IN THE SUPREME COURT OF FLORIDA

FLORIDA DEPARTMENT OF REVENUE

Petitioner,

v.

Case No. SC 02-2013
Lower Case No. 4D00-3873

NEW SEA ESCAPE CRUISES, LTD.,

Respondent.

PETITIONER FLORIDA DEPARTMENT OF REVENUE'S REPLY BRIEF

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

NICHOLAS BYKOWSKY
Florida Bar No. 111295
MARTHA F. BARRERA
Florida Bar No. 234036
Assistant Attorneys General
Office of the Attorney General
The Capitol - Tax Section
Tallahassee, FL 32399-1050
850-414-3300
850-488-5865 (Facsimile)

Attorneys for Petitioner
Florida Department of Revenue

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SUMMARY OF THE ARGUMENT

Oceanic navigation by a vessel, with nothing more, does not constitute foreign commerce. Dream Boat, Inc. v. Department of Revenue, 2003 WL 1560175, ***2-4** (Fla. 1st DCA 2003) The definition of foreign commerce as stated in Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1 (1824) - that foreign commerce involves contact with a foreign nation - is still controlling law. Sea Escape's reliance on Lord v. Steamship Company, 102 U.S. 541 (1880) is not supported in the case law and is therefore misplaced. Sea Escape's navigation beyond Florida's three-mile limit has no effect on Florida's ability to tax the Florida transactions that occur within its jurisdiction because these transactions are intrastate commerce, not interstate or foreign commerce. Dream Boat, supra.

Even if this Court finds that Sea Escape's vessel operated in international waters such a finding would not entitle Sea Escape to claim the partial exemption from tax for its cruises to nowhere under Section 212.08(8), Florida Statutes, because it is not engaged in foreign or interstate commerce. This Court should follow the decision in Dream Boat, supra and reverse the decision of the Fourth District in New Sea Escape Cruises, Ltd. v. Department of Revenue, 823 So. 2d 161 (Fla. 4th DCA 2002) and Deerbrooke Investments, Inc. v. Department of Revenue, No. 4D01-5043 (Fla. 4th DCA September 10, 2003) to the extent the Fourth District misapplied Section

212.08(8), Florida Statutes.

ARGUMENT

I. OCEANIC NAVIGATION BY ITSELF IS NOT FOREIGN COMMERCE; SEA ESCAPE IS ENGAGED IN INTRASTATE COMMERCE

Sea Escape's analysis and reliance on Lord v. Steamship Company, 102 U.S. 541 (1880) has been found erroneous by the United States Supreme Court. Wilmington Transportation Co. v. RR Commission of California, 236 U.S. 151, 153 (1915). There is no case cited by Sea Escape that overrules the definition of foreign commerce as stated in Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1 (1824).

Contrary to Sea Escape's reliance on Lord for the proposition that "extra-territorial ocean navigation"[1] constitutes foreign commerce, the general principle as stated in U.S. Supreme Court jurisprudence since Gibbons v. Ogden, supra, whether implicit or inferred, is that foreign commerce involves contact with a foreign nation. U.S. v. Lopez, 514 U.S. 549, 552 (1995), citing Gibbons v. Ogden, 22 U.S. 1, 9 Wheat. 1, 189-190, (1824) ("Commerce, undoubtedly, is traffic, but it is something more: it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches, and is regulated by prescribing rules for carrying on that intercourse."). This general principle relating to foreign

[1]Sea Escape's Answer brief, at page 6.

commerce has been followed for well over 150 years.[2]

The Supreme Court in Wilmington Transportation Co. v. RR Commission of California, 236 U.S. 151, 153 (1915) held that transportation over 20 miles of the high seas[3] between two local points within the state of California not involving "passage through the territory of another state" was subject to rate regulation by California in the absence of controlling federal legislation and that it was "error" to rely upon Lord for the proposition that "transportation over the high seas is 'commerce with foreign nations' in the constitutional sense." Wilmington, at 153.

This Court should find that the mere oceanic navigation of a gambling vessel into waters beyond the territorial boundaries of Florida is not determinative of foreign commerce. Dream Boat v.

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[2] See e.g., Smith v. Turner, 48 U.S. 283, 408-409 (1849); United States v. The "Grace Lothrop", 95 U.S. 527, 530 (1877); Texas & N.O.R. Co. v. Sabine Tram Co., 227 U.S. 111, 122-123 (1913); Bob-Lo Excursion Co. v. State of Michigan, 333 U.S. 28, 34 (1948); Gunther v. Baltimore, 55 Md. 457, 458-460 (Ct. App. Md. 1881); United States v. Stephen Bros. Line, 384 F.2d 118, 123-124 (5th Cir. 1967); United States v. One Colt Machine Gun, 625 F. Supp. 1539 (S.D. Fla. 1986); U.S. v. Montford, 27 F.3d 137, 140 (5th Cir. 1994); U.S. v. Cummings, 281 F.3d 1046, 1049-1050 (9th Cir. 2002).

[3] Arguably, since August 2, 1999, the territorial sovereignty of the United States now extends twenty-four (24) miles from the coastal baseline. Proclamation No. 7219, August 2, 1999, 64 F.R. 48701. Thus, the high seas begin today after 24 miles from land.

Department of Revenue, 2003 WL 1560175, ***2-4** (Fla. 1st DCA 2003); Wilmington, supra; One Colt Machine Gun; supra; U.S. v. Montford, 27 F.3d 137, 140 (5th Cir. 1994); The Winnie, 65 F.2d 706, 707 (3d Cir. Pa. 1933). The Supreme Court in Lord took a similar view when it recognized that while the contracts sued on in that case were contracts to carry goods between ports in the same state[4] (i.e., intrastate commerce) the contracts could not be performed except by venturing out upon the high seas. Lord, at 543-44.

The issue in Lord turned on the effect of oceanic (on the high seas or international waters) navigation on federal regulatory power while Sea Escape's navigation in waters beyond Florida's three-mile limit is "merely incidental to the real purpose" of a cruise to nowhere; the real purpose here is to provide gambling and entertainment for Sea Escape's passengers.[5] E.g., Wilmington, at 152-153. Sea Escape's cruise to nowhere navigation has no effect on Florida's ability to tax the Florida transactions that occur within its jurisdiction because these transactions are intrastate commerce, not interstate or foreign commerce. Dream Boat, supra; see also New Sea Escape Cruises, Ltd. v. Department of Revenue, 823 So. 2d 161, 163 (Fla. 4th DCA

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[4] San Diego and San Francisco, California.

[5]The state of Florida does not tax the gambling revenue of Sea Escape; it is only taxed by the United States.

2002); Deerbrooke Investments, Inc. v. Department of Revenue, No. 4D01-5043 (Fla. 4th DCA September 10, 2003).

The decision in Lord is a part of U.S. Supreme Court jurisprudence that limits state laws attempting to regulate ships in foreign or interstate commerce or laws that conflict with existing federal law regarding navigation[6]. The holding in Lord[7] simply does not address a state's power to tax transactions that have substantial nexus with that state. Dream Boat, supra; Brent Leasing Co., Inc. v. State Tax Assessor, 773 A.2d 457 (Me. 2001); Wilmington, supra.

Moreover, if this Court adopts Sea Escape's view of the

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[6] For example, cases cited for the well-settled principle of the government's authority to regulate commerce, navigation or exercise sovereignty over vessels navigating outside the territorial limits of states include Cunard S.S. Co. v. Mellon, 262 U.S. 100, 129 (1923); United States v. Hamburg-Amerikanische Packetfahrt Actien Gesellschaft, 212 F. 40, 44 (2d Cir. N.Y. 1914). See also The Robert W. Parsons, 191 U.S. 17 (1903)(admiralty jurisdiction).

[7]Sea Escape also cites on page 13 of its Answer Brief The Abby Dodge, 223 U.S. 166 (1912) for the proposition the mere sailing of a vessel into international waters from a Florida port constituted foreign commerce. The Abby Dodge decision dealt with the limited question of Congress' power to prohibit the introduction of "foreign articles" into the United States. See U.S. v. 12 200-Foot Reels of Super 8mm. Film, 413 U.S. 123, 126 (1973). The Abby Dodge is distinguishable from the instant case because it both involved the transportation of goods and the transportation of goods from what was considered at the time to be international waters. As the Supreme Court found the application of Lord to foreign commerce to be erroneous such an application of the Abby Dodge to the facts of this case is also erroneous. Wilmington Transportation, supra.

holding in Lord then such a decision would render the phrase "foreign commerce" in Article I, Section 8 to have little or no effect under the law. If the framers of Article I, Section 8 did not distinguish between interstate and "foreign commerce" then, of course, they could have just used the word "commerce." Instead, under the law there are three types of commerce: interstate, foreign and intrastate. Gibbons v. Ogden, supra.

Sea Escape's navigation beyond Florida's three-mile limit does not change the essentially "local" (i.e., Florida-related) character of the transactions at issue in this case. Even if this Court finds that Sea Escape's vessel operated in international waters such a finding would not entitle Sea Escape to claim the partial exemption from tax for its cruises to nowhere under Section 212.08(8), Florida Statutes.

The Fourth District in Deerbrooke correctly identified the central issue as being whether a cruise to nowhere from a Florida port "constitutes purely foreign commerce" or "purely intrastate commerce." Deerbrooke, at page 2. However, the Fourth District in Deerbrooke again reached the wrong result as to proration relying in large part on it prior decision Sea Escape and failing to apply the last sentence of Section 212.08(8), Florida Statutes. As in Sea Escape, the Fourth District in Deerbrooke did not decide whether a cruise to nowhere is foreign, interstate or intrastate

commerce, leaving that determination for this Court.[8] Deerbrooke, page 3.

Sea Escape cites to just two state appellate courts[9] (in Louisiana and Maine) for the proposition that "vessels traveling into international waters and returning to ports in the same sate are engaged in foreign commerce under the United States Constitution." (Answer Brief, at page 7). The Louisiana cases are distinguishable and are not controlling in this case.

The activities of the taxpayers in Sales Tax District No. 1 v. Express Boat Company, 500 So. 2d 364 (La. 1987) and Moonmaid Marine, Inc. v. Larpenter, 599 So. 2d 820 (La. 1992) are not comparable to the activities of Sea Escape in this case. The taxpayer in Express Boat supported drilling activity through the delivery of personnel and supplies. Express Boat, at 367. Sea Escape does not deliver people or property to a place or destination. The taxpayer in Moonmaid Marine also serviced the

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[8]Judge Warner, specially concurring in Deerbrooke, noted agreement with the decision of the First District in Dream Boat, but was constrained by the prior decision of the Fourth District in Sea Escape. Deerbrooke, at page 3.

[9]But see State Department of Revenue v. Orange Beach Marina, Inc., 699 So. 2d 1279, 1281 (Ala. Ct. App. 1997)(holding the sales of diesel fuel to vessels that traveled between state territorial waters and foreign waters, but did not travel to a foreign port or another state's port, did not come within the sales tax exemption for sales of fuel to vessels engaged in foreign or interstate commerce).

oil industry and the tax involved was an ad valorem tax.

Sea Escape cites to *dicta* from the case of Brent Leasing Co., Inc. v. State Tax Assessor, 773 A.2d 457, 462 (Me. 2001). The Supreme Court of Maine rejected a taxpayer's broad interpretation of foreign commerce[10] under the Commerce Clause and held that whale watching ships that took passengers into international waters were not engaged in foreign commerce within the interpretation of a Maine sales and use tax exemption statute.

Just as in this case, the issue in Brent Leasing came down to a plain reading of the statute in question: whether the Commerce Clause definition of "foreign commerce" was applicable to a sales and use tax exemption statute or whether the Maine Legislature intended a narrower meaning. Brent Leasing, at 459. With respect to Commerce Clause concerns and Section 212.08(8), Florida Statutes, this Court stated that it "may not construe the statute so narrowly as to deny businesses engaged in interstate or foreign commerce their right to be free from undue interference." Tropical Shipping & Construction Co. v. Askew, 364 So. 2d 433, 435 (Fla. 1978). The plain language of the statute is the proper analysis for this Court, not the definition of "foreign commerce" under the Constitution or The Johnson Act and as may be

[10]The taxpayer in Brent Leasing did not challenge the constitutionality of the Maine sales and use tax exemption statute. Brent Leasing, at 461.

"interpreted" under Lord. Dream Boat, supra.

The holding in Lord does not control the application of Section 212.08(8), Florida Statutes. Sea Escape's proposed application of the partial exemption of Section 212.08(9), Florida Statutes, based in large part on Lord, ignores the plain meaning and substantial legislative policy reasons behind the statute and is contrary to this Court's holding in Tropical Shipping. This Court has held it will uphold the "clearly expressed legislative intent" of such an enactment. Holly v. Auld, 450 So. 2d 217, 219 (Fla. 1984).

Sea Escape's vessels do not qualify for the partial exemption because its cruises to nowhere do not constitute the transportation of persons or property in foreign or interstate commerce. Dream Boat, at ***3.** This Court has already held that vessels that neither transport people nor any goods in commerce are not engaged in interstate or foreign commerce so as to qualify for the partial exemption under Section 212.08(8), Florida Statutes. See L.B. Smith Aircraft Corp. v. Green, 94 So. 2d 832, 836 (Fla. 1957) [the phrase "passengers or property in interstate and foreign commerce"[11] must be interpreted in "its narrower sense"

[11]The current phrase in Section 212.08(8)(a), Florida Statutes, reads "persons or property in interstate or foreign commerce."

and refers “to a public business of transport for value...”].[12]

There is no finding in the record that Sea Escape is in the “public business” of transporting people or goods for value. On the contrary, Sea Escape is in the business of providing “legal” (i.e., out-of-Florida) gambling and other entertainment to its passengers on board the vessel. Sea Escape, at 161. The fact that Sea Escape operates the gambling equipment outside Florida’s territorial waters in no way determines the taxability of the transactions in this case.[13]

Sea Escape’s reliance on the case of United States v. One Big Six Wheel, 166 F.3d 498 (2d. Cir. 1998) and the definition of foreign commerce in the Johnson Act and other federal statutes is a misguided exercise. The One Big Six Wheel case concerned whether the extension of U.S. territorial sovereignty to twelve

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[12]The root word “transport” means “to carry from one place to another.” American Heritage Dictionary, 10th Edition. Commerce and transportation go hand in hand. “At the time the original Constitution was ratified, "commerce" consisted of selling, buying, and bartering, as well as transporting for these purposes.” U.S. v. Lopez, 514 U.S. 549, 585-586, 115 S.Ct. 1624, 1643 (1995) [Justice Thomas concurring] (citation omitted, emphasis supplied). Justice Thomas found support in the etymology of the word “which literally means "with merchandise." Lopez, at 586. Justice Thomas concluded his analysis by stating that “[a]griculture and manufacturing involve the production of goods; commerce encompasses traffic in such articles.” Lopez, at 587 (emphasis supplied).

[13]See footnote 25, pages 27-28 of the Department’s Initial Brief.

nautical miles under Presidential Proclamation 5928 of December 27, 1988 (as adopted by Congress in the Antiterrorism and Effective Death Penalty Act of 1996) altered the three-mile rule for gambling cruises under the Gambling Ship Act; it is not a state tax case. Dream Boat, at ***3** (citing to United States v. One Big Six Wheel, 166 F.3d 498 (2d. Cir. 1998). The First District in Dream Boat stated that in spite of the extension of territorial sovereignty cruises to nowhere are not in violation of the Gambling Ship Act. Id.

Sea Escape's interpretation of the definition of foreign commerce as defined in the Johnson Act and other federal statutes is an interpretation not found in the law. The full text of the definition in the Johnson Act states as follows:

> The term "interstate or foreign commerce" means commerce (1) between any State or possession of the United States and any place outside of such State or possession, or (2) between points in the same State or possession of the United States but through any place outside thereof.

15 U.S.C. Section 1171(d).[14]

Sea Escape's arguments and conclusion that its cruises to nowhere

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[14]This is a new argument raised by Sea Escape before this Court. In the proceedings before the Fourth District Court of Appeal, Sea Escape argued that it was not engaged in interstate or foreign commerce, and it was for that reason that it was entitled to the partial exemption under Section 212.08(8), Florida Statutes. See Sea Escape's Fourth District Reply Brief, page 10.

fall within the definition of “foreign commerce” do not pass a careful analysis of the phrase “but through any place outside thereof” and is contrary to the well-settled law of Gibbons v. Ogden, supra. Place is defined as “locality, situation or site.” Black’s Law Dictionary (6th Ed. 1990).

The recent case of United States v. Cabaccang, 332 F.3d 622 (9th Cir. 2003) in interpreting the phrase “any place outside thereof” found in 15 U.S.C. 1171(d) with similar statutory language found in 21 U.S.C. Section 952(a) displaces Sea Escape’s contention that international waters or the high seas is “any place outside thereof,” and thus, constitutes foreign commerce under Lord, and Abby Dodge, supra. The Ninth Circuit in that case held that the transport of drugs through international airspace on a nonstop intrastate flight from one United States location to another did not constitute “importation” within the meaning of 952(a). In so holding, the court stated that the importation of drugs cannot come from international airspace and that “unlike...a foreign nation -- which is unquestionably a "place outside" the United States -- international airspace is neither a point of origin nor a destination of a drug shipment; it is merely something through which an aircraft must pass on its way from one location to another.” Cabaccang,, at 626. See also U.S. v. Dinero Express, Inc., 313 F.3d 803, 804-805 (2d Cir. 2002). The

phrase “any place outside thereof” in the Johnson Act or other similar federal statutes cited by Sea Escape cannot mean international waters or the high seas.

The Johnson Act does not grant gambling ships immunity from state sales and use tax. Sea Escape’s cruises to nowhere constitute only intrastate commerce, and are therefore not entitled to the partial exemption under Section 212.08(8), Florida Statutes. Dream Boat, supra.

II. SEA ESCAPE AND ITS GAMBLING EQUIPMENT AND CONCESSIONS ARE NOT EXEMPT UNDER CHAPTER 212, FLORIDA STATUTES

Chapter 212, Florida Statutes, does not expressly provide a sales tax exemption of any kind for a cruise to nowhere. All Florida transactions are taxable unless expressly made exempt. Section 212.21(2), Florida Statutes. Any exemption from taxation is to be strictly construed against the party claiming the exemption and in favor of the State. Capital City Country Club, Inc. v. Tucker, 613 So. 2d 448, 452 (Fla. 1993). The legislative intent of Section 212.08(8), Florida Statutes, focuses on what the vessel is doing, not the activities (e.g., unregulated casino gambling) that occur on the vessel. The First District Court in Dream Boat understood this critical distinction: that the vessel must be engaged in foreign or interstate commerce for the partial exemption to apply. Dream Boat, at ***3**. Section 212.08(8),

Florida Statutes, by its clear and unambiguous text, does not provide a partial exemption for a vessel or its parts that engages only in intrastate commerce. Dream Boat, supra.

The Fourth District's decisions in Sea Escape and Deerbrooke, and the arguments of Sea Escape fail to apply the last sentence of Section 212.08(8)(a), Florida Statutes, with the whole of Section 212.08(8)(a), Florida Statutes. Such a position is simply "at odds with the actual language of the statute," is contrary to the purpose of Chapter 212, Florida Statutes[15], and stands in direct conflict with this Court's opinion in Tropical Shipping, supra.

III. THE FOREIGN COMMERCE CLAUSE DOES NOT PROHIBIT THE DEPARTMENT'S TAX ASSESSMENT

Because there is no evidence in the record Sea Escape is continuously engaged in foreign commerce[16] and paid sales and use tax to any other jurisdiction there is no risk of double taxation in this case as was held in Japan Line, Ltd. v. Los Angeles County, 441 U.S. 434 (1979).

The facts in Japan Line are inapposite to the facts in this case. In Japan Line the Supreme Court found that its vessels are

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[15]See Section 212.21(2), Florida Statutes.

[16]The United States Supreme Court has established that in order to be continuously engaged in foreign commerce there must be "continuous transportation to another state or to a foreign country" and the sovereignty of another jurisdiction must be "encountered." Wilmington Transportation Company v. Railroad Commission of California, 236 U.S. 151, 156 (U.S. 1915).

used exclusively in foreign commerce. Japan Line, at 436. There is no evidence in this case of sales and use tax being paid to another jurisdiction. The Fourth District has recently rejected the application of Japan Line to a foreign corporation engaging in a cruise to nowhere from a Florida port. Deerbrooke, at page 2.

The mere speculation that the transactions at issue are subject to tax in the Bahamas[17] and the fact that Florida does not extend a credit for a "like tax" paid to another jurisdiction as Tennessee did in the case of Itel Containers v. Huddleston, 507 U.S. 60 (1993) does not prove "multiple taxation" in this case. Itel Containers, at 75 ("the careful apportionment of a state tax on business transactions conducted within state borders does not create the substantial risk of international multiple taxation that implicates Foreign Commerce concerns."). See also Wardair Canada, Inc. v. Florida Department of Revenue, 477 U.S. 1, 9-13 106 S.Ct. 2369 (1986). Sea Escape's arguments with respect to multiple taxation are contrary to the holdings in Japan Line and Itel Containers, supra, and are unsupported by the record in this case.

IV. THIS COURT SHOULD FOLLOW THE DECISION OF DREAM BOAT

[17]In addition, Sea Escape's reliance on the language in Japan Line concerning the "home port doctrine" is misplaced because the Supreme Court in Japan Line declined to apply it. Japan Line, at 443.

The application of Lord, One Big Six Wheel, supra, the Gambling Ship Act and Presidential Proclamation OF 1988 are not determinative of whether or not Florida can tax the local transactions at issue in this case. The First District's recognition in Dream Boat that the vessels involved did not leave the territorial sovereignty of the United States illustrates that "[t]here is no 'commercial intercourse between the United States and foreign nations.'" Dream Boat, at ***3.** Since there is no such "commercial intercourse" the court found that the vessels, just like Sea Escape in this case, do not engage in interstate or foreign commerce. The First District Court in Dream Boat understood this critical distinction: that the vessel must be engaged in foreign or interstate commerce for the partial exemption to apply. Id. The decision in Dream Boat, supra, is correct.

CONCLUSION

Sea Escape's cruises to nowhere are intrastate commerce, not foreign or interstate commerce. No jurisdiction other than Florida can tax the transactions at issue in this case. This Court should follow the holding of the First District Court of Appeal in Dream Boat.

The Department of Revenue respectfully requests that the decisions of the Fourth District Court of Appeal in Sea Escape and

Deerbrooke be reversed as to the misapplication of Section 212.08(8), Florida Statutes.

Dated at Tallahassee, Florida, this 10th day of September, 2003.

Respectfully submitted,

CHARLES J. CRIST, JR.
ATTORNEY GENERAL

_____
NICHOLAS BYKOWSKY
Florida Bar No. 111295
MARTHA F. BARRERA
Florida Bar No. 234036
Assistant Attorneys General
Office of the Attorney General
The Capitol - Tax Section
Tallahassee, FL 32399-1050
850-414-3300
850-488-5865 (Facsimile)
Attorneys for Petitioner
Florida Department of Revenue

CERTIFICATE OF COMPLIANCE

I hereby certify that Department's Reply Brief complies with the font requirements of Rule 9.210(a)(2), Fla. R. App. P., in that this Brief uses Courier New 12-point font.

_____
NICHOLAS BYKOWSKY
ASSISTANT ATTORNEY GENERAL

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been furnished by U.S. Mail to: Edna L. Caruso, Esquire, Caruso & Burlington, P.A., Suite 3A Barristers Building, 1615 Forum Place, West Palm Beach, Florida 33401, on this ___ day of September, 2003.

_____
NICHOLAS BYKOWSKY
ASSISTANT ATTORNEY GENERAL

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