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IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas for the Fourteenth Circuit

Carmen T. Mullen, Circuit Court Judge

Appellate Case No. 2014-001524
Lower Court Case No. 2011-CP-07-3322

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SC Court of Appeals

The Callawassie Island Members Club, Inc. Respondent,

v.

Ronnie D. Dennis and Jeanette Dennis Appellants.

APPELLANTS' PETITION FOR REHEARING

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This Court is correct. A question of material fact exists as to whether the Club treated its members differently. There is evidence that the Club haphazardly applied its ever-evolving rules to its members, liberating some, while tightening the vise on others. The Nonprofit Corporation Act—the legal umbrella under which the Club was formed—dictates that the Club must treat its members uniformly. Furthermore, the Club has a contractual duty to apply its documents consistently and precisely.

However, the Court's Opinion overlooks that the Club's disparate treatment of its members is just a symptom of the disease. The corporate body of the Callawassie Island Members Club belongs to a troubled mind. Over time, that unsettled mind has imposed upon its body ever-tightening manacles. The Dennises—and many others—are constrained by fetters for which they never bargained. Therein lies the source of the disease: the contract by which the Club and its members are bound has been unilaterally changed into something un contemplated, grotesque, and certainly not mutual.¹

The corrupted rules have led to a jumbled mess, which even the Club does not fully understand nor evenly apply. Since the Club filed this case in 2011, at least seven lawyers, one circuit court judge, three Court of Appeals judges (twice), and five Supreme Court justices have tried to sort out the mess, seeking to align the contract, the facts, and the law. Respectfully, the Dennises submit that questions of facts exist that prevent such determinations by the court.

¹ "If I cannot inspire love, I will cause fear." Shelley, Mary Wollstonecraft (1797–1851), *Frankenstein, Or, The Modern Prometheus: the 1818 Text*, Oxford; New York: Oxford University Press, 1998.

Appellants Ronnie D. Dennis and Jeanette Dennis petition this Court for rehearing as to certain portions of Opinion No. 5696, filed December 18, 2019 (the “Opinion”). As set forth below, Appellants respectfully submit that the Opinion overlooks or misapprehends the following points:

I. Standard of Review

The first issue before this Court on appeal was the circuit court’s improper application of the standard of review. The crux of the Dennises’ argument on this issue is that the trial court—in its haste to dispense with this case based on contractual provisions—improperly disregarded evidence that implicated questions of fact, which should have been for the jury. This Court found in its Opinion that it need not address the issue, reasoning that the Supreme Court had decided the question “when [it] cited the applicable standard of review.” Op. No. 5696, p. 4.

This determination by the Opinion overlooks the plain language within *Dennis*, which clearly excludes the question of the summary judgment standard from the decision. The *Dennis* Court particularly delineated that “[t]he questions before us *in this appeal are questions of law.*” *Callawassie Island Members Club, Inc. v. Dennis*, 425 S.C. 193, 198, 821 S.E.2d 667, 669 (2018) (emphasis added). Because the *Dennis* Court was deciding only (two) questions of law, based on specific contractual language that it found to be unambiguous, it could not and did not make any determination on the scintilla standard, which is designed to evaluate whether any question of fact exists that would properly be heard by a jury—preventing summary judgment by the Court.

The Dennises requested a jury trial on numerous issues, which were not solely contractual in nature, which were not before the Supreme Court, and which this Court has mistakenly overlooked. The Dennises contend that the circuit court improperly shifted the burden of proof and failed to apply the “mere scintilla” standard in granting summary judgment on those issues. Those questions of fact included (*inter alia*):

- The question of which documents (or version of them) should apply;²
- The question of whether the applicable documents had been properly amended;
- The question of whether the Club applied the (ever-shifting) provisions of its governing documents uniformly to its members;
- The question of whether the Club violated the Nonprofit Corporation Act;
- The questions of damages and attorney’s fees.

This Court has properly remanded this case for trial on the question of whether the Club violated the Nonprofit Corporation Act by treating its members disparately and failing to apply the provisions of its governing documents uniformly.

The Dennises respectfully request that this Court would reconsider its Opinion, so as to more fully correct the error made by the trial court, when it disregarded material facts to grant summary judgment to the Club. *See, e.g., Radcliffe v. S. Aviation Sch.*, 209 S.C. 411, 420, 40 S.E.2d 626, 630 (1946) (“A scintilla of evidence is **any material** evidence

² In this regard, the trial court’s order on appeal is patently erroneous, citing disparate snippets from the governing documents, without rhyme or reason, without regard to the questions of fact raised as to the amendment process, and without any apparent rationale for its application of cherry-picked provisions from at least three separate versions of the documents.

that, if true, would tend to establish the issue in the mind of a reasonable jury.”) (emphasis in original) (*quoting In re Crawford*, 205 S.C. 72, 30 S.E.2d 841, 849 (1944)); *see also Bethea v. Floyd*, 177 S.C. 521, 181 S.E. 721, 724 (1935) (defining “scintilla” as the smallest trace); *see also S.C. Prop. & Cas. Guar. Ass'n v. Yensen*, 345 S.C. 512, 518, 548 S.E.2d 880, 883 (Ct. App. 2001) (“Summary judgment is not appropriate where further inquiry into the facts of the case is desirable to clarify the application of the law.”).

It cannot be said that the Dennises did not submit any evidence whatsoever in opposition to the Club’s motion for summary judgment. The circuit court, therefore, improperly disregarded that the law of this state dictates that a mere scintilla (*i.e.*, “the smallest trace”) of evidence is sufficient to defeat summary judgment and to create a jury question for trial. *Bethea*, 177 S.C. at 521, 181 S.E. at 724. This Court should remand this entire case for a trial on the merits, in order to allow a jury to decide the questions of fact.

II. Governing Documents

A. Ability to Swap Memberships

While correctly reversing the circuit court as to a member’s ability to concede membership, the Opinion seems to reject the Dennises’ argument that there is a genuine issue of fact as to whether or not the Dennises should have been allowed to **swap** their memberships. Op. p. 5. The apparent basis for this rejection is that the Dennises cite to the 1994 Bylaws for the swapping provision, but that the 2009 Bylaws were in effect when the Dennises resigned in 2010, and those Bylaws are not in the Record. *Id.* This ruling inadvertently overlooks the simple reality that the Record on Appeal is a creature of the parties.

Back in 2014, when they first appealed the circuit court's decision, the Dennises designated matter to be included in the Record, particularly identifying those provisions of the governing documents that they contended were applicable to their arguments against the court's improper grant of summary judgment. The Club, pursuant to Rule 209, SCACR, also had full opportunity to designate those governing documents upon which it planned to rely. The fact that the Club failed to entirely identify the governing documents from 2008 and 2009 indicates that **even the Club did not consider those documents to be controlling.** (*See Designation of Matter to Be Included in the Record on Appeal*, filed on Oct. 20, 2014). Nor did the Dennises consider those documents to be controlling; the Dennises designated and included the 1994 Plan, By-Laws, and Rules, as well as the 2001 Rules, in their entirety. (*See Appellant's Designation of Matter to Be Included in the Record on Appeal*, filed with the Court of Appeals on Sept. 24, 2014). The bottom line is that the Court has before it the 1994 documents in their entirety, which the Club contends have not been altered to affect the substantive rights of members.

This Court should therefore reconsider its Opinion and assume that the 1994 Bylaws (and the swap provision that they contain) apply to the question of whether the Club failed to uniformly apply its own policies. Certainly, the 1994 Bylaws—along with the evidence³ contained in the Record—present a question of fact on the issue, which is best decided by a jury.

³ Mrs. Dennis testified that they made several attempts to swap their membership (R. pp. 159-161) and, had the Dennises been allowed to do that swap, they would have been social members (as opposed to perpetually-obligated equity members).

B. Improper Amendment of Governing Documents

The Opinion wrongly concludes that the Court need not address the Dennises' argument that a question of fact exists as to whether the governing documents were properly amended. The Court based this decision on two factors: (1) that the Dennises were never suspended,⁴ and (2) that the board purportedly had the right to change the rules without a vote of the membership. Op. p. 7. This analysis overlooks the scope of the Dennises' argument on this issue, and it misapprehends that the Club's unilateral amendment of the contract by which it sought to bind its members violated statutory law as well as the contract itself. Because the question of the Club's amendment of the documents is at the heart of this entire lawsuit, and because the Dennises raised at least a scintilla of evidence that the amendment process was corrupt and illegal, this Court should reconsider its Opinion and remand for trial on the issue.

⁴ On the suspension issue, the Supreme Court ruled that "Here, no suspension ever occurred; the Dennises resigned. Therefore, the four-month suspension period that leads to expulsion was never triggered." *Dennis*, 425 S.C. at 204, 821 S.E.2d at 673. The Dennises respect the Supreme Court's ruling. However, the record shows that the Club **did** suspend the Dennises. For example:

- The Club's general manager, Jeff Spencer, signed two separate affidavits attesting that the Dennises had been suspended. (R. p. 429) (affidavit dated Sept. 24, 2013); (R. p. 435) (affidavit dated Nov. 8, 2013).
- The status of the Dennis membership is twice listed as suspended ("S") Club's documents. (R. p. 39) (July 31, 2011: "Status: S"); (R. p. 436) (November 7, 2013 member history: "Status: S").

To be clear, the Dennises raised this in their Petition for Rehearing to the Supreme Court, which was denied without elaboration on this point. However, it remains befuddling (to the Dennises) as to how it can be concluded that the Dennises were never suspended when the Club's own witnesses and documents clearly, and repeatedly, show that they were.

1. The Dennises' argument was not limited to suspension.

The Court mistakenly compartmentalizes the amendment question to pertain only to the Club's modification of those portions of the documents dealing with suspension and expulsion. However, in their initial Brief to this Court, the Dennises identified the following areas in which they contend the documents were improperly amended:

- Change of "shall" to "may" expulsion language; (Final Brief of Appellants, pp. 33-35)
- Changes to the portions of the documents pertaining to a members' ultimate liability to the Club; (*Id.*, p. 34)
- Changes pertaining to the obligations of members; (*Id.*, p. 34)
- Insertion of language to include ongoing liability of expelled members; (*Id.*, p. 34)
- Changes that favored the developer; (*Id.*, pp. 34-35)
- Changes regarding concession; (*Id.*, pp. 34-35)
- Changes affecting transfer rights. (*Id.*, p. 36)

As set forth below, the Opinion overlooks that a question of fact for trial exists as to whether those changes were made in conformity with the law and the Club's governing documents.

2. If the Amendments were indeed properly made, their result was to render the contract illegal.

At the outset, it is worth noting that the Dennises did not enter into a perpetual contract with indefinite liability. The contract by which they agreed to be bound had a finite term, mandatory provisions for exit by expulsion, and it clearly limited liability to the amount of equity contribution. The contract has **become illegal over time** because

the Club has unilaterally changed its provisions. The Dennises seek either an outright ruling from this Court that those amendments were illegal as a matter of law, or (at a minimum) that questions of fact exist for the jury as to whether the amendments were made in compliance with the law and enforced by the Club uniformly.

3. The Club's unilateral, secret amendment of the governing documents violated statutory law.

The Opinion erroneously concludes that the Club Rules can be changed without a vote of the membership. Op. p. 7. The Opinion's determination that amendment was proper hinges on a passage within the Rules themselves. Citing the 2001 Rules, this Court holds:

[T]he board had the right to change the rules without a vote of the membership. Section 1.3 of the 2001 Rules provides "[t]he Board of Directors reserves the right to amend or modify these rules when necessary and will notify the membership of such changes. Any such amendments or modifications shall be subject to and controlled by the applicable provisions of the By-Laws and the Plan for Offering of Memberships." Accordingly, we find a genuine issue of fact does not exist as to whether the governing documents were properly amended.

Id. This decision overlooks that the Board—as a matter of law—did not have the power to affect substantive rights of members without a vote of the membership.

As this Court well knows, this is a document-driven case, where the issues are shaped by the copious governing documents of the Callawassie Island Members Club. Those documents, in order of self-imposed hierarchy, are the Plan, the By-laws, and the Rules. In its analysis of whether the Rules were properly amended by the Club, the Opinion fails to take into account that **all of the governing documents are subservient to the law, which overshadows the documents' own hierarchy.** *Catawba Indian Tribe v.*

State, 372 S.C. 519, 642 S.E.2d 751, 756 (2007) (“[I]t is a fundamental rule of contract construction that the law existing at the time and place of the making of a contract is a part of the contract.”). The law expressly prevents the Club from making the changes that it did, without a vote of the members.

Importantly, regardless of the moniker that the Club attaches to them, be it “Plan” or “Rules” or “Terms of Indenture,” all of the Club’s governing documents are actually “Bylaws” as defined by the law of South Carolina. Specifically, the Nonprofit Corporation Act clearly sets forth in its Definitions:

(4) “Bylaws” means the code or codes of rules, other than the articles, adopted pursuant to this chapter for the regulation or management of the affairs of the corporation **irrespective of the name or names by which the rules are designated.**

S.C. Code § 33-31-140 (emphasis added). Thus, pursuant to South Carolina law, the Club’s “Rules” are truly corporation “Bylaws,” and they are bound by statutory law’s explicit requirements for their amendment.

This Court’s Opinion overlooks that the Club ran afoul of the law when it amended its Rules, in secret, to change language that affected the rights and obligations of its members. South Carolina law puts the following limitations on the amendment of a nonprofit corporation’s governing documents (*i.e.*, “bylaws”):

- “Where transfer rights have been provided, no restriction on them is binding with respect to a member holding a membership issued before the adoption of the restriction unless the restriction is approved by the members and the affected member.” S.C. Code § 33-31-611.

- “A notice of a meeting for members at which bylaws are to be adopted, amended, or repealed shall state that the purpose, or one of the purposes, of the meeting is to consider the adoption, amendment, or repeal of bylaws and contain or be accompanied by a copy or summary of the proposal.” S.C. Code § 33-31-1021.
- “Unless otherwise provided in the articles, an amendment to the bylaws which relates solely to the dues required for membership and which establishes or changes an amount for, or method of computation of, dues, must be approved by the members.” S.C. Code § 33-31-1021.

As the Dennises have contended throughout the years of this litigation, a question of fact exists as to whether the Board provided the required notice, or sought the required membership approval, prior to stealthily amending the Rules (which are actually “bylaws”) to affect the substantive rights and obligations of the members of the Club. There is no evidence whatsoever within the Record of such notice or vote; in fact, the Opinion overlooks evidence to the contrary. (*See, e.g.*, R. pp. 205–206). Importantly, if the amendments were invalid, it follows that the Dennises did not make a commitment to pay dues and fees in perpetuity.

Because the Club, as a matter of law, could not have unilaterally amended the documents to affect the substantive rights, the transfer rights, nor the liability of members, a question of fact exists as to whether the process by which it altered the Rules violated the law.

4. The Club's unilateral, secret amendment of the governing documents violated Club procedure.

Furthermore, the Opinion overlooks that the Club's documents themselves expressly prohibit the Club from secretly affecting the substantive rights of members. Although the Rules reserve for the Board the right to modify them, that authority is clearly restricted by the requirement that "[a]ny such amendments or modifications shall be subject to and controlled by the applicable provisions of the By-Laws and the Plan for the Offering of Memberships." (R. p. 510). The Opinion errs when it overlooks the fact that the higher-level governing documents require a vote of membership for "[a]ny amendment or modification" which materially and adversely affects the rights of the equity members.⁵ Op. p. 7.

The hierarchy of the Club's governing documents is that the Plan is supreme, the By-laws are next, and the Rules are the lowliest. As discussed at oral argument before this Court, the Club Rules are for day-to-day items such as hours of operation, pets in the clubhouse, golf tee times, clubhouse dress attire, dining room reservations, and swimming attire. (*See, e.g.*, R. pp. 495, 499, 500). That is why the Club's Rules do not require a vote of the full membership—they are for standard operational issues only. The

⁵ This issue was not reached by the Supreme Court, which—only having isolated snippets of the governing documents before it in the Record—focused instead on whether or not certain provisions governing documents were ambiguous or contradicted previous versions of those same provisions, and not on whether the Club followed the proper process for amendment. *See Dennis*, 425 S.C. at 199, 821 S.E.2d at 670 ("There is no evidence that the various amendments to the documents were in any way contrary to the Bylaws, Plan, and Rules in place at the time of the amendments.").

Rules are *not* for fundamental modifications of the legal rights and obligations of members.

The Plan governs fundamental legal rights of members and the transfer of memberships. For that reason, the Plan requires a vote of members for important issues:

Any amendment or modification which materially and adversely affects the rights of the equity members must be approved by a majority of the votes held by the equity members so affected.

(R. p. 470) (emphasis added). The Bylaws explicitly state that *the Plan* applies to “Membership transfer provisions,” which are at issue here (*inter alia*). (R. p. 525 § 10.1(e)).

Similarly, the suspension and expulsion of members is governed by the Bylaws, which may only be amended by a vote of the members.⁶ (R. p. 489: Bylaws Art. XIV, § 3: “Suspension”; § 5: “Expulsion”). The Bylaws state that equity membership certificates are not transferrable except as provided in the Bylaws. (R. p. 486 § 10.a).

The issues in this lawsuit—and the dozens of other similar lawsuits the Club is ravenously pursuing against its members—involve modifications of the fundamental legal rights and obligations of equity members. Modifications to the exit rights of equity members certainly “materially and adversely affect[] the rights of the equity members”

⁶ The By-laws provide that a vote of the members is required for amendments:

After the Closing Date, these By-Laws may be altered, amended, or repealed by a majority vote of all of the members of the Board of Directors and a majority of the votes cast by the equity members of the Club entitled to vote, in person or by proxy, at any duly called or constituted annual or special meeting of the equity members of the Club at which a quorum of equity members is present. A proposed amendment must be set forth in the notice of the meeting.

(R. p. 491).

and require a vote of the members. Such fundamental terms cannot be simply inserted into the Rules, disseminated to the members, put into practice by the Club, and then unilaterally changed by the Club's board; instead those provisions are expressly subject to and must follow the amendment process of the controlling governing documents, such as the Plan and the Bylaws. As the Supreme Court stated, "The three documents reference each other and are intended to operate together." *Dennis*, 425 S.C. at 199, 821 S.E.2d at 670.

That the Club's board has tucked certain provision in the Rules—and quietly massaged them over the years into something grotesque—does not change the fact that process for modifications of members' legal transfer rights are controlled by the amendment provisions of the higher-level documents (Plan and Bylaws). In contract terms, the Opinion's ruling on this point allows one party (the Club) to unilaterally change material terms of a contract (the membership agreement) without consent of, or consultation with, the other party to the contract (the Dennises, and scores of other members). Such a "contract" is no contract at all—it is servitude. As the facts of this and many other Callawassie cases show, that servitude has become never-ending if the Club's interpretation is allowed.

Accordingly, the Dennises respectfully submit that the Opinion errs when it holds the Rules' amendment provision prevails over the amendment provisions of the Plan and the By-laws.

III. Contract: Any contract that existed is no longer valid or is not properly before this Court.

The Opinion reiterates its finding from its previous opinion (Op. No. 5434) and the Supreme Court that any obligations to the previous Island Club transferred to this Club. The Opinion overlooks the fact that, as discussed above, the alleged contract *became* illegal and therefore invalid due to the Club's improper amendments (*inter alia*). As discussed above, those amendments were done improperly (unilaterally, and without a necessary vote by members) and resulted in a perpetual, unconscionable contract (which is unlawful under South Carolina law).

Further, the Supreme Court concluded *sua sponte* that "When the Dennises resigned in 2010, the membership documents in effect were the 2008 Plan, the 2009 Bylaws, and the 2009 Rules." *Dennis*, 425 S.C. at 199, 821 S.E.2d at 670. Until the Supreme Court so ruled, no party or court had recognized those documents as controlling. The Supreme Court dissent noted that:

The majority contends the Club's 2008 Plan, 2009 Bylaws, and 2009 Rules unambiguously require a resigning member to continue to pay—potentially for that member's lifetime and beyond—dues, fees, and food and beverage minimums unless their membership is reissued. The majority's categorical reliance on these documents is stunning because **neither the trial judge nor the Club has identified them as the controlling documents.**

Id., 425 S.C. at 206–207, 821 S.E.2d at 674 (emphasis added). That is why neither the Club nor the Dennises put the entirety of those documents into the Record on Appeal—nobody thought they were the controlling documents.

Having received this new instruction from the Supreme Court, it is erroneous to continue to uphold the alleged contract at issue when the purported "terms"—the 2008

Plan, 2009 Bylaws, and 2009 Rules—are not fully in the Record. It is erroneous to uphold such a purported contract, in a light most favorable to the Dennises, when the Record does not contain the full amended versions of the three governing documents that “reference each other and are intended to operate together.” *Dennis*, 425 S.C. at 198–99, 821 S.E.2d at 670, cited at Opinion p. 7.

The Dennises simply request as additional grounds for vacating summary judgment, and remanding for jury trial, that a factfinder should be provided the opportunity to review the governing documents, and their amended versions, in their entirety. That would include, as this Court has held, the method by which those documents were amended.

IV. Previous Points Preserved

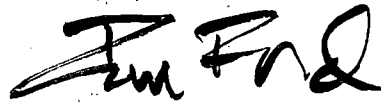
In the event that this Court grants the Club’s Petition for Rehearing, the Dennises incorporate herein all of their previous briefs to this Court, so as to preserve for appellate review any undecided issues.

CONCLUSION

This Court should not only remand this case for trial on the issue of the Club's disparate treatment of its members, but it should also allow a jury to decide numerous other evidentiary issues raised by the Dennises. Those issues include the question of whether the Club has improperly amended its documents to alter material provisions on swapping, liability, transfer rights, membership obligations and commitments. For the reasons set forth above, the Dennises respectfully request that this Court would grant their petition and remand the case in its entirety to the circuit court for trial.

Respectfully submitted,

FORD WALLACE THOMSON LLC

A handwritten signature in black ink, appearing to read "Ian Ford", written over a horizontal line.

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January 30, 2020

IN THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM BEAUFORT COUNTY
In the Court of Common Pleas for the Fourteenth Circuit

Carmen T. Mullen, Circuit Court Judge

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The Callawassie Island Members Club, Inc Respondents,

v.

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CERTIFICATE OF SERVICE

I certify that I have served the *Appellants' Petition for Rehearing* on all counsel of record by depositing a copy of it in the United States Mail, postage prepaid, on January 30, 2020, addressed to their attorneys of record:

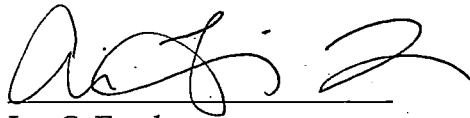
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Respectfully submitted,

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January 30, 2020
Charleston, South Carolina

FORD WALLACE THOMSON LLC

ATTORNEYS AT LAW

January 30, 2020

VIA FEDERAL EXPRESS; OVERNIGHT DELIVERY

The Honorable Jenny Abbot Kitchings
SC Court of Appeals
1220 Senate Street
Columbia, SC 29201

RECEIVED
JAN 31 2020
SC Court of Appeals

Re: *The Callawassie Island Members Club Inc. vs. Ronnie D. Dennis and Jeanette
Dennis*
SC Court of Appeals Case No.: 2014-001524

Dear Ms. Kitchings:

Enclosed for filing please find the original and six copies of the Appellants' Petition for Rehearing, along with the filing fee and Certificate of Service in the above-referenced matter.

Thank you in advance for your assistance with this matter. Should you have any questions or concerns, please do not hesitate to contact my office.

With kind regards, I am,

Very truly yours,



Ainsley F. Tillman

Ian S. Ford

Neil D. Thomson

AFT/ja

Enc. - as stated

cc: All Counsel of Record

IGIN ID:RBWA (843) 277-2011
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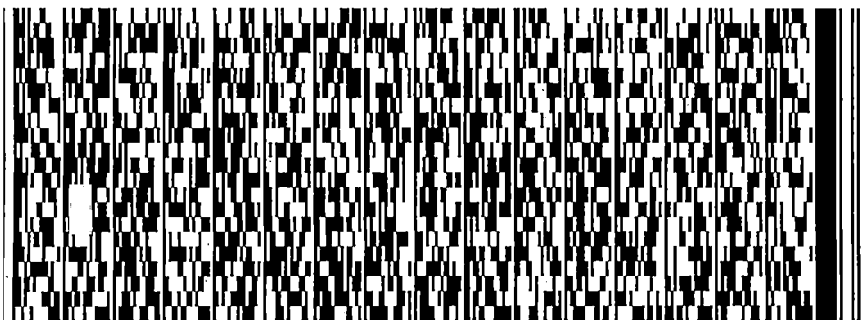
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