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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

MEI WONG; DANA HINDMAN-ALLEN,

Plaintiffs,

v.

SHEMIA FAGAN; DEBORAH SCROGGIN; ALMA WHALEN; BOB ROBERTS; SHERRY HALL; REBEKAH DOLL; CLACKAMAS COUNTY CLERK'S OFFICE; and THE OFFICE OF THE SECRETARY OF THE STATE OF OREGON,

Defendants.

Case No. 3:22-cv-01714-SB

DEFENDANTS' RESPONSE TO PLAINTIFFS' RESPONSE AND OBJECTION TO FINDINGS AND RECOMMENDATION

On June 30, 2023, U.S. Magistrate Judge Stacie F. Beckerman issued Findings and Recommendation (ECF 25 ("F&R")), concluding that Defendants' Joint Motion to Dismiss (ECF 13) be granted pursuant to Federal Rule of Procedure 12(b)(6). Under Federal Rule of Civil

Procedure 72, Defendants, by and through the undersigned counsel, hereby respond to Plaintiffs Mei Wong and Dana Hindman-Allen's ("Plaintiffs") Response and Objection to the F&R (ECF 27).

The Court should adopt Judge Beckerman's Findings and Recommendation in its entirety.

BACKGROUND

While the F&R and Defendants' Motion to Dismiss provide sufficient background (F&R, ECF 25, pp. 2-5; MTD, ECF 13, pp. 1-3), Defendants summarize the key facts here. This lawsuit stems from a May 2022 primary election in which Plaintiffs were candidates. Wong was a candidate for the District 2 Metro Council position which includes Clackamas, Multnomah, and Washington counties. Hindman-Allen ran as a candidate for a Commissioner of Clackamas County, Oregon (the "County").

The Secretary of State is Oregon's chief elections officer and distributes to the county clerks written directives and other instructions on election procedures. ORS 246.110, 246.120. The Secretary of State is responsible for ensuring that procedures used in conducting election recounts are efficient and accurate. ORS 258.150. Whenever a demand is filed for a recount of a vote for a nomination or office, the Secretary of State may determine the most appropriate procedures. *Id.* A candidate may file a demand requiring the Secretary of State to direct that a recount be made in specified precincts in which votes were cast for the nomination or office for which the candidate received a vote. ORS 258.161(1). If a candidate makes a recount demand, each demand shall be accompanied by a cash deposit of $15 for each precinct to be recounted up to a maximum of $8,000 for a recount of all precincts in the State. ORS 258.161(5). Under certain circumstances, a county clerk may file a demand requiring the Secretary of State to direct a recount at the county's expense. ORS 258.161(3). Plaintiffs attached ORS 258.016 to their Response to the Motion to Dismiss (ECF 16-5), appearing to emphasize the following excerpts:

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The election of a person may be contested by any person who was a candidate at the election for the same nomination or office for "nondeliberate and material error in the distribution of the official ballots by a local elections official, as that term is defined in ORS 246.012, or a county clerk." ORS 258.016(6). The first demand shall be filed in the office of the Secretary of State not later than the 42nd day after the date of the election. ORS 258.161(8). Only one recount shall be made for any office for which a recount may be demanded. ORS 258.181(1).

A primary election was held on May 17, 2022. On June 6, 2022, Wong sent a complaint to the Secretary of State via letter. (Pls.' Resp., ECF 16-9, pp. 1-2.) Wong's complaint expressed security and irregularity concerns related to Clackamas County including misprinting of 60% of ballots, observers in elections office prior to office hours, and manually inputting incorrect results on the Secretary of State's website. *Id.* She then referenced statute ORS 254.632 which provides a process for the county clerk to conduct a risk-limiting audit at the clerk's discretion. *Id.* Wong did not directly request an audit pursuant to ORS 258.016(6) or (8), but instead provided screenshots and stated, "this should be enough evidence to put into motion a risk-limiting audit and/or hand recount." *Id.*

On June 9, the Secretary of State directed the County clerk's office to verify by hand recount that duplicated ballots were transcribed accurately from their originals (ballots were duplicated because barcodes on the original ballots were misprinted) and hand recount six countywide contests and ten precinct committee person contests as selected randomly by the Secretary of State.[1] (Pls.' Resp., ECF 16-8, p. 20.) From June 15-23, Hindman-Allen's race was hand recounted pursuant to the Secretary of State's directive. *Id.* The hand recount did not change the results of the primary election which resulted in Sonya Fischer and Ben West receiving the most votes. (*Id.*, ECF 16-8, p. 3.)

[1] Directive of the Secretary of State, June 9, 2022, available at https://sos.oregon.gov/elections/Documents/Directive-ClackamasRecountFinal-2022.pdf (last accessed Feb. 7, 2023).

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In a June 14 email Plaintiffs submitted to the Court, the Secretary of State responded to Wong's June 6 email asking for clarification as to what Wong was specifically requesting an investigation into and what procedures she believed were not followed. Wong responded. (*Id.*, ECF 16-9, p. 3.) On June 16, the Secretary of State sent a letter to Wong declining to investigate because the complaints by Wong did not "arise to the level of an election law violation." (*Id.*, ECF 16-9, p. 5.) As to the issue of observers being in the office prior to office hours, the Secretary of State's investigator informed Wong that an investigation was already open and therefore they would not conduct a separate investigation pursuant to her request. *Id.*

On June 20, Hindman-Allen sent a letter to the Secretary of State outlining concerns related to the misprinted ballots, observers prior to office hours, and inputting incorrect election results on the Secretary of State's websites. (*Id.*, ECF 16-11, pp. 2-3.) She then referenced ORS 254.532 which relates to the clerk's determination as to whether a risk-limiting audit is necessary. *Id.* On June 23, the Secretary of State's office responded. (*Id.*, ECF 16-11, p. 6.) On June 24, Hindman-Allen requested an investigation and a full hand recount. (*Id.*, ECF 16-11, p. 7.)

On June 24, Wong sent the county clerk a letter stating, "it is greatly appreciated to provide a hand recount of the original ballots." (*Id.*, ECF 16-9, p. 9). On July 22, the county clerk responded to Wong via letter with explanations related to Wong's election concerns. (*Id.*, ECF 16-9, pp. 12-13.) The clerk also informed Wong that to demand a hand recount, a request must have been submitted to the Secretary of State's office along with payment for the expense of the recount. *Id.*

On June 27, Hindman-Allen emailed the county clerk presumably forwarding the attached letter she sent to the Secretary of State on June 20, 2022. (*Id.*, ECF 16-11, p. 8.) On July 6, Hindman-Allen sent a letter to the county clerk requesting "a full hand recount of the entire Clackamas County original (not duplicated) ballots." (*Id.*, ECF 16-11, p. 10.)

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On July 22, Wong wrote a letter to the Secretary of State's office stating she had contacted the county clerk and requested a hand recount of original ballots. (*Id.*, ECF 16-9, pp. 6-7.) Wong then referenced sections of ORS 258.016 and attached an SEL-800 form as "a demand for full hand recount per the phone conversation with Sherry Hall on July 20, 2022." *Id.* Wong states she sent the SEL-800 form to Clackamas County on July 21 (65 days after election day, May 17). *Id. See* ORS 258.161(8) (requiring the demand to be made by the 42nd day after election day). Wong does not allege she sent a deposit as required by statute. *See* ORS 258.161(5) (requiring a deposit). On July 25, Hindman-Allen requested that the clerk provide a cost estimate for a hand recount. (*Id.*, ECF 16-11, p. 20.) As noted above, Hindman-Allen's race was randomly selected for a hand recount pursuant to the Secretary of State's directive; the results of the hand recount matched the initial machine count. (*Id.*, ECF 16-8, p. 20.)

ARGUMENT

I. The Court Should Adopt the F&R's Recommendation to Dismiss All Claims.

A. Plaintiffs' Section 1983 Claims Should Be Dismissed (Counts Three, Five, and Seven)

1. Plaintiffs Fail to State a Section 1983 Claim

a. Equal Protection Under 42 U.S.C. § 1983.

A plaintiff "must plead intentional unlawful discrimination or allege facts that are at least susceptible of an inference of discriminatory intent." *Monteiro v. Tempe Union High Sch. Dist.*, 158 F.3d 1022, 1026 (9th Cir. 1998) (citations omitted). "The equal protection clause forbids the establishment of laws which arbitrarily and unreasonably create dissimilar classifications of individuals when, looking to the purpose of those laws, such individuals are similarly situated." *Williams v. Field*, 416 F.2d 483, 486 (9th Cir. 1969). Plaintiffs do not claim the statutes governing the election procedures are discriminatory on their face.

"[The equal protection clause] also forbids unequal enforcement of valid laws, where such unequal enforcement is the product of improper motive." *Id.* "To state a claim under 42

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U.S.C. § 1983 for a violation of the Equal Protection Clause of the Fourteenth Amendment a plaintiff must show that the defendants acted with an intent or purpose to discriminate against the plaintiff based upon membership in a protected class." *Barren v. Harrington*, 152 F.3d 1193, 1194 (9th Cir. 1998). Plaintiffs fail to allege any facts showing that Defendants discriminated against Wong based on her membership in a protected class or that Defendants intentionally treated her differently than others who were similarly situated. In fact, there is no indication that Wong and Hindman-Allen are of the same race and yet they have the same complaints. Based on this comparator alone, the equal protection theory fails.

b. Due Process Under 42 U.S.C. § 1983.

Plaintiffs fail to articulate a protected liberty or property interest in this case. Political candidates have no property or liberty interest in being elected. *Emanuele v. Town of Greenville*, 143 F. Supp. 2d 325, 333 (S.D.N.Y. 2001); *Flinn v. Gordon*, 775 F.2d 1551 (11th Cir. 1985) (a candidate has no constitutional right to win an election). Candidates do not have a fundamental right to run for public office. *N.A.A.C.P., L.A. Branch v. Jones*, 131 F.3d 1317, 1324 (9th Cir. 1997). A losing candidate in a state election "has no property interest in the elected position." *D'Agostino v. Delgadillo*, 111 Fed. Appx. 885, 886 (9th Cir. 2004). Further, even if Plaintiffs could establish a protected liberty interest, they failed to allege that Defendants interfered with the results of the election. At most, Plaintiffs assert negligence. However, "mere negligence" does not deprive an individual of liberty or property for purposes of procedural due process. *Daniels v. Williams*, 474 U.S. 327, 330-31 (1986).

c. Free Speech Under 42 U.S.C. § 1983.

Plaintiffs fail to establish the elements of a free speech claim under Section 1983. To recover under 42 U.S.C. § 1983 for retaliation in violation of the First Amendment, Plaintiffs must establish that they "(1) engaged in constitutionally protected activity; (2) as a result, [they were] subjected to adverse action by the defendant that would chill a person of ordinary firmness

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from continuing to engage in protected activity; and (3) there was a substantial causal relationship between the constitutionally protected activity and the adverse action." *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir. 2010). Plaintiffs do not allege that any specific speech was stifled and there is no nexus between their speech and Defendants' actions.

2. Plaintiffs' Section 1983 Claims Are Also Procedurally Barred

a. Sovereign Immunity

For the reasons set forth in the F&R, the State's sovereign immunity extends to state defendants named in their official capacities and they therefore cannot be liable for damages under 42 U.S.C. § 1983. (F&R, ECF 25, pp. 26-27.)

b. Qualified Immunity

To the extent Plaintiffs are suing Defendants in their individual capacities, they have qualified immunity. Qualified immunity is a legal question, and it is addressed by the Court at the earliest possible point in the litigation. *Act Up!/Portland v. Bagley*, 988 F.2d 868, 872-73 (1993). The doctrine of qualified immunity protects government officials performing discretionary functions "from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Pearson v. Callahan*, 555 U.S. 223, 231 (2009); *Romero v. Kitsap Cnty.*, 931 F.2d 624, 627 (9th Cir. 1991) (citations omitted). It "gives ample room for mistaken judgments by protecting all but the plainly incompetent or those who knowingly violate the law." *Hunter v. Bryant*, 502 U.S. 224, 229 (1991) (internal quotation marks omitted). "Therefore, regardless of whether the constitutional violation occurred, the [official] should prevail if the right asserted by the plaintiff was not 'clearly established' or the [official] could have reasonably believed that his particular conduct was lawful." *Romero*, 931 F.2d at 627. Plaintiffs' allegations do not support the conclusion that the individual Defendants' conduct was unlawful, let alone violated a "clearly established" constitutional right.

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Plaintiffs' assertion that Defendants approved a request to open an investigation "for one candidate" but declined to do so "for other candidates, one [of whom was] a minority candidate, resulting in discrimination," does not meet the threshold for a discriminatory animus. *See* (Compl., ECF 1, at 1, 11.) Furthermore, the allegations as presented demonstrate that the County had no authority to independently investigate Plaintiffs' complaints or instigate a hand recount. The exhibits to Plaintiffs' Complaint, Response to Defendants' Motion to Dismiss, and their Response and Objection to Recommendations and Findings demonstrate that the County had non-discriminatory rationales for their decisions related to Plaintiffs' requests to investigate complaints and conduct audit/hand recounts.

First, directives must come from the Secretary of State. ORS 258.150 and ORS 258.161. Second, if the county clerk determined that a hand recount be conducted it would have been a recount "between the two candidates receiving the largest number of votes in the county" and "an election contest for an office to be voted on in the state at large * * *." ORS 254.529(3). Plaintiffs do not allege they are subject to those criteria. Third, Plaintiffs were required to file the recount demand pursuant to ORS 258.161(1) to the Secretary of State's office by the 35th day after the election and pay a deposit, which they did not do. See ORS 258.161(1), (5) and (8); (Pls.' Resp, ECF 16-9, p. 13.) Fourth, Hindman-Allen's electoral race for County Commissioner was hand recounted pursuant to the Secretary of State's directive. (*Id.*, ECF 16-8, p. 3.) Fifth, the Secretary of State's website display of vote counts was not official, Wong's vote tallies were not the only ones fluctuating, and there is no indication that the County was responsible for the tallies on the Secretary of State's website. (*Id.*, EFC 16-9, p. 12.) Finally, the county clerk responded to Plaintiffs' inquiries with reasonable explanations. (*Id.*, ECF 16-9, pp. 12-13, 17.)

c. *Monell*

Plaintiffs' Section 1983 claim under *Monell v. Department of Social Services*, 436 U.S. 658 (1978), against County Defendants fails to plausibly allege "a deliberate policy, custom, or

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practice" that caused the alleged constitutional violations complained of in Plaintiffs' complaint. *AE ex rel. Hernandez v. County of Tulare*, 666 F.3d 631, 636 (9th Cir. 2012) (citation omitted). Plaintiffs do not allege, and there is no indication from the exhibits attached to Plaintiffs' pleadings, that the news articles referenced relate to instances similar to the allegations in their complaint or that they are close enough in time to show a policy, custom, or practice. (Pltfs' Resp., ECF 16-13, pp. 1-7).

B. Plaintiffs' Section 1985 Claim Should Be Dismissed (Count Two)

To state a claim for conspiracy under 42 U.S.C. § 1985(3) the Plaintiffs must show: (1) a conspiracy; (2) "for the purpose of depriving … any person or class of persons of the equal protection of laws, or of equal privileges and immunities under the laws"; (3) an "act in furtherance" of the conspiracy; and (4) an injury or deprivation of rights. *Sever v. Alaska Pulp Corp*., 978 F.2d 1529, 1536 (9th Cir. 1992). The second element requires that the Plaintiffs identify a legally protected right and demonstrate that the conspirators not only caused the deprivation of that right but were motivated by some racial or invidiously discriminatory animus. *O' Handley v. Padilla*, 579 F. Supp. 3d 1163, 1185 (2022). "A mere allegation of conspiracy without factual specificity is insufficient." *Karim-Panahi v. Los Angeles Police Dep't,* 839 F.2d 621, 626 (9th Cir. 1988). As the F&R concluded, Plaintiffs do not sufficiently allege any actions that meet this standard and thus their claim fails for the same reasons as the Section 1983 claims. (F&R, ECF 25, p. 25.)

C. Plaintiffs' Title VII Claims Should Be Dismissed (Counts Four and Eight)

The F&R recommended dismissal of Plaintiffs' Title VII claims, because there is no employment relationship between the parties. (F&R, ECF 25, p. 30-31.) Plaintiffs object that they would have been employed as elected officials had they won their elections. (Response and Objection to the F&R, ECF 27, p. 8.) But Title VII specifically excludes elected officials from

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coverage. 42 U.S.C. § 2000e(f)(1) (excluding "an official elected by qualified voters"). Accordingly, the Title VII claim should be dismissed.

D. Plaintiffs' Criminal Claims Should Be Dismissed (Count One)

As the F&R properly concluded, Plaintiffs cannot assert claims under 18 U.S.C. §§ 241 and 242, which provide solely for criminal liability. (F&R, ECF 25, p. 22.)

E. Other claims (Counts Six and Nine)

As the F&R explained, Plaintiffs' respondeat superior theory and requests for declaratory and injunctive relief are not standalone claims and cannot save the complaint from dismissal. (*Id.*, ECF 25, pp. 30, 31.)

II. The Additional Claims Cited in the Response Would Be Futile.

Plaintiffs cite the Fifteenth Amendment and several provisions of the Oregon Constitution that were neither asserted in the complaint nor cited in the briefing of the motion to dismiss.[2] Even if the Court construes those references as a request for leave to amend, such amendments would be futile; thus, the Court should dismiss the complaint with prejudice. *See Chappel v. Lab. Corp. of Am.*, 232 F.3d 719, 725–26 (9th Cir. 2000) ("A district court acts within its discretion to deny leave to amend when amendment would be futile . . . ."); *Chaset v. Fleer/Skybox Int'l, LP*, 300 F.3d 1083, 1087-88 (9th Cir. 2002) (affirming the district court's dismissal of the plaintiffs' claim without leave to amend where the court's analysis of "[t]he

[2] The Court need not consider these issues at all, because they were not presented to Judge Beckerman in the first instance. *See Greenhow v. Sec'y of Health & Hum. Servs.*, 863 F.2d 633, 638 (9th Cir. 1988) ("We do not believe that the Magistrates Act was intended to give litigants an opportunity to run one version of their case past the magistrate, then another past the district court."), *overruled on other grounds by United States v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992); *Roy v. Laborers' Loc. 737*, No. 3:18-CV-01695-YY, 2021 WL 395760, at *3 (D. Or. Feb. 4, 2021) ("A district court is well within its discretion in barring arguments raised for the first time in objections to a magistrate's F&R absent exceptional circumstances.") (citing *Greenhow*), *aff'd sub nom. Roy v. Laborer's Loc. 737*, No. 21-35103, 2021 WL 5985031 (9th Cir. Dec. 16, 2021).

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basic underlying facts [as] alleged by plaintiffs" demonstrated that "the plaintiffs cannot cure the basic flaw in their pleading" and finding that "[b]ecause any amendment would be futile, there is no need to prolong the litigation by permitting further amendment" (citing *Lipton v. Pathogenesis Corp.*, 284 F.3d 1027, 1038 (9th Cir. 2002))).

A. Fifteenth Amendment

Plaintiffs cite one federal claim not asserted in their complaint: the Fifteenth Amendment, which provides "The right of citizens of the United States to vote shall not be denied or abridged by the United States or by any State on account of race, color, or previous condition of servitude." "The Fifteenth Amendment's prohibition on race-based voting restrictions is both fundamental and absolute." *Davis v. Guam*, 932 F.3d 822, 832 (9th Cir. 2019).

This claim fails for the same reasons that Plaintiffs' other discrimination claims fail. As the F&R concluded, Plaintiffs' allegations are insufficient "to state plausible discrimination or equal protection claims." (F&R, ECF 25, p. 27.) Plaintiffs do not specify any facts that they would plead to remedy this deficiency. Accordingly, the Court need not provide leave to amend. *See Kendall v. Visa U.S.A., Inc.*, 518 F.3d 1042, 1052 (9th Cir. 2008) ("Appellants fail to state what additional facts they would plead if given leave to amend, or what additional discovery they would conduct to discover such facts. Accordingly, amendment would be futile.").

B. State constitutional claims

Plaintiffs' objections cite several provisions of the Oregon Constitution, but do not articulate any basis to suggest that Defendants violated them. Even if these claims were well pleaded, this Court would lack subject-matter jurisdiction to hear them.

The only basis for this Court to exercise subject-matter jurisdiction over a state law claim asserted against any defendant in this case would be supplemental jurisdiction under 28 U.S.C. § 1367. But a "district court[] may decline to exercise supplemental jurisdiction over a claim ... if the district court has dismissed all claims over which it has original jurisdiction...." 28 U.S.C.

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§ 1367(c)(3). "In the usual case in which all federal-law claims are eliminated before trial, the balance of factors to be considered under the pendent jurisdiction doctrine—judicial economy, convenience, fairness, and comity—will point toward declining to exercise jurisdiction over the remaining state-law claims." *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 n.7 (1988); *see also Zielinski v. Serv. Emps. Int'l Union Loc. 503*, No. 3:20-CV-00165-HZ, 2020 WL 6471690, at *5 (D. Or. Nov. 2, 2020) (dismissing state law claim without prejudice because federal claims were dismissed). Without Plaintiffs' federal claims, the Court should decline jurisdiction over Plaintiffs' state law claims.

In addition, sovereign immunity would bar these claims from being asserted against the state Defendants in their official capacities. The State's absolute sovereign immunity from suit generally also extends to state officials sued in their official capacities, because "the state is the real, substantial party in interest" in such suits. *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101 (1984) (internal quotation marks and citation omitted). A federal court cannot even provide injunctive relief against these state actors in their official capacities, because "the Eleventh Amendment deprives federal courts of jurisdiction to order state actors to comply with state law." *Hale v. State of Ariz.*, 967 F.2d 1356, 1369 (9th Cir. 1992), *on reh'g*, 993 F.2d 1387 (9th Cir. 1993); *see also Pennhurst*, 465 U.S. at 106 (holding *Ex Parte Young* is "inapplicable in a suit against state officials on the basis of state law"); *Spoklie v. Montana*, 411 F.3d 1051, 1060 (9th Cir. 2005) (holding state law claim for declaratory and injunctive relief under *Ex parte Young* was barred by *Pennhurst*).

Finally, no defendant could be sued on these state constitutional theories in their personal capacity. Damages are not available for alleged violations of the Oregon Constitution. *See Hunter v. City of Eugene*, 309 Or. 298, 303 (1990) ("Oregon's Bill of Rights provides no textual or historical basis for implying a right to damages for constitutional violations."). Thus, state

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constitutional claims could provide no basis for relief against any defendant in their personal capacity.

CONCLUSION

For these reasons, Defendants respectfully request that the Court adopt Judge Beckerman's Findings and Recommendation in its entirety.

DATED July 28, 2023.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on July 28, 2023, I served the foregoing DEFENDANTS' RESPONSE TO PLAINTIFFS' RESPONSE AND OBJECTION TO FINDINGS AND RECOMMENDATION upon the parties hereto by the method indicated below, and addressed to the following:

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