THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge
J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2014-CP-10-7037

South Carolina Human Affairs Commission,

Appellant,

v.

Zeyi Chen & Zhirong Yang,

Respondents.

INITIAL BRIEF OF APPELLANT

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STATEMENT OF THE CASE (ISSUES 1-3)

On November 14, 2014, the South Carolina Human Affairs Commission (Appellant) brought an action in the Charleston County Court of Common Pleas alleging illegal discrimination in violation of the South Carolina Fair Housing Law against Chen and Yang (Respondents). On March 24, 2016, Appellant and Respondents (hereinafter referred to as the "Parties"), participated in mediation resulting in a settlement agreement. After Respondents withdrew their assent to the settlement agreement, Appellant filed a motion to enforce the settlement agreement on April 15, 2016. A hearing was held on July 14, 2016 and the circuit court denied Appellant's motion to enforce on the grounds that Rule 43(k), SCRCP had not been satisfied.

STANDARD OF REVIEW (ISSUES 1-3)

The circuit court ruled as a matter of law that the settlement agreement entered into by the parties was unenforceable, on grounds that the agreement failed to strictly comply with SCRCP 43(k). Order of November 3, 2016, p. 4. In reviewing the determination of the circuit court that SCRCP 43(k) must be strictly complied with, this court is to consider the question *de novo* without deference to the circuit court as directed by the Supreme Court of South Carolina in *State ex rel. Wilson v. Town of Yemassee,* 391 S.C. 565, 707 S.E.2d 402, 405 (2011):

> The construction of a statute is a question of law, which this Court may resolve without deference to the circuit court. *Catawba Indian Tribe of S.C. v. State*, 372 S.C. 519, 524, 642 S.E.2d 751, 753 (2007) ("The issue of interpretation of a statute is a question of law for the court. We are free to decide a question of law with no particular deference to the circuit court." (internal citation omitted)). Interpretation of court rules applies the same rules of construction used to interpret statutes. *See Maxwell v. Genez*, 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003).

"In South Carolina jurisprudence, settlement agreements are viewed as contracts." *Nichols Holding, LLC v. Divine Capital Grp.*, 416 S.C. 327, 335, 785 S.E.2d 613, 615 (Ct. App. 2016)

(quoting *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009)). "The court's duty is to enforce the contract made by the parties regardless of its wisdom or folly, apparent unreasonableness, or the parties' failure to guard their rights carefully." *Id.* (quoting *Ellis v. Taylor*, 316 S.C. 245, 248, 449 S.E.2d 487, 488 (1994)). "When the language of a contract is clear and unambiguous, the determination of the parties' intent is a question of law for the court." *Id.* at 336, 785 S.E.2d at 615 (quoting *Wallace v. Day*, 390 S.C. 69, 74, 700 S.E.2d 446, 449 (Ct. App. 2010)).

FACTS

The March 24, 2016 mediation was conducted in Charleston, with two attorneys for the Appellant, three attorneys for the Respondents, and an attorney mediator present. July 13, 2017 Tr. 3:5. Attorneys for Appellant and Respondent were present for the entirety of the mediation. At mediation, the Parties reached a settlement agreement which was reduced to writing; the agreement was signed by Appellant's attorney[1], by Respondents, but not by Respondents' attorney, although Respondents' attorney was present for the signing[2]. July 13, 2017 Tr. 3:8-13. The terms called for the preparation of a Consent Order reflecting the terms of the settlement agreement that would be entered into the record. July 13, 2017 Tr. 3:17-18. Appellant prepared a Consent Order and delivered it to Respondents; Respondents' attorney acknowledged receipt of the proposed Consent Order and stated he would review it. July 13, 2017 Tr. 3:518-21; Pate Email dated April 1, 2016; O'Shea Email dated April 4, 2016. Shortly thereafter, before the Consent Order was signed and entered into the record, Respondents informed their counsel that they were withdrawing

[1] Appellant's attorney, Lee Ann Wooten Rice, signed on behalf of the South Carolina Human Affairs Commission.
[2] The settlement agreement was prepared by the mediator and did not include lines for counsels' signatures; none of the six attorneys present at the mediation noted or commented on this matter.

their assent to the settlement agreement. Thereafter, Respondents' counsel informed Appellant and its counsel of the withdrawal of assent to the agreement. July 13, 2017 Tr. 3:25 – 4:2.

ARGUMENT

I. BECAUSE SETTLEMENT AGREEMENTS ARE VIEWED AS CONTRACTS, THE RELEVANT LAW OF CONTRACTS SUGGESTS THE INSTANT SETTLEMENT AGREEMENT EXISTS AS AN ENFORCEABLE CONTRACT

"In South Carolina jurisprudence, settlement agreements are viewed as contracts." *Pee Dee Stores, Inc. v. Doyle*, 381 S.C. 234, 241, 672 S.E.2d 799, 802 (Ct. App. 2009). This applies to enforcement of an agreement as well; *see Pruitt v. S.C. Med. Malpractice Liab. Joint Underwriting Ass'n*, 343 S.C. 335, 339, 540 S.E.2d 843, 845 (2001) (finding enforcement of the terms of a settlement agreement is a matter of contract law).

Given that settlement agreements are viewed as contracts, the relevant law suggests that the circuit court erred in finding the agreement unenforceable.

A) EXISTENCE

In determining if a valid contract exists, our courts have consistently held that "a binding contract requires a manifestation of mutual assent to its terms." *Edens v. Laurel Hill, Inc.*, 271 S.C. 360, 364, 247 S.E.2d 434, 436 (1978). In making this determination, extrinsic evidence may be used, "[a]lthough the majority of case law addressing extrinsic evidence pertains to contract construction and not the existence of a contract, the inquiry in both instances involves giving force and effect to the intent of the parties, and we discern no reason for different rules of analysis." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia,* 409 S.C. 568, 577, 762 S.E.2d 696, 700 (2014). Our courts have consistently emphasized that "[t]he 'meeting of minds' required to make a contract is not based on secret purpose or intention on the part of one of the parties, stored away

in his mind and not brought to the attention of the other party, but must be *based on purpose and intention which has been made known or which, from all the circumstances, should be known.*" *Player v. Chandler*, 299 S.C. 101, 105, 382 S.E.2d 891, 894 (1989) (emphasis added). "The intention of the parties should be determined from the surrounding circumstances, as well as from the testimony of all the witnesses; and subsequent acts are relevant to show whether a contract was intended." *Wright v. Trask,* 329 S.C. 170, 178, 495 S.E.2d 222, 226 (Ct. App. 1997).

Prior to mediation, the parties signed an Agreement to Mediate; included in this agreement was a recognition that "[a]ny partial or global settlement will be reduced to a written and enforceable Memorandum of Settlement on the date of settlement." Mediation Agreement, p2. On the date of settlement, both parties and their attorneys distilled the agreed settlement terms down to a Settlement Agreement. Transcript of Record, P. 3, L. 8-10. This agreement was signed by both parties in the presence of their respective counsel and by counsel for the Appellants; an oversight in the preparation of the document resulted in an absence of a signature line for the Respondents' attorney. Transcript of Record, P. 3, L. 10-16. There is no dispute as to the meaning of the terms and Respondents signed on their own behalf with their counsel present; Respondents' counsel further acknowledged the existence of an agreement in emails with the Appellant and in the circuit court. O'Shea Email dated April 4, 2016; Transcript of Record, p 9, line 8. For formation of a valid contract, there must be an offer and an acceptance accompanied by valuable consideration; these elements are all present. Under traditional contract law, there would be no question of the existence of a contract as the essential elements have all been met: the parties agreed that any agreement resulting from mediation would be enforceable, there was mutual assent to the terms of the agreement and there is no ambiguity in the agreed upon terms.

Respondents argued below that SCRCP 43(k) relieves them of compliance with the agreement. Rule 43(k) states:

> No agreement between counsel affecting the proceedings in an action shall be binding unless reduced to the form of a consent order or written stipulation signed by counsel and entered in the record, or unless made in open court and noted upon the record, or reduced to writing and signed by the parties and their counsel.

SCRCP 43(k).

The circuit court, relying on *Farnsworth*, found that the agreement was unenforceable as it had not strictly complied with the conditions of 43(k). *Farnsworth v. Davis Heating & Air Conditioning, Inc.*, 367 S.C. 634, 627 S.E.2d 724 (2006). However, *Farnsworth* involved an agreement entered into solely between counsel; while authorized by the parties, there was no writing signed by the parties and one of the parties later rescinded the agreement. In the instant matter, the parties signed the agreement with their attorneys present; allowing a party that would be otherwise bound under contract law to withdraw from a contract due to an unnecessarily strict adherence to 43(k) could not possibly have been intended. Our Supreme Court has previously noted that "[h]owever plain the ordinary meaning of the words used in a statute may be, the courts will reject that meaning when to accept it would lead to a result so plainly absurd that it could not possibly have been intended by the Legislature or would defeat the plain legislative intention." *Kiriakides v. United Artist Commun., Inc.*, 312 S.C. 271, 275, 440 S.E.2d 364, 366 (1994). In interpreting the meaning of the South Carolina [Court] Rules ... the Court applies the same rules of construction used to interpret statutes. *Maxwell v. Genez,* 356 S.C. 617, 620, 591 S.E.2d 26, 27 (2003). The strict application of 43(k) to the agreement reached at mediation requires the courts to ignore long-established rules of contract interpretation. In *Ashfort*, our Supreme Court noted that "the purpose of rules such as Rule 43(k) is: '[T]o prevent fraudulent claims of oral stipulations, and to prevent disputes as to the existence and terms of agreements and to relieve the court of the

necessity of determining such disputes[.]'" *Ashfort Corp. v. Palmetto Const. Grp., Inc.*, 318 S.C. 492, 493, 458 S.E.2d 533, 534 (1995) (quoting 83 *C.J.S. Stipulations* § 4 (1953)). In this regard, 43(k) is most similar to the Statute of Frauds in contract law, serving similar proposes and requiring similar formalities. The circuit court's determination that 43(k) must be strictly adhered to in the instant matter is in direct conflict with the existing body of law that allows for certain exceptions to the requirements of a signed writing to evince the existence of a valid contract. *See, e.g.*, *Bekham v. Short*, 294 S.C. 415 (S.C. Ct. App. 1988) (part performance doctrine as exception to Statute of Frauds), *Florence Printing Co. v. Parnell*, 178 S.C. 119, 182 S.E. 313 (1935) (doctrine of estoppel as exception to Statute of Frauds). The strict adherence to 43(k) the circuit court reads into *Farnsworth* requires invalidating years of settlements-as-contracts precedence.

B) ENFORCEMENT

"Specific performance should be granted only if there is no adequate remedy at law and specific enforcement of the contract is equitable between the parties." *King v. Oxford*, 282 S.C. 307, 318 S.E.2d 125 (Ct. App. 1984) (citing *Monteith v. Harby*, 190 S.C. 453, 3 S.E.2d 250 (1939)). In order to compel specific performance, a court of equity must find: (1) there is clear evidence of a valid agreement; (2) the agreement had been partly carried into execution on one side with the approbation of the other; and (3) the party who comes to compel performance has performed his or her part, or has been and remains able and willing to perform his or her part of the contract. *Gibson v. Hrysikos*, 293 S.C. 8, 358 S.E.2d 173 (Ct. App. 1987) (citing *Thomson v. Scott*, 6 S.C. Eq. (1 McCord Eq.) 32 (1825)).

Here, there is no adequate remedy at law as the settlement agreement requires specific acts on behalf of the Respondents that promote the public good. Specifically, the requirements of adherence to Fair Housing Laws, undergoing fair housing training provided by the Human Affairs

Commission, and the posting of fair housing materials at properties offered for rental cannot be reduced to monetary damages, rendering any remedy at law inadequate. The agreement is valid as there are no disputes as to the terms and strict adherence to 43(k) should be waived through application of traditional contract law (see above) or, in the alternative, on equitable grounds (see below). The agreement had been partially carried into execution as evidenced by the Appellant's creation of a Consent Order, the mutual assent to the case status being changed from active to "settled" status with the clerk of court, and the preparation of training and poster materials for the Respondents. Appellant remains willing and able to perform any additional obligations under the contract.

In *Peddler, Inc. v. Rikard*, 266 S.C. 28, 31, 221 S.E.2d 115, 117 (1975), the supreme court noted that "[t]he appellant . . . contend[ed] that the franchise agreement was never signed by him, so there was no meeting of the minds and hence there was no contract between the parties..." The court determined, however, that "[i]t is not always necessary, in order to give validity to a contract, that it should be signed by both parties; it may be sufficient if it be signed by one party and accepted, held, and acted upon by the other." *Id.* at 32, 221 S.E.2d at 117 (quoting *Gladden v. Keistler*, 141 S.C. 524, 140 S.E. 161 (1927)).

Here, Respondents accepted the signed agreement and acted upon it. Respondents' counsel reviewed the proposed consent order and allowed the mediator to submit a report to the court stating that the matter had been settled. Proof of ADR filed March 29, 2016. Respondents at no time made any effort to update the court on their rescinded agreement and the original complaint was only restored to active status with the court after the Appellant sought and received an order from the circuit court. Respondents' actions and inaction demonstrate that they accepted the agreement and derived benefit from it prior to rescinding their assent. "[I]t has long been a

paradigm of South Carolina law that when a contract signed by one party only is accepted by the other party, it becomes binding upon both just as if it were signed by both." *Jaffe v. Gibbons*, 290 S.C. 468, 472–73, 351 S.E.2d 343, 346 (Ct. App. 1986) (citing *Peddler, Inc. v. Rikard*, 266 S.C. 28, 221 S.E.2d 115 (1975); *Bullwinkle v. Cramer*, 3 S.C. 776, 27 S.E. 376, 13 Am.St.R. 645 (1887)).

II. BECAUSE RESPONDENTS' ATTORNEY WAS PRESENT FOR AND ADMITTED TO THE EXISTENCE OF THE AGREEMENT, THE BALANCE OF THE EQUITIES SUGGESTS ENFORCING THE AGREEMENT.

This court has previously addressed "courts' substantial flexibility when deciding cases in equity, stating '[o]nce invoked, the scope of a district court's equitable powers is broad, for breadth and flexibility are inherent in equitable remedies.'" *Regions Bank v. Wingard Properties, Inc.*, 394 S.C. 241, 249, 715 S.E.2d 348, 352 (Ct. App. 2011) (referring to, *e.g.*, *Brown v. Plata*, No. 09-1233, 2011 WL 1936074, at 28 (U.S. May 23, 2011) (internal citation and quotation marks omitted). The *Regions* decision involved the awarding of a first priority equitable lien superior to the mortgage of appellant Regions Bank. Just as in *Regions*, the instant matter "involves the consideration and balancing of several equitable maxims: equity regards as done that which ought to have been done; equity applies substance over form; ...[and] equity follows the law." *Id.* The *Regions* court found that the balance of the equities favored application of substance over form, in spite of urging from the appellant that "equity should follow the law and reward the party who filed first according to section 30-7-10 of the South Carolina Code (2007)." *Id.* In *Regions*, despite appellant's argument that the statutory guidelines dictated the court's decision, the court states that "[t]he principle 'equity regards as done that which ought to be done' applies in cases where the party seeking equitable relief establishes 'a clear obligation based upon a valuable consideration that another do some act which he has failed to perform.' The notion 'equity looks to substance

rather than form' evolved out of judicial regard for that which ought to be done. This maxim applies by '*dispensing with pure formalities which would otherwise defeat the equity.*'" *Id* (internal citations omitted; emphasis added). Our Supreme Court has held that "[w]hen applying this principle, courts look to the substance and intent of the parties, and give a construction consistent with such intent. *Harpending v. Reformed Protestant Dutch Church of City of N.Y.*, 41 U.S. 455, 480, 16 Pet. 455, 10 L.Ed. 1029 (1842). The *Regions* court points out that "[t]his maxim has at times guided a court to relieve a party from the consequences of accident, mistake, and fraud." *Regions Bank v. Wingard Properties, Inc., 394 S.C. 241, 254, 715 S.E.2d 348, 355 (Ct. App. 2011)* (citing *Camp v. Boyd*, 229 U.S. 530, 559 (1913)).

The record clearly shows that the parties and their counsel were all in agreement at the time the mediation agreement was signed. All parties agree that the failure of Respondents' attorney to sign the agreement at the mediation was a mistake. As shown above, Appellant has partially performed their obligations under the agreement; strict adherence to 43(k) removes all power from a court to craft an equitable remedy when warranted by the facts. We urge this court to treat as done that which ought to be done and apply substance over form by reversing the circuit court's decision to not enforce the agreement.

III. PUBLIC POLICY FAVORS ENFORCING SETTLEMENT AGREEMENTS REACHED THROUGH MEDIATION AND A CLIENT

Our courts have repeatedly recognized "South Carolina's strong public policy favoring alternative dispute resolution" as a means of resolving disputes prior to judicial hearings. *Ross v. Waccamaw Community Hosp.* 404 S.C. 56, 744 S.E.2d 547 (2013); *see also* Order of the South Carolina Supreme Court 2013-03-14-01 and 2015-11-12-04.

In its orders adopting mandatory mediation, the Supreme Court adopted the Court-Annexed Alternative Dispute Resolution (ADR) Rules. Among those rules is a requirement that "[u]pon reaching an agreement, the parties shall, before the adjournment of the mediation, reduce the agreement to writing and sign along with their attorneys." Rule 6(f), SCRADR. This rule comports with the language of 43(k) in requiring attorneys to sign the settlement agreement. In this instance, the Respondents changed their minds after an agreement was reached; only as a result of their attorney's mistake is there even a question of enforceability. Strict adherence to 43(k) in this instance rewards Respondents' attorney for failing to comply with the ADR and civil procedure rules. Requiring strict adherence to 43(k) could easily result in the opposite situation, where a party could be unjustly denied enforcement of an agreement due to a mistake by their attorney. Finally, strict adherence to 43(k) could create a sort of perverse incentive for an attorney to avoid signing an agreement in order to retain the option to later rescind the agreement[3].

As the public policy of South Carolina favors alternative dispute resolution; an attorney's failure to comply with the rules should not be rewarded; and strict adherence to 43(k) could potentially create a perverse incentive to avoid compliance, we urge this Court to reverse the judgement of the circuit court.

[3]To be perfectly clear, Appellant does not believe this to be the case in the instant matter. The issue is raised here prospectively as a potential harm to maintaining a strict adherence to 43(k).

STATEMENT OF THE CASE (ISSUES 4-7)

On February 6, 2014, Stacy Woods (hereinafter referred to as "Aggrieved Party") filed a complaint with the Appellant alleging violations by the Respondents of the South Carolina Fair Housing Law on the basis of race and familial status. As part of its investigation, Appellant assigned an investigator to investigate the claims of Aggrieved Party and the defenses raised by Respondents and to attempt to conciliate the dispute as required by law. As with all agency investigations, Appellant requested a position statement from Respondents. On its third attempt to solicit a position statement, Appellant included an offer from Aggrieved Party to conciliate the matter, in addition to further inquiries related to the investigation. Respondents finally submitted a written response to Appellant which did not evince an offer of compromise or settlement, but did contain factual statements regarding the policies and procedures Respondent used in offering housing.

At the conclusion of its investigation, Appellant issued a cause determination on the basis of familial status and a no cause determination on the basis of race. Pursuant to statutory requirement, Appellant filed a civil action on November 14, 2014 in the Charleston County Court of Common Pleas alleging discrimination in violation of the South Carolina Fair Housing Law against Respondents. Discovery materials were exchanged by the parties, including deposition of Respondent Chen. In August of 2017, Appellant moved for partial summary judgment. In response to this filing, Respondents sought to exclude certain portions of the investigative file from use in the hearing on the basis that they were done "in the course of conciliation." A hearing was held on October 9, 2017. By email dated October 26, 2017, Judge Nicholson informed the parties he would issue a protective order sealing information "obtained during the conciliation proceedings." See Nicholson Email 1 dated Oct. 26, 2017. This same email noted that "should

the [Appellant] subsequently acquire such information through another admissible procedure it may revisit the issue before the trial judge." *Id.* In another email later that day, the judge ordered the production of "some type of privilege log outlining materials and portions thereof that contain information believed to be have been obtained during the conciliation proceedings." See Nicholson Email 2 dated Oct. 26, 2018. The court denied SCHAC's motion for summary judgment and granted Respondents' motion for protection as to materials shielded from public disclosure; this order did permit that information to be obtained through subsequent discovery measures. See Nicholson Order 1 filed Feb 8, 2018. Subsequently, both parties filed motions for reconsideration; the court, *sua sponte*, also requested memoranda on whether the South Carolina Fair Housing Law (hereinafter "SCFHL" or "FHL") violated Respondents' due process rights. A hearing was held on April 11, 2018, and the court issued an order May 15, 2018, expanding the materials excluded from admission to all materials in the Appellant's investigatory file, as well as excerpts from depositions and other discovery materials. Respondents filed another motion for reconsideration requesting that the case be dismissed on the basis that the SCFHL violated Respondents' due process rights and was unconstitutionally vague. By order dated September 17, 2018, the court dismissed the case and deemed the entirety of the SCFHL unconstitutional due to vagueness.

STANDARD OF REVIEW (ISSUES 4-5)

Issues 4 and 5 center on a question of statutory interpretation. "Questions of statutory interpretation are questions of law, which we are free to decide without any deference to the court below." *City of Rock Hill v. Harris,* 391 S.C. 149, 152, *CFRE, LLC v. Greenville Cty. Assessor*, 395 S.C. 67, 74, 716 S.E.2d 877, 881 (2011).

> The cardinal rule of statutory interpretation is to ascertain and effectuate the intention of the legislature." *Sloan v. Hardee,* 371 S.C. 495, 498, 640 S.E.2d 457, 459 (2007). "When a statute's terms are clear and unambiguous on their face, there

> is no room for statutory construction and a court must apply the statute according to its literal meaning." *Id.* In interpreting a statute, "[w]ords must be given their plain and ordinary meaning without resort to subtle or forced construction to limit or expand the statute's operation." *Id.* at 499, 640 S.E.2d at 459. Further, "the statute must be read as a whole and sections which are a part of the same general statutory law must be construed together and each one given effect." *S.C. State Ports Auth. v. Jasper County,* 368 S.C. 388, 398, 629 S.E.2d 624, 629 (2006). Accordingly, we "read the statute as a whole" and "should not concentrate on isolated phrases within the statute." *CFRE,* 395 S.C. at 74, 716 S.E.2d at 881. *Centex Int'l, Inc. v. S.C. Dep't of Revenue*, 406 S.C. 132, 139, 750 S.E.2d 65, 69 (2013)

"[W]e give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control,* 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014). Citing *Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc.,* our Supreme Court held, "If the statute or regulation 'is silent or ambiguous with respect to the specific issue,' the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2014) (internal citation omitted). The Court further notes: "[a]s repeatedly stated in our decisions, our deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations unless there is a compelling reason to differ." *Id* (internal quotations omitted).

There are no state cases analyzing the provision in question. The South Carolina Supreme Court has stated that:

> [u]nder general rules of statutory construction, a jurisdiction adopting legislation from another jurisdiction imports with it the judicial gloss interpreting that legislation. *Melby v. Anderson*, 64 S.D. 249, 266 N.W. 135 (1936); *Santee Mills v. Query*, 122 S.C. 158, 115 S.E. 202 (1922). Thus, Title VII cases which interpret provisions or procedures essentially identical to those of the Human Affairs Law are certainly persuasive if not controlling in construing the Human Affairs Law.

Orr v. Clyburn, 277 S.C. 536, 540, 290 S.E.2d 804, 806 (1982).

FACTS

Appellant's investigator mailed letters to Respondents Chen and Yang on February 11, 2014, informing them of the complaint filed by the Aggrieved Party and requesting a position statement from Respondents. No written response was received from Respondents to these letters. A second letter was sent on February 27, 2014. Included in the first paragraph of this letter is an explanation of conciliation and an initial conciliation offer. See Caldwell letter dated Feb. 27, 2014. The second paragraph states "[a]s the investigator, I am inclined to continue to investigate the case just in case the complaint can't be resolved through conciliation." *Id.* The remainder of the letter contains a repeated request for formal position statement and additional investigative questions.

On March 6, 2014, Respondents finally submitted a written position statement to the investigator. Nowhere within this response is there any discussion of conciliation or an offer of negotiation. See Respondents' First Position Statement dated Mar. 6, 2014. A second position statement, dated March 12, 2014, was sent by Respondents via email. It was identical to the first position statement with the exception of an additional introductory paragraph. The only part of that letter that could remotely be construed as regarding conciliation is the statement "Stacy should not be paid anything and she will never be paid." See Respondents' Second Position Statement dated Mar. 12, 2014. No counteroffer or invitation to negotiate was included in the document, or any other statement Respondents made to Appellant. A third position statement and response to request for information dated March 12, 2014, and sent by Respondents via email dated March 13, 2014, also contains responses to the investigator's requests for information; this

letter contains no references to conciliation. See Respondents' Third Position Statement dated Mar. 12, 2014 (sent Mar. 13, 2014).

The lower court repeatedly expressed hostility to the Appellant's use of federal case law in addressing the SCFHL passage in question. At the October 9, 2017 hearing, the circuit court judge repeatedly questioned the relevance and use of federal case law in interpreting the SCFHL. See Oct. 9, 2017 Tr. 13-15. At the April 11, 2018 hearing, the circuit court judge went so far as to explicitly state "I'll be perfectly honest with you I don't really care what they do in federal court and the other states." See Apr. 11, 2018 Tr. 32:20-22.

After the October 9, 2017 hearing, the lower court, by emails dated Oct. 26, 2017, issued a preliminary order and requested logs of documents the parties considered excluded under the order. See Nicholson Email 1 and 2 dated Oct. 26, 2017. Appellant produced a log of materials that it considered fell under the order; see Plaintiff's Log of Nonpublic Materials. However, Appellant disputed, and continues to dispute, that any materials should be excluded under the SCFHL and made the log only for purposes of complying with the judge's order.

The lower court issued its first order on February 8, 2018. This order excluded from admission certain parts of Appellant's investigative file as well as portions of depositions. The court noted that Appellant "may choose to revisit it's [sic] contests to the occupancy policy, and any information related to it, before the trial judge who shall then make a final determination on its admissibility under S.C. Code § 31-21-120." This order also permitted parties to acquire protected information through standard discovery practices. See Nicholson Order 1, filed Feb. 8. 2017.

The lower court's May 14 order excluded "any material contained in [Appellant's] conciliatory file, its investigative file, the attached logs submitted by the [Respondents], and any

material covered by this Court's previous Protective Order that is not covered by this Order." See Nicholson Order 2 filed May 15, 2018. The logs submitted by Respondents included information gathered during the administrative investigation as well as materials gathered through civil discovery, including depositions, subpoenas, and Requests for Admission.

ARGUMENT

IV. THE TRIAL COURT ERRED IN INCLUDING PURELY FACTUAL INFORMATION IN ITS PROTECTIVE ORDERS

The South Carolina Fair Housing Law and the South Carolina Human Affairs Law that established the Agency were designed to mirror their federal counterparts. Our Supreme Court has acknowledged this and provided guidance for state courts deciding matters of first impression concerning laws the SCHAC administers:

> The South Carolina Human Affairs Law essentially follows the substantive structure of Title VII, and the enforcement agency for Title VII, the Equal Employment Opportunity Commission, is in all relevant and material respects analogous to the respondent commission. Under general rules of statutory construction, a jurisdiction adopting legislation from another jurisdiction imports with it the judicial gloss interpreting that legislation. *Melby v. Anderson*, 64 S.D. 249, 266 N.W. 135 (1936); *Santee Mills v. Query*, 122 S.C. 158, 115 S.E. 202 (1922). Thus, Title VII cases which interpret provisions or procedures essentially identical to those of the Human Affairs Law are certainly persuasive if not controlling in construing the Human Affairs Law.

Orr v. Clyburn, 277 S.C. 536, 540, 290 S.E.2d 804, 806 (1982).

Appellant provided the lower court with numerous citations to federal cases interpreting the provision of Title VII that is nearly-identical to the SCFHL code section in question. At no point in the proceedings below did Respondents provide any conflicting authority.

In its May 15, 2018 order, the lower court noted that it "does not disagree with the holding" in one such case, but "decline[s] to adopt such a concrete rule." See Nicholson Order 2, filed May 15, 2018. That same order states that "the Court agrees with Plaintiff that the

majority of the deposition testimony does not fall within the confines of conciliation" but "this Court declines to adopt the rule that purely factual information is never within the scope of conciliation." *Id.*

The lower court erred in excluding two categories of information: information derived from the administrative investigation and information derived from civil discovery after a lawsuit had been filed.

A. MATERIALS DERIVED FROM THE INVESTIGATION

The only materials the SCFHL excludes from public disclosure are those that are "said or done in the course of the informal endeavors;" those "informal endeavors" are identified as "conference, conciliation, and persuasion." S.C. Code Ann. § 31-21-120(a). That section also states: "[i]f practicable, conciliation meetings must be held in the cities or other localities where the discriminatory housing practices allegedly occurred." Id.

The lower court determined that, as a matter of law, the position statements provided to Appellant by Respondents were done "in the course of the informal endeavors" of conciliation. The statements of position provided by Respondents in their March 6, 12, and 13 emails contain information the Appellant sees regularly in statements of position from other housing providers or employers in the agency's investigations of complaints. The letters acknowledge receipt of the investigator's letters, give background information on the Respondents, address the content of the Aggrieved Party's complaint, provide Respondents' account of their interactions with the Aggrieved Party, contain an attached copy of the Respondents' policies, and contain denials of particular allegations found in Aggrieved Party's complaint. The only passage in any of these three letters that addresses the conciliation offer extended in the investigator's February 27 letter is found in the second position statement: "Stacy should not be paid anything and she will never

be paid." See Respondents' Second Position Statement, dated Mar. 12, 2014. In the very next sentence, Respondents state that "[w]e will continue work to make everything clear." *Id.*

In this case, the conciliation offer was made near the start of the process; Appellant's investigator had not received any response from Respondents yet, a conciliation conference had not yet been scheduled, nor had a conciliation meeting been arranged.

i. RESPONDENT NEVER ENGAGED IN CONCILIATION UNDER THE STATUTE

In the Fair Housing context, conciliation means negotiation of a complaint. See 24 C.F.R. § 103.9. Negotiation, defined by Black's Law Dictionary as "deliberation, discussion, or conference upon the terms of a proposed agreement," is not present in any of the position statements at issue here. The only reference to the conciliation offer in any Respondents' letters is a flat rejection of any conciliation. It is inconceivable that a blanket and unequivocal rejection can be construed as an invitation to further negotiation; that the lower court found it did so, not only for the second position statement, but also for the one that preceded and followed, is puzzling. As such, on the plain language of the statute, none of the position statements or investigative materials should be excluded.

ii. CLOSEST SOUTH CAROLINA ANALOGUE WOULD PERMIT SAME MATERIALS TO BE ADMITTED

If there is some doubt as to whether the position statements were provided in the course of conciliation, we can look to the closest analogue in South Carolina law: Rule 408, South Carolina Rules of Evidence:

> Evidence of (1) furnishing or offering or promising to furnish, or (2) accepting or offering or promising to accept, a valuable consideration in compromising or attempting to compromise a claim which was disputed as to either validity or amount, is not admissible to prove liability for or invalidity of the claim or its

> amount. Evidence of conduct or statements made in compromise negotiations is likewise not admissible. This rule does not require the exclusion of any evidence otherwise discoverable merely because it is presented in the course of compromise negotiations.

Like the SCFHL provision in question, this Rule prohibits the use of things said or done in compromise negotiations from being admitted into evidence. Both the Rule and the SCFHL provision are designed to permit frank discussions during negotiations: "[t]his rule is founded on the common-law public policy of encouraging litigants to attempt compromise before suit and trial." § 13:8.Negotiations, compromise offers, and prepayments, Trial Handbook for South Carolina Lawyers § 13:8. However, as noted above, the Respondents' Second Position Statement, and the only reference to conciliation found in any of Respondents' communications with Appellant's investigator, is a rejection of *any* compromise. That the preceding and following positions statements could be done in furtherance of compromise that Respondents rejected outright is preposterous.

The notes to SCRE 408 reference the *Hunter* case; it discusses statements against interest that are unrelated to offers of compromise. That is directly on point with the case at bar, where Respondents provided position statements devoid of any offer of compromise. Indeed, this comparison to Rule 408 is not unique to Appellant's position; in *E.E.O.C. v. Scrub, Inc.*, No. 09 C 4228, 2010 WL 2136807, at *6 (N.D. Ill. May 25, 2010), the court notes:

> [T]he Fifth Circuit likened the purpose of section 706(b), and the confidentiality provisions therein, to the traditional evidentiary rule making offers of compromise and settlement that are inadmissible under Federal Rule of Evidence 408. Here, we do the same... We will not, therefore, require EEOC to disclose communications or proposals made during the conciliation process. Again, purely factual material related to the merits of the EEOC charge, however, remain discoverable.

The lower court rejected any comparisons to SCRE 408, stating that such an analysis would render the protections of the statute superfluous in light of the Rule. This ignores the fact

that the SCFHL was enacted in 1989 and predates the Rule's adoption in 1995. In any event, the Rule merely codified the rule at common law and would not take precedence over the statute in any event; see SCRE 101. The lower court's rejection of the only comparable language in South Carolina law ignores the possibility of the Rule and statute having coextensive coverage, or the possibility that the statute was meant to codify the then-common law rule.

iii. THE COMMISSION'S INTERPRETATION SHOULD BE GRANTED GREAT DEFERENCE

If the plain text of the statute and its closest South Carolina analogue are insufficient in deciding that the excluded materials should be admitted, the court should defer to the Appellant agency's interpretation. "[W]e give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014). Citing *Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc.,* our Supreme Court held, "If the statute or regulation 'is silent or ambiguous with respect to the specific issue,' the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2014) (internal citation omitted). The Court further notes: "[a]s repeatedly stated in our decisions, our deference doctrine provides that courts defer to an administrative agency's interpretations with respect to the statutes entrusted to its administration or its own regulations unless there is a compelling reason to differ." *Id* (internal quotations omitted).

The Appellant provided the lower court an affidavit from its agency head outlining the agency's interpretation of conciliation which states in part:

> 5. South Carolina Human Affairs Commission has adopted the same standard for determining whether something is conciliatory based on how the Courts have interpreted conciliation in other parts of the Civil Rights Act of 1964, through our legal department's review of appropriate case law, interpretation of other jurisdictions, and specific HUD guidance.
> 6. This standard is that only offers or concessions made for settlement are considered conciliatory. This specifically excludes fact and denial statements and position statements by the parties.

Affidavit of Commission Raymond Buxton dated Feb. 16, 2018.

The lower court rejected this interpretation as being inconsistent with Appellant's filing of a log of non-public documents. However, this log was produced by Appellant in order to comply with an order from the court; it has consistently rejected the argument that *any* of the proffered materials evince an offer of compromise. The lower court also points to the deposition of investigator Marvin Caldwell, wherein counsel for Appellant objected to discussion of the February 27 letter "in as much as it contains information related to conciliation." Appellant has never argued that the February 27 letter contained *no* conciliation materials, only that the first paragraph containing the offer should be redacted if it is to be made public absent the written consent of the parties. The lower court adopted Respondents' mischaracterization of Appellant's position as inconsistent, despite the repeated assertions actually made by Appellant at oral argument and in written memoranda.

. "We defer to an agency interpretation unless it is arbitrary, capricious, or manifestly contrary to the statute." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34–35, 766 S.E.2d 707, 718 (2014) (internal quotations and citation omitted). In this case, the lower court made a finding that the agency's interpretation was arbitrary and inconsistent; the court also noted, however, that:

> [i]n support of [Appellant's] final position –that none of the materials sealed by the Court are conciliatory—and its Commissioner's interpretation, it cites to a number of case from other jurisdictions where courts were interpreting federal statutes that

> largely mirror the statute at issue here. The limited amount of cases that have addressed this issue seem to fall in line with the Commission's approach... .

Nicholson Order 2 at 4, filed May 15, 2018.

Despite acknowledging that the agency's interpretation was consistent with all available comparative case law, the lower court, without explanation, deemed the Appellant's interpretation arbitrary and not worthy of deference.

This flies in the face of controlling case law from the South Carolina Supreme Court that agency interpretations be deferred to unless there are compelling reasons to do so. Respondents' mischaracterization of the agency's interpretation does not rise to the level of a compelling reason, especially in light of the universal acceptance from other jurisdictions that addressed this same issue.

iv. ALL FOREIGN COURTS THAT HAVE ANALYZED THIS ISSUE HAVE DETERMINED THAT "PURELY FACTUAL INFORMATION" SHOULD NOT BE EXCLUDED

The South Carolina Supreme Court, analyzing the statute that created the SCHAC, recognized that there is little case law in the state concerning the Commission and the statutes it enforces. However, the Court also recognized that "[u]nder general rules of statutory construction, a jurisdiction adopting legislation from another jurisdiction imports with it the judicial gloss interpreting that legislation. Thus, Title VII cases which interpret provisions or procedures essentially identical to those of the Human Affairs Law are certainly persuasive if not controlling in construing the Human Affairs Law." *Orr v. Clyburn*, 277 S.C. 536, 540, 290 S.E.2d 804, 806 (1982) (internal citation omitted).

In this case, the provisions of the SCFHL concerning conciliation:

> Nothing said or done in the course of the informal endeavors may be made public or used as evidence in a subsequent proceeding under this chapter without the written consent of the persons concerned. and the provisions of 42 U.S.C.A. § 2000e-5 (Title VII) concerning conciliation:
>
> Nothing said or done during and as a part of such informal endeavors may be made public by the Commission, its officers or employees, or used as evidence in a subsequent proceeding without the written consent of the persons concerned. are nearly identical.

Even though the lower court acknowledged the provision of the SCFHL in question "largely mirror[s]" the federal statute, the court rejected the SC Supreme Court's admonition that cases analyzing it are "persuasive if not controlling." *Orr*, 277 S.C. at 540. Judge Nicholson rejected Appellant's presentation of the foreign cases unanimously in support of Appellant's position, stating on the record that "I'll be perfectly honest with you I don't really care what they do in federal court and the other states." April 11, 2018 hearing transcript, p 32, line 20-22. The lower court provided no reason for refusing to accept these cases, despite the SC Supreme Court's view of their weight.

Every authority Appellant has been able to find addressing this issue has concluded that purely factual information conveyed to the civil rights agency is properly admissible and the restrictions on the use of conciliation materials are limited to those materials that actually evince an offer of compromise. Appellant presented cases from the Fifth Circuit[4], the Second Circuit[5],

[4] Olitsky v. Spencer Gifts, Inc., 964 F.2d 1471, 1476–77 (5th Cir.1992) (holding Defendant's letter written by attorney contained only facts in support and denials and was not barred from use in future proceedings); *E.E.O.C. v. Philip Servs. Corp.*, 635 F.3d 164 (5th Cir. 2011) (acknowledging the distinction between conciliation materials concerning negotiations that are confidential and factual information permitted for use); see also *Barnes v. Ergon Ref., Inc.*, 38 F.3d 568 (5th Cir. 1994) and *Branch v. Phillips Petroleum Co.*, 638 F.2d 873, 881 (5th Cir. 1981).
[5] *Binder v. Long Island Lighting Co.*, 933 F.2d 187, 193 (2d Cir.1991) ("Factual statements regarding past events are distinguishable from offers of compromise.")

and district courts in states in the 6th (Tennessee[6]), 7th (Wisconsin[7], Illinois[8], and Indiana[9]), and 9th (Alaska[10]) circuits. No Fourth Circuit authority addressing this particular issue could be found, although the S.C. Supreme Court's holding in *Orr v. Clyburn* does not limit the persuasive, if not controlling, use of federal authorities to that of the Fourth Circuit; indeed, the *Orr* court cites to cases out of South Dakota and Michigan in deciding the due process issues in that case.

All of these cases were provided to the lower court at oral argument, in memoranda or other filings, or by email upon request of the court. Respondents never produced any authority, state or federal, to support their contention that any of the communications produced by Respondent during the investigation were conciliation materials shielded from disclosure.

Considering the *Orr* court's directive that cases interpreting substantially similar provisions of federal law should be treated as "persuasive, if not controlling," the lower court erred in refusing to adopt the unanimous rule from every other court that has analyzed this issue.

B. MATERIALS DERIVED FROM DISCOVERY

The analysis above applies equally to materials the lower court excluded that were derived from the discovery process. The lower court determined that, as a matter of law, certain

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[6] *Hill v. Shoe Show, Inc.*, No. 13-2931-STA-CGC, 2015 WL 4527722, at *4 (W.D. Tenn. July 27, 2015) (holding that the prohibition on subsequent use "does not apply to position papers reciting one party's version of events.").
[7] *Brooks v. Grandma's House Day Care Centers, Inc.*, 227 F. Supp. 2d 1041, 1044 (E.D. Wis. 2002) (ruling that an attorney's letter under Title VII void of statements relating to compromise, settlement, or negotiation was admissible).
[8] *E.E.O.C. v. Scrub, Inc.*, No. 09 C 4228, 2010 WL 2136807, at *6 (N.D. Ill. May 25, 2010) ("...purely factual material related to the merits of the EEOC charge, however, remain discoverable.").
[9] *Frazier v. Indiana Dep't of Labor*, No. IP 01-198-C-TK, 2003 WL 21254424, at *5 (S.D. Ind. Mar. 17, 2003), *modified on reconsideration*, No. IP01-198CTK, 2003 WL 21254567 (S.D. Ind. Mar. 24, 2003) (If ... the DOL's position paper contains statements relating to compromise, settlement or conciliation, such statements would be inadmissible and should be redacted.").
[10] *Equal Employment Opportunity Commission, et al v. Parker Drilling Company*, No. 3:2013cv00181 - Document 404 (D. Alaska 2015) ("The Court holds that only proposals or counterproposals of compromise made by the parties during the Commission's efforts to conciliate are shielded from discovery.").

portions of Respondents' discovery responses and excerpted deposition testimony were shielded from disclosure as having been somehow tainted by their reference to information gathered during the investigation but later asserted to be part of conciliation.

The only additional point to be made here is that it is inconceivable that information gathered years after the closure of the Appellant's administrative investigation and after the commencement of a lawsuit could be done "in the course of" conciliation. Conciliation, under the SCFHL, runs "[d]uring the period beginning with the initial filing of a complaint and ending with the filing of complaint for hearing or dismissal, the Commission will, to the extent feasible, attempt to conciliate the complaint." S.C. Code Regs. 65-225 (A) (1). At the point that litigation has commenced, there can be no question that conciliation has ended. The lower court's determination that materials derived from discovery are somehow shielded under the conciliation provision of the statute is manifestly contrary to the plain language of the statute and implementing regulations.

The lower court determined that deposition testimony of Respondents Chen (taken January 26, 2016) and Anrbiushkiavichus (taken February 18, 2016), along with investigator Caldwell (taken March 10, 2016), were excludable, even where they discussed purely factual information, such as Respondents' housing policy and rules, despite these depositions taking place over a year and half after the closure of the administrative investigation and the conciliation period. See Nicholson Order 2. Further, the lower court barred from use Respondents Responses to Plaintiffs Second Set of Requests for Admission, dated January 19, 2018, over three years from the commencement of litigation. *Id.*

As with materials derived from the investigation, Respondents made no showing of any authority to support the exclusion of information derived from discovery. The lower court's

ruling leads to an absurd result wherein a party could make any number of admissions against interest tangentially coupled with an offer of compromise[11] and then use that relation as a means of preventing all efforts to legitimately acquire information during the discovery process.

This absurd result occurred in the instant matter. An order dated Feb. 12, 2018 compelling Respondents' response to discovery was issued; at the February 7, 2018 hearing, Respondents raised similar objections to the disclosure of certain materials as part of the discovery process. The court noted this in its findings of fact:

> Defendants allege that because they mentioned policies and procedures in the course of conciliation during the SCHAC investigation, the underlying policies and procedures are somehow now protected from disclosure. Defendants alternatively argued that any information was already set forth in what Defendant asserts is a "privilege log." The Court has reviewed the log and rejects this argument... .

Order by Judge Hyman dated May 11, 2018.

In that same order, Judge Hyman further noted that:

> I was provided with a copy of Judge Nicholson's order dated February 5, 2018, on the day following this [February 7, 2018] hearing. I find that Judge Nicholson's order mirrors my understanding of what may be discovered. [excerpt from Judge Nicholson's order issued February 8, 2018 omitted] The matters requested by the Plaintiff involve policies, procedures, and licensing that existed prior to the acts which give rise to the complaint. These documents and related information are fully discoverable under the South Carolina Rules of Civil Procedure and are not protected merely because they may have been mentioned or discussed in a conciliation proceeding. In so far as the Plaintiff's request for production and interrogatories address issues arising prior to the acts which give rise to this action, they are discoverable. The matter of the admissibility of any such information will be a matter determined by the Trial Judge.

Id.

In spite of Judge Hyman's existing order, Respondents sought, and Judge Nicholson granted, the exclusion of materials that were derived from discovery under the SCRCP.

[11] Although, again, there was never any offer of compromise or attempt to negotiate made in the instant matter.

While Appellant maintains that none of the materials excluded are conciliation materials, it seems that, at the very least, information derived from the discovery process more than a year after the close of the administrative investigation and the end of the period of potential conciliation cannot possibly be done "in the course" of conciliation and should therefore not be excluded.

V. THE TRIAL COURT ERRED IN REFUSING TO CONSIDER CASE LAW FROM OTHER JURISDICTIONS THAT INTERPRETED PROVISIONS ESSENTIALLY IDENTICIAL TO THOSE OF THE SOUTH CAROLINA FAIR HOUSING LAW

In *Orr v. Clyburn*, the South Carolina Supreme Court analyzed the South Carolina Human Affairs Law, the statute that created Appellant agency, and noted that, where there is no state case law on point, courts should look to other courts' interpretations of substantially similar provisions of law:

> Under general rules of statutory construction, a jurisdiction adopting legislation from another jurisdiction imports with it the judicial gloss interpreting that legislation. *Melby v. Anderson*, 64 S.D. 249, 266 N.W. 135 (1936); *Santee Mills v. Query*, 122 S.C. 158, 115 S.E. 202 (1922). Thus, Title VII cases which interpret provisions or procedures essentially identical to those of the Human Affairs Law are certainly persuasive if not controlling in construing the Human Affairs Law.

Orr v. Clyburn, 277 S.C. 536, 540, 290 S.E.2d 804, 806 (1982).

The SC Supreme Court reiterated this point recently, citing to *Orr* for the idea that, in the absence of state law, courts should look to case law from foreign jurisdictions; see *State v. Whitner*, 399 S.C. 547, 552, 732 S.E.2d 861, 864 (2012) (citing *Orr v. Clyburn,* 277 S.C. 536).

In spite of this being explicitly brought to the lower court's attention, Judge Nicholson rejected any adoption of foreign case law in deciding this case, going so far as to state at oral

argument "I'll be perfectly honest with you I don't really care what they do in federal court and the other states." April 11, 2018 Tr. 32:20-22.

The lower court erred in rejecting out of hand the SC Supreme Court's direction to consider as persuasive, if not controlling, the "judicial gloss" that the SCFHL inherited from Appellant agency's federal counterparts.

STANDARD OF REVIEW (ISSUES 6-7)

In addressing a constitutional challenge to a statute, our Supreme Court notes:

> [t]his Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid." *Curtis v. State,* 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). "A 'legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt.' " *In re Treatment and Care of Luckabaugh,* 351 S.C. 122, 134–35, 568 S.E.2d 338, 344 (2002) (quoting *Joytime Distribs. & Amusement Co. v. State,* 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999)). "A possible constitutional construction must prevail over an unconstitutional interpretation." *Curtis,* 345 S.C. at 569–70, 549 S.E.2d at 597.

State v. Neuman, 384 S.C. 395, 402, 683 S.E.2d 268, 271 (2009)

Our Supreme Court recently reaffirmed this standard for constitutionality:

> Moreover, when the constitutionality of a statute is challenged, *every presumption will be made in favor of its validity....* A 'legislative act will not be declared unconstitutional unless its repugnance to the constitution is *clear and beyond a reasonable doubt.*' " *Segars-Andrews v. Judicial Merit Selection Comm'n,* 387 S.C. 109, 118, 691 S.E.2d 453, 458 (2010) (per curiam) (emphasis added) (quoting *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999)). Therefore, to prevail, Appellant [...] "must overcome this Court's mandate to sustain a legislative enactment if there is 'any reasonable hypothesis to support it.' " *Ed Robinson Laundry & Dry Cleaning, Inc. v. S.C. Dep't of Revenue*, 356 S.C. 120, 124, 588 S.E.2d 97, 99 (2003) (quoting *D.W. Flowe & Sons v. Christopher Constr. Co.*, 326 S.C. 17, 23, 482 S.E.2d 558, 562 (1997)).

Retail Servs. & Sys., Inc. v. S.C. Dep't of Revenue, 419 S.C. 469, 477, 799 S.E.2d 665, 669 (2017), reh'g dismissed (May 31, 2017) (emphasis in the original).

VI. TRIAL COURT ERRED IN FINDING A DUE PROCESS RIGHT ATTACHED DURING THE EXERCISE OF THE AGENCY'S NON-ADJUDICATORY POWERS

The lower court found that a due process right attached during the administrative investigation. The court's order, filed September 17, 2018, contains no citations to case law supporting this proposition, nor indeed does Respondents' motion for reconsideration, dated May 29, 2018, contain any support for the proposition that due process rights attach during the administrative investigation.

As with so many matters in this appeal, this has been directly addressed by the South Carolina Supreme Court. In discussing the Appellant agency's authorizing statute, the Court notes that:

> Under the Human Affairs Law, as under Title VII, the final step in the respondents' investigation, even if adverse to appellant (a determination that there was reasonable cause to believe that the employer discriminated unlawfully against the applicant) would be lifeless, could fix no obligation, could impose no liability, would have no determinative consequences, and would not be binding on the employer; consequently, when only these investigative non-adjudicatory powers of an agency are utilized, due process considerations do not attach.

Orr v. Clyburn, 277 S.C. 536, 540–41, 290 S.E.2d 804, 806 (1982) (citing *Georator Corp. v. E. E. O. C.*, 592 F.2d 765 (4th Cir. 1979)).

The processes used by Appellant agency in arriving at a cause determination under the Human Affairs Law are substantially similar to those used under the SCFHL. The same conditions apply: a finding by the Appellant agency under the SCFHL "could fix no obligation, could impose no liability, would have no determinative consequences, and would not be binding on the" housing provider. It follows, therefore, that "when only these investigative non-adjudicatory powers of an agency are utilized, due process considerations do not attach." *Id.*

The *Georater* case, cited by the South Carolina Supreme Court in *Orr*, goes into more detail on this issue:

When only investigative powers of an agency are utilized, due process considerations do not attach. The Supreme Court, noting the differences between investigative and adjudicative functions of agencies, has made this distinction:

> (W)hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process. On the other hand, when governmental action does not partake of an adjudication, as for example, when a general fact-finding investigation is being conducted, it is not necessary that the full panoply of judicial procedures be used."

Hannah v. Larche (1960) 363 U.S. 420, 442, 80 S.Ct. 1502, 1514, 4 L.Ed.2d 1307, Reh. denied 364 U.S. 855, 81 S.Ct. 33, 5 L.Ed.2d 79. When the preliminary determination is without legal effect in and of itself, due process will be satisfied if there is an opportunity to be heard before any final order of the agency becomes effective. *Ewing v. Mytinger & Casselberry*, supra, 339 U.S. at 598, 70 S.Ct. 370. The Commission's determination of reasonable cause, while final in itself, has no effect until either the Commission or the charging party brings suit in district court.

Georator Corp. v. Equal Employment Opportunity Comm'n, 592 F.2d 765, 768–69 (4th Cir. 1979).

In the matter appealed, Respondents' rights were not impacted by the Appellant agency's investigation; they suffered no deprivation and still enjoy the full rights to a hearing on the merits. As such, the lower court erred in determining that due process rights were implicated by the Appellant agency's actions during the administrative investigation.

VII. THE TRIAL COURT ERRED IN FINDING THAT THE SOUTH CAROLINA FAIR HOUSING LAW IS UNCONSTITUTIONAL BECAUSE IT FAILED TO APPLY A PROPER ANAYLSIS IN A VOID FOR VAGUENESS CHALLENGE.

In his order dismissing the case below, Judge Nicholson listed six reasons that the statute is void for vagueness, leading to his ruling that the statute was unconstitutional, including that 1) Respondents have a constitutional right to due process; 2) the statute and issues before the Court have not been addressed or limited by prior judicial decisions or binding authority; 3) the statute fails to adequately define terms and provide standards as to the statute's application; 4) a person of common intelligence cannot understand the statute's meaning and application if "the Court,

attorneys, and agency vested with the statute's enforcement differ in opinion so vastly as to the statute's meaning and application;" 5) the Court will not defer to an agency interpretation, which is arbitrary, capricious, or manifestly contrary to the statute; and 6) the SCHAC has inconsistently interpreted and arbitrarily enforced the statute. See Nicholson Order 3.

Item one (1) was addressed above; no due process right attaches in the investigative process. Item two (2) has also been addressed above generally but is referenced herein specifically as to the cases defining the content of conciliation discussions; in sum, the cases exist, but the court refused to hear them. Item three (3) is incorrect insomuch as it ignores that there are regulations that provide for the types of relief that would be discussed in conciliation. Item four (4) fails in that the court admits it is looking at "opinions" of others and not to the Appellant agency with the specialized skills to make the interpretation. Item (5) claims that the interpretation is arbitrary, capricious, or manifestly contrary to the statute, while the court sought to exclude every case, guidance, or explanation that bolstered the logical explanation of the Appellant agency. Finally, as to six (6), the court provided no example and Appellant asserts that there are none, where the Agency has provided any inconsistent interpretation.

A. Because there is no due process attached, the court cannot hold the statute is void-for-vagueness.

Of paramount importance, void for vagueness is only an issue where there is a due process right:

> When only investigative powers of an agency are utilized, **due process considerations do not attach**..."When the preliminary determination is without legal effect in and of itself, due process will be satisfied if there is an opportunity to be heard before any final order of the agency becomes effective."

Georator Corp. v. Equal Employment Opportunity Comm'n, 592 F.2d 765, 768–69 (4th Cir. 1979)(citing *Ewing v. Mytinger & Casselberry*, 339 U.S. 594, 598 (1950) (emphasis added). See also, *Orr v. Clyburn*:

> Under the Human Affairs Law, as under Title VII, the final step in the respondents' investigation, even if adverse to appellant (a determination that there was reasonable cause to believe that the employer discriminated unlawfully against the applicant) would be lifeless, **could fix no obligation, could impose no liability, would have no determinative consequences**, and would not be binding on the employer; consequently, when only these investigative non-adjudicatory powers of an agency are utilized, **due process considerations do not attach.**

Orr, 277 S.C. at 541 (citing *Georator Corp.*) (emphasis added).

Further, "[a]n administrative agency's failure to follow its own rules and regulations does not create a constitutional due process right on behalf of a party who suffers some wrong at the hands of the administrative body." *Ogburn-Matthews v. Loblolly Partners (Ricefields Subdivision)*[12], 332 S.C. 551, 562 (Ct. App. 1998)(quoting *Tiffany v. Arizona Interscholastic Ass'n, Inc.*, 151 Ariz. 134, 726 P.2d 231, 236 (Ct.App.1986)). As demonstrated by the court's complete disregard of both *Orr* and *Ogburn-Matthews*, even where the lower court had undisputed binding case law under which to rule in this case, it simply chose to ignore the same.

Despite this vagueness challenge being incorrectly asserted, Appellant demonstrates herein that the court failed to consider applicable case law wherein the allegedly vague portions have been defined; the court refused to give deference to the agency's interpretation; and that when looking at the elements of a void-for-vagueness analysis, the burden has not been met, regardless of whether it is set forth by Respondents or the court on Respondents' behalf.

[12] Overruled on other grounds by *Brown v. S.C. Dep't of Health & Envtl. Control*, 348 S.C. 507 (2002).

1. Prior judicial decisions have interpreted the content of the statute.

The first inquiry in a void-for-vagueness challenge is to determine "whether the allegedly unconstitutional statute has been interpreted or limited by prior judicial decisions." *Town of Mount Pleasant v. Chimento*, 401 S.C. 522 (2012). Although Appellant provided ample case law on the matter, Judge Nicholson plainly stated he did not care about any federal case law. The Agency repeatedly pointed him to *Orr v. Clyburn*, a binding case on his court set forth by the Supreme Court, which calls federal case law interpreting similar provisions of federal law "certainly persuasive, if not controlling." *Orr*, 277 S.C. 536, 540, 290 S.E.2d 804, 806 (1982). Appellant acknowledged that it found no state or federal case law that spoke directly to conciliatory materials under the Fair Housing Law or its federal counterpart, the Fair Housing Act (also referenced as Title VIII of the Civil Rights Act of 1964), but showed that case law is replete with Courts holding that in the absence of case law directly related to Title VIII Fair Housing Act, the Courts will adopt any parallel rulings under Title VII. Moreover, Congress has continued to ratify these statutes in light of the Courts' repeated use of Title VII law to adjudicate Title VIII Fair Housing claims. See *Texas Dept. of Housing and Community Affairs v. Inclusive Communities Project, Inc.*, 135 S.Ct. 2507 (2015), wherein the Supreme Court relies upon *Huntington Branch, N.A.A.C.P. v. Town of Huntington*, 844 F.2d 926 (1988).

> "In determining whether discriminatory effect is sufficient, we look to congressional purpose, as gleaned from the legislative history of Title VIII, related Title VII jurisprudence, and practical concerns....The two statutes are part of a coordinated scheme of federal civil rights laws enacted to end discrimination; the Supreme Court has held that both statutes must be construed expansively to implement that goal."

Id. at 934-935. A myriad of other courts on other matters have looked to Title VII to interpret Title VIII.[13]

Where South Carolina's Human Affairs Law has not been heavily litigated, the South Carolina Supreme Court has held that Courts are to look to Title VII. As shown above, Courts rely on Title VII when there is a case of first impression under the Fair Housing Act. It follows then that the lower court should have at least considered Title VII cases when determining the meaning of conciliation materials as they apply to South Carolina's Fair Housing Law.

> South Carolina Human Affairs Law essentially follows the substantive structure of Title VII, and the enforcement agency for Title VII, the Equal Employment Opportunity Commission, is in all relevant and material respects analogous to the respondent commission...Thus, Title VII cases which interpret provisions or procedures essentially identical to those of the Human Affairs Law are certainly persuasive if not controlling in construing the Human Affairs Law.

Orr v. Clyburn, 277 S.C. 536, 540, 290 S.E.2d 804, 806 (1982).

Conciliation within Title VII, the language of which is mirrored by the South Carolina Fair Housing Law, has been discussed by numerous courts over a wide period of time. See 42 U.S. Code § 2000e–5(b). Each time, the courts have found that **documents containing the position of a party does not constitute conciliation.** See *Olitsky v. Spencer Gifts, Inc.*, 964 F.2d 1471, 1476–77 (5th Cir.1992) (holding Respondent's letter written by attorney **contained only facts in support and denials** and was not barred from use in future proceedings); *Brooks v. Grandma's House Day Care Centers, Inc.*, 227 F. Supp. 2d 1041, 1044 (E.D. Wis. 2002) (ruling that an

[13] Other courts have relied on Title VII for more specific questions arising in Title VIII. *Gamble v. City of Escondido*, 104 F.3d 300 (9th Cir. 1997) (applying Title VII's *McDonnell Douglas/Burdine* test to Fair Housing Act for determining disparate treatment); *Francis v. Kings Park Manor, Inc.*, 91 F.Supp.3d 420 (E.D.N.Y. 2015) (using Title VII to find hostile environment in Fair Housing case); *Bangerter v. Orem City Corp.*, 46 F.3d 1491 (10th Cir. 1995) (interpreting Title VII to cover discriminatory intent and disparate impact under Fair Housing Act); *Williams v. Poretsky Management, Inc.*, 955 F. Supp. 490 (D. Md. 1996) (holding that a case of first impression for sexual harassment under Fair Housing Act should be recognized as a cause of action because the same is actionable under Title VII); *Pelot v. Criterion 3, LLC*, 157 F.Supp.3d 618 (2016) (citing Title VII as basis for reasonable belief in retaliation cases under Fair Housing Act).

attorney's letter under Title VII **void of statements relating to compromise, settlement, or negotiation** was admissible).

> The evidentiary prohibition contained in section 2000e–5(b) covers statements made during this informal "conference, conciliation, and persuasion" phase of the administrative proceedings. Courts construing section 2000e–5(b) have held that the prohibition on the use of these statements in a subsequent proceeding does not apply to position papers reciting one party's version of events.

Hill v. Shoe Show, Inc., No. 13-2931-STA-CGC, 2015 WL 4527722, at *4 (W.D. Tenn. July 27, 2015).

Under Title VII, statements sent in the course of an investigation that include facts and denials but are void of any statements of compromise, settlement, or negotiation, are admissible. In the absence of any case law directly contradicting the Agency's interpretation, the Court should have considered persuasive, or potentially binding, federal case law analyzing provisions that the Court acknowledged mirror those found in the SCFHL.

2. **The Order failed to give deference to the agency's interpretation in determining the constitutionality of the statute and regulations.**

Even if the lower court did not find the case law applicable, the Appellant's interpretation is entitled to deference. "[W]e give deference to agencies both because they have been entrusted with administering their statutes and regulations and because they have unique skill and expertise in administering those statutes and regulations." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 34, 766 S.E.2d 707, 718 (2014). Citing *Chevron, U.S.A., Inc., v. Natural Res. Def. Council, Inc.,* our Supreme Court held, "If the statute or regulation 'is silent or ambiguous with respect to the specific issue,' the court then must give deference to the agency's interpretation of the statute or regulation, assuming the interpretation is worthy of deference." *Kiawah Dev. Partners, II v. S.C. Dep't of Health & Envtl. Control*, 411 S.C. 16, 33, 766 S.E.2d 707, 717 (2014) (internal citation omitted). The Court further notes: "[a]s repeatedly stated in our decisions, our deference doctrine provides that courts defer to an administrative agency's

interpretations with respect to the statutes entrusted to its administration or its own regulations unless there is a compelling reason to differ." *Id* (internal quotations omitted).

To date, Judge Nicholson has not articulated any reason, much less one that is compelling, as to why he refused to defer to the agency interpretation. In this case, the allegedly vague text is found at S.C. Code Ann. § 31-21-120(A).

> If the commission decides to resolve the complaint, it shall proceed to try to eliminate or correct the alleged discriminatory housing practice by informal methods of conference, conciliation, and persuasion. If practicable, conciliation meetings must be held in the cities or other localities where the discriminatory housing practices allegedly occurred. Nothing said or done in the course of the informal endeavors may be made public or used as evidence in a subsequent proceeding under this chapter without the written consent of the persons concerned.

Id.

Specifically, the court focused on the last sentence, "[n]othing said or done in the course of the informal endeavors," to be the problematic passage. The Commission explained multiple times its interpretation of the meaning of conciliatory materials, in court and in its filings, asserting they were "statements of settlement or compromise" and pointing the court to its regulations, which details what types of relief are available under the statute: monetary relief, equitable relief, and injunctive relief. See S.C. Code Ann. Regs. 65-225. The Agency repeatedly proffered parallel cases, the guidance from HUD, and its prior experiences to support its interpretation. Again, Judge Nicholson gave no deference to the Agency in any of his hearings. This failure to consider the Agency's skillset and knowledge that it has accumulated over nearly five decades is largely why his ruling is wrong and must be overturned.

3. The Order fails to comply with any of the longstanding principles of the law as to a constitutional challenge for vagueness.

Judge Nicholson, in his Order, failed to comply with longstanding principles that surround constitutional challenges. First, he ignored a reasonable hypothesis for interpretation that

Appellant, as the party uniquely tasked with the requisite knowledge and skill to interpret its statutes, set forth. Second, the lower court ignored that Respondents lacked standing to bring such argument because their conduct is squarely within the statute. Third, the lower court acted subjectively and without regard for the facts by suggesting the Respondents did not understand the statute because it was vague.

a) The standard for overturning a statute is very high, and Appellant met its burden by setting forth at minimum a reasonable hypothesis as to the meaning of the statute.

In a constitutional challenge, the standard is very high. "A legislative enactment will be sustained against constitutional attack if there is 'any reasonable hypothesis' to support it." *Lee v. S.C. Dep't of Nat. Res.*, 339 S.C. 463, 467 (2000). In *State v. Neuman*, the Court set forth the following case law articulating this standard:

> '**This Court has a limited scope of review in cases involving a constitutional challenge to a statute because all statutes are presumed constitutional and, if possible, will be construed to render them valid.**' *Curtis v. State*, 345 S.C. 557, 569, 549 S.E.2d 591, 597 (2001). 'A ''legislative act will not be declared unconstitutional unless its repugnance to the constitution is clear and beyond a reasonable doubt.'' *In re Treatment and Care of Luckabaugh*, 351 S.C. 122, 134–35, 568 S.E.2d 338, 344 (2002) (quoting *Joytime Distribs. & Amusement Co. v. State*, 338 S.C. 634, 640, 528 S.E.2d 647, 650 (1999)). '**A possible constitutional construction must prevail over an unconstitutional interpretation.**' *Curtis*, 345 S.C. at 569–70, 549 S.E.2d at 597.

State v. Neuman, 384 S.C. 395, 402–03, 683 S.E.2d 268, 271–72 (2009) (emphasis added).

The lower court wrote in its Order that neither the court, attorneys, nor agency could agree on an interpretation. With all due respect to the court, opposing counsel's agreement with the agency's interpretation does not matter at all. Regarding the court, it may disagree with the interpretation, but that does not give it cause to overturn the statute. Moreover, the court cannot simply label the interpretation arbitrary and capricious, without justification, while excluding all case law and federal guidance that speaks to the issue.

The lower court failed to assert anything that would support its finding that the statute is unconstitutional. At worst, Appellant put forth a "reasonable hypothesis" as to what the statute meant. It is, in fact, highly probable that the Appellant correctly interpreted the statute when one considers the unanimity of other courts' decisions addressing this issue that the lower court excluded.

b) The Court failed to consider that the conduct of the Respondents sets themselves wholly in the statute.

The entire issue on the original motion for summary judgment and subsequent request for protection was that Respondents claimed they were protected by the statute in that they engaged in conciliation.

> 'The constitutionality of a statute must be considered in light of the standing of the party who seeks to raise the question and of its particular application....' *Town of Mount Pleasant v. Chimento*, 401 S.C. 522, 535 n. 7, 737 S.E.2d 830, 839 n. 7 (2012) (citation omitted). 'Standing is not a separate issue when the constitutionality of a statute is challenged under the **due process clause**, but is instead the foundation of the inquiry.' *Id.*
>
> **'One whose conduct clearly falls within the statutory proscription does not have standing to raise a void-for-vagueness challenge.'** *Id.* at 535, 737 S.E.2d at 839; accord *Curtis*, 345 S.C. at 572, 549 S.E.2d at 598; see also *In re Amir X.S.*, 371 S.C. 380, 385 n. 2, 639 S.E.2d 144, 146 n. 2 (2006) (stating the traditional rule of standing for constitutional attacks is that one to whom application of a statute is constitutional may not attack the statute on the ground that it might be unconstitutional when applied to other people or situations (citing *United States v. Raines*, 362 U.S. 17, 21, 80 S.Ct. 519, 4 L.Ed.2d 524 (1960))). **'A statute's constitutionality is judged on an objective, not subjective, basis.'** *Chimento*, 401 S.C. at 535 n. 6, 737 S.E.2d at 838 n. 6.
>
> **Thus, when raising a claim of unconstitutional vagueness, the litigant must demonstrate that the challenged statute is vague as applied to his own conduct, regardless of its potentially vague application to others.** *In re Hanks*, 553 A.2d 1171, 1176 (Del.1989) (citing *Aiello v. City of Wilmington, Del.*, 623 F.2d 845, 850 (3d Cir.1980)).

S.C. Dep't of Soc. Servs. v. Michelle G., 407 S.C. 499, 506–07, 757 S.E.2d 388, 392–93 (2014) (emphasis added).

Throughout this case, Respondents have argued that their conduct was protected by this statute and that evidence should be excluded. Where the Respondents are inside the scope of the statute, they lack standing to raise a void for vagueness argument. The only evidence that Respondent Chen did not understand this statute, despite professing to be a doctor in America for decades and longstanding landlord to many properties, is a self-serving and contradictory affidavit that the court requested from Respondents. The Chen Affidavit is directly contradicted by his earlier sworn testimony at deposition; see Chen Affidavit and Chen Deposition 22:3-7; 26:7:22; 128:17-129:10; 146:3-11[14]. Respondents provided the Appellant's investigator with information in its position statements that reflects the general tone and content of materials the Appellant agency regularly sees in statements of position: denials of prohibited conduct, alternate accounts of events in question, copies of policies and procedures, etc. Respondents have made no showing that they failed to understand the investigative process and their outright refusal to entertain any discussion of compromise (see Respondents Second Position Statement) gives lie to the idea that they were in any way confused about the conciliation process; they just had no interest in pursuing any compromise.

c) The Court erred in interjecting its subjective view of the statute onto the objective facts as set forth by the Respondents throughout the presentation of the case.

Finally, Respondents never alleged they thought the statute was vague or that they did not understand it until the circuit court suggested that it was vague. The Respondents simply disagreed with the Agency's interpretation of the statute. Based on the back and forth between the parties, Judge Nicholson, who refused to consider legal authority or binding regulations on the matter which provided additional the clarification, determined that the statute was vague. It was only after the court *sua* sponte raised the specter of vagueness that Respondents argued they

[14] N.B.: Ashley Duffy's lease predates the Appellant agency's investigation; see Duffy Lease.

did not understand the statute. Because the prompting came from subjective opinions of Judge Nicholson, and not from an objective concern regarding the statute, the Respondents should not now be able to claim that they lacked understanding of the statute.

CONCLUSION

For the reasons stated, this Court should reverse the judgments of the circuit court and find that:

1. An enforceable contract existed and should be enforced as a result of the March 24, 2016 mediation.
2. Purely factual information is distinct from conciliation material and does not fall under the disclosure limitations found in the South Carolina Fair Housing Law.
3. The orders, memoranda, and other materials sealed by the court below should be unsealed.
4. The South Carolina Fair Housing Law is not unconstitutional and no due process rights attach during a non-adjudicatory administrative investigation.

November 19, 2018

Respectfully submitted,

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THE STATE OF SOUTH CAROLINA
In The Court Of Appeals

APPEAL FROM CHARLESTON COUNTY
Court of Common Pleas

Benjamin H. Culbertson, Circuit Court Judge
J.C. Nicholson, Jr., Circuit Court Judge

Case No. 2014-CP-10-7037

South Carolina Human Affairs Commission,

Appellant,

v.

Zeyi Chen & Zhirong Yang,

Respondents.

CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of November, 2018 in Columbia, South Carolina, I served a copy of the foregoing **Appellant's Initial Brief and Appellant's Designation of Matter To Be Included In The Record On Appeal** upon Counsel for Respondents by depositing the same in the United States Mail, postage prepaid, and addressed as follows:

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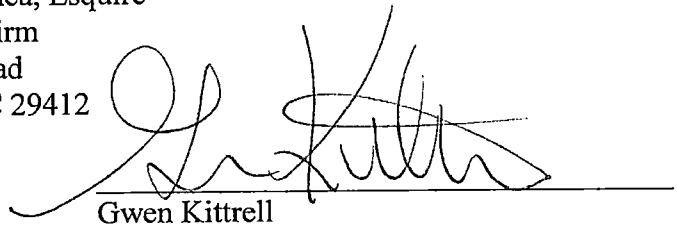

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