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IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Proceeding	91213064
Party	Defendant Northwest Territorial Mint, LLC
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Submission	Motion to Suspend for Civil Action
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Date	11/05/2013
Attachments	Motion to Suspend TTAB Proceedings with Exhibits.pdf(439696 bytes )

IN THE UNITED STATES PATENT AND TRADEMARK OFFICE  
BEFORE THE TRADEMARK TRIAL AND APPEAL BOARD

Regarding the mark SILVER BULLET BULLION (Serial No. 85824772)

PROVIDENT PRECIOUS METALS,  
LLC,

Opposer,

v.

NORTHWEST TERRITORIAL MINT,  
LLC,

Applicant.

Opposition No. 91213064

**MOTION TO SUSPEND**

Applicant Northwest Territorial Mint, LLC (“Applicant”), respectfully moves the U.S. Trademark Trial and Appeal Board to suspend the instant proceeding pending disposition of the parties’ trademark litigation that is pending in the United States District Court for the Northern District of Texas. The parties’ civil action involves the same trademark at issue in the instant proceeding, the same parties, many of the same issues, and may dispose of the instant proceeding. Recognizing this, Opposer Provident Precious Metals, LLC (“Opposer”) disclosed the parties’ civil action as a “related proceeding” when it filed its opposition. In the interests of economy, the Board should suspend the instant proceeding until the parties’ federal litigation is determined. Doing so would avoid devoting further resources to the instant proceeding, which the federal litigation may render wholly unnecessary.

**FACTS**

On January 16, 2013, Applicant applied to register SILVER BULLET BULLION as a trademark with the U.S. Patent and Trademark Office in International Class 14 for “precious metals, namely, gold and silver bullion” (Serial No. 85824772).<sup>1</sup>

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<sup>1</sup> See Applicant’s trademark application file.

On July 29, 2013, Opposer filed a lawsuit against Applicant in U.S. District Court for the Northern District of Texas (the “District Court Litigation”). Among other claims, Opposer seeks a declaratory judgment that Applicant’s “alleged trademark for Silver Bullet Bullion, which was asserted by [Applicant], lacks the requisite legal requirements to be protectable on the Principal Register and to be enforceable.” It also seeks a declaratory judgment that “it is not infringing, and it is not liable for infringing any allegedly enforceable trademark or trade dress rights owned by [Applicant]. . . .”<sup>2</sup>

On September 6, 2013, Applicant answered Opposer’s complaint in the District Court Litigation, denying Opposer’s claims.

On September 27, 2013, Applicant filed an amended answer and asserted a number of counterclaims in the District Court Litigation. Among other claims, Applicant alleged that Opposer’s use of its COPPER BULLET BULLION trademark for similar goods infringes Applicant’s superior rights in its SILVER BULLET BULLION trademark that is the subject of the instant opposition proceeding, which constitutes unfair competition and a false designation of origin under federal law. Applicant also cited its application to register SILVER BULLET BULLION that is the subject of the instant proceeding.<sup>3</sup>

On October 18, 2013, after Opposer’s initiation of the Federal Court Litigation and Applicant’s assertion of counterclaims, Opposer filed the instant proceeding. In doing so, it asserted that Applicant’s SILVER BULLET BULLION trademark is not entitled to registration because it is generic, merely descriptive, or deceptively misdescriptive. As part of its filing, Opposer identified the District Court Litigation as a “related proceeding.”<sup>4</sup> However, when Applicant requested that Opposer stipulate to suspend this proceeding, Opposer’s counsel

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<sup>2</sup> Pl.’s Complaint for Declaratory J. and Relief (attached hereto as Exhibit A) at ¶¶ 24-25.

<sup>3</sup> Def.’s Amended Answer to Pl.’s Complaint for Declaratory J. (attached hereto as Exhibit B) at ¶¶ 8, 29-36.

<sup>4</sup> Notice of Opposition (TTAB Dkt. #1).

informed Applicant that Opposer “instructed [him] not to stipulate to suspension of the opposition,” necessitating this motion.<sup>5</sup>

### **ARGUMENT**

The authority for suspending proceedings pending the disposition of related district court litigation is well-known. 37 CFR § 2.117(a) provides:

Whenever it shall come to the attention of the Trademark Trial and Appeal Board that parties to a pending case are engaged in a civil action which may be dispositive of the case, proceedings before the Board may be suspended until termination of the civil action.

*See also*, Trademark Board Manual of Procedure (“TBMP”) § 510.02(a); *General Motors Corp. v. Cadillac Club Fashions Inc.*, 22 USPQ2d 1933 (TTAB 1992).

As the Board has recognized, “[m]ost commonly, a request to suspend pending the outcome of another proceeding seeks suspension because of a civil action pending between the parties in a Federal district court.” TBMP at § 510.02(a), *citing Goya Foods Inc. v. Tropicana Products Inc.*, 846 F.2d 848, 6 USPQ2d 1950 (2d Cir.1988) (additional citations omitted). Suspension serves the interests of economy, because “[t]o the extent that a civil action in a Federal district court involves issues in common with those in a proceeding before the Board, the decision of the Federal district court is binding upon the Board, while the decision of the Board is not binding upon the court.” *Id.* (citations omitted). For this reason, the Board frequently grants suspension requests when the parties are involved in a related civil action. *See id.* (“Ordinarily, the Board will suspend proceedings in the case before it if the final determination of the other proceeding will have a bearing on the issues before the Board.”), *citing Other Telephone Co. v. Connecticut National Telephone Co.*, 181 USPQ 125 (TTAB 1974), *petition denied*, 181 USPQ 779 (Comm’r 1974) (additional citations omitted).

Suspension would serve the interests of economy here. The District Court Litigation involves the same trademark, the same parties, many of the same issues, and may dispose of the instant proceeding. Therefore, the Board should suspend the instant proceedings until the

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<sup>5</sup> Email exchange between Michael Atkins and Jason Worgull, dated Oct. 31, 2013 (attached hereto as Exhibit C).

District Court Litigation is concluded. It makes no sense to devote further resources to the instant proceeding when the District Court Litigation may render it wholly unnecessary.

**CONCLUSION**

The Board should suspend the instant proceeding for the reasons stated above.

DATED this 5<sup>th</sup> day of November, 2013.

By /s/ Michael G. Atkins  
Michael G. Atkins  
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Attorneys for Applicant

**CERTIFICATE OF SERVICE**

I hereby certify that a true copy of the foregoing was served on counsel for Opposer

Jason A. Worgull  
Wegman, Hessler & Vanderburg  
6055 Rockside Woods Boulevard, Suite 200  
Cleveland, OH 44131  
jaworgull@wegmanlaw.com

by ESTTA and First Class Mail on November 5, 2013.

/s/ Michael G. Atkins  
Michael G. Atkins

# **Exhibit A**

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

PROVIDENT PRECIOUS METALS, LLC,

*Plaintiff,*

v.

NORTHWEST TERRITORIAL MINT, LLC,

*Defendant.*

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Civil Action No. \_\_\_\_\_

**PLAINTIFF’S COMPLAINT FOR DECLARATORY JUDGMENT  
AND RELIEF PURSUANT TO 15 U.S.C. § 1125**

Plaintiff Provident Precious Metals, LLC (“Provident” or “Plaintiff”) files this complaint for declaratory judgment against the Defendant Northwest Territorial Mint, LLC (“Northwest” or “Defendant”).

**NATURE OF THE ACTION**

1. Plaintiff Provident seeks declaratory judgment of non-infringement of alleged copyright(s), trademarks and trade dress rights asserted against Plaintiff by Defendant Northwest. Provident further seeks declaratory judgment that any alleged copyright, trademark or trade dress rights asserted by Northwest are invalid and unenforceable.

2. Northwest has asserted that Provident is infringing Northwest’s alleged copyright, trademarks and trade dress rights by selling copper in the shape of the common and well-known .45 caliber ACP ammunition. Provident denies that it has infringed any copyrights owned by Northwest regarding metals with intrinsic value, such as platinum, gold, silver and copper, shaped in the form of ammunition. Provident further denies that is has infringed any trademarks or trade dress rights owned by Northwest relating to replica ammunition-shaped metal products, including, but not limited to, .45 caliber ACP ammunition.

### THE PARTIES

3. Provident is a limited liability company organized and existing under the laws of the State of Texas with its principal place of business located in Dallas, Texas.

4. Upon information and belief, Northwest is a limited liability company organized under the laws of the State of Washington and is registered to do business in the State of Texas as a foreign entity with registration #801425366 with its principal place(s) of business represented to be 2505 S. 320<sup>th</sup> Street, Federal Way, Washington 98003 and/or 80 Airport Vista Boulevard, Dayton, Nevada 89403. Northwest also has a designated agent for service of process in the State of Texas – Fredreck S. Hudgens (“Hudgens”). Hudgens has an address in Tomball, Texas – 720 West Main Street, Tomball, Texas 77375.

### JURISDICTION AND VENUE

5. This is an action for declaratory judgment arising under (i) the United States Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* (the “Copyright Act”); (ii) the Trademark Laws of the United States, 15 USC § 1051 *et seq.* (the “Trademark Act”); (iii) 15 U.S.C. §1125, *et seq.* (the “Lanham Act”); and (iv) 28 U.S.C. §§ 2201 and 2202 (the Declaratory Judgment Act). Thus, this Court has original jurisdiction over the subject matter of this action pursuant to 28 U.S.C. §§ 1331 and 1338.

6. Defendant Northwest is also subject to the personal jurisdiction of this Court because the Defendant regularly maintains an office and registered agent in the State of Texas and, therefore, is continuously present in the State of Texas. In addition, its false assertions of infringement of alleged copyrights, trademarks and trade dress were directed to the Plaintiff in the State of Texas. Thus, this Court has both general and specific personal jurisdiction over Northwest.

7. Venue of this action is proper in the Northern District of Texas under 28 U.S.C. § 1391(b)(1) and (2) because Northwest is subject to the personal jurisdiction of this Court in this Judicial District and thus qualifies as a resident of this Judicial District under 28 U.S.C. § 1391(c)(2). In addition, a substantial part of the events giving rise to Plaintiff's claims has occurred and will continue to occur in the Northern District of Texas.

#### FACTUAL BACKGROUND

8. Plaintiff re-avers and re-states the foregoing Paragraphs 1-7 inclusively as if fully set forth herein.

9. Provident is a Texas business located in the Dallas area. Provident sells novelty and commemorative items, such as coins, medals, statuettes, and similar ornamental and affinity products, including, but not limited to, full-scale replicas of common shapes of weapon ammunition (such as .45 caliber ACP ammunition), made from metals with intrinsic value, including, but not limited to, copper.

10. Northwest holds itself out as a manufacturer and seller of similar products, including, but not limited to, full-scale replicas of common shapes of weapons ammunition made from metals with intrinsic value, including, but not limited to, silver.

11. The common weapon ammunition shapes, which have been in the public domain for up to 102 years and which are in controversy, include ammunition shapes such as the .45 caliber ACP (*circa* 1911), .308 NATO (*circa* 1958), and the .50 BMG (*circa* 1940). For many years, these have been replicated for novelty and collection purposes in metals with intrinsic value, such as gold, silver and copper.

12. Provident and Northwest are competitors in the marketplace for novelty and/or affinity collectible products made from metals with intrinsic value, including replica ammunition.

### DEFENDANT'S ACTS COMPRISING ACTUAL CONTROVERSY

13. Plaintiff re-avers and re-states the foregoing Paragraphs 1-12 inclusively as if fully set forth herein.

14. On July 15, 2013, Defendant Northwest threatened litigation against Provident, asserting that Provident is infringing Northwest's claimed copyright in the .45 caliber ACP ammunition made of silver and Northwest's trademark in the name, Silver Bullet Bullion (subject of Serial No. 85/824,772, filed January 16, 2013), and Northwest's product shape associated with its .45 caliber ACP replica ammunition made of silver. Northwest also asserted that Provident was infringing Northwest's alleged trade dress rights relating to these objects. Such threats were communicated through telephone conversations between Northwest and Provident, which clearly and unambiguously articulated Northwest's intent to commence litigation to enforce their purported intellectual property rights.

15. On July 23, 2013, Defendant Northwest also sent Provident a letter accusing Provident of copyright and trademark infringement in connection with Provident's sale of ammunition shapes, including Provident's .45 caliber ACP replica ammunition. Northwest's letter of July 23, 2013 expressly asserted, "[i]f you do not immediately remove and cease all sales of products that infringe upon the intellectual property owned by NWTM by Monday, July 29<sup>th</sup>, NWTM will not hesitate to pursue all legal remedies necessary to cure your infringement and to recover damages and costs."

16. There presently exists a justiciable controversy regarding the Plaintiff's right to make any and all forms and shapes of replica weapon ammunition from metals with intrinsic value free of any allegation by Northwest that such conduct constitutes an infringement of any copyright, trademark or trade dress rights allegedly owned by Northwest.

**FIRST CLAIM FOR RELIEF  
(Invalidity of Copyright)**

17. Plaintiff re-avers and re-states the foregoing Paragraphs 1-16 inclusively as if fully set forth herein.

18. This is a declaratory judgment action under (i) the United States Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* (the "Copyright Act"), and 28 U.S.C. §§ 2201 and 2202 (the Declaratory Judgment Act). As an actual justiciable controversy exists by way of the credible threat of immediate litigation and demand to cease and desist manufacture of the Plaintiff's product and forbearance of manufacture of other similar products, Plaintiff seeks relief from this Court.

19. Plaintiff requests an order declaring that the alleged copyright(s) asserted by the Defendant in the form of replicas of common, public domain weapons ammunition shapes, including the .45 caliber ACP ammunition shape, are invalid and unenforceable for, *inter alia*, the following not all-inclusive reasons:

(a) an absence of sufficient creativity and originality to be entitled to copyright protection or registration; and

(b) the products merely consist of a combination of known elements, components, depictions and/or shapes, all of which are in the public domain, and are not entitled to copyright protection or registration.

**SECOND CLAIM FOR RELIEF  
(Non-Infringement of Copyright)**

20. Plaintiff re-avers and re-states the foregoing Paragraphs 1-19 inclusively as if fully set forth herein.

21. This is a declaratory judgment action under (i) the United States Copyright Act of 1976, 17 U.S.C. § 101 *et seq.* (the "Copyright Act"), and 28 U.S.C. §§ 2201 and 2202 (the

Declaratory Judgment Act). As an actual justiciable controversy exists by way of the credible threat of immediate litigation and demand to cease and desist manufacture of the Plaintiff's product and forbearance of manufacture of other similar products, Plaintiff seeks relief from this Court.

22. Plaintiff is entitled to declaratory judgment that it is not infringing, has not infringed, and is not liable for infringing any valid copyright owned by Northwest relating to replica ammunition made of metals having intrinsic value, either directly or by inducing others to infringe or by contributing to infringement by others.

**THIRD CLAIM FOR RELIEF**  
**(Unenforceability of Trademark – Word Mark)**

23. Plaintiff re-avers and re-states the foregoing Paragraphs 1-22 inclusively as if fully set forth herein.

24. This is a declaratory judgment action under the Trademark Laws of the United States, 15 USC § 1051 *et seq.* (the "Trademark Act"), and 28 U.S.C. §§ 2201 and 2202 (the Declaratory Judgment Act). As an actual justiciable controversy exists by way of the credible threat of immediate litigation and demand to cease and desist manufacture of the Plaintiff's product and forbearance of manufacture of other similar products, Plaintiff seeks relief from this Court.

25. Plaintiff requests an order declaring that the Defendant's alleged trademark for Silver Bullet Bullion, which was asserted by the Defendant, lacks the requisite legal requirements to be protectable on the Principal Register and to be enforceable.

**FOURTH CLAIM FOR RELIEF**  
**(Unenforceability of Trademark and Trade Dress – Product Shape)**

26. Plaintiff re-avers and re-states the foregoing Paragraphs 1-25 inclusively as if fully set forth herein.

27. This is a declaratory judgment action under the Trademark Laws of the United States, 15 USC § 1051 *et seq.*, the Lanham Act, 15 U.S.C. §1125, *et seq.* and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. As an actual justiciable controversy exists by way of the credible threat of immediate litigation and demand to cease and desist manufacture of the Plaintiff's product and forbearance of manufacture of other similar products, Plaintiff seeks relief from this Court.

28. Plaintiff requests an order declaring that the Defendant's alleged trademark and trade dress rights for the product shape of its replica weapons ammunition shapes, including, but not limited to, the .45 caliber ACP ammunition shape, lack the requisite legal requirements to be protectable on the Principal Register, and to be enforceable.

**FIFTH CLAIM FOR RELIEF**  
**(Unenforceability of Trademark and Trade Dress – Product Packaging)**

29. Plaintiff re-avers and re-states the foregoing Paragraphs 1-28 inclusively as if fully set forth herein.

30. This is a declaratory judgment action under the Trademark Laws of the United States, 15 USC § 1051 *et seq.*, the Lanham Act, 15 U.S.C. §1125, *et seq.* and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. As an actual justiciable controversy exists by way of the credible threat of immediate litigation and demand to cease and desist manufacture of the Plaintiff's product and forbearance of manufacture of other similar products, Plaintiff seeks relief from this Court.

31. Plaintiff requests an order declaring that the Defendant's alleged trademark and trade dress rights for the product packaging used in conjunction with its replica weapons ammunition shapes, including, but not limited to the .45 caliber ACP ammunition shape, lack the requisite legal requirements to be protectable and enforceable.

**SIXTH CLAIM FOR RELIEF**  
**(Non-Infringement of Trademarks and Trade Dress)**

32. Plaintiff re-avers and re-states the foregoing Paragraphs 1-31 inclusively as if fully set forth herein.

33. This is a declaratory judgment action under the Trademark Laws of the United States, 15 USC § 1051 *et seq.*, the Lanham Act, 15 U.S.C. §1125, *et seq.* and the Declaratory Judgment Act, 28 U.S.C. §§ 2201 and 2202. As an actual justiciable controversy exists by way of the credible threat of immediate litigation and demand to cease and desist manufacture of the Plaintiff's product and forbearance of manufacture of other similar products, Plaintiff seeks relief from this Court.

34. Plaintiff is entitled to declaratory judgment that it is not infringing, has not infringed, and is not liable for infringing any allegedly enforceable trademark or trade dress rights owned by Northwest relating to the sale replica ammunition made of metals having intrinsic value, either directly or by inducing others to infringe or by contributing to infringement by others.

**REQUEST FOR RELIEF**

WHEREFORE, Plaintiff seeks judgment awarding it the following relief:

(a) An order declaring the alleged copyright(s) asserted by Northwest in the form of replicas of common, public domain weapons ammunition shapes, including, but not limited to, the .45 caliber ACP ammunition shape, are invalid and unenforceable;

(b) An order declaring that Provident does not infringe any valid copyright owned by Northwest relating to replica ammunition made of metals having intrinsic value;

(c) An order declaring Northwest's alleged trademark for Silver Bullet Bullion lacks the requisite legal requirements to be protectable on the Principal Register and to be enforceable;

(d) An order declaring Northwest's alleged trademark or trade dress rights for the product shape of its replica weapons ammunition shapes, including the .45 caliber ACP ammunition shape, lacks the requisite legal requirements to be protectable on the Principal Register and to be enforceable;

(e) An order declaring that Provident has not infringed any valid, distinctive and enforceable trademark or trade dress rights owned by Northwest relating to the sale of replica ammunition made of metals having intrinsic value;

(f) An order awarding attorneys' fees, costs, and expenses incurred in connection with this action to Provident; and

(h) An order awarding such other and further relief as this Court deems just and proper.

Dated: July 29, 2013

Respectfully submitted,

**BUETHER JOE & CARPENTER, LLC**

By: /s/ Eric W. Buether

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**ATTORNEYS FOR PLAINTIFF  
PROVIDENT PRECIOUS METALS, LLC**

# **Exhibit B**

**IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION**

PROVIDENT PRECIOUS METALS, LLC,	§	
	§	
<i>Plaintiff,</i>	§	
	§	
v.	§	Civil Action No. 3:13-cv-02942-M
	§	
NORTHWEST TERRITORIAL MINT, LLC,	§	
	§	
<i>Defendant.</i>	§	

**DEFENDANT’S AMENDED ANSWER TO PLAINTIFF’S COMPLAINT FOR  
DECLARATORY JUDGMENT AND RELIEF AND COUNTERCLAIMS**

**AMENDED ANSWER**

For its Answer to Plaintiff Provident Precious Metals, LLC’s (“Provident”) Complaint for Declaratory Judgment and Relief, Defendant Northwest Territorial Mint, LLC (“NWTM”) hereby admits, alleges, and denies as follows:

**NATURE OF THE ACTION**

1. Answering Paragraph 1 of the Complaint, NWTM alleges that this paragraph contains legal conclusions to which no response is required. To the extent that a response is required, NWTM denies the allegations contained in the paragraph.

2. Answering Paragraph 2 of the Complaint, NWTM admits that it has asserted that Provident is infringing its copyright, trademark, and trade dress rights and that Provident has denied those assertions. The remaining allegations in the paragraph are legal conclusions to which no response is required. To the extent that a response is required, NWTM denies the remaining allegations contained in the paragraph.

### **THE PARTIES**

3. Answering Paragraph 3 of the Complaint, NWTM is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in the paragraph. For this reason, NWTM denies the allegations of the paragraph.

4. Answering Paragraph 4 of the Complaint, NWTM admits that it is a limited liability company organized under the laws of the State of Washington and is registered to do business in the State of Texas as a foreign entity with registration #801425366 with its principal place of business located at 723 South Cherry St., Tomball, Texas 77375. NWTM's designated agent for service of process in the State of Texas is Fredreck S. Hudgens, who has an address at 720 West Main Street, Tomball, Texas 77375. Unless specifically admitted herein, NWTM denies the remaining allegations of Paragraph 4.

### **JURISDICTION AND VENUE**

5. Answering Paragraph 5, NWTM states that the allegations in this Paragraph constitute legal conclusions to which a responsive pleading is not required; however, NWTM, admits the Complaint purports to set forth an action arising under the laws stated therein. NWTM admits that subject-matter jurisdiction is proper as to this action only pursuant to 28 U.S.C. §§ 1331 and 1338. Any other allegations not specifically admitted herein are denied.

6. Answering Paragraph 6, NWTM states that the allegations in this Paragraph constitute legal conclusions to which a responsive pleading is not required. NWTM admits that it maintains an office and registered agent in the State of Texas. Any other allegations not specifically admitted herein are denied.

7. Answering Paragraph 7 of the Complaint, NWTM alleges that these paragraphs contain legal conclusions to which no response is required. However, NWTM admits that it does business in the State of Texas and this District. Any other allegations not specifically admitted herein are denied.

#### **FACTUAL BACKGROUND**

8. Answering Paragraph 8 of the Complaint, NWTM realleges its responses to the previous paragraphs as though set forth fully herein.

9. Answering Paragraph 9 of the Complaint, NWTM is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 9. For this reason, NWTM denies the allegations contained in Paragraph 9.

10. Answering Paragraph 10 of the Complaint, NWTM is a manufacturer and selling of weapons ammunition made from metals with intrinsic value, including, but not limited to, silver. Any allegations not specifically admitted herein are denied.

11. Answering Paragraph 11 of the Complaint, NWTM admits that certain ammunition shapes have been replicated for novelty and collection purposes in metals with intrinsic value, such as gold, silver, and copper. Any allegations not specifically admitted herein are denied.

12. Answering Paragraph 12 of the Complaint, NWTM is without knowledge or information sufficient to form a belief as to the truth or falsity of the allegations in Paragraph 12. For this reason, NWTM denies the allegations of Paragraph 12.

#### **DEFENDANT'S ACTS COMPRISING ACTUAL CONTROVERSY**

13. Answering Paragraph 13 of the Complaint, NWTM realleges its responses to the previous paragraphs as though set forth fully herein.

14. Answering Paragraph 14 of the Complaint, NWTM admits that there was a telephone conversation between NWTM and Provident on July 15, 2013 wherein NWTM informed Provident that Provident was infringing upon NWTM's intellectual property rights. NWTM denies the remaining allegations of the paragraph.

15. Answering Paragraph 15 of the Complaint, NWTM asserts that the document referenced in the paragraph speaks for itself. NWTM denies every allegation in the paragraph inconsistent with the document referenced.

16. Answering Paragraph 16 of the Complaint, NWTM states that the allegations in this Paragraph constitute legal conclusions to which a responsive pleading is not required. To the extent a response is required, NWTM denies the allegations of Paragraph 16.

#### **FIRST CLAIM FOR RELIEF**

##### **(Invalidity of Copyright)**

17. Answering Paragraph 17 of the Complaint, NWTM realleges its responses to the previous paragraphs as though set forth fully herein.

18. Answering Paragraph 18 of the Complaint, NWTM alleges that this paragraph contains legal conclusions to which no response is required. To the extent that a response is required, NWTM denies the allegations of Paragraph 18.

19. Answering Paragraph 19 of the Complaint, NWTM alleges that this paragraph contains legal conclusions to which no response is required. To the extent that a response is required, NWTM denies the allegations of Paragraph 19 and denies that Provident is entitled to the relief requested therein.

**SECOND CLAIM FOR RELIEF**

**(Non-Infringement of Copyright)**

20. Answering Paragraph 20 of the Complaint, NWTM realleges its responses to the previous paragraphs as though set forth fully herein.

21. Answering Paragraph 21 of the Complaint, NWTM alleges that this paragraph contains legal conclusions to which no response is required. To the extent that a response is required, NWTM denies the allegations of Paragraph 21.

22. Answering Paragraph 22 of the Complaint, NWTM denies the allegations of Paragraph 22 and denies that Provident is entitled to the relief requested therein.

**THIRD CLAIM FOR RELIEF**

**(Unenforceability of Trademark – Word Mark)**

23. Answering Paragraph 23 of the Complaint, NWTM realleges its responses to the previous paragraphs as though set forth fully herein.

24. Answering Paragraphs 24 of the Complaint, NWTM alleges that this paragraph contains legal conclusions to which no response is required. To the extent that a response is required, NWTM denies the allegations of Paragraph 24.

25. Answering Paragraph 25 of the Complaint, NWTM alleges that this paragraph contains legal conclusions to which no response is required. To the extent that a response is required, NWTM denies the allegations of Paragraph 25 and denies that Provident is entitled to the relief requested therein.

#### **FOURTH CLAIM FOR RELIEF**

##### **(Unenforceability of Trademark and Trade Dress – Product Shape)**

26. Answering Paragraph 26 of the Complaint, NWTM realleges its responses to the previous paragraphs as though set forth fully herein.

27. Answering Paragraphs 27 of the Complaint, NWTM alleges that this paragraph contains legal conclusions to which no response is required. To the extent that a response is required, NWTM denies the allegations of Paragraph 27.

28. Answering Paragraph 28, NWTM alleges that this paragraph contains legal conclusions to which no response is required. To the extent that a response is required, NWTM denies the allegations of Paragraph 28 and denies that Provident is entitled to the relief requested therein.

#### **FIFTH CLAIM FOR RELIEF**

##### **(Unenforceability of Trademark and Trade Dress – Product Packaging)**

29. Answering Paragraph 29 of the Complaint, NWTM realleges its responses to the previous paragraphs as though set forth fully herein.

30. Answering Paragraph 30 of the Complaint, NWTM alleges that this paragraph contains legal conclusions to which no response is required. To the extent that a response is required, NWTM denies the allegations of Paragraph 30.

31. Answering Paragraph 31 of the Complaint, NWTM alleges that this paragraph contains legal conclusions to which no response is required. To the extent that a response is required, NWTM denies the allegations of Paragraph 31 and denies that Provident is entitled to the relief requested therein.

## **SIXTH CLAIM FOR RELIEF**

### **(Non-Infringement of Trademarks and Trade Dress)**

32. Answering Paragraph 32 of the Complaint, NWTM realleges its responses to the previous paragraphs as though set forth fully herein.

33. Answering Paragraph 33 of the Complaint, NWTM alleges that this paragraph contains legal conclusions to which no response is required. To the extent that a response is required, NWTM denies the allegations of Paragraph 33.

34. Answering Paragraph 34 of the Complaint, NWTM alleges that this paragraph contains legal conclusions to which no response is required. To the extent that a response is required, NWTM denies the allegations of Paragraph 34 and denies that Provident is entitled to the relief requested therein.

## **REQUEST FOR RELIEF**

NWTM denies that Plaintiff is entitled to any of the relief sought in Plaintiff's Request for Relief.

## **AFFIRMATIVE DEFENSES**

### **FIRST AFFIRMATIVE DEFENSE**

The Complaint and each cause of action within it fail to state a claim upon which relief may be granted.

### **SECOND AFFIRMATIVE DEFENSE**

The Complaint and each cause of action, including equitable relief sought, within it fail due to Plaintiff's unclean hands.

**THIRD AFFIRMATIVE DEFENSE**

Plaintiff has prior and superior rights with regard to the trademarks, copyrights, trade dress, and other intellectual property referenced in the Complaint.

**FOURTH AFFIRMATIVE DEFENSE**

Plaintiff is unable to establish any rights whatsoever to the trademarks, copyrights, trade dress, and other intellectual property referenced in the Complaint.

Discovery in this case is continuing, and NWTM reserves the right to raise additional affirmative defenses as it becomes aware of those defenses.

**RELIEF REQUESTED**

NWTM requests that this Court enter judgment in its favor and grant the following relief:

- a. Deny all relief requested by Plaintiff in view of any or all of the denials or affirmative defenses set forth above;
- b. Award NWTM its attorneys' fees, costs, and expenses incurred in connection with this action;
- b. Award NWTM such other and further relief as the Court may deem just and proper.

**COUNTERCLAIMS**

Counterclaimant NWTM, by and through its undersigned counsel of record, hereby files claims against Counterdefendant Provident and alleges as follows:

**NATURE OF ACTION**

This is an action for unfair competition under federal statutes, as well as common law trademark infringement, unfair competition, and unjust enrichment under Texas law.

Counterclaimant seeks damages, attorneys' fees and costs, and preliminary and permanent injunctive relief.

### **JURISDICTION**

1. This Court has jurisdiction over this case pursuant to 28 U.S.C. §§ 1331, 1338(b), and 1338(a). This Court has jurisdiction over Counterclaimant's state law claims pursuant to 28 U.S.C. § 1367(a).

2. This Court has personal jurisdiction over Defendant Provident, as it is a Texas limited liability company with its principal place of business in the Dallas area. Moreover, Counterdefendant Provident filed suit against Counterclaimant NWTM in this judicial district.

### **THE PARTIES**

3. Counterclaimant NWTM is a Washington limited liability company with its principal place of business in Federal Way, Washington. NWTM additionally maintains manufacturing facilities in Nevada, Texas, and Wisconsin, a shipping facility in Washington, sales offices in Washington and Virginia, and a retail facility at the Pentagon in Washington, D.C.

4. Upon information and belief, Counterdefendant Provident is a Texas limited liability company with its principal place of business in the Dallas area. Provident represents itself as a manufacturer of copper novelty items.

### **ALLEGATIONS COMMON TO ALL CLAIMS**

5. In its over three decades of existence, NWTM has become the largest private mint operation in the United States with more than 300 full-time employees. It primarily manufactures items made from precious metals and services institutions,

corporations, and individuals in the United States and around the world, including the United States military and various United States government agencies.

6. In or about January of 2013, NWTM commenced use of the SILVER BULLET BULLION and BULLET BULLION marks for consumer products, including but not limited to silver replicas of ammunition, such as .45 caliber ACP ammunition. To Counterclaimant's knowledge, no other commercial supplier of bullion had marketed its bullion in this manner nor under a similar name.

7. In October of 2012, NWTM founder Ross Hansen registered the domain name <silverbulletbullion.com> for use in connection with NWTM's sale of products under the SILVER BULLET BULLION and BULLET BULLION marks. A website associated with the domain name went live on the World Wide Web on or about January 14, 2013. *See* Screenshot of <silverbulletbullion.com>, attached hereto as Exhibit A.

8. On January 16, 2003, NWTM filed a trademark application with the United States Patent and Trademark (the "USPTO") for SILVER BULLET BULLION (U.S. Ser. No. 85/824,772) for precious metals, namely gold and silver bullion. *See* USPTO Application for SILVER BULLET BULLION mark, attached hereto as Exhibit B.

9. According to the USPTO, the SILVER BULLET BULLION application received a notice of publication and was published for opposition on June 25, 2013.

10. In August of 2013, NWTM additionally filed a trademark application with the USPTO for BULLET BULLION (U.S. Ser. No. 86/027,602) for precious metals, namely gold and silver bullion.

11. While NWTM's application for BULLET BULLION has received an office action from the USPTO examiner, the application has not been abandoned and is still live.

12. Following NWTM's introduction of products under the SILVER BULLET BULLION and BULLET BULLION marks, NWTM heavily advertised these products on the <silverbulletbullion.com> website, as well as through Google and Bing pay-per-click, at trade shows, in banner ads, on Drudge Report, and on Facebook.

13. NWTM sold more than 100,000 products nationwide bearing the SILVER BULLET BULLION and BULLET BULLION marks since the introduction of the marks into the marketplace in January 2013. This market reach demonstrates strong common law rights to the BULLET BULLION and SILVER BULLET BULLION marks.

14. Upon information and belief, Counterdefendant Provident commenced marketing goods under the COPPER BULLET BULLION and/or BULLET BULLION names in or about May or June of 2013.

15. Counterdefendant Provident specifically markets copper replicas of ammunition under the COPPER BULLET BULLION and/or BULLET BULLION marks, including but not limited to .45 caliber ACP ammunition. These copper replicas are, for all intents and purposes, identical to those made by Counterclaimant NWTM, including the head stamp.

16. Upon information and belief, since Provident's introduction of copper replicas under the COPPER BULLET BULLION and/or BULLET BULLION marks, consumers have become confused regarding the source of Provident's replicas, believing that those replicas were manufactured by NWTM.

17. In fact, in a video posted to YouTube, metals collector SalivateMetal noted that Provident's replicas were "machined exactly the same way" as those manufactured by NWTM and even speculated that Provident might have had "Northwest Territorial Mint manufacture them for them." See "Copper Bullet Bullion Provident Metals" video, located on the World Wide Web at <[youtube.com/watch?v=CkvKrcDlaJM](http://youtube.com/watch?v=CkvKrcDlaJM)>.

18. NWTM has not endorsed or otherwise approved of Provident's use.

19. Upon information and belief, this consumer confusion is a result of Provident manufacturing identical replicas to those manufactured by NWTM using a mark that is identical or confusingly similar to the SILVER BULLET BULLION and/or BULLET BULLION marks.

20. NWTM and Provident share the same or similar relevant markets, given that both manufacture replicas made of various metals.

21. Provident's use of marks identical or confusingly similar to marks owned by NWTM will create an impression in the consumer's mind that they are affiliated with NWTM.

22. Consumers are likely to be confused regarding whether Provident's products are endorsed by, sponsored by, approved by, or affiliated with products manufactured, marketed, and sold by NWTM.

23. Due to NWTM's legitimate concerns that Provident's advertisement and use of the COPPER BULLET BULLION and/or BULLET BULLION marks would cause confusion among the consuming public, Counterclaimant NWTM contacted Provident by telephone on or about July 15, 2013 expressing its concerns.

24. Due to NWTM's legitimate concerns that Provident's advertisement and use of the COPPER BULLET BULLION and/or BULLET BULLION marks would cause confusion among the consuming public, Counterclaimant NWTM sent correspondence to Provident on or about July 23, 2013 expressing its concerns. A copy of that correspondence is attached hereto as Exhibit C.

25. In response, Counterdefendant Provident initiated the instant lawsuit, filing a Complaint for Declaratory Judgment and Relief Pursuant to 15 U.S.C. § 1125 on or about July 29, 2013. Counterdefendant Provident has refused and failed to cease its infringing activities.

26. By marketing its copper replicas using marks identical or confusingly similar to marks used by NWTM, Provident is attempting to trade on the business success and goodwill of NWTM and its SILVER BULLET BULLION and BULLET BULLION marks.

27. By marketing its copper replicas using marks identical or confusingly similar to marks used by NWTM, Provident is attempting to create an association or affiliation between its products and NWTM's products.

28. Upon information and belief, Provident commenced using and is using the COPPER BULLET BULLION and/or BULLET BULLION marks with the bad faith intent to profit from NWTM's SILVER BULLET BULLION and BULLET BULLION marks and to create an association between the products of NWTM and the products of Provident in the minds of consumers.

**CLAIMS FOR RELIEF**

**FIRST CLAIM FOR RELIEF**

**(Unfair Competition: False Designation of Origin – 15 U.S.C. § 1125(a)(1)(A))**

29. Counterclaimant incorporates the allegations in the preceding paragraphs as though set forth fully herein.

30. Counterdefendant's use in interstate commerce of the marks COPPER BULLET BULLION and/or BULLET BULLION to market its replicas constitutes material false and misleading representations of fact with respect to the origin of Counterdefendant's products in violation of Section 43(a)(1)(A) of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A). NWTM has been damaged by Counterdefendant's actions. Counterdefendant's aforesaid acts are likely to cause confusion or mistake as to the origin of Counterdefendant's products and the affiliation, sponsorship, and approval of Counterdefendant's products and indicates to consumers that the products are affiliated with or manufactured by NWTM, when in fact, they are not.

31. Counterdefendant's actions have created a likelihood of confusion among consumers who will falsely believe that Provident's products are manufactured by and/or endorsed by NWTM, when in fact, they are not.

32. Counterdefendant's use of the COPPER BULLET BULLION and BULLET BULLION marks, and variants thereof, to market its goods and services to the public constitutes intentional conduct by Provident to make false designations of origin and false descriptions about its goods, services, and commercial activities.

33. Unless Provident is immediately enjoined and prohibited from using the COPPER BULLET BULLION and/or BULLET BULLION marks, Counterdefendant

will continue to intentionally make false designations of origin and false descriptions about Counterdefendant's goods, services, and commercial activities.

34. As a direct and proximate result of Counterdefendant's false designations of origin, Counterclaimant has suffered, and will continue to suffer, monetary loss and irreparable injury to its business, reputation, and goodwill.

35. In accordance with Section 34 of the Lanham Act, 15 U.S.C. § 1116, Counterdefendant should be preliminarily and upon hearing, permanently enjoined from using NWTM's SILVER BULLET BULLION and or BULLET BULLION marks or any confusing similar variation thereof, such as COPPER BULLET BULLION, alone or in combination with other words, as a trademark, or otherwise, to market, advertise, or identify Counterdefendant's products.

36. Under Section 35 of the Lanham Act, 15 U.S.C. § 1117(a), NWTM is entitled to recover from Counterdefendant: (i) Counterdefendant's profits, (ii) the damages sustained by NWTM, and (iii) the costs of this action. Due to the knowing, intentional, and purposeful nature of Counterdefendant's conduct, NWTM seeks treble the amount of its actual damages. Due to the exceptional nature of this case, NWTM seeks its reasonable attorney's fees.

## **SECOND CLAIM FOR RELIEF**

### **(Trademark Infringement Under Texas Law)**

37. Counterclaimant incorporates the allegations in the preceding paragraphs as though set forth fully herein.

38. By virtue of having used and continuing to use its SILVER BULLET BULLION and BULLET BULLION marks, Counterclaimant NWTM has acquired common law rights in those marks. NWTM is the senior user of these marks.

39. Counterdefendant's use of marks identical or confusingly similar to Counterclaimant's marks infringes upon Counterclaimant's common law rights in its trademarks. This use is likely to cause confusion, mistake, or deception among consumers who will believe that Counterdefendant's goods and services are affiliated with or endorsed by Counterclaimant NWTM, when they are not.

40. Unless Counterdefendant is enjoined and prohibited from continuing to engage in its infringements of Counterclaimant's marks, Counterclaimant will continue to infringe upon Counterclaimant's marks. In accordance with Texas law, Counterdefendant should be preliminarily and permanently enjoined, upon hearing, from using NWTM's SILVER BULLET BULLION and BULLET BULLION marks or any confusingly similar variation thereof, such as COPPER BULLET BULLION, alone or in combination with other words, as a trademark or service mark to identify Counterdefendant's products.

41. As a direct and proximate result of Counterdefendant's common law trademark infringement, Counterclaimant has suffered, and will continue to suffer, monetary loss to its business, reputation, and goodwill. According to Texas law, NWTM is entitled to recover its actual damages caused by Counterdefendant's trademark infringement and exemplary damages due to the knowing, willful, and intentional nature of Counterdefendant's actions.

**THIRD CLAIM FOR RELIEF**

**(Unfair Competition Under Texas Law)**

42. Counterclaimant incorporates the allegations in the preceding paragraphs as though set forth fully herein.

43. Counterdefendant has engaged in commerce in the State of Texas and this judicial district by marketing, offering to sell, and selling their competing products. Counterdefendant has competed unfairly in violation of Texas law by misrepresenting or leading the public to believe that its goods are sponsored by, approved by, affiliated with, associated with, or originated by NWTM.

44. In accordance with Texas law, Counterdefendant should be preliminarily and permanently enjoined, upon hearing, from using NWTM's SILVER BULLET BULLION and BULLET BULLION marks or any confusingly similar variation thereof, such as COPPER BULLET BULLION, alone or in combination with other words, as a trademark or service mark or otherwise to market, advertise, or identify Counterdefendant's products.

**FOURTH CLAIM FOR RELIEF**

**(Unjust Enrichment Under Texas Law)**

45. Counterclaimant incorporates the allegations in the preceding paragraphs as though set forth fully herein.

46. As set forth above, Counterdefendant has used variants confusingly similar and/or identical to NWTM's SILVER BULLET BULLION and BULLET BULLION marks and goodwill as an integral step of Counterdefendant's sales of its products. Counterdefendant is therefore unjustly enriched to NWTM's detriment. As a

result, NWTM is entitled to recover its actual damages caused by Counterdefendant's unjust enrichment.

**APPLICATION FOR PRELIMINARY AND PERMANENT INJUNCTION**

47. Counterclaimant incorporates the allegations in the preceding paragraphs as though set forth fully herein.

48. On information and belief, Counterdefendant, unless enjoined, will continue to misrepresent to or mislead the public into believing that its products are sponsored by, approved by, affiliated with, associated with, or originated by NWTM and infringe NWTM's marks by using those marks or confusingly similar variations thereof to identify Counterdefendant's competing products. All of these acts violate the Lanham Act and Texas law.

49. These actions entitle NWTM to a preliminary and upon hearing, permanent injunction enjoining Counterdefendant and its officers, agents, servants, employees, and attorneys, and all those persons in active concert or participation with them from:

(i) Representing that Counterdefendant's products are in any way sponsored by, approved by, affiliated with, associated with, or originated by NWTM;

(ii) Using variants confusingly similar and/or identical to NWTM's SILVER BULLET BULLION and BULLET BULLION marks or any confusingly similar variation thereof, such as COPPER BULLET BULLION, alone or in combination with other words, as a trademark, service mark, or

otherwise, to market, advertise, or identify Counterdefendant's products or for any other purpose;

(iii) Representing themselves, or any of their officers, agents, servants, employees, and/or all other persons acting in concert with them, as representatives of NWTM;

(iv) Representing to third parties that their activities, or the activities of their officers, agents, servants, employees, and/or all other persons acting in concert with them, are affiliated with, or endorsed by NWTM; and

(v) Otherwise competing unfairly with NWTM or injuring its business reputation in any manner.

50. For these actions, there is no adequate remedy at law. Further, NWTM is substantially likely to prevail on the merits of these claims. The injury to NWTM greatly outweighs any injury to Counterdefendant that the requested injunction may cause. The balance of hardships tips strongly in favor of NWTM. Finally, the injunction will not disserve the public interest. Therefore, NWTM is entitled to the above preliminary and permanent injunctive relief against Counterdefendant.

#### **JURY REQUEST**

In accordance with Federal Rule of Civil Procedure 38, NWTM hereby demands a trial by jury on its claims alleged against Counterdefendant.

#### **REQUEST FOR RELIEF**

For these reasons, NWTM respectfully requests the Court to:

1. In accordance with Texas law and 15 U.S.C. § 1116, issue a preliminary and permanent injunction enjoining Counterdefendant and its officers, agents, servants,

employees, and attorneys, and all those persons in active concert or participation with Counterdefendant from the acts described in paragraph 49 of this Complaint;

2. Order Counterdefendant and its officers, agents, servants, employees, and attorneys, and all those persons in active concert or participation with them to identify all third parties to which Counterdefendant has distributed any type of materials incorporating variants confusingly similar and/or identical to the SILVER BULLET BULLION and BULLET BULLION marks;

3. Order Counterdefendant to provide an accounting of all sales, revenues, and profits related to Counterdefendant's services and products that infringe NWTM's marks and that were falsely designated as being sponsored by, approved by, affiliated with, or associated with NWTM;

4. In accordance with 15 U.S.C. § 1118, order that all materials in Counterdefendant's possession or control bearing the COPPER BULLET BULLION and BULLET BULLION marks be surrendered for destruction;

5. In accordance with the Lanham Act, award NWTM all of Counterdefendant's profits from the aforesaid acts of unjust enrichment, trademark infringement, and unfair competition;

6. In accordance with the Lanham Act, find this case to be exceptional in NWTM's favor and award NWTM its reasonable attorney's fees, costs, and expenses of this action;

7. In accordance with Texas law, actual and exemplary damages;

8. Award NWTM pre-judgment and post-judgment interest at the maximum allowable interest rate; and

9. Grant NWTM such other and further relief, at law or in equity, to which it is justly entitled.

Dated: September 27, 2013

Respectfully submitted,

/s/ Darin M. Klemchuk

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**ATTORNEYS FOR DEFENDANT  
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LLC**

**CERTIFICATE OF SERVICE**

The undersigned certifies that this pleading was filed electronically in compliance with Local Rule CV-5(a). As such, this document has been served on all counsel who have consented to electronic service.

/s/ Darin M. Klemchuk  
Darin M. Klemchuk

# **Exhibit C**

## Michael Atkins

---

**From:** Jason A. Worgull [JAWorgull@wegmanlaw.com]  
**Sent:** Thursday, October 31, 2013 8:12 AM  
**To:** 'Michael Atkins'  
**Cc:** rdg@randazza.com  
**Subject:** RE: SILVER BULLET BULLION - Stipulation to suspend TTAB proceeding?

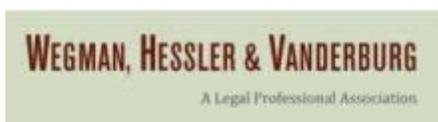
Michael,

Thank you for your email. I relayed this information to our client. They instructed me not to stipulate to suspension of the opposition.

Best regards,

Jason

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Cleveland, OH 44131  
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Click [here](#) for the WH&V Email Disclaimer

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**From:** Michael Atkins [mailto:mike@atkinsip.com]  
**Sent:** Wednesday, October 23, 2013 6:38 PM  
**To:** Jason A. Worgull  
**Cc:** rdg@randazza.com  
**Subject:** SILVER BULLET BULLION - Stipulation to suspend TTAB proceeding?

Jason,

Will Provident stipulate to suspend the opposition proceeding pending the disposition of the parties' federal litigation? If so, I'll send you a proposed form of agreement.

Thanks,

**Michael G. Atkins**

*Attorney*

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