THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM HORRY COUNTY
Circuit Court
Cynthia Graham Howe, Master-in-Equity

Appellate Case No. 2018-001590

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

v.

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

RESPONSE OF SOUTH CAROLINA ASSOICATION OF REALTORS® TO BRIEF OF NATIONAL ASSOCIATION OF REALTORS® AS *AMICUS CURIAE*

Marcus A. Manos, SC Bar #011876
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
(803) 771-8900
MManos@nexsenpruet.com

Attorneys for Appellant South Carolina Association of REALTORS®

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Appellant South Carolina Association of REALTORS® ("Appellant"), adopts the Brief of National Association of REALTORS® (NAR), as *Amicus Curiae,* pursuant to Rule 208(b)(6), and further responds, as follows:

STANDARD OF REVIEW

"When a dispute is submitted to arbitration, the arbitrator determines questions of both law and fact. Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award. An award will be *only* vacated under narrow, limited circumstances." *Pittman Mortgage Co., Inc. v. Edwards*, 327 S.C. 72, 75-76, 488 S.E.2d 335, 337 (1997) (emphasis added). "An arbitrator's award may be vacated when the arbitrator exceeds his or her powers and/or manifestly disregards or perversely misconstrues the law." *Gissel v. Hart,* 382 S.C. 235, 676 S.E.2d 320 (2009) citing, *Trident Technical College v. Lucas & Stubbs, Ltd.,* 286 S.C. 98, 333 S.E.2d 864 (Ct. App. 2000); S.C. Code Ann. § 15-48-130(a). In order for a court to vacate an arbitration award on the basis of an arbiter's manifest disregard of the law, the law ignored by the arbiter must be well defined, explicit and clearly applicable. *Id.* A "clearly erroneous interpretation of the contract cannot be disturbed." Rather, jurisprudence requires something beyond a mere error in construing or applying the law. *Id.* at 108, 333 S.E.2d at 787. "An arbitrator's 'manifest disregard of the law,' as a basis for vacating an arbitration award occurs when the arbitrator knew of a governing legal principle yet refused to apply it." *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009), citing, *Weimer v. Jones*, 364 S.C. 78, 610 S.E.2d 850 (Ct. App. 2005). "Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award." *Pittman, at 76, 488 S.E.2d at 337.*

ARGUMENT

Unquestionably, arbitration is favored as a method for resolving disputes in South Carolina. See, *Pittman*, *supra*; citing *Batten v. Howell,* 300 S.C. 545, 389 S.E.2d 170 (Ct. App.1990). It is likewise without question that "[a]rbitration is not litigation carried on by other means, but is an alternative means for resolving disputes without the cost and delay of a lawsuit." *Lauro v. Visnapuu*, 351 S.C. 507, 516, 570 S.E.2d 551, 555 (Ct. App. 2002). Here, the arbitration process at issue is a long standing and time tested process. It is this process, not support for either party in the outcome of their dispute that motivates Appellant to stand for its defense.[1] The question properly before this Court is whether the arbitration panel exceeded their powers or manifestly disregarded or perversely misconstrued the law. *Gissel*, at 241, 676 S.E.2d at 323. To vacate the award at issue based upon the master-in-equity's opinion, which exceeds the permissible scope of review and is founded on errors of law, would be an initial step toward eviscerating the dispute resolution tenets established by both Appellant and NAR for their members and successfully used for many decades.

Respondent, in his response to NAR's *amicus* brief, outrageously suggests NAR and the other associations of REALTORS® have no concern for their members or justice. The contrary can be shown from the research and briefing in this case. Realtor® associations across the United States provide a quick, inexpensive and fundamentally fair arbitration process for real estate professionals that are tested, tried and true over the decades and no party sites a single court decision criticizing the program as

[1] It is noteworthy that the parties' examination of South Carolina jurisprudence reveals no opinion in which the arbitration process required by Respondent's contract with the Association met judicial disfavor.

fundamentally flawed. Respondent simply does not wish to abide by the process to which he agreed because he did not get the result he wanted.

I. NAR Appropriately Establishes the Reviewing Court's Error in Vacating the Arbitration Award and Substituting its Judgment for that of the Arbiters.

NAR credibly recounts the deference to arbitration historically exercised by both South Carolina and tribunals construing the Federation Arbitration Act 9 U.S.C. §§ 1-10 (FAA).

First, South Carolina has clearly and repeatedly manifested its favor of arbitration in the resolution of disputes. *See* S.C. Code Ann. § 15-47-10; *see also*, *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008), citing *Stokes v. Metropolitan Life Ins. Co.*, 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002), *and Tritech Elec. Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 399, 540 S.E.2d 864, 865 (Ct. App. 2000). So strong is South Carolina's support of arbitration that our courts have found "[I]f an issue is within the scope of the arbitration agreement, the court need not review the merits of the decision." *Harris v. Bennett*, 332 S.C. 238, 243, 503 S.E.2d 782, 785 (Ct. App. 1998). South Carolina courts further favor arbitration results by holding factual and legal errors by arbiters do not establish abuse of the arbiter's powers, and a review of the merits of the arbiter's decision is not required so long as the arbiter does not exceed the contractual grant of powers. *See Pittman, supra* at 76. Where statutory grounds are lacking, an arbitration award will be vacated *only upon the ground of 'manifest disregard or perverse misconstruction of the law.' See Weimer v. Jones*, 364 S.C. 78, 80, 610 S.E.2d 850, 852 (Ct. App. 2002) (emphasis added). In order to establish 'manifest disregard or perverse misconstruction of the law,' the law purportedly jettisoned by the arbiter must be well-defined, explicit and clearly applicable; something significantly

more than an error in construction or application of the law. *See Gissel*, 382 S.C. at 241, 676 S.E.2d at 323.

In the case *sub judice,* NAR correctly brings to the forefront Respondent's confusion of the issue at bar; this is not a case involving a dispute between a real estate agent and a party to a real estate transaction. Instead, this matter arises from a dispute between two real estate brokers, both of whom contracted to arbitrate such disputes and both of whom agreed to and participated in the underlying arbitration process. Disliking the conclusion reached, however, Respondent attacks the process with weapons of confusion and distraction. Appellant SCAR reiterates reliance upon *Batten v. Howell*, 300 S.C. 545, 389 S.E.2d 170 (Ct. App. 1990).

Appellant adopts NAR's argument, in full, as to the favor or arbitration of disputes by federal forums and NAR's reliance thereon in its membership requirements.

II. NAR Appropriately Establishes That the Arbiters were not Required to Issue Detailed Findings of Fact and Conclusions of Law.

Respondent is bound by the Arbitration Rules he agreed to follow. Appellant has adopted the Rules of NAR. NAR's arbitration procedure does not permit findings of fact by the arbiter. If the arbiter's factual inferences and legal conclusions upon which an award is founded **are "barely colorable," it should be confirmed**. *See Batten at 549, 389 S.E.2d at 172 (emphasis added).* See also, *MCI Constr., LLC v. City of Greensboro*, 610 F.3d 849 (4th Cir. 2010). South Carolina has long held that arbitration is a matter of contract between parties. *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 667 S.E.2d 1 (Ct. App. 2008), *citing Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). Courts are limited to the interpretation of the contractual terms made by the parties, regardless of its "wisdom or folly, apparent

unreasonableness, or failure of the parties to guard their rights carefully." *See Sphere Drake Ins. Co. v. Litchfield*, 313 S.C. 471, 473, 438 S.E.2d 275, 277 (Ct. App. 1993).[2]

As succinctly set forth by NAR, to allow brokers to circumvent NAR's well-established and time-tested rules for the arbitration of disputes would serve only to provide a backdrop for the denigration of the very purpose of such rules – the expedient and inexpensive resolution of disputes. Moreover, such circumvention would serve to denigrate South Carolina's adherence to the well-founded philosophy that a contract must be construed according to the terms the parties have used, without altering a contract by construction or rewriting the terms for the parties. *See C.A.N. Enterprises, Inc. v. South Carolina Health and Human Services Finance Comm'n,* 296 S.C. 373, 373 S.E.2d 584 (1988).

CONCLUSION

NAR, as *amicus*, presents a well-reasoned and supported argument that Respondent's attempt to overturn the arbiters' award will have sweeping implications, if allowed by this Court. Specifically, setting aside the arbiter's award would effectively negate NAR's arbitration rules to which thousands of its members have agreed, and which have been responsible for consistent, expedient and predictable dispute resolution. Perhaps even more far reaching is the effect upon South Carolina jurisprudence. Overturning the arbiters' award would serve to potentially negate the historical respect for contract terms reached between parties and thereby serve as a springboard for countless attempts to seek legal re-litigation of arbitrations.

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[2] Respondent's efforts to have the Court rewrite the contractual terms requiring arbitration are thinly veiled; in fact, Respondent admits he believed the arbitration process to be fair, *until* he received the award adverse to his interest. See, 6/25/19 Br. Resp. at 7.

For the foregoing reasons, as well as those included in its final Brief of Appellant, Reply Brief, and those articulated in the *amicus* brief of NAR, Appellant South Carolina Association of REALTORS® prays that this Court reverse the Master-in-Equity and confirm the arbitration award. Appellant believes oral argument would be helpful for the Court and requests same.

Respectfully submitted,

Marcus A. Manos, SC Bar #11876
NEXSEN PRUET, LLC
1230 Main Street, Suite 700 (29201)
Post Office Drawer 2426
Columbia, South Carolina 29202
(803) 771-8900
mmanos@nexsenpruet.com

Attorneys for Appellant South Carolina Association of REALTORS®

December 2, 2020

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PROOF OF SERVICE

The undersigned hereby certifies that a copy of the **RESPONSE OF SOUTH CAROLINA ASSOCIATION OF REALTORS® TO BRIEF OF NATIONAL ASSOCIATION OF REALTORS® AS *AMICUS CURIAE*** has been served upon counsel of record, via electronic mail, on the 2nd day of December, 2020, to the addresses shown below.

Douglas M. Zayicek, Esquire – dzayicek@bellamylaw.com
Holly M. Lusk, Esquire – hlusk@bellamylaw.com
THE BELLAMY LAW FIRM
1000 29th Avenue North
Myrtle Beach, South Carolina 29578
Attorneys for Respondents

L. Sidney Connor, IV, Esquire – sconner@classactlaw.com
KELAHER, CONNELL & CONNOR, P.C.
The Courtyard, Suite 209
1500 U.S. Highway 17 North
Surfside Beach, South Carolina 29587
Attorneys for Appellants Michael Cousins; Founders Five, LLC d/b/a Sperry Van Ness Founders Group

Elizabeth Van Doren Gray, Esquire – egray@robinsongray.com
Vordman Carlisle Traywick, III, Esquire – ltraywick@robinsongray.com
ROBINSON GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street
Post Office Box 11449
Columbia, South Carolina 29211

NEXSEN PRUET, LLC

Columbia, South Carolina