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IN THE SUPERIOR COURT OF THE STATE OF ARIZONA
IN AND FOR THE COUNTY OF COCONINO

BrickHouse Trust, Dated October 27, 2011,
by and through Nicholas A. and Kathleen A.
Heth, trustees,

Plaintiff,

vs.

Continental Country Club, Inc., an Arizona
non-profit corporation, Jon Held, an
individual; Kathy Mitchell, an individual;
Chuck Thompson, an individual; Bobby
Goitia, an individual; William McGrath, an
individual; Wesley Dunlap, an individual;
Terry Makinster, an individual, DeeDee
Malmstone; an individual, Josie McCarthy, an
individual; and DOES 1 through 10 and ABC
Entities 1-10,

Defendants.

No. S0300CV202100446

**PLAINTIFF'S REPLY IN
SUPPORT OF ITS MOTION FOR
PARTIAL JUDGMENT ON THE
PLEADINGS RE: CLAIM FOR
DECLARATORY JUDGMENT**

(Assigned to the Hon. Stacy Krueger)

Div. 3

(Oral Argument Requested)

1 Defendants' Opposition admits that the Arizona Supreme Court's holding in
2 *Kalway v. Calabria Ranch HOA, LLC*, 506 P.3d 18 (Ariz. 2022) governs the issues
3 presented in Plaintiff's Motion for Partial Judgment on the Pleadings re: Claim for
4 Declaratory Judgment ("Motion"). Pursuant to *Kalway*, an amendment adding new
5 restrictive covenants to the CC&Rs is invalid unless both of the following requirements
6 have been met: (1) the addition of new restrictive covenants was authorized by the
7 express terms of the declaration, and (2) the declaration gave "sufficient notice" of the
8 specific new restrictive covenants. *Id.* at ¶¶ 1, 10, 14 and 17.

9 Here, the pleadings establish as a matter of law that the new restrictive
10 covenants in the First Amendment¹ must be stricken (i.e., "blue-penciled") because: (1)
11 the Unified Declaration's² general-amendment provisions are narrow in scope and do not
12 authorize the addition of new restrictive covenants or affirmative obligations without
13 Plaintiff's consent, and (2) they are untethered to, and are different in kind from, any
14 restriction in the Unified Declaration, and therefore, the Unified Declaration does not
15 provide notice of the new restrictions. *Id.* Thus, the Court should grant Plaintiff's
16 Motion and enter the proposed form of judgment submitted therewith.³

17 **I. The Unified Declaration Does Not Allow Amendments Adding New**
18 **Restrictive Covenants.**

19 Defendants' principle argument in the Opposition is that Sections 7 (signage
20 restriction) and 12 (prohibiting rentals of a part of a lot) of the Unified Declaration gave

21 ¹ The Certificate of First Amendment to the Amended and Unified Declaration of
22 Restrictions Continental Country Club is attached as Exhibit B to the Motion.

23 ² The Amended and Unified Declaration of Restrictions for Continental Country Club
24 ("Unified Declaration") is attached as Exhibit A to the Motion.

25 ³ Defendants baldly assert in their concluding paragraph that there are "factual issues
26 which must be resolved." Opposition, p. 9:12. But they admit that the Motion raises a
legal issue to be determined by examining the "four corners" of the Unified Declaration
and the First Amendment, which are part of the pleadings. See Motion, p. 7:6-11. They
also do not identify a factual issue "in dispute." Thus, this argument is properly rejected.

1 “sufficient notice” to support the new restrictive covenants in the First Amendment.
2 While this is itself an incorrect assertion, as is discussed herein below, the Court need not
3 reach this issue. *Kalway* holds that the first step in assessing the validity of the First
4 Amendment is to determine whether the plain language of the Unified Declaration
5 authorizes adding new restrictive covenants to Plaintiff’s property without Plaintiff’s
6 consent. *Id.* at ¶ 10 (“Arizona law permits the amendment of CC&Rs by majority vote”
7 when “specified in the original declaration.”).

8 Unlike the broad general-amendment authority at issue in *Kalway* that allowed
9 for amendments to the declaration itself, the Unified Declaration’s amendment provisions
10 are limited in scope and only authorize changes to “these Restrictions.” Unified
11 Declaration, §§ 15 and 20. Courts analyzing amendment provisions with language
12 similar to the Unified Declaration have held that such clauses do not authorize a majority
13 to add new restrictions to the original CC&Rs. *See* Motion, p. 11, ll. 5-16 (citing
14 *Lakeland Prop. Owners Ass’n v. Larson*, 459 N.E.2d 1164, 1167 (Ill. App. 1984) and
15 *Wilkinson v. Chiwawa Communities Ass’n*, 327 P.3d 614 (Wash. 2014)).⁴ Motion, p. 11,
16 ll. 5-16. Just as the courts in *Lakeland* and *Wilkinson* invalidated majority-approved
17 amendments that added new restrictions on the grounds that they exceeded the express
18 amendment power in the CC&Rs, the Court here should strike the First Amendment’s
19 new restrictions.

20 Indeed, *Lakeland*—a case cited with approval in *Kalway*—examined whether a
21 majority-approved amendment adding an obligation to pay additional dues was valid and
22 enforceable. *Id.*, 459 N.E.2d at 1166. Like Arizona, Illinois law provides that, “[w]here

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24 ⁴ *Kalway* also cites with approval *Boyles v. Hausmann*, 517 N.W.2d 610, 616-18 (Neb.
25 1994). There, the Supreme Court of Nebraska held that an amendment provision
26 authorizing changes to “these covenants” did not “authorize a majority of lotowners to
bind all lotowners to new and different covenants which restrict the use of land.”

1 a deed contains restrictive covenants but also permits their future alteration, the language
2 employed determines the extent and scope of that provision.” *Id.* at 1169. Because the
3 language of the subject amendment provision authorized amendments only to “the
4 following covenants” and “the said covenants,” the court held that “the [amendment]
5 provision ... clearly directs itself to changes of existing covenants, not the adding of new
6 covenants which have no relation to existing ones,” and therefore, the addition of a new
7 restriction without the plaintiff’s consent was invalid. *Id.*

8 Like *Lakeland*, the defendant-association in *Wilkinson* sought to add a new
9 restrictive covenant even though the amendment provision in the original CC&R’s was
10 limited in scope and only permitted changes to “*these* protective restrictions and
11 covenants, in whole or in part.” *Id.* at 25 (emphasis added). *Id.*, 327 P.3d at ¶ 1.
12 However, as Defendants have done here, the association in *Wilkinson* had added a new
13 restriction to the CC&Rs that prohibited rentals for periods of less than 30 days. *Id.*
14 Because the court determined that the short-term rental restriction “was unrelated to any
15 existing covenant,” including certain covenants in the original CC&R regarding “single-
16 family uses,” “nuisance or offensive uses” and “the display of excessive rental signs,”
17 *Wilkinson* held that the short-term rental restriction was not a change to “these
18 restrictions” and, therefore, it exceeded the scope of the amendment power and was
19 invalid “without unanimous consent.” *Id.* at ¶ 28.

20 Despite Plaintiff’s Motion expressly relying on *Lakeland* and *Wilkinson*,
21 Defendants’ Opposition does not discuss either opinion, let alone present a cogent reason
22 why this Court should disregard these persuasive authorities. In addition, Defendants do
23 not make any textual argument to support a contention that an entirely new set of
24 restrictions could be added to the Unified Declaration without Plaintiff’s consent despite
25

1 the express, constrictive language limiting future amendments to changes to “[t]hese
2 Restrictions.” Unified Declaration, ¶¶ 15 and 20.⁵

3 Defendants instead misstate the issue, and entirely ignore the holding in
4 *Kalway*, in asserting that it was “foreseeable” that an entirely new section 26 could be
5 added. Opposition, p. 8:1-4. This argument, however, confuses the two requirements in
6 *Kalway*. As discussed above, before the Court applies the common law “sufficient
7 notice” test, Defendants must establish that the express language of the Unified
8 Declaration—i.e., the contract between the association and homeowners—authorizes the
9 addition of new restrictions. This is an issue of contract interpretation that is resolved by
10 reviewing the four corners of the Unified Declaration to ascertain the intent of the
11 original drafters. *Powell v. Washburn*, 211 Ariz. 553, 557, ¶¶ 1, 14 (2006) (“[r]estrictive
12 covenants [are] interpreted to give effect to the intention of the parties ***as determined***
13 ***from the language of the document*** in its entirety and the purpose for which the
14 covenants were created.”) (emphasis added). Defendants have not and cannot identify
15 language in the Unified Declaration allowing amendments that add new restrictions—
16 foreseeable or otherwise—to Plaintiff’s property without Plaintiff’s consent.

17 The amendment provisions in the Unified Declaration, Sections 15 and 20, are
18 properly construed to authorize amendments to “these restrictions” already contained in
19 the Unified Declaration and not the addition of new restrictions. Defendants do not
20 assert that the Unified Declaration limits or restricts Plaintiff’s right to rent its entire lot
21

22 ⁵ Defendants mistakenly argue that the Board’s authority to promulgate and amend the
23 rules and regulations includes the authority to impose new restrictions not found in the
24 Declaration. Opposition, p. 8:14-9:1. The scope of the Board’s rulemaking authority is
25 not relevant to the issues raised in the Motion. But even if it were, it is well-established
26 that the Board cannot adopt rules and regulations creating new restrictions that are not
contained or authorized in the Unified Declaration. *Wilson v. Playa de Serrano*, 211
Ariz. 511, 515, ¶ 16, 123 P.3d 1148, 1152 (App. 2005).

1 to a single-family for any period of time. Indeed, Defendants admit that rentals for less
2 than 30 days have been occurring in Continental Country Club since at least 2012—
3 approximately five years before Plaintiff purchased its lot and ten years before the First
4 Amendment. First Amended Answer to Second Amended Complaint, ¶ 26.⁶ Similarly,
5 Defendants do not argue that any restriction or covenant in the Declaration places an
6 affirmative obligation on Plaintiff to “ensure that all Rentals and occupants of such
7 rentals comply with all of the terms of these Restrictions and the Rules and Regulations.”
8 Because these are not amendments to “these [r]estrictions” in the Unified Declaration,
9 the Court should—as the courts in *Lakeland* and *Wilkinson* did—declare them invalid.

10 **II. The New Restrictions in the First Amendment Fail *Kalway*’s Sufficient** 11 **Notice Requirement**

12 Even if the express language of the general-amendment provisions in the
13 Unified Declaration had authorized the two-thirds majority to add new restrictions to
14 Plaintiff’s property (which is not so), *Kalway*’s sufficient notice test also requires that
15 any additional restriction be “tethered to” and “similar in character” to an already
16 existing restriction such that the amendment can be said to “refine it, correct an error, fill
17 in a gap, or change [the existing restriction] in a particular way.” 506 P.3d at ¶ 17. As
18 discussed in Plaintiff’s Motion, *Kalway*’s five principles each support striking the new
19 restrictions in the First Amendment. Defendants’ arguments otherwise are incorrect.

22 ⁶ The intended meaning of the provisions in the Unified Declaration can be ascertained
23 from the way the properties have been used since the Unified Declaration’s creation and
24 prior to the current dispute. Restatement (Third) of Property: Servitudes § 4.1, cmt. d;
25 *United Cal. Bank v. Prudential Ins. Co. of Am.*, 140 Ariz. 238, 266 (App. 1983)
(construction or interpretation given by the parties to an agreement, as evidence by the
26 acts and conduct of the parties with knowledge of the agreement’s terms and prior to any
controversy, is entitled to great weight and will be adopted by the court if reasonable).

1 **A. The First Amendment’s New Restriction Prohibiting Rentals of**
2 **Less Than 30 Days Is Not Tethered To And Is Different In**
3 **Character From the Unified Declaration’s Restrictions**

4 In more than one instance, the Unified Declaration expressly confirms
5 Plaintiff’s natural right to rent its lot to a single family without any durational restriction.
6 Unified Declaration, §§ 2, 7 and 12. Pursuant to Arizona law, the Unified Declaration’s
7 silence on rental time periods confirms that Plaintiff’s lot can be used for rentals of any
8 duration. A.R.S. § 33-1806.01(A). Defendants argue, nonetheless, that the Unified
9 Declaration’s section 12 restriction, providing “no boarders or renters of a portion of any
10 of said lots shall be permitted, but an entire lot, together with the improvements thereon,
11 may be rented,” gave sufficient notice that “the Association could also restrict how long
12 an owner might rent their property.” Opposition, p. 3:6-10.⁷ Defendants’ argument is
13 entirely without merit and flies squarely in the face of the Arizona Supreme Court’s own
14 application of the “sufficient notice” test in *Kalway*.

15 Defendants’ analysis of Section 12 is unsound and misses the point of *Kalway*.
16 First, Defendants wrongly assert that “property owners are restricted from taking in
17 boarders.” Opp. at 2:16-3:3. To the contrary, Section 12 expressly allows “boarders or
18 renters” so long as they occupy “an entire lot.” Indeed, the language indicates the words

19 ⁷ Defendants also make a conclusory assertion that the Unified Declaration’s section 7
20 restrictions regarding the maximum size of signage advertising rental availability put
21 Plaintiff “on notice” that such a provision “might be amended or modified” to add a
22 restriction limiting the duration of rentals themselves. Opposition, p. 5:16-6:2.
23 Defendants lack of any authority or analysis to support this argument is indicative of and
24 implicitly acknowledges its futility. A restriction limiting the size of permissible signage
25 does not give notice of the possibility of a future restriction placing a durational imitation
26 on rentals. *See, e.g., Wilkinson*, 327 P.3d at ¶ 14 (explaining that a sign restriction
 permitting an owner to advertise for rentals is not only evidence “[t]he drafters
 specifically anticipated and permitted rentals” but also “proves” that the “drafters ...
 consciously decided not to limit their duration, restricting just the appearance of rental
 signs.”) (emphasis added). Indeed, the fact the drafters of the Unified Declaration
 elsewhere included durational restrictions that are expressly unrelated to rentals, *see e.g.,*
 § 10, further undermines Defendants’ flawed foreseeability-based analysis.

1 “boarders or renters” are interchangeable. Ignoring both the plain language and the
2 requirement that it must be narrowly construed, Defendants broadly suggest that the “intent”
3 of Section 12 somehow speaks to “transient use” or “nuisance activity.”⁸ *Id.*; Opp. at 5:9-15.
4 This is exactly the type of “untethered” interpretation that *Kalway* forbids. Defendants’
5 argument goes widely beyond the language of the covenant and invites the Court to accept,
6 without any cited authority, that “short term rental properties are this century’s equivalent of
7 a property that accepts [boarders or renters of a portion of a lot].” *Id.*

8 Contrary to Defendants’ unsupported “intent” argument, the express language
9 of the Unified Declaration “proves” that the drafters did not to “intend” to preclude the
10 use of lots for rentals for periods of less than 30 days.⁹ *Wilkinson*, 327 P.3d at ¶ 13; *see*
11 *also, Scott v. Walker*, 645 S.E.2d 278, 283 (Va. 2007) (“if the restrictive covenant at
12 issue was intended to prevent the short-term rental of lots, it would have been easy to
13 say so, and it would not likely have been left to the uncertainty of inference.”) (internal
14 quotations omitted); *Lake Serene Prop. Owners Ass’n Inc. v. Esplin*, 334 So. 3d 1139,
15 1143, ¶¶ 12, 15 (Miss. 2022) (holding that short-term rental was neither a “transient” use
16 nor prohibited under the Declaration, reasoning, in part, that the restrictions expressly
17 recognize rentals but do not specifically restrict short term rentals). In addition,
18 Defendants’ position cannot be reconciled with the fact that both parties agree upon the
19 reasonable definition of “rent,” as adopted in the First Amendment, Subpart B, which
20

21 ⁸ As the Motion points out and Defendants’ ignore, short-term or “transient use” of
22 property by vacation-home owners, the Wyndham timeshares and rentals are consistent
23 with the general purpose of the development and the public golf course operated by
24 Defendants, as well as the express definition of “rent” adopted in the First Amendment.
25 Motion at fn. 7 & fn. 10. Furthermore, Section 11 relating to “nuisance activity” is
entirely silent on any relation to rentals and applies equally to owners and renters.

⁹ Defendants also admit that nothing in the Unified Declaration’s general purpose
statement indicates that “transient uses” or rentals of less than 30 days would be
prohibited. Opposition, p. 4:19-23.

1 expressly includes “vacation rental or timeshare”—precisely the same “transient use”
2 that Defendants now argue Section 12 should be read to prohibit. *See* Motion at fn. 10.

3 Importantly, *Kalway* did not simply adopt the “sufficient notice” standard and
4 remand the case to the trial court to determine the validity of the challenged restrictions.
5 Rather, the Arizona Supreme Court applied the standard it adopted and, in doing so,
6 provided valuable guidance to Arizona courts and parties who must apply the “sufficient
7 notice” test in future cases. *Kalway*, 506 P.3d at ¶¶ 18-41. Consistent with the
8 presumption that “any doubts [are] resolved against the validity of a restriction,” *id.* at ¶
9 16, *Kalway* approved only a single amended restriction assigning an ordinary definition
10 to the term “garage,” which had been used in the original declaration but was not defined.
11 All of the other challenged restrictions did not “survive” and were stricken, including
12 those that *Kalway* deemed “untethered” to an existing restriction or that were similar but
13 “different in kind” from those in the original CC&Rs. *Id.*

14 *Kalway*’s application of the sufficient notice test to the challenged restrictions
15 on ownership of livestock is particularly instructive here, as it closes the door on
16 Defendants’ assertion that Plaintiff had sufficient notice because some provisions in the
17 Unified Declaration restricted some aspects of renting Plaintiff’s lot. *Id.* at ¶¶ 30-34.
18 The original CC&Rs in *Kalway* expressly regulated livestock by limiting each owner to
19 “six ... livestock on the Property, including, but not limited to, horses/cattle per 3.3
20 acres.” *Id.* The defendant-association’s amended restriction modified this restriction by
21 limiting “livestock” to “chickens, horses and cattle” and added a cap to the “total number
22 of livestock, regardless of the size of the lot.” *Id.* Even though the original CC&Rs had
23 certain restrictions on livestock ownership, *Kalway* held there was insufficient notice to
24 support the association’s new livestock restrictions that were “different in kind” than
25 those in the original declaration and thus “was not portended by” the declaration. *Id.*

1 Whether the First Amendment’s restriction on rentals for less than 30 days is
2 invalid under the sufficient notice test is readily determined by comparing it to the
3 restrictions approved and stricken in *Kalway*. Unlike the single permissible amendment
4 in *Kalway* that added an ordinary definition to a term already used in the original
5 CC&Rs, the First Amendment’s entirely new paragraph restricting the duration of rentals
6 is a material change that is at odds with the Unified Declaration’s language that confirms,
7 rather than restricts, the owner’s natural right to rent the entire property. Moreover, the
8 fact that the Unified Declaration restricts certain aspects of renting, such as “how much”
9 of a lot may be rented or the size of signs that may be used to advertise, does not give
10 notice of the potential for a restriction on the duration of rentals. If an amendment
11 adding “chickens” to the definition of “livestock” is a “drastic[]” and “unreasonable”
12 new restriction, *id.* at ¶¶ 32-33, then the First Amendment’s entirely new durational
13 limitation on rentals where no such restriction had previously existed in the Unified
14 Declaration must fail *Kalway*’s sufficient notice test—especially so given that any doubts
15 must be resolved against the validity of the rental duration restriction. *Id.* at ¶ 16.

16 Despite the Motion’s discussion of the five principles in *Kalway* and their
17 application here, Defendants’ Opposition expressly takes issue with only one of those
18 principles. Specifically, Defendants contend that the fourth *Kalway* principle—requiring
19 close scrutiny of an amendment that “potentially” lessens the value of property—does
20 not apply because the new restriction on rentals, in Defendants’ opinion, will have a
21 positive overall effect “on the value of homes in the community.” Opposition, p. 6:3-20.
22 In addition to lacking any support in the record, Defendants’ argument is not persuasive
23 for at least two reasons. First, *Kalway* explains that the fact triggering close scrutiny was
24 the court’s own determination that the subject amendment would “*potentially* lessen[] the
25 value of” the plaintiff’s lot. *Id.* at ¶ 28 (emphasis added). Here, Defendants do not and
26

1 cannot dispute that taking away a potential source of revenue from owners who
2 commonly and responsibly use their properties as rentals will “potentially” lessen the
3 value of those lots.¹⁰ Second, *Kalway*’s discussion of value focused on the minority
4 owner’s property that was disenfranchised as a result of the amendment and not the
5 impact on the community as a whole. In this context then, close scrutiny must be applied
6 to the First Amendment because the restriction potentially lessens the value of Plaintiff’s
7 property; a fact that Defendants have not disputed. Thus, the fourth *Kalway* principle
8 requires close scrutiny of the First Amendment’s new durational restriction on rentals.

9 The First Amendment’s new restriction limiting the duration of rentals is
10 invalid because it is not sufficiently related to an existing restriction such that it can be
11 said to “refine it, correct an error, fill in a gap or change [the existing restriction] in a
12 particular way.” *Id.* at ¶ 17. Pursuant to *Kalway*, this restriction must be stricken.

13 **B. The First Amendment’s New Restriction in Paragraph 26, Subpart C,**
14 **Fails The Sufficient Notice Test.**

15 The First Amendment’s new paragraph 26, subpart C, also must be stricken for
16 lack of sufficient notice. Defendants do not identify any provisions in the Unified
17 Declaration that give notice to owners that they may be obligated to “ensure” that
18 “Rentals” and “occupants of such rentals” are complying with the Declaration or the
19 “Rules and Regulations of the Association.” Defendants contention that this new
20 restriction is similar to, or an extension of, the natural operation of the Unified
21 Declaration because the restrictions are “appurtenant to and run with the land,” and
22 therefore, binding on a renter and a renter’s guests misses the point. The First
23

24 ¹⁰ Defendants seek to minimize the inherent financial effect of the First Amendment on
25 homeowner who responsibly rent their homes for periods of less than 30 days by
26 asserting that owners may still rent their property for “longer periods of time.” This
assertion is disingenuous, at best.

1 Amendment does not just state that renters and their occupants must comply with the
2 Unified Declaration and any valid rules and regulations, it additionally purports to create
3 a new obligation on the part of the owner to “ensure” compliant behaviors. But the
4 Unified Declaration neither requires owners to engage in enforcement activities nor
5 makes an owner vicariously responsible for the conduct of renters or guests. Thus, this
6 new restriction expressly targeting owners who use their property for rentals of less than
7 30 days is invalid and should be stricken.¹¹

8 **III. Conclusion**

9 The Arizona Supreme Court in *Kalway* protected the real property rights of
10 homeowners who have acquired property in a planned community from majority-
11 approved amendments that take away those property rights without sufficient notice.
12 Here, many homeowners, including Plaintiff, purchased second homes in Continental
13 Country Club relying on the Unified Declaration’s (1) narrow amendment provision and
14 (2) express confirmation of the natural right to rent an entire lot to a single family
15 without any durational limitation. By adopting the First Amendment, Defendants haven
16 taken away this right, upended a decade-long practice of short term rentals, and
17 materially changed how homeowners like Plaintiff are allowed to use their property. In
18 other words, Defendants have done exactly what *Kalway* prohibits. Plaintiff thus
19 respectfully requests that the Court grant its Motion and enter the proposed order
20 submitted therewith.

23 ¹¹ Additionally, per A.R.S. § 33-1806.01(D), Defendants are prohibited from imposing “a
24 requirement on a member’s rental property any differently than on an owner-occupied
25 property in the association.” Thus, the First Amendment is invalid because it contains no
26 similar obligation on non-rental owners to “ensure all occupants” comply at all times with
all of the terms of the Declaration and Rules of the Association.

1 RESPECTFULLY SUBMITTED this 16th day of May, 2022.

2 **JENNINGS, STROUSS & SALMON, PLC**

3 By: Eric D. Gere
4 Eric D. Gere
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8 Original of the foregoing filed with
9 the Clerk of the Court and a Copy of the
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Davis-Digeno, Tana L.

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Case Title: BRICKHOUSE TRUST, DATED OCT. 27, 2011, BY THROUGH NICHOLAS A. AND KATHLEEN A. HETH.. PLAINTIFF vs JON HELD et al. DEFENDANT

Filed By: Eric D Gere

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