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20 Attorneys for Defendant  
21 ACE PARKING MANAGEMENT, INC.

22 **UNITED STATES DISTRICT COURT**  
23 **SOUTHERN DISTRICT OF CALIFORNIA**

24 PARK ASSIST LLC,

25 Plaintiff,

26 v.

27 SAN DIEGO COUNTY REGIONAL  
28 AIRPORT AUTHORITY AND  
ACE PARKING MANAGEMENT,  
INC.,

Defendants.

Case No. 3:18-cv-02068-BEN-MDD

**REPLY BRIEF IN SUPPORT OF ACE  
PARKING MANAGEMENT, INC.'S  
MOTION FOR RULE 11 SANCTIONS**

Date: April 22, 2019  
Time: 10:30 a.m.  
Place: Courtroom 5A  
Judge: Hon. Roger T. Benitez

1 **I. INTRODUCTION**

2 Park Assist’s opposition brief is an insult to the Court. Park Assist repeatedly  
3 dodges the issues, fails to address fatal deficiencies in its claim, and fails to provide  
4 critical components of its pre-filing investigation (e.g. the claim construction upon which  
5 the claim was based). Park Assist is blatantly expecting this Court to overlook multiple  
6 deficiencies and give it a pass on complying with Rule 11. Park Assist’s brief confirms  
7 that the Original and First Amended Complaints are frivolous and their filing violated  
8 Rule 11.

9 Ace Parking showed three independent violations of Rule 11:

- 10 1. Park Assist had no basis to allege the existence of human review and  
11 correction of any erroneous determinations of occupancy;
- 12 2. Park Assist had no basis to allege the existence of permit parking (and  
13 therefore no basis to allege the existence of enforcement of permit parking);  
14 and
- 15 3. Park Assist had no basis to allege infringement of a claim that cannot be  
16 infringed because it is physically impossible.

17 Park Assist provided no substantive response to any of them:

- 18 1. Park Assist argues that because 99% accuracy is required, there *must be*  
19 correction to achieve 100% accuracy, which is plainly not a legitimate  
20 inference and contrary to the evidence it submitted and the declarations  
21 provided by Ace Parking;
- 22 2. Park Assist dodges the issue regarding permit parking by discussing  
23 differential pricing without pointing to any evidence that Ace Parking uses  
24 permits to apply differential pricing (or even uses differential pricing at all);  
25 and
- 26 3. Park Assist provides no explanation how the asserted claim could be  
27 infringed and instead focuses on the irrelevant presumption of validity –  
28 there is no presumption of infringement.

1 Park Assist’s counsel failed to conduct – *and could not have conducted* – a  
2 reasonable and competent inquiry before signing the pleadings. Park Assist violated its  
3 Rule 11 obligations and its misconduct merits sanctions.

4 **II. ARGUMENT**

5 **A. CLAIM 1 OF THE ’956 PATENT IS IMPOSSIBLE TO INFRINGE**  
6 **AND PARK ASSIST VIOLATED ITS RULE 11 OBLIGATIONS IN**  
7 **FILING THIS LITIGATION.**

8 As explained in Ace Parking’s opening brief, element (h) of claim 1 of the ’956  
9 patent requires a parking space to actually be vacant. However, element (i) of claim 1  
10 requires the parking space to be occupied such that a “permit identifier” can be extracted  
11 from the image of the occupied parking space. Claim 1 of the ’956 patent cannot be  
12 infringed because a parking space cannot be both vacant and occupied at the same time,  
13 as the patent requires.

14 Park Assist does not propose any resolution to this fatal conflict in its opposition  
15 brief and does not explain any interpretation of Claim 1 which would support  
16 infringement.<sup>1</sup> This confirms the violation of Rule 11 which requires, “at a minimum,  
17 that an attorney interpret the asserted patent claims.” *Q-Pharma, Inc. v. Andrew Jergens*  
18 *Co.*, 360 F.3d 1295, 1300-01 (Fed. Cir. 2004).<sup>2</sup>

19 Park Assist cannot hide behind the presumption of validity. Its cited cases on this  
20 issue are all inapposite because they concerned issues different from the patent holder  
21 ignoring a patent claim that is impossible to infringe. *See, e.g., id.* at 1303 (patent holder  
22 received letters from accused infringers questioning the validity of the patent); *Brady*  
23 *Constr. Innovations, Inc. v. Cal. Expanded Metal Co.*, No. CV 07-217 AHS (MLGx),  
24

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25 <sup>1</sup> This glaring omission is not only fatal to Park Assist’s claim but calls into question Park  
26 Assist’s statement that its counsel “interpreted the claims” before filing suit. D.I. 46 at  
27 24. Either that statement is false or the pre-filing claim interpretation did not support  
infringement. If the analysis had been done and supported the claim, Park Assist was  
required to disclose it.

28 <sup>2</sup> Park Assist’s attorney, Mr. Melgar, testified by declaration that he interpreted the claims  
before filing the Original Complaint but, tellingly, did not disclose what that  
interpretation was. D.I. 46-1 ¶ 9.

1 2007 U.S. Dist. LEXIS 98156, at \*6 (C.D. Cal. Sept. 25, 2007) (USPTO had expressly  
2 concluded that a particular claim of a reissued patent was narrower than the claims of the  
3 original patent); *Kimberly-Clark Worldwide, Inc. v. First Quality Baby Prods., LLC*, No.  
4 10-C-1118, 2011 U.S. Dist. LEXIS 66745, at \*13 (E.D. Wis. June 22, 2011) (Rule 11  
5 motion was only directed at infringement, not validity, issues). Additionally, any reliance  
6 on the presumption of validity does not change the fact that claim 1 is impossible to  
7 infringe.

8 In a last ditch effort to justify its misconduct, Park Assist argues that this Court  
9 should re-write Park Assist's patent to eliminate the fatal conflict. Park Assist's cited  
10 cases do not stand for this bold proposition. *In re Johnston*, 435 F.3d 1381, 1384 (Fed.  
11 Cir. 2006) (using the permissive term "may" in a patent claim limitation does not narrow  
12 the claim because the claim limitation is optional); *Cadence Pharms., Inc. v. Exela*  
13 *Pharma Scis., LLC*, No. 11-733-LPS, 2013 U.S. Dist. LEXIS 166097, at \*59-61 (D. Del.  
14 Nov. 13, 2013) (claim expressly recited that certain steps were "optional"). There is no  
15 language in either claim 1 of the '956 patent, or anywhere else in the '956 patent,  
16 supporting this flawed theory.

17 Claim 1 of the '956 patent, as written, is impossible to infringe. Park Assist had  
18 the affirmative duty to have a plausible claim construction supporting infringement  
19 before filing the lawsuit. Its failure to provide one even in the face of a motion for  
20 sanctions shows that it has no plausible construction and has violated Rule 11. This  
21 violation of Rule 11 merits sanctions.

22 **B. PARK ASSIST VIOLATED ITS RULE 11 OBLIGATIONS**  
23 **REGARDING THE REQUIREMENT FOR HUMAN OVERRIDE.**

24 Regarding the human override requirement, Park Assist's brief cites to the same  
25 documents and quotations found in its Complaint and FAC. It is beyond dispute that  
26 Park Assist's position is fundamentally based on the implausible assertion that because an  
27 accuracy of 99% is required, the system must have the ability for human override to  
28 achieve 100% accuracy. There is no evidence to support that proposition and it is facially

1 unreasonable. There is nothing in the PGSR that requires any errors to be corrected.<sup>3</sup>  
2 There is also nothing in INDECT's documents or website that states the INDECT system  
3 allows occupancy determination errors to be corrected. Both Ace Parking and INDECT  
4 have provided direct evidence that no human review and correction occurs.

5 As pointed out in Ace Parking's opening brief, the "human override" elements of  
6 claim 1 require an indicator light at each parking space that can change colors from  
7 "vacant" to "occupied" and back. D.I. 42-1 at 7. *Nothing in the PGSR even requires*  
8 *such lights* and therefore nothing in the PGSR supports an inference about using human  
9 override to correct the status of a single parking space and therefore change the  
10 associated lights. Park Assist's strained reading of broad statements in the PGSR  
11 concerning "control", as well as a statement on INDECT's website concerning the ability  
12 of the INDECT system to "[q]uickly change ... colors" (which counsel for Ace Parking  
13 has made clear has nothing to do with correcting occupancy determinations (D.I. 46-19 at  
14 2)) provide no support for an infringement claim.

15 Park Assist's reliance on a news report released on June 26, 2018, before Park  
16 Assist filed this litigation, is bizarre. It provides affirmative evidence that there are no  
17 corrections to occupancy determination errors and thus no infringement. Park Assist's  
18 counsel admits reviewing it before filing the original Complaint (D.I. 46-1 ¶ 7(b); D.I.  
19 46-2), but Park Assist ignored this strong evidence of non-infringement and filed suit  
20 anyway.<sup>4</sup>

21 Park Assist has been on notice at least since December 3, 2018, when it received a  
22 sworn declaration from INDECT's President, that the INDECT system used in the  
23

24 \_\_\_\_\_  
25 <sup>3</sup> The declaration of Park Assist's CEO submitted with Park Assist's opposition brief  
26 (D.I. 46-21) is irrelevant. Whether Mr. Neff believes it would be "incomprehensible" for  
27 the INDECT system to not be able to correct occupancy status (*id.* ¶ 27) is irrelevant to  
28 whether the INDECT system actually has this functionality. Nor does Mr. Neff's  
unsupported belief that the PGSR required a parking override feature (*id.* ¶ 24) make it  
so. The same holds true for all of Mr. Neff's unsupported beliefs regarding preferred  
parking in the PGSR and INDECT system.

<sup>4</sup> This testimony by Park Assist's attorney, *inter alia*, waived Park Assist's attorney-client  
privilege.

1 Airport Parking Plaza does not allow for human override of system determinations of  
2 occupancy. D.I. 42-13; 42-14 ¶ 12. This plain fact was also confirmed by the General  
3 Manager of Ace Parking in another sworn declaration. D.I. 42-2 ¶ 13.<sup>5</sup> It is thus not  
4 surprising that Park Assist can point to no specific statements in either the PGSR or an  
5 INDECT document that describes the ability to correct a system determination of  
6 occupancy. Park Assist’s ignorance of the evidence of non-infringement and blind  
7 assumption that infringement occurs does not satisfy its Rule 11 obligations.

8 **C. PARK ASSIST VIOLATED ITS RULE 11 OBLIGATIONS**  
9 **REGARDING THE REQUIREMENT FOR PARKING PERMIT**  
10 **ENFORCEMENT.**

11 Regarding the parking permit enforcement requirement, Park Assist claims it has  
12 “strong” pre-suit evidence showing permit parking, but then only cites to the documents  
13 relied on in the FAC as supporting the existence of this claim requirement. Park Assist  
14 apparently hopes that the Court will allow it to improperly try to support infringement by  
15 arguing “capability” when there must be evidence of actual operation for infringement.  
16 These references do not state or suggest that the Airport Parking Plaza, *in operation*, has  
17 parking permit enforcement functionality. As explained in Ace Parking’s opening brief,  
18 whether the PGSR discusses the *concept* of preferred parking or the INDECT system has  
19 the *capability* of reading license numbers and storing them for *potential* use is irrelevant.  
20 Potential capabilities do not support allegations of infringement of a method claim. “A  
21 patented method is a series of steps, each of which must be performed for infringement to  
22 occur. It is not enough that a claimed step be ‘capable’ of being performed.”  
23 *Cybersettle, Inc. v. Nat’l Arbitration Forum, Inc.*, 243 Fed. App’x 603, 606 (Fed. Cir.  
24 2007); *see also Ormco Corp. v. Align Tech., Inc.*, 463 F.3d 1299, 1311 (Fed. Cir. 2006)  
25 (rejecting an argument that a claim requiring the replacement of appliances can be  
26 performed if the appliances are merely “capable of” being replaced); *NTP, Inc. v.*

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<sup>5</sup> Park Assist’s only substantive response to these declarations is to essentially label both declarants perjurers.

1 *Research in Motion, Ltd.*, 418 F.3d 1282, 1318 (Fed. Cir. 2005) (“[T]he use of a  
2 [claimed] process necessarily involves doing or performing each of the steps cited.”).  
3 Nonetheless, differential pricing does not involve permits, as explained in Ace Parking’s  
4 opening brief.

5 Park Assist cannot identify, either in the Complaint, the FAC, or its opposition  
6 brief, a single instance where the “infringement process”<sup>6</sup> recited in claim 1 of the ’956  
7 patent has actually occurred in the Airport Parking Plaza. Park Assist acknowledges that  
8 it visited the Airport Parking Plaza prior to filing suit, and thus knew through that visit  
9 that there are no permit parking areas subject to enforcement. Defendants confirmed this  
10 fact to Park Assist numerous times (D.I. 42-11, 42-12, 42-15), and the General Manager  
11 of Ace Parking has also confirmed that the Airport Parking Plaza does not have any  
12 permit parking that is monitored or enforced with any component of the INDECT system  
13 (D.I. 42-2 ¶¶ 14-17).<sup>7</sup>

14 Despite claiming, without explaining how it could possibly be true, that its visit to  
15 the San Diego Airport and the photographs taken during that visit “are perfectly  
16 consistent with the [alleged] documentary evidence of the infringement”, Park Assist then  
17 – inconsistently – argues that “no amount of public inspection could ever confirm the  
18 absence of the permit elements because the system can be implemented in any of many  
19 different ways” and postulates, without support, that the Airport Parking Plaza may have  
20 had this functionality at one point and then removed it. D.I. 46 at 18:12-19:26. Park  
21 Assist provides this Court with no excuse for its lack of a proper pre-filing investigation  
22

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23 <sup>6</sup> Park Assist argues, incorrectly, that differential parking rates could constitute an  
24 enforcement action. Even if correct, Park Assist must show a basis to allege that  
25 differential parking rates are charged based on parking location. This is inherently public  
26 information and Park Assist has provided no evidence that it occurs. Park Assist  
complaints that this argument involves claim construction but does not disclose its pre-  
filing construction for “permit parking” and therefore has waived this argument.

27 <sup>7</sup> Park Assist’s reliance on Melgar Decl. Ex. 19 (D.I. 46-20) is of no consequence, as that  
28 website only discusses the ability of the Airport Parking Plaza to scan a license plate, not  
initiate an “infringement process” as required by claim 1 of the ’956 patent.  
Additionally, as Park Assist admits, this scanning of the license plate occurs before the  
vehicle even enters the Airport Parking Plaza, not at the parking space as claim 1 of the  
’956 patent requires.

1 into this issue. The Airport Parking Plaza has been available for public inspection since it  
2 began operation, Park Assist actually visited the Airport Parking Plaza, and yet Park  
3 Assist presents no evidence that the Airport Parking Plaza has areas controlled by permits  
4 or the required permit enforcement functionality.

5 Despite not having evidence prior to filing either its Complaint or FAC that the  
6 Airport Parking Plaza, in operation, has parking permit enforcement functionality, despite  
7 being told numerous times that the documents Park Assist relies on in its FAC do not  
8 demonstrate the operation of the Airport Parking Plaza in practice, and despite having  
9 visited the Airport Parking Plaza and not finding any evidence of parking permit  
10 enforcement functionality, Park Assist *assumed, and continues to assume*, that the  
11 Airport Parking Plaza has this functionality. Both the Complaint and the FAC are  
12 factually baseless from an objective perspective, and Park Assist failed in its Rule 11  
13 obligations. Park Assist should therefore be sanctioned by this Court.

14 Park Assist's argument that evidence of infringement cannot be obtained publicly  
15 is an admission that it violated Rule 11. Even accepting its unreasonable interpretation of  
16 the PGSR, the patent requires permit parking and an infringement process actually occur.  
17 This would necessarily be public information so that those without permits can know  
18 where they cannot park. For example, accepting, *arguendo*, Park Assist's argument that  
19 differential pricing is a sufficient "infringement process," there would necessarily be  
20 signs showing areas reserved for staff, as suggested by Park Assist, so that a different rate  
21 would be charged to non-staff. Park Assist has admitted the absence of any such signage  
22 and thus the lack of any basis to bring the claim. The PGSR, prepared over two years  
23 ago, does not control current operations and there is no reasonable basis to believe it  
24 does.

25 **D. POST-FILING EVIDENCE IS RELEVANT TO THE RULE 11**  
26 **INQUIRY.**

27 Park Assist wrongly argues that this Court cannot consider events occurring after  
28 Park Assist filed suit. Many courts have properly considered events occurring after the



1 initial filing of a patent infringement lawsuit in granting Rule 11 motions. *See, e.g.,*  
2 *Smart Wearable Techs. Inc. v. Fitbit Inc.*, No. 17-cv-05068-VC, 2018 U.S. Dist. LEXIS  
3 111375, at \*2 (N.D. Cal. June 27, 2018) (granting Rule 11 sanctions where defendant  
4 sent plaintiff a letter putting plaintiff on notice of why the accused devices did not  
5 infringe, and defendant also gave plaintiff a declaration from an engineer of the defendant  
6 yet plaintiff “boldly continued to assert its implausible (and, as the unrebutted evidence at  
7 summary judgment showed, impossible) theories of infringement.”); *Gabriel Techs.*  
8 *Corp. v. Qualcomm Inc.*, No. 3:08-cv-01992-AJB-MDD, 2013 U.S. Dist. LEXIS 14105,  
9 at \*43-46 (S.D. Cal. Feb. 1, 2013) (granting Rule 11 sanctions for actions taken by  
10 Plaintiff in continuing the litigation after the court had issued a bond order that “clearly  
11 indicated that Plaintiffs’ claims were likely unmeritorious, lacked any significant  
12 evidentiary support, and appeared to be brought in bad faith”); *Fraser v. High Liner*  
13 *Foods, Inc.*, No. 06-11644-RWZ, 2008 U.S. Dist. LEXIS 111929, \*22-25 (D. Mass. July  
14 10, 2008) (granting Rule 11 sanctions when plaintiffs continued their litigation “despite  
15 letters from counsel for [defendants] explaining the process used by their clients and  
16 pointing out the differences between the patented method and that used by defendants”  
17 and finding “[p]laintiffs have put defendants to great expense not only by bringing the  
18 lawsuit, but then prosecuting it with procedural misstep after procedural misstep and  
19 willful misunderstanding of the concept of infringement. Whether plaintiffs were ill-  
20 advised, ignorant, or obstinate, they failed to heed ample evidence of the futility of their  
21 hunt and rejected numerous opportunities to reevaluate their untenable position. That is  
22 what Rule 11 is about.”); *Despatch Indus. Ltd. P’ship v. TP Solar, Inc.*, No. CV 11 2357-  
23 R (FMOx), slip op. at 2-3 (C.D. Cal. Nov. 28, 2011) (granting Rule 11 sanctions as  
24 “Plaintiff ignored the unambiguous claim limitations in the patent ... it was clear that  
25 there could be no literal infringement and that no amount of discovery will change the  
26 fact ... A reasonable and competent inquiry would have revealed the substantive  
27 deficiencies of Plaintiff’s claims.”).

28

1 While the filing of Park Assist’s Complaint and FAC both violated Rule 11 for the  
 2 reasons explained herein and in Ace Parking’s opening brief, Park Assist’s continued  
 3 prosecution of this litigation after learning on December 3, 2018 that the Airport Parking  
 4 Plaza could not infringe Park Assist’s patent (D.I. 42-13, 42-14), also supports Rule 11  
 5 sanctions.

6 **E. THE DECLARATION OF PARK ASSIST’S COUNSEL FAILS TO**  
 7 **SUPPORT A REASONABLE PRE-FILING INVESTIGATION.**

8 Park Assist’s attempt to show a reasonable pre-filing inquiry fails. The declaration  
 9 states that attorneys at the Sills Cummis & Gross law firm<sup>8</sup> reviewed the patent, reviewed  
 10 the prosecution history, reviewed the documents attached to the Complaint and FAC, and  
 11 performed the analysis disclosed in the FAC.<sup>2</sup> D.I. 46-1 ¶¶ 6-12. Park Assist provides  
 12 nothing that this Court can use to determine that the pre-filing investigation was  
 13 adequate, nor anything supporting the unreasonable inferences and half-truths that Park  
 14 Assist conjures from the documents cited in the Complaint and FAC (e.g. Mr. Melgar’s  
 15 unsupported conclusions that the PGSR contained “critical requirements of ... the  
 16 preferred parking features and manual override features” and “Indect’s product literature  
 17 that touted the functionality to implement the features required by the PGSR”). Nor does  
 18 Park Assist’s declaration claim it attempted to construe the key claim limitations (human  
 19 review and correction, permit enforcement, and the physical impossibility of having a  
 20

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21 <sup>8</sup> The declaration only states limited information concerning the work performed by  
 22 attorneys at the Sills Cummis & Gross law firm. However, Park Assist’s Complaint was  
 23 not signed by an attorney from that firm. D.I. 1 (signed by Mary Robberson of the Higgs  
 24 Fletcher & Mack law firm). Thus, Park Assist’s declaration is not relevant to the Rule 11  
 25 motion concerning the filing of the Complaint. *See* Fed. R. Civ. P. 11(b) advisory  
 committee’s note to 1993 amendment (subdivisions (b) and (c) “restate the provisions  
 requiring attorneys and pro se litigants to conduct a reasonable inquiry into the law and  
 facts before signing pleadings, written motions, and other documents, and prescribing  
 sanctions for violation of these obligations.”).

26 <sup>2</sup> Park Assist has waived privilege and work product concerning its pre-filing  
 27 investigation through the filing of its declaration. But the declaration discloses virtually  
 28 nothing about the actual pre-filing investigation. Park Assist is using the privilege as  
 both a sword and a shield by only selectively disclosing limited portions of its pre-filing  
 investigation. After this Court rules on Ace Parking’s Rule 11 motion, further discovery  
 into Park Assist’s pre-filing investigation may be required, e.g. to determine the  
 appropriate sanction.

1 parking space be both occupied and vacant at the same time) prior to filing suit.

2       Importantly, Park Assist’s declaration does not disclose any investigation  
3 performed after filing the Complaint and before filing the FAC. Park Assist received a  
4 letter from the San Diego Airport on October 17, 2018 raising specific Rule 11 concerns  
5 regarding the human override and permit enforcement requirements of claim 1 of the  
6 ’956 patent. D.I. 42-6. Two days later, INDECT filed a Complaint in this Court seeking  
7 declaratory relief that its camera-based parking guidance systems do not infringe Park  
8 Assist’s ’956 patent, *inter alia*, because they do not perform the human override and  
9 permit enforcement requirements of claim 1 of the ’956 patent. D.I. 42-7. Park Assist  
10 filed its FAC on October 26, 2018 and its declaration does not disclose any additional  
11 investigation performed into its infringement allegations based on the information it  
12 received on October 17, 2018 and October 19, 2018. At the very least, Park Assist had a  
13 duty to further investigate its claims given what it learned from the San Diego Airport  
14 and INDECT before filing the frivolous FAC. *See, e.g., Smart Wearable Techs.*, 2018  
15 U.S. Dist. LEXIS 111375, at \*2; *Gabriel Techs.*, 2013 U.S. Dist. LEXIS 14105, at \*43-  
16 46; *Fraser*, 2008 U.S. Dist. LEXIS 111929, \*22-25.

### 17 **III. CONCLUSION**

18       A plaintiff’s failure to demonstrate how it has a reasonable chance of showing  
19 infringement “should ordinarily result in the district court expressing its broad discretion  
20 in favor of Rule 11 sanctions.” *View Eng’g, Inc. v. Robotic Vision Sys.*, 208 F.3d 981,  
21 986 (Fed. Cir. 2000). Here, Park Assist has not shown it has a reasonable chance of  
22 showing infringement as the Airport Parking Plaza does not have the ability to correct  
23 system determinations of occupancy and the Airport Parking Plaza does not have permit  
24 parking subject to enforcement by INDECT’s system. Park Assist also has not shown it  
25 has a reasonable chance of showing that anyone can infringe claim 1 of the ’956 patent  
26 given it is physically impossible for a parking space to be both vacant and occupied at the  
27 same time. Park Assist has failed to meet its Rule 11 obligations, and this Court should  
28 impose Ace Parking’s requested sanctions.

1 Dated: April 15, 2019

Respectfully submitted,

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3  
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