No. 081232

In The

Supreme Court of the United States

CARLYLE FORTRAN TRUST,

Petitioner,

vs.

NVIDIA CORPORATION, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In 1972, the United States Supreme Court held in *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416, 428 (1972), that a bankruptcy trustee lacks standing to sue third parties on behalf of a class of creditors. Since *Caplin*, there has been a "**divergence among the circuits** concerning the ability of a bankruptcy trustee to bring actions against third parties on behalf of creditors of the bankrupt." *E.F. Hutton & Co. v. Hadley*, 901 F.2d 979, 987 (11th Cir. 1996). *See also Koch Refining v. Farmers Union Cent. Exchg., Inc.*, 831 F.2d 1339, 1349 (7th Cir. 1987) ("Two recent appellate opinions . . . have decided this issue of a trustee's standing in **diametrically opposite ways**."); *In re Miller*, 197 B.R. 810, 814 (W.D.N.C. 1996) ("These **two lines of cases** raise a question that was not asked, and therefore was not answered, in *Caplin*.").

1. Was the Ninth Circuit correct in rejecting the "line of cases" published by the Second, Eighth and Eleventh Circuits which held that a creditor has standing to assert general creditor claims under *Caplin*?

The Second Circuit has adopted the *Wagoner* rule, which provides that, "A claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not to the guilty corporation." *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2nd Cir. 1991). The Ninth Circuit, in the unpublished opinion below, held that

QUESTIONS PRESENTED – Continued

"the *Wagoner* rule has been much criticized and we decline to follow it." Pet. App. 7 (citing *In re Senior Cottages of Am., LLC*, 482 F.3d 997, 1003-04 (8th Cir. 2007)).

2. Was the Ninth Circuit correct in declining to follow the Second Circuit's *Wagoner* rule?

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3. As between a Chapter 11 reorganization trustee and a creditor of the estate, does the creditor (landlord) have standing to pursue interference claims against a third party for causing the debtor in bankruptcy (tenant) to breach the lease?

As between a Chapter 11 reorganization trustee and a creditor, does the creditor (landlord) have standing to pursue claims against a third party for lease damages in excess of the 11 U.S.C. § 502(b)(6) "cap"?

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4. If a purchase and sale agreement provides that the buyer is purchasing certain assets listed in an exhibit to the agreement, is the buyer's signature on the agreement alone sufficient to satisfy the statute of frauds (rather than requiring the buyer to sign the exhibit as well)?

Does an E-mail from the buyer admitting that the buyer "bought" those assets satisfy the statute of frauds?

PARTIES TO THE PROCEEDING

Petitioner is Carlyle Fortran Trust.

Respondents are nVidia Corporation, nVidia US Investment Company, f/k/a Titan Acquisition Corp. No. 2, Jen-Hsun Huang, James C. Gaither, A. Brooke Seawell, William J. Miller, Tench Coxe, Mark A. Stevens, Harvey C. Jones, Stephen H. Pettigrew, Christine B. Hoberg, Richard A. Heddleson, Gordon A. Campbell, James Whims, James L. Hopkins, Scott D. Sellers, and Alex M. Leupp.

CarrAmerica Realty Corporation, CarrAmerica Realty, LP, Carr Office Park, LLC, and Carr Texas OP, L.P. (collectively, "CarrAmerica Parties") are appellants in the appeal (Ninth Circuit Docket No. 06-17109) that was consolidated with the appeal filed by petitioner Carlyle Fortran Trust (Ninth Circuit Docket No. 07-15077). Petitioner Carlyle Fortran Trust has been informed that the CarrAmerica Parties are not joining in this Petition or filing their own Petition.

CORPORATE DISCLOSURE STATEMENT

The parent company of Carlyle Fortran Trust is Carlyle Fortran Holdings, L.L.C. No publicly held company owns 10% or more of the ownership interests of any of the above referenced entities.

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The opinion of the Ninth Circuit Court of Appeals ("Ninth Circuit") was unreported and is reprinted at Pet. App. 8. The order of the Ninth Circuit amending the opinion and denying the petition for rehearing *en banc* is reprinted at Pet. App. 35-37. The order of the United States District Court for the Northern District of California was unreported and is reprinted at Pet. App. 9-34.

STATEMENT OF JURISDICTION

The opinion of the Ninth Circuit was issued on November 25, 2008. Pet. App. 1. A timely petition for rehearing *en banc* was denied on January 22, 2009. Pet. App. 37. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of 11 U.S.C. § 502(b), 11 U.S.C. § 524(a) and (e), Cal. Civ. Code § 1624, Cal. Civ. Code § 1633.4, Cal. Civ. Code § 1633.7, and Cal. Civ. Code § 1633.9 are reprinted in Pet. App. 38-44.

STATEMENT OF THE CASE

I. INTRODUCTION

The underlying appeal is from an order dismissing the complaint of petitioner Carlyle Fortran Trust ("Carlyle") under Rule 12(b)(6) of the Federal Rules of Civil Procedure for lack of standing. First and foremost, the issue in this appeal is whether a creditor or a trustee in bankruptcy has standing to assert "general" creditor claims against third parties. This issue raises a complex question of bankruptcy law that has engendered irreconcilable inter-circuit conflicts ever since *Caplin v. Marine Midland Grace Trust Co. of New York*, 406 U.S. 416 (1972) – conflicts that have been well documented and recognized in numerous published opinions and treatises. *See e.g.*, *E.F. Hutton & Co. v. Hadley*, 901 F.2d 979, 987 (11th Cir. 1996) ("We recognize that there has been **divergence among the circuits** concerning the ability of a bankruptcy trustee to bring actions against third parties on behalf of creditors of the bankrupt."); *St. Paul Fire and Marine Ins. Co. v. PepsiCo, Inc.*, 884 F.2d 688, 696 (2d Cir. 1989) ("The courts that have considered this issue, however, have reached **differing conclusions**."); *Koch Refining v. Farmers Union Cent. Exchg., Inc.*, 831 F.2d 1339, 1349 (7th Cir. 1987) ("Two recent appellate opinions (released since the writing of the above *Koch* opinion but prior to its publication) have decided this issue of a trustee's standing in **diametrically opposite ways**."); *In re Miller*, 197 B.R. 810, 814 (W.D.N.C. 1996) ("These **two lines of cases** raise a question that was not

asked, and therefore was not answered, in *Caplin*."); Richard J. Corbi, *Causes of Action: What Is and Is Not Part of the Bankruptcy Estate?*, 17 NORTON J. BANKR. L. & PRAC. 4 (2008) ("There are **divergent views** as to how the courts answer this question.").

Second, this appeal also presents an irreconcilable inter-circuit conflict with respect to the application of the *Wagoner* rule. *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2nd Cir. 1991) ("A claim against a third party for defrauding a corporation with the cooperation of management accrues to creditors, not to the guilty corporation.").

Third, this appeal concerns the issue of who has standing – the creditor (landlord) or reorganization trustee for the debtor (tenant) – to seek damages in excess of the bankruptcy cap ("cap") against an interfering third party who caused the debtor (tenant) to breach its lease with the creditor (landlord).

Finally, this appeal presents the question whether the statute frauds can be satisfied through E-mails. The opinion of the Ninth Circuit (which answered this question in the negative) is clearly contrary to California statutes and case law.

Carlyle respectfully petitions for writ of certiorari for a review of the opinion of the Ninth Circuit so that profound and "diametrically opposite" inter-circuit conflicts concerning important issues of bankruptcy law finally may be resolved.

II. FACTS

A. The nVidia Agreement

The underlying lawsuit arises out of a highly unusual agreement, labeled an "asset purchase" agreement, between 3dfx Interactive, Inc., the debtor ("3dfx"), and respondent nVidia Corporation ("nVidia"), a publicly traded corporation, pursuant to which nVidia acquired substantially all of 3dfx's assets for a combination of cash and nVidia stock. Subject to a certain exception, the "asset purchase" agreement between 3dfx and nVidia provided that while the cash was available to 3dfx to satisfy the obligations owed to its creditors, the nVidia stock could be distributed only to 3dfx's shareholders and not the creditors.

Carlyle is the owner and landlord of an office building in San Jose, California. 3dfx was a public company which developed and sold graphics chips out of the office building that 3dfx leased from Carlyle.

3dfx and nVidia were competitors. In December 2000, 3dfx (which was then insolvent), nVidia, and respondent nVidia US Investment Company ("nVidia Sub"), entered into an "asset purchase" agreement ("nVidia Agreement") whereby (a) nVidia agreed to purchase substantially all of 3dfx assets for an immediate payment of $70,000,000 cash and a contingent payment of 1,000,000 shares of nVidia common stock (then worth more than $50,000,000), which could be transferred only to 3dfx's insiders, and (b) 3dfx agreed to (i) cease operations, (ii) discharge over $119,000,000 in liabilities of 3dfx and its subsidiary,

STB Systems, Inc., **with only the $70,000,000 cash**, and (iii) wind up its business and dissolve.

nVidia knew that the wind up and dissolution of 3dfx constituted an event of default under Carlyle's lease ("Lease") because nVidia had performed extensive due diligence of 3dfx, including a review of the Lease, prior to executing the nVidia Agreement. Nevertheless, the nVidia Agreement required 3dfx to breach Carlyle's Lease by, among other things, winding up its business and dissolving.

nVidia initially offered to pay $100,000,000 cash for substantially all of 3dfx's assets, which would have been available in the entirety to 3dfx's creditors. The directors and officers of 3dfx ("3dfx Ds&Os") were also shareholders of 3dfx who held lucrative stock options. The 3dfx Ds&Os declined that offer and devised a scheme to divert funds away from 3dfx's creditors to 3dfx's shareholders, with nVidia's help.

Under the nVidia Agreement, 3dfx would receive the stock (then worth over $50,000,000) only if 3dfx discharged the $119,000,000 owed to creditors with only the $70,000,000 in cash. 3dfx could not use the stock to discharge liabilities to creditors. If 3dfx failed, nVidia would keep the 1,000,000 shares of stock. If 3dfx succeeded, the 1,000,000 shares of stock would go to 3dfx's insiders. Paragraph 1.3(a) of the nVidia Agreement provides:

> The Stock Consideration . . . shall only become deliverable by [nVidia Sub] to [3dfx] upon and subject to the completion of the winding up of the business of [3dfx] pursuant

> to the Plan of Dissolution, and delivery to [nVidia Sub] of a certificate . . . that all Liabilities of [3dfx and its subsidiaries and affiliates] have been paid . . . **from sources other than the Stock Consideration** and that [3dfx] has been validly dissolved. . . .[1]

If 3dfx had persuaded its creditors to accept substantially less than the amounts owed by claiming that only $70,000,000 in cash was available under the nVidia Agreement to discharge more than $119,000,000 in liabilities, 3dfx would have succeeded in diverting more than $50,000,000 worth of nVidia stock to 3dfx's insiders and shareholders, at the expense of 3dfx's creditors. If 3dfx failed, nVidia would keep the 1,000,000 shares of nVidia stock and obtain a $50,000,000 windfall, at the expense of 3dfx's creditors.

Either way, whether 3dfx won or nVidia won, the creditors were certain to lose.

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[1] Under paragraph 1.3(b) of the nVidia Agreement, 3dfx also was provided the option of obtaining a one-time $25,000,000 payment if (i) the $70,000,000 Cash Consideration is not sufficient to pay the liabilities of 3dfx and its subsidiaries, and (ii) 3dfx demonstrates that the additional $25,000,000 payment is sufficient to pay all of the remaining liabilities of 3dfx and its subsidiaries to nVidia's satisfaction. In the event that nVidia advanced the $25,000,000 payment, the number of shares that constitutes the Stock Consideration would be reduced by 500,000 shares.

If nVidia failed to make the additional $25,000,000 payment, 3dfx would have received only $70,000,000 and, faced with $119,000,000 in liabilities, would have no alternative but to file bankruptcy. Indeed, nVidia failed to make the $25,000,000 payment, and 3dfx filed bankruptcy.

B. nVidia's Assumption Of Carlyle's Lease

3dfx's rent under Carlyle's Lease was only $1 per square foot when market rent exceeded $3 per square foot at the height of the dot com boom in the Silicon Valley. As a result, nVidia knew that Carlyle's Lease was worth at least $3,000,000 and expressly agreed to assume that Lease under the nVidia Agreement. In December 2000, Carlyle offered to buy out 3dfx's remaining term of the Lease for $1,000,000 so that Carlyle could relet the building to another tenant at a higher rent. On December 21, 2000, 3dfx asked nVidia how to respond to Carlyle's offer. nVidia ordered 3dfx to reject Carlyle's offer to buy out the Lease.

When 3dfx and nVidia signed the nVidia Agreement on December 15, 2000, the schedules which specify the assets being acquired by nVidia were being finalized and had not yet been attached to the nVidia Agreement. Accordingly, the nVidia Agreement contained a provision stating that such schedules were to be delivered on December 18, 2000. As required under the nVidia Agreement, on December 18, 2000, 3dfx delivered to nVidia the schedules to the nVidia Agreement ("Schedules") identifying the various assets that nVidia had bought on December 15, 2000. The Schedules identified Carlyle's Lease as one of the "Assumed Contracts" that nVidia had assumed under the nVidia Agreement.

By March 2001, however, the "dot com crash" hit, causing a radical downturn in real estate that saw vacancy jump 60% and rents plummet 21%. As a

result, nVidia refused to assume the Lease, despite its agreement to do so under the nVidia Agreement, because the Lease, which had been a $3,000,000 asset in December 2000, became a $7,000,000 liability in March 2001. The 3dfx Ds&Os and the directors and officers of nVidia ("nVidia Ds&Os") agreed to switch the December 18, 2000 Schedules with schedules excluding Carlyle's Lease as an "Assumed Contract" after the closing on April 18, 2001 so that nVidia could dump the liability for Carlyle's Lease back on 3dfx, which had been rendered insolvent as of December 15, 2000. Carlyle discovered the existence of the December 18, 2000 Schedules only through discovery after (a) the lawsuit had commenced, (b) Carlyle filed numerous motions to compel against nVidia, and (c) the Bankruptcy Court issued more than $100,000 in discovery sanctions against nVidia.

C. 3dfx's Breach and Bankruptcy

On April 18, 2001, after the nVidia Agreement closed, 3dfx transferred substantially all of its assets to nVidia, including all of its key patents and intellectual property. The remaining assets were sold for nominal amounts. Overnight, more than 100 of 3dfx's top engineers became nVidia's employees, and the rest were terminated. 3dfx ceased normal business operations, abandoned its facilities, and stopped paying rent under the Lease.

On May 10, 2002, Carlyle filed a complaint in state court against 3dfx, nVidia, and their respective directors and officers. Carlyle's complaint, as amended,

alleged claims for interference with Lease and economic relations, breach of Lease, successor liability, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty, among other causes of action. On October 15, 2002, 3dfx filed bankruptcy.

On January 3, 2003, nVidia, nVidia Sub, and the nVidia Ds&Os (collectively, the "nVidia Defendants") removed Carlyle's action to the Bankruptcy Court. On January 23, 2003, the Bankruptcy Court appointed William A. Brandt, Jr. as the Chapter 11 reorganization trustee for 3dfx (the "Trustee"). On March 12, 2003, the Trustee filed a complaint against nVidia and nVidia Sub for Avoidance of Fraudulent Transfer, Recovery of Voidable Transfer, and De Facto Merger. On September 11, 2008, the Bankruptcy Court entered a judgment in favor of nVidia and nVidia Sub dismissing all of the claims asserted by the Trustee.

Although the nVidia Defendants had removed Carlyle's lawsuit to the Bankruptcy Court and litigated there for three years, on January 18, 2005, the nVidia Defendants filed a Motion for Withdrawal of Reference of Carlyle's action on the ground that the nVidia Defendants were entitled to a jury trial. On May 6, 2005, the District Court entered an order withdrawing the reference of Carlyle's action.

On June 30, 2005, Carlyle filed its Third Amended Complaint, which added claims for express assumption of the Lease and aiding and abetting breach of fiduciary duty. nVidia filed a motion to dismiss the new claims. On November 10, 2005, the

District Court entered an order dismissing, with leave to amend, Carlyle's new claims and dismissing *sua sponte* Carlyle's preexisting claims for lack of standing.

On February 1, 2006, Carlyle filed a Fourth Amended Complaint. Approximately 10 months later, on December 15, 2006, the District Court dismissed the complaint without leave to amend on the grounds that Carlyle's claims are "general creditor claims" because the claims arose from the nVidia Agreement which "affected all creditors," and that Carlyle lacked standing to pursue "general creditor claims" under *CBS, Inc. v. Folks (In re Folks)*, 211 B.R. 378, 387 (B.A.P. 9th Cir. 1997). Pet. App. 14 & 20.

On January 9, 2007, Carlyle filed a Notice of Appeal. On November 25, 2008, the Ninth Circuit affirmed the dismissal of Carlyle's complaint. On January 22, 2009, the Ninth Circuit denied Carlyle's Petition for Rehearing *En Banc*.

D. Basis for Federal Jurisdiction In the Court Of First Instance

The nVidia Defendants removed Carlyle's action to the Bankruptcy Court pursuant to 28 U.S.C. §§ 157, 1334 and 1452. Accordingly, the basis for federal jurisdiction in the court of first instance is 28 U.S.C. §§ 157, 1334 and 1452.

REASONS FOR GRANTING THE PETITION

I. REVIEW IS NECESSARY TO RESOLVE INTER-CIRCUIT AND INTRA-CIRCUIT CONFLICTS REGARDING THE INTERPRETATION OF THIS COURT'S DECISION IN *CAPLIN*

In *Caplin*, the debtor corporation executed an indenture with an indenture trustee pursuant to which the debtor issued $8,607,600 in debentures. To protect the debenture holders, the debtor covenanted to file certificates with the indenture trustee regarding debtor's obligation to maintain an asset to liability ratio of 2:1. The debtor sustained substantial losses for years without the debenture holders' knowledge because the indenture trustee breached its obligation to confirm the accuracy of the debtor's certificates.

After the debtor filed bankruptcy, the reorganization trustee filed an action on behalf of the debenture holders against the indenture trustee for failing to compel debtor's compliance with the indenture. The reorganization trustee argued that it was more desirable for him to prosecute the claims against the indenture trustee on behalf of all creditors rather than the creditors filing numerous individual lawsuits against the indenture trustee. The Supreme Court rejected this argument, holding that "nowhere in the statutory scheme is there any suggestion that the trustee in reorganization is to assume the responsibility of suing third parties on behalf of debenture holders." *Caplin*, 406 U.S. at 428.

Caplin concerned a cause of action brought by the bankruptcy trustee on behalf of a certain **class** of creditors. *In re Miller*, 197 B.R. 810, 812 (W.D.N.C. 1996) ("*Caplin* concerned a cause of action brought by the bankruptcy trustee on behalf of a class of creditors (not the creditors generally)"). As a result, *Caplin* engendered a split of authority whether a bankruptcy trustee lacks standing to sue on behalf of creditors generally or only a certain class of creditors. *E.F. Hutton & Co. v. Hadley*, 901 F.2d 979 (11th Cir. 1996) ("We recognize that there has been **divergence among the circuits** concerning the ability of a bankruptcy trustee to bring actions against third parties on behalf of creditors of the bankrupt."); *Miller*, 197 B.R. at 814 ("These **two lines of cases** raise a question that was not asked, and therefore was not answered, in *Caplin*.").

A review of the decisions interpreting *Caplin* demonstrates that there are profound and irreconcilable inter-circuit and intra-circuit conflicts regarding whether a bankruptcy trustee has standing to pursue "general" claims on behalf of creditors.

A. Inter-Circuit Conflict

The Second Circuit, the Eighth Circuit, the Ninth Circuit, and the Eleventh Circuit read *Caplin* broadly and for the proposition that a bankruptcy trustee cannot bring "general" creditor claims. *Mixon v. Anderson (In re Ozark Restaurant Equipment Co.)*, 816 F.2d 1222 (8th Cir. 1987) ("**no trustee**, whether a

reorganization trustee as in *Caplin* or a liquidation trustee as in the present case, **has power under Section 544 of the Code to assert general causes of action**, such as the alter ego claim, **on behalf of the bankrupt estate's creditors**"); *Williams v. California 1st Bank*, 859 F.2d 664, 667 (9th Cir. 1988) ("**no trustee**, whether a reorganization trustee as in *Caplin* or a liquidation trustee, has power under . . . the Code to assert **general causes of action**, such as [an] alter ego claim, on behalf of the bankrupt estate's creditors."); *E.F. Hutton*, 901 F.2d at 985 ("we approve the reasoning of the Ninth Circuit in *Williams*, an analogous case factually and procedurally, and the Eighth Circuit in *Ozark Equip. Co.*, where those respective circuit courts determined that the bankruptcy trustee does not have standing to assert claims of creditors of the bankrupt"), *Wagoner*, 944 F.2d at 118 ("It is well settled that a bankruptcy **trustee has no standing generally** to sue third parties on behalf of the estate's creditors, but may only assert claims held by the bankrupt corporation itself.").

The Second Circuit, the Seventh Circuit, the Ninth Circuit Bankruptcy Appellate Panel, and the Ninth Circuit in the unpublished opinion below, read *Caplin* narrowly and for the proposition that only the bankruptcy trustee can pursue "general" creditor claims. *Koch Refining v. Farmers Union Cent. Exchg., Inc.*, 831 F.2d 1339, 1349 (7th Cir. 1987) ("A trustee may maintain only a **general claim**."); *CBS, Inc. v. Folks (In re Folks)*, 211 B.R. 378, 387 (B.A.P. 9th Cir.

1997) ("'If a **claim is a general one**, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, **the trustee is the proper person to assert the claim**, and the creditors are bound by the outcome of the trustee's action.'") (citing *Kalb*, 8 F.3d at 132); Pet. App. 6 ("The district court did not err by relying on *In re Folks*, 211 B.R. 378"); *Kalb, Voorhis & Co. v. American Financial Corp.*, 8 F.3d 130, 132 (2d Cir. 1993) ("If a claim is a **general** one, with no particularized injury arising from it, and if that claim could be brought by any creditor of the debtor, **the trustee is the proper person to assert the claim**, and the creditors are bound by the outcome of the trustee's action.").

B. Intra-Circuit Conflict

Not only has *Caplin* engendered an inter-circuit split of authority, Courts of Appeals within the same circuit also have interpreted *Caplin* in a profoundly conflicting manner.

For example, the Ninth Circuit's holding in *Williams*, 859 F.2d at 667, that "**no trustee**, whether a reorganization trustee as in *Caplin* or a liquidation trustee, **has power** under . . . the Code **to assert general causes of action**, such as [an] alter ego claim, on behalf of the bankrupt estate's creditors," cannot be reconciled with the Ninth Circuit Bankruptcy Appellate Panel's holding in *Folks*, 211 B.R. at

387, that an alter ego claim is "a **general claim** and '**cannot belong to any individual creditor.**'"

The Second Circuit's holding in *St. Paul Fire*, 884 F.2d at 700 ("the trustee is the only one with standing to bring a certain action, because of the generalized nature of the injury"), cannot be reconciled with the Second Circuit's holding in *Wagoner*, 944 F.2d at 118 ("It is well settled that a bankruptcy trustee has no standing generally to sue third parties on behalf of the estate's creditors"). *See also Miller*, 197 B.R. at 814 n.5 ("**The Court is unable to reconcile the Second Circuit's** broad view of the trustee's powers under § 544 in *St. Paul Fire*, *supra*, with the Second Circuit's later decision in *Shearson Lehman v. Wagoner*, 944 F.2d 114, 118-20 (2nd Cir.1991) where the Court, relying on *Caplin*, held that the bankruptcy trustee for the debtor (HMK) did not have standing to assert claims for dissipation of corporate funds and what seems the equivalent of an alter ego claim against Shearson because those claims belonged to the creditors of HMK, or the Court's later decision in *Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1092-94 (2nd Cir.1995), where the Court held that the trustee for the debtor did not have standing to pursue claims of investors in the limited partnerships managed by the debtor against the debtor's accounting firm.").

The Seventh Circuit's holding in *Koch Refining*, 831 F.2d at 1349 ("A trustee may maintain only a general claim"), cannot be reconciled with the Seventh Circuit's holding in *Steinberg v. Buczynski*, 40

F.3d 890, 893 (7th Cir. 1994) ("The claim in such a case is said to be 'personal,' not 'general.' That is not an illuminating usage. The point is simply that the trustee is confined to enforcing entitlements of the corporation. He has no right to enforce entitlements of a creditor."). *See also Miller*, 197 B.R. at 813 n.4 ("The Court finds the broad view of the trustee's powers advanced in *Koch*, *supra*, has been eviscerated by the Court's later opinion in *Steinberg v. Buczynski*, 40 F.3d 890 (7th Cir. 1994), where the Seventh Circuit, cited *Caplin*, *supra*, and held that the trustee for the debtor (Ted's Plumbing, Inc.) did not have standing to assert an action on behalf of a creditor (the pension fund) noting that the distinction between 'personal' and 'general' claims offered in *Koch*, *supra*, 'is not an illuminating usage' *id.* at 893, a sentiment with which this Court wholeheartedly agrees."); *Alberts v. Tuft (In re Greater Southeast Community Hospital Corp.)*, 2005 WL 3036507 (Bankr. D.D.C. 2005) ("Indeed, the Seventh Circuit effectively overruled *Koch* in *Steinberg v. Buczynski*, 40 F.3d 890 (7th Cir. 1994), for this exact reason.").[2]

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[2] Similarly, Carlyle believes that the only way to reconcile the Ninth Circuit's decision in *Williams* with the Ninth Circuit B.A.P.'s decision in *Folks* is to overrule *Folks*. The Ninth Circuit in the opinion below declined to do so.

C. A Review Is Necessary To Resolve "Diametrically Opposite" Inter-Circuit And Intra-Circuit Conflicts

Carlyle respectfully believes that this appeal provides a compelling demonstration why the Eighth Circuit in *Mixon*, the Ninth Circuit in *Williams*, the Eleventh Circuit in *E.F. Hutton*, and the Second Circuit in *Wagoner* interpreted *Caplin* correctly and why the Seventh Circuit in *Koch Refining*, the Ninth Circuit Bankruptcy Appellate Panel in *Folks*, the Ninth Circuit in the unpublished opinion below, and the Second Circuit in *Kalb* interpreted *Caplin* incorrectly.

In *Caplin*, the Supreme Court "identified three factors militating against finding standing" for a reorganization trustee. *Williams*, 859 F.2d at 666; *Mixon*, 816 F.2d at 1266; *E.F. Hutton*, 901 F.2d at 986.

"First, nowhere in the statute did the Court find any provision enabling the trustee 'to collect money not owed to the estate.'" *Williams*, 859 F.2d at 666 (quoting *Caplin*, 406 U.S. at 428). Because the rights under a lease accrue only to the landlord, not to creditors of the tenant, only the landlord has standing to sue a third party for inducing the tenant to breach the lease. For example, damages arising from nVidia's interference with the Lease (*i.e.,* the unpaid rents resulting from 3dfx's breach of the Lease) are damages that can be claimed only by Carlyle. The Trustee lacks standing to collect money not owed to

the estate. *Id.* Even if the Trustee could collect money owed to Carlyle, he could not recover any money owed to Carlyle in excess of the "cap," as such funds are not owed by or to the debtor (tenant). 11 U.S.C. § 502(b)(6). See Part III, *infra*. Indeed, the Trustee and the creditors in general have an incentive to "cap" Carlyle's lease damage claims against the 3dfx estate because the "cap" will result in a greater *pro rata* distribution to the unsecured creditors.

"Second, the [Supreme] Court noted that the debtor had no claim against the indenture trustee. At the most, then, the trustee's claims described a situation where the debtor and the indenture trustee were *in pari delicto*. Since it appeared that the indenture trustee would be entitled to be subrogated to the position of the debenture holders against the debtor, the Court saw no advantage to giving the trustee standing to sue." *Id.* (citing *Caplin*, 406 U.S. at 429-30). Here, 3dfx (the debtor) and the nVidia Defendants were also *in pari delicto* as the nVidia Defendants conspired with 3dfx to defraud the creditors of 3dfx. See Part II, *infra*.

"The third problem troubling the [Supreme] Court was the possibility that the trustee's suit on behalf of debenture holders could be 'inconsistent with any independent actions that they might bring themselves.'" *Id.* at 666 (quoting *Caplin*, 406 U.S. at 431-32). As the Ninth Circuit noted in *Williams*:

> The failure of the Trustee to obtain assignments from all the investors bears out the

> *Caplin* Court's fear that "it is extremely doubtful that the trustee and all [creditors] would agree on the amount of damages to seek, or even on the theory on which to sue." Inconsistent actions increase the chance that the Trustee will find her interests diverging from those of the investors on whose behalf she is suing.

Id. at 667 (quoting *Caplin*, 406 U.S. at 432).

Here, the Trustee finds that (a) the interests of 3dfx shareholders conflict with the interests of 3dfx creditors,[3] (b) the interests of creditors that 3dfx inherited from STB conflict with the interests of other 3dfx creditors, and (c) the interests of 3dfx shareholders and creditors who benefit by "capping" Carlyle's claims conflict with the interests of Carlyle, whose claims against solvent third parties (such as nVidia) should not be capped.

Despite the "three factors militating against finding standing" for a reorganization trustee enunciated by this Court in *Caplin*, the primary reason why the Seventh Circuit in *Koch Refining* and the Second Circuit in *St. Paul Fire* found that a reorganization

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[3] Indeed, when the Creditors' Committee sought to enter into a settlement with the Trustee before the Bankruptcy Court conducted a trial of the Trustee's claims against nVidia and nVidia Sub, the Trustee opposed the Creditors' Committee's settlement with nVidia on the ground that, "While the assumptions underlying that estimate of recovery to creditors may be subject to challenge, it is clear that equity holders under the settlement would receive nothing."

trustee should have exclusive standing to pursue general creditor claims was the concern of numerous individual lawsuits filed by creditors against third parties. *Miller*, 197 B.R. at 814 ("There is a common-sense concern that drives these decisions. They reason that the Trustee must have authority to pursue causes of action that injure the creditors generally, because otherwise individual creditors will rush to pursue the action and receive judgments, thereby circumventing the equality of distribution among creditors that is so fundamental to the bankruptcy scheme; in order to avoid this result, these courts reason that the trustee (not individual creditors) should have standing to pursue such claims.") (citing *Koch*, 831 F.2d at 1349; *St. Paul Fire*, 884 F.2d at 700-02; and *In re MortgageAmerica Corp.*, 714 F.2d 1266, 1275-76 (5th Cir. 1983)). However, the Supreme Court in *Caplin* already had anticipated and addressed this concern when it explained that "Rule 23 of the Federal Rules of Civil Procedure, which provides for class actions, avoids some of these difficulties." *Id.* at 433. Indeed, the regulatory scheme governing class actions provides far greater due process protections to creditors than conferring exclusive standing on a reorganization trustee in the place of such creditors (for example, the right to opt out if the class representative is inadequate or the right to have its own day in court if the interests of other creditors conflict with the interests of the individual creditor).

Finally, the fact that the Congress had an opportunity to overrule *Caplin* and confer exclusive standing on the reorganization trustee to pursue general creditor claims, and that Congress chose not to do so, demonstrates that the narrow reading of *Caplin* by the Seventh Circuit in *Koch Refining* and the Second Circuit in *St. Paul Fire* is contrary to the Congressional intent and legislative history of 11 U.S.C. § 544. In *Caplin*, this Court expressly invited Congress to decide whether or not to grant such standing to the reorganization trustee.

> Congress might well decide that reorganizations have not fared badly in the 34 years since Chapter X was enacted and that the status quo is preferable to inviting new problems by making changes in the system. Or, Congress could determine that the trustee in a reorganization was so well situated for bringing suits against indenture trustees that he should be permitted to do so. In this event, Congress might also determine that the trustee's action was exclusive, or that it should be brought as a class action on behalf of all debenture holders, or perhaps even that the debenture holders should have the option of suing on their own or having the trustee sue on their behalf. Any number of alternatives are available. Congress would also be able to answer questions regarding subrogation or timing of law suits before these questions arise in the context of litigation. Whatever the decision, it is one that only Congress can make.

Caplin, 406 U.S. at 434-35.

As the Eighth Circuit explained in *Mixon*, Congress declined the Supreme Court's invitation to overturn *Caplin*.

> In 1978, six years after *Caplin* was decided, Congress overhauled the bankruptcy laws when it enacted the Bankruptcy Code. As part of the revision, Congress consolidated former sections 70c and 70e of the Act (11 U.S.C. §§ 110(c), (e) of former title 11) into Sections 544(a) and (b) of the Code, respectively, which apply to both reorganization and liquidation trustees. Although Section 544 clarified and expanded the trustee's role with respect to creditors, in no way was it changed to authorize the trustee to bring suits on behalf of the estate's creditors against third parties. In fact, the legislative history suggests just the opposite.
>
> As originally proposed by the House, Section 544 was to contain a subsection (c), which was intended to overrule *Caplin*. It is extremely noteworthy, however, that this provision was deleted before promulgation of the final version of Section 544. Because subsection (c), as a part of Section 544, would have applied to both reorganization and liquidation trustees, and because Congress refused to enact subsection (c), we believe Congress' message is clear – no trustee, whether a reorganization trustee as in *Caplin* or a liquidation trustee as in the present case, has power under Section 544 of the Code to assert general causes of action, such as the

> alter ego claim, on behalf of the bankrupt estate's creditors.

816 F.2d at 1227-28.

Thus, the interpretation of *Caplin* by the Second Circuit in *Wagoner*, the Eighth Circuit in *Mixon*, the Ninth Circuit in *Williams*, and the Eleventh Circuit in *E.F. Hutton*, is supported by the Congressional intent and legislative history of 11 U.S.C. § 544.

In sum, it has been 37 years since this Court addressed the question of standing between a reorganization trustee and individual creditors in *Caplin*. *Mixon*, 816 F.2d at 1228 ("*Caplin* is still good law and is **the only Supreme Court case to address the standing question**"). Ever since this Court issued its opinion in *Caplin*, the Second, Seventh, Eighth, Ninth, and Eleventh Circuits have interpreted *Caplin* in "diametrically opposite ways," *Koch Refining*, 831 F.2d at 1349, sometimes even within the same Circuit. The Court should grant this petition to clarify and resolve profound inter-circuit and intra-circuit conflicts and confusion regarding the "diametrically opposite" interpretation of *Caplin*.

II. REVIEW IS NECESSARY TO RESOLVE INTER-CIRCUIT CONFLICTS REGARDING THE APPLICATION OF THE *WAGONER* RULE

The "*Wagoner* rule" states that under the *in pari delicto* doctrine, the reorganization trustee lacks standing to sue third parties for conspiring with a

corporate debtor to defraud creditors. *Wagoner*, 944 F.2d at 118 ("when a bankrupt corporation has joined with a third party in defrauding its creditors, the trustee cannot recover against the third party for the damage to the creditors"). The *Wagoner* rule should apply here because Carlyle alleged that the bankrupt corporation (*i.e.*, 3dfx) conspired with the nVidia Defendants to defraud the creditors of 3dfx by diverting the one million shares of nVidia stock to 3dfx's insiders under the nVidia Agreement.

Other circuits, including the Ninth Circuit in the opinion below, however, have refused to follow the Second Circuit in applying the *Wagoner* rule. Pet. App. 7 ("However, the *Wagoner* rule has been much criticized and we decline to follow it. *See In re Senior Cottages of Am., LLC*, 482 F.3d 997, 1003-04 (8th Cir. 2007) (listing authorities rejecting *Wagoner* and concluding that the *in pari delicto* defense has nothing to do with trustee standing)."). This appeal provides a compelling demonstration why the Second Circuit in *Wagoner* correctly applied the *Wagoner* rule and why the Eighth Circuit in *Senior Cottages* and the Ninth Circuit in the unpublished opinion below incorrectly refused to follow the *Wagoner* rule.

The Ninth Circuit held here that "the district court properly concluded that the Trustee has **exclusive standing**" to assert general creditor claims. Pet. App. 5. Because (a) the Trustee stands in the shoes of the debtor and its claims against the nVidia Defendants would be barred by the *in pari delicto* doctrine,

Bank of Marin v. England, 385 U.S. 99, 101 (1966) ("trustee succeeds only to such rights as the bankrupt possessed; and the **trustee is subject to all** claims and **defenses which might have been asserted against the bankrupt** but for the filing of the petition"), and (b) innocent creditors are barred from pursuing general creditor claims, the defendants in this case will escape scot-free for their role in conspiring with 3dfx to defraud the creditors.

Indeed, although this Court decided *Caplin* well before the Second Circuit decided *Wagoner*, this Court prophetically recognized and anticipated this exact problem in *Caplin*. *Caplin* articulated "three problems" why a reorganization trustee lacks standing to assert claims on behalf of creditors, one of which was that the trustee was "*in pari delicto*" with the defendant. 406 U.S. at 429-30 ("This brings us to the second problem with petitioner's argument. Nowhere does petitioner argue that Webb & Knapp could make any claim against Marine. Indeed, the conspicuous silence on this point is a tacit admission that no such claim could be made. Assuming that petitioner's allegations of misconduct on the part of the indenture trustee are true, petitioner has at most described a situation where Webb & Knapp and Marine were *in pari delicto*.") (footnote omitted). Thus, *Caplin* confirms that the *Wagoner* rule should be followed.

In sum, the Supreme Court should grant this petition to resolve irreconcilable inter-circuit conflict regarding the application of the *Wagoner* rule.

III. REVIEW IS NECESSARY TO RESOLVE AN ISSUE OF FIRST IMPRESSION WHETHER A REORGANIZATION TRUSTEE HAS STANDING TO PURSUE A LANDLORD CREDITOR'S LEASE DAMAGES IN EXCESS OF THE "CAP"

Carlyle alleged that the nVidia Defendants intentionally and negligently interfered with Carlyle's Lease by (i) contractually requiring 3dfx to discontinue its operations and dissolve, in breach of the Lease, and (ii) failing to assume the Lease after having rendered 3dfx insolvent.

Damages arising from the nVidia Defendants' interference with the Lease (*i.e.*, the unpaid rents resulting from 3dfx's breach of the Lease) are damages that can be claimed only by Carlyle. Rents due under the Lease are owed to Carlyle, not to the tenant (*i.e.*, the 3dfx estate). The Trustee lacks standing to collect money not owed to the estate. *Caplin*, 406 U.S. at 428 (nothing in the Bankruptcy Code enabled the trustee "to collect money not owed to the estate"); *Williams*, 859 F.2d at 667 (the Trustee lacked standing because "the Trustee, as in *Caplin*, is attempting to 'collect money not owed to the estate' ").

Even if the Trustee, not Carlyle, has "exclusive standing" to pursue Carlyle's claims (and the Trustee cannot and does not), the Trustee cannot pursue Carlyle's Lease damages in excess of the "cap" imposed by 11 U.S.C. § 502(b)(6) as a matter of law because the "cap" limits the estate's liability to

Carlyle to no more than "the rent reserved by such lease, without acceleration, for the greater of one year, or 15 percent, not to exceed three years, of the remaining term of such lease." In other words, even if the 3dfx estate has sufficient assets to make a 100% distribution to all creditors, it may pay Carlyle only $3,500,000 under the 11 U.S.C. § 502(b)(6) "cap," not the full $11,000,000 or more actually owed under the Lease. Since the estate is not liable for more than the capped claim, the Trustee has no standing to pursue claims *in excess* of its capped damages. *Bullfrog Films Inc. v. Wick*, 847 F.2d 502, 506 n.4 (9th Cir. 1988) ("At an 'irreducible minimum' Article III standing requires that a plaintiff show (1) 'that he personally has suffered some actual or threatened injury' as a result of defendant's conduct, (2) that the injury 'fairly can be traced to the challenged action' and (3) that the injury 'is likely to be redressed by a favorable decision.'") (quoting *Valley Forge Christian College v. Americans United For Separation of Church and State*, 454 U.S. 464, 472, 102 S.Ct. 752, 758, (1982)). Thus, even if the Trustee, and not Carlyle, has "exclusive standing" to pursue Carlyle's claims (and the Trustee does not), only Carlyle has standing to pursue Lease damages in excess of the "cap."

Despite extensive research, Carlyle did not find any case law addressing the question whether a reorganization trustee would have standing to pursue lease damages in excess of the "cap" on behalf of a

landlord creditor. The Ninth Circuit in the unpublished opinion below held that:

> We are not persuaded that the cap imposed by 11 U.S.C. § 502(b)(6) gives rise to a particularized injury that divests the Trustee of standing. Section 502 deals with allowance of secured claims, not powers of the Trustee, so the cap impairs the Creditors' claims regardless of whether the Trustee or the Creditors pursue the claim.

The Ninth Circuit's reasoning is erroneous. As pointed out by the Ninth Circuit, the "cap" operates as a limitation of a landlord creditor's claims **against the bankrupt estate, not against solvent (indeed, multi-billion dollar) third parties** like nVidia. To the contrary, it is well established that landlord creditors whose claims are capped against the bankruptcy estate have standing to sue third parties for the full amount of their claims in *excess* of the capped amount chargeable to the debtor's estate. 11 U.S.C. § 524(e); *Kopolow v. P.M. Holding Corp. (In re Modern Textile, Inc.)*, 900 F.2d 1184, 1191 (8th Cir. 1990) ("Although the Bankruptcy Code limits the amount which a lessor can claim against the debtor's bankrupt estate following the Trustee's rejection of an unexpired lease, **that limitation does not operate to cut off and extinguish the lessor's claim for amounts in excess of the amount chargeable to the debtor's estate**.").

Kopolow held that the 11 U.S.C. § 502(b)(6) "cap" does not bar lessor's lawsuit against a third party

who "guaranteed the debtor's lease obligations." The Court of Appeal reasoned that "under the Bankruptcy Code, even the 'discharge of debt of the debtor **does not affect the liability of any other entity on . . . such debt.**'" *Id.* (citing 11 U.S.C. § 524(e)).

In *Landsing Diversified Properties-II v. First National Bank and Trust Co. (In re Western Real Estate Fund, Inc.)*, 922 F.2d 592 (10th Cir. 1990), two transformers maintained by a company named PSO exploded, causing substantial damage to the debtor's facility. The debtor retained an attorney named Abel on a contingency fee basis to litigate against PSO. Abel filed suit against PSO and secured his fees by filing an attorney's lien under state law. The debtor settled with PSO and agreed to indemnify PSO should it be held liable to Abel for ignoring his attorney's lien.

The Tenth Circuit held that although Abel's claim against the debtor's estate must be "capped" at the reasonable value of Abel's services pursuant to 11 U.S.C. § 502(b)(4), *id.* at 596-98, it flatly rejected the argument that Abel was barred by the debtor's settlement and confirmation of the debtor's plan from pursuing damages in excess of the cap against PSO:

> Neither the confirmation of a plan nor the creditor's recovery (of partial satisfaction) thereunder bars litigation against third parties for the **remainder of the discharged debt. The same holds true specifically where**, as here, **the creditor's bankruptcy claim is** based on an executory contract that

> is both rejected under section 365(a) and **subject to limitation in amount by the bankruptcy court pursuant to section 502(b)**.

Id. at 601 (citation omitted).

Carlyle's claims for damages in excess of the cap cannot, and do not, belong to the Trustee because 3dfx (the debtor) is not liable to Carlyle for rents in excess of the cap. Since the Trustee has no standing to assert injuries which 3dfx has not sustained, the District Court's ruling and the Ninth Circuit's opinion below divest *both* Carlyle and the Trustee of standing to pursue claims for unpaid rents in excess of the "cap" against nVidia, a solvent third party.

The Bankruptcy Code was not designed to protect a solvent third party from wrongdoing. To the contrary, the law is settled that a landlord, like Carlyle, has standing to pursue damages in excess of the "cap" against any third parties. 11 U.S.C. § 524(e); *Kopolow*, 900 F.2d at 1191; *Landsing Diversified*, 922 F.2d at 601; 4 Collier on Bankruptcy ¶502.03[7][f] (the cap "'does not operate to cut off and extinguish the lessor's claim for amounts in excess of the amount chargeable to the debtor's estate,' and thus, the liability of a nondebtor guarantor or cotenant is not limited or altered by section 502(b)(6)").

In sum, the Court should grant this petition to address a question of first impression whether or not a reorganization trustee would have standing to

pursue lease damages in excess of the "cap" on behalf of a landlord creditor.

IV. REVIEW IS NECESSARY TO DETERMINE WHETHER THE NINTH CIRCUIT ERRED IN FINDING THAT E-MAILS CANNOT SATISFY THE STATUTE OF FRAUDS

The Ninth Circuit below affirmed the dismissal of Carlyle's complaint on the ground that "Carlyle's complaint failed to allege there was a written assumption of the lease signed by NVIDIA." Pet. App. 7. However, Carlyle's complaint alleged that "the Lease was specifically identified and accepted as a Specified Asset and Assumed Contract under the Nvidia Agreement." In any event, the opinion below is contrary to California statute and case law for at least two reasons.

First, the statute of frauds is satisfied because the nVidia Agreement ***is*** signed. The December 18, 2000 Schedules are merely an exhibit to the signed nVidia Agreement, which 3dfx was required to deliver, and did deliver, on December 18, 2000, as required under the nVidia Agreement. Nothing in the California statute of frauds requires the separate signing of every exhibit and schedule to an agreement, in addition to the signing of the agreement itself. Cal. Civ. Code § 1624(a).

Second, Carlyle alleged that E-mails from nVidia satisfied the statute of frauds. For example, on January 31, 2001, Christine B. Hoberg (the Chief Financial Officer of nVidia) sent an E-mail to Richard A. Heddleson (Chief Executive Officer of 3dfx) demanding that 3dfx remove a mechanic's lien from Carlyle's Lease, as Carlyle's Lease was "one of the assets" that nVidia had "bought." The January 31, 2001 E-mail from nVidia states, "heard about the mechanics lien on the building. **[C]an you pay the $96k else the lease terminates and one of the assets we bought goes away.**"

If nVidia had not accepted the December 18, 2000 Schedules and purchased Carlyle's Lease, there was no reason why Hoberg would refer to Carlyle's Lease as "one of the assets that we [*i.e.*, nVidia] bought."

California law is well-settled that an E-mail is a sufficient "note or memorandum" that satisfies the statute of frauds. Cal. Civ. Code § 1624 (contracts "are invalid, unless they, or **some note or memorandum thereof**, are in writing and subscribed by the party to be charged or the party's agent"); 1 B.E. Witkin, Summary of California Law § 350 (10th ed. 2005) ("The memorandum is not the contract, but merely evidence of its terms; the oral agreement is the contract. Hence, an oral agreement may originally be subject to the bar of the statute, but may become enforceable if a note or memorandum is subsequently made.").

"If the email had been sent after January 1, 2000, there would be no question of its sufficiency under the Statute of Frauds because the Uniform Electronic Transactions Act, Cal. Civ. Code § 1633.7 (2004), provides that a 'record or signature may not be denied legal effect or enforceability solely because it is in electronic form.'" *Lamle v. Mattel, Inc.*, 394 F.3d 1355, 1362 (Fed. Cir. 2005).[4] Here, Hoberg sent the E-mail on January 31, 2001, at least one year after the effective date of the Uniform Electronic Transactions Act.

In sum, the Court should grant this petition to correct a manifest error in the opinion below that Carlyle's complaint was barred by the statute of frauds.

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[4] On January 1, 2000, the Uniform Electronic Transaction Act became effective in California. Cal. Civ. Code § 1633.4 ("This title applies to any electronic record or electronic signature created, generated, sent, communicated, received, or stored on or after January 1, 2000."). *See also* Cal. Civ. Code §§ 1633.7 & 1633.9.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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