

UNITED STATES BANKRUPTCY COURT
SOUTHERN DISTRICT OF FLORIDA
West Palm Beach Division
www.flsb.uscourts.gov

CASE NO. 08-29769-PGH

(All 7 Cases Jointly Administered)
Chapter 7

In re:

GINN - LA ST. LUCIE LTD., LLLP, et al. ¹

Debtors. /

In re:

GINN - LA QUAIL WEST LTD., LLLP, et al. ³

Debtors. /

(4 Cases Substantively Consolidated
into Lead Case No. 08-29769-PGH) ²

CASE NO. 08-29774-PGH

(3 Cases Substantively Consolidated
into Lead Case No. 08-29774-PGH) ⁴

DREW M. DILLWORTH, Chapter 7 Trustee,

Adv. Pro. No.

Plaintiff,

v.

AUSTIN OUTDOOR, LLC, a Florida
limited liability company, and **AUSTIN**
OUTDOOR, INC., a Florida corporation,

Defendants.

COMPLAINT

Plaintiff, Drew M. Dillworth, in his capacity as Chapter 7 Trustee for the Tesoro Debtors' Estates ("**Trustee Dillworth**"), sues Defendants, Austin Outdoor, LLC and Austin Outdoor, Inc. (together "**Austin Outdoor**") and states as follows:

¹ The last four digits of the Debtors' tax identification numbers are as follows: (i) Ginn-LA St. Lucie Ltd., LLLP, Employer Tax I.D. No. (5632); (ii) Ginn-St Lucie GP, LLC, Employer Tax I.D. No. (0983); (iii) Tesoro Golf Club Condominium, LLC, Employer Tax I.D. No. (4385); and (iv) The Tesoro Club, LLC, Employer Tax I.D. No. (1917). See 11 U.S.C. § 342(c)(1).

² The "**Tesoro Debtors' Estates**" (Case Nos. 08-29769-PGH, 08-29770-PGH, 08-29772-PGH and 08-29773-PGH) are substantively consolidated into Lead Case No. 08-29769-PGH. See Order [D.E. 308/309].

³ The last four digits of the Debtors' tax identification numbers are as follows: (i) Ginn-LA Quail West Ltd., LLLP, Employer Tax I.D. No. (2397); (ii) Ginn-Quail West Beach, LLC, Employer Tax I.D. No. (9142); and (iii) Ginn-Quail West GP, LLC, Employer Tax I.D. No. (6313). See 11 U.S.C. § 342(c)(1).

⁴ The "**Quail West Debtors' Estates**" (Case No. 08-29774-PGH, 08-29775-PGH and 08-29776-PGH) are substantively consolidated into Lead Case No. 08-29774-PGH. See Order [D.E. 34].

I. NATURE OF ACTION, PARTIES, JURISDICTION AND VENUE

A. Nature of Action

1. This adversary proceeding is brought by Trustee Dillworth against Austin Outdoor to avoid and recover preferential and fraudulent transfers pursuant to sections 101(31), 547, 548 and 550 of Title 11 of the United States Code, 11 U.S.C. §§ 101, et seq., (“**Bankruptcy Code**”), and for unjust enrichment.

B. Parties

2. Plaintiff, Trustee Dillworth, is the duly authorized and acting Chapter 7 Trustee of the Tesoro Debtors’ Estates and the Quail West Debtors’ Estates.

3. Defendants, Austin Outdoor, are a Florida limited liability company and Florida corporation, respectively, that has its principal place of business in Flagler County, Florida and are doing business in Palm Beach County, Florida.

C. Jurisdiction

4. This Court has jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 157(a) and (b) and 1334(b).

5. This is a core proceeding for which this Court is authorized to determine all matters regarding this adversary proceeding in accordance with 28 U.S.C. § 157(b)(2)(A) and (E).

6. All conditions precedent to the filing of this action have been performed, have occurred, have been waived or have otherwise been excused.

D. Venue

7. Venue is proper in this district pursuant to 28 U.S.C. §§ 1408 and 1409.

II. PROCEDURAL BACKGROUND

A. Bankruptcy Cases

8. On December 23, 2008 (“**Petition Date**”), each of the Debtors filed a voluntary petition under Chapter 7 of the Bankruptcy Code.

9. The Tesoro Debtors’ Estates and the Quail West Debtors’ Estates are being jointly administered under the Bankruptcy Case styled *In re Ginn-LA St. Lucie Ltd., LLLP*, Case No. 08-29769-PGH (D.E. 20) (“**Main Case**”).

10. On the Petition Date, the United States Trustee appointed Drew M. Dillworth as interim Chapter 7 Trustee of the Debtors’ estates (D.E. 4).

11. No trustee was elected at the Bankruptcy Code § 341 meeting of creditors held and concluded on January 30, 2009 in these jointly administered cases. Accordingly, pursuant to Bankruptcy Code § 702, Drew M. Dillworth is the duly appointed, qualified and acting Chapter 7 Trustee in these cases.

12. The Tesoro Debtors’ Estates were substantively consolidated into Lead Case No. 08-29769-PGH (D.E. 308/309). The Quail West Debtors’ Estates were substantively consolidated into Lead Case No. 08-29774-PGH (D.E. 34).

III. GENERAL ALLEGATIONS

13. In or around 1998, Edward R. Ginn, III (“**Ginn**”), and a fund established by Ira Lubert (“**Lubert**”) and Dean Adler (“**Adler**”) created Ginn Development, LLC with the purpose of pursuing the acquisition of undeveloped land suitable for development as residential resort properties.

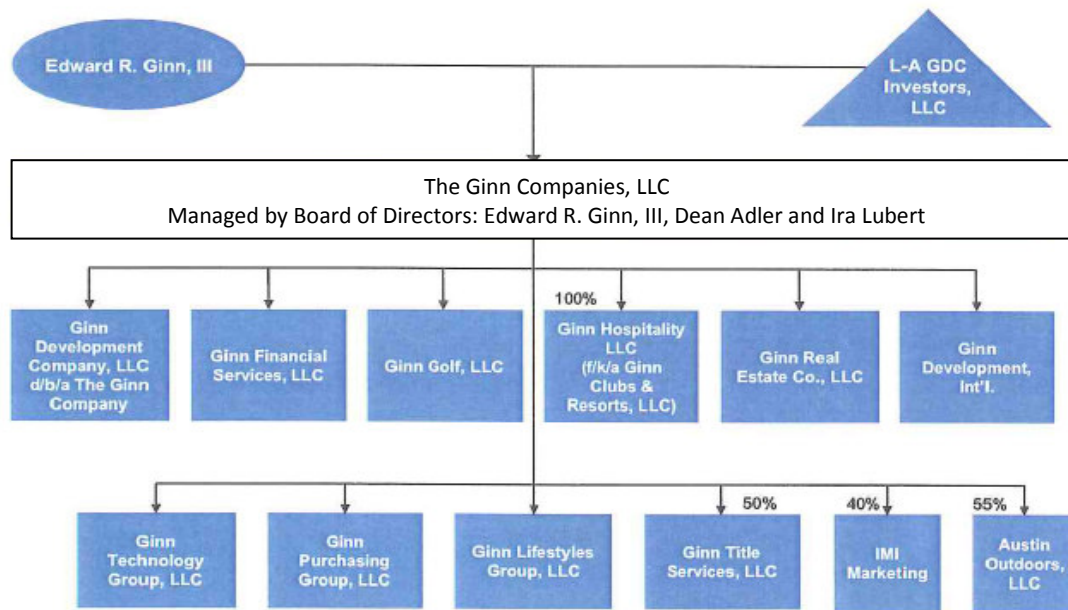
14. Ginn Development, LLC eventually became The Ginn Companies, LLC and continued to engage in the business of real estate development and management, architectural

design and engineering, resort development and operation, and golf course construction and management. The Ginn Companies, LLC's primary marketing focus was selling single family lots and condominium units in upscale residential and resort communities to affluent individuals.

15. Prior to the Petition Date, Ginn, Lubert and Adler, by and through the Debtors, engaged in the development of two master plan residential real estate projects known as Tesoro (the "**Tesoro Project**") located in Port St. Lucie, Florida, and Quail West (the "**Quail West Project**") located in Naples, Florida.

16. The Tesoro Project, in particular, was held by Debtor, Ginn-LA St. Lucie Ltd., LLLP, a Georgia limited liability limited partnership. As denoted by its name, this entity was jointly owned and controlled by Ginn, Lubert and Adler through various entities. Moreover, The Ginn Companies, LLC, either directly or through its subsidiaries and other affiliates, acted as the authorized representative of the Debtors throughout the multi-step strategic sales and marketing process for the Tesoro Project.

17. As illustrated in the enterprise chart below, all of the Ginn related projects (including the Tesoro Project) were managed and operated by The Ginn Companies, LLC as a vertically integrated operation in which Ginn, Lubert and Adler closely managed and controlled its various subsidiary companies:



18. In or around 2005, The Ginn Companies, LLC, acquired a 55% interest in Austin Outdoor. The Ginn Companies, LLC marketed this acquisition as a means of strictly managing its cost center with respect to its real estate projects.

19. Therefore, as of 2005 and through the Petition Date, the same people who owned, operated and controlled the Debtors – Ginn, Lubert and Adler – owned, operated and controlled Austin Outdoor. Thus, the Debtors and Austin Outdoor not only shared the same ownership and control, but also an identity of economic interests.

20. As a direct result of their close relationship, the Debtors and Austin Outdoor entered into a number of landscape management agreements and other transactions. However, and also as a direct result of their close relationship, these agreements were not made upon an arm's-length basis.

21. Moreover, according to the Debtors' principal's sworn testimony in the Statement of Financial Affairs, Main Case D.E. 11, Austin Outdoor was an "insider" of the Debtors within

the meaning of 11 U.S.C. § 101(31).

IV. THE AVOIDABLE TRANSFERS AT ISSUE IN THIS CASE

A. The Transfers

22. As set forth in Schedule 1 attached to this Complaint, Austin Outdoor was the recipient of transfers from Plaintiff within the one year prior to the Petition Date (the “**Insider Preference Period**”) and totaling at least \$1,763,374.05 (the “**Transfers**”).

B. The Tesoro Project Lease

23. In or around 2007, Austin Outdoor constructed a new maintenance facility (the “**Capital Improvement**”) on that certain parcel of real property referred to as “Tract K” within the Tesoro Project, at its own expense, and at a cost of approximately \$400,000.00.

24. On or about May 5, 2008, Austin Outdoor and the Debtor, Ginn-LA St. Lucie Ltd., LLLP, entered into a lease agreement (the “**Lease**”) of that certain structure and real property referred to as “Tract K” within the Tesoro Project for a term of sixty (60) consecutive months, renewable for up to two consecutive twelve (12) month periods, and for total consideration of \$1.00 for the term of the Lease. The effective date of the Lease was January 1, 2008.

25. Debtor acknowledged the obligation it owed to Austin Outdoor as a result of the Capital Improvement in the Lease provision permitting Debtor/lessor to effect an early cancellation of the terms of the Lease (the “**Early Cancellation Provision**”). The Early Cancellation Provision states in pertinent part:

If the [Debtor] exercises its right to cancel the Lease upon ninety (90) days prior to the expiration of the initial Lease Term, or during either of the twelve (12) month renewal option periods, if exercised by [Austin Outdoor], the [Debtor] agrees to reimburse [Austin Outdoor] for the

undepreciated portion of its initial site improvement costs that were invested on [Debtor's] property. These site improvement costs total three hundred and seven (sic) five thousand dollars (\$375,000) and will be depreciated on a straight line basis over a period of seven (7) years, commencing on January 1, 2008.

Lease, ¶ 4. There is no other mention of the Capital Improvement in the Lease other than the Early Cancellation Provision.

**COUNT I - AVOIDANCE AND RECOVERY OF
PREFERENCES PURSUANT TO BANKRUPTCY CODE §§ 547 AND 550
(*The Transfers*)**

Trustee Dillworth sues Defendants, Austin Outdoor and alleges:

26. Trustee Dillworth incorporates the allegations contained in paragraphs 1 through 25 as if fully set forth herein.

27. Based on the facts set forth above and the Debtors' principal's sworn testimony, Austin Outdoor was an insider of the Debtors pursuant to 11 U.S.C. § 101(31).

28. Plaintiff made the Transfers set forth in Schedule 1 to or for the benefit of Austin Outdoor which occurred within the Insider Preference Period.⁵

29. The Transfers were made at a time when the Debtors was insolvent.

30. The Transfers were for, or on account of, antecedent debts owed by the Debtors before the Transfers were made.

31. The Transfers constituted a transfer of an interest of the property of the Debtors.

⁵ During the course of this adversary proceeding, Trustee Dillworth may learn (through discovery or otherwise) of additional transfers made to Defendants during the Preference Period. Trustee Dillworth reserves the right to amend this Complaint to include: (i) further information regarding the Transfers, (ii) additional Transfers, (iii) modifications of and/or revisions to Defendants' names, and/or (iv) additional defendants, (collectively, the "**Amendments**"), that may become known and to request that the Amendments relate back to this original Complaint.

32. As a result of the Transfers, Defendants received more than they would have received if: (i) the Debtors' cases were under chapter 7 of the Bankruptcy Code; (ii) the Transfers had not been made; and (iii) Defendants received payment of their claims under the provisions of the Bankruptcy Code.

33. To the extent Austin Outdoor is not adjudicated to be an insider of Debtors, then Plaintiff seeks to avoid all payments referenced in this Count that occurred within the ninety day period preceding the Petition Date (the "**Non-Insider Preference Period**").

34. In accordance with the foregoing, the Transfers are avoidable pursuant to 11 U.S.C. § 547(b).

35. Austin Outdoor was the initial transferee of the Transfers, or the immediate or mediate transferee of such initial transferee or the person for whose benefit the Transfers were made.

36. Pursuant to 11 U.S.C. § 550(a), Trustee Dillworth is entitled to recover the value of the Transfers from Austin Outdoor, plus interest thereon to the date of payment and the costs of this action.

WHEREFORE, Trustee Dillworth requests this Court enter a judgment in favor of Trustee Dillworth and against Austin Outdoor:

A. Avoiding the Transfers, plus any other preferential transfers revealed through discovery or otherwise;

B. Finding that Austin Outdoor was the entity for whose benefit the Transfers were made;

C. Finding that Austin Outdoor is liable to the Tesoro Debtors' Estates for the Transfers, pursuant to 11 U.S.C. § 550(a)(1);

D. Awarding damages against Austin Outdoor in an amount equal to the Transfers under 11 U.S.C. § 550(a)(1);

E. Awarding expenses, interests and costs; and

F. Granting such other relief as the Court deems just and proper under the circumstances.

**COUNT II – AVOIDANCE AND RECOVERY OF
PREFERENCES PURSUANT TO BANKRUPTCY CODE §§ 547 AND 550
(*The Lease*)**

Trustee Dillworth sues Defendants, Austin Outdoor and alleges:

37. Trustee Dillworth incorporates the allegations contained in paragraphs 1 through 25 as if fully set forth herein.

38. Based on the facts set forth above and the Debtors' principal's sworn testimony, Austin Outdoor was an insider of the Debtors pursuant to 11 U.S.C. § 101(31).

39. Plaintiff made and entered into the Lease for the benefit of Austin Outdoor which occurred within the Insider Preference Period.

40. The Lease was made and entered into at a time when the Debtors were insolvent.

41. The Lease was granted to Defendants for, or on account of, antecedent debts, namely the Capital Improvement, owed by the Debtors before the Lease was made.

42. The Lease constituted a transfer of an interest of the real property of the Debtors.

43. As a result of the Lease, Defendants received more than they would have received if: (i) the Debtors' cases were under chapter 7 of the Bankruptcy Code; (ii) the Lease had not been made and entered into; and (iii) Defendants received payment of their claims under the provisions of the Bankruptcy Code.

44. In accordance with the foregoing, the Lease is avoidable pursuant to 11 U.S.C. §

547(b).

45. Austin Outdoor was the initial transferee of the Lease, or the immediate or mediate transferee of such initial transferee or the person for whose benefit the Lease was made and entered into.

46. Pursuant to 11 U.S.C. § 550(a), Trustee Dillworth is entitled to recover the value of the Lease from Austin Outdoor, plus interest thereon to the date of payment and the costs of this action.

WHEREFORE, Trustee Dillworth requests this Court enter a judgment in favor of Trustee Dillworth and against Austin Outdoor:

A. Avoiding the Lease, plus any other preferential transfers revealed through discovery or otherwise;

B. Finding that Austin Outdoor was the entity for whose benefit the Lease was made;

C. Finding that Austin Outdoor is liable to the Tesoro Debtors' Estates for the value of the Lease, pursuant to 11 U.S.C. § 550(a)(1);

D. Awarding damages against Austin Outdoor in an amount equal to the market value of the Lease payments that came due in the Insider and Non-Insider Preference Periods as well as the under 11 U.S.C. § 550(a)(1);

E. Awarding expenses, interests and costs; and

F. Granting such other relief as the Court deems just and proper under the circumstances.

**COUNT III – AVOIDANCE AND RECOVERY OF FRAUDULENT
TRANSFERS PURSUANT TO BANKRUPTCY CODE §§ 548(a)(1)(B) AND 550**
(The Transfers)

Trustee Dillworth sues Defendants, Austin Outdoor and alleges:

47. Trustee Dillworth incorporates the allegations contained in paragraphs 1 through 25 as if fully set forth herein.

48. The Transfers were made within two (2) years prior to the Petition Date.

49. The Transfers were voluntary or involuntary transfers of an interest of Debtors in property.

50. To the extent the Transfers were payments of amounts owed to Austin Outdoor by any non-debtor, the Debtors received less than reasonably equivalent value in exchange for the Transfers; and

a. Debtors were insolvent on the date that the Transfers were made, or were rendered insolvent as a result of the Transfers;

b. Debtors were engaged in business or a transaction, or were about to engage in business or a transaction, for which any property remaining with Debtors was an unreasonably small capital;

c. Debtors intended to incur, or believed they would incur, debts that would be beyond their ability to pay as such debts matured; or

d. Debtors made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

51. Austin Outdoor was the initial transferee of the Transfers and/or the entity for whose benefit such Transfers was made.

52. The Transfers are avoidable by Trustee Dillworth pursuant to Bankruptcy Code § 548 and, as a result, such Transfers, or the value of such transfers, are recoverable by Trustee Dillworth pursuant to Bankruptcy Code § 550.

WHEREFORE, Trustee Dillworth respectfully requests the Court to enter a Judgment:

A. Declaring the Transfers to be fraudulent transfers pursuant to Bankruptcy Code § 548(a)(1)(B);

B. Avoiding the Transfers made to Austin Outdoor as fraudulent transfers pursuant to Bankruptcy Code § 548(a)(1)(B);

C. Declaring Austin Outdoor to be the initial transferee and/or the entity for whose benefit the Transfers were made;

D. Granting money damages in the amount of the Transfers, plus interest at the applicable federal statutory rate, and reasonable attorneys' fees and expenses, to the extent permissible by applicable law, to Trustee Dillworth; and

E. Granting such other and further relief as may be just and proper.

**COUNT IV – AVOIDANCE AND RECOVERY OF FRAUDULENT
TRANSFERS PURSUANT TO BANKRUPTCY CODE § 548(a)(1)(B)
(The Lease)**

Trustee Dillworth sues Defendants, Austin Outdoor and alleges:

53. Trustee Dillworth incorporates the allegations contained in paragraphs 1 through 25 as if fully set forth herein.

54. The Lease was made within two (2) years prior to the Petition Date.

55. The Lease was a voluntary or involuntary transfer of an interest of Debtors in real property.

56. To the extent the Lease was not made on account of an antecedent debt, Debtors received less than reasonably equivalent value in exchange for the Lease when the total consideration for the Lease term was \$1.00; and

- a. Debtors were insolvent on the date that the Lease was made, or were rendered insolvent as a result of the Lease;
- b. Debtors were engaged in business or a transaction, or were about to engage in business or a transaction, for which any property remaining with Debtors was an unreasonably small capital;
- c. Debtors intended to incur, or believed they would incur, debts that would be beyond their ability to pay as such debts matured; or
- d. Debtors made such transfer to or for the benefit of an insider, or incurred such obligation to or for the benefit of an insider, under an employment contract and not in the ordinary course of business.

57. Austin Outdoor was the initial transferee of the Lease and/or the entity for whose benefit such transfer was made.

58. The Lease is avoidable by Trustee Dillworth pursuant to Bankruptcy Code § 548 and, as a result, such transfer, or the value of such transfer, is recoverable by Trustee Dillworth pursuant to Bankruptcy Code § 550.

WHEREFORE, Trustee Dillworth respectfully requests the Court to enter a Judgment:

- A. Declaring the Lease to be a fraudulent transfer pursuant to Bankruptcy Code § 548(a)(1)(B);
- B. Avoiding the Lease made to Austin Outdoor as a fraudulent transfer pursuant to Bankruptcy Code § 548(a)(1)(B);

C. Declaring Austin Outdoor to be the initial transferee and/or the entity for whose benefit the Lease was made;

D. Granting money damages in the amount of the value of the Lease, plus interest at the applicable federal statutory rate, and reasonable attorneys' fees and expenses, to the extent permissible by applicable law, to Trustee Dillworth; and

E. Granting such other and further relief as may be just and proper.

COUNT V – UNJUST ENRICHMENT
(The Transfers and the Lease)

Trustee Dillworth sues Defendants, Austin Outdoor for unjust enrichment and alleges:

59. Trustee Dillworth incorporates each and every allegation contained in paragraphs 1 through 25 as if fully set forth herein.

60. The Debtors made the Transfers to and entered into the Lease with Austin Outdoor.

61. Defendants accepted and retained the Transfers and the Lease from the Debtors.

62. The creditors of the Debtors were harmed by the Transfers and the Lease.

63. Defendants have been unjustly enriched by the Transfers and the Lease because:

- a. Debtors have conferred a benefit on the Defendants, who have knowledge thereof;
- b. Defendants voluntarily accepted and retained the benefit conferred; and
- c. The circumstances render the Defendants' retention of the benefit inequitable unless the Defendants pay to the Trustee the value of the benefit.

WHEREFORE, Trustee Dillworth respectfully requests the Court to enter a judgment in favor of Trustee Dillworth and against Defendants, Austin Outdoor:

A. Declaring that Defendants have been unjustly enriched by the Transfers and the Lease;

B. Granting money damages in the amount of the Transfers and the amount of the value of the Lease, plus interest at the applicable federal statutory rate, and reasonable attorneys' fees and expenses, to the extent permissible by applicable law, to Trustee Dillworth; and

C. Granting such other and further relief as may be just and proper.

Dated: December 21, 2010.

Respectfully submitted,

/s/ Eric J. Silver

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COUNSEL FOR TRUSTEE DILLWORTH

Schedule 1

Transfers to Austin Outdoor

<u>Ginn - LA St. Lucie Ltd., LLLP Transfers</u> <u>Colonial Bank Account # 8044844705</u>		
Date	Check#	Amount
1/7/2008	2641	\$255,427.00
3/5/2008	wire	\$9,900.00
3/11/2008	wire	\$92,645.68
3/13/2008	wire	\$233,867.26
3/17/2008	wire	\$370,346.11
3/24/2008	2782	\$25,238.02
3/26/2008	2802	\$132,421.50
5/27/2008	2882	\$61,135.04
6/9/2008	2907	\$160.00
6/18/2008	2915	\$8,100.00
7/1/2008	wire	\$25,670.02
7/29/2008	2951	\$59,337.52
7/29/2008	2958	\$49,254.00
9/15/2008	2979	\$68,611.02
9/23/2008	2990	\$16,418.00
12/3/2008	3004	\$27,145.50
Subtotal:		<u>\$1,435,676.67</u>

<u>The Tesoro Club, LLC Transfers</u> <u>Colonial Bank Account # 8044845611</u>		
Date	Check#	Amount
1/9/2008	7295	\$25,301.00
1/24/2008	7472	\$36,620.25
2/20/2008	7793	\$37,968.00
3/25/2008	8148	\$40,343.00
4/3/2008	8248	\$315.00
4/22/2008	8456	\$1,350.00
4/29/2008	8522	\$35,198.00
5/22/2008	8710	\$29,337.40
7/23/2008	9076	\$35,198.00
7/30/2008	9112	\$35,390.67
9/15/2008	9426	\$50,111.06
9/23/2008	9455	\$180.00
12/12/2008	9702	\$385.00
Subtotal:		<u>\$327,697.38</u>

Total:	<u>\$1,763,374.05</u>
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