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**UNITED STATES DISTRICT COURT
 CENTRAL DISTRICT OF CALIFORNIA**

MARK'S ENGINE COMPANY NO. 28 RESTAURANT,
 LLC

 PLAINTIFF(S),
 v.
 THE TRAVELER'S INDEMNITY COMPANY OF
 CONNECTICUT, ERIC GARCETTI, ET AL.
 DEFENDANT(S).

CASE NUMBER:
 2:20-cv-04423-AB-SK

NOTICE OF APPEAL

NOTICE IS HEREBY GIVEN that Mark's Engine Company No. 28 Restaurant, LLC hereby appeals to
Name of Appellant
 the United States Court of Appeals for the Ninth Circuit from:

Criminal Matter

- Conviction only [F.R.Cr.P. 32(j)(1)(A)]
- Conviction and Sentence
- Sentence Only (18 U.S.C. 3742)
- Pursuant to F.R.Cr.P. 32(j)(2)
- Interlocutory Appeals
- Sentence imposed:

Bail status:

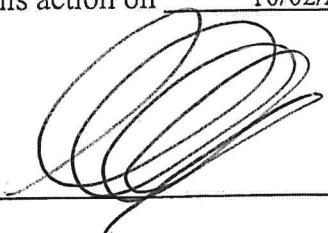
Civil Matter

- Order (specify):
 Order Granting Motion to Dismiss FAC
- Judgment (specify):
- Other (specify):

Imposed or Filed on 10/02/2020. Entered on the docket in this action on 10/02/2020.

A copy of said judgment or order is attached hereto.

October 5, 2020
 Date


 Signature
 Appellant/ProSe Counsel for Appellant Deputy Clerk

Note: The Notice of Appeal shall contain the names of all parties to the judgment or order and the names and addresses of the attorneys for each party. Also, if not electronically filed in a criminal case, the Clerk shall be furnished a sufficient number of copies of the Notice of Appeal to permit prompt compliance with the service requirements of FRAP 3(d).

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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

MARK’S ENGINE COMPANY NO.
28 RESTAURANT, LLC, a limited
liability company,

Plaintiff,

v.

THE TRAVELERS INDEMNITY
COMPANY OF CONNECTICUT, a
corporation; ERIC GARCETTI, an
individual; and DOES 1 TO 25,
inclusive,

Defendants.

Case No. 2:20-cv-04423-AB-SK

**ORDER GRANTING DEFENDANT
TRAVELERS PROPERTY
CASUALTY COMPANY OF
AMERICA’S MOTION TO DISMISS
PLAINTIFF’S FIRST AMENDED
COMPLAINT**

I. INTRODUCTION

Pending before the Court is Defendant Travelers Property Casualty Company of America’s (“Travelers” or “Defendant”) Motion to Dismiss. (ECF 28.) The motion has been fully briefed and the Court heard oral arguments on this matter on September 4, 2020. (ECF 50.) For the following reasons, the motion is **GRANTED** and this matter is **DISMISSED WITH PREJUDICE**.

1
2 **II. BACKGROUND**

3 Plaintiff Mark’s Engine Company No. 28 Restaurant, LLC (“Plaintiff”) owns
4 and operates a restaurant in downtown Los Angeles. (FAC ¶ 1.) In September 2019,
5 Plaintiff obtained insurance coverage (the “Policy”) from Travelers that covers “losses
6 including, but not limited to, business income losses at [Plaintiff’s] restaurant.” (FAC
7 ¶ 6.) The Policy includes provisions for “Business Income and Extra Expense
8 Coverage” in the case Civil Authority orders closure of the restaurant. (*Id.* ¶ 11.)
9 The Policy states that a covered cause of loss under the policy includes “direct
10 physical loss or direct physical damage unless the loss is specifically excluded or
11 limited in the Policy.” (*Id.* ¶ 13.) The Policy specifically excludes “loss or damage
12 caused by or resulting from any virus.” (ECF 29-2 at 212.)

13 In March 2020, like many other businesses, Plaintiff had to significantly adjust
14 its operations due to COVID-19. (*See* FAC at ¶ 22.) Specifically, Plaintiff has “been
15 forced to . . . begin the termination process for dozens of its employees” and to deal
16 with employees who “refused to work out of fear of contracting the novel
17 Coronavirus.” (*Id.* at ¶¶ 22-23.) Mayor Eric Garcetti (“Garcetti”) issued an order
18 requiring restaurants to close all but take-out and delivery services due to the “dire
19 risks of exposure with the contraction of COVID-19 and evidence of physical damage
20 to property.” (*Id.* at ¶ 18.) Garcetti “direct[ed] all non-essential businesses to be
21 closed in Los Angeles,” and Plaintiff states that, “[e]xcept for delivery or takeout,” the
22 order “caused a complete and total shutdown of Plaintiff’s business operations.” (*Id.*
23 at ¶¶ 18, 22.)

24 On April 15, 2020, Plaintiff filed a lawsuit in Los Angeles Superior Court
25 seeking declaratory judgment as to the applicability of the insurance policy to the
26 insured premises. (ECF 1-2.) Plaintiff also asserted causes of action for breach of the
27 implied covenant of good faith and fair dealing and violation of Cal. Insurance Code
28 Section 790.03. (*Id.*) On May 15, 2020, the case was removed to federal court and on

1 May 22, 2020, Defendant Travelers Indemnity Company of Connecticut filed a
2 Motion to Dismiss. (ECF 1, 13, 14.) On May 29, 2020, Plaintiff filed its First
3 Amended Complaint (“FAC”), replacing Defendant Travelers Indemnity Company of
4 Connecticut with Defendant Travelers Property Casualty Company of America
5 (“Travelers”) and mooted the pending Motion to Dismiss. (ECF 21, 25.) Plaintiff
6 also filed a Motion to Remand which was denied on July 27, 2020. (ECF 22, 39.)

7 The FAC included four causes of action: (1) declaratory relief; (2) breach of
8 contract; (3) breach of implied covenant of good faith and fair dealing; and (4)
9 violation of Business & Professions Code § 17200. (*See generally* FAC.) On June
10 12, 2020, Travelers filed a Motion to Dismiss. (ECF 28, 29.) Defendant attached a
11 copy of the Policy to its Motion. (ECF 29-2.) Plaintiff opposed the Motion and the
12 Court heard oral arguments on September 4, 2020. (ECF 34, 50.)

13 Defendant asserts two main arguments: (1) Plaintiff is not entitled to coverage
14 under either the Civil Authority or Business Income and Extra Expense Coverage; (2)
15 even if Plaintiff could show that the Policy provisions apply, the Virus Exclusion
16 provision expressly denies coverage in this instance. (*See Mot.* at 9-10, 14.) Plaintiff
17 argues that (1) where a government-mandated shutdown impedes operations or access
18 to an insured property, Civil Authority coverage applies; (2) it is entitled to coverage
19 because the order caused “physical loss of” its property; and (3) the Virus Exclusion
20 does not apply because the “physical loss” resulted from the government order, not the
21 coronavirus. (*Opp’n* at 5-6, 7-13.) Both parties have submitted supplemental
22 authorities from other courts, including ones in California and this district. (ECF 41,
23 42, 46, 47, 48, 49, 51.)

24 **III. THE INSURANCE POLICY**

25 The parties’ arguments center on three provisions of the Policy: Civil Authority
26 Coverage, Business Income and Extra Expense Coverage, and the Virus Exclusion
27 endorsement.
28

1 **A. Civil Authority Coverage**

2 The Civil Authority provision covers losses and expenses “caused by action of
3 civil authority that prohibits access to the described premises.” (ECF 29-2 at 99.)
4 “The civil authority action must be due to direct physical loss of or damage to
5 property . . . caused by or resulting from a Covered Cause of Loss.” (*Id.*)

6 **B. Business Income and Extra Expense Coverage**

7 The Business Income provision provides that Defendant “will pay for the actual
8 loss of Business Income you sustain due to the necessary ‘suspension’ of your
9 ‘operations’ during the ‘period of restoration’. The ‘suspension’ must be caused by
10 direct physical loss of or damage to property at the described premises. The loss or
11 damage must be caused by or result from a Covered Cause of Loss. . . .” (*Id.* at 86-
12 87.)

13 Plaintiff’s Extra Expense coverage provides, in relevant part: “Extra Expense
14 means reasonable and necessary expenses you incur during the ‘period of restoration’
15 that you would not have incurred if there had been no direct physical loss of or
16 damage to property caused by or resulting from a Covered Cause of Loss. (*Id.* at 87.)

17 **C. Virus Exclusion Provision**

18 The Policy also contains an endorsement entitled, “EXCLUSION OF LOSS
19 DUE TO VIRUS OR BACTERIA.” (*Id.* at 212.) This exclusion applies to action of
20 the civil authority, business income, and extra expense provisions. (*Id.*) It reads as
21 follows: “We will not pay for loss or damage caused by or resulting from any virus,
22 bacterium or other microorganism that induces or is capable of inducing physical
23 distress, illness or disease.” (*Id.*)

24 **IV. LEGAL STANDARD**

25 A motion to dismiss under Rule 12(b)(6) challenges the legal sufficiency of the
26 claims stated in the complaint. *See* Fed. R. Civ. P. 12(b)(6). To survive a motion to
27 dismiss, the plaintiff’s complaint “must contain sufficient factual matter, accepted as
28 true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S.

1 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).
2 A claim is facially plausible “when the plaintiff pleads factual content that allows the
3 court to draw the reasonable inference that the defendant is liable for the misconduct
4 alleged.” *Iqbal*, 556 U.S. at 678. A complaint that offers mere “labels and
5 conclusions” or “a formulaic recitation of the elements of a cause of action will not
6 do.” *Id.*; see also *Moss v. U.S. Secret Serv.*, 572 F.3d 962, 969 (9th Cir. 2009) (citing
7 *Iqbal*, 556 U.S. at 678). In reviewing a Rule 12(b)(6) motion, a court “must accept as
8 true all factual allegations in the complaint and draw all reasonable inferences in favor
9 of the nonmoving party.” *Retail Prop. Trust v. United Bhd. of Carpenters & Joiners of*
10 *Am.*, 768 F.3d 938, 945 (9th Cir. 2014). Thus, “[w]hile legal conclusions can provide
11 the complaint’s framework, they must be supported by factual allegations. When there
12 are well-pleaded factual allegations, a court should assume their veracity and then
13 determine whether they plausibly give rise to an entitlement to relief.” *Iqbal*, 556 U.S.
14 at 679.

15 V. ANALYSIS

16 A. Plaintiff Fails to Plausibly Allege that Any Policy Term 17 Applies.

18 The Civil Authority, Business Income, and Extra Expense provisions all contain
19 identical language regarding what conditions trigger coverage: “direct physical loss of
20 or damage to property.” (ECF 29-2 at 86-86, 99, 212.) Absent either direct physical
21 loss of or damage to the property, Plaintiff cannot show that coverage applies. The
22 Court finds persuasive the reasoning of the Honorable Steven V. Wilson who
23 addressed identical policy language as it relates to COVID-19 with parties whose
24 arguments mirrored those made before this Court:¹

25 Although “[a]s a general rule, a district court may not consider any material
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27
28 ¹ The Court notes that in adopting the reasoning of Judge Wilson, it has changed the text only to the extent that it reflects the records cites for this matter.

1 beyond the pleadings in ruling on a Rule 12(b)(6) motion,” a court can consider
2 extrinsic material when its “authenticity . . . is not contested and the plaintiff’s
3 complaint necessarily relies on them.” *Lee v. City of Los Angeles*, 250 F.3d 668,
4 688 (9th Cir. 2001) (citation and quotation marks omitted). Plaintiff does not
5 contest the authenticity of the insurance policy attached to Defendant’s
6 memorandum. *See generally* Opp’n. Because Plaintiff seeks to recover under
7 the Policy, *see generally* ECF 21, the FAC necessarily relies on the Policy.
8 Therefore, the Court will consider the language contained directly in the Policy
9 in resolving this motion. *See Khoury Investments Inc. v. Nationwide Mutual Ins.*
10 *Co.*, 2013 WL 12140449, at *2 (C.D. Cal. 2013) (citing *United States ex rel.*
11 *Lee v. Corinthian Colls.*, 655 F.3d 984, 999 (9th Cir. 2011)) (“Because
12 Plaintiffs refer to this insurance policy in their FAC and their claim for breach
13 of contract relies on the terms of the policy . . . , this document would likely be
14 appropriate for judicial notice as ‘unattached evidence on which the complaint
15 necessarily relies.’”).

16 “When interpreting a policy provision, we must give terms their ordinary and
17 popular usage, unless used by the parties in a technical sense or a special
18 meaning is given to them by usage.” *Palmer v. Truck Ins. Exch.*, 21 Cal. 4th
19 1109, 1115 (1999) (citation and quotation marks omitted). The property
20 insurance Policy at issue here requires “direct physical loss of or damage to
21 property” for recovery under the civil authority provision, [the business income
22 provision, and the extra expense provision]. ECF 29-2 at 86-87, 99.

23 Under California law, losses from inability to use property do not amount to
24 “direct physical loss of or damage to property” within the ordinary and popular
25 meaning of that phrase. Physical loss or damage occurs only when property
26 undergoes a “distinct, demonstrable, physical alteration.” *MRI Healthcare Ctr.*
27 *of Glendale, Inc. v. State Farm Gen. Ins. Co.*, 187 Cal. App. 4th 766, 779
28 (2010) (citation and quotation marks omitted). “Detrimental economic impact”
does not suffice. *Id.* (citation and quotation marks omitted); *see also Doyle v.*
Fireman’s Fund Ins. Co., 21 Cal. App. 5th 33, 39 (2018) (“[D]iminution in
value is not a covered peril, it is a measure of loss” in property insurance).

An insured cannot recover by attempting to artfully plead impairment to
economically valuable use of property as physical loss or damage to property.
For example, in *MRI Healthcare Ctr.*, the court held that lost use of an MRI
machine after it was powered off did not qualify as a “direct physical loss.”
187 Cal. App. 4th at 789. Likewise, in *Ward General Ins. Servs., Inc. v.*
Employers Fire Ins. Co., 114 Cal. App. 4th 548 (2003), the court held that a
loss of valuable electronic data did not qualify as “direct physical loss or

1 damage” without any physical alteration to the storage media. 114 Cal. App. 4th
2 at 555-56. Finally, in *Doyle*, 21 Cal. App. 5th 33 (2018), the court held that
3 purchasing counterfeit wine did not count as a loss to the wine covered by a
4 property insurance policy without a physical alteration to the insured property.
21 Cal. App. 5th at 38-39.

5 Plaintiff’s FAC attempts to make precisely this substitution of impaired use or
6 value for physical loss [of] or damage. Plaintiff only plausibly alleges that in-
7 person dining restrictions interfered with the use or value of its property—not
8 that the restrictions caused direct physical loss or damage.

9 Plaintiff characterizes in-person dining restrictions as “labeling of the insured
10 property as nonessential.” FAC at ¶ 19. That “labeling” surely carries
11 significant social, economic, and legal consequences. But it does not physically
12 alter any of Plaintiff’s property.

13 Plaintiff’s FAC appears to suggest that Plaintiff’s business hardships resulted
14 from the physical action of the novel coronavirus itself, which “infects and
15 stays on surfaces of objects or materials . . . for up to twenty-eight days.” *Id.* at
16 ¶ 16. However, Plaintiff does not allege that the virus “infect[ed]” or “stay[ed]
17 on surfaces of” its insured property. Whatever physical alteration the virus may
18 cause to property in general, nothing in the FAC plausibly supports an inference
19 that the virus physically altered Plaintiff’s property, however much the public
20 health response to the virus may have affected business conditions for
21 Plaintiff’s restaurant. Even if Plaintiff could somehow recover for physical loss
22 or damage to other property, such loss or damage could hardly qualify as
23 “direct.” *See MRI Healthcare Ctr.*, 187 Cal. App. 4th at 779 (internal citation
24 and quotation marks omitted) (“[D]irect means [w]ithout intervening persons,
25 conditions, or agencies; immediate.”).

26 Plaintiff attempts to circumvent the plain language of the Policy by
27 emphasizing its disjunctive phrasing – “direct physical loss of *or* damage to
28 property,” ECF 29-2 at 87, 99—and insisting that “loss [of],” unlike “damage,”
encompasses impaired use. To support this argument, Plaintiff relies on *Total
Intermodal Servs. Inc. v. Travelers Prop. Cas. Co. of Am.*, 2018 WL 3829767
(C.D. Cal. 2018). In *Total Intermodal*, the court concluded that giving separate
effect to “loss [of]” and “damage” in the phrase, “direct physical loss or
damage,” required recognizing coverage for “the permanent dispossession of
something.” *Id.* at *4.

1 Even if the Policy covers “permanent dispossession” in addition to physical
2 alteration, that does not benefit Plaintiff here. Plaintiff’s FAC does not allege
3 that it was permanently dispossessed of any insured property. *See generally*
4 FAC. As far as the FAC reveals, while public health restrictions kept the
5 restaurant’s “large groups” and “happy-hour goers” at home instead of in the
6 dining room or at the bar, Plaintiff remained in possession of its dining room,
7 bar, flatware, and all of the accoutrements of its [restaurant.] FAC at ¶ 8.

8 Next, to the extent Plaintiff relies on this Court’s order in *Total Intermodal* for
9 the proposition that “direct physical loss of” encompasses deprivation of property
10 without physical change in the condition of the property (Opp’n at 11-12), the Court
11 notes that such an interpretation of any insurance policy would be without any
12 “manageable bounds.” *See Plan Check Downtown III, LLC v. AmGuard Insurance*
13 *Company, et al.*, No. 2:20-cv-06954-GW-SK at 7 (Sept. 10, 2020) (distinguishing
14 *Total Intermodal*, 2018 WL 3829767, No. 17-cv-04908 (C.D. Cal. July 11, 2018)
15 from COVID-19 business closure).

16 Lastly, the Court alternatively concludes that Plaintiff suffered no complete
17 “direct physical loss of” its property as it always had complete access to the premises
18 even after the order was issued. The only individuals who could potentially claim
19 “direct physical loss of” access to the premises would be patrons who were no longer
20 allowed to dine in. And even then, the Policy is between Plaintiff and Defendant, not
21 restaurant goers and Defendant.

22 The Court concludes that Plaintiff has not alleged facts plausibly supporting an
23 inference that it is entitled to coverage under the Policy.

24 **B. Even Assuming Plaintiff Could Plausibly Allege “Direct
25 Physical Loss Of or Damage To” Its Premises, the Virus
26 Exemption Precludes Coverage.**

27 Although the Court finds that Plaintiff fails to plausibly allege that that it
28 suffered a “physical loss of or damage to” its premises by having to shift its business
operations, the Court further finds that even if Plaintiff was able to show that it

1 suffered such loss or damage, coverage would be precluded under the virus exemption
2 provision.

3 The virus provision clearly and unequivocally exempts “loss or damage caused
4 by or resulting from any virus.” (ECF 29-2 at 212.) Plaintiff’s FAC clearly
5 demonstrates that all alleged loss or damage was both caused by and resulted from the
6 novel coronavirus. The FAC alleges that Mayor Garcetti issued the order because of
7 “the dire risks of exposure with the contraction of COVID-19 and evidence of
8 physical damage to property.” (FAC ¶ 18.) Plaintiff also states that it shut down its
9 business because employees had “refused to work out of fear of contracting the novel
10 Coronavirus.” (*Id.* at ¶ 22.) And most tellingly, Plaintiff seeks declaratory relief “due
11 to physical loss or damage from the Coronavirus.” (*Id.* at ¶ 28.) The virus exemption
12 applies here and precludes all coverage.

13 **C. All Causes of Action Fail Because They Are Premised Upon an**
14 **Inapplicable Policy.**

15 Plaintiff’s first cause of action fails because Plaintiff has failed to provide a
16 cognizable legal theory or set of facts about the Policy that would allow the Court to
17 provide declaratory relief, this cause of action fails. *See Native Vill. of Noatak v.*
18 *Blatchford*, 38 F.3d 1505, 1514 (9th Cir. 1994) (“The district court, . . . may grant
19 declaratory relief only when there is an actual case or controversy; a declaratory
20 judgment may not be used to secure judicial determination of moot questions.”),
21 *overruled on other grounds by Bd. of Trs. of Glazing Health & Welfare Tr. v.*
22 *Chambers*, 941 F.3d 1195 (9th Cir. 2019); *see also Amaral v. Wachovia Mortg. Corp.*,
23 692 F. Supp. 2d 1226, 1236 & n.3 (E.D. Cal. 2010) (dismissing two of three requested
24 declarations in part because “a determination as to whether Plaintiffs [were] entitled to
25 the third requested declaration [would] involve an analysis of the issues surrounding
26 the first two with no need for separate declarations on all three matters”).

27 Next Plaintiff’s second cause of action fails because Travelers did not withhold
28 benefits due because no conditions triggered coverage, and even if they had, coverage

1 would have been excluded under the virus provision. “[T]he failure of [a policy’s]
2 conditions precedent is a complete defense to [an insured’s] breach of contract claim.”
3 *1231 Euclid Homeowners Ass’n v. State Farm Fire & Cas. Co.*, 135 Cal. App. 4th
4 1008, 1020–21 (Ct. App. 2006); *see also Love v. Fire Ins. Exch.*, 221 Cal. App. 3d
5 1136, 1151 n.10 (Ct. App. 1990) (quoting Kornblum et al., Cal. Practice Guide: Bad
6 Faith § 4:28, pp. 4–9) (emphasis omitted) (“[A]bsent an actual withholding of benefits
7 due, there is no breach of contract.”).

8 Plaintiff’s third cause of action similarly fails because “[w]here benefits are
9 withheld for proper cause, there is not breach of the implied covenant.” *Love v. Fire*
10 *Ins. Exch.*, 221 Cal. App. 3d 1136, 1151 (1990).

11 And finally, Plaintiff’s fourth cause of action fails because it is premised upon
12 the above claims which also fail. *See Aleksick v. 7-Eleven, Inc.*, 205 Cal. App. 4th
13 1176, 1185 (Ct. App. 2012); *Krantz v. BT Visual Images, LLC*, 89 Cal. App. 4th 164,
14 178 (Ct. App. 2001) (finding viability of a UCL claim “stand[s] or fall[s] depending
15 on the fate of the antecedent substantive causes of action”); *see also Glenn K. Jackson*
16 *Inc. v. Roe*, 273 F.3d 1192, 1203 (9th Cir. 2001) (finding Section 17200 claim failed
17 where underlying negligence and fraud claims failed). Further, the Court has
18 concluded that Plaintiff was not entitled to recover under the Policy on the facts
19 alleged in the FAC based on the “ordinary and popular sense” of the Policy language.
20 *Palmer*, 21 Cal. 4th at 1115. And because “the ordinary and popular sense” of the
21 Policy language does not support recovery on these facts, Plaintiff cannot plausibly
22 allege that the Policy constitutes fraudulent, unfair, or unlawful conduct giving rise to
23 UCL liability. *See Glenn K. Jackson Inc. v. Roe*, 273 F.3d 1192, 1203 (9th Cir. 2001)
24 (citing *Cel-Tech Comms., Inc. v. Los Angeles Cellular Telephone Co.*, 20 Cal. 4th 163,
25 182 (1999)) (“[T]he breadth of [the UCL] does not give a plaintiff license to ‘plead
26 around’ the absolute bars to relief contained in other possible causes of action by
27 recasting those causes of action as one for unfair competition.”).

1 **VI. CONCLUSION**

2 For the reasons above, the Court **GRANTS** Defendant’s Motion to Dismiss the
3 FAC. The Court finds that even if Plaintiff plausibly alleged coverage under the
4 Policy, the Virus Exemption provision would preclude all coverage such that
5 Travelers would have no duty to perform under—or breach—the Policy. Accordingly,
6 amendment would be futile and this matter is **DISMISSED WITH PREJUDICE**.

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9 Dated: October 02, 2020

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HONORABLE ANDRÉ BIROTTE JR.
11 UNITED STATES DISTRICT COURT JUDGE
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