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J. G. Boswell Company

**SUPERIOR COURT OF THE STATE OF CALIFORNIA**

**COUNTY OF KERN**

BRING BACK THE KERN, WATER AUDIT  
CALIFORNIA, KERN RIVER PARKWAY  
FOUNDATION, KERN AUDUBON  
SOCIETY, SIERRA CLUB, and CENTER  
FOR BIOLOGICAL DIVERSITY ,

Plaintiffs and Petitioners,

v.

CITY OF BAKERSFIELD, and DOES 1-500,

Defendants and Respondents.

BUENA VISTA WATER STORAGE  
DISTRICT, KERN DELTA WATER  
DISTRICT, NORTH KERN WATER  
STORAGE DISTRICT, ROSENDALE-RIO  
BRAVO WATER STORAGE DISTRICT,  
KERN COUNTY WATER AGENCY, and  
DOES 501-999,

Real Parties in Interest.

Case No. BCV-22-103220-GAP  
*Assigned to Hon. Gregory Puskamp*

**INTERVENOR-DEFENDANT  
J. G. BOSWELL COMPANY'S  
MEMORANDUM OF POINTS AND  
AUTHORITIES IN SUPPORT OF  
MOTION FOR LEAVE TO INTERVENE**

*Filed Concurrently with Notice of Motion and  
Motion to Intervene; Declaration of D. Sween  
ISO Motion to Intervene; [Proposed] Order  
Granting Motion to Intervene; [Proposed]  
Verified Answer in Intervention*

Date: February 20, 2024  
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Div.: "J"  
Judge: Hon. Gregory Puskamp

Action Filed: November 30, 2022  
Trial Date: None Set

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1 **I. INTRODUCTION**

2 Plaintiffs and Petitioners Bring Back the Kern, Water Audit California, Kern River  
3 Parkway Foundation, Kern Audubon Society, Sierra Club, and Center for Biological Diversity’s  
4 (collectively, “Plaintiffs”) Third Amended Complaint and Petition for Writ of Mandate requests  
5 that the Court substantially and significantly change historic Kern River operations, void  
6 contracts, infringe upon property rights, and rewrite California law concerning the Kern River. If  
7 granted, that request will significantly and uniquely harm proposed Intervenor-Defendant J. G.  
8 Boswell Company. Boswell owns Kern River water rights and it owns agricultural property that  
9 could flood under high river flow conditions. Should the Court grant Plaintiffs’ requested  
10 preliminary injunction and permanently change the flow on the Kern River, Boswell will suffer  
11 harm in both wet and dry years: Plaintiffs’ request will flood Boswell’s properties in wet years and  
12 will undermine Boswell’s water rights in dry years. No other party in this lawsuit would suffer  
13 these drastic impacts.

14 Because of these unique interests in this lawsuit, Boswell meets the requirements for both  
15 mandatory intervention under Code of Civil Procedure section 387(d)(1) and permissive  
16 intervention under section 387(d)(2). Should the Court grant Plaintiffs’ requested relief, it will  
17 impair Boswell’s interests in the “transaction” that is the Kern River’s continued use and  
18 operation. No other parties can adequately represent Boswell’s unique interests. This case also is  
19 in the beginning stages of litigation: no party has filed an answer, no stipulated preliminary  
20 injunction has been submitted or ordered, and the Court has not yet addressed the merits of  
21 Plaintiffs’ claims. Boswell’s motion thus is timely. For these reasons, Boswell’s Motion to  
22 Intervene should be granted.

23 **II. FACTUAL BACKGROUND**

24 A complex process allocates Kern River water involving long-standing water rights,  
25 judgments, decrees, agreements, policies, and water management procedures, which are  
26 collectively known as the “Law of the River.” Most relevant to Boswell, the Law of the River  
27 includes the 1888 Miller-Haggin Agreement (and its later amendments), the 1900 Shaw Decree,  
28 and the 1964 Kern River Water Rights and Storage Agreement. Water rights on the Kern River are

1 generally referred to by their historic points of measurement and diversion set forth in the Miller-  
2 Haggin Agreement: First Point, Second Point, and Lower River. Boswell holds a portion of the  
3 Second Point right. (Declaration of Dominic Sween in Support of Boswell’s Motion for  
4 Intervention [“Sween Decl.”], ¶ 12.) Boswell generally diverts this water below the Second Point  
5 of Measurement on the Kern River near Highway 43, downstream of Bakersfield. (*Id.* ¶ 10.)

6 Daily monitoring, measurement, and reporting of the river flow ensure adequate  
7 calculation and allocation of water consistent with the Law of the River. Defendant and  
8 Respondent City of Bakersfield is tasked with maintaining the daily operations, record keeping,  
9 and administration of rights along the Kern River consistent with the Law of the River. In other  
10 words, Bakersfield implements and oversees compliance with the Law of the River by diverting  
11 water, manipulating constructed weirs, and adjusting water surface elevations to manage water  
12 delivered to Kern River water right holders like Boswell.

### 13 **III. PROCEDURAL HISTORY**

14 On November 30, 2022, Plaintiffs filed a Verified Complaint for Declaratory and  
15 Injunctive Relief; Verified Petition for Writ of Mandate against Bakersfield. The Complaint  
16 named Intervenor the Buena Vista Water Storage District, Kern Delta Water District, North Kern  
17 Water Storage District, and Rosedale-Rio Bravo Water Storage District as real parties in interest.  
18 (Comp., ¶¶ 15-18.) Plaintiffs alleged that Bakersfield regularly diverts water from the Kern River  
19 “on its own behalf and on behalf of other parties, including the Real Parties in Interest named  
20 herein, either pursuant to water rights held by those parties or pursuant to contractual agreements.”  
21 (*Id.* ¶ 2.) On March 6, 2023, Plaintiffs filed a First Amended Complaint, which again named  
22 Bakersfield but this time omitted the four water districts as real parties in interest. On May 2nd,  
23 the Buena Vista Water Storage District, Kern Delta Water District, North Kern Water Storage  
24 District, and Rosedale-Rio Bravo Water Storage District, along with the Kern County Water  
25 Agency (collectively, “Real Parties in Interest”) moved to intervene. On May 22nd, Bakersfield  
26 demurred to the First Amended Complaint, which the Court sustained on September 29th with  
27 leave to amend to name the Real Parties in Interest as necessary and indispensable parties. (Ruling  
28 on City of Bakersfield’s Demurrer to Plaintiffs’ FAC, p. 4.)

1 On August 10th, Plaintiffs moved for a preliminary injunction and, on October 4th, filed  
2 their Second Amended Complaint. On October 30th, the Court ruled on Plaintiffs' Motion for  
3 Preliminary Injunction and, on November 9th, issued an Order of Implementation of the  
4 Preliminary Injunction incorporating the terms of the October 30th ruling.

5 The Order of Implementation instructed Bakersfield not to operate certain weirs "in any  
6 manner that reduces Kern River flow below the volume sufficient to keep fish downstream of said  
7 weirs in good condition." (Order of Implementation, p. 2.) The Order also instructed Bakersfield  
8 and Plaintiffs to "engage in good faith consultations to establish flow rates necessary to comply  
9 with [the] order." (*Ibid.*)

10 On November 21st, the Real Parties in Interest moved to stay the Order of Implementation  
11 because that order imposed a "vague 40 percent instream flow dedication on the Kern River"  
12 "without a reasonable factual basis regarding the key issue of what flows are necessary to keep  
13 Kern fishes in 'good condition.'" (Kern Water Agency's Mem. P. & A. in Supp. of Mot. for  
14 Reconsideration and Stay ["Motion for Stay"], p. 4.) They also argued that the Order of  
15 Implementation did not provide them with an opportunity to participate in the consultations that  
16 resulted in an inadequate flow regime. (*Ibid.*) On December 27th, the Court granted the Stay and  
17 explained that it was "willing to modify the Order" to allow the Real Parties in Interest's  
18 participation so that all parties may "reach a global resolution satisfactory to all the parties."  
19 (Ruling on Motion for Stay, p. 2.) If, "after good faith consultation, Defendant, Plaintiffs, and *Real*  
20 *Parties in Interest* are not successful in agreeing to flow rates necessary for compliance, *any party*  
21 may file a request for this Court to make a determination regarding compliance, impose specific  
22 flow rates, or make any other legal determination pertinent to the order ... ." (*Ibid.*)

23 On December 1st, Plaintiffs filed a Third Amended Complaint. On January 3rd, the Real  
24 Parties in Interest filed a demurrer to the Third Amended Complaint. The hearing on the demurrer  
25 is set for January 31st. Boswell now moves to intervene and represent its interests in the  
26 consultation on flow rates necessary for compliance, as well as in this lawsuit generally.

#### 27 **IV. LEGAL ARGUMENT**

28 A nonparty may intervene and become a party by uniting with a defendant in resisting a

1 plaintiff's claims or demanding anything adverse to both plaintiff and defendant. (Code Civ. Proc.,  
2 §§ 387(b)(2)-(3).) Intervention promotes fairness "by involving all parties potentially affected by a  
3 judgment." (*Simpson Redwood Co. v. State of California* (1987) 196 Cal.App.3d 1192, 1199.)  
4 Doing so obviates delay and multiplicity of actions. (*Sanders v. Pacific Gas & Elec. Co.* (1975) 53  
5 Cal.App.3d 661, 668.) To this end, courts recognize that "section 387 should be liberally  
6 construed in favor of intervention." (*Simpson Redwood Co.*, 196 Cal.App.3d at 1200.) There are  
7 two grounds on which intervention rests: compulsory or permissive intervention. Boswell satisfies  
8 the requirements for either means of intervention.

9 **A. Boswell May Intervene as of Right to Protect Its Kern River Water Interests.**

10 A party may intervene as of right upon a timely application where: (1) the party claims an  
11 interest relating to the property or transaction which is the subject of the action; (2) the party is so  
12 situated that the disposition of the action may, as a practical matter, impair or impede the party's  
13 ability to protect that interest; and (3) the party's interest may not be adequately represented by  
14 existing parties to the litigation. (Code Civ. Proc., § 387(d)(1)(B).) Boswell satisfies these  
15 requirements and may intervene as of right.

16  
17 **1. Boswell's Motion is Timely Because Boswell Only Recently Learned  
that this Lawsuit Can Impact its Interests.**

18 A motion for intervention must be made within a "reasonable time" so that an intervenor is  
19 not guilty of unreasonable delay. (Code Civ. Proc., § 387(d)(1); *Allen v. California Water & Tel.*  
20 *Co.* (1947) 31 Cal.2d 104, 108.) Courts liberally construe what is a reasonable time. (See, e.g.,  
21 *Mallick v. Superior Court* (1979) 89 Cal.App.3d 434, 437 [intervention not barred even though  
22 action was on appeal]; *Harrison v. Englebrick* (1967) 254 Cal.App.2d 871, 875 [intervention  
23 permissible after statute of limitations has run]; and *Hernandez v. Restoration Hardware, Inc.*  
24 (2018) 4 Cal.5th 260, 267 [intervention after judgment is possible].) A motion's timeliness is  
25 based on when the intervenor knew or should have known that its interests were not adequately  
26 represented. (*Ziani Homeowners Assn. v. Brookfield Ziani LLC* (2015) 243 Cal.App.4th 274, 282.)

27 **Boswell only recently become aware that this lawsuit could impact its interests without any**  
28 **adequate protection. Though Boswell learned about this lawsuit shortly after Plaintiffs filed their**



1 complaint against Bakersfield (Sween Decl., ¶ 4), the claims made against Bakersfield—and no  
2 others—did not tend to show that a judgment in this lawsuit could impact Boswell’s rights. For  
3 instance, the lawsuit directs claims at Bakersfield’s diversions only and to no other water  
4 diverters. Nor does the lawsuit allege any facts tending to show that the in-stream flows that  
5 Plaintiffs seek would require flooding downstream properties like those that Boswell owns.  
6 Boswell thus had no reason to suspect that this lawsuit could impact its property interests.

7 Boswell’s understanding, however, began to change when the Court granted its Order of  
8 Implementation on November 15th. That order revealed that this lawsuit could require a flow rate of  
9 water based on the computed natural inflow to Isabella Reservoir or the computed natural flow at the  
10 First Point of Measurement. (*Id.*, ¶ 5.) Whether the Order of Implementation required a flow based on  
11 the computed natural inflow to Isabella Reservoir or the computed natural flow at the First Point of  
12 Measurement, however, was not readily apparent from the Order. Boswell did not learn until later that  
13 the November 15th Order imposed such a requirement. (*Ibid.*) From this new fact, Boswell first  
14 determined that the Court could grant relief in this lawsuit that not only would affect Boswell’s Kern  
15 River water rights, but also would result in flooding and damaging Boswell’s downstream properties  
16 in Kern and Kings counties. (*Ibid.*)

17 Though the Court has since vacated and stayed the Order of Implementation (see *id.* ¶¶ 6-  
18 7), this lawsuit may still result in an order or judgment that could significantly damage Boswell’s  
19 property interests. So, once it learned of the Order of Implementation’s effects, Boswell promptly  
20 moved to intervene. Boswell’s motion thus is timely.

21 Boswell’s request also is timely because it is made in the infancy of this lawsuit and no  
22 party will suffer prejudice from Boswell intervening. No party has answered any of Plaintiffs’  
23 pleadings, including the Third Amended Complaint. Nor has the Court addressed the complaint’s  
24 merits. The Court’s stay of the Order of Implementation further ensures that Boswell’s  
25 intervention will not disrupt proceedings. For these reasons too, Boswell’s motion is timely.

## 26 **2. Boswell Has Significant Property Interests in Kern River Water.**

27 Boswell may intervene as of right because it “claims an interest relating to the property or  
28 transaction which is the subject of the action.” (Code Civ. Proc., § 387(d)(1)(B).) That interest

1 must be “direct, and not consequential” and which will be determined in the action. (*Timberidge*  
2 *Enterprises, Inc. v. City of Santa Rosa* (1978) 86 Cal.App.3d 873, 881.)

3 Boswell satisfies this requirement for mandatory intervention because it has property  
4 interests in the Kern River waters and related facilities. The right to use water is a vested property  
5 right. (*United States v. State Water Res. Control Bd.* (1986) 182 Cal.App.3d 82, 100.) Boswell  
6 enjoys water rights and property rights in the Kern River and the Buena Vista Lakebed in an area  
7 known as the Buena Vista Lake Land. (Sween Decl., ¶ 9.) In this area, Boswell owns 3.452% of  
8 the water rights entitled at the Second Point of Measurement on the Kern River (“Second Point  
9 Water Right”). Boswell’s portion of the Second Point Water Right is known as the Carmel Water  
10 Right. (*Id.*, ¶¶ 10-12.) Boswell also has the right to store water on the Buena Vista Lake Land for  
11 farming purposes (*id.*, ¶¶ 13-14), and the right to use 32% of the storage capacity in Isabella that is  
12 allocated to the Buena Vista Water Storage District under certain conditions (*id.*, ¶ 15-16).  
13 Accordingly, Boswell enjoys significant property interests in the Kern River’s water, which this  
14 lawsuit will impact.

15 But Boswell’s interests in this lawsuit do not end there. Boswell also owns farmland  
16 downstream from Bakersfield in both Kern County and Kings County. (Sween Decl., ¶¶ 22-26.)  
17 The Tulare Lakebed in Kings County is the Kern River’s natural terminus. (*Id.*, ¶ 25.) Boswell  
18 owns most of the property in the Tulare Lakebed. (*Id.*, ¶¶ 20, 26.) So, in high flow years, Kern  
19 River water can migrate below the Second Point of Measurement, through the Buena Vista Water  
20 Storage District and continue through to Kings County until it reaches Boswell’s land in the  
21 Tulare Lakebed through the Kern Flood Channel. Given these conditions, Boswell’s lands in the  
22 Buena Vista Lakebed in Kern County are subject to a flood servitude in which the Buena Vista  
23 Water Storage District may flood Boswell’s lands under certain conditions. (*Id.*, ¶ 23.) By  
24 contrast, Boswell has not accepted any such servitude with any parties for its Tulare Lakebed  
25 properties. (*Id.*, ¶ 27.) All the same, those Tulare Lakebed properties can flood if Kern River water  
26 is not properly managed. (*Id.*, ¶ 26.)

27 The relief that Plaintiffs seek in this lawsuit may result in flooding these Boswell  
28 properties. Consider that the Order of Implementation would have imposed a flow based on the

1 computed natural inflow to Isabella Reservoir or the computed natural flow at the First Point of  
2 Measurement. If implemented, this condition could flood and damage Boswell’s properties in the  
3 Buena Vista and Tulare lakebeds. (Sween Decl. ¶¶ 5, 24.) And if floodwaters cause the South  
4 Wilbur Flood Area in the Tulare Lakebed to reach storage capacity, floodwaters would then  
5 migrate north and damage lands in the Lakebed that Boswell farms while—far more critically—  
6 putting the City of Corcoran and nearby communities at risk of flooding. (*Id.*, ¶ 26.) Accordingly,  
7 Boswell has property interests in protecting its farmlands from flooding, which demand that  
8 Boswell protect them now by intervening.

9 **3. This Lawsuit Will Disrupt Boswell’s Interests in Kern River Water.**

10 Boswell also is so situated that, as a practical matter, resolving this lawsuit may impair or  
11 impede its interests. (Code Civ. Proc., § 387(d)(1)(B).) An intervenor need not prove with  
12 “absolute certainty” that resolving the lawsuit will adversely impact their interests; it only must  
13 show that it *may* impair those interests. (*Ibid.*) A judgment thus need not inevitably affect those  
14 interests, but it is enough for granting intervention that a judgment may have a substantial  
15 probability of affecting those interests. (*Timberidge, supra*, 86 Cal.App.3d at 881.) For three  
16 reasons, Plaintiffs’ allegations and the Order of Implementation show how this lawsuit will  
17 negatively impact Boswell’s agricultural interests.

18 *First*, Plaintiffs’ lawsuit will affect agricultural water uses. (See, e.g., Third Am. Comp., ¶  
19 82 [explaining that the Kern River lacks flows to meet Bakersfield’s diversions for agricultural  
20 purposes].) As a significant agricultural water user, this lawsuit can impede Boswell’s interests.

21 *Second*, Plaintiffs seek orders to compel a physical solution that impacts Boswell’s water  
22 rights, property rights, and interests in water diversion and conveyance facilities. (*Id.*, ¶¶ 93-99.)

23 *Third*, Boswell must intervene to protect its rights because, as it now understands, a new  
24 flow regime through a preliminary injunction and resolution of this lawsuit will undoubtedly harm  
25 its properties. To illustrate, consider that on March 11, 2023, a peak one-day inflow of just over  
26 23,200 cubic feet per second (cfs)-days was observed on the Kern River. (Sween Decl., ¶ 18.) But  
27 the Order of Implementation required releasing 40% of the flow, which could have required  
28 releasing nearly 9,300 cfs from Isabella Dam. (*Ibid.*) Because that release would have exceeded the

1 peak release during the 2023 Water Year—the fourth wettest year on record—it could have flooded  
2 Bakersfield and severely damaged Highway 178 in Kern Canyon. (Sween Decl. ¶ 18.) In contrast,  
3 the actual outflow during the one-day peak inflow was approximately 2,100 cfs, proving the flood  
4 regulation benefit of the Isabella Dam. (*Ibid.*) Put otherwise, by using a simple proportional  
5 allocation of available Kern River flow to “keep fish in good condition,” the Order of Implementation  
6 could have effectively undermined the flood protection that the Isabella Dam offers. (*Ibid.*)

7 These concerns reflect how this lawsuit will impair and impede Boswell’s rights. And  
8 Boswell is so situated that resolving this lawsuit will, as a practical matter, impair or impede its  
9 ability to protect those interests. Accordingly, Boswell meets this requirement for mandatory  
10 intervention.

#### 11 **4. No Parties Can Adequately Represent Boswell’s Interests in This** 12 **Lawsuit.**

13 Finally, mandatory intervention is appropriate because no party—including neither  
14 Bakersfield nor the Real Parties in Interest—can adequately represent Boswell’s interests. “The  
15 burden to qualify for intervention as-of-right is ‘minimal’ and evidence showing that existing  
16 representation ‘may be’ inadequate suffices.” (*Accurso v. In-N-Out Burgers* (2023) 94 Cal.App.5th  
17 1128, 1137, quoting *Trabovich v. United Mine Workers of America* (1972) 404 U.S. 528, 538, fn.  
18 10.) These “minimal” requirements “are broadly interpreted in favor of intervention.” (*Id.*, quoting  
19 *United States v. Alisal Water Corp.* (9th Cir. 2004) 370 F.3d 915, 919.) A court’s assessment may  
20 consider several factors, including whether other parties will undoubtedly make all of the  
21 intervenor’s arguments; whether other parties can make such arguments; and whether the intervenor  
22 offers a “necessary element to the proceedings” that would otherwise be neglected if intervention  
23 were not permitted. (*Id.*, quoting *Arakaki v. Cayetano* (9th Cir. 2003) 324 F.3d 1078, 1086.)

24 Boswell’s interests differ from all other parties, including Bakersfield and any Real Parties  
25 in Interest. While Bakersfield holds certain First Point Kern River rights, it has no interest in either  
26 the Second Point Water Right owned by Buena Vista Water Storage District or the Second Point  
27 Carmel Water Right. This lawsuit will affect both rights. Bakersfield is largely a municipal water  
28 supplier that also has no interest in protecting the agricultural water supply for landowners,

1 farmers, or communities within the Buena Vista or Tulare lakebeds. (See, e.g., Third Am. Comp.,  
2 ¶ 82 [“However, the Kern River does not have sufficiently reliable flows to satisfy the City’s  
3 current diversions for agricultural purposes while still providing sufficient water via the current  
4 points of diversion to flow downriver through the City.”].)

5 Further, Boswell’s interests are distinct from other Real Parties in Interest, even those  
6 public entities like the Buena Vista Water Storage District with agricultural interests. Recall that  
7 Boswell’s interests in the Buena Vista Lake Land are subject to a flood servitude in the Buena  
8 Vista Water Storage District’s favor. The District thus may address an order or judgment in this  
9 lawsuit that requires higher unimpaired flows by flooding Boswell’s lands when excessive water  
10 remains in the Kern River downstream of the Second Point Measurement. (Sween Decl., ¶¶ 23,  
11 24.) As the Order of Implementation revealed, that outcome is real and alarming to Boswell. (*Id.*, ¶  
12 24.) This outcome means that the Buena Vista Water Storage District’s and Boswell’s interests in  
13 the Kern River diverge and, under certain circumstances, may be adverse.

14 Added to the concerns are Boswell’s farming operations in the Tulare Lakebed, which risk  
15 flooding under high flow conditions from the Kern River. (*Id.*, ¶ 26.) No party here other than  
16 Boswell has property, jurisdiction, or any interest in the Tulare Lakebed. No party thus can  
17 represent those interests.

18 Accordingly, no party has made any argument, and no party can make the arguments,  
19 necessary to protect Boswell’s interests. Boswell’s interests thus are inadequately protected in this  
20 lawsuit, which requires Boswell’s intervention.

21 **B. In the Alternative, Boswell Meets the Requirements for Permissive**  
22 **Intervention.**

23 In the alternative, Boswell requests that the Court permit Boswell to intervene under Code  
24 of Civil Procedure section 387(d)(2). The Court has discretion to allow permissive intervention  
25 “upon timely application” if the party “has an interest in the matter in litigation ... or an interest  
26 against” the existing parties. (Code Civ. Proc., § 387(d)(2).)

27 As discussed above, Boswell has significant, unique property interests in the continued use  
28 and administration of the Kern River and the water diversion and conveyance facilities at issue in

1 this lawsuit. Further, any judgment in this lawsuit that fails to protect Boswell's interests may  
2 require further litigation to determine whether and how that judgment affects those interests. For  
3 instance, should the Court adopt a flow regime agreed upon by the parties that would harm  
4 Boswell's water and property rights, Boswell must then sue to recover damages it will suffer. In  
5 the interests of judicial economy and conserving the parties' resources, Boswell must participate in  
6 this lawsuit to protect those interests. Permissive intervention thus is appropriate.

7 **V. CONCLUSION**

8 For the foregoing reasons, Boswell respectfully requests that the Court grant this Motion to  
9 Intervene. Boswell holds significant property interests in the Kern River that will be disrupted or  
10 terminated by a new flow regime. Because no party can adequately represent Boswell's interests,  
11 mandatory intervention is warranted. In the alternative, the Court should grant Boswell permissive  
12 intervention.

13  
14 DATED: January 18, 2024

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