

1 UNITED STATES DISTRICT COURT
 2 FOR THE EASTERN DISTRICT OF VIRGINIA
 3 ALEXANDRIA DIVISION

4 BIONESS INC., :
 5 :
 6 Plaintiff, : Civil Action
 7 : No. 22-cv-679-MSN-IDD
 8 v. :
 9 ARETECH, LLC, :
 10 : January 13, 2023
 11 : 9:53 a.m.
 12 :
 13 Defendant. :
 14 :
 15 :

16 TRANSCRIPT OF MOTION HEARING
 17 BEFORE THE HONORABLE MICHAEL S. NACHMANOFF,
 18 UNITED STATES DISTRICT COURT JUDGE

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(Continued)

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1 THE COURTROOM DEPUTY: *Bioness Inc. v. Aretech, LLC*,
2 Case Number 22-cv-679. Will the parties please note their
3 appearances for the record.

4 MR. GRAVES: Good morning, Your Honor. Jonathan Graves
5 from Cooley, LLP for the plaintiff, Bioness Inc. With me at
6 counsel table are my colleagues, Dee Bansal and Eric Milch. I
7 will be handling the inequitable conduct issues this morning, and
8 Ms. Bansal will handle the antitrust specific issues.

9 THE COURT: Good morning.

10 MR. MASTERS: Good morning, Your Honor. Robert Masters
11 of Sheppard Mullin on behalf of the defendant, Aretech, and with
12 me today is my partner, Jon DeFosse of Sheppard Mullin; the
13 founder and CEO of Aretech, Dr. Hidler; and of Sheppard Mullin,
14 Roy Jones. And Mr. DeFosse will be handling the oral argument
15 today.

16 THE COURT: Good morning to you all.

17 MR. MASTERS: Good morning.

18 THE COURT: This matter comes before the Court on the
19 plaintiff and counter-defendant's, Bioness, partial motion to
20 dismiss certain counterclaims. There's a lot of material here,
21 and the Court has had the opportunity to review it. I appreciate
22 the briefing on both sides.

23 I'll hear oral argument at this time, but you-all don't
24 need to repeat everything that's in the pleadings, and I may well
25 ask some questions or ask you to focus on areas that I'd like to

1 clarify, so don't be shocked if I cut you off. It's not to be
2 rude; it's just to try and use everyone's time efficiently.

3 It's Bioness' motion, so I'll hear from you-all first.

4 MR. GRAVES: Thank you, Your Honor, and I will try to
5 avoid repetition from the papers. They are extensive, but I'd
6 like to highlight a few issues, in part, because of how extensive
7 the papers are. I'll try to distill some issues down for the
8 Court.

9 First, under the heightened pleadings standard for
10 inequitable conduct, in the wake of the Federal Circuit's
11 decisions *in Exergen* and *Therasense*, as this Court has
12 recognized, the party asserting inequitable conduct here,
13 Aretech, must make an initial showing from which it may be
14 plausibly inferred that, one, a specific individual knew of the
15 information not disclosed to the Patent Office; the information
16 that was not disclosed was but-for material, meaning the claims
17 or the patent would not have issued if that information had been
18 before the examiner; and, three, that intent to deceive by that
19 specific individual or those specific individuals is the single
20 most likely explanation for the nondisclosure of the information.
21 Under that standard, we submit that all three of Aretech's
22 different assertions of inequitable conduct fail to meet the
23 heightened pleadings standard.

24 Now, Aretech is free to pursue these three arguments as
25 invalidity defenses, as they will, but what they've tried to do

1 here is poorly dress up invalidity challenges, which
2 every accused infringer mounts, as an extensive and live-ranging
3 scheme to defraud the Patent Office, and the specific facts are
4 just not alleged there to support that.

5 I would like to start with the allegation that
6 Dr. Hidler himself is the true and sole inventor of Bioness'
7 first patent. That's the '000 patent. They claim that
8 Dr. Hidler invented everything claimed in that patent, although
9 they don't engage in any sort of claim-by-claim analysis and
10 submit any specific facts from which one can infer that that's
11 the case even with respect to one claim. And they claim that all
12 11 inventors on this patent and all 3 of my colleagues engaged in
13 the prosecution committed fraud on the Patent Office by not
14 telling the examiner about Dr. Hidler and his ZeroG Version 1
15 system. It's a curious claim for Dr. Hidler to raise in 2022 for
16 the first time in response to a patent infringement suit against
17 his company. The '000 patent was filed for in 2013; the
18 application published, for the world to see, in 2014. The
19 counterclaims allege that the application was confidential. That
20 was, of course, true for a year, but it then published the very
21 next year and it issued in 2017.

22 Now, by 2013, January of 2013, the relationship between
23 these two parties had completely soured. As the defendant
24 alleges in its pleading, Dr. Hidler terminated their distribution
25 agreement in January of 2013, soon after discovering that Bioness

1 was marketing a competing product. So Bioness was certainly on
2 his radar screen, front and center, by 2013; yet, when the patent
3 application published in 2014, the application that he claims
4 he's the sole inventor of through his ZeroG system, he said
5 nothing to either Bioness or the Patent Office. He said nothing
6 in 2017 when the patent actually issued. He's now claiming that
7 he is the sole and true inventor, and he's making this claim over
8 eight years after the application published and over five years
9 after the patent actually issued.

10 So what are the grounds for this allegation that
11 Dr. Hidler himself is the true and sole inventor of Bioness'
12 first patent? The allegation is that Dr. Hidler generally
13 pioneered overhead gait technology by developing his original
14 ZeroG system, and that what's disclosed and claimed in the '000
15 patent is nothing more than a nefariously obtained knockoff copy
16 of that commercially available system with the addition of a
17 powered rail. And the allegation is that Dr. Hidler told one
18 Bioness employee, at some unidentified point in time, that he
19 intended to add a powered rail to the ZeroG Version 1. That's
20 it. The pleading makes no effort to examine the claims of this
21 '000 patent and offer evidence that Dr. Hidler contributed to the
22 conception of any of them, and that is the touchtone of
23 the inventorship analysis. They make no effort to make any
24 showing, based on particularized facts, that he invented any
25 claim of that patent, let alone all of them. They offer no

1 evidence that Dr. Hidler disclosed to Bioness any particular
2 powered rail design, let alone that he conceived of and disclosed
3 to Bioness the '000 patent's particular mechanical configuration
4 to energize motorized trolleys in a overhead body-weight support
5 system using a conductive rail where part of the trolley is
6 within the rail; and those are all required elements of the
7 claims of the '000 patent.

8 These allegations on inventorship fall well short of
9 stating an inequitable conduct claim, and I submit they don't
10 even make sense when they're scrutinized. First, the commercial
11 system, the ZeroG, was publicly available by 2009, four years
12 before Bioness filed its first patent application that led to the
13 '000 patent. The notion, as the pleading alleges, that Bioness
14 snuck around taking photos of this commercially available product
15 three and four years after it had been out on the market just
16 doesn't make sense.

17 Second -- and this is most important; I want to
18 emphasize this -- Dr. Hidler applied for and obtained his own
19 patent specifically to cover his original ZeroG system. He
20 applied for this patent, and the application published in 2008;
21 the patent itself issued in 2011 -- that's the '415 patent that's
22 addressed in our briefing -- and the face of the '000 patent
23 shows that both the Hidler application for the ZeroG system
24 patent and the resulting '415 patent were before the examiner
25 during prosecution of the Bioness '000 patent. So their whole

1 story that Bioness inventors simply copied the ZeroG system and
2 added a powered rail to it and hoodwinked the examiner by
3 concealing that Dr. Hidler had actually invented the ZeroG system
4 just doesn't even make sense, because that supposedly material
5 killer prior art was in front of the examiner during prosecution
6 of the '000.

7 And not only that, the examiner expressly considered
8 the 2008 Hidler application covering the ZeroG system and used it
9 in combination with a primary reference called "Bergenstrale,"
10 which we address in our papers, to find, initially, some of the
11 proposed dependent claims invalid based on obviousness. So not
12 only was the Hidler ZeroG system of record before the examiner,
13 the examiner expressly considered it and, ultimately, allowed the
14 claims over that reference as well as the prior art. This is
15 hardly the stuff of inequitable conduct.

16 Aretech's allegations fail, quite simply, Your Honor,
17 to make the required initial showing from which it may be
18 plausibly inferred that a specific individual knew that
19 Dr. Hidler invented all that was disclosed and claimed in the
20 '000 patent through his creation of the ZeroG system and his
21 alleged verbal disclosure of the concept of a powered rail to one
22 Bioness employee. They failed to make the required showing that
23 this was but-for material information not disclosed and that --

24 THE COURT: Well, let me stop you there, and all of
25 these arguments, you've made in the papers. The one thing that

1 they seem to be focused on is this verbal discussion, right?
2 There's the military contract, which there doesn't seem to be an
3 allegation was ever shared with Bioness from 2007; is that right?

4 MR. GRAVES: Correct.

5 THE COURT: In which, apparently, Dr. Hidler raised the
6 idea of a powered rail at that early stage. But the focus seems
7 to be that there was a discussion at some point of the powered
8 rail and whether that's really the idea, whether its conception
9 of this idea or it's just sort of talking generally, and then
10 Bioness pursued that idea and made it into a reality. So why
11 isn't that enough? Why isn't that enough? And this isn't
12 summary judgment, so accepting as true that that conversation
13 took place and --

14 MR. GRAVES: The alleged conversation, according to the
15 pleading, was simply Dr. Hidler stating to one employee at
16 Bioness that he was thinking of adding a powered rail to the
17 ZeroG system, period. We don't know when that occurred,
18 according to the pleading.

19 THE COURT: Well, that employee, though, is one of the
20 inventors on the '000 patent, right?

21 MR. GRAVES: Correct, Mr. McBride, but the '000 patent
22 is not directed to simply a powered rail. That's the point I was
23 trying to make earlier in my remarks. For inventorship, you need
24 to look at the claims of the patent; and the assessment of who is
25 a proper inventor boils down to who contributed to the conception

1 of the claim limitations. The patent claims a very particular
2 mechanical configuration, as I said. It includes a powered rail,
3 but a lot of other features. And the examiner didn't just say,
4 Okay, you guys invented a powered rail in this context; you get
5 claims to cover that. The claims had to be very specific and
6 included the notion of a trolley being partially disposed within
7 a conductive rail. And there were powered rails already known
8 before the submission of the application that led to the '000
9 patent.

10 And, in fact, that leads me to their second allegation
11 of inequitable conduct regarding the '000 patent, namely, that
12 Bioness must have been aware -- not just Bioness, but all other
13 inventors and three patent attorneys -- must have been aware of a
14 particular catalog published by this vendor in Germany of powered
15 rail, Vahle; and, initially, they didn't specify a particular
16 Vahle catalog from a particular year that constituted prior art.
17 Then they changed their allegations in response to the original
18 motion to dismiss and added that, Well, Dr. Hidler himself was
19 aware of a 2007 Vahle catalog when he was prosecuting an
20 application of his own in 2020, and they used this 2007 catalog.
21 They don't allege that anyone associated with the prosecution of
22 the '000 had that catalog, let alone was aware of specific
23 information in it, but they say, Look, Vahle is supplying a
24 powered rail component to Bioness during the prosecution, so they
25 must have known about the catalog, and they must have known about

1 specific disclosures in the catalog, and they intentionally
2 withheld it from the Patent Office. Now, there's no specific
3 facts from which one could infer that intent to deceive is the
4 single most reasonable explanation for this nondisclosure of a
5 piece of prior art, which they don't even allege that anyone in
6 particular had, but I'd like to focus on the materiality and
7 cumulativeness in particular, because this goes to part of Your
8 Honor's question about the issue of Dr. Hidler claiming to be the
9 inventor of all of the '000 patent.

10 As we pointed out in our papers, not only did the
11 examiner have the ZeroG prior art in front of him when he allowed
12 these claims, but he relied on a primary reference, called
13 "Bergenstrale," initially to reject the claims, the independent
14 claims, under anticipation. And we noted in our opening brief
15 that the Vahle catalog doesn't disclose any trolley -- which is a
16 required element of all the claims -- let alone a
17 powered conductor with a portion of the trolley within it, which
18 is required by the claims and was a point of novelty that the
19 examiner found.

20 But even if you assume that their interpretation of
21 this Vahle catalog from 2007 that Dr. Hidler was aware of is
22 correct, it's clearly rendered cumulative by this Bergenstrale
23 reference. And you don't need to take our word for it; the
24 examiner himself expressly characterized Bergenstrale -- and this
25 is at pages 8 and 9 of our opening brief, and the prosecution

1 history is at Exhibit 4 -- and we quoted from the prosecution
2 history of the '000 patent where the examiner expressly stated
3 that Bergenstrale discloses a powered conductor substantially
4 parallel to the track and in contact with a portion of the
5 trolley. In the opposition -- and this is telling -- Aretech
6 completely dodges Bergenstrale and urges the Court not to even
7 look at it and not to look at what the examiner had to say about
8 it. Their argument is, You're not even allowed to even assess
9 cumulativeness at the motion to dismiss stage. We disagree.
10 That's not the law, and we cited cases where inequitable conduct
11 cases are dismissed at the pleading stage based on a failure to
12 show but-for materiality, including where other prior art of
13 record rendered the supposedly deceptively withheld information
14 cumulative.

15 So we cite several cases in our reply at page 5 in
16 which courts have dismissed inequitable conduct claims based on a
17 failure to adequately plead materiality, and we submit that their
18 silence regarding Bergenstrale and what the examiner had to say
19 about that reference is very telling. They offer no response to
20 the point that this 2007 Vahle catalog that Dr. Hidler knew about
21 is, at best, cumulative in light of Bergenstrale. So those are
22 the two issues as to the '000 patent and its progeny.

23 Finally, Your Honor, they have a third allegation.
24 This is as to the '316 patent. They added this in their
25 amendments. It's not clear why they didn't plead it originally

1 and what prompted them to add it, but it's really another prior
2 art challenge that the defendant attempts to dress up as a fraud
3 claim without specific supporting facts for that. And this time,
4 the prior art at issue is a 2013 clinician guide for Bioness'
5 Vector Elite system -- and, again, all the inventors and the
6 patent attorneys are accused of committing fraud -- and the basis
7 for this inequitable conduct claim is some purported overlap
8 between some graphically user interface screens in the guide in
9 two of the 79 figures appearing in the application that Bioness
10 filed that led to the '316 patent. But as we pointed out in our
11 briefing, those overlapping figures actually disclose additional
12 software features in the patent figures that were not shown in
13 the clinician guide. Bioness properly sought a patent on
14 additional software functionalities from its prior Vector Elite
15 system, and the defendant here has no specific allegations to
16 support any deliberate decision by any particular individual to
17 withhold that guide; therefore, this claim also fails based on
18 lack of allegations supporting deceptive intent.

19 Finally, Your Honor, I would just note inequitable
20 conduct is a very serious charge. The Federal Circuit decried
21 the reflexive pleading of it as a plague on the profession in
22 *Exergen* and *Therasense* and tightened the materiality and intent
23 standards, the pleadings standards, through those decisions. And
24 we submit, unfortunately, this shotgun approach the defendant has
25 taken is a prime example of that plague, and we, respectfully,

1 submit the claim should be dismissed.

2 THE COURT: Thank you. Let me hear from the
3 counter-plaintiff before we move on to the antitrust claims.

4 MR. DEFOSSE: Thank you, Your Honor.

5 So I'd like to try to address each of the points that
6 Mr. Graves raised in his presentation. First, I think it's
7 important, especially in the inventorship claim, to revert back
8 to what we've actually alleged, because I think the gloss that's
9 been given on the claims is not quite aligning with what's in the
10 amended counterclaims.

11 So the essence of what we've alleged here is that
12 Bioness went out, they took measurements and photographs of our
13 system, they took confidential information that they were able to
14 obtain as the exclusive distributor of Aretech system, and they
15 provided that to an engineering firm in California, and they
16 instructed that firm to reverse engineer our system; and the only
17 difference between what they created and what we had already was
18 this power rail. And as Your Honor noted, the power rail was
19 something that Dr. Hidler himself conceived of. We've presented,
20 in the amended counterclaims, the 2007 grant proposal that was
21 submitted to the U.S. government, which was approved, and we've
22 already identified the specific person who Dr. Hidler disclosed
23 this design to, which was then provided to the California
24 engineering firm and added to the system that they ultimately
25 filed the patent on.

1 THE COURT: I'm sorry to interrupt, but just to be
2 clear, and I think the record is, the proposal in 2007, you're
3 not alleging that that had been shared with Bioness and that they
4 were aware of it and should have disclosed it as prior art; is
5 that correct?

6 MR. DEFOSSE: Not the physical piece of paper itself,
7 but the substance of the proposal was shared with Mr. McBride.

8 THE COURT: That's the verbal communication that
9 occurred?

10 MR. DEFOSSE: Exactly. And the way this is coming up,
11 Your Honor, just to provide some context, is Bioness is out
12 installing the systems that we have, and Mr. McBride raises with
13 our client, Dr. Hidler, that some clients were saying that, you
14 know, there's some issues about the installation of the system
15 that, you know, conceptually, are being presented by the presence
16 of this Court; and Dr. Hidler said to Mr. McBride, We have that
17 covered; I've got a grant from the U.S. government; we have
18 alternative design; let me tell you about this design; it's got
19 this powered rail. And Mr. McBride took that, he hands it to D&K
20 Engineering, this California engineering firm, and says,
21 Implement this design. Dr. Hidler's conception of the power rail
22 is the essence of inventorship. The fact that they can take that
23 design and say to someone else, Please, now implement this, that
24 doesn't make D&K Engineering an inventor.

25 THE COURT: I don't mean to put you on the spot --

1 MR. DEFOSSE: Sure.

2 THE COURT: -- but I would like to know exactly where
3 in the amended counterclaim what you just said is.

4 MR. DEFOSSE: Sure. So, Your Honor -- and I apologize
5 if I'm -- I didn't mean to mislead the Court. I'm not saying all
6 of the details that I just said about the back-and-forth in the
7 context in which this came up were there, so I may be pointing
8 Your Honor to the allegation that you're already aware of.

9 THE COURT: I think it's paragraph 31. Again, this is
10 not a quiz; this is more to make sure I'm looking at the adequacy
11 of the pleadings and to understand what it is you're alleging
12 Dr. Hidler specifically shared.

13 MR. DEFOSSE: I understand, Your Honor.

14 So the conversation with Mr. McBride is in
15 paragraph 31, I believe. And then if you look at paragraph 58, I
16 believe we say in paragraph 58 that Bioness took that design that
17 Dr. Hidler provided and provided it to create the invention --
18 yes. And also in paragraph 58, you can see the link to the 2007
19 military grant.

20 THE COURT: I interrupted you. Please continue.

21 MR. DEFOSSE: Thank you, Your Honor.

22 I think Mr. Graves raised a number of arguments about,
23 you know, this all happened in 2013; why did Dr. Hidler not raise
24 this prior to this lawsuit? And I think there's two responses to
25 that. One is a procedural response and one is a substantive one.

1 Procedurally, I think that's the exact example of asking the
2 Court to draw inferences in favor of the moving party here, and
3 that's not proper on this type of motion.

4 Substantively, I think Your Honor has to appreciate
5 that Dr. Hidler is running a small business here. He's just lost
6 his primary distributor who he's discovered has committed this
7 subterfuge. His whole focus at this time is just keeping his
8 business afloat and keeping his employees employed, and staying
9 out there. He's not interested in starting a legal battle,
10 filing lawsuits, and all that type of thing. So, you know, now,
11 standing here today, in retrospect, maybe you look back and say,
12 Oh, well, he should have sued them right away. But that was just
13 not his focus. And in any case, I think to ask the Court to
14 draw an inference that the claims were meritless because he
15 didn't file a lawsuit in 2013 is not the type of thing that Your
16 Honor should consider at this stage.

17 Mr. Graves made the point that all of these -- or that
18 there are a number of documents about the ZeroG system that are
19 publicly available, so Dr. Hidler has his own patents that were
20 previously out there. The system itself was sold to hospitals.
21 And I guess maybe they're saying, theoretically, someone could go
22 in and examine the system, although not in the way that they did
23 here, I think, is a practical matter. I think that's missing the
24 point on the inventorship. First of all, it's basically
25 disputing the allegations in the complaint, but it's also saying

1 that, Well, if I can go out and copy a system, well, it's fine to
2 file a patent on that system. You can't do that. That's still a
3 false oath to the Patent Office to claim that you've invented a
4 system that you copied from someone else.

5 I will move on now to the Vahle argument, unless Your
6 Honor would like to discuss anything else on inventorship.

7 THE COURT: No, I don't think so. Thank you.

8 MR. DEFOSSE: Okay. So I think there were a few points
9 here, one that was, I think, the focus of Mr. Graves' argument
10 and was cumulateness and materiality; and I think the most
11 important response to that point is *Exergen* sets out precisely
12 how you plead cumulateness and materiality in this type of
13 case. That is by doing two things: Number 1, identifying the
14 specific disclosures in the prior art that are material to the
15 reference. We did that. We went limitation by limitation. We
16 took the Vahle catalog and we identified the material parts of
17 that catalog. Number 2 is to tie those to something in the
18 Patent Office record that was missing from the examination, and
19 we've done that, too. We've pointed to the aspects of the Vahle
20 catalog that the Patent Office said were missing from the prior
21 art. To the extent Bioness is asking Your Honor to delve into
22 the actual references that were before the examiner -- the
23 Bergenstrale reference, the Hidler reference -- and to try to
24 line those up with the Vahle catalog and make factual
25 determinations about whether they're actually the same or not,

1 again, that's a factual determination. It's not appropriate at
2 this stage of the case.

3 Mr. Graves also referenced --

4 THE COURT: Help me with their allegation that, really,
5 if *Exergen* and the heightened pleadings standard requires the
6 who, what, where, when -- one of their arguments is you've just
7 named all the inventors; there's no specific reference, other
8 than McBride, with regard to the conversation -- what they knew
9 about the catalog or what they knew about the Vahle system and
10 how they then chose not to present that it's that they generally
11 all knew about it, they all were responsible for the submission,
12 the submission left that information out, therefore, they did it
13 on purpose. Is there anything more you can point to in the
14 amended complaint to address that concern about, sort of, the
15 scattershot approach, I guess -- and I think you've distinguished
16 that there are cases where they say "unnamed people," and, here,
17 you're naming the 11 or 14 people, specifically because those are
18 the inventors, the people who were interfacing with the Patent
19 Office -- but is there anything more particular that you have
20 shown or that, arguably, needs to be shown to make this
21 inequitable conduct claim?

22 MR. DEFOSSE: Yes, absolutely. Thank you, Your Honor.

23 So the first thing I would note is that, here, the
24 reason that we've named these 14 individuals -- the people at D&K
25 Engineering, the people at Bioness, and the specific individuals

1 involved in the prosecution of the patent -- Number 1, this is
2 not a case where there's some piece of prior art that's kind of
3 floating out there in the ether and we find later that, Oh,
4 Bioness cited it in some other patent application, and now we're
5 saying they should have cited it in this one and they should have
6 known about it. This is a case where they drafted a patent
7 application to cover features of a specific power rail that they
8 were using in their system at the time the application was filed.
9 So these inventors who they're alleging were involved in the
10 creation of the system knew exactly what power rail was there and
11 the features of that power rail, and they drafted the application
12 to cover those features. So this is not like they had general
13 knowledge that there's some catalog that might be out there that
14 we're saying now, in retrospect, is relevant. This is drafting a
15 patent application to cover specific features of that system that
16 they were already using at the time they filed the application.
17 And not only that, we've set out in the complaint that during the
18 prosecution, as the examiner is coming back to them and saying, I
19 don't think this application can be granted; I'm rejecting this
20 application, time after time what they point to to say, No, you
21 should grant this application, are the features of this power
22 rail that they're already using. And so on the one hand, they're
23 saying to the examiner, Look at this power rail; it has all these
24 great features; you should grant this application, and then on
25 the other hand, they're hiding in their back pocket and saying,

1 Well, let's not tell the examiner that this was a publicly
2 available system, that these features were all publicly available
3 long before we filed the application.

4 And then I would say, thirdly, Your Honor, in addition
5 to writing the application to cover these features, pointing to
6 the features during the prosecution as distinguishing the prior
7 art, I think it's quite powerful to note here that two weeks
8 after this patent issued, suddenly, they decide the Vahle catalog
9 is relevant and they disclose it in the continuation of the
10 patent that's at issue here. And I don't know how familiar Your
11 Honor is with this, but the continuation means that the
12 specification is exactly the same. So the patent issues. Two
13 weeks later, they suddenly unearth the Vahle catalog and say,
14 Here, Patent Office, here's the material reference that you
15 should consider in connection with this identical specification
16 that's before you.

17 So from those facts, I think that's more than
18 reasonable inference that they knew about the catalog and that
19 they were intending to withhold it until the Patent Office issued
20 this patent.

21 THE COURT: Thank you.

22 MR. DEFOSSE: Thank you, Your Honor.

23 I'll move on to the '316 patent, which is the third
24 inequitable conduct claim here. I have to admit I'm not sure I
25 entirely follow Mr. Graves' argument. I think the allegations

1 here are pretty detailed and direct. We are not saying that this
2 was inequitable conduct because there was a graphic interface
3 that was the same. What we alleged in the complaint -- again, I
4 think in a fair amount of detail -- is that Bioness was selling a
5 system for more than four years before they filed this
6 application. They had the exact features that they then said to
7 the Patent Office, You have to issue this patent because these
8 are new features. And it's not just that they were selling the
9 system. When they drafted this application for the patent, they
10 took the user guide from this prior art system and they used it
11 as a model or a basis for drafting the patent application. So in
12 that scenario, I don't see how you can say -- or how they can say
13 that they didn't know about this system or that they didn't have
14 the intent not to deceive the Patent Office, because they drafted
15 an application based on a system, again, covering the features of
16 that system; and then at the same time as they're telling the
17 Patent Office these are new and novel features that should allow
18 issuance of this patent, they have taken -- they've withheld the
19 information about the system that they're actually claiming. I
20 mean, I think that's probably the plain-vanilla inequitable
21 conduct, very straightforward right down the line. It satisfies
22 every pleading in *Exergen*, and we've set that forth, Your Honor,
23 on page 9 of our opposition brief where we've kind of gone
24 through, we've aligned the elements of *Exergen* with the pleadings
25 of the first amended complaint -- or the first amended

1 counterclaims.

2 So I guess, just in closing, Mr. Graves characterized
3 our approach here as a shotgun approach, that we're just, you
4 know, reflexively filing an inequitable conduct claim here
5 because we were sued; and I think the facts of the first amended
6 complaint completely undermine that. I mean, this is a case
7 where the parties have a long history. The roots of this case go
8 back to more than a decade. As we've alleged in the first
9 amended complaint, this is a case where this company has gone out
10 and reverse engineered, taken confidential information, recreated
11 our client's system, and filed a patent application saying, Hey,
12 we invented this, when they didn't actually invent it. I mean,
13 if that's not inequitable conduct, I don't know what is.

14 THE COURT: Thank you.

15 MR. DEFOSSE: Thank you, Your Honor.

16 MR. GRAVES: If I may respond briefly, Your Honor.

17 A few points: First, regarding Dr. Hidler as inventor
18 of the '000 patent, when Mr. DeFosse actually went and looked at
19 the pleading, it became clear that there was no specific
20 allegation in the pleading of what exactly Dr. Hidler supposedly
21 disclosed in terms of a particular powered rail design to
22 Mr. McBride. On the contrary, it just says he indicated that he
23 had the idea of adding a powered rail, period. He offered no
24 response, Mr. DeFosse, to my point that powered rails, in this
25 context, were known at the time of the prosecution of the '000

1 patent, and specifically my point that --

2 THE COURT: You mean powered rails in the context of
3 overhead gait technology?

4 MR. GRAVES: Yes. Yes, sir. And, in fact, I made the
5 point -- and this is in our papers -- that this Bergenstrale
6 reference specifically discloses a powered rail in that context.

7 Now, they don't want you to look at that reference at
8 all, and they don't want you to look at what the examiner quoted
9 or said about it --

10 THE COURT: Well, you don't need to repeat that.
11 You've made that point. Their argument, I think, in fairness, is
12 this is a motion to dismiss, this is not summary judgment; if
13 we're talking about weighing facts, that's more appropriate to do
14 after discovery.

15 You're making the argument that their case is at this
16 stage of the proceedings that permit the Court to do that. I've
17 got it. You don't need to repeat it.

18 MR. GRAVES: Absolutely. And the *Pfizer* case, we said,
19 from EDVA is a good example of the court digging into materiality
20 at the pleading stage, and we cited many other examples. If they
21 had a point to make as to how this Vahle catalog that their
22 client had -- not necessarily that my client had -- was better
23 than Bergenstrale, I think they would have made it, quite
24 frankly.

25 That's all I have, Your Honor.

1 THE COURT: Thank you. I want to make sure we have
2 enough time to discuss the antitrust matter. I'll hear from you,
3 Ms. Bansal.

4 MS. BANSAL: Thank you, Your Honor. Good morning.

5 THE COURT: Good morning.

6 MS. BANSAL: Now, if you agree that Aretech has not
7 plausibly pled inequitable conduct, then you need not get to the
8 antitrust issues; it's game over, but if you allow them to
9 proceed, they have still failed to plead a Section 2 attempted
10 monopolization claim, and that's for two reasons: They have
11 failed to plead antitrust standing, and they have failed to plead
12 all three elements of a Section 2 attempted monopolization case.

13 Now, to plead Section 2 -- and I'll focus on that
14 rather than standing, unless Your Honor has questions -- to plead
15 a Section 2 claim, there's three elements. They have to plead a
16 specific intent to monopolize a market, predatory conduct in
17 furtherance of that intent, and then that Bioness has a dangerous
18 success of -- a dangerous probability of success in monopolizing
19 that market. Now, in our papers, we argue that they have failed
20 to plead all three of those elements, but I'm going to focus on
21 element three, which goes to their proposed relevant markets,
22 because I think it's that element that really shows the
23 deficiency of their antitrust claims.

24 Aretech cannot plausibly plead that Bioness has a
25 dangerous probability of success in monopolizing relevant market,

1 because their relevant markets -- their proposed relevant
2 markets, products, and geographic fail on their face. That means
3 they are not legally cognizable. Aretech makes a big deal about
4 how relevant market is a factual issue. Courts routinely
5 dismiss antitrust claims at the pleading stage for failing to
6 state a plausible market, product, and geographic; and the reason
7 for that -- that's not just some hypertechnical
8 antitrust argument -- the reason for that is clear: Because
9 without a plausible market, without understanding what the
10 plausible parameters are, it's impossible to assess their
11 allegations of harm to competition. If we don't know who's in,
12 if we don't know who's out, if we don't know what therapies are
13 included, it's impossible to know if there's any plausible harm.
14 So in order to start the analysis, they have to come to the court
15 with something that is facially sustainable, and we argue that
16 they have not. And, by the way, Your Honor, we have cited a
17 number of those cases in our pleadings where courts have
18 dismissed, at the motion to dismiss stage, cases for failing to
19 state plausible markets, so I won't repeat that here.

20 So turning to the facts of this case, they allege that
21 their plausible product market includes robotic body-weight
22 support systems, and they tell you that there's only two players
23 in that market -- Aretech and Bioness. Now, there are two
24 independent reasons why that market fails on its face as a legal
25 matter: One, Aretech's complaint and the sources that they cite

1 in that complaint completely undermine that this market is as
2 narrow as they have artificially gerrymandered it. They make
3 clear, these sources and these allegations, that there are a
4 number of non-robotic alternative gait therapies that might be
5 reasonable substitutes to the products that they claim aren't
6 within the market; and the only reason that they provide for why
7 they are not reasonable substitutes is because they are
8 supposedly inferior or not as safe. That is soundly rejected by
9 antitrust law. That is not a -- under antitrust jurisprudence,
10 that is not an accepted reason or an accepted basis for defining
11 the parameters of a market.

12 The second independent reason is if the market is as
13 they say it is, if it is truly just robotic body-weight support
14 systems, then their complaint and the sources they cite in their
15 complaint make clear that that's not a market that's limited to
16 two players. There's a long list of companies that
17 provide robotic body-weight support systems that should be
18 included in their market. That internal inconsistency -- which
19 is just based on their pleadings and what they've cited to
20 Your Honor -- that internal inconsistency is what makes this a
21 legal issue and not a factual --

22 THE COURT: So help me understand that. Where are the
23 references to the other competitors?

24 MS. BANSAL: So if you look, Your Honor, at Footnote 2
25 of their amended answer and complaint with their counterclaims,

1 they cite both a market report and a Yahoo article -- and these
2 are exhibits, I believe, 11 and 12 to our motion to dismiss --
3 and if you look at those -- so I'm looking at Exhibit 13 to our
4 motion to dismiss; this is cited in their Footnote 2 -- if you
5 look at page 3, there's a long list of companies, presumably,
6 according to a source that they themselves introduced, that
7 provide alternative gait therapies. And if you look at -- I
8 believe it might be Exhibit 11 -- this is page 4 of 9 in
9 Exhibit 11 -- the header of this market report that they again
10 cited and introduced as key companies, there's, again, a long
11 list of companies that provide alternative gait therapies. And
12 these are sources that they've introduced, Your Honor. And the
13 reason I mention that is because you have two options here: One
14 is that the market, as they've pled it, is too narrow; there are
15 non-robotic therapies that should be considered as reasonable
16 alternatives; or, two, the market is exactly as they say and they
17 have failed to include certain companies and other types of
18 robotic therapies, such as exoskeletons. And it's that internal
19 inconsistency, Your Honor, that makes this a legal question and
20 not a factual one.

21 So going back to reason one, if you look at
22 paragraph 110 of their complaint, they talk about a global gait
23 rehabilitation market that is worth roughly \$300 million and is
24 proposed to grow to 800 million -- I'm sorry -- 450 million in
25 the next few years. That global gait rehabilitation market would

1 include alternatives like treadmill training, passive trolleys,
2 static overhead suspensions; and they only give you one reason
3 for why all of those alternatives don't compete: Because they're
4 different. And the antitrust law says that's not enough.

5 If you look at Footnote 2 -- again, back to the Yahoo
6 article, Exhibit 13 -- that article says, and I quote, "The
7 various kinds of locking difficulties have urged the development
8 of a broad spectrum of gait systems." A broad spectrum of gait
9 systems. They tell you that there's not a single one of those
10 therapies that competes, because their products, the products in
11 their proposed market, are safer, more efficient, technologically
12 advanced. But that's not sufficient under antitrust law to set
13 the parameters of a market. Even if you take all of that as
14 true, that's not a sound basis.

15 The Supreme Court's decision in *U.S. v. E.I. du Pont* is
16 instructive, Your Honor. There, the court was trying to decide
17 if cellophane was in the same product market as other flexible
18 packaging materials, and the court said, For sure, cellophane has
19 its advantages -- it's transparent, it may be slightly more
20 flexible than, for example, aluminum foil -- but they still
21 compete because consumers can turn to aluminum foil if the price
22 of cellophane goes up. And under antitrust law, that's the
23 question: If the price were to go up of the products that they
24 say are in this market, would consumers have an alternative? And
25 their complaint is completely silent on that question.

1 Another case that we've cited, *B.V. Optische*, is also
2 helpful. There, the plaintiff tried to allege that chest
3 equalization radiography was its own product market, and the
4 court rejected that at the pleading stage and said, No, that is
5 part of an overall x-ray market. And that's exactly what we're
6 dealing with here.

7 We cite another case, Your Honor, *Ojmar v. Security*
8 *People*. There, the plaintiff said electronic locks were better
9 and unique than all other types of locks, and the court said, No,
10 electronic locks are part of a larger market.

11 THE COURT: I think I understand your argument in this
12 area. Maybe you can turn to the standing issue briefly.

13 MS. BANSAL: Yes, Your Honor.

14 So we have two arguments under standing: One, we
15 believe that their allegations of harm are conclusory; two, if
16 the product market is broader than they say it to be, which their
17 complaint and the sources they cite suggest, then the removal of
18 a single competitor, Aretech, does not necessarily equate to
19 antitrust injury; and without antitrust injury, they do not have
20 antitrust standing.

21 Now, even if you find, Your Honor -- and I think this
22 is important -- even if you find that they've pled a relevant
23 market, we would say that their allegations of harm are
24 completely conclusory. So, for example, they tell you there's
25 two players in this market and they jointly have 99-percent sales

1 within that market, but they don't give you any sort of
2 breakdown. They don't tell you Bioness has this percentage,
3 Aretech has this percentage. Based on the allegations, it could
4 be that Bioness has 98.5 percent of those 99-percent sales, which
5 means that Aretech is not serving as a price constraint today,
6 and the fact of this alleged harm would not change that equation.
7 And it's those types of details that Your Honor does need at the
8 pleading stage to understand whether their alleged harm is
9 plausible on its face.

10 The one other point I'd like to mention, Your Honor, is
11 their proposed geographic market. They allege that their
12 proposed geographic market is limited to the United States, and
13 we believe that that's also facially implausible. First, they've
14 referenced contradictory materials that talk about a global
15 market. They mention a number of global players. That's issue
16 one.

17 Issue two, they themselves market themselves as global
18 players.

19 Issue three is that they only talk about -- they
20 provide three other reasons for why the U.S. is the market: One,
21 in-person installation; two, ongoing service; and, three, a
22 preference for FDA-regulated therapies, but they don't explain
23 why foreign entities -- for example, if you have a headquarters
24 in Switzerland, wouldn't have an outpost in the United States
25 that could provide those same services -- and they say nothing

1 about why foreign therapies would not be able to get approval
2 from the FDA. And so like their product market, we believe that
3 their geographic market is manufactured for litigation and is not
4 facially plausible.

5 If Your Honor has no other questions --

6 THE COURT: Thank you.

7 MR. DEFOSSE: Your Honor, I'd like to start with the
8 relevant market definition as the first issue. I think before
9 getting into some of the specifics, the Court would find
10 instructive the Fourth Circuit's decision in the *E.I. du Pont*
11 case here. Not to belabor points that have already been briefed,
12 but that court, I think, makes very clear that this issue is an
13 extremely factual issue that's rarely addressed at a motion to
14 dismiss stage. Yes, there are some cases, but *E.I. du Pont* also
15 explains the context of those cases. Those are cases where there
16 are glaring deficiencies, and those deficiencies basically fall
17 into two kinds of buckets. One is where a complaint doesn't
18 identify a market at all. That's clearly not the case here. The
19 second one is cases where the identification of the market is
20 facially defective because the complaint doesn't address
21 reasonable interchangeability. And so the example of that is one
22 of the cases they cite, *America Online* case from this court,
23 where the plaintiff alleged that the antitrust market
24 was advertising through -- email advertising through America
25 Online. Had no allegations about why email advertising through

1 America Online was not reasonably interchangeable with any of the
2 other kinds of advertising that an advertiser might undertake,
3 including advertising to other email subscribers or advertising
4 through billboards, the radio, or things like that. So that's a
5 complete absence of an allegation of reasonable
6 interchangeability. Here, we've gone through and we've
7 identified exactly why robotic body-weight support systems are
8 not reasonably interchangeable with other gait therapies, and
9 that's because these systems are used to provide specific kinds
10 of therapies that cannot be provided with other systems; for
11 example, treadmills.

12 And they've referred to exoskeletons. I'm not sure
13 exactly what the contours they're claiming there are, but our
14 allegations here are that in order to provide the therapies that
15 the customers of these systems want, they basically have to buy
16 this type of system, and we've explained why. It has to do with
17 access to a patient's body. It has to do with a patient being
18 able to walk over wheel surfaces. It has to do with the ability
19 to dynamically unload the body weight of a patient, because if
20 you just have a static tether on someone that's not unloading
21 their weight, you can't provide these kinds of therapies.

22 At the motion to dismiss stage, I have not seen any
23 case, and certainly none of the cases that they've cited, that
24 have found that these types of allegations are insufficient for a
25 product market.

1 I guess one other issue I just want to quickly address
2 is they make a big deal of the fact that in a footnote in the
3 first amended counterclaims, we cite a newspaper article and an
4 industry report; and I think the point is that those materials
5 refer to a worldwide gait market. And somehow the link that's
6 being drawn is, because there are some materials that referred to
7 a worldwide gait therapy market, that must be the market for
8 antitrust purposes. That's not the case. I mean, that would be
9 similar to saying there's a market report that refers to the
10 market for consumer electronics, and now every consumer
11 electronic is competing with every other consumer electronic --
12 phones against TVs against back massagers or I don't know what.
13 And to put it in context, we cited those materials specifically
14 to note that these systems fill a void in the therapies that are
15 out there for the overhead gait market; and that's paragraph 113
16 of the complaint. So we weren't alleging that the overall
17 market, the worldwide gait therapy market, which would include
18 things even like walkers and canes, is the relevant antitrust
19 market here.

20 On the geographic market, I think it's a very similar
21 point, which I'll make more briefly. We've identified the
22 reasons why consumers in the United States cannot turn to
23 companies outside of the United States to provide these systems.
24 There are three reasons: One, these systems are systems that are
25 installed by the companies that provide them, so if you imagine a

1 hospital in Cincinnati wants to buy these systems, they're not
2 going to look to a provider in France to say, Well, you come to
3 Cincinnati and install the system; two, these systems require
4 constant maintenance and support, so that would require flying
5 someone back and forth from other countries to come and support
6 these systems; and, three, FDA approval or FDA sanctioning of
7 these systems. Now, I think counsel on the other side noted
8 that, Well, a foreign manufacturer may be able to get that FDA
9 approval. But it hasn't happened. That's not the reality today.
10 So that's -- you know, a consumer today who would be faced with
11 increased prices couldn't look to one of those foreign providers
12 if FDA approval was important to them.

13 Then, finally, Your Honor, I will pick up the standing
14 point that the Court raised. I heard again that our allegations
15 here are conclusory. I take issue with that. I think we've
16 identified exactly why this case results in antitrust injury.
17 That's because these two companies, as a practical matter, have
18 about over 95 percent of this market. I think we said 99 percent
19 in the complaint. If one competitor eliminates the other
20 competitor from the market, it doesn't matter who has 98 percent
21 and who has 2 percent. If the remaining competitor then has
22 obtained the entire market, as a matter of law, that creates
23 antitrust injury because consumers have fewer choices because
24 there's no incentive to keep prices low; you can now price as a
25 monopolist, and because it stifles innovation, because as a

1 monopolist, you have no reason to try to innovate your product.
2 I mean, we've cited the cases in our brief, which I can find if
3 Your Honor would like. It says this is the very definition of
4 antitrust injury that provides standing in these cases, and
5 that's exactly what we've alleged here.

6 THE COURT: Thank you.

7 MR. DEFOSSE: Thank you, Your Honor.

8 MS. BANSAL: Your Honor, I'll just briefly respond. I
9 think you understand the basic question here. The question is
10 whether they have provided Your Honor sufficient allegations to
11 say that the market is as narrow as robotic body-weight support
12 systems that are only provided by two companies. They have
13 manufactured that market for litigation purposes because they
14 would like to tell Your Honor, unsurprisingly, if you remove one
15 competitor, then you're just left with one, and they will raise
16 the price. But their own allegations make clear that there are a
17 number of other therapies out there and they're provided by a
18 number of other companies; and if we take that as true because
19 they've included it in their complaint, then their market is not
20 facially plausible.

21 They cite -- they talk about I.E. du Pont [*sic*], and
22 the court did say that these issues, these market definition
23 issues, can be factual, but we've given Your Honor a number of
24 examples where courts have decided this at the pleading stage,
25 because as I mentioned earlier, this is the start of the

1 analysis. Where did the harm take place? Who was in? Who was
2 out? Without some plausible parameters, we cannot and the Court
3 cannot proceed with that analysis.

4 Glaring deficiencies -- counsel talked about glaring
5 deficiencies. Failure to take into account reasonable
6 alternatives is a glaring deficiency, and courts have found that.
7 I'd like to point Your Honor to a case we've cited, *Novartis v.*
8 *Regeneron*. There, they said plaintiffs or counter-plaintiffs
9 need not take into account every alternative, but they must put
10 facts forward sufficient to understand what are the parameters of
11 the market; and that's what they have failed to do here. All
12 they've told you is that these other therapies are unique, these
13 other therapies are improvements. We take all of that as true,
14 but that does not mean that they do not compete with these older
15 therapies or with these different therapies. If the price goes
16 up, where will consumers go? And that is the critical question;
17 not whether there is some distinct trait or feature that makes it
18 slightly better. That's not the analysis.

19 On the question of whether their antitrust injury
20 claims are conclusory, they are. Three arguments, Your Honor:
21 One, we've already talked about the market; if the market is
22 broader than they say it is, then the removal of a single
23 company, Aretech, does not equate to antitrust injury; two, it
24 does matter -- of this 99 percent, it does matter how much of
25 that can be attributed to Bioness and how much of that can be

1 attributed to Aretech. If Aretech is not a price constraint
2 today, then it does not matter; that will not change if the
3 alleged harm -- if the harm that they have alleged is valid.

4 And I believe, Your Honor, those are the two points
5 that I'd like to end with.

6 THE COURT: Thank you.

7 MS. BANSAL: Thank you.

8 THE COURT: Well, I would like nothing more than to
9 rule from the bench right now, but I'm going to take this matter
10 under advisement. I want to make sure I get this right. I have
11 a good sense of what I'm going to do, but I'm not going to share
12 that with you now, and I'm going to make sure that we've
13 considered all of the arguments you've made. I appreciate the
14 arguments made by all counsel here and your briefing on this
15 matter.

16 Let me just say this before we go, because you-all have
17 not been before me before: This is a very serious case on both
18 sides. This is very important technology. There's a lot of
19 money at stake, and there's a lot of money that's probably
20 already been spent, I have no doubt, seeing the number of lawyers
21 here this morning. I question whether or not the best way to
22 resolve this longstanding -- and I think it's fair to say,
23 perhaps, strongly held, perhaps even bitter feelings -- whether
24 or not resolving those differences through litigation is the best
25 way to do it. I will tell you this: It's certainly not the best

1 way to do it for the many patients out there who can benefit from
2 the technologies that are discussed at great length here. It's
3 easy for the Court to say that and assume that somehow everyone's
4 going to shake hands and find some way to move forward, but
5 stranger things have happened; and good lawyers, while they can
6 pursue vigorously on behalf of their clients' positions that they
7 think they can defend and, ultimately, be vindicated either
8 through the Court's rulings or through a jury verdict, can also
9 think strategically and help their clients think strategically
10 about whether or not there are other ways to solve these
11 problems. I don't believe that it is hopeless even in cases that
12 have a many-year history to them, and I don't think it's a waste
13 of time.

14 I would urge you-all -- and we have Dr. Hidler here --
15 I assume that you will share all of this information with your
16 clients on the other side that the cost -- and I don't just mean
17 the cost of paying the lawyers, but all of the costs involved in
18 pursuing this litigation -- and I will remind you -- and you-all,
19 as intellectual property lawyers know better than I that
20 resolving these pretrial motions, getting through summary
21 judgment, winning a verdict, if you do so, is simply one of many
22 steps that can be reversed at any time, and the Federal Circuit
23 has no hesitation to send matters back. So what you really need,
24 if you are forward-thinking people who are trying to help people
25 through these technologies, is to think about how you can spend

1 your money and time furthering that mission. All litigation is
2 backwards-looking. All litigation is trying to figure out who
3 should have done what when and who betrayed whom and who stole
4 what from whom.

5 The courts are here, and we can resolve that -- and,
6 certainly, I will look at every issue and view it fairly -- but I
7 would strongly recommend that as you think about your next
8 litigation moves -- because this case is moving forward, and it's
9 going to move forward promptly, and there's no other motion to
10 dismiss out there. This was a partial motion to dismiss.
11 Whether I grant it in full, whether I deny it in full, whether I
12 do something in between, this matter is going forward on a whole
13 variety of claims on both sides, and you're going to be spending
14 a lot of money and a lot of time getting through discovery in the
15 Eastern District of Virginia in the time frame that we set. So I
16 hope that you will spend a little bit of time reflecting on what
17 I've just said. To the extent you believe that the court can be
18 of assistance, we have wonderful magistrate judges here who can
19 mediate settlement, and do so in intellectual property cases all
20 the time. So I'm not requiring that at this stage, and you can
21 do it privately, you can do it bilaterally without the help of a
22 mediator. It is very reasonably priced if you use a magistrate
23 judge to assist you rather than a private mediator, so I urge you
24 to consider that.

25 I will make these decisions and issue an order as

1 promptly as possible, and then you will see an initial scheduling
2 order coming out promptly as well, setting the length of
3 discovery and the other matters that are coming up.

4 Is there anything else I need to address before we
5 recess court this morning?

6 MR. GRAVES: No, Your Honor.

7 MR. MASTERS: Nothing from Aretech, Your Honor. Thank
8 you for your time.

9 THE COURT: Thank you very much. Court will be in
10 recess.

11 * * * * *

12
13 CERTIFICATE OF REPORTER

14 I, Diane Salters, hereby certify that the foregoing
15 transcript is a true and accurate record of the stenographic
16 proceedings in this matter.

17
18 /s/ Diane Salters

19 _____
20 Diane Salters, CSR, RCR, RPR
21 Official Court Reporter
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