IN THE SUPREME COURT OF FLORIDA

CASE NO. 91,821

5 DCA CASE NO. 96-03182

PATRICIA SEIFERT, as Personal Representative of the Estate of Ernest Seifert, Deceased, for the benefit of PATRICIA SEIFERT, surviving spouse,

Petitioner,

v.

U.S. HOME CORPORATION and WOODY TUCKER PLUMBING, INC.,

Respondents.

_____/

AMENDED REPLY BRIEF OF PETITIONER SEIFERT

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ARGUMENT

MRS. SEIFERT CANNOT BE REQUIRED TO ARBITRATE HER WRONGFUL DEATH ACTION BECAUSE SHE DID NOT AGREE TO ARBITRATE SUCH A CLAIM WHEN SHE SIGNED THE SALES AGREEMENT FOR HER HOUSE.

U.S. Home has forgotten the essence of the subject matter at issue. It talks excessively about the policies of favoring arbitration and broadly construing arbitration agreements. But an arbitration agreement is no more than a contract clause. And it cannot be given a meaning the parties to the contract did not intend when they entered into the agreement. That is the basic concept U.S. Home ignores. U.S. Home points to the broad language in its contract but ignores the context in which that language was written. U.S. Home cites numerous cases which hold that tort claims generally are arbitrable. But Seifert has never disputed that proposition. She has only claimed that this home purchase contract never contemplated arbitration of personal injury claims.

A. The interpretation of this arbitration agreement in a contract that does not involve substantial interstate commerce is determined under the Florida Arbitration Code.

U.S. Home begins with the premise that this case is governed by both federal and Florida law and the Federal Arbitration Act preempts any Florida law to the contrary. U.S. Home is wrong. It can enforce this arbitration clause only if it falls within the Florida Arbitration Code. Federal caselaw is relevant only to the extent it may interpret clauses with similar language or similar

facts. But the enforceability question is one of Florida law because this transaction did not fall within the federal Act.

The Florida Arbitration Act states in pertinent part:

> Two or more parties may agree in writing to submit to arbitration any controversy existing between them at the time of the agreement, or they may include in a written contract a provision for the settlement by arbitration of any controversy thereafter arising between them relating to such contract or the failure or refusal to perform the whole or any part thereof. Such agreement or provision shall be valid, enforceable, and irrevocable without regard to the justiciable character of the controversy . . . .

Fla.Stat. § 682.02. Arbitration agreements which do not fall within the confines of the Act are not enforceable, unless they fall within the scope of the Federal Arbitration Act. See Riverfront Properties, Ltd. v. Max Factor III, 460 So.2d 948 (Fla. 2d DCA 1984). Arbitration agreements are within the scope of the federal Act only if they concern a transaction involving interstate commerce, i.e., "the dispositive issue is whether the contract is 'in fact' affecting interstate commerce." Coastal Health Care Group, Inc. v. Schlosser, 673 So.2d 62 (Fla. 4th DCA 1996).

There is no evidence in this record that the transaction for the purchase of this home in fact affected interstate commerce in any way. Cf. Wood, Wire & Metal Lathers Int'l Union, Local 345 v. Babcock, Co., 132 So.2d 16, 18 (Fla. 3d DCA 1961)(trial court erred in assuming business of constructing model homes by a contractor affected interstate commerce); William Passalacqua Builders, Inc. v. Mayfair House Ass'n, Inc., 395 So.2d 1171, 1173 (Fla.

4th DCA 1981)(Florida Act applies to all construction contract disputes); Acton CATV, Inc. v. Wildwood Partners, Ltd., 508 So.2d 1274 (Fla. 5th DCA 1987)(contract for construction of a community antenna television system did not involve interstate commerce); Ronbeck Constr. Co. v. Savanna Club Corp., 592 So.2d 344 (Fla. 4th DCA 1992)(applying Florida Act to dispute between property owner and construction contractor). Thus, there is no basis for U.S. Home's assertion that its arbitration clause is enforceable under the federal Act. This difference is significant because to the extent U.S. Home interprets its clause more broadly than permitted under § 682.02, the clause is unenforceable under Florida law.[1/]

B. Nothing in the agreement, or in record, indicates the parties clearly intended to arbitrate this wrongful death claim.

U.S. Home acknowledges in its brief at 8 that "the parties' intent controls the construction of the [arbitration] agreement and, in determining such intent, the court should consider the language of the contract and the subject matter of the agreement, as well as its object and purpose." But it then ignores this analysis. It basically assumes the parties contemplated personal injury and death claims - with no evidence whatever of such in-

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[1/] See DaMora v. Stresscon Int'l, Inc., 324 So.2d 80 (Fla. 1975)(agreement to submit future disputes to arbitration voidable by either party and has no effect on party's right to invoke court's jurisdiction); Fenster v. Makovsky, 67 So.2d 427 (Fla. 1953)(agreement to arbitrate future claims invalid). See also Coastal Health Care, 673 So.2d 62 (provision that arbitration would take place in New York not enforceable in Florida courts).

tent.[2/] Certainly if the parties did not contemplate the possibility this injury could occur they could not intend to arbitrate it. Regardless of how broad, an arbitration clause can only address contemplated claims contemplated by the parties, as would any other contract.[3/] Hadley v. Baxendale, 9 Ex. 341, 156 Eng.Rep. 145 (1845)(damages for breach of contract are limited to those which "can reasonably be said to have been foreseen or contemplated by the parties at the time when they made the contract as a probable or natural result of the breach).

U.S. Home does not address the question of intent until the end of its analysis. And it does so by claiming at 28 that "the final point of analysis . . . is to determine if the parties in this case have expressly excluded personal injury claims from the scope of the arbitration clause." It concludes the parties must have intended to include personal injury claims because they did not expressly exclude such claims.[4/] This analysis is back

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[2/] The injury that occurred here was a foreseeable result of U.S. Home's failure to use reasonable care. However, as evidenced by U.S. Home's statement to the trial court, it was not contemplated by U.S. Home when the contract was formed. Therefore, arbitration of Seifert's wrongful death claim was not intended.

[3/] Here, arbitration of this claim was not part of the agreement because the parties did not contemplate Mr. Seifert's death. Thus, U.S. Home's attempt to distinguish Terminix Int'l Co., L.P. v. Michaels, 668 So.2d 1013 (Fla. 4th DCA 1996) and Dusold v. Porta-John Corp., 807 P.2d 526 (Ariz.Ct.App. 1990) on the ground that the arbitration clauses there were not as broad is of no consequence.

[4/] U.S. Home makes a similar argument in its brief at 10. It quotes several cases in support, but these quotations are taken out of context. The cases do not support its position. Beaver (continued...)

wards. As explained in Seifert's initial brief at 11-12 and 13-14, intent is the overriding concept. The cases cited in that portion of Seifert's brief make clear that there must be an intent to include the particular dispute in the arbitration clause.

U.S. Home has no answer to Seifert's straightforward contract analysis. As Seifert explained in her initial brief, there is nothing which shows the parties intended to arbitrate personal injury claims; nothing in the context in which they entered into this agreement gave notice of any such intent. The purpose of the agreement between the Seiferts and U.S. Home was the sale and purchase of a home. The Seiferts intended to purchase the home described in the agreement. U.S. Home intended to sell the Seiferts the home described in the agreement. There is no evidence in the agreement the parties ever imagined this sale/purchase would result in a wrongful death claim. The scope of the arbitration clause should be limited to those issues that

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[4/] (...continued)
Coaches, Inc. v. Revels Nationwide R.V. Sales, Inc., 543 So.2d 359 (Fla. 1st DCA 1989)(breach of franchise claim in which plaintiff sought contract damages); Zolezzi v. Dean Witter Reynolds, Inc., 789 F.2d 1447 (9th Cir. 1986)(broker sued former employer for defamatory statements about employment after voluntary resignation; court interpreted arbitration clause under NYSE Rule 347). The cases cited in Zolezzi also do not support U.S. Home. Prima Paint Corp. v. Flood & Conklin Mfg. Co., 388 U.S. 395, 87 S.Ct. 1801 (1967)(court held that arbitrators should determine whether contract was induced by fraud and court should determine whether arbitration clause was induced by fraud; court did not focus on scope of arbitration agreement, but rather on Congressional intent in enacting the FAA); United Steelworkers of America v. Warrior and Gulf Navigation Co., 363 U.S. 564, 80 S.Ct. 1343 (1960)(court upheld arbitration clause in collective bargaining agreement based on policy of Labor Management Relations Act).

arise generally in the purchase of a new home – economic risks; benefit of the bargain damages. In other words, breach of contract issues, not personal injury or wrongful death.

U.S. Home relies heavily on the Fourth District's decision in Bachus & Stratton, Inc. v. Mann, 639 So.2d 35 (Fla. 4th DCA 1994). It stretches the case too far. Plaintiff Mann, a broker, sued her former employer for a variety of tort and contract claims, including a claim for assault and battery which was apparently committed by another employee. The opinion contains no facts from which one could determine the nature of the incident or how it could have related to the plaintiff's employment. The Fourth District separately ruled on conduct that occurred before and after termination. The court first held that any post-termination claims against the employer and two account executives were not arbitrable because the individuals had not signed the arbitration agreement. But the court then held that "her tort claims" against those same account executives were subject to arbitration because of the doctrine of respondeat superior. 639 So.2d at 37 (citing Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Melamed, 453 So.2d 858 (Fla. 4th DCA 1984); Vic Potamkin Chevrolet, Inc. v. Bloom, 386 So.2d 286 (Fla. 3d DCA 1980)). These cryptic holdings seem inconsistent. In any event, it is clear from the opinion that the plaintiff never claimed she had personal injury claims which were not contemplated by the parties when they signed the arbitration

agreement.[5/] Since that is the issue addressed here, and the issue addressed by the courts in Michaels, 668 So.2d 1013 and Dusold, 807 P.2d 526, Bachus & Stratton offers U.S. Home no assistance.

C. The language of the arbitration clause itself does not mandate the conclusion that personal injury claims must be arbitrated.

U.S. Home claims in its brief at 11-12 that its arbitration clause is so broad and all-encompassing that "U.S. HOME signaled its intention that any claim" should be arbitrated. But the language on which it relies from this standard form sales agreement is taken out of context. In context, a reasonable person could read the arbitration clause and conclude that it referred to any contractually related claims, not a personal injury or wrongful death claim. This two-page sales agreement contains clauses on deposits, closing, title, lot description, damage to the property before closing, defaults by either the buyer or seller before closing and limitations on the homeowner's warranty. Nothing in the agreement indicates that U.S. Home was sending any signals about personal injury claims. How could one possibly infer from all this that Seifert agreed to such an implied "signal? As the

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[5/] Employee assaults could have been contemplated at the time of signing the agreement. It is certainly not unusual to see sex discrimination framed as assault and battery. Cf. Byrd v. Richardson-Greenshields, 552 So.2d 1099 (Fla. 1989)(employees asserted various claims against employer including assault and battery based on sexual harassment); Schwartz v. Zippy Mart, Inc., 470 So.2d 720 (Fla. 1st DCA 1985)(employees sue employer based on sexual assaults and batteries by supervisor); Brown v. Winn-Dixie Montgomery, Inc., 469 So.2d 155 (Fla. 1st DCA 1985)(employee sued employer alleging supervisor grabbed her breast).

Michaels court concluded, "[t]he protection of persons was not within the subject matter of the contract." 668 So.2d at 1015.

Furthermore, U.S. Home's interpretation of its arbitration clause places it beyond the scope of Fla. Stat. § 682.02. That provision of the Florida Arbitration Code only permits parties to agree to arbitrate future potential claims where those claims "relat[e] to such contract or the failure or refusal to perform the whole or any part thereof." Obviously, the legislature intended to protect parties from unwittingly being forced to arbitrate matters beyond the terms of the contract or its breach, i.e., matters the parties specifically contemplated at the time they entered into the agreement.[6/] Thus, to the extent U.S. Home's clause could be construed as encompassing any conceivable claim, even a claim for wrongful death, there is no basis on which to enforce the clause under the Florida Arbitration Code.

In its brief at 12-16 U.S. Home explains why it takes the position that Seifert's death claim arose out of and relates to the contract or the property, within the meaning of the arbitration clause. It claims that the clause applies because "but for" the sales agreement, the injury would not have occurred. That

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[6/] This language should be contrasted with the earlier, much broader, language in the statute which permits parties to agree to arbitrate "any controversy existing between them at the time of the agreement." This further demonstrates the legislature's concern that a party not be blind-sided by agreeing to arbitrate unknown future claims, yet emphasizing that a party can agree to arbitrate anything they want after-the-fact, i.e., after they know the nature of the claim.

analysis is incorrect. Michaels, 668 So.2d at 1014; Armada Coal Export, Inc. v. Interbulk, Ltd., 726 F.2d 1566 (11th Cir. 1984). Contractual duties arise from the contract while tort damages arise from a common law duty to exercise reasonable care. Builder-vendors are not exempt from this common law duty. Cf. Mitchell v. Madison Enter. of Connecticut, Inc., 1997 WL 297725 *16 (Conn.Super. 1997)(builder-sellers have a common law duty, outside of any contract, to build a fit and workmanlike structure); Degnan v. Executive Homes, Inc., 696 P.2d 431 (Mont. 1985)(builder-vendor can be liable for breach of implied warranty of habitability based on the contract as well as for common law negligence); ABC Builders, Inc. v. Phillips, 632 P.2d 925, 937-38 (Wyo. 1981)(builder has a duty apart from the contract "[t]o furnish a safe location for a residential structure and it may be negligence to not do so"). This Court has also held that a duty can arise apart from a contract and in such cases the action lies on the case, not on the contract.

> Where there is carelessness, recklessness, want of reasonable skill, or the violation or disregard of a duty which the law implies from the conditions or attendant circumstances, and individual injury results therefrom, an action on the case lies in favor of the party injured; and if the transaction had its origin in a contract, which places the parties in such relation that, in performing or attempting to perform the service promised, the tort or wrong is committed, then the breach of the contract is not the gravamen of the suit. There may be no technical breach of the letter of the contract. The contract, in such case, is mere inducement . . . . It induces, causes, creates the condi-

> tions or state of things, which furnishes the occasion of the tort. The wrongful act, outside the letter of the contract, is the gravamen of the complaint; and in all such cases, the remedy is an action on the case.

Banfield v. Addington, 140 So. 893, 896 (Fla. 1932)(citations omitted). Here, the contract involved the sale of a home. Surely U.S. Home had a duty to use reasonable care to build a home which would not cause personal injury and death. This duty arose separate and apart from its contractual duties.[7/] The damages Seifert is seeking are for wrongful death, not contractual benefit of the bargain damages. As Seifert discussed in her initial brief at 10, n.8, the fact that the injury would not have occurred absent the existence of the contract is not enough to warrant arbitration of this particular claim.

The cases U.S. Home cites in support are factually distinguishable and do not involve personal injury. Genesco, Inc. v. T. Kakiuchi & Co., Ltd., 815 F.2d 840 (2d Cir. 1987); Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614, 105 S.Ct. 3346 (1985);Royal Caribbean Cruises, Ltd. v. Universal Employment Agency, 664 So.2d 1107 (Fla. 3d DCA 1996). These cases

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[7/] U.S. Home erroneously argues that Michaels, 668 So.2d 1013, and Dusold, 807 P.2d 526, are distinguishable because the duty imposed in those cases was by law rather than by contract. Here, Seifert has alleged that U.S. Home breached its duty to use reasonable care. This duty, as the duty imposed on producers and distributors of hazardous chemicals in Michaels and Dusold, is imposed by law. U.S. Home also tries to distinguish those cases on the ground that they involve ultra hazardous materials for which the defendants were strictly liable. Seifert also alleged strict liability here. See initial brief at 2-3.

involved international agreements between large corporations. The "federal policy in favor of arbitral dispute resolution applies with special force in the field of international commerce." Mitsubishi, 473 U.S. at 631, 105 S.Ct. at 3356. The courts' discussions and holdings reflect the federal policy in favor of arbitration in the international context. They do not evidence favoritism of arbitral proceedings for personal injury claims.

Similarly, both Emerald Texas, Inc. v. Peel, 920 S.W.2d 398 (Tex. 1st DCA 1996) and Sweet Dreams Unlimited, Inc. v. Dial-A-Mattress Int'l, Ltd., 1 F.3d 639 (7th Cir. 1993) are inapposite as in neither case was there any claim of personal injury. Further, the injuries claimed were reasonably contemplated by the parties, based on the nature and purpose of the contracts.[8/]

U.S. Home's cases regarding arbitration of tort claims based on employment contracts are also distinguishable. There is certainly no comparison between the employer-employee relationship and that of a builder-vendor and a home purchaser. Nor are the torts alleged or the resulting injuries in the employment cases

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[8/] In Emerald Texas, homeowners sued a contractor for negligent design and construction. The only injury was the decreased value of the house. As Seifert argued in her initial brief at 19, a homeowner can expect shoddy workmanship to arise under the contract and be subject to arbitration. In Sweet Dreams, a franchisee sued the franchisor for recission, fraudulently inducing franchisee to incur expenditures after the expiration of the contract and intentional interference with business relations. These torts and the resulting monetary damages frequently arise out of a joint venture transaction and, therefore, a party can expect them to be addressed in an arbitral proceeding.

comparable to Seifert's allegations.[9/]

In sum, the intent of the parties, and the clause viewed in the context of the entire transaction, lead to the conclusion that this wrongful death claim should not be arbitrated.

D. The Fourth District's analysis in Michaels, rather than the Fifth District's conclusions in Ponzio, are appropriate to determine whether an arbitration clause applies to personal injury claims.

In its brief at 18-27, U.S. Home gives several reasons why it urges this Court to follow the Fifth District's analysis and holding in Terminix Int'l Co., L.P. v. Ponzio, 693 So.2d 104 (Fla. 5th DCA 1997), rather than that of the Fourth District in Michaels. Those arguments should be rejected. As Seifert explained in her initial brief, the Fourth District in Michaels properly considered the language of the arbitration agreement, the intent of the parties, the nature of the underlying agreement and the policy interests at stake before it concluded that the arbitration agreement

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[9/] Chase Manhattan Inv. Serv., Inc. v. Miranda, 658 So.2d 181 (Fla. 3d DCA 1995) involved claims by a broker that his employer had gone through and taken his personal possessions from his work station as well as obtaining information as to his banking accounts to determine if he had stolen money from his clients or the firm. Aspero v. Shearson American Express, Inc., 768 F.2d 106 (6th Cir. 1985) involved allegations that following the employee's resignation her ex-employer told potential employers and various exchanges that she had been terminated for unauthorized trading. Similarly, in Morgan v. Smith Barney, Harris Upham & Co., 729 F.2d 1163 (8th Cir. 1984), an ex-employee alleged slander and loss of professional opportunity based on statements made to his former customers by the ex-employer. The nature of the torts and the injuries alleged in those cases are certainly not analogous to this case. Further, like Bachus, they involved securities industry arbitration agreements.

did not encompass personal injury claims.

In Ponzio, the Fifth District merely concluded that "[t]he allegations of the complaint assert that Terminix has a duty, deriving from its contractual agreement, to eradicate certain pests and that it failed to do so resulting in bodily injury, etc. to the plaintiffs." 693 So.2d at 108. The court attempted to distinguish Michaels by stating that it involved only a common law duty to warn. But it failed to recognize or address Terminix's common law duty to use reasonable care. It did not consider the parties' intent as it should have when interpreting a contract. It did not consider what the parties contemplated when they entered into the agreement. It did not view the arbitration clause in relation to the subject matter, objective or purpose of the agreement. It certainly did not address the policy interests at stake. Had the court looked at those issues as did the Fourth District in Michaels, it probably would have recognized that the arbitration clause did not apply.

The two main prongs of U.S. Home's attack on Michaels are: (1) the scope of the arbitration clause at issue; and (2) the nature of the legal relationship between the parties. Neither of these alter Michaels' applicability. The clause in Michaels required arbitration of "any controversy or claim" "arising out of or relating to the interpretation, performance, or breach of any provision of this agreement." The clause here is not substantively different. It requires arbitration of "[a]ny controversy

or claim arising under or related to this Agreement or to the Property" in the context of a sales contract that includes clauses completely unrelated to any potential personal injuries. The application of pesticides in Michaels bore as little relationship to the "performance . . . of this agreement" as the failure to use reasonable care in the air conditioning system here related to the agreement or the property generally.

U.S. Home's claim that the "legal relationship between the parties" somehow distinguishes Michaels from this case is wholly without merit. Here it essentially claims that it only owed Seifert duties as set out in its contract; it owed no common law duty of reasonable care; it could not be liable for any claim of defect in the air conditioning system aside from a contract claim. Not surprisingly, this argument is not supported by any authority. It is wrong. See Seifert's initial brief at 3 n.4, 3-4 n.5, 16 and cases cited there.

In sum, Fifth District's holding in Ponzio was improper and was not consistent with Florida and federal law. See American Home Assurance v. Larkin Gen. Hosp., 539 So.2d 195 (Fla.1992)(a party's intent controls construction of a contract and in determining such intent the court should consider the language of the contract, the subject matter of the agreement, its objectives and purpose); Mastrobuono v. Shearson Lehmann Hutton, Inc., 514 U.S. 52, 115 S.Ct. 1212 (1995)(the parties' intent controls the construction of a contract); Armada Coal, 726 F.2d 1566 (that a dispute would not have arisen absent the existence of the contract

is not sufficient to make the claim subject to arbitration). This Court should adopt the Fourth District's reasoning in Michaels.

U.S. Home concludes its brief at 29-30 with an attack on the policy considerations set out in Seifert's initial brief at 19-21. However, the Supreme Court has discussed the same historical basis of the federal Act addressed in the treatise Seifert cited and discussed there. Prima Paint, 388 U.S. 408, 87 S.Ct. 1801 (1967). The legislative history of the federal Act shows it was to have limited application to contracts between merchants for the interstate shipment of goods.

> The principal support for the Act came from trade associations dealing in groceries and other perishables and from commercial and mercantile groups in the major trading centers. Practically all who testified in support of the bill before the Senate subcommittee in 1923 explained that the bill was designed to cover contracts between people in different States who produced, shipped, bought, or sold commodities. The same views were expressed in the 1924 hearings. When Senator Sterling suggested, 'What you have in mind is that this proposed legislation relates to contracts arising in interstate commerce,' Mr. Bernheimer, a chief exponent of the bill, replied: 'Yes; entirely. The farmer who will sell his carload of potatoes, from Wyoming, to a dealer in the State of New Jersey, for instance.'

388 U.S. at 411, 87 S.Ct. at 1810 (J. Black, dissenting)(citations omitted). It is apparent the Act was intended to permit resolution of commercial disputes between merchants by their peers. Although subsequent decisions have expanded the concept of commercial disputes between merchants, no court to date has required arbitration of personal injury or wrongful death claims that re-

late to the sale of a home based on a non-specific arbitration clause in the purchase contract. Certainly no Florida case has so interpreted the Florida Act. This Court should not do so here.

CONCLUSION

For the foregoing reasons, and the reasons stated in her initial brief, Appellee PATRICIA SEIFERT, as Personal Representative of the Estate of Ernest Seifert, Deceased, for the benefit of PATRICIA SEIFERT, surviving spouse, respectfully requests this Court to reverse the Fifth District's decision and reinstate the order denying U.S. Home's motion to compel arbitration.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing has been and mailed this ___ day of April, 1998, to: Fredric S. Zinober, Esq., Counsel for U.S. Home Corp., 2655 McCormick Dr., Clearwater, FL 34619; and Joseph T. Patsko, Esq., Counsel for Woody Tucker Plumbing, Inc., 300 S. Hyde Park Ave., Tampa, FL 33601.

Respectfully submitted,

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