
COVID-19: Lessons from the Second Wave of Securities Fraud Class Actions

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While the global pandemic may have disrupted many industries, it has not stopped plaintiffs from continuing to file COVID-19-related securities fraud class actions under Section 10(b) of the Securities Exchange Act. As we [previously observed](#), in the first wave of COVID-19-related securities fraud class actions—filed in March and April 2020—plaintiffs primarily challenged public statements made by companies that were directly involved in the response to COVID-19, such as healthcare companies, or in industries significantly impacted by COVID-19, such as videoconferencing technology and travel. In those cases, plaintiffs primarily challenged public statements that companies made about the direct, and often significant, impact of COVID-19 on their businesses.

In the second wave of COVID-19-related securities fraud litigation—defined for purposes of this article as suits filed between May and September 2020—plaintiffs have continued to bring suit against companies directly involved in or significantly impacted by COVID-19 but have also broadened their scope. Plaintiffs have now targeted a wider range of companies, including cybersecurity, cannabis and real estate companies, and have challenged a range of alleged misstatements, including statements that fall into two broad categories concerning (i) a company's receipt, or use, of federal funds or loans in connection with COVID-19-related programs; and (ii) a company's representations about how COVID-19 impacted the company's economic projections and financial results. While non-exhaustive, this article summarizes some of the most interesting second wave cases in each category.

This second wave of litigation suggests that companies—no matter whether their industry is directly or significantly impacted by COVID-19—should be mindful that any statements related to the impact of COVID-19 are susceptible to scrutiny by class plaintiffs, who will continue to identify novel types of alleged misstatements in public disclosures as companies adapt to changing public health measures and an ever-evolving marketplace.

Continuation of the First Wave: Cases Against Companies Directly Involved in the Response to COVID-19 or in Industries Heavily Impacted by COVID-19

As noted above, class plaintiffs have continued to file cases against companies in industries heavily impacted by COVID-19 by challenging statements about the impact of the coronavirus on the business of those companies. As in the first wave, the second wave plaintiffs have focused on companies that made disclosures concerning the development of COVID-19 treatments or the impact of the pandemic on the company's ability to operate.

Perhaps not surprisingly, the pharmaceutical industry, which is on the front lines of the global response to COVID-19, and the travel industry, which has been all but halted in some instances, continue to be significant areas of focus for class plaintiffs and susceptible to 10(b) litigation.

a. Pharmaceutical Industry Litigation

Since May 2020, plaintiffs have filed three notable securities fraud suits against pharmaceutical companies, each of which relates to the companies' developments with respect to COVID-19 testing products.

In the first, involving Sorrento Therapeutics, Inc., filed on May 26, 2020, in the Southern District of California, plaintiffs alleged that the biopharmaceutical company and its CEO made false and misleading statements when the company announced that it had discovered an antibody that had "demonstrated 100% inhibition of SARS-CoV-2 virus infection," a claim that was allegedly repeated on a cable news network when the CEO referred to the company's breakthrough as a "cure" for COVID-19. Per the plaintiffs, the truth was soon revealed when, on May 20, 2020, a third party issued a research report referring to Sorrento's claims as "sensational," "nonsense" and "too good to be true," and quoting medical researchers as describing Sorrento's disclosure as "very hyped." While that same day Sorrento's CEO appeared on a business news program to allegedly defend the company's claims, Sorrento's stock price declined 43 percent from its "Class Period high" by the close of trading. Two days later, a life sciences industry news outlet published an interview with Sorrento's CEO allegedly stating that the CEO "insist[ed] that they did not say [Sorrento's breakthrough] was a cure." Sorrento's stock price allegedly declined on that news, closing approximately 49 percent below the class period high.

Similarly, in cases filed against Co-Diagnostics, a biotechnology company, and Chembio Diagnostics, a point-of-care diagnostics company, plaintiffs challenged statements that the companies' COVID-19 diagnostic tests were "100% accurate." The suit against Co-Diagnostics, filed on June 15, 2020, in the District of Utah, was brought against the company, its CEO and three board members. Plaintiffs alleged that in response to questions from the media on April 30, 2020,

and in a subsequent press release, Co-Diagnostics made “unequivocal statements to the market” that its COVID-19 diagnostic test was “100% accurate” when, in fact, the tests were “materially less than 100% accurate.” Per plaintiffs, the truth was revealed on May 14, 2020, when a newspaper published data demonstrating that Co-Diagnostics’s tests were likely to have a higher false negative reporting rate than other comparable tests and thus were not 100 percent accurate. That same day, Iowa Governor Kim Reynolds released a statement allegedly confirming the same. Within a number of hours, Co-Diagnostics’s share price allegedly fell more than 38 percent. Three days later, on June 18, 2020, plaintiffs filed suit in the Eastern District of New York against Chembio Diagnostics, its CEO and one of its directors similarly alleging that Chembio misrepresented that its antibody diagnostic tests were 100 percent accurate. Per plaintiffs, the truth was revealed on June 16, 2020, when the US Food and Drug Administration (FDA) issued a press release saying that it had revoked the authorization previously issued to Chembio “due to performance concerns regarding the sensitivity and specificity” of Chembio’s test. Chembio disclosed the FDA’s conclusion on Form 8-K the following day, after which Chembio’s share price allegedly declined over 60 percent.

b. Travel Industry Litigation

As in the first wave, plaintiffs again targeted a cruise line for statements concerning the impact of COVID-19 on its business. Plaintiffs also filed the first case against an airline for statements concerning the impact of COVID-19 on that industry.

With respect to the cruise line litigation, on May 27, 2020, plaintiffs filed suit against Carnival Corporation, a leisure travel and cruise company, and its CEO in the Southern District of Florida. Plaintiffs allege that beginning in its January 28, 2020 Form 10-K, Carnival made a series of false and misleading statements about its adherence to its health and safety protocols and its compliance risk management program while failing to disclose increasing incidents of COVID-19 on the company’s ships, violations of “port of call regulations” resulting from “concealing the amount and severity of COVID-19 infections” on Carnival’s ships, and the company’s failure to follow its health and safety protocols, and that the company was continuing to operate and spread COVID-19 at “various ports throughout the world,” negatively impacting its business prospects. Then, on April 16, 2020, a business magazine published an article allegedly stating that “Carnival’s ships have become a floating testament to the viciousness of the new coronavirus and raised questions about corporate negligence and fleet safety,” asserting that Carnival allegedly ignored early warning signs and failed to take action after being informed of the spread of COVID-19 on its ships. Carnival’s stock price allegedly fell more than 4 percent on that news. Approximately two weeks later, on May 1, 2020, *The Wall Street Journal* published an article allegedly describing how cruise ships, including Carnival ships, “facilitated the spread of COVID-19,” describing additional early warning signs about the spread of COVID-19 on cruise ships that Carnival ignored, and noting that the House Committee on Transportation and Infrastructure had requested documents from Carnival related to “COVID-19 or other infectious disease outbreaks aboard cruise ships.” Carnival’s stock price allegedly fell another 12 percent that day.

In what appears to be the first COVID-19-related securities fraud suit brought against an airline, on September 30, 2020, plaintiffs filed suit against GOL Linhas Aeras Inteligentes, a Brazilian airline, and its CEO in the Eastern District of New York. Plaintiffs allege GOL issued false and misleading statements related to the strength of its financial outlook and internal controls. For instance, plaintiffs allege that on February 20, 2020, GOL announced “record revenues” for the fourth quarter of 2019. Plaintiffs further allege that GOL remained overly optimistic through the second quarter of 2020, announcing that its financial results for that quarter were “a reflection of the severe impact that COVID-19 is having on Brazil’s economy, the air transportation industry and our Company,” that the company had taken “several measures to decrease costs and preserve liquidity” as it managed “through this crisis,” and that [c]ustomer demand [wa]s returning” when in fact there was “substantial doubt” as to GOL’s ability to continue to exist as a going concern.

The truth allegedly began to emerge on June 16, 2020, when GOL disclosed several material weaknesses in its internal controls and announced that it could not timely file its 2019 annual report. On this news, GOL’s share price allegedly dropped approximately 3.5 percent. A few weeks later, on June 29, 2020, GOL’s share price allegedly fell another 2 percent following the filing of its annual report and disclosure that the company’s auditor questioned the company’s ability to exist as a going concern. Plaintiffs allege that GOL’s share price fell another 7 percent on the company’s July 23, 2020 disclosure that it had dismissed the auditor as its registered auditing firm.

New Territory Emerges: Cases Against Companies in Less Heavily Affected Industries

In the second wave of litigation, plaintiffs have expanded their focus on COVID-19-related representations, filing complaints against companies in a wider range of industries and basing their allegations on a more diverse group of alleged misstatements. To date, plaintiffs have focused on at least two broad categories of alleged misrepresentations related to a company’s receipt, or use, of federal funds or loans in connection with COVID-19-related programs and, even more expansively, a company’s representations about how COVID-19 impacted the company’s economic projections and financial results.

a. Cases Alleging Misrepresentations Related to a Company’s Receipt, or Use, of Federal Funds or Loans in Connection With COVID-19-Related Programs

In several cases, plaintiffs have challenged representations concerning a company’s participation in COVID-19-related government programs.

Two of the most interesting of these suits were filed in August. In one, filed on August 13, 2020, in the District of New Jersey against Eastman Kodak Company, a technology company focused on print and advanced materials and chemicals, and its CEO, plaintiffs alleged that Kodak made false and misleading statements in connection with the announcement of a new manufacturing deal with

the US International Development Finance Corporation (DFC). Per the complaint, on June 27, 2020, the company announced that DFC had loaned Kodak \$765 million to produce ingredients used in drugs to treat COVID-19. According to plaintiffs, Kodak's share price increased 24 percent on the announcement and that same day, Kodak granted several of its insiders large stock options without disclosing those grants to the public. On July 28, 2020, the price of Kodak's shares allegedly jumped another 200 percent following the publication of an article describing the DFC loan and detailing the projected creation of at least 300 jobs in Rochester, New York. Plaintiffs state that while Kodak did not issue its own press release, "a Kodak spokesperson stated the 'official press release' was published by the DFC" and that the DFC's press release indicated that Kodak has completed "DFC's initial screening" and that the DFC would undertake "standard due diligence" before formally committing. The following day, Kodak's CEO appeared on a news show and stated that he felt "very comfortable that we can bank on" the deal and that the company had "been working on this for a few months." Kodak's share price allegedly rose over 1,000 percent between July 27 and 29, 2020.

Then, on August 1, 2020, a news article allegedly reported new details of the "unusual" 1.75 million option grant to Kodak's CEO, after which Kodak's share price fell approximately 34 percent. On August 4, 2020, before the market opened, *CQ Roll Call* reported that Senator Elizabeth Warren submitted a letter to the US Securities and Exchange Commission (SEC) requesting an investigation of the Kodak deal. That same day, *The Wall Street Journal* reported that the SEC had commenced an investigation into "how Kodak controlled disclosure of the loan, word of which began to emerge on July 27, 2020." Also that day, one of Kodak's directors allegedly donated 6.3 million shares of stock to a religious organization that the director "founded, controlled, and personally benefitted from." As a result of the alleged revelations and events on August 4, 2020, Kodak's stock price dropped another 4 percent. On August 7, 2020, the DFC announced it was pausing the deal, after which Kodak's stock purportedly declined 28 percent.

In another suit filed almost two weeks later in the Northern District of California, plaintiffs challenged statements made by Vaxart Inc., a vaccine developer, that plaintiffs described as overly optimistic statements about the company's work on a COVID-19 vaccine. Plaintiffs named Vaxart's CEO and a number of board members in the suit. Plaintiffs alleged that on June 25, 2020, Vaxart issued a press release allegedly misstating that Vaxart was close to the production of a vaccine. The following day, Vaxart purportedly issued another press release "misleadingly implying that the federal government's Operation Warp Speed"—a "program which commits the federal government to massive funding for the development of COVID-19 vaccines"—"had accepted Vaxart's vaccine as part of its program." Plaintiffs further allege that following the press releases, one board member cashed out of Vaxart, profiting \$200 million. Per the plaintiffs, the truth allegedly emerged on July 25, 2020, when *The New York Times* published an article allegedly exposing that Vaxart's vaccine had not been selected into Operation Warp Speed and describing the stock trades that had purportedly generated significant profits for Vaxart insiders. Following this news, the price of Vaxart shares allegedly fell by approximately 27 percent.

b. Cases Alleging Misrepresentations Related to a Company's Representations About How COVID-19 Impacted Its Economic Projections and Financial Results

In what is perhaps the most expansive category in the second wave, plaintiffs have broadly challenged companies' representations regarding the impact of COVID-19 on the company's projected and actual financial performance. We address the most interesting of those cases in the order in which they were filed.

On **May 22, 2020**, plaintiffs filed an amended complaint against Forescout Technologies, a cybersecurity company, and its CEO in the Northern District of California (plaintiffs filed their original complaint on January 2, 2020, but amended it to add COVID-19-related claims). The plaintiffs attacked not the company's representation regarding its ability to withstand COVID-19-related challenges, but instead the company's statements inappropriately attributing its challenges to COVID-19 when they were allegedly caused by other factors. Specifically, plaintiffs alleged that Forescout made false and misleading statements when, beginning in February 2019, the company provided "extraordinarily bullish guidance for the full fiscal year of 2019" and throughout 2019 issued partial disclosures stating that the company would not meet prior revenue guidance. The complaint alleges that while the company publicly assured investors that its sales pipeline and rate of closing deals "remained 'very strong'" and that the company was "hiring like crazy," the company failed to disclose that its inability to meet guidance was due in part to weakness in the company's sales and deal pipeline and a declining number of sales representatives. According to plaintiffs, in January 2020, Forescout again issued overly aggressive guidance, this time for the first quarter of 2020, and included the guidance in a March 2020 definitive proxy statement filed with the SEC that sought approval of the acquisition of Forescout by another company. Then, on May 11, 2020, Forescout disclosed in its first-quarter Form 10-Q that its revenues "for the first quarter of 2020 were \$57 million, or \$5 million less" than the company projected in its March 2020 proxy statement. The complaint alleges that Forescout "conveniently blamed the global pandemic" for its failure to meet revenue projections, even though a global pandemic was not declared until March 11, 2020, and many of Forescout's "peer" companies beat guidance for the first quarter of 2020. Forescout's stock price allegedly fell nearly 5 percent on May 12, 2020. One week later, on May 18, the company issued a press release stating that acquisition of Forescout would not proceed. Following that release, the company's stock price allegedly declined by nearly 24 percent.

About a month later, on **June 28, 2020**, plaintiffs filed suit against Ideanomics, Inc. and its CEO in the Southern District of New York. Plaintiffs allege that in several press releases between March and June 2020, Ideanomics falsely stated that it had established the "one million square foot EV expo center" and made material misrepresentations about the strength of the performance of its electric car business, which it described as "optimistic" despite being "negatively impacted by the shutdowns resulting from COVID-19." Following these statements, which allegedly inflated Ideanomics's stock price to "over \$3.00 per share for the first time since 2018," Ideanomics filed a registration statement with the SEC announcing its plans to offer \$250 million of common stock. Then, on June 25, 2020, a third-party researcher issued a series of tweets in which it called

Ideanomics “an egregious & obvious fraud” and stated that Ideanomics “doctored photos in its [press release] to suggest it owns/operates the [expo center],” which the third-party researcher described as a “clear effort by the company to manipulate the photographs in order to drive its stock price up.” The third-party researcher further stated that the facility allegedly owned by Ideanomics was “actually operated by almost 100 sales groups,” and concluded that Ideanomics’s press releases amounted to an extension of the company’s “stock pump and dump on a neverending [sic] stream of press releases over the last 5 years.” On June 25, 2020, another third-party researcher allegedly reiterated largely the same conclusions. Following that report, Ideanomics issued another press release allegedly trying to “clarify the status of” the business and provided additional video and pictures, after which a third-party researcher posted its own videos allegedly contradicting Ideanomics’s claims and stating that Ideanomics was “engaged in flagrant securities fraud.” On this news, Ideanomics’s stock price allegedly fell approximately 53 percent over two days.

On **August 19, 2020**, plaintiffs filed suit against STAAR Surgical Co., a creator of implantable lenses for the eye, and its CEO in the Central District of California. Plaintiffs allege that STAAR Surgical made false statements and misrepresentations in its February 26, 2020 Form 10-K and press release and in its April 13, 2020 press release by overstating and mischaracterizing its sales and growth in China, including with respect to its largest client, and its marketing and research and development expenses. Specifically, plaintiffs alleged that in its April 13, 2020 press release, STAAR falsely stated that it “estimate[d] COVID-19 negatively impacted first quarter sales by \$4 million, less than previously anticipated” and that “[d]espite the pandemic’s impact on business,” first-quarter growth was expected to be strong in multiple countries, including China. Then, on August 5, 2020, STAAR filed a Form 10-Q in which the company allegedly reported disappointing financial results for the second quarter, after which STAAR’s share price fell approximately 10 percent. On August 11, 2020, a third party published a report stating that STAAR had reported fake sales, including with respect to its largest client, and noting that it believed that “fraud . . . pervades the China business.” STAAR’s stock price allegedly plummeted again on the news, falling an additional 6.2 percent.

On **September 8, 2020**, plaintiffs filed a securities fraud class action against Harborside, a cannabis company, and its CEO in the District of Oregon.¹ Plaintiffs allege that in addition to issuing false and misleading financial statements throughout 2019, on March 25, 2020, Harborside falsely touted its business prospects during the COVID-19 pandemic by stating in a press release that because the governor of California had declared cannabis to be an essential part of the state’s infrastructure, “all relevant Harborside operations and retail store locations remain fully operational.” Harborside added that “while the situation remains fluid, we are seeing record weekly revenues and average basket sizes . . . and significant improvement in profitability.” Plaintiffs allege that the truth began to emerge on May 29, 2020, when Harborside announced the suspension of

¹ Harborside’s shares are traded on the OTC Pink Market. The shares of all other issuers discussed herein traded on the New York Stock Exchange or Nasdaq at the time the complaint was filed.

trading of its Canadian shares, the restatement of historical financial statements and the delay of the filing of its annual statement, noting that it intended to file on July 10, 2020, but could give “no assurance” as to “the anticipated timing of filing . . . due to the COVID-19 pandemic.” Harborside’s stock price allegedly dropped 2 percent on the news. On June 22, 2020, and again on July 10, 2020, Harborside allegedly issued a press release reiterating the same, which purportedly caused its stock price to drop an additional 12 percent. Harborside’s share price allegedly fell another 5 percent when the company filed its restated second-quarter financial statements on August 12, 2020.

On **September 11, 2020**, plaintiffs filed a securities fraud class action, as well as claims under the Securities Act, against Lexinfintech Holdings Limited (Lexin), an online consumer finance platform offering various loans and financial services to consumers, and its CEO in the District of New Jersey. Plaintiffs allege that Lexin made false and misleading statements by overstating its growth prospects, engaging in undisclosed related-party transactions and, following the COVID-19 pandemic, maintaining low delinquency rates by providing borrowers in default new funds to make payments. With respect to the pandemic, in its April 30, 2020 Form 20-F, Lexin allegedly stated that “[w]ith the negative impact of COVID-19 on the general economic environment as well as on [Lexin’s] collection efforts, [Lexin] ha[s] experienced an increase in both delinquency rates and charge-off rates in the first quarter of 2020,” which could continue in future quarters; and that due to the pandemic, there were “uncertainties” “with respect to the effectiveness of [Lexin’s] loan performance management in the future.” Then, on August 25, 2020, a third-party researcher issued a research report questioning Lexin’s growth, stating that the company engaged in undisclosed related-party transactions, and saying that Lexin reported low delinquency rates by providing borrowers in default new funds to make payments. Following the release of the report, plaintiffs allege that Lexin’s share price fell about 5.5 percent.

That same day, **September 11, 2020**, plaintiffs filed a securities fraud class action against Portland General Electric Company (PGE), an electric utility, and its CEO in the District of Oregon. Plaintiffs allege that in its April 24, 2020 Form 10-Q, PGE stated that its “financial performance [the first] quarter [of 2020] largely reflects conditions experienced prior to the COVID-19 pandemic,” and revised its full-year earnings guidance as a result of the “deteriorating economic outlook.” Approximately three months later, on July 31, 2020, PGE filed a Form 10-Q and accompanying press release, allegedly downplaying risks related to its wholesale business, reaffirming its 2020 earnings guidance and asserting its commitment to “keeping operating expenses and costs low.” Plaintiffs allege the truth was revealed on August 24, 2020, when PGE provided a business update announcing losses and lowering its full-year 2020 guidance. On this news, PGE shares allegedly fell 11 percent.

Observations

Although the cases are still too few in number to make any statistically significant findings, an analysis of the first and second waves of COVID-19-related securities fraud litigation—including the cases summarized herein and others—reveals a number of trends.

First, pharmaceutical companies—named as defendants in six suits—have been the biggest area of focus for plaintiffs. Four cases filed against pharmaceutical companies involved public statements made to the media expressing extreme optimism about the effectiveness and performance of the company’s treatment or tests. More specifically, two cases relate to a company’s representation that its COVID-19 test was 100 percent effective, and one case involved statements expressing extreme optimism about how close the company was to producing a treatment.

Second, while the travel industry has been heavily impacted by COVID-19, to date, only two cruise lines and one airline have been the target of COVID-19-related securities fraud suits. Plaintiffs have focused on these companies’ statements regarding how COVID-19 affected their business and in the cases of the cruise lines, their public representations about the increasing incidents of COVID-19 and risk of infection. In the two cases against the cruise lines, plaintiffs have also relied on investigative journalists in their allegations about the exposure of the alleged fraud.

Third, plaintiffs have sued a number of companies involved in government-funded COVID-19 relief programs, including Operation Warp Speed. In these cases, plaintiffs have primarily scrutinized the companies’ allegedly unwarranted optimism that they would receive the government funding at issue.

Fourth, a significant number of cases focus on companies’ optimistic financial statements made before a stock drop. These cases attribute the stock drop to the companies’ prior overly optimistic revenue outlooks and statements concerning their ability to grow and withstand the financial impact of COVID-19.

Fifth, since March, plaintiffs have slowly increased the pace at which they have filed securities fraud class actions related to COVID-19, with a brief slowdown in July and a surge in August and September, likely attributable to the release of companies’ second-quarter financial results. Numerous actions filed in August and September contained substantive allegations regarding companies’ earnings releases or Form 10-Q quarterly reports.

Month (2020)	Number of Securities Fraud Suits Related to COVID-19
March	2
April	2
May	4
June	4
July	1
August	5
September	6

Sixth, to date, plaintiffs have filed cases in district courts in eight states: California, Utah, Florida, New Jersey, Indiana, Pennsylvania, Oregon and New York, though the majority of cases (nine) have been filed in California. Perhaps unsurprisingly, most cases against pharmaceutical companies (three) and technology companies (four) have been filed in California.

State (Federal District Court)	Number of Securities Fraud Suits Related to COVID-19
California	9
New York	5
Florida	3
New Jersey	2
Oregon	2
Utah	1
Pennsylvania	1
Indiana	1

Seventh, plaintiffs have not yet named auditors as defendants in their COVID-19-related securities fraud class actions.

Finally, plaintiffs have alleged both Securities Act and Securities Exchange Act claims in only one case (involving Lexin, as discussed above).

Conclusion

While the outcomes of these cases have yet to be determined—the courts in these cases have not taken any significant actions, and motions to dismiss have been filed in less than a handful of cases—the examples of cases provide the additional, instructive context for securities fraud suits related to COVID-19. Based on this second wave of litigation, class plaintiffs appear to have targeted companies across a range of industries and have challenged a wider variety of misstatements than during the first wave of litigation. They have challenged statements related to receipt of government funding and the ability to withstand COVID-19-related challenges or inappropriately using COVID-19 as a scapegoat where something else impacted the company’s business. Ultimately, as these cases demonstrate, each potential action will turn on the specific facts at issue.

To that end, WilmerHale is closely monitoring developments in securities fraud litigation related to COVID-19. If you have any questions or require assistance with a securities litigation matter, please feel free to reach out to this alert's authors or any of your contacts at WilmerHale.

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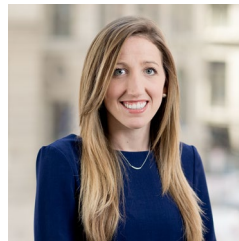
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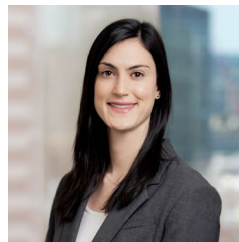
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