Court File No. CV-23-00707839-00CL

ONTARIO
SUPERIOR COURT OF JUSTICE
(COMMERCIAL LIST)

B E T W E E N:

KEB HANA BANK as trustee of IGIS GLOBAL PRIVATE PLACEMENT REAL ESTATE FUND NO. 301 and as trustee of IGIS GLOBAL PRIVATE PLACEMENT REAL ESTATE FUND NO. 434

Applicant

- and -

MIZRAHI COMMERCIAL (THE ONE) LP, MIZRAHI DEVELOPMENT GROUP (THE ONE) INC., and MIZRAHI COMMERCIAL (THE ONE) GP INC.

Respondents

IN THE MATTER OF AN APPLICATION PURSUANT TO SECTION 243 OF THE *BANKRUPTCY AND INSOLVENCY ACT,* R.S.C. 1985, c. B-3, AS AMENDED, AND SECTION 101 OF THE *COURTS OF JUSTICE ACT*, R.S.O. 1990, c. C.43, AS AMENDED

REPLY FACTUM OF THE RECEIVER
(Receiver's Cross-Motion)
Returnable June 17-19, 2025

June 9, 2025

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ADDENDA

A. Overview

1. MI argues that it should be entitled to keep approximately $58.8 million that it took from the Debtors[1] without any contractual or legal justification. As set out below, neither the facts nor the law support MI's position. The Debtors' claims are not out of time, because they could not be advanced – and therefore could not be discovered within the meaning of the *Limitations Act* – until the Receiver was appointed and Mr. Mizrahi lost control of the Debtors. The Debtors' claims are not estopped because the parties never had a shared assumption that MI was entitled to payment based on the MI Payment Practices. MI is not entitled to any set-off, because the Debtors do not owe it any debt.

B. MI's Misapprehension of the Facts

2. **MI is liable for breach of contract.** MI claims that the Receiver has not articulated a cause of action that supports its claim for return of the Labour Rates paid to MI.[2] This position is not tenable: as set out in detail in the Receiver's First Factum, MI breached the terms of the GC Agreement and the Mediator's Proposal – the collection of contracts governing the relationship between the Debtors and MI – by charging the Labour Rates.[3] It is liable for the resulting damages.[4]

3. **The Receiver's position is coherent and correct.** Similarly, MI claims that the Receiver's claim is internally inconsistent because it does not sue for *all* of the damages the Debtors suffered as a result of MI breaching its contractual obligations to the Debtors. But a party is free to assert some, all or none of the legal claims available to it. There is nothing inconsistent, and indeed it is

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[1] Capitalized terms not defined herein are as defined in the Receiver's Moving Factum on the Receiver's Cross-Motion dated May 19, 2025 (the "**Receiver's First Factum**").
[2] MI Factum dated June 2, 2025 ("**MI Responding Factum**") at paras. 2 and 77.
[3] Receiver's First Factum at paras. 4, 5, 8, 10, 13, 51, 54, 60, 65, 121, 126, 137, 139, and 142-143.
[4] Though the Receiver's claim is framed in breach of contract, it could equally be framed in unjust enrichment: MI received an enrichment in the form of the Labour Rates, to the detriment of the Project, without any juristic reason.

entirely appropriate, for a party (particularly a court officer) to assert its strongest and most straightforward claims.

C. The Debtors' Claims Are Not Statute Barred

4. **The Debtors could not enforce their rights until the Receiver was appointed.** MI alleges that the Debtors' claims against it with respect to the Labour Rates, the Reserve and third-party real estate broker commission repayment are barred by the *Limitations Act*.[5] This is not correct, because, at the earliest, the limitation period did not begin to run until the Receiver was appointed and the Debtors ceased being effectively controlled by Mr. Mizrahi.

5. Pursuant to the terms of the USA between Coco and Mizrahi, the Debtors could not commence any action without Mr. Mizrahi's consent.[6] Mr. Mizrahi testified that he would have never consented to a claim against MI.[7] It follows that the Debtors *could not* enforce their rights against MI until the Receiver was appointed.

6. **The Debtors thus did not "discover" their claims within the meaning of the *Limitations Act* until they could pursue them.** The discoverability rules in the *Limitations Act* work to "avoid the injustice of precluding an action before the person is able to raise it."[8]

7. The limitation period does not begin until a claim is "discovered", and a claim is not discovered until the Plaintiff knows that legal proceedings are "an appropriate means to seek a remedy".[9] As a matter of law and logic, legal proceedings are *not* appropriate – and the limitation

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[5] *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B [***Limitations Act***].
[6] USA at s. 3.7, Transcript Brief at Tab 3(1), PDF pp. 351-355.
[7] Mizrahi Cross, Qs. 324-325, Transcript Brief, PDF p. 312
[8] *Scott v. Golden Oaks Enterprises Inc.*, 2024 SCC 32 at para. 77 citing *Peixeiro v. Haberman*, [1997] 3 S.C.R. 549 at para. 36.
[9] *Limitations Act*, at s. 5(1)(a)(iv).

period does not begin to run – if the plaintiff is unable to commence a proceeding because doing so would require the consent of, or direction from, the wrongdoer.

8. This principle was recently articulated in the concurring decision of Côté, J. in *Golden Oaks*,[10] which involved an action by the plaintiff trustee to recover improper payments made as part of a ponzi scheme orchestrated by the debtor corporation's sole shareholder, officer and directing mind. Justice Côté held (as had the trial judge) that an action was not "legally appropriate" – and the limitation period did not begin – until the trustee was appointed, because the company's directing mind would have never commenced an action founded on his own wrongdoing.[11] The majority decision reached the same result based on the doctrine of corporate attribution, and noted the injustice of making the claims "statute-barred before the trustee was even able to assert them."[12]

9. Equally in this case, it was not "appropriate" for the Debtors to commence a claim against MI until the Receiver was appointed. Mr. Mizrahi had an effective veto over claims against MI pursuant to the USA. He exercised sole control over the Debtors from May 2021 pursuant to the terms of the Control Agreement, and from August 2022 pursuant to the (unilaterally executed by Mr. Mizrahi and improper) Control Resolution.[13] The Debtors could not commence a claim against MI until the Receiver was appointed.

10. Coco's claims against Mizrahi do not change this discoverability analysis. The limitation period runs when the "person with the claim" can assert it.[14] Coco is not the "person with the claim" that the Debtors now advance against MI.

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[10] *Golden Oaks*.
[11] *Golden Oaks* at paras. 174-176.
[12] *Golden Oaks* at para. 78.
[13] Fifth Report of the Receiver dated October 11, 2024 ("**Fifth Report**"), Motion Record of the Receiver dated October 18, 2024 ("**Receiver's MR**") Vol 1 at Tab 2 at Appendices 20 and 24.
[14] *Limitations Act*, at s. 5(1).

D. Estoppel by Convention Does Not Apply

11. MI claims that the Debtors' claims against it are barred by the doctrine of estoppel by convention. This argument is an explicit attempt by a sophisticated party to avoid the terms of the contracts to which it agreed. The Court of Appeal recently warned that such attempts should be "received with caution and applied with care".[15] In any event, MI cannot meet the test for estoppel by convention.

12. **No shared assumption that MI could charge the Labour Rates.** The "crucial requirement" for estoppel by convention is that "at the material time both parties must be of 'a like mind'".[16] The assumption must be "unambiguous and unequivocal".[17]

13. Coco (and therefore the Debtors) and MI were never of "like mind" about MI charging the Labour Rates. As soon as MI began charging the Labour Rates, Coco objected in writing and commenced an arbitration to challenge MI's actions.[18] Coco paused its explicit objections when the Sale was pending, but there is no suggestion (let alone evidence) that MI assumed that Coco had changed its mind about MI's right to charge the Labour Rates. Coco resumed its explicit and repeated objections as soon as the Sale fell through.[19]

14. **No detrimental reliance.** MI claims that it "continued to undertake its work" in reliance on some (unspecified) "convention".[20] But MI did not rely on any assumption about Coco's approval when it took over construction management from CCM and began charging the Labour Rates. MI unilaterally terminated CCM and assumed its role without prior notice to Coco.[21] It did

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[15] *Grasshopper Solar Corporation v. Independent Electricity System Operator*, 2020 ONCA 499 at para. 54 [***Grasshopper***], citing *Ryan v. Moore*, 2005 SCC 38 at para. 50 [***Ryan***].
[16] *Ryan*, at paras. 61-62.
[17] *Grasshopper*, at para. 56.
[18] Coco Submissions, Fifth Report at Appendix 16, Receiver's MR Vol 2, Tab 2(16), pdf 273.
[19] Coco Cross, q. 114-120, Transcript Brief, Tab 1, PDF pp. 21-22.
[20] MI Responding Factum at para. 88.
[21] Letter from J. Lisus dated October 30, 2020, Mizrahi Cross, Transcript Brief at Tab 3(5), PDF pp. 442-443.

not change course when Coco objected and commenced an arbitration.[22] It ignored Coco's written objections after the Control Agreement expired.[23] There is simply no evidence that MI relied on – or cared about – Coco's position on the MI Payment Practices.

15. **It is not unfair to hold MI to its contractual entitlements.** MI is a sophisticated party (represented by numerous experienced lawyers)[24] that took a calculated risk. It claimed, and was paid, significant amounts that it was not legally entitled to, with knowledge of Coco's objections. There is nothing unfair about forcing MI to return funds that it should never have received in the first place.

16. **In the alternative, any estoppel that existed ended after Coco explicitly objected to the MI Payment Practices beginning in August 2022.** A party is entitled to bring an estoppel to an end, and return to the terms of the contract, by providing reasonable notice ending the assumption.[25] As noted, Coco objected explicitly and consistently to the MI Payment Practices every month after August 2022. Mr. Mizrahi conceded that MI received payment after this time with full awareness of Coco's objection.[26] This brought any assumption, and by extension any estoppel, to an end.

E. Laches Does Not Assist MI

17. MI claims that the doctrine of laches applies, because "there was nothing preventing the Project or its beneficial owner, Ms. Coco, from advancing the claims the Receiver now

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[22] Coco Submissions, Fifth Report at Appendix 16, Receiver's MR Vol 2, Tab 2(16), pdf 273.
[23] Supplemental Report of the Receiver dated February 28, 2025 ("**Supplemental Report**") at paras. 3.24-3.34, Receiver's Reply Motion Record dated February 28, 2025 ("**Receiver's Reply MR**") at Tab 1 at PDF pp. 35-38; Excerpt of Payment Listings Objections, Receiver's Reply MR at Tab 1(6); Kilfoyle Cross, Q. 260-279, Transcript Brief at Tab 2, PDF pp. 230-232; Mizrahi Cross, Q. 919-924, Transcript Brief at Tab 4, PDF pp. 820.
[24] The Court of Appeal for Ontario has warned that estoppel by convention should be applied sparingly in commercial relationships between sophisticated parties represented by counsel: *Grasshopper* at para. 54.
[25] *Grasshopper* at para. 72.
[26] Mizrahi Cross, Q. 919-924, Transcript Brief at Tab 4, PDF pp. 820.

advances."[27] This argument has two flaws. First, the doctrine of laches only applies to equitable claims, while the Receiver seeks to recover damages for breach of contract.[28] Second, MI's laches claim ignores all of the evidence outlined above and in the Receiver's prior factums: the Debtors did not acquiesce to payment based on the MI Payment Practices; the Debtors were unable to pursue a claim prior to the Receiver's appointment; and MI did not change its position as a result of any alleged delay in commencing the claim.

F. Set-Off Does not Assist MI

18. MI claims that legal and equitable set-off operate to "eliminate" any of the Receiver's contractual claims against MI. MI claims that by virtue of the disclaimer of the Mediator's Proposal and ELA it is entitled to a Residential Management Fee of $3.6 million and real estate commissions totalling approximately $10 million (collectively, the "**MI Set-Off Claim**").

19. At its highest, the MI Set-Off Claim is less than the Debtors' claims for breach of contract. The MI Set-Off Claim is also grossly overstated. MI includes amounts it is not entitled to and may never be entitled to in the MI Set-Off Claim.

20. **The MI Set-Off Claim includes amounts that MI was not entitled to.** MI claims that it is owed a Residential Management Fee on each and every sale that it made on the Project.[29] But according to the Mediator's Proposal, MI is not entitled to any Residential Management Fee until the purchaser pays "the appropriate deposit."[30] A number of purchasers *did not* pay the "appropriate deposits" either because they breached the applicable APS or because MI reduced the deposit requirements in the APS below the standard amount required to be a "Qualifying Sale"

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[27] MI Responding Factum at para. 81.
[28] *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6 at p. 77, citing R.P. Meagher, W.M.C. Gummow and J.R.F. Lehane, Equity Doctrines and Remedies (Sydney: Butterworths, 1984) at 755.
[29] Fifth Report at 15.4, Receiver's MR Vol 1, Tab 2, PDF p. 122.
[30] Fifth Report at 15.3, Receiver's MR Vol 1, Tab 2, PDF p. 122.

under the Credit Agreement.[31] The Qualifying Sales totaled $482,466,690 and so MI was entitled to a maximum Residential Management Fee of approximately $4.8 million, not the $6.3 million it claims.[32]

21. The Residential Management Fee also has to be reduced to reflect payments already made to MI totalling $719,121.49;[33] unpaid deposits owed by Mr. Mizrahi and his family of $1.3 million;[34] and amounts that MI agreed to pay in the Mediator's Proposal of $2.6 million.[35] MI also argues that $2.7 million worth of "marketing fees" which it charged the Debtors – and had no contractual right to charge – were actually payments towards the Residential Management Fee that also need to be deducted from the MI Set-Off Claim.[36]

22. In light of the foregoing, MI had been *overpaid* in respect of the Residential Management Fee when the Receiver disclaimed the Mediator's Proposal. The Receiver's calculation of the Residential Management Fee is attached as **Schedule "B"**. MI also admits that it had been paid all of the commissions owed to it under the ELA and, in fact, has an obligation to *return* commissions for CSAs terminated for purchaser default.[37]

23. **MI's other claimed damages are speculative, contingent, unliquidated and unproven.** The balance of the MI Set-Off Claim relates to amounts which were not due when the Mediator's

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[31] Fifth Report at 15.3, Receiver's MR Vol 1, Tab 2, PDF p. 122.
[32] Fifth Report at 15.4, Receiver's MR Vol 1, Tab 2, PDF p. 122. Though MI starts from a higher Residential Management Fee based on all sales, including those without appropriate deposits, it also concedes that amounts should be deducted for the Defaulting Purchasers whose Default CSAs were terminated by the Receiver for default, and for other CSAs that may be terminated for default. See MI Responding Factum, Schedule C.
[33] MI Responding Factum at Schedule C; Fifth Report at 15.5, Receiver's MR Vol 1, Tab 2, PDF p. 122.
[34] In the Fifth Report at 15.6, Receiver's MR Vol 1, Tab 2, PDF p. 122, the Receiver calculated a deduction of $2.7 million on account of these units, but the Receiver subsequently disclaimed agreements for which the unpaid deposits were $1.4 million and no longer seeks a deduction of such amount.
[35] MI Responding Factum at Schedule C.
[36] While the Receiver disagrees that such fees were advances against the Residential Management Fee, the Receiver agrees that such amounts are owing to the Project as damages for breach of contract as set out in the Receiver's First Factum.
[37] MI Responding Factum at para. 56 and Schedule C.

Proposal and ELA were disclaimed but relate to future potential commissions and fees that may be owed if residential unit sales negotiated by MI are completed. MI has not proven its claim for damages. Such claims are the definition of unliquidated claims – they are not ascertainable with certainty, are currently contingent on future events (including whether the relevant condominium sales agreements will be affirmed or disclaimed), and may never become liquidated.[38]

24. In MI's claim for breach of contract, it must prove that, but-for the disclaimer, it would have earned further income pursuant to the terms of the ELA or the Residential Management Fee. MI could earn future payments if – and only if – the Project was completed and the condominium purchasers that executed a condominium sales agreement prior to the Receivership Proceedings have those agreements affirmed and complete their purchases. Its right to future payment was contingent on an event that had not occurred, and may never occur.

25. MI has tendered no evidence to support the assertion that any – let alone all – of the prospective purchasers would close on their purchased units. Most of the sales occurred in 2017.[39] The Project will not be completed until early 2028.[40] There is no evidence that any (let alone all) of the condominium purchasers remain ready, willing and able to complete the purchases. The Debtors also have the right to disclaim any or all of the CSAs in accordance with the CCAA and they have not yet determined whether to exercise that right. Thus, MI has no liquidated claim for future Residential Management Fees pursuant to the Mediator's Proposal or future commissions pursuant to the ELA.

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[38] *Citibank Canada v. Confederation Life Insurance Co.*, 1996 CanLII 8269 at para. 48 [***Citibank***], citing Odgers' Principles of Pleading and Practice, 22nd ed. (London: Stevens & Sons, 1981) at p. 46.
[39] Affidavit of Sam Mizrahi sworn January 20, 2025 ("**Mizrahi #2**") at Exhibit "GG", Mizrahi Responding Record dated January 20, 2025 ("**MI RMR**") Vol 3, Tab 1(GG), PDF p. 130.
[40] Fifth Report at 2.14 and 12.10, Receiver's MR Vol 1, Tab 2, PDF pp. 44 & 101.

26. **Equitable set-off is not appropriate.** MI can only claim a set-off if there is such a relationship between the claims of the parties that it would be unconscionable or inequitable not to permit set-off.[41] The two claims must be "so clearly connected" that it would be "manifestly unjust" to allow the Debtors to enforce payment without accounting for MI's claims.[42] Because the Debtors are insolvent, the Court "may consider, as part of the equities, the effect of allowing an equitable set-off on other creditors".[43] MI does not meet this test.

27. There is no injustice to MI if it is not allowed to set-off its unliquidated, speculative and unproven claims against the damages that it owes to the Debtors. To the contrary, MI seeks a windfall. It owes funds to the Debtors today and it seeks to avoid that obligation (or part of that obligation) on the basis that it *might* have a right to payment at some unknown future date. Allowing the set-off would be manifestly unfair to the Debtors and their creditors.

G. Relief Requested

28. The Receiver respectfully requests that the Receiver's Cross-Motion be granted.

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[41] *Citibank* at para. 38; Houlden and Morawetz, Bankruptcy and Insolvency Law of Canada, 4th Edition at § 5:551.
[42] *Canada (Attorney General) v. Confederation Life Insurance Co.*, 2002 CanLII 23606 at para. 26.
[43] *Golden Oaks* at para. 99.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of June, 2025.

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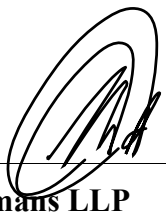
SCHEDULE "A"

LIST OF AUTHORITIES

I, Mark Dunn, counsel for the Receiver, am satisfied as to the authenticity of every authority listed in the Factum of the Receiver as required by Rule 4.06.1.



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Legislation

1) *Limitations Act, 2002*, S.O. 2002, c. 24, Sched. B

Case Law

1) *Scott v. Golden Oaks Enterprises Inc.*, 2024 SCC 32
2) *Grasshopper Solar Corporation v. Independent Electricity System Operator*, 2020 ONCA 499
3) *Ryan v. Moore*, 2005 SCC 38
4) *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6
5) *Citibank Canada v. Confederation Life Insurance Co.*, 1996 CanLII 8269
6) *Canada (Attorney General) v. Confederation Life Insurance Co*., 2002 CanLII 23606

Secondary Sources

1) Houlden and Morawetz, Bankruptcy and Insolvency Law of Canada, 4th Edition

SCHEDULE "B" – CALCULATION OF RESIDENTIAL MANAGEMENT FEE

Residential Management Fee	**Receiver Calculation**	**MI Calculation**
1% Fee Owing Upon CSA	$4,824,666.90[i]	$6,213,429.69[ii]
1% Fee Owing Upon Closing of Unit	N/A[iii]	$6,213,429.69[iv]
Less Amount Already Paid to MI	($719,121.49)[v]	($719,121.49)[vi]
Less Amounts owed by Mizrahi and related parties for insufficient unit deposits	($1,300,000)[vii]	N/A
Less Amounts paid as monthly marketing expenses	N/A[viii]	($2,700,000)[ix]
Less Amount "due to the Mediator's Proposal"	($2,648,733.26)[x]	($2,648,733.26)[xi]
Less Amount "due to terminated APS owing to purchaser default"	N/A[xii]	($1,269,270.40)[xiii]
Less Amount "due to other defaulting purchasers"	N/A[xiv]	($1,426,000)[xv]
Total MI Claim for Residential Management Fee	**$156,812.15**	**$3,663,734.23**
Total MI Claim for Residential Management Fee excluding unliquidated amount	**$156,812.15**	**($2,549,695.46)**

[i] Fifth Report, paras. 15.3-15.5, Receiver's MR Vol 1, Tab 2, PDF p. 122. This is calculated based on 1% of the total value of Qualifying Sales Agreements.

[ii] MI Responding Factum, Schedule A. This is calculated without consideration of those units for which "the appropriate deposit" has been paid, and includes units for which no deposit or a substantially reduced deposit was paid. See Fifth Report at 15.4, Receiver's MR Vol 1, Tab 2, PDF p. 122 and Supplemental Report at 6.26(i), Receiver's Reply MR at Tab 1 at PDF pp. 50-51.

[iii] The Receiver does not accept that any amount is owing for a contingent unliquidated future liability, for the reasons set out in this factum.

[iv] MI Responding Factum, Schedule C. This amount also reflects the calculation discrepancy noted in Endnote ii.

[v] Fifth Report at 15.5, Receiver's MR Vol 1, Tab 2, PDF p. 122.

[vi] MI Responding Factum, Schedule C.

[vii] Fifth Report at 15.6, Receiver's MR Vol 1, Tab 2, PDF p. 122; Supplemental Report at 6.26(ii), Receiver's Reply MR at Tab 1 at PDF p. 51. The Receiver has disclaimed certain of these agreements and accordingly does not seek the unpaid deposits for such units.

[viii] The Receiver does not deduct these amounts because there is no evidence they were considered pre-payments of the Residential Management Fee, but the Receiver claims them as part of the damages sought from MI as part of the Receiver's Cross-Motion.

[ix] MI Responding Factum, Schedule C.

[x] The Receiver only became aware of this unpaid amount upon reviewing Mizrahi #2 and the MI Responding Factum, Schedule C. Based on its inclusion, the Receiver accepts that such amount was never repaid to the Project as required and the CM Fee difference on which it is partially calculated was never adjusted after the Control Agreement. See also Endnote xi.

[xi] MI Responding Factum, Schedule C. Note there appears to be a mathematical error in the underlying document on which MI relies for this number, correction of which would result in an additional $20,000 owing by MI – see Mizrahi #2, Exhibit W, MI RMR Vol. 3, PDF p. 121.

[xii] The Receiver did not deduct any amounts from its calculation of the contractually-required Residential Management Fee on account of the Defaulting CSAs. The Defaulting CSAs were not Qualifying Sales, and so they are not included in the Receiver's calculation of the Residential Management Fee.

[xiii] MI Responding Factum, Schedule C. This amount is calculated based on MI's view that no Residential Management Fee is payable for terminated CSAs.

[xiv] See Endnote xii.

[xv] MI Responding Factum, Schedule C. This amount is calculated based on MI's acceptance of anticipated termination of CSAs as described in the Fifth Report, para. 13.26, Receiver's MR Vol 1, Tab 2, PDF p. 112.

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