

THE UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

FORTINET, INC.,

Petitioner,

v.

NETSKOPE, INC.,

Patent Owner.

U.S. Patent No. 8,356,336

Case No.: IPR2026-00040

NETSKOPE, INC.'S BRIEF FOR DISCRETIONARY DENIAL

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EXHIBIT LIST

No.	Exhibit Description
Ex. 2001	Scheduling Order for <i>Netskope, Inc. v. Fortinet, Inc.</i> , Case No. 4:25-cv-02360-HSG, pending in the United States District Court for the Northern District of California.
Ex. 2002	Fortinet Inc.’s Preliminary Invalidity Contentions in <i>Netskope, Inc. v. Fortinet, Inc.</i> , Case No. 4:25-cv-02360-HSG, pending in the United States District Court for the Northern District of California.
Ex. 2003	Exhibit A-1 of Fortinet Inc.’s Preliminary Invalidity Contentions in <i>Netskope, Inc. v. Fortinet, Inc.</i> , Case No. 4:25-cv-02360-HSG, pending in the United States District Court for the Northern District of California.
Ex. 2004	Plot from Docket Navigator – Profile of Judge Haywood S. Gilliam Motion Success To Stay Pending IPR
Ex. 2005	Plots from Docket Navigator – Profile of Judge Haywood S. Gilliam Time to Milestones (annotated)
Ex. 2006	Website blog on Fortinet.com, titled: “Fortinet is Leading Innovation in the Security Industry with More Than 1,500 Patents” https://www.fortinet.com/blog/business-and-technology/fortinet-is-the-security-innovation-leader-more-than-1500-patents-either-awarded-or-pending
Ex. 2007	Website article on Wikipedia.org, titled: “Fortinet” https://en.wikipedia.org/wiki/Fortinet

I. Introduction

Under the October 17 *Open Letter* and *Memorandum* by the Director of the United States Patent and Trademark Office (the “October Memorandum”), the decision to institute an *inter partes* review is reclaimed by the Director who will decide, based on two briefings, whether (i) discretionary factors or (ii) merits and other non-discretionary issues warrant denial of the petition. Regarding the discretionary factors, the October Memorandum explained that “[t]he Office has issued more than 580 decisions under the Interim Processes, providing substantial guidance on how the Director will handle discretionary considerations.” October Memorandum at 5. Pursuant to the October Memorandum, Patent Owner, Netskope, Inc., requests that the Director discretionarily deny Petitioner’s, Fortinet Inc.’s, Petition for *Inter Partes* Review (“IPR”) of U.S. Patent No. 8,356,336 (the “’336 patent”) for the reasons below.

Discretionary denial is warranted here for several reasons. First, the ’336 patent was issued on January 15, 2013 and has been *in force for nearly thirteen years*, creating strong settled expectations for Patent Owner. The Director’s office has made clear that “the longer the patent has been in force, the more settled expectations should be.” *Dabico Airport Sols. Inc. v. AXA Power ApS*, IPR2025-00408, Paper 21 at 2 (Director Decision, June 18, 2025).

Discretionary denial is also warranted because of Petitioner's inconsistent claim construction positions in the district court and IPR proceedings. While Petitioner argues that multiple claim limitations are indefinite in its district court preliminary invalidity contentions, Petitioner makes no assertions about indefiniteness of claim limitations in the instant IPR and alleges that all claim terms are taught or suggested by the Petition's references. These types of inconsistent positions have been clearly called out by the Director's recent presidential and informative decisions, and warrant discretionary denial of the Petition.

Furthermore, institution would waste the Patent Office's valuable resources in a duplicable effort with the district court. The '336 patent's validity is being adjudicated in a parallel proceeding, *Netskope, Inc. v. Fortinet, Inc.*, Case No. 4-25-cv-02360 (N.D.Cal., Mar. 7, 2025) (the "District Court Litigation"), which will require the district court to evaluate many of the same validity questions raised in the Petition, regardless of the Director's decision on whether to institute an IPR trial or not. Notably, the District Court Litigation is already moving at a steady pace, with preliminary invalidity contentions having been served back in August 2025 and the *Markman* hearing on claim construction to be held in less than two months. Petitioner wants it both ways, as no *Sotera* stipulation has been filed in this IPR matter.

The Petition is also substantively flawed and lacking in merit. Grounds 1-2 are amalgamated in a way that fails to distinguish between § 102 and § 103 challenges, and Petitioner impermissibly relies on the knowledge of a person of ordinary skill in the art (“POSITA”) for limitations that the Petition’s references fall short of disclosing or teaching. Additionally, the Petition appears hastily drafted and is replete with errors—both substantive and typographical—that impair clarity and, in several instances, materially obscures Petitioner’s arguments.

Thus, the totality of circumstances strongly favors discretionary denial.

II. Strong Settled Expectations Favor Discretionary Denial

Many prior decisions by the Office, in compliance with the Interim Process guidelines, have established that “[s]ettled expectations of the parties, such as the length of time the claims have been in force,” is a relevant factor when determining whether to deny institution. *See* Memorandum re: Interim Processes for PTAB Workload Management (Mar. 26, 2025) at 2. Here, this factor is not only relevant but compelling.

Patent Owner’s expectations of the ’336 patent are clearly well settled. The ’336 patent was issued on January 15, 2013, which, by the time of Director’s review, will be over 13 years old. The Office has consistently denied IPRs challenging such longstanding patents, making the age of the ’336 patent reason enough to warrant

discretionary denial. *See Google LLC v. Cellular South, Inc.*, IPR2025-00875, Paper 10 at 2-3 (denying institution for a 7-year-old patent); *see also Amazon.com, Inc. et al. v. Soundclear Technologies LLC*, IPR2025-01067, Paper 15 at 2 (denying institution for a 10-year-old patent); *see also Intel Corp. et al. v. General Video, LLC*, IPR2025-01036, Paper 14 at 3 (denying institution for a 10-year-old patent). *See also TankLogix, LLC v. SitePro, Inc.*, IPR2025-00648, Paper 10 at 2-3 (denying institution for 11-year-old patent); *see also Microsoft Corp. v. TS-Optics Corp.*, IPR2025-00767, Paper 13 at 2 (denying institution for a 17-year-old patent despite having previously expired due to nonpayment of maintenance fee by prior owner and subsequent revival by the present patent owner TS-Optics Corporation¹).

Moreover, discretionary denial due to a patent owner's settled expectations does not require a petitioner's prior knowledge or awareness of the patent. "Actual notice of a patent or of possible infringement is not necessary to create settled expectations." *Dabico*, Paper 21 at 3. There, the Director reminded parties, like Petitioner, that issued patents are always "publicly available to provide notice to the public, other inventors, competitors, and commercial interests" and capable of finding "using the Office's automated search systems as well as publicly available resources on the Internet." *Id.* Here, Petitioner, Fortinet, Inc., is a sophisticated

¹ *Microsoft Corp. v. TS-Optics Corp.*, IPR2025-00767, Paper 13 at 2-3.

actor with a substantive patent portfolio in network communications and security,² having acquired more than a dozen companies and their IP in the relevant technology space since 2009 (Ex. 2007 at 2-3)) and thus is likely aware of patent activity by its competitors in that technology area.

Therefore, all evidence supports Patent Owner's strong settled expectations for the '336 patent, which has been in force for 13 years.

III. Petitioner's Inconsistent Claim Construction Positions Favor Denial

The Petition contends that four claim terms are to be construed under the plain and ordinary meaning: (1) "shared network"; (2) "anonymous user"; (3) "pre-authentication capture destination"; and (4) "authentication token." Petition at 13-16. The Petition then provides Petitioner's proposed constructions for each of the above four terms based on support from the detailed description of the '336 patent. *Id.*

In contrast, Fortinet's preliminary invalidity contentions filed in the district court identifies as allegedly indefinite three claim limitations (reproduced below) that include the phrases "shared network" and "anonymous user." Ex. 2002 at 60-61. Petitioner's district court position states:

² By their own account, Fortinet, Inc. has more than 1,500 patents. Ex. 2006 at 1.

[v]arious Asserted Claims identified below do not comply with the requirements pre-AIA 35 U.S.C. § 112, ¶ 2, for failing to particularly point out and distinctly claim "the subject matter which the applicant regards as his invention" for the following reasons.... The following chart identifies the claims in which the identified terms and phrases explicitly appear, although those identified terms and phrases are also incorporated into additional dependent Asserted Claims.

Id. at 60.

Excerpts from Petitioner's District Court Preliminary Invalidity Contentions

Patent	Claim(s)	Indefinite Term and/or Phrase
'336	1, 9	"intercepting at [a/the] network access controller a request to access a network resource from a browser application running on a client device within the shared network associated with an anonymous user";
'336	16	"intercepting a request to access a network resource from a browser application running on a client device within the shared network coupled to the apparatus, wherein the client device is associated with an anonymous user"
'336	5, 12, 19	"intercepting at the network access controller a second request from the browser application running on the client device associated with the anonymous user to access a second network resource that is not in the set of network destinations"

The Petitioner, however, fails to mention any such assertions of indefiniteness for any claim terms or limitations in its IPR filing and instead explains how the various prior art references teach or suggest all of the terms that Petitioner deemed indefinite in district court. *See, e.g.*, Petition at 27-29, 42-43.

Petitioner's inconsistent claim constructions are yet another reason for denying the Petition. The Office has made its position regarding this issue clear in

both *Revvo Technologies v. Cerebrum*, IPR2025-000632, Paper 20 (Precedential) and *Tesla v. Intellectual Ventures II LLC*, Paper 18 (Informative). Similar to *Revvo Technologies* and *Tesla*, Petitioner, Fortinet Inc., has decided to pursue differing claim construction positions without any explanations whatsoever in the Petition about the reasons for such divergent constructions. Therefore, the Petition should be discretionarily denied.

IV. The *Fintiv* Factors Favor Denial

As established in the precedential case of *Apple v. Fintiv*, the Director considers six factors when exercising discretion whether to deny an *inter partes* review in view of a parallel proceeding. *Apple v. Fintiv*, IPR2020-00019, Paper 11 (PTAB Mar. 20, 2020) (precedential). Those factors are: (1) whether the district court granted a stay or evidence exists that one may be granted if a proceeding is instituted; (2) proximity of the court's trial date to the projected statutory deadline for a final written decision; (3) investment in the parallel proceeding by the district court and the parties; (4) overlap between issues raised in the petition and in the parallel proceeding; (5) whether the petitioner and the defendant in the parallel proceeding are the same party; and (6) other circumstances that impact the exercise of discretion, including the merits. *Id.*

The majority of these *Fintiv* factors, i.e., factors 3-6, strongly weighs in favor of the Director denying institution of this IPR in view of the ongoing District Court Litigation.

A. *Fintiv* Factors 1-2

Factors 1 and 2 are either neutral or favor Petitioner. The district court case has been assigned to District Court Judge, Haywood S. Gilliam, who has demonstrated propensity to stay the litigation pending IPR institution. *See* Ex. 2004. Here, Petitioner's motion to stay the litigation is opposed by Patent Owner, with a hearing scheduled on this issue, *inter alia*, on January 8, 2026. Ex. 2001 at 2. Yet, in prior decisions, even for IPR cases in which the parallel district court case has already been stayed, the Office has denied institution due to Patent Owner's strong settled expectations, as is the case here for the '336 patent. *See again Amazon*, IPR2025-01067, Paper 15 at 2-3 (discretionarily denying institution based on holistic assessment of all arguments and evidence, including a stay in parallel district court proceeding and the patent owner's "strong settled expectations" of three patents in force for ten, eight, and ten years).

Also, it is possible—albeit not certain—that the district court trial would begin after a final written decision (“FWD”) by the PTAB if an IPR trial was instituted. *See* Ex. 2005, showing Judge Gilliam's average time to trial of 2 years, 10.6 months. Regardless of that potential outcome, the Director's office has shown this factor is

not weighted as heavily when there are strong settled expectations. *See again TS-Optics*, IPR2025-00767, Paper 13 at 2 (where Director discretionarily denied IPR based primarily on “strong settled expectations” despite the petitioner’s arguments on the anticipated trial date in the parallel district court proceeding being “nearly 8-10 months after the anticipated final written decision” (*id.*, Paper 12 at 28-29)).

B. *Fintiv* Factors 3-5

Factors 3-5 strongly favor Patent Owner because the two parallel proceedings deal with the same parties, substantial investment by both, and multiple overlapping issues.

The parties are the same (factor 5). Patent Owner is the plaintiff that brought an action for patent infringement of nine patents, including the '336 patent, in the district court against the defendant, Petitioner.

There has already been significant investment by the parties in the parallel district court proceeding to date with significantly more investment by the time of the institution decision in April 2026 (factor 3). For instance, both parties have served their initial claim constructions on the opposing party months ago, and the *Markman* hearing will be concluded by February 6, 2026. *See* Ex. 2001 at 2. Moreover, Petitioner already challenged the validity of all claims of the '336 patent in the District Court Litigation (see e.g., Ex. 2003) and served their preliminary invalidity contentions on Patent Owner on August 15, 2025 (Ex. 2002 at 2, 80),

nearly two months before filing the Petition for *inter partes* review at the PTAB on October 10, 2025. Critically, Petitioner did not file any stipulations per *Sand Revolution* or *Sotera* for this IPR matter and continues the pursuit of the same and additional invalidity challenges in the District Court Litigation. Therefore, the institution of this IPR proceeding would result in duplicative adjudication of the same issues, risks divergent results, and waste of judicial resources and the parties' investments in both the district court and at the PTAB.

With respect to factor 4, the Petition's invalidity grounds substantially overlap with Petitioner's preliminary invalidity contentions served on Patent Owner. Petition at 4; Ex. 2002 at 15-16; *see also* Ex. 2003. In the District Court Litigation, Petitioner contends that the same claims challenged in the IPR (Claims 1-20) are invalid based on the same grounds in the Petition. *Compare* Petition at 4 (table listing "Grounds of Rejection") *with* Exhibit A-1 claim chart (Ex. 2003 at 1)³ of Petitioner's preliminary invalidity contentions.

³ Petitioner's Exhibit A-1 asserts on pg. 1: "[a]s illustrated in the chart below, Subbiah anticipates the asserted claims of the '336 Patent. To the extent Subbiah is found not to expressly disclose certain limitations in the asserted claims, such limitations are inherent. To the extent the Subbiah is found not to anticipate any asserted claims or claim elements of the '336 Patent, the reference nevertheless

Because Petitioner is asserting the same grounds (Subbiah alone or Subbiah in view of Hinton) in both proceedings, Petitioner has created redundancy that risks divergent results and amount to a waste of resources—avoidable through discretionary denial.

C. *Fintiv* Factor 6

Finally, for factor 6, there are other circumstances that should impact the Director's exercise of discretion to deny the IPR. The Petition's three invalidity grounds lack merit even under a cursory review, and close examination reveals significant flaws that cause each ground to fail. While those shortcomings will be described in detail in the forthcoming Patent Owner Preliminary Response ("POPR"), the following provides a few highlights that illustrate significant deficiencies of the Petition.

1. The Grounds fail to delineate between § 102 and § 103 arguments or properly assert either category.

Grounds 1 and 2 of the Petition assert unpatentability under the anticipation standard of § 102 and the obviousness standard of § 103, respectively, but are presented together in a manner that fails to fully or clearly articulate either theory,

renders those claims or claim elements obvious under 35 U.S.C. § 103, either alone or in combination with other art identified in the cover pleading or herein."

particularly for at least Claims 3, 10, and 18 of the '336 patent. *See* Petition at 19 (“A. Grounds 1 and 2: Claims 1—18 Are Anticipated, Or At Least Rendered Obvious By, Subbiah”). Due to this lack of clarity, the grounds of the Petition are substantively deficient and noncompliant with 35 U.S.C. § 312(a)(3),⁴ thereby favoring discretionary denial.

First, it is unclear whether the Petition intends to raise both § 102 and § 103 arguments. Within this combined hetero-ground, the Petition impermissibly conflates anticipation and obviousness, shifting theories across the same parsed claim elements without coherent analysis.

For example, in Claim 3, the Petition first attempts to paper over Subbiah's clear deficiency with an inherency assertion—that a POSITA “would have understood” that redirection “necessarily” requires sending the target URL—before pivoting, in the very next breath, to an obviousness theory that “a POSITA would have found it obvious to do so for the same reason,” offering no substantive rationale

⁴ 35 U.S. Code § 312(a) Requirements of Petition.—A petition filed under section 311 *may be considered only if*— . . . (3) the petition identifies, in writing *and with particularity*, each claim challenged, *the grounds on which the challenge to each claim is based*, and the evidence that supports the grounds for the challenge to each claim, . . . (emphasis added)

whatsoever for that conclusion. *Id.* at 39 (emphasis added); *see also id.* at 52 (Claim 10). The Petition's failure is compounded by the absence of any supporting statement or analysis in the Expert's Declaration to shore up its obviousness argument. *See* Ex. 1003, ¶115.

As another example, in Claim 18, the Petition again toggles between theories, reciting Subbiah as if it anticipates while simultaneously invoking what can only be an obviousness rationale. Particularly, the Petition cherry-picks disparate disclosures from Subbiah but never undertakes the required element-by-element showing that Subbiah expressly or inherently discloses every limitation of Claim 18 arranged as in the claim. *See* Petition at 57. The Petition then fills the resulting gaps with generic "would have understood" assertions that are inherently obviousness concepts, not anticipation. *Id.* The Petition's ipse dixit that a POSITA "would have" supplied what Subbiah does not disclose cannot do double duty: it cannot salvage an anticipation theory, and it is likewise inadequate to carry an obviousness burden.

Petitioner cannot have it both ways. If it proceeds on anticipation, it must identify where Subbiah discloses **each and every element and limitation** of the challenged claim. It does not. That failure is dispositive under § 102, and the anticipation theory collapses at the threshold. If instead Petitioner proceeds on obviousness, it must do far more than gesture at the prior art. It must demonstrate a clear teaching, suggestion, or motivation in the art for every claimed feature and

supply a coherent rationale explaining why a POSITA would have combined those teachings to arrive at the claimed invention with a reasonable expectation of success. Petitioner does neither. Its obviousness case is devoid of a feature-by-feature showing and untethered to the factors articulated in *Graham v. John Deere Co.*, 383 U.S. 1 (1966) and reiterated in *KSR International Co. v. Teleflex Inc.*, 550 U.S. 398 (2007). The court has “repeatedly emphasized that an obviousness inquiry requires examination of all four *Graham* factors and that an obviousness determination can be made only after consideration of each factor.” *Nike, Inc. v. Adidas AG*, 812 F.3d 1326, 1335 (Fed. Cir. 2016). Here, for every claim element of the challenged claims, the Petition lacks any articulation of the second *Graham* factor (ascertaining the differences between the claimed invention and the prior art). While arguing such differences risks undercutting one’s anticipation arguments, Petitioner in this case chose to avoid taking the risk at the expense of ignoring the legal standard of obviousness.

The improper ground not only requires Patent Owner to respond to multiple incomplete arguments but also would impel the Board, if the Petition is instituted, to analyze multiple unarticulated invalidity grounds under multiple legal standards. Furthermore, gaps in Petitioner’s claim mapping (discussed briefly below) raise doubts that any § 102 argument was made in good faith. Yet Patent Owner is forced to respond to both anticipation and obviousness arguments within the limited word

count requirements, despite neither theory being sufficiently explained for Patent Owner to appropriately rebut. Petitioner has improperly shifted the burden to the Board and to Patent Owner, which warrants dismissal of the Petition based on discretionary considerations.

2. Petitioner improperly relies on POSITA's knowledge instead of disclosure or teaching in the prior art reference.

On July 31, 2025, the Director's office issued a memorandum (the "July Memorandum") putting all practitioners on notice that the Office "will enforce and no longer waive the requirement of 37 C.F.R. § 42.104(b)(4) (Rule 104(b)(4)) that a petition for inter partes review (IPR) "must specify where each element of the claim is found in the prior art patents or printed publications relied upon"" and prohibiting reliance on "applicant admitted prior art (AAPA), expert testimony, common sense, and other evidence that is not "prior art consisting of patents or printed publications" ... to supply a missing claim limitation." July Memorandum at 1. The July Memorandum makes clear that reliance on a "general knowledge," such as by a POSITA, to fill in missing claim limitations from prior art reference(s) was impermissible and is limited to supporting motivation to combine and demonstrating the knowledge of a POSITA. *Id.* at 1-2. This change applies to any petition filed on or after September 1, 2025 (*id.* at 3) and, thus, applies to the instant Petition.

Petitioner disregarded the Director's instructions. The Petition impermissibly relies on the knowledge of a POSITA to substitute for missing '336 patent claim limitations in the cited references, namely Subbiah. Particularly, the Petition fails to show that Subbiah discloses, teaches, or suggests multiple claim elements and limitations.

For example, in Claim 18, Petitioner identifies passages in Subbiah stating that an access point “waits for a client to connect” in an attempt to satisfy the claimed “*continuously monitor for network access from client devices on the first network interface.*” Perhaps recognizing that “waiting” is not “*continuously monitoring,*” Petitioner tries to gloss over the glaring gap with a generic POSITA “understanding,” asserting that a POSITA would have recognized—or at minimum found it obvious—that a wireless access point must continuously monitor connection requests by client devices to facilitate network access. Petition at 57 (citing Ex. 1003 ¶155). The declaration merely parrots the Petition and, more tellingly, neither the Petition nor the expert's declaration provides a single citation to Subbiah or any evidence for this limitation. *See* Petition at 57; *see also* Ex. 1003 ¶¶154–55. The July Memorandum was clear that failures like this cannot be covered up by reliance on a POSITA knowledge. Petitioner's disregard for Rule 104(b)(4) provides a compelling reason for the Director to exercise discretion by denying the Petition.

3. Errors in the Petition

The Petition is riddled with errors—some substantive, others careless—that undermine its credibility and coherence. While mistakes can appear insignificant in isolation, the aggregate effect here impairs clarity and, in several instances, materially obscures what Petitioner is actually arguing, particularly when the Petition is conflating anticipation and obviousness.

First, the “Statutory Grounds on Which the Challenge is Based” table is inconsistent with the body of the Petition for Grounds 1-2. Petition at 4. The table states that Grounds 1-2 challenge only claims 1-4, 9-11, and 16-18, but the analysis under those grounds also challenges claims 5-8, 12-15, and 19-20. *Id.* at 42-49, 53-54, and 57-58. Moreover, neither the table (*id.* at 4) nor the Grounds’ 1-2 header (*id.* at 19) includes claims 19-20, even though the body challenges those claims. This mismatch prevents the Board and Patent Owner from discerning with confidence which claims are actually at issue under Grounds 1-2.

Second, the same table represents that Ground 3 relies on Subbiah in view of Hinton, whereas the Ground 3 section header omits Subbiah and instead adds Crandell to Hinton (*id.* at 59). Petitioners must clearly identify the precise combinations they advance; the conflicting descriptions of Ground 3 inject uncertainty into both the scope and the structure of Petitioner’s obviousness theory.

Third, the Petition includes numerous broken internal cross-references—displayed as “**Error! Reference source not found**”—throughout key sections, including claim-by-claim analyses. *Id.* at 22, 65-66, 68-71 (emphasis in original). The pervasive cross-reference failures make it challenging to reliably trace Petitioner's claim-by-claim theories back to their purported evidentiary and analytical bases.

In addition to these three substantive problems, the Petition and its supporting papers also reflect evidentiary miss-citations: several citations in the analysis reference Ex. 1007 when the context makes clear they should cite the expert declaration at Ex. 1003. Petition at 68-71. A number of formatting⁵, procedural⁶, and symbol⁷ errors also appear. These defects evidence haste and a lack of due care.

V. Conclusion

Patent Owner's settled expectations alone warrant discretionary denial of instituting *inter partes* review of the '336 patent. Yet, this taken together with the *Fintiv* factors and other considerations discussed herein further weigh in favor of the

⁵ “[C]laims...19-12” should read “claims...19-20.” Petition at 19.

⁶ Certification of Service lists the wrong patent number and filing date.

⁷ “§102(b)” appears instead of “§102(b)” in the Specific Art table. Petition at 4.

Director exercising discretion to deny this IPR.

Dated: December 22, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 22nd day of December, 2025, true and correct copies of the foregoing NETSKOPE, INC.'S BRIEF FOR DISCRETIONARY DENIAL and EXHIBITS were served via electronic mail on Petitioner's counsel at the following address:

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