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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Bentley D. Price, Circuit Court Judge

Case No. 2024-000322

Thomas H. Morgan ..... Respondent,

v.

John L. Gilbert, Stuart L. Fred, Bella Vista Partnership, A Texas General Partnership, Bomasada Group, Inc., A Texas Corporation, Bomasada Investment Group II, LLC, A Texas Limited Liability Company, Lauralis Management, Inc., A Texas Corporation, and 150 Bee Street, LLC, A South Carolina Limited Liability Company .....Defendants,

Of which John L. Gilbert, Stuart L. Fred, Bella Vista Partnership, A Texas General Partnership, Bomasada Group, Inc., A Texas Corporation, Bomasada Investment Group II, LLC, A Texas Limited Liability Company, and Lauralis Management, Inc., A Texas Corporation are the .....Appellants.

FINAL BRIEF OF RESPONDENT

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September 12, 2024

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STATEMENT OF FACTS

This is an appeal of a final arbitration award issued by a three-member panel comprised of Costa Pleicones, a former Chief Justice of the Supreme Court of South Carolina, and two experienced attorneys with over 80 years of trial experience, Brew Hagood and Paul Dominick. In their award, the panel found that the Defendants exploited their positions with the limited liability company that Plaintiff was a member of to enrich themselves in an amount approaching $3,000,000. In response, Defendants claim that these highly qualified arbitrators not only did not understand the law, but Defendants go so far as to claim the arbitrators manifestly disregarded the law they knew. While Defendants understandably disagree with the result, they fall far short of meeting the very high standard for vacating an arbitration award.

On January 26, 2012, the Plaintiff filed an initial Summons and Complaint (R. pp. 139-163) and obtained a Temporary Restraining Order. On February 1, 2012, the Defendants filed a Motion to Dissolve the Temporary Restraining Order and Dismiss the Complaint (R. pp. 372-380), arguing that the parties were bound by an arbitration clause in their Company's Operating Agreement.

The Defendants now move pursuant to SCRCP 12(b)(l) to dismiss and assert (1) that the

> Circuit Court was without subject matter jurisdiction inasmuch as the Agreement in question requires submission of the disputes in the Plaintiffs Complaint to a binding arbitration; (2) that the Circuit Court was the improper venue due to the fact that the proper forum to hear the case was the appropriate arbitration panel.

(R. p. 375, lines 3-7)

On February 27, 2012, the Court denied the Motion to Dismiss and to Compel Arbitration, citing the fact that the Operating Agreement did not comply with the notice provision contained in the South Carolina Uniform Arbitration Act, and even if the federal act applied, not all parties before the court were parties to the arbitration agreement (R. pp. 1-5).

On March 13, 2012, the Defendants filed an Answer to the Complaint, with affirmative defenses and counterclaims against the Plaintiff. One of the affirmative defenses was the lack of subject matter jurisdiction based not on the grounds it now argues before this Court but on the presence of an arbitration clause in the company's Operating Agreement. (R. p. 0191, line 27 – R. p. 0192, line 5).

Although the Court had ruled that the arbitration clause was not a bar to the Complaint filed in Circuit Court, the Plaintiff and the Defendants consented on July 9, 2012, to submit the entire case for binding arbitration before the court. [1]

The July 9, 2012, Order of Judge Hughston, referring this matter to arbitration, contained the following language in paragraph 1 of that Order directed to the jurisdiction of the arbitration panel:

> **The parties, through their counsel, have stipulated** to the entry of this Order referring the above captioned matter to binding arbitration.
>
> NOW THEREFORE, IT IS HEREBY ORDERED:
>
> 1. **All claims**, both compulsory and non-compulsory, specifically including all claims, counter-claims, and/or third-party claims, related to the underlying facts, transactions, and/or occurrences that are the subject matter of the pleadings and claims asserted in this

[1] It is not without irony that the Defendants who fought so hard for arbitration are now fighting even harder to undermine that same process.

> case, **shall be decided by binding arbitration** that shall be conducted in accordance with the terms of this Order and otherwise pursuant to the Federal Arbitration Act and **all of the parties submit themselves to the jurisdiction of this court and arbitration panel**. All parties shall assert all claims they may have against one another arising out of this matter, including, without limitation, any claims for breach of the arbitration agreement by the other party by the filing of the instant action. ... (emphasis added).

The Court's order not only provides the jurisdictional referral language excerpted above, but it also provides for the following procedural details that have particular relevance to the arguments currently before the court:

> 4. The **Chairperson shall have sole authority and responsibility to hear and decide procedural, scheduling, and discovery-related motions, disputes, and issues**, including but not limited to:
> (A) Initiating a scheduling conference and establish a schedule for arbitration proceedings, including the hearing on the merits;
> (B) Conducting pre-hearing conferences;
> (C) **Disposing of motions to amend the pleadings;**
> (D) Ordering discovery, including in-state and out-of-state subpoenas to third parties;
> (E) Resolving discovery disputes and impose sanctions against a party that does not comply with the orders of the Chairperson/Panel; and
> (F) Resolving motions concerning discovery, compelling discovery responses, and protecting parties from discovery abuses.
> 5. **All other motions, disputes, and/or issues, including dispositive motions**, rulings on the admissibility and exclusion of evidence and/or witnesses, injunctive relief, and any other non-procedural, non-scheduling, and non-discovery issue, **must be determined by a majority vote of the full Panel** unless otherwise agreed to by both sides. …
> 7. **The arbitrator(s) are not required to strictly follow the South Carolina Rules of Evidence.** The arbitrator(s) shall exercise discretion in applying evidentiary rules **to secure fairness in the hearing, consistent with the expedited purpose of arbitration**. It is the intent of this arbitration agreement to expedite and streamline the presentation of evidence and witnesses at the arbitration hearing, and, to that end, the parties do hereby agree that records custodians shall not be required to authenticate documents at the hearing. Moreover, to the extent that the parties may agree on the relevancy or admissibility of evidence, exhibits and witnesses to be presented at trial, the panel of arbitrators shall defer to the parties' agreement. In order to encourage the streamlined presentation of witnesses and evidence, the parties shall be required to exchange proposed exhibits and witnesses with each other ten (10) days in advance of the first day of the arbitration trial hearing and will make best efforts to submit one comprehensive list of exhibits to the panel. It is not necessary that the parties agree to the exhibits in the exhibit list, only that the parties intend to introduce the exhibits at trial. Moreover, the exhibit list shall not be a bar to the admission of other evidence that may become relevant at trial.
> 8. **This arbitration shall follow the South Carolina Rules of Civil Procedure where**

> **practical** and to the extent not inconsistent herewith.
> 9. **The arbitrator(s) shall apply the substantive law that the arbitrator(s) determine(s) to be applicable to the issues in the dispute.**
> 10. The Court shall enter appropriate orders to ensure compliance with the Orders and awards of the arbitrator(s) and to ensure that the arbitrator(s) receive payment. …
> 13. The arbitrators shall issue a final determination within thirty (30) days of the completion of the hearing unless otherwise agreed to in writing by the parties. **The determination shall be issued in the form of an award on all claims and counterclaims.**
> 14. This case shall be administratively stayed pending completion of the arbitration. **The Court retains jurisdiction** to enforce this Order and **to enter any Orders including a judgment upon the arbitrator's award or order.**

(R. pp. 6-9) (emphasis added).

After Judge Hughston's order, the panel convened, and the panel chair directed discovery and heard motions on pleading and discovery matters. The order of July 9, 2012, governed the administration of this arbitration process through the final award.

The panel was a three-arbitrator panel of experienced lawyers chosen with the parties' consent. The panel changed somewhat over the ten years, but the panel that decided the dispositive motions and tried the case over more than a week could not have been more qualified for the reasons already described (the "Panel" or "Arbitration Panel").

The Defendants filed three separate dispositive motions to dismiss or for summary judgment. Two were the same arguments on subject matter jurisdiction and the statute of limitations that the Defendants argue on this appeal. After receiving memoranda from both sides on all issues, reviewing notebooks full of exhibits, reviewing the transcript of hours of argument, and meeting on a separate day after the argument to confer, the Panel denied all three motions, including those based on lack of subject matter jurisdiction and the statute of limitations. (R. pp. 13-17). This was the first of at least five times the Defendants asserted these arguments and lost every time.

According to the Third Amended Scheduling Order issued by Panel Chair Hagood on April 29, 2022, the Plaintiff's claims and Defendants' defenses and counterclaims were heard before the arbitration panel beginning on October 31, 2022. Live testimony was presented through November

8, 2022.

The Defendants raised their three Motions to Dismiss (collectively, the "Motions") they argued earlier at the hearing on June 16, 2022 (the "Motion Hearing")[2] after the presentation of Plaintiff's case and again after the arbitration hearing. After the hearing, the Panel took these Motions under advisement.

At the Panel's request, counsel submitted proposed Orders on December 22, 2022. Counsel for the Plaintiff provided one document entitled Final Determination of The Arbitration Panel. Counsel for the Defendants provided three documents: (a) Order of Dismissal (Statute of Limitations Issue); (b) Order of Dismissal (Derivative Action Issue); and (c) Order.

The panel was also provided with the 1,504-page transcript of the hearing. The two depositions that were introduced were submitted separately. The Panel also had access to electronic copies of the Exhibits introduced into evidence by the parties at the hearing.

The Panel issued its unanimous 25-page Arbitration Award on April 10, 2023, awarding judgment against the Defendants, except for 150 Bee Street, LLC, in the total amount of $2,976,234.00, deferring consideration of an award of Plaintiff's attorneys' fees and costs. The Plaintiff was directed to provide a detailed summary of expenses, including legal fees, within 15 days from the date of the Award. The Defendants were given 15 days to respond to Plaintiff's submission. (R. pp. 75-99)

Among many findings, the panel found:

- The record is replete with tactics employed by the Bomasada Defendants to inhibit Plaintiff's access to records of BIG II (the project construction company with the same ownership as

[2] *See* Tr. p. 1487, l. 16 – p. 1490, l. 2.

the Bomasada Defendants), which, if they were as represented by Defendants, could have obviated much of the difference in the party's calculations, but instead, the Defendants effectively blocked access to these records. (R. p. 84).

- The Plaintiff met his burden of proving that the Bomasada Defendants paid $1,270,872.00 directly and improperly to themselves. This finding was based not only on the contention of Plaintiff's witnesses that these charges lack sufficient documentation but also on Defendants' history of resistance to Plaintiff's access to their internal records, which lasted through the hearing. The panel found the overarching theme of Defendants' resistance to scrutiny of its records as support for the Plaintiff's position. (R. p. 84).
- The Bomasada Defendants paid themselves for unsupported and improper "business trips" from the company's funds. Many of these travel expenses were trips on private jets owned by Defendant Fred through Defendant Lauralis that were charged to the Company. Though Defendants defended many charges as "employee bonus trips" or "business trips," any such use had to be reasonably related to the project, which these were not. Golf trips and other vacations charged to the Company (African safaris and Mexican fishing trips) were not reasonably related to the Project. The explanation of "bonus trips" is also unconvincing when the trips at issue were taken primarily by the Managing Members of a struggling project that was not completed with many unsold units. (R. p. 91).
- Plaintiff proved that Defendant Fred, as a Managing Member of the Company, and Defendants Fred and Gilbert, as General Partners of Defendant Bella Vista, were grossly negligent and breached their fiduciary duty, including their duty of loyalty and contractual duty of good faith and fair dealing. The Company was damaged as a result of these breaches. Plaintiff also carried the burden of proving that Defendants Bomasada and BIG II were conduits for the breaches by Defendants Fred and Gilbert and breached their contracts with

the Company by charging for unrelated Project expenses and were, thus, unjustly enriched. Plaintiff carried the burden that Defendant Lauralis was a wholly owned affiliate of Defendant Fred through which the Company was charged for flights unrelated to the Project, Lauralis and Fred were unjustly enriched, and the Company was damaged as a result of the wrongful charges. (R. p. 93).

On April 17, 2023, the Plaintiff sent an e-mail to the Panel requesting an award of attorney's fees and costs in the amount of $2,002,805.18 and attached: Plaintiff's Exhibit 202; Schedule 1 Exhibit 220 Breakout; and Addendum 1 Thomas H. Morgan Transaction Report. On May 1, 2023, Defendants submitted a Memorandum In Opposition to Plaintiff's Demand for Attorneys' Fees.

The Defendants submitted a Motion for Reconsideration of the Arbitration Award on April 18, 2023 (R. pp. 768-776), and the Plaintiff submitted a Memorandum in Opposition to the Defendants' Motion for Reconsideration of the Arbitration Award on May 3, 2023. (R. pp. 777-781)

After considering the Defendants' motions and supporting memoranda on a Motion for Reconsideration, the Panel issued a final award on June 19, 2023 (R. pp. 100-109). It again denied the motions to dismiss based on the subject matter jurisdiction and the statute of limitations that had been denied pretrial, during the trial, and in the initial arbitration award. The panel also awarded Plaintiff $696,509.00 in attorney's fees and costs.

As the case was a derivative case brought by the Plaintiff, Mr. Morgan, on behalf of the company, the panel directed the Final Arbitration Award, $3,672,743 on confirmation by the circuit court, to be entered as a judgment against the Defendants, except for Bee Street Lofts, LLC and in favor of Bee Street Lofts, LLC, except for member Bella Vista Partnership, and John L. Gilbert and Stuart L. Fred. Thomas H. Morgan retained a charging lien for his

attorney's fee and cost award. (R. p. 108).

The Defendants then filed a Motion to Vacate the Arbitration Award in the circuit court, though the substance of its Motion and memoranda read like an appeal of the arbitration award (R. pp. 782-800). The Plaintiff filed memoranda opposing the Defendants' motion and filed a countermotion to confirm the arbitration award. See Plaintiff's Memorandum in Opposition to Motion to Vacate and Supplemental Memorandum. (R. pp. 801-812).

The Circuit Court reviewed the motions, memoranda, and exhibits submitted by the parties. After hearing arguments of counsel for both parties on November 13, 2023, the Circuit Court denied the Defendants' motions to vacate or modify the arbitration award and confirmed the arbitrators' award. (R. pp. 64-74).

This appeal followed.

ARGUMENT

The fundamental flaw with the Appellants' appeal is encapsulated in the first words from the Appellants' Counsel in the argument before the circuit court: "For the record, my name is Henry Grimball. **This is an appeal for (sic) an arbitration award** dated June 19, 2023." Transcript of Nov. 13, 2023, Hearing, page 3, lines 6-8(emphasis added).

There is no appeal from an arbitration award in South Carolina. There is only a motion to vacate under S.C. Code Ann. §15-48-130 (2005) based on the grounds provided in that statute or upon the arbitrator's manifest disregard of the law. The circuit court correctly judged that this distinguished panel diligently reviewed the facts and the law in a nearly two-week trial that followed an almost 10-year arbitration process and did not "manifestly disregard the law" in issuing its detailed and measured award. As is evident from a review of the award, the Panel carefully considered every claim and element of damages in light of the applicable law, awarding only 48% of the alleged financial losses suffered by the LLC. The Defendants fail entirely to satisfy the exacting standard for overturning the

circuit court's decision to deny the motion to vacate and confirm the arbitration award. This court should affirm that decision and deny the appeal.

I. THE CIRCUIT COURT CORRECTLY DENIED THE MOTION TO VACATE AN ARBITRATION AWARD WHEN THERE WAS NO EVIDENCE THAT THE PANEL ENGAGED IN MISCONDUCT OR MANIFESTLY DISREGARDED THE LAW.

A. This Court may review circuit court decisions refusing to vacate and confirming arbitration awards.

After the arbitrator issues an award, the circuit court has the authority to "enter judgment on [the] award." S.C. Code Ann. § 15-48-180 (2005).

Upon motion of either party to confirm, vacate, modify, or correct the arbitrator's award, a circuit court that previously stayed an action to allow arbitration resumes jurisdiction over the case. S.C. Code Ann. §§ 15-48-120, -130, -140 (2005).

In an arbitration case, the only appeals to this court that may be taken are from the types of orders of the circuit court enumerated in section 15-48-200. *Steinmetz v. Am. , LLCedia Servs.*, 393 S.C. 72, 74-75, 709 S.E.2d 708, 709 (Ct. App. 2011) citing *Main Corp. v. Black*, 357 S.C. 179, 181, 592 S.E.2d 300, 301-02 (2004). These include "(3) An order confirming or denying confirmation of an award, (4) An order modifying or correcting an award...." S.C. Code Ann. § 15-48-200(a)(3) and (4) (2005).

B. The circuit court's standard of review of an arbitration award is limited, and the arbitrator's decision will be vacated only upon specific grounds as provided by statute or upon the non-statutory ground of manifest disregard or perverse misconstruction of the law.

Arbitration is not "litigation carried on by other means." *Lauro v. Visnapuu*, 351 S.C. 507, 516, 570 S.E.2d 551, 555-56 (Ct. App. 2002), citing *White v. Preferred Research, Inc.*, 315 S.C. 209, 212, 432 S.E.2d 506, 508 (Ct. App. 1993). Judicial review of an arbitration award is, therefore, limited in scope, and any attempt to convert arbitration into a trial-like judicial proceeding is looked upon with

disfavor. *Lauro*, 570 S.E. 2d at 555-556.

Arbitration is a favored method of settling disputes in South Carolina. When a dispute is submitted to arbitration, the arbitrators determine both law and fact questions. *Id.* Generally, an arbitration award is conclusive, and courts will refuse to review the merits of an award. *Id*, citing *Pittman Mortgage Co. v. Edwards,* 327 S.C. 72, 75-76, 488 S.E.2d 335, 337 (1997) (citations omitted). Review of an arbitration award is limited, and the arbitrator's decision will be vacated only under specific grounds as provided by statute or upon the non-statutory ground of manifest disregard or perverse misconstruction of the law. *Id.*, citing *Harris v. Bennett*, 332 S.C. 238, 503 S.E.2d 782 (Ct. App. 1998).

"Generally, an arbitration award is conclusive, and courts will refuse to review the merits of an award." *Crouch Constr. Co. v. Causey*, 405 S.C. 155, 163, 747 S.E.2d 482, 486 (2013), citing *C-Sculptures, LLC v. Brown*, 403 S.C. 53, 56, 742 S.E.2d 359, 360 (2013) (quoting Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009)). "An award will be vacated only under narrow, limited circumstances." *Id.* "The judiciary should minimize its role in arbitration **as judge of the arbitrator's impartiality**." *Id.,* quoting *Commonwealth Coatings Corp. v. Cont'l Cas. Co.*, 393 U.S. 145, 151, 89 S. Ct. 337, 21 L. Ed. 2d 301 (1968) (White, J., concurring) (emphasis added).

In reviewing arbitration awards, "the standards for judicial intervention are . . . narrowly drawn to assure the basic integrity of the arbitration process without meddling in it." *Id.*, quoting *Merit Ins. Co. v. Leatherby Ins. Co.*, 714 F.2d 673, 681 (7th Cir. 1983). "The reasons for this are not hard to identify." *Id.,* citing *In re Andros Compania Maritima, S.A.*, 579 F.2d 691, 700 (2d Cir. 1978).

A decision to vacate an arbitration award may only be made on the specific grounds found in S C Code Ann. Sec. 15-48-130 or on the non-statutory basis of "manifest disregard or perverse misconstruction" of the law.

The SC Arbitration Act provides:

> (a) Upon application of a party, the court shall vacate an award where: (1) The award was procured by corruption, fraud, or other undue means; (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party; (3) The arbitrators exceeded their powers; (4) The arbitrators refused to postpone the hearing upon sufficient cause being shown therefor or refused to hear evidence material to the controversy or otherwise so conducted the hearing, contrary to the provisions of § 15-48-50, as to prejudice substantially the rights of a party; or (5) There was no arbitration agreement and the issue was not adversely determined in proceedings under § 15-48-20 and the party did not participate in the arbitration hearing without raising the objection. **But the fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award.**
>
> S.C. Code Ann. § 15-48-130(a) (emphasis added).

In addition to these five statutory grounds for vacating an award, courts' decisions in this and other jurisdictions have also vacated arbitration awards where there has been "a manifest disregard or perverse misconstruction of the law." *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009), citing *Technical College v. Lucas and Stubbs*, 286 S.C. 98, 333 S.E.2d 781 (1985); S.C. Code Ann. § 15-48-130(a); *Batten v. Howell*, 300 S.C. 545, 548-49, 389 S.E.2d 170, 172 (Ct. App. 1990) (citations omitted). However, decisions recognizing this non-statutory ground for vacating arbitration awards have required "something beyond and different from a mere error of law or failure on the part of arbitrators to understand or apply the law." *Batten*, 389 S.E.2d at 172. **"[A]rbitrators need not specify their reasoning or the basis of the award so long as the factual inferences and legal conclusions supporting the award are 'barely colorable**.'" Id. (emphasis added). If grounds for the award can be inferred from the facts, the award should be confirmed. *Id.*

For a court to vacate an arbitration award based upon an arbitrator's manifest disregard of the law, the governing law ignored by the arbitrator must be well-defined, explicit, and clearly applicable. *Id.* Case law presupposes something beyond a mere error in construing or applying the law. Even a "clearly erroneous interpretation of the contract" cannot be disturbed. *Id.* at 108, 333 S.E.2d 787. The focus is on the arbitrator's conduct and presupposes something beyond a mere error in construing or applying the law. *Id.* at 108, 333 S.E.2d at 787. Accord, *Harris v. Bennett*, 332 S.C. 238,

503 S.E.2d 782 (Ct. App. 1998).

An arbitrator's "manifest disregard of the law" as a basis for vacating an arbitration award occurs when the arbitrator knows of a governing legal principle yet refuses to apply it. *Gissel*, 676 S.E. 2d at 324, citing *Weimer v. Jones*, 364 S.C. 78, 610 S.E.2d 850 (Ct. App. 2005). **Factual and legal errors by arbitrators do not constitute an abuse of power, and a court is not required to review the merits of a decision so long as the arbitrators do not exceed their powers.** *Id., Pittman*, supra (emphasis added).

Here, the Defendants argued at the circuit court that the award should be vacated under the statute because "The arbitrators exceeded their powers" "and/or manifestly disregarded the law governing their jurisdiction in this matter in that the Panel lacked subject matter jurisdiction to hear the case and should have dismissed the case as a matter of law." (R. pp. 782-800).

The Defendants' burden, therefore, is to prove that as a matter of law, the arbitrators (1) **knew that they had no authority to decide this case**, (2) **ignored the law**, and (3) **decided the arbitration proceeding in knowing and manifest disregard of that law**. The Defendants could not do this, and the circuit court correctly denied their motion to vacate the award.

C. The Defendants presented no evidence to the circuit court and cited no evidence to this Court supporting any finding that the arbitration panel members committed any wrongful conduct under the statute or manifestly disregarded the law in making their award.

The upshot of the Defendants' appeal is their contention that the Panel made a legal error. The Plaintiff, of course, disagrees with this assertion, but even if there were legal errors, which there were not, that would not come close to meeting the high standard for vacating the award. The only remedy by a party disappointed in an arbitration decision is to move to vacate under the statutory provisions of S.C. Code Ann. § 15-48-130 or to argue that the panel exhibited a "manifest disregard or perverse misconstruction of the law" in reaching its ruling. However, decisions recognizing this non-statutory ground for vacating arbitration awards have required "something beyond and different

from a mere error of law or failure on the part of arbitrators to understand or apply the law." *Batten v. Howell,* 300 S.C. 545, 389 S.E.2d 170, 172 (Ct. App. 1990) ("[A]rbitrators need not specify their reasoning or the basis of the award so long as the factual inferences and legal conclusions supporting the award are 'barely colorable.'") Even the "fact that the relief was such that it could not or would not be granted by a court of law or equity is not ground for vacating or refusing to confirm the award." S.C. Code Ann. § 15-48-130(a).

In each instance, the two dispositive legal issues argued by the Defendants (subject matter jurisdiction and the statute of limitations) were thoroughly litigated before the arbitration panel, which issued its ruling in its Initial and Final Awards after careful consideration of all of the evidence, testimony, and extensive and voluminous briefing of counsel for both sides.

The Defendants presented no evidence to the circuit court that the former Chief Justice of the Supreme Court of South Carolina and two highly experienced trial lawyers knew a principle of controlling law and decided to simply disregard it. Even Defendants recognize that they have no factual basis for asserting this esteemed Panel was consciously indifferent to controlling law. Instead, they argued that the panel's decision was incorrect. That is not an appropriate argument in a motion to vacate an arbitration award, and the circuit was correct in denying the Defendant's motion in the face of no evidence of any arbitrator misconduct, bias, or manifest disregard of the evidence.

This Court should affirm the circuit court's decision to deny the motion to vacate and to confirm the Final Arbitration Award.

II. THE CIRCUIT COURT CORRECTLY REFUSED TO REVIEW THE DECISION OF THE ARBITRATION PANEL ON THE "SUBJECT MATTER JURISDICTION" ISSUE WHEN A DISAPPOINTED PARTY CANNOT APPEAL AN ARBITRATION DECISION, AND THE PANEL CONSIDERED THIS SAME ISSUE ON SEVERAL OCCASIONS AND EACH TIME RULED AGAINST THE DEFENDANTS.

The issue of subject matter jurisdiction was thoroughly briefed and argued before the panel at both the dispositive motion stage and the trial and post-trial stages. The panel ultimately rejected

those arguments, recognizing the court's and the panel's subject matter jurisdiction.

The consent order initiating the arbitration established exclusive and binding subject matter jurisdiction in the panel for all matters raised by the pleadings in this matter. The consent order referring this matter to arbitration dated July 9, 2012, to which the Defendants explicitly agreed, referred:

> **All claims**, both compulsory and non-compulsory, specifically including all claims, counter-claims, and/or third-party claims, **related to the underlying facts, transactions, and/or occurrences that are the subject matter of the pleadings and claims asserted in this case, shall be decided by binding arbitration** that shall be conducted in accordance with the terms of this Order and otherwise pursuant to the Federal Arbitration Act **and all of the parties submit themselves to the jurisdiction of this court and arbitration panel**. (Emphasis added.)

All matters in the case, including the presence or absence of subject matter jurisdiction, were submitted to binding arbitration for final determination by the arbitration panel. All parties submitted themselves to the jurisdiction of the court and the arbitration panel as to everything "related to the underlying facts, transactions, and/or occurrences that are the subject matter of the pleadings and claims asserted in this case."

This is not a matter of a party raising subject matter jurisdiction in the concluding stages of a case. Rather, subject matter jurisdiction of the arbitration Panel was decided at the outset by court order and consent submission of the parties, including these Defendants. This Court and the arbitration Panel to which it referred this matter unequivocally have subject matter jurisdiction. Despite their binding stipulation, Defendants later decided to reverse course and challenge the panel's all-inclusive jurisdiction; Defendants repeatedly questioned the panel's jurisdiction in their motions for summary judgment, at trial, post-trial, and in a motion for reconsideration. Likewise, at every stage, the Plaintiffs presented arguments establishing the court's subject matter jurisdiction and arguing against the Defendant's position.

Though the Defendants argue that they first raised "subject matter jurisdiction" in their

original Answer, that reference in paragraph 79 stated that the circuit court had no jurisdiction because the arbitration agreement between the parties governed the case. That argument became moot after the order referred the entire case to arbitration. . (R. p. 0191, line 27 – R. p. 0192, line 5).

The first substantive argument related to the inclusion of the Company, 150 Bee Street, LLC in the case came during the arbitration chair's consideration of the Plaintiff's Motion to Amend to add, among other things, 150 Bee Street, LLC as a nominal party for purposes of Plaintiff's derivative claims. Plaintiff argued that the law of South Carolina and Rule 15, SCRCP, allowed liberal amendment and relation back, among other arguments. The Defendants filed their memorandum in opposition, making the same or similar argument to the one raised here. The panel chair allowed the amendment, adopting the Plaintiff's reasoning, though it did allow the Defendants to continue raising this argument as a defense, which they did.

In June 2022, the arbitration Panel scheduled a hearing on dispositive motions and heard the Defendants' arguments in person, including this one. The parties fully briefed the panel on the question of subject matter jurisdiction. The Defendants made essentially the same argument then that they are making now.

The Plaintiff argued:

- The panel had jurisdiction through Judge Hughston's July 9, 2012, Order, to which the Defendants consented. Plaintiff complied fully with the requirements of the South Carolina Uniform Limited Liability Company Act in bringing this action, which does not mention the inclusion of the company as necessary to provide subject matter jurisdiction to the court. Dawes Cooke, Panel Chair, granted a motion to amend the complaint, and the First Amended Complaint did (and the Second Amended Complaint does) include 150 Bee Street, LLC, and that inclusion relates back to the filing of the original complaint.

- Further, Morgan, through his counsel, sought to mediate and arbitrate this dispute as the Operating Agreement provided in 2011, and the Defendants rejected those overtures through their counsel. It was apparent that no majority would support bringing the case, and it was futile to continue to pursue a vote of the members when no voting member other than Morgan would vote for it. And, given that it was necessary to file the suit and obtain a temporary restraining order to prevent funds from being removed by one of the Managing Members, Stuart Fred, from the Company's account, it was in the ordinary course of business of the Company for the other Managing Member, Morgan, to safeguard and preserve its assets, so no vote of the Members was required under the Operating Agreement.
- This arbitration panel had subject matter jurisdiction to decide this case, and the motion to dismiss should be denied.

(R. pp. 704-717)

After the hearing, the Panel reviewed the extensive memoranda filed by the Plaintiff and Defendants, notebooks full of exhibits, and the transcript of the oral arguments at the hearing. The Panel met after the hearing for a conference to deliberate. After fully considering the parties' respective arguments and filings, the Panel denied the Defendants' motion to dismiss. (R. pp. 13-14)

At trial, the Defendants tried again to convince the Panel it did not have subject matter jurisdiction over the derivative claims, arguing for a directed verdict on this same issue. The parties repeated the same arguments presented to the Panel at the dispositive motion stage. At the merits hearing, the Panel took this motion under advisement.

The Panel requested proposed briefs in place of final closing arguments, and the parties submitted hundreds of pages of arguments, including on this issue. The Panel also waited until the hearing transcript was completed (1,504 pages) to deliberate and considered the testimony, the exhibits

admitted into evidence, and the voluminous written and oral arguments of counsel before issuing their ruling, which included a denial of the directed verdict motion based on this legal argument.

The Defendants still did not accept the panel's third ruling against their jurisdictional challenge. They tried a fourth time in their Motion for Reconsideration and submitted a memorandum in support.

In its Final Award, the Panel ultimately ruled again against the Defendants:

> After considering the testimony presented at the hearing, including the deposition excerpts of Jo Ved and Stuart Fred, and reviewing the transcript of the hearing and the exhibits entered into evidence by the parties along with the proposed Order submitted by the parties, the Panel issues the following rulings: The Defendants' Motion for Dismissal of the Derivative Action, which was renewed after presentation of the Plaintiff's case and at the conclusion of the testimony, is hereby DENIED.

After receiving the Plaintiff's briefing in opposition, the Panel again denied the Defendants' motion. As this sequence of rulings attests, far from disregarding the law, the Panel dealt with it four separate times, fully considering Defendants' submissions each time.

Undeterred, the Defendants argued this motion again, in full, before the circuit court for the fifth time, hoping for a different result. Not surprisingly, the circuit court did not agree and refused to vacate the award on this ground.

The Defendants' argument that the Panel had no subject matter jurisdiction to determine the derivative claims is totally undermined by the provision of the consent order they signed referring this entire case to binding arbitration for final determination of"[a]ll claims, both compulsory and non-compulsory, specifically including all claims, counter-claims, and/or third-party claims, related to the underlying facts, transactions, and/or occurrences that are the subject matter of the pleadings and claims asserted in this case...". In addition, that same consent order provides that "all of the parties submit themselves to the jurisdiction of this court and arbitration panel." (R. p. 6, lines 4-12)

The Defendants argue that even though they sought arbitration through a motion to compel arbitration in response to the complaint and ultimately signed a consent arbitration order submitting

the entire dispute to arbitration, they are not bound by its decision because they could not have agreed to arbitrate subject matter jurisdiction in the first place.

This is not the case. The court has the authority and the obligation to decide whether or not it has subject matter jurisdiction. *Hertz Corp. v. Friend*, 559 U.S. 77, 94, 130 S. Ct. 1181, 1193 (2010)(courts have an independent obligation to determine whether subject-matter jurisdiction exists, even when no party challenges it.)

Under the terms of the consent order, it was up to the tribunal to decide whether it had subject matter jurisdiction. The issue was argued numerous times before the Panel, and the Panel ultimately decided it had subject matter jurisdiction. An argument that the court or Panel lacks subject matter jurisdiction does not mean that the court or Panel cannot decide the issue (clearly, they can), but rather, whether the Plaintiff is entitled to relief. Here, the Panel agreed that the Plaintiff is entitled to relief and dismissed the motion based on this argument.

Because of the express wording of the consent order they agreed to and the multiple adverse rulings of the Panel, the Defendants' last resort to arguing that the Panel exhibited a "manifest disregard or perverse misconstruction of the law" in reaching its ruling.

For the Defendants to argue that the Panel knew what the law was and yet willfully disregarded it is to say that these Panel members, including senior and well-regarded members of the South Carolina Bar (Dawes Cooke, Paul Dominick, Brew Hagood) and a former Chief Justice of the SC Supreme Court (Chief Justice Costa Pleicones (ret.)), were not only wrong in deciding this matter but all three chose to disregard the law they knew to be binding and issued a willfully erroneous decision despite that knowledge.

But where is the proof of this condemning accusation? There is none.

The Panel members conscientiously reviewed counsel's arguments in written form and oral arguments on motions, at trial, during post-trial motions, and on a motion to reconsider. The Panel

considered hundreds of pages of briefing, reviewed thousands of pages of exhibits, and heard many days of testimony before reaching their decisions. Their written findings are not cursory but describe their decisions and reasoning in some detail.

The Defendants here simply want not only a second bite but a fifth or sixth bite at the apple, rehashing arguments they have made on multiple occasions that failed to persuade the Panel to decide in their favor. The Defendants cannot vacate the arbitration award by arguing that the Panel did not fully consider their argument or wrongly decided the issue. Instead, they must show that there is a clear law supporting their position that the Panel recognized as controlling and purposely refused to follow it. There is no such clear controlling law, and there is no evidence that the Panel disregarded the law of South Carolina in any respect. The Panel disagreed with the Defendants' interpretation of the law and facts and instead adopted the argument made by the Plaintiff. The circuit court correctly ruled as such, and this court should affirm that ruling.

The Defendants are simply disappointed in the result and want this Court to take the bait on an argument rejected four times by the Panel and one time by the circuit court. However, the law of arbitration in South Carolina does not permit overturning an arbitration award for an alleged error of law. The Plaintiff argues he is correct on the law, as he has consistently argued. The Panel agreed with Plaintiff. No clear legal principle compels a decision for Defendants that the panel knowingly failed to follow. The circuit court's denial of the Defendants' motion to vacate on this issue should be affirmed.

III. THE CIRCUIT COURT CORRECTLY REFUSED TO REVIEW THE DECISION OF THE ARBITRATION PANEL ON THE STATUTE OF LIMITATIONS ISSUE WHEN A DISAPPOINTED PARTY CANNOT APPEAL AN ARBITRATION DECISION AND THE PANEL CONSIDERED THIS SAME ISSUE ON SEVERAL OCCASIONS AND EACH TIME RULED AGAINST THE DEFENDANTS.

The statute of limitations issue was exhaustively briefed and argued before the Panel at the dispositive motion, trial, and post-trial stages. The Panel ultimately decided against the Defendants'

arguments.

The track record for this argument is much the same as that for the subject matter jurisdiction/ derivative case argument. This issue was fully briefed, with multiple exhibits, and argued before the Panel on June 16, 2022.

The Plaintiff argued:

- Defendants Fred and Gilbert used the Bomasada entities to take money from this condo construction project far beyond what was allowed in the contracts and what the company's Members were able to see to pay for their business operations, private assets, and personal lifestyles and to draw more than $2 million in profit from the project. In this context of secrecy and deception, no reasonable person, including Mr. Morgan, could have known that the Company or he had a claim based on these acts until they were revealed through forensic investigation in Bomasada's Houston offices beginning in 2010 and into 2011.
- The statute was triggered in 2010-2011, not 2007-2008.
- The Defendants are equitably estopped from claiming SOL as a defense through their actions.
- The Defendants' actions equitably tolled the statute of limitations while they operated the business in the way they did, hiding the books from their fellow Members and failing to provide truthful financial reports.

See Plaintiff's Memorandum in Opposition to Summary Judgment.

Again, after considering the hundreds of pages of briefing and exhibits and extensive argument of counsel at the hearing, as described earlier, the Panel denied the motion for summary judgment on this issue by Order of July 11, 2022. (R. pp. 13-14)

As recounted by the Defendants in their initial brief to this court, the Defendants presented evidence directly related to this issue at the trial of this case before the Panel and renewed their motion seeking dismissal based on the statute of limitations. In their initial Arbitration Award on April 10,

2023, deciding the merits, the Panel denied the Defendants' Motion.

On April 18, 2023, Defendants tried for a third time in their Motion for Reconsideration to have the Panel rule in their favor on the factual question of the statute of limitations. After receiving Plaintiff's memorandum in opposition and fully considering the argument again, as the Defendants concede, "[f]or a third time," the Panel denied the Defendants' Motion.

The Defendants then sought to vacate the award and repeated the same argument to the circuit court they had made on at least three occasions without success. The circuit court found that this claimed error would not meet the standard for setting aside the award.

Now, the Defendants pitch the same statute of limitations argument to this Court, asking it to rule on a mixed question of law and fact where an arbitration panel has ruled (several times) against them. The circuit court did not consider this adequate ground to vacate the award and proceeded to confirm the award instead.

The question of when a cause of action accrued for purposes of the statute of limitations is a question of fact. *Dean v. Ruscon Corp.*, 321 S.C. 360, 366, 468 S.E.2d 645, 647 (1996). The defense of equitable estoppel is a question of fact for the judge as a factfinder. *Black v. Lexington Sch. Dist. No. 2*, 327 S.C. 55, 62 n.1, 488 S.E.2d 327, 330 (1997). Here, the Defendants seek to overturn an arbitration panel's decision and the circuit court's confirmation, not even on the merits of a jurisdictional decision as with their first argument, but on a question of fact decided by the factfinder. There is no basis for this argument, even if this Court were to review the merits of the arbitration panel's decision, which, as the Plaintiff has argued and the circuit court held, is inconsistent with the law governing arbitration decisions in South Carolina.

As with the subject matter jurisdiction issue, the Defendants must prove that the Panel members erred as a matter of law and that they did so knowing a clear and unassailable principle of law that controlled the outcome of the issue and knowingly disregarded it to render their decision.

There is no support for this argument in the record or the award, and this Court must reject the Defendants' appeal of the circuit court's decision to deny the motion to vacate on this issue.

CONCLUSION

For the reasons stated in this Respondents' Brief, the Respondents respectfully request that this Court affirm the Circuit Court's decision affirming the arbitration award and denying the motion to vacate it.

Respectfully submitted,

/s W. Andrew Gowder, Jr.
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