IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
SAN ANTONIO DIVISION

JOHN A. PATTERSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	No. 5:17-CV-00467
v.	)	
	)	
DEFENSE POW/MIA ACCOUNTING AGENCY, et al.,	)	
	)	
	)	
Defendants	)	

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS PLAINTIFFS' COMPLAINT

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INTRODUCTION

Plaintiffs, the next of kin of seven servicemembers killed in the Philippines during World War II, have brought a mandamus action seeking orders compelling the United States government to identify and repatriate the remains of their family members lost during the war. These next of kin have spent decades navigating a byzantine bureaucracy controlled by reams of dense and confusing rules, regulations, directives, statutes and white papers in their futile attempts to honor the Army's own warrior code "I will never leave a fellow comrade."[1]

Recent history is replete with public allegations of incompetence, mismanagement and, at times, outright deception committed by the Defense POW/MIA Accounting Agency's ("DPAA") predecessor, the Joint POW/MIA Accounting Command ("JPAC").[2] Many of these allegations were subsequently confirmed by a Department of Defense Inspector General's ("DODIG") report, that found, among many other issues "DOD does not have a comprehensive, fully coordinated strategic plan that integrates the collective efforts of the accounting community and directs actions towards accomplishment of common goals and objectives."[3] This comprehensive review of JPAC by DODIG was ordered after a Government Accountability Office ("GAO") report dated July

[1] U.S. Army Warrior Code, http://www.army.mil/values/warrior (visited October 15, 2017)

[2] *See e.g.* *https://www.stripes.com/jpac-admits-to-phony-ceremonies-honoring-returning-remains-1.246322#.WePeSRNSyi4* , http://www.sandiegouniontribune.com/sdut-ap-impact-mia-work-acutely-dysfunctional-2013jul07-story.html , http://investigations.nbcnews.com/_news/2013/08/01/19796976-pentagon-agency-under-fire-for-refusing-to-id-unknown-world-war-ii-soldiers?lite

[3] Ex. 1 DODIG 2015-001 "Assessment of the Department of Defense Prisoner of War/Missing in Action Accounting Communits" (Oct. 17, 2014) at p. 15. Courts may take judicial notice of factual information and documents published on a government agency website. *Kitty Hawk Aircargo, Inc. v. Chao*, 418 F.3d 453, 457 (5th Cir. 2005); *Johnson v. Sawyer*, 47 F.3d 716, 734 n.36 (5th Cir. 1995). http://www.dodig.mil/reports.html/Article/1119070/assessment-of-the-department-of-defense-prisoner-of-warmissing-in-action-accoun/ (with link to full report)

2013 concluded that JPAC was plagued by significant problems impeding basic mission accomplishment including weak leadership and a fragmented organizational structure.[4]

As argued at greater length below, little has changed since the DPAA replaced JPAC on January 15, 2015, and the accounting community remains deeply dysfunctional. It is this ongoing dysfunction and inaction by JPAC and its successor DPAA that prompted the Plaintiffs, who have been seeking return of their loved ones for years , to file suit. Notwithstanding giving their last full measure of devotion to this Country, the Government now declines, on technical legal grounds as opposed to the spirit of the law, to give the Plaintiffs' fallen servicemembers a decent burial in a marked grave.

ARGUMENT

I. Standard of Review

Defendants bring their motion to dismiss pursuant to Rules 12(b)1 and 12(b)(6) of the Federal Rules of Civil Procedure. "Jurisdiction is, of necessity, the first issue for an Article III Court." *Stockman v. Federal Election Comm'n*, 138 F.3d 144, 151 (5th Cir. 1998). In their brief, the Defendants argue that Plaintiffs have failed to state a claim under the Mandamus Act 28 U.S.C. § 1361. Defs's. Br. p. 15. Defendants further argue that, because Plaintiffs' claims under the Mandamus Act fail, that Plaintiffs' claim for declaratory relief under the Declaratory Judgement Act, 28 U.S.C. § 2201 cannot prevail because the Act is not an independent basis for jurisdiction. Defs's. Br. p.28 citing *Jones v. Alexander*, 609 F.2d 778, 781 (5th Cir. 1980). Accordingly, Defendants argue, the Court is without jurisdiction to hear this case.

[4] Ex. 2 Government Accountability Office report "Top Level Leadership Attention Needed to Resolve Longstanding Challenge in Accounting for Missing Persons from Past Conflicts" (July 2013). *See also* Transcript of Senate hearing of the Subcommittee on Financial and Contracting Oversight 1 Aug. 2013 highlighting persistent and longstanding (20+ years) issues with JPAC accountability. Ex. 3

Alternatively, the Defendants assert that Plaintiffs' claims must be dismissed under Rule 12(6)(b) because Plaintiffs have failed to plead enough facts to state a claim for relief that is plausible on its face. Defs's Br. at p.15 citing *Roberts v. Ochoa,* No. 14-0080, 2014 WL 4187180, at *4 (W.D. Tex. Aug. 21, 2014). In reviewing a motion to dismiss for failure to state a claim, the Court must accept all well-pleaded facts as true and view these facts in a light most favorable to the Plaintiff. *De Leon v. City of San Antonio,* No. 14-204 WL 3407385, at *8 (W.D. Tex. July 10, 2014). Additionally, the Court must consider the Complaint in its entirety including documents incorporated into the Complaint by reference, and matters of which a court may take judicial notice. *Funk v. Stryker Corp.,* 631 F.3d 777, 783 (5th Cir. 2011). When reviewing a motion to dismiss, courts may take judicial notice of factual information and documents published on a government agency's website. *See Johnson v. Sawyer,* 47 F.3d 716, 734 n.36 (5th Cir. 1995); *Loyola v. Am. Homes for Rent Property II, LLC,* No. 13-752, 2015 WL 11348310, at *5 nn.203 (W.D. Tex. Aug. 12, 2015).

II. Plaintiffs Have Standing

A. Plaintiffs Are Primary Next of Kin of the Deceased or the Designee of the Primary Next of Kin

The Defendants do not dispute Plaintiffs' allegation that each is the Primary Next of Kin ("PNOK") of the deceased or the PNOK's designee. Compl. §I, ¶ 1-7. This satisfies the requirement set forth in 10 U.S.C. § 1501(d), 10 U.S.C. § 1513(4) and 10 U.S.C. § 1482(c). In short, the Plaintiffs are the persons properly authorized to make inquiries of the DPAA regarding the identification and recovery of their family members' remains and to direct the disposition of those remains once they have been identified.

B. DPAA Has Failed to Perform Ministerial Duties and Mandamus is Appropriate

The Defendants misconstrue the Plaintiffs' allegations and give the DPAA too much credit. The Plaintiffs have alleged, broadly, that the DPAA has failed to perform a ministerial duty to identify and recover remains of the PNOK. Comp l. § V(A), ¶¶ 7-8. This duty goes to the very heart of the DPAA's mission which is to "[p]rovide the fullest accounting of our missing personnel to their families and the nation."[5] This mission statement is consistent with Congress' direction requiring the establishment of an agency having responsibility for Department of Defense policy related to missing persons. 10 U.S.C. § 1501(a)(1). This same statute requires the Department of Defense to prescribe mandatory procedures for that agency including procedures facilitating "the systematic, comprehensive, and *timely* collection, analysis, review, dissemination, and periodic update of information related to such persons." *Id*. § 1501(b) (emphasis added).

But the DPAA isn't following many of its own mandatory procedures. This is not discretionary and directly undermines its ability to identify and recover remains of missing servicemembers. The problems are systemic, ongoing and known to the DPAA. Examples abound.

1. Failure to Establish Personnel Files and Centralized Database

10 U.S.C § 1509(d) requires the DPAA to ensure that a personnel file is established and maintained for each unaccounted for servicemember from five specific conflicts, including World War II and "[s]uch other conflicts in which members of the armed forces served as the Secretary of Defense may designate." However, to our knowledge, DPAA has failed to meet this

[5] DPAA Mission Statement www.dpaa.mil (Visited October 15, 2017).

requirement.[6] This is a specific and prescribed duty. Nor, to our knowledge, has the DPAA "establish[ed] and maintain[ed] a single centralized database and case management system containing information on all missing persons for whom a file has been established under this subsection." § 1509(d)4.[7] This subsection goes on to state "[t]he database and case management system shall be accessible to all elements of the Department of Defense involved in the search, recovery, identification, and communications phases of the program established by this section. This is a specific and prescribed duty meant to enable the DPAA in performing its core function.

2. No Accessible Disinterment Policy

Contrary to the Defendants' argument, no disinterment policy existed at DPAA for 16 years between November 1999 and May 2016. Defs's Br. pp. 9-10, 25-26. The initial Undersecretary of Defense for Policy, Memorandum: Disinterment Policy for the Purpose of Identification was signed on May 13, 1999. We could find no other disinterment memorandum until May 5, 2016. The 1999 memo is a Directive Type Memorandum ("DTM"). This is significant because DOD Instruction 5025.01 states that such memoranda are only effective for 6 months after signing unless it is timely incorporated into a DOD Instruction.[8] Therefore, the 1999 memorandum was inoperative from November 13, 1999 until May 5, 2016.[9] This resulted in:

> *"confusion between the Services and resulting inaction within the accounting community organizations due to the lack of a clear definition of authorities and processes for disinterring missing personnel currently buried as "unknowns." Consequently, the DoD accounting community has been unable to pursue an aggressive plan for disinterring*

[6] July 2013 GAO Report at pp. 39,41,48 "the accounting community has not fully developed personnel files as required by statute 10 U.S.C §1509(d)".

[7] July 2013 GAO Report at *Id.* After investing almost $5M dollars in the project, JPAC scrapped the program stating that it would seek funding in the 2015-2019 budgeting cycles. *See also* DODIG report dated October 17, 2014 at p.29 "[a] single comprehensive database...is essential to plan and implement informed future recovery operations." This requirement to establish a centralized database is also codified in DOD Directive 5110.10 s. 1.2.

[8] *Id.* at p.25.

[9] JPAC continued to use the standard set forth in the 99 DTM requiring a "high probability of identification" even though it was void according to DODI 5025.01. This resulted in the denial of 96% of disinterment requests. *See* March 2014 interview with JPAC scientific director Tom Hollad https://wallacehouse.umich.edu/wp-content-uploads/2016/02/mccloskey.pdf

> *remains designated as "unknowns," preventing resulting MIA identifications and appropriate repatriations."*[10]

In short, the DPAA's failure to perform a ministerial duty, in this case promulgate a policy to disinter the remains of servicemembers, directly undercut their core mission to locate, recover and identify the missing for 16 years.

On February 10, 2017, the DPAA published DPAA Administrative Instruction 2310.01 ("AI"). This Instruction superseded any pre-existing DPAA memoranda regarding disinterment (including DTM-16-003 cited by Defendants).[11] The AI outlines procedures for requesting the disinterment of missing servicemembers and states "[r]equests to disinter specific individual Unknowns submitted by family members of unaccounted for DoD personnel will be given high priority when compared to requests submitted by third parties and internal disinterment proposals." *Id.* at 2. However, this AI is only available to personnel holding a Common Access Card (CAC).[12] The CAC, a "smart" card about the size of a credit card, is the standard identification for active duty uniformed Service personnel, Selected Reserve, DoD civilian employees, and eligible contractor personnel.[13] It is also the principal card used to enable physical access to buildings and controlled spaces, and it provides access to DoD computer network and systems and websites such as the site named in the AI. *Id.* None of the Plaintiffs are uniformed Service Personnel, Selected Reserve, DoD civilian employee, or eligible contractor personnel. Accordingly, they are not authorized to carry CACs that would give them access to the website which includes the AI.

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[10] *Id.*

[11] DPAA Administrative Instrucion 2310.01 at 1

[12] *Id.* at 3. The AI states that a copy of the instruction may also be obtained by contacting the Deputy Director for Policy and Plans, though obviously one would need to see the AI in the first instance to know this.

[13] *See* www.CAC.mil/common-access-card

Therefore, if, after 16 years, a new disinterment policy were published, how would non-DOD PNOK know?[14]

Such program mismanagement may explain the following quote from the July 2013 GAO Reports, "[a]ccording to DOD officials, the process to request approval for disinterment of unknown remains ha[s] been lengthy and cumbersome." at 17 n.24. Undeterred, all of the Plaintiff PNOK have made frequent requests for disinterment, some spanning decades. Additionally, contrary to the implication in Defendants' brief, the Plaintiffs have provided several DNA samples in order to facilitate identification of the missing using mitochondrial and nuclear DNA analysis.[15] Defs's Br. at 24-25. The statement of Mr. Jack Boyt, the PNOK for Colonel Loren Stewart, relates a typical experience of the named Plaintiffs in dealing with the DPAA bureaucracy.[16]

Defendants argue that once a request to disinter a missing servicemember is received, the DPAA has broad discretion in making a determination to proceed with the disinterment based on, *inter alia*, "reasonable probability of identification", whether information received is "credible" or "significant enough". Defs's Br. at 23-24. Moreover, the Defendants assert that the time in which DPAA needs to make a determination is also discretionary. Defs's Br. at 24 (citing *Cf. Helfgott v. United States*, 891 F. Supp 327, 331 (S.D. Miss 1994)).

The Plaintiffs agree with the Defendants. But the Defendants miss a crucial point: the Plaintiffs cannot prove a negative. Plaintiffs have alleged that the DPAA has done little or nothing to act on their disinterment requests, much less undertaken the analyses required in sections 1505, 1509, etc., nor has the DPAA provided the Plaintiffs with a statutory rationale (Mr. Patterson

[14] Nor is AI 2310.01 posted to the DPAA official website at www.DPAA.mil. (as of October 15, 2017)

[15] Presumably, such DNA samples, along with previous disinterment requests, could be found in the personnel files DPAA is required to keep pursuant § 1509(d). These samples were provided after 1997 and, Plaintiffs argue, constitutes new credible evidence under § 1509(e)(3).

[16] Ex.4 Statement of Jack Boyt and accompanying affidavit of Atty. Benoit Letendre.

excepted) or any reason for denying their repeated disinterment requests. Instead, the Plaintiffs allege that they have been repeatedly ignored or prevented from obtaining fair consideration by the agency. *See* Compl. pp.1-2; § I ¶¶ 1-7; § V(A) ¶¶ 7,11 (alleging "DPAA has failed to provide family members of missing persons with appropriate information related to their fallen relatives…" and later alleging "ongoing DPAA inaction and failure to carry out its ministerial duties".) As for the Defendants' argument regarding the discretionary nature of the timeliness of DPAA's reply, the Plaintiffs' agree in part, but challenge any assertion that the passage of years, not 150 days as contemplated by the new AI 2310, is reasonable or discretionary. Instead, such a lapse of time constitutes a total failure to carry out the letter, much less the spirit, of the law.[17] While the outcome of a DPAA determination as it relates to disinterment requests is discretionary (to a point), undertaking the analysis itself is not.

Finally, the DPAA's disinterment criteria are confusing, shifting and contradictory. For example, the Defendants' brief cites to two thresholds for disinterment. Defs's Br. at 10. The first, from the void 1999 DTM states that disinterment can only be authorized when there is "a high probability of positive identification." The second states that individual disinterment is appropriate when "it is more likely than not [51%] that DOD can identify the remains."[18] For years JPAC authorized disinterment in only four percent of cases based on the erroneous application of a void DTM. *See* n.9 *supra*. Yet the Defendants argue that the "high probability of positive identification" standard is "consistent with longstanding DOD policy" on the one hand and then fail to explain how a four percent disinterment approval rate squares with DPAA's responsibility to "account for missing persons from past conflicts, including locating, recovering, and identifying

[17] Additionally, Plaintiffs point to the Defendants' own instruction which states that "[r]equests cannot be denied or permanently deferred by DPAA personnel." DPAA AI 2310.01 at 2.

[18] Or, in the case of multiple disinterments, "at least 60% of the Service members associated with the group can be individually identified." Also citing a superseded DTM.

missing persons…" or to "implement a comprehensive, coordinated, integrated and fully resourced program to account for persons...who are unaccounted for…". Defs's Br. at 10 n.4, 17.

3. Failure to Prioritize Cases

In 2009, the DPAA committed to meeting a goal set by Congress that the agency identify at least 200 missing servicemembers a year.[19] Thus far, eight years later, DPAA continues to fall well short of this goal.[20] Assuming that the DPAA meets its annual goal of 200 identifications moving forward, and assuming the number of missing, now estimated at 83,000, is accurate, it would take the DPAA 415 years to identify and repatriate the missing.

But the 83,000 figure is misleading. That is because DOD MIA records reflect that approximately 50,000 of those identified as MIA were lost in deep water in aviation and shipping mishaps and are likely unrecoverable.[21] This means that, by the Defense POW/Missing Personnel Office's own account, only approximately 33,000 are recoverable. The Defendants state in their brief, "[t]he DPAA actively reviews cases from numerous conflicts and must prioritize its efforts among more than 83,000 unaccounted for servicemembers from past conflicts." Defs's Br. p.9. Except the DPAA does not prioritize its cases to exclude 50,000 missing from its own records and an independent Inspector General report states are non-recoverable.[22] This has occurred because the DPAA does not have uniform policies across theatres to categorize and declare a person as non-recoverable. *Id.* As a consequence:

> *...[F]amily members, Congress, and the public may mistakenly believe that it is feasible for DoD to actively pursue the recovery of all 83,000 MIA personnel. This may also present the illusion that DoD should be focusing their recovery efforts on all 83,000 missing rather than just those who are potentially recoverable.*[23]

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[19] DOD Directive 2310.07 § 1.2(f); Pub. L. No. 111-84, Div. A, Title V § 541(d), 123 Stat. 2298 (Oct. 28, 2009)
[20] DPAA website. Tabs "Our Missing" "Recently Accounted For". *See also* GAO July 2013 report at p. 11. *See also,*
[21] DODIG Report at 31.
[22] *Id.*
[23] *Id.*

Without systematic prioritization, it is difficult to see how the DPAA will ever meet the directive set forth in DOD Directive 1300.22 *Mortuary Affairs* which states that "Mortuary Affairs Policy is that the human remains of all members of the Armed Forces of the U.S. will be returned for permanent disposition in accordance with the decedent's Will or the laws of the state of the decedent's legal residence as directed by PADD."[24] It appears, on its face, that this inability of the DPAA to meet its very purpose, to "[p]rovide the fullest accounting of our missing personnel to their families and the nation," through "the systematic, comprehensive, and timely collection, analysis, review, dissemination, and periodic update of information related to such persons," (10 U.S.C. § 1501(b)) is due to fundamental failures at every level within the DPAA attributable in large part to outdated, incomplete, or non-existent accounting community policies, guidance, and standard operating procedures (SOPs) or similar policies that do not fully encompass the accounting mission.[25] All of these shortcomings stem from DPAA's failure to perform specific ministerial duties outlined in the law.

This failure is particularly galling considering the facts in the Plaintiffs' cases. In each instance the PNOK have performed extensive research yielding credible evidence and identified specific graves in which their missing servicemembers are buried. All of the PNOK have provided multiple DNA samples for comparison to the disinterred remains. Moreover, in some instances, the missing servicemembers are buried under a single grave marker. How their requests for disinterment fail to meet the "high priority" threshold for family members requesting disinterment outlined in AI 2310.01(3)(e) or how they fail to meet the "dual thresholds" ("high probability" or

[24] Joint Publication 4-06 Mortuary Affairs (12 Oct. 2011) at I-2 (p.22). The JP also states that "[t]he guidance in this publication is authoritative;..." at i (p.3). Chapter 8 of AR 638-2 goes on to state "[r]esponsible commanders will take appropriate action to serach for, recover, and tentatively ID, when possible, remains of eligible deceased personnel" at p.35.

[25] Conclusion of DODIG report at p.2.

"more likely than not") is unknown, because, with the exception of Mr. Patterson (whose disinterment requests were formally denied), the Plaintiffs have received no report from DPAA. This is a classic failure to perform a ministerial duty under the statutes, already described at length herein, governing the DPAA.[26]

C. Declaratory Relief Is Appropriate

The Mandamus Act states that "district courts shall have original jurisdiction of any action in the nature of mandamus to compel an officer or employee of the United States or any agency thereof to perform a duty owed to the Plaintiff." 28 U.S.C. § 1361. In order to prevail in its claims for relief under the Act, Plaintiffs must show that: (1) the Plaintiff has a clear right to relief, and; (2) the defendant has a clear duty of act, and; (3) no other adequate remedy exists. *Randall D. Walcott, M.D., P.A., v. Sebellius,* 635 F.3d 757, 768 (5th Cir. 2011).

As argued at length above, the Plaintiffs have identified a number of ministerial duties which the DPAA has failed to perform including, failing to compile personnel files for all of the missing, failing to develop a centralized database, failure to develop and promulgate a coherent disinterment policy, and failure to prioritize and systematize cases such that meeting its fundamental mission will be impossible for centuries. Substantiated allegations of rampant DPAA incompetence and mismanagement have been provided. The Plaintiffs have sought relief through DPAA and its administrative process for decades. An extraordinary remedy such as a writ of Mandamus is necessary because the Plaintiffs' case is clear and compelling and there is no other avenue that will guarantee them the relief to which they are entitled under the law. At a minimum,

[26] It is instructive to note that AI 2310.01 does not discuss a "formal disinterment request" nor does it require a family member requesting disinterment to do so in writing, nor does it provide a form that would permit a family member to do so.

at this early stage of the litigation, Plaintiffs have met their burden and should survive Defendants' motion to dismiss.

Assuming the Court declines the Defendants' invitation to dismiss the Plaintiffs' claim for a writ of Mandamus, this Court has an independent basis for jurisdiction in this case. The Mandamus Act grants jurisdiction to "command the performance of a particular duty that rests on the defendant." *Randall D. Walcott*, 635 F.3d at 766. The relief requested by the Plaintiffs includes a demand that the DPAA consider new and credible evidence provided by the Plaintiffs, a demand that the DPAA disinter the remains of Plaintiffs' NOK upon meeting the requisite DPAA standard of evidence, and any other relief the Court may deem fair and just. [27] These are entirely consistent with the kind of relief ordinarily sought in mandamus actions in that they demand that the defendant do what the law dictates.

The Court would then have leave to weigh the merits of the Plaintiffs' prayer for relief under the Declaratory Judgment Act. In this case, the relief sought by Plaintiffs, which includes a finding that certain of Defendants' policies concerning identification of unidentified remains were applied selectively and inconsistently and other relief under the Act the Court may deem fair and just, are consistent with the elements Courts generally apply when determining if relief is appropriate under the Act, namely,

(1) the remedies requested are practical and further efficient judicial administration;

(2) it is within the Court's judicial function and power to do so;

[27] The demand for relief also asks that if the DPAA declines to disinter remains that meet the agency's evidentiary threshold, that the DPAA compensate the family members for undertaking this task themselves. This private-public partnership was specifically recommended by the IG in its report. DODIG at 40.

(3) granting such relief is consistent with traditional principles of equity, comity, and federalism;

(4) the petition raises a concern sounding in substantive due process guaranteed by the United States Constitution;

(5) clarification of the rights and obligations of the parties is manifestly in the public interest as thousands of other American citizens are similarly situated to Plaintiffs;

(6) a declaratory judgment will serve a useful purpose by establishing a precedent for similarly situated American citizens and resolve the controversy between the parties.

CONCLUSION

The Plaintiffs have demonstrated that Defendants have failed to carry out ministerial duties under the laws governing the DPAA for purposes of surviving Defendants' motion to dismiss under 12(b)1 and 12(b)6. Accordingly, the Defendants' motions should be denied. Alternatively, Plaintiffs should be given leave to either amend their pleadings or the Plaintiffs' claims should be dismissed without prejudice.

Respectfully submitted, this 16th day of October, 2017.

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CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of October, 2017, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following:

Galen N. Thorp
U.S. Department of Justice
Civil Division, Federal Programs Branch

Mary F. Kruger
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/s/ *Benoit M. Letendre*
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