

**IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA
HARRISBURG DIVISION**

**IN RE: CHOCOLATE
CONFECTIONARY ANTITRUST
LITIGATION**

**MDL DOCKET NO. 1935
(Civil Action No. 1:08-MDL-1935)
(Judge Christopher C. Conner)**

THIS DOCUMENT APPLIES TO:

ELECTRONICALLY FILED

ALL CASES

**MEMORANDUM IN SUPPORT OF MOTION BY DEFENDANTS
CADBURY PLC AND CADBURY HOLDINGS LTD. TO DISMISS FOR
LACK OF PERSONAL JURISDICTION**

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I. PRELIMINARY STATEMENT

Defendants Cadbury Holdings Ltd. and Cadbury plc respectfully submit this Memorandum of Law in support of the motion to dismiss all of the complaints as against them for lack of personal jurisdiction.

II. PROCEDURAL HISTORY

These antitrust actions were consolidated before this Court pursuant to Order of the Multidistrict Litigation Panel, dated April 7, 2008. On or about August 13, 2008, plaintiffs filed four consolidated complaints captioned Direct Purchaser Plaintiffs' Consolidated Class Action Complaint ("Direct Purchaser Class Compl."), the Indirect End Users' Consolidated Complaint ("Indirect Purchaser End User Compl."), the Indirect Purchasers for Resale's Consolidated Complaint ("Indirect Purchaser Resale Compl.") and the Individual Plaintiffs' Amended Consolidated Complaint ("Individual Plaintiffs' Compl.").

III. STATEMENT OF FACTS

Defendant Cadbury Holdings Ltd. is a private company organized under the laws of the United Kingdom with its principal place of business in Middlesex, England. Decl. of John Mills in Supp. of the Mot. by Defs. Cadbury Holdings Ltd. and Cadbury plc to Dismiss for Lack of Personal Jurisdiction, dated September 26, 2008 ("Mills Decl.") ¶¶ 3-4. Prior to May 2, 2008, Cadbury Holdings Ltd. was known as Cadbury Schweppes plc. *Id.* ¶ 5. Cadbury Schweppes plc was a

publicly held company with no parent company. *Id.* On May 2, 2008, Cadbury Schweppes plc underwent a re-organization, becoming a private company and changing its name to Cadbury Schweppes Ltd. *Id.* On May 7, 2008, Cadbury Schweppes Ltd. again changed its name to Cadbury Holdings Ltd. *Id.* Cadbury Holdings Ltd. is a wholly owned subsidiary of Cadbury plc. *Id.* ¶ 6. Cadbury Holdings Ltd. has not manufactured or sold any products in the United States during the alleged conspiracy period. *Id.* ¶ 7.

Defendant Cadbury plc is a publicly held company organized under the laws of the United Kingdom, with its principal place of business in Middlesex, England. *Id.* ¶¶ 8-9. Cadbury plc is a holding company and it does not manufacture or sell any products anywhere in the world. *Id.* ¶ 10.

Defendant Cadbury Adams Canada Inc. is a private company organized under the laws of Canada, with its principal place of business in Toronto, Ontario, Canada. *Id.* ¶¶ 11-12. Cadbury Adams Canada Inc. manufactures and sells products exclusively in Canada. *Id.* ¶ 13. While there are inter-company transfers between Cadbury Adams Canada Inc. and Cadbury Adams USA LLC, Cadbury Adams Canada Inc. does not sell any products to customers in the United States. *Id.* These inter-company transfers do not include any chocolate confectionery products. *Id.* Cadbury Adams Canada Inc. has been an indirect, wholly owned subsidiary of Cadbury Holdings Ltd. since May 7, 2008. *Id.* ¶ 14. Prior to that

time, Cadbury Adams Canada was an indirect, wholly owned subsidiary of Cadbury Schweppes plc. *Id.*

Cadbury Adams USA LLC, which is not named as a defendant in this action, is a limited liability company organized under the laws of the state of Delaware. *Id.* ¶ 15. Cadbury Adams USA LLC's principal place of business is in Parsippany, New Jersey. *Id.* ¶ 16. Cadbury Adams USA LLC does not manufacture any chocolate confectionery products in the United States. *Id.* ¶ 31. Prior to March 2007, Cadbury Adams USA LLC also did not sell or market any chocolate confectionery products in the United States. *Id.* ¶ 32. Since March 2007, Cadbury Adams USA LLC has imported and sold premium chocolate bars in the United States under the brand name Green and Black's. Between March 2007 and December 2007, sales of Green and Black's chocolate bars in the United States totaled approximately \$12.2 million. *Id.* Cadbury Adams USA LLC has been an indirect, wholly-owned subsidiary of Cadbury Holdings Ltd. since May 7, 2008. *Id.* ¶ 17. Prior to that time, Cadbury Adams USA LLC was an indirect, wholly owned subsidiary of Cadbury Schweppes plc. *Id.*

IV. STATEMENT OF QUESTION INVOLVED

Have any of the plaintiffs made a *prima facie* showing that this Court has personal jurisdiction over Cadbury plc or Cadbury Holdings Ltd.?

Suggested Answer: No.

V. ARGUMENT

“Once a jurisdictional defense has been raised, the plaintiff bears the burden of establishing with reasonable particularity sufficient contacts between the defendant and the forum state to support jurisdiction.” *Provident Nat’l Bank v. California Fed. Savings & Loan Ass’n*, 819 F.2d 434, 437 (3d Cir. 1987). Plaintiffs must meet this burden by submitting sworn affidavits or other competent evidence; they may not rely upon the allegations in the complaint. *Savin Corp. v. Heritage Copy Prods., Inc.*, 661 F. Supp. 463, 466 (M.D. Pa. 1987) (citing *Time Share Vacation Club v. Atlantic Resorts, Ltd.*, 735 F.2d 61, 66 n.9 (3d Cir. 1984)).

In order to establish personal jurisdiction, a plaintiff must show both that the relevant state long-arm statute allows for the exercise of personal jurisdiction and that the exercise of jurisdiction would not violate due process. *Simeone v. Bombardier-Rotax GMBH*, 360 F. Supp. 2d 665, 669 (E.D. Pa. 2005). Because Pennsylvania’s long-arm statute allows for jurisdiction that is “coextensive with the constitutional limits of due process,” this “two-step inquiry collapses into a single step.” *Id.* at 669-670 (citing 42 Pa.C.S. § 5322 (2005) and *Mellon Bank v. Farino*, 960 F.2d 1217, 1221 (3d Cir. 1992)).

The constitutional touchstone of personal jurisdiction is the requirement that the “defendant has ‘certain minimum contacts with [the forum] such that the maintenance of the suit does not offend traditional notions of fair play and

substantial justice.” *Telecordia Tech. Inc. v. Telkom SA Ltd.*, 458 F.3d 172, 177 (3d Cir. 2006) (quoting *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)). Those “minimum contacts” with the forum must be substantial enough that the defendant “should reasonably anticipate being haled into court there.” *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980). The extensiveness of the contacts required, of course, “varies according to the nature of the interactions and type of jurisdiction asserted.” *Telecordia*, 458 F.3d at 177. A plaintiff must establish “either that the particular cause of action sued upon arose from the defendant’s activities within the forum state (‘specific jurisdiction’) or that the defendant has ‘continuous and systematic’ contacts with the forum state (‘general jurisdiction’).” *Provident Nat’l Bank*, 819 F.2d at 437 (citing *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414, 416 (1984)).

All four groups of plaintiffs (collectively, “Plaintiffs”) allege in boilerplate language that Cadbury Holdings Ltd. and Cadbury plc manufactured, sold, and/or marketed chocolate confectionery products in the United States. Direct Purchaser Class Compl. ¶¶ 8(b), 30-32; Indirect Purchaser End User Compl. ¶¶ 60-62; Indirect Purchaser Resale Compl. ¶¶ 13-15; Individual Plaintiffs’ Compl. ¶¶ 8(b), 49-51. In addition, the Individual Plaintiffs allege in a conclusory fashion that all of the Defendants in this action, including Cadbury Holdings Ltd. and Cadbury plc,

are subject to personal jurisdiction because “each inhabits, transacts business in, has continuous or systematic contacts with, or is found or has sufficient minimum contacts in the United States sufficient to satisfy due process.” Individual Plaintiffs’ Compl. ¶ 8(a). Yet, none of the Plaintiffs make even a colorable attempt to back up these formulaic allegations with any facts specific to either Cadbury Holdings Ltd. or Cadbury plc.

Plaintiffs’ allegations are insufficient to establish either specific or general jurisdiction over Cadbury Holdings Ltd. or Cadbury plc. Not only are their conclusory statements unsupported by facts, but they are untrue and contradicted by the declaration submitted by Cadbury Holdings Ltd. and Cadbury plc in support of this motion. As demonstrated below, Cadbury Holdings Ltd. and Cadbury plc and have not met the minimum contacts or due process standards to satisfy Pennsylvania’s long-arm statute for specific jurisdiction and have not engaged in substantial or systematic contacts with the United States necessary to justify the exercise of general jurisdiction over them.

A. THIS COURT LACKS SPECIFIC JURISDICTION OVER BOTH CADBURY HOLDINGS LTD. AND CADBURY PLC

“The inquiry as to whether specific jurisdiction exists has three parts. First, the defendant must have ‘purposefully directed [its] activities’ at the forum.” *O’Connor v. Sandy Lane Hotel Co., Ltd.*, 496 F.3d 312, 317 (3d Cir. 2007) (quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985)) (alterations

in original). If the court finds “purposeful availment,” it must then inquire whether the litigation “‘arise[s] out of or relate[s] to’ at least one of those activities.” *O’Connor*, 496 F.3d at 317 (quoting *Helicopteros*, 466 U.S. at 414). Finally, “if the prior two requirements are met, a court may consider whether the exercise of jurisdiction otherwise ‘comport[s] with fair play and substantial justice.’” *O’Connor*, 496 F.3d at 317, quoting *Burger King*, 471 U.S. at 476 (alteration in original).

In an attempt to establish specific jurisdiction over Cadbury Holdings Ltd. and Cadbury plc, Plaintiffs allege that each of these defendants manufactured, sold, marketed, distributed or had available for purchase chocolate confectionery products in the United States. Direct Purchaser Class Compl. ¶¶ 8(b), 30-32; Indirect Purchaser End User Compl. ¶¶ 60-62; Indirect Purchaser Resale Compl. ¶¶ 13-15; Individual Plaintiffs’ Compl. ¶¶ 8(b), 49-51. These boilerplate allegations are unsupported by any facts and are demonstrably false.

As explained above, Cadbury plc is purely a holding company; it does not manufacture or sell any products anywhere in the world. Mills Decl. ¶ 10. Cadbury Holdings Ltd. also is a holding company that does not manufacture, sell, or distribute any products, let alone chocolate confectionery products, in the United States. *Id.* ¶ 7.

The only chocolate confectionery products sold by any Cadbury entity to customers in the United States are Green and Black's chocolate bars, a small, premium chocolate brand that is imported and sold by Cadbury Adams USA LLC. *Id.* ¶ 32. Notably, Cadbury Adams USA LLC is not a party to these lawsuits. Direct Purchaser Class Compl. at 1; Indirect Purchaser End User Compl. at 1; Indirect Purchaser Resale Compl. at 1; Individual Plaintiffs' Compl. at 1. Like the other Cadbury entities, Cadbury Adams USA LLC does not manufacture any chocolate confectionery products in the United States. Mills Decl. ¶ 31. With the exception of the small amount of Green & Black's sold by Cadbury Adams USA LLC, all chocolate confectionery products for which Cadbury owns the brand name that are sold in the United States are, in fact, manufactured, sold and distributed by Hershey pursuant to certain license agreements. *Id.* ¶¶ 27-29. Accordingly, neither Cadbury Holdings Ltd. nor Cadbury plc manufactures, sells, markets or distributes any products in the United States.

Plaintiffs do not allege any additional contacts between either Cadbury Holdings Ltd. or Cadbury plc and the United States which could serve as a basis for the exercise of personal jurisdiction. Indeed, the license agreement between Cadbury Holdings Ltd. and Hershey is the only additional alleged contact between a Cadbury entity and the United States that has any relation to chocolate confectionery products, but it cannot be the basis for personal jurisdiction, as

Plaintiffs' alleged injuries do not "arise out of or relate to" the license agreement. *Highmark, Inc. v. Allcare Health Mgmt. Sys., Inc.*, 304 F. Supp. 2d 663, 666 (W.D. Pa. 2003) (in order for license agreement to give rise to specific jurisdiction, plaintiffs' cause of action "would have to relate to or arise out of" the agreement).

"It is well established . . . that a non-resident's contracting with a forum resident, without more, is insufficient to establish the requisite 'minimum contacts' required for an exercise of personal jurisdiction over the nonresident." *Sunbelt Corp. v. Noble, Denton & Assoc., Inc.*, 5 F.3d 28, 32 (3d Cir. 1993) (citing *Burger King*, 471 U.S. at 478). This is true even when a plaintiff's alleged injuries result from a breach of the very contract on which the plaintiff relies to establish personal jurisdiction. *See, e.g., Burger King*, 471 U.S. at 478 (in breach of contract action, individual's contract with out of state party does not automatically establish sufficient minimum contacts).

Plaintiffs do not make sufficient additional allegations of contacts between either Cadbury Holdings Ltd. or Cadbury plc and the United States relating to the license agreement to constitute the required minimum contacts with the forum. The Indirect End User Plaintiffs allege only that the license provides for quarterly royalty payments from Hershey to Cadbury. Indirect End User Compl. ¶ 84. However, the payment of royalties pursuant to a license agreement is an insufficient basis for the exercise of personal jurisdiction. *Carson Optical, Inc. v.*

Telebrands Corp., No. 06 Civ. 821, 2007 WL 2460672, at *3 (D. Conn. Aug. 27, 2007) (citing *Red Wing Shoe Co. v. Hockerson-Halberstadt, Inc.*, 148 F.3d 1355, 1361 (Fed. Cir. 1998)).

The complaints also allege that Cadbury has a right to audit Hershey's sales of the licensed product and that this exchange of data provides Cadbury and Hershey with "opportunities to collude." Indirect End User Compl. ¶¶ 85-86; *see also* Direct Purchaser Compl. ¶ 91; Individual Plaintiffs' Compl. ¶ 53; Indirect Purchaser Resale Compl. ¶¶ 61, 63. However, a "right to audit" and an "opportunity to collude" are not actual contacts between Cadbury and the United States. Plaintiffs' allegations, "without more," are therefore insufficient to establish specific jurisdiction.

More importantly, the Cadbury-Hershey license cannot be relied upon to establish specific jurisdiction because Plaintiffs' alleged injuries do not "arise out of or relate to" the license agreement. In *O'Connor v. Sandy Lane Hotel Company*, the Third Circuit established standards for determining whether a plaintiff's alleged injuries "relate to or arise out of" a defendant's contacts with the forum. 496 F.3d at 320-323. The Court stated that "but-for causation provides a useful starting point for the relatedness inquiry." *Id.* at 322. Because but-for causation is "vastly overinclusive in its calculation of a defendant's reciprocal obligations," however, the inquiry must not stop there. *Id.* When an out-of-state resident

purposefully makes contact with the forum, it receives certain benefits and in exchange has certain obligations imposed upon it. *Id.* at 323. The purpose of inquiring whether a plaintiff's cause of action relates to the defendant's contacts with the forum is to "maintain balance in this reciprocal exchange." *Id.* In order to do so, the relatedness inquiry "must keep the jurisdictional exposure that results from a contact closely tailored to that contact's accompanying substantive obligations." *Id.* While the causal connection between the defendant's contacts and the plaintiff's cause of action may be "somewhat looser than the tort concept of proximate causation . . . it must nonetheless be intimate enough to keep the quid pro quo proportional and personal jurisdiction reasonably foreseeable." *Id.*

Applying these standards, Plaintiffs' alleged injuries clearly do not "arise out of or relate to" the Cadbury-Hershey license. The license agreement is not the but-for cause of Plaintiffs' injuries, which purportedly arise out of an alleged price-fixing agreement among the Hershey, Mars, Nestle, and Cadbury Defendants. Any connection between the license agreement and the price-fixing allegations is extremely attenuated and not nearly "intimate enough" to provide a "meaningful link . . . between a legal obligation that arose in the forum and the substance of the plaintiffs' claims." *Id.* at 323, 324. The only legal obligations that even arguably arose in the forum as a result of the license agreement run between the parties to

the license agreement and do not extend to Plaintiffs, who are not parties to the contract.

B. THIS COURT LACKS GENERAL JURISDICTION OVER BOTH CADBURY HOLDINGS LTD. AND CADBURY PLC

Plaintiffs do not assert a sufficient basis for the Court to exercise general jurisdiction over either Cadbury Holdings Ltd. or Cadbury plc. Where, as here, “the connection between a defendant’s contacts and the litigation are insufficient to give rise to specific jurisdiction,” general jurisdiction may still be available if “the defendant’s contacts unrelated to the litigation are ‘continuous and systematic.’” *BP Chemicals Ltd. v. Formosa Chemical & Fibre Corp.*, 229 F.3d 254, 262 (quoting *Helicopteros*, 466 U.S. at 416). Plaintiffs must “show significantly more than mere minimum contacts to establish general jurisdiction.” *Provident Nat’l Bank*, 819 F.2d at 437. The threshold for general jurisdiction is “much higher than that for specific jurisdiction, as the facts required to assert general jurisdiction must be ‘extensive and pervasive.’” *Allied Leather*, 785 F. Supp. at 497. In determining whether general jurisdiction exists, the Court “should look to the nature and quality of business contacts the defendant has initiated with the forum” including “direct sales in the forum, maintenance of a sales force in the state, advertising targeted at the residents of the forum state, and the derivation of a significant slice of revenue from activity within the state.” *Id.* at 498.

Cadbury Holdings Ltd. and Cadbury plc have very few contacts with the United States, let alone the “extensive and pervasive” contacts needed to establish general jurisdiction. Neither of these defendants maintains any officers or directors in the United States. *Id.* ¶ 18. They are not licensed to do business within any of the states of the United States. *Id.* ¶ 19. They do not solicit customers in the United States through advertisements or in any other manner. *Id.* ¶ 20. As explained above, Cadbury Holdings Ltd. and Cadbury plc do not manufacture, sell, or distribute any products in the United States. *Id.* ¶¶ 7, 10. They do not own or lease any property in the United States, *id.* ¶ 21, and they do not maintain any office facilities, telephone numbers, or mailing addresses in the United States. *Id.* ¶ 22. They do not pay federal, state, or local taxes in the United States, *id.* ¶ 24, and they do not maintain any bank or brokerage accounts in the United States. *Id.* ¶ 25. In sum, neither Cadbury Holdings Ltd., nor Cadbury plc, has the “continuous and systematic” business contacts with the United States required for the exercise of general jurisdiction.

In *BP Chemicals Ltd. v. Formosa Chemical & Fibre Corporation*, the Third Circuit found that there was no general jurisdiction over a foreign corporation even though – in contrast to the situation here – it exported its products to the United States. 229 F.3d 254, 262. The holding was based on the undisputed fact that the corporation had no personnel or facilities in the United States and the lack of

evidence that the corporation had ever advertised or solicited business in the United States. *Id.* The court concluded that there was “simply no basis for concluding that it has a continuous presence in the United States.” *Id.* The foreign corporation had also “entered into four other recent contracts for the purchase of chemical technology, two of which involved [company] personnel traveling to the United States for training. *Id.* at 263. Even so, the court held that the requirements for general jurisdiction were not met. *Id.* The contacts of Cadbury Holdings Ltd. and Cadbury plc with the United States are, of course, even more limited than those in *BP Chemicals*. Mills Decl. ¶¶ XX, XX.

Nor can general jurisdiction over Cadbury Holdings Ltd. and Cadbury plc be based on Cadbury Adams USA LLC’s contacts with the forum. Cadbury Adams USA LLC’s contacts with the United States are not automatically attributable to Cadbury Holdings Ltd. or Cadbury plc, for “[m]ere ownership by a parent corporation of a subsidiary present in the forum state will not automatically subject the parent to personal jurisdiction in that forum.” *Clark*, 811 F. Supp. at 1067. In determining whether the contacts of a subsidiary should be imputed to the parent, the Court should consider “whether the subsidiary corporation played any part in the transaction at issue, whether the subsidiary was merely the alter ego or agent of the parent, and whether the independence of the separate corporate entities was disregarded.” *Id.*

Here, Plaintiffs do not allege that the subsidiary “played any part in the transaction at issue.” Indeed, Cadbury Adams USA LLC is not even named as a defendant in any of the actions.

Cadbury Adams USA LLC also is not alleged to be the “alter ego” or agent of either Cadbury Holdings Ltd. or Cadbury plc. “A subsidiary is the ‘alter ego’ of its parent corporation if domination and control by the parent renders the subsidiary its mere instrumentality.” *Clark*, 811 F. Supp. at 1067. Factors that the courts in this district consider in determining whether a subsidiary is the alter ego of a parent corporation include: “gross undercapitalization, failure to observe corporate formalities, nonpayment of dividends, insolvency of debtor corporation, siphoning of funds from the debtor corporation by the dominant stockholder, nonfunctioning of officers and director, absence of corporate records, and whether the corporation is merely a façade for the operations of the dominant stockholder.” *Pearson v. Component Tech. Corp.* 247 F.3d 471, 484 (3d Cir. 2001).

None of the complaints allege any of these factors with respect to Cadbury Adams USA LLC. While Cadbury Adams USA LLC is indirectly, wholly owned by Cadbury Holdings Ltd., this fact is insufficient to conclude that Cadbury Adams USA LLC is the alter ego of its indirect parent company. “[S]ubsidiaries, even if wholly-owned, are presumed separate and distinct entities from their parent corporations. The mere ownership of a subsidiary, even one hundred percent

ownership, is not sufficient to assert that a subsidiary is the alter ego or agent of its parent corporation.” *Clark*, 811 F. Supp. at 1067.

The requisite degree of control necessary to find an alter ego relationship has not been alleged and is not present here. Cadbury Holdings Ltd., Cadbury plc and Cadbury Adams USA LLC are separate and distinct corporate entities. Mills Decl. ¶ 33. Cadbury Holdings Ltd. and Cadbury plc have no directors or officers in common with Cadbury Adams USA LLC. *Id.* ¶¶ 34-35. Three officers of Cadbury Adams USA LLC are employees of Cadbury Holdings Ltd. that were seconded to Cadbury Adams USA LLC. *Id.* ¶ 36. Yet, these three individuals are not officers of Cadbury Holdings Ltd. *Id.* Moreover, while they technically remain employees of Cadbury Holdings Ltd., the costs of their employment are borne by Cadbury Adams USA LLC. *Id.* Cadbury Adams USA LLC is indirectly owned by Cadbury Holdings Ltd., and there are five distinct corporate entities between Cadbury Adams USA LLC and Cadbury Holdings Ltd. *Id.* ¶ 17. Cadbury plc is, of course, even one further step removed from Cadbury Adams USA LLC. *Id.* ¶ 6. Cadbury Holdings Ltd., Cadbury plc and Cadbury Adams USA LLC each maintain separate stand-alone financial statements. *Id.* ¶ 40. Cadbury Holdings Ltd. and Cadbury plc also do not control financial decision-making for Cadbury Adams USA LLC. *Id.* ¶ 41. Final approval of any financial projects relating to Cadbury Adams USA

LLC is carried out and implemented by the Board of Directors of Cadbury Adams USA LLC. *Id.*

Taken together, these facts establish nothing more than the normal degree of control exercised by a parent over a subsidiary and fall far short of showing that either Cadbury Holdings Ltd. or Cadbury plc exercises the degree of “domination and control” that would render Cadbury Adams USA LLC the “mere instrumentality” of either of these defendants. *Clark*, 811 F. Supp. at 1067. Accordingly, Cadbury Adams USA LLC is not the alter ego of Cadbury Holdings Ltd. or Cadbury plc.

VI. CONCLUSION

Plaintiffs have failed to establish that this Court has personal jurisdiction over Cadbury plc or Cadbury Holdings Ltd. Therefore, this Court should dismiss all of the complaints as to Cadbury plc and Cadbury Holdings Ltd. for lack of personal jurisdiction.

Respectfully submitted,

Dated: September 29, 2008

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