

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**



ORIGINAL

In the Matter of)
)
)
Impax Laboratories, Inc.,)
a corporation,)
)
Respondent)
_____)

DOCKET NO. 9373

**COMPLAINT COUNSEL'S
MOTION TO COMPEL RESPONSE TO INTERROGATORY NOS. 2 & 3**

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Dated: June 1, 2017

**COMPLAINT COUNSEL'S MOTION TO COMPEL RESPONSE TO
INTERROGATORY NOS. 2 & 3**

TO ALL PARTIES AND THEIR COUNSEL OF RECORD:

Please take notice that, pursuant to Federal Trade Commission Rule of Practice 3.38(a), Complaint Counsel hereby respectfully requests an order compelling Respondent to provide substantive responses to Complaint Counsel's Interrogatory Nos. 2 & 3. For the reasons set forth in the accompanying Memorandum, this motion should be granted.

This Motion is supported by the accompanying Memorandum and the authorities cited therein. A Proposed Order is attached.

Respectfully submitted,

/s/ Nicholas A. Leefer

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Counsel Supporting the Complaint

Dated: June 1, 2017

**UNITED STATES OF AMERICA
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In the Matter of)	
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Impax Laboratories, Inc.,)	
a corporation,)	DOCKET NO. 9373
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Respondent)	

**MEMORANDUM OF LAW IN SUPPORT OF COMPLAINT COUNSEL'S
MOTION TO COMPEL RESPONSE TO INTERROGATORY NOS. 2 & 3**

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Dated: June 1, 2017

This case challenges an anticompetitive reverse-payment agreement between Impax and Endo to obstruct lower-cost generic competition to Opana ER, a pain-relief medication. Under this agreement, Impax accepted large payments in cash and other valuable consideration in exchange for its commitment not to compete for 2 ½ years. In *FTC v. Actavis, Inc.*, 133 S. Ct. 2223 (2013), the Supreme Court held that such “reverse payments” can violate the antitrust laws and should be evaluated under the rule of reason applicable to most antitrust cases. Under the well-established burden-shifting framework used in antitrust rule-of-reason cases, Impax has the burden of establishing a legitimate justification for the reverse payment it received.

In its Answer, Impax asserts that the alleged conduct had “substantial pro-competitive justifications,” but does not identify or provide any other information about these purported procompetitive justifications. Answer at 21. To obtain the information necessary to conduct meaningful discovery, Complaint Counsel propounded two interrogatories, asking Impax to identify (1) the purported procompetitive justifications, and (2) how the reverse payments were reasonably necessary to achieve those benefits. Impax refused to answer these interrogatories on the ground that they are “contention interrogatories, to which Impax need not respond until the close of discovery, if at all.” Declaration of Nicholas A. Leefer (“Leefer Decl.”) Exhibit C at 2.

Complaint counsel respectfully submits that Impax should answer these interrogatories now. They seek discovery at the heart of this case: whether Impax can demonstrate legitimate, cognizable, procompetitive justifications for the reverse payment. Both interrogatories clearly can be answered at this time; Impax has no need to take its own discovery to identify whatever justifications it claims exist. By refusing to answer these interrogatories until the “close of discovery, if at all,” Impax is denying Complaint Counsel the opportunity to conduct meaningful

discovery into the bases for Impax's affirmative defense. Accordingly, the Court should order Impax to provide a substantive response to Interrogatory Nos. 2 & 3.

I. FACTUAL BACKGROUND

On February 07, 2017, Impax filed its Answer to the Complaint. In the Answer, Impax asserted ten affirmative defenses, including its eighth defense:

The alleged conduct had substantial pro-competitive justifications, benefited consumers and the public interest, and avoided potential infringement of valid patents. These pro-competitive justifications outweigh any alleged anticompetitive effects of the alleged conduct. There were no less restrictive alternatives that could have achieved these same pro-competitive outcomes.

Answer at 21. Although Impax will bear the burden of proof in advancing its purported procompetitive justifications and consumer benefits, it has pleaded no facts to support its eighth asserted defense.

To understand the scope of Impax's asserted defense, Complaint Counsel served its first set of interrogatories on April 5, 2017. *See* Leefer Decl. Exhibit A. Interrogatory Nos. 2 & 3 sought information related to Impax's eighth defense:

Interrogatory No. 2

Identify all procompetitive justifications and benefits to consumers and the public interest referenced in the Eighth Defense in Your Answer to the Complaint in this case, and explain the factual basis for Your answer to this Interrogatory, including identifying all facts and documents You rely on in Your answer to this Interrogatory.

Interrogatory No. 3

For each procompetitive justification and benefit identified in response to Interrogatory No. 2, explain how the No-AG Provision and the Endo Credit provision contained in the Opana ER Settlement and License Agreement were reasonably necessary to achieve that benefit, including identifying all facts and documents You rely on in Your answer to this Interrogatory.

On May 5, 2017, Impax served its objections and responses. Rather than respond substantively, it merely objected that these were contention interrogatories, and refused to

respond until the close of discovery. *See* Leefer Decl. Exhibit B. To resolve this discovery dispute Complaint Counsel proposed a compromise: Impax could wait until the close of discovery to identify the factual bases for its asserted procompetitive justifications and benefits, but that it would identify now the claimed procompetitive justifications and benefits and explain why the provisions of the settlement agreement were necessary to achieve those benefits. *See* Leefer Decl. Exhibit C at 3. Impax rejected this compromise, and instead recycled a three-year-old response to a much narrower CID Specification from the FTC’s investigation. *Id.* at 1-2.

II. ARGUMENT

A. Interrogatory Nos. 2 & 3 seek relevant information

“Parties may obtain discovery to the extent that it may be reasonably expected to yield information relevant to the allegations of the complaint, to the proposed relief, or to the defenses of any respondent.” 16 C.F.R. § 3.31(c)(1). In its Answer, Impax has raised purported procompetitive justifications as an affirmative defense. The interrogatories at issue seek a description of and other information relating to that affirmative defense. Thus, notwithstanding Impax’s boilerplate objections, the interrogatories unquestionably seek relevant information. *See Liguria Foods, Inc. v. Griffith Labs., Inc.*, No. C14-3041, 2017 U.S. Dist. LEXIS 35370, at *51 (N.D. Iowa Mar. 13, 2017) (“Federal discovery rules and the cases interpreting them uniformly finding the ‘boilerplate’ discovery culture impermissible are not aspirational, they are the law.”).

B. Interrogatory Nos. 2 & 3 should be answered now to allow Complaint Counsel to conduct meaningful discovery of Impax’s affirmative defenses

An answer to these interrogatories at this time is both appropriate and necessary to allow Complaint Counsel to conduct discovery and prepare for trial. To be sure, the FTC’s Rules of Practice presume that a party may wait to answer contention interrogatories until the end of discovery. But, the rules also contemplate that in appropriate circumstances contention

interrogatories should be answered at an earlier stage. *See* Rules of Practice; Final Rule, 74 Fed. Reg. 1804, 1815 (Jan. 13, 2009) (amending 16 C.F.R. pt. 3 and 4) (“[T]he proposed Rule also allowed a party posing a contention interrogatory to secure an earlier answer, if one was necessary, by filing a motion seeking an earlier answer.”); *see also* Rules of Practice; Proposed Rule, 73 Fed. Reg. 58832, 58839 (Oct. 7, 2008) (amending 16 C.F.R. pt. 3 and 4) (“If a party poses a contention interrogatory that is capable of being answered at an earlier time, there is no reason it could not move to compel a more expeditious response.”). This is one of those circumstances.

Basic fairness dictates that a party raising a claim or defense disclose such claim or defense and the factual basis for it. *See* 16 C.F.R. § 3.31(b)(2) (requiring initial disclosures that include “a copy of, or a description by category and location of, all documents and electronically stored information...that are relevant to...the defenses of the respondent...”). A party “is not excused from making its disclosures because it has not fully completed its investigation.” *Id.* This makes sense; absent early disclosure of affirmative defenses and related facts, Complaint Counsel has no opportunity to question witnesses, request documents, or seek admissions related to those affirmative defenses. Impax’s refusal to specify its purported procompetitive justifications and benefits impairs Complaint Counsel’ ability to prepare for trial.

This logic applies equally regardless of whether Interrogatory Nos. 2 & 3 are labeled “contention interrogatories.” As the district court observed in *United States v. Blue Cross Blue Shield of Mich.*, No. CV 10-14155, 2012 WL 12930840, at *5 (E.D. Mich. May 30, 2012), an interrogatory seeking “the basis of one of BCBS’s defenses—that BCBS’s MFN clauses caused procompetitive effects” was “not one that is best served at the end of discovery.” This Court reached a similar conclusion in *In re POM Wonderful LLC*, explaining that undue delay in

answering contention interrogatories risks prejudice to the propounding party. Dkt. No. 9344, 2011 FTC LEXIS 42, at *9 (F.T.C. Mar. 16, 2011) (“Undue delay in disclosure of a contention, with the conditions proposed by Complaint Counsel, could hamper Respondents’ ability to defend against the charge at trial and thereby present an unnecessary risk of prejudice to Respondents.”). As in *POM Wonderful*, Impax’s refusal to answer these interrogatories until the “close of discovery, if at all” will hamper Complaint Counsel’s ability to prepare for trial, and presents an unnecessary risk of prejudice. For example, once discovery is closed, Complaint Counsel will have no way to test Impax’s purported procompetitive justifications through depositions or requests for production.

Requiring Impax to respond to these interrogatories now also has the potential to narrow the issues for discovery and trial. Currently, Complaint Counsel faces the impossible choice of either forgoing discovery into Impax’s eighth affirmative defense, or seeking discovery on every conceivable procompetitive justification, without knowing whether Impax may choose to rely on it at trial. The purpose of interrogatories in discovery is to avoid this outcome. *See In re TK-7 Corp.*, Dkt. No. 9224, 1990 FTC LEXIS 20, at *1-2 (F.T.C. Mar. 9, 1990) (“The purpose of interrogatories is to narrow the issues and thus help determine what evidence will be needed at the trial and to reduce the possibility of surprise at the trial.”).

Notwithstanding these good reasons for answering the interrogatories now, Impax provides no reason why it is unable to do so. To plead procompetitive justifications in the Answer, Impax must already have a good faith basis in fact and law. *See Dot Com Entm’t Grp., Inc. v. Cyberbingo Corp.*, 237 F.R.D. 43, 45-6 (W.D.N.Y. 2006) (“Defendants are expected to have, even at an early stage, some good faith basis in fact and law for such claim and defense...Accordingly, Plaintiff’s Interrogatories which primarily seek the basis for the defense

and related counterclaim, even if they are assumed to constitute contention interrogatories, should be answered at this time.”). *See also* 16 C.F.R. § 4.2(f)(2) (“Signing a document constitutes a representation by the signer that...to the best of his or her knowledge, information, and belief, the statements made in it are true...”). Thus, even though it failed to include any detail in its Answer, Impax must already know what it claims are the asserted procompetitive justifications and benefits and how the payment provisions of the settlement agreement were reasonably necessary to achieve such benefits. Impax has no need to conduct discovery on this issue. Such information will be found—if it exists at all—in the knowledge of Impax’s witnesses and its own documents.

Moreover, requiring an answer to these interrogatories now does not prejudice Impax. To the extent that Impax intends to develop additional information throughout discovery, Impax may supplement its responses; that is not a reason to refuse to respond at all until after discovery closes. *See In re N. Tex. Specialty Physicians*, Dkt. No. 9312, 2003 FTC LEXIS 180, at *5 (F.T.C. Dec. 4, 2003) (ordering answers to contention interrogatories and citing 16 C.F.R. § 3.31(e) for the proposition that the party must supplement its answers to the extent it obtains additional information later).

C. At a minimum, Impax should be required to identify its purported procompetitive justifications and benefits, and explain how the reverse payments were reasonably necessary to achieve those benefits

Even if the Court concludes that Impax need not answer the contention portion of the interrogatories until the close of discovery, the Court should require Impax to answer Interrogatory Nos. 2 & 3 as narrowed by Complaint Counsel’s proposed compromise. Under this proposed compromise, Interrogatory No. 2 merely asks for the identification of Impax’s purported procompetitive justifications and benefits, and Interrogatory No. 3 seeks an

explanation of how the provisions of the settlement agreement relate to Impax’s purported procompetitive justifications. *See* Leefer Decl. Exhibit C at 3. As narrowed, Complaint Counsel is simply seeking the particularization of Impax’s asserted affirmative defenses.

Interrogatories that ask a party to particularize its defenses are not contention interrogatories—that is, interrogatories that “involve[] an opinion or contention that relates to fact or the application of law to fact.” 16 C.F.R. § 3.35(b)(2). *See Dot Com Entm’t Grp., Inc.*, 237 F.R.D. at 44 (holding that an interrogatory demanding that “Defendants particularize, *i.e.*, ‘identify,’ the prior art upon which Defendants’ prior art defense is predicated” was not a contention interrogatory); *see also Intelligent Verification Systems, LLC v. Microsoft Corp.*, No. 2:12-cv-525, 2015 WL 846012, at *4 (E.D. Va. Feb. 25, 2015) (“Strikingly absent from Interrogatory No. 6 is any request for an opinion or contention as contemplated by Rule 33(c).”) (*internal quotation omitted*). As in *Dot Com Entm’t Grp.*, Interrogatory No. 2 does not ask Impax “to explain why or how, as a matter of opinion or otherwise,” its purported justifications are procompetitive, or require Impax to “advance legal argument in support of [its] defense...” *Dot Com Entm’t Grp., Inc.*, 237 F.R.D. at 44. And, although Interrogatory No. 3 does ask Impax to explain “how” the reverse payments from the settlement agreement were necessary to achieving the purported procompetitive effects, this is a factual inquiry into why the payments were included in the settlement, not a request for opinion or legal argument. As narrowed, both interrogatories are easily answered based on Impax’s current knowledge, and should be answered so that Complaint Counsel has a meaningful opportunity to conduct appropriate discovery.

CONCLUSION

For the reasons stated above, Complaint Counsel’s Motion to Compel should be granted.

Respectfully submitted,

/s/ Nicholas A. Leefer

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Counsel Supporting the Complaint

Dated: June 1, 2017

STATEMENT REGARDING MEET AND CONFER

The undersigned counsel certifies that Complaint Counsel conferred with Respondent's counsel in a good faith effort to resolve by agreement the issues raised by Respondent's Objections and Responses to Complaint Counsel's First Set of Interrogatories. On May 9, 2017, Complaint Counsel (Nicholas Leefer) responded to Impax's objections with a proposed compromise, and asked to meet and confer. On May 16, 2017, Complaint Counsel (Nicholas Leefer, Bradley Albert, and Maren Schmidt) and Respondent's Counsel (Anna Fabish) communicated by telephone. And on May 22, 2017, Complaint Counsel (Nicholas Leefer) and Respondent's Counsel (Anna Fabish) communicated by email.

Dated: June 1, 2017

Respectfully submitted,

/s/ Nicholas A. Leefer

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Federal Trade Commission
600 Pennsylvania Ave, NW
Washington, DC 20580

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

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In the Matter of)	
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Impax Laboratories, Inc.,)	
a corporation,)	DOCKET NO. 9373
)	
Respondent)	
_____)	

[PROPOSED] ORDER

Having carefully considered Complaint Counsel’s Motion to Compel Response to Interrogatory Nos. 2 & 3, Respondent’s Opposition thereto, all supporting evidence, and the applicable law, it is hereby ORDERED that Complaint Counsel’s Motion to Compel Response to Interrogatory Nos. 2 & 3 is GRANTED and it is hereby ORDERED that, no later than June 15, 2017, Respondent shall provide full and complete answers to Interrogatory Nos. 2 & 3 from Complaint Counsel’s First Set of Interrogatories.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: _____

CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2017, I filed the foregoing documents electronically using the FTC's E-Filing System, which will send notification of such filing to:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing documents to:

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Counsel for Respondent Impax Laboratories, Inc.

Dated: June 1, 2017

By: /s/ Nicholas A. Leefer
Attorney

CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

June 1, 2017

By: /s/ Nicholas A. Leefer
Attorney

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
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In the Matter of)	
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Impax Laboratories, Inc.,)	
a corporation,)	DOCKET NO. 9373
)	
Respondent)	

DECLARATION OF NICHOLAS A. LEEFER

1. I am an attorney at the Federal Trade Commission and Complaint Counsel in this proceeding. Attached to this declaration are the exhibits submitted in support of Complaint Counsel's Memorandum in Support of its Motion to Compel Response to Interrogatory Nos. 2 & 3
2. I have personal knowledge of the facts set forth in this declaration, and if called as a witness I could and would testify competently under oath to such facts.
3. Exhibit A is a true and correct copy of Complaint Counsel's First Set of Interrogatories to Impax Laboratories, Inc.
4. Exhibit B is a true and correct copy of Respondent Imax Laboratories' Objections and Responses to Complaint Counsel's First Set of Interrogatories.
5. Exhibit C is a true and correct copy of an email exchange consisting of an email from Anna Fabish to Nicholas Leefer and others, dated May 5, 2017, an email from Nicholas Leefer to Anna Fabish and others, dated May 9, 2017, an email from Anna Fabish to Nicholas Leefer and others, dated May 22, 2017, an email from Nicholas Leefer to Anna

Fabish and others, dated May 22 2017, and an email from Anna Fabish to Nicholas
Leefer and others, dated May 24, 2017.

I declare under the penalty of perjury that the foregoing is true and correct. Executed this 1st
day of June, 2017 in Washington, DC.

/s/ Nicholas A. Leefer

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Counsel Supporting the Complaint

Exhibit A

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION
OFFICE OF ADMINISTRATIVE LAW JUDGES**

In the Matter of

Docket No. 9373

**Impax Laboratories, Inc.,
a corporation.**

**COMPLAINT COUNSEL'S FIRST SET OF INTERROGATORIES TO
IMPAX LABORATORIES, INC.**

Pursuant to the Federal Trade Commission's Rules of Practice, 16 C.F.R. §§ 3.31 and 3.35, Complaint Counsel hereby requests that the Respondent answer the following Interrogatories within 30 days from the date of service thereof or in such lesser time as the Administrative Law Judge may allow pursuant to Rule of Practice 3.35(a)(2):

1. Identify any joint defense or common interest between You and Endo in any actual or potential litigation (including, but not limited to, *FTC v. Endo Pharmaceuticals Inc.*, Case No. 16-cv-01440 (E.D. Pa. filed March 30, 2016), *Endo Pharmaceuticals Inc. v. FTC*, Case No. 16-cv-05600 (E.D. Pa. filed Oct. 16, 2016), and *In re Opana Antitrust Litigation*, Case Nos. 1:14-cv-10150, 1:14-cv-07320, and 15-cv-00269 (N.D. Ill.)), and describe the subject matter and scope of any joint defense or common interest.
2. Identify all procompetitive justifications and benefits to consumers and the public interest referenced in the Eighth Defense in Your Answer to the Complaint in this case, and explain the factual basis for Your answer to this Interrogatory, including identifying all facts and documents You rely on in Your answer to this Interrogatory.
3. For each procompetitive justification and benefit identified in response to Interrogatory No. 2, explain how the No-AG Provision and the Endo Credit provision contained in the Opana ER Settlement and License Agreement were reasonably necessary to achieve that benefit, including identifying all facts and documents You rely on in Your answer to this Interrogatory.

DEFINITIONS

1. The terms “Impax,” “Company,” “You,” or “Your” mean Impax Laboratories, Inc., its directors, officers, trustees, employees, attorneys, agents, accountants, consultants, and representatives, its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, partnerships and joint ventures, and the directors, officers, trustees, employees, attorneys, agents, consultants, and representatives of its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, and partnerships and joint ventures.
2. The terms “and” and “or” have both conjunctive and disjunctive meanings.
3. The term “Communication” means any transmittal, exchange, transfer, or dissemination of information, regardless of the means by which it is accomplished, and includes all communications, whether written or oral, and all discussions, meetings, telephone communications, or email contacts.
4. The term “Complaint” means the Complaint issued in this matter, *In re Impax Laboratories, Inc.*, FTC Docket No. 9373.
5. The term “Documents” means all written, recorded, transcribed, or graphic matter of every type and description, however and by whomever prepared, produced, reproduced, disseminated, or made, including, but not limited to, analyses, letters, telegrams, memoranda, reports, bills, receipts, telexes, contracts, invoices, books, accounts, statements, studies, surveys, pamphlets, notes, charts, maps, plats, tabulations, graphs, tapes, data sheets, data processing cards, printouts, net sites, microfilm, indices, calendar or diary entries, manuals, guides, outlines, abstracts, histories, agendas, minutes or records of meetings, conferences, electronic mail, and telephone or other conversations or Communications, as well as films, tapes, or slides, and all other data compilations in the possession, custody, or control of the Company, or to which the Company has access. The term “documents” includes the complete original document (or a copy thereof if the original is not available), all drafts (whether or not they resulted in a final document), and all copies that differ in any respect from the original, including any notation, underlining, marking, or information not on the original.
6. The term “each,” “any,” and “all” mean “each and every.”
7. The term “Endo” means Endo International plc, its directors, officers, trustees, employees, attorneys, agents, accountants, consultants, and representatives, its domestic and foreign parents, predecessors, divisions, subsidiaries (including, but not limited to, Endo Pharmaceuticals Inc.), affiliates, partnerships and joint ventures, and the directors, officers, trustees, employees, attorneys, agents, consultants, and representatives of its domestic and foreign parents, predecessors, divisions, subsidiaries, affiliates, and partnerships and joint ventures.
8. The term “Endo Credit” means Section 4.4 of the Opana ER Settlement and License Agreement.
9. The term “Identify” means to state:

- a) in the case of a natural person, his or her name, employer, business address and telephone number, title or position, and dates the person held that position(s);
 - b) in the case of a Person other than a natural person, its name and principal address, telephone number, and name of a contact person;
 - c) in the case of a document, the title of the document, the author, the title or position of the author, the addressee, each recipient, the type of document, the subject matter, the date of preparation, and its number of pages; and
 - d) in the case of a communication, the date of the communication, the parties to the communication, the method of communication (oral, written, etc.), and a description of the substance of the information exchanged during the communication.
10. The term “No-AG Provision” means Section 4.1(c) of the Opana ER Settlement and License Agreement.
11. The term “Opana ER Settlement and License Agreement” means the Settlement and License Agreement between Endo, Penwest, and Impax signed on June 7, 2010, and effective on June 8, 2010.
12. The term “Person” includes the Company, and means any natural person, corporate entity, partnership, association, joint venture, governmental entity, trust, or any other organization or entity engaged in commerce.

INSTRUCTIONS

1. The relevant period for each Interrogatory is January 1, 2008 to the present.
2. Provide separate and complete sworn responses for each Interrogatory and subpart. Please note that under 16 C.F.R. §3.35, interrogatories directed to a corporation shall be answered by an “officer or agent,” “[e]ach interrogatory shall be answered separately and fully in writing under oath,” and “[t]he answers are to be signed by the person making them, and the objections signed by the attorney making them.” See 16 C.F.R. §§3.35(a), (b), (c).
3. State if You are unable to answer any of the Interrogatories herein fully and completely after exercising due diligence to secure the information necessary to make full and complete answers. Specify the reason(s) for Your inability to answer any portion or aspect of such Interrogatory, including a description of all efforts You made to obtain the information necessary to answer the Interrogatory fully.
4. Answer each Interrogatory fully and completely based on the information and knowledge currently available to You, regardless of whether You intend to supplement Your response upon the completion of discovery. See *North Texas Specialty Physicians*, FTC Docket No. 9312 (April 11, 2002) (Complaint Counsel must provide “full and complete responses . . . with the information and facts it currently has available”) (Chappell, A.L.J.).
5. If You object or otherwise decline to set forth in Your response any of the information requested by any Interrogatory, set forth the precise grounds upon which You rely with specificity so as to permit the Administrative Law Judge or other administrative or judicial entity to determine the legal sufficiency of Your objection or position, and provide the most responsive information You are willing to provide without an order.
6. Your answers to any Interrogatory herein must include all information within Your possession, custody or control, including information reasonably available to You and Your agents, attorneys or representatives.
7. If in answering any of the Interrogatories You claim any ambiguity in either the Interrogatory or any applicable definition or instruction, identify in Your response the language You consider ambiguous and state the interpretation You are using in responding.
8. Each Interrogatory herein is continuing and requires prompt amendment of any prior response if You learn, after acquiring additional information or otherwise, that the response is in some material respect incomplete or incorrect. See 16 C.F.R. § 3.31(e).
9. If You object to any Interrogatory or any portion of any Interrogatory on the ground that it requests information that is privileged (including the attorney-client privilege) or falls within the attorney work product doctrine, state the nature of the privilege or doctrine You claim and provide all other information as required by 16 C.F.R. § 3.38A.

10. The singular form of a word shall be interpreted as plural, and the plural form of a word shall be interpreted as singular, so as to bring within the scope of the Interrogatory that which might otherwise be excluded.
11. “And” and “or” are to be interpreted inclusively so as not to exclude any information otherwise within the scope of any request.
12. None of the Definitions or Interrogatories set forth herein shall be construed as an admission relating to the existence of any evidence, to the relevance or admissibility of any evidence, or to the truth or accuracy of any statement or characterization in the Definition or Interrogatory.
13. Whenever a verb is used in one tense it shall also be taken to include all other tenses, so as to bring within the scope of the Interrogatory that which might otherwise be excluded.
14. All words that are quoted from the Complaint filed in this matter have the same meaning as those used therein.
15. For each natural person You refer to in Your answers, state (1) that person’s full name; (2) the person’s last known business address and business phone number, or where that person’s business address and phone number is unavailable, that person’s home address and home phone number; (3) the person’s business affiliation and title during the time period of the matter at issue; and (4) the person’s current business affiliation and title.

Dated: April 5, 2017

By: /s/ Bradley S. Albert
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Bureau of Competition
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balbert@ftc.gov
Telephone: (202) 326-3670

Counsel Supporting the Complaint

CERTIFICATE OF SERVICE

I hereby certify that on April 5, 2017, I served via electronic mail a true copy of the foregoing document on:

Edward D. Hassi
O'MELVENY & MYERS LLP
1625 Eye Street, NW
Washington, D.C. 20006
ehassi@omm.com

Counsel for Respondent Impax

By: /s/ Rebecca E. Weinstein
Rebecca E. Weinstein

Counsel Supporting the Complaint
Bureau of Competition
Federal Trade Commission
Washington, D.C. 20024

Exhibit B

**UNITED STATES OF AMERICA
BEFORE THE FEDERAL TRADE COMMISSION**

In the Matter of

Impax Laboratories, Inc.
a corporation

Docket No. 9373

**RESPONDENT IMPAX LABORATORIES' OBJECTIONS AND RESPONSES TO
COMPLAINT COUNSEL'S FIRST SET OF INTERROGATORIES**

Respondent Impax Laboratories, Inc. ("Impax") hereby provides the following responses to Complaint Counsel's first set of Interrogatories.

I. PRELIMINARY STATEMENT

The following objections and responses to the FTC's Interrogatories are made on the basis of information that is presently known and available to Impax and may include information that is inadmissible at trial. Respondent's discovery, investigation, and preparation for trial are not yet completed and are continuing as of the date of these objections and responses. Because discovery is ongoing, Respondent expressly reserves the right to continue its discovery and investigation for facts, documents, witnesses, and supplemental data that may reveal information that, if presently within Respondent's knowledge, would have been included in these objections and responses. Respondent's objections and responses are based upon a reasonable investigation and its good-faith understanding of the Interrogatories. Respondent reserves the right to alter or amend its objections and responses if Complaint Counsel's understanding of the Interrogatories differs. Respondent also specifically reserves the right to present additional information at trial, as may be disclosed through continuing investigation and discovery, and specifically reserves the

right to supplement or modify these objections and responses at any time in light of subsequently discovered information.

The following objections and responses are made without waiving but, instead, preserving: (a) the right to raise in any subsequent proceeding or in the trial of this or any other action all questions of authenticity, foundation, relevancy, materiality, privilege, and evidentiary admissibility of any information or document provided or identified in these responses; (b) the right to object on any ground to the use or introduction into evidence of any information or document in any subsequent proceeding or in the trial of this or any other action on any ground; and (c) the right to object on any ground at any time to additional discovery.

II. GENERAL OBJECTIONS

Respondent makes the following general objections whether or not separately set forth in response:

1. Impax objects to each Interrogatory to the extent it is vague, ambiguous, overbroad, unduly burdensome, and/or fails to describe the information sought with reasonable particularity.
2. Impax objects to each Interrogatory to the extent it requires the disclosure of information that is neither relevant to the parties' claims or defenses in this action nor reasonably calculated to lead to the discovery of admissible evidence.
3. Impax objects to each Interrogatory to the extent it requires the disclosure of any information that is a matter of public record, or is equally available to Complaint Counsel.

4. Impax objects to each Interrogatory to the extent it seeks information not in Impax's possession, custody, or control.
5. Impax objects to each Interrogatory to the extent it does not contain reasonable time limits.
6. Impax objects to each Interrogatory to the extent it calls for information that is protected by the attorney-client privilege, the joint prosecution privilege, the joint defense privilege, the work-product doctrine, or any other privileges, protections, or doctrines of similar effect.
7. Impax objects to each Interrogatory to the extent it seeks to impose obligations different from, or in excess of, those required or authorized by the Federal Trade Commission's Rules of Practice or any applicable order or rule of this Court.
8. Impax's discovery and investigation into the matters specified are continuing. Accordingly, Impax reserves its right to supplement, alter, or change its responses and objections to each Interrogatory and to provide additional information that Impax has in its possession, custody, or control at the time the Interrogatories were propounded, in the manner and to the extent required or permitted by the Federal Trade Commission's Rules of Practice.
9. Impax objects to each Interrogatory to the extent it seeks Impax's proprietary, confidential, financial, trade secret, or commercially-sensitive information, the disclosure of which would unduly and improperly invade its protected rights. Impax similarly objects to each Interrogatory to the extent it seeks third-party proprietary, confidential,

financial, trade secret, or commercially-sensitive information, the disclosure of which could harm third parties' competitive or business positions or result in a breach of Impax's obligation to maintain the confidentiality of such information. Impax will produce such information as necessary, subject to the Protective Order entered by the Court.

10. Impax's responses do not in any way constitute an adoption of Complaint Counsel's purported Definitions of words or phrases. Impax objects to the Definitions to the extent they (i) are unclear, ambiguous, overly broad, or unduly burdensome; (ii) are inconsistent with the ordinary and customary meaning of the words or phrases they purport to define; and/or (iii) seek to impose obligations different from, or in excess of, those created by the Federal Trade Commission's Rules of Practice. Without limiting the generality of this objection, Impax specifically objects to the following:

- A. Impax objects to the definition of the terms "Impax" and "the Company" in Definition 1 to the extent it purports to include third-party "agents," "consultants," "representatives," or "affiliates" on the grounds that the definition is vague, ambiguous, overly broad, and/or unduly burdensome.
- B. Impax objects to the definition of the term "Documents" in Definition 5 to the extent it purports to include "all drafts (whether or not they resulted in a final document), and all copies that differ in any respect from the original," on the grounds that the definition is overly broad and unduly burdensome.

- C. Impax objects to the definition of the term “Endo” in Definition 7 to the extent it purports to include third-party “agents,” “consultants,” “representatives,” or “affiliates” on the grounds that the definition is vague, ambiguous, overly broad, and/or unduly burdensome.
11. To the extent that Impax adopts any term defined by Complaint Counsel, it is adopted solely for convenience in responding to Complaint Counsel’s Interrogatories, and Impax does not accept or concede that any of the terms or definitions contained therein are appropriate, descriptive, or accurate.
12. Impax objects to Complaint Counsel’s Instructions to the extent that they purport to impose burdens and requirements on Impax that exceed or differ from the requirements of the Federal Trade Commission’s Rules of Practice. Without limiting the generality of this objection, Impax specifically objects to the following:
- A. Impax objects to Complaint Counsel’s Instruction 1 to the extent that it does not contain reasonable time limits.
 - B. Impax objects to Complaint Counsel’s assertion in Instruction 8 that each Interrogatory “is continuing and requires prompt amendment,” to the extent it purports to impose duties on Impax beyond that which is required by the Federal Trade Commission’s Rules of Practice. Impax will supplement its responses pursuant to the requirements set forth in Rule §3.31(e)(2) of the Federal Trade Commission’s Rules of Practice.

C. Impax objects to Complaint Counsel's Instruction 15 to the extent it requests information that Impax does not have or information that is publicly available or equally accessible by Complaint Counsel.

III. SPECIFIC RESPONSES AND OBJECTIONS

Interrogatory No. 1:

Identify any joint defense or common interest between You and Endo in any actual or potential litigation (including, but not limited to, *FTC v. Endo Pharmaceuticals Inc.*, Case No. 16-cv-01440 (E.D. Pa. filed March 30, 2016), *Endo Pharmaceuticals Inc. v. FTC*, Case No. 16-cv-05600 (E.D. Pa. filed Oct. 16, 2016), and *In re Opana Antitrust Litigation*, Case Nos. 1:14-cv-10150, 1:14-cv-07320, and 15-cv-00269 (N.D. Ill.)), and describe the subject matter and scope of any joint defense or common interest.

Response to Interrogatory No. 1:

Impax objects to Interrogatory No. 1 as vague and overbroad in that it asks whether Impax and Endo may have a "common interest" in any "potential litigation."

Impax further objects to Interrogatory No. 1 to the extent that it requires Impax reveal attorney work product or information that is otherwise privileged.

Impax further objects to this Interrogatory to the extent it requests information regarding the existence or details of any joint defense agreement, joint defense relationship, common interest agreement, or common interest relationship, in any proceedings other than the instant litigation. Neither the fact nor details of any such agreement or relationship (to the extent any exist) are relevant to the allegations in the Complaint, any proposed relief, or Impax's defenses.

Finally, to the extent that Interrogatory No. 1 asks whether Impax has any interest in common with Endo at a theoretical level, Impax objects that responding to Interrogatory No. 1 calls for a legal conclusion and involves an opinion or contention that relates to fact or the application of law to fact. Therefore, under Federal Trade Commission Rule of Practice § 3.35(b)(2), no answer is required until the close of discovery, if at all.

Subject to and without waiving the foregoing objections, Impax responds as follows: Impax has no joint defense or common interest agreement with Endo in this litigation.

Interrogatory No. 2:

Identify all procompetitive justifications and benefits to consumers and the public interest referenced in the Eighth Defense in Your Answer to the Complaint in this case, and explain the factual basis for Your answer to this Interrogatory, including identifying all facts and documents You rely on in Your answer to this Interrogatory.

Response to Interrogatory No. 2:

Impax objects that responding to Interrogatory No. 2 involves an opinion or contention that relates to fact or the application of law to fact. Therefore, under Federal Trade Commission Rule of Practice § 3.35(b)(2), no answer is required until the close of discovery. Impax will supplement its response to Interrogatory No. 2 in due course.

Interrogatory No. 3:

For each procompetitive justification and benefit identified in response to Interrogatory No. 2, explain how the No-AG Provision and the Endo Credit provision contained in the Opana ER Settlement and License Agreement were reasonably necessary to achieve that

benefit, including identifying all facts and documents You rely on in Your answer to this Interrogatory.

Response to Interrogatory No. 3:

Impax objects that responding to Interrogatory No. 3 involves an opinion or contention that relates to fact or the application of law to fact. Therefore, under Federal Trade Commission Rule of Practice § 3.35(b)(2), no answer is required until the close of discovery. Impax will supplement its response to Interrogatory No. 3 in due course.

Dated: XXXX, 2017

_____/s/Edward D. Hassi

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*Counsel for Respondent Impax
Laboratories, Inc.*

CERTIFICATE OF SERVICE

I hereby certify that on **XXXXXX**, 2017, I served the foregoing document on the following counsel via electronic mail:

Markus Meier
Bradley Albert
Daniel Butrymowicz
Nicholas Leefer
Synda Mark
Maren Schmidt
Jaime Towey
Eric Sprague
Chuck Loughlin

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*Counsel for Complainant Federal Trade
Commission*

/s/ Anna M. Fabish

Anna M. Fabish

Exhibit C

Leefer, Nicholas

From: Fabish, Anna <afabish@omm.com>
Sent: Wednesday, May 24, 2017 10:28 AM
To: Leefer, Nicholas; Hassi, Ted; Antalics, Michael E.; Parker, Richard; McIntyre, Stephen; Hendricks, Benjamin J.; Brogan, Eileen M.
Cc: Meier, Markus H.; Albert, Bradley Scott; Butrymowicz, Daniel W.; Mark, Synda; Schmidt, J. Maren; Towey, Jamie; Sprague, Eric M.; Loughlin, Chuck; Weinstein, Rebecca; Clark, Alexandra
Subject: RE: Docket 9373 - Responses and Objections to First Set of Interrogatories

My May 22nd email below reflects Impax's final position on this issue.

Best,

Anna

From: Leefer, Nicholas [mailto:nleefer@ftc.gov]
Sent: Monday, May 22, 2017 2:14 PM
To: Fabish, Anna; Hassi, Ted; Antalics, Michael E.; Parker, Richard; McIntyre, Stephen; Hendricks, Benjamin J.; Brogan, Eileen M.
Cc: Meier, Markus H.; Albert, Bradley Scott; Butrymowicz, Daniel W.; Mark, Synda; Schmidt, J. Maren; Towey, Jamie; Sprague, Eric M.; Loughlin, Chuck; Weinstein, Rebecca; Clark, Alexandra
Subject: RE: Docket 9373 - Responses and Objections to First Set of Interrogatories

Anna,

Impax's response to CID specification 17 provides only an incomplete answer to Interrogatory Nos. 2 and 3. For example, CID spec 17 only asks for the competitive benefits of the No-AG clause of the settlement agreement, while Interrogatory Nos. 2 and 3 are not so limited. In addition, this response does not resolve our concern of not being able to conduct meaningful discovery related to Impax's affirmative defense because you have reserved the right to add additional purported justifications at the close of discovery.

We also reiterate our position that these are not contention interrogatories. *See Dot Com Entm't Grp., Inc. v. Cyberbingo Corp.*, 237 F.R.D. 43, 44-45 (W.D.N.Y. 2006) (finding that interrogatories asking that Defendants "state the facts which support Defendants' invalidity defense" and "identify the prior art upon which Defendants' prior art defense is predicated" did not "involve an opinion or contention that relates to fact or the application of law to fact" and so were not contention interrogatories) (internal quotations omitted). Interrogatory Nos. 2 and 3 are similar to those the *Cyberbingo* court found should be answered early in discovery because "Defendants are expected to have, even at an early stage, some good faith basis in fact and law for such claim and defense." *Id.* at 45.

Please let us know Impax's final position on these interrogatories by Wednesday, May 24. If we cannot reach an agreement on these issues, we may be forced to seek relief from Judge Chappell.

Best Regards,

Nicholas Leefer
Federal Trade Commission
Bureau of Competition, Health Care Division
202-326-3573
nleefer@ftc.gov

From: Fabish, Anna [<mailto:afabish@omm.com>]

Sent: Monday, May 22, 2017 11:34 AM

To: Leefer, Nicholas; Hassi, Ted; Antalics, Michael E.; Parker, Richard; McIntyre, Stephen; Hendricks, Benjamin J.; Brogan, Eileen M.

Cc: Meier, Markus H.; Albert, Bradley Scott; Butrymowicz, Daniel W.; Mark, Synda; Schmidt, J. Maren; Towey, Jamie; Sprague, Eric M.; Loughlin, Chuck; Weinstein, Rebecca

Subject: RE: Docket 9373 - Responses and Objections to First Set of Interrogatories

Nicholas -

As discussed during our meet and confer last week regarding the issues you raise below, Impax continues to object to Interrogatories 2 and 3 as contention interrogatories, to which Impax need not respond until the close of discovery, if at all. However, three years ago, Impax identified numerous procompetitive justifications and benefits to consumers in Impax's narrative response to CID Specification 17. As we stated then (subject to and without waiving the objections noted in our narrative responses):

“[T]here are several benefits flowing from the SLA's co-exclusive licensing provisions. Impax and Endo were settling a contested and uncertain patent dispute. Impax's objective was to secure a path to launching and selling generic original Opana ER while neutralizing the risk of patent infringement liability and damages to Endo. Impax naturally preferred to maximize its sales. The co-exclusive licensing provisions helped to serve these ends. Under the collection of terms embodied in the SLA, Impax received, among other things, a license and covenants that permitted Impax to manufacture and sell generic original Opana ER free from patent infringement risk to Endo earlier than Impax likely would have been able to achieve through other means. Specifically, the SLA permitted Impax to introduce generic original Opana ER no later than January 2013—earlier than Impax likely would have otherwise entered, before the patents that were the subject of the parties' litigation were set to expire, and before patents subsequently issued to or obtained by Endo are set to expire. Had Impax not settled the litigation on the material terms it did, Impax would likely be embroiled in patent litigation with Endo even today (as are other generic companies), rather than having the freedom to operate it obtained and selling its generic version of original Opana ER. The SLA agreement increased competition and directly benefited consumers.”

Impax reserves the right to supplement this prior answer in responding to Interrogatories 2 and 3 at the close of discovery.

With respect to Interrogatory 1, Impax served a supplemental response to this interrogatory earlier today.

Best,

Anna

O'Melveny

Anna M. Fabish

Counsel

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From: Leefer, Nicholas [<mailto:nleefer@ftc.gov>]

Sent: Tuesday, May 09, 2017 12:05 PM

To: Fabish, Anna; Hassi, Ted; Antalics, Michael E.; Parker, Richard; McIntyre, Stephen; Hendricks, Benjamin J.; Brogan, Eileen M.

Cc: Meier, Markus H.; Albert, Bradley Scott; Butrymowicz, Daniel W.; Mark, Synda; Schmidt, J. Maren; Towey, Jamie; Sprague, Eric M.; Loughlin, Chuck; Weinstein, Rebecca

Subject: RE: Docket 9373 - Responses and Objections to First Set of Interrogatories

Anna,

We would like to meet and confer with you regarding Impax's responses to our First Set of Interrogatories. Please let us know your availability this week or next for a call. In the hopes of having a quick and productive conversation, these are the issues we would like to discuss:

1. **Interrogatory No. 1:** We disagree with Impax's objections. First, the existence of a common interest or joint defense, in and of itself, is not privileged or work product. Second, as we have explained, the existence—or lack thereof—of a common interest or joint defense with respect to the agreements at issue in this case already came up as a point of contention during the case scheduling conference, and bears on various aspects of the case. Third, we are only interested in a common interest or joint defense that would give rise to an assertion of privilege or work product covering documents or communications shared between Endo and Impax in the identified proceedings, rather than “any interest in common at a theoretical level.” We ask that Impax provide this information.
2. **Interrogatory No. 2:** We understand that Impax is not required to respond to contention interrogatories until the close of discovery. However, this interrogatory does not solely request “an opinion or contention that relates to fact or the application of law to fact.” In particular, the language highlighted below seeks clarification and a clearer articulation of one of Impax's defenses. This information is necessary to conduct discovery relevant to Impax's defense, so an answer after the close of discovery would be untimely. We ask that Impax provide a substantive answer to the highlighted section of this interrogatory at this time.
 - a. Identify all procompetitive justifications and benefits to consumers and the public interest referenced in the Eighth Defense in Your Answer to the Complaint in this case, and explain the factual basis for Your answer to this Interrogatory, including identifying all facts and documents You rely on in Your answer to this Interrogatory.
3. **Interrogatory No. 3:** As above, this interrogatory contains non-contention portions. The language highlighted below seeks clarification and clearer articulation of Impax's defenses. This information is necessary to conduct discovery relevant to Impax's defenses, so an answer after the close of discovery would be untimely. We ask that Impax provide a substantive answer to the highlighted section of this interrogatory at this time.
 - a. For each procompetitive justification and benefit identified in response to Interrogatory No. 2, explain how the No-AG Provision and the Endo Credit provision contained in the Opana ER Settlement and License Agreement were reasonably necessary to achieve that benefit, including identifying all facts and documents You rely on in Your answer to this Interrogatory.

In addition, we would like to follow up on our previous discussions related to the use of search terms to locate documents belonging to Joe Camargo, John Anthony, and Mark Donohue; as well as documents postdating Impax's CID production. Based on your April 27 email, we understood that you were going to discuss our search proposal with Impax, but we have not yet heard back. Please let us know Impax's position on running the searches we proposed by Friday, May 12. Thank you.

Best Regards,

Nicholas Leefer

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From: Fabish, Anna [<mailto:afabish@omm.com>]
Sent: Friday, May 05, 2017 3:17 PM
To: Leefer, Nicholas; Meier, Markus H.; Albert, Bradley Scott; Butrymowicz, Daniel W.; Mark, Synda; Schmidt, J. Maren; Towey, Jamie; Sprague, Eric M.; Loughlin, Chuck; Weinstein, Rebecca
Cc: Hassi, Ted; Antalics, Michael E.; Parker, Richard; McIntyre, Stephen; Hendricks, Benjamin J.; Brogan, Eileen M.
Subject: Docket 9373 - Responses and Objections to First Set of Interrogatories

Counsel -

Attached are Respondent's Responses and Objections to Complaint Counsel's First Set of Interrogatories.

Best,

Anna

O'Melveny

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Notice of Electronic Service

I hereby certify that on June 01, 2017, I filed an electronic copy of the foregoing CC Motion to Compel Response to Interrogatories, with:

D. Michael Chappell
Chief Administrative Law Judge
600 Pennsylvania Ave., NW
Suite 110
Washington, DC, 20580

Donald Clark
600 Pennsylvania Ave., NW
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Washington, DC, 20580

I hereby certify that on June 01, 2017, I served via E-Service an electronic copy of the foregoing CC Motion to Compel Response to Interrogatories, upon:

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I hereby certify that on June 01, 2017, I served via other means, as provided in 4.4(b) of the foregoing CC Motion to Compel Response to Interrogatories, upon:

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