

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

TRACY JONASSEN,

Plaintiff,

v.

PORT OF SEATTLE.

Defendant.

CASE NO. C11-34 RAJ

ORDER GRANTING  
DEFENDANT’S MOTION FOR  
SUMMARY JUDGMENT

**I. INTRODUCTION**

This matter comes before the court on defendant Port of Seattle’s (“POS” or the “Port”) motion for summary judgment. Dkt. # 41. Plaintiff Tracy Jonassen alleges two claims against the Port: (1) retaliation in violation of the False Claims Act (“FCA”), 31 U.S.C. § 3729, *et seq.*, and (2) breach of the Port’s written policies. Dkt. # 23 (Second Am. Compl.). In its reply, the Port moves to strike plaintiff’s response for failure to comply with the formatting requirements of Local Rules W.D. Wash. CR 10(e)(1), or to strike everything after page 22, line 3. Dkt. # 50 at 1 n.1. On April 24, 2012, after the close of briefing, plaintiff filed a motion seeking leave to file an amended response in conformity with the Local Rules. Dkt. # 54. The Port did not respond to plaintiff’s motion, which the court construes “as an admission that the motion has merit.” Local

1 Rules W.D. Wash. CR 7(b)(2). Accordingly, the court GRANTS plaintiff's motion to  
2 amend its response to conform to the Local Rules. Dkt. # 53. The court has only  
3 reviewed plaintiff's amended response in connection with this order. Dkt. # 54-2. The  
4 court also notes that it has disregarded the Port's "Praecipe," filed three days before oral  
5 argument on August 28, 2012. The Praecipe attaches deposition testimony referenced in  
6 the Port's motion. The deposition testimony was "inadvertently omitted" from the  
7 excerpts provided to the court on March 15, 2012. The Port could have brought this  
8 evidence to the court's attention earlier with the exercise of reasonable diligence.

9 Having considered the memoranda, exhibits, oral argument, and the record herein,  
10 the court GRANTS the Port's motion for summary judgment.

## 11 II. BACKGROUND

12 Plaintiff has been employed by the Port since 2004, serving a portion of this time  
13 as a Waste Water Treatment Plant operator. Dkt. # 48 (Jonassen Decl.) ¶ 2. Plaintiff's  
14 responsibilities included operating certain mechanical or water treatment processes in the  
15 Seattle-Tacoma International Airport Industrial Waste Treatment Plant ("IWTP"). *Id.*  
16 During the course of his employment, plaintiff uncovered evidence that the IWTP was  
17 not operating properly, resulting in effluent discharges into the Puget Sound Waterway,  
18 contrary to the IWTP's National Pollution Discharge Elimination Systems ("NPDES")  
19 permit. *Id.* at ¶ 3. Plaintiff notified management personnel of the malfunctioning of the  
20 IWTP and associated systems. *Id.* Plaintiff also complained about contractors  
21 wrongfully using and/or stealing POS property and tools, and about the contractors using  
22 the "wheel wash" system to process contaminated water at no cost to the contractor. *Id.* ¶  
23 4. The wheel wash systems were erected and operated by the contractors that were  
24 contracted to build the third runway. *Id.* Many heavy trucks were used on the third  
25 runway project, and the contractors were required to have mud and dirt washed off the  
26 vehicles' tires before leaving the job site for public roads. *Id.* The chemical used in the  
27 wheel wash solution sprayed on the truck tires was piped and trucked directly to the

1 IWTP as waste water. *Id.* Plaintiff claims that the IWTP could not adequately process  
2 this chemical, and that the waste water could not be effectively treated by the IWTP  
3 because of the chemical. *Id.* Since POS did not have the ability to remove the wheel  
4 wash process chemical at the IWTP, the wheel wash water was diluted to a level that  
5 would allow discharge of the chemical into the environment, which plaintiff claims  
6 violated the NPDES permit. *Id.* ¶ 5. Plaintiff also complained of various defective  
7 valves. *Id.* ¶ 6. Plaintiff claims that after reporting these issues, his supervisor, Randy  
8 Sweet, and other management began retaliating against him. *Id.* ¶¶ 9-21, 26-35.<sup>1</sup>

### 9 III. ANALYSIS

10 Summary judgment is appropriate if there is no genuine dispute as to any material  
11 fact and the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P.  
12 56(a). The moving party bears the initial burden of demonstrating the absence of a  
13 genuine issue of material fact. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986).  
14 Where the moving party will have the burden of proof at trial, it must affirmatively  
15 demonstrate that no reasonable trier of fact could find other than for the moving party.  
16 *Calderone v. United States*, 799 F.2d 254, 259 (6th Cir. 1986). On an issue where the  
17 nonmoving party will bear the burden of proof at trial, the moving party can prevail  
18 merely by pointing out to the district court that there is an absence of evidence to support  
19 the non-moving party's case. *Celotex Corp.*, 477 U.S. at 325. If the moving party meets  
20 the initial burden, the opposing party must set forth specific facts showing that there is a  
21 genuine issue of fact for trial in order to defeat the motion. *Anderson v. Liberty Lobby,*  
22 *Inc.*, 477 U.S. 242, 250 (1986). The court must view the evidence in the light most  
23 favorable to the nonmoving party and draw all reasonable inferences in that party's favor.  
24 *Reeves v. Sanderson Plumbing Prods.*, 530 U.S. 133, 150-51 (2000).

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27 <sup>1</sup> The court notes that it has not considered Jonassen's legal conclusions, speculation, or  
improper opinion testimony, as discussed below.

1           However, the production of “a scintilla of evidence in support of the non-moving  
2 party’s position” is not sufficient. *Triton Energy Corp. v. Square D Co.*, 68 F.3d 1216,  
3 1221 (9th Cir. 1995). Hyperbole, supposition, and conclusory accusations cannot take  
4 the place of evidence. *CarePartners LLC v. Lashway*, Case No. C05–1104 RSL, 2010  
5 WL 1141450 (W.D. Wash. 2010) (citing *British Airways Bd. v Boeing Co.*, 585 F.2d 946,  
6 955 (9th Cir. 1978)). Nor will the production of a stack of uncited documents in  
7 opposition to or in support of a motion for summary judgment satisfy a party’s burden.  
8 The court need not, and will not, “scour the record in search of a genuine issue of triable  
9 fact.” *Keenan v. Allan*, 91 F.3d 1275, 1279 (9th Cir. 1996); *see also, White v. McDonnel-*  
10 *Douglas Corp.*, 904 F.2d 456, 458 (8th Cir. 1990) (the court need not “speculate on  
11 which portion of the record the nonmoving party relies, nor is it obliged to wade through  
12 and search the entire record for some specific facts that might support the nonmoving  
13 party’s claim”).<sup>3</sup>

14 **A. Evidentiary Analysis**

15           In resolving a motion for summary judgment, the court may only consider  
16 admissible evidence. *Orr v. Bank of America*, 285 F.3d 764, 773 (9th Cir. 2002). At the  
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19           <sup>3</sup> Plaintiff has repeatedly failed to provide pin-point citations to the record in violation of  
20 Local Rule W.D. Wash. CR 10(e)(6). Dkt. #54-2 at ns. 4-5, 7-10, 24 (citing pages 59 through  
21 88), 34 (citing pages 28 through 42), 46-47, 50-58. Counsel for plaintiff has also made several  
22 inaccurate statements that are unsupported by the factual record in the briefing. The court  
23 reminds counsel of his duty of candor to the court. 2 Wash. Prac. RPC 3.3; Local Rules W.D.  
24 Wash. GR 2(f), 3. The consistent failure to provide pin-point citations on key issues, along with  
25 counsel’s hyperbolic arguments and inaccurate representations of the record has confounded the  
26 court’s efforts to determine whether a genuine issue of material fact exists. The court has spent  
27 an inordinate amount of time hunting through the record in an attempt to find the evidentiary  
basis for plaintiff’s factual contentions. The court provided plaintiff with an opportunity during  
oral argument to provide pin-point citations to the record through a minute order. Dkt. # 61.  
During oral argument, the court again requested pin-point citations to the record. Counsel for  
plaintiff failed to refer the court to any specific portion of the record, choosing instead to argue  
generalities, suppositions, and conclusions.

1 summary judgment stage, a court focuses on the admissibility of the evidence's content,  
2 not on the admissibility of the evidence's form. *Fraser v. Goodale*, 342 F.3d 1032, 1036  
3 (9th Cir. 2003).

4 The Port moves to strike Mr. Jonassen's declaration because "it is replete with  
5 hearsay, speculation, and other 'facts' not admissible at trial." Dkt. # 50 at 1 n.1. The  
6 court has read Mr. Jonassen's declaration. Rather than limit his declaration to statements  
7 of fact of which he has personal knowledge, plaintiff's declaration includes argument,  
8 improper opinion testimony, speculation, hearsay, and legal conclusions. Fed. R. Evid.  
9 602, 701, 702, 801.

10 In accordance with the Federal Rules of Evidence, the court has considered  
11 statements of fact that appear to be within plaintiff's personal knowledge that are not  
12 otherwise inadmissible. The court has disregarded all other arguments, legal conclusions,  
13 hearsay, speculation, and improper opinion testimony. The court has also considered the  
14 exhibits attached to his declaration, except for Exhibit 8 which purports to be an expert  
15 report of Gary M. Namie, Ph.D. Dr. Namie has been identified in plaintiff's expert  
16 disclosure list as a "Social-Organization Psychologist, Researcher, Author, Consultant  
17 and Educator." Dkt. # 29 at 3. The disclosure further states that Dr. Namie is expected to  
18 provide testimony related to the plaintiff's injuries relating to workplace retaliation and  
19 harassment." *Id.*

20 An expert witness may testify at trial if such expert's specialized knowledge will  
21 assist the trier of fact to understand the evidence or to determine a fact in issue. Fed. R.  
22 Evid. 702(a) (2011). Such a witness must be "qualified as an expert by knowledge, skill,  
23 experience, training, or education" and may testify if (1) "the expert's scientific,  
24 technical, or other specialized knowledge will help the trier of fact to understand the  
25 evidence or to determine a fact in issue;" (2) "the testimony is based on sufficient facts or  
26 data;" (3) "the testimony is the product of reliable principles and methods; and" (4) "the  
27 expert has reliably applied the principles and methods to the facts of the case." *Id.*

1 Plaintiff has not provided the court with sufficient information to determine whether Dr.  
2 Namie’s scientific technical, or other specialized knowledge will help the trier of fact to  
3 understand the evidence or to determine a fact in issue. Additionally, the court finds that  
4 Dr. Namie’s testimony is not based on sufficient facts or data. Dr. Namie makes his  
5 opinion based on a review of “selected case documents which were provided by the  
6 plaintiff’s attorney, Douglas R. Cloud, a telephone interview with the plaintiff, the cited  
7 relevant scientific literature, and [his] knowledge, skills and experience as consultant and  
8 management instructor.” Dkt. # 48 (Jonassen Decl.), Ex. 8 at 1. With respect to the  
9 “case documents reviewed,” Dr. Namie only identifies plaintiff’s second amended  
10 complaint, plaintiff’s response to the Port’s motion for judgment, Port of Seattle tort  
11 claim form, the McKay report, a newspaper article, a 2010 State Auditor’s report, the  
12 Port’s employee handbook, a workplace integrity survey, and disciplinary documents and  
13 valve repair records contained in the Port’s responses. *Id.* It appears that Dr. Namie has  
14 not reviewed any deposition transcripts or any other evidence before the court, other than  
15 the disciplinary documents and valve repair records. Accordingly, the court has  
16 disregarded Dr. Namie’s report.

17 **B. FCA Retaliation**

18 The FCA protects “whistleblowers” from retaliation by their employers for  
19 protected activities. 31 U.S.C. § 3730(h); *see United States ex. rel. Hopper v. Anton*, 91  
20 F.3d 1261, 1269 (9th Cir. 1996). Section 3730(h) provides, in relevant part, that any  
21 employee shall be entitled to relief who is “discharged, demoted, suspended, threatened,  
22 harassed, or in any other manner discriminated against in the terms and conditions of  
23 employment because of lawful acts done by the employee . . . in furtherance of an action  
24 under this section or other efforts to stop 1 or more violations of this subchapter.” 31  
25 U.S.C. § 3730(h)(1). Plaintiff must establish three elements to prove a FCA retaliation  
26 claim: (1) the employee must have been engaging in conduct protected under the FCA;  
27

1 (2) the employer must have known that the employee was engaging in such conduct; and  
2 (3) the employer must have discriminated against the employee because of his protected  
3 conduct. *Hopper*, 91 F.3d at 1269.

4 1. Protected Conduct

5 “Section 3730(h) only protects employees who have acted ‘in furtherance of an  
6 action’ under the FCA. Specific awareness of the FCA is not required. However, the  
7 plaintiff must be investigating matters which are calculated, or reasonably could lead to a  
8 viable FCA action.” *Hopper*, 91 F.3d at 1269. “[A]n employee engages in protected  
9 activity where (1) the employee in good faith believes, and (2) a reasonable employee in  
10 the same or similar circumstances might believe, that the employer is possibly  
11 committing fraud against the government.” *Moore v. Cal. Inst. of Tech. Jet Propulsion*  
12 *Lab.*, 275 F.3d 838, 845 (9th Cir. 2002); *see Mendiondo v. Centinela Hospital Med. Ctr.*,  
13 521 F.3d 1097, 1104 (9th Cir. 2008) (plaintiff engaged in protected activity if reasonably  
14 believed that the Port “was possibly committing fraud against the government, and she  
15 investigated the possible fraud.”). Additionally, an employee’s investigation of nothing  
16 more than his employer’s non-compliance with federal or state regulations is not  
17 protected activity. *Hopper*, 153 F.3d at 1269.

18 With respect to the first prong, Jonassen has stated that he investigated what he  
19 believed to be fraud of the Federal Government. Dkt. # 48 (Jonassen Decl.) ¶¶ 9, 38-39.  
20 The Port does not dispute that plaintiff has met the subjective prong. Rather, the Port  
21 argues that plaintiff has failed to establish the objective prong. Dkt. # 41 at 13; # 50 at 4.  
22 In support of the objective prong, plaintiff identifies, without citation to the record,  
23 “written and oral reports to his supervisors about contractor misappropriation of property  
24 and service; failure of numerous mechanical devices at the IWTP; his complaint about  
25 contractors receiving sewage treatment services for ‘wheelwash’ water and other factual  
26 details established herein . . . .” Dkt. # 54-2 at 12. The court has reviewed the factual  
27 record and has attempted to find the evidentiary basis for these complaints.

1                    *a. Violations of NPDES Permit*

2                    Jonassen claims that he “uncovered evidence that the IWTP was not operating  
3 properly, resulting in effluent discharges in the Puget Sound Waterway, contrary to” the  
4 NPDES permit. Dkt. # 48 (Jonassen Decl.) ¶ 3, ¶ 37; *see* Dkt. # 47 (Cloud Decl.), Ex. 1  
5 (Price Depo.) at 14:6-18. He also identifies complaints about “theft of POS property and  
6 services” by using IWTP to process “wheel wash waste water” generated by third runway  
7 contractors at no cost to the contractor. Dkt. # 48 (Jonassen Decl.) ¶ 4. With respect to  
8 the wheel wash water, Jonassen claims that the Port was treating contractor waste water  
9 for free, and that the water had not been adequately treated resulting in a violation of the  
10 NPDES permit. Dkt. # 48 (Jonassen Decl.) ¶ 5; *see* Dkt. # 47 (Cloud Decl.), Ex. 2  
11 (Sweet Depo.) at 105:3-15. Jonassen also identifies defective valves in the IWTP system  
12 that caused contaminated water to be diluted, which violated the NPDES permit. Dkt. #  
13 48 (Jonassen Decl.) ¶ 6. *See* Dkt. # 47 (Cloud Decl.), Ex. 2 (Sweet Depo.) at 27:8-24,  
14 29:2-15, 100:1-9, 101:17-24; *id.*, Ex. 3 (Moikobu Depo.) at 93:9-94:21.

15                    Complaints of violations of the NPDES permit are not protected activity.  
16 *Hopper*, 153 F.3d at 1269 (investigation of non-compliance with federal or state  
17 regulations is not protected activity). Plaintiff’s attempts to save these complaints by  
18 characterizing them as “theft of property and services” fail because plaintiff has not  
19 provided any evidence that the malfunctioning or other operational issues of the IWTP or  
20 the defective valves could reasonably be believed to be possible fraud on the federal  
21 government.<sup>2</sup> Plaintiff’s conclusory allegations do not create a genuine issue of material  
22 fact.

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26                    <sup>2</sup> The court notes that plaintiff has failed to present any evidence that federal funds were  
27 used, or reasonably could be believed to be used for any of these complaints.



1                    *b. Contractors' Use of Property and Tools*

2                    Plaintiff claims he made complaints about “contractors wrongfully using the POS  
3 property and tools,” “the use and theft of POS tools by contractors,” and “potable water  
4 being stolen by contractors.” Dkt. # 48 (Jonassen Decl.) ¶ 4. Plaintiff provides a 2004  
5 email in support of his complaint with respect to the use and/or theft of property and tools  
6 by contractors in which he reported that garden hoses and spray nozzles were destroyed,  
7 and that contractors were using the hoses to pump water for fire and dust suppression.  
8 *Id.*, Ex. 1. Jonassen was thanked “for watching out for [the] equipment” in response. *Id.*  
9 Given this evidence, the court finds that no reasonable employee in the same or similar  
10 circumstances could believe that the employer was possibly committing fraud against the  
11 government.

12                    *c. FCA Lawsuit*

13                    Plaintiff also argues that he was retaliated against as a result of filing the FCA  
14 lawsuit on April 1, 2008, Case Number C08-508MJP. Dkt. # 54-2 at 13, 17; Dkt. # 48  
15 (Jonassen Decl.) ¶ 39. The court finds that filing an FCA lawsuit is protected activity.

16                    2. Employer Knowledge and Causal Connection

17                    An employer must be aware that the employee is investigating fraud against the  
18 government to possess the retaliatory intent necessary to establish a violation of section  
19 3730(h), and the employer must have discriminated against employee because of his  
20 protected conduct. *Hopper*, 91 F.3d at 1269-70.

21                    Even if Jonassen had raised an issue of material fact regarding whether he engaged  
22 in protected activity with respect to the reports about the IWTP, he cannot show that the  
23 Port was aware that he was investigating fraud against the federal government. Jonassen  
24 admits that he had “a separate duty as a waste water treatment operator to comply with all  
25 NPDES directives for fear of losing [his] license to process and treat water” and to raise  
26 concerns about plant operations, including “fraudulent activity.” Dkt. # 48 (Jonassen  
27 Decl.) ¶ 8; Dkt. # 51 (Supplemental Cramer Decl.), Ex. 7 (Jonassen Depo.) at 102:7-20.

1 Accordingly, the monitoring and reporting activities described by Jonassen were exactly  
2 those activities he was required to undertake as part of his job duties. Jonassen took no  
3 additional steps to put the Port on notice that he was acting in furtherance of an FCA  
4 action, rather than merely alerting the Port to mechanical, operational, and defective  
5 issues. *See Robertson v. Bell Helicopter Textron, Inc.*, 32 F.3d 948, 952 (5th Cir. 1994)  
6 (no employer knowledge where employee expressed concerns consistent with his job  
7 duties, but “never characterized his concerns as involving illegal, unlawful, or false-  
8 claims investigations”); *see also Maturi v. McLaughlin Research Corp.*, 413 F.3d 166,  
9 173 (1st Cir. 2005); *Yuhasz v. Brush Wellman, Inc.* 341 F.3d 559, 567-68 (5th Cir. 2003);  
10 *Eberhardt v. Integrated Design & Const., Inc.*, 167 F.3d 861, 869 (4th Cir. 1999); *United*  
11 *States ex rel. Ramseyer v. Century Healthcare Corp.*, 90 F.3d 1514, 1523, n.7 (10th Cir.  
12 1996). Indeed, the only time plaintiff used the term “fraud” to anyone was on April 30,  
13 2008. In his declaration, plaintiff claims that he “did specifically indicate to [Cynthia  
14 Alvarez] at Sea-Tac on April 30, 2008, that [he] was investigating fraud.” Dkt. # 48  
15 (Jonassen Decl.) ¶ 38. Ms. Alvarez confirmed that Jonassen identified “fraud related to  
16 water treatment issues not being appropriately reported to the Department of Ecology.”  
17 Dkt. # 47 (Cloud Decl.), Ex. 6 (Alvarez Depo.) at 41:6-9. However, there is no evidence  
18 that Jonassen reported that the alleged fraud plaintiff complained of was against the  
19 federal government, or otherwise connected with the FCA. There is also no evidence that  
20 federal funds were used, or reasonably could have been used for the water treatment  
21 issues.

22 With respect to the FCA lawsuit, Jonassen testified that after he filed the FCA  
23 lawsuit, he was interviewed regarding the case by the Department of Justice. He testified  
24 that the interviewers asked him to keep the information discussed and the fact of filing  
25 the *qui tam* case confidential and not to discuss it with anyone. Dkt. # 42 (Cramer Decl.),  
26 Ex. 4 (Jonassen Depo.) at 85:7-21. Jonassen also testified that he did not report or  
27 discuss his involvement in the *qui tam* case with Mr. Sweet, anyone in human resources,

1 or management while it was pending. *Id.* at 86:5-13. Jonassen did testify that he told  
2 Paul Price, Rob Voight, Dale Parks, and Omayio Moikobu that he was contemplating  
3 filing a lawsuit against the Port. *Id.* at 88:8-89:12. However, when pressed about  
4 whether he discussed filing litigation relating to wheel wash, commissioning, or leaky  
5 valve issues with anyone in management or human resources, he replied that he did not  
6 know. *Id.* at 88:13-89:19. More importantly, there is no evidence that he informed his  
7 superiors that he was going to file a *qui tam* action or that the litigation he contemplated  
8 filing had anything to do with the FCA or fraud against the federal government.

9 Other witnesses have testified that they found out about the *qui tam* action in the  
10 latter part of 2009 or later from Port attorneys. Dkt. # 42 (Cramer Decl.), Ex. 6 (Mathews  
11 Depo.) at 101:10-14 (latter part of 2009); Dkt. # 48 (Cloud Decl.), Ex. 6 (Alvarez Depo.)  
12 at 55:4-6 (January 2010). However, plaintiff has failed to produce any evidence linking  
13 the Port's knowledge of the FCA action in late 2009 or early 2010 with any alleged  
14 retaliatory conduct.

15 Accordingly, plaintiff has failed to set forth specific facts showing that there is a  
16 genuine issue of fact for trial with respect to his FCA retaliation claim.

### 17 **C. Breach of Contract**

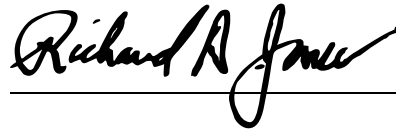
18 The Port argues that there is no evidence supporting plaintiff's breach of contract  
19 claim. Dkt. # 41 at 23. Plaintiff has not opposed the Port's motion with respect to the  
20 breach of contract claim, which the court construes "as an admission that the motion has  
21 merit." Local Rules W.D. Wash. CR 7(b)(2). During oral argument, plaintiff referred to  
22 various policies as the evidentiary basis for his breach of contract claim. However, the  
23 Port's policies simply recite its obligations under various state and federal statutes.  
24 Plaintiff has not produced any evidence that the Port's policies amount to promises of  
25 specific treatment in specific situations. *See Quedado v. Boeing Co.*, 168 Wash. App.  
26 363, 368-69, 276 P.3d 365 (2012).

1 Accordingly, plaintiff has failed to set forth specific facts showing that there is a  
2 genuine issue of material fact with respect to his breach of contract claim.

3 **IV. CONCLUSION**

4 For all the foregoing reasons, the court GRANTS the Port's motion for summary  
5 judgment. Dkt. # 41. The court also GRANTS plaintiff's motion to amend its response  
6 to conform to the Local Rules. Dkt. # 53.

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8 Dated this 4<sup>th</sup> day of September, 2012.

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11 The Honorable Richard A. Jones  
12 United States District Judge  
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