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PROFESSIONAL PRACTICE

Bartlit Beck Herman Palenchar & Scott LLP, 1994-Present, Partner

Kirkland & Ellis (Chicago), 1993, Associate

Paul, Weiss, Rifkind, Wharton & Garrison (New York), 1989-1993, Associate

EDUCATION & HONORS

New York University School of Law, 1989, J.D.

Stanford University, 1980, A.B., in English with Distinction

AWARDS & RECOGNITION

Myron J. Greene Award for preeminent achievement in advocacy

Order of the Barristers

Best Oralist, 1988 J.
Braxton Craven Moot Court Competition

Phi Beta Kappa

Pi Mu Iota (Italian Academic Honor Society)

American Lawyer's "Most Wired Lawyer In America"

BAR ADMISSIONS

New York

Illinois

CASES TRIED OR OTHERWISE TAKEN TO JUDGMENT

Express Scripts v. Walgreen Co. (Northern District of Illinois and American Arbitration Association 2011)

Lead counsel for Walgreens in an action that pharmacy benefit manager Express Scripts brought in Federal Court seeking to enjoin Walgreens' "I choose Walgreens" communications and website campaign. Walgreens and Express Scripts are parties to a contract that expired at the end of 2011. When their contract renewal negotiations failed, Walgreens began communicating to Walgreens' patients whose insurance coverage is administered by Express Scripts that Walgreens would not likely be a part of the Express Scripts pharmacy network in 2012. Express Scripts sued to shut down such communications and also made disparaging remarks about Walgreens that Walgreens alleged were disparaging. Walgreens successfully moved to compel arbitration pursuant to the parties' contract and a preliminary injunction hearing ensued before an AAA arbitrator. On Sunday, October 16, 2011, the arbitrator in the Express Scripts–Walgreens matter issued a ruling denying both parties' requests for preliminary injunctive relief. No ruling was issued as to the substantive claims of either party as the arbitration ruling was only the denial of preliminary injunctive relief. The arbitrator will consider the underlying merits and the parties' claims at a future date.

In re Ciprofloxacin Hydrochloride Antitrust Litigation (Eastern District of New York 2005; Federal Circuit 2008; Superior Court of California, San Diego 2009; Second Circuit 2010, 4th District California Court of Appeal 2011)
Together with Fred Bartlit, lead counsel for Bayer AG and Bayer Corporation in nationwide class action antitrust litigation in connection with Bayer's settlement of patent litigation against Barr Laboratories. Bayer owns the

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PROFESSIONAL ACTIVITIES AND COMMUNITY SERVICE

President, Chicago Sinai
Congregation, Chicago's
oldest Reform synagogue
Board member, Children's
Memorial Research Center

Adjunct Professor,
Northwestern University
School of Law: High-Tech
Trial Techniques

Actor in New York
(1981-1986), Appearances
on "Saturday Night Live"
and "All My Children"

Featured performer,
Chicago Bar Association's
Christmas Spirits Show.

Appearances include:
President Clinton and
Mayor Daley

patent on Cipro, one of the world's leading antibiotics. Barr sought approval from the FDA for a generic version of Cipro and, pursuant to the "Hatch-Waxman" statute, Bayer sued Barr in the Southern District of New York. On the eve of trial in January 1997, Bayer and Barr settled with Bayer making payments amounting to \$398 million. Bayer defeated three later generic challenges (Bartlit Beck lawyers Fred Bartlit and Mark Levine represented Bayer).

The antitrust plaintiffs contend that it was an antitrust violation for Bayer to pay Barr to settle Hatch-Waxman litigation. The MDL proceeding was before Judge David G. Trager in the Eastern District of New York. Wrote Bayer's brief in opposition to plaintiffs' motion for partial summary judgment that Bayer's payment was a *per se* antitrust violation. Judge Trager ruled in Bayer's favor and adopted Bayer's analytical framework for analyzing Hatch-Waxman settlements (261 F. Supp. 2d 188). Thereafter, the Eleventh and Second Circuit adopted Judge Trager's reasoning (402 F.3d 1056; 466 F.3d 187).

Following the *per se* ruling, Judge Trager invited Bayer to file a motion for summary judgment. Wrote Bayer's briefs, and Judge Trager granted Bayer's motion (363 F. Supp. 2d 514). Plaintiffs appealed to the Second Circuit, which transferred the Indirect Purchaser Plaintiffs' (the consumers') appeal to the Federal Circuit due to an alleged state-law *Walker Process*-type claim based on fraud on the Patent Office. Wrote Bayer's appellate briefs in the Second and Federal Circuits. Both Circuits affirmed Judge Trager's decision and adopted his reasoning (544 F.3d 1323 (Fed Cir. 2008); 604 F.3d 98 (2d Cir. 2010)). The Supreme Court denied *certiorari* in both appeals, and the MDL federal litigation has concluded in Bayer's favor.

Wrote Bayer's briefs and conducted oral argument in support of Bayer's motion for summary judgment in the Superior Court of the State of California, County of San Diego. Judge Strauss granted Bayer's motion, which the California Court of Appeal (4th District) affirmed in a unanimous opinion. Wrote Bayer's appellate brief and argued the appeal. Other state actions are inactive or have been dismissed.

Bayer Schering v. Barr (District of New Jersey 2007; Federal Circuit 2009)
Lead counsel for Bayer Schering in ANDA IV "Hatch Waxman" litigation against Barr Laboratories. Barr sought to market a generic version of Bayer Schering's oral contraceptive Yasmin®, which was the leading brand oral contraceptive in the world. Bayer Schering sued Barr in the United States District Court for the District of New Jersey for infringement of a Bayer

Schering formulation patent covering Yasmin®. Barr stipulated to infringement. On December 4, 2007, Judge Peter Sheridan completed a bench trial on Barr's invalidity challenge. He found the patent invalid due to obviousness (2008 WL 628592). Barr's CEO, Bruce Downey, told the Investors Business Daily that "[t]he unique thing about the Yasmin trial is that it was tried by the best guy trying cases for the generics industry and the best guy trying cases for the branded industry. So it was a heavyweight fight. It was like Ali and Frazier." Argued appeal before the Federal Circuit Judges Newman, Mayer and Friedman. In a 2-1 opinion, with Judge Newman dissenting, the majority affirmed Judge Sheridan's "obvious to try" ruling (2009 WL 2385095).

Morgan Stanley v. Chubb, et al. (Superior Court of New Jersey 2005)

Represented Morgan Stanley as the insured in insurance coverage litigation in New Jersey state court. An investment advisor fraudulently instructed Morgan Stanley to sell off a client portfolio and to deliver the proceeds to entities associated with the late Robert Maxwell. The client sued Morgan Stanley for the resulting loss and the case settled. Morgan Stanley sought coverage pursuant to an Electronic Computer Crimes Policy that it purchased from defendant insurance companies. The trial court granted the insurers' motion for summary judgment on the ground that the policy covered only fraud by an imposter, not fraud by the investment advisor. Argued appeal and obtained reversal and remand (2005 WL 3242234). The case settled thereafter.

Weilert v. Baan Company (Northern District of Illinois 2004)

Represented Baan Company in a \$100 million stock option -- breach of contract action brought against it in the Northern District of Illinois by Ronald Weilert, former CEO of Baan's American operations. Weilert alleged that Baan's offer letter granted him a guaranteed option on 2% of Baan. He alleged that under the terms of his offer letter, continued employment was not a condition to the vesting of his option, which was subject to Baan's standard five-year vesting schedule. Baan terminated Weilert after eight months on the job and before Baan implemented its company stock plan. On the eve of trial, the Court asked Baan to file a cross-motion for summary judgment. The Court later ruled in Baan's favor, granting summary judgment against the plaintiff. The case settled thereafter.

Fix v. Quantum (Northern District of Illinois 2004)

Represented Quantum Industrial Partners, a Soros holding company that owned Outboard Marine Company, in connection with a breach of contract action brought against it by Outboard Marine's CEO, Roger Fix. Fix contended that his employment contract entitled him to a \$5 million equity upside payment in the event of bankruptcy on the ground that the sale of assets in bankruptcy was a change in control that triggered his upside payment. Fix won summary judgment in the trial court. Argued appeal in the Seventh Circuit before Judges Ripple, Manion and Evans. The appellate court affirmed (374 F.3d 549).

SK Hand Tool v. Dresser (Circuit Court of Cook County, Illinois 1998)

Together with Phil Beck, represented defendant Dresser on remand for a trial on damages only. In a first trial that another firm handled, the jury awarded plaintiffs \$4 million in compensatory and \$50 million in punitive damages for fraud in the sale of Dresser's hand tool division. Dresser hired Bartlit Beck to handle the post-trial motion and appeal. The Illinois Appellate Court, First District, reversed the damages awards and remanded for a new trial on damages only. On remand, the trial judge resurrected the original \$50 million in punitive damages

subject to post-trial review. At the trial on remand in October 1998, plaintiffs sought \$40 million in compensatory damages. At trial, conducted key cross-examinations of plaintiff Corcoran and of plaintiffs' damages expert. The jury awarded \$1. Trial Judge Ken Gillis granted Dresser's post-trial motion and reduced the original \$50 million in punitive damages down to \$650,000. Dresser paid the \$650,001 judgment. Several articles chronicle Dresser's success: *Corporate Counsel Magazine* (July 1999), *The Trial Lawyer's Guide* (Vol. 42, No. 2 1998), and the *National Law Journal* (April 19, 1999) (honorable mention defense verdict for 1998).

Swiss Bank v. Dresser (Northern District of Illinois; Seventh Circuit 1998)

Represented Dresser Industries in a breach of contract action in which Swiss Bank alleged Dresser breached a stock warrant agreement. Judge James B. Zagel of the Northern District of Illinois granted Dresser's motion to dismiss. Argued appeal to the Seventh Circuit before Judges Posner, Easterbrook and Evans. Affirmed, with opinion by Judge Posner (141 F.3d 689).

Murphy v. United Technologies (Circuit Court, Palm Beach, Florida 1996)

Together with Phil Beck, represented United Technologies in a fraud/tortious interference with prospective advantage suit concerning sale of plaintiff's business, remote controlled stealth boats, to a third party. We tried the case to a jury in state court in Palm Beach County, Florida. Conducted direct and cross-examination of half of the witnesses. After the five week trial, the jury returned a complete defense verdict. The *National Law Journal* reported the victory as one of the top defense verdicts for 1996.

Castrol v. Pennzoil (District of New Jersey; Third Circuit 1993)

Represented Castrol in a false advertising suit against Pennzoil. In its national ad campaign, Pennzoil claimed its oil outperformed all other leading oils against viscosity breakdown. Second-chaired bench trial before Judge Alfred M. Wolin in the District of New Jersey, who permanently enjoined Pennzoil's ads because they were literally false. The Third Circuit affirmed (987 F.2d 939).

Castrol v. Quaker State (Southern District of New York; Second Circuit 1992)

Represented Castrol in a false advertising suit against Quaker State. In its national ad campaign, Quaker claimed that its oil protected better against wear during start-up. Second-chaired bench trial before Judge Charles S. Haight, Jr. of the Southern District of New York, who found Quaker's claim to be literally false. The Second Circuit affirmed the preliminary injunction (977 F.2d 57) and Quaker abandoned the campaign.

OTHER REPRESENTATIVE CASES

Intellectual Property Litigation

Bayer Schering Pharma AG v. Teva, et al. (Northern District of Illinois 2010)

Lead counsel for Bayer in Lanham Act false advertising and patent infringement case arising out of Teva's launch of a generic version of Bayer's YAZR oral contraceptive and product literature claiming that Teva's generic contains Bayer's patented betadex clathrate formulation. Bayer moved for a temporary restraining order on June 15, 2010. On June 16, the Court heard argument. Teva contended that Bayer could not show likelihood

of success on the merits of its claims and that Bayer was not entitled to emergency relief. During proceedings, the Court read a tentative ruling finding that Bayer was entitled to a TRO. Teva agreed to remedial measures including a weekly e-mail blast for three months directed at pharmacists and calling attention to its false prescribing information. Court entered an agreed order regarding these remedial measures and required compliance reporting from Teva. The case has since settled.

Bayer HealthCare LLC v. Abbott Laboratories, et al. (District of Massachusetts 2010)

Lead counsel for Bayer in a patent infringement action Bayer brought for damages in connection with Abbott's flagship drug, Humira. Argued Markman Hearing and the case settled thereafter pending appeal of the district court's Markman rulings to the Federal Circuit.

Novartis v. Bayer HealthCare et al. (Eastern District of Texas 2009)

Lead counsel for Bayer HealthCare in patent infringement suit brought against it by Novartis in the United States District Court for the Eastern District of Texas, Marshall Division. Novartis alleged that Bayer Healthcare's Kogenate® product used in the treatment of hemophilia infringed a Novartis patent on recombinant Factor VIII concentrate. The case has settled.

Bayer Schering v. Watson and Sandoz (District of Nevada; Southern District of New York 2009)

Lead counsel for Bayer Schering in ANDA IV "Hatch Waxman" litigation against Watson Laboratories and Sandoz, Inc. Watson and Sandoz seek to market generic versions of Bayer Schering's oral contraceptives Yasmin® and YAZ®, which are the best selling brand oral contraceptives in the United States. Bayer Schering sued Watson and Sandoz in the United States District Court for the District of Nevada for infringement of Bayer Schering patents covering the YAZ® 24-day pill-taking regimen. Summary judgment motions are pending and no trial date has been set. Bayer Schering sued Watson and Sandoz in the Southern District of New York for infringement of a Bayer Schering patent covering Yasmin®. Bayer lost a motion to dismiss on the ground that the patented method was not described fully in the "indications and usage" section of the FDA approved label, and that description of the patented method in the clinical pharmacology section of the FDA approved label did not evidence FDA approval of the patented method. Argued appeal to the Federal Circuit and awaiting decision.

Aventis Behring v. Bayer HealthCare and Bayer Corporation (District of Pennsylvania 2007)

Lead counsel for Bayer in this breach of contract and patent litigation in Pennsylvania state and federal court relating to recombinant Factor VIII concentrates used in the treatment of hemophilia. Obtained bifurcation for an early trial of Bayer's license defense to Aventis's infringement action, after which the parties reached a settlement.

GenProbe v. Bayer HealthCare and Bayer Corporation (Southern District of California 2006)

Lead counsel for Bayer HealthCare's diagnostic division in patent infringement suits related to GenProbe patents on nucleic acid detection assays. The cases settled favorably to Bayer.

Pinpoint v. Amazon.com (Northern District of Illinois 2004-2005)

Lead counsel for owner of patents on personalization technology and intelligent recommender systems in patent suit against Amazon.com in the Northern District of Illinois. Conducted technical tutorial and *Markman* Hearings on the meaning of disputed patent claim terms before Judge Suzanne B. Conlon and before Seventh Circuit Judge Richard A. Posner (sitting as a trial judge by designation), when he revisited Judge Conlon's construction. Deposed Amazon founder, Jeff Bezos. Pinpoint gave Amazon a statement of non-liability under two of the patents in suit following Judge Posner's reversal of Judge Conlon's claim construction.

Genlyte v. Acuity Brands (Northern District of Kentucky 2003)

Lead counsel for Lithonia Lighting, a division of Acuity Brands, in a patent infringement suit brought against it in the Northern District of Kentucky (Louisville) by competitor Genlyte. Took over case shortly before trial following adverse summary judgment ruling on infringement. Conducted presentation on the merits before Magistrate Judge, who settled the case on terms favorable to Acuity Brands.

Guidant v. Boston Scientific (Northern District of Illinois 2003)

Lead counsel for Guidant in patent litigation against Boston Scientific in the Northern District of California. Guidant sued Boston for infringing its patent on laser-cut coronary stents. The matter settled as part of a global settlement of all patent litigation between the companies.

Honeywell v. Goodrich Avionics (District of Delaware 2003)

Lead counsel for the Avionics Division of Goodrich Corporation in a patent infringement suit brought against it by Honeywell in the District of Delaware before Judge Joseph J. Farnan, Jr. The technology concerned terrain warning and awareness systems for aircraft. The case settled prior to claim construction.

Crown, Cork & Seal Technologies, Corp. v. Continental PET Technologies (District of Delaware 2002)

Lead counsel for Continental in an infringement suit in the District of Delaware. Crown alleged that Continental's plastic beer bottles infringed a Crown patent on "oxygen scavenging" technology. The case was stayed pending resolution of a contractual issue between Crown and Chevron, from whom Continental claimed a license. During resolution of that dispute, Bartlit Beck was conflicted out of the representation.

American National Can v. Continental PET Technologies (District of Connecticut 2000)

Lead counsel for Continental in a patent infringement suit in the District of Connecticut (New Haven) in which American National Can claimed Continental's clear and recyclable squeeze bottle for Heinz ketchup, and several other Continental containers, infringed various ANC patents on simultaneous injection blow-molding technology. Conducted week-long *Markman* Hearing with witnesses before Special Master, Don W. Martens, concerning the meaning of the asserted patent claims. The matter settled.

Schlumberger Technology Corporation v. Sperry-Sun Drilling Services (Southern District of Texas 1998)

Represented a Dresser Industries subsidiary in an infringement suit in the Southern District of Texas. Schlumberger alleged that Dresser infringed its patent on oilfield “measurement while drilling” technology. Dresser countersued for Schlumberger’s infringement of its patent on directional drilling. The parties settled as part of an international settlement.

Wokas v. Dresser (Northern District of Indiana 1997)

Represented the Wayne Division of Dresser Industries in a patent infringement action in which individual inventor, Albert Wokas, claimed that Wayne’s gasoline vapor recovery system infringed his 1979 patent on gasoline vapor emission control systems. Conducted week-long *Markman* Hearing with witnesses before Judge William C. Lee of the Northern District of Indiana, Ft. Wayne Division, concerning the meaning of the asserted patent claims. Wokas settled on the courthouse steps before the jury trial began.

Hampton v. Guare and Lincoln Center Theater (Supreme Court, New York County 1992)

Represented Lincoln Center in a “right of publicity” suit filed against it by David Hampton, the con man upon whose life the hit John Guare play, “Six Degrees of Separation,” is based. Lincoln Center’s motion to dismiss was granted by the New York State trial court. Hampton did not appeal.

Combustion Engineering / Mitsubishi Heavy Industries (Arbitration 1992)

Represented Mitsubishi Heavy Industries (“MHI”) in a potential arbitration in which MHI prepared to defend itself from claims of misappropriation of trade secrets in connection with the expiration of a license agreement between Combustion Engineering and MHI concerning industrial boiler technology. Spent one week in Japan touring MHI’s boiler works and interviewing technology specialists. The matter was resolved without resort to arbitration.

Georg Fischer v. Sintokogio (Southern District of New York 1991)

Represented Sintokogio, a Japanese manufacturer of impact molding machines, in a patent infringement action filed against it by competitor, Georg Fischer. Spent two weeks in Toyokawa, Japan coordinating Sintokogio’s document production. The matter settled shortly thereafter.

Business Torts Litigation

Norcross Safety Products v. Invensys (Arbitration 2001)

Represented Invensys as first chair in a \$60 million arbitration in which Norcross alleged that Invensys committed fraud when it sold Norcross its safety products division. The case settled on terms favorable to our client Invensys seconds prior to opening statements before Judge Abner Mikva, Judge John Upchurch and Dick Pogue of Jones Day.

City Colleges of Chicago v. Coopers & Lybrand and Arthur Andersen (Circuit Court of Cook County, Illinois 2000)

Represented Arthur Andersen in an accountant liability suit brought by City Colleges in connection with alleged losses City Colleges suffered when its treasurer allegedly invested City Colleges' funds in derivative securities that City Colleges contends were illegal, inappropriate and highly risky and which defendants allegedly failed to detect and report.

Starr v. LSI (Northern District of Illinois 1997)

Represented Litigation Sciences in a suit brought by trial consultant Hale Starr in which she alleged tortious interference with an employment contract and tortious interference with prospective relations when her protégé, Theresa Zagnoli, left Starr and worked briefly for Litigation Sciences. The case settled in mediation.

Other Representative General Commercial Litigation

Millennium Laboratories v. Ameritox, Ltd. (District of Maryland 2011)

Lead counsel for Ameritox in false advertising (Lanham Act) case that competitor Millennium Labs brought against Ameritox in connection with its urine drug testing protocol, Rx Guardian.

Baan Company Litigation (Various State and Federal Courts)

Represented Baan Company, which makes enterprise resource planning software, in various breach of contract and fraud actions in which plaintiffs alleged that Baan breached promises or made misrepresentations concerning the performance and functionality of Baan software.

NL Industries v. Commercial Union (District of New Jersey 1993-1995)

Represented NL Industries in insurance coverage case for reimbursement of environmental cleanup costs at several sites nationwide.

FMC Corporation v. Astra Veicoli Industriali (UNCITRAL Arbitration 1991)

Represented Astra Veicoli Industriali, a FIAT subsidiary that renovated certain M113 armored personnel carriers, in a breach of contract arbitration. Appeared on behalf of Astra in the London-based arbitration. Interviewed fact witnesses in Italian.

Manhattan Cable Television Franchise Renewal (Franchise Negotiation 1990)

Represented Manhattan Cable Television, a Time-Warner subsidiary, in franchise renewal negotiations with the City of New York's Bureau of Franchises. Drafted and negotiated the technical portions of the New York City 1990 cable franchise agreement.

ACKNOWLEDGEMENTS, PRESENTATIONS, AND PUBLICATIONS

Featured speaker on legal technology: ABA Tech Show, Legal Tech (including NYC Keynote on “Magazine Briefs”).

2006 Sedona Conference Institute, ediscovery of dynamic files: “the Excel cross”

Keynote presentation with Judge Shira Scheindlin (*Zubulake* author) at the 2006 “Managing Electronic Records” Conference

ABA Techshow 2006: Methods for Managing Electronic Evidence

ABA Techshow 2005: Methods for Managing Electronic Evidence

ABA Techshow 2004: Managing Electronic Evidence; Using Technology to Evaluate and Settle Cases

ABA Techshow 2003: 1) So That’s How You Spell Spoliation: Responding to Electronic Discovery Requests; and 2) Using Technology to Prepare for and Conduct Depositions

8th National Court Technology Conference 2003: Keynote Speech -- The High-Tech Attorney, Expectations for the Future

ABA Techshow 2002: 1) Tips and Tricks for Realtime Depositions; and 2) E-Briefs and Pleadings: Current Developments in the Creation and Filing of Electronic Pleadings and Briefs

ABA Techshow 2001: 1) E-Advocacy—How to Craft E-briefs; and 2) 60 Tips & Tricks for Busy Litigators

LegalTech New York 2000: Keynote Speech -- Magazine Briefs: Full Color Diagrams, Demonstratives and Images in Legal Briefs

NEWS

Peter Bensinger Argues for Bayer Before Fed. Cir. in Important Hatch-Waxman Case

Cert denied: Bartlit Beck Plays Key Role in End to Federal Cipro Antitrust Class Actions

Bartlit Beck Obtains Immediate Relief For Bayer In Lanham Act False Generic Drug Advertising Case

Fred Bartlit, Peter Bensinger and Mike Valaik Win Federal Circuit Appeal on Behalf of Bayer in Leading Patent-Antitrust Case, In re Ciprofloxacin Hydrochloride Antitrust Litigation

Peter Bensinger on Law Firm Technology, ABA Law Practice

Pitching the Gen-X Jury

Still Packing

Wired Lawyers: Up Close With Two Traveling Attorneys

Peter Bensinger Picked as "The Most Wired Lawyer in America"

Magazine Briefs

Producing a Winner - Backstage at Three of Corporate America's Megasuccesses

Picture This: Facts Come Alive

1998 Honorable Mention Defense Victories

Demonstrative Evidence: The Opening Statement

Honorable Mention Defense Victory in 1996

Diamonds Are This Firm's Best Friend

BIG WINS

Cert denied: Bartlit Beck Plays Key Role in End to Federal Cipro Antitrust Class Actions, *Bayer Cipro Antitrust (2005)*

Fred Bartlit, Peter Bensinger, Mike Valaik and Paul Skiermont Win Federal Circuit Appeal on Behalf of Bayer in Leading Patent-Antitrust Case, In re Ciprofloxacin Hydrochloride Antitrust Litigation, *Bayer Cipro Antitrust (2005)*

Bartlit Beck Wins Summary Judgment, Defeating \$10 Billion Antitrust Claims Against Bayer Corp., *Bayer Cipro Antitrust (2005)*

Bartlit Beck Wins Appeal, Court Sets Aside \$54 Million Verdict, *SK Hand Tool v. Dresser*

Bartlit Beck Wins Complete Defense Verdict in Fraud Case Involving Stealth Boat Technology, *Technology Innovations v. United Technologies (1996)*