STATE OF NEW YORK
INDUSTRIAL BOARD OF APPEALS

In the Matter of the Petition of:	:	
NATIONAL CREDIT SYSTEMS, INC.,	:	
Petitioner,	:	DOCKET NO. PR 08-117
To Review Under Section 101 of the Labor Law: Two Orders to Comply with Article 6 of the Labor Law, and an Order under Article 19, dated May 28, 2008,	:	RESOLUTION OF DECISION
- against -	:	
THE COMMISSIONER OF LABOR,	:	
Respondent.	:	

APPEARANCES

Joel M. Gluck, Esq., for Petitioner.

Maria L. Colavito, Counsel to the New York State Department of Labor, Benjamin A. Shaw of Counsel, for the Respondent.

WITNESSES

Christopher Rehkow, Nancy Sue Hano and Dawn Hughes, Labor Standards Investigator.

WHEREAS:

On July 22, 2008, Petitioner National Credit Systems, Inc. (Petitioner or NCS) filed a petition with the Industrial Board of Appeals (Board) appealing two Orders that the Respondent Commissioner of Labor (Respondent) issued against it on May 28, 2008.

The first Order (Wage Order) finds that the Petitioner failed to pay commissions to a named Claimant in violation of Article 6 of the Labor Law. It directs payment to the Commissioner of wages due in the amount of $3,118.50 for the period from March 1, 2004 to August 3, 2007, continuing interest on the wages due at the rate of 16% calculated to the date of the Order in the amount of $408.74, and a civil penalty in the amount of $6,237.00, for a total amount due of $9,764.24. The second Order (Penalty Order) assesses Petitioner with a civil penalty in the amount of $500.00 for failure to keep and/or furnish true and

accurate payroll records for each employee in violation of Labor Law § 661 Part 142 of Title 12 of the Official Compilation of Codes, Rules and Regulations, § 2.6.

Petitioner alleges that the Orders are invalid and unreasonable because the Claimant is an independent contractor and not an employee, as evidenced by past decisions of the Unemployment Insurance Appeals Board, and that even if she were an employee, she is not due any commissions because none of the commissions in dispute were earned prior to the termination of her employment. Respondent denies the material allegations of the Petition.

Upon notice to the parties, the Board held a hearing in New York City on June 9, 2009 before Anne Stevason, Esq., Chairperson of the Board and the designated hearing officer in this case. Each party was afforded full opportunity to present documentary evidence, examine and cross-examine witnesses, and raise relevant arguments. The parties submitted closing briefs and Petitioner requested that the Board take official notice of two Unemployment Insurance Appeals Board decisions related to NCS. Respondent thereafter submitted a supplemental brief on the case of *Arbeeny v Kennedy Exec. Search, Inc.*, 2010 NY Slip Op 00306. Briefing was complete on February 17, 2010.

SUMMARY OF THE EVIDENCE

Petitioner sells debt collection services to businesses. Among its services is a debt collection kit which includes a book of forms used by customers to direct NCS to issue a series of collection letters to the customers' debtors. Debt collection kits are ordered through sales representatives who receive commissions based on the number of kits ordered. NCS has approximately 400 sales representatives (reps) that sell these services all over the country.

Christopher Rehkow (Rehkow), president of NCS, testified that the only payment that the sales reps receive is commission, i.e., a percentage of the sales that they bring in. An accounting is usually done every Tuesday and the reps are given checks on Friday. Commissions are payable after the customer has paid NCS. No deductions are taken from the reps' checks for tax withholding, social security or disability insurance and the reps received a 1099 tax form every year.

NCS places ads for sales reps in newspapers. An individual answering the ad will be interviewed by the sales manager and then an independent contractor agreement is signed. Sales are made by knocking on doors, making telephone calls, sending out mailers, sponsorships by professional associations and occasionally NCS will provide the sales rep with leads. Most of the sales reps work out of their homes, are free to engage in other employment and are free to choose the hours that they work. The reps generally do not have exclusive territories.

When hired, the sales rep is brought in for one day of classroom training and then someone accompanies the new rep "into the field to help them, show them how to do that work. . . The field rep will work with them over a long period of time answering their

questions or maybe helping them with their presentation or helping them write letters to customers, all kinds of things like that." The rep is given a sales kit, with a presentation book to demonstrate the product and also receives business cards with his/her name on them as Representative of NCS, brochures, and sales letters with the company's name. If a rep wants to send a sales letter or use any form of publication or advertisement other than that provided by the company, the rep first has to get NCS approval. After a rep makes a sale, the information is entered onto the NCS database, and any computer on the internet can be used to enter the information, but sales reps can use NCS computers if they wish to. The original orders would then be sent to NCS. The reps could also use the NCS phones and work in the office if they wanted to. Rehkow testified that NCS can not operate without its sales agents.

If a customer reorders or orders additional forms, the original sales rep gets a commission on the reorder unless a new sales rep got the reorder or the original sales rep's contract had been terminated. Rehkow testified that it is unusual to get reorders without someone soliciting the reorder. If a sales rep signed up an association, the association advertises the NCS services to its members, and if a member becomes a customer, the association receives a fee and the sales rep earns a commission on the sale minus the association's fee.

Rehkow testified that Nancy Hano (Claimant or Hano) went to work for NCS' predecessor company in 1985. At that time she signed an independent contractor agreement. Rehkow was unable to produce a copy of the agreement signed by Hano, however, a prototype was produced and an addendum signed in 2002 by Hano indicating that Hano was entitled to a 45% commission was entered into evidence. During the time that Hano worked for NCS she received a 1099 each year. Although NCS does not provide fringe benefits, Hano was given a bonus which was informally called a health insurance bonus.

Rehkow testified that he spoke with Hano on the phone some time in 2004 and terminated her contract because for a long time she had not written two new orders a month as required by the contract. Rehkow could not produce any written documentation to show that Hano's contract was terminated or when.

The contract between the parties, a template of which was introduced into evidence, contains the following provisions regarding commissions, servicing accounts and termination:

"9) NATIONAL CREDIT SYSTEMS, INC. COMMISSION SCHEDULING.

A) COMMISSION ON ORDERS. The Company agrees to pay the Agent, and the Agent agrees to accept as payment in full for all services rendered, on all National Credit Systems, Inc. sales a commission of (see 'Addendum') [45%] of the net retail sales prices (less sales tax and other miscellaneous charges, if any).

B) SERVICE OF CLIENT ACCOUNTS. The Agent understands that the servicing of client accounts is a key part of the Company's Services. The

Agent therefore agrees promptly to respond to client inquiries and periodically to call on clients to determine whether the client is using the Service properly, to explain changes in the Services and any mailing made by the company to clients. If a client requests that the Company's sales Agent be changed for any reason or if the Company receives any complaints from a client for lack of service by Agent, then the company reserves the right to assign that client to another agent, and the Agent shall not be entitled to any commission for reorders after such reassignment."

"17) **TERMINATION.**

"A) This Agreement may be terminated by the parties as follows:

"BY THE AGENT:

1) Upon 15 days' written notice to the Company.
2) For cause, without notice, upon breach by the Company of any of its covenants herein.

"BY THE COMPANY:

1) Upon death of Agent.
2) Upon 15 days' written notice from the Company in the event the Agent fails to sell two (2) ~~new~~ *[CKR]* orders within two ~~(2)~~ (4) *[CKR]* consecutive calendar months.
3) For cause, without notice, upon breach by the Agent of any covenant contained in this Agreement.
4) For misrepresentation, fraud, acts of moral turpitude, or withholding funds due to the Company.
5) It is understood that the Company's reputation in any given Territory is determined by the amount of service provided by the clients. Failure by the Agent to properly service his/her accounts thereby causing ill will for the Company would be grounds for terminating this Agreement.
6) At any time, following a filing of bankruptcy, or receivership, by or against the Agent.

"B) It is understood and agreed that the company shall pay the Agent all commissions earned by him on orders, reorders and ACM commissions on net checks received in the Corporate Office up to date of termination. It is further understood and the Agent specifically agrees that he is not entitled to commissions, and no commissions will be paid, on orders, reorders, invoices payments or ACM Commissions where the net checks have not been received in the Corporate Office prior to the date of termination. . . ."

Rehkow testified that none of the payments on the commissions listed in Hano's wage claim were payable until after he terminated her contract and, therefore, nothing is due to Hano. After Hano was terminated, her clients, including her association clients, were assigned to another representative. Rehkow could not remember whether he spoke with or had any communication from Hano after he terminated the contract in 2004.

Dawn Hughes, Labor Standards Investigator (LSI) for the Department of Labor (DOL) testified concerning DOL's investigation. She was not the investigator on the case but she verified the contents of the DOL file that included Hano's claim form, correspondence to Petitioner, the case log and the civil penalty worksheet. According to the file and the conversation that Hughes had with the investigator who was assigned the case, a 200% civil penalty was recommended for Petitioner because NCS never responded to any attempts by DOL to contact NCS and never provided records that were requested.

The Claimant testified that she started working for NCS as a sales rep in 1985 when Rehkow, with whom she had previously worked, called her up and asked her to work for his company. Her agreed rate of compensation was 45% of the sale price. The form contract presented to Hano provided for termination if the salesperson did not acquire two new orders every two months but Hano would not agree to that but agreed to "two orders or reorders every four months." Rehkow agreed to the change as evidenced by his initials on the contract where "new" is crossed out next to orders and where the "(2)" is changed to a "(4)." "An order is when you first approach a new client, and you write up a sale, and then he runs out of forms and he reorders more forms, generally every year . . . he will reorder when he runs out." Hano would receive a commission on an order and a reorder even if she did not write up the reorder. With professional associations, like the Colorado Chiropractic Association, Hano would receive a commission when any of the association's members ordered forms. At one point a telemarketer was hired to process the orders from the associations and his wages would be deducted from Hano's commissions. Hano called her accounts on a monthly basis to see if anything was needed.

Hano maintained that her employment was never terminated, that the contract limits the circumstances by which her employment can be terminated and, as long as she was getting two orders or reorders every four months, the contract remained in effect. She stated that she did not receive a phone call terminating her employment for not obtaining new orders. She spent extra time signing up associations because she felt in the long run that they would produce more commissions since the association members would be placing orders and reorders. She was never asked to turn in her sales kit or customer list. She received her last payment from Petitioner in March 2004 and stopped servicing her clients, due to the fact that she was not being paid, at the end of December 2004. She called Petitioner numerous times asking for her pay and was never able to speak directly with Rehkow. Since Hano believed that none of the conditions for terminating the contract were met, she maintained that she was still employed.

In June 2007, Hano filed a complaint against Petitioner with DOL for unpaid commissions. Prior to filing the complaint, she attempted to obtain information from Petitioner concerning orders or reorders received from her customers. She also wrote to the associations that she signed up to see what orders had been placed since March 2004. Hano received no information from Petitioner but based on the information that she received from the Colorado Chiropractic Association, the National Association of Remodeling Industry and the Alarm Association of Florida, she filed a claim for $3,118.50 for commissions on sales received by Petitioner between March 2004 and August 2007.

FINDINGS

1. Standard of Review

In general, the Board reviews the validity and reasonableness of an Order to Comply made by the Commissioner upon the filing of a Petition for review. The Petition must specify the order "proposed to be reviewed and in what respects it is claimed to be invalid or unreasonable. Any objections ...not raised in the [Petition] shall be deemed waived." [Labor Law § 101].

When reviewing an Order to comply issued by the Commissioner, the Board shall assume that the Order is valid. Labor Law § 103.1 provides, in relevant part:

> "Every provision of this chapter and of the rules and regulations made in pursuance thereof, and every order directing compliance therewith, shall be valid unless declared invalid in a proceeding brought under the provisions of this chapter."

Pursuant to Board Rule 65.30: "The burden of proof of every allegation in a proceeding shall be upon the person asserting it." Therefore, the burden is on the Petitioner to prove that the Order under review is not valid or reasonable in the respects asserted in its Petition.

2. Claimant was Petitioner's employee and not an independent contractor.

a. The Unemployment Insurance Appeals Board decisions are not controlling.

Petitioner argues that the Board should rescind the Order based upon two decisions of the Unemployment Insurance Appeals Board (UIAB) in March 1998 and April 2001 which found that sales reps of Petitioner's predecessor corporations were independent contractors and not employees. Petitioner recognizes that the Board is not bound by the determinations of UIAB (*Matter of Bartender's Unlimited, Inc.*, 289 AD2d 785, 786 [3rd Dept 2001]) but urges that we adopt its findings in this instance. We reject Petitioner's argument because the factors that govern the Board's finding of employment or independent contractor status, differ from those governing UIAB. (*Bartender's, id.)*

b. Definition of "employer" under Article 6 of the New York Labor Law

Under Article 6 of the New York Labor Law, "employer" is defined as "any person, corporation or association employing any individual in any occupation, trade, business or service" (Labor Law § 190[3]). "Employed" is defined as "permitted or suffered to work" (Labor Law § 2[7]). The federal Fair Labor Standards Act (FLSA) also defines "employ" to include "suffer or permit to work" (29 U.S.C. § 203[g]). This similarity of language is due to the fact that Congress adopted the definition of "employ" from state child labor laws to protect employees who might have been otherwise unprotected at common law (*see Rutherford Food Corp. v McComb*, 331 US 722, 728 and n.7 [1947]). Because the statutory

language is identical, the New York Labor Law and the FLSA follow the same test to determine the existence of an employment relationship (*see e.g. Ansoumana v Gristede's Operating Corp.*, 255 FSupp2d 184, 189 [SDNY 2003]).

In determining whether an individual is an employee covered by the Labor Law or an independent contractor without wage and hour protections, "the ultimate concern is whether, as a matter of economic reality the workers depend upon someone else's business for the opportunity to render service or are in business for themselves" (*Brock v Superior Care Inc.*, 840 F2d 1054, 1059 [2d Cir. 1988]). The factors to be considered in assessing such economic reality include (1) the degree of control exercised by the employer over the workers, (2) the workers' opportunity for profit or loss, (3) the degree of skill and independent initiative required to perform the work, (4) the permanence or duration of the working relationship and (5) the extent to which the work is an integral part of the employer's business (*Id.* at 1058-1059). In applying these factors, we must be mindful that "the remedial nature of the statute . . . warrants an expansive interpretation of its provisions so that they will have the widest possible impact in the national economy" (*Herman v RSR Sec. Servs., Ltd.*, 172 F3d 132, 139 [2d Cir. 1999]). Indeed, the Supreme Court in discussing the broad definition of "employ" set forth in the FLSA has observed that "[a] broader or more comprehensive coverage of employees . . . would be difficult to frame" (*United States v Rosenwasser*, 323 US 360, 362 [1945]).

Factor 1: The degree of control exercised by the employer over the worker

Although Claimant could perform her work at any time and any place, she was trained on sales, both in the classroom and in the field, by the Petitioner, and Petitioner supplied all sales material including business cards, sales letters, order forms, and a sales kit. If the Claimant wanted to use her own letters or advertising, she would first have to obtain Petitioner's approval. Thus, Petitioner had pervasive control over Claimant's work.

Factor 2: The worker's opportunity for profit or loss

Claimant's main, if not sole, investment in her work was her time and services. Her opportunity for profit depended upon her sales and she had no financial stake in her work. There was no risk of loss of money since there was no investment other than time. The sales tools and materials were supplied by Petitioner. There is no evidence that Claimant was operating her own business. She only sold Petitioner's debt collection services.

Factor 3: The degree of skill and independent initiative required to perform the work

Although Hano was a good sales rep, she did not possess any specific skills or licenses to perform the job and was required to use the materials provided or approved by Petitioner. Petitioner trained sales reps with a single day in classroom training and several days of field training.

Factor 4: The permanence or duration of the working relationship

Hano began working for Petitioner in 1985 and worked for no one else for over 20 years.

Factor 5: The extent to which the work is an integral part of the employer's business

Petitioner sells debt-collection kits and services. Approximately 430 people work for Petitioner, 400 of whom are salespeople. Rehkow, himself, admitted that the sales reps are an essential part of the company.

We find that based on the totality of the circumstances the Claimant was dependent on the Petitioner's business for "the opportunity to render service" (*see Brock v Superior Care*, 840 F2d at 1059). Accordingly, an employment relationship existed between the Petitioner and the Claimant and the Petitioner is liable for any unpaid wages under Article 6 of the Labor Law.

3. Termination of the Contract.

Petitioner alleges that he terminated the contract with the Claimant over the telephone in approximately February 2004 because Claimant had not obtained two new orders every month. Claimant maintains that the contract was never terminated and remained in effect as long as at least two orders or reorders were received by Petitioner from one of Claimant's customers every four months. Claimant stated that the termination of her contract was never communicated to her and she was never asked for her sales kit or customer list. Petitioner admits that there is no documentation to support his termination of the contract. Claimant admits that she stopped servicing customers, i.e. calling them on a regular basis, at the end of 2004.

The contract has specific provisions relating to its termination. We do not credit Rehkow's testimony that he terminated the contract by phone to Claimant in February 2004. First of all, the contract provides that if termination is for failure to sell orders, 15 days written notice is required. No such notice was provided here. In addition, prior to the introduction of the contract into evidence, Rehkow misrepresented the terms, stating that the contract required two new orders every month. Hano's testimony that the terms were changed to two new orders or reorders every 4 months, as evidenced by Rehkow's initials, was not evidence rebutted. Therefore, the contract was not terminated by the phone call in February 2004.

The contract also provides that it may be terminated without notice, upon breach by the Agent of any covenant in the Agreement. A covenant in the Agreement requires that the Agent "periodically call on clients to determine whether the client is using the Service properly, to explain changes in the Services and any mailing made by the Company to clients." Hano testified that prior to 2005, she called her clients on a monthly basis. At the

end of 2004, due to the fact that she was not receiving any compensation, Hano stopped calling her clients.

Although Hano had worked for Petitioner for 20 years, there was no fixed term to her contract. Therefore, her employment was terminable at will (*Mackie v La Salle Indus.*, 92 AD2d 821 [1st Dept 1983]). Hano ceased servicing her contract at the end of 2004, and at that time, both parties conducted themselves as if the contract was terminated. Accordingly, we find that the contract was terminated as of the end of December 2004. We do not believe that it was the intent of the parties for commissions to continue for the indefinite future on sales made to customers that were originated by Hano. In fact, the contract provides for other methods of termination and also provides that commissions are not due after termination. Hano herself was the recipient of commissions from customer sales that were originated by other sales reps.

Since Petitioner failed to offer any credible evidence that the contract was terminated prior to the time that Hano stopped servicing the customers, we find that the contract terminated in December 2004, based on the voluntary actions of both parties indicating termination. (*See Dunn v Mack Motor Truck Corp*, 120 NYS2d 719 [1953] [where the contract does not definitively state that notice must be given as a condition of its termination, the voluntary conduct of both parties, is an adequate substitute for the written notice of termination]).

Respondent cites to *Arbeeny v Kennedy Exec. Search, Inc.*, 71 AD3d 177 (1st Dept 2010) in support of its position that the commissions continued to be due. agrees with the *Arbeeny*, cites with approval the cases which have rejected open-ended claims for unspecified commissions for the indefinite future where the contract is not specific as to the limits of the employer's obligation or on accounts that were not "service[d] for over a year, simply because [the salesperson] originally obtained it." *Arbeeny*, 71 AD3d 181.

In *Arbeeny*, commissions were due after termination of employment because the parties' contract provided that commissions were due on sales "arranged" by the employee prior to termination. The *Arbeeny* court further provided that the covenant of good faith, while not available to modify the right of an employer to terminate an employment at will, is available to enable one party to receive the benefits promised for performance of the contract, if necessary, in order to effectuate the intent of the parties. "A contract 'cannot be read to enable the defendant to terminate an employee for the purpose of avoiding the payment of commissions that were coming due to the employee." *Arbeeny,* 71 AD3d 181. Once earned, the commissions could not be forfeited.

Contrary to the argument of Respondent, the facts in *Arbeeny* are not "nearly identical to the case at bar." The contract here does not provide that Hano will continue to earn commissions as long as two orders or reorders are obtained every four months. That is only one of the stated reasons for termination in the contract.

4. Commissions due to Claimant.

Claimant was "paid on a commission basis and a commission is considered a wage under section 190 (l) of the Labor Law." (*Pachter v. Bernard Hodes Group, Inc.*, 10 NY3d 609, 617-18 [2008]). Regarding the employer's obligation to pay commission wages, specifically, Labor Law § 191-c (1) provides, in pertinent part:

> "When a contract between a principal and a sales representative is terminated, all earned commissions shall be paid within five business days after termination or within five business days after they become due in the case of earned commissions not due when the contract is terminated . . . ."

Labor Law § 191-a further provides:

> "For purposes of this article the term:
>
> (a) "Commission" means compensation accruing to a sales representative for payment by a principal, the rate of which is expressed as a percentage of the dollar amount of wholesale orders or sales.
>
> (b) "Earned commission" means a commission due for services or merchandise which is due according to the terms of an applicable contract or, when there is no applicable contractual provision, a commission due for merchandise which has actually been delivered to, accepted by, and paid for by the customer, notwithstanding that the sales representative's services may have terminated."

Since the contract terminated at the end of 2004 and provides that commissions are not due after termination, Hano is due commissions on orders and reorders that were paid prior to the end of 2004. Therefore we find that she is due $1,044.00 in unpaid commission based on one sale to a member of the Colorado Chiropractic Assn. dated January 2004 with the commission payable in October 2004 in the amount of $90.00; and four sales to Alarm Association of Florida members, all payable in 2004 and totaling $954.00.

5. Imposition of Civil Penalty

The Order assesses civil penalties in the amount of 200% of the wages ordered to be paid. Labor Law § 218 provides, in relevant part:

> "In addition to directing payment of wages, benefits or wage supplements found to be due, such order, if issued to an employer who previously has been found in violation of those provisions, rules or regulations, or to an employer whose violation is willful or egregious, shall direct payment to the commissioner of an additional

> sum as a civil penalty in an amount equal to double the total amount found to be due. In no case shall the order direct payment of an amount less than the total wages, benefits or wage supplements found by the commissioner to be due, plus the appropriate civil penalty. Where the violation is for a reason other than the employer's failure to pay wages, benefits or wage supplements found to be due, the order shall direct payment to the commissioner of a civil penalty in an amount not to exceed one thousand dollars . . . In assessing the amount of the penalty, the commissioner shall give due consideration to the size of the employer's business, the good faith of the employer, the gravity of the violation, the history of previous violations and, in the case of wages, benefits or supplements violations, the failure to comply with recordkeeping or other non-wage requirements."

The Board finds that the assessment of the maximum civil penalty of 200% is not reasonable in this case. The statute provides for a 200% penalty where the employer has a previous violation or has acted in a willful or egregious manner. Neither condition has been established here and such penalty is particularly unjustified in light of the previous Unemployment Insurance Appeals Board rulings that the sales reps are independent contractors and not employees. DOL based its penalty exclusively on the fact that Petitioner did not respond to its inquiries. We find that a civil penalty in the amount of 100% of the unpaid wages is reasonable in this instance.

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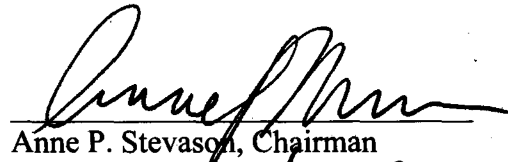
NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

1. The Order to Comply is modified to provide that Petitioner owes $1,044.00 in unpaid wages plus interest of 16%; and

2. The Order to Comply is further modified to assess a civil penalty in the amount of 100% of the wages or $1,044.00; and

3. The Order is affirmed in all other respects; and

4. The Petition is otherwise denied.



Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Jean Grumet, Member

LaMarr J. Jackson, Member

Absent

Jeffrey R. Cassidy, Member

Dated and signed in the Office
of the Industrial Board of Appeals
at New York, New York, on
July 28, 2010.

NOW, THEREFORE, IT IS HEREBY RESOLVED THAT

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2. The Order to Comply is further modified to assess a civil penalty in the amount of 100% of the wages or $1,044.00; and

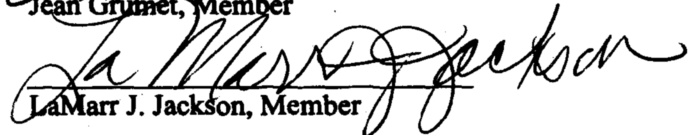
3. The Order is affirmed in all other respects; and

4. The Petition is otherwise denied.

Anne P. Stevason, Chairman

J. Christopher Meagher, Member

Jean Grumet, Member



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