

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2017-001690

RECEIVED

DEC 28 2017

SC Court of Appeals

Robert F. Berry, ...Respondent,

v.

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., ... Appellants.

**MOTION TO STRIKE;
MOTION TO HOLD DEADLINES IN ABEYANCE; MOTION FOR AN
EXTENSION OF TIME TO FILE INITIAL BRIEF OF RESPONDENT**

Respondent Robert F. Berry moves the Court for an Order striking certain arguments and citations from Appellants' Initial Brief, filed November 30, 2017, on the grounds that they were not presented below and, therefore, their inclusion for substantive consideration on appeal contravenes the well-established rules and practices of appellate courts in South Carolina. Moreover, Appellants disregard the express holding of the trial court that they failed to meet their burden of advancing any evidence which proves the applicability to Mr. Berry of the very standards and rules on which Appellants now principally rely. Rather than attempt to convince this Court that the trial court erred in its

view of the measure and admissibility of proof advanced below, Appellants simply skip this fundamental appellate burden in favor of arguing the merits of matters expressly excluded below, in addition to offering other new grounds for compelling arbitration. Unburdened by their obligation to demonstrate error below, Appellants effectively abandon the documents which they unsuccessfully argued were the sole source of Mr. Berry's obligation to arbitrate his claims, advancing what amounts to an entirely new case on appeal.

Appellants' reliance on these new, previously unraised below, and additional arguments and citations is so pervasive throughout the Initial Brief that Mr. Berry respectfully submits that the offending portions of the brief should be stricken and Appellants be required to file an amended Initial Brief excluding those citations and derivative arguments, while also not being permitted to bolster their remaining grounds and arguments. Such a remedy is appropriate here, as Mr. Berry, successful in defeating Appellants' motion on the grounds advanced below, should not be forced on appeal to undertake the time, effort, and expense to respond to what amounts to a new motion, including new arguments and grounds not raised below. Accordingly, and pursuant to Rule 240(b), SCACR, because of the prevalence and unavoidability of Appellants' improper citations and arguments comprising a substantial portion of the substantive arguments of their Initial Brief, Mr. Berry respectfully requests the Court **issue an immediate and intervening Order holding the timeline for filing the Initial Brief of Respondent in abeyance** until such time as the Court can consider the within Motion to Strike.

INTRODUCTION

The claims underlying this appeal relate to an action for damages filed by Mr. Berry against his former employers, Appellants 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 "Appellants"), for a deliberate breach of Mr. Berry's long-standing profit formula agreement and for other tortious actions designed to humiliate, defame, and damage Mr. Berry's professional reputation, his good name, and his ability to effectively compete against the Appellants in the future. During Mr. Berry's employment, Appellants implemented a now well-publicized and fraudulent scam to illegally increase the earnings and stock price of their corporate parent, Appellant Wells Fargo & Company, by aggressively pushing the employees of all subsidiary corporations, including Mr. Berry, to sell financial products to their customers and clients, regardless of whether the products were wanted, needed, or in the best interests of the customers and clients.

Mr. Berry refused to participate in Appellants' unlawful scheme, which would have violated the securities laws and his fiduciary obligations to his clients, and was rewarded for his demonstration of courage and adherence to ethical and legal obligations by being marked for termination. As part of their illicit scheme, Appellants subjected Mr. Berry to a systematic pattern of undercutting and disparagement, ultimately culminating in his forced resignation, subsequent defamation, and resulting damages.

In response to the action filed by Mr. Berry in the Court of Common Pleas in Lexington County, Appellants filed a Motion to Dismiss or to Stay Pending Arbitration. As the proponent of the motion to compel, Appellants asserted that arbitration of Mr.

Berry's claims was required based solely upon three (3) Form U4 registration statements¹ from the period when Mr. Berry was associated with Wheat, First Securities, Inc. ("Wheat First"), a now defunct firm. *See* Exhibit A, Appellants' Motion to Dismiss/Stay Pending Arbitration and Memorandum in Support (including exhibits). Although only the November 1994 Form U4 included possible arbitration fora for settling disputes between Mr. Berry and a third party company (Wheat First, which no longer exists), Appellants sought to compel arbitration of Mr. Berry's claims through the November 1994 registration statement before the Financial Industry Regulatory Authority, Inc. ("FINRA"), *a forum that was not referenced in any of the Form U4s advanced by Appellants before the trial court; indeed, FINRA did not even exist in 1994.*

Rather than rely upon the purported arbitration clause and fora that appeared in the Wheat First Form U4s, Appellants simply inserted the FINRA forum as a substitution for the designated fora without informing the trial court of the switch or offering admissible proof that such a substitution was appropriate. *See* Exhibit B, June 21, 2017 Order Denying Arbitration ("Order") at 8 ("[Appellants] 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.").

¹ A Form U-4 is a Uniform Application for Securities Industry Registration or Transfer. The forms advanced by Appellants to the trial court, *see* Ex. A, as being supportive of their motion were forms dated and then in use in 1994 and 1995, respectively. Only one of the Form U4s advanced by Appellants, the one dated November 5, 1994, designated potential arbitration fora, including the National Association of Securities Dealers (NASD), an entity no longer in existence.

For a number of reasons detailed in the Order, the trial court determined that Appellants had failed to meet their burden through admissible evidence in demonstrating that the submitted Form U4s established the existence of a valid arbitration agreement between Mr. Berry and these Appellants. Order at 5. The trial court further held that Appellants' conclusory references to a single FINRA rule were insufficient to compel arbitration of Mr. Berry's claims, because Appellants "have not met their threshold burden of demonstrating the applicability of any FINRA rule to Mr. Berry." Order at 8 n.7.

STANDARD

The South Carolina Appellate Court Rules are clear that the briefs of the parties are limited to references to and arguments about matters which may be properly included in the Record on Appeal. *See* Rule 208(b)(4) ("The brief shall contain references to the transcript, pleadings, orders, exhibits, or other materials which may be properly included in the Record on Appeal [see Rule 210(c)] to support the salient facts alleged. References shall also be made to where relevant objections and rulings occurred in the transcript."). Correspondingly, the Record on Appeal is limited to matters that were presented to the lower tribunal. *See* Rule 210(c), SCACR ("The Record ***shall not***, however, include matter which was not presented to the lower court or tribunal.") (emphasis added). Moreover, Rule 210(h), SCACR limits this Court's appellate consideration to those matters which are included in the Record. In giving full effect to the combination of these three rules, appellate courts of this state have universally held that parties are limited to presenting, and the Court is limited to reviewing, those issues and arguments which were presented to the lower tribunal and, by consequence, the record on appeal is expressly limited to same. As explained in South Carolina Highway Department v. Meredith:

This Court will not consider any fact which does not appear in the transcript of record nor will any fact stated in an exception be considered unless it appears from the record that it is true. Likewise, counsel is prohibited from **embodying in their briefs any fact which does not appear in the record.**

241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962) (emphasis added) (internal citations omitted); see also Cobb v. Benjamin, 325 S.C. 573, 482 S.E.2d 589 (Ct. App. 1997) (recounting that an insurance policy was stricken from the record, upon motion by opposing counsel, because it was not presented to the lower court and was therefore not part of the record that could be considered on appeal); Reed v. Beck, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999) (refusing to consider documents which were not presented to the trial court); State v. White, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007) (“Morris’ statement was not presented to the lower court and cannot be properly included in the Record on Appeal.”), *aff’d*, 382 S.C. 265, 676 S.E.2d 684 (2009); *see also* Exhibit C, Preservation Society of Charleston et al. v. S.C. Dep’t of Health and Envtl. Control, Appellate Case No. 2014-000847 (Order dated November 21, 2014) (striking a brief containing reference to matters that were not presented to the trial court and requiring the submission of an amended brief removing the offending references).

ARGUMENT

I. The arguments and citations to FINRA rules and their applicability to Mr. Berry should be stricken from the Initial Brief of the Respondent.

Based on the abovementioned authorities, Appellants should not be permitted to advance new theories that were not presented to the trial court. Apparently, Appellants have decided that the evidence and arguments presented to the trial court are without merit, so they largely abandon that evidence and those arguments and now essentially seek to try

a new case on appeal.² Further, it was improper for the Appellants to premise any arguments in their Initial Brief on these additional FINRA rules and to repeatedly cite to web addresses of other purported authority in an attempt to circumvent the Rules of Evidence and the Appellate Court Rules. References to and arguments based on FINRA rules, other than FINRA Rule 13200, were not presented to the trial court and are therefore subject to the Court's traditional preservation standards. *See e.g., Wilder Corp. v. Wilke*, 330 S.C. 71, 76, 497 S.E.2d 731, 733 (1998) ("It is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review.") (citation omitted). However, Appellants' citation to matters which were either not presented or expressly excluded below is so pervasive in their Initial Brief that responding to the remaining arguments is nearly impossible and unduly burdensome on Mr. Berry, a burden that he should not have to bear, since the new arguments and information are improperly included in the first place. Accordingly, Mr. Berry respectfully files this motion to strike the offending portions of the Initial Brief of Appellants and requests the Court to Order Appellants to re-file an amended brief, without bolstering its other arguments, prior to Mr. Berry's filing of his initial brief.

² Appellants have turned the old adage that "there's the case you plan to try, the case you try, and the case you wish you'd tried" on its head by attempting to argue the motion they wish they had argued below and asking this Court to sanction their do-over on appeal.

A. Appellants' citation to FINRA rules below was limited to a single citation and the trial court expressly held that Appellants did not meet their burden of proving FINRA's applicability to Mr. Berry, much less the existence of any agreement to arbitrate Mr. Berry's claims against Appellants before FINRA.

The basis for this motion is straightforward: a review of Appellants' motion to compel arbitration, *see* Ex. A, reveals that Appellants relied principally on the arbitration provision appearing in a single Form U4 document dated November 5, 1994, which Appellants contended was the source of Mr. Berry's obligation to arbitrate his claims against all Appellants. In the alternative, Appellants cited FINRA Rule 13200 for the proposition that Mr. Berry's claims must be arbitrated. Appellants cited no additional authority or documents, including no other FINRA rules or standards. Importantly, Appellants simply cited FINRA Rule 13200 as quasi-legal authority for its proposition, but put forward no evidence of FINRA's application to Mr. Berry generally, or FINRA Rule 13200 specifically, despite their burden to do so. Sensing a failure to meet their burden of proof as to the applicability of any FINRA rule to Mr. Berry, as the trial court notes in its order, Appellants alternatively requested the trial court to take judicial notice of FINRA Rule 13200, but that request was correctly rejected. *See* Order at 8, n.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 trial court's holding forms the basis of this Motion to Strike and stands for the proposition that Appellants failed to meet their evidentiary burden of proof regarding the applicability of FINRA rules generally, and FINRA Rule 13200 specifically. But rather

than argue that the trial court's threshold holding was incorrect or in disregard of submitted evidence, Appellants simply ignore the court's holding and cite FINRA rules and documents with impunity throughout their Initial Brief. Indeed, Appellants cite to and rely upon FINRA rules as though they are binding legal authority in this state. They are not, however, and as the trial court correctly held, the application of FINRA rules and standards are subject to a more fundamental demonstration by the proponent of their applicability: "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. Appellants are required to prove the existence of an agreement by Mr. Berry to arbitrate claims against them not just before any [self-regulatory organization], but before the [self-regulatory organization] forum in which they seek to compel arbitration." Order at 14 (citing *Keller v. ING Financial Partners, Inc.*, Op. No. 2011-CP-23-0336 (S.C. Cir. Ct. filed June 2, 2011), *affirmed* 2013 WL 8482243, Op. No. 2013-UP-014 (S.C. Ct. App. filed Jan. 9, 2013) and Op. No. 2015-MO-006 (S.C. filed Feb. 11, 2015)).

Appellants had the burden of putting forward competent evidence of the applicability of FINRA rules generally, and FINRA Rule 13200 specifically, to Mr. Berry, but the record is devoid of any such evidence or demonstration. Instead of asserting that the trial court's ruling was in error, Appellants simply disregard it altogether in their Initial Brief and incorrectly advance as binding legal authority on appeal the very FINRA rule that the trial court excluded without consideration due to Appellants' failure to prove its applicability. In short, rather than meet their appellate burden of demonstrating that the trial court's exclusion of any FINRA rule, and FINRA Rule 13200 specifically, on factual and evidentiary grounds was error, they simply ignore the trial court's ruling and attempt

to try a new case on appeal in direct violation of the rules and longstanding case law of this Court.

Accordingly, the following citations and arguments derived therefrom should be stricken from the Initial Brief of Appellants:

App. Brief at 6	FINRA, Registration and Qualification, Individual Registration; http://www.finra.org/industry/individualregistration
App. Brief at 6	Uniform Application for Securities Industry Registration or Transfer, Revised Form U4 (05/2009); https://www.finra.org/sites/default/files/form-u4.pdf
App. Brief at 6, 19	FINRA Manual, FINRA Rules, 1031, Registration Requirements; http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=3584
App. Brief at 11	NASD Rule IM-10100
App. Brief at 11	NASD Rule 2110
App. Brief at 14	FINRA Manual, FINRA Manual contents; http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=1
App. Brief at 14	S.E.C. Release No. 34-56615; https://www.sec.gov/rules/sro/finra/2007/34-56615.pdf ³
App. Brief at 14	S.E.C. Release No. 34-570033; https://www.sec.gov/rules/sro/finra/2007/34-57033.pdf
App. Brief at 16	FINRA, <i>Our Mission</i> ; https://www.finra.org/about/our-mission
App. Brief at 16	FINRA, <i>What We Do</i> ; https://www.finra.org/about/what-we-do
App. Brief at 17, 23	BrokerCheck; https://brokercheck.finra.org/
App. Brief at 17	FINRA, <i>About BrokerCheck</i> ; http://www.finra.org/investors/about-brokercheck
App. Brief at 19	FINRA Bylaws, Art. 4, § 1(a)(1); http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4609
App. Brief at 20	FINRA Manual, FINRA Rules, 13100; http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4196

³ Appellants' citation to these two SEC releases for the first time on appeal was done to circumvent their failure of proof below and the express ruling of the trial court that Appellants provided no evidence of the applicability of any FINRA Rule to Mr. Berry and his claims. *See* Order at 7-15.

App. Brief at 20-21	FINRA, Code of Arbitration Procedure; https://www.finra.org/arbitration-and-mediation/code-arbitration-procedure
App. Brief at 21	FINRA Manual, FINRA Rules, 12200; http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4106
App. Brief at 23	FINRA BrokerCheck, Robert Franklin Berry; https://brokercheck.finra.org/individual/summary/1262947
App. Brief at 23-24	S.E.C. Release No. 34-56208

II. Appellants' citations to FINRA rules and other online documents for the proposition of their applicability to Mr. Berry are inappropriate, and the Court should not take Judicial Notice of them for the first time on appeal.

Ordinarily, under Rule 210(h), SCACR, an appellate court will not consider any fact which does not appear in the Record on Appeal. Notwithstanding that general rule, appellate courts have employed the concept of appellate judicial notice in a discrete number of cases in the past where matters are indisputable. However, this Court has cautioned against the liberal use of judicial notice, particularly for matters that are subject to proof and in dispute. In Masters v. Rodgers Development Group, the Court explained the rationale behind a limited use of appellate judicial notice:

Appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable. Notice of “facts” for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record. Finally, appellate courts, limited to the “cold” record, cannot be as sensitive to the appropriateness of judicial notice as the trial judge. For the foregoing reasons we hold that original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable.

283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984).

Here, the rationale for taking judicial notice of documents which were not presented to the trial court has not been met, particularly in light of the fact that the trial court expressly held that Appellants did not meet their burden of demonstrating any of the cited rules' and documents' application to Mr. Berry and his claims and therefore excluded them without consideration. Doing so under these circumstances would effectively permit Appellants to try a new case on appeal, and in effect secure a second bite at the apple.⁴ *C.f.* Order at 5, n.2 (discussing Appellants ability to amend their filings to submit supplemental or additional documentation in support of their motion to compel arbitration, as "permitting them to do so at this time would provide [Appellants] a second bite at the apple.").

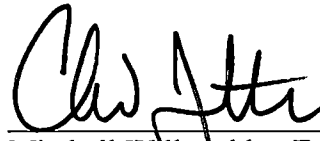
CONCLUSION

Based on the pending deadline (January 2, 2018) to file his Initial Respondent's Brief, Mr. Berry respectfully requests an immediate and intervening Order holding the timeline for filing the Initial Brief of Respondent in abeyance until such time as the Court can consider the within Motion to Strike. Because the citations to and arguments based on FINRA rules cited above are either presented for the first time on appeal or were expressly excluded by the trial court below on evidentiary grounds, Mr. Berry respectfully requests that the Court issue an Order striking the offending portions of Appellants' Initial Brief. Further, in removing the offending portions of the brief, Appellants should not be permitted to bolster their arguments regarding the Form U4s or FINRA Rule 13200 beyond what

⁴ In truth, allowing Appellants *carte blanche* to amend their basis for compelling arbitration would be a third bite at the apple, as Appellants already attempted to amend their motion to dismiss/stay pending arbitration prior to the hearing below, *see* Order at 5, n.2, not to mention the additional and new documents submitted by Appellants in support of their motion for reconsideration, which are improper for consideration on appeal but which are not the subject of this motion.

appears in their brief filed November 30, 2017. In striking those portions of the Initial Brief, Mr. Berry respectfully requests the Court provide Appellants a date certain time period in which to delete the offending portions from their Initial Brief and re-serve the Amended Initial Brief on Mr. Berry. In the event that the Court provides the relief sought by this motion, Mr. Berry respectfully requests an extension of thirty (30) days from the date of service of the Amended Initial Brief of Appellants in order to file his Initial Brief of Respondent. In the event the within motion is denied, Mr. Berry respectfully requests an extension of an additional twenty (20) days from the date of the Order to file the Initial Brief of Respondent.

Respectfully submitted,



Mitchell Willoughby, Esquire
Elizabeth Zeck, Esquire
Chad N. Johnston, Esquire
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Attorneys for Robert F. Berry

This 28th day of December 2017
Columbia, South Carolina

EXHIBIT A

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

BERRY,
☐ Plaintiff

v.

SPANG, *et al.*
☐ Defendant.

ORIGINAL
IN THE COURT OF COMMON PLEAS

CASE NO.
2017-CP-32-00397

**MOTION AND ORDER INFORMATION
FORM AND COVER SHEET**

Plaintiff's Attorney:
Mitchell Willoughby, Esquire; Elizabeth Zeck,
Esquire; Chad N. Johnston, Esquire, Bar No.
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P. O. Box 8416, Columbia, SC 29202
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Defendant's Attorney:
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Address:
Haynsworth Sinkler Boyd, P.A., P. O. Box 340,
Charleston, SC 29402-0340
phone: (843) 720-4484 fax: (843) 722-2266
e-mail: ayount@hsblawfirm.com other:

- ☒ **MOTION HEARING REQUESTED (attach written motion and complete SECTIONS I and III)**
☐ **FORM MOTION, NO HEARING REQUESTED (complete SECTIONS II and III)**
☐ **PROPOSED ORDER/CONSENT ORDER (complete SECTIONS II and III)**

SECTION I: Hearing Information

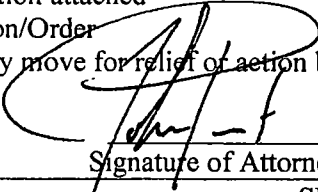
Nature of Motion: Motion to Dismiss or Stay Pending Arbitration

Estimated Time Needed: 20 mins. Court Reporter Needed: ☒ YES / ☐ NO

SECTION II: Motion/Order Type

- ☒ Written motion attached
☐ Form Motion/Order

I hereby move for relief of action by the court as set forth in the attached proposed order.


Signature of Attorney for ☐ Plaintiff / ☒ Defendant

April 12, 2017

Date submitted

SECTION III: Motion Fee

- ☒ **PAID - AMOUNT: \$25**
☐ **EXEMPT:** ☐ Rule to Show Cause in Child or Spousal Support
(check reason) ☐ Domestic Abuse or Abuse and Neglect
☐ Indigent Status ☐ State Agency v. Indigent Party
☐ Sexually Violent Predator Act ☐ Post-Conviction Relief
☐ Motion for Stay in Bankruptcy
☐ Motion for Publication ☐ Motion for Execution (Rule 69, SCRCF)
☐ Proposed order submitted at request of the court; or,
reduced to writing from motion made in open court per judge's instructions
Name of Court Reporter:
☐ Other:

JUDGE'S SECTION

- ☐ Motion Fee to be paid upon filing of the attached order.
☐ Other:

JUDGE

CODE: Date:

CLERK'S VERIFICATION

Date Filed:

Collected by: _____

- ☐ **MOTION FEE COLLECTED:**
☐ **CONTESTED - AMOUNT DUE:**

ORIGINAL

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

Robert F. Berry,

Plaintiff,

v.

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.

Case No. 2017-CP-32-00397

2017 APR 12 PM 2:33
CLERK OF COURT
SOUTH CAROLINA

DEFENDANTS' MOTION TO DISMISS OR STAY PENDING ARBITRATION

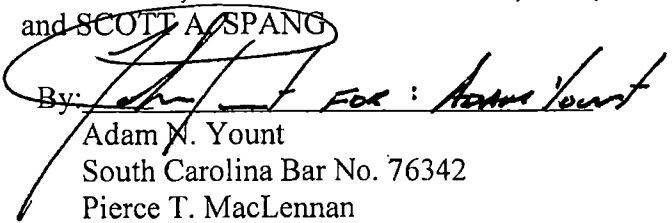
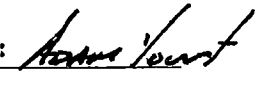
Defendants Wells Fargo Clearing Services, LLC f/k/a Wells Fargo Advisors, Wachovia Securities Financial Holdings, LLC, Wells Fargo & Company, Wells Fargo Bank, N.A., and Scott A. Spang, by their attorneys and pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, respectfully move for dismissal of this action, or alternatively for a stay pending arbitration before the Financial Industry Regulatory Authority in accordance with the provisions of the Form U4 signed by Plaintiff.

This motion is supported by applicable law, the arguments of counsel, a memorandum of law, and any other material the Court may receive.

(Signature block on following page.)

Respectfully submitted,

WELLS FARGO CLEARING SERVICES,
LLC F/K/A WELLS FARGO ADVISORS,
WACHOVIA SECURITIES FINANCIAL
HOLDINGS, LLC, WELLS FARGO &
COMPANY, WELLS FARGO BANK, N.A.,
and SCOTT A. SPANG

By:  For: 

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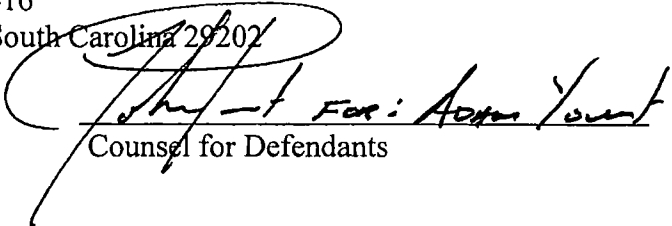
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Date: April 12, 2017

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2017, I mailed DEFENDANTS' MOTION TO DISMISS OR STAY PENDING ARBITRATION by the United States Postal Service to the following attorneys of record:

Mitchell Willoughby, Esquire
Elizabeth Zeck, Esquire
Chad N. Johnston, Esquire
Willoughby & Hoefer, P.A.
P.O. Box 8416
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Counsel for Defendants

DM: 4927887 v.1

ORIGINAL

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

Robert F. Berry,

Plaintiff,

v.

Scott A. Spang, Wells Fargo Clearing Services,
LLC, f/k/a Wells Fargo Advisors, LLC,
Wachovia Securities Financial Holdings, Inc.,
Wells Fargo & Company, and Wells Fargo
Bank, N.A.,

Defendants.

Case No. 2017-CP-32-00397

FILED
JUL 12 PM 2:53
CLERK OF COURT

DEFENDANTS' MEMORANDUM OF LAW
IN SUPPORT OF THEIR MOTION TO DISMISS OR STAY PENDING ARBITRATION

Defendants Wells Fargo Clearing Services, LLC f/k/a Wells Fargo Advisors, LLC, Wachovia Securities Financial Holdings, LLC, Wells Fargo & Company, Wells Fargo Bank, N.A., and Scott A. Spang, by their attorneys and pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), respectfully move for dismissal of this action, or alternatively for a stay pending arbitration pursuant to the Code of Arbitration Procedure for Industry Disputes of the Financial Industry Regulatory Authority ("FINRA").

INTRODUCTION

In enacting the FAA, Congress codified a strong public policy in favor of arbitration of disputes. Thus, where there is a written agreement between two or more parties that contains an arbitration provision, and that provision provides that all disputes "arising between" the parties must be arbitrated, there is a presumption of arbitrability. All questions concerning the scope or breadth of the arbitration provision must be resolved in favor of arbitration.

All of Plaintiff's claims against all Defendants¹ are subject to Plaintiff's U4 agreement executed with Wells Fargo Clearing Services' predecessor in interest and filed with FINRA, signed and dated November 5, 1994 (the "U4") (attached as Exhibit 1).² The U4 contains a comprehensive arbitration provision, which provides that all disputes, claims or controversies that arise between Plaintiff and his employer, his customers or other persons must be arbitrated with FINRA. Plaintiff's claims against Defendants are based upon events that occurred during his employment, as well as his termination. This action, therefore, falls within the scope of the arbitration provision agreed to by Plaintiff in the U4.

Moreover, FINRA Rule 13200 specifically requires a dispute to be arbitrated under FINRA's Code if the dispute arises out of the business activities of a member or an associated person, and Plaintiff's claims regarding the end of his employment and breach of his compensation agreement certainly arise out of the business activities of Wells Fargo Clearing Services (formerly Wells Fargo Advisors), Plaintiff, and Scott Spang. Finally, and in the alternative, Plaintiff's First Amended Complaint must be dismissed for failure to state a claim because it is impossible to tell from the face of his complaint which Defendants are accused of

¹ Plaintiff's Complaint names various corporate entities as defendants. His actual employer was the broker-dealer entity Defendant Wells Fargo Advisors, LLC. Effective November 2016, Wells Fargo Advisors, LLC changed its name to Wells Fargo Clearing Services, LLC. Defendant Wachovia Securities Financial Holdings, LLC, incorrectly named in this action as "Wachovia Securities Financial Holdings, Inc.," is the parent company of Wells Fargo Clearing Services, LLC. Wachovia Securities Financial Holdings, LLC is an indirect subsidiary of Wells Fargo & Company. Defendant Wells Fargo Bank, N.A. is a subsidiary of Wells Fargo & Company. Defendant Scott A. Spang is employed by Defendant Wells Fargo Clearing Services, LLC and is a registered representative or associated person under FINRA By-Laws and the Code of Arbitration Procedure of Industry Disputes. (See Affidavit of Beverly Jackson, attached hereto as Exhibit 2.)

² Plaintiff signed several amended versions of the U4, but the firm/employer of Wheat First Securities remained the same. (See Exhibit 1.) Wheat First Securities is a predecessor in interest to both Wells Fargo Advisors, LLC and Wells Fargo Clearing Services, LLC (See Exhibit 2.)

which actions. For all these reasons and as explained in more detail below, Plaintiff's claims should be dismissed because they must be arbitrated before FINRA and/or because Plaintiff fails to state a claim upon which relief may be granted.³

FACTUAL BACKGROUND

Almost three years to the day after his employment with Wells Fargo Advisors ended, Plaintiff filed this action, asserting a litany of claims against five Wells Fargo corporate entities and one individual Defendant that relate to alleged events during his employment as well as the termination of his employment. Plaintiff alleges that Defendants pressured him to cross-sell various bank products to his clients, and that when he refused to do so, Defendants unilaterally changed his compensation agreement, forced him to resign, and reported that Plaintiff's employment ended due to misconduct. (Am. Compl. ¶¶ 2-4.) Despite the fact that Plaintiff was employed only by Wells Fargo Advisors, in his First Amended Complaint, Plaintiff routinely references all six Defendants together as if they are one entity without specifying which entity did what or when. Plaintiff's First Amended Complaint, however, makes no mention of Plaintiff's agreement to arbitrate all of his claims against the predecessor in interest to Wells Fargo Advisors, LLC, before FINRA.

When he was hired by Wells Fargo Advisors' predecessor in interest, Plaintiff was required to complete and sign a U4, which is a FINRA requirement for all registered representatives as a condition of employment and as a condition of maintaining the ability to conduct securities business under both federal and state law. The U4 signed by Plaintiff on November 5, 1994, and each subsequent amended U4 signed by Plaintiff, states:

³ *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709-10 (4th Cir. 2001) ("dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable."); *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 179 (3d Cir. 1998) ("If all the claims in an action are arbitrable, a court may dismiss the action instead of staying it.")

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 [FINRA] as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent jurisdiction.

(See Exhibit 1.)

FINRA rules, in turn, specifically provide that “a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among: Members; Members and Associated Persons; or Associated Persons.”

FINRA Rule 13200(a). Notwithstanding the clear arbitration provisions contained in the U4 and FINRA Rule 13200(a), which are well known in the industry and require arbitration of employment disputes, Plaintiff deliberately chose to disregard his agreement and the rules and improperly brought his claims against Defendants in this Court.

ARGUMENT

I. Plaintiff's Claims Against All Defendants Must Be Arbitrated Pursuant to the U4 Arbitration Provision And FINRA Rule 13200.

Pursuant to federal and state law, all of Plaintiff's claims against Defendants must be arbitrated pursuant to the U4 arbitration provision and FINRA Rule 13200. Section 2 of the FAA provides that arbitration provisions contained in written contracts “shall be valid, irrevocable, and enforceable.” 9 U.S.C. § 2. The FAA manifests a liberal federal policy favoring arbitration agreements. *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (“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”); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The FAA was enacted with the purpose “to reverse the longstanding judicial hostility to arbitration agreements that had existed at

English common law” and had been adopted by American courts, and to place arbitration agreements on the same footing as other contracts. *Adkins*, 303 F.3d at 502 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)).

Consequently, arbitration agreements should be enforced according to their terms, and “any doubt concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24-25. This presumption in favor of arbitration persists, ““unless 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 Tech., Inc. v. Comm. Workers of Am.*, 475 U.S. 643, 650 (1986) (quoting *Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-83 (1960)); accord *Peabody Holding Co., LLC v. United Mine Workers of Am., Int’l Union*, 665 F.3d 96, 104 (4th Cir. 2012).

“To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim.” *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 287, 733 S.E.2d 597, 600 (Ct. App. 2012). “A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute.” *Id.*

In this action, the factual allegations underlying Plaintiff’s claims are unquestionably within the scope of the broad arbitration clause contained in the U4. The U4’s broad arbitration provision provides that Plaintiff agreed to arbitrate “any dispute, claim or controversy” arising between Plaintiff and his employer that is required to be arbitrated by FINRA rules. FINRA Rule 13200(a), in turn, states that a dispute must be arbitrated if it “arises out of the business activities of a member or an associated person” and is between or among, members, members

and associated persons, or associated persons. Thus, the clause contained in the U4 is “precisely the kind of broad arbitration provision that justifies a presumption of arbitrability.” *Oldroyd v. Elmira Sav. Bank*, 134 F.3d 72, 75 (2d Cir. 1998); accord *Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 261, 743 S.E.2d 868, 874 (Ct. App. 2013) (compelling arbitration of plaintiff’s tort claims as well as contract claims and noting that “[a] clause which provides for arbitration of all disputes ‘arising out of or relating to’ the contract is construed broadly”); *Cornett Mgmt. Co., LLC v. Fireman’s Fund Ins. Co.*, 332 F. App’x 146, 149 (4th Cir. 2009) (noting that term “arising out of” must be broadly construed, thereby requiring court to apply a broad construction). Plaintiff’s allegations that Defendants breached his compensation agreement, forced his resignation, and falsely reported that he was terminated for cause certainly arise out of Plaintiff’s and his employer’s business activities.

Plaintiff cannot dispute that he was required to, and did, in fact, execute a Form U4 agreement at the time he commenced his employment with the predecessor in interest to Wells Fargo Advisors in 1994. Numerous courts have repeatedly confirmed that claims by a registered representative, such as those asserted by Plaintiff, fall within the arbitration provision contained in the Form U4. *See, e.g., Troutman v. SunTrust Bank*, No. CA 3:13-1690-MBS, 2013 WL 5657681, at *4 (D.S.C. Oct. 16, 2013) (dispute regarding repayment of signing bonus is a “dispute, claim or controversy” arising between plaintiff and member firm that is required to be submitted to arbitration pursuant to FINRA Rule 13200); *PFS Invs., Inc. v. Imhoff*, No 11-10142, 2011 WL 1135538, at *6 (E.D. Mich. Mar. 25, 2011) (admission by plaintiff that he executed U4 and was registered with FINRA confirmed obligation to arbitrate disputes with former employer); *Hawkins v. Toussaint Capital Partners, LLC*, No. 08 Civ. 6866, 2010 WL 2158332, at *2 (S.D.N.Y. May 27, 2010) (employee required to arbitrate dispute with employer based

upon arbitration provision in U4); *Gunby v. The Equitable Life Assurance Soc’y*, 971 S.W.2d 7, 9-10 (Tenn. App. 1997) (Form U4 is an enforceable agreement to arbitrate employment disputes between a registered representative and his or her firm). The U4 signed by Plaintiff is an enforceable agreement to arbitrate the very claims that Plaintiff has brought. *See Blackwell v. Bank of Am. Corp.*, No. CIV.A. 7:11-2475-JMC, 2012 WL 1229673, at *2 (D.S.C. Mar. 22, 2012), *report and recommendation adopted*, No. 7:11-CV-02475-JMC, 2012 WL 1229675 (D.S.C. Apr. 12, 2012) (compelling plaintiff, who signed a U4 Registration Form, to arbitrate his claims against a FINRA member firm).

Plaintiff’s claims in his First Amended Complaint alleging that Defendants breached his compensation agreement, forced him to resign, and reported false and negative information regarding the end of his employment are the exact type of dispute concerning business activities contemplated by the U4 and FINRA rules as being subject to arbitration. As recently confirmed by one federal district court, “[t]he term ‘business activities’ [within FINRA Rule 13200(a)] encompasses a dispute arising from the employment or termination of an associated person.” *French v. Wells Fargo Advisors, LLC*, No 5:11-cv-246, 2012 WL 479961, at *5 (D. Vt. Feb. 14, 2012) (emphasis added) (citations omitted); *see also Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 111, 739 S.E.2d 209, 214–15 (2013) (alleged defamatory statements made by employer concerning reasons for plaintiff’s termination were covered by arbitration agreement); *Blackwell*, 2012 WL 1229673, at *2 (granting motion to compel arbitration, pursuant to Form U4, for plaintiff’s employment claims against his employer); *Hawkins*, 2010 WL 2158332, at *4-5 (plaintiff’s claims for failure to pay commission, breach of employment contract, and retaliatory discharge subject to FINRA arbitration in parties’ U4 because claims “clearly fall within the scope of the parties’ ‘business activities’ because they directly implicate some of the most

fundamental aspects of [plaintiff's] business relationship with [his employer]"); *Thaning v. UBS/Paine Webber*, No. C 07-5528 PJH, 2008 WL 2024884, at *3 (N.D. Cal. May 8, 2008) (same); *McCafferty v. A.G. Edwards & Sons, Inc.*, No. 2:11-cv-00517 (WJM), 2011 WL 3515909, at *4 (D.N.J. Aug. 11, 2011) (wrongful termination claim based on violation of state whistleblower statute subject to FINRA arbitration). All of Plaintiff's claims - wrongful termination, breach of contracts and covenants of good faith and fair dealing, defamation, violation of the South Carolina Unfair Trade Practices Act, intentional interference with prospective contractual relations, false imprisonment, and conversion - are therefore covered by the arbitration provision that Plaintiff agreed to and signed.

Finally, and quite importantly, not only is Plaintiff compelled to arbitrate his claims against his former employer, Defendant Wells Fargo Advisors, and Spang, a fellow registered representative and associated person, but Plaintiff is also required to pursue claims against *any and all* of the Defendants via FINRA arbitration. South Carolina has recognized "a party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint ... because this would nullify the rule requiring arbitration." *Pearson*, 400 S.C. at 288, 733 S.E.2d at 600 (noting that because claims against nonsignatory parent company were "intimately founded in and intertwined with" a contract containing an arbitration clause, signatory was estopped from refusing to arbitrate those claims) (citing *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993)). Further, where a plaintiff "makes no distinction between the [signatory] and [nonsignatory] in his complaint and "lumps them together as defendants and states they are jointly and severally liable," as Plaintiff repeatedly does in his First Amended Complaint, the lawsuit against all parties "ar[ises] from the same set

of facts,” and the claims against all the defendants must be arbitrated pursuant to the arbitration provision in the U4. *Id.* at 297, 733 S.E.2d at 605.

In his First Amended Complaint, Plaintiff alleges that he was pressured to cross-sell bank products and forced to resign when he did not comply, that his compensation agreement was breached, and that Defendants defamed him by making false statements regarding the reason for his termination; these allegations form the basis for Plaintiff’s claims against all Defendants. And, like the plaintiff in *Pearson*, who was not permitted to avoid arbitration by “mak[ing] no distinction between” the defendants, the Court should, likewise, reject Plaintiff’s attempt to “lump[] them together as defendants.” *Pearson*, 400 S.C. at 297. Because all of Plaintiff’s claims “arise out of the business activities” of a member or an associated person and the dispute is between an associated person and a member and another associated person, such claims must all be arbitrated pursuant to FINRA Rules. Accordingly, this action should be dismissed outright or, at least stayed, and Plaintiff should be ordered to pursue his claims in accordance with the FINRA Code.

II. In the Alternative, Plaintiff’s First Amended Complaint Should Be Dismissed For Failure To State A Claim.

As explained above, all of Plaintiff’s claims are subject to dismissal and should be compelled to arbitration. In the alternative, however, Plaintiff’s claims must also be dismissed because he fails to allege any facts that would entitle him to relief against Defendants. Rule 8(a) of the South Carolina Rules of Civil Procedure requires that a complaint contain “a short and plain statement of the facts showing that the pleader is entitled to relief.” A motion to dismiss should be granted where, even when viewed in the light most favorable to the nonmoving party, the “facts alleged and inferences reasonably deducible” from those facts do not entitle the claimant to relief. *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999) (internal quotes

omitted). When a complaint involves multiple parties and multiple claims, each claim should make it clear which defendant or defendants are alleged to have committed which wrong. *Washington v. Thomas*, No. 09-11302, 2009 WL 1424193, at *2 (E.D. Mich. May 18, 2009); *see also Unisun Ins. v. Hawkins*, 342 S.C. 537, 542, 537 S.E.2d 559, 562 (Ct. App. 2000) (noting that where a state rule is similar to the federal rule, federal cases interpreting the federal rule are persuasive). If it is “impossible to tell from the face of the complaint which defendants were accused of which violations, what specific acts constituted violations, or when alleged violations occurred,” such a complaint fails to state a claim upon which relief can be granted. *Id.*

Plaintiff’s First Amended Complaint should be dismissed as it fails to clearly delineate which Defendant is alleged to have committed which wrong. To that end, Plaintiff names five corporate defendants and one individual defendant, but the complaint is riddled with vague and sweeping allegations against “Defendants,” “the WFA Defendants,” and “the Wells Fargo Bank Defendants,” without specifying which entity did what or when. For example, Plaintiff fails to allege any facts at all pertaining to Wells Fargo & Company or Wells Fargo Bank, N.A., which Plaintiff collectively and generically refers to as “the Wells Fargo Bank Defendants.” Plaintiff does not allege that either of “the Wells Fargo Bank Defendants” was his employer (because he cannot) nor does the complaint explain how or why they are even named as defendants at all. In discussing Plaintiff’s alleged forced resignation and breach of his compensation agreement, for example, Plaintiff never mentions “the Wells Fargo Bank Defendants” in any capacity.

Likewise, Plaintiff does not specify in his First Amended Complaint which of the “WFA Defendants” took what actions that would subject them to liability. Plaintiff repeatedly lumps the brokerage firm defendants together as the “WFA Defendants.” Plaintiff fails throughout his complaint to specify any alleged wrongdoing attributable to Wells Fargo Advisors, LLC, Wells

Fargo Clearing Services, LLC, and Wachovia Securities Financial Holdings, LLC (the parent company of Wells Fargo Clearing Services). Plaintiff also fails to allege any facts to support a theory that the parent company could or should be liable for the acts of its subsidiary.

“[U]nadorned conclusory allegations” like these are akin to no allegations at all. *Vitol, S.A. v. Primerose Shipping Co.*, 708 F.3d 527, 543 (4th Cir. 2013).

Plaintiff cannot pursue claims against defendants who are not alleged to have done anything at all. Because Plaintiff’s First Amended Complaint fails to put each Defendant on notice as to what allegations are directed at it, Plaintiff fails to allege facts that would entitle him to relief as to any Defendant.

CONCLUSION

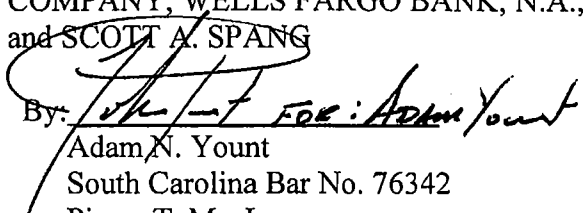
For all the foregoing reasons, Plaintiff’s claims against Defendants must be dismissed or stayed pending arbitration of those claims in accordance with the provisions of the Form U4 signed by Plaintiff. In the alternative, Plaintiff’s First Amended Complaint should be dismissed in its entirety for failure to state a claim upon which relief can be granted.

(Signature block on following page.)

Respectfully submitted,

WELLS FARGO CLEARING SERVICES,
LLC F/K/A WELLS FARGO ADVISORS,
LLC, WACHOVIA SECURITIES FINANCIAL
HOLDINGS, LLC, WELLS FARGO &
COMPANY, WELLS FARGO BANK, N.A.,
and SCOTT A. SPANG

By:

 For: Adam Yount

Adam N. Yount

South Carolina Bar No. 76342

Pierce T. MacLennan

South Carolina Bar No. 101797

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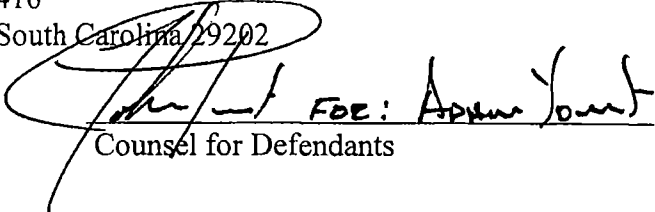
fsmith@seyfarth.com

Date: April 12, 2017

CERTIFICATE OF SERVICE

I hereby certify that on April 12, 2017, I mailed DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS OR STAY PENDING ARBITRATION by the United States Postal Service to the following attorneys of record:

Mitchell Willoughby, Esquire
Elizabeth Zeck, Esquire
Chad N. Johnston, Esquire
Willoughby & Hoefer, P.A.
P.O. Box 8416
Columbia, South Carolina 29202


Counsel for Defendants

DM: 4927907 v.1

EXHIBIT 1

FORM U-4

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

If there is an amendment to this page, complete only items 1, 2, 3, 4 and items being amended

① LAST NAME: Berry	JR SR etc	FIRST NAME Robert	MIDDLE NAME Franklin	② APPLICANT'S CMT # 1262947
③ FIRM CMT # 20182	④ FIRM NAME (Do not include this employment under item 15, page 2) Wheat, First Securities, Inc.			⑤ EMPLOYMENT DATE 11/04/94

⑥ FIRM MAIN ADDRESS 901 East Byrd Street, Richmond, Virginia 23219	STREET	CITY	STATE	ZIP
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⑦ BRANCH ID # 190	OFFICE OF EMPLOYMENT ADDRESS Nations Bank Plaza, Suite 1570, 1901 Main Street, Columbia, SC 29202	STREET	CITY	STATE	ZIP
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⑧ Will applicant maintain registration with another Broker-Dealer not under common ownership or control with the firm named in item 4 above? ☐ Yes ☒ No
 If "Yes" list in item 19:
 If "Yes" has have the firm(s) been contacted? ☐ Yes ☐ No

⑨ Will applicant maintain multiple registrations with Broker-Dealers under common ownership or control with the firm named in item 4 above? ☐ Yes ☒ No
 If "Yes" list in information below:
 Firm CRD # _____ Name of Firm _____
 Firm CRD # _____ Name of Firm _____
 Firm CRD # _____ Name of Firm _____

⑩ TO BE REGISTERED WITH THE FOLLOWING

S R O J U R I S D I C T I O N	☐ ASE	☐ BSE	☐ CBOE	☐ CSE	☐ MSE	☐ NASD	☐ NFA	☐ NYSE	☐ PHLX	☐ PSE	OTHER (Specify) _____			
	☐ AK	☐ AL	☐ AR	☐ AZ	☐ CA	☐ CO	☐ CT	☐ DC	☐ DE	☐ FL	☐ GA	☐ HI	☐ IA	
	☐ ID	☐ IL	☐ IN	☐ KS	☐ KY	☐ LA	☐ MA	☐ MD	☐ ME	☐ MI	☐ MN	☐ MO	☐ MS	
	☐ MT	☒ NC	☐ ND	☐ NE	☐ NH	☐ NJ	☐ NM	☐ NV	☐ NY	☐ OH	☐ OK	☐ OR	☐ PA	
	☐ RI	☐ SC	☐ SD	☐ TN	☐ TX	☐ UT	☐ VA	☐ VT	☐ WA	☐ WI	☐ WV	☐ WY	☐ PR	

All Jurisdictions.
(Check in Lieu Of
Each Individual
Box).

⑪ TYPE OF EXAMINATION/REGISTRATION REQUESTED (check all applicable categories)

☐ S-3 Commodity Futures Examination	☐ S-39 (DP) Direct Participation Program Principal
☐ S-4 (OP) Registered Options Principal	☐ S-42 (OR) Options Representative
☐ S-5 Interest Rate Options Examination	☐ S-52 (MR) Municipal Securities Representative
☐ S-6 (IR) Investment Company and Variable Contracts Products Representative	☐ S-53 (MP) Municipal Securities Principal
☐ S-7 (GS) Full Registration/General Securities Representative	☐ S-62 (CS) Corporate Securities Representative
☐ S-7 (TR) Securities Trader (NYSE)	☐ S-63 Uniform Securities Agent State Law Examination
☐ S-7 (TS) Trading Supervisor (NYSE)	☐ S-65 Uniform Investment Advisor Law Examination
☐ S-8 (SU) General Securities Sales Supervisor	☐ (AG) Agent
☐ S-8 (BM) Branch Office Manager (NYSE)	☐ (RG) Government Securities Representative
☐ S-11 (AR) Assistant Representative/Order Processing	☐ (PG) Government Securities Principal
☐ S-15 (FC) Foreign Currency Options	☐ (ME) Member Exchange (NYSE)
☐ S-16 (SA) Supervisory Analyst	☐ (LE) Securities Lending Representative (NYSE)
☐ S-22 (OR) Direct Participation Program Representative	☐ (LS) Securities Lending Supervisor (NYSE)
☐ S-24 (GP) General Securities Principal	☐ (AM) Allied Member (NYSE)
☐ S-28 (IP) Investment Company and Variable Contracts Products Principal	☐ (AP) Approved Person (NYSE)
☐ S-27 (FN) Financial and Operations Principal	☐ (AI) Agent of the Issuer
☐ S-28 (FI) Introducing Broker-Dealer/Financial and Operations Principal	☐ Reschedule Exam Series _____
	☒ Other FA Rep.

THIS PORTION MUST BE COMPLETED FOR ALL PARTIAL (TRANSFER OR RE-REGISTRATION) FILINGS

⑫ APPLICANT'S CURRENT ADDRESS	STREET	CITY	STATE	ZIP	FROM MONTH	YEAR
FIRM(S) APPLICANT IS TRANSFERRING FROM:	TERMINATION DATE: (Mo/Day/Yr)					
☐ CHECK IF THIS U-4 IS BEING FILED TO MAKE PERMANENT A TEMPORARY REGISTRATION (TAT).						

The appropriate signature area DOES NOT have to be completed UNLESS this page is being submitted as an amendment

MONTH	DAY	YEAR	SIGNATURE OF APPROPRIATE SIGNATORY
			TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

I CRD USE ONLY

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER
If there is an amendment to this page, complete only Items 13, 14 and the items being amended

PERSONAL DATA

RESIDENTIAL HISTORY

EMPLOYMENT AND PERSONAL HISTORY

Mid-Atlantic Marketing, Inc.; Charlotte, NC; Director

CBD USE ONLY

If there is an amendment to this page, complete only item 21 and items being amended

FIRM CRD # 20182	FIRM NFA #	SOCIAL SECURITY # REDACTED	APPLICANT'S CRD # 1262947	APPLICANT'S NFA #
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IF THE ANSWER TO ANY OF THE FOLLOWING QUESTIONS IS "YES" AND YOU CANNOT UTILIZE THE CERTIFICATION IN ITEM 22O BELOW, ATTACH COMPLETE DETAILS OF ALL EVENTS OR PROCEEDINGS ON DRP(S)

22 DEFINITIONS

- Charged — Accused of a crime in a formal complaint, information, or indictment
- Investment or Investment-Related — Pertaining to securities, commodities, banking, insurance, or real estate including, but not limited to acting as or being associated with a broker-dealer, investment company, investment adviser, futures sponsor, bank, or savings and loan association

- Involved — Doing an act or acting, abetting, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act
- Foreign Financial Regulatory Authority — Includes (A) a foreign securities authority; (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of investment or investment-related activities; or (C) membership organization, a function of which is to regulate the participation of its members in the activities listed above

	YES	NO	
22A. Have you been convicted of or plead guilty or nolo contendere ("no contest") in a domestic or foreign court to:			
(1) a felony or misdemeanor involving: investments or an investment-related business, fraud, false statements or omissions, wrongful taking of property, or bribery, forgery, counterfeiting or extortion?	☐	☒	1
(2) gambling?	☐	☒	2
(3) any other felony?	☐	☒	3
B. Have you, or an organization over which you exercised management or policy control, ever been charged with any felony or charged with a misdemeanor specified in question A(1) or (2) in a domestic or foreign court?	☐	☒	4
C. Has any domestic or foreign court ever:			
(1) enjoined you in connection with any investment-related activity?	☐	☒	5
(2) found that you were involved in a violation of investment-related statutes or regulations?	☐	☒	6
D. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:			
(1) found you to have made a false statement or omission?	☐	☒	7
(2) found you to have been involved in a violation of investment-related regulations or statutes?	☐	☒	8
(3) found you to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☒	9
(4) entered an order denying, suspending or revoking your registration or disciplined you by restricting your activities?	☐	☒	10
(5) imposed a civil money penalty on you, or ordered you to cease and desist from any activity?	☐	☒	10A
E. Has any other Federal regulatory agency or any state regulatory agency or foreign financial regulatory authority ever:			
(1) found you to have made a false statement or omission or been dishonest, unfair or unethical?	☐	☒	11
(2) found you to have been involved in a violation of investment regulations or statutes?	☐	☒	12
(3) found you to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☒	13
(4) entered an order against you in connection with investment-related activity?	☐	☒	14
(5) denied, suspended, or revoked your registration or license or otherwise prevented you from associating with an investment-related business, or disciplined you by restricting your activities?	☐	☒	15
(6) revoked or suspended your license as an attorney, accountant or federal contractor?	☐	☒	16
F. Has any self-regulatory organization or commodities exchange:			
(1) found you to have made a false statement or omission?	☐	☒	17
(2) found you to have been involved in a violation of its rules?	☐	☒	18
(3) found you to have been the cause of an investment-related business having its authorization to do business denied, suspended, revoked or restricted?	☐	☒	19
(4) disciplined you by expelling or suspending you from membership, barring or suspending your association with its members, or restricting your activities?	☐	☒	20
G. Has any foreign government ever entered an order against you related to investments or fraud, other than as reported in items 22A, B, C or E?	☐	☒	21
H. Have you ever been the subject of an investment-related, consumer-initiated complaint or proceeding that:			
(1) alleged compensatory damages of \$10,000 or more, fraud, or wrongful taking of property?	☒	☐	22
(2) was settled or decided against you for \$5,000 or more, or found fraud or the wrongful taking of property?	☐	☒	23
I. Are you now the subject of any complaint, investigation, or proceeding that could result in a "yes" answer to parts A-H of this item?	☐	☒	24
J. Has a bonding company denied, paid out on, or revoked a bond for you?	☐	☒	25
K. Do you have any unsatisfied judgments or liens against you?	☒	☐	26
L. Have you or a firm that you exercised management or policy control over, or owned 10% or more of the securities of, failed in business, made a compromise with creditors, filed a bankruptcy petition or been declared bankrupt?	☐	☒	27
M. Has a broker or dealer firm that you exercised management or policy control over, or owned 10% or more of the securities of, been declared bankrupt, had a trustee appointed under the Securities Investor Protection Act, or had a direct payment procedure initiated?	☐	☒	28
N. Have you been discharged or permitted to resign because you were accused of:			
(1) violating investment-related statutes, regulations, rules, or industry standards of conduct?	☐	☒	29
(2) fraud or the wrongful taking of property?	☐	☒	30
(3) failure to supervise in connection with investment-related statutes, regulations, rules or industry standards of conduct?	☐	☒	31

DISCLOSURE CERTIFICATION (OPTIONAL)

You may only certify to the accuracy and completeness of the disclosure information in your file if it has been fully provided in DRP format. If DRP(s) are not on file, do not answer these certification boxes. Provide full details of all matters on DRP(s). All appropriate questions in item 22 must be answered, regardless of whether the certification is being utilized. Refer to the instructions on the inside cover of the Form U-4 for additional information on the utilization of the certification language.

O. I have reviewed a copy of my disclosure file taken from the CRD system. I acknowledge that all information contained therein is fully disclosed, accurate and in DRP format. I further certify the following:	1. I have no new information to add to my disclosure file.	1. ☐	32
	2. I have new information to add to my disclosure file which is reported on the attached DRP(s).	2. ☐	33
	3. I have updated information, reported on the attached DRP(s), which was previously reported and contained in Occurrence	3. ☐	34

This applicant and appropriate signatory area **DOES NOT** have to be completed **UNLESS** this page is being submitted as an amendment.

MONTH DAY YEAR SIGNATURE OF APPLICANT
TYPE OR PRINT NAME OF APPLICANT

MONTH DAY YEAR SIGNATURE OF APPROPRIATE SIGNATORY
TYPE OR PRINT NAME OF

CRD USE ONLY

FORM U-4
UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER
If there is an amendment to this page, complete only Item 23 and Items being amended

FIRM CRD # 20182	SOCIAL SECURITY # REDACTED	APPLICANT'S CRD # 1262947 APPLICANT'S NFA #
-------------------------	--------------------------------------	---

THE APPLICANT MUST READ THE FOLLOWING VERY CAREFULLY

1. I swear or affirm that I have read and understand the items and instructions on this form and that my answers (including attachments) are true and complete to the best of my knowledge. I understand that I am subject to administrative, civil or criminal penalties if I give false or misleading answers.
2. I apply for registration with the jurisdictions and organizations indicated in Item 10 as may be amended from time to time and, in consideration of the jurisdictions and organizations receiving and considering my application, I submit to the authority of the jurisdictions and organizations and agree to comply with all provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the jurisdictions and organizations as they are or may be adopted, or amended from time to time. I further agree to be subject to and comply with all requirements, rulings, orders, directives and decisions of, and penalties, prohibitions and limitations imposed by the jurisdictions and organizations, subject to right of appeal or review as provided by law.
3. I agree that neither the jurisdictions or organizations nor any person acting on their behalf shall be liable to me for action taken or omitted to be taken in official capacity or in the scope of employment, except as otherwise provided in the statutes, constitutions, certificates of incorporation, by-laws or the rules and regulations of the jurisdictions and organizations.
4. I authorize the jurisdictions and organizations to give any information they may have concerning me to any employer or prospective employer, any federal state or municipal agency, or any other organization and I release the jurisdictions and organizations and any person acting on their behalf from any and all liability of whatever nature by reason of furnishing such information.
5. 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 and that any arbitration award rendered against me may be entered as a judgement in any court of competent jurisdiction.
6. For the purpose of complying with the laws relating to the offer or sale of securities or commodities in the jurisdictions indicated in Item 10 as may be amended from time to time, I irrevocably appoint the administrator of each of those jurisdictions, or such other person designated by law, and the successors in such office, my attorney upon whom may be served any notice, process or pleading in any action or proceeding against me arising out of or in connection with the offer or sale of securities or commodities, or out of the violation or alleged violation of the laws of the jurisdictions. I consent that any such action or proceeding against me may be commenced in any court of competent jurisdiction and proper venue by service of process upon the appointee as if I were a resident of, and had been lawfully served with process in, the jurisdiction. I request that a copy of any notice, process or pleading served hereunder be mailed to my current residential address as reflected in this form or any amendment thereto.
7. I consent that notice of any investigation or proceeding by any self-regulatory organization against applicant may be given by personal service or by regular, registered or certified mail or confirmed telegram to applicant at his/her most recent business or home address as reflected in this Form U-4, or any amendment thereto, or by leaving notice of the investigation or proceeding at such address.
8. I authorize all of my employers and any other person to furnish to any jurisdiction or organization or any agent acting on its behalf, any information they have, including my creditworthiness, character, ability, business activities, educational background, general reputation, history of my employment and, in the case of former employers, complete reasons for my termination. Moreover, I release each employer, former employer and each other person from any and all liability, of whatever nature, by reason of furnishing any of the above information, including that information reported on the Uniform Termination Notice for Securities Industry Registration (Form U-5). I recognize that I may be the subject of an investigative consumer report ordered by the jurisdictions, or organizations with which this application is being filed, and waive any requirement of notification with respect to any investigative consumer report ordered by any such jurisdiction or organization. I understand that I have the right to request complete and accurate disclosure by the jurisdiction or organization of the nature and scope of the requested investigative consumer report.
9. I understand and certify that the representations in this form apply to all employers with whom I seek registration as indicated in Items 4 and 9 of this form. I agree to update this form by causing an amendment to be filed on a timely basis whenever changes occur to answers previously reported. Further, I represent that, to the extent any information previously submitted is not amended, the information provided in this form is currently accurate and complete.
10. If I have become temporarily registered as an agent, I acknowledge that this application for registration with the jurisdictions and organizations indicated in Item 10 is separate and distinct from any temporary registration already obtained with the jurisdictions and organizations. I further understand that my registration may be denied, suspended or revoked under the laws, regulations or rules of the jurisdictions and organizations.

9/28/95

Month Day Year

SIGNATURE OF APPLICANT

Robert F. Berry

TYPE OR PRINT NAME OF APPLICANT

THE FIRM MUST COMPLETE THE FOLLOWING

To the best of my knowledge and belief, the applicant is currently bonded where required, and, at the time of approval, will be familiar with the statute(s), constitution(s), rules and by-laws of the agency, jurisdiction or self-regulatory organization with which this application is being filed, and the rules governing registered persons, and will be fully qualified for the position for which application is being made herein. I agree that, notwithstanding the approval of such agency, jurisdiction or organization which hereby is requested, I will not employ the applicant in the capacity stated herein without first receiving the approval of any authority which may be required by law. This firm has communicated with all of the applicant's previous employers for the past three years.

EMPLOYER	NAME OF PERSON CONTACTED	POSITION OF PERSON CONTACTED	EMPLOYED		HOW CONTACTED		
			FROM	TO	PHONE	LETTER	INTERVIEW
PRudential Sec. , Inc.			4/85	11/94		XX	

IN ADDITION, I HAVE TAKEN APPROPRIATE STEPS TO VERIFY THE ACCURACY AND COMPLETENESS OF THE INFORMATION CONTAINED IN AND WITH THIS APPLICATION.

THE APPROPRIATE SIGNATORY AREA MUST BE COMPLETED ON ALL INITIAL TRANSFER OR AMENDMENT FILINGS

CRD USE ONLY

9/28/95

MONTH DAY YEAR

SIGNATURE OF APPROPRIATE SIGNATORY

William L. Short, Jr.

TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

FORM U-4

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

If there is an amendment to this page, complete only items 1, 2, 3, 4 and items being amended

LAST NAME: **Berry** FIRST NAME: **Robert** MIDDLE NAME: **Franklin** APPLICANT'S CRD #: **1262947**
 SOC SEC #: **REDACTED**

③ FIRM CRD #: **20182** FIRM NAME (Do not include this employment under item 1B, page 1): **Wheat, First Securities, Inc.** APPLICATION DATE: **11/04/94**

⑥ FIRM MAIL ADDRESS: **901 East Byrd Street, Richmond, Virginia 23219** STREET: CITY: STATE: ZIP:

⑦ BRANCH ID #: **190** OFFICE OF EMPLOYMENT ADDRESS: **Nations Bank Plaza, Suite 1570, 1901 Main Street, Columbia, SC 29202** STREET: CITY: STATE: ZIP:

⑧ Will applicant maintain registration with another Broker/Dealer not under common ownership or control with the firm named in item 4 above? ☐ Yes ☒ No
 If "Yes" list in item 19: ☐ Yes ☐ No

⑨ Will applicant maintain multiple registrations with Broker/Dealers under common ownership or control with the firm named in item 4 above? ☐ Yes ☒ No
 If "Yes" fill in information below:

Firm CRD #: Name of Firm:
 Firm CRD #: Name of Firm:
 Firm CRD #: Name of Firm:

⑩ TO BE REGISTERED WITH THE FOLLOWING

S R O J U R I S D I C T I O N	☐ ASE	☐ BSE	☐ CBOE	☐ CSE	☐ MSE	☐ NASD	☐ NFA	☐ NYSE	☐ PHLX	☐ PSE	☐ OTHER (Specify):		
	☐ AK	☐ AL	☐ AR	☐ AZ	☐ CA	☐ CO	☐ CT	☐ DC	☐ DE	☐ FL	☐ GA	☐ HI	☐ IA
	☐ ID	☐ IL	☐ IN	☐ KS	☐ KY	☐ LA	☐ MA	☐ MD	☐ ME	☐ MI	☐ MN	☐ MO	☐ MS
	☐ MT	☐ NC	☐ ND	☐ NE	☐ NH	☐ NJ	☐ NM	☐ NV	☐ NY	☐ OH	☐ OK	☐ OR	☐ PA
	☐ RI	☒ SC	☐ SD	☐ TN	☐ TX	☐ UT	☐ VA	☐ VT	☐ WA	☐ WI	☐ WV	☐ WY	☐ PR

All Jurisdictions (Check in Lieu Of Each Individual Box).

⑪ TYPE OF EXAMINATION/REGISTRATION REQUESTED (check all applicable categories):

☐ S-3 Commodity Futures Examination	☐ S-39 (DPI) Direct Participation Program Principal
☐ S-4 (DPI) Registered Options Principal	☐ S-42 (ORI) Options Representative
☐ S-5 Interest Rate Options Examination	☐ S-52 (MRI) Municipal Securities Representative
☐ S-6 (IRI) Investment Company and Variable Contracts Products Representative	☐ S-53 (IMP) Municipal Securities Principal
☐ S-7 (IGS) Full Registration/General Securities Representative	☐ S-62 (CSI) Corporate Securities Representative
☐ S-7 (ITR) Securities Trader (NYSE)	☐ S-63 Uniform Securities Agent State Law Examination
☐ S-7 (TSI) Trading Supervisor (NYSE)	☐ S-65 Uniform Investment Advisor Law Examination
☐ S-8 (ISU) General Securities Sales Supervisor	☐ (AGI) Agent
☐ S-8 (BMO) Branch Office Manager (NYSE)	☐ (IRG) Government Securities Representative
☐ S-11 (ARI) Assistant Representative/Order Processing	☐ (IPG) Government Securities Principal
☐ S-15 (FCI) Foreign Currency Options	☐ (IME) Member Exchange (NYSE)
☐ S-16 (ISA) Supervisory Analyst	☐ (ILEI) Securities Lending Representative (NYSE)
☐ S-22 (DRI) Direct Participation Program Representative	☐ (ILS) Securities Lending Supervisor (NYSE)
☐ S-24 (GPI) General Securities Principal	☐ (AMI) Allied Member (NYSE)
☐ S-26 (IPI) Investment Company and Variable Contracts Products Principal	☐ (API) Approved Person (NYSE)
☐ S-27 (FNI) Financial and Operations Principal	☐ (AI) Agent of the Issuer
☐ S-28 (FI) Introducing Broker-Dealer/Financial and Operations Principal	☐ Reschedule Exam Series
	☒ Other: <u>IA Rep.</u>

THIS PORTION MUST BE COMPLETED FOR ALL/PARTIAL (TRANSFER OR RE-REGISTRATION) FILINGS

⑫ APPLICANT'S CURRENT ADDRESS: STREET: CITY: STATE: ZIP: FROM MONTH: YEAR:

FIRM/IS APPLICANT IS TRANSFERRING FROM: TERMINATION DATE (Mo/Da/Yr):

☐ CHECK IF THIS U-4 IS BEING FILED TO MAKE PERMANENT A TEMPORARY REGISTRATION (TAT).

The appropriate signatory area DOES NOT have to be completed UNLESS this page is being submitted as an amendment

MONTH DAY YEAR SIGNATURE OF APPROPRIATE SIGNATORY

TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

ICRD USE ONLY

FORM U-4

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

If there is an amendment to this page, complete only items 13, 14 and the items being amended

(13) FIRM CRD # 20182	SOCIAL SECURITY # REDACTED	APPLICANT S CRD # 1262947
FIRM NFA #		APPLICANT S NFA #

PERSONAL DATA

(14) LAST NAME Berry	JR./SR., etc.	FIRST NAME Robert	MIDDLE NAME Franklin	(15) OTHER NAMES KNOWN BY Bob
(16) DATE OF BIRTH (Month, Day, Year) REDACTED	(17) SEX Male	HEIGHT 5'9"	WEIGHT 145	HAIR COLOR Brown
				EYE COLOR Blue

RESIDENTIAL HISTORY

(18) GIVE ALL ADDRESSES FOR THE PAST FIVE YEARS STARTING WITH CURRENT ADDRESS							
STREET	CITY	STATE	ZIP	FROM MONTH	YEAR	TO MONTH	YEAR
201 Silvermill Court	Columbia	SC	29210	11	90	PRESENT	
96 Muskrat Run	Irmo	SC	29603	09	88	11	90

EMPLOYMENT AND PERSONAL HISTORY

(19) ACCOUNT FOR ALL TIME FOR THE PAST TEN YEARS. Give all employment experience starting with your previous employer and working back ten years. Include full and part-time work, self-employment, military service, unemployment and full-time education. (If this page is being filed as part of a Form BD, start with your present employer instead.)

NAME	CITY	STATE	FROM		TO		POSITION HELD
			MONTH	YEAR	MONTH	YEAR	
Prudential Securities, Inc.	Columbia	SC	04	85	11	94	Vice President/ Investments
Dean Witter Reynolds, Inc.	Columbia	SC	02	84	04	85	Financial Advisor
NAME							
CITY							
NAME							
CITY							
NAME							
CITY							
NAME							
CITY							
NAME							
CITY							
NAME							
CITY							
NAME							
CITY							
NAME							
CITY							
NAME							
CITY							

(20) Are you currently engaged in any other business (not shown above) either as a proprietor, partner, officer, director, trustee, employee, agent or otherwise?

☒ YES ☐ NO If "YES", please explain below

Mid-Atlantic Marketing, Inc.; Charlotte, NC; Director

The appropriate signatory area DOES NOT have to be completed UNLESS this page is being submitted as an amendment

MONTH DAY YEAR SIGNATURE OF APPROPRIATE SIGNATORY

TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

If there is a change to this page, complete only item 21 and item 22.

(2) FIRM CRD # 20182	FIRM NFA #	SOCIAL SECURITY # REDACTED	APPLICANT'S CRD # 1262947	APPLICANT'S NFA #
--------------------------------	------------	--------------------------------------	-------------------------------------	-------------------

IF THE ANSWER TO ANY OF THE FOLLOWING QUESTIONS IS "YES" AND YOU CANNOT UTILIZE THE CERTIFICATION IN ITEM 22 BELOW, ATTACH COMPLETE DETAILS OF ALL EVENTS OR PROCEEDINGS ON DRP(S).

22. DEFINITIONS

- Charged - Accused of a crime in a formal complaint, information, or indictment
- Investment or Investment-Related - Pertaining to securities, commodities, banking, insurance or real estate including, but not limited to acting as or being associated with a broker-dealer, investment company, investment adviser, futures sponsor, bank, or savings and loan association

- Involved - Using an act of aiding, advising, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act
- Foreign Financial Regulatory Authority - includes (A) a foreign securities authority; (B) other governmental body or foreign equivalent of a self regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of investment or investment related activities; or (C) membership organization, a function of which is to regulate the participation of its members in the activities listed above

22A. Have you been convicted of or plead guilty or nolo contendere (no contest) in a domestic or foreign court to:	YES	NO	
(1) a felony or misdemeanor involving: investments or an investment-related business, fraud, false statements or omissions, wrongful taking of property or bribery, forgery, counterfeiting or extortion?	☐	☒	1
(2) gambling?	☐	☒	2
(3) any other felony?	☐	☒	3
B. Have you, or an organization over which you exercised management or policy control, ever been charged with any felony or charged with a misdemeanor specified in question A(1) or (2) in a domestic or foreign court?	☐	☒	4
C. Has any domestic or foreign court ever:			
(1) enjoined you in connection with any investment-related activity?	☐	☒	5
(2) found that you were involved in a violation of investment-related statutes or regulations?	☐	☒	6
D. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:			
(1) found you to have made a false statement or omission?	☐	☒	7
(2) found you to have been involved in a violation of investment-related regulations or statutes?	☐	☒	8
(3) found you to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☒	9
(4) entered an order denying, suspending or revoking your registration or disciplined you by restricting your activities?	☐	☒	10
(5) imposed a civil money penalty on you, or ordered you to cease and desist from any activity?	☐	☒	10A
E. Has any other Federal regulatory agency or any state regulatory agency or foreign financial regulatory authority ever:			
(1) found you to have made a false statement or omission or been dishonest, unfair or unethical?	☐	☒	11
(2) found you to have been involved in a violation of investment regulations or statutes?	☐	☒	12
(3) found you to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☒	13
(4) entered an order against you in connection with investment-related activity?	☐	☒	14
(5) denied, suspended, or revoked your registration or license or otherwise prevented you from associating with an investment-related business, or disciplined you by restricting your activities?	☐	☒	15
(6) revoked or suspended your license as an attorney, accountant or federal contractor?	☐	☒	16
F. Has any self-regulatory organization or commodities exchange:			
(1) found you to have made a false statement or omission?	☐	☒	17
(2) found you to have been involved in a violation of its rules?	☐	☒	18
(3) found you to have been the cause of an investment-related business having its authorization to do business denied, suspended, revoked or restricted?	☐	☒	19
(4) disciplined you by expelling or suspending you from membership, barring or suspending your association with its members, or restricting your activities?	☐	☒	20
G. Has any foreign government ever entered an order against you related to investments or fraud, other than as reported in Items 22A, B, C or E?	☐	☒	21
H. Have you ever been the subject of an investment-related, consumer-initiated complaint or proceeding that:			
(1) alleged compensatory damages of \$10,000 or more, fraud, or wrongful taking of property?	☒	☐	22
(2) was settled or decided against you for \$5,000 or more or found fraud or the wrongful taking of property?	☐	☒	23
I. Are you now the subject of any complaint, investigation, or proceeding that could result in a "yes" answer to parts A-H of this item?	☐	☒	24
J. Has a bonding company denied, paid out on, or revoked a bond for you?	☐	☒	25
K. Do you have any unsatisfied judgments or liens against you?	☒	☐	26
L. Have you or a firm that you exercised management or policy control over, or owned 10% or more of the securities of, failed in business, made a compromise with creditors, filed a bankruptcy petition or been declared bankrupt?	☐	☒	27
M. Has a broker or dealer firm that you exercised management or policy control over, or owned 10% or more of the securities of, been declared bankrupt, had a trustee appointed under the Securities Investor Protection Act, or had a direct payment procedure initiated?	☐	☒	28
N. Have you been discharged or permitted to resign because you were accused of:			
(1) violating investment-related statutes, regulations, rules, or industry standards of conduct?	☐	☒	29
(2) fraud or the wrongful taking of property?	☐	☒	30
(3) failure to supervise in connection with investment-related statutes, regulations, rules or industry standards of conduct?	☐	☒	31

DISCLOSURE CERTIFICATION (OPTIONAL)

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O. I have reviewed a copy of my disclosure file taken from the CRD system. I acknowledge that all information contained therein is fully disclosed, accurate and in DRP format. I further certify the following:	1. I have no new information to add to my disclosure file.	1. ☐	32
	2. I have new information to add to my disclosure file which is reported on the attached DRP(s).	2. ☐	33
	3. I have updated information, reported on the attached DRP(s), which was previously reported and contained in Occurrence _____.	3. ☐	34

The applicant and appropriate signatory DOES NOT have to complete UNLESS this page is being submitted as a change to _____

MONTH DAY YEAR	SIGNATURE OF APPLICANT
TYPE OR PRINT NAME OF APPLICANT	
MONTH DAY YEAR	SIGNATURE OF APPROPRIATE SIGNATORY
TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY	

CRD USE ONLY

FORM U-4

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

If there is an amendment to this page, complete only item 23 and items being amended

23 FIRM CRD #	20182	SOCIAL SECURITY #	REDACTED	APPLICANT'S CRD #	1262947
FIRM NFA #				APPLICANT'S NFA #	

THE APPLICANT MUST READ THE FOLLOWING VERY CAREFULLY

- I swear or affirm that I have read and understand the items and instructions on this form and that my answers (including attachments) are true and complete to the best of my knowledge. I understand that I am subject to administrative, civil or criminal penalties if I give false or misleading answers.
- I apply for registration with the jurisdictions and organizations indicated in Item 10 as may be amended from time to time and, in consideration of the jurisdictions and organizations receiving and considering my application, I submit to the authority of the jurisdictions and organizations and agree to comply with all provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the jurisdictions and organizations as they are or may be adopted or amended from time to time. I further agree to be subject to and comply with all requirements, rulings, orders, directives and decisions of, and penalties, prohibitions and limitations imposed by the jurisdictions and organizations, subject to right of appeal or review as provided by law.
- I agree that neither the jurisdictions or organizations nor any person acting on their behalf shall be liable to me for action taken or omitted to be taken in official capacity or in the scope of employment, except as otherwise provided in the statutes, constitutions, certificates of incorporation, by-laws or the rules and regulations of the jurisdictions and organizations.
- I authorize the jurisdictions and organizations to give any information they may have concerning me to any employer or prospective employer, any federal state or municipal agency, or any other organization and I release the jurisdictions and organizations and any person acting on their behalf from any and all liability of whatever nature by reason of furnishing such information.
- 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 and that any arbitration award rendered against me may be entered as a judgement in any court of competent jurisdiction.
- For the purpose of complying with the laws relating to the offer or sale of securities or commodities in the jurisdictions indicated in Item 10 as may be amended from time to time, I irrevocably appoint the administrator of each of those jurisdictions, or such other person designated by law, and the successors in such office, my attorney upon whom may be served any notice, process or pleading in any action or proceeding against me arising out of or in connection with the offer or sale of securities or commodities, or out of the violation or alleged violation of the laws of the jurisdictions. I consent that any such action or proceeding against me may be commenced in any court of competent jurisdiction and proper venue by service of process upon the appointee as if I were a resident of, and had been lawfully served with process in, the jurisdiction. I request that a copy of any notice, process or pleading served hereunder be mailed to my current residential address as reflected in this form or any amendment thereto.
- I consent that notice of any investigation or proceeding by any self-regulatory organization against applicant may be given by personal service or by regular, registered or certified mail or confirmed telegram to applicant at his/her most recent business or home address as reflected in this Form U-4, or any amendment thereto, or by leaving notice of the investigation or proceeding at such address.
- I authorize all of my employers and any other person to furnish to any jurisdiction or organization or any agent acting on its behalf, any information they have, including my creditworthiness, character, ability, business activities, educational background, general reputation, history of my employment and, in the case of former employers, complete reasons for my termination. Moreover, I release each employer, former employer and each other person from any and all liability, of whatever nature, by reason of furnishing any of the above information, including that information reported on the Uniform Termination Notice for Securities Industry Registration (Form U-5). I recognize that I may be the subject of an investigative consumer report ordered by the jurisdictions, or organizations with which this application is being filed, and waive any requirement of notification with respect to any investigative consumer report ordered by any such jurisdiction or organization. I understand that I have the right to request complete and accurate disclosure by the jurisdiction or organization of the nature and scope of the requested investigative consumer report.
- I understand and certify that the representations in this form apply to all employers with whom I seek registration as indicated in Items 4 and 9 of this form. I agree to update this form by causing an amendment to be filed on a timely basis whenever changes occur to answers previously reported. Further, I represent that, to the extent any information previously submitted is not amended, the information provided in this form is currently accurate and complete.
- If I have become temporarily registered as an agent, I acknowledge that this application for registration with the jurisdictions and organizations indicated in Item 10 is separate and distinct from any temporary registration already obtained with the jurisdictions and organizations. I further understand that my registration may be denied, suspended or revoked under the laws, regulations or rules of the jurisdictions and organizations.

JAN 10 1995

Month Day Year

SIGNATURE OF APPLICANT

Robert F. Berry

TYPE OR PRINT NAME OF APPLICANT

THE FIRM MUST COMPLETE THE FOLLOWING

To the best of my knowledge and belief, the applicant is currently bonded where required, and, at the time of approval, will be familiar with the statutes, constitutions, rules and by-laws of the agency, jurisdiction or self-regulatory organization with which this application is being filed, and the rules governing registered persons, and will be fully qualified for the position for which application is being made herein. I agree that, notwithstanding the approval of such agency, jurisdiction or organization which hereby is requested, I will not employ the applicant in the capacity stated herein without first receiving the approval of any authority which may be required by law. This firm has communicated with all of the applicant's previous employers for the past three years.

EMPLOYER	NAME OF PERSON CONTACTED	POSITION OF PERSON CONTACTED	EMPLOYED		HOW CONTACTED		
			FROM	TO	PHONE	LETTER	INTERVIEW
Prudential Securities, Inc.			4/85	11/94		XX	

IN ADDITION, I HAVE TAKEN APPROPRIATE STEPS TO VERIFY THE ACCURACY AND COMPLETENESS OF THE INFORMATION CONTAINED IN AND WITH THIS APPLICATION.

THE APPROPRIATE SIGNATORY AREA MUST BE COMPLETED ON ALL INITIAL, TRANSFER, OR AMENDMENT FILINGS.

JAN 10 1995
MONTH DAY YEAR

SIGNATURE OF APPROPRIATE SIGNATORY

William L. Short, Jr.

TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

FORM U-4

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER
If there is an amendment to this page, complete only items 1, 2, 3, 4 and items being amended.

LAST NAME BERRY		JR /SR, etc.	FIRST NAME ROBERT	MIDDLE NAME (SPECIFY IF NONE) FRANKLIN	① APPLICANT'S CRD # 1262947
③ FIRM CRD # 6124		④ FIRM NAME (Do not include this employment under item 19, page 2) Wheat, First Securities, Inc.			APPLICANT'S NFA #
⑥ FIRM MAIN ADDRESS 901 East Byrd Street, Richmond, Virginia 23219					⑤ EMPLOYMENT DATE 11-4-94

⑦ BRANCH ID # 190	OFFICE OF EMPLOYMENT ADDRESS 1901 Main Street	STREET Columbia	CITY SC	STATE 29202	ZIP
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⑧ Will applicant maintain registration with another Broker-Dealer not under common ownership or control with the firm named in Item 4 above? ☐ Yes ☒ No
If "Yes", list in item 19

⑨ Will applicant maintain multiple registrations with Broker-Dealers under common ownership or control with the firm named in Item 4 above? ☐ Yes ☒ No
If "Yes", fill in information below:

Firm CRD #	Name of Firm
Firm CRD #	Name of Firm
Firm CRD #	Name of Firm

⑩ TO BE REGISTERED WITH THE FOLLOWING.

S E C U R I T I E S I N D U S T R Y R E G I S T R A T I O N	☒ ASE	☐ BSE	☐ CBOE	☐ CSE	☐ MSE	☒ NASD	☐ NFA	☒ NYSE	☒ PHLX	☐ PSE	☐ OTHER (Specify)		
	☐ AK	☒ AL	☐ AR	☐ AZ	☒ CA	☐ CO	☐ CT	☐ DC	☐ DE	☒ FL	☒ GA	☐ HI	☐ IA
	☐ ID	☐ IL	☐ IN	☐ KS	☐ KY	☐ LA	☐ MA	☒ MD	☐ ME	☐ MI	☐ MN	☐ MO	☐ MS
	☐ MT	☒ NC	☐ ND	☐ NE	☐ NH	☐ NJ	☐ NM	☐ NV	☒ NY	☐ OH	☐ OK	☐ OR	☐ PA
	☐ RI	☒ SC	☐ SD	☒ TN	☒ TX	☐ UT	☒ VA	☐ VT	☐ WA	☒ WI	☐ WV	☐ WY	☐ PR

All Jurisdictions.
(Check in Lieu Of Each Individual Box).

⑪ TYPE OF EXAMINATION/REGISTRATION REQUESTED (check all applicable categories)

☐ S-3 Commodity Futures Examination	☐ S-39 (DP) Direct Participation Program Principal
☐ S-4 (OP) Registered Options Principal	☐ S-42 (OR) Options Representative
☐ S-5 Interest Rate Options Examination	☐ S-52 (MR) Municipal Securities Representative
☐ S-6 (IR) Investment Company and Variable Contracts Products Representative	☐ S-53 (MP) Municipal Securities Principal
☒ S-7 (GS) Full Registration/General Securities Representative	☐ S-62 (CS) Corporate Securities Representative
☐ S-7 (TR) Securities Trader (NYSE)	☐ S-63 Uniform Securities Agent State Law Examination
☐ S-7 (TS) Trading Supervisor (NYSE)	☐ S-65 Uniform Investment Advisor Law Examination
☐ S-8 (SU) General Securities Sales Supervisor	☐ (AG) Agent
☐ S-8 (BM) Branch Office Manager (NYSE)	☐ (RG) Government Securities Representative
☐ S-11 (AR) Assistant Representative/Order Processing	☐ (PG) Government Securities Principal
☐ S-15 (FC) Foreign Currency Options	☐ (ME) Member Exchange (NYSE)
☐ S-16 (SA) Supervisory Analyst	☐ (LE) Securities Lending Representative (NYSE)
☐ S-22 (DR) Direct Participation Program Representative	☐ (LS) Securities Lending Supervisor (NYSE)
☐ S-24 (GP) General Securities Principal	☐ (AM) Allied Member (NYSE)
☐ S-26 (IP) Investment Company and Variable Contracts Products Principal	☐ (AP) Approved Person (NYSE)
☐ S-27 (FN) Financial and Operations Principal	☐ (AI) Agent of the Issuer
☐ S-28 (FI) Introducing Broker-Dealer/Financial and Operations Principal	☐ Reschedule Exam Series
	☐ Other

THIS PORTION MUST BE COMPLETED FOR ALL PARTIAL (TRANSFER OR RE-REGISTRATION) FILINGS

⑫ APPLICANT'S CURRENT ADDRESS. STREET CITY STATE ZIP

FIRM(S) APPLICANT IS TRANSFERRING FROM: TERMINATION DATE: (Mo/Day/Yr.)

☐ CHECK IF THIS U-4 IS BEING FILED TO MAKE PERMANENT A TEMPORARY REGISTRATION (TAT).

The appropriate signatory area DOES NOT have to be completed UNLESS this page is being submitted as an amendment.

MONTH DAY YEAR SIGNATURE OF APPROPRIATE SIGNATORY

TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER
If there is an amendment to this page, complete only Items 13, 14 and the Items being amended.

PERSONAL DATA

RESIDENTIAL HISTORY

EMPLOYMENT AND PERSONAL HISTORY

PAGE 2

If there is an amendment to this page, complete only item 21 and items being amended

FIRM CRD # 6124	FIRM NFA #	SOCIAL SECURITY # REDACTED	APPLICANT #	APPLICANT'S NFA #
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IF THE ANSWER TO ANY OF THE FOLLOWING QUESTIONS IS "YES" AND YOU CANNOT UTILIZE THE CERTIFICATION IN ITEM 220 BELOW, ATTACH COMPLETE DETAILS OF ALL EVENTS OR PROCEEDINGS ON DRP

DEFINITIONS

- Charged - Accused of a crime in a formal complaint, information or indictment
- Investment or Investment-Related - Pertaining to securities, commodities, banking, insurance, or real estate (including, but not limited to acting as or being associated with a broker-dealer, investment company, investment adviser, futures sponsor, bank, or savings and loan association)
- Involved - Doing an act or aiding, abetting, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act.
- Foreign Financial Regulatory Authority - Includes (A) a foreign securities authority; (B) other government body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of investment or investment-related activities; or (C) members organization, a function of which is to regulate the participation of its members in the activities listed above.

22A Have you been convicted of or plead guilty or nolo contendere ("no contest") in a domestic or foreign court to:	YES	NO	
(1) a felony or misdemeanor involving: investments or an investment-related business, fraud, false statements or omissions, wrongful taking of property, or bribery, forgery, counterfeiting or extortion?	☐	☒	
(2) gambling?	☐	☒	
(3) any other felony?	☐	☒	
B. Have you, or an organization over which you exercised management or policy control, ever been charged with any felony or charged with a misdemeanor specified in question A(1) or (2) in a domestic or foreign court?	☐	☒	
C. Has any domestic or foreign court ever:			
(1) enjoined you in connection with any investment-related activity?	☐	☒	
(2) found that you were involved in a violation of investment-related statutes or regulations?	☐	☒	
D. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:			
(1) found you to have made a false statement or omission?	☐	☒	
(2) found you to have been involved in a violation of investment-related regulations or statutes?	☐	☒	
(3) found you to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☒	
(4) entered an order denying, suspending or revoking your registration or disciplined you by restricting your activities?	☐	☒	1.
(5) imposed a civil money penalty on you, or ordered you to cease and desist from any activity?	☐	☒	10
E. Has any other Federal regulatory agency or any state regulatory agency or foreign financial regulatory authority ever:			
(1) found you to have made a false statement or omission or been dishonest, unfair or unethical?	☐	☒	1
(2) found you to have been involved in a violation of investment regulations or statutes?	☐	☒	1
(3) found you to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☒	1
(4) entered an order against you in connection with investment-related activity?	☐	☒	1
(5) denied, suspended, or revoked your registration or license or otherwise prevented you from associating with an investment-related business, or disciplined you by restricting your activities?	☐	☒	15
(6) revoked or suspended your license as an attorney, accountant or federal contractor?	☐	☒	16
F. Has any self-regulatory organization or commodities exchange:			
(1) found you to have made a false statement or omission?	☐	☒	17
(2) found you to have been involved in a violation of its rules?	☐	☒	18
(3) found you to have been the cause of an investment-related business having its authorization to do business denied, suspended, revoked or restricted?	☐	☒	19
(4) disciplined you by expelling or suspending you from membership, barring or suspending your association with its members, or restricting your activities?	☐	☒	20
G. Has any foreign government ever entered an order against you related to investments or fraud, other than as reported in items 22A, B, C or E?	☐	☒	21
H. Have you ever been the subject of an investment-related, consumer-initiated complaint or proceeding that:			
(1) alleged compensatory damages of \$10,000 or more, fraud, or wrongful taking of property?	☒	☐	22
(2) was settled or decided against you for \$5,000 or more, or found fraud or the wrongful taking of property?	☐	☒	23
I. Are you now the subject of any complaint, investigation, or proceeding that could result in a "yes" answer to parts A-H of this item?	☐	☒	24
J. Has a bonding company denied, paid out on, or revoked a bond for you?	☐	☒	25
K. Do you have any unsatisfied judgments or liens against you?	☒	☐	26
L. Have you or a firm that you exercised management or policy control over, or owned 10% or more of the securities of, failed in business, made a compromise with creditors, filed a bankruptcy petition or been declared bankrupt?	☐	☒	27
M. Has a broker or dealer firm that you exercised management or policy control over, or owned 10% or more of the securities of, been declared bankrupt, had a trustee appointed under the Securities Investor Protection Act, or had a direct payment procedure initiated?	☐	☒	28
N. Have you been discharged or permitted to resign because you were accused of:			
(1) violating investment-related statutes, regulations, rules, or industry standards of conduct?	☐	☒	29
(2) fraud or the wrongful taking of property?	☐	☒	30
(3) failure to supervise in connection with investment-related statutes, regulations, rules or industry standards of conduct?	☐	☒	31

DISCLOSURE CERTIFICATION (OPTIONAL)

You may only certify to the accuracy and completeness of the disclosure information in your file if it has been fully provided in DRP format. If DRP(s) are not on file, do not answer these certification boxes. Provide full details of all matters on DRP(s). All appropriate questions in item 22 must be answered, regardless of whether the certification is being utilized. Refer to the instructions on the inside cover of the Form U-4 for additional information on the utilization of the certification language.

O. I have reviewed a copy of my disclosure file taken from the CRD system. I acknowledge that all information contained therein is fully disclosed, accurate and in DRP format. I further certify the following:	1. I have no new information to add to my disclosure file.	☐	32
	2. I have new information to add to my disclosure file which is reported on the attached DRP(s).	☐	33
	3. I have updated information, reported on the attached DRP(s), which was previously reported and contained in Occurrence	☐	34

The applicant and appropriate signatory area DOES NOT have to be completed UNLESS this page is being submitted as an amendment.

MONTH DAY YEAR SIGNATURE OF APPLICANT
TYPE OR PRINT NAME OF APPLICANT

MONTH DAY YEAR SIGNATURE OF APPROPRIATE SIGNATORY
TYPE OR PRINT NAME OF SIGNATORY

CRD USE ONLY

FORM U-4
UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER
If there is an amendment to this page, complete only Item 23 and Items being amended.

23 FIRM CRD # 6124

SOCIAL SECURITY #
REDACTED

APPLICANT'S
CRD # 1262947
APPLICANT'S
NFA #

FIRM NFA #

THE APPLICANT MUST READ THE FOLLOWING VERY CAREFULLY

- 1 I swear or affirm that I have read and understand the items and instructions on this form and that my answers (including attachments) are true and complete to the best of my knowledge. I understand that I am subject to administrative, civil or criminal penalties if I give false or misleading answers.
- 2 I apply for registration with the jurisdictions and organizations indicated in Item 10 as may be amended from time to time and, in consideration of the jurisdictions and organizations receiving and considering my application, I submit to the authority of the jurisdictions and organizations and agree to comply with all provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the jurisdictions and organizations as they are or may be adopted, or amended from time to time. I further agree to be subject to and comply with all requirements, rulings, orders, directives and decisions of, and penalties, prohibitions and limitations imposed by the jurisdictions and organizations, subject to right of appeal or review as provided by law.
- 3 I agree that neither the jurisdictions or organizations nor any person acting on their behalf shall be liable to me for action taken or omitted to be taken in official capacity or in the scope of employment, except as otherwise provided in the statutes, constitutions, certificates of incorporation, by-laws or the rules and regulations of the jurisdictions and organizations.
- 4 I authorize the jurisdictions and organizations to give any information they may have concerning me to any employer or prospective employer, any federal, state or municipal agency, or any other organization and I release the jurisdictions and organizations and any person acting on their behalf from any and all liability of whatever nature by reason of furnishing such information.
- 5 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 and that any arbitration award rendered against me may be entered as a judgement in any court of competent jurisdiction.
- 6 For the purpose of complying with the laws relating to the offer or sale of securities or commodities in the jurisdictions indicated in Item 10 as may be amended from time to time, I irrevocably appoint the administrator of each of those jurisdictions, or such other person designated by law, and the successors in such office, my attorney upon whom may be served any notice, process or pleading in any action or proceeding against me arising out of or in connection with the offer or sale of securities or commodities, or out of the violation or alleged violation of the laws of the jurisdictions. I consent that any such action or proceeding against me may be commenced in any court of competent jurisdiction and proper venue by service of process upon the appointee as if I were a resident of, and had been lawfully served with process in, the jurisdiction. I request that a copy of any notice, process or pleading served hereunder be mailed to my current residential address as reflected in this form or any amendment thereto.
- 7 I consent that notice of any investigation or proceeding by any self-regulatory organization against applicant may be given by personal service or by regular, registered or certified mail or confirmed telegram to applicant at his/her most recent business or home address as reflected in this Form U-4, or any amendment thereto, or by leaving notice of the investigation or proceeding at such address.
- 8 I authorize all of my employers and any other person to furnish to any jurisdiction or organization or any agent acting on its behalf, any information they have, including my creditworthiness, character, ability, business activities, educational background, general reputation, history of my employment and, in the case of former employers, complete reasons for my termination. Moreover, I release each employer, former employer and each other person from any and all liability, of whatever nature, by reason of furnishing any of the above information, including that information reported on the Uniform Termination Notice for Securities Industry Registration (Form U-5). I recognize that I may be the subject of an investigative consumer report ordered by the jurisdictions, or organizations with which this application is being filed, and waive any requirement of notification with respect to any investigative consumer report ordered by any such jurisdiction or organization. I understand that I have the right to request complete and accurate disclosure by the jurisdiction or organization of the nature and scope of the requested investigative consumer report.
- 9 I understand and certify that the representations in this form apply to all employers with whom I seek registration as indicated in Items 4 and 9 of this form. I agree to update this form by causing an amendment to be filed on a timely basis whenever changes occur to answers previously reported. Further, I represent that, to the extent any information previously submitted is not amended, the information provided in this form is currently accurate and complete.
- 10 If I have become temporarily registered as an agent, I acknowledge that this application for registration with the jurisdictions and organizations indicated in Item 10 is separate and distinct from any temporary registration already obtained with the jurisdictions and organizations. I further understand that my registration may be denied, suspended or revoked under the laws, regulations or rules of the jurisdictions and organizations.

November 5, 1994
Month Day Year

SIGNATURE OF APPLICANT

Robert F. Berry

TYPE OR PRINT NAME OF APPLICANT

THE FIRM MUST COMPLETE THE FOLLOWING

To the best of my knowledge and belief, the applicant is currently bonded where required, and, at the time of approval, will be familiar with the statute(s), constitution(s), rules and by-laws of the agency, jurisdiction or self-regulatory organization with which this application is being filed, and the rules governing registered persons, and will be fully qualified for the position for which application is being made herein. I agree that, notwithstanding the approval of such agency, jurisdiction or organization which hereby is requested, I will not employ the applicant in the capacity stated herein without first receiving the approval of any authority which may be required by law. This firm has communicated with all of the applicant's previous employers for the past three years.

EMPLOYER	NAME OF PERSON CONTACTED	POSITION OF PERSON CONTACTED	EMPLOYED		HOW CONTACTED		
			FROM	TO	PHONE	LETTER	INTERVIEW
Prudential Sec., Inc.			4/85	11/94		xx	

IN ADDITION, I HAVE TAKEN APPROPRIATE STEPS TO VERIFY THE ACCURACY AND COMPLETENESS OF THE INFORMATION CONTAINED IN AND WITH THIS APPLICATION.

THE APPROPRIATE SIGNATORY AREA MUST BE COMPLETED ON ALL INITIAL, TRANSFER OR AMENDMENT FILINGS.

11/7/94
MONTH DAY YEAR

SIGNATURE OF APPROPRIATE SIGNATORY

Joseph L. Turner, Jr.

TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

EXHIBIT 2

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

Robert F. Berry,

Plaintiff,

v.

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.

Case No. 2017-CP-32-00397

AFFIDAVIT OF BEVERLY W. JACKSON

On this day, personally appeared before me, the undersigned authority, Beverly W. Jackson, who upon her oath, deposes and states:

1. My name is Beverly W. Jackson. I am employed in the Wells Fargo Law Department as a Paralegal. I am over the age of 21, competent to make this Affidavit, and have personal knowledge that everything stated herein is true and correct.

2. In my capacity as a member of the Law Department, I am familiar with the corporate structure of Wells Fargo & Company and its related corporate entities.

3. Effective November 11, 2016, Wells Fargo Advisors, LLC changed its name to Wells Fargo Clearing Services, LLC.

4. Wachovia Securities Financial Holdings, LLC, which is incorrectly named in Robert F. Berry's action as "Wachovia Securities Financial Holdings, Inc.," is the parent company of Wells Fargo Clearing Services, LLC. Wachovia Securities Financial Holdings, LLC

is an indirect subsidiary of Wells Fargo & Company. Wells Fargo Investment Group, Inc. owns thirty-one percent (31%) of Wachovia Securities Financial Holdings, LLC, and EVEREN Capital Corporation owns sixty-nine percent (69%) of Wachovia Securities Financial Holdings, LLC. Wells Fargo Investment Group, Inc. and EVEREN Capital Corporation are 100% owned by Wells Fargo & Company.

5. Wells Fargo Bank, N.A. is a subsidiary of Wells Fargo & Company.

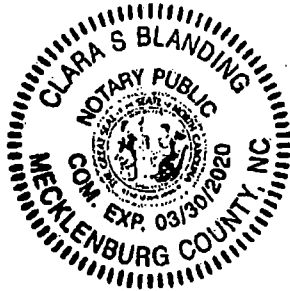
6. In my capacity as a member of the Wells Fargo Law Department, I have access to certain personnel records of current and former employees of Wells Fargo & Company and related corporate entities. Scott A. Spang, a defendant in this action, is employed by Wells Fargo Clearing Services, LLC and is a registered representative or associated person under FINRA By-Laws and the Code of Arbitration Procedure of Industry Disputes. Mr. Berry was formerly employed by Wells Fargo Advisors, LLC, and his employment was terminated in February 2014.

7. The Form U4 for Mr. Berry shows that he was employed by Wheat First Securities Inc. at the time of its filing (*See* Form U4 attached as Exhibit 1.) Wheat First Securities Inc., part of Wheat First Butcher Singer, was the predecessor in interest to Wells Fargo Advisors, LLC. Wheat First Butcher Singer was acquired by First Union Corporation. First Union then acquired EVEREN Capital Corporation, and separately Wachovia Corporation acquired Interstate Johnson Lane. First Union and Wachovia Corporation merged, and their brokerage firms merged to form Wachovia Securities, LLC. Wells Fargo & Company acquired Wachovia Corporation, including Wachovia Securities, in 2008. In 2009, Wachovia Securities became Wells Fargo Advisors, LLC.

Further Affiant sayeth not.

Beverly W. Jackson
Beverly W. Jackson

SUBSCRIBED AND SWORN TO before me on this the 12 day of April, 2017
certify which witness my hand and seal of office.



Clara S. Blanding
Notary Public in and for
The State of North Carolina
Printed name: Clara S. Blanding
My commission expires: 3/30/2020

EXHIBIT 1

FORM U-4

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER
If there is an amendment to this page, complete only Items 1, 2, 3, 4 and items being amended.

LAST NAME BERRY		FIRST NAME ROBERT		MIDDLE NAME (SPECIFY IF NONE) FRANKLIN	APPLICANT'S CRD # 1207947
FIRM CRD # 6124		FIRM NAME (Do not include this employment under item 19, page 2) Wheat, First Securities, Inc.			APPLICANT'S NFA # REDACTED
FIRM MAIN ADDRESS 901 East Byrd Street, Richmond, Virginia 23219					EMPLOYMENT DATE 11-4-94
BRANCH ID # 190		OFFICE OF EMPLOYMENT ADDRESS 1901 Main Street		CITY Columbia	STATE SC
				CITY 29202	ZIP 29202

Will applicant maintain registration with another Broker-Dealer not under common ownership or control with the firm named in Item 4 above?
If "Yes", list in item 19: ☐ Yes ☒ No

Will applicant maintain multiple registrations with Broker-Dealers under common ownership or control with the firm named in Item 4 above?
If "Yes", fill in information below: ☐ Yes ☒ No

Firm CRD # _____ Name of Firm _____
Firm CRD # _____ Name of Firm _____
Firm CRD # _____ Name of Firm _____

TO BE REGISTERED WITH THE FOLLOWING.

S R O	☒ ASE	☐ BSE	☐ CBOE	☐ CSE	☐ MSE	☒ NASD	☐ NFA	☒ NYSE	☒ PHLX	☐ PSE	OTHER (Specify) _____		
	☐ AX	☒ AT	☐ AR	☐ AZ	☒ CA	☐ CO	☐ CT	☐ DC	☐ DE	☒ FL	☒ GA	☐ HI	☐ IA
	☐ ID	☐ IL	☐ IN	☐ KS	☐ KY	☐ LA	☐ MA	☒ MD	☐ ME	☐ MI	☐ MN	☐ MO	☐ MS
	☐ MT	☒ NC	☐ ND	☐ NE	☐ NH	☐ NJ	☐ NM	☐ NV	☒ NY	☐ OH	☐ OK	☐ OR	☐ PA
	☐ RI	☒ SC	☐ SD	☒ TN	☒ TX	☐ UT	☒ VA	☐ VT	☐ WA	☒ WI	☐ WV	☐ WY	☐ PR

**All Jurisdictions.
(Check in Lieu Of
Each Individual
Box).**

TYPE OF EXAMINATION/REGISTRATION REQUESTED (check all applicable categories)

☐ S-3 Commodity Futures Examination	☐ S-39 (DP) Direct Participation Program Principal
☐ S-4 (OP) Registered Options Principal	☐ S-42 (OR) Options Representative
☐ S-5 Interest Rate Options Examination	☐ S-52 (MR) Municipal Securities Representative
☐ S-6 (IR) Investment Company and Variable Contracts Products Representative	☐ S-53 (MP) Municipal Securities Principal
☒ S-7 (GS) Full Registration/General Securities Representative	☐ S-62 (CS) Corporate Securities Representative
☐ S-7 (TR) Securities Trader (NYSE)	☐ S-63 Uniform Securities Agent State Law Examination
☐ S-7 (TS) Trading Supervisor (NYSE)	☐ S-65 Uniform Investment Advisor Law Examination
☐ S-8 (SU) General Securities Sales Supervisor	☐ (AG) Agent
☐ S-8 (BM) Branch Office Manager (NYSE)	☐ (RG) Government Securities Representative
☐ S-11 (AR) Assistant Representative/Order Processing	☐ (PG) Government Securities Principal
☐ S-15 (FC) Foreign Currency Options	☐ (ME) Member Exchange (NYSE)
☐ S-16 (SA) Supervisory Analyst	☐ (LE) Securities Lending Representative (NYSE)
☐ S-22 (DR) Direct Participation Program Representative	☐ (LS) Securities Lending Supervisor (NYSE)
☐ S-24 (GP) General Securities Principal	☐ (AM) Allied Member (NYSE)
☐ S-26 (IP) Investment Company and Variable Contracts Products Principal	☐ (AP) Approved Person (NYSE)
☐ S-27 (FN) Financial and Operations Principal	☐ (AI) Agent of the Issuer
☐ S-28 (FI) Introducing Broker-Dealer/Financial and Operations Principal	☐ Reschedule Exam Series _____
	☐ Other _____

THIS PORTION MUST BE COMPLETED FOR ALL PARTIAL (TRANSFER OR RE-REGISTRATION) FILINGS

APPLICANT'S CURRENT ADDRESS: _____				FROM MONTH _____	YEAR _____
FIRM(S) APPLICANT IS TRANSFERRING FROM: _____				TERMINATION DATE: (Mo/Day/Yr.) _____	
☐ CHECK IF THIS U-4 IS BEING FILED TO MAKE PERMANENT A TEMPORARY REGISTRATION (TAT).					

The appropriate signatory area DOES NOT have to be completed UNLESS this page is being submitted as an amendment.

MONTH _____	DAY _____	YEAR _____	SIGNATURE OF APPROPRIATE SIGNATORY _____
TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY _____			CRD USE ONLY

FORM U-4

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER
If there is an amendment to this page, complete only Items 13, 14 and the items being amended.

13 FIRM CRD # 6124	SOCIAL SECURITY # REDACTED	APPLICANT'S CRD #
FIRM NFA #		APPLICANT'S NFA #

PERSONAL DATA

14 LAST NAME BERRY	JR./SR., etc.	FIRST NAME ROBERT	MIDDLE NAME FRANKLIN	15 OTHER NAMES KNOWN BY BOB
16 DATE OF BIRTH (Month, Day, Year) REDACTED	17 SEX M	HEIGHT 5'9"	WEIGHT 145	HAIR COLOR Brown EYE COLOR Blue

RESIDENTIAL HISTORY

18 GIVE ALL ADDRESSES FOR THE PAST FIVE YEARS. STARTING WITH CURRENT ADDRESS.

STREET	CITY	STATE	ZIP	FROM MONTH	YEAR	TO MONTH	YEAR
201 Silvermill Court	Columbia	SC	29210	11	90	PRESENT	
96 Muskrat Run	Irmo	SC	29063	09	88	11	90

EMPLOYMENT AND PERSONAL HISTORY

19 ACCOUNT FOR ALL TIME FOR THE PAST TEN YEARS. Give all employment experience starting with your previous employer and working back ten years. Include full and part-time work, self-employment, military service, unemployment and full-time education. (If this page is being filed as part of a Form BD, start with your present employer instead.)

NAME	FROM MONTH	YEAR	TO MONTH	YEAR	POSITION HELD
Prudential Securities, Inc.	04	85	11	94	Vice President/ Investments
CITY Columbia STATE SC					
NAME Dean Witter Reynolds, Inc.	02	84	04	85	Financial Advisor
CITY Columbia STATE SC					
NAME					
CITY					
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NAME					
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NAME					
CITY					
NAME					
CITY					
NAME					
CITY					
NAME					
CITY					

20 Are you currently engaged in any other business (not shown above) either as a proprietor, partner, officer, director, trustee, employee, agent or otherwise?
☒ YES ☐ NO If "YES", please explain below:

Mid-Atlantic Marketing, Inc., Charlotte, N.C. - Director

The appropriate signatory area DOES NOT have to be completed UNLESS this page is being submitted as an amendment.

MONTH DAY YEAR SIGNATURE OF APPROPRIATE SIGNATORY

TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

If there is an amendment to this page, complete only item 21 and items being amended

FIRM CRD # 6124	FIRM NFA #	SOCIAL SECURITY # REDACTED	APPLICANT #	APPLICANT'S NFA #
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IF THE ANSWER TO ANY OF THE FOLLOWING QUESTIONS IS "YES" AND YOU CANNOT UTILIZE THE CERTIFICATION IN ITEM 220 BELOW, ATTACH COMPLETE DETAILS OF ALL EVENTS OR PROCEEDINGS ON DRP

DEFINITIONS

- Charged - Accused of a crime in a formal complaint, information or indictment
- Investment or Investment-Related - Pertaining to securities, commodities, banking, insurance, or real estate (including, but not limited to acting as or being associated with a broker-dealer, investment company, investment adviser, futures sponsor, bank, or savings and loan association)

- Involved - Doing an act or aiding, abetting, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act.
- Foreign Financial Regulatory Authority - includes (A) a foreign securities authority; (B) other government body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of investment or investment-related activities; or (C) members' organization, a function of which is to regulate the participation of its members in the activities listed above.

22A Have you been convicted of or plead guilty or nolo contendere ("no contest") in a domestic or foreign court to:	YES	NO	
(1) a felony or misdemeanor involving: investments or an investment-related business, fraud, false statements or omissions, wrongful taking of property, or bribery, forgery, counterfeiting or extortion?	☐	☒	
(2) gambling?	☐	☒	
(3) any other felony?	☐	☒	
B. Have you, or an organization over which you exercised management or policy control, ever been charged with any felony or charged with a misdemeanor specified in question A(1) or (2) in a domestic or foreign court?	☐	☒	
C. Has any domestic or foreign court ever:			
(1) enjoined you in connection with any investment-related activity?	☐	☒	
(2) found that you were involved in a violation of investment-related statutes or regulations?	☐	☒	
D. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:			
(1) found you to have made a false statement or omission?	☐	☒	
(2) found you to have been involved in a violation of investment-related regulations or statutes?	☐	☒	
(3) found you to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☒	
(4) entered an order denying, suspending or revoking your registration or disciplined you by restricting your activities?	☐	☒	1
(5) imposed a civil money penalty on you, or ordered you to cease and desist from any activity?	☐	☒	10
E. Has any other Federal regulatory agency or any state regulatory agency or foreign financial regulatory authority ever:			
(1) found you to have made a false statement or omission or been dishonest, unfair or unethical?	☐	☒	1
(2) found you to have been involved in a violation of investment regulations or statutes?	☐	☒	1
(3) found you to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☒	1
(4) entered an order against you in connection with investment-related activity?	☐	☒	1
(5) denied, suspended, or revoked your registration or license or otherwise prevented you from associating with an investment-related business, or disciplined you by restricting your activities?	☐	☒	15
(6) revoked or suspended your license as an attorney, accountant or federal contractor?	☐	☒	16
F. Has any self-regulatory organization or commodities exchange:			
(1) found you to have made a false statement or omission?	☐	☒	17
(2) found you to have been involved in a violation of its rules?	☐	☒	18
(3) found you to have been the cause of an investment-related business having its authorization to do business denied, suspended, revoked or restricted?	☐	☒	19
(4) disciplined you by expelling or suspending you from membership, barring or suspending your association with its members, or restricting your activities?	☐	☒	20
G. Has any foreign government ever entered an order against you related to investments or fraud, other than as reported in Items 22A, B, C or E?	☐	☒	21
H. Have you ever been the subject of an investment-related, consumer-initiated complaint or proceeding that:			
(1) alleged compensatory damages of \$10,000 or more, fraud, or wrongful taking of property?	☒	☐	22
(2) was settled or decided against you for \$5,000 or more, or found fraud or the wrongful taking of property?	☐	☒	23
I. Are you now the subject of any complaint, investigation, or proceeding that could result in a "yes" answer to parts A-H of this item?	☐	☒	24
J. Has a bonding company denied, paid out on, or revoked a bond for you?	☐	☒	25
K. Do you have any unsatisfied judgments or liens against you?	☒	☐	26
L. Have you or a firm that you exercised management or policy control over, or owned 10% or more of the securities of, failed in business, made a compromise with creditors, filed a bankruptcy petition or been declared bankrupt?	☐	☒	27
M. Has a broker or dealer firm that you exercised management or policy control over, or owned 10% or more of the securities of, been declared bankrupt, had a trustee appointed under the Securities Investor Protection Act, or had a direct payment procedure initiated?	☐	☒	28
N. Have you been discharged or permitted to resign because you were accused of:			
(1) violating investment-related statutes, regulations, rules, or industry standards of conduct?	☐	☒	29
(2) fraud or the wrongful taking of property?	☐	☒	30
(3) failure to supervise in connection with investment-related statutes, regulations, rules or industry standards of conduct?	☐	☒	31

DISCLOSURE CERTIFICATION (OPTIONAL)

You may only certify to the accuracy and completeness of the disclosure information in your file if it has been fully provided in DRP format. If DRP(s) are not on file, do not answer these certification boxes. Provide full details of all matters on DRP(s). All appropriate questions in item 22 must be answered, regardless of whether the certification is being utilized. Refer to the instructions on the inside cover of the Form U-4 for additional information on the utilization of the certification language.

O. I have reviewed a copy of my disclosure file taken from the CRD system. I acknowledge that all information contained therein is fully disclosed, accurate and in DRP format. I further certify the following:	1. I have no new information to add to my disclosure file.	1.	☐	32
	2. I have new information to add to my disclosure file which is reported on the attached DRP(s).	2.	☐	33
	3. I have updated information, reported on the attached DRP(s), which was previously reported and contained in Occurrence _____.	3.	☐	34

The applicant and appropriate signatory area DOES NOT have to be completed UNLESS this page is being submitted as an amendment.

MONTH DAY YEAR SIGNATURE OF APPLICANT

TYPE OR PRINT NAME OF APPLICANT

MONTH DAY YEAR SIGNATURE OF APPROPRIATE SIGNATORY

TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

FORM U-4
UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER
 If there is an amendment to this page, complete only item 23 and items being amended.

23 FIRM CRD # 6124 FIRM NFA #	SOCIAL SECURITY # REDACTED	APPLICANT'S CRD # 1262947 APPLICANT'S NFA #
---	-------------------------------	---

THE APPLICANT MUST READ THE FOLLOWING VERY CAREFULLY

- 1 I swear or affirm that I have read and understand the items and instructions on this form and that my answers (including attachments) are true and complete to the best of my knowledge. I understand that I am subject to administrative, civil or criminal penalties if I give false or misleading answers.
- 2 I apply for registration with the jurisdictions and organizations indicated in Item 10 as may be amended from time to time and, in consideration of the jurisdictions and organizations receiving and considering my application, I submit to the authority of the jurisdictions and organizations and agree to comply with all provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the jurisdictions and organizations as they are or may be adopted, or amended from time to time. I further agree to be subject to and comply with all requirements, rulings, orders, directives and decisions of, and penalties, prohibitions and limitations imposed by the jurisdictions and organizations, subject to right of appeal or review as provided by law.
- 3 I agree that neither the jurisdictions or organizations nor any person acting on their behalf shall be liable to me for action taken or omitted to be taken in official capacity or in the scope of employment, except as otherwise provided in the statutes, constitutions, certificates of incorporation, by-laws or the rules and regulations of the jurisdictions and organizations.
- 4 I authorize the jurisdictions and organizations to give any information they may have concerning me to any employer or prospective employer, any federal, state or municipal agency, or any other organization and I release the jurisdictions and organizations and any person acting on their behalf from any and all liability of whatever nature by reason of furnishing such information.
- 5 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 and that any arbitration award rendered against me may be entered as a judgement in any court of competent jurisdiction.
- 6 For the purpose of complying with the laws relating to the offer or sale of securities or commodities in the jurisdictions indicated in Item 10 as may be amended from time to time, I irrevocably appoint the administrator of each of those jurisdictions, or such other person designated by law, and the successors in such office, my attorney upon whom may be served any notice, process or pleading in any action or proceeding against me arising out of or in connection with the offer or sale of securities or commodities, or out of the violation or alleged violation of the laws of the jurisdictions. I consent that any such action or proceeding against me may be commenced in any court of competent jurisdiction and proper venue by service of process upon the appointee as if I were a resident of, and had been lawfully served with process in, the jurisdiction. I request that a copy of any notice, process or pleading served hereunder be mailed to my current residential address as reflected in this form or any amendment thereto.
- 7 I consent that notice of any investigation or proceeding by any self-regulatory organization against applicant may be given by personal service or by regular, registered or certified mail or confirmed telegram to applicant at his/her most recent business or home address as reflected in this Form U-4, or any amendment thereto, or by leaving notice of the investigation or proceeding at such address.
- 8 I authorize all of my employers and any other person to furnish to any jurisdiction or organization or any agent acting on its behalf, any information they have, including my creditworthiness, character, ability, business activities, educational background, general reputation, history of my employment and, in the case of former employers, complete reasons for my termination. Moreover, I release each employer, former employer and each other person from any and all liability, of whatever nature, by reason of furnishing any of the above information, including that information reported on the Uniform Termination Notice for Securities Industry Registration (Form U-5). I recognize that I may be the subject of an investigative consumer report ordered by the jurisdiction, or organizations with which this application is being filed, and waive any requirement of notification with respect to any investigative consumer report ordered by any such jurisdiction or organization. I understand that I have the right to request complete and accurate disclosure by the jurisdiction or organization of the nature and scope of the requested investigative consumer report.
- 9 I understand and certify that the representations in this form apply to all employers with whom I seek registration as indicated in Items 4 and 9 of this form. I agree to update this form by causing an amendment to be filed on a timely basis whenever changes occur to answers previously reported. Further, I represent that, to the extent any information previously submitted is not amended, the information provided in this form is currently accurate and complete.
- 10 If I have become temporarily registered as an agent, I acknowledge that this application for registration with the jurisdictions and organizations indicated in Item 10 is separate and distinct from any temporary registration already obtained with the jurisdictions and organizations. I further understand that my registration may be denied, suspended or revoked under the laws, regulations or rules of the jurisdictions and organizations.

November 5, 1994
 Month Day Year

Robert F. Berry
 SIGNATURE OF APPLICANT
 Robert F. Berry
 TYPE OR PRINT NAME OF APPLICANT

THE FIRM MUST COMPLETE THE FOLLOWING

To the best of my knowledge and belief, the applicant is currently bonded where required, and, at the time of approval, will be familiar with the statute(s), constitution(s), rules and by-laws of the agency, jurisdiction or self-regulatory organization with which this application is being filed, and the rules governing registered persons, and will be fully qualified for the position for which application is being made herein. I agree that, notwithstanding the approval of such agency, jurisdiction or organization which hereby is requested, I will not employ the applicant in the capacity stated herein without first receiving the approval of any authority which may be required by law. This firm has communicated with all of the applicant's previous employers for the past three years.

EMPLOYER	NAME OF PERSON CONTACTED	POSITION OF PERSON CONTACTED	EMPLOYED		HOW CONTACTED		
			FROM	TO	PHONE	LETTER	INTERVIEW
Prudential Sec., Inc.			4/85	11/94		XX	

IN ADDITION, I HAVE TAKEN APPROPRIATE STEPS TO VERIFY THE ACCURACY AND COMPLETENESS OF THE INFORMATION CONTAINED IN AND WITH THIS APPLICATION.

THE APPROPRIATE SIGNATORY AREA MUST BE COMPLETED ON ALL INITIAL, TRANSFER OR AMENDMENT FILINGS.

11/7/94
 MONTH DAY YEAR

Joseph L. Turner, Jr.
 SIGNATURE OF APPROPRIATE SIGNATORY
 Joseph L. Turner, Jr.
 TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

EXHIBIT B

ORIGINAL

STATE OF SOUTH CAROLINA)
)
COUNTY OF LEXINGTON)
)
ROBERT F. BERRY,)
)
Plaintiff,)
)
vs.)
)
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.)
_____)

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
Civil Action No. 2017-CP-32-00397

ORDER

FILED
JUL 21 11:05 AM
CLERK OF COURT
JUL 21 2017

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), SCRCF, as well as a separate motion for protective order and a stay of discovery.

A handwritten signature in black ink, appearing to be "G. Berry" with a stylized flourish at the end.

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 burden² 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'n's Workers*, 475 U.S. 643, 648 (1986).

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), SCRC, asserting as support for the motion Rule 15(a), SCRC. 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).

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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 statements⁵ 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

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. **If an arbitration agreement arises from the 1994 registration statement, it fails because the fora specified in that clause no longer exist.**

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 Vin. 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

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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:

 10

[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

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the 2

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.

* * *

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.

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

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.*

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 them 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), SCRPC 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), SCRPC 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

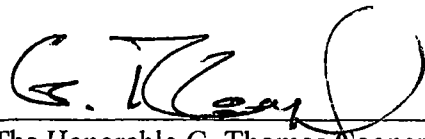
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“facts sufficient” standard of a “short and plain statement” of a well-pled complaint sufficient to put each of the Defendants on notice of the allegations of wrongdoing advanced by Mr. Berry. Defendants’ motion to dismiss is therefore denied.

CONCLUSION¹⁰

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.


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

CAMDEN

Lexington, South Carolina

This 16 day of JUNE, 2017

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CLERK OF COURT
JUN 21 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), 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:

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.

EXHIBIT C

The South Carolina Court of Appeals

Preservation Society of Charleston, Historic Charleston Foundation, Historic Ansonborough Neighborhood Association, South Carolina Coastal Conservation League, Charleston Chapter of the Surfrider Foundation, and Charleston Communities for Cruise Control, Appellants,

v.

South Carolina Department of Health and Environmental Control and South Carolina State Ports Authority, Respondents.

Appellate Case No. 2014-000847

ORDER

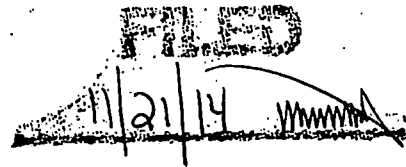
Respondents filed a motion requesting permission to exceed the page limitations set forth in Rule 208(b)(5) of the South Carolina Appellate Court Rules. Additionally, Respondents filed a motion to strike a portion of Appellants' brief addressing the August 12, 2014 letter from Lieutenant Colonel John T. Litz to Jim Van Ness. Appellants filed a return opposing the motion to strike.

After careful consideration, this Court grants Respondents' motion to exceed the page limit and requires Respondents to submit an initial brief not exceeding seventy-five pages within thirty days of the date of this order. This Court also grants Respondents' motion to strike and orders Appellants to remove from their brief any reference to the August 12, 2014 letter. *See* Rule 210(c), SCACR (stating the record on appeal "shall not . . . include matter which was not presented to the lower court or tribunal"). Appellants shall submit an amended brief within ten days of the date of this order.


FOR THE COURT

Columbia, South Carolina

cc: Amy Elizabeth Armstrong, Esquire
Michael Gary Corley, Esquire
Jessie Allison White, Esquire
W. Jefferson Leath, Jr., Esquire
James Blanding Holman, IV, Esquire
Bradley David Churdar, Esquire
Tracey Colton Green, Esquire
Randolph Russell Lowell, Esquire
Chad Nicholas Johnston, Esquire
Philip L. Lawrence, Esquire


FILED
11/21/14

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2017-001690

Robert F. Berry, ...Respondent,

v.

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.,.....Appellants.

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SC Court of Appeals

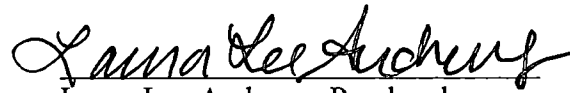
PROOF OF SERVICE

I, the undersigned employee of Willoughby & Hoefer, P.A., do hereby certify that I have caused to be served this day one (1) copy of Respondent's **Motion to Strike** by placing same in the care and custody of the United States Postal Service with first class postage affixed thereto and addressed as follows:

Adam N. Yount, Esquire
Pierce T. MacLennan, Esquire
HAYNSWORTH SINKLER BOYD, P.A.
PO Box 340
Charleston, SC 29402

Sarah P. Spruill, Esquire
HAYNSWORTH SINKLER BOYD, P.A.
PO Box 2048
Greenville, SC 29602

Frederick T. Smith, Esquire
SEYFARTH SHAW, LLP
1075 Peachtree Street, NE
Suite 2500
Atlanta, GA 30309

A handwritten signature in black ink, reading "Laura Lee Andrews". The signature is written in a cursive, flowing style with a horizontal line underneath the name.

Laura Lee Andrews, Paralegal
Willoughby & Hoefer, P.A.
930 Richland Street
Columbia, SC 29201

Columbia, South Carolina
This 28th day of December, 2017.

WILLOUGHBY & HOEFER, P.A.

ATTORNEYS & COUNSELORS AT LAW

MITCHELL M. WILLOUGHBY
JOHN M.S. HOEFER
RANDOLPH R. LOWELL**
TRACEY C. GREEN
BENJAMIN P. MUSTIAN**
ELIZABETH ZECK*
ELIZABETHANN LOADHOLT CARROLL
CHAD N. JOHNSTON
JOHN W. ROBERTS
R. WALKER HUMPHREY, II***
CHRISTOPHER M. CAMPBELL
ANDREW R. HAND****

ELIZABETH S. MABRY
JAMES PATRICK HUDSON
OF COUNSEL

JOSEPH H. FARRELL, III
SPECIAL COUNSEL

*ALSO ADMITTED IN TEXAS

**ALSO ADMITTED IN WASHINGTON, D.C.

***ALSO ADMITTED IN CALIFORNIA

****ALSO ADMITTED IN NORTH CAROLINA

VIA HAND DELIVERY

The Honorable Jenny Abbott Kitchings
Clerk of Court, Court of Appeals
1220 Senate Street
Columbia, South Carolina 29201

RE: *Robert F. Berry, Respondent v. 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., Appellants.*
C/A No. 2017-CP-32-00397
Appellate Case No. 2017-001690

Dear Ms. Kitchings:

Pursuant to Rules 208, 210 and 240, of the South Carolina Appellate Court Rules, enclosed for filing please find the original and seven (7) copies of the **Motion to Strike** of Respondent Robert F. Berry in the above-captioned matter. The within motion seeks the following relief:

- **Immediate and Intervening Order Holding the Deadline for Filing the Initial Brief of Respondent in Abeyance**, until such time as the Motion to Strike is considered (filing deadline for Initial Brief of Respondent is currently January 2, 2018).
- **Order Striking Certain Arguments and Citations from the Initial Brief of Appellant**, filed November 30, 2017.
- **Order Providing an Extension of Time to File the Initial Brief of Respondent.**

By copy of this letter to counsel, I am serving Appellants 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., and enclose a proof of service to that effect. Enclosed, please also find a check in the amount of \$25 for the filing fee.

OFFICES:

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P.O. BOX 8416
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CHARLESTON, SC 29402

AREA CODE 843
TELEPHONE 619-4426
FAX 619-4430

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DEC 28 2017

SC Court of Appeals

December 28, 2017

(continued...)

The Honorable Jenny A. Kitchings

December 28, 2017

Page 2 of 2

If you have any questions or if you need any additional information, please do not hesitate to contact me. I would appreciate your acknowledging receipt of the Motion by file stamping the enclosed extra copy of same and returning it to me via our courier. With best regards, I am,

Respectfully,

WILLOUGHBY & HOEFER, P.A.

A handwritten signature in black ink, appearing to read "Chad Johnston", written over the printed name.

Chad N. Johnston

cc: Sarah P. Spruill, Esquire
Frederick T. Smith, Esquire
Adam N. Yount, Esquire
Pierce T. MacLennan, Esquire