

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

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Lower Court Case No. 2013-CP-40-7729  
Court of Appeals Case No. 2017-002325

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**RECEIVED**

AUG 15 2018

SC Court of Appeals

THE GATES AT WILLIAMS-BRICE CONDOMINIUM  
ASSOCIATION and KATHARINE SWINSON, Individually,  
and on behalf of all others similarly situated #296848,

Appellants,

v.

QUALITY BUILT, LLC and COAST TO COAST  
ENGINEERING SERVICES, INC. d/b/a CRITERIUM  
ENGINEERS,

Respondents.

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**RESPONDENT QUALITY BUILT, LLC'S REPLY TO APPELLANTS' RETURN TO  
RESPONDENT QUALITY BUILT, LLC'S NOTICE OF DEFICIENCY OF RECORD ON  
APPEAL AND MOTION TO CORRECT RECORD ON APPEAL**

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NOW COMES Respondent, Quality Built, LLC ("Respondent"), by and through its undersigned counsel, and pursuant to Rule 240(f) of the South Carolina Appellate Court Rules ("SCACR"), respectfully replies to Appellants' Return to Respondent's Notice of Deficiency of Record on Appeal and Motion to Correct Record on Appeal. Respondent incorporates its arguments presented in its original Motion as if fully set forth herein, and states further:

Rule 210(c), SCACR provides that "[t]he Record on Appeal shall include all matter designated to be included by any party under Rule 209 and shall comply with the requirements of Rule 267." Respondent, pursuant to Rule 209(a) SCACR, filed its Designation of Matter to be

Included in the Record on Appeal, which included the following two designations omitted by Appellants in the Record on Appeal:

- 22. Bankruptcy Court - Motion for Order Approving Sale of Property of the Estate Free and Clear of All Liens, Claims, and Encumbrances, Subject to Overbid; and Memorandum of Points and Authorities in Support Thereof (Filed 01/29/2010). (Hereinafter referred to as "Sale Motion").

The referenced Sale Motion was brought before the circuit court via Quality Built, LLC's Memorandum in Support of its Motion for Declaratory Relief or in the Alternative, Motion for Summary Judgment. See Memorandum p. 8 (attached). The Sale Motion was filed on January 29, 2010, as part of Qualitybuilt.com's bankruptcy proceedings. The bankruptcy matter was referenced in the Memorandum, motions and opposing responses, including Appellants' Memorandum in Opposition to Quality Built, LLC's Motion for Declaratory Relief or in the Alternative, Motion for Summary Judgment. Moreover, The Order (I) Authorizing the Sale of Substantially All of the Debtor's Assets Free and Clear of All Liens, Claims, Interests and Encumbrances, (II) Authorizing the Assumption and Assignment of Certain Executory Contracts and Unexpired Leases in Connection Therewith and Related Procedures and (III) Granting Related Relief (hereinafter referred to as "Order Authorizing Sale") was also brought before the circuit court in Respondent's Memorandum and made an exhibit. The Order Authorizing Sale cites the Sale Motion ("This matter is coming before the Court on the motion, dated January 29, 2010 (the "Sale Motion")(Docket No. [ 110])") and the Sale Motion is referenced throughout said Order. Due to the extremely voluminous bankruptcy file of Qualitybuilt.com, Respondent did not want to overbear and burden the circuit court with the entire bankruptcy file as an exhibit. The entire file is a matter of public record.

- 28. Bankruptcy Court - Reply Declaration . . . to U.S. Trustee's Response to Debtor's [Qualitybuilt.com] Motion for Order Approving Sale Of Property of the Estate Free and Clear of All Liens, Claims and Encumbrances, Subject to Overbid (Filed 02/18/2010).

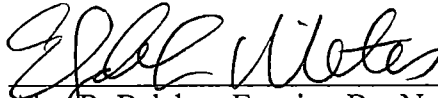
The Reply Declaration to "U.S. Trustee's Response to Debtor's Motion" was part and parcel of the Sale Motion, which was brought before the circuit court as established above.

Respondent submits that both of the documents referenced above were properly before the circuit court. In addition, however, a respondent to an appeal, as the "winner" at the trial level "may raise on appeal any additional reasons the appellate court should affirm the lower court's ruling, regardless of whether those reasons have been presented to or ruled on by the lower court." Sims v. Amisub of South Carolina, Inc., 408 S.C. 202, 214-15, 758 S.E.2d 187, 194 (Ct. App. 2014) (quoting I'On, LLC v. Town of Mt. Pleasant, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (S.C. 2000)). The Court of Appeals can, in its own discretion, review anything raised by Respondent and "if it is proper and fair to do so, rely on it to affirm the lower court's judgment." Sims, 408 S.C. at 215, 758 S.E.2d at 194. Accordingly, Respondent contends these matters are properly before the Court and should be designated in the Record.

**WHEREFORE**, for good cause shown, Respondent respectfully requests this Honorable Court issue an Order granting its Motion to Correct Record on Appeal and order Appellants to correct the Record on Appeal and serve a complete Record upon the Respondent.

*(Signature appears on succeeding page)*

Respectfully submitted,



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*Attorney for Respondent Quality Built, LLC*

Dated: August 14, 2018



Connection Therewith and Related Procedures and (III) Granting Related Relief filed on January 29, 2010 (hereinafter the "Sale Order" attached hereto as Exhibit A and incorporated herein by reference), the United States Bankruptcy Court authorized Defendant's purchase of Qualitybuilt.com's assets, free of liabilities with the exception of those explicitly named. As part of the Sale Order, the Bankruptcy Court authorized the entry of a contract called the Amended and Restated Asset Purchase Agreement by and among QualityBuilt.com as Seller and Quality Built, LLC as Buyer (hereinafter the "Purchase Agreement" attached hereto as Exhibit B and incorporated herein by reference).

The Purchase Agreement sets forth the detailed terms of the asset purchase between the two entities, including which liabilities were assumed by Defendant in the transaction. Pursuant to the Purchase Agreement and Sale Order, The Gates at Williams-Brice was not an Assumed Liability to be retained by Defendant.

Therefore, pursuant to the United States Bankruptcy Court's order and the contract between Defendant and Qualitybuilt.com, the Plaintiffs do not have a right of action against Defendant arising from any alleged services provided by Qualitybuilt.com at The Gates project. Whether the Court looks through the lens of declaratory relief or through summary judgment, either vehicle leads to the same dispositive result: Defendant should be dismissed from this action with prejudice. Holding Defendant in this action as a party would be in direct contravention to the plain meaning of the United States Bankruptcy Court's Order and the plain language of the Purchase Agreement.

### **PROCEDURAL HISTORY**

Over three years after entry of the Sale Order, on December 27, 2013 Plaintiffs filed the subject action, alleging negligence and breach of warranty against Defendant. (Plts.' Compl.) In

the Complaint, Plaintiffs allege that Defendant, its agents, servants, employees and subcontractors were negligent in failing to adequately effect quality control relating to construction of The Gates at Williams-Brice (hereinafter "the Project"). (Plts.' Compl., ¶ 39.) Moreover, Plaintiffs allege that Defendant performed an inspection with express and implied warranties, and that Defendant breached those warranties. (Plts.' Compl. ¶¶ 42-46.) In its original Complaint, Plaintiffs fail to acknowledge that neither Defendant nor any of its agents, servants, employees, or subcontractors ever performed work or consulted on the Project.

On or about January 28, 2014, Defendant, through counsel, sent correspondence to Plaintiffs' counsel advising of the Sale Order and seeking a voluntary dismissal. See Exhibit C. Upon information and belief, Defendant did not receive a response from the Plaintiffs.

Plaintiffs filed an Amended Summons and Complaint in May of 2016, adding the cause of action of Successor Liability against Defendant and adding Criterium as a Defendant to this action. (Plts.' Am. Compl.) In the Amended Complaint, Plaintiffs allege as a Third Cause of Action that Defendant is a successor to Qualitybuilt.com as a mere continuation, and Defendant is therefore liable for the obligations of Qualitybuilt.com in this action. (Plts.' Am. Compl. ¶¶ 65-67.)

Subsequent to Defendant answering the Plaintiffs' Amended Complaint in state court, Criterium removed the case to United States District Court on June 17, 2016. The Plaintiffs filed a Motion for Remand and during the pendency of the District Court's deliberation as to the motion, the discovery and pending motions in the case were stayed until the District Court remanded the case to the Richland County Court of Common Pleas on September 7, 2016. After remand, Criterium served its Answer to Plaintiffs' Complaint on October 31, 2016.

## OPERATIVE FACTS

Qualitybuilt.com was a California corporation formed on or around July 12, 1999. See Exhibit D, Qualitybuilt.com Articles of Incorporation. On August 14, 2009, Qualitybuilt.com filed for Chapter 11 Bankruptcy in the United States Bankruptcy Court for the Southern District of California. See Exhibit E, Notice of Bankruptcy Filing. The Motion for Order Approving Sale<sup>1</sup> was filed on January 29, 2010. During that time and as part of the bankruptcy proceedings, Defendant Quality Built, LLC, a Delaware limited liability company<sup>2</sup>, entered into the Purchase Agreement with Qualitybuilt.com for the purchase of various assets and liabilities, which was attached as an exhibit to the Motion for Order Approving Sale. Purchase Agreement, ¶¶ 1.1–2.2.

As part of the contract, Defendant assumed only those liabilities identified in Schedule 2.1 of the Purchase Agreement. Defendant expressly disclaimed all other liabilities, including "any liabilities or obligations with respect to . . . litigation or threatened litigation, claim, obligation, damages, costs and expenses relating to or arising out of or relating to any actions or omissions of, or services performed by, Seller . . . whether arising under contract, tort, civil or criminal law or otherwise[.]" Purchase Agreement, ¶ 2.2(e). Additionally, at the time the parties consummated the Purchase Agreement, the subject action had not been filed, nor had Qualitybuilt.com even been notified of a pending claim. Purchase Agreement, Schedule 5.10.

On March 11, 2010, by order of the United States Bankruptcy Court for the Southern District of California, Defendant purchased certain assets of Qualitybuilt.com from the trustee in bankruptcy pursuant to 11 U.S.C. §§ 101, 105, 363, and 365. See Sale Order. As a prerequisite

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<sup>1</sup> Full title of the motion filed is: "Motion for Order Approving Sale of Property of the Estate Free and Clear of All Liens, Claims, and Encumbrances, Subject to Overbid; and Memorandum of Points and Authorities in Support Thereof."

<sup>2</sup> Quality Built, LLC was formed as a Delaware limited liability company on July 24, 2009. See Exhibit F.

to the bankruptcy sale, the United States Bankruptcy Court authorized the Purchase Agreement and entered it as part-and-parcel of the Sale Order and transaction.

In the Sale Order, the Bankruptcy Court authorized and approved the sale

[F]ree and clear of liens, claims (as such term is defined by section 101(5) of the Bankruptcy Code), **liabilities encumbrances, rights, remedies, restrictions, and interests and encumbrances of any kind of nature whatsoever whether arising before or after the Petition Date, whether at law or in equity . . .** (collectively, "Claims") (other than certain liabilities that are expressly assumed or created by the Purchaser, as set forth in the Purchase Agreement) (collectively, the "Assumed Liabilities").

Sale Order, p. 1. In short, Defendant's liabilities were exclusively limited to those contained in the Assumed Liabilities, and the Sale Order, in no uncertain terms, discharged and released Defendant from any past, present, or future liabilities.

The Sale Order also contains numerous provisions regarding Defendant's purchase of Qualitybuilt.com's assets "free and clear" of "all [c]laims." See Sale Order, ¶¶ T-X. The Bankruptcy Court found "The Purchaser would not have entered into the Purchase Agreement . . . if the sale of the Purchased Assets was not free and clear of all Claims other than Assumed Contracts and Assumed Liabilities, or if the purchaser would, or in the future could, be liable for any such Claims, including, without limitation and as applicable, certain liabilities [] that expressly are not assumed by the Purchaser." Sale Order, ¶ W. In no uncertain terms, the Order states:

Except as otherwise provided in the Purchase Agreement, all persons and entities (and their respective successors and assigns) including, but not limited to, all debt security holder, equity security holders, affiliates, governmental, tax and regulatory authorities, lenders customers, employees, trade creditors, **litigation claimants** and other creditors, holding Claims (whether legal or equitable, secured or unsecured, known or unknown, matured or unmatured, contingent or non-contingent, liquidated or unliquidated, senior or subordinated) except for Assumed

Liabilities, arising under or out of, in connection with, or in any way relating to, [Qualitybuilt.com], the Purchased Assets, the operation of the Business prior to Closing or the transfer of the Purchased Assets to [Defendant], are hereby forever barred, estopped and permanently enjoined from asserting such Claims against [Defendant], its successors or assigns, its property or the Purchased Assets. No such persons or entities shall assert against [Defendant] or their successors in interest any Claim arising from, related to or in connection with the ownership, sale or operation of any Assets prior to Closing, except for Assumed Liabilities.

Sale Order, ¶ 10 (emphasis added). Defendant only assumed two liabilities: payment of \$69,343.04 to Mid Pacific Testing and Inspections and payment of \$3,128.38 to James Edward Engineers. Purchase Agreement, Schedule 2.1. Moreover, Defendant did not assume any contract between Qualitybuilt.com and Plaintiffs. Purchase Agreement, Schedule 1.1(d). In fact, Defendant did not assume a contract between QualityBuilt.com and any person or entity in South Carolina. Again, in no uncertain terms, the Sale Order states,

The Sale Order [] shall be effective as a determination that, as of Closing [] no Claims, other than Assumed Liabilities and Assumed Contracts relating to the Purchased Assets, will be assertable against the Purchaser, its affiliates, successors or assigns, or any of their respective assets [and that all claims] have been unconditionally released, discharged and terminated . . .

Sale Order, ¶ 11. Furthermore, "[Defendant] shall have no obligations under any liabilities of Seller or the Bankruptcy Estate other than the Assumed Liabilities, the Assumed Contracts, and its obligations under this Agreement." Sale Order, ¶ 35.

### LAW AND ARGUMENT

#### **A. Defendant Has No Liabilities As To Plaintiffs' Claims And Should Be Dismissed From This Action With Prejudice.**

The Uniform Declaratory Judgments Act is to be liberally construed so as to be remedial, and created with purpose to settle and afford relief from uncertainty – and in certain circumstances an award of further relief based upon a declaratory judgment decree may be just

and proper. S.C. Code §§ 15-53-120 and 130. The Uniform Declaratory Judgments Act gives the Court the liberal authority to determine questions under a written contract and declare the rights, status and other legal relations. S.C. Code § 15-53-10, *et seq.*, Rule 57, SCRC.P.

"Where the terms of a contract are clear and unambiguous as a matter of law, its construction is for the court . . ." Holcombe v. Orkin Exterminating Co., Inc., 282 S.C. 104, 105 (S.C. Ct. App. 1984) (citing Black v. Freeman, 274 S.C. 272 (S.C. 1980)). "If its language is plain, unambiguous, and capable of only one reasonable interpretation, no construction is required and the contract's language determines the instrument's force and effect." Ellie, Inc. v. Miccihi, 358 S.C. 78, 93 (S.C. Ct. App. 2004). Courts "are without authority to alter an unambiguous contract by construction or to make new contracts for the parties." Lee v. Univ. of S.C., 407 S.C. 512, 518 (S.C. 2014) (quoting S.C. Dept. of Transp. v. M & T Enters. of Mt. Pleasant, 379 S.C. 645, 655 (S.C. Ct. App. 2008)).

As demonstrated by the recitation of the plain language of the Purchase Agreement and Sale Order above, Defendant did not assume the liabilities of Qualitybuilt.com so as to be liable to the Plaintiffs in connection with The Gates at Williams-Brice. Not only is this contention clearly defined by the terms of the Purchase Agreement, but those terms were also authorized and entered by the United States Bankruptcy Court, via the Sale Order:

The Court may liberally apply the Uniform Declaratory Judgments Act and grant Defendant further relief by way of a dismissal by merely interpreting and applying the terms of the Purchase Agreement. In that vein, the Court may declare that it is extending full faith and credit to the United States Bankruptcy Court's Sale Order, which expressly adopts the terms of the Purchase Agreement as part of its Order:

"A judgment or order in a bankruptcy litigation is a judgment or order of the district court, whether it is rendered by a district judge or a bankruptcy judge, and as such it is entitled to the same respect that would be afforded to any other judgment or order of the district court. As a general proposition, then, the finality doctrines apply in bankruptcy cases in the same fashion in which they apply elsewhere." McNaughton-McKay Elec. Co. of NC, Inc. v. Andrich, 324 S.C. 275, 280 (S.C. Ct. App. 1996) (quoting 1B J. Moore, MOORE'S FEDERAL PRACTICE ¶ 0.419[3.-2], at 430 (2d ed. 1983)). Similarly, bankruptcy orders and judgments are entitled to full faith and credit by state courts in subsequent proceedings. See id.

On its face, the legal declaration necessary in this matter is abundantly clear. Defendant is free of any liability arising from Qualitybuilt.com's alleged involvement at The Gates at Williams-Brice project. To find otherwise would be contrary to the plain language of the contract at issue and the subsequent confirmation of that contract by order of the United States Bankruptcy Court. Therefore, Defendant seeks declaratory relief as to its lack of liability under the Purchase Agreement and Sale Order and a dismissal with prejudice.

**B. In The Alternative, Defendant Moves The Court To Grant Summary Judgment In Its Favor As To Defendant Having No Liability To Plaintiffs In This Case.**

In the event the Court declines to render declaratory relief, Defendant moves the Court to grant summary judgment in its favor.

Summary judgment is proper when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. Rule 56(c), SCRPC; Flemming v. Rose, 350 S.C. 488 (S.C. 2002) (emphasis added). Summary judgment is appropriate where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Rule 56(c), SCRPC; see also Smith v. S.C.

Ins. Co., 350 S.C. 82 (S.C. Ct. App. 2002); Tupper v. Dorchester County, 326 S.C. 318 (S.C. 1997).

Defendant submits to the Court that there is no genuine issue as to any material fact that pursuant to the Sale Order and Purchase Agreement, Defendant has no liability in this action as it was not involved in The Gates at Williams-Brice project. The Gates was completed in 2007, prior to Defendant's formation in 2009. Moreover, as recited herein above (and as attached to this Memorandum) the terms of the Sale Order and Purchase Agreement leave no question that Defendant did not assume the liability of a claim arising from The Gates when it purchased the assets of Qualitybuilt.com in 2010.

Therefore, Defendant moves the Court for judgment as a matter of law, finding that Defendant has no assumed liability pertaining to this action and should be dismissed with prejudice.

#### CONCLUSION

Based upon the foregoing grounds, the arguments of counsel at the hearing, statutory and common law in support of its motion, the Clerk of Court's file in this matter, and any additional memorandum of law, documents, or materials submitted in support of its motion, Defendant Quality Built, LLC hereby moves this Honorable Court for declaratory relief and/or summary judgment in its favor, and a dismissal with prejudice from this action.

Respectfully submitted,

**HALL BOOTH SMITH, P.C.**



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*Attorneys for Quality Built, LLC*

February 17, 2017  
Charleston, South Carolina

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Court of Common Pleas

The Honorable G. Thomas Cooper, Jr., Circuit Court Judge

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THE GATES AT WILLIAMS-BRICE CONDOMINIUM  
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Appellants,

v.

QUALITY BUILT, LLC and COAST TO COAST  
ENGINEERING SERVICES, INC. d/b/a CRITERIUM  
ENGINEERS,

Respondents.

**PROOF OF SERVICE**

I certify that I have served Respondent Quality Built, LLC's Reply to Appellants' Return to Respondent Quality Built, LLC's Notice of Deficiency of Record on Appeal and Motion to Correct Record on Appeal upon the attorneys of record by way of U.S. Mail, stamped First Class delivery, on July 31, 2018, addressed as follows:

Justin O'Toole Lucey, Esquire  
Stephanie D. Drawdy, Esquire  
Justin O'Toole Lucey, P.A.  
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*Attorneys for Coast to Coast Engineering Services, Inc.  
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*Attorney for Respondent Quality Built, LLC*

Dated: August 14, 2018

H|B|S HALL BOOTH SMITH, P.C.

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August 14, 2018

VIA FEDERAL EXPRESS PRIORITY OVERNIGHT  
South Carolina Court of Appeals  
Clerk of Court Office  
ATTN: JESSICA SALEN  
1220 Senate Street  
Columbia, South Carolina 29201

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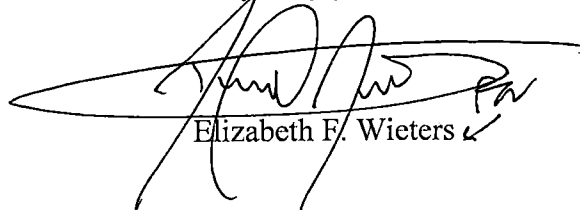
RE: *The Gates at Williams-Brice Condominium Association, et al. v. Quality Built, LLC*  
Lower Court Case No.: 2013-CP-40-7729  
Court of Appeals Case No.: 2017-002325  
HBS File No.: 7484.0001

Dear Ms. Salen:

As it pertains to the above-captioned appeal, enclosed please find the original and six copies of *Respondent Quality Built, LLC's Reply to Appellants' Return to Respondent Quality Built, LLC's Notice of Deficiency of Record on Appeal and Motion to Correct Record on Appeal and Proof of Service*.

I have included an extra copy of the reply, and would appreciate your returning the filed copy to our office in the enclosed self-addressed stamped envelope. Thank you for your assistance in this matter. If you have any questions and/or concerns, please do not hesitate to contact our office.

Very truly yours,

  
Elizabeth F. Wieters

EFW/bje  
Enclosures

cc: Justin O'Toole Lucey, Esquire  
Stephanie D. Drawdy, Esquire  
Kent Stair, Esquire  
Robin Graham, Esquire

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**THE SOUTH CAROLINA COURT OF APPEALS**  
**1220 SENATE STREET**

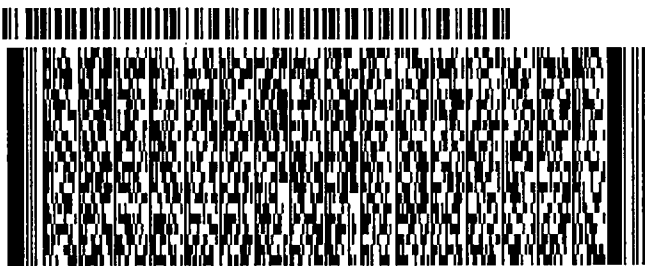
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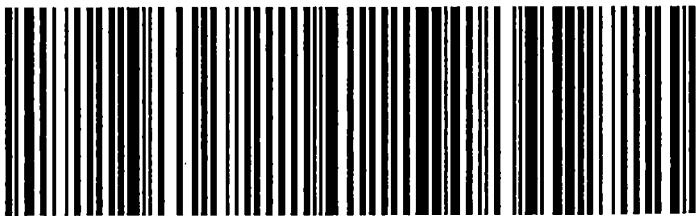
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