

IN THE SUPERIOR COURT FOR THE STATE OF ALASKA
THIRD JUDICIAL DISTRICT, AT ANCHORAGE

ALASKA BUILDING, INC., an Alaska
corporation,

Plaintiff

vs.

716 WEST FOURTH AVENUE LLC, *et al.*

Defendants.

COPY
Original Received

JUN 23 2015

Clerk of the Trial Courts

Case No. 3AN-15-05969CI

**SUR-REPLY TO:
LEGISLATIVE AFFAIRS AGENCY'S REPLY IN SUPPORT OF
MOTION TO DISMISS OR IN THE ALTERNATIVE TO SEVER
CLAIMS FOR MISJOINDER**

The Legislative Affairs Agency's has so grossly mischaracterized *Ruckle v. Anchorage School District*, 85 P.3d 1030 (Alaska 2004) in its Reply In Support Of Motion To Dismiss Or In The Alternative To Sever Claims For Misjoinder (Reply) that Plaintiff Alaska Building, Inc. (ABI) has moved for leave to file this sur-reply. In addition, ABI draws this Court's attention to the fact that the Amended Complaint was filed within the time allowed for amendment without motion and it should not be summarily dismissed as urged by the Legislative Affairs Agency.

A. In *Ruckle* Another Plaintiff Had Brought Suit

At both pages 3 and 4 of its Reply, the Legislative Affairs Agency grossly mischaracterizes *Ruckle* as applying here because a disappointed bidder is a more

LAW OFFICES OF
JAMES B. GOTTSTEIN
406 G STREET, SUITE 206
ANCHORAGE, ALASKA
99501

TELEPHONE
(907) 274-7686
FACSIMILE
(907) 274-9493

appropriate plaintiff than ABI. This grossly mischaracterizes *Ruckle* because there the critical factor was that such a disappointed bidder had already filed suit.

Ruckle recites the requirements for citizen-taxpayer standing as follows:

Under Alaska law, to establish such standing a taxpayer or citizen need only show that the case in question is "one of public significance" and the plaintiff is "appropriate in several respects." This "[a]ppropriateness has three main facets: the plaintiff must not be a 'sham plaintiff' with no true adversity of interest; he or she must be capable of competently advocating his or her position; and he or she may still be denied standing if 'there is a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit

85 P.3d at 1034-1035, footnotes omitted.

Ruckle also addresses the importance and purpose of the public bidding system:

In *McBirney & Associates v. State*,¹ this court explained that the purposes of the competitive public bidding system are:

to prevent fraud, collusion, favoritism, and improvidence in the administration of public business, as well as to insure that the [state] receives the best work or supplies at the most reasonable prices practicable.

... [T]he requirement of public bidding is for the benefit of property holders and taxpayers, and not for the benefit of the bidders; and such requirements should be construed with the primary purpose of best advancing the public interest.

85 P.3d at 1035, footnotes omitted.

In *Ruckle* the Supreme Court was clear that *Ruckle* would have had standing if no suit had already been filed by a disappointed bidder.

These cases do support the proposition that citizen-taxpayers have standing to challenge the results of public bidding systems. However, none of these cases involve a situation, such as the one at bar, where both the

¹ 753 P.2d 1132 (Alaska 1988).

bidder and a citizen-taxpayer have filed suit on the same issue, and three of the cases hail from jurisdictions where bidders are only permitted to challenge the bid procedures of municipalities in which they are also municipal taxpayers.

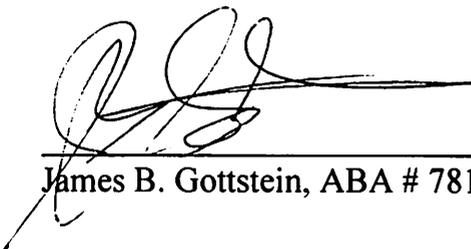
85 P.3d at 1035-1036, footnotes omitted. Here, no suit has been filed by a disappointed or potential bidder.

ABI has citizen-taxpayer standing under *Ruckle*.

B. The Amended Complaint Is Allowed Under the Routine Pretrial Order

Citing the 1984 case of *Fomby v. Whisenhunt*, 680 P.2d 787, 790 (Alaska 1984), the Legislative Affairs Agency also argues the Amended Complaint filed June 12, 2015, should not be allowed. This ignores that the Routine Pretrial Order in this case allows the parties to amend the pleadings without motion until June 30, 2015, a circumstance that was not present in *Fomby*. The Legislative Affairs Agency apparently recognizes that the proper mechanism to challenge the legal sufficiency of the complaint is not through its motion to dismiss for lack of standing, but through a Civil Rule 12(b)(6) motion. *See*, note 12.²

Dated June 25, 2015.



James B. Gottstein, ABA # 7811100

² Substantively, the Legislative Affairs Agency's legal analysis is wrong because the LIO Lease is in reality a contract to construct and then lease the new Anchorage Legislative Information Office Building and for all intents and purposes the Legislative Affairs Agency did contract for Pfeffer Development to be the Project Manager. Exhibit 1, pages 30-84 to June 12, 2015, Affidavit in Support of Plaintiff's Motion for Partial Summary Judgment (Not Extension).

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THIRD JUDICIAL DISTRICT, AT ANCHORAGE

ALASKA BUILDING, INC., an Alaska
corporation,

Plaintiff

vs.

716 WEST FOURTH AVENUE LLC,
KOONCE PFEFFER BETTIS, INC., d/b/a
KPB ARCHITECTS, PFEFFER
DEVELOPMENT, LLC, LEGISLATIVE
AFFAIRS AGENCY, and CRITERION
GENERAL, INC.,

Defendants.

Case No. 3AN-15-05969CI

**PLAINTIFF'S OPPOSITION TO
LEGISLATIVE AFFAIRS AGENCY'S MOTION
TO DISMISS OR, IN THE ALTERNATIVE, TO SEVER CLAIMS
FOR MISJOINER**

Plaintiff, Alaska Building, Inc. (ABI), opposes the Legislative Affairs Agency's Motion to Dismiss or, in the Alternative, to Sever Claims For Misjoinder (Motion).

A. Background

On September 19, 2013, defendant 716 West Fourth Avenue LLC (716 LLC) entered into a sole source agreement with defendant Legislative Affairs Agency (LAA) to:

(a) demolish (i) the existing Anchorage Legislative Information Office down to its steel frame and (ii) the Empress Theatre building, and

LAW OFFICES OF
JAMES B. GOTTSTEIN
408 G STREET, SUITE 206
ANCHORAGE, ALASKA
99501

TELEPHONE
(907) 274-7666
FACSIMILE
(907) 274-9493

(b) lease a newly constructed office building to LAA for the Anchorage Legislative Information Office on the two lots upon which the old LIO building and the Empress Theatre had been demolished

(LIO Lease).

This was purportedly authorized under AS 36.30.083(a), but AS 36.30.083(a) only allows sole source procurement of leased space to extend a real property lease for up to 10 years if a minimum cost savings of at least 10 percent below the market rental value of the real property at the time of the extension would be achieved on the rent due under the lease. (emphasis added).

The LIO Lease is not an extension because (1) the existing building was demolished down to its steel frame (2) the adjacent old Empress Theatre, most recently the Anchor Pub, was completely demolished, (3) a brand new building was constructed on the combined sites of the old Legislative Information Office Building and the Old Empress Theatre, and (4) the premises were vacated for at least 13 months during the demolition and while the new building was constructed. This was a new construction project not a lease extension.

In addition, the cost is well over the market rental value of the real property. Comparing apples to apples, the LIO Lease rate is about \$7.15 per square foot per month, while the market rate is about \$3.00. Ten percent below market rate is about \$2.70/square foot per month, which works out to \$104,310 per month instead of the rate specified in the illegal LIO Lease of \$281,638. This is \$177,328 per month more than allowed under AS

36.30.083(a). Over the life of the LIO Lease this is \$21,279,360 more than allowed under AS 36.30.083(a).

The old Empress Theatre and the Alaska Building shared a wall (Party Wall) and the demolition of the old Empress Theatre and construction of the New Legislative Information Office Building caused substantial damage to the Alaska Building. This damage would not have occurred but for the LAA agreeing to the illegal LIO Lease. On June 8, 2015, an Amended Complaint was filed which makes this causation explicit.¹

Count One of the original and Amended Complaint is to declare the LIO Lease null and void or reform it to at least 10 percent below the market rental value of the real property, and in either event, award ABI 10% of the savings for bringing this action in the face of such pervasive corruption that this blatantly illegal contract has been allowed to proceed.²

Count Two is for damage to the Alaska Building. The Amended Complaint includes that the Legislative Affairs Agency as liable in Count Two because its action in entering into the illegal LIO Lease caused the damage to the Alaska Building.³ It also adds

¹ See, paragraph 31 of the Amended Complaint.

² Exhibit A is a copy of the e-mail transmitting a copy of the original complaint to the Legislative Affairs Agency and the Attorney General expressing the hope that either or both of them would support invalidation or reformation of the illegal LIO Lease as it appears the lease rate is at least \$2 million per year above market. While the Attorney General's Office usually represents state agencies, in this case, the Legislative Affairs Agency hired private counsel, authorizing \$100,000 in attorney's fees to defend the illegal LIO Lease. Exhibit B.

³ Paragraph 37 of the Amended Complaint.

allegations regarding the foreseeability of damage to the Alaska Building,⁴ that damage to the Alaska Building was in fact foreseen,⁵ and the owner of ABI attempted to convince 716 LLC to not proceed with the project because of (a) the all but certain damage to the Alaska Building that would result and (b) the illegality of the LIO Lease.⁶

B. Summary of Argument

First, the proposed order submitted by the Legislative Affairs Agency (LAA) with respect to severing this action goes far beyond what is supported by the Motion, or allowed by the rules, and is essentially an order for dismissal without prejudice. Should this Court decide to grant the motion to sever alternative, it should not use the proposed order.

With respect to standing, an Amended Complaint was filed on June 8, 2015, which makes explicit that by entering into the illegal lease, the Legislative Affairs Agency caused damage to the Alaska Building and requests compensation therefor. This is sufficient for interest injury standing with respect to Count Two, pertaining to the damage to the Alaska Building.

With respect to Count One, the illegality of the LIO Lease, ABI is seeking 10% of any savings and this is a sufficient interest for standing purposes. In addition, ABI believes it has citizen-taxpayer standing as well.

⁴ Paragraph 32 of the Amended Complaint.

⁵ Paragraphs 33 & 34 of the Amended Complaint.

⁶ Paragraph 35 of the Amended Complaint.

With respect to the motion to sever, LAA is simply incorrect when it asserts that the claims arise out of different transactions. All of the claims against all of the defendants arise out of the illegal LIO Lease.

C. Standing

(1) Standing Requirements

In *Larson v. State, Dept. of Corrections*, 284 P.3d 1, 11-12 (Alaska 2012), the Supreme Court recently stated:

[W]e have interpreted the concept of standing broadly, "favoring increased accessibility to judicial forums." We have identified two types of standing: interest-injury and taxpayer-citizen standing. To establish interest-injury standing, a party must demonstrate "a sufficient personal stake in the outcome of the controversy to ensure the requisite adversity." However, the degree of injury to interest need not be great: "an identifiable trifle is enough for standing to fight out a question of principle."⁷

The seminal case for "citizen-taxpayer" standing in Alaska is *Trustees for Alaska*, in which the Alaska Supreme Court laid out the requirements as follows:

First, the case in question must be one of public significance. . . . Second, the plaintiff must be appropriate in several respects. For example, standing may be denied if there is a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit. The same is true if there is no true adversity of interest, such as a sham plaintiff whose intent is to lose the lawsuit and thus create judicial precedent upholding the challenged action. Further, standing may be denied if the plaintiff appears to be incapable, for economic or other reasons, of competently advocating the position it has asserted.⁸

⁷ Citing to *Bowers Office Prods., Inc. v. Univ. of Alaska*, 755 P.2d 1095, 1097 (Alaska 1988), *Trustees for Alaska v. State, Dep't of Natural Res.*, 736 P.2d 324, 327 (Alaska 1987), *Kleven v. Yukon-Koyukuk Sch. Dist.*, 853 P.2d 518, 526 (Alaska 1993), *Hoblit v. Comm'r of Natural Res.*, 678 P.2d 1337, 1340 (Alaska 1984).

⁸ (736 P.2d at 329-30 footnotes omitted).

Since *Trustees for Alaska*, the Supreme Court has identified situations in which citizen-taxpayer standing would be denied because of potentially better situated plaintiffs or when citizen-taxpayer standing would not substitute for third party-party standing. *Law Project for Psychiatric Rights v. State of Alaska*, 239 P.3d 1252, 1255 (Alaska 2009), *Keller v. French*, 205 P.3d 299, 302 (Alaska 2009), *Kleven v. Yukon-Koyukuk Sch. Dist.*, 853 P.2d 518, 526 (Alaska 1993). Thus, for example, in *Keller*, the Court did not allow legislators to sue when Governor Palin chose not to. In *Kleven*, the Court denied citizen-taxpayer standing when a grievant was no longer employed and the employees still affected had chosen not to sue. In *Law Project for Psychiatric Rights*, the Court did not find citizen-taxpayer standing to assert the constitutional rights of children when no parent had brought suit.

(2) Count One

Count One of the Complaint is over the illegality of the LIO Lease because it is neither a lease extension, nor at least 10% below market rent as required by AS 36.30.083(a). The claims for relief under Count One are to invalidate or reform the LIO Lease to 10% less than market rent and award ABI 10% of any cost savings.

(i) Interest-Injury Standing Exists Against the Legislative Affairs Agency

ABI has interest-injury standing because of its claim for 10% of any cost savings. In the words of *Larson*, ABI has "a sufficient personal stake in the outcome of the controversy to ensure the requisite adversity." The requested invalidation or reformation of the LIO Lease is a prerequisite for the 10% award so ABI has interest-injury standing with respect to it, as well.

Opposition to Motion
to Dismiss or Sever

(ii) **Citizen-Taxpayer Standing Exists for the LIO Lease Invalidation or Reformation Claim**

ABI also has independent citizen-taxpayer standing with respect to the invalidation or reformation of the LIO Lease under the *Trustees for Alaska* criteria. The Legislative Affairs Agency does not dispute that it is a matter of public significance and it clearly is. ABI is an appropriate plaintiff in the required respects. There is no plaintiff more directly affected by the challenged conduct who has or is likely to bring suit. ABI is not a sham plaintiff and is capable of competently advocating its position.

Keller, Kleven, and Law Project for Psychiatric Rights seem to have made the "no plaintiff more directly affected who has or is likely to bring suit," requirement more stringent than articulated in *Trustees for Alaska* by denying standing if a plaintiff more directly affected and capable of bringing suit has decided not to do so.

Here, the State of Alaska, presumably acting through the Attorney General would be the party to do so. However, in this case, the defendant is an agency of the State of Alaska and cannot be both the defendant and a plaintiff. Normally the Attorney General's Office represents state agencies and when the Complaint was filed the Attorney General was requested to support invalidation or reformation of the LIO Lease:

[T]he Complaint alleges that the sole source lease entered into by the Legislative Affairs Agency is illegal under AS 36.30.83 because it is neither a lease extension nor 10 percent below the market rental value. The relief claimed is to invalidate or reform the lease so that it is at least 10% below market rental rates.

The lease clearly violates AS 36.30.83 and it is my hope the Legislative Affairs Agency and State of Alaska will support invalidation or reformation as it appears the lease rate is at least \$2 million per year above market.

Exhibit A. Instead, the Legislative Affairs Agency hired an outside law firm, authorizing up to \$100,000 in legal fees to defend the illegal LIO Lease.⁹ It thus appears the Attorney General is not in a position to bring suit, giving ABI citizen-taxpayer standing.

(3) Count Two

Count Two is a claim for damages to the Alaska Building arising out of the illegal LIO Lease. The Amended Complaint includes the Legislative Affairs Agency as a defendant with respect to this claim. The damage to the Alaska Building was caused by the Legislative Affairs Agency entering into the illegal LIO Lease. ABI has standing to assert this claim against the Legislative Affairs Agency.

D. Severance

As an alternative to dismissal, the Legislative Affairs Agency putatively asks this Court to sever Count One from Count Two pursuant to Civil Rule 21. In actuality, the proposed order submitted by the Legislative Affairs Agency is a dismissal without prejudice. This is specifically disallowed under Civil Rule 21.

Civil Rule 21 provides:

Rule 21. Misjoinder and Non-Joinder of Parties.

Misjoinder of parties is not ground for dismissal of an action. Parties may be dropped or added by order of the court on motion of any party or of its own initiative at any stage of the action and on such terms as are just. Any claim against a party may be severed and proceeded with separately.

The putative severance option of the Legislative Affairs Agency's proposed order provides:

⁹ Exhibit B.

IT IS THEREFORE ORDERED that Defendant Legislative Affairs Agency's Motion to Dismiss for lack of subject matter jurisdiction is DENIED, but the claims against the Legislative Affairs Agency contained in Count One of the Complaint are SEVERED from this case. If Plaintiff wishes to pursue the claims in Count One against the Legislative Affairs Agency, it must file a separate case.

The Legislative Affairs Agency does not provide any authority, support or analysis for requiring ABI to file a separate case, and as set forth above, it is specifically not allowed under Civil Rule 21.

The severance part of the Legislative Affairs Agency's motion is also based on a couple of erroneous premises. First, the Legislative Affairs Agency is not the only defendant for Count One. The invalidation or reformation of the illegal LIO Lease is also directed at 716 LLC, the owner and lessor of the building. Punitive damages are sought against 716 LLC for entering into the illegal LIO Lease. Thus, any severance would also include 716 LLC as a defendant.

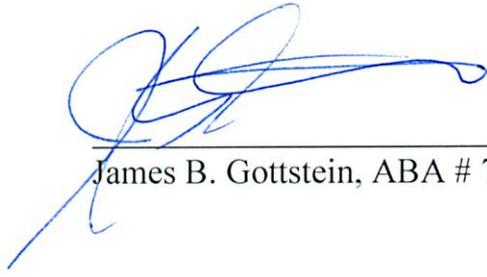
The severance part of the Legislative Affairs Agency's motion is also based on the erroneous analysis that Count One and Two do not share any common facts or common questions of law. Both Count One and Count Two arise from the illegal LIO Lease.

In light of the Legislative Affairs Agency and 716 LLC being defendants in both counts and both counts arising from the illegal LIO Lease, it is respectfully suggested severance should not be granted.

E. Conclusion

For the foregoing reasons, the Legislative Affairs Agency's Legislative Affairs Agency's Motion to Dismiss or, in the Alternative, to Sever Claims For Misjoinder should be **DENIED**.

Dated June 12, 2015.



James B. Gottstein, ABA # 7811100

James B. Gottstein

From: James B. Gottstein <james.b.gottstein@gottsteinlaw.com>
Sent: Tuesday, March 31, 2015 12:25 PM
To: attorney.general@alaska.gov; craig.richards@alaska.gov; pam.varni@akleg.gov
Cc: james.b.gottstein@gottsteinlaw.com
Subject: Complaint in 3AN-15-05969CI
Attachments: 150331ComplaintRcvdStampedWCASENo.pdf

Dear Mr. Richards and Ms. Varni:

Please find attached a copy of the just filed Complaint in *Alaska Building, Inc., v. 716 West Fourth Avenue, LLC; Koonce Pfeffer Bettis, Inc., d/b/a KPB Architects; Pfeffer Development LLC; Legislative Affairs Agency; and Criterion General, Inc.*, Case No 3AN-15-05969CI, State of Alaska, Third Judicial District in Anchorage.

In addition to claiming for substantial damage to the Alaska Building, which is adjacent to the new Anchorage Legislative Information Office and shares a party wall, the Complaint alleges that the sole source lease entered into by the Legislative Affairs Agency is illegal under AS 36.30.83 because it is neither a lease extension nor 10 percent below the market rental value. The relief claimed is to invalidate or reform the lease so that it is at least 10% below market rental rates.

The lease clearly violates AS 36.30.83 and it is my hope the Legislative Affairs Agency and State of Alaska will support invalidation or reformation as it appears the lease rate is at least \$2 million per year above market.

James B. Gottstein
Law Offices of James B. Gottstein
406 G Street, Suite 206
Anchorage, AK 99501
Tel: (907) 274-7686 Fax: (907) 274-9493
e-mail: James.B. Gottstein@ GottsteinLaw.Com

ALASKA STATE LEGISLATURE

LEGISLATIVE COUNCIL

APRIL 9, 2015

5:05 PM

Approved May 26, 2015

MEMBERS PRESENT

Senator Gary Stevens, Chair
Representative Bob Herron, Vice Chair
Senator John Coghill
Senator Lyman Hoffman
Senator Charlie Huggins
Senator Anna MacKinnon
Senator Lesil McGuire, alternate
Senator Kevin Meyer
Senator Peter Micciche
Representative Mike Chenault
Representative Craig Johnson
Representative Sam Kito
Representative Charisse Millett
Representative Mark Neuman
Representative Steve Thompson, alternate

MEMBERS ABSENT

Representative Mike Hawker

OTHER MEMBERS PRESENT

Senators Egan, Stedman, Gardner, Giessel, Olson and Dunleavy; Representatives Ortiz, Kawasaki, Saddler, Claman, Drummond, Wilson, Tilton, Stutes, Guttenberg, Edgmon, Wool,

Josephson, Hughes, Seaton, Gattis, Vazquez, Tarr, Pruitt, Tuck, Colver, LeDoux, Reinbold and Gara

AGENDA

EXECUTIVE SESSION

SPEAKER REGISTER

5:05:06 PM

I. **CHAIR GARY STEVENS** called the Legislative Council meeting to order at 5:05 p.m. in Room 519 (House Finance) of the State Capitol. Present at the call were Senators Meyer, Coghill, Huggins, Micciche, Stevens, and McGuire, alternate member; Representatives Johnson, Kito, Millett, Neuman, Herron, and Thompson, alternate member. Speaker Chenault joined the meeting right after the roll call; Senators Hoffman and MacKinnon joined the meeting during the motion to go into executive session. Representative Hawker was absent.

5:06:07 PM

VICE CHAIR HERRON moved that Legislative Council go into executive session under Uniform Rule 22 (b)(1) for the discussion of matters, the immediate knowledge of which would adversely affect the finances of a government unit. He asked that the following individuals remain in the room: Pam Varni, Executive Director of the Legislative Affairs Agency; Doug Gardner, Legal Services Director; Emily Nauman, Legal Services Staff Attorney; Katrina Matheny, staff to Chair Stevens; Linda Hay, staff to Vice Chair Herron; Serena Carlsen, Partner, Stoel Rives LLP; and Deven Mitchell, State Investment Officer, Alaska Department of

Revenue. He said that any Legislators not on Legislative Council are welcome to remain in the room.

Legislative Council went into executive session.

7:07:02 PM

Legislative Council came out of executive session.

VICE CHAIR HERRON moved that Legislative Council approve a legal services contract for \$100,000 for Stoel Rives LLP with Doug Gardner as the Project Director to represent the

th

Legislature with any matters related to 716 W 4 Avenue lease.

A roll call vote was taken.

YEAS: Meyer, Coghill, Huggins, McGuire, Johnson, Kito
Millet, Neuman, Thompson, Herron, Stevens

NAYS: None

The motion passed 11-0.

There being no further business before the committee, the Legislative Council meeting was adjourned at 7:08 p.m.

7:08:25 PM

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Legislature hires law firm to defend lawsuit over its Anchorage offices

Nathaniel Herz | April 10, 2015



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Erik Hill / ADN

The committee that oversees the Legislature’s internal business has approved spending up to \$100,000 to defend against a lawsuit challenging the state’s lease for remodeled legislative office space in Anchorage.

The \$4 million annual lease was **challenged last month** by an Anchorage attorney, Jim Gottstein, whose building adjoins the Legislature’s new offices. Gottstein says his building was damaged during the remodel and contends the state’s lease for the legislative office space violates a law that requires payments to be below market rates.

The Legislative Council on Thursday night voted to pay the law firm Stoel Rives up to \$100,000 to work on matters related to the Anchorage offices. Sen. Gary Stevens, R-Kodiak, the council’s chair, said afterward that the money would pay for work on Gottstein’s lawsuit.

Stevens said a separate meeting of the council is likely to be scheduled for Monday, when it will recommend whether to abandon the lease for the Anchorage office space and move into a state-owned building elsewhere downtown.

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