

IN THE SUPREME COURT OF FLORIDA

(Before a Referee)

THE FLORIDA BAR,

Complainant,

Case No. SC12-514

v.

TFB File No. 2011-31,247 (5B)

TIMOTHY ALBERT FRANTZ,

Respondent.

_____ /

REPORT OF REFEREE ACCEPTING CONSENT JUDGMENT

I. **SUMMARY OF PROCEEDINGS**

Pursuant to the undersigned being duly appointed as referee to conduct disciplinary proceedings herein according to Rule 3-7.6, Rules of Discipline, the following proceedings occurred:

On March 14, 2012, The Florida Bar filed its Complaint against Respondent. All of the aforementioned pleadings, responses thereto, exhibits received in evidence, and this Report constitute the record in this case and are forwarded to the Supreme Court of Florida.

II. **FINDINGS OF FACT**

A. Jurisdictional Statement. Respondent is, and at all times mentioned during this investigation was, a member of The Florida Bar, subject to the jurisdiction and disciplinary rules of the Supreme Court of Florida.

B. Narrative Summary Of Case.

1. Nick Ahrens hired respondent in or around November 2009 to file an employment discrimination claim against Universal Technical Institute, Mr. Ahrens' former employer. Mr. Ahrens had obtained the EEOC right to sue letter that is required prior to filing suit in federal court for an employment issue.

2. Mr. Ahrens advised respondent that his former employer failed to pay him for overtime work, in violation of the Fair Labor Standards Act, and that he believed he was the victim of sex and age discrimination.

3. Mr. Ahrens advised respondent that most of his evidence with respect to his claims would be based on witnesses rather than on documentary evidence.

4. Despite providing respondent with the names and contact information of some eighteen potential witnesses, respondent contacted several of the witnesses but only obtained affidavits from two.

5. On or about December 30, 2009, respondent filed Mr. Ahrens' claim in federal court alleging only sexual discrimination. The case was styled Ahrens v. Universal Technical Institute, Case No. 6:09-CV-2188-ORL-35KRS.

6. On or about January 5, 2010, respondent filed an amended complaint in Mr. Ahrens' case alleging his claims for age discrimination and failure of his employer to pay him for overtime work.

7. Pursuant to 29 U. S. C. §626(e), respondent was required to assert all claims on behalf of Mr. Ahrens within 90 days of Mr. Ahrens' receipt of his notice of right to sue letter from the EEOC on October 2, 2009. Although the initial Complaint was filed timely, respondent failed to assert the two additional claims until after the expiration of the statute of limitations.

8. Thereafter, respondent failed to diligently pursue Mr. Ahrens' case and failed to maintain adequate communication with him.

9. On August 23, 2010, the court entered its case management order setting forth the time frames in which discovery needed to be completed, any expert reports needed to be filed, mediation needed to be scheduled and the joint pre-trial statements needed to be filed. The discovery deadline was January 14, 2011, respondent's expert report needed to be filed by October 4, 2010, the joint

pre-trial statement needed to be filed by June 20, 2011, and mediation needed to be completed by January 8, 2011. The trial period was set for August 1, 2011.

10. On or about August 30, 2010, the defendant served discovery requests on respondent consisting of a request to produce documents, interrogatories, and a requests for admission.

11. Respondent failed to diligently follow up with Mr. Aherns regarding the responses needed to comply with the discovery demands.

12. Mr. Ahrens advised respondent that he no longer had in his possession many of the documents being sought by the opposing party because he had left them at Universal Technical Institute when he was terminated. Other documents never existed and thus could not be produced. Respondent failed to note these facts in responding to the production request.

13. Respondent failed to timely file the discovery responses and failed to seek an extension of time from opposing counsel.

14. Shortly after the deadline for receipt of respondent's discovery responses passed, opposing counsel contacted respondent to inquire as the status of the responses. Respondent advised opposing counsel that the responses would be forthcoming in the near future.

15. On October 15, 2010, opposing counsel wrote respondent and advised that the discovery responses must be received no later than October 22, 2010.

16. On October 20, 2010, respondent served the responses to the production request and the requests for admission, but failed to serve an answer to the interrogatories or an objection to the interrogatories.

17. Most of respondent's responses to the production request were nonresponsive or incomplete. For example, respondent stated that his client still was in the process of obtaining the requested documents, but gave no description of the factual nature. He stated that the defendant was in possession of responsive documents, but failed to describe the specific documents in the defendant's possession that Mr. Ahrens believed were responsive, or whether Mr. Ahrens was in possession of any responsive documents or when the defendant might expect to receive the documents.

18. On or about October 23, 2010, respondent delivered to opposing counsel additional documents he received from Mr. Ahrens in response to the production request.

19. On or about November 1, 2010, opposing counsel wrote respondent outlining the deficiencies in respondent's discovery responses and

demanding that he supplement his responses on or before November 8, 2010. Opposing counsel reminded respondent that the answers to the interrogatories still had not been served and that this information was necessary before Mr. Ahrens' deposition could be scheduled. Opposing counsel further reminded respondent that the court's case management order of August 23, 2010 imposed a deadline for completing discovery of January 14, 2011.

20. On November 12, 2010, opposing counsel conferred with respondent regarding the discovery issues. Respondent advised that he would produce responsive documents and interrogatory answers by November 15, 2010. Although opposing counsel advised respondent that it appeared it would be necessary to file a motion seeking to extend certain deadlines as a result of respondent's failure to comply with discovery requests in a timely manner, respondent did not indicate to opposing counsel whether he would consent to the filing of such a motion.

21. After respondent failed to meet the agreed discovery production deadline of November 15, 2010, on or about November 18, 2010, opposing counsel filed a motion to compel discovery and to extend mediation and discovery deadlines citing respondent's ongoing dilatory conduct. Respondent failed to file a response to the motion to compel.

22. On or about November 24, 2010, respondent served an additional discovery response on opposing counsel consisting solely of more documents in response to the production request.

23. On or about December 5, 2010, respondent gave Mr. Ahrens a verified consent to respondent's withdrawal for Mr. Ahrens' signature. Mr. Ahrens executed the document only after he made changes to it. Respondent did not file the verified consent to withdrawal with the court.

24. On December 7, 2010, the court entered an order directing respondent to more fully comply with the discovery requests on or before December 13, 2010. The order indicated failure to do so could result in the imposition of sanctions, including dismissal of Mr. Ahrens' case. The court denied, without prejudice, defense counsel's request to extend the discovery and mediation deadlines.

25. On December 10, 2010, opposing counsel advised respondent by electronic mail message as to the discovery requests he believed remained outstanding, which included better responses to the requests for admission, the answers to interrogatories, a privilege log, and certain documents sought by the request to produce but still not provided.

26. On December 13, 2010, respondent provided opposing counsel with unsigned and undated additional responses to the requests for admission and the request to produce. Opposing counsel advised respondent to date and execute the discovery responses, which respondent did, and advised respondent that the answers to the interrogatories were due on or before December 14, 2010.

27. Respondent failed to serve the answers to the interrogatories until after he was contacted by opposing counsel on December 15, 2010 and advised that opposing counsel intended to seek payment of attorney's fees in the approximate amount of \$12,000.00 as a result of respondent's ongoing failure to comply with discovery.

28. On December 20, 2010, opposing counsel filed a motion for attorney's fees in the amount of \$11,553.00 incurred as a result of respondent's failure to comply with discovery requests.

29. Respondent failed to file a response to said motion and, on February 16, 2011, the court granted the motion as unopposed and required Mr. Ahrens to pay attorney's fees in the amount of \$11,553.00 by on or before March 4, 2011.

30. Respondent failed to advise Mr. Ahrens in a timely manner of the entry of the court's order against him.

31. On December 23, 2010, the parties filed a joint motion for extension of time to February 4, 2011 to complete discovery so that Mr. Ahrens could be deposed on January 17, 2011 and so that respondent could depose other, unnamed witnesses.

32. On or about December 28, 2010, the court granted said motion in part. The court granted the extension of time for opposing counsel to depose Mr. Ahrens but denied respondent's request for additional time to depose other witnesses because respondent failed to identify those witnesses and failed to explain his reason for not being able to depose them prior to the discovery cutoff date.

33. On December 27, 2010, opposing counsel served a response to respondent's production request, which was the only discovery respondent sought in the case. Opposing counsel objected to certain production requests. With respect to the remaining production requests, opposing counsel advised that, due to the large volume of documents, they would be available for inspection and copying.

34. Respondent failed to challenge the objections to discovery, nor did he arrange to review the documents opposing counsel indicated would be produced despite Mr. Ahrens' request that he do so.

35. On December 28, 2010, respondent filed his ten day notice, as required by local rule 2.03(b), that he intended to file a motion to withdraw from further representation of Mr. Ahrens. Opposing counsel advised that he did not oppose respondent's motion so long as respondent did not withdraw until after Mr. Ahrens' deposition was completed.

36. On or about January 16, 2011, respondent filed another motion seeking an extension of time to February 14, 2011 to complete discovery and until March 11, 2011 to file dispositive motions.

37. Respondent stated that, since the filing of the previous joint motion for extension of time, he had produced to the defendant five supplemental disclosures, including witness statements, and that respondent needed the additional time to conduct discovery on his own supplemental disclosures, including deposing the additional witnesses whose statements respondent had produced.

38. Respondent also advised the court that he could not complete these depositions by the discovery cutoff date of January 14, 2011, which had already passed at the time respondent served said motion, because he had been caring for his ill mother and closing down his law practice due to financial distress.

39. Respondent further advised that he intended to file a motion to withdraw after the two depositions scheduled for January 18, 2011 and that substitute counsel would need the additional time to depose the witnesses. Respondent also informed the court that he had conferred with opposing counsel, but had not been advised as to opposing counsel's position of this motion.

40. None of the witnesses whose statements respondent provided to opposing counsel referenced in his motion for extension of time were newly discovered, nor had respondent taken any steps to arrange for their depositions prior to filing his motion for extension of time.

41. On January 18, 2011, opposing counsel advised the court that, other than the deposition of Mr. Ahrens and one fact witness held that date, both of which were sought by the defendant, no other depositions had been sought by either party under the court's order granting the partial extension of time. Opposing counsel opposed respondent's motion for extension of time based on respondent's ongoing lack of due diligence in the case.

42. After repeated unsuccessful attempts to contact respondent concerning Mr. Ahrens' failure to pay the court ordered attorney's fees by March 4, 2011, opposing counsel filed a motion for sanctions pursuant to Fed. R. Civ. P. 16(f) and F. R. Civ. P. 41(b) on March 16, 2011.

43. Opposing counsel requested the court dismiss Mr. Ahrens' case as a sanction based on the ongoing failure to timely comply with discovery requests resulting in repeated delays in the case and Mr. Ahrens' failure to comply with the court's order imposing payment of attorney's fees as a sanction for his failure to comply with discovery. Alternatively, opposing counsel requested the court condition continuation of the suit on payment of the fees already ordered and payment of additional fees and costs associated with the instant motion with all amounts to be due and payable by March 28, 2011 or suffer dismissal of the case with prejudice.

44. On March 18, 2011, the court issued an order to show cause to Mr. Ahrens why the case should not be dismissed under Federal Rule of Civil Procedure 41(b) for his failure to comply with a court order. The court stated that failure to respond to the order to show cause on or before March 25, 2011 would result in dismissal of the case. The order to show cause was served on respondent as counsel for Mr. Ahrens.

45. Respondent failed to file a timely response to the court's order to show cause.

46. On April 8, 2011, respondent filed his motion to withdraw without substitution and attached the consent to withdrawal that Mr. Ahrens had previously executed.

47. Respondent did not address the order to show cause in his motion.

48. Respondent did not file the response to the court's order to show cause until April 18, 2011.

49. Respondent stated that his failure to timely file the response was due to extreme financial hardship resulting from the "collapse of his law firm." Respondent admitted he had been negligent in handling the case, but argued that it did not warrant imposition of the extreme sanction of dismissal of the case with prejudice.

50. Respondent further argued that dismissal of the case based on Mr. Ahrens' failure to pay the attorney's fees previously ordered was unwarranted because neither respondent nor Mr. Ahrens had the ability to pay. Respondent did not provide supporting documentation for this position.

51. On June 2, 2011, the court entered its order dismissing Mr. Ahrens' case.

52. The court found dismissal was appropriate given Mr. Ahrens' violation of the court's prior order by failing to render timely payment of the monetary sanctions imposed as a result of his ongoing discovery violations.

53. The court noted that it had previously warned Mr. Ahrens that failure to comply with a court order could result in dismissal of his case; nevertheless, Mr. Ahrens failed to obey another order without offering any explanation to the court or to opposing counsel.

54. Additionally, the court found that a reply to the motion for sanctions or the show cause order had not been filed within the deadlines imposed by the court despite the court's warning that failure to respond timely would result in the dismissal of the action.

55. The court found that "[p]laintiff's noncompliance with Court orders at the very least amounts to a clear record of delay, if not willful contempt."

56. In the April 18, 2011 response to the order to show cause filed by respondent, respondent failed to submit any evidence to support Mr. Ahrens' claim of inability to pay, detail the unsuccessful attempts made to obtain the funds needed to pay the sanctions or tender an offer for Mr. Ahrens to pay in installments. The court found that the "pervasive noncompliance in this matter is

'evidence of a refusal to acknowledge the authority' of the Court and [indicated] 'no willingness to comply with court order.'"

57 Respondent failed to timely advise Mr. Ahrens of the order dismissing the case. Respondent did not advise Mr. Ahrens of the dismissal until June 15, 2011, when he wrote Mr. Ahrens in response to Mr. Ahrens' grievance to The Florida Bar.

58. Mr. Ahrens requested that respondent file the notice of appeal on his behalf because he was unable to hire an appellate attorney.

59. Although respondent filed the notice of appeal on July 7, 2011, he failed to pay the filing fee and failed to file the necessary documents for Mr. Ahrens to proceed in forma pauperis; however, respondent provided copies of the documents necessary for Mr. Ahrens to proceed in forma pauperis to Mr. Ahrens and instructed him regarding the filing of such forms.

60. On July 13, 2011, the Eleventh Circuit Court of Appeals advised respondent that, if the filing fee was not paid or leave to proceed in forma pauperis not filed within fourteen days, the appeal would be dismissed.

61. On July 27, 2011, respondent filed his motion to withdraw in the appellate case, citing that he did not practice appellate law and thus was not able to handle the appeal.

62. On August 3, 2011, the Eleventh Circuit Court of Appeals notified respondent that, upon the expiration of fourteen days, the appeal would be dismissed without further notice unless the required Civil Appeal Statement with the required portions of the district court record was received and a motion to file the Civil Appeal Statement out of time was filed.

63. Respondent failed to take any further action in the case, other than to file an amended motion to withdraw in the appeal on August 29, 2011, which the appellate court granted on September 15, 2011.

64. In the interim, on August 12, 2011, the lower court entered its judgment in favor of the defendant and assessed \$11,553.00 in attorney's fee, plus costs, against Mr. Ahrens.

65. On October 20, 2011, the appellate court dismissed Mr. Ahrens' appeal for lack of prosecution due to the failure to pay the filing fee or file a motion to proceed in forma pauperis within the required time period.

III. RECOMMENDATIONS AS TO GUILT

I recommend that Respondent be found guilty of violating the following Rules Regulating The Florida Bar:

A. 4-1.1 A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.

B. 4-1.3 A lawyer shall act with reasonable diligence and promptness in representing a client.

C. 4-1.4(a) A lawyer shall: (1) promptly inform the client of any decision or circumstance with respect to which the client's informed consent, as defined in terminology, is required by these rules; (2) reasonably consult with the client about the means by which the client's objectives are to be accomplished; and (3) keep the client reasonably informed about the status of the matter.

D. 4-1.4(b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation.

E. 4-3.4(c) A lawyer shall not knowingly disobey an obligation under the rules of a tribunal except for an open refusal based on an assertion that no valid obligation exists.

IV. STANDARDS FOR IMPOSING LAWYER SANCTIONS

I considered the following Standards prior to recommending discipline:

4.4 Lack of Diligence

4.43 Public reprimand is appropriate when a lawyer is negligent and does not act with reasonable diligence in representing a client, and causes injury or potential injury to a client.

4.5 Lack of Competence

4.53 Public reprimand is appropriate when a lawyer:

(a) demonstrates failure to understand relevant legal doctrines or procedures and causes injury or potential injury to a client, or

(b) is negligent in determining whether he or she is competent to handle a legal matter and causes injury or potential injury to a client.

6.2 Abuse of the Legal Process

6.23 Public reprimand is appropriate when a lawyer negligently fails to comply with a court order or rule, and causes injury or potential injury to a client or other party, or causes interference or potential interference with a legal proceeding.

V. CASE LAW

I considered the following case law prior to recommending discipline:

The Florida Bar v. Barcus, 697 So. 2d 71 (Fla. 1997) – Public reprimand administered by an appearance before the Board of Governors of The Florida Bar and completion of the Practice and Professionalism Enhancement Program for engaging in isolated acts of neglect where there was no evidence that he purposefully neglected the case or tried to disadvantage his clients or that the clients were harmed. Mr. Barcus was found to have ineptly handled a difficult situation. Mr. Barcus was hired to represent a married couple in an interrelated series of civil suits that ultimately were combined. During discovery, Mr. Barcus and the client failed to appear twice for the client's scheduled deposition. Mr. Barcus deposed his client shortly thereafter but failed to mail the notice of the deposition to opposing counsel until after the deposition had been held. Mr. Barcus filed a notice of appeal for the sole purpose of delaying foreclosure and did not pursue the appeal, resulting in its dismissal. Mr. Barcus also failed to move for a rehearing or to set aside or vacate the judgment of foreclosure and, instead, advised his client they needed to hire new counsel. The Court found Mr. Barcus spent many hours counseling his clients and applied all the money he was paid to costs rather than to his fees.

The Florida Bar v. Littman, 612 So. 2d 582 (Fla. 1993) – Public reprimand for failing to provide a client with competent representation in connection with a child custody dispute. Mr. Littman failed to advise his client that he would be required to pay child support pursuant to the prior court order despite the fact that the minor child was residing with him rather than with the mother. Mr. Littman also failed to include in his motion seeking to change the child’s residential custody the required Uniform Child Custody Jurisdiction Act affidavit. Although the client was not harmed by this omission because the court denied the opposing party’s motion to dismiss, Mr. Littman clearly failed to take the necessary steps to familiarize himself with the requirements of the law. The Court stated that normally the appropriate discipline for such misconduct would be an admonishment but, due to Mr. Littman’s prior disciplinary history for engaging in similar acts of misconduct, a public reprimand was warranted.

The Florida Bar v. Grant, 465 So. 2d 527 (Fla. 1985) – Public reprimand, pursuant to a Consent Judgment for Conditional Guilty Plea, for neglect resulting in client prejudice. Mr. Grant represented a city in a federal civil rights action where he failed to respond to several discovery requests, court orders, and failed to attend hearings on the discovery issues. His neglect resulted in the court imposing sanctions against his client, including a finding of full liability on all pending claims, and assessing against his client the opposing parties’ attorneys’ fees. Mr.

Grant agreed to make full restitution to his client for the amount of attorney's fees assessed against it.

The Florida Bar v. Hotaling, 454 So. 2d 555 (Fla. 1984) – Public reprimand and two year period of probation for neglect and incompetent representation in two separate matters. Ms. Hotaling undertook the representation of one client in a personal injury case and another client in a dissolution of marriage matter. She failed to diligently handle the personal injury case and failed to provide competent representation in the dissolution of marriage case. In mitigation, there was no evidence of fraud or deceit. Instead, Ms. Hotaling's organization and preparation failed to meet any type of reasonable standard and many of her difficulties stemmed from her inability to turn down clients from lower economic levels and her habit of taking cases on short notice. Neither client was prejudiced by her misconduct. Also in mitigation, she had no prior disciplinary history. The terms of her probation required the filing of quarterly case load reports

VI. RECOMMENDATION AS TO DISCIPLINARY MEASURES TO BE APPLIED

I recommend that Respondent be found guilty of misconduct justifying disciplinary measures, and that he be disciplined by:

A. Public reprimand by publication.

B. Two years probation with the following conditions:

i. Respondent will contact Florida Lawyers Assistance, Inc., at 800-282-8981 for an evaluation within thirty (30) days of the order of the Supreme Court of Florida accepting this Consent Judgment for Conditional Guilty Plea and respondent will abide by all recommendations made by FLA, Inc. At the end of the sixty (60) day period, respondent will provide the Bar's headquarters office with proof that respondent has scheduled an evaluation. If treatment is recommended, respondent will enter into a rehabilitation contract with Florida Lawyers Assistance, Inc., within thirty (30) days of the recommendation for treatment. Respondent shall follow all recommendations by Florida Lawyers Assistance, Inc., during the entire probation period.

ii. Respondent will pay a Florida Lawyers Assistance, Inc. registration fee of \$250.00 and a probation monitoring fee of \$100 a month to The Florida Bar's headquarters office. All monthly monitoring fees must be remitted no later than the end of each respective month in which the monitoring fee is due. All fees must be paid to the bar's headquarters office in Tallahassee. *Failure to pay will render respondent delinquent and ineligible to practice law.*

iii. Respondent will undergo an office procedures and record-keeping analysis by and under the direction of the Law Office Management

Assistance Service (hereinafter LOMAS) of The Florida Bar. Respondent shall cooperate with LOMAS in the conduct thereof. Respondent shall fully comply with and implement, at respondent's sole expense, all recommendations made by LOMAS, which recommendations shall be in accordance with the Office Procedures and Record Keeping Guidelines of LOMAS.

iv. Respondent shall be required to contact LOMAS staff within 30 days from the date of the order of the Supreme Court of Florida accepting this Consent Judgment for Conditional Guilty Plea and shall schedule a review within 60 days from that date. A final review by LOMAS staff shall be conducted not less than 45 days prior to the termination of probation. This final review shall confirm compliance with, and implementation of, the recommendations of LOMAS. LOMAS may require such additional interviews or reviews as it may, in its sole discretion, deem necessary or advisable.

v. Respondent shall pay all fees and expenses of LOMAS incurred or required in connection with the conduct of its analysis. The minimum fees and costs to be associated with this LOMAS review shall be \$1,750.00. Respondent shall be responsible for any additional fees and/or costs associated with this review. LOMAS shall provide the Lawyer Regulation Department of The Florida Bar with status reports as to the ordered analysis.

vi. Respondent shall reimburse to Nick Aherns, his former client, in the amount of \$3,500.00. All restitution must be paid to Mr. Aherns by no later than 60 days prior to termination of probation with proof being supplied to the bar's headquarters office in Tallahassee by no later than 50 days prior to the termination of probation. All payments are to be sent to Mr. Nick Aherns, 353 Bluff Lake Road, Mascotte, Florida 34753 or such other address as Mr. Aherns makes known to respondent. *Failure to pay will render respondent delinquent and ineligible to practice law.*

C. Payment of the bar's costs in the amount of \$1,361.31

VII. PERSONAL HISTORY AND PAST DISCIPLINARY RECORD

Prior to recommending discipline pursuant to Rule 3-7.6(m)(1)(D), I considered the following personal history of Respondent, to wit:

Age: 36

Date admitted to the Bar: September 21, 2007

Prior Discipline: None

VIII. STATEMENT OF COSTS AND MANNER IN WHICH COSTS SHOULD BE TAXED

I find the following costs were reasonably incurred by The Florida Bar:

Administrative Costs	1,250.00
Bar Counsel Travel	101.91
Investigative Costs and Expenses	<u>17.40</u>
TOTAL	\$1369.31

It is recommended that such costs be charged to Respondent and that interest at the statutory rate shall accrue and that should such cost judgment not be satisfied within thirty days of said judgment becoming final, Respondent shall be deemed delinquent and ineligible to practice law, pursuant to R. Regulating Fla. Bar 1-3.6, unless otherwise deferred by the Board of Governors of The Florida Bar.

Dated this _____ day of _____, 2012.

William Elbridge Davis
Referee

Original to Supreme Court with Referee's original file.

Copies of this Report of Referee only to:

JoAnn Marie Stalcup, Bar Counsel, The Florida Bar, 1000 Legion Place, Suite 1625, Orlando, Florida 32801-1050;

Timothy Albert Frantz, Respondent, 5245 W Irlo Bronson Memorial Highway, Suite 1, Kissimmee, Florida 34747-5347; and

Kenneth Lawrence Marvin, Staff Counsel, The Florida Bar, 651 E Jefferson Street,
Tallahassee, Florida 32399-2300

Dated this _____ day of _____, 2012

Judicial Assistant/Deputy Clerk

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