

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
COURT OF COMMON PLEAS

Edgar W. Dickson, Circuit Court Judge

Case No. 2018-000826

Colleton River Plantation Club, Inc.....Appellant,

v.

Jennifer L. Holmes.....Respondent.

INITIAL BRIEF OF APPELLANT COLLETON RIVER PLANTATION CLUB, INC.

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STATEMENT OF ISSUE ON APPEAL

Did the Trial Court err in granting Respondent's Motion to Dismiss the Plaintiff's claims, holding the Trial Court lacked both personal and *in rem* jurisdiction?

STATEMENT OF THE CASE

A. Procedural History

This case arises out of alleged unpaid dues and fees owed to the Appellant, Colleton River Plantation, Inc. ("Colleton"), a not-for-profit property owners association located in Bluffton, South Carolina, by the Respondent, Jennifer L. Holmes ("Holmes"), an owner of record of Lot 173 ("Property") described as follows:

ALL that certain piece, parcel or lot of land, lying and being in Beaufort County, South Carolina and being shown and described as ***Lot 173, Block "C" of Phase 2-A, Colleton River Plantation***, on a plat thereof entitled "A Subdivision Plat of Lots 89- 93 and 163-176, Being a Portion of Block "C" of Phase 2-A, Colleton River Plantation Single Family Homesites, Beaufort County, South Carolina", which plat is dated February 23, 2000, prepared by Thomas & Hutton Engineering Co., Savannah, Georgia, Boyce L. Young, SCRLS No. 11079, and recorded in the Office of the Register of Deeds for Beaufort County, South Carolina, in Plat Book 73 at Page 111. For a more detailed description as to the courses and distances, metes and bounds of the above-mentioned lots, reference is had to said plat of record.

SAID PROPERTY is further conveyed subject to all other applicable rights, obligations, easements, restrictions and reservations as recorded in the Office of the Register of Deeds for Beaufort County, South Carolina.

This is the same property conveyed to Charles B. Holmes and Jennifer L. Homes by Deed from Edward K. Elanjian, recorded in the Register of Deeds Office for Beaufort County, South Carolina on August 2, 2010 in Book 2978 at Page 0072.

Beaufort County Tax Map Reference: R600 017 000 0039 0000.

(Title to Real Estate, July 23, 2010).

This action was initiated on November 30, 2016, when Colleton filed its Notice and Certificate of Lien with the Beaufort County Office of the Register of Deeds. (Notice & Certificate of Lien, Dec. 6, 2016). Then, on December 9, 2016, Colleton sent a Notice Under the Fair Debt Collection Practices Act, and that same day filed its Summons and Complaint with the Beaufort County Court of Common Pleas. (Notice Under FDCPA, Dec. 9, 2016; Summons & Compl., Dec. 9, 2016). Colleton's Complaint alleged a debt owed to Colleton by Holmes by virtue of Holmes' ownership interest in the Property located in Colleton River Plantation, which Property is subject to the Third Amended and Restated Colleton River Plantation Declaration of Covenants and Provisions for Membership in Colleton River Plantation Club, Inc. ("Covenants") of the Colleton River Plantation development. (Summons & Compl., Dec. 9, 2016).

In response to Colleton, Holmes filed a Motion to Dismiss on January 17, 2017, pursuant to Rule 12(b)(2), SCRCF, alleging that Holmes "does not have any legal or equitable interest in the subject property." (Notice of Mot. & Mot. To Dismiss, Jan. 17, 2017). Colleton filed a Return to Holmes' Motion to Dismiss, and the Trial Court held a hearing before the Honorable Edgar W. Dickson on May 30, 2017. (Pl's. Return to Def's. Mot. to Dismiss, Jan. 24, 2017). After the hearing, Judge Dickson entered the Order Granting Defendant's Motion to Dismiss, on July 10, 2017, holding that Holmes was not subject to the personal or *in rem* jurisdiction of the Trial Court concerning the Property, because Holmes lost all legal and equitable rights to the Property upon the divorce of the Holmes from the now deceased, Charles B. Holmes, in the State of Indiana on July 25, 2012. (Order Granting Def's. Mot. to Dismiss, § Conclusions of Law ¶ 1, July 10, 2017). Additionally, Judge Dickson found that "no deed was recorded transferring the property to Charles B. Holmes which was mandated by the parties' Divorce Decree." (Order Granting Def's. Mot. to Dismiss, § Findings of Fact ¶ 6).

In response, Colleton filed a Motion for Reconsideration and an Amended and Restated Motion for Reconsideration on July 19 and 20, 2017, respectively. (Pl's. Mot. for Recons., July 19, 2017; Pl's. Am. & Restated Mot. for Recons., July 20, 2017). Then, Judge Dickson entered the Order Denying Motion (and Amended Motion) for Reconsideration on April 16, 2018. (Order Den. Mot. for Recons., Apr 16, 2018). Accordingly, Colleton served the Notice of Appeal on May 2, 2018, and the same was filed with the Court of Appeals on May 3, 2018.

B. Factual History

Holmes and her late husband, Charles B. Holmes¹ ("Ex-Husband"), purchased the Property in Colleton River Plantation, Bluffton, South Carolina on or around July 23, 2010. (Title to Real Estate, July 23, 2010). Thereafter, Mr. and Ms. Holmes were divorced in the State of Indiana, with the Dissolution Settlement Agreement ("Divorce Agreement") signed on or around July 25, 2012. In the Divorce Agreement, section 5.3 South Carolina Property, the wife, Holmes, was to "execute a quit claim deed for each property in favor of Husband and in exchange for same, Husband shall set over to Wife Thirty Thousand Seven Hundred Fifty Dollars." (Divorce Agmt., § 5.3). However, after the divorce was final, Holmes did not execute a quit claim deed to her Ex-Husband for the Property, and Holmes remained a record owner of the Property until she attempted to deed the Property to the Estate of Charles B. Holmes on or around February 21, 2017. (Title to Real Estate, Feb. 21, 2017). Thus, at the time Colleton filed and served this lawsuit against Holmes, Holmes was a record owner of the Property.

At the time of the filing of this lawsuit, and as alleged by Colleton, up until the present day, Holmes remains subject to the Covenants of Colleton River Plantation. Specifically, Holmes

¹ The Trial Court stated in its Findings of Facts in the Order Granting Defendant's Motion to Dismiss that Charles B. Holmes passed away on May 26, 2016. (Order Granting Def's. Mot. To Dismiss, § Findings of Fact ¶ 5). Furthermore, no estate was probated in South Carolina for Charles B. Holmes, nor was an ancillary proceeding filed to probate any assets of Mr. Holmes.

remains obligated under the Covenants to pay all applicable assessments and fees according to the following Covenant provisions:

By accepting a deed or entering into a recorded contract to purchase any Lot, each owner covenants and agrees to pay all assessments authorized in the Governing Documents, together with any collection costs, interest or late charge equal to 1.5% per month of the unpaid amount (not to exceed the maximum charges allowed by law). Any delinquency shall be the personal obligation of each Owner and a lien upon each Lot until paid in full. Upon a transfer of title to a lot, the grantee shall be jointly and severally liable for any assessments and other charges due at the time of conveyance.

...

No Owner may exempt himself or herself from liability for assessments by non-use of Common Property, abandonment of his or her Lot, or non-use of services provided to all Lots. The obligation to pay assessments is a separate and independent covenant on the part of each Owner.

(Covenants § 12.6).

STANDARD OF REVIEW

“The question of whether a court may exercise personal jurisdiction over a nonresident defendant is one that must be resolved upon the facts of each particular case.” *Hidria, USA, Inc. v. DELO*, 415 S.C. 533, 539, 783 S.E.2d 839, 842 (Ct. App. 2016) (citing *Moosally v. W.W. Norton & Co.*, 358 S.C. 320, 327, 594 S.E.2d 878, 882 (Ct. App. 2004)). “The decision of the trial court should be affirmed unless unsupported by the evidence or influenced by an error of law.” *Id.* (citing *Moosally*, 358 S.C. at 327, 594 S.E.2d at 882).

Colleton in this action bears the burden of proving the existence of personal jurisdiction over Holmes, a nonresident defendant, via the South Carolina long-arm statute. *Id.* (citing *Moosally*, 358 S.C. at 327, 594 S.E.2d at 882). “At the pretrial stage, the burden of proving personal jurisdiction over a nonresident is met by a *prima facie* showing of jurisdiction either in the complaint or in affidavits.” *Id.* (citing *Moosally*, 358 S.C. at 328, 594 S.E.2d at 882). “When a motion to dismiss attacks the allegations of the complaint on the issue of jurisdiction, the court

is not confined to the allegations of the complaint but may resort to affidavits or other evidence to determine jurisdiction.” *Id.* (citing *Sullivan v. Hawker Beechcraft Corp.*, 397 S.C. 143, 150, 723 S.E.2d 835, 839 (Ct. App. 2012)).

ARGUMENT

I. THE TRIAL COURT HAS JURISDICTION OVER HOLMES.

A. The Law of Requisite Minimum Contacts

For a court to have jurisdiction over a nonresident defendant, the court must have specific jurisdiction over the defendant. *Id.* at 540, 783. S.E.2d at 842. “Specific jurisdiction is the State’s right to exercise personal jurisdiction because the cause of action arises specifically from a defendant’s contacts with the forum; specific jurisdiction is determined under” the South Carolina Long Arm Statute. *Id.* (quoting *Coggeshall v. Reprod. Endocrine Assocs. of Charlotte*, 376 S.C. 12, 16, 655 S.E.2d 476, 478 (2007)).

“The determination of whether a court may exercise personal jurisdiction over a nonresident involves a two-step analysis.” *Id.* (quoting *Sullivan*, 397 S.C. at 150, 723 S.E.2d at 839). “The trial court must (1) determine whether the South Carolina long-arm statute applies and (2) whether the nonresident’s contacts in South Carolina are sufficient to satisfy due process.” *Id.* (quoting *Sullivan*, 397 S.C. at 150, 723 S.E.2d at 839).

South Carolina’s long-arm statute provides that “a court may exercise personal jurisdiction over a person who acts directly or by an agent as to a cause of action arising from the person’s . . . (e) having an interest in, using, or possessing real property in this State.” S.C. Code Ann. § 36-2-803(e). The trend in court decisions in this State has developed a body of law in which the long-arm statute is shown to be coextensive with the due process clause, such that the long-arm statute extends to the outer limits of the due process clause. *Hidira*, 415 S.C. at 540, 783 S.E.2d at 843; *Cribb v. Spatholt*, 382 S.C. 490, 498–99, 676 S.E.2d 714, 718–19 (Ct. App. 2009). Thus,

the analysis is compressed into a due process analysis only. *Cribb*, 382 S.C. at 499, 676 S.E.2d at 719.

“Because we treat our long-arm statute as coextensive with the due process clause, the sole question becomes whether the exercise of personal jurisdiction in this case would violate the strictures of due process.” *Hidira*, 415 S.C. at 540, 783 S.E.2d at 843 (quoting *Moosally*, 358 S.C. at 329, 594 S.E.2d at 883). “Due process requires that there exist minimum contacts between the defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice.” *Id.* (quoting *Moosally*, 358 S.C. at 330, 594 S.E.2d at 883).

“The determination of whether the requirements of due process are satisfied involves a two-prong analysis of (1) the ‘power’ prong, under which minimum contacts grant a court the ‘power’ to adjudicate the action; and (2) the ‘fairness’ prong, which requires the exercise of jurisdiction to be ‘reasonable’ or ‘fair.’” *Id.* (citing *S. Plastics Co. v. S. Commerce Bank*, 310 S.C. 256, 260, 423 S.E.2d 128, 131 (1992)). A plaintiff has the burden to satisfy both prongs, and if either prong fails the court lacks personal jurisdiction over the nonresident. *Id.*

“In deciding whether finding of minimum contacts comports with the due process requirements of traditional notions of fair play and substantial justice, the court must consider: (1) the duration of the activity of the nonresident within the state; (2) the character and circumstances of the commission of the nonresident’s acts; (3) the inconvenience resulting to the parties by conferring or refusing to confer jurisdiction over the nonresident; and (4) the State’s interest in exercising jurisdiction.” *Moosally*, 358 S.C. at 331, 594 S.E.2d at 884 (citing *Clark v. Key*, 304 S.C. 497, 405 S.E.2d 599 (1991); *Colite Indus. v. G.W. Murphy Constr. Co.*, 297 S.C. 426, 377 S.E.2d 321 (1989); *South Carolina Dep’t of Soc. Servs. v. Basnight*, 346 S.C. 241, 551 S.E.2d 274 (Ct. App. 2001)).

Under the first prong, the power prong, the minimum contacts analysis requires that the court find the nonresident defendant directed its activities to South Carolina, and that the “cause of action arises out of or relates to those activities.” *Id.* at 331–32, 594 S.E.2d at 884 (citing *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985); *S. Plastics Co.*, 310 S.C. at 260, 423 S.E.2d at 131). “It is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws.” *Id.* (citing *Hanson v. Denckla*, 357 U.S. 235 (1958); *S. Plastics Co.*, 310 S.C. at 261, 423 S.E.2d at 131).

Under the second prong, the fairness prong, the court examines the following factors: “the burden on the defendant, the extent of the plaintiff’s interest, South Carolina’s interest, efficiency of adjudication, and the several states’ interest in substantive social policies.” *Id.* at 332, 594 S.E.2d at 885.

B. Under the Law and Facts, Holmes is Subject to the Specific and Personal Jurisdiction of the Trial Court.

Holmes is subject to the specific and personal jurisdiction of the Trial Court because of her ownership interest in the Property in Colleton River Plantation. Holmes sought out South Carolina as a place to purchase real property, and in doing so has enjoyed the benefits and protections of the laws of South Carolina. It is of fundamental public interest that South Carolina’s courts adjudicate disputes concerning real property located in South Carolina.

A jurisdictional factor of the South Carolina Long Arm Statute is that a South Carolina court can exercise personal jurisdiction over a nonresident defendant if that nonresident has an interest in, uses, or possesses real property in South Carolina. S.C. Code Ann. § 36-2-803(e). Holmes has had an interest in and possessed real property in South Carolina since 2010, when she and her Ex-Husband purchased the Property. (Title to Real Estate, July 23, 2010).

Holmes' activities in South Carolina satisfy the requirements of due process in the personal jurisdiction analysis. Holmes has directed her activities to South Carolina by virtue of Holmes owning real property in South Carolina, and this case arises out of Holmes' ownership of the Property located in South Carolina. Furthermore, Holmes has entered into a contract in South Carolina, because when she acquired an ownership interest in the Property, Holmes agreed to the Covenants to which the Property is bound. (Title to Real Estate, July 23, 2010). Holmes has purposely availed herself of the benefits and protections of the laws of South Carolina by owning real property in South Carolina, and in doing so has become subject to the personal jurisdiction of the Trial Court.

Additionally, it is fair for the Trial Court to exercise jurisdiction over Holmes in this case. While Holmes lives outside of South Carolina, Holmes' burden in adjudicating this matter in South Carolina is slight in comparison to Colleton's interest in this matter, and South Carolina's public interest in this matter. Colleton has a substantial interest in this matter because Holmes' Property is not the only lot in the Colleton River Plantation for which property owners are required to pay annual dues for the right and privileges of owning real property in the development. Colleton must seek to enforce its rights under the Covenants to which all lots are subject, lest the development become defunct because of property owners' refusals to pay the dues and fees, which they agreed to pay. South Carolina has a substantial public interest in adjudicating this matter in South Carolina for the fact that the real property is located in South Carolina, and a South Carolina court is best equipped to interpret and apply the law to which the parties, real property, and applicable Covenants are subject. It will also be most efficient to adjudicate this matter in South Carolina because the majority of the witnesses are located in South Carolina. Finally, the several national state's interest will be best served by adjudication of this matter in South Carolina because states have a substantial interest in determining matters that involve real

property located within their respective borders. To not do so would result in a system in which laws are applied inconsistently in the same state, by out-of-state courts, to determine property interests and disputes in that state.

C. The Trial Court's Ruling that Holmes is not Subject to the *In Rem* Jurisdiction of the Trial Court is in Error.

The Trial Court held that Holmes was not subject to the “*in rem* jurisdiction concerning the subject property.” (Order Granting Def’s. Mot. to Dismiss, § Conclusions of Law ¶ 1). This holding by the Trial Court was in error because the issue of *in rem* jurisdiction was not addressed in the record before the Trial Court, Holmes did not move before the Trial Court on the ground of the lack of *in rem* jurisdiction, the Trial Court did not cite any authority to support its finding of a lack of *in rem* jurisdiction, and the Trial Court did not cite in its Order any reference to where the issue of *in rem* jurisdiction was raised by either party. *Id.* For these reasons, the holding of the Trial Court, as to *in rem* jurisdiction, should be reversed.

II. HOLMES’ DIVORCE AGREEMENT DOES NOT IMPACT HER PROPERTY RIGHTS IN THE SUBJECT PROPERTY BECAUSE HOLMES DID NOT DEED THE SUBJECT PROPERTY TO HER EX-HUSBAND AS REQUIRED IN THE DIVORCE AGREEMENT.

A. The Divorcee Agreement Required a Deed from Holmes to Transfer Her Property Rights.

As found by the Trial Court, Holmes did not record a deed transferring the Property to her Ex-Husband as required by their Divorce Decree. (Order Granting Def’s. Mot. to Dismiss, § Findings of Fact ¶ 6). Thus, Holmes remained a record owner of the Property, and was subject to the Covenants on the Property, and is liable for all dues and fees pursuant to the Covenants. (Covenants at § 12.6).

Furthermore, the deed Holmes attempted to use, on February 21, 2017, to transfer title to the Property to the estate of her Ex-Husband fails as a matter of law because the deed does not

transfer the Property to a natural person or legal entity. (Title to Real Estate, Feb. 21, 2017). “The Estate of Charles B. Holmes” is not a natural person or legal entity, and is incapable under the law of South Carolina of taking title to real estate. Also, no information, documentation, or evidence was presented to the Trial Court that the Deed was ever delivered to the grantee, that delivery was accepted by the grantee, or that on February 21, 2017, the Estate of Charles B. Holmes was still open and active. *See Walker v. Frazier*, 19 S.C. Eq. (2 Rich. Eq.) 99 (1845). Therefore, title to the Property remains vested in the Defendant.

In South Carolina, a transfer of the title to real property is not effective until a proper deed is recorded. S.C. Code Ann. § 30-7-10. The deed mandated by the Divorce Decree was never recorded; no allegation was made in the Trial Court that the consideration mandated by the Divorce Decree was paid, nor was any allegation made that Holmes and her Ex-Husband made any effort to comply with the terms of the Divorce Decree to effectuate transfer of Holmes’ interest in the Property to her Ex-Husband. Thus, legal title to the Property remains with Holmes.

The Trial Court’s holding that Holmes “lost all legal and equitable rights to the subject property upon the divorce of the parties” is unsupported by the evidence and influenced by an error of law. (Order Granting Def’s. Mot. to Dismiss, § Conclusions of Law ¶ 1). Specifically, a divorce decree does not extinguish the right of a creditor to sue over a debt concerning real property if the divorce decree is not properly filed with the register of deeds to put the creditor on notice of the transfer of real property rights. *See* S.C. Code Ann. § 30-5-90 (stating that all marriage settlements affecting the title to real property must be recorded within one month after its lodgment). *See also Laborde v. Penn*, 16 S.C. Eq. (McMul. Eq.) 448 (1842). Thus, Holmes, at the time of filing of this case, was a record owner of the Property and remained bound by the Covenants thereon, and contrary to the Trial Court’s holding the Divorce Decree did not alter Holmes’ rights in the Property.

B. The Colleton Covenants Must be Complied with for an Effective Property Transfer.

Every lot in Colleton River Plantation is subject to the Covenants, recorded with the register of deeds, that govern the use of the lots and the payment of property owner fees and assessments. (Covenants). Holmes agreed to abide by and be bound by these Covenants when she and her Ex-Husband purchased the Property in Colleton River Plantation. (Title to Real Estate, July 23, 2010; Covenants § 12.6).

Section 12.6 of the Covenants, Obligation for Assessments, requires the payment of periodic assessments as mandated by Colleton. Holmes, by accepting the Deed, was subject to the requirement to pay assessments by virtue of her status as a record owner of the subject lot. (Title to Real Estate, July 23, 2010). Furthermore, Holmes remains obligated to pay assessments because of her invalid and illegal transfer of the Property to the estate of her Ex-Husband.

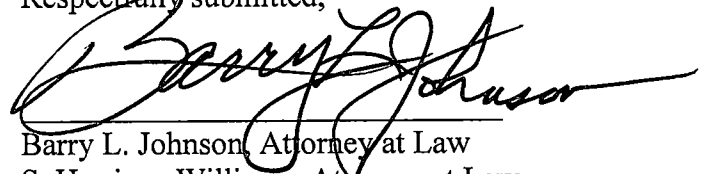
Finally, each lot in Colleton River Plantation is required to have a Designated User, and when a husband and wife purchase a lot they are both deemed the Designated User under the Covenants. (Covenants § 14.2). The purpose of the Designated User is to have a specific individual or individuals who are responsible for the payment of the annual operating assessments. (Covenants § 14.1(f)). In the event of a transfer of real property, the transferee and the previous Designated User remain jointly and severally liable to Colleton for the payment of the annual operating assessments until the new proposed Designated User is approved by Colleton. *Id.* In this case, Holmes transferred the Property to the estate of her Ex-Husband without proposing, or obtaining approval by Colleton's Board of Directors of, a new Designated User. Therefore, she remains jointly and severally liable to Colleton for the payment of all assessments, even if the transfer of the Property to her Ex-Husband's estate was effective, which Colleton maintains that such transfer was not effective. (Covenants § 14.1(f)).

CONCLUSION

Based on the analysis above, the Trial Court erred in holding that it did not have personal or *in rem* jurisdiction over Holmes. Therefore, Colleton respectfully requests that this Court find that the Trial Court does possess personal jurisdiction over Holmes, and remand this action back to the Trial Court for an adjudication on the merits of this case.

Bluffton, SC
June 28, 2018

Respectfully submitted,



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COURT OF COMMON PLEAS

Edgar W. Dickson, Circuit Court Judge

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Jennifer L. Holmes.....Respondent.

PROOF OF SERVICE

I certify that I have served the Initial Brief of Appellant Colleton River Plantation Club, Inc. on Jennifer L. Holmes, by depositing a copy of it in the United States Mail, postage prepaid, on June 28, 2018, addressed to her attorney of record, Terry A. Finger, Post Office Box 24005, Hilton Head Island, South Carolina 29225.

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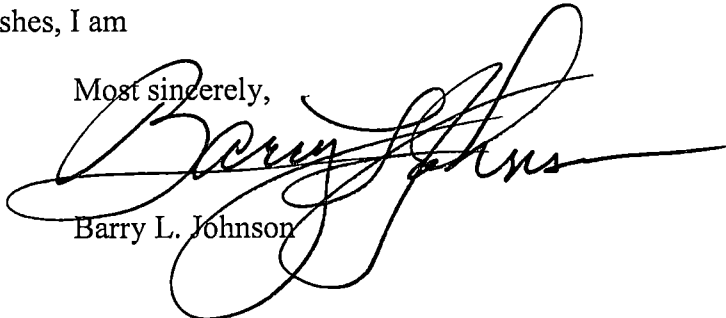
Re: Appeal of: *Colleton River Plantation Club, Inc. vs. Jennifer L. Holmes*
Appellate Case No. 2018-000826
J &D, PA File No.: C16-6403

Dear Ms. Kitchings:

Enclosed please find the original and one copy of Appellant's Initial Brief of Appellant Colleton River Plantation Club, Inc. with Proof of Service in the above referenced matter. Please file the original with the records of your office, and return the clocked copy to me in the enclosed envelope.

Thanking you, and with best wishes, I am

Most sincerely,



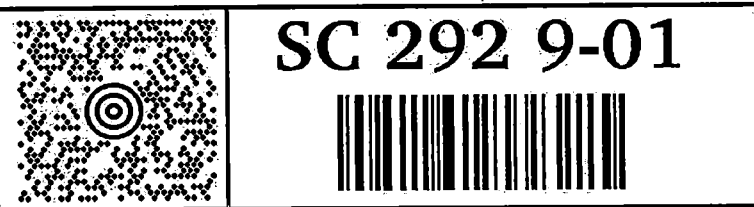
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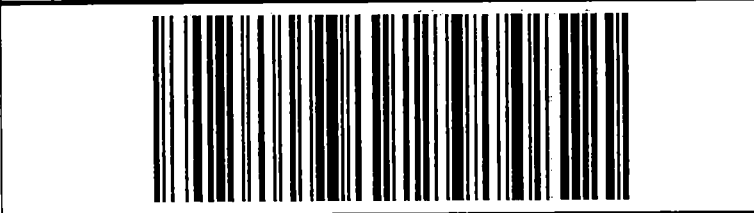
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Attn: Stephanie Kerr, CFO


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