

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

LESLIE WANDRIE-HARJO, )  
individually and in her official capacity )  
as Governor of the Cheyenne and )  
Arapaho Tribes; THE CHEYENNE )  
AND ARAPAHO TRIBES OF )  
OKLAHOMA, a federally-recognized )  
Indian tribe, )

Plaintiffs, )

-vs- )

Case No. CIV-11-171-F

JANICE PRAIRIE CHIEF- )  
BOSWELL, individually and as the )  
Suspended, Impeached and Removed )  
Governor of the Cheyenne and )  
Arapaho Tribes, et al., )

Defendants. )

**ORDER**

There are several motions pending before the court in this matter, two of which seek dismissal of this action. Upon due consideration, the court makes its determination.

**I. Plaintiffs' Motion to Amend Caption and Docket Sheet**

Plaintiffs, Leslie Wandrie-Harjo, individually and as Governor of the Cheyenne and Arapaho Tribes of Oklahoma, and the Cheyenne and Arapaho Tribes of Oklahoma, a federally-recognized Indian tribe, commenced this action on February 18, 2011, against defendants, Janice Prairie Chief-Boswell, individually and as the suspended, impeached and removed Governor of the Cheyenne and Arapaho

Tribes, Cornell Sankey, individually and as the unconfirmed Treasurer of the Cheyenne and Arapaho Tribes, Does 1-100 and various banking institutions. On March 22, 2011, plaintiffs filed a First Amended Verified Complaint and Application for Temporary Restraining Order and Preliminary Injunction (“First Amended Complaint”). In the First Amended Complaint, plaintiffs identified as a defendant “First National Bank and Trust Company, Inc., an Oklahoma corporation.” Plaintiffs, in their motion, represent that they have been made aware that the true name of defendant is “First Bank and Trust Company” rather than “First National Bank and Trust Company, Inc.”<sup>1</sup> Therefore, plaintiffs request, pursuant to Rule 15, Fed. R. Civ. P., or this court’s equitable powers, to amend the caption in this matter to reflect the proper name of defendant as “First Bank and Trust Company.”

Upon review, the court concludes that plaintiffs’ request to amend the caption to identify the correct defendant as First Bank and Trust Company should be granted. The caption in this matter shall be amended to reflect First Bank and Trust Company, an Oklahoma banking corporation, as the proper name for defendant instead of First National Bank and Trust Company, Inc., an Oklahoma corporation.

In their motion, plaintiffs also request the court to amend the docket sheet in this matter to remove Charles B. Morris and Kimberley M. Richey as counsel for Plaintiff/Counter Defendant, Cheyenne and Arapaho Tribes of Oklahoma, a federally recognized Indian tribe. Plaintiffs contend that Mr. Morris and Ms. Richey are improperly listed on this matter’s docket sheet because Plaintiff/Counter Defendant is represented by Jeremy D. Oliver and Padraic I. McCoy. Plaintiffs do not object to

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<sup>1</sup> Indeed, in its answer to plaintiffs’ First Amended Complaint, defendant identified itself as “First Bank and Trust Company, an Oklahoma banking corporation” and stated, upon information and belief, “First Bank and Trust Company, an Oklahoma banking corporation” is the correct name of the party that plaintiffs intended to name in this action. *See*, doc. no. 75. Moreover, John M. Thompson and Scott Meacham entered their appearances as counsel on behalf of “Defendant, First Bank and Trust Company.” *See*, doc. nos. 74 and 80.

the listing of Mr. Morris and Ms. Richey elsewhere on the docket sheet as the court deems appropriate (such as counsel for defendant, Janice Praire Chief-Boswell, as suspended, impeached and removed Governor of the Cheyenne and Arapaho Tribes), if counsel each file appropriate entries of appearance.

The court, upon review, concludes that Mr. Morris and Ms. Richey should be terminated of record as counsel for Plaintiff/Counter Defendant, Cheyenne and Arapaho Tribes of Oklahoma, a federally recognized Indian tribe. Neither Mr. Morris nor Ms. Richey entered an appearance as counsel on behalf of this plaintiff. Thus, the court concludes that the docket sheet should not reflect Mr. Morris and Ms. Richey as counsel for Plaintiff/Counter Defendant, Cheyenne and Arapaho Tribes, a federally recognized Indian tribe.

Mr. Morris and Ms. Richey have entered their appearances as counsel on behalf of “Defendants Cheyenne and Arapaho Tribes.” Plaintiffs have represented that the Cheyenne and Arapaho Tribes are not named as defendants in the First Amended Complaint. And Mr. Morris and Ms. Richey have not sought leave on behalf of the Cheyenne and Arapaho Tribes to intervene in the action as defendants under Rule 24, Fed. R. Civ. P., or to be added as defendants under Rule 21, Fed. R. Civ. P. Nonetheless, Mr. Morris and Ms. Richey have filed, on behalf of the Cheyenne and Arapaho Tribes, a motion to dismiss. Although the Cheyenne and Arapaho Tribes are not named as defendants, plaintiffs have not moved to strike the dismissal motion. They simply complain of its filing in their response brief. The court, in its discretion and in the interest of justice, concludes that the Cheyenne and Arapaho Tribes should be named on the docket sheet as amici curiae. Mr. Morris and Ms. Richey’s entries of appearances shall be construed as entries of appearances as counsel for the Cheyenne and Arapaho Tribes as amici curiae. The motion to dismiss and

memorandum in support shall be construed by the court as an amicus brief by the Cheyenne and Arapaho Tribes in support of dismissal of this action.

## II. Plaintiffs' Motion for Leave to File a Supplement to First Amended Complaint

In the instant motion, plaintiffs<sup>2</sup> seek leave, pursuant to Rule 15(d), Fed. R. Civ. P., to file a supplement to the First Amended Complaint. Plaintiffs seek to supplement the First Amended Complaint with “[s]ignificant events highly relevant to the immediate litigation,” *see*, plaintiffs’ motion, p. 2, which have occurred since the filing of the First Amended Complaint. These events include decisions issued by the Interior Board of Indian Appeals and the Bureau of Indian Affairs, and the closing, at the instruction of defendant, Janice Prairie Chief-Boswell, of the bank accounts at one of the banking institutions named in the First Amended Complaint.

Upon review of the motion, the court concludes that the motion should be granted. Plaintiffs’ Supplement to First Amended Complaint, which is attached to the motion, is deemed filed *instanter*. Although Rule 15(d) provides that the court “may” order the opposing party to plead to a supplemental pleading, the court concludes that a response is not required. Therefore, the court, in its discretion, declines to allow a responsive pleading. 3 James Wm. Moore, Moore’s Federal Practice, § 15.30 (3d ed. 2011) (“The opposing party is not automatically entitled to plead in response to a supplemental pleading; instead, it is within the discretion of the court whether to allow responsive pleading.”) The subsequent events set forth in Plaintiffs’ Supplement to First Amended Complaint will be considered in adjudicating defendants’ dismissal motion discussed in this order.

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<sup>2</sup> Because Leslie Wandrie-Harjo sues both in her individual capacity and in her purported capacity as Governor of the Cheyenne and Arapaho Tribes of Oklahoma (e.g., two separate legal personalities), the court refers to the plaintiffs in the plural.

### III. Defendants' Motion to Supplement the Record

Defendants, Janice Prairie Chief-Boswell and Cornell Sankey, request leave to supplement the record with 11 Cheyenne and Arapaho Tribes' Tribal Council Resolutions, which were passed on May 7, 2011. Plaintiffs object to the request on the grounds that defendants have not cited any authority for their request; they have not filed any pleading which may be supplemented under Rule 15(d); they cannot supplement plaintiffs' First Amended Complaint and they have not complied with LCvR 7.1(k) in regard to their motion.

The court's Local Civil Rules do provide for the filing of supplemental briefs upon motion and leave of court. *See*, LCvR 7.1(i). The court construes defendants' motion as a motion for leave to file a supplemental brief. Although defendants have not specifically complied with LCvR 7.1(k) in regard to the motion, the court waives the requirements of LCvR 7.1(k) because the court concludes that the administration of justice requires it. *See*, LCvR 1.2(c). The court concludes that defendants' motion should be granted. The court also construes the motion as a supplemental brief under LCvR 7.1(i). No further supplemental brief need be filed. The court concludes that plaintiffs are not prejudiced by the filing of the supplemental brief as plaintiffs have addressed the legality of the Tribal Council's meeting of May 7, 2011 and the resolutions purportedly passed at the meeting in their opposition to defendants' motion to supplement the record.

### IV. Defendant Governor Janice Prairie Chief-Boswell and Defendant Treasurer Cornell Sankey's Special Appearance Motion to Dismiss

In their First Amended Complaint, plaintiffs seek injunctive and declaratory relief against defendants. Plaintiffs specifically request entry of a temporary restraining order and preliminary injunction:

- (i) enjoining defendants, Janice Prairie Chief-Boswell and Cornell Sankey, from exercising further control over the checking accounts, savings accounts, money market accounts, brokerage accounts or other similar bank accounts or monies of plaintiff, Cheyenne and Arapaho Tribes, which includes monies from plaintiff's casino operations ("Accounts"), including over any federal grant dollars in those Accounts ("Federal Funds") and requiring Defendants Boswell and Sankey to immediately relinquish control over plaintiff's Accounts and Federal Funds to plaintiff, Leslie Wandrie-Harjo, as existing court orders already have required;
- (ii) enjoining defendant banking institutions from permitting defendant, Janice Prairie Chief-Boswell, to access or draw upon any of the Accounts or Federal Funds that may be located at the institutions;
- (iii) in the alternative to (i) and (ii), (a) adding plaintiff, Leslie Wandrie-Harjo, to the Accounts and/or (b) enjoining defendants, Janice Prairie Chief-Boswell and Cornell Sankey, from withholding pay of properly seated and employed tribal officials and employees, improperly seating and employing tribal officials and employees, and/or (c) enjoining defendants, Janice Prairie Chief-Boswell and Cornell Sankey, from continuing, through their control of the Accounts and Federal Funds and otherwise, to violate the Indian Gaming Regulatory Act, 25 U.S.C. § 2701, *et seq.* ("IGRA") through violations of the Tribe's National Indian Gaming Commission-approved gaming ordinance ("Gaming Ordinance"), the Department of the Interior-approved gaming compact between the Cheyenne and Arapaho Tribes and the State of Oklahoma ("Compact"), the Cheyenne and Arapaho Tribes' Gaming Revenue

Allocation Plan (the “GRAP”), the Indian Self-Determination and Education Assistance Act, 25 U.S.C. § 450, *et seq.* (“ISDEAA”), the Cheyenne and Arapaho Tribes’ existing ISDEAA contracts, the Indian Reorganization Act, 25 U.S.C. §461, *et seq.*, the Oklahoma Indian Welfare Act, 25 U.S.C. § 501-510 (“OIWA”), the Indian Civil Rights Act, 25 U.S.C. § 1301, *et seq.*, and the Indian Child Welfare Act, 25 U.S.C. § 1901, *et seq.*

Plaintiffs additionally request a declaratory judgment as to whether defendant, Janice Prairie Chief-Boswell’s actions violate the IGRA, ISDEAA and OIWA. In the alternative, plaintiffs request habeas relief under ICRA. Further, plaintiffs request an accounting under Oklahoma state law.

Defendants, Janice Praire Chief-Boswell and Cornell Sankey, seek to dismiss this action for lack of subject matter jurisdiction and personal jurisdiction. Defendants argue that they are immune from suit based upon tribal sovereign immunity. In addition, defendants contend that federal question jurisdiction does not exist as plaintiffs have no private right of action under the federal statutes alleged in the First Amended Complaint. Defendants also argue that the court has no jurisdiction because this case involves a purely intratribal dispute which must be resolved by tribal procedures and not by the federal government or its courts. Further, defendants argue that plaintiff, Leslie Wandrie-Harjo, has attempted to avail herself of administrative remedies with the Bureau of Indian Affairs (“BIA”) by submitting a portion of the intratribal dispute for resolution and that a final determination has not been issued by the BIA, thereby making plaintiff’s issues not ripe for resolution by the court. Finally, defendants contend that the court should decline to exercise supplemental jurisdiction over the state law claim.

In their amicus brief, the Cheyenne and Arapaho Tribes also urge dismissal of plaintiffs' action claiming that plaintiffs lack authority to bring an action in the name of the tribes and that they are not the real parties in interest. The Cheyenne and Arapaho Tribes also argue that plaintiffs have failed to exhaust their tribal court remedies.

The court concludes that it lacks subject matter jurisdiction over plaintiffs' request for a temporary restraining order and preliminary injunction. The relief requested by plaintiffs can only be granted to the extent the court can resolve the intratribal dispute as to who is governor of the Cheyenne and Arapaho Tribes. Although plaintiffs contend that they are not seeking a determination as to who is governor because they claim the issue has already been decided in favor of plaintiff, Leslie Wandrie-Harjo, it is not clear from the filings in this court, including the First Amended Complaint as supplemented, that a final determination has been made in regard to this issue. Jurisdiction to resolve internal tribal disputes and to interpret tribal constitutions and laws lies with the Indian tribes and not the district courts. United States v. Wheeler, 435 U.S. 313, 323-36 (1978) (noting that Indian tribes are "unique aggregations possessing attributes of sovereignty over both their members and their territory"); Kaw Nation ex rel. McCauley v. Lujan, 378 F.3d 1139, 1143 (10<sup>th</sup> Cir. 2004) (dispute over the meaning of tribal law does not arise under the Constitution, laws, or treaties of the United States and federal court has no jurisdiction over an intratribal dispute); In re: Sac & Fox Tribe of Mississippi in Iowa/Meswaki Casino Litigation, 340 F.3d 749, 766 (8<sup>th</sup> Cir. 2003) ("jurisdiction does not exist to resolve an intra-tribal leadership dispute"); Runs After v. U.S., 766 F.2d 347, 352 (8<sup>th</sup> Cir. 1985) (Resolution of "disputes involving questions of interpretation of the tribal constitution and tribal law is not within the jurisdiction of the district court").



The court also finds that dismissal of the request for declaratory relief is appropriate. The court, in order to determine the merits of plaintiffs' claims, must determine the intratribal dispute as to whether defendant Janice Praire Chief-Boswell was governor of the Cheyenne and Arapaho Tribes at the time of the alleged events and whether she had the authority to take the actions alleged. As discussed, this court does not have the jurisdiction to decide that issue. Moreover, plaintiffs, individually, do not have a private right of action under the Indian Gaming Regulatory Act ("IGRA"), 25 U.S.C. § 2701, *et seq.*, the Indian Self-Determination and Education Assistance Act ("ISDEAA"), 25 U.S.C. § 450, *et seq.* or the Oklahoma Indian Welfare Act ("OIWA"), 25 U.S.C. § 501, *et seq.* See, Hartman v. Kickapoo Tribe Gaming Com'n, 319 F.3d 1230, 1233 (10<sup>th</sup> Cir. 2003) (IGRA contains no implied private right of action in favor of an individual seeking to enforce compliance with statute's provisions); Walton v. Tesuque Pueblo, 443 F.3d 1274 (10<sup>th</sup> Cir. 2006) (ISDEAA is not a source of jurisdiction when individual is not party to self-determination contract); Twin Cities Chippewa Tribal Council v. Minnesota Chippewa Tribe, 370 F.2d 529, 531 (8<sup>th</sup> Cir. 1967) ("The [Indian Reorganization] Act merely provides the authority and procedures whereby an Indian tribe may organize itself and adopt a tribal constitution and bylaws. The Act makes no mention of jurisdiction in any sense and such is not within its purview.") and Memphis Biofuels, LLC v. Chickasaw Nation Industries, Inc., 585 F.3d 917, 920 (6<sup>th</sup> Cir. 2009) (OIWA is an extension of the Indian Reorganization Act).

Although plaintiffs also cite other federal statutes, such as the Indian Reorganization Act ("IRA"), 25 U.S.C. § 461, *et seq.*, the Indian Child Welfare Act ("ICWA"), 25 U.S.C. § 1901, 18 U.S.C. § 1163, 25 U.S.C. § 81 and the Nonintercourse Act, 25 U.S.C. § 177, to support their claims, the court concludes that no cause of action lies in favor of plaintiffs, individually, under these statutes. See,

Twin Cities Chippewa Tribal Council, 370 F.2d at 531 (“The [IRA] merely provides the authority and procedures whereby an Indian tribe may organize itself and adopt a tribal constitution and bylaws. The Act makes no mention of jurisdiction in any sense and such is not within its purview.”); Kaw Nation ex rel. McCauley v. Lujan, 378 F.3d 1139, 1142 (10<sup>th</sup> Cir. 2004) (no private right of action for civil parties exists under 18 U.S.C. § 1163), Doe v. Mann, 285 F. Supp. 2d 1229, 1241 (N.D. Cal. 2003) (ICWA only provides cause of action for an action in violation of three IWCA sections, 25 U.S.C. § 1911, 1912 and 1913; 25 U.S.C. § 1915 does not provide any cause of action); 25 U.S.C. § 1914 (“Any Indian child . . . any parent or Indian custodian . . . the Indian child’s tribe may petition any court of competent jurisdiction to invalidate such action . . . .”); Stalley v. Methodist Healthcare, 517 F.3d 911, 917 n. 3 and 4 (6<sup>th</sup> Cir. 2008) (the *qui tam* provision of 25 U.S.C. § 81 has been removed); U.S. ex rel. The Saint Regis Mohawk Tribe v. President R.C. – St. Regis Management Co., 451 F.3d 44, 53-54 (2<sup>nd</sup> Cir. 2006) (even if former § 81 did apply, the statute does not provide a right to bring a *qui tam* action for declaratory judgment); Thompson v. County of Franklin, 15 F.3d 245, 249 (2<sup>nd</sup> Cir. 1994) (the Nonintercourse Act, 25 U.S.C. § 177, provides a cause of action for collective Indian tribes, not the individual members of a tribe).<sup>3</sup> Plaintiffs further cite ILERA as a federal statute supporting federal question jurisdiction. However, plaintiffs have failed to demonstrate that Congress, expressly or by implication, intended to create a private right of action in favor of plaintiffs against defendants under ILERA. Sonnefeld v. Denver, 100 F.3d 744, 747 (10<sup>th</sup> Cir. 1996), *cert. denied*, 520 U.S. 1228 (1997).

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<sup>3</sup> In their briefing, plaintiffs also rely upon treaties and other statutes to support federal question jurisdiction. In addition to these treaties and statutes not being alleged in the First Amended Complaint, plaintiffs have failed to show that they provide any cause of action in favor of plaintiffs, individually, against defendants.

In their First Amended Complaint, plaintiffs have also advanced an alternative request for habeas relief under the ICRA. The court, however, finds that dismissal of this request is appropriate. Plaintiffs do not have a claim for habeas relief under ICRA. *See, Shenandoah v. U.S. Dept. of Interior*, 159 F.3d 708, 714 (2d Cir. 1998) (suspended or terminated employment and health insurance are insufficient restraints on liberty to constitute a detention under 25 U.S.C. § 1303 and to confer jurisdiction). Moreover, the ICRA confers no subject matter jurisdiction for declaratory, injunctive and monetary damage remedies. *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 72 (1978); *Wheeler v. Swimmer*, 835 F.2d 259, 261 (10<sup>th</sup> Cir. 1987).

Plaintiffs also rely upon 28 U.S.C. §§ 1331 and 1362 to support jurisdiction. To acquire jurisdiction under § 1331 or § 1362, plaintiffs must establish that they have a claim arising under federal law. *Kaw Nation ex rel. McCauley*, 378 F.3d at 1142. As discussed, plaintiffs, individually, have no claim arising under federal law. Although not alleged in the First Amended Complaint, to the extent plaintiffs seek judicial review under the Administrative Procedure Act, the court concludes that plaintiffs have failed to exhaust their administrative remedies and have failed to demonstrate that their action falls within any of the broad exceptions to the exhaustion requirement. *See, Western Shoshone Business Council for and on behalf of Western Shoshone Tribe of Duck Valley Reservation v. Babbitt*, 1 F.3d 1052, 1055 n. 3 (10<sup>th</sup> Cir. 1993) (Department of the Interior decisions are not final for purposes of 5 U.S.C. § 704 review if they are subject to appeal to a higher authority within the department); *Begay v. Public Service Co. of N.M.*, 710 F. Supp. 2d 1161, 1191 (D.N.M. 2010) (listing three broad exceptions to the exhaustion requirement).

Finally, in their briefing, plaintiffs contend that the Cheyenne and Arapaho Tribes have authority to bring an action under the federal statutes alleged in the First Amended Complaint. The court again concludes that in order to determine whether

the tribes can bring an action for declaratory relief under the federal statutes alleged, the court must make a determination as to who is governor of the tribes and whether Jeremy Oliver, the acting attorney general, has authority to bring the claim on behalf of the tribes. This is an internal tribal matter; the court consequently does not have jurisdiction to make this determination. Sac & Fox Tribe of Mississippi in Iowa, Election Bd. v. Bureau of Indian Affairs, 439 F.3d 832, 835 (8<sup>th</sup> Cir. 2006) (district court lacked jurisdiction to reach merits of case because district court would have to construe and apply tribal law to determine whether an election board has authority to file suit on behalf of the tribe).

As the court does not have original jurisdiction over this action, the court declines to exercise supplemental jurisdiction over any state law claim alleged by plaintiffs. *See*, 28 U.S.C. § 1367(c).

In sum, the court concludes that defendants' motion to dismiss should be granted. The court concludes that the First Amended Complaint as supplemented should be dismissed without prejudice under Rule 12(b)(1), Fed. R. Civ. P., and 28 U.S.C. § 1367(c).

#### V. Motion to Set a Hearing Date

Plaintiffs request the court to set a hearing date on their request for a temporary restraining order and a preliminary injunction. As the court has found that a ruling in regard to plaintiffs' request for a temporary restraining order and a preliminary injunction involves resolution of an intra-tribal dispute and the court lacks jurisdiction to decide the intra-tribal dispute, the court concludes that plaintiffs' motion should be denied.

#### VI. Conclusion

Based upon the foregoing,

Plaintiffs' Motion to Amend Caption and Docket Sheet, filed May 6, 2011 (doc. no. 86), is **GRANTED**. The caption of this matter is amended to reflect First Bank and Trust Company, an Oklahoma banking corporation, as defendant instead of First National Bank and Trust Company, Inc., an Oklahoma corporation. The docket sheet shall reflect Mr. Morris and Ms. Richey as terminated as counsel for Plaintiff/Counter Defendant, Cheyenne and Arapaho Tribes of Oklahoma, a federally recognized Indian tribe. However, the docket sheet shall reflect the Cheyenne and Arapaho Tribes as participating in this action as amici curiae. Mr. Morris and Ms. Richey's entries of appearance shall be construed as entries of appearance as counsel for the Cheyenne and Arapaho Tribes as amici curiae. The motion to dismiss filed by the Cheyenne and Arapaho Tribes and the memorandum in support (doc. nos. 76 and 77) shall be construed by the court as an amicus brief on behalf of the Cheyenne and Arapaho Tribes.

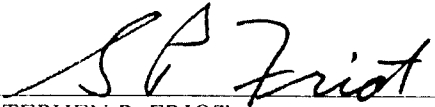
Plaintiffs' Motion for Leave to file a Supplement to First Amended Complaint, filed April 22, 2011 (doc. no. 82), is **GRANTED**. Plaintiffs' Supplement to First Amended Complaint is deemed filed instant. No response to Plaintiffs' Supplement to First Amended Complaint is permitted.

Defendants' Motion to Supplement the Record, filed May 10, 2011 (doc. no. 89), is **GRANTED**. The court also construes the motion as a supplemental brief under LCvR 7.1(i) and no further supplemental brief need be filed.

Defendant Governor Janice Prairie Chief-Boswell and Defendant Treasurer Cornell Sankey's Special Appearance Motion to Dismiss (doc. no. 70) is **GRANTED**. Plaintiffs' First Amended Complaint is **DISMISSED WITHOUT PREJUDICE** pursuant to Rule 12(b)(1), Fed. R. Civ. P., and 28 U.S.C. § 1367(c).

Plaintiffs' Motion to Set a Hearing Date, filed June 1, 2011 (doc. no. 94) is  
**DENIED.**

ENTERED this 15<sup>th</sup> day of August, 2011.

  
STEPHEN P. FRIOT  
UNITED STATES DISTRICT JUDGE

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