

ESTTA Tracking number: **ESTTA595946**

Filing date: **04/01/2014**

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

Notice of Opposition

Notice is hereby given that the following parties oppose registration of the indicated application.

Opposers Information

Name	Boston Scientific Corporation, on behalf of itself and its subsidiaries
Granted to Date of previous extension	04/02/2014
Address	One Boston Scientific Place Natick, MA 01760-1537 UNITED STATES

Name	Asthmatx, Inc.		
Entity	Corporation	Citizenship	California
Address	888 Ross Drive Suite 100 Sunnyvale, CA 94089 UNITED STATES		

Attorney information	Timothy D. Sitzmann Winthrop & Weinstine, PA 225 South Sixth Street Capella Tower Suite 3500 Minneapolis, MN 55402 UNITED STATES trademark@winthrop.com, sbaird@winthrop.com, tsitzmann@winthrop.com, jbriley@winthrop.com Phone:612.604.6689
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Applicant Information

Application No	85806379	Publication date	12/03/2013
Opposition Filing Date	04/01/2014	Opposition Period Ends	04/02/2014
Applicant	HOLAIRA, INC. SUITE 105 PLYMOUTH, MN 55447 GERMANY		

Goods/Services Affected by Opposition

Class 010. First Use: 0 First Use In Commerce: 0
All goods and services in the class are opposed, namely: Medical devices for treating obstructive lung diseases; medical apparatus and instruments for treating obstructive lungdiseases

Grounds for Opposition

Priority and likelihood of confusion	Trademark Act section 2(d)
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Marks Cited by Opposer as Basis for Opposition

U.S. Registration No.	2856168	Application Date	12/03/1999
Registration Date	06/22/2004	Foreign Priority Date	NONE
Word Mark	ALAIR		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 010. First use: First Use: 2001/08/09 First Use In Commerce: 2001/08/09 medical therapeutic devices for use in the treatment of pulmonary diseases, namely, catheters, probes, generators, bronchoscopes, and electrodes		

U.S. Registration No.	3380080	Application Date	10/11/2006
Registration Date	02/12/2008	Foreign Priority Date	NONE
Word Mark	ALAIR		
Design Mark			
Description of Mark	NONE		
Goods/Services	Class 041. First use: First Use: 2006/10/06 First Use In Commerce: 2006/10/06 Training and teaching in the field of surgery and treatment of pulmonary diseases, namely training and teaching in the use and operation of medical devices for bronchial surgery or treatment, and distribution of course materials, namely printed materials and electronic media, in connection therewith		

Attachments	75863338#TMSN.gif(bytes) 77019259#TMSN.jpeg(bytes) 8942342_1.pdf(807270 bytes)
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Certificate of Service

The undersigned hereby certifies that a copy of this paper has been served upon all parties, at their address record by First Class Mail on this date.

Signature	/Timothy D. Sitzmann/
Name	Timothy D. Sitzmann
Date	04/01/2014

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

In the matter of Application Serial No.: 85/806,379
Filed: December 19, 2012
For the mark: HOLAIRA
Published in the *Trademark Official Gazette* on December 3, 2013

Boston Scientific Corporation and
Asthmatx, Inc.
Opposers,

v.

Opposition No. _____

Holaira, Inc.

Applicant.

NOTICE OF OPPOSITION

Boston Scientific Corporation and its wholly-owned and related company Asthmatx, Inc. (“Opposers”) believe that they will be damaged by registration of the HOLAIRA mark shown in Application Serial No. 85/806,379 (the “Application”) and hereby oppose the same.

The grounds for opposition are as follows:

1. Holaira, Inc. (“Applicant”) filed an intent-to-use based trademark application on December 19, 2012 seeking to register the proposed HOLAIRA mark in connection with “medical devices for treating obstructive lung diseases; medical apparatus and instruments for treating obstructive lung diseases” (“Applicant’s Goods”) in International Class 10.
2. Upon information and belief, Applicant has not yet used in commerce HOLAIRA as a trademark in connection with Applicant’s Goods.
3. On information and belief, Applicant cannot rely on any priority date for the proposed HOLAIRA mark earlier than the filing date of December 19, 2012.

4. Applicant's HOLAIRA mark was published for opposition in the *Trademark Official Gazette* on December 3, 2013. On December 10, 2013, Boston Scientific Corporation filed a request for an Extension of Time to Oppose the Application on behalf of itself and its subsidiaries. The Board granted this request on December 11, 2013, extending the filing period to February 1, 2014. On January 31, 2014 Boston Scientific Corporation filed a second request for an Extension of Time to Oppose the Application on behalf of itself and its subsidiaries. The Board granted this request on January 31, 2014, extending the filing period to April 2, 2014. This Notice of Opposition is therefore timely filed.

5. Opposer Asthmatx, Inc., is a wholly-owned and related company to Boston Scientific Corporation.

6. As a wholly-owned and related company, Asthmatx, Inc. is in privity with Boston Scientific Corporation, permitting both Opposers to jointly file this Opposition, pursuant to TBMP Sections 206.02 and 303.05(b).

7. Opposer Boston Scientific Corporation along with its wholly-owned and related company Asthmatx, Inc., is a leading developer, manufacturer, and marketer of medical devices in the United States and around the world.

8. Opposer Asthmatx, Inc. owns underlying common law rights and is the record owner of U.S. trademark registration number 2,856,168 for the ALAIR® mark in connection with "medical therapeutic devices for use in the treatment of pulmonary diseases, namely, catheters, probes, generators, bronchoscopes, and electrodes" ("Opposers' Goods") in International Class 10, with a first use date at least as early as August 9, 2001 ("the Class 10 Registration"). The Registration issued on the Principal Register on June 22, 2004, and it is incontestable. The filing date and nationwide constructive use date is December 3, 1999.

9. Opposer Asthmatx, Inc. owns underlying common law rights and is the record owner of U.S. trademark registration number 3,380,080 for the ALAIR® mark in connection with “Training and teaching in the field of surgery and treatment of pulmonary diseases, namely training and teaching in the use and operation of medical devices for bronchial surgery or treatment, and distribution of course materials, namely printed materials and electronic media, in connection therewith” (“Opposers’ Services”) in International Class 41, with a first use date at least as early as October 6, 2006 (“the Class 41 Registration”). The Class 41 Registration issued on the Principal Register on February 12, 2008, and it is incontestable. The filing date and nationwide constructive use date is October 11, 2006.

10. Two copies of Opposer Asthmatx, Inc.’s U.S. Registration No. 2,856,168 along with two copies of printouts from the Trademark Electronic Search System showing both the current status of and current title to the registration are attached hereto as Exhibit A.

11. Two copies of Opposer Asthmatx, Inc.’s U.S. Registration No. 3,380,080 along with two copies of printouts from the Trademark Electronic Search System showing both the current status of and current title to the registration are attached hereto as Exhibit B.

12. Opposers have expended considerable time and expense in promoting, advertising and popularizing the distinctive ALAIR® mark and the medical therapeutic devices and services offered in connection therewith. The relevant public has come to know, rely upon and recognize the ALAIR® mark as a strong indicator of the source, quality, and reputation of Opposers and their medical therapeutic devices and services.

13. Opposers have made continuous use of their ALAIR® mark in connection with medical therapeutic devices for use in the treatment of pulmonary diseases, namely, catheters, probes, generators, bronchoscopes, and electrodes.

14. Because of their incontestable status, Asthmatx, Inc.'s Class 10 Registration and Class 41 Registration (collectively, "the Registrations") provide conclusive evidence of the validity and distinctiveness of Asthmatx, Inc.'s ALAIR® mark as well as Asthmatx, Inc.'s exclusive right to use the ALAIR® mark in commerce for Opposers' Goods and Opposers' Services.

15. Opposer's nationwide constructive use date of December 3, 1999 for the Class 10 Registration predates Applicant's filing date of December 19, 2012 by more than thirteen (13) years.

16. The date of registration of June 22, 2004 for the Class 10 Registration predates Applicant's filing date of December 19, 2012 by more than eight (8) years.

17. Opposers have priority over the Application as a result of the Registrations and Opposers' earlier continuous use of the ALAIR® mark identified in the Class 10 Registration.

18. Opposers have priority of common law rights in the ALAIR® mark in connection with medical therapeutic devices for use in the treatment of pulmonary diseases, namely, catheters, probes, generators, bronchoscopes, and electrodes.

19. The nationwide constructive use date of October 11, 2006 for the Class 41 Registration predates Applicant's filing date of December 19, 2012 by more than six (6) years.

20. The date of registration of February 12, 2008 for the Class 41 Registration predates Applicant's filing date of December 19, 2012 by more than four (4) years.

21. Opposers have made continuous use of the ALAIR® mark in in connection with Opposers' Services.

22. Opposers have priority over the Application based on the earlier common law rights in the ALAIR® mark and as a result of Opposers' prior registration of the same as identified in the Class 10 Registration and the Class 41 Registration.

23. Upon information and belief, the ALAIR® mark is likely to be pronounced similar to Applicant's HOLAIRA mark.

24. Upon information and belief, the ALAIR® mark may be pronounced identical to the HOLAIR- portion of Applicant's HOLAIRA mark.

25. Upon information and belief, Applicant's HOLAIRA mark is confusingly similar in sound to the ALAIR® mark.

26. Applicant's HOLAIRA mark contains the identical letters LAIR, incorporating all but the initial letter 'A' of the ALAIR® mark.

27. Upon information and belief, Applicant's HOLAIRA mark is confusingly similar in sight to the ALAIR® mark.

28. Upon information and belief, there are sufficient similarities in sight, sound, and meaning between Applicant's proposed HOLAIRA mark and the ALAIR® mark such that the two marks create highly similar overall commercial impressions.

29. Applicant's Goods consist of medical devices, apparatus, and instruments for treating obstructive lung diseases and Opposers' Goods are medical devices for use in the treatment of pulmonary diseases, namely, catheters, probes, generators, bronchoscopes, and electrodes.

30. Applicant's Goods do not identify a specific type of "medical devices," "apparatus," or "instruments."

31. Because of the expansive identification of goods in the Application, Applicant's Goods are presumed to include all types of medical devices, apparatus, and instruments, including catheters, probes, generators, bronchoscopes, and electrodes.

32. Applicant's Goods are therefore identical in part to Opposers' Goods.

33. Applicant's Goods are used for the purpose of treating "obstructive lung diseases" and Opposers' Goods are used for "the treatment of pulmonary diseases."

34. Pulmonary is a medical term meaning "relating to, affecting, or occurring in the lungs."

35. Upon information and belief, both Applicant's Goods and Opposers' Goods are both used for the treatment of pulmonary diseases, also known as lung diseases.

36. Upon information and belief, Applicant's planned medical device for use under the proposed HOLAIRA mark is a "catheter-based" system.

37. Upon information and belief, Applicant's proposed HOLAIRA medical device will include bronchoscopes.

38. Upon information and belief, Applicant's proposed HOLAIRA medical device will include probes.

39. Upon information and belief, Applicant's proposed HOLAIRA medical device will include electrodes.

40. Upon information and belief, Applicant's Goods are the type of medical devices, instruments, and apparatuses that consumers would expect to be used in conjunction with, involved with, or otherwise closely related to Opposers' Services, namely, "training and teaching in the field of surgery and treatment of pulmonary diseases, namely, training and teaching in the use and operation of medical devices for bronchial surgery or treatment. . . ."

41. Upon information and belief, Applicant's Goods, Opposers' Goods, and Opposers' Services would be used or purchased by the same individuals or entities, namely, health care organizations, doctors and other medical professionals.

42. Upon information and belief, Applicant's Goods, Opposers' Goods, and Opposers' Services would be used or purchased by health care organizations, and doctors or other medical professionals who treat lung or pulmonary diseases.

43. Upon information and belief, Applicant's Goods, Opposers' Goods, and Opposers' Services would be used or purchased in similar procedures for similar patients.

44. Upon information and belief, Applicant's Goods, Opposers' Goods, and Opposers' Services would be purchased by the same health care organizations, hospitals and clinics.

45. Opposers' Registrations are unrestricted as to the channels of trade and thus the goods and services identified in the registrations are deemed to travel in all channels of trade.

46. The Application is unrestricted as to channels of trade and thus the goods identified in the Application are deemed to travel in all channels of trade.

47. The goods and services identified in Opposers' Registrations and in the Application therefore will travel in overlapping channels of trade.

48. The goods and services identified in Opposers' Registrations are unrestricted as to a particular class of consumer.

49. The goods identified in the Application are unrestricted as to a particular class of consumer.

50. The goods and services identified in Opposers' Registrations and in the Application are therefore directed toward the same classes of consumers.

51. Upon information and belief, Applicant's Goods will appeal to the same classes of consumers as Opposers' Goods.

52. Upon information and belief, the goods identified in Application are identical in-part as well as highly related to Opposers' Goods.

53. Upon information and belief, Applicant's Goods are highly related to Opposers' Services.

54. Applicant's proposed HOLAIRA mark so resembles the ALAIR® mark as to be likely, when used in connection with Applicant's proposed medical devices, apparatus, and instruments for treatment of lung diseases, to cause confusion, to cause mistake, or to deceive as to affiliation, source, or sponsorship with Opposers' medical devices for treatment of lung diseases identified in Opposers' Class 10 Registration and the services identified in the Class 41 Registration.

55. Registration of Applicant's HOLAIRA mark will result in a likelihood of confusion with Opposers based on Opposers' prior use and ownership of the ALAIR® mark and would therefore cause damage and harm to Opposers and their businesses.

56. Because Applicant's HOLAIRA mark and the ALAIR® mark are highly similar in overall commercial impression and because Applicant's Goods, as identified in the Application are identical in-part and highly related to Opposers' Goods and Services, purchasers and prospective purchasers are likely to mistakenly believe that Applicant's medical devices, apparatus and instruments for treatment of pulmonary diseases to be offered under the Applicant's HOLAIRA mark are sponsored, endorsed, or approved by Opposers, or are in some other way affiliated, connected, or associated with Opposers, all to the detriment of Opposers. Registration of the mark shown in the Application should therefore be refused under 15 U.S.C. §§ 1052(d) and 1063.

WHEREFORE, Opposers request that the Trademark Trial and Appeal Board:

- 1) Sustain this Opposition;
- 2) Refuse registration of the HOLAIRA mark identified in Application Serial No. 85/806,379 for the goods identified in International Class 10; and
- 3) Grant Opposers any further relief the Board deems equitable.

Dated: April 1, 2014

WINTHROP & WEINSTINE, P.A.



Stephen R. Baird
Timothy D. Sitzmann
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Minneapolis, Minnesota 55402
(612) 604-6400 (Telephone)
(612) 604-6800 (Facsimile)

Attorneys for Boston Scientific Corporation
and Asthmatx, Inc.

Exhibit A

Int. Cl.: 10

Prior U.S. Cls.: 26, 39, and 44

United States Patent and Trademark Office

Reg. No. 2,856,168

Registered June 22, 2004

**TRADEMARK
PRINCIPAL REGISTER**

ALAIR

ASTHMATX, INC. (CALIFORNIA CORPORATION)
1340 SPACE PARK WAY
MOUNTAIN VIEW, CA 94043

FOR: MEDICAL THERAPEUTIC DEVICES FOR
USE IN THE TREATMENT OF PULMONARY DIS-
EASES, NAMELY, CATHETERS, PROBES, GEN-
ERATORS, BRONCHOSCOPES, AND

ELECTRODES, IN CLASS 10 (U.S. CLS. 26, 39 AND
44).

FIRST USE 8-9-2001; IN COMMERCE 8-9-2001.

SN 75-863,338, FILED 12-3-1999.

RONALD AIKENS, EXAMINING ATTORNEY



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Typed Drawing

Word Mark	ALAIR
Goods and Services	IC 010. US 026 039 044. G & S: medical therapeutic devices for use in the treatment of pulmonary diseases, namely, catheters, probes, generators, bronchoscopes, and electrodes. FIRST USE: 20010809. FIRST USE IN COMMERCE: 20010809
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	75863338
Filing Date	December 3, 1999
Current Basis	1A
Original Filing Basis	1B
Published for Opposition	December 23, 2003
Registration Number	2856168
Registration Date	June 22, 2004
Owner	(REGISTRANT) ASTHMATX, INC. CORPORATION CALIFORNIA 888 Ross Drive, First Floor Sunnyvale CALIFORNIA 94089
Assignment Recorded	ASSIGNMENT RECORDED
Attorney of Record	Michael T. Hess
Type of Mark Register	TRADEMARK PRINCIPAL
Affidavit Text	SECTION 8(10-YR) 20140106.
Renewal	1ST RENEWAL 20140106
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Int. Cl.: 10

Prior U.S. Cls.: 26, 39, and 44

Reg. No. 2,856,168

United States Patent and Trademark Office

Registered June 22, 2004

**TRADEMARK
PRINCIPAL REGISTER**

ALAIR

ASTHMATX, INC. (CALIFORNIA CORPORATION)
1340 SPACE PARK WAY
MOUNTAIN VIEW, CA 94043

ELECTRODES, IN CLASS 10 (U.S. CLS. 26, 39 AND 44).

FIRST USE 8-9-2001; IN COMMERCE 8-9-2001.

FOR: MEDICAL THERAPEUTIC DEVICES FOR USE IN THE TREATMENT OF PULMONARY DISEASES, NAMELY, CATHETERS, PROBES, GENERATORS, BRONCHOSCOPES, AND

SN 75-863.338, FILED 12-3-1999.

RONALD AIKENS, EXAMINING ATTORNEY



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Typed Drawing

Word Mark	ALAIR
Goods and Services	IC 010. US 026 039 044. G & S: medical therapeutic devices for use in the treatment of pulmonary diseases, namely, catheters, probes, generators, bronchoscopes, and electrodes. FIRST USE: 20010809. FIRST USE IN COMMERCE: 20010809
Mark Drawing Code	(1) TYPED DRAWING
Serial Number	75863338
Filing Date	December 3, 1999
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Published for Opposition	December 23, 2003
Registration Number	2856168
Registration Date	June 22, 2004
Owner	(REGISTRANT) ASTHMATX, INC. CORPORATION CALIFORNIA 888 Ross Drive, First Floor Sunnyvale CALIFORNIA 94089
Assignment Recorded	ASSIGNMENT RECORDED
Attorney of Record	Michael T. Hess
Type of Mark Register	TRADEMARK PRINCIPAL
Affidavit Text	SECTION 8(10-YR) 20140106.
Renewal	1ST RENEWAL 20140106
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Exhibit B

Int. Cl.: 41

Prior U.S. Cls.: 100, 101 and 107

United States Patent and Trademark Office

Reg. No. 3,380,080

Registered Feb. 12, 2008

SERVICE MARK
PRINCIPAL REGISTER

ALAIR

ASTHMATX, INC. (CALIFORNIA CORPORATION)
1340 SPACE PARK WAY
MOUNTAIN VIEW, CA 94043

FOR: TRAINING AND TEACHING IN THE FIELD OF SURGERY AND TREATMENT OF PULMONARY DISEASES, NAMELY TRAINING AND TEACHING IN THE USE AND OPERATION OF MEDICAL DEVICES FOR BRONCHIAL SURGERY OR TREATMENT, AND DISTRIBUTION OF COURSE MATERIALS, NAMELY PRINTED MATERIALS AND ELECTRONIC MEDIA, IN CONNECTION THEREWITH, IN CLASS 41 (U.S. CLS. 100, 101 AND 107).

FIRST USE 10-6-2006; IN COMMERCE 10-6-2006.

THE MARK CONSISTS OF STANDARD CHARACTERS WITHOUT CLAIM TO ANY PARTICULAR FONT, STYLE, SIZE, OR COLOR.

OWNER OF U.S. REG. NO. 2,856,168.

SER. NO. 77-019,259, FILED 10-11-2006.

ROBIN MITTLER, EXAMINING ATTORNEY



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ALAIR

Word Mark	ALAIR
Goods and Services	IC 041. US 100 101 107. G & S: Training and teaching in the field of surgery and treatment of pulmonary diseases, namely training and teaching in the use and operation of medical devices for bronchial surgery or treatment, and distribution of course materials, namely printed materials and electronic media, in connection therewith. FIRST USE: 20061006. FIRST USE IN COMMERCE: 20061006
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	77019259
Filing Date	October 11, 2006
Current Basis	1A
Original Filing Basis	1A
Published for Opposition	November 27, 2007
Registration Number	3380080
Registration Date	February 12, 2008
Owner	(REGISTRANT) Asthmatx, Inc. CORPORATION CALIFORNIA 888 Ross Drive, First Floor

Sunnyvale CALIFORNIA 94089
Attorney of Record Michael T. Hess
Prior Registrations 2856168
Type of Mark SERVICE MARK
Register PRINCIPAL
Affidavit Text SECT 15. SECT 8 (6-YR).
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Int. Cl.: 41

Prior U.S. Cls.: 100, 101 and 107

Reg. No. 3,380,080

United States Patent and Trademark Office

Registered Feb. 12, 2008

SERVICE MARK
PRINCIPAL REGISTER

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ASTHMATX, INC. (CALIFORNIA CORPORATION)
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FOR: TRAINING AND TEACHING IN THE FIELD OF SURGERY AND TREATMENT OF PULMONARY DISEASES, NAMELY TRAINING AND TEACHING IN THE USE AND OPERATION OF MEDICAL DEVICES FOR BRONCHIAL SURGERY OR TREATMENT, AND DISTRIBUTION OF COURSE MATERIALS, NAMELY PRINTED MATERIALS AND ELECTRONIC MEDIA, IN CONNECTION THEREWITH, IN CLASS 41 (U.S. CLS. 100, 101 AND 107).

FIRST USE 10-6-2006; IN COMMERCE 10-6-2006.

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SER. NO. 77-019,259, FILED 10-11-2006.

ROBIN MITTLER, EXAMINING ATTORNEY



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ALAIR

Word Mark	ALAIR
Goods and Services	IC 041. US 100 101 107. G & S: Training and teaching in the field of surgery and treatment of pulmonary diseases, namely training and teaching in the use and operation of medical devices for bronchial surgery or treatment, and distribution of course materials, namely printed materials and electronic media, in connection therewith. FIRST USE: 20061006. FIRST USE IN COMMERCE: 20061006
Standard Characters Claimed	
Mark Drawing Code	(4) STANDARD CHARACTER MARK
Serial Number	77019259
Filing Date	October 11, 2006
Current Basis	1A
Original Filing Basis	1A
Published for Opposition	November 27, 2007
Registration Number	3380080
Registration Date	February 12, 2008
Owner	(REGISTRANT) Asthmatx, Inc. CORPORATION CALIFORNIA 888 Ross Drive, First Floor

Sunnyvale CALIFORNIA 94089
Attorney of Record Michael T. Hess
Prior Registrations 2856168
Type of Mark SERVICE MARK
Register PRINCIPAL
Affidavit Text SECT 15. SECT 8 (6-YR).
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