THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Court of Common Pleas

Cynthia Graham Howe, Master-In-Equity

APPELLANT CASE NO. 2018-001590

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.....Appellants

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FINAL BRIEF OF APPELLANTS MICHAEL COUSINS; FOUNDERS FIVE, LLC D/B/A AND SPERRY VAN NESS FOUNDERS GROUP

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STATEMENT OF THE CASE

Andrew Waldo submitted an application to the Coastal Carolinas Association of REALTORS®. Affidavit of Heather Tenney, Attachment A and ¶7, Electronic Application. (R.pp. 388-391). 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). (R.pp. 388-391; pp. 393-395; 398-399).

The NAR Code of Ethics requires arbitration between realtors in any dispute arising out of their real-estate practice. Affidavit of Lindsey Davidson, Attachment A (Relevant portions of NAR Code of Ethics) and ¶ 6. (R.pp. 366-367) . Likewise, the Bylaws and Rules of both the Association and the Coastal Carolinas Association require the same. Attachment B (Relevant portion of Association Bylaws); and ¶ 7. (R.pp. 375-377).

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. ¶ 8 and Attachment C (Waldo Request for Arbitration). (R.pp. 64-65). 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. A full hearing was held before a panel of five (5) arbitrators.

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. Second Affidavit of Lindsey Davidson, ¶¶ 6 and 7 (R.pp. 409-410).

At Waldo's request, the Association scheduled an appellate review of the current arbitration decision from March 30, 2016. ¶¶ 9 and 10, Attachment D (Waldo Request for Review) and Attachment E (Hearing Notice). (R.pp. 67-68; p. 379). On May 2, 2016, the Procedural Review Hearing Tribunal affirmed the award, concluding the arbitration process. (R.p. 19).

Cousins moved to confirm the award (R.p.80). Waldo appealed to Circuit Court, seeking a reversal of the arbitration award. (R.pp. 83-87). The matter was referred to the Master-In-Equity. (R.pp. 34-35). The Master conducted a hearing and issued an order reversing the ruling of the arbitration panel. (R.pp. 37-57). Cousins appealed the Master's Order. (R.pp. 165-166).

ARGUMENT

I. THE CIRCUIT COURT ERRED IN REVERSING THE ARBITRATION AWARD.

A. The parties agreed that there would be no appeal from arbitration.

Both Waldo and Cousins and their respective realty companies agreed to abide by the arbitration award and to comply with it promptly. The parties agreed that the arbitration award is not appealable. In his request and agreement to arbitrate, Waldo specifically agreed under Paragraph 5 as follows:

> I request and consent to arbitration through the board in accordance with its code of ethics and arbitration manual... 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. [Emphasis added.]

Arbitration is a matter of contract between parties. As a member of the South Carolina Association of Realtors, Waldo agreed in advance to arbitrate any disputes over commissions with other realtors before the South Carolina Association of Realtors. Not only did Waldo agree to arbitrate prior to any dispute arising, but Waldo also initiated this particular arbitration thus specifically consenting to the rules of the South Carolina Association of Realtors and their arbitration process. On his own initiative, Waldo filed a request and agreement to arbitration with the South Carolina Association of Realtors. He filled out the form on his own and voluntarily consented to the rules. Therefore, he is contractually bound by the results of the South Carolina Association of Realtors and has absolutely no right of appeal to the Circuit Court. His request specifically states that "I request and consent to arbitration... and I agree to abide by the arbitration award and to comply with it promptly." The rules of arbitration of the South Carolina Association of Realtors do not provide for Appellate review in the Circuit Courts of South Carolina. The Code of Ethics and Standards of Practice of the National Association of Realtors states under Article 17, in pertinent part, as follows:

> If the dispute is not resolved through mediation, or the mediation is not required, realtors shall submit the dispute to arbitration in accordance with the policies of the board rather than litigate the matter...
>
> The obligation to participate in mediation and arbitration contemplated by this article include the obligation of realtors (principals) to cause their firms to mediate and arbitrate and be bound by any resulting agreement or award.

Article 17 makes no provision for any appeal and requires the participants to be bound by any resulting award. The National Association of Realtors, Code of Ethics and Arbitration

Manual which is used by the South Carolina Association of Realtors, states "Arbitration awards, unlike ethics decisions, are not subject to appeal and do not include findings of fact or rationale." (Emphasis added) NAR Code of Ethics and Arbitration Manual, Appendix IV to Part Ten, (R.p. 600).

Appendix V to Part Ten under (33) The Award at Page 174 of the Manual, (R.p. 604), states that "The award shall be in writing and signed by the arbitrators or a majority of them, and shall state only the amount of the award, and when transmitted to each of the parties shall not be subject to review or appeal." (Emphasis added.) The terms of arbitration between the parties agreed to in advance and in writing, specifically elected by Waldo, state quite specifically that the award is not subject to review or appeal. Subsection 33 goes on to state, "A party may appeal to the Board of Directors only on the basis of alleged irregularity(ies) of the proceeding as may have deprived the party of fundamental due process." (R.p. 604). Waldo availed himself of this narrow right of appeal to the Board of Directors. He was heard in full by the Board of Directors and the Board of Directors affirmed the decision of the arbitrators. There is no further right of appeal past the Board of Directors.

The record contains the entire manual on arbitration used by the South Carolina Association of Realtors. This manual is entitled National Association of Realtor's Code of Ethics and Arbitration Manual. It was made a part of the record under the Affidavit of Lindsey Davidson, Director of Member Services for the South Carolina Association of Realtors. This manual was adopted by the South Carolina Association of Realtors as its arbitration manual. The entire manual has been submitted to the Court in the record, not only for the contents of the manual but also for the sheer volume of the manual and to show the Court that the South Carolina Association of Realtors has a comprehensive system of rules and guidelines for

arbitration. The manual is a staggering 358 pages in length. Both Waldo and Cousins agreed to be bound by these rules of arbitration. The agreement to be bound took place prior to any dispute arising by virtue of the fact that they are members of the South Carolina Association of Realtors and also after the dispute arose because Waldo specifically requested arbitration and signed the agreement to be bound. In this sense, the finality of the arbitration award is much more certain and concrete than might exist in other arbitration agreements entered into prior to a dispute arising. The benefit of the finality of the arbitration decision is not only for the benefit of Cousins who responded to the arbitration but also for Waldo who initiated the arbitration. If the arbitration panel had found in Waldo's favor and denied any relief to Cousins, this decision would be final and not appealable to the Circuit Courts under any circumstances. If that had occurred, certainly Waldo would have been arguing the finality of the arbitration agreement and he would be entitled to that benefit of the bargain. Likewise, Cousins is also entitled to the benefit of the bargain for agreeing to arbitrate and to be bound by the arbitration panel's decision. The exhaustive and comprehensive rules of arbitration as adopted by the South Carolina Association of Realtors is for the benefit of all realtors in this state. If the finality of these decisions is disregarded by the Circuit Court and by the Appellate Courts of South Carolina, then the purposes of arbitration (including efficiency, speed, and predictability) would be seriously undercut. The Circuit Court and Appellate Courts of this state should give deference to the parties informed decision to agree to arbitrate and to the finality of that decision. To do otherwise would open the floodgates of Appellate litigation to all arbitration matters decided by the South Carolina Association of Realtors. This would certainly defeat the purposes of arbitration and result in an even heavier workload for the Circuit Courts and Appellate Courts of this state.

B. **Even if an appeal is taken, the Standard of Review is very narrow.**

As stated above, there is no standard of review because the decision of the arbitration panel is not appealable. Therefore, the award cannot be reviewed by the Circuit Court under any set of circumstances. If this Court determines for some reason, that the arbitration award is reviewable, then the only review standard offered is "manifest disregard of the law."

The standard of review from an arbitration award is the most stringent standard of review of any appeal. 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.

In the case of Batten v. Howell, 300 S.C. 545, 389 S.E.2d 170 (Ct. App. 1990), 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.")

C. Waldo has failed to show a manifest disregard of the law.

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'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. Second Affidavit of Lindsey Davidson, ¶¶ 6 and 7, (R.pp. 409-410).

Waldo 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).

D. There is no record to support Waldo's contention of the absence of a written agreement between Waldo and cousins.

Waldo appeared at the arbitration hearing without counsel. Although he had been represented by the Bellamy Law Firm previously and is being represented by the Bellamy Law Firm on this appeal, he elected not to have an attorney present at the arbitration hearing.

The arbitration rules of the South Carolina Association of Realtors do not provide for recordings or any official record to be made. Furthermore, the rules specifically state that no explanation will be given with the award. (R.p. 600). Therefore, the arbitration hearing was held with no record, according to the rules as agreed between the parties and there is nothing in the written award signifying any rationale behind the award. Because of the simplicity of an arbitration and the necessity of streamlining the process to be efficient, our Courts have recognized that there is no requirement that the arbitrators give reasons for their decision. See Batten, Id. at 549, 389 S.E.2d at 172. Likewise, there is no requirement that a record be made in any arbitration proceeding. The rules are agreed to in advance by the parties and they are contractually bound by those rules. The rules of arbitration in this particular case do not provide for a record of the arbitration.

Therefore, Waldo's contention that there was no written documentation of an agreement

between the parties is without any support. There is no record of such a contention and it is not contained in the award of the arbitrators. Waldo's entire argument regarding manifest disregard of the law hinges on his claim that there is no evidence of a written contract. It is true that the Circuit Court found that there was no written contract to pay a commission as between Cousins as a broker and the original seller of the golf course. But this decision does not address any agreements between realtors to share in a commission. The decision also does not address the numerous emails between and among the realtors nor does it address the prior dealings between the realtors who shared commissions with the same seller on previous golf course property sales. These matters were presented to the arbitration panel by Cousins in his initial "Response and Agreement to Arbitrate" (R.p. 66; pp. 323-328) and the attachments thereto which include numerous emails between and among the realtors. Based upon Cousins' response and agreement to arbitrate and the attachments thereto, there was ample evidence before the arbitration panel that Cousins was the "procuring cause" of the transaction and that there were emails in writing evidencing this procuring cause. None of these issues were addressed in the decision of the Circuit Court which dealt only with the relationship between Cousins and the seller. The bottom line is that Waldo cannot produce any record to support his primary contention that there was no evidence of a written agreement between the realtors. In fact, the documentation and emails submitted by Cousins to the arbitration panel suggest just the opposite.

Without a record to establish Waldo's primary factual contention, there is no basis for this Court to conclude or to even consider the question of whether the arbitration panel manifestly disregarded the law.

E. 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 in 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.

F. Michael Cousins was neither a dual agent nor a subagent with Andrew Waldo.

The Master's Order incorrectly applies the standards of the dual agency and/or co-broker to the relationship between Waldo and Cousins. 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.

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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.

The Master is correct that South Carolina statutory law requires written agreements between buyer/seller and an agent. It is also correct that when buyer/seller engages a dual agent or subagent, a written agreement is also required. But these statements continue 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 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.

CONCLUSION

The Circuit court erred in overturning the arbitration award. This Court should overturn the Circuit Court and reinstate and confirm the arbitration award.

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CERTIFICATE OF COUNSEL

The undersigned certifies that Appellant's Final Brief complies with Rule 211(b), SCACR.

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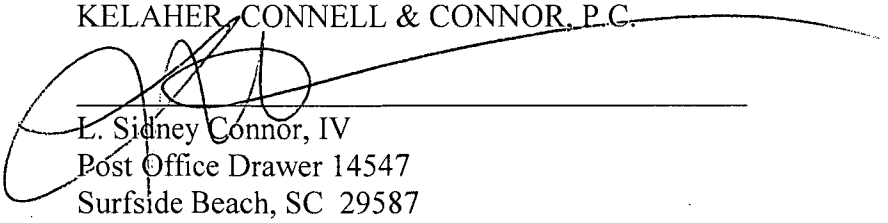

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