IN THE SUPREME COURT OF FLORIDA

CASE NO.: SC20-1167
L.T: CASE NO.: 2D19-1383

AIRBNB, INC.,

Petitioner,

v.

JOHN DOE and JANE DOE,

Respondents.
_____/

BRIEF OF PETITIONER AIRBNB, INC.

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I.
STATEMENT OF THE CASE AND FACTS.

The Second District Court's 2-1 decision, which certifies conflict with the decisions of two other District Courts of Appeal, and acknowledges conflict with a third, addresses a recurrent issue in cases involving arbitration--the issue of who decides arbitrability—that is, "whether a dispute is subject to a contract's arbitration provision, an arbitrator or a judge." *Doe v. Natt*, 299 So. 3d 599, 600 (Fla. 2d DCA March 25, 2020) (hereinafter "Decision"). Who decides the question of arbitrability "can make a critical difference to a party resisting arbitration." *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942 (1995). The arbitration clauses in the three other Florida cases are materially identical to that in the instant case. At present, however, in the Second District the trial court will decide the question of arbitrability; in the Third, Fourth and Fifth Districts, as well as in every federal circuit in which a court has addressed the issue, the arbitrator will do so.

The action was brought against Petitioner Airbnb, Inc. by a Texas couple who were guests at a condominium in the area of Longboat Key, Florida, in which the owner is alleged to have

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surreptitiously installed hidden cameras (*see* Decision at 600). The Plaintiffs (the "Does") alleged that Airbnb had failed to warn them of "past invasions of privacy" at *other* properties--not this one--and to "ensure that [the owner's] property did not contain electronic recording devices" (*id.*; *see* R. 73).[1] Airbnb moved to compel arbitration pursuant to its Terms of Service, *see infra* p. 5 (R. 78, Ex. 1-C, Ex. 1-G (at R. 117-39, 143-65); the trial court ordered arbitration (R. 333-36); the Does moved for reconsideration (R. 337); the trial court denied reconsideration (R. 357). The District Court reversed. Airbnb moved for rehearing en banc, and in the alternative, requested certification from the en banc panel, which was denied (Decision at 600). The District Court, on its own motion, withdrew its March 25, 2020 opinion and replaced it with an opinion in which some changes in the dissenting opinion had been made. *Id.*

A. Airbnb's Terms of Service. Airbnb provides an online platform that connects third-party Hosts who wish to offer their unique accommodations to third-party Guests who want to book

[1] "R." refers to the Record on Appeal in this Court.

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them (*see* R. 78, Ex. 1, ¶2 (at R. 102)). The Airbnb platform is accessible to users online, at http:/./www.airbnb.com, and via mobile applications. *Id.* Hosts are alone responsible for listing their accommodations on the Airbnb platform, and they decide with whom, when, and on what material terms they will offer or book them. *Id.* The accommodation agreements are made directly between Hosts and Guests. Airbnb is not a party to them (*see* R. 78, Ex. 1, ¶3 (at R. 102)). Airbnb does not own or control the accommodations that the Hosts list on Airbnb's platform. *Id.* Nor does Airbnb operate, manage, or otherwise have or confer any interest in such accommodations. *Id.*

An Airbnb user--Host or Guest--cannot list or book an accommodation without first creating an Airbnb account, and doing so requires acceptance of the then-current version of Airbnb's Terms of Service, among other agreements (*see* R. 78, Ex. 1, ¶8 (at R. 104)). Users consent to the Terms of Service by clicking on a checkbox, thereby assenting through what is called a clickwrap presentation, which contains a red-colored hyperlink to the Terms of Service (*see* R. 78, Ex. 1, ¶¶10 and 21 (at R. 105, 108)).

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The Terms of Service require all Users and Airbnb to arbitrate any disputes, incorporating and hyperlinking to the American Arbitration Association (AAA) Rules (*see* R. 78, Ex. 1-C, 1-G (at R. 137-38, 163-64)). Airbnb periodically updates its Terms of Service, and requires its account holders to agree to each update in order to offer or book an accommodation on the Airbnb platform (*see* R. 78, Ex. 1, ¶12 (at R. 105-06)). The first time an existing user logs in after a specific date, Airbnb presents the user with a screen on which he is required to accept the updated Terms of Service. *Id.* Airbnb does not allow any user to log in, interact with other users, create listings, or book reservations using the Airbnb platform until he or she accepts the updated Terms of Service presented on this screen. *Id.*

The Terms of Service in effect in January of 2016, when Respondent John Doe created his Airbnb account, included a capitalized notice at the outset referencing the dispute-resolution provision (R. 78, Ex. 1-C (at R. 117)): "PLEASE READ THESE TERMS OF SERVICE CAREFULLY AS THEY CONTAIN IMPORTANT INFORMATION REGARDING YOUR LEGAL RIGHTS, REMEDIES

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AND OBLIGATIONS. THESE INCLUDE A CLAUSE THAT GOVERNS THE JURISDICTION AND VENUE OF DISPUTES . . . ." The Terms of Service provided (R. 78, Ex. 1, ¶19 (at R. 107); Ex. 1-C (at R. 137-38); *see* Decision at 601):

> **Dispute Resolution.**
>
> You and Airbnb agree that any dispute, claim or controversy arising out of or relating to these Terms or the breach, termination, enforcement, interpretation or validity thereof, or to the use of the Services of use of the Site or Application (collectively "Disputes") will be settled by binding arbitration. . . . You acknowledge and agree that you and Airbnb are each waiving the right to a trial by jury . . .
>
> Arbitration Rules and Governing Law. The arbitration will be administered by the American Arbitration Association ("AAA") in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the "AAA Rules") then in effect, except as modified by this Dispute Resolution section. (The AAA Rules are available at www.adr.org/arb_med or by calling the AAA at 1-800-778-7879). The Federal Arbitration Act [FAA, 9 U.S.C. §§1-14] will govern the interpretation and enforcement of this section.

Rule 7(a)-(b) of the incorporated AAA Rules provided: "The arbitrator shall have the power to rule on his or her own jurisdiction,

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including any objections with respect to the existence, scope or validity of the arbitration agreement or the arbitrability of any claim or counterclaim."

Using his Facebook account, John Doe signed up for his Airbnb account on a Mac desktop on January 1, 2016 (*see* R. 78, Ex. 1, ¶9 (at R. 104-05)). Using her Facebook account, Respondent Jane Doe signed up for her Airbnb account on an iPhone on April 5, 2016 (*see* R. 78, Ex. 1,¶20 (at R. 108)). By creating their Airbnb accounts, the Does agreed to Airbnb's then-current Terms of Service, containing the mandatory Arbitration Provision (*see* R. 78, Ex. 1, ¶¶ 11 and 22 (at R. 105, 108)).[2]

It is undisputed that on April 13, 2016, John Doe booked the property owned by Defendant Wayne Natt at 623 Cedars Court, Longboat Key, Florida, 34228, identified by Reservation Code N2JD38, and subsequently added Jane Doe as an Additional Guest

[2]The Terms of Service that were accepted by John Doe--initially and by updates--are at R. 78, Ex. 1-C (at R. 117-38); Ex. 1-G (at R. 143-65); Ex. 1-H (at R. 166-89), Ex. 1-I (at App. R. 190-212). Each version of the Terms of Service contains the Arbitration Provision (*see* R. 78, Ex. 1, ¶19 (at R. 107); Ex. 1-C (at R. 137-38); Ex.1-G, ¶34 (at R. 163-64); Ex. 1-H, ¶34 (at R. 187-88); Ex. 1-I, ¶19 (at R. 208-09)).

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on the reservation from Natt (*see* R. 78, Ex. 1, ¶7 (at R. 104)). The Does do not contest that they were bound by Airbnb's Terms of Service (*see* R. 264-65).

B. The Lawsuit. In their Complaint, the Does alleged that Wayne Natt, the owner of the Property, had recorded them on video and/or audio equipment at the Property without their consent or knowledge, from May 16, 2016 through May 18, 2016, and that they had sustained injuries as a result. *See* R. 70. They did not contend that Airbnb owned the Property, but rather that Airbnb had been "[s]erving, essentially, as a broker between the host or owner of the property and the guests, renters, or tenants." R. 68. Nevertheless, they contended that Airbnb had a duty to take action with respect to the Property, and that Airbnb had violated their rights "by failing to warn of past invasion[s] of privacy known to have occurred at *other* Airbnb properties." R. 73 (emphasis added).

Airbnb moved to compel the Does to arbitrate their claims against Airbnb in accordance with the Arbitration Provision in the Terms of Service. R. 78. In response, the Does did not contest that they were bound by Airbnb's Terms of Service, but argued that their

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claims fell outside of them, and therefore were not arbitrable (arbitrability). R. 264-65. And they argued that despite the Terms of Service, the trial court--not the arbitrator--had to decide whether their claims were arbitrable. R. 265. They did not raise any contention, nor offer any proof, that they were unsophisticated, which they later said was a relevant factor (again offering no proof) that assertedly should vitiate the Arbitration Provision even if it were otherwise enforceable. *See* R. 265-72.

The Circuit Court granted Airbnb's Motion to Compel. R. 333-36. It ruled that the "parties are bound by that provision of their agreement (and the incorporated rules of the American Arbitration Association (AAA)) which dictates that the issue of arbitrability be decided by the arbitrator and not the trial court." R. 334. It ruled that the "parties had entered into an express agreement which incorporated the AAA Rules, and . . . this court is therefore bound to submit the issue of arbitrability to the arbitrator." *Id.*

The Does moved for reconsideration, arguing for the first time, without proof, that they were unsophisticated consumers, and for that reason that the incorporation of the AAA Rules into Airbnb's

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Terms of Service was not clear and unmistakable evidence of an intent to delegate the issue of arbitrability to an arbitrator. R. 337-46. The Circuit Court denied the motion, R. 441:

> I find that the persuasive authority cited by the defense from the Eleventh Circuit and elsewhere that stand for the proposition that the push-through agreement, which incorporates the AAA rules of arbitration, can in and of itself constitute clear and unmistakable intent to delegate arbitrability to the arbitrator on the issue of sophistication based on the persuasive authority that's been presented to me and my interpretation of it. I do not find that it precludes the arbitrator from determining arbitrability automatically or as a requirement. So I remain comfortable with my decision to abide by the AAA terms which say that the arbitrability shall be determined by the arbitrator.

C. *The Appeal.* The District Court reversed 2-1, applying the standard for interpreting the FAA endorsed in *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 943-44 (1995), in which the Supreme Court had held that although typically "'any doubts . . . should be resolved in favor or arbitration,'" *quoting Moses H. Cone Memorial Hospital v. Mercury Construction Corp.*, 460 U.S. 1, 24-25 (1983), it had earlier applied a stricter standard for construing

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contractual language concerning the discrete issue of who decides arbitrability. In *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643 (1986), the court had held that the agreement must "clearly and unmistakably" delegate the question of arbitrability to the arbitrator, "or the question of whether the parties agreed to arbitrate is to be decided by the court . . . ." *Id.* at 649.

The District Court held that Airbnb's "clickwrap agreement fell short of the clear and unmistakable evidence of assent that First Options requires" (Decision at 607). But in doing so, the court "recognize[d] that our decision may constitute something of an outlier in the jurisprudence of arbitration" (*id.*), acknowledging conflict with three other Florida District Courts' decisions, and certifying conflict with two of them (*see* Decision at 608, 610). It also acknowledged conflict with six federal appellate decisions, while citing no authority to the contrary--Florida, federal or any other state's (*see* Decision at 607-08).

The District Court disagreed with the unanimous body of contrary case law, listing five considerations that all had been

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rejected by Florida, federal and other states' courts to address them.

First, as in the contrary cases, the "agreement [Terms of Service] itself is silent on the issue of who should decide arbitrability" (Decision at 606). Second, as in the contrary cases, "the AAA Rules were not attached to the agreement," which instead "directed the [users] to AAA's website and phone number if they wished to learn more about what was in the AAA Rules" (*id.*). Third, as in the contrary cases, "the AAA Rules . . . were referenced in the clickwrap agreement as a generic body of procedural rules . . ." (*id.*). All three factors are characteristic of the contracts in all of the cases on the other side of the issue.

Fourth, the District Court found that the reference to the AAA Rules in the Terms of Service itself was ambiguous, because it referred to them only as a determinant of how the arbitration was to be "administered" (*id.*). The District Court found that this invocation of the AAA Rules was "necessarily conditional on there being an arbitration. If a claim is arbitrated, then the AAA Rules apply" (*id.*). In contrast, the Court said, on the initial question of

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whether a claim is arbitrable, this language was "not a very helpful answer and not at all clear" (*id.*). The Court therefore posited that the "administ[ration]" of an arbitration does not include deciding the question of whether a case or claim is arbitrable. Therefore, it said, the particular AAA Rules addressing who decides arbitrability were not clearly invoked in the Airbnb Terms of Service. (Decision at 607). Here too, the same or analogous language, such as "administer," "administration," or "conduct" of the arbitration, did not forestall numerous contrary decisions. *See infra* pp. 36-38.

Fifth, the District Court held that even if AAA Rule 7 was unambiguously incorporated into the Terms of Service, the Rule itself is ambiguous, in stating that "[t]he arbitrator shall have the power to rule on his or her own jurisdiction." It said: "This rule confers an adjudicative power upon the arbitrator, but it does not purport to make that power exclusive. Nor does it purport to contractually remove that adjudicative power from a court of competent jurisdiction." *Id.* That tortured construction would mean that a Plaintiff who wants a court to decide the issue can almost always achieve that result by simply filing a lawsuit. Here

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too, the same language did not forestall the contrary decisions. No other court has held that the operative language of the AAA Rules--in particular Rule 7, delegating the issue of arbitrability to the arbitrator--is ambiguous.

The District Court acknowledged conflict with *Reunion West Development Partners, LLLP v. Guimaraes*, 221 So. 3d 1278 (Fla. 5th DCA 2017); *Glasswall, LLC v. Monadnock Construction, Inc.*, 187 So. 3d 248 (Fla. 3d DCA), *rev. denied*, 2016 WL 3486432 (Fla. June 27, 2016); and *Younessi v. Recovery Racing LLC*, 88 So. 3d 364 (Fla. 4th DCA 2012) (*see id.* at 608), and it certified conflict with *Reunion* and *Younessi*: "Because we disagree with the conclusion [of] those courts . . . we certify conflict with Reunion and Younessi to the extent they are inconsistent with our decision today" (*id.* at 609).

Judge Villanti dissented, writing that "[f]or better or worse, we, as a society, have decided to choose the speed and convenience of the Internet over more traditional modes of communication. . . . [I]t should come as no surprise that contracting parties resort to incorporating material by reference--which in this instance includes

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the AAA Rules and specifically Rule 14(a), which allows the arbitrator to decide arbitrability in the first instance" (*id.* at 610).[3]

Judge Villani disagreed with the majority's statement that the reference in the Terms of Service to the AAA Rules "'is necessarily conditional on there being an arbitration'" (*id.* at 611, *quoting id.* at 606). He wrote (*id.* at 611):

> With respect to the application of Rule 14(a), this is illogical: The question of whether a claim is arbitrable must, by necessity, be determined before the commencement of arbitration. Thus, Rule 14(a) can only apply at the outset of a claim, not after the arbitration has already commenced.

Judge Villani also took issue with the majority's conclusion that the rule was ambiguous because it does not use the word "exclusive" (*id.* at 611-12) (emphasis in original):

> This ignores the obvious: the power to decide <u>is</u> the power to decide. To contend that the absence of the term "exclusive" (or words to that effect) in relation to the arbitrator gives exclusive power to the trial court sub silentio

[3] The reference to Rule 14(a) reflects the fact that by the time of the Plaintiffs' stay at the listing, the AAA Commercial Arbitration Rules had been renamed the Consumer Arbitration Rules, which then became the reference in Airbnb's Terms of Service; and the arbitrator's jurisdiction was relocated from Rule 7 to Rule 14 (*see* Decision at 610 n. 8).

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to make that decision is, in my view, a stretch too far. Indeed, the word "exclusive," emphasized by the majority, does not appear at all in First Options . . . or in [seven other cited decisions].

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In sum, the rule expressed in First Options and the other cited opinions is "clear and unmistakable," not "exclusive." These words do not mean the same things. Here, the majority has created a new requirement that the contract must confer an "exclusive" power upon the arbitrator or arbitration panel to determine arbitrability of an issue. This result is at odds with a substantial body of law . . ..

II.
ISSUES ON REVIEW

A. WHETHER THE DISTRICT COURT ERRED IN RULING THAT THE ARBITRATION CLAUSE IN AIRBNB'S TERMS OF SERVICE DID NOT STATE CLEARLY AND UNMISTAKABLY THAT ONLY THE ARBITRATOR COULD DECIDE THE ISSUE OF ARBITRABILITY.

B. IN THE ALTERNATIVE, EVEN IF THE QUESTION OF ARBITRABILITY WERE ONE FOR THE COURT, WHETHER THE DOES COULD SUSTAIN THEIR BURDEN OF SHOWING THAT THE ARBITRATION CLAUSE IN AIRBNB'S TERMS OF SERVICE DOES NOT UNAMBIGUOUSLY APPLY TO THE DOES' CLAIMS.

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III.
SUMMARY OF ARGUMENT

The District Court's decision is not merely an "outlier" (Decision at 607). It is a solitary wave in a sea of contrary authority. Indeed, as we note below, it would be difficult to find another legal question on which the extant law is so uniform.

The *de novo* issue is one of federal law, which requires that a contract clearly and unmistakably delegate the question of arbitrability to the arbitrator, or else it will be decided by a court. Every other court to address the question presented here--Florida, federal, and other states'--has held 1) that a clickwrap agreement can satisfy this standard if the documents referenced are clear and unambiguous; and 2) that the same or analogous language as that utilized in Airbnb's Terms of Service, and the incorporated AAA Rules, is clear and unambiguous in delegating the issue of arbitrability to the arbitrator. These decisions address and reject the District Court's rationales for its decision, as well as the Does' arguments.

Moreover, even if the determination of arbitrability were for the court, this Court should hold that under the language of Airbnb's

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Terms of Service, the Does cannot sustain their burden of demonstrating that their claims fall outside the scope of the arbitration clause.

IV.
STANDARD OF REVIEW

There are several aspects to this question:

First, what is the applicable law? Although Airbnb's Terms of Service calls for the application of California law on substantive issues, *see* R. 78, Ex. 1-C, 1-G (at R. 137, 163), both sides agree that on issues concerning arbitration that arise under contracts like this one, that are governed by the Federal Arbitration Act (FAA), 9 U.S.C §§1-6, federal law controls.[4]

Therefore, federal law determines such questions as who decides arbitrability; whether the claim in fact is arbitrable; and the interpretation of any rules incorporated into the Terms of Service,

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[4]*See Preston v. Ferrer*, 552 U.S. 346, 349-50 (2008); *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 55-56 (1995); *Spirit Airlines, Inc. v. Maizes*, 899 F.3d 1230, 1236 (11th Cir. 2018), *cert. denied*, 139 S.Ct. 1322 (2019); *Sachse Construction and Development Corp. v. Affirmed Drywall Corp.*, 251 So. 3d 1005, 1008 (Fla. 3d DCA 2018); *Jensen v. Rice*, 809 So. 2d 895, 898 (Fla. 3d DCA 2002) (stating that this is true even if the agreement would be invalid under Florida law).

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such as the Rules of the American Arbitration Association.[5] When such federal questions arise in state court, the court is bound only by decisions of the United States Supreme Court; all other federal courts' decisions, while persuasive, are advisory. *See Carnival Corp. v. Carlile*, 953 So. 2d 461, 465 (Fla. 2007).

Second, these issues of law are reviewable *de novo*. *See Hernandez v. Crespo*, 211 So. 3d 19 (Fla. 2016), *cert. denied*, 138 S.Ct. 132 (2017); *Gainesville Health Care Ctr., Inc. v. Weston*, 857 So. 2d 278 (Fla. 1st DCA 2003).

Third, what standard governs the question of who decides arbitrability? The FAA was enacted to encourage and enforce Arbitration Agreements according to their terms. *See* 9 U.S.C. §2; *Volt Information Science, Inc. v. Board of Trustees of Leland Stanford*

[5] *See Rent-A-Center, Inc. v. Jackson*, 561 U.S. 63 (2010); *Blanton v. Domino's Pizza Franchising, LLC*, 962 F.3d 842, 845-47 (6th Cir. 2020); *JPay, Inc. v. Kobel*, 904 F.3d 923, 938 (11th Cir. 2018), *cert. denied*, 139 S.Ct. 1545 (2019); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1279 (10th Cir. 2017); *Terminix International Co. v. Palmer Ranch Ltd. Partnership*, 432 F.3d 1327, 1333 (11th Cir. 2005).

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Junior University, 489 U.S. 468, 479 (1989). As a general rule, there is an "emphatic policy in favor of arbitral dispute resolution."[6]

However, on the threshold question of who decides whether a case or claim is arbitrable, the Supreme Court has applied a strict standard. If the parties have not clearly and unmistakably agreed otherwise, the court will decide whether disputes or claims fall within the scope of an arbitration provision. *See Howsam v. Dean Witter Reynolds, Inc.*, 537 U.S. 79, 83 (2002). A court "should not assume that the parties agreed to arbitrate arbitrability unless there is clear and unmistakable evidence that they did so." *Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63, 69 n.1 (2010). *Accord, First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995).

However, "[w]here the agreement clearly and unmistakably provides for the arbitrator to determine the issue of arbitrability of a dispute, courts should enforce the agreement as written." *Bank of America, N.A. v. Beverly*, 183 So. 3d 1099, 1101 (Fla. 4th DCA

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[6]*Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985), *quoted in Cordoba v. DIRECTV, LLC*, 801 Fed. Appx. 723, 725 (11th Cir. 2020). *Accord, Buckeye Check Cashing, Inc. v. Cardegna*, 546 U.S. 440, 443 (2006); *Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 91-92 (2000).

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2015). *Accord, Mercedes Homes, Inc. v. Colon*, 966 So. 2d 10, 14 (Fla. 5th DCA 2007), *review denied,* 980 So. 2d 488 (Fla. 2008). This is true "even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless." *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S.Ct. 524, 529 (2019). The parties' "intention to have the issue of arbitrability decided by the arbitrator can be manifested either through express terms or through the use of broad terms describing the scope of the arbitration agreement." 1 M. Domke, et al., *Domke on Commercial Arbitration* § 15:2 (3d ed. 2014).

Fourth, what standard governs the substantive question of arbitrability--whether the case or claim is subject to an arbitration provision? The party seeking arbitration has the initial burden of showing the existence of a valid arbitration provision. *See Palm Garden of Healthcare Holdings, LLC v. Haydu*, 209 So. 3d 636, 68 (Fla. 5th DCA 2017). Here the Does did not contest the validity of the Terms of Service that they had consented to, and raised no claim that Airbnb had waived enforcement of the Terms of Service. *See* R. 264-65. Such a showing shifts the burden to the party

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opposing arbitration to show that the agreement does not apply to his claim. *See Green Tree Financial Corp.-Alabama v. Randolph*, 531 U.S. 79, 91-92 (2000).

This burden reflects the favorability of arbitration under the FAA, *see supra* pp. 18-19, which prescribes a broad construction of the scope of any arbitration provision. *See JPay, Inc. v. Kobel*, 904 F.3d 923, 938 (11th Cir. 2018), *cert. denied*, 139 S.Ct. 1545 (2019). Any doubts concerning the scope of an arbitration clause must be resolved in favor of arbitration.[7] Arbitration of a claim or issue should not be denied "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation that could cover the dispute at issue." *United Steelworkers of America v. Warrior Gulf & Navigation Co.*, 363 U.S. 574, 582-83 (1960). If any interpretation of the clause would place the dispute within the scope of the arbitration provision, the dispute is

[7]*See Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 476 (1989); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 631 (1985); *Cordoba v. DIRECTV, LLC*, 801 Fed. Appx. 723, 725 (11th Cir. 2020); *Jensen v. Rice*, 809 So. 2d 895, 899 (Fla. 3d DCA 2002); *Stinson-Head, Inc. v. City of Sanibel*, 661 So. 2d 119, 120 (Fla. 2d DCA 1995), *review dismissed*, 671 So. 2d 788 (Fla. 1996).

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arbitrable. *See Downer v. Siegel*, 489 F.3d 623, 626 (5th Cir.), *cert. denied*, 552 U.S. 1063 (2007); *Jensen v. Rice*, 809 So. 2d 895, 899 (Fla. 3d DCA 2002).

V.
ARGUMENT.

A. THE DISTRICT COURT ERRED IN RULING THAT THE ARBITRATION CLAUSE IN AIRBNB'S TERMS OF SERVICE DID NOT STATE CLEARLY AND UNMISTAKABLY THAT ONLY THE ARBITRATOR COULD DECIDE THE ISSUE OF ARBITRABILITY.

Airbnb's Terms of Service incorporate the AAA Rules (*see* R. 78, Ex. 1-C, 1-G (at R. 138, 163)). Those rules in turn provide that the arbitrator "shall have the power to rule on his or her own jurisdiction." AAA Rules 7(a)-(b). Every other court to consider this language--Florida, federal and the courts of other states--has held that the parties to the contract had unambiguously agreed that in the event of a dispute, the arbitrator--not the trial court--would decide arbitrability.

A. The Florida Decisions.[8] In *Reunion West Development Partners, LLLP v. Guimaraes*, 221 So. 3d 1278 (Fla. 5th DCA 2017),

[8]This is a federal question arising in a Florida court. As noted, on federal questions, the Florida courts must follow U.S. Supreme

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a home purchase agreement said that disputes "will be resolved by binding arbitration pursuant to the [Federal Arbitration Act (FAA), 9 U.S.C. §§1-6] . . . conducted in accordance with the Construction Industry Arbitration Rules of the [AAA] and the terms of this agreement." They were the same as AAA Rule 7(a)-(b), which are applicable here: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." The District Court held, *id.* at 1280: "Where, like here, the language of the contract clearly states that AAA rules govern, then said rules are expressly incorporated into the contract . . . and those rules provide that the arbitrator is authorized to rule on the arbitrability of the instant contract." As here, the *Reunion West* contract incorporated the AAA Rules in general--not any specific provision--and provided that the arbitrator was "authorized" to rule on the issue of arbitrability. The court nevertheless held that the incorporation of the AAA Rules into the contract was clear and

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decisions only. Decisions of other federal courts are persuasive. Therefore, we begin with the Florida cases that have addressed this question of federal law.

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unambiguous, and in turn that the AAA Rules were clear and unambiguous, in providing that the arbitrator decides arbitrability.[9]

In *Younessi v. Recovery Racing, LLC*, 88 So. 3d 364, 365 (Fla. 4th DCA 2012), in which the dispute was about how the arbitrator would be selected, the contract "expressly stated that any dispute arising from it was to be arbitrated under AAA Rules." The court held: "Even though the contract does not specify how the arbitrator is to be selected, AAA rules have a procedure to be followed . . . for the selection of an arbitrator [which] should have been followed."

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[9]In their initial Brief in the District Court (R. 57-58), the Does argued that because the "plaintiffs in *Reunion* were purchasing real estate . . . it is entirely possible . . . that the plaintiffs were sophisticated when it came to buying property. And even if they were not, there is an obvious difference between an arms-length real-estate transaction and a one-sided clickwrap agreement between two consumers and a corporation valued at nearly $40 billion" (emphasis deleted). Even apart from the fact that what is "possible" means nothing, as noted, *see infra* pp. 43-48, no case has ever held that the enforceability of a clickwrap agreement depends upon the sophistication of the parties, and in fact, several have rejected that contention. And there is no contrary suggestion in the *Reunion* decision--indeed, no discussion at all of the parties' sophistication. Nor is there any basis for assuming that purchasing a home (or renting short-term) means that the buyer is unsophisticated. The Does introduced no evidence one way or the other, including any evidence of the extent of their own sophistication.

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The reference to the AAA Rules was clear, and the Rules themselves were clear. The court enforced the contract.

In *Rintin Corp., S.A. v. Domar, Ltd.*, 766 So. 2d 407 (Fla. 3d DCA 2000), the shareholders' agreement provided that any controversy "will be submitted to arbitration . . . according to the provisions of the Florida International Arbitration Act (FIAA) [§§684.01-.35] and the rules of the [AAA]." The FIAA provided that "whether the dispute is arbitrable . . . shall be for the arbitral tribunal to decide." §684.22(1), Fla. Stat. Citing *First Options*, 514 U.S. 938, the court held (*id.* at 409):

> [A]lthough the parties did not include specific language indicating that the issue of arbitrability of a dispute will be submitted to an arbitral panel, they did include a specific reference to the FIAA which contains such a provision. The inclusion of this reference is "clear and unmistakable" evidence of the parties' intent to be governed by the FIAA and its provision requiring the submission of the issue of arbitrability of a dispute to the arbitral panel.

The parties had clearly and unmistakably invoked the AAA Rules, and those Rules unambiguously and unmistakably assigned the issue of arbitrability to the arbitrator.

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In *Glasswall LLC v. Monadnock Construction, Inc.*, 187 So. 3d 248 (Fla. 3d DCA), *rev. denied*, 2016 WL 3486432 (Fla. June 27, 2016), the parties had agreed that if mediation failed, "the method of binding dispute resolution" would be arbitration, to be "administered by the [AAA] in accordance with its Construction Industry Arbitration Rules . . . ." Rule R.9(a) provided: "The arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." The court relied upon *Rintin*, *supra* p. 25, in which the contract, "like the one presently before us, did not include specific language indicating that the issue of arbitrability of a dispute would be submitted to an arbitral panel but did incorporate a reference to Florida's International Arbitration Act." That referral, and the incorporated FIAA provision, together constituted "'clear and unmistakable' evidence that the parties intended that arbitrability be decided by the arbitral panel . . . ." *Id.* at 251.

And in *Miami Marlins, L.P. v. Miami-Dade County*, 276 So. 3d 936 (Fla. 3d DCA 2019), the contract between Miami-Dade County,

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the City of Miami, and the Miami Marlins called for the arbitration of "any disagreements," incorporating arbitration provisions contained in a different agreement made between the City, the County, and a different Marlins entity. That other agreement in turn incorporated the Commercial Arbitration Rules of the AAA, including Rule 7, giving the arbitrator "the power to rule on his or her own jurisdiction, including . . . the arbitrability or any claim or counterclaim." The court held: "In the abundant Florida and federal case law pertaining to the threshold decisions arising between judges and arbitrators regarding the scope of their respective jurisdictions, this AAA Rule makes the arbitration panel the gateway for determinations regarding arbitrability [*citing Glasswell, supra* p. 26]." Again, the contract's reference to AAA Rule 7 was clear and unambiguous, as was the language of Rule 7 itself.

The contracts or statute in all of these cases contained arbitration clauses that incorporated AAA Rules in general, without citing to the specific provision addressing who decides arbitrability. And the incorporated rules or statute in these cases did not say

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either that the arbitrator had the "exclusive" authority to decide that issue, or that a trial court did not have such authority. Nevertheless, in interpreting the FAA or analogous arbitration rules, the cited decisions all held that the contracts and the statute clearly and unambiguously incorporated arbitration rules that in turn clearly and unambiguously required arbitration of the issue of arbitrability.

B. The Federal Decisions.

1. The Eleventh Circuit. In *Terminix International Co., LP v. Palmer Ranch Ltd. Partnership*, 432 F. 3d 1327, 1332-333 (11th Cir. 2005), the court held that an arbitration agreement's incorporation of rules providing that an arbitrator would have the power to determine the scope and validity of the arbitration agreement was clear and unmistakable evidence of the parties' intent. In *Terminix*, as here, the arbitration clause at issue stated that "arbitration shall be conducted in accordance with the Commercial Arbitration Rules then in force of the American Arbitration Association (AAA)." *Id.* at 1332. Rule 8 of the AAA Rules provided that "the arbitrator shall have the power to rule on his or

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her own jurisdiction, including any objections with respect to the existence, scope or validity of the arbitration agreement." *Id.* The court held that "[b]y incorporating the AAA Rules, including Rule 8, into their agreement, the parties clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid." *Id.* The *Terminix* decision gave no consideration to the sophistication of the parties. *See* discussion of the issue *infra* pp. 43-48.

In 2018, *Terminix* was expressly reaffirmed in two Eleventh Circuit decisions involving consumers--*Spirit Airlines, Inc. v. Maizes*, 899 F. 3d 1230, 1233 (11th Cir. 2018), *cert. denied*, 139 S.Ct. 1322 (2019), and *JPay, Inc. v. Kobel*, 904 F. 3d 923, 937-38 (11th Cir. 2018). As in *Terminix*, both held that by expressly incorporating the AAA Rules, the parties had clearly and unmistakably delegated to the arbitrator the power to rule on his or her own jurisdiction. Moreover, numerous District Court decisions in the Eleventh Circuit have applied *Terminix* to consumer plaintiffs. *See, e.g., Cordoba v. DIRECTV, LLC,* 801 Fed. Appx. 723 (11th Cir. 2020) (action by consumer under Satellite Television Extension and

Localism Act of 2010, PL 111-175, 124 Stat. 1218, amending 47 U.S.C. §1338; unambiguous delegation); *Schuster v. Uber Technologies, Inc.*, 2019 WL 545441 (M.D. Fla. Feb. 7, 2019) (Telephone Consumer Protection Act, 47 U.S.C.A. §227, *et seq.*, lawsuit filed by consumer plaintiff: "The Eleventh Circuit has held that when parties incorporate the AAA Rules, which empower arbitrators to decide issues of arbitrability, into their arbitration agreements, they have clearly and unmistakably agreed that the arbitrator should decide whether the arbitration clause is valid"); *Donado v. MRC Express, Inc.*, 2018 WL 318473 (S.D. Fla. Jan. 4, 2018) (case filed by employee under Fair Labor Standards Act, 29 U.S.C.A. §201).

2. *Federal Decisions Outside of the 11th Circuit.* "Virtually every [federal] circuit court to have considered the issue has determined that incorporation of the American Arbitration Association's (AAA) arbitration rules constitutes clear and unmistakable evidence that the parties agreed to arbitrate arbitrability." *Oracle America, Inc. v. Myriad Group A.G.*,724 F. 3d

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1069, 1074 (9th Cir. 2013). The post-*Brennan* decisions[10] "have consistently found that the reference to AAA Rules evinces a clear and unmistakable intent to delegate arbitrability to an arbitrator, regardless of the sophistication of the parties." *Diaz v. Intuit, Inc.*, 2017 WL 4355075 (N.D. Cal. Sep. 29, 2017).

In *Selden v. Airbnb, Inc.*, 2016 WL 6476934, *5 (D.D.C. Nov. 1, 2016), the court enforced Airbnb's clickwrap presentation for mobile devices, holding that it created an enforceable contract, binding the plaintiff user to its Terms of Service and arbitration provision. As here, the Plaintiff created his account via a Facebook sign-up method that hyperlinked to Airbnb's Terms of Service. Its reference to the AAA Rules was clear and unambiguous, and those Rules in turn were clear and unambiguous. *Accord, Plazza v. Airbnb, Inc.*, 2018 WL 583122 (S.D.N.Y. Jan. 26, 2018). Additional unpublished decisions regarding Airbnb are cited and attached at R. 78, Composite Ex. 2 (at R. 214-62).

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[10]*Brennan v. Opus Bank*, 796 F.3d 1125 (9th Cir. 2015), discussed *infra* p. 46.

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The same result is found in decisions enforcing analogous arbitration provisions of other enterprises. A good example is *Cordas v. Uber Technologies, Inc.*, 228 F. Supp. 3d 985 (N.D. Cal. 2017). Uber is one of a number of e-commerce companies that offer ride-sharing services online and via mobile applications. A consumer must create an account to use Uber's platform, which was also true for the Does when using Airbnb's platform. As here, by creating an account, the consumer agreed to Uber's Terms and Conditions and Privacy Policy, which provided that "arbitration will be administered by the American Arbitration Association ('AAA') in accordance with the Commercial Arbitration Rules and the Supplementary Procedures for Consumer Related Disputes (the 'AAA Rules') then in effect." *Id.* at 991 n.3. These are the same AAA Rules that are at issue in this case. The *Uber* court held that this language was "clear and unmistakable evidence of the parties' intent to delegate questions of arbitrability to an arbitrator." Thus, "the arbitrator shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability

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of any claim or counterclaim." *Id.* at 991-92. Many other federal courts have come to the same conclusion.[11]

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[11]*See, e.g., In re Automotive Parts Antitrust Litigation*, 951 F.3d 377, 382 (6th Cir. 2020); *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 845 (6th Cir. 2020), *cert. denied sub nom. Piersing v. Domino's Pizza*, 2021 WL 231566 (Jan. 25, 2021); *Richardson v. Coverall North America, Inc.*, 811 Fed. Appx. 100, 103-04 (3d Cir. 2020); *McGee v. Armstrong*, 941 F.3d 859, 866 (6th Cir. 2019); *Arnold v. Homeaway, Inc.*, 890 F.3d 546 (5th Cir. 2018); *Dish Network L.L.C. v. Ray*, 900 F.3d 1240, 1246 (10th Cir. 2018); *Belnap v. Iasis Healthcare*, 844 F.3d 1272 (10th Cir. 2017); *Simply Wireless, Inc. v. T-Mobile US, Inc.*, 877 F.3d 522, 527-28 (4th Cir. 2017), *cert. denied*, 139 S.Ct. 915, *abrogated on other grounds by Henry Schein, Inc. v. Archer and White Sales Inc.*, 139 S.Ct. 524 (2019) (affirming Court of Appeal's ruling that arbitrator decides arbitrability, but reversing its ruling that a court can usurp this delegation if it finds that the purported application of the arbitration clause to the lawsuit is "wholly groundless"); *Brennan v. Opus Bank*, 796 F.3d 1125, 1130-31 (9th Cir. 2015); *Chevron Corp. v. Ecuador*, 795 F.3d 200, 207-08 (D.C. Cir. 2015), *cert. denied*, 136 S.Ct. 2410 (2016); *Petrofac, Inc v. DynMcDermott Petrol. Operations Co.*, 687 F.3d 671, 675 (5th Cir. 2012); *Turi v. Main St. Adoption Services, LLP*, 633 F.3d 496, 506 (6th Cir. 2011), *abrogated on other grounds by Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S.Ct. 524 (2019) (*see* description of Supreme Court ruling above); *Fallo v. High-Tech. Institute*, 559 F.3d 874 878 (8th Cir. 2009); *Awuah v. Coverall North America, Inc.*, 554 F.3d 7, 11-12 (1st Cir. 2009); *Qualcomm Inc. v. Nokia Corp.* 466 F.3d 1366, 1372-73 (Fed. Cir. 2006), *abrogated on other grounds by Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S.Ct. 524 (2019) (*see* description of Supreme Court ruling above); *Contec Corp. v. Remote Solutions, Co.*, 398 F.3d 205, 208-09 (2d Cir. 2005); *In re Facebook Biometric Information Privacy Litigation*, 185 F.Supp. 3d 1155 (N.D. Cal. 2016); *Swift v. Zynga Game Network, Inc.*, 805 F. Supp. 2d 904, 910-12 (N.D. Cal. 2011). *See also Commonwealth*

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3. Apollo. Many of the cited decisions rely in part upon *Apollo Computer, Inc. v. Berg*, 886 F.2d 469 (1st Cir. 1989). In *Apollo*, the parties had agreed to arbitrate claims in accordance with the Rules of Arbitration of the International Chamber of Commerce. The court held that this provision clearly and unmistakably delegated the determination of arbitrability to the arbitrator. *Id.* at 473:

> Ordinarily, Apollo would be entitled to have these issues resolved by a court. By contracting to have all disputes resolved according to the Rules of the ICC, however, Apollo agreed to be bound by Articles 8.3 and 84. These provisions clearly and unmistakably allow the arbitrator to determine her own jurisdiction when, as here, there exists a *prima facie* agreement to arbitrate . . . . The arbitrator should decide whether a valid arbitration agreement exists between Apollo and the defendants under the terms of the contract between Apollo and Dieo.

The Does contended below that all of the many contrary decisions on this question had simply rubber-stamped *Apollo*, exercising no independent judgment. They then sought to wipe

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Edison Co. v. Gulf Oil Corp., 541 F.2d 1263,1272-73 (7th Cir. 1976) (*dictum*).

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them all out in one fell swoop, by challenging *Apollo* on the ground that "[n]o explanation was offered for how, exactly, this language would be clear and unmistakable to the contracting parties." *See* R. 47 (Brief of Appellants at 15). But even apart from the insult to the Judges in these many other cases, who of course made their own decisions, no further analysis was required in *Apollo*. The parties had unambiguously agreed to be bound by the ICC Rules. The ICC Rules unambiguously delegated the issue of arbitrability to the arbitrator. That was the beginning and the end of the analysis.

Moreover, *Apollo* has not faded into quiescence. In the past decade alone, it has been cited favorably dozens of times, in every federal circuit in which a court has addressed the issue.[12] And the

[12] *See, e.g., Green Tree Servicing, L.L.C. v. House*, 890 F.3d 493, 503 & n. 49 (5th Cir. 2018); *Belnap v. Iasis Healthcare*, 844 F.3d 1272, 1279 (10th Cir. 2017); *Turi v. Main Street Adoption Services, LLP*, 633 F.3d 496, 506 (6th Cir. 2011),*overruled on other grounds by Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S.Ct. 524 (2019) (affirming Court of Appeal's ruling that arbitrator decides arbitrability, but reversing its ruling that a court can usurp this delegation if it finds that the purported application, of the arbitration clause to the lawsuit is "wholly groundless"); *Tannatt v. Varonis Systems*, 2019 WL 830482 (D. Mass. Feb. 21, 2019); *Promptu Systems Corp. v. Comcast Corp.*, 2017 WL 4475966 (E.D. Pa. May 5, 2017); *Townsend Ventures, LLC v. Hybrid Kinetic Grp. Ltd.*, 2017 WL 3730345 (D. Md. Aug. 30, 2017); *In re Lithium Ion Batters Antitrust Litigation*, 2016 WL 5791357 (N.D. Cal. Oct. 4,

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same is true of recent state court decisions.[13] The federal and the other states' decisions overwhelmingly--indeed unanimously--agree with all of the Florida decisions except this one.

C. The District Court's Rationales. As noted, the District Court offered five rationales for its decision. The first three--that the Terms of Service were themselves silent on the question of who decides arbitrability; that the AAA Rules were not attached to the Terms of Service; and that they were referenced only as a generic body of rules--have been rejected by every other court to address this issue. All three points must fall if this Court agrees that clickwrap agreements are enforceable on this issue if the language they incorporate is clear and unambiguous.

The District Court's fourth and fifth rationales are the following:

2016); *Boehm v. Getty Images (US), Inc.*, 2016 WL 6110058 (W.D. Wis. Oct. 19, 2016); *Kastner v. Vanbestco Scandanavia, A.B.*, 2014 WL 6682440 (D. Vt. Nov. 25, 2014); *Eckert/Wordell Architects, Inc. v. FJM Properties of Willmar, LLC*, 2013 WL 1942167 (D. Minn. May 9, 2013), *aff'd*, 756 F.3d 1098 (8th Cir. 2014).

[13] *See, e.g., Eickhoff Corp. v. Warrior Met Coal, LLC*, 265 So. 3d 216, 222 (Ala. 2018); *HPD, LLC v. TETRA Technologies, Inc.*, 424 S.W. 3d 304 (Ark. 2012); *Bailey v. Ford Motor Co.*, 244 N.C. App. 346, 353 (N.C. App. 2015), *review denied*, 782 S.E. 2d 514 (N.C. 2016).

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1. The District Court's Holding That Airbnb's Terms of Service Are Ambiguous Because They Invoke the AAA Rules Only to Determine How the Arbitration Is to Be "Administered." *See* Decision at 606. The Court said that the use of the word "administered" suggests that the AAA Rules apply "[i]f a claim is arbitrated," but "on the initial question of arbitrability, [it is] not at all clear" (*id.*). The Court concluded that the determination of whether an action or a claim is arbitrable is arguably not part of the "administration" of the arbitration, but rather precedes it. By the same reasoning, such a preliminary ruling by a court would also not be part of its "administration" of a lawsuit--for example, on the issues of subject matter or personal jurisdiction. It was this fiction upon which the District Court based its ruling that only *some* of the AAA Rules would apply to the Airbnb Terms of Service--those applicable only when an arbitrator actually reaches the merits of a controversy, but not others that are preliminary to its merits analysis, such as Rules 7(a)-(b).

Respectfully, the threshold determination of arbitrability is indeed part of the administration of an arbitration, no less than a

court's determination of its jurisdiction is part of that court's administration of a lawsuit. Several cases have applied an arbitration clause to such language. *See, e.g., Belnap v. Iasis Healthcare*, 844 F.3d 122 (10th Cir. 2017) (determining arbitrability is part of "administration" of arbitration); *Cordas v. Uber Technologies, Inc.*, 228 F.Supp. 2d 389 (N.D. Cal. 2017) ("administered"--same); *Plazza v. Airbnb, Inc.*, 2018 WL 583122 (S.D.N.Y. Jan. 26, 2018) (Airbnb's Terms of Service); *Glasswell LLC v. Monadnock Construction, Inc.*, 187 So. 3d 248 (Fla. 3d DCA), *rev. denied*, 2016 WL 3486432 (Fla. June 27, 2016) ("administered"--same). *See also Dish Network L.L.C. v. Ray*, 900 F.3d 1240 (10th Cir. 2018) (holding that deciding arbitrability is part of the "conduct" of an arbitration); *Terminix International Co., LP v. Palmer Ranch Ltd. Partnership*, 432 F.3d 1327 (11th Cir. 2005) ("conducted"--same); *Reunion West Development Partners, LLLP v. Guimaraes*, 221 So. 3d 1278 (Fla. 5th DCA 2017) ("conducted"--same). The word "administration," as applied to an arbitration, unambiguously covers the determination of arbitrability.

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2. The District Court's Holding That the AAA Rules Are Themselves Ambiguous. The District Court not only held that the Airbnb Terms of Service did not explicitly and unmistakably invoke the AAA Rules. It also held that the AAA Rules themselves were not clear and unambiguous, because they do not expressly say that the arbitrator's authority to decide the issue of arbitrability is exclusive (*see* Decision at 607). The Does went even further, contending that the AAA Rules' "plain language" gave both the court and the arbitrator the authority to determine arbitrability, and thus did "not divest the trial court of its authority to decide whether Plaintiffs' claims were arbitrable." R. 49 (Brief of Appellant at 17).

But neither the Does nor the District Court ever explained how this would work. A claimant *always* has the option to file his claim in court. If the court had concurrent authority to decide arbitrability, then any plaintiff who wanted the court to do so need only file a lawsuit. The court's authority would be *de facto* exclusive. And that is exactly what the court said in rejecting this argument in *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d

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842, 849 (6th Cir. 2020), *cert. denied sub nom. Piersing v. Domino's Pizza*, 2021 WL 231566 (Jan. 25, 2021):

> [T]hings would get pretty chaotic if the rule were read that way. It would lead to a race to the courthouse (or arbitrator's forum) to have each party's preferred decision maker be the first to rule on the issue. For if a court ruled on the issue first, that would bind the arbitrator . . . .

The delegation clause of the AAA Rules unambiguously gives exclusive power to the arbitrator. It says nothing about a court deciding the issue. It says that the arbitrator "shall have the power to rule on his or her own jurisdiction, including any objections with respect to the existence, scope, or validity of the arbitration agreement or to the arbitrability of any claim or counterclaim," and "shall have the power to determine the existence or validity of a contract of which an arbitration clause forms a part." AAA Rules at R-7(a)-(b). As Judge Villani wrote in dissent, "the power to decide *is* the power to decide" (Decision at 611) (emphasis in original). It is the arbitrator who has "the power." The arbitration agreement says nothing about a court.

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Every one of the decisions finding a clear and unmistakable assignment of the issue of arbitrability to the arbitrator *ipso facto* found not only that the clickwrap link to the AAA Rules was unambiguous, but also that the AAA Rules themselves were unambiguous. The Supreme Court unanimously held in *Henry Schein, Inc. v. Archer and White Sales, Inc.*, 139 S.Ct. 524, 529 (2019), that when a contract delegates threshold questions of arbitrability to the arbitrator, a court "*possesses no power to decide*" the question (emphasis added), but *must* refer the matter to arbitration:

> When the parties' contract delegates the arbitrability question to an arbitrator, a court may not override the contract. In those circumstances, a court possesses no power to decide the arbitrability issue. That is true even if the court thinks that the argument that the arbitration agreement applies to a particular dispute is wholly groundless.

In addition, several courts have said more generally what is inherent in every decision on this issue--that the relevant AAA Rules are unambiguous. For example, in *Apollo Computer, Inc. v. Borg*, 886 F.2d 469, 473 (1st Cir. 1989), the court said that the ICC Rule "clearly and unmistakably allow[s] the arbitrator to determine

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his own jurisdiction . . . ." The court said in *Awuah v. Coverall North America, Inc.*, 554 F.3d 7, 11 (1st Cir. 2009) that the AAA Rule is "about as 'clear and unmistakable' as language can get." In *Terminix*, 432 F.3d at 1332, the court said: "By incorporating the AAA Rules, including Rule 8, into their agreement, the parties clearly and unambiguously agreed that the arbitrator should decide whether the arbitration clause is valid." The court said in *Dish Network, L.L.C. v. Ray*, 900 F.3d 1240, 1246 (10th Cir. 2018) that "incorporation of the Rules clearly and unmistakably shows the parties intended for the arbitrator to decide all issues of arbitrability." *See Blanton*, 962 F.3d at 845 (incorporation of the AAA Rules was "pretty compelling evidence that [the parties] agreed to arbitrate 'arbitrability'"); *Cooper v. WestEnd Capital Management L.L.C.*, 832 F.3d 534, 546 (5th Cir. 2016); *Emilio v. Sprint Spectrum L.P.*, 508 Fed. Appx. 3, 5 (2d Cir. 2013); *Wynn Resorts, Ltd. v. Atlantic-Pacific Capital, Inc.*, 497 Fed. Appx. 740, 742 (9th Cir. 2012).

The Does below cited *Morton v. Polivchak*, 931 So. 2d 935 (Fla. 2d DCA 2006) as "instructive." R. 49 (Brief of Appellants at 17). In

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Morton, it was the "AAA Commercial Arbitration and Mediation Center for the Americas (CAMCA) Mediation and Arbitration Rules" that governed the parties' agreement--not the Rules at issue in this case. And the opinion in *Morton* does not say whether the CAMCA Rules even contained a delegation clause, as do the AAA Rules. Not surprisingly, therefore, *Morton* did not even address the issue of arbitrability–no less the issue of shared authority on the question. It addressed the substantive question of whether the claim in *Morton* was arbitrable, with no consideration of who determines the arbitrability of a claim, *id.* (emphasis in original):

> The provision in the AAA [CAMCA] rules on which Polivchack relies provides simply that "[o]bjections to the arbitrability of a claim must be raised no later than thirty (30) days after notice to the parties of the commencement of the arbitration." This provision only addresses the procedure of raising an objection to arbitrability in an arbitration proceeding *when the arbitration panel has the authority to decide issues of arbitrability*. The provision does not itself grant the arbitration panel that authority.

The CAMCA Rules at issue in *Morton* were silent as to who decides the question of arbitrability. The AAA Rules at issue in the instant case specifically state that it is the arbitrator who has the

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authority to determine arbitrability. No decision interprets such language to give concurrent authority to both the arbitrator and the court.

D. The Alleged Sophistication of the Contracting Parties Is Not a Factor; and in Any Event, the Does Introduced No Evidence on the Question. The Does did not introduce any evidence concerning their level of sophistication. Therefore, even if this were a relevant factor, it would not be implicated here. In addition, however, it is not a relevant fact.

We have already cited numerous cases involving consumers, none of which took into account the sophistication of the parties. Moreover, in addition to these decisions, some courts have explicitly declined to consider sophistication when determining whether parties had clearly and unmistakably intended to delegate arbitrability to an arbitrator through the incorporation of the AAA Rules.

The court said in *Blanton v. Domino's Pizza Franchising LLC*, 962 F.3d 842, 851 (6th Cir. 2020), *cert. denied sub nom. Piersing v. Domino's Pizza*, 2021 WL 231566 (Jan. 25, 2021): "[N]othing in the

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Federal Arbitration Act purports to distinguish between 'sophisticated' and 'unsophisticated' parties. . . . And as judges, we have no authority to redline Congress's work." The court said in *Arnold v. Homeaway, Inc.*, 890 F.3d 546, 552 (5th Cir. 2018): "[T]his circuit has already applied the . . . rule in a case in which there was unequal bargaining power between the parties--a national chain and locally owned drugstore," *citing Petrofac, Inc. v. DynMcDermott Petroleum Operations Co.*, 687 F.3d 671, 674-75 (5th Cir. 2012); and "also . . . to an individual investor without mention of his level of sophistication," *citing Cooper v. WestEnd Capital Management, L.L.C.*, 832 F.3d 534, 536 (5th Cir. 2016).[14]

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[14]*Accord, Richardson v. Coverall North America, Inc.*, 811 Fed. Appx. 100, 104 (3d Cir. 2020), *citing Brennan v. Opus Bank*, 796 F.3d 1125, 1131-32 (9th Cir. 2015); *Davis v. USA Nutra Labs*, 303 F. Supp. 3d 1183, 1199 (D. N.M. 2018) (citing "the clear weight of authority . . . enforcing arbitrability delegation via incorporation of the AAA rules . . . regardless of the sophistication of the parties"; "Uber's terms and conditions, by incorporating the AAA rules into their arbitration provision, showed 'the parties' clear and unmistakable intent to delegate arbitrability questions to an arbitrator'"), *citing Cordas v. Uber Technologies, Inc.*, 228 F. Supp. 3d 985, 991-92 (N.D. Cal. 2017); *Collins v. Discover Financial Services*, 2018 WL 2087392 (D. Md. May 4, 2018) ("The cardmember agreements include AAA and JAMS rules which clearly state that issues of arbitrability [are] to be determined by the arbitrator. Plaintiffs give no sound basis for this Court to find that certain of the provisions in the cardmember agreements are

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Nevertheless, the Does contended in the Circuit Court--for the first time on rehearing, *see* R. 337--and then again on appeal, *see* R. 55 (Brief of Appellants at 23)--that the court should have taken the sophistication of the parties into consideration before enforcing the delegation clause incorporated in the AAA Rules. Inexplicably, they relied upon a statement in *Brennan v. Opus Bank*, 796 F. 3d 1125, 1131-32 (9th Cir. 2015), in contending that there was only a "limited context" in which the entire body of cases on this issue were decided; it said that all of them involved an arbitration agreement between sophisticated parties. R. 55 (Brief of Appellant

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sufficiently plain to bind them, yet others are not. Accordingly, Plaintiffs have provided the Court no reason to find otherwise. This determination is consistent with courts reaching similar questions involving 'unsophisticated' parties") (citations omitted), *appeal dismissed*, 2019 WL 3026966 (4th Cir. Feb. 14, 2019); *Khraibut v. Chahal*, 2016 WL 1070662 (N.D. Cal. June 21, 2016); *AccentCare Inc. v. Echevarria*, 2015 WL 3465761 (N.D. Cal. June 1, 2015) ("[N]early every decision in the Northern District of California subsequent to *Oracle* [*America, Inc. v. Myriad Group A.G.*, 724 F.3d 169 (9th Cir. 2013)] has not limited its holding to 'sophisticated parties'") (collecting cases); *West Virginia CVS Pharmacy, LLC v. McDowell Pharm*acy, 238 W. Va. 465, 481 (2017) ("Moreover, even if we agreed that the Plaintiff Pharmacies were unsophisticated, their presumed lack of expertise likely would not absolve them from application of the AAA rules").

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at 23). But like many cases involving consumers that we have already cited, the court in *Brennan* in fact said the opposite:

> The issue of sophistication of the parties was raised at oral argument. Our holding should not be interpreted to require that the contracting parties be sophisticated or that the contract be "commercial" before a court may conclude that incorporation of the AAA rules constitutes "clear and unmistakable" evidence of the parties' intent. Thus, our holding does not foreclose the possibility that this rule could also apply to unsophisticated parties or to consumer contracts. Indeed, the vast majority of the circuits that hold that incorporation of the AAA rules constitutes clear and unmistakable evidence of the parties' intent to do so without explicitly limiting that holding to sophisticated parties or to commercial contracts.

As noted, *supra* note 14, the court in *Richardson v. Coverall North America, Inc.*, 811 Fed. Appx. 100, 104 (3d Cir. 2020), properly cited *Brennan* for the proposition that sophistication is *not* a factor.

Citing only decisions involving employer or franchise agreements, the Does also contended that "many (if not most) federal district courts to address the question" had held that a lack of sophistication could vitiate an unambiguous assignment of the issue of arbitrability to the arbitrator. R. 56 (Brief of Appellants at

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24). In fact, *no court* to address "the question" that is presented *in this case* has done so, and numerous decisions cited above have said the opposite. None of the cases cited by the Does involved an e-commerce company or online service agreements. And even cases concerning labor or franchise agreements, which are *sui generis*, are not unanimous. *See, e.g., Rent-A-Center, West, Inc. v. Jackson*, 561 U.S. 63 (2010) (employment contract; issue of the contract's validity was clearly delegated to arbitrator); *Richardson v. Coverall North America, Inc.*, 811 Fed. Appx. 100, 103 (3d Cir. 2020) (franchise agreement; issue of arbitrability clearly delegated to arbitrator) (reversing a decision relied upon by the Does below).[15]

[15] The other decisions cited below either addressed agreements in an employment setting, *see Mikhak v. University of Phoenix*, 2016 WL 3401763 (N.D. Cal. June 21, 2016); *Vargas v. Delivery Outsourcing, LLC*, 2016 WL 946112 (N.D. Cal. March 14, 2016); *Ajamian v. CantorCO2e, L.P.*, 137 Cal. Rptr. 3d 773 (2012)(expressly limiting decision to the employer/employee relationship); or in the franchise setting, *see Chong v. 7-Eleven, Inc.*, 2019 WL 1003135 (E.D. Pa. Feb. 28, 2019); *Meadows v. Dickey's Barbecue Restaurants., Inc.*, 144 F. Supp. 3d 1069 (N.D. Cal. 2015); *Money Mailer, LLC v. Brewer*, 2016 WL 11479219 (W.D. Wa. Nov. 15, 2016), *dismissed*, 2017 WL 9288127 (Dec. 1, 2017); *Richardson v. Coverall N. Am., Inc.*, 2018 WL 4639225 (D.N.J. Sept. 27, 2018), *rev'd in relevant part*, 811 Fed. Appx. 100 (3d Cir. 2020); *Takiedine v. 7-Eleven, Inc*, 2019 WL 934994 (E.D. Pa. Feb. 25, 2019).

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Whether the contracting party is a consumer has never been held to matter when the contract in question is clear and unmistakable in its delegation. And in any event, as noted at the outset, the Does never offered any evidence concerning their level of sophistication.

E. The Does Were Provided Access to the AAA Rules. The Does argued below that the hyperlink in the Terms of Service that directed them to the AAA Rules was "broken, and the rules no longer exist," and therefore that "Airbnb did not even establish . . . that Plaintiffs could have accessed that language." R. 53 (Brief of Appellants at 21). They were incorrect. The hyperlink that existed in Airbnb's Terms of Service *in 2016 was* linked to the AAA Rules. *See* R. 78, Ex. 1-C, 1-G, Ex. 1-G (at R. 138, 163). That hyperlink to the Rules does not work *now*, because the AAA Rules website has been changed. Hyperlink to the current Commercial Arbitration Rule is https://www.adr.org/sites/default/files/Commercial%20Rules.pdf. The prior hyperlink did work in 2016, when the Does accepted the Terms of Service.[16]

[16]The March 2016 Terms of Service also included the existing telephone number to call to request a copy of the AAA Rules: The

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B. IN THE ALTERNATIVE, EVEN IF THE QUESTION OF ARBITRABILITY WERE ONE FOR THE COURT, THE DOES COULD NOT SUSTAIN THEIR BURDEN OF SHOWING THAT THE ARBITRATION CLAUSE IN AIRBNB'S TERMS OF SERVICE DOES NOT UNAMBIGUOUSLY APPLY TO THE DOES' CLAIMS.

Even if the issue of arbitrability were for a court--not the arbitrator--this Court should find that the Does cannot sustain their burden of showing that Airbnb's claims fall outside the scope of the Airbnb Arbitration Provision. As noted, this is a *de novo* issue of law. As also noted, the Does have the burden of proof on this issue, and any doubts concerning the scope of an arbitration clause must be resolved in favor of arbitration. *See supra* pp. 18, 20-21. The Arbitration Provision in Airbnb's Terms of Service applies to "any dispute, claim or controversy arising out of or relating to" Airbnb's Terms of Service, to Airbnb Members' use of the services provided by Airbnb, or to an Airbnb Member's use of Airbnb's online platform. *See* R. 78, Ex. 1-C, 1-G, ¶34 (at R. 137-38, 163-64); "Services" is defined as "connect[ing] hosts who have

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"AAA Rules are available at www.adr.org/arb_med or by calling the AAA at 1-800-778-7879." R. 78, Ex. 1-C, 1-G (at R. 138, 163).

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accommodations to rent with guests seeking to rent such accommodations." R. 78, Ex. 1-C, 1-G, ¶1 (at R. 117, 143). "Site" is defined as "www.airbnb.com and any other websites through which Airbnb makes services available." *Id.* "Application" is defined as "applications for mobile, tablet and other smart devices and application program interfaces." *Id.* Thus, the Arbitration Provision in Airbnb's Terms of Service includes any and all claims and disputes that arise out of or relate to either the Does' stay at the Property, or the Does' use of Airbnb's platform, including its website and Application.

The Does' claims literally arise under the Terms of Service. In their Complaint, the Does alleged that Airbnb had breached a duty 1) to ensure that the Property did not contain electronic devices capable of capturing visual images and/or audio recordings without their knowledge; and 2) to disclose whether the Property did contain electronic devices capable of capturing visual images and/or audio recordings without their knowledge. *See* R. 67, ¶¶41-42, 55-56. The Does also alleged that Airbnb had violated their rights "by failing to warn of past invasion[s] of privacy known to have occurred

at other Airbnb properties." *See* R. 67, ¶¶43, 54. Their claims of intrusion of privacy, common law negligence, and breach of fiduciary duties are all premised on their use of Airbnb's Application and Services. Their claim of breach of fiduciary duty is also based on their access to and interpretation of statements allegedly made on Airbnb's Site. These claims specifically arise under the contract.

Moreover, even if these claims did not satisfy that standard, the agreement covers all claims "relating to" the Terms of Service. This Court has stated that "narrow" arbitration clauses are those that only require arbitration of disputes "arising out of" the contract, whereas "broad Arbitration Clauses" govern disputes "arising out of" or "relating to" the contract. *Jackson v. Shakespeare Foundation, Inc.*, 108 So. 3d 587, 593 (Fla. 2013). A broad arbitration provision that purports to cover all disputes "related to" the contract is not limited to claims that literally arise under the contract. *Id.* A broad arbitration provision includes "those claims that are described as having a 'significant relationship' to the contract--regardless of whether the claim is

founded in tort or contract law." *Id.* A broad provision creates a presumption that a given claim is arbitrable.[17]

The "relating to" language of Airbnb's Arbitration Provision is "broad," and as a result, it is capable of expansive reach to all aspects of the Does' and Airbnb's relationship under the Terms of Service. Such allegations have repeatedly been held to be within the scope of broad arbitration provisions such as the one here. *See* cases cited *supra* note 17. Therefore, even if the Court were to hold that the issue of arbitrability should be decided by a court--not the arbitrator--it should hold that all of the Does' claims are arbitrable.

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[17]*See Cordoba v. DIRECTV, LLC,* 801 Fed. Appx. 723 (11th Cir. 2020); *Board of Trustees of City of Delray Beach Police & Firefighters Retirement System v. Citigroup Global Markets, Inc.*, 623 F.3d 1335, 1343 (11th Cir. 2010); *Naru Phosphate Royalties, Inc. v. Drago Daic Interests, Inc.*, 138 F.3d 165, 166 (5th Cir.), *cert. denied*, 525 U.S. (1998); *Collins & Aikman Products v. Building Systems, Inc.*, 58 F.3d 16, 20 (2d Cir. 1998) ("The clause in this case, submitting to arbitration '[a]ny claim or controversy arising out of or related to the agreement,' is the paradigm of a broad clause"); *Van Williams v. Voga Financial Advisors, Inc.*, 2021 WL 50491, *2 (M.D. Fla. Jan. 6, 2021); *Seifert v. U.S. Homes Corp.*, 750 So. 2d 633, 637 (Fla. 1999); *Maguire v. King*, 917 So. 2d 263, 268 (Fla. 5th DCA 2005), *app'd sub nom. Jackson v. Shakespeare Foundation, Inc.*, 108 So. 3d 587, 593 (Fla. 2013). *See also Prima Paint Corp. v. Flood & Conkling Mfg. Co.*, 388 U.S. 395, 397-98 (1967).

VI.
CONCLUSION

Florida, federal, and other state courts that have evaluated the AAA Rules incorporated by Airbnb into its Terms of Service, or their functional equivalent, have uniformly held that those Rules require the arbitrator to decide issues of arbitrability. There does not appear to be a single authority holding otherwise. Respectfully, this Court should approve the decisions of the three other Florida District Courts on this question, and disapprove the decision of the District Court in the instant case.

In the alternative, it is respectfully submitted that this Court should hold that the Does cannot satisfy their burden of showing that the Arbitration Clause in the Airbnb Terms of Service does not unambiguously apply to the Does' claims.

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CERTIFICATE OF COMPLIANCE

Pursuant to Florida Rule of Appellate Procedure 9.210(a), undersigned counsel hereby certifies that this brief is submitted in Bookman Old Style 14-point font and contains 9,326 words.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that I electronically filed the foregoing document via the Florida Court E-filing Portal, which will serve it via electronic mail upon all counsel on the attached Service List on this 3rd day of May, 2021.

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