UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

THE CHEROKEE NATION,

Plaintiff,

v.

THE DEPARTMENT OF THE INTERIOR, DAVID BERNHARDT, THE BUREAU OF INDIAN AFFAIRS, TARA MACLEAN SWEENEY, THE OFFICE OF THE SPECIAL TRUSTEE FOR AMERICAN INDIANS, JEROLD GIDNER, THE OFFICE OF TRUST FUND MANAGEMENT, CASEY HAMMOND, THE BUREAU OF LAND MANAGEMENT, THE OFFICE OF NATURAL RESOURCES REVENUE, GREGORY J. GOULD, THE UNITED STATES DEPARTMENT OF THE TREASURY, STEVEN T. MNUCHIN, and THE UNITED STATES OF AMERICA,

Defendants.

Case No. 1:19-cv-02154-TNM

CHEROKEE NATION'S MEMORANDUM OF POINTS AND AUTHORITIES
IN OPPOSITION TO FEDERAL DEFENDANTS' 12(c) MOTION TO DISMISS

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INTRODUCTION

After decades of failed attempts to receive a full and complete accounting of its Trust Fund,[1] the Cherokee Nation (herein "the Nation") filed this action on July 19, 2019. The Nation requests that this Court order the United States to provide such an accounting. To the extent that the United States cannot account or such an accounting shows mismanagement of the Trust Fund resulting in a loss to the Nation, the Nation requests that the Court order the United States to restore the Nation's Trust Fund. The United States' obligations arise from the common law of trusts and were codified by federal statute in – among other places – the American Indian Trust Fund Management Reform Act of 1994, Pub. Law No. 103-412, 108 Stat. 4239 (codified at 25 U.S.C. §§ 4001 *et seq.* and amending 25 U.S.C. § 161a *et seq.*) (the "1994 Act"). "[T]he 1994 Act [did] not *create* trust responsibilities of the United States," but "lists some of the means through which the Secretary shall discharge these preexisting duties." *Cobell v. Norton*, 240 F.3d 1081, 1101 (D.C. Cir. 2001) ("*Cobell VI*") (emphasis original).

The United States first moved to dismiss the Nation's claims pursuant to Rules 12(b)(1) and (b)(6), arguing that this Court lacks jurisdiction to hear the Nation's breach of trust claims, including the claim for an accounting. *See* Dkt. Nos. 34, 34-1 ("First Motion to Dismiss"). The Court denied the First Motion to Dismiss, finding that the United States' arguments had been presented and rejected in multiple other tribal trust accounting cases.

> [T]his is far from the first lawsuit by an Indian tribe seeking a trust accounting from the United States. Indeed, the D.C. Circuit has found that the United States has mismanaged Indian trusts for nearly as long as it has been trustee. *Cobell v. Norton* ("*Cobell VI*"), 240 F.3d 1081, 1086 (D.C. Cir. 2001). Finding earlier

[1] The Cherokee Nation's "Trust Fund," as alleged by the Nation, includes money; proceeds from the sale of land or profits from the land; money from surface leases for agriculture, surface, oil and gas mining leases, coal leases, sand and gravel leases, businesses, and town lots; income from property owned by the Nation; buildings; the Nation's records; and money resulting from treaties or other agreements. *See* Dkt. No. 2-1 ¶ 2.

> precedent forecloses dismissal, the Court is satisfied that it has jurisdiction and that the Nation has met its burden at this early stage.

See Memorandum Opinion and Order [Dkt. No. 42] at 1. This Court held, *inter alia*, that it has jurisdiction over the Nation's claims, that the United States has waived its sovereign immunity from suit through the Administrative Procedure Act (herein the "APA"), that the Nation properly set forth specific relevant statutes for its claims, that "the Government's trust obligations create an exception to the requirement for 'final agency action,'" and that the United States' statute of limitations arguments were premature. *Id*. at 4-6.

At the initial scheduling conference the Court rejected the United States' contention that discovery was not necessary in this action and referred this action to the Magistrate Judge. *See* Feb. 18, 2020 Minute Entry; *see also* Dkt. No. 48-2 at 11 (stating that the Court is "going to refer this case to a magistrate judge for discovery and handling up to dispositive motions"). The Magistrate Judge subsequently issued a scheduling order that permitted discovery beginning on April 20, 2020, while also allowing the United States to move for a protective order by May 20, 2020. *See* Scheduling Order [Dkt. No. 49] at 1. The Nation timely propounded discovery. The United States' non-responses will be the subject of a Motion to Compel. On May 20, 2020, the United States filed both a Motion for Protective Order [Dkt. No. 55] and a Second Motion to Dismiss [Dkt. No. 54].

Just as with the First Motion, the United States' Second Motion to Dismiss mischaracterizes the Nation's claims, and sets forth an argument that has already been rejected by the courts. The Second Motion to Dismiss seeks to dismiss the Nation's "common law claims" arguing that the Nation must base its breach of trust claims on relevant treaties, statutes, and regulations. *See* Dkt. No. 54-1 at 4. But the Court has already held that the Nation properly identified a statutory basis for its claims. *See* Memorandum Opinion and Order [Dkt. No. 42] at

5. The United States is seeking absolution of any common law trust obligations to the Nation, regardless of the fact that its obligation is grounded in statute; a fact that has been regularly acknowledged by this and other courts that have considered similar trust accounting claims. As advantageous as that interpretation may be to the United States, it stands in stark contrast to the established law of Indian trust responsibilities and seeks to deprive the Nation of a meaningful accounting. Simply stated, the United States owes the Nation a host of trust duties which are both informed by, and based upon, the common law of trusts. The Nation's claims cannot be dismissed as a matter of law.

STANDARD OF REVIEW

The United States has moved to dismiss pursuant to Federal Rule of Civil Procedure 12(c) which allows a party to move for judgment on the pleadings. "A motion brought under 12(c) is designed to dispose of cases where the material facts are not in dispute and a judgment on the merits can be rendered by looking at the substance of the pleadings and any judicially noted facts." *All. of Artists & Recording Cos., Inc. v. Gen. Motors Co.*, 162 F. Supp. 3d 8, 16 (D.D.C. 2016) (internal quotation and citation omitted). The standard of reviewing a Rule 12(c) motion is "virtually identical" to that applied to a motion to dismiss under Rule 12(b)(6). *Baumann v. Dist. of Columbia*, 744 F. Supp.2d 216, 221 (D.D.C. 2010) (quoting *Haynesworth v. Miller*, 820 F.2d 1245, 1254 (D.C. Cir. 1987)). Accordingly, the court "must accept as true all well-pleaded factual allegations and draw all reasonable inferences in favor of the plaintiffs." *Friends of Capital Crescent Trail v. Fed. Transit Admin.,* 2019 WL 1046889 at *2 (D.D.C. Mar. 5, 2019) (quoting *Logan v. Dep't of Veterans Affairs*, 357 F. Supp. 2d 149, 153 (D.D.C. 2004)). The allegations must be sufficient enough to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S.

544, 570 (2007)). "Because a Rule 12(c) motion would summarily extinguish litigation at the threshold and foreclose the opportunity for discovery and factual presentation, the Court must treat [the] motion with the greatest of care and deny it if there are allegations in the complaint which, if proved, would provide a basis for recovery." *Baumann*, 744 F. Supp. 2d at 221 (quoting *Haynesworth*, 820 F.2d at 1254) (internal quotation omitted).

ARGUMENT AND AUTHORITIES

I. THE UNITED STATES INCORRECTLY CONTENDS THAT THE NATION HAS BROUGHT A CLAIM BASED SOLELY ON COMMON LAW.

"To trigger a duty to account [Indian tribes] first have to identify some statute or regulation creating a trust relationship between them and the government." *Fletcher v. United States*, 730 F.3d 1206, 1208-09 (10th Cir. 2013). Such trust relationships are "defined and governed by statutes" and "particular statutes and regulations clearly establish fiduciary obligations." *United States v. Jicarilla Apache Nation*, 564 U.S. 162, 174, 177 (2011) ("*Jicarilla I*") (internal quotation omitted) (citing *United States v. Mitchell*, 463 U.S. 206, 226 (1983) ("*Mitchell II*")). The "applicable statutes and regulations . . . define the contours of the United States' fiduciary responsibilities." *Jicarilla I*, 564 U.S. at 177 (internal quotation omitted). After such a relationship has been established, the actual fiduciary duties owed to Indian beneficiaries may be interpreted through the common law as is necessary. *Id*. at 177; *United States v. White Mtn. Apache*, 537 U.S. 465, 475-76 (2003) (inferring a common law fiduciary duty to preserve trust corpus from delegation of control over resources to the United States); *Mitchell II*, 462 U.S. at 224; *Cobell v. Norton*, 392 F.3d 461, 472 (D.C. Cir. 2004) ("*Cobell XIII*") ("once a statutory obligation is identified, the court may look to common law trust principles to particularize that

obligation.").[2] For instance, "[w]hen a statute imposes a fiduciary duty on the government, but does not explicitly define the scope of the fiduciary duty or guide the mechanics of how to advance the desired result, the court may look to the common law for guidance on how to define the scope of the duty." *W. Shoshone Identifiable Group by Yomba Shoshone Tribe v. United States*, 143 Fed. Cl. 545, 607 (2019) (finding that the common law "prudent investor" rule can be inferred under 25 U.S.C. § 162a). In assessing the United States' actions as trustee in its tribal trust relationships, one must recognize that the United States "has charged itself with the moral obligations of the highest responsibility and trust in its relationship with Indians, and its conduct should therefore be judged by the most exacting fiduciary standards." *Sisseton Wahpeton Oyate of the Lake Traverse Reservation v. Jewell*, 130 F. Supp. 3d 391, 394 (D.D.C. 2015) (quoting *Seminole Nation v. United States*, 316 U.S. 286, 297 (1942)) (internal quotations omitted).

On these issues, the parties are not in dispute. However, the United States incorrectly asserts that the Nation has brought claims based solely upon common law trust obligations. The United States' motion fails to identify with specificity the claims it is seeking to dismiss. *See e.g.* Dkt. No. 54-1 at 1 ("to the extent Plaintiff's claims rest on an asserted common law trust obligation, those claims fail as a matter of law and must be dismissed.").

Despite its posturing, the United States actually agrees in its briefing that the Court can look to common law trust obligations when interpreting the obligations set forth in statute: "common-law trust principles might play a role in informing the nature of fiduciary obligations." *See* Dkt. 54-1 at 4. This language from the United States is quite tepid in comparison to what federal courts commonly hold. *See e.g. Cobell XIII*, 392 F.3d at 472 ("once a statutory

[2] In *Cobell XIII*, the United States accepted and enforced the D.C. Circuit's "observation that interpretation of statutory terms is informed by common law trust principles." *Id*. at 473.

obligation is identified, the court may look to common law trust principles to particularize that obligation."); *Jicarilla I*, 564 U.S. at 177 ("We have looked to common-law principles to inform our interpretation of statutes and to determine the scope of liability that Congress has imposed."). In fact, this Court has already recognized that "the D.C. Circuit has consistently interpreted the United States' duties regarding Indian trust accounts in light of the common law of trusts and the United States' Indian policy." *See* Opinion and Order [Dkt. No. 42] at 5 (quoting *Sisseton*, 130 F. Supp. 3d at 394) (internal quotation omitted).

The Nation's Complaint identifies numerous treaties, statutes, and regulations that demonstrate the trust obligations of the United States. These treaties, statutes, and regulations are most succinctly stated in the Nation's Complaint in numerous locations with specific focus on both accounting duties in treaties with the Nation and the requirements of the 1994 Indian Trust Fund Management Reform Act,[3] codified at 25 U.S.C. §§ 162a, 4011, and 4044. *See inter alia* Complaint [Dkt. No. 2-1] at ¶¶ 40, 44, 61, 63, 72-75, 77, 101, 118, 123, 139-154. The 1994 Act provides that "[t]he Secretary <u>shall account</u> for the daily and annual balance of <u>all funds</u> held in trust by the United States for the benefit of an Indian tribe . . . which are deposited or invested pursuant to The Act of June 24, 1938," 25 U.S.C. § 4011(a) (emphasis added), and to produce monthly statements and an annual audit of all such funds, 25 U.S.C. § 4011(b). Accordingly, in this case "[t]he Nation seeks an Order from this Court compelling the United States to provide an accounting for all elements of the Trust Funds that are held or have been held by the United States *qua* trustee for the Nation, including without limitation those elements described as

[3] The D.C. Circuit has advised, the 1994 Act "recognized the federal government's preexisting trust responsibilities." *Cobell VI*, 240 F.3d at 1090; *see also id.* at 1101 (explaining that the 1994 Act did "not *create* trust responsibilities of the United States," but rather provides a list of "some of the means through which the Secretary shall discharge these preexisting duties."); *Sisseton*, 130 F. Supp. 3d at 394-95 (same).

examples of the Trust Fund," Dkt. No. 2-1 ¶¶ 137, 142, and to appropriately manage the Fund, *id.* ¶¶ 154, 167.

This Court has already held that these treaties, statutes, and regulations are sufficient for the Nation to bring its breach of trust claims: "the body of law governing Indian trusts forecloses the Government's argument that the Nation has failed to 'set forth any specific relevant statutes' for its claims." *See* Opinion and Order [Dkt. No. 42] at 5.

II. THE MOTION IS JUST AN ATTEMPT TO AVOID DISCOVERY.

Ultimately, it appears that the entire purpose of the Second Motion to Dismiss is to avoid discovery in this action. Specifically, the United States twists the Nation's argument in the parties' Supplemental Joint Statement [Dkt. No. 48] as to why discovery is necessary, as a basis to argue that the Nation seeks to impose common-law trust obligations in lieu of statutory trust obligations. Instead, what the Nation has consistently presented is that certain of its claims are not limited to APA record review:

> Counts I and II in the Cherokee Nation's complaint, Dkt. 2-1, are not based on "review on an administrative record," but rather are grounded in common law and statute (including 25 U.S.C. § 4011, 25 U.S.C. § 4044, and 25 U.S.C. § 162a). (The Cherokee Nation's claims are described in the parties' February 11, 2020 Joint Statement, Dkt. 46 at 2.)
>
> As this Court in *Sisseton Wahpeton Oyate of the Lake Traverse Reservation v. Jewell* held, tribes are "entitled to seek enforcement of their statutory rights provided for in the 1994 Act." 130 F. Supp. 3d 391, 395 (D.D.C. 2015) (Hogan, J.). Those claims do not arise out of the Administrative Procedure Act and are not for review on an administrative record. It is clear that the Court would have required discovery in *Sisseton* had the claims not been stayed and settled. *Id.* at 397 (noting that the parties had "not yet had the opportunity to develop a record through discovery" on certain issues raised in the United States' motion to dismiss and reserving the issue "for a later stage of the proceedings after the parties have had the opportunity for discovery"). As the Court noted in denying the Federal Defendants' motion to dismiss in this case, "as precedent goes, it is hard to get closer than Judge Hogan's recent" decision in the *Sisseton* case. Dkt. 42 at 3.

Dkt. No. 48 at 3-4.

The United States, in contrast, continues to contend that it need not participate in discovery based on its position that this case should be limited to review of an administrative record.[4] However, the Nation has consistently explained that the APA provides jurisdiction for counts I and II, as this Court has recognized:

> this Court may exercise jurisdiction over claims for breach of trust under the auspices of the APA, and that the trust duties that plaintiffs may seek to enforce in this Court are imposed, not only by statute, but by established principles of equity and federal common law. The very holding of *Cobell VI* was an affirmation of Judge Lamberth's findings of *duty* and *breach,* and not solely on the basis of obligations created by in the 1994 Act. *See* 240 F.3d at 1100 ("The Indian Trust Fund Management Reform Act reaffirmed and clarified preexisting duties; it did not create them. It further sought to remedy the government's long-standing failure to discharge its trust obligations; it did not define and limit the extent of appellants' obligations.").

Cobell v. Kempthorne, 569 F. Supp. 2d 223, 243 (D.D.C. 2008) ("*Cobell XXI*"), *vacated and remanded on other grounds, Cobell v. Salazar*, 573 F.3d 808 (D.C. Cir. 2009) ("*Cobell XXII*"); *Cobell v. Babbit*, 30 F. Supp.2d 24, 31 (D.D.C. 1998) ("*Cobell I*") (the APA's waiver of sovereign immunity "also applies to claims brought outside the purview of the APA," including claims of Indian trust fund mismanagement) (relying on *Chamber of Commerce v. Reich*, 74 F.3d 1322, 1328 (D.C. Cir. 1996) ("The APA's waiver of sovereign immunity applies to any suit whether under the APA or not.")). This Court reiterated that same point in denying the United States' First Motion to Dismiss: "the Government's waiver of immunity applies not only to the Nation's APA claim, but to its other claims as well, because the APA's waiver of sovereign immunity applies to any suit whether under the APA or not." *See* Opinion and Order [Dkt. No. 42] at 4 (quoting *Reich*, 74 F.3d at 1328) (internal quotation omitted).

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[4] This matter is largely addressed in the parties' briefing for a protective order. *See* Dkt. Nos. 55 and 57.

III. <u>THE UNITED STATES' FAILED ARGUMENTS ARISE AGAIN.</u>

A. This Court Has Already Rejected The United States' Position.

The Second Motion to Dismiss is—in form and function—a second attempt at a motion it has already lost in this litigation. This Court has already found that the Nation's claims, including those involving common law trust obligations, are legally cognizable:

> As the Nation correctly observes, the Government's arguments for dismissal "have been presented and rejected in multiple other trust accounting cases," including those in this District. Pl.'s Opp'n 2 (ECF No. 39). Indeed, as precedent goes, it is hard to get closer than Judge Hogan's recent denial of a nearly identical motion to dismiss. *See Sisseton Wahpeton Oyate of the Lake v. Jewell*, 130 F. Supp. 3d 391 (D.D.C. 2015). *Sisseton* also involved trust claims for declaratory and injunctive relief under statute, common law, and the APA. *Id*. at 393–94. And the arguments for dismissal were nearly the same as well, right down to the specifics. *Id*. at 393 (listing arguments). It appears the only distinction between *Sisseton* and this case is that here the Government has raised arguments under both Rule 12(b)(1) *and* 12(b)(6), while *Sisseton* involved only the former. *See id*. But given the success of previous Indian trust claims, neither basis for dismissal is compelling. Following *Sisseton*—and the precedents on which it rests—the Court is satisfied in its jurisdiction and that the Nation has stated a claim.

Opinion and Order [Dkt. No. 42] at 3-4. The only distinction is that the United States now relies on Rule 12(c) and not Rules 12(b)(1) and 12(b)(6). However, considering the standards for a Rule 12(b)(6) motion and a Rule 12(c) motion are "virtually identical" it is a distinction without a difference. *Baumann*, 744 F. Supp.2d at 221. This same argument is raised again with the ostensible hope that third time's a charm. The Court should deny the Second Motion to Dismiss for the same reasons it denied the First Motion to Dismiss.

B. The United States Lost This Argument In Other Cases.

The United States' arguments in this case simply reargue the same arguments it has consistently lost in other tribal trust litigation across the country – that the United States' actionable trust obligations to Indian beneficiaries are <u>only</u> those expressly provided by statute. The Federal Court of Claims recently addressed these very arguments and, in comprehensive

form, thoroughly rejected them one and all. *See W. Shoshone*, 143 Fed. Cl. 545. In denying the United States' Rule 56 motion, the court recognized that, though the federal government's "fiduciary duty must stem from law," common-law principles may be utilized to determine the scope of such duties. *Id.* at 605 (citing *Jicarilla I*, 564 U.S. at 176); *see also White Mtn. Apache Tribe v. United States*, 249 F.3d 1364, 1377 (Fed. Cir. 2003) *aff'd* 537 U.S. 465 (2003) (once it is determined that a fiduciary obligation exists pursuant to statute or regulation, "it is well established that we then look to the common law of trusts" to ascertain the nature of the government's obligations). Indeed, the common law of trusts can be used to "flesh-out th[e] skeletal duty" of statutory trust obligations upon the United States to tribal beneficiaries. *Id.* at 605 (citing *Jicarilla Apache Nation v. United States*, 100 Fed. Cl. 726, 734 (2011) ("*Jicarilla II*"); *Cheyenne-Arapaho Tribe of Indians of Oklahoma v. United States*, 512 F.2d 1390, 1396 (Ct. Cl. 1975)). Accordingly, federal courts use "common law principles" to determine the scope of the United States' trust obligations to Indian beneficiaries. *Id.* (quoting *Jicarilla I*, 564 U.S. at 177).

Federal courts have long rejected the United States' argument that "a federal trust must spell out specifically all the trust duties of the Government." *Jicarilla II*, 100 Fed. Cl. at 737 (citing *Duncan v. United States*, 667 F.2d 36, 42-43 (Ct. Cl. 1981)). Neither a court nor a tribe "is required to find all the fiduciary obligations it may enforce within the express terms of an authorizing statute. . . ." *Navajo Tribe of Indians v. United States*, 624 F.2d 981, 988 (Ct. Cl. 1980). Instead, though a tribe must "point, at the outset, to a specific, trust-creating statute, the language of such a statute ultimately does not cabin [the federal government's] fiduciary obligations." *Jicarilla II*, 100 Fed. Cl. at 738 (citing *Jicarilla I*, 564 U.S. at 177). In rejecting

the same statute-limited duty the United States advocates for here, the Court of Federal Claims stated:

> Defendant would have this court blithely accept what so many courts have rejected—that for the breach of a fiduciary duty to be actionable in this court, that duty must be spelled out, in no uncertain terms, in a statute or regulation. But to conclude this, this court would have to perform a logic-defying feat of legal gymnastics.
>
> That routine would commence with a full jurisprudential gainer—a twisting, backwards maneuver that would allow the court to ignore cases like *White Mountain Apache* and *Mitchell II* that have relied upon the common law to map the scope of enforceable fiduciary duties established by statutes and regulations. The court would then need to vault over *Cheyenne–Arapaho* and a soaring pyramid of other precedents, all of which have found defendant's argument wanting. Next, the court would be called upon to handspring to the conclusion that Congress' repeated legislative efforts to ensure the safe investment of tribal funds were mostly for naught—because, if defendant is correct, the provisions enacted were generally not perspicuous enough to create enforceable duties and, even where specific enough to do so, left interstices in which defendant could range freely. Indeed, while egging the court on, defendant never quite comes to grip with the fact that if the government's fiduciary duties are limited to the plain dictates of the statutes themselves, such duties are not really "fiduciary" duties at all. *See Varity Corp. v. Howe,* 516 U.S. 489, 504, 116 S.Ct. 1065, 134 L.Ed.2d 130 (1996) ("[i]f the fiduciary duty applied to nothing more than activities already controlled by other specific legal duties, it would serve no purpose"). Taken to its logical dismount, defendant's view of the controlling statutes would not only defeat the twin claims at issue, but virtually ***all*** the investment claims found in the tribal trust cases, few of which invoke *haec verba* specific language in a statute or regulation. Were the court convinced even to attempt this tumbling run, it almost certainly would end up flat on its back and thereby garner from the three judges reviewing its efforts a combined score of "zero"—not coincidentally, precisely the number of decisions that have adopted defendant's position.
>
> This court will not be the first to blunder down this path.

Jicarilla II, 100 Fed. Cl. at 738.

Here, the Nation has plainly identified the relevant statutory bases and – now, implicitly – the United States wants to cabin the Nation to the confines of the statutory language. This

approach upends well-established Indian trust law and would reject the common law trust principles which inform upon the relevant obligations of the federal government. Indeed, it is the express purpose of the Second Motion to Dismiss to "foreclos[e]" the Nation's common law allegations at this early juncture in order to "narrow[] the scope of the case," *see* Dkt. No. 54-1 at 3, despite precedent expressly providing that this is exactly when the Court is to now "look to the common law of trusts" to determine the scope and nature of the United States' obligations which are identified in statute, *White Mtn. Apache*, 249 F.3d at 1377.

CONCLUSION

The Second Motion to Dismiss should be denied. The Second Motion to Dismiss fails to specifically identify any claim that should be dismissed, and ignores the previous finding of this Court that the Nation's claims have a clear basis in statute. Moreover, much like the United States' First Motion to Dismiss, the arguments raised have been consistently rejected by this Court and others and the United States fails to address, much less distinguish, the guiding precedent.

Respectfully submitted this 12th day of June, 2020.

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