UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Nichole Williams et al., Plaintiffs, v. Timothy F. Geithner, as United States Secretary of the Treasury, et al. Defendants.	Court File No. 09-CV-1959 ADM/JJG **U.S. BANK NATIONAL ASSOCIATION'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS**

Through the First Amended Complaint, Plaintiff Carey Koppenberg ("Koppenberg") seeks broad injunctive relief on behalf of herself and a purported class of Minnesota borrowers with mortgage loans serviced by Defendant U.S. Bank National Association ("U.S. Bank") who were denied participation in the Home Affordable Modification Program ("HAMP"). The basis for these claims is that HAMP's denial process is constitutionally deficient under the Procedural Due Process Clause of the Fifth Amendment to the United States Constitution. It is undisputed that U.S. Bank has neither the power nor the authority to promulgate the regulatory protection that Koppenberg seeks.

Koppenberg's claims against U.S. Bank must be dismissed for two reasons. First, since filing this lawsuit, Koppenberg's claims became moot when she voluntarily agreed to accept a HAMP modification from U.S. Bank following her submission of a second HAMP application. As such, there is no case or controversy for this Court to adjudicate with respect to Koppenberg's claims. Second, even if Koppenberg's claims were live,

they would fail as a matter of law because she does not have standing to assert constitutional claims against U.S. Bank and could not prevail on such claims if she did. Accordingly, Koppenberg's claims should be dismissed.

BACKGROUND

I. FACTS RELATING TO U.S. BANK'S RULE 12(b)(6) MOTION.

Plaintiff Carey Koppenberg ("Koppenberg") took out a mortgage to purchase a home in 1994. (Am. Compl. ¶ 14.) Koppenberg's mortgage is owned by Defendant Federal National Mortgage Association ("Fannie Mae"). (*Id.* ¶ 15.) Her mortgage is serviced by U.S. Bank National Association ("U.S. Bank"). (*Id.* ¶ 78.) In late 2008, Koppenberg defaulted on her mortgage and began looking for ways to keep her home from going into foreclosure. (*Id.* ¶¶ 73-74.)

In late May 2009, Koppenberg submitted an application for the Home Affordable Modification Program ("HAMP") to U.S. Bank. (*Id.* ¶ 78.) Koppenberg alleges she was eligible to participate in HAMP. (*Id.* ¶ 77.) Koppenberg further alleges that U.S. Bank failed to follow HAMP guidelines in processing her HAMP application. (*Id.* ¶ 80.) The Koppenberg home was sold at a sheriff's sale on June 7, 2009. (*Id.* ¶ 79.) Before the sale, Koppenberg alleges she was not given notice that her HAMP application was denied nor was she given an opportunity to appeal her denial. (*Id.* ¶ 81.)

At the time Koppenberg submitted her HAMP application to U.S. Bank, there was no statute, regulation, or guideline either requiring U.S. Bank to give Koppenberg notice that her HAMP application had been denied or setting forth a process by which Koppenberg could appeal her denial. (*Id.* ¶¶ 133, 150.) As to the statutes, regulations,

and guidelines Koppenberg alleges should exist, she alleges that the United States Department of the Treasury ("Treasury"), Fannie Mae, and the Federal Home Loan Mortgage Corporation ("Freddie Mac"), but not U.S. Bank, have the authority to issue such rules. (*Id.* ¶¶ 14, 16, 17.)

II. FACTS RELATING SOLELY TO U.S. BANK'S 12(b)(1) MOTION.

When this action was initially commenced on July 28, 2009, neither U.S. Bank nor Koppenberg were named parties. (Compl.) On August 17, 2009, an Amended Complaint was filed naming Koppenberg and U.S. Bank. (Am. Compl.) U.S. Bank was served with the Amended Complaint on August 19, 2009. (Certificate of Service.) At the invitation of U.S. Bank, Koppenberg submitted a second HAMP application to U.S. Bank on or around September 22, 2009. (Affidavit of Maria Lawrence ¶ 2.) After processing Koppenberg's second HAMP application, U.S. Bank approved Koppenberg for a HAMP loan modification. (*Id.* ¶ 3.)

HAMP guidelines require a private servicer implementing a HAMP modification to place an eligible borrower on a Trial Period Plan after determining that borrower's eligibility for a modification. (Am. Compl. Ex. C at 20.) The Trial Period Plan effective date is usually the first day of the month following the servicer's mailing of the offer for the Trial Period Plan. (*Id.*) The Trial Period Plan is three months long for mortgage loans when the payment is already in default. (*Id.*) The borrower's payments must be current under the terms of the Trial Period Plan at the end of the trial period in order to receive a permanent modification. (*Id.*) The borrower is considered to have failed the trial period and thus, not eligible for a HAMP modification, if all of the trial period

payments are not received by the end of the trial payment period. (*Id.*) If the borrower complies with the terms and conditions of the Trial Period Plan, the loan modification will become effective on the first day of the month following the end of the trial period as specified in the Trial Period Plan. (*Id.* at 21.)

Pursuant to HAMP guidelines, U.S. Bank notified Koppenberg that she had been approved for a HAMP loan modification on or around September 28, 2009. (Lawrence Aff. ¶ 3.) Accordingly, Koppenberg agreed to accept the HAMP Trial Period Plan on or around October 8, 2009. (*Id.* ¶ 4.) Upon receipt of Koppenberg's first payment under the trial plan, U.S. Bank instructed its attorneys to take action to void the sheriff's sale that had occurred on June 7, 2009 in order to restore Koppenberg's title to her home. (*Id.*) On or around October 8, 2009, U.S. Bank's attorneys commenced an action to void the sheriff's sale. (Schneebeck Aff. Ex. A.)

The effective date of Koppenberg's Trial Period Plan is November 1, 2009. (Lawrence Aff. ¶ 6.) By the terms of the Trial Period Plan, U.S. Bank agrees to provide Koppenberg with a HAMP Modification as long as Koppenberg complies with the terms of the Trial Period Plan; to wit: makes three timely trial period payments and the representations she made establishing eligibility remain true in all material respects. (*Id.* ¶ 7.) As such, by agreement, U.S. Bank no longer has any discretion to deny a final HAMP modification as long as Koppenberg complies with her end of the agreement. (*Id.*) Ms. Koppenberg's first payment, which was received by U.S. Bank on or around October 16, 2009, was made on time pursuant to the Trial Period Plan. (*Id.* ¶ 8.) Ms. Koppenberg's second payment is not yet due. (*Id.* ¶ 9.)

ARGUMENT

I. KOPPENBERG'S CLAIMS MUST BE DISMISSED AS MOOT PURSUANT TO RULE 12(b)(1).

The Court does not have jurisdiction to hear Koppenberg's claims because they have become moot. After initiating this litigation, Koppenberg submitted a second HAMP application to U.S. Bank. As to this second HAMP application, U.S. Bank determined Koppenberg was eligible for a HAMP modification and has approved her application pursuant to HAMP. Accordingly, U.S. Bank and Koppenberg have agreed to a Trial Period Plan. As a result, U.S. Bank has since commenced an action to vacate the sheriff's sale. Through the First Amended Complaint, Koppenberg asked for injunctive relief to stop her foreclosure and to allow her to challenge her denial but made no claim for damages. Because U.S. Bank and Koppenberg have agreed to a modification under HAMP and because U.S. Bank has taken legal action to void the sheriff's sale, Koppenberg has now received everything she has asked for from U.S. Bank in this action. As such, her claims are now moot and there is no longer a case or controversy for this Court to adjudicate. Moreover, because Koppenberg's claims have become moot prior to a motion by Koppenberg to certify a class, Koppenberg does not have standing to seek relief on behalf of the class she seeks to represent. The Court must accordingly dismiss Koppenberg's claims pursuant to Article III of the Constitution and Rule 12(b)(1).

A motion to dismiss pursuant to Rule 12(b)(1) must be granted where the Court lacks jurisdiction because a plaintiff's claims are moot. *Aaran Money Wire Serv., Inc. v.*

United States, Nos. 02-789 & 02-790, 2003 WL 22143735, at *1 (D. Minn. Aug. 21, 2003). "In deciding such a motion, the court may consider facts that have developed since the filing of the complaints." *Id.* "[A] request for injunctive relief remains live only so long as there is some present harm left to enjoin." *Id.* at *5.

"It is axiomatic that a 'case' or 'controversy' must exist at all stages of the litigation and not merely at the time the complaint is filed." *Allen v. Likins*, 517 F.2d 532, 534 (8th Cir. 1975). "[T]he federal courts' impotence to review moot cases derives from the Article III requirement that judicial power shall extend only to 'cases' and 'controversies.'" *Id.* "To be cognizable in a federal court, any action 'must be a real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts.'" *Id.* The case or controversy requirement

> limit[s] the business of the federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process. And in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government.

Bishop v. Comm. on Prof. Ethics & Conduct of the Iowa State Bar Ass'n, 686 F.2d 1278, 1283 (8th Cir. 1982) (quoting *Flast v. Cohen*, 392 U.S. 83, 94-95 (1968)).

"In a class action, dismissal on mootness grounds normally is required when the named plaintiffs' claims become moot prior to a decision on class certification." *Anderson v. CNH U.S. Pension Plan*, 515 F.3d 823, 826 (8th Cir. 2008). "A named plaintiff must have a personal stake in the outcome of the case at the time the district

court rules on class certification in order to prevent mootness of the action." *Inmates of the Lincoln Intake & Det. Fac. by Windes v. Boosalis*, 705 F.2d 1021, 1023 (8th Cir. 1983).

Reliance on moot claims is especially problematic where the state of the law is fluid because the government is adapting its regulations based on experience and changed circumstances. In *Bradley v. Housing Authority of Kansas City*, 512 F.2d 626, 627 (8th Cir. 1975), four public housing applicants brought a putative class action seeking injunctive relief against the Kansas City Housing Authority ("HAKC") and the Department of Housing and Urban Development ("HUD") based on claims that HKAC's and HUD's tenant selection policies denied the applicants apartments in violation of their due process rights. Following the suit, HAKC provided the named plaintiff applicants with apartments. *Id.* The district "court held that the grant of apartments to the named plaintiffs mooted their individual claims." *Id.* at 627-28. The district court then dismissed the named plaintiffs' claims without ruling on the named plaintiffs' motion for class certification. *Id.* The Eighth Circuit affirmed: "dismissal is required by the case or controversy provisions of Article III when the claims of all the named plaintiffs become moot before certification of the class under [Rule] 23(c)(1)." *Id.* at 628. While there is an exception to this rule for claims that may evade review, the Eighth Circuit chose not to apply that exception under the circumstances of the case. *Id.* at 628-29. The Eighth Circuit was mindful of the fluid state of the law and regulations and found it more prudent to begin anew with named class members who could present a ripe controversy for adjudication than to rely on mooted claims to litigate the issue. *Id.* at 629. Here, as in

Bradley, prudence and Article III both dictate the use of a plaintiff with live claims to test the government's evolving processes.

As noted in *Bradley*, there is a "narrow exception to this rule" in cases "where a claim is distinctly 'capable of repetition, yet evading review,' . . . even though the named plaintiff's claim became moot prior to the district court's consideration of the issue." *Boosalis*, 705 F.2d at 1023. This narrow exception has two applications: (1) "in cases in which due to the inherently transitory nature of the proposed class representative's individual claims and the realities of the judicial process, the proposed class representative's individual interest will expire prior to the time a district court reasonably could be expected to rule on a motion for class certification" or (2) "to allow a named plaintiff to litigate an issue despite the mootness of his or her personal claim in cases where the named plaintiff's expired individual claim may be expected to reoccur . . . ." *Bishop*, 686 F.2d at 1284 n.13 (citations omitted). Under the second application of the narrow exception, the "reoccurrence of the plaintiff's expired claim [must] be reasonably expected, rather than a mere possibility, and 'speculative contingencies' do not provide a sufficient basis for such a conclusion." *Id.* In determining whether this narrow exception applies, the Eighth Circuit looks to whether the named plaintiff voluntarily relinquished her claims (militating against application of the exception) or was forced to give up her claims (militating in favor of the exception). *Potter v. Norwest Mortgage, Inc.*, 329 F.3d 608, 612-13 (8th Cir. 2003); *see also Anderson*, 515 F.3d at 827.

Courts in the Eighth Circuit apply a strict standard in judging whether the narrow exception applies. In *Allen v. Likins*, 517 F.2d 532, 533 (8th Cir. 1975), a former prison

inmate brought a class action challenging under the Fourteenth Amendment the constitutionality of a state statute making the inmate's children subject to the county's custody. The plaintiff brought motions for a preliminary injunction and for class certification. *Id.* After bringing her motions, but before the judge ruled, the plaintiff was paroled from prison and regained custody of her children. *Id.* The district court "reasoned that plaintiff's parole from prison and regaining custody of her children divested the court of subject matter jurisdiction under Article III, Section 2 of the United States Constitution." *Id.* at 534. The Eighth Circuit affirmed. First, it found that "any threat of a future loss of custody" was too "remote and speculative" a possibility to present a live controversy. *Id.* Second, the court found that the defendants could not resume their allegedly illegal activity until the plaintiff committed an act justifying her parole revocation, making "resumption of the challenged conduct" not solely dependent "on the defendants' capricious actions by which they are 'free to return to their old ways.'" *Id.* at 535. Finally, the court noted that plaintiff's claim became moot before class certification. *Id.*

Here, there is no basis to conclude that Koppenberg's claims are capable of evading review. The presence of other plaintiffs with similar claims and the presence of other defendants, especially Treasury and the Government Sponsored Entities ("GSEs") who do have the power and authority to change the procedures at issue, demonstrates that the HAMP process will not evade review if Koppenberg's moot claims against U.S. Bank are dismissed.

Second, there is not a non-speculative basis to conclude that Koppenberg's claims will recur. As already stated, while U.S. Bank did have discretion in approving Koppenberg for a HAMP loan modification, now that U.S. Bank has approved Koppenberg's loan modification, U.S. Bank has agreed to finalize that modification unless Koppenberg fails to follow the Trial Period Plan. Pursuant to HAMP guidelines, after determining eligibility, a private servicer implementing a HAMP modification places an eligible borrower on a Trial Period Plan, which U.S. Bank has done. The Trial Period Plan is three months long for mortgage loans where the payment is already in default. If Koppenberg complies with the terms and conditions of the Trial Period Plan, her loan modification will become effective on the first day of the month following the trial period as specified in the Trial Period Plan. U.S. Bank, through its agreement with Koppenberg, no longer has discretion to deny Koppenberg her loan modification as long as she makes her three required payments and her representations concerning eligibility remain true. As such, there is no reasonable basis to conclude that Koppenberg will not receive a HAMP modification as long as she makes her payments.[1] Without such a basis, Koppenberg's claims are moot and no live controversy can be said to persist.

Accordingly, prudence, Article III, and Rule 12(b)(1) dictate that Koppenberg's moot claims should be dismissed.

[1] Moreover, Koppenberg will never again be eligible for HAMP under current guidelines. A mortgage loan is not eligible for HAMP if it has been previously modified under HAMP. (Am. Compl. Ex. C at 2.) Thus, if Koppenberg defaults on her modified loan, she will not meet HAMP's initial eligibility requirements.

II. KOPPENBERG'S CLAIMS MUST BE DISMISSED UNDER RULE 12(b)(6) BECAUSE THEY FAIL TO STATE A CLAIM.

The Amended Complaint asserts two causes of actions based on the Fifth Amendment of the United States Constitution. The first count alleges that the entities administering HAMP (Treasury, Fannie Mae, and Freddie Mac) were constitutionally required to promulgate regulations, guidelines, or rules that comported with procedural due process and that required U.S. Bank, the private entity servicing Koppenberg's mortgage, to provide Koppenberg with a detailed written notice of denial. The second count alleges that the entities administering HAMP were constitutionally required to promulgate regulations, guidelines, or rules that comported with due process and that required U.S. Bank, the private entity servicing Koppenberg's mortgage, to provide Koppenberg with an unbiased and uniform process to evaluate and reverse adverse decisions related to HAMP. Koppenberg alleges that because Treasury, Fannie Mae, and Freddie Mac were required to promulgate such regulations, but failed to do so, she is entitled to an injunction stopping U.S. Bank from depriving Koppenberg of her Property unless and until: (1) Treasury, Fannie Mae, and/or Freddie Mac issue regulations requiring U.S. Bank to provide a detailed notice of denial and (2) Treasury, Fannie Mae, and/or Freddie Mac issue regulations, guidelines, or rules requiring U.S. Bank to avoid the foreclosure sale and restore her property rights if she is eligible and qualified for HAMP.

These two causes of action must be dismissed because Koppenberg cannot state these claims against U.S. Bank. U.S. Bank is not a government actor and is accordingly

immune from constitutional claims. Even if U.S. Bank were a state actor, HAMP does not rise to a property interest or entitlement necessary to support a due process claim and Koppenberg cannot show that the process already available under HAMP is constitutionally deficient. Finally, because Koppenberg cannot establish a 12(b)(6) proof claim against U.S. Bank, she is neither entitled to a remedy against U.S. Bank nor allowed to otherwise join U.S. Bank as a party to this litigation.

A. The Standard On A Motion To Dismiss.

A court must dismiss a complaint pursuant to Rule 12(b)(6) when the complaint fails "to state a claim upon which relief can be granted." Fed. R. Civ. P. 12(b)(6). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of [her] 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Benton v. Merrill Lynch & Co.*, 524 F.3d 866, 870 (8th Cir. 2008) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). "The complaint must allege facts, which, when taken as true, raise more than a speculative right to relief." *Id.* (quoting *Twombly*, 550 U.S. at 555 (2007) (internal citations omitted)). "Where the allegations show on the face of the complaint there is some insuperable bar to relief, dismissal under Rule 12(b)(6) is appropriate." *Id.*

B. U.S. Bank Is A Private Actor Immune From Constitutional Claims.

Private action is not subject to a Fifth Amendment Due Process Claim. *Warren v. Gov't Nat'l Mortgage Ass'n*, 611 F.2d 1229, 1232 (8th Cir. 1980). Under Supreme Court precedent, a private entity may be a government actor for Fifth Amendment Due Process

purposes where the government has delegated to the private actor power traditionally reserved for the government, where the private actor jointly participates with the government in an activity, or where there is a pervasive entanglement between the private entity and the government. *Wickersham v. City of Columbia*, 481 F.3d 591, 597 (8th Cir. 2007). In analyzing whether the action of a private entity is government action under these tests, the focus is not on the nexus between the government and the private party, but instead on the nexus between the government and the deprivation. *Id.*

Koppenberg cannot establish a nexus between the government and the alleged deprivation of HAMP benefits pleaded in the First Amended Complaint. First, mere participation in the administration of a government created and regulated program does not convert a private entity into a government actor. *See Warren*, 611 F.2d at 1234. Second, according to the facts pleaded by Koppenberg, U.S. Bank failed to follow government mandates in denying her HAMP application, making U.S. Bank's alleged actions adverse to the government, rather than aligned with the government. Third, by denying Koppenberg's HAMP application, U.S. Bank was denied, rather than provided with, compensation from the government, yet another reason to find no nexus between the alleged deprivation and the government. Finally, U.S. Bank's conduct in evaluating and denying a mortgage modification and initiating a foreclosure on a defaulted loan is not the exercise of a power traditionally reserved to the government, but rather a power traditionally exercised by a private actor with a private contractual right to so exercise it. Accordingly, U.S. Bank did not undertake government action in denying Koppenberg's loan modification and her constitutional claims must therefore be dismissed.

C. Koppenberg Has No Entitlement To Or Property Interest In HAMP Benefits.

Koppenberg cannot establish a constitutional entitlement to a HAMP modification. A property interest rising to the level of "a legitimate claim of entitlement" is a prerequisite to a Fifth Amendment Due Process Claim. *Hill v. Group Three Housing Dev. Corp.*, 799 F.2d 385, 390 (8th Cir. 1986). Here, Koppenberg has no legitimate claim of entitlement (1) because she has not pleaded the receipt and subsequent loss of a benefit and (2) because HAMP encourages a private servicer like U.S. Bank to modify mortgages pursuant to HAMP but ultimately leaves that decision up to the servicer's discretion.

Applicants for benefits, as opposed to recipients of benefits who have had those benefits taken away, do not have a legitimate claim of entitlement to such benefits. *Lyng v. Payne*, 476 U.S. 926, 942 (1986); *DeJournett v. Block*, 799 F.2d 430, 431 (8th Cir. 1986). Koppenberg has not pleaded a receipt of benefit and a subsequent deprivation. As such, her claim of entitlement fails as a matter of law.

Moreover, benefits the government retains discretion to grant do not give rise to a legitimate claim of entitlement. The Emergency Economic Stability Act does not require the government to modify any borrower's loan and demonstrates an intent to provide a servicer participating in HAMP discretion to apply a net present value test in determining whether any particular loan should be approved for modification pursuant to HAMP. *See*

12 U.S.C. § 5219.[2] Under controlling Eighth Circuit precedent, where a private provider of government-sponsored benefits is guided by eligibility requirements, but retains ultimate discretion to determine whether an applicant qualifies for the benefit, no legitimate claim of entitlement exists. *Hill v. Group Three Housing Dev. Corp.*, 799 F.2d 385, 393 (8th Cir. 1986); *see also Eidson v. Pierce*, 745 F.2d 453 (7th Cir. 1984).

Moreover, to the extent mandatory language appears in the agreements between U.S. Bank and the GSEs, persuasive precedent dictates that Koppenberg does not have standing to enforce private agreements between the GSEs and U.S. Bank. *See, e.g., Roberts v. Cameron-Brown Co.*, 556 F.2d 356, 360-61 (5th Cir. 1977).

Accordingly, no legitimate claim of entitlement exists in this case.

D. The Current Regulations Are Constitutionally Sufficient.

It is not disputed that defendants other than U.S. Bank are the actors with the authority to promulgate the rules and guidelines at issue in this case. As such, U.S. Bank defers to those parties' well-reasoned arguments supporting the constitutional sufficiency of the rules and guidelines at issue.

E. Without A Wrong, Koppenberg Can Have No Remedy Against U.S. Bank.

Koppenberg cannot seek a remedy against U.S. Bank in the absence of a well pleaded substantive claim. See *Vieux Carre Prop. Owners, Residents & Assoc., Inc. v.*

[2] As previously stated, pursuant to the Trial Period Plan agreed to by Koppenberg and U.S. Bank, U.S. Bank has no discretion as to whether the agreed to trial modification becomes final. However, HAMP leaves servicers discretion to approve or deny HAMP modifications in the first instance.

Brown, 875 F.2d 453, 457 (5th Cir. 1989); *Davenport v. Int'l Bhd. of Teamsters*, 166 F.3d 356, 366 (D.C. Cir. 1989). Rule 19(a) does not provide a plaintiff a substitute for a well pleaded cause of action. *Id.* In fact, "in order to be entitled to injunctive relief, a plaintiff must establish . . . that it has a valid claim against the defendant." *Plan Pros v. Zych*, No. 08-125, 2009 WL 928867, at *2 (D. Neb. Mar. 31, 2009).

If this Court decides to issue an injunction against the defendants that possess policy-making power (Treasury, Fannie Mae, and Freddie Mac), as a practical matter, U.S. Bank's absence from this case will not impact the effectiveness of any such injunction. To the extent the Court directs the policy makers to change the law, an injunction is not appropriate to direct U.S. Bank to follow the law. *See Meyer v. Brown & Root Constr. Co.*, 661 F.2d 369, 373 (5th Cir. 1981). If this Court issues an injunction against the policy makers that is something less than a change in the law, U.S. Bank will be bound by such an injunction pursuant to the terms of Rule 65(d)(2) to the extent U.S. Bank is acting as an agent of Fannie Mae in servicing loans owned by Fannie Mae. As such, there is no legal or practical basis to force U.S. Bank to continue as a litigant in this case.

CONCLUSION

For the aforementioned reasons, Defendant U.S. Bank's motion to dismiss Plaintiff Koppenberg's claims should be granted.

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