

**UNITED STATES BANKRUPTCY COURT  
FOR THE DISTRICT OF DELAWARE**

In re: )  
 ) Chapter 11  
The SCO Group, Inc., et al., )  
 )  
 ) Case No. 07-11337 (KG)  
Debtors. ) (Jointly Administered)

**Objection Deadline: October 25, 2010 at 4:00 p.m. (prevailing Eastern time)  
Hearing: November 8, 2010 at 10:00 a.m. (prevailing Eastern time)**

**OBJECTION OF NOVELL, INC. TO  
ASSUMPTION AND ASSIGNMENT AND CURE AMOUNTS**

For the reasons stated herein, Novell, Inc. (“Novell”), objects to the Notice of Cure Amounts in Connection with the Assumption and Assignment of Executory Contracts and Unexpired Leases dated October 15, 2010 [Docket No. 1184] (the “Notice”). The Debtors served the Notice in connection with their Motion of the Chapter 11 Trustee for Order (1) Authorizing the Marketing, Auction and Sale of Substantially All of the Debtors’ Software Business Assets [etc.] (Dkt. No. 1141) (the “Sale Motion”) of trustee Edward N. Cahn (the “Trustee”) of debtors the SCO Group, Inc. and SCO Operations, Inc. (the “Debtors”). By the Motion, the Trustee seeks to sell assets of the Debtors pursuant to the subsequently-issued Order (1) Authorizing Marketing [etc.] (Dkt. No. 892) (the “Sale Procedures Order”).

By the Notice, the Trustee has declared his intent to assume and assign to a potential purchaser (the “Purchaser”) certain executory agreements between the Debtors and Novell. Novell objects to the Notice and proposed assumptions and assignments on at least the following grounds: (1) as to certain items, the Notice is so cryptic as to make it impossible to determine to what agreements the Trustee is referring; (2) as to the cure amounts, because the Trustee and Debtors have not provided the information that only they can and that they are required to supply regarding certain of the contracts at issue (the “SVRX Licenses”), Novell cannot at this time verify the sums in the Notice, and in any event the Trustee must cure other monetary defaults that he does not even mention in the Notice; (3) as to the Trustee’s intent generally, the Trustee cannot assume and assign any of the Debtors’ agreements with Novell without assuming and

assigning all of them, something the Trustee does not attempt to do; and finally, (4) as to some of the agreements the Trustee wishes to assume and assign, he must obtain, but cannot get, Novell's consent, and more generally, based upon (3) above, he must get, but cannot obtain, Novell's consent to be able to assume all of the Novell agreements he must assume if he is to be able to assume any.

**I. INTRODUCTION**

**A. The Notice**

1. The Trustee has not yet announced a proposed transaction in connection with the Sale Motion; his form of asset purchase agreement is unexecuted and lacks the relevant schedules. Evidently, the Trustee's marketing process has not produced a "stalking horse" bidder. The Trustee is supposed notify Novell and others of any successful bidder immediately following an auction scheduled for October 25, 2010. (Sale Procedures Order ¶ 7.g.)

2. Even though he has no actual deals, pursuant to Sale Procedures Order ¶ 4 the Trustee has, however, served the Notice to advise the relevant parties that the Trustee wishes to assume and assign to a Purchaser the executory contracts with those parties scheduled in the Notice and to state what, if any, cure amounts the Trustee believes must be paid pursuant to Code<sup>1</sup> section 365(b)(1).

3. Per the Notice, the Trustee is purporting to assume and assign certain agreements with Novell. The following descriptions of the agreements come directly from the Notice.

**Exhibit A-2**

<b>Company Name</b>	<b>Cure Amounts due as of September 30, 2010</b>	<b>Agreement Type</b>	<b>Dates</b>
<b>Novell, Inc.</b> UNIX SVRX Royalty collections due	\$73,436.91	Asset Purchase Agreement	1995

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<sup>1</sup> The "Code" is the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

Component	Third Party Licensor	Binary Distribution Rights	Royalty Free Binary Distribution	Royalties due for SCO Distribution	SCO Product	Royalties due for SCO Distribution	Cure Amount Due as of September 30, 2010
NetWare	Novell			Yes	UnixWare 2.0 & 2.1	Yes	NONE

### Exhibit A-3

COM/EDU		LICENSEE	CURE AMOUNTS DUE AS OF SEPTEMBER 30, 2010	AGREEMENTS GOVERNING ACCESS AND USE	SOFTWARE PRODUCTS LICENSED THROUGH A PRODUCT SUPPLEMENT OR THROUGH A NDA/EVALUATION TYPE AGREEMENT
CR	2	NOVELL, INC.	NONE	SOFT-01460  Non-Disclosure (May 6, 1993)  SOFT-01460 (Jan 13, 1989) SUB-01460A (Jan 28, 1993)  Technology License Agreement (Dec 6, 1995)	UNIX System V, Release 4.2 OEM Adapter Kit  UNIX System V, Release 3.2 (Jan 13, 1989) UNIX System V/386, Release 4.0 (Feb 14, 1990) UNIX System V/386, Release 4.0, Version 2 (Oct 1, 1990)  Limited Rights License to all UNIX and UnixWare

The APA (as defined below) listed in Exhibit A and the agreements listed in Exhibit A-3 to the Notice listed above shall be referred to as the “Novell Agreements.”

### B. Summary of the Issues

4. In accordance with Sale Procedures Order ¶ 4, Novell makes its objections to the cure amounts set forth for Novell; it adds certain other objections even if they are not yet formally due in the hope of advancing the efficient resolution of the Motion.<sup>2</sup>

#### 1. The Notice Is Vague in Certain Respects

5. As a preliminary matter, Novell finds certain aspects of the Notice so vague as to create serious uncertainty as to the Trustee’s intentions. First, the information in Exhibit A-2 to the Notice leaves it unclear whether the Trustee is purporting to assume and assign the APA itself, or only the SVRX Licenses (also defined below). Novell is advised unofficially that the Trustee’s intent is only the latter. However, out of caution Novell will address both possibilities.

<sup>2</sup> Novell continues to reserve its right to make further objections if and when it is presented with an actual proposed transaction.

In the end, both essentially share certain key underlying issues regarding assumption and assignment, whether the Trustee intends to try to assume and assign both the APA and the SVRX Licenses, or just the SVRX Licenses. There are not only cure amount issues, but fundamental questions about the Trustee's ability to assume assign any of the Novell Agreements without Novell's consent. Novell does not give its consent.

6. Similarly, Novell is not able to identify certain of the Novell Agreements listed on page 108 of Exhibit A-3 of the Notice (the "Unix Agreements"). For example, one of the Unix Agreements listed is described solely as "SOFT-01460." There are no additional details or identification of corresponding products licensed through this purported agreement.<sup>3</sup> As a result, Novell is unable at this time to adequately respond on the issue of whether these supposed agreements are assumable. Novell reserves the right to object to the assumption and assignment of the Unix Agreements until such time that the Trustee supplies Novell with necessary clarification.

## **2. Summary of Substantive Issues**

7. Though important, vagueness is the least of the Notice's problems. The first set of issues concerns the cure amounts. If the Trustee intends to (and can otherwise) assume and assign the APA itself, the \$73,000+ cure amount listed by the Trustee on Exhibit A-2 is wholly inadequate. Even if the Trustee only intends to assume and assign only the SVRX Licenses (if that is permissible, which Novell will explain shortly it is not), Novell cannot confirm the purported \$73,000 cure amount because the Trustee and the Debtors have failed for many months to provide the required royalty reports to Novell.

8. Two further sets of issues concern basic issues of assumability and assignability. *First*, the Novell Agreements cannot be assumed and assigned without Novell's consent. Novell does not consent. *Second*, the Novell Agreements cannot be assumed and assigned separately;

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<sup>3</sup> This is precisely the same problem that Novell noted in response to the last effort by the Debtors as debtors in possession to effect a sale. (See Novell's Response to the Debtors' Notice of Cure Amounts (Dkt. No. 858) 2, 4.) It thus appears that the Trustee has proceeded largely by adopting the work of the Debtors.

they must (along with certain other agreements) be read as a single agreement; under applicable law, the Trustee must assume and assign all of those agreements or none of them, but he is not proposing to do so even if he otherwise could.

9. Because of the insurmountable obstacles for the Trustee to assumption and assignment whatever may be the proper cure amounts, any monetary cure would be futile because the Trustee still could not assume and assign the Novell Agreements.

10. Finally, having failed to disclose who the bidders are or may be, let alone provide any financial and other information about them, the Trustee has not produced any evidence of adequate assurance of future performance of the Novell Agreements.

## **II. BRIEF BACKGROUND**

11. Because it is at the heart of what is at issue here, Novell will remind the Court briefly of the contractual and related background. In 1995, Novell transferred certain UNIX software-related assets to The Santa Cruz Operations, Inc. (“Santa Cruz”) pursuant to an Asset Purchase Agreement (the “APA”).<sup>4</sup> Eventually, Santa Cruz assigned the APA to The SCO Group, Inc., one of the Debtors.

12. In the APA, Novell reserved certain important rights to itself. For example, it retained all copyrights. More importantly for this matter, although the transferred assets included legal title to (but not its equitable interest in) the SVRX software licenses (the “SVRX Licenses”),<sup>5</sup> which generated a royalty stream for Novell (the “SVRX Royalties”), Novell similarly reserved and augmented important rights for itself regarding the SVRX Licenses and SVRX Royalties. Specifically, for purposes of this proceeding:

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<sup>4</sup> A more extensive discussion of this background, with relevant evidence (including a copy of the APA and the relevant court decisions), can be found in Novell, Inc.’s Motion for Order Directing the Debtors to Remit Undisputed Further SVRX Royalties [etc.] (filed October 4, 2007, Dkt. No. 90), the supporting Affidavit of Greg Jones [etc.] (filed October 4, 2007, Dkt. No. 91) and Novell’s Amended Proof of Claim filed March 27, 2009. *See also* the documents cited in footnote 7, *infra*.

<sup>5</sup> The software industry refers to certain versions of UNIX as “SVRX,” which stands for System V, Release X. “X” is the generic placeholder for the release number: System V, Release 1; System V, Release 2; and so on.

- SCO has *only* “legal title and not an equitable interest in the SVRX Licenses [R]oyalties within the meaning of Section 541(d) of the Bankruptcy Code.” APA § 1.2(b).
- “All right, title and interest to the SVRx [sic] Royalties, less . . .[a] 5% fee for administering the collection thereof pursuant to Section 4.16 hereof” are *excluded* from the transfer. APA, Schedule 1.1(b)(VIII).
- “Within 45 days of the end of each fiscal quarter of [SCO], [SCO] shall deliver to [Novell] or [Novell’s] assignee 100% of any SVRX Royalties collected in the immediately preceding quarter.” APA § 4.16(a).
- SCO is required “to [re]assign [to Novell at Novell’s sole pleasure] any rights to . . . any SVRX License to the extent so directed in any manner or respect by” Novell. APA § 4.16(b).
- SCO cannot “amend, modify or waive any right under or assign any SVRX License *without the prior written consent of [Novell].*” APA § 4.16(b).
- SCO must provide Novell detailed monthly reports and submit to audits. APA §§ 1.2(b)
- SCO must collection and remit all royalties per Section 4.16. APA § 1.2.

(Emphasis added.)

13. There are other provisions imposing continuing obligations of the parties to each other that arise in or from the APA. Examples include the provisions of APA Sections 6.6 (obligations of Novell relating to sale of Novell securities) and 4.18 (obligation of SCO to develop the “Business” Novell sold to it)). Under Amendment 2 to the APA, as confirmed by the Tenth Circuit’s recent decision in the appeal of the Utah Action, SCO also has ongoing obligations to Novell relating to its dealings with the SVRX Licenses. *See generally The SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201 (10th Cir. 2010, *cert. denied sub nom. Novell, Inc. v. The SCO Group, Inc.*, \_\_\_ U.S. \_\_\_, 2010 WL 767041 (August 26, 2010); Findings of Fact and Conclusions of Law (United States District Court, District of Utah, Case No. 2:04-CV-139-CS, (Dkt. 876)) (the “Findings and Conclusions”) (attached hereto as Exhibit A).

14. In addition, the APA provided for and gave rise to certain other agreements between Novell and SCO (together with the APA, the “APA Agreements”).<sup>6</sup> Pursuant to APA Section 1.6, there is a Technology License Agreement (the “TLA”) between the parties in which the Debtors licensed certain rights to Novell. (*See also* Notice, Ex. A-3, at 108.) In accordance with APA Section 4.19 and the Operating Agreement associated with the APA, Novell licensed SCO to include Novell’s NetWare code in its products. And, of course, the SVRX licenses are themselves executory agreements, as the Notice itself reflects.

15. Finally, and of the utmost importance, APA Section 9.5(c) expressly prohibits its assignment by SCO without Novell’s consent.

16. Litigation between Novell and SCO ensued over the APA regarding such key issues as whether Novell had transferred the UNIX software copyrights to SCO. Ultimately, Novell prevailed on that issue and others. As the District Court wrote, after jury trial on some of the issues:

After its deliberations, the jury found that the amended Asset Purchase Agreement (“APA”) did not transfer the UNIX and UnixWare copyrights from Novell to SCO. Because it found that SCO was not the owner of the UNIX and UnixWare copyrights, there was no need for the jury to reach SCO’s slander of title claim.

(Findings and Conclusions 3 (footnote omitted).) As to the issues the parties agreed would be tried to the bench, the District Court found in favor of Novell on each of the following issues:

(1) SCO’s claim for specific performance seeking an order directing Novell to transfer the UNIX and UnixWare copyrights [to SCO] [denied]; (2) Novell’s counterclaim for declaratory judgment of its rights under Section 4.16 of the APA [including the right to demand reassignment of the SVRX Licenses and direct SCO waive rights thereunder] [granted]; and (3) SCO’s claim that Novell breached the implied covenant of good faith and fair dealing in exercising its rights under Section 4.16 of the APA [denied].

(Findings and Conclusions 3, 61 (footnote omitted).)

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<sup>6</sup> Thus, the “APA Agreements” encompasses the Novell Agreements (the APA and the Netware license scheduled in Notice Exhibit A-2 and the agreements with Novell in Notice Exhibit A-3, but includes additional agreements.

17. Previously, Novell had also obtained an award in the District Court against SCO of \$3,506,526 (including pre- and post-judgment interest), plus as-yet undetermined costs of up to \$127,432.20.<sup>7</sup> Of that sum, \$625,486.90 plus accrued interest thereon was paid last Spring as funds held in trust for Novell (*see* Agreed Order Approving Stipulation [etc.] (Dkt. No. 1126), but the balance of about \$2,881,040 (plus costs) remains unpaid.

### III. LEGAL BACKGROUND

18. Novell's objections to the Notice also require a brief summary of applicable principles of law. The Trustee must take each contract as he finds it, with *all* of its burdens along with its benefits. He thus may only assume a contract in whole; he cannot pick and choose which provisions or benefits or burdens he wishes to assume and assign and which he wishes to shed. *In re Fleming Cos.*, 499 F.3d 300, 308 (3d Cir. 2007). The assumption and assignment of a contract is "intended to change only *who* performs and obligation, not the obligation to be performed itself." *Id.* (citation omitted) (emphasis added).

19. By the same token, the Trustee must assume or assign all of a series of integrated and related contracts even if they appear in separate documents. *In re Exide Techs.*, 340 B.R. 222, 229 (Bankr. D. Del. 2006), *affirmed* 607 F.3d 957 (3d Cir. 2010). In *Exide Technologies*, the Court found that the following agreements were part of an integrated transaction and that the debtor had to assume or reject them as a batch rather than individually:

In 1991, [debtor] Exide entered into a series of agreements with EnerSys for the sale of substantially all of Exide's industrial battery division. The parties executed over twenty-three agreements as part of the transaction. The following four agreements are at the heart of this dispute: (1) the Trademark and Trade Name License Agreement, dated June 10, 1991 ("Trademark License"), (2) the Asset Purchase Agreement, dated June 10, 1991, (3) the Administrative Services Agreement, dated June 10, 1991, and (4) a letter agreement, dated December 27, 1994 (collectively, all four are referred to herein as the "Agreement") . . . .

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<sup>7</sup> See the following, attached as Exhibits A through C from United States District Court, District of Utah, Case No. 2:04-CV-139-CS: Findings of Fact and Conclusions of Law (Dkt. 876); Final Judgment (Dkt. 878); partial docket sheet showing pendency of costs determination; *see also* Novell's Amended Proof of Claim (filed March 27, 2009) (attached as Exhibit D). *See also The SCO Group, Inc. v. Novell, Inc.*, 578 F.3d 1201, 1208, 1227 (10th Cir. 2010, *cert. denied sub nom. Novell, Inc. v. The SCO Group, Inc.*, \_\_\_ U.S. \_\_\_, 2010 WL 767041 (August 26, 2010)

As part of the transaction, EnerSys paid in excess of \$ 135 million at closing. In exchange for such payment, EnerSys received various assets, including manufacturing plants, equipment and certain intellectual property rights. Certain Exide employees in the industrial battery division became EnerSys employees.

*Ibid*, 340 B.R. at 227-28.

20. In addition, the right to assume or reject an executory contract is subject to certain limitations. One, found in Section 365(c) of the Code, sets forth exceptions to the general right to assume executory contracts in the first instance. It provides, in relevant part:

The trustee may not assume or assign any executory contract or unexpired lease of the debtor whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties, if –

(1)(A) applicable law excuses a party, other than the debtor, to such contract or lease from accepting performance from or rendering performance to an entity other than the debtor or the debtor in possession, whether or not such contract or lease prohibits or restricts assignment of rights or delegation of duties; and

(B) such party does not consent to such assumption or assignment;

11 U.S.C. § 365(c).

21. Accordingly, under section 365(c) of the Code, the Trustee may not assume or assign an executory contract without consent if “applicable law” provides that the non-debtor does not consent. In the Third Circuit, based on the so-called “hypothetical” test governing the interplay between Code sections 365(c) and 365(f), *see In re West Elecs., Inc.*, 852 F.3d 79, 83 (3d Cir. 1988), the Trustee may not assume, let alone assign, licenses of copyrights from the copyright holder without the former’s consent. *RCI Tech. Corp. v. Sunterra Corp. (In re Sunterra Corp.)*, 361 F.3d 257, 265-70.

**IV. THE CURE AMOUNTS IN RESPECT OF THE NOVELL SANTA CRUZ APA ARE WHOLLY INADEQUATE AND IT CANNOT BE ASSUMED AND ASSIGNED WITHOUT FULL CURE OF OUTSTANDING AMOUNTS**

22. If the Trustee intends to assume and assign the APA itself, the cure amount of \$73,436.91 listed on Exhibit A-2 as being owed to Novell plainly is incorrect. It appears to comprise only the SVRX royalties the Trustee believes are due under Section 4.16 of the APA.

It clearly does not include the \$2.88 million balance owed to Novell pursuant to final judgment of the District Court in favor of Novell. Even if the Trustee could otherwise assume the APA, a subject Novell will discuss later in this brief, he cannot do so without paying the full balance of the judgment (including costs once awarded).

23. Second, Novell cannot independently confirm whether the \$73,436.91 cure amount listed as due and owing as of September 30, 2010 is accurate even as to the SVRX Royalties alone. The Debtors and the Trustee have for many months failed to deliver the monthly reports required of them under APA Section 1.2(b) that Novell depends on for royalty information. Hence, whether the Trustee intends to assume the APA and the SVRX Licenses, or just the SVRX Licenses (if they can), the cure amount in the Notice as to the SVRX Licenses requires further documentation by the Trustee and review by Novell.

#### **V. THE DEBTORS MUST ASSUME AND ASSIGN ALL THE APA AGREEMENTS**

24. Based upon *Exide Technologies*, it is clear that the Novell Agreements are part of an integrated transaction that includes *all* of the APA Agreements. Consequently, the Trustee must assume all of the APA Agreements (not just the narrower class of the Novell Agreements set forth in Notice Exhibits A-2 and A-3) or none of them. *Exide Techs.; Fleming Cos.* Here the Trustee does not appear to be trying to assume all of the APA Agreements, but only the Novell Agreements (the APA (or just the SVRX Licenses) and the agreements on Exhibit A-3). For that reason alone, Trustee cannot assume any of them. Moreover, as Novell will explain below, there are additional reasons why the Trustee cannot assume any of the Novell Agreements, let alone the APA Agreements (as he must do if he is to assume any).

#### **VI. THE NOVELL AGREEMENTS CANNOT BE ASSUMED AND ASSIGNED WITHOUT NOVELL'S CONSENT**

25. The SVRX Licenses are copyright licenses. There are other copyright licenses in (or provided for by) the APA itself that are part of the integrated transaction of which the APA is the linchpin. The APA itself both contains copyright licenses and is part of an integrated agreement

(comprising the APA Agreements) that encompasses other, albeit separately-documented, copyright licenses. *See also, e.g.*, the Netware license (referred to in Notice Ex. A-2). Consequently, the Trustee cannot assume any of these copyright licenses (or copyright license-embedding agreements such as the APA) without Novell's consent. *Sunterra Corp.* Novell declines to consent.

26. This means that the Trustee cannot assume the APA or any copyright license in it or that is part of the integrated agreement comprising the APA Agreements, including the SVRX Licenses.<sup>8</sup> Hence, the Trustee also cannot assume *any* of those agreements since under *Exide Technologies* he must assume them all to assume any of them.<sup>9</sup>

## **VII. THE TRUSTEE CANNOT PROVIDE ADEQUATE ASSURANCE OF FUTURE PERFORMANCE**

27. Because the Trustee has not identified the prospective Purchaser or exactly what the Purchaser will be purchasing – there being no actual purchase agreement yet – he cannot yet provide Novell with adequate assurance of future performance of the terms and conditions of the Novell Agreements (and, indeed, of the larger family of APA Agreements) to which Novell is entitled under Code section 365(f)(2)(B). Should the Trustee have and identify a Purchaser by October 25, 2010 in accordance with Sale Procedures Order ¶¶ 7.e-g., Novell has until November 1 to raise any issues it has regarding the Purchaser's ability to provide adequate assurance of future performance of both the Novell Agreements and, more generally, the APA Agreements that encompass the Novell Agreements (if, as Novell contends, the Trustee must assume and assign the latter to assume and assign any of the former *and* the Trustee seeks to do

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<sup>8</sup> Because the Trustee's listing of agreements on Exhibit A-3 to the Notice is vague, Novell cannot tell yet whether those agreements are copyright licenses; if they are, Novell's lack of consent would be a direct bar to the Trustee's assumption and assignment even if they were not part of the integrated transaction that the APA Agreements represent.

<sup>9</sup> It would seem that at the very least the Purchaser would want Novell's voluntary consent anyhow. Otherwise, the Purchaser faces the prospect of an unhappy Novell exercising certain of its rights that will detract from the value of the deal the Purchaser makes with the Trustee. For example, Novell, as laid out above, will have the right to require the Purchaser "to [re]assign [to Novell at Novell's sole pleasure] any rights to . . . any SVRX License to the extent so directed in any manner or respect by" Novell. APA § 4.16(b) (emphasis added). Similarly, under the same provision of the APA, Novell can require the Purchaser to waive certain claims the Purchaser might otherwise have under the SVRX Licenses. *See* Final Judgment (Exhibit B hereto) 1-1, ¶3.)

so). (Sale Procedures Order ¶ 7.h.) Novell observes in the interim that adequate assurance will require an assessment not only of such matters as the Purchaser's technical competence and financial wherewithal, but also (if the Court agrees that the Purchaser must assume the APA) of the Purchaser's ability to develop the "Business" Novell sold to SCO in accordance with APA Section 4.18. This provision means that the Purchaser must do more far more than simply collect and remit the SVRX Royalties, for example.

### VIII. CONCLUSION

The Notice and cure amounts therein fail to satisfy the standards for assumption and assignment of the Novell Agreements requires. In addition, cures would in any case be futile because, even apart from the open adequate assurance issue, the Trustee cannot assume the Novell Agreements.

Dated: October 25, 2010  
Wilmington, Delaware

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