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STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	ELEVENTH JUDICIAL CIRCUIT
ROBERT F. BERRY, Plaintiff, vs.	Civil Action No. 2017-CP-32-00397
SCOTT A. SPANG, WELLS FARGO CLEARING SERVICES, LLC, f/k/a WELLS FARGO ADVISORS, LLC, WACHOVIA SECURITIES FINANCIAL HOLDINGS, LLC, WELLS FARGO & COMPANY, and WELLS FARGO BANK, N.A., Defendants.	ORDER

This matter came before the Court on June 1, 2017, for a hearing on the Defendant's Motion to Dismiss or Stay Pending Arbitration. Also before the Court was Defendants' Motion for a Protective Order and Motion to Stay Discovery. Present at the hearing were Frederick T. Smith of Seyfarth Shaw LLP, appearing *pro hac vice*, and John G. Tamasitis of Haynsworth Sinkler Boyd, P.A., representing Defendants, and Mitchell Willoughby, Chad Johnston and Elizabeth Zeck of Willoughby & Hoefer, P.A., representing Plaintiff. For the reasons set forth below, Defendants' Motion to Dismiss or Stay Pending Arbitration is denied, with prejudice. Further, Defendants' Motion for a Protective Order and Stay of Discovery pending arbitration is rendered moot by the effect of this Order.

FACTUAL BACKGROUND

This is a claim for damages brought by Plaintiff Robert F. Berry, formerly a Wealth Manager and Senior Vice President with Defendant Wells Fargo Advisors, LLC. Among other

allegations, Mr. Berry alleges that Defendants Scott A. Spang, Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, Wachovia Securities Financial Holdings, LLC, Wells Fargo & Company, and Wells Fargo Bank, N.A.'s (collectively referred to as "Defendants") deliberately breached his long-standing profit formula agreement. Mr. Berry also alleges that to illegally increase the earnings and stock price of the corporate parent, Wells Fargo & Company, Defendants aggressively pushed employees of all subsidiary corporations, including Mr. Berry, to sell financial products, regardless of whether the products were wanted, needed, or in the best interests of the customers and clients, and targeted for retribution those employees who refused and/or failed to cooperate.

Mr. Berry alleges that he refused to participate in the scheme because it would have violated the securities laws and his fiduciary obligations to his clients. (First Amended Complaint ("FAC") at ¶ 33-36). Based on his refusal, Mr. Berry alleges that Defendants internally identified him as a person to be terminated for speaking up against the improper cross-selling program. Mr. Berry alleges he was also targeted for retribution based on the complaints he lodged with Defendants regarding the changes they unilaterally made to his profit formula employment agreement, which had been in effect since the early 2000s. (FAC at ¶¶ 29, 42-43). Defendants' efforts culminated in a February 3, 2014 meeting during which Mr. Berry alleges he was humiliated, unlawfully detained, and forced to resign. (FAC at ¶¶ 38-44, 51-55). Mr. Berry filed this action seeking damages. Rather than answer Mr. Berry's complaint, Defendants filed their Motion to Dismiss or to Stay Pending Arbitration under Rule 12(b)(6). SCRCP, as well as a separate motion for protective order and a stay of discovery.

FINDINGS and ANALYSIS

I. Defendants failed to meet their burden, as the proponents of arbitration, to prove the existence of a duty to arbitrate.

Whether a claim is subject to arbitration is an issue for judicial determination. It is the duty of this Court to ascertain the existence, if any, of an enforceable arbitration agreement. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 78, 749 S.E.2d 139, 144-45 (Ct. App. 2013). That duty is fulfilled by applying the principles of state contract law, according to the ordinary procedural and evidentiary rules applicable to all contract disputes. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001).

"Arbitration is a matter of contract, and a party cannot be required to submit to arbitration any dispute that the party has not agreed to submit." *Chassereau v. Glob.-Sun Pools, Inc.*, 363 S.C. 628, 632, 611 S.E.2d 305, 307 (Ct. App. 2005). "Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement." *Chassereau*, 363 S.C. at 632, 611 S.E.2d at 307 (quoting *Zabinski*, 346 S.C. at 596–97, 553 S.E.2d at 118).

As the proponents of arbitration, Defendants bear the burden of establishing the existence of an agreement to arbitrate the dispute between themselves and Mr. Berry. "General contract principles of state law apply to arbitration clauses governed by the F[ederal] A[rbitration] A[ct]." *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001); *see also Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458, 730 S.E.2d 312, 317-18 (2012) (holding that the burden of proof as to the existence of an arbitration agreement and the facts attendant to its enforcement is on the party seeking to compel arbitration). State law remains applicable if that law, whether legislative or judicial, arose to govern issues concerning the validity, revocability, and enforceability of all contracts generally. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364.

A. Defendants' Motion to Stay fails because they did not properly authenticate the registration statements upon which they rely to create the duty to arbitrate.

A threshold question is the admissibility of the documents upon which Defendants rely to support their demand for arbitration. South Carolina law has always required authentication as a condition precedent to admissibility. Rule 901(a), SCRE; see also *State v. Rich*, 293 S.C. 172, 359 S.E.2d 281 (1987). This rule applies to evidence submitted in support of motions. *See Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 121, 441 S.E.2d 835, 838 (Ct. App. 1994). That is, before this Court can rely upon any document, its proponent must provide a proper foundation. This requirement applies to employment records of the type proffered here. *Connelly v. Wometco Enterprises, Inc.*, 314 S.C. 188, 191, 442 S.E.2d 204, 206 (Ct. App. 1994). In *Connelly*, a wrongful termination case, the employee's personnel file was properly excluded from evidence, as the employer failed to offer the excluded records through a custodian or other properly qualified witness. *Id.* The proffered documents were properly excluded from evidence, even though they might have had probative value and would therefore otherwise have been relevant and admissible. *Id.*

In support of their Motion, Defendants rely upon three registration statements which were simply attached as Exhibit 1 to their supporting memorandum. However, business records of this type do not qualify as self-authenticating. *Cf.* Rule 902, SCRE. Although Defendants provided an affidavit from a paralegal employed in the "Wells Fargo Law Department,"[1] the paralegal did not claim to be a custodian of records for any of the corporate Defendants, nor did she make any claim that the documents attached to Defendants' memorandum were true and correct copies of business records maintained by any specific Defendant. Like the inadequate sponsoring witness

[1] Defendants' affiant fails to even assert that she is employed by any of the four corporate Defendants or, assuming she is, to identify which one.

in *Connelly*, this testimony is insufficient to meet the foundation requirements imposed by Rule 901(a), SCRE. In the absence of such authentication testimony, Defendants have failed to lay a proper foundation for the admission of these three registration statements and this Court therefore determines that they are inadmissible for substantive consideration in support of Defendants' Motion. Because the three unauthenticated registration statements constitute the only evidence submitted in support of their Motion, Defendants have failed to meet their burden[2] to prove the existence of an enforceable agreement to arbitrate and the motion to stay these proceedings and compel arbitration is denied.

B. Defendants' Motion also fails because they are not parties to the documents upon which they rely and therefore lack standing to enforce any arbitration agreement contained therein.

Even if the three registration statements relied upon by Defendants were properly before this Court, Defendants have failed to prove that they have standing to enforce the arbitration clause contained therein such that they may benefit from their terms. "Ultimately, arbitration is a matter of contract and a party cannot be forced to arbitrate a dispute if it has not agreed to do so." *AT&T Tech., Inc. v. Comm'ns Workers*, 475 U.S. 643, 648 (1986).

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[2] It is now too late for Defendants to amend their filings "as of right" to submit supplemental or additional documentation in support of their Motion, and permitting them to do so at this time would provide Defendants a second bite at the apple. *See, e.g., Parker v. S.C. Public Service Com'n*, 288 S.C. 304, 307, 342 S.E.2d 403, 405 (1986) (holding that "no party may afford itself two bites at the apple."). The Court notes that Defendants have already attempted to amend their motion to dismiss, namely, to add grounds under Rule 12(b)(1) and (3), SCRCP, asserting as support for the motion Rule 15(a), SCRCP. However, Defendants' motion to dismiss is not a "pleading" capable of amendment under Rule 15(a); therefore, Defendants' motion was untimely and ineffective. While an assertion of a Court's lack of subject matter jurisdiction may be raised at any time during the litigation, other defenses specified in Rule 12(b) — including the defenses listed as subsections 12(b)(2), (3), (4), (5) and (8) — are waived if not asserted in the initial motion or responsive pleading, as is the case here where Defendants' motion relied solely on the defense provided by Rule 12(b)(6). *See* Rule 12(g), (h).

Defendants' Motion is based on a clause included in three Form U-4 registration statements that were apparently submitted on behalf of Wheat, First Securities, Inc. ("Wheat First"), a firm that no longer exists,[3] during Mr. Berry's association with that firm. However, this litigation does not involve any dispute, claim or controversy arising between Plaintiff and Wheat First.[4] Mr. Berry asserts no claim against Wheat First, nor does he complain of any act or omission by Wheat First. Rather Mr. Berry alleges that the Profit Formula Agreement at issue in this case was not between him and Wheat First, but originated with Wachovia Securities. (FAC at ¶29).

The three registration statements[5] relied upon by Defendants each contain an identical arbitration clause, which reads as follows:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the organizations indicated in Item 10 as may be amended from time to time . . . .

The firm named in each of the registration statements is Wheat First. The arbitration clause is devoid of any language indicating that any arbitration obligation extends to successors and/or assigns of "my firm," that is, Wheat First. Nor can this Court take judicial notice of the internal

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[3] In support of his opposition to Defendants' motions, Mr. Berry submitted self-authenticating, certified copies of records kept by the South Carolina Secretary of State, which demonstrated that Wheat First changed its name to First Union Capital Markets Corporation in 1999, which subsequent business was later dissolved and surrendered its authority to do business in South Carolina. *See* Exhs. 2 and 3, Plaintiff's Opp. to Mot. to Stay.

[4] In their Motion, Defendant Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, invokes rights as a member of those self-regulatory organizations. Thus, Defendants stand in the role of the drafters of the forms issued by such organizations. Under South Carolina law, "any ambiguity will be construed in favor of the non-drafting party." *McGill v. Moore*, 381 S.C. 179, 186, 672 S.E.2d 571, 575 (2009). Thus, Mr. Berry is entitled to the construction benefit of a non-drafting party such that any ambiguities in the registration statements must be construed against Defendants.

[5] Defendants proffered three registration statements, dated September 28, 1995, January 16, 1995, and November 5, 1994. Only the November 1994 registration statement designates any SRO and Item 10 fora.

affairs of private corporations to find that Defendants can invoke the rights of Wheat First. *Moss v. Aetna Life Ins. Co.*, 267 S.C. 370, 377, 228 S.E.2d 108, 112 (1976). In short, the three registration statements relied upon by Defendants simply do not satisfy Defendants' burden to prove the existence of an agreement by Mr. Berry to arbitrate his dispute in this case with these Defendants. Moreover, even if these registration statements were admissible, Defendants lack standing to rely upon a registration statement of a dissolved corporate entity to compel Mr. Berry to arbitrate claims he asserts against them.

C. <u>If an arbitration agreement arises from the 1994 registration statement, it fails because the fora specified in that clause no longer exist.</u>

Even if the arbitration clause contained in the registration statements were properly before this Court, and even if Defendants had standing to enforce clauses contained within those statements, any purported agreement to arbitrate is rendered void by the failure of the statement's forum selection clause, which constitutes an integral and material term of the arbitration clause. The clause relied upon by Defendants requires arbitration "under the rules, constitutions, or by-laws of the organizations indicated in Item 10." *See supra* at 6. Item 10 of the registration statements contains two sections, labeled SRO and Jurisdictions. In the securities context, SRO stands for Self-Regulatory Organization. *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 386 n. 12, 759 S.E.2d 727, 735 (2014). The SRO box is checked on only the earliest Form U-4 relied upon by Defendants, dated November 1994 ("1994 Form").[6] The 1994 Form designated the following entities as potential arbitral fora: the American Stock Exchange ("ASE"), the National Association of Securities Dealers ("NASD"), the New York Stock Exchange

[6] The other two registration statements do not designate any SRO arbitration forum, and, thus, the arbitration clause is void *ab initio*.

("NYSE"), and the Philadelphia Stock Exchange ("PHLX"). The SRO section box labeled "Other (Specify)" was left blank on the 1994 Form.

Defendants have offered no proof of the continued existence of either the ASE or the PHLX. Moreover, and more important, Defendants offer no proof that any of the organizations specified on the 1994 Form currently provide arbitration services. Defendants are unable to point to any language indicating that any arbitration obligation extends to successors and/or assigns of the specified entities; in fact, no such obligation appears in the 1994 Form. Item 10 includes a box labeled "Other" box in the SRO category, but no "successors or assigns" language was specified there, either.

In tacit recognition of the unavailability of the arbitral fora actually specified in the documents upon which they rely, Defendants do not seek to compel arbitration before NASD, NYSE or any of the other fora listed in the 1994 Form. Rather, Defendants disregard the actual language of the SRO section of the 1994 Form and instead simply substituted "FINRA" without explanation or even bothering to inform the Court of this most significant change, much less openly requesting or offering proof that such a substitution is proper and permissible. In purporting to quote from the arbitration clause contained in the 1994 Form, Defendants' brief replaced the term "NASD" with "FINRA" without comment or explanation, thereby failing in their duty to bring to the Court's attention the alteration of a material term in the document. In the absence of such proof,[7] this Court cannot simply assume that this dispute might be "required to be arbitrated under"

[7] During the hearing, Defendants asked the Court to take judicial notice of FINRA Rule 13200. Setting aside the issue of whether this Court may even take judicial notice of such rules, the Court finds that Defendants have not met their threshold burden of demonstrating the applicability of any FINRA rule to Mr. Berry.

the absent rules of these non-existent arbitral fora, as required by the arbitration clause in the 1994 Form.

However, in interpreting agreements to arbitrate, courts agree that where a material, integral part of an arbitration agreement fails, the entire agreement to arbitrate is void. *See Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 132, 678 S.E.2d 435, 439 (2009) (failure of selected arbitral forum warrants invalidation of entire arbitration clause); *Brown v. ITT Consumer Fin. Corp.*, 211 .F.3d 1217, 1220 (11th Cir. 2000) (asserting that where the selection of a particular forum constitutes an integral part of the agreement to arbitrate, the failure of the chosen forum precludes arbitration); *In re Salomon Inc.*, 68 F.3d 554, 561 (2d. Cir. 1995) (a failed forum selection term is as important a consideration as the agreement to arbitrate itself); *Smith Barney, Inc. v. Critical Health Sys.*, 212 F.3d 858, 862 (4th Cir. 2000). Specifically, "if the choice of [an arbitral] forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern ... the failure of the chosen forum [will] preclude arbitration." *Grant*, 383 S.C. at 131, 678 S.E.2d at 438 (citing *Singleton v. Grade A Market, Inc.*, 607 F. Supp. 2d 333, 341 (D. Conn. 2009)). Because the selection of the designated fora constituted an integral term of the arbitration clause in the 1994 Form, and because none of the chosen arbitral fora currently exist, the arbitration agreement is impossible to perform and thus void.

In *Grant*, for example, the plaintiff executed an admissions contract containing an agreement to arbitrate on behalf of her deceased husband concurrent with his admission into a nursing home. *Id.* at 127, 678 S.E.2d at 436. Shortly after admission, the plaintiff's decedent was injured at the facility. *Id.* Plaintiff filed suit in state court, and the Defendant moved to dismiss the action and to compel arbitration pursuant to the admissions contract. *Id.* The arbitration clause in the agreement specifically selected the American Health Lawyers Association ("AHLA") as the

arbitral forum to resolve all related disputes arising from the decedent's admission. *Id.* at 128, 678 S.E.2d at 437. Subsequent to the execution of the admissions agreement, the AHLA amended its rules, declining to arbitrate disputes arising from arbitration agreements executed prior to the injury. *Id.* Consequently, the AHLA would not hear the dispute between the parties, and the parties were effectively denied their forum choice. *Id.*

The *Grant* plaintiff asserted that the inability to arbitrate through the AHLA constituted a failure of a material term in the agreement, and therefore she was no longer bound to arbitrate the dispute. *Id.* at 128, 678 S.E.2d at 437. The Supreme Court agreed, finding that "the specific designation of the AHLA as arbitrator [was] an integral term of this arbitration agreement." *Id.* at 131, 678 S.E.2d at 438-439. The court reasoned that "the designation of a forum such as the AHLA has wide-ranging substantive implications that may affect, *inter alia*, the arbitrator-selection process, the law, procedures, and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration." *Id.* at 132; 678 S.E.2d at 439. The court determined that these implications rendered the selection of a specific forum an integral term of the agreement. *Id.* Consequently, the court held that the arbitration agreement between the parties was unenforceable, and dismissed the defendant's motion to compel arbitration.

The rationale employed by the Supreme Court in *Grant* has been echoed in many other cases across jurisdictions. For example, in *In re Salomon Inc.*, the parties agreed to arbitrate any dispute pursuant to "the arbitration procedure prescribed in the Constitution and rules then obtaining of the NYSE." 68 F.3d at 558. When the NYSE's arbitration group declined to hear the dispute, the courts refused to substitute an alternate arbitrator. *Id.* at 561. In affirming this holding, the Second Circuit explicitly rejected the brokerage firm's contention that the arbitration could be held in another arbitral forum, so long as the rules of the chosen forum govern the proceeding:

> [When] it is clear that the failed [forum selection] term is not an ancillary logistical concern, but rather is as important a consideration as the agreement to arbitrate itself, a court will not sever the failed term from the rest of the agreement and the entire arbitration provision will fail.

Id. at 561 (internal citations omitted). The choice of a specialty forum is an integral term in the arbitration clause precluding the appointment of substitute arbitrators.

Likewise, the Sixth Circuit Court of Appeals affirmed a decision barring a customer from submitting her claim to arbitration before the NASD in *Roney & Co. v. Goren*, 875 F.2d 1218, 1219 (6th Cir. 1989). This result was premised on a pre-dispute provision stating that all disputes would be submitted to arbitration "under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange." *Id.* In refusing to treat the various arbitral fora as interchangeable, the court opined that "[a] forum selection clause in an arbitration agreement, just like any other contract provision, is entitled to complete enforcement absent evidence that the contract was procured through fraud or excessive economic power." *Id.* at 1223. This was true even though the court found that there was purportedly no substantive difference between the NASD's and the NYSE's arbitration procedure. *Id.* at 1220. The parties selected the NYSE, which selection was an integral term of the agreement to arbitrate, and the NYSE therefore constituted the sole arbitration forum before which the parties could arbitrate. *Id.*

Just as in *Grant*, *Saloman* and *Roney*, the 1994 Form relied upon by Defendants indicates the selection of specific arbitral fora. As noted *supra*, the provision relied upon by Defendants identifies the ASE, the NASD, the NYSE, and the PHLX as approved arbitral fora. In mid-2007, however, the NASD joined with the New York Stock Exchange (a competitor in the arbitration of securities disputes and another authorized arbitral forum specified in the 1994 Form U-4s) to create a new entity, which is now known as the Financial Industry Regulatory Authority, or "FINRA." *See* SEC Release No. 34-56145, 2007 SEC LEXIS 1640 (July 26, 2007). Concurrent with the

creation of the new entity came both procedural and substantive changes to the dispute resolution processes previously utilized by NASD and the NYSE. FINRA is neither NASD nor NYSE (much less the ASE or the PHLX) and the parties no longer have access to the arbitration fora specified in the 1994 Form registration statement. Just as a contract for the purchase of brand-name pharmaceuticals cannot be satisfied by the provision of generics, an agreement to arbitrate before the NASD cannot be satisfied by arbitration before any other forum. Courts have determined that "a clause which adopts the rules of an organization like the NASD implicitly chooses that organization as the, or a, forum." *Reddam v. KPMG LLP*, 457 F.3d 1054, 1060 (9th Cir. 2006) (collecting cases), *overruled on other grounds by Atl. Nat'l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931 (9th Cir. 2010).

Our Supreme Court has recognized that the choice of an arbitral fora maintained by securities self-regulatory organizations is entitled to special deference and recognition. *See Dean*, 408 S.C. 371 n. 12, 759 S.E.2d 727 (2014). The Supreme Court reasoned that securities self-regulatory organizations — or SROs — are considered to have "special expertise" as they are "closely governed by the Securities and Exchange Commission and have developed complex regulatory schemes for overseeing arbitration of securities disputes." *Id.* Therefore, the selection of one of these organizations as the fora for dispute resolution has a wide-ranging, substantive impact on the arbitration process. The selection of a specific SRO forum, therefore, is an integral term of the arbitration clause.

Consequently, just as in *Grant*, if Defendants are allowed to treat SRO arbitral fora as interchangeable, Mr. Berry will be deprived of the arbitral forum that was expressly designated in the 1994 registration statement submitted with Wheat First. Because none of the designated arbitration fora are available to resolve the present dispute, and because an arbitrator selection

clause in the 1994 Form is an integral and material term of the arbitration obligation, the arbitration clause relied upon by Defendants is impossible to perform and is therefore void and unenforceable. *See In re Salomon Inc.*, 68 F.3d at 558 ("we cannot compel a party to arbitrate a dispute before someone other than the NYSE when the party had agreed to arbitrate disputes only before the NYSE"); *Roney*, 875 F.2d 1218 (interpreting designation of NYSE as the arbitral forum of choice meant that *only* the NYSE could arbitrate a dispute between the parties).

In reaching the conclusion that securities arbitral fora cannot be treated as interchangeable, this Court is mindful of the result obtained on very similar facts in *Keller v. ING Financial Partners, Inc.*, Op. No. 2011-CP-23-0336 (S.C. Cir. Ct. filed June 2, 2011). That case involved an attempt to compel arbitration before FINRA based on an arbitration clause which identified NASD as the chosen arbitral forum. The Honorable D. Garrison Hill denied a motion to compel arbitration on such facts, finding that:

> The "NASD," or the National Association of Securities Dealers, Inc., as then constituted, no longer exists, having combined regulatory functions with certain divisions of the New York Stock Exchange ("NYSE") to become what is now known as the Financial Industry Regulatory Authority, or FINRA.
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> * * *
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> In mid-2007, the NASD combined regulatory functions with certain divisions of the New York Stock Exchange (a competitor in the arbitration of securities disputes), and became what is now known as the Financial Industry Regulatory Authority, or FINRA See SEC Release No. 34-56145, 2007 SEC LEXIS 1640. (July 26, 2007). Moreover, coincident with this consolidation, came both procedural and substantive changes to the NASD's former dispute resolution process and rules. See FINRA. Archive of Arbitration Procedures for Cases Before and After April 16, 2007, http://www.finra.org/ArbitrationMediation/Rules (last visited Apr. 4, 2011). Consequently, just as in *Grant* and *Salomon*, the parties in the present case are deprived of the arbitration forum that they specifically bargained for and agreed upon.
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> Because the designated arbitrator is not available to resolve the present dispute, and because the arbitrator selection clause in the subject agreement constitutes a material and integral term of the agreement to arbitrate, this Court finds the arbitration agreement impossible to perform, and denies Defendants' Motion to Compel Arbitration and Dismiss or Stay.

This ruling was affirmed on appeal in an unpublished opinion.[8] *Keller v. ING Financial Partners, Inc.*, 2013 WL 8482243, Op. No. 2013-UP-014 (S.C. Ct. App. filed Jan. 9, 2013). The Court of Appeals characterized the trial court ruling as follows:

> The circuit court found the arbitration agreement between the parties designated the National Association of Securities Dealers (NASD) as an exclusive arbitral forum, the NASD was unavailable to arbitrate because it no longer existed, and the court could not substitute the Financial Industry Regulatory Authority (FINRA) for NASD.

The Court of Appeals further noted that the courts "cannot rewrite the parties' agreement to substitute FINRA for NASD." *Id.* at 2.

According to the South Carolina Appellate Court Case Management Public Index, the *Keller* arbitration proponents then petitioned for a writ of certiorari to the South Carolina Supreme Court. Certiorari was granted and the matter was fully briefed and argued to the Court. Following argument, the writ of certiorari was dismissed as improvidently granted, and the opinion of the Court of Appeals and Judge Hill's order remained unchanged. *Keller v. ING Financial Partners, Inc.*, Op. No. 2015-MO-006 (S.C. filed Feb. 11, 2015).

Keller provides an example of the importance of requiring proof of each material term in an arbitral agreement so that parties are not compelled to arbitrate before a forum to which they did not agree. South Carolina courts put arbitration proponents to their proof and do not allow them to rely on mere assumptions as a basis for compelling arbitration. Defendants are required to prove the existence of an agreement by Mr. Berry to arbitrate claims against them not just before any SRO forum, but before the SRO forum in which they seek to compel arbitration. Because

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[8] This Court recognizes Rule 268(d)(2), SCACR, regarding the reliance on unpublished opinions of the Court of Appeals and Supreme Court in non-related proceedings. Mr. Berry cited the appellate opinions in *Keller*, not as binding precedent, but rather as an indisputable fact about the subsequent procedural appellate history of Judge Hill's prior order in *Keller*. The Court takes judicial notice of these facts and the court's files in the *Keller* case pursuant to Rule 201, SCRE.

Defendants have offered no proof that any of the arbitral fora specifically selected in the 1994 Form still exist or offer arbitration services, an integral and material term of the purported arbitration clause is impossible to perform, rendering the entire arbitration agreement void. For this additional reason, Defendants' motion to compel arbitration is therefore denied.

II. Defendants' motion to dismiss is denied because the Amended Complaint provides Defendants with adequate notice of their alleged wrongdoing.

In the alternative to compelling arbitration of these claims, Defendants sought dismissal of the Amended Complaint under Rule 12(b)(6), SCRCP.[9] Defendants' motion lacks merit and is denied. "A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true." *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014) (quoting *Disabato v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013)). A motion to dismiss under Rule 12(b)(6), SCRCP, should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003) (citations omitted); *see also Baird v. Charleston Cty*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) (if the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper); *McCormick v.*

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[9] As was noted *supra* at p.5 n.2, Defendants did not timely raise their Rule 12(b)(3) objections to venue as this ground was not included in its initial motion. *See* Rule 12(g), (h), SCRCP. Although a Rule 12(b)(1) objection to the Court's subject matter jurisdiction can be raised at any time, Defendants have made no arguments in support of either this ground or their untimely raised venue objection. Thus, Defendants' failure to articulate any argument in support of any venue or subject matter objection dooms those objections as conclusory. This Court therefore treats them as abandoned and denies then accordingly. *See Mulherin-Howell*, 362 S.C. at 600, 608 S.E.2d at 593-94 (finding an argument advanced through conclusory statements with no argument or supporting authority abandoned); *Muir*, 336 S.C. at 298, 519 S.E.2d at 600 (declaring that conclusory arguments may be treated as abandoned).

England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997)(motion to dismiss cannot be sustained if facts alleged in complaint and inferences reasonably deducible therefrom would entitle plaintiff to relief on any theory of the case). In deciding whether to grant a motion to dismiss, this Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *See Flateau*, 355 S.C. at 202, 584 S.E.2d at 415 (citation omitted); *see also Cowart v. Poore*, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999) (looking at facts in light most favorable to plaintiff, and with all doubts resolved in his behalf, the court must consider whether the pleadings articulate any valid claim for relief). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987).

Defendants' two page Rule 12(b)(6), SCRCP argument is conclusory and unserious in the face of Mr. Berry's forty-four (44) page Amended Complaint that provides explicit detail on his assertions of wrongdoing supporting the causes of action alleged against Defendants. In fact, the motion to dismiss does not assert that *any* of the ten (10) specifically-pled causes of action are unsupported by sufficiently stated facts to support those causes of action. Consequently, Defendants' motion and accompanying memorandum does not meet its burden of showing a violation of Rule 12(b)(6), SCRCP and therefore the motion fails. *See, e.g., Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (finding an argument advanced through conclusory statements with no argument or supporting authority abandoned); *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 298, 519 S.E.2d 583, 600 (Ct. App. 1999) (declaring that conclusory arguments may be treated as abandoned).

Viewing the asserted facts as true and in the light most favorable to Mr. Berry, as this Court is required to in considering a Rule 12(b)(6) motion, the Amended Complaint greatly exceeds the

"facts sufficient" standard of a "short and plain statement" of a well-pled complaint sufficient to put each of the Defendants on notice of the allegations of wrongdoing advanced by Mr. Berry. Defendants' motion to dismiss is therefore denied.

CONCLUSION[10]

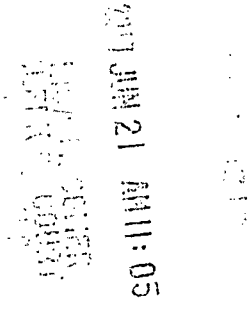
THEREFORE, for the reasons set forth above, Defendants' Motion to Stay or to Dismiss is DENIED. Defendants' Motion for a Protective Order and Stay of Discovery pending arbitration is rendered moot by the effect of this Order and is therefore DENIED. Defendants are ordered to file any responsive pleadings within fifteen (15) days of this Order and provide discovery responses to all outstanding discovery requests of Plaintiff within ten (10) days of this Order.

IT IS SO ORDERED.

G. Thomas Cooper

The Honorable G. Thomas Cooper, Jr.
Circuit Court Judge
Eleventh Judicial Circuit

Camden
~~Lexington~~, South Carolina
This 16 day of June, 2017



[10] In opposition to Defendants' motions, Mr. Berry also asserted that the purported arbitration clause relied upon by Defendants is unenforceable under these circumstances because its enforcement would compel Plaintiff to arbitrate outrageous conduct by Defendants that clearly was not contemplated at the inception of the arbitration agreement. While the Court agrees with the analysis and case law advanced by Mr. Berry on this topic, the Court need not address, in light of the rulings above, all issues at length where other grounds in opposition are likewise dispositive and provide the same relief. *See, e.g., Futch v. McAllister Towing of Georgetown Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999).

FORM 4

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

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2017CP3200397

Robert F Berry	Wells Fargo Clearing Services LLC Wells Fargo & Company Scott A Spang	Wells Fargo Advisors LLC Wells Fargo Bank NA Wachovia Securities Financial Holdings LLC
PLAINTIFF(S)		DEFENDANT(S)

Submitted by: | Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

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. ☐ See Page 2 for additional information.

☐ **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:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

6/22/2017

Circuit Court Judge **Judge Code** **Date**

For Clerk of Court Office Use Only

This judgment was entered on **21st June 2017**, and a copy mailed first class or placed in the appropriate attorney's box or **22nd June 2017**, to attorneys of record or to parties (when appearing pro se) as follows:

Chad Nicholas Johnston
PO Box 8416 Columbia, SC 29202-8416

Adam Noah Yount
PO Box 340 Charleston, SC 29402-0340
Frederick T Smith
6000 Fairview Road Suite 1200 Charlotte, NC 28210

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Lisa M. Comer/jp

Court Reporter

Lisa M. Comer - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, 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 judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

COUNTY OF LEXINGTON
LISA COMER
CLERK OF COURT
LEXINGTON COUNTY JUDICIAL CENTER
205 EAST MAIN STREET - SUITE 227
LEXINGTON, S.C. 29072

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Adam Noah Yount
PO Box 340
Charleston, SC 29402-0340

Haynsworth Sinkler Boyd, P.A.

Date Rec'd 6/27/17
C/M # 3686.0261
Routing ANY
Calendar

29402$0340 B042