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

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.

BRIEF OF *AMICUS CURIAE* NATIONAL ASSOCIATION OF REALTORS®

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INTEREST OF AMICUS CURIAE

In 1908, the National Association of Realtors® (NAR) was founded to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property, and to advance the professional competence of real estate licensees in their rendering of services to the public as well as their interactions with each other.

NAR is a nonprofit professional association of persons engaged in all aspects of the real estate business, including brokerage, appraisal, management, and counseling. Its membership is comprised of 54 state and territorial associations; approximately 1,200 local associations; and approximately 1.4 million Realtors®[1]. Members must agree to abide by NAR's strict Realtors® Code of Ethics, which ensures that consumers are served by requiring members to cooperate with each other in furthering clients' best interests. The Realtors® Code of Ethics requires members to resolve real estate-related controversies with other members through arbitration rather than litigation. Local Realtor® associations enforce the Realtors® Code of Ethics.

Indeed, NAR is an ardent proponent of arbitrating disputes among members. Courts have repeatedly recognized that the duty to arbitrate imposed upon Realtors® by NAR is reasonable, consistent with due process, and a source of significant judicial economy. From NAR's perspective, arbitration of disputes between members offers at least three benefits. First, arbitration affords Realtors® an opportunity to resolve disputes in a forum that is substantially faster and less expensive than litigation. Second, arbitration protects consumers of real estate services provided by Realtors® from being drawn into costly and time-consuming court battles among real estate professionals. Third, arbitration facilitates and encourages cooperation between

[1] The term "Realtor®" has only one meaning: a federally registered collective membership mark that identifies a real estate professional who is a member of the National Association of Realtors® and subscribes to its strict Code of Ethics. Realtor® only means member of the National Association of Realtors®.

Realtors® in the sale of properties by eliminating the risk of litigation stemming from disputes between them. This cooperation, in turn, enhances the marketing of properties, the effectiveness of services provided to buyers and sellers, and the satisfaction of all parties to a real estate transaction.

The present case is far more than an intramural dispute between two real estate firms over entitlement to a portion of a commission earned on the sale of a golf course. Given the breadth of NAR's membership and its mission to advance the professional competence of its members rendering services to the public, NAR has a strong interest in this case, which has the potential to curb the laudable aims of arbitration and, consequently, the quality of these services. To that end, NAR wishes to submit this brief as *amicus curiae* in support of the South Carolina Association of Realtors®. NAR believes it can provide a useful voice as the Court considers whether the master-in-equity exceeded the scope of her authority in reviewing the arbitration award.

STATEMENT OF THE ISSUES ON APPEAL

I. Did the reviewing court err in vacating the arbitration award and substituting its judgment for that of the arbitrator?

II. Did the reviewing court err in finding that, contrary to NAR rules, the arbitrator was required to issue a detailed judgment with findings of fact and conclusions of law?

STATEMENT OF THE CASE

NAR adopts Appellant South Carolina Association of Realtors®' (SCAR) Statement of the Case and Facts. See Rule 208(b)(6), SCACR.

STANDARD OF REVIEW

"Arbitration is a favored method of settling disputes in South Carolina." Pittman Mortg. Co., Inc. v. Edwards, 327 S.C. 72, 75, 488 S.E.2d 335, 337 (1997). "Judicial review of an arbitration award is limited in scope, and any attempt to convert arbitration into a trial-like proceeding is looked upon with disfavor." Lauro v. Visnapu, 351 S.C. 507, 516, 570 S.E.2d 551, 555 (Ct. App. 2002). "Generally, an arbitration award is conclusive and courts will refuse to review the merits of an award." Pittman Mortg. Co., Inc., 327 S.C. at 76, 488 S.E.2d at 337. And "[a]n award will only be vacated under narrow, limited circumstances." Id. After all, "[a]rbitration is not litigation carried on by other means. It is intended to be, and is, an alternative means for resolving disputes without the cost and delay of a lawsuit." White v. Preferred Research, Inc., 315 S.C. 209, 212, 432 S.E.2d 506, 508 (Ct. App. 1993).

ARGUMENT

Here, the parties had a dispute and—as members of NAR—agreed to submit it to arbitration pursuant to NAR rules. Respondents frame the issue on appeal as "whether a real estate agent who does not have a written agreement with any party to a real estate transaction is entitled to a commission from such real estate transaction." 6/25/2019 Br. Resp. at 1 (emphasis omitted). In another brief, they argue the issue is "whether a real estate agent who does not have a written agreement with any party to a real estate transaction, and admits not knowing anything about the real estate transaction until shortly before closing, is entitled to a commission from such real estate transaction." 6/27/2019 Br. Resp. at 1 (emphasis omitted). Respondents then dedicate a great deal

of ink to arguing in two briefs about the factual and legal merits of the award. Respectfully, this confuses the issue.

Respondents' issue statement invites this Court to conduct, as the lower court did, a de novo merits review of the factual and legal issues at hand. But the Court cannot disregard the arbitration context in which this case arose and upon which NAR relies in providing for nationwide arbitration by its members of commission disputes. The question before this Court should be whether the arbitrator—followed by the arbitration panel—manifestly disregarded or perversely misconstrued the law such that the circuit court was justified in vacating the arbitration award. And the answer is clear – it did not.

Because the master-in-equity exceeded the permissible scope of review and committed errors of law, the Court should reverse the order and confirm the arbitrator's award. This result is essential to preserve the arbitration forum and rules to which all NAR members commit. To digress from this commitment and seek the court's intervention contravenes the basic tenet of NAR to facilitate the expeditious resolution of disputes among its members and also undermines the usefulness of arbitration as an alternative dispute resolution tool.

I. The reviewing court erred in vacating the arbitration award and substituting its judgment for that of the arbitrator.

Historically, the FAA[2] and South Carolina law have called for great deference to arbitration awards. See Apex Plumbing Supply, Inc., 142 F.3d at 193; Trident Tech. Coll., 286 S.C. at 106, 333 S.E.2d at 786. To be sure, "[t]he fundamental premise upon which" the federal policy favoring arbitration "is grounded in the laudable goal of providing 'a relatively quick and inexpensive

[2] 9 U.S.C. §§ 1–10. The Federal Arbitration Act (the FAA) governs the present dispute. See, e.g., Zabinsky v. Bright Acres Assocs., 346 S.C. 580, 594, 553 S.E.2d 110, 117 (2001) ("To ascertain whether a transaction involves interstate commerce within the meaning of the FAA, the court must examine the agreement, the complaint, and the surrounding facts.").

resolution of contractual disputes by avoiding the expense and delay of extended court proceedings.'" Trident Tech. Coll., 286 S.C. at 104, 333 S.E.2d at 785 (quoting Diapulse Corp. of Am. v. Carba Ltd., 626 F.2d 1108, 1110 (2d Cir. 1980)).

"When a dispute is submitted to arbitration, the arbitrator determines questions of both law and fact." Gissel v. Hart, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009). "Review 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). "If 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). "Factual and legal errors by arbitrators do not constitute an abuse of their powers, and the court is not required to review the merits of the decision so long as the arbitrators do not exceed their powers." Pittman Mortg. Co., Inc., 327 S.C. at 76, 488 S.E.2d at 338. Further, "[a] party may not attempt to relitigate the merits of the arbitrators' resolution of the arbitrable issues under the guise of questioning the arbitrators' power." Id. at 76–77, 488 S.E.2d at 338.

As the U.S. Court of Appeals for the Fourth Circuit has recognized, "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." Apex Plumbing Supply, Inc., 142 F.3d at 193 (emphasis added) (footnote omitted); see also Trident Tech. Coll. v. Lucas & Stubbs, Ltd., 286 S.C. 98, 105, 333 S.E.2d 781, 785 (1985) (per curiam) (observing that "[b]road judicial review on the merits would render resort to arbitration wasteful and superfluous" and frustrate the "purpose for arbitration, i.e., avoidance of litigation" (alteration in original) (quoting Farris v. Alaska Airlines, Inc., 113 F. Supp. 907, 908 (D. Wash. 1953);

Amicizia Societa Navegazione v. Chilean Nitrate & Iodine Sales Corp., 274 F.2d 805, 808 (2d Cir. 1960), cert. denied, 363 U.S. 843 (1960))).

NAR's arbitration agreement applies consistently to all members across the country and the present dispute involves a $500,000 commission between two brokers who each agreed to be bound by NAR's arbitration rules. This appeal stems from an effort by an NAR member to avoid the context of arbitration, and the conclusion of the arbitrator, on grounds not permitted under the applicable rules, or the law. Our supreme court has acknowledged that "[t]hese grounds must be construed in light of the rule that the Court's function in vacating, or confirming, an arbitration award is severely limited." Trident Tech. Coll., 286 S.C. at 106, 333 S.E.2d at 786.

"Absent one of [the statutory] grounds, an arbitration award will be vacated only on the non-statutory ground of 'manifest disregard or perverse misconstruction of the law.'" Weimer v. Jones, 364 S.C. 78, 80, 610 S.E.2d 850, 852 (Ct. App. 2005) (quoting Lauro v. Visnapuu, 351 S.C. 507, 516, 570 S.E.2d 551, 556 (Ct. App. 2002)). "However, for a court to vacate an arbitration award based upon an arbitrator's manifest disregard of the law, the governing law ignored by the arbitrator must be well defined, explicit, and clearly applicable. Case law presupposes something beyond a mere error in construing or applying the law." Gissel, 382 S.C. at 241, 676 S.E.2d at 323 (internal citation omitted).

Even under the manifest disregard of the law exception, courts have held that the party seeking to vacate the award must show "something beyond a mere error in construing or applying the law." Gissel, 382 S.C. at 241, 676 S.E.2d at 323. Indeed, our supreme court has held that "even a 'clearly erroneous interpretation of a contract cannot be disturbed.'" Harris, 332 S.C. at 244, 503 S.E.2d at 786 (quoting Trident Tech. Coll., 286 S.C. at 108, 333 S.E.2d at 787).

> Generally speaking, "[a]n award within the scope of submission is conclusive on fact issues and interpretation of law." The award is

> presumptively correct, and "[i]t is the general rule that the courts will refuse to review the merits of an arbitration award." Otherwise, an arbitration award would signify "the commencement, not the end, of litigation."

Trident Tech. Coll., 286 S.C. at 111, 333 S.E.2d at 788–89 (internal citations omitted). After all, "[t]he primary function of arbitration is to serve as a substitute for and not a prelude to litigation." Id. at 104–05, 333 S.E.2d at 785 (quoting Farris, 113 F. Supp. at 908).

Here, the parties submitted this claim to arbitration and agreed to be bound by the award. NAR's process was not designed to signify "the commencement . . . of litigation." Id. (emphasis omitted). To the contrary, NAR carefully drafted its guidelines to give members a reliable and efficient dispute resolution mechanism that contains multiple levels of due process protections, including review of the arbitration proceedings by an arbitration panel. See (R. pp. 413–788).

NAR arbitration gives Realtors® an opportunity to resolve disputes in a forum that is substantially faster and less expensive than litigation, protects consumers of real estate services from being drawn into costly and time-consuming court battles among real estate professionals, and facilitates and encourages cooperation between Realtors® in the sale of properties by eliminating the risk of litigation stemming from disputes among them. This cooperation, in turn, enhances the marketing of properties, the effectiveness of services provided to buyers and sellers, and the satisfaction of all parties to a real estate transaction. NAR rules did not contemplate the courts intervening and upsetting arbitration awards simply because they would have reached a different result. Nor do South Carolina or federal law. Engaging in a sweeping review ignores the very spirit of arbitration—as well as the rules themselves—and has the potential to curb the laudable aims of arbitration and, by extension, the quality of its members' services.

NAR has an interest in courts across the country uniformly applying the correct standard of review for arbitration awards in disputes among its members. One of the primary attractions

NAR arbitration offers is the predictability and consistency of the rules. Upholding the lower court's ruling here, which rewrites those rules, may well impact arbitrations in this state, as well as in other states, as other Realtors® with a dispute would point to it as support to deviate from the majority rule governing the review of arbitration awards. And permitting the de novo review employed by the lower court would undercut the very purpose behind submitting broker disputes to arbitration, converting arbitrators into mere junior varsity trial courts. It is well settled, however, that "[t]he primary function of arbitration is to serve as a substitute for and not a prelude to litigation." Cf. Trident Tech. Coll., 286 S.C. at 104–05, 333 S.E.2d at 785 (quoting Farris, 113 F. Supp. at 908).

The Court should therefore reverse the lower court's decision to vacate the arbitrator's award under an improper standard of review and, instead, confirm the award

II. The reviewing court erred in finding that, contrary to NAR rules, the arbitrator was required to issue a detailed judgment with findings of fact and conclusions of law.

"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." MCI Constr., LLC v. City of Greensboro, 610 F.3d 849, 862 (4th Cir. 2010). "After all, the Supreme Court has held that arbitrators need not state reasons for reaching a particular result." Remmey v. PaineWebber, Inc., 32 F.3d 143, 151 (4th Cir. 1994) (citing United Steelworkers of Am. v. Enterprise Wheel & Car Corp., 363 U.S. 593, 598 (1960)).

NAR's arbitration procedure does not permit findings of fact by the arbitrator. Awards are based on the hearing panel's analysis of the entire course of conduct giving rise to a dispute, and there is usually no single act, statement or particular event that forms the basis for an award. Reducing the grounds on which an arbitration award is made to writing is viewed as too complex and difficult to require in arbitration disputes in this context. Moreover, findings of fact by an

arbitrator could lead to arbitration case law that panels could rely on rather than considering each disputed transaction in totality. For these reasons, NAR has repeatedly declined to permit findings of fact in arbitration awards.

As this Court has recognized, "courts defer to the arbitral panel both on the merits of the final decision and on procedural questions that 'grow out of the dispute,' even where those questions 'bear on its final disposition.'" Grp. III Mgmt., Inc., 425 S.C. at 150, 819 S.E.2d at 785–86 (quoting UBS Fin. Servs. v. Padussis, 842 F.3d 336, 339 (4th Cir. 2016)). This Court has further explained:

> Opening up arbitral awards to myriad legal challenges would eventually reduce arbitral proceedings to the status of preliminary hearings. Parties would cease to utilize a process that no longer had finality. To avoid this result, courts have resisted temptations to redo arbitral decisions. [A]rbitrators do not act as junior varsity trial courts where subsequent appellate review is readily available to the losing party.

Grp. III Mgmt., Inc., 425 S.C. at 150, 819 S.E.2d at 786 (alteration in original) (quoting Remmey, 32 F.3d at 146).

NAR has promulgated detailed arbitration procedures in its Code of Ethics and Arbitration Manual upon which Realtor® associations around the country—including the SCAR and the various local REALTOR® associations in South Carolina—rely when conducting arbitration proceedings. (R. p. 555-667). Notably, the rules do not require the arbitrator to issue a written ruling. See id. Respondents voluntarily agreed to submit this dispute to arbitration without a detailed written and reasoned ruling.

Arbitration, of course, "is a matter of contract." Zabinski, 346 S.C. at 596, 553 S.E.2d at 118. "It is not the function of the courts to rewrite or torture the meaning of a contract." Gray v. State Farm Auto Ins. Co., 327 S.C. 646, 649, 491 S.E.2d 272, 274 (Ct. App. 1997). The court's

role is limited to enforcing the terms of a plain and unambiguous contract, not rewriting or distorting the contract "under the guise of judicial construction." S.S. Newell & Co. v. Am. Mut. Liab. Ins. Co., 199 S.C. 325, ___, 19 S.E.2d 463, 466 (1942).

Here, NAR's rules did not require the arbitrator to provide a reasoned award. And it is well settled under state and federal law that arbitrators are not required to state the basis for the award. See MCI Constr., LLC, 610 F.3d at 862; Remmey, 32 F.3d at 151; United Steelworkers of Am., 363 U.S. at 598; Trident Tech. Coll., 286 S.C. at 111, 333 S.E.2d at 789 (quoting Andros Compania Maritima, S.A., 579 F.2d at 704. The lower court thus erred in rewriting the arbitration agreement to require those things. Cf. Gray, 327 S.C. at 649, 491 S.E.2d at 274.

In sum, NAR carefully drafted its arbitration guidelines for consistent application across the United States with due process protections in mind. Allowing brokers to circumvent NAR's time-honored process for arbitrating disputes would undermine the very policy behind arbitration, eroding the predictability, consistency, and lower costs that make arbitration a favored method of resolving disputes. Further, if the lower court's order stands, this threatens to establish a dangerous precedent—contrary to at least a century of case law—that would permit South Carolina courts to rewrite contracts based upon their own preferences. That is simply not warranted here.

Therefore, the Court should reverse the lower court's findings that NAR's arbitration proceedings were inconsistent with state law and confirm the arbitration award.

CONCLUSION

While the present dispute may center only on a single transaction, the Court's decision in this case could have far-reaching implications. Uniform, consistent, and predictable application of NAR arbitration rules is essential to promoting the goals of NAR, including providing a dispute forum for members that is substantially faster and less expensive than litigation, protecting

consumers of real estate services provided by NAR's members from being drawn into costly and time-consuming court battles among real estate professionals, and encouraging cooperation between real estate professionals. The lower court's expanded judicial review of the award thwarts the very policy behind arbitrating broker disputes and runs afoul of the contractual rules to which the parties, as well as all Realtors® across the United States, agreed to be bound. The Court should therefore reverse the lower court's order and reinstate the arbitrator's award in this matter.

Respectfully submitted,

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Columbia, South Carolina
September 17, 2020

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Cynthia Graham Howe, Master-in-Equity

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Founders Group; and South Carolina Association of REALTORS® .....Appellant.

PROOF OF SERVICE

I hereby certify that I have served National Association of *REALTORS*® Motion for Leave to File Amicus Brief and the National Association of *REALTORS*® Amicus Brief by emailing it to counsel for the other parties at the email addresses below on September 17, 2020 (copy of email attached):

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Date:	Thursday, September 17, 2020 4:57:52 PM
Attachments:	image001.png image002.png NAR"s Motion for Leave to File an Amicus Curiae Brief - For Filing(37093056.1).pdf National Association of Realtors" Amicus Brief - FINAL - FOR FILING(37092813.1).pdf PROOF OF SERVICE - Motion for Leave to file Amicus Brief and Amicus Brief - FINAL for Filing 9.17.20(37093076.1).pdf

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Dear Counselors:

Attached herewith for service upon you, pursuant to the Supreme Court of South Carolina Amended Order dated May 29, 2020, please find National Association of REALTORS® Motion for Leave to File Amicus Brief, National Association of REALTORS® Amicus Brief, and Proof of Service for the same. The attached will be filed with the South Carolina Court of Appeals this afternoon.

A copy of this email will be filed with the Proof of Service.

Please let us know if you have any difficulty opening the attachments.

With kindest regards,
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