

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master-In-Equity

Appellate Case No. 2018-001590

RECEIVED
JUN 12 2019
SC Court of Appeals

Andrew Waldo; Jane Zheng; and SC Coast Properties, LLC d/b/a Keller Williams Realty.....Respondents,

v.

Michael Cousins; Founders Five, LLC d/b/a Sperry Van Ness Founders Group; and South Carolina Association of REALTORS® Appellants.

RECORD ON APPEAL
Volume 1 of 2

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Other Material:

2016-02-02 Audio recording of Arbitration Panel Hearing (USB drive retained by trial court pursuant to SCAR Rule 210(f)).....	N/A

Certificate of Counsel:

Certificate of Counsel	789

STATE OF SOUTH CAROLINA:) COUNTY IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY 2015 JUN 29 PM 4:42 FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 15-CP-26-2066

Founders Five, LLC d/b/a Sperry)
Van Ness Founders Group,)
CLERK OF COURT

Plaintiff,)

vs.)

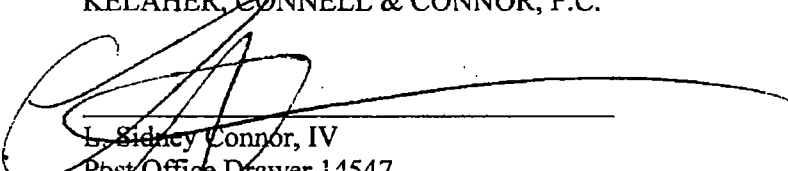
The Real Estate Company, LLC)
d/b/a Keller Williams Realty,)
Randy Wallace, Jane Zheng,)
National Golf Management, LLC,)
Xian (Nick) Dou, individually and)
Assigns and/or Nominees, Yang)
Wang, and Kang Xou,)

Defendants.)

**STIPULATION OF DISMISSAL
WITHOUT PREJUDICE AS TO
DEFENDANT RANDY WALLACE ONLY
(NOT ENDING ACTION)**

YOU WILL PLEASE TAKE NOTICE that the Plaintiff hereby stipulates pursuant to
Rule 41(a) of the South Carolina Rules of Civil Procedure to the dismissal of Defendant Randy
Wallace without prejudice. This **dismissal** of this Defendant **does not end this action**.

KELAHER, CONNELL & CONNOR, P.C.


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Attorneys for Plaintiff

June 25, 2015

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF HORRY
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2015CP2602066

Founders Five LLC

Sperry Van Ness Founders
GroupReal Estate Company
LLCRandy Wallace
National Golf
Management LLC
Yang Wang

Keller Williams Realty

Jane Zheng
Xian Nick Dou

Kang Xou

PLAINTIFF(S)

DEFENDANT(S)

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☒ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit);
☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy;
☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):
☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court

ORDER INFORMATION

Defendant Keller Williams Realty Motion to Dismiss-DISMISSED WITHOUT PREJUDICE
Defendant National Golf Management LLC Motion to Dismiss- CONTINGENT

This order ☐ ends ☒ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
N/A	N/A	N/A
If applicable, describe the property, including tax map information and address, referenced in the order:		

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.

	2157	9/23/2015
Circuit Court Judge WILLIAM H. SEALS JR.	Judge Code	Date

For Clerk of Court Office Use Only

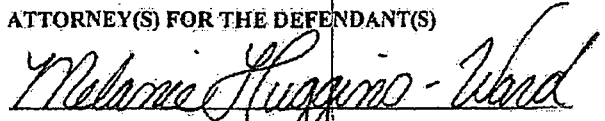
This judgment was entered on , and a copy mailed first class or placed in the appropriate attorney's box on , to attorneys of record or to parties (when appearing pro se) as follows:

Lawrence Sidney Connor IV PO Drawer 14547 Surfside
Beach, SC 29587

ATTORNEY(S) FOR THE PLAINTIFF(S)

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Douglas Michael Zayicek PO Box 357 Myrtle Beach, SC
29578-0357

ATTORNEY(S) FOR THE DEFENDANT(S)


Melanie Huggins-Ward - Clerk of Court

Court Reporter DIXIE EUBANKS

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2015-CP-26-02066

Founders Five, LLC d/b/a Sperry Van
Ness Founders Group,)
Plaintiff,)

vs.)

The Real Estate Company, LLC d/b/a)
Keller Williams Realty, Randy Wallace,)
Jane Zheng, National Golf Management,)
LLC, Xian (Nick) Dou, individually and)
Assigns and/or Nominees, Yang Wang)
and Kang Xou,)
Defendants.)

ORDER

HORRY COUNTY
2016 JAN 11 PM 2:13
CLERK OF COURT

This matter is before me pursuant to (a) Defendant National Golf Management, LLC's ("NGM") Motion to Dismiss the Plaintiff's Complaint against it, (b) Defendant NGM's Motion for attorney's fee and costs pursuant to the South Carolina Frivolous Proceedings Sanction Act, and (c) Plaintiff's Motion to Amend its Complaint in order to add additional party defendants. A hearing on these matters was held before me on October 28, 2015; present at which was Emma Ruth Brittain, Esq. and Matthew R. Magee, Esq. on behalf of Defendant, National Golf Management, LLC, and L. Sidney Connor, IV, Esquire on behalf of Plaintiff, Founders Five, LLC d/b/a Sperry Van Ness Founders Group.

The current dispute between the parties arose in connection with a commercial real estate transaction closed in early 2015. Plaintiff's Complaint alleges causes of action against Defendant NGM, as the seller of such real estate, for Breach of Contract, Breach of Contract with Fraudulent Intent and violation of the South Carolina Unfair Trade Practices Act. Said causes of action are each premised on NGM's alleged attempt to deprive the Plaintiff of a brokerage



commission alleged to have been earned in connection with Plaintiff's service as broker/agent for NGM during the sale of such real property.

The creation of an agency relationship in the context of a real estate transaction is specifically regulated by statute. See S.C. Code Ann. § 40-57-5, et seq. (Supp. 2014). Pursuant to S.C. Code Ann. § 40-57-139(G) (Supp. 2014):

For all real estate transactions, no agency relationship between a buyer, seller, landlord, or tenant and a brokerage company and its affiliated licensees exists unless the buyer, seller, landlord, or tenant and the brokerage company and its affiliated licensees agree, in writing, to the agency relationship. No type of agency relationship may be assumed by a buyer, seller, landlord, tenant, or licensee or created orally or by implication.

(emphasis added). Further, "[a] listing or buyer's representation agreement must be in writing and must set forth all material terms of the parties' agency relationship" S.C. Code Ann. § 40-57-135(D)(4) (Supp. 2014). "A licensee may not advertise, market, or offer to conduct a real estate transaction involving real estate owned in whole or in part by another person without first obtaining a written listing agreement from the owner. . . ." S.C. Code Ann. § 40-57-135(C)(4) (Supp. 2014).

In the present case, no such written listing agreement has been alleged to exist, and Plaintiff concedes that the nature of the alleged agreement arose orally and by implication. Plaintiff, however, argues that the common law, as articulated in Hilton Head Island Realty, Inc. v. The Skull Creek Club, 287 S.C. 530, 339 S.E.2d 890 (Ct. App. 1986), does not require a signed writing in order for a licensed real estate broker or agent to recover a commission in a real estate transaction. Specifically, the Plaintiff points to the portion of the court's holding in which it states "a written contract . . . is unnecessary" even in light of a then-enacted regulation of the South Carolina Real Estate Commission to the contrary. Id. at 539, 339 S.E.2d at 895; see also S.C. Code Ann. Regs. 105-18 (1986). Since the court's decision in Skull Creek, however, the

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South Carolina General Assembly has undertaken a significant overhaul of the statutory framework governing the creation of agency relationships in the context of real estate transactions. Such overhaul included the enactment of the above-cited statutes that even more clearly require a written agreement in order to establish an agency or dual agency relationship. See, e.g., S.C. Code Ann. Sections 40-57-139(G); 40-57-135(C)(4); and 40-57-135(D)(4) (Supp. 2014).

A review of the legislative history of the above-cited statutes reveals that the operative amendments became effective on January 1, 1998 (twelve years following the South Carolina Court of Appeals decision in Skull Creek). Pursuant to 1997 S.C. Act No. 24 (the "1997 Act"), each of Sections 40-57-135 and 40-57-139 was codified into law for the first time. In addition, beginning with the 1997 Act, and as further amended by 2000 S.C. Act Nos. 285 and 218, the following provision was added to Section 40-57-135:

The provisions of this Section which are inconsistent with applicable principles of common law supersede the common law, and the common law may be used to aid in interpreting or clarifying the duties described in this section.

SC Code Ann. § 40-47-135(Q) (Supp. 2014). Moreover, the court in Skull Creek premised its decision on the fact that "the evidence and the reasonable inferences drawn therefrom support the finding that an implied contract to pay a commission existed between the parties" Skull Creek, 287 S.C. at 536, 339 S.E.2d at 894. Clearly, the same finding could not be made in light of today's statutory environment. See S.C. Ann. § 40-57-139(G) (stating "No type of agency relationship may be assumed by a buyer, seller, landlord, tenant, or licensee or created orally or by implication.").

The South Carolina General Assembly has definitively spoken on the issue before this court, and such statement is dispositive of Plaintiff's argument. Consequently, the Plaintiff has

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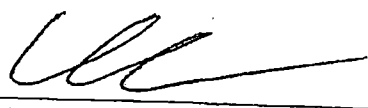
failed to state facts sufficient to constitute a cause of action against Defendant National Golf Management, LLC, and dismissal of the Plaintiff's complaint against said Defendant is proper.

CONCLUSION

IT IS ACCORDINGLY ORDERED that (a) Plaintiff's Complaint against Defendant National Golf Management, LLC is hereby dismissed with prejudice; (b) Defendant NGM's Motion for attorney's fees and costs is denied; and (c) Plaintiff's Motion to Amend its Complaint is denied, inasmuch as the decision of the Court renders the same moot.

IT IS SO ORDERED.

December 8, 2015
Conway, South Carolina



The Honorable Donald B. Hocker
Circuit Court Judge



South Carolina Association of REALTORS®
3780 Fernandina Road, Columbia, SC 29210

Award of Arbitrators

The undersigned, duly appointed as the Hearing Panel to hear and determine an arbitrable dispute between

REALTOR® Andrew Waldo
Complainant

and

REALTOR® Michael Cousins
Respondent

certify that on the 2nd day of February, 2016, we heard evidence of the parties and having heard all the evidence and arguments of the parties, a majority of the panel finds there is due and owing \$250,000 to be paid by REALTOR® Andrew Waldo to REALTOR® Michael Cousins, which shall be paid within 20 days from the award becoming final.*

The deposit of the non-prevailing party shall be used to cover the costs of arbitration or shall go into the general operating funds of the South Carolina Association of REALTORS®. In the event the award of the arbitrators is in an amount other than that requested by any of the parties, the disposition of the deposits shall be directed by the arbitrators.

Requests for procedural review of the arbitration hearing procedures must be filed in writing with the President within twenty (20) days after the award has been served on the parties. The request for procedural review must cite the alleged procedural deficiencies or other irregularities the party believes constitute a deprivation of due process.

Dated: February 2, 2016

ARBITRATORS:

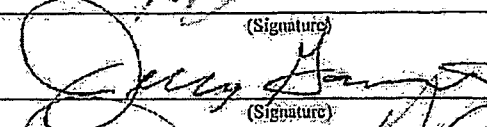
John Settle
(Type/Print)

, Chairperson
(Signature)

Michael Bruce
(Type/Print)

, Member
(Signature)

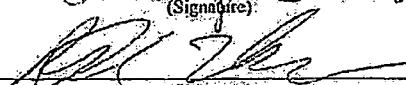
Jerry Garrett
(Type/Print)

, Member
(Signature)

Danny Glenn
(Type/Print)

, Member
(Signature)

Mike Thomas
(Type/Print)

, Member
(Signature)

* Award becomes final upon final action of the Board of Directors of the South Carolina Association of REALTORS® absent a procedural review request being filed.



South Carolina Association of REALTORS®
3780 Fernandina Road, Columbia, SC 29210

Decision of the Procedural Review Hearing Tribunal

Procedural review of the arbitration hearing in the matter of

REALTOR® Andrew Waldo
Complainant

vs.

REALTOR® Michael Cousins
Respondent

(copy of Award of Arbitrators attached) was requested by REALTOR® Andrew Waldo

and was considered by the Procedural Review Tribunal on Monday, May 2, 2016.

The Procedural Review Tribunal's decision is as follows:

☒ Affirm the award of the Arbitration Hearing Panel.

☐ Overturn the award of the Arbitration Panel based on a substantial procedural error in the arbitration hearing process that resulted in a denial of due process or in a determination that the appellant was otherwise deprived of due process, and

☐ the matter is to be referred to the Board's Professional Standards Committee for a new hearing on the merits before a different Hearing Panel.

☐ the parties are released from their obligation to arbitrate and are free to pursue any other remedy that may be available to them.

Procedural Review Tribunal

DAVID C. LOCKWOOD, JR.
(Type/Print)

B. Jeannine Rees
(Type/Print)

JIM DAVIS
(Type/Print)

Keith Jones
(Type/Print)

Fritzi B. Barber
(Type/Print)

David C. Lockwood, Jr., Chairperson
(Signature)

B. Jeannine Rees, Member
(Signature)

Jim Davis, Member
(Signature)

Keith Jones, Member
(Signature)

Fritzi B. Barber, Member
(Signature)

Dated: May 2, 2016

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

Andrew Waldo,

Appellant,

vs.

Michael Cousins; and South Carolina
Association of REALTORS[®],

Respondents.

Andrew Waldo; Jane Zheng; and
SC Coast Properties, LLC d/b/a Keller
Williams Realty,

Appellants,

vs.

Michael Cousins; Founders Five, LLC d/b/a
Sperry Van Ness Founders Group; and South
Carolina Association of REALTORS[®],

Respondents.

IN THE COURT OF COMMON PLEAS
IN THE FIFTEENTH JUDICIAL CIRCUIT

CIVIL ACTION NO.: 2016-CP-26-01498

CIVIL ACTION NO.: 2016-CP-26-03338

FILED
2016 SEP 23 PM 12:20
CLERK OF COURT

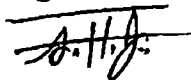
**ORDER GRANTING APPELLANTS' MOTION TO CONSOLIDATE,
DENYING RESPONDENTS' MOTIONS TO DISMISS OR IN THE ALTERNATIVE
FOR SUMMARY JUDGMENT, AND
DENYING RESPONDENT COUSINS & FOUNDERS FIVE, LLC'S MOTION TO
CONFIRM ARBITRATION AWARD¹**

These matters were before the Court on Tuesday, September 6, 2016, at 1:00 p.m.

Present were: Douglas M. Zayicek and Holly M. Lusk, attorneys for Appellants; Marcus A.

¹ Appellants' underlying appeal was not before the Court. Any findings or conclusions herein are only applicable to the extent necessary to support the Court's rulings as to the pending Motions. The Court expresses no opinion as the merits of the underlying appeal.

Page 1 of 12



Manos, attorney for Respondent South Carolina Association of Realtors; and L. Sidney Connor, IV, attorney for Respondents Michael Cousins, and Founders Five, LLC d/b/a Sperry Van Ness Founders Group.

This case involves the appeal of an arbitration decision made by Respondent South Carolina Association of REALTORS®' Arbitration Panel, which awarded a \$250,000.00 commission to Respondent Michael Cousins for his alleged involvement in a commercial real estate transaction involving thirteen (13) golf courses in the Myrtle Beach, South Carolina area.²

Before the Court were Appellants' Motion to Consolidate these actions, Respondents' Motions to Dismiss, or, in the Alternative, for Summary Judgment,³ and Respondent Cousins and Sperry Van Ness' Motion to Confirm the arbitration award.

Because the parties agreed in advance of the September 6, 2016 hearing to the consolidation of these matters, again consented on the record at the hearing, and because the two cases arise out of the identical set of facts, the Court hereby **GRANTS** Appellants' Motion for Consolidation.

Also, after a thorough review of Respondents' motions, memoranda submitted by the parties, the parties' oral arguments at the September 6, 2016 hearing, and appellants' Exhibits, the Court hereby **DENIES** Respondents' Motions to Dismiss, or in the Alternative, Motion for

2 For simplicity, Respondent Cousins and Sperry Van Ness are referred to herein as "Cousins;" Respondent Association's Arbitration Panel and Procedural Review Board are referred to as "Association;" and Appellants Waldo, Zheng, and Keller Williams are referred to as "Appellants" or "Keller Williams."

3 The Association first filed its Motion to Dismiss, or, in the Alternative, for Summary Judgment along with a supporting memorandum. Then, Cousins and Sperry Van Ness filed their own Motion to Dismiss, or, in the Alternative, for Summary Judgment, in which they adopted Respondent Association's supporting memorandum.

Summary Judgment, and **DENIES** Respondents' Motion to Confirm the Arbitration Award for the reasons set forth herein below.

FACTS AND PROCEDURAL HISTORY

These cases arose over Cousins⁴ allegations that he was due a commission on a real estate transaction involving 13 golf courses in the Myrtle Beach, South Carolina area. For that transaction, the Chinese buyers and their entity, Founders National Golf, LLC, were exclusively represented by Appellants.⁵

On March 20, 2015, Cousins brought a Circuit Court action against Keller Williams, Randy Wallace, Jane Zheng, National Golf Management, LLC (or otherwise referred to as "Seller"), Xian (Nick) Dou, Yang Wang, and Kang Xou (together, "Chinese Buyers"). In its Complaint, Sperry Van Ness alleged it was the "procuring cause" of certain real estate transactions between the Seller and Chinese Buyers⁶ and sought the following: (1) that any commission from these golf course real estate transactions obtained by Appellants be set aside at closing and held in escrow, (2) that it be awarded one-half of any commissions received by Appellants; and (3) that it be awarded treble damages, costs, and attorney's fees. However, in an affidavit filed by Respondent Cousins' on November 16, 2015, Cousins acknowledged Jane Zheng and/or Keller Williams was the Chinese Buyers' agent, Cousins' relationship was only with the Seller, and that he did not have any written agreement with Seller.

⁴ Respondent Cousins is a real estate agent and the broker-in-charge of Respondent Sperry Van Ness.

⁵ Nick Dou, a representative of the Chinese Buyers, executed two agency agreements with Jane Zheng of Keller Williams covering the period during which the transactions at issue took place. Both agreements specify that Jane Zheng of Keller Williams was to be the Chinese Buyers' "exclusive agent."

⁶ Sperry Van Ness also acknowledges in its Complaint that its alleged "arrangement for the split of the real estate commission...is recognized as a standard *oral* contractual arrangement."

In June 2015, Cousins dismissed Randy Wallace from the case. On or around August 2015, Keller Williams and Jane Zheng were dismissed from the case upon the understanding that should there be any issue remaining after the Circuit Court action, that dispute would be arbitrated by Respondent Association. Appellants submitted a Request and Agreement to Arbitrate to the Association, which was received by the Association on September 28, 2015, prior to this Court's Order in the Circuit Court action.

Seller, National Golf Management, LLC, filed a motion to dismiss the Circuit Court action, arguing: (1) Cousins never represented Seller in the real estate transactions at issue and (2) South Carolina law requires a written agreement to form an agency or dual agency relationship, of which there was none. This Court agreed. On January 11, 2016, the Court granted Seller's Motion to Dismiss, holding that pursuant to South Carolina statutory law, an agency relationship in the context of a real estate transaction cannot exist without a written agreement. As a result, this Court concluded that because "[t]he South Carolina General Assembly has definitively spoken on [this issue]...such statement is dispositive of [Cousins'] argument.⁷ That Order was not appealed and is now the law of the case.

Therefore, as of January 11, 2016, the arbitration between Appellants and Cousins, remained. On February 2, 2016, the Association found Appellants owed Cousins a \$250,000.00 commission on the real estate transactions at issue. On March, 1, 2016, in order to preserve its appeal, Appellant Waldo filed Civil Action Number 2016-CP-26-10498.

Thereafter, on February 24, 2016, Appellants filed a Request for Procedural Review with the Association. Association held a Procedural Review Hearing on May 2, 2016, during which

⁷ The Court's Order provides a clear and explicit outline of South Carolina statutory law regarding the requirement of a writing to create an agency and/or dual agency relationship in the real estate transaction context.

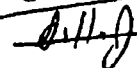
Appellants were informed, that the basis for the Association's award of a \$250,000.00 commission to Cousins was the existence of an oral and implied agency agreement between Chinese Buyers and Cousins. Subsequently, the Association affirmed the award of a \$250,000.00 commission to Cousins, despite the Court's January 11, 2016 Order and applicable South Carolina law. Nothing regarding the Procedural Review Hearing was preserved for the record. Following the Association's Review Board decision, Appellants filed a Notice of Appeal on May 17, 2016, in action 2016-CP-26-3338.

Thereafter, Respondents' filed their Motions to Dismiss, or, in the Alternative, for Summary Judgment, and Cousins filed a Motion to Confirm the Arbitration Award. Appellants opposed both Motions.

STANDARD OF REVIEW

A court must base its ruling on a motion to dismiss solely on allegations set forth in the complaint. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (citing Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006)). In considering such allegations, "[t]he question is whether, in the light most favorable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Doe, 373 at 395 (quoting Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999)). A plaintiff's complaint should not be dismissed "merely because the court doubts the plaintiff will prevail in the action." Doe, 373 at 395 (citing Toussant v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987)).

Similarly, a grant of summary judgment is only appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56, SCRCP; Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802 (2009). When considering a motion for summary judgment, the court must view all evidence

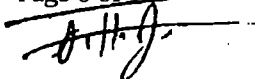


and all inferences which can be reasonably drawn from the evidence, in the light most favorable to the non-moving party. Hancock, 381 S.C. at 330 (citing Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994)).

ANALYSIS

Arbitration is a favored method of dispute resolution in South Carolina. Gissel v. Hart, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). When parties submit a dispute to arbitration, the arbitrator determines both questions of law and fact. Id. at 241; See also S.C. Code Ann. § 15-40-180 (“[W]hen a dispute is submitted to arbitration, the arbitrators shall determine questions of both law and fact.”).

“Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award.” Id. However, under certain circumstances, such as when the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law, the court may vacate an arbitration award. Id. (citing Technical College v. Lucas and Stubbs, 286 S.C. 98, 333 S.E.2d 781 (1985) and S.C. Code § 15-480-130(a)). For a South Carolina court to vacate an arbitration award on the grounds that the arbitrator manifestly disregarded the law, the governing law ignored by the arbitrator must be “well defined, explicit, and clearly applicable.” Gissel, 403 S.C. at 241 (citations omitted). Further, “[a]n arbitrator’s manifest disregard for the law’ as a basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principal yet refused to apply it.” Gissel, 403 at 241 (citing Weimer v. Jones, 364 S.C. 78, 610 S.E.2d 850 (S.C. Ct. App. 2005)); See also C-Sculptures, LLC v. Brown, 403 S.C. 53, 58, 742 S.E.2d 359, 361-62 (2013) (holding that the manifest disregard standard is not insurmountable and vacating an arbitrator’s award where the arbitrator was apprised of unambiguous, clearly applicable South Carolina statutory law and did not apply that law). Likewise, the Fourth Circuit



will also vacate an arbitration award where an arbitrator acts in manifest disregard of the law.

See Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc., 142 F.3d 188 (4th Cir. 1998) ("Federal courts may vacate an arbitration award only upon a showing of one of the grounds listed in the Federal Arbitration Act, or if the arbitrator acted in manifest disregard of the law.").

In their Memorandum in Support of their Motions to Dismiss, or, in the Alternative, for Summary Judgment, and during their oral arguments, Respondents argued Appellants failed to set forth a viable claim for vacating the Association's arbitration award to Cousins. The Court disagrees based on Appellants' following arguments:

1. Cousins did not have a written listing/agency agreement with the Chinese Buyers or the Seller. Appellants have set forth a viable claim that the Association's arbitration award of a commission to Cousins in the absence of any written representation agreement was in manifest disregard of South Carolina law.⁸

2. Respondents' procuring cause argument directly contravenes South Carolina statutory law. Respondents argue the basis for the award was that Cousins was the procuring cause of the thirteen (13) golf course transaction.⁹ Appellants disagree. As argued by Appellants,

⁸ The Court's January 11, 2016 Order explicitly states that Respondents Cousins and Sperry Van Ness cannot recover a commission on the transactions at issue because they had no written agreement, nor did they allege the existence of any written agreement, with the Seller. Therefore, there is already an Order in place holding that Cousins did not represent the Seller. Also, despite conflicting testimony from Respondent Cousins, it is exceptionally clear, viewing the facts in the light most favorable to Appellants, that neither Cousins, nor Sperry Van Ness, represented the Chinese Buyers, as there is no written agency agreement between Respondents and the Chinese Buyers. To the contrary, there are written agency agreements between Jane Zheng and a representative of the Chinese Buyers, which specify that Ms. Zheng, of Keller Williams, is to be the Chinese Buyers' exclusive agent.

⁹ In addition to the fact that South Carolina statutory law does not provide for the recovery of a real estate commission under a "procuring cause" theory, Cousins' own Affidavit demonstrates that he could not have been a procuring cause of the real estate transactions at issue because, as he points out in series of emails attached as Exhibit 11 to his Affidavit, he did not even have knowledge of the thirteen (13) golf course deal that is the subject of this commission dispute.

South Carolina statutory law strictly prohibits agency relationships in the real estate context absent a written agreement (i.e. Cousins could not have been the “procuring cause” of transactions when he did not legally represent either party). See S.C. Code Ann. §40-37-139(G) (1976, as amended). Further, where South Carolina common law contradicts South Carolina statutory law, South Carolina Code Annotated Section 40-57-137(Q) states that statutory law supersedes the common law. (1976, as amended). Therefore, Respondents’ procuring cause argument may directly contravene South Carolina statutory law.¹⁰

3. Cousins did not have the requisite prior informed, written consent of either the Chinese Buyers or the Seller to be a disclosed dual agent. Pursuant to South Carolina law, “A licensee may act as a disclosed dual agent only with the prior informed and written consent of all parties [and] the informed consent must be evidenced by a dual agency agreement[.]” S.C. Code Ann. 40-57-137(M)(1) (1976, as amended) (emphasis added). The facts of this case, as alleged by Appellants and taken as true for this Order, indicate that neither Seller nor the Chinese Buyers gave prior informed, written consent to such an agreement. Furthermore, Cousins would have to produce that written agreement, which he has not done. Additionally, the Court, in its January 11, 2016 Order, has already held Cousins had no agency relationship with Seller; therefore, it must follow that Respondents was not a dual agent of both the Chinese Buyers and Seller.

4. Respondents did not have the requisite knowledge and written consent of either the Chinese Buyers or the Seller to serve as co-broker(s) in the transactions at issue. Respondents

¹⁰ A court may choose to vacate an arbitration award if the basis of such award is not at least “barely colorable.” See Harris v. Bennett, 332 S.C. 238, 246, 503 S.E.2d 782, 787 (S.C. Ct. App. 1998) (holding that courts are allowed to intrude upon an arbitrator’s decision when the arbitrator commits error that was obvious and capable of being instantly perceived by the average person qualified to be an arbitrator and/or when the arbitrator appreciates the existence of a clearly governing legal principle, but decides to ignore or pay no attention to it)).

argue that the arbitration concerned a co-broker dispute, rather than a dispute between himself and the Chinese Buyers or Seller; therefore, Appellants have failed to set forth a viable claim for vacating the Association's arbitration award. Appellants disagree.

Prior to brokers establishing any type of co-broker agreement on behalf of a buyer or seller, the buyer and/or the seller, respectively, must: (1) have knowledge of the subagency agreement and (2) must consent to such an agreement. See S.C. Code Ann. §§ 40-37-137(E) and (J) (1976, as amended) (stating that before a subagency agreement can exist between agents/brokers, a buyer and/or a seller must have knowledge of and consent to any such subagency agreements). Therefore, regardless of whether Cousins argues his alleged oral agreement to split a commission for the transactions at issue was with Appellants, rather than with the Chinese Buyers or Seller, the Chinese Buyers and/or the Seller must still have knowledge of and consent to any such alleged agreement. Appellants argue no such evidence exists.

Additionally, South Carolina Code Annotated Section 40-57-135(D)(4)(d) provides that the buyer's representation agreement must be in writing and must set forth "an explanation of how compensation will be divided among participating or cooperating brokers." (1976, as amended). Thus, any alleged co-broker agreement regarding division of compensation must: (1) not only be known by and consented to by the buyer, (2) it must also be documented in writing within the buyer's representation agreement.

Without the Chinese Buyers' knowledge and consent to a subagency agreement, and without written documentation of a division of compensation agreement as required by South Carolina Code Annotated Section 40-57-135(D)(4)(d) (1976, as amended), there can be no such agreement between brokers. Therefore, based upon the facts before the Court at this time, as

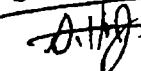
viewed in the light most favorable to Appellants, Appellants have set forth a viable claim the Association's arbitration award of a commission to Cousins under a co-broker theory, in the absence of the requisite knowledge and consent of either the seller and/or the buyer, was in manifest disregard of South Carolina law.¹¹

5. The Association had knowledge of the aforementioned well defined, explicit, and clearly applicable South Carolina law when it awarded Cousins a commission. Appellants argue that further evidencing the Association's manifest disregard of South Carolina law in awarding Cousins a commission, is that when the arbitration was held, the Association was in possession of a copy of the Court's January 11, 2016 Order. In its Order, the Circuit Court held that without a written agreement (which Cousin admitted he did not have), Cousins' argument that he is due a commission must fail. Appellants have clearly stated a claim that the Association's award was a complete and manifest disregard of South Carolina law, resulting in an illegal contract that cannot be enforced by this Court.

6. Respondent Association failed to decide all matters of law and fact during arbitration. "[W]hen a dispute is submitted to arbitration, the arbitrators shall determine questions of both law and fact." S.C. Code Ann. § 15-48-180; See also Gissel v. Hart, 382 S.C. at 241. An arbitration panel cannot know of a governing legal principle, yet, refuse to apply it. Id. Nor can a court enforce an illegal contract. See Mason, 412 S.C. 28, 770 S.E.2d 405 and Twillman, 365 S.C. 178, 617 S.E.2d 125.

Section 15-48-180 requires arbitrators to provide some explanation, or findings of fact and conclusions of law, to allow a reviewing court to determine the basis for the decision. Respondent Association filed a one-sentence ruling in favor of Respondent Cousins. There is no

¹¹ It must be noted that past transactions are irrelevant to this case.



explanation or findings of fact or conclusions of law to let this Court know what, if any, questions of law or fact the arbitrators decided.

Thus, Appellants have set forth a viable claim that by failing to consider all matters of fact and law before it, the Association manifestly disregarded South Carolina law.

7. Appellants have set forth a viable claim that the Association's failure to follow its own policies and procedures and South Carolina law was substantially prejudicial. In its Memorandum In Opposition to the Respondent's Motion to Dismiss, or, in the Alternative, For Summary Judgment, Appellants argue the Association was substantially prejudicial by failing to abide by South Carolina statutory law and by failing to follow its Policy Governing State Professional Standards Procedures (hereinafter, the "Policies"). According to the Policies, "Association Counsel, if present, shall prepare for review of the Panel Chairman and/or the President any statement of facts or a summary of the reasons supporting any decision made by the Panel."

The absence of any documented findings of fact or conclusions of law by Association's, and any recording of the Procedural Review hearing, makes it virtually impossible for a reviewing Court to determine what the Association relied on or whether the Association even tried to comply with SC law. As a result, at a bare minimum, the Court finds that Appellants have set forth viable claims against Respondents, and defeated summary judgment.

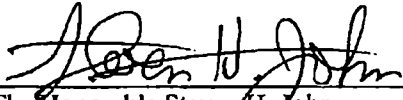
CONCLUSION

For the reasons set forth above,¹² Appellants have carried their burden of proof as to the Motions before the Court. Accordingly, the Court hereby **DENIES** Respondents' Motions to

¹² As additional sustaining grounds, Appellants argue Respondent Cousins is barred by collateral estoppel, res judicata, and judicial estoppel from trying to enforce an arbitration award based on issues already decided, or positions taken by Respondent via Affidavit or otherwise in the

Dismiss, or in the Alternative for Summary Judgment, and **DENIES** Respondents Cousins and Sperry Van Ness' Motion to Confirm the Arbitration Award.

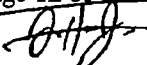
IT IS SO ORDERED.


The Honorable Steven H. John
Resident Circuit Court Judge
Fifteenth Judicial Circuit

September 23, 2016

Conway, South Carolina.

previous Circuit Court action. For purposes of the Motions before the Court, the Court also accepts those allegations as further support to deny Respondents' Motions.

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Andrew Waldo,

Appellant,

vs.

Michael Cousins; and South Carolina
Association of REALTORS®,

Respondents.

Andrew Waldo; Jane Zheng; and
SC Coast Properties, LLC d/b/a Keller
Williams Realty,

Appellants,

vs.

Michael Cousins; Founders Five, LLC d/b/a
Sperry Van Ness Founders Group; and South
Carolina Association of REALTORS®,

Respondents.

IN THE COURT OF COMMON PLEAS
IN THE FIFTEENTH JUDICIAL CIRCUIT

CASE NO.: 2016-CP-26-01498

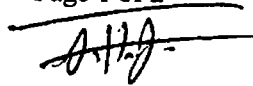
CASE NO.: 2016-CP-26-03338
(Consolidated)

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HON. JUDGE

**ORDER GRANTING LIMITED MOTION TO RECONSIDER AND AMENDING
ORDER OF SEPTEMBER 23, 2016**

This matter came before the Court on the Motion of Defendant Cousins supported by Defendant South Carolina Association of REALTORS® to reconsider and amend the Court's Order of September 23, 2016. The Court grants the Motion for the limited amendment contained in this Order.

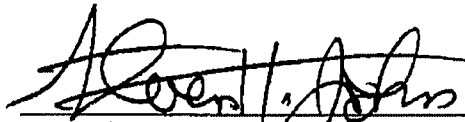
The Court amends the Order of September 23, 2016, granting Motion to Consolidate Cases, denying the Motion to Dismiss of the South Carolina Association of REALTORS®, denying the



Motion for Summary Judgment of the South Carolina Association of REALTORS®, and denying the Motion to Confirm the Arbitration Award by Defendant Cousins as presented on that day. The Court clarifies that nothing in that Order or any discussions the Court had with counsel prior to the issuance of the Order, was meant to determine the merits of this action. The Order of September 23, 2016, dismissed the pending motions. The parties may proceed on the merits as they deem proper to represent the interests of their clients.

In all other respects, the Order of September 23, 2016, remains in full force and effect.

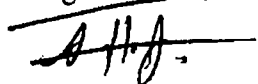
AND IT IS SO ORDERED.



Honorable Steven H. John
Resident Circuit Court Judge
Fifteenth Judicial Circuit

February 17, 2017.

Conway, South Carolina.



STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	IN THE FIFTEENTH JUDICIAL CIRCUIT
	)	
Andrew Waldo,	)	
	)	CASE NO.: 2016-CP-26-01498
Appellant,	)	
	)	
vs.	)	
	)	
Michael Cousins; and South Carolina	)	
Association of REALTORS®,	)	
	)	
Respondents.	)	
	)	
Andrew Waldo; Jane Zheng; and	)	
S.C. Coast Properties, LLC d/b/a Keller Williams	)	CASE NO.: 2016-CP-26-03338
Realty,	)	(Consolidated)
	)	
Appellants,	)	
	)	
vs.	)	
	)	
Michael Cousins; Founders Five, LLC d/b/a	)	
Sperry Van Ness Founders Group; and South	)	
Carolina Association of REALTORS®,	)	
	)	
Respondents.	)	
	)	

CONSENT ORDER OF REFERENCE TO MASTER-IN-EQUITY

In these consolidated matters, the parties have jointly moved the Court for, and consented to, a reference of this non-jury matter to the Master-in-Equity for Horry County sitting as a Special Circuit Judge, pursuant to S.C.R.Civ. P. 53. The parties further agree and consent that the Master-in-Equity shall enter final judgment with regard to the review of the arbitration award at issue in these matters and any appeal from that judgment shall be to the

Supreme Court of South Carolina or the Court of Appeals of South Carolina, as appropriate under the Rules of Appellate Procedure.

The parties consulted with the Master-in-Equity's office regarding schedule and all parties agree that the hearing on the merits in the matter shall be conducted before June 1, 2017.

On the motion of all parties and with their consent, the Court finds that the reference to the Master-in-Equity for Horry County sitting as Special Circuit Judge is appropriate and in the interest of justice.

AND IT IS SO ORDERED.

The Honorable Benjamin H. Culbertson
Chief Judge for Administrative Purposes,
Common Pleas, Fifteenth Judicial Circuit

Date: _____, 2017.
Conway, South Carolina.

WE SO MOVE AND CONSENT:

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Attorneys for Defendant Michael Cousins



Horry Common Pleas

Case Caption: Andrew Waldo , plaintiff, et al VS Michael Cousins , defendant, et al
Case Number: 2016CP2603338
Type: Order/Referred to Master or Special Referee

Resident Judge

s/Benjamin H. Culbertson, Judge Code 2148

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	IN THE FIFTEENTH JUDICIAL CIRCUIT
COUNTY OF HORRY	)	
	)	
Andrew Waldo; Jane Zheng; and	)	CIVIL ACTION NO.: 2016-CP-26-03338
SC Coast Properties, LLC d/b/a Keller	)	
Williams Realty,	)	
	)	
Appellants,	)	
	)	
vs.	)	
	)	
Michael Cousins; Founders Five, LLC d/b/a	)	
Sperry Van Ness Founders Group; and South	)	
Carolina Association of REALTORS®,	)	
	)	
Respondents.	)	

ORDER VACATING ARBITRATION AWARD

This matter was before the Court on June 21, 2017. Present were: Douglas M. Zayicek and Holly M. Lusk, attorneys for the Appellants; Marcus A. Manos, attorney for Respondent South Carolina Association of Realtors; and L. Sidney Connor, IV, attorney for Respondents Michael Cousins and Founders Five, LLC d/b/a Sperry Van Ness Founders Group.

This case involves the appeal of an arbitration decision made by the Arbitration Panel of Respondent, South Carolina Association of REALTORS®, which awarded a \$250,000.00 commission to Respondent Michael Cousins for his alleged involvement in a commercial real estate transaction involving thirteen (13) golf courses in the Myrtle Beach, South Carolina area.¹ In addition to Appellants' appeal of that arbitration award, Respondents filed a Motion to Confirm the Arbitration Award. After thorough review of the pleadings, memoranda submitted by the parties, the parties' exhibits, oral arguments, and relevant South Carolina law, the Court hereby

¹ For simplicity, Respondent Cousins and Sperry Van Ness are referred to herein as "Cousins;" Respondent Association's Arbitration Panel and Procedural Review Board are referred to as "Association;" and Appellants Waldo, Zheng, and Keller Williams are referred to as "Appellants" or "Keller Williams."

ORDERS the Association's arbitration award be vacated² for the following reasons: (1) Association manifestly disregarded or perversely misconstrued South Carolina statutory and common law by awarding Cousins a commission, and there was not a colorable claim allowing Association to award Cousins a commission; (2) Cousins did not represent either Seller or Buyer in the underlying transaction; (3) the Circuit's Court's Order in 2015-CP-26-02066 was binding on Respondents and this Court, and Cousins is barred by collateral estoppel, and res judicata from alleging he represented anyone but the Seller in the underlying transaction; and (4) Respondent Association did not comply with S.C. Code §§15-48-180 and -50.

FACTS AND PROCEDURAL HISTORY

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This case arose out of a dispute over whether Cousins³ was due a commission on certain real estate transactions involving golf courses in the Myrtle Beach, South Carolina area, during which the buyers were exclusively represented by Appellants via written representation agreements.⁴ It is undisputed that Cousins did not have any written representation agreement with either the seller or buyer.

On March 20, 2015, Cousins brought a Circuit Court action (2015-CP-26-02066) against Keller Williams, Randy Wallace, Jane Zheng, National Golf Management, LLC (or otherwise referred to as "Seller"), Xian (Nick) Dou, Yang Wang, and Kang Xou (together, "Buyers"). In its Complaint, Cousins alleged it was the "procuring cause" of certain real estate transactions between the Seller and Buyers⁵ and sought one-half of any commissions received by Appellants. However, in an affidavit filed by Cousins on November 16, 2015, he acknowledged Appellants were the

² In addition, the Court denies Respondents' Motions to Confirm Arbitration Award.

³ Respondent Cousins is a real estate agent and/or broker employed by Sperry Van Ness.

⁴ Nick Dou, a representative of the Buyers, executed two agency agreements with Jane Zheng of Keller Williams covering the period during which the transactions at issue took place. Both agreements specify that Jane Zheng of Keller Williams was to be the Buyers' "exclusive agent."

⁵ Sperry Van Ness also acknowledges in its Complaint that its alleged "arrangement for the split of the real estate commission...is recognized as a standard *oral* contractual arrangement."

Buyers' exclusive agent, his relationship was only with the Seller, and that he did not have any written agreement with Seller.

In June 2015, Cousins dismissed Randy Wallace from the case. On or around September 2015, Keller Williams and Jane Zheng were dismissed from the Circuit Court action upon the agreement that any dispute with Cousins would be arbitrated by a panel chosen by Association, should there be any matters left to arbitrate pending the outcome of the Circuit Court action. Thereafter, Appellants submitted a Request and Agreement to Arbitrate to the Association, which was received by the Association on September 28, 2015.

At the time Keller Williams and Jane Zheng were dismissed from the Circuit Court action, Seller also had a motion to dismiss the action pending before the Court. In its Motion, Seller argued: (1) Cousins never represented Seller in the real estate transactions at issue (either orally or in writing); and (2) South Carolina law requires a written agreement to form an agency or dual agency relationship in a real estate transaction, which Cousins admitted did not exist. The Court agreed with Seller; and, on January 11, 2016, the Court granted Seller's Motion to Dismiss, holding that, pursuant to South Carolina law, an agency relationship in the context of a real estate transaction cannot exist without a written agreement. In its Order, the Court stated, "No such written listing agreement has been alleged to exist, and [Cousins] concedes that the nature of the alleged agreement arose orally and by implication." As a result, the Court concluded that because "[t]he South Carolina General Assembly has definitively spoken on [this issue]...such statement is dispositive of [Cousins'] argument."⁶ The Circuit Court's Order was not appealed and is now the law of the case. *See, e.g., ML-Lee Acquisition Fund, L.P. v. Deloitte Touche*, 327 S.C. 238, 241, 489 S.E.2d 470, 472 (1997).

⁶ The Court's Order provides a clear and explicit outline of South Carolina statutory law regarding the requirement of a writing to create an agency and/or dual agency relationship in the real estate transaction context.

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Therefore, as of January 11, 2016, only the arbitration between Appellants and Cousins, remained. Prior to the arbitration, Appellants provided Association with a copy of the Circuit Court's January 11, 2016 Order specifying that without a written agency/listing agreement and/or without a written dual agency agreement, of which there were none, Cousins was not entitled to a commission for the underlying real estate transactions. Despite having knowledge of the Court's January 11, 2016 Order, applicable South Carolina statutory law, and the admitted absence of any written listing or commission agreement involving Cousins,⁷ on February 2, 2016, Association found Appellants owed Cousins a \$250,000.00 commission on the underlying real estate transaction. The Chairman of the Association's arbitration panel indicated before the hearing that Association's goal was to achieve an equitable result, even though the National Association of Realtors' rules, allegedly followed by the Association, specifically required that state law be followed. In addition, the Chairman indicated that no issue regarding agency was to be considered by the panel in reaching its decision.

In its one-sentence decision, Association did not provide any specific findings of fact or conclusions of law relied upon as the basis for its decision, even though its own rules provide that its counsel shall prepare findings of fact and conclusions of law to support the panel's decision.

On February 24, 2016, Appellants filed a Request for Procedural Review with the Association.⁸ Appellants provided Association with relevant documents, inclusive of the Court's January 11, 2016 Order and other materials. Even though Appellants had a Court reporter present

⁷ Not only did Cousins not have a written agency/listing agreement with the Buyers, the Buyers had an exclusive agency agreement with Appellant Jane Zheng of Keller Williams.

⁸ Shortly after filing its Request for Procedural Review, on March 1, 2016, Appellant Waldo filed a Notice of Appeal of the Association's arbitration award ("Appeal I") in the Horry County Court of Common Pleas, which was captioned C/A No. 2016-CP-26-01498.

and the Procedural Review is a part of Association's arbitration hearing process, Association banned Appellants' court reporter from the proceeding.

Association held a Procedural Review Hearing on May 2, 2016, during which Appellants were informed, for the first time, that the basis for the Association's arbitration award of a \$250,000.00 commission to Cousins was the existence of an alleged oral and implied agency agreement with Cousins, which the Circuit Court already ruled in its January 11, 2016 Order was illegal and unenforceable under South Carolina law. Association affirmed the award of a \$250,000.00 commission to Cousins. By Association issuing a one-sentence decision with no findings of fact or conclusions of law to support that decision, and barring a court reporter from transcribing the Procedural Review hearing wherein those findings were actually provided, Appellants argue Association has attempted to place its decision beyond judicial review, contrary to the text, intent, and spirit of the South Carolina Arbitration Act.

On May 17, 2016, Appellants filed a second Notice of Appeal, which was captioned C/A No. 2016-CP-26-03338 ("Appeal II").⁹ Shortly thereafter, Appellants filed a Motion to Consolidate Appeal I and Appeal II.

Prior to consolidation, in both Appeals, Association filed a Motion to Dismiss or, in the Alternative, for Summary Judgment, which Cousins joined. Cousins also filed a Motion to Confirm Arbitration Award. On September 6, 2016, the Circuit Court heard all pending motions. On September 7, 2016, by Form 4 Order, the Circuit Court consolidated the appeals with the consent of the Parties, denied Respondents' Motions to Dismiss or, in the Alternative, for Summary Judgment, and Denied Cousins' Motion to Confirm Arbitration Award and Enter

⁹ The allegations in Appeal II are identical to Appeal I, with the exception that Appeal II also encompasses the Procedural Review Board's decision.

Judgment.¹⁰ Subsequently, Cousins filed a Motion for Reconsideration of the Court's Order denying its Motion to Confirm Arbitration Award, which the Court denied on February 1, 2017.¹¹ By Order dated April 3, 2017, the consolidated Appeals were referred to the Master-In-Equity and were heard on June 21, 2017.

LEGAL STANDARD

Arbitration is a favored method of dispute resolution in South Carolina. Gissel v. Hart, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). When parties submit a dispute to arbitration, the arbitrator determines both questions of law and fact. Id. at 241; See also S.C. Code Ann. § 15-40-180 (“[W]hen a dispute is submitted to arbitration, the arbitrators shall determine questions of both law and fact.”).

“Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award.” Id. However, under certain circumstances, such as when the arbitrator manifestly disregards or perversely misconstrues the law, a court can vacate an arbitration award. Id. (citing Technical College v. Lucas and Stubbs, 286 S.C. 98, 333 S.E.2d 781 (1985) and S.C. Code § 15-480-130(a)). For a South Carolina court to vacate an arbitration award on the grounds that the arbitrator manifestly disregarded or perversely misconstrued the law, the governing law must be “well defined, explicit, and clearly applicable.” Gissel, 403 S.C. at 241 (citations omitted). Further, “[a]n arbitrator’s manifest disregard for the law” as a basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principal yet refused to apply it.” Gissel, 403 at 241 (citing Weimer v. Jones, 364 S.C. 78, 610 S.E.2d 850 (S.C. Ct. App. 2005)); See also C-Sculptures, LLC v. Brown, 403 S.C. 53, 58, 742 S.E.2d 359, 361-62 (2013) (holding

¹⁰ The Court’s Form 4 Order was followed by a formal written Order, which was entered on September 23, 2016.

¹¹ With its denial of Respondent Cousins’ Motion to Reconsider, the Court did clarify by Order dated February 21, 2017, that nothing in the Court’s September 23, 2016 Order was meant to determine the merits of the Appeals.

the manifest disregard standard is not insurmountable and vacating an arbitrator's award where the arbitrator was apprised of unambiguous, clearly applicable South Carolina statutory law and did not apply that law). Likewise, the Fourth Circuit will also vacate an arbitration award where an arbitrator acts in manifest disregard of the law. See Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc., 142 F.3d 188 (4th Cir. 1998) ("Federal courts may vacate an arbitration award only upon a showing of one of the grounds listed in the Federal Arbitration Act, or if the arbitrator acted in manifest disregard of the law.").

ANALYSIS

I. ASSOCIATION MANIFESTLY DISREGARDED AND/OR PERVERSELY MISCONSTRUED KNOWN, WELL-DEFINED, EXPLICIT, AND CLEARLY APPLICABLE SOUTH CAROLINA LAW IN AWARDED COUSINS A COMMISSION WITHOUT A WRITTEN AGREEMENT SHOWING HE REPRESENTED EITHER THE SELLER OR THE BUYER.

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It is uncontested that Cousins has nothing in writing showing he represented anyone in the underlying real estate transaction. His only allegation in the Circuit Court Complaint is that his alleged representation was solely based on an alleged oral agreement with Seller. Seller denied any such agreement, and prevailed in the Circuit Court action.

South Carolina statutory law is well defined, explicit, and clear about the fact that in the context of real estate transactions, an agency relationship can only be created with a buyer or seller by written agreement. See S.C. Code Ann. § 40-57-139(G) (1976, as amended) (prohibiting oral agreements and stating, "No type of agency relationship may be assumed by a buyer, seller, landlord, tenant, or licensee or created orally or by implication.") and S.C. Code Ann. § 40-57-139, Subsections (B) and (C) (1976, as amended) (stating that a licensee who becomes either a seller's or a buyer's agent shall provide an agency disclosure form to the respective seller or buyer

at the time an agency agreement is signed and that there must be an acknowledgment of receipt of that form in the agency agreement) (1976, as amended).¹²

South Carolina statutory law also provides that a licensee may not “advertise, market, or offer to conduct a real estate transaction involving real estate owned in whole or in part by another person without first obtaining a written listing agreement from the owner...” S.C. Code Ann. § 40-57-135(C)(4) (1997); See also S.C. Code Ann. § 40-57-135(D)(4)(d) (1976, as amended) (“A listing or buyer’s representation agreement must be in writing and must set forth all material terms of the parties’ agency relationship including, but not limited to...an explanation of how compensation will be divided among participating or cooperating brokers, if applicable.”)

South Carolina statutory law also prohibits subagency and/or dual agency agreements between agents/brokers without buyer and/or seller knowledge and consent. South Carolina Code Annotated Section 40-57-137, Subsections E, J, M(1), and Q state:

(E) A licensee acting as a seller’s agent may not offer a subagency relationship to other brokers or offer to compensate another broker who represents a buyer without the knowledge and consent of the seller client.

(J) A licensee acting as a buyer’s agent may not offer a subagency relationship to other brokers or offer to compensate another broker who represents a seller without the knowledge and consent of the buyer client.

(M)(1) A licensee may act as a disclosed dual agent only with the prior informed and written consent of all parties. The informed consent must be evidenced by a dual agency agreement, promulgated by the commission, and must be signed by the buyer before writing an offer and by the seller before signing the sales contract.

(Q) The provisions of this section which are inconsistent with applicable principles of common law supersede the common law,

¹² S.C. Code Ann. §§ 40-57-135, 40-57-137, and 40-57-139 are all effective through December 31, 2016 and apply to this case.

and the common law may be used to aid in interpreting or clarifying the duties described in this section.

(1976, as amended). Thus, the law adopted by the General Assembly is defined, explicit, clear, and expressly prohibits the exact scenario present in this litigation—a real estate agent trying to obtain a commission in a real estate transaction in which there is no written agency agreement, whatsoever.

During the Arbitration, the Association not only had knowledge of this clearly applicable South Carolina statutory scheme (legislating its very profession), it also possessed a copy of the Circuit Court's January 11, 2016 Order, which unequivocally sets forth this law and holds that absent a written listing/agency agreement, of which Cousins admits there is none, he is not entitled to a commission in the underlying transaction.¹³ This law covers all real estate transactions in South Carolina, and does not distinguish between commercial and residential real estate transactions. See S.C. Code Ann § 40-57-10 (1997). Thus, the Association's award of a commission in light of governing South Carolina statutory law is a manifest disregard, or a perverse construction, of such law.

A. Cousins Did Not Have a Written Listing/Agency Agreement with Either the Sellers or Buyers.

Appellants correctly argue that in the absence of a written agreement with either the Seller or the Buyer, Cousins could not have represented either party in the transactions at issue; therefore, an award of a real estate commission to Cousins is a manifest disregard and/or a perverse misconstruing of South Carolina law. In support of their position, Appellants cite to the fact that Cousins admits in his affidavit in the Circuit Court action: (1) Appellants were the Buyers' agent;

¹³ The January 11, 2016 Order also explicitly holds that Respondents Cousins and Sperry Van Ness did not represent the Seller in the transactions at issue; therefore, pursuant to the aforementioned South Carolina statutory law, they were not entitled to a commission under either an agency theory or a dual agency theory.

and (2) no written agreement existed between Cousins and Seller. Regardless of the contradictory positions Cousins has taken while under oath in regards to whom he asserts he "represented" in the real estate transactions at issue, his arguments that he is entitled to a commission all fail under South Carolina law in the absence of a written agency/listing agreement with either the Seller or the Buyers.¹⁴

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Cousins has not presented any evidence of a written listing/agency agreement with the Buyers or the Seller in the real estate transaction at issue. Both the Buyers and the Seller have denied that such documents exist. Further evidencing the fact that Cousins never represented the Buyers are the two, written agency agreements between the Buyers and Jane Zheng, both of which state that Ms. Zheng of Keller Williams is to be the Buyers' "exclusive" agent during the time period the transactions at issue took place. As to Cousins' relationship with the Seller, this issue was resolved by this Court's January 11, 2016 Order, wherein the Court held Cousins was not the Seller's representative in the transactions at issue.

Pursuant to South Carolina Code Annotated Sections 40-37-135(C)(4) and (D)(4) (1976, as amended), a written representation agreement is required by law before a broker/agent may represent anyone in a real estate transaction. For this reason, Cousins cannot establish as a matter of law that he represented any party to the real estate transactions in this case, as he admits that there was no requisite written agreement between himself and either Seller or Buyers.

¹⁴ The Circuit Court's January 11, 2016 Order explicitly states Cousins and Sperry Van Ness cannot recover a commission on the transactions at issue because they had no written agreement, nor did they allege the existence of any written agreement, with the Seller. Therefore, the Circuit Court has already held Cousins did not represent the Seller, and such ruling is the law of the case. Also, it is exceptionally clear from the facts in this case that Cousins did not represent the Buyers, as there is no written agency agreement between Cousins and the Buyers. To the contrary, there are written agency agreements showing Jane Zheng of Keller Williams was the Buyers' exclusive agent.

Accordingly, Cousins has no right to a commission and the Court finds the Association's award of a commission to Cousins is in manifest disregard of South Carolina law.

Simply put, an agency relationship cannot be established based on the unilateral representations of the alleged agent—there must be some manifestation of intent from the principal in order to create an agency relationship. The South Carolina General Assembly has expressly indicated that in the context of a real estate transaction, the principal's intent must be in the form of a writing executed by the principal. In this case, the evidence shows that both the Seller and Buyers vehemently denied Cousins represented either of them in the underlying transaction, and Cousins admits there is nothing whatsoever in writing indicating that he represented either the Buyers or Sellers.

i. Cousins' "Procuring Cause" Argument Does Not Entitle Him to a Commission In the Absence of a Written Agency/Listing Agreement with the Buyers Or the Seller.

Cousins argues, and it appears the Association agreed, he is entitled to a commission because he was the "procuring cause" of the real estate transactions at issue. The Court disagrees, as Cousins' "procuring cause" argument also fails in the absence of a written agreement with the Buyers or the Seller.

As discussed above, South Carolina statutory law expressly prohibits agency relationships in the real estate context absent a written agreement (i.e. Cousins could not have been the "procuring cause" of transactions when he did not legally represent either party).¹⁵ See S.C. Code Ann. §40-37-139(G) (1976, as amended).

¹⁵ In addition to the fact that South Carolina statutory law does not provide for the recovery of a real estate commission under a "procuring cause" theory, Cousins' own Affidavit demonstrates that he could not have been a procuring cause of the real estate transactions at issue because, as he points out in series of emails attached as Exhibit 11 to his Affidavit, he did not even have knowledge of the thirteen (13) golf course deal that is the subject of this commission dispute.

Further, South Carolina common law confirms that a real estate broker cannot be the "procuring cause" of a sale in the absence of an agency relationship. See United Farm Agency v. Malanuk, 284 S.C. 382, 325 S.E.2d 544 (1985) (holding that a broker has generally earned his commission when he acts during his agency as the efficient or procuring cause of a sale),¹⁶ Hobbs v. Hudgens, 223 S.C. 88, 96, 74 S.E.2d 425, 427-28 (1953) ("[T]he broker must not only show that his efforts were the procuring cause of the sale but must further show that his intervention was during the continuance of an agency to sell or find a purchaser.") (emphasis added), Smith v. Peebles, 177 S.C. 479, 181 S.E. 653, 656 ("A broker is entitled to his commissions, if during the continuance of his agency, he is the efficient or procuring cause of the sale.") (emphasis added); Roberts v. Gaskins, 327 S.C. 478, 487, 486 S.E.2d 771, 775 (Ct. App. 1997) (wherein the South Carolina Supreme Court cited to Goldsmith v. Coxe, 80 S.C. 341, 346-47, 61 S.E. 555, 557 (1908), holding that a broker is entitled to his commissions, "if during the continuance of his agency," he is the efficient or procuring cause of the sale).¹⁷ Thus, even if Cousins were to solely rely on a procuring cause argument as the basis for being entitled to a commission, South Carolina common law still requires proof of an agency relationship, which our General Assembly requires to be in writing.

¹⁶ The Malanuk case was decided in 1985, prior to our current statutory scheme that now requires written agency agreements between brokers and buyers and/or sellers. Moreover, in Malanuk, the South Carolina Supreme Court stated that although, at that time, oral commission agreements were often enforceable, the better practice was requiring a written listing agreement. 284 S.C. at 384, 325 S.E.2d at 545. Therefore, the enactment of the current statutory scheme barring oral commission agreements is in line with what the Supreme Court believed to be the best practice prior to its enactment. See Id.

¹⁷ Emphasis added. Appellants reference King v. Bennett, No. 2013-UP-459, 2013 WL 8541636 (S.C. Ct. App. Dec. 11, 2013), wherein a real estate professional sought compensation following a real estate transaction for alleged services she provided to the buyers. Appellants acknowledged that King v. Bennett case is an unpublished opinion and not a controlling authority; however, its facts and legal analysis are directly on point to this matter. Like Cousins, in King, the realtor never obtained a written agency agreement with any party to the real estate transaction and argued that her claims for compensation were based upon equity rather than contract. Id. at *1. The Court of Appeals disagreed with the realtor's arguments and upheld the trial court's dismissal of the realtor's claims, holding that a realtor cannot recover any compensation in the absence of a written agreement. Id.

Finally, the Court cannot overlook the email Cousins sent to Appellant Jane Zheng, wherein he expressly admits not having any knowledge of the thirteen (13) golf course transaction at issue in this case. It is axiomatic that one cannot be the procuring cause of something they admit knowing nothing about.¹⁸

Therefore, the Association's award of a commission to Cousins on the basis of an alleged implied, oral, or otherwise tangential relationship, or in the alternative based on a procuring cause theory, directly contravenes South Carolina statutory and common law, is not "barely colorable,"¹⁹ and was made in manifest disregard or a perverse misrepresentation of clearly applicable law.

B. Cousins Did Not Have the Requisite Prior Informed, Written Consent of Either the Buyers or the Seller to Be a Disclosed Dual Agent.

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Directly comparable to the non-existence of a written agency/listing agreement between Cousins and the Buyers or Seller, Cousins presented no written evidence of any dual agency agreement with regard to the real estate transactions at issue. Pursuant to South Carolina law, "A licensee may act as a disclosed dual agent only with the prior informed and written consent of all parties [and] the informed consent must be evidenced by a dual agency agreement[.]" S.C. Code Ann. 40-57-137(M)(1) (1976, as amended). Neither Seller nor Buyers gave prior informed, written consent to such an agreement and Cousins is required to produce that written agreement, which he has not done. See Id. Additionally, the Circuit Court held its January 11, 2016 Order that Cousins had no agency relationship with Seller; therefore, it must follow that Cousins cannot be a dual

¹⁸ In another email exchange, Appellant Jane Zheng instructed Cousins to get a representation agreement to protect himself. Cousins chose to ignore that advice.

¹⁹ A court may choose to vacate an arbitration award if the basis of such award is not at least "barely colorable." See Harris v. Bennett, 332 S.C. 238, 246, 503 S.E.2d 782, 787 (S.C. Ct. App. 1998) (holding that courts are allowed to intrude upon an arbitrator's decision when the arbitrator commits error that was obvious and capable of being instantly perceived by the average person qualified to be an arbitrator and/or when the arbitrator appreciates the existence of a clearly governing legal principle, but decides to ignore or pay no attention to it).

agent of both the Seller and the Buyers. As a result, Cousins is not entitled to a commission under a dual agency argument.

C. Cousins Did Not Have the Requisite Knowledge and Written Consent of Either the Buyers or the Seller to Serve as Co-Broker(s) in the Transactions at Issue.

Finally, Cousins attempts to argue that the arbitration concerned a co-broker dispute, rather than a dispute between himself and the Buyers or Seller. This argument similarly fails under South Carolina statutory law.

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Prior to brokers establishing any type of co-broker agreement on behalf of a buyer or seller, the buyer and/or the seller, respectively, must: (1) have knowledge of the subagency agreement and (2) must consent to such an agreement. See S.C. Code Ann. §§ 40-37-137(E) and (J) (1976, as amended). Therefore, regardless of whether Cousins argues his alleged oral agreement to split a commission for the transactions at issue was with Appellants, rather than with the Buyers or Seller, the Buyers and/or the Seller must still have knowledge of and consent to any such alleged agreement. Additionally, South Carolina Code Annotated Section 40-57-135(D)(4)(d) provides the buyer's representation agreement must be in writing and must set forth "an explanation of how compensation will be divided among participating or cooperating brokers." (1976, as amended). Thus, any alleged co-broker agreement regarding division of compensation must: (1) not only be known by and consented to by the buyer, (2) it must also be documented in writing within the buyer's representation agreement. It is uncontested that there is no evidence of any such agreement.

The Circuit Court has already held in its January 11, 2016 Order that Respondents did not represent the Seller in the transactions at issue. Therefore, it must follow that Respondents could not be a co-broker representing the Seller. Likewise, no evidence of a subagency agreement

between Appellants and Respondents has been produced, nor has any evidence been produced that the Buyers had knowledge of or consented to such a subagency agreement.

Contrary to Cousins' alleged "co-broker" argument, the Buyers had a written agency agreement with Jane Zheng specifying that Ms. Zheng was their exclusive agent. There is also nothing in writing setting forth any agreement between Appellants and Cousins to split a commission for the transactions at issue, as required by South Carolina law. As a result, without the Buyers' knowledge and consent to a subagency agreement, and without written documentation of a division of compensation agreement, as required by South Carolina Code Annotated § 40-57-135(D)(4)(d) (1976, as amended), there can be no such agreement between brokers.²⁰ Therefore, Cousins is not entitled to the recovery of a commission under any alleged subagency agreement and/or co-broker agreement in the matter at hand.

D. Association Had Knowledge of the Aforementioned Well Defined, Explicit, and Clearly Applicable South Carolina Law When it Awarded Cousins a Commission In Manifest Disregard of that Law, and Created an Illegal and Unenforceable Agreement.

When arbitration was held, Association was in possession of a copy of the Court's January 11, 2016 Order. In addition, it is axiomatic that everyone is charged with knowledge of the law, especially in this case when the law governs the exact conduct of the parties.

In its Order, the Circuit Court, which considered these very arguments, held that without a written agreement, which Cousin admits he did not have, his argument that he is due a commission must fail. The Order explicitly outlines directly applicable South Carolina statutory law on this

²⁰ The only evidence before the Association was that Andy Waldo was the broker-in-charge of Respondent Keller Williams, and that he did not know about any such commission-splitting agreement, much less agree to any such arrangement. Also, Cousins presented no evidence whatsoever that Appellant Jane Zheng could in any way bind Respondent Keller Williams. The law is clear that a commission belongs to the agency, not an individual agent, and that the parties to the real estate transaction control who earns the commission. Individual agents cannot have "side deals" to circumvent the intent of the General Assembly, nor are other transactions between the parties relevant to the case at bar.

issue, which supports the Court's dismissal of Cousins' claims in Circuit Court. Additionally, the Court rejected Cousins' argument that South Carolina common law allows for oral and/or implied agreements between agents/brokers for commissions, holding that the cases Cousins relied on were decided prior to the existing aforementioned statutory framework and the courts cannot allow oral or implied commission agreements under the current statutory scheme.

Therefore, when the Association made its initial arbitration decision, and again at the Procedural Review hearing, it had actual knowledge of both the Circuit Court's Order and of South Carolina law that clearly governs the issues in this matter. The Association's holding that Cousins was entitled to a commission based on an oral or implied agreement, created an illegal contract which directly contravenes South Carolina statutory and common law, which cannot be enforced by this Court. See Ward v. West Coast Oil Co., Inc., 387 S.C. 268, 274, 692 S.E.2d 516, 519 (2010) (holding that the Court will not lend its assistance to carry out the terms of a contract that violates statutory law or public policy) (internal citations omitted), Mason v. Mason, 412 S.C. 28, 56-57, 770 S.E.2d 405, 420 (Ct. App. 2015) ("An illegal contract is unenforceable. The general rule is that courts will not enforce a contract which is violative of public policy, statutory law, or provisions of the Constitution.' The Court 'will not lend its assistance to carry out the terms of a contract that violates statutory law or public policy.'") (internal citations omitted), and The Beach Company v. Twillman, Ltd., 351 S.C. 56, 566 S.E.2d 863 (Ct. App. 2002) (holding that South Carolina courts will not enforce an illegal contract, i.e., a contract that violates statutory law.)

The Association's award was not simply an erroneous application of the law; it was a complete and manifest disregard of South Carolina law and a Circuit Court Order involving the very same transaction at issue in this case and created an illegal contract that this Court cannot enforce. Both South Carolina and the Circuit Court Order clearly prohibit Cousins from receiving

a commission on the exact real estate transactions at issue before the Association. As stated in Appellants' Notice of Appeal, the Association's award of a commission to Cousins "now requires a buyer/seller to pay a commission to an agent/broker in which it has no knowledge of, and never agreed to compensate; all directly contrary to state law."

E. Batton v. Howell, 300 S.C. 545, 389 S.E.2d 170 (S.C. Ct. App. 1990) and Other Cases Relied Upon By Respondents, Are Not Applicable Because They Predate the Statutory Law.

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Respondents rely upon the Batton v. Howell case, which is not comparable to this matter because, like Cousins' argument in his 2015 Circuit Court action, the Batton case was decided prior to the enactment of the current South Carolina statutory provisions requiring written agreements, outlined above, on January 1, 1998.²¹ Respondents have sought to characterize Batton as "a case almost on point," because, in Batton, the appellant challenged an arbitration award to the respondent of a \$10,000.00 real estate commission, and the award was upheld, seemingly absent of any written agreement between the agents, buyer, and/or seller.²² However, like the cases relied upon by Cousins in the Circuit Court action, Batton was decided prior to the General Assembly's significant overhaul of the statutory framework governing the creation of agency relationships in the context of real estate transactions. As such, those cases are not comparable to

²¹ In support of its argument in opposition to the dismissal of its Circuit Court action against the Buyers and Seller, Cousins cited to Hilton Head Island Realty, Inc. v. The Skull Creek Club, a 1986 decision by the South Carolina Court of Appeals, wherein the Court held that a signed writing is not required in order for a licensed real estate broker or agent to recover a commission in a real estate transaction. In its January 11, 2016 Order granting Seller's Motion to Dismiss, the Court stated, "Since the court's decision in Skull Creek, however, the South Carolina General Assembly has undertaken a significant overhaul of the statutory framework governing the creation of agency relationships in the context of real estate transactions. Such overhaul included the enactment of...statutes that even more clearly require a written agreement in order to establish an agency or dual agency relationship...Clearly the same finding [as in Skull Creek] could not be made in light of today's statutory environment."

²² No written agreement between the buyer, seller, or agents is mentioned within the Batton case and it is unclear from the facts what the arbitration panel's decision was based upon when it awarded Respondent Howell a commission in that matter. See Batton, 300 S.C. 545.

this matter and are irrelevant to the Association's manifest disregard of current governing South Carolina statutory law.²³

II. ASSOCIATION VIOLATED S.C CODE § 15-48-180 BY FAILING TO DECIDE ALL MATTERS OF LAW AND FACT, FURTHER EVIDENCING ITS MANIFEST DISREGARD FOR GOVERNING SOUTH CAROLINA LAW.

"[W]hen a dispute is submitted to arbitration, the arbitrators shall determine questions of both law and fact." S.C. Code Ann. § 15-48-180; See also Gissel v. Hart, 382 S.C. at 241. An arbitration panel cannot know of a governing legal principle, yet, refuse to apply it. Id. Nor can a court enforce an illegal contract. See Mason, 412 S.C. 28, 770 S.E.2d 405 and Twillman, 365 S.C. 178, 617 S.E.2d 125.

Here, Association knew of the governing South Carolina statutory law, was provided a copy of the Court's January 11, 2016 Order, and intentionally chose not to address or decide issues of agency between the parties, instead creating an illegal alleged oral commission contract in direct contravention of South Carolina statutory and common law.

During the arbitration, as Appellants were attempting to show Cousins was not an agent of either party to the transaction and therefore not entitled to a commission, Association's Panel Chairman cut off Appellants, and stated on the record that he wanted to remind everyone that the proceeding was not a grievance hearing and that although he understood what the issues before the Panel were, the Panel was not going to get into the agency analysis. The Chairman further stated that the focus only should be on whether Cousins was the "procuring cause" of the real estate transactions.

²³ The findings and conclusions above support the Court's ruling that Cousins is barred by judicial estoppel, collateral estoppel, and res judicata from alleging he represented anyone but the Seller in the underlying transaction, which was previously decided by the Circuit Court.

Yet even under a “procuring cause” analysis under South Carolina common law, Association was required to hear and decide the agency issues. As discussed above, a realtor is not entitled to a commission under a procuring cause analysis unless the sale was procured during the course or its agency. Thus, Association’s Panel Chairman prevented Appellants from presenting their case in full, and essentially admits not even considering the agency issues (much less deciding them), even though the agency issues are fundamental under both statutory law, and the common law regarding procuring cause. Thus, there is no conceivable argument that can be made to show Association considered and ruled upon all relevant issues of law and fact, as required by statute. Association was charged with reaching a result that comported with the law, not seeking an equitable result in spite of the law.

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Association clearly knew the issues of fact and law before it (i.e. issues of the creation of an agency, subagency, and/or dual agency) and had knowledge of South Carolina’s governing law on those issues. However, the Panel manifestly disregarded governing law by awarding Cousins a commission based upon a “procuring cause” theory and/or oral/implied commission theory, all of which directly contravene South Carolina law.²⁴ Thus, by failing to consider all matters of fact and law before it, the Association manifestly disregarded and refused to apply clearly applicable South Carolina law.

²⁴ Cousins could not be a procuring case of the real estate transactions at issue when he did not represent anyone involved in the transactions. See S.C. Code Ann. §§ 40-57-135, 139; Malanuk, 284 S.C. 382, 325 S.E.2d 544 (1985), Hobbs, 223 S.C. 88, 74 S.E.2d 425 (1953), Peeples, 173 S.C. 479, 181 S.E. 653 (1935), and Gaskins, 327 S.C. 478, 486 S.E.2d 771 (Ct. App. 1997). Cousins admitted having no knowledge of the thirteen (13) golf course deal negotiated between Jane Zheng and/or Keller Williams and Seller. Further, no written agreements exist to create any type agency relationship between Cousins and any of the parties for the real estate transactions at issue.

III. APPELLANTS' RIGHTS WERE SUBSTANTIALLY PREJUDICED BY THE FAILURE OF THE ASSOCIATION TO FOLLOW THEIR OWN POLICIES AND PROCEDURES AND SOUTH CAROLINA LAW.

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In addition to the Association's manifest disregard for South Carolina law, Association substantially prejudiced Appellants by failing to abide by South Carolina statutory law and by failing to follow its Policy Governing State Professional Standards Procedures (the "Policies"). According to their own Policies, "Association Counsel, if present, shall prepare for review of the Panel Chairman and/or the President any statement of facts or a summary of the reasons supporting any decision made by the Panel. The decision is made by the Panel, not the Association Counsel." No statements of facts or summary of the reasons supporting the Association's decision were ever made or provided to Appellants. As such, Association has not provided any basis for their decision other than the one-sentence arbitration order, which provides no basis whatsoever to support Association's decision.²⁵ Thus, Association has not provided any evidence whatsoever that it in any way complied with S.C. Code § 15-48-180, and in fact did decide all issues of law and fact. By issuing a one-sentence Order, Association attempts to place its decision beyond judicial review, despite the provisions and intent of the South Carolina Arbitration Act. In order for S.C. Code § 15-48-180 to have any meaning, there must be something more than "Respondent Cousins wins."

Similarly, upon review of the Arbitration Panel's decision, Association substantially prejudiced Appellants' rights by refusing to allow the Procedural Review Hearing to be either transcribed or recorded. First, the South Carolina Uniform Arbitration Act provides that "upon

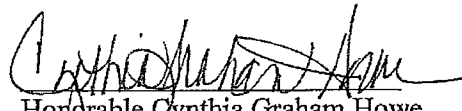
²⁵ Respondents argued in their Memorandum In Support of their Motions to Dismiss, that at the arbitration hearing, Appellant Waldo testified that he believed the arbitration hearing to be fair. However, upon review of the audio recording of the arbitration, not only was Appellant questioned as to the fairness of the hearing prior to the Panel's decision being made, but Appellant also specified that he felt that the issue of agency was an important issue for the Panel to consider, and, aside from the agency issues, he believed the hearing to have been fair.

the request of any party or arbitrator, the arbitrators shall cause to be made a record of the testimony and evidence introduced at the hearing." S.C. Code Ann. § 15-48-50 (1976, as amended). Second, the Association's Policies state, "All Professional Standards Panel hearings shall be recorded and the recording retained until after the prescribed date for any appeal or procedural review or ratification by the Executive Committee." Counsel for Appellants contacted the Association prior to the Procedural Review Hearing in an attempt to employ a court reporter for the Hearing. However, ignoring the Policies outlined hereinabove, and state law, the Association refused to allow the recording and/or transcription of the proceeding. Again, on the day of the Procedural Review Hearing, the Association similarly refused to allow the recording and/or transcription. These violations of the Association's Policies and state law have substantially prejudiced Appellants.

Association splits up its arbitration process into two hearings—the initial hearing and a procedural review hearing. Both are hearings and a part of the arbitration process.

NOW, THEREFORE, for the reasons set forth above, Association manifestly disregarded and/or perversely misconstrued South Carolina law, and there is no colorable claim to award Cousins a \$250,000.00 commission. Accordingly, the Court **ORDERS** the Association's arbitration award be vacated and this matter dismissed with prejudice, and **DENIES** Respondents' Motion to Confirm Arbitration Award. In addition, any commission being held may be immediately disbursed to Appellants Keller Williams and Jane Zheng, without recourse.

IT IS SO ORDERED!


Honorable Cynthia Graham Howe
Horry County Master-In-Equity

Dated: August 14, 2018
Conway, South Carolina

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 15-CP-26-_____

Founders Five, LLC d/b/a Sperry
Van Ness Founders Group,

Plaintiff,)

vs.)

The Real Estate Company, LLC
d/b/a Keller Williams Realty,
Randy Wallace, Jane Zheng,
National Golf Management, LLC,
Xian (Nick) Dou, individually and
Assigns and/or Nominees, Yang
Wang, and Kang Xou,

Defendants.)

COMPLAINT
(SUIT FOR REAL ESTATE
COMMISSIONS
INJUNCTIVE RELIEF AND DAMAGES)
JURY TRIAL DEMANDED

FILED
CLERK OF COURT
HORRY COUNTY
2015 MAR 20 AM 11:48

The Plaintiff, complaining of the Defendants herein, would show and allege unto this Honorable Court as follows:

1. The Plaintiff is a limited liability company organizing and existing pursuant to the laws of the State of South Carolina and doing business in Horry County as Sperry Van Ness Founders Group.

2. The Defendant The Real Estate Company, LLC d/b/a Keller Williams Realty is, upon information and belief, a corporation organized and existing pursuant to the laws of one of the states of the United States with a local office in Horry County, South Carolina and that the Defendant Randy Wallace is the Broker In Charge of the local Keller Williams Office and that Jane Zheng is a Real Estate Agent employed or contracted with Keller Williams Realty.

3. The Defendant National Golf Management, LLC is, upon information and belief, a limited liability company organized and existing pursuant to the laws of the State of South Carolina with its principal place of business in Horry County, South Carolina.

4. The Defendants Xian (Nick) Dou, individually and Assigns and/or Nominees, Yang Wang, and Kang Xou, upon information and belief, are citizens and residents of some nation other than the United States and, upon information and belief, are the buyers or represent the buyers of various properties owned and/or controlled by National Golf Management, LLC, which properties are located in Horry County, South Carolina.

5. This court has jurisdiction over the parties and subject matter of this lawsuit.

FACTUAL BACKGROUND

6. The Defendant Keller Williams Realty, by and through its employee and/or contractor Jane Zheng contacted the Plaintiff through the Plaintiff's employees for the purpose of establishing contacts and a relationship with property owners in Horry County on behalf of various purchasers, including purchasers from the Nation of China represented by Keller Williams Realty through Jane Zheng.

7. The Plaintiff, through its agents, servants, and employees worked closely with Keller Williams and its agents, servants, and employees to introduce the Chinese buyers to potential sellers in South Carolina.

8. The Plaintiff through its agents, servants, and employees worked diligently to make introductions and to assist in establishing relationships which would lead to a sale and purchase of properties to the Chinese buyers.

9. At all times during these introductions and sales processes, there was an agreement and oral understanding between and among all the parties that a commission would be

paid upon the sale of property to the Chinese investors and that the commission would be shared between Keller Williams Realty and the Plaintiff Founders Five, LLC d/b/a Sperry Van Ness Founders Group.

10. The Plaintiff assisted in and was a procuring cause of the sale and closing of a Golf Course between and among the Defendants, which closed in November, 2014.

11. Pursuant to the understanding between and among the parties, the Plaintiff Founders Five, LLC received one half of the commission on the sale of this property and, upon information and belief, the other half of the commission went to Keller Williams Realty.

12. Upon successful completion of this real estate transaction, the Plaintiff continued to work diligently to assist and secure additional transfers of real estate including properties owned by the Defendant National Golf Management, LLC to be purchased by Chinese buyers, including the Defendants in this case.

13. Through the efforts of both Keller Williams Realty and its agents, servants, and employees as well as the Plaintiff Founders Five, LLC and its agents, servants and employees, contracts have been negotiated and signed with regard to the transfer of other properties owned by National Golf Management, LLC and, upon information and belief, the closing of those properties is due to take place in a matter of days or weeks.

14. In the past several weeks, however, the Defendants have failed to respond to emails, answer phone calls, or respond to letters issued by the Plaintiff and by the Plaintiff's representatives.

15. Upon information and belief, the Defendants intend to dishonor the commission arrangement and understanding with the Plaintiff Founders Five, LLC.

FOR A FIRST CLAIM
(Breach of Contract as to the Seller and Buyers)

16. The allegations of Paragraph Nos. 1 through 15 are incorporated as if fully set forth herein.

17. Plaintiff would show that there existed a contract either expressed or implied through mutual agreements and understandings between and among the parties as well as prior course of dealing, that the Plaintiff would be entitled to a commission upon the transfer of additional properties from National Golf Management, LLC (Seller) and/or its affiliates to Xian (Nick) Dou, buyer and Assigns and/or Nominees, and Yang Wang, and/or Kang Xou, and/or other person (buyers) in regard to the transfer of any properties from Seller to one or more of the buyers.

18. Plaintiff would show that the Plaintiff was a procuring cause of these transactions and is contractually entitled to a real estate sales commission.

19. The Plaintiff prays for injunctive relief, both temporary and permanent and for an Order from the Court requiring that the Plaintiff's sales commission be set aside at the closing and then to be paid directly to the Plaintiff.

FOR A SECOND CLAIM
(Breach of Contract as to Keller Williams Realty, Randy Wallace and Jane Zheng)

20. The allegations of Paragraph Nos. 1 through 19 are incorporated as if fully set forth herein.

21. Plaintiff would show that the Plaintiff had an express and/or implied contractual agreement with Keller Williams Realty through its Broker-In-Charge Randy Wallace and through its employee and/or contractor Jane Zheng whereby the two agencies would split any commission on sales or transfers of real estate between National Golf Management, LLC and/or

any of its affiliated companies with the buyers listed above and/or any other affiliated Chinese buyers.

22. Plaintiff would show that the arrangement for the split of the real estate commission is common in the real estate industry and is recognized as a standard oral contractual arrangement to be honored and enforced by the Courts of this State.

23. Plaintiff would further show that this contractual arrangement and understanding is confirmed by the sharing of the commission in the prior sale involving essentially the same seller and buyers.

24. Plaintiff anticipates that the Defendants intend to dishonor this contractual agreement and therefore requests the court to order that all commission funds be held in escrow and then one-half of those commissions be paid to Plaintiff.

FOR A THIRD CLAIM
(Breach of Contract with Fraudulent Intent as to all Defendants)

25. The allegations of Paragraph Nos. 1 through 24 are incorporated as if fully set forth herein.

26. The Plaintiff would show that the Defendants breached their contractual relationship to pay commissions to the Plaintiff and that this breach was with fraudulent intent and accompanied by fraudulent actions.

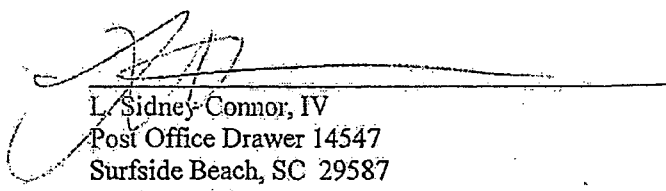
27. The Defendants have intentionally cut off all communications with the Plaintiff and denied the Plaintiff access to information concerning the transactions involved in the closing of real estate between and among the Defendants.

28. Upon information and belief, the Defendants intend to defraud the Plaintiff out of rightfully earned commissions by denying the Plaintiff access to information concerning the transactions.

35. The acts and omissions of the Defendants are willful, reckless, intentional violations of the South Carolina Unfair Trade Practices Act and the Plaintiff requests treble damages, costs and attorney's fees.

WHEREFORE, having fully pled its Complaint, the Plaintiff prays for the relief set forth above and for other relief as the Court may deem just and proper.

KELAHHER, CONNELL & CONNOR, P.C.



L. Sidney Connor, IV
Post Office Drawer 14547
Surfside Beach, SC 29587
(843) 238-5648
sconnor@classactlaw.net
Attorneys for Plaintiff

March 20, 2015

RECEIVED

Form #A-1

South Carolina Association of Realtors
Board or State Association

SEP 28 2015

2002 N. Oak St Suite 300
Address

Myrtle Beach
City

SC 29577

**SOUTH CAROLINA
ASSOCIATION OF REALTORS®**

Request and Agreement to Arbitrate

- (1) The undersigned, by becoming and remaining a member of the CCAR Board of REALTORS® (or Participant in its MLS), has previously consented to arbitration through the Board under its rules and regulations.
- (2) I am informed that each person named below is a member in good standing of the Board (or Participant in its MLS), or was a member of said Board of REALTORS® at the time the dispute arose.
- (3) A dispute arising out of the real estate business as defined by Article 17 of the Code of Ethics exists between me (or my firm) and (list all persons and/or firms you wish to name as respondents to this arbitration):

Michael Cousins (Broker in Charge) REALTOR® principal 2411 N. Oak St Myrtle Beach, SC 29577
Name Address

REALTOR® principal
Name Address

Sperry Van Ness (Founders Group) 2411 N. Oak St Myrtle Beach, SC 29577
Firm Address

(NOTE: Arbitration is generally conducted between REALTORS® (principals) or between firms comprised of REALTOR® principals. Naming a REALTOR® [principal] as a respondent enables the complainant to know who will participate in the hearing from the respondent's firm; naming a firm may increase the likelihood of collecting any resulting award.)

- (4) I retain, unpaid and owed to me commission which is contested by the above-named persons the sum of \$250,000.00. My claim is predicated upon the statement attached, marked Exhibit 1 and incorporated by reference into this application. The disputed funds are currently held by Keller Williams Realty.
- (5) I request and consent to arbitration through the Board in accordance with its Code of Ethics and Arbitration Manual (alternatively, "in accordance with the professional standards procedures set forth in the bylaws of the Board"), and I agree to abide by the arbitration award and to comply with it promptly.
- In the event I do not comply with the arbitration award and it is necessary for any party to this arbitration to obtain judicial confirmation and enforcement of the arbitration award against me, I agree to pay the party obtaining such confirmation the costs and reasonable attorney's fees incurred in obtaining such confirmation and enforcement.
- (6) I enclose my check in the sum of \$500.00 for the arbitration filing deposit.**
- (7) I understand that I may be represented by legal counsel, and that I should give written notice no less than fifteen (15) days before the hearing of the name, address, and phone number of my attorney to all parties and the Board. Failure to provide this notice may result in a continuance of the hearing, if the Hearing Panel determines that the rights of the other party(ies) require representation.

*Complainants may name one or more REALTOR® principals or a firm comprised of REALTOR principals as respondent(s). Or, complainants may name REALTOR® principals and firms as respondents.

** Not to exceed \$500

- (8) Each party must provide a list of the names of witnesses he intends to call at the hearing to the Board and to all other parties not less than fifteen (15) days prior to the hearing. Each party shall arrange for his witnesses to be present at the time and place designated for the hearing. The following REALTOR® nonprincipal (or REALTOR-ASSOCIATE® nonprincipal) affiliated with my firm has a financial interest in the outcome of the proceeding and may be called as a witness, and has the right to be present throughout the hearing:

All parties appearing at a hearing may be called as a witness without advance notice.

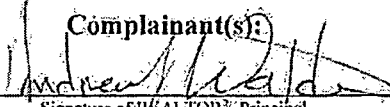
- (9) I declare that this application and the allegations contained herein are true and correct to the best of my knowledge and belief and this request for arbitration is filed within one hundred eighty (180) days after the closing of the transaction, if any, or within one hundred eighty (180) days after the facts constituting the arbitrable matter could have been known in the exercise of reasonable diligence, whichever is later.
- (10) If either party to an arbitration request believes that the Grievance Committee has incorrectly classified the issue presented in the request (i.e., mandatory or voluntary), the party has twenty (20) days from the date of receipt of the Grievance Committee's decision to file a written appeal of the decision. Only those materials that the Grievance Committee had at the time of its determination may be considered with the appeal by the Board of Directors.
- (11) Are the circumstances giving rise to this arbitration request the subject of civil litigation? Yes ☒ No ☐
- (12) Important note related to arbitration conducted pursuant to Standard of Practice 17-4 (1) or (2): Where arbitration is conducted between two (or more) cooperating brokers pursuant to Standard of Practice 17-4 (1) or (2), the amount in dispute and the amount of any potential resulting award is limited to the amount paid to the respondent by the listing broker, seller, or landlord and any amount credited or paid to a party to the transaction at the direction of the respondent.

- (13) Address of the property in the transaction giving rise to this arbitration request:

See attached Purchase Agreement – National Golf Management LLC to Founders National Golf LLC

- (14) The sale/lease closed on: April 22nd 2015

- (15) Agreements to arbitrate are irrevocable except as otherwise provided under state law.

Complainant(s):		
<u>Andrew F. Waldo</u>		<u>9/21/15</u>
Name (Type/Print)	Signature of REALTOR® Principal	Date
<u>2002 N. Oak Street Suite 300 Myrtle Beach, SC 29577</u>		
Address		
<u>843-340-8080</u>	<u>andywaldo@kw.com</u>	
Telephone	Email	
Name (Type/Print)	Signature of REALTOR® Principal	Date
Address		
Name of Firm*	Address	
Telephone	Email	

* In cases where arbitration is requested in the name of a firm comprised of REALTORS® (principals), the request must be signed by at least one of the REALTOR® principals of the firm as a complainant.

(Revised 11/14)



South Carolina Association of REALTORS®
3780 Fernandina Road, Columbia, SC 29210

Response and Agreement to Arbitrate

To the Professional Standards Committee:

REALTOR® Andrew Waldo, Keller Williams

REALTOR® Michael Cousins, Sperry Van Ness

Complainant(s)

Respondent(s)

1. The undersigned, by becoming and remaining a member of the South Carolina Association of REALTORS® has previously consented to arbitration through the Association under its Rules and Regulations.
2. I am a member of the South Carolina Association of REALTORS® (or was a member of the Association at the time the dispute arose).
3. I acknowledge the existence of a dispute arising out of the real estate business as defined by Article 17 of the Code of Ethics but deny any indebtedness as claimed.
4. My denial is predicated upon the statement attached marked Exhibit A, which is hereby incorporated by reference into this Response.
5. (Complete if applicable) Affirmatively, I claim that a monetary dispute arising out of the real estate business exists between the parties wherein there is due to me the sum of \$_____. My claim is predicated upon the statement attached, marked Exhibit B, which is hereby incorporated by reference into this Response.
6. I consent to arbitration through the Association in accordance with its *Code of Ethics and Arbitration Manual* (alternatively, "in accordance with the professional standards procedures set forth in the Bylaws of the Association"), and I agree to abide by the arbitration award and to comply with it promptly.
In the event I do not comply with the arbitration award and it is necessary for any party to this arbitration to obtain judicial confirmation and enforcement of the arbitration award against me, I agree to pay the party obtaining such confirmation the costs and reasonable attorney's fees incurred in obtaining such confirmation and enforcement.
7. I enclose my check in the sum of \$500 for the arbitration filing fee.
8. I understand that I may be represented by counsel, and that I should give written notice no less than 15 days before the hearing of the name, address and phone number of my attorney to all parties and the Board. Failure to provide this notice may result in a continuance of the hearing, if the Hearing Panel determines that the rights of the other party requires representation. Each party must provide a list of the names of witnesses he intends to call at the hearing to the Association and to all other parties not less than 15 days prior to the hearing. Each party shall arrange for his witnesses to be present at the time and place designated for the hearing. The following REALTOR® non-principal (or REALTOR-ASSOCIATE® non-principal) affiliated with my firm has a financial interest in the outcome of the proceeding and has the right to be present throughout the hearing:_____.
9. I declare that the information provided with this Response is true and correct to the best of my knowledge and belief.
10. If either party to an Arbitration Request believes that the Grievance Committee has incorrectly classified the issue presented in the request (i.e., mandatory or voluntary), the party has 20 days from the date of receipt of the Grievance Committee's decision to file a written appeal of the decision. Only those materials that the Grievance Committee had at the time of its determination may be considered with the appeal by any Appeal Panel.

Dated: November 20, 2015

Respondent(s):

Signature of REALTOR® principal

MICHAEL DAVID COUSINS

Name (Type or Print)

2411 N. Oak Street Suite 201

Street Address

Myrtle Beach, SC 29575

City

State

Zip Code

Phone (843) 424 9310

Signature of REALTOR® principal

Name (Type or Print)

Street Address

City

State

Zip Code

Phone ()



South Carolina Association of REALTORS®
3780 Fernandina Road, Columbia, SC 29210

**Request for Procedural Review
(Arbitration)**

To the President of the South Carolina Association of REALTORS®

In the case of: Andrew Waldo, Complainant vs. Michael Cousins, Respondent.

I, Andrew Waldo, do hereby request a procedural review of the arbitration hearing procedures in the above-cited case before a Hearing Tribunal appointed by the President of S.C.A.R.

NOTE: The Directors will not hear an appeal on the merits of the arbitration award. A request for procedural review must be based on allegation(s) of procedural deficiency or other irregularities which may have deprived a party of due process.

My request is based on the following:

(Set forth in reasonable detail [narrative] the facts which support the Request for Review. Attach narrative to Request form if the narrative exceeds the space below. The procedural review request must be accompanied by a deposit in the amount of \$500.00 made payable to the South Carolina Association of REALTORS®).

Please see attached narrative, and Exhibits "A" and "B."

NOTE: Only those facts and issues raised in this written request will be considered by the Hearing Tribunal at the procedural review hearing.

Dated: 2/24/16

Type/Print: Douglas M. Zayicek, Esq., Attorney for Complainant

Signature: [Handwritten Signature]

Address: Bellamy Law Firm
P.O. Box 357
Myrtle Beach, SC 29578-0357

Phone: 843-448-2400

The following grounds, and all inferences, implications, and arguments related thereto, are provided for review, and Complainant requests the decision of the Panel be reversed, or a new hearing by a different Panel of Arbitrators be granted to cure the following defects:

1. The Arbitration Panel denied Complainant due process by allowing testimony/facts/arguments in clear opposition to the Circuit Court Order dated January 11, 2016, signed by the Hon. Donald B. Hocker ("Order"), a copy of which is attached as Exhibit "A." Respondent should not have been provided a forum or opportunity to be heard on issues already decided by a Circuit Court Judge.
2. Order relates to the exact transaction at issue in this Arbitration, involved the same parties, is binding on this Arbitration, and controls the outcome thereof. Order was also issued prior to the Panel hearing, and was provided to the Panel prior to the hearing, and at the hearing.
3. The Panel denied Complainant due process by creating a verdict inconsistent with the Order; in fact, the Panel's decision is directly contrary to Order, and state law.
4. The Panel denied Complainant due process by incorrectly applying state law as outlined in Order. Realtors must follow state law, and the statutes and regulations that govern their conduct, and cannot use the arbitration process to get around state law.
5. The Panel denied Complainant due process based on res judicata, collateral estoppel, and judicial estoppel in light of Order, and the judicial findings therein. Respondent is bound by the judicial findings/conclusions in Order, absent a successful appeal thereof.
6. The Panel now requires a buyer/seller to pay a commission to an agent/broker in which it has no knowledge of, and never agreed to compensate, all directly contrary to state law.
7. The Panel denied Complainant due process by not providing any specific findings of fact or conclusions of law relied on by the Panel as the basis for its decision.
8. The Panel denied Complainant due process by issuing a ruling unsupported by the facts, and completely against state law. Specifically, there cannot be an oral commission agreement among brokers/agents, the Panel cannot make a buyer or seller pay a commission to someone with whom there is no written fee agreement, and the procuring cause of real estate transaction is irrelevant on the payment of a commission under state law.
9. The Panel denied Complainant due process by not having, publishing, and disclosing to its members the details of the arbitration process, or providing its members notice of the procedures to be used at the arbitration.

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF HORRY	)	CIVIL ACTION NO.: 2016-CP-26-_____
Andrew Waldo,	)	
	)	
Appellant,	)	
	)	
vs.	)	
	)	NOTICE OF APPEAL
Michael Cousins; and South Carolina	)	
Association of REALTORS [®] ,	)	
	)	
Respondents.	)	

2016 MAR -1 PM 1:44

Appellant hereby appeals the Award of Arbitrators issued by the South Carolina Association of REALTORS[®] ("Association") in the matter of Andrew Waldo, Complainant, and Michael Cousins, Respondent, dated February 2, 2016 ("Award"), which is attached hereto and incorporated herein as "Exhibit A."¹ This appeal is based upon the following enumerated and otherwise stated grounds:

1. The Arbitration Panel ("Panel") assembled by Respondent Association improperly allowed testimony/facts/arguments in clear opposition to the Circuit Court Order dated January 11, 2016, signed by the Hon. Donald B. Hocker ("Order"), a copy of which is attached as "Exhibit B." The issues herein were already decided by a Circuit Court Judge, and could not be collaterally attacked in an arbitration process.
2. Order relates to the exact transaction at issue in this Arbitration, involved the same parties, is binding on this Arbitration, and controls the outcome thereof. Order was also

¹ Appellant has also filed a Request for Procedural Review with Respondent Association. To the extent Respondent Association refuses to review the issues raised therein, they are raised in this Appeal. Similarly, Appellant reserves the right to amend this Appeal to include any additional grounds for appeal after Respondent Association finishes its review.

issued prior to the Panel hearing, and was provided to the Panel prior to the hearing, and at the hearing.

3. The Panel created a verdict inconsistent with the Order; in fact, the Panel's decision is directly contrary to Order, and state law.
4. The Panel incorrectly applied state law as outlined in Order. Realtors must follow state law, and the statutes and regulations that govern their conduct, and cannot use the arbitration process to get around state law.
5. The Panel decision is barred by res judicata, collateral estoppel, and judicial estoppel. Respondent is bound by the judicial findings/conclusions in Order, absent a successful appeal thereof.
6. The Panel now requires a buyer/seller to pay a commission to an agent/broker in which it has no knowledge of, and never agreed to compensate, all directly contrary to state law.
7. The Panel denied Appellant due process by not providing any specific findings of fact or conclusions of law relied on by the Panel as the basis for its decision.
8. The Panel improperly issued a ruling unsupported by the facts, and completely against state law. Specifically, there cannot be an oral commission agreement among brokers/agents, the Panel cannot make a buyer or seller pay a commission to someone with whom there is no written fee agreement, and the procuring cause of real estate transaction is irrelevant on the payment of a commission under state law.
9. The Panel failed to provide its members the details of the arbitration process, or providing its members notice of the procedures to be used at the arbitration.
10. The Panel violated Appellant's industrial due process rights as described above, in both the manner and process used in the arbitration.

Appellant hereby gives notice of its reservation of all rights to pursue an action before a jury or otherwise for damages resulting from Award, and the process employed by Respondent Association.

Appellant relies upon all documents in possession of Respondent Association related to this matter including, but not limited to, all information disseminated to the Arbitration Panel. Appellant further reserves the right to supplement this appeal with and rely upon at the hearing thereof, such memoranda of law as Appellant may elect to submit prior to or at the hearing on this matter.

Respectfully submitted,

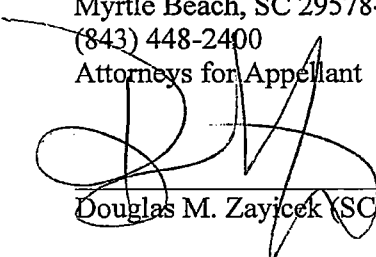
**BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.**

P.O. Box 357

Myrtle Beach, SC 29578-0357

(843) 448-2400

Attorneys for Appellant



Douglas M. Zaycek (SC Bar #11304)

Dated: 3/1/16
Myrtle Beach, South Carolina.

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 16-CP-26-1498

Andrew Waldo,)
Appellant,)

vs.)

Michael Cousins and South Carolina)
Association of REALTORS,)
Respondents.)

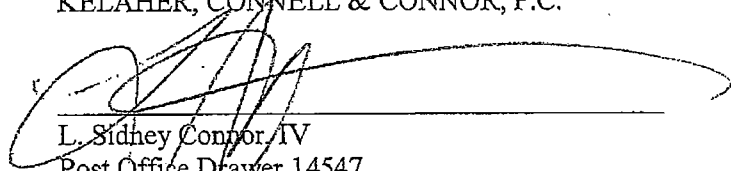
RESPONDENT MICHAEL COUSINS
RESPONSE TO NOTICE OF APPEAL

HORRY COUNTY
2016 MAR 30 PM 1:26
MICHAEL COUSINS - WARD
CLERK OF COURT

The Respondent Michael Cousins hereby responds to Plaintiff's Notice of Appeal as follows:

1. Respondent Michael Cousins denies the material allegations of Appellant's Notice of Appeal.
2. Respondent Michael Cousins would show that Appellant's Notice of Appeal is not ripe because the Plaintiff requested an appeal with the South Carolina Association of REALTORS and that appeal has not yet been heard.
3. Respondent Michael Cousins reserves the right to file an amended response at the appropriate time.

KELAHER, CONNELL & CONNOR, P.C.



L. Sidney Connor, IV
Post Office Drawer 14547
Surfside Beach, SC 29587
(843) 238-5648
sconnor@classactlaw.net
Attorney for Respondent Michael Cousins

March 26, 2016

copy

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Andrew Waldo,

Plaintiff,

vs.

Michael Cousins and South Carolina
Association of REALTORS®,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2016-CP-26-01498

**MOTION TO DISMISS OF DEFENDANT SOUTH
CAROLINA ASSOCIATION OF REALTORS®**

FILED
HORRY COUNTY
2016 APR 12 AM 9:59
CLERK OF COURT
JILLIANE HUGGINS-WARD

The Defendant, South Carolina Association of REALTORS® ("Association") moves the Court for an order dismissing this action pursuant to S.C.R. Civ. P. 12(b)(6) and 12(b)(8). The grounds for this motion are that:

1. The individual parties to this case, Andrew Waldo and Michael Cousins, are members of a REALTOR® association and, as such, agreed to submit all disputes relating to real estate commissions or their work as REALTORS® to binding arbitration before the Association;
2. The binding arbitration between the parties is not complete as Andrew Waldo requested and is receiving a hearing to review the arbitration award appealed in this action on May 2, 2016;
3. The arbitration process is not complete and exhausted, therefore, it is not ready for judicial review; and
4. This Court does not have jurisdiction to entertain an appeal from a non-final process nor a motion to vacate an award that is not final.

copy

This Motion is supported by the pleadings filed in this action, and the memorandum of authorities in support with attached Affidavits and documents to be filed and served.

Respectfully submitted,

Marcus A. Manos By *Mark Gironi*

Marcus A. Manos
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Box 2426
Columbia, South Carolina 29202
803.771.8900
mmanos@nexsenpruet.com

Attorneys for Defendant
South Carolina Association of REALTORS®

April 7, 2016

Columbia, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Andrew Waldo,

Plaintiff,

vs.

Michael Cousins and South Carolina
Association of REALTORS®,

Defendants.

IN THE COURT OF COMMON PLEAS

Case No. 2016-CP-26-01498

**DEFENDANT SOUTH CAROLINA ASSOCIATION
OF REALTORS® MEMORANDUM IN SUPPORT
OF MOTION TO DISMISS**

HORRY COUNTY
2016 APR 14 PM 1:26
CLERK OF COURT

The Defendant, South Carolina Association of REALTORS® ("Association"), submits this memorandum in support of its Motion to Dismiss pursuant to S.C.R. Civ. P. 12(b)(6) and 12(b)(8).

FACTS

Andrew Waldo submitted an application to the Coastal Carolinas Association of REALTORS®. **Exhibit 1**, Affidavit of Heather Tenney, Attachment A and ¶ 7, Electronic Application. Waldo became a member of the Coastal Carolinas Association on August 15, 2014. Pursuant to this agreement, Waldo agreed to abide by the Rules, Regulations, and Code of Ethics of the National Association of REALTORS®, the South Carolina Association of REALTORS®, and the Coastal Carolinas Association of REALTORS®. **Exhibit 1**, Attachment A, Attachment B (Relevant portion of Coastal Carolinas Association Rules), and Attachment C, (Relevant portion of Coastal Carolinas Association Bylaws).

The NAR Code of Ethics requires arbitration between realtors in any dispute arising out of their real-estate practice. **Exhibit 2**, Affidavit of Lindsey Davidson, Attachment A (Relevant

copy

portions of NAR Code of Ethics) and ¶ 6. Likewise, the Bylaws and Rules of both the Association and the Coastal Carolinas Association require the same. **Exhibit 2, Attachment B** (Relevant portion of Association Bylaws); and ¶ 7.

Waldo and Defendant Michael Cousins disputed whether or not a commission was due on certain real-estate transactions involving golf courses. Waldo initiated an arbitration before the Association seeking a determination that the commission need not be split with Cousins. **Exhibit 2, ¶ 8 and Attachment C** (Waldo Request for Arbitration). The agreement between Waldo, Cousins, and the three Associations requires mandatory arbitration and is enforceable under both the Federal Arbitration Act and the South Carolina Uniform Arbitration Act, depending upon which is found to apply. Waldo voluntarily submitted to the arbitration process by filing his request for arbitration on September 28, 2015.

The arbitration process is not yet complete. At Waldo's request, the Association scheduled an appellate review of the current arbitration decision from March 30, 2016. **Exhibit 2, ¶¶ 9 and 10, Attachment D** (Waldo Request for Review) and **Attachment E** (Hearing Notice). Waldo requested a continuance and that hearing has been moved to April 18, 2016. **Exhibit 2, ¶¶ 11 and 12, Attachment F** (Waldo Request for Continuance) and **Attachment G** (Hearing Rescheduling Notice). The parties requested, and the Association agreed, to reschedule the review hearing to May 2, 2016. **Exhibit 2, Attachment H** (Notice of Second Rescheduled Hearing).

DISCUSSION

Under either the Federal Arbitration Act or the South Carolina Uniform Arbitration Act, the "appeal" filed by Waldo is premature and should be dismissed as a matter of law. A participant in an arbitration may only challenge the award on specific statutory grounds. 9 U.S.C. § 10; S.C. Code Ann. § 15-48-130. Both Federal and South Carolina law favor the arbitration of disputes. *Dillon v. BMO Harris Bank, N.A.*, 787 F.3d 707, 712 (4th Cir. 2015) (The Federal Arbitration Act manifests an emphatic federal policy in favor of arbitration and requires courts to rigorously enforce agreements to arbitrate); *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 492, 593 S.E.2d 480, 484 (Ct. App. 2003) (South Carolina law favors arbitration of disputes); *Tritech Elec., Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct. App. 2000). While an exception exists for orders compelling arbitration, any other review of an arbitration issue must await the completion of the arbitration before being reviewed by a trial court and possibly appealed further under the appropriate statutory grounds. *American Cas. Co. of Reading, Pennsylvania v. L-J, Inc.*, 35 F.3d 133, 139 (4th 1994); *abrogation recognized on other gnds., Murray v. United Food and Commercial Workers Intern. Union*, 289 F.3d 297 (4th 2002). Even prior to the enactment of arbitration statutes, South Carolina courts recognized that arbitration must be complete before a party may bring a court action on the same matter. *Harwell v. Home Mut. Fire Ins. Co.*, 228 S.C. 594, 91 S.E.2d 273 (1956).

The arbitration process at the Association is not complete. A review hearing is scheduled for April 18, 2016. Plaintiff Waldo voluntarily submitted this matter to arbitration and participated in the hearing and requested a review hearing. As the Supreme Court of South Carolina stated in a case related to the very same arbitration rules and contracts, a party who

voluntarily participates waives any objection to arbitration of a commission dispute. *Garrell v. Blanton*, 316 S.C. 186, 447 S.E.2d 840 (1994). This substantive issue, however, should await this Court's review upon completion of the arbitration before the Association.

Several courts hold they lack subject-matter jurisdiction to review non-final arbitration proceedings. See, e.g., *In re Pisgah Contractors, Inc.*, 117 F.3d 133, 136 (4th Cir. 1997). Neither the Federal Arbitration Act nor the South Carolina Uniform Arbitration Act gives this Court subject-matter jurisdiction to review an incomplete arbitration. Thus, the case should also be dismissed under S.C.R. Civ. P. 12(b)(1).

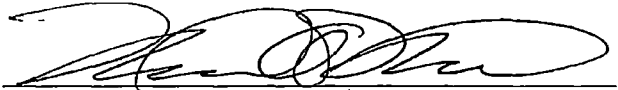
This filing by REALTOR® Waldo is premature and should not be entertained by this Court. The case should be dismissed without prejudice awaiting the outcome of the full arbitration process.

Furthermore, the arbitration constitutes an independent form of litigation which this Court only has power to review once complete under the relevant federal and state statutes. The arbitration involves identical litigation raising identical issues and parties. Waldo's pleading before this Court admits the same issue has been raised and presented to the arbiters for decision. Therefore, this case is improper pursuant to Rule 12(b)(8). Whenever parallel litigation exists over the exact same issues, the second case should be dismissed and the first case allowed to run its course. *Corbett v. City of North Myrtle Beach*, 336 S.C. 601, 521 S.E.2d 276 (Ct. App. 1999). Where, as here, a case involves the same parties, based upon the same facts and circumstances, it should be dismissed. *Id.* at 610-11, 521 S.E.2d at 281.

CONCLUSION

For the foregoing reasons, this case should be dismissed without prejudice to Waldo's right to file an appropriate statutory action for review of a completed arbitration award.

Respectfully submitted,



Marcus A. Manos
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Box 2426
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mmanos@nexsenpruet.com

Attorneys for Defendant
South Carolina Association of REALTORS®

April 12, 2016

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 16-CP-26-1498

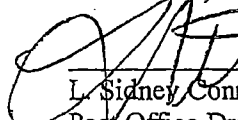
Andrew Waldo,)
Appellant,)
vs.)
Michael Cousins and South Carolina)
Association of REALTORS,)
Respondents.)

**NOTICE OF MOTON AND MOTION
OF RESPONDENT MICHAEL COUSINS
TO CONFIRM ARBITRATION AWARD
AND ENTER JUDGMENT**

**TO: DOUGLAS M. ZAYICEK, ATTORNEY FOR ANDREW WALDO AND
MARCUS A. MANOS, ATTORNEY FOR SOUTH CAROLINA ASSOCIATION
OF REALTORS**

YOU WILL PLEASE TAKE NOTICE that on the tenth (10th) day after service hereof, or as soon hereafter as counsel may be heard, counsel for the above-named Defendant Michael Cousins will move before this Court for an Order confirming the Arbitration Award of the South Carolina Association of Realtors and entering judgment accordingly. The grounds for this motion are that this matter was arbitrated before the South Carolina Association of Realtors and an award rendered in favor of Michael Cousins against Andrew Waldo in the amount of \$250,000. All appeals have been exhausted before the South Carolina Association of Realtors and the arbitration rules of the South Carolina Association of Realtors allow the prevailing party to petition the Circuit Court for confirmation of the award and entry of judgment. This motion is further supported by the attached Memorandum.

KELAHER, CONNELL & CONNOR, P.C.


L. Sidney Connor, IV
Post Office Drawer 14547
Surfside Beach, SC 29587
(843) 238-5648
sconnor@classactlaw.net
Attorney for Defendant/ Respondent Michael Cousins

May 9, 2016

RULE 11 CERTIFICATION

The attorney(s) below hereby certifies that either:

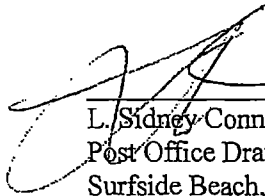
A. He/She has communicated, orally or in writing, with opposing counsel and has attempted in good faith to resolve the matter contained in the motion; or

B. Such consultation would serve no useful purpose, or could not be timely held; or

C. Due to the nature of the motion, there is no duty to consult opposing counsel in that this is a motion:

- a. To Dismiss
- b. For Summary Judgment
- c. For New Trial
- d. For Judgment NOV

KELAHHER, CONNELL & CONNOR, P.C.



L. Sidney Connor, IV
Post Office Drawer 14547
Surfside Beach, SC 29587
(803) 238-5648
Attorneys for Plaintiff

May 9, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)
)
Andrew Waldo,)
)
Appellant,)
)
vs.)
)
Michael Cousins and South Carolina)
Association of REALTORS,)
)
Respondents.)
_____)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 16-CP-26-1498

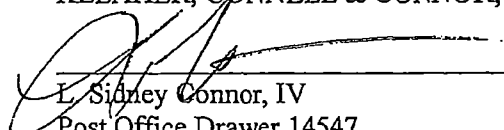
**MEMOMORANDUM IN SUPPORT OF
RESPONDENT MICHAEL COUSINS'
MOTION TO CONFIRM ARBITRATION
AWARD AND ENTER JUDGMENT**

This matter involves a dispute over a commission for the sale of real estate. As a result of the sale of certain golf course property, a commission was generated in the amount of \$500,000. Broker Andrew Waldo claimed the entire commission of \$500,000. Broker Michael Cousins claimed one-half of that commission in the amount of \$250,000.

Andrew Waldo filed an Arbitration proceeding with the South Carolina Association of REALTORS. A full arbitration hearing was held on February 2, 2016 resulting in an award of \$250,000 to Michael Cousins. See Award of Arbitrators attached. That ruling was appealed by Mr. Waldo and the Appeal was heard on May 2, 2016. See Decision of Procedural Review Hearing Tribunal attached hereto with cover letter.

Defendant Michael Cousins requests this Court to enter an Order confirming the Arbitration Award and entering judgment against the Plaintiff Andrew Waldo in the amount of \$250,000.

KELAHHER, CONNELL & CONNOR, P.C.



L. Sidney Connor, IV
Post Office Drawer 14547
Surfside Beach, SC 29587
(843) 238-5648
sconnor@classactlaw.net
Attorney for Defendant/Respondent Michael Cousins

May 9, 2016

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Andrew Waldo; Jane Zheng; and
SC Coast Properties, LLC d/b/a Keller
Williams Realty,

Appellants,

vs.

Michael Cousins; Founders Five, LLC d/b/a
Sperry Van Ness Founders Group; and South
Carolina Association of REALTORS®,

Respondents.

IN THE COURT OF COMMON PLEAS

CIVIL ACTION NO.: 2016-CP-26-9338

NOTICE OF APPEAL

2016 MAY 17 PM 1:05
CLERK OF COURT

Appellants hereby appeal and challenge the validity of the Award of Arbitrators issued by the South Carolina Association of REALTORS® ("Association") in the matter of Andrew Waldo, Complainant, and Michael Cousins, Respondent, dated February 2, 2016, as affirmed by the Procedural Review Hearing Panel on May 2, 2016 ("Award"), attached hereto and incorporated herein as "Exhibit A." This appeal is based upon the following enumerated and otherwise stated grounds:

1. The Association improperly allowed testimony/facts/arguments in clear opposition to the Circuit Court Order dated January 11, 2016, signed by the Hon. Donald B. Hocker ("Order"), a copy of which is attached as "Exhibit B." The issues were already decided by a Circuit Court Judge, and could not be collaterally attacked in an arbitration process.
2. Order relates to the exact transaction at issue in the Arbitration, involved the same parties, is binding on this Arbitration, and controls the outcome thereof. Order was also issued prior to the Arbitration, and was provided to the Association prior to the arbitration.

3. Association's decision is barred by res judicata, collateral estoppel, and/or judicial estoppel. Association is bound by the judicial findings/conclusions in Order, absent a successful appeal thereof.
4. Association's decision created an inconsistent decision with the Circuit Court; in fact, the Association's decision is contrary to the Circuit Court, state law, and its own rules and regulations.
5. Association failed to apply the law, and/or incorrectly stated that it could not, or should not, consider the law. The Association is bound by the law, and is not above the law.
6. Association incorrectly applied, and/or failed to apply, state law as outlined in Order. Association must follow the statutes and regulations that govern real estate agents and brokers, and cannot use the arbitration process to avoid state law.
7. Association's decision requires a buyer/seller to pay a commission to an agent/broker in which it has no knowledge, and never agreed to compensate. Such decision is directly contrary to state law, and Order. The Affidavits from the buyer and seller are clear, and neither wanted Mr. Cousins involved in the underlying transaction.
8. Respondent Cousins is not entitled to any commission whatsoever from the underlying transaction, because he had no agreement with either the buyer or seller, and had no knowledge of the underlying transaction, among other reasons.
9. The Circuit Court already ruled Respondent Cousins did not represent seller in the underlying transaction, and it was error for Association to allow Respondent Cousins to then testify before Association that he represented the buyer in the underlying transaction without any legal agreement from buyer. The affidavit from buyer is dispositive of any

claim by Mr. Cousins that he represented the buyer, and Mr. Cousins admitted never having any communication with the buyer.

10. Equity cannot be the basis for disregarding the law established through the will of the South Carolina General Assembly.
11. Association denied Appellants due process, and violated state law, by not providing any specific findings of fact or conclusions of law relied as the basis for its decision. In fact, Association did not provide Appellants with the basis for the Hearing Panel's decision until after Appellants were required to present their case to the Review Panel.
12. Association's rules allow for its counsel to unilaterally make up reasons to support the Hearing Panel's decision and provide those reasons to the Review Panel, even though said counsel is not a part of the decision-making process, and even though Association asserts the actual outcome is not relevant to the Review Panel.
13. Association allowed and relied on hearsay, speculative testimony, and otherwise improper and inadmissible testimony in reaching its decision.
14. Association improperly issued a ruling unsupported by the facts and the law; in fact, the ruling is contrary to state law. Specifically, there was no agreement as found by Association (implied agency or co-broker), nor could there be either such agreements under South Carolina law; there was no evidence whatsoever that Mr. Cousins was the procuring cause; Ms. Zheng did not, and in fact could not, bind Keller Williams in any "co-broker" situation; Association cannot make a buyer or seller pay a commission to someone with whom there is no written agreement sufficient under state law; and the procuring cause of real estate transaction is irrelevant on the payment of a commission under state law in the absence of such legal agreement.

15. Association failed to provide its members the details of the arbitration process, or providing its members notice of the procedures to be used at the arbitration.
Alternatively, the Association provided incomplete, confusing, and contradictory instructions to its members.
16. Association's standard of review violated its own instructions, as well as its definition of due process.
17. Association created and enforced an illegal contract as the basis for its decision.
18. The Panel violated Appellant's industrial due process rights as described above, in both the manner and process used in the arbitration.
19. Association was arbitrary and capricious, violated Appellants' due process rights, and violated state law by not allowing a court reporter to be present.
20. Association has attempted to create an arbitration process that freely disregards the law, and is beyond judicial review.
21. Appellants are agreeable to the Court holding the money at issue until all appeals/rehearings, etc. have been decided. Appellants requested Association hold the money at issue, but Association would not agree. In the alternative, Appellants will provide the money to Association upon Association's agreement not to disburse the money until this matter is finally and fully resolved.
22. Association's requirement that any award be paid to the Association prior to Appellants' time to file an action challenging the validity of the award, or be at risk of violating its membership duties, violates Appellants' legal rights.
23. This action, and 2016-CP-26-1498, should be consolidated.

24. To the extent this action is incorrectly captioned as an appeal, it should be characterized as a declaratory judgment under the South Carolina Uniform Declaratory Judgments Act, S.C. Code Ann. 15-53-10, et seq., or other legal claim for relief.

Appellant hereby gives notice of its reservation of all rights to pursue an action before a jury or otherwise for damages resulting from Award, and the process employed by Association.

Appellant relies upon all documents in possession of Respondent Association related to this matter including, but not limited to, all information disseminated to Association, which Appellants shall make a part of this record, including the recording of the Hearing Panel. Appellant further reserves the right to supplement this appeal with and rely upon at the hearing thereof, and such memoranda of law as Appellant may elect to submit prior to or at the hearing on this matter.

Respectfully submitted,

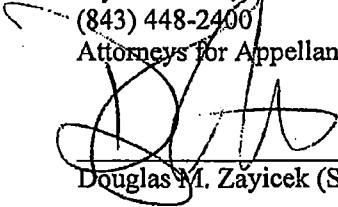
**BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.**

P.O. Box 357

Myrtle Beach, SC 29578-0357

(843) 448-2400

Attorneys for Appellants



Douglas M. Zayicek (SC Bar #11304)

Dated: 5/17/16
Myrtle Beach, South Carolina.

COPY

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Andrew Waldo,

Appellant,

vs.

Michael Cousins; and South Carolina
Association of REALTORS®,

Respondents.

) IN THE COURT OF COMMON PLEAS
)
)

) CIVIL ACTION NO.: 2016-CP-26-01498
)
)

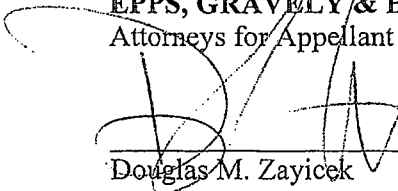
)
) **MEMORANDUM IN OPPOSITION TO**
) **RESPONDENT MICHAEL COUSINS'**
) **MOTION TO CONFIRM ARBITRATION**
) **AWARD AND ENTER JUDGMENT**
)
)
)

TO: L. SIDNEY CONNOR, IV, ATTORNEY FOR RESPONDENT MICHAEL COUSINS; AND MARCUS A. MANOS, ATTORNEY FOR SOUTH CAROLINA ASSOCIATION OF REALTORS®.

The underlying dispute involves a real estate commission. As a result of this Court's Order in Civil Action No. 2015-CP-26-02066, this Court has already determined that Respondent Cousins is not entitled to any commission. Contrary to South Carolina law, and in complete disregard for the Circuit Court's Order and the will of the buyer and seller in the underlying real estate transaction, the South Carolina Association of REALTORS® awarded Respondent Cousins one-half of the commission.

The decision of the South Carolina Association of REALTORS® is under appeal in this case, and in Civil Action No. 2016-CP-26-03338. Therefore, Respondent Cousins' Motion to confirm the arbitration award and enter judgment is not ripe until all appeals have been exhausted.

**BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELLY & BOWERS, P.A.**
Attorneys for Appellant


Douglas M. Zayicek

Dated: 5/19/16
Myrtle Beach, South Carolina.

2016 MAY 19 PM 1:07

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 16-CP-26-3338

Andrew Waldo' Jane Zheng; and)
SC Coast Properties, LLC d/b/a)
Keller Williams Realty,)
)
Appellants,)

vs.)

Michael Cousins; Founders Five,)
LLC d/b/a Sperry Van Ness)
Founders Group; and South Carolina)
Association of REALTORS,)
)
Respondents.)

**RESPONSE TO NOTICE OF APPEAL
BY RESPONDENTS MICHAEL COUSINS,
FOUNDERS FIVE, LLC D/B/A
SPERRY VAN NESS FOUNDERS GROUP**

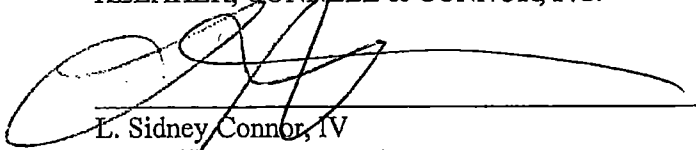
The Respondents Michael Cousins and Founders Five LLC d/b/a Sperry Van Ness Founders Group hereby respond to Plaintiffs' Notice of Appeal as follows:

1. Except as is hereinbelow specifically admitted, each and every allegation of the Notice of Appeal is expressly denied.
2. The allegations of Paragraph No. 1 are denied.
3. The allegations of Paragraph No. 2 are denied.
4. The allegations of Paragraph No. 3 are denied.
5. The allegations of Paragraph No. 4 are denied.
6. The allegations of Paragraph No. 5 are denied.
7. The allegations of Paragraph No. 6 are denied.
8. The allegations of Paragraph No. 7 are denied.
9. The allegations of Paragraph No. 8 are denied.
10. The allegations of Paragraph No. 9 are denied.

11. The allegations of Paragraph No. 10 are denied.
12. The allegations of Paragraph No. 11 are denied.
13. The allegations of Paragraph No. 12 are denied.
14. The allegations of Paragraph No. 13 are denied.
15. The allegations of Paragraph No. 14 are denied.
16. The allegations of Paragraph No. 15 are denied.
17. The allegations of Paragraph No. 16 are denied.
18. The allegations of Paragraph No. 17 are denied.
19. The allegations of Paragraph No. 18 are denied.
20. The allegations of Paragraph No. 19 are denied.
21. The allegations of Paragraph No. 20 are denied.
22. The allegations of Paragraph No. 21 are denied.
23. The allegations of Paragraph No. 22 are denied.
24. In responding to Paragraph No. 23, these Respondents have no position with regard to consolidation.
25. In responding to Paragraph No. 24, these Respondents deny the legal conclusions contained therein.
26. In further responding to the Appeal, Respondents would state as follows:
 - a. The Appellants agreed to the arbitration forum and filed the arbitration proceeding on their own initiative. The Appellants are charged with knowledge of all rules and regulations of the arbitration proceeding which are clearly set forth by the South Carolina Association of Realtors and available to the Realtors for their review.
 - b. The Respondents hereby make reference to and incorporate all of the Rules of Arbitration of the South Carolina Association of Realtors.

- c. The Circuit Court Order signed by the Honorable Donald B. Hocker addressed a limited issue, namely the relationship between the Seller and Michael Cousins and Founders Five, LLC d/b/a Sperry Van Ness Founders Group. The decision did not address the relationship between two co-brokers. Further, Paragraph No. 2 of the Notice of Appeal contains a misstatement by claiming that the Order "involved the same parties." By the time the Order was written, the Appellants in this case had already been voluntarily dismissed from the case and had filed their own arbitration proceeding. The Appellants in this case were not a party to the Order and the Order does not relate to the relationship between the Appellants and Respondents.
- d. The Appellants had a full and fair opportunity to have this matter heard before the Arbitration Panel.
- e. The Appellants had a full and fair opportunity to appeal that award through a procedural review to another arbitration panel.
- f. Both of those hearings were conducted according to the Arbitration Rules of the South Carolina Association of Realtors.
- g. Any confusion which the Appellant claims concerning the Rules of Arbitration were a result of the Appellant not reading the rules as was evident both at the initial hearing and at the Appeals hearing.
- h. Section 53(a) of the Arbitration Rules specifically state that "the award shall be in writing and signed by the Arbitrators or a majority of them, shall state only the amount of the award, and, when so signed and transmitted to each of the parties, shall be valid and binding and shall not be subject to review or appeal."

KELAHHER, CONNELL & CONNOR, P.C.



L. Sidney Connor, IV
Post Office Drawer 14547
Surfside Beach, SC 29587
(843) 238-5648
sconnor@classactlaw.net
Attorney for Respondents Michael Cousins,
Founders Five, LLC d/b/a Sperry Van Ness
Founders Group

May 23, 2016

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Andrew Waldo,

Plaintiff,

vs.

Michael Cousins and South Carolina
Association of REALTORS®,

Defendants.

IN THE CIRCUIT COURT

Case No. 2016-CP-26-1498

**MOTION TO DISMISS OR, IN THE
ALTERNATIVE, FOR SUMMARY
JUDGMENT AND MEMORANDUM IN
SUPPORT**

The Defendant, South Carolina Association of REALTORS® ("Association") moves to dismiss Plaintiff Andrew Waldo's Notice of Appeal on the grounds that his "appeal" does not fit within the narrow exceptions allowing a court to vacate an arbitration award. The Complaints/Appeal filed in these actions fail to allege facts sufficient to vacate an arbitration award under either the South Carolina or Federal Arbitration Acts and should be dismissed under S.C.R. Civ. P. 12(b)(6). Alternatively, Defendants are entitled to summary judgment pursuant to S.C.R. Civ. P. 56.

FACTS

Andrew Waldo submitted an application to the Coastal Carolinas Association of REALTORS®. Exhibit 1, Affidavit of Heather Tenney, Attachment A and ¶ 7, Electronic Application. Waldo became a member of the Coastal Carolinas Association on August 15, 2014. Pursuant to this agreement, Waldo agreed to abide by the Rules, Regulations, and Code of Ethics of the National Association of REALTORS®, the South Carolina Association of REALTORS®, and the Coastal Carolinas Association of REALTORS®. Exhibit 1, Attachment A, Attachment B (Relevant portion of Coastal Carolinas Association Rules), and

copy

Attachment C, (Relevant portion of Coastal Carolinas Association Bylaws).

The NAR Code of Ethics requires arbitration between realtors in any dispute arising out of their real-estate practice. **Exhibit 2**, Affidavit of Lindsey Davidson, Attachment A (Relevant portions of NAR Code of Ethics) and ¶6. Likewise, the Bylaws and Rules of both the Association and the Coastal Carolinas Association require the same. **Exhibit 2**, Attachment B (Relevant portion of Association Bylaws); and ¶7.

Waldo and Defendant Michael Cousins disputed whether or not a commission was due on certain real-estate transactions involving golf courses. Waldo initiated an arbitration proceeding before the Association seeking a determination that the commission need not be divided with Cousins. **Exhibit 2**, ¶8 and Attachment C (Waldo Request for Arbitration). The agreement between Waldo, Cousins, and the three Associations requires mandatory arbitration and is enforceable under both the South Carolina Uniform Arbitration Act and the Federal Arbitration Act depending upon which is found to apply. Waldo voluntarily submitted to the arbitration process by filing his request for arbitration on September 28, 2015. At the conclusion of the hearing, Waldo admitted that the hearing had been fair and that he had an adequate opportunity to testify, present evidence and witnesses, and conduct cross examination. **Exhibit 3**, Second Affidavit of Lindsey Davidson, ¶¶ 6 and 7.

At Waldo's request, the Association scheduled an appellate review of the current arbitration decision from March 30, 2016. **Exhibit 2**, ¶¶ 9 and 10, Attachment D (Waldo Request for Review) and Attachment E (Hearing Notice). On May 2, 2016, the Procedural Review Hearing Tribunal affirmed the award, concluding the arbitration process. **Exhibit 4**.

ARGUMENT

I. STANDARD OF REVIEW

A trial court's ruling on a Rule 12(b)(6) motion to dismiss is premised solely on the allegations set forth in the complaint. Williams v. Condon, 347 S.C. 227, 231 553 S.E.2d 496, 499 (Ct. App. 2001). Although the allegations in the complaint, and the inferences drawn from the alleged facts, must be viewed in the light most favorable to the plaintiff, the court "may dismiss a claim when the defendant demonstrates the plaintiff has failed to state facts sufficient to constitute a cause of action in the pleadings filed with the court." Flateau v. Harrelson, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003).

"If on a motion under 12(b)(6) matters outside the pleadings are presented and not excluded, the motion shall be treated as one for summary judgment." McDonnell v. The Consolidated School District of Aiken, 315 S.C. 487, 489 n.2, 445 S.E.2d 639, 639 n.2 (1994). "Summary judgment is appropriate when it is clear there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." Wiedmann v. Town of Hilton Head, 330 S.C. 532, 537, 500 S.E.2d 785-86 (1998).

II. WALDO'S APPEAL SHOULD BE DISMISSED BECAUSE IT FAILS TO FIT WITHIN THE NARROW EXCEPTIONS THAT ALLOW A COURT TO VACATE AN ARBITRATION AWARD UNDER THE SOUTH CAROLINA ARBITRATION ACT.

Waldo's appeal should be dismissed because it does not fit within the narrow exceptions allowing a court to vacate an arbitration award. When a case is submitted to arbitration, arbiters decide issues of both law and fact. Once an award is entered, it is generally conclusive, and "courts will refuse to review the merits of an award." Gissel v. Hart, 383 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). A court will vacate an award only if the arbiter "exceeds his or her powers and/or manifestly disregards or perversely

misconstrues the law.” Id.; S.C. Code § 15-48-130.¹ “Judicial review of an arbitration award is limited in scope.” White v. Preferred Research, Inc., 315 S.C. 209, 212, 432 S.E.2d 506, 508 (Ct. App. 2003).

Arbiters exceed their powers only if the arbitrated issue is not within the scope of the arbitration agreement. Harris v. Bennett, 332 S.C. 238, 244, 503 S.E.2d 782, 785 (Ct. App. 1998). For example, if an arbiter awards punitive damages when the agreement expressly excludes them, the arbiter has exceeded his or her powers. But “[f]actual and legal errors by arbitrators do not constitute an abuse of powers, and a court is not required to review the merits of a decision so long as the arbitrators do not exceed their powers.” Gissel at 242, 676 S.E.2d at 324.

As to a manifest disregard of the law, a party must show “something beyond a mere error in construing or applying the law.” Id. at 241, 676 S.E.2d at 323. “Even a ‘clearly erroneous interpretation of the contract’ cannot be disturbed.” Id. The focus is on the conduct of the arbiter, and setting aside an award on this basis requires proof that “*the arbitrator knew of the governing principle yet refused to apply it.*” Id. (emphasis added). Further, “the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable.” Id.

A case almost on point is Batten v. Howell, 300 S.C. 545, 389 S.E.2d 170 (Ct. App. 1990). In that case, realtor Howell disputed whether he owed realtor Batten a commission over a sale of real estate. The arbiters ruled in favor of Batten and awarded him \$10,000. Howell challenged the award, claiming there was no legal or factual basis to support it, and

¹ A court will also vacate an award if the (1) the award was procured by corruption, fraud, or undue means; (2) the arbiters were unfairly biased; (3) the arbiters refused to postpone the hearing despite due cause; or (4) there was no actual arbitration agreement. S.C. Code Ann. § 15-48-130. But Waldo has not raised these issues and instead alleges that law does not support the award.

that the arbiters had manifestly disregarded or perversely misconstrued the law. On appeal, the court found that there was evidence that Howell invited Batten to sell the property and agreed to pay a commission if he produced a buyer. Although the buyer rejected the offer made through Batten, the buyer later bought the property.

Importantly, the court noted that “[t]he arbitrators did not give reasons for their decision to award Realtor Batten a commission, *but they are not required to do so.*” *Id.* at 549, 389 S.E.2d at 172 (emphasis added). So long as the factual inferences and legal conclusions supporting the award are “barely colorable,” it should be confirmed. Because there was “at least an arguable ground for the award,” the court affirmed the award. *Id.*; see also Weimer v. Jones, 364 S.C. 78, 610 S.E.2d 850 (Ct. App. 2005) (“The parties’ vigorous debate regarding which defense is proper demonstrates the arbitrator did not disregard well-defined, explicit, and clearly applicable law in rendering his decision.”).

In this case, Cousins and Waldo, both realtors, disputed whether Waldo was entitled to keep the entire \$500,000 commission for the sale of property that closed in early 2015. Cousins claims he is entitled to \$250,000. The Association takes no side in this dispute, but simply defends the process it used to arbitrate the dispute.

Cousins’s brokerage firm originally sued Waldo’s brokerage firm, along with several property sellers, in the case styled Founders Five, LLC v. The Real Estate Company et al., Case No. 2015-CP-26-2066. Although he now attacks the arbitration award, Waldo demanded in 2015 that the parties arbitrate their dispute and he initiated proceedings with the Association. See Garrell v. Blanton, 316 S.C. 186, 447 S.E.2d 840 (1994) (holding that, in a case involving very same arbitration rules and contracts, a party who voluntarily participates in arbitration waives any objection to the arbitration of a commission dispute).

Although Cousins and Waldo agreed to carve out their claims and arbitrate them, Cousins's claims against the sellers of the property remained in the circuit court. On January 11, 2016, the circuit court dismissed Cousins's claims against National Golf Management, LLC on the basis that Cousins, as broker, did not have a written agreement with National Golf Management, LLC, as seller. In dismissing Cousins's claim against National Golf Management, the circuit court relied on S.C. Code Ann. § 40-57-139(G), which states as follows:

For all real estate transactions, no agency relationship between a buyer, seller, landlord, or tenant and a brokerage company and its affiliated licensees exists unless the buyer, seller, landlord, or tenant *and the brokerage company and its affiliated licenses agree, in writing, to the agency relationship*. No type of agency relationship may be assumed by a buyer, seller, landlord, tenant, or licensee or created orally or by implication.

The circuit court's dismissal of Cousins's claims against National Golf Management based on § 40-57-139(G) makes sense because the statute states that, between broker and seller, a written agreement is required. Real estate agents owe a fiduciary duty to their clients. Darby v. Furman Co., Inc., 334 S.C. 343, 346, 513 S.E.2d 848, 849 (1999). The statute created a requirement that this fiduciary relationship be in writing.

But the statute *does not* apply to claims between brokers. The statute states that an agency relationship between "buyer, seller, landlord, or tenant," on one hand, and a "brokerage company and its affiliated licensees," on the other hand, requires a written agreement. The statute does not address agreements between brokers to share a commission. The circuit court in Founders Five relied solely on this statute in making its decision.

The distinction is important because the arbitration between Cousins and Waldo was not a dispute between a broker and a seller, but rather a dispute between broker and

broker. Section 40-57-139(G), therefore, did not apply. Further, the court order relied on by Waldo for res judicata did not address the issue of brokers sharing a commission. The courts recognize an independent claim to split commissions between brokers. See, e.g., Hackler v. Earl Wiegand Real Estate, Inc., 295 S.C. 396, 368 S.E.2d 686 (Ct. App. 1988). The agreement to divide a commission need not be in writing or even expressed. Such an agreement between brokers can be implied. Id. at 398-99; 368 S.E.2d at 686.

Cousins and Waldo arbitrated their broker-versus-broker dispute on February 2, 2016 before a panel of five Association arbiters. After reviewing the evidence and hearing arguments, the panel found in favor of Cousins and awarded him \$250,000, which was half of the \$500,000 commission. Waldo then appealed to the Association's Procedural Review Hearing Tribunal, which affirmed the award on May 2, 2016.

Waldo has no basis to dispute the arbitration award. There is no evidence that the dispute was outside the arbitration agreement, nor was there any evidence that the arbitration panel exceeded the authority provided in its Code of Ethics. Indeed, Waldo admitted at the hearing that the hearing had been conducted fairly, and that he had had an opportunity to testify, present evidence and witnesses, and cross examine any hostile witnesses. **Exhibit 3**, Second Affidavit of Lindsey Davidson, ¶¶ 6 and 7.

This court should not entertain Waldo's attempts to re-litigate the same matter that he presented to the arbitration panel. He voluntarily submitted his claim to the full \$500,000 commission, presented his evidence and made his arguments, and must now live with the decision. The arbitration panel found that, based on the evidence, there was an agreement between Waldo and Cousins to split the commission. Cousins's entitlement to half the commission was more than "barely colorable" and at least "arguable," which is all

that is required. See Batten, 300 S.C. at 549, 389 S.E.2d at 172 (Ct. App. 1990).

III. UNDER THE FEDERAL ARBITRATION ACT, WALDO'S APPEAL FAILS TO MEET THE NARROW STATUTORY EXCEPTIONS ALLOWING A COURT TO VACATE AN AWARD.

If the Federal Arbitration Act ("FAA") applies to Waldo's appeal, his case should be dismissed. Similar to South Carolina law, "[r]eview of an arbitrator's award is severely circumscribed" Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc., 142 F.3d 188, 193 (4th Cir. 1998). "Indeed, the scope of review of an arbitrator's valuation decision is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation." Id. To vacate an award under the FAA, an applicant must show that the arbiter manifestly disregarded the law; the award was procured by fraud or corruption; the arbiter was partial or corrupt; the arbiters were guilty of misconduct; or the arbiters "exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." Id.; 9 U.S.C. § 10.

The burden on the applicant seeking to vacate an award is "heavy." MCI Constructors, LLC v. City of Greensboro, 610 F.3d 849, 857 (4th Cir. 2010). As a matter of law, "neither misinterpretation of a contract nor an error of law constitutes a ground on which an award may be vacated." Id. at 861. So long as there is an arguable basis for the arbiter's decision, it should be upheld. And similar to South Carolina law, an arbiter does not need to post his or her reasoning. "It is well settled that an arbitrators are not required to disclose the basis upon which their awards are made and courts will not look behind a lump-sum award in an attempt to analyze their reasoning process." Id. at 862.

Thus, the analysis that a court uses for determining whether to vacate a federal arbitration award is largely the same analysis used under South Carolina law. An arbiter does not need to state reasons; the challenger faces a heavy burden; and merely misapplying the law is not enough to vacate an award. For the same reasons given above in Part II, Waldo does not allege a basis to challenge an award under the FAA. Regardless of whether state or federal law applies, Waldo's appeal should be dismissed, and the award confirmed.

CONCLUSION

Waldo's appeal in this action and in Case Number 2016-CP-26-3338 (which the Association consents to being consolidated with this case, and in which the Association is filing a separate Motion to Dismiss or, in the alternative, for Summary Judgment) fails to state a claim upon which relief may be granted. In the alternative, there is no genuine issue of material fact and the Association is entitled to judgment as a matter of law. For the above reasons, this case should be dismissed with prejudice or summary judgment should be granted for the Association.



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Attorneys for Defendant
South Carolina Association of REALTORS®

June 17, 2016

Columbia, South Carolina

COPY

STATE OF SOUTH CAROLINA

COUNTY OF HORRY

Andrew Waldo,

Appellant,

vs.

Michael Cousins; and South Carolina
Association of REALTORS®,

Respondents.

IN THE COURT OF COMMON PLEAS
CIVIL ACTION NO.: 2016-CP-26-01498

**APPELLANT'S MEMORANDUM IN
OPPOSITION TO RESPONDENT'S
MOTION TO DISMISS, OR, IN THE
ALTERNATIVE, FOR SUMMARY
JUDGMENT**

HORRY COUNTY
2016 JUL 25 AM 8:47
CLERK OF COURT

INTRODUCTION

Respondent South Carolina Association of REALTORS® (hereinafter, the Association) filed a Motion to Dismiss or, in the Alternative, for Summary Judgment in this matter. In its motion, the Association alleges Appellant's appeal of an arbitration award in favor of Michael Cousins (hereinafter, "Cousins") should be dismissed because Appellant's Notice of Appeal does not fit within the exceptions which allow a court to vacate an arbitration award. Appellant now files this Memorandum in Opposition to Respondent's Motion on the grounds that Appellant's Notice of Appeal alleges facts sufficient to set forth a viable claim that the Association's arbitration panel manifestly disregarded well-defined, explicit, and clearly applicable South Carolina law when it awarded Cousins a real estate commission of \$250,000.00: (1) in absence of any written agency and/or listing agreement with the buyers or sellers in the transactions at issue, (2) in the absence of buyers' or sellers' knowledge and consent to any alleged subagency agreement between Michael Cousins, Sperry Van Ness, and Appellant, and (3) in the absence of buyers' or sellers' informed written consent to any alleged dual agency agreement between Cousins and/or Sperry Van Ness, and Appellant. Further, the actions of the Arbitration Panel

and the Procedural Review Board, in contravention of their own set policies and procedures, as well as state law, substantially prejudiced Appellant. Therefore, Respondent's Motion to Dismiss, or, In the Alternative, for Summary Judgment should be denied.

PROCEDURAL HISTORY AND STATEMENT OF FACTS

This case arises out of a dispute over whether or not Cousins¹ and Sperry Van Ness were due a commission on certain real estate transactions involving golf courses in the Myrtle Beach, South Carolina area, during which a group of Chinese buyers' and their entity, Founders National Golf, LLC, were represented by Keller Williams and its agent Jane Zheng.

On March 20, 2015, Sperry Van Ness brought an action against Keller Williams, Randy Wallace, Jane Zheng, National Golf Management, LLC (or otherwise referred to as "Seller"), Xian (Nick) Dou, Yang Wang, and Kang Xou (together, "Chinese Buyers"). In its Complaint, Sperry Van Ness alleged that it was the "procuring cause" of certain real estate transactions between the Seller and Chinese Buyers and sought the following: (1) that any commission from these golf course real estate transactions obtained by Keller Williams, Randy Wallace and/or Jane Zheng be set aside at closing and held in escrow, (2) that it be awarded one-half of any commissions received by Keller Williams, Randy Wallace, and/or Jane Zheng; and (3) that it be awarded treble damages, costs, and attorney's fees. However, in Cousins' affidavit, filed November 16, 2015, Cousins acknowledges that Jane Zheng and/or Keller Williams was the Chinese Buyers' agent, his relationship was only with the Seller, and that neither he nor Sperry Van Ness had a signed listing or commission agreement with Seller. See Exhibit F – Affidavit of Michael Cousins.

In June 2015, Sperry Van Ness dismissed Randy Wallace from the case. On or around August 2015, Defendants Keller Williams and Jane Zheng were dismissed from the case upon

¹ Cousins is a real estate agent and/or broker employed by Sperry Van Ness.

knowledge and belief that their commission dispute with Sperry Van Ness would be arbitrated by a panel chosen by the Association, should there be any matters left to arbitrate pending the outcome of the Circuit Court action. Thereafter, Andrew Waldo, Cousins, and Sperry Van Ness, submitted a Request and Agreement to Arbitrate to the Association, which was received by the Association on September 28, 2015.

Subsequently, Seller, National Golf Management, LLC, filed a motion to dismiss the Circuit Court action, arguing: (1) that Sperry Van Ness never represented Seller in the real estate transactions at issue and (2) that South Carolina law requires a written agreement to form an agency or dual agency relationship, of which there was none. The Court agreed; and, on January 11, 2016, the Court granted Defendants' Motion to Dismiss, holding that, pursuant to South Carolina statutory law, an agency relationship in the context of a real estate transaction cannot exist without a written agreement. (See Exhibit A – January 11, 2016 Order). In its Order, the Court stated, "No such written listing agreement has been alleged to exist, and [Sperry Van Ness] concedes that the nature of the alleged agreement arose orally and by implication." Id. at p. 2. As a result, the Court concluded that because "[t]he South Carolina General Assembly has definitively spoken on [this issue]...such statement is dispositive of [Sperry Van Ness's] argument. Id. at ps. 3-4.² That Order was not appealed and is now the law of the case.

Therefore, as of January 11, 2016, only the arbitration between Appellant, Cousins, and Sperry Van Ness remained. In preparation for arbitration, which was scheduled for February 2, 2016, Appellant provided the Association with a copy of the Court's January 11, 2016 Order specifying that without a written agency/listing agreement and/or without a writing dual agency agreement, of which there were none, Sperry Van Ness was not entitled to a commission for the

² The Court's Order provides a clear and explicit outline of South Carolina statutory law regarding the requirement of a writing to create an agency and/or dual agency relationship in the real estate transaction context. See Exhibit A.

real estate transactions at issue. However, despite having knowledge of the Court's January 11, 2016 Order and South Carolina statutory law, and the absence of any written agreement between Appellant, Cousins, Sperry Van Ness, Seller, or the Chinese Buyers and/or their entity, on February 2, 2016, the Association's Arbitration Panel found that Appellant Waldo owed Cousins a \$250,000.00 commission on the real estate transactions at issue. See Exhibit B – Award of Arbitrators. The Arbitration Panel did not provide Appellant with any specific findings of fact or conclusions of law relied upon as the basis for its decision, but noted during the proceeding that it was not going to go into an agency analysis under South Carolina law, rather, it would only deal with Cousins' "procuring cause" argument. Subsequently, Appellant submitted a Request for Procedural Review of the arbitration with the Association on February 24, 2016 and filed his Notice of Appeal with this Court on March 1, 2016.

STANDARD OF REVIEW

A court must base its ruling on a motion to dismiss solely on allegations set forth in the complaint. Doe v. Marion, 373 S.C. 390, 395, 645 S.E.2d 245, 247 (2007) (citing Spence v. Spence, 368 S.C. 106, 116, 628 S.E.2d 869, 874 (2006)). In considering such allegations, "[t]he question is whether, in the light most favourable to the plaintiff, and with every doubt resolved in his behalf, the complaint states any valid claim for relief." Doe, 373 at 395 (quoting Gentry v. Yonce, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999)). A plaintiff's complaint should not be dismissed "merely because the court doubts the plaintiff will prevail in the action." Doe, 373 at 395 (citing Toussant v. Ham, 292 S.C. 415, 357 S.E.2d 8 (1987)). Therefore, the court must deny a motion to dismiss, if the facts alleged and inferences reasonably deducible therefrom, viewed in the light most favourable to the plaintiff, state any valid claim for relief. Spence, 368 at 116.

If, on a motion to dismiss presented under Rule 12(b)(6), SCRCP, matters outside the pleadings are presented to and not excluded by the court, the motion to dismiss shall be treated as a motion for summary judgment under Rule 56, SCRCP, and all parties shall be given a reasonable opportunity to present all pertinent materials under a motion for summary judgment. Rule 12(b), SCRCP. A grant of summary judgment is only appropriate where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. Rule 56, SCRCP; Hancock v. Mid-South Management Co., Inc., 381 S.C. 326, 330, 673 S.E.2d 801, 802 (2009). When considering a motion for summary judgment, the court must view all evidence and all inferences which can be reasonably drawn from the evidence, in the light most favourable to the non-moving party. Hancock, 381 S.C. at 330 (citing Koester v. Carolina Rental Ctr., 313 S.C. 490, 493, 443 S.E.2d 392, 394 (1994)).

ARGUMENT

I. RESPONDENT'S MOTION SHOULD BE DENIED BECAUSE APPELLANT HAS SET FORTH A VIABLE CLAIM THAT THE ASSOCIATION'S ARBITRATION AWARD SHOULD BE VACATED.

Arbitration is a favored method of dispute resolution in South Carolina. Gissel v. Hart, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009). When parties submit a dispute to arbitration, the arbitrator determines both questions of law and fact. Id. at 241; See also S.C. Code Ann. § 15-40-180 (“[W]hen a dispute is submitted to arbitration, the arbitrators shall determine questions of both law and fact.”). “Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award.” Id. However, under certain circumstances, such as when the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the

law, the court may vacate an arbitration award.³ Id. (citing Technical College v. Lucas and Stubbs, 286 S.C. 98, 333 S.E.2d 781 (1985) and S.C. Code § 15-480-130(a)). For a South Carolina court to vacate an arbitration award on the grounds that the arbitrator manifestly disregarded the law, the governing law ignored by the arbitrator must be “well defined, explicit, and clearly applicable.” Gissel, 403 S.C. at 241 (citations omitted). Further, “[a]n arbitrator’s manifest disregard for the law’ as a basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principal yet refused to apply it.” Gissel, 403 at 241 (citing Weimer v. Jones, 364 S.C. 78, 610 S.E.2d 850 (S.C. Ct. App. 2005)).

a. The Arbitration Panel Manifestly Disregarded and/or Perversely

Misconstrued Known, Well-Defined, Explicit, and Clearly Applicable South Carolina Law In Awarding Cousins a \$250,000.00 Real Estate Commission.

Respondent’s Motion to Dismiss, or In the Alternative, for Summary Judgment, should be denied because the Association’s Arbitration Panel in this matter manifestly disregarded and/or perversely misconstrued well defined, explicit, and clearly applicable South Carolina law by awarding Cousins a commission: (1) in the absence of Cousins or Sperry Van Ness having a written listing/agency agreement with the Chinese Buyers or Seller, (2) in the absence of a subagency agreement between Cousins and/or Sperry Van Ness, Appellant, and/or Keller Williams, and/or (3) without the Chinese Buyers’ and/or Sellers’ prior informed and written consent to Cousins being a dual agent in the transactions at issue.

South Carolina statutory law is well defined, explicit, and clear about the fact that in the real estate transactions context, an agency relationship can only be created with a buyer or seller

³ The Fourth Circuit will also vacate an arbitration award where an arbitrator acts in manifest disregard of the law. See Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc., 142 F.3d 188 (4th Cir. 1998) (“Federal courts may vacate an arbitration award only upon a showing of one of the grounds listed in the Federal Arbitration Act, *or if the arbitrator acted in manifest disregard of the law.*”) (emphasis added).

by written agreement. See S.C. Code Ann. § 40-57-139(G) (prohibiting oral agreements and stating, “*No type of agency relationship may be assumed by a buyer, seller, landlord, tenant, or licensee or created orally or by implication.*”) (emphasis added). Directly relevant to the parties’ dispute, South Carolina statutory law provides that a licensee may not “advertise, market, or offer to conduct a real estate transaction involving real estate owned in whole or in part by another person without *first obtaining a written listing agreement from the owner...*”. S.C. Code Ann. § 40-57-135(C)(4) (emphasis added); See also S.C. Code Ann. § 40-57-135(D)(4)(d) (“*A listing or buyer’s representation agreement must be in writing and must set forth all material terms of the parties’ agency relationship including, but not limited to...an explanation of how compensation will be divided among participating or cooperating brokers, if applicable.*”). (emphasis added).

South Carolina statutory law also prohibits subagency and/or dual agency agreements between agents/brokers without buyer and/or seller consent. S.C. Code Annotated Section 40-57-137, Subsections E, J, M(1), and Q state:

(E) A licensee acting as a seller’s agent may not offer a subagency relationship to other brokers or offer to compensate another broker who represents a buyer without the *knowledge and consent* of the seller client.

(J) A licensee acting as a buyer’s agent may not offer a subagency relationship to other brokers or offer to compensate another broker who represents a seller without the *knowledge and consent* of the buyer client.

(M)(1) A licensee may act as a disclosed dual agent *only with the prior informed and written consent of all parties*. The informed consent must be evidenced by a dual agency agreement, promulgated by the commission, and must be signed by the buyer before writing an offer and by the seller before signing the sales contract.

(Q) The provisions of this section which are inconsistent with applicable principles of common law supersede the common law, and the common law may be used to aid in interpreting or clarifying the duties described in this section. (emphasis added).

The Arbitration Panel not only had knowledge of the aforementioned, clearly applicable South Carolina statutory scheme, it also possessed a copy of the Court's January 11, 2016 Order, which unequivocally sets forth this law and holds that Cousins and Sperry Van Ness are not entitled to a commission. This law does not distinguish between commercial and residential real estate transactions. Thus, the Arbitration Panel's award of a commission in light of governing South Carolina statutory law is a manifest disregard for such law for the reasons set forth hereinbelow.

First, Cousins admitted in his affidavit: (1) that Jane Zheng and/or Keller Williams was the Chinese Buyers' agent and (2) that no written agreement existed between Cousins and/or Sperry Van Ness and the Seller. See Exhibit H – Affidavit of Michael Cousins, paras. 9, 27, 31. Then, at the Arbitration Hearing, under oath and subject to perjury, Cousins gave conflicting testimony, during which he (1) disavowed being Seller's agent (2) stated that he could be characterized as representing both the buyer and seller in direct contradiction to his November 16, 2015 Affidavit, and, (3) ultimately, asserted that it did not matter who he represented because he was the "procuring cause" of the transactions. See Exhibit D – Recording of Arbitration Hearing. Regardless of multiple, contradicting positions Cousins has taken in regards to whom he asserts he "represented" in the real estate transactions at issue, his arguments that he is entitled to a commission all fail under South Carolina law in the absence of a written agency/listing agreement, written dual agency agreement, and/or the knowledge and consent of the Chinese Buyers and Seller to a subagency agreement, of which none of the above exists. See Exhibit C – Affidavits of Nick Dou, Matthew Brittain, and Jane Zheng.

Under S.C. Code Ann. §§ 40-37-135(C)(4) and (D)(4), a written representation agreement is **required by law** before a broker/agent may represent anyone in a real estate transaction. For this reason, Cousins and Sperry Van Ness cannot establish that they represented any party to the real estate transactions in this case, as they admit that there was no requisite written agreement between themselves and either the Chinese Buyers or Seller. See Exhibit F – Affidavit of Michael Cousins, para. 31. Accordingly, Cousins has no right to a commission. Cousins’ “procuring cause” argument⁴ similarly fails because South Carolina statutory law strictly prohibits agency relationships in the real estate context absent a written agreement (i.e. Cousins could not have been the “procuring cause” of transactions where they did not represent either party). See S.C. Code Ann. §40-37-139(G). Thus, the Arbitration Panel’s award of a commission to Cousins on the basis of Cousins’s alleged implied, oral, or otherwise tangential relationship to the real estate transactions at issue directly contravenes South Carolina law, is not even “barely colorable,”⁵ and was made in manifest disregard of such clearly applicable law.

Second, Respondent argues that the arbitration concerned a broker-to-broker dispute, rather than a dispute between Cousins and/or Sperry Van Ness and the Chinese Buyers or Seller. However, directly comparable to South Carolina law requiring written agreements to establish an agency relationship with a buyer or seller, under S.C. Code Ann. § 40-37-137, before a

⁴ In addition to the fact that South Carolina statutory law does not provide for the recovery of a real estate commission under a “procuring cause” theory, Cousins’ own Affidavit demonstrates that Cousins *could not* have been a procuring cause of the real estate transactions at issue because, as Cousins points out in series of emails attached as Exhibit 11 to his Affidavit, Cousins did not even have knowledge of the thirteen (13) golf course deal negotiated between Jane Zheng and/or Keller Williams and Seller. See Exhibit F – Affidavit of Michael Cousins, Ex. 11, p. 2.

⁵ A court may choose to vacate an arbitration award if the basis of such award is not at least “barely colorable.” See Harris v. Bennett, 332 S.C. 238 246, 503 S.E.2d 782, 787 (S.C. Ct. App. 1998) (holding that courts are allowed to intrude upon an arbitrator’s decision when the arbitrator commits error that was obvious and capable of being instantly perceived by the average person qualified to be an arbitrator and/or when the arbitrator appreciates the existence of a clearly governing legal principle, but decides to ignore or pay no attention to it)).

subagency agreement can exist between agents/brokers, a buyer and/or a seller must have knowledge of and consent to any such subagency agreements in writing. Here, there was no subagency agreement between Appellant, Jane Zheng, Keller Williams, and Cousins or Sperry Van Ness, nor is there any evidence whatsoever that either the Chinese Buyers or Seller had knowledge of or consented to such a subagency agreement. See Exhibit C – Affidavits of Nick Dou, Matthew Brittain, and Jane Zheng. Therefore, Cousins is not entitled to the recovery of a commission under any alleged subagency agreement in the matter at hand. Likewise, there was no dual agency agreement between Appellant, Jane Zheng, or Keller Williams and Cousins/Sperry Van Ness regarding the real estate transactions at issue. Neither Seller nor the Chinese Buyers gave informed written consent to such an agreement and Cousins has to produce that written agreement, which he has not done. See Id. As a result, pursuant to South Carolina law, Cousins cannot prove his entitlement to a commission under a dual agency argument. Thus, regardless of whether Cousins and/or Sperry Van Ness argues its alleged “agreement” was between brokers, rather than with the Seller, which is in direct contravention of Cousins’ affidavit testimony, their argument still fails in the absence of buyer or seller knowledge and consent.

Further evidencing the Arbitration Panel’s manifest disregard for South Carolina law, when arbitration was held, the Arbitration Panel was in possession of a copy of the Court’s January 11, 2016 Order. In its Order, the Circuit Court, which considered these very arguments, held that without a written agreement with the buyer or seller, which Sperry Van Ness conceded that it did not have, Sperry Van Ness’s argument that it was due a commission must fail. See Exhibit A. The Order explicitly outlines directly applicable South Carolina statutory law on this issue, which supports the Court’s dismissal of Sperry Van Ness’s claims. Id. Additionally, the

Court rejected Sperry Van Ness's argument that South Carolina common law allows for oral and/or implied agreements between agents/brokers for commissions, holding that the cases Sperry Van Ness cited in its argument were decided prior to the existing aforementioned statutory framework and the courts cannot allow oral or implied commission agreements under the current statutory scheme. Id. at ps. 2-3.

Therefore, when the Arbitration Panel made its decision, it had actual knowledge of both the Circuit Court's Order and of the clearly governing legal principles in this matter. Based upon the foregoing, the Arbitration Panel's award was not simply an erroneous application of the law, it was a complete and manifest disregard of South Carolina law, which clearly applied to prohibit Cousins and/or Sperry Van Ness from receiving a commission on the real estate transactions at issue. As stated in Appellant's Notice of Appeal, the Arbitration Panel's award of a commission to Cousins "now requires a buyer/seller to pay a commission to an agent/broker in which it has no knowledge of, and never agreed to compensate, all directly contrary to state law." See also Exhibit C – Affidavits of Nick Dou, Matthew Brittain, and Jane Zheng.

b. Batton v. Howell, 300 S.C. 545, 389 S.E.2d 170 (S.C. Ct. App. 1990), Relied Upon By Respondent In His Motion to Dismiss, Is Not Comparable to This Matter.

The Batton v. Howell case, relied upon by Respondent in his Motion to Dismiss, is not comparable to this matter because, like Sperry Van Ness's arguments in its 2015 Circuit Court action, the Batton case was decided prior to the enactment of the current South Carolina statutory provisions requiring written agreements, outlined hereinabove, on January 1, 1998. See Exhibit A, pp. 3-4.⁶ Respondent seeks to characterize Batton as "a case almost on point," because, in

⁶ In support of its argument in opposition to the dismissal of its action against the Chinese Buyers and Seller, Sperry Van Ness cited to Hilton Head Island Realty, Inc. v. The Skull Creek Club, a 1986 decision

Batton, the appellant challenged an arbitration award to the respondent of a \$10,000.00 real estate commission, and the award was upheld, seemingly absent of any written agreement between the agents, buyer, and/or seller.⁷ However, like the Skull Creek case, Batton was decided prior to the General Assembly's significant overhaul of the statutory framework governing the creation of agency relationships in the context of real estate transactions. As such, the case cannot be compared to this matter and is irrelevant to the Arbitration Panel's manifest disregard of current governing South Carolina statutory law.

**c. The Arbitration Panel's Failure To Decide All Matters of Law and Fact
Further Evidences Its Manifest Disregard For Governing South Carolina
Law On the Disputed Issues.**

The Arbitration Panel's failure to decide and/or consider all matters of law and fact when it awarded a \$250,000.00 commission to Cousins further evidences the fact that it manifestly disregarded governing South Carolina law. "[W]hen a dispute is submitted to arbitration, the arbitrators shall determine questions of both law and fact." S.C. Code Ann. § 15-48-180; See also Gissel v. Hart, 382 S.C. at 241. As argued hereinabove, an arbitration panel cannot know of a governing legal principle, yet, refuse to apply it. Id. In the matter at hand, the Association's Arbitration Panel knew of the governing South Carolina statutory law, was provided a copy of

by the South Carolina Court of Appeals, wherein the Court held that a signed writing is not required in order for a licensed real estate broker or agent to recover a commission in a real estate transaction. In its Order granting Defendants' Motion to Dismiss, the Court stated, "Since the court's decision in Skull Creek; however, the South Carolina General Assembly has undertaken a significant overhaul of the statutory framework governing the creation of agency relationships in the context of real estate transactions. Such overhaul included the enactment of...statutes that even more clearly require a written agreement in order to establish an agency or dual agency relationship...Clearly the same finding [as in Skull Creek] could not be made in light of today's statutory environment." Exhibit A, ps. 2-3 (citations omitted).

⁷ No written agreement between the buyer, seller, or agents is mentioned within the Batton case and it is unclear from the facts what the arbitration panel's decision was based upon when it awarded Respondent Howell a commission in that matter. See Batton, 300 S.C. 545.

the Court's January 11, 2016 Order, and chose not to address or decide issues of agency between the parties.

During the arbitration, the Panel chairman stated that he wanted to remind everyone that the proceeding was not a grievance hearing and that although he understood what the issues before the Panel were, the Panel was not going to get into the real estate transaction agency analysis. See Exhibit D – Recording of Arbitration Hearing. He further stated that the focus should be on whether Cousins was the “procuring cause” of the real estate transactions. Id. As a result, it is clear that the Panel knew what the issues of fact and law before it were (i.e. issues of the creation of an agency, subagency, and/or dual agency relationship in the real estate transaction context) and had knowledge of South Carolina’s governing law on those issues. However, the Panel manifestly disregarded governing law by awarding Cousins a commission based upon a “procuring cause” theory and/or oral/implied commission theory, all of which directly contravene South Carolina law.⁸ Thus, by failing to consider all matters of fact and law before it, the Panel manifestly disregarded South Carolina law. Accordingly, Respondent’s Motion to Dismiss should be denied, or at the very least, the case should be remanded for a new arbitration hearing, as Appellant has set forth a viable claim for vacating the Arbitration Panel’s award in this matter.

**II. APPELLANT’S RIGHTS WERE SUBSTANTIALLY PREJUDICED BY THE
FAILURE OF THE ARBITRATION PANEL TO FOLLOW THEIR OWN
POLICIES AND PROCEDURES.**

⁸ As previously argued in Section I(a), Cousins could not be a procuring case of the real estate transactions at issue when they did not represent anyone involved in the transactions. See S.C. Code Ann. §§ 40-57-135, 139. Cousins admittedly had no knowledge of the thirteen (13) golf course deal negotiated between Jane Zheng and/or Keller Williams and Seller until after its negotiation had already begun. See Exhibit F – Affidavit of Michael Cousins, Ex. 11, p. 2. Further, no written agreements exist to create any type agency relationship between Cousins and any of the parties for the real estate transactions at issue.

In addition to the arguments set forth above, the Association substantially prejudiced Appellant by failing to follow its Policy Governing State Professional Standards Procedures (hereinafter, the "Policies"), attached hereto as "Exhibit E." According to the Policies, "Association Counsel, if present, shall prepare for review of the Panel Chairman and/or the President any statement of facts or a summary of the reasons supporting any decision made by the Panel. The decision is made by the Panel, not the Association Counsel." Exhibit E, p. 4. In contravention of the Policies, no statements of facts or summary of the reasons supporting the Arbitration Panel's decision were ever made or provided to Appellant. As a result, Appellant could neither provide the Procedural Review Board, nor this Court on appeal, with a formal documentation of the Arbitration Panel's basis for its decision. This violation of the Association's Policies has substantially prejudiced Appellant and are clearly indicative of the Association's attempts to conceal the Arbitration Panel's manifest disregard of governing South Carolina law.

CONCLUSION

For the reasons set forth hereinabove, Appellant respectfully requests that Respondent's Motion to Dismiss, or, In the Alternative, for Summary Judgment, be denied.

Respectfully submitted,

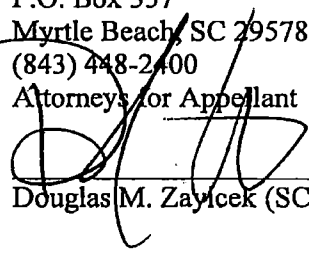
**BELLAMY, RUTENBERG, COPELAND,
EPPS, GRAVELY & BOWERS, P.A.**

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Attorneys for Appellant


Douglas M. Zayicek (SC Bar #11304)

Dated: 7/24/16
Myrtle Beach, South Carolina.

RECEIVED

JUL 27 2016

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE CIRCUIT COURT

Andrew Waldo ,
Plaintiff,

Case No. 2016-CP-26-01498

vs.

Michael Cousins and South Carolina
Association of REALTORS®,
Defendants.

**DEFENDANT SOUTH CAROLINA
ASSOCIATION OF REALTORS®' REPLY TO
PLAINTIFF'S MEMORANDUM IN
OPPOSITION TO DEFENDANT'S MOTION
TO DISMISS OR, IN THE ALTERNATIVE,
FOR SUMMARY JUDGMENT**

The Defendant, South Carolina Association of REALTORS® ("Association") replies to Plaintiff Andrew Waldo's Memorandum in Opposition. The Association relies on its Memorandum in Support of its Motion to Dismiss, but submits this short Reply to address several inaccuracies in Waldo's Memorandum.

ARGUMENTS IN REPLY

I. MICHAEL COUSINS WAS NEITHER A DUAL AGENT NOR A SUBAGENT WITH ANDREW WALDO

Waldo's Memorandum in Opposition argues that Cousins was either a dual agent or subagent and, therefore, any agency relationship would require a written agreement. Waldo did not allege a dual agency or a subagency with Cousins. Rather, his dispute with Cousins—which Cousins chose to handle through arbitration—was solely an agent-versus-agent dispute over a commission, and no written agreement between them was required.

A “dual agency” is “a form of agency in which two clients represented by a real estate brokerage firm in the same transaction may be given almost equivalent treatment as a single agency.” S.C. Code Ann. § 40-57-30 (effective Jan. 1, 2017).¹ In other words, a “dual agent” is someone representing both sides of the transaction, similar to a lawyer representing both husband and wife in a divorce. Because of the potential for a conflict of interest, a written agreement is required. But neither Cousins nor Waldo are “dual agents” because they were not representing both sides of the transaction.

A “sub agency” is “an agent of an agent.” *Id.* Cousins is not a subagent of Waldo; rather he is a separate agent that is in a dispute with Waldo about whether or not Waldo owes him money based on his role as a “procuring cause” of the transaction.

Waldo is correct that South Carolina statutory law requires written agreements between buyer/seller and an agent. And Waldo is also correct that when buyer/seller engages a dual agent or subagent, a written agreement is also required. But Waldo continues to miss the point. This is not a dispute between a buyer/seller and the agent, but rather it is a dispute between an agent and agent. This distinction is crucial, because the purpose of the statutory scheme in S.C. Code Ann. § 40-57-5 *et seq.* and the Real Estate Commission it created is “to protect the public's interest when involved in real estate transactions.” S.C. Code Ann. § 40-57-5. The public is, of course, the buyers and sellers who should be protected from unscrupulous agents, who owe them fiduciary duties. To protect the public, the statutory scheme requires written agreements between brokers and the public. But it is silent regarding agreements between agents where buyers or sellers are

¹ Although the definitions of “dual agency” and “subagency” are new to the statutory scheme and do not go into effect until January 1, 2017, they show what the General Assembly meant when it used those words in S.C. Code Ann. § 40-57-137.

not affected. If Cousins were in a dispute with the buyer or seller, Waldo's arguments might have a point. In this case, they do not apply.

Finally, S.C. Code Ann. § 40-57-137 makes clear that it applies only to disputes between brokers/agents and their client sellers and buyers. "A real estate brokerage company that provides services through an agency agreement *for a client* is bound by the duties of loyalty, obedience, disclosure, confidentiality, reasonable care, diligence, and accounting as set forth in this chapter." Because the focus of the statute is to protect the public at large, it does not address disputes between agent and agent, where written agreements are not required. In fact, the statute states that "[e]xcept as otherwise stated, nothing in this section precludes an injured party from bringing a cause of action against licensees, their companies, or their brokers-in-charge." *Id.* at § 40-57-137(Q). Importantly, nothing in the statutory scheme has overruled Batten v. Howell, 300 S.C. 545, 389 S.E.2d 170 (Ct. App. 1990), which upheld a \$10,000 arbitration award in a broker-versus-broker dispute.

Here, nothing in § 40-57-137 (or § 40-57-139) requires written agreements *between* brokers/agents, and nothing prevents an injured broker/agent, such as Cousins, bringing an action against another broker/agent. Because the purpose of the statutory scheme is to protect buyers and sellers against unscrupulous agents, an agent such as Waldo should not be able to use as a shield a statute that was ever meant to protect him or other agents. The arbitration panel heard the evidence in this broker-versus-broker dispute and found that Cousins had a claim against Waldo, and that Waldo had injured him. The panel correctly ignored the circuit court's order in Founders Five, LLC v. The Real Estate Company et al., Case No. 2015-CP-26-2066 because that order ruled on a broker-versus-seller dispute, and

did not involve the type of dispute that the arbitration panel heard.

In any event, the law requires Waldo to raise these arguments in the arbitration. This Court is not allowed to adjudicate them again.

II. WALDO HAS FAILED TO SHOW A MANIFEST DISREGARD OF THE LAW

To prove that an arbitration panel manifestly disregarded the law, a party must show “something beyond a mere error in construing or applying the law.” Gissel v. Hart, 383 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). “Even a ‘clearly erroneous interpretation of the contract’ cannot be disturbed.” Id. To vacate an award based on manifest disregard of the law, “the governing law must be well defined, explicit, and clearly applicable.” Id. Federal law is similar. Under the FAA, “neither misinterpretation of a contract nor an error of law constitutes a ground on which an award may be vacated.” MCI Constructors, LLC v. City of Greensboro, 610 F.3d 849, 857 (4th Cir. 2000).

As stated above and in the Association’s Memorandum in Support of its Motion to Dismiss or Summary Judgment, the arbitration panel applied the law correctly. At a minimum, Waldo has failed to prove that his theory of requiring a written contract in a dispute between broker and broker is “well defined, explicit, and clearly applicable.” When the statute is silent on the issue, and when the common law allows agents to recover against other agents without a written agreement, Waldo has failed to meet his heavy burden of proving that the arbitration panel manifestly disregarded the law.

CONCLUSION

For the reasons stated above and in the Association's Memorandum in Support of its Motion to Dismiss or, In the Alternative, For Summary Judgment, Waldo's case should be dismissed or summary judgment should be granted in favor of the Association.



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Attorneys for Defendant
South Carolina Association of REALTORS®

September 6 2016

Columbia, South Carolina

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 16-CP-26-3338

Andrew Waldo; Jane Zheng; and)
SC Coast Properties, LLC d/b/a)
Keller Williams Realty,)
Appellants,)

vs.)

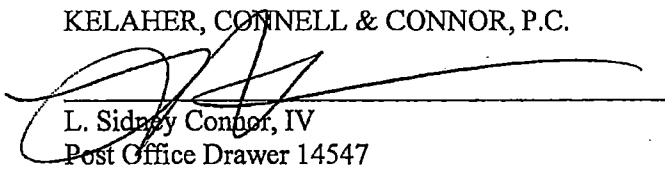
Michael Cousins; Founders Five,)
LLC d/b/a Sperry Van Ness)
Founders Group; and South Carolina)
Association of REALTORS,)
Respondents.)

**NOTICE OF MOTION AND MOTION
BY RESPONDENT MICHAEL COUSINS,
FOUNDERS FIVE, LLC D/B/A SPERRY
VAN NESS, AND FOUNDERS GROUP
FOR RECONSIDERATION OF
MOTION TO CONFIRM
ARBITRATION AWARD**

**TO: DOUGLAS M. ZAYICEK, ATTORNEY FOR ANDREW WALDO AND
MARCUS A. MANOS, ATTORNEY FOR SOUTH CAROLINA ASSOCIATION
OF REALTORS**

YOU WILL PLEASE TAKE NOTICE that on the tenth (10th) day after service hereof,
or as soon hereafter as counsel may be heard, counsel for the above-named Defendants Michael
Cousins and Founders Five LLC d/b/a Sperry Van Ness Founders Group will move before this
Court for reconsideration of his earlier Motion to Confirm the Arbitration Award. (Attached.)
The grounds for this motion are that the standard of a review for Motion to Confirm an
Arbitration Award is different from the standard of review on a Motion to Dismiss or for
Summary Judgment. This Motion is further supported by the attached Memorandum.

KELAHER, CONNELL & CONNOR, P.C.


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Founders Five, LLC d/b/a Sperry Van Ness Founders Group

September 29 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 16-CP-26-3338

Andrew Waldo; Jane Zheng; and)
SC Coast Properties, LLC d/b/a)
Keller Williams Realty,)
)
Appellants,)

vs.)

Michael Cousins; Founders Five)
LLC d/b/a Sperry Van Ness)
Founders Group; and South Carolina)
Association of REALTORS,)
)
Respondents.)

**MEMORANDUM IN SUPPORT OF
MOTION FOR RECONSIDERATION**

The Defendants Michael Cousins Founders Five, LLC d/b/a Sperry Van Ness Founders Group have requested the Court to reconsider these Defendants' Motion to Confirm the Arbitration Award. The grounds for this Motion are that a Motion to Confirm an Arbitration Award is very different from the standard of review of a Motion to Dismiss or for Summary Judgment. Under the correct standard of review, the Motion to Confirm should be granted.

FACTS

Andrew Waldo submitted an application to the Coastal Carolinas Association of REALTORS®. **Exhibit 1**, Affidavit of Heather Tenney, Attachment A and ¶ 7, Electronic Application. Waldo became a member of the Coastal Carolinas Association on August 15, 2014. Pursuant to this agreement, Waldo agreed to abide by the Rules, Regulations, and Code of Ethics of the National Association of REALTORS®, the South Carolina Association of REALTORS®, and the Coastal Carolinas Association of REALTORS®. **Exhibit 1**, Attachment A, Attachment B (Relevant portion of Coastal Carolinas Association Rules), and Attachment C, (Relevant

portion of Coastal Carolinas Association Bylaws).

The NAR Code of Ethics requires arbitration between realtors in any dispute arising out of their real-estate practice. **Exhibit 2**, Affidavit of Lindsey Davidson, Attachment A (Relevant portions of NAR Code of Ethics) and ¶6. Likewise, the Bylaws and Rules of both the Association and the Coastal Carolinas Association require the same. **Exhibit 2**, Attachment B (Relevant portion of Association Bylaws); and ¶7.

Waldo and Defendant Michael Cousins disputed whether or not a commission was due on certain real-estate transactions involving golf courses. Waldo initiated an arbitration proceeding before the Association seeking a determination that the commission need not be divided with Cousins. **Exhibit 2**, ¶ 8 and Attachment C (Waldo Request for Arbitration). The agreement between Waldo, Cousins, and the three Associations requires mandatory arbitration. Waldo voluntarily submitted to the arbitration process by filing his request for arbitration on September 28, 2015. At the conclusion of the hearing, Waldo admitted that the hearing had been fair and that he had an adequate opportunity to testify, present evidence and witnesses, and conduct cross examination. **Exhibit 3**, Second Affidavit of Lindsey Davidson, ¶¶6 and 7.

At Waldo's request, the Association scheduled an appellate review of the current arbitration decision from March 30, 2016. **Exhibit 2**, ¶¶ 9 and 10, Attachment D (Waldo Request for Review) and Attachment E (Hearing Notice). On May 2, 2016, the Procedural Review Hearing Tribunal affirmed the award, concluding the arbitration process. **Exhibit 4**.

Waldo then appealed the arbitration award to Circuit Court. Cousins moved to confirm the award. This court denied Cousins' Motion to Confirm.

The Order Denying Defendants' Motion to Confirm sets forth the standard of review for Motions to Dismiss and for Motions for Summary Judgment. It does not set forth the standard of review for Defendants' Motion to Confirm the Award.

ARGUMENT

I. UNDER THE CORRECT STANDARD OF REVIEW, COUSINS' MOTION TO CONFIRM SHOULD BE GRANTED.

Mr. Waldo (the appellant) filed this case in arbitration pursuant to the Arbitration Rules of the South Carolina Association of Realtors. He chose this forum initially by contract with MLS and by virtue of his membership in the Association. He also chose this forum voluntarily, after a dispute had arisen. He is bound by the Arbitration Rules of the SC Association of Realtors.

The Association has adopted the Rules of the National Association of Realtors. The National Association has produced a manual entitled, "Code of Ethics and Arbitration Manual," which is a public document. Relevant sections are attached hereto as **Exhibit 5**.

Under Part Ten – Arbitration of Disputes, Section 44 sets forth the Duty and Privilege to Arbitrate. It states that the member (Mr. Waldo) agrees to arbitrate disputes with other realtors using the Board's facilities and Rules, "as set forth in the provisions of this Manual."

The standard of appellate review for this arbitration is set forth in Section 53, "The Award." Subsection (a) states, "The award shall be in writing and signed by the arbitrators or a majority of them, shall state only the amount of the award, and, when so signed and transmitted to each of the parties, shall be valid and binding and shall not be subject to review or appeal." (Emphasis added.) The order proposed by Mr. Waldo, however, sets forth the facts disputed at the arbitration hearing and assumes the facts favorable to the Appellant to be

true. While this standard may apply to an original complaint that has not yet been tried, it does not apply to facts that have already been arbitrated, especially under the rules applicable to this arbitration which Mr. Waldo agreed to in advance.

Section 53 also provides for an appeal “to the Board of Directors” only as to matters involving fundamental due process. Section 55(a) defines fundamental due process as including such issues as fraud, coercion, bias, prejudice, and evident partiality. Mr. Waldo appealed to the Board and was granted a full appeals hearing. He did not argue that there was any fraud, coercion, bias, prejudice or evident partiality. The Manual has no provision for any further appeal.

The Standard of Review is nearly identical under the S.C. Uniform Arbitration Act. When a case is submitted to arbitration, arbiters decide issues of both law and fact. Once an award is entered, it is generally conclusive, and “courts will refuse to review the merits of an award.” Gissel v. Hart, 383 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). A court will vacate an award only if the arbiter “exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law.” Id.; S.C. Code § 15-48-130. “Judicial review of an arbitration award is limited in scope.” White v. Preferred Research, Inc., 315 S.C. 209, 212, 432 S.E.2d 506, 508 (Ct. App. 2003).

Arbiters exceed their powers only if the arbitrated issue is not within the scope of the arbitration agreement. Harris v. Bennett, 332 S.C. 238, 244, 503 S.E.2d 782, 785 (Ct. App. 1998). For example, if an arbiter awards punitive damages when the agreement expressly excludes them, the arbiter has exceeded his or her powers. But “[f]actual and legal errors by arbitrators do not constitute an abuse of powers, and a court is not required to review the merits

of a decision so long as the arbitrators do not exceed their powers.” Gissel at 242, 676 S.E.2d at 324.

As to a manifest disregard of the law, a party must show “something beyond a mere error in construing or applying the law.” Id. at 241, 676 S.E.2d at 323. “Even a ‘clearly erroneous interpretation of the contract’ cannot be disturbed.” Id. The focus is on the conduct of the arbiter, and setting aside an award on this basis requires proof that “*the arbitrator knew of the governing principle yet refused to apply it.*” Id. (emphasis added). Further, “the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable.” Id.

A similar case is Batten v. Howell, 300 S.C. 545, 389 S.E.2d 170 (Ct. App. 1990). In that case, realtor Howell disputed whether he owed realtor Batten a commission over a sale of real estate. The arbiters ruled in favor of Batten and awarded him \$10,000. Howell challenged the award, claiming there was no legal or factual basis to support it, and that the arbiters had manifestly disregarded or perversely misconstrued the law. On appeal, the court found that there was evidence that Howell invited Batten to sell the property and agreed to pay a commission if he produced a buyer. Although the buyer rejected the offer made through Batten, the buyer later bought the property.

Importantly, the court noted that “[t]he arbitrators did not give reasons for their decision to award Realtor Batten a commission, *but they are not required to do so.*” Id. at 549, 389 S.E.2d at 172 (emphasis added). So long as the factual inferences and legal conclusions supporting the award are “barely colorable,” it should be confirmed. Because there was “at least an arguable ground for the award,” the court affirmed the award. Id.; see also Weimer v. Jones, 364 S.C. 78, 610 S.E.2d 850 (Ct. App. 2005) (“The parties’ vigorous debate regarding which

defense is proper demonstrates the arbitrator did not disregard well-defined, explicit, and clearly applicable law in rendering his decision.”).

In this case, Cousins and Waldo, both realtors, disputed whether Waldo was entitled to keep the entire \$500,000 commission for the sale of property that closed in early 2015. Cousins claims he is entitled to \$250,000.

Cousins’ brokerage firm originally sued Waldo’s brokerage firm, along with several property sellers, in the case styled Founders Five, LLC v. The Real Estate Company et al., Case No. 2015-CP-26-2066. Although he now attacks the arbitration award, Waldo demanded in 2015 that the parties arbitrate their dispute and he initiated proceedings with the Association. See Garrell v. Blanton, 316 S.C. 186, 447 S.E.2d 840 (1994) (holding that, in a case involving very same arbitration rules and contracts, a party who voluntarily participates in arbitration waives any objection to the arbitration of a commission dispute). Although Cousins and Waldo agreed to carve out their claims and arbitrate them, Cousins’ claims against the sellers of the property remained in the circuit court. On January 11, 2016, the circuit court dismissed Cousins’ claims against National Golf Management, LLC on the basis that Cousins, as broker, did not have a written agreement with National Golf Management, LLC, as seller. In dismissing Cousins’ claim against National Golf Management, the circuit court relied on S.C. Code Ann. § 40-57-139(G), which states as follows:

For all real estate transactions, no agency relationship between a buyer, seller, landlord, or tenant and a brokerage company and its affiliated licensees exists unless the buyer, seller, landlord, or tenant *and the brokerage company and its affiliated licenses agree, in writing, to the agency relationship*. No type of agency relationship may be assumed by a buyer, seller, landlord, tenant, or licensee or created orally or by implication.

The circuit court’s dismissal of Cousins’ claims against National Golf Management based

on § 40-57-139(G) makes sense because the statute states that, between broker and seller, a written agreement is required. Real estate agents owe a fiduciary duty to their clients. Darby v. Furman Co., Inc., 334 S.C. 343, 346, 513 S.E.2d 848, 849 (1999). The statute created a requirement that this fiduciary relationship be in writing.

But the statute *does not* apply to claims between brokers. The statute states that an agency relationship between “buyer, seller, landlord, or tenant,” on one hand, and a “brokerage company and its affiliated licensees,” on the other hand, requires a written agreement. The statute does not address agreements between brokers to share a commission. The circuit court in Founders Five relied solely on this statute in making its decision.

The distinction is important because the arbitration between Cousins and Waldo was not a dispute between a broker and a seller, but rather a dispute between broker and broker. Section 40-57-139(G), therefore, did not apply. Further, the court order relied on by Waldo for res judicata did not address the issue of brokers sharing a commission. The courts recognize an independent claim to split commissions between brokers. See, e.g., Hackler v. Earl Wiegand Real Estate, Inc., 295 S.C. 396, 368 S.E.2d 686 (Ct. App. 1988). The agreement to divide a commission need not be in writing or even expressed. Such an agreement between brokers can be implied. Id. at 398-99; 368 S.E.2d at 686.

Cousins and Waldo arbitrated their broker-versus-broker dispute on February 2, 2016 before a panel of five Association arbiters. After reviewing the evidence and hearing arguments, the panel found in favor of Cousins and awarded him \$250,000, which was half of the \$500,000 commission. Waldo then appealed to the Association’s Procedural Review Hearing Tribunal, which affirmed the award on May 2, 2016.

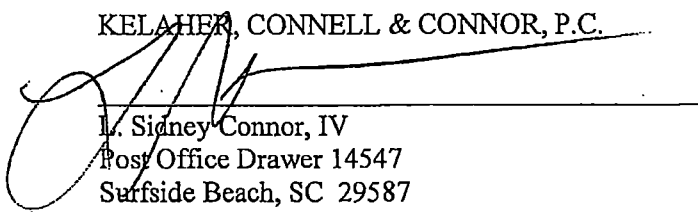
Waldo has no basis to dispute the arbitration award. There is no evidence that the dispute was outside the arbitration agreement, nor was there any evidence that the arbitration panel exceeded the authority provided in its Code of Ethics. Indeed, Waldo admitted at the hearing that the hearing had been conducted fairly, and that he had had an opportunity to testify, present evidence and witnesses, and cross examine any hostile witnesses. **Exhibit 3**, Second Affidavit of Lindsey Davidson, ¶¶ 6 and 7.

This court should not entertain Waldo's attempts to re-litigate the same matter that he presented to the arbitration panel. He voluntarily submitted his claim to the full \$500,000 commission, presented his evidence and made his arguments, and must now live with the decision. The arbitration panel found that, based on the evidence, there was an agreement between Waldo and Cousins to split the commission. Cousins' entitlement to half the commission was more than "barely colorable" and at least "arguable," which is all that is required. See Batten, 300 S.C. at 549, 389 S.E.2d at 172 (Ct. App. 1990).

CONCLUSION

For the foregoing reasons, these Defendants request the court to reconsider its earlier decision and to grant these Defendants' Motion to Confirm the Arbitration Award.

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Founders Five, LLC d/b/a Sperry Van Ness Founders Group

September 29, 2016

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 16-CP-26-3338

Andrew Waldo; Jane Zheng; and)
SC Coast Properties, LLC d/b/a)
Keller Williams Realty,)

Appellants,)

vs.)

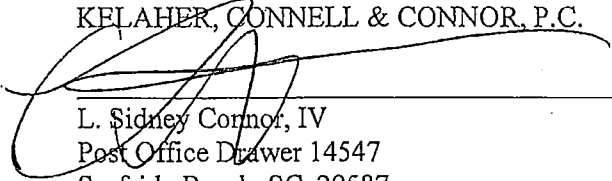
Michael Cousins; Founders Five)
LLC d/b/a Sperry Van Ness)
Founders Group; and South Carolina)
Association of REALTORS,)

Respondents.)
_____)

**SUPPLEMENTAL MEMORANDUM
IN SUPPORT OF DEFENDANTS'
MOTION FOR RECONSIDERATION**

The Defendants Michael Cousins Founders Five, LLC d/b/a Sperry Van Ness Founders Group hereby supplements their Memorandum In Support of Motion for Reconsideration by filing with the Court the attached Affidavit of Lindsey Davidson along with a complete copy of the Code of Ethics and Arbitration Manual which applies to this case. Certain sections of this manual were supplied with the original Memorandum but out of an abundance of precaution, the Defendants hereby file the entire set of rules for completeness.

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October 14, 2016

COPY

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF HORRY)

CIVIL ACTION NO.: 2016-CP-26-3338

Andrew Waldo; Jane Zheng; and SC Coast
Properties, LLC d/b/a Keller Williams
Realty,

Appellants,

vs.

**APPELLANTS' MEMORANDUM IN
OPPOSITION TO MOTION FOR
RECONSIDERATION**

Michael Cousins; Founders Five, LLC d/b/a
Sperry Van Ness Founders Group; and South
Carolina Association of REALTORS®,

Respondents.

FILED
HENRY COUNTY
2016 OCT 14 PM 12:58
MELANIE HUGGINS-WARD
CLERK OF COURT

On September 29, 2016, Respondents¹ filed a Motion for Reconsideration of the Court's September 23, 2016 Order, wherein the Court denied Respondents' Motion to Dismiss, or in the Alternative, for Summary Judgment and Respondents' Motion to Confirm the Arbitration Award.² Respondents' Motion for Reconsideration seeks the reconsideration of the Court's denial of its Motion to Confirm the Arbitration Award. Appellants now submit this Memorandum in opposition to Respondents' Motion on the grounds set forth below.

I. THE COURT APPLIED THE CORRECT STANDARD OF REVIEW.

Respondents argue that the Court's September 23, 2016 Order should be reconsidered because the Court failed to set forth the standard of review for their Motion to Confirm the Arbitration Award. This is simply untrue, and because the Court never ruled on the underlying merits, completely irrelevant.

¹ "Respondents," as used herein, refers to Michael Cousins and Founders Five, LLC d/b/a Sperry Van Ness Founders Group.

² Respondents' Motion to Confirm the Arbitration Award was simply denied as being premature. The Court never ruled on the underlying merits of Appellants' appeal, or Respondents' Motion to Confirm the Arbitration Award.

Appellants' appeal of the Arbitration Panel's award is based, in part, on the Panel's manifest disregard of clearly applicable state law, which the Panel had knowledge of at the time it made its decision. As such, the Court's September 23, 2016 Order sets forth the following standard of review for either the vacation of an arbitration award or, conversely, the confirmation of an award:

"Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award." [Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009).] However, under certain circumstances, such as when the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law, the court may vacate an arbitration award. Id. (citing Technical College v. Lucas and Stubbs, 286 S.C. 98, 333 S.E.2d 781 (1985) and S.C. Code § 15-480-130(a)). For a South Carolina court to vacate an arbitration award on the grounds that the arbitrator manifestly disregarded the law, the governing law ignored by the arbitrator must be "well defined, explicit, and clearly applicable." Gissel, 403 S.C. at 241 (citations omitted). Further, "[a]n arbitrator's manifest disregard for the law" as a basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principal yet refused to apply it." Gissel, 403 at 241 (citing Weimer v. Jones, 364 S.C. 78, 610 S.E.2d 850 (S.C. Ct. App. 2005)); See also C-Sculptures, LLC v. Brown, 403 S.C. 53, 58, 742 S.E.2d 359, 361-62 (2013) (holding that the manifest disregard standard is not insurmountable and vacating an arbitrator's award where the arbitrator was apprised of unambiguous, clearly applicable South Carolina statutory law and did not apply that law). Likewise, the Fourth Circuit will also vacate an arbitration award where an arbitrator acts in manifest disregard of the law. See Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc., 142 F.3d 188 (4th Cir. 1998) ("Federal courts may vacate an arbitration award only upon a showing of one of the grounds listed in the Federal Arbitration Act, or if the arbitrator acted in manifest disregard of the law.").

(September 23, 2016 Order, ps. 6-7). Not only does South Carolina case law confirm this is the standard for evaluating an appeal of an arbitration award where an appellant has alleged a

manifest disregard of state law,³ Respondents' own Memorandum⁴ cites to the above standard. (See Respondents' Memorandum In Support of Motion for Reconsideration, ps. 4-5). Therefore, Respondents' argument that the Court failed to set forth the standard of review for their Motion to Confirm the Arbitration Award fails, as the appropriate standard for review of a Motion to Confirm the Arbitration Award was clearly set forth in the Court's September 23, 2016 Order.⁵ Accordingly, Respondents' Motion for Reconsideration should be denied on this ground.

II. SOUTH CAROLINA STATUTORY LAW REQUIRES THAT A BUYER AND/OR A SELLER HAVE KNOWLEDGE OF AND CONSENT IN WRITING TO ANY SUBAGENCY AGREEMENT BETWEEN BROKERS.

Respondents argue the Court should reconsider its denial of their Motion to Confirm the Arbitration Award because the arbitration concerned a co-broker dispute, rather than a dispute between Respondents and either the Chinese Buyers or Seller. Respondents' argument fails for several reasons, including applicable South Carolina statutory law.

In its September 23, 2016 Order, the Court held, in pertinent part:

Prior to brokers establishing any type of co-broker agreement on behalf of a buyer or seller, the buyer and/or the seller, respectively, must: (1) have knowledge of the subagency agreement and (2) must consent to such an agreement. See S.C. Code Ann. §§ 40-37-137(E) and (J) (1976, as amended) (stating that before a subagency agreement can exist between agents/brokers, a buyer and/or a seller must have knowledge of and consent to any such subagency agreements). Therefore, regardless of whether Respondents' alleged oral agreement to split a commission for the transactions at

³ See Gissel, 383 S.C. 235 (setting forth the standard of review where a party appeals an arbitration award on the basis of manifest disregard for well-defined, explicit and clearly applicable state law).

⁴ All references to "Respondents' Memorandum" herein mean Respondents' Memorandum in Support of Respondents' Motion for Reconsideration.

⁵ Respondents' argument that Appellants are not entitled to an appeal based upon the Rules of the National Association of Realtors' Code of Ethics and Arbitration Manual also fails because it contradicts South Carolina state law. See S.C. Code Ann. §15-48-130 (specifying multiple statutory grounds for vacating an arbitration award) and Gissel, 383 S.C. 235 (setting forth the common law ground for vacating an arbitration award).

issue was with Appellants, rather than with the Chinese Buyers or Seller, the Chinese Buyers and/or the Seller must still have knowledge of and consent to any such alleged agreement.

Additionally, South Carolina Code Annotated Section 40-57-135(D)(4)(d) provides that the buyer's representation agreement must be in writing and must set forth "an explanation of how compensation will be divided among participating or cooperating brokers." (1976, as amended). Thus, any alleged co-broker agreement regarding division of compensation must: (1) not only be known by and consented to by the buyer, (2) it must also be documented in writing within the buyer's representation agreement.

(September 23, 2016 Order, ps. 8-9.)

The Circuit Court's January 11, 2016 Order, in Respondent's prior action,⁶ held Respondents did not represent the Seller in the transactions at issue. Therefore, it must follow that Respondents could not be a co-broker representing the Seller. Likewise, there was no subagency agreement between Appellants and Respondents as to representing the Chinese Buyers, nor is there any evidence whatsoever that the Chinese Buyers had knowledge of or consented to such a subagency.

Contrary to Cousins' alleged "co-broker" argument, the Chinese Buyers had a written agency agreement with Jane Zheng specifying Ms. Zheng was their *exclusive* agent.⁷ Respondents have produced nothing in writing setting forth any agreement between Appellants, Chinese Buyers, and Cousins to split a commission for the transaction at issue, as required by South Carolina law.

Thus, the Court has held that "[w]ithout the Chinese Buyers' knowledge and consent to a subagency agreement, and without written documentation of a division of compensation

⁶ See pages 3-4 of the Court's September 23, 2016 Order for a full description of facts related to this prior Circuit Court action, which was initiated by Respondents on March 20, 2015.

⁷ Appellants' Buyer's Agency Agreement was presented as an Exhibit at the hearing.

agreement, as required by South Carolina Code Annotated Section 40-57-135(D)(4)(d) (1976, as amended), there can be no such agreement between brokers.” (September 23, 2016 Order, p. 9).

Therefore, Respondents’ argument that the Court should reconsider its order denying Respondents’ Motion to Confirm the Arbitration award based upon an alleged, oral co-broker agreement must fail, as such an argument directly contravenes state law.

In addition, Respondents’ argument directly contradicts the basis for the arbitration decision as stated on the record by the attorney for the South Carolina Association of Realtors. Per Mr. Manos (who simply reiterated the statements of the hearing chairman of the arbitration panel on the audio recording submitted as an exhibit), the arbitrators found Respondent Cousins was the “procuring cause” of the underlying transaction, meaning the arbitrators found an oral agency agreement involving Respondent Cousins (which must be in writing under South Carolina law). Respondents may not now alter that by trying to claim the panel actually found there was an agreement between agents. In addition, there is not one shred of evidence showing Ms. Zheng could bind Appellant Waldo or his brokerage as to how the buyer’s commission would be allocated.

III. BATTEN V. HOWELL, 300 S.C. 545, 389 S.E.2d 170 (CT. APP. 1990) AND HACKLER V. EARL WIEGAND REAL ESTATE, INC., 295 S.C. 396, 368 S.E.2d 686 (CT. APP. 1988) ARE NOT APPLICABLE IN LIGHT OF SOUTH CAROLINA STATUTORY LAW.

In their Memorandum, and in direct contravention of the South Carolina statutory law discussed above, Respondents rely upon the Batton and Hackler cases for the proposition that oral and/or implied agreements between brokers, without buyer or seller consent, are permissible

under South Carolina law. However, these cases are not applicable to this appeal for the following reasons.

In Respondents' prior action before the Circuit Court for the recovery of the real estate commission at issue, Respondents relied upon Hilton Head Island Realty, Inc. v. The Skull Creek Club, 287 S.C. 530, 339 S.E.2d 890 (Ct. App. 1986), wherein the Skull Creek Court held that a signed writing is not required in order for a licensed real estate broker or agent to recover a commission in a real estate transaction. However, the Circuit Court disagreed with applicability of the Skull Creek case and rejected Respondents' argument. In its January 11, 2016 Order granting Seller's Motion to Dismiss, the Circuit Court stated:

Since the court's decision in Skull Creek, however, the South Carolina General Assembly has undertaken a significant overhaul of the statutory framework governing the creation of agency relationships in the context of real estate transactions. Such overhaul included the enactment of...statutes that even more clearly require a written agreement in order to establish an agency or dual agency relationship...Clearly the same finding [as in Skull Creek] could not be made in light of today's statutory environment.

(See Exhibit A – January 11, 2016 Order, ps. 2-3).

The same analysis applies in this appeal. Both the Batton case and the Hackler case were decided prior to the enactment of the current South Carolina statutory provisions, on January 1, 1998. The current statutory scheme clearly prohibits agreements between brokers without the knowledge and consent of either the buyer or the seller. See S.C. Code Ann. §§ 40-37-137(E) and (J) (1976, as amended) (stating that before a subagency agreement can exist between agents/brokers, a buyer and/or a seller must have knowledge of and consent to any such subagency agreements). Further, South Carolina statutory law specifically states that where

there is a conflict between the state's statutory scheme that governs real estate transactions and the common law, the statutes supersede the common law. S.C. Code Ann. § 40-57-137(Q).

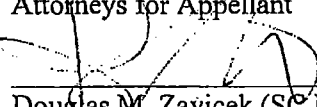
Therefore, the cases Respondents cite to within their Memorandum are not applicable to this matter and, accordingly, the Court should deny Respondents' Motion for Reconsideration.

CONCLUSION

Based upon the foregoing reasons, Appellants respectfully request that the Court deny Respondents' Motion for Reconsideration.

**BELLAMY, RUTENBERG, COPELAND,
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Attorneys for Appellant



Douglas M. Zayicek (SC Bar #11304)

Dated: 10/14/16
Myrtle Beach, South Carolina.

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OCT 19 2016

NEXSEN PRUET, LLC

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

Andrew Waldo,

Plaintiff,

vs.

Michael Cousins and South Carolina
Association of REALTORS®,

Defendants.

Case No. 2016-CP-26-1498

DEFENDANT SOUTH CAROLINA
ASSOCIATION OF REALTORS®'S
RESPONSES TO PLAINTIFF'S
APPLICATIONS TO VACATE THE AWARD

FILED
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CLERK OF COURT

The Defendant, South Carolina Association of REALTORS® ("Association"), responds to Plaintiff's Notices of Appeal as follows:

BACKGROUND AND NATURE OF THESE RESPONSES

Plaintiff filed a Notice of Appeal in this case and a separate Notice of Appeal in Case No. 2016-CP-26-3338, an action that was consolidated with this case. Although the Plaintiff styled both actions as a "Notice of Appeal," this was procedurally incorrect, as Section 15-48-170 of the South Carolina Arbitration Act requires parties to file a motion to vacate an award in order to challenge an arbitration award. The motion to vacate is heard as a motion, not a trial. Although the Association is not required to file a response to Plaintiff's applications to vacate an award and may instead appear at a hearing to oppose the motions, the Association files the following Responses.

RESPONSE AND DENIAL TO "NOTICE OF APPEAL" DATED MARCH 1, 2016
(Case No. 2016-CP-26-1498)

1. Each and every allegation of Plaintiff's Notice of Appeal not specifically admitted herein is denied.

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2. The Association denies the allegations in Paragraphs 1 through 10 of the Notice of Appeal.

RESPONSE AND DENIAL TO "NOTICE OF APPEAL" DATED MAY 17, 2016
(Case No. 2016-CP-26-3338)

3. Each and every allegation of Plaintiff's Notice of Appeal not specifically admitted herein is denied.

4. The Association denies the allegations in Paragraphs 1 through 22 of the Notice of Appeal.

5. In response to Paragraph 23 of the Notice of Appeal, the Association agrees with the consolidation of the two actions.

5. The Association denies the allegations in Paragraph 24 of the Notice of Appeal.

FOR A SECOND DEFENSE TO BOTH ACTIONS
(Confirmation of Award)

6. The Association incorporates by reference its Motions to Dismiss or, in the Alternative, for Summary Judgment and Memoranda in Support, filed on June 17, 2016 in both Case No. 2016-CP-26-1498 and Case No. 2016-CP-26-3338. The Association also incorporates Replies filed in those actions.

7. Plaintiff's "Appeal" in both actions does not fit within the narrow exceptions that allow a court to vacate an award under Section 15-48-130. He has failed to show that the arbiters exceeded their powers, manifestly disregarded or perversely misconstrued the law, or otherwise violated Section 15-48-130.

8. To the extent the Plaintiff alleges that the arbitrators committed errors of law, fact, or both, this is not enough to overturn an award. The Plaintiff must prove the

arbiters knew a well-defined, explicit, and clearly applicable law yet refused to apply it. The law is similar under both the South Carolina Arbitration Act and the Federal Arbitration Act. Under both state and federal law, an arbiter need not state his or her reasons, the burden to overturn an award is “heavy,” and merely misapplying the law is not enough to overturn an award. The Plaintiff cannot meet this high threshold.

9. Further, Plaintiff’s reliance on a court order in *Founders Five, LLC v. The Real Estate Company et al.*, Case No. 2015-CP-26-2066 is misplaced. That order has no precedential value and, even if it did, would not apply to the facts of this case, as that order involved a dispute between broker and seller—who share a fiduciary relationship—and involves Section 40-57-139, which does not apply to this case. Rather than a broker-versus-seller dispute, this case simply involves a broker-versus-broker dispute, and nothing in the statutory scheme or regulations governing brokers requires a written agreement between brokers to memorialize an oral agreement to split a commission.

10. The Plaintiff initiated the arbitration proceedings, admitted at the hearing that the proceedings had been conducted fairly, and he was given the opportunity to testify, present evidence and witness testimony, and cross examine hostile witnesses. This Court should not allow him to re-litigate the same issues he lost before the arbitration panel. He has no evidence that the arbitrators knew a *clear and well-defined* law yet refused to apply it.

11. Additionally, the Court reviewed a complete record of the arbitration proceedings below sufficient to review for the limited exceptions allowing judicial intervention in an arbitration under either the South Carolina Arbitration Act or the FAA. Plaintiff’s insistence on factual discovery and development is contrary to the purpose and

language of both Acts.

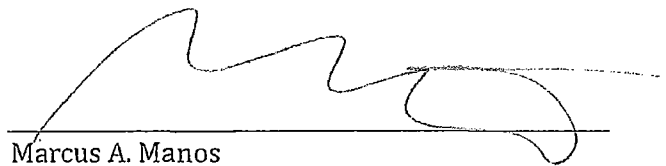
12. Therefore, the Plaintiff's "Appeals" in both Case No. 2016-CP-26-1498 and Case No. 2016-CP-26-3338 should be denied and the award affirmed.

13. The Association reserves the right to file additional supporting memoranda when this Court orders a hearing on this matter.

WHEREFORE, having fully responded to Plaintiff's Notices of Appeal, the Association respectfully prays that:

1. Plaintiff's Notices of Appeals be dismissed;
2. The arbitration award be affirmed; and
3. The Court award the Association such other and further relief as it deems just and proper.

Respectfully submitted,



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October 28, 2016

Columbia, South Carolina

Attorneys for Defendant
South Carolina Association of REALTORS®

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 16-CP-26-3338

Andrew Waldo; Jane Zheng; and)
SC Coast Properties, LLC d/b/a)
Keller Williams Realty,)
Appellants,)

vs.)

Michael Cousins; Founders Five)
LLC d/b/a Sperry Van Ness)
Founders Group; and South Carolina)
Association of REALTORS,)
Respondents.)

**SUPPLEMENTAL
MEMORANDUM IN SUPPORT OF
COUSINS' MOTION TO CONFIRM
ARBITRATION AWARD**

The Defendants Michael Cousins Founders Five, LLC d/b/a Sperry Van Ness Founders Group have moved to confirm the Arbitration Award, entered by the South Carolina Association of Realtors.

FACTS

Andrew Waldo submitted an application to the Coastal Carolinas Association of REALTORS®. **Exhibit 1**, Affidavit of Heather Tenney, Attachment A and ¶ 7, Electronic Application. Waldo became a member of the Coastal Carolinas Association on August 15, 2014. Pursuant to this agreement, Waldo agreed to abide by the Rules, Regulations, and Code of Ethics of the National Association of REALTORS®, the South Carolina Association of REALTORS®, and the Coastal Carolinas Association of REALTORS®. **Exhibit 1**, Attachment A, Attachment B (Relevant portion of Coastal Carolinas Association Rules), and Attachment C, (Relevant portion of Coastal Carolinas Association Bylaws).

The NAR Code of Ethics requires arbitration between realtors in any dispute arising out

of their real-estate practice. **Exhibit 2**, Affidavit of Lindsey Davidson, Attachment A (Relevant portions of NAR Code of Ethics) and ¶ 6. Likewise, the Bylaws and Rules of both the Association and the Coastal Carolinas Association require the same. **Exhibit 2**, Attachment B (Relevant portion of Association Bylaws); and ¶ 7.

Waldo and Defendant Michael Cousins disputed whether or not a commission was due on certain real-estate transactions involving golf courses. Waldo initiated an arbitration proceeding before the Association seeking a determination that the commission need not be divided with Cousins. **Exhibit 2**, ¶ 8 and Attachment C (Waldo Request for Arbitration). The agreement between Waldo, Cousins, and the three Associations requires mandatory arbitration. Waldo voluntarily submitted to the arbitration process by filing his request for arbitration on September 28, 2015. At the conclusion of the hearing, Waldo admitted that the hearing had been fair and that he had an adequate opportunity to testify, present evidence and witnesses, and conduct cross examination. **Exhibit 3**, Second Affidavit of Lindsey Davidson, ¶¶ 6 and 7.

At Waldo's request, the Association scheduled an appellate review of the current arbitration decision from March 30, 2016. **Exhibit 2**, ¶¶ 9 and 10, Attachment D (Waldo Request for Review) and Attachment E (Hearing Notice). On May 2, 2016, the Procedural Review Hearing Tribunal affirmed the award, concluding the arbitration process. **Exhibit 4**.

Waldo then appealed the arbitration award to Circuit Court. Cousins moved to confirm the award.

ARGUMENT

I. COUSINS' MOTION TO CONFIRM SHOULD BE GRANTED.

Mr. Waldo (the appellant) filed this case in arbitration pursuant to the Arbitration Rules of the South Carolina Association of Realtors. He chose this forum initially by contract with MLS and by virtue of his membership in the Association. He also chose this forum voluntarily, after a dispute had arisen. He is bound by the Arbitration Rules of the SC Association of Realtors.

The Association has adopted the Rules of the National Association of Realtors. The National Association has produced a manual entitled, "Code of Ethics and Arbitration Manual," which is a public document. Relevant sections are attached hereto as **Exhibit 5**.

Under Part Ten – Arbitration of Disputes, Section 44 sets forth the Duty and Privilege to Arbitrate. It states that the member (Mr. Waldo) agrees to arbitrate disputes with other realtors using the Board's facilities and Rules, "as set forth in the provisions of this Manual."

The standard of appellate review for this arbitration is set forth in Section 53, "The Award." Subsection (a) states, "The award shall be in writing and signed by the arbitrators or a majority of them, shall state only the amount of the award, and, when so signed and transmitted to each of the parties, shall be valid and binding and shall not be subject to review or appeal." (Emphasis added.) A full hearing was held before the South Carolina Association of Realtors. Testimony was taken and all parties participated. The Association ruled in favor of Cousins. See Award of Arbitrators, attached as Exhibit 6.

Section 53 also provides for an appeal "to the Board of Directors" only as to matters involving fundamental due process. Section 55(a) defines fundamental due process as including

such issues as fraud, coercion, bias, prejudice, and evident partiality. Mr. Waldo appealed to the Board and was granted a full appeals hearing. He did not argue that there was any fraud, coercion, bias, prejudice or evident partiality. The Manual has no provision for any further appeal.

The Standard of Review is nearly identical under the S.C. Uniform Arbitration Act. When a case is submitted to arbitration, arbiters decide issues of both law and fact. Once an award is entered, it is generally conclusive, and “courts will refuse to review the merits of an award.” Gissel v. Hart, 383 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). A court will vacate an award only if the arbiter “exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law.” Id.; S.C. Code § 15-48-130. “Judicial review of an arbitration award is limited in scope.” White v. Preferred Research, Inc., 315 S.C. 209, 212, 432 S.E.2d 506, 508 (Ct. App. 2003).

Arbiters exceed their powers only if the arbitrated issue is not within the scope of the arbitration agreement. Harris v. Bennett, 332 S.C. 238, 244, 503 S.E.2d 782, 785 (Ct. App. 1998). For example, if an arbiter awards punitive damages when the agreement expressly excludes them, the arbiter has exceeded his or her powers. But “[f]actual and legal errors by arbitrators do not constitute an abuse of powers, and a court is not required to review the merits of a decision so long as the arbitrators do not exceed their powers.” Gissel at 242, 676 S.E.2d at 324.

As to a manifest disregard of the law, a party must show “something beyond a mere error in construing or applying the law.” Id. at 241, 676 S.E.2d at 323. “Even a ‘clearly erroneous interpretation of the contract’ cannot be disturbed.” Id. The focus is on the conduct of the

arbiter, and setting aside an award on this basis requires proof that “*the arbitrator knew of the governing principle yet refused to apply it.*” Id. (emphasis added). Further, “the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable.” Id.

A similar case is Batten v. Howell, 300 S.C. 545, 389 S.E.2d 170 (Ct. App. 1990). In that case, realtor Howell disputed whether he owed realtor Batten a commission over a sale of real estate. The arbiters ruled in favor of Batten and awarded him \$10,000. Howell challenged the award, claiming there was no legal or factual basis to support it, and that the arbiters had manifestly disregarded or perversely misconstrued the law. On appeal, the court found that there was evidence that Howell invited Batten to sell the property and agreed to pay a commission if he produced a buyer. Although the buyer rejected the offer made through Batten, the buyer later bought the property.

Importantly, the court noted that “[t]he arbitrators did not give reasons for their decision to award Realtor Batten a commission, *but they are not required to do so.*” Id. at 549, 389 S.E.2d at 172 (emphasis added). So long as the factual inferences and legal conclusions supporting the award are “barely colorable,” it should be confirmed. Because there was “at least an arguable ground for the award,” the court affirmed the award. Id.; see also Weimer v. Jones, 364 S.C. 78, 610 S.E.2d 850 (Ct. App. 2005) (“The parties’ vigorous debate regarding which defense is proper demonstrates the arbitrator did not disregard well-defined, explicit, and clearly applicable law in rendering his decision.”).

In this case, Cousins and Waldo, both realtors, disputed whether Waldo was entitled to keep the entire \$500,000 commission for the sale of property that closed in early 2015. Cousins claims he is entitled to \$250,000.

Cousins' brokerage firm originally sued Waldo's brokerage firm, along with several property sellers, in the case styled Founders Five, LLC v. The Real Estate Company et al., Case No. 2015-CP-26-2066. Although he now attacks the arbitration award, Waldo demanded in 2015 that the parties arbitrate their dispute and he initiated proceedings with the Association. See Garrell v. Blanton, 316 S.C. 186, 447 S.E.2d 840 (1994) (holding that, in a case involving very same arbitration rules and contracts, a party who voluntarily participates in arbitration waives any objection to the arbitration of a commission dispute). Although Cousins and Waldo agreed to carve out their claims and arbitrate them, Cousins' claims against the sellers of the property remained in the circuit court. On January 11, 2016, the circuit court dismissed Cousins' claims against National Golf Management, LLC on the basis that Cousins, as broker, did not have a written agreement with National Golf Management, LLC, as seller. In dismissing Cousins' claim against National Golf Management, the circuit court relied on S.C. Code Ann. § 40-57-139(G), which states as follows:

For all real estate transactions, no agency relationship between a buyer, seller, landlord, or tenant and a brokerage company and its affiliated licensees exists unless the buyer, seller, landlord, or tenant *and the brokerage company and its affiliated licenses agree, in writing, to the agency relationship*. No type of agency relationship may be assumed by a buyer, seller, landlord, tenant, or licensee or created orally or by implication.

The circuit court's dismissal of Cousins' claims against National Golf Management based on § 40-57-139(G) makes sense because the statute states that, between broker and seller, a written agreement is required. Real estate agents owe a fiduciary duty to their clients. Darby v. Furman Co., Inc., 334 S.C. 343, 346, 513 S.E.2d 848, 849 (1999). The statute created a requirement that this fiduciary relationship be in writing.

But the statute *does not* apply to claims between brokers. The statute states that an

agency relationship between “buyer, seller, landlord, or tenant,” on one hand, and a “brokerage company and its affiliated licensees,” on the other hand, requires a written agreement. The statute does not address agreements between brokers to share a commission. The circuit court in Founders Five relied solely on this statute in making its decision.

The distinction is important because the arbitration between Cousins and Waldo was not a dispute between a broker and a seller, but rather a dispute between broker and broker. Section 40-57-139(G), therefore, did not apply. Further, the court order relied on by Waldo for res judicata did not address the issue of brokers sharing a commission. The courts recognize an independent claim to split commissions between brokers. See, e.g., Hackler v. Earl Wiegand Real Estate, Inc., 295 S.C. 396; 368 S.E.2d 686 (Ct. App. 1988). The agreement to divide a commission need not be in writing or even expressed. Such an agreement between brokers can be implied. Id. at 398-99; 368 S.E.2d at 686.

Cousins and Waldo arbitrated their broker-versus-broker dispute on February 2, 2016 before a panel of five Association arbiters. After reviewing the evidence and hearing arguments, the panel found in favor of Cousins and awarded him \$250,000, which was half of the \$500,000 commission. Waldo then appealed to the Association’s Procedural Review Hearing Tribunal, which affirmed the award on May 2, 2016.

Waldo has no basis to dispute the arbitration award. There is no evidence that the dispute was outside the arbitration agreement, nor was there any evidence that the arbitration panel exceeded the authority provided in its Code of Ethics. Indeed, Waldo admitted at the hearing that the hearing had been conducted fairly, and that he had had an opportunity to testify, present evidence and witnesses, and cross examine any hostile witnesses. **Exhibit 3, Second Affidavit**

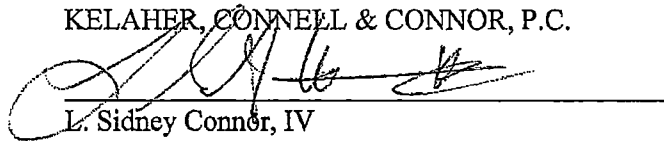
of Lindsey Davidson, ¶¶ 6 and 7.

This court should not entertain Waldo's attempts to re-litigate the same matter that he presented to the arbitration panel. He voluntarily submitted his claim to the full \$500,000 commission, presented his evidence and made his arguments, and must now live with the decision. The arbitration panel found that, based on the evidence, there was an agreement between Waldo and Cousins to split the commission. Cousins' entitlement to half the commission was more than "barely colorable" and at least "arguable," which is all that is required. See Batten, 300 S.C. at 549, 389 S.E.2d at 172 (Ct. App. 1990).

CONCLUSION

For the foregoing reasons, these Defendants request the court to Confirm the Arbitration Award and deny the Plaintiff's appeal.

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June 19, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF HORRY	)	IN THE FIFTEENTH JUDICIAL
	)	CIRCUIT
Andrew Waldo,	)	
	)	CASE NO.: 2016-CP-26-01498
Appellant,	)	
vs.	)	
Michael Cousins; and South Carolina	)	
Association of REALTORS®,	)	
Respondents.	)	
Andrew Waldo; Jane Zheng; and	)	CASE NO.: 2016-CP-26-03338
S.C. Coast Properties, LLC d/b/a Keller	)	(Consolidated)
Williams Realty,	)	
Appellants,	)	
vs.	)	
Michael Cousins; Founders Five, LLC d/b/a	)	
Sperry Van Ness Founders Group; and	)	
South Carolina Association of	)	
REALTORS®,	)	
Respondents.	)	

**DEFENDANT SOUTH CAROLINA ASSOCIATION OF REALTORS®
MEMORANDUM IN SUPPORT OF MOTION TO CONFIRM ARBITRATION AWARD**

The Defendant, South Carolina Association of REALTORS® ("Association"), submits this memorandum in support of the Motion to Confirm the Arbitration Award. The Association appears in this matter to defend the overall fairness, due process, and efficiency of the procedure it uses to resolve disputes between REALTORS®. The arbitration forum provided by the Association, its regional members, and the National Association of REALTORS® provides an inexpensive, quick, and fair method for

resolving disputes between REALTORS®, including those about commissions. It has been used extensively for years across South Carolina and the other states. Further, the process provides for a second level of review to ensure due process.

The advantages of arbitration will be lost if the very circumscribed review provided in both the Federal Arbitration Act and the South Carolina Uniform Arbitration Act is turned into a *de novo* review of the basis for the arbiters' decision as sought by the Plaintiff in this action.

FACTS

Andrew Waldo submitted an application to the Coastal Carolinas Association of REALTORS®, **Exhibit 1**, Affidavit of Heather Tenney, Attachment A and ¶ 7, Electronic Application and became a member of that association on August 15, 2014. Pursuant to this agreement, Waldo agreed to abide by the Rules, Regulations, and Code of Ethics of the National Association of REALTORS®, the South Carolina Association of REALTORS®, and the Coastal Carolinas Association of REALTORS®. **Exhibit 1**, Attachment A, Attachment B (Relevant portion of Coastal Carolinas Association Rules), and Attachment C, (Relevant portion of Coastal Carolinas Association Bylaws).

The NAR Code of Ethics requires arbitration between realtors in any dispute arising out of their real-estate practice. **Exhibit 2**, Affidavit of Lindsey Davidson, ¶ 6 and Attachment A (Relevant portions of NAR Code of Ethics). Likewise, the Bylaws and Rules of both the Association and the Coastal Carolinas Association require the same. **Exhibit 2**, ¶ 7 and Attachment B (Relevant portion of Association Bylaws).

Waldo and Defendant Michael Cousins disputed whether a commission was due on certain real-estate transactions involving golf courses. Cousins and his brokerage

originally sued in the circuit court. In Case No. 2015-CP-26-2066, the court granted summary judgment to the **non-realtor seller** of the property finding no commission due as there was no written agreement between the seller and Cousins' broker. The court, however dismissed the claim between Waldo and Cousins from that lawsuit as the realtor parties agreed to mandatory arbitration.

Waldo initiated an arbitration before the Association seeking a determination that the commission need not be split with Cousins. **Exhibit 2**, ¶ 8 and Attachment C (Waldo Request for Arbitration). The agreement between Waldo, Cousins, and the three Associations requires mandatory arbitration and is enforceable under both the Federal Arbitration Act and the South Carolina Uniform Arbitration Act, depending upon which is found to apply. Thus, Waldo voluntarily submitted to the arbitration process by filing his request for arbitration on September 28, 2015. At the conclusion of the initial arbitration hearing, Waldo admitted that the hearing had been fair and that he had an adequate opportunity to testify, present evidence and witnesses, and conduct cross examination. **Exhibit 3**, Second Affidavit of Lindsey Davidson, ¶¶ 6 and 7. The arbiters awarded Cousins one-half of the commission paid, totaling \$250,000. **Exhibit 4**, Award.

At Waldo's request, the Association scheduled an appellate review of the current arbitration decision from March 30, 2016. **Exhibit 2**, ¶¶ 9 and 10, Attachment D (Waldo Request for Review) and Attachment E (Hearing Notice). On May 2, 2016, the Procedural Review Hearing Tribunal affirmed the award, concluding the arbitration process. **Exhibit 5**.

In this case, Cousins and Waldo, both realtors, disputed whether Waldo was entitled to keep the entire \$500,000 commission for the sale of property that closed in early 2015. Cousins claims he is entitled to \$250,000. The Association takes no side in this dispute, but simply defends the process used to arbitrate the dispute.

DISCUSSION

I. NOTHING COMPLAINED OF IN THESE CASES MEETS THE NARROW REQUIREMENTS FOR VACATING OR AMENDING AN ARBITRATION AWARD.

A. The Narrow Exceptions Provided for in the South Carolina Act and Common Law do not Apply and the Award Should Be Confirmed.

When a case is submitted to arbitration, arbiters decide issues of both law and fact. Once an award is entered, it is generally conclusive, and “courts will refuse to review the merits of an award.” *Gissel v. Hart*, 383 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). A court will vacate an award only if the arbiter “exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law.” *Id.*; S.C. Code § 15-48-130.¹ “Judicial review of an arbitration award is limited in scope.” *White v. Preferred Research, Inc.*, 315 S.C. 209, 212, 432 S.E.2d 506, 508 (Ct. App. 2003).

“Manifest disregard for the law” as a basis for vacating an arbitration award does not appear in either the South Carolina Uniform Arbitration Act nor in the Federal Arbitration Act (“FAA”). Courts created the manifest disregard doctrine adding to the statutes and, therefore, courts apply it very narrowly under both the Uniform Arbitration Act and the FAA. *House v. Vance Ford-Lincoln-Mercury Inc.*, 328 P.3d 1239, 1247 (Ok. App. 2014) (applying FAA); *Home Owners Management Enterprises, Inc. v. Dean*, 230

¹ A court will also vacate an award if the (1) the award was procured by corruption, fraud, or undue means; (2) the arbiters were unfairly biased; (3) the arbiters refused to postpone the hearing despite due cause; or (4) there was no actual arbitration agreement. S.C. Code Ann. § 15-48-130. But Waldo has not raised these issues and instead relies on the common law principle of manifest disregard of the law.

S.W.3d 766, 768-69 (Tex. App. 2007) (in a case under Texas Uniform Arbitration Act related to sale of real property, citing federal law that manifest disregard is a “very narrow standard or review”).²

Arbiters exceed their powers only if the arbitrated issue is not within the scope of the arbitration agreement. *Harris v. Bennett*, 332 S.C. 238, 244, 503 S.E.2d 782, 785 (Ct. App. 1998). For example, if an arbiter awards punitive damages when the agreement expressly excludes them, the arbiter has exceeded his or her powers. But “[f]actual and legal errors by arbitrators do not constitute an abuse of powers, and a court is not required to review the merits of a decision so long as the arbitrators do not exceed their powers.” *Gissel* at 242, 676 S.E.2d at 324.

As to a manifest disregard of the law, a party must show “something beyond a mere error in construing or applying the law.” *Id.* at 241, 676 S.E.2d at 323. “Even a ‘clearly erroneous interpretation of the contract’ cannot be disturbed.” *Id.* The focus is on the conduct of the arbiter, and setting aside an award on this basis requires proof that “*the arbitrator knew of the governing principle yet refused to apply it.*” *Id.* (emphasis added). Further, “the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable.” *Id.* In order to convince this Court to vacate the award on this narrow common law ground, Waldo must show that the arbiters knew of a controlling legal principle and purposefully ignored it. *Harris v. Bennett*, 332 S.C. 238, 246, 503 S.E.2d 782, 787 (Ct. App. 1998). If there is a legal argument supporting the award, then it cannot be a “manifest disregard” so long as the argument is “barely colorable.” *Id.* South Carolina’s interpretation of the act is consistent with those of

² Texas, like South Carolina, adopted the 1956 version of the Uniform Arbitration Act without changing in any way the section on vacating an award. See, Uniform Arbitration Act (1956), 7 U.L.A. Table of Adopting Jurisdiction and § 12 at 99, 514-15 (West 2009).

sister states. *Groceman v. Pulte Homes Corp.*, 53 S.W.3d 599, 602 (Mo. App. 2001) (Party moving to vacate bears heavy burden of demonstrating arbiter knew of and correctly stated the controlling legal rule and then ignored it); *Chrobak v. Edward D. Jones & Co.*, 46 Ark. App. 105, 112, 878 S.W.2d 760, 763 (1994) (Party seeking to vacate cannot simply complain that award violates law, but must specifically show arbiter knew the law and expressly ignored it).

A case almost on point is *Batten v. Howell*, 300 S.C. 545, 389 S.E.2d 170 (Ct. App. 1990). In that case, realtor Howell disputed whether he owed realtor Batten a commission over a sale of real estate. The arbiters ruled in favor of Batten and awarded him \$10,000. Howell challenged the award, claiming there was no legal or factual basis to support it, and that the arbiters had manifestly disregarded or perversely misconstrued the law. On appeal, the court found that there was evidence that Howell invited Batten to sell the property and agreed to pay a commission if he produced a buyer. Although the buyer rejected the offer made through Batten, the buyer later bought the property.

Importantly, the court noted that “[t]he arbitrators did not give reasons for their decision to award Realtor Batten a commission, *but they are not required to do so.*” *Id.* at 549, 389 S.E.2d at 172 (emphasis added). So long as the factual inferences and legal conclusions supporting the award are “barely colorable,” it should be confirmed. Because there was “at least an arguable ground for the award,” the court affirmed the award. *Id.*; see also, *Weimer v. Jones*, 364 S.C. 78, 610 S.E.2d 850 (Ct. App. 2005) (“The parties’ vigorous debate regarding which defense is proper demonstrates the

arbitrator did not disregard well-defined, explicit, and clearly applicable law in rendering his decision.”).

Courts in other jurisdictions adopting the Uniform Arbitration Act agree that arbiters need not set out any reasoning or explanation for an award under the statute. *Umana v. Swidler & Berlin, Chartered*, 745 A.2d 334, 343 (D.C. App. 2000) (Arbiter not required to set out reasons for award); *Lisbon School Committee v. Lisbon Ed. Ass’n*, 438 A.2d 239, 244 (Me. 1981) (“Arbitrators have no obligation to the court to give their reasons for an award”).³

Waldo cannot rely on *C-Sculptures, LLC v. Brown* to reach a different result. 403 S.C. 53, 742 S.E.2d 359 (2013). In that case, the Supreme Court of South Carolina reversed the Court of Appeal and found that arbiters had manifestly disregarded the law when they awarded a home-repair general contractor full damages, even though the general contractor lacked the license required to perform the work. The contractor's license limited the contractor to projects \$100,000 or less and the contract in arbitration totaled \$800,000. The applicable statute stated: “An entity which does not have a valid license as required by this chapter may not bring an action either at law or in equity to enforce the provisions of a contract.” S.C. Code Ann. § 40-11-370(C).

The record established that the losing party brought the statute to the arbiter's attention. The court held the plain language of the statute closed the door on any claim, in court or arbitration, if the contractor lacked the correct license. Thus, the arbiter ignored a clear, governing legal requirement.

³ The District of Columbia adopted the 2000 Uniform Arbitration Act, but Section 23 of that act on vacating awards is substantively identical to the 1956 Uniform Arbitration Act adopted by South Carolina. Uniform Arbitration Act (2000), 7 U.L.A. Table of Adopting Jurisdiction and § 23 at 1 and 77-78 (West 2009). Maine adopted the exact same provision as South Carolina. Uniform Arbitration Act (1956), 7 U.L.A. Table of Adopting Jurisdiction at 99 (West 2009).

C-Sculptures presents facts far different from the case before this Court. Here, Waldo relies on a statute that protects real estate sellers and does not apply to relationships between realtors. The statute states:

For all real estate transactions, no agency relationship between a buyer, seller, landlord, or tenant and a brokerage company and its affiliated licensees exists **unless the buyer, seller, landlord, or tenant and the brokerage company and its affiliated licenses agree, in writing, to the agency relationship.** No type of agency relationship may be assumed by a buyer, seller, landlord, tenant, or licensee or created orally or by implication.

S.C. Code Ann. § 40-57-139(G) (emphasis added). Thus, the “governing law” cited by Waldo is not “well defined, explicit and clearly applicable” so as to support the common law “manifest disregard” exception to confirming the arbitration award. The statute on its face does not apply to the transaction in arbitration—a dispute between brokers/licensees over a commission.

B. If Federal Law Applies, Nothing Before the Court Establishes any of the Very Narrow Exceptions that Support Vacating an Arbitration Award.

If the FAA applies to Waldo’s appeal, there is no basis to vacate or amend the award. Similar to South Carolina law, “[r]eview of an arbitrator’s award is severely circumscribed” *Apex Plumbing Supply, Inc. v. U.S. Supply Co., Inc.*, 142 F.3d 188, 193 (4th Cir. 1998). “Indeed, the scope of review of an arbitrator’s decision is among the narrowest known at law because to allow full scrutiny of such awards would frustrate the purpose of having arbitration at all—the quick resolution of disputes and the avoidance of the expense and delay associated with litigation.” *Id.* To vacate an award under the FAA, an applicant must show that the arbiter manifestly disregarded the law; the award was procured by fraud or corruption; the arbiter was partial or corrupt; the arbiters were guilty of misconduct; or the arbiters “exceeded their powers, or so imperfectly executed

them that a mutual, final, and definite award upon the subject matter submitted was not made." *Id.*; 9 U.S.C. § 10.

The burden on the applicant seeking to vacate an award is "heavy." *MCI Constructors, LLC v. City of Greensboro*, 610 F.3d 849, 857 (4th Cir. 2010). As a matter of law, "neither misinterpretation of a contract nor an error of law constitutes a ground on which an award may be vacated." *Id.* at 861. So long as there is an arguable basis for the arbiter's decision, it should be upheld. And similar to South Carolina law, an arbiter does not need to post his or her reasoning. "It is well settled that arbitrators are not required to disclose the basis upon which their awards are made and courts will not look behind a lump-sum award in an attempt to analyze their reasoning process." *Id.* at 862; *see also, United Steelworkers of America v. Enterprise Wheel & Car Corp.*, 363 U.S. 593, 597 (1960) ("Arbitrators have no obligation to the court to give their reasons for an award"). Thus, Waldo's complaint about the lack of detail in the award fails to give this Court any basis to vacate or remand the award.

In order to demonstrate manifest disregard of the law, Waldo must show that an arbiter knew about a clearly defined legal principle, not subject to debate, and then refused to apply it. *Wachovia Securities, LLC v. Brand*, 671 F.3d 472, 483 (4th Cir. 2013). As discussed above, the statute cited by Waldo does not clearly and unarguably apply and there is no evidence the arbiters ignored it. As the Fourth Circuit noted:

When parties consent to arbitration, and thereby consent to extremely limited appellate review, they assume the risk that the arbitrator may interpret the law in a way with which they disagree. *Cf. Remmey v. PaineWebber, Inc.*, 32 F.3d 143, 146 (4th Cir.1994) (explaining that arbitration is an alternative to litigation); *Safeway Stores v. Am. Bakery & Confectionery Workers*, 390 F.2d 79, 84 (5th Cir.1968) ("The arbiter was chosen to be the Judge. That Judge has spoken. There it ends."). Any more probing review of arbitral awards would risk changing arbitration

from an efficient alternative to litigation into a vehicle for protracting disputes.

Id. at 478 n. 5. Waldo's attempt to inject South Carolina statutes protecting parties contracting for realtor services in a realtor vs. realtor dispute is not recognized by federal law. Federal courts routinely reject attempts to inject state law principles not adopted in the arbitration agreement. *Id.* at 479.

Thus, the analysis that a court uses for determining whether to vacate a federal arbitration award is largely the same analysis used under South Carolina law. An arbiter does not need to state reasons; the challenger faces a heavy burden; and merely misapplying the law is not enough to vacate an award. Regardless of whether state or federal law applies, the award should be confirmed.

II. THE ORDER OF THE CIRCUIT COURT IN A RELATED CASE BETWEEN DIFFERENT PARTIES AND BASED ON DIFFERENT THEORIES GOVERNED BY DIFFERENT STATUTES DOES NOT PRECLUDE THE ARBITRATION RESULT.

Waldo attempts to apply *res judicata* or collateral estoppel to the arbitration, when there is no basis to do so.

Cousins's brokerage firm originally sued Waldo's brokerage firm, along with several property sellers, in the case styled *Founders Five, LLC v. The Real Estate Company et al.*, Case No. 2015-CP-26-2066. Although he now attacks the arbitration award, Waldo demanded in 2015 that the parties arbitrate their dispute and he initiated proceedings with the Association. See, *Garrell v. Blanton*, 316 S.C. 186, 447 S.E. 2d 840 (1994) (holding that, in a case involving very same arbitration rules and contracts, a party who voluntarily participates in arbitration waives any objection to the arbitration of a commission dispute). Although Cousins and Waldo agreed to carve out their claims

and arbitrate them, Cousins's claims against the sellers of the property remained in the circuit court. On January 11, 2016, the circuit court dismissed Cousins's claims against National Golf Management, LLC on the basis that Cousins, as broker, did not have a written agreement with National Golf Management, LLC, as seller. In dismissing Cousins's claim against National Golf Management, the circuit court relied on S.C. Code Ann. § 40-57-139(G).

The circuit court's dismissal of Cousins's claims against National Golf Management based on § 40-57-139(G) makes sense because the statute states that, between broker and seller, a written agreement is required. Real estate agents owe a fiduciary duty to their clients. *Darby v. Furman Co., Inc.*, 334 S.C. 343, 346, 513 S.E.2d 848, 849 (1999). The statute created a requirement that this fiduciary relationship be in writing.

But the statute *does not* apply to claims between brokers. The statute states that an agency relationship between "buyer, seller, landlord, or tenant," on one hand, and a "brokerage company and its affiliated licensees," on the other hand, requires a written agreement. The statute does not address agreements between brokers to share a commission. The circuit court in *Founders Five* relied solely on this statute in making its decision.

The distinction is important because the arbitration between Cousins and Waldo was not a dispute between a broker and a seller, but rather a dispute between broker and broker. Section 40-57-139(G), therefore, did not apply. Further, the court order relied on by Waldo for *res judicata* did not address the issue of brokers sharing a commission. The courts recognize an independent claim to split commissions between

brokers. See, e.g., *Hackler v. Earl Wiegand Real Estate, Inc.*, 295 S.C. 396, 368 S.E.2d 686 (Ct. App. 1988). The agreement to divide a commission need not be in writing or even expressed. Such an agreement between brokers can be implied. *Id.* at 398-99; 368 S.E.2d at 686.

The doctrine of *res judicata* requires that the parties in the first action be identical to the parties in the second action. *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 494, 593 S.E.2d 480, 485 (Ct. App. 2004). The court dismissed Waldo and his brokerage firm from the prior suit so they could pursue arbitration with Cousins. The dismissal occurred before the order claimed to have preclusive effect. *Res judicata* cannot apply.

The doctrine of collateral estoppel bars a party from re-litigating an issue fully litigated in another lawsuit if the prior action directly resolved the specific issue and the resolution of the issue was necessary to the prior judgment. *Crosby v. Prysmian Communications Cables and Systems USA, LLC*, 397 S.C. 101, 109, 723 S.E.2d 813, 817 (Ct. App. 2012). The *Founders Five* case determined that the seller of the property had no obligation to pay Cousins a commission. The *Founders Five* case did not address whether a relationship between Waldo and Cousins as realtors bound Waldo to split the commission with Cousins. The court in *Founders Five* did not address the issue decided in arbitration and, therefore, the decision in *Founders Five* does not preclude the issue being decided in arbitration.

IV. DUAL AGENCY AND SUB-AGENCY DO NOT APPLY TO A COMMISSION SPLIT DISPUTE, WERE NOT RAISED BEFORE THE ARBITERS, AND CANNOT BE RELIED UPON TO CHANGE THE RESULT AT THE JUDICIAL REVIEW STAGE.

Waldo failed to raise the issue of a dual agency or a sub-agency relationship with Cousins. Rather, his dispute with Cousins—which Waldo chose to handle through

arbitration—was solely an agent-versus-agent dispute over a commission split, and no written agreement between them was required.⁴

A “dual agency” is “a form of agency in which two clients represented by a real estate brokerage firm in the same transaction may be given almost equivalent treatment as a single agency.” S.C. Code Ann. § 40-57-30 (effective Jan. 1, 2017).⁵ In other words, a “dual agent” is someone representing both sides of the transaction, similar to a lawyer representing both husband and wife in a divorce. Because of the potential for a conflict of interest, a written agreement is required. But neither Cousins nor Waldo are “dual agents” because they were not representing both sides of the transaction. A “sub agency” is “an agent of an agent.” *Id.* Cousins is in a dispute with Waldo about whether or not Waldo owes him money based on his role as a “procuring cause” of the transaction.

Waldo is correct that South Carolina statutory law requires written agreements between buyer/seller and an agent. And Waldo is also correct that when buyer/seller engages a dual agent or subagent, a written agreement is also required. But Waldo continues to miss the point. This is not a dispute between a buyer/seller and the agent, but rather it is a dispute between an agent and agent. This distinction is crucial, because the purpose of the statutory scheme in S.C. Code Ann. § 40-57-5 *et seq.* and the Real Estate Commission it created is “to protect the public's interest when involved in real estate transactions.” S.C. Code Ann. § 40-57-5. The public consists of the

⁴ Although the definitions of “dual agency” and “sub-agency” are new to the statutory scheme and do not go into effect until January 1, 2017, they show what the General Assembly meant when it used those words in S.C. Code Ann. § 40-57-137.

⁵ The arbiters considered and relied on an email, a writing exchanged between Cousins and Waldo, in any event. They also relied on course of dealing commission splits in earlier golf course sales by Waldo and Cousins.

buyers and sellers who should be protected from unscrupulous agents, who owe them fiduciary duties. To protect the public, the statutory scheme requires written agreements between brokers and the public. But it is silent regarding agreements between agents. If Cousins were in a dispute with the buyer or seller, Waldo's arguments might have a point. In this case, they do not apply.

Finally, S.C. Code Ann. § 40-57-137 makes clear that it applies only to disputes between brokers/agents and their client sellers and buyers. "A real estate brokerage company that provides services through an agency agreement *for a client* is bound by the duties of loyalty, obedience, disclosure, confidentiality, reasonable care, diligence, and accounting as set forth in this chapter." Because the focus of the statute is to protect the public at large, it does not address disputes between agent and agent, where written agreements are not required. In fact, the statute states that "[e]xcept as otherwise stated, nothing in this section precludes an injured party from bringing a cause of action against licensees, their companies, or their brokers-in-charge." *Id.* at § 40-57-137(Q). Importantly, nothing in the statutory scheme has overruled *Batten v. Howell*, 300 S.C. 545, 389 S.E.2d 170 (Ct. App. 1990), which upheld a \$10,000 arbitration award in a broker-versus-broker dispute.

Here, nothing in § 40-57-137 (or § 40-57-139) requires written agreements *between* brokers/agents, and nothing prevents an injured broker/agent, such as Cousins, bringing an action against another broker/agent. Because the purpose of the statutory scheme is to protect buyers and sellers against unscrupulous agents, an agent such as Waldo should not be able to use as a shield a statute that was ever meant to protect him or other agents. The arbitration panel heard the evidence in this broker-

versus-broker dispute and found that Cousins had a claim against Waldo, and that Waldo had injured him. The panel correctly ignored the circuit court's order in *Founders Five, LLC v. The Real Estate Company et al.*, Case No. 2015-CP-26-2066 because that order ruled on a broker-versus-seller dispute, and did not involve the type of dispute that the arbitration panel heard.

In any event, the law requires Waldo to raise these arguments in the arbitration. See, e.g., *Seagate Technology v. Western Digital Corp.*, 834 N.W.2d 555, 560-61 (Minn. App. 2013) (Party failing to raise issue of improper remedy in arbitration could not use it as basis to vacate under Minnesota Uniform Arbitration Act); *Wells Fargo Bank, N.A. v. WMR e-PIN, LLC*, 653 F.3d 702, 711-12 (8th Cir. 2011) (Party failing to raise issue of sanctions before arbitrator could not raise it to court on motion to vacate). This Court is not allowed to adjudicate dual agency written agreements when Waldo did not present the specific issue to the arbiters.

CONCLUSION

This court should not entertain Waldo's attempts to re-litigate the same matter that he presented to the arbitration panel. He voluntarily submitted his claim to the full \$500,000 commission, presented his evidence and made his arguments, and must now live with the decision. The arbitration panel found that, based on the evidence, there was an agreement between Waldo and Cousins to split the commission. Cousins's entitlement to half the commission was more than "barely colorable" and at least "arguable," which is all that is required. See, *Batten*, 300 S.C. at 549, 389 S.E.2d at 172 (Ct. App. 1990).

For the foregoing reasons, this Court should confirm the arbitration award and enter the award as a judgment.

Respectfully submitted,

s/ Marcus A. Manos

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June 20, 2017

Columbia, South Carolina

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master-In-Equity

CASE NO. 2016-CP-26-03338

Andrew Waldo; Jane Zheng; and SC Coast Properties, LLC d/b/a
Keller Williams Realty..... Respondents

vs.

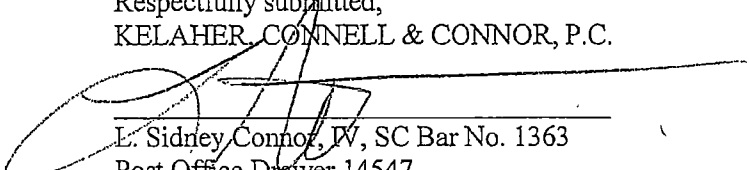
Michael Cousins; Founders Five, LLC d/b/a Sperry Van Ness Founders
Group; and South Carolina Association of REALTORS.....Defendants

Of Whom Michael Cousins; Founders Five, LLC d/b/a
Sperry Van Ness Founders Group are.....Appellants

NOTICE OF APPEAL

YOU WILL PLEASE TAKE NOTICE THAT the Appellants hereby gives Notice of Intent
to Appeal the Honorable Cynthia Graham Howe's Order Vacating Arbitration Award filed
August 16, 2018 and received by electronic mail on August 17, 2018.

Respectfully submitted,
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1 STATE OF SOUTH CAROLINA
2 COUNTY OF HORRY COURT OF COMMON PLEAS
3 FIFTEENTH JUDICIAL CIRCUIT
4 ANDREW WALDO,
5 Plaintiff,
6 Vs. CIVIL ACTION NO. 2016-CP-26-03338
7 MICHAEL COUSINS AND SC
8 ASSOCIATION OF REALTORS,
9 ET AL.,
10 Defendants.

10 HEARING: BEFORE THE HONORABLE
11 CYNTHIA GRAHAM HOWE
12 DATE: June 21, 2017
13 TIME: 4:31 PM
14 LOCATION: Horry County Courthouse
15 1301 2nd Avenue
16 Conway, South Carolina
17 REPORTED BY: Jane L. McKillop, Reporter

18
19
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(Index at rear of transcript)

1 JUDGE HOWE: All right, we have two cases
2 here that have been consolidated. We have Andrew
3 Waldo versus Michael Cousins and South Carolina
4 Association of Realtors. That's case Number
5 2016-CP-26-1498, and Andrew Waldo, Jane Zheng --
6 I may have mispronounced that.

7 MR. ZAYICEK: I believe that's correct, Your
8 Honor.

9 JUDGE HOWE: Oh, okay. Good -- and the SC
10 Coast Properties, LLC, d/b/a Keller Williams
11 Realty versus Michael Cousins, Founder of Spice,
12 LLC, d/b/a Sperry Van Ness Founders Group and
13 South Carolina Association of Realtors, and
14 that's Case Number 2016-CP-26-3338.

15 And there is an order of reference which was
16 signed by the Honorable Benjamin H. Culbertson.
17 That was filed on April the 3rd, 2017. Therefore
18 this court does have jurisdiction of this matter.

19 Today is a hearing on the Appellant's motion
20 to vacate the arbitration award and I just want
21 to make sure that's all.

22 MR. CONNOR: It's also on Mr. Cousins' motion
23 to confirm.

24 JUDGE HOWE: Okay, very good. Well, I
25 thought there would be a corresponding one. I

1 have been getting e-mails all week. So I have
2 all the memos, and we actually printed them so
3 that I could read them better. So I have them
4 here in front of me.

5 Okay, who wants to go first? How are we
6 going to do this?

7 MR. ZAYICEK: Your Honor, I am lead in the
8 Appellant's case.

9 JUDGE HOWE: Okay, very good.

10 MR. ZAYICEK: It's all in front of you. So
11 it's all going to come out.

12 JUDGE HOWE: I figured it would. Let me get
13 a legal pad. I like to write as I listen.
14 Mainly I scribble as I listen and I am ready when
15 y'all are.

16 MR. ZAYICEK: Thank you, Your Honor. Holly
17 Lusk and Doug Zayicek for the Appellant.

18 Your Honor, I did not print out the exhibits
19 when I submitted my memo.

20 JUDGE HOWE: I noticed that.

21 MR. ZAYICEK: I don't know. Is the list of
22 exhibits -- this is the same exhibits that I
23 introduced in front of Judge John. So I hope
24 they are still in the file, and if not I have
25 extra copies.

1 JUDGE HOWE: They are not in the file.

2 Oh, wait a minute. Yes, they are.

3 MR. ZAYICEK: I will just go ahead. It's the
4 same ones that were introduced before.

5 JUDGE HOWE: They weren't in the little bitty
6 file in front of me but they are in this big
7 thick file over here.

8 MR. ZAYICEK: I don't know if the thumb drive
9 with the recording of the arbitration hearing is
10 in there but I will just hand it up.

11 JUDGE HOWE: Is it. No, it's not.

12 Ms. Sadek says it's not in the file, the
13 thumb drive.

14 Thank you very much.

15 MR. ZAYICEK: Thank you, Your Honor.

16 MR. CONNOR: Did you provide a copy of the
17 thumb drive? I can't remember.

18 MR. ZAYICEK: I think the Association
19 provided a link and I went and downloaded it.

20 MR. CONNOR: Since it's an exhibit just
21 before the next week or something could you give
22 me a copy?

23 MR. ZAYICEK: It's 65 megs. I will call and
24 get it. It's like an MP-3 file.

25 MR. CONNOR: Okay. Thank you.

1 MR. ZAYICEK: I will do it.

2 Your Honor, this is a petition to vacate the
3 South Carolina Real Estate Commission's
4 arbitration decision that awarded Mr. Cousins a
5 real estate commission for his alleged
6 involvement in a real estate transaction
7 involving 13 golf courses in the Myrtle Beach
8 area.

9 JUDGE HOWE: Yes, sir.

10 MR. ZAYICEK: Our position is that it is in
11 clear disregard to a circuit court order on the
12 very issue, and it also is in clear disregard for
13 the statutory law of South Carolina.

14 JUDGE HOWE: Yes, sir.

15 MR. ZAYICEK: The order that I am referring
16 to was issued by Judge Hocker on January 11th of
17 2016.

18 JUDGE HOWE: Yes, sir. I have that order.

19 MR. ZAYICEK: I will just hand it up.

20 JUDGE HOWE: You are going to give me another
21 one?

22 MR. ZAYICEK: Not if you don't want it, Your
23 Honor.

24 JUDGE HOWE: That's okay. I will be glad to
25 take it.

1 JUDGE ZAYICEK: I just wanted to make sure.

2 JUDGE HOWE: Is that the January 11th? I
3 mean it was filed January 11, 2016?

4 MR. ZAYICEK: That's correct, Your Honor.
5 And I will be coming back to that later on.

6 As I said the arbitrators -- that order came
7 out before the arbitration and it was provided to
8 the arbitrators. And it contained an agency
9 analysis, and ruled that Mr. Cousins was not
10 entitled to a real estate commission in the very
11 transaction that we are talking about today.

12 That order was provided to the Real Estate
13 Commission prior to the arbitration. The
14 arbitrators they asked one question about the
15 order. They asked about who one of the parties
16 was. Otherwise, didn't ask any questions about
17 the order, and I will get into that when we get
18 into the case.

19 So our position is clearly that order where
20 he was denied -- there was a motion to dismiss by
21 the sellers. That motion to dismiss was denied
22 because Mr. Cousins failed to comply with the
23 statutory law of South Carolina in that he did
24 not have any listing or commission agreement. So
25 the circuit court threw the case out.



1 So we submitted that. He took and he
2 submitted an affidavit in that case, and I will
3 get into his affidavit. But our position is not
4 only is the order binding, but the positions that
5 he took in that action are still binding on this
6 court regardless of the arbitration.

7 So the underlying petition to vacate the
8 award is before the court as well as Mr. Connor
9 said the Respondents' petition to affirm that
10 award. And as Your Honor knows you certainly
11 have the authority to remand the matter.

12 So I am not sure either side really favors
13 that, but that's certainly within the court's
14 discretion when it comes to an arbitration.

15 The standard of review with regard to
16 vacating an arbitration award is -- and I think
17 we basically agree on what the standard is --
18 when the arbitrators either manifestly disregard
19 the law or perversely misconstrue the law then it
20 is actually the court's duty and obligation to
21 vacate the arbitration award. And we have both
22 in this case that I will get into. We both -- we
23 have a manifest disregard and we have a perverse
24 misconstruction on different things that I will
25 get into.

1 For a court to vacate an arbitration award on
2 those grounds the governing law simply has to be
3 defined and clearly applicable, and we obviously
4 would point out that the statutes that govern the
5 practice of real estate in South Carolina are
6 applicable and certainly apply to the South
7 Carolina Association of Realtors.

8 So I don't think there is any issue about
9 whether or not the statutes are clearly
10 applicable.

11 South Carolina law and the circuit court
12 order that I just handed up are both very clear,
13 and they expressly require that before a real
14 estate agent is entitled to a commission in a
15 real estate transaction the agent must represent
16 either the buyer or the seller in the
17 transaction, and that must be in writing and it
18 must spell out the compensation agreement.

19 That is black letter law. I don't think
20 there is any dispute about that. I am going to
21 go through the statutes. They have come up with
22 some different theories about why the court order
23 doesn't apply to them or, you know, how they can
24 change their approach after the court order. But
25 our position is very clear that the statutes are

1 expressed, and even as Judge Hocker put in his
2 order clearly apply to this transaction. And as
3 I said I will certainly get into that.

4 It is uncontested that Mr. Cousins has no
5 written agreement, no listing agreement
6 whatsoever, nothing from the prior buyer and the
7 seller in this transaction in writing that
8 entitles him to a commission.

9 I think that's uncontested. I don't think
10 they will challenge that in any way, shape or
11 form. He admits even in his pleadings in the
12 circuit court action these are all oral
13 agreements that he is trying to enforce.

14 The only -- so he didn't represent anyone in
15 this deal. It would kind of be similar if an
16 attorney comes and tries to enforce attorneys
17 fees against a client who he had no
18 attorney/client relationship with. You can just
19 replace realtors with attorneys in that
20 situation.

21 The only evidence in the record is that
22 actually the buyer and the seller did not want
23 Mr. Cousins involved in this transaction.

24 My client had an exclusive agency agreement
25 with the buyer. There is actually two that are

1 in those exhibits. My client complied with the
2 statutory laws of South Carolina. She got an
3 exclusive agency agreement.

4 The buyer and the seller are the ones who
5 control who represents them in a real estate
6 transaction, similar to a legal transaction. The
7 client decides who represents them and who is
8 their attorney in a legal matter.

9 So it is not up to the realtor to try to put
10 himself in a deal. He can't do that. The buyer
11 and the seller are the ones who decide who the
12 realtors are in a transaction. They decide what
13 is done with their money.

14 JUDGE HOWE: Because they are the principals?

15 MR. ZAYICEK: Yes. Yes, Your Honor. It is
16 their money. It is not the realtor's money to
17 decide how it's to be split. And as I will get
18 into it the statutes make that very clear.

19 And we would ask the court for Mr. Cousins to
20 produce any shred of written evidence whatsoever
21 wherein either the buyer or the seller agreed
22 that he is entitled to a commission, and it does
23 not exist as the circuit court order points out.

24 So really the sole fundamental question --
25 there is three briefs. There is stacks of

1 documents. The sole question that is really
2 before the court that controls the entire outcome
3 one way or the other is whether or not Mr.
4 Cousins was required by law to have a written
5 listing agreement with either the buyer or the
6 seller that specifies his entitlement to a
7 commission.

8 If the answer to that question is yes, then
9 the arbitration award has to be vacated because
10 what the arbitrators did, even in addition to the
11 manifest disregard of the law what the
12 arbitration panel did was essentially create an
13 oral agreement and then they enforced it.

14 So they are coming in front of the court and
15 asking you to affirm a contract that is illegal
16 under South Carolina law. And the court cannot
17 in any way, shape or form lend its assistance to
18 enforce an illegal contract. So that is in
19 addition to that manifest disregard. At no point
20 can the court affirm an arbitration award that's
21 based on illegal contract.

22 So that is separate and distinct from that
23 manifest disregard of the law. It's really a
24 question of subject matter jurisdiction, which
25 can be raised at any time. If it's an illegal

1 contract the court can't enforce it. The case
2 law even says the state sua sponte can go ahead
3 and make that issue and rule on that tissue even
4 if the parties don't bring it up.

5 So that's the fundamental question. If Mr.
6 Cousins does not have a written listing agreement
7 from the buyers and the seller, the principals in
8 the deal, showing that they have the knowledge
9 and consent that he is a part of that transaction
10 and entitled to a commission, then there is no
11 way the arbitration award can be affirmed. It
12 has to be vacated.

13 Let me go ahead and get into there is about
14 four statutes or five statutes that govern the
15 relationship of broker's agents and even
16 co-brokers, which are applicable and will show,
17 clearly define and express that any agreement
18 that there cannot be an oral commission agreement
19 plain and simple.

20 The first statute, Your Honor, is 40-57-10.

21 Your Honor, this just states the purpose of
22 the Real Estate Commission, and it says the
23 purpose of the Commission is to regulate the real
24 estate industry so as to protect the public
25 interest when involved in real estate

1 transactions.

2 The only reason I hand that up, Your Honor,
3 is that there has been, in previous hearings
4 there has been an allegation that somehow because
5 this is a commercial transaction that these real
6 estate laws don't apply to this transaction. But
7 I don't know if it will still take that position
8 or not, but the real estate laws apply to all
9 real estate transactions, the real estate
10 industry so to speak as a whole, not just
11 residential real estate.

12 The next code section, Your Honor, is
13 40-57-30.

14 Your Honor, I have highlighted a few sections
15 in here. First, number three is the definition
16 of a broker. A broker is an individual who for a
17 fee, salary, commissioner or valuable
18 consideration or with the intent or expectation
19 of receiving compensation A, negotiator attempt
20 to negotiate the listing, sale, purchase,
21 exchange, lease, et cetera, et cetera.

22 So if you are a real estate agent and you
23 expect to get a commission in a real estate
24 transaction you have to comply with these rules
25 and regulations. Again, it couldn't be more

1 clear. If you have the intent or expectation of
2 receiving a commission you have to comply with
3 these conditions.

4 The next statute, Your Honor, is 40-57-139.

5 This is the duties of a licensee to provide
6 an agency disclosure form. Subsection A -- these
7 all kind of say the same thing. Subsection A
8 says a licensee shall provide at first practical
9 opportunity to all buyers and sellers with whom
10 they come in contact with a meaningful
11 explanation of the agency agreement, the agency
12 disclosure form that's prescribed by the
13 Commission, et cetera.

14 Now E says -- E essentially says the same
15 thing. It says a licensee who has substantive
16 contact with a buyer or seller shall provide to
17 the buyer or seller an agency disclosure form at
18 the first substantive contact.

19 At the time of contact it is presumed that
20 the potential buyer or seller is a customer of
21 the licensee as defined by this chapter, and that
22 the licensee shall offer services to a customer
23 as defined under section 40-57-139 only until the
24 potential buyer or seller requests
25 representation.

1 And here is one of the important sections.
2 However, before ratification of a real property
3 sales agreement the real estate licensee must
4 represent either the buyer or the seller in an
5 agency capacity in order to be in compliance with
6 this chapter.

7 Again what I said earlier was if you have the
8 expectation of earning a fee you must be
9 representing either the buyer or the seller in a
10 real estate transaction.

11 Then subsection G, Your Honor, and this is
12 the one that the circuit court judge Judge Hocker
13 relied on. For all real estate transactions,
14 again not just residential, all real estate
15 transactions no agency relationship between a
16 buyer, seller, landlord or tenant in a brokerage
17 company and its affiliated licensee exists unless
18 the buyer, seller, landlord or tenant and the
19 brokerage company and its affiliated licensee
20 agree in writing to the agency relationship.

21 And just to clarify the in writing part it
22 goes on to say in the next sentence no type of
23 agency relationship may be assumed by a buyer,
24 seller, landlord, tenant or licensee or created
25 orally or by implication.

1 So again crystal clear language mandatory in
2 writing listing agreements, agency agreements
3 with either the buyer or the seller depending on
4 who you represent in the transaction.

5 The next section is 40-57-135.

6 C-4 on page 5, Your Honor, it says a licensee
7 may not advertise, market or offer to conduct a
8 real estate transaction involving real estate in
9 whole or in part owned in whole or in part by
10 another person without first obtaining a written
11 listing agreement from the owner. Again, written
12 listing agreement.

13 Then it goes on on page 7, D-4.

14 Your Honor, are you there on page 7?

15 JUDGE HOWE: I have it.

16 MR. ZAYICEK: Okay. Under D-4 it says a
17 listing or buyer's representation agreement must
18 be in writing and must set forth all material
19 terms of the party's agency relationship,
20 including but not limited to A, description of
21 the duties. B, the amount of compensation to be
22 paid or the method to be used in calculating the
23 amount of compensation to be paid. C, an
24 explanation of how and when the agent earns his
25 compensation. And D, an explanation of how

1 compensation will be divided among participating
2 or cooperating brokers if applicable.

3 Now again here is the writing requirements
4 that have to be in any agency agreement between a
5 realtor and their client, and it specifically
6 provides the compensation has to be spelled out.
7 And the reason I highlight that last section is,
8 and I am going to get into it in a minute but in
9 the circuit court action Mr. Cousins says he
10 represented the seller and the seller was the one
11 who was entitled to a commission. And the
12 circuit court threw that out and said you had no
13 agreement with the seller.

14 So then Mr. Cousins goes to the arbitration
15 and employs what I think they referred to in
16 their briefs as an alternate strategy and says,
17 well, I didn't really represent the seller. I
18 could be classified as representing both sides.
19 I was a cooperating broker.

20 So that's kind of a theory they want to apply
21 now to try and get around the circuit court
22 order. But it specifically states right there
23 that any, any agreement on being a cooperating or
24 participating broker in sharing compensation has
25 got to be spelled out in the listing agreement,

1 which has to be entered into prior to the parties
2 executing the real estate contract. So it's all
3 got to be spelled out in advance.

4 And it goes on. The other sections of that
5 says it's got to have the signatures of all
6 parties, et cetera. Clearly that's got to be in
7 writing and agreed to by both parties.

8 And I think the last code section is
9 40-57-137.

10 JUDGE HOWE: Thank you.

11 MR. ZAYICEK: Your Honor, on page 3,
12 subsection E it says a licensee acting as a
13 seller's agent may not offer a subagency
14 relationship to other brokers or offer to
15 compensate another broker who represents the
16 buyer without the knowledge and consent of the
17 seller client.

18 Subsection J is the reverse. A licensee
19 acting as a buyer's agent may not offer a
20 subagency relation to other brokers or offer to
21 compensate another broker who represents a seller
22 without the knowledge and consent of the buyer
23 client.

24 And again that knowledge and consent has got
25 to be spelled out in the listing agreement where

1 it has to spell out how the compensation is
2 earned and how the compensation is to be split
3 among these brokers. This statutory scheme is
4 set up specifically to avoid this action.

5 You cannot go and say I had an oral
6 agreement. In the circuit court I represented
7 the seller. I lose there. Well, I'll go to
8 arbitration. Well, I can be construed as
9 representing both sides. It's all an oral
10 agreement.

11 The arbitration is not a do over for the
12 circuit court action. You cannot take a position
13 inconsistent or maybe in theory you can take a
14 position that's inconsistent in the arbitration,
15 but you can't come back to circuit court and ask
16 the circuit court to affirm the arbitration award
17 based on that inconsistent position.

18 You've already taken a position in litigation
19 you represented the seller. You lost that
20 action. That action is binding on you. The
21 representations and positions you've taken in
22 that action are binding on you when you come back
23 to court for the very same transaction, not a
24 different transaction, the very same transaction.

25 So the case law -- or I'm sorry -- the

1 statutory law -- and there is also statutes that
2 say you can't be a dual agent. If you are going
3 to be a dual agent you have to have informed
4 consent on both sides. You essentially have to
5 have a listing agreement with both sides. And
6 Mr. Manos admits in his brief Mr. Cousins was not
7 a dual agent.

8 And the circuit court already ruled he didn't
9 represent the seller. So if you didn't represent
10 the seller, you obviously can't be a dual agent.
11 And my client has the exclusive agency agreement
12 with the buyer. So that's kind of the agency
13 position in this transaction.

14 And I think section 137 also has another
15 provision I want to point out. Yes. I'm sorry.
16 If Your Honor will go back to section 137 on page
17 9, at the bottom subsection Q.

18 Is Your Honor there?

19 JUDGE HOWE: I am there.

20 MR. ZAYICEK: Okay. And this is also relied
21 on in Judge Hocker's order but I wanted to point
22 it out to the court. It says the provisions of
23 this section which are inconsistent with
24 applicable principles of common law supersede the
25 common law, and the common law may only be used

1 to aid in the interpretation for clarifying the
2 duties.

3 So it is the clear and tell of the general
4 assembly that this statutory framework that was
5 adopted in 1997 I believe it is -- '98. I'm
6 sorry. Whatever, '97 or '98, whatever the date
7 may be. I am not trying to trick anybody on the
8 date.

9 But when the general assembly adopted this
10 statutory framework it specifically says this
11 overrules the common law.

12 And what Mr. Cousins did with Judge Hocker,
13 he tried to rely on like a 1988 case, and Judge
14 Hocker said the statutory framework overrides the
15 common law. What they did in their briefs now,
16 they relied on this Batten versus Howell case,
17 again a case from the '80s. And so any case
18 prior to 1998 is actually irrelevant on this
19 agency question.

20 There is no doubt that prior to the enactment
21 of this statutory framework you could have oral
22 agreements, but after the adoption of the
23 statutory framework you absolutely cannot. You
24 know, one can argue that's exactly why the
25 statutory framework was put in place.

1 So let me get into what happened up to this
2 point. Specifically I want to start out with the
3 circuit court action.

4 Well, let me -- I have got one case I want to
5 hand up actually that talks about this statutory
6 framework. And, Your Honor, this is an
7 unpublished case.

8 JUDGE HOWE: Okay.

9 MR. ZAYICEK: I am not presenting it as
10 controlling authority in any way, shape or form.
11 Your Honor can ignore it completely obviously if
12 you so choose. But this is the only case that I
13 could find that deals with this statutory
14 framework since it was adopted in '97 or '98.

15 And this is King versus Bennett. It's a 2013
16 case decided by South Carolina Court of Appeals.
17 I am just going to read the first two paragraphs.
18 Shelby King sue respondent Amy Bennett, the Amy
19 D. Bennett trust fund and Amy Bennett trustee
20 asserting various causes of action, fraud, civil
21 conspiracy and conversion by false pretensions
22 arriving from King's claim that she was entitled
23 to a compensation for her services as a real
24 estate professional.

25 The trial court granted summary judgment to

1 Respondents holding King could not recover either
2 damages or equitable relief because she did not
3 have a written agreement with respondents. King
4 appeals. We affirm. King argues the trial court
5 erred in ruling that pursuant to 40-57-135 D-4 of
6 the South Carolina code the absence of a written
7 agreement barred her from recovering for the
8 services that she provided to respondents. We
9 disagree.

10 So that case clearly holds, and again
11 unpublished decision clearly holds you don't have
12 a written agreement you cannot get a real estate
13 commission. You can't allege various equitable
14 causes of action or anything else to get around
15 the statutory requirements of having to have a
16 written agreement.

17 So then getting back to what has happened to
18 this point. The first thing was the circuit
19 court action and that was 15-CP-26-2066. Mr.
20 Cousins is the one who filed an action in the
21 circuit court.

22 JUDGE HOWE: That was on behalf of the entity
23 for which he worked?

24 MR. ZAYICEK: For which he is the broker in
25 charge, right.

1 JUDGE HOWE: Okay. But not individually?

2 MR. ZAYICEK: Right. My client is the broker
3 in charge of Keller Williams.

4 JUDGE HOWE: Yes, sir.

5 MR. ZAYICEK: So he brought an action in
6 circuit court. He is the one who asked the
7 circuit court to resolve this matter. And the
8 circuit court certainly did dissolve this matter
9 and threw out his claim.

10 And it's kind of ironic that after getting an
11 adverse ruling from the circuit court they have
12 tried to do everything possible to disavow that
13 the circuit court action really had anything to
14 do with anything, that order is not relevant in
15 any way, shape or form.

16 But they are the ones who submitted it to
17 circuit court and asked for the circuit court to
18 rule on the matter. My clients were defendants
19 in that action, and he lumped everybody together
20 in his allegations.

21 JUDGE HOWE: But this was for the same
22 commission?

23 MR. ZAYICEK: This is the exact same
24 commission, Your Honor. That's right.

25 JUDGE HOWE: Okay.

1 MR. ZAYICEK: I am going to hand up a copy of
2 the pleadings filed by Mr. Cousins. In paragraph
3 nine of the complaint, Your Honor, Mr. Cousins
4 alleges at all times during these introductions
5 and sales processes there was an agreement and
6 oral understanding between and among all the
7 parties.

8 So he admitted in his complaint that it was
9 oral. In paragraph 22 he alleges the same thing.
10 He says plaintiff would show that the arrangement
11 for the split of the real estate commission is
12 common in the real estate industry, and is
13 recognized as a standard oral contract to be
14 honored and enforced by the courts of this state.

15 Obviously the circuit court didn't agree with
16 that. The sellers were represented by Ms. Emma
17 Ruth Brittain. She filed a motion to dismiss
18 based on the theory that these oral allegations,
19 these oral contracts that he is referring to that
20 entitled him to a commission are illegal and
21 unenforceable in South Carolina.

22 In response to that motion Mr. Cousins
23 submitted an affidavit. In paragraph eight on
24 page 2 of the affidavit he alleges -- and this
25 will be the second sentence of paragraph eight,

1 the fourth line down. It says there was an
2 understanding between me as a representative of
3 Sperry Van Ness and the representatives of
4 National Golf Management, LLC, who is the seller.

5 So there was an agreement between Mr. Cousins
6 and the seller that a standard six percent
7 commission will be paid on the sale of golf
8 course property. So again his agreement is with
9 the seller.

10 In paragraph nine he admits that there was no
11 signed listing agreement. He says that's not
12 unusual in the commercial market in the Myrtle
13 Beach area. So again oral agreement. I am not
14 sure how admitting that a lot of people don't
15 comply with the statutory law is really helpful
16 but, you know, I guess he routinely doesn't get
17 listing agreements.

18 In paragraph 15 he references an e-mail, and
19 the only thing I want to point out there is my
20 client at the end, the second line from the
21 bottom tells Mr. Cousins get a commission
22 agreement, please.

23 Paragraph 24, Mr. Cousins states that he sent
24 an e-mail to Jane Zheng a few minutes later and
25 then that -- then two lines down he says five

1 minutes later he sent another e-mail to my client
2 as follows. Jane, I do not understand what is
3 happening here. What is the 13 golf course GC
4 deal you refer to with Bob. You talked to him in
5 China in November, question mark. I opened the
6 door to National Golf Management and Aberdeen and
7 then Wal-Meg. Why would you go directly to Bob
8 and not involve me. I do not understand. Mike.

9 So what he is alleging in that e-mail is he
10 doesn't even have an understanding or any
11 knowledge of the 13 golf course deal that he is
12 claiming that he is entitled to a commission for.
13 He very clearly states what are you talking
14 about, what is this 13 gold course deal, why
15 would you go to Bob.

16 The seller chose not to retain Mr. Cousins in
17 this transaction. The fact that Mr. Cousins
18 represented the seller in the past is totally
19 irrelevant. It would be the same in an
20 attorney/client relationship. If a client hires
21 an attorney for one thing, they are not bound to
22 use that attorney forever. They can go get
23 another attorney later on.

24 So it doesn't matter what happened in the
25 past. If the buyer doesn't -- buyer or seller,

1 if they don't want to retain you to represent
2 them in a real estate transaction they don't have
3 to. And it's your obligation as the realtor to
4 get the listing agreement to protect yourself
5 before you do anything in a transaction.

6 So I got a little sidetracked there. Okay,
7 paragraph 26, it was the understanding between
8 and among Bob Mauragas as a representative of
9 National Golf Management, the seller, and the
10 undersigned Mr. Cousins as an agent of Sperry Van
11 Ness that Sperry Van Ness was to be paid the same
12 commission on Long Bay and other golf courses as
13 was agreed to be paid on Aberdeen. So again his
14 agreement is with the seller.

15 Paragraph 27, he says upon information and
16 belief conversations were taking place between
17 the seller and the same group of Chinese buyers
18 through their buyers's agent Jane Zheng acting as
19 agent for Keller Williams.

20 Again, my client represents the buyer. He
21 represents the seller. He doesn't say oh, I also
22 represent the buyer or I am cooperating agent
23 with Jane Zheng, none of that. He represents the
24 seller. Jane, my client, represents the buyer.

25 In paragraph 28 he says on December 2014 Bob

1 Mauragas would no longer return his calls to
2 respond to him in any way. That's the agent for
3 the seller. Okay, so he lost contact with the
4 seller. Again, respectfully the seller didn't
5 want him involved in the transaction. That's up
6 to the seller.

7 Paragraph 29, eventually there was a closing
8 of the 13 golf courses sold by National Golf
9 Management, the seller, and its affiliates to the
10 group of Chinese buyers through the buyer's agent
11 Jane Zheng at Keller Williams. Again, another
12 representation of my client being the one
13 representing the buyers.

14 Then the last sentence in that paragraph 29
15 says National Golf Management, LLC, then paid
16 \$500,000 to the buyer's agent Keller Williams on
17 the sale of those 13 golf courses with no signed
18 commission agreement. That's just completely
19 wrong.

20 There is two exclusive agency agreements in
21 favor of my client in that package. I won't
22 point them out or go into them. That's just
23 completely wrong.

24 Paragraph 30, one of the key paragraphs -- it
25 took me a while to get there -- would state that

1 a commission agreement existed between and among
2 National Golf Management, the seller, and its
3 affiliates and/or its affiliates in Sperry Van
4 Ness -- that's Mr. Cunningham -- through numerous
5 communications and course of dealings concerning
6 prior golf courses and sales. So again his
7 commission agreement is with the seller.

8 In paragraph 31 he just again admits there
9 was no signed commission agreement with the
10 seller and Sperry Van Ness.

11 Then paragraph 32, the last paragraph, I will
12 just go and read line five. It says Sperry Van
13 Ness is entitled to be paid a commission from the
14 seller, not the buyer or anyone else, the seller.

15 His position in the lawsuit is I had a deal
16 with the seller. The seller was going to pay me
17 a commission. Jane Zheng, Keller Williams, they
18 represented the buyers. That's the position he
19 took in the litigation that he filed and that he
20 asked. So he asked the circuit court to rule on
21 that matter and the circuit court did. That's
22 the order I handed up in the beginning.

23 I don't really want to go through the whole
24 thing. Your Honor, I can obviously clearly read
25 it but I want to go through just one paragraph,

1 this. Paragraph two, the current dispute between
2 the parties arose in connection with the
3 commercial real estate transaction closed in
4 early 2015. Plaintiff's complaint alleges cause
5 of action against Defendant NGM, as the seller,
6 as the seller for such real estate for breach of
7 contract, breach of contract, fraudulent intent,
8 violation of South Carolina Unfair Practices Act.
9 Said cause of actions are each premised on the
10 seller's attempt to deprive the Plaintiff of a
11 brokerage commission are alleged to have been
12 earned in connection with the Plaintiff,
13 Plaintiff's services as an agent for the seller
14 during the sale of such real property.

15 And then, Your Honor, the judge goes through
16 the creation of an agency relationship is
17 governed by statute. He cites a couple of the
18 statutes that I have already handed up. He goes
19 on to say in the last paragraph on page 2 that
20 there is no listing agreement that exists, that
21 the Plaintiff conceded that it all arose orally
22 and by implication.

23 Then he goes into the Skull Creek Hilton Head
24 Island Realty case, which they handed up and
25 tried to allege that as you can see the case law

1 clearly says you don't need a written listing
2 agreement. The court then clearly pointed out
3 that these statutes were enacted after that case
4 came out. So that case is totally irrelevant.
5 The statute's sole purpose or the intent of the
6 general assembly is that the common law is
7 superseded by the statutory framework. So
8 regardless of what all the case law says
9 previously it's really irrelevant.

10 Then on the bottom of page 3 he simply states
11 the South Carolina general assembly has
12 definitively spoken on the issue before this
13 court, and such statement is dispositive of
14 Plaintiff's argument and went ahead and dismissed
15 his claims in circuit court.

16 So he is bound as I said by the
17 representations in his affidavits. He is also
18 bound by the outcome of that case and cannot go
19 to the arbitration and hope for a Mulligan so to
20 speak. And it's not a do over. Arbitration is
21 not a do over.

22 So what was remaining -- as I said my client
23 sent a copy of the order to the arbitrators prior
24 to the arbitration hearing, which was after
25 obviously the circuit court dismissed Mr.

1 Cousins' claims in circuit court.

2 The arbitration panel chairman started the
3 arbitration proceedings saying that he was going
4 to handle things equitably.

5 JUDGE HOWE: Well, were any of the
6 arbitrators attorneys?

7 MR. ZAYICEK: Neither I nor Mr. Manos were
8 present at the arbitration. Mr. Connor was but I
9 certainly don't know the answer to that question.

10 JUDGE HOWE: Were they all just realtors?

11 MR. ZAYICEK: I believe they are realtors but
12 I can't say for sure.

13 JUDGE HOWE: I didn't mean that to sound just
14 realtors. I mean I am not a realtor. So I don't
15 know. Were they all realtors?

16 MR. CONNOR: The panel was realtors. Their
17 counsel was there at the side table. They had
18 four or five people.

19 JUDGE HOWE: And was that George Cox?

20 MR. CONNOR: From here? From the beach?

21 MR. ZAYICEK: I think he is the attorney for
22 the local Association of Realtors, not the state
23 association.

24 JUDGE HOWE: Okay. So this was in Columbia.

25 MR. CONNOR: This was in Columbia but there

1 was at least one lawyer present at all times,
2 maybe two.

3 Is Lindsey a lawyer?

4 MR. MANOS: No.

5 MR. CONNOR: They were on the side. If the
6 panel had legal questions they would consult with
7 them. They never really --

8 JUDGE HOWE: In they had legal questions they
9 would consult, but the attorney is not --

10 MR. CONNOR: There were no attorneys on the
11 five person panel that I am aware of. They were
12 all realtors.

13 JUDGE HOWE: Right. Okay, thank you.

14 MR. MANOS: That's right, Your Honor.

15 JUDGE HOWE: All right. Thank you.

16 MR. ZAYICEK: So, Your Honor, that just says
17 that the -- and I've handed up the thumb drive.
18 There was no court reporter there, and we will
19 get into the transcription issues in a minute and
20 court reporter issues. But it's kind of not the
21 best recording in the world. It's kind of soft
22 and quiet. It's hard to hear at times.

23 But anyway the panel chairman as I said
24 started by stating that things were going to be
25 handled equitably in order to achieve due process

1 I think is the exact words that he used.

2 And my clients went into the entire agency
3 analysis, and tried to show who represented who
4 and why Mr. Cousins could not legally as a matter
5 of law be entitled to a commission.

6 As I said before the arbitrators asked him
7 one question about the order. They asked about
8 who one of the parties was. Otherwise they
9 didn't ask any questions whatsoever about the
10 effect of the order. I don't know if they had
11 conversations with the counsel or not. But they
12 didn't ask any questions about it whatsoever.

13 So the words -- getting back to what the
14 standard of review is, the manifest disregard of
15 the law or the perverse application of the law is
16 being the basis for overturning an arbitration
17 decision it can't be more clearly made out than
18 what the Commission chairman stated.

19 I am just going to play one clip. After my
20 clients went through the whole agency analysis
21 the hearing chairman stated this.

22 (Tape playing.)

23 MR. ZAYICEK: Can you hear it?

24 JUDGE HOWE: Not well.

25 (Tape played.)

1 MR. ZAYICEK: The procuring cause. So you
2 have the chairman at the hearing saying y'all put
3 up all this evidence of agency, who represented
4 who, et cetera, et cetera, but we are not at a
5 grievance hearing.

6 JUDGE HOWE: We are not at an agreements
7 hearing?

8 MR. ZAYICEK: Grievance.

9 JUDGE HOWE: Oh, a grievance hearing.

10 MR. ZAYICEK: Yeah. We are not at an ethics
11 complaint. This is an arbitration. What we are
12 going to do is talk about the money.

13 I don't even know what that means, but it's a
14 clear representation that all the stuff that was
15 brought up about representation and who
16 represented who, who is entitled to a commission,
17 what's in writing doesn't matter. They were out
18 to achieve an equitable result and that's what
19 they did.

20 He expressly stated there okay, it's all in
21 front of me, I understand, what I am telling the
22 members of the panel this is not an ethics
23 grievance hearing. This is an arbitration.

24 Don't know what the difference is but an
25 arbitration. It would be like Your Honor having

1 to decide an attorney fees dispute and totally
2 disregard the attorney/client relationship.

3 JUDGE HOWE: Or totally disagreeing or
4 totally ignoring whether there had been a written
5 fee or written attorney/client arrangement.

6 MR. ZAYICEK: Right, but as he said, his own
7 words all that agency analysis doesn't matter,
8 let's not talk about that, that's for an ethics
9 hearing, for a grievance hearing.

10 So there can't be a more clear or expressed
11 statement by the hearing chairman that we are
12 going to manifestly disregard statutory law. We
13 are not even going to consider it however you
14 want to phrase it or word it. But that's his own
15 words.

16 So that's what the court has to go on are his
17 own words. That's all we have is that recording.
18 There was no court reporter there. It wasn't
19 transcribed. Neither Mr. Manos or myself were
20 there. Mr. Connor was there for Mr. Cousins.

21 So what they say in their briefs, what the
22 panel relied on, what the panel considered
23 totally irrelevant it's almost fabricated because
24 there is nothing -- and I am going to get into
25 the order in a minute, but the arbitration order

1 is one sentence. It says we find for Mr.
2 Cousins. That's it.

3 And they go into great length in their briefs
4 and try to point out well, here is what they
5 actually considered, and here is what they did
6 and, you know, and it's okay, and the order
7 doesn't actually matter, totally irrelevant.

8 JUDGE HOWE: The order just says we find for
9 Mr. Cousins?

10 MR. ZAYICEK: Yes, and I will get to that in
11 a second. But as the chairman stated what they
12 want to focus is on procuring cause. That was
13 his words.

14 They even completely disregarded and
15 manifested, misconstrued the law in South
16 Carolina on procuring cause. Procuring cause has
17 to also have an agency analysis involved. You
18 cannot ignore the agency questions even if you
19 are considering procuring cause. And I will even
20 submit the South Carolina statutory framework for
21 entitlement to a commission is not based on
22 procuring cause. It's based on do you have a
23 listing agreement.

24 But even if the court were to look at this
25 procuring cause argument, this is Hobbs versus

1 Hudgins, 1953 case. Just it's an action by a
2 real estate broker on an alleged implied contract
3 for commission on sale of realty. The last
4 sentence in the description there states
5 plaintiff did not earn a commission by merely
6 introducing the purchaser to the vendor in the
7 absence of a contract so provided.

8 But the agency analysis begins on page 2.
9 The portion that I have highlighted that's
10 indented. There is no case in this state bearing
11 on the questions here presented, but the rule of
12 reason which seems to be supported by practically
13 all the authorities on the subject is that the
14 broker is entitled to a commission if during the
15 continuance of his agency he is the efficient or
16 procuring cause of the sale. Though the actual
17 agreement for the sale is made by the owner
18 without the aid of a broker, then the broker will
19 be regarded as the procuring cause of his
20 intervention of the founding foundation published
21 in the negotiation resulting when the sale began.

22 The next paragraph states -- and this is kind
23 of where this whole procuring cause argument
24 came. It's kind of a first case for the Supreme
25 Court. It' say the evidence in the Goldsmith

1 case was susceptible of these inferences, colon,
2 that the plaintiff was employed by the owners to
3 sell the property, that pursuant to his agency he
4 advertised it for sale, that he brought the
5 property to the attention of the ultimate
6 purchaser and negotiated with them, that after a
7 lull in the negotiations without termination of
8 plaintiff's agency the owner sold the property to
9 the same persons with whom he had negotiated.

10 And I have highlighted a whole bunch of other
11 stuff, but the only one I really want to talk
12 about is on the next page in the left-hand column
13 the bottom paragraph that I highlighted.

14 It says under the rule in the Goldsmith case
15 the broker must not only show that his efforts
16 were the procuring cause of the sale, but must
17 further show that his intervention was during the
18 continuance of an agency to sell or find a
19 purchaser.

20 So again there has to got to be an agency
21 analysis done even if you are going to rely on
22 procuring cause as the basis for awarding the
23 commission. And you heard the hearing chairman
24 say that's for a grievance hearing, that ain't in
25 front of us.

1 So you can't disregard this whole entire
2 agency analysis and award a commission, and
3 that's what they did.

4 There are more modern cases on point but they
5 all say that same thing, and I don't even
6 think -- I am not even sure either one of the
7 Respondents really go into procuring cause in
8 their briefs at all. But as you heard that is
9 what the hearing chairman said was going to be an
10 important thing. That's what we've got to focus
11 on, procuring cause. Even under that analysis
12 you've got to have an agency.

13 Now then at that time up until 1997 it
14 probably could be an oral agency, not after 1997.
15 Got to be in writing, period. That's what the
16 general assembly said. Any case law they hand
17 up, they also talk about something in 1984 and
18 '88, totally irrelevant.

19 And again I don't know how -- going back to
20 that e-mail that Mr. Cousins referred to in his
21 affidavit he doesn't even know what this 13 golf
22 course transaction is. So as a practical matter
23 I don't know how you could be the procuring cause
24 about something you admit you don't know anything
25 about. Just as a practical matter it doesn't

1 even make sense but you still have to have the
2 agency analysis.

3 They are not, they are not a panel of equity.

4 JUDGE HOWE: They are not a panel of?

5 MR. ZAYICEK: A panel of equity.

6 JUDGE HOWE: Okay. Thank you.

7 MR. ZAYICEK: They have to apply the very
8 statutes that govern their area of practice,
9 their profession. These are some weird statutes
10 that are buried in the probate code or something
11 like that. These are the very statutes that
12 govern their profession. So somehow argue they
13 don't apply or they are not clearly established
14 is I think nonsensical.

15 The bottom line is, again just to reiterate,
16 that in the absence of that written agency
17 agreement specifying that Mr. Cousins is entitled
18 to a comission, then the arbitration panel
19 creating a commission agreement in violation of
20 state law is an illegal contract that this court
21 cannot enforce in any way, shape or form.

22 My client complied with the law and got an
23 agency agreement. There is two of them, two
24 exclusive buyers agency agreements in that list
25 of documents I handed up. I believe they're -- I

1 think they are marked 22 and 23.

2 My client complied with the law. My client
3 has agency agreements. They are exclusive agency
4 agreements. She told Mr. Cousins in the e-mail,
5 in his affidavit there is a reference, she told
6 him get a commission agreement, please.

7 He should not be rewarded, even as a matter
8 of equity he should not be rewarded for failing
9 to comply with the law and a commission taken
10 away from my client who complied with the law.
11 But again that's just an equitable argument.

12 And the Real Estate Commission can't divert
13 the money of the buyer and the seller without
14 their consent and that's -- the commission comes
15 from their money. It's the buyer's money. It's
16 the seller's money. They dictate who gets the
17 commission and who it goes to.

18 The Commission can't step in without the
19 consent of the buyer and the seller and say no,
20 we are going to take your commission money and
21 give it to somebody else. Why we have the
22 statutory framework in place is to avoid this
23 exact same -- this exact scenario.

24 There's two other issues and it goes into the
25 order and whether or not there has to be findings

1 of facts and conclusions of law. Your Honor,
2 section 15-48-180 the second sentence -- I take
3 that back -- the third sentence states that
4 unless otherwise provided in the arbitration
5 agreement when a dispute is submitted to
6 arbitration the arbitrators shall determine
7 questions of law and fact.

8 They cannot be, as I said, an equitable panel
9 that just kind of does whatever it wants to do.
10 It has to consider all the questions of law and
11 fact. It is incumbent in that requirement that
12 they actually provide some type of findings and
13 facts in conclusions of law so not only the
14 parties know the basis of the decision but a
15 reviewing court.

16 JUDGE HOWE: Absolutely.

17 MR. ZAYICEK: So the arbitration award, the
18 arbitration award from the panel, which is dated
19 February 2, 2016, all it says about that second I
20 guess -- I don't know what it is but four or five
21 lines down it says they certify that on the 2nd
22 day of February 2016 we heard evidence of the
23 parties, and having heard all the evidence and
24 arguments of the parties a majority of the panel
25 finds there is due and owing \$250,000 to be paid

1 by Realtor Waldo to Realtor Cousins which shall
2 be paid within 20 days. That's it. That's what
3 they state, we just rule in your favor.

4 And what they want Your Honor to believe is
5 they are beyond judicial review. Your Honor
6 can't look behind this in any way, shape or form.
7 They are not required in any way, shape or form
8 to come up with statements of facts or findings
9 of facts and conclusions of law. They don't have
10 to notify anybody what the basis of their
11 decision is, what they relied on.

12 I am not saying it's got to be a 40 page
13 memorandum, but they've got to give some
14 indication as to what they considered and what
15 the basis of their opinion was. They've got to
16 provide findings of facts and conclusions of law.

17 They vehemently deny in their briefs that
18 they are required to do that, vehemently. There
19 has been no case law that has considered that
20 statute. I will grant that. But what they do
21 have, Your Honor, is their own policies and
22 procedures. Their own policies and procedures
23 state they've got to create findings of facts and
24 conclusions of law.

25 So I don't know how they can come and argue

1 they don't have to provide findings of facts and
2 conclusions of law for a review in court to even
3 consider. The policy of the South Carolina
4 Realtors governing the state professional
5 standard procedures, this document came with the
6 application of to arbitrate. And I apologize I
7 don't know why highlighting on this is kind of
8 faint.

9 JUDGE HOWE: That's okay. I can see it.

10 MR. ZAYICEK: The second paragraph says the
11 purpose of the policy listed hereunder is to
12 address those discretionary areas not covered by
13 the procedures of the National Association of
14 Realtors as well as those areas of the
15 arbitration procedures with are inconsistent with
16 the uniform Arbitration Act 15-48-10, et cetera,
17 et cetera.

18 On page 4 under section 5-C -- Your Honor,
19 are you there?

20 JUDGE HOWE: Yes, I am there.

21 MR. ZAYICEK: Okay. Sorry. 5-C under legal
22 counsel it says Association counsel if present,
23 and as Mr. Connor already stated there was one,
24 if not two of their attorneys present, shall
25 prepare for review of the panel chairman and/or

1 president any statement of facts or a summary of
2 the reasons supporting any decision made by the
3 panel. The decision is made by the panel, not
4 the counsel.

5 So their own rules require them to come up
6 with findings of facts and conclusions of law
7 that support the panel. And they actually have
8 their counsel do it. So you'd think it would be,
9 you know, iron proof, iron clad done by an
10 attorney.

11 They say we don't have to do it. We don't
12 have to prepare anything, and we don't have to
13 tell you why we decided what we did. We can
14 issue a one-sentence order saying we find for so
15 and so and you abide by it.

16 JUDGE HOWE: Who is Association counsel, do
17 you know?

18 MR. ZAYICEK: Mr. Manos certainly knows.

19 MR. CONNOR: Mr. King.

20 MR. MANOS: Senior vice president and general
21 counsel is actually here today, Your Honor.

22 JUDGE HOWE: Very good. So we shall ask him.

23 MR. MANOS: Your Honor, the rules also state
24 that the award may be simply the amount awarded,
25 but I will find that for you.

1 JUDGE HOWE: What rules say that?

2 MR. MANOS: The rules of the Association,
3 Your Honor.

4 JUDGE HOWE: So there is something that
5 contradicts this?

6 MR. MANOS: That's an internally prepared
7 document for the panel, Your Honor.

8 JUDGE HOWE: So the panel can just ignore
9 this?

10 MR. MANOS: They decided. Counsel doesn't.

11 MR. ZAYICEK: Your Honor, can I go ahead and
12 finish up?

13 JUDGE HOWE: Okay, yes, sir. Very good.

14 MR. ZAYICEK: I am almost done. That will be
15 a blessing to all of us.

16 So again what they want to do -- and in their
17 briefs, especially Mr. Manos's brief, there is a
18 couple of places where he says the panel did
19 this, the panel relied on this. Absolutely
20 totally irrelevant.

21 JUDGE HOWE: How did he know that?

22 MR. ZAYICEK: Exactly. And even Judge John
23 at the summary judgment hearing essentially
24 said -- I don't want to put words in his mouth.
25 I can't say this verbatim but he said I don't

1 know how you expect anybody to affirm you based
2 on that order.

3 And that's why it's important. Again, their
4 policies and procedures require them to do it.
5 So for them to now come in and say well, we don't
6 have to do it, you are bound by whatever we
7 decide, it's beyond judicial review I think is --
8 I won't say it exactly but we don't have to
9 accept their decision.

10 And again my clients are substantially
11 prejudiced by them not coming up with findings of
12 facts and --

13 JUDGE HOWE: I mean this is like a jury's
14 award.

15 MR. ZAYICEK: Right. At least you've got a
16 transcript and the jury can do whatever it wants.

17 JUDGE HOWE: Right.

18 MR. ZAYICEK: Ain't no question about that.
19 But you can specify interrogatories.

20 JUDGE HOWE: Sure.

21 MR. ZAYICEK: You can find out kind of what
22 the jury --

23 JUDGE HOWE: If you had the right to be there
24 as counsel you could have requested that.

25 MR. ZAYICEK: Requested?

1 JUDGE HOWE: I mean --

2 MR. ZAYICEK: They issued their order the day
3 after the arbitration. Maybe it was two days
4 after the arbitration. There is no -- we don't
5 know -- the parties don't know in advance what
6 they are going to decide or how they were are
7 going to decide it or what they are going to
8 include in their order.

9 JUDGE HOWE: I mean according to this
10 document that I am looking at you were not
11 entitled to be there because the hearing is
12 confidential.

13 MR. ZAYICEK: Attorneys for the parties could
14 be there. Mr. Connor was there for the
15 Respondent Mr. Cousins.

16 MR. CONNOR: Judge, I would like to clarify.
17 You've got to distinguish between a grievance
18 hearing and an arbitration.

19 JUDGE HOWE: Okay, very good.

20 MR. ZAYICEK: So in getting back to that
21 statute that I handed up, that 40 -- 15-48-180 --

22 JUDGE HOWE: Yes, sir.

23 MR. ZAYICEK: -- the statute that says when a
24 dispute is submitted to arbitration the
25 arbitrators shall determine question of law and

1 questions of fact --

2 JUDGE HOWE: Yes, sir.

3 MR. ZAYICEK: -- how is anyone supposed to
4 know if they actually complied with their
5 statutory obligations if they can just issue an
6 order that says we find for so and so. If they
7 don't have findings of facts and conclusions of
8 law how is any court supposed to know whether
9 they actually did in fact consider all the
10 matters of law and fact, especially when the
11 hearing chairman says we are going to reach an
12 equitable result and all that stuff about
13 agency, that's for an ethics hearing.

14 So there is nothing other than the chairman's
15 own statements to show what they considered, what
16 they relied on, what the basis of their decision
17 was. And they just asked us and especially the
18 court you got to accept it. It can't be
19 reviewed, Your Honor, and we don't have to do
20 these findings of facts and conclusions of law.

21 So there is nothing whatsoever to show that
22 they complied with that statute that requires
23 them to consider all matters of law and facts.

24 The last thing very briefly, their
25 arbitration process is broken up into two phases.

1 There is the hearing and then they have what's
2 called procedural review.

3 We had the procedural review hearing and I
4 asked for a court reporter to be present. And I
5 had the court reporter there and they would not
6 allow the court reporter to transcribe what
7 happened at that hearing. So there is no record
8 of what happened at that hearing at their
9 insistence.

10 So the 15-48-50 specifically states that a
11 copy of the record -- the arbitrator shall cause
12 to be made a copy of the record of the testimony
13 and evidence introduced at the hearing. Again,
14 they internally break up their arbitration
15 process into these two hearings, and we were not
16 allowed to have a court reporter at the second
17 hearing.

18 That's where the hearing chairman showed up
19 and stated again the basis for their decision.
20 And that's again the only thing on the record as
21 to what the basis of the decision was. So
22 without us having a court reporter there we are
23 substantially prejudiced, and we believe 15-48-50
24 allows us to have a court reporter present.

25 JUDGE HOWE: And you had a court reporter

1 there?

2 MR. ZAYICEK: Had a court reporter there and
3 she was barred from coming in.

4 JUDGE HOWE: She was barred from coming in?

5 MR. ZAYICEK: They would not allow her to
6 come in. That goes to what Mr. Connor said a
7 little while ago that it's confidential, no one
8 is allowed to be a part of it.

9 MR. CONNOR: I did not say it was
10 confidential.

11 MR. ZAYICEK: I thought he did.

12 MR. CONNOR: No. I said you have to
13 distinguish between what's a grievance hearing
14 and what's an arbitration hearing.

15 JUDGE HOWE: This is the procedural review
16 hearing?

17 MR. ZAYICEK: That's right. That's where
18 they have the chairman come and say why did you
19 do what you did. There is nothing confidential
20 about that.

21 So without us having that and being able to
22 transcribe that, again there is no findings of
23 facts and there is no conclusions of law,
24 nothing. They can't now go and say -- try and
25 argue to you here is what the panel did, here is

1 why they did it, here is what they considered.
2 None of that is relevant or can come in in any
3 way, shape or form or be considered by Your Honor
4 on whether or not confirm the award or vacate.

5 So in conclusion, Your Honor, without the
6 written agency agreement, without something
7 specifying from the buyer and seller in writing
8 how Mr. Cousins is entitled to be compensated the
9 Real Estate Commission can't through arbitration
10 create a compensation agreement for Mr. Cousins.
11 That violates the statutory law of South
12 Carolina, and then they come into this court and
13 say you got to enforce it.

14 That does not comply with the statutory law
15 from the general assembly that regulate the very
16 industry that they are practicing in. And again
17 it's an illegal contract that can't be enforced
18 by this court. The court doesn't even have
19 subject matter jurisdiction to enforce a
20 commission agreement that doesn't comply with
21 South Carolina law.

22 And as I've said I don't want it to happen,
23 but it's always within Your Honor's discretion to
24 send it back, remand it with instructions.

25 JUDGE HOWE: Remand to the Board of Realtors?

1 MR. ZAYICEK: For another arbitration
2 hearing, and it could specifically say you must
3 make statements of findings of facts and
4 conclusions of law, you must allow a court
5 reporter be present, whatever. That's certainly
6 within Your Honor's discretion.

7 We would prefer obviously just that the award
8 be vacated because in the absence of a written
9 commission agreement there is no way he is
10 entitled to a commission period, not today, not
11 tomorrow, not next week, not at another hearing.
12 It doesn't matter.

13 Thank you, Your Honor.

14 JUDGE HOWE: All right, does anyone need a
15 break?

16 Ms. Court Reporter, do you need a break?

17 MR. CONNOR: Let's take a little break, Your
18 Honor. I need a break.

19 JUDGE HOWE: Okay. All right, let's take
20 about a ten-minute break so that everyone can get
21 to the restroom.

22 (A recess was taken.)

23 JUDGE HOWE: All right, is Mr. Connor going
24 to go first or Mr. Manos?

25 MR. CONNOR: I will go first. I will defer

1 to Mr. Manos on a lot of the real estate issues
2 and procedures.

3 JUDGE HOWE: Okay, very good.

4 MR. CONNOR: And we will start off by just
5 looking at our argument. Under number one, on
6 the third page just to review the standard of
7 review. And as Your Honor knows I have been
8 involved in arbitration situations for many years
9 now.

10 JUDGE HOWE: Yes, sir.

11 MR. CONNOR: And that's why I filed this case
12 initially in the state court because I am not a
13 big fan of arbitration as you know.

14 My choice was state court. My choice was to
15 have a record. My choice was to put it on the
16 record. My choice was to have a judge give me a
17 20-page opinion on what she did. That was my
18 choice.

19 The Defendant's choice was to arbitrate, and
20 because there is an agreement under the multiple
21 listing service agreement we had no choice but to
22 say we will arbitrate. So reluctantly we went to
23 arbitration.

24 We went to Columbia. We don't know anybody
25 on the panel. I don't know Mr. King. We have no

1 influence over anybody there. For two or three
2 hours this panel heard factual arguments and
3 legal arguments about this case. They consulted
4 with their counsel. They came up with the
5 correct decision, and contrary to what
6 arbitration is supposed to be -- it's supposed to
7 be a quick means of dissolving disputes -- we are
8 now here two years later arguing about the same
9 things and probably will be another couple of
10 years.

11 So I think a lot of what has been said is
12 really a policy argument against arbitration.
13 And I find myself in the untenable position of
14 taking the opposite side of that, which is the
15 South Carolina Supreme Court has numerous times
16 upheld alternative dispute resolutions,
17 especially arbitration, to relieve some of the
18 court load and to hopefully expedite the process.

19 JUDGE HOWE: Isn't there usually some sort of
20 record?

21 MR. CONNOR: No. No, there is not, Your
22 Honor.

23 JUDGE HOWE: Isn't there usually some sort of
24 written response of how the arbitrators came up
25 with their decision?

1 MR. CONNOR: No, there is not. If this court
2 rules that way that will be a change in policy
3 that will be sweeping across the State of South
4 Carolina. In other cases I might welcome it, but
5 that's not the law.

6 JUDGE HOWE: Have you been in front of the
7 South Carolina Board of Realtors before?

8 MR. CONNOR: Not this board, no, Your Honor.

9 JUDGE HOWE: And isn't their internal policy
10 that there should be?

11 MR. CONNOR: No, it's not.

12 JUDGE HOWE: Well, what did I just look at
13 that said there should be?

14 MR. CONNOR: Well, that's a misreading of
15 another document that deals mostly with
16 grievance. And I am going to let Mr. Manos deal
17 with that because I am not thoroughly familiar
18 with that.

19 I will tell you on the first page I have set
20 forth what it is. If you look down at the fourth
21 paragraph --

22 JUDGE HOWE: Okay. What am I supposed to be
23 looking at?

24 MR. CONNOR: Actually if you will take my
25 brief.

1 JUDGE HOWE: Okay. Let me find it. We have
2 got it. Let me find that.

3 MR. CONNOR: My cover letter is June 19th.

4 JUDGE HOWE: Hold on. I got it.

5 Is it your supplemental memo?

6 MR. CONNOR: It's supplemental memorandum,
7 yes, Ma'am.

8 JUDGE HOWE: Okay, I've got it.

9 MR. CONNOR: But if you just go all the way
10 to the back and count four pages from my exhibits
11 in the back, one, two, three, four you will be
12 looking at section 53 of an arbitration manual
13 which is about this thick. And I have the entire
14 manual and I am prepared to hand it up if you
15 like.

16 JUDGE HOWE: Would you do that? We didn't
17 print the exhibits.

18 MR. CONNOR: Well, this page is what is
19 relevant and then I will proceed with what he has
20 presented is relevant, but there is so much other
21 stuff in there that is not relevant to the court.

22 I mean this section on the award under A says
23 the award of the arbitrators shall be made as
24 soon as possible after the evidence is presented.
25 The award shall be in writing and signed by

1 arbitrators or a majority of them shall state
2 only the amount of the award, and when so signed
3 and transmitted to each of the parties shall be
4 valid and binding and shall not be subject to
5 review or appeal.

6 South Carolina has held over and over again
7 as well as the Federal Arbitration Act in federal
8 courts determining Federal Arbitration Act that
9 arbitration is a matter of contract between the
10 parties. And there is probably no more refined
11 arbitration process in the nation than the
12 Realtors Board of -- than the realtors
13 arbitration. It's been in effect since the
14 1950s.

15 It's a very, very tried method of
16 arbitration. It's been there for many years, and
17 the court has recognized it as such.

18 This issue was brought up in Batten versus
19 Howell, which I've quoted on page 5, where one of
20 the objections was hey, the arbitrators didn't
21 give us anything but an award. And the court of
22 appeals said the arbitrators did not give reasons
23 for their decision to award Realtor Batten a
24 commission but they are not required to do so.
25 That's basically the law.

1 The section that was read earlier I believe,
2 and I will let them clarify, is for the president
3 of the Association if asked to give information
4 to the board as it likes. It's not to put in the
5 award, but I could be wrong there. I am going to
6 let them address that.

7 And that's just -- that's the way
8 arbitrations are. There is no record. There is
9 no court reporter.

10 JUDGE HOWE: Let me ask you, is there an
11 arguable ground for the award here when there is
12 no agreement in writing at all?

13 MR. CONNOR: Yes, Your Honor, absolutely.

14 JUDGE HOWE: Okay. What is that ground?

15 MR. CONNOR: Absolutely. There is lots of
16 arguments. Let me start here.

17 Counsel has referred several times to an
18 agency agreement that is in his documents, but he
19 never actually pointed it out or talked about it.
20 So I am handing it up to the Court as Exhibit 7.
21 There is three exhibits here 7, 8 and 9.

22 JUDGE HOWE: Okay.

23 MR. CONNOR: And I have highlighted
24 everybody's copy in yellow. Exhibit 7 is an
25 agency disclosure brochure. And if you will

1 look, turn over to the last page which is four or
2 five pages over, it is signed electronically by
3 Nick Dou, and I think I am pronouncing that
4 correctly, D-O-U, Dou, and it's signed by Jane
5 Zheng, who is the broker licensee for Keller
6 Williams.

7 JUDGE HOWE: Okay. And this is on Exhibit 7?

8 MR. CONNOR: Yes, Exhibit 7.

9 JUDGE HOWE: All right.

10 MR. CONNOR: And it states the time stamp on
11 the last page that we have highlighted in yellow,
12 desktop verified September 22, 2014 at 1:46
13 eastern time.

14 Now one of the issues we had -- and I will go
15 over a little bit of this in a minute. One of
16 the issues we had from the beginning, which is
17 why some of these affidavits refer to oral
18 agreement, is we kept asking for this agreement
19 but it was never provided to us.

20 The first time we saw this agreement was when
21 Mr. Waldo made his application to the South
22 Carolina Association of Realtors. He attached
23 this agreement to his application. So this is in
24 the record at the Association. And this is the
25 document that Mr. Zayicek was referring to.

1 This is the document under which Jane Zheng
2 and Keller Williams obtained a commission at the
3 transaction of these golf courses. And if you
4 will look --

5 JUDGE HOWE: And this is an agreement
6 between?

7 MR. CONNOR: This is a buyer/agency contract.
8 This is an agreement between Keller Williams and
9 the Chinese investors.

10 JUDGE HOWE: Okay. So how does this help
11 your client?

12 MR. CONNOR: I am getting there.

13 JUDGE HOWE: You are getting there.

14 MR. CONNOR: Yes. Absolutely.

15 JUDGE HOWE: You are getting there.

16 MR. CONNOR: Absolutely. If you look on page
17 1 of 4 of the exclusive rights to buyer/agency
18 contract you will see at the top this contract is
19 between X-I-A-N Dou, D-O-U, and his group slash
20 companies. And then the broker in charge Jane
21 Zheng, comma, KWR, Keller Williams Realty.

22 It states the preferred term is 12 months,
23 which means it starts on the date that we saw on
24 the back of it and it goes for 12 months.

25 Then if you will look at Exhibit 8 --

1 JUDGE HOWE: Okay.

2 MR. CONNOR: -- the agreement of sale, this
3 is the first sale for Aberdeen golf course. If
4 you notice it took place on October 209, 2014 --

5 JUDGE HOWE: Okay.

6 MR. CONNOR: -- after the entry of this
7 buyer's agreement. So the buyer's agreement
8 applies to this agreement of sale.

9 There is no question everybody agrees that my
10 client was paid a commission on the sale of this
11 golf course. The only way they were paid a
12 commission is as a co-broker under this agreement
13 Exhibit 7. There is no other agreement. There
14 is no brokerage with the seller, anything.

15 If you look over on the contract of sale --
16 and these are from Waldo's own documents. So Mr.
17 Waldo chose several documents out of the
18 contract. That's why it goes from page 1 to 17,
19 and I agree the other pages are irrelevant.

20 So if you look at page 17, which is Waldo
21 page 3 at the bottom, you will see under
22 brokers --

23 JUDGE HOWE: Waldo page 3, okay.

24 MR. CONNOR: Waldo page 3 under paragraph 17
25 you will see this Sperry Van Ness was paid a

1 commission. Sperry Van Ness, the only way they
2 were paid a commission in this document is
3 through their buyers agreement because there was
4 no seller's agreement, even though in parentheses
5 after that you see the words seller's agent.

6 JUDGE HOWE: Okay. Now the buyer --
7 everybody signed this one though.

8 MR. CONNOR: Correct. But this is after the
9 fact. This is not an agency agreement. This is
10 a contract to sell. This is not the agency
11 agreement. The agency agreement is the one
12 before.

13 And then if you will look over on the next
14 exhibit, Exhibit 9 --

15 JUDGE HOWE: Okay. But this is not the
16 contract at issue?

17 MR. ZAYICEK: No, it's not.

18 MR. CONNOR: No. Exhibit 9 is the contract
19 at issue.

20 JUDGE HOWE: Okay. But this one doesn't have
21 anything to do with the commission at hand?

22 MR. CONNOR: It actually does.

23 MR. ZAYICEK: No.

24 MR. CONNOR: It actually does because one of
25 the things that was presented as evidence at the

1 hearing was the past method of doing business
2 between the parties. These parties had been
3 together --

4 JUDGE HOWE: Now how does that help your
5 client when the past -- I mean how does that help
6 your client when you have to have a listing
7 agreement in writing?

8 I mean nothing prohibits somebody from just
9 giving your client -- nothing prohibits somebody
10 from giving your client a commission.

11 MR. CONNOR: And nothing --

12 JUDGE HOWE: Nothing prohibits a party from
13 giving your client a commission.

14 MR. CONNOR: Correct.

15 JUDGE HOWE: Nothing prohibits that. But for
16 your client to sue on a commission -- for a
17 commission doesn't the agreement have to be in
18 writing?

19 MR. CONNOR: No, absolutely not.

20 JUDGE HOWE: What law says that? Isn't there
21 a statute that says -- aren't there several
22 statutes that say that?

23 MR. CONNOR: The statutes say that there has
24 to be a written agreement in order to get a
25 commission between a seller and someone acting as

1 an agent. It does not say you have to be -- you
2 have to have a listing agreement to be a
3 co-broker and to be a procuring cause.

4 If that were the law it would change
5 everything about what is done in South Carolina
6 in real estate. Today over and over and over
7 again co-brokers are getting paid and they don't
8 have listing agreements. That is a routine in
9 the industry. It happens every day.

10 JUDGE HOWE: So you say the statute only
11 applies between the buyer -- between the
12 principal and the agent?

13 MR. CONNOR: Yes. And I am going to let the
14 real estate commission or the Association of
15 Realtors deal with that more precisely because I
16 am a litigator. They do practically nothing but
17 real estate so . . .

18 JUDGE HOWE: So the statutes only apply
19 between the principal and the agent, not between
20 co-brokers?

21 MR. CONNOR: The statutes only require a
22 written listing agreement between the seller
23 and/or the buyer and the broker in order for the
24 broker to get a commission, to be entitled to sue
25 for a commission.

1 JUDGE HOWE: Okay.

2 MR. CONNOR: What I am showing you these
3 documents for is to basically show you that the
4 parties have been together. The parties have
5 worked together.

6 JUDGE HOWE: On past deals.

7 MR. CONNOR: On past deals. And there is a
8 lot of factual things that went into this hearing
9 that you are not hearing about because that's
10 just part of the decision.

11 JUDGE HOWE: Well, I haven't heard your side
12 yet.

13 MR. CONNOR: Right. Well, the facts are
14 simply that there was a relationship between Ms.
15 Zheng and my client. Ms. Zheng is an agent and I
16 believe she is Chinese. She has contacts with
17 the Chinese buyers. She works for Keller
18 Williams Realty, and one of the things she does
19 is she represents these Chinese buyers. That's
20 what she does.

21 She and my client had numerous e-mails back
22 and forth, which were all presented to the
23 Association of Realtors in the arbitration. And
24 from that long chain of e-mails it was obvious
25 that there was a relationship and that my client

1 was entitled to and expected a co-broker
2 commission on the sale of these golf courses.

3 That's not an issue here. The standard of
4 review is so prohibitively high it's not even
5 something we can argue about. The only thing
6 that can be argued about is was there some
7 provision of law that was so clear and so
8 undeniable that it wasn't followed. And that's
9 not the case here either.

10 If it were anything other than that
11 arbitration would simply be a trial before a
12 trial. In order to have -- in order to protect
13 the integrity of the arbitration process the
14 court has recognized very high standard of
15 review. I think everybody here agrees with it.
16 The case is outside of the same provisions that
17 Mr. Zayicek cited about the standard review for
18 arbitration appeal.

19 JUDGE HOWE: A perversely misconstruing and
20 manifestly disregarding.

21 MR. CONNOR: Right. And that can't be said
22 in this case because this statute applies to a
23 relationship. It's there to protect a seller
24 from a real estate agent saying you owe me a
25 commission on the sale of your property, you

1 can't go behind my back and sell this property.

2 The seller can now. The seller can say yeah,
3 I can because I don't have an agreement with you.
4 And that's what the new law says from 1998. It
5 says if I don't have a listing agreement with you
6 I can sell this property even though you
7 introduced me and everything to everybody and you
8 can't collect the commission.

9 But it doesn't relate to if there is an
10 agreement in place that provides a commission
11 from the buyer, in this case Ms. Zheng had an
12 agreement with the buyer, that the co-broker who
13 introduced the deal to the buyer can't also get a
14 part of the commission.

15 The e-mails that what were cited -- I mean I
16 don't want to get into the facts, but it's just a
17 long string of e-mails indicating a relationship
18 between the parties, and the Association of
19 Realtors concluded that there was a suspicion
20 basis to determine that my client was a procuring
21 cause of this sale and was entitled to half the
22 commission.

23 JUDGE HOWE: And a procuring cause in what
24 way because apparently your client did say in the
25 first circuit court case that he represented the

1 seller. And then apparently in front of the
2 arbitration commission he said he represented
3 both the seller and the buyer and put this deal
4 together.

5 So who does he represent?

6 MR. CONNOR: He is a co-broker for the buyer.

7 If you look at paragraph eight --

8 JUDGE HOWE: So why does he say in circuit
9 court that he represented the seller? Does he
10 not know who he represented?

11 MR. CONNOR: Let's look at paragraph eight.

12 JUDGE HOWE: So he's the co-broker for the
13 buyer?

14 MR. CONNOR: Yes. Under that he is entitled
15 to a commission as being a procuring cause for
16 the broker for the buyer.

17 JUDGE HOWE: He is a co-broker for the buyer.
18 But in circuit court does he not say he
19 represented the seller?

20 MR. CONNOR: Let me read paragraph eight.

21 JUDGE HOWE: Paragraph eight of what?

22 MR. CONNOR: Of his affidavit.

23 JUDGE HOWE: Okay. Let me find it too.

24 MR. CONNOR: Okay.

25 JUDGE HOWE: I've got it.

1 MR. CONNOR: Paragraph eight also has the
2 result of my contacts with Jane Zheng and the
3 Chinese buyers. Ms. Zheng asked me on behalf of
4 her buyers to approach National Golf Management.
5 That's the fact. Ms. Zheng asked him to approach
6 National Golf Management.

7 MR. ZAYICEK: In a different transaction. I
8 just wanted to keep repeating that.

9 MR. CONNOR: I didn't interrupt Mr. Zayicek
10 when went on for an hour and 15 minutes.

11 JUDGE HOWE: Okay.

12 MR. CONNOR: Now as to how that should be
13 interpreted, at the time no one would provide us
14 with any commission agreements although we asked
15 for them.

16 So at the time that we wrote up this he
17 reasonably believed that he possibly could have
18 been an agent for Keller Williams. We don't
19 know. But he reasonably believed that because if
20 you look at the --

21 JUDGE HOWE: He reasonably believed what?

22 MR. CONNOR: That he was an agent for the
23 seller.

24 JUDGE HOWE: Well, if he didn't know who he
25 represented who did?

1 MR. CONNOR: It was to be -- it had to be
2 determined because we didn't know. He didn't
3 have an agreement. He didn't personally have an
4 agreement, exactly.

5 He was paid under the prior transaction under
6 a buyer's agreement that Ms. Zheng had with the
7 buyer. And we contend in this situation he
8 should have been paid exactly the same way.

9 We did file -- we filed against both the
10 seller and the buyer in the state court action.

11 JUDGE HOWE: I thought this -- now I may be
12 wrong but I thought 2015 and 2066 was the same
13 deal. It's not a civil action case. 2015, 2066
14 is that not the same deal?

15 MR. CONNOR: I am not sure what you are
16 talking about.

17 MR. ZAYICEK: It's the very same commission
18 that we are arguing about today, absolutely.

19 JUDGE HOWE: Yes, Civil Action Number 2015,
20 2066.

21 MR. CONNOR: You mean the case that we filed?

22 JUDGE HOWE: Yes, sir.

23 MR. CONNOR: Yes, Ma'am. It's the same
24 \$500,000 commission which we claim half to.

25 JUDGE HOWE: Okay.

1 MR. CONNOR: At the time we were not sure
2 whether that commission should be paid by the
3 seller or whether it should be paid by the buyer
4 because no one had shared the buyer's agency
5 agreement with us. They wouldn't give it to us.
6 So we were acting --

7 JUDGE HOWE: But regardless of whether --
8 regardless of who Ms. Zheng represented shouldn't
9 your client have known who he represented?

10 MR. CONNOR: Paragraph eight indicates that
11 he was asked by Ms. Zheng to approach National
12 Golf Management. I am not sure if he -- if it's
13 important for him to define that himself. I
14 really am not.

15 JUDGE HOWE: I don't understand.

16 MR. CONNOR: It happens all the time in real
17 estate transactions. Realtors get involved in a
18 transaction and bring people together and get a
19 co-brokers commission. It happens all the time.
20 And in this particular case we were not sure
21 because we didn't have the agreement.

22 JUDGE HOWE: But how do they know who their
23 loyalties belong to?

24 MR. CONNOR: In this particular case Mr.
25 Cousins indicated that Ms. Zheng asked him to

1 contact National Golf Management for the Chinese
2 buyers. Now as to how you define that I am
3 uncertain.

4 But he was -- it was determined by the
5 Association of Realtors that he was due a
6 commission for assisting to get this transaction
7 to the table and closed, and for being a
8 procuring cause.

9 JUDGE HOWE: Then he says there was an
10 understanding between him and the representatives
11 of the sellers that he was going to get his
12 commission from the sellers.

13 MR. CONNOR: He reasonably believed that was
14 the case and the judge said no.

15 JUDGE HOWE: Because -- and the reason is
16 because nothing was in writing.

17 MR. CONNOR: But the reason is because there
18 was nothing in writing but he wasn't given the
19 writing. There is something in writing. There
20 is a buyer's agency agreement.

21 All the cases that you read, Your Honor --

22 JUDGE HOWE: And the reasons is because he
23 wasn't part of the deal. Ms. Zheng was the part
24 of the deal.

25 MR. CONNOR: That's why it's a procuring

1 cause case.

2 If realtors cannot pay co-brokers for
3 procuring sales in transactions it would
4 fundamentally alter the way real estate is done
5 in the State of South Carolina. That happens
6 every day.

7 There does not have to be a written agreement
8 for a co-broker to get a commission for being a
9 procuring cause. There does not. There is no
10 law anywhere written. There is no common law
11 that says that. There is nothing that says that.

12 JUDGE HOWE: Okay. All right, go ahead with
13 your argument then.

14 MR. CONNOR: At this time I am going to defer
15 to Mr. Manos to make some of these arguments
16 about the policies of the Commission -- of the
17 Association.

18 MR. MANOS: May it please the Court, Your
19 Honor.

20 JUDGE HOWE: Certainly.

21 MR. MANOS: Marc Manos for the South Carolina
22 Association of Realtors. Seated in the back of
23 the room is Byron King, who is the senior vice
24 president and general counsel of the Association.

25 One point, Your Honor, in terms of the

1 arbitration award itself, that's article 53 of
2 the National Association of Realtors handbook on
3 arbitration, which is incorporated in the
4 contract that the Coastal Association and its
5 members and the state Association does.

6 JUDGE HOWE: Yes. Do you have a copy of that
7 section, sir?

8 MR. MANOS: I do, Your Honor.

9 JUDGE HOWE: Okay, great.

10 MR. MANOS: Well, I don't have sufficient
11 copies for everyone. This is kind of my working
12 copy.

13 JUDGE HOWE: My law clerk seems to believe we
14 have a copy.

15 MR. MANOS: It is incorporated in Exhibit
16 5 --

17 JUDGE HOWE: Okay, great.

18 MR. MANOS: -- of Mr. Cousins' supplemental
19 brief, excerpts from the national code. So it's
20 there.

21 MR. CONNOR: Your Honor, I will also state
22 that the affidavit of Lindsey Davis filed in the
23 court on October 17 of 2016 contains the entire
24 set of arbitration rules. So it's in the court
25 files somewhere.

1 JUDGE HOWE: The national rules?

2 MR. CONNOR: Yes. And chapter 53 is buried
3 in here somewhere.

4 JUDGE HOWE: Okay, very good.

5 Go ahead, Mr. Manos.

6 MR. MANOS: It specifies that the award will
7 say who prevailed and if there is an amount what
8 the amount is.

9 JUDGE HOWE: Okay, very good.

10 MR. MANOS: And that's it.

11 JUDGE HOWE: Let me ask you then, if that's
12 all that is required then how does anybody ever
13 determine if in fact the award that the
14 arbitrators perversely misconstrued or manifestly
15 disregarded the law?

16 How do you do that? How does a reviewing
17 court ever do that if all the court has in front
18 of it is an award that says we decide that Mr.
19 Cousins should have \$250,000?

20 How do you do that if in fact a reviewing
21 court is able to review it, to look and decide
22 whether the arbitrators perversely misconstrued
23 the law or manifestly disregarded the law and all
24 the court has in front of it is an award that
25 says we believe he ought to get \$250,000?

1 MR. MANOS: Your Honor, it comes from what
2 the parties have to bring to this court in this
3 very limited circumscribed review. Described by
4 one of the cases in the Fourth Circuit cited in
5 our brief as the most circumscribed judicial
6 review allow, which it is.

7 JUDGE HOWE: Okay.

8 MR. MANOS: The parties have to come to you
9 and say this piece of paper that was in the
10 record shows they were aware of this controlling
11 legal principle. This piece of paper that's in
12 the record shows they chose to ignore it. It's
13 not just an error of law.

14 JUDGE HOWE: No. It's perversely --

15 MR. MANOS: It's very clear, a mistake
16 misconstruing the law, misconstruing the
17 contract. None of that allows --

18 JUDGE HOWE: I mean it sounds kind of strange
19 to me that nobody was able to have a court
20 reporter to transcribe it.

21 MR. MANOS: Not at the appeal hearing, no,
22 Your Honor. That is absolutely consistent with
23 the rule. The second level of hearing that the
24 National Association provides and the State
25 Association has adopted is a due process review.

1 JUDGE HOWE: Well, why isn't is a court
2 reporter allowed to be there? I mean why not?

3 MR. MANOS: The rules of the Association are
4 the initial hearing a tape is made. The party
5 may buy that tape for \$50 if they wish. It is
6 not transcribed by the Association. Court
7 reporters aren't allowed. The party may
8 transcribe it if they so chose.

9 JUDGE HOWE: I mean just so I can hear, the
10 county doesn't provide a court reporter. Mr.
11 Zayicek had to pay for a court reporter to be
12 here.

13 Why can't a party pay for a court reporter to
14 be there, do you know? I am just curious.

15 MR. MANOS: The contractual rules between the
16 parties state that at the appellate level hearing
17 there won't be a record. They don't even do the
18 tape. It is actually a due process review. It's
19 not to go behind what the first arbitration panel
20 did.

21 JUDGE HOWE: Well, I am talking about at the
22 first one.

23 MR. MANOS: The first one just has a tape.
24 That's what we set.

25 Your Honor, the goal of arbitration is to be

1 quick, efficient and relatively fair.

2 JUDGE HOWE: Well, I understand that.

3 MR. MANOS: Not to adjudicate judicial
4 process.

5 JUDGE HOWE: I understand that but you still
6 have a review.

7 The review is perversely misconstrue, and I
8 find that strange perversely misconstrue and
9 manifestly disregard.

10 So why don't you have -- why can't the party
11 have a -- and I know you didn't make the rules,
12 but I think it's strange you can't have a court
13 reporter there.

14 MR. MANOS: Well, the same at magistrate's
15 court, Your Honor. They don't let me bring a
16 court reporter in there.

17 JUDGE HOWE: I know.

18 MR. MANOS: I have to take the eight track
19 tapes they've already used -- they have cassette
20 tape today -- and have it typed.

21 JUDGE HOWE: But magistrate's court has a
22 limit, jurisdictional limit. You don't have that
23 in arbitration.

24 You don't find that strange?

25 MR. MANOS: No, Your Honor, I don't. The

1 federal Arbitration Act is gold from the 1930s,
2 and the uniform act that our state adopted passed
3 in 1956 by the commissioners on uniform laws was
4 to create something quicker, more efficient and
5 less susceptible at levels of detailed review
6 frankly than litigation.

7 JUDGE HOWE: Okay. I mean I know you didn't
8 make up the rules, but I just find it strange.
9 And then you get a tape that's kind of hard to
10 understand.

11 MR. MANOS: Yes.

12 JUDGE HOWE: And then I am sure court
13 reporters hate to transcribe from that little
14 tape when they weren't there.

15 MR. MANOS: It makes it a lot more difficult.

16 JUDGE HOWE: I am sure it does.

17 MR. MANOS: I used to have our word
18 processing do it instead of court reporters.

19 JUDGE HOWE: I know. I am sure it does. I
20 am sure they hate to do that.

21 MR. MANOS: And, Your Honor, on this whether
22 or not there had to be findings of fact and
23 conclusions of law, it is a matter of contract.
24 You can contract and have that if you wish.

25 But the uniform Arbitration Act of 1956,

1 which our general assembly adopted in 1978, the
2 uniform decisions we have from several different
3 states, not just ours say no.

4 The Supreme Court in 1985, and this case I do
5 not believe is cited in my brief, in Trident
6 Technical College versus Lucas & Stubbs, Limited,
7 said arbitrators need not specify their reasoning
8 or the basis of their award.

9 The Court of Appeals cited that case in the
10 Batten case in 1990 on a commission same as this
11 one. Batten gets commission. It's \$10,000.
12 That's it. That's enough. There is no
13 irregularity of the award.

14 We are outside the statutory grounds, Your
15 Honor, for vacating an arbitration award.

16 JUDGE HOWE: Are we?

17 MR. MANOS: Under the federal act or the
18 state act.

19 JUDGE HOWE: Are we based on what the tape
20 says? I am going back to the tape now because I
21 have listened to a portion of the tape. I
22 haven't listened to all of it of course. I just
23 listened to what Mr. Zayicek told me.

24 And you don't think the arbitrators were
25 wrong based on what they were -- we are not here

1 to look at the law. We are just here on
2 procuring cause. We don't even want to look at
3 agency.

4 MR. MANOS: No, Your Honor, I don't.

5 JUDGE HOWE: You don't think agency --

6 MR. MANOS: I don't think they are wrong.

7 JUDGE HOWE: You don't think agency is
8 important here?

9 MR. MANOS: Agency would be crucial if this
10 were a circuit court case because you are suing a
11 member of the public for commission. This is a
12 question between realtors of whether there is
13 co-brokerage or subagency that would establish an
14 entitlement to share the commission.

15 There were written evidence of a prior
16 sharing of commission. There are written e-mails
17 between the two brokers. There is not an agency
18 agreement because it's not an agency relationship
19 between the two brokers. It's a shared
20 commission.

21 The agency -- the statutes being relied on
22 here by Mr. Waldo are designed to protect buying
23 and selling public. There is such a thing as a
24 customer relationship where you don't have an
25 agency agreement. That's found in section 135-0

1 I think.

2 But obviously the typical transaction is --
3 it might be 137. I don't know -- is with an
4 agency agreement. And you can't go against a
5 member of the public without that writing. The
6 general assembly did fundamentally change the
7 law.

8 JUDGE HOWE: Apparently Mr. Cousins didn't
9 know that until after he sued and got kicked out.
10 And he is supposed to know that because he is a
11 member of the Board of Realtors.

12 MR. MANOS: He is a member of the
13 Association, yes.

14 JUDGE HOWE: Right. He didn't know that. He
15 must have flunked his real estate exam the first
16 go around, right.

17 MR. MANOS: Your Honor, I am a lawyer and I
18 am admitted in multiple jurisdictions and I am a
19 member before the Supreme Court of the United
20 States, but I perhaps would not know if asked
21 whether internal revenue code section 6103 allows
22 me to represent a taxpayer or not. I would have
23 to look.

24 JUDGE HOWE: But you know, you know that all
25 listing agreements have to be in writing. All

1 lawyers know that.

2 MR. MANOS: Yes, Your Honor, a listing
3 agreement with a member of the public who wishes
4 to sell property, absolutely, has to be in
5 writing.

6 JUDGE HOWE: Right. So I don't know what you
7 just said has to do with this argument.

8 MR. MANOS: This is a co-broker agreement.
9 This is you are the listing broker. You have
10 come to me. I am here. I've got a buyer. I've
11 got these folks who want to invest I assume -- I
12 don't know facts per se but it appears that
13 golf --

14 JUDGE HOWE: My point was --

15 MR. MANOS: -- golf courses --

16 JUDGE HOWE: My point is your client didn't
17 know that listing agreements with a member of
18 the --

19 MR. CONNOR: It's actually my client, Your
20 Honor.

21 JUDGE HOWE: Okay -- didn't know that.

22 MR. MANOS: What's happening in this hearing
23 is we tried to get behind the facts, Your Honor.
24 It's exactly what arbitration is designed to
25 award.

1 JUDGE HOWE: Review. Review. Arbitration is
2 to prevent review.

3 MR. MANOS: Yes, it is in large part.

4 JUDGE HOWE: It is.

5 MR. MANOS: And the federal will tell you
6 that when it comes to securities deals, the old
7 NASA. But, yeah, in part it is to prevent
8 detailed review.

9 JUDGE HOWE: But it's not to prevent review
10 when the arbitrators were not following the law.

11 MR. MANOS: Your Honor, that's correct. The
12 manifest disregard doctrine -- and that's why I
13 say we say outside the statute --

14 JUDGE HOWE: That's where we are now.

15 MR. MANOS: -- is to judicially create a
16 document.

17 JUDGE HOWE: That's right. And that's Mr.
18 Zayicek believes where we are now.

19 MR. MANOS: Right, we are. And, Your Honor,
20 again our own Supreme Court is that and the
21 Fourth Circuit has said that is the narrowest of
22 possible reviews. It's got to be something so
23 clear you can't even debate about it, that you
24 can't argue back and forth whether the law
25 applies. So it's got to be at that level of

1 clarity and it has to have been ignored.

2 So the C Sculptures case, that's C the
3 letter, which is a South Carolina Supreme Court
4 case, they reversed the Court of Appeals who
5 affirmed an arbitration and the circuit court who
6 affirmed an arbitration award. And the court
7 said, you know, this one reaches manifest
8 disregard and you know why, because the statute
9 actually says very plainly, very clearly a person
10 with a contractor's license may not sue at law or
11 in equity for any of the benefits under a
12 contract unless they have the proper license for
13 that contract.

14 It's very clear. I paraphrased by the way
15 somewhat. But it was very clear, and the Supreme
16 Court said you only had a contractor's license
17 for up to a hundred thousand dollars. You gave
18 that to the arbitrator. They saw it. You gave
19 the contract to the arbitrator, not the award --
20 we are arguing about it by the way, the detail of
21 it -- and contract says it was for \$800,000 worth
22 of work.

23 That's a door closing statute. The general
24 assembly made that so clear that that's not --
25 they said and/or equities. You can't even go in

1 and say hey, but I did the work so I deserve my
2 \$800,000. They made it very clear you have no
3 relief against no one for a benefit under that
4 contract because the general assembly made that
5 language that clear.

6 Compared to the real estate sections which
7 say you can't seek a commission from a tenant,
8 landlord, buyer, seller unless you have signed a
9 written agency agreement with them. You can't
10 bind the person you signed a written agency
11 agreement with to a dual agency or a subagency
12 without a writing from them.

13 It doesn't say you can't agree to split your
14 commission with somebody who helped you make the
15 deal. To take Mr. Waldo's argument to its
16 logical conclusion, once I received a commission
17 where I had an agreement with the seller and I
18 said to the person who brought the -- the
19 buyer -- excuse me -- who brought the seller to
20 me I am going to give you a third of my
21 commission because you helped me out on this one,
22 here is my check. If the seller heard about it
23 he could sue me for disposing of his commission
24 contrary to my written agreement. You can't find
25 a case like that anywhere in the United States.

1 I've looked.

2 The purpose of the statute is to protect the
3 consuming public, to make sure those agreements
4 are in writing from now on so that there aren't
5 misunderstandings and so that you don't get the
6 situation that have sometimes happened if you
7 practice in this area where two different people
8 come seeking the same commission based on two
9 different agreements from the same poor seller.

10 The general assembly said we are not going to
11 have that happen anymore, not going to happen
12 anymore to sellers, buyers, landlords and
13 tenants. The general assembly did not say we are
14 divesting the idea of co-brokerage, it doesn't
15 exist anymore, we are divesting the idea that two
16 licensees can share a commission amongst
17 themselves because of the effort that they've
18 made and made that agreement.

19 That's why the decision of the circuit court
20 case is not res judicata and is not even
21 collateral estoppel to what was litigated in the
22 arbitration. They were two different issues.

23 There is no one at the Association who would
24 disagree by the way with the circuit court's
25 order that you cannot under the current

1 legislation -- well, the then current legislation
2 seek a commission directly from a seller or buyer
3 unless you had that written agreement. You can't
4 do it.

5 But the interplay between agents is
6 different. And while we don't have a detailed
7 award there were written materials presented to
8 the arbiters.

9 JUDGE HOWE: Does it not bother you that Mr.
10 Cousins has signed an affidavit that I think says
11 that he represents the sellers in this circuit
12 court case but that there wasn't a signed
13 agreement? That doesn't bother you?

14 MR. MANOS: That affidavit does appear to be
15 in the circuit court case, Your Honor, and if
16 presented to the arbiters I don't know if that
17 might have made a difference or not in their
18 analysis because in the same affidavit Mr.
19 Cousins does state facts that support the general
20 concept of co-brokerage, of having brought, you
21 know, been asked to bring to the table and work
22 with another broker.

23 JUDGE HOWE: Because he is asking for a
24 commission, he is asking for a commission from
25 the seller and saying that he represented the

1 seller. I mean I think those are two
2 consistent -- I mean I don't know how he can take
3 two inconsistent positions.

4 MR. MANOS: Well, Your Honor, I think that in
5 that case the circuit court must have recognized
6 the possibility for litigation proceeding on two
7 paths.

8 JUDGE HOWE: Pardon?

9 MR. MANOS: Because the circuit court must
10 have recognized --

11 JUDGE HOWE: No. The circuit court kicked
12 them out. The circuit court just said you are
13 out with prejudice.

14 MR. MANOS: But, Your Honor, the broker
15 clients were dismissed so they could pursue
16 arbitration prior to the ultimate summary
17 judgment order.

18 The realtors were opposing each other in
19 that.

20 JUDGE HOWE: Well, I don't know why they were
21 dismissed. They were dismissed with prejudice
22 and it didn't say anything else. It says you are
23 dismissed with prejudice.

24 MR. MANOS: My understanding is it was
25 because they said they had to pursue arbitration

1 which is --

2 JUDGE HOWE: Well, it doesn't say that. It
3 just says they are dismissed with prejudice.

4 MR. CONNOR: Your Honor, where does it say
5 that? I'm sorry. I am not following.

6 MR. MANOS: Dismissal of the brokerage
7 parties.

8 MR. CONNOR: You are not talking about the
9 dismissal of the buyer's agent; are you?

10 JUDGE HOWE: No, sir.

11 MR. CONNOR: Okay.

12 JUDGE HOWE: I am talking about the
13 Plaintiff's complaint against Defendant National
14 Golf Management is dismissed with prejudice.

15 MR. MANOS: I agree, Your Honor, but at that
16 point Ms. Zheng and her firm had been sent away
17 prior.

18 JUDGE HOWE: Pardon?

19 MR. MANOS: The parties consented to the
20 dismissal of the defendant brokerage firm so that
21 the brokers could arbitrate. That happened
22 before the final order of the circuit court.

23 JUDGE HOWE: Well, regardless I think they
24 saw the writing on the wall because Judge Hocker
25 said they are gone.

1 I mean why would they consent when they
2 argued the motion and Judge Hocker dismissed them
3 with prejudice.

4 MR. CONNOR: Maybe I can address it, Your
5 Honor. I am not sure I am following you. I was
6 contacted by the attorney for the broker
7 basically saying we have an arbitration agreement
8 with them unless.

9 I read through it. I said you are right. We
10 agreed to take them out before there was any
11 ruling by Judge Hocker.

12 JUDGE HOWE: Well, Judge Hocker's ruling is
13 the ruling of the case.

14 MR. CONNOR: Right. And he dismisses -- he
15 dismisses the case at that time, which did not
16 include the buyer's agent.

17 JUDGE HOWE: I didn't say that. He dismissed
18 National Golf Management, LLC.

19 MR. CONNOR: Yes.

20 JUDGE HOWE: Right.

21 MR. CONNOR: I think we agree.

22 JUDGE HOWE: Right. But my point is that in
23 this case he says, Mr. Connor, your client says
24 that he is seeking money from the seller and that
25 he is the agent of the seller.

1 MR. CONNOR: In the case that was remaining,
2 yes, that was our theory. And he disagreed.

3 JUDGE HOWE: Not just in theory. Your client
4 said I am the agent of the seller. So that's the
5 truth as far as he is concerned. Your client
6 said I am the agent of the seller. I mean he
7 swore to that in an affidavit.

8 MR. CONNOR: By which we know now is not
9 correct. He can't collect a commission from the
10 seller.

11 JUDGE HOWE: No. No. He said I am the agent
12 of the seller. That's not a theory. He said I
13 am.

14 MR. CONNOR: I am not going to argue with the
15 court.

16 JUDGE HOWE: I mean I don't understand. I
17 mean he said it in an affidavit. I don't think
18 that's a theory. It's not -- you didn't put that
19 in your memo. He put it in his affidavit.

20 Don't you think that's a difference?

21 MR. CONNOR: I think he reasonably believed
22 that he was the agent for National Golf
23 Management.

24 JUDGE HOWE: Well --

25 MR. CONNOR: But the theory of recovery is

1 that he -- which is also in the affidavit that he
2 was asked by Jane Zheng to contact National Golf
3 Management about more golf courses, which he did
4 and brought to them. And that's what the
5 Association awarded him the commission on.

6 You know, whatever you call him or whether he
7 is wrong in his affidavit or wrong in his
8 thinking he deserved a co-broker commission.

9 JUDGE HOWE: Well, he says he had contacts
10 with Jane Zheng. He doesn't say he was a
11 co-broker of Jane Zheng. He said I have contacts
12 with Jane Zheng and the Chinese buyers, but he's
13 clear in his affidavit that he had an
14 understanding with the seller. He had a contract
15 with the seller. And he says here and I am
16 entitled to a commission from the seller.

17 MR. CONNOR: And the court disagreed.

18 JUDGE HOWE: Yes.

19 MR. CONNOR: I think we are saying the same
20 thing.

21 JUDGE HOWE: Maybe.

22 MR. CONNOR: Okay.

23 JUDGE HOWE: Maybe. I mean this is a sworn
24 statement. This isn't a theory. I think there
25 is a difference.

1 MR. CONNOR: Right. Well, it was my case
2 that I brought. So it's essentially my theory
3 but you are right, it is an affidavit from him
4 that he believed to be true and still does.

5 JUDGE HOWE: Okay. All right. All right, we
6 might be saying the same thing but I think there
7 might be a slight difference.

8 Okay.

9 MR. MANOS: Your Honor, to wrap up, on the
10 federal level, frankly the manifest disregard
11 doctrine itself --

12 JUDGE HOWE: The manifest disregard doctrine?

13 MR. MANOS: The law doctrine has been
14 questioned by the United States Supreme Court as
15 to whether it is still effective. The Fourth
16 Circuit has said it is. The Fifth Circuit has
17 said it's not. The U.S. Supreme Court noted to
18 reach arbitration decision said don't read this
19 to say we say the manifest disregard survives our
20 ruling as we haven't said that yet.

21 So the doctrine itself is under fire, at
22 least in the federal Arbitration Act. And the
23 Association has taken no position as to which act
24 applies here.

25 JUDGE HOWE: Okay.



1 MR. MANOS: It is something of national
2 implication the realtor has said. I have been
3 instructed not to take a position on the
4 litigation, but we think the result should be the
5 same.

6 JUDGE HOWE: Okay.

7 MR. MANOS: The manifest disregard requires
8 that the arbiters know of a clear, basically an
9 arguable principle of law that controls the
10 outcome of the case and they ignored it.

11 Here, Your Honor, we don't think the pre 1997
12 precedent of Hackler and Batten has really
13 changed by the fact that the legislature has
14 decided to protect the consuming public by saying
15 your commission agreements are going to be in
16 writing, your agency agreements are going to be
17 in writing, and if their agent wants to give sub
18 agents, dual agents for you to be bound, your
19 agent is going to have to get that in writing
20 from you too for you to be bound.

21 Both of those cases were realtor versus
22 realtor, one in court, one out of an arbitration.
23 And in both cases the decision to split a
24 commission or to award a commission was found
25 without a particular listing or a contract with

1 the seller or buyer. It's not a necessary
2 element for that realtor versus realtor case.

3 We believe the Association followed its own
4 rules, followed the contract these parties agreed
5 to abide by, and did not manifestly disregard the
6 law or perversely or whatever. That was -- the
7 manifest disregard document, both state and
8 federal just said manifest disregard. That's
9 something unique we have added in South Carolina,
10 which I am not sure changes it at all.

11 Thank you very much, Your Honor.

12 JUDGE HOWE: So let me just get it straight.
13 You believe that as long as it's realtor versus
14 realtor the agreements do not need to be in
15 writing because it's agency -- its broker versus
16 broker?

17 MR. MANOS: They don't need to be in writing
18 and signed by the seller or buyer.

19 JUDGE HOWE: I understand that.

20 MR. MANOS: Written evidence presented in
21 this case about communications between the
22 brokers. I can't said tell you if the arbiters
23 thought that rose to the level of an electronic
24 agreement or not. But we don't believe there has
25 to be a listing agreement, the sort of agreements

1 that are outlined in the statute that are
2 required if you are going to seek liability
3 against a non-realtor. It doesn't have to be
4 written.

5 JUDGE HOWE: Okay, thank you.

6 Mr. Zayicek.

7 MR. ZAYICEK: Your Honor, I will try to be
8 very brief and quick. The policy of the South
9 Carolina Realtors governing the procedures
10 specifically said the South Carolina State
11 Arbitration Act controls. It doesn't reference
12 the federal Arbitration Act.

13 I can understand what he is trying to do. He
14 is trying to argue. It specifically cites the
15 very sections of the State Arbitration Act.

16 Their argument, Your Honor, is that agents
17 create agencies. And that is absolutely false as
18 a matter of law. There is no scenario under
19 agency theory where an agent creates the agency
20 relationship. It's got to be a manifestation
21 from the principal.

22 I can go all over town and say I am your
23 attorney, Judge Howe. That doesn't mean I can
24 create a bill and send it to you and you have to
25 pay it. That doesn't create -- whether it's an

1 attorney/client or a realtor/buyer,
2 realtor/seller, the agent doesn't get to go out
3 and search around town and say well, maybe I
4 represent the seller, maybe I represent the
5 buyer, I don't know, let's see which argument
6 sticks to the law today.

7 Agents don't create agency. Principals
8 creates agency.

9 JUDGE HOWE: But here they are saying the
10 agent has to pay; aren't they? Aren't they
11 saying the agent has to pay the other agent?

12 MR. ZAYICEK: Yes. Okay, so let's take that
13 attorney/client relationship. Here is the
14 analogy. If Your Honor had hired me to represent
15 you on a legal case in the past, that doesn't
16 mean I am your attorney forever.

17 JUDGE HOWE: That's true.

18 MR. ZAYICEK: Let's say Your Honor then goes
19 out in another lawsuit and gets Mr. Connor to
20 represent you. I bring an action in circuit
21 court saying I am your attorney, you owe me
22 attorneys fees. The court throws it out.

23 I then turn around and I say, Mr. Connor, you
24 owe me those attorney fees you just got from
25 Judge Howe. How does the attorney/client

1 relationship then become irrelevant?

2 It's still based on the relationship between
3 you and me as to whether I am entitled to
4 attorneys fee.

5 JUDGE HOWE: Maybe it's different when you
6 are talking about a profession. Attorneys are
7 professionals. I don't know that they've ever
8 determined a realtor as a professional.

9 MR. ZAYICEK: I will concede they are. My
10 fiance is. I can't be caught on the record
11 saying she's not a professional.

12 JUDGE HOWE: But I don't know that.

13 MR. ZAYICEK: But, Your Honor, there are
14 other arguments that this does not have to be in
15 writing is absolutely false. I handed up
16 40-57-135, section --

17 JUDGE HOWE: What am I looking for now?

18 MR. ZAYICEK: 40-57-135.

19 JUDGE HOWE: I have got them all here I
20 think. I have got it.

21 MR. ZAYICEK: Page 7.

22 JUDGE HOWE: I got it.

23 MR. ZAYICEK: This is I believe D-4.

24 JUDGE HOWE: Yes.

25 MR. ZAYICEK: Subsection D, it says an

1 explanation of how compensation will be divided
2 among participating or cooperating brokers. It's
3 got to be in writing. We can't just come with
4 some agreement -- again this is kind of -- they
5 are arguing that there can be some undisclosed
6 secret double agent realtor involved in a
7 transaction.

8 The statute framework specifically says if
9 there is an agreement among co-brokers to split a
10 commission it has got to be in writing, has to be
11 signed by either the buyer or the seller.

12 JUDGE HOWE: Let me ask Mr. Manos that.

13 Mr. Manos, what do you say about that?
14 That's pretty clear. The statute says it should
15 be spelled out if you are talking about
16 cooperating brokers.

17 And I know you say the policy and the
18 practice has been for years that we have these
19 oral agreements between brokers.

20 What do you say about this statute, this
21 written statute that says it must be in writing?
22 It says the listing agreement must spell out when
23 you've got cooperating or participating brokers,
24 and it must be spelled out how the compensation
25 is going to be divided.

1 Because if I am the seller or the buyer I may
2 not like Mr. Connor's client and I don't want him
3 getting any of the commission. So I want to see
4 who is getting -- I want to see who is getting
5 some of the commission. So I want it spelled
6 out. I want to know who is getting the
7 commission.

8 And this statute says it's supposed to be
9 spelled out in writing.

10 MR. MANOS: This statute does say that, Your
11 Honor.

12 JUDGE HOWE: Well, what does it say?

13 MR. MANOS: It does say that. It does say
14 that, Your Honor. It says it and then it goes
15 on. But it does say that.

16 JUDGE HOWE: It does say that.

17 MR. MANOS: It does say that, but it has to
18 be writing that is signed by the seller or buyer,
19 whoever is representing, in order to bind them.
20 They can't be bound in any other way.

21 JUDGE HOWE: Well, I am the one -- let's just
22 say I am the -- I guess I'd be the buyer who's --
23 the buyer of the seller and I am the one
24 ultimately paying the commission, okay, to the
25 agent Waldo I suppose in this case.

1 And you want Waldo to pay some money to Mr.
2 Cousins; right? Is that how this goes?

3 But I don't want your client getting any
4 money. I want Waldo getting all the money, and
5 that's why this is written this way. I want it
6 all in writing spelled out.

7 And the statute says it's supposed to be in
8 writing and it's supposed to spell out how it's
9 going to be divided; doesn't it?

10 MR. MANOS: It does, Your Honor.

11 JUDGE HOWE: Okay. So isn't that for my
12 benefit? I am the member of the public.

13 MR. MANOS: It is a protection for a member
14 of the public. I don't think there is any
15 question about that, Your Honor.

16 JUDGE HOWE: So how can some policy that you
17 say has been going on for years with the real
18 estate people, how can that get around this
19 statute and my rights as a member of the public
20 for whom this statute was written?

21 MR. MANOS: Your Honor, it takes the statute
22 a step further.

23 JUDGE HOWE: What does?

24 MR. MANOS: That analysis.

25 JUDGE HOWE: Okay. Tell me how.

1 MR. MANOS: At the end of the day then the
2 statute is not designed. It's designed to
3 protect those members of the public so that they
4 have transparency in their transactions, yes.

5 JUDGE HOWE: Right. Yes.

6 MR. MANOS: But could that member of the
7 public then tell Mr. Waldo I can't give ten
8 percent of my commission?

9 JUDGE HOWE: No. It can say, Mr. Waldo, I
10 don't want you being my broker or my agent
11 because I don't trust you, because I want it
12 spelled out in writing who is going to be
13 involved in my real estate transaction and you
14 defrauded me. I want to know who is going to be
15 involved in handling my real estate matters.

16 MR. MANOS: The statute definitely says that
17 needs to be in writing, that needs to be signed
18 by the parties.

19 JUDGE HOWE: It does.

20 MR. MANOS: The statute does not go to the
21 level of fear of controlling manifest disregard
22 of the law as you see in C Sculptures where it
23 says oh by the way, you can't make any claim
24 against anybody at law or in equity to try and
25 get paid if you somehow procured that transaction

1 and were involved in it.

2 That, Your Honor, is the difference between
3 the two statutory.

4 JUDGE HOWE: Which one overrides?

5 MR. MANOS: Your Honor, in this case the
6 private arbitration.

7 What Mr. Waldo is asking this court to do is
8 go a step beyond manifest disregard where a fair
9 undebatable principle as to whether or not you
10 can get any compensation of law is there, versus
11 going into the realm of the arbiters and trying
12 to decide whether or not the written evidence
13 presented to them, the oral evidence they heard
14 which was efficient to establish a commission for
15 them.

16 JUDGE HOWE: But if in fact we have this
17 statutory scheme, and it's a very elaborate
18 statutory scheme, and Mr. Cousins is a realtor
19 and knows this statutory scheme and should know
20 it better than anybody else because he is a
21 member of the South Carolina Board of Realtors,
22 shouldn't he make sure that he has something in
23 writing and that's why he was e-mailing all these
24 times to get something in writing before he
25 becomes a procuring cause?

1 Shouldn't he make darn sure he has something
2 in writing pursuant to the statutory scheme
3 before he gets involved? He should make sure
4 that he pursues other avenues and make sure that
5 he spends all his time on other matters as
6 opposed to this matter. He should put his
7 talents elsewhere as opposed to this avenue when
8 he knows he doesn't have anything in writing, a
9 broker agreement or an agency agreement.

10 He should spend his time and talents doing
11 something else because he knows he didn't follow
12 the statutory scheme.

13 MR. MANOS: Your Honor, it's difficult for me
14 to get into Mr. Cousins' mind.

15 JUDGE HOWE: I know. I understand. You
16 don't represent him.

17 MR. MANOS: Right.

18 JUDGE HOWE: But anybody, anybody who is a
19 member of the South Carolina Board of Realtors
20 knows in advance that this statutory scheme
21 requires something to be in writing. Regardless
22 of what used to be the policy and procedure among
23 co-agencies this requires it to be in writing.

24 It looks -- I mean it looks to me as if it
25 bears the requirement that this be in writing,

1 and before they get too involved in something
2 they need to make sure that it's in writing. And
3 I think Mr. Cousins knew that. That's why he
4 kept saying where is my agreement in writing,
5 please give me something in writing and he never
6 did.

7 MR. MANOS: Your Honor, there is not a
8 remedial restriction contained within the
9 statute.

10 JUDGE HOWE: I'm sorry?

11 MR. MANOS: There is not a remedial
12 restriction contained within the statute like
13 there is in C Sculptures. And there is also as
14 the evidence presented to the court which was
15 also presented to the arbiter showed without such
16 a writing other than the buyer's brokerage
17 agreement.

18 Mr. Cousins received a 50/50 commission split
19 on a sale between the same parties of a golf
20 course.

21 JUDGE HOWE: Well, that was another
22 agreement. That was a whole other agreement.

23 MR. MANOS: It was the same term as the
24 buyer's agreement there. So by getting into his
25 mind one might think he is there already. He has

1 got one signed agreement that everybody signed
2 saying yes, you brought us together, you get half
3 of it. But again I don't know, Your Honor.

4 JUDGE HOWE: But he kept asking for something
5 in writing.

6 MR. ZAYICEK: Your Honor, if that's the case
7 why would he say in an affidavit I represent the
8 seller. It's an illogical argument. He lost in
9 circuit court. I think again they refer to it as
10 an alternate strategy that he tried to employ in
11 arbitration, and it just doesn't make sense. You
12 either represent the seller or you represent the
13 buyer.

14 As Your Honor clearly pointed out, you can't
15 have divided loyalty. You can't say I represent
16 the seller, he owes me a commission but actually
17 I am a co-broker with the exclusive agent for the
18 buyer. Alleging that is in violation of the law
19 and can't be enforced.

20 So it just doesn't make sense, Your Honor.

21 Can I just clarify. Say that I believe the
22 National Association rules have been submitted.
23 There was a question of a couple of pages might
24 be submitted or did we agree to introduce the
25 whole set?

1 MR. MANOS: The whole set is in the court's
2 file.

3 MR. ZAYICEK: Then that's fine.

4 MR. MANOS: But there is a partial one there
5 too. It's easier for referencing this issue.

6 MR. ZAYICEK: Your Honor, in the preface on
7 page 6 -- and I am just going to cite these for
8 the record. In the preface on page 6, in the
9 footnote on page 146, and factor number six
10 listed on page 160, they all specifically state
11 the State Association is obligated to -- the
12 procedures by which arbitration requests are
13 received hearings are conducted and awards are
14 made must be in strict conformity with the law.

15 And the footnote on page 146 said the State
16 Association as a member of the board of the
17 National Association has the obligation to
18 establish arbitration procedures and facilities
19 consistent with applicable state law.

20 This is not the Bible. It's a guideline by
21 which they go by, but the state Real Estate
22 Commission has to comply with state law. And
23 they can't we will use federal law and that
24 standard of view is different, and what the
25 realtors view nationwide is important.

1 No, it's not. I mean it is in theory but
2 it's not important to this case. They have to
3 comply with state law. State law is all that
4 controls.

5 JUDGE HOWE: So they have to use the state
6 arbitration rules except for insofar as the
7 state -- the state arbitration -- the State South
8 Carolina Board of Realtors rules apply?

9 MR. ZAYICEK: Correct. And they have to
10 comply obviously with the state statutes
11 governing the agency.

12 JUDGE HOWE: Sure.

13 Mr. Manos.

14 MR. MANOS: Your Honor, I did want to correct
15 one other thing. The portion of the policy of
16 the South Carolina Realtors governing state
17 professional standards --

18 JUDGE HOWE: Yes, sir.

19 MR. MANOS: -- that was read earlier by legal
20 counsel, it does say the Association counsel
21 present shall prepare for the review of the panel
22 chairman or the president any statement of facts
23 or summaries of reasons supporting the decision
24 made by the panel. It's an internal
25 communication. It's never one that's ever been

1 presented to the outside. It's just one of those
2 possibilities.

3 JUDGE HOWE: Do we have one here? Has been
4 one been prepared?

5 MR. MANOS: One was prepared.

6 JUDGE HOWE: Did you do a FOIA request?

7 MR. MANOS: We are not a government agency,
8 Your Honor.

9 MR. ZAYICEK: No, we didn't.

10 JUDGE HOWE: Sir?

11 MR. MANOS: We are not a government agency,
12 Your Honor.

13 JUDGE HOWE: And that was prepared before?

14 MR. ZAYICEK: If it benefits them I have no
15 doubt they would have already made it part of the
16 record.

17 MR. CONNOR: Your Honor, that's absurd.
18 That's like me asking to review Your Honor for
19 your law clerk's complying with law.

20 JUDGE HOWE: For a bench memo?

21 MR. CONNOR: I am never going to get that.
22 That's what this is. It's like advice of
23 counsel.

24 JUDGE HOWE: It's like a bench memo.

25 MR. CONNOR: Yes. Yes.

1 MR. ZAYICEK: Why did they include it their
2 policies and procedures and tell that to the
3 members of the public if it's an internal
4 document?

5 JUDGE HOWE: I don't know.

6 MR. ZAYICEK: Okay.

7 JUDGE HOWE: You are right. It makes no
8 sense.

9 MR. ZAYICEK: Nothing further, Your Honor.

10 JUDGE HOWE: I used to be on the state ethics
11 commission, and it's a similar agency. But I
12 have never heard of such rules as the South
13 Carolina Board of Realtors have, believe me. I
14 mean I just haven't.

15 I was on the state ethics commission for two
16 terms, and we had an internal counsel and we had
17 an attorney from the state's attorneys general
18 office, a liaison. It just happened to be Trip
19 Anderson at the time. And we had our own
20 internal practices and procedures, but I've never
21 heard of such rules as these.

22 MR. MANOS: If I may, Your Honor, we have
23 kind of -- the parties kind of interchangeably
24 used boards as associations. We are not the
25 board. The board is the governmental agency.

1 This is South Carolina Association of Realtors.
2 It's a voluntary association that realtors belong
3 to, and in order to be able to use the trademark
4 term realtors have to belong to it. They belong
5 through their local entities like the Coastal
6 Association which is here.

7 JUDGE HOWE: Well, I've definitely had
8 dealings with the Coastal Board of Realtors.
9 That's the one represented by George Cox.

10 MR. MANOS: I believe that's correct.

11 MR. ZAYICEK: Yes.

12 MR. MANOS: I will say one other thing, Your
13 Honor. If Mr. Zayicek had been your attorney
14 once upon a time and Mr. Connor became your
15 attorney later and Mr. Connor consulted with Mr.
16 Zayicek as the consulting expert assistant on an
17 issue of law, Mr. Zayicek, he did not get your
18 approval to do that. Mr. Zayicek sued you for a
19 fee and lost. I think he could still sue Mr.
20 Connor for a portion of the fee you paid him for
21 assisting him under whatever agreement they may
22 have had. Thank you.

23 MR. ZAYICEK: I will let the rules for
24 professional responsibility speak for themselves.
25 An attorney can't hire another attorney and agree

1 to pay that other attorney without the prior
2 written consent of the client, period.

3 JUDGE HOWE: I think that's true.

4 MR. ZAYICEK: So you have to agree that I can
5 be consulted on your case before I am entitled to
6 any money from you. It's your money.

7 MR. CONNOR: I move to adjourn, Your Honor.

8 MR. ZAYICEK: Yes.

9 JUDGE HOWE: Anything else before we get
10 started -- I mean before we adjourn anything
11 else?

12 MR. ZAYICEK: They are holding \$250,000, Your
13 Honor. So I know it's important for everybody to
14 get this resolved. That's a lot of money.

15 JUDGE HOWE: Who is holding the money, the
16 Board of Realtors?

17 MR. ZAYICEK: Yes.

18 MR. MANOS: The Association.

19 JUDGE HOWE: I keep saying board. The
20 Association of Realtors. Okay, very good.

21 All right, I will get back in touch with
22 y'all. Thank you very much.

23 MR. ZAYICEK: Thank you. Your Honor.

24 MR. CONNOR: Thank you, Your Honor.

25 MR. MANOS: Thank you.

1 JUDGE HOWE: I have learned a lot. And I
2 have a lot of documents in front of me and I
3 appreciate the professional way and manner in
4 which this was presented. I definitely have
5 learned a lot between yesterday and last night
6 when I started reading everything.

7 We were in court yesterday until after five
8 but I did start reading all this last night. But
9 thank you very much.

10 MR. ZAYICEK: Thanks for your indulgence,
11 Your Honor.

12 MR. CONNOR: Thank you, Your Honor.

13 MR. MANOS: Thank you.

14 JUDGE HOWE: And we are adjourned.

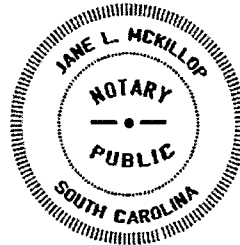
15 (The hearing was concluded at 5:17 p.m.)
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CERTIFICATE OF REPORTER

I, Jane L. McKillop, Notary Public for the
State of South Carolina at Large, do hereby certify
that the foregoing transcript is a true, accurate, and
complete record.

I further certify that I am neither related
to nor counsel for any party to the cause pending or
interested in the events thereof.

Witness my hand, I have hereunto affixed my
official seal this 3rd day of July 2017 at Murrells
Inlet, Georgetown County, South Carolina.



Jane L. McKillop

My Commission expires

September 15, 2024

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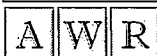
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Waldo, Andrew vs.
Cousins, Michael & SC Association of Realtors et al

Hearing Hearing
June 21, 2017

A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
scheduledepo.com



A. WILLIAM ROBERTS, JR., & ASSOCIATES (800) 743-DEPO
scheduledepo.com

**THIS AGREEMENT CONTAINS A BINDING, IRREVOCABLE AGREEMENT TO
ARBITRATE AND IS SUBJECT TO ARBITRATION PURSUANT TO TITLE 15, CHAPTER 48
(UNIFORM ARBITRATION ACT) OF THE CODE OF LAWS OF SOUTH CAROLINA**

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

CONTRACT OF SALE

THIS CONTRACT OF SALE (this "Agreement") is made as of the Effective Date, as herein defined, by and between NATIONAL GOLF MANAGEMENT, LLC, a South Carolina corporation having a local address of P.O. Box 7308, Myrtle Beach, South Carolina 29572 (hereinafter referred to as the "Seller") and XIAN DOU (hereinafter referred to as the "Buyer").

WHEREAS, Seller is the owner of those certain pieces, parcels or tracts of real property, together with the improvements thereon (collectively, the "Land"), located in Horry County, South Carolina, a more particular description of which is attached hereto as Exhibit A and by this reference made a part hereof; and

WHEREAS, Seller is the owner and holder of the fixtures, furniture, furnishings, equipment, and other personal property set forth and described in Exhibit B attached hereto and by this reference made a part hereof (the "Personalty") used in the operation of a golf course upon the Land; and

WHEREAS, subject to the terms and conditions hereof, Seller desires to sell the Land and the Personalty (hereinafter collectively referred to as the "Property") to Buyer, and Buyer, subject to the terms and conditions hereof, desires to purchase the Property from Seller.

NOW THEREFORE, in consideration of the covenants and provisions contained herein, and subject to the terms and conditions hereinafter set forth, the Parties hereto, intending to be legally bound hereby, agree as follows:

1. **SALE.** On the terms and conditions set forth herein, Seller hereby agrees to sell and convey to Buyer, and Buyer hereby agrees to purchase and accept from Seller, the Property.

2. **PURCHASE PRICE.** The consideration for the purchase of the Property shall be (a) payment to the Seller of Three Million Three Hundred Thousand and No/100 (\$3,300,000.00) Dollars U.S. and (b) Seller's transfer, and Buyer's assumption, of the leases, agreements and other obligations set forth in Exhibit C (the "Assumed Contracts", and together with the payment in (a) above, being collectively referred to as the "Purchase Price"). The cash portion of the Purchase Price shall be paid as follows:

(A) On or before three (3) business days after the full execution of this Agreement, Buyer shall escrow an earnest money deposit in the sum of One Hundred Thousand and No/100 (\$100,000.00) Dollars (the "Deposit") with Parsons, Ouverson & Stark, Guest & Sandefur, PA ("Escrow Agent") to be held, invested and disbursed pursuant to the terms of this Agreement. The Deposit shall be applied toward the Purchase Price at Settlement. Interest earned on the Deposit, if any, shall belong to the Buyer, and Buyer shall be responsible for any taxes in connection therewith.

(B) The balance of the Purchase Price, less any applicable closing credits, shall be due at Settlement in immediately available and collectable funds.

(2) Non-Material Condemnation. In the event of any Condemnation other than a Material Condemnation, Buyer shall not have the right to terminate this Contract, but shall proceed to Closing, in which case Seller shall assign to Buyer all of Seller's right, title and interest in all proceeds and awards from such Condemnation by delivering an assignment instrument to Buyer at Closing in form and substance reasonably satisfactory to Buyer.

15. COMPLIANCE WITH NOTICES, ORDINANCES. Seller shall comply with any notices given or ordinances enacted by any governing authority prior to the date of Settlement for which a lien could be filed against the Property.

16. BROKERS. Buyer and Seller each warrant and represent to the other that it has not engaged or dealt with any broker, salesman, finder or similar intermediary in connection with the purchase of the Property other than Sperry Van Ness and _____ [INSERT NAME OF BUYER'S CO-BROKER], to which Seller shall pay a commission of six and No/100 percent (6.0%) of the cash portion of the Purchase Price. Each party shall hold harmless, indemnify and defend the other from and against any claim based on any alleged fact inconsistent with such party's warranty and representation contained in this Section 16.

17. RECORDING. Buyer shall not have the right to record a memorandum of this Agreement in the local land records.

18. NOTICES. Any notice required to be given hereunder shall be given in writing and either (i) sent by United States registered or certified mail, with postage prepaid, return receipt requested, (ii) sent by Federal Express or another nationally recognized overnight courier, or (iii) sent by facsimile transmission with a hard copy sent on the same day by a nationally recognized overnight courier. All notices shall be deemed to have been given 48 hours following deposit in the United States Postal Service, or upon delivery if sent by overnight courier service or facsimile. All notices shall be addressed to the following address or at such other address as may hereafter be substituted by written notice:

To Seller: National Golf Management, LLC
P.O. Box 7308
Myrtle Beach, South Carolina 29578-1936
Attn: Robert Mauragas
Telephone: _____
Fax: _____

With a copy to: Matthew R. Magee, Esquire
Thomas & Brittain, PA
P. O. Box 1290
Myrtle Beach, S.C. 29578
Telephone: 843-692-2628
Fax: 843-692-0918

To Buyer: _____

Telephone: _____
Fax: _____

STATE OF SOUTH CAROLINA)

COUNTY OF HORRY)

AGREEMENT OF PURCHASE AND SALE

THIS AGREEMENT OF PURCHASE AND SALE (the "Agreement"), dated June _____, 2014 (the "Effective Date"), is entered into by and between Colonia Golf Club, LLC, a South Carolina limited liability company (the "Seller") and Xian Dou, or his assigns (the "Purchaser").

RECITALS

WHEREAS, the Seller is the owner of (or has contracted to purchase) the land and improvements located in the North Myrtle Beach area of Horry County, South Carolina located on Hwy. 9 and known generally as Colonial Charters Golf Course (the "Golf Course"), and the personal property, intangible property and intellectual property associated with, and used in the operation of, the Golf Course (the "Business"), all as described more fully below; and

WHEREAS, Seller has agreed to sell all of its right, title and interest in and to the Property (as defined below) to Purchaser, and Purchaser has agreed to purchase all of Seller's interest in the Property, all according to the terms, conditions and limitations described herein;

NOW, THEREFORE, for and in consideration of the above premises, the mutual promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

AGREEMENT TO SELL AND PURCHASE

Seller agrees to sell and convey all of its right, title and interest in and to the Property defined below to Purchaser or his designee, and Purchaser agrees to purchase the Property from Seller on the terms and conditions set forth in this Agreement.

1. The Property. The Property includes the following:

- The real property described on the attached Exhibit A, which is attached hereto and incorporated herein comprising approximately 123 acres, and as outlined in red on the site plan(s) attached hereto as Exhibit A-1, including but not limited to all of Seller's rights to any submerged land lying within any ponds, lakes, creeks, and other waterways lying within the boundaries thereof (the "Land"). The actual boundaries of the Land may be established by one or more Surveys to be obtained by Purchaser as provided in Paragraph 9, and a legal description may, with the consent of both parties, be taken from the Survey and used in the Deed;
- All permits, licenses, easements and other rights and privileges appurtenant to the Land including, but not limited to all of Seller's rights to adjacent roads, walkways, drives, public or private, lying within or without the Land (the "Appurtenances");

Seller hereby agrees that the truthfulness of each of the foregoing representations and warranties, and of all other representations and warranties made in this Agreement, as of the Effective Date and as of the Closing Date (except as may be limited by the express terms of this Agreement), is a condition precedent to the performance by Purchaser of its obligations under this Agreement. If any of the foregoing representations and warranties is not true in any material respect when made, or when re-certified at Closing, Purchaser may consider such material misrepresentation to be a default under this Agreement, entitling Purchaser to terminate this Agreement and receive a full refund of its Earnest Money; provided, however, that with respect to any representation or warranty made to the knowledge of Seller, Purchaser shall be entitled to exercise default remedies only if the substance of the representation or warranty is materially untrue, and if such untruth was known to Seller at the time the representation or warranty was made (or re-certified). If any of the foregoing representations and warranties is true of the Effective Date, but is not true as of the Closing Date as a result of a matter, circumstance or event beyond the reasonable control of Seller, Purchaser shall not be entitled to consider the untruth of the representation or warranty as an event of default under this Agreement, but instead Purchaser may, at its election and as its sole remedy, terminate this Agreement by delivery of written notice to Seller, and in that event Purchaser shall be entitled to a return of the Earnest Money.

Representations and Warranties of Purchaser. Purchaser represents and warrants to Seller that

(a) Purchaser has full power and authority to enter into this Agreement and to acquire the Property in accordance with the terms of this Agreement.

(b) The execution and performance of this Agreement and the Closing Documents by Purchaser, and the consummation of the Closing, will not conflict with any provision of law applicable to Purchaser, nor will it result in the breach of any provision of, or constitute a default under, any court order, agreement or instrument to which Purchaser is a party or by which Purchaser is bound.

(c) This Agreement and the Closing Documents to be delivered by Purchaser have been or will be duly authorized by all necessary company action on the part of Purchaser, and have been or will be duly executed and delivered by Purchaser and no further action or approval is required in order to constitute this Agreement as a binding and enforceable obligation of Purchaser.

16. **Real Estate Commissions.** Purchaser represents and warrants to Seller that no brokers' or real estate commissions will be due as a result of the sale of the Property from its actions other than commissions due from Seller (a) to the Keller-Williams office in Myrtle Beach, South Carolina - 3% of the Purchase Price (Jane Zheng, agent) and (b) Sperry Van Ness Founders Group - 3% of the Purchase Price (Mike Cousins, agent). Seller represents and warrants to Purchaser that no brokers' or real estate commissions will be due as a result of the sale of the Property from its actions other than as stated above. Seller agrees to indemnify, defend and save Purchaser harmless from and against any cost and expense (including reasonable attorneys' fees) incurred by Purchaser as a result of the untruth of the foregoing representation by Seller, or any claims by a broker for payment of a commission by Purchaser



POLICY OF THE SOUTH CAROLINA REALTORS® GOVERNING STATE PROFESSIONAL STANDARDS PROCEDURES

The Bylaws of the South Carolina Association of REALTORS® (SCR) provide in Article XXII, Section 3 that the responsibility of the Association members relating to the enforcement of the Code of Ethics, the Bylaws and Rules of Operation REALTORS®, the disciplining of members and the arbitration of disputes, and the organization and procedures incident thereto, shall be governed by the Code of Ethics and Arbitration Manual of the NATIONAL ASSOCIATION OF REALTORS® (NAR), as from time to time amended, which by this reference is made part of these Bylaws, provided, however, that any provision deemed inconsistent with South Carolina Law shall be deleted or amended to comply with South Carolina Law.

The purpose of the policies listed hereunder is to address those discretionary areas not covered by the procedures of the NAR as well as those areas of the arbitration procedures which are inconsistent with the Uniform Arbitration Act, §15-48-10, *et seq.*, Code of Laws of South Carolina, 1976, as amended. The South Carolina Uniform Arbitration Act shall not apply to any agreement or provision to arbitrate in which it is stipulated that the Act shall not apply.

ENFORCEMENT OF THE CODE OF ETHICS

I. JURISDICTION OF SCR

State Professional Standards Complaints: Anyone involved in a real estate transaction money dispute or alleging a REALTOR® ethics violation in a real estate transaction should file their complaint with the Local Board/Association Executive Officer. All complaints should allege specific and detailed facts of the issues involved including violations of specific Articles of the Code of Ethics. Complaints that lack specificity and clarity should be referred back to Complainant by the Local Board/Association Grievance Committee for revision. A Local Board/Association, prior to referring an ethics complaint or arbitration request for review to the State Association, should exhaust all efforts to impanel an impartial panel to conduct either the original hearing or the appeal or procedural review. If because of notoriety, familiarity of the parties, etc., the Local Board/ Association cannot impanel an impartial tribunal, the Local Board may refer the matter to the State Association, and the State Grievance Committee may delegate to the SCR Professional Standards Committee the authority to hear the case on behalf of the State Association. Mediation is available as a voluntary settlement system for money disputes.

1. Allegations of unethical conduct and contractual disputes (and specific non-contractual disputes as defined in Standard of Practice 17-4) between REALTORS®, and between REALTORS® and their customers or clients may be submitted to an ethics or arbitration panel at the State Association level under the following circumstances:
 - (a) Allegations of unethical conduct made against a REALTOR® who is directly a member of the State Association and not a member of any Local Board.

- (b) Allegations of unethical conduct made against a REALTOR® in the instance in which the local Board, because of size or other valid reason, determines that it cannot provide a due process hearing of the matter and petitions the State Association to conduct a hearing. In accordance with S.C.R Bylaws and Rules of Operation, a local Board/Association shall be required to enter into cooperative professional standards agreements with other local boards or the state association to maintain the enforcement of professional standards. In the event that the local or cooperative Grievance Committee determines there is a basis for an ethics hearing, or arbitration, but it is impossible to impanel an impartial hearing panel, the complaint can be forwarded to the State Association, which will refer the matter to the State Grievance Committee for review.
- (c) Contractual disputes (and specific non-contractual disputes as defined in Standard of Practice 17-4) between REALTORS® who are not members of the same Board where the matter has been referred to the State Association by both local Boards.
- (d) Contractual disputes (and specific non-contractual disputes as defined in Standard of Practice 17-4) between REALTORS® who are directly members of the State Association and are not members of any Board.*
- (e) Contractual disputes (and specific non-contractual disputes as defined in Standard of Practice 17-4) between a REALTOR® who does not hold membership in any Board, but is directly a member of the State Association, and a REALTOR® who is a member of a Board.* (*Reference is made to members of the State Association who are outside the jurisdiction of and are not members of any local Board within the state.)
- (f) Contractual disputes (and specific non-contractual disputes as defined in Standard of Practice 17-4) between REALTOR® Members of the same Board where the Board with good and sufficient reason is unable to arbitrate the dispute. (This provision is not designed to relieve the local Board of its primary responsibility to resolve differences arising between members of the same Board. The section recognizes that in some Boards with limited membership usual arbitration procedures may be impossible.)
- (g) Contractual disputes between a customer or a client and a REALTOR® where the Board with good and sufficient reason is unable to arbitrate the dispute or the REALTOR® is a direct member of the State Association.

II. S.C.R GRIEVANCE COMMITTEE

- A. Make-up of Committee: The Grievance Committee shall consist of a number of members to be determined yearly by the President, including the Chair and Vice-Chair. Members shall serve for one year only, but may be re-appointed the following years.
- B. Qualifications of Committee Members: Committee members shall have been a member in good standing of the Association or a REALTOR® Board/Association of REALTORS® with 2 years professional standards experience. Appointees shall sign an oath of confidentiality prior to serving on this committee. Appointees must attend annual training provided by the State Association.

- C. Handling of Complaints or Arbitration Requests: A copy of any complaint or arbitration request shall not be sent to the Respondent and the Respondent shall not be provided with an opportunity to reply before the Grievance Committee makes any determination as to the disposition of the complaint or arbitration request, unless the Respondent has already been given the opportunity to submit a response by the local association. In those situations, the Grievance Committee may be provided with the response.
- D. Grievance Committee Panel: A grievance committee panel shall consist of a minimum of three (3) members. A grievance committee panel may meet by audio or video conference call.

III S.C.R. PROFESSIONAL STANDARDS COMMITTEE

- A. Make-up of Committee: The committee shall consist of at least 30 members, with no more than 3 members per firm, including 20 Designated REALTORS® and 10 REALTOR® members. The committee shall include a Chair, a maximum of 8 Hearing Panel Chairs, with not more than one Hearing Panel Chair per firm, and members appointed by the President of the Association. Members shall serve for one year only, but may be re-appointed for the following years.
- B. Qualifications of Committee Members: Members of the Regional Professional Standards Committee must be REALTORS® in good standing who have served for two Consecutive years on the Professional Standards Committee of a Local Board/Association. Appointees shall sign an oath of confidentiality prior to serving on this Committee. Appointees must attend annual training provided by the State Association.
- C. Setting Up Hearings: The Chair of the Professional Standards Committee, shall be responsible for coordinating and setting up all Professional Standards Hearings with assistance from SCR staff. Chair sets the date, time and place of hearings and the selection of Panel Members.

IV. RECORDING OF HEARINGS

- A. All Professional Standards Panel hearings shall be recorded and the recording retained until after the prescribed date for any appeal or procedural review or ratification by the Executive Committee. Only SCR staff may record the proceedings.
- B. Recordings or transcripts from ethics or arbitration hearings may only be requested and used for the purpose of an appeal hearing, a rehearing, or procedural reviews, and may not be introduced into evidence for any other purpose. The recordings shall not be routinely transcribed. Copies of the recording can be made available to the parties for a fee of \$50.00 if ordered at least 7 days in advance of the date set for the appeal hearing or procedural review. Copies of the recording ordered less than 7 days in advance of the appeal hearing shall cost \$100.00. Payment for any recording shall be in advance of delivery.
- C. In the case of Professional Standards Committee Hearings, the recorder shall be operated by SCR staff.
- D. Recordings or transcripts from ethics or arbitration hearings are to be used only for the purpose of appeals, rehearing, or pursuant to any application to change award, application to

confirm award, application for vacate of award or application to modification award, pursuant to the Uniform arbitration Act, §§ 15-48-100, 15-48-120, 15-48-130, and 15-48-140, Code of Laws of South Carolina, 1976, as amended, and may not be introduced into evidence for any other purpose.

V. LEGAL COUNSEL

- A. Legal Counsel shall be present at any and all SCR Ethics, Arbitrations, Appeals, and Procedural Review Hearings unless determined otherwise by the SCR CEO or President.
- B. The presence of Legal Counsel at local Grievance Committees shall be determined by the SCR CEO in consultation with the Local Board/Association Executive Officer.
- C. Association Counsel, if present, shall prepare for review of the Panel Chairman and/or the President any statement of facts or a summary of the reasons supporting any decision made by the Panel. The decision is made by the Panel, not the Association Counsel.
- D. Every party may be represented by legal counsel. A waiver of counsel prior to the proceeding or hearing is ineffective.

VI. MATERIALS RELATED TO PROFESSIONAL STANDARDS HEARINGS

- A. All relevant materials related to Professional Standards Hearings, including the complaint or arbitration request, response and other evidentiary documentation, shall be provided to Ethics, Arbitration and Appeals or Procedural Review Panels at least 21 days prior to the date of the hearing.
- B. Any notice required to be given or paper required to be served may be given by personally handing it to the parties to be notified or by certified mail. Email will be used as supplemental notice.
- C. The Association shall maintain all materials on file for cases related to Professional Standards Hearings (including all materials on file for cases arising out of local Boards/Associations) until the appeal or procedural review period has expired, at which time all materials shall be destroyed. "All materials" include the complaint, response, other evidentiary documentation, recordings and/or transcripts, but does not include the award of the Arbitrators or the final decision of the Ethics Hearing Panel. In cases arising out of Local Boards/Associations, the State Association shall only return the award of the Arbitrators or the final decision of the Ethics Hearing Panel to the Local Board/Association related to that case, to be kept in the member's permanent membership file. All final decisions are to be retained for seven (7) years by the State Association.

VII. ETHICS COMPLAINTS

- A. The decision as to whether or not to join the Designated REALTOR® in any complaint filed against a REALTOR® in the Designated REALTOR®'s firm shall be treated on a case by case basis in the interests of due process and justice. Such decision shall be by action of the Complainant, upon review of the appropriate Grievance Committee or Hearing Panel.

- B. Copies of any final decision where a member has been found to have violated the Code of Ethics shall be part of the permanent record of any REALTOR® members' confidential file and provided to the Executive Officer of the Complainant's and Respondent's Board/Associations for their records. If the Complainant or the Respondent is a direct member of the State Association, the State Association will retain a copy of any final decision where a member has been found to have violated the Code of Ethics and shall be part of the permanent record of any REALTOR® members' confidential file.
- C. Any member found in violation of the Code of ethics or other membership duty will be assessed an administrative processing fee of \$500.00.

VIII. MEDIATION AND ARBITRATION

A. Mediation:

1. The Association shall provide Mediation as a preliminary, voluntary alternative to Arbitration. **Every effort shall be made to encourage all parties to a contractual dispute to settle the matter through mediation.**
2. Seven or more Mediation officers shall be appointed by the Association President each year. One Mediation Officer shall be appointed from each Region, if qualified candidates are available. Mediation Officers shall serve for one year unless reappointed.
2. SCR or NAR trained Mediators will apply to be on the SCR Mediator List. Mediators on the list are required to attend annual professional standards training and submit a complete mediator application annually.
3. The Board/Association Grievance Committee Chairperson shall make any requested effort to assist the parties coordinate their own Mediation as quickly and efficiently as possible.

B. Arbitration:

1. The Association may provide arbitration procedures only in those instances described in the Code of Ethics and Arbitration Manual of the NATIONAL ASSOCIATION OF REALTORS® as amended. A client of a REALTOR® may invoke the arbitration facilities of the Association in a business dispute with a REALTOR® arising out of an agency relationship providing the client agrees in writing to be bound by the arbitration. In the event such request and willingness to enter into a written agreement by the client, the REALTOR® shall have an obligation to sign a written agreement to arbitrate the dispute and the Association shall arbitrate the dispute.
2. The Grievance Committee shall review all arbitration requests to determine if the matter is properly arbitrable, whether or not the appropriate parties are named, and whether or not a contractual relationship exists between the parties.

3. The arbitration fee shall be \$1,000.00. \$500.00 is to be paid by the Complainant and \$500.00 is to be paid by the Respondent.
4. Refusal to Arbitrate:
 - (a) If the respondent fails to pay the appropriate arbitration fee of \$500.00, but appears and takes part in the hearing, the hearing may still take place at the discretion of the Hearing Panel Chairman in consultation with Association Counsel.
 - (b) If the respondent does not pay the required arbitration fee of \$500.00, and does not appear to take part in the hearing, and the matter at hand is an arbitrable matter, the hearing may still take place at the discretion of the Hearing Panel Chairman in consultation with Association Counsel.
5. Refusal to Abide by an Award in Arbitration:
 - (a) If the respondent agrees to and submits to arbitration but then refuses to abide by the award, the Local Board/Association should not, in the first instance of such refusal by a member, initiate a disciplinary proceeding. Rather the Local Board/Association should encourage the award recipient to seek enforcement of the award in the courts, and suggest that a request be made for payment of legal costs incurred in seeking judicial enforcement. In such a first instance, the Local Board/Association shall not initiate any disciplinary action. If an individual repeatedly refuses to abide by awards in Arbitration for reasons which, in the reasonable judgment of the Local Board/Association reflect a willful purpose to frustrate the intent of Article 17 of the Code of Ethics rather than a purpose to ensure due process, the respondent's Local Board/Association may initiate disciplinary proceedings for violation of Article 17. The Local Board/Association Board of Directors may direct the implementation of such sanction resulting from the disciplinary proceedings, and should if it has reason to believe that the imposition of such sanction will become the basis of litigation and a claim for damages consequent to such sanction, delay the effective date of implementing the sanction to a date following receipt by the Local Board/Association of a judicial decision in a petition for Declaratory relief filed by the Local Board/Association to confirm the propriety of its action. Such proceedings will be in addition to and not in lieu of Local Board/Association support of judicial enforcement of the award by the award recipient.

IX. AWARDS

- A. If the dispute is settled before an award rendered, or at mediation, the Association shall return all filing fees to the complainant and respondent.
- B. The Association has no policy regarding the escrowing of arbitration awards in the event the non-prevailing party wishes to challenge the award.
- C. The Association shall consider offering financial assistance to any prevailing party who seeks to have an arbitration award judicially enforced or to defend an arbitration award in the event

the respondent has appealed the award through the courts. Such applications for financial assistance must be made through the Legal Action Committee of the Association.

- D. Any mediation award shall be in writing and shall be signed by the parties joining in the award. Once the award is signed, it shall be valid and binding and a copy shall be delivered to each party either personally or by certified mail. A mediation award that has been signed by all parties is enforceable in a court of law.
- E. The award of an Arbitration Panel shall be in writing and signed by a majority of the Panel Members. Once the award is signed, it shall be a valid and binding and a copy shall be delivered to each party either personally or by certified mail.
- F. A party to an arbitration proceeding may appeal to the Executive Committee only with respect to such alleged irregularities occurring in the conduct of the proceeding as may have deprived the party of fundamental "due process." Such action is known as a Procedural Review.

X. APPEALS

- A. Appeals of determinations by the Grievance Committee and/or Ethics or Arbitration Panels shall be heard by a panel of no less than 5 REALTORS® appointed by the President from the Executive Committee, the Board of Directors or the Professional Standards Committee. The President shall appoint the Chair of the Appeal or Procedural Review Panel. An individual who served as a member of a Grievance or Hearing Panel may not be appointed to an Appeals or Procedural Panel to hear an appeal or procedural review arising from the same cause of action.

The Appellant in an appeal hearing must file an appeal fee of \$500.00, payable in advance. There is no fee to file an ethics complaint. These same procedures and fees shall apply to the appointment of Procedural Review Panels where there is an allegation concerning the irregularity of the procedures. If the Appellant prevails in an appeal hearing and the Board of Directors reverses the Professional Standards Panel's decision, the appeal fee shall be returned to the Appellant. If the Board of Directors affirms the Professional Standards Panel's decision, the appeal fee shall be retained by the State Association.

- B. In the event of an appeal of a decision of an Ethics Panel or a Procedural Review of an Arbitration Panel, the Chair of the Professional Standards Panel, or in his or her absence, another member of the Professional Standards Panel shall summarize the case before the Appeal or Procedural Review Panel.
- C. It shall be the decision of the Chair of the Appeal or Procedural Review Panel to determine whether or not they wish to hear the original recording of the case or excerpts of the original recording. Any party to a dispute may have the original tape recording transcribed, at their expense. In such cases the State Association and any other parties to the dispute are to be provided with copies of the transcription, at no charge.

XI. AFFIRMATION OF ETHICS DECISION AND DISTRIBUTION OF FINES AND OR ARBITRATION/APPEAL FEES RETAINED

- A. Following any State Professional Standards Hearing, any decision which includes penalties associated with violations of the Code of Ethics, the SCR Board of Directors directs that the unedited decision shall be referred to the State Executive Committee for confidential affirmation in executive session, 20 days after the decision has been mailed to the parties.

NOTE: Only a Local Board/Association can enforce penalties involving the suspension or expulsion of a member, but it will be the prerogative of the State Association to determine whether it will assist legally and/or financially in the filing of any procedures for Declaratory Relief in matters involving suspension or expulsion of a member.

- B. The State Hearing Panels will disburse the \$500.00 deposit of the non-prevailing party to the State Association. The \$500.00 deposit of the prevailing party shall be returned to the prevailing party.

XII. ASSOCIATION STAFF INVOLVEMENT IN SCR PROFESSIONAL STANDARDS PROCEDURES

- A. The administration of the Professional Standards Procedures shall be a direct responsibility of the Professional Standards Administrator and the Vice President and General Counsel, in consultation with the Association CEO.
- B. The Professional Standards Administrator shall provide summaries, as needed, of Professional Standards complaints to the CEO and the Chair of the Professional Standards Committee.
- C. The Professional Standards Administrator shall be present at all Grievance Committee meetings, at the beginning of all Ethics and Arbitration Hearings and Procedural Review Hearings and shall remain at the discretion of the Hearing Panel Chairman.
- D. The CEO and Association Counsel shall be present during any Appeal or Procedural Review Hearings before the Executive Committee, but only Association Legal Counsel shall remain during the Executive Session.
- E. The Professional Standards Administrator and/or the Vice President and General Counsel shall be responsible for drafting any Hearing Panel decisions or decisions on Appeal of the Executive Committee.

XIII. CONFLICTS BETWEEN THE ARBITRATION PROCEDURES AND THE SC CODE

- A. Failure to Submit to Arbitration

Nothing contained herein should be interpreted to preclude a member from making application to a court for an order directing the parties to proceed with arbitration or for an order to stay arbitration in accordance with the terms hereof as provided in § 15-48-20, Code of Laws of South Carolina, 1976, as amended.

- B. Joinder of Parties

The Grievance Committee or the Hearing Panel may join any other person who has an interest in the arbitration in accordance with § 15-48-60, Uniform Arbitration Act, Code of Laws of South Carolina, 1976, as amended. The purpose of this provision is to allow the Grievance Committee or the Hearing Panel to consolidate like claims so that one hearing may be held at which one hearing panel will make a definitive decision with respect to all competing claims that have been filed by parties with standing.

Approved by the SCR Board of Directors, April 8, 2014

Company. *As a disclosed dual agent, the Company and its associated licensees cannot advocate on behalf of one client over the other, and cannot disclose confidential client information concerning the price negotiations, terms, or factors motivating the buyer/client to buy or the seller/client to sell.* Each Dual Agency Agreement contains the names of both the seller client(s) and the buyer client(s) and identifies the property.

Designated Agency

In designated agency, a broker-in-charge may designate individual associated licensees to act solely on behalf of each client. Designated agents are not limited by the Company's agency relationship with the other client, but instead have a duty to promote the best interest of their clients, including negotiating a price. The broker-in-charge remains a disclosed dual agent for both clients, and ensures the assigned agents fulfill their duties to their respective clients.

At the time you sign an agency agreement, you may be asked to acknowledge whether you would consider giving written consent allowing the Company to designate a representative for you and one for the other client in a designated agency.

Each Designated Agency Agreement contains the names of both the seller client(s) and the buyer client(s) and identifies the property.

What to Look For in Any Agreement

When you choose client-level service, your written Agency Agreement or your agent should answer these questions:

- Can I work with other Companies during the time of the Agreement?
- What will happen if I buy or sell on my own without the agent?
- When will this agreement expire?
- How will the Company be paid for its services?

- Does this Company represent both buyers and sellers as clients?
- If so, what are the choices if two clients become involved in one transaction?
- What duties will the Company continue to provide me after the transaction is completed?

If you plan to become a client of a Company, the licensee will explain the agreement to you fully and will answer questions you may have about the agreement. Remember, however, that until you enter into a representation agreement with the Company, you are considered a customer and the Company cannot be your advocate, cannot advise you on price or terms, and cannot keep your confidences.

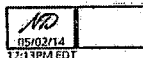
It's Your Choice

As a real estate consumer in South Carolina, it is your choice as to the type and nature of services you receive.

- You can choose to remain a customer and represent yourself while the Company represents the other party.
- You can choose to hire the Company for representation through a written agreement.
- If represented by the Company, you can decide whether to go forward under the shared services of dual agency or designated agency or to remain in single agency.

The choice of services belongs to you—the South Carolina real estate consumer.

This brochure has been approved by the S.C. Real Estate Commission for use in explaining representation issues in real estate transactions and consumers rights as a buyer or seller. Reprinting without permission is permitted provided no changes or modifications are made.



Agency Disclosure Brochure

Agency Relationships in Real Estate



South Carolina Department of
Labor, Licensing and
Regulation

South Carolina Real Estate Commission

PO Box 11847
Synergy Business Park, Kingstree Building
110 Centerview Dr., Suite 201
Columbia, SC 29210

Telephone: (803) 896-4400
Fax: (803) 896-4404

www.llr.state.sc.us/Pol/RealEstateCommission/

(Rev. 1/05)

Agency Relationships in South Carolina

The SC Real Estate License Law, in Section 40-57-139 (A) (1) and (2), requires a real estate licensee to provide you this brochure and a meaningful explanation of agency relationships offered by the licensee's Company. This must be done at the first practical opportunity when you and the licensee have substantive contact.

Before you begin to work with a real estate licensee, it is important for you to know the difference between a broker-in-charge and associated licensees. The broker-in-charge is the person in charge of a real estate Company. Associated licensees may work only through a broker-in-charge. In other words, when you choose to work with any real estate licensee, your business relationship is legally with the Company and not with the associated licensee.

A real estate Company and its associated licensees can provide buyers and sellers valuable real estate services, whether in the form of basic customer services, or through client-level agency representation. The services you can expect will depend upon the legal relationship you establish with the Company. It is important for you to discuss the following information with the real estate licensee and agree on whether in your business relationship you will be a **customer** or a **client**.

Now You Are a Customer of the Company

South Carolina license law defines customers as buyers or sellers who choose **NOT** to establish an agency relationship. The law requires real estate licensees to perform the following **basic duties** when dealing with **any** real estate buyer or seller as customers:

- Present all offers in a timely manner
- Account for money or other property received on your behalf
- Provide an explanation of the scope of services to be provided
- Be fair and honest and provide accurate information
- Disclose "adverse material facts" about the property or the transaction which are within the licensee's knowledge.

Unless or until you enter into a written agreement with the Company for agency representation, you are considered a "Customer" of the Company, and the Company will not act as your agent. As a Customer, you should not expect the Company or its licensees to promote your best interest, or to keep your bargaining information confidential.

Customer service does not require a written agreement; therefore, you are not committed to the Company in any way.

You Can Become a Client

Clients receive more services than customers. If client status is offered by the real estate Company, you can become a client by entering into a written agency agreement requiring the Company and its associated licensees to act as an agent on your behalf and promote your best interests. If you choose to become a client, you will be asked to confirm in your written representation agreement that you received this brochure in a timely manner.

A seller becomes a client of a real estate company by signing a formal listing agreement with the Company. For a seller to become a client, this agreement must be in writing and must clearly establish the terms of the agreement and the obligations of both the seller and the Company which becomes the agent for the seller.

A buyer becomes a client of a real estate Company by signing a formal buyer agency agreement with the Company. For a buyer to become a client, this agreement must be in writing and must clearly establish the terms of the agreement and the obligations of both the buyer and the Company which becomes the agent for the buyer.

If you enter into a written agency agreement, as a Client, you can expect the real estate Company to provide the following client-level services:

- Obedience
- Loyalty
- Disclosure
- Confidentiality
- Accounting
- Reasonable care and skill

Client-level services also include advice, counsel and assistance in negotiations.

Single Agency

When the Company represents only one client in the same transaction (the seller or the buyer), it is called single agency.

Dual Agency

Dual Agency exists when the real estate Company has two clients in one transaction – a seller client and a buyer client.

At the time you sign an agency agreement, you may be asked to acknowledge whether you would consider giving written consent allowing the Company to represent both you and the other client in a disclosed dual agency relationship.

Disclosed Dual Agency

In a disclosed dual agency, the Company's representation duties are limited because a buyer and seller have recognized conflicts of interest. Both clients' interests are represented by the



EXCLUSIVE RIGHT TO BUY BUYER AGENCY CONTRACT

1. APPOINTMENT OF BROKER: By this contract Xian Dou and his groups/companies

("Buyer") appoints Broker in Charge of Jane Zheng, KWR Company ("Broker") as Buyer's exclusive agent, subject to the terms and conditions stated in this Contract. By appointing Broker as Buyer's exclusive agent, Buyer agrees to conduct all negotiations for the types of property described in Section 2 below through Broker, and refer to Broker all inquiries made to Buyer about such properties from other brokers, salespersons, sellers and others during the term of this contract. "Negotiation" as used in this agreement shall mean property shown, negotiated, or information requested by Buyer through Broker.

2. PURPOSE OF AGENCY: Buyer desires to purchase or lease real property (which may include items of personal property) described as follows:

Type: ☐ Residential ☐ Commercial ☐ Industrial ☐ Vacant Land ☐ Other

General Description: all real estate properties above

Approximate Price Range: \$ 0-50M

General Location: properties introduced by Jane Zheng

Preferred Terms: 12 months

Other: _____

3. BROKER'S DUTIES: (a) The Broker shall provide to Buyer a meaningful explanation of agency and shall use Broker's professional real estate knowledge and skills to represent the Buyer in a diligent and effective manner and to locate property which is available for purchase or lease and suitable to the Buyer; (b) if the Broker is not representing the seller, the Broker shall represent solely the interest of the Buyer in all negotiations and transactions regarding the acquisition of real property, and repudiate any agency or subagency relationship with the seller or the company representing the seller and shall not claim the subagency compensation offered to the selling broker in the Multiple Listing Service; (c) if the Broker represents the seller as well as the Buyer (i.e., disclosed dual agency), the Broker shall not disclose to the Buyer information obtained within the confidentiality and trust of the fiduciary relationship with the seller, nor disclose to the seller information similarly obtained from the Buyer, without the consent of the party adversely affected by the disclosure; (d) the Broker may represent other buyers who may be interested in the same property as the Buyer. Upon the termination or completion of this agreement, Broker shall keep confidential all information received during the course of this agreement which was made confidential by written request or instructions from the client, except as provided for under South Carolina law.

Broker represents that Broker is duly licensed under the laws of the State of South Carolina as a real estate broker. Broker will use his best efforts as Buyer's agent to locate property of the type described in Section 2 of this contract and to negotiate acceptance of any offer by Buyer to purchase or lease such property. During the term of this Contract, Broker will give Buyer information describing and identifying properties that appear to Broker to substantially meet the conditions set forth in Section 2.

4. BUYER'S DUTIES. BUYER AGREES TO:

(A) Work exclusively with Broker and its Affiliated licensees during the term of this agreement by: (1) viewing any property (previewing, etc.) only with Broker or Broker's designated representative and not with another real estate broker, salesperson or seller; and (2) exclusively allowing Broker or Salesperson to identify property, negotiate for Buyer and otherwise to represent Buyer; and (3) referring to Broker all inquiries received in any form from any other real estate broker or affiliated licensees; and (4) holding Broker harmless from liability as a result of incomplete/inaccurate information provided to Broker by Buyer or Seller; (5) holding Broker harmless from liability as a result of Seller's failure to provide a complete Seller's Property Condition Disclosure statement; and (6) indemnifying Broker against all claims, damages, losses, expenses, or liability arising from the handling of earnest money by anyone other than Broker.

(B) Assist Broker and its Affiliated Licensees in the process of identifying, negotiating and contracting to purchase, lease or otherwise acquire by: (1) providing Broker with reliable information (including financial information and written authorization to obtain verification of funds) that Broker deems necessary for the performance of this Agreement; and (2) making himself available to meet with Broker and to see properties, in order that the Broker will be able to perform the promises of the Brokerage Engagement.

(C) Provide Broker and its Affiliated Licensees the following information: (1) general nature, location, and requirements of desired property; and (2) price range, and other terms and conditions relating to desired property.

(D) To authorize Buyer's attorneys and the settlement agent to furnish to Broker copies of the final HUD-1 settlement statement for the transaction prior to the closing date.


09/22/14
2:09PM EDT

BUYER



BUYER


09/22/14
1:46PM EDT

BROKER HAVE READ THIS PAGE

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5. COMPENSATION OF BROKER: Brokers fees will be deemed earned when Buyer is under contract to purchase any property presented by Broker or negotiated by Buyer. This fee will be due and payable at closing or upon Buyer's default. If Buyer defaults, the total compensation that would have been due Broker will be due and payable immediately in cash from the Buyer. In consideration of the services performed by Broker under the terms of this Contract, Buyer agrees to pay Broker the following fee(s): **(CHECK ALL APPLICABLE SECTIONS)**

☐ a. **Retainer Fee:** Buyer will pay Broker a nonrefundable retainer fee of \$ _____ due and payable upon the signing of this contract. This fee ☐ shall or ☐ shall not be credited against the Brokerage fee.

☐ b. **Service Fee:** Buyer shall pay Broker a Service Fee of \$ _____ to be paid on _____, whether or not Buyer purchases any property. **(Check applicable sub-section.)**

☐ This Service Fee shall be the only fee due Broker from Buyer under the terms of this Contract.

☐ This Service Fee shall be credited against the Brokerage Fee described in subsection (c) below and shall be kept by Broker whether or not a Brokerage Fee is earned.

☐ This Service Fee shall be credited against the Brokerage Fee described in subsection (c) below and shall be kept by Broker whether or not a Brokerage Fee is earned, unless Buyer enters into a purchase and sale agreement. In the event that Buyer enters into a purchase and sale agreement, Buyer and Broker agree that the above Service Fee will be credited against the Brokerage Fee as defined below.

☐ c. **Brokerage Fee:** Buyer shall pay Broker a Brokerage Fee which is the greater of \$ _____ or _____ % of the purchase or total lease price (renewal, if applicable) of any property purchased or leased by Buyer, including "For Sale by Owner" properties. If within _____ days after the expiration of this Contract Buyer purchases or leases any property which Broker has negotiated during the term of this Contract, Buyer will pay Broker the Brokerage Fee stated above. Broker shall use his best efforts to obtain payment of the Brokerage Fee out of the transaction, but Buyer shall have the obligation to pay Broker the Brokerage Fee set forth in this Contract if Broker cannot obtain payment of such fee out of the transaction. Any fees paid by the seller or seller's agent shall be credited against the Brokerage fee.

☒ d. **Brokerage Fee:** Broker shall obtain payment of the Brokerage Fee out of the transaction. Broker shall be paid by the cooperating broker as stated in the Multiple Listing Service or as agreed to by the Broker and cooperating broker, or as agreed to by the Broker and Seller in a "For Sale By Owner" transaction. Buyer shall not be responsible for paying Broker the Brokerage fee.

6. TERM OF AGENCY: Broker's authority to act as Buyer's exclusive agent under the terms of this Contract shall begin on 10/01/2014 and shall end at 11:59 p.m. on 10/01/2015.

7. CONSENT TO DISCLOSED DUAL AGENCY/DESIGNATED AGENCY: (INITIAL APPLICABLE CHOICES)


09/22/14
2:09PM EDT

Buyer acknowledges receiving an explanation of the types of agency relationships that are offered by brokerage and an Agency Disclosure Form at the first practical opportunity at which substantive contact occurred between the Broker and Buyer.

Buyer acknowledges that after entering into this written agency contract, agent might request a modification in order to act as a **dual agent** or a **designated agent** in a specific transaction. If asked:

☐ Permission to act as a dual agent will not be considered.

☒ Permission to act as a dual agent may be considered at the time I am provided with information about the other party to a transaction. If Buyer agrees, Buyer will execute a separate written **Dual Agency Agreement**.

☐ Permission to act as a designated agent will not be considered.

☐ Permission to act as a designated agent may be considered at the time I am provided with information about the other party to a transaction. If Buyer agrees, Buyer will execute a separate written **Designated Agency Agreement**.

8. OTHER POTENTIAL BUYERS: Buyer understands that other potential buyers have entered into similar agency contracts with Broker which may involve the purchase or lease, through Broker of the same or similar property or properties as Buyer is attempting to purchase or lease. Buyer consents to Broker's representation of such other buyers.


09/22/14
2:09PM EDT

BUYER

☐

BUYER


09/22/14
1:46PM EDT

BROKER HAVE READ THIS PAGE

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9. INDEMNIFICATION OF BROKER: Buyer promises to disclose to Broker whether Buyer has signed any agency agreement with any other Broker, or has been given prior information about any property that is the subject of this Contract by any other Broker or salesperson, or has previously been shown any such property by any other broker or salesperson. If Buyer fails to tell Broker about such other broker's or salesperson's involvement, and Broker incurs any loss or damage as a result of any claim being brought against him on account of such involvement, due to no fault of Broker, then Buyer shall pay Broker all such losses and damages incurred by Broker because of such claim.

10. DISCLOSURE OF BUYER'S IDENTITY/CONFIDENTIALITY: The Broker ☐ does or ☒ does not have the Buyer's permission to disclose Buyer's identity to all property owners and other third parties. The Buyer is advised of the possibility that seller or seller's agent may not treat the existence, terms, or conditions of offers as confidential unless confidentiality is required by law, regulation, or by confidentiality agreement of the parties.

11. NONDISCRIMINATION: Broker and Buyer agree that all actions carried out under this contract shall be in full compliance with local, state, and federal fair housing laws against discrimination on the basis of race, creed, color, religion, national origin, sex, familial status, marital status, age or disabilities.

12. PROFESSIONAL COUNSEL: Buyer acknowledges that Broker is being retained solely as a real estate agent and not as an attorney, tax advisor, lender, appraiser, surveyor, structural engineer, home inspector or other professional service provider. Buyer agrees to seek professional advice concerning the condition of the property, legal, tax and other professional service matters.

13. MEDIATION CLAUSE: Any dispute or claim arising out of or relating to this Agreement, the breach of this Agreement or the services provided in relation to this Agreement, shall be submitted to mediation in accordance with the Rules and Procedures of the Dispute Resolution System of the NATIONAL ASSOCIATION OF REALTORS®. Disputes shall include representations made by Buyer or Broker in connection with the services to which this Agreement pertains, including without limitation, allegations of concealment, misrepresentation, negligence and/or fraud. Any agreement signed by the parties pursuant to the mediation conference shall be binding. This mediation clause shall survive for a period of 120 days after the date of the closing.

14. SEX OFFENDER REGISTRY INFORMATION: The Buyer and Broker agree that during the course of the agency relationship, referred to in the above mentioned agreement, the Broker and all affiliated agents shall not be responsible for obtaining or disclosing any information contained in the official South Carolina Sex Offender Registry. The Buyer understands that no course of action may be brought against the Broker or his affiliates for failing to obtain and disclose information contained in the official South Carolina Sex Offender Registry. The Buyer understands and agrees that the Buyer shall be responsible for obtaining any such information. The Buyer understands that Sex Offender Registry information may be obtained from the local Sheriff's Department or other appropriate law enforcement officials.

15. ENTIRE BINDING AGREEMENT: This written instrument, including the additional terms and conditions set forth on the reverse, expresses the entire agreement and all promises, covenants, and warranties between the Buyer and Broker. It can be changed only by a subsequently written instrument signed by both parties.

16. CONTINGENCIES:

17. FACSIMILE AND OTHER ELECTRONIC MEANS: The parties agree that this Agreement may be communicated by use of a fax or other secure electronic means, including but not limited to electronic mail and the internet, and the signatures, initials and handwritten or typewritten modifications to any of the foregoing shall be deemed to be valid and binding upon the parties as if the original signatures, initials and handwritten or typewritten modifications were present on the documents in the handwriting of each party.

NR
09/22/14
2:09PM EDT

BUYER

☐

BUYER

09/22/14
1:46PM EDT

BROKER HAVE READ THIS PAGE

Form 130
PAGE 3 OF 4

THIS IS A LEGALLY BINDING AGREEMENT. BUYER SHALL SEEK FURTHER ASSISTANCE IF THE CONTENTS ARE NOT UNDERSTOOD. BUYER AND BROKER ACKNOWLEDGES RECEIPT OF A COPY OF THIS AGREEMENT. BUYER AGREES TO RECEIVE COMMUNICATIONS FROM BROKER AT THE EMAIL ADDRESS, PHONE AND FAX NUMBER LISTED BELOW.

Nick Dou
BUYER Date Time
dotloop verified
09/22/14 2:09PM EDT
TMZ3-MNYQ-YYQ-L4HW

Email: nickdou@hotmail.com

Phone: 21222268651

Fax: _____

BUYER Date Time

Email: _____

Phone: _____

Fax: _____

BUYER Address: _____

BROKER/BUYER'S AGENT COMPANY

BY:

Jane Zheng

Broker/Licensee

Date

Time

dotloop verified
09/22/14 1:46PM EDT
BFCF-SQHW-CLKG-9EPF

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2/25/2015

Sperry Van Ness Mail - Aberdeen Golf Course

Michael

We will get back to you as soon as possible. Regards Bob

Bob Mauragas

President

National Golf Management

Office-843-282-1102

E-Mail- bob.mauragas@nationalgolfmanagement.com

nationalgolfmanagement.com

MBN.com

From: Michael Cousins [mailto:michael.cousins@svn.com]

Sent: Tuesday, September 23, 2014 3:28 PM

To: Bob Mauragas

Subject: Aberdeen Golf Course

[Quoted text hidden]

LB

CONFIDENTIALITY NOTICE: This e-mail transmission (and/or the attachments accompanying it) may contain confidential information, belonging to the sender. The information is only for the use of the intended recipient. If you are not the intended recipient, you are hereby notified that any disclosure, copying or distribution of any information in this transmission, or the taking of any action in reliance on the contents of this transmission, is strictly prohibited. Any unauthorized interception use or retransmission of this transmission is illegal under the law. If you have received this transmission in error, please promptly notify the sender by reply e-mail, and then destroy all copies of this transmission. Thank you.

michael.cousins@svn.com <michael.cousins@svn.com>

To: Bob Mauragas <bob.mauragas@nationalgolfmanagement.com>

Bcc: jay.smith@svn.com

Sat, Sep 27, 2014 at 6:32 AM

Bob

I'm in Inverness FL for a few days (R&R). Connectivity is spotty. Wondered if you have any progress to share.

Mike

Sent from my iPhone

[Quoted text hidden]

Bob Mauragas <bob.mauragas@nationalgolfmanagement.com>

To: "michael.cousins@svn.com" <michael.cousins@svn.com>

Sat, Sep 27, 2014 at 6:43 AM

Michael

Contract should be on your computer no later than Monday . Would your client have interest in purchasing long bay as well. Bob

EXHIBIT 5

2/25/2015

Sperry Van Ness Mail - Aberdeen Golf Course

Sent from my iPhone

Bob Mauragas

President

National Golf Management

[Quoted text hidden]

[Quoted text hidden]

michael.cousins@svn.com <michael.cousins@svn.com>

Sat, Sep 27, 2014 at 6:55 AM

To: Bob Mauragas <bob.mauragas@nationalgolfmanagement.com>

Very possibly. Details?

Sent from my iPhone

[Quoted text hidden]

EXHIBIT 5

2/25/2015

Sperry Van Ness Mail - Long Bay Golf Course



 Sperry Van Ness

Michael Cousins <michael.cousins@svn.com>

Long Bay Golf Course

2 messages

Michael Cousins <michael.cousins@svn.com>

Mon, Sep 29, 2014 at 4:10 PM

To: Joy Good <joygoodz@hotmail.com>

Jane,

Just heard from Seller of Long Bay. Property is 190 acres. Plays 37,000 rounds of golf annually.
Price will be cleared by Board tomorrow.

In comparison to CCGC, Long Bay is far more attractive; homes are more expensive. Rounds of golf are close to the same.

Mike

—
Michael Cousins-Senior Adviser
Sperry Van Ness/Founders Group
2411 N Oak St, Suite 201, Myrtle Beach, SC 29577
Phone 843-839-0182 - Fax 843-492-6529
Cell 843-424-9310
Michael.Cousins@svn.com - www.svn.com

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joygoodz@hotmail.com <joygoodz@hotmail.com>

Mon, Sep 29, 2014 at 4:16 PM

To: "michael.cousins@svn.com" <michael.cousins@svn.com>

Asking price and get commission agreement pls

Jane Zheng 8432679989

— Original message —

From: Michael Cousins

Date: Mon, Sep 29, 2014 4:10 PM

To: Joy Good;

Subject: Long Bay Golf Course

[Quoted text hidden]

EXHIBIT 6

Sperry Van Ness

Michael Cousins <michael.cousins@svn.com>

LB

Long Bya Golf Club

4 messages

Matt Magee <MMagee@myrlaw.com>

Fri, Oct 3, 2014 at 3:36 PM

To: "michael.cousins@svn.com" <michael.cousins@svn.com>

Cc: Bob Mauragas <bob.mauragas@nationalgolfmanagement.com>, Kathi Lennon <KLennon@myrlaw.com>

Mr. Cousins: Pursuant to your request, and our earlier conversation, attached is a non-binding term sheet for your client's review and comment concerning the terms upon which my client, National Golf Management, LLC, may be willing to consider a sale of the assets known Long Bay Golf Club. I look forward to your thoughts. Thank you.

Matt

Matthew R. Magee

Thomas & Brittain, P. A.

1314 Professional Drive (29577)

P.O. Box 1290

Myrtle Beach, SC 29578

Phone: (843) 692-2628

Fax: (843) 692-0918

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2 attachments

 SKMBT_C45214100314270.pdf
159K

 smime.p7s
6K

michael.cousins@svn.com <michael.cousins@svn.com>
To: Matt Magee <MMagee@myrlaw.com>

EXHIBIT 8

Fri, Oct 3, 2014 at 4:04 PM

LB

NON-BINDING TERM SHEET

TO: Xian Dou, c/o Michael Cousins, Sperry Van Ness / Founders Group
FROM: Robert Mauragas, President, National Golf Management, LLC
RE: Long Bay Golf Club
DATE: October 3, 2014

Mr. Cousins:

Pursuant to our discussions, this Term Sheet is intended only to provide a framework for discussion with your client concerning the terms upon which a sale of the assets known as the Long Bay Golf Club might be affected, and as a result, is not binding upon the parties. Subject to the execution and delivery of a mutually acceptable asset purchase agreement (the "Asset Purchase Agreement"), the parties agree as follows:

1. **Parties:**
 - A. Seller: National Golf Management, LLC
 - B. Buyer: Xian Dou, or his assigns
2. **Definition of "Assets":** One hundred ninety-five (195) acres of land, more or less, located in Simpson Creek Township, Horry County, South Carolina, together with the improvements thereon, currently being operated as the Long Bay Golf Club, together with certain operating equipment to be delineated by Seller, including, without limitation, golf carts, maintenance equipment, furniture and pro-shop inventory.
3. **Purchase Price / Deposit:** The purchase price ("Purchase Price") for the Assets shall be Three Million Eight Hundred Thousand and No/100 (\$3,800,000.00) Dollars and an initial earnest money deposit of One Hundred Thousand and No/100 (\$100,000.00) Dollars shall be placed in Escrow upon the signing of the Asset Purchase Agreement.
4. **Encumbrances:** The Assets shall be conveyed to Buyer free and clear of all monetary liens and encumbrances, subject only to the Assumed Contracts (as defined below) and any easements, rights of way, encroachments, mineral and royalty rights, covenants, restrictions and other matters appearing of record and on the ground as of the effective date of the Asset Purchase Agreement. Buyer shall, as a condition to closing, accept and assume all of Seller's obligations under any and all equipment leases as well as Club membership contracts (collectively, the "Assumed Contracts").
5. **Closing Date and Conditions:**
 - A. **Closing Date:** The consummation of the purchase by Buyer and the sale by Seller of the Assets under the Asset Purchase Agreement ("Closing") shall occur on a date mutually acceptable to the Buyer and Seller not more than ninety (90) days following the execution of the Asset Purchase Agreement.
 - B. **Closing Conditions:** Buyer's obligation to purchase the Assets, and Seller's obligation to sell the assets, will be subject to satisfaction of the following conditions prior to closing:
 - i. Review and acceptance by Buyer of all real and personal property comprising the purchased Assets.

- ii. Review and acceptance by Buyer of certain leases, membership contracts, management agreements and executory contracts that constitute a part of the Assets.
 - iii. Receipt of any necessary third-party consents to the transfer of the Assets and the assumption of the Assumed Contracts by Buyer.
 - iv. The consummation and closing of the sale of Seller's golf course known as Aberdeen Golf Club.
6. **Warranties and Representations:** Other than with respect to express representations and warranties made by Seller in the Asset Purchase Agreement (which such representations and warranties shall survive closing for a period of no more than two years), Buyer will purchase the Assets based on its own inspections thereof and otherwise "AS-IS, WHERE IS".
7. **Preparation of Purchase Agreement:** Within fifteen (15) days following Buyer's execution of this Letter, Seller shall proceed in good faith to cause its attorneys to set forth the terms hereof in a definitive Asset Purchase Agreement. Buyer, with its attorneys will promptly review such draft and provide Seller with written comments thereto. Seller and Buyer, and their respective attorneys, will then proceed diligently and in good faith to attempt to conclude the Asset Purchase Agreement. Additionally, prior to the execution of the mutually acceptable documents and instruments referenced herein above, Buyer shall demonstrate to Seller evidence of Buyer's financial ability to close on the acquisition of the Assets.
8. **Assignment:** Prior to Closing, Buyer will have the right to assign its rights under the Purchase Agreement. Upon such assignment such entity shall assume all of Buyer's obligations under the Asset Purchase Agreement.
9. **Confidentiality:** Except as may be pre-approved in writing by Buyer and Seller and except for disclosure by Buyer and Seller to their respective attorneys, agents and consultants, neither Buyer nor Seller shall advertise or otherwise disclose to any party the existence and/or terms hereof and/or the Asset Purchase Agreement.

If the foregoing outline of basic terms and conditions is acceptable to Buyer as a basis for negotiations, we request that Buyer so acknowledge by signing and returning the enclosed copy of this Term Sheet by 5:00 P.M., Eastern Standard Time, on October 8, 2014, either by facsimile or e-mail transmission to Matthew R. Magee, Esq. at (843) 692-0918 or mmagee@myrlaw.com.

Seller and Buyer acknowledge and agree that (i) this Letter is not intended to be, and should not be construed as an agreement for the sale and purchase of the Assets; (ii) the terms and conditions for such a sale which are outlined herein do not necessarily include all of the material terms and conditions which will be required in the Asset Purchase Agreement; (iii) the enumeration of certain contingencies, conditions, warranties and representations in this Letter is not intended to be exhaustive; and (iv) the Asset Purchase Agreement may well contain additional contingencies, conditions, warranties, and representations.

Accepted and agreed to this ____ day of October, 2014

Xian Dou

2/25/2015

Sperry Van Ness Mail - Long Bay Golf Course

LB

 Sperry Van Ness

Michael Cousins <michael.cousins@svn.com>

Long Bay Golf Course

11 messages

Michael Cousins <michael.cousins@svn.com>

Fri, Oct 3, 2014 at 3:46 PM

To: Joy Good <joygoodz@hotmail.com>

Jane,

Attached is a term sheet for Long Bay Golf Course. I do not know why it is priced higher than Aberdeen, even though it has substantially less acreage and golf holes. I have call into the head of Seller to find out their reasoning.

Enjoy your trip. Still nothing back from Fred Newby on Aberdeen.

Mike

Michael Cousins-Senior Adviser
Sperry Van Ness/Founders Group
2411 N Oak St, Suite 201, Myrtle Beach, SC 29577.
Phone 843-839-0182 - Fax 843-492-6529
Cell 843-424-9310
Michael.Cousins@svn.com - www.svn.com

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 LongBayTermSheet.pdf
159K

jane Z <joygoodz@hotmail.com>

Fri, Oct 3, 2014 at 4:46 PM

To: Michael Cousins <michael.cousins@svn.com>

1. Why my client's representative is you, not me? you are representing seller, not the buyer. Or we can co-represent buyer, but commission needs to be stated as 6% and my name should be on the sheet. Why there is no commission rate on the sheet?
2. Listing price is \$3.8M. That is reasonable.
3. Why there is only 2 weeks restriction on selling to Dou? It should be no restriction at all, for 3 months minimum. Otherwise, they can sell it to Dou directly after 2 weeks. Request one week for EM is equally unreasonable and unnecessary request. I have one year buyer's agent agreement signed with Dou.
4. this whole sheet should be signed by you or me with Seller, not the buyer.

Thanks.

EXHIBIT 9

LP

[PLACE ON NATIONAL GOLF MANAGEMENT, LLC LETTER HEAD]

NON-BINDING TERM SHEET

TO: Xian Dou, c/o Jane Zheng of Keller Williams Realty
FROM: Robert Mauragas, President, National Golf Management, LLC
RE: Long Bay Golf Club
DATE: October 10, 2014

Dear Ms. Zheng:

This Term Sheet is intended to provide a framework for our discussions with you and Mr. Xian Dou concerning the terms upon which a sale of the assets known as the Long Bay Golf Club might be affected, and as a result, is not binding upon the parties. Subject to the execution and delivery of a mutually acceptable asset purchase agreement (the "Asset Purchase Agreement"), the parties agree as follows:

1. **Parties:**
 - A. Seller: National Golf Management, LLC
 - B. Buyer: Xian Dou, or his assigns
2. **Definition of "Assets":** One hundred ninety-five (195) acres of land, more or less, located in Simpson Creek Township, Horry County, South Carolina, together with the improvements thereon, currently being operated as the Long Bay Golf Club, together with certain operating equipment to be delineated by Seller, including, without limitation, golf carts, maintenance equipment, furniture and pro-shop inventory.
3. **Purchase Price / Deposit:** The purchase price ("Purchase Price") for the Assets shall be Three Million Eight Hundred Thousand and No/100 (\$3,800,000.00) Dollars and an initial earnest money deposit of One Hundred Thousand and No/100 (\$100,000.00) Dollars shall be placed in Escrow upon the signing of the Asset Purchase Agreement.
4. **Encumbrances:** The Assets shall be conveyed to Buyer free and clear of all monetary liens and encumbrances, subject only to the Assumed Contracts (as defined below) and any easements, rights of way, encroachments, mineral and royalty rights, covenants, restrictions and other matters appearing of record and on the ground as of the effective date of the Asset Purchase Agreement. Buyer shall, as a condition to closing, accept and assume all of Seller's obligations under any and all equipment leases as well as Club membership contracts (collectively, the "Assumed Contracts").
5. **Closing Date and Conditions:**
 - A. **Closing Date:** The consummation of the purchase by Buyer and the sale by Seller of the Assets under the Asset Purchase Agreement ("Closing") shall occur on a date mutually acceptable to the Buyer and Seller not more than ninety (90) days following the execution of the Asset Purchase Agreement.

- B. **Closing Conditions:** Buyer's obligation to purchase the Assets, and Seller's obligation to sell the assets, will be subject to satisfaction of the following conditions prior to closing:
- i. Review and acceptance by Buyer of all real and personal property comprising the purchased Assets.
 - ii. Review and acceptance by Buyer of certain leases, membership contracts, management agreements and executory contracts that constitute a part of the Assets.
 - iii. Receipt of any necessary third-party consents to the transfer of the Assets and the assumption of the Assumed Contracts by Buyer.
 - iv. The consummation and closing of the sale of Seller's golf course known as Aberdeen Golf Club.
6. **Warranties and Representations:** Other than with respect to express representations and warranties made by Seller in the Asset Purchase Agreement (which such representations and warranties shall survive closing for a period of no more than two years), Buyer will purchase the Assets based on its own inspections thereof and otherwise "AS-IS, WHERE IS".
7. **Preparation of Purchase Agreement:** Within fifteen (15) days following Buyer's execution of this Letter, Seller shall proceed in good faith to cause its attorneys to set forth the terms hereof in a definitive Asset Purchase Agreement. Buyer, with its attorneys will promptly review such draft and provide Seller with written comments thereto. Seller and Buyer, and their respective attorneys, will then proceed diligently and in good faith to attempt to conclude the Asset Purchase Agreement. Additionally, prior to the execution of the mutually acceptable documents and instruments referenced herein above, Buyer shall demonstrate to Seller evidence of Buyer's financial ability to close on the acquisition of the Assets.
8. **Assignment:** Prior to Closing, Buyer will have the right to assign its rights under the Purchase Agreement. Upon such assignment such entity shall assume all of Buyer's obligations under the Asset Purchase Agreement.
9. **Confidentiality:** Except as may be pre-approved in writing by Buyer and Seller and except for disclosure by Buyer and Seller to their respective attorneys, agents and consultants, neither Buyer nor Seller shall advertise or otherwise disclose to any party the existence and/or terms hereof and/or the Asset Purchase Agreement.
10. **Commission:** A three and No/100 percent (3.0%) commission shall be earned and paid by Seller at the closing of the Asset Purchase Agreement to Sperry Van Ness. Any fees or other commissions to co-brokers or other cooperating agents may be paid out of said sum, or shall otherwise be paid by Buyer.

If the foregoing outline of basic terms and conditions is acceptable to Buyer as a basis for negotiations, we request that Buyer so acknowledge by signing and returning the enclosed copy of this Term Sheet by 5:00 P.M., Eastern Standard Time, on October 24th, either by facsimile or e-mail transmission to Matthew R. Magee, Esq. at (843) 692-0918 or mmagee@myrlaw.com.

Seller and Buyer acknowledge and agree that (i) this Letter is not intended to be, and should not be construed as an agreement for the sale and purchase of the Assets; (ii) the terms and conditions for such a sale which are outlined herein do not necessarily include all of the material terms and conditions which will be required in the Asset Purchase Agreement; (iii) the enumeration of certain contingencies, conditions, warranties and representations in this Letter is not intended to be exhaustive; and (iv) the Asset Purchase Agreement may well contain additional contingencies, conditions, warranties, and representations.

Sincerely,

Robert Mauragas, President

Accepted and agreed to this ____ day of October, 2014

Xian Dou

ABERDEEN GOLF COURSE

AGREEMENT OF SALE

10/29/2014

Waldo 0001

THIS AGREEMENT CONTAINS A BINDING, IRREVOCABLE AGREEMENT TO
ARBITRATE AND IS SUBJECT TO ARBITRATION PURSUANT TO TITLE 15,
CHAPTER 48 (UNIFORM ARBITRATION ACT) OF THE CODE OF LAWS OF
SOUTH CAROLINA

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY) CONTRACT OF SALE

THIS CONTRACT OF SALE (this "Agreement") is made as of the Effective Date, as herein defined, by and between NATIONAL GOLF MANAGEMENT, LLC, a South Carolina corporation having a local address of P.O. Box 7308, Myrtle Beach, South Carolina 29572 (hereinafter referred to as the "Seller") and XIAN DOU (hereinafter referred to as the "Buyer").

WHEREAS, Seller is the owner of those certain pieces, parcels or tracts of real property, together with the improvements thereon, located in Horry County, South Carolina, known generally as Aberdeen Golf Course (the "Golf Course"), and the personal property, intangible property and intellectual property associated with, and used in the operation of, the Golf Course (the "Business"), all as described more fully below;

WHEREAS, subject to the terms and conditions hereof, Seller desires to sell the Property (as defined below) to Buyer, and Buyer, subject to the terms and conditions hereof, desires to purchase the Property from Seller.

NOW THEREFORE, in consideration of the covenants and provisions contained herein, and subject to the terms and conditions hereinafter set forth, the Parties hereto, intending to be legally bound hereby, agree as follows:

1. SALE. On the terms and conditions set forth herein, Seller hereby agrees to sell and convey to Buyer, and Buyer hereby agrees to purchase and accept from Seller, the Property.

(A) Property. The Property includes the following:

- The real property described on the attached Exhibit A, which is attached hereto and incorporated herein, comprising approximately 455 acres, and as outlined in red on the maps or plats attached hereto as Exhibit A-1, including but not limited to all of Seller's rights to any submerged land lying within any ponds, lakes, creeks, and other waterways lying within the boundaries thereof (the "Land"). The actual boundaries of the Land may be established by one or more Surveys to be obtained by Buyer and approved by Seller, and a legal description may be taken from the Survey and used in the Deed;
- All permits, licenses, easements and other rights and privileges appurtenant to the Land including, but not limited to all of Seller's rights

 RM

Waldo 0002

(1) Material Condemnation. If the Condemnation would (i) result in the loss of more than three percent (3%) of the fair market value of the Land, (ii) result in any reduction or restriction in access to the Land, or (iii) have an adverse effect on the operation of the golf course as conducted prior to such Condemnation (a "Material Condemnation"), then Buyer shall have the right to elect, by providing written notice to Seller within thirty (30) days after Buyer's receipt of Seller's written notice of such Condemnation, to (A) terminate this Contract, in which case the Deposit shall be refunded to Buyer, and the Parties shall have no further rights or obligations under this Contract, except those which expressly survive such termination, or (B) proceed to Closing, without terminating this Contract, in which case Seller shall assign (or cause to be assigned) to Buyer all of Seller's right, title and interest in all proceeds and awards from such Condemnation by delivering an assignment instrument to Buyer at Closing in form and substance reasonably satisfactory to Buyer. If Buyer fails to provide written notice of its election to Seller within such time period, then Buyer shall be deemed to have elected to terminate this Contract pursuant to clause (A) of the preceding sentence. If the Closing is scheduled to occur within Buyer's thirty (30) day election period, then the Closing shall be postponed until the date which is five (5) Business Days after the Buyer's delivery of its election notice to Seller.

(2) Non-Material Condemnation. In the event of any Condemnation other than a Material Condemnation, Buyer shall not have the right to terminate this Contract, but shall proceed to Closing, in which case Seller shall assign to Buyer all of Seller's right, title and interest in all proceeds and awards from such Condemnation by delivering an assignment instrument to Buyer at Closing in form and substance reasonably satisfactory to Buyer.

16. COMPLIANCE WITH NOTICES, ORDINANCES. Seller shall comply with any notices given or ordinances enacted by any governing authority prior to the date of Settlement for which a lien could be filed against the Property.

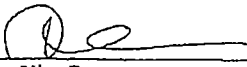
17. BROKERS. Buyer and Seller each warrant and represent to the other that it has not engaged or dealt with any broker, salesman, finder or similar intermediary in connection with the purchase of the Property other than Sperry Van Ness (Seller's agent) and Keller Williams Realty (Buyer's agent), to which Seller shall pay a total commission of six and No/100 percent (6.0%) of the cash portion of the Purchase Price. Each party shall hold harmless, indemnify and defend the other from and against any claim based on any alleged fact inconsistent with such party's warranty and representation contained in this Section 17.

18. RECORDING. Buyer shall not have the right to record a memorandum of this Agreement in the local land records.

19. NOTICES. Any notice required to be given hereunder shall be given in writing and either (i) sent by United States registered or certified mail, with postage prepaid, return receipt requested, (ii) sent by Federal Express or another nationally recognized overnight courier, or (iii) sent by facsimile transmission with a hard copy sent on the same day by a nationally recognized overnight courier. All notices shall be deemed to have been given 48 hours following deposit in the United States Postal Service, or upon delivery if sent by overnight courier service

IN WITNESS WHEREOF, the parties hereto have hereunto set their hands and seals
the day and year first above written.

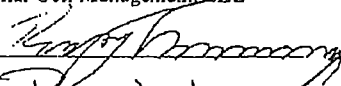
BUYER:


Name: Xian Dou

DATE: 11-4-2014

SELLER:

National Golf Management, LLC

By: 

Its: President

DATE: 10-29-14



Sperry Van Ness

Michael Cousins <michael.cousins@svn.com>

Re: 13 GCs

7 messages

A

Jane.
13 coms

Bob Mauragas <bob.mauragas@nationalgolfmanagement.com>

Wed, Dec 3, 2014 at 10:13 AM

To: "joygoodz@hotmail.com" <joygoodz@hotmail.com>

Cc: Matt Magee <MMagee@myrlaw.com>, Michael Cousins <michael.cousins@svn.com>

Jane

The buyers agent will be paid by the buyer. It was agreed to increase the sale price from 3MM to 3.3 MM, so the buyers agent could be paid. This was arranged with our attorneys. I have no authority to guarantee a commission to you.

Sent from my iPad

Bob Mauragas

President

National Golf Management

MBN.com

On Dec 3, 2014, at 4:05 AM, "joygoodz@hotmail.com" <joygoodz@hotmail.com> wrote:

Bob, would you please acknowledge in the email that i will be paid 3% commission if 13 GCs deal is closed with the Buyer i introduce to u? You told me that over the phone in Nov when i was in China. But i feel a lot more comfortable if you can put it in writing. I am sure you understand that.

Also, about ocean front hotel, would u please make sure Seller will pay me commission on it if the deal closes?

Thanks!

Jane

Jane Zheng 8432679989

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Michael Cousins <michael.cousins@svn.com>

Wed, Dec 3, 2014 at 10:28 AM

To: Joy Good <joygoodz@hotmail.com>

Jane,

Seller pays us 6% on Aberdeen. We pay you half (3%). Why are you asking Bob for confirmation?

Mike

[Quoted text hidden]

EXHIBIT 11

Michael Cousins-Senior Adviser
Sperry Van Ness/Founders Group
2411 N Oak St, Suite 201, Myrtle Beach, SC 29577
Phone 843-839-0182 - Fax 843-492-6529
Cell 843-424-9310
Michael.Cousins@svn.com - www.svn.com

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Michael Cousins <michael.cousins@svn.com>
To: Joy Good <joygoodz@hotmail.com>

Wed, Dec 3, 2014 at 10:33 AM

Jane,

I do not understand what is happening here. What is the 13 GC deal you refer to with Bob? You talked to him in China in November? I opened the door to National Golf Mgmt on Aberdeen, and then LongBay. Why would you go directly to Bob, and not involve me?

I do not understand.

Mike

[Quoted text hidden]

Michael Cousins <michael.cousins@svn.com>
To: Jay Smith <jay.smith@svn.com>

Wed, Dec 3, 2014 at 11:09 AM

FYI

----- Forwarded message -----

From: Bob Mauragas <bob.mauragas@nationalgolfmanagement.com>

Date: Wed, Dec 3, 2014 at 10:13 AM

Subject: Re: 13 GCs

To: "joygoodz@hotmail.com" <joygoodz@hotmail.com>

Cc: Matt Magee <MMagee@myrlaw.com>, Michael Cousins <michael.cousins@svn.com>

[Quoted text hidden]

Michael Cousins-Senior Adviser
Sperry Van Ness/Founders Group
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EXHIBIT 11

SELLERS CLOSING STATEMENT

SELLER: NATIONAL GOLF MANAGEMENT, LLC
A South Carolina Limited Liability Company

PURCHASER: FOUNDERS ABERDEEN, LLC
A South Carolina Limited Liability Company

PURCHASE PRICE: \$3,300,000.00

CLOSING DATE: December 11, 2014

PROPERTY: 701 Bucks Trail
Longs, SC 29568
ABERDEEN GOLF COURSE

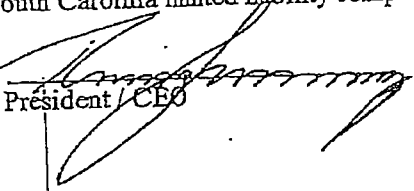
I.	GROSS AMOUNT DUE SELLER:	\$3,300,000.00
II.	REDUCTIONS IN AMOUNT DUE SELLER:	
	A. <u>Payoff of B&C Subordinated Debt:</u>	(\$2,844,752.99)
	B. <u>Purchaser Credits to be applied toward Purchase Price:</u>	(\$42,736.46)
	1. Aggregate Building Repair Credit	\$20,655.00
	2. Aggregate Personal Property Credit	\$20,000.00
	3. Pro-Shop Gift Certificate Credit	\$2,081.46
	C. <u>Seller Charges:</u>	(\$271,892.41)
	1. Wood-Rot Escrow	\$5,000.00
	2. Commission (6.0%)	
	(a) 3.0% to Keller Williams	\$99,000.00
	(b) 3.0% to Sperry Van Ness	\$99,000.00
	3. 2014 Prorated Ad Valorem Taxes	
	(a) 2014 Real Property Taxes (093)	\$2,828.82
	(b) 2014 Real Property Taxes (098)	\$995.85
	(c) 2014 Real Property Taxes (015)	\$36,094.72
	(d) 2014 Personal Property Taxes	\$2,108.02
	4. Recording Fees to Horry County Register of Deeds	
	(a) Deed Transfer Fees/Taxes	\$12,210.00
	(b) UCC Termination Secretary of State	\$10.00
	(c) Release Recording Fees (UCC)	\$10.00
	(d) Release Recording Fees	\$10.00

5. Closing Fees and Costs	
(a) CL-100 to Lanes Pest Control	\$125.00
(b) Attorney Fees to Thomas & Brittain, PA	<u>\$14,500.00</u>
Subtotal of Seller Charges	\$271,892.41

III. NET AMOUNT DUE TO SELLER: \$140,618.14

SELLER:

NATIONAL GOLF MANAGEMENT, LLC
A South Carolina limited liability company

By: 
Its: President / CEO

SELLERS CLOSING STATEMENT

SELLER: COLONIAL GOLF CLUB, LLC
A South Carolina Limited Liability Company

PURCHASER: FOUNDERS DEVELOPMENT, LLC
A South Carolina Limited Liability Company

PURCHASE PRICE: \$1,300,000.00

CLOSING DATE: December 17, 2014

PROPERTY: COLONIAL CHARTERS GOLF COURSE
301 Charter Drive
Longs, SC 29568

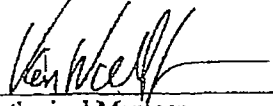
PURCHASE PRICE: \$ 1,300,000.00

Seller Charges:

Attorney Fee	\$	5,180.00	
Mortgage Payoff	\$	450,902.70	
Mortgage/UCC Satisfaction Recording Fees	\$	20.00	
Commissions-Keller Williams	\$	39,000.00	
Commissions-Sperry Van Ness	\$	39,000.00	
Transfer Taxes	\$	4,810.00	
2014 Prorated Real Property Taxes	\$	35.42	
2014 Prorated Real Property Taxes	\$	22,798.53	
2014 Prorated Real Property Taxes	\$	16,664.82	
2015 Prepaid Membership Credit to Buyer	\$	156,656.54	
Total Seller Charges/Deductions:	\$	735,068.01	\$ (735,068.01)

NET AMOUNT DUE TO SELLER: \$ 564,931.99

SELLER: COLONIAL GOLF CLUB, LLC

By: 
Its: Authorized Manager

Code of Ethics and Arbitration Manual

A Manual for use by Member Boards of the National Association to ensure due process in the conduct of hearings to enforce the Code of Ethics and in the arbitration of business disputes arising out of the real estate business. Professional standards procedures of Member Boards must reflect substantively the approved due process policies and procedures of this Manual in order to ensure Board entitlement to coverage by the Professional Liability Insurance Policy of the National Association in litigation involving the Board in connection with Board enforcement of the Code of Ethics, provided that such policies and procedures are consistent with applicable state law.

For ease of reference, all amended provisions where content has changed are shaded to highlight additions.

NOTE: This edition includes all Case Interpretations approved by the Professional Standards Committee through 2014. All new and amended Case Interpretations become effective upon approval by the National Association's Professional Standards Committee and publication on REALTOR.org.

National Association of Realtors®
430 North Michigan Avenue
Chicago, Illinois 60611-4087

Section 44. Duty and Privilege to Arbitrate

- (a) By becoming and remaining a member and by signing or having signed the agreement to abide by the bylaws of the Board, every member, where consistent with applicable law, binds himself or herself and agrees to submit to arbitration (and to mediation if required) by the Board's facilities all disputes as defined by Article 17 of the Code of Ethics and, as set forth in the provisions of this Manual, all disputes with any other member, as defined, under the following conditions. In addition, Realtor® principals who participate in a Board's MLS where they do not hold Board membership, or nonmember brokers and nonmember licensed or certified appraisers who participate in the Board's MLS, having signed the agreement to abide by the Board's Multiple Listing Service rules and regulations binds himself or herself and agrees to submit to arbitration by the Board's facilities. The duty to submit to arbitration continues in effect even after membership lapses or is terminated, provided that the dispute arose while the respondent was a Realtor® or an MLS Participant. *(Amended 11/11)*

Mandatory types of arbitration

- (1) Every Realtor® of the Board who is a Realtor® principal, every Realtor® principal who participates in a Board's MLS where they do not hold Board membership and every nonmember broker or licensed or certified appraiser who is a Participant in the Board's MLS shall have the right to invoke the Board's arbitration facilities in any dispute arising out of the real estate business with a Realtor® principal in another real estate firm or with that firm (or both), or nonmember broker/appraiser or their firm (or both) who is a Participant in the Board's MLS. *(Amended 5/01)*
- (2) A Realtor® other than a principal or a Realtor-Associate® shall have the right to invoke the arbitration facilities of the Board in a business dispute with a Realtor® or Realtor-Associate® in another firm or with their firm (or both), whether in the same or a different Board, provided the Realtor® principal with whom he is associated joins in the arbitration request, and requests the arbitration with the Realtor® principal of the other firm or with their firm (or both). Arbitration in such cases shall be between the Realtor® principals or their firms (or both). Realtor® nonprincipals and Realtor-Associate®s who invoke arbitration in this manner, or who are affiliated with a respondent and have a vested financial interest in the outcome, have the right to be present throughout the proceedings and to participate but are not considered to be parties. *(Amended 5/01)*
- (3) A client of a Realtor® principal may invoke the arbitration facilities of the Board in a business dispute with a Realtor® principal or the Realtor®'s firm (or both) arising out of an agency relationship, provided the client agrees to be bound by the arbitration. In the event of such request and agreement the Board will arbitrate the dispute subject to the provisions of Part Ten, Section 45. A Realtor® principal may also invoke arbitration against his client but no arbitration may be held without the client's voluntary agreement to arbitrate and to be bound by the decision. *(Amended 5/01)*

Voluntary types of arbitration

- (4) Realtors® and Realtor-Associate®s who are or were affiliated with the same firm shall have the same right to invoke the arbitration facilities of the Board, provided each party voluntarily agrees to the arbitration in writing and the Board finds the matter properly subject to arbitration in accordance with the provisions of Part Ten, Section 45 of this Manual. This privilege as stated applies to disputes arising when the parties are or were affiliated with the same firm, irrespective of the time request is made for such arbitration. *(Amended 11/95)*

Section 53. The Award

- (a) The award of the arbitrators (Form #A-12; Award of Arbitrators, Part Thirteen) shall be made as soon as possible after the evidence is presented. The award shall be in writing and signed by the arbitrators or a majority of them, shall state only the amount of the award, and, when so signed and transmitted to each of the parties, shall be valid and binding and shall not be subject to review or appeal. Any award rendered may not be greater than the amount in dispute, may not include punitive damages, may not include attorney's fees unless expressly provided for in the agreement giving rise to the dispute, and may not include interest unless called for in the arbitration agreement and permitted by state law. Notwithstanding the foregoing, a party to an arbitration proceeding may appeal to the Board of Directors only with respect to such alleged irregularities occurring in the conduct of the proceeding as may have deprived the party of fundamental "due process." (Revised 11/14)

- (b) After the award has been transmitted to each of the parties, they have twenty (20) days to request procedural review of the arbitration hearing procedure by the Board of Directors. (Revised 11/14)

If no such review is requested, the award becomes final and binding following the twenty (20) day period. However, if procedural review is requested, the award is not considered final and binding until after the Board of Directors has concluded that the hearing was conducted in a manner consistent with the Board's procedures and the parties had been afforded due process.

NOTE: Adoption of Section 53(c)-(f) is at the option of each Member Board.

- (c) If an award has been rendered, the nonprevailing party must, within ten (10) days following transmittal of the award, either (1) pay the award to the party(ies) named in the award or (2) deposit the funds with the Board Secretary or Board Executive Officer to be held in a special Board escrow account maintained for this purpose. Failure to satisfy the award or to deposit the funds with the Board within this time period may be considered a violation of a membership duty and may subject the member to disciplinary action at the discretion of the Board of Directors. (Revised 11/14)

The nonprevailing party shall have twenty (20) days following transmittal of the award to request procedural review of the arbitration hearing procedure or to have legal counsel notify the Board Secretary or Executive Officer that a legal challenge to the validity of the award has been initiated. (Revised 11/14)

- (d) If a request for procedural review of the arbitration procedure is received within twenty (20) days, the funds deposited with the Board shall be retained in the Board's escrow account until the review is completed. If the arbitration award is confirmed by the Board of Directors following the conduct of the limited procedural review, the nonprevailing party shall have an additional fifteen (15) days to institute an appropriate legal challenge to the validity of the arbitration award. In such case, the nonprevailing party shall also cause legal counsel to advise the Board in writing that a suit challenging the validity of the arbitration award has been filed during this additional fifteen (15) day period. After fifteen (15) days, if written notice of a suit challenging the validity of the arbitration award has not been received by the Board, the funds shall be released from escrow and paid to the prevailing party. If written notification is received during the fifteen (15) day period, the funds will be held in escrow pending the determination of the matter by a court of competent jurisdiction. (Adopted 11/87)

Section 55. Request for Procedural Review by Directors

- (a) A written request for procedural review of the arbitration hearing procedures must be filed with the President within twenty (20) days after the award has been transmitted to the parties and be accompanied by a deposit in the sum of \$_____ (not to exceed \$500). The request for procedural review should cite the alleged procedural deficiencies or other irregularities the party believes constitute a deprivation of due process (e.g., fraud, coercion, bias, prejudice, evident partiality, etc.) on the part of Hearing Panel members or others acting on behalf of the Board. The request for procedural review shall be reviewed by the Board. President or the President's designee only for the purpose of determining whether the request states any legitimate basis for consideration by the Board of Directors. If determined to be insufficient, it shall be returned to the requester accompanied by an explanation and a request for additional detail to be received by the Board within ten (10) days of notice. This initial administrative review is not a decision on the merits of the request for procedural review but is intended only to ensure compliance with the requirement that the request cite the alleged procedural deficiency or irregularity on which the request is based and which will be presented to the Board of Directors for its consideration. All requests for procedural review received by the Board must be considered by the Board of Directors, and only the bases raised in the written request for procedural review may be raised during the review before the Directors. *(Amended 11/14)*
- (b) When a request for procedural review (as originally filed if in proper form, or as originally filed if no amendment is submitted, or as amended even if still deemed to be lacking) is received, the Secretary shall immediately send a copy to the other party, notify all parties of the time and place of the review hearing by the Directors at least ten (10) days in advance (including challenge Forms #A-7 and #A-8, Part Thirteen of this Manual), and bring the matter before the Directors for review at their next regular meeting or at a special meeting called by the Secretary for that purpose. The Secretary shall provide to the Directors, in advance, a copy of the request for procedural review or the amended request for procedural review, if any, and the President's correspondence, if any. The Directors shall be advised that the information provided is confidential and not to be discussed with others at any time. *(Revised 11/91)*
- (c) The request for procedural review may be heard by a panel of Directors appointed by the President for that purpose (or, alternatively, by the Board's Executive Committee). Five (5) Directors or a quorum of the Board of Directors, whichever is less, shall constitute such panel, which shall act on behalf of the Board of Directors. The decision of the panel (or Executive Committee) shall be final and binding and shall not be subject to further review by the Board of Directors. *(Revised 11/91)*
- (d) At the procedural review hearing, the party filing the request will have an opportunity to explain the bases on which the party is requesting that the award of the arbitrators be overturned. The Chairperson of the arbitration panel (or the Chairperson's designee) will have an opportunity to respond to the allegations. The other party shall have the opportunity to present to the Directors reasons why the arbitration Hearing Panel's award should not be overturned. *(Revised 5/09)*
- (e) The Board of Directors shall not hear an appeal with respect to the merits of an arbitration award, and shall not, on appeal, review such evidence offered with respect to the merits of that award, except as such evidence may bear upon a claim of deprivation of due process. The Directors shall render their decision promptly. This decision may be to adopt the award of the arbitrators or to overturn the award based on a substantial procedural error in the arbitration hearing process that resulted in a denial of due process or on a determination that the member was otherwise deprived of due process. *(Revised 11/88)*

SELLER-SIDE CLOSING STATEMENT

SELLER: MYRTLE BEACH NATIONAL PROPERTIES, a South Carolina General Partnership
(a) MBNC, LLC ("MBNC");
(b) MBNR, LLC ("MBNR");
(c) BBJ of Horry County, LLC ("BBJ"); and
(d) National Golf Management, LLC ("NGM")

PURCHASER: Founders National Golf, LLC ("Founders")

CLOSING AGENT: Fred B. Newby, Esq.
Newby, Sartip, Masel & Casper, LLC
P.O. Box 808
Myrtle Beach, SC 29578

PROPERTY: THREE GOLF COURSES AT MYRTLE BEACH NATIONAL

CLOSING DATE: April 21, 2015

I. SUMMARY OF SELLER'S TRANSACTION

A. AMOUNT DUE SELLERS

(1)	Contract Sales Price	\$6,000,000.00
<u>Less</u> (2)	Clubhouse Repair Credit to Purchaser	<u>(\$2,650.00)</u>
TOTAL AMOUNT DUE FROM PURCHASER:		\$5,997,350.00

B. FURTHER REDUCTIONS IN AMOUNT DUE SELLERS

(1)	Lien Payoff / Release Fees to BB&T -- None	N/A
(2)	Commission to Keller Williams	\$157,900.00
(3)	Documentary Transfer Fee to: Horry County Register of Deeds (consideration paid for real property - \$6,000,000.00)	\$22,200.00
(4)	<u>2015 Real Property Tax Prorations</u> (Taxes Paid by NGM under Lease -- prorated on NGM statement) TMS Nos.: 151-00-04-005; 151-00-04-031; 151-30-01-033; 151-31-01-019; 151-30-02-010; 151-30-02-018; 151-34-01-040; 151-34-01-060; 151-00-03-043; and 151-35-01-035.	N/A
(5)	CL-100 Inspection Fee to Lanes Pest Control	\$175.00
(6)	Attorney's Fees to The Bellamy Law Firm	\$2,300.00
(7)	Attorney's Fees to Thomas & Britain, PA	\$10,000.00
(8)	Estimated Lien Release Recording Fees to H.C. Register of Deeds:	\$16.00
(9)	Estimated Lien Release Recording Fees to S.C. Secretary of State:	\$50.00
SUBTOTAL OF SELLER CHARGES:		\$192,641.00

C. TOTAL AGGREGATE AMOUNT DUE SELLER: \$5,804,709.00

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY) AGREEMENT OF PURCHASE AND SALE
 [MYRTLE BEACH NATIONAL COURSES]

THIS AGREEMENT OF PURCHASE AND SALE (the "Agreement"), dated April 22, 2015 (the "Effective Date"), is entered into by and between MYRTLE BEACH NATIONAL PROPERTIES, a South Carolina general partnership (the "Seller"), and FOUNDERS NATIONAL GOLF, LLC, a South Carolina limited liability company, or its assigns (the "Purchaser").

RECITALS

WHEREAS, the Seller, is the owner of certain land and the improvements thereon located in Horry County, South Carolina comprising three 18-hole golf courses and related improvements currently operated as the Southcreek Course, the West Course and the King's North Course (collectively, the "Golf Courses"), as described more fully herein below; and

WHEREAS, Seller has agreed to sell all of its right, title and interest in and to the Golf Courses to Purchaser, and Purchaser has agreed to purchase all of Seller's interest in the Golf Courses, all according to the terms, conditions and limitations described herein;

NOW, THEREFORE, for and in consideration of the above premises, the mutual promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

AGREEMENT TO SELL AND PURCHASE

Seller agrees to sell and convey all of its right, title and interest in and to the Property defined below to Purchaser or its designee, and Purchaser agrees to purchase the Property from Seller on the terms and conditions set forth in this Agreement.

1. The Property. The Property includes the following:
 - The real property described on the attached Exhibit A attached hereto and incorporated herein comprising the Golf Courses, including but not limited to, all of Seller's rights to any submerged land lying within any ponds or lakes lying within the boundaries thereof (collectively, the "Golf Course Land").
 - Seller's interest, if an, in any development rights, licenses, permits, consents, and authorizations with respect to the Property issued by any governmental authority or utility service provider, to the degree they are assignable, together with all permits, licenses, easements and other rights and privileges appurtenant to the Golf Course Land, including, but not

an event of default under this Agreement, but instead Purchaser may, at its election and as its sole remedy, terminate this Agreement by delivery of written notice to Seller, subject only to the Surviving Obligations.

Representations and Warranties of Purchaser. Purchaser represents and warrants to Seller that

(i) Purchaser has full power and authority to enter into this Agreement and to acquire the Property in accordance with the terms of this Agreement.

(ii) The execution and performance of this Agreement and the Closing Documents by Purchaser, and the consummation of the Closing, will not conflict with any provision of law applicable to Purchaser, nor will it result in the breach of any provision of, or constitute a default under, any court order, agreement or instrument to which Purchaser is a party or by which Purchaser is bound.

(iii) This Agreement and the Closing Documents to be delivered by Purchaser have been or will be duly authorized by all necessary company action on the part of Purchaser, and have been or will be duly executed and delivered by Purchaser and no further action or approval is required in order to constitute this Agreement as a binding and enforceable obligation of Purchaser.

16. Commissions and Finder's Fees. Purchaser and Seller each agree, represent and warrant to the other that no broker's or real estate commissions will be due as a result of the sale of the Property from their respective actions, other than commissions due to the Purchaser's agent, Keller-Williams office in Myrtle Beach, South Carolina (Jane Zhang, agent) under separate commission agreement. Seller agrees to pay the sum of \$157,900.00 in such commissions upon the consummation of the Closing and the payment of the Purchase Price. Seller consents to such fees being paid directly by the closing agent. Seller agrees to indemnify, defend and save Purchaser harmless from and against any cost and expense (including reasonable attorneys' fees) incurred by Purchaser as a result of the untruth of the foregoing representation by Seller, or any claims by a broker for payment of a commission by Purchaser based upon the actions of Seller, or Seller's officers, agents or employees. Purchaser agrees to indemnify, defend and save harmless the Seller from and against any cost and expense (including reasonable attorneys' fees) incurred by Seller as a result of the untruth of the foregoing representation by Purchaser, or any claims by a broker for payment of a commission by Seller based upon the actions of Purchaser, or Purchaser's officers, agents or employees.

The Purchaser hereby acknowledges that the Seller has relatives that are currently licensed in the State of South Carolina as Real Estate Brokers that are not participating in this transaction as follows: Arthur H. Cottingham III, husband of M. Russell Holliday, Jr. with license #7003; and David D. Douglas husband of Christian M. H. Douglas with license # 8603.

17. Indemnity and Hold Harmless. Seller hereby agrees to indemnify and hold Purchaser harmless from and against any and all charges, demands, damages, actions and causes of action, including but not limited to reasonable attorneys' fees, arising out of the ownership of

STATE OF SOUTH CAROLINA)
)
COUNTY OF HORRY) **AGREEMENT OF PURCHASE AND SALE**
) **[NATIONAL GOLF MANAGEMENT]**

THIS AGREEMENT OF PURCHASE AND SALE (the "Agreement"), dated April 22, 2015 (the "Effective Date"), is entered into by and between NATIONAL GOLF MANAGEMENT, LLC, a South Carolina limited liability company, and its wholly-owned subsidiaries PAWLEYS PLANTATION OPERATING COMPANY, LLC, a South Carolina limited liability company, PAWLEY'S PLANTATION HOLDINGS, LLC, a South Carolina limited liability company (collectively, the "Seller"); and FOUNDERS NATIONAL GOLF, LLC, a South Carolina limited liability company, or its assigns (the "Purchaser").

RECITALS

WHEREAS, the Seller, is (a) the owner of certain land and improvements located in Horry County and Georgetown County, South Carolina, comprised of fee title to eight golf facilities and related improvements (containing nine 18-hole courses in the aggregate) known generally as Long Bay Golf Club, Pawleys Plantation Golf & Country Club, The River Club, Litchfield Country Club, Willbrook Golf Club, Myrtlewood Golf Club, Pine Lakes Country Club and The Grande Dunes Resort Course and (b) the leasehold operator of the facility and related improvements (containing three 18-hole courses in the aggregate) known generally as the Courses at Myrtle Beach National (the Southcreek Course, West Course and King North Course being collectively referred to as the "MBN Courses") (all such golf course facilities, whether owned in fee or operated under a lease being hereinafter called the "Golf Courses"), along with certain personal property, intangible property and intellectual property and other property associated with, and used in the operation of, the Golf Courses (the "Businesses"), all as described more fully below; and

WHEREAS, Seller has agreed to sell all of its right, title and interest in and to the Property (as defined below) to Purchaser, and Purchaser has agreed to purchase all of Seller's interest in the Property, all according to the terms, conditions and limitations described herein;

NOW THEREFORE, for and in consideration of the above premises, the mutual promises and covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the parties hereto agree as follows:

1. Agreement To Sell And Purchase. Seller agrees to sell and convey all of its right, title and interest in and to the Property defined below to Purchaser or his designee, and Purchaser agrees to purchase and assume the Property from Seller on the terms and conditions set forth in this Agreement.

- a. The Property. The Property includes the following:
 - The real property described on the attached Exhibits A-1 through A-8,

"WARN Act" means the Worker's Adjustment and Retraining Notification Act, 29 U.S.C. § 2101, *et seq.*, and any similar state and local laws, as amended from time to time, and any regulations, rules and guidance issued pursuant thereto.

17. **Real Estate Commissions.** Seller agrees to pay the sum of \$342,100.00 in such commissions upon the consummation of the Closing and the payment of the Purchase Price. Seller consents to such fees being paid directly by the closing agent.

18. **Indemnity and Hold Harmless.** Seller hereby agrees to indemnify and hold Purchaser harmless from and against any and all charges, demands, damages, actions and causes of action, including but not limited to reasonable attorneys' fees, arising from the operation of the Property, the Golf Courses and the Business conducted from the Real Property prior to the Closing date, unless such claims are the result of actions of the Purchaser or its agents.

Purchaser hereby agrees to indemnify and hold Seller harmless from and against any and all charges, demands, damages, actions and causes of action, including but not limited to reasonable attorneys' fees, arising from the Real Property or from the operation of the Property, the Golf Courses and the Business conducted from the Real Property on or after the Closing date, unless such claims are the result of actions of the Seller or its agents. This provision shall survive the Closing.

The indemnities in this Section 17 shall survive the closing.

19. **Intentionally Omitted.**

20. **Intentionally Omitted.**

21. **Captions.** Paragraph headings or captions appearing in this Agreement are for convenience only, are not a part of this Agreement, and are not to be considered in interpreting this Agreement.

22. **Entire Agreement, Waiver and Amendment.** The parties acknowledge that this Agreement, together with any attached Schedules any Exhibits, contains the entire agreement between the parties with respect to the Sale and Purchase of the Property, and supersedes any prior oral or written understandings. No modification of this Agreement and no waiver of any of its terms or conditions shall be effective unless made in writing and duly executed by both parties.

23. **Successors and Assigns.** This Agreement shall be binding on, and inure to the benefit of, the parties hereto, their respective successors and permitted assigns.

24. **Notices.** Any notice, consent or other communication permitted or required by this Agreement shall be in writing, and shall be given to each party, at the address set forth below, in one or more of the following manners: (a) personal delivery, (b) reputable overnight delivery service with proof of delivery, (c) United States Mail, postage prepaid, registered or certified mail, return receipt requested, or (d) transmission by e-mail. Each such notice shall be deemed to have been given upon receipt or refusal to accept delivery, or, in the case of e-mail transmission, as of the date of the transmission provided that an original of such transmission

SELLER'S CLOSING STATEMENT

SELLER: NATIONAL GOLF MANAGEMENT, LLC,
a South Carolina Limited Liability Company;
PAWLEY'S PLANTATION HOLDINGS, LLC,
a South Carolina Limited Liability Company; and
PAWLEY'S PLANTATION OPERATING COMPANY, LLC,
a South Carolina Limited Liability Company.

PURCHASER: FOUNDERS NATIONAL GOLF, LLC
a South Carolina Limited Liability Company

CLOSING DATE: April 22, 2015

CLOSING AGENT: Fred B. Newby, Esq.
Newby, Sartip, Masel & Casper, LLC
P.O. Box 808
Myrtle Beach, SC 29578

I. CONTRACT SALES PRICE (allocation attached as Schedule I): \$32,000,000.00
[Real Property: \$13,200,000.00 / Personal Property: \$18,800,000.00]

II. SALES PRICE ADJUSTMENTS:

A. Prepaid Credits	\$200,000.00
1. EZ-Go Golf Car:	\$50,000.00
2. Hotel Coops:	\$120,000.00
3. Prepaid Advertising	\$30,000.00
B. Discounted Accounts Receivable (see Schedule II(B) worksheet)	\$2,072,074.31
C. Inventory	\$1,529,592.28
D. Early Close Credit	\$750,000.00
E. Petty Cash in Club Drawers	\$28,925.00
F. Unearned Revenue	(\$1,508,393.14)
1. Member Dues:	\$144,123.07
2. Prepaid Events:	\$114,144.07
3. Golf:	\$545.00
4. Ambassador	\$1,249,581.00
G. Pro Shop Gift Cards	(\$38,735.90)
TOTAL AGGREGATE ADJUSTMENT:	\$35,033,462.55
III. ASSUMED LEASES ESCROW:	\$2,000,000.00

GROSS AMOUNT DUE TO SELLER:		<u>\$37,033,462.55</u>
IV.	PURCHASER CREDITS AGAINST PURCHASE PRICE:	(\$354,586.67)
	1. Aggregate Building Repair Credit	(\$127,000.00)
	2. 2015 Ad Valorem Taxes (Real & Personal)	
	(a) Real Property:	(\$198,881.25)
	(b) Personal Property:	(\$24,499.20)
	(c) PPOC Tax Bill:	(\$4,206.22)
	NET AMOUNT DUE FROM PURCHASER TO SELLER:	<u>\$36,678,875.88</u>
V.	FURTHER REDUCTIONS IN AMOUNT DUE SELLER:	
	1. <u>Payoff to BB&T:</u>	(\$12,388,102.91)
	2. <u>Interest Rate Swap Prepayment Penalty:</u>	(\$136,510.00)
	3. <u>Health Plan Claims Run Escrow:</u>	(\$250,000.00)
	4. <u>Supplemental Building Repair Credit Escrow:</u>	(\$129,650.00)
	5. <u>Lease Assumption Escrow to Thomas & Brittain, PA:</u>	(\$2,000,000.00)
	6. <u>Seller Charges:</u>	
	(a) Commission To Keller Williams (remainder paid at MBNP)	(\$342,100.00)
	(b) Recording Fees to Register of Deeds:	(\$49,440.00)
	(i) Deed Transfer Fees/Taxes	\$52,540.00
	(ii) UCC Termination Secretary of State	\$50.00
	(iii) Release Recording Fees (UCC)	\$100.00
	(iv) Miscellaneous Recording Fees	\$150.00
	(v) Satisfaction Recording Fees (Horry)	\$150.00
	(vi) Satisfaction Recording Fees (G-Town)	\$150.00
	(c) Closing Fees and Costs:	(\$83,250.00)
	(i) CL-100 Fees to Lanes Pest Control	\$1,500.00
	(ii) Attorneys Fees to Thomas & Brittain, PA	\$80,500.00
	(iii) Cost Reimbursement to Thomas & Brittain	\$1,250.00
	NET AMOUNT DUE TO SELLER:	<u>\$21,299,822.97</u>

STATE OF SOUTH CAROLINA)
COUNTY OF HORRY)

Founders Five, LLC d/b/a Sperry)
Van Ness Founders Group,)
Plaintiff,)

vs.)

National Golf Management, LLC,)
Defendant.)

IN THE COURT OF COMMON PLEAS
FIFTEENTH JUDICIAL CIRCUIT
CASE NO.: 15-CP-26-02066

AFFIDAVIT OF MICHAEL COUSINS

HORRY COUNTY
2015 NOV 16 PM 2:16
CLERK OF COURT

PERSONALLY APPEARED BEFORE ME, Michael Cousins, who, being duly sworn,
deposes and states as follows:

1. I am a Real Estate Broker and part owner of Founders Five, LLC, d/b/a Sperry
Van Ness, the Plaintiff in this case.

2. I am over twenty-one (21) years of age and I am competent to give this Affidavit.

3. Those things stated herein are of my own personal knowledge unless otherwise
stated.

4. I met Jane Zheng in September or October, 2013. She worked for Keller
Williams. In early 2014, I told her about a listing in Longs, South Carolina, consisting of 312
undeveloped acres. Shortly thereafter, I met her on the property, with her buyer Nick Dou.
Shortly after that meeting, I met her again concerning the 312 acres. She brought with her Nick
Dou and several other Chinese buyers. We met at the clubhouse at Colonial Charters Golf Club.
Mr. Dou asked if the Colonial Charters Golf course was for sale.

5. At the request of Ms. Zheng and Mr. Dou, I contacted the owners of Colonial
Charters, to determine the availability of the Golf Course.

Waldo 0050

6. In June, 2014, the Affiant, as an agent of Sperry Van Ness and Jane Zheng as an agent of Keller Williams, were successful in bringing the parties together in an agreement to purchase Colonial Charters Golf Course. See Exhibit 1 attached hereto, which is a portion of that written agreement.

7. Paragraph 16 of Exhibit 1 states that the six (6%) percent commission will be split three (3%) percent to Keller Williams and three (3%) to Sperry Van Ness. This commission was paid out of closing, EVEN THOUGH THERE WAS NO SIGNED COMMISSION AGREEMENT. See Closing Statement, attached as Exhibit 2.

8. Also, as a result of my contacts with Jane Zheng and the Chinese buyers, Ms. Zheng asked me, on behalf of her buyers, to approach National Golf Management, LLC because I had knowledge that National Golf Management, LLC owned several golf courses and because I was personally familiar with some of the principals of National Golf Management, LLC. There was an understanding between me as a representative of Sperry Van Ness and the representatives of National Golf Management, LLC that a standard six (6%) percent commission would be paid on the sale of golf course property.

9. There was no signed listing agreement between Sperry Van Ness and National Golf Management, which is not unusual in the commercial market in the Myrtle Beach area.

10. As a result of the continuing relationship between and among National Golf Management, LLC and Sperry Van Ness and Keller Williams, a second contract of sale was entered into in late 2014 for the sale of Aberdeen Golf Course. See Exhibit 3 attached hereto consisting of relevant portions of that contract.

11. Paragraph 16 of Exhibit 3 specifically states that a six (6%) percent brokerage commission shall be paid to Sperry Van Ness and a co-broker, EVEN THOUGH THERE WAS NO SIGNED COMMISSION AGREEMENT.

12. Aberdeen Golf Course was closed on December 11, 2014. Please see Sellers Closing Statement attached hereto as Exhibit 4 showing a six (6%) percent commission paid, three (3%) percent to Keller Williams and three (3%) percent to Sperry Van Ness.

13. During the negotiations for Colonial Charters and Aberdeen, the Affiant had conversations with Bob Mauragas, President of National Golf Management, concerning the sale of other golf courses owned or controlled by National Golf Management, and/or its affiliates.

14. On September 27, 2014, Bob Mauragas sent an email to the affiant stating as follows:

"Michael, contract should be on your computer no later than Monday. Would your client have interest in purchasing Long Bay as well? Bob." See Exhibit 5 attached hereto which is a copy of that email.

A few minutes later on the same date, the affiant replied to Mr. Mauragas by email as follows:

"Very possibly. Details?"

15. On September 29, 2014, the Affiant wrote to Defendant Jane Zheng in an email as follows:

"Jane, just heard from Seller of Long Bay. Property is 190 acres. Plays 37,000 rounds of golf annually. Price will be cleared by board tomorrow. In comparison to CCGC, [Colonial Charters] Long Bay is far more attractive; homes are more expensive. Rounds of golf are close to the same. Mike."

Six minutes later, Ms. Zheng responded as follows:

"Asking price and get, Commission Agreement pls."

See Exhibit 6 attached.

16. As a result of my inquiries and at my request, Bob Mauragas, President of National Golf Management, LLC had prepared a Term Sheet dated October 3, 2014. See Exhibit 7 attached hereto. This term sheet was drafted by Matthew Magee, Attorney for National Golf Management, LLC, as is evidenced by Mr. Magee's email of October 3, 2014, attached hereto as Exhibit 8.

17. The attorneys currently representing National Golf Management, LLC and writing the briefs against our commissions are the same attorneys who drafted the term sheets WHICH INCLUDE THE AGREEMENT FOR THE PAYMENT OF COMMISSIONS BEING SOUGHT IN THIS CASE.

18. When the Affiant received the October 3 Term Sheet for Long Bay, he forwarded the same by email to Jane Zheng, at Keller Williams because they were working together. See Exhibit 9 attached hereto.

19. In response to the Term Sheet, Ms. Zheng wrote back an email to the Affiant discussing the commissions, the price, and other terms. See Exhibit 9.

20. Mr. Mauragas then had amended the Term Sheet for Long Bay on October 10, 2014 to show a three (3%) percent commission to be paid to Sperry Van Ness with a provision for other co-brokers fees to be paid by the buyer. See Exhibit 10 attached hereto.

21. On December 3, 2014 at 4:05 a.m. Jane Zheng emailed Bob Mauragas. She did not send me a copy of her email. It reads,

"Bob, would you please acknowledge in the email that I will be paid three (3%) commission if 13 GCs deal is closed with the buyer I introduced to you? You told me over the phone in Nov when I was in China but I'd feel a lot more comfortable if you could put it in writing. I am sure you understand that... Jane." See Exhibit 11 attached hereto.

Her reference to the "13 GCs deal" Included Long Bay, which Affiant had been working on in September and October, PRIOR TO any call she had with Bob Mauragas in November.

22. At 10:13 a.m. on the same day, Bob Mauragas responded to Jane Zheng. Bob did in fact copy me on the email because of our prior dealings and because he knew that I was the procuring cause of the deal. His response to Ms. Zheng reads,

"Jane, the Buyer's agent will be paid by the Buyer. It was agreed to increase the sale price from 3MM to 3.3MM, so the Buyer's agent could be paid. This was arranged with our attorneys. I have no authority to guarantee a commission to you." See Exhibit 11.

23. Bob Mauragas sent a copy of his December 3 email to the Affiant. Upon information and belief, he copied the email to me because he acknowledged that I was a procuring cause of the multiple golf course deal.

24. The Affiant then sent an email to Jane Zheng a few minutes later as follows:

"Jane, Seller pays us six (6%) percent on Aberdeen. We pay you half (three (3%) percent). Why are you asking Bob for confirmation? Mike" See Exhibit 11.

Five (5) minutes later, Affiant sent another email to Jane Zheng as follows.

"Jane, I do not understand what is happening here. What is the 13 GC deal you refer to with Bob? You talked to him in China in November? I opened the door to National Golf Management on Aberdeen and then Long Bay. Why would you go directly to Bob and not involve me? I do not understand. Mike." See Exhibit 11 attached hereto.

25. Affiant had conversations with Bob Mauragas of National Golf Management, LLC and numerous communications concerning the sale of Long Bay Golf Club.

26. It was the understanding between and among Bob Mauragas as a representative of National Golf Management, and the undersigned Affiant as an agent of Sperry Van Ness, that Sperry Van Ness was to be paid the same commission on Long Bay and other golf courses as was agreed to and paid on Aberdeen. There are numerous writings confirming this agreement between and among the parties and principals. The commissions on Colonial Charters and

Aberdeen were paid EVEN THOUGH THERE WAS NO SIGNED COMMISSION AGREEMENT.

27. Upon information and belief, conversations were taking place between National Golf Management and the same group of Chinese buyers through their buyer's agent Jane Zheng acting as agent for Keller Williams at the same time that the Affiant was having discussions with National Golf Management, LLC concerning the sale of Long Bay and potentially other golf courses.

28. After December, 2014, Bob Mauragas would no longer return any phone calls to the Affiant or respond to emails in any way.

29. Eventually there was a closing of thirteen (13) golf courses sold by National Golf Management, LLC and/or its affiliates to the same group of Chinese buyers through the buyer's agent Jane Zheng at Keller Williams. These courses were all part of the same deal. ONE OF THOSE GOLF COURSES WAS LONG BAY GOLF CLUB, which was procured and negotiated by the Affiant. See Exhibit 12 attached hereto; consisting of portions of the contracts and closing statements for Long Bay and 12 other golf courses. National Golf Management, LLC paid total commissions of \$500,000 to the buyer's agent, Keller Williams on the sale of Long Bay and 12 other golf courses, WITH NO SIGNED COMMISSION AGREEMENT.

30. Affiant would state that a Commission Agreement existed between and among National Golf Management, LLC and or its affiliates and Sperry Van Ness through numerous written communications and through a course of dealing concerning prior golf course sales and transactions.

31. Furthermore, Affiant would show that even though there was no specific signed Commission Agreement between National Golf Management, LLC and Sperry Van Ness for the

sale of Aberdeen, there was an understanding between and among the parties that a commission would be paid and in fact a commission was paid to Sperry Van Ness, EVEN WITHOUT A SIGNED COMMISSION AGREEMENT.

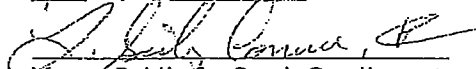
32. Likewise, with regard to the sale of Long Bay and the associated courses, from the same seller to the same group of buyers, through the written documentation, prior conduct of the parties, and numerous emails between and among the parties, Sperry Van Ness was a procuring cause of the contract for the group of golf courses which started with Long Bay and Sperry Van Ness is entitled to be paid a commission from the Seller.

33. Further, Affiant sayeth not.



Michael Cousins

SWORN TO before me this
12 day of March 2015


Notary Public for South Carolina
My Commission Expires: 6/24/24

STATEMENT OF MICHAEL COUSINS, FOR SPERRY VAN NESS

I met Jane Zheng in September or October, 2013. She worked for Keller Williams. In early 2014, Ms. Zheng asked me about any land listings. I told her about a listing in Longs, South Carolina, consisting of 312 undeveloped acres. Shortly thereafter, I met her on that property, with her buyer Nick Dou. Shortly after that meeting, I met her again concerning the 312 acres. She brought with her Nick Dou and several other Chinese buyers. We met at the clubhouse at Colonial Charters Golf Club. A contract for the 312 acres was discussed and agreed to. Mr. Dou asked if Colonial Charters Golf course was for sale. Ms. Zheng asked me about the commission. I told her it was a 50/50 split. It was our understanding and agreement that if we procured property for the Chinese buyers, we would split the commission 50-50 between Sperry Van Ness and Keller Williams.

In June, 2014, Jane Zheng and I were successful in bringing the parties together in an agreement to purchase Colonial Charters Golf Course. See Exhibit 1 attached hereto, which is a portion of that written agreement. Paragraph 16 of Exhibit 1 states that the six (6%) percent commission will be split three (3%) percent to Keller Williams and three (3%) to Sperry Van Ness. This commission was paid out of closing. See Closing Statement, attached as Exhibit 2.

As a result of my contacts with Jane Zheng and the Chinese buyers, Ms. Zheng asked me, on behalf of her buyers, to approach National Golf Management, LLC because I had knowledge that National Golf Management, LLC owned several golf courses and because I was personally familiar with some of the principals of National Golf Management, LLC. There was an understanding between me as a representative of Sperry Van Ness and the representatives of National Golf Management, LLC that a standard six (6%) percent commission would be paid by

them on the sale of golf course property and that the commission would be split 50-50 if the purchaser was represented by Jane Zheng.

There was no signed listing agreement between Sperry Van Ness and National Golf Management, which is not unusual in the commercial market in the Myrtle Beach area.

As a result of my contact with National Golf Management, LLC; the Chinese buyers purchased Aberdeen Golf Course from National Golf Management in late 2014. See Exhibit 3 attached hereto consisting of relevant portions of that contract. Paragraph 16 of Exhibit 3 specifically states that a six (6%) percent brokerage commission shall be paid to Sperry Van Ness and a co-broker, which was Keller Williams.

Aberdeen Golf Course was closed on December 11, 2014. Please see Sellers Closing Statement attached hereto as Exhibit 4 showing a six (6%) percent commission paid, three (3%) percent to Keller Williams and three (3%) percent to Sperry Van Ness.

During the negotiations for Colonial Charters and Aberdeen, I had conversations with Bob Mauragas, President of National Golf Management, concerning the sale of other golf courses owned or controlled by National Golf Management, and/or its affiliates. I discussed the potential sale of any golf courses owned by National Golf Management or its affiliates, on behalf of the Chinese buyers represented by Ms. Zheng.

On September 27, 2014, Bob Mauragas sent an email to me stating as follows:

"Michael, contract should be on your computer no later than Monday. Would your client have interest in purchasing Long Bay as well? Bob." See Exhibit 5 attached hereto which is a copy of that email.

A few minutes later on the same date, I replied to Mr. Mauragas by email as follows:

"Very possibly. Details?"

On September 29, 2014, I wrote to Defendant Jane Zheng in an email as follows:

"Jane, just heard from Seller of Long Bay. Property is 190 acres. Plays 37,000 rounds of golf annually. Price will be cleared by board tomorrow. In comparison to CCGC, [Colonial Charters] Long Bay is far more attractive; homes are more expensive. Rounds of golf are close to the same. Mike."

Six minutes later, Ms. Zheng responded as follows:

"Asking price and get, Commission Agreement pls."

See Exhibit 6 attached. Her response indicates that she was unaware of the Long Bay course and that I was the initial contact for this deal.

As a result of those communications, Bob Mauragas, President of National Golf Management, LLC had a Term Sheet prepared dated October 3, 2014. See Exhibit 7 attached hereto. When I received the October 3 Term Sheet for Long Bay, I forwarded it by email to Jane Zheng, at Keller Williams because we were working together on the sale. See Exhibit 9 attached hereto.

In response to the Term Sheet, Ms. Zheng wrote back an email to me discussing the commissions, the price, and other terms. See Exhibit 9.

Mr. Mauragas had the Term Sheet amended for Long Bay on October 10, 2014 to show a three (3%) percent commission to be paid to Sperry Van Ness, with a provision for other co-brokers fees to be paid by the buyer. See Exhibit 10 attached hereto.

On December 3, 2014 at 4:05 a.m. Jane Zheng emailed Bob Mauragas. SHE DID NOT COPY ME ON THE EMAIL. The email reads,

"Bob, would you please acknowledge in the email that I will be paid three (3%) commission if 13 GCs deal is closed with the buyer I introduced to you? You told me over the phone in Nov when I was in China but I'd feel a lot more comfortable if you could put it in writing. I am sure you understand that... Jane." See Exhibit 11 attached hereto.

Her reference to the "13 GCs deal" INCLUDED LONG BAY, which I had been working on in September and October, PRIOR TO any call she had with Bob Mauragas in November.

At 10:13 a.m. on December 3, Bob Mauragas responded to Jane Zheng, in an email as follows:

"Jane, the Buyer's agent will be paid by the Buyer. It was agreed to increase the sale price from 3MM to 3.3MM, so the Buyer's agent could be paid. This was arranged with our attorneys. I have no authority to guarantee a commission to you." See Exhibit 11.

Bob Mauragas did send me a copy of his December 3 response because I was active in trying to procure the sale/purchaser of Long Bay and as many golf courses as possible to the Chinese buyers. THE FACT THAT HE COPIED ME ON THE EMAIL SHOWS HIS ACKNOWLEDGMENT THAT I WAS THE PROCURING CAUSE.

I then sent an email to Jane Zheng a few minutes later as follows:

"Jane, Seller pays us six (6%) percent on Aberdeen. We pay you half (three (3%) percent). Why are you asking Bob for confirmation? Mike" See Exhibit 11.

Five (5) minutes later, I sent another email to Jane Zheng as follows:

"Jane, I do not understand what is happening here. What is the 13 GC deal you refer to with Bob? You talked to him in China in November? I opened the door to National Golf Management on Aberdeen and then Long Bay. Why would you go directly to Bob and not involve me? I do not understand. Mike." See Exhibit 11 attached hereto.

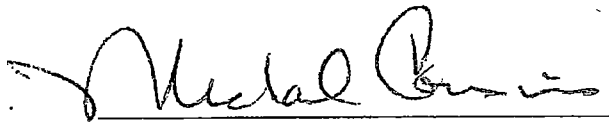
I had conversations with Bob Mauragas of National Golf Management, LLC and numerous communications concerning the sale of Long Bay Golf Club, as well as attempts to include other golf courses. Ms. Zheng's follow-up on Long Bay and other courses without sending me a copy was intended to exclude me from the deal.

It was the understanding between and among Bob Mauragas as a representative of National Golf Management, and Jane Zheng representing Keller Williams, and me as an agent of

Sperry Van Ness, that Sperry Van Ness and Keller Williams were to share in the same commission on Long Bay and other golf courses as was agreed to and paid on Aberdeen. There are numerous writings confirming this agreement between and among the parties and principals.

Eventually there was a closing of thirteen (13) golf courses sold by National Golf Management, LLC and/or its affiliates to the same group of Chinese buyers as Aberdeen. ONE OF THOSE GOLF COURSES WAS LONG BAY GOLF CLUB. See Exhibit 12 attached hereto; consisting of portions of the contracts and closing statements for Long Bay and 12 other golf courses. National Golf Management, LLC paid total commissions of \$500,000 on the sale of Long Bay and 12 other golf courses. Sperry Van Ness is entitled to one-half of this commission.

Respectfully submitted,


Michael Cousins, for Sperry Van Ness

November 12, 2015

Code of Ethics and Standards of Practice

of the NATIONAL ASSOCIATION OF REALTORS®

Effective January 1, 2016

Where the word REALTORS® is used in this Code and Preamble, it shall be deemed to include REALTOR-ASSOCIATE®s.

While the Code of Ethics establishes obligations that may be higher than those mandated by law, in any instance where the Code of Ethics and the law conflict, the obligations of the law must take precedence.

Preamble

Under all is the land. Upon its wise utilization and widely allocated ownership depend the survival and growth of free institutions and of our civilization. REALTORS® should recognize that the interests of the nation and its citizens require the highest and best use of the land and the widest distribution of land ownership. They require the creation of adequate housing, the building of functioning cities, the development of productive industries and farms, and the preservation of a healthful environment.

Such interests impose obligations beyond those of ordinary commerce. They impose grave social responsibility and a patriotic duty to which REALTORS® should dedicate themselves, and for which they should be diligent in preparing themselves. REALTORS®, therefore, are zealous to maintain and improve the standards of their calling and share with their fellow REALTORS® a common responsibility for its integrity and honor.

In recognition and appreciation of their obligations to clients, customers, the public, and each other, REALTORS® continuously strive to become and remain informed on issues affecting real estate and, as knowledgeable professionals, they willingly share the fruit of their experience and study with others. They identify and take steps, through enforcement of this Code of Ethics and by assisting appropriate regulatory bodies, to eliminate practices which may damage the public or which might discredit or bring dishonor to the real estate profession. REALTORS® having direct personal knowledge of conduct that may violate the Code of Ethics involving misappropriation of client or customer funds or property, willful discrimination, or fraud resulting in substantial economic harm, bring such matters to the attention of the appropriate Board or Association of REALTORS®. (Amended 1/00)

Realizing that cooperation with other real estate professionals promotes the best interests of those who utilize their services, REALTORS® urge exclusive representation of clients; do not attempt to gain any unfair advantage over their competitors; and they refrain from making unsolicited comments about other practitioners. In instances where their opinion is sought, or where REALTORS® believe that comment is necessary, their opinion is offered in an objective, professional manner, uninfluenced by any personal motivation or potential advantage or gain.

The term REALTOR® has come to connote competency, fairness, and high integrity resulting from adherence to a lofty ideal of moral conduct in business relations. No inducement of profit and no instruction from clients ever can justify departure from this ideal.

In the interpretation of this obligation, REALTORS® can take no safer guide than that which has been handed down through the centuries, embodied in the Golden Rule, "Whatsoever ye would that others should do to you, do ye even so to them."

Accepting this standard as their own, REALTORS® pledge to observe its spirit in all of their activities whether conducted personally, through associates or others, or via technological means, and to conduct their business in accordance with the tenets set forth below. (Amended 1/07)

Duties to Clients and Customers

Article 1

When representing a buyer, seller, landlord, tenant, or other client as an agent, REALTORS® pledge themselves to protect and promote the interests of their client. This obligation to the client is primary, but it does not relieve REALTORS® of their obligation to treat all parties honestly. When serving a buyer, seller, landlord, tenant or other party in a non-agency capacity, REALTORS® remain obligated to treat all parties honestly. (Amended 1/01)

• Standard of Practice 1-1

REALTORS®, when acting as principals in a real estate transaction, remain obligated by the duties imposed by the Code of Ethics. (Amended 1/93)

• Standard of Practice 1-2

The duties imposed by the Code of Ethics encompass all real estate-related activities and transactions whether conducted in person, electronically, or through any other means.

The duties the Code of Ethics imposes are applicable whether REALTORS® are acting as agents or in legally recognized non-agency capacities except that any duty imposed exclusively on agents by law or regulation shall not be imposed by this Code of Ethics on REALTORS® acting in non-agency capacities.

As used in this Code of Ethics, "client" means the person(s) or entity(ies) with whom a REALTOR® or a REALTOR®'s firm has an agency or legally recognized non-agency relationship; "customer" means a party to a real estate transaction who receives information, services, or benefits but has no contractual relationship with the REALTOR® or the REALTOR®'s firm; "prospect" means a purchaser, seller, tenant, or landlord who is not subject to a representation relationship with the REALTOR® or REALTOR®'s firm; "agent" means a real estate licensee (including brokers and sales associates) acting in an agency relationship as defined by state law or regulation; and "broker" means a real estate licensee (including brokers and sales associates) acting as an agent or in a legally recognized non-agency capacity. (Adopted 1/95, Amended 1/07)

• Standard of Practice 1-3

REALTORS®, in attempting to secure a listing, shall not deliberately mislead the owner as to market value.

• Standard of Practice 1-4

REALTORS®, when seeking to become a buyer/tenant representative, shall not mislead buyers or tenants as to savings or other benefits that might be realized through use of the REALTOR®'s services. (Amended 1/93)

• Standard of Practice 1-5

REALTORS® may represent the seller/landlord and buyer/tenant in the



• **Standard of Practice 17-1**

The filing of litigation and refusal to withdraw from it by REALTORS® in an arbitrable matter constitutes a refusal to arbitrate. *(Adopted 2/86)*

• **Standard of Practice 17-2**

Article 17 does not require REALTORS® to mediate in those circumstances when all parties to the dispute advise the Board in writing that they choose not to mediate through the Board's facilities. The fact that all parties decline to participate in mediation does not relieve REALTORS® of the duty to arbitrate.

Article 17 does not require REALTORS® to arbitrate in those circumstances when all parties to the dispute advise the Board in writing that they choose not to arbitrate before the Board. *(Amended 1/12)*

• **Standard of Practice 17-3**

REALTORS®, when acting solely as principals in a real estate transaction, are not obligated to arbitrate disputes with other REALTORS® absent a specific written agreement to the contrary. *(Adopted 1/96)*

• **Standard of Practice 17-4**

Specific non-contractual disputes that are subject to arbitration pursuant to Article 17 are:

- 1) Where a listing broker has compensated a cooperating broker and another cooperating broker subsequently claims to be the procuring cause of the sale or lease. In such cases the complainant may name the first cooperating broker as respondent and arbitration may proceed without the listing broker being named as a respondent. When arbitration occurs between two (or more) cooperating brokers and where the listing broker is not a party, the amount in dispute and the amount of any potential resulting award is limited to the amount paid to the respondent by the listing broker and any amount credited or paid to a party to the transaction at the direction of the respondent. Alternatively, if the complaint is brought against the listing broker, the listing broker may name the first cooperating broker as a third-party respondent. In either instance the decision of the hearing panel as to procuring cause shall be conclusive with respect to all current or subsequent claims of the parties for compensation arising out of the underlying cooperative transaction. *(Adopted 1/97, Amended 1/07)*
- 2) Where a buyer or tenant representative is compensated by the seller or landlord, and not by the listing broker, and the listing broker, as a result, reduces the commission owed by the seller or landlord and, subsequent to such actions, another cooperating broker claims to be the procuring cause of sale or lease. In such cases the complainant may name the first cooperating broker as respondent and arbitration may proceed without the listing broker being named as a respondent. When arbitration occurs between two (or more) cooperating brokers and where the listing broker is not a party, the amount in dispute and the amount of any potential resulting award is limited to the amount paid to the respondent by the seller or landlord and any amount credited or paid to a party to the transaction at the direction of the respondent. Alternatively, if the complaint is brought against the listing broker, the listing broker may name the first cooperating broker as a third-party respondent. In either instance the decision of the hearing panel as to procuring cause shall be conclusive with respect to all current or subsequent claims of the parties for compensation arising out of the underlying cooperative transaction. *(Adopted 1/97, Amended 1/07)*

- 3) Where a buyer or tenant representative is compensated by the buyer or tenant and, as a result, the listing broker reduces the commission owed by the seller or landlord and, subsequent to such actions, another cooperating broker claims to be the procuring cause of sale or lease. In such cases the complainant may name the first cooperating broker as respondent and arbitration may proceed without the listing broker being named as a respondent. Alternatively, if the complaint is brought against the listing broker, the listing broker may name the first cooperating broker as a third-party respondent. In either instance the decision of the hearing panel as to procuring cause shall be conclusive with respect to all current or subsequent claims of the parties for compensation arising out of the underlying cooperative transaction. *(Adopted 1/97)*

4) Where two or more listing brokers claim entitlement to compensation pursuant to open listings with a seller or landlord who agrees to participate in arbitration (or who requests arbitration) and who agrees to be bound by the decision. In cases where one of the listing brokers has been compensated by the seller or landlord, the other listing broker, as complainant, may name the first listing broker as respondent and arbitration may proceed between the brokers. *(Adopted 1/97)*

- 5) Where a buyer or tenant representative is compensated by the seller or landlord, and not by the listing broker, and the listing broker, as a result, reduces the commission owed by the seller or landlord and, subsequent to such actions, claims to be the procuring cause of sale or lease. In such cases arbitration shall be between the listing broker and the buyer or tenant representative and the amount in dispute is limited to the amount of the reduction of commission to which the listing broker agreed. *(Adopted 1/05)*

• **Standard of Practice 17-5**

The obligation to arbitrate established in Article 17 includes disputes between REALTORS® (principals) in different states in instances where, absent an established inter-association arbitration agreement, the REALTOR® (principal) requesting arbitration agrees to submit to the jurisdiction of, travel to, participate in, and be bound by any resulting award rendered in arbitration conducted by the respondent(s) REALTOR®'s association, in instances where the respondent(s) REALTOR®'s association determines that an arbitrable issue exists. *(Adopted 1/07)*

Explanatory Notes

The reader should be aware of the following policies which have been approved by the Board of Directors of the National Association:

In filing a charge of an alleged violation of the Code of Ethics by a REALTOR®, the charge must read as an alleged violation of one or more Articles of the Code. Standards of Practice may be cited in support of the charge.

The Standards of Practice serve to clarify the ethical obligations imposed by the various Articles and supplement, and do not substitute for, the Case Interpretations in *Interpretations of the Code of Ethics*.

Modifications to existing Standards of Practice and additional new Standards of Practice are approved from time to time. Readers are cautioned to ensure that the most recent publications are utilized.

• **Standard of Practice 16-6**

When REALTORS® are contacted by the client of another REALTOR® regarding the creation of an exclusive relationship to provide the same type of service, and REALTORS® have not directly or indirectly initiated such discussions, they may discuss the terms upon which they might enter into a future agreement or, alternatively, may enter into an agreement which becomes effective upon expiration of any existing exclusive agreement. *(Amended 1/98)*

• **Standard of Practice 16-7**

The fact that a prospect has retained a REALTOR® as an exclusive representative or exclusive broker in one or more past transactions does not preclude other REALTORS® from seeking such prospect's future business. *(Amended 1/04)*

• **Standard of Practice 16-8**

The fact that an exclusive agreement has been entered into with a REALTOR® shall not preclude or inhibit any other REALTOR® from entering into a similar agreement after the expiration of the prior agreement. *(Amended 1/98)*

• **Standard of Practice 16-9**

REALTORS®, prior to entering into a representation agreement, have an affirmative obligation to make reasonable efforts to determine whether the prospect is subject to a current, valid exclusive agreement to provide the same type of real estate service. *(Amended 1/04)*

• **Standard of Practice 16-10**

REALTORS®, acting as buyer or tenant representatives or brokers, shall disclose that relationship to the seller/landlord's representative or broker at first contact and shall provide written confirmation of that disclosure to the seller/landlord's representative or broker not later than execution of a purchase agreement or lease. *(Amended 1/04)*

• **Standard of Practice 16-11**

On unlisted property, REALTORS® acting as buyer/tenant representatives or brokers shall disclose that relationship to the seller/landlord at first contact for that buyer/tenant and shall provide written confirmation of such disclosure to the seller/landlord not later than execution of any purchase or lease agreement. *(Amended 1/04)*

REALTORS® shall make any request for anticipated compensation from the seller/landlord at first contact. *(Amended 1/98)*

• **Standard of Practice 16-12**

REALTORS®, acting as representatives or brokers of sellers/landlords or as subagents of listing brokers, shall disclose that relationship to buyers/tenants as soon as practicable and shall provide written confirmation of such disclosure to buyers/tenants not later than execution of any purchase or lease agreement. *(Amended 1/04)*

• **Standard of Practice 16-13**

All dealings concerning property exclusively listed, or with buyer/tenants who are subject to an exclusive agreement shall be carried on with the client's representative or broker, and not with the client, except with the consent of the client's representative or broker or except where such dealings are initiated by the client.

Before providing substantive services (such as writing a purchase offer or presenting a CMA) to prospects, REALTORS® shall ask prospects whether they are a party to any exclusive representation agreement. REALTORS® shall not knowingly provide substantive services concerning a prospective transaction to prospects who are parties to exclusive representation agreements, except with the consent of the prospects' exclusive representatives or at the direction of prospects. *(Adopted 1/93, Amended 1/04)*

• **Standard of Practice 16-14**

REALTORS® are free to enter into contractual relationships or to negotiate with sellers/landlords, buyers/tenants or others who are not subject to an exclusive agreement but shall not knowingly obligate them to pay more than one commission except with their informed consent. *(Amended 1/98)*

• **Standard of Practice 16-15**

In cooperative transactions REALTORS® shall compensate cooperating REALTORS® (principal brokers) and shall not compensate nor offer to compensate, directly or indirectly, any of the sales licensees employed by or affiliated with other REALTORS® without the prior express knowledge and consent of the cooperating broker.

• **Standard of Practice 16-16**

REALTORS®, acting as subagents or buyer/tenant representatives or brokers, shall not use the terms of an offer to purchase/lease to attempt to modify the listing broker's offer of compensation to subagents or buyer/tenant representatives or brokers nor make the submission of an executed offer to purchase/lease contingent on the listing broker's agreement to modify the offer of compensation. *(Amended 1/04)*

• **Standard of Practice 16-17**

REALTORS®, acting as subagents or as buyer/tenant representatives or brokers, shall not attempt to extend a listing broker's offer of cooperation and/or compensation to other brokers without the consent of the listing broker. *(Amended 1/04)*

• **Standard of Practice 16-18**

REALTORS® shall not use information obtained from listing brokers through offers to cooperate made through multiple listing services or through other offers of cooperation to refer listing brokers' clients to other brokers or to create buyer/tenant relationships with listing brokers' clients, unless such use is authorized by listing brokers. *(Amended 1/02)*

• **Standard of Practice 16-19**

Signs giving notice of property for sale, rent, lease, or exchange shall not be placed on property without consent of the seller/landlord. *(Amended 1/93)*

• **Standard of Practice 16-20**

REALTORS®, prior to or after their relationship with their current firm is terminated, shall not induce clients of their current firm to cancel exclusive contractual agreements between the client and that firm. This does not preclude REALTORS® (principals) from establishing agreements with their associated licensees governing assignability of exclusive agreements. *(Adopted 1/98, Amended 1/10)*

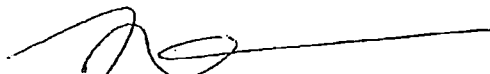
Article 17

In the event of contractual disputes or specific non-contractual disputes as defined in Standard of Practice 17-4 between REALTORS® (principals) associated with different firms, arising out of their relationship as REALTORS®, the REALTORS® shall mediate the dispute if the Board requires its members to mediate. If the dispute is not resolved through mediation, or if mediation is not required, REALTORS® shall submit the dispute to arbitration in accordance with the policies of the Board rather than litigate the matter.

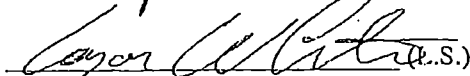
In the event clients of REALTORS® wish to mediate or arbitrate contractual disputes arising out of real estate transactions, REALTORS® shall mediate or arbitrate those disputes in accordance with the policies of the Board, provided the clients agree to be bound by any resulting agreement or award.

The obligation to participate in mediation and arbitration contemplated by this Article includes the obligation of REALTORS® (principals) to cause their firms to mediate and arbitrate and be bound by any resulting agreement or award. *(Amended 1/12)*

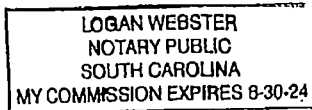
9. Mr. Cousins had no idea about this package golf course deal and had no involvement, whatsoever. Mr. Cousins did NOT introduce us to the Seller, and had nothing to do with our relationship with the Seller, the Buyer, or anything involving the transaction before the Panel.
10. We did not, and would certainly now never, want Mr. Cousins to represent us and he was NOT the procuring cause in this transaction or the relationship we had with the Seller.


Xian ("Nick") Dou

SWORN to before me this 6
day of April, 2016.


Notary Public for South Carolina

My Commission Expires: 6-30-24



STATE OF SOUTH CAROLINA

COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

Andrew Waldo,

Plaintiff,

vs.

Michael Cousins and South Carolina
Association of REALTORS®,

Defendants.

Case No. 2016-CP-26-01498

AFFIDAVIT OF LINDSEY DAVIDSON

PERSONALLY APPEARED BEFORE ME, **Lindsey Davidson**, who, after being duly sworn,
deposes and states the following:

1. I am Lindsey Davidson and I am Director of Member Services for the South Carolina Association of REALTORS®.
2. I am over 21 years of age and have personal knowledge of the matters contained herein.
3. As part of my duties as Director of Member Services, I maintain records regarding our members and any arbitration disputes they may have.
4. The documents attached to this Affidavit are kept in the ordinary course of business by the Association for its business purposes of providing services to its REALTOR® members and to the public on behalf of its REALTOR® members.
5. The documents attached are genuine and accurate copies of records maintained in the Association office created at or near the time and dates reflected on them.

6. Attachment A to this Affidavit is the cover page and relevant portions of the National Association of REALTORS®'s Code of Ethics related to arbitration between REALTORS®.

7. Attachment B to this Affidavit is the cover page and relevant portions of the South Carolina Association of REALTORS®'s Bylaws related to arbitration between members and acceptance of the Code of Ethics.

8. Attachment C to this Affidavit is a Request for Arbitration submitted by REALTOR® Andrew Waldo on September 28, 2015, requesting that the South Carolina Association of REALTORS® arbitrate the issue of a commission division between Andrew Waldo and Michael Cousins.

9. Attachment D to this Affidavit is a document received from REALTOR® Andrew Waldo requesting review of the initial arbitration award as provided under the Arbitration Rules.

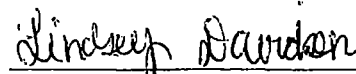
10. Attachment E to this Affidavit is the Notice of the Review Hearing originally scheduled for March 30, 2016.

11. Attachment F to this Affidavit is a Request from REALTOR® Andrew Waldo for a continuance of the Review Hearing to a later date.

12. Attachment G to this Affidavit is Notice from the Association to REALTORS® Waldo and Cousins of a new Review Hearing date of April 18, 2016.

13. Attachment H to this Affidavit is the Notice rescheduling the Review Hearing until May 2, 2016 at the request of the parties.

FURTHER AFFIANT SAYETH NAUGHT.


Lindsey Davidson

SWORN TO BEFORE ME

This 8th day of April, 2016.

Jessica Pruitt
Notary Public for South Carolina

My Commission Expires: 2/11/26

JESSICA PRUITT
Notary Public, State of South Carolina
My Commission Expires 2/11/2026

ATTACHMENT B



South Carolina Association of REALTORS® Constitution and Bylaws

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Effective Date: September 14, 2013

<u>Article</u>	<u>Pages</u>	<u>Description</u>
Article I	2	Name
Article II	2	Objectives
Article III	2	Headquarters
Article IV	2	Administration
Article V	3	Territorial Jurisdiction
Article VI	3	Fiscal Year and Elective Year
Article VII	3	Membership
Article VIII	3-5	Membership Classes
Article IX	5-6	Dues
Article X	6-7	Officers
Article XI	7-8	Nominating Procedure and Election of Officers
Article XII	8-10	Board of Directors
Article XIII	10	Indemnification of Officers and Directors
Article XIV	10-11	Chief Executive Officer
Article XV	11	Advisory Council
Article XVI	11-12	Executive Committee
Article XVII	12	Committees
Article XVIII	12	Sections
Article XIX	12	Rules of Order
Article XX	12-13	Amendments
Article XXI	13	Code of Ethics
Article XXII	13-14	Ethics, Mediation, and Arbitration
Article XXIII	14	Use of Terms "REALTOR® and REALTORS®"
Article XXIV	14	Legal Action Fund
Article XXV	15	Housing Opportunity Committee
Article XXVI	16	Harassment
Article XXVII	16	Dissolution

Approved by S.C.A.R. Board of Directors: September 13, 2013

SECTION 1: The Bylaws may be amended, or completely revised at any Board of Directors meeting by a majority of Directors present at any meeting at which a quorum is present, provided however, that notice of any proposed amendments and/or revisions shall first have been mailed thirty (30) days in advance to all Directors by the Chief Executive Officer, whose duty it shall be to send any such notices. All amendments and/or revisions may be first submitted to the Bylaws Committee for consideration. After the Bylaws Committee has considered such amendments or revisions, its recommendations will be made to the Executive Committee. After Executive Committee approval of any amendments and/or revisions, the President shall make final presentation to the Board of Directors. The amendment of these bylaws to conform to policy mandated by NAR may, however, be approved by majority vote of the Board of Directors at any regularly called meeting of the Board of Directors at which a quorum is present.

SECTION 2: Amendments to these Bylaws affecting the admission or qualifications of REALTOR® Members, and Institute Affiliates, the use of the terms REALTOR®, or REALTORS®, or any alteration in the territorial jurisdiction of a Member Board shall become effective only upon approval of the Board of Directors of NAR.

ARTICLE XXI

CODE OF ETHICS

SECTION 1: The Code of Ethics of NAR is hereby adopted as the Code of Ethics of the Association and shall be considered a part of its rules and regulations, and the Code of Ethics and the rules and regulations of the Association shall in the future be deemed to be amended or changed by NAR.

ARTICLE XXII

ETHICS, MEDIATION, AND ARBITRATION

Section 1: Allegations of unethical conduct and contractual disputes (and specific non-contractual disputes as defined in Standard of Practice 17-4) between REALTORS® and between REALTORS® and their customers or clients may be submitted to an ethics or arbitration panel at the State Association level under the following circumstances:

- (a) Allegations of unethical conduct made against a REALTOR® who is directly a member of the State Association and not a member of any local Board.
- (b) Allegations of unethical conduct made against a REALTOR® in the instance in which the local Board, because of size or other valid reason, determines that it cannot provide a due process hearing of the matter and petitions the State Association to conduct a hearing.
- (c) Contractual disputes (and specific non-contractual disputes as defined in Standard of Practice 17-4) between REALTORS® who are not members of the same Board where the matter has been referred to the State Association by both local Boards.
- (d) Contractual disputes (and specific non-contractual disputes as defined in Standard of Practice 17-4) between REALTORS® who are directly members of the State Association and are not members of any Board.*
- (e) Contractual disputes (and specific non-contractual disputes as defined in Standard of Practice 17-4) between a REALTOR® who does not hold membership in any Board, but is directly a member of the State Association, and a REALTOR® who is a member of a Board.**
- (f) Contractual disputes (and specific non-contractual disputes as defined in Standard of Practice 17-4) between REALTOR® members of the same Board where the Board with good and sufficient reason is unable to arbitrate the dispute. (This provision is not designed to relieve the local Board of its primary responsibility to resolve differences arising between members of the same Board. The section recognizes that in some Boards, with limited membership, usual arbitration procedures may be impossible.)
- (g) Contractual disputes between a customer or a client and a REALTOR® where the Board with good and sufficient reason is unable to arbitrate the dispute or the REALTOR® is a direct member of the State Association.

SECTION 2: A Grievance Committee and a Professional Standards Committee shall be appointed by the President.

SECTION 3: Professional Standards hearings and organization and procedures incident thereto shall be governed by the *Code of Ethics and Arbitration Manual* of NAR, as adopted by the Board of Directors, and as from time to time amended, which by this reference is made a part of these Bylaws and by Policy as adopted by the Executive Committee of the South Carolina Association of REALTORS®, as amended from time to time.

SECTION 4: Regional Hearing Panels. The Executive Committee of the South Carolina Association of REALTORS® may adopt policy governing Regional Professional Standards procedures and Regional Hearing Panels.

SECTION 5: If a REALTOR® Member (as defined in Article II, Section 4, of these bylaws) resigns from the Board or otherwise causes membership to terminate with an ethics complaint pending, that Board of Directors may condition the right of the resigning Member to reapply for membership upon the applicant's certification that he/she will submit to the pending ethics proceeding and will abide by the decision of the hearing panel.

If a REALTOR® Member (as defined in Article II, Section 4, of these bylaws) resigns or otherwise causes membership to terminate, the duty to submit to arbitration continues in effect even after membership lapses or is terminated, provided that the dispute arose while the former member was a REALTOR®.

SECTION 6: New Member Code of Ethics Orientation. Applicants for REALTOR® and REALTOR-ASSOCIATE® membership shall complete an orientation program on the Code of Ethics of not less than two hours and thirty minutes of instructional time. This requirement does not apply to applicants who have completed comparable orientation in another association, provided that membership has been continuous, or that any break in membership is for one year or less.

Failure to satisfy this requirement within ninety (90) days of the date of application will result in denial of the membership application.

SECTION 7: Continuing Member Code of Ethics Training. Effective January 1, 2001, through December 31, 2004, and for successive four year periods thereafter, each REALTOR® and REALTOR-ASSOCIATE® member of the association shall be required to complete quadrennial ethics training of not less than two hours and thirty minutes of instructional time. This requirement will be satisfied upon presentation of documentation that the member has completed a course of instruction conducted by this or another association, or NAR, or any other recognized educational institution or provider which meets the learning objectives and minimum criteria established by NAR from time to time. Members who have completed training as a requirement of membership in another association and members who have completed the New Member Code of Ethics Orientation during any four year cycle shall not be required to complete additional ethics training until a new four year cycle commences.

Failure to satisfy this requirement shall be considered a violation of a membership duty for which REALTOR® membership shall be suspended until such time as the training is completed.

Members suspended for failing to meet the requirement for the first four (4)-year cycle (2001 through 2004) will have until December 31, 2005 to meet the requirement. Failure to meet the requirement by that time will result in automatic termination of membership. Failure to meet the requirement for the second (2005 through 2008) cycle and subsequent four (4)-year cycles will result in suspension of membership for the first two months (January and February) of the year following the end of any four (4)-year cycle or until the requirement is met, whichever occurs sooner. On March 1 of that year, the membership of a member who is still suspended as of that date will be automatically terminated.

SECTION 8. The responsibility of the Association and of Association members relating to the enforcement of the Code of Ethics, the disciplining of members, and the arbitration of disputes, and the organization and procedures incident thereto, shall be governed by the *Code of Ethics and Arbitration Manual* of NAR, as amended from time to time, which is by this reference incorporated into these Bylaws, provided, however, that any provision deemed inconsistent with state law shall be deleted or amended to comply with state law.

It shall be the duty and responsibility of every REALTOR® member of this Association to abide by the Constitution and Bylaws and the rules and regulations of the Association, the Constitution and Bylaws of the South Carolina Association of REALTORS®, the Constitution and Bylaws of NAR, and to abide by the Code of Ethics of NAR, including the duty to mediate and arbitrate controversies arising out of real estate transactions as specified by Article 17 of the Code of Ethics, and as further defined and in accordance with the procedures set forth in the Code of Ethics and Arbitration Manual of NAR, as from time to time amended.

ARTICLE XXIII USE OF TERMS "REALTOR®" AND "REALTORS®"

SECTION 1: Use of the term "REALTOR®" and "REALTORS®", by members shall at all times be subject to the provisions of the Constitution and Bylaws of NAR and to the rules and regulations prescribed by its Board of Directors. The South Carolina Association of REALTORS® shall have the authority to control jointly, and in full cooperation with NAR, use of the terms within its jurisdiction. Any misuse of the terms by members is a violation of a membership duty and may subject members to disciplinary action by the Board of Directors after a hearing as provided for in the association's Code of Ethics and Arbitration Manual.

SECTION 2: REALTOR® Members of the Association shall have the privilege of using the term "REALTOR®, or REALTORS®, in connection with their business so long as they remain REALTOR® members in good standing. No other class of membership shall have this privilege.

SECTION 3: A REALTOR® Member who is a principal of a real estate firm, partnership, corporation or trust may use the term "REALTOR® or REALTORS®" only if all of the principals of such firm, partnership, corporation or trust who are actively engaged in the real estate profession within the state or a state contiguous thereto are REALTOR® or Institute Affiliate Members.

SECTION 4: An Institute Affiliate Member shall not use the terms REALTOR® or REALTORS® and shall not use the imprint of the emblem seal of NAR.

ARTICLE XXIV LEGAL ACTION FUND

SECTION 1: AUTHORITY. The South Carolina Association of REALTORS® shall maintain a Legal Action Fund.

SECTION 2: PURPOSE. The Legal Action Fund shall be established for the purpose of providing legal advocacy for the Association, its Officers, Directors, Members and Employees. The Legal Action Committee shall establish bylaws to cover the purpose, funding and administration of the Legal Action Fund. The Legal Action Committee bylaws and all future amendments will be reviewed and approved by the Executive Committee.

SECTION 3: APPOINTMENT OF A COMMITTEE.

- (a) The President shall appoint, subject to confirmation by the Executive Committee, a Legal Action Committee of nine REALTOR® Members, all of whom shall be REALTORS® in good standing with the Association.
- (b) Starting in January, 1994, three Members of the Committee shall serve for three years, three Members shall serve for two years, and three Members shall serve for one year. In subsequent years, the President shall appoint Members, as necessary, to fill the vacancies and each new Member shall serve for three years.
- (c) In the event a vacancy occurs on the Committee, the President shall appoint a new Committee Member to serve out the remainder of the term of the Committee Member who is being replaced.

SECTION 4: FINANCING AND MAINTENANCE OF THE FUND. The financing of the Legal Action Fund shall be from dues or special assessments, paid by all REALTOR® Members and shall be a budget item. The

ATTACHMENT E



South Carolina Association of REALTORS®
3780 Fernandina Road, Columbia, SC 29210

Official Notice of Procedural Review (Arbitration)

In the case of: REALTOR® Andrew Waldo vs. REALTOR® Michael Cousins.
Complainant Respondent

Above parties are hereby notified:

(1) REALTOR® Andrew Waldo has requested a procedural review of the arbitration hearing procedures used in the above-cited case before a Hearing Tribunal appointed by the President of the South Carolina Association of REALTORS®.

A copy of the Request for Review, together with its supporting documentation, is attached.

(2) The Hearing Tribunal will meet on Wednesday, March 30, 2016, 10:00 a.m. at the SCR Office located at 3780 Fernandina Road, Columbia, SC 29210 to hear the appeal.

(3) The members of the Hearing Tribunal who will hear the request are:

David Lockwood, Chair

Jim Davis

Jeannine Kees

Fritzi Barbour

Keith Jones

(4) Either party may be represented by legal counsel, and each party is required to give the Association and the other party written notice of an intention to have counsel present 10 days before the hearing. Failure to provide this notice will not invalidate a party's right to legal representation, but may result in a continuance of the hearing if the Hearing Tribunal determines that the rights of any other party require representation by legal counsel.

(5) Either party may file with the Secretary not less than 10 days prior to the date of the procedural review hearing written request for disqualification from the hearing of any member of the Hearing Tribunal for the following reasons:

(A) Is related by blood or marriage to either complainant or respondent.

(B) Is an employer, partner, or employee or in any way associated in business with either complainant or respondent.

(C) Is a party to the hearing.

(D) Knows of any reason that may prevent him from rendering an impartial judgment.

(E) Has served as a member of the Grievance Committee initially reviewing the request for arbitration or as a member of the Arbitration Hearing Panel which rendered the award.

(6) The parties shall not discuss the case with any member of the Arbitration Panel or Hearing Tribunal prior to, or after, the procedural review hearing and prior to announcement of the decision of the Hearing Tribunal.

Respectfully submitted,

Lindsey Davidson

Administrator

(Print)

Lindsey Davidson

(Signature)

South Carolina Association of REALTORS®

Dated: March 14, 2016

ATTACHMENT F



Lindsey Davidson <lindsey@screaltors.org>

SCR Procedural Review Hearing Continuance

8 messages

Lindsey Davidson <lindsey@screaltors.org>

Tue, Mar 22, 2016 at 9:55 AM

To: Andy Waldo <andywaldo@kw.com>

Cc: dzayicek@bellamylaw.com

Dear REALTOR® Waldo,

The hearing panel Chair has granted your request for a continuance. The hearing will be scheduled for a new date that is agreed upon by both parties.

Please let me know if any of the following dates **do not** fit your schedule:

Tuesday, April 12th

Monday, April 18th

Monday, April 25th

Thank you,

Lindsey Davidson

Member Services Director

Professional Standards Administrator

South Carolina REALTORS®

3780 Fernandina Road

Columbia, SC 29210

direct: 803-807-2107

office: 803-772-5206

Zayicek, Douglas M. <DZayicek@bellamylaw.com>

Tue, Mar 22, 2016 at 10:08 AM

To: Lindsey Davidson <lindsey@screaltors.org>, Andy Waldo <andywaldo@kw.com>

This message was sent securely using ZixCorp.

I have a hearing already scheduled for April 12, but the 18th or the 25th are free. Thank you.

Douglas M. Zayicek

Description:

cid:image001.jpg@01CCB4

Bellamy, Rutenberg, Copeland, Epps.

Gravely & Bowers, P.A.

P.O. Box 357

Myrtle Beach, SC 29578

General: (843) 448-2400

Facsimile: (843) 448-3022

ATTACHMENT G

If we can help you succeed we all succeed!!!

[Quoted text hidden]

Lindsey Davidson <lindsey@screaltors.org>
To: Andy Waldo <andywaldo@kw.com>
Cc: Doug Zayicek <dzayicek@bellamylaw.com>

Mon, Mar 28, 2016 at 9:39 AM

Dear REALTOR® Waldo,

We were moving ahead with getting Monday, April 18th scheduled as we had not heard of any conflicts. The other side is not available on the 25th and the date must be mutually agreed upon. **Are you unavailable on the 18th? Please let me know as soon as possible.** The next possible dates will have to be looking into May.

Thank you,

Lindsey Davidson
Member Services Director
Professional Standards Administrator
South Carolina REALTORS®
3780 Fernandina Road
Columbia, SC 29210
direct: 803-807-2107
office: 803-772-5206

[Quoted text hidden]

Andy Waldo <andywaldo@kw.com>
To: Lindsey Davidson <lindsey@screaltors.org>, Doug Zayicek <DZayicek@bellamylaw.com>

Wed, Mar 30, 2016 at 2:11 PM

The 25th is the only date we all can make it and one of my people will be out of the country starting May 5th for a month. what would you recommend?

Sincerely,

Andy Waldo - CRB, CRS, ABR, Eco-Broker, CDPE
Broker in Charge / Operating Principal
Licensed Broker in SC, NC, VA, & WV
Licensed SC Real Estate Course Instructor
(843) 340-8080 - Cell
andywaldo@kw.com

www.AndyWaldo.com

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[Quoted text hidden]

Lindsey Davidson <lindsey@screaltors.org>
To: Andy Waldo <andywaldo@kw.com>
Cc: Doug Zayicek <DZayicek@bellamylaw.com>, Byron King <byron@screaltors.org>

Wed, Mar 30, 2016 at 2:35 PM

The other party is not available on the 25th. We can do Monday, May 2nd or Wednesday, May 4th, but those

ATTACHMENT H



South Carolina REALTORS®
3780 Fernandina Road, Columbia, SC 29210

Official Notice of Procedural Review (Arbitration)

In the case of REALTOR® Andrew Waldo vs. REALTOR® Michael Cousins
Complainant Respondent

Above parties are hereby notified:

(1) REALTOR® Andrew Waldo has requested a procedural review of the arbitration hearing procedures used in the above-cited case before a Hearing Tribunal appointed by the President of the South Carolina Association of REALTORS®.

A copy of the Request for Review, together with its supporting documentation, is attached.

(2) The Hearing Tribunal will meet on **Monday, May 2, 2016, 10:00AM** at the **SCR Office located at 3780 Fernandina Road, Columbia, SC 29210** to hear the appeal.

(3) The members of the Hearing Panel appointed to hear the case will be:

David Lockwood, Chair

Jeannine Kees

Keith Jones

Jim Davis

Fritzi Barbour

(4) Either party may be represented by counsel, and each party is requested to provide written notice of an intention to have counsel present 15 days before the hearing to the Board and the other party including counsel's name, address, and phone number. Failure to provide this notice will not invalidate a party's right to legal representation, but may result in a continuance of the hearing if the Hearing Panel determines that the rights of any other party require representation by counsel.

(5) Each party must provide a list of the names of witnesses he intends to call at the hearing to the Board and to all other parties not less than 15 days prior to the hearing. Each party shall arrange for his witnesses to be present at the time and place designated for the hearing.

(6) The parties shall not discuss the case with any member of the Hearing Panel or any Appeal Panel prior to the hearing or after hearing and prior to announcement of the decision.

(7) The parties to an arbitration proceeding may settle the issue between them by joint agreement at any time and shall provide written notice of such settlement to the South Carolina REALTORS®.

Respectfully submitted,

Lindsey Davidson
(Type/Print)

Lindsey Davidson, Administrator
(Signature)

South Carolina REALTORS®

Dated: April 4, 2016

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

Andrew Waldo,

Plaintiff,

vs.

Michael Cousins and South Carolina
Association of REALTORS®,

Defendants.

Case No. 2016-CP-26-01498

AFFIDAVIT OF HEATHER TENNEY

PERSONALLY APPEARED BEFORE ME, Heather Tenney, who, after being duly sworn,
deposes and states the following:

1. I am Heather Tenney, Vice-President of Member Services of the Coastal
Carolinas Association of REALTORS® since 2002.

2. I am over 21 years of age and have personal knowledge of the matters contained
herein.

3. In my position of Vice-President for Member Services, I am responsible for
keeping the membership records and providing the members with copies of the applicable
Bylaws and Rules.

4. REALTOR® Andrew Waldo became a member of the Coastal Carolinas
Association of REALTORS® on August 15, 2014, according to the records of the Association.

5. The attachments to this Affidavit are genuine and accurate copies of documents
maintained as business records in the ordinary course of the Coastal Carolinas Association of

REALTORS® business providing services to its REALTOR® members and the public on behalf of its REALTOR® members.

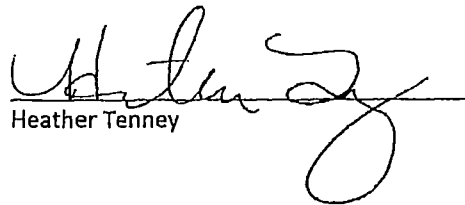
6. These documents were created at or near the time of the date reflected on them by persons with personal knowledge of the contents of the documents.

7. Attachment A is the electronic Application of REALTOR® Waldo in which he agrees to abide by the Bylaws, Rules, and Code of Ethics of the Coastal Carolinas Association of REALTORS®, the South Carolina Association of REALTORS®, and the National Association of REALTORS®.

8. Attachment B to this Affidavit contains the cover page and relevant portions of the Coastal Carolinas Association of REALTORS®'s Rules regarding arbitration of REALTOR® disputes.

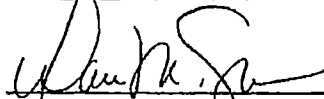
9. Attachment C to this Affidavit contains the cover page and relevant portions of the Coastal Carolinas Association of REALTORS®'s Bylaws regarding the arbitration of REALTOR® disputes.

FURTHER AFFIANT SAYETH NAUGHT.


Heather Tenney

SWORN TO BEFORE ME

This 14 day of April, 2016.



Notary Public for South Carolina

My Commission Expires: 2/17/21

ATTACHMENT A



- > [Template](#)
- > [Pending Applications](#)
- > [Back To NRDS Online](#)



APPLICATION FOR REALTOR® MEMBERSHIP

To the COASTAL CAROLINAS ASSOCIATION OF REALTORS®, I hereby apply for REALTOR® Membership in the above named Board and will provide my payment in the amount of \$100 for a one time application fee and my 2014 Dues payable to COASTAL CAROLINAS ASSOCIATION OF REALTORS®. (\$330.84 for REALTOR®). My 2014 dues will be returned to me in the event of non-election. Application fee is nonrefundable. I will attend orientation within 60 days of Association's confirmation of provisional membership. Failure to meet this requirement may result in having my membership terminated. In the event of my election, I agree to abide by the Code of Ethics of the National Association of REALTORS®, which includes the duty to arbitrate, and the Constitution, Bylaws and Rules and Regulations of the above named Board, the State Association and the National Association, and if required, I further agree to satisfactorily complete a reasonable and non-discriminatory written examination on such Code, Constitutions, Bylaws and Rules and Regulations. I understand membership brings certain privileges and obligations that require compliance. Membership is final only upon approval by the Board of Directors and may be revoked should completion of requirements, such as orientation, not be completed within timeframe established in the association's bylaws. I understand that I will be required to complete periodic Code of Ethics training as specified in the association's bylaws as a continued condition of membership.

NOTE: Applicant acknowledges that if accepted as a member and he/she subsequently resigns from the Board or otherwise causes membership to terminate with an ethics complaint pending, the Board of Directors may condition renewal of membership upon applicant's certification that he/she will submit to the pending ethics proceeding and will abide by the decision of the hearing panel. If applicant resigns or otherwise causes membership to terminate, the duty to submit to arbitration continues in effect even after membership lapses or is terminated, provided the dispute arose while applicant was a REALTOR®.

First Name: **Andrew** Middle Name: **Fraser** Last Name: **Waldo** Suffix: _____

Email Address: **andy.teamwaldo@gmail.com** Real Estate License#: **89522**

Licensed/certified appraiser: **No** Appraisal License #: _____

Office Name: **Keller Williams**

Office Address: **2002 Oak Street Suite 3000 City: Myrtle Beach State: SC Zip: 29577**

Office Phone: **843 - 443- 9400** Office Fax: **843 - 282 8601**

Home Address: **604 Crestview Terrace City: Winchester State: VA Zip: 22601**

Home Phone: ____ - ____ - ____ Personal Fax: ____ - ____ - ____

Cell Phone: **540 - 664 2544**

Preferred Publication Mailing: **Office Street**

Preferred Mailing: **Office Street**

Preferred Phone: **Cell**

Are you presently a member of any other Association of REALTORS®? Yes

If yes, name of Association and type of membership held: Blue Ridge Association of Realtors, Panhandle Association of Realtors, Virginia Association of Realtors and West Virginia Association of Realtors

Have you previously held membership in any other Association of REALTORS®? _____

if yes, name of Association and type of membership held: _____

Please enter NRDS number if known: 838565793

Have you been found in violation of the Code of Ethics or other membership duties in any Association of REALTORS® in the past three (3) years or are there any such complaints pending? No

How long with the current real estate firm? 1 day

Previous real estate firm (if applicable): Team Waldo Realty

Number of years engaged in the real estate business: 11

Field of Business (Specialties): 1. 100

Field of Business (Specialties): 2. 120

Field of Business (Specialties): 3. 123

Field of Business (Specialties): 4. 100

Languages spoken:

If you are a principal, partner, corporate officer or branch office manager you must complete the following information:

Company Information: _____

Position: _____ Name of other Partners/Officers of your firm: _____

Have you ever been refused membership in any other Association of REALTORS®? _____

if yes, state the basis for each such refusal and detail the circumstances related thereto: _____

Is the Office Address, as stated, your principal place of business? _____

If not, or if you have any branch offices, please indicate and give address:

Address: _____ City: _____ State: _____ Zip: _____

Do you hold, or have you held, a real estate license in any other state? _____

If so, where: _____

Have you or your firm been found in violation of state real estate licensing regulations within the last three years? If yes, provide details: _____

Have you or your firm been convicted, adjudged, or otherwise recorded as guilty by a final judgment of any court of competent jurisdiction of a felony or other crime. If yes, provide details: _____

I hereby certify that the foregoing information furnished by me is true and correct, and I agree that failure to provide complete and accurate information as requested, or any misstatement of fact, shall be grounds for revocation of my membership if granted. I further agree that, if accepted for membership in the Board, I shall pay the fees and dues as from time to time established. NOTE: Payments to the COASTAL CAROLINAS ASSOCIATION OF REALTORS® are not deductible as charitable contributions. Such payments may, however, be deductible as an ordinary and necessary business expense. No refunds.

By clicking "I Agree", I consent that the REALTOR® Associations (local, state, national) and their subsidiaries, if any (e.g., MLS, Foundation) may contact me at the specified address, telephone numbers, fax numbers, email address or other means of communication available. This consent applies to changes in contact information that may be provided by me to the Associations(s) in the future. This consent recognizes that certain state and federal laws may place limits on communications that I am waiving to receive all communications as part of my membership.

☒ I Agree

Information to be supplied by Local Association:

Join Date _____

Status: Active, Provisional

Primary Local Association NRDS ID _____

Primary State Association NRDS ID _____

Office ID _____

(If broker) Office Contact OR _____

Office Contact Manager _____

Number of Non-Member Licensees _____

Printer Friendly Version

© COASTAL CAROLINAS ASSOCIATION OF REALTORS®
951 Shine Ave, Myrtle Beach, SC 29577
Phone: (843) 626-3638
E-mail: laura@ccarsc.org

ATTACHMENT B

listing. Such offers are unconditional except that entitlement to compensation is determined by the cooperating broker's performance as the procuring cause of the sale (or lease) or as otherwise provided for in this rule. The listing broker's obligation to compensate any cooperating broker as the procuring cause of the sale (or lease) may be excused if it is determined through arbitration that, through no fault of the listing broker and in the exercise of good faith and reasonable care, it was impossible or financially unfeasible for the listing broker to collect a commission pursuant to the listing agreement. In such instances, entitlement to cooperative compensation offered through MLS would be a question to be determined by an arbitration hearing panel based on all relevant facts and circumstances including, but not limited to, why it was impossible or financially unfeasible for the listing broker to collect some or all of the commission established in the listing agreement; at what point in the transaction did the listing broker know (or should have known) that some or all of the commission established in the listing agreement might not be paid; and how promptly had the listing broker communicated to cooperating brokers that the commission established in the listing agreement might not be paid. (Amended 11/98)

In filing a property with the multiple listing service of an association of REALTORS®, the participant of the service is making blanket unilateral offers of compensation to the other MLS participants, and shall therefore specify on each listing filed with the service, the compensation being offered to the other MLS participants. Specifying the compensation on each listing is necessary, because the cooperating broker has the right to know what his compensation shall be prior to his endeavor to sell.* (Amended 11/96)

*The compensation specified on listings filed with the multiple listing service shall appear in one of two forms. The essential and appropriate requirement by an association multiple listing service is that the information to be published shall clearly inform the participants as to the compensation they will receive in cooperative transactions, unless advised otherwise by the listing broker, in writing, in advance of submitting an offer to purchase. The compensation specified on listings published by the MLS shall be shown in one of the following forms:

1. by showing a percentage of the gross selling price
2. by showing a definite dollar amount (Amended 11/95)

Note: MLSs may also, as a matter of local discretion, allow participants to offer cooperative compensation as a percentage of the net sales price, with the net sales price defined as the gross sales price minus buyer upgrades (new construction) and seller concessions (as defined by the MLS unless otherwise defined by state law or regulation). (Adopted 5/08)

VIII MEETINGS

Section 8.1 Meetings of MLS Committee

The MLS Committee shall meet for the transaction of its business at a time and place to be determined by the committee or the call of the Chair.

Section 8.2 Meetings of MLS Participants

The Committee may call meetings of the Participants in the MLS to be known as meetings of the MLS.

Section 8.3 Conducts Of The Meetings

The Chair shall preside at all meetings or, in their absence; a temporary Chair from the membership of the Committee shall be named by the Chair or, upon his/her failure to do so, by the Committee.

IX. ENFORCEMENT OF RULES OR DISPUTES

Section 9.1 Consideration Of Alleged Violations

The Committee shall give consideration to all written complaints from Participants having to do with violations of the Rules and Regulations.

Section 9.2 Violations of Rules and Regulations

If the alleged offense is a violation of the Association Bylaws or Rules and Regulations of the MLS and such charge does not include alleged violations of the Code of Ethics for MLS Participants, or request for arbitration, it may be administratively considered and determined by the MLS Committee or Association Board of Directors. If a violation is determined, the Committee or the Association Board of Directors may direct the imposition of sanction, provided the recipient of such sanction may

request a hearing before the Professional Standards Committee of the Association in accordance with the Bylaws and Rules and Regulations of the Association of REALTORS® within twenty (20) days following receipt of the Committee's decision. If the MLS Committee has a procedure established to conduct hearings, the decision of the MLS Committee tribunal may be appealed to the Board of Directors within twenty (20) days of the tribunal's decision being rendered. Alleged violations of the Code of Ethics for MLS Participants shall be referred to the Association's Grievance Committee for processing in accordance with the Professional Standards procedures of the Association. If the charge alleges a refusal to arbitrate, such charge shall be referred directly to the Association Board of Directors.

Section 9.3 Complaints of Unethical Conduct

All other complaints of unethical conduct shall be referred by the Committee to the Executive Vice President of the Association of REALTORS® for appropriate action in accordance with the Professional Standards procedures established in the Association's Bylaws.

X. CONFIDENTIALITY OF MLS INFORMATION

Section 10.1 Confidentiality of MLS Informations

Any information provided by the MLS to the Participants shall be considered official information of the MLS. Such information shall be considered confidential and exclusively for the use of Participants and real estate licensees affiliated with such Participants and those Participants who are licensed or certified by an appropriate state or regulatory agency to engage in property management or the appraisal of real property and licensed or certified appraisers affiliated with such Participants.

Section 10.2 MLS Not Responsible for Accuracy of Information

The information published and disseminated by the MLS is communicated verbatim, without change by the MLS, as entered into with the MLS by the Participant. The MLS does not verify such information provided and disclaims any responsibility for its accuracy. Each Participant agrees to hold the MLS harmless against any liability arising from any inaccuracy or inadequacy of the information such Participant provides.

ATTACHMENT C

BYLAWS OF THE COASTAL CAROLINAS ASSOCIATION OF REALTORS®, INC.

ARTICLE I - NAME

Section 1. Name. The name of this organization shall be the COASTAL CAROLINAS ASSOCIATION OF REALTORS®, INC. hereafter referred to as the "Association".

Section 2. REALTOR. Inclusion and retention of the Registered Collective Membership Mark REALTORS® in the name of the Association shall be governed by the Constitution and Bylaws of the NATIONAL ASSOCIATION OF REALTORS® as from time to time amended.

ARTICLE II - OBJECTIVES

The objectives of the Association are:

Section 1. To unite those engaged in the recognized branches of the real estate profession for the purpose of exerting a beneficial influence upon the profession and related interests.

Section 2. To promote and maintain high standards of conduct in the real estate profession as expressed in the Code of Ethics of the NATIONAL ASSOCIATION OF REALTORS®.

Section 3. To provide a unified medium for real estate owners and those engaged in the real estate profession whereby their interests may be safeguarded and advanced.

Section 4. To further the interests of home and other real property ownership.

Section 5. To unite those engaged in the real estate profession in this community with the SOUTH CAROLINA ASSOCIATION OF REALTORS® and the NATIONAL ASSOCIATION OF REALTORS®, thereby furthering their own objectives throughout the state and nation, and obtaining the benefits and privileges of the membership therein.

Section 6. To designate, for the benefit of the public, individuals authorized to use the terms REALTOR® and REALTORS® as licensed, prescribed, and controlled by the NATIONAL ASSOCIATION OF REALTORS®.

ARTICLE III - JURISDICTION

Section 1. The territorial jurisdiction of the Association as a member of the NATIONAL ASSOCIATION OF REALTORS® shall include: All within the counties of Georgetown and Horry, South Carolina (amended 12/08).

Section 2. Territorial Jurisdiction is defined to mean:

(a) The right and duty to control the use of the terms REALTOR® and REALTORS®, subject to the conditions set forth in these Bylaws and those of the NATIONAL ASSOCIATION OF REALTORS®, in return for which the Association agrees to protect and safeguard the property rights of the National Association in the terms.

ARTICLE IV - MEMBERSHIP

Section 1. There shall be seven (7) classes of Members as follows:

(a) **REALTOR® Members.** REALTOR® Members whether primary or secondary shall be:

Section 12. Certification by REALTOR®. "Designated" REALTOR® Members of the Association shall certify to the Association during the months of March and September, on a form provided by the Association, a complete listing of individuals licensed or certified in the REALTOR's® office(s) and shall designate a primary Board for each individual who holds membership. Designated REALTORS® shall also identify any non-member licensees in the REALTOR's® office(s) and if Designated REALTOR® dues have been paid to another Board based on said non-member licensees, the Designated REALTOR® shall be used for purposes of calculating dues under Article X, Section 2(a) of the Bylaws. "Designated" REALTOR® Members shall also notify the Association of any additional individual(s) licensed or certified with the firm(s) within thirty (30) days of the date of affiliation or severance of the individual.

Section 13. Legal Liability Training. Within two years of the date of membership, and every two years thereafter, each REALTOR® Member of the Association shall be required to demonstrate that they have completed a course of instruction on anti-trust laws, agency laws, civil rights laws or the REALTOR'S® Code of Ethics, its interpretation and meaning and/or the procedures related to its enforcement.

This requirement will be considered satisfied upon presentation of evidence that the member has completed an educational program conducted by another Member Board, the State Association of REALTORS®, the NATIONAL ASSOCIATION OF REALTORS® or any of its affiliated institutes, societies or councils, or any other recognized educational institution which, in the opinion of the Board of Directors, is an adequate substitute for the training programs conducted by the Association.

Failure to satisfy this requirement biennially will result in membership being suspended from the date it otherwise would be renewed until such time that the member provides evidence of completion of the aforementioned educational requirements.

NOTE: Any education requirement must comply with Interpretation No. 37 of Article I, Section 2, Bylaws, NATIONAL ASSOCIATION OF REALTORS®.

Section 14. Harassment. Any member of the Association may be reprimanded, placed on probation, suspended or expelled for harassment of an Association or MLS employee or Association Officer or Director after an investigation in accordance with the procedures of the Association. As used in this Section, harassment means any verbal or physical conduct including threatening or obscene language, unwelcome sexual advances, stalking, actions including strikes, shoves, kicks, or other similar physical contact, or threats to do the same, or any other conduct with the purpose or effect of unreasonably interfering with an individual's work performance by creating a hostile, intimidating or offensive work environment. The decision of the appropriate disciplinary action to be taken shall be made by the investigatory team comprised of the President, and President-elect and one member of the Board of Directors selected by the highest ranking officer not named in the complaint, upon consultation with legal counsel for the Association. Disciplinary action may include any sanction authorized in the association's Code of Ethics and Arbitration Manual. If the complaint names the President, President-Elect, they may not participate in the proceedings and shall be replaced by the Immediate Past President or alternatively, by another member of the Board of Directors selected by the highest ranking officer not named in the complaint. (Amended 5/08)

ARTICLE VII - PROFESSIONAL STANDARDS

Section 1. The responsibility of the Association and of Association Members relating to the enforcement of the Code of Ethics, the disciplining of Members, the mediation and arbitration of disputes, and the organization and procedures incident thereto, shall be governed by the Code of Ethics and Arbitration Manual of the NATIONAL ASSOCIATION OF REALTORS®, as amended from time to time, which is by this reference incorporated into these Bylaws, provided, however, that any provision deemed inconsistent with state law shall be deleted or amended to comply with state law.

Section 2. It shall be the duty and responsibility of every REALTOR® Member of this Association to abide by the Constitution and Bylaws and the Rules and Regulations of the Association, the Constitution and Bylaws of the State Association, the Constitution and Bylaws of the NATIONAL ASSOCIATION OF REALTORS®, and to abide by the Code of Ethics of the NATIONAL ASSOCIATION OF REALTORS®, including the duty to mediate and arbitrate controversies arising out of real estate transactions as specified by Article 17 of the Code of Ethics, and as further defined and in accordance with the procedures set forth in the Code of Ethics and Arbitration Manual of this Association as from time to time amended.

Section 3. The responsibility of the Association and Association members relating to the enforcement of the Code of Ethics, the disciplining of members, the mediation and arbitration of disputes, and the organization and procedures

incident thereto, shall be consistent with the cooperative professional standards enforcement agreement entered into by the Association, which by this reference is made a part of these Bylaws.

ARTICLE VIII - USE OF THE TERMS REALTOR® AND REALTORS®

Section 1. Use of the terms REALTOR® and REALTORS® by Members shall, at all times, be subject to the provisions of the Constitution and Bylaws of the NATIONAL ASSOCIATION OF REALTORS® and to the Rules and Regulations prescribed by its Board of Directors. The Association shall have the authority to control, jointly and in full cooperation with the NATIONAL ASSOCIATION OF REALTORS®, use of the terms within its jurisdiction. Any misuse of the terms by members is a violation of a membership duty and may subject members to disciplinary action by the Board of Directors after a hearing as provided for in the associations' Code of Ethics and Arbitration Manual. (Amended 06/06)

Section 2. REALTOR® Members of the Association shall have the privilege of using the terms REALTOR® and REALTORS® in connection with their places of business within South Carolina or a state contiguous thereto so long as they remain REALTOR® Members in good standing. No other class of Members shall have this privilege.

Section 3. A REALTOR® Member who is a principal of a real estate firm, partnership, or corporation may use the terms REALTOR® and REALTORS® only if all the principals of such firm, partnership, or corporation who are actively engaged in the real estate profession within the state or a state contiguous thereto are REALTOR® Members of the Association or Institute Affiliate Members as described in Section 1(b) of Article IV.

(a) In the case of a REALTOR® member who is a principal of a real estate firm, partnership, or corporation whose business activity is substantially all commercial, the right to use the term REALTOR® or REALTORS® shall be limited to office locations in which a principal, partner, corporate officer, or branch office manager of the firm, partnership, or corporation holds REALTOR® membership. If a firm, partnership, or corporation operates additional places of business in which no principal, partner, corporate officer, or branch office manager holds REALTOR membership, the term REALTOR® or REALTORS® may not be used in any reference to those additional places of business. (Amended 1/01)

Section 4. Institute Affiliate Members shall not use the terms REALTOR® or REALTORS®, nor the imprint of the emblem seal of the NATIONAL ASSOCIATION OF REALTORS®.

ARTICLE IX - STATE AND NATIONAL MEMBERSHIPS

Section 1. The Association shall be a Member of the NATIONAL ASSOCIATION OF REALTORS® and the SOUTH CAROLINA ASSOCIATION OF REALTORS®. By reason of the Association's Membership, each REALTOR® Member of the Member Association shall be entitled to membership in the NATIONAL ASSOCIATION OF REALTORS® and the SOUTH CAROLINA ASSOCIATION OF REALTORS® without further payment of dues. The Association shall continue as a Member of the State and National Associations, unless by a majority vote of all of its REALTOR® Members, a decision is made to withdraw, in which case the State and National Associations shall be notified at least one month in advance of the date designated for the termination of such membership.

Section 2. The Association recognizes the exclusive property rights of the NATIONAL ASSOCIATION OF REALTORS® in the terms REALTOR® and REALTORS®. The Association shall discontinue use of the terms in any form in its name, upon ceasing to be a Member of the National Association, or upon its determination by the Board of Directors of the National Association that it has violated the conditions imposed upon the terms.

Section 3. The Association adopts the Code of Ethics of the NATIONAL ASSOCIATION OF REALTORS® and agrees to enforce the Code among its REALTOR Members. The Association and all of its Members agree to abide by the Constitution, Bylaws, Rules and Regulations, and policies of the NATIONAL ASSOCIATION and the SOUTH CAROLINA ASSOCIATION OF REALTORS®.

ARTICLE X - DUES AND ASSESSMENTS

Section 1. Application Fee. The Board of Directors may adopt an application fee for REALTOR® Membership in a reasonable amount, not exceeding three times the amount of the annual dues for REALTOR® Membership, which shall be required to accompany each application for REALTOR® Membership and which shall become the property of the

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STATE OF SOUTH CAROLINA

COUNTY OF HORRY

)
)
)

AFFIDAVIT OF JANE ZHENG

The undersigned, being duly sworn, hereby states and affirms as follows under penalty of perjury:

1. I am Buyer's agent for the 13 golf course transaction ("Transaction"), the commission for which is the subject of this dispute.
2. Mike Cousins represented no one in this Transaction, either in writing or orally.

Furthermore, Mike Cousins had no knowledge and had zero involvement in any stage of this Transaction. However, to everyone's surprise, Mike Cousins sued everyone involved in this Transaction.
3. Mike Cousins lost his lawsuit in Court in January, 2016.
4. Mike Cousin had no agreement with me to split any commission in this Transaction, either in writing or orally. Specifically, because Mike Cousins did not represent either the Buyer or Seller, there could not be a commission split agreement. A Commission was never discussed in any shape or form between me and Mike Cousins.
5. I have never received any text message, email, or phone call from Mike Cousins about splitting the commission for this Transaction. Mike Cousins' claim of me not responding to his calls or email about that matter is incorrect. Please ask Mike Cousins to show the evidence of his email, text message, or phone calls about this matter. The first time I heard about Mike Cousins' claim for a commission on this Transaction was the lawsuit he sent to the closing attorney, and it was a complete shock to me.

6. Mike Cousins was not the person who introduced Buyer or Buyer's agent to Seller in this Transaction. Seller's representative, Bob Mauragas, already knew me. I sent several requests (email and/or verbally) to Mr. Mauragas on potential golf courses for sale, and his response was that he would let me know if anything became available.
7. The only transaction Mike Cousins was involved in between Seller and Buyer was the Aberdeen golf course transaction, which closed in December, 2014. It was Seller's choice to let Mike Cousins represent Seller in that transaction, even though Seller knew me as Buyer's agent several months prior. In that single transaction when Mike Cousins represented Seller, Mike Cousins told me at the beginning the commission was 6%, and I would get 3% as Buyer's agent. However, near the end of negotiations, Mike Cousins told me Seller was only willing to pay a 3% commission, which would be his commission, and I had to get my commission from Buyer. Mike Cousins did not offer to split the commission then. It is important to note that Mike Cousins' involvement was clearly spelled out in writing in that contract between the parties.
8. It was Seller's decision not to have Mike Cousins represent it as Seller's agent on this Transaction. Seller directly approached me, Buyer's agent, on this Transaction. Seller clearly told me it did not have an agent.
9. The only involvement Mike Cousins had related to this Transaction was that he mentioned to me that the Long Bay golf course (one of the 13 golf courses in this Transaction) was for sale, and gave me the asking price. Mr. Cousins then falsely informed me several times that he was Seller's agent. Mr. Cousins claimed he had

Seller's agency agreement in writing, and that Seller only wanted to deal with one agent so it was better for him to be the only agent in the transaction.

10. The Long Bay golf course deal didn't go anywhere beyond Mike Cousins presenting me with the asking price. Neither Buyer nor Seller was interested in buying or selling the Long Bay golf course alone. Therefore, Mr. Cousins' misrepresentations were not caught or addressed at that time—no one knew anything about his alleged commission claim until he filed the lawsuit right before this Transaction closed. Mr. Cousins had absolutely nothing to do with the showing, negotiating of the contracts, or any other detail of this Transaction whatsoever.

11. The Panel's decision was shocking to me, Mr. Waldo, and the Buyer and Seller. We would like an explanation from the South Carolina Real Estate Commission with supporting rules, regulations, and/or laws on the Panel's decision. Should you be entitled to a commission by just telling someone that some property is for sale, but there is never a representation, a contract or a closing? Should you be entitled a commission on all future deals just because you made one deal between Buyer and Seller, even though you have no knowledge, no representation and no involvement on the future deals? Can a Realtor claim to be a seller's agent without seller's consent? Can a Realtor automatically get a 50% commission from a buyer's agent when the seller refuses to pay you, both buyer and seller state you had nothing to do with the transaction, and there was no discussion or any agreement on splitting commission with the buyer's agent? If this is the case, all Realtors would be able to claim a commission by simply telling people what properties are possibly for sale, without having any involvement in the deal, and all

Realtors will be subjected to many more attacks, and there will be many more lawsuits in the future. I would have at least a handful people I can sue for commission, and I think this industry would be chaotic in dealing with all types of claims and lawsuits. The South Carolina law that requires written agency agreements in order to claim a commission protects Realtors from this exact situation.

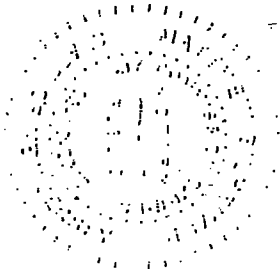
 4/18/2016
Jane Zheng

SWORN to before me this 18th
day of April, 2016.

 (L.S.)

Notary Public for Morris County

My Commission Expires: 3/16/2017



From: Austin Smallwood <austin@screaltors.org>
Sent: Wednesday, April 27, 2016 11:05 AM
To: Zayicek, Douglas M.
Cc: Byron King
Subject: SCR Professional Standards Policy Regarding Court Reporters

As we discussed in our earlier phone call due to the confidentiality of our hearings and entire professional standards process no outside recording or transcription is allowed. Please see below the applicable portions of our SCR Professional Standards Policy.

A. All Professional Standards Panel hearings shall be recorded and the recording retained until after the prescribed date for any appeal or procedural review or ratification by the Executive Committee. Only SCR staff may record the proceedings.

Austin Smallwood, Esq.
Staff Attorney
South Carolina REALTORS®
3780 Fernandina Road
Columbia, SC 29210
Phone: (803) 807-2094
austin@screaltors.org

[illegible]

Zayicek, Douglas M.

From: Zayicek, Douglas M.
Sent: Wednesday, April 27, 2016 11:16 AM
To: 'Austin Smallwood'
Cc: Byron King
Subject: RE: SCR Professional Standards Policy Regarding Court Reporters

Thanks. As indicated, I will have her there, and you can state on the record that she is not allowed to be present.

My understanding is that you do not provide a transcript. However, a transcript will be necessary should there be an appeal.

Be happy to work with you, direct her to not provide copies to anyone other than you or the attorneys, etc.

Thanks.



Douglas M. Zayicek
Bellamy, Rutenberg, Copeland, Epps,
Gravely & Bowers, P.A.
P.O. Box 357
Myrtle Beach, SC 29578
General: (843) 448-2400
Facsimile: (843) 448-3022
www.BellamyLaw.com

From: Austin Smallwood [<mailto:austin@screaltors.org>]
Sent: Wednesday, April 27, 2016 11:05 AM
To: Zayicek, Douglas M.
Cc: Byron King
Subject: SCR Professional Standards Policy Regarding Court Reporters

Mr. Zayicek,

As we discussed in our earlier phone call due to the confidentiality of our hearings and entire professional standards process no outside recording or transcription is allowed. Please see below the applicable portions of our SCR Professional Standards Policy.

IV. RECORDING OF HEARINGS

A. All Professional Standards Panel hearings shall be recorded and the recording retained until after the prescribed date for any appeal or procedural review or ratification by the Executive Committee. Only SCR staff may record the proceedings.

D. Recordings or transcripts from ethics or arbitration hearings are to be used only for the purpose of appeals, rehearing, or pursuant to any application to change award, application to confirm award, application for vacate of award or application to modification award, pursuant to the Uniform arbitration Act, §§ 15-48-100, 15-48-



South Carolina REALTORS®
3780 Fernandina Road, Columbia, SC 29210

Outline of Procedure for Arbitration Hearing

(To be mailed in advance to both parties)

Postponement of hearing: Postponement may be granted if there are extenuating circumstances. Requests for postponement must be made in writing. Permission can be given by Chairperson. All parties shall be advised of the date of the rescheduled hearing.

Recording the hearing: The Association shall, and any party may, at the party's expense, have a court reporter present or may tape record the proceeding and, if transcribed, shall present a transcript to the Secretary. If the Association utilizes a court reporter in lieu of tape recording, the parties may not be prohibited from making their own tape recording.

Method and objective of procedure: The Hearing Panel shall not be bound by the rules of evidence applicable in courts of law, but shall afford all parties a full opportunity to be heard, present witnesses, and offer evidence, subject to its judgment as to relevance.

Due process procedure: The hearing procedures will be:

1. Opening statement by Chairperson - Cite authority to hear case and explain reason for hearing.
2. The arbitration request will be read into the record.
3. The testimony of all parties and witnesses will be sworn or affirmed. All witnesses will be excused from the hearing except while testifying.
4. The parties will be given an opportunity to present evidence and testimony on their behalf and they may call witnesses.
5. The parties and their legal counsel will be afforded an opportunity to examine and cross-examine all witnesses and parties.
6. The panel members may ask questions at any time during the proceedings.
7. The Chairperson may exclude any question ruled to be irrelevant or argumentative.
8. Each side may make a closing statement. The complainant will make the first closing statement and the respondent will make the final closing statement.
9. Adjournment of hearing.
10. The Hearing Panel will go into executive session to decide the case.

Award in arbitration hearing: The decision of the Hearing Panel in an arbitration proceeding shall be reduced to writing (setting forth only the amount of the award by the panel) and signed by the arbitrators or a majority of them, and a copy shall be furnished to each of the parties to the arbitration. A copy also shall be filed with the Secretary of the Association.

Use of legal counsel: A party may be represented in any hearing by legal counsel. However, parties may not refuse to directly respond to requests for information or questions addressed to them by members of the panel except on grounds of self-incrimination, or on other grounds deemed by the panel to be appropriate. In this connection, the panel need not accept the statements of counsel as being the statements of counsel's client if the panel desires direct testimony. Parties shall be held responsible for the conduct of their counsel. Any effort by counsel to harass, intimidate, coerce, or confuse the panel members or any party to the proceedings, or any action by counsel which is viewed by the panel as disruptive of the proceedings, shall be grounds for exclusion of counsel. The decision to exclude counsel for any of the foregoing reasons shall be the result of a majority vote of the members of the panel and shall be non-appealable. In the event counsel is excluded, the hearing shall be postponed to a date certain not less than fifteen (15) nor more than thirty (30) days from date of adjournment to enable the party to obtain alternate counsel provided, however, that such postponement shall not be authorized if it appears to members of the panel that the action of counsel has been undertaken by counsel to obtain a postponement or delay of the hearing.



CONFIDENTIAL

May 2, 2016

RE: REALTOR® Andrew Waldo vs. REALTOR® Michael Cousins

Dear REALTOR® Waldo,

Enclosed is a copy of the Decision of the Procedural Review Hearing Tribunal rendered on Monday, May 2, 2016, at the offices of the South Carolina Association of REALTORS® (SCR). The decision of the SCR Board of Directors serving on the Tribunal is to affirm the award of the original SCR Arbitration Hearing Panel. According to the *Code of Ethics and Arbitration Manual*, the decision of the Tribunal shall be final and binding and shall not be subject to further review by the SCR Board of Directors.

Also enclosed is the original Award of Arbitrators. This Award is final upon receipt of this notification. The non-prevailing party must, within 10 days of receipt of this notification, either pay the award to the parties named in the award, or alternatively deliver funds to SCR for deposit into the SCR trust account for prompt disbursement to the prevailing party. Failure to satisfy the award or to deposit the funds within this time period may be considered a violation of membership duty.

Sincerely,

A handwritten signature in cursive script that reads 'Lindsey Davidson'.

Lindsey Davidson
Professional Standards Administrator

Enclosure: Decision of the Procedural Review Hearing Tribunal
Award of Arbitrators

c: David Kent, SCR President
Nick Kremydas, SCR CEO
Laura Crowther, AE, Coastal Carolinas Association of REALTORS®
REALTOR® Michael Cousins, Respondent

STATE OF SOUTH CAROLINA
COUNTY OF HORRY

IN THE COURT OF COMMON PLEAS

Andrew Waldo,
Plaintiff,

Case No. 2016-CP-26-01498

vs.

SECOND AFFIDAVIT OF LINDSEY
DAVIDSON

Michael Cousins and South Carolina
Association of REALTORS®,
Defendants.

PERSONALLY APPEARED BEFORE ME, **Lindsey Davidson**, who, after being duly sworn, deposes and states the following:

1. I am Lindsey Davidson and I am Director of Member Services for the South Carolina Association of REALTORS® ("Association").

2. I am over 21 years of age and have personal knowledge of the matters contained herein.

3. This is my second affidavit made in this case.

4. As part of my duties as Director of Member Services, I maintain records regarding our members and any arbitration disputes they may have. I also make audio recordings of arbitration hearings.

5. On February 2, 2016, the Association held an arbitration hearing in this matter. I have reviewed the audio of that hearing.

6. At 2:26:31 on the audio recording, the Chairman asked whether "Each of you feel that this hearing has been conducted fairly? Realtor Waldo?"

7. Waldo responded "I do believe that the agency does play a part in this discussion. Other than that, I feel like it was, but I feel that is a large part of what we do as a real estate agency, and being a part of National Association of Realtors, and following the Ethics and Standards of Practices. So, in my opinion that is a large part of it. *However, I do feel that we've been done... we've had a fair hearing.*" (emphasis added).

8. At 2:27:24 in the audio recording, the Chairman asked, "If each of you had an adequate opportunity to testify, present evidence and witnesses, and conduct cross-examination? Realtor Waldo?" In response, Waldo said "Yes."

FURTHER AFFIANT SAYETH NAUGHT.

Lindsey Davidson
Lindsey Davidson

SWORN TO BEFORE ME

This 15th day of June, 2016.

Jessica Pruitt
Notary Public for South Carolina

My Commission Expires: 02/11/26