker, Esquire, Escambia County Attorney's Office, 14 West Government Street, Room 411, Pensacola, Florida 32501 and on Paula G. Drummond, Esquire, 120 S. Alcaniz Street, Pensacola, Florida 32501 by HAND DELIVERY, this 16 day of September, 1999.

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