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.

REPLY IN SUPPORT OF MOTION TO STRIKE

Robert F. Berry respectfully submits this Reply to Appellants' Return to his Motion to Strike certain arguments and citations from Appellants' Initial Brief, filed November 30, 2017. In this appeal, Appellants have effectively abandoned their unsuccessful arguments below in favor of arguing entirely new grounds and the merits of arguments that were either not presented to or were expressly excluded by the trial court. Because these new grounds and derivative arguments are so ubiquitous in the Initial Brief, Mr. Berry respectfully submits that the only appropriate remedy is for the offending portions of the Initial Brief be stricken and for Appellants to be required to file an amended brief excluding the offending grounds and arguments, while also not being permitted to bolster the remaining brief.

ARGUMENT

I. The Motion to Strike is the appropriate mechanism and relief for Appellants' clear effort to circumvent the trial court's order and appellate court rules, by presenting the merits of new and excluded arguments for the first time on appeal.

A. Confronted with the universally accepted rule of appellate practice that this Court may not consider arguments that were not presented to the trial court, Appellants now misrepresent the record and the arguments they advanced below.

As provided in the Motion, the South Carolina Appellate Court Rules (SCACR), as well as the long-established case law setting out the accepted practice and procedure in appellate courts of this state, are clear that the briefs of the parties and the record on appeal are limited to references to, and arguments about, matters which were presented to the trial court. *See* Rules 208(b)(4) and 210(c), (h), SCACR; see also South Carolina Highway Department v. Meredith, 241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962); Motion Ex. 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). Having no rebuttal to these Rules and binding precedent, Appellants instead patently misrepresent the content of their arguments to the trial court, contending that "[t]he arguments made on appeal are exactly the arguments that were made both in writing and at oral argument[1] below." Such a claim is curious in that it is so easily and conclusively disproven by simple reference to Appellants' motion and supporting memorandum to the trial court, which Mr. Berry

[1] Appellants' assertion that they made certain additional arguments "at oral argument below," without providing the Court a copy of the actual transcript and citation to these arguments, is convenient, but should be given little credence. As Mr. Berry will show herein by reference and attachment of the actual arguments made by Appellants below, this claim is likewise inaccurate.

provided to the Court as an exhibit to his Motion. *See* Motion Ex. A, Appellants' Motion to Dismiss/Stay Pending Arbitration and Memorandum in Support (including exhibits).

Contrary to Appellants' assertion that they argued that "the **rules** of the Financial Industry Regulatory Authority ('FINRA')," Return at 1 (emphasis added to the assertion of plurality), as a basis for compelling arbitration, or that "[t]here is no question that the [Appellants] argued to the trial court that the FINRA **rules** require arbitration in this case," Return at 3 (same), in fact, Appellants advanced a single FINRA Rule – 13200 – to the trial court. Indeed FINRA Rule 13200 was not Appellants' primary ground to compel arbitration, as it is now on appeal, but rather it was advanced as an alternative to Appellants' primary argument that arbitration is compelled by a 1994 Form U4 Registration Statement filed by Wheat, First Securities, Inc. ("Wheat First"), a now defunct firm. Although he disputes its application under these circumstances, Mr. Berry does not dispute that Appellants argued FINRA Rule 13200 to the trial court and thus the Motion does not seek to strike reference to FINRA Rule 13200 from Appellants' Initial Brief. However, the additional Rules, citations, releases, and documents identified in the table of Mr. Berry's Motion, *see* Motion at 10-11, did not appear in Appellants' submissions to the trial court, including the oral presentation of the motion to compel at the hearing before the trial court. *See* Motion Ex. A, Memorandum at 2 (relying on FINRA Rule 13200, but no other FINRA Rules); see also Reply Exhibit 1, Excerpts from June 1, 2017 Hearing Transcript at p.8:20-22 ("In addition to the arbitration agreement which we believe is binding to this day, Finra [sic] has **a rule**. It's rule 13-200(A) [sic] ....") (emphasis added to reference of a singular rule); p.10:15-19 ("Your Honor, if I my [sic] approach the bench? I have a copy of **the FINRA rule**, too, if Your Honor would like that. We cited **it** in our memorandum of law.") (emphasis added); p.22:21-24 ("Even if the Court were to find that there is no agreement

which we don't think it should hold, Your Honor, **that rule** that I placed in front of you binds the parties to arbitration.") (emphasis added).

The trial court astutely rejected Appellants' claim that FINRA Rule 13200 compels arbitration of Mr. Berry's claims for the more fundamental reason that Appellants failed to introduce *any evidence* demonstrating the applicability of *any* FINRA rule to Mr. Berry. *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**.") (emphasis added); Order at 14 ("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."). Appellants misleadingly argue on this appeal that the trial court misapplied the FINRA rules to Mr. Berry, arguing the merits of the rules while ignoring their fundamental appellate burden of demonstrating error of the trial court's exclusion on evidentiary grounds of any FINRA rule to Mr. Berry. Because these additional citations and linked documents are presented for the first time on appeal and make up the majority of the Initial Brief, Mr. Berry should not be forced to undertake the time and expense of responding to these new arguments, and would respectfully submit that the appropriate remedy is for the Court to strike the offending portions of the Initial Brief and order Appellants to re-file an amended brief.

B. A motion to strike is appropriately directed at the contents of an Initial Brief.

In the Return, Appellants are critical of Mr. Berry's use of a motion to strike as a means to argue for the exclusion of arguments and web-linked documents which were not presented to the trial court. In effect, Appellants contend that, notwithstanding Rule 208(b)(4), SCACR's clear directive that a brief should only contain references to documents which may be included in the record on appeal (i.e., matters that were presented to the trial court), a motion to strike should only be directed to a designation of matter to be included in the record on appeal and a party is free to include new arguments and web-linked documents in their brief with impunity. This argument appears to be made as a matter of convenience for Appellants, as the new citations and web-linked documents which are pervasive in the Initial Brief are not included in Appellants' designation of matter, in violation of Rule 209, SCACR ("[T]he Designation may only propose to include portions of the transcript, pleadings, orders, exhibits, **or other materials** which he proposed to include in the record on appeal.") (emphasis added), notwithstanding the fact that they could not be a part of a proper designation, as they were not presented below.

Appellants cite no rule or case law for the proposition that motions to strike may only be directed at appellate designations, and there is none. In point of fact, Mr. Berry has already provided the Court with an example that disproves Appellants' assertion. See Motion Ex. 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). In the Preservation Society appeal, the respondent moved to strike a reference to a letter which was cited and relied upon in the appellant's initial brief, but which had not been presented to the lower tribunal. Id. The appellant quoted from the letter and fashioned an argument based on its contents in the initial brief, but did not include the letter in its designation of

matter to be included in the record on appeal. See Reply Exhibit 2 (Preservation Society, Designation of Matter on Appeal). Upon the respondent's motion to strike in Preservation Society, this Court rejected the appellant's reliance on this new document and the arguments derived therefrom and struck the citation, quotation and arguments on the letter from the brief. See Motion Ex. C. Here, Appellants' Initial Brief presents precisely the same impropriety, as the citations and web-linked documents included by Appellants throughout their Initial Brief were not included in the designation; therefore, a motion to strike is appropriately addressed to the Initial Brief.

Appellants suggest that the appropriate mechanism under these circumstances is for Mr. Berry to simply argue traditional preservation grounds in the context of a full rejoinder on the merits of these new arguments in his Initial Respondents Brief. Return at 3 ("To the extent Berry believes any portion of these arguments is unpreserved, he is welcome to address those matters in his initial brief and the Court can then make its determination, based on its review of all of the parties' arguments and the record on appeal."). However, it is Appellants' willful disregard of the rules of preservation that makes the requested remedy appropriate at this early stage of this appeal. A party seeking to compel arbitration has the absolute burden of demonstrating that a valid arbitration clause is applicable to a plaintiff and his or her claims. Order at 3 (citing Bradley v. Brentwood Homes, Inc., 398 S.C. 447, 458, 730 S.E.2d 312, 317-318 (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)). The party seeking to compel arbitration should not be permitted to advance new grounds for compelling arbitration in each successive filing with the trial and appellate court, having been unsuccessful on the grounds previously advanced. But that is precisely what Appellants did below in their original motion and

motion for reconsideration, and what Appellants seek to do once more through their Initial Brief. Having already been significantly harmed financially by Appellants, Mr. Berry should not be forced to incur the additional significant expense of defending against the merits of these new claims on appeal, and a motion to strike is the appropriate mechanism to halt Appellants' attempted circumvention of the rules.

C. The Return and Initial Brief attempt to convert matters that require evidentiary proof into legal arguments and citations in order to avoid the trial court's exclusion of the FINRA rules based on Appellants' failure to meet their evidentiary burden.

In order to avoid the traditional "raised to and ruled upon" requirement placed on arguments and documents which an appellant seeks to raise on appeal, Appellants instead seek to convert matters and arguments which are subject to a foundational demonstration of evidentiary proof into legal citations which they may freely cite as binding authority. The trial court did not consider any argument advanced by Appellants based on the applicability of FINRA or the FINRA rules to Mr. Berry, including FINRA Rule 13200. Instead, the trial court correctly held that Appellants had failed to meet their burden in demonstrating the applicability of FINRA rules to Mr. Berry. 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.").

In the Initial Brief, and continued in the arguments of the Return, Appellants ignore the trial court's exclusion of the FINRA rules on evidentiary grounds and abandon any pretense of arguing that the exclusion was an error requiring reversal. Instead, Appellants now contend that their citations, web-links and derivative arguments are appropriate

because they constitute binding *legal authority* on this Court, rather than matters subject to proof. See Return at 2 ("There is no precedent suggesting a party is limited to the same statutory, legal, regulatory or rule citations presented to the trial court."); Return at 3-4 ("But a motion to strike what are, at bottom, legal arguments supported by SEC and FINRA rules is inappropriate and should be summarily rejected."). Of course, **FINRA rules are neither statutes nor appropriate citations to the Court as binding legal, regulatory or rule precedent, and Appellants admit that no South Carolina court has accepted FINRA's rules, citations, and myriad releases or compilations.**[2] See Initial Brief at 17.

The reason this distinction is important is that, if Appellants are unburdened by their obligation to prove the applicability of these rules and citations to Mr. Berry, they will be free to argue, as they do in the Initial Brief and Return, that these FINRA rules and citations are legally binding on this Court and against Mr. Berry – which they are not. For example, when Appellants assert that Mr. Berry is a "regulated member of FINRA" and "is required to agree that any and all such disputes with [Mr. Berry's] firm must be arbitrated ... [under] the FINRA rules to which every member agrees" see Return at 2, they are both factually incorrect and simultaneously attempting overcome their evidentiary failures below through misguided conclusory statements. As an initial matter, only brokerage firms are members of FINRA. But that is beside the point, as Appellants' argument presumes the very fact on which the trial court found that they failed to meet their evidentiary burden of proof: Appellants simply assert – without any factual evidence

[2] In fact, no published South Carolina opinion has ever recognized FINRA or its rules, while the only unpublished South Carolina opinion (Keller v. ING Financial Partners, Inc., Op. No. 2013-UP-014 (S.C. Ct. App. filed Jan. 9, 2013)) – an opinion of this Court – reached the same result advanced by Mr. Berry on the precise question presented in this appeal.

in this record – that Mr. Berry is a "member" of FINRA and has agreed to abide by its rules.[3] Arguing the merits of an issue that was not considered below – and was expressly excluded by the trial court on evidentiary grounds – is improper, and Appellants citations and derivative arguments should be stricken from the Initial Brief.

D. Appellants' citations to FINRA rules and other online documents are not subjects for judicial notice, and even if they were, there is still no evidence proving their use against Mr. Berry.

In two short, conclusory sentences making legal assertions without citation to any case law, Appellants claim that "there is no question that under well-settled authority, FINRA rules are subject to judicial notice." Return at 4; but see 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); Englert, Inc. v. Netherlands Ins. Co., 315 S.C. 300, 304 n.2, 433 S.E.2d 871, 873 n.2 (Ct. App. 1993) (stating a one sentence argument is too conclusory to present to the Court). As stated above, however, no South Carolina court has ever recognized FINRA or applied its rules as precedent. But even if foreign jurisdictions have taken judicial notice of FINRA's rules or documents on FINRA's website based on the evidence before them, and even if the judicial notice standards of this Court were met, which Mr. Berry disputes for the reasons set forth in his Motion, such notice would not accomplish the objective claimed by Appellants, as the foundational

[3] Such a conclusion, even if true, does not compel the arbitration of Mr. Berry's claims, however. Appellants would still have the burden of proving that Mr. Berry agreed to arbitrate the claims asserted against *these* Appellants and in the forum sought. All of that additional evidence is similarly lacking here, as detailed in the trial court's Order.

demonstration of the FINRA rules applicability to Mr. Berry is wholly lacking on this record. See Order at 8, n.7; see also McCall v. Finley, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter.").

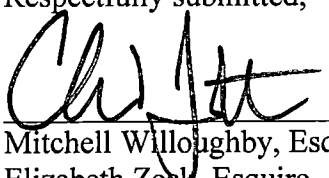
CONCLUSION

For the reasons set forth herein and in the Motion, 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 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 for Appellants to delete the offending portions and re-serve an amended brief on Mr. Berry. 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.

Should the within motion be 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.

[SIGNATURE PAGE FOLLOWS]

Respectfully submitted,



Mitchell Willoughby, Esquire
Elizabeth Zeck, Esquire
Chad N. Johnston, Esquire
Willoughby & Hoefer, P.A.
Post Office Box 8416
Columbia, South Carolina 29202
Telephone Number: 803-252-3300
mwilloughby@willoughbyhoefer.com
ezeck@willoughbyhoefer.com
cjohnston@willoughbyhoefer.com

Attorneys for Robert F. Berry

This 16th day of January 2018
Columbia, South Carolina

Exhibit 1

State of South Carolina County of Lexington Robert F. Berry, Plaintiff, vs. Wells Fargo Clearing Services, LLC, et al., Defendants.	In the Court Of Common Pleas Case No.: 2017-CP-32-00397 Transcript of Record

June 1, 2017

Lexington, South Carolina

BEFORE:

The Honorable G. Thomas Cooper, Junior, Judge

APPEARANCES:

Mitchell Willoughby, Esquire
Chad N. Johnston, Esquire
Elizabeth Zeck, Esquire
Attorneys for the Plaintiff

John G. Tamasitis, Esquire
Frederick T. Smith, Esquire
Attorneys for the Defendants

Wells Fargo Company and he's also named the retail bank Wells Fargo Bank NA.

THE COURT: Called the shotgun approach?

MR. SMITH: We think so, Your Honor. And our argument boils down to this, Your Honor. When Mr. Berry first started with the predecessor entity to what is now Wells Fargo Clearing Services, he completed a U4 which is standard in the securities industry. That U4 contained an arbitration provision in which Mr. Berry agreed 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 rules, constitutions or bylaws. At the time it was the NASD. It's now FINRA. As may be amended from time to time and then any arbitration award rendered against me may be entered a judgment in any court of competent jurisdiction.

It's well established under both federal law and South Carolina state law that there's a heavy presumption in favor of arbitrability, Your Honor. In addition to the arbitration agreement which we believe is binding to this day, Finra has a rule. It's rule 13-200(A) and that rule specifically states, quote, that a dispute must be arbitrated under the code, that's the FINRA code, if the dispute arises out of the business activities of a member

industry as a U4. I have not had a chance to read plaintiff's memorandum in opposition that was just provided to us. Even if plaintiff would argue that that agreement isn't binding --

THE COURT: Well, just point out the arbitration clause.

MR. SMITH: It's number 5, Your Honor.

THE COURT: I agree to arbitrate?

MR. SMITH: Yes, sir.

THE COURT: What is the requirement?

MR. SMITH: Under FINRA, Your Honor, a three person arbitration panel would decide the party's disputes unless they agree to a single arbitrator.

THE COURT: It doesn't state that.

MR. SMITH: The details of the arbitration process are set forth in the FINRA code, Your Honor. Your Honor, if I my approach the bench? I have a copy of the FINRA rule, too, if Your Honor would like that. We cited it in our memorandum of law. I have a copy for the Court (proffering.)

THE COURT: Thank you. Mr. Willoughby.

MR. WILLOUGHBY: May it please the Court.

THE COURT: You may proceed.

MR. WILLOUGHBY: Your Honor, I would hand up to the Court and your law clerk copies of our brief and the

there are any true material disputes here, the law is real clear that any doubts must be discarded and that a presumption of arbitration has hold and we think that that maxim applies here.

THE COURT: What about form selection? Most arbitration agreements that I have seen, I have seen many, carry a form selection provision but this one is sort of bare of that other than this reference to paragraph 10.

MR. SMITH: Right. And my response to that, Your Honor, is that NASD has morphed into FINRA. If you're part of this industry which Mr. Berry has been for decades, Your Honor, he knows as does every broker and the entities that employ them that if there are disputes of this nature, they end up being arbitrated before FINRA and prior to that the NASD. There is no doubt or confusion about that. And I'll note, too, Your Honor, that even if the Court were to find that this agreement hasn't continued forth and doesn't bind --

THE COURT: Say that again.

MR. SMITH: Yes. I apologize. Even if the Court were to find that there is no agreement which we don't think it should hold, Your Honor, that rule that I placed in front of you binds the parties to arbitration. If you want to sell securities and be a broker in this country,

CERTIFICATE OF REPORTER

(STATE OF SOUTH CAROLINA)

(COUNTY OF LEXINGTON)

I, THE UNDERSIGNED, Steven E. LeBlanc, Sr., R.P.R., and Official Circuit Court Reporter for the Eleventh Judicial Circuit in and for the State of South Carolina, do hereby certify that I reported the proceedings in the before captioned case in the Court of Common Pleas in and for the State of South Carolina on the 1st day of June, 2017.

I FURTHER CERTIFY that the forgoing 30 pages constitute a true and accurate record of said proceedings.

I FURTHER CERTIFY that I am neither related, counsel to, nor of interest to any party hereto.

IN WITNESS WHEREOF, I have hereunto set my hand at Lexington County, this 30th day of September, 2017.

_____

Steven E. LeBlanc, Sr., R.P.R.
Eleventh Circuit Court Reporter
State of South Carolina.

Exhibit 2

THE STATE OF SOUTH CAROLINA

In the Court of Appeals

APPEAL FROM ADMINISTRATIVE LAW COURT

Ralph King Anderson, III, Administrative Law Judge

Case No. 13-ALC-07-056-CC
Appellant Case No. 2014-000847

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

vs.

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

APPELLANTS' DESIGNATION OF MATTERS TO BE INCLUDED IN THE RECORD ON APPEAL

The Appellants propose the following material to be included in the Record on Appeal:

1. Order Granting Summary Judgment for Lack of Standing, dated April 11, 2014
2. Amended Order Granting Sanctions, dated April 11, 2014
3. Order Denying Petitioners' Motion to Expand Discovery and Granting Petitioners' Motion to File a Surreply, dated March 3, 2014
4. Order Granting Sanctions, dated March 3, 2014
5. Order Denying Petitioners' Motion to Vacate, dated December 20, 2013

6. Order Denying Ports Authority's Motion to Dismiss, dated December 2, 2013

7. Order Granting Continuance and Amended Notice of Hearing, dated August 14, 2013

8. Amended Notice of Hearing, dated June 12, 2013

9. Notice of Hearing, dated May 31, 2013

10. Order for Prehearing Statements, dated May 6, 2013

11. Order Denying Petitioners' Motion to Remand, dated May 3, 2013

12. DHEC Board Denial Letter, dated January 11, 2013

13. Request for Final Review Conference, dated January 2, 2013

14. Request for Contested Case Hearing (with exhibits), dated February 11, 2013

15. Motion to Remand to DHEC Board (with exhibits), dated February 27, 2013

16. SPA's Response to Motion to Remand (without exhibits), dated March 14, 2013

17. DHEC's Response to Motion to Remand, dated March 14, 2013

18. SPA's Prehearing Statement, dated May 20, 2013

19. Petitioners' Prehearing Statement, dated May 21, 2013

20. DHEC's Prehearing Statement, dated May 21, 2013

21. SPA's Motion to Dismiss for Lack of Standing (without exhibits), dated July 1, 2013

22. SPA's Motion for Sanctions (without exhibits), dated July 1, 2013

23. Petitioners' Response to Motion to Dismiss for Lack of Standing and Motion to Strike Exhibits (with exhibits), dated July 22, 2013

24. Petitioners' Response to Motion for Sanctions (with exhibits), dated July 26, 2013

25. SPA's Reply on Motion for Sanctions (without exhibits), dated August 2, 2013

26. SPA's Reply on Motion to Dismiss for Lack of Standing (without exhibits), dated August 5, 2013

27. Petitioners' Reply to Motion to Strike Exhibits, dated August 26, 2013

28. Petitioners' Motion to Quash Subpoena (with exhibits), dated August 28, 2013

29. Motion for Leave to File Sur-Reply, dated August 30, 2013

30. SPA's Response to Motion to Quash Subpoena, dated September 3, 2013

31. SPA's Response to Motion for Leave to File Sur-Reply, dated September 4, 2013

32. SPA's Response In Support of Subpoena and Opposition to Motion to Quash (without exhibits), dated September 3, 2013

33. SPA's Response in Opposition to Motion/Surreply (without exhibits), dated September 4, 2013

34. SPA's First Amended Prehearing Statement, dated September 18, 2013

35. Petitioners' Supplemental Brief on Standing (with exhibits), dated September 18, 2013

36. SPA's Supplemental Brief on Standing, dated September 18, 2013

37. Petitioners' Motion to Vacate (with exhibits), dated November 1, 2013

38. SPA's Response to Motion to Vacate (without exhibits), dated November 25, 2013

39. Petitioners' Reply on Motion to Vacate (with exhibits), dated December 16, 2013

40. Motion to Expand Discovery, dated December 23, 2013

41. SPA's Motion for Partial Summary Judgment (without exhibits), dated December 27, 2013

42. SPA's Motion for Summary Judgment for Lack of Standing (with exhibits 3 and 6), dated December 27, 2013

43. SPA's Response to Motion to Expand Discovery (without exhibits), dated January 7, 2014

44. Petitioners' Reply on Motion to Expand Discovery (with exhibits), dated January 16, 2014

45. Petitioners' Response to Motion for Partial Summary Judgment and Cross Motion for Summary Judgment (with exhibits), dated January 21, 2014

46. Petitioners' Response to Motion for Summary Judgment for Lack of Standing (with exhibits), dated January 21, 2014

47. SPA's Reply on Motion for Partial Summary Judgment (without exhibits), dated February 5, 2014

48. SPA's Reply on Motion for Summary Judgment for Lack of Standing (without exhibits), dated February 5, 2014

49. Petitioners' Motion to File Surreply (with exhibits), dated February 11, 2014

50. SPA's Response to Motion to File Sur-Reply (without exhibits), dated February 18, 2014

51. Petitioners' Reply in Support of Motion to File Sur-Reply, dated February 26, 2014

52. SPA's Response to Surreply, dated March 10, 2014

53. Petitioners' Motion for Reconsideration (with exhibits), dated March 13, 2014

54. Petitioners' Motion to Reconsider and for Stay, dated March 13, 2014

55. SPA's Response to Motion for Reconsideration, dated March 19, 2014

56. Petitioners' Reply on Motion for Reconsideration (with exhibits), dated March 21, 2014

57. SPA's Response on Motion to Reconsider and for Stay (without exhibits), dated March 27, 2013

58. Petitioners' Reply on Motion to Reconsider and for Stay, dated April 8, 2014

RULE 209 CERTIFICTION BY COUNSEL

The undersigned counsel for Appellants hereby certifies, pursuant to S.C. App. Ct. R. 209, that the foregoing Designation of Matter To Be Included in the Record on Appeal contains no matter which is irrelevant to the appeal.

J. Blanding Holman IV
Southern Environmental Law Center
43 Broad Street, Suite 300
Charleston, SC 29401
Telephone: (843) 720-5270
Fax: (843) 720-5240

Jefferson Leath
Leath, Bouch & Seekings, LLP
92 Broad Street
Charleston, SC 29401
Telephone: (843) 513-1076

Amy E. Armstrong
Jessie A. White
South Carolina Environmental Law Project
Mailing Address: Post Office Box 1380
Pawleys Island, SC 29585
Physical Address:430 Highmarket Street
Georgetown, SC 29440
Telephone: (843) 527-0078
Fax: (843) 527-0540

Attorneys for the Appellants

Charleston, SC

October 14, 2014

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,

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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.

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 **Reply to the Return to the 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

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

Columbia, South Carolina
This 16th day of January, 2018.

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

OFFICES:

COLUMBIA
930 RICHLAND STREET
P.O. BOX 8416
COLUMBIA, SC 29202-8416

AREA CODE 803
TELEPHONE 252-3300
FAX 256-8062

CHARLESTON
151 MEETING STREET
SUITE 325
P.O. BOX 10
CHARLESTON, SC 29402

AREA CODE 843
TELEPHONE 619-4426
FAX 619-4430

January 16, 2018

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 **Reply to the Return to the Motion to Strike** of Respondent Robert F. Berry in the above-captioned matter. By copy of this letter to counsel, I am serving the Appellants with a copy of this Reply and enclose a proof of service to that effect.

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 Reply 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.

Chad N. Johnston

(continued...)

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