IN THE SUPREME COURT OF THE STATE OF MONTANA

No. DA 19-0460

IN RE PARENTING OF:

A.F.,

Minor Child,

L.F.,

Petitioner and Appellee,

and

B.F.

Respondent and Appellant.

APPELLEE'S RESPONSE BRIEF

On Appeal from the Montana Fourth Judicial District Court, Missoula County,
The Honorable Karen S. Townsend, Presiding.

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STATEMENT OF THE CASE

This is a termination of parental rights case. B.F. ("Father") initiated legal proceedings by filing a parenting plan proceeding (DR-18-25). L.F. ("Mother") began an action to terminate Father's parental rights, alleging A.F. was conceived from sexual intercourse without consent. (Dkt. 1) The parties engaged in the discovery process and both parties were deposed. Upon the completion of discovery, Mother moved this district court to amend her petition. (Dkt. 53). Mother's amendment to the petition to terminate stated Father abandoned A.F. and also failed to financially support A.F. (Dkt. 67). Mother's husband, C.H., concurrently filed a petition to adopt A.F. (DA-19-24). The district court terminated Father's parental rights in order that A.F. could be adopted by C.H. Father has appealed the July 11, 2019 Order Terminating Father's Parental Rights. (Dkt. 84).

STATEMENT OF FACTS

Father and Mother are A.F.'s biological parents. Father has never met A.F.

Father suffered a traumatic brain injury at age 17. (See Respondent's Exhibit 13, History and Physical Examination, admitted at Termination Hearing).

June 2011, Father and Mother first met. *Trans.* 74:25-75:1 They began residing together at Mother's home. Mother had two children from a previous relationship and resided with her father. Mother and Father were romantically involved. On or about November A.F. was conceived. *Trans.* 42:13-15.

Father attended one prenatal visit, where pregnancy was confirmed. *Trans.* 43:1-19.

Mother and Father remained together as a couple approximately four to six weeks after this prenatal visit. *Trans.* 44:8-11.

Mother ended her relationship with Father at that time because he backhanded her four year-old-son from a previous relationship and broke his nose. *Trans.* 44: 12-15.

Following this, Mother asked him to leave, Father left Mother's residence and took his belongings with him. *Trans.* 46:7-12.

July 12, A.F. was born. *Trans.* 45:11-16.

The next time Father contacted Mother was when she was served paperwork to establishing a parenting plan for A.F. in February 2018. *Trans.* 46:13-16.

After their separation, Father did not attempt to establish a relationship with the baby or provide financial support while the baby was in utero, despite knowing Mother was carrying his child. *Trans.* 45-17-25.

Mother tried to inform Father when A.F. was born by sending him a text message. *Trans.* 46:17-25. Mother's phone stated that the text message had been delivered. *Trans.* 104:9-24. Mother had no other way of contacting Father about A.F.'s birth. *Trans.* 47:2-3.

Father testified Mother contacted him when A.F. was born and consequently he attempted to visit A.F. at the hospital but was turned away by hospital staff. *Trans.* 193:11-25. No hospital staff testified in support of his testimony and no hospital records documenting his attempted visit were submitted.

Father does not appear of A.F.'s birth certificate, because he was not present at A.F.'s birth. *Trans.* 50: 3-13. Mother never asked Father to sign the birth certificate because she had no way of contacting him. *Id.*

Mother tried to contact Father using the number she originally had for him when A.F. was hospitalized at 6 months of age. A.F. was hospitalized due to being at 80% oxygen level and needing to be placed on oxygen. Mother received no response from Father. *Trans.* 47:4-15.

Mother submitted a child support application for A.F. to CSED on July 17, 2012. *Trans.* 112: 1-2. On January 14, 2013, CSED ordered Father to pay $136 in child support per month. *Trans.* 112:22–113:2. She opened this case because she

needed to in order to receive Medicaid benefits for A.F. and State financial assistance with the childcare for A.F. *Trans.* 49:5-18.

Because Father did not attempt to assume the role of a parent for A.F., A.F. does not know who Father is. *Trans.* 42:5-10.

The only father figure A.F. recognizes is C.H, who he has viewed that way for the past three years. *Trans.* 65: 14-18. A.F. began referring to C.H. as "Dad" on his own. *Trans.* 65: 21-66:10.

A.F. has asthma and ptosis of the left eye. *Trans.* 52:15-18. These conditions place a financial obligation on Mother and C.H. *Trans.* 53: 2-5. A.F. sees his doctor for his asthma once per year, necessitating Mother or C.H. miss work with no financial compensation. *Trans.* 53:13-54:4. A.F. has taken a medication called Singulair since the age of two to control his asthma. *Trans.* 54:10-21. He also uses a nebulizer to control his asthma attacks. *Id.* He uses Albuterol along with the nebulizer. *Id.* A.F. also carries a rescue inhaler and a spacer with him at all times in case of an asthma attack. *Id.* A.F takes Advair twice daily to control his asthma. *Id.*

Medicaid covers these expenses except for the spacer and nebulizer, which Mother has paid for herself. *Trans.* 54:22-55:15.

Mother receives financial assistance from the State of Montana for A.F.'s childcare. *Trans.* 56:4-18. At the time of the district court litigation A.F. received $101.25 per month in childcare assistance and Mother paid the remainder which

was $319.00 per month. *Trans.* 56: 14-25. Mother has been paying $300.00 monthly in childcare expenses for A.F. since he was 6 months old. *Trans.* 57:14-58:4. A.F.'s daycare provider testified Father never made financial contributions to A.F.'s daycare expenses. *Trans.* 93:9-14.

Mother allowed Paternal Grandmother to establish a relationship with A.F, provided Mother was always present when they interacted. *Trans.* 48:8-11. Paternal Grandmother would bring gifts for A.F. and Mother's other children, but she never identified these gifts as coming from Father. *Trans.* 107:20-24.

When Mother and A.F. interacted with Paternal Grandmother, the issue of Father parenting A.F. was never brought up by Mother. *Trans*. 64:19-25. Paternal Grandmother testified that she tried to bring this issue up with Mother. *Trans.* 168:20-25. Mother testified Paternal Grandmother did not address this issue to her. *Trans.* 65:1-7.

At one point Father bought a fishing pole and gave it to Paternal Grandmother to give to A.F. as a birthday gift. *Trans.* 174:12-17.

Father is eligible for social security disability benefits due to his TBI diagnosis. As of 2016, if Father was classified as disabled with the Montana Social Security Administration, approximately $571.80 in auxiliary benefits would pass to his two children. *Trans.* 115:10-25. These auxiliary benefits would be credited against Father's child support obligation for A.F. *Trans.* 114: 3-9. Currently,

Father's A.F. would be eligible for auxiliary benefits of some amount if Father were to maintain his disability benefits. *Trans.* 116:1-6.

Father was dropped from SSDI in 2016 and not reinstated. Father did not reapply for benefits. *Trans.* 114:20-25.

In 2013, Father paid approximately $1181.62 in child support. Exhibit B: Dept Computation Worksheet. In 2014, Father made no payments. *Trans.* 113: 12-13, Debt Computation Worksheet. In 2015, Father paid approximately $504.43. Debt Computation Worksheet. In 2016, Father paid approximately $749.00. *Id.* Father made no payments in 2017. *Trans.* 113:18-19. Finally, Father made small child support payments to A.F. for the months of August 2018 ($13.57) and November 2018. *Trans.* 57: 8-10. Debt Computation Worksheet.

Before being served with parenting plan documents in February 2018, Mother received no indication from Father that he intended to assume a parental role with A.F. *Trans.* 64:11-18.

STANDARDS OF REVIEW

When deciding to terminate parental rights under Mont. Code Ann. § 42-2-608, the district court must make specific factual findings which this Court reviews under the clearly erroneous standard. *In re J.W.M*, 2015 MT 231, ¶¶ 11-12, 380 Mont. 282, 354 P.3d 626. "A finding is clearly erroneous if it is not supported by substantial evidence, if the trial court misapprehended the effect of the evidence, or if our review of the record convinces us that a mistake has been

committed." *Id.* This Court reviews a district court's conclusions of law terminating parental rights to determine whether they are correct. *Id.*

The Montana Supreme Court will presume that a district court's decision is correct and will not disturb it on appeal unless there is a mistake of law or a finding of fact not supported by substantial evidence that would amount to a clear abuse of discretion. *In re E.K.*, 2001 MT 279, ¶ 33, 307 Mont. 328, 37 P.3d 690.

The Montana Supreme Court reviews "findings of fact in a civil bench trial to determine whether they are supported by substantial credible evidence." *Only A Mile, LLP, v. State of Montana and Missoula County*, 2010 MT 99, ¶ 10, 356 Mont. 213, 233 P.3d 320. That evidence is reviewed "in a light most favorable to the prevailing party, . . . [leaving] the credibility of witnesses and weight assigned to their testimony to the determination of the district court." *Only A Mile*, ¶ 10 (internal citations omitted). The District Court's conclusions of law are reviewed "in this context for correctness." *Id.*

SUMMARY OF THE ARGUMENT

This is a case of judicial discretion terminating the parental rights of a biological father who slept on his constitutional right to parent until it was too late. In this instance, Father abandoned A.F. and also failed to support him for an aggregate period of far more than six months. This Court should affirm Missoula County District Court and permit A.F. to be adopted by his step-father due to being abandoned by his biological father.

ARGUMENT

The district court correctly terminated Father's parental rights by finding that he abandoned A.F. and did not contribute to A.F.'s support.

The evidence shows Father left A.F. under circumstances creating the reasonable belief that Father never intended to initiate or resume care of A.F. in the future within the meaning of Mont. Code Ann. 41-3-102(1)(a)(i). Further, Father failed to financially support A.F. for over an aggregate period of one year, despite having the capacity to do so.

As a result, this Court must **affirm**.

I. THE TRIAL COURT CORRECTLY FOUND FATHER WILLFULLY ABANDONED A.F.

Father's actions show clear and convincing evidence he intentionally abandoned A.F within the meaning of Mont. Code. Ann. § 41-3102(1)(a)(i). Further, Father's actions were willful. The district court properly took into account Father's traumatic brain injury when making the determination that he intentionally abandoned A.F.

A. Father's actions conclusively show he abandoned A.F.

The court may terminate parental rights for purposes of making a child available for adoption on the grounds of unfitness if…the parent has willfully

abandoned the child, as defined in Mont. Code. Ann. § 41-3-102, in Montana or in any other jurisdiction of the United States. Mont. Code. Ann. § 42-2-608(2)(b).

"Abandon", "abandoned", and "abandonment" mean: i) leaving a child under circumstances that make reasonable the belief that the parent does not intend to resume care of the child in the future; [or] ii) willfully surrendering physical custody for a period of 6 months and during that period not manifesting to the child and the person having physical custody of the child a firm intention to resume physical custody or to make permanent legal arrangements for the care of the child…. Mont. Code. Ann. § 41-3-102(1).

"Clear and convincing evidence is simply a requirement that a preponderance of the evidence be definite, clear, and convincing, or that a particular issue must be established by a preponderance of the evidence or by a clear preponderance of proof. This requirement does not call for unanswerable or conclusive evidence. The quality of proof, to be clear and convincing, is somewhere between the rule in ordinary civil cases and the requirement of criminal procedure – that is, it must be more than a mere preponderance but not beyond a reasonable doubt." *In re C.M.C.*, 2009 MT 153, ¶ 23, 350 Mont. 391, 208 P.3d 809 (citations omitted). See also *Santosky v. Kramer*, 455 U.S. 745 (1982).

The record shows Father willfully abandoned A.F within the meaning of Mont. Code. Ann. § 42-2-608. He never attempted to establish a relationship with

A.F. Further, he never manifested to the custodial parent, Mother, that he had any intention of attempting to establish a relationship with A.F.

Father argues because he never had custody of A.F., he could not have abandoned him. This argument fails. Father points to *In re. T.C.* for the proposition that a non-custodial parent cannot abandon the child, however, that case does not state this. *In re. T.C.,* 2001 MT 264, 37 P.3d 70. *In re T.C.* involves circumstances where the parents divorced and the mother had custody of the children, and then DPHHS obtained custody of the children after the mother was arrested on a probation violation. *Id.* The Court found the father could not have willfully surrendered the children when DPHHS had custody and thus could not have abandoned them. *Id.* ¶ 28. However, the Court went on to state it was possible for a court to find that a non-custodial parent had abandoned a child under other circumstances. *Id.* ¶ 29.

In *In re M.W.*, the Court found that a father who had only had minimal contact for years with his child had abandoned the child, though this father had never had custody of the child. 234 Mont. 530, 764 P.2d 1282 (1988). There, M.W. had been in foster care for almost two years, the father had had no contact with the child for three years, and at no time indicated his intention to resume custody until he learned his parental rights had been terminated. Id. 234 Mont. at 534 ,764 P.2d at 1282. The father's lack of contact for three years clearly established abandonment under the controlling statute. Id.

In the present instance, Father did not contact Mother or attempt to be involved in A.F.'s life after he separated from her. There was no outside agency such as DPHHS which had taken custody of A.F. and prevented Father from assuming custody. Father did not respond to Mother's text message informing him A.F. had been born. There is no record of hospital staff or anyone present with Mother at the hospital seeing him attempt to visit when A.F. was born. Paternal Grandfather was with Mother at the hospital when A.F. was born and testified he never saw Father at the hospital. *Trans.* 150:14-19. Father did not attempt to reach out to Mother after he was allegedly turned away from the hospital.

Father did not respond when Mother told him about A.F.'s hospitalization at 6 months of age. He never sent cards of letters to A.F. Father made no other attempts to visit A.F. until filing for a parenting plan on January 13, 2018.

Paternal Grandmother developed a relationship with A.F., but Father never accompanied her to see A.F. Father never sent any money though her to A.F. and only once provided her a fishing pole to give to A.F. Further, Father never contacted Paternal Grandfather about receiving contact with A.F. Mother and Father lived with Paternal Grandfather when they cohabitated and Paternal Grandfather continued to reside in the same place, meaning Father would have known how to locate him in order to contact him about A.F.

All witnesses with personal knowledge testified Father had never met A.F. or established a relationship with him.

The district court properly concluded Father failed to take even minimal steps to initiate or maintain a relationship with A.F. Consequentially, Father abandoned A.F. within the meaning of Mont. Code. Ann.

B. Father's actions were willful.

To act willfully requires a purpose or a willingness to commit an act or omission. Mont. Code Ann. § 1-1- 204(5). Willfully when applied to the intent with which an act is done or omitted, means a purpose or willingness to commit the act or make the omission referred to. It does not require any intent to violate the law, to injure another, or to acquire any advantage. Mont. Code Ann. § 1-1-204(5); *In re B.W.Z.-S.*, 2009 MT 433, ¶ 12, 354 Mont. 116, 222 P.3d 613.

Purpose means that which a person sets before him as an object to be reached or accomplished; an end, intention or aim. *State v. Patch*, 64 Mont. 565, 210 P. 748, 750 (1922). Willingness is defined as the quality or state of being prepared to do something; readiness. *State v. Drawl*, ¶ 55, 2018 WL 4898564 (Ohio 2018) (internal citation and quotation omitted).

Father states this matter is comparable to *In re B.W.Z.-S.,* in that as in that case, he did not willfully abandon A.F. To the contrary, that matter is distinguishable from the present case. In *In re B.W.Z.-S.*, the father at least attempted to contact the mother about the child, in attempts to either see the child exclusively or in conjunction with prior relationship he had had with the mother

and the child. *Id.* ¶ 17. Additionally, Father had traveled for employment opportunities in order to support the child, thus taking him geographically away from the child, and causing him to be absent. *Id.* The district court concluded under the totality of the circumstances, the father did not willfully manifest intent to abandon the child. *Id.*

In the present instance, the record clearly shows Father had the purpose of leaving A.F. There is clear and convincing evidence that Father never intended to assume care of A.F. Unlike the Father in *B.W.Z.-S*, Father did not reach out to Mother about attempting to establish contact with A.F. Father never made an efforts to support and care for A.F. Father did not remove himself from A.F. in order to secure work to support A.F. Father did not respond when Mother informed him A.F. had been born. Father did not respond when Mother reached out to him when A.F. was six months old and hospitalized and she required genetic information to assist with A.F.'s care.

The record shows Father's actions were clearly willful. Father's TBI did not prevent him from responding to Mother's text messages about A.F., giving Mother his current contact information, reaching out to to Mother's father about A.F., or asking his mother to attempt to communicate messages from him or bring cards or letters. While Maternal Grandmother testified she asked Mother about Father spending time with A.F.; however, Mother testified this matter was not addressed to her, and the district court found her testimony credible. By the time Father

initiated parenting plan proceedings, the time-period for calculating abandonment, six months, had long since passed.

The district court properly took into account Father's TBI and its impact on Father's ability to communicate. However, Father was aware Paternal Grandmother was in regular contact with Mother and A.F. and the only concrete step Father took to establish a connection with A.F. was to give Paternal Grandmother a fishing pole to give to A.F. Father also knew how to contact Paternal Grandfather, having lived with him previously, and took no steps to establish contact with A.F. through him.

C. Mother did not prevent Father from establishing contact with A.F.

Montana law on abandonment does not state attempts by one parent to prevent the other parent from contacting the child negates abandonment by that parent.

In any case, Mother did not prevent Father form establishing contact with A.F. The district court correctly found that Mother did not take active steps to prevent father from contacting A.F. To the contrary, Mother reached out to Father about A.F. twice. A.F.'s Paternal Grandmother testified she asked Mother about A.F. and Father having contact. Mother testified Paternal Grandmother did not request contact between A.F. and Father and instead visited to maintain her own relationship with A.F.

Paternal Grandmother did not discontinue her relationship with Mother and A.F. because she was upset with Mother for keeping Father from A.F. Mother testified Paternal Grandmother stopped contacting her after Father filed for a parenting plan. *Trans.* 67:8-21.

C.H. testified he never witnessed Mother tell Paternal Grandmother that Father was not have contact with A.F. *Trans.* 158:3-10. The district court found Mother's and C.H.'s testimony that Mother did not prevent Father from having contact over the years credible.

The district court correctly concluded Father abandoned A.F.

II. THE DISTRICT COURT PROPERLY FOUND FATHER FAILED TO SUPPORT A.F.

To terminate Father's rights and free A.F. for adoption, the district court correctly found, by clear and convincing evidence, that: (1) Father was able to support A.F.; and (2) that Father had not contributed to the support of A.F. Mont. Code Ann. § 42-2-608(c). The district court correctly found that Father was able to support A.F. through his SSDI benefits.

A parents' circumstances, such as an intellectual disability, do not necessarily or automatically redeem a parents' failure to demonstrate reasonable interest, concern, or responsibility towards the child. Nor do such circumstances fix a different standard of reasonableness. Rather, the question is whether a parents

then-existing circumstances provide a valid excuse. *In re M.I. v. J.B.*, 77 N.E.3d 69, 77 (Ill. 2016).

The district court correctly concluded that Father was capable of filling out the SSDI paperwork that would allow A.F. to receive SSDI benefits.

The record only shows that Father provided a fishing pole to Paternal Grandmother, which she then gave to A.F. This is not sufficient to provide financial support to A.F. Father incorrectly states the law from *In re Adoption of C.R.N.* In that case, this court stated, "we have repeatedly held that providing occasional articles of clothing or other gifts does not satisfy a parent's obligation to provide financial support." *In re Adoption of C.R.N.*, 294 Mont. 202, 979 P.2d 210.

Father provided child support to A.F. in a total amount of $2,435.05 over the years. However, for the purposes of termination of parental rights, the district court may do so if a parent has failed to pay child support for an aggregate period of one year, which Father had done in this instance. Additionally, the majority of the $2,435.05 in support payments came from Father's disability insurance, which he failed to maintain.

Father initially lost his SSDI benefits when he began working, but was unable to maintain this job. *Trans.* 114:20-25. Upon the loss of this job, Father did not successfully complete his SSDI paperwork, denying A.F. any SSDI benefits. Father was capable of filing parenting plan documents, and thus, capable of applying for SSDI benefits.

The district court concluded Father may not be able to maintain regular employment due to his TBI, but that he could use his SSDI benefits to support A.F. The district court's finding that Father was capable of reapplying for SSDI benefits is supported by the clear and convincing evidence.

III. FATHER WAS NOT PREJUDICED BY MOTHER'S AMENDMENT TO THE PETITION AND THE DISTRICT PROPERLY ALLOWED MOTHER TO AMEND.

Leave to amend should be freely given when justice so requires. Mont. R. Civ. Pro. 15(a)(2). After the filing of a responsive pleading, a plaintiff may amend a complaint only upon stipulation or leave of court. Mont. R. Civ. Pro. 15(a). When procedurally proper, Mont. R. Civ. Pro. 15(a) allows revision of existing claims and the addition of new claims and parties. *Priest v. Taylor*, 227 Mont. 370, 377-379, 740 P.2d 648 (1987). It is within the discretion of the trial court whether to grant or deny a motion to amend a pleading. *Gursky v. Parkside Professional Village,* 258 Mont. 148, 152, 852 P.2d 569 (1992). The Montana Supreme Court has previously held Mont. R. Civ. Pro. 15(a)(2) is to be interpreted to freely and liberally allow the amendment of pleadings "when justice so requires." *Hobble Diamond Cattle Co. v. Triangle Irr. Co.* 249 Mont. 322, 899 P.2d 531 (1991). However, "leave to amend may be properly denied when the amendment is futile or legally insufficient to support the requested relief." *Hawkins v. Carney,* 2003

MT 58, ¶ 39, 314 Mont. 384, 66 P.3d 305. A trial court is justified in denying a motion to amend for reasons such as undue delay, bad faith on the part of the movant, the repeated failure to cure deficiencies by previous amendment that was allowed, undue prejudice to the opposing party, or futility of the amendment. *Bitterroot Inter. Sys. v. West Star Trucks*, 2007 MT 48, ¶ 50, 336 Mont. 145, 153 P.3d 627.

In making the determination of whether allowing the amendment would cause undue prejudice to the opposing party, the court should balance the prejudice suffered by the opposing party with the sufficient of the moving party's justification for the delay in seeking amendment. *Farmers' Coop. Ass'n v. Amsden, LLC*, 2007 MT 286, ¶ 14, 339 Mont. 445, 171 P.3d 690. If the opposing party has already expanded "substantial effort and expense" in the dispute that would be wasted by allowing the moving party to proceed on a new legal theory than undue prejudice exists. *Eagle Ridge Ranch v. Park County*, 283 Mont. 62, 68-69, 938 P.2d 1342 (1997).

The district court properly considered whether Mother had acted in bad faith, been dilatory, or otherwise delayed in moving to amend her Petition. The district concluded that the parties had already engaged in discovery and both parties had been deposed, however; the purpose of discovery is to narrow the issues for trial. Mother concluded as a result of the discovery process that she while she could meet her burden of proof that a sexual assault took place, she

could not meet her burden of proof that the assault led to the conception of A.F. Thus, she was required to ethically abandon her claim.

The district court properly concluded Father would not suffer undue prejudice as a result of the amendment. The results of the discovery already engaged in by the parties was not wasted, as it was used in the trial proceedings after the amendment. The trial court also allowed the parties to engaged in further discovery if necessary before the trial, which was scheduled far enough in advance to provide for this.

Had Mother dismissed her first petition or had the trial court done so, Mother could have a filed a separate petition to terminate Father's rights on the basis of abandonment. Father would then have incurred the same amount to time and expense in defending against this petition. Mother's amendment to the first petition did not cause Father to incur any time or expense that he would not already have incurred.

CONCLUSION

Based upon the foregoing arguments, this Court should affirm the district court's decision termination Father's parental rights.

RESPECTFULLY submitted this 2nd day of June, 2020.

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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this Appellee's Response Brief is printed with proportionately-spaced Times New Roman typeface of 14 points; is double-spaced except for lengthy quotations or footnotes, and does not exceed 10,000 words, excluding the Table of Contents, the Table of Authorities, Certificate of Service, and Certificate of Compliance, as calculated by my Macintosh Pages software.

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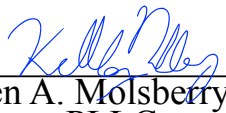

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CERTIFICATE OF SERVICE

I, Kathleen Anne Molsberry, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellee's Response to the following on 06-02-2020:

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