

**COPY**

**IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI  
COURT OF APPEALS**

**DUFFY MORF, BROKER AND KAREN  
PRESTON-MORF, SALESPERSON**

**FILED**

**APPELLANTS**

**VS.**

**FEB 06 2008  
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SUPREME COURT  
COURT OF APPEALS**

**2007CA00839**

**NORTH CENTRAL MISSISSIPPI BOARD OF  
REALTORS, INC. BOARD OF DIRECTORS**

**APPELLEE**

**ON APPEAL FROM THE CHANCERY COURT OF  
LAFAYETTE COUNTY, MISSISSIPPI**

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***ORAL ARGUMENT REQUESTED***

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**REPLY BRIEF FOR APPELLANTS**

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**SUBMITTED BY:**

**Lisa A. Reppeto (Bar No. [REDACTED])  
WATKINS LUDLAM WINTER & STENNIS, P.A.  
633 North State Street (39202)  
Post Office Box 427  
Jackson, MS 39205  
(601) 949-4900**

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**CERTIFICATE OF INTERESTED PERSONS**

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or judges of the Court of Appeals may evaluate possible disqualification or recusal.

Honorable Glen Alderson  
Chancellor Lafayette County, MS  
Post Office Drawer 70  
Oxford MS 38655  
*Trial Judge*

Nicholas Brown, Esq.  
Hughes and Hitt  
510 Azalea Drive, Suite 100  
Oxford, MS 38655  
*Attorney for the Appellee*

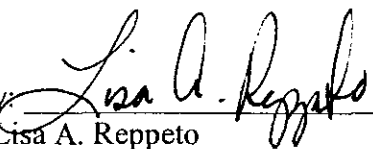
Bryan Buckely, Esq.  
Post Office Box 5837  
Brandon, MS 39047

Joe Davis, Esq.  
113 W. Bankhead  
New Albany, MS 38652

Lisa A. Reppeto, Esq.  
Watkins Ludlam Winter & Stennis, P.A.  
Post Office Box 427  
Jackson, MS 39205

*Attorneys for Appellant*

So certified this, the 6<sup>th</sup> day of February, 2008.

By:   
\_\_\_\_\_  
Lisa A. Reppeto

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## **I. SUMMARY OF THE ARGUMENT**

In their initial brief, the Morfs established that general contract law governs the present controversy. They further established that the court below failed to properly apply the appropriate legal standards in its determination to grant NCMBR's Motion to Dismiss. NCMBR largely ignored and failed to address these arguments in its brief and, instead, argued that the trial court was correct to defer to NCMBR's position and that this Court should do likewise. The Morfs submit that NCMBR is utilizing the wrong analysis. Unlike decisions made by governmental administrative agencies, a private organization's interpretation of its bylaws, rules and regulations is not entitled to any deference as basic contract law governs the relationship between the organization and its members.

In its brief, NCMBR does not argue that it followed the procedures set forth in the Manual, incorporated into its bylaws, nor that it followed its own guidelines and rules in the punishment that it imposed against the Morfs. Rather, NCMBR argues that its interpretation of the relevant rules, regulations, bylaws and procedures should simply be accepted. These arguments were largely anticipated and addressed in the Morfs' initial brief which is incorporated herein by reference. The Morfs will not unnecessarily repeat those arguments in this Reply Brief. The Morfs submit the following arguments in answer and opposition to the Response filed by NCMBR and respectfully requests that this Court reverse the ruling of the court below and grant the relief requested herein.

## **II. ARGUMENT**

### **A. Contract Interpretation is a Matter of Law Subject to *De Novo* Review.**

As established in the Morfs' initial brief, the present case is a case of contract interpretation. Where a case turns on interpretation of a written contract, the appropriate standard of review is *de novo*. *Ferrara v. Walters*, 919 So. 2d 876, 881 (Miss. 2005)(citing *Warwick v. Gautier Utility Dist.*, 738 So. 2d 212, 215 (Miss. 1999); *Miss. State Highway Comm'n v. Patterson Enters., Ltd.*, 627 So. 2d 261, 263 (Miss. 1993)). Notwithstanding, NCMBR argues that this Court should "defer" to its interpretation of the relevant documents and should only review the Chancellor's interpretation of the relevant documents under a "manifest error" standard of review.

This position is not sustainable for two reasons. First, the authorities cited by NCMBR providing for "deference" with regard to rule interpretation all involve governmental authorities and agencies wherein the agency's authority arises as a matter of law – not private associations wherein the authority arises from a contractual agreement between the organization and its members. Under Mississippi law, no deference is warranted. On the contrary, any ambiguity is construed against the organization by application of basic tenants of contract law. Second, the "manifest error" standard only applies to factual determinations – not matters of law, such as contract interpretation. As this case turns on contract interpretation, the Chancellor's decision is subject to *de novo* review.

#### **1. Ambiguities are construed against private organizations.**

In its brief, NCMBR argues that, although it is "not an administrative agency, per se," its interpretation of its own rules and regulations are entitled to deference from the Court. *See Appellee's Brief at p. 18*. In support of this argument, NCMBR relies on *Mississippi State Tax Comm'n v. Mask*, 667 So. 2d 1313 (Miss. 1995).



In *Mask*, this Court acknowledged that the State Tax Commission has the authority to promulgate the relevant regulations at issue pursuant to authority granted by Miss. Code Ann. § 27-65-15 (1972) (emphasis added). The Court's decision did not rely on deference to the Tax Commission but, instead, turned upon this Court's *de novo* review of the applicable state statutes being enforced by the Tax Commission. *Id.* at 315. Likewise, in *Mississippi Real Estate Comm'n' v. Hennessee*, 672 So. 2d 1209, 1215-17 (Miss. 1996) (also relied upon by NCMBR), this Court's analysis centered upon a *de novo* review of the language adopted by the legislature and persuasive authority from other states to overturn the trial court and find a broker subject to Mississippi law for sale of her own property.

The analysis advocated by NCMBR (and applicable to governmental administrative agencies) provides for relief from the decisions of administrative agencies where the agency's decision is "beyond the power of the administrative agency to make . . ." *See Appellee's Brief at p. 18*. Indeed, such agencies are strictly limited in their authority to that expressly granted by statute:

The MPSC also stresses that their order adopting the rules may be sustained on the basis of inherent and implied authority. Recognizing that authority may be implied as well as expressed we restrict the power to that necessarily or reasonably incident to those granted. Although implied powers may sometimes be referred to as "inherent", it is well settled that an administrative agency has no inherent powers. 1 Am.Jur.2d, *Administrative Law*, § 73 (1962). Moreover, the agency may not make and adopt rules under the guise of "implied power" which exceed or conflict with the authority granted it by statute.

*Mississippi Public Service Comm'n v. Mississippi Power & Light Co.*, 593 So. 2d 997, 1003-4 (Miss. 1991).

NCMBR is not a governmental agency. As such, there is no statutory basis for any authority it may wield over its membership. Rather, the source of NCMBR's authority is contractual and, therefore, subject to Mississippi law regarding contracts.

Likewise, in *Communications Workers of America, Local 10517 v. Gann*, 510 So.2d 781 (Miss.1987), a case which NCMBR failed to address in its brief, this Court specifically applied basic contract law to analyze an organization's recourse against a member for failure to abide by its rules and regulations. *Gann* involved a labor union's attempt to judicially force payment of fines imposed against eleven members for continuing to work during a strike. *Gann*, 510 So. 2d at 782. Inasmuch as the union failed to demonstrate that the fines imposed pursuant to a "uniform ***predetermined methodology*** . . . ." this Court held the fines unenforceable, citing *Cantrell*. *Id.* at 782. Further, this Court applied basic contract law in determining the meaning of the union's bylaws with regard to what punishments and remedies were available for addressing the serious infractions of the eleven members. *Id.* at 784 ("[w]e are bound to follow firmly established ***basic contract law***, and not do violence to its principles.")(emphasis added).

Mississippi is certainly not alone in this regard. As noted in the Morfs' initial brief, basic contract law applies to disputes regarding disciplinary actions by private organizations in Mississippi's sister jurisdictions. *See, Fellheimer v. Middlebury College*, 869 F.Supp. 238, 244-246 (D.Vt.1994) (analyzing disciplinary procedures and finding that college failed to provide student with process described in student handbook); *Clayton v. Trustees of Princeton Univ.*, 519 F.Supp. 802, 806 (D.N.J.1981) ("Certainly the proposition that once an organization has established rules for itself it must follow them is not a radical proposition" ); *Harvey v. Palmer College of Chiropractic*, 363 N.W.2d 443, 445 (Iowa Ct.App.1984) (university must follow disciplinary procedures detailed in student handbook); *Tedeschi v. Wagner College*, 404 N.E. 2d 1302 (N.Y. 1980) (holding that "when a university has adopted a rule or guideline establishing the procedure to be followed in relation to suspension or expulsion that procedure must be substantially observed" ); *Clayton v. Trustees of Princeton*, 519 F.Supp. 802, 806 (D.C.N.J. 1981)(citing *Walsh v. International Alliance of Theatrical Stage Employees*, 40 A.2d 623 (N.J.

1944); *Height v. Democratic Women's Luncheon Club of New Jersey, Inc.*, 25 A.2d 899 (N.J. 1942) (political organization)); *McCune v. Wilson*, 237 So.2d 169, 172 (Fla. 1970); *Salkin v. Ca. Dental Assn'*, 224 Cal.Rptr. 652, 356-57 (Ca. Ct. App. 1986); *Van Daele v. Vinci*, 282 N.E.2d 728, 731 (Ill. 1972); *King v. Grand Chapter of Rhode Island Order of Eastern Star*, 919 A.2d 991, 998-1000 (R.I. 2007)(“A private voluntary organization is entitled to make its own rules and bylaws as long as they are not arbitrary and capricious. . . . However, once those rules have been established, *they bind the organization as well as its members*. . . .The disciplinary procedures established by OES are not arbitrary and capricious, but are, in fact, commendable procedural protections for members accused of violating the rules of the organization. However, *OES simply ignored those protections with regard to King, and it acted arbitrarily and capriciously in the proceedings disciplining her.*”)(emphasis added).

Clearly, statutory authority to act and contractual obligations are completely different matters. As set forth in great detail in the Morfs' initial brief, the rules of contract construction required that the trial resolve any ambiguity or confusion against NCMBR rather than defer to its interpretation. *Pursue Energy Corp. v. Perkins*, 558 So. 2d 349, 352 (Miss. 1990). Indeed, this Court specifically held this to be the law in *Gann*: “Since the Union prepared the Constitution, this provision should be construed most strongly against it.” *Gann*, 510 So. 2d at 783 (citing *Hinds v. Primeaux*, 367 So.2d 925 (Miss.1979); *Globe Music Corp. v. Johnson*, 84 So.2d 509 (1956); *Home Mutual Fire Ins. Co. v. Pittman*, 71 So. 739 (1916)). As such, NCMBR's argument that its interpretations of the bylaws, Rules and Manual are entitled to deference should be rejected.

## **2. Contract interpretation is a question of law.**

In its brief, NCMBR proclaims, without citation, that “the trial court clearly found there to be no ‘matters of law.’” *See Appellee's Brief at p. 18.* The Morfs respectfully disagree.

The primary dispute at trial was whether or not the sanctions imposed against the Morfs and the procedure by which they were imposed complied with the bylaws, rules and regulations adopted by NCMBR. What sanctions were imposed and what procedure was employed by NCMBR was not at issue. Rather, the trial court was called upon to determine what punishments were allowed and what procedural protections were required by the “contract” between NCMBR and the Morfs, the terms of which being set forth in the bylaws, Manual and Rules adopted by NCMBR.

Both the United States District Court of Appeals for the Fifth Circuit and the Mississippi Supreme Court have recognized that contract interpretation is a question of law. *Quorum Health Resources, L.L.C. v. Maverick County Hosp. Dist.*, 308 F. 3d 451, 458 (5<sup>th</sup> Cir. 2002)(citing *Fina, Inc. v. ARCO*, 200 F. 3d 266, 268 (5th Cir. 2000); *Am. States Ins. Co. v. Bailey*, 133 F. 3d 363, 369 (5th Cir.1998); *Canutillo Indep. Sch. Dist. v. Nat'l Union Fire Ins.*, 99 F. 3d 695, 700 (5th Cir. 1996)). *See also, Warwick v. Gautier Utility Dist.*, 738 So. 2d 212, 215 (Miss. 1999); *Mississippi State Highway Comm'n'. v. Patterson Enters., Ltd.*, 627 So. 2d 261, 263 (Miss. 1993). Under Mississippi law, “questions concerning the construction . . . are questions of law that are committed to the court rather than to the fact finder.” *Warwick*, 738 So. 2d at 215 (citing *Mississippi State Highway Comm. v. Patterson Enters., Ltd.*, 627 So. 2d 261, 263 (Miss. 1993)).

In the present case, the due process analysis with regard to the procedures employed by NCMBR and the determination of whether the sanctions imposed was arbitrary and capricious are both questions of contract interpretation. In the present appeal, the Morfs argue that the trial court failed to properly apply the correct legal analysis and, therefore, this matter should be reversed. As such, this Court should apply the *de novo* standard of review. *See, Aronson v. University of Mississippi*, 8282 So.2d 752, 755 (Miss. 2002).

**B. NCMBR Failed to Follow Its Own Rules, Bylaws and Procedures.**

In its brief, NCMBR argues that because some hearings were held and the Morfs eventually “figured out” what infractions they were being charged with, the lower court correctly denied the injunctive relief sought by the Morfs. However, NCMBR makes little attempt to demonstrate how the Morf’s reading of the bylaws, Rules and Manual set forth in their initial brief is erroneous.

**1. NCMBR failed to follow its own hearing procedure.**

As set forth in the Morfs’ initial brief, the bylaws adopted by NCMBR specifically provide for certain notice and hearing procedures to be employed whenever a member has been accused of violating the rules. Article VI of the bylaws provide, that *prior to any punishment* “for a *violation of these Bylaws and Board Rules and Regulations*” there must be a hearing “*as provided in the Code of Ethics and Arbitration Manual of the Board . . .*” (TR Exh 1 at 7)(emphasis added). Likewise, Article VII, expressly states that the disciplining of Members, among other things, “*shall be governed by the Code of Ethics and Arbitration Manual of the NATIONAL ASSOCIATION OF REALTORS® . . .*” (TR Exh 1 at 9)(emphasis added) Further, Article VII expressly incorporates the Manual by reference. (TR Exh 1 at 9)

In its brief, NCMBR continues its argument that, notwithstanding the plain language cited above, the manual only applies to ethics violations. NCMBR makes much of an exchange between the trial court and witness Will Knotts regarding NCMBR’s position that the Morfs were not entitled to the procedural protections set forth in the Manual because they were charged with rule violations rather than ethics violations. *See Appellee’s Brief at p. 14.* Knott’s position fell apart, however, when he was subsequently questioned about the above referenced language in the bylaws.

THE COURT : . . . Now, then, I'm wanting to know, you've got in your Bylaws that says that a member may be reprimanded, fined, placed on probation, suspended, or expelled by the Board of Directors for a violation of these Bylaws and Board Rules and regulations consistent with these bylaws *after* a hearing as provided in the Code of Ethics and Arbitration Manual of your Board?

THE WITNESS: I don't think it's clearly referenced or called that, we just refer to them as the bylaws and the rules and regulations, which it outlines in them what procedures are to happen.

THE COURT: *You can't do that. You've got to – you are calling for – you – you are talking about a document. Have you got something that says that your bylaws and your rules is your Code of Ethics and Arbitration Manual?*

THE WITNESS: *I do not have anything that says that.*

(emphasis added)

(TR 50-51) Ultimately, Mr. Knotts admitted that the only Code of Ethics and Arbitration Manual referenced in NCMBR's documents was that document admitted into evidence at trial. (Exhibit 5). (TR 52)

Notwithstanding NCMBR's protests to the contrary, the bylaws clearly adopt and incorporate the hearing procedures set forth in the Manual as a prerequisite to the imposition of any punishment. The Manual sets forth the various notice requirements and procedures that must be followed in the investigation and determination of alleged rule violations. Section 7 of the Manual provides that any required notice or document must be either hand delivered or sent via registered or certified mail. (TR Exh 5 at 32) Section 7 also requires that any notice of hearing "*shall* include the names of the members of the tribunal and be given not less than twenty-one (21) days before hand." (TR Exh 5 at 32)(emphasis added).

Section 12 of the Manual provides as follows, in pertinent part:

The *duties of membership* include the following:

. . .

(b) to *abide by the* bylaws of this Board and *its rules and regulations*

...  
Subject to any *preliminary consideration* by any administrative body of the Board or its *subsidiary MLS*, any allegations or charges *that a member has violated any membership duty shall be referred to the Professional Standards Committee for review in conformity with the procedures established in the Code of Ethics and Arbitration Manual of the National Association of Realtors®* as from time to time amended.

(TR Exh 5 at 35)(emphasis added) Section 13 of the Manual provides that **after** the review by the Professional Standards Committee, the Directors may then take disciplinary action against the member accused. (TR Exh 5 at 35)

With regard to the hearing itself, the Manual provides that the accused member is entitled to the following notice and procedural protections with regard to an alleged violation of a membership duty:

- service of a complaint setting forth the alleged violation; (TR Exh 5 at 43)
- the right to file a written response to the allegations in the complaint within fifteen days after service; (TR Exh 5 at 43)
- notice of the names of the members of the Professional Standards Committee and the opportunity to challenge any such member as qualified to serve on the Hearing Panel within fifteen days of such notice. (TR Exh 5 at 43)

Under NCMBR's bylaws, the Directors do not have *any* authority to impose punishment until **after** a hearing before the Professional Standards Committee. Even then, the Manual imposes an affirmative duty on the Directors to ensure "that the rights of all members are safeguarded and the Board or Association is operated in a legally prudent manner *consistent with the provisions of its governing documents.*" (TR Exh 5 at 49) Indeed, this duty is imposed regardless of whether or not the member appeals any recommendation of disciplinary action by the Professional Standards Committee Hearing Panel. (TR Exh 5 at 49)

As demonstrated in their initial brief, the Morfs were afforded *none* of the procedural and notice requirements set forth above with regard to either the 2005 sanctions or the 2006 sanctions at issue herein. Indeed, NCMBR does not seriously contend that these procedural protections were afforded. Rather, NCMBR argues that the Morfs were represented by counsel and that questions were asked and answered in hearings before the MLS Committee. *See Appellee's Brief at p. 13.* Additionally, NCMBR argues that the documents entered into evidence regarding the disciplinary proceedings "speak for themselves . . ." *See Appellee's Brief at p. 13.* If this is so, these documents give testimony to the fact that NCMBR utterly failed to follow the procedural protections required by the Manual and set forth above.

With regard to the 2005 disciplinary action, the documents introduced at trial establish that the Morfs were not given written notice of the charges against them and were only advised of the hearing telephonically, less than twenty-four hours prior to the hearing. (TR Exh 16) Further, the Morfs were not informed of the identity of the members sitting in judgment of them and the opportunity to challenge *prior to* the hearing but had to ask for this information after the fact.<sup>1</sup> (TR Exh 17)

The same deficiencies exist with regard to the 2006 sanctions. The Morfs were notified that they were to appear for a hearing via an undated letter that appears to have been written some time after May 19, 2007 (TR Exh 13) The letter advised the Morfs to appear on May 31, 2007, for a hearing on an alleged rule violation. (TR Exh 13) As such, the hearing date was set for a date less than twenty-one days after the notice was given. Further, the notice did

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<sup>1</sup> NCMBR argues that, in response to Trial Exhibit 16, the Morfs were provided with a list of all members of the MLS Committee and Board of Directors. NCMBR makes no attempt to explain how obtaining this information *after* the hearing before the MLS Committee on May 11, 2005 and, then *only* upon request, complies with the requirements of the Manual which specifically requires that the identity of those Professional Standards Committee members who will be sitting in judgment be provided *prior to* the hearing to determine whether sanctions are advised. (TR Exh 5 at 43) Clearly, it does not fulfill this requirement.



not advise the Morfs of their right to submit a response within fifteen days, does not indicate that it was either hand delivered or sent by registered/certified mail and does not identify the members of any tribunal before whom the Morfs were to appear. (TR Exh 13)

NCMBR argues that the Morfs had sufficient notice because they “figured out” what charges were being asserted against them. *See Appellee’s Brief at p. 16.* However, the notice provided for by the Manual requires far more. The notice required by the Manual provides for a minimum amount of time, twenty-one days, to be given to prepare a defense and allows for a written response to a formal complaint. In neither 2005 nor 2006 were the Morfs given the required amount of time to prepare prior to the hearing. Further, the notice required by the Manual identifies the individuals who will sit in judgment so as to allow the accused the opportunity to challenge their impartiality. In light of the fact that those sitting in judgment can be direct competitors of the accused, this procedural safeguard is very important. Notwithstanding, this safeguard was also denied the Morfs.

NCMBR cites to an exchange with Duffy Morf on cross examination that purports to be an admission with regard to the procedures utilized by NCMBR. *See Appellee’s Brief at 15.* The testimony occurs on page 167 of the transcript and deals with whether or not an Appeal to the Board of Directors under the “Model Rules” is provided for in the Model Rules. NCMBR cites this testimony as an admission by the Morfs that they were not entitled to an “appeal” to the Professional Standards Committee. This argument misconstrues the Morf’s position. The problem here, and NCMBR’s procedural failure, is not that the Morfs’ appeal was to the Board of Directors, but that they were not afforded a hearing before a Hearing Panel comprised of members of the Professional Standards Committee and were not afforded the procedural notice protections required by the Manual. It is clear in the record that the Morfs were *never* afforded a

hearing before a Hearing Panel comprised of members of the Professional Standards Committee. (TR 44-46) (TR Exh 4) (TR Exh 18) Indeed, NCMBR does not argue to the contrary.

It is abundantly clear that NCMBR made no effort whatsoever to ensure that the procedural protections adopted in the bylaws were afforded the Morfs when it imposed and affirmed the sanctions at issue. As such, the Court erred in finding that the Morfs were afforded due process consistent with NCMBR's bylaws, rules and regulations.

## 2. NCMBR imposed sanctions in excess of that provided in the rules

The MLS Rules and Regulations, in the form they existed during the relevant time periods, were admitted into evidence at trial as Exhibits 2 and 3. In both versions, the first six sections set forth the rules and regulations governing participation and use of the MLS. (TR Exh 2 at 343-352)(TR Exh 3 at 300-305) In 2006, Karen Preston-Morf was explicitly charged with violating rules related to listing procedures set forth in Section 1 (specifically, Sections 1.1 and 1.5). (TR Exh 18)

Immediately following the rules set forth in Sections 1-6, is Section 7, which is entitled "Compliance with Rules." This section initially sets forth as follows: "**Compliance with Rules:** For failure to abide by *these* MLS Rules and Regulations and *any* violations *within a quarter*, the following sanctions may be imposed for non-compliance . . ." (TR Exh 2 at 352)(Tr Exh 3 at 305) Consistent with Mississippi law requiring a schedule of maximum fines assessed in accordance with a predetermined methodology (*Cantrell and Gann, supra*), Section 7 then sets forth the following schedule:

**1<sup>st</sup> offense** – A warning issued to Participant that offense has occurred and that additional sanctions will be imposed if failure to comply with rules is not corrected within one (1) business day. For repeat offenses by the same agency in a four-month period, no warning call is warranted.

**2<sup>nd</sup> offense** - \$50.00 fine and Participant and/or subscriber will appear before MLS Committee. ***Failure to appear*** before the MLS Committee will lead to

suspension of service and additional fines and sanctions will be determined by the MLS Committee and Board of Directors.

**3<sup>rd</sup> Offense and Subsequent Office [sic]** - \$100.00 fine levied against Participant and mandatory sixty (60) day suspension.

**Fourth Offense *within any four-month period*** will result in Participant and all affiliated subscribers being suspended from access to and use of the MLS service for a period of *up to 60 days*.

Any listings which does [sic] not fulfill the minimum requirements of the service, or contain false or misleading information, may be deleted from the service with approval by the majority vote of the MLS committee and with 24 hour notice to the Participant.

For *more than four (4) sanctions in any three (3) month period* the violations will be submitted to the MLS committee for possible *additional* sanctions including possible suspension of services as outlined *under Section 9*.

(TR 2 at 352-353)<sup>2</sup>

Section Seven goes on to set forth a bullet-point list prefaced by the statement that “[v]iolations of rules and regulations includes *but is NOT limited to . . .*” and then lists various violations including “[f]ailure to provide complete and accurate information on any MLS listing . . . Failure to timely file any listing with the service as required by Section 1 . . .” With regard to both the 2005 sanctions and the 2006 sanctions, Karen Preston-Morf was charged with failing to comply with Section 1 listing requirement rules and regulations. (TR Exh 16)(Tr Exh 18) In both instances, Duffy Morf was sanctioned vicariously for the same rule violations pursuant to rule 7.1 (TR Exh 4)(TR Exh 18)

In its brief, NCMBR argues that *only* those specific violations set forth in the aforementioned bullet-point list fall under the discipline ladder identified in Section 7. *See*

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<sup>2</sup> The schedule applicable at the time the 2005 sanctions were imposed is essentially the same except for the following: the first offense schedule did not contain the provision for repeat offenses within the same office and the second offense schedule did not provide for a mandatory appearance before the MLS Committee and the possibility of additional sanctions for failure to appear. (TR Exh 3 at 305)

*Appellee's Brief at p. 19-20.* In addition to the points raised in the Morfs' initial brief, there are two clear problems with this argument.

First, NCMBR's argument ignores and writes out of the preface to the bullet-point list the language: "includes **but is NOT limited to . . .**" Under Mississippi law, an interpretation that fails to read the contract as a whole and give meaning to all of its provisions is not a valid interpretation. *Royer Homes of Mississippi, Inc. v. Chandeleur Homes, Inc.*, 857 So.2d 748, 759 (Miss. 2003)(citing *Warwick v. Gautier Utility Dist.*, 738 So. 2d 212, 215 (Miss. 1999)).

Second, Karen Morf was specifically cited for violations of Section 1 listing requirement rules and regulations as was Duffy Morf (vicariously through Section 7.1). (TR Exh 4)(TR Exh 16)(TR Exh 18) Violation of Section 1 listing requirements are expressly identified in the bullet-point list. (Tr Exh 2 at 353)

Even if Section 9 did apply (as opposed to Section 7), the 2006 sanctions imposed on Karen Preston-Morf fall outside the identified sanctions set forth in the applicable version of Section 9. Expulsion from membership in NCMBR, "including all membership rights and privileges and denial of all Board services, including access to MLS" for any period of time is simply not listed as an available sanction under Section 9. (TR Exh 2 at 354) The **only** possible source for the imposition of this sanction is NCMBR's bylaws and the Manual as incorporated by reference. The bylaws and the Manual specifically require a hearing in accordance with the requirements of the Manual **before** any such sanction may be imposed. (TR 1 at 7) As these requirements were not met, NCMBR did not have the authority to impose this sanction against Karen Preston-Morf.

**C. Sanctions Imposed Were Arbitrary and Capricious**

Mississippi law defines "arbitrary" as follows:

“Arbitrary” means fixed or done capriciously or at pleasure. An act is arbitrary when it is done *without adequately determining principle; not done according to reason or judgment*, but depending upon the will alone, absolute in power, *tyrannical, despotic*, non-rational, implying either a lack of understanding of or a disregard for the fundamental nature of things.

*Mississippi State Dept. of Health v. Southwest Mississippi Regional Medical Center*, 580 So. 2d 1238, 1239-40 (Miss. 1991)(citing *In Re Housing Authority of City of Salisbury*, 70 S.E.2d 500, 503 (N.C. 1982). The law states that an act is capricious when it evidences “either a lack of understanding of or a *disregard for the surrounding facts and settled controlling principles....*” *Id.* (emphasis added).

In the discussion above and in the Morfs’ initial brief, it was established that the sanctions imposed against the Morfs were not authorized by the express provisions of NCMBR’s rules, bylaws and the Manual. As such, the sanctions were arbitrary and capricious as they were counter to the “controlling principals” adopted by NCMBR. For this reason alone, the sanctions cannot stand.

Additionally, in their initial brief, the Morfs demonstrated that the sanctions imposed were arbitrary and capricious because they were inconsistent with NCMBR’s adopted discipline guidelines and the severity of the sanctions was based upon a finding of intent predicated upon an invalid “probation” and despite the fact that the Morfs brought the alleged violations to the attention of NCMBR, promptly corrected the situation without request and no harm was done. (TR 105-106, 124, 134-135, 162-163)

NCMBR did not dispute any of the above-referenced facts either at trial or in their brief. Rather, NCMBR takes issue with the Morfs’ argument that the definition of “probation” as set forth in the Manual did not provide a legitimate basis for the imposition of heightened sanctions against the Morfs in 2006. NCMBR argues that this definition is set forth in the Manual under a section entitled “Definitions Relating to Ethics.” See *Appellee’s Brief at pp. 15-*

16. NCMBR fails to recognize that this is the *only* definition of “probation” set forth anywhere in any of the organization’s governing documents and it is repeatedly referenced throughout the Manual. (TR Exh 5 at 29, 36, 64, 66)

In addition to the “Definitions Relating to Ethics” section, the same definition of “probation” is repeated in a footnote in Section 14 entitled “Nature of Discipline” which sets forth the exclusive list of possible disciplinary actions that may be imposed for violation of a membership “duty”. (TR Exh 5 at 35-36) The definition of “Membership Duties” include abiding by the bylaws and rules of the organization. (TR Exh. 5 at 55) It is also repeated in two footnotes in the “Disciplinary Guidelines” section of the Manual. NCMBR has identified no other definition for “probation” set forth in the bylaws, rules and/or regulations, much less a definition of “probation” which raises a presumption of intent for any subsequent violation.

Notwithstanding, NCMBR argues that the trial court was correct to apply some other unspecified definition for “probation” when it relates to rule violations other than “ethics” violations. If NCMBR wanted another definition of “probation” to be applicable to instances of non-ethics rule violations, it should have adopted such a definition in its rules and/or bylaws. The fact that it did not is telling. At a minimum, the meaning of “probation” as it relates to non-ethics rule violations is ambiguous in light of the definition repeated throughout the Manual, incorporated by reference in the bylaws. As such, the ambiguity must be construed against NCMBR. *Gann*, 510 So. 2d at 783.

As stated above, NCMBR made no attempt to address the undisputed fact that no harm arose from the alleged violations for which the Morfs were so severely sanctioned. (TR 106) Rather, NCMBR argued that punishment was not so harsh. It is hard to imagine a more severe sanction than expulsion of a partner of the agency who is single-handedly responsible for approximately seventy to seventy-five percent of the agency’s income. (TR 113) This amounts

to a death sentence to the Morfs' business for an alleged violation that was inadvertent, promptly corrected and caused no harm. (TR 105-106, 113-114, 124, 134-135, 162-163)

In light of the foregoing, the severe sanctions imposed by NCMBR against the Morfs, can only be considered contrary to "reason or judgment" "**tyrannical, despotic**, non-rational,- implying either a lack of understanding of or a disregard for the fundamental nature of things" and evidencing "a lack of understanding of or a **disregard for the surrounding facts and settled controlling principles.**" *Southwest Mississippi Regional Medical Center*, 580 So. 2d at 1239-40 (emphasis added). In short, the imposition of these sanctions in light of the evidence presented by the Morfs at trial was arbitrary and capricious. As such, the trial court's dismissal should be reversed.

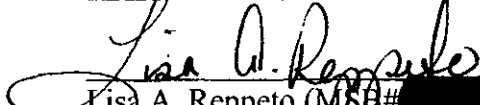
### CONCLUSION

NCMBR expects its members to adhere to all membership duties imposed by the governing documents adopted by it. Under Mississippi law and the basic concept of fairness NCMBR must also adhere to the procedures and discipline ladder adopted by it when disciplining members for violations. NCMBR failed to abide by its procedures, rules and regulation in imposing what amounts to a death sentence to the real estate practice of Duffy and Karen Preston-Morf. As such, the Morfs respectfully request that this Court reverse dismissal of their complaint. The Morfs further request that this Court find that, in light of the undisputed facts, the Morfs were entitled to the injunctive relief sought in the proceedings below. Alternatively, the Morfs request remand for further proceedings in accordance with this Court's findings.

This the 6<sup>th</sup> day of February, 2008.

Respectfully Submitted:

**DUFFY MORF**  
**KAREN PRESTON-MORF**

  
Lisa A. Reppeto (MSB# [REDACTED])



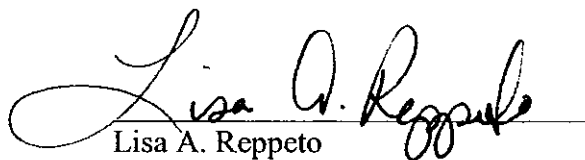
**CERTIFICATE OF SERVICE**

I, Lisa A. Reppeto, do hereby certify that I have this day served via U.S. Mail, a true and correct copy of the foregoing pleading upon the following counsel of record:

Honorable Glen Alderson  
Chancellor Lafayette County, MS  
Post Office Drawer 70  
Oxford MS 38655  
*Trial Judge*

Nicholas Brown, Esq.  
Hughes and Hitt  
510 Azalea Drive, Suite 100  
Oxford, MS 38655  
*Attorney for the Appellee*

THIS the 6<sup>th</sup> day of February, 2008

  
Lisa A. Reppeto