

IN THE MATTER OF THE CLAIM	* BEFORE JOY L. PHILLIPS,
OF DAVID & LAURIE MURCHAKE,	* AN ADMINISTRATIVE LAW JUDGE
CLAIMANTS,	* OF THE MARYLAND OFFICE
AGAINST THE MARYLAND HOME	* OF ADMINISTRATIVE HEARINGS
IMPROVEMENT GUARANTY FUND	* OAH NO.: DLR-HIC-02-12-22257
FOR THE ALLEGED ACTS OR	* MHIC NO.: 11 (05) 30
OMISSIONS OF GILBERT COLLINS,	*
t/a HOMEFINDER CONTRACTING	*
GROUP, Reg. # 94600,	*
RESPONDENT	*

* * * * *

RECOMMENDED DECISION

STATEMENT OF THE CASE
ISSUES
SUMMARY OF THE EVIDENCE
FINDINGS OF FACT
DISCUSSION
CONCLUSIONS OF LAW
RECOMMENDED ORDER

STATEMENT OF THE CASE

On July 9, 2010, David and Laurie Murchake (Claimants) filed a claim with the Maryland Home Improvement Commission (MHIC) Guaranty Fund (Fund) for reimbursement of \$14,172.93.00 in actual losses they allegedly suffered as a result of a home improvement contract with Gilbert Collins t/a Homefinder Contracting Group, Reg. # 94600, (Respondent). On March 3, 2011, the claim amount was amended to \$39,787.00.

I held a hearing on December 10, 2012, at the Queen Anne's County Library, Kent Island Branch, 200 Library Circle, Stevensville, MD 21666. Md. Code Ann., Bus. Reg. §§ 8-312, 8-

407 (2010 & Supp. 2012). Eric B. London, Assistant Attorney General, Department of Labor, Licensing and Regulation (Department), represented the Fund. Holland C. Brownley, Esq., represented the Claimants. The Respondent failed to appear for the hearing and was not represented.¹

The contested case provisions of the Administrative Procedure Act, the procedural regulations of the Department of Labor, Licensing and Regulation, and the Rules of Procedure of the Office of Administrative Hearings govern procedure in this case. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (2009 & Supp. 2012); Code of Maryland Regulations (COMAR) 09.01.03, 09.08.02 and 28.02.01.

ISSUES

Did the Claimants sustain an actual loss as a result of the Respondent's acts or omissions, and if so, what amount are the Claimants entitled to recover from the Fund?

SUMMARY OF THE EVIDENCE

Exhibits

I admitted the following exhibits on the Claimants' behalf:

- Cl. Ex. 1 Articles of Incorporation for PZ Investments, LLC, dated December 13, 2006
- Cl. Ex. 2 Deed for 1807 N. Pulaski St., Baltimore, MD, in the name of PZ Investments, dated November 3, 2007
- Cl. Ex. 3 Building sketch for 1807 N. Pulaski St., Baltimore, MD

¹ On August 14, 2012, the OAH sent the Respondent a Notice of Hearing to his trading and home address of record by certified and regular mail. (Fund Ex. 2.) Although the certified mailing sent to the Respondent's work address was returned to the OAH as unclaimed or rejected, the regular mailing to the home address was not returned as undeliverable by the United States Postal Service. The Fund additionally offered into evidence a copy of two letters, dated August 11, 2010, and March 9, 2011, which John Borz, Chairman, MHIC, sent to the Respondent informing him of the original claim and amended claim. (Fund Exs. 7, 9.) Subsequent to that, the MHIC mailed to the Respondent the Hearing Order, dated May 17, 2012, again informing him of the claim. (Fund Ex. 4.) Based upon the record before me, I am satisfied that the OAH properly notified the Respondent of the date, time and location of the scheduled hearing, as well as the issues to be presented. Accordingly, when the Respondent was still not present after fifteen minutes of the scheduled hearing time, the hearing proceeded in his absence.

- Cl. Ex. 4 Emails dated March 17-19, 2008, between the Claimants and the Respondent
- Cl. Ex. 5 Construction Contract, dated March 17, 2008, with \$28,899.05 contract price
- Cl. Ex. 6 Construction Contract, dated March 17, 2008, with \$25,000.00 contract price
- Cl. Ex. 7 Copies of checks and receipts, dated March 20, April 4, April 11, and May 12, 2008
- Cl. Ex. 8 Emails from the Claimants to the Respondent, dated May 12 and June 2, 2008
- Cl. Ex. 9 Emails between the Claimants, Jonathan Grassi and John Hajducko, dated June 26-27, 2008
- Cl. Ex. 10 Emails from the Claimants to the Respondent, dated July 15, August 1, August 15, August 18, August 21, August 22, August 31, and September 11, 2008; emails from the Respondent to the Claimants, dated August 15 and 22, 2008; and one email from John (NLN) at J & J Investment Properties, to the Claimants, on September 11, 2008
- Cl. Ex. 11 Emails between John Ly and the Claimants, dated October 28, 2008
- Cl. Ex. 12 List created by the Claimants of work done, work not done and items missing from the Respondent's contract, faxed to the Claimants' attorney on June 2, 2010
- Cl. Ex. 13 Estimate by AES Builder & Home Improvements, dated February 4, 2011

I admitted the following exhibits on the Fund's behalf:

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The Respondent, who did not attend the hearing, offered no documents to be admitted into evidence.

Testimony

David Murchake testified on behalf of the Claimants.

The Respondent did not attend the hearing and presented no testimony.

The Fund presented no testimony.

FINDINGS OF FACT

I find the following facts by a preponderance of the evidence:

1. At all times relevant to the subject of this hearing, the Respondent was a licensed home improvement contractor operating under MHIC license number #94600. (Fund Ex. 5.)
2. In 2007, the Claimants formed a limited liability corporation called PZ Investments, LLC, for the purpose of buying houses, renovating them, and renting them out as investment property. (Cl. Ex. 1.)
3. As part of a property investment group called Real Estate Riches, the Claimants found and purchased a three-bedroom row house at 1807 N. Pulaski St., Baltimore, Maryland, 21207, (Property). (Cl. Ex. 2.)
4. The Claimants had no experience in renovating and leasing homes and had no specialized knowledge regarding home construction.

5. The Property had no kitchen and no heating system or water heater. It needed new paint on the exterior and interior walls, dry wall, new carpeting and new bathroom fixtures. The roof had been leaking, resulting in stains in the ceiling, and the roof needed to be repaired. The Property needed repairs to the stairs and railing and was generally messy. The house was uninhabitable.
6. Real Estate Riches referred the Claimants to the Respondent for an estimate on renovating the Property.
7. On or about March 11, 2008, the Claimants inspected the Property with the Respondent to review what work needed to be done.
8. The Claimants and the Respondent entered into a contract for home renovations (Contract) to the Property on March 17-19, 2008. They negotiated a price for the contracted work via a series of emails. (Cl. Ex. 4-6.)
9. The initial agreed upon Contract price was \$28,899.05. (Cl. Ex. 5.)
10. After some negotiations, the Contract price was reduced to \$25,000 (Contract Price) with no change in the work to be completed. (Cl. Ex. 6.)
11. The Respondent underbid the project. (Cl. Ex. 9.)
12. The Contract called for the following work to be completed by the Respondent, at the following cost for materials and labor: (Cl. Ex. 5.)

<u>Item</u>	<u>Cost (in dollars)</u>
Front Exterior	
-Scrape and repaint home exterior	1,384.25
-Exterior door	329.46
-Repair front steps	208.74
Foyer and Hallway	
-Drywall	636.44
-Ceiling fixture	61.06

Living Room

-Replacement windows	678.78
-Skim and point up walls	432.00
-Ceiling fan	137.46

Dining Room

-Ceiling fan	137.46
-Drywall	989.16
-Replacement windows	304.57

Kitchen

-Demo all walls and ceiling	2,500.00
-Replace ceiling and drywall	1,239.00
-Ceiling fan	137.46
-Drywall	989.16
-Replacement windows	242.48
-Exterior door	329.46
-Oak base and wall cabinets	1,370.39
-Stainless steel kitchen sink, double bowl	120.17
-Laminate countertop	113.61

Bedroom One

-Drywall	1,229.06
-Replacement windows	538.86
-Ceiling fan	137.46

Bedroom Two

-Drywall	1,229.06
-Replacement windows	269.43
-Ceiling fan	137.46

Bedroom Three

-Drywall	1,229.06
-Replacement windows	269.43
-Ceiling fan	137.46

Bathroom

-Demo out and replace tub, toilet, sink	3,000.00
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Roof

-Install rubber roof	3,022.80
Paint	
-Repaint interior of home	2,307.64
Carpet	
-Minimum quality carpet and pad	3,050.21
Subcontract costs (not otherwise specified)	<u>2,500.00</u>
Total estimated costs:	\$28,899.05

13. Numerous standard items were not included in the Contract. For example, there is no mention of a kitchen stove and refrigerator; plumbing repairs; electrical work; a heating system; a water heater; parging² and painting the basement walls; repairing the basement stairs; or the cost of inspections.³
14. The Contract specified that the work was to begin on approximately March 17, 2008, and be completed by April 25, 2008.
15. The Claimants paid the Respondent \$11,000.00 on March 20, 2008; \$9,000.00 on April 4, 2008; \$3,800.00 on April 11, 2008; and \$3,000.00 on May 12, 2008, for a total of \$26,800.00.
16. The check for \$3,800.00 written on April 11, 2008, represented the amount the Respondent requested to buy a heating system to replace the heating system that was allegedly stolen from the Property. No replacement heating system was installed by the Respondent.
17. The Respondent began working on the Property. The Claimants did not tour the Property regularly to check on the Respondent's progress.

² Parging is applying a coating on basement walls to prevent leakage.

³ A water leak requiring \$5,500.00 work of repairs was mentioned in the Claimants' list of items missing from the Contract (Cl. Ex. 12), but there was no testimony regarding the water leak or why that should have been included, so I have not addressed it in my decision.

18. The Respondent did not complete the work under the Contract by April 25, 2008.
19. On or about May 12, 2008, the Claimants and the Respondent conducted a walk-through of the Property. The Respondent estimated that the job would be finished in about two weeks, but it was not close to being finished.
20. On June 2, 2008, the Claimants emailed the Respondent to complain about the Respondent's lack of response to voice mails. (Cl. Ex. 8.) There was no response to this email.
21. On June 26, 2008, the Claimants learned that Jonathan Grassi, affiliated with Real Estate Riches, had spoken with the Respondent, who said he knew he was behind on the job, but that it should be done within two weeks. (Cl. Ex. 9.)
22. The Claimants emailed the Respondent to complain about the delays and the cost of the job, on July 15, August 1, August 15, August 18, 2008, August 21, August 22, August 31, September 9, and September 11, 2008. (Cl. Ex. 10.) The Respondent responded to only two of those emails, on August 15 and 22, 2008. There was also a telephone call between the parties on August 11, 2008.
23. The Respondent never finished the renovations on the Property; he abandoned the job sometime in May 2008.
24. The following summarizes the Respondent's work under the Contract: (Cl. Exs. 11-13.)
 - a. Installed two new exterior doors, front and rear.
 - b. Only partially dry walled the foyer, dining room, living room and kitchen and did not dry wall the bedrooms.
 - c. Hung some windows in the living room, kitchen and dining room, but they were the wrong size.
 - d. Repaired some cracks in the walls and painted the interior of the house, but the walls were not uniformly smooth when he finished.
 - e. Installed carpeting, but some of it will have to be removed to install duct work for the heating system.
 - f. Installed ceiling fans in some rooms, but not in all rooms as required.
 - g. Demolished the kitchen, but did not install cabinets, countertop, sink or appliances.
 - h. Painted the exterior of the house only up to 6'.

25. The following summarizes the work the Respondent did not do under the Contract: (Cl.

Exs. 11-13.)

- a. Did not install a heating system.
- b. Did not repair the front steps.
- c. Did not hang new windows in the bedrooms.
- d. Did not install a rubber roof, but only laid a tar roof, resulting in water damage to the ceilings of the bedrooms.
- e. Did not demolish and replace the bathroom fixtures.
- f. Did not properly paint the stair railing.
- g. Did not clean out trash from the basement.
- h. Did not parge the basement walls.
- i. Did not have his work inspected or obtain permits for the work.

26. Sometime in September or October 2008, Jonathan Grassi and John Hajducko, both affiliated with Real Estate Riches, agreed to have a contractor complete some of the work on the Property, for a charge of \$3,000.00. That contractor installed a non-working furnace, stove, water heater, single bowl kitchen sink, kitchen countertops and some salvaged kitchen cabinets. The contractor's name is unknown.

27. The Claimants leased the Property to tenants for approximately six months in 2009, but the furnace did not heat the home and the tenants moved out. Since that time, no one has lived in the Property.

28. AES, a licensed contractual firm, inspected the Property in February 2011 and assessed what work had not been done pursuant to the Contract and what work had been done poorly and the cost of redoing or completing those items. The estimated cost for repairs and/or completion is \$37,987.00. (Cl. Ex.13.)

29. The Claimants' actual loss is \$39,787.00.

DISCUSSION

Pursuant to sections 8-405(a) and 8-407(e)(1) of the Maryland Annotated Code's Business Regulation Article (2010 & Supp 2012), to recover compensation from the Fund, the

Claimants must prove, by a preponderance of the evidence, that they incurred an actual loss, which resulted from a licensed contractor's acts or omissions. *See also* COMAR

09.08.03.03B(2). Actual loss "means the costs of restoration, repair, replacement, or completion that arise from an unworkmanlike, inadequate, or incomplete home improvement." Md. Code Ann., Bus. Reg. § 8-401 (2010). For the following reasons, I conclude that the Claimants have met this burden by proving that the Respondent failed to complete a workmanlike job and that the Claimants incurred an actual loss, entitling them to an award from the Fund.

The Claimants produced evidence to show that they established a limited liability corporation for the purposes of buying, renovating and renting houses as an investment. They apparently had no experience in renovating houses or hiring contractors and they depended on advice received by a real estate group they joined called Real Estate Riches. Through Real Estate Riches, they located property for sale, financed the purchase of the property, found contractors to complete the renovations and learned about investing in real estate. The Property at issue in this case was their first venture into real estate investment.

The Claimants and the Respondent entered into a Contract under which the Respondent would renovate the entire Property. The Contract omitted a number of standard items, for instance, a stove, refrigerator, plumbing repairs, heating system, hot water heater, repair of the basement walls and inspection costs. The Respondent worked for a number of weeks without inspection visits by the Claimants, who continued to pay the Respondent each time they were asked for another payment. The Claimants also wrote a check for \$3,800.00 to the Respondent for a heating system after the Respondent told the Claimants that the system purchased earlier had been stolen, however the Respondent never installed the heating system. Months after the Contract end date, the Claimants were still trying to communicate with the Respondent and were still waiting for the work to be completed. Eventually, their associates at Real Estate Riches

brought in an unknown contractor to do enough work to make the house habitable. The work was not sufficient, however, as the heating system that was installed by this contractor apparently did not heat the house. After six months, the tenants moved out.

In February 2011, the Claimants had a licensed contractor, AES, inspect the property and provide a list of items that were not completed or were not done in a workmanlike manner, along with its estimate for the cost of repairing or completing those items. (Cl. Ex.13.) When read in conjunction with the emails that were introduced into evidence and Mr. Murchake's testimony regarding the work, I believe the list offers a reliable summary of the unworkmanlike work done by the Respondent. Much of the work required under the Contract was not done and some of the work that was done was done poorly.

The Respondent's work on the Claimants' Property was unworkmanlike and incomplete; furthermore, the Respondent abandoned the project before it was even close to being finished. The Fund agreed at the hearing that the Claimants met their burden of proof and are entitled to an award under the statute. I concur.

With respect to such awards, COMAR 09.08.03.03B(3) provides as follows:

B. Measure of Awards from Guaranty Fund.

....
(3) Unless it determines that a particular claim requires a unique measurement, the Commission shall measure actual loss as follows:

(a) If the contractor abandoned the contract without doing any work, the claimant's actual loss shall be the amount which the claimant paid to the contractor under the contract.

(b) If the contractor did work according to the contract and the claimant is not soliciting another contractor to complete the contract, the claimant's actual loss shall be the amount which the claimant paid to the original contractor less the value of any materials or services provided by the contractor.

(c) If the contractor did work according to the contract and the claimant has solicited or is soliciting another contractor to complete the contract, the claimant's actual loss shall be the amounts the claimant has paid to or on behalf of the contractor under the original contract, added to any reasonable amounts the

claimant has paid or will be required to pay another contractor to repair poor work done by the original contractor under the original contract and complete the original contract, less the original contract price. If the Commission determines that the original contract price is too unrealistically low or high to provide a proper basis for measuring actual loss, the Commission may adjust its measurement accordingly.

COMAR 09.08.03.03B(3)(a) does not apply in this case. Although the Respondent abandoned the work, he did so after months of working on the Property.

COMAR 09.08.03.03B(3)(b) is used where the Claimant is not going to have another contractor redo or complete the work. This section does not apply in this case because the Claimants have already exhibited their desire to have the work completed by paying for an unknown contractor sent by Real Estate Riches to make the house habitable.

COMAR 09.08.03.03B(3)(c) most closely applies in this case. Under this section, I would calculate the award by taking the amount the Claimants actually paid to the Respondent (\$26,800.00), add a reasonable amount that will be required to be paid to another contractor to repair the poor work done by the Respondent and deduct the original contract price (\$25,000.00). The question in this case is what constitutes a reasonable amount to be paid to another contractor to repair or complete the work.

The Claimants asked that I calculate an award under varying theories. They requested that I use the full amount of the estimate for repairs provided by AES, \$37,987.00, limited only by the legal limit of \$20,000.00. (Cl. Ex. 13.) Alternatively, they asked that I use the total cost of the items from the Contract that were not done, \$14,602.01, according to the list compiled by the Claimants,⁴ plus the cost of the heating system, \$3,800.00, for a total of \$18,402.01.

⁴ Counsel did not make clear how she determined this amount. I believe she started with the Claimants' list of what had not been done under the Contract and discounted certain items that were done by the unknown contractor, for example, installation of kitchen cabinets. But because I find the AES estimate to be more reliable than that provided by the Claimants, who have no experience in renovations, and because counsel did not make it clear how she derived her numbers, I have decided against using the Claimants' own tallies.

The Fund's counsel did not contest that the Claimants have met their burden of proof under the statute and are entitled to reimbursement from the Fund. The Fund argued that I could either accept the Claimants' estimate of what still needed to be done under the Contract; use that amount and add the cost of the uninstalled heating system; or use the estimate for repair and completion provided by AES. The Fund's counsel urged that I not use the AES estimate because it seemed fairly high and no one was present from AES to be cross-examined. He noted, for example, the Respondent's original estimate to renovate the bathroom was \$3,000.00, while the AES estimate to do the same work is \$12,460.00. The Respondent's original estimate to renovate the kitchen totaled \$2,163.00, while the AES estimate to do the same work is \$7,250.00. The Respondent's original estimate to install a rubber roof was \$3,022.80, while the AES estimate is \$4,860.00. The total for the AES proposed work is \$37,987.00, as compared to the total of the Respondent's contractual for the same work, calculated by AES to be \$16,694.99.

For the following reasons, I conclude that the AES estimate is reasonable. It is clear that the Contract Price was somewhat arbitrary, as the Respondent reduced it from \$28,899.05 to \$25,000.00, without removing anything from the Contract to justify the reduced rate. Additionally, some standard household items, such as a stove, refrigerator and heating system, as well as inspections, were omitted from the Contract. Had they been included, certainly the Contract Price would have been higher. Additionally, the Claimants presented evidence that the Respondent gave them a low estimate for the job in an effort to help them out. In an email from Jonathan Grassi to the Claimants on June 27, 2008, he wrote that the Respondent told him he was "upside down" on the Property because he underbid the job to help them out because of issues the Claimants had with a previous contractor. (Cl. Ex. 9.) Considering the scope of the work, it is clear that the job was underbid.

AES is a licensed contractor who inspected the Property and provided a list of items that had not been completed pursuant to the Contract, as well as its cost for completing those items. Other than the fact that some of its estimates were higher than the Respondent's estimates and that no one from AES was present at the hearing to cross-examine regarding the estimate, I was given no other reason to discount its estimate for the cost of completing the work. Although its estimate for the work was higher than the Respondent's, it does not seem outrageous considering the scope of the work. In fact, the estimate only addresses redoing or completing work outlined in the original Contract, as the AES contractor noted. Were items added that had been omitted from the Contract, the estimate would have been even higher. (Cl. Ex. 13.) Accordingly, I will accept its estimate of \$37,987.00 to complete or redo the work.

One issue to be addressed is that the Claimants paid an unknown contractor \$3,000.00 to work on the house to make it habitable. The testimony regarding this work was somewhat concerning to me. The Claimants did not immediately disclose that this work was done. Only on cross-examination did we learn about this work. The Claimants did not know who did the work, whether the person was licensed, or exactly what work was done. For instance, the Respondent did not install kitchen cabinets, but when AES inspected the Property, it found salvaged kitchen cabinets in the kitchen, along with countertops that were shorter than called for in the Contract. The Claimants surmised during testimony that the unknown contractor had installed the salvaged cabinets. This same contractor apparently also installed a heating system which did not work, a water heater, stove, and a single bowl kitchen sink. This is considerable work for that price. The house was rendered only partially habitable after that work was done. Because the work seems not to comply with the specifications of the Contract,⁵ I will not use the \$3,000.00 as a measure under (3)(c) or incorporate that amount in the actual loss.

⁵ For instance, a single bowl sink was installed rather than a double bowl sink. The heating system never worked. The countertops were a foot shorter than the Contract called for.

Using the above formula, I conclude that the Claimants are entitled to an award from the Fund, calculating the Claimants' actual loss as follows:

\$26,800.00	Amount the Claimants paid the Respondent (including amount paid for the heating system)
+ <u>37,987.00</u>	Amount required to repair/complete the Respondent's work, as calculated by AES
= 64,787.00	
- <u>25,000.00</u>	Contract price
= \$39,787.00	The Claimants' actual loss

Although I am finding that the Claimants suffered an actual loss of \$39,787.00, the Claimants are entitled to reimbursement of only a portion of that actual loss from the Fund. According to section 8-405 (e)(1) and (5) of the Business Regulation Article, Annotated Code of Maryland (Supp. 2012), the maximum recovery from the Fund is limited to the lesser of \$20,000.00 or the amount paid by or on behalf of the Claimants to the Respondent. The Claimants paid \$26,800.00 to the Respondent, so the Claimants are limited to reimbursement in the maximum amount of \$20,000.00 from the Fund.⁶

CONCLUSIONS OF LAW

Based upon the foregoing Findings of Fact and Discussion, I conclude that the Claimants have met their burden of proving that they incurred an actual loss as a result of the Respondent's unworkmanlike performance of home improvement work. Md. Code Ann., Bus. Reg. §§ 8-405(a) and 8-407(e)(1) (2010 & Supp. 2012). The actual loss is \$39,787.00. The compensable amount of that loss is \$20,000.00, which the Claimants should be awarded from the Fund. *Id.*; COMAR 09.08.03.03B(3)(c).

⁶ The governing statute provides that the "Commission may not award ... more than \$20,000.00 to one claimant for acts or omissions of one contractor[.]" The Commission's regulations provide that it may not award more than \$15,000.00 in such circumstances. *Compare* Md. Ann. Code, Bus. Reg. § 8-405(e)(1) and COMAR 09.08.03.03D(2)(a). The difference between these two enactments constitutes a conflict, as a result of which I am bound to follow the statute. *Thanner Enterprises v. Baltimore Co.*, 414 Md. 265, 276 (2010).

RECOMMENDED ORDER

I **PROPOSE** that the Maryland Home Improvement Commission **ORDER** as follows:

1. The Claimants are awarded \$20,000.00 from the Maryland Home Improvement Commission Guaranty Fund;
2. The Respondent is ineligible for a Maryland Home Improvement Commission license until the Respondent reimburses the Guaranty Fund for all monies disbursed under this Order, plus annual interest of at least ten percent. Md. Code Ann., Bus. Reg. § 8-411(a) (2010); and
3. The records and publications of the Maryland Home Improvement Commission reflect this decision.

February 1, 2013
Date Decision Mailed

JLP/kc
139643

Signature on File



Joy L. Phillips
Administrative Law Judge



IN THE MATTER OF THE CLAIM * BEFORE JOY L. PHILLIPS,
OF DAVID & LAURIE MURCHAKE, * AN ADMINISTRATIVE LAW JUDGE
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