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SC Court of Appeals

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM RICHLAND COUNTY
Court of Common Pleas
The Honorable Martha M. Rivers

Circuit Court Case No. 2024-CP-40-03510
Appellate Case No. 2024-001963

Sherman and Claudia Howell, ……………………………………………………….Respondents,

v.

D.R. Horton, Inc., ………………………………………………………………….Appellant.

AND

D.R. Horton, Inc., …………………………………………………………Third-Party Plaintiff,
v.

Jenkins Plumbing Company, LLC, Caryl
Mechanicals II, Inc., L&M Electric, Inc.,
Unique Stone Creations, M&L General
Construction, Inc., Alpha Omega Construction
Group, Inc., and ASC Services and Supply, Inc., ………………………..Third-Party Defendants.

REPLY BRIEF OF APPELLANT

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ARGUMENT IN REPLY

The trial court erred in not enforcing the parties' arbitration agreement. Respondents acknowledge that they agreed to arbitrate these disputes with Appellant, and they do not challenge any provision of the arbitration agreement as unconscionable. This should end the inquiry, and the arbitration agreement should be enforced.

The trial court also erred in refusing to apply the Federal Arbitration Act and the body of substantive federal law on arbitration to this dispute. Had the lower court correctly applied the law, it would have applied the *Prima Paint* doctrine, which instructs that an arbitration agreement must be analyzed on a standalone basis and any objections to other portions of the contract are not considered when determining arbitrability. Additionally, it would have been clear that no appellate or federal court has applied the merger doctrine to arbitration agreements and doing so would violate applicable law.

In short, the parties agreed to arbitrate this dispute, and that agreement should be enforced.

I. The Parties' Arbitration Agreement Is Not Unconscionable.

The Howells do not argue that they did not agree to arbitrate construction disputes; in fact, they freely acknowledge that they specifically initialed the arbitration agreement. The Howells do not even argue that any provision of the arbitration agreement itself is unconscionable. This should end the inquiry—the parties agreed to arbitrate, and no provision of that agreement is unconscionable. Any other objections the Howells have to the Home Purchase Agreement should go to the arbitrator for resolution.

Respondents have not identified any objectionable provisions in the arbitration agreement like those struck down by other courts as unconscionable. *E.g.*, *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 615–16, 879 S.E.2d 746, 757 (2022) (agreement unconscionable where only the

homebuilder could join contractors and other third parties, and findings would not be binding in other proceedings without mutuality of parties, which the homebuilder had unilateral power to prevent); *Huskins v. Mungo Homes, LLC*, 444 S.C. 592, 595, 910 S.E.2d 474, 476 (2024) (holding that a provision in an arbitration agreement purporting to shorten the statute of limitations was "void and illegal as a matter of public policy").

Because the Howells do not contend that they did not agree to arbitrate, or that any provision in the arbitration agreement is unconscionable, the arbitration agreement should be enforced according to its terms. The lower court erred in not doing so.

II. The Only Facts Relevant to the Issue of Arbitrability Are Those Relating to the Formation of the Parties' Agreement to Arbitrate.

The only facts relevant to the threshold issue of arbitrability are those relating to the formation of the parties' agreement to arbitrate. Respondents' opening brief repeatedly discusses the factual allegations underlying their various causes of action. However, these facts are contested and have not been litigated, nor are they relevant to this Court's determination of arbitrability.

Because a fact finder has not yet determined any contested fact in this case, D.R. Horton rejects Respondents' suggestion that Appellant agrees with Respondents' framing of this case. (*See* Resp'ts' Initial Br. at 2 n.1.) In addressing the standard of review in its initial brief, D.R. Horton stated that "the underlying facts of this case are not in dispute." (Appellant's Initial Br. at 6.) D.R. Horton did not mean to suggest that it agrees with *everything* Respondents alleged, much less Respondents' characterization of those allegations. (*See* Resp'ts' Initial Br. at 2 (citing Sherman Howell Aff. ¶¶ 4, 9, Aug. 23, 2024).) Rather, D.R. Horton meant that the parties do not dispute the general basis for this dispute: Respondents bought a new home pursuant to a Home Purchase Agreement, Respondents brought claims alleging construction defects and fraud relating to

construction, and Respondents refused to arbitrate those claims pursuant to the arbitration provision in the Home Purchase Agreement.

This case hinges on a question of law—the enforceability of the arbitration provision—which this Court reviews de novo. *See, e.g.*, *Shipyard Prop. Owners' Ass'n v. Mangiaracina*, 307 S.C. 299, 308, 414 S.E.2d 795, 801 (Ct. App. 1992) ("Where an action presents a question as to the construction of a written contract and the language of the contract is clear and unambiguous, the question is not one of fact but one of law."); *cf. Gen. Equip. & Supply Co. v. Keller Rigging & Constr., SC, Inc.*, 344 S.C. 553, 556, 544 S.E.2d 643, 645 (Ct. App. 2001) (remarking that "the determination of whether a party waived its right to arbitrate is a legal conclusion subject to de novo review" (citation and internal quotation marks omitted)).

The facts relevant to the parties' agreement to arbitrate are that: (1) Appellant and Respondents signed the Home Purchase Agreement, which includes an arbitration agreement; (2) Respondents individually initialed the arbitration agreement in section 15 (Home Purchase Agreement § 15); and (3) Respondents do not challenge any provision of section 15 as unconscionable. Under these uncontested facts, the parties' agreement to arbitrate should be enforced.

III. The FAA Controls Because New Home Construction Plainly Implicates Interstate Commerce.

The lower court wrongly held that the FAA did not apply to the Howells' new home construction contract. If a transaction implicates interstate commerce, the Federal Arbitration Act controls along with its "body of federal substantive law." *Southland Corp. v. Keating*, 465 U.S. 1, 11 (1984). The United States Supreme Court has long held that the FAA supplies a body of federal substantive law that applies in federal and state courts to transactions involving interstate

commerce because of "Congress' broad power to fashion substantive rules under the Commerce Clause." *Id.* at 11; *see also id.* at 12 (observing that the Court's statements in *Prima Paint*[1] "that the Arbitration Act was an exercise of the Commerce Clause power clearly implied that the substantive rules of the Act were to apply in state as well as federal courts"). Courts have interpreted "the words 'involving commerce' [as] the functional equivalent of 'affecting commerce,' which typically indicates Congress' intent to exercise its commerce power in full." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 591, 553 S.E.2d 110, 115 (2001).

The South Carolina Supreme Court has long held that new home construction implicates interstate commerce and the FAA. *See Damico*, 437 S.C. at 608, 879 S.E.2d at 753 ("The transactions here manifestly involve interstate commerce, as they involved the construction of new homes built to Petitioners' specifications rather than the purchase of pre-existing homes."); *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458 n.8, 730 S.E.2d 312, 318 n.8 (2012) ("We emphasize that had the Agreement actually encompassed the construction of the residence, it would have been subject to the FAA as our appellate courts have consistently recognized that contracts for construction are governed by the FAA."); *Episcopal Housing. Corp. v. Fed. Ins. Co.*, 269 S.C. 631, 640, 239 S.E.2d 647, 652 (1977) (observing that construction contracts for new buildings implicate interstate commerce because "it would be virtually impossible to construct [a building] with materials, equipment and supplied all produced and manufactured solely within the State of South Carolina"). This means that federal arbitration law preempts state law in transactions involving the construction of new homes. *See, e.g.*, *Damico*, 437 S.C. at 608, 879 S.E.2d at 753 (recognizing the preemptive effect of federal law).

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[1] *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395 (1967).

The trial court and Respondents ignore United States Supreme Court and South Carolina Supreme Court precedent on this issue. The trial court's analysis largely ignores the FAA and its body of substantive law governing interstate commerce, concluding that the South Carolina Uniform Arbitration Act ("SCUAA") governs the parties' dispute. The court based its decision in large part on the header in the Home Purchase Agreement, which states that the agreement is subject to arbitration under the SCUAA. (Order at 6.) As Appellant previously noted, the header that refers to the SCUAA is simply the notice that *allows* disputes to be arbitrated under the SCUAA. (Appellant's Initial Br. at 10.) It does not *require* disputes to be arbitrated under the SCUAA's substantive rules, and it certainly does not allow parties to sidestep the FAA. (*See id.*) Indeed, as Appellant demonstrated, it is not even a true choice of law provision.[2] (*See id.* (citing *Toler's Cove Homeowners Ass'n v. Trident Constr. Co.*, 355 S.C. 605, 609–10, 586 S.E.2d 581, 583–84 (2003)).

Respondents wrongly argue that the Howells' new home purchase did not implicate interstate commerce and that the *Bradley* case controls because the Howells purchased a completed home. However, the situation here is more like *Damico* than *Bradley*. In *Bradley*, the parties' home purchase agreement was purposefully drafted to identify the homebuilder, Brentwood

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[2] Respondents contend that this argument is not preserved for appellate review because it was not made to the court below. (Resp'ts' Initial Br. at 25.) "It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review." *Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998). Moreover, the argument must be "raised in a timely manner" and "with sufficient specificity." *S.C. Dep't of Transp. v. First Carolina Corp. of S.C.*, 372 S.C. 295, 302, 641 S.E.2d 903, 907 (2007) (citation omitted). However, the issue need not be raised with the "exact words" used on appeal, so long as it was made "with sufficient specificity to allow the trial court to rule on the issue." *Id.* In this case, Appellant has consistently maintained that the header satisfies the notice requirement of the SCUAA, but the parties' dispute is governed by the FAA. (*See* D.R. Horton's Mem. Supp. Mot. Stay Action & Compel Arbitration at 6–10.) Therefore, this issue was sufficiently raised to and ruled upon by the trial court.

Homes, as the "seller", for Brentwood Homes to disclaim any role as Bradley's contractor, and to make explicit that Bradley was purchasing a completed dwelling:

> It is understood that Purchaser is buying a completed dwelling and that Seller is not acting as a contractor for Purchaser in the construction of a dwelling. Purchaser will acquire no right, title or interest in the dwelling except the right and obligation to purchase the same in accordance with the terms of this Agreement upon the completion of the dwelling.

Bradley, 398 S.C. at 450 n.3, 730 S.E.2d at 313 n.3 (emphasis added). In analyzing whether this agreement fell under intestate commerce, it was crucial for the court that the agreement "specifically provide[d] that Bradley agreed to purchase a completed dwelling rather than contract for the construction of a dwelling." *Id.* at 458, 730 S.E.2d at 318. The court also found it notable that the buyer did not sign portions of the contract dealing with new construction—where the buyer could select additional options and personalize the home. *Id.* ("Notably, the provisions of the Agreement providing for 'New Construction,' 'House Plan,' 'Options,' and 'Color Selection,' are eliminated as 'N/A' and were not signed by Bradley.").

In contrast to *Bradley*, there is no dispute that the Howells' Home Purchase Agreement was a contract for the construction of a new home. Respondents claim that Appellant "provided no direct evidence that [Respondents' home] was still under construction at the time [Respondents] signed the Home Purchase Agreement." (Resp'ts' Initial Br. at 23.) Respondents erroneously suggest that Appellant relies on the arguments of counsel, ignoring the plain language of the Home Purchase Agreement and the numerous provisions—which they signed—that make sense only in the context of new home construction. (*See* Appellant's Initial Br. at 9.) The Home Purchase Agreement contains numerous references to the "new home" and construction, it gave the Howells numerous opportunities to select certain home features, which they did and signed for separately,

and it provided for a final walkthrough upon completion of the house prior to closing, a provision that only makes sense in the context of a newly constructed house. (App. Initial Br. at 8–9.)

Like the circuit court in this case, the circuit court in *Damico* erroneously held that home construction contracts did not implicate interstate commerce and it refused to apply the FAA. 437 S.C. at 607 n.5, 879 S.E.2d at 752 n.5. The South Carolina Supreme Court easily rejected the circuit court's position, observing that "[t]he transactions here manifestly involve interstate commerce, as they involved the construction of new homes built to Petitioners' specifications rather than the purchase of pre-existing homes." *Id.* at 608, 879 S.E.2d at 753. The Howells' Home Purchase Agreement therefore falls under *Damico* and implicates interstate commerce and federal substantive law, including the *Prima Paint* doctrine.

IV. The *Prima Paint* Rule of Severability Applies to the Home Purchase Agreement.

The *Prima Paint* doctrine is part of the body of substantive federal law that applies to all transactions involving interstate commerce, including the Howells' purchase of their newly constructed home from D.R. Horton.

a. The *Prima Paint* Doctrine Applies to State Courts

The *Prima Paint* rule of severability provides that the arbitration provision is severable from the remainder of the contract and is analyzed on a standalone basis to determine if arbitration is enforceable. *Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 445–46 (2006) (noting that "unless the challenge is to the arbitration clause itself, the issue of the contract's validity is considered by the arbitrator in the first instance"). When an arbitration agreement is analyzed under the FAA, the *Prima Paint* doctrine requires courts first "to separate the arbitration provision from the rest of the contract." *Doe v. TCSC, LLC*, 430 S.C. 602, 607, 846 S.E.2d 874, 876 (Ct. App. 2020). With the arbitration provision separated, courts should then consider only "challenges

specifically [to] the validity of the agreement to arbitrate." *Rent-A-Ctr., W., Inc. v. Jackson*, 561 U.S. 63, 70 (2010) (emphasis added) (citation omitted).

In *Buckeye Check Cashing*, the borrowers argued that under Florida state law the contracts at issue charged usurious interest rates, making the contracts void or even criminal on their face. 546 U.S. at 443. The borrowers also argued that the *Prima Paint* doctrine of severability did not apply in state court and did not apply to a void contract. *Id.* at 447. The Supreme Court rejected this narrow reading of "contract" as only those contracts ultimately determined to be valid under state law and rejected any limitation of the *Prima Paint* doctrine as a rule of federal procedure. The Court reaffirmed its prior rulings that "regardless of whether the challenge is bought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator." *Id.* at 449.

Likewise, here, *even if* the parties agreed to arbitrate under the SCUAA, federal substantive law provides that the arbitration agreement must be separately analyzed on the question of arbitrability. All other challenges to the contract are for the arbitrator to decide. Because Respondents do not challenge any portion of the arbitration agreement in Section 15, any other challenge they have to other portions of the Home Purchase Agreement are for the arbitrator.

Respondents argue that objectional provisions in Section 14 render the arbitration agreement in Section 15 unconscionable and thus unenforceable. (Resp'ts' Initial Br. at 7–10.) The borrowers in *Buckeye Check Cashing* similarly argued that because the usurious interest rates made the contracts void under Florida law, they should not be required to arbitrate a contract that will later be determined void. 546 U.S. at 447. As convincing as this may sound, even under the circumstances of a potentially void contract, the Supreme Court rejected this inversion of the

Prima Paint doctrine and confined the analysis of arbitrability to the arbitration provision alone. As the Court stated:

> It is true, as respondents assert, that the *Prima Paint* rule permits a court to enforce an arbitration agreement in a contract that the arbitrator later finds to be void. But it is equally true that respondents' approach permits a court to deny effect to an arbitration provision in a contract that the court later finds to be perfectly enforceable. *Prima Paint* resolved this conundrum—and resolved it in favor of the separate enforceability of arbitration provisions. We reaffirm today that, regardless of whether the challenge is brought in federal or state court, a challenge to the validity of the contract as a whole, and not specifically to the arbitration clause, must go to the arbitrator.

Id. at 448–49. Because Respondents do not challenge any provision of the arbitration clause, all other objections to the contract are for the arbitrator to decide.

b. South Carolina Courts Apply the *Prima Paint* Doctrine

Like the borrowers in *Buckeye Check Cashing*, Respondents argue that South Carolina state courts have no such obligation to apply *Prima Paint* under the SCUAA. (Resp'ts' Initial Br. at 27–28 & n.13.) However, Respondents misread federal law and read South Carolina case law far too narrowly. There is nothing to suggest that South Carolina courts do not follow *Prima Paint*. In fact, South Carolina courts apply the doctrine under both the FAA and the SCUAA, as the Supreme Court in *Buckeye Check Cashing* ruled they must.

South Carolina appears to have adopted the *Prima Paint* doctrine more than thirty years ago in *South Carolina Public Service Authority v. Great Western Coal (Kentucky), Inc.*, 312 S.C. 559, 437 S.E.2d 22 (1993) (per curiam). In that case, the South Carolina Supreme Court observed that an "arbitration clause is separable from the [rest of the] contract" and held that "a party cannot avoid arbitration through rescission of the entire contract when there is no independent challenge to the arbitration clause." *Id.* at 562–63, 437 S.E.2d at 24. Although *Great Western* does not

specify whether the decision arose under federal or state law, later case law suggests the rule is the same under both.

Not long after *Great Western*, the South Carolina Supreme Court affirmed its adoption of *Prima Paint*. *See Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 403, 440 S.E.2d 877, 879 (1994) (citing *Prima Paint*, 388 U.S. 395; *Great Western*, 312 S.C. at 562–63, 437 S.E.2d at 24). In reversing the lower court's refusal to grant a stay, the court stated that "it is only when a party has valid grounds upon which to challenge *the arbitration clause itself* that arbitration may be avoided." *Id.* at 404, 440 S.E.2d at 879 (emphasis added). Notably, the court responded to criticism that its ruling would make arbitration provisions unreviewable by pointing to provisions of the SCUAA that contemplate judicial review under certain circumstances. *Id.* at 403–04, 440 S.E.2d at 879 (citing S.C. Code Ann. §§ 15-48-10(a), -20(a)–(b)). This makes sense only if the court was making clear that the *Prima Paint* doctrine applies to arbitration provisions under both the FAA and the SCUAA.[3]

Therefore, although the Court should hold that the Home Purchase Agreement is subject to the FAA, even under the SCUAA the arbitration provision must be considered separately from the rest of the contract.

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[3] Indeed, the South Carolina Supreme Court had no reason to "adopt" *Prima Paint* in the context of the FAA, as it was already binding precedent. *See DIRECTV, Inc. v. Imburgia*, 577 U.S. 47, 53 (2015) (discussing the "elementary point of law" that the FAA "is a law of the United States" and, therefore, "the judges of every State must follow" the U.S. Supreme Court's "authoritative interpretation[s]" of it).

V. <u>The Merger Doctrine Does Not Apply to Arbitration Agreements.</u>

Arbitration agreements do not merge into the deed. Appellants have identified numerous courts rejecting application of the merger doctrine to arbitration agreements in the new home construction context. *E.g.*, *Bushman v. Inv. Props., Ltd v. DBSI E-470 E. LLC*, No. 09-cv-00674-MSK-KLM, 2010 U.S. Dist. LEXIS 21011, at *15–16. (D. Colo. Feb. 15, 2010); *Thomas v. Sloan Homes, LLC*, 81 So. 3d 309, 313–14 (Ala. 2011); *Dress Co. v. Osburg*, 144 S.W.3d 831, 832–33 (Ky. Ct. App. 2003); *Stanford Dev. Corp v. Stanford Condo. Owners Ass'n*, 285 S.W.3d 45, 51–52 (Tex. App. 2009). Notably none of these decisions depended on the presence of express survival language in the arbitration provision. Respondents have not identified a single case holding that an arbitration agreement was merged into the deed at closing.

Application of the merger doctrine to arbitration agreements would run contrary to federal law providing for broad enforcement of arbitration agreements. The only limits on the enforcement of arbitration agreements that the Supreme Court has recognized are: (1) the requirement that the contract implicates foreign or interstate commerce, and (2) state law grounds for the revocation of any contract. *Southland Corp.*, 465 U.S. at 10–11. The Supreme Court has rejected any other state law limit on the enforcement of arbitration agreements. *Id.* at 11 ("We see nothing in the [FAA] indicating that the broad principle of enforceability is subject to any additional limitations under state law."); *see also AT&T Mobility v. Concepcion*, 563 U.S. 333, 341 (2011) (discussing the FAA's preemptive effect against state rules "normally thought to be generally applicable" when those rules are "applied in a fashion that disfavors arbitration"); *Saturn Distrib. Corp. v. Williams*, 905 F.2d 719, 723 (4th Cir. 1990) (holding that the FAA "preempt[s] state rules of contract formation which single out arbitration clauses and unreasonably burden the

ability to form arbitration agreements"); *cf. Lamps Plus, Inc. v. Varela*, 587 U.S. 176, 189 (2019) (rejecting use of a state rule of construction to interpret an ambiguous arbitration agreement against the drafter and reaffirming that "the FAA provides the default rule for resolving certain ambiguities in arbitration agreements"[4]). Respondents have failed to identify *any* federal or appellate authority affirming use of a merger argument to invalidate an arbitration agreement.

In short, Respondents have not raised any valid state law challenges to revoke their entering into the arbitration agreement. Therefore, the arbitration agreement must be enforced.

CONCLUSION

For the reasons expressed above, the trial court erred in denying D.R. Horton's motion to compel arbitration.

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[4] This is equally applicable to Respondents' argument that "if there are any ambiguities in the [Home Purchase] Agreement regarding whether the arbitration provision survived merger with the deed, such ambiguities would be construed against D.R. Horton." (Resp'ts' Initial Br. at 35–36.) Federal precedent forbids the use of such state rules of construction to frustrate the purposes of the FAA.

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AND

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Jenkins Plumbing Company, LLC, Caryl Mechanicals II, Inc., L&M Electric, Inc., Unique Stone Creations, M&L General Construction, Inc., Alpha Omega Construction Group, Inc., and ASC Services and Supply, Inc.,

Third-Party Defendants.

PROOF OF SERVICE

The undersigned does hereby certify that on May 27, 2025, the Reply Brief of Appellant was served by email on all counsel of record as follows. A copy of the sent email is enclosed as **Exhibit 1** with this Proof of Service.

The undersigned certifies that the Reply Brief of Appellant was served by U.S. Mail on the Third-Party Defendants L&M Electric, Inc. and Unique Stone Creations, addressed as follows:

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EXHIBIT 1

From:	Natascha Genc
To:	ianduggan@callisontighe.com; harrydixon@callisontighe.com; will@richardsonthomas.com; terry@richardsonthomas.com; grace@richardsonthomas.com; rwylie@mullenwylie.com; jhills@mullenwylie.com; aethompson@mullenwylie.com; trippett.boineau@mgclaw.com; matthew.laney@mgclaw.com; dean@bestlawsc.com; jenkins@bestlawsc.com; dianne@bestlawsc.com; pcristaldi@rclawsc.com; acampbell@rclawsc.com; ebrown@rclawsc.com; rescalante@rclawsc.com; jrogers@wardfirm.com; jclark@wardfirm.com; fhgrimball@richardsonplowden.com
Cc:	John Crawford; Kim Wooten; David Paavola; Jacob Henerey; Amelia Farmer; Angelia Shaw; Cara Smith
Subject:	RE: Sherman and Claudia Howell v D.R. Horton, Inc. (Appellate Case No. 2024-001963)
Date:	Tuesday, May 27, 2025 3:57:00 PM
Attachments:	image001.png 25.05.27 DRH Reply Brief.pdf

Dear Counsel:

Attached please find D.R. Horton, Inc.'s Reply Brief in the above-referenced matter. We plan on emailing this to Court Administration and filing in the Court of Appeals shortly.

With kindest regards,

Natascha Genc
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