

THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM AIKEN COUNTY  
Court of Common Pleas  
The Honorable J. Cordell Maddox, Jr., Circuit Court Judge  
Case No. 2021-CP-02-00889

Appellate Case No. 2023-001211

Julianne Foster, ..... Plaintiff,

v.

Rhett Riviere, Katherine A. Thomas, Chase Enterprises, LLC  
of South Carolina, and Airbnb, Inc., ..... Defendants,

Of which Rhett Riviere is the.....Appellant,

And Airbnb, Inc. is the.....Respondent.

**Airbnb Inc.’s Return to Julianne Foster’s Motion to Intervene**

Plaintiff Julianne Foster (“Plaintiff”) has moved to intervene in the above captioned appeal as a party. Plaintiff took the position before the circuit court that Riviere’s motion to compel arbitration should be denied. (See **Exhibit 1**, Barbier Ltr. to Judge Maddox, June 16, 2023.) Therefore, Airbnb, Inc. (“Airbnb”) does not oppose the Court adding Plaintiff as a Respondent.

Therefore, Airbnb respectfully requests the Court issue an order declaring that Julianne Foster is an additional Respondent in this appeal and providing her with a period of time within which to file a Respondent’s brief and otherwise declaring the Plaintiff’s Motion to Intervene as moot.

**[Signature on following pages.]**

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Columbia, South Carolina  
November 13, 2023

## Exhibit 1

(Barbier letter to Judge Maddox, June 16, 2023)

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June 16, 2023

Via E-Filing and Email:

The Honorable J. Cordell Maddox, Jr.  
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RE: *Foster v. Riviere, et. al.*  
Case No. 2021-CP-02-00889

Your Honor,

Thank you for the opportunity to clarify and supplement the Plaintiff's positions regarding our opposition to Defendants Rhett Riviere and Airbnb's Motions to Compel Arbitration on the issues that were discussed at the conclusion of the virtual hearing in the above-referenced case on June 13, 2023. As we have stated, this case presents a serious public safety issue and it is very important to our client - as the victim of a sexual offense - to have her fundamental right to access to the Court. She seeks to hold the Defendants accountable in the hopes of preventing this from happening to other people.

The following issues will be addressed:

1. The threshold issue is whether or not there is an enforceable contract to arbitrate with Airbnb Guest Michele Jain. If your honor determines that there is no such contract, it is the end of the Court's inquiry and the motions to compel arbitration must be denied. If an enforceable arbitration agreement is recognized, the Court must then turn to the following issues:
2. Whether Airbnb can compel, Plaintiff, a non-signatory to arbitrate under South Carolina law by applying estoppel? and
3. Whether Airbnb has waived its right to arbitrate under the facts of this case?

Plaintiff prevailing on any one of these three issues necessarily results in a denial of the Motions to Compel Arbitration, and/or a strike of the Motions to Compel Arbitration as deficient. Because each of these three issues must be decided in favor of the Plaintiff's positions, the motions must be denied.

**1. Airbnb Has Not Presented An Enforceable Arbitration Agreement with Michele Jain.**

In its June 14, 2023 letter, Airbnb states that Michele Jain “electronically accepted” Airbnb’s Terms of Service (“TOS”), which it attempts to establish by providing a computer printed chart that it created which simply has a date in a column entitled “tos\_accepted\_at.” Airbnb does not present any evidence of how Ms. Jain was presented with an arbitration agreement and, more importantly, how she allegedly consented to it. Airbnb does not present an electronically signed contract or any document that Michelle Jain signed wherein she allegedly agreed to arbitration.

In her sworn Affidavit (*See Exhibit A – Affidavit of Michelle Jain*), Ms. Jain has indicated that: 1. She did not physically sign or electronically sign an agreement to arbitrate with Airbnb; 2. She does not have any recollection of being presented with Airbnb’s Terms of Service; 3. She does not have any recollection of “clicking” to agree to Airbnb’s Terms of Service; 4. She did not receive any documentation from Airbnb memorializing that she agreed to their Terms of Service; 5. She is not aware of ever agreeing to any arbitration agreement with Airbnb; 6. She did not discuss with any of her friends in her tennis group, including Julianne Foster, that their stay at the Airbnb was subject to an arbitration agreement or any Terms of Service; and 7. She did not have the authority to bind Julianne Foster to an arbitration agreement at that time or presently. *See Exhibit A – Affidavit of Michelle Jain.*

While new commerce on the Internet has exposed courts to many new situations, it has not fundamentally changed the principles of contract.” *Register.com, Inc. v. Verio, Inc.*, 356 F.3d 393, 403 (2d Cir. 2004). “Arbitration is available only when the parties involved contractually agree to arbitrate.” *Towles v. United HealthCare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct. App. 1999). Courts should not assume parties have agreed to arbitration, and, when an agreement is made electronically, there are specific requirements under the Uniform Electronics Transactions Act (“UETA”), S.C. Code Ann. § 26-6-10, et. seq., which must be met.

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For example, § 26-6-90 provides:

Showing that electronic record or signature is attributable to a person; effect of electronic record or signature.

(A) An electronic record or electronic signature is attributable to a person if it is the act of the person. The act of the person may be shown in any manner, including a showing of the efficacy of a security procedure applied to determine the person to which the electronic record or electronic signature was attributable.

(B) The effect of an electronic record or electronic signature attributed to a person pursuant to subsection (A) is **determined from the context and surrounding circumstances at the time of its creation, execution, or adoption, including the parties' agreement**, if any, and as otherwise provided by law.

S.C. Code Ann. § 26-6-90 (emphasis added). Recently, the Court in *Fair v. Shutterfly, LLC*, No. 0:21-cv-1718-JMC-SVH, 2021 WL 11421826,\*4 (D.S.C. Aug. 4, 2021), applied § 26-6-90 of the UETA in a case where an employer used a web-based site to allow its new employees to electronically sign their initial employment documents, including an arbitration agreement.<sup>1</sup> The employer put forth extensive evidence of the process the web-based site uses to deliver and obtain the electronic signatures of new employees. 2021 WL 11421826, \*2. Thus, the Court determined that the employer had met its initial burden under § 26-6-90. *Id.* at \*4. Likewise, in *Hill v. Aarons, Inc.*, No. 7:18-cv-1892-TMC, 2019 WL 13258466, \*8 (D.S.C. Jan. 7, 2019), the Court discussed the UETA and what evidence is needed to establish an electronic acceptance. The Court determined that the company presented sufficient evidence that the plaintiff had electronically signed the agreement when it verified the company records showing when the agreement was published to the plaintiff and when he accepted it and established the security measures that ensure the signature was authentic.

Here, however, Airbnb has failed to meet its initial burden that Ms. Jain entered into an agreement to arbitrate under the UETA. Airbnb merely presents an electronic chart purporting to be Ms. Jain's consent to its terms of service which allegedly contained an arbitration provision (from someone who is not the custodian) without any evidence regarding

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<sup>1</sup>Furthermore, Airbnb has stated it “does not have any records of any communications between Airbnb and Jain” and that it has already produced complete responses about the “information Michelle Jain provided at sign-up.” (Response Opp. Mot. to Compel Arb., Exhibit C – Airbnb's Responses 4-5, 7).

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the actual document, the context and surroundings at the time of its creation, execution, or adoption.

In her June 14, 2023 Affidavit, Ms. Chauvet avers that “the ‘TOS\_Consent’ in [Ms. Jain’s] user account information *indicates* that she agreed to and accepted Airbnb’s Terms of Service,” and that *generally* Users are required to agree to Airbnb’s TOS. (Chauvet Aff. ¶3, 4) (emphasis added). She then repeatedly cites to her own deposition testimony as to what the TOS states. *Id.* at ¶¶3, 4, 6. Ms. Chauvet says nothing more than Airbnb claims to have records of when Ms. Jain allegedly “consented” to the TOS on April 11, 2019. That is all; this is simply not enough for Airbnb to meet its burden. *See Bazemore v. Jefferson Capital Sys., LLC*, 827 F.3d 1325, 1330 (11th Cir. 2016) (affirming denial of arbitration where corporation’s declaration was “woefully inadequate” and there was no evidence about what appeared on plaintiff’s computer screen and how declarant could determine she had consented). Airbnb wants the Court to basically just take their word for it that Ms. Jain agreed to arbitration.

Ms. Chauvet does not aver or testify what steps must be taken to accept the TOS or that she was even familiar with the registration process on April 11, 2019. Ms. Chauvet also does not aver or testify that the registering Guest is required to click through a page where they can actually read the TOS or that the document is emailed or otherwise provided to the new Guest. She does not aver or testify that the arbitration clause was conspicuously placed within the TOS as required by South Carolina law. Further, Ms. Chauvet also does not aver or testify that the registering Guest is required to electronically sign the TOS.<sup>2</sup>

Importantly, Airbnb has failed to provide any evidence of the User interface in place *at the time* Ms. Jain reserved the Airbnb rental at issue in this case. The booking for the rental house at issue did not take place on April 11, 2019 – it took place on April 13, 2019. There is no evidence that at the time Ms. Jain made this reservation on April 13, 2019 that she agreed to any Terms of Service or was presented with any arbitration agreement or that she signed anything.

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<sup>2</sup> The Affidavit of Ms. Chauvet stands in stark contrast to the Affidavit Airbnb submitted in the case of *Shaw v. Airbnb, Inc.*, No. 2:20-cv-00214-DCN-MGB, \*4-5 (D.S.C. 2020) which was attached to their Reply brief. In that case Airbnb’s declarant set out the manner in which the plaintiff in that case was presented with and agreed to the TOS and arbitration agreement. He also declared that he “is familiar with the computer code that generates the Platform and website pages maintained by Airbnb including, but not limited to, the parts of the code that display Airbnb’s account sign-up screens and the subsequent events that require user assent or consent (“Consent Events”) on both computer and mobile devices (the “Code”).” *Id.* ¶1. Ms. Chauvet does not make those declarations.

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The bottom line is that despite knowing that the formation of an arbitration agreement was disputed and being given numerous opportunities to do so in this case, Airbnb has simply not presented any evidence that Ms. Jain was presented with an arbitration agreement; that she agreed to arbitration; or that she either physically signed or electronically signed an arbitration agreement. Thus, there is no showing of an offer, an acceptance, or of any consideration and the Defendants have not presented this Court with an enforceable arbitration agreement.

## **2. Airbnb Cannot Compel Plaintiff, a Nonsignatory, to Arbitrate and Estoppel Is Inapplicable Because Plaintiff Is Not Attempting to Enforce Any Contract Provision.**

In its June 14, 2023 Letter, Airbnb contends that Plaintiff is subject to direct benefits estoppel. Airbnb implicitly acknowledges that estoppel applies in this case only if Plaintiff is raising a claim under a contract, and thus argues that Plaintiff is relying on portions of its Terms of Service and other incorporated provisions, the Standards and Policies, to support her claims.

First and foremost, “a presumption against arbitration arises where the party resisting arbitration is a nonsignatory to the written agreement to arbitrate.” *Wilson v. Willis*, 426 S.C. 326, 337-38, 827 S.E.2d 167, 173 (2019). Airbnb cannot overcome this presumption and force Plaintiff, a nonsignatory, to arbitrate.

Second, there can be no third-party beneficiary unless a valid contract exists, which as discussed above, Airbnb has failed to establish. Moreover, even assuming Ms. Jain agreed to the arbitration agreement, “[a] third-party beneficiary is a party that the contracting parties intend to directly benefit.” *Helms Realty, Inc. v. Gibson-Wall Co.*, 363 S.C. 334, 340, 611 S.E.2d 485, 488 (2005). There is nothing to establish that the parties agreed to arbitrate to directly benefit Plaintiff.

Furthermore, Airbnb cannot escape the fact that Plaintiff is simply not attempting to enforce the arbitration agreement or any other contract provisions, which is what estoppel in the context of arbitration is meant to preclude. *See Hodge v. UniHealth Post-Acute Care of Bamberg, LLC*, 422 S.C. 544, 563, 813 S.E.2d 292, 302 (Ct. App. 2018) (holding because Respondents are not suing for a breach of the Admission Agreement, they equitable estoppel does not apply).

“[W]hen the substance of the claim arises from general obligations imposed by state law, including statutes, torts and other common law duties, or federal law,” direct-benefits estoppel is not implicated even if the claim refers to or relates to the contract or would not

have arisen ‘but for’ the contract’s existence.” *Id.* (citation omitted); *see also Wilson*, 426 S.C. at 343, 827 S.E.2d at 167 (“direct benefits estoppel is not implicated simply because a claim relates to or would not have arisen ‘but for’ a contract’s existence.”).

Referring to Airbnb’s Standards in her Amended Complaint to support her tort and statutory claims is entirely different than bringing a breach of contract claim.

In the arbitration context, the [estoppel] doctrine recognizes that a party may be estopped from asserting that the lack of his signature on a written contract precludes enforcement of the contract’s arbitration clause when he has consistently maintained that other provisions of the same contract should be enforced to benefit him.

*Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 290, 733 S.E.2d 597, 601 (Ct. App, 2012) (emphasis omitted) (citation omitted)). *See also Thompson*, 416 S.C. at 57, 784 S.E.2d at 687 (holding third-party beneficiary cannot be required to arbitrate unless he is attempting to enforce the contract containing the arbitration agreement) (citation omitted).

The claims Plaintiff has alleged in her Amended Complaint in this case rely on breaches of common law, regulatory, and statutory duties.

Finally, “estoppel is, ultimately, a theory designed to prevent injustice, and it should be used sparingly.” *Wilson*, 426 S.C. at 345, 827 S.E.2d at 177 (citation omitted)( noting equitable estoppel “is more properly viewed as a shield to prevent injustice rather than a sword to compel arbitration”). Airbnb is attempting to use estoppel as a sword to compel arbitration and not to prevent any injustice.

Following Airbnb’s logic to its conclusion – anyone who creates an account with Airbnb is subject to arbitration for *any* rental thereafter and *anyone* who stays with them in *any* rental is also thereafter bound to arbitration. Therefore, the Airbnb account creator is binding potentially hundreds of people to future arbitration without their knowledge or consent. This novel theory does not even come close to comporting with the stringent requirements of legal consent required to bind someone to arbitration.

### 3. Airbnb Has Waived Any Right It May Have Had to Arbitrate in This Case.

A party may waive its contractual right to arbitration if it knew of the right and acted inconsistently with that right. *In re Mercury Const. Corp.*, 656 F.2d 933, 939 (4th Cir. 1981). Airbnb has been actively litigating this matter in court for over two years—answering the Complaint and the Amended Complaint, participating in extensive discovery and mediation, and filing numerous motions with the Court, including two dispositive motions, which the Court denied. Airbnb waived any right it contends it had to arbitrate by acting inconsistently to an arbitration agreement for the past two years.

Finally, Airbnb’s claim that the Amended Complaint revived its right to arbitrate is without merit or basis in law. Airbnb has been aware of the proposed Amended Complaint since Plaintiff filed a motion to amend her Complaint on September 2, 2022. The Court granted it on November 30, 2022, and, instead of moving to compel arbitration, Airbnb moved to dismiss the Amended Complaint on January 20, 2023, which the Court denied on April 5, 2022. Airbnb then waited another six weeks to finally file the instant Motion to Compel Arbitration – almost 6 months after the Amended Complaint was filed. The Motion to Compel Arbitration was Airbnb’s direct response to it losing a host of discovery disputes –e.g., being ordered to produce hundreds of thousands of documents; being ordered to retake the Rule 30(b)(6) deposition; being ordered to allow the deposition of its Director of Global Operations; and being scolded by the Court for their failure to produce discovery.

Airbnb cannot “reserve” its purported arbitration rights while taking inconsistent actions for almost two years. *In Re Mirant Corp. v. Castex Energy, Inc.*, 613 F.3d 584, 591 (5th Cir. 2010) (“A party cannot keep its right to demand arbitration in reserve indefinitely while it pursues a decision on the merits before the district court.”). “A reservation of rights is not an assertion of rights.” *See also Hooper v. Advance Am., Cash Advance Ctrs. of Missouri, Inc.*, 589 F.3d 917, 923 (8th Cir. 2009). Further, as the court held in *Liberty Builders*, “the right to arbitrate can be waived even in the face of a no-waiver provision.” 336 S.C. at 667, 521 S.E.2d at 754.

Moreover, Plaintiff’s Amended Complaint, including the SCUTPA claim, did not alter the scope in such a way as to revive Airbnb’s alleged right to arbitration. *See Manasher v. NECC Telecom*, 310 F. App’x 804, 807 (6<sup>th</sup> Cir. 2009) (holding additional claims contained in amended complaint did not substantially alter the scope or theory of case so as to revive defendant’s right to compel arbitration).

### Conclusion

Ms. Foster has suffered greatly as a result of the Defendants' actions and after two years of enduring their abusive litigation tactics, she deserves her day in court in front of a jury of her peers. Indeed, South Carolina courts have declined to enforce arbitration provisions in cases of outrageous acts that are unforeseeable to reasonable consumers. *Wilson v. Willis*, 426 S.C. 326 (2019).

Thank you for your careful consideration of this important matter.

Best regards,

s/ Deborah Barbier  
DEBORAH BARBIER

s/ Ryan Beasley  
RYAN BEASLEY

s/ Wes Few  
WES FEW

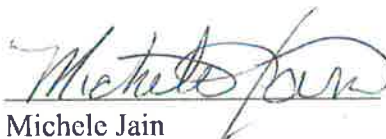
STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF AIKEN	)	2nd JUDICIAL CIRCUIT
Julianne Foster,	)	Case No: 2021-CP-02-00889
Plaintiff,	)	<b>AFFIDAVIT OF MICHELE JAIN</b>
vs.	)	
Rhett Riviere, Katherine A. Thomas,	)	
Chase Enterprises, LLC of South Carolina,	)	
and AIRBNB Inc.,	)	
Defendants.	)	

Personally appeared before the undersigned Notary Public, Michele Jain, who being duly sworn, does hereby testify as follows:

1. I am a citizen and resident of Greenville County, South Carolina. I make this Affidavit based on personal knowledge and belief.
2. Upon the best recollection, I created an Airbnb account sometime in April of 2019.
3. I did not physically sign or electronically sign an agreement to arbitrate with Airbnb.
4. I do not have any recollection of being presented with Airbnb's Terms of Service.
5. I do not have any recollection of "clicking" to agree to Airbnb's Terms of Service. I did not physically sign or electronically sign Airbnb's Terms of Service.
6. I did not receive any documentation from Airbnb memorializing that I agreed to their Terms of Service.
7. I am not aware of ever agreeing to any arbitration agreement with Airbnb.

8. On or about April 13th, 2019, I rented the Stirrup Cottage on Airbnb for the dates of May 17-19, 2019, in Aiken, South Carolina for the purpose of attending a tennis tournament with my tennis group.
9. I did not discuss with any of my friends in my tennis group, including Julianne Foster, that their stay at the Airbnb was subject to an arbitration agreement or any Terms of Service.
10. In 2019, I did not have the authority to bind Julianne Foster to an arbitration agreement and I do not presently have the authority to bind Julianne Foster to an arbitration agreement.

THE AFFIANT FURTHER SAYETH NAUGHT.

  
Michele Jain

Sworn to before me this 16 day of June, 2023

  
Notary Public for the State of South Carolina

My commission expires: 11/10/2031





\*\*\*\*\* IMPORTANT NOTICE - READ THIS INFORMATION \*\*\*\*\*  
NOTICE OF ELECTRONIC FILING [NEF]

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**A filing has been submitted to the court RE:** 2021CP0200889

**Official File Stamp:** 06-16-2023 12:49:18 PM  
**Court:** CIRCUIT COURT  
Common Pleas  
Aiken  
**Case Caption:** Julianne Foster , plaintiff, et al VS Rhett Riviere , defendant, et al  
**Document(s) Submitted:** Letter/Letter  
- Exhibit/Filing of Exhibits  
**Filed by or on behalf of:** Deborah B. Barbier

This notice was automatically generated by the Court's auto-notification system.

---

**The following people were served electronically:**

Matthew A. Abee for Airbnb Inc  
Blake Terence Williams for Airbnb Inc  
Richard A. Harpootlian for Airbnb Inc  
Phillip Donald Barber for Airbnb Inc  
C. Mitchell Brown for Airbnb Inc  
Damon Christian Włodarczyk for Katherine A Thomas  
Ryan Lewis Beasley for Julianne Foster  
Deborah B. Barbier for Julianne Foster  
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Kathy R. Schillaci  
Wesley D. Few for Julianne Foster  
James Mixon Griffin for Rhett Riviere  
Margaret Nicole Fox  
Beattie B. Ashmore for Airbnb Inc, Airbnb Inc

**The following people have not been served electronically by the Court. Therefore, they must be served by traditional means:**

Brad Owensby  
Damali Taylor for Airbnb Inc  
Dawn Sestito for Airbnb Inc  
Jane Page Thompson

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Nov 13 2023

SC Court of Appeals

20THE STATE OF SOUTH CAROLINA  
In The Court of Appeals

APPEAL FROM AIKEN COUNTY  
Court of Common Pleas  
The Honorable J. Cordell Maddox, Jr., Circuit Court Judge  
Case No. 2021-CP-02-00889

Appellate Case No. 2023-001211

Julianne Foster, .....Respondent,

v.

Rhett Riviere, Katherine A. Thomas, Chase Enterprises, LLC  
of South Carolina, and Airbnb, Inc., ..... Defendants,

Of whom Rhett Riviere is the .....Appellant,

And Airbnb, Inc. is a.....Respondent.

**PROOF OF SERVICE**

I, the undersigned Administrative Assistant, of the law offices of Nelson Mullins Riley & Scarborough LLP, attorneys for Airbnb, Inc., do hereby certify that I have served all counsel in this action with a copy of the pleading(s) hereinbelow specified, pursuant to the Supreme Court Order 2022-05-06-04, and a copy of that electronic mail is attached to this certificate.

Pleading(s): **Airbnb Inc.'s Return to Julianne Foster's Motion to Intervene**

Served: **Via E-Mail**

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Administrative Assistant

11/13, 2023

## Eileen Hindman

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**From:** Eileen Hindman  
**Sent:** Monday, November 13, 2023 2:23 PM  
**To:** dbb@deborahbarbier.com; rlb@ryanbeasleylaw.com; wes@wesleyfew.com; cassy@wesleyfew.com; damonw@rplfirm.com; john@jwhartelaw.com; joe@mccullochlaw.com; kathy@mccullochlaw.com; mfox@griffindavislaw.com; jgriffin@griffindavislaw.com; beattie@beattieashmore.com; pdb@harpootlianlaw.com; rah@harpootlianlaw.com; dsestito@omm.com; dtaylor@omm.com; Mitch Brown; Blake Williams; Matt Abee  
**Subject:** Foster v. Riviere., et al. - Appellate Case No. 2023-001211  
**Attachments:** 2023.11.13 Return to Motion to Intervene (Riviere Appeal).pdf; Exhibit 1 - 2023.06.16 ECF Letter from Barbier to Judge Maddox.pdf; 2023.11.13 Proof of Service (Riviere Appeal).pdf

Good afternoon,

Attached for service upon you in the above matter is Airbnb Inc.'s Return to Julianne Foster's Motion to Intervene, Exhibit, and Proof of Service.

Thank you,



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