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**SC Court of Appeals**

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM RICHLAND COUNTY  
Jocelyn Newman, Circuit Court Judge

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Appellate Case No. 2025-002124

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Curis D. Bale,.....Appellant,

v.

John A. Dougherty, Wachovia Securities Financial Holdings, LLC, Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, Wells Fargo & Company, Wells Fargo Bank, N.A., and LPL Financial, LLC, .....Defendants,

of which John A. Dougherty, Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, Wells Fargo Bank, N.A., and LPL Financial, LLC are.....Respondents.

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**MOTION TO REINSTATE THE APPEAL**

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Appellant Curtis “C.D.” Bale, the 82-year-old plaintiff in this case, moves this Court to reinstate his appeal following the unilateral October 22, 2025 order of dismissal.<sup>1</sup> The Court’s dismissal overlooks intervening changes in the law, the unconstitutional disparity in how arbitration orders are treated, and other matters which makes the circuit court’s orders immediately appealable.

## INTRODUCTION

“[N]othing is settled until it is settled right.” *McLeod v. Starnes*, 396 S.C. 647, 654, 723 S.E.2d 198, 202 (2012) (quoting *Smith v. Daniel Const. Co.*, 253 S.C. 248, 255–56, 169 S.E.2d 767, 771 (1969) (Bussey, J., dissenting)). Thirty years ago, our Supreme Court declared—with no briefing or input from the parties, like the dismissal order here—that orders compelling arbitration are not immediately appealable. *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995). The Court built its holding on “the policy of the United States and this State [] to favor arbitration of disputes.” *Id.* at 537, 471 S.E.2d at 136. But both the U.S. Supreme Court and our Supreme Court have since jettisoned that policy. *Palmetto Const. Grp., LLC v. Restoration Specialists*,

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<sup>1</sup> Bale recognizes that motions to reinstate an appeal usually follow an order of dismissal entered by the Clerk of Court, whereas Judge Vinson signed the dismissal here. See Rule 260(a), SCACR. Even so, a motion to reinstate is more appropriate than a petition for rehearing because there is nothing to rehear—the Court dismissed the appeal six days after it was filed without first hearing from the parties. See *Kennedy v. S.C. Ret. Sys.*, 349 S.C. 531, 532–33, 564 S.E.2d 322, 322–23 (2001) (holding petitions for rehearing are confined to issues previously raised by the parties). If the Court nevertheless determines a petition for rehearing is needed, Bale asks the Court to treat this motion as a petition for rehearing and grant leave to exceed the page limits in Rule 221(a), SCACR, because Bale has not previously had an opportunity to fully state his arguments. See *Richland Cnty. v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (holding the substance of the relief requested controls regardless of the form in which it was requested).

*LLC*, 432, S.C. 633, 649, 856 S.E.2d 150, 153 (2021) (“There is ... no public policy—federal or state—‘favoring’ arbitration.”); *see also Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022) (observing that the Supreme Court’s historic references to a “policy favoring arbitration” actually “connotes something different,” where “[t]he policy is to make arbitration agreements as enforceable as other contracts, but not more so”) (cleaned up); *Lampo v. Amedisys Holding, LLC*, 445 S.C. 305, 317, 914 S.E.2d 139, 146 (2025) (“We remind our litigants and lower courts that we dispensed with this incorrect notion [that there is a policy favoring arbitration] almost four years ago.”). By extension, they also jettisoned rules based on that policy like the disparate appellate treatment for arbitration orders which caused this Court to dismiss Bale’s appeal.

Given this change in the law, the Court should reinstate Bale’s appeal of the circuit court’s orders compelling arbitration for five reasons. First, the case law finding these orders to be non-appealable is no longer good law following the rejection of the policy in favor of arbitration. Second, the current one-sided appeal right violates equal protection by allowing for appeals from orders denying arbitration but disallowing them from orders granting arbitration with no rational basis. Third, the orders finally dispose of Bale’s judicial rights and thus are immediately appealable. Fourth, the orders compelling arbitration are injunctions barring Bale from pursuing his claims in court, which are immediately appealable. And fifth, the issues raised on appeal are capable of repetition and thus appealable regardless.

This case exemplifies why appellate oversight is essential. The circuit court compelled an 82-year-old investor to litigate a single dispute before three forums: court,

FINRA, and AAA. In doing so, the court did not address Bale's arguments that the agreements are unconscionable; overlooked the failure of Wells Fargo Advisors, Wells Fargo Bank, and LPL Financial to prove a valid and enforceable arbitration agreement exists; and compelled Bale to arbitrate his claims against John Dougherty before FINRA, despite Dougherty's permanent bar from the securities industry making him ineligible to arbitrate under FINRA's own rules. Finally, the Court stayed the remaining claims against Wells Fargo & Co. and Wachovia Securities Financial Holdings, even though they never moved to compel arbitration, no one moved for that stay, and a stay deprives Bale of substantial evidence and due process.

By foreclosing review of these orders, the Court's dismissal insulates significant questions of contract validity, statutory compliance, and due process from any judicial scrutiny. The existing rule which prohibits that review is not entitled to deference with its foundation having been overruled. *See McLeod*, 396 S.C. at 202–03, 723 S.E.2d at 654 (“An original case could not possible gain authority by a mere perfunctory following on the principle of stare decisis.”) (quoting *State v. Williams*, 13 S.C. 546, 554–55 (1880)). This Court should recognize that the prohibition against appealing orders compelling arbitration is no longer valid and reinstate Bale's appeal.

### **STATEMENT OF THE CASE**

This case arises out of Defendants' gross mismanagement of Bale's investments, including their intentional overleveraging of his accounts, leaving Bale grossly overexposed to market fluctuations, without disclosing the risks of that

strategy.<sup>2</sup> Defendants' misconduct caused Bale to lose over \$10 million, and their conflicted and frenetic actions to protect themselves instead of Bale when the value of Bale's overleveraged holdings plummeted during the pandemic irretrievably locked-in Bale's losses. Bale filed his suit nearly three years ago but has not been able to move beyond the pleadings as Defendants actively work to keep this case out of circuit court. The issue now is whether Bale is entitled to appellate review of the circuit court's decision forcing him to arbitrate his dispute. As explained in this motion, Bale has that right.

**I. Defendants intentionally overleveraged Bale's account, failed to disclose the risk of their strategy, and caused Bale to suffer tremendous damage.**

Bale had a successful career in the oil refining industry. Ex. 1, Compl., ¶19. In 2010, he retired and sold the business he helped bring out of Chapter 11 bankruptcy, Warrior Asphalt, Inc., for \$9.5 million. *Id.* ¶21. From the sale, Bale had to pay \$5 million for the buyout of his partner's interest in Warrior, capital gains taxes from the sale of his interest in Warrior, and a real estate loan. *Id.* Dougherty, who had managed Warrior's employee retirement plans, solicited Bale to become his personal client after learning of the substantial proceeds Bale would receive. *Id.* ¶22.

Dougherty assured Bale that the best way to manage the proceeds from Warrior's sale and satisfy Bale's obligations was through a three-pronged investment strategy where (1) Dougherty would be entrusted with the entire \$9.5 million Warrior proceeds in exchange for a management fee based on the gross value of Bale's

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<sup>2</sup> The term "Defendants" refers to all defendants in the circuit court action, and the term "Respondents" refers only to those defendants who are on appeal.

investments; (2) rather than pay off Bale's existing obligations with a portion of the \$9.5 million proceeds, Bale, at Dougherty's solicitation, would take out a \$5 million loan secured by Bale's investments, thus preserving the full amount of the proceeds for Dougherty's management; and (3) Bale, on Dougherty's advice, would never pay down the loan and would instead use the investment accounts to generate income to pay interest on the loan, management fees for Dougherty, and living expenses for Bale. Ex. 1 ¶23. Dougherty knew, but intentionally failed to disclose to Bale, the substantial risks of his plan to excessively leverage Bale's accounts which maximized Dougherty and his employer's earnings to the detriment of Bale's financial security. *Id.* ¶¶23–24. But, relying on Dougherty's reputation, apparent financial knowledge, and assurances that this investment strategy was prudent and safe, Bale accepted Dougherty's recommendation in full. *Id.*

In 2013, Dougherty transferred his registration to Wells Fargo Advisors. Ex. 1 ¶25. Unaware of the risk created by Dougherty's strategy, Bale followed Dougherty to Wells Fargo Advisors. *Id.* In connection with that move, Dougherty and Wells Fargo Advisors worked with Wells Fargo Bank to issue a "Secured Primeline" loan to assume Bale's existing \$5 million debt collateralized by his investment accounts. *Id.*; *see also* Ex. 2, Aff. of Curtis D. Bale, ¶5. Unbeknownst to Bale, he was the victim of a well-orchestrated scheme jointly devised by the principals of Wells Fargo & Co., Wells Fargo Bank, and Wells Fargo Advisors to pressure brokers like Dougherty to cross-sell bank loans to brokerage clients like Bale, and to keep loan balances as high as possible. *See* Bethany McLean & Ethan Wolff-Mann, *Exclusive: Wells Fargo pushed*

*wealth advisors to use high-fee products, cross-sell*, YAHOO! FINANCE (Aug. 21, 2018) <https://shorturl.at/550K0>. Wells Fargo’s now highly publicized fraudulent cross-selling scheme depended on all Wells Fargo entities aggressively pressuring their employees, including advisors like Dougherty, to sell Wells Fargo Bank products even when they were against a client’s best interests to fraudulently increase the earnings and stock price of Wells Fargo & Co.<sup>3</sup> *See id.* (reporting that “advisors felt pushed to add high-fee products to portfolios” that “could result in additional revenue for the bank”); *id.* (“In addition to the use of advanced investing options, Wells Fargo advisors in the Private Bank were also required to generate other business in the form of loans, mortgages, and wealth-planning products, or, once again, put their bonuses in jeopardy.”); *see also* Rachel Lousie Ensign, *Wells Fargo Ex-CEO Banned, to Pay \$17 Million in Fake-Account Scandal*, Wall St. J. (Jan. 23, 2020) (reporting that a former employee wrote to John Stumpf in 2013 stating “I was in the 1991 Gulf War ... This is sad and hard for me to say, but I had less stress in the 1991 Gulf War than working for Wells Fargo”).

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<sup>3</sup> Wells Fargo has been subject to numerous regulatory and enforcement actions resulting in billions of dollars in fines because of their unlawful cross-selling of company products. *See* Srinivasan Ragothaman, et al., *Fake Accounts Scandal at Wells Fargo: What are the Lessons?*, 14 J. FORENSIC INVESTIGATIVE ACCT. (Dec. 2022), <http://web.nacva.com/JFIA/Issues/JFIA-2022-No2-11.pdf>. As part of a federal case brought by the Office of the Comptroller of the Currency, the former CEO of Wells Fargo John Stumpf was banned from the industry and ordered to pay a fine of \$17.5 million. *Id.*; *see also In re John Stumpf*, AA-EC-2019-83 (Jan. 22, 2020), <https://www.occ.gov/static/enforcement-actions/ea2020-004.pdf>. Similarly, former Wells Fargo senior executive Carrie Tolstedt agreed to pay \$3 million in fines to the SEC for her role in misleading investors about abusive sales practices. SEC Release No. 2023-99 (May 30, 2023), <https://www.sec.gov/newsroom/press-releases/2023-99>.

The “Secured Primeline” loan is an exemplar of Wells Fargo’s fraudulent cross-selling scheme. *See* Brian Tayan, *The Wells Fargo Cross-Selling Scandal*, Harv. L. Sch. F. Corp. Governance (Feb. 6, 2019) (noting the risks of financial incentives when employees are rewarded “for achieving a metric without regard to the actions they took to achieve that metric”). Bale’s accruing interest and nearly doubled investment account balance maximized Wells Fargo’s profits and Dougherty’s income—in 2019 alone, Wells Fargo collected over \$250,000 from Bale in loan interest and investment management fees, meaning his investments needed to generate an over 3.5% return just to pay his fiduciaries’ fees before he received any funds for living expenses. Ex. 1 ¶32. To continue maximizing the revenue stream, Wells Fargo and Dougherty never instructed Bale to pay down the loan balance. *Id.* ¶¶26–27.

As 2020 began, Bale’s assets remained excessively leveraged to secure the \$5 million he still owed to Wells Fargo Bank. Ex. 1 ¶32. When the Covid-19 pandemic struck, Dougherty preemptively sold off Bale’s securities holdings to protect Wells Fargo Bank’s interest in obtaining repayment of the loan debt by converting all of Bale’s holdings into cash. *Id.* ¶37. This locked Bale’s losses while protecting Wells Fargo, and prevented Bale from participating in the market rebound in early May 2020. *Id.* Throughout 2020, Dougherty continued engaging in erratic and imprudent short-term trading to Bale’s detriment. *Id.* ¶¶36–40.

In early 2021, Dougherty transferred his registration to LPL Financial, and again, at Dougherty’s urging and without knowledge or understanding of the gross mismanagement of his financial accounts, Bale transferred his accounts to LPL

Financial. Ex. 1 ¶43. Dougherty continued to engage in erratic and imprudent short-term in-and-out trading at LPL Financial, even though this strategy had proved fruitless at Wells Fargo, eroding the little remaining equity in Bale's accounts. *Id.* ¶¶46–47. Facing a forced sale of his entire investment account if its value dropped below \$5 million, Bale transferred his assets out of LPL Financial in August 2021. *Id.* ¶47. Bale had to cut his standard of living, including selling his beloved retirement home and foregoing the retirement he worked so hard for, to begin paying down the loan taken and maxed out at Dougherty's recommendation. *Id.* ¶48.

**II. The circuit court erroneously compelled Bale's case to arbitration based on agreements which are unconscionable, invalid, and contrary to forum rules.**

Bale filed his complaint in the Richland County Court of Common Pleas on January 17, 2023, alleging causes of action for breach of fiduciary duty, breach of contract, breach of contract accompanied by a fraudulent act, violation of the South Carolina Uniform Securities Act of 2005, and violation of the South Carolina Uniform Securities Act. *See generally* Ex. 1. LPL Financial removed the case to federal court, alleging diversity jurisdiction. But after LPL Financial failed to meet its burden to prove diversity of citizenship, the district court remanded the case on March 25, 2024. *Bale v. Dougherty*, No. 3:23-cv-660-SAL, 2024 WL 3607691 (D.S.C. Mar. 25, 2024).

Back in circuit court, Respondents moved to compel arbitration on March 25 and April 3, 2024. Ex. 3, LPL Mot. and Mem. to Compel Arb.; Ex. 4, Wells Fargo Advisors and Dougherty Mot. and Mem. to Compel Arb.; Ex. 5, Wells Fargo Bank

Mot. and Mem. to Compel Arb.<sup>4</sup> Wells Fargo Advisors, LPL Financial, and Dougherty sought arbitration before FINRA, the Financial Industry Regulatory Authority, while Wells Fargo Bank sought arbitration before AAA. Wells Fargo & Co. and Wachovia Securities Financial Holdings answered the complaint and did not seek arbitration.

Bale opposed Respondents' motions on three grounds. *See* Ex. 6, Bale Opp. to Mots. to Compel Arb. The first was the unconscionability of Wells Fargo Advisors' and Wells Fargo Bank's agreements. Wells Fargo's liability results from a unified scheme which Wells Fargo wants to spread across this Court (for Wells Fargo & Co.) and two separate arbitration groups (FINRA for Wells Fargo Advisors and AAA for Wells Fargo Bank). No single decision-maker will consider Wells Fargo's collective liability, and it will be impossible to present all evidence and witnesses before any single body. This creates a risk of inconsistent fact-finding that precludes recovery on a procedural rather than merits basis, in violation of *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 612, 879 S.E.2d 746, 755 (2022), and oppressively increases the cost and complexity of arbitration. Ex. 6 at 13–15. These arbitration agreements are also unconscionable because Wells Fargo Advisors and Wells Fargo Bank retained the unilateral right to amend them. *Id.* at 15–16. The second was that no valid arbitration agreements exist due to the lack of consideration, absence of a meeting of the minds, mistake, and failure of a condition precedent. *Id.* at 16–33. And the third

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<sup>4</sup> For ease of review at this stage, Bale omits exhibits to any filings in the circuit court because they are not germane to the Court's understanding of the issues presented. The main documents are sufficient to provide the needed information. In any event, Bale will supplement these documents with their exhibits if requested.

was that FINRA rules prohibit Dougherty—who has been barred from the industry—from forcing Bale to arbitrate in that forum. *Id.* at 34–35.

The Honorable Jocelyn Newman, who had been assigned to the case through the Business Court program, heard Respondents’ motions on November 18, 2024, and entered a Form 4 granting them on March 26, 2025. Ex. 7, Form 4 Order. Judge Newman then entered Respondents’ proposed orders without change on July 9, 2025. Ex. 8, Orders Granting Mots. to Compel Arb. The court also stayed Bale’s claims against Wells Fargo & Co. and Wachovia Securities Financial Holdings, even though no one had asked for such a stay. *E.g., id.* at 16, 19.

Bale moved for reconsideration on July 21, 2025. Ex. 9, Bale Mot. for Recons.; *see also* Ex. 10, LPL Opp. to Mot. for Recons.; Ex. 11, Wells Fargo Advisors, Wells Fargo Bank, and Dougherty’s Opp. to Mot. for Recons.; Ex. 12, Bale Reply in Supp. of Mot. for Recons. As Bale summarized, the circuit court’s orders are deeply flawed:

The Court’s July 9, 2025 orders compelling arbitration overlooked, misapprehended, and did not consider core arguments Bale raised in opposition to arbitration, and improperly, albeit inadvertently, stayed claims against two parties not subject to arbitration. First, the Court did not address Bale’s unconscionability argument, despite clear and un rebutted evidence that the arbitration agreements were procedurally and substantively oppressive and one-sided. Also, after a hearing on the original motions the Fourth Circuit affirmed a district court’s refusal to compel arbitration under similar unilateral contractual terms. *See Johnson v. Cont’l Fin. Co., LLC*, 131 F.4th 169, 178 (4th Cir. 2025). Second, the Court overlooked the failure of Wells Fargo Advisors, Wells Fargo Bank, and LPL Financial to meet their burden of proving the existence of a valid and enforceable arbitration agreement with Bale. Each entity relied on flawed or irrelevant contracts, including documents that lack a meeting of the minds, are infected by mistake, are unsupported consideration, or fail to meet FINRA’s requirements. Third, the Court did not consider FINRA Rule 12202(a), which prohibits a barred broker like Dougherty from

compelling arbitration without customer consent, which Bale has not given. Because these omissions materially affect the outcome of the Court's orders and implicate Bale's right to a judicial forum, reconsideration is both necessary and appropriate.

Reconsideration is also necessary to clarify that the claims against Wells Fargo & Company and Wachovia Securities Financial Holdings are not stayed. Both entities answered Bale's complaint, neither moved to compel arbitration, no other party asked that claims against these two Defendants be stayed, all Defendants understood that the case would proceed against these entities in court even if the then-pending motions to compel arbitration were granted, and Bale would be greatly prejudiced by a stay. Yet, the Court's orders purport to stay this *entire* case. Reconsideration is imperative to afford the Court the opportunity to, at a minimum, clarify the scope of its ruling as only applying to the moving Defendants.

*Id.* at 1–2. Judge Newman denied Bale's motion on September 16, 2025. Ex. 13, Order Denying Recons.

Bale appealed Judge Newman's orders on October 16, 2025. Six days later, and with no motion or input from the parties, this Court dismissed the appeal on the ground that the orders are not immediately appealable under *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.*, 355 S.C. 605, 586 S.E.2d 581 (2003). Bale now brings this motion to reinstate the appeal under Rule 260, SCACR, because these orders are immediately appealable under current case law.

## ARGUMENT

### **I. The Court should reinstate the appeal because its dismissal is based on a single line of cases rooted in the now-rejected “policy in favor of arbitration.”**

Reinstatement is warranted because the rule prohibiting appeals from orders compelling arbitration is no longer good law.

The Court based its dismissal on the holding from *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co.* that “an order compelling arbitration is not immediately appealable.” 355 S.C. 605, 610, 586 S.E.2d 581, 584 (2003). For this proposition, *Toler's Cove* cited the Supreme Court’s earlier decision in *Heffner v. Destiny, Inc.*, 321 S.C. 536, 471 S.E.2d 135 (1995). *Id.* In *Heffner*, the Supreme Court held that “[t]he policy of the United States and this State is to favor arbitration of disputes” and “[c]onsistent with this policy, statutes at both the federal and state level have been enacted which restrict the right to appeal orders which favor arbitration over litigation.” 321 S.C. at 537, 471 S.E.2d at 136; *see also Towles v. United HealthCare Corp.*, 338 S.C. 29, 34, 524 S.E.2d 839, 842 (Ct. App. 1999) (“Both federal and state policy favor arbitrating disputes. This preference for arbitration has manifested itself in legislation and judicial decisions supporting the expeditious appeal of decisions denying an application to compel arbitration.”) (citing *Heffner*, 321 S.C. at 537, 471 S.E.2d at 136). With this policy in mind, *Heffner* next held that S.C. Code Ann. § 15-48-200, which specifically allows for appeals from orders denying arbitration but is silent on orders granting arbitration, controls over the general appealability statute, S.C. Code Ann. § 14-3-330. 321 S.C. at 537–38, 471 S.E.2d at 136. And finally, *Heffner* held that § 15-48-200’s silence as to the appealability of orders compelling arbitration means they are not appealable. *Id.* Notably, the Court reached this decision on its own without a motion or input from the parties.

The cornerstone of *Heffner* and *Toler's Cove*—the policy in favor of arbitration—has since been repudiated. *See Palmetto Const. Grp., LLC v. Restoration Specialists*,

*LLC*, 432, S.C. 633, 649, 856 S.E.2d 150, 153 (2021) (“There is ... no public policy—federal or state—‘favoring’ arbitration.”); *see also Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022) (observing that the Supreme Court’s historic references to a “policy favoring arbitration” actually “connotes something different,” where “[t]he policy is to make arbitration agreements as enforceable as other contracts, but not more so”) (cleaned up); *Lampo v. Amedisys Holding, LLC*, 445 S.C. 305, 317, 914 S.E.2d 139, 146 (2025) (“We remind our litigants and lower courts that we dispensed with this incorrect notion [that there is a policy favoring arbitration] almost four years ago.”).

With the policy favoring arbitration over litigation gone, the statutory appealability analysis becomes straightforward. General and specific statutes must be harmonized if possible. *Denman v. City of Columbia*, 387 S.C. 131, 138, 691 S.E.2d 465, 468 (2010). The specific statute prevails over the general one *only* when the two conflict. *Porter v. S.C. Pub. Serv. Comm’n.* 327 S.C. 220, 224 n.3, 489 S.E.2d 467, 469 n.3 (1997). With there being no policy in favor of arbitration, § 15-48-200 and § 14-3-330 do not conflict. Section 15-48-200 simply removes doubt that certain orders involving arbitration—such as orders denying arbitration or staying arbitration, both of which allow court proceedings to continue—are appealable. But it does not supplant the general statute. *See Cnty. of Hawaii v. UNIDEV, LLC*, 129 Haw. 378, 390, 301 P.3d 588, 600 (2013), *as corrected* (July 24, 2013) (finding that the UAA poses “no hurdle” to the general appeals statute but must be read in conjunction to permit appeals from orders compelling arbitration). Further, the canon that “including one thing implies the exclusion of another” which *Heffner* employed is not a rule of substantive of law.

*S.C. Dept. of Consumer Affairs v. Rent-A-Center, Inc.*, 345 S.C. 251, 256, 547 S.E.2d 881, 884 (Ct. App. 2001) (citing *Hodges v. Rainey*, 341 S.C. 79, 96 n.1, 533 S.E.2d 578, 587 n.1 (2000) (Burnett, J., concurring in part, dissenting in part)). As a result, it “should be used with care.” *Id.* (quoting *Hodges*, 341 S.C. at 96 n.1, 533 S.E.2d at 587 n.1); *see also UNIDEV*, 129 Haw. at 390, 301 P.3d at 600 (rejecting application of this canon because the UAA’s use of “may” indicates that it is not an exclusive list). So if there is no policy in favor of arbitration, then an intent to prohibit appeals from order compelling arbitration cannot be inferred under this canon of construction.<sup>5</sup>

*Heffner* has lost the foundation for its holding and its precedential value. *See McLeod v. Starnes*, 396 S.C. 647, 654, 723 S.E.2d 198, 202 (2012) (“[W]hen the court is asked to follow the line marked out by a single precedent case it is not at liberty to place its decision on the rule of stare decisis alone, without regard to the grounds on which the antecedent case was adjudicated.”) (quoting *State v. Williams*, 13 S.C. 546, 554 (1880)). Simply put, there are no special appealability rules for arbitration orders. And because orders denying arbitration are appealable, so too are orders compelling arbitration. The Court therefore should reinstate Bale’s appeal.

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<sup>5</sup> Section 15-48-200 differs significantly from the Federal Arbitration Act in this regard. Unlike the state statute, 9 U.S.C. § 16(b)(2) expressly states that orders compelling arbitration are *not* appealable. That Congress needed to exempt those orders demonstrates they otherwise are appealable if they fall within § 14-3-330. *See Denene, Inc. v. City of Charleston*, 352 S.C. 208, 212, 574 S.E.2d 196, 198 (2002) (“The Court must presume the legislature did not intend a futile act, but rather intended its statutes to accomplish something.”); *see also Toler’s Cove*, 355 S.C. at 584–85, 586 S.E.2d at 611 (holding state law applies to questions of appealability).

**II. Even if *Heffner* has not been overruled, the Court should reinstate the appeal because the one-side appeal right unconstitutionally treats parties who are compelled to arbitrate differently than those who seek arbitration.**

Denying appellate review also creates a classification that violates the Equal Protection Clauses of the United States and South Carolina Constitutions. A party who loses a motion to compel arbitration has a right to immediately appeal, while a party who loses his opposition to arbitration does not. Because there is no rational basis for that disparity, Court should find that the current rule is unconstitutional and reinstate the appeal.

“[N]o person, or class of persons, shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.” *City of Beaufort v. Holcombe*, 369 S.C. 643, 647–48, 632 S.E.2d 894, 897 (Ct. App. 2006) (citing *Harrison v. Caudle*, 141 S.C. 407, 416, 139 S.E. 842, 845 (1927)). “A classification does not violate the equal protection clause if: (1) the classification bears a reasonable relation to the legislative purpose sought to be effected; (2) the members of the class are treated alike under similar circumstances and conditions; and (3) the classification rests on some reasonable basis.” *In re Treatment & Care of Luckabaugh*, 351 S.C. 122, 149, 568 S.E.2d 338, 351 (2002). Because no suspect class is implicated here, only “irrational and unjustified classifications” are barred and “legislative enactments are to be avoided only when they are without any reasonable basis.” *Holcombe*, 369 S.C. at 649, 632 S.E.2d at 897.

There is no rational justification for allowing defendants to appeal the denial of arbitration while depriving plaintiffs of the same right when the identical issue is

decided against them. The purpose behind allowing appeals only from orders denying arbitration is the policy in favor of arbitration. *Stedor Enters., Ltd. v. Armtex, Inc.*, 947 F.2d 727, 730 (4th Cir. 1991); *see also Towles*, 338 S.C. at 34, 524 S.E.2d at 842 (finding an order denying arbitration to be appealable because it “favored litigation over arbitration”); George F. Lieberman, *Discovery in an Arbitration Proceeding and Appealing an Award Under the Federal Arbitration Act: It’s Not That Simple (and What You Do Not Know Can Hurt You)*, 56-May Fed. Law. 54, 56 (2009) (“The rules governing appeals [under the Federal Arbitration Act] may be simply stated as follows: orders favoring arbitration are not considered final for purposes of appeal and not immediately appealable; orders unfavorable to arbitrations are considered final for purposes of appeal and immediately appealable.”). With that policy now gone, there is no justification for rule. Both categories of litigants raise the identical question of arbitrability, and both face irreparable consequences if wrongly decided: loss of the bargained-for forum, forfeiture of procedural rights, and exposure to inconsistent outcomes. There is no basis to give a right of appeal to one but not the other. To the extent this disparity remains the law, it is unconstitutional.

The preservation of Bale’s constitutional rights necessitates reconsideration of the asymmetrical review afforded to similarly situated litigants. If left intact, this imbalance will produce an untenable result: a defendant may immediately appeal to avoid arbitration, while a plaintiff must submit to arbitration, lose access to the courts, and only later attempt to unwind the process after years of expense and procedural prejudice. “It is the duty of this Court, not the legislature, to determine the

constitutionality of a statute.” *Joseph v. S.C. Dep’t of Labor, Licensing, & Reg.*, 417 S.C. 436, 453, 790 S.E.2d 763, 772 (2016). This Court must now exercise that duty to preserve parity and ensure meaningful judicial oversight, recognizing Bale’s right to an immediate appeal.

**III. The Court should reinstate the appeal because the orders granting Respondents’ motions to compel arbitration are appealable under S.C. Code Ann. § 14-3-330.**

As noted above, the recognition that a party can appeal the denial of arbitration means a party can appeal the grant of arbitration too. The foundation for the preexisting dichotomy no longer exists and allowing it to persist violates equal protection. In any event, orders granting arbitration are independently appealable under § 14-3-330.<sup>6</sup>

**A. The orders are appealable final judgments under § 14-3-330(1) because they dispose of the entire case before the circuit court.**

An appeal lies under § 14-3-330(1) from any final judgment. South Carolina courts have specified that an order does not have to terminate a case to be a final judgment; it is merely “something that finally *disposes of the whole subject matter of the action or* terminates the action, leaving nothing to be done but to execute the

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<sup>6</sup> *Heffner* refused to consider § 14-3-330 because it believed § 15-48-200 is the controlling statute. 321 S.C. at 538, 471 S.E.2d at 136. But in the years since, appellate courts have turned to § 14-3-330 even after finding that an order is not appealable under § 15-48-200. *E.g.*, *Widener v. Fort Mill Ford*, 381 S.C. 522, 524, 674 S.E.2d 172, 173–74 (Ct. App. 2009) (“Although section 15-48-200 does not include an order dismissing an action among a list of orders from which an appeal may be taken in arbitration cases, this section does not preclude the order in this case from being immediately appealable. By dismissing Widener’s action, the court finally determined the rights of the parties; therefore, we have jurisdiction pursuant to section 14-3-330 of the South Carolina Code.”).

judgment.” *Bone v. U.S. Food Serv.*, 404 S.C. 67, 83, 744 S.E.2d 552, 561 (2013) (emphasis added). “An order usually will be deemed interlocutory and not immediately appealable when there is some further act that must be done by the trial court prior to a determination of the parties’ rights.” *Watson v. Underwood*, 407 S.C. 443, 458, 756 S.E.2d 155, 163 (Ct. App. 2014). Under this controlling law, there has been an appealable final order: the circuit court has disposed of the entire case before it, leaving nothing left but confirmation or vacation of the arbitral award.

Once the circuit court compelled arbitration and stayed the judicial proceedings, the litigation ceased to exist in any meaningful sense as private arbitrators now dictate the parties’ rights and remedies entirely. And no subsequent act by the circuit court will alter the merits of the case. In other words, Bale has “arrived at the end of the road” of the circuit court’s involvement. *Baldwin Constr. Co. v. Graham*, 357 S.C. 227, 230, 593 S.E.2d 146, 147 (2004). The court can only, after the arbitration concludes, review the arbitrator’s order through the extraordinarily narrow lens of modification, confirmation, or vacation. “The award is presumptively correct, and it 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. v. Lucas & Stubbs, Ltd.*, 286 S.C. 98, 111, 333 S.E.2d 781, 788–89 (1985) (internal citation omitted); see also 6 C.J.S. *Arbitration* § 218 (“[C]ourts are not authorized to reconsider the merits of an arbitration award.”). This functional finality of sending the case to arbitration is precisely what § 14-3-330(1) contemplates.

The circuit court's decision to *stay* the proceedings, rather than formally dismiss them, does not alter the analysis. South Carolina courts look to the substance and effect of an order, not its label, when determining finality. See *Mid-State Distributors, Inc. v. Century Importers, Inc.*, 310 S.C. 330, 335, 426 S.E.2d 777, 780 (1993) (holding appealability is determined by whether “there is some further act which must be done by the court prior to a determination of the rights of the parties” rather than the order itself). Other courts have correctly concluded that orders compelling arbitration are final for purposes of appealability. E.g., *Kremer v. Rural Cmty. Ins. Co.*, 280 Neb. 591, 601, 788 N.W.2d 538, 549 (2010) (“[W]e agree with courts that hold that an order compelling arbitration and staying judicial proceedings is a final determination of arbitrability.... Just as an order refusing to compel arbitration diminishes a party's claim that it is entitled to arbitrate, so does an order compelling arbitration diminish a party's claim that it is entitled to litigate in court. These claims cannot be effectively vindicated after the party has been compelled to do that which it claims it is not required to do.”); *Schuele v. Case Handyman & Remodeling Servs., LLC*, 412 Md. 555, 571, 989 A.2d 210, 219 (2010) (“More specifically, in the context of arbitration, we have held that an order compelling arbitration of a controversy is immediately appealable as a final judgment even though it does not finally dispose of all claims in the action in which it was filed because the order has the effect of putting the parties out of court.”) (internal citation omitted); *Sawyers v. Herrin-Gear Chevrolet Co.*, 26 So. 3d 1026, 1034 (Miss. 2010) (“In an effort to provide uniformity and judicial economy, this Court holds today that an order compelling arbitration which disposes of all the issues before the

trial court *or orders the entire controversy to be arbitrated* is a final decision, and therefore, immediately appealable.”) (emphasis added); *Wein v. Morris*, 194 N.J. 364, 380, 944 A.2d 642, 651 (2008) (“[W]e find it appropriate to deem an order compelling arbitration a final judgment appealable as of right. That is, whether the court in compelling arbitration dismisses the action as part of a final order or stays the matter, the order will be deemed final and appealable as of right.”); *Edward Fam. Ltd. P’ship v. Brown*, 2006-NMCA-083, ¶8, 140 N.M. 104, 108, 140 P.3d 525, 529 (“An order referring issues to arbitration is a final, appealable order if it is the last deliberative action of the court with respect to the controversy before it.”) (internal quotation omitted); *Douglass v. Pflueger Hawaii, Inc.*, 110 Haw. 520, 522 n. 1, 135 P.3d 129, 131 n. 1 (2006), *as corrected* (May 30, 2006) (“Orders granting stays and compelling arbitration are appealable final orders.”) (internal quotation omitted); *Horsey v. Horsey*, 329 Md. 392, 403, 620 A.2d 305, 310–11 (1993) (stating that “an order compelling the parties before the trial court to submit their dispute to arbitration, thereby denying all relief sought in the trial court and terminating the action there, is a final appealable judgment”); *Cajun Elec. Power Co-op., Inc. v. Louisiana Power & Light Co.*, 334 So.2d 554, 555 (La. App. 4 Cir. 1976) (“When the trial judge ordered arbitration, he passed on the merits of the case. Therefore, the trial court judgment is a final judgment.”); *see also Marketch Int’l Corp. USA, Inc. v. Process Serv. Specialists, LLC*, No. 1 CA-SA 25-0039, 2025 WL 2984900, at \*2 (Ariz. Ct. App. Oct. 23, 2025) (permitting appeal from motion compelling arbitration when it involved questions of law because “accepting jurisdiction now will resolve who must decide the threshold

question of whether arbitration can be compelled at all in the face of a likely illegal and void contract, before a costly, duplicative, and unnecessary proceeding must be litigated to conclusion”); *Triple Crown at Observatory Vill. Ass’n, Inc. v. Vill. Homes of Colo., Inc.*, 2013 COA 144, ¶ 15–¶ 23, 389 P.3d 888, 891–93 (Colo. Ct. App. 2013) (granting review of a motion compelling arbitration under Colorado’s statute governing interlocutory appeals because questions of contract interpretation are questions of law and if “the district court had erred in enforcing the arbitration provision, the parties would have needlessly expended substantial amounts of time and money” by “litigating an entire case in a forum that had no power to decide it”); 4 Am. Jur. 2d *Alternative Dispute Resolution* § 103 (“However, an order granting a motion to compel arbitration is reviewable if it is a final decision with respect to arbitration, from which an appeal will lie, is a decision that ends the litigation on the merits and leaves nothing more for the court to do but execute the judgment.”).

Here, the effect of the stay is indistinguishable from dismissal—it terminates all judicial proceedings, removes the case from the court’s active docket, and transfers resolution of every issue to private arbitrators. A procedural stay that leaves a party without any remaining avenue for relief in court is a final order. As a result, the circuit court’s orders are immediately appealable under S.C. Code Ann. § 14-3-330(1).

**B. Even if the orders are not final judgments, they are immediately appealable under § 14-3-330(4) as orders granting an injunction.**

S.C. Code Ann. § 14-3-330(4) grants appellate jurisdiction over an “interlocutory order or decree in a court of common pleas granting, continuing, modifying, or refusing an injunction.” This Court has adopted the broadest interpretation of an injunction,

stating that “[a]n injunction is an equitable remedy that may be used to require a party to perform an action.” *Richland Cnty. v. Kaiser*, 351 S.C. 89, 94, 567 S.E.2d 260, 262 (Ct. App. 2002) (citing *Kneale v. Bonds*, 317 S.C. 262, 269, 452 S.E.2d 840, 843 (Ct. App. 1994)); *see also* 42 Am. Jur. 2d *Injunctions* § 1 (“[An injunction] is an equitable remedy, designed to protect property or other rights from irreparable injury or harm. The term injunction is to be construed broadly.”). An order compelling parties to pursue a matter outside of court, thereby staying or dismissing the underlying action to protect defendant’s contractual rights, fits precisely within that broad reading.

There is no dispute that the court’s enforcement of a contractual right by enjoining a party from some act is an immediately appealable injunction. *See Poynter Invs., Inc. v. Century Builders of Piedmont, Inc.*, 387 S.C. 583, 585, 694 S.E.2d 15, 16 (2010) (“This is an appeal from an order granting a preliminary injunction to enforce a non-competition agreement but modifying the territorial restriction in that agreement.”); *AJG Holdings, LLC v. Dunn*, 382 S.C. 43, 51, 674 S.E.2d 505, 509 (Ct. App. 2009) (“Generally, a restrictive covenant will be enforced regardless of the amount of damage that will result from the breach and even though there is no substantial monetary damage to the complainant by reason of the violation.... The mere breach alone is grounds for injunctive relief.”); S.C. Code Ann. § 14-3-330(4) (conferring appellate jurisdiction over orders “granting, continuing, modifying, or refusing an injunction”). And “a court must hold a party to its arbitration contract just as court would to any other kind” and “may not devise novel rules to favor arbitration over litigation.” *Morgan*, 596 U.S. at 418; *see also id.* (“If an ordinary procedural rule—

whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it.”).

To properly treat arbitration agreements as ordinary contracts, courts must apply these same rules to injunctive relief to enforce an arbitration clause. When a plaintiff files an action in court, a defendant’s motion to compel is the procedural response to an alleged breach of that agreement. If granted, the plaintiff is met with an order enjoining him from pursuing his claims in court. And like the enforcement of any other restrictive covenant, the plaintiff is entitled to appellate review of that order.

While South Carolina has not addressed this issue head on, other jurisdictions have held that an order granting arbitration is immediately appealable as an injunction. *Washington v. Persona Identities, Inc.*, 2024 IL App (3d) 240210, ¶11, 254 N.E.3d 394, 400, *appeal denied*, 246 N.E.3d 1196 (Ill. 2024) (“Because such an order is akin to an injunction it is appealable under Rule 307(a)(1), which allows us to review interlocutory orders granting ... an injunction.”) (internal citation omitted); *Andrew v. Am. Imp. Ctr.*, 110 A.3d 626, 633 (D.C. 2015) (“We are satisfied that applying the *Carson* test, an order compelling arbitration in the context of a consumer adhesion contract is injunctive in nature.”); *see also Kansas Gas & Elec. Co. v. Westinghouse Elec. Corp.*, 861 F.2d 420, 422 (4th Cir. 1988) (“We hold that orders denying arbitration do have an injunctive effect and have ‘serious, perhaps irreparable, consequence.’ The order is injunctive because it enjoins proceedings in another tribunal. It has serious consequences because of the ‘irreparable harm that exists when arbitration is denied ab initio.’”) (citing *Taylor v. Nelson*, 788 F.2d 220, 224 (4th Cir. 1986)).

Accordingly, this Court has jurisdiction to review an order compelling arbitration as an interlocutory injunction under § 14-3-330(4). The circuit court's order did not merely determine a procedural question; it affirmatively enjoined Bale from exercising his right to proceed in court and compelled him to litigate his claims across multiple private forums. That is the essence of injunctive relief. This Court therefore should reinstate Bale's appeal under 14-3-330(4).<sup>7</sup>

**IV. Setting all else aside, the Court should reinstate the appeal because the issues raised are capable of repetition.**

As the Supreme Court acknowledged in *Toler's Cove*, appellate courts may review orders compelling arbitration where the “issues are capable of repetition and need to be addressed.” 355 S.C. at 611, 586 S.E.2d at 585. That is the case here. If review is deferred, the same substantive questions will continue to arise and evade review, perpetuating uncertainty for litigants and trial courts alike. The “capable of

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<sup>7</sup> While Respondents may point to other jurisdictions rejecting the appealability of an order compelling arbitration as an injunction or a final order, these courts do so under the rejected policy favoring arbitration. *E.g.*, *Stoebner v. Konrad*, 2018 S.D. 47, ¶13, 914 N.W.2d 590, 595 (2018) (“Our decision dismissing this appeal [of a motion compelling arbitration] is in harmony with the plain reading of the applicable appeal statutes and *our case law favoring resolution of disputes by arbitration.*”) (emphasis added); *Muao v. Grosvenor Props.*, 99 Cal. App. 4th 1085, 1092, 122 Cal. Rptr. 2d 131, 138 (2002) (disallowing appeals from motions compelling arbitration “is consistent with the overall purpose of the FAA to encourage, rather than discourage, the use of arbitration, and [California] is even more encouraging of the use of arbitration than is the federal procedure.”); *Elm Creek Villas Homeowner Ass’n, Inc v. Beldon Roofing & Remodeling Co.*, 940 S.W.2d 150, 155 (Tex. App. 1996) (rejecting the injunction argument because “[a]rbitration, so heavily favored both under statute and caselaw, is not so easily avoided”); *Fayette Cnty. Farm Bureau Fed’n v. Martin*, 758 S.W.2d 713, 714 (Ky. Ct. App. 1988) (noting the policy the appealability of an order denying a motion to compel arbitration, which hinders arbitration and is immediately appealable under KRS 417.220(1)(a), “espouses the policy that arbitration is to be encouraged”).

repetition” rationale that justified review in *Toler’s Cove* therefore compels review now regardless of § 15-48-200 and § 14-3-330.

First, like so many other agreements in our increasingly complex world, this case concerns multiple agreements with different forums. Absent immediate review, the extent to which these agreements are unconscionable under cases like *Damico* will be a perpetual issue that needs further guidance. The circuit court splintered a single, unified dispute against Wells Fargo into multiple, unconscionable proceedings through Respondents’ standard contracts of adhesion. Bale has no meaningful opportunity for review of this decision. A motion to vacate, modify, or correct an arbitration award must be filed within three months of the award’s issuance. *See* 15-40-120 to -140. Yet if the AAA and FINRA proceedings proceed on different schedules, a virtual certainty, Bale must file piecemeal judicial actions to preserve his rights, all while his claims against Wells Fargo & Co. remain dormant, potentially for years. The question will then be: must Bale file separate appeals following a ruling on each application, must he wait until all have been ruled on *and* his claims against Wells Fargo & Co. are resolved, or can he do either? *Accord Link v. Sch. Dist. of Pickens Cnty.*, 302 S.C. 1, 3–6, 393 S.E.2d 176, 177–79 (1990) (holding that summary judgment as to one claim may be appealed at the time of the order or at end of the case). The result is a procedural morass, implemented by Defendants, that risks extinguishing substantive rights before any unified judicial review is even possible.

Bale’s appeal also raises a host of other repeatable issues that need review. Can arbitration be compelled even if the forum rules prohibit the claim? Here, FINRA rules

prohibit Dougherty from forcing Bale into arbitration. *See* FINRA Rule 12202(a) (“A claim by or against a member or an associated person who is inactive at the time the claim is filed *is ineligible for arbitration under the Code unless the customer agrees in writing to arbitrate after the claim arises.*”) (emphasis added). Without a right to appeal, Bale would file a claim in FINRA, which requires submission to FINRA and an attestation that the claim is arbitrable, and then ask FINRA to dismiss it as improper. The law does not require such absurdity to obtain review. *Cf. Link*, 302 S.C. at 7, 393 S.E.2d at 179 (holding a party should not have to make frivolous arguments to reverse a final decision to appeal an intermediate one). When can an agreement to arbitrate a dispute involving one account (or construction project, professional engagement, etc.) require arbitration of disputes relating to a separate account? What happens when a party produces illegible arbitration agreements, the agreement does not comply with forum rules, there was not a meeting of the minds on the agreements, or there are myriad other routine contractual defenses that regularly arise? All these recurring issues are present here but largely go unanswered with one-sided appeals.

The practical effect of the circuit court’s intertwined arbitration orders is to trap Bale in a procedural no-man’s-land: multiple forums operating on conflicting timelines, with no single tribunal possessing complete jurisdiction, and no mechanism for coordinated review, all under agreements that fail as a matter of law. Absent review, these defects will quickly calcify beyond reach, producing inconsistent results and potentially foreclosing relief for Bale and others who bring similar disputes. The damage will have been done by the end of the case. Each respective arbitration will

have determined the evidence, the scope of discovery, and even the applicable law.<sup>8</sup> Bale would then face the near-impossible task of undoing the consequences of arbitration itself, which are presumptively correct and heavily weighted in favor of the arbitrator's findings. *See Grp. III Mgmt., Inc. v. Suncrete of Carolina, Inc.*, 425 S.C. 141, 150, 819 S.E.2d 781, 785 (Ct. App. 2018) ("Generally speaking, an award within the scope of submission is conclusive on fact issues and interpretation of law."); *see also UBS Fin. Servs., Inc. v. Padussis*, 842 F.3d 336, 339 (4th Cir. 2016) ("The scope of judicial review of an arbitration award is among the narrowest known at law.") (internal quotation omitted). Recognizing appellate jurisdiction here therefore serves not only the integrity of this case but also the broader constitutional imperative of equal access to the courts.

## CONCLUSION

Reinstatement of Bale's appeal is necessary under current law which eliminated the policy in favor of arbitration and to resolve recurring questions that will otherwise continue to evade review. Denying appellate review under the former rule creates an unconstitutional asymmetry, granting defendants an immediate right to appeal while denying plaintiffs the same opportunity when the identical issue is decided against them with finality. For these reasons, this Court should reinstate the appeal and reach the merits of the circuit court's order compelling arbitration. While Bale maintains

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<sup>8</sup> Although FINRA has proclaimed that its arbitrators "are not bound to follow the substantive law." *See* Ex. 6 at 14.

existing precedent compels this result, the Court may, if desired, request certification of this issue under Rule 204(b), SCACR.

Respectfully submitted,

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*Attorneys for Appellant*

November 6, 2025  
Charleston, South Carolina

# EXHIBIT 1

|                                        |   |                                   |
|----------------------------------------|---|-----------------------------------|
| STATE OF SOUTH CAROLINA                | ) | IN THE COURT OF COMMON PLEAS      |
|                                        | ) |                                   |
| COUNTY OF RICHLAND                     | ) | FIFTH JUDICIAL CIRCUIT            |
|                                        | ) |                                   |
| Curtis D. Bale,                        | ) | Civil Action No. 2023-CP-40-_____ |
|                                        | ) |                                   |
| Plaintiff,                             | ) |                                   |
|                                        | ) |                                   |
| vs.                                    | ) |                                   |
|                                        | ) |                                   |
| John A. Dougherty; Wachovia Securities | ) |                                   |
| Financial Holdings, LLC; Wells Fargo   | ) | <b>SUMMONS</b>                    |
| Clearing Services, LLC, f/k/a Wells    | ) |                                   |
| Fargo Advisors, LLC; Wells Fargo &     | ) |                                   |
| Company; Wells Fargo Bank, N.A.; and   | ) |                                   |
| LPL Financial, LLC,                    | ) |                                   |
|                                        | ) |                                   |
| Defendants.                            | ) |                                   |
|                                        | ) |                                   |

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TO THE DEFENDANTS ABOVE-NAMED:

YOU ARE HEREBY SUMMONED and required to answer the complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this complaint upon the subscriber, at the address shown below, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the complaint, judgment by default will be rendered against you for the relief demanded in the complaint.

BY: **WILLOUGHBY HUMPHREY &  
D'ANTONI, P.A.**

/s/ R. Walker Humphrey, II  
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*Attorneys for Plaintiff*

This 17th day of January 2023

|                                        |   |                                   |
|----------------------------------------|---|-----------------------------------|
| STATE OF SOUTH CAROLINA                | ) | IN THE COURT OF COMMON PLEAS      |
|                                        | ) |                                   |
| COUNTY OF RICHLAND                     | ) | FIFTH JUDICIAL CIRCUIT            |
|                                        | ) |                                   |
| Curtis D. Bale,                        | ) | Civil Action No. 2023-CP-40-_____ |
|                                        | ) |                                   |
| Plaintiff,                             | ) |                                   |
|                                        | ) |                                   |
| vs.                                    | ) |                                   |
|                                        | ) |                                   |
| John A. Dougherty; Wachovia Securities | ) |                                   |
| Financial Holdings, LLC; Wells Fargo   | ) |                                   |
| Clearing Services, LLC, f/k/a Wells    | ) |                                   |
| Fargo Advisors, LLC; Wells Fargo &     | ) |                                   |
| Company; Wells Fargo Bank, N.A.; and   | ) |                                   |
| LPL Financial, LLC,                    | ) |                                   |
|                                        | ) |                                   |
| Defendants.                            | ) |                                   |
|                                        | ) |                                   |

**COMPLAINT**  
**(Jury Trial Demanded)**

Plaintiff Curtis D. Bale complains of Defendants and would respectfully show as follows:

**THE PARTIES**

1. Mr. Bale is a citizen and resident of Beaufort County, South Carolina.
2. Upon information and belief, Defendant John A. Dougherty is a citizen and resident of Montgomery County, Pennsylvania.
3. Upon information and belief, Defendant Wells Fargo Clearing Services, LLC is, and at all times relevant was, a Delaware limited liability company with its principal place of business in St. Louis, Missouri, and is a successor-in-interest to Wells Fargo Advisors, LLC, which also is, and at all times relevant was, a Delaware limited liability company with its principal place of business in St. Louis, Missouri.
4. Upon information and belief, Defendant Wachovia Securities Financial Holdings, LLC is, and at all relevant times was, a Delaware limited liability company with its principal place of business in Richmond, Virginia, and at all times relevant was the parent company of Defendant

Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC. Defendants Wells Fargo Clearing Services, LLC, Wells Fargo Advisors, LLC, and Wachovia Securities Financial Holdings, LLC are referred to collectively as the WFA Defendants.

5. Defendants Wells Fargo Clearing Services, LLC and Wells Fargo Advisors, LLC are registered to do business in South Carolina and are in good standing with the South Carolina Secretary of State.

6. Upon information and belief, Defendant Wells Fargo & Company is, and at all times relevant was, a financial holding corporation organized under the laws of the State of Delaware with its principal place of business in San Francisco, California.

7. Upon information and belief, Defendant Wells Fargo Bank, N.A. is, and at all times relevant was, a national bank subsidiary of Defendant Wells Fargo & Company and is organized under the laws of the State of Delaware with its principal place of business in Sioux Falls, South Dakota.

8. Defendants Wells Fargo & Company and Wells Fargo Bank, N.A. are registered to do business in South Carolina and are in good standing with the South Carolina Secretary of State. Defendants Wells Fargo & Company and Wells Fargo Bank, N.A. are collectively referred to in this Complaint as the Wells Fargo Bank Defendants.

9. Defendants Wells Fargo Clearing Services, LLC, Wells Fargo Advisors, LLC, Wachovia Securities Financial Holdings, LLC, Wells Fargo & Company, and Wells Fargo Bank N.A. are collectively referred to in this Complaint as the Wells Fargo Defendants.

10. Upon information and belief, Defendant LPL Financial, LLC is, and at all times relevant was, a California limited liability company with its principal place of business in Fort

Mill, South Carolina. Defendant LPL Financial LLC is registered to do business in South Carolina and is in good standing with the South Carolina Secretary of State.

11. The Wells Fargo Defendants and LPL are referred to collectively in this Complaint as the Corporate Defendants.

12. From approximately April 26, 2013, through January 13, 2021, Defendant Dougherty was a registered representative of the WFA Defendants. From approximately January 4, 2021 through the present, Defendant Dougherty has been a registered representative of LPL.

13. At all times relevant to this case, Defendant Dougherty was an agent, representative, servant and/or employee of the Corporate Defendants. All of his actions, inactions, omissions and wrongdoing were performed for and on behalf of the Corporate Defendants in the course and scope of his agency and/or employment with the Corporate Defendants. Therefore, in addition to Defendant Dougherty's personal liability for his own actions, inactions and omissions, the Corporate Defendants are directly liable and also jointly, severally, and totally liable and fully accountable for the mismanagement, misconduct, wrongdoing, actions and/or omissions of Defendant Dougherty under agency law and common law principles of *respondeat superior*.

#### **VENUE AND JURISDICTION**

14. Defendants engage in continuous and systematic activities within the State of South Carolina, including the use of the courts of this State to enforce contractual and other rights against citizens of South Carolina. Defendants presently conduct business and, at all relevant times, conducted business and performed acts in South Carolina and have sufficient contacts and business within South Carolina to be subject to the *in personam* jurisdiction of this Court pursuant to the laws of South Carolina.

15. All claims arising under this Complaint arise out of a common nucleus of operative facts. All Defendants therefore are subject to the *in personam* jurisdiction of this Court.

16. All claims arising under this Complaint are covered by the laws of the State of South Carolina. Venue is proper in Richland County, South Carolina because the Wells Fargo Defendants' principal place of business in South Carolina is in Richland County.

### **FACTUAL ALLEGATIONS**

17. Mr. Bale trusted Defendants to invest approximately \$9.5 million of his hard-earned money, generate income for him, and manage his obligations. Defendants developed a "strategy" which ensured substantial profits for them but, unbeknownst to Mr. Bale, exposed him to imprudent, excessive, and unwarranted substantial risk. In March 2020, in the midst of the COVID pandemic, Defendant Dougherty and the Wells Fargo Defendants' risky "strategy" obliterated his holdings. Under those volatile market conditions, Defendant Dougherty and the Wells Fargo Defendants took action to protect their own interests by selling out Mr. Bale's holdings. While other investors suffered merely temporary "paper" losses, Defendant Dougherty and the Wells Fargo Defendants' self-protective actions in response to their overleveraged "strategy" locked out Mr. Bale as the market rebounded. Instead, in apparent attempt to recoup the substantial losses they caused, Defendant Dougherty and the Wells Fargo Defendants began to engage in increasingly frantic and imprudent trading with millions of dollars moving in and out of Mr. Bale's accounts each month.

18. This completely imprudent and unsustainable trading continued after Mr. Bale was convinced to move his assets to LPL. It was only then that Mr. Bale learned Defendants had grossly mismanaged his accounts and caused him great harm. As a result of Defendants' actions,

Mr. Bale lost millions of dollars, was forced to sell his house, and lost the financial security he worked a lifetime to obtain.

19. Mr. Bale was born and raised in Kentucky and had a successful career in the oil refining industry. In the mid-1980s, he purchased a refinery called Warrior Asphalt, Inc. in Tuscaloosa, Alabama. Through years of grit, hard work, and tireless dedication, Mr. Bale brought Warrior out of Chapter 11 bankruptcy and built it into a successful asphalt terminal which serviced infrastructure and construction projects throughout the Southeast.

20. Mr. Bale purchased Warrior together with three partners. As Warrior returned to profitability, Mr. Bale bought out two partners. The third partner later died, and that partner's estate acquired his interest. After decades of hard work, Mr. Bale decided to retire, sell Warrior, and enjoy the fruits of his labor.

21. Mr. Bale ultimately sold Warrior in December 2010 and received approximately \$9.5 million. At that time, Mr. Bale also had approximately \$5 million in obligations, including capital gains taxes from the sale of his interest in Warrior, the buyout of his deceased partner's estate, and a real estate loan.

22. Mr. Bale knew Defendant Dougherty from the latter's service managing Warrior's employee retirement plans. Through that work as a fiduciary to Mr. Bale's company and its employees, Defendant Dougherty solicited, encouraged, and engendered Mr. Bale's utmost trust and confidence. Defendant Dougherty actively solicited Mr. Bale as a personal client after learning Mr. Bale would receive substantial proceeds from selling Warrior. Defendant Dougherty told Mr. Bale that he had would act in Mr. Bale's best interests, and Defendant Dougherty thereafter continued to seek and engender Mr. Bale's trust and confidence. In reliance on Defendant Dougherty's representations and the trust Defendant Dougherty sought and obtained, Mr. Bale

entrusted his assets and financial future to Defendant Dougherty, who assured Mr. Bale that he knew how to best manage the proceeds from Warrior's sale and how to best satisfy Mr. Bale's obligations. Defendant Dougherty continued to serve as Mr. Bale's financial advisor and continued the same course of imprudent, excessively risky, and harmful conduct after Mr. Bale moved to South Carolina.

23. Defendant Dougherty recommended a three-pronged investment strategy. First, that he be entrusted with the entirety of Mr. Bale's \$9.5 million Warrior proceeds in exchange for a management fee based on the gross value of Mr. Bale's investments. Second, that Mr. Bale not use his Warrior sale proceeds to satisfy his existing obligations and instead take out a \$5 million loan for that purpose from Defendant Dougherty's then employer, secured by his investment accounts. Finally, Defendant Dougherty did not recommend that Mr. Bale pay down the loan, and instead used Mr. Bale's accounts solely to generate income to pay interest on the loan, management fees, and for living expenses. Defendant Dougherty assured Mr. Bale that this was a prudent, wise, safe, and smart financial plan. Defendant Dougherty knew, but intentionally failed to disclose to Mr. Bale, the substantial risks inherent in his plan to carry so much debt. Trusting Defendant Dougherty's reputation, knowledge, and advice, and not knowing the risks of Mr. Dougherty's plan, Mr. Bale accepted Defendant Dougherty's recommendation in full.

24. Defendant Dougherty's proposal ensured that he would maximize his and his employer's own earnings despite the risks to Mr. Bale. He could benefit from the charging of management fees on Mr. Bale's gross investment of approximately \$9.5 million, while simultaneously receiving credit for interest payments on the secured loan, even though this arrangement left Mr. Bale unknowingly exposed to great market risk and the potential for financial

ruin. By recommending and executing this plan, Defendant Dougherty and those acting in connection with him put their own interests ahead of Mr. Bale's best interests.

25. In approximately April 2013, Defendant Dougherty became registered with the WFA Defendants. At Defendant Dougherty's urging, Mr. Bale transferred his accounts to Wells Fargo so that Defendant Dougherty could continue to manage them. The WFA Defendants accepted the transfer of Mr. Bale's investment accounts, and the Wells Fargo Bank Defendants issued a loan to Mr. Bale collateralized by his investments. The Wells Fargo Defendants induced Mr. Bale's utmost trust and confidence in their ability to prudently manage his investments and collateral account.

26. The Wells Fargo Defendants had an opportunity and obligation to conduct appropriate due diligence on, and upon information and belief were in fact made aware of the nature of, Mr. Bale's holdings, his secured loan, his needs and interests, and Defendant Dougherty's excessively risky and imprudent "strategy" for Mr. Bale. With the full understanding of Mr. Bale's holdings and collateralized loan, and of the fees and interest they would receive as a result, the Wells Fargo Defendants adopted the same faithless wrongful conduct and strategy Defendant Dougherty previously used, and they authorized and actively supported Defendant Dougherty to continue that strategy.

27. The Wells Fargo Defendants, upon accepting the transfer of Mr. Bale's account, failed to advise Mr. Bale of the risks associated with Defendant Dougherty's "strategy." Instead, by accepting the investment accounts and issuing a collateralized loan without comment or warning to Mr. Bale and accepting the management fees and interest generated from them, the Wells Fargo Defendants ratified Defendant Dougherty's existing recommendations and actions. Indeed, Defendant Dougherty's "strategy" was consistent with the Wells Fargo Defendants' policy

of cross-selling unnecessary products to customers solely to generate additional fees and interest. Upon information and belief, the Wells Fargo Defendants expressly authorized, allowed, permitted, and encouraged Defendant Dougherty to continue the “strategy” he devised for Mr. Bale. These actions ensured that Defendant Dougherty was able to continue concealing the great risk in Mr. Bale’s account, and thereby hiding from Mr. Bale the knowledge he needed to protect his investments and financial well-being, while still generating substantial fees and interest for Defendant Dougherty and his employers.

28. The interest rate charged by Wells Fargo Bank on the secured loan collateralized by Mr. Bale’s securities holdings was variable. Although that rate tripled between 2016 and 2019 greatly increasing the cost of the “strategy” to Mr. Bale, Defendant Dougherty never advised Mr. Bale of the excessive risks or recommended a strategy to pay off the principal of the loan.

29. Instead, while Defendant Dougherty was registered with the WFA Defendants and associated with the Wells Fargo Bank Defendants, each time the topic of Mr. Bale paying down his collateralized loan arose, Defendant Dougherty recommended that Mr. Bale not pay down his loan to Wells Fargo and assured Mr. Bale that he could earn sufficient living expenses from his investment accounts. At no point did Defendant Dougherty recommend that Mr. Bale pay down the balance of the loan. Mr. Bale, trusting Defendant Dougherty’s advice and being unaware that Defendant Dougherty profited personally from Mr. Bale’s continued indebtedness, accepted that recommendation and continued with Defendant Dougherty’s “strategy.”

30. Furthermore, Defendant Dougherty, in his capacity as Mr. Bale’s financial advisor employed by the WFA Defendants, recommended that Mr. Bale invest in Jamaica Cures, LLC, a medical marijuana grower with operations in Jamaica. Defendant Dougherty represented to Mr. Bale that Defendant Dougherty had personally invested in the company and was a member of its

board of directors. Defendant Dougherty also told Mr. Bale that income from investments in Jamaica Cures would replace a substantial portion of the income generated by Mr. Bale's other investments. However, Defendant Dougherty failed to provide Mr. Bale with documentation and disclosures (including a prospectus) regarding Jamaica Cures which Defendant Dougherty was required to provide and which Defendant Dougherty knew or should have known were important for potential investors like Mr. Bale to review. Defendant Dougherty did not disclose the serious risks of investing in Jamaica Cures, the overall absence of other meaningful investors in the company, or the personal benefits Defendant Dougherty would receive from Mr. Bale's investment in the company.

31. Relying on the recommendation of Defendant Dougherty and the trust and confidence engendered by Defendant Dougherty and the WFA Defendants, Mr. Bale made three investments totaling \$300,000 in Jamaica Cures. Mr. Bale would not have invested in Jamaica Cures but for the recommendation Defendant Dougherty and his position with the WFA Defendants. Upon information and belief, Defendant Dougherty used his firsthand knowledge of when Mr. Bale had cash in or coming into his account, information which Defendant Dougherty obtained solely as Mr. Bale's trusted financial advisor and fiduciary, to time his requests that Mr. Bale invest in Jamaica Cures.

32. As 2020 began, after nearly seven years of being "advised" by Defendant Dougherty and the WFA Defendants, Mr. Bale's assets were still excessively leveraged as collateral pledged to secure the nearly \$5 million he still owed to financial institutions which were supposedly acting as his fiduciaries. Moreover, that \$5 million loan required Mr. Bale to pay nearly \$11,000 per month in interest (over \$167,000 in 2019) and he was also being charged advisory fees averaging nearly \$8,000 per month (over \$93,000 in 2019). His securities accounts

therefore needed to generate an over 3.5% return just to pay the charges from his fiduciaries before he received any funds for living expenses.

33. But prudent fiduciaries know that markets do not remain calm and ever-increasing. Consequently, when the volatile market conditions triggered by the COVID pandemic hit, Defendant Dougherty and the WFA Defendants' highly leveraged and imprudent strategy was positioned for disaster.

34. When the pandemic came, Defendant Dougherty did not act to protect Mr. Bale's interests, but instead chose to protect those of the Wells Fargo Defendants. On March 10, 2020, a few weeks after the market began its precipitous drop following the declaration of a public health emergency, Defendant Dougherty began selling off Mr. Bale's holdings. By month's end, he had sold about \$2.9 million including both equities and bonds and both short-term and long-term holdings. During this indiscriminate sell off, Defendant Dougherty did not even bother to discontinue purchases by the unified managed account program he had enrolled Mr. Bale in, which led to some stocks being purchased on an automated basis only to be sold days later.

35. The proceeds of these sales were held in a money market fund, a cash equivalent. Holdings in this money market fund were listed as a mutual fund on the Portfolio Summary provided by Wells Fargo Advisors. This method of reporting disguised the cash nature of Mr. Bale's holdings.

36. The market began its rebound from the COVID-induced crash in mid-March 2020, even as Defendant Dougherty was moving all Mr. Bale's holdings to cash. Despite this, throughout April 2020, Defendant Dougherty continued to sell Mr. Bale's holdings indiscriminately, including all remaining bonds, with reported sales of another \$2.9 million. Once again, simultaneously with these bulk sales, automated purchases by the unified managed account program continued

unabated, with some being sold again just days later to further Defendant Dougherty's sell-off. By month's end, Mr. Bale's holdings had been reduced to roughly \$5.8 million in cash and cash equivalents, with only \$130,000 in equities.

37. Defendant Dougherty, in concert with the WFA Defendants, undertook to sell off Mr. Bale's securities holdings preemptively to protect the Wells Fargo Defendants' interest in obtaining repayment of the loan debt by converting all Mr. Bale's holdings into cash. This scheme protected Wells Fargo (and its loan) from any further market fluctuations, while locking Mr. Bale out from benefiting from any rebound, which was already occurring even as Defendant Dougherty completed the sell-off.

38. In early May 2020, the market continued its rebound. Now that stock values had increased from the low points where he sold out Mr. Bale's investments, Defendant Dougherty did an about-face and began repurchasing many of the same stocks he had sold for substantially less just days or weeks earlier. But the damage had been done; those few weeks spent out of the market to protect the Wells Fargo Defendants' interest locked in losses for Mr. Bale.

39. In June and July 2020, as the market continued to climb, Defendant Dougherty engaged in even more erratic activity, apparently in a desperate attempt to recoup losses. He sold all the investments purchased in May 2020 and any remaining earlier holdings. He then began buying precious metal stocks and traded in and out of many stocks, with holding periods of less than a week. This frantic trading occurred primarily in an account with an investment objective/risk tolerance of "moderate growth" with a moderate time horizon of 5-10 years. Despite this mis-match between the account's stated objectives and the trading activity, no one from Wells Fargo's management ever reached out to Mr. Bale to question this imprudent trading, nor was any action taken to stop it.

40. Throughout the second half of 2020, Defendant Dougherty continued his short-term in-and-out trading, including day-trading in Vanguard Exchange Traded Funds (ETFs), all in the account coded for “moderate growth.” Trading volume increased from around \$800,000 in August to over \$3 million in September, \$11 million in October, \$12 million in November, and over \$9 million in December 2020. None of this frantic and absurdly improper trading recouped the losses caused by the self-serving initial strategy of retaining substantial debt compounded by the overly defensive moves taken to protect the Wells Fargo Defendants at great risk and damage to Mr. Bale.

41. At the end of 2020, Mr. Bale also first discovered that his investments in Jamaica Cures were worthless.

42. Defendant Dougherty and the Wells Fargo Defendants’ wrongful and imprudent actions and omissions caused Mr. Bale to lose substantial principal, lose income, and pay substantial fees and interest.

43. In approximately January 2021, Defendant Dougherty transferred his registration to LPL. At Defendant Dougherty’s urging, and still unable to fully comprehend how Defendant Dougherty had mismanaged his accounts, Mr. Bale transferred his accounts to continue under Defendant Dougherty’s management. LPL induced Mr. Bale’s utmost trust and confidence in its ability to prudently manage his investments and collateral account.

44. LPL had an opportunity and obligation to conduct appropriate due diligence on, and upon information and belief was in fact made aware of the nature of, Mr. Bale’s holdings, his debt obligations, his needs and interests, and Defendant Dougherty’s “strategy” for Mr. Bale. With the understanding of Mr. Bale’s holdings and debt, and of the fees and/or interest they would receive as a result, LPL adopted the same faithless wrongful conduct and strategy Defendant

Dougherty and the Wells Fargo Defendants used, and it authorized Defendant Dougherty to continue just as he had when affiliated with those other financial institutions.

45. LPL, upon accepting the transfer of Mr. Bale's accounts, failed to advise Mr. Bale of the risks associated with Defendant Dougherty's "strategy." Instead, by accepting the accounts without comment and accepting the advisory fees generated from them, LPL ratified Defendant Dougherty's recommendations and actions while associated with the Wells Fargo Defendants. Upon information and belief, LPL expressly authorized, allowed, permitted, and encouraged Defendant Dougherty to continue the "strategy" he devised for Mr. Bale so Defendant Dougherty could continue recovering substantial fees for himself and LPL.

46. Defendant Dougherty continued to engage in substantial short-term in-and-out trading while with LPL. As at Wells Fargo, this frantic trading did not rebuild the account or recoup Mr. Bale's losses. Instead, his investments continued to drop in value, further eroding the little equity he had left. Defendant Dougherty and LPL's actions and omissions caused Mr. Bale to lose substantial principal, lose income, and pay substantial fees and interest.

47. Defendant Dougherty still failed to recommend that Mr. Bale reduce the principal of his collateralized loan. Facing a forced sale of his entire investment account if its value dropped below \$5 million, Mr. Bale transferred his assets out of LPL in approximately August 2021.

48. As a result of Defendants' egregious and unlawful conduct, Mr. Bale was forced to make drastic changes to his standard of living that he had worked so long to achieve and sell his beloved retirement home in Bluffton. Meanwhile, upon information and belief, Defendants enjoyed substantial profits.

**FOR A FIRST CAUSE OF ACTION**  
**(Breach of Fiduciary Duty – All Defendants)**

49. The relevant allegations contained in the preceding and subsequent paragraphs are reasserted and reincorporated as if fully set forth verbatim herein, insofar as they are not inconsistent with the allegations of this cause of action.

50. Mr. Bale expressly sought the safety and security of fiduciary management for his irreplaceable assets, because in his retirement he intended to delegate investment responsibilities and the management of his assets to professional fiduciaries and Defendants agreed to act as his fiduciaries. Defendant Dougherty, who was already serving as a fiduciary for the retirement plan for Mr. Bale's company, undertook to provide fiduciary wealth management and investment advisory services to Mr. Bale. Such relationships are fiduciary and, upon information and belief, were recognized as such by the Corporate Defendants in their respective codes of ethics.

51. Mr. Bale's relationship with Defendants involved a relationship of the utmost trust and confidence because of the parties' preexisting relationships, the nature of the transactions in question, and the parties' agreements. This relationship was, by its essential nature, intrinsically fiduciary, calling for Defendants to act with perfect good faith and undivided loyalty in the interests of Mr. Bale.

52. As the fiduciaries of Mr. Bale, Defendants owed a clear duty to Mr. Bale of undivided loyalty, absolute faithfulness, and a duty to exercise due care and diligence with respect to the wealth management and control of Mr. Bale's investments, assets, and accounts.

53. With this fiduciary relationship also came the duties and obligations to keep Mr. Bale fully informed of all facts and risks pertinent to any recommended investments or related financial transactions (including but not limited to the loans collateralized by his investment accounts) which Defendants arranged for Mr. Bale, to make full disclosure of all facts and risks

that could materially affect his financial well-being, to avoid conflicts of interests where Defendants could or did place their interests and/or their affiliates' interests above Mr. Bale's interests, to promptly disclose to Mr. Bale any actual or potential conflict of interest, and to exercise reasonable care, diligence, and prudence in the performance of its duties.

54. Mr. Bale entrusted his assets to Defendants, who agreed to accept them and to act as his fiduciaries in providing wealth management and investment advice. Defendants breached their fiduciary duties in one or more of the following particulars:

- a. Defendants placed their own interests ahead of Mr. Bale's by creating, recommending, and advocating a risky and flawed wealth management and investment strategy that was imprudent, aggressive, uninformed, conflicted, and reckless for Mr. Bale;
- b. Defendants placed their own interests ahead of Mr. Bale's thus treating him as a profit center and cross-selling opportunity, instead of as their fiduciary principal;
- c. Defendants repeatedly advocated and recommended a collateralized loan strategy that failed to meet Mr. Bale's investment objectives and needs while guaranteeing substantial profits for Defendants;
- d. Defendants failed to advise Mr. Bale of the patent conflicts of interest inherent in their promotion of a wealth management and investment strategy premised upon his continuing to maintain a substantial debt collateralized by his investments;
- e. Despite knowing that their plan was speculative, risky, and imprudent, Defendants nonetheless created and recommended to Mr. Bale a wealth management and investment plan based on the maintenance of a substantial debt collateralized by his investments without advising him of its known speculative nature, nor of the

substantial risks, interest, and fees associated with the plan devised and recommended by Defendants;

- f. Defendants created a multi-level fee structure when they advised Mr. Bale to maintain a substantial loan (for which they charged significant interest) collateralized (for Defendants' protection) by his investment holdings (for which Defendants charged additional management fees), which promoted Defendants' self-interests at the expense of Mr. Bale's;
- g. Defendants knew, but failed to disclose to Mr. Bale, the speculative nature of their "wealth management" strategy and its dangers under volatile market conditions;
- h. Defendants knew of, but failed to disclose to Mr. Bale their own financial interests in recommending a combination strategy involving a collateralized loan and fee-based advisory services;
- i. Defendant Dougherty and the Wells Fargo Defendants placed their own interests ahead of Mr. Bale's by converting his holdings into cash or cash equivalents in a volatile market, thus protecting their interest in the collection of their collateralized loan over the interests of Mr. Bale as their fiduciary principal;
- j. Defendant Dougherty and the Wells Fargo Defendants failed to exercise reasonable care, diligence, and prudence in the performance of their duties when they engaged in reckless and imprudent trading schemes in a futile effort to recover losses caused by their own failed strategy and their self-protective sell-off;
- k. Defendant Dougherty and the WFA Defendants placed their own interests ahead of Mr. Bale's by suggesting and recommending that Mr. Bale invest in a risky and speculative medical marijuana business on whose board of directors Defendant

Dougherty served, by failing to advise Mr. Bale of their conflicts of interest in that investment, by failing to provide Mr. Bale with relevant disclosures about the company and the risks inherent in the investment, and by falsely advising Mr. Bale that the investment was sound, prudent, and would enable him to achieve his financial goals; and/or

1. Defendant Dougherty and Defendant LPL failed to exercise reasonable care, diligence, and prudence in the performance of its duties when it engaged in reckless and imprudent trading schemes in a futile effort to recover losses caused by its predecessors' failed strategy and self-protective sell-off.

55. In one or more of the preceding particulars, Defendants acted willfully, wantonly, and recklessly and with imprudence, fraudulent intent, and bad faith and thereby breached the fiduciary duties owed to Mr. Bale, proximately causing him to suffer damages.

56. Mr. Bale is therefore informed and believes that he is entitled to (1) actual damages, including the disgorgement of fees and interest charged in violation of Defendants' fiduciary obligations, (2) consequential damages, (3) punitive damages for the recklessness, willful misconduct, bad faith, and/or misrepresentations and omissions, (4) costs, (5) prejudgment interest, and (6) such other relief as is just, equitable and proper.

**FOR A SECOND CAUSE OF ACTION**  
**(Breach of Contract – All Defendants)**

57. The relevant allegations contained in the preceding and subsequent paragraphs are reasserted and reincorporated as if fully set forth verbatim herein, insofar as they are not inconsistent with the allegations of this cause of action.

58. Upon the opening of Mr. Bale's accounts with each of the Corporate Defendants, and then as those accounts began to be managed by Defendants, Defendants entered into both

express agreements and implied agreements with the Mr. Bale. These agreements constituted contracts between the Mr. Bale and the respective Defendants (hereinafter “the Agreements”).

59. As a customer of the Corporate Defendants and also pursuant to the Agreements, Defendants owed Mr. Bale a duty to advise him honestly, fairly, competently, and prudently, and in accordance with his needs, goals and best interests.

60. In addition, under South Carolina law a duty of good faith and fair dealing is implied in every contract, including the Agreements.

61. Defendants breached their Agreements with Mr. Bale in one or more of the following particulars:

- a. Defendants repeatedly advocated and recommended a collateralized loan strategy that failed to meet Mr. Bale’s investment objectives and needs while guaranteeing substantial profits for Defendants;
- b. Defendants failed to advise Mr. Bale of the patent conflicts of interest inherent in their promotion of a wealth management and investment strategy premised upon his maintenance of a substantial debt collateralized by his investments;
- c. Despite knowing that their plan was speculative, risky, and imprudent, Defendants nonetheless created and recommended to Mr. Bale a wealth management and investment plan based on the maintenance of a substantial debt collateralized by his investments without advising him of its known speculative nature, nor of the substantial risks, interest, and fees associated with the plan devised and recommended by Defendants;
- d. Defendants created a multi-level fee structure when they advised Mr. Bale to maintain a substantial loan (for which they charged significant interest)

collateralized (for Defendants' protection) by his investment holdings (for which Defendants charged additional management fees), which promoted Defendants' self-interests at the expense of Mr. Bale's;

- e. Defendants knew, but failed to disclose to Mr. Bale, the speculative nature of their "wealth management" strategy and its dangers under volatile market conditions;
- f. Defendants knew of, but failed to disclose to Mr. Bale their own financial interests in recommending a combination strategy involving a collateralized loan and fee-based advisory services;
- g. Defendants failed to ascertain or understand the nature and type of securities it promoted to Mr. Bale and whether or not they were imprudent for him at his age and position as a retired person;
- h. Defendant Dougherty and the Wells Fargo Defendants placed their own interests ahead of Mr. Bale's by converting his holdings into cash or cash equivalents in a volatile market, thus protecting their interest in the collection of their collateralized loan over the interests of Mr. Bale as their fiduciary principal;
- i. Defendant Dougherty and the Wells Fargo Defendants failed to exercise reasonable care, diligence, and prudence in the performance of their duties when they engaged in reckless and imprudent trading schemes in a futile effort to recover losses caused by their own failed strategy and their self-protective sell-off;
- j. Defendant Dougherty and the WFA Defendants placed their own interests ahead of Mr. Bale's by suggesting and recommending that Mr. Bale invest in a risky and speculative medical marijuana business on whose board of directors Defendant Dougherty served, by failing to advise Mr. Bale of their conflicts of interest in that

investment, by failing to provide Mr. Bale with relevant disclosures about the company and the risks inherent in the investment, and by falsely advising Mr. Bale that the investment was sound, prudent, and would enable him to achieve his financial goals; and/or

- k. Defendant Dougherty and Defendant LPL failed to exercise reasonable care, diligence, and prudence in the performance of its duties when it engaged in reckless and imprudent trading schemes in a futile effort to recover losses caused by its predecessor's failed strategy and self-protective sell-off.

62. Defendants' acts and omissions constitute failures to abide by the terms of the Agreements and constitute breaches of the Agreements entered into with Mr. Bale. Mr. Bale has been directly and proximately damaged as a result of Defendants' breaches.

63. Mr. Bale is therefore informed and believes that he is entitled to (1) actual damages, including the disgorgement of fees and interest, (2) consequential damages, (3) attorneys' fees, (4) costs, (5) prejudgment interest at the highest legal rate, and (6) such other relief as is just, equitable, and proper.

**FOR A THIRD CAUSE OF ACTION**  
**(Breach of Contract Accompanied by a Fraudulent Act – All Defendants)**

64. The relevant allegations contained in the preceding and subsequent paragraphs are reasserted and reincorporated as if fully set forth verbatim herein, insofar as they are not inconsistent with the allegations of this cause of action.

65. As a customer of each of the Defendants and pursuant to the Agreements, Defendants owed Mr. Bale a duty of good faith and fair dealing as well as a duty to advise him honestly, fairly and in accordance with her needs, goals and best interests.

66. Defendants' fraudulent misconduct, actions, and inactions, as alleged in this Complaint, constitute a failure to abide by the terms of Defendants' contracts with Mr. Bale, including the Agreements, and constitute a breach of these agreements entered into with Mr. Bale. Mr. Bale has been directly and proximately damaged as a result of Defendants' breaches.

67. Moreover, in breaching the Agreements with Mr. Bale, Defendants exhibited a fraudulent intent relating to those breaches.

68. Defendant's breaches of the Agreements were accompanied by fraudulent acts and/or omissions on the part of Defendants in one or more of the following particulars:

- a. Defendants breached the Agreements when their strategy premised upon Mr. Bale maintaining a substantial debt collateralized by his investments failed to protect Mr. Bale's investment portfolio and resulting net worth after representing to Mr. Bale that they would provide such protections and then, through the acts and omissions alleged in this Complaint, attempted to disguise the shortcomings of the strategy known to Defendants by misrepresenting and/or failing to disclose to Mr. Bale accurate and truthful information related to the costs and risks of the strategy based upon the collateralized loan.
- b. Defendants breached the Agreements by placing their own interests ahead of Mr. Bale's by creating, recommending, and executing a risky and flawed wealth management and investment strategy that was imprudent, aggressive, uninformed, conflicted, negligent, and reckless, while assuring Mr. Bale that the strategy was instead defensive, prudent, and desirable for him.
- c. Defendants breached the Agreements by allowing Mr. Bale to maintain a substantial debt collateralized by his investments which guaranteed substantial

profits for Defendants but failed to meet Mr. Bale's investment objectives and needs, while assuring Mr. Bale that this strategy was defensive, prudent, and desirable for him.

- d. Defendants breached the Agreements by repeatedly recommending and executing wealth management and investment schemes premised upon Mr. Bale continuing to maintain a substantial debt collateralized by his investments which advanced Defendants' interests but failed to meet Mr. Bale's investment objectives, while repeatedly assuring Mr. Bale that this strategy was defensive, prudent, and desirable.
- e. Defendants breached the Agreements by recommending and executing a wealth management and investment plan premised upon Mr. Bale's continuing to maintain a substantial debt collateralized by his investments known to Defendants to be speculative and costly, while Defendants repeatedly assured Mr. Bale that this strategy was defensive, prudent, and desirable and simultaneously failed to advise him of the substantial risks, costs and fees associated with the plan devised and recommended by Defendants;
- f. Defendants breached the Agreements by providing advice which was tainted with the patent conflicts of interest inherent in their promotion of a wealth management and investment strategy based upon Mr. Bale continuing to maintain a substantial debt to Defendants collateralized by his investments while failing to disclose this conflict of interest;
- g. Defendants breached the Agreements by recommending and promoting an investment strategy as being prudent and desirable for Mr. Bale, when in fact they

knew that such strategy was imprudent for Mr. Bale at his age and position as a retired person;

- h. Defendants breached the Agreements by representing to Mr. Bale that his continuing to maintain a substantial debt to Defendants collateralized by his investments was a reasonable and sound strategy by which Mr. Bale could attain his investment goals, while providing liquid funds to sustain his lifestyle, when they knew or should have known that this strategy was overly risky, doomed to failure as a result of market volatility and that the undisclosed information was material to Mr. Bale;
- i. Defendant Dougherty and the Wells Fargo Defendants breached their Agreements when they placed their own interests ahead of Mr. Bale's by converting his holdings into cash or cash equivalents in a volatile market, thus protecting their interest in the collection of their collateralized loan over the interests of Mr. Bale as their fiduciary principal; and then, through the acts and omissions alleged in this Complaint, attempted to disguise that failure by misrepresenting and/or failing to disclose to Mr. Bale accurate and truthful information related to the losses in his accounts;
- j. Defendant Dougherty and the Wells Fargo Defendants breached their Agreements when they engaged in reckless and imprudent trading schemes in a futile effort to recover losses caused by their own failed strategy and self-protective sell-off of Mr. Bale's long-term investments and then, through the acts and omissions alleged in this Complaint, attempted to disguise that breach by misrepresenting and/or failing

to disclose to Mr. Bale accurate and truthful information related to the losses in his accounts;

- k. Defendant Dougherty and the WFA Defendants breached their Agreements when they suggested and recommended that Mr. Bale invest in a risky and speculative medical marijuana business on whose board of directors Defendant Dougherty served, failed to advise Mr. Bale of their conflicts of interest in that investment, failed to provide Mr. Bale with relevant disclosures about the company and the risks inherent in the investment, and falsely advised Mr. Bale that the investment was sound, prudent, and would enable him to achieve his financial goals; and/or
- l. Defendant Dougherty and Defendant LPL breached its Agreement when it engaged in reckless and imprudent trading schemes in a futile effort to recover losses caused by its predecessor's failed strategy and self-protective sell-off of Mr. Bale's long-term investments and then, through the acts and omissions alleged in this Complaint, attempted to disguise that breach by misrepresenting and/or failing to disclose to Mr. Bale accurate and truthful information related to the losses in his accounts.

69. As a direct, consequent, and proximate result of Defendants' breach of contract accompanied by fraudulent acts, Mr. Bale has suffered injury all in direct violation of the laws of the State of South Carolina.

70. Mr. Bale is therefore informed and believes that he is entitled to (1) actual damages, including the disgorgement of fees and interest, (2) consequential damages, (3) punitive damages for the fraudulent acts accompanying the breaches of the Agreements, (4) costs, (5) prejudgment interest, (6) and such other relief as is just, equitable, and proper.

**FOR A FOURTH CAUSE OF ACTION**  
**(Violation of the South Carolina Uniform Securities Act of 2005, S.C. Code Ann. § 35-1-101, *et seq.* – All Defendants)**

71. The relevant allegations contained in the preceding and subsequent paragraphs are reasserted and reincorporated as if fully set forth verbatim herein, insofar as they are not inconsistent with the allegations of this cause of action.

72. In the course of their fiduciary duties to Mr. Bale, Defendants recommended and advised that he enter into imprudent transactions involving *inter alia*, Mr. Bale's continuing to maintain a substantial debt collateralized by his investments and Mr. Bale's investment in a risky medical marijuana venture on whose board of directors Defendant Dougherty served, in a manner known to Defendants to be unduly risky and costly, and in so doing, misrepresented the risk of the strategy and collateralized loan to Mr. Bale and thereby defrauded him as is set forth in more detail in ¶¶ 20-51 of this Complaint.

73. Defendants also failed to disclose to Mr. Bale the gross conflict of interest existing when they advised him about the maintenance of a substantial loan secured by assets under their management, and when Defendants Dougherty and the WFA Defendants recommended that Mr. Bale invest in a risky medical marijuana venture on whose board of directors Defendant Dougherty served, as is set forth in more detail in ¶¶ 20-51 of this Complaint.

74. The actions of Defendants were wrongful, fraudulent, and in violation of S.C. Code Ann. §§ 35-1-501, -502, and -509, and the regulations regulating broker conduct established thereunder.

75. As a direct, consequent, and proximate result of the fraud perpetrated by Defendants, Mr. Bale suffered substantial damages.

76. Mr. Bale is therefore informed and believes that he is entitled to (1) actual damages, (2) costs, (3) attorneys' fees, (4) prejudgment interest at the highest legal rate, and (5) such other relief as is just, equitable, and proper.

**FOR A FIFTH CAUSE OF ACTION**  
**(Violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.* – All Defendants)**

77. The relevant allegations contained in the preceding and subsequent paragraphs are reasserted and reincorporated as if fully set forth verbatim herein, insofar as they are not inconsistent with the allegations of this cause of action.

78. To the extent that the collateralized loans or any other product or service recommended or sold to or performed for Mr. Bale are not considered "securities" under South Carolina law, Defendants engaged in an unfair method of competition and/or an unfair or deceptive act or practice in the conduct of trade or commerce.

79. Defendants' unfair acts and practices included recommending and implementing an investment scheme premised upon Mr. Bale's continuing to maintain a substantial debt collateralized by his investments known to Defendants to be speculative and costly, while Defendants repeatedly assured Mr. Bale that this strategy was defensive, prudent, and desirable and simultaneously failed to advise him of the substantial risks, costs and fees associated with the plan devised and recommended by Defendants, as is set forth in more detail in ¶¶ 20-32, 35-43, and 45-51 of this Complaint.

80. The unfair and deceptive acts and practices committed by Defendants in the conduct of their trade and commerce have a potential for repetitive impact on the public interest.

81. Such unfair acts and practices constitute a violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10, *et seq.*

82. Insofar as they do not involve securities, Defendants' unfair acts and practices described above constituted willful, intentional, and knowing violations of the Unfair Trade Practices Act.

83. Mr. Bale has suffered damages as a result of the aforementioned unfair and deceptive acts and practices of Defendants in that he has paid substantial interest to Defendants in connection with the collateralized loans, paid substantial fees to Defendants for the management of his investments, suffered losses as a result of Defendants' sell-off of his assets to protect their own interests, incurred substantial tax liabilities, and suffered other financial harms as a result of the scheme concocted by Defendants.

84. Mr. Bale is therefore informed and believes that he is entitled to (1) actual damages, including the disgorgement of fees and interest, (2) treble damages, (3) costs, (4) attorneys' fees, (5) prejudgment interest at the highest legal rate, and (6) such other relief as is just, equitable, and proper.

WHEREFORE, having set forth his claims, Plaintiff prays for judgment against Defendants as follows:

- a. For actual damages;
- b. For consequential damages;
- c. For treble damages pursuant to S.C. Code Ann. § 39-5-140;
- d. For punitive damages;
- e. For disgorgement of the fees and interest Defendants received from Plaintiff's accounts;
- f. For reasonable attorneys' fees and costs of investigation and litigation;
- g. For the costs of this action;

- h. For pre-judgment interest at the highest legal rate; and
- i. For such other and further relief as is just, equitable, and proper.

Respectfully submitted,

**WILLOUGHBY HUMPHREY &  
D'ANTONI, P.A.**

/s/ R. Walker Humphrey, II

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*Attorneys for Plaintiff*

This 17th day of January 2023

# EXHIBIT 2

# Exhibit A

|                                        |   |                                    |
|----------------------------------------|---|------------------------------------|
| STATE OF SOUTH CAROLINA                | ) | IN THE COURT OF COMMON PLEAS       |
|                                        | ) |                                    |
| COUNTY OF RICHLAND                     | ) | FIFTH JUDICIAL CIRCUIT             |
|                                        | ) |                                    |
| Curtis D. Bale,                        | ) | Civil Action No. 2023-CP-40-00242  |
|                                        | ) |                                    |
| Plaintiff,                             | ) |                                    |
|                                        | ) |                                    |
| vs.                                    | ) |                                    |
|                                        | ) |                                    |
| John A. Dougherty; Wachovia Securities | ) |                                    |
| Financial Holdings, LLC; Wells Fargo   | ) | <b>AFFIDAVIT OF CURTIS D. BALE</b> |
| Clearing Services, LLC, f/k/a Wells    | ) |                                    |
| Fargo Advisors, LLC; Wells Fargo &     | ) |                                    |
| Company; Wells Fargo Bank, N.A.; and   | ) |                                    |
| LPL Financial, LLC,                    | ) |                                    |
|                                        | ) |                                    |
| Defendants.                            | ) |                                    |
|                                        | ) |                                    |

PERSONALLY APPEARED before me, Curtis D. Bale, who, being duly sworn, states as follows:

1. My name is Curtis D. Bale. I am over eighteen years old and competent to provide testimony in this case based on my personal knowledge regarding the matters addressed herein. I affirm that all statements included herein are truthful and accurate.

2. I am the Plaintiff in the above-captioned action. I retained Defendant John A. Dougherty as my financial advisor in late 2010 or early 2011. He was not registered with any of the other Defendants at that time. Dougherty recommended that I invest approximately \$10 million with him and simultaneously open a securities loan account for \$5 million secured by my investments. I did so based on the deep trust and special confidence which he solicited and which I placed in him. At all times, I also gave Dougherty and the firms with which he was registered discretionary trading authority in my investment accounts and believed Dougherty and the firms would discharge such authority with good faith and in my best interest.

3. In approximately April 2013, Dougherty moved his registration to Wells Fargo Advisors, which I am informed is now organized as Defendant Wells Fargo Clearing Services, LLC. For ease of reference, I will refer to Wells Fargo Clearing Services in this affidavit as Wells Fargo Advisors.

4. In approximately 2011, I opened an unrelated checking and savings account with Wells Fargo Bank, N.A. In 2015, I opened an unrelated high-yield savings account with Wells Fargo Bank.

5. In connection with Dougherty's move to Wells Fargo Advisors and at his request and express urging, I transferred my investment account to Wells Fargo Advisors and my existing \$5 million securities loan was transferred to a "Secured Primeline" loan issued by Wells Fargo Bank, N.A. The Secured Primeline account which I opened in approximately April 2013 is a specialized Wells Fargo Bank loan product. It was separate from, was opened independently of, and is governed by separate documents than my Wells Fargo Bank checking and savings accounts. Years after I opened the loan account, Wells Fargo Bank asked me to sign new account paperwork for the loan. The document dated January 21, 2016, which is attached as Exhibit 1 to SaVita Davis's April 3, 2024 affidavit appears to be part of this paperwork. Dougherty, acting for Wells Fargo Bank, told me this was just a routine paperwork update. He did not inform me that I would receive anything in exchange for signing the paperwork, nor did I receive anything for doing so.

6. In approximately 2021, Dougherty moved his registration from Wells Fargo Advisors to LPL Financial, LLC. Because of the trust that Dougherty had cultivated in me and at Dougherty's specific request and express urging, I transferred my investment accounts to LPL Financial.

7. I did not draft any of the documents related to the opening of my accounts with Wells Fargo Bank, Wells Fargo Advisors, or LPL Financial. I was not represented by counsel in

connection with these documents, nor did anyone suggest I was being asked to relinquish any rights of any kind that would necessitate the need for me to be represented by counsel. Dougherty, Wells Fargo Bank, Wells Fargo Advisors, and LPL Financial presented the documents on a non-negotiable, "take it or leave it" basis. None of them indicated these documents were negotiable, and I understood that they were not negotiable. Dougherty simply told me these were routine documents that were needed to transfer my accounts.

8. No one from Wells Fargo Bank, Wells Fargo Advisors, or LPL Financial, including Dougherty, reviewed or explained the arbitration language in any account documents with me or told me that I needed any additional information to evaluate the arbitration language. Dougherty, Wells Fargo Bank, Wells Fargo Advisors, and LPL Financial led me to believe that they were acting in my best interest and that the documents were routine documents that were required for them to transfer my assets to their management. Because I believed Dougherty, Wells Fargo Bank, Wells Fargo Advisors, and LPL Financial were acting in my best interest, I trusted them, thought I was making an informed decision, and signed the documents believing that my trusted advisors had fully disclosed to me all information that I needed in which to make an informed decision.

9. I understood, assumed, and was led to believe that any forum for resolving disputes between me and LPL Financial, Wells Fargo Advisors, and Dougherty, whether in court or arbitration, would be bound to follow the substantive law governing my claims. I did not know, and at no point did these Defendants disclose to me, that FINRA arbitrators are not bound to follow the substantive law. I therefore was mistaken about a basic assumption on which any claimed arbitration agreement between me and LPL Financial, Wells Fargo Advisors, and Dougherty, was made, and that mistake had a material effect on the performance of the agreement that is adverse to me. LPL Financial, Wells Fargo Advisors, and Dougherty intentionally withheld this

information from me. I would not have agreed to the arbitration language on which these Defendants rely in their motions to compel arbitration had that fact been disclosed.

10. I also understood, assumed, and was led to believe that any forum for resolving disputes between me and LPL Financial, Wells Fargo Advisors, and Dougherty, whether court or arbitration, would afford me an equal opportunity to seek and obtain full compensation for the damages I allege. I did not know, and at no point did these Defendants disclose to me, that customers with losses of over \$1,000,000, like I have suffered, statistically only recover 20.85 cents on the dollar in FINRA arbitration. I therefore was again mistaken about a basic assumption on which any claimed arbitration agreement between me and LPL Financial, Wells Fargo Advisors, and Dougherty, was made, and that mistake had a material effect on the performance of the agreement that is adverse to me. I believe LPL Financial, Wells Fargo Advisors, and Dougherty intentionally withheld this critical information from me as well. I would not have agreed to the arbitration language on which these Defendants rely in their motions to compel arbitration had that fact been disclosed.

11. At no time did Defendants indicate to me that there would be substantial and material costs to file and bring a claim in arbitration, compared to bringing a claim in the tax-payer funded court system. I have now been informed as to the significant and material costs of proceeding in arbitration before either the AAA or FINRA. Because of the decimated and damaged state in which Defendants left my finances, I am unable to afford to bring my claims before those bodies.

12. I have read the Complaint filed in this matter. I hereby verify that the allegations contained therein are true to the best of my knowledge and belief, except those matters and things therein stated on information and belief, and as to those, I believe them to be true.

**FURTHER AFFIANT SAYETH NOT.**

Curtis D. Bale  
Curtis D. Bale

SWORN TO AND SUBSCRIBED BEFORE ME  
This 14th day of November 2024.

Kim M. Duball  
Notary Public for South Carolina  
My Commission Expires: 12/07/2031



Kim M. Duball  
NOTARY PUBLIC  
State of South Carolina  
My Commission Expires 12/7/2031

# EXHIBIT 3

|                                            |   |                                   |
|--------------------------------------------|---|-----------------------------------|
| STATE OF SOUTH CAROLINA                    | ) | IN THE COURT OF COMMON PLEAS      |
| COUNTY OF RICHLAND                         | ) | FIFTH JUDICIAL CIRCUIT            |
|                                            | ) |                                   |
| Curtis D. Bale,                            | ) | Civil Action No. 2023-CP-40-00242 |
|                                            | ) |                                   |
| Plaintiff,                                 | ) |                                   |
|                                            | ) |                                   |
| vs.                                        | ) |                                   |
|                                            | ) |                                   |
| John A. Dougherty; Wachovia Securities     | ) |                                   |
| Financial Holdings, LLC; Wells Fargo       | ) |                                   |
| Clearing Services, LLC, f/k/a Wells Fargo  | ) |                                   |
| Advisors, LLC; Wells Fargo & Company;      | ) |                                   |
| Wells Fargo Bank, N.A.; and LPL Financial, | ) |                                   |
| LLC,                                       | ) |                                   |
|                                            | ) |                                   |
| Defendants.                                | ) |                                   |

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**MOTION TO COMPEL  
ARBITRATION**

Defendant LPL Financial, LLC (“LPL”) hereby moves this Court to compel arbitration of all claims raised by Plaintiff Curtis D. Bale (“Plaintiff”) and to dismiss or stay this action in its entirety under 9 U.S.C. § 4 and Rules 12(b)(1), (3), and/or (6) of the South Carolina Rules of Civil Procedure. With reference to the Declaration of Tiffinee Walford (“Walford Decl.”) and the documents attached thereto as exhibits, and as may be set forth additionally in any memoranda submitted by LPL in support of this Motion prior to a ruling on the same, LPL requests this relief on the following grounds:

1. Plaintiff brings this action seeking recovery from LPL for LPL’s allegedly wrongful handling of his LPL investment account. (See Compl. ¶¶ 43–48.)

2. When Plaintiff became an LPL client, he signed an LPL account application. (See Declaration of Tiffinee Walford ¶¶ 6–11, attached hereto as **Exhibit 1**; see *id.* Ex. A.) As expressly stated in that application, Plaintiff’s investment account was governed by an account agreement that mandates arbitration of the claims at issue in the Complaint. (*Id.* Ex. A.) Specifically, the

account agreement's arbitration provisions require Plaintiff to arbitrate "any controversy . . . arising out of or relating to" his LPL investment account. (*See id.* Ex. B at 15.)

3. Once an LPL client, Plaintiff subsequently executed and signed three other account applications for his additional LPL accounts—all governed by analogous arbitration provisions. (*See id.* Ex. D at 19–20; Ex. F at 15; Ex. H at 15.)

4. Plaintiff's claims "aris[e] out of or relat[e] to" his LPL investment account because they are based on allegations of mismanagement of his LPL investment account. Thus, they fall squarely within the scope of the arbitration provision in his LPL account agreement. *See Landers v. FDIC*, 402 S.C. 100, 109–13, 739 S.E.2d 209, 213–15 (2013); *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 537–43, 542 S.E.2d 360, 363–65 (2001); *Masters v. KOL, Inc.*, 431 S.C. 28, 35–41, 846 S.E.2d 893, 896–99 (Ct. App. 2020); *see also Chorley Enterps., Inc. v. Dickey's Barbecue Rest., Inc.*, 807 F.3d 553, 564–65 (4th Cir. 2015); *Nat. Home Ins. Co. v. Bridges*, 142 F. Supp. 3d 425, 431–33 (D.S.C. 2015) (addressing account agreement governed by Missouri law); *Bruck v. Morgan Stanley Smith Barney, LLC*, 967 F. Supp. 2d 418, 420, 422–23 (D. Mass. 2013); *Benezra v. Zacks Inv. Res., Inc.*, No. 1:11-cv-596, 2012 WL 1067559, at \*7–8 (M.D.N.C. Mar. 30, 2012).

5. Plaintiff has voluntarily entered into binding arbitration agreements, and his claims against LPL should be submitted to binding arbitration. The account relationships necessarily affect interstate commerce, triggering the application of the Federal Arbitration Act ("FAA"), 9 U.S.C. § 1 *et seq.*

6. Accordingly, LPL seeks an Order compelling Plaintiff to arbitrate all claims against LPL in accordance with the binding arbitration agreements, and dismissing the claims against LPL with prejudice or, in the alternative, staying all proceedings in this action, including discovery,

related to the claims against LPL until after Plaintiffs have submitted all claims to arbitration and the arbitration proceedings have been completed.

7. This Motion is supported by the FAA; the South Carolina Uniform Arbitration Act, S.C. Code Ann. § 15-48-10 *et seq.*; the South Carolina Rules of Civil Procedure; applicable federal and state case law; and such other authorities, arguments, and/or exhibits as may be included in any memoranda submitted by LPL in support of this Motion prior to a ruling on the same.

WHEREFORE, for the foregoing reasons, LPL hereby requests an Order as follows:

- (1) Compelling Plaintiff to arbitrate all claims against LPL with FINRA in accordance with the arbitration provisions in the account agreements;
- (2) Dismissing the claims against LPL with prejudice or, in the alternative, staying all proceedings in this action, including discovery, related to the claims against LPL until after Plaintiff has submitted all claims to arbitration and the arbitration proceedings have been completed; and
- (3) Awarding fees and costs associated with filing this Motion.

Submitted this 25th day of March 2024.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/Adam J. Hegler

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|                                            |   |                                     |
|--------------------------------------------|---|-------------------------------------|
| STATE OF SOUTH CAROLINA                    | ) | IN THE COURT OF COMMON PLEAS        |
| COUNTY OF RICHLAND                         | ) | FIFTH JUDICIAL CIRCUIT              |
|                                            | ) |                                     |
| Curtis D. Bale,                            | ) | Civil Action No. 2023-CP-40-00242   |
|                                            | ) |                                     |
| Plaintiff,                                 | ) |                                     |
|                                            | ) |                                     |
| vs.                                        | ) |                                     |
|                                            | ) | <b>MEMORANDUM IN SUPPORT</b>        |
|                                            | ) | <b>OF MOTION TO COMPEL</b>          |
| John A. Dougherty; Wachovia Securities     | ) | <b>ARBITRATION AND DISMISS</b>      |
| Financial Holdings, LLC; Wells Fargo       | ) | <b>UNDER 9 U.S.C. § 4 AND</b>       |
| Clearing Services, LLC, f/k/a Wells Fargo  | ) | <b>RULES 12(b)(1), (3), AND (6)</b> |
| Advisors, LLC; Wells Fargo & Company;      | ) |                                     |
| Wells Fargo Bank, N.A.; and LPL Financial, | ) |                                     |
| LLC,                                       | ) |                                     |
|                                            | ) |                                     |
| Defendants.                                | ) |                                     |
|                                            | ) |                                     |

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Defendant LPL Financial, LLC (“LPL”) hereby submits this memorandum in support of its Motion to Compel Arbitration under 9 U.S.C. § 4 (the “Motion”). For the reasons detailed below, and with reference to the documents attached as exhibits to the Affidavit of Kyle Poston (“Poston Aff.”),<sup>1</sup> LPL moves this Court to compel arbitration of all claims raised by Plaintiff pursuant to a binding and enforceable arbitration agreement, and thus to dismiss or stay this action in its entirety under 9 U.S.C. § 4 and Rules 12(b)(1), (3), and/or (6) of the South Carolina Rules of Civil Procedure.<sup>2</sup>

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<sup>1</sup> In the notarized affidavit submitted herewith (attached as **Exhibit 1**), Kyle Poston affirms as true and correct the statements in the Walford Declaration (Exhibit A to the Poston Aff.), previously submitted in federal court in connection with LPL’s original motion to compel arbitration, and he authenticates the documents attached thereto. The Walford Declaration was also submitted to this Court with LPL’s Motion to Compel filed on March 25, 2024.

<sup>2</sup> Pursuant to *Wilson v. Willis*, 426 S.C. 326, 827 S.E.2d 167 (2019), LPL files this motion under both 9 U.S.C. § 4 and Rule 12. In this motion, LPL addresses only Plaintiff’s obligation to arbitrate his claims pursuant to a binding and enforceable arbitration agreement. LPL preserves and maintains its right to deny any or all allegations contained in Plaintiff’s Complaint and to raise and pursue any arguments and defenses in response to his Complaint in a subsequent responsive pleading or motion if arbitration is not ordered. See *Conrad v. Phone Directories Co., Inc.*, 585

Plaintiff Curtis Bale (“Plaintiff”) describes himself as a successful and experienced businessman. (Compl. ¶¶ 17–19.) Since 2013, he has signed *at least* ten arbitration agreements with multiple financial firms, including LPL and the co-defendants affiliated with Wells Fargo. Despite his knowledge of and experience with these unambiguous agreements, Plaintiff continues to attempt to evade his contractual obligations to arbitrate any claims arising from his relationship with LPL. Plaintiff bases his arguments on nothing more than conclusory claims of unenforceability.

### **INTRODUCTION**

By way of background, in January 2021, Plaintiff’s longtime financial advisor Defendant John A. Dougherty (“Dougherty”) left his position at Wells Fargo and joined LPL. Plaintiff chose to follow Dougherty and to open accounts at LPL—four in total. In opening each of his four LPL accounts, Plaintiff completed and signed an account application agreeing to certain terms that would govern his relationship with LPL. Most relevantly, Plaintiff agreed to a clear and express binding arbitration clause that mandates arbitration of Plaintiff’s present claims against LPL before the Financial Industry Regulatory Authority (“FINRA”). Plaintiff agreed to this clause not once ***but four separate times***, once for each of his four LPL accounts. Accordingly, Plaintiff’s relationship with LPL and the management of the investments at issue are governed by the four account agreements, each with a broad arbitration provision requiring arbitration of *any controversy* between Plaintiff and LPL that arises out of or relates to Plaintiff’s accounts, transactions conducted for or with him, or the account agreements.

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F.3d 1376, 1383 n.2 (10th Cir. 2009) (“If a party files a motion under FAA §§ 3 or 4, that motion is denied by the court, and the denial is affirmed on interlocutory appeal, nothing prevents that party from then filing a Rule 12 motion to dismiss. Rules 12(g) and (h) are not to the contrary.”); *see also* *Wheeling Hosp., Inc. v. Health Plan of the Upper Ohio Valley, Inc.*, 683 F.3d 577 (4th Cir. 2012); *Dillon v. BMO Harris Bank, N.A.*, 787 F.3d 707 (4th Cir. 2015).

Contrary to each of those arbitration agreements, Plaintiff commenced his action against LPL and Dougherty in the South Carolina Court of Common Pleas, alleging that his investments had been mismanaged since 2010. Because Plaintiff's claims against LPL specifically relate to Dougherty's handling of his LPL accounts over a roughly seven-month period in 2021, all of these claims are governed by the arbitration provisions.

As set forth in more detail below, this Court should prohibit Plaintiff from breaching his contractual obligation to arbitrate his claims against LPL and Dougherty. Plaintiff should be compelled to arbitrate this dispute before FINRA, and his Complaint should be dismissed or this action stayed pending completion of arbitration in accordance with the Parties' agreement.

### **FACTUAL ALLEGATIONS AND PROCEDURAL BACKGROUND**<sup>3</sup>

#### **1. Plaintiff Utilizes Investment Services of Dougherty and Wells Fargo.**

In 2010, Plaintiff became a client of Dougherty, a financial advisor. (Compl. ¶¶ 22–23.) In 2013, Dougherty became affiliated with the Wells Fargo Advising Defendants;<sup>4</sup> Plaintiff chose to follow Dougherty to and open accounts with the Wells Fargo Advising Defendants. (*Id.* ¶ 25.) At the inception of the COVID-19 pandemic in early 2020, Plaintiff's portfolio declined in value. (*Id.* ¶¶ 33–34). Nevertheless, Plaintiff continued to work with Dougherty and raised no complaints at that time despite receiving monthly account statements. (*Id.* ¶¶ 34–41).

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<sup>3</sup> LPL's recitation of Plaintiff's factual and legal allegations is made upon information and belief, and LPL expressly reserves its right to deny or otherwise challenge any and all of Plaintiff's factual and legal allegations in the appropriate forum.

<sup>4</sup> As used here, the term Wells Fargo Advising Defendants denotes Wells Fargo Clearing Services, LLC; Wells Fargo Advisors, LLC; and Wachovia Securities Financial Holdings, LLC. (See Compl. ¶ 4.)

**2. Plaintiff Briefly Becomes a Client with LPL in January 2021 and Signs Four Account Agreements Governing his LPL Accounts Requiring Arbitration of All Claims Against LPL.**

In January 2021, Dougherty became affiliated with LPL, and Plaintiff chose to leave Wells Fargo and follow Dougherty to LPL. (*Id.* ¶ 43). When Plaintiff opened his first account with LPL, he executed an express agreement with LPL governing the parties’ relationship (the “Account Application”) (Poston Aff. Ex. A.A). (See Compl. ¶ 58; see also Plfs.’ Mem. Opp. Defs.’ Mots. Compel Arb. 5–6, *Bale v. Dougherty*, No. 3:23-cv-00660 (D.S.C. Dec. 4, 2023), ECF No. 46.) The Account Application “constituted [a] contract[] between the [Plaintiff] and [LPL].” (*Id.* ¶ 58).

Section I.1 of the Account Application completed by Plaintiff incorporates the accompanying “Account Packet” (the “Account Agreement”) (Poston Aff. Ex. A.B). Each of the three subsequent account applications completed by Plaintiff (Poston Aff. Exs. A.C, A.E, & A.G) (collectively with Poston Aff. Ex. A.A, the “Account Applications”) incorporate a similar account agreement (Poston Aff. Exs. A.D, A.F, & A.H) (collectively with Poston Aff. Ex. A.B, the “Account Agreements”).

The initial Account Application and the subsequent Account Applications state, “This separate packet contains the Account Agreement that details the relationship between you, your financial professional, LPL Financial (“LPL”) and other related parties, as applicable, to your account.” (Poston Aff. Ex. A.A, at 1.)<sup>5</sup> By signing the Account Applications, Plaintiff endorsed the following statement: “I acknowledge by signing below that I have received, read, understand and agree to the terms of this Account Application, the applicable Account Agreement, and the LPL Relationship Summary (included in the Account Packet specified in Section I).” (*Id.* at 6.)<sup>6</sup>

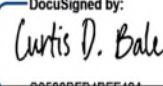
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<sup>5</sup> (See also Poston Aff. Ex. A.C, at 1 (similar); *id.* Ex. A.E, at 1 (same); *id.* Ex. A.G, at 1 (same).)

<sup>6</sup> (See also Poston Aff. Ex. A.C, at 7 (similar); *id.* Ex. A.E, at 6 (same); *id.* Ex. A.G, at 6 (same).)

By signing each of the Account Applications, Plaintiff also endorsed the following statement provided directly above their signature blocks: **“This account is governed by and I acknowledge receipt of the predispute arbitration clause** that is located in the last numbered section of the Account Agreement (included in the Account packe[t] specified in Section I), which is incorporated by reference into the Account Application.”

This account is governed by and I acknowledge receipt of the predispute arbitration clause that is located in the last numbered section of the Account Agreement (included in the Account Packed specified in Section I), which is incorporated by reference into the Account Application.

|                                                                                                                                                                                |                                                            |                            |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------|----------------------------|
| <p>DocuSigned by:<br/> <br/> <small>C8533BF64BFF42A</small><br/> Account Holder Signature</p> | <p>Curtis Dalton Bale<br/> Account Holder Name (print)</p> | <p>1/11/2021<br/> Date</p> |
|--------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|------------------------------------------------------------|----------------------------|

(*Id.* (emphasis added).)<sup>7</sup>

As Plaintiff acknowledged, each of the incorporated Account Agreements contains an arbitration provision (the “Arbitration Provision”), which states in relevant part the following:

In consideration of opening one or more accounts for you, you agree that **any controversy** between you and LPL and/or your Representative(s) (whether or not a signatory(ies) to this Master Account Agreement or Arbitration Agreement), arising out of or relating to your account, transactions with or for you, or the construction, performance, or breach of this agreement whether entered into prior, on or subsequent to the date hereof, **shall be settled by arbitration in accordance with the rules, then in effect of the Financial Industry Regulatory Authority (FINRA)**. . . . Any arbitration award hereunder shall be final, and judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction. Nothing in this this [sic] Agreement requires arbitration of any claim that under the law cannot be made subject to a pre-dispute agreement to arbitrate claims, including any dispute or controversy nonarbitrable under federal law.

(Poston Aff. Ex. A.B, at 15 (emphasis added).)<sup>8</sup>

<sup>7</sup> (See also Poston Aff. Ex. A.C, at 7 (similar); *id.* Ex. A.E, at 6 (same); *id.* Ex. A.G, at 6 (same).)

<sup>8</sup> (See also Poston Aff. Ex. A.D, at 19–20 (similar); *id.* Ex. A.F, at 15 (same); *id.* Ex. A.H, at 15 (same).)

**3. Plaintiff Leaves LPL in August 2021 and Files Suit in South Carolina State Court in 2023.**

At LPL, Plaintiff alleged that his investments “continued to drop in value.” (Compl. ¶ 46.) Plaintiff then “transferred his assets out of LPL in approximately August 2021”—roughly 7 months after opening his account. (*Id.* ¶ 47.)

On January 17, 2023, Plaintiff filed his Complaint and initiated suit in the Richland County Court of Common Pleas. (*See generally id.*) Plaintiff asserted five causes of action against LPL: Breach of Fiduciary Duty (Count I); Breach of Contract (Count II); Breach of Contract Accompanied by a Fraudulent Act (Count III); Violation of the South Carolina Uniform Securities Act of 2005 (Count IV); and Violation of South Carolina Unfair Trade Practices Act (Count V). (*See id.* ¶¶ 49–84.)

Count I seeks recovery from LPL for LPL’s breach of its fiduciary duties to “provid[e] wealth management and investment advice” to Plaintiff. (*Id.* ¶ 54.) Similarly, Count II seeks recovery from LPL for LPL’s breach of the Account Agreements. (*Id.* ¶¶ 58–61.) Count III likewise seeks recovery from LPL for LPL’s “fraudulent acts and/or omissions” accompanying its breach of the Account Agreements. (*Id.* ¶ 68.) Count IV, moreover, seeks recovery from LPL for LPL’s misrepresentations regarding the riskiness of his financial strategy, *inter alia*. (*Id.* ¶¶ 72–73.) Finally, Count V seeks recovery from LPL for LPL’s “recommending and implementing” an injurious investment scheme. (*Id.* ¶ 79.) All causes of action against Dougherty and LPL “aris[e] out of or relat[e] to” Plaintiff’s accounts and transactions at LPL. (*See Poston Aff. Ex. A.B*, at 15.)<sup>9</sup>

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<sup>9</sup> (*See also Poston Aff. Ex. A.D*, at 20; *id.* *Ex. A.F*, at 15; *id.* *Ex. A.H*, at 15.)

**4. LPL Removed the Matter to Federal Court on February 16, 2023, and the Matter was Remanded to this Court on March 25, 2024.**

On February 16, 2023, LPL filed a Notice of Removal of Plaintiff's state court action in the United States District Court for the District of South Carolina, Columbia Division ("District Court") and then filed a Notice of Removal in the South Carolina Court of Common Pleas for Richland County on February 17, 2023. LPL then filed its initial Motion to Compel Arbitration and Dismiss in the District Court. The District Court denied LPL's initial Motion to Compel Arbitration and Dismiss without prejudice and permitted limited discovery into the narrow issue of Defendant LPL Financial LLC's citizenship for diversity purposes. (*See Bale v. Dougherty*, No. 3:23-cv-00660 (D.S.C. Apr. 17, 2023), ECF No. 24.) LPL refiled its Motion to Compel Arbitration and Dismiss after the period for jurisdictional discovery closed. (*See Bale v. Dougherty*, No. 3:23-cv-00660 (D.S.C. June 20, 2023), ECF No. 33.)

The District Court remanded this matter to this Court on March 25, 2024. (*See Bale v. Dougherty*, No. 3:23-cv-00660 (D.S.C. Mar. 25, 2024), ECF No. 63.) That same day, LPL filed in this Court its Motion to Compel Arbitration and Dismiss ("Motion"). On October 31, 2024, this Court set a hearing on LPL's Motion for November 18, 2024. (Not. of Hearing.) LPL now files this memorandum in support of its Motion.

**LEGAL STANDARD**

In South Carolina, a party seeking to compel arbitration under the Federal Arbitration Act ("FAA") "must establish that (1) there is a valid agreement, and (2) the claims fall within the scope of the agreement." *Wilson v. Willis*, 426 S.C. 326, 336, 827 S.E.2d 167, 172 (2019). The FAA "applies in state or federal court to any arbitration agreement involving interstate commerce, unless the parties contract otherwise." *Id.* There is an "expansive view of interstate commerce" under the FAA, and the FAA requires courts to "enforce privately negotiated agreements to arbitrate,

like other contracts, in accordance with their terms.” *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 596, 553 S.E.2d 110, 116, 118 (2001) (citation omitted).

The party opposing arbitration “bears the burden of proving that the claims at issue are unsuitable for arbitration.” *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (citation omitted). As explained below, Plaintiff has failed to satisfy his burden of proof in this case.

### **ARGUMENT**

#### **1. The Agreement to Arbitrate is Governed by the FAA and Must Be Enforced under State and Federal Law.**

The FAA governs written agreements to arbitrate involving the interstate commerce. *See* 9 U.S.C. §§ 1 *et seq.*; *Wilson*, 426 S.C. at 336, 827 S.E.2d at 172; *see also Conway v. CLC BIO, LLC*, 32 N.E.3d 330, 335–36 (Mass. Ct. App. 2015).<sup>10</sup> There is an “expansive view of interstate commerce” under the FAA. *Zabinski*, 346 S.C. at 592, 596, 553 S.E.2d at 116, 118 (citation omitted). The FAA “requires courts to enforce privately negotiated agreements to arbitrate . . . in accordance with their terms.” *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013) (quoting *Zabinski*, 346 S.C. at 592, 553 S.E.2d at 116). The FAA confers a right “to obtain an order directing that arbitration proceed in the manner provided for in the parties’ agreement.” *Id.* at 126, 747 S.E.2d at 466 (original quotation marks and citation omitted). The Court shall direct the parties to proceed to arbitration upon showing there is a valid agreement for arbitration. *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 628 n.5, 667 S.E.2d 1, 4 n.5 (Ct. App. 2008) (citing 9 U.S.C. § 4). Arbitration provisions in

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<sup>10</sup> Massachusetts law governs LPL’s account agreements with Plaintiff. (*See Poston Aff. Ex. A.B*, at 9; *id. Ex. A.D*, at 9; *id. Ex. A.F*, at 9; *id. Ex. A.H*, at 9.) Plaintiff himself has conceded this point. (*See Plfs.’ Mem. Opp. Defs.’ Mots. Compel Arb. 13, Bale v. Dougherty*, No. 3:23-cv-00660 (D.S.C. Dec. 4, 2023), ECF No. 46.)

contracts involving interstate commerce “shall be valid, irrevocable, and enforceable,” and will be enforced by the court “save upon such grounds as exist at law or in equity for the revocation of any contract.” *Wilson*, 426 S.C. at 336, 827 S.E.2d at 173 (quoting 9 U.S.C. § 2).

A court is obligated to “rigorously enforce” arbitration agreements. *Cape Romain Contractors*, 405 S.C. at 125, 747 S.E.2d at 466 (quoting *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 228 (2013)). Significantly, too, any doubts concerning arbitrability should be resolved in favor of arbitration. *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118 (“Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”).

In South Carolina, dismissal is appropriate when all of the issues are arbitrable and within the scope of the arbitration agreement. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 97, 749 S.E.2d 139, 154 (Ct. App. 2013) (upholding trial court’s decision to dismiss suit and compel arbitration as “[e]very dispute was within the scope of at least one valid arbitration agreement”); *see also Choice Hotels Int’l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709–10 (4th Cir. 2001) (holding “dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable”); *Weckesser v. Knight Enterps. S.E., LLC*, 228 F. Supp. 3d 561, 564 (D.S.C. 2017) (noting district courts can “dismiss an action if all claims asserted are arbitrable”); *Town of Danvers v. Wexler Const. Co., Inc.*, 422 N.E.2d 782, 784 (Mass. Ct. App. 1981) (“Thus, once a dispute is determined to be arbitrable, it should, barring compelling reasons to the contrary, be remitted to the arbitral forum for consideration.”).

**2. LPL Has Satisfied All of the Elements Necessary to Compel Arbitration Pursuant to the FAA.**

As detailed above, a party seeking to compel arbitration under the FAA “must establish that (1) there is a valid agreement, and (2) the claims fall within the scope of the agreement.” *Wilson*, 426 S.C. at 336, 827 S.E.2d at 172. Stated more fully, a party must establish “(1) the

existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute.” *Am. Gen. Life & Acc. Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005) (citation omitted).

**A. A Dispute Exists Between the Parties.**

First, a dispute exists between the parties, as Plaintiff has filed a Complaint relating to his accounts at LPL, investments held at LPL, and advice received while at LPL. (See Compl. ¶¶ 54–79). Accordingly, this first element is met. *See Wood*, 429 F.3d at 87; *cf. Wilson*, 426 S.C. at 336, 827 S.E.2d at 172.

**B. A Written Agreement Containing an Arbitration Clause Covers the Dispute.**

Second, Plaintiff signed not one but four arbitration provisions with LPL covering this dispute. As noted above, arbitration is proper when there is a valid arbitration agreement, and the disputes are covered by the arbitration provision. *Landers v. Federal Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 214 (2013); *see York*, 406 S.C. at 97, 749 S.E.2d at 154 (upholding trial court’s decision to dismiss suit and compel arbitration, as “[e]very dispute was within the scope of at least one valid arbitration agreement”).

Simply put, arbitration is required when “(1) an arbitration clause specifically encompasses the asserted claims; or (2) there exists a significant relationship between the asserted claims and the parties’ contract.” *Timmons v. Starkey*, 380 S.C. 590, 596, 671 S.E.2d 101, 105 (Ct. App. 2008).

Each of the Account Agreements include a valid, written Arbitration Provision that is binding and enforceable against Plaintiff. (See Poston Aff. Ex. A.A, at 15).<sup>11</sup> Additionally, each of Plaintiff's claims falls within the Arbitration Provision's scope.

Both the Fourth Circuit Court of Appeals and [the South Carolina Supreme Court] have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. Thus, the scope of the clause does "not limit arbitration to the literal interpretation of performance of the contract, but embraces every dispute between the parties having a significant relationship to the contract."

*Landers*, 402 S.C. at 109, 739 S.E.2d at 214 (citation sentences and original brackets omitted) (quoting *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988)); see also *Com. v. Philip Morris Inc.*, 864 N.E.2d 505, 511 (Mass. 2007) ("[W]hen considering a broadly worded arbitration clause, there is a presumption that a contract dispute is encompassed by the clause unless it is clear the dispute is excluded."). Moreover, "under the expansive reach of the FAA[,] a tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause." *Landers*, 402 S.C. at 111, 739 S.E.2d at 214.

Here, the Arbitration Provisions to which Plaintiff agreed require arbitration of a broad category of disputes:

[A]ny controversy between you and LPL and/or your Representative(s) (whether or not a signatory(ies) to this Master Account Agreement or Arbitration Agreement), arising out of or relating to your account, transactions with or for you, or the construction, performance, or breach of this agreement whether entered into prior, on or subsequent to the date hereof, shall be settled by arbitration in accordance with the rules, then in effect of the Financial Industry Regulatory Authority (FINRA).

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<sup>11</sup> (See also Poston Aff. Ex. A.D, at 19–20; *id.* Ex. A.F, at 15; *id.* Ex. A.H, at 15.)

(Poston Aff. Ex. A.B, at 15).<sup>12</sup>

Plaintiff's five causes of action all fall within the scope of this Arbitration Provision because they arise out of or relate to Plaintiff's accounts, transactions with or for him, and performance under the Account Agreements. Indeed, in the briefing in the District Court, Plaintiff did not challenge that the claims all fell within the scope of the Arbitration Agreements.

i. The Arbitration Provision Covers Plaintiff's Breach of Fiduciary Duty Claim.

First, Plaintiff's breach of fiduciary duty claim is contingent on Plaintiff's allegations that LPL assumed a duty but "failed to exercise reasonable care, diligence, and prudence in the performance of its duties when it engaged in reckless and imprudent trading schemes in a futile effort to recover losses caused by its predecessors' failed strategy and self-protective sell-off." (See Compl. ¶¶ 54(1), 58–59 ("Upon the opening of [Plaintiff]'s account[] [with LPL] . . . , [LPL] entered into both express agreements and implied agreements with the [Plaintiff] . . . . As a customer of [LPL] and also pursuant to the Agreements, [LPL] owed [Plaintiff] a duty to advise him honestly, fairly, competently, and prudently, and in accordance with his needs, goals[,] and best interests.").)

If any fiduciary duties arose, they arose from the Account Agreements which govern LPL's conduct with respect to the operation and oversight of his LPL accounts. See *Timmons*, 380 S.C. at 595–96, 671 S.E.2d at 104 (agreeing that arbitration was required as there was a significant relationship between plaintiff's claims including breach of fiduciary duty, breach of contract, and breach of contract accompanied by a fraudulent act as the underlying allegations involved duties created by the parties' contractual relationship); *Hatcher v. Edward D. Jones & Co., L.P.*, 379 S.C.

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<sup>12</sup> (See also Poston Aff. Ex. A.D, at 20 (similar); *id.* Ex. A.F, at 15 (same); *id.* Ex. A.H, at 15 (same).)

549, 552, 666 S.E.2d 294, 296 (Ct. App. 2008) (agreeing that plaintiff's claims for breach of contract and breach of fiduciary duty were subject to arbitration based on arbitration agreement signed between the parties). Any fiduciary duties would thus be encompassed in the Account Agreement and encompassed within the arbitration provision. *See Timmons*, 380 S.C. at 596, 671 S.E.2d at 105 ("The respective arbitration clauses in the [] contracts provide that all controversies which may arise between [the parties] concerning any transaction or the performance or breach of any contract between the parties shall be determined by arbitration. Additionally, the arbitration clause in the [] agreement expands the scope of arbitrable controversies to include those concerning any account or dispute."). Thus, Plaintiff's fiduciary breach claim arises from and relates to Plaintiff's account and performance under the Account Agreements. It must be arbitrated under the Arbitration Provision.

ii. The Arbitration Provision Covers Plaintiff's Breach of Contract and Accompanying Fraudulent Act Claims.

Next, Plaintiff's breach of contract and breach of contract accompanied by a fraudulent act claims also fall within the broad scope of the Arbitration Provision. Specifically, Plaintiff alleges that LPL executed the Account Agreements with Plaintiff and then "breached [its] Agreements with [Plaintiff]" through mismanagement—failing "to abide by the terms of the agreements." (*See* Compl. ¶¶ 58, 61–62, 65–58). Manifestly, Plaintiff's breach of contract and breach of contract accompanied by a fraudulent act claims arise from and relate to the Account Agreements and must be arbitrated under the Arbitration Provision. *See Hatcher*, 379 S.C at 552, 666 S.E.2d at 296 (agreeing that claims as to breach of contract and breach of contract accompanied by fraudulent act claims asserted were subject to arbitration pursuant to their arbitration agreement and investment account agreements).

iii. The Arbitration Provision Covers Plaintiff's Statutory Violation Claims.

Plaintiff's claim for violation of the South Carolina Uniform Securities Act of 2005 ("SCUSA") likewise arises from and relates to Account Agreements. *See Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 275, 776 S.E.2d 91, 96 (Ct. App. 2015) (holding statutory claims were subject to mandatory arbitration as the claims arose out of the parties' contract); *Benezra v. Zacks Inv. Res., Inc.*, No. 1:11-cv-00596, 2012 WL 1067559, at \*7 (M.D.N.C. Mar. 30, 2012) ("Plaintiffs' claims of breach of fiduciary duty, including engaging in prohibited transactions under the Investment Act of 1940 . . . , violation of the North Carolina Securities Act . . . , and unfair and deceptive trade practices . . . all either 'relate to' or 'arise out of' the [Investment Advisory Agreement]"). Plaintiff alleges that LPL "recommended and advised that he enter into imprudent transactions." (Compl. ¶ 72.) The Account Agreements governed LPL's conduct with respect to the operation and oversight of his LPL accounts. Thus, Plaintiff's SCUSA claim arises from and relates to Plaintiff's account and performance under the Account Agreements. It too must be arbitrated under the Arbitration Provision.

Finally, Plaintiff's claim for violation of the South Carolina Unfair Trade Practices Act ("SCUTPA") likewise arises from and relates to the Account Agreements. *See Hall*, 413 S.C. at 275, 776 S.E.2d at 96; *Benezra*, 2012 WL 1067559, at \*7. Plaintiff alleges that LPL "engaged in an unfair method of competition and/or an unfair or deceptive act or practice" by "recommending and implementing an investment scheme premised upon [Plaintiff's] continuing to maintain a substantial debt collateralized by his investments." (Compl. ¶ 79.) The Account Agreements governed LPL's conduct with respect to the operation and oversight of his LPL accounts. *See Timmons*, 380 S.C. at 597, 671 S.E.2d at 105 (holding any duty as to account management and transactions concerning the account was governed purely by the parties' contractual relationship and thus encompassed by the arbitration clauses in the parties' contract). Like the other claims

asserted in the Complaint, Plaintiff's SCUTPA claim arises from and relates to Plaintiff's accounts, transactions with or for Plaintiff, and the Account Agreements, and it must be arbitrated under the Arbitration Provision.

iv. The Arbitration Agreements are Valid.

In the prior briefing in the District Court, Plaintiff did not contest that the claims he asserted were within the scope of the Arbitration Agreements. Instead, Plaintiff challenged the Arbitration Agreements as unenforceable, raising several meritless arguments which LPL anticipates he will attempt again here.

First, Plaintiff argued that his repeated decisions to enter arbitration agreements with LPL are nullified by alleged hyper-technical shortcomings in those agreements, citing certain FINRA rules. However, courts have rejected this exact argument, finding that a technical rule promulgated by a self-regulatory organization cannot constitute an "exception[]" to the FAA in order to invalidate an otherwise valid arbitration agreement." *See, e.g., Singh v. Interactive Brokers LLC*, 219 F. Supp. 3d 549, 559 (E.D. Va. 2016); *Hillow v. E\*Trade Sec., LLC*, No. 4:22-CV-145-JAR, 2022 WL 1165791, at \*3–5 (E.D. Mo. Apr. 20, 2022).<sup>13</sup>

Second, despite alleging that he is a successful and experienced businessman (Compl. ¶¶ 17–19), and despite the fact that he signed, at least, ten different arbitration agreements with Defendants, Plaintiff also made several arguments that the agreement was void due to mistake. Plaintiff's purported mistake was, he alleged, brought on by LPL's failure to disclose some alleged

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<sup>13</sup> Notably, although his argument is premised on technical requirements designed to ensure notice, Plaintiff makes no suggestion that he actually did not have notice that the agreements contained an arbitration provision—and in fact, in an affidavit filed in federal court, he concedes that he had *actual notice* of the provisions. (Aff. of CD Bale ¶¶ 9–10, *Bale v. Dougherty*, No. 3:23-cv-00660 (D.S.C. Dec. 4, 2023), ECF No. 46-1 (outlining Bale's expectations, at the time of signing, regarding the forum for any disputes—"whether court or *arbitration*" (emphasis added)).)

substantial prejudice inherent to the FINRA forum.<sup>14</sup> This is an extraordinary allegation, divorced from facts and law. Plaintiff's personal feelings about this Court or an arbitration forum are simply irrelevant to the fact that he signed numerous arbitration agreements, consenting to be bound to the arbitration clauses, which clearly cover this dispute. He cited no case law where a court refused to compel an eligible dispute to arbitration simply because one party equivocated on its forum selection choice or claimed—without basis—that it is somehow unfair. To allow Plaintiff to dishonor his contractual obligations now would wreak havoc on the entire arbitration process and parties' contractual rights.

Even assuming that Plaintiff's whim were somehow tantamount to a mistake, the only issue would be Plaintiff's unilateral failure to investigate the substance of his contracts. But Plaintiff cannot evade his contractual obligations, because Plaintiff bore the risk of that unilateral mistake. *See Dahua Tech. USA Inc. v. Feng Zhang*, 988 F.3d 531, 539 (1st Cir. 2021) (“Asserting a unilateral mistake defense requires a party to show that . . . [he] did not bear the risk of mistake.”)

Finally, in the District Court, Plaintiff raised the argument that arbitration was improper because he could not “effectively vindicate his statutory rights in the arbitral forum” (citing *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 282 (4th Cir. 2007)). (See Plfs.' Mem. Opp. Defs.' Mots. Compel Arb. 16–17, *Bale v. Dougherty*, No. 3:23-cv-00660 (D.S.C. Dec. 4, 2023), ECF No. 46.) But his argument ignored that the “effective vindication” doctrine applies only to *federal* statutes—not *state* statutes like the South Carolina Uniform Securities Act of 2005 or the South

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<sup>14</sup> Plaintiff's disingenuous attempt to paint the entire forum of FINRA as unconscionable fails because he offers nothing more than mere speculation as to the outcome of his particular case. Moreover, Plaintiff's position is all the more ironic—if not disingenuous—because his own counsel “is a certified arbitrator by the Financial Industry Regulatory Authority.” Mitchell Willoughby, WILLOUGHBY HUMPHREY & D'ANTONI, <https://whdlawyers.com/attorney/mitchell-willoughby/> (last accessed Nov. 8, 2024).

Carolina Unfair Trade Practices Act raised by Plaintiff. *See Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013) (addressing argument that “effective vindication” doctrine “serves to harmonize competing *federal* policies by allowing courts to invalidate agreements that prevent the ‘effective vindication’ of a *federal* statutory right” (emphasis added)).

Accordingly, all five of Plaintiff’s causes of action fall within the broad scope of this Arbitration Provision because they all relate to or arise out of Plaintiff’s accounts, transactions with or for Plaintiff, or performance under the Account Agreements themselves, and the unenforceability arguments that Plaintiff advanced to avoid his signed Arbitration Agreements with LPL are baseless.

### **C. The Agreement Evidences a Relationship to Interstate Commerce.**

Third, the transactions at issue in the Complaint relate to interstate commerce. Not only do the transactions at issue relate to investment and brokerage accounts in national and/or international financial markets, but they involve the Plaintiff (located in South Carolina), his advisor (the individual Defendant John Dougherty, located in Pennsylvania), and the entity Defendants (located throughout the United States).<sup>15</sup>

It is well-settled that such agreements relating to investment and brokerage accounts “evidence[e] a transaction involving [interstate] commerce” such that the FAA applies. *See* 9 U.S.C. §§ 1, 2; *Dean*, 408 S.C. at 380, 759 S.E.2d at 732 (noting courts must consider “the agreement, the complaint, and the surrounding facts” in determining whether an arbitration agreement implicates interstate commerce for purposes of the FAA); *Newcome v. Esrey*, 862 F.2d 1099, 1100, 1107 (4th Cir. 1988) (affirming district court’s ruling that investment services and

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<sup>15</sup> As noted above, the Arbitration Agreements establish FINRA as the forum for any dispute and Massachusetts as the governing law.

brokerage agreements for securities meet FAA requirements and arbitration clauses will be held enforceable to prevent litigation); *Park v. Merrill Lynch*, 582 S.E.2d 375, 378 (N.C. Ct. App. 2003) (“Securities brokerage agreements are contracts ‘involving’ interstate commerce, and therefore, the FAA applies to them.”); *cf. Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 610, 571 S.E.2d 711, 713 (Ct. App. 2002) (applying FAA in investment representative’s claims against his employer); *Citigroup Glob. Markets, Inc. v. Bock*, No. 10-24157-MC, 2013 WL 210253, at \*3 (S.D. Fla. Jan. 17, 2013) (“The Court concludes the FAA applies here. As Bock describes his employment responsibilities, he served as an investment advisor and purchased securities listed on national exchanges. . . . This activity—purchasing securities on national exchanges—is quintessentially an activity that affects interstate commerce.”).

Accordingly, the FAA applies here because the Account Agreements for investment services involve interstate commerce in national and/or international financial markets. Additionally, they also involve interstate commerce because Plaintiff (located in South Carolina) contracted with the entity Defendants (located throughout the United States) for investment services to be provided by individual Defendant John Dougherty (located in Pennsylvania).

#### **D. Plaintiff Refuses to Arbitrate the Dispute.**

Fourth, and finally, Plaintiff filed this case in the South Carolina Court of Common Pleas on January 17, 2023, and has not, to date, agreed to stipulate to dismiss this case and refile in FINRA—the proper, agreed-to, venue for the matter.

### **CONCLUSION**

For the reasons detailed above, this Court must compel arbitration of Plaintiff’s claims in accordance with the Account Agreements and the Arbitration Provision therein. *See Timmons*, 380 S.C. at 596, 671 S.E.2d at 105; *Landers*, 402 S.C. at 109, 739 S.E.2d at 214. Accordingly, LPL respectfully requests that this Court grant its Motion and enter an Order:

- (1) Compelling Plaintiff to arbitrate all claims against LPL with FINRA in accordance with the Arbitration Provision in the Account Agreements;
- (2) Dismissing the claims against LPL with prejudice or, in the alternative, staying all proceedings in this action, including discovery, related to the claims against LPL until after Plaintiff has submitted all claims to arbitration and the arbitration proceedings have been completed; and
- (3) Awarding fees and costs associated with filing this Motion.

Submitted this 8th day of November 2024.

NELSON MULLINS RILEY & SCARBOROUGH LLP

By: /s/Adam J. Hegler

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# EXHIBIT 4

|                                                 |   |                                              |
|-------------------------------------------------|---|----------------------------------------------|
| STATE OF SOUTH CAROLINA                         | ) | IN THE COURT OF COMMON PLEAS                 |
|                                                 | ) |                                              |
| COUNTY OF RICHLAND                              | ) | CIVIL ACTION NO. 2023-CP-40-00242            |
|                                                 | ) |                                              |
| Curtis D. Bale,                                 | ) |                                              |
|                                                 | ) | <b>DEFENDANTS JOHN A. DOUGHERTY'S</b>        |
| Plaintiff,                                      | ) | <b>AND WELLS FARGO CLEARING</b>              |
|                                                 | ) | <b>SERVICES, LLC, F/K/A WELLS FARGO</b>      |
| v.                                              | ) | <b>ADVISORS, LLC'S MOTION TO</b>             |
|                                                 | ) | <b>COMPEL ARBITRATION UNDER 9</b>            |
| John A Dougherty; Wachovia Securities Financial | ) | <b>U.S.C. §§ 3 AND 4 AND MOTIONS TO</b>      |
| Holdings, LLC; Wells Fargo Clearing Services,   | ) | <b>DISMISS UNDER RULES 12(b)(1), (3) and</b> |
| LLC, f/k/a Wells Fargo Advisors, LLC; Wells     | ) | <b>(6) AND MOTION TO STAY IN THE</b>         |
| Fargo & Company; Wells Fargo Bank, N.A.; and    | ) | <b>ALTERNATIVE</b>                           |
| LPL Financial, LLC                              | ) |                                              |
| Defendants.                                     | ) |                                              |
|                                                 | ) |                                              |

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Pursuant to 9 U.S.C. §§ 3 and 4 and South Carolina Rules of Civil Procedure 12(b)(1), (3), and (6), Defendants John A. Dougherty ("Dougherty") and Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC ("WFCS") (collectively "Defendants") hereby move to compel arbitration of Plaintiff Curtis D. Bale's ("Plaintiff" or "Bale") claims as required by Plaintiff's arbitration agreement with WFCS and dismiss, administratively close, or stay this litigation pending arbitration.

1. Plaintiff filed this action seeking recovery from Defendants for Dougherty's allegedly wrongful handling of Plaintiff's brokerage accounts at WFCS. *See* Complaint, ¶¶ 17 - 48.

2. When Plaintiff opened his brokerage accounts with WFCS, Plaintiff executed a Signature Page for each brokerage account in which he acknowledged receipt of and agreed to be bound by the terms of his Client Agreement and the Wells Fargo Advisors General Account Agreement and Disclosure Document ("Account Agreement"). *See* Declaration of Michelle Keller (attached hereto as **Exhibit 1**), ¶¶ 3-4. True and correct copies of Signature Pages for

Plaintiff's accounts are attached to Ms. Keller's declaration as Ex. A. True and correct copies of the Client Agreements are attached to Ms. Keller's declaration as Exs. B-C. True and correct copies of the Account Agreements are attached to Ms. Keller's declarations as Exs. D-E. The Parties' agreements require Plaintiff to arbitrate the claims he raised against WFCS. *Id.* The Account Agreements state that:

It is agreed that all controversies or disputes which may arise between [Plaintiff] and [WFCS], including controversies or disputes with [WFCS]'s clearing agent, concerning any transaction or the construction, performance or breach of this Agreement or any other agreement between [WFCS and Plaintiff], whether entered into prior to, on, or subsequent to the date of this Agreement, including any controversy concerning whether an issue is arbitrable, shall be determined by arbitration conducted before, and only before, an arbitration panel set up by either the Financial Industry Regulatory Authority ("FINRA") in accordance with its arbitration procedures.

Keller Decl., Ex. D, p. 5 and Ex. E, p. 4

3. Plaintiff's claims against Defendants are subject to arbitration because Plaintiff's claims involve a controversy or dispute between Plaintiff and WFCS. *See Chorley Enterps., Inc. v. Dickey's Barbeque Rest., Inc.*, 807 F. 3d 553, 564-65 (4th Cir. 2015).

4. Prior to filing this Motion, Defendants contacted counsel for Plaintiff and requested that Plaintiff agree to proceed in arbitration in accordance with Plaintiff's arbitration agreement. Plaintiff's counsel has stated Plaintiff will not consent.

WHEREFORE, for the foregoing reasons and the reasons set forth in the accompanying Memorandum in Support, Defendants respectfully request that this Court grant their Motion and enter an Order:

- (1) Compelling Plaintiff to arbitrate all claims against Defendants with FINRA in accordance with the arbitration clause in the Client Agreement;
- (2) Dismissing the claims against Defendants with prejudice, or in the alternative, staying all proceedings in this action, including discovery, related to the claims

against Defendants until after Plaintiff has submitted all claims to arbitration and the arbitration proceedings have been concluded; and

(3) Awarding fees and costs associated with filing this Motion.

Respectfully submitted,

Dated: April 3, 2024

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Holdings, LLC, Wells Fargo and  
Company, and Wells Fargo Bank, N.A.*

|                                                 |   |                                              |
|-------------------------------------------------|---|----------------------------------------------|
| STATE OF SOUTH CAROLINA                         | ) | IN THE COURT OF COMMON PLEAS                 |
|                                                 | ) |                                              |
| COUNTY OF RICHLAND                              | ) | CIVIL ACTION NO. 2023-CP-40-00242            |
|                                                 | ) |                                              |
| Curtis D. Bale,                                 | ) |                                              |
|                                                 | ) | <b>MEMORANDUM OF LAW IN SUPPORT</b>          |
| Plaintiff,                                      | ) | <b>OF MOTION TO COMPEL</b>                   |
|                                                 | ) | <b>ARBITRATION UNDER 9 U.S.C. §§ 3</b>       |
| v.                                              | ) | <b>AND 4 AND MOTIONS TO DISMISS</b>          |
|                                                 | ) | <b>UNDER RULES 12(b)(1), (3) and (6) AND</b> |
| John A Dougherty; Wachovia Securities Financial | ) | <b>MOTION TO STAY IN THE</b>                 |
| Holdings, LLC; Wells Fargo Clearing Services,   | ) | <b>ALTERNATIVE</b>                           |
| LLC, f/k/a Wells Fargo Advisors, LLC; Wells     | ) |                                              |
| Fargo & Company; Wells Fargo Bank, N.A.; and    | ) |                                              |
| LPL Financial, LLC                              | ) |                                              |
| Defendants.                                     | ) |                                              |
|                                                 | ) |                                              |

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Pursuant to 9 U.S.C. §§ 3 and 4 and South Carolina Rules of Civil Procedure 12(b)(1), (3) and (6) Defendants John A. Dougherty (“Dougherty”) and Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC (“WFCS”) (collectively “Defendants”) submit this memorandum of law in support of their Motion to Compel Arbitration. For the reasons set forth below, and with reference to the documents attached as Exhibits A-E of the Declaration of Michelle Keller, filed herewith, Defendants move the Court to compel arbitration of Plaintiff Curtis D. Bale’s (“Plaintiff” or “Bale”) claims as required by Plaintiff’s arbitration agreement and thus to dismiss, administratively close, or stay this litigation pending arbitration.

### **NATURE OF THE CASE**

This case is about a disgruntled client, Plaintiff, who, after a substantial correction in the market occurred, decided to sue anyone with whom he ever had an account. Plaintiff, however, has failed to bring his claims in the proper venue. Pursuant to Plaintiff’s valid binding arbitration agreements with WFCS, the claims asserted by Plaintiff against Defendants are subject to arbitration.

Almost ten years ago, Plaintiff opened multiple brokerage accounts with WFCS. Throughout the time during which Plaintiff had brokerage accounts at WFCS, Dougherty served as Plaintiff's financial advisor. Plaintiff executed a Signature Page for each brokerage account he opened with WFCS. Each Signature Page incorporated into it a Client Agreement and a Wells Fargo Advisors General Account Agreement and Disclosure Document. By executing the Signature Pages for each of his brokerage accounts, Plaintiff acknowledged receipt of a copy of both and agreed to be bound by their terms. Both agreements include arbitration provisions that subject any controversies or disputes that arise between Plaintiff, WFCS, and his WFCS financial advisor to arbitration.

#### **STATEMENT OF THE FACTS**

Plaintiff opened multiple brokerage accounts with WFCS in May 2013. In conjunction with opening each brokerage account, Plaintiff received a New Account Documents package. These documents included a Client Agreement, a Wells Fargo Advisors General Account Agreement and Disclosure Document, and a Signature Page.

The Signature Page for each account provided as follows:

By signing this page, I/we acknowledge that I have received and reviewed a copy of my/our investment profile(s) included in this package and, in the case of an advisory program account, the disclosure document(s) relating to my particular advisory program account, and I have read and agree to be bound by the agreements and/or documents listed below and any other agreements and documents that are incorporated by reference into such agreements and/or documents.

See Ex. A. In addition, the Signature Page provided that:

This Client Agreement Contains a Pre-Dispute Arbitration Clause located on page 4 in Section I, Paragraph 5 and in the Wells Fargo Advisors General Account Agreement and Disclosure Document on page 5, Paragraph 5 under the header "Arbitration." The undersigned hereby acknowledges receipt of a copy of the Client Agreement and the Wells Fargo Advisors General Account Agreement and Disclosure Documents and hereby agrees to the terms of these agreements.

*Id.*

The arbitration provision in the Account Agreement provides that:

**It is agreed that all controversies or disputes which may arise between you and [WFCS], including all controversies or disputes with [WFCS]’s clearing agent (collectively, “us”), concerning any transaction or the construction, performance or breach of this Agreement or any other agreement between us, whether entered into prior to, on, or subsequent to the date of this Agreement, including any controversy concerning whether an issue is arbitrable, shall be determined by arbitration conducted before, and only before, an arbitration panel set up by either the Financial Regulatory Authority (“FINRA”) in accordance with its arbitration procedures.**

See Ex. D, p. 5. (emphasis added). Throughout the time during which Plaintiff had brokerage accounts at WFCS, Dougherty served as Plaintiff’s financial advisor.

### **ARGUMENT**

#### **I. PLAINTIFF MUST ARBITRATE HIS CLAIMS AGAINST WFCS AND DOUGHERTY**

##### **A. The FAA Applies and Requires Enforcement of the Arbitration Agreements.**

A written arbitration provision contained in a “contract evidencing a transaction involving commerce ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The Federal Arbitration Act (“FAA”) mandates that “the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement,” upon application of one of the parties, if there has been a “failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration.” 9 U.S.C. § 4 (emphasis added). The Act also provides that a court “shall” stay its proceedings if it is satisfied that an issue before it is arbitrable under the parties’ agreement “until such arbitration has been had in accordance with the terms of the agreement.” 9 U.S.C. § 3 (emphasis added).

By its terms, “the Act leaves no place for the exercise of discretion by a [trial] court, but instead mandates that [trial] courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original) (citing 9 U.S.C. §§ 3, 4). To abide by this Congressional mandate, courts must “rigorously enforce agreements to arbitrate.” *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Byrd*, 470 U.S. at 221). All of this means that “generalized attacks on arbitration,” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991), based on the “suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,” *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989), have been repudiated as “far out of step with our current strong endorsement of the federal statutes enclosing this method of resolving disputes.” *Id.*

The FAA also establishes “a liberal federal policy favoring arbitration agreements” as a preferred method of dispute resolution. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). This federal policy favoring arbitration is strong, so strong that it preempts any state law “to the extent that [the state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989).

There are some limits to enforcement of an arbitration agreement. Section 2 of the FAA states that such an agreement is enforceable “save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. But this “saving clause” does not allow for “defenses that apply only to arbitration or that derive their meaning from the fact that an

agreement to arbitrate is at issue.” *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 339 (2011).

Under the FAA, an arbitration agreement must be enforced where: (1) the parties entered a written agreement to arbitrate claims, (2) the transaction has a nexus to interstate commerce, and (3) the arbitration clause encompasses the claims. 9 U.S.C. § 2. Each of these inquiries “must be undertaken against the background of a ‘liberal federal policy favoring arbitration agreements.’” *Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24; *see also Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012). Given the strong federal policy favoring arbitration, “the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration.” *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

**B. The Agreement to Arbitrate Is Valid.**

Under Supreme Court precedent, state contract law controls the question of whether a valid agreement to arbitrate has been formed. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Under South Carolina law, a “valid and enforceable contract requires meeting of the minds between the parties with regard to all essential and material terms of the agreement.” *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 762 S.E. 2d 696, 701 (S.C. 2014). There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes. *Towles v. United HealthCare Corp.*, 524 S.E. 2d 839, 842 (S.C. Ct. App. 1999). Unless a court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should generally be ordered. *Zabinski v. Bright Acres Associates*, 553 S.E. 2d 110, 118 (S.C. 2001).

Due to strong South Carolina and federal policy favoring arbitration, arbitration agreements are presumed valid in South Carolina. *Cape Romain Contractors, Inc. v. Wando E.*,

LLC, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013). With this policy at the forefront, courts are required to enforce the bargain of the parties to arbitrate. The Supreme Court of South Carolina provided specific direction in *Landers v. Federal Deposit Insurance Corporation*:

It is the policy of this state and federal law to favor arbitration and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 92 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*, 460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)); accord *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 118. "The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Am. Recovery*, 96 F.3d at 94 (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989)). Such a presumption is strengthened when an arbitration clause is broadly written. *AT & T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). Therefore, "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute[.]" arbitration must generally be ordered. *Am. Recovery*, 96 F. 3d at 92 (quoting *Warrior & Gulf Navigation Co.*, 363 U.S. at 582-83, 80 S.Ct. 1347); *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 119. A clause which provides for arbitration of all disputes "arising out of or relating to" the contract is construed broadly. *See, e.g., Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) (labeling as "broad" a clause that required arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement"). Courts have held that such broad clauses are "capable of an expansive reach." *Am. Recovery Corp.*, 96 F.3d at 93. Both the Fourth Circuit Court of Appeals and this Court have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir. 1988); *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119... In applying this standard, this Court "must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim." *Id.* at 319; *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

*Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213-14 (2013).

Plaintiff agreed to arbitrate "all controversies and disputes" he had with WFCS and its representatives, as well as WFCS's "clearing agent" in the Client Agreement and Account Agreement. *See* Keller Decl., Exs. B-C and D-E. Plaintiff manifested his assent to the terms of the Client Agreement and Account Agreement when he executed the Signature Page in which

Plaintiff acknowledged receipt of a copy of the Client Agreement and Account Agreement and agreed to the terms of both. See Keller Decl., Ex. A. Here, Plaintiff and WFCS formed a valid agreement to arbitrate under both South Carolina law and the FAA.

**C. Interstate Commerce Is Present.**

The FAA provides, in pertinent part, that:

A written provision in maritime transaction or a contract ***evidencing a transaction involving commerce*** to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). The term “involving commerce” in the FAA has been interpreted as the functional equivalent of the more familiar term “affecting commerce” and “encompasses a wider range of transactions than those actually ‘in commerce’ – that is, ‘within the flow of interstate commerce.’” *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (citing *Allied-Bruce Terminix*, 513 U.S. at 273)). “Congress’ Commerce Clause power ‘may be exercised in individual cases without showing any specific effect upon interstate commerce’ if in the aggregate the economic activity in question would represent ‘a general practice . . . subject to federal court.’” *Citizens Bank*, 539 U.S. at 56-57 (citing *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)). The FAA extends to the full reach of the Commerce Clause. See *Allied-Bruce Terminix*, 513 U.S. at 270; *Perry v. Thomas*, 482 U.S. 483, 490 (1987).<sup>1</sup>

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<sup>1</sup> It is now beyond dispute that the delivery, transfer, or movement of goods, services, or other articles of commerce “across state lines has long been recognized as a form of ‘commerce.’” *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 573 (1997); see also, *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824). This is particularly true where it is **money** that is the “article” delivered, transferred, or moved across state lines. See, e.g., *24 GO Wireless, Inc. v. AT&T Mobility II*,

Here, there can be no serious dispute about whether the management of Plaintiff's brokerage accounts at WFCS involved or affected interstate commerce. The Client Agreement governed the management of Plaintiff's brokerage accounts and management of Plaintiff's brokerage accounts involved the movement of money across state lines. Keller Decl., ¶ 5; *see, also, e.g., Newcome v. Esrey*, 862 F. 2d 1099, 1100, 1107 (4th Cir. 1988) (affirming district court's ruling that investment services and brokerage agreements for securities meet FAA requirements and arbitration clauses will be held enforceable to prevent litigation); *Whitaker v. Protective Life Insurance Company*, 2011 WL 13217968 at \*2 (D.S.C. August 18, 2011) ("Courts have held that arbitration agreements in contracts for the sale of stock are transactions involving commerce ... The Account Agreement contemplates the sale of stock ... Thus, the arbitration clause in questions is in a contract that involves commerce and falls within the scope of the FAA."); *Ottenritter v. Shearson Lehman Hutton, Inc.*, 727 F. Supp. 980, 986 (D. Md. 1989) (concluding that FAA applied to customer agreement for investment account that evidenced a transaction involving interstate commerce); *Secs. Indus. Ass'n v. Connolly*, 703 F. Supp. 146, 149 n.6 (D. Mass. 1998) ("The written brokerage contracts in which these agreements are contained plainly concern transactions involving interstate and international commerce. For the most part, the purchase and sale of securities is conducted over national exchanges ... The instrumentalities of interstate commerce – telephones and the mails – are used to execute and report brokerage trades. Thus, the agreements at issue here fall within the broad construction ... given the reach of the [FAA] ...").

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*LLC*, No. 11-20930-CIV, 2011 WL 2607099, at \*1 (S.D. Fla. June 30, 2011) (recognizing that a business transaction involving the transfer of money and goods between citizens of different states affects interstate commerce); *accord United States v. Owens*, 159 F.3d 221, 226 (6th Cir. 1998); *Staples v. Money Tree, Inc.*, 936 F. Supp. 856, 858 (M.D. Ala. 1996).

Moreover, Plaintiff resides in South Carolina and was served by Dougherty, an alleged citizen of Pennsylvania. *See* Doc. 1-1, ¶¶ 1-2. Therefore, the second prerequisite to enforcement of the parties' arbitration agreement – the presence of transactions in commerce – is met.

**D. The Arbitration Clause Encompasses Plaintiff's Claims.**

The arbitration agreement here unquestionably encompasses each of the Plaintiff's claims against Defendants. When determining the scope of an arbitration provision, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself must be resolved in favor of arbitration." *Volt Info.*, 489 U.S. at 476. The presumption of arbitrability, created by the mere existence of an arbitration clause, may be rebutted only if "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)). In construing arbitration clauses, the courts have distinguished between "broad" clauses that purport to cover all disputes "arising out of" or "relating to" a contract, and "narrow" clauses that limit arbitration to specific types of disputes. *See McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F.2d 825, 832 (2d Cir. 1988). If a court concludes that the arbitration provision before it is a "broad" one, then the presumption in favor of arbitrability applies with even greater force. *See AT&T Techs.*, 475 U.S. at 650.

The present dispute is clearly within the scope of the Client Agreement's broad arbitration provision. The Client Agreement refers to arbitration of "all controversies or disputes" between Plaintiff, on the one hand, and WFCS and its clearing agent on the other hand. *See Keller Decl.*, Exs. B-C. The "controversies and disputes" contemplated by the Client Agreement includes any controversies and disputes concerning any transaction or the

construction, performance, or breach of the Client Agreement. *Id.* Plaintiff alleges that Defendants failed to conduct appropriate due diligence, adopted faithless wrongful conduct and strategy, and failed to advise Plaintiff of the risks associated with Plaintiff's financial advisor's investment strategies. See Complaint, Doc. 1-1. Claims related to the transactions in Plaintiff's brokerage accounts and the management of Plaintiff's brokerage accounts are exactly the sort of "controversies or disputes" contemplated in the Client Agreement.

Each of the claims asserted by Plaintiff, moreover, are the types that courts have already determined are arbitrable:

- Breach of Fiduciary Duty: See *Long v. Silver*, 248 F. 3d 309, 318 (4th Cir. 2001); See also *Aiken v. World Finance Corp. of S.C.*, 644 S.E. 2d 705, 709 (2007).
- Breach of Contract: See *Aiken v. World Finance Corp. of S.C.*, 644 S.E. 2d 705, 709 (S.C. 2007).
- Breach of Contract Accompanied by a Fraudulent Act: See *Aiken v. World Finance Corp. of S.C.*, 644 S.E. 2d 705, 709 (S.C. 2007).
- Violation of the South Carolina Uniform Securities Act of 2005, S.C. Code Ann. § 35-1-101, et seq.: See *Levendag v. Churchill*, 623 F. Supp. 620, 622 (U.S. D.S.C. 1985).
- Violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 35-5-10, et seq.: See *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F. 2d 315, 319 (4th Cir. 1988).

**E. All Possible Challenges To The Formation, Validity, Or Enforceability Of The Arbitration Provision Must Also Be Resolved By The Arbitrator.**

Not only are each of Plaintiff's substantive claims subject to arbitration, but any potential defenses Plaintiff may have to the arbitrability of his claims must also be submitted to arbitral resolution. Binding Supreme Court authorities have foreclosed any contrary arguments.

The parties in this case have delegated all issues as to the formation, validity, or enforceability of the arbitration agreement to the arbitrator. The arbitration provisions in the Client Agreement and Account Agreement provide that any controversy concerning whether an

issue is arbitrable shall be determined by arbitration. See Keller Decl., Ex. B, p. 2; Ex. C, p. 2; Ex. D, p. 5; and Ex. E, p. 4. Moreover, under FINRA rules governing customer disputes, the panel of arbitrators has the authority to interpret and determine the applicability of all provisions under the Code, and such interpretations are final and binding upon the parties. See FINRA Rule 12409.

Both the United States Supreme Court and the Fourth Circuit have concluded that clauses that delegate all gateway issues to the arbitrator when expressly stated in the agreement or incorporated by reference in arbitral body rules are enforceable and provide clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. See *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531, 202 L. Ed. 2d 480, 489 (2019) (“[w]hen the parties’ contract delegates the arbitrability question to an arbitrator, the courts must respect the parties’ decision as embodied in the contract.”); *Rent-A-Center W., Inc. v. Jackson*, 561 U.S. 63, 72-73 (2010); *Gibbs v. Haynes Investments, LLC*, 967 F. 3d 332, 337 (4th Cir. 2020). Thus, any challenge that Plaintiff could possibly raise to defeat the arbitration provisions must be decided in the first instance by the arbitrator, not the Court.

### **CONCLUSION**

For all of the foregoing reasons, this Court should grant Defendants’ motion to compel arbitration of Plaintiff’s claims against Defendants. This Court should not just compel the arbitration of Plaintiff’s claims against Defendants, it should dismiss them. Section 3 of the FAA addresses the procedure for handling cases where issues are referable to arbitration:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement,

providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (emphasis added).

Although 9 U.S.C. § 3 speaks in terms of requiring a stay in the circumstances noted, there is authority from the Fourth Circuit and other circuit courts of appeals which clearly supports a dismissal of an action when, due to an order compelling arbitration, there are no substantive claims left pending before the district court. *See Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F. 3d 707, 709-10 (4th Cir. 2001); *see also Clayton v. Woodmen of World Life Ins. Soc.*, 981 F. Supp. 1447 (M.D. Ala. 1997) (citing *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) (“dismissal of the action is appropriate, since retaining jurisdiction and staying the action does not serve judicial economy” where all claims against Defendants are subject to arbitration.)).

Plaintiff's Complaint alleges claims against WFCS and Dougherty, all arising out of and relating to his brokerage accounts at WFCS. Claims arising out of and relating to Plaintiff's brokerage accounts at WFCS fall within the broad definition of the “controversies and disputes” covered by Plaintiff's arbitration agreements, leaving no claims or disputes against WFCS and Dougherty to be decided by this Court.

Accordingly, Defendants respectfully request that this Court grant their Motion and enter an Order:

- (1) Compelling Plaintiff to arbitrate all claims against Defendants with FINRA in accordance with the arbitration provisions in the Client Agreement and Account Agreement;
- (2) Dismissing the claims against Defendants with prejudice or, in the alternative, staying all proceedings in this action, including discovery, related to the claims

against Defendants until after Plaintiff has submitted all claims to arbitration and the arbitration proceedings have concluded; and

(3) Awarding fees and costs associated with filing this motion.

Respectfully submitted,

Dated: April 3, 2024

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Securities Financial Holdings, LLC, Wells  
Fargo and Company, and Wells Fargo  
Bank, N.A.*

# EXHIBIT 5

|                                                 |   |                                        |
|-------------------------------------------------|---|----------------------------------------|
| STATE OF SOUTH CAROLINA                         | ) | IN THE COURT OF COMMON PLEAS           |
|                                                 | ) |                                        |
| COUNTY OF RICHLAND                              | ) | CIVIL ACTION NO. 2023-CP-40-00242      |
|                                                 | ) |                                        |
| Curtis D. Bale,                                 | ) |                                        |
|                                                 | ) | <b>WELLS FARGO BANK, N.A.'S MOTION</b> |
| Plaintiff,                                      | ) | <b>TO DISMISS AND COMPEL</b>           |
|                                                 | ) | <b>ARBITRATION, AND MOTION TO STAY</b> |
| v.                                              | ) | <b>IN THE ALTERNATIVE</b>              |
|                                                 | ) |                                        |
| John A Dougherty; Wachovia Securities Financial | ) |                                        |
| Holdings, LLC; Wells Fargo Clearing Services,   | ) |                                        |
| LLC, f/k/a Wells Fargo Advisors, LLC; Wells     | ) |                                        |
| Fargo & Company; Wells Fargo Bank, N.A.; and    | ) |                                        |
| LPL Financial, LLC                              | ) |                                        |
| Defendants.                                     | ) |                                        |
|                                                 | ) |                                        |

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Pursuant to 9 U.S.C. §§ 3 and 4, and South Carolina Rules of Civil Procedure 12(b)(1), (3), and (6), Defendant Wells Fargo Bank, N.A. (“Defendant” or “Wells Fargo”) respectfully moves to compel arbitration of Plaintiff Curtis D. Bale’s (“Plaintiff” or “Bale”) claims and dismiss, administratively close, or stay this litigation pending arbitration.

1. Plaintiff filed this action seeking recovery from Wells Fargo for its allegedly wrongful conduct. *See* Complaint, ¶¶ 49 - 84. Plaintiff’s primary allegations against this defendant (Wells Fargo Bank, N.A.) arise from “a loan to Mr. Bale collateralized by his investments.” *Id.* at ¶ 25.

2. In relation to that loan, Plaintiff received and signed a Secured Primeline Account Agreement and Disclosure Statement dated January 21, 2016. *See* Declaration of SaVita Davis (attached hereto as **Exhibit A**), Ex. 1. Section III of this agreement is entitled “ARBITRATION PROGRAM.” *Id.*, Ex. 1 at 7. Section III further states Plaintiff’s and Wells Fargo’s agreement to arbitrate as follows:

### Dispute Resolution Program: Arbitration Agreement

(a) Binding Arbitration. The Borrower and Bank agree that if a Dispute arises between the Borrower and Bank, upon demand by either the Borrower or Bank, the Dispute will be resolved through the arbitration process as set forth in this section. A “Dispute” is any unresolved disagreement between the Borrower and Bank. It includes any disagreement relating in any way to this line of credit Account or related services, accounts or matters; to Borrower’s use of any of Bank’s banking locations or facilities; or to any means Borrower may use to access Bank. It includes claims based on broken promises or contracts, torts, or other wrongful actions. It also includes statutory, common law, and equitable claims. “Disputes” include disagreements about the meaning or application of this Arbitration Agreement. This arbitration agreement shall survive the payment of this Account and the termination of this Account Agreement. **Borrower agrees that by signing the Agreement, Borrower and Bank are waiving the right to a jury trial or trial before a judge in a public court.**

3. Moreover, when Plaintiff opened his bank accounts with Wells Fargo, Plaintiff received a Consumer Account Agreement. See Declaration of Corine Aguilar (attached hereto as **Exhibit B**), Ex. 1 at p. 3. This agreement also requires Plaintiff to arbitrate the claims he raised against Wells Fargo. *Id.* The Consumer Account Agreement provides that:

If you have a dispute with the Bank, and you are not able to resolve the dispute informally, you and the Bank agree that upon demand by either you or the Bank, the dispute will be resolved through the arbitration process as set forth in this part. A “dispute” is any unresolved disagreement between you and the Bank. It includes any disagreement relating in any way to services, accounts or matters; to your use of any of the Bank’s banking locations or facilities; or to any means you may use to access your account(s). It includes claims based on broken promises or contracts, torts, or other wrongful actions. It also includes statutory, common law, and equitable claims.

“Disputes” include disagreements about the meaning, application or enforceability of this arbitration agreement. This arbitration agreement shall survive any termination of your account(s). **YOU AGREE THAT YOU AND THE BANK ARE WAIVING THE RIGHT TO A JURY TRIAL OR TRIAL BEFORE A JUDGE IN A PUBLIC COURT**

Decl., Ex. 3 at p. 4.

4. Plaintiff’s claims against Wells Fargo are subject to arbitration because Plaintiff’s

claims involve a dispute between Plaintiff and Wells Fargo. *See Chorley Enterps., Inc. v. Dickey's Barbeque Rest., Inc.*, 807 F. 3d 553, 564-65 (4th Cir. 2015).

5. There is no question that the parties entered into a valid agreement to arbitrate.

6. The parties' agreements provides for arbitration of all "disputes" including "the meaning, application or enforceability of this arbitration agreement." The parties also agreed to arbitrate subject to the rules of the American Arbitration Association (AAA), and those rules provide for the arbitrator to determine the scope and validity of the arbitration agreement. Therefore, any challenge to the arbitrability of plaintiff's claims in this action must be decided by the arbitrator. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531, 202 L. Ed. 2d 480, 489 (2019) ("[w]hen the parties' contract delegates the arbitrability question to an arbitrator, the courts must respect the parties' decision as embodied in the contract.]; *see also Henry Shein Rent-A-Center W., Inc. v. Jackson*, 561 U.S. 63, 72-73 (2010); *Gibbs v. Haynes Investments, LLC*, 967 F. 3d 332, 337 (4th Cir. 2020).

7. Prior to filing this Motion, Wells Fargo contacted counsel for Plaintiff and requested that Plaintiff agree to proceed in arbitration in accordance with Plaintiff's arbitration agreement. Plaintiff's counsel has stated that Plaintiff does not consent to arbitration.

WHEREFORE, for the foregoing reasons and the reasons set forth in the accompanying Memorandum in Support, Wells Fargo respectfully requests that this Court grant its Motion and enter an Order:

- (1) Compelling Plaintiff to arbitrate all claims against Wells Fargo with the AAA in accordance with the arbitration clause in Plaintiff's agreements;
- (2) Dismissing the claims against Wells Fargo with prejudice, or in the alternative, staying all proceedings in this action, including discovery, related to the claims

against Wells Fargo until after Plaintiff has submitted all claims to arbitration and the arbitration proceedings have been concluded; and

(3) Awarding fees and costs associated with filing this Motion.

Respectfully submitted,

Dated: April 3, 2024

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|                                                 |   |                                        |
|-------------------------------------------------|---|----------------------------------------|
| STATE OF SOUTH CAROLINA                         | ) | IN THE COURT OF COMMON PLEAS           |
|                                                 | ) |                                        |
| COUNTY OF RICHLAND                              | ) | CIVIL ACTION NO. 2023-CP-40-00242      |
|                                                 | ) |                                        |
| Curtis D. Bale,                                 | ) |                                        |
|                                                 | ) | <b>MEMORANDUM OF LAW IN SUPPORT</b>    |
| Plaintiff,                                      | ) | <b>OF WELLS FARGO BANK, N.A.'S</b>     |
|                                                 | ) | <b>MOTION TO COMPEL ARBITRATION,</b>   |
| v.                                              | ) | <b>MOTION TO DISMISS AND MOTION TO</b> |
|                                                 | ) | <b>STAY IN THE ALTERNATIVE</b>         |
| John A Dougherty; Wachovia Securities Financial | ) |                                        |
| Holdings, LLC; Wells Fargo Clearing Services,   | ) |                                        |
| LLC, f/k/a Wells Fargo Advisors, LLC; Wells     | ) |                                        |
| Fargo & Company; Wells Fargo Bank, N.A.; and    | ) |                                        |
| LPL Financial, LLC                              | ) |                                        |
| Defendants.                                     | ) |                                        |
|                                                 | ) |                                        |

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Pursuant to 9 U.S.C. §§ 3 and 4 and South Carolina Rules of Civil Procedure 12(b)(1), (3) and (6) Defendant Wells Fargo Bank, N.A. (“Defendant” or “Wells Fargo”) submits this memorandum of law in support of its motion to compel arbitration (Motion). For the reasons set forth below, and with reference to the Declaration of SaVita Davis and the Declaration of Corine Aguilar (Exhibits A and B to the Motion, respectively) and the documents attached thereto, Wells Fargo moves the Court to compel arbitration of Plaintiff Curtis D. Bale’s (“Plaintiff” or “Bale”) claims as required by Plaintiff’s arbitration agreements with Wells Fargo and to dismiss, administratively close, or stay this litigation pending arbitration.

### **NATURE OF THE CASE**

This case is about a customer, Plaintiff, who, after a substantial correction in the market, has sued to recover his alleged damages and air his grievances. Plaintiff, however, has failed to bring his claims in the proper forum. Pursuant to Plaintiff’s valid binding arbitration agreements with Wells Fargo, the claims asserted by Plaintiff against Defendant are subject to arbitration.

## STATEMENT OF THE FACTS

In connection with the Secured Primeline loan that is the subject of Plaintiff's claims against Wells Fargo, Plaintiff received and signed a Secured Primeline Account Agreement and Disclosure Statement dated January 21, 2016 ("Loan Agreement"). *See* Davis Decl., Ex. 1. The Loan Agreement contains an agreement to arbitrate all disputes with Wells Fargo. Section III of the Loan Agreement is entitled "ARBITRATION PROGRAM" and states Plaintiff's and Wells Fargo's agreement to arbitrate as follows:

### **Dispute Resolution Program: Arbitration Agreement**

(a) Binding Arbitration. The Borrower and Bank agree that if a Dispute arises between the Borrower and Bank, upon demand by either the Borrower or Bank, the Dispute will be resolved through the arbitration process as set forth in this section. A "Dispute" is any unresolved disagreement between the Borrower and Bank. It includes any disagreement relating in any way to this line of credit Account or related services, accounts or matters; to Borrower's use of any of Bank's banking locations or facilities; or to any means Borrower may use to access Bank. It includes claims based on broken promises or contracts, torts, or other wrongful actions. It also includes statutory, common law, and equitable claims. "Disputes" include disagreements about the meaning or application of this Arbitration Agreement. This arbitration agreement shall survive the payment of this Account and the termination of this Account Agreement. **Borrower agrees that by signing the Agreement, Borrower and Bank are waiving the right to a jury trial or trial before a judge in a public court.**

*Id.*, Ex. 1 at 7.

Plaintiff also opened multiple accounts with Wells Fargo. On August 13, 2011, Plaintiff signed an application for a PMA Prime Checking Account and a Wells Fargo Way2Save Savings Account. Plaintiff agreed that his disputes with Wells Fargo "will be decided before one or more neutral persons in an arbitration proceeding and not by a jury trial or a trial before a judge." *See* Aguilar Decl., Ex. 1 at p. 3. On January 22, 2015, Plaintiff signed an application for a Wells Fargo High Yield Savings Account. *Id.*, Ex. 2. In conjunction with opening this account, Plaintiff received a Consumer Account Agreement. *Id.*, Ex. 3.

The Consumer Account Agreement includes an arbitration provision, which provides as follows:

**Binding arbitration**

If you have a dispute with the Bank, and you are not able to resolve the dispute informally, you and the Bank agree that upon demand by either you or the Bank, the dispute will be resolved through the arbitration process as set forth in this part. A “dispute” is any unresolved disagreement between you and the Bank. It includes any disagreement relating in any way to services, accounts or matters; to your use of any of the Bank’s banking locations or facilities; or to any means you may use to access your account(s). It includes claims based on broken promises or contracts, torts, or other wrongful actions. It also includes statutory, common law, and equitable claims.

“Disputes” include disagreements about the meaning, application or enforceability of this arbitration agreement. This arbitration agreement shall survive any termination of your account(s). **YOU AGREE THAT YOU AND THE BANK ARE WAIVING THE RIGHT TO A JURY TRIAL OR TRIAL BEFORE A JUDGE IN A PUBLIC COURT.**

See Aguilar Decl., Ex. 3 at p. 4.

**ARGUMENT**

**I. PLAINTIFF MUST ARBITRATE HIS CLAIMS AGAINST WELLS FARGO.**

**A. The FAA Applies and Requires Enforcement of the Arbitration Agreements.**

A written arbitration provision contained in a “contract evidencing a transaction involving commerce ... shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.” 9 U.S.C. § 2. The Federal Arbitration Act (“FAA”) mandates that “the court shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement,” upon application of one of the parties, if there has been a “failure, neglect, or refusal of another to arbitrate under a written agreement for arbitration.” 9 U.S.C. § 4 (emphasis added). The Act also provides that a court “shall” stay its proceedings if it is satisfied that an issue before it is arbitrable under the parties’

agreement “until such arbitration has been had in accordance with the terms of the agreement.” 9 U.S.C. § 3 (emphasis added).

By its terms, “the Act leaves no place for the exercise of discretion by a [trial] court, but instead mandates that [trial] courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed.” *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985) (emphasis in original) (citing 9 U.S.C. §§ 3, 4). To abide by this Congressional mandate, courts must “rigorously enforce agreements to arbitrate.” *Shearson/American Express, Inc. v. McMahon*, 482 U.S. 220, 226 (1987) (quoting *Byrd*, 470 U.S. at 221). All of this means that “generalized attacks on arbitration,” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 30 (1991), based on the “suspicion of arbitration as a method of weakening the protections afforded in the substantive law to would-be complainants,” *Rodriguez de Quijas v. Shearson/American Express, Inc.*, 490 U.S. 477, 481 (1989), have been repudiated as “far out of step with our current strong endorsement of the federal statutes enclosing this method of resolving disputes.” *Id.*

The FAA also establishes “a liberal federal policy favoring arbitration agreements” as a preferred method of dispute resolution. *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983). This federal policy favoring arbitration is strong, so strong that it preempts any state law “to the extent that [the state law] stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 477 (1989).

Under the FAA, an arbitration agreement must be enforced where: (1) the parties entered a written agreement to arbitrate claims, (2) the transaction has a nexus to interstate commerce, and (3) the arbitration clause encompasses the claims. 9 U.S.C. § 2. Each of these inquiries

"must be undertaken against the background of a 'liberal federal policy favoring arbitration agreements.'" *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 24; see also *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct. 1201, 1203 (2012). Given the strong federal policy favoring arbitration, "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000).

**B. The Agreement to Arbitrate Is Valid.**

Under Supreme Court precedent, state contract law controls the question of whether a valid agreement to arbitrate has been formed. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). Under South Carolina law, a "valid and enforceable contract requires meeting of the minds between the parties with regard to all essential and material terms of the agreement." *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 762 S.E. 2d 696, 701 (S.C. 2014). There is a strong presumption in favor of the validity of arbitration agreements because both state and federal policy favor arbitration of disputes. *Towles v. United HealthCare Corp.*, 524 S.E. 2d 839, 842 (S.C. Ct. App. 1999). Unless a court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute, arbitration should generally be ordered. *Zabinski v. Bright Acres Associates*, 553 S.E. 2d 110, 118 (S.C. 2001).

Due to strong South Carolina and federal policy favoring arbitration, arbitration agreements are presumed valid in South Carolina. *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013). With this policy at the forefront, courts are required to enforce the bargain of the parties to arbitrate. The Supreme Court of South Carolina provided specific direction in *Landers v. Federal Deposit Insurance Corporation*:

It is the policy of this state and federal law to favor arbitration and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Id.* at 92 (citing *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Co.*,

460 U.S. 1, 24-25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983)); accord *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 118. "The heavy presumption of arbitrability requires that when the scope of the arbitration clause is open to question, a court must decide the question in favor of arbitration." *Am. Recovery*, 96 F.3d at 94 (quoting *Peoples Sec. Life Ins. Co. v. Monumental Life Ins. Co.*, 867 F.2d 809, 812 (4th Cir. 1989)). Such a presumption is strengthened when an arbitration clause is broadly written. *AT & T Tech., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650, 106 S.Ct. 1415, 89 L.Ed.2d 648 (1986). Therefore, "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute[.]" arbitration must generally be ordered. *Am. Recovery*, 96 F. 3d at 92 (quoting *Warrior & Gulf Navigation Co.*, 363 U.S. at 582-83, 80 S.Ct. 1347); *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 119. A clause which provides for arbitration of all disputes "arising out of or relating to" the contract is construed broadly. See, e.g., *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398, 87 S.Ct. 1801, 18 L.Ed.2d 1270 (1967) (labeling as "broad" a clause that required arbitration of "[a]ny controversy or claim arising out of or relating to this Agreement"). Courts have held that such broad clauses are "capable of an expansive reach." *Am. Recovery Corp.*, 96 F.3d at 93. Both the Fourth Circuit Court of Appeals and this Court have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 319 (4th Cir. 1988); *Zabinski*, 346 S.C. at 598, 553 S.E.2d at 119... In applying this standard, this Court "must determine whether the factual allegations underlying the claim are within the scope of the arbitration clause, regardless of the legal label assigned to the claim." *Id.* at 319; *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

*Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213-14 (2013).

Plaintiff agreed to arbitrate any "dispute" he had with Wells Fargo in the Loan Agreement. See Davis Decl., Ex. 1 at p. 7-8. A "dispute" was defined to include "any disagreement relating in any way to this line of credit Account or related services, accounts or matters" *Id.* at 7. Plaintiff also agreed to arbitrate "claims based on broken promises or contracts, torts, or other wrongful actions." *Id.* There can be no question that a valid agreement to arbitrate between Plaintiff and Wells Fargo has been formed under both South Carolina law and the FAA.

Plaintiff also agreed to arbitrate any "dispute" he had with Wells Fargo in the Consumer Account Agreement. See Aguilar Decl., Ex. 3 at p. 4. "Dispute" was broadly defined to include

“any disagreement relating in any way to *services*, accounts or matters . . . claims based on broken promises or contracts, torts, or other wrongful acts.” *Id.* Plaintiff’s acceptance of these terms was an acknowledged condition on Plaintiff’s continued use of his Wells Fargo accounts. *See id.* at p. 1. (“This Agreement governs your account and related services, and replaces all prior agreements with the Bank regarding them. By signing the Bank’s signature card for your account or using your account or service, you will be considered to have received and agreed to this Agreement.”). Here, valid agreements to arbitrate between Plaintiff and Wells Fargo have been formed under both South Carolina law and the FAA.

**C. Interstate Commerce Is Present.**

The FAA provides, in pertinent part, that:

A written provision in maritime transaction or a contract ***evidencing a transaction involving commerce*** to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

9 U.S.C. § 2 (emphasis added). The term “involving commerce” in the FAA has been interpreted as the functional equivalent of the more familiar term “affecting commerce” and “encompasses a wider range of transactions than those actually ‘in commerce’ – that is, ‘within the flow of interstate commerce.’” *Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56 (2003) (citing *Allied-Bruce Terminix*, 513 U.S. at 273)). “Congress’ Commerce Clause power ‘may be exercised in individual cases without showing any specific effect upon interstate commerce’ if in the aggregate the economic activity in question would represent ‘a general practice . . . subject to federal court.’” *Citizens Bank*, 539 U.S. at 56-57 (citing *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 236 (1948)). The FAA extends to the full reach of the

Commerce Clause. See *Allied-Bruce Terminix*, 513 U.S. at 270; *Perry v. Thomas*, 482 U.S. 483, 490 (1987).<sup>1</sup>

Here, there is no legitimate dispute about whether the transactions in and related to Plaintiff's loan and accounts at Wells Fargo involved or affected interstate commerce. Wells Fargo is a National Banking Association with its main office in state of South Dakota and lends money across state lines. See Davis Decl. and Aguilar Decl. The Consumer Account Agreement for Plaintiff's accounts govern transactions in and related to Plaintiff's accounts – accounts from which money moved across state lines. See Aguilar Decl., ¶ 5; see also *Hunt v. Debt Assistance Network, LLC*, 2019 WL 4647008 at \*2 (M.D.N.C. September 24, 2019) (parties' dispute is related to interstate commerce – sending money to entities in different states). Therefore, the second prerequisite to enforcement of the parties' arbitration agreement – the presence of transactions in commerce – is met.

**D. The Arbitration Clause Encompasses Plaintiff's Claims.**

The arbitration agreement here unquestionably encompasses each of the Plaintiff's claims against Wells Fargo. When determining the scope of an arbitration provision, "due regard must be given to the federal policy favoring arbitration, and ambiguities as to the scope of the arbitration clause itself must be resolved in favor of arbitration." *Volt Info.*, 489 U.S. at 476. The presumption of arbitrability, created by the mere existence of an arbitration clause, may be

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<sup>1</sup> It is now beyond dispute that the delivery, transfer, or movement of goods, services, or other articles of commerce "across state lines has long been recognized as a form of 'commerce.'" *Camps Newfound/Owatonna, Inc. v. Town of Harrison*, 520 U.S. 564, 573 (1997); see also, *Lewis v. BT Inv. Managers, Inc.*, 447 U.S. 27, 36 (1980); *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 194 (1824). This is particularly true where it is **money** that is the "article" delivered, transferred, or moved across state lines. See, e.g., *24 GO Wireless, Inc. v. AT&T Mobility II, LLC*, No. 11-20930-CIV, 2011 WL 2607099, at \*1 (S.D. Fla. June 30, 2011) (recognizing that a business transaction involving the transfer of money and goods between citizens of different states affects interstate commerce); *accord United States v. Owens*, 159 F.3d 221, 226 (6th Cir. 1998); *Staples v. Money Tree, Inc.*, 936 F. Supp. 856, 858 (M.D. Ala. 1996).

rebutted only if "it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *AT&T Techs., Inc. v. Commc'ns Workers of Am.*, 475 U.S. 643, 650 (1986) (quoting *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960)). In construing arbitration clauses, the courts have distinguished between "broad" clauses that purport to cover all disputes "arising out of" or "relating to" a contract, and "narrow" clauses that limit arbitration to specific types of disputes. See *McDonnell Douglas Fin. Corp. v. Pa. Power & Light Co.*, 858 F.2d 825, 832 (2d Cir. 1988). If a court concludes that the arbitration provision before it is a "broad" one, then the presumption in favor of arbitrability applies with even greater force. See *AT&T Techs.*, 475 U.S. at 650.

The present dispute is clearly within the scope of the arbitration provision in the Loan Agreement, which applies to all "disputes" including "disagreements relating in any way to this line of credit Account." The broad arbitration provision in the Loan Agreement also applies to "any unresolved disagreement between the Borrower and Bank," including "claims based on broken promises or contracts, torts, or other wrongful actions" and "statutory, common law, and equitable claims." See Davis Decl., Ex. 1 at p. 7. Plaintiff's claims against Wells Fargo reflect exactly the sort of "disputes" contemplated in the Loan Agreement.

Moreover, the broad arbitration provision in the Consumer Account Agreement similarly governs "any unresolved disagreement between you and the Bank," including "claims based on broken promises or contracts, torts, or other wrongful actions" and "statutory, common law, and equitable claims." See Aguilar Decl., Ex. 3 at p. 4. Plaintiff's claims reflect exactly the sort of "disputes" contemplated in the Consumer Account Agreement.

Each of the claims asserted by Plaintiff are the types that courts have already determined are arbitrable:

- Breach of Fiduciary Duty: See *Long v. Silver*, 248 F. 3d 309, 318 (4th Cir. 2001); See also *Aiken v. World Finance Corp. of S.C.*, 644 S.E. 2d 705, 709 (2007).
- Breach of Contract: See *Aiken v. World Finance Corp. of S.C.*, 644 S.E. 2d 705, 709 (S.C. 2007).
- Breach of Contract Accompanied by a Fraudulent Act: See *Aiken v. World Finance Corp. of S.C.*, 644 S.E. 2d 705, 709 (S.C. 2007).
- Violation of the South Carolina Uniform Securities Act of 2005, S.C. Code Ann. § 35-1-101, et seq.: See *Levendag v. Churchill*, 623 F. Supp. 620, 622 (U.S. D.S.C. 1985).
- Violation of the South Carolina Unfair Trade Practices Act, S.C. Code Ann. § 35-5-10, et seq.: See *J.J. Ryan & Sons v. Rhone Poulenc Textile, S.A.*, 863 F. 2d 315, 319 (4th Cir. 1988).

**E. All Possible Challenges To The Formation, Validity, Or Enforceability Of The Arbitration Provision Must Also Be Resolved By The Arbitrator.**

Not only are each of Plaintiff's substantive claims subject to arbitration, but any potential defenses Plaintiff's may have to the arbitrability of their claims must also be submitted to arbitral resolution. Binding Supreme Court authorities have foreclosed any contrary arguments.

The parties in this case have delegated all issues as to the formation, validity, or enforceability of the arbitration agreement to the arbitrator. The arbitration provision in the Loan Agreement provides that any controversy concerning whether an issue is arbitrable shall be determined by arbitration. See Davis Decl., Ex. 1 at p. 7 ("Disputes' include disagreements about the meaning or application of this Arbitration Agreement."). Moreover, the Loan Agreement Plaintiff signed incorporates the rules of the American Arbitration Association. *Id.* Under the AAA Rules, the arbitrator is given the power to rule on his or her own jurisdiction, including any challenges to the existence, scope, or validity of the arbitration agreement. See

AAA Commercial Rule 7(a), available at <https://adr.org/commercial/>; AAA Consumer Rule 14(a), available at <https://adr.org/consumer>.

The arbitration provision in the Consumer Account Agreement provides that any “disagreements about the meaning, application or enforceability of this arbitration agreement” shall be determined by arbitration, and the Consumer Account Agreement also incorporates the rules of the American Arbitration Association . *See* Aguilar Decl., Ex. 3 at p. 4

Both the United States Supreme Court and the Fourth Circuit have concluded that these types of clauses that delegate all gateway issues to the arbitrator when expressly stated in the agreement or incorporated by reference in arbitral body rules are enforceable and provide clear and unmistakable evidence that the parties agreed to arbitrate arbitrability. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 139 S. Ct. 524, 531, 202 L. Ed. 2d 480, 489 (2019) (“[w]hen the parties’ contract delegates the arbitrability question to an arbitrator, the courts must respect the parties’ decision as embodied in the contract.”); *see also Henry Shein Rent-A-Center W., Inc. v. Jackson*, 561 U.S. 63, 72-73 (2010); *Gibbs v. Haynes Investments, LLC*, 967 F. 3d 332, 337 (4th Cir. 2020). Thus, any challenge that Plaintiffs could possibly raise to defeat the arbitration provisions must be decided in the first instance by the arbitrator, not the Court.

### **CONCLUSION**

For all of the foregoing reasons, this Court should grant Defendant’s motion to compel arbitration of Plaintiff’s claims against Defendant, and dismiss the court action Section 3 of the FAA addresses the procedure for handling cases where issues are referable to arbitration:

If any suit or proceeding be brought in any of the courts of the United States upon any issue referable to arbitration under an agreement in writing for such arbitration, the court in which such suit is pending, upon being satisfied that the issue involved in such suit or proceeding is referable to arbitration under such an agreement, shall on application of one of the parties stay the trial of the action until such arbitration has been had in accordance with the terms of the agreement,

providing the applicant for the stay is not in default in proceeding with such arbitration.

9 U.S.C. § 3 (emphasis added).

Although 9 U.S.C. § 3 speaks in terms of requiring a stay in the circumstances noted, there is authority from the Fourth Circuit and other circuit courts of appeals which clearly supports a dismissal of an action when, due to an order compelling arbitration, there are no substantive claims left pending before the district court. *See Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F. 3d 707, 709-10 (4th Cir. 2001); *see also Clayton v. Woodmen of World Life Ins. Soc.*, 981 F. Supp. 1447 (M.D. Ala. 1997) (citing *Alford v. Dean Witter Reynolds, Inc.*, 975 F.2d 1161, 1164 (5th Cir. 1992) ("[D]ismissal of the action is appropriate, since retaining jurisdiction and staying the action does not serve judicial economy" where all claims against Defendants are subject to arbitration.).

Plaintiff's Complaint alleges claims against Wells Fargo, all arising out of and relating to his loan and accounts at Wells Fargo. Claims reflecting a dispute between Plaintiff and Wells Fargo fall within the broad scope of Plaintiff's arbitration agreements, leaving no claims or disputes against Wells Fargo to be decided by this Court.

Accordingly, Defendant respectfully request that this Court grant their Motion and enter and Order:

- (1) Compelling Plaintiff to arbitrate all claims against Defendant with the AAA in accordance with the arbitration provision in the Client Agreement;
- (2) Dismissing the claims against Defendant with prejudice or, in the alternative, staying all proceedings in this action, including discovery, related to the claims against Defendant until after Plaintiff has submitted all claims to arbitration and the arbitration proceedings have concluded; and

(3) Awarding fees and costs associated with filing this motion.

Respectfully submitted,

Dated: April 3, 2024

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# EXHIBIT 6

|                                           |   |                                       |
|-------------------------------------------|---|---------------------------------------|
| STATE OF SOUTH CAROLINA                   | ) | IN THE COURT OF COMMON PLEAS          |
|                                           | ) |                                       |
| COUNTY OF RICHLAND                        | ) | FIFTH JUDICIAL CIRCUIT                |
|                                           | ) |                                       |
| Curtis D. Bale,                           | ) | Civil Action No. 2023-CP-40-00242     |
|                                           | ) |                                       |
| Plaintiff,                                | ) |                                       |
|                                           | ) |                                       |
| vs.                                       | ) |                                       |
|                                           | ) |                                       |
| John A. Dougherty; Wachovia Securities    | ) | <b>PLAINTIFF'S OPPOSITION TO</b>      |
| Financial Holdings, LLC; Wells Fargo      | ) | <b>DEFENDANTS' MOTIONS TO DISMISS</b> |
| Clearing Services, LLC, f/k/a Wells Fargo | ) | <b>AND COMPEL ARBITRATION</b>         |
| Advisors, LLC; Wells Fargo & Company;     | ) |                                       |
| Wells Fargo Bank, N.A.; and LPL           | ) |                                       |
| Financial, LLC,                           | ) |                                       |
|                                           | ) |                                       |
| Defendants.                               | ) |                                       |
|                                           | ) |                                       |

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### INTRODUCTION

This case arises out of Defendants' gross mismanagement of C.D. Bale's investments, including their intentional overleveraging of his accounts, leaving Bale grossly overexposed to market fluctuations, which risks were known to Defendants but not disclosed to Bale. Defendants' misconduct caused Bale to lose over \$10 million, and their conflicted and frenetic actions to protect themselves instead of Bale when the value of Bale's overleveraged holdings plummeted during the pandemic irretrievably locked-in Bale's losses. This case is not, as Wells Fargo Advisors callously claims, "about a disgruntled client" who "decided to sue anyone with whom he ever had an account." WFA Mem. at 1. It is about a victim of corporate greed and unethical business practices that placed Defendants' profit motives above Bale's best interests. And it is about a good man who lost almost everything he worked for, including the golden years of his retirement and the legacy he wished to leave his children, due to Defendants' wrongful and fraudulent actions.

Since Bale filed this case almost two years ago, Defendants have worked tirelessly to thwart its progress. After first improperly removing this case to federal court, where it remained for over one year, Defendants once again attempt to evade proper administration of this case by compelling arbitration. This Court should reject Defendants' latest effort for three reasons:

- I. Arbitration agreements which force plaintiffs to litigate a common liability across multiple inconsistent and uncoordinated tribunals, or which give one party the unilateral right to modify the agreement, are unconscionable. Here, Wells Fargo's liability results from a unified scheme which Wells Fargo wants to spread across this Court and two separate arbitration groups. No single decision-maker will consider Wells Fargo's collective liability, and it will be impossible to present all evidence and witnesses before any single body. Also, Wells Fargo retained the unilateral right to modify the arbitration agreements. The arbitration agreements therefore are unconscionable and unenforceable.
- II. Like any other contract, arbitration agreements must have valid consideration, be timely asserted, fulfill all conditions precedent, and be free from unilateral or mutual mistake. Neither Wells Fargo nor LPL Financial have satisfied all these common law contract requirements for their asserted arbitration agreements. As a result, they cannot meet their burden to prove valid and enforceable arbitration agreements exist.
- III. FINRA rules prohibit expelled financial advisors from compelling arbitration. FINRA expelled and permanently banned Dougherty from the industry in December 2023. He therefore cannot seek arbitration before FINRA.

Defendants have failed to meet their burden to compel arbitration, and this Court should swiftly deny their attempts to avoid judicial process. Bale is entitled to bring his claims before an impartial, fair, and unbiased judge and jury. Defendants' arguments to strip him of that right are all without merit.

### STATEMENT OF FACTS

For decades, Bale had a successful career in the oil refining industry. Compl. ¶ 19. In 2010, he retired and sold the business he helped bring out of Chapter 11 bankruptcy, Warrior Asphalt, Inc., for \$9.5 million. *Id.* ¶ 21. At that time, Bale had approximately \$5 million in obligations, including the buyout of the remaining interest in Warrior, capital gains taxes from the sale of his

interest in Warrior, and a real estate loan. *Id.* Dougherty, who was known to Bale as the manager of Warrior's employee retirement plans, actively solicited and encouraged Bale to become his personal client after learning of the sale of Warrior and the substantial proceeds Bale would be receiving. *Id.* ¶ 22. Dougherty knew that these assets were Bale's irreplaceable retirement funds and needed to be prudently managed.

Dougherty assured Bale that the best way to manage the proceeds from Warrior's sale and satisfy Bale's outstanding obligations was through a three-pronged investment strategy where: (1) Dougherty would be entrusted with the entire \$9.5 million Warrior proceeds in exchange for a management fee based on the gross value of Bale's investments; (2) rather than paying off Bale's existing obligations with a portion of the \$9.5 million proceeds, Bale, at Dougherty's solicitation, would take out a \$5 million loan secured by Bale's investments, thus preserving the full amount of the Warrior proceeds for Dougherty's management; and (3) Bale, on Dougherty's advice, would never pay down the loan and would instead use the investment accounts to generate income to pay interest on the loan, management fees for Dougherty, and for living expenses. Compl. ¶ 23. Dougherty knew, but intentionally failed to disclose to Bale, the substantial risks of his highly leveraged plan to carry excessive debt because the plan would maximize his and his employer's earnings to the detriment of Bale's financial security. *Id.* ¶¶ 23–24. But, relying on Dougherty's reputation, apparent financial knowledge, and assurances that this investment strategy was a prudent and safe financial plan, Bale accepted Defendant Dougherty's recommendation in full. *Id.*

In 2013, Dougherty transferred his registration to Wells Fargo Advisors. Compl. ¶ 25. Unaware of the risk created by Dougherty's strategy, Bale transferred his accounts to Wells Fargo Advisors upon Dougherty's solicitation so that Dougherty could continue managing them. *Id.* ¶ 25. Around that same time, Dougherty and Wells Fargo Advisors worked with Wells Fargo Bank

to issue a “Secured Primeline” loan to assume Bale’s existing \$5 million debt collateralized by his investment accounts. *Id.*; *see also* Exhibit A, Affidavit of Curtis D. Bale, ¶ 5. Unbeknownst to Bale, he was the victim of a well-orchestrated scheme jointly devised by the principals of Wells Fargo & Co., Wells Fargo Bank, and Wells Fargo Advisors to pressure brokers like Dougherty to cross-sell bank loans to brokerage clients like Bale, and to then to keep loan balances as high as possible. *See* Bethany McLean & Ethan Wolff-Mann, *Exclusive: Wells Fargo pushed wealth advisors to use high-fee products, cross-sell*, YAHOO! FINANCE (Aug. 21, 2018) <https://shorturl.at/NF7iT>. Wells Fargo's now highly publicized fraudulent cross-selling scheme<sup>1</sup> depended on all Wells Fargo entities aggressively pressuring their employees, including advisors like Dougherty, to sell Wells Fargo Bank products even when they were against a client’s best interests to fraudulent increase the earnings and stock price of Wells Fargo & Co. *See id.* (reporting that “advisors felt pushed to add high-fee products to portfolios” that “could result in additional revenue for the bank”); *id.* (“In addition to the use of advanced investing options, Wells Fargo advisors in the Private Bank were also required to generate other business in the form of loans, mortgages, and wealth-planning products, or, once again, put their bonuses in jeopardy.”); *see also* Rachel Lousie Ensign, *Wells Fargo Ex-CEO Banned, to Pay \$17 Million in Fake-Account Scandal*,

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<sup>1</sup> Wells Fargo has been subject to numerous regulatory and enforcement actions resulting in billions of dollars in fines because of their unlawful cross-selling of company products. *See* Srinivasan Ragothaman et al., *Fake Accounts Scandal at Wells Fargo: What are the Lessons?*, 14 J. FORENSIC INVESTIGATIVE ACCT. (Dec. 2022), <http://web.nacva.com/JFIA/Issues/JFIA-2022-No2-11.pdf>. As part of a federal case brought by the Office of the Comptroller of the Currency, the former CEO of Wells Fargo John Stumpf was banned from the industry and ordered to pay a fine of \$17.5 million. *Id.*; *see also* *In re John Stumpf*, AA-EC-2019-83 (Jan. 22, 2020), <https://www.occ.gov/static/enforcement-actions/ea2020-004.pdf>. Similarly, former Wells Fargo senior executive Carrie Tolstedt agreed to pay \$3 million in fines to the SEC for her role in misleading investors about abusive sales practices. SEC Release No. 2023-99 (May 30, 2023), <https://www.sec.gov/newsroom/press-releases/2023-99>.

Wall St. J. (Jan. 23, 2020) (reporting that a former employee wrote to John Stumpf in 2013 stating “I was in the 1991 Gulf War . . . This is sad and hard for me to say, but I had less stress in the 1991 Gulf War than working for Wells Fargo”).

The “Secured Primeline” loan is an exemplar of Wells Fargo’s fraudulent cross-selling scheme. *See* Brian Tayan, *The Wells Fargo Cross-Selling Scandal*, Harv. L. Sch. F. Corp. Governance (Feb. 6, 2019) (noting the risks of financial incentives when employees are rewarded “for achieving a metric without regard to the actions they took to achieve that metric”). The accruing interest and nearly doubled investment account balance maximized Wells Fargo’s profits and Dougherty’s income—in 2019 alone, Wells Fargo collected over \$250,000 from Bale in loan interest and investment management fees, meaning his investments accounts needed to generate an over 3.5% return just to pay his fiduciaries’ fees before he received any funds for living expenses. Compl. ¶ 32. As a direct result of this scheme and conflicted interest, Wells Fargo and Dougherty never instructed Bale to pay down the principal balance on the loan. *Id.* ¶¶ 26–27.

As 2020 began, Bale’s assets remained excessively leveraged as collateral pledged to secure the nearly \$5 million he still owed to Wells Fargo Bank. Compl. ¶ 32. When the pandemic struck, Dougherty did not act to protect Bale’s interests but chose to protect those of Wells Fargo and began rapidly selling off Bale’s holdings. *Id.* ¶ 34. Acting in concert with Wells Fargo Advisors, Dougherty preemptively sold off Bale’s securities holdings to protect Wells Fargo Bank’s interest in obtaining repayment of the loan debt by converting all of Bale’s holdings into cash. *Id.* ¶ 37. This locked in Bale’s losses while protecting Wells Fargo, and prevented Bale from participating in the market rebound in early May 2020. *Id.* Throughout 2020, Dougherty continued to engage in erratic and imprudent short-term in-and-out trading to Bale’s detriment. *Id.* ¶¶ 36–40.

In early 2021, Dougherty transferred his registration to LPL, and again, at Dougherty's urging and without knowledge or understanding of the gross mismanagement of his financial accounts, Bale transferred his accounts to LPL. Compl. ¶ 43. With full understanding of Bale's holdings and debt, and the fees it would receive as a result, LPL adopted, ratified, and authorized the same faithless wrongful conduct and strategy which had left Bale excessively over-leveraged, without informing Bale of his financial condition or telling him to pay down the principal on his loan. *Id.* ¶¶ 44–45. Dougherty continued to engage in erratic and imprudent short-term in-and-out trading at LPL, even though this “strategy” had proved fruitless at Wells Fargo, eroding the little remaining equity in Bale's accounts. *Id.* ¶¶ 46–47. Facing a forced sale of his entire investment account if its value dropped below \$5 million, Bale transferred his assets out of LPL in August 2021. *Id.* ¶ 47. Bale had to cut his standard of living, including selling his beloved retirement home and forgo the retirement he worked so hard for, to begin paying down the loan he took and maxed out at Dougherty's recommendation. *Id.* ¶ 48.

Bale filed his complaint in the Richland County Court of Common Pleas on January 17, 2023. LPL removed the case to federal court, alleging diversity jurisdiction. But after LPL failed to meet its burden to prove diversity of citizenship, the district court remanded the case on March 25, 2024. *Bale v. Dougherty*, No. 3:23-cv-660-SAL, 2024 WL 3607691 (D.S.C. Mar. 25, 2024). Before remand, Defendants each moved the district court to compel arbitration twice. The court denied the first motions without prejudice to allow for jurisdictional discovery, and the second set became moot upon remand. Defendants thereafter moved to compel arbitration with this Court and once again fail to meet their burden to avoid this Court's jurisdiction.

## LEGAL STANDARD

“There is . . . no public policy—federal or state—‘favoring’ arbitration.”<sup>2</sup> *Palmetto Const. Grp., LLC v. Restoration Specialists, LLC*, 432, S.C. 633, 649, 856 S.E.2d 150, 153 (2021); see also *Granite Rock*, 561 U.S. at 302 (confirming that “the federal policy favoring arbitration” is a misnomer because the “policy is merely an acknowledgment of the FAA’s commitment to overrule the judiciary’s longstanding refusal to enforce agreements to arbitrate *and to place such agreements upon the same footing as other contracts.*”) (emphasis added) (internal quotation omitted). “[A] court must hold a party to its arbitration contract just as court would to any other kind” and it “may not devise novel rules to favor arbitration over litigation.” *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022); see also *id.* (“If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it.”); *Stolt–Nielsen S.A. v. AnimalFeeds Int’l Corp.*, 559 U.S. 662, 682 (2010) (“[A]s with any other contract, the parties’ intentions control.”) (citation omitted). And so the core principle of the Federal Arbitration Act is that arbitration simply is a matter of contract. *AT&T Mobility LLC v. Conception*, 563 U.S. 333, 339 (2011). Courts therefore “must place arbitration agreements on equal footing with other contracts and enforce them according to their terms.” *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 314 (2010). (internal citations omitted).

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<sup>2</sup> Defendants’ incantation that arbitration agreements are preferred and there is a policy granting arbitration agreements special treatment relies on old law. Recently, the U.S. Supreme Court explained that its historic references to a “policy favoring arbitration” actually “connotes something different.” *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022). “The policy is to make arbitration agreements as enforceable as other contracts, but not more so.” *Id.* (cleaned up). This Court can swiftly disregard Defendants’ placement of arbitration agreements on a pedestal.

The FAA commands courts to invalidate arbitration agreements on the same grounds at law for any contract, such as fraud, duress, unconscionability, and violation of public policy. *AT&T Mobility*, 563 U.S. at 339; *United Paperworkers Intl. Union, AFL-CIO v. Misco, Inc.*, 484 U.S. 29, 42 (1987). A party may therefore raise any defense to the formation of an arbitration agreement that it could raise to the formation of any contract. *Dr.'s Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686–87 (1996); *see also Hengle v. Treppa*, 19 F.4th 324, 334 (4th Cir. 2021) (“Courts [] must enforce arbitration agreements on an equal footing with other contracts, . . . and may invalidate an arbitration agreement based on generally applicable contract defenses.”) (internal citations and quotations omitted). The only limitation is that defenses which “apply only to arbitration or that derive their meaning from the fact that an agreement to arbitrate is at issue” are invalid. *AT&T Mobility*, 563 U.S. at 339. A state therefore cannot erect special barriers to the enforcement of arbitration agreements, whether direct or covert. *Kindred Nursing Ctrs. L.P. v. Clark*, 581 U.S. 246, 252 (2017); *Dr.'s Assocs.*, 517 U.S. at 687. But just as importantly, neither can a state “elevate [arbitration agreements] over other forms of contracts.” *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n. 12 (1967).

So just as with any other contract dispute, on a motion to compel arbitration, a court must “confirm (1) that the parties have an agreement to arbitrate and (2) that the agreement covers their dispute” before it can order arbitration. *Granite Rock*, 561 U.S. at 314. The burden of proof on the existence of an enforceable arbitration agreement is on the party seeking to compel arbitration. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458, 730 S.E.2d 312, 317–18 (2012); *see also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001) (precluding a court from considering the merits of the underlying claim when ruling on a motion to compel arbitration). That party must prove the essential elements of offer, acceptance, and consideration.

See *Armstrong v. Collins*, 366 S.C. 204, 222, 621 S.E.2d 368, 377 (Ct. App. 2005). And by extension, the burden to prove any affirmative defenses to a contract is on the party opposing arbitration.

Wells Fargo wrongly argues that “any challenge that [Bale] could possibility raise to defeat the arbitration provisions must be decided in the first instance by the arbitrator, not the Court.” WFA Mem. at 11 (emphasis added); WF Bank Mem. at 11 (emphasis added). “These are bold statements, and they are wrong.” *Holiday Isle Owners Ass’n v. Certain Underwriters at Lloyd’s London*, No. CV 21-00512-JB-B, 2022 WL 2161511, at \*5 (S.D. Ala. June 15, 2022). It is presumed courts will decide “gateway matters, such as whether the parties have a valid arbitration agreement at all or whether a concededly binding arbitration clause applies to a certain type of controversy.” *Green Tree Fin. Corp. v. Bazzle*, 539 U.S. 444, 452 (2003). And determining whether a valid arbitration agreement was formed is *always* for the Court, even if an arbitration agreement purports to delegate that question to the arbitrator. See *Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 69 (2019) (“To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists.”); *In re StockX Customer Data Sec. Breach Litig.*, 19 F.4th 873, 879 (6th Cir. 2021) (“[E]ven where a delegation provision purports to require arbitration of formation issues, the severability principle does not apply and courts must decide challenges to the formation or existence of an agreement in the first instance (‘whether it was in fact agreed to’ or ‘was ever concluded’).”) (quotations omitted); see also *id.* & n.3 (stating “[w]e are not alone in this regard” and collecting cases). Parties may delegate *other* “gateway” questions to the arbitrator, but there must be clear and unmistakable evidence of their intent to do so. *First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 944 (1995). And even then, the Court

must decide any challenges to the delegation itself.<sup>3</sup> *Gibbs v. Sequoia Cap. Operations, LLC*, 966 F.3d 286, 291 (4th Cir. 2020).

Similarly, the Court must reject Wells Fargo’s assertion that an arbitration agreement is valid “[u]nless a court can say with positive assurance that the arbitration clause is not susceptible to an interpretation that covers the dispute” WFA Mem. at 5; WF Bank Mem. at 5; *see also* LPL Financial Mem. at 9 (“[A]ny doubts concerning arbitrability should be resolved in favor of arbitration.”) (citing *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118 (“Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”)). On its face, that standard applies only to the scope of an agreement and not to the agreement’s existence. More important, it is no longer good law. Requiring a “positive assurance” creates a super-presumption in favor of arbitration which the Supreme Court recently confirmed is invalid under the FAA. *Morgan*, 596 U.S. at 412 (“[A] court must hold a party to its arbitration contract just as court would to any other kind” and it “may not devise novel rules to favor arbitration over litigation.”); *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12 (1967) (holding courts cannot “elevate[s] [arbitration agreements] over other forms of contracts”).

## LAW/ANALYSIS

### **I. Wells Fargo’s Arbitration Agreements are Unconscionable.**

“[U]nder South Carolina law, the same principles of unconscionability apply to contract terms and arbitration provisions alike.” *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 612, 879 S.E.2d 746, 755 (2022). “[U]nconscionability is defined as the absence of meaningful choice on

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<sup>3</sup> Only Wells Fargo relies on a delegation clause. LPL Financial’s agreements expressly leave these issues with the Court. *E.g.*, LPL Financial Mot. Ex. 1, Ex. A. at 14 (“A court of competent jurisdiction (and not an arbitrator) shall resolve any dispute about the formation, validity, or enforceability of any provision of this Agreement.”).

the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007). A determination of whether a contract is unconscionable depends on all the circumstances of the case. *Damico*, 437 S.C. at 611, 879 S.E.2d at 755 (citing *S.C. Farm Bureau Mut. Ins. Co. v. Kennedy*, 398 S.C. 604, 614, 730 S.E.2d 862, 867 (2012)).

“Whether one party lacks a meaningful choice in entering the arbitration agreement at issue typically speaks to the fundamental fairness of the bargaining process.” *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016). Fundamental unfairness in the bargaining process often arises in contracts of adhesion or “standard form contract[s] offered on a take-it or leave-it basis with terms that are not negotiable.” *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 541, 542 S.E.2d 360, 365 (2001). “While adhesion contracts are not unconscionable per se, courts tend to look upon them with ‘considerable skepticism’ because they give rise to ‘considerable doubt that any true agreement ever existed to submit disputes to arbitration.’” *Smith*, 417 S.C. at 49, 790 S.E.2d at 4 (quoting *Munoz*, 343 S.C. at 26–27, 644 S.E.2d at 669–70). “[A]dhesive contracts are not unconscionable in and of themselves **so long as the terms are even-handed.**” *Damico*, 437 S.C. at 614, 879 S.E.2d at 756 (emphasis in original). And so “unconscionability requires a finding of a lack of meaningful choice *coupled with* unreasonably oppressive terms.” *Id.* at 614, 879 S.E.2d at 756 (original emphasis). Both elements are present here for Wells Fargo’s claimed delegation clause and for the rest of the arbitration agreement.<sup>4</sup>

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<sup>4</sup> As a matter of state contract law, which controls, unconscionability goes to “whether an arbitration agreement even existed in the first place.” *Simpson*, 373 S.C. at 23, 644 S.E.2d at 668. It therefore is not a matter which can be delegated to an arbitrator. Even so, the delegation clause is invalid for the reasons explained below.

**A. Bale lacked meaningful choice to negotiate Wells Fargo’s arbitration agreements.**

“In determining whether a party lacked a meaningful choice to arbitrate, courts should consider, inter alia, the relative disparity in the parties’ bargaining power, the parties’ relative sophistication, whether the parties were represented by independent counsel, and whether ‘the plaintiff is a substantial business concern.’” *Smith*, 417 S.C. at 49, 790 S.E.2d at 4 (quoting *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669).

Bale had no meaningful choice to negotiate the agreement. He never enjoyed a stronger bargaining position than that of an average investor in his dealings with Wells Fargo. He was never represented by independent counsel in connection with the agreements. *See* Ex. A, Bale Aff., ¶ 7. There was no suggestion that any terms in the agreement were negotiable. *Id.* Bale’s business with Wells Fargo pales in comparison to the business Wells Fargo regularly conducts as the third-largest bank in the United States with over \$1.7 trillion assets under management. Cassidy Horton, *Largest Banks In The U.S. 2024*, Forbes Advisor (Mar. 13, 2024), <https://www.forbes.com/advisor/banks/largest-banks-in-the-us-90373/>. Bale’s account did not, and does not, represent a “substantial business concern” to Wells Fargo. *Id.*

Our Supreme Court’s decisions confirm this is a classic contract of adhesion. In *D.R. Horton*, the court held that a client lacked a meaningful choice to negotiate an arbitration agreement in a contract of adhesion. 417 S.C. at 50, 790 S.E.2d at 5. The Court reasoned that a single client of a corporation which does business in 27 states did not represent a substantial enough business concern to give the client any meaningful power to negotiate. *Id.* Consistent with that opinion, six years later *Damico* held that homebuyers lacked meaningful choice to negotiate against a “significantly more sophisticated” homebuilder and contractor which had sold “thousands of homes in the Carolinas.” 437 S.C. at 614, 879 S.E.2d at 756. *Damico* lamented the “specious” “common practice for the sophisticated drafter of contracts to routinely argue that a

particular contract is not one of adhesion when that is plainly untrue.” *Id.* That is the case here—the account agreements Wells Fargo relies on are adhesion contracts. Bale had no ability to negotiate the agreements’ terms, Wells Fargo is “significantly more sophisticated” than Bale in opening these accounts, and Bale’s impact on Wells Fargo’s \$1.7 trillion in assets is significantly smaller than in *D.R. Horton* and *Damico*.

**B. Allowing Wells Fargo to divide resolution of its undisclosed unified, common scheme between three independent and uncoordinated forums is unreasonably oppressive.**

An arbitration agreement becomes unreasonably oppressive when it “creates the possibility of inconsistent fact findings that would preclude [a plaintiff] from recovery on a purely procedural (rather than a merit) basis.” *Damico*, 437 S.C. at 616, 879 S.E.2d at 757. And the greater the inequity in bargaining power, the less evidence of oppressiveness is required to prove unconscionability. *Id.* at 612, 879 S.E.2d at 755.

For the same reasons, the delegation clauses and remainder of Wells Fargo’s arbitration agreements unconscionably erect a procedural, not merits-based, barrier to Bale’s claims because they allow Wells Fargo to divide their unified scheme across three forums. This prevents any one decisionmaker from fully determining whether the agreement is unconscionable (under the delegation clause) and Wells Fargo’s responsibility for Bale’s losses. Each of Wells Fargo’s chosen forums will be presented with only a fragmented part of the case and is only authorized to decide a portion of unconscionability or Wells Fargo’s liability. As a result, no single forum will see the full picture. Courts, FINRA, and AAA each have their own procedures, filing requirements, rules, jurisdiction, authority, formalities, and timelines. Bale would be unable to gather and bring all the necessary evidence and witnesses involving Wells Fargo’s unified scheme before any single forum. And each forum would apply its own wildly different legal standards to Bale’s claims. *E.g.*, Exhibit

B, FINRA Statement on Key Issues, at 1 (stating that FINRA is “an equity forum” and its arbitrators “are not bound to follow the substantive law or rules of procedure that govern litigation”). Each forum could also reach different results—for example, a verdict against Wells Fargo & Co. in this Court for unlawfully devising and implementing its cross-selling scheme which caused Bale’s losses, but no liability in FINRA or AAA. Or AAA could find the arbitration agreement unconscionable because of how it splits up the parties, but FINRA might not. Those results cannot be harmonized—so what happens next is anybody’s guess. Wells Fargo’s divide and conquer strategy makes likely “the possibility of inconsistent factual findings that would preclude [Bale] from recovery.” *Damico*, 437 S.C. at 616, 879 S.E.2d at 757.

Finally, the need to utilize three fora imposes astronomical, and duplicative, costs on Bale. For example, to proceed against Wells Fargo Bank under AAA’s Commercial Rules, which the bank contends apply, will cost well over \$100,000 just in filing and arbitrator fees.<sup>5</sup> The FINRA filing and arbitrator fees themselves can amount to tens of thousands of dollars. *See, e.g.*, FINRA Rule 12900 (imposing of filing fee of \$2,300 for Bale’s claims); FINRA Rule 12902(a)(1) (imposing fees of \$1,575 for any hearing taking four hours or less (such as prehearing matters, discovery, and so forth) and \$3,150 for a full hearing day (such as the final merits hearing)). Bale

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<sup>5</sup> Bale believes AAA’s Consumer Rules should apply, where Wells Fargo would be responsible for all forum and arbitrator fees save a relatively nominal filing fee. Wells Fargo Bank’s desire to force the Commercial Rules and their exorbitant fees on Bale in contravention of AAA’s own procedures is yet another example of the unconscionability of these agreements. And under the Commercial Rules, Bale’s filing fee will be over \$11,000. *Commercial Arbitration Rules and Mediation Procedures Administrative Fee Schedules*, AM. ARB. ASS’N, <https://go.adr.org/feeschedule> (last visited Nov. 13, 2024). He will owe an additional \$13,750 fee just to go to a hearing. *Id.* And if three arbitrators are appointed, at a conservative rate of \$500/hour each the arbitrator fees *per day* for a hearing can push \$15,000, in addition to any prehearing arbitrator time. Plus, Wells Fargo Bank can refuse to pay its portion of the arbitrator fees and either (1) prevent the case from going to a hearing or (2) force Bale to pay those costs himself, with Wells Fargo bank still being entitled to fully present a defense. *See* AAA Commercial Rules R-57, <https://adr.org/sites/default/files/Commercial%20Rules.pdf>.

would have to pay these substantial fees just to have unconscionability determined—a tragically ironic result. What’s more, witnesses, including experts, will have to testify three times, imposing additional repetitive fees and expenses. This further skyrockets Bale’s costs—assuming schedules can even be arranged for witnesses to appear three times. Because of Wells Fargo’s egregious conduct here, Bale cannot afford to pay these costs. Ex. A, Bale Aff., ¶ 12.

For all these reasons, Wells Fargo’s arbitration terms “are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Damico*, 437 S.C. at 611, 879 S.E.2d at 754 (quoting *Fanning v. Fritz’s Pontiac-Cadillac-Buick, Inc.*, 322 S.C. 399, 403, 472 S.E.2d 242, 245 (1997)). They are unconscionable, and so the Court should find they are unenforceable in this case and deny arbitration under them.

**C. Wells Fargo’s right to unilaterally modify the agreements is unreasonably oppressive.**

Retaining the right to unilaterally modify an agreement “speaks to the one-sidedness of [an] arbitration agreement” and thereby renders the agreement unconscionable. *315 Corley CW LLC v. Palmetto Bluff Development, LLC*, Op. No. 6074 (S.C. Ct. App. filed Nov. 13, 2024) (Howard Adv. Sh. No. 44 at 21). In *315 Corley CW*, the South Carolina Court of Appeals affirmed the circuit court’s conclusion that an arbitration agreement subject to an independent unilateral modification clause was unconscionable. *Id.* at 22. Although the modification clause was not located specifically within the arbitration section of agreement, the court found it was nevertheless part of the arbitration provisions because it applied universally to all terms in the agreement. *Id.* at 20.

Wells Fargo Advisors and Wells Fargo Bank both include these unconscionable unilateral modification provisions in their contracts with Bale. Wells Fargo Advisors’ General Account Agreement and Disclosure Document—the same document which provides the arbitration terms

which Wells Fargo Advisors relies on—grants Wells Fargo Advisors the right to “unilaterally change the terms and conditions of this Agreement at any time upon providing notice to you.” WFA Mot. Ex. 1, Ex. B at 7; *id.* at Ex. 1, Ex. C at 7; *id.* at Ex. 1, Ex. D at 13; *id.* at Ex. 1, Ex. E at 12. The Secured Primeline agreement which Wells Fargo Bank produces for the Court’s review also includes that “the Bank may change any terms or conditions of this Agreement . . . upon notice where required by law.” WF Bank Mot. Ex A, Ex. 1 at 5. Similarly, the other deposit account documents which the Bank relies on assert that “the Bank may, in its sole discretion, from time to time change this Agreement by adding new provisions or by modifying or deleting existing provisions.” *Id.* Ex. B, Ex. 3 at 34.

Just as in *315 Corley CW*, “the documents in which the arbitration agreement is located are subject in their entirety to the Defendants' unilateral ability to make changes,” which is a term no reasonable person would make or accept. *Id.* Once again, Wells Fargo’s arbitration agreement is unconscionable and therefore unenforceable.

## **II. Neither Wells Fargo nor LPL Financial has Proven that a Valid Arbitration Agreement with Bale Exists.**

Independent of whether any arbitration agreements are unconscionable, Defendants must prove that each agreement fulfills all the basic requirements to form a contract. There is no agreement for each Defendants have met this burden. The Court therefore should deny their motions for this reason as well.

### **A. There was no meeting of the minds with Wells Fargo Advisors on an essential element of the agreements and Wells Fargo Advisors mislead Bale into mistakenly believing he could fully and fairly vindicate his rights in FINRA arbitration.**

Wells Fargo Advisors has failed to prove that a valid arbitration agreement exists between it and Bale for three independently sufficient reasons. Each of these issues relates to the formation of the contract, and thus is not subject to the delegation clause.

*First*, there was no meeting of the minds on essential elements of the claimed arbitration agreement. The General Account Agreement and Disclosure Agreement is governed by the laws of New York. WFA Mot. Ex. 1, Ex. D ¶¶ 5, 31. On the other hand, the Client Agreements are governed under the laws of Virginia. WFA Mot. Ex. 1, Exs. B and C. “It is elementary that mutuality of assent—the meeting of the minds of the parties—is an essential element of all contracts.” *Phillips v. Mazyck*, 273 Va. 630, 636, 643 S.E.2d 172, 175 (2007); *Gomez v. Bicknell*, 756 N.Y.S.2d 209, 216 (2d Dept. 2002) (“[M]utual assent evincing the intention of the parties to form a contract is essential, and without it, a party may not be held to the contract[.]”). Choice-of-law provisions are material to a contract. *Reeves Bros. v. Cap.-Mercury Shirt Corp.*, 962 F. Supp. 408, 412–13 (S.D.N.Y. 1997). Thus, there is no meeting of the minds regarding the material choice-of-law provision, and the agreement therefore is void.

*Second*, the agreement is void for unilateral mistake under either New York or Virginia law. “Under New York law, in order for a court to allow rescission of a contract on the basis of unilateral mistake, ‘a party must establish that (i) he entered into a contract under a mistake of material fact, and that (ii) the other contracting party either knew or should have known that such mistake was being made.’” *Creative Waste Mgmt., Inc. v. Capitol Env’t Servs., Inc.*, 429 F. Supp. 2d 582, 599 (S.D.N.Y. 2006), *supplemented*, 458 F. Supp. 2d 178 (S.D.N.Y. 2006) (quoting *Ludwig v. NYNEX Serv. Co.*, 838 F. Supp. 769, 795 (S.D.N.Y.1993)); *VCG Special Opportunities Master Fund Ltd. v. Citibank, N.A.*, 594 F. Supp. 2d 334, 343 (S.D.N.Y. 2008), *aff’d*, 355 F. App’x 507 (2d Cir. 2009). “If the party establishes a unilateral mistake as to a basic assumption of the contract, a court may ‘void releases even in the absence of fraud.’” *Id.* (quoting *Middle E. Banking Co. v. State St. Bank Int’l*, 821 F.2d 897, 906 (2d Cir.1987)); *see also Middle E. Banking*, 821 F.2d at 906 (“While it is true that New York courts will, in some cases, rescind contracts and void releases even in the

absence of fraud where unilateral mistake is established, the mistake must be ‘one which is known or ought to have been known to the other party’”) (citation omitted); *Indep. Ord. of Foresters v. Donald, Lufkin & Jenrette, Inc.*, 157 F.3d 933, 940 (2d Cir. 1998) (“As a basic proposition, a contract is made voidable by either unilateral or mutual mistake only where the asserted mistake concerns ‘a basic assumption on which the contract was made.’”) (quoting Restatement (Second) of Contracts §§ 152 (mutual mistake) and 153 (unilateral mistake)).

In executing the signature page for his brokerage accounts, Bale made the material assumption that he would be able to fully vindicate his rights wherever his claims were decided. Ex. A, Bale Aff., ¶¶ 9–10. But Wells Fargo Advisors did not inform Bale that FINRA arbitrators “are not bound to follow the substantive law” (Ex. B, FINRA Statement, at 1) despite Wells Fargo Advisors knowledge of this defining “feature” of FINRA arbitration through its substantial experience before the forum. Ex. A, Bale Aff., ¶ 9. In fact, Bale was led to believe whatever forum resolves his disputes with Wells Fargo Advisors *would* be bound to follow substantive law. *Id.* For example, Wells Fargo’s Client Agreements and General Account Agreement and Disclosure Document contain several disclosures about arbitration—e.g., no right to a jury and a limited ability to obtain discovery—but it makes no mention that FINRA arbitrators are not bound to follow the law. WFA Mot. Ex. 1. Ex. B at 1; *id.*, Ex. 1, Ex. C at 1; *id.*, Ex. 1, Ex. D at 5. And Wells Fargo Advisors and Dougherty never advised Bale of the dismal recoveries which claimants obtain before FINRA. Ex. A, Bale Aff., ¶ 10. A survey analyzing FINRA arbitration customer win-rates by jurisdiction between 2014–2016, published in the 2017 PIABA Bar Journal, found that customers who had over \$1,000,000 in losses, like Bale, were likely to only recover 20.85 cents for every dollar of *compensatory* damages. Exhibit C, Ryan Cook, *FINRA Arbitration Customer Win-Rates: A Survey By Jurisdiction*, 24 PIABA L. J. 57, 59 n.7 & 62 (2017). LPL Financial failed

to disclose this dismal reality of FINRA arbitration to Bale. Ex. A, Bale Aff., ¶ 10. Thus, this Court should not compel Bale to arbitrate his claims—or at a minimum his two statutory claims—before FINRA under New York Law.

The agreements are also void under the heightened standard for unilateral mistake required by Virginia law. Under Virginia law, a unilateral mistake will provide ground for relief when there is a mistake by one party “accompanied by ‘misrepresentation and fraud perpetrated by the other.’” *Hill v. Brooks*, 253 Va. 168, 178, 482 S.E.2d 816, 823 (1997) (quoting *Ward v. Ward*, 239 Va. 1, 5, 387 S.E.2d 460, 462 (1990)). “A fiduciary relationship exists in all cases when special confidence has been reposed in one who in equity and good conscience is bound to act in good faith and with due regard for the interests of the one reposing the confidence.” *Augusta Mut. Ins. Co. v. Mason*, 274 Va. 199, 207, 645 S.E.2d 290, 295 (2007) (quotation omitted). “Incorporated in every contract between a fiduciary and his principal is an obligation, imposed by law upon the fiduciary, to disclose anything known to him which might affect the principal’s decision whether or how to act.” *Id.* (quoting *Owen v. Shelton*, 221 Va. 1051, 1054, 277 S.E.2d 189, 191 (1981)); *see also Owen*, 221 Va. at 1055, 277 S.E.2d at 191 (holding that “the duty to disclose continues so long as the fiduciary relation continues”) (cleaned up).

Bale imposed trust and confidence in Wells Fargo Advisors, expected it would act in his best interest, and gave it authority to engage in discretionary trading under his accounts. Ex. A, Bale Aff., ¶ 2. Wells Fargo Advisors therefore was Bale’s fiduciary. *See, e.g., Allen Realty Corp. v. Holbert*, 227 Va. 441, 446, 318 S.E.2d 592, 595 (1984) (acknowledging that Virginia law will impose a fiduciary relationship “when special confidence has been reposed in one who in equity and good conscience is bound to act in good faith and with due regard for the interests of the one reposing the confidence”) (quoting *H–B Partnership v. Wimmer*, 220 Va. 176, 179, 257 S.E.2d

770, 773 (1979)); *Bissell v. Merrill Lynch & Co.*, 937 F. Supp. 237, 246 (S.D.N.Y. 1996), *aff'd*, 157 F.3d 138 (2d Cir. 1998) (stating New York law imposes a general fiduciary duty on brokers charged with discretionary trading authority by the customer); William Allen Nelson II, *Broker-Dealer: A Fiduciary by Any Other Name?*, 20 Fordham J. Corp. & Fin. L. 637, 663 (2015) (“A majority of courts have found that when brokers are providing anything other than purely transactional assistance, they owe a fiduciary duty to their clients.”). Wells Fargo Advisors therefore was required to disclose to Bale that FINRA arbitrators are not bound to follow substantive law and his slim chances of success before FINRA when asking him to agree to arbitrate before that body. Because it did not, Bale’s mistaken belief that FINRA would apply the substantive law and provide an equitable forum constitutes a unilateral mistake that voids the alleged arbitration agreements under either Virginia’s or New York’s laws.

*Third*, whether these Defendants knew FINRA arbitrators are not bound to follow the substantive law, the alleged arbitration agreements are void under New York’s and Virginia’s law on mutual mistake. “If certain facts are assumed by both parties as the basis of the contract, and it subsequently appears that such facts did not exist, the contract is inoperative.” *Virginia Iron, Coal & Coke Co. v. Graham*, 124 Va. 692, 708, 98 S.E. 659, 664 (1919); *see also Gould v. Bd. of Educ. of Sewanhaka Cent. High Sch. Dist.*, 81 N.Y.2d 446, 453, 616 N.E.2d 142, 145 (1993) (“Generally, a contract entered into under a mutual mistake of fact is voidable and subject to rescission.”); *Simkin v. Blank*, 19 N.Y.3d 46, 52, 968 N.E.2d 459, 462 (2012) (holding that an agreement may be subject to rescission or reformation based on a mutual mistake by the parties if the mistake existed at the time the contract is entered into and is substantial such that it goes to the foundation of the agreement). “The premise underlying the doctrine of mutual mistake is that ‘the agreement as expressed, in some material respect, does not represent the meeting of the minds of the parties’”

*Simkin*, 19 N.Y.3d at 52–53, 968 N.E.2d at 462 (quoting *Gould*, 81 N.Y.2d at 453, 616 N.E.2d at 146)). “No principle of equity is more firmly settled than that relief will be granted from the consequences of a mistake of fact, provided that such mistake is in reference to a fact material to the transaction, and was not occasioned by the parties’ own neglect of a legal duty.” *Virginia Iron, Coal & Coke*, 124 Va. at 707, 98 S.E. at 664 (quotation omitted).

The basic assumption underlying the alleged arbitration agreements at issue here is that the parties will be afforded a forum to determine their respective rights arising under the agreement. *See, e.g.*, WFA Mot. Ex. 1, Ex. D at 5 (stating that the underlying belief “[w]ith respect to controversies or disputes which may arise . . . under this Agreement concerning matters involving alleged violations of . . . applicable state investment advisory laws, . . . [is] that an agreement to submit disputes to arbitration does not constitute a waiver of any rights provided under . . . applicable state investment advisory laws”). Because FINRA has proclaimed that its arbitrators “are not bound to follow the substantive law” (Ex. B, FINRA Statement, at 1) this basic assumption of the parties is frustrated such that it “does not represent the meeting of the minds of the parties.” Thus, even if Wells Fargo Advisors did not know that FINRA arbitrators did not have to follow the law, the alleged agreements are void under New York and Virginia law.

Wells Fargo Advisors therefore has failed to prove it has a valid arbitration agreement with Bale, and its motion should be denied.

**B. Wells Fargo Bank also has no valid arbitration agreement with Bale.**

Like wells Fargo Advisors, Wells Fargo Bank also cannot prove that a valid agreement exists. Here too, these issues relate to the formation of the agreement and therefore are for the court, and not the arbitrator, to decide.

**1. The 2016 Wells Fargo Bank arbitration agreement was unsupported by valid consideration.**

To form a contract, “valuable consideration to support a contract may consist of some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.” *Prestwick Golf Club, Inc. v. Prestwick Ltd. P’ship*, 331 S.C. 385, 389, 503 S.E.2d 184, 186 (Ct. App.1998). It is equally settled that “an agreement to do that which one is already legally bound to do is not sufficient consideration to support a new contract.” *Castell v. Stephenson Fin. Co.*, 244 S.C. 45, 54, 135 S.E.2d 311, 315 (1964); *Atl. Joint Stock Land Bank of Raleigh v. Latta*, 164 S.C. 56, \_\_\_, 162 S.E. 68, 69 (1932) (“It is elementary that the consideration for a contract cannot consist of the doing of an act which the moving party was in any event required to do as a matter of law or existing contract.”). New contract terms inserted after a relationship begins therefore must be supported by separate consideration other than a mere continuation of the relationship. *Accord Poole v. Incentives Unlimited, Inc.*, 345 S.C. 378, 382, 548 S.E.2d 207, 209 (2001) (holding that separate consideration is necessary for a subsequent covenant not to compete to be enforceable).

In 2013, Bale and Wells Fargo Bank entered into an agreement to open a Secured Primeline loan account. Even after two years of litigation and three motions to compel arbitration, Wells Fargo Bank has failed to produce that account agreement or any documentation from that time. *See generally* Exhibit D, Wells Fargo Bank Motion to Compel Arbitration, *Bale v. Dougherty*, No. 3:23-cv-660-SAL (D.S.C. Feb. 23, 2023), ECF No. 8 (relying on other documents); Exhibit E, Wells Fargo Bank Motion to Compel Arbitration, *Bale*, No. 3:23-cv-660-SAL (D.S.C. June 20, 2023), ECF No. 35 (same); WF Bank Mot. Exs. A–B (same). Instead, and for the first time in the history of this case, the Bank relies on an “Agreement and Disclosure Statement” for Bale’s existing Secured Primeline loan account dated nearly three years after it was opened. WF Bank

Mot. Ex. A, Ex. 1. That 2016 agreement contains the only alleged arbitration agreement between Bale and Wells Fargo Bank related to the loan account. *See id.* at 7–8.

Wells Fargo Bank provides no evidence that this claimed arbitration clause from 2016 was supported by separate consideration. *E.g., Poole*, 345 S.C. at 382, 548 S.E.2d at 209 (“[W]hen a covenant is entered into after the inception of employment, separate consideration, in addition to continued at-will employment, is necessary in order for the covenant to be enforceable.”). Instead, it simply appears to have been for nothing but the mere continuation of the Secured Primeline loan account bargained for in 2013. *See* Ex. A., Bale Aff., ¶ 5. By relying on contracts unsupported by consideration formed years after the account was opened, Wells Fargo Bank cannot meet its burden of showing that Bale entered into an enforceable arbitration agreement.

**2. Wells Fargo Bank waived its right rely on 2016 account documentation to compel arbitration by failing to assert it in its prior two motions to compel.**

Wells Fargo Bank has also waived its right to rely on the 2016 Agreement and Disclosure Statement by failing to raise it in the two prior motions to compel arbitration it filed.

“Waiver is a voluntary and intentional abandonment or relinquishment of a known right. It may be expressed or implied by a party’s conduct . . . .” *SPUR at Williams Brice Owners Ass’n, Inc. v. Lalla*, 415 S.C. 72, 91, 781 S.E.2d 115, 125 (Ct. App. 2015) (quoting *Parker v. Parker*, 313 S.C. 482, 487, 443 S.E.2d 388, 391 (1994)). “An implied waiver results from acts and conduct of the party against whom the doctrine is invoked from which an intentional relinquishment of a right is reasonably inferable.” *Lyles v. BMI, Inc.*, 292 S.C. 153, 158–59, 355 S.E.2d 282, 285 (Ct. App. 1987). To waive a right, the party must have known of the right and known that the right was being abandoned. *Eason v. Eason*, 384 S.C. 473, 480, 682 S.E.2d 804, 807 (2009). The party asserting waiver need not show prejudice or a changed position. *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 388 (1992); *see also Morgan*, 596 U.S. at 417–

19 (invalidating a rule of waiver which requires a showing of prejudice for arbitration agreements but not for other contracts). “The determination of whether one’s actions constitute waiver is a question of fact.” *King v. James*, 388 S.C. 16, 30, 694 S.E.2d 35, 42 (Ct. App. 2010) (citing *Laser Supply & Servs., Inc. v. Orchard Park Assocs.*, 382 S.C. 326, 337, 676 S.E.2d 139, 145 (Ct. App. 2009)).

Bale and Wells Fargo Bank have been locked in litigation for nearly two years. During that time, Wells Fargo Bank had not only the opportunity, but the obligation to provide him with arbitration agreements on which they rely. Before the case was remanded, Wells Fargo Bank filed two motions to compel arbitration in federal court. But in both attempts to compel arbitration there, the Bank relied only on the checking and savings account agreements discussed in the next section. There was never any reference to, or inclusion of, the 2016 agreement the Bank relies on now—even after Bale observed *twice* that the Bank did not cite any loan agreements when previously moving for arbitration. Exhibit F, Bale Reply in Support of Motion to Stay and for Discovery, *Bale*, 3:23-cv-660-SAL, at 6–7 (D.S.C. Mar. 28, 2023), ECF No. 21; Exhibit G, Bale Memorandum in Opposition to Defendants’ Motions to Compel Arbitration, *Bale*, 3:23-cv-660-SAL, at 10–13 (D.S.C. Dec. 4, 2023), ECF No. 46.

By failing to assert any rights under the 2016 agreement for two years—and affirmatively relying on other agreements instead—the Bank has waived the right it seeks to enforce now.<sup>6</sup>

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<sup>6</sup> Relatedly, Wells Fargo Bank failed to properly consult with Bale regarding the 2016 document. As noted, the Bank did not cite, produce, or rely on that document in federal court. Before filing its motion here, the Bank generically inquired whether Bale “is still not willing to consent to arbitration.” Exhibit H, Email Correspondence re: Bale v. John Dougherty, et al. (Mar. 29, 2024). The Bank did not mention it intended to rely on a new document. It in fact actively misled Bale into thinking there was no new document by stating it intended to “refile” its federal motion in state court. *Id.* The Court therefore should deny the Bank’s motion under Rule 11(a), SCRCP.

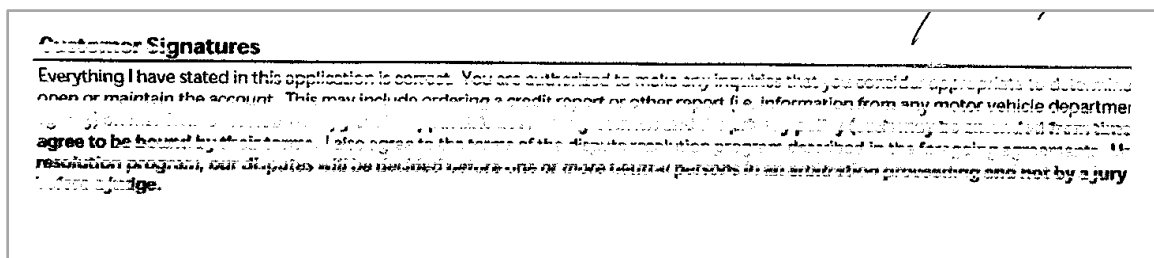
**3. The remaining bank documents which the Bank relies on do not cover Bale's securities loan account.**

Recognizing that the 2016 document is not a valid contract, Wells Fargo Bank falls back on agreements related to *other* accounts: (1) Bale's "Consumer Account Application for his PMA Prime Checking Account and Way2Save Savings Account dated August 13, 2011," WF Bank Mot. Ex B. ¶ 6; *see id.*, Ex. B, Ex. 1; (2) Bale's "Consumer Account Application for his Wells Fargo High Yield Savings Account dated January 22, 2015," *id.* Ex. B ¶ 7; *see id.*, Ex. B, Ex. 2; and (3) "the Consumer Account Agreement in effect at the time [Bale] opened his Wells Fargo High Yield Savings Account," *id.* Ex. B ¶ 8; *see id.*, Ex. B, Ex. 3. But Wells Fargo has failed to prove the first and third documents relate to the account at issue, and thus that an arbitration agreement for the securities loan account was formed, and failed to prove that the second even contains an arbitration clause. Wells Fargo Bank therefore once again fails to meet its burden.

Under the FAA, "[a] written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter *arising out of such contract or transaction*, or the refusal to perform the whole or any part thereof, . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). Thus, a party seeking to compel arbitration must show the existence of "a written agreement that includes an arbitration provision *which purports to cover the dispute*." *Galloway v. Santander Consumer USA, Inc.*, 819 F.3d 79, 84 (4th Cir. 2016) (emphasis added). As a matter of contract, "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *United Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582 (1960).

Wells Fargo Bank has offered no proof of an account application or general account agreement that relates to the \$5 million loan the Bank issued around April 2013 secured by Bale's

investments at Wells Fargo Advisors. These checking and savings account records on which Wells Fargo Bank relies exclusively do not fill the void. These accounts are separate and distinct from Bale's loan account. Ex. A, Bale Aff., ¶ 4. The Consumer Account Application for the PMA Prime Checking Account and Way2Save Savings Account dated in 2011 generically states that it is subject to "the applicable account agreement," which allegedly includes a provision that "our disputes will be decided before one or more neutral persons in an arbitration proceeding and not by a jury trial or a trial before a judge." WF Bank Mot. Ex. B, Ex. 1 at 3. Wells Fargo Bank did not provide "the applicable account agreement" referenced in this document. Bale's high yield savings account application from 2015 is indecipherable in places, including where the alleged reference to arbitration may be:



*Id.* Ex. B, Ex 2 at 2. The Court cannot accept the Bank's bald, unsupported, and conclusory allegation that these documents evidence an arbitration agreement applicable here. *See, e.g., Bryant v. Wynne*, No. CIV.A.2:07-340SB-RSC, 2008 WL 4361242, at \*8 (D.S.C. Sept. 24, 2008), *aff'd*, 318 F. App'x 174 (4th Cir. 2009) (holding that "bald, unsupported, and conclusory allegations do not constitute evidence").

All Wells Fargo Bank has left is the "Customer Account Agreement" effective October 29, 2014, which the Bank summarily asserts in an employee affidavit "governs Plaintiff's Wells Fargo accounts and related services." WF Bank Mot. Ex. B ¶ 8. But it too is of no help. Even if this agreement applies to Bale through the two checking and savings account applications, and Bale asserts they do not, Wells Fargo Bank provides no evidence that the agreement relates to Bale's

*Secured Primeline* loan account. The affidavit authenticating this document only references the checking and savings accounts and makes no mention of this loan account. *See generally* WF Bank Ex. B. Even the Bank’s witness fails to offer any evidence that the Customer Account Agreement applies to Bale’s loan account at issue. And the agreement itself is limited to traditional checking and savings accounts and related “[e]lectronic banking services.” *Id.* Ex. B, Ex. 3 at i. It further expressly provides:

This document and other documents provided are collectively referred to as the ‘*Agreement*’ and includes the following documents related to our consumer deposit accounts and related services that we have separately provided to you:

- The *Customer Account Agreement* . . . .

*Id.* Ex. B, Ex. 3 at 1 (underline added). At the end, the agreement reiterates that it “governs consumer ***deposit accounts*** maintained at Wells Fargo Bank, N.A.” *Id.* Ex. B, Ex. 3 at 65 (emphasis added). Nothing expands the obligations in the agreement to a loan account; in fact, the agreement explicitly distances itself from loan accounts.

In sum, Wells Fargo Bank failed to prove that any portion of the agreement applies to Bale’s *Secured Primeline* account. At most, the agreement is ambiguous—and under governing principles of contract law which must apply equally to arbitration agreements, such ambiguity must be construed against the drafter to exclude claims related to Bale’s loan account. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (holding that “a court should construe ambiguous language against the interest of the party that drafted it”). Either way, the Court should find that Wells Fargo Bank has not met its burden of showing that Bale entered into an enforceable arbitration agreement for the disputes at issue and deny its motion.

**C. LPL Financial also failed to meet its burden to prove it has a valid arbitration agreement with Bale.**

LPL Financial also seeks to force Bale's claims into arbitration before FINRA. Yet LPL Financial cannot show that the proffered account applications are even valid and in accordance with the rules of its chose arbitration forum to bind Bale. Moreover, even if the account applications comply with FINRA rules, they are still void under governing Massachusetts law. LPL Financial's motion should be denied. Doing so does not "wreak havoc on the arbitration process and parties' contractual rights." LPL Financial Mem. at 16. It simply holds LPL Financial to the same standards they wish to hold Bale to. And LPL Financial's expressly kept these issues for the Court to decide. *E.g.*, LPL Financial Mot. Ex. 1, Ex. A. at 14.

**1. The account applications do not adhere to FINRA's requirements for using predispute arbitration agreements for customer accounts.**

Ironically, LPL Financial seeks to subject Bale to rules before FINRA that it cannot be bothered to adhere to itself.

The drafter of the contract "should be the party to suffer from its shortcomings." *WDI Meredith & Co. v. Am. Telesis, Inc.*, 359 S.C. 474, 480, 597 S.E.2d 885, 888 (Ct. App. 2004). Unambiguous contracts must be enforced according to their terms. *Liberty Mut. Ins. Co. v. Gibbs*, 773 F.2d 15, 17 (1st Cir. 1985). A condition precedent in a contract is "an act which must occur before performance by the other party is due." *Superior Mech. Plumbing & Heating, Inc. v. Ins. Co. of the W.*, 81 Mass. App. Ct. 584, 589, 965 N.E.2d 890, 895 (2012) (quotation omitted). "If the condition is not fulfilled, the contract, or the obligations attached to the condition, may not be enforced." *Id.* (quotation omitted). And the word "shall" should be read as imposing "a mandatory or imperative obligation." *Hashimi v. Kalil*, 388 Mass. 607, 609, 446 N.E.2d 1387, 1389 (1983).

LPL Financial’s arbitration agreement required that “any controversy between you and LPL . . . shall be settled by arbitration in accordance with the rules then in effect of” FINRA. *E.g.*, LPL Financial Mot. Ex. 1, Ex. B at 15. FINRA Rule 2268(b)(1) states that “[i]n any agreement containing a predispute arbitration agreement, there ***shall be a highlighted*** statement immediately preceding any signature line or other place for indicating agreement that states that the agreement contains a predispute arbitration clause. ***The statement shall also indicate at what page*** and paragraph the arbitration clause is located.” (emphasis added) “FINRA Rule 2268 requires, among other things, that predispute arbitration agreements contain certain highlighted disclosures so that customers are advised about what they are agreeing to when they sign them.” FINRA Notice 11-19 (2011).

In support of its argument to compel arbitration, LPL Financial offers four separate account applications that supposedly offer “a clear and express arbitration clause that is binding on [Bale].” LPL Financial Mem. at 2. But each of these account agreements fail to meet FINRA Rule 2268(b)(1)’s “highlighted” and “page” requirements. LPL Financial Mot. Ex. 1, Ex. A at 7 (stating, in plain type, that the predispute arbitration clause “is located in the last numbered section of the Account Agreement (included in the Account Packed [sic] specified in Section 1)”); *id.* Ex. 1, Ex. C at 7 (same); *id.* Ex. 1, Ex. E at 6 (same); *id.* Ex. 1, Ex. G at 6 (same). LPL Financial therefore breached FINRA Rule 2268(b)(1), which is a material condition precedent to invoking arbitration before FINRA which LPL Financial voluntarily assumed by selecting FINRA as the arbitration forum. As a result, LPL Financial cannot enforce any obligation attached to that condition—such as forcing Bale into arbitration.

LPL Financial’s claim that “courts have rejected this exact argument” is meritless. LPL Financial Mem. at 15. For example, in *Singh v. Interactive Brokers, LLC*, 219 F. Supp. 549,

(E.D.V.A. 2016), the plaintiffs argued that their case “was not governed by the FAA” and instead was governed by FINRA rules. *Id.* at 559. The court rejected the argument that FINRA rules somehow preempt or are an exception to the FAA. *Id.* at 559–60. The plaintiff in *Hillow v. E\*Trade Securities, LLC*, No. 4:22-cv-145-JAR, 2022 WL 1165791 (E.D. Mo. April 20, 2022), made a similar argument that Rule 2268 is a “congressional command” that “override[s] the FAA.” *Id.* at \*5. That is not Bale’s argument here. Bale simply argues that the requirements of Rule 2268, by virtue of being expressly incorporated into the account agreement, are a common law condition precedent—which “shall” be met—which LPL Financial failed to fulfill. Enforcing Rule 2268 as incorporated into the account agreements embodies enforcing arbitration agreements “according to their terms.” *Granite Rock*, 561 U.S. at 314. On the other hand, giving LPL Financial a pass on this express requirement just because an arbitration agreement is involved improperly grants arbitration agreements special treatment. *See Morgan*, 596 U.S. at 418 (“If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it.”).

## **2. The account applications are void under Massachusetts contract law.**

Under Massachusetts Law, “[a] mistake by one party to the knowledge of the other is equivalent to a mutual mistake.” *Corp. Design Ins. Agency, Inc. v. Thomas Ford Sales, Inc.*, 2001 Mass. App. Div. 34 (Dist. Ct. 2001); *Mates v. Penn Mut. Life Ins.*, 316 Mass. 303, 306, 55 N.E.2d 770 (1944). “A unilateral mistake may provide the basis for avoiding a contract where the other party had reason to know of the mistake or his fault caused the mistake.” *Id.* (quotation omitted); *see also* § 1:33. Mistake, 35 Mass. Prac., Consumer Law § 1:33 (4th ed.) (“Where, at the time the contract was made, one party was mistaken as to a basic assumption on which he made it and that mistake has a material effect on the agreed exchange of performance that is adverse to him, the

contract is voidable by the mistaken party if the effect of the mistake is such that enforcement of the contract would be unconscionable.”).

LPL Financial moved to compel arbitration before FINRA. Bale made the material assumption that he would be able to fully vindicate his rights wherever his claims were decided. Ex. A, Bale Aff., ¶¶ 9–10. But FINRA has proclaimed that its arbitrators “are not bound to follow the substantive law.” Ex. B, FINRA Statement, at 1. LPL Financial routinely avails itself of FINRA’s arbitration and has substantial experience arbitrating claims before it. LPL Financial therefore knew this defining “feature” of FINRA arbitration. But LPL Financial never told Bale, who lacks LPL Financial’s familiarity with FINRA arbitration, that FINRA would not be bound to follow the substantive law governing his claims when signing LPL Financial’s account applications. Ex. A, Bale Aff., ¶ 9. In fact, Bale was led to believe otherwise. *Id.* For example, LPL Financial’s account agreement contains several disclosures about arbitration—*e.g.*, no right to a jury and a limited ability to obtain discovery—but it makes no mention that FINRA arbitrators are not bound to follow the law. *E.g.*, LPL Financial Mot. Ex. 1, Ex. B at 15.

In particular, “[b]y agreeing to arbitrate a statutory claim, a party does not forgo the substantive rights afforded by the statute; it only submits to their resolution in an arbitral, rather than a judicial, forum.” *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 26 (1991). “Arbitration of [a] claim will not be compelled if the prospective litigant cannot effectively vindicate his statutory rights in the arbitral forum.” *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 282 (4th Cir. 2007). LPL Financial claims the “effective vindication” standard only applies to federal statutory rights. The case it cites, *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), is irrelevant because it evaluated a *federal procedural* rule and not *state substantive* statutory rights. There, the plaintiff argued that a class action waiver in an arbitration

clause prevented efficient resolution of antitrust claims. The Court held that individual suits were a path to effectively vindicate these rights because the rights were not substantively curtailed. *Id.* at 236–37. The majority did not discuss state statutory rights because none were at issue. The only discussion of state rights is in dissent. *Id.* at 252 (Kagan, J., dissenting). Returning to arbitration’s foundations in contract law, the question becomes can someone waive rights under the Securities Act or the Unfair Trade Practices Act. If parties cannot do so generally, then an arbitration agreement cannot effectively waive them. And under general South Carolina law, parties cannot waive these rights. S.C. Code Ann. § 35-1-509(l); *Simpson*, 373 S.C. at 29–30 & n.7, 644 S.E.2d at 671 & n.7.

Here, Bale brought two statutory claims—violation of the South Carolina Uniform Securities Act of 2005 and violation of the South Carolina Unfair Trade Practices Act. Thus, this Court, at a minimum, should not compel Bale to arbitrate his statutory claims before FINRA because he would not be able to “effectively [] vindicate” his statutory causes of action. As parties who routinely proceed in FINRA arbitration, LPL Financial (and Wells Fargo Advisors) would know that FINRA does not have to follow the substantive law, and therefore it had the burden of alerting its customers, by clear and unmistakable language, that by agreeing to arbitrate before FINRA, the customer could be waiving its substantive rights.

Bale was also unaware that FINRA is not bound by the equitable principles of our judicial system. The benefit of being “made whole” is central to our civil justice system. *See, e.g., Huang v. Ma*, 491 Mass. 235, 245–46, 201 N.E.3d 713, 722 (2023) (“It is a fundamental principle of contract law that, in the event of breach, the injured party should be put in the position they would have been in had the contract been performed, if possible.”) (internal quotation omitted); *Governo L. Firm LLC v. Bergeron*, 487 Mass. 188, 199, 166 N.E.3d 416, 427 (2021) (“Under the common

law of torts, at the time of an accident, an injured party accrues a right to be made whole and compensated for injuries wrongfully inflicted by the tortfeasor.”). And the ability to be made whole was a material assumption of Bale’s when opening his account with LPL Financial. Ex. A, Bale Aff., ¶ 10. Yet LPL Financial failed to disclose this dismal reality of FINRA arbitration to Bale. *Id.*; see also Ex. C, Cook, *FINRA Arbitration Customer Win-Rates*, at 59 n.7 & 62 (observing that customers with over \$1,000,000 in losses were likely to only recover 20.85 cents for every dollar of compensatory damages).

Alternatively, should LPL Financial claim that it did not know that FINRA arbitrators were not bound to follow substantive law, the agreements are void under Massachusetts law on mutual mistake. “The legal principles underlying the doctrine of mutual mistake are well established. Where there has been a mistake between the parties as to the subject matter of a contract, there has been no ‘meeting of the minds,’ and the contract is voidable at the election of the party adversely affected.” *LaFleur v. C.C. Pierce Co.*, 398 Mass. 254, 257–58, 496 N.E.2d 827, 830 (Mass. 1986). “The mistake must be shared by both parties, and must relate to an essential element of the agreement.” *Id.* at 258, 496 N.E.2d at 830.

An essential element of the alleged arbitration agreements with LPL Financial is a party’s ability to have “any controversy . . . settled by arbitration,” including claims arising under statute. LPL Financial Mot. Ex. 1, Ex. B at 15. If both Bale and LPL Financial were mistaken on a party’s ability to vindicate its substantive rights before FINRA, then the alleged agreements are void for mutual mistake. In sum, Bale’s account agreement with LPL Financial, or at the very least the arbitration provision within it, is therefore void due to mistake under Massachusetts law. LPL Financial’s motion therefore should be denied.

### III. FINRA Rules Prohibit Dougherty from Compelling Arbitration.

FINRA understands that “most customer arbitration awards that go unpaid are rendered against firms or individuals whose FINRA registration has been terminated, suspended, cancelled or revoked, or who have been expelled from FINRA.” FINRA, Regulatory Notice 20-11. To combat this inefficiency, FINRA declared that claims against inactive associated persons to be ineligible for arbitration unless the customer consents.<sup>7</sup> FINRA Rule 12202(a) (“A claim by or against a member or an associated person who is inactive at the time the claim is filed is ineligible for arbitration under the Code unless the customer agrees in writing to arbitrate after the claim arises.”). “[I]n these situations, the customer is able to evaluate the likelihood of collecting on an award and make an informed decision whether to proceed in arbitration, to file the claim in court or to take no action, regardless of whether the customer signed a predispute arbitration agreement.” FINRA Regulatory Notice 20-11. As an inactive associated person, any new claim against Dougherty in FINRA arbitration would be ineligible without Bale’s written consent.

Since December 1, 2023, John Dougherty has been permanently barred in all capacities by FINRA from acting as a broker or otherwise associating with a broker-dealer firm. Exhibit I, FINRA Letter of Acceptance, Waiver, and Consent. The decision to exile Dougherty from the industry was made after he repeatedly refused to provide information and documents requested by FINRA in connection with undisclosed outside business activities and private securities transactions. *Id.* at 1–2. Upon information and belief, those outside business activities and private securities transactions include some investments Dougherty sold to Bale. Instead of simply

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<sup>7</sup> “An “inactive associated person” is defined as a person associated with a member whose registration is revoked, cancelled, or suspended, *who has been expelled or barred from FINRA*, or whose registration has been terminated for a minimum of 365 days.” FINRA, Regulatory Notice 20-11 (emphasis added).

cooperating with FINRA's regulatory authority, Dougherty consented to the permanent bar so he would not have to cooperate with the investigation. *Id.* at 2–3.

Paradoxically, Dougherty now wishes to invoke FINRA's arbitration proceedings via Wells Fargo Advisors' arbitration agreement. But from June 14, 2023, until his bar on December 1, 2023, Dougherty knowingly and repeatedly refused to cooperate with FINRA's investigations. He dragged FINRA through months of extension requests, empty promises, and other obfuscation to no productive end, before finally deciding that a bar from the securities industry was preferable to cooperating with FINRA. Yet now, one year after his permanent ban, Dougherty wishes to compel arbitration before the very authority which he flouted and is no longer allowed to practice under. These transparent tactics provide more evidence that the end goal is not simply to arbitrate, but to disperse and confuse the matter as much as possible and make recovery impossible for Bale.

While Bale staunchly maintains there is no enforceable arbitration agreement with any Wells Fargo entity, the point is moot with respect to Dougherty. Since Bale's initial agreement with Wells Fargo Advisors, which pre-dates Dougherty's expulsion by 10 years, Bale has made no subsequent agreement with either Wells Fargo or Dougherty consenting to arbitrate despite Dougherty's industry ban. FINRA therefore prohibits Dougherty from compelling arbitration of any claims against him. The Court therefore should deny Dougherty's motion to compel arbitration.<sup>8</sup>

### CONCLUSION

For the reasons explained above, there are no enforceable arbitration agreements governing any dispute at issue in this instant action. This Court should therefore deny Defendants' motions

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<sup>8</sup> Because Dougherty claims the benefit of Wells Fargo Advisors' arbitration agreement, any argument advanced above against that agreement applies equally to Dougherty.

to compel arbitration. But if the Court grants any of the motions, the claims must be stayed and not dismissed. *See Smith v. Spizzirri*, 601 U.S. 472, 475 (2024). While Wells Fargo urged dismissal before the Supreme Court decided *Smith* and resolved a circuit split on whether claims subject to arbitration could be dismissed instead of stayed (WFA Mem. at 12; WF Bank Mem. at 12), LPL Financial sought dismissal six months after *Smith* was decided (LPL Financial Mem. at 9). As yet another argument which is not founded on good law, the Court must reject it.

Respectfully submitted,

**WILLOUGHBY HUMPHREY & D'ANTONI, P.A.**

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*Attorneys for Plaintiff*

November 14, 2024  
Charleston, South Carolina

# EXHIBIT 7

## FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2023CP4000242

Curtis D Bale  
PLAINTIFF(S)

John A Dougherty et al  
DEFENDANT(S)

**DISPOSITION TYPE (CHECK ONE)**

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

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

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

Following a hearing on November 18, 2024,

- "Motion to Compel Arbitration" filed on March 25, 2024, by Defendant LPL Financial, LLC, is GRANTED. Counsel shall efile proposed Order granting motion within 20 days.
- "Wells Fargo Bank, N.A.'s Motion to Dismiss and Compel Arbitration" filed on April 3, 2024, is GRANTED. Counsel shall efile proposed Order granting motion within 20 days.
- "Defendants John A. Dougherty's ... Motion to Compel Arbitration..." filed on April 3, 2024, is GRANTED. Counsel shall efile proposed Order granting motion within 20 days.

This matter is STAYED pending arbitration.

**ORDER INFORMATION**

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

**For Clerk of Court Office Use Only**

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 03/25/2025 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

## Court Reporter:

**E-Filing Note:** The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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Richland Common Pleas

**Case Caption:** Curtis D Bale vs John A Dougherty , defendant, et al

**Case Number:** 2023CP4000242

**Type:** Order/Electronic Form 4

So Ordered

Jocelyn Newman

# EXHIBIT 8

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

Curtis D. Bale,

Plaintiff,

v.

John A. Dougherty; Wachovia Securities  
Financial Holdings, LLC; Wells Fargo  
Clearing Services, LLC, f/k/a Wells Fargo  
Advisors, LLC; Wells Fargo & Company;  
Wells Fargo Bank, N.A.; and LPL Financial,  
LLC,

Defendants.

IN THE COURT OF COMMON PLEAS  
FIFTH JUDICIAL CIRCUIT

Civil Action No. 2023-CP-40-00242

**ORDER GRANTING  
DEFENDANT LPL'S MOTION  
TO COMPEL ARBITRATION**

THIS MATTER COMES BEFORE THE COURT on Defendant LPL Financial, LLC's ("LPL") Motion to Compel Arbitration under 9 U.S.C. § 4 (the "Motion"). For the reasons set forth below, this Court grants the Motion and compels arbitration of all claims raised by Plaintiff Curtis D. Bale ("Plaintiff") against LPL pursuant to a binding and enforceable arbitration agreement, and stays this action under 9 U.S.C. § 4.<sup>1</sup> Having considered the materials and arguments of counsel on the papers and during the hearing held on November 18, 2024, the Court hereby finds and concludes as follows:

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<sup>1</sup> This Order addresses only the Motion to Compel Arbitration filed by Defendant LPL. This Court will address the Motions to Compel Arbitration filed by the remaining Defendants via separate orders.

## **BACKGROUND**

In 2010, Plaintiff became a client of Dougherty, a financial advisor. (Compl. ¶¶ 22–23.) In 2013, Dougherty became affiliated with the Wells Fargo Advising Defendants<sup>2</sup>; Plaintiff chose to follow Dougherty to and open accounts with the Wells Fargo Advising Defendants. (*Id.* ¶ 25.) In January 2021, Dougherty became affiliated with LPL, and Plaintiff chose to leave Wells Fargo and follow Dougherty to LPL, where he opened four accounts. (*Id.* ¶ 43). When Plaintiff opened his first account with LPL, he executed an express agreement with LPL governing the parties’ relationship (the “Account Application”). (LPL’s Mem. in Supp. of Mot. to Compel Arb., Nov. 8, 2024, Ex. 1, Aff. of Kyle Poston, Ex. A.A (“Poston Aff.”).)

Section I.1 of the Account Application completed by Plaintiff incorporates the accompanying “Account Packet” (the “Account Agreement”) (Poston Aff. Ex. A.B). Each of the three subsequent account applications completed by Plaintiff (Poston Aff. Exs. A.C, A.E, & A.G) (collectively with Poston Aff. Ex. A.A, the “Account Applications”) incorporate a similar account agreement (Poston Aff. Exs. A.D, A.F, & A.H) (collectively with Poston Aff. Ex. A.B, the “Account Agreements”).

By signing each of the Account Applications, Plaintiff endorsed the following statement provided directly above the signature blocks: “This account is governed by and I acknowledge receipt of the predispute arbitration clause that is located in the last numbered section of the Account Agreement (included in the Account packe[t] specified in Section I), which is incorporated by reference into the Account Application.”

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<sup>2</sup> As used here, the term Wells Fargo Advising Defendants denotes Wells Fargo Clearing Services, LLC; Wells Fargo Advisors, LLC; and Wachovia Securities Financial Holdings, LLC. (See Compl. ¶ 4.)

This account is governed by and I acknowledge receipt of the predispute arbitration clause that is located in the last numbered section of the Account Agreement (included in the Account Packed specified in Section I), which is incorporated by reference into the Account Application.

DocuSigned by:  
Curtis D. Bale  
C6533BF646FF42A  
Account Holder Signature

Curtis Dalton Bale  
Account Holder Name (print)

1/11/2021  
Date

(*Id.*)<sup>3</sup>

As Plaintiff acknowledged, each of the incorporated Account Agreements contains an arbitration provision (the “Arbitration Provision”), which states in relevant part the following:

In consideration of opening one or more accounts for you, you agree that **any controversy** between you and LPL and/or your Representative(s) (whether or not a signatory(ies) to this Master Account Agreement or Arbitration Agreement), arising out of or relating to your account, transactions with or for you, or the construction, performance, or breach of this agreement whether entered into prior, on or subsequent to the date hereof, **shall be settled by arbitration in accordance with the rules, then in effect of the Financial Industry Regulatory Authority (FINRA)**. . . . Any arbitration award hereunder shall be final, and judgment upon the award rendered may be entered in any court, state or federal, having jurisdiction. Nothing in this this [sic] Agreement requires arbitration of any claim that under the law cannot be made subject to a pre-dispute agreement to arbitrate claims, including any dispute or controversy nonarbitrable under federal law.

(Poston Aff. Ex. A.B, at 15 (emphasis added).)<sup>4</sup>

On January 17, 2023, Plaintiff filed his Complaint and initiated suit in the Richland County Court of Common Pleas. (*See generally* Compl.) Plaintiff asserted five causes of action against LPL: Breach of Fiduciary Duty (Count I); Breach of Contract (Count II); Breach of Contract Accompanied by a Fraudulent Act (Count III); Violation of the South Carolina Uniform Securities Act of 2005 (Count IV); and Violation of South Carolina Unfair Trade Practices Act (Count V). (*See id.* ¶¶ 49–84.) All causes of action against LPL are related to Plaintiff’s accounts and transactions at LPL.

<sup>3</sup> (*See also* Poston Aff. Ex. A.C, at 7 (similar); *id.* Ex. A.E, at 6 (same); *id.* Ex. A.G, at 6 (same).)

<sup>4</sup> (*See also* Poston Aff. Ex. A.D, at 19–20 (similar); *id.* Ex. A.F, at 15 (same); *id.* Ex. A.H, at 15 (same).)

On February 16, 2023, LPL removed the present action to the United States District Court for the District of South Carolina, Columbia Division. The federal district court ultimately remanded the action to this Court on March 25, 2024. That same day, LPL filed in this Court its Motion to Compel Arbitration and Dismiss. This Court held a hearing on LPL's Motion and the motions to compel brought by the other Defendants on November 18, 2024. The Court granted LPL's Motion to Compel Arbitration by Form 4 Order dated March 26, 2025, and now enters this Order as to the LPL's Motion.

### **LEGAL STANDARD**

In South Carolina, a party seeking to compel arbitration under the Federal Arbitration Act ("FAA") "must establish that (1) there is a valid agreement, and (2) the claims fall within the scope of the agreement." *Wilson v. Willis*, 426 S.C. 326, 336, 827 S.E.2d 167, 172 (2019). The FAA "applies in state or federal court to any arbitration agreement involving interstate commerce, unless the parties contract otherwise." *Id.* There is an "expansive view of interstate commerce" under the FAA, and the FAA requires courts to "enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 592, 596, 553 S.E.2d 110, 116, 118 (2001) (citation omitted).

The party opposing arbitration "bears the burden of proving that the claims at issue are unsuitable for arbitration." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (citation omitted). As explained below, the Court holds that Plaintiff has failed to satisfy his burden of proof in this case.

## ANALYSIS

### **1. The Agreement to Arbitrate is Governed by the FAA and Enforceable under State and Federal Law.**

The FAA governs written agreements to arbitrate involving the interstate commerce. *See* 9 U.S.C. §§ 1 *et seq.*; *Wilson*, 426 S.C. at 336, 827 S.E.2d at 172; *see also Conway v. CLC BIO, LLC*, 32 N.E.3d 330, 335–36 (Mass. Ct. App. 2015).<sup>5</sup> There is an “expansive view of interstate commerce” under the FAA. *Zabinski*, 346 S.C. at 592, 596, 553 S.E.2d at 116, 118 (citation omitted). The FAA “requires courts to enforce privately negotiated agreements to arbitrate . . . in accordance with their terms.” *Cape Romain Contractors, Inc. v. Wando E., LLC*, 405 S.C. 115, 125, 747 S.E.2d 461, 466 (2013) (quoting *Zabinski*, 346 S.C. at 592, 553 S.E.2d at 116). The FAA confers a right “to obtain an order directing that arbitration proceed in the manner provided for in the parties’ agreement.” *Id.* at 126, 747 S.E.2d at 466 (original quotation marks and citation omitted). The Court shall direct the parties to proceed to arbitration upon showing there is a valid agreement for arbitration. *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 628 n.5, 667 S.E.2d 1, 4 n.5 (Ct. App. 2008) (citing 9 U.S.C. § 4). Arbitration provisions in contracts involving interstate commerce “shall be valid, irrevocable, and enforceable,” and will be enforced by the court “save upon such grounds as exist at law or in equity for the revocation of any contract.” *Wilson*, 426 S.C. at 336, 827 S.E.2d at 173 (quoting 9 U.S.C. § 2).

A court is obligated to “rigorously enforce” arbitration agreements. *Cape Romain Contractors*, 405 S.C. at 125, 747 S.E.2d at 466 (quoting *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 228 (2013)).

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<sup>5</sup> Massachusetts law governs LPL’s account agreements with Plaintiff. (*See Poston Aff. Ex. A.B.*, at 9; *id. Ex. A.D.*, at 9; *id. Ex. A.F.*, at 9; *id. Ex. A.H.*, at 9.)

**2. LPL Has Satisfied All of the Elements Necessary to Compel Arbitration Pursuant to the FAA.**

As detailed above, a party seeking to compel arbitration under the FAA “must establish that (1) there is a valid agreement, and (2) the claims fall within the scope of the agreement.” *Wilson*, 426 S.C. at 336, 827 S.E.2d at 172. Stated more fully, a party must establish “(1) the existence of a dispute between the parties, (2) a written agreement that includes an arbitration provision which purports to cover the dispute, (3) the relationship of the transaction, which is evidenced by the agreement, to interstate or foreign commerce, and (4) the failure, neglect or refusal of the defendant to arbitrate the dispute.” *Am. Gen. Life & Acc. Ins. Co. v. Wood*, 429 F.3d 83, 87 (4th Cir. 2005) (citation omitted). The Court holds that LPL has satisfied each of these elements.

**A. A Dispute Exists Between the Parties.**

First, this Court finds that a dispute exists between the parties, as Plaintiff has filed a Complaint relating to his accounts at LPL, investments held at LPL, and advice received while at LPL. (See Compl. ¶¶ 54–79). Accordingly, this first element is met. See *Wood*, 429 F.3d at 87.

**B. A Written Agreement Containing an Arbitration Clause Covers the Dispute.**

Second, the Court finds that the arbitration agreements cover the dispute. Notably, Plaintiff signed four arbitration provisions with LPL covering this dispute. As noted above, arbitration is proper when there is a valid arbitration agreement, and the disputes are covered by the arbitration provision. *Landers v. Federal Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 214 (2013); see *York*, 406 S.C. at 97, 749 S.E.2d at 154 (upholding trial court’s decision to dismiss suit and compel arbitration, as “[e]very dispute was within the scope of at least one valid arbitration agreement”). Simply put, arbitration is required when “(1) an arbitration clause specifically encompasses the asserted claims; or (2) there exists a significant relationship between the asserted

claims and the parties' contract." *Timmons v. Starkey*, 380 S.C. 590, 596, 671 S.E.2d 101, 105 (Ct. App. 2008).

Here, the Court finds that each of the Account Agreements include a valid, written Arbitration Provision that is binding and enforceable against Plaintiff. (See Poston Aff. Ex. A.A, at 15).<sup>6</sup> Additionally, the Court finds that each of Plaintiff's claims falls within the Arbitration Provision's scope.

Both the Fourth Circuit Court of Appeals and [the South Carolina Supreme Court] have held that the sweeping language of broad arbitration clauses applies to disputes in which a significant relationship exists between the asserted claims and the contract in which the arbitration clause is contained. Thus, the scope of the clause does "not limit arbitration to the literal interpretation of performance of the contract, but embraces every dispute between the parties having a significant relationship to the contract."

*Landers*, 402 S.C. at 109, 739 S.E.2d at 214 (citation sentences and original brackets omitted) (quoting *J.J. Ryan & Sons, Inc. v. Rhone Poulenc Textile, S.A.*, 863 F.2d 315, 321 (4th Cir. 1988)); see also *Com. v. Philip Morris Inc.*, 864 N.E.2d 505, 511 (Mass. 2007) ("[W]hen considering a broadly worded arbitration clause, there is a presumption that a contract dispute is encompassed by the clause unless it is clear the dispute is excluded."). Moreover, "under the expansive reach of the FAA[,] a tort claim need not raise an issue that requires reference to or the construction of some portion of the contract in order to be encompassed by a broadly-worded arbitration clause." *Landers*, 402 S.C. at 111, 739 S.E.2d at 214.

The Arbitration Provisions to which Plaintiff agreed require arbitration of a broad category of disputes:

[A]ny controversy between you and LPL and/or your Representative(s) (whether or not a signatory(ies) to this Master Account Agreement or Arbitration Agreement), arising out of or relating to your account, transactions with or for you, or the construction, performance, or breach of this agreement whether entered into

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<sup>6</sup> (See also Poston Aff. Ex. A.D, at 19–20; *id.* Ex. A.F, at 15; *id.* Ex. A.H, at 15.)

prior, on or subsequent to the date hereof, shall be settled by arbitration in accordance with the rules, then in effect of the Financial Industry Regulatory Authority (FINRA).

(Poston Aff. Ex. A.B, at 15).<sup>7</sup>

As explained below, the Court finds that Plaintiff's five causes of action all fall within the scope of this Arbitration Provision because they arise out of or relate to Plaintiff's accounts, transactions with or for him, and performance under the Account Agreements. Indeed, Plaintiff did not challenge that the claims all fell within the scope of the Arbitration Agreements.

i. The Arbitration Provision Covers Plaintiff's Breach of Fiduciary Duty Claim.

First, Plaintiff's breach of fiduciary duty claim is contingent on Plaintiff's allegations that LPL assumed a duty but "failed to exercise reasonable care, diligence, and prudence in the performance of its duties when it engaged in reckless and imprudent trading schemes in a futile effort to recover losses caused by its predecessors' failed strategy and self-protective sell-off." (See Compl. ¶¶ 54(1), 58–59.)

Simply put, if any fiduciary duties arose, then they arose from the Account Agreements which govern LPL's conduct with respect to the operation and oversight of Plaintiff's LPL accounts. Any fiduciary duties would thus be encompassed in the Account Agreement and encompassed within the arbitration provision. Accordingly, Plaintiff's fiduciary breach claim arises from and relates to Plaintiff's account and performance under the Account Agreements. The Court finds that this claim must be arbitrated under the Arbitration Provision.

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<sup>7</sup> (See also Poston Aff. Ex. A.D, at 20 (similar); *id.* Ex. A.F, at 15 (same); *id.* Ex. A.H, at 15 (same).)

ii. The Arbitration Provision Covers Plaintiff's Breach of Contract and Accompanying Fraudulent Act Claims.

Next, Plaintiff's claims for breach of contract and breach of contract accompanied by a fraudulent act also fall within the broad scope of the Arbitration Provision. Specifically, Plaintiff alleges that LPL executed the Account Agreements with Plaintiff and then "breached [its] Agreements with [Plaintiff]" through mismanagement—failing "to abide by the terms of the agreements." (See Compl. ¶¶ 58, 61–62, 65–58.) Manifestly, Plaintiff's breach of contract and breach of contract accompanied by a fraudulent act claims arise from and relate to the Account Agreements. The Court finds that these claims also must be arbitrated under the Arbitration Provision.

iii. The Arbitration Provision Covers Plaintiff's Statutory Violation Claims.

Plaintiff's claim for violation of the South Carolina Uniform Securities Act of 2005 ("SCUSA") likewise arises from and relates to Account Agreements. Plaintiff alleges that LPL "recommended and advised that he enter into imprudent transactions." (Compl. ¶ 72.) The Account Agreements governed LPL's conduct with respect to the operation and oversight of his LPL accounts. Thus, Plaintiff's SCUSA claim arises from and relates to Plaintiff's account and performance under the Account Agreements. It too must be arbitrated under the Arbitration Provision.

Finally, Plaintiff's claim for violation of the South Carolina Unfair Trade Practices Act ("SCUTPA") likewise arises from and relates to the Account Agreements. Plaintiff alleges that LPL "engaged in an unfair method of competition and/or an unfair or deceptive act or practice" by "recommending and implementing an investment scheme premised upon [Plaintiff's] continuing to maintain a substantial debt collateralized by his investments." (Compl. ¶ 79.) The Account Agreements governed LPL's conduct with respect to the operation and oversight of his LPL

accounts. Like the other claims asserted in the Complaint, Plaintiff's SCUTPA claim arises from and relates to Plaintiff's accounts, transactions with or for Plaintiff, and the Account Agreements, and the Court finds that it must be arbitrated under the Arbitration Provision.

iv. The Arbitration Agreements are Valid.

In the briefing and at the hearing, Plaintiff raised several arguments to challenge the Arbitration Agreements as unenforceable. The Court finds that none of those arguments have merit.

First, Plaintiff argued that his repeated decisions to enter arbitration agreements with LPL are nullified by alleged hyper-technical shortcomings in those agreements, citing certain FINRA rules. However, other courts confronting similar arguments have rejected them—finding instead that a technical rule promulgated by a self-regulatory organization cannot constitute an “exception[] to the FAA in order to invalidate an otherwise valid arbitration agreement.” *See, e.g., Singh v. Interactive Brokers LLC*, 219 F. Supp. 3d 549, 559 (E.D. Va. 2016); *Hillow v. E\*Trade Sec., LLC*, No. 4:22-CV-145-JAR, 2022 WL 1165791, at \*3–5 (E.D. Mo. Apr. 20, 2022). For the same reasons, the Court rejects that argument here.<sup>8</sup>

Second, Plaintiff also made several arguments that the agreement was void due to mistake. Plaintiff's purported mistake was, he alleged, brought on by LPL's failure to disclose some ostensible substantial prejudice inherent to the FINRA forum.<sup>9</sup> Plaintiff, however, cited no case law where a court refused to compel an eligible dispute to arbitration simply because one party

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<sup>8</sup> Although Plaintiff attempted to distinguish these cases by framing his argument in terms of a condition precedent, the Court finds that he is simply seeking the same result by a different route—creating an exception to the FAA—and that the argument likewise fails.

<sup>9</sup> The Court declines to make the sweeping finding that the entire forum of FINRA is unconscionable on the basis of nothing more than Plaintiff's speculation as to the outcome of this particular case.

later disagreed on its forum selection choice. Moreover, even assuming that Plaintiff made a mistake, Plaintiff cannot evade his contractual obligations because Plaintiff himself bore the risk of that unilateral mistake. See *Dahua Tech. USA Inc. v. Feng Zhang*, 988 F.3d 531, 539 (1st Cir. 2021) (“Asserting a unilateral mistake defense requires a party to show that . . . [he] did not bear the risk of mistake.”). The Court finds Plaintiff’s argument meritless.

Finally, Plaintiff suggested that arbitration was improper because he could not “effectively vindicate his statutory rights in the arbitral forum” (citing *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 282 (4th Cir. 2007)). But the Court finds that this argument is misplaced because the “effective vindication” doctrine applies only to *federal* statutes—not *state* statutes like the South Carolina Uniform Securities Act of 2005 or the South Carolina Unfair Trade Practices Act raised by Plaintiff. See *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235 (2013) (addressing argument that “effective vindication” doctrine “serves to harmonize competing federal policies by allowing courts to invalidate agreements that prevent the ‘effective vindication’ of a federal statutory right” (emphasis added)). The Court also finds that Plaintiff has offered nothing more than mere speculation about his alleged inability to effectively vindicate his rights in FINRA, and the argument fails for this reason as well. See *Braintree v. Citigroup*, 671 F. Supp. 202, 210 (D. Mass. 2009) (“Specifically, the Court declines to engage in the speculative forecasting necessary to hold that FINRA is sure to ignore plaintiffs’ state statutory claim for rescission whenever this dispute finally makes its way to arbitration.”).

Accordingly, the Court finds that all five of Plaintiff’s causes of action fall within the broad scope of this Arbitration Provision because they all relate to or arise out of Plaintiff’s accounts, transactions with or for Plaintiff, or performance under the Account Agreements themselves. In

addition, the Court finds that the unenforceability arguments raised by Plaintiff fail and do not change the result that the Account Agreements are enforceable.

**C. The Agreement Evidences a Relationship to Interstate Commerce.**

Third, the Court finds that the transactions at issue in the Complaint relate to interstate commerce. It is well-settled that such agreements relating to investment and brokerage accounts “evidence[e] a transaction involving [interstate] commerce” such that the FAA applies. See 9 U.S.C. §§ 1, 2; *Dean*, 408 S.C. at 380, 759 S.E.2d at 732 (noting that courts must consider “the agreement, the complaint, and the surrounding facts” in determining whether an arbitration agreement implicates interstate commerce for purposes of the FAA); *Newcome v. Esrey*, 862 F.2d 1099, 1100, 1107 (4th Cir. 1988) (affirming district court’s ruling that investment services and brokerage agreements for securities meet FAA requirements and that arbitration clauses will be held enforceable to prevent litigation). Accordingly, the Court finds that the FAA applies here because the Account Agreements for investment services involve interstate commerce in national and/or international financial markets. Additionally, the Court also finds that the Account Agreements involve interstate commerce because Plaintiff (located in South Carolina) contracted with the entity Defendants (located throughout the United States) for investment services to be provided by individual Defendant John Dougherty (located in Pennsylvania).

**D. Plaintiff Refuses to Arbitrate the Dispute.**

Fourth, and finally, the Court finds that Plaintiff has refused to arbitrate the dispute. Plaintiff filed this case in the South Carolina Court of Common Pleas on January 17, 2023, opposed the Motion to Compel Arbitration, and did not agree to refile in FINRA.

**CONCLUSION**

For the reasons detailed above, **IT IS THEREFORE ORDERED** that LPL's Motion to Compel Arbitration is hereby **GRANTED**;

**IT IS FURTHER ORDERED** that this matter is hereby STAYED pending arbitration.

**IT IS SO ORDERED.**

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The Hon. Jocelyn T. Newman  
Presiding Judge  
South Carolina Business Court

Date: April \_\_, 2025



Richland Common Pleas

**Case Caption:** Curtis D Bale vs John A Dougherty , defendant, et al

**Case Number:** 2023CP4000242

**Type:** Order/Compel

So Ordered

Jocelyn Newman

|                                                 |   |                                      |
|-------------------------------------------------|---|--------------------------------------|
| STATE OF SOUTH CAROLINA                         | ) | IN THE COURT OF COMMON PLEAS         |
|                                                 | ) |                                      |
| COUNTY OF RICHLAND                              | ) | CIVIL ACTION NO. 2023-CP-40-00242    |
|                                                 | ) |                                      |
| Curtis D. Bale,                                 | ) |                                      |
|                                                 | ) |                                      |
| Plaintiff,                                      | ) | <b>ORDER GRANTING</b>                |
|                                                 | ) | <b>JOHN A. DOUGHERTY’S AND WELLS</b> |
| v.                                              | ) | <b>FARGO CLEARING SERVICES, LLC,</b> |
|                                                 | ) | <b>F/K/A WELLS FARGO ADVISORS,</b>   |
| John A Dougherty, Wachovia Securities Financial | ) | <b>LLC’S MOTION TO COMPEL</b>        |
| Holdings, LLC; Wells Fargo Clearing Services,   | ) | <b>ARBITRATION</b>                   |
| LLC, f/k/a Wells Fargo Advisors, LLC; Wells     | ) | <b>AND MOTION TO STAY</b>            |
| Fargo & Company; Wells Fargo Bank, N.A.; and    | ) |                                      |
| LPL Financial, LLC,                             | ) |                                      |
| Defendants.                                     | ) |                                      |
|                                                 | ) |                                      |

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This matter came before me on Defendants John A. Dougherty’s and Wells Fargo Clearing Services, LLC’s (collectively, “WFCS”) Motion to Dismiss and Compel Arbitration Under 9 U.S.C. §§ 3 and 4 and Motions to Dismiss under Rules 12(b)(1), (3) and (6) and Motion to Stay in the Alternative (the “Motion”). In its Motion, WFCS asks this Court to dismiss Plaintiff Curtis D. Bale’s (“Plaintiff” or “Bale”) claims against Wells Fargo and compel those claims to arbitration or, in the alternative, to stay this litigation pending arbitration. The parties fully briefed the issues.

A hearing was held on November 18, 2024. After careful consideration of the motion, all submissions by WFCS and Bale, and oral arguments by counsel, I hereby GRANT WFCS’s motion to compel arbitration and to stay this action pending arbitration.

Based on the record before me, I further find as follows:

1. Bale and WFCS entered into a valid, binding agreement to arbitrate any disputes between them before the Financial Industry Regulatory Authority (“FINRA”).

2. To the extent this Court has jurisdiction to decide the arbitrability of Bale's claims, I find that Bale's claims against WFCS are subject to the valid, binding agreement to arbitrate before FINRA.

3. This matter and all related proceedings in this matter should be stayed until the claims have been submitted to arbitration before FINRA and the arbitration proceedings have concluded.

THEREFORE, IT IS HEREBY ORDERED that the Motion is GRANTED as follows: The Plaintiff Curtis D. Bale must arbitrate the claims asserted against Wells Fargo Clearing Services, LLC f/k/a Wells Fargo Advisors, LLC and John A. Dougherty. before FINRA, and all proceedings in this action are stayed until after Plaintiff has submitted all claims against WFCS to arbitration with FINRA and the arbitration proceedings have concluded.

IT IS SO ORDERED.



Richland Common Pleas

**Case Caption:** Curtis D Bale vs John A Dougherty , defendant, et al

**Case Number:** 2023CP4000242

**Type:** Order/Compel

So Ordered

Jocelyn Newman

|                                                 |   |                                     |
|-------------------------------------------------|---|-------------------------------------|
| STATE OF SOUTH CAROLINA                         | ) | IN THE COURT OF COMMON PLEAS        |
|                                                 | ) |                                     |
| COUNTY OF RICHLAND                              | ) | CIVIL ACTION NO. 2023-CP-40-00242   |
|                                                 | ) |                                     |
| Curtis D. Bale,                                 | ) |                                     |
|                                                 | ) |                                     |
| Plaintiff,                                      | ) | <b>ORDER GRANTING</b>               |
|                                                 | ) | <b>WELLS FARGO BANK, N.A.'S</b>     |
| v.                                              | ) | <b>MOTION TO COMPEL ARBITRATION</b> |
|                                                 | ) | <b>AND MOTION TO STAY</b>           |
| John A Dougherty, Wachovia Securities Financial | ) |                                     |
| Holdings, LLC; Wells Fargo Clearing Services,   | ) |                                     |
| LLC, f/k/a Wells Fargo Advisors, LLC; Wells     | ) |                                     |
| Fargo & Company; Wells Fargo Bank, N.A.; and    | ) |                                     |
| LPL Financial, LLC,                             | ) |                                     |
| Defendants.                                     | ) |                                     |
|                                                 | ) |                                     |

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This matter came before me on Defendant Wells Fargo Bank, N.A.'s Motion to Dismiss and Compel Arbitration, and Motion to Stay in the Alternative (the "Motion"). In its Motion, Wells Fargo Bank, N.A. ("Defendant" or "Wells Fargo"), pursuant to 9 U.S.C. §§ 3 and 4, and South Carolina Rules of Civil Procedure 12(b)(1), (3), and (6), asks this Court to dismiss Plaintiff Curtis D. Bale's ("Plaintiff" or "Bale") claims against Wells Fargo and compel those claims to arbitration or, in the alternative, to stay this litigation pending arbitration. The parties fully briefed the issues.

A hearing was held on November 18, 2024. After careful consideration of the motion, all submissions by Wells Fargo and Bale, and oral arguments by counsel, I hereby GRANT Wells Fargo's motion to compel arbitration and to stay this action pending arbitration.

Based on the record before me, I further find as follows:

1. Bale and Wells Fargo entered into a valid, binding agreement to arbitrate any disputes between them before the American Arbitration Association ("AAA").

2. To the extent this Court has jurisdiction to decide the arbitrability of Bale's claims, I find that Bale's claims against Wells Fargo are subject to the valid, binding agreement to arbitrate before the AAA.

3. This matter and all related proceedings in this matter should be stayed until the claims have been submitted to arbitration before the AAA and the arbitration proceedings have concluded.

THEREFORE, IT IS HEREBY ORDERED that the Motion is GRANTED as follows: The Plaintiff Curtis D. Bale must arbitrate the claims asserted against Wells Fargo Bank, N.A. before the AAA, and all proceedings in this action are stayed until after Bale submits all claims to arbitration with the AAA and the arbitration proceedings have concluded.

IT IS SO ORDERED.



Richland Common Pleas

**Case Caption:** Curtis D Bale vs John A Dougherty , defendant, et al

**Case Number:** 2023CP4000242

**Type:** Order/Compel

So Ordered

Jocelyn Newman

# EXHIBIT 9

|                                           |   |                                   |
|-------------------------------------------|---|-----------------------------------|
| STATE OF SOUTH CAROLINA                   | ) | IN THE COURT OF COMMON PLEAS      |
|                                           | ) |                                   |
| COUNTY OF RICHLAND                        | ) | FIFTH JUDICIAL CIRCUIT            |
|                                           | ) |                                   |
| Curtis D. Bale,                           | ) | Civil Action No. 2023-CP-40-00242 |
|                                           | ) |                                   |
| Plaintiff,                                | ) |                                   |
|                                           | ) |                                   |
| vs.                                       | ) |                                   |
|                                           | ) |                                   |
| John A. Dougherty; Wachovia Securities    | ) | <b>PLAINTIFF'S MOTION FOR</b>     |
| Financial Holdings, LLC; Wells Fargo      | ) | <b>RECONSIDERATION</b>            |
| Clearing Services, LLC, f/k/a Wells Fargo | ) |                                   |
| Advisors, LLC; Wells Fargo & Company;     | ) |                                   |
| Wells Fargo Bank, N.A.; and LPL           | ) |                                   |
| Financial, LLC,                           | ) |                                   |
|                                           | ) |                                   |
| Defendants.                               | ) |                                   |
|                                           | ) |                                   |

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**TO: Defendants John A. Dougherty, Wachovia Securities Financial Holdings, LLC, Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, Wells Fargo & Company, Wells Fargo Bank, N.A., and LPL Financial, LLC, and their respective counsel:**

**PLEASE TAKE NOTICE THAT** Curtis D. Bale, the 82-year-old Plaintiff in this case who suffers from significant health issues, through undersigned counsel and under Rule 59(e), SCRCF, respectfully moves the Court to reconsider its July 9, 2025 Orders on Defendants' Motion to Compel Arbitration and to Stay.

### INTRODUCTION

The Court's July 9, 2025 orders compelling arbitration overlooked, misapprehended, and did not consider core arguments Bale raised in opposition to arbitration, and improperly, albeit inadvertently, stayed claims against two parties not subject to arbitration. First, the Court did not address Bale's unconscionability argument, despite clear and un rebutted evidence that the arbitration agreements were procedurally and substantively oppressive and one-sided. Also, after a hearing on the original motions the Fourth Circuit affirmed a district court's refusal to compel

arbitration under similar unilateral contractual terms. *See Johnson v. Cont'l Fin. Co., LLC*, 131 F.4th 169, 178 (4th Cir. 2025). Second, the Court overlooked the failure of Wells Fargo Advisors, Wells Fargo Bank, and LPL Financial to meet their burden of proving the existence of a valid and enforceable arbitration agreement with Bale. Each entity relied on flawed or irrelevant contracts, including documents that lack a meeting of the minds, are infected by mistake, are unsupported consideration, or fail to meet FINRA's requirements. Third, the Court did not consider FINRA Rule 12202(a), which prohibits a barred broker like Dougherty from compelling arbitration without customer consent, which Bale has not given. Because these omissions materially affect the outcome of the Court's orders and implicate Bale's right to a judicial forum, reconsideration is both necessary and appropriate.

Reconsideration is also necessary to clarify that the claims against Wells Fargo & Company and Wachovia Securities Financial Holdings are not stayed. Both entities answered Bale's complaint, neither moved to compel arbitration, no other party asked that claims against these two Defendants be stayed, all Defendants understood that the case would proceed against these entities in court even if the then-pending motions to compel arbitration were granted, and Bale would be greatly prejudiced by a stay. Yet, the Court's orders purport to stay this *entire* case. Reconsideration is imperative to afford the Court the opportunity to, at a minimum, clarify the scope of its ruling as only applying to the moving Defendants.

### LEGAL STANDARD

"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment[,] is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.'" *Collins Music Co. v. IGT*, 353 S.C. 559, 562, 579 S.E.2d 524, 525 (Ct. App. 2002) (quoting *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992)). "Consequently, a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously

presented.” *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778–79 (2004). It would be inherently unfair to disallow “a party one final chance not only to call the court’s attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument.” *Id.* at 22, 602 S.E.2d at 779.

“When a court alters a judgment, the party aggrieved by the alteration may ask for correction.” *Coward Hund Const. Co. v. Ball Corp.*, 336 S.C. 1, 3, 518 S.E.2d 56, 58 (Ct. App. 1999). A judgment challenged by a Rule 59(e) motion is not final. *See id.* at 3–4, 518 S.E.2d at 58. The court must rule on the pending Rule 59(e) motion for the original order to take effect. *See id.*

### ARGUMENT<sup>1</sup>

#### **I. The Court Should Clarify that Claims Against Wells Fargo & Co. and Wachovia Securities Financial Holdings Are Not Stayed.**

The Court’s July 9, 2025 orders granting Wells Fargo Advisors, Wells Fargo Bank, and LPL Financial’s motions to compel arbitration purport to stay this *entire* case, inadvertently expanding the scope of Defendants’ motions to include non-moving parties. *See* Order on Wells Fargo Bank’s Mot. at 2 (“[A]ll proceedings in this action are stayed until after Bale submits all claims to arbitration with the AAA and the arbitration proceedings have been concluded.”); Order on Wells Fargo Advisors and Dougherty’s Mot. at 2 (“[A]ll proceedings in this action are stayed until after Plaintiff submits all claims against [Wells Fargo Advisors] to arbitration with FINRA and the arbitration proceedings have been concluded.”); Order on LPL Financial’s Mot. at 13 (“[T]his matter is hereby STAYED pending arbitration.”). Bale does not believe the Court intended to stay proceedings against Wells Fargo & Co. and Wachovia Securities Financial Holdings, and this stay is improper in any event. The Court therefore should clarify that a stay, if left otherwise

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<sup>1</sup> Bale also incorporates and reasserts all arguments made in his written opposition to the Defendants’ motions to compel arbitration and made at the hearing on those motions.

in place following its ruling on this motion, does not apply to claims against Wells Fargo & Co. and Wachovia Securities Financial Holdings and that Bale's claims against these two defendants may proceed in court without delay. This is true for at least four reasons.

*First*, Wells Fargo & Co. and Wachovia Securities Financial Holdings never moved to compel arbitration or stay the case. Instead, those Defendants filed answers on April 3, 2024, which did not mention arbitration. They consequently waived any right which may flow from arbitration, including a stay of the claims against them.

*Second*, the moving Defendants did not move to stay claims against Wells Fargo & Co. and Wachovia Securities Financial Holdings. This stay therefore was not even an issue before the Court. Wells Fargo Advisors and Dougherty only asked that proceedings related to claims against *them* be stayed. Wells Fargo Advisors and Dougherty Mot. at 2–3 (asking for a stay of proceedings against “Defendants,” with Defendants defined earlier as Wells Fargo Advisors and Dougherty). The same goes for Wells Fargo Bank and LPL Financial. Wells Fargo Bank Mot. at 3–4 ( asking for a stay of “all proceedings in this action, including discovery, related to the claims against Wells Fargo,” which was defined in the motion as Wells Fargo Bank); LPL Financial Mot. at 3 ( asking for a stay of “all proceedings in this action, including discovery, related to claims against LPL”). Without a request to stay claims against Wells Fargo & Co. and Wachovia Securities Financial Holdings pending, entering one was improper.

*Third*, all Defendants understood that claims against Wells Fargo & Co. and Wachovia Securities Financial Holdings would move forward even if the Court otherwise compelled arbitration as requested by the moving Defendants. For example, no Defendant challenged the premise that Bale would litigate his Wells Fargo claims simultaneously in three venues—court (against Wells Fargo & Co. and Wachovia Securities Financial Holdings), AAA (against Wells

Fargo Bank), and FINRA (against Wells Fargo Advisors)—if the Court granted their motions. At no point did Defendants claim that Bale could not move forward in court against Wells Fargo & Co. and Wachovia Securities Financial Holdings because any stay would apply to these entities. Rather, they correctly understood that no request to stay those claims was before the Court.

*Fourth*, Bale will be severely prejudiced if his claims against Wells Fargo & Co. and Wachovia Securities Financial Holdings are stayed. For example, Wells Fargo & Co. has independent liability here. It created the cross-selling scheme that incentivized brokers like Dougherty to sell loans like the Secured Primeline and keep the credit lines maximized, which caused Bale's substantial losses. Without the ability to proceed against these Defendants, Bale will be severely prejudiced and deprived of a critical source of evidence and recovery for his losses.

Therefore, at minimum, this Court should alter or amend its July 9 orders to clarify that claims against Wells Fargo & Co. and Wachovia Securities Financial Holdings are not stayed and Bale may immediately proceed to litigate his claims against these two Defendants in court.

**II. The Wells Fargo Advisors and Wells Fargo Bank Arbitration Agreements Are Unconscionable Because They Force Bale to Litigate His Claims Involving a Common Scheme in Three Places at Once and Because They Give These Defendants a Unilateral Right to Amend.**

Traditional unconscionability principles apply to arbitration agreements. *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 612, 879 S.E.2d 746, 755 (2022). Under South Carolina law, “unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them.” *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 24–25, 644 S.E.2d 663, 668 (2007). Bale proved both prongs, but the Court's orders make no findings on this issue. The Court therefore should reconsider its decision.

*First*, Bale had no meaningful choice in the formation of the Wells Fargo Advisors and Wells Fargo Bank arbitration agreements. “In determining whether a party lacked a meaningful choice to arbitrate, courts should consider, inter alia, the relative *disparity* in the parties’ bargaining power, the parties’ relative sophistication, whether the parties were represented by independent counsel, and whether ‘the plaintiff is a substantial business concern.’” *Smith v. D.R. Horton, Inc.*, 417 S.C. 42, 49, 790 S.E.2d 1, 4 (2016) (quoting *Simpson*, 373 S.C. at 25, 644 S.E.2d at 669). These Defendants never seriously disputed this factor. At all relevant times, Bale was in a much weaker position than these Wells Fargo entities. While Bale is a seasoned business professional, he was not allowed to negotiate his account agreements, and all documents were presented on a “take it or leave it basis.” Also, Bale was never represented by legal counsel throughout any interaction with Wells Fargo Advisors or Wells Fargo Bank. And his business with these Wells Fargo entities pales in comparison to the business they regularly conduct. For example, Wells Fargo Bank is the third-largest bank in the United States with over \$1.7 trillion assets under management. Cassidy Horton, *Largest Banks In The U.S. 2024*, Forbes Advisor (Mar. 13, 2024), <https://www.forbes.com/advisor/banks/largest-banks-in-the-us-90373/>; Plaintiff’s Opp. at 12. So Bale’s account did not, and does not, represent a “substantial business concern” to Wells Fargo Advisors or Wells Fargo Bank. Plaintiff’s Opp. at 12. The agreements with Wells Fargo Advisors and Wells Fargo Bank are contracts of adhesion and are sufficiently one-sided to satisfy the first prong of unconscionability under South Carolina law. *Id.*

*Second*, the arbitration agreements’ terms are also unreasonably oppressive. An arbitration agreement becomes unreasonably oppressive when it “creates the possibility of inconsistent fact findings that would preclude [a plaintiff] from recovery on a purely procedural (rather than a merit) basis.” *Damico*, 437 S.C. at 612, 879 S.E.2d at 755. The arbitration agreements unconscionably

erect a procedural, not merits-based, barrier to Bale's claims because they allow Wells Fargo & Co., Wells Fargo Advisors, and Wells Fargo Bank to divide their unified scheme across three forums. Plaintiff's Opp. at 13–14. The end goal of these schemes is to create a disparity in discovery and factfinding, thus causing unequal, or impossible, recovery. *Id.* This divide and conquer strategy makes “the possibility of inconsistent factual findings that would preclude [Bale] from recovery” not only possible, but likely. *Damico*, 437 S.C. at 616, 879 S.E.2d at 757. This division would also inevitably lead to astronomical costs which could disproportionately fall on Bale. Plaintiff's Opp. at 14–15 & n.5. Still, this Court did not recognize the binding law in this state which prevents this injustice from happening.

While those terms are oppressive enough to end the analysis, other terms in the contract present an even more oppressive document. For example, Wells Fargo Advisors and Wells Fargo Bank retain the right to unilaterally modify the agreements. Plaintiff's Opp. at 15–16. Retaining the right to unilaterally modify an agreement “speaks to the one-sidedness of [an] arbitration agreement” and makes the agreement unconscionable. *315 Corley CW LLC v. Palmetto Bluff Dev., LLC*, 444 S.C. 521, 534, 908 S.E.2d 892, 899 (Ct. App. 2024). Similarly, the Fourth Circuit recently affirmed a district court's refusal to compel arbitration because a unilateral change-in-terms clause rendered the arbitration agreement at issue illusory. *Johnson*, 131 F.4th at 178. The same is true here.

Because the arbitration clause is unconscionable under well-established South Carolina law, the Court's orders compelling arbitration without acknowledging these arguments was clear legal error. Respectfully, reconsideration is required.

### III. Neither Wells Fargo Advisors, Wells Fargo Bank, nor LPL financial Proved a Valid Arbitration Agreement Exists.

The burden to prove an enforceable arbitration agreement exists is on the party seeking to compel arbitration. *Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458, 730 S.E.2d 312, 317–18 (2012). But the Court overlooked or misapprehended the evidence and argument confirming that none of these Defendants met their burden.

#### Wells Fargo Advisors

As for Wells Fargo Advisors, there is no valid agreement for three independent reasons: (1) there was no meeting of the minds on an essential element of the agreement; (2) unilateral mistake; and (3) mutual mistake. The Court’s order makes no finding as to any of them and should be reconsidered.

*First*, there was no meeting of the minds on an essential element of the arbitration agreement. Choice-of-law provisions are material contract terms. *Reeves Bros. v. Cap.-Mercury Shirt Corp.*, 962 F. Supp. 408, 412–13 (S.D.N.Y. 1997). The General Account Agreement and Disclosure Agreement is governed by New York law. WFA Mot. Ex. 1. But the Client Agreements are governed by Virginia law. WFA Mot. Ex. 1. “It is elementary that mutuality of assent—the meeting of the minds of the parties—is an essential element of all contracts.” *Phillips v. Mazyck*, 273 Va. 630, 636, 643 S.E.2d 172, 175 (2007); *Gomez v. Bicknell*, 756 N.Y.S.2d 209, 216 (2d Dept. 2002) (“[M]utual assent evincing the intention of the parties to form a contract is essential, and without it, a party may not be held to the contract[.]”). Because there is no meeting of the minds regarding the material choice-of-law provision, the agreement is void.

*Second*, the agreement is void for unilateral mistake under either New York or Virginia law. Take New York law first. “Under New York law, in order for a court to allow rescission of a contract on the basis of unilateral mistake, a party must establish that (i) he entered into a contract under a

mistake of material fact, and that (ii) the other contracting party either knew or should have known that such mistake was being made.” *Creative Waste Mgmt., Inc. v. Capitol Env’t Servs., Inc.*, 429 F. Supp. 2d 582, 599 (S.D.N.Y. 2006), *supplemented*, 458 F. Supp. 2d 178 (S.D.N.Y. 2006) (quotation omitted); *VCG Special Opportunities Master Fund Ltd. v. Citibank, N.A.*, 594 F. Supp. 2d 334, 343 (S.D.N.Y. 2008), *aff’d*, 355 F. App’x 507 (2d Cir. 2009). “If the party establishes a unilateral mistake as to a basic assumption of the contract, a court may ‘void releases even in the absence of fraud.’” *Id.* (quoting *Middle E. Banking Co. v. State St. Bank Int’l*, 821 F.2d 897, 906 (2d Cir. 1987)); *see also Middle E. Banking*, 821 F.2d at 906 (“While it is true that New York courts will, in some cases, rescind contracts and void releases even in the absence of fraud where unilateral mistake is established, the mistake must be ‘one which is known or ought to have been known to the other party’”) (citation omitted); *Indep. Ord. of Foresters v. Donald, Lufkin & Jenrette, Inc.*, 157 F.3d 933, 940 (2d Cir. 1998) (“As a basic proposition, a contract is made voidable by either unilateral or mutual mistake only where the asserted mistake concerns ‘a basic assumption on which the contract was made.’”) (quoting Restatement (Second) of Contracts §§ 152 (mutual mistake) and 153 (unilateral mistake)).

Bale made the material assumption he could vindicate his rights wherever his claims were decided. Plaintiff’s Opp. Ex. A, Bale Aff., ¶¶ 9–10. But Wells Fargo Advisors did not tell Bale that FINRA arbitrators “are not bound to follow the substantive law” (Plaintiff’s Opp. Ex. B, FINRA Statement, at 1) despite Wells Fargo Advisors’ knowledge of this defining “feature” of FINRA arbitration through its substantial experience before the forum. Plaintiff’s Opp. Ex. A, Bale Aff., ¶ 9. Bale was led to believe whatever forum resolves his disputes with Wells Fargo Advisors *would* be bound to follow substantive law. *Id.* Also, Wells Fargo Advisors and Dougherty never advised Bale of the dismal recoveries to which claimants are subjected before the securities industry’s own

arbitration forum, FINRA. Plaintiff's Opp. Ex. A, Bale Aff., ¶ 10. *see also* Plaintiff's Opp. Ex. C, Ryan Cook, *FINRA Arbitration Customer Win-Rates: A Survey By Jurisdiction*, 24 PIABA L. J. 57, 59 n.7 & 62 (2017) (finding that customers who had over \$1,000,000 in losses, like Bale, were likely to recover only 20.85 cents for every dollar of *compensatory* damages). Thus, under New York law, this Court should not compel Bale to arbitrate his claims—or at a minimum his two statutory claims—before FINRA.

The agreements are also void under the heightened standard for unilateral mistake required by Virginia law. Under Virginia law, a unilateral mistake will provide ground for relief when there is a mistake by one party “accompanied by ‘misrepresentation and fraud perpetrated by the other.’” *Hill v. Brooks*, 253 Va. 168, 178, 482 S.E.2d 816, 823 (1997) (quoting *Ward v. Ward*, 239 Va. 1, 5, 387 S.E.2d 460, 462 (1990)). “A fiduciary relationship exists in all cases when special confidence has been reposed in one who in equity and good conscience is bound to act in good faith and with due regard for the interests of the one reposing the confidence.” *Augusta Mut. Ins. Co. v. Mason*, 274 Va. 199, 207, 645 S.E.2d 290, 295 (2007) (quotation omitted). “Incorporated in every contract between a fiduciary and his principal is an obligation, imposed by law upon the fiduciary, to disclose anything known to him which might affect the principal’s decision whether or how to act.” *Id.* (quoting *Owen v. Shelton*, 221 Va. 1051, 1054, 277 S.E.2d 189, 191 (1981)); *see also* *Owen*, 221 Va. at 1055, 277 S.E.2d at 191 (holding that “the duty to disclose continues so long as the fiduciary relation continues”) (cleaned up).

Bale imposed trust and confidence in Wells Fargo Advisors, expected it would act in his best interest, and gave it authority to engage in discretionary trading under his accounts. Plaintiff's Opp. Ex. A, Bale Aff., ¶ 2. Wells Fargo Advisors therefore was Bale's fiduciary. *See, e.g., Allen Realty Corp. v. Holbert*, 227 Va. 441, 446, 318 S.E.2d 592, 595 (1984) (acknowledging that

Virginia law will impose a fiduciary relationship “when special confidence has been reposed in one who in equity and good conscience is bound to act in good faith and with due regard for the interests of the one reposing the confidence”) (quoting *H–B Partnership v. Wimmer*, 220 Va. 176, 179, 257 S.E.2d 770, 773 (1979)); William Allen Nelson II, *Broker-Dealer: A Fiduciary by Any Other Name?*, 20 Fordham J. Corp. & Fin. L. 637, 663 (2015) (“A majority of courts have found that when brokers are providing anything other than purely transactional assistance, they owe a fiduciary duty to their clients.”). Wells Fargo Advisors therefore had to disclose to Bale that FINRA arbitrators are not bound to follow substantive law and his slim chances of success before FINRA when asking him to arbitrate before that body. Because it did not, Bale’s mistaken belief that FINRA would apply the substantive law and provide a fair forum is a unilateral mistake that voids the alleged arbitration agreements under Virginia law too.

*Third*, the alleged arbitration agreements are void under New York and Virginia law on mutual mistake if Wells Fargo Advisors did not know these facts about FINRA arbitration. “If certain facts are assumed by both parties as the basis of the contract, and it subsequently appears that such facts did not exist, the contract is inoperative.” *Virginia Iron, Coal & Coke Co. v. Graham*, 124 Va. 692, 708, 98 S.E. 659, 664 (1919); *see also Gould v. Bd. of Educ. of Sewanhaka Cent. High Sch. Dist.*, 81 N.Y.2d 446, 453, 616 N.E.2d 142, 145 (1993) (“Generally, a contract entered into under a mutual mistake of fact is voidable and subject to rescission.”); *Simkin v. Blank*, 19 N.Y.3d 46, 52, 968 N.E.2d 459, 462 (2012) (holding that an agreement may be subject to rescission or reformation based on a mutual mistake by the parties if the mistake existed when the contract is entered into and is substantial such that it goes to the foundation of the agreement). “The premise underlying the doctrine of mutual mistake is that ‘the agreement as expressed, in some material respect, does not represent the meeting of the minds of the parties’” *Simkin*, 19 N.Y.3d at 52–53,

968 N.E.2d at 462 (quoting *Gould*, 81 N.Y.2d at 453, 616 N.E.2d at 146)). “No principle of equity is more firmly settled than that relief will be granted from the consequences of a mistake of fact, provided that such mistake is in reference to a fact material to the transaction, and was not occasioned by the parties’ own neglect of a legal duty.” *Virginia Iron, Coal & Coke*, 124 Va. at 707, 98 S.E. at 664 (quotation omitted).

The basic assumption underlying the alleged arbitration agreements is that the parties will be afforded a forum to determine their respective rights arising under the agreement. *See, e.g.*, WFA Mot. Ex. 1, Ex. D at 5 (stating that the underlying belief “[w]ith respect to controversies or disputes which may arise . . . under this Agreement concerning matters involving alleged violations of . . . applicable state investment advisory laws, . . . [is] that an agreement to submit disputes to arbitration does not constitute a waiver of any rights provided under . . . applicable state investment advisory laws”); *Id.* at 21. Because FINRA has proclaimed that its arbitrators “are not bound to follow the substantive law” (Plaintiff’s Opp. Ex. B, FINRA Statement, at 1), this basic assumption the parties made is frustrated such that it does not represent the meeting of the parties’ minds. *Id.* at 21. Thus, even if Wells Fargo Advisors did not know that FINRA arbitrators did not have to follow the law, the alleged agreements are void under New York and Virginia law. *Id.*

Wells Fargo Advisors therefore did not prove it has a valid arbitration agreement with Bale, and the Court should reconsider its decision and deny Wells Fargo Advisors’ motion to compel arbitration, allowing Bale to seek redress for his claims in court.

#### Wells Fargo Bank

Wells Fargo Bank also failed to meet its burden to show a valid arbitration agreement exists between it and Bale. Here too, the Court made no findings and should reconsider its order.

*First*, Wells Fargo Bank improperly relies on a Secured Primeline account agreement from 2016, years after Bale opened his loan account. The Bank has **not** provided an account agreement from the time Bale opened the account to prove the terms he originally agreed to. So on this record, there was no arbitration clause in the original agreement. Nor has it provided evidence that the new arbitration clause from 2016 agreement was supported by separate consideration. Instead, the agreement is a continuation of the original Secured Primeline loan account bargained for years before. *See Castell v. Stephenson Fin. Co.*, 244 S.C. 45, 54, 135 S.E.2d 311, 315 (1964) (“[A]n agreement to do that which one is already legally bound to do is not sufficient consideration to support a new contract.”); *Atl. Joint Stock Land Bank of Raleigh v. Latta*, 164 S.C. 56, 69, 162 S.E. 68, 69 (1932) (“It is elementary that the consideration for a contract cannot consist of the doing of an act which the moving party was in any event required to do as a matter of law or existing contract.”). By relying on contracts formed years after the account was opened and unsupported by consideration, Wells Fargo Bank cannot meet its burden of showing that Bale entered into an enforceable arbitration agreement.

*Second*, Wells Fargo Bank waived the right to rely on the 2016 account agreement by failing to assert it in its past two motions to compel. “Waiver is a voluntary and intentional abandonment or relinquishment of a known right. It may be expressed or implied by a party’s conduct . . . .” *SPUR at Williams Brice Owners Ass’n, Inc. v. Lalla*, 415 S.C. 72, 91, 781 S.E.2d 115, 125 (Ct. App. 2015) (quotation omitted). “If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it.” *Morgan v. Sundance, Inc.*, 596 U.S. 411, 418 (2022). Before its current motion to compel arbitration, Wells Fargo Bank tried to compel arbitration two times in federal court. Plaintiff’s Opp. at 24. During that process, the Bank relied only on the checking and savings

account agreements. There was never any reference to, or inclusion of, the 2016 agreement the Bank relies on now—even after Bale observed *twice* that the Bank cited no loan agreements when previously moving for arbitration. Plaintiff’s Opp. Ex. F, Bale Reply in Support of Motion to Stay and for Discovery, *Bale*, 3:23-cv-660-SAL, at 6–7 (D.S.C. Mar. 28, 2023), ECF No. 21; Plaintiff’s Opp. Ex. G, Bale Memorandum in Opposition to Defendants’ Motions to Compel Arbitration, *Bale*, 3:23-cv-660-SAL, at 10–13 (D.S.C. Dec. 4, 2023), ECF No. 46. By asserting no rights under the 2016 agreement for two years—and affirmatively relying on other agreements instead—the Bank has waived the right it tries to enforce now.

*Third*, the remaining documents which the Bank relies on do not cover Bale’s securities loan account. These agreements relate to *other* accounts: (1) Bale’s “Consumer Account Application for his PMA Prime Checking Account and Way2Save Savings Account dated August 13, 2011,” WF Bank Mot. Ex. B. ¶ 6; Plaintiff’s Opp. Ex. B, Ex. 1; (2) Bale’s “Consumer Account Application for his Wells Fargo High Yield Savings Account dated January 22, 2015,” *id.* Ex. B ¶ 7; Plaintiff’s Opp. Ex. B, Ex. 2; and (3) “the Consumer Account Agreement in effect at the time [Bale] opened his Wells Fargo High Yield Savings Account,” *id.* Ex. B ¶ 8; Plaintiff’s Opp. Ex. B, Ex. 3. But Wells Fargo Bank has failed to prove any of them relate to the account at issue or that the second one even has an arbitration clause. Wells Fargo Bank therefore failed to meet its burden.

The Consumer Account Application for the PMA Prime Checking Account and Way2Save Savings Account dated in 2011 generically states that it is subject to “the applicable account agreement,” which allegedly includes a provision that “our disputes will be decided before one or more neutral persons in an arbitration proceeding and not by a jury trial or a trial before a judge.” WF Bank Mot. Ex. B, Plaintiff’s Opp. Ex. 1 at 3. Wells Fargo Bank did not provide “the applicable account agreement” referenced in this document. And Bale’s high yield savings account

application from 2015 is indecipherable in places, including where the alleged reference to arbitration may be. *See* Plaintiff's Opp. at 26 (image of indecipherable agreement). Finally, Wells Fargo offers no evidence that the only remaining document—the “Customer Account Agreement” effective October 29, 2014—relates to Bale's *Secured Primeline* loan account. Plaintiff's Opp. at 26-27. The affidavit authenticating this document only references the checking and savings accounts and does not mention this loan account. *Id.* at 27. And the agreement itself likewise is limited to traditional checking and savings accounts and related “[e]lectronic banking services,” references “consumer deposit accounts,” and repeats that it “governs consumer deposit accounts maintained at Wells Fargo Bank, N.A.” WF Bank Mot. Ex. B, Ex. 3 at i, 3, 65. Nothing expands the obligations in the agreement to a loan account; the agreement explicitly distances itself from loan accounts. At most, the agreement is ambiguous—and under governing principles of contract law which must apply equally to arbitration agreements, this ambiguity must be construed against the drafter to exclude claims related to Bale's loan account. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (holding that “a court should construe ambiguous language against the interest of the party that drafted it”). Again, the Court's failure to recognize these arguments merits reconsideration and rejection of the motion to compel arbitration.

*LPL Financial*

LPL Financial likewise failed to meet its burden to prove it has a valid arbitration agreement with Bale.

*First*, LPL Financial's account applications do not meet FINRA's requirements for using predispute arbitration agreements. Plaintiff's Opp. at 28. FINRA Rule 2268(b)(1) states that “[i]n any agreement containing a predispute arbitration agreement, there ***shall be a highlighted*** statement immediately preceding any signature line or other place for indicating agreement that

states that the agreement contains a predispute arbitration clause. ***The statement shall also indicate at what page*** and paragraph the arbitration clause is located.” (emphasis added) “FINRA Rule 2268 requires, among other things, that predispute arbitration agreements contain certain highlighted disclosures so that customers are advised about what they are agreeing to when they sign them.” FINRA Notice 11-19 (2011). But none of the documents which LPL relies on to compel arbitration meet these requirements. Plaintiff’s Opp. at 29; LPL Financial Mot. Ex. 1, Ex. B at 15. As a result, LPL Financial cannot enforce its arbitration clauses.<sup>2</sup>

*Second*, LPL Financial’s agreements are void under Massachusetts law due to unilateral mistake for the same reasons as Wells Fargo Advisors’ agreement is void. Under Massachusetts law, “[a] mistake by one party to the knowledge of the other is equivalent to a mutual mistake.” *Corp. Design Ins. Agency, Inc. v. Thomas Ford Sales, Inc.*, 2001 Mass. App. Div. 34 (Dist. Ct. 2001); *Mates v. Penn Mut. Life Ins.*, 316 Mass. 303, 306, 55 N.E.2d 770 (1944). Here too, Bale made the material assumption he could fully vindicate his substantive rights wherever his claims were decided. Plaintiff’s Opp. Ex. A, Bale Aff., ¶¶ 9–10. Bale also assumed he would be made

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<sup>2</sup> The Court’s conclusion that “other courts confronting similar arguments have rejected them” misstates those other cases and Bale’s arguments. *See* Order on LPL Financial’s Mot. at 10 (citing *Singh v. Interactive Brokers, LLC*, 219 F. Supp. 3d 549 (E.D.V.A. 2016) and *Hillow v. E\*Trade Secs., LLC*, No. 4:22-cv-145-JAR, 2022 WL 1165791 (E.D. Mo. April 20, 2022)). In *Singh*, the plaintiffs argued that their case “was not governed by the FAA” and instead was governed by FINRA rules. 219 F. Supp. 3d. at 559. The court rejected the argument that FINRA rules preempt or are an exception to the FAA. *Id.* at 559–60. The plaintiff in *Hillow* made a similar argument that Rule 2268 is a “congressional command” that “override[s] the FAA.” 2022 WL 1165791, at \*5. Neither point is Bale’s argument here. Bale simply argues that the requirements of Rule 2268, by virtue of being expressly incorporated into the account agreement, are a common law condition precedent—which “shall” be met—which LPL Financial failed to fulfill. Enforcing Rule 2268 as incorporated into the account agreements embodies enforcing arbitration agreements “according to their terms.” *Granite Rock Co. v. Int’l Bhd. of Teamsters*, 561 U.S. 287, 314 (2010). On the other hand, giving LPL Financial a pass on this express requirement just because an arbitration agreement is involved improperly grants arbitration agreements special treatment. *See Morgan*, 596 U.S. at 418 (“If an ordinary procedural rule—whether of waiver or forfeiture or what-have-you—would counsel against enforcement of an arbitration contract, then so be it.”).

whole if he had a claim against LPL Financial. Plaintiff's Opp. Ex. A, Bale Aff., ¶ 10; *see also Huang v. Ma*, 491 Mass. 235, 245–46, 201 N.E.3d 713, 722 (2023) (“It is a fundamental principle of contract law that, in the event of breach, the injured party should be put in the position they would have been in had the contract been performed, if possible.”) (internal quotation omitted); *Governo L. Firm LLC v. Bergeron*, 487 Mass. 188, 199, 166 N.E.3d 416, 427 (2021) (“Under the common law of torts, at the time of an accident, an injured party accrues a right to be made whole and compensated for injuries wrongfully inflicted by the tortfeasor.”). But LPL Financial never told Bale, who lacks LPL Financial's familiarity with FINRA arbitration, what it knew about that forum: that FINRA would not be bound to follow the substantive law governing his claims and that customers recover mere pennies on the dollar when required to arbitrate their claims before the industry-created forum of FINRA. Plaintiff's Opp. Ex. A, Bale Aff., ¶¶ 9–10.

*Third*, the agreements are void under Massachusetts law on mutual mistake. “The legal principles underlying the doctrine of mutual mistake are well established. Where there has been a mistake between the parties as to the subject matter of a contract, there has been no ‘meeting of the minds,’ and the contract is voidable at the election of the party adversely affected.” *LaFleur v. C.C. Pierce Co.*, 398 Mass. 254, 257–58, 496 N.E.2d 827, 830 (Mass. 1986). “The mistake must be shared by both parties, and must relate to an essential element of the agreement.” *Id.* at 258, 496 N.E.2d at 830. An essential element of the alleged arbitration agreements with LPL Financial is a party's ability to have “any controversy . . . settled by arbitration,” including claims arising under statute. LPL Financial Mot. Ex. 1, Ex. B at 15. If both Bale and LPL Financial were mistaken on a party's ability to vindicate its substantive rights before FINRA, then the alleged agreements are void for mutual mistake. In sum, Bale's account agreement with LPL Financial, or at the least the arbitration provision within it, is void due to mistake under Massachusetts law.

The Court's order does not address these arguments in substance. It instead makes four conclusory findings which overlook and misapprehend the law and facts. The order begins by incorrectly suggesting that Bale's mistake argument is that he "later disagreed on [his] forum selection choice." Order on LPL Financial Mot. at 10–11. This is not a case of buyer's remorse. This is a case of LPL Financial withholding information which it had a duty to disclose about the forum in the agreement. The order also finds that Bale bore the risk of any unilateral mistake. *Id.* at 11. But the order never explains how or why Bale bore the risk when (1) LPL Financial knew these facts, (2) Bale did not know them, and (3) LPL Financial had the duty to disclose them but did not. Next, the order "declines to make the sweeping finding that the entire forum of FINRA is unconscionable on the basis of nothing more than Plaintiff's speculation as to the outcome of this particular case." *Id.* at 10 n.9. Bale never made that argument. He instead argued that LPL Financial's failure to disclose the FINRA award statistics is a unilateral or mutual mistake of fact which voids any agreement to arbitrate before that forum.

The order's last finding is that the prohibition of arbitration when a plaintiff cannot "effectively vindicate his statutory rights in the arbitral forum," *In re Cotton Yarn Antitrust Litig.*, 505 F.3d 274, 282 (4th Cir. 2007), only applies to federal statutes and not state ones. Order on LPL Financial Mot. at 11. The case it cites for this proposition, *American Express Co. v. Italian Colors Restaurant*, 570 U.S. 228 (2013), is irrelevant because it evaluated a *federal procedural* rule and not *state substantive* statutory rights. There, the plaintiff argued that a class action waiver in an arbitration clause prevented efficient resolution of antitrust claims. The Court held that individual suits were a path to effectively vindicate these rights because the rights were not substantively curtailed. *Id.* at 236–37. The majority did not discuss state statutory rights because none were at issue. The only discussion of state rights is in dissent. *Id.* at 252 (Kagan, J., dissenting). Returning

to arbitration's foundations in contract law, the question is can someone waive rights under the Securities Act or the Unfair Trade Practices Act. If parties cannot do so generally, then an arbitration agreement cannot effectively waive them. And under general South Carolina law, parties cannot waive these rights. S.C. Code Ann. § 35-1-509(*l*); *Simpson*, 373 S.C. at 29–30 & n.7, 644 S.E.2d at 671 & n.7.

In any event, Bale did not make a standalone argument that his inability to effectively vindicate his statutory rights before FINRA precludes enforcement of the arbitration agreements. He instead argued that the “effective vindication” standard shows the materiality of the fact that FINRA need not follow substantive law and of FINRA's recovery statistics, and LPL Financial's (and Wells Fargo Advisors') failure to disclose them therefore constitutes a unilateral mistake of fact. Plaintiff's Opp. at 31–33.

\* \* \*

None of the moving Defendants proved a valid arbitration agreement exists with Bale. The Court therefore should reconsider its orders and now reject the motions seeking to compel arbitration before FINRA and AAA.

#### **IV. This Court Did Not Address the FINRA Rules Prohibiting Dougherty from Compelling Arbitration.**

This Court did not consider that since December 1, 2023, John Dougherty has been permanently barred in all capacities by FINRA from acting as a broker or otherwise associating with a broker-dealer firm and, as a result, he is ineligible for arbitration unless the customer consents under FINRA Rule 12202(a). Plaintiff's Opp. at 34. Despite clear authority under FINRA's rules, and despite Bale's lack of consent to arbitrate this matter with Dougherty, this Court compelled arbitration and created the exact situation which FINRA tried to avoid. *Id.* at 35. While Bale staunchly maintains there is no enforceable arbitration agreement with any Wells Fargo

entity, which extends to Dougherty, this is an independent reason to deny arbitration as to him. The Court therefore should reconsider its ruling.

### CONCLUSION

For these reasons, along with those in Bale's briefing and arguments made on these motions, the Court should reconsider its orders, deny these Defendants' motions to compel arbitration, and allow Bale to have his day in court.

Respectfully submitted,

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*Attorneys for Plaintiff*

July 21, 2025  
Charleston, South Carolina

# EXHIBIT 10

|                                            |   |                                   |
|--------------------------------------------|---|-----------------------------------|
| STATE OF SOUTH CAROLINA                    | ) | IN THE COURT OF COMMON PLEAS      |
| COUNTY OF RICHLAND                         | ) | FIFTH JUDICIAL CIRCUIT            |
|                                            | ) |                                   |
| Curtis D. Bale,                            | ) | Civil Action No. 2023-CP-40-00242 |
|                                            | ) |                                   |
| Plaintiff,                                 | ) |                                   |
|                                            | ) |                                   |
| vs.                                        | ) |                                   |
|                                            | ) | <b>DEFENDANT LPL FINANCIAL</b>    |
| John A. Dougherty; Wachovia Securities     | ) | <b>LLC'S OPPOSITION TO</b>        |
| Financial Holdings, LLC; Wells Fargo       | ) | <b>PLAINTIFF'S MOTION FOR</b>     |
| Clearing Services, LLC, f/k/a Wells Fargo  | ) | <b>RECONSIDERATION</b>            |
| Advisors, LLC; Wells Fargo & Company;      | ) |                                   |
| Wells Fargo Bank, N.A.; and LPL Financial, | ) |                                   |
| LLC,                                       | ) |                                   |
|                                            | ) |                                   |
| Defendants.                                | ) |                                   |

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Defendant LPL Financial LLC (“LPL”) hereby submits this memorandum in opposition to Plaintiff Curtis D. Bale’s Motion for Reconsideration (the “Motion”). On July 9, 2025, this Court entered an Order granting LPL’s Motion to Compel Arbitration and compelling all claims raised by Plaintiff against LPL to binding and enforceable arbitration before FINRA, as set forth in the agreements signed by the Parties. Even though: 1) Plaintiff signed valid, enforceable arbitration agreements, 2) LPL demonstrated in its papers and arguments before this Court that Plaintiff’s claims must be compelled to arbitration, and 3) this Court’s July 9, 2025 Order addressed all of Plaintiff’s arguments in opposition to LPL’s Motion to Compel, Plaintiff now seeks reconsideration of that Order by advancing the exact same arguments the Court already considered—and rejected. ***Plaintiff offers no new evidence or law, this Court did not err in its ruling***, so the Motion therefore fails to demonstrate any grounds for reconsideration.

For the reasons detailed below, and for the reasons set forth in LPL’s Motion to Compel Arbitration (filed March 25, 2024), LPL’s Memorandum in Support of Motion to Compel

Arbitration and Dismiss (filed Nov. 8, 2024), and this Court's Order Granting LPL's Motion to Compel Arbitration (entered July 9, 2025), Plaintiff's Motion must be denied.

### **BACKGROUND**

Plaintiff chose to file his Complaint with this Court on January 17, 2023, rather than submitting it in the agreed-upon FINRA arbitral forum. Since that time, LPL has been attempting to compel Plaintiff to arbitrate this matter, including by filing its Motion to Compel Arbitration with this Court on March 25, 2024. Plaintiff has opposed those efforts, along with the motions to compel arbitration filed by the Wells Fargo Co-Defendants. This Court held a hearing on Defendants' Motions to Compel on November 18, 2024, and on March 26, 2025, the Court issued a Form 4 Order granting Defendants' motions to compel arbitration and directing Defendants to submit proposed written orders. On July 9, 2025, the Court entered its written order granting LPL's Motion to Compel Arbitration. Rather than comply with that Order and his arbitration agreements with LPL, Plaintiff chose instead to file the instant Motion to Reconsider on July 21—impermissibly raising the same grounds he previously raised that have already been considered, and rejected, by this Court.

### **LEGAL STANDARD**

Plaintiff brings his motion to reconsider as a motion to alter or amend under S.C. Rule of Civil Procedure 59(e). Rule 59(e) motions should be granted sparingly and only in the following circumstances: (1) to accommodate an intervening change in controlling law; (2) to account for new evidence not available at the time the issue was presented; or (3) to correct a clear error of law or prevent manifest injustice. *See Hutchinson v. Staton*, 994 F.2d 1076, 1081–82 (4th Cir. 1993); *Villagomez v. Knight*, No. 1:21-cv-0309-MBS, 2022 WL 1050464, at \*1 (D.S.C. Mar. 7, 2022); *see also Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 22, 602 S.E.2d 772, 779 (2004) (noting

that “Rule 59(e) in the South Carolina and federal rules of civil procedure” are “practically identical” and drawing on federal precedent to interpret Rule 59(e) of the South Carolina Rules of Civil Procedure). “Mere disagreement with the court’s ruling does not warrant a Rule 59(e) motion.” *Villagomez*, 2022 WL 1050464, at \*1 (citations omitted).

### **ARGUMENT**

Plaintiff’s Motion does not satisfy any of the grounds warranting relief under Rule 59(e) and instead consists of nothing more than Plaintiff’s *mere disagreement* with the Court’s rejection of the arguments he previously raised. There have been no intervening changes in controlling law; there has been no evidence discovered that was not available at the time of the decision; there has not been any clear error in law; and there has not been any manifest injustice.

**First**, Plaintiff does not identify any intervening change in controlling law.<sup>1</sup> Indeed, much of the argument in Plaintiff’s Motion appears to be copied wholesale from his Opposition to LPL’s Motion to Dismiss and Compel Arbitration, highlighting that the Motion offers no new law for this Court to consider.

**Second**, Plaintiff does not identify any new evidence—much less new evidence unavailable at the time of his Opposition to LPL’s Motion to Dismiss and Compel Arbitration. Again, Plaintiff’s Motion simply relies upon the very same facts as before, offering no new evidence for this Court to consider.

**Finally**, Plaintiff does not identify any clear error of law. Instead, Plaintiff’s Motion merely argues that this “Court overlooked the failure of . . . LPL Financial to meet [its] burden of proving the existence of a valid and enforceable arbitration agreement.” (Pl.’s. Mot. at 2.) Plaintiff

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<sup>1</sup> Plaintiff cites one additional case that has been decided since the hearing, but it is not applicable to LPL, and in any event, Plaintiff does not suggest it represents a change in controlling law. (Pl.’s Mot. at 7.)

then seeks to reargue the same points this Court previously rejected—without presenting any reasonable grounds for reconsideration—simply seeking a different result. There is no clear error of law or manifest injustice here, where the Court properly considered and rejected the same evidence and arguments Plaintiff raises again in his Motion for Reconsideration. *See Brown v. United States*, No. 2:21-cv-030801-DCN, 2025 WL 642115, at \*4–5 (D.S.C. Feb. 27, 2025) (“[A] prior decision does not [constitute clear error or manifest injustice] by being just maybe or probably wrong; it must strike [the court] as wrong with the force of a five-week-old, unrefrigerated dead fish. It must be dead wrong.” (quoting *U.S. Tobacco Coop. v. Big S. Wholesale of Virginia, LLC*, 899 F.3d 236, 258 (4th Cir. 2018))).

Moreover, Plaintiff’s assertion that the Court “overlooked” its argument regarding the existence of a valid and enforceable agreement is simply wrong because this Court specifically addressed that concern and each of the three arguments Plaintiff now repeats in his Motion. (*Compare* Order. on LPL Financial Mot. at 10–11, *with* Pl.’s Mot. at 15–19, *and* Pl.’s Opp’n. to LPL’s Mot. to Dismiss and Compel Arbitration at 28–33.)

Far from being “dead wrong,” the Court’s Order *correctly* rejected Plaintiff’s arguments. Because Plaintiff’s Motion simply raises the same arguments that LPL has previously addressed, LPL will not repeat them in full here.<sup>2</sup> In summary, LPL satisfied its burden under the Federal Arbitration Act (“FAA”) to demonstrate it has a valid arbitration agreement with Plaintiff. LPL demonstrated that Plaintiff’s argument referencing FINRA’s rules about notice (however Plaintiff chooses to describe that argument) cannot constitute an exception to the FAA, and demonstrated that Plaintiff’s arguments of both unilateral and mutual mistake were meritless because Plaintiff

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<sup>2</sup> LPL expressly and fully incorporates the arguments set forth in its Memorandum in Support of its Motion to Compel Arbitration with exhibits, filed on November 8, 2024, as if fully stated herein.

bore the risk, and could offer nothing more than rank speculation about the outcome and generalized complaints about the FINRA arbitration forum.

In short, Plaintiff's "[m]ere disagreement with the court's ruling does not warrant relief under the Rule 59(e) motion." *Villagomez*, 2022 WL 1050464, at \*1 (citations omitted). At no point in the Motion does Plaintiff identify any intervening changes in controlling law; evidence discovered that was not available at the time of the decision; any clear error in law; or any manifestation of injustice that would justify the relief sought. That's because there is none. There are no grounds for reconsideration under Rule 59(e). The Motion is simply a recapitulation of arguments the Court has already heard and decided against Plaintiff. Plaintiff presents no basis to alter or amend this Court's Order, and the Motion must be denied.

### **CONCLUSION**

For the foregoing reasons and those already set forth in LPL's Motion to Compel Arbitration and Memorandum in support of same, as well as in this Court's Order granting LPL's Motion to Compel Arbitration, Plaintiff is not entitled to reconsideration of the Court's Order compelling arbitration, and his Motion should be denied.

Submitted this 27th day of August 2025.

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# EXHIBIT 11

STATE OF SOUTH CAROLINA  
COUNTY OF RICHLAND

) IN THE COURT OF COMMON PLEAS  
)  
) CASE NO.: 2023-CP-40-00242

Curtis D. Bale,

Plaintiff,

v.

John A Dougherty; Wachovia Securities Financial Holdings, LLC; Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC; Wells Fargo & Company; Wells Fargo Bank, N.A.; and LPL Financial, LLC,

Defendants.

**DEFENDANTS WELLS FARGO BANK,  
N.A., WELLS FARGO CLEARING  
SERVICES, LLC, AND JOHN A.  
DOUGHERTY'S RESPONSE TO  
PLAINTIFF'S MOTION FOR  
RECONSIDERATION**

Under South Carolina Rule of Civil Procedure 59(e), Defendants Wells Fargo Bank, N.A., Wells Fargo Clearing Services, LLC, and John A. Dougherty submit this response in opposition to Plaintiff Curtis D. Bale's motion seeking reconsideration of the Court's July 9, 2025 Orders compelling arbitration. The Court's decisions to compel arbitration are correct, and Bale has given the Court no sufficient reason to reach a different conclusion on his second bite at the apple. The Court should deny the motion.

#### INTRODUCTION

Bale asks the Court, under Rule 59(e), to reconsider its orders granting Wells Fargo Bank's and Wells Fargo Clearing's motions to compel arbitration. In a Rule 59(e) motion, a party may suggest the court has misapprehended an argument or ask the court to revisit an argument it has already rejected. *See Elam v S.C. Dep't of Transp.*, 602 S.E.2d 772, 778–79 (S.C. 2004). Nonetheless, granting motions to reconsider under Rule 59(e) is hardly ordinary.

Here, Bale gives the Court no sufficient reason to revisit its previous orders and change its mind. Instead, he asserts only the same arguments he made when he initially opposed the motions

to compel arbitration. The Court was correct to reject those arguments then, and it should reject them again now. The Court should deny Bale's motion to reconsider.

#### ARGUMENT

##### **1. Unconscionability is a question for the arbitrator.**

Under the Federal Arbitration Act, delegation clauses—clauses that assign gateway issues related to formation, validity, or enforceability to the arbitrator—are valid and courts must enforce them. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 71 (2019) (“When the parties’ contract delegates the arbitrability question to an arbitrator, the courts must respect the parties’ decision as embodied in the contract.”); *see also Rent-A-Center W., Inc. v. Jackson*, 561 U.S. 63, 72–73 (2010); *Blume v. Starbucks Corp.*, No. 2023-001506, 2025 WL 2159033, at \*3–4 (S.C. Ct. App. July 30, 2025). Unconscionability is one of the threshold questions that arbitrators must decide when the parties have agreed to delegate questions of formation, validity, or enforceability to the arbitrator. *See Wu v. Uber Techs., Inc.*, 260 N.E.3d 1060, 1078–79 (N.Y. 2024) (holding that, under delegation provision in the contract, unconscionability was a question for the arbitrator); *see also Rent-A-Center*, 561 U.S. at 72–73 (same).

Here, Bale argues that the arbitration agreements with both Wells Fargo Clearing and Wells Fargo Bank are unconscionable, (Pl.’s Mot. to Reconsider at 5–7) despite the fact that the record is devoid that Bale ever sought any changes or modifications to the agreements. But, as Wells Fargo Clearing and Wells Fargo Bank explained when they moved to compel arbitration, the relevant agreements contain delegation clauses that delegate questions of unconscionability to the arbitrator. (*See* Mem. of Law in Support of Wells Fargo Bank, N.A.’s Mot. to Compel Arbitration at 10–11; Mem. of Law in Support of Wells Fargo Clearing Services’ Mot. to Compel Arbitration at 10–11.) So the Court should decline to decide Bale’s unconscionability challenge and, instead, refer the issue to arbitration.

**2. Bale's Agreements with Wells Fargo Clearing and Wells Fargo Bank are not unconscionable.**

Again, an arbitrator should decide Bale's unconscionability challenge, not this Court. But if the Court were to reach the question, it should conclude that the relevant arbitration agreements are not unconscionable.

Under South Carolina law,<sup>1</sup> "unconscionability is defined as the absence of meaningful choice on the part of one party due to one-sided contract provisions, together with terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them." *Gladden v. Boykin*, 739 S.E.2d 882, 884 (S.C. 2013). To determine "whether a contract was tainted by an absence of meaningful choice, courts should take into account the nature of the injuries suffered by the plaintiff; whether the plaintiff is a substantial business concern; the relative disparity in the parties' bargaining power; the parties' relative sophistication; whether there is an element of surprise in the inclusion of the challenged clause; and the conspicuousness of the clause." *Simpson v. MSA of Myrtle Beach, Inc.*, 644 S.E.2d 663, 669 (S.C. 2007) (quotation modified).

Bale argues the terms of the arbitration agreements are unreasonably oppressive for two reasons. First, he argues that in their aggregate, the arbitration agreements with Wells Fargo Clearing and Wells Fargo Bank, and the lack of an agreement with Wells Fargo & Co. result in Bale having to litigate his claims against the three entities in three different forums. (Pl.'s Mot. to Reconsider at 6–7.) There are multiple problems with this argument. Among them, Bale cites no authority holding (or even suggesting) that he can treat multiple independent legal entities as one

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<sup>1</sup> Bale asks the Court to assess unconscionability under South Carolina law, but he asks the Court to assess mistake under New York or Virginia law.

party and multiple independent legal agreements as one agreement and then assess their aggregate effect to determine whether the individual agreements are unconscionable. Bale did not contract with an aggregated entity named “Wells Fargo”; he contracted with Wells Fargo Clearing and Wells Fargo Bank. The same principle applies to the contracts. Further, Bale fails even to attempt an argument that no fair, honest, and reasonable person would agree to litigate different claims against different, though related, parties in different forums. *See Gladden*, 739 S.E.2d at 884 (noting that unconscionability requires “terms that are so oppressive that no reasonable person would make them and no fair and honest person would accept them”). As it did before, the Court should reject this argument.

Second, Bale argues the terms are oppressive because Wells Fargo Clearing and Wells Fargo Bank both “retain the right to unilaterally modify the agreements.” (Pl.’s Mot. to Reconsider at 7.) But the relevant provisions require notice to Bale of any changes, something Bale acknowledged in his initial opposition to the motions to compel arbitration (*See* Pl’s Opp’n to Defs.’ Mots. to Dismiss & Compel Arbitration at 16 (citing WFA Mot. Ex. 1, Ex. B at 7; *id.* at Ex. 1, Ex. C at 7; *id.* at Ex. 1, Ex. D at 13; *id.* at Ex. 1, Ex. E at 12; WF Bank Mot. Ex A, Ex. 1 at 5.) As multiple courts have held, this type of notice requirement prevents the ability to make unilateral changes from rendering a contract unconscionable. *See, e.g., Bank of Am., N.A. v. Jill P. Mitchell Living Tr.*, 822 F. Supp 2d 505, 527 (D. Md. 2011) (“Courts may enforce contracts that provide a party with the unilateral right to modify an agreement so long as the contract requires the party to give advance notice of his or her intention to do so.”); *see also Larsen v. Citibank FSB*, 871 F.3d 1295, 1318 (11th Cir. 2017); *ShaZor Logistics, LLC v. Amazon.com, LLC*, 628 F. Supp. 3d 708, 715 (E.D. Mich. 2022); *Biglow v. Dell Techs., Inc.*, No. 20-2563-KHV, 2021 WL 1784559, at \*5 (D. Kan. May 5, 2021); *Yufan Zhang v. UnitedHealth Grp.*, 367 F. Supp. 3d 910, 916 (D. Minn. 2019);

*Gergeni v. Evangelical Lutheran Good Samaritan Soc’y*, No. 17-cv-4037, 2018 WL 1175228, at \*4–5 (N.D. Iowa Mar. 6, 2018); *Forbes v. SeaWorld Parks & Entm’t*, No. 4:16-cv-172, 2017 WL 2437348, at \*5 (E.D. Va. June 2, 2017). Thus, the unilateral change provision does not render these agreements unconscionable.

Not only has Bale not shown oppressive terms, he also has not shown that he lacked meaningful choice. Bale argues that the agreements were not negotiated, but a take-it-or-leave-it contract is not per se unconscionable so long as the terms are not oppressive. *See Damico v. Lennar Carolinas, LLC*, 879 S.E.2d 746, 755 (S.C. 2022); *Mart v. Great S. Homes, Inc.*, 893 S.E.2d 360, 367 (S.C. Ct. App. 2023). He acknowledges that he is a sophisticated professional. (Pl.’s Mot. to Reconsider at 6.) He complains that he lacked counsel, (*see id.*), but he offers no evidence that Wells Fargo Clearing or Wells Fargo Bank acted to prevent or discourage him from consulting with an attorney. He points to nothing surprising about the provisions, and he does not argue the provisions were hidden or otherwise inconspicuous. Lastly, Bale argues his \$9.5 million investment and \$5 million loan did not represent a substantial business concern. (*See id.*) That statement refutes itself.

In short, Bale has not shown that he lacked a meaningful choice about whether to contract with Wells Fargo Clearing or Wells Fargo Bank on the terms to which he agreed. He also has not shown that the terms to which he agreed are so oppressive that no reasonable person would have agreed to them. So he has not shown the agreements are unconscionable.

### **3. The Agreement between Wells Fargo Clearing and Bale is not void based on mistake.**

Bale contends the Court should not enforce the arbitration agreement because there was either a unilateral or mutual mistake about whether FINRA arbitrators are “bound to follow the substantive law” and because FINRA arbitration recoveries are lower than Bale thinks they should be. (Pl.’s Mot. to Reconsider at 8–12.) As it did before, the Court should reject Bale’s arguments.

Under New York law, a mistake is an insufficient basis to rescind or reform an agreement. *See Barclay Arms, Inc. v. Barclay Arms Assocs.*, 540 N.E.2d 707, 708–09 (N.Y. 1989) (“A bare claim of unilateral mistake by plaintiff, unsupported by legally sufficient allegations of fraud on the part of defendants, does not state a cause of action for reformation”). It is not a “mistake” if a party misunderstood a contract’s terms, failed to take steps to ensure the contract reflected the agreement, or failed to exercise ordinary care in the transaction when the means to gain knowledge were readily accessible. *See Summit Health, Inc. v. APS Healthcare Bethesda, Inc.*, 993 F. Supp. 2d 379, 405 (S.D.N.Y. 2014) (“Rescission will be denied if the mistake arises out of negligence and the means of knowledge were easily accessible.” (quotation marks omitted); *Winmar Co. v. Teachers Ins. & Annuity Ass’n of Am.*, 870 F. Supp. 524, 538 (S.D.N.Y. 1994) (“[I]t was incumbent upon Winmar to ensure that the agreement reflected the prior understanding of the parties.”); *Marren v. Nathan*, 2 A.D.3d 230, 231 (N.Y. App. Div. 2003) (“At most, plaintiff shows only that he misunderstood the terms of the stipulation, i.e., a unilateral mistake insufficient to support a claim for reformation.”). Further, reformation based on unilateral mistake requires either fraudulent concealment or one party taking advantage of the other party’s error under circumstances that constitute fraud. *See Am. Home Assur. Co. v. Merck & Co.*, 329 F. Supp 2d 436, 444 (S.D.N.Y. 2004) (“Under New York law, reformation may be granted in only two circumstances: where there has been (1) a mutual mistake, or (2) unilateral mistake coupled with fraudulent concealment by the knowing party.”); *Resort Sports Network Inc. v. PH Ventures III, LLC*, 67 A.D.3d 132, 136 (N.Y. App. Div. 2009) (“A unilateral mistake may give rise to reformation where the other party takes advantage of an error only it has noticed under circumstances constituting fraud.”). “This require-

ment comports with the general rule that one who signs a document is, absent fraud or other wrongful act by the other contracting party, bound by its contents.” 28 Glen Banks, *New York Practice Series, Contract Law* § 6.10 (2025).

Virginia law is much the same. See *Langman v. Alumni Ass’n of Univ. of Va.*, 442 S.E.2d 669, 677 (Va. 1994) (“A unilateral mistake will not invalidate a contract.”); see also *Hill v. Brooks*, 482 S.E.2d 816, 823 (Va. 1997). For that matter, so is South Carolina law. See 30 Roderick J. Mortimer, *South Carolina Jurisprudence* § 28 (2025) (“Accordingly, a contract may be rescinded based on unilateral mistake only where the mistake has been induced by fraud, deceit, misrepresentation, concealment, or imposition of the party opposed to rescission, without negligence on the part of the party claiming rescission, or where the mistake is accompanied by very strong and extraordinary circumstances which would make it a great wrong to enforce the agreement.”).

Here, Bale argues mistake based on a statement by FINRA that its arbitrators “are not bound to follow the substantive law.” (See Pl.’s Mot. to Reconsider at 8–12.) But Bale pulls that quotation from a public FINRA statement made to the SEC, a statement that is available to the public online. See Securities & Exchange Comm’n Investor Advisory Committee Panel on Securities Arbitration, Financial Industry Regulatory Authority Statement on Key Issues, at 1 (May 17, 2010), <https://www.sec.gov/spotlight/invadvcomm/iacmeeting051710-finra.pdf>. Further, the statement is hardly a new idea. Courts have been noting in their published opinions that arbitrators are not bound by substantive law for decades. See *Lentine v. Fundaro*, 278 N.E.2d 633, 635 (N.Y. 1972) (“Absent provision to the contrary in the arbitration agreement, arbitrators are not bound by principles of substantive law or rules of evidence.”). Because the information in the FINRA statement was readily accessible to Bale when he contracted with Wells Fargo Clearing, the statement cannot be a basis to invalidate an agreement based on mistake.

Further, Bale points to no evidence at all that Wells Fargo Clearing acted in any way to conceal from Bale that FINRA arbitrators are not bound by substantive law, that he reasonably relied on Wells Fargo Clearing to disclose it, or that Wells Fargo Clearing was ever aware that Bale was ignorant of the topic and chose to take advantage of that ignorance. Thus, again, the information in the statement cannot be a basis to invalidate an agreement based on mistake.

Much the same is true for Bale's argument about the size of FINRA awards. To support his assertions about the size of FINRA awards, he cites to a publicly accessible journal article. (See Pl.'s Mot. to Reconsider at 8–12 (citing Ryan Cook, *FINRA Arbitration Customer Win Rates: A Survey by Jurisdiction*, 24 PIABA Bar J. 57, 59 n.7, 62 (2017).) Further, Cook's article was based on publicly available information from "FINRA's online repository of arbitration awards"—information published by FINRA. Cook, *supra* at 57–58. Thus, all this data was readily available to Bale, and Bale has no evidence that Wells Fargo Clearing concealed it, that he reasonably relied on Wells Fargo Clearing to disclose it, or that Wells Fargo Clearing was ever aware that Bale was ignorant of the information and sought to take advantage of it. This argument by Bale also fails to take into account the multiple unknown factors that impact any such statistics such as taking into account that most meritorious claims are settled without any hearing thus leaving less meritorious claims to be tried.

As a result, this is not a case in which the Court should invalidate an agreement based on mistake.

**4. There was a meeting of the minds between Wells Fargo Clearing and Bale.**

In addition to arguing unconscionability and mistake, Bale argues his multiple agreements (emphasis on the fact that word is plural) with Wells Fargo Clearing are invalid due to a lack of a meeting of the minds on choice of law because one of the agreements chooses Virginia law and one of them chooses New York law. (See Pl.'s Mot. to Reconsider at 8.) But when the essential

terms of a contract (emphasis on the fact that word is singular) are not ambiguous or indefinite, “a party to a written contract ... cannot say their minds did not meet.” *Time Warner Cable v. Condo Servs., Inc.*, 672 S.E.2d 816, 820 (S.C. Ct. App. 2009) (quoting *Parker v. Byrd*, 420 S.E.2d 850, 853 (S.C. 1992)).

Here, Bale points to no ambiguity or indefiniteness in the terms of either agreement with Wells Fargo Bank or Wells Fargo Clearing. Instead, he attempts to create one external to the contracts by noting that his two different contracts include different choice-of-law provisions. But the parties manifested mutual assent that Virginia law would govern their relationship under one agreement and New York law would govern their relationship under the other. So their minds met.

The two contracts choosing different states’ laws may mean that the arbitrator will face conflicts of law questions or have to decide which contract governs which portion of Bale’s claims. Those are not, however, questions of a meeting of the minds.

**5. Wells Fargo Bank can compel arbitration based on the 2016 Secured Primeline Agreement and the Consumer Account Agreement.**

In 2013, Wells Fargo Bank issued a “Secured Primeline” loan to Bale for roughly \$5 million. (See Compl. at ¶ 25; see also Pl’s Opp’n to Defs’ Mots. to Dismiss & Compel Arbitration, Ex. A at ¶ 5.) That loan lies at the heart of this lawsuit.

In its motion to compel arbitration, Wells Fargo Bank relies (in part) on the dispute resolution clause in the Secured Primeline Account Agreement. (See Mem. of Law in Support of Wells Fargo Bank, N.A.’s Mot. to Compel Arbitration at 2; see also Wells Fargo Bank, N.A.’s Mot. to Dismiss & Compel, Ex. A at Ex. 1, p. 7.) It also relies on a Consumer Account Agreement Bale signed in 2015. (See Mem. of Law in Support of Wells Fargo Bank, N.A.’s Mot. to Compel Arbitration at 3; see also Wells Fargo Bank, N.A.’s Mot. to Dismiss & Compel, Ex. B at Ex. 1, p. 3.)

Bale argues that Wells Fargo Bank cannot compel arbitration based on the Secured Prime-line Agreement for two reasons. First, he argues that the Secured Primeline Agreement he signed in 2013 did not include an arbitration agreement. According to Bale, the arbitration provision in the 2016 version of the Agreement on which Wells Fargo Bank relies is a modification not supported by separate consideration. (Pl.’s Mot. to Reconsider at 13.) Second, Bale argues that Wells Fargo Bank has waived any right to rely on the Secured Primeline Agreement to compel arbitration. The Court should reject both arguments. (*Id.* at 13–14.)

One, assuming for the sake of argument that the Secured Primeline Agreement Bale signed in 2013 did not include an arbitration provision, the Agreement includes a provision that permits Wells Fargo Bank to change the terms of the Agreement.<sup>2</sup> (Wells Fargo Bank, N.A.’s Mot. to Dismiss & Compel, Ex. A at Ex. 1, p. 5.) So if Wells Fargo Bank added the provision, it had a contractual right to do so. What is more, Bale assented to the change when he executed the 2016 version of the Secured Primeline Agreement. (*See id.* at Ex.1, p. 8.)

There is also new consideration to support the supposed modification to add the arbitration provision—mutual promises. Under the arbitration provision, both Bale and Wells Fargo Bank are obligated to arbitrate their disputes with each other. (*See id.* at Ex. 1, p. 5.) If the arbitration provision was not in the 2013 version of the Secured Primeline Agreement as Bale argues, then when it was added, Wells Fargo Bank also took on a new obligation to Bale to arbitrate its disputes. The parties’ new obligations to arbitrate—an exchange of a promise for a promise—is a hornbook example of consideration. *See Rickborn v. Liberty Life Ins. Co.*, 468 S.E.2d 292, 304 (S.C. 1996) (“[T]he exchange of promises qualified as consideration.”); *Evatt v. Campbell*, 106 S.E.2d 447,

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<sup>2</sup> In fact, Bale relies on this clause as part of his argument that the agreement is unconscionable. (*See* Pl.’s Mot. to Reconsider at 7.)

451 (S.C. 1959) (“Mutual promises also constitute a good consideration.”); *Furman Univ. v. Waller*, 117 S.E. 356, 362 (S.C. 1923) (“Promise for promise is a sufficient consideration.” (quoting *Rice v. Sims & Worthy*, 42 S.C.L. (8 Rich.) 416, 420 (Ct. App. 1832))).

Two, Bale has not shown that Wells Fargo Bank waived any right to compel arbitration under the Secured Primeline Agreement. That Wells Fargo Bank previously relied on other arbitration provisions in other cases involving Bale has no bearing on whether Wells Fargo Bank has acted inconsistently with its right to compel arbitration under the Secured Primeline Agreement in this case. Further, relying on other documents as a source of a right to compel arbitration is not even inconsistent, and Bale cites no decision of any court holding that it is.

What is more, under South Carolina law “[t]he party seeking to establish waiver has the burden of showing prejudice through an undue burden caused by a delay in the demand for arbitration’ Mere inconvenience or delay is insufficient to establish prejudice on its own.” *Johnson v. Heritage Healthcare of Estill, LLC*, 788 S.E.2d 216, 218–19 (S.C. 2016) (quoting *Gen. Equip. & Supply Co. v. Keller Rigging & Constr., SC, Inc.*, 544 S.E.2d 643, 645 (S.C. Ct. App. 2001)). In his motion to reconsider, Bale never argues (much less shows) that Wells Fargo’s decision not to rely on the Secured Primeline Agreement in other proceedings has caused any delay that has resulted in an undue burden on Bale. (Pl.’s Mot. to Reconsider at 13–14.)

Thus, Wells Fargo Bank has an enforceable right to compel arbitration under the Secured Primeline Agreement. The Court should reject Bale’s arguments to the contrary.

In addition, Wells Fargo Bank has a right to compel arbitration under the Consumer Account Agreement. (See Mem. of Law in Support of Wells Fargo Bank, N.A.’s Mot. to Compel

Arbitration at 3.) In his motion to reconsider, Bale argues that the arbitration provision in the Consumer Account Agreement does not cover his securities loan account. (See Pl.'s Mot. to Reconsider at 14.)

Yet South Carolina courts enforce unambiguous contracts according to the plain language of their terms. *See Milliken & Co. v. Morin*, 731 S.E.2d 288, 295 (S.C. 2012) (“We must therefore apply the contract’s plain language.”); *Donahue v. Multimedia, Inc.*, 608 S.E.2d 162, 167 (S.C. Ct. App. 2005) (“It is this court’s duty to enforce the plain language of [the] contract.”). Here, the unambiguous terms of the arbitration clause in the Consumer Account Agreement requires Bale to submit all “dispute[s]” to arbitration, and it defines a dispute as:

any unresolved disagreement between you and the Bank. It includes any disagreement relating in any way to services, accounts, or matters; to your use of any of the Bank’s banking locations or facilities; or to any means you may use to access your account(s). It includes claims based on broken promises or contracts, torts, or other wrongful actions. It also includes statutory, common law, and equitable claims.

(Wells Fargo Bank, N.A.’s Mot. to Dismiss & Compel, Ex. B at Ex. 3, p. 4.). Bale’s claims against Wells Fargo Bank in this lawsuit all fall within that definition, which is unambiguous. So the Court should enforce the provision according to its terms.

#### **6. FINRA retains jurisdiction over Dougherty for claims filed before December 1, 2025.**

Bale creates a new (but previously uninserted argument) that under FINRA Rule 12202(a), Dougherty is ineligible for FINRA arbitration without customer consent because Dougherty is inactive. (Pl.’s Mot. to Reconsider at 19–20.) But Bale reads that Rule in isolation, and as a result, he misreads it. Bale is simply incorrect.

Under Article V, § 4 of the FINRA by-laws, when a registered representative’s license (registration) terminates, FINRA retains jurisdiction over that person for any complaint filed within two years after the effective date of termination, revocation, or cancelling of the registration. *See Retention of Jurisdiction*, FINRA, By-Laws of the Corporation, Art. V. § 4,

<https://www.finra.org/rules-guidance/rulebooks/corporate-organization/retention-jurisdiction-0>.

This means the person can be investigated, charged, and disciplined for conduct that occurred while they were registered. *See id.* A FINRA adjudicator can also compel that person to “provide information orally, in writing, or electronically ... and to testify ... under oath or affirmation ... with respect to any matter involved in the investigation, complaint, examination, or proceeding.” *See* FINRA Rule 8210(a).

Here, that means FINRA retains jurisdiction over Dougherty and will continue to retain that jurisdiction in any proceeding filed before December 1, 2025. As a result, Bale’s argument that FINRA arbitration is unavailable for his claims against Dougherty fail. Any delay is entirely due to Bale causing the delay.

**7. The Wells Fargo & Co. and Wachovia Securities stay issue is a red herring.**

Lastly, in his motion to reconsider, Bale asks the Court to clarify that the Court has not stayed proceedings against Wells Fargo & Co. and Wachovia Securities Financial Holdings. (Pl.’s Mot. to Reconsider at 3–5.) To be clear, none of the defendants have yet asked the Court to stay proceedings against those other two entities.

That said, staying related proceedings pending an arbitration, including related proceedings against parties who are not parties to an arbitration agreement, is within the Court’s discretion. *See Episcopal Housing Corp. v. Fed. Ins. Co.*, 239 S.E.2d 647, 652 (S.C. 1977) (“The fact that Federal is not a party to an arbitration agreement does not prevent an order staying the judicial proceedings pending arbitration between those who are parties to such an agreement.”); *see also Klay v. All Defs.*, 389 F.3d 1191, 1204 (11th Cir. 2004) (“When confronted with litigants advancing both arbitrable and nonarbitrable claims, however, courts have discretion to stay nonarbitrable claims.” (citing *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 21 n.3 (1983))); *Summer Rain v. Donning Co./Publishers, Inc.*, 964 F.2d 1455, 1461 (4th Cir. 1992) (“The decision whether

to stay the litigation of the non-arbitrable issues is a matter largely within the district court's discretion to control its docket."). Bale has not shown that concluding that the "arbitrable claims predominate or ... [that] the outcome of the nonarbitrable claims will depend upon the arbitrator's decision" is beyond the Court's discretion. *Klay*, 389 F.3d at 1204. Thus, even though no party has requested a stay it is no abuse of the Court's discretion to stay proceedings against Wells Fargo & Co. and Wachovia Securities pending the arbitrations the Court has ordered.

### CONCLUSION

For all these reasons, the Court should not disturb its previous orders compelling arbitration. Instead, it should deny Bale's motion to reconsider.

Respectfully submitted,

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August 27, 2025  
Columbia, South Carolina

# EXHIBIT 12

|                                           |   |                                        |
|-------------------------------------------|---|----------------------------------------|
| STATE OF SOUTH CAROLINA                   | ) | IN THE COURT OF COMMON PLEAS           |
|                                           | ) |                                        |
| COUNTY OF RICHLAND                        | ) | FIFTH JUDICIAL CIRCUIT                 |
|                                           | ) |                                        |
| Curtis D. Bale,                           | ) | Civil Action No. 2023-CP-40-00242      |
|                                           | ) |                                        |
| Plaintiff,                                | ) |                                        |
|                                           | ) |                                        |
| vs.                                       | ) |                                        |
|                                           | ) |                                        |
| John A. Dougherty; Wachovia Securities    | ) | <b>PLAINTIFF'S REPLY IN SUPPORT OF</b> |
| Financial Holdings, LLC; Wells Fargo      | ) | <b>MOTION FOR RECONSIDERATION</b>      |
| Clearing Services, LLC, f/k/a Wells Fargo | ) |                                        |
| Advisors, LLC; Wells Fargo & Company;     | ) |                                        |
| Wells Fargo Bank, N.A.; and LPL           | ) |                                        |
| Financial, LLC,                           | ) |                                        |
|                                           | ) |                                        |
| Defendants.                               | ) |                                        |
|                                           | ) |                                        |

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Plaintiff Curtis D. Bale files this reply in support of his July 21, 2025 motion for the Court to reconsider its orders granting Defendants' Motion to Compel Arbitration and to Stay.

### INTRODUCTION

Defendants' oppositions to Bale's motion bespeak a fundamental failure to understand the law, the facts, and Bale's arguments against arbitration. For example, LPL Financial misstates the state court standard for reconsideration. Wells Fargo Bank, Wells Fargo Advisors, and John Dougherty claim Bale failed to previously make arguments which he did. These Wells Fargo entities also rely on law which the U.S. Supreme Court has overruled. And all Defendants incorrectly summarize Bale's claims, leading them to attack strawmen to deprive Bale of his day in court. Individually and together, these failures all confirm why granting Defendants' motions should be reconsidered.

Bale's briefing has presented several arguments for why his claims against each Defendant should remain in court, any one of which standing alone is sufficient to deny Defendants' motions

to compel arbitration. Reconsideration as to any of them therefore warrants denying the motions. Respectfully, the Court erred when it adopted Defendants' arguments originally. And now, Defendants present no sound reason the Court should stay the course. The Court therefore should reconsider its ruling and deny Defendants' motions.

### **ARGUMENT<sup>1</sup>**

#### **I. The Court Should Clarify that Claims Against Wells Fargo & Co. and Wachovia Securities Financial Holdings Are Not Stayed.**

Wells Fargo Advisors and Wells Fargo Bank admit that "none of the defendants have yet asked this Court to stay proceedings against" Wells Fargo & Company and Wachovia Securities Financial Holdings. Wells Fargo Opp. to Rule 59(e) Mot. at 13. But despite acknowledging no one asked for such a stay, they do not explain why the proposed orders which they submitted to the Court surreptitiously included such a stay. Because no one has moved for the Court for that stay, and nobody asks for one now, the Court should reconsider that portion of its orders and decline to enter one.

Even if any moving Defendant had asked to stay claims against those other parties, a stay would be improper. Bale explained, for example, that Wells Fargo & Co. has liability for Bale's losses independent of Wells Fargo Bank and Wells Fargo Advisors. It was the architect of the cross-selling scheme which harmed him, a scheme which was designed to boost Wells Fargo & Co.'s stock price. Bale Rule 59(e) Mot. at 5; Bale Opp. to Mots. to Compel Arb. at 4–5 & n.1. That alone is enough to deny a stay. Further, Wells Fargo & Co.'s status as an "independent legal entit[y]" from Wells Fargo Advisors and Wells Fargo Bank further counsels against a stay. *See* Wells Fargo Opp. to Rule 59(e) Mot. at 3. Because it is a separate company, this stay deprives Bale of both (1)

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<sup>1</sup> Bale incorporates and reasserts all arguments made in his written opposition to the Defendants' motions to compel arbitration, those made at the hearing on those motions, and those made in Bale's Rule 59(e) motion.

a critical source of discovery in any arbitration proceeding against the bank and financial advisory firm, and (2) a path to full recovery. Wells Fargo & Co. therefore gets the benefits of arbitration (not proceeding in court) without any of the burdens (having to still defend itself on liability), while Bale is left in the lurch. This Court should not countenance such an inequitable, extra contractual, and prejudicial result that only rewards Wells Fargo.

## **II. LPL Financial Misstates the Burden for Reconsideration under Rule 59(e), SCRCP.**

LPL Financial's brief opposition to reconsideration rests of a foundational flaw: it relies exclusively on the *federal* standard for reconsideration which is stricter than the governing *state* standard. LPL Financial maintains that reconsideration is not a vehicle for expressing disagreement with a court's ruling, and instead is available only when there is an intervening change on controlling law, there is new evidence which was previously unavailable, or the court's original ruling was not just wrong but must "strike the court as wrong with the force and effect of a five-week-old, unrefrigerated dead fish." LPL Op. to Rule 59(e) Mot. at 2, 4 (cleaned up). That may be the standard in federal court, but it is not the standard here.

In state court, "a party usually is allowed to ask the court to reconsider its decision even if it means rehashing all or part of an argument previously presented." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 21, 602 S.E.2d 772, 778–79 (2004). It is inherently unfair to disallow "a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument." *Id.* at 22, 602 S.E.2d at 779.<sup>2</sup> Bale therefore appropriately asks the Court to revisit arguments it ruled on, in addition to pointing out how the Court overlooked other points which Bale raised which the Court did not address.

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<sup>2</sup> LPL Financial curiously cites this page from *Elam* but misses the core holding of the case. See LPL Opp. to Rule 59(e) Mot. at 2–3.

Because LPL Financial asks the wrong question, it gets the wrong answer. LPL Financial does not meaningfully engage with Bale's argument that the Court did not address the substance of Bale's arguments on why there is no enforceable arbitration agreement between Bale and LPL Financial, and that the four findings which the Court made misapprehend the law and facts. *See* Bale Rule 59(e) Mot. at 15–19. LPL Financial therefore urges this Court to compel arbitration by rejecting arguments Bale did not make, relying on inapposite case law, and dodging the substance of the issues. The Court should not accept LPL Financial's invitation. Instead, the Court should reconsider its ruling and deny arbitration of Bale's claims against LPL Financial.

### **III. Wells Fargo Advisors' and Wells Fargo Bank's Opposition is Riddled with Legal and Factual Errors.**

While Wells Fargo Advisors and Wells Fargo Bank acknowledge the correct standard for a Rule 59(e) motion, *see* Wells Fargo Opp. to Rule 59(e) Mot. at 1, the substantive arguments they raise falter at almost every turn. The most egregious of these errors and omissions are emphasized below in the order in which they appear.

1. *The Court must decide unconscionability.* Wells Fargo Advisors and Wells Fargo Bank lead off by arguing that the parties delegated the question of unconscionability to an arbitrator, meaning the Court cannot decide it. Under South Carolina law, unconscionability goes to “whether an arbitration agreement even existed in the first place.” *Simpson v. MSA of Myrtle Beach, Inc.*, 373 S.C. 14, 23, 644 S.E.2d 663, 668 (2007). And determining whether a valid arbitration agreement was formed is *always* for the Court, even if an arbitration agreement purports to delegate that question to the arbitrator. *See Henry Schein, Inc. v. Archer & White Sales, Inc.*, 586 U.S. 63, 69 (2019) (“To be sure, before referring a dispute to an arbitrator, the court determines whether a valid arbitration agreement exists.”); *In re StockX Customer Data Sec. Breach Litig.*, 19 F.4th 873, 879 (6th Cir. 2021) (“[E]ven where a delegation provision purports to require arbitration

of formation issues, the severability principle does not apply and courts must decide challenges to the formation or existence of an agreement in the first instance (‘whether it was in fact agreed to’ or ‘was ever concluded’).”) (quotations omitted); *see also id.* & n.3 (stating “[w]e are not alone in this regard” and collecting cases).

2. *Wells Fargo Advisors and Wells Fargo Bank falsely assert that Bale cites no authority showing the agreements are unconscionable because they split Bale’s claims.* In his opposition to arbitration, Bale argued that the arbitration agreements with Wells Fargo Advisors and Wells Fargo Bank are unconscionable because they divide these Defendants’ unified scheme between forums (FINRA arbitration for Wells Fargo Advisors, AAA arbitration for Wells Fargo Bank, and court for Wells Fargo & Co., which has no arbitration agreement) with different rules, standards, procedures, and timelines, where there is a near-certain risk of inconsistent judgments and the possibility that Bale could never present all his proof to any given decision-maker. *See Bale Opp. to Mots. to Compel Arb.* at 13–15.

In response to reconsideration of the argument, these Defendants first claim that “Bale cites no authority holding (or even suggesting) that he can treat multiple independent legal entities as one party and multiple independent legal agreements as one agreement and then assess their aggregate effect to determine whether the individual agreements are unconscionable.” Wells Fargo Opp. to Rule 59(e) Mot. at 4. Breaking it down, the first part of this statement is false. Bale cited *Damico v. Lennar Carolinas, LLC*, 437 S.C. 596, 879 S.E.2d 746 (2022), for the proposition that dividing a unified claim involving independent legal entities between court and arbitration was unconscionable. *Bale Opp. to Mots. to Compel Arb.* at 13–15. In *Damico*, our Supreme Court held that a clause allowing a general contractor to compel arbitration but keep claims against his subcontractors in court was unreasonably oppressive when it “creates the possibility of

inconsistent fact findings that would preclude [a plaintiff] from recovery on a purely procedural (rather than a merit) basis.” *Damico*, 437 S.C. at 616, 879 S.E.2d at 757. Bale therefore provided the law, contrary to Defendants’ claim that he never did. And the second part of the statement makes no sense. Of course Bale is not arguing that “he can treat . . . multiple independent legal agreements as one agreement.” That’s the point—there is not one agreement, but an amalgam of agreements across related entities which make it impossible to achieve a full determination on the merits of his claims.

Next, these Defendants claim that “Bale fails to even attempt an argument that no fair, honest, and reasonable person would agree to litigate different claims against different, though related, parties in different forums.” Wells Fargo Opp. to Rule 59(e) Mot. at 4. But this is *exactly* what Bale argued. *See* Bale Opp. to Mots. to Compel Arb. at 15 (arguing, after detailing all the problems with litigating in three forums, that “Wells Fargo’s arbitration terms are so oppressive that no reasonable person would make them and no fair and honest person would accept them”) (citation omitted).

3. *These Defendants’ obligation to provide notice of unilateral changes does not save the arbitration clause from being unconscionable.* These Defendants next argue that their unilateral right to change the terms of the parties’ agreement is not unconscionable because they must provide notice of any changes to Bale. Wells Fargo Opp. to Rule 59(e) Mot. at 4. In *Johnson v. Continental Finance Company, LLC*, 131 F.4th 169 (4th Cir. 2025), which Bale cited in his Rule 59(e) motion, the Fourth Circuit dispensed with this very argument to hold that a unilateral change provision—even one which requires giving notice—is unconscionable. *Id.* at 180–81. These Defendants do not address *Johnson* in their opposition.

4. *These Defendants' argument that Bale did not show he lacked a meaningful choice directly contradicts the Supreme Court's holding in Damico.* Wells Fargo Advisors and Wells Fargo Bank preposterously claim that Bale has not shown he lacked a meaningful choice. Banking and advisory agreements are prototypical contracts of adhesion. Bale presented substantial evidence that he could not negotiate the contracts' terms, and neither Wells Fargo Advisors nor Wells Fargo Bank argue here that he could have. Bale Opp. to Mots. to Compel Arb. at 12; Bale Rule 59(e) Mot. at 6. Even if Bale is "sophisticated," as these Defendants claim, the agreements still are adhesion contracts. By insisting against all logic that these form agreements with a multi-trillion-dollar financial behemoth were negotiable, these Defendants engage in the "specious" "common practice for the sophisticated drafter of contracts to routinely argue that a particular contract is not one of adhesion when that is plainly untrue." *Damico*, 437 S.C. at 614, 879 S.E.2d at 756.

5. *New York law does not require fraud to rescind an arbitration agreement with Wells Fargo Advisors for unilateral mistake.* Wells Fargo Advisors next argues that Bale must show fraud to demonstrate a unilateral mistake under New York law. Wells Fargo Opp. to Rule 59(e) Mot. at 6–7. But that is for *reformation* of a contract. *Id.* Bale does not seek reformation of the arbitration agreement. He seeks rescission based on a unilateral mistake. And for that, a showing of fraud is not required where the mistake pertains to a "basic assumption of the contract." *Creative Waste Mgmt., Inc. v. Capitol Env't Servs., Inc.*, 429 F. Supp. 2d 582, 599 (S.D.N.Y. 2006), *supplemented*, 458 F. Supp. 2d 178 (S.D.N.Y. 2006). Bale detailed his mistaken assumption that arbitrators would follow the law and he could fully recover losses in arbitration, both of which were basic assumptions of the agreement. Bale Opp. to Mots. to Compel Arb. at 18–19. Wells Fargo Advisors does not dispute that arbitrators do not have to follow the law, that Bale likely will not recover all his losses in arbitration, that it knew about these "features" of arbitration, that it never told Bale

about them, that Bale did not know about them, and that being able to fully vindicate his rights and recover his losses was a basic assumption Bale made. This case therefore is a classic unilateral mistake.<sup>3</sup>

6. *Conflicting choice of law provisions preclude any meeting of the minds between Bale and Wells Fargo Advisors.* Bale has two agreements with Wells Fargo Advisors—a “General Account Agreement and Disclosure Agreement,” which is governed by New York law, and a “Client Agreement” governed by Virginia law. WFA Mot. to Compel. Arb. Ex 1. Wells Fargo Advisors moved to compel arbitration under both and has treated them indistinguishably. Wells Fargo Advisors therefore does not know which law applies to any dispute with Bale. Because choice of law provisions are material contract terms, *e.g.*, *Reeves Bros. v. Cap.-Mercury Shirt Corp.*, 962 F. Supp. 408, 412–13 (S.D.N.Y. 1997), there is no meeting of the minds, *Phillips v. Mazyck*, 273 Va. 630, 636, 643 S.E.2d 172, 175 (2007); *Gomez v. Bicknell*, 756 N.Y.S.2d 209, 216 (2d Dept. 2002).

In response, Wells Fargo Advisors simply argues that “the arbitrator will face conflicts of law questions or have to decide which contract governs which portion of Bale’s claims.” Wells Fargo Opp. to Rule 59(e) Mot. at 9. This argument misses the point. Even Wells Fargo Advisors cannot explain when one agreement applies over another, meaning the provisions conflict. The parties therefore did not have a meeting of the minds.

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<sup>3</sup> Wells Fargo Advisors seeks to avoid this result by blaming Bale for this mistake because the information was on the internet. Wells Fargo Opp. to Rule 59(e) Mot. at 7–8. It cites no case law supporting their argument. And Wells Fargo Advisors ignores that it had a duty to disclose these facts as Bale’s fiduciary. 28A N.Y. Prac., *Contract Law* § 21:20 (“A fiduciary negotiating an agreement with a party to whom it owes a fiduciary duty is obliged to disclose any information that could reasonably bear on the agreement being negotiated.”).

7. *Wells Fargo Bank's unilateral right to add an arbitration clause after making a loan is unconscionable.* Wells Fargo Bank, to this day, has not provided the loan agreement Bale signed in 2013. The only agreement for a loan which Wells Fargo Bank has produced is from 2016. That failure means there is no record of an arbitration agreement from 2013. To Wells Fargo Bank, that does not matter. It argues that it had a unilateral right to add such an agreement in 2016. Wells Fargo Opp. to Rule 59(e) Mot. at 10. But as explained repeatedly, a unilateral contract amendment right is enforceable. *See* Bale Opp. to Mots. to Compel Arb. at 15–16; Bale Rule 59(e) Mot. at 7; *supra* at 6. And an arbitration provision added under an opposing party's unilateral amendment right, consent to which was required simply to maintain the existing loan under the same terms, is not sufficient consideration. *E.g., Poole v. Incentives Unlimited, Inc.*, 345 S.C. 378, 382, 548 S.E.2d 207, 209 (2001) (“[W]hen a covenant is entered into after the inception of employment, separate consideration, in addition to continued at-will employment, is necessary in order for the covenant to be enforceable.”).

8. *Wells Fargo Bank relies on bad law to argue it did not waive reliance on the 2016 loan agreement.* Wells Fargo Bank did not argue or seek to enforce the 2016 loan agreement until its *third* motion to compel arbitration. The Bank instead relied on agreements for *other* accounts. Looking to avoid Bale's argument that it waived reliance on this loan agreement, Wells Fargo Bank argues waiver of an arbitration agreement requires a showing prejudice beyond mere delay or inconvenience, which is not required for ordinary waiver of a contractual right. Wells Fargo Opp. to Rule 59(e) Mot. at 11. The U.S. Supreme Court expressly overruled such special requirements for waiver of an arbitration agreement in *Morgan v. Sundance*. 596 U.S. 411, 417–18 (2022). “[A] court must hold a party to its arbitration contract just as it would to any other kind, and it may not devise novel rules to favor arbitration over litigation.” *Id.* at 418 (cleaned up). Our Supreme Court

recognized that *Morgan* “unanimously rebuked” courts for creating special waiver rules for arbitration. *Lampo v. Amedisys Holding, LLC*, 445 S.C. 305, 317, 914 S.E.2d 139, 146 (2025). This Court should reject Wells Fargo Bank’s attempt to inject bad law into this case.

South Carolina law defines waiver as “a voluntary and intentional abandonment or relinquishment of a known right.” *Janasik v. Fairway Oaks Villas Horizontal Prop. Regime*, 307 S.C. 339, 344, 415 S.E.2d 384, 387 (1992). The party asserting waiver must show that the opposing party had actual or constructive knowledge of the right and the material facts on which it depended. *Id.* Here, Wells Fargo Bank knew the 2016 loan agreement has an arbitration clause and it failed to assert that right for years. Waiver of any arbitration right in this document is patent.

9. *Wells Fargo Bank ignores the plain language of the other account agreements it cites.* Once again, Wells Fargo Bank relies on the checking and savings Consumer Account Agreement to compel arbitration regarding a loan account. Wells Fargo Opp. to Rule 59(e) Mot. at 11–12. Although Wells Fargo Banks claims to be applying the agreement’s plain language, *id.*, the bank ignores its plain language. That agreement, on its face, applies only to *deposit* accounts. WF Bank Mot. to Compel Arb. Ex. B, Ex. 3 at i, 1, 65. It consequently cannot, as a matter of law, apply to a dispute involving a loan. At best, the agreement is ambiguous as to whether it extends beyond deposit accounts. If it is, that ambiguity is construed in Bale’s favor, which would limit the scope of the agreement to deposit accounts only. *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 62 (1995) (holding “a court should construe ambiguous language against the interest of the party that drafted it”). Either way, the Court cannot compel arbitration under it.

#### **IV. Dougherty Disingenuously Seeks to Avoid FINRA Rule 12202(a)’s Bar of Arbitration Proceedings Against Him.**

John Dougherty—the individual broker who defrauded Bale—falsely claims that Bale did not previously argue that FINRA Rule 12202(a) precludes arbitration against him. Wells Fargo

Opp. to Rule 59(e) Mot. at 12. Bale's opposition to Dougherty's motion to compel arbitration expressly argued, under its own heading, that "FINRA rules prohibit Dougherty from compelling arbitration." Bale Opp. to Mots. to Compel Arb. at 34–35. Those rules included FINRA Rule 12202(a). Rule 12202(a) makes claims against Dougherty, who has been barred by FINRA for misconduct, ineligible for arbitration absent Bale's consent. *Id.* Yet Dougherty bafflingly says this argument is "new" and "previously uninserted." Wells Fargo Opp. to Rule 59(e) Mot. at 12. The Court should reject that demonstrably false claim out of hand.

On the merits, Dougherty does not address the substance of Rule 12202(a). And he can't—the rule prohibits arbitration against him. So he pivots to FINRA by-laws which give FINRA jurisdiction over complaints involving a registered representative who has been terminated. Wells Fargo Opp. to Rule 59(e) Mot. at 12–13. In doing so, Dougherty ignores the specific rule at issue here: because Bale has been barred from the securities industry, FINRA can arbitrate the case (*i.e.*, exercise jurisdiction over Dougherty) *only* if Bale agrees. *See Capco of Summerville, Inc. v. J.H. Gayle Const. Co.*, 368 S.C. 137, 142, 628 S.E.2d 38, 41 (2006) ("[T]he more specific statute will be considered an exception to, or a qualifier of, the general statute and given such effect."). FINRA adopted Rule 12202(a) specifically to give plaintiffs the option of proceeding against terminated representatives in court. *See* FINRA Regulatory Notice 20-11. Because Bale does not consent to arbitrate his claims against Dougherty, FINRA's own rules require that the case be heard in court.

Dougherty's related argument that arbitration should proceed because a FINRA adjudicator can compel him to provide documents and testimony under Rule 8210(a) is particularly egregious. Wells Fargo Opp. to Rule 59(e) Mot. at 13. FINRA barred Dougherty from the industry for refusing to comply with Rule 8210(a) during an investigation into his misconduct. Bale Opp. to Mots. to Compel Arb. Ex. I. His invocation of this rule now as grounds to require arbitration against him is

specious. If he did not comply with the rule when his securities license was on the line, there is no chance he complies with it now. The Court should reject his sophistry and deny his attempt to hide behind arbitration.

### CONCLUSION

For these reasons, along with those in Bale's briefing and arguments made on the arbitration motions and his motion to reconsider, the Court should reconsider its orders, deny these Defendants' motions to compel arbitration, and allow Bale to have his day in court.

Respectfully submitted,

**WILLOUGHBY HUMPHREY & D'ANTONI, P.A.**

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*Attorneys for Plaintiff*

August 29, 2025  
Charleston, South Carolina

# EXHIBIT 13

## FORM 4

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

JUDGMENT IN A CIVIL CASE

CASE NO. 2023CP4000242

Curtis D Bale  
PLAINTIFF(S)

John A Dougherty et al  
DEFENDANT(S)

## DISPOSITION TYPE (CHECK ONE)

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

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

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

Plaintiff's Motion for Reconsideration (filed on July 21, 2025) is DENIED.

## ORDER INFORMATION

This order ☐ ends ☒ does not end the case.

☐ See Page 2 for additional information.

## For Clerk of Court Office Use Only

This judgment was electronically entered by the Clerk of Court as reflected on the Electronic Time Stamp, and a copy mailed first class to any party not proceeding in the Electronic Filing System on 09/16/2025 .

NAMES OF TRADITIONAL FILERS SERVED BY MAIL

## Court Reporter:

**E-Filing Note:** The date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgment to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

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Richland Common Pleas

**Case Caption:** Curtis D Bale vs John A Dougherty , defendant, et al

**Case Number:** 2023CP4000242

**Type:** Order/Electronic Form 4

So Ordered

Jocelyn Newman

RECEIVED

Nov 06 2025

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM RICHLAND COUNTY  
Jocelyn Newman, Circuit Court Judge

Appellate Case No. 2025-002124

Curis D. Bale,.....Appellant,

v.

John A. Dougherty, Wachovia Securities Financial Holdings, LLC, Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, Wells Fargo & Company, Wells Fargo Bank, N.A., and LPL Financial, LLC,..... Defendants,

of which John A. Dougherty, Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, Wells Fargo Bank, N.A., and LPL Financial, LLC are... Respondents.

**CERTIFICATE OF SERVICE**

I hereby certify that on November 6, 2025, in compliance with Rule 262(c), SCACR, I served the Motion to Reinstate the Appeal by electronic mail on the counsel below at their email address on file with the Attorney Information System. I further certify that all parties required to have been served have been served.

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/s/ R. Walker Humphrey, II  
R. Walker Humphrey, II

November 6, 2025  
Charleston, South Carolina



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November 6, 2025

**VIA ELECTRONIC FILING**

The Honorable Jenny Abbott Kitchings  
Clerk of Court, South Carolina Court of Appeals  
P.O. Box 11629  
Columbia, SC 29211  
ctappfilings@sccourts.org

**RECEIVED**

**Nov 06 2025**

**SC Court of Appeals**

Re: *Curtis D. Bale v. John A. Dougherty, Wachovia Securities Financial Holdings, LLC, Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, Wells Fargo & Company, Wells Fargo Bank, N.A., and LPL Financial, LLC*  
Appellate Case No. 2025-002124

Dear Ms. Kitchings:

Attached for electronic filing please find Appellant Curtis D. Bale's Motion to Reinstate the Appeal and accompanying exhibits.

By copy of this letter, we are serving counsel of record via electronic mail and enclose a Certificate of Service to that effect. The filing fee for the motion has been hand delivered to your office. If you have any questions or need any additional information, please do not hesitate to contact me.

With kindest regards, I am

Sincerely yours,

**WILLOUGHBY HUMPHREY & D'ANTONI, P.A.**

R. Walker Humphrey, II

RWH/kmd

Cc: All Counsel of Record (by email)