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**IN THE SUPREME COURT OF THE STATE OF DELAWARE**

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| POPE INVESTMENTS LLC, POPE INVESTMENTS II, LLC and CHINA ALARM HOLDINGS ACQUISITION LLC, | ) | |
| Defendant-Below, Appellants, | ) | |
| v. | ) | |
| | ) | C.A. No. 259, 2017 |
| THE MARILYN ABRAMS LIVING TRUST, | ) | On Appeal from the Court of Chancery of the State of Delaware C.A. No. 12829-VCL |
| Plaintiff-Below, Appellee. | ) | |

# REPLY BRIEF OF APPELLANTS POPE INVESTMENTS, LLC, POPE INVESTMENTS, II, LLC, AND CHINA ALARM HOLDINGS ACQUISITIONS, LLC

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Dated: October 5, 2017

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## PRELIMINARY STATEMENT

In order for it to be within a court's discretion to make a bad faith finding and shift attorneys' fees under the American Rule, the conduct must be such that there is clear evidence and that it rises to a high level of egregiousness. In Appellee's Answering Brief (hereinafter "Ans. Br."), Abrams fails to address either of these legal concepts. The Funds' conduct here was not highly egregious and, therefore, was not done in bad faith. There is certainly not clear evidence of highly egregious conduct.

As set forth in the Opening Brief of Appellants Pope Investments, LLC, Pope Investments II, LLC, and China Alarm Holding Acquisitions, LLC (hereinafter "Opening Br."), the Funds[1] had a good faith basis to oppose Abrams Demand at the outset and through trial. Indeed, Abrams testified in her deposition that she was not seeking the membership lists and several of her alleged credible bases for mismanagement had no basis in fact. Together with the requests coming after the SAM Litigation involving Abrams' husband had commenced, these facts supported the Funds' belief that Abrams' asserted purposes for inspection were not her primary ones. That the Chancery Court determined the Funds' position was incorrect does not mean that the Funds acted with any level of egregiousness in denying the Demand, which resulted in Abrams filing the books and records

[1] All capitalized terms not defined herein shall have the same meaning as set forth in the Opening Br.

action. Nor were the Funds' other basis for denying inspection made in bad faith. Indeed, the Funds successfully reduced the look-back period for her valuation requests from over ten years to five years and narrowed the scope of her requests. The Chancery Court erred as a matter of law in finding that the Funds' actions were in bad faith and awarding Abrams her attorneys' fees.

Similarly, the Chancery Court erred as a matter of law and abused its discretion in determining that the filing of the Reargument Motion was filed in bad faith. The Funds had valid bases for requesting clarification, which in fact resulted in several parts of the Chancery Court's ruling being clarified, including having a significant portion of the lookback period reduced, and the Funds were not required to meet and confer with Abrams first. The Funds also had valid arguments that their actions both prior to and during the underlying litigation were done in good faith. The Funds' actions do not rise to a high level of egregiousness. The Chancery Court thus erred as a matter of law in finding that the Funds' actions were in bad faith and awarding Abrams her attorneys' fees for defending the Reargument Motion.

Finally, if the Chancery Court's determinations of bad faith are affirmed, the award of all of Abrams' attorneys' fees and expenses exceeds the bounds of reason and ignores the rules of law or practices in a manner that creates injustice. The

Chancery Court thus abused its discretion in making a full fee award. A partial fee award would be the appropriate remedy under the circumstances.

## ARGUMENT

### I. The Chancery Court's Bad Faith Finding Is Not Supported by Clear Evidence that the Funds Actions Rose to a High Level of Egregiousness

Although the Chancery Court determined that Abrams had a clearly defined and established right to the requested documents, the mere existence of that right does not suffice to shift attorneys' fees. *See Borin v. Rasta Thomas LLC*, 2010 Del. Ch. LEXIS 82, at *8 (Del. Ch. May 4, 2010) (quotation omitted) ("If a defendant forces a plaintiff to seek judicial intervention to enforce a clearly defined right this is evidence of bad faith. But a defendant's conduct will not constitute the type of bad faith warranting a shift in fees unless it rises to a high level of egregiousness."); *In re Sunbelt Beverage Corp. S'holder Litig.*, 2010 Del. Ch. LEXIS 1, (Del. Ch. Jan. 5, 2010, revised Feb. 15, 2010) (declining to award attorneys' fees under the bad faith exception because the defendants' litigation strategy "was sufficiently reasoned to preclude a finding that there was no legal issue in the case upon which reasonable parties could differ"). The exception to the American Rule is "quite narrow" and "is applied in only the most egregious instances of fraud or overreaching." *Arbitrium (Cayman Islands) Handels AG v. Johnston*, 705 A.2d 225, 231 (Del. Ch. 1997). *See also Montgomery Cellular Holding Co., Inc.* v. Dobler, 880 A.2d 206, 227 (Del. 2005) ("The bad faith exception is applied in 'extraordinary circumstances' as a tool to deter abusive litigation and to protect the integrity of the judicial process."). "Attorneys' fees are

not awarded 'in the absence of intentional misconduct' or where the opposing party 'merely acted pursuant to an incorrect perception of its legal rights.'" *Estate of Carpenter v. Dinneen*, 2008 Del. Ch. LEXIS 40, at *76 (Del. Ch. Mar. 26, 2008).

The Funds' conduct in this case simply does not rise to the high level of egregiousness necessary to shift attorneys' fees under the American Rule. The Funds put forth colorable arguments as to why Abrams was not entitled to the documents she requested, including that Abrams had not stated a proper purpose, that her requests were overly broad, that the mismanagement bases stated in the Demand and Complaint were not credible and that the Manager had designated many of the documents sought as confidential and that Abrams had waived her right to challenge such designations. *See* A150-A169. Moreover, Abrams testified during her deposition that she was not seeking the Funds' membership lists and the Funds established that several of her initial purported grounds for mismanagement were baseless.

Even if Abrams had a contractual right to the requested documents without the need to establish a proper purpose, Chancery Court's bad faith finding was not made on that basis. Rather, the Chancery Court found that Abrams had a "clearly defined and established right" to inspect the Funds' books and records because "[s]he was a member who articulated numerous facially valid purposes for her

inspection." Op. at 14. The Chancery Court also did not find that the Funds' acted in bad faith in asserting that Abrams' purported purposes were not actually her primary purposes. *See generally* Op. Indeed, the Chancery Court noted that there was likely a connection between the SAM Litigation and "Abrams' newfound interest in her investment." Op. at 10.

Moreover, the question is not whether Abrams' asserted purposes were in fact her primary purposes, but whether the Funds had a colorable basis to assert that they were not her primary purposes. *See, e.g., P.J. Bale v. Rapuano*, 2005 Del. LEXIS 459, at *6 (Del. Nov. 17, 2005). They did. McCandless testified that the timing of the inspection requests, coming after the filing of the SAM Litigation, together with the breadth of the requests gave the Funds concern that Abrams had "ulterior motives and purposes." Trial Tr. 167:8-22. Other evidence also suggested that the purposes set forth in Abrams' Demand and Complaint were not her primary purposes. *See* Opening Brief at 23-26.[2] Though the Chancery Court

[2] While Abrams claims that Bradley Arant did not represent her *husband* in the SAM Litigation, the August 23 letter did not say that it did not represent her husband's *company*. Indeed, Abrams testified that the defendant in the SAM Litigation, C.V. Holdings—also known as Si02—was represented by the same law firm representing her in the instant action. *See* A44-46 (Abrams Tr. 26:24-28:12). Counsel for Ms. Abrams' husband also stated that the law firm has been C.V. Holdings "longtime corporate counsel." *See* AR3 (R. Abrams Tr. 38:18-21). Thus, the Funds had good reason for suspecting that there was a strong relationship between the SAM Litigation and this action. *See Quantum Tech. Partners IV, L.P. v. Ploom, Inc.*, 2014 Del. Ch. LEXIS 78, at *25 (Del. Ch. May 28, 2014) (Court may inquire into the *bona fides* of the stockholder's primary purpose).

determined that Abrams' asserted purposes were her primary ones, that does not change the fact that the Funds' believed in good faith that she had ulterior motives.

At the very least, there is not "clear evidence" that the Funds acted in bad faith in challenging Abrams' purposes for inspection. *See, e.g., CNL-AB LLC v. E. Prop. Fund I SPE (MS Ref) LLC*, 2011 Del. Ch. LEXIS 25, *41 (Del. Ch. Jan. 28, 2011). (Under Delaware law, bad faith constitutes "not simply bad judgment or negligence, but rather . . . the conscious doing of a wrong because of dishonest purpose or moral obliquity; it is different from the negative idea of negligence in that it contemplates a state of mind affirmatively operating with furtive design or ill will.").

The Funds' assertion of confidentiality was also made in good faith. The pre-complaint assertions of confidentiality were made by the Funds' counsel. *See* A398, A403.[3] At trial, McCandless testified that he believed that Section 3.01(c) "allows the manager a pretty wide amount of discretion in terms of determining what information the disclosure of which he would believe is not in the best interest of the company." Trial Tr. at 178:13-17. While he was unable to articulate precisely what other information besides the member lists were

[3] *See also Sutherland v. Sutherland*, 2010 Del. Ch. LEXIS 88, *58 (Del. Ch. May 3, 2010) (noting defendants formed good faith belief in validity of defenses following discussions with their counsel).

considered confidential,[4] the Funds' Pre-Trial Brief noted that the Manager considered "documents reflecting negotiations or efforts to buy out Pope I or Pope II's position in certain assets—to also be confidential information the disclosure of which is not in the best interest of the funds or could damage the funds or their business." A151. The Funds thus had a colorable position that certain documents were could be designated confidential by the Manager.

The pre-complaint assertions and the assertions at trial were based on language in Section 3.01(c) of the Pope I and Pope II Operating Agreements that the Chancery Court itself suggested was "ambiguous." Op. at 12 (quoting *Zimmerman v. Crothall*, 2012 WL 702738, at *7 (Del. Ch. Mar. 5, 2012).[5] Those assertions were also based on the good faith belief that Abrams had waived her right to challenge confidentiality designations under Section 3.01(d). *See* A403. The Funds' incorrect perception of the limitations of Sections 3.01(c) and 3.01(d) do not rise to the high level of egregiousness necessary for a finding of bad faith. *See LeCrenier v. Cent. Oil Asphalt Corp.*, 2010 Del. Ch. LEXIS 246, at *19 (Del. Ch. Dec. 22, 2010).

Moreover, from the outset the Funds asserted good faith challenges to the scope of Abrams' books and requests and, in fact successfully reduced both the

[4] Trial Tr. at 84:17-24.

[5] Although China Alarm's operating agreement did not contain the language of Section 3.01, the language in that section tracked the language in 6 Del. C. § 18-305(c).

scope of the requests, as well as reduced the look-back period from over ten years to five years. *See* Opening Brief at 24-28. That alone should be sufficient to show that the Funds did not act with the requisite egregiousness for a bad faith finding. Moreover, although Abrams claims that she "did attempt to narrow her requests in the August 12 and August 23 requests"[6] a review of those requests shows that she actually expanded her requests. *Compare* A394-A395 *to* A399. By the time of the Demand, the requests had expanded further. *See* A405-A407.

Indeed, while the August 12 request requested documents over a 10-year time period, there was no time limitation set forth in the August 23 request, which not only requested documents "all information related to [Abrams'] investments with" the Funds, but also any separate investments with the Manager. A399. Abrams' August 23 request also requested additional categories of documents, including the catchall "any other books and records, together with all correspondence, papers and other documents related to the business affairs of the limited liability companies. *Id*. The Demand requested even more categories of documents. A405-A407. In fact, after the August 12 request, there was no point prior to the deposition of Abrams' expert—which occurred on March 1, 2017, five days prior to trial—that a time limitation was mentioned. Indeed, although

[6] Ans. Br. at 32.

Abrams cites to her Pre-Trial Brief as evidence that she narrowed her requests,[7] she later argues that "Appellee's Pre-Trial Brief (… did not include a comprehensive list of documents)"[8] and the brief does not contain any limitation on time period, nor does the Pre-Trial Order. *See* A120-12, A198-A200. As noted in the Opening Brief, the Funds successfully limited the scope of production for certain documents to five years. It was Abrams, not the Funds, who chose to wait until—at the earliest—her expert's deposition just a few days before trial, to assert that five years might be an appropriate limitation.

Abrams also argues that, because the books and records are all located at the Funds' offices, it would not be burdensome or harassing to produce. Ans. Br. at 23. Abrams' requests encompassed virtually every document in the Funds' possession, going back at least ten years. A394-A395; A399-A400; A403-A404; A198-A200. The Manager has only five or six employees. *See* Trial Tr. 58:14-16 (McCandless). There is no doubt that it would be burdensome for such a small group to produce that breadth of records. The Funds had every right to challenge the scope and breadth of the requests and, as noted, were successful in cutting the requested time period in half. The Funds therefore acted in good faith in challenging the scope and breadth of the requests.

[7] Ans. Br. at 32 (citing to A120-121).
[8] Ans. Br. at 38.

The Funds also had a good faith basis to refuse to produce the membership lists. McCandless testified that the Manager considered the Funds' membership lists confidential and had never provided the lists to any member. *See* Trial Tr. at 156:8-18. The Manager based the confidentiality designation for Pope I and Pope II on Sections 3.01(c) (which allowed the Manager to make confidentiality designations) and 3.01(d) (whereby members waived their right to challenge confidentiality designations) of the Operating Agreements. *Id.* at 162:22-164:21. The Funds also believed that the requests for the member lists were connected to the SAM Litigation. *Id.* at 156:19-157:10. The Funds therefore had a colorable basis to deny Abrams request for the membership list prior to her filing suit.

Moreover, once she filed suit, Abrams Answering Brief sidesteps the critical fact that she testified at her deposition that she was not seeking the member lists: "Q … You are not really interested in learning the names of the other members of these LLCs, are you? A. I am not interested in the names of the other people unless there were some reason that I should know them, which I am not aware."[9] Despite opportunities to do so, Abrams let that testimony stand until trial. *See* Opening Br. at 29. The Funds cannot be faulted for failing to produce the membership lists prior to trial when Abrams herself stated she had no reason to have them. A58-59 (M. Abrams Tr. at 75:25-76:5).

[9] A58 (M. Abrams Tr. at 75:16-24).

Abrams next argues that her unsupported mismanagement claims "could not, and did not, have any bearing on the Funds' refusal to provide the requested information" because mismanagement claims were not raised in her initial letters requesting books and records. Ans. Br. at 34. This argument, of course, ignores that Abrams raised claims of mismanagement in her Demand (A405-407).[10] The Chancery Court found that Abrams was forced to bring litigation to enforce a clearly defined and established right, and cited to the Funds' refusal to comply with the Demand. Op. at 14-15. Abrams argument also ignores that, despite listing as a basis for mismanagement "the fact that she has not been given the opportunity to liquidate her investments …"[11] she knew that she had never even requested that her investments be liquidated. A48-A49, A52 (M. Abrams Tr. at 30:18-31:4, 34:5-10). The Funds also established that there was no credible basis for other mismanagement claims set forth in the Demand and Complaint. *See* Opening Br. at 11-12. The Funds therefore had a good faith basis to challenge those mismanagement claims.[12]

[10] Abrams also asserts that the Funds fail to identify which requests they denied related to mismanagement. Ans. Br. at 35. This ignores that Abrams never identified which categories of documents were related to her mismanagement requests.

[11] A405.

[12] Abrams' mismanagement claims related to Multivir and Bill Wells' loan from Pope I to Pope II were only asserted after the Complaint had been filed and substantial discovery had occurred.

The Funds also cited Abrams' testimony regarding the member list, together with her false mismanagement claims, as a good faith basis to argue that (1) Abrams' asserted purposes were not her primary ones; and (2) that Abrams brought this litigation in bad faith. A154, A175. The Chancery Court then used the Funds' assertion that Abrams brought the action in bad faith as a further basis to find that the Funds were acting in bad faith. Op. at 16. The Funds conduct did not rise to the high level of egregiousness necessary for a bad faith finding.[13] It is an error as a matter of law and an abuse of discretion to determine that there was clear evidence that Funds' conduct rose to the level of bad faith.

The Funds had good faith and colorable challenges to Abrams' inspection requests. The Funds' conduct was neither fraudulent, nor was there intentional misconduct. While the Funds' may have acted under incorrect perceptions of Abrams' intentions and the documents she was entitled to, they were successful in limiting the scope of the requests made in the Demand and Complaint. Thus, their conduct does not rise to the high level of egregiousness required for a bad faith finding and the Chancery Court's finding and award of attorneys' fees must be reversed.

[13] *See Shawe v. Elting*, 2017 WL 563180, at *5 (Del. Feb. 13, 2017) (noting that courts have also found bad faith where a party changed their position on an issue).

## II. The Reargument Motion Was Brought in Good Faith

The Funds' conduct in bringing the Reargument Motion also does not rise to the high level of egregiousness necessary for a finding of bad faith. The Funds obtained the clarification they were seeking, which in and of itself is a sufficient basis to determine that there was no bad faith in bringing the motion. As set forth above and in the Opening Brief, the Funds also had a good faith basis to challenge the Court's finding of bad faith for the Funds' pre-Complaint and post-Complaint conduct. Although stating that the Funds' acted in bad faith in bringing the Reargument Motion the Chancery Court never stated that the conduct rose a high level of egregiousness. The Funds' conduct was in fact not egregious and should not have formed the basis for the Chancery Court further award of attorneys' fees.

The Chancery Court thus erred as a matter of law and abused its discretion when it cited to a lack of a meet and confer prior to filing a motion for clarification as a basis for finding that the Funds acted in bad faith and awarding attorneys' fees and costs. Findings of bad faith require a "high level of egregiousness" that is simply not present here. *See FGC Holdings Ltd., v. Teltronics, Inc.*, 2007 Del. Ch. LEXIS 14, at *16 (Del. Ch. Jan. 22, 2007). As noted in the Opening Brief, rather than send the parties back to meet and confer as to the proper scope of inspection, the Chancery Court actually clarified several of the issues raised by the Funds. *See* Opening Br. at 39; Reargument Order at 2-4.

Abrams cites to *Judy v. Preferred Comm'n Sys., Inc.*,[14] and *Tafeen v. Homestore, Inc.*,[15] for the proposition that a duty exists to meet and confer in good faith to resolve differences before filing a motion for reconsideration or reargument. *See* Ans. Br. at 39. Yet neither case sets forth any such duty. In *Judy*, the Chancery Court addressed certain discovery disputes and stated that "Counsel are expected to meet and confer in a good faith effort to resolve differences.[16] As in *Judy*, the issue in *Tafeen* was a discovery dispute and, rather than stating that a duty existed, the Chancellor merely stated "I urge counsel to confer in good faith regarding such disputes."[17] Abrams cites no cases, and the Funds are aware of none, that require a meet and confer prior to the filing of a motion for reconsideration or reargument. In the absence of a duty, the Funds' conduct in failing to meet and confer cannot be said to be highly egregious.

Moreover, although Abrams asserts that "there is no question that each issue likely could have been resolved between counsel," Ans. Br. at 37, after the Funds requested clarification Abrams' counsel *never* contacted the Funds' counsel prior to filing its response. The assertion that these issues could have been resolved

[14] 2010 WL 2367481 (Del. Ch. Jun. 11. 2010).
[15] 2004 Del. Ch. LEXIS 88 (Del. Ch. Jun. 15, 2004).
[16] *See Judy*, 2010 WL 2367481, at *1.
[17] *Taffen*, 2004 Del. Ch. LEXIS 88, at *1-*2.

between counsel is simply that—an assertion—and there is not clear evidence[18] that the request for clarification was improper or unnecessary, or that the Funds acted in bad faith in bringing the request.

Additionally, Abrams does not dispute that the Funds' argument that the Chancery Court incorrectly claimed that the Funds misrepresented the Op. when requesting whether the Abrams' Pre-Trial Brief or Pre-Trial Order controlled with respect to the valuation-related documents.[19] Indeed, although the Court stated that "the documents identified for emphasis [in the Op.] are not different from those requested in the Pre-Trial Order,"[20] the Funds never argued to the contrary. *See* A676-678. Rather, the Funds requested clarification as to whether the documents requested in Abrams Pre-Trial Brief (which also listed the same documents enumerated in the Op.) or the Pre-Trial Order were the documents referred to by the Chancery Court when it held that Abrams was "entitled to all of the documents she sought." *Id.* The Funds request for clarification on this point therefore did not misrepresent the Op. and was made in good faith. The Chancery Court thus abused its discretion when it made this finding and there was nothing improper about the Funds' request for clarification.

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[18] *See Nichols v. Chrysler Group LLC*, 2010 Del. Ch. LEXIS 251, at *9 (Del. Ch. Dec. 29, 2010).
[19] Opening Brief at 38.
[20] Op. at 2.

Similarly, the Funds' request for reargument was also made in good faith. As set forth above and in the Opening Brief, the conduct that resulted in the initial attorneys' fee award in this case does not rise to a high level of egregiousness. The Funds' pointed in their Reargument Motion that this standard was not met. *See* A685-A685. Nevertheless, the Chancery Court did not address the egregiousness standard either in the Op. or Reargument Order. Nor did the Chancery Court find that the Funds' alternative request that only a portion of Abrams' fees be awarded was made in bad faith. *See* Reargument Order at 7-8.

As explained in the Opening Brief, the Funds also did not misrepresent the factual record.[21] At most, the Funds' arguments were zealous advocacy which is not bad faith. *See Estate of Carpenter*, 2008 Del. Ch. LEXIS 40, at *75 ("To constitute bad faith, Respondents' action must rise to a high level of egregiousness, such that their actions extend beyond the realm of zealous advocacy."). Nor did the Funds rehash arguments already rejected by the Chancery Court. *See* Ans. Br. at 40 (citing Reargument Order at ¶ 5(g)). Rather, as part of the Reargument Motion, the Funds asserted that the arguments made during the litigation and rejected by the Chancery Court in the Op. were made in good faith. *See* A679-A685. The arguments made in the Reargument Motion were not made in bad faith and do not rise to a high level of egregiousness.

[21] Opening Brief at 38, 40-41.

The Chancery Court's finding that the Reargument Motion was brought in bad faith was both in error as a matter of law and an abuse of discretion and should therefore be reversed.

## III. A Partial Award of Fees is the Appropriate Remedy if Any Conduct Justifying Fees is Found

As set forth above and in the Opening Brief, the Funds had a good faith basis to challenge the Demand from the outset. Abrams argues, however, that the Funds' denial at the outset caused her to incur all of the fees and expenses at issue, which differentiates this case from *Ensing v. Ensing*, 2017 Del. Ch. LEXIS 41 (Del. Ch. Mar. 6, 2017). Ans. Br. at 42. Abrams is incorrect. In *Ensing*, prior to the litigation, the defendant engaged in a variety of bad faith conduct, including relying on a "sham" document as the basis for his defense. *Id.* at *29-*31. It appears from the *Ensing* opinion that, had the sham document not been created and had the defendant not perpetuated his pre-litigation bad faith conduct, it is possible that litigation may never have been necessary.

But *Ensing* also demonstrates the high level of egregiousness that is typically seen when a Delaware court shifts attorneys' fees. Here, while the Chancery Court has the discretion to award full or partial fees, it was an abuse of discretion given that the Funds' conduct was not so egregious as to warrant a full award of fees. Rather, the Funds' denial of and subsequent challenges to Abrams' inspection requests, to the extent this Court determines they were made in bad faith, warrant, at most, a partial award of attorneys' fees. Discovery was necessary in this case to challenge the *bona fides* of Abrams' purposes and there is no evidence that, without litigation, Abrams would have limited the time periods of

her inspection requests. A full award of attorneys' fees in this instance both exceeds the bounds of reason and ignores the rules of law or practices in a manner that creates injustice. *See Schultz v. Ginsburg*, 965 A.2d 661, 667 (Del. 2009). Thus, to the extent bad faith conduct is found, the appropriate remedy is a partial award of fees.

## CONCLUSION

For the foregoing reasons, the Funds respectfully request that this Court reverse the Final Order and Fee Order and hold that: (1) the Funds' conduct was not in bad faith; and (2) shifting all of Abrams' reasonable attorneys' fees and costs is not warranted or (3) alternatively, that the amount of attorneys' fees should be reduced.

Respectfully submitted,

Dated: October 5, 2017
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