Supreme Court of California
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Supreme Court of California
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No. S277211

IN THE SUPREME COURT OF CALIFORNIA

CITY OF LOS ANGELES,

Plaintiff and Appellant,

v.

PRICEWATERHOUSECOOPERS, LLC,

Defendant and Respondent.

After a Decision of the Court of Appeal of the State of California,
Second Appellate District, Division Five,
Case No. B310118

On Appeal from the Superior Court of Los Angeles County
Case No. BC574690
The Honorable Elihu M. Berle, Presiding

PRICEWATERHOUSECOOPERS LLP'S REPLY BRIEF ON THE MERITS

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INTRODUCTION

This case presents a straightforward question: When a party engages in a systemic, pervasive pattern of discovery abuse that transcends the discrete forms of misconduct addressed in the Civil Discovery Act's method-specific chapters, does Code of Civil Procedure section 2023.030's provision that courts "may impose a monetary sanction" against "one engaging in [a] misuse of the discovery process" authorize the court to sanction such misconduct? Rather than address that question, the City goes on a 66-page detour in which it alternately disputes for the first time whether it even engaged in misconduct (contrary to the trial court's findings) and fights an imagined, straw-man argument—presented in neither the dissenting opinion below nor PwC's Opening Brief on the Merits ("OBM") in this Court—that would have courts entirely disregard the Discovery Act's method-specific chapters.

Every judge to have reviewed the extensive record has recognized that the City engaged in a years-long pattern of egregious discovery abuse orchestrated at the highest levels of the City Attorney's Office and the Department of Water and Power to hide from PwC and the trial court a collusive settlement the City

had engineered to defraud PwC out of tens of millions of dollars—and to cheat its own ratepayers out of an honest and adversarial settlement of their claims against the City. The trial court expressly found that "there has been a serious abuse of discovery by the City and its counsel." (8AA4011.) And Justice Grimes noted that "[t]his case presents a record of egregious discovery abuse that is unmatched in [her] experience." (Dis. Op. at p. 1.) Even the Court of Appeal majority, in vacating the sanctions award on a novel ground never presented by the parties, emphasized that its holding "[wa]s not intended to absolve the City of the serious and egregious nature of the [City's] conduct at issue." (Op. at p. 51.)

The City did not dispute any of these findings at the trial-court sanctions hearing or in the Court of Appeal. At the hearing, the City did "not take[] issue with a single specific allegation made by PwC" regarding the City's extensive discovery misconduct and failed "to deny [the] existence of the discovery abuse." (3RT4822.) Yet remarkably, the City now changes tack in its Answer Brief on the Merits ("ABM"), falsely portraying itself as an innocent victim that promptly came clean when confronted with the misconduct of its outside counsel. (See, e.g., ABM at p. 17 ["For the sake of transparency, and to meet the issues surrounding former

Special Counsel head-on," the City "provided PwC with extraordinary access to the City's inside and outside attorneys, over one-hundred-thousand pages of documents, and limited disclosure of otherwise privileged information"].)

This narrative was debunked in painstaking detail by Justice Grimes's methodical account of how, for several months ***after*** the City fired its Special Counsel (one of whom has since been convicted of bribery),[1] the City continued to engage in obstruction, misdirection, and abuse. (See, e.g., Dis. Op. at p. 11 [explaining how "the City's intransigence [even] *after* the City produced the Jones v. PwC complaint" forced PwC "to take many more depositions that … would reveal the falsity of the City's claim that the conduct finally uncovered in March 2019 was attributable only to so-called 'rogue actors' in special counsel's office"].) In other words, the City *still* refuses to accept responsibility for the multi-year discovery abuse it perpetrated in an attempt to extort tens of

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1 See PwC's unopposed Request for Judicial Notice, Ex. D [Paul Paradis's guilty plea]. The City's former Chief Assistant City Attorney, Thomas Peters, also pleaded guilty to a felony charge for aiding and abetting extortion. (See OBM at p. 28, fn. 4.)

millions of dollars from PwC on claims that were so meritless the City ultimately dismissed them with prejudice.[2]

Just as it brazenly spins a false narrative to this Court, the City also grossly mischaracterizes PwC's legal arguments. PwC has made abundantly clear that while section 2023.030[3] "provides broad general authority to impose a wide range of sanctions" for any "misuse of the discovery process" identified in section 2023.010, "courts may not impose sanctions that exceed the outer limits prescribed in certain situations by subsequent, more specific provisions of the Discovery Act." (OBM at pp. 51–52.) Yet the City repeatedly argues that PwC's position would allow courts "to impose monetary sanctions for discovery abuse *without regard to* *the specific requirements set forth in the method-specific provisions*." (ABM at p. 33, emphases added.). Indeed, nearly all of the City's statutory arguments respond to this straw man. The

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[2] Thus, nothing need be said about the City's baseless, unproven allegations. (See, e.g., ABM at pp. 11–13.) The same holds true as to the City's assertion that PwC's sanctions motion was somehow untimely—an argument unanimously rejected by the Court of Appeal and the trial court, and not challenged by the City at the petition-for-review stage. (ABM at p. 20; Op. at pp. 64–66; Dis. Op. at p. 1.)

[3] Unless otherwise specified, all statutory references are to the Code of Civil Procedure.

Answer Brief is therefore largely beside the point and of little use to this Court.

The upshot of the City's failure to engage honestly with the facts and arguments before this Court is that PwC's Opening Brief is effectively unrebutted. As PwC has explained, the Court of Appeal's judgment should be reversed for at least three reasons. ***First*,** sections 2023.030 and 2023.010 authorize courts to sanction pervasive patterns of misconduct that, like the City's here, transcend the Discovery Act's method-specific chapters. ***Second*,** courts may independently impose monetary sanctions for discovery abuse under their inherent authority, when needed (in appropriate circumstances) to vindicate their core judicial function. ***Third*,** even assuming arguendo that each dollar of a sanctions award must be tied to a particular violation of a method-specific provision of the Discovery Act, the record here is more than sufficient to do so, thus warranting reinstatement of the trial court's sanctions award.

The Court of Appeal's decision, if affirmed, would invite discovery abuse by hamstringing courts' ability to impose sanctions for the worst, most systemic kinds of misconduct committed by the most sophisticated, powerful offenders, such as

the City and its attorneys. That result is particularly problematic because, in the vast majority of cases, the victims of discovery misconduct lack the resources to uncover and effectively prosecute their opponent's misconduct like PwC did here (partly at the trial court's request). This Court should reverse the judgment below and remand with instructions to reinstate, in full, the trial court's sanctions award.

ARGUMENT

I. Section 2023.030 Authorizes Courts to Impose Monetary Sanctions for Misuses of the Discovery Process Identified in Section 2023.010.

The Discovery Act's text, structure, and history all point toward the same conclusion: Section 2023.030 authorizes courts to impose monetary sanctions for any "misuse of the discovery process" listed in section 2023.010. By providing that a court "may impose a monetary sanction" against "one engaging in the misuse of the discovery process" (Code Civ. Proc., § 2023.030, subd. (a)), the Act invests courts with discretion to impose such sanctions in appropriate cases. This grant of discretionary authority complements the *mandatory* sanctioning authority conferred by the method-specific provisions of the Discovery Act. (See, e.g., *id.*, § 2025.430 ["If the party giving notice of a deposition fails to attend

or proceed with it, the court shall impose a monetary sanction[.]"].) And this reading is the only one that aligns with the Legislature's purpose in enacting the Civil Discovery Act of 1986—namely, "insur[ing] ***total*** protection of discovery throughout the litigation." (Tonegato, *The Decline & Fall of Sanctions in California Discovery: Time to Modernize California Code of Civil Procedure Section 2034* (1974) 9 U.S.F. L.Rev. 360, 388, emphasis added.)

The City's response hinges on a blatant mischaracterization of PwC's position as ignoring the Discovery Act's method-specific provisions. But PwC has consistently recognized that, where they apply, those method-specific provisions set the outer limit on courts' exercise of their broader sanctioning authority under section 2023.030. Where there are *no* method-specific provisions addressing misuses of the discovery process, however, section 2023.030 operates without qualification. This includes the worst kinds of discovery abuse, such as openly and repeatedly lying to the court and other patterns of pervasive, fraudulent misconduct like what transpired here.

A. The Text and Structure of the Discovery Act Confirm That Section 2023.030 Authorizes Courts to Impose Sanctions for Misuses of the Discovery Process Identified in Section 2023.010.

The City agrees that the "[p]lain [l]anguage" of "[s]ections 2023.010 and 2023.030 of the Civil Discovery Act [is] unambiguous." (ABM at p. 28.) In the City's telling, however, these provisions "do *not* authorize courts to impose monetary sanctions for discovery misconduct," but simply "direct the reader to apply those sections containing method-specific provisions." (*Id.* at pp. 28–29, italics added.)

The City reaches this conclusion only by ignoring the statutory text. As PwC has explained (OBM at pp. 39–40), courts' authority to impose monetary sanctions for misuses of the discovery process derives from section 2023.030, subdivision (a), which provides that:

> To the extent authorized by the chapter governing any particular discovery method or any other provision of this title, ***the court***, after notice to any affected party, person, or attorney, and after opportunity for hearing, ***may impose the following sanctions*** against anyone engaging in conduct that is a misuse of the discovery process:
>
> (a) ***The court may impose a monetary sanction*** ordering that one engaging in the misuse of the discovery process, or any attorney advising that conduct, or both pay the reasonable expenses,

> including attorney's fees, incurred by anyone as a result of that conduct. The court may also impose this sanction on one unsuccessfully asserting that another has engaged in the misuse of the discovery process, or on any attorney who advised that assertion, or on both. ***If a monetary sanction is authorized by any provision of this title, the court <u>shall impose that sanction</u>*** unless it finds that the one subject to the sanction acted with substantial justification or that other circumstances make the imposition of the sanction unjust.

(Code Civ. Proc., § 2023.030, emphases added.)

The emphasized language undeniably authorizes courts to impose sanctions. The City effectively concedes as much when it says that "[n]othing in Section 2023.010 authorizes, mandates, or empowers courts with any authority to impose sanctions" because "Section 2023.010 does not contain the sanctions-related language found in the Civil Discovery Act's other provisions specific to discovery methods, *i.e.*, ***the 'court shall impose a monetary sanction*** under Chapter 7 (commencing with Section 2023.010) against any party, person, or attorney who … ' " (ABM at pp. 30–31, emphasis added.) But PwC does not argue that *section 2023.010* provides independent authority to impose sanctions. (See OBM at p. 54.) And section 2023.030, subdivision (a)—which *does* provide that authority—contains precisely the words the City considers critical.

Rather than address this authorizing language, the City fixates on section 2023.030's prefatory clause: "[t]o the extent authorized by the chapter governing any particular discovery method or any other provision of this title[.]" (See ABM at pp. 31–32.) But the City never explains how the "plain language" of this prefatory clause "'means that the statutes governing the particular discovery methods limit the permissible sanctions to those sanctions provided under the applicable governing statutes'" (*id.* at p. 32, quoting *Moofly Prods., LLC v. Favila* (2020) 46 Cal.App.5th 1, 10–11)—nor does the City explain how a prefatory clause could obliterate section 2023.030, subdivision (a)'s operative "may impose" clause (see OBM at p. 44).[4]

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[4] If anything, *Moofly* supports PwC. There, the plaintiff violated a federal court's order to respond to interrogatory requests and failed to pay monetary sanctions imposed by the federal court. (*Supra*, 46 Cal.App.5th at p. 11.) When the case was remanded to state court, the trial court imposed terminating sanctions. Because Moofly disputed only whether the state court had authority to impose terminating sanctions based on pre-remand conduct in federal court (see *id.* at pp. 11–12), and because Moofly's failure to respond to interrogatories was sanctionable under a method-specific provision (see *id.* at p. 11, citing Code Civ. Proc., § 2030.290, subd. (c)), the Court of Appeal never opined on whether section 2023.030 provided independent authority to impose sanctions. Nevertheless, in affirming the sanctions award, the court reasoned that even if Moofly's failure to respond to interrogatories was not sufficient to justify terminating sanctions, "Moofly's misconduct was not limited to

The City's silence should come as no surprise. As PwC explained in its Opening Brief (at p. 48), dictionaries are clear that the term "'to the extent' simply conveys an uppermost or outer limit on [the] potential *range* of outcomes'" authorized by section 2023.030—from monetary sanctions to terminating and contempt sanctions. (See, e.g., Oxford English Dict. (3d ed. 2001) ["*to a certain, great,* etc., *extent, to the (full) extent of.* Hence: the limit to which anything extends" (italics added)].) It does not, as the City suggests, mean that the sanctions outlined in section 2023.030 are available only *if* expressly authorized by a method-specific provision.[5]

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failing to respond to interrogatories." (*Id.* at p. 12.) Indeed, "'the entire course of Moofly's behavior demonstrate[d] its utter disregard for the court as well as court procedures[.]'" (*Id.* at p. 6.) Here, too, the City engaged in an "entire course" of misconduct, the cumulative effect of which is far greater than the sum of its parts.

[5] The City disputes PwC's contention that "the Court of Appeal's interpretation of '[t]o the extent authorized by' in Section 2023.030 is improperly equivalent to if or only if." (ABM at p. 48.) Ironically, the only authority it cites is the Court of Appeal majority's opinion that is currently under review. (*Id.* at pp. 48–49.) While that opinion did quote *New Albertsons, Inc. v. Superior Court* (2008) 168 Cal.App.4th 1403, that case acknowledged decisions holding "that sanctions may be imposed in exceptional circumstances not specifically authorized by the statutes governing the particular discovery methods" (*id.* at p. 1423), and simply concluded that those cases

PwC's reading of "to the extent" fits with how the same phrase is used elsewhere in the Discovery Act. (See, e.g., Code Civ. Proc., § 2030.220, subd. (b) ["If an interrogatory cannot be answered completely, it shall be answered to the extent possible."]; Code Civ. Proc., § 2025.230 ["[T]he deponent shall designate and produce at the deposition those of its officers, directors, managing agents, employees, or agents who are most qualified to testify on its behalf as to [designated] matters to the extent of any information known or reasonably available to the deponent."].) Each of these provisions uses the term to connote an upper limit on a continuum, not the type of binary choice forced on it by the City.

Rather than even discuss the plain text of section 2023.030, the City skips straight to context and structure. In particular, the City claims that PwC's reading "would make superfluous not only

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"are distinguishable and d[id] not justify the sanctions imposed" (*id.* at p. 1428). The City also fails to respond to PwC's argument that it would be nonsensical to read "to the extent" as equivalent to "if" given that the phrase "appears immediately before a sentence that does actually use the word 'if'" (OBM at p. 47), other than to allege that "[a] cursory review of the statute shows that is untrue" (ABM at p. 45, fn. 9). Fair enough: The "to the extent" clause appears *two* sentences before the "if" clause.

Section 2023.030's language requiring authorization by another section, but also the sanctions provisions of those chapters governing the specific discovery methods." (ABM at p. 32.) But this argument rests on the faulty assumption that "[t]rial courts would not need to consult or comply with the sanctions-related limitations and requirements that the Legislature included in the method specific provisions." (*Id.* at p. 33.)

Once again, the City's argument fails both on the facts and the law. As PwC has made clear, "the '[t]o the extent authorized' language in the introductory paragraph of section 2023.030 simply confirms that, notwithstanding the broad general authority to impose a wide range of sanctions conferred by the principal clauses of section 2023.030's introductory paragraph and the first sentence of subdivision (a), *courts may not impose sanctions that exceed the outer limits prescribed in certain situations by subsequent, more specific provisions of the Discovery Act*." (OBM at pp. 51–52, italics added.) In other words, a two-step process governs the imposition of sanctions.

First, courts must determine whether the target of sanctions "engag[ed] in conduct that is a misuse of the discovery process." (Code Civ. Proc., § 2023.030; see also *id.*, § 2023.010.) If the

answer is "yes," the court "may impose" sanctions. (*Ibid.*) Second, the court must determine whether a method-specific provision of the Discovery Act addresses the precise conduct at issue. If the answer is "yes," the court may impose sanctions only "[t]o the extent authorized" by that method-specific provision—for example, "a monetary sanction" against a party who "makes or opposes a motion to compel a [further] response to interrogatories" without "substantial justification" (*id.*, § 2030.290, subd. (c)), but "an issue sanction, an evidence sanction, or a terminating sanction" if the "party then fails to obey an order compelling . . . [further] response to interrogatories" (*id.*, § 2030.290, subd. (c)).

This accords with longstanding appellate authority, which recognizes that "[t]his structure suggests that the section 2023[.030] phrase '[t]o the extent authorized by the section governing any particular discovery method …, the court … may impose the following sanctions' simply refers to whether the discovery method statute authorizes a *type* of sanction (i.e., monetary, issue, evidence, terminating or contempt) for a particular misuse of the discovery method." (*London v. Dri-Honing Corp.* (2004) 117 Cal.App.4th 999, 1006, italics added.)

For the same reason, the City misses the mark with its suggestion that "[r]eversing the Court of Appeal would also reverse the 'well settled' understanding that '[a] specific provision relating to a particular subject will govern in respect to that subject, as against a general provision.'" (ABM at p. 33, quoting *Muller v. Fresno Cmty. & Hosp. Ctr.* (2009) 172 Cal.App.4th 887, 906.)[6] The relevant question here is not which provision controls, but whether section 2023.030 and the method-specific provisions can be

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[6] The City criticizes PwC for not "address[ing] *Muller*, even though it was at the center of the City's supplemental letter brief filed with the Court of Appeal." (ABM at p. 41, fn. 7.) Tellingly, neither the majority nor the dissenting opinions below addressed *Muller* either. And it is easy to see why. The City claims that "[t]he *Muller* court rejected [PwC's] interpretation of the Civil Discovery Act" by "conclud[ing] that, to determine whether a specific sanction could be imposed in the face of a specific type of discovery abuse, 'we must look to section 2034.300, subdivision (b) and not the general provisions providing for sanctions for 'conduct that is a misuse of the discovery process' found in Code of Civil Procedure section 2023.030.'" (ABM at p. 43.) But the court did so because the precise misconduct alleged—the "[non]disclosure of expert witness information and testimony"—was "specifically regulated in Code of Civil Procedure section 2034.010[.]" (*Muller*, *supra*, 172 Cal.App.4th at p. 906.) Notably, *Muller* distinguished *Sherman v. Kinetic Concepts, Inc.* (1998) 67 Cal.App.4th 1152, which "approved the imposition of sanctions, including monetary sanctions, under Code of Civil Procedure section 2023.030," where the sanctioned party engaged in an extended pattern of misconduct, as did the City here. (*Ibid.*; see *Sherman*, *supra*, 67 Cal.App.4th at p. 1164.)

harmonized. After all, "'[w]hen two statutes touch upon a common subject,' [this Court] must construe them 'in reference to each other, so as to harmonize the two in such a way that no part of either becomes surplusage.'" (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 476.) And that is what PwC's interpretation does, consistent with longstanding caselaw.

It is *the City's* reading of section 2023.030 that would yield surplusage. If that provision's prefatory clause barred courts from imposing sanctions except where authorized by a subsequent method-specific provision of the Discovery Act, then section 2023.030's repeated statements that the court "may impose" sanctions would be meaningless surplusage. Although the City insists that "the clauses … work together" by "recogniz[ing] that sanctions, including monetary sanctions, can still be imposed for misuse of the discovery process '[t]o the extent authorized by the chapter governing any particular discovery method or any other provision of this title'" (ABM at p. 45), that misses the point. If section 2023.030's "may impose" language applied only where another provision *already* provides that the court shall or may impose sanctions, then section 2023.030's

"may impose" language would add nothing to the statutory scheme.

Given the overwhelming weight of the text, context, and structure of section 2023.030, it should come as no surprise that courts have uniformly recognized that section 2023.030 authorizes courts to impose sanctions for misuses of the discovery process identified in section 2023.010. (See OBM at p. 39, citing, e.g., *Kwan Software Engineering, Inc. v. Hennings* (2020) 58 Cal.App.5th 57; *Dept. of Forestry & Fire Protection v. Howell* (2017) 18 Cal.App.5th 154.) Even the Court of Appeal majority acknowledged that "no prior case law squarely held that section 2023.030 requires monetary sanctions to be authorized by another provision of the Discovery Act." (Op. at p. 51.)

The City does not dispute that these cases recognized that monetary sanctions could (or should) be awarded under sections 2023.030 and 2023.010. Instead, the City argues that they "did not interpret the '[t]o the extent authorized' language in Section 2023.030" (ABM at p. 48), and thus are supposedly irrelevant because "'cases are not authority for propositions that are not considered'" (*id.* at p. 47, quoting *Cal. Bldg. Indus. Ass'n v. State Water Res. Control Bd.* (2018) 4 Cal.5th 1023, 1043).

But once again, the City has completely misread the law, which simply holds that a case is not authority for a *question of law* not passed upon by the court—not that a case's precedential force can somehow be nullified whenever any lawyer can conjure up some new *argument* on that question of law. (See, e.g., *Cal. Bldg. Indus. Ass'n*, *supra*, 4 Cal.5th at p. 1043 ["Plaintiff also argues *Marina County Water Dist. v. State Water Resources Control Bd.* (1984) 163 Cal.App.3d 132 supports its position. But the *Marina* court did not interpret section 183. It simply mentioned the statute in discussing an earlier judgment against the Board."].) Otherwise, long-settled principles of stare decisis would have no application as long as creative counsel can think up some new argument not directly addressed in otherwise binding precedent.

In any event, Court of Appeal decisions are not binding "authority" on this Court. They do, however, reflect what other courts and parties have found important when interpreting the same statute. And the fact that "the litigants and the court[s] never even considered" the notion that section 2023.030's prefatory clause somehow prohibits courts from imposing sanctions except where authorized by a method-specific provision

simply underscores how unmoored the Court of Appeal majority's reading is. (ABM at p. 47.)

B. The Legislative History of the Discovery Act Confirms That Sections 2023.030 and 2023.010 Give Courts Broad Authority to Address Discovery Abuse, Especially Systemic Abuse.

Unable to ground its position in the statute's text or structure, the City turns to legislative history. (See ABM at pp. 34–40.) But because the statutory text is clear, this Court need not look to legislative history. (See *People v. Cornett* (2012) 53 Cal.4th 1261, 1265 ["The plain meaning controls if there is no ambiguity in the statutory language."].) Even if it were inclined to do so, the legislative history supports PwC's interpretation of the statute.

While this history does indicate that most cases of discovery misconduct are adequately addressed by the Discovery Act's method-specific provisions, that much is undisputed. Again, PwC maintains only that sections 2023.030 and 2023.010 provide an independent source of authority for imposing sanctions—a general authorization that may be *limited* or *conditioned* in particular instances by those method-specific provisions where they apply, but which otherwise operates unimpeded wherever a party has

misused the discovery process. (See *ante* at pp. 18–19.) Nothing cited by the City suggests otherwise.

The Reporter's Note to section 2023.030 certainly doesn't. Although the City observes that "[t]he Reporter's Note for what is now Section 2023.030 specifically describes the statute as '***mainly*** definitional in function'" (ABM at p. 37, emphasis added), nowhere does it suggest that the provision is *solely* definitional. Commentators have long recognized it's not: "Although the Reporter's Notes to the Proposed Act of 1986 suggest the revisions are primarily definitional, it is evident that many more substantial changes are involved." (Donovan, *The Sanction Provision of the New California Civil Discovery Act, Section 2023: Will It Make a Difference or Is It Just Another "Paper Tiger"?* (1988) 15 Pepperdine L.Rev. 401, 402–403.)

The focus on section 2023.030's definitional function is understandable given that it marked a significant departure from the prior statutory scheme governing discovery sanctions. Section 2023.030 was "derived from the present CCP § 2034" (Reporter's Note to Section 2023), which outlined every form of discovery misconduct that could be sanctioned, as well as the sanctions that could be imposed for that misconduct. The Civil

Discovery Act of 1986, by contrast, identifies specific forms of sanctionable misconduct in the chapters governing the respective discovery methods, which then "cross-reference to [section 2023.030] to ascertain just what those terms mean." (*Ibid.*) This approach was "preferable to that used in the [prior] Discovery Act, which requires constant reference to CCP § 2034, a cumbersome statute containing almost 1,400 words." (*Ibid.*)

But the foregoing does not conflict with section 2023.030's plain meaning, which authorizes courts to impose sanctions for other misuses of the discovery process not expressly addressed in the Act's method-specific provisions. Such a reading makes far more sense and better fits the Legislature's purpose in enacting the Civil Discovery Act, since a frequent criticism of the prior regime was that "section 2034 does not cover all possible violations of the discovery process." (Tonegato, *The Decline & Fall of Sanctions in California Discovery: Time to Modernize California Code of Civil Procedure Section 2034* (1974) 9 U.S.F. L.Rev. 360, 385.) Commentators advised that "[a]ny amendment must go beyond the four corners of section 2034 and include a comprehensive study of the discovery process to insure total protection of discovery throughout the litigation." (*Id.* at p. 388.)

That is exactly what section 2023.030 does by providing that a court "*may impose*" sanctions for "misuses of the discovery process" as broadly defined in section 2023.010—and precisely what it *wouldn't* do under the City's proposed interpretation. (See Dis. Op. at p. 32 [noting, for example, that "the chapters of the Discovery Act governing particular discovery methods do not mention sanctions for spoliation of evidence"].)

The Reporter's Note to section 2023.010 is no more helpful to the City. It is true, as the City observes (ABM at p. 36), that the Reporter's Note concedes "[i]t is arguable that, in view of the detailed regulations of the discovery process in the various sections governing the individual methods of discovery, this subdivision is unnecessary." (Reporter's Note to Section 2023.010.) But crucially, the subdivision *was* included in the Discovery Act, and it is a bedrock principle that "[i]n construing the words of a statute … [,] every word should be given some significance, leaving no part useless or devoid of meaning." (*City & Cnty. of San Francisco v. Farrell* (1982) 32 Cal.3d 47, 54.) And the Reporter's Note is clear that section 2023.010 was included because "the Commission feels that the subdivision underscores the importance of conducting discovery in a manner that does not abuse the methods provided

to achieve its goals" (Reporter's Note to Section 2023.010)—a purpose that aligns with PwC's reading of sections 2023.030 and 2023.010 as authorizing courts to sanction discovery misconduct consistent with whatever limits or conditions (if any) may be prescribed by subsequent method-specific provisions.

Unable to ground its position in the Reporter's Notes, the City turns to a treatise written by the late Professor James Hogan, who served as the reporter to the joint commission tasked with drafting the Civil Discovery Act of 1986. (See, e.g., ABM at pp. 36, 37, 38 & fn. 6, 39, 40.) But while the City insists that "[t]he Reporter's Notes for a statute are 'entitled to great weight in construing the statute and determining the intent of the Legislature'" (*id.* at p. 35, quoting *London*, *supra*, 117 Cal.App.4th at p. 1008, fn. 2), there is no reason why the *independent* writings of a reporter would merit any such deference—especially in light of the lack of textual support for the City's view. (See, e.g., *Diamond Multimedia Systems, Inc. v. Super. Ct.* (1999) 19 Cal.4th 1036, 1055 [declining to consider "comments made by … Commissioner Volk and Professor Harold Marsh, Jr., the reporter of the committee, in their treatise" because the "language of [the]

statutes is [not] susceptible to more than one reasonable construction"].)

In any event, even Professor Hogan's treatise is in the minority on the question presented here. For example, one leading treatise explains that, while "a party should first consider the sanctions authorized by the CDA for the particular discovery method at issue (e.g., depositions, interrogatories, requests for admissions)," "[i]f the sanctions provisions for the particular discovery method do not address the misconduct, or if the sanctions authorized by the provisions would not adequately rectify the misconduct, ***the party should explore the possibility of sanctions under the CDA's more general provisions***." (Levine, *O'Connor's Cal. Practice* (2023 ed.) Civil Pretrial § 5, emphasis added.)

And as one commentator wrote shortly after the Discovery Act was enacted, "the new law leaves full discretion with the courts to decide whether acts not specifically mentioned in the new statute do, in fact, constitute a misuse and require the imposition of monetary sanctions" by "provid[ing] that the court *may* impose a monetary sanction where a person engages in the misuse of pretrial discovery or where a person unsuccessfully asserts that

another has engaged in the misuse of pretrial discovery." (Donovan, *supra*, 15 Pepperdine L.Rev. at pp. 411–412.) "[T]his gives the court system needed flexibility to determine whether actions not specified by the new act constitute a misuse." (*Id.* at p. 412.)

II. Courts' Inherent Authority Independently Authorizes Them to Impose Monetary Sanctions for Discovery Misconduct When Necessary to Vindicate Their Core Judicial Function.

The City, like the Court of Appeal, does not dispute that courts have inherent authority, under Article VI, section 1 of California's Constitution, to impose discovery sanctions as necessary to vindicate their core judicial function of rendering justice in particular cases. (ABM at p. 59; Op. at p. 59.) It seeks to limit such inherent authority, however, to the imposition of *nonmonetary* sanctions. (ABM at pp. 57–58.) Relying on this Court's decision in *Bauguess v. Paine* (1978) 22 Cal.3d 626 and its progeny, the City contends that courts are powerless "to impose monetary sanctions for discovery violations." (ABM at p. 57.)

But as PwC explained in its Opening Brief, *Bauguess*—which prohibited the award of monetary sanctions "to *punish* misconduct" (22 Cal.3d at p. 638, italics added)—is not on point.

(OBM at pp. 69–71.) Unlike the sanctions order in *Bauguess*, the sanctions imposed by the trial court here were *not* imposed to punish the City. Instead, the trial court sought to provide PwC with some (partial) measure of compensation for the millions of dollars in attorney's fees and costs it incurred—partly at the trial court's direction—to uncover the City's obstruction, fraud, and cover-ups, which continued even after it fired its now-convicted Special Counsel. (4AA1665–1669.) The lack of a punitive purpose underlying the trial court's sanctions award distinguishes the sanctions here from the unlawful sanctions in *Bauguess*. (See *Olmstead v. Arthur J. Gallagher & Co.* (2004) 32 Cal.4th 804, 809 [explaining that the restriction on monetary sanctions in *Bauguess* was limited to the use of "fee awards" imposed "to *punish* misconduct," italics added]; see also *Goodyear Tire & Rubber Co. v. Haeger* (2017) 581 U.S. 101, 108 [sanctions under a court's inherent authority "must be compensatory rather than punitive in nature"].)

Moreover, in concluding that the trial court's punitive monetary sanction in *Bauguess* exceeded its inherent authority, this Court emphasized that "the penalty assessed" by the trial court "was in excess of that permitted for contempt" by statute.

(*Bauguess*, *supra*, 22 Cal.3d at pp. 638–639.) It was the trial court's circumvention of a legislatively enacted limit on courts' imposition of civil contempt that accounted for this Court's concern that "serious due process problems would result were trial courts to use their inherent power, in lieu of the contempt power, to punish misconduct." (*Id.* at p. 638.) This Court's decision in *Olmstead* echoed the same point, explaining that *Bauguess* "placed limits" on courts' authority to award attorney's fees "to avoid the 'serious due process problems' that would arise if trial courts had unfettered authority to award fees as sanctions." (*Olmstead*, *supra*, 32 Cal.4th at p. 809, citing *Bauguess, supra*, 22 Cal.3d at pp. 637–638.)

There is significant daylight between the sanctions award here and the one in *Bauguess*. In imposing its sanctions order, the trial court here did not circumvent any legislatively enacted procedure or limit on the imposition of monetary sanctions. As the City acknowledges, none of the "discovery misuse [here] was beyond the Civil Discovery Act's reach." (ABM at p. 60, fn. 13.) And as the trial court explained, its sanctions award was based on both section 2023.030 *and* its "inherent power to deal with litigation abuse." (8AA4010.) The trial court's sanctions order is

thus far different from the one in *Bauguess*, where the court sought to bypass the statutory maximum fine for civil contempt. (*Bauguess*, *supra*, 22 Cal.3d at pp. 638–639.)

The City nevertheless urges this Court to interpret the Legislature's enactment of the Discovery Act as manifesting an intent to rein in courts' authority to impose monetary sanctions for discovery misconduct. (ABM at p. 61.) But the purpose and history of the Discovery Act demonstrate the opposite: The Legislature enacted the Civil Discovery Act of 1986 to invest courts with *stronger* and *more robust* authority to remedy discovery abuses—especially the most systematic misconduct of the sort perpetrated by the City here. (See OBM at pp. 54–56; Dis. Op. at pp. 34–35.)

Had the Legislature sought to *restrict* courts' authority to impose monetary sanctions to only those discrete circumstances specifically delineated in one of the Act's method-specific provisions (as the City contends), "one would assume there would be some mention of such a goal elsewhere in [the Discovery Act]." (*Cal. Cannabis Coalition v. City of Upland* (2017) 3 Cal.5th 924, 940.) "Yet nothing close to this limitation appears in the language of [the Discovery Act]"—an "omission" that "is significant to show"

the Legislature had no such intent. (*United Auburn Indian Cmty. of Auburn Rancheria v. Newsom* (2020) 10 Cal.5th 538, 554.) Because "it is unlikely [the Legislature] would have used such a subtle approach to achieve [an important] end," this Court should decline to read into the statute a restriction that does not exist. (*Mendoza v. Fonseca McElroy Grinding Co.* (2021) 11 Cal.5th 1118, 1135.)

The sanctions award here also did not compensate PwC for the millions of dollars in fees it incurred defending against the City's meritless claims—fees that PwC did not even request in its sanctions motion. (See 8AA4010–4011 [trial court describing the "three categories of conduct," all of which related to PwC's discovery abuse and fraud, "in which [PwC] seeks sanctions against the City"].). Instead, the trial court's sanctions award was intended to compensate PwC for just a fraction of the significant expenses PwC had to incur as a result of the "serious abuse of discovery by the City and its counsel." (8AA4011; see *ibid.* [trial court finding that "PwC has been required to expend a substantial number of hours because of the abuse in discovery. This serious abuse merits considerable sanctions."].) The trial court's sanctions award is thus far different from the award

in *Bauguess*, which was the amount "defense counsel requested … for the two days of the aborted trial." (*Bauguess*, *supra*, 22 Cal.3d at p. 633.)

The City is also wrong to suggest that California courts have rejected the approach to courts' inherent authority adopted by the U.S. Supreme Court in *Chambers v. NASCO, Inc.* (1991) 501 U.S. 32. (ABM at p. 59.) The decision the City cites in support of that dubious proposition, *Sheller v. Superior Court* (2008) 158 Cal.App.4th 1697, addressed a far more limited topic: "the inherent power of a trial court … to sanction attorneys for bad faith conduct" unrelated to discovery. (*Id.* at p. 1711.) Relying once again on *Bauguess*, the court explained "that procedural safeguards have been enacted [by the Legislature] to govern contempt proceedings" to avoid "serious due process problems [that] would result were trial courts to use their inherent power, in lieu of the contempt power, to punish" misconduct by attorneys. (*Id.* at p. 1712.)

But *Sheller* did not address the inherent authority of courts to impose other types of monetary sanctions, including sanctions for discovery misconduct, that do not circumvent any statutory limits. And it certainly did not address *Chambers*'s concern that

"requiring a court first to apply [r]ules and statutes containing sanctioning provisions" in "circumstances … in which all of a litigant's conduct is deemed sanctionable" would "foster extensive and needless satellite litigation." (*Chambers*, *supra*, 501 U.S. at 51; see also *id.* at p. 46 [noting the "intersti[tial]" role of courts' "inherent power[s]," which are necessary to "vindicat[e] judicial authority" and "mak[e] the prevailing party whole for expenses caused by his opponent's obstinacy"].)

That concern is at its zenith here given the City's extensive, years-long pattern of discovery abuse, fraud, and obstruction, which included repeated and wholly improper claims of privilege (4AA1633–1634; 3RT4836, 4838), lying to the court during discovery hearings (4AA1646–1647; 2RT1806; 3RT4835), the unilateral termination of court-ordered depositions (4AA1644–1647), as well as flagrantly improper attempts at recanting and rewriting deposition testimony through a multi-page "errata" (4AA1668)—just to name a few examples.

Confronted with an ocean of adverse authority substantiating courts' "robust and varied" inherent sanctioning authority (OBM at p. 63, citations omitted), the City simply dismisses the cases cited by PwC as "all inapposite." (ABM at

p. 62.) But the distinctions it draws actually *support* PwC's position. The City contends, for example, that several of PwC's cases involved different types of sanctions compared to the monetary sanctions imposed here. (See ABM at p. 62 [explaining that *Howell* and *Stephen Slesinger, Inc. v. Walt Disney Co.* (2007) 155 Cal.App.4th 736 "concerned terminating sanctions," and *Peat, Marwick, Mitchell & Co. v. Super. Ct.* (1988) 200 Cal.App.3d 272 involved "evidentiary sanction[s]"].)

But as PwC has explained, given that courts have the inherent authority to impose evidentiary, issue, and terminating sanctions, it is counterintuitive—and senseless—to suggest that courts do not have the authority to impose less drastic monetary sanctions. (OBM at pp. 65–66.) As this case illustrates, such a rule would also create perverse, dangerous incentives for the worst and most incorrigible discovery abusers, such as the City here: Because the City voluntarily dismissed its claims against PwC with prejudice on September 26, 2019 (7AA3304–3316), monetary sanctions were the only remaining tool available to try to remedy the City's systemic wrongdoing and to provide some measure of compensation to PwC for the millions in expenses it has had to incur in uncovering the City's elaborate fraudulent scheme.

Unable to find its footing in precedent, practice, or basic fairness, the City instead trots out a wholly unconvincing parade of horribles if this Court recognizes the inherent authority of courts to impose monetary sanctions for discovery misconduct. According to the City, doing so would engender "chaos[,] … questions, uncertainty, and litigation" by allowing courts "to pick and choose which provisions of the Code of Civil Procedure to follow and which to disregard as infringing on their inherent powers." (ABM at p. 67.)[7] But that is just the latest straw man the City argues against, given that neither PwC nor the trial court has suggested such free-wheeling, unrestrained picking and choosing.

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[7] The City relies in part on *Le Francois v. Goel* (2005) 35 Cal.4th 1094 for this assertion. (ABM at p. 67.) It does so despite asserting, just a few pages earlier, that PwC's citation of *Le Francois* is "inapposite because [*Le Francois*] do[es] not concern the imposition of any type of sanctions." (*Id.* at p. 64, fn. 16.) But even if the City could have it both ways, *Le Francois* does not support its argument. There, this Court addressed a regime under which courts could freely "declare [as] invalid" statutes they perceived as limiting their powers. (*Le Francois*, *supra*, 35 Cal.4th at p. 1104.) But as PwC has explained, courts do not disregard any legislatively enacted limits when, in appropriate cases, they exercise their inherent authority to impose monetary sanctions for discovery misconduct, in order to vindicate their core judicial function. Nothing in the Discovery Act purports to restrict courts' authority to impose these types of sanctions.

Instead, PwC maintains that courts have the inherent authority—which overlaps with and, in appropriate cases, augments their statutory authority—to impose monetary sanctions for discovery misconduct as necessary to vindicate their core judicial function of ensuring the orderly administration of justice in particular cases and preserving the integrity of the judicial system. (See, e.g., *Rutherford v. Owens-Illinois, Inc.* (1997) 16 Cal.4th 953, 967; *Peat, Marwick*, *supra*, 200 Cal.App.3d at p. 289.) Such inherent authority is particularly well-suited to a case like this one, in which the trial court's carefully tailored sanctions were imposed to compensate for and protect against the City's serial discovery abuse that imperiled the sound administration of justice. Because no legislatively enacted limit on that authority exists here, the trial court acted well within its inherent authority in imposing sanctions on the City to partially compensate PwC for the expenses it incurred as a direct result of the City's misconduct. (See *United Auburn*, *supra*, 10 Cal.5th at p. 565.)

Such an approach has long worked well in the federal system, without any of the disastrous outcomes foretold by the City. As Justice Kagan explained for a unanimous Court in

Goodyear, courts' inherent authority is necessary for the judiciary "to manage [its] own affairs so as to achieve the orderly and expeditious disposition of cases." (*Goodyear Tire & Rubber Co. v. Haeger* (2017) 581 U.S. 101, 107.) "That authority includes 'the ability to fashion an appropriate sanction for conduct which abuses the judicial process.'" (*Ibid.*, quoting *Chambers*, *supra*, 501 U.S. at pp. 44–45.) And in cases such as this one where "a plaintiff initiates a case in complete bad faith," courts' inherent authority allows them to "grant all fees incurred" as a result of the party's sanctioned behavior. (*Id.* at pp. 110–111.)

The trial court's judgments, moreover, "are entitled to substantial deference on appeal" given "the trial court's 'superior understanding of the litigation.'" (*Id.* at p. 110, quoting *Hensley v. Eckerhart* (1983) 461 U.S. 424, 437.) The long experience of federal courts in imposing such sanctions, and the resultant lack of "chaos" and "uncertainty" (ABM at p. 67), exposes the City's hyperbole as false fear-mongering. (Cf. Liu, *State Courts and Constitutional Structure* (2018) 128 Yale L.J. 1304, 1339 ["whenever the [U.S. Supreme] Court confronts a federal constitutional problem with a state analogue, it might usefully learn from the experience of the state courts that got there first"].)

The City also suggests that recognizing courts' inherent authority in these circumstances would lead to questions such as "what … constitutes discovery abuse subject to monetary sanctions." (ABM at p. 67.) But that is yet another false concern: As Justice Grimes explained, the City has not argued on appeal "that it did not engage in discovery abuse for which sanctions are recoverable." (Dis. Op. at p. 1.)

In sum, all of the City's arguments against recognizing courts' inherent authority to vindicate their core judicial function by imposing monetary sanctions fall flat.

III. This Court Should Instruct the Court of Appeal to Reinstate the Trial Court's Sanctions Award, Even if It Were to Adopt the Court of Appeal Majority's Unprecedented Misreading of the Discovery Act.

In its last-ditch attempt to evade responsibility for its years-long pattern of rampant discovery abuse, fraud, and obstruction, the City weakly suggests that justice can still be served on remand if the trial court ties each dollar of sanctions awarded to discrete violations of particular discovery-method-specific provisions. (See ABM at p. 70 [trial court must "allocate amounts [it awards as sanctions] to different categories of misconduct," "identify [and] explain which method-specific provision of the Civil Discovery Act

was the basis for the monetary sanction," and "state whether the sanction was based in part or in whole on inherent power outside the Civil Discovery Act."].) This Court should reject the City's attempt to drag out this litigation any longer in a case the City never should have brought.

Conspicuously absent from the City's brief is any citation of a case in which any court used such a laborious, time-consuming process to award monetary sanctions for systemic, multi-year discovery misconduct such as what the City engaged in. No such case is ever cited for good reason: None exists. Even under the Court of Appeal majority's unprecedented misreading of the Discovery Act, this type of "green-eyeshade account[ing]" is not required. (*Goodyear*, *supra*, 581 U.S. at 110.) Instead, as the U.S. Supreme Court has explained, a trial court's judgments regarding the expenses incurred as a result of a party's serial misconduct "are entitled to substantial deference on appeal." (*Ibid.*)

In support of its argument, the City distorts the record, mischaracterizing the trial court's ruling and attempting to engraft onto it the false patina of ambiguity and shoddiness. (ABM at pp. 70–72.) According to the City, "the trial court did not find[]

what amount of attorney['s] fees were incurred as a result of each of the City's specific forms of alleged misconduct." (*Id.* at p. 72.)

But that contention is not borne out by the record. As Justice Grimes explained in her thorough dissent, "[t]here is no ambiguity about what conduct the [trial] court found sanctionable." (Dis. Op. at p. 34.) During the lengthy October 6, 2020 hearing on PwC's sanctions motion, the trial court specifically found numerous examples of the City's extensive, unrelenting discovery abuse, fraud, and obstruction—including the City's initial refusal to produce a PMQ witness (3RT4834), that witness's refusal to prepare for or answer questions during the deposition (3RT4834–4835), the City's improper claims of privilege over more than 19,000 documents (3RT4833), and the City's improper recanting of then-Chief Deputy City Attorney James Clark's testimony, which required PwC to take an additional 18 fact-witness depositions (3RT4837). And contrary to the City's contention (ABM at p. 73), the trial court specifically found, "based upon [its] review of all the evidence of the files and records in this case … and the totality of the circumstances," that there had "been a serious abuse of discovery by the City and its counsel." (3RT4838.) Because these forms of discovery abuse are

sanctionable even under the Court of Appeal's unprecedented misreading of the Discovery Act, this Court should remand with instructions to reinstate the trial court's sanctions award in full.

The City goes further with its revisionist rewriting of history, falsely representing that the trial court's sanctions order "did not evaluate or find that the fees and expenses PwC incurred were reasonable." (ABM at p. 72.) Even a cursory review of the trial court's sanctions ruling exposes this latest untruth in the City's Answer Brief: The trial court specifically found in its written ruling that PwC's "billing rates and time summaries" for the expenses PwC had to incur were "*each supported by evidence*." (8AA4011, italics added.)

The court also applied a steep discount from the sanctions requested in PwC's motion—awarding only $2.5 million of the more than $8 million requested and exhaustively substantiated by PwC. (8AA4010–4011; see 3AA1043–1581; 4AA1583–2128; 5AA2130–2710; 6AA2712–3019.) This record evidence, together with the fact that this Court "draw[s] all legitimate and reasonable inferences in favor of the trial court's decision" (*Coffey v. Shiomoto* (2015) 60 Cal.4th 1198, 1217), demonstrates that the trial court rejected the City's arguments about the supposed excessiveness of

the fees sought by PwC—something the City never contested on appeal or at the petition-for-review stage in this Court, and is thus now precluded from challenging (*Doers v. Golden Gate Bridge etc. Dist.* (1979) 23 Cal.3d 180, 184, fn. 1; see Dis. Op. at p. 1).

If anything, the City's weak suggestion that all will be well on remand exposes the fundamental flaws in its (and the Court of Appeal majority's) misreading of the Discovery Act. Even though "[t]here is no question that monetary sanctions are authorized for those kinds of discovery violations" found by the trial court (Dis. Op. at p. 34), the City insists that this Court remand the case for the trial court to conduct an exhaustive line-by-line allocation and accounting of each dollar of sanctions awarded.

Such a result would impose a tremendous, unfair, and unwise burden—both on innocent parties who are *victims* of discovery misconduct and on trial courts seeking to restore balance and basic fairness to the adversary system through the measured issuance of compensatory sanctions. This Court should decline to adopt such an onerous requirement, which finds no support in reason or precedent.

CONCLUSION

The trial court acted well within its authority by awarding PwC monetary sanctions as partial compensation for the City's years-long discovery abuse. At a minimum, the award can clearly be upheld on this record under the method-specific provisions of the Discovery Act. Consequently, this Court should reverse the Court of Appeal's judgment and remand with instructions to reinstate, in full, the trial court's sanctions award.

Dated: August 16, 2023 Respectfully submitted,

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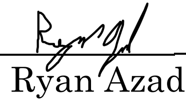
CERTIFICATION OF WORD COUNT

Pursuant to rule 8.520(c)(1), California Rules of Court, the undersigned hereby certifies that this brief contains 8,362 words, excluding tables and this certificate, according to the word count generated by the computer program used to produce the brief.

Dated: August 16, 2023

GIBSON, DUNN & CRUTCHER LLP



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PRICEWATERHOUSECOOPERS LLP'S REPLY BRIEF ON THE MERITS

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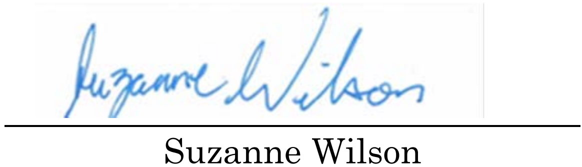

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This proof of service was automatically created, submitted and signed on my behalf through my agreements with TrueFiling and its contents are true to the best of my information, knowledge, and belief.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

8/16/2023

Date

/s/Julian Poon

Signature

Poon, Julian (219843)

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