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January 21, 2021

**VIA EMAIL**

Vanessa A. Countryman, Secretary  
Securities and Exchange Commission  
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Washington, DC 20549-1090  
Fax: (202) 772-9324  
apfilings@sec.gov

**RE: In the Matter of the Application for Review of Potomac Capital Markets LLC,  
Administrative Proceeding No. 3-19917**

Dear Ms. Countryman:

Enclosed please find an electronic copy of FINRA's Reply Brief in Support of Its Motion to Dismiss the Application for Review in the above-captioned matter.

Please contact me at (202) 728-8207 if you have any questions.

Sincerely,

Ashley Martin

Ashley Martin

Enclosures

cc: Goodloe E. Byron, Jr. (via Email)  
Potomac Capital Markets, LLC  
gebyron@potomacinvestments.com

**BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, DC**

In the Matter of the Application of

Potomac Capital Markets LLC

For Review of

FINRA Disciplinary Action

File No. 3-19917

**FINRA'S REPLY BRIEF IN SUPPORT OF ITS  
MOTION TO DISMISS THE APPLICATION FOR REVIEW**

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January 21, 2021

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**BEFORE THE  
SECURITIES AND EXCHANGE COMMISSION  
WASHINGTON, D.C.**

In the Matter of the Application of  
  
Potomac Capital Markets LLC  
  
For Review of  
  
FINRA Disciplinary Action  
  
File No. 3-19917

**FINRA’S REPLY BRIEF IN SUPPORT OF ITS  
MOTION TO DISMISS THE APPLICATION FOR REVIEW**

Potomac Capital Markets LLC (“Potomac” or “the Firm”) violated an important reporting requirement when it failed to file timely its 2019 annual audited report. Potomac neither timely requested an extension of time to file the audit nor, after the Firm received notice of its resulting suspension under FINRA Rule 9552, did it avail itself of FINRA’s administrative procedures by timely requesting a hearing or seeking termination of the suspension on grounds of full compliance. Potomac’s failure to exhaust FINRA’s administrative proceedings precludes the Firm from raising its purported defenses and explanations for its failure to file timely the audit for the first time on appeal before the Commission. Moreover, Potomac’s assertion that availing itself of FINRA’s administrative procedures would have been futile has no merit. The Firm has not demonstrated that timely requesting a hearing before FINRA would have been “clearly useless,” as the futility exception requires.

Rather than accept responsibility for its regulatory failings, Potomac attempts to blame FINRA and its auditor for its failure to timely file its annual audited report. The Commission has repeatedly held, however, that broker-dealers who are FINRA members bear responsibility for complying with regulatory rules, including the timely filing of annual audits, and cannot shift this responsibility to other parties. Potomac's arguments blaming other parties are nothing more than an attempt to distract from real issue of its failure to exhaust its administrative remedies before FINRA. Accordingly, the Commission should reject Potomac's unpersuasive arguments and grant FINRA's Motion to Dismiss the Application for Review on exhaustion grounds.

**I. Potomac's Failure to File Its 2019 Annual Audited Report was a Significant Reporting Violation**

Potomac does not dispute that it failed to file timely its 2019 annual audited report.<sup>1</sup> (Opp. at 1.); Exchange Act Rule 17a-5(d); 17 C.F.R. § 240.17a-5. This delinquency was no mere technical violation, as the obligation to file an annual audited report is "important to monitor the financial status of broker-dealers and to protect investors." *Gremo Invs., Inc.*, Exchange Act Release No. 64481, 2011 SEC LEXIS 1695, at \*14-15 (May 12, 2011). Simply put, Potomac's failure to file an annual audited report impeded FINRA's ability to monitor the Firm's financial status. *See id.* That impediment raised a significant concern, as the notes to Potomac's financial statements for the preceding year disclosed liquidity and going concern issues. (R. at 15, n.1 Liquidity and Going Concern Issues.)

Despite the importance of timely filing the Firm's annual audited report, it appears that

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<sup>1</sup> Potomac acknowledges in its Opposition to FINRA's Motion to Dismiss the Application to Review (the "Opposition") that it did not make any attempt to submit its 2019 audit until November 17, 2020, more than eight months after the audit was due and more than four months after its expulsion from FINRA membership. (Opp. at 6.) "Opp. at \_\_\_" refers to the Opposition.

Potomac exercised little or no diligence to complete the report by the March 2, 2020 deadline. (R. at 34.) (noting the report’s due date). In its Opposition, Potomac acknowledges that it first engaged an auditor for its 2019 report in March 2020, which virtually guaranteed that the firm could not timely file its annual audited report. (Opp. at 3.) Although it hired an auditor in March, Potomac’s failure to file its annual audited report continued for months, the Firm failed to timely request a hearing, and did not present an argument for why it was not in violation of Exchange Act Rule 17a-5(d).

## **II. Potomac Failed to Exhaust the Available Administrative Remedies, and Its Arguments that Those Remedies were Futile Lack Merit**

Potomac asserts that it sufficiently exhausted the administrative remedies before FINRA because it “engaged fully with [FINRA’s] administrative process” to request an extension of time to file its 2019 annual audited report. (Opp. at 1). The Firm further argues that to the extent it did not avail itself of an administrative procedure, its failure to do so should be excused by the futility exception. (Opp. at 9-10). Potomac misunderstands the applicable law, and the Commission should reject these meritless arguments.

Potomac repeatedly failed to avail itself of FINRA’s administrative procedures. At the outset, Potomac could have sought an extension of time prior to the report’s due date by submitting a written request three days before the deadline.<sup>2</sup> Potomac does not explain why it

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<sup>2</sup> FINRA, Annual Audit Extension of Time Request Policy, <https://www.finra.org/filing-reporting/annual-audit/extension-time-request-policy#:~:text=In%20exceptional%20circumstances%2C%20FINRA%20may,due%20date%20of%20the%20audit.> (last visited Jan. 17, 2021) (attached) (When a firm determines that an extension is necessary, it must submit a written request to its assigned FINRA Coordinator as early as possible—“but no later than three business days prior to the audit due date.”)

While Potomac asserts that the Firm verbally requested an extension of time, it fails to specify when it did so. (Opp. at 3-4). In any event, the record includes no indication that  
[Footnote continued on the next page]



did not employ this procedure, which it could have used to explain that it changed auditing firms in February 2020. (*See Opp.* at 3). Instead of timely requesting an extension, Potomac remained silent. Nonetheless, Potomac effectively was given a 30-day extension from the date its report was due on March 2, 2020 and the date FINRA sent the April 2, 2020 Pre-Suspension Notice. (R. at 34-36.) The Firm could have used this time period to submit its audit. It did not.

Next, once Potomac received FINRA’s April 2, 2020 Pre-Suspension Notice, it could have requested a hearing under FINRA Rule 9552(e) to present any reasons why a suspension (and potential expulsion) would not be appropriate. (R. at 34-36.); FINRA Rules 9552(d)-(e) (providing that a member or person who receives a Pre-Suspension Notice has twenty-one days to stay the suspension by requesting a hearing). It did not do so. While Potomac now contends that a hearing would have been futile because its defenses “were not knowable” at that point in time, this argument strains credulity and is contradicted by its other assertions. (*See Opp.* at 3, 9.) Potomac’s deadline to request a hearing was April 27, 2020—almost two months after the annual audited report was due (March 2, 2020). At that point, Potomac surely was aware of the reasons (meritorious or not) why it had not filed the report, including its change of auditor and any circumstances related to the pandemic. (*Opp.* at 3.) Moreover, Potomac had to have been aware that an examination report remained pending. (*Opp.* at 9.) The Firm chose not to present those reasons to FINRA by requesting a hearing, instead seeking to present them for the first time on appeal to the Commission. *See* FINRA Rule 9552(e). Because Potomac did not request a hearing, the Firm did not develop the record regarding whether the change in accounting firms,

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[cont'd]

Potomac submitted a written extension request prior to the March 2, 2020 deadline—indeed, the only written extension request in the record is dated July 2, 2020. (R. at 47.)

the pandemic, or an open examination excused its failure to file timely its audit.<sup>3</sup> *See Patrick H. Dowd*, Exchange Release No. 83710, 2018 SEC LEXIS 1875, at \*17 (Jul. 25, 2018) (explaining that, in bypassing the opportunity to request a hearing under FINRA Rule 9552, the applicant “prevented FINRA from considering his defenses and from developing a record from which we could review the merits of those defenses”); *Ricky D. Mullins*, Exchange Act No. 71926, 2014 SEC LEXIS 1268, at \*10 (Apr. 10, 2014) (explaining that one of the salutary purposes of the exhaustion requirement is to develop the record).

Finally, despite Potomac’s failure to timely request a hearing, there was a final administrative option available to it—the Firm could have used the ninety days between the Pre-Suspension Notice and the final day to request termination of the suspension (July 2, 2020) on grounds of full compliance by submitting its 2019 audit. FINRA Rule 9552(f). Again, Potomac did not do this, instead submitting an extension request on the last possible day to request termination of its suspension.<sup>4</sup> (R. at 47.) Because Potomac did not employ any of the administrative procedures available to it under FINRA Rule 9552, dismissal for failure to exhaust is appropriate. *David Richard Kerr III*, Exchange Act Release No. 79744, 2017 SEC LEXIS 76, at \*11-12 (Jan. 5, 2017) (explaining that the applicant failed to exhaust his administrative remedies by failing to take any of the steps available under FINRA Rule 9552).

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<sup>3</sup> Potomac asserts that it could not have raised any issues caused by the open examination at a hearing because it did not discover that its auditor considered the pending exam report to be a challenge until after the deadline to request a hearing. (Opp. at 9.); FINRA Rule 9552(e). This simply underscores why a firm should engage an auditor in advance of the due date for its annual audited report. Indeed, Potomac does not specify the date that it purportedly learned this information from its auditor. (Opp. at 9.) Moreover, when Potomac chose not to request a hearing, it bore the risk that an unforeseen issue might delay the completion of the annual audited report beyond Rule 9552’s automatic expulsion date. *See* FINRA Rules 9552(e)-(f), (h).

<sup>4</sup> Potomac’s extension request largely cited its auditor’s vacation as the reason for the delay. (R. at 47.)

While Potomac argues that pursuing its administrative remedies would have been futile, its argument lacks merit. Potomac bears the burden of establishing the futility of FINRA’s administrative review procedures. *See Honig v. Doe*, 484 U.S. 305, 327 (1988) (stating that the burden “to demonstrate the futility or inadequacy of administrative review” rests on the party seeking to avoid the exhaustion requirement).<sup>5</sup> To rely on the futility exception to the exhaustion requirement, a party must show that pursuing its administrative remedies was “clearly useless.” *Dowd*, 2018 SEC LEXIS 1875, at \*18 (explaining that a party invoking the futility exception to the exhaustion requirement must show that the administrative procedures in question were “clearly useless”) (quoting *Marine Mammal Conservancy v. Dep’t of Agriculture*, 134 F.3d 409, 413 (D.C. Cir. 1998)). Potomac has failed to meet this burden.

In its Opposition, the Firm contends that requesting termination based on full compliance under FINRA Rule 9552(f) would have been futile because: (1) its auditing firm would not complete the annual audited report until FINRA completed a pending examination report, and (2) one of its auditors went on vacation on or near the expulsion date.<sup>6</sup> (Opp. at 1, 5, 10, 14). Potomac has not shown, however, that it would have been “clearly useless” to raise its change of auditing firm, the pandemic, and the open FINRA examination at a FINRA hearing. *See Dowd*, 2018 SEC LEXIS 1875, at \*18; FINRA Rule 9552(e). The Commission should reject Potomac’s futility argument because the Firm effectively is complaining about the consequences of its own

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<sup>5</sup> *Superseded, in part, on other grounds by statute*, 20 U.S.C. § 1415(k)(1)(G), as recognized in *Joshua A. v. Rocklin Unified Sch. Dist.*, 559 F.3d 1036, 1039 n.1 (9th Cir. 2009).

<sup>6</sup> Potomac’s assertion that its auditor would not complete the annual audited report while an examination report was pending remains uncorroborated by the auditor and, as noted in FINRA’s Motion to Dismiss, is unsupported by relevant guidance from the Public Company Accounting Oversight Board (“PCAOB”). FINRA’s Motion to Dismiss, at 11 n.9. In addition, Potomac’s statement that a January 2020 change in its assigned FINRA Risk Monitoring Analyst (“RMA”) may have somehow contributed to its delay is unsupported speculation. (Opp. at 3.)

choice not to request a hearing. *See Gregory S. Profeta*, Exchange Act Release No. 62055, 2010 SEC LEXIS 1563, at \*7-8 (May 6, 2010) (dismissing the application for failure to exhaust administrative remedies and explaining that the applicant “chose not to respond to FINRA’s letters [] or request a hearing to challenge his impending sanction, and therefore cannot complain at this stage about the consequence of his choice”). By its own admission, Potomac chose to take the gamble that it could complete the annual audited report prior to expulsion under FINRA Rule 9552(h), rather than request a hearing. (Opp. at 14.) (stating that Potomac did not request a hearing at least in part because the Firm “believe[d] it would meet the July 2, 2020 deadline”); FINRA Rule 9552(h). The Firm bore responsibility for its decisions not to seek an extension or a hearing under FINRA Rule 9552(e), as well as responsibility for filing the annual audited report in a timely manner. *See Kerr*, 2017 SEC LEXIS 76, at \*18 (dismissing the petition for failure to exhaust administrative remedies and explaining that the applicant bore the burden of requesting an extension of time or seeking a stay of his suspension); *Robert Marcus Lane*, Exchange Act Release 74269, 2015 SEC LEXIS 558, at \*56 (Feb. 13, 2015) (a member or associated person may not shift its compliance burden to FINRA). Potomac cannot now complain of the consequences of its own choices. *See Profeta*, 2010 SEC LEXIS 1563, at \*7-8.

In sum, Potomac may not avoid the consequences of its failure to exhaust available administrative remedies with its unsupported assertions that those remedies are futile. *See Profeta*, 2010 SEC LEXIS 1563, at \*7-8; *Kerr*, 2017 SEC LEXIS 76, at \*18. The present application for review cannot substitute for Potomac’s failure to exhaust its remedies under FINRA Rule 9552, nor is it a proper means for Potomac to garner an extension of time of nearly nine months to file the report. *See Carol Trewyn Lenahan*, Exchange Act Release No. 73146, 2014 SEC LEXIS 3503, at \*6 (Sept. 19, 2014) (explaining that a departure from exhaustion

requirements “would severely hinder the self-regulatory capabilities” of self-regulatory organizations); *cf. Scottsdale Capital Advisors Corp. v. Fin. Indus. Regulatory Auth.*, 390 F. Supp. 3d 72, 80-83 (D.D.C. 2019) (rejecting the plaintiff’s attempt to bypass the proper administrative review process by bringing its claims to a district court in the first instance), *aff’d*, 811 F. App’x 667 (D.C. Cir. 2020). Accordingly, dismissal on exhaustion grounds is appropriate.

### **III. Potomac Cannot Shift Its Responsibility for Completing the Annual Audited Report to Others**

Instead of taking responsibility for the Firm’s failure to timely file the annual audited report, Potomac places blame on its auditor, FINRA, and the pandemic shutdown (which post-dates the March 2, 2020 due date).<sup>7</sup> (*See Opp.* at 1.) (stating that the annual audited report was not timely filed “[d]ue to a combination of factors that included change in auditor, global pandemic constraints, delays caused by FINRA’s failure to provide a timely examination report, and unfortunately timed vacations by auditor staff”). As discussed above, Potomac did not properly raise any of these explanations for its delinquency before FINRA, and thus failed to exhaust its administrative remedies. *See Kerr*, 2017 SEC LEXIS 76, at \*11-12. In any event, even if these assertions were properly raised in the first instance in this appeal (which they are not), the Commission should reject Potomac’s improper attempts to shift its responsibility for meeting its reporting obligations to its auditor and FINRA. *See Lane*, 2015 SEC LEXIS 558, at \*56; *Thomas C. Kocherhans*, 52 S.E.C. 528, 531 (1995) (“Participants in the securities industry must take responsibility for compliance with regulatory requirements.”).

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<sup>7</sup> As noted in FINRA’s Motion to Dismiss, the State of Maryland closed non-essential businesses on March 23, 2020, and did not require that “securities and investment companies” close. FINRA’s Motion to Dismiss at 12-13 & n.11.

Moreover, while Potomac's Opposition relies heavily on the pandemic and open FINRA examination as factors that somehow excuse or justify the Firm's failure to file a timely audit, Potomac has never explained how these factors prevented the firm from timely meeting its regulatory obligations. (Opp. at 1, 3, 6-7, 9, 11, 13-15.) Potomac first mentioned the pandemic to FINRA in its July 2, 2020 letter and did so in passing and without elaboration, citing its auditor's vacation as the primary reason it could not complete the audit. (R. at 47.) With respect to the open FINRA examination, Potomac never provided FINRA with any writing from its auditor claiming or explaining why the open examination prevented the auditor from completing the audit. Indeed, FINRA member firms regularly file annual audits while examinations are open, and Potomac had failed to establish that it could not do so here.<sup>8</sup>

#### **IV. Potomac Has Not Demonstrated that FINRA Erred in Applying FINRA Rule 9552**

Potomac also contends that FINRA erred by failing to: (1) treat its July 2, 2020 letter as a request for a hearing; (2) specifically respond to the letter; and (3) explain why the Firm's expulsion was the appropriate outcome. (Opp. at 1, 11-12, 15.) Potomac also claims that FINRA abused its discretion by not granting the open-ended extension for submission of its audit that it requested in its July 2 letter. (Opp. at 11-12.) These arguments are meritless because FINRA acted consistently with the requirements of FINRA Rule 9552, which provides a deadline for requesting a hearing and for an automatic expulsion if a firm does not timely request a hearing or termination of its suspension on grounds of full compliance. FINRA Rules 9552(e)-(f), (h); *Dowd*, 2018 SEC LEXIS 1875, at \*9-10 ("As a general rule courts should not topple over administrative decisions unless the administrative body not only has erred, *but has erred*

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<sup>8</sup> Again, FINRA notes that Potomac's assertion that the open examination prevented the completion of its annual audited report is unsupported by relevant PCAOB guidance. See FINRA's Motion to Dismiss at 11 n.9.

*against objection made at the time appropriate under its practice.”*) (quoting *Woodford v. Ngo*, 548 U.S. 81, 90 (2006)) (internal alterations omitted)); *Norman Chen*, Exchange Act Release No. 65345, 2011 SEC LEXIS 3224, at \*7-10 (Sept. 16, 2011) (denying the application for review of a bar imposed under FINRA Rule 9552 because FINRA acted consistently with the rule).

First, FINRA did not err by failing to treat Potomac’s July 2, 2020 letter as a request for a hearing because the letter did not ask for a hearing and, under FINRA Rule 9552(e), the time to request a hearing had expired more than two months beforehand. (R. at 47.); FINRA Rule 9552(e); *cf. Chen*, 2011 SEC LEXIS 3224, at \*4-5, 10 (the applicant’s hearing request was untimely under FINRA Rule 9552(e) and, therefore, insufficient to avert a suspension or bar under the rule). Nothing in FINRA Rule 9552 authorizes or requires FINRA to grant an untimely hearing request even when one is expressly requested. Second, FINRA’s correspondence with Potomac repeatedly explained that the Firm’s failure to timely request a hearing under FINRA Rule 9552(e), or a termination of its suspension based on full compliance under FINRA Rule 9552(f), would result in the Firm’s automatic expulsion. (R. at 33-36.) Accordingly, Potomac was aware that an extension letter submitted on the last possible day to request termination of the suspension was insufficient to avert an expulsion. *See Chen*, 2011 SEC LEXIS 3224, at \*5-6, 10 (the applicant’s last-minute letter to FINRA was insufficient to avert a bar under Rule 9552(h)); *Li-Lin Hsu*, Exchange Act Release No. 78899, 2016 SEC LEXIS 3585, at \*9-14 (Sept. 21, 2016) (explaining that an extension request filed on the day the respondent would be barred automatically did not demonstrate good cause to excuse her failure to exhaust administrative remedies). FINRA Rule 9552 did not require FINRA to provide any additional response or explanation.

Finally, the reasons for Potomac's expulsion are set forth in the applicable rule itself, as well as the expulsion letter FINRA sent to the Firm on July 6, 2020. (R. at 49.); *see* FINRA Rules 9552(e)-(f), (h). The expulsion is consistent with the rule, and FINRA properly notified Potomac of this consequence of its failure to timely request a hearing or termination of its suspension under the rule. *See id.*; (R. at 33-36.) Potomac's expulsion was by operation of FINRA Rule 9552 and the rule required no additional explanation justifying the expulsion. As a result, the Commission should reject Potomac's arguments that FINRA erred in applying FINRA Rule 9552 in this case.

#### **V. Potomac's Expulsion was Prescribed by FINRA Rule 9552**

Finally, Potomac asserts that its expulsion is an excessive penalty. (Opp. at 12-13.) Citing to other cases, it argues that other member firms or associated persons received more lenient sanctions for similar, or more serious, regulatory violations. *Id.* Under FINRA Rule 9552, however, Potomac's expulsion was automatic because the Firm failed to timely request a hearing or seek termination of its suspension on grounds of full compliance. FINRA Rules 9552(e)-(f), (h). Moreover, the expulsion was consistent with other cases in which associated persons failed to follow FINRA Rule 9552's procedures. *See Dowd*, 2018 SEC LEXIS 1875, at \*19; *Hsu*, 2016 SEC LEXIS 3585, at \*5-6, 14; *Chen*, 2011 SEC LEXIS 3224, at \*10. The cases Potomac cites in support of its argument are inapposite, as none of them involve member firms or associated persons who received an automatic bar or expulsion after failing to request a hearing or termination of a suspension under FINRA Rule 9552, but rather cases in which a sanction was imposed after a hearing. (Opp. at 12-13); *TMR Bayhead Sec. LLC*, Exchange Act Release No. 88006, 2020 SEC LEXIS 2833, at \*6 (Jan. 17, 2020) (the firm timely requested a hearing); *Gremo Invs.*, 2011 SEC LEXIS 1695, at \*5 (same); *Stephen J. Horning*, Exchange Act



Release No. 56886, 2007 SEC LEXIS 2796, at \*2 (Dec. 3 2007) (addressing an appeal from a decision by a SEC administrative law judge in a matter not involving FINRA or its rules), *aff'd*, 570 F.3d 337 (D.C. Cir. 2009). Accordingly, the Commission should reject Potomac's argument that expulsion is inappropriate.

## **VI. Conclusion**

Potomac failed to timely file its 2019 annual audited report and, after receiving notice of its resulting suspension under FINRA Rule 9552, failed to exhaust FINRA's available administrative procedures. Based on Potomac's failure to exhaust, the Commission should grant FINRA's Motion to Dismiss the Application for Review.

Respectfully submitted,

*Ashley Martin*  
\_\_\_\_\_  
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January 21, 2021

**CERTIFICATE OF SERVICE**

I, Ashley Martin, certify that on this 21st day of January 2021, I caused a copy of the foregoing FINRA's Reply Brief In Support of Its Motion to Dismiss the Application for Review to be served by email on:

Vanessa A. Countryman  
Acting Secretary  
Securities and Exchange Commission  
apfilings@sec.gov

On this date, I also caused a copy of the reply to be served by email on:

Goodloe E. Byron, Jr.  
Potomac Capital Markets, LLC  
gebyron@potomacinvestments.com

Service was made pursuant to the Commission's order in Matter of Pending Administrative Proceedings, Exchange Release No. 88415, 2020 SEC LEXIS 760 (March 18, 2020).

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