UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE PLATINUM-BEECHWOOD LITIGATION	Case No. 18 Civ. 6658 (JSR)
SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA, Third-Party Plaintiff, v. PB INVESTMENT HOLDINGS LTD., ET AL., Third-Party Defendants.	Case No. 18 Civ. 12018 (JSR)

THIRD-PARTY DEFENDANT DANIEL SAKS' MEMORANDUM OF LAW IN SUPPORT OF THE MOTION TO DISMISS THE THIRD-PARTY COMPLAINT OF THE SENIOR HEALTH INSURANCE COMPANY OF PENNSYLVANIA

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Third-Party Defendant Daniel Saks ("Saks") respectfully submits this memorandum of law in support of his Motion to Dismiss the Third-Party Complaint (Dkt. No. 367) ("TPC") filed by Third-Party Plaintiff Senior Health Insurance Company of Pennsylvania ("SHIP").

PRELIMINARY STATEMENT

In this third-party action, SHIP has filed a lengthy pleading that appears merely to amalgamate allegations asserted in a number of other complaints in related actions. However, SHIP fails to plead the elements of any of the causes of action it asserts against Saks. SHIP's attempt to proceed against Saks by relying solely on conclusory allegations of knowledge, participation, and conspiracy drawn from assertions in related complaints is insufficient, and its claims against Saks should be dismissed.

SHIP asserts that Saks aided and abetted an alleged fraud and breach of fiduciary duty that allegedly involved funneling SHIP's assets to Platinum Partners ("Platinum"), a failed hedge fund. But SHIP at most pleads Saks' constructive notice of such a scheme, when it is required to plead that Saks actually knew of the alleged fraud to support a claim for aiding and abetting. SHIP also pleads no facts that explain how any of Saks' actions substantially assisted in causing any of the injuries that SHIP claims are actionable. Both failures are fatal to SHIP's aiding and abetting claim.

SHIP likewise asserts that Saks is liable for the same tortious acts through a theory of civil conspiracy. But SHIP fails to plead any facts linking Saks to any agreement to conspire with the primary tortfeasors—the critical element of a conspiracy claim.

Finally, while SHIP brings a claim for unjust enrichment against Saks, SHIP acknowledges it is aware of no facts to suggest that Saks was enriched at SHIP's expense. This claim, therefore, also fails.

STATEMENT OF FACTS

Saks began working at B Asset Manager, LP ("BAM"), which the TPC identifies as one of the "Beechwood Entities" ("Beechwood"), in late 2014, after working for 6 months at Platinum Management (NY) LLC ("Platinum Management") from March 2014 through September 2014. (Ex. A, Decl. of Daniel Saks ("Saks Decl."), ¶ 2.) Saks is alleged to have replaced David Levy as Chief Investment Officer for BAM at the end of 2014. (TPC ¶ 37.) Saks joined Beechwood only after resigning from Platinum (Saks Decl. ¶¶ 4-5); the allegations that he "was still also working for PPVA/Platinum Management" when he started at BAM, (TPC ¶ 37), and [redacted], (TPC ¶ 119), are not plausible given his specific employment dates, which SHIP cannot dispute.[1] Saks resigned from BAM on December 31, 2015. (Saks Decl. ¶ 6.)

By the time Saks began his employment at BAM in late 2014, SHIP had already established an investment relationship with Beechwood, governed by two investment management agreements ("IMAs") with Beechwood Re and Beechwood Bermuda International Limited, signed in May and June of 2014. (TPC ¶¶ 163, 183.) The third IMA, which Saks

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[1] The TPC makes numerous allegations, including as to Saks' employment dates, that are apparently derived from the complaint filed by the Joint Official Liquidators ("JOLs") of Platinum Partners Value Arbitrage Fund, LP ("PPVA") in the action *Trott v. Platinum Management (NY) LLC*, No. 18 Civ. 10936 (S.D.N.Y.). (*See, e.g.*, TPC ¶¶ 3, 114, 414, 423, 446; *compare* TPC ¶ 37 ("Saks routinely received and was involved in commenting on the third-party valuation reports sent to BAM that included inflated valuations of the Beechwood transactions with PPVA . . . . For example, Saks was involved in orchestrating the January 2015 Montsant transaction and executed the transaction documents on behalf of BAM. Saks similarly was involved in negotiating amendments to the Golden Gate Oil transaction documents."), *with* PPVA SAC ¶¶ 191-92 (same).) However, the JOLs now admit that Saks' start date at Platinum Management is March 2014, and that they do not presently have information regarding his end date at Platinum Management or his dates of employment at BAM. (Plaintiffs' Memorandum of Law in Opposition to Moving Defendants' Second Round of Motions to Dismiss, dated May 13, 2019 at 11, 31, 35-36 (Dkt. 351) (accepting March 2014 start date and failing to address the other employment dates sworn to by Saks)). Saks submits on this motion his declaration regarding his dates of employment filed in his motion to dismiss submitted in *Trott* on May 10, 2019 (Dkt. No. 317) to ensure consistency in the record. By addressing this specific information now, Saks does not concede the correctness of any other allegations in the SAC and reserves all rights, including the right to challenge all of the incorrectly pleaded information at an appropriate time.

executed on behalf of BAM on January 15, 2015 ("BAM IMA"), (TPC ¶¶ 200-01), contained "the same basic structure" as the first two IMAs, (TPC ¶ 162), except that it provided for a Performance Fee equal to 1% of the net asset value of the account regardless of the account's performance, (TPC ¶ 207), and it did not "expressly guarantee a specific investment return," (TPC ¶ 205). The TPC alleges that Platinum Partners founder and CIO Mark Nordlicht ("Nordlicht") wrote a "Side Letter" to SHIP that provided SHIP "certain assurances as relates to the performance of the investments managed under the IMA," and that in the Side Letter Nordlicht agreed to extend to SHIP an investment return guarantee. (TPC ¶¶ 205-06.) SHIP does not allege that Saks played any role in the Side Letter.

The TPC alleges that Saks undertook to invest the funds that SHIP had placed in trust with BAM. SHIP alleges that Saks signed a Note Purchase Agreement on SHIP's behalf to acquire a note from Montsant Partners, LLC ("Montsant"), a wholly owned portfolio company of Platinum Partners Value Arbitrage Fund, LP ("PPVA"), on January 30, 2015. (TPC ¶¶ 249-51.) The loan to Montsant carried a two-year term, to be repaid in full, with interest, on January 30, 2017, more than a year after Saks left BAM. (TPC ¶ 255.) The loan to Montsant was collateralized in two ways: first, SHIP alleges that Mark Nordlicht and his wife, Dahlia Kalter, provided duly notarized personal guarantees of the loan to SHIP, (TPC ¶ 256); and second, Montsant executed a Pledge Agreement on May 13, 2015 through which it agreed to pledge a 2008 promissory note with "original principal amount of $5,600,000 made by Implant Sciences corporation," as well as significant equity in Navidea Biopharmaceuticals, Inc. and Vistagen

Therapeutics, Inc., (PPVA SAC, Ex. 65).[2] SHIP makes a wholly conclusory allegation that the collateral for the Montsant note was inadequate, (TPC ¶¶ 253, 255), but fails to support such allegation with any facts allowing an inference that the collateral obtained was not valuable, let alone that Saks knew that the collateral was inadequate, (*see generally* TPC ¶¶ 249-56).

SHIP also alleges that Saks executed the April 16, 2015 document through which SHIP acquired a 2014 secured note issued by PEDEVCO Corporation ("PEDEVCO"), a company engaged primarily in the exploration and development of oil and natural gas reserves. (TPC ¶¶ 258, 259, 261.) SHIP acknowledges that PEDEVCO was not owned by Platinum. (TPC ¶ 257.) SHIP also does not allege that the PEDEVCO note was inadequately secured at the time it was brought into SHIP's portfolio. (*See generally* TPC ¶¶ 257-267.) Rather, SHIP asserts that beginning in 2016—after Saks left BAM—Beechwood engaged in a series of transactions to restructure the PEDEVCO debt in a manner that allegedly subordinated SHIP's priority for repayment under the PEDEVCO note to Beechwood's. (TPC ¶¶ 262-67.)

The TPC fails to allege that SHIP's investment portfolio declined in value during Saks' tenure as CIO of BAM. Moreover, SHIP acknowledges that it received third-party valuation reports from Duff & Phelps, (TPC ¶ 339), and thus was on the same notice as Saks regarding the valuations of assets in its portfolio. SHIP cites to the "boilerplate warning" contained in Duff & Phelps' third-quarter 2015 valuation report addressed to Saks (*id.*), and argues that these valuations were "largely inflated or falsified based on the information that we now know Beechwood and the Co-Conspirators had available." Based on its bare allegation regarding the

[2] As discussed above, SHIP relies on the PPVA SAC as a basis for several allegations in its Complaint, and thus the Court may consider that document and its attached exhibits at the motion to dismiss stage as incorporated by reference into the TPC. *See, e.g.*, *Chambers v. Time Warner, Inc.*, 282 F.3d 147, 153 (2d Cir. 2002).

falsity of the third-party valuation reports, SHIP argues that the performance fees paid to Beechwood under the IMAs—calculated using these third-party valuation reports—"had not in fact been earned." (*See, e.g.*, TPC ¶ 209.) However, the only fact that SHIP alleges in support of its argument is that the "Beechwood valuations and assertions were based on Platinum information." (TPC ¶ 338.) SHIP alleges no further facts to explain why the source of certain information, standing alone, would have alerted Saks to the alleged falsity of that information in 2015, while he was at Beechwood and before Platinum failed.

ARGUMENT

The TPC asserts against Saks three counts of secondary liability—aiding and abetting fraud (Count I), aiding and abetting breach of fiduciary duty (Count II), and civil conspiracy (Count V). Each of these causes of action sounds in fraud and is subject to the heightened pleading standards of Federal Rule of Civil Procedure 9(b). SHIP also alleges against Saks one count of unjust enrichment (Count VII). Each of these causes of action fails to state a claim against Saks for the reasons described below.

I. SHIP Fails to State Aiding and Abetting Claims by Saks

SHIP alleges that Saks, along with the other "Co-Conspirator Defendants" named in the TPC, aided and abetted Beechwood's alleged fraud and breach of duty against SHIP through his participation in transactions with or related to Platinum. (TPC ¶¶ 415, 424.) The TPC also alleges that Saks, along with the other "Beechwood Insiders" named in the TPC, "aggressively encouraged" SHIP to participate in these allegedly fraudulent transactions, even though the TPC never specifies any interaction between Saks and SHIP. (TPC ¶¶ 416, 425.) SHIP alleges that these supposed acts caused harm to SHIP in four ways: (1) through being fraudulently induced to enter into the IMAs; (2) through not terminating the IMAs earlier or mitigating damages; (3)

through payment of allegedly unearned performance fees; and (4) through the expenses incurred in connection with terminating the IMAs. (TPC ¶¶ 417, 426.)

To establish liability for aiding and abetting fraud, the Plaintiffs must show "(1) the existence of a fraud; (2) the defendant's knowledge of the fraud; and (3) that the defendant provided substantial assistance to advance the fraud's commission." *Krys v. Pigott*, 749 F.3d 117, 127 (2d Cir. 2014) ("*Krys II*"). For the purposes of an aiding and abetting claim, knowledge is subjective and requires that the defendant actually knew of the fraudulent scheme, "not mere notice or unreasonable awareness." *Samuel M. Feinberg Testamentary Tr. v. Carter*, 652 F. Supp. 1066, 1082 (S.D.N.Y. 1987). Aiding and abetting breach of fiduciary duty likewise requires that the defendant had "actual knowledge of the breach of duty" and "knowingly induced or participated in the breach." *Krys v. Butt*, 486 F. App'x 153, 157 (2d Cir. 2012) ("*Krys I*"). A defendant substantially assists a breach of fiduciary duty or fraud "when the defendant affirmatively assists, helps conceal or fails to act when required to do so, thereby enabling the breach to occur." *SPV OSUS Ltd. v. AIA LLC*, No. 15 Civ. 0619, 2016 WL 3039192, at *6 (S.D.N.Y. May 24, 2016) (Rakoff, J.) (quoting *Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 295 (2d Cir. 2006)). Where, as here, the plaintiff has not alleged that the defendant owes direct fiduciary duties to the plaintiff, substantial assistance cannot be established by inaction. *Lerner*, 459 F.3d at 295; *SPV OSUS*, 2016 WL 3039192, at *8. Courts have rejected attempts to draw a distinction between culpable conduct for aiding and abetting fiduciary duty liability, and aiding and abetting fraud. *See, e.g.*, *Hongying Zhao v. JPMorgan Chase & Co.*, No. 17 Civ. 8570, 2019 WL 1173010, at *5 n.6 (S.D.N.Y. Mar. 13, 2019); *Kirschner v. Bennett*, 648 F. Supp. 2d 525, 533 (S.D.N.Y. 2009). The similarity of the two claims is particularly apparent here, where SHIP repeats the same facts in its recitation of each cause of action.

A. Alleged notice or constructive knowledge of the allegedly fraudulent nature of the Platinum investments is insufficient to plead actual knowledge

SHIP pleads two bases for Saks' alleged knowledge of the alleged fraud and breach of duty, neither of which provides any basis to infer that Saks was actually aware of the supposed fraud. First, SHIP alleges that based "on Saks' position and involvement at the Beechwood Advisors, he understood that its investment valuations as reported to SHIP and others were materially inflated." (TPC ¶ 37.) Second, SHIP alleges that because Saks had worked at Platinum Management, he was generally aware of "all aspects of the Platinum-Beechwood Scheme," even though that scheme allegedly began before he worked at either company, and allegedly continued well after he departed. (*Id.*)

Neither of these assertions sufficiently pleads that Saks *actually* understood the alleged fraud was occurring. Regarding the alleged "Platinum-Beechwood Scheme" to funnel SHIP's capital to Platinum, SHIP does not allege any facts known by Saks that would have led Saks to doubt Platinum's solvency. SHIP does not allege that Saks was involved in the founding of Beechwood, or the pitch to and negotiation of the IMAs with SHIP. Nor does SHIP allege that Saks had any independent knowledge of those events that would have led him to appreciate the supposed purpose of Beechwood's creation. Instead, SHIP alleges that Saks supervised SHIP's investments at BAM as CIO for essentially the calendar year 2015. In connection with that role, SHIP alleges that Saks signed off on one investment of SHIP's capital in a Platinum-related investment, Montsant, and another investment of SHIP's capital in PEDEVCO, which was not owned by Platinum.

These facts do not allow an inference that Saks appreciated that any fraudulent scheme existed to improperly funnel third-party assets to Platinum principals. SHIP provides no basis to infer that Saks actually knew Platinum was insolvent, or that Platinum did not otherwise intend

to repay its debts. Conclusory allegations of a defendant's knowledge of the solvency of a third party are insufficient to establish actual knowledge. *See Krys II*, 749 F.3d at 132. To state a claim for aiding and abetting the fraudulent transfer of assets from SHIP to Platinum, SHIP must plead facts to suggest that Saks subjectively knew that BAM and SHIP would not get paid back on the Montsant transaction at the time of execution in early 2015. But no such facts exist. Furthermore, even if the transactions executed by Saks would have raised red flags for him—which SHIP has not pleaded with any reference to specific facts—red flags alone merely plead notice or constructive knowledge of an alleged fraud, not the actual knowledge necessary to survive a motion to dismiss a claim for aiding and abetting. *See, e.g.*, *Rosner v. Bank of China*, 349 F. App'x 637, 638-39 (2d Cir. 2009); *Chemtex, LLC v. St. Anthony Enters., Inc.*, 490 F. Supp. 2d 536, 547 (S.D.N.Y. 2007) ("even alleged ignorance of obvious warning signs of fraud will not suffice to adequately allege actual knowledge"); *In re Agape Litig.*, 773 F. Supp. 2d 298, 310 (E.D.N.Y. 2011) (no actual knowledge where plaintiff pled facts demonstrating that "the fraud was obvious"); *Zamora v. JPMorgan Chase Bank, N.A.*, No. 14 Civ. 5344, 2015 WL 4653234, at *3 (S.D.N.Y. July 31, 2015); *Berman v. Morgan Keegan & Co.*, No. 10 Civ. 5866, 2011 WL 1002683, at *10 (S.D.N.Y. Mar. 14, 2011).

SHIP likewise fails to establish Saks' actual knowledge that the Duff & Phelps reports allegedly overstated the net asset value of SHIP's investments in the BAM IMA. SHIP's theory on this point appears to be that because certain information given to Duff & Phelps came from Platinum, and because Platinum ultimately failed, the information provided by Platinum therefore must have been fraudulently inaccurate. But SHIP's logic assumes that Saks would have known that Platinum was failing in 2015, even though it alleges no facts to support that assertion. Nor does SHIP plead any pecuniary incentive for Saks to falsify data provided to Duff

& Phelps. SHIP does not allege that Saks had any ownership interest or investment in Beechwood, or in Platinum. SHIP also does not allege that Saks' compensation depended on the performance fees earned through the BAM IMA. Moreover, unlike the IMAs that SHIP had with BBIL and Beechwood Re (where Saks did not work), SHIP admits that the BAM IMA included a performance fee regardless of whether SHIP's portfolio achieved a 5.85% annual return, which would further diminish Saks' motive to falsify valuations. SHIP has therefore failed to plead facts sufficient to support an inference that Saks actually knew of the alleged fraud or had any incentive to engage in it. The aiding and abetting claims should be dismissed for this reason alone.

B. The TPC fails to identify any overt act by Saks that proximately caused harm to SHIP, as necessary to plead substantial assistance of a fraud or breach of duty

Because the TPC does not allege that Saks owed SHIP fiduciary duties in his individual capacity, the substantial assistance necessary to support a fraud claim can be pleaded only through overt acts, not through inaction. The substantial assistance provided by the defendant must also be both an actual, but-for cause and a proximate cause of injury to the plaintiff. *See SPV OSUS*, 2016 WL 3039192, at *6; *Fraternity Fund Ltd. v. Beacon Hill Asset Mgmt. LLC*, 479 F. Supp. 2d 349, 370 (S.D.N.Y. 2007). SHIP does not allege with particularity that any overt act of Saks proximately caused any of the four injuries it identifies in its aiding and abetting claims.

First, as to SHIP's decision to enter into the three IMAs, SHIP concedes that Saks did not induce SHIP to enter into any of the three contracts. Both the Beechwood Re IMA and the BBIL IMA were executed before Saks was employed at Beechwood. And although Saks signed the BAM IMA, SHIP states that it entered into the BAM IMA because of Beechwood's representations as to the "nature, quality, value, and performance of investments under the BBIL IMA and the Beechwood Re IMA." (TPC ¶ 203.) In other words, SHIP was induced to enter

into the BAM IMA by the past performance of the other two IMAs and the initial representations about them prior to Saks' employment with BAM, and not because of any representation made by Saks to SHIP.

Second, as to SHIP's failure to terminate the IMA or mitigate its damages, SHIP fails to connect any overt act of Saks to its decision not to terminate the IMAs. To the extent SHIP's theory is that Saks' failure to correct the information Beechwood provided to Duff & Phelps in connection with its valuation reports caused SHIP not to terminate the IMAs, it has not pled that Saks owed SHIP a personal fiduciary duty and therefore cannot establish substantial assistance through omission. *Lerner*, 459 F.3d at 295.

Third, as to the payment of allegedly unearned performance fees, those fees were contractually defined and not the result of any overt act of Saks. Moreover, as with the second alleged injury discussed above, SHIP fails to identify any overt act of Saks that caused false information to be included in the third-party valuation reports that formed the basis for BAM's performance fees.

Fourth, as to the costs incurred in connection with canceling the SHIP IMAs, such cancellation occurred after November 2016, (TPC ¶ 407), almost a full year after Saks left Beechwood. The TPC provides no detail to explain how any overt act of Saks from 2015 contributed to the cost of SHIP's investigation and legal action in late 2016 and beyond.

In sum, SHIP fails to allege any injury that is the proximate result of any of Saks' overt conduct. The TPC fails to adequately plead Saks' substantial assistance, and the aiding and abetting claims should be dismissed.

II. SHIP Fails to Impute Other Torts to Saks Through a Theory of Civil Conspiracy Because It Fails to Connect Saks to Any Underlying Agreement

SHIP pleads a claim of civil conspiracy against each of the defendants, including Saks, who do not have direct claims asserted against them in the related SHIP action. (TPC ¶¶ 445-453.) Civil conspiracy does not exist as an independent cause of action. *See, e.g.*, *Powell v. Kopman*, 511 F. Supp. 700, 704 (S.D.N.Y. 1981). Rather, civil conspiracy is a concept that may link a defendant to the torts of other defendants under certain circumstances. *Rutkin v. Reinfeld*, 229 F.2d 248, 252 (2d Cir. 1956); *Brownstone Inv. Grp., LLC v. Levey*, 468 F. Supp. 2d 654, 661 (S.D.N.Y. 2007). Under a theory of civil conspiracy, a third party may be liable for the conduct of a tortfeasor only in the presence of the following elements: "(1) an agreement between two or more parties; (2) an overt act in furtherance of the agreement; (3) the parties' intentional participation in the furtherance of a plan or purpose; and (4) resulting damage or injury." *Treppel v. Biovail Corp.*, No. 03 Civ. 3002, 2005 WL 2086339, at *5 (S.D.N.Y. Aug. 30, 2005).

The TPC fails to identify any formal or informal agreement to which Saks was a party, which is fatal to a claim of civil conspiracy. SHIP pleads only that Saks was employed at Platinum, and later at Beechwood. To the extent SHIP is arguing that the general trajectory of Saks' employment establishes that he was part of a conspiracy agreement, "to survive a motion to dismiss, a complaint must contain more than general allegations in support of the conspiracy. Rather, it must allege the specific times, facts, and circumstances of the alleged conspiracy." *Brownstone Inv. Grp.*, 468 F. Supp. 2d at 661 (quoting *Fitzgerald v. Field*, No. 99 Civ. 3406, 1999 WL 1021568, at *4 (S.D.N.Y. Nov. 9, 1999)). The TPC provides no "times, facts, and circumstances" regarding how the conspiracy began or, to the extent Saks was brought into the conspiracy later, the agreement by which Saks allegedly joined the conspiracy. Furthermore, courts have held defendants' common employment insufficient, standing alone, to support a

claim of civil conspiracy. *See, e.g.*, *Schwartz v. Soc'y of N.Y. Hosp.*, 605 N.Y.S.2d 72, 73 (1st Dep't 1993); *Brownstone Inv Grp.*, 468 F. Supp. 2d at 661; *cf. Donini Int'l, S.p.A. v. Satec (USA) LLC*, No. 03 Civ. 9471, 2004 WL 1574645, at *3-4 (S.D.N.Y. July 13, 2004) (common ownership of company not sufficient to establish agreement).

III. SHIP Fails to Adequately Plead Unjust Enrichment

Finally, SHIP pleads that "*[t]o the extent that* [Saks] received the proceeds of unearned Performance Fees or monies earned from transactions favoring Beechwood's or Platinum's interests over SHIP's and thus were enriched, and those proceeds are not recoverable or collectible from any other party, [he was] unjustly enriched in a manner that harmed SHIP and should be ordered to repay amounts they received, as a matter of equity." (TPC ¶ 464 (emphasis added).) That pleading fails to make even a conclusory allegation of the elements of unjust enrichment. Unjust enrichment requires that the "(1) defendant was enriched, (2) at plaintiff's expense, and (3) equity and good conscience militate against permitting defendant to retain what plaintiff is seeking to recover." *Briarpatch Ltd. v. Phoenix Pictures, Inc.*, 373 F.3d 296, 306 (2d Cir. 2004). There is no allegation at all in the TPC that Saks was enriched by performance fees or other monies earned as a result of any transaction under the IMAs, which is fatal to the unjust enrichment claim. Indeed, by pleading its unjust enrichment claim "to the extent that" Saks received any performance fees or other payments, SHIP implicitly admits that it is in possession of no facts suggesting that Saks received any such payments. Accordingly, the unjust enrichment claim should be dismissed.

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CONCLUSION

For each of the foregoing reasons, Saks requests an order dismissing all of the claims asserted against him with prejudice and without leave to renew, as well as granting any further relief as the Court deems just and proper under the circumstances.

Dated: June 14, 2019
New York, New York

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