

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA**

| | | |
|---|---|------------------------------|
| LESLIE ARRINGTON, |) | |
| Individually, and on Behalf of all |) | |
| Similarly Situated Persons, |) | |
| |) | |
| Plaintiff, |) | |
| |) | |
| vs. |) | Civil No. <u>12-264 Erie</u> |
| |) | |
| COLORTYME, INC., |) | |
| ABERDEEN COLORTYME |) | |
| PROPERTY, L.L.C., d/b/a ColorTyme, |) | |
| a franchisee of COLORTYME, INC.; and |) | |
| JOHN DOES (1-100) COLORTYME |) | |
| FRANCHISEES, |) | |
| |) | |
| Defendants. |) | |

CLASS ACTION COMPLAINT

Plaintiff Leslie Arrington, individually and on behalf of all similarly situated persons, by and through their undersigned attorneys allege the following.

NATURE OF THE ACTION

1. Plaintiff, Leslie Arrington, brings this action on her own behalf and as a Class Action for the benefit of a class consisting of all customers of ColorTyme, Inc. (“ColorTyme”), its franchisees including ACP Enterprises (“ACP”) and other John Doe franchisees (collectively hereafter referred to as the “ColorTyme Defendants”) who reside in the United States, who have purchased, leased, rented or rented to own (“RTO”), ColorTyme computers and people who used said computers whose electronic communications and/or images were intercepted, accessed, monitored and/or transmitted by a spying device or software without authorization or permission, wherever they may reside in the United States of America.

2. Plaintiff and the Class seek damages caused by Defendants' unlawful invasion of privacy and interception of electronic communications and images in violation of the Federal Wiretap Act as amended by the Electronic Communications Privacy Act (hereinafter referred to as the "Wiretap Act" or the "Electronic Communications Privacy Act").

3. Unbeknownst to Plaintiff and the members of the Class, and without their authorization, Defendants have been spying on the activities of Plaintiff and Class members through the use of the PC Rental Agent® device and/or other similar devices which were designed to, and in fact did, access, intercept, transmit, use and/or disclose electronic communications, and capture photographs of persons using computers in the privacy of their homes or other places in which they had reasonable expectations of privacy. Such spying device and/or spying software was installed and enabled surreptitious spying on Plaintiff or Class members without their consent.

THE PARTIES, JURISDICTION AND VENUE

4. Plaintiff and the Class bring this action pursuant to §§ 2511 and 2520 of title 18 of the United States Code also known as the Electronic Communication Privacy Act ("ECPA") or Wiretap Act.

5. This Court has original jurisdiction of Plaintiff' and the Class' federal law claims pursuant to 28 U.S.C. §§ 1331 and 1337.

6. This Court also has jurisdiction over Plaintiff' state law claims pursuant to 28 U.S.C. § 1367, as those claims are so related to the claims in the action within the original jurisdiction that they form part of the same case or controversy.

7. Plaintiff Leslie Arrington is a resident of Clarkston, Washington, and was a customer of ColorTyme and/or ACP by virtue of her rental and purchase of a laptop computer from the ColorTyme store located at 205 Diagonal Street, Clarkston, Washington 99403.

8. ColorTyme, Inc., a wholly owned subsidiary of Rent-A-Center, Inc., and is a national franchisor of approximately 220 rent-to-own stores operating under the trade name of "ColorTyme." Defendant ColorTyme is a Texas corporation, with a principal place of business in Plano, Texas, and has retail store locations through America, including Pennsylvania, and other states and territories of the United States. During the time relevant to this Complaint, ColorTyme Franchisees purchased, installed and/or used PC Rental Agent® from DesignerWare, LLP, a now bankrupt Pennsylvania Corporation with its principle (and only) place of business located in Erie, Pennsylvania, and installed it on computers it offered for rent or sale without authorization from its customers. As referenced through the facts alleged herein, ColorTyme has purposely availed itself to the jurisdiction of the state of Pennsylvania by agreeing with its franchisees to open its portal on its internal intranet, which allowed and permitted its ColorTyme stores throughout the country to utilize the DesignerWare server in Erie, Pennsylvania to invade the privacy of Plaintiff and others, and to intercept their communications through Emails transmitted from Erie, the necessary conduit for these intercepted communications, to the ColorTyme stores throughout the country, through the ColorTyme portal and corporate server.

9. Defendant ACP d/b/a ColorTyme is a franchisee of ColorTyme, Inc (hereinafter "ColorTyme Inc." or "ColorTyme Corporate"), and is a Washington business with a retail store in Clarkston, Washington.

10. Pursuant to the franchise agreement between ACP and the Doe Franchisees and ColorTyme Inc., ColorTyme Corporate retained and maintained the power, control and ability to

revoke and terminate any Franchise for any reason it unilaterally deemed appropriate or necessary.

11. At all times relevant to the facts alleged herein, ColorTyme Inc. retained the control to prevent the ColorTyme Franchisees' use of ColorTyme corporate server and a portal ColorTyme Inc. intentionally opened within ColorTyme internal intranet, as well as Email transmitted through ColorTyme corporate server, which allowed the Franchisees to intercept electronic communications and images, as alleged herein.

12. Instead, ColorTyme Inc. chose to permit such activity despite specific knowledge that its Franchise stores were utilizing the integral portal and ColorTyme corporate server to secretly gather photographs of ColorTyme customers in their home as well as their computer keystrokes and screenshots, all without the permission of those customers.

13. During the time relevant to this Complaint, ACP and/ or ColorTyme Corporate entered into an agreement with DesignerWare, an Erie Pennsylvania Corporation, and pursuant to that agreement, purchased, installed and used PC Rental Agent® from DesignerWare and installed it on computers ACP offered for rent or sale without authorization from its customers. Pursuant to said agreement with DesignerWare, and through the use of PC Rental Agent®, and technical support offered by DesignerWare in Pennsylvania, ACP purposely availed itself to the jurisdiction of the state of Pennsylvania.

14. The John Does Defendants are ColorTyme Franchisees who have entered into Agreements with DesignerWare, and who have, pursuant to those agreements, purchased PC Rental Agent® and installed it on their computers for rent or purchase without authorization from their customers. Through the use of PC Rental Agent® and the technical support offered

by DesignerWare in Pennsylvania, the John Does purposely availed themselves to the jurisdiction of the state of Pennsylvania.

15. Venue is proper in this district pursuant to 28 U.S.C. §§ 1391 (b) and (c) as DesignerWare, LLC, the designer and distributor of PC Rental Agent® device and/or software, has its principal place of business is located in North East, Pennsylvania. Moreover, in this district, DesignerWare receives, manages, stores, intercepts, discloses and transmits images secretly taken of ColorTyme customers in their home or other places where customers had expectations of privacy, via computer webcams, as well as keystrokes, screen shots, and electronic communications intercepted by PC Rental Agent® and/or Software for the ColorTyme Defendants.

16. Venue is proper in this district because the ColorTyme Defendants received, managed, accessed, intercepted and transmitted communications collected in this district, including the images secretly taken of customers via computer webcams, through the use of the PC Rental Agent® device and/or software intentionally installed on their rental computers throughout the country (including the computer rented, owned and used by class Plaintiff Leslie Arrington).

17. In connection with the acts and conduct complained of below, Defendants, directly or indirectly, used the means and instrumentalities of interstate commerce, including the internet, or made such use possible.

CLASS ACTION ALLEGATIONS

18. Plaintiff Leslie Arrington brings this action on behalf of themselves and a class of all other persons similarly situated pursuant to Fed. R. Civ. P. 23 as defined as follows:

All customers of the ColorTyme Defendants who reside in the United States, who have purchased, leased, rented or rented to

own, ColorTyme computers and people who used said computers whose electronic communications and/or images were intercepted, accessed, monitored and/or transmitted by Defendants via PC Rental Agent® or other devices or software without the customer's authorization.

19. Specifically excluded from the class are the Defendants themselves, any subsidiary of any of the Defendants, any family members of the Defendants who are such customers, all employees and directors of Defendants or any subsidiary, and their legal representatives.

20. The class is so numerous that joinder of all members is impracticable. Plaintiff's claims are typical of the class, as Plaintiff and all other class members were injured in exactly the same way – by the unauthorized collection, interception and/or transmission of their electronic communications and images, all through PC Rental Agent® installed on their ColorTyme RTO computer.

21. Plaintiff will fairly and adequately represent the interests of the class and have retained counsel competent and experienced in class action litigation.

22. Plaintiff has no interests that are contrary to or in conflict with those of the class.

23. A class action is superior to other available methods for the fair and efficient adjudication of this controversy under the acts described below. Given the nature of these claims, the expense and burden of individual litigation make it virtually impossible for the class members individually to seek redress for the unlawful conduct alleged.

24. Plaintiff knows of no difficulty that will be encountered in the management of this litigation that would preclude its maintenance as a class action.

25. Common questions of law and fact exist as to all members of the class and predominate over any questions effecting solely individual members of the class. Among the questions of law and fact, common to the class:

- a. Whether Defendants' acts as alleged herein violated the ECPA.
- b. Whether Defendants' acts as alleged herein constituted invasions of Plaintiff' privacy.
- c. Whether Defendants participated in and pursued the concerted action or common course of conduct complained of; and
- d. Whether Plaintiff and members of the class are entitled to compensatory damages, as well as statutory and punitive damages pursuant to the ECPA.

26. Plaintiff also brings this action under Rule 23(b)(3) because common questions of law and fact identified herein predominate over questions of law and fact affecting individual members of the Class. Indeed, the predominant issues in this class are whether Defendants have violated the law by the unauthorized, inappropriate and undisclosed invasion of privacy, and by their remote interception and transmission of communications and information secretly obtained by computers rented, leased and/or sold to said Class members, and in the intentional unauthorized interception and use of electronic and computer communications and information, including "screen shots," photographs and information (including keystrokes) relating to internet usage. Certification under Rule 23(b)(3) is appropriate because:

- a. by virtue of the secret nature of the spying device and software described in this complaint, individual class members may not be aware that they have been wronged and are thus unable to prosecute individual claims;

- b. concentration of the litigation concerning this matter in this Court is desirable;
- c. the claims of the representative Plaintiff are typical of the claims of the members of the purported class;
- d. a failure of justice will result from the absence of a class action; and
- e. the difficulties likely to be encountered in the management of this class action are not great.

SUBSTANTIVE ALLEGATIONS

FACTS CONCERNING COLORTYME STORES' USE OF PC RENTAL AGENT®

27. ACP and other ColorTyme Franchisees have entered into agreements with DesignerWare, pursuant to which said ColorTyme Defendants would purchase, and DesignerWare would provide, a spying device and software product called PC Rental Agent®, as well as technical support, and use of the DesignerWare server in North East, Pennsylvania, that would permit these Defendants to conduct the spying activity alleged herein.

28. ACP and numerous ColorTyme Franchisees have secretly installed this spying device and/or software on ColorTyme RTO computers. As designed, PC Rental Agent®, would permit the ColorTyme Defendants to remotely and surreptitiously access, monitor, intercept, and/or transmit electronic communications and images, including, but not limited to, images of monitors or screens (“screen shots”), keystrokes, as well as images captured by the computers’ respective cameras (“webcams”) of whatever person(s) was sitting in front of the computer, and whatever activity was occurring at the time the webcam was capturing the photographs.

29. PC Rental Agent® makes possible such illegal, surreptitious, and unauthorized remote electronic surveillance, intrusion on Plaintiff's seclusion, and the interception of protected communications.

30. PC Rental Agent® is manufactured, assembled, advertised and sold to the ColorTyme Defendants by DesignerWare for the purpose of allowing the ColorTyme Defendants to remotely spy on Plaintiff, as well as track, access, monitor, intercept and/or transmit electronic communications on ColorTyme RTO computers.

31. PC Rental Agent® is a device and/or software that is manufactured, advertised to be and is, in fact, invisible or generally undetectable to customers and to other end users of ColorTyme RTO computers.

32. Once PC Rental Agent® is installed on the RTO computers, it permits the installer – in this case ACP and the Franchisees – to remotely “install” or “build” a “Detective Mode” on the RTO computer over the internet and through the PC Rental Agent® and/or DesignerWare website.

33. After the Detective Mode has been remotely installed on the RTO computers, the installer is able to choose various levels of surveillance upon the RTO computer and the computer users. These various levels of surveillance permit the installer to secretly take photographs with the RTO computers' webcams, and capture keystrokes, and screen shots. The surveillance is sent from DesignerWare to the installer through Email transmissions, which have attachments that show those keystrokes, screenshots, and webcam images.

34. Upon information and belief, ColorTyme Inc. consented to all of its Franchisees' use of PC Rental Agent® and it was not until sometime after May 3, 2011 did ColorTyme direct all of its franchisees to stop using PC Rental Agent®.

35. It has been the practice and policy of the ColorTyme Defendants to conceal from their customers – and not expressly reveal nor obtain such customers’ consent or authority to permit – their ability to remotely intrude upon the seclusion of Plaintiff and ColorTyme customers in their homes or other private areas, or to remotely access, intercept and monitor customers’ private, personal electronic communications, information, screen shots, keystrokes or images captured on webcams and to further disclose to consumers exactly the kinds of private information and images that can be and were routinely collected, transmitted and stored.

36. The ColorTyme Defendants’ sales, rental or lease agreements neither seek permission from, nor disclose to RTO customers the presence of PC Rental Agent® nor its ability to monitor and intercept communications, photographs taken with the webcam, and other data from ColorTyme RTO computers, wherever those computers may be.

37. On March 31, 2011 Plaintiff entered into a ColorTyme RTO lease agreement for a laptop computer, model # AS5536-5105 with ColorTyme and ACP

38. The agreement did not disclose that the ColorTyme Defendants had installed a device which could monitor Plaintiff in her home, and intercept her private communications.

39. PC Rental Agent® was installed on Plaintiff’s computer.

40. Upon information and belief, the Plaintiff’s computer was secretly accessed by ACP, resulting in her images being taken with the webcam and her communications being stolen, all via PC Rental Agent® and the DesignerWare and ColorTyme Inc. corporate server.

41. The images gathered by Franchisees’ secret spying activity, via use of PC Rental Agent® and the DesignerWare and ColorTyme corporate servers, included photographs taken through the webcam of individuals in various private and compromising positions.

42. The electronic information which defendants intercepted from members of the class included personal and/or private information.

43. At all times relevant to this Complaint, ColorTyme, Inc. retained actual and sufficient authority and control over ACP and the other Franchisees who utilized PC Rental Agent® to spy on their customers, so as to be vicariously liable for the acts of the Franchisee.

CAUSES OF ACTION

COUNT I

(Violation of the Electronic Communications Privacy Act, 18 U.S.C. § 2511)

44. Plaintiff repeats and re-alleges each and every allegation above as if fully set forth herein.

45. Defendants have intentionally intercepted and/or procured to be intercepted Plaintiff's and class members' electronic communications without Plaintiff's or the class members' knowledge, authorization, or consent in violation of 18 U.S.C. § 2511.

46. Defendants have also intentionally used and/or procured to be used a device to intercept the above-referenced electronic communications.

47. Defendants conspired to intercept the images and communications of Plaintiff, as alleged herein.

48. Through the agreement for the purchase of PC Rental Agent® from DesignerWare, and DesignerWare's provision of the software, server, and technical support to permit the illegal interception of electronic communications as alleged herein, Defendants, one or all of them, set out on a course of conduct with the intention of intercepting images and communications of Plaintiff.

49. An “electronic communication” is defined in § 2510(12) as any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system that affects interstate or foreign commerce.

50. Defendants violated 18 U.S.C. § 2511(1)(a) by intentionally, collecting, gathering intercepting, endeavoring to intercept, transmit, procure, store any other person to intercept or endeavor to intercept Plaintiff’ and Class members’ electronic communications.

51. Defendants violated 18 U.S.C. § 2511(1)(c) by intentionally collecting, transmitting, storing and disclosing, or endeavoring to disclose, to any other person, the contents of Plaintiff and Class members’ electronic communications, knowing or having reason to know that the information was obtained through the interception of Plaintiff’ and class members electronic communications.

52. Defendants violated 18 U.S.C. § 2511(1)(d) by intentionally using or endeavoring to use, the contents of Plaintiff’s and class members electronic communications, knowing or having reason to know that the information was obtained through the interception of Plaintiff’ electronic communications.

53. Neither Plaintiff nor class members authorized or consented to Defendants’ interception of electronic communications.

54. ColorTyme, Inc. is directly liable for every interception by virtue of the use of the ColorTyme, Inc. corporate intranet, server and Email accounts; as well as for its determination to jointly continue its participation and to conduct a Beta study to determine the viability of the PC Rental Agent® or similar software for its corporate stores, rather than terminate its involvement

and discontinue its express consent to allow such misconduct to occur through its corporate property and structure.

55. ColorTyme, Inc. is also vicariously liable for the actions of its Franchisees, including ACP, as it retained actual and sufficient control over its ACP and its Doe Franchisees, as alleged herein, including, but not limited to controlling specific aspects of its Franchisees' business operations from which the injury arose, to wit: the mandated use of the ColorTyme corporate intranet, server and Email and express consent that was required under the franchise agreements, and which it granted to its Franchisees, so they could access and use the PC Rental Agent® – all necessarily through ColorTyme, Inc. server.

56. Section 2520 of the ECPA provides for a private cause of action and allows for declaratory and equitable relief as appropriate and statutory damages of the greater of \$10,000 or \$100 a day for each day of violation, actual and punitive damages, and reasonable attorney's fees and costs.

COUNT II

(Invasion of Privacy)

57. Plaintiff repeats and re-alleges each and every allegation above as if fully set forth herein.

58. These Defendants, through their concerted and agreed upon conduct as alleged herein, engaged in actions which constituted the intentional intrusion on the seclusion of Plaintiff and their customers' private concerns, including, but not limited to, the private occurrences, communications, engagements, and otherwise personal and private engagements, transmissions and recordings of information, whether occurring in their homes or in other places in which Plaintiff and others had a reasonable expectation of privacy.

59. Each Defendant's actions played an integral and necessary part, without which, these intrusions on seclusion and invasions of privacy could not have been committed, insofar as ACP intended to intrude upon Plaintiff's seclusion by purchasing PC Rental Agent® from DesignerWare; ColorTyme, Inc. made such intrusion possible by opening the portal on its intranet so ACP could access DesignerWare's server and website to use the PC Rental Agent® to activate and build the Detective Mode and begin spying on Plaintiff, and by ColorTyme Inc.'s choice to leave open such portal even after learning of the very intrusive nature of the PC Rental Agent® and what it was allowing the Franchisees to do; and by DesignerWare's creation of and provision of the software which made the spying possible, and the server which was the hub from which all of the spying activities were communicated to Franchisees through ColorTyme server.

60. The private information of Plaintiff surreptitiously obtained as referenced herein, was viewed, posted, ogled, shared, available and displayed unnecessarily and illegally by Defendants in their Franchise stores, and elsewhere.

61. ColorTyme, Inc. is directly liable for all of its direct participation in the illegal conduct alleged herein.

62. ColorTyme, Inc. is also vicariously liable for the actions of its Franchisees, including ACP, as it retained actual and sufficient control over its ACP and its Doe Franchisees, as alleged herein, including, but not limited to controlling specific aspects of its Franchisees' business operations from which the injury arose, to wit: the mandated use of the ColorTyme corporate intranet, server and Email and express consent that was required under the franchise agreements, and which it granted to its Franchisees, so they could access and use the PC Rental Agent® – all necessarily through ColorTyme, Inc. server.

63. The intentional and deliberate intrusion on seclusion as referenced in the preceding paragraph and throughout this Complaint, did cause, and would cause, mental suffering, shame, or humiliation to persons of ordinary sensibilities, and thus, was substantial and highly offensive to reasonable persons, and thus, Plaintiff and the Class members are entitled to compensatory damages for their injuries.

64. The intentional and deliberate intrusion on seclusion as referenced herein constituted wanton, willful and malicious conduct justifying an award of punitive damages against these Defendants.

COUNT III

(Conspiracy)

65. Plaintiff repeats and re-alleges each and every allegation above as if fully set forth herein.

66. Of Defendants and DesignerWare, two or more of them acted with a common purpose to commit and do unlawful acts, to wit: to commit the tort of intrusion on seclusion, and thus invade the privacy of Plaintiff and the class members; and to illegally and in violation of the ECPA, intercept electronic communications; all as alleged herein.

67. One or more of the Defendants committed overt acts to further their common purpose as described here:

- a. DesignerWare designed and made available for sale, its spying software, PC Rental Agent®, and then provided and maintained a server in North East, Pennsylvania, within the Western District of Pennsylvania, and said server made possible the illegal acts complained of herein as it served as the hub through which all spying and collection of intercepted

communications commended and was transmitted and conducted. Without the DesignerWare product and server, none of the illegal conduct was possible.

- b. ACP and the Doe Franchisees entered into agreements with DesignerWare for the purchase of the spying software and the use of DesignerWare's server for the purpose of committing the illegal acts complained of herein, and then issued the commands that travelled through both the ColorTyme, Inc. server and the DesignerWare server, that remotely began and completed the installation of the Detective Mode upon the RTO computers, as well as the commands to commence the illegal spying and interception of personal, private and electronic communications. Without the commands given by ACP and the Doe Franchises, none of the illegal conduct would have occurred.
- c. ColorTyme, Inc. expressly consented to, aided, assisted and directly participated in said spying activities while maintaining control and authority over its corporate intranet and server, as well as its Franchisees.

68. The conduct of these Defendants was *per se*, malicious as they acted in concert to commit unlawful acts, and, alternatively, was malicious as they undertook the activity with the intent to injure Plaintiff and the class, and was without legal justification.

69. The conduct of these Defendants caused actual legal damage to Plaintiff and the class as described herein, including, but not limited to, the statutory damages provided for in the ECPA, the compensatory damages to which they are entitled for the invasion of their privacy, the

theft of their images and likeness, their personal and private information and communications, as well as their attorneys fees and punitive damages.

70. The Defendants are jointly and severally liable for the compensatory damages caused to Plaintiff and the Class.

COUNT IV

(Aiding and Abetting)

71. Plaintiff repeats and re-alleges each and every allegation above as if fully set forth herein.

72. ColorTyme, Inc. aided and abetted ACP and the Doe Franchisees in their acts of invading the privacy, and intercepting the private and personal information and communications – electronic and otherwise – of Plaintiff and the class; to wit: ColorTyme, Inc. knew, understood, or learned that tortuous and criminal acts had been, were, or would be committed, by ACP and the Doe Franchisees; that those Defendants’ tortuous and illegal conduct constituted breaches of common law and statutory duties toward Plaintiff and the class; and thereafter provided substantial assistance to those Defendants’ in the form of physical assistance, participation and/or encouragement of their conduct.

73. The substantial assistance provided by ColorTyme, Inc., as alleged herein, included their express consent to permit ACP and the Doe Franchisees to use and access the DesignerWare and/or PC Rental Agent® website(s) via the ColorTyme, Inc. corporate intranet and server to build and install the Detective Mode on ColorTyme customers’ RTO computers, as well as their consent to allow ACP and the Doe Franchisees to secretly spy on and invade the privacy of ColorTyme customers in their homes, and intercept private and personal information

and electronic communications, all through the ColorTyme, Inc. server and the email accounts it owned and managed.

74. Not only was the substantial assistance provided by ColorTyme, Inc. a proximate cause of the resulting illegal conduct and damages to Plaintiff and the Class, as alleged herein, such illegal conduct and resulting damages was impossible without ColorTyme substantial assistance.

75. As alleged herein, Plaintiff and the Class suffered damages as a result of such aiding and abetting by ColorTyme, Inc., including but not limited to those referenced in paragraphs 95, 102, and 103.

76. As a result, ColorTyme is jointly and severally liable for the compensatory damages caused to Plaintiff and the Class.

WHEREFORE, Plaintiff Leslie Arrington, and all members of the Class, request judgment in their favor and against Defendants, jointly and severally, as follows:

- a. For an order certifying the Class under the appropriate provisions of Rule 23 and appointing Plaintiff and their legal counsel to represent the Class;
- b. Awarding damages as provided by the Electronic Communications Privacy Act including declaratory relief, actual damages, punitive damages and reasonable attorneys' fees and costs to counsel for the Class pursuant;
- c. Awarding compensatory and punitive damages where appropriate for all other claims; and
- d. Granting such other and further relief as is just and proper.

DEMAND FOR JURY TRIAL

Plaintiff and the members of the Class hereby demand a trial by jury on all issues for which a right to jury trial exists.

LEVIN, FISHBEIN, SEDRAN & BERMAN

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