

IN THE SUPREME COURT OF APPEALS OF WEST VIRGINIA

State ex rel. **JILL CLITES,**

Petitioner,

v.

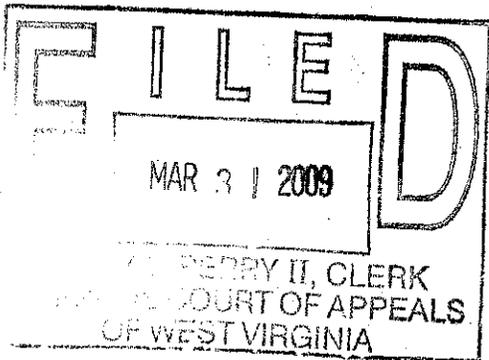
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**THE HONORABLE RUSSELL M. CLAWGES, JR. Chief Judge,
17th Judicial Circuit, Division II,
TELETECH CUSTOMER CARE MANAGEMENT (WEST VIRGINIA), Inc.,
LOR WINDLE, and MICHELE EBERT,**

Respondents.

PETITION FOR A WRIT OF PROHIBITION

**From the Circuit Court of Monongalia County, West Virginia
Civil Action No. 08-C-201**



Submitted by:

**Georgia Lee Gates #8547
Law Offices of Ron L. Tucker
310 Adams Street
Fairmont, WV 26554
(304) 367-1137.**

PETITION FOR A WRIT OF PROHIBITION

I. GROUNDS SUPPORTING THIS PETITION

The Petitioner, Jill Clites (Plaintiff Below), petitions this Honorable Court for a Writ of Prohibition, pursuant to West Virginia Code §53-1-3 and Rule 14(a) of the West Virginia Rules of Appellate Procedure. Ms. Clites invokes this Court's original jurisdiction in connection with the circuit court's February 6, 2009 Order (attached hereto) granting the Respondents TeleTech Customer Care Management (West Virginia), Inc., Lor Windle, and Michele Ebert's (Defendants Below) (collectively TeleTech) motion for a stay of all proceedings in her cause of action brought under the West Virginia Human Rights Act, West Virginia Code §5-11-1, *et seq.* (HRA), pending arbitration pursuant to an Arbitration Agreement drafted by a holding company of the Respondent TeleTech. Ms. Clites posits by her Petition that the circuit court's ruling, in which it refused to exercise its jurisdiction over her HRA claims and compelled her to arbitrate, is clearly contrary to law and provides the following in support of her Petition:

1. This Court has the requisite original jurisdiction to hear this Petition for a Writ of Prohibition because such writ is an appropriate vehicle by which to prevent enforcement of a circuit court's directive which requires a party to resolve her claims through arbitration. *See Dunlap v. Berger*, 211 W.Va. 549, 568, 567 S.E.2d 265, 284 (2002), cert. denied, 537 U.S. 1087 (2002) *citing State ex rel. United, Inc. v. Sanders*, 204 W.Va. 23, 25-26, 511 S.E.2d 134, 136-37 (1999);

2. The circuit court's ruling is clearly contrary to law because it expressly found TeleTech's Arbitration Agreement to be a contract of adhesion, and ineluctably determined that

the costs associated with arbitration under the Agreement's express terms rendered it so unconscionable that it re-wrote the Agreement in an effort to sanitize TeleTech's unconscionable contractual attempt and, thus, recast the unconscionable as conscionable in direct contravention of this Court's admonition in Dunlap, 211 W.Va. at 568, 567 S.E.2d at 284;

3. The circuit court's ruling is clearly contrary to law because, in violation of Dunlap, it imposed upon Ms. Clites a "duty to read" TeleTech's unconscionable contract of adhesion in the course of finding her bound by its terms. See Dunlap, 211 W.Va. at 558, 567 S.E.2d at 274 *citing with approval* Restatement (Second) Contracts §211, cmt. b;

4. The circuit court's ruling is clearly contrary to law because, after judicially re-writing TeleTech's adhesive Arbitration Agreement, it found the Agreement did not contain terms unreasonably favorable to TeleTech even though TeleTech reserved to itself the right to commence suit for injunctive relief, in a judicial forum, for any claim it might have of irreparable injury from the breach or threatened breach of any duty owed by Ms. Clites to it, while at the same time obligating Ms. Clites to arbitrate all claims, including those for injunctive relief she might bring against TeleTech. See Ferguson v Countrywide Credit Industries, Inc., 298 F.3d 778 (9th Cir. 2002);

5. The circuit court's ruling is clearly contrary to law because it failed to differentiate between the mandate for a knowing and voluntary waiver of a right, under 77 CSR 6-3. The question presented was not whether Ms. Clites might contractually waive her right to a judicial forum but rather whether Ms. Clites might waive her right to a judicial forum without knowing and voluntarily doing so, within the meaning of 77 CSR 6-3;

II.
PROCEDURAL HISTORY OF THE CASE *SUB JUDICE*

6. Jill Clites, commenced her cause of action against TeleTech, on March 21, 2008. Her claims were brought under the HRA and arose from the sexual harassment to which she was directly subjected by the Respondent Windle. The Complaint further alleged that upon proper notice of the sexual harassment of Ms. Clites, TeleTech failed to take timely, requisite, remedial actions both to prevent and to correct the same, in violation of the HRA. Furthermore, after notice of the sexual harassment to which Ms. Clites was subjected, TeleTech, in direct contravention of the HRA, retaliated against Ms. Clites by unlawfully subjecting her to a reduction in force, as both a factual and legal result of her complaints of sexual harassment;

7. On April 24, 2008, TeleTech moved to dismiss Ms. Clites' Complaint, pursuant to W.V.R.Civ.P., Rule 12(b)(6), or in the alternative for a stay of proceedings. As grounds for this motion, TeleTech invoked the Arbitration Agreement, at issue in this Petition;

8. In a response memorandum opposing TeleTech's motion to dismiss or stay, filed on May 6, 2008, Ms. Clites argued that the Arbitration Agreement was unenforceable because it was both a contract of adhesion and unconscionable;

9. After an initial round of briefing and oral argument on TeleTech's motion, the circuit court, although staying discovery generally pending its ruling on the Arbitration Agreement, granted the parties 60 days within which to conduct limited discovery on the question of whether the Agreement might be enforced;

10. After discovery was complete, the circuit court entered an order setting a supplemental briefing schedule;

11. TeleTech filed its supplemental brief in further support of its motion to dismiss or stay Ms. Clites' case, on August 14, 2008;

12. On August 21, 2008, Ms. Clites timely filed her supplemental response brief in opposition to TeleTech's motion;

13. TeleTech's reply brief was thereafter timely filed on August 29, 2008;

14. A second hearing was held on TeleTech's motion to dismiss or stay Ms. Clites' cause of action, on September 11, 2008;

15. Thereafter, on February 6, 2009, the circuit court granted the Respondents' motion to stay Ms. Clites' cause of action "pending arbitration as set forth in the subject Arbitration Agreement";

III.
BRIEF FACTUAL BACKGROUND
OF THE ARBITRATION AGREEMENT AT ISSUE

16. On or about October 1, 2004, Jill Clites applied for a position as a Customer Service Representative with TeleTech. Ms. Clites was hired;

17. When Ms. Clites reported for her first day as a TeleTech employee, she had been unemployed for nearly ten months;

18. On October 25, 2004, her first day of work, Ms. Clites reported to a classroom, along with 20 to 25 other new-hires for TeleTech's "New Employee Orientation";

19. During the course of the "New Employee Orientation" a TeleTech Human Resources (HR) Generalist made a short presentation to the roomful of 20 to 25 new employees. In the course of the presentation the HR Generalist showed a 20 minute video concerning general harassment in the workplace, went over policy detail consisting of a stapled section of 15 to 20

pages related to, at least, fourteen (14) different TeleTech policies and took care of new-hire paper work;

20. The new-hire paper work each new employee was required to sign included 23 documents and collectively totaled, at least, 33 pages. The 33 pages of documents were compiled in folders in assembly line fashion by the TeleTech HR Department;

21. The signature of the TeleTech HR Director was stamped with a signature stamp on all requisite documents requiring her signature and then photocopied by the hundreds, before the documents were presented to the new employees for signing during the short HR "New Employee Orientation";

22. The new employees were not provided with enough time to read the documents which they signed at the "New Employee Orientation," before signing them;

23. The new employees were not provided with copies of the documents they signed at the "New Employee Orientation";

24. Nestled among the 22 documents requiring an employee signature was the 6 page Arbitration Agreement, at issue, in this Petition;

25. Initially, under the terms of the Arbitration Agreement, TeleTech and the employee mutually promise to arbitrate all claims, thereby mutually waiving the right to a jury trial in a court of law. Under the terms of the Agreement, this mutual promise to arbitrate all claims is subsequently unilaterally rescinded by TeleTech as it reserves to itself the right to seek injunctive relief, in a court of law, for any claim it might have of irreparable injury from the breach or threatened breach of any duty owed by the employee to it. No such remedy is reserved to the employee, under the terms of the Arbitration Agreement;

26. The TeleTech HR Generalist instructing the new employees on the purpose of the Arbitration Agreement erroneously believed the Arbitration Agreement simply provided for a third party mediator to mediate disputes between TeleTech and its employees;

27. The TeleTech HR Generalist instructing the new employees on the purpose of the Arbitration Agreement did not know that the Arbitration Agreement required an employee to waive her right to a jury trial in a court of law;

28. Accordingly, the TeleTech HR Generalist instructing the new employees on the purpose of the Arbitration Agreement did not advise the new employees that by signing the Arbitration Agreement they could not bring suit in a court of law and were waiving their rights to a jury trial;

29. The TeleTech HR Generalist's understanding of the Arbitration Agreement as a means of "mediating" disputes between an employee and TeleTech, as opposed to binding arbitration, is consistent with the explanation included within the TeleTech "New Employee Orientation: New Hire Paperwork" guide included in TeleTech's *Human Resources Manual*;

30. Ms. Clites did not read the TeleTech Arbitration Agreement before signing it as it was in a stack of documents which were all signed at one time by 20 to 25 people;

31. Ms. Clites has no recollection of signing TeleTech's Arbitration Agreement;

32. Ms. Clites does not recall the TeleTech HR Generalist ever mentioning the word "arbitration";

33. Before instituting her suit against TeleTech, Ms. Clites did not know what arbitration was;

34. Ms. Clites, who is unemployed, cannot afford the costs of arbitration, under the

express terms of TeleTech's Arbitration Agreement;

35. Ms. Clites' only vehicle to prevent enforcement of the circuit court's Order compelling her to arbitrate her HRA claims, in accordance with TeleTech's adhesive and unconscionable Arbitration Agreement, is this Petition for a Writ of Prohibition;

**IV.
RELIEF REQUESTED**

For the foregoing reasons as well as all those reasons set forth in her contemporaneously filed Memorandum in Support of Petition for a Writ of Prohibition, Ms. Clites respectfully requests this Honorable Court to accept her Petition for a Writ of Prohibition, issue a Rule to Show Cause to the Respondents, and, upon completion of all requisite briefing, direct the circuit court to vacate its Order compelling arbitration and further direct the circuit court to exercise its jurisdiction over her claims, brought pursuant to the HRA.

Respectfully submitted,
Petitioner Jill Clites by counsel


Georgia Lee Gates #8547
Law Offices of Ron L. Tucker
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PETITION FOR A WRIT OF PROHIBITION
VERIFICATION

STATE OF VIRGINIA
COUNTY OF ARLINGTON,
To wit:

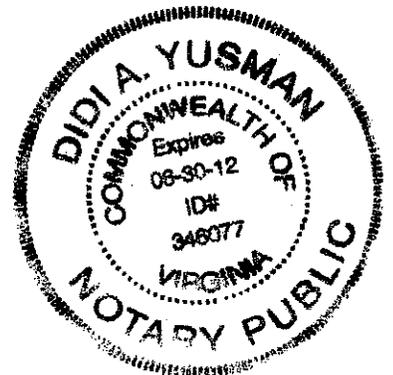
I, Jill Clites, being first duly sworn, state that the facts and allegations contained in the foregoing **Petition for a Writ of Prohibition** are true, or to the extent they are stated to be on information, are believed to be true.

Jill Clites
Petitioner Jill Clites

Taken, subscribed and sworn to before me the undersigned authority this 25TH day of March, 2009.

My commission expires: 06/30/2012

[Signature]
Notary Public



IN THE CIRCUIT COURT OF MONONGALIA COUNTY, WEST VIRGINIA
DIVISION II

JILL CLITES,

Plaintiff,

v.

CASE NO.: 08-C-201
Judge Russell M. Clawges, Jr.

TELETECH CUSTOMER CARE
MANAGEMENT (WEST VIRGINIA), INC.;
LOR WINDLE; and
MICHELE EBERT,

Defendants.

**ORDER GRANTING DEFENDANTS' MOTION FOR STAY AND
DENYING DEFENDANTS' MOTION TO DISMISS**

This matter came before the Court on the 11th day of September 2008, on the Defendants' TeleTech Customer Care Management (West Virginia), Inc. ("TeleTech"), Lor Windle, and Michele Ebert's Motion to Dismiss pursuant to Rule 12(b)(6) of the Rules of Civil Procedure for failure to state a claim upon which relief can be granted or in the alternative to stay all further proceedings in this civil action pending arbitration. Plaintiff appeared, not in person, but by counsel, Georgia Lee Gates. Defendants TeleTech, Lor Windle, and Michele Ebert appeared by counsel, Webster J. Arceneaux, III.

The Court heard arguments of counsel and took the motion under advisement. The Court has studied the motion, responses, and the memoranda of law, submitted by the parties; considered the arguments of counsel; and reviewed pertinent legal authorities. As a result of these deliberations, the Court is ready to rule.

FACTS and PROCEDURAL HISTORY

Plaintiff, Jill Clites, is a former employee of TeleTech Customer Care Management in Morgantown, West Virginia. She has a bachelor's and master's degree in exercise physiology from West Virginia University. Prior to being hired by TeleTech on October 24, 2004, Ms. Clites had been unemployed for ten months. Ms. Clites's first position with TeleTech was that of Customer Service Representative I (CSR-I). In January 2005, she was promoted to a Supervisor/Team Manager, responsible for supervision of a team of CSR-I's. Ms. Clites remained in her supervisory position until July 12 or 13, 2007, when Defendants terminated her. Plaintiff alleges she was unlawfully subjected to a reduction in force as a result of her gender and in retaliation for her complaints of sexual harassment.

During the first four weeks of Plaintiff's employment, she participated in classroom training to learn her job as a CSR-I. On one of the first few days of this training, a representative of TeleTech's Human Resources Department explained TeleTech policies during a one- to two-hour session for all new hires. Various employee benefits, policies, procedures, and general provisions of the employee manual were reviewed. At the end of the session, each new hire was given a packet containing documents to be signed. The documents were signed by each new hire and then collected. The documents were not explained in detail and copies were not provided to the employees. Among these documents was an Arbitration Agreement. This arbitration requirement was not mentioned or explained during any training or meetings for employees of TeleTech. However, it was a separate six (6) page document with the title "ARBITRATION AGREEMENT" in large letters. The last sentence of Paragraph 3, on the first page of the Agreement, states: "By agreeing to arbitrate all disputes before an arbitrator selected under AAA rules, the Company and

the Employee give up the right to a jury trial." Paragraph 7 of the Agreement, Scope of Arbitration, lists the disputes that are included and excluded.

7.1 Disputes Included

Except as specifically excluded in 7.2 below, this Arbitration Agreement covers any and all disputes between the Company and Employee. Such disputes include by way of example only and not limited to, disputes regarding Employee's employment with the Company and termination thereof, employment discrimination, harassment and retaliation, wrongful discharge, defamation, invasion of privacy, negligence, intentional infliction of emotional distress, wages, benefits and overtime, leave, and disputes regarding the formation and enforceability of this Arbitration Agreement.

7.2 Disputes Excluded

The following categories of disputes are excluded from the scope of coverage of this Arbitration Agreement: (1) Workers' Compensation and unemployment compensation claims; and (2) claims for injunctive relief arising out of irreparable injury from breach or threatened breach of any duty owed by Employee to the Company.

Plaintiff maintains that she was unaware of the existence of the Arbitration Agreement until after this action was commenced.

On April 23, 2008, the Defendants filed a motion to dismiss or in the alternative for a stay. The Defendants claim that the Plaintiff agreed to arbitrate her claims with TeleTech that could not be resolved within the company by executing an Arbitration Agreement. The Defendants take the position that Ms. Clites must arbitrate and may not proceed in this Court. After a May 29, 2008, hearing on the motion, the parties were given a period of sixty days to conduct discovery on the issue of arbitrability. The parties then submitted supplemental briefings on the issue.

Also on April 23, 2008, Defendant TeleTech brought suit in the United States District Court for the Northern District of West Virginia, naming Ms. Clites as a Defendant. In that case, as in this one, TeleTech asks the Court to enforce the Arbitration Agreement. The Plaintiff does not dispute

that she signed the Arbitration Agreement, but argues unconscionability and impairment of a statutory claim.

DISCUSSION

The standard applied to Rule 12(b)(6) motions is well established. In analyzing the complaint, the Court must accept the allegations as true, and construe the same in the light most favorable to the Plaintiff. "The trial court, in appraising the sufficiency of a complaint on a Rule 12(b)(6) motion, should not dismiss the complaint unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Syllabus, Flowers v. City of Morgantown, 166 W.Va. 92 (1980).

"The [Federal Arbitration Act]. . . promotes the enforcement of arbitration agreements involving interstate commerce, including employment-related arbitration agreements, but only when such agreements constitute valid contracts under state law." State ex rel. Saylor v. Wilkes, 216 W.Va. 766, 772 (2005).

"[T]he failure to read a contract before signing it does not excuse a person from being bound by its terms." Reddy v. Community Health Foundation of Man, 171 W.Va. 368, 373 (1982).

"It is presumed that an arbitration provision in a written contract was bargained for and that arbitration was intended to be the exclusive means of resolving disputes arising under the contract; however, where a party alleges that the arbitration provision was unconscionable or was thrust upon him because he was unwary and taken advantage of, or that the contract was one of adhesion, the question of whether an arbitration provision was bargained for and valid is a matter of law for the court to determine by reference to the entire contract, the nature of the contracting parties, and the nature of the undertaking covered by the contract." Syl. Pt. 3, Bd. of Educ. of the County of Berkeley

v. W. Harley Miller, Inc., 160 W.Va. 473 (1977).

“Finding that there is an adhesion contract is the beginning point for analysis, not the end of it.” State ex rel. Dunlap v. Berger, 211 W.Va. 549, 558 (2002). “[W]hat courts aim at doing is distinguishing good adhesion contracts which should be enforced from bad adhesion contracts which should not.” Id. “A determination of unconscionability must focus on the relative positions of the parties, the adequacy of the bargaining position, and ‘the meaningful alternatives available to the plaintiff, and the existence of unfair terms in the contract’.” Syl. Pt. 4, Art’s Flower Shop, Inc. v. Chesapeake and Potomac Telephone Co., 186 W.Va. 613 (1991). When gross inadequacy in bargaining power combines with terms unreasonably favorable to the stronger party, the contract provisions will be found unconscionable, which in turn renders the contract unenforceable. State ex rel. Saylor v. Wilkes, 216 W.Va. 766, 774 (2005). However, “[a] litigant who complains that he was forced to enter into a fair agreement will find no relief on grounds of unconscionability.” Troy Mining Corp. v. Itmann Coal Co., 176 W.Va. 599, 604 (1986).

Plaintiff argues that her bargaining position was not only grossly unequal and inadequate, but was nonexistent. In addition, had she not signed the Agreement, her employment with TeleTech would have ended. The Plaintiff also argues that the documents, including the Arbitration Agreement were signed during a limited period of time. This limited time only allowed for “skimming” of the documents and that the employees were not provided copies of the documents they signed. However, copies could have been obtained from the human resources office.

The Plaintiff emphasizes that Ellen Trovato, the human resources representative, did not understand the terms, conditions, and limitations of the Arbitration Agreement. It is irrelevant what Ms. Trovato did or did not understand regarding the Agreement. Plainly stated and underlined on

page one (1) of the Agreement is the phrase, "the Company and the Employee give up the right to a jury trial."

Plaintiff contends that she has lost her right to assert human rights claims because she must assert them in an arbitral forum. The United States Supreme Court found no inherent problem with statutory claims such as a Human Rights Act claim being part of an arbitration agreement. See Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985); Preston v. Ferrer, 128 S. Ct. 978 (2008). A party does not forgo the substantive rights afforded by the statute; he or she only submits their resolution in an arbitral, rather than judicial, forum. Id.

Plaintiff also argues that the Arbitration Agreement imposes expenses and fees upon her far in excess of those she would be required to pay to vindicate her rights under the Human Rights Act before this Court. As a consequence she contends she will not be able to afford the additional expenses of arbitration as she is currently unemployed. The Defendants have asserted and stipulated through affidavit that the arbitration will take place in Morgantown, West Virginia, and that TeleTech will pay for all costs and expenses that would not be incurred by the Plaintiff in court, including the fees of the arbitrator, the costs of the hearing room, and a stenographer. If the AAA should terminate the arbitration proceedings because TeleTech has failed to pay the filing fees, rental fees for the hearing room, costs of a stenographer, arbitrator's compensation, administration charges, and other expenses that are the Defendants' responsibility, this action can resume in Court. Therefore, the costs associated with arbitration that the Plaintiff will incur are not prohibitive.

The Arbitration Agreement requires the parties to arbitrate all disputes except workers' compensation claims, unemployment claims, and claims for injunctive relief arising out of irreparable injury from breach or threatened breach of any duty owed by Employee to the Company.

This is a very narrow and specific exclusion to allow TeleTech to quickly obtain an emergency temporary injunction in Court. This very limited exception is not so one-sided as to render the Agreement unconscionable. Injunctive relief for harm that was not deemed by the Court to be irreparable would still be subject to arbitration.

The Court FINDS that the Arbitration Agreement that Plaintiff signed was a contract of adhesion in that it was a standardized contract form, containing no individualized terms, offered on essentially a take it or leave it basis. However, the Court also CONCLUDES that the Arbitration Agreement is valid and enforceable. The terms of the Arbitration Agreement are not unreasonably favorable to TeleTech and not so one-sided as to render the Agreement unconscionable.

ORDER

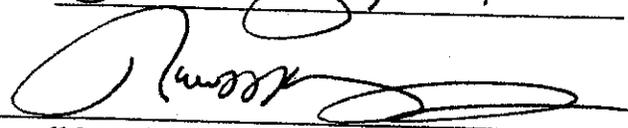
WHEREFORE, it is ORDERED that the Court GRANTS TeleTech's Motion to Stay all further proceedings in this civil action pending arbitration as set forth in the subject Arbitration Agreement. It is ORDERED that the Defendants will pay for all costs associated with the arbitration except those expenses that would otherwise be incurred with traditional litigation filed in this Court.

It is further ORDERED that the Court DENIES TeleTech's Motion to Dismiss.

The Court further directs the Clerk of the Circuit Court of Monongalia County to distribute certified copies of this order to the parties and/or counsels of record.

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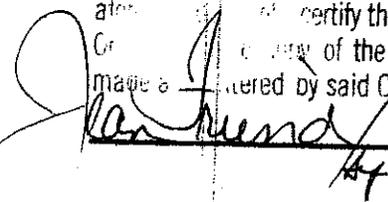
February 6, 2009



Russell M. Clawges, Jr., Chief Judge
17th Judicial Circuit, Division II.

STATE OF WEST VIRGINIA SS:

I, Jean Friend, Clerk of the Circuit Court and
Family Court of Monongalia County State
attest and certify that the attached
is a true and correct copy of the original Order
made and entered by said Court.



Circuit Clerk

PETITION FOR A WRIT OF PROHIBITION

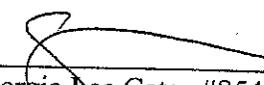
CERTIFICATE OF SERVICE

**From the Circuit Court of Monongalia County, West Virginia
Civil Action No. 08-C-201**

I hereby certify that on the 27th day of March, 2009 I served a true copy of the foregoing
Petition for a Writ of Prohibition upon the Respondents by depositing the same in the United
States mail, postage prepaid, to the following addresses:

The Honorable Russell M. Clawges,
Chief Judge, 17th Judicial Circuit, Division II
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