

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

Case No. 2017-CP-32-00397

RECEIVED
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SC Court of Appeals

Robert F. Berry.....Respondent

vs.

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

RECORD ON APPEAL

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

FORM 4

JUDGMENT IN A CIVIL CASE

CASE NO. 2017-CP-32-0397

Robert F Berry

Wells Fargo Clearing Services, LLC, et al

PLAINTIFF(S)

DEFENDANT(S)

ORIGINAL

Submitted by:

Attorney for: ☐ Plaintiff ☐ Defendant
or
☐ 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:
DEFENDANT WELLS FARGO CLEARING'S MOTION FOR PROTECTIVE ORDER AND MOTION TO STAY DISCOVERY IS UNDER ADVISEMENT
DEFENDANT WELLS FARGO CLEARING'S MOTION TO DISMISS OR STAY PENDING ARBITRATION IS UNDER ADVISEMENT
DEFENDANT WELLS FARGO CLEARING'S AMENDED MOTION TO DISMISS OR STAY PENDING ARBITRATION IS UNDER ADVISEMENT
This order ☐ ends ☒ does not end the case.

Additional Information
for the Clerk:

Proposed Orders in 10
days

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
SCRPC Form 4C (02/2017)

Page 1 of 2

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.

[Signature]
Circuit Court Judge

2126
Judge Code

6/1/17
Date

For Clerk of Court Office Use Only

This judgment was entered on the _____ day of _____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 7 day of June 29 17 to attorneys of record or to parties (when appearing pro se) as follows:

Chad Nicholas Johnston

Adam Noah Yount

ATTORNEY(S) FOR THE PLAINTIFF(S)

[Signature]
ATTORNEY(S) FOR THE DEFENDANT(S)

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 judgment 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.

Haynsworth Sinkler Boyd, P.A.

Date Rec'd 6/16/17
C/M # 31686.0261
Routing ANY
Calendared _____

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
JUN 21 2017
11:05
CLERK OF COURT

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

FACTUAL BACKGROUND

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



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

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



FINDINGS and ANALYSIS

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

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

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

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



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

A threshold question is the admissibility of the documents upon which Defendants rely to support their demand for arbitration. South Carolina law has always required authentication as a condition precedent to admissibility. Rule 901(a), SCRE; see also *State v. Rich*, 293 S.C. 172, 359 S.E.2d 281 (1987). This rule applies to evidence submitted in support of motions. See *Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 121, 441 S.E.2d 835, 838 (Cl. 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 (Cl. 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'ns 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), SCRCF, asserting as support for the motion Rule 15(a), SCRCF. 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.

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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.

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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:

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

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

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

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



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

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

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



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

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

The "NASD," or the National Association of Securities Dealers, Inc., as then constituted, no longer exists, having combined regulatory functions with certain divisions of the New York Stock Exchange ("NYSE") to become what is now known as the Financial Industry Regulatory Authority, or FINRA.

* * *

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), SCRPC.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), SCRPC, 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.*

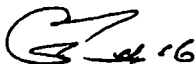
⁹ As was noted *supra* at p.5 n.2, Defendants did not timely raise their Rule 12(b)(3) objections to venue as this ground was not included in its initial motion. *See* Rule 12(g), (h), SCRPC. Although a Rule 12(b)(1) objection to the Court's subject matter jurisdiction can be raised at any time, Defendants 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).

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

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

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

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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

CANDEN

Lexington, South Carolina

This 6 day of JUNE, 2017

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CLERK OF COURT
ELEVENTH JUDICIAL CIRCUIT
LEXINGTON, SC

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).

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

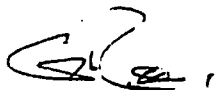
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CLERK OF COURT
JANICE L. BRYANT

Before the Court is Defendants' Motion for Reconsideration or Amendment of this Court's Order, filed June 21, 2017, denying Defendants' Motion to Dismiss or Stay Pending Arbitration.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or facts not appropriately considered.

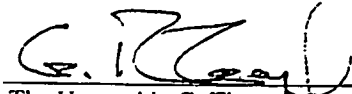
Accordingly, this Court hereby **DENIES** Defendant's Motion under Rule 59(e), SCRCP, to reconsider this Court's March 1, 2017, Order. Furthermore, pursuant to Rule 59(f), SCRCP, the Court is of the opinion that oral argument is not necessary.

In regard to Defendants' request to for an extension of time to file a responsive pleading, which request has been extended with the consent of Plaintiff, Defendants' request is granted, and Defendants are ordered to file a responsive pleading within 10 days from receipt of this Order.



In regard to Defendants' request for an extension of time to respond to Plaintiff's outstanding discovery requests, which request has been extended with the consent of Plaintiff, Defendants' request is granted, and Defendants are ordered to provide discovery responses to all outstanding discovery requests of Plaintiff within 40 days from receipt of this Order.

AND IT IS SO ORDERED.


The Honorable G. Thomas Cooper, Jr.

July 24, 2017

Haynsworth Sinkler Boyd, P.A.

Date Rec'd 7/31/17
C/M # 31686-0261
Routing ANY
Calendared _____

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CLERK OF COURT

COPY

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STATE OF SOUTH CAROLINA

) IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON

2017 FEB 22

) PM 4:27
) ELEVENTH JUDICIAL CIRCUIT

Robert F. Berry,

LISA COVER
CLERK OF COURT
LEXINGTON, SC

Civil Action No. 2017-CP-_____

Plaintiff,

vs.

SUMMONS

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

Defendants.

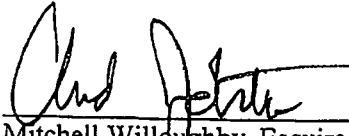
2017CP3200397

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this Complaint upon the subscriber, at their office, 930 Richland Street, P.O. Box 8416, Columbia, South Carolina 29202-8416, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, or otherwise appear and defend, judgment by default will be rendered against you for the relief demanded in the Complaint.

PM 4:16:38 FEB03/2017

SIGNATURE PAGE FOLLOWS



Mitchell Willoughby, Esquire, Esquire

Elizabeth Zeck, Esquire

Chad N. Johnston, Esquire

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Attorneys for Robert F. Berry

This 2nd day February 2017
Columbia, South Carolina

COPY

FILED

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON)

2017 FEB -2 PM 4:27

ELEVENTH JUDICIAL CIRCUIT

ROBERT F. BERRY,

USA COVER
CLERK OF COURT
LEXINGTON, SC

Civil Action No. 2017-CP-32-

Plaintiff,

vs.

PLAINTIFF'S ORIGINAL COMPLAINT

(Jury Trial Demanded)

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

Defendants.

2017 CP 32 00397

Plaintiff Robert F. Berry ("Mr. Berry") complains of Defendants Wells Fargo Clearing Services, LLC, Wells Fargo Advisors, LLC, Wachovia Securities Financial Holdings, LLC, (collectively "the WFA Defendants"), Wells Fargo & Company and Wells Fargo Bank, N.A. (collectively "the Wells Fargo Bank Defendants"), and Scott A. Spang, and respectfully alleges as follows:

SUMMARY OF CASE

1. This is a claim for damages brought by Mr. Berry, formerly a Wealth Manager and Senior Vice President with Defendant Wells Fargo Advisors, LLC, arising from the defendants' deliberate sabotage and breach of Mr. Berry's long-standing compensation agreement with the WFA Defendants and their predecessors.

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2. Mr. Berry was chastised by Defendants for resisting their demands that he "cross-sell" Wells Fargo Bank products to his clients for whom he served as their fiduciary, products which the clients did not want, did not need and which were unsuitable for them. He also expressed concern and attempted to seek information about the reasons for the inexplicable changes in his compensation arrangement.

3. As a result of Mr. Berry's actions, Defendants internally identified Mr. Berry as a malcontent to be punished for having the courage and temerity to speak up against the illegality of Defendants' cross-selling program and the injustice of the unilateral compensation changes, as well as other failures by Defendants to support Mr. Berry's efforts to properly serve his clients. Defendants' efforts intensified over several months and culminated in a February 3, 2014 meeting orchestrated and engineered by Defendants, during which Defendant Spang, on behalf of all Defendants, humiliated and berated Mr. Berry, thereby forcing his resignation by threatening that he would either resign or be immediately fired.

4. Then, to further damage Mr. Berry, Defendants defamed his professional reputation and good name by filing a false and defamatory statement about his departure with regulatory authorities, accusing him of unethical and dishonest acts. Defendants knew that the false statement would damage Mr. Berry in his subsequent professional endeavors, but took the action specifically to promote Defendants' own interests in retaining Mr. Berry's client base, while achieving their real goal of punishing Mr. Berry for refusing to participate in their improper cross-selling scheme and terminating a longstanding payout arrangement that Defendants viewed as too lucrative in favor of Mr. Berry. These illegal, false and deceptive practices by Defendants seriously harmed Plaintiff as was Defendants' specific and deliberate intent.

5. This complaint seeks damages and injunctive relief in compensation for those wrongful acts.

PARTIES

6. Plaintiff Robert F. Berry is, and at all times herein relevant was, an individual residing in the County of Lexington, South Carolina.

7. Upon information and belief, defendant Wells Fargo Clearing Services, LLC is, and at all times relevant was, a Delaware limited liability company with its principal place of business in St. Louis, Missouri, and is a successor-in-interest to defendants Wells Fargo Advisors, LLC, which is, and at all times relevant was also, a Delaware limited liability company with its principal place of business in St. Louis, Missouri.

8. Upon information and belief, defendant Wachovia Securities Financial Holdings, Inc. is, and at all times relevant was, a Delaware limited liability company with its principal place of business in Richmond, Virginia, and at all times relevant was the parent company of defendant Wells Fargo Clearing Services, LLC, and Wells Fargo Advisors, LLC.

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

10. Defendants Wells Fargo Clearing Services, LLC, Wells Fargo Advisors, LLC, and Wachovia Securities Financial Holdings, Inc. are collectively referred to in this Complaint as "the WFA Defendants."

11. The WFA Defendants engage in continuous and systematic activities within the State of South Carolina, including the use of the courts of this State to enforce contractual and other rights against citizens of South Carolina. The WFA Defendants presently conduct business

and, at all relevant times, conducted business and performed acts in Lexington County, South Carolina and have sufficient contacts and business within Lexington County, South Carolina so as to be subject to the *in personam* jurisdiction of this Court pursuant to the laws of South Carolina.

12. Upon information and belief, Wells Fargo & Company is a financial holding corporation organized under the laws of the State of Delaware with its principal place of business in San Francisco, California. Wells Fargo & Company is a citizen and resident of the States of Delaware and California.

13. Upon information and belief, Defendant Wells Fargo Bank, N.A. is a national bank subsidiary of Defendant Wells Fargo & Company and is organized under the laws of the State of Delaware with its principal place of business in Sioux Falls, South Dakota. Wells Fargo Bank is a citizen and resident of the States of Delaware and South Dakota.

14. Upon information and belief, Defendants Wells Fargo & Company and Wells Fargo Bank, N.A., are registered to do business in South Carolina and are in good standing with the South Carolina Secretary of State.

15. Defendants Wells Fargo & Company and Wells Fargo Bank, N.A. are collectively referred to in this Complaint as "the Wells Fargo Bank Defendants."

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

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

18. On information and belief, Defendant Scott A. Spang is a citizen and resident of the County of Fairfield in the State of South Carolina. At the times relevant to the claims herein, Scott was an agent, employee, servant and/or representative of the WFA Defendants assigned to their South Carolina headquarters based in the Main Street office in Columbia, South Carolina. Spang was the Senior Vice President and/or Managing Director and/or South Carolina Complex Manager in charge of all WFA brokerage and wealth management functions and business in South Carolina.

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

20. All claims arising under this Complaint are governed by the laws of the state of South Carolina. Venue is proper in Lexington County, South Carolina because the Corporate Defendants have locations in and hold themselves out as doing business in that South Carolina county.

STATEMENT OF FACTS

21. Mr. Berry was born in Columbia, South Carolina. He is a 1974 graduate of the University of South Carolina, where he received a degree in accounting. Mr. Berry trained as an accountant and in 1983 became licensed as a certified public accountant.

22. After running his own accounting firm for several years, Mr. Berry decided to enter the financial services industry. He has worked continuously in that profession since 1984.

23. In 1994, Mr. Berry joined the brokerage firm then known as Wheat First Butcher Singer. He opened that firm's office in Columbia, South Carolina, which was located in the office tower at 1901 Main Street. Over the years, Mr. Berry continued to provide financial services to clients from that building, although the name on the office suites changed as a result of numerous mergers and acquisitions in the securities industry.¹

24. In 2001, when the brokerage firm was known as Wachovia Securities, Mr. Berry entered into a profit formula agreement with his employer. Under this arrangement, profit formula agreement brokers essentially ran their own financial services business under the Wachovia Securities umbrella. Profit formula agreement brokers reported to a separate management and compliance structure within Wachovia Securities. Mr. Berry's profit formula agreement business was called "Berry & Boan² Wealth Management." It received 75% of all fees generated by its advising activities, out of which the partnership covered all overhead expenses. Wachovia Securities calculated the costs of all support services provided by the firm and deducted these costs

¹In 1997 Wheat First Butcher Singer was acquired by First Union Corporation and continued to do business under the name Wheat First Union. Thereafter, in 2001 the parent company of Wheat First Union merged with Wachovia Corporation with the brokerage business continuing under the name Wachovia Securities. In 2008, Wachovia was acquired by Wells Fargo and in 2009 the retail brokerage became known as Wells Fargo Advisors.

²Mr. Berry's partner from 2001 to 2013 was Reggie L. Boan.

from the Berry & Boan payout. The partnership also paid all employment related expenses for its registered sales assistants from its 75% portion of generated fees.

25. The Berry & Boan partnership was very successful and was among the biggest producers upon profit formula agreement brokers in South Carolina.

26. In 2009, as a result of the acquisition of Wachovia by Wells Fargo, Mr. Berry became an employee of the WFA Defendants. No changes were made to the profit formula agreement governing Mr. Berry's compensation.

27. After the Wells Fargo takeover, changes were made to the management structure. The specialized management and compliance team dedicated to profit formula agreement brokers was eliminated and their management transferred to general brokerage services. Spang was elevated from Regional Manager to State Manager. On information and belief, this promotion resulted in a salary increase from \$400,000 to \$1 million per year, which significantly increased cost was to be borne by brokers under his management, including Mr. Berry.

28. Under Wells Fargo, brokers, including profit formula agreement brokers like Mr. Berry, were pressured to cross-sell bank products to their securities clients. As a fee-based broker, Mr. Berry stood in a fiduciary relationship to his client and was legally required to put their interests above his own and above those of Defendants.

29. For example, Mr. Berry had a large number of wealthy clients who owned expensive homes free and clear of any mortgage debt. The bank products pushed by management included home equity lines of credit.

30. Mr. Berry came to believe that his clients did not want or need home equity lines of credit and that these products and other bank products pushed by Defendants were unsuitable for his clients, for whom he was acting as a fiduciary financial advisor. He therefore declined to

cross-sell such products to his clients and told Defendants that he would be violating his duties under the securities laws and regulations and as a fiduciary if he urged clients to purchase such unneeded, unwanted and unsuitable products. During each subsequent performance review Mr. Berry was chastised for his refusal to cross-sell these and other bank products to his clients.

31. On information and belief, the WFA Defendants had an undisclosed policy to undercut brokers with profit formula agreements, which was designed to force them either to become "branch brokers" or to leave WFA without their client base. Both of these outcomes would increase profits for the Defendants. This scheme included gradual increases to the overhead expenses and imposing other roadblocks and expenses upon employees like Mr. Berry, as they attempted to serve their clients, all of which were designed to make the profit formula agreements more costly and less remunerative and to drive brokers like Mr. Berry out of the arrangement.

32. Periodically, Mr. Berry utilized his accounting skills to analyze profit and loss statements for his compensation under the profit formula agreement with the WFA Defendants. In or around 2013, he noticed that the expenses charged by the WFA Defendants had drastically increased, doubling and trebling in some categories.

33. Mr. Berry expressed concern to and sought information from the WFA Defendants about the reasons for these inexplicable changes. Spang, on behalf of the WFA Defendants, told Mr. Berry in essence that the increased expenses were non-negotiable and could not be questioned. Sprang further pressured Mr. Berry to forego the profit formula agreement and become a "branch broker."

34. Mr. Berry also experienced difficulties in obtaining support services from the WFA Defendants needed to provide services to existing clients and to grow his client base.

35. Unbeknownst to Mr. Berry, as a result of his refusal to engage in improper cross-selling in violation of his duties under the securities laws and his expression of concerns about increased expenses under the profit formula agreements, Defendants marked Mr. Berry as a malcontent and a prime target for their scheme to eliminate profit formula agreement brokers.

36. Mr. Berry had dedicated his professional life to the brokerage firm which ultimately became the WFA Defendants. He was looking forward to his twenty year anniversary with the firm in 2014, a degree of success and loyalty which the WFA Defendants customarily rewarded with a gold watch. Despite this past commitment, Mr. Berry grew concerned by Defendants' insistence on improper and illegal cross-selling and their increasing attempts to undercut or destroy his status as a profit formula agreement broker. These concerns caused Mr. Berry to begin to take steps to devise a back-up plan to protect his interests and those of his clients if Defendants continued to demonstrate a willingness to sacrifice the rights of both brokers and clients to promote their corporate agenda.

37. WFA and its predecessor firms have been members of the Protocol for Broker Recruiting ("the Protocol") since January 2006. The Protocol recognizes that registered representatives, like Mr. Berry, sometimes wish to make a change in employment and sets forth guidelines under which they may do so without liability.

38. The Protocol expressly permits registered representatives, like Mr. Berry, to explore employment options with other brokerage firms, so long as the representative does not reveal client identities to any prospective employer.

39. In late 2013 and early 2014, Mr. Berry engaged in activities permitted by the Protocol and South Carolina law as a backstop to protect his interests and those of his clients.

None of these activities were inconsistent with nor interfered with the service of his clients who then held accounts with the WFA Defendants.

40. In January 2014, Mr. Berry was in the process of personally delivering to his clients leather-bound volumes of their financial planning information, including wills and insurance policies, as well as accounts with the WFA Defendants. These documents had been approved by compliance officials of the WFA Defendants and had been assembled in the WFA offices. Because of the size and geographic scope of Mr. Berry's client base, this was a multi-week project.

41. As of Monday, February 3, 2014, Mr. Berry had no plans to immediately terminate his relationship with WFA. His financial planning information delivery project was on-going; consequently, the WFA-compliance approved volumes for his next week of client appointments were already in his car. Mr. Berry's schedule for the following week, which included the client meetings for which he was in possession of the materials, was known to the WFA Defendants and Spang.

42. Unbeknownst to Mr. Berry, part of Defendants' scheme to eliminate profit formula agreement brokers was to force resignations at a time convenient to WFA and use the circumstances of the resignations to discredit the departing broker, so that the WFA Defendants could retain his or her client base.

43. On Monday, February 3, 2014, Mr. Berry was called into the office by Spang. When he entered the office, Mr. Berry had no immediate intention of leaving WFA.

44. Immediately upon Mr. Berry's entry into the office, Spang began browbeating and mistreating Mr. Berry, accusing him of wrongdoing. Mr. Berry denied that he had any present intent to leave WFA, but was planning to continue his previously WFA-approved efforts to deliver client financial information volumes. Spang continued to berate Mr. Berry and told him that his

options were immediate resignation or being fired. As a consequence, Mr. Berry felt that he had no choice but to immediately resign, not realizing that he had been being baited into this course of conduct.

45. Continuing Defendants' scheme to use forced resignations to discredit profit formula agreement brokers like Mr. Berry, Spang refused to allow Mr. Berry to voluntarily retrieve the client financial information volumes from his vehicle and instead insisted on taking them back himself.

46. Mr. Berry was not even allowed to remove his own personal belongings from the WFA offices.

47. In the months that followed Mr. Berry's departure from WFA, Mr. Berry began to hear from former co-workers and former and current clients that Spang and the WFA Defendants had contacted most, if not all, of Mr. Berry's former and/or current clients and made false and slanderous statements to those clients about Mr. Berry and the circumstances and reasons for Mr. Berry's departure from WFA.

48. The plain implication of comments by Spang and the WFA Defendants was that Mr. Berry had engaged in seriously illegal and/or criminal behavior, and that Mr. Berry is unethical, dishonest and/or incompetent.

49. Mr. Berry is further informed and believes that Spang and the WFA Defendants promoted Mr. Berry's former partner at WFA³ as preferred alternative for Mr. Berry's clients, touting that individual as being an honest, trustworthy and competent financial advisor. Mr. Berry is informed and believes that WFA did not disclose to these clients that Wall conducted speculative

³In furtherance of the scheme to eliminate profit formula agreement brokers, Mr. Berry's former partner under the profit formula became a "branch broker" upon Mr. Berry's departure from WFA.

and excessive trading in his own accounts or that WFA had considered terminating Wall for these activities.

50. Securities regulations require financial advisors to be registered with a firm to sell or buy securities or otherwise provide financial advice. After his departure from WFA, Mr. Berry chose to affiliate himself with LPL Financial Corporation ("LPL"), which is also a signatory to the Protocol on Broker Recruitment. Although he began the registration process with LPL immediately after his departure from WFA, Mr. Berry's registration was not accepted by regulatory authorities until several weeks later. Thus, for several weeks following his departure from WFA, Mr. Berry was prevented from contacting clients or providing financial advice. The WFA Defendants used this period while Mr. Berry was essentially frozen out of the financial service business to approach his clients. Mr. Berry alleges on information and belief that WFA failed to promptly cooperate with standard regulatory inquiries associated with the transfer of his registration for the purpose of delaying that transfer and interfering with Mr. Berry's rights under the Protocol to solicit clients following his departure from WFA.

51. In or around March 2016, Mr. Berry applied for an insurance licensure with Prudential Select Brokerage. At that time, Mr. Berry realized that the WFA Defendants had filed a Form U-5 which stated that Mr. Berry had been "permitted to resign" with the official WFA Termination Comment of "Branch office manager discovered several binders of customer information in the trunk of Mr. Perry's [sic] automobile," thus falsely implying that the reason for Mr. Berry's resignation was the wrongful possession of client information

52. Mr. Berry was shocked to learn of the language that the WFA Defendants had put on his Form U-5. Mr. Berry was rightfully in possession of the client information, as his intent

was to advance WFA's interests by providing service to those WFA clients, until it became obvious that he could not effectively do so, given the hostile work environment created by Spang.

53. During Mr. Berry's employment with WFA and each of its predecessor firms, he had never been disciplined for violation of any securities law, rule or regulation by either WFA or any regulatory body. Moreover, neither WFA nor any of its predecessor firms had ever indicated to Mr. Berry that he had violated any securities rules or regulations.

54. Mr. Berry had never been the subject of any customer complaints during the nearly two decades of his work for the WFA Defendants and their predecessor firms.

55. Although Mr. Berry was ultimately able to obtain an appointment with Prudential Select Brokerage, despite the false and defamatory information placed on his Form U-5 by the WFA Defendants, this license was delayed. As a result of this delay, Mr. Berry lost business opportunities.

56. As a result of the false and defamatory comment that the WFA Defendants put onto Mr. Berry's Form U-5, Mr. Berry has also experienced difficulties in obtaining licensure in Colorado, where his application has been pending since October 2016. As a result of this delay, Mr. Berry has lost and continues to lose business opportunities.

57. The false and defamatory statements that Spang and the WFA Defendants and their agents have made about Mr. Berry to his former clients and the false and defamatory comment that the WFA Defendants put onto Mr. Berry's Form U-5 have caused severe damage to Mr. Berry. Mr. Berry was unable to move a substantial portion of his client base to his new firm, which Mr. Berry estimates that Defendants' wrongful conduct has cost him hundreds of thousands of dollars yearly in lost revenue.

58. Further, the Form U-5 comment has caused and continues to cause ongoing damage to Mr. Berry's reputation with clients and within the industry. The Form U-5 comment also essentially prevents Mr. Berry from ever being able to find other employment within the securities industry, as most firms will not hire advisors who have adverse termination comments on their Form U-5.

59. The conduct complained of was done willfully, oppressively, and maliciously, and in conscious disregard of Mr. Berry's rights. Punitive damages are warranted.

**FIRST CAUSE OF ACTION
WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY**

60. Mr. Berry refers to and incorporates for all purposes each and all of the preceding allegations, as if set forth at length herein.

61. While Mr. Berry was an employee of the WFA Defendants, Defendants pressured him to cross-sell bank products to clients for whom he was acting in a fiduciary capacity. Mr. Berry came to believe that these bank products were not wanted or needed by his clients and that these products were unsuitable and not in the best interests of his clients. He therefore declined to cross-sell such products and told Defendants that he would be violating his duties as a fiduciary and under the securities laws and regulations if he urged clients to purchase such unneeded, unwanted and unsuitable products.

62. Placing their own monetary interests above those of clients to whom they and Mr. Berry owed fiduciary duties, Defendants continued to pressure Mr. Berry to cross-sell such unsuitable products and criticized his refusals to sell them during his employment reviews.

63. Clear public policy mandates require fiduciaries like Mr. Berry and Defendants to put the interests of their clients before their own monetary objections and thus prohibit licensed

securities brokers like Mr. Berry and the WFA Defendants and also Defendant Spang from selling unsuitable products to clients and particularly to those to whom they owe fiduciary obligations.

64. Upon Mr. Berry's refusal to cross-sell unsuitable bank products to his fiduciary clients and his complaints to management about Defendants' internal policy and directive that he do so, Defendants targeted Mr. Berry for retribution and eventual termination;

65. Defendants, by and through Defendant Spang, in retribution for Mr. Berry's refusal to violate his fiduciary duties to his clients, employed and applied systematic pressure on Mr. Berry, including unreasonable conduct by Spang in the February 3, 2014 meeting, to force his resignation.

66. Defendants' wrongful acts and practices described above constituted a wrongful termination of Mr. Berry in violation of the public policy of this State.

67. Mr. Berry has suffered damages as a result of the aforementioned wrongful termination.

68. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, (2) consequential damages, (3) injunctive relief, including but not limited to an order requiring the correction of Mr. Berry's Form U-5 and CRD entries (4) punitive damages for in an amount to be determined by the finder of fact, (5) costs, (6) prejudgment interest, (7) and such other relief as is just, equitable, and proper

**SECOND CAUSE OF ACTION
BREACH OF CONTRACT AND
COVENANT OF GOOD FAITH AND FAITH DEALING**

69. Mr. Berry refers to and incorporates for all purposes each and all of the preceding allegations, as if set forth at length herein.

70. In or around 2001, the predecessors-in-interest of the WFA Defendants entered into both express agreements and implied agreements with Mr. Berry, as formalized in the profit formula agreement, which agreements were ratified and continued by the WFA Defendants. These agreements constituted contracts between the Mr. Berry and the WFA Defendants (hereinafter "the Agreements").

71. South Carolina law further implies a duty of good faith and fair dealing into every contract, including the profit formula agreement.

72. The WFA Defendants breached their Agreements with Mr. Berry in one or more of the following particulars:

- A. Defendants engaged in a calculated plan to undercut Mr. Berry and force him out of the contractual profit formula agreement relationship, through deliberately unfair and deceptive actions, including but not limited to:
 - i. Defendants deliberately and intentionally misrepresented their true motivations and intentions with respect to brokers employed under profit formula agreements;
 - ii. Defendants imposed consistently escalating overhead costs and expenses that were not tied to actual costs and expenses but were instead designed to shrink Mr. Berry's profit margin to Defendants' benefit;
 - iii. Defendants imposed unnecessary and punitive compliance roadblocks and expenses on Mr. Berry for routine client development and retention services; and
 - iv. Defendants, by and through Defendant Spang, employed and applied systematic pressure on Mr. Berry to forgo his contractual profit formula agreement in lieu of a "branch broker" position that would decrease Mr. Berry's salary to Defendants' benefit.

- B. Defendants encouraged and pressured Mr. Berry to cross-sell unsuitable bank products to his fiduciary clients notwithstanding the fact that those products were unsuitable and not in the clients' best interest;
- C. Defendants placed their respective monetary interests ahead of the interests of Mr. Berry and the clients;
- D. Upon Mr. Berry's refusal to cross-sell unsuitable bank products to his fiduciary clients, and his complaints to management about Defendants' internal policy and directive that he do so, Defendants targeted Mr. Berry for retribution and eventual termination;

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

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

THIRD CAUSE OF ACTION DEFAMATION

75. Mr. Berry refers to and incorporates for all purposes as if set forth at length herein, each and all of the preceding allegations.

76. The WFA Defendants made a written publication on Mr. Berry's Form U-5 which stated that he been "permitted to resign" because "Branch Office Manager discovered several binders of customer information in the trunk of Mr. Perry's [sic] automobile." This Form U-5 is a publicly available document. Further, the statement above also appears on Mr. Berry's BrokerCheck Report which is posted on the web-site of the Financial Industry Regulatory Authority ("FINRA") and is available to the public.

77. Spang and the WFA Defendants also made false and slanderous statements about Mr. Berry and the circumstances and reasons for Mr. Berry's departure from WFA to Mr. Berry's former and/or current clients.

78. The foregoing statements made by Spang and/or the WFA Defendants on Mr. Berry's Form U-5 and to Mr. Berry's current and former clients were false. Mr. Berry's departure from WFA had nothing to do with the client files, which were properly in his possession. Mr. Berry did not, at any time, wrongfully possess any client information. Instead, Defendants had targeted Mr. Berry for retribution and eventual termination as a result of his refusal to improperly cross-sell unsuitable bank products to his fiduciary clients, his complaints to management about Defendants' internal policy and directive that he do so, and as part of Defendants' calculated plan to undercut Mr. Berry and force him out of the contractual profit formula agreement relationship.

79. Defendants' statements on Mr. Berry's Form U-5 and to Mr. Berry's current and former clients were defamatory. The plain meaning of the Form U-5 statement is that Mr. Berry was wrongfully in possession of client information to which he was not entitled. Essentially, it charges Mr. Berry with having appropriated client information or attempted to have appropriated WFA client information. This is a highly damaging charge of egregious misconduct that negatively reflects on Mr. Berry's integrity and honesty. It indicates that Mr. Berry is an untrustworthy individual who engaged in serious violation of the Protocol against WFA. Similarly, statements to Mr. Berry's current and former clients also plainly implied that Mr. Berry had engaged in seriously illegal and/or criminal behavior, and that Mr. Berry is unethical, dishonest and/or incompetent.

80. The false and defamatory statement made on Mr. Berry's Form U-5 has been particularly injurious to Mr. Berry. It indicates that Mr. Berry is a dishonest person who stole or

tried to wrongfully appropriate client information from WFA. WFA's false and defamatory statement on Mr. Berry's Form U-5 has damaged Mr. Berry. He has suffered a substantial decrease in income as a result. The statement on the Form U-5 has also continues to deprive Mr. Berry of other opportunities.

81. Defendants' defamatory statements to Mr. Berry's current and former clients have also damaged Mr. Berry's reputation and his ability to keep former clients and identify new ones.

82. The conduct complained of was done willfully, oppressively, and maliciously, and in conscious disregard of Mr. Berry's rights. Punitive damages are warranted.

83. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, (2) consequential damages, (3) injunctive relief, including but not limited to an order requiring the correction of Mr. Berry's Form U-5 and CRD entries (4) punitive damages for Defendants' defamation of his character in an amount to be determined by the finder of fact, (5) costs, (6) prejudgment interest, (7) and such other relief as is just, equitable, and proper

**FOURTH CAUSE OF ACTION
VIOLATION OF SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT
(S.C. CODE ANN. § 39-5-10 *et seq.*)**

84. Mr. Berry refers to and incorporates for all purposes each and all of the preceding allegations, as if set forth at length herein.

85. Defendants engaged in an unfair method of competition and/or an unfair or deceptive act or practice in the conduct of trade or commerce.

86. Defendants engaged in a calculated plan to undercut Mr. Berry and force him out of the contractual profit formula agreement relationship, through deliberately unfair and deceptive actions, including but not limited to:

- A. Defendants deliberately and intentionally misrepresented their true motivations and intentions with respect to brokers employed under profit formula agreements;
 - B. Defendants imposed consistently escalating overhead costs and expenses that were not tied to actual costs and expenses but were instead designed to shrink Mr. Berry's profit margin to Defendants' benefit;
 - C. Defendants imposed unnecessary and punitive compliance roadblocks and expenses on Mr. Berry for routine client development and retention services; and
 - D. Defendants, by and through Defendant Spang, employed and applied systematic pressure on Mr. Berry to forgo his contractual profit formula agreement in lieu of a "branch broker" position that would decrease Mr. Berry's salary to Defendants' benefit.
87. Defendants encouraged and pressured Mr. Berry to cross-sell unsuitable bank products to his fiduciary clients notwithstanding the fact that those products were unsuitable and not in the clients' best interest.
88. Defendants placed their respective monetary interests ahead of the interests of Mr. Berry and the clients;
89. Upon Mr. Berry's refusal to cross-sell unsuitable bank products to his fiduciary clients, and his complaints to management about Defendants' internal policy and directive that he do so, Defendants targeted Mr. Berry for retribution and eventual termination;
90. Defendants violated provisions of the Protocol by discouraging and ultimately punishing Mr. Berry for taking precautionary pre-termination actions in both his and his clients' best interests;
91. Upon Mr. Berry's forced resignation, Defendants unfairly and deceptively

- A. Placed false and defamatory information on Mr. Berry's Form U-5, which *inter alia* violated FINRA Regulatory Notice 10-39 by including inaccurate and misleading details when responding to the Form U-5 questions regarding Mr. Berry's voluntary resignation from WFA thus preventing reasonable persons from understand the true circumstances of the termination of his employment;
- B. Made false and defamatory statements about Mr. Berry to his current and former clients regarding his professional reputation and good name; and
- C. Unfairly delayed Mr. Berry's registration with his new brokerage firm,

92. Defendants falsely promoted another broker to Mr. Berry's clients, touting its preferred alternative as being an honest, trustworthy and competent alternative to Mr. Berry, despite Defendants' direct knowledge of a history of improper, excessive and speculative trading by its preferred replacement.

93. The unfair and deceptive acts and practices committed by Defendants in the conduct of its trade and commerce had an impact upon the public interest, in that they resulted in inclusion of false, misleading, slanderous, and disparaging statements in publicly available documents, including but not limited the BrokerCheck Report on Mr. Berry and in the dissemination of such statements to many of Mr. Berry's former clients.

94. Such unfair acts and practices constitute a violation of the Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 et seq. (1976) (as amended).

95. Defendants' unfair acts and practices described above constituted willful, intentional, and knowing violations of the Unfair Trade Practices Act.

96. Mr. Berry has suffered damages as a result of the aforementioned unfair and deceptive acts and practices of Defendants in that he has suffered loss of business opportunities.

97. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, (2) consequential damages, (3) injunctive relief, including but not limited to an order requiring the correction of Mr. Berry's Form U-5 and CRD entries (4) treble damages as a result of Defendants' intentional conduct, in an amount to be determined by the finder of fact, (5) costs, (6) attorneys fees, (7) prejudgment interest, and (8) such other relief as is just, equitable, and proper.

**FIFTH CAUSE OF ACTION
BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACT**

98. Mr. Berry refers to and incorporates for all purposes each and all of the preceding allegations, as if set forth at length herein.

99. As an employee of WFA and pursuant to the profit formula agreement with the WFA Defendants, the WFA Defendants owed him a duty of good faith and fair dealing.

100. The WFA Defendants' wrongful and defamatory misconduct, actions and inactions, as alleged herein, including but not limited to the allegations contained in ¶72 *supra*, constitute a failure to abide by the terms of the WFA Defendants' contracts with Mr. Berry and constitute a breach of these agreements entered into with Mr. Berry. Mr. Berry has been directly and proximately damaged as a result of these breaches.

101. Moreover, in breaching the Agreements with Mr. Berry, the WFA Defendants exhibited a fraudulent intent relating to those breaches.

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

- A. Upon Mr. Berry's forced resignation, Defendants unfairly and deceptively placed false and defamatory information on Mr. Berry's Form U-5;

- B. Upon Mr. Berry's forced resignation, Defendants and their agents, including but not limited to Defendant Spang, unfairly and deceptively made false and defamatory statements to Mr. Berry current and former clients regarding his professional reputation and good name;
- C. Upon Mr. Berry's forced resignation, Defendants and their agents, including but not limited to Defendant Spang, unfairly delayed Mr. Berry's registration with his new brokerage firm,
- D. Defendants falsely promoted remaining employees as being an honest, trustworthy and competent alternative to Mr. Berry, despite its direct knowledge of a history of improper, excessive and speculative trading by its preferred replacement..

103. As a direct, consequent and proximate result of WFA's breaches of contract accompanied by fraudulent acts, Mr. Berry has suffered injury all in direct violation of the laws of the State of South Carolina.

104. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, (2) consequential damages, (3) punitive damages for the fraudulent acts accompanying the breaches of the Agreements, in an amount to be determined by the finder of fact, (4) costs, (5) prejudgment interest, (6) and such other relief as is just, equitable, and proper.

**SIXTH CAUSE OF ACTION
INTENTIONAL INTERFERENCE WITH
PROSPECTIVE CONTRACTUAL RELATIONS**

105. Mr. Berry refers to and incorporates for all purposes each and all of the preceding allegations, as if set forth at length herein.

106. Mr. Berry had existing and ongoing contractual relationships which were reasonably likely to continue with numerous customers who he had developed as clients for WFA.

107. Defendants, at all times herein relevant, knew of Mr. Berry's economic relationships with the customers who he had developed as clients for WFA.

108. Defendants intentionally disrupted Mr. Berry's economic relationships with the customers who he had developed as clients for WFA by putting a false and defamatory comment on the Form U-5 which it filed for Mr. Berry, by making false, defamatory and disparaging statements about Mr. Berry and Mr. Berry's honesty, integrity and competence to Mr. Berry's current and former customers and by making false, misleading and/or incomplete statements to Mr. Berry's former customers and clients about the honesty, integrity, ethics and competence of their preferred replacement broker, whom WFA knew to have a history of imprudent, excessive and speculative trading in his own accounts.

109. Defendants knew, or reasonably should have known, that their wrongful conduct was certain or substantially certain to result in a disruption of Mr. Berry's contractual relations with his customers and indeed, were designed to do so.

110. As a direct and proximate result of Defendants' conduct, as alleged herein, many of Mr. Berry's customers ceased to do business with Mr. Berry. Mr. Berry was unable to retain a significant portion of his client base after departing from WFA.

111. As a direct and proximate result of Defendants' intentional interference with his existing and prospective contractual relations, Mr. Berry has suffered damages.

112. WFA's conduct of WFA, in intentionally interfering with Mr. Berry's existing and prospective contractual relations, as set forth above, was malicious, willful, despicable and oppressive. Punitive damages are warranted.

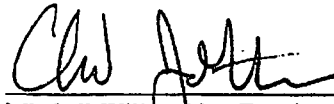
113. As a direct result of the false statement placed on the Form U-5 and other wrongful conduct by Defendants, Mr. Berry has been unable to consummate additional business relations since his departure from WFA.

114. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, (2) consequential damages, (3) injunctive relief, including but not limited to an order requiring the correction of Mr. Berry's Form U-5 and CRD entries (4) punitive damages for Defendants' intentional interference with his business relationships, in an amount to be determined by the finder of fact, (5) costs, (6) prejudgment interest, (7) and such other relief as is just, equitable, and proper

WHEREFORE, Plaintiff Robert F. Berry prays for relief as follows:

1. For compensatory damages, including, but not limited to, back pay and front pay, in a sum according to proof;
2. For disgorgement of WFA's unjustly acquired profits generated as a result of its wrongful conduct;
3. For an order directing the expungement of the false and defamatory statements regarding his termination from WFA on his Form U-5;
4. For punitive damages in a sum sufficient to serve as an example to deter and punish WFA for its wrongful conduct;
5. For reasonable attorneys' fees pursuant to S.C. Code Ann. § 39-5-140(a);
6. For statutory treble damages;
7. For costs incurred herein; and
8. For such other and further relief as this panel may deem just and proper.

[SIGNATURE PAGE FOLLOWS]



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Attorneys for Robert F. Berry

This 2nd day February 2017
Columbia, South Carolina

COPY

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

**PLAINTIFF'S FIRST AMENDED
COMPLAINT
(Jury Trial Demanded)**

Plaintiff Robert F. Berry ("Mr. Berry") complains of Defendants Scott A. Spang ("Defendant Spang"), Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, and Wachovia Securities Financial Holdings, LLC, (collectively "the WFA Defendants"), Wells Fargo & Company, and Wells Fargo Bank, N.A. (collectively "the Wells Fargo Bank Defendants"), and defendants are collectively referred to as "Defendants", and respectfully alleges as follows:

SUMMARY OF CASE

1. This is a claim for damages brought by Mr. Berry, formerly a Wealth Manager and Senior Vice President with Defendant Wells Fargo Advisors, LLC, arising from Defendants' deliberate sabotage and breach of Mr. Berry's long-standing profit formula agreement with the WFA Defendants and their predecessors, their sabotage and breach of his implied agreements with

¹The WFA Defendants and the Wells Fargo Bank Defendants are collectively referred to as "the Corporate Defendants."

all Defendants, and their collective, coordinated, and conspiratorial tortious, deliberate, unfair, deceptive, deceitful, and fraudulent conduct towards Mr. Berry to sabotage his economic well-being, his then current employment, his future economic opportunity, and his professional reputation within the wealth advisory community, with regulators, with other providers of financial services, and with his current clients and potential clients.

2. The Wells Fargo Defendants implemented a fraudulent scam to illegally increase the earnings and stock price of their corporate parent, Defendant Wells Fargo & Company, by aggressively pushing the employees of all subsidiary corporations, including Mr. Berry, to sell Wells Fargo products and thereby increase their cross-selling numbers. The scheme was orchestrated by the leadership of all Corporate Defendants and was actively participated in and aggressively supported, advanced, and implemented by Defendant Spang. The scam included selling Wells Fargo customers an average of eight accounts/products per person regardless of whether the products were wanted, needed, or in the best interests of the customers. This fraudulent scam was perpetrated among all subsidiaries and pushed to Wells Fargo employees, who, in many cases, then cross-sold Wells Fargo products to unsuspecting clients.

3. The fraudulent scheme was founded on unadulterated greed and unlawful conduct and was designed to fraudulently increase Wells Fargo's stock price and earnings, support massive salaries and leadership overrides, and generate massive bonuses. Employees and wealth advisors including Mr. Berry were directed to aggressively cross-sell products to their customers even when not needed or otherwise in the best interests of customers. Refusal and/or failure to cooperate resulted in being targeted by management for retribution. Mr. Berry and his productive career of nearly 20 years with Wells Fargo and its predecessors, as well as his intended future career with Wells Fargo Advisors for an additional 15 years or more, were targeted by the Corporate

Defendants and Defendant Spang for retribution and to set an example for all other employees of the ruthless treatment that would be meted out to anyone who dared not embrace this deceptive, deceitful, and illegal scam being perpetrated upon unsuspecting clients. In sum, Mr. Berry was a casualty of this illegal scam and was belittled, derided, mistreated, defamed, and seriously damaged in furtherance of the scam.

4. Wells Fargo was famous for cross-selling, which is pushing existing customers to open more accounts and buy more products. Cross-selling is one of the main reasons that Wells Fargo has become one of the most valuable banks in the world. Wells Fargo measures cross-selling by the number of different accounts and/or products a customer has with Wells Fargo. In multiple conference calls, Wells Fargo's corporate leadership cited the company's cross-selling success as a principal reason undergirding its earnings and share price.

5. Wells Fargo customers already held an average of six financial products, which Wells Fargo calls "solutions." This was more than the average bank, whose customers only owned three. However, Wells Fargo set a goal of eight accounts/products per customer, which was referred to internally as the "Gr-eight" initiative. To reach this goal, Wells Fargo placed knowingly unrealistic and impossible cross-selling initiatives on their employees.

6. Wells Fargo's fraudulent scam was established at the highest levels of management and directed toward employees with direct customer contact. By squeezing employees to the breaking point with unrealistic, improper, and illegal cross-selling and related strategies, management of Wells Fargo, including Defendant Spang, intended through their scam to deceitfully and deceptively increase earnings, drive up the price of the company's stock, and then skim off hundreds of millions of dollars into the pockets of upper management as payment for their devising, implementing, and running this deceitful and illegal enterprise.

7. In furtherance of their fraudulent, deceitful, and deceptive scam, Wells Fargo fired or forced resignations of employees who did not meet their impossible quotas or did not willingly participate in the scam. Adverse actions against employees who refused to participate were an essential part of the scam, as Wells Fargo pointed to their hapless fates to "motivate" remaining employees to continue to cross-sell.

8. Mr. Berry, a conscientious employee was a victim of this scheme because he refused to cross-sell Wells Fargo products when doing so violated his fiduciary obligation to his clients. In doing so, Mr. Berry was chastised by Defendants for resisting their demands that he "cross-sell" Wells Fargo products to his clients for whom he served as their fiduciary, products which the clients mostly did not want, did not need, and which were not in their best interests. He also expressed concern and attempted to seek information about the reasons for the inexplicable, unilateral changes in the fulfillment of his profit formula agreement, which had been in effect and implemented, applied, and administered through a course and pattern of dealings since 2001.

9. As a result of Mr. Berry's actions, Defendants internally identified Mr. Berry as a person to be terminated for having the courage and temerity to speak up against the illegality of Defendants' cross-selling program and the injustice of the unilateral changes to his profit formula agreement, as well as other failures by Defendants to support Mr. Berry's efforts to properly serve his clients. Defendants' efforts intensified over several months and culminated in a February 3, 2014 meeting orchestrated and engineered by Defendants, during which Defendant Spang, on behalf of all Defendants, humiliated and berated Mr. Berry, thereby forcing his resignation by threatening that he would either resign or be immediately fired.

10. Thereafter, to further damage Mr. Berry, Defendants defamed his professional reputation and good name by filing a false and defamatory statement about his departure with

regulatory authorities, accusing him of unethical, unprofessional, and dishonest acts. Defendants knew that the false statement would damage Mr. Berry in his subsequent professional endeavors, but took the action specifically to promote Defendants' own interests in retaining Mr. Berry's client base, while achieving their real goals, namely, to punish Mr. Berry for not willingly and aggressively participating in their illegal cross-selling scheme and to terminate a longstanding payout arrangement that Defendants viewed as too lucrative in favor of Mr. Berry. These illegal, false and deceptive practices by Defendants seriously harmed Plaintiff as was Defendants' specific and deliberate intent.

11. This complaint seeks actual damages, attorneys' fees, costs, treble damages, punitive damages, and injunctive relief in compensation for those wrongful acts.

PARTIES

12. Plaintiff Robert F. Berry is, and at all times herein relevant was, an individual residing in the County of Lexington, South Carolina.

13. Upon information and belief, defendant Wells Fargo Clearing Services, LLC is, and at all times relevant was, a Delaware limited liability company with its principal place of business in St. Louis, Missouri, and is a successor-in-interest to defendants Wells Fargo Advisors, LLC, which is, and at all times relevant was also, a Delaware limited liability company with its principal place of business in St. Louis, Missouri.

14. Upon information and belief, defendant Wachovia Securities Financial Holdings, LLC is, and at all times relevant was, a Delaware limited liability company with its principal place of business in Richmond, Virginia, and at all times relevant was the parent company of defendant Wells Fargo Clearing Services, LLC, and Wells Fargo Advisors, LLC.

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

16. Defendants Wells Fargo Clearing Services, LLC, Wells Fargo Advisors, LLC, and Wachovia Securities Financial Holdings, LLC are collectively referred to in this Complaint as "the WFA Defendants."

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

18. Upon information and belief, Wells Fargo & Company is a financial holding corporation organized under the laws of the State of Delaware with its principal place of business in San Francisco, California. Wells Fargo & Company is a citizen and resident of the States of Delaware and California. Wells Fargo & Company has nearly \$1.9 trillion in assets, and through its subsidiaries, provides banking, insurance, investment, mortgage, and consumer and commercial finance services through more than 9,000 locations. It is ranked 27th on Fortune Magazine's 2016 rankings of America's 500 largest corporations. It regularly transacts business throughout South Carolina and in Lexington County through, among other ways, the sale of its stock.

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

a citizen and resident of the States of Delaware and South Dakota. It is currently the world's second largest bank by market capitalization² and the third largest bank in the United States by assets. Upon information and belief, Defendants Wells Fargo & Company and Wells Fargo Bank, N.A., are registered to do business in South Carolina and are in good standing with the South Carolina Secretary of State.

20. Defendants Wells Fargo & Company and Wells Fargo Bank, N.A. are collectively referred to in this Complaint as "the Wells Fargo Bank Defendants."

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

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

23. On information and belief, Defendant Scott A. Spang is a citizen and resident of the County of Fairfield in the State of South Carolina. At the times relevant to the claims herein, Scott was an agent, employee, servant and/or representative of the WFA Defendants assigned to their South Carolina headquarters based in the Main Street office in Columbia, South Carolina.

²In July 2015 Wells Fargo became the world's largest bank by market capitalization; however, it fell to second in September 2016 in the wake of the cross-selling and related deceptive and deceitful actions complained of herein.

Defendant Spang was the Senior Vice President and/or Managing Director and/or South Carolina Complex Manager in charge of all WFA brokerage and wealth management functions and business in South Carolina.

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

25. All claims arising under this Complaint are governed by the laws of the state of South Carolina. Venue is proper in Lexington County, South Carolina, because the Corporate Defendants have locations in and hold themselves out as doing business in that South Carolina county.

STATEMENT OF FACTS

26. Mr. Berry was born in Columbia, South Carolina. He is a 1974 graduate of the University of South Carolina, where he received a degree in accounting. Mr. Berry trained as an accountant and in 1983 became licensed as a certified public accountant.

27. After running his own accounting firm for several years, Mr. Berry decided to enter the financial services industry. He has worked continuously in that profession since 1984.

28. In 1994, Mr. Berry joined the brokerage firm then known as Wheat First Butcher Singer. He opened that firm's office in Columbia, South Carolina, which was located in the office tower at 1901 Main Street. Over the years, Mr. Berry continued to provide financial services to clients from that building, although the name on the office suites changed as a result of numerous mergers and acquisitions in the securities industry.³

29. In 2001, when the brokerage firm was known as Wachovia Securities, Mr. Berry entered into a profit formula agreement with his employer. Under this arrangement, profit formula agreement advisors essentially ran their own financial services business under the Wachovia Securities umbrella. Profit formula agreement advisors reported to a separate management and compliance structure within Wachovia Securities. Mr. Berry's profit formula agreement business was called "Berry & Boan⁴ Wealth Management." Berry & Boan received 75% of all fees generated by its advising activities, out of which the partnership covered certain overhead expenses. Wachovia Securities calculated and accounted for the recoverable costs of certain services provided by the firm and deducted these costs from the Berry & Boan payout. The course of dealings during the period of 2001 through 2008 established and defined the payout arrangement that was agreed to under the profit formula agreement Mr. Berry had with Wachovia Securities.

30. The Berry & Boan partnership was very successful and was among the biggest producers among profit formula agreement advisors in South Carolina.

³In 1997 Wheat First Butcher Singer was acquired by First Union Corporation and continued to do business under the name Wheat First Union. Thereafter, in 2001 the parent company of Wheat First Union merged with Wachovia Corporation with the brokerage business continuing under the name Wachovia Securities. In 2008, Wachovia was acquired by Wells Fargo and in 2009 the retail brokerage became known as Wells Fargo Advisors.

⁴Mr. Berry's partner from 2001 to 2013 was Reggie L. Boan.

31. In 2009, as a result of the acquisition of Wachovia by Wells Fargo, Mr. Berry became an employee of the WFA Defendants. No changes were made to the profit formula agreement governing Mr. Berry's compensation, and the WFA Defendants were obligated in good faith to abide by the agreement. Likewise, Defendant Spang, in his management role for the Corporate Defendants and as Mr. Berry's direct supervisor, was obligated to implement, carryout, and fairly administer the terms of the profit formula agreement that Mr. Berry had with the WFA Defendants in accordance with its terms and consistent with the prior course of dealings under the agreement.

32. After the Wells Fargo takeover, changes were made to the management structure. The specialized management and compliance team dedicated to profit formula agreement advisors was eliminated and their management transferred to general brokerage services. Defendant Spang was elevated from Regional Manager to State Manager. On information and belief, this promotion resulted in a salary increase from \$400,000 to \$1 million per year as well as certain overrides and bank's incentive. Defendant Spang's salary increase was part and parcel of the overall scam as it incentivized Defendant Spang to force the cross-selling program onto his subordinates. In furtherance of the scam, it also significantly increased costs, all of which were to be borne by advisors under Defendant Spang's management, including Mr. Berry. This action was taken unilaterally by the Corporate Defendants and Defendant Spang, without input from or consent by Mr. Berry. He was expected to pay up and shut up, or else.

33. Under Wells Fargo, brokers and advisors, including profit formula agreement advisors like Mr. Berry, were pressured to cross-sell Wells Fargo products to their clients. These products included, but were not limited to, credit cards, certificates of deposit, checking and

savings accounts, home equity loans, business loans, insurance products, and/or proprietary mutual funds.

34. As a fee-based advisor, Mr. Berry and Defendants stood in a fiduciary relationship to his clients. As such, Mr. Berry and Defendants were legally required to put the clients' interests above the interest of Mr. Berry and Defendants.

35. Mr. Berry came to believe that the Wells Fargo products he was directed to cross-sell were not needed or wanted by most of his clients. Moreover, in his role as a fiduciary advisor, Mr. Berry should not, nor should Defendants require or permit Mr. Berry to, recommend products to his clients which were not the best and/or least expensive or otherwise in the best interest of the clients. In most cases, the Wells Fargo products (including, but not limited to, credit cards, savings accounts, home equity lines of credit, business loans, and proprietary mutual funds) were not in the best interests of his clients for a variety of reasons including cost, need, preference, and suitability.

36. Mr. Berry therefore declined to cross-sell such products to all of his clients and told Defendants that he would be violating his duties under the governing laws and regulations and under his duties as a fiduciary if he urged clients to purchase unneeded and unwanted products not in their best interests.

37. On information and belief, Defendant Spang received overrides or a percentage of fees paid to brokers and advisors under his management, including profit formula advisors like Mr. Berry, for the sale of Wells Fargo products, and thus, he had a personal incentive to push and direct Mr. Berry to sell Wells Fargo products regardless of whether such products were needed or wanted by or were suitable for, much less in the best interests of, Mr. Berry's clients or whether

their sale was otherwise consistent with Mr. Berry's and Defendants' fiduciary obligations to those clients.

38. During each subsequent performance review, Defendant Spang, on his own behalf as well as on behalf of the Wells Fargo Defendants, repeatedly chastised Mr. Berry for his refusal to cross-sell Wells Fargo products to his clients and refusal to voluntarily terminate his profit formula agreement. Defendant Spang specifically criticized Mr. Berry for running the "cheapest" business of any of the profit formula advisors under his (Defendant Spang's) management. Defendant Spang complained that he (Defendant Spang) made the least amount of money from Mr. Berry, even though Mr. Berry was one of the largest, if not the largest, producers in South Carolina. In fact, Mr. Berry's business was efficient and designed to provide excellent services to clients while providing them with products that were in their best interest. Defendant Spang, on his own behalf and on behalf of the Corporate Defendants, was displeased with Mr. Berry's responsible fiduciary approach; rather than Defendant Spang fulfilling his own fiduciary duties and that of the Corporate Defendants, he continued to demand Mr. Berry's participation in the ongoing scam regardless of Mr. Berry's clients' needs or best interest. In sum, the only interest for which Defendant Spang and the other Defendants expressed care and concern was their own.

39. On information and belief, Defendants had an undisclosed policy to undercut advisors with profit formula agreements, which was designed to force them either to become "branch brokers" or to leave WFA without their client base. Both of these outcomes would increase profits for Defendants. This scheme included gradual unilateral increases to the overhead expenses as well as imposing other roadblocks and expenses upon employees like Mr. Berry, as they attempted to serve their clients, all of which were designed to make the profit formula

agreements more costly and difficult, as well as less remunerative and to drive advisors like Mr. Berry out of the arrangement.

40. On information and belief, Defendant Spang received a larger override on fees generated by "branch brokers" under his management than he received for those generated by profit formula advisors like Mr. Berry. He thus had a personal incentive to push Mr. Berry to abandon his rights under the profit formula agreement with the Wells Fargo Defendants.

41. In or around 2013, Mr. Berry noticed that the expenses charged against his earnings by the WFA Defendants had drastically increased, doubling and trebling in some categories.

42. Mr. Berry expressed concern to and sought information from Defendant Spang and the WFA Defendants about the reasons for these inexplicable changes. Defendant Spang, on behalf of the WFA Defendants, told Mr. Berry in essence that the increased expenses were non-negotiable and could not be questioned. Defendant Spang again pressured Mr. Berry to forego the profit formula agreement and become a "branch broker," in a continued effort by Defendant Spang to further the deceit and deception being perpetrated upon Mr. Berry by all Defendants.

43. Mr. Berry also experienced difficulties in obtaining support services from the WFA Defendants needed to provide services to existing clients and to grow his client base.

44. Unbeknownst to Mr. Berry, as a result of his refusal to engage in improper cross-selling in violation of his duties to his clients and his expression of concerns about increased expenses under the profit formula agreement, Defendants targeted Mr. Berry for elimination in furtherance of their fraudulent, deceptive, and deceitful scheme to eliminate profit formula agreement advisors, including, and particularly, Mr. Berry.

45. Mr. Berry had dedicated the bulk of his professional life to the brokerage firm which ultimately became the WFA Defendants. He was looking forward to his twenty-year

anniversary with the firm in 2014, a degree of success and loyalty which the WFA Defendants customarily rewarded with a gold watch. Moreover, having successfully devoted nearly 20 years to essentially one firm, he was looking forward to continued success for himself and Defendants for the remainder of his working life. Despite this past commitment and future expectations, Mr. Berry grew concerned by Defendants' continued insistence on improper and illegal cross-selling and their increasing attempts to undercut or destroy his status as a profit formula agreement advisor. These concerns caused Mr. Berry to begin to take steps to devise a back-up plan to protect his interests and those of his clients if Defendants continued to demonstrate a willingness to sacrifice the rights of both advisors and clients to promote their corporate agenda.

46. WFA and its predecessor firms have been members of the Protocol for Broker Recruiting ("the Protocol") since January 2006. The Protocol recognizes that registered representatives, like Mr. Berry, are often recruited by competing firms and sometimes may change employment for a variety of reasons, including, as in Mr. Berry's case, a hostile and non-supportive work environment. Mr. Berry hoped that his work environment would improve, that Defendants would stop improperly shifting costs onto his business, and that the unreasonable demands and pressures to illegally "cross-sell" would be removed. However, as the inordinate pressure to either cross-sell or lose his livelihood continued – known at Wells Fargo as the "coach them up or coach them out" management strategy – he grew increasingly concerned that this situation was not going to change. He therefore felt forced to explore options to protect his business, his clients, his future opportunities to grow his business, and his need for income into the future and through retirement.

47. While the Protocol is designed to largely protect the interest of the member firms like the Corporate Defendants, it nevertheless expressly permits registered representatives, like Mr. Berry, to explore employment options with other brokerage firms, so long as the representative

does not reveal certain client information to any prospective employer. This exploration may be undertaken by the representative without liability or retribution if the guidelines are followed.

48. Even though Mr. Berry is not a party to the Protocol and is not bound to its terms, in late 2013 and early 2014, Mr. Berry nevertheless engaged in activities which he had been instructed by the Defendant were permitted by the Protocol. More importantly, his activities were sanctioned by South Carolina law. Those activities were undertaken by Mr. Berry not by preference but purely as a backstop to protect his interests and those of his clients. None of these activities were inconsistent with or interfered with the service of his clients who then held accounts with the WFA Defendants.

49. In January 2014, as part of his ongoing provision of wealth advisory services to his clients, Mr. Berry was in the process of personally delivering to his clients leather-bound volumes of their financial planning information, including wills, trusts and insurance policies, as well as information relating to their accounts with the WFA Defendants. These documents had been approved by compliance officials of the WFA Defendants and had been assembled in the WFA offices. Because of the size and geographic scope of Mr. Berry's client base, this was a multi-week project.

50. As of Monday, February 3, 2014, Mr. Berry had no plans to terminate his relationship with WFA. He remained hopeful that his concerns would be alleviated and his plan to work with WFA through retirement could be realized. His financial planning information delivery project was on-going; consequently, the WFA-compliance approved volumes for his next week of client appointments were already in his car. Mr. Berry's schedule for the following week, including the five client meetings for which he was in possession of client materials, was known to the WFA Defendants and Defendant Spang.

51. Unbeknownst to Mr. Berry, part of Defendants' deceptive and deceitful scheme to eliminate profit formula agreement advisors was to force resignations at a time convenient to Defendants and to use the circumstances of the resignations to discredit the departing broker, so that the WFA Defendants could retain his or her client base. Retention of Mr. Berry's client base and reassignment of those clients to a "branch broker" would also further Defendant Spang's personal interest in receiving the greater overrides payable from "branch broker" fees, thus improving Defendant Spang's own profits, as well as those of the Corporate Defendants.

52. On Monday, February 3, 2014, immediately upon Mr. Berry's entry into his office, Defendant Spang began browbeating and mistreating Mr. Berry, accusing him of wrongdoing. Mr. Berry denied that he had done anything wrong, indicated that he intended to continue his advisory work with Defendants, including his plan for the week to continue his previously WFA-approved efforts to deliver client financial information volumes and providing advisory services to those clients during the meetings. Defendant Spang continued to berate and belittle Mr. Berry and told him that he had two options: to immediately resign or be fired. As a consequence of the belittling, the berating, and the indignities and insults, Mr. Berry felt that he had no choice but to immediately resign, not then realizing that he was being baited into resigning as part of the ongoing deceptive and deceitful scam carried out by Defendants over many months.

53. In addition to the verbal assaults by Defendant Spang, on his own behalf and on behalf of the Corporate Defendants, he restrained, denied Mr. Berry freedom of movement, and otherwise prevented Mr. Berry from collecting his personal belongings (including several expensive art pieces) from his office as well as his files and even his office copy of the profit formula agreement.

54. Continuing Defendants' scheme to use forced resignations to discredit profit formula agreement advisors like Mr. Berry, Defendant Spang further restrained Mr. Berry from voluntarily retrieving the client financial information volumes from his vehicle. Instead, Defendant Spang used verbal force and physical intimidation to direct Mr. Berry out of his office to his personal vehicle in a nearby parking garage. Defendant Spang forced Mr. Berry to unlock the vehicle and by verbal force and physical intimidation detained and prevented him from entering it or from leaving the area until after Defendant Spang searched the vehicle and removed Mr. Berry's clients' records that he was scheduled to deliver to those clients.

55. Further, as part of the scheme to discredit Mr. Berry and eliminate him as a business competitor, Defendants initially retained all of Mr. Berry's personal belongings maintained in the WFA offices. Although some of his possessions were returned weeks later, some, including personal financial records and expensive art pieces, were permanently confiscated and either converted to the use of Defendants or discarded and destroyed, all to Mr. Berry's damage.

56. However, the personal indignities, insults, false imprisonment, and theft of his personal property were only part of the scheme to damage Mr. Berry. In the months that followed Mr. Berry's departure from WFA, Mr. Berry began to hear from former co-workers and former and current clients that Defendant Spang and the WFA Defendants had contacted most, if not all, of Mr. Berry's former and/or current clients and made false and slanderous statements to those clients about Mr. Berry and the circumstances and reasons for Mr. Berry's departure from WFA.

57. The plain implication of comments by Defendant Spang and the WFA Defendants was that Mr. Berry had engaged in seriously illegal and/or criminal behavior, and that Mr. Berry was unethical, dishonest and/or incompetent in his profession.

58. Mr. Berry is further informed and believes that Defendant Spang and the WFA Defendants promoted Mr. Berry's former partner at WFA⁵ as the preferred alternative for Mr. Berry's clients, touting that individual as being an honest, trustworthy, and competent financial advisor. Mr. Berry is informed and believes that neither Defendant Spang nor WFA disclosed to these clients that their preferred alternative broker conducted speculative and excessive trading in his own accounts or that WFA had considered terminating that broker for these activities.

59. Financial advisors are required to be registered with a firm to sell or buy securities or otherwise provide financial advice. After his departure from WFA, Mr. Berry chose to affiliate himself with LPL Financial Corporation ("LPL"), which is also a signatory to the Protocol on Broker Recruitment. Mr. Berry alleges on information and belief that Defendant Spang and the other WFA Defendants failed to promptly cooperate with standard regulatory inquiries associated with the transfer of his registration for the purpose of delaying that transfer and interfering with Mr. Berry's rights under the Protocol to solicit clients following his departure from WFA. Although he began the registration process with LPL immediately after his departure from WFA, Mr. Berry's registration was delayed for several weeks. Thus, for several weeks following his departure from WFA, Mr. Berry was prevented from contacting clients or providing financial advice. Defendant Spang and the other WFA Defendants used this period while Mr. Berry was essentially frozen out of the financial services business to approach his clients. This wrongful delay was intended to harm and damage Mr. Berry and it did so.

⁵In furtherance of the scheme to eliminate profit formula agreement brokers and to allow Defendant Spang to collect the increased overrides payable from "branch broker," Mr. Berry's former partner under the profit formula became a "branch broker" upon Mr. Berry's departure from WFA.

60. In or around March 2016, Mr. Berry applied for an insurance licensure with Prudential Select Brokerage. At that time, Mr. Berry learned for the first time that the WFA Defendants had filed a Form U-5 termination notice stating that Mr. Berry had been "permitted to resign" with the official WFA Termination Comment of "Branch office manager discovered several binders of customer information in the trunk of Mr. Perry's [sic] automobile," thus falsely implying that the reason for Mr. Berry's resignation was the wrongful possession of client information.

61. Mr. Berry was shocked to learn of the language that the WFA Defendants had put on his official record. Mr. Berry was rightfully in possession of the client information, as his intent was to prudently service his clients who all maintained accounts with the WFA Defendants until it became obvious that he could not effectively do so, given the hostile work environment created by Defendant Spang and the Corporate Defendants.

62. During Mr. Berry's employment with WFA and each of its predecessor firms, he had never been disciplined for violation of any law, rule or regulation by either WFA or any regulatory body. Moreover, neither WFA nor any of its predecessor firms had ever indicated to Mr. Berry that he had violated any rules or regulations.

63. Mr. Berry had never been the subject of any customer complaints during the nearly two decades of his work for the WFA Defendants and their predecessor firms.

64. Although Mr. Berry was ultimately able to obtain an appointment with Prudential Select Brokerage, despite the false and defamatory information placed on his official record by the WFA Defendants, this license was delayed. As a result of this delay, Mr. Berry was damaged.

65. As a result of the false and defamatory comment that the WFA Defendants put onto Mr. Berry's official record, Mr. Berry has also experienced difficulties in obtaining licensure in

Colorado, where his application has been pending since October 2016. As a result of this delay, Mr. Berry has been damaged.

66. The false and defamatory statements that Defendant Spang and the WFA Defendants and their agents have made about Mr. Berry to his former clients and the false and defamatory comment that the WFA Defendants put onto Mr. Berry's official record have caused severe damage to Mr. Berry. Mr. Berry was unable to move a substantial portion of his client base to his new firm. Defendants' wrongful conduct has cost and continues to cost Mr. Berry hundreds of thousands of dollars yearly in lost revenue.

67. Further, the defamatory comments on his official record have caused and continues to cause ongoing damage to Mr. Berry's reputation with clients and within the industry. The defamatory comments also essentially prevent Mr. Berry from ever being able to find other employment within his profession, as most firms will not hire advisors who have adverse termination comments on their official record.

68. The conduct complained of was done willfully, oppressively, and maliciously, and in conscious disregard of Mr. Berry's rights. Punitive damages are warranted.

FIRST CAUSE OF ACTION
WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY

69. Mr. Berry refers to and incorporates for all purposes each and all of the allegations in this Complaint, as if repeated verbatim herein.

70. While Mr. Berry was an employee of the WFA Defendants, Defendants pressured him to cross-sell Wells Fargo products to clients for whom he was acting in a fiduciary capacity. Mr. Berry came to believe that these products were not wanted or needed by most of his clients and that these products were unsuitable and not in the best interests of his clients. He therefore declined to cross-sell such products when appropriate and told Defendants that he would be

violating his duties as a fiduciary and under the certain laws and regulations if he urged clients to purchase unneeded, unwanted, and unsuitable products which were not in their best interests.

71. Placing their own monetary interests above those of clients to whom they and Mr. Berry owed fiduciary duties as well as other common law and statutory duties, Defendants continued to pressure Mr. Berry to cross-sell unsuitable products which were not in the best interests of his clients and criticized his refusals to sell them during his employment reviews.

72. Clear public policy mandates require fiduciaries like Mr. Berry and Defendants to put the interests of their clients before their own monetary interests and thus prohibit licensed financial advisors like Mr. Berry and the WFA Defendants and also Defendant Spang from selling to clients unsuitable products not in their best interests, despite fiduciary obligations owed to these clients.

73. Upon Mr. Berry's refusal to cross-sell to his fiduciary clients unsuitable products not in their best interests and his complaints to management about Defendants' internal policy and directive that he do so, Defendants targeted Mr. Berry for retribution and eventual termination;

74. Defendants, by and through Defendant Spang, in retribution for Mr. Berry's refusal to violate his fiduciary duties to his clients, employed and applied systematic pressure on Mr. Berry, culminating in the humiliating and unreasonable conduct by Defendant Spang in the February 3, 2014 meeting, to constructively fire Mr. Berry by forcing his resignation.

75. Defendants' wrongful acts and practices described above constituted a wrongful termination of Mr. Berry in violation of the public policy of this State.

76. Mr. Berry has suffered damages as a result of the aforementioned wrongful termination.

77. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, (2) consequential damages, (3) injunctive relief, including but not limited to an order requiring the correction of Mr. Berry's official record (4) punitive damages in an amount to be determined by the finder of fact, (5) costs, (6) prejudgment interest, (7) the reasonable attorneys' fees incurred to vindicate this egregious violation of state law and public policy, and (8) such other relief as is just, equitable, and proper.

SECOND CAUSE OF ACTION
BREACH OF CONTRACT AND
COVENANT OF GOOD FAITH AND FAITH DEALING

78. Mr. Berry refers to and incorporates for all purposes each and all of the allegations in this Complaint, as if repeated verbatim herein.

79. In or around 2001, the predecessors-in-interest of the WFA Defendants entered into both express agreements and implied agreements with Mr. Berry, as formalized in the profit formula agreement, which agreements were ratified and continued by the WFA Defendants. These agreements constituted contracts between Mr. Berry and the WFA Defendants (hereinafter "the Agreements").

80. South Carolina law further implies a duty of good faith and fair dealing into every contract, including the profit formula agreement.

81. The WFA Defendants breached their Agreements with Mr. Berry in one or more of the following particulars, each and every one of which violate South Carolina's public policy and/or common and statutory law:

- A. Defendants encouraged and pressured Mr. Berry to cross-sell Wells Fargo products to his fiduciary clients notwithstanding the fact that those products were unsuitable and not in the best interest of most of Mr. Berry's clients;

- B. Defendants placed their respective monetary interests ahead of the interests of Mr. Berry and his clients;
- C. Upon Mr. Berry's refusal to cross-sell to his fiduciary clients unsuitable products not in their best interests, and his complaints to management about Defendants' internal policy and directive that he do so, Defendants targeted Mr. Berry for retribution and eventual termination;
- D. Defendants engaged in a calculated, deceitful, and deceptive scheme to undercut Mr. Berry and force him out of the contractual profit formula agreement relationship, through deliberately unfair and deceptive actions, including but not limited to:
 - i. Defendants deliberately and intentionally misrepresented their true motivations and intentions with respect to advisors employed under profit formula agreements;
 - ii. Defendants imposed consistently escalating overhead costs and expenses in breach of the profit formula agreement and for the specific purpose of reducing Mr. Berry's profit margin to Defendants' benefit and in furtherance of their deceitful and deceptive cross-selling scheme;
 - iii. Defendants imposed unnecessary and punitive compliance roadblocks and expenses on Mr. Berry for routine client development and retention services; and
 - iv. Defendants, by and through Defendant Spang, employed and applied systematic pressure on Mr. Berry to forgo his contractual profit formula

agreement in lieu of a "branch broker" position that would decrease Mr. Berry's salary to Defendants' benefit.

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

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

THIRD CAUSE OF ACTION
BREACH OF IMPLIED CONTRACT AND
COVENANT OF GOOD FAITH AND FAITH DEALING

84. Mr. Berry refers to and incorporates for all purposes each and all of the allegations of this Complaint, as if repeated verbatim herein.

85. As part of the Agreements described *supra*, Defendants, including Defendant Spang, assumed and agreed to undertake the implied duties of faithful, fair, and accurate contract administration, implementation, and execution. These duties include obligations to fairly and impartially administer, implement, and execute the Agreements between Defendants and Mr. Berry, and to do so without deceitful, deceptive, fraudulent, unlawful, and dishonest purposes.

86. South Carolina law further implies a duty of good faith and fair dealing into every contract, including these implied agreements.

87. The WFA Defendants breached their duties under the implied agreements with Mr. Berry in one or more of the following particulars, each and every one of which violates South Carolina's public policy and/or common and statutory law:

- A. Defendants encouraged and pressured Mr. Berry to cross-sell Wells Fargo products to his fiduciary clients notwithstanding the fact that those products were unsuitable and not in the best interest of most of Mr. Berry's clients;
- B. Defendants placed their respective monetary interests ahead of the interests of Mr. Berry and his clients;
- C. Upon Mr. Berry's refusal to cross-sell to his fiduciary clients unsuitable products not in their best interests, and his complaints to management about Defendants' internal policy and directive that he do so, Defendants targeted Mr. Berry for retribution and eventual termination;
- D. Defendants engaged in a calculated, deceitful, and deceptive scheme to undercut Mr. Berry and force him out of the contractual profit formula agreement relationship, through deliberately unfair and deceptive actions, including but not limited to:
 - i. Defendants deliberately and intentionally misrepresented their true motivations and intentions with respect to advisors employed under profit formula agreements;
 - ii. Defendants imposed consistently escalating overhead costs and expenses in breach of the profit formula agreement and for the specific purpose of reducing Mr. Berry's profit margin to Defendants' benefit and in furtherance of their deceitful and deceptive cross-selling scheme;
 - iii. Defendants imposed unnecessary and punitive compliance roadblocks and expenses on Mr. Berry for routine client development and retention services; and

- iv. Defendants, by and through Defendant Spang, employed and applied systematic pressure on Mr. Berry to forgo his contractual profit formula agreement in lieu of a "branch broker" position that would decrease Mr. Berry's salary to Defendants' benefit.

88. The WFA Defendants' acts and omissions constitute failures to abide by the implied agreements to fairly, faithfully, honestly, and impartially execute, implement, and administer the profit formula agreement and constitute breaches of the implied agreements entered into with Mr. Berry. Mr. Berry has been directly and proximately damaged as a result of these breaches.

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

FOURTH CAUSE OF ACTION **DEFAMATION**

90. Mr. Berry refers to and incorporates for all purposes each and all of the allegations in this Complaint, as if repeated verbatim herein.

91. Defendant Spang, for his own purposes and on behalf of the other WFA Defendants made a written publication on Mr. Berry's official record which stated that he had been "permitted to resign" because "Branch Office Manager discovered several binders of customer information in the trunk of Mr. Perry's [sic] automobile." This official record is publicly available. Further, the statement above also appears on Mr. Berry's Broker Check Report which is posted on the web site of the Financial Industry Regulatory Authority ("FINRA") and is available to the public.

92. Defendant Spang and the WFA Defendants also made false and slanderous statements about Mr. Berry and the circumstances and reasons for Mr. Berry's departure from WFA to Mr. Berry's former and/or current clients.

93. The foregoing statements made by Defendant Spang and/or the WFA Defendants on Mr. Berry's official record and to Mr. Berry's current and former clients were false. Mr. Berry's constructive termination and forced resignation from WFA had nothing to do with the client files, which were properly in his possession. Mr. Berry did not, at any time, wrongfully possess any client information. Instead, Defendants had targeted Mr. Berry for retribution and eventual termination as a result of his refusal to improperly cross-sell to his fiduciary clients unsuitable Wells Fargo products not in their best interests, his complaints to management about Defendants' unlawful internal policy and their demand that he nevertheless cross-sell Wells Fargo products regardless of his concerns, and as part of Defendants' calculated deceptive and deceitful scheme to undercut Mr. Berry and force him out of the contractual profit formula agreement relationship.

94. Defendants' statements on Mr. Berry's official record, to Mr. Berry's current and former clients, and other advisors in the industry were defamatory. The plain meaning of the official record statement is that Mr. Berry was wrongfully in possession of client information to which he was not entitled. Essentially, it charges Mr. Berry with having appropriated client information or attempted to have appropriated client information. This is a highly damaging charge of egregious misconduct that Defendants crafted for the specific purpose of casting aspersion on Mr. Berry's integrity, honesty, and professional standing. Similarly, statements to Mr. Berry's current and former clients by Defendants also plainly implied that Mr. Berry had engaged in seriously illegal and/or criminal behavior, and that Mr. Berry was unethical, dishonest and/or incompetent.

95. The false and defamatory statement made on Mr. Berry's official record has been particularly injurious to Mr. Berry. Defendants' statement was designed to portray Mr. Berry as a dishonest person who stole or tried to wrongfully appropriate client information. WFA's false and defamatory statement on Mr. Berry's official record has damaged Mr. Berry. The statement on the official record also continues to deprive Mr. Berry of other business opportunities.

96. Defendants' defamatory statements to Mr. Berry's current and former clients have also damaged Mr. Berry's reputation, his professional standing, and his business.

97. The conduct complained of was done willfully, oppressively, and maliciously, and in conscious disregard of Mr. Berry's rights and in furtherance of the deceitful and deceptive scheme to discredit and damage Mr. Berry. Punitive damages are warranted.

98. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, including damages to his reputation, (2) consequential damages, (3) injunctive relief, including but not limited to an order requiring the correction of Mr. Berry's official record (4) punitive damages for Defendants' defamation of his character in an amount to be determined by the finder of fact, (5) costs, (6) prejudgment interest, (7) and such other relief as is just, equitable, and proper

FIFTH CAUSE OF ACTION
VIOLATION OF SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT
(S.C. CODE ANN. § 39-5-10 *et seq.*)

99. Mr. Berry refers to and incorporates for all purposes each and all of the allegations in this Complaint, as if repeated verbatim herein.

100. Defendants engaged in an unfair method of competition and/or an unfair or deceptive act or practice in the conduct of trade or commerce in violation of South Carolina law.

101. Defendants engaged in a calculated plan to undercut Mr. Berry and force him out of the contractual profit formula agreement relationship, through deliberately unfair and deceptive actions, including but not limited to:

- A. Defendants encouraged and pressured Mr. Berry to cross-sell Wells Fargo products to his fiduciary clients notwithstanding the fact that those products were unsuitable and not in the best interest of most of Mr. Berry's clients;
- B. Defendants placed their respective monetary interests ahead of the interests of Mr. Berry and his clients;
- C. Upon Mr. Berry's refusal to cross-sell to his fiduciary clients unsuitable products not in their best interests, and his complaints to management about Defendants' internal policy and directive that he do so, Defendants targeted Mr. Berry for retribution and eventual termination;
- D. Defendants engaged in a calculated, deceitful, and deceptive scheme to undercut Mr. Berry and force him out of the contractual profit formula agreement relationship, through deliberately unfair and deceptive actions, including but not limited to:
 - i. Defendants deliberately and intentionally misrepresented their true motivations and intentions with respect to advisors employed under profit formula agreements;
 - ii. Defendants imposed consistently escalating overhead costs and expenses in breach of the profit formula agreement and for the specific purpose of reducing Mr. Berry's profit margin to Defendants' benefit and in furtherance of their deceitful and deceptive cross-selling scheme;

- iii. Defendants imposed unnecessary and punitive compliance roadblocks and expenses on Mr. Berry for routine client development and retention services; and
 - iv. Defendants, by and through Defendant Spang, employed and applied systematic pressure on Mr. Berry to forgo his contractual profit formula agreement in lieu of a "branch broker" position that would decrease Mr. Berry's salary to Defendants' benefit.
- E. Defendants instructed its advisors, including Mr. Berry, to follow the Protocol in pre-termination activities; then, in violation of industry standards, unfairly and deceptively in the conduct and practice of its trade or commerce, nevertheless targeted Mr. Berry for termination for, among other deceptive reasons, taking precautionary pre-termination actions. Defendants' unfair and deceptive act or practice in the conduct of its trade or commerce and in violation of industry standards, harmed clients, the public at large by engaging in deceptive and unfair principles of trade, and seriously damaged Mr. Berry as Defendants deliberately and maliciously intended;
- F. Upon Mr. Berry's constructive termination and forced resignation, Defendants unfairly and deceptively in the conduct of its trade or commerce:
- i. Placed false and defamatory information on Mr. Berry's official record with the specific intent to damage Mr. Berry in his profession and trade, and damage and discredit him as a competitor, in clear violation of fair and just principles of trade or commerce;

- ii. In further violation of fair and just principles of trade or commerce, made false and defamatory statements about Mr. Berry to his current and former clients regarding his professional reputation and good name for the specific purpose of harming and discrediting Mr. Berry as a competitor and thereby improve Defendants opportunity for either taking clients or denying Mr. Berry the opportunity to retain his clients;
- iii. In further violation of fair and just principles of trade or commerce, specifically converted to its own use and/or failed to return Mr. Berry's personal property and business files, for the specific purpose of gaining a competitive advantage in the conduct of its trade or commerce by making it more difficult for him to restart his business; and
- iv. In further violation of fair and just principle of trade or commerce, unfairly delayed Mr. Berry's registration with his new brokerage firm for the specific purposes of gaining a competitive advantage in its trade or commerce by limiting Mr. Berry's ability to compete and by providing Defendants with the competitive time advantage of talking with clients first without Mr. Berry being able to respond and thereby give Defendants the unfair opportunity to malign Mr. Berry's professional standing to his clients, colleagues, peers and regulators and in so doing diminish Mr. Berry to the clients and others within the industry with whom he interacts for the conduct of his business.

102. Defendants falsely promoted another broker to Mr. Berry's clients, touting their preferred alternative as being an honest, trustworthy and competent alternative to Mr. Berry,

despite Defendants' direct knowledge of a history of improper, excessive and speculative trading by their preferred replacement.

103. Defendant Spang's involvement in the acts and omissions detailed in the preceding paragraphs were undertaken to advance his own personal interests to bring Mr. Berry's clients under the control of a "branch broker" thus allowing Defendant Spang to receive a larger override, bonus, and compensation either by forcing Mr. Berry to forego his rights under the profit formula agreement or by forcing Mr. Berry out entirely while retaining control over his clients.

104. The unfair and deceptive acts and practices committed by Defendants in the conduct of its trade or commerce were specifically designed to gain an unfair competitive advantage by (1) destroying of Mr. Berry's professional reputation, (2) damaging his business and his ability to compete because he was unwilling to cross-sell Wells Fargo products that were not in his clients best interests to buy, and (3) punishing him for refusing to allow Defendants to terminate and unilaterally alter his profit formula agreement and transfer his business to one of a branch broker, all for the unlawful and deceitful purpose of furthering Defendants' fraudulent profit generating scheme. These unfair and deceptive acts and practices committed by the Defendants in its trade or commerce had an impact upon the public interest in that they violated industry standards of just and fair principles of trade or commerce as they denied wealth management clients the investing public accurate and truthful information from which to make decisions, resulted in the inclusion of false, misleading, slanderous, and disparaging statements in publicly available documents, including but not limited to, the Broker Check Report on Mr. Berry, and disseminated and published such statements to many of Mr. Berry's former clients as well as to regulators, other financial institutions, and the public at large, all for the purpose of unfairly and deceptively gaining a competitive advantage and damaging Mr. Berry.

105. Such unfair and deceptive acts and practices constitute a violation of the Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 et seq. (1976) (as amended). Defendants' unfair and deceptive acts and practices described above constituted willful, intentional, and knowing violations of the Unfair Trade Practices Act.

106. Mr. Berry has suffered damages as a result of the aforementioned unfair and deceptive acts and practices of Defendants in that he has suffered loss of income, business opportunities, future income, and professional standing, among other losses and damages.

107. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, including damages to his reputation, (2) consequential damages, (3) injunctive relief, including but not limited to an order requiring the correction of Mr. Berry's official record (4) treble damages as a result of Defendants' intentional conduct, in an amount to be determined by the finder of fact, (5) costs, (6) attorneys' fees, (7) prejudgment interest, and (8) such other relief as is just, equitable, and proper.

SIXTH CAUSE OF ACTION
BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACT

108. Mr. Berry refers to and incorporates for all purposes each and all of the allegations in this Complaint, as if repeated verbatim herein.

109. As an employee of WFA and pursuant to the profit formula agreement with the WFA Defendants, the WFA Defendants owed him a duty of good faith and fair dealing.

110. The WFA Defendants' wrongful and defamatory misconduct, actions and inactions, as alleged herein, including but not limited to the allegations contained in ¶81 *supra*, constitute a failure to abide by the terms of the WFA Defendants' contracts with Mr. Berry and constitute a breach of these agreements entered into with Mr. Berry. Mr. Berry has been directly and proximately damaged as a result of these breaches.

111. Moreover, in breaching the Agreements with Mr. Berry, the WFA Defendants exhibited a fraudulent intent relating to those breaches.

112. Defendant's breaches of the Agreements were accompanied by fraudulent acts and/or omissions on the part of WFA, all acts being committed with dishonesty, fraud, and deceit as their essential purpose, in one or more of the following particulars:

- A. Placed false and defamatory information on Mr. Berry's official record with the specific intent to damage Mr. Berry in his profession and trade, in clear violation of fair and just principles of trade or commerce and for the specific purpose to damage him as a competitor;
- B. Made false and defamatory statements about Mr. Berry to his current and former clients regarding his professional reputation and good name for the specific purpose of harming and discrediting Mr. Berry as a competitor and thereby improving Defendants opportunity for either taking Mr. Berry's clients for their own financial benefit or denying Mr. Berry the opportunity to retain his clients to weaken him as an ongoing competitor;
- C. Intentionally detained and/or failed to return Mr. Berry's personal property and business files, for the specific purpose of gaining a competitive advantage in the conduct of its trade or commerce by making it more difficult for him to restart his business; and
- D. In violation of fair and just principles of trade or commerce, unfairly delayed Mr. Berry's registration with his new brokerage firm, for the specific purposes of gaining a competitive advantage in its trade or commerce by damaging Mr. Berry's ability to compete and by providing Defendants with the competitive

time advantage of talking with clients first without Mr. Berry being able to respond and thereby give Defendants the unfair opportunity to malign Mr. Berry's professional standing to his clients, colleagues, peers and regulators and in so doing diminish Mr. Berry to the clients and others within the industry with whom he interacts for the conduct of his business.

- E. Mr. Berry is further informed and believes that Defendant Spang and the WFA Defendants promoted Mr. Berry's former partner at WFA as a preferred alternative for Mr. Berry's clients, touting that individual as being an honest, trustworthy, and competent financial advisor. Mr. Berry is informed and believes that neither Defendant Spang nor WFA disclosed to these clients that their preferred alternative broker conducted speculative and excessive trading in his own accounts or that WFA had considered terminating that broker for these activities.

113. As a direct, consequent and proximate result of WFA's breaches of contract accompanied by fraudulent acts, Mr. Berry has suffered injury all in direct violation of the laws of the State of South Carolina.

114. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, (2) consequential damages, (3) punitive damages for the fraudulent acts accompanying the breaches of the Agreements, in an amount to be determined by the finder of fact, (4) costs, (5) prejudgment interest, (6) and such other relief as is just, equitable, and proper.

SEVENTH CAUSE OF ACTION
INTENTIONAL INTERFERENCE WITH
PROSPECTIVE CONTRACTUAL RELATIONS
(Against Defendant Spang)

115. Mr. Berry refers to and incorporates for all purposes each and all of the allegations in this Complaint, as if repeated verbatim herein.

116. Mr. Berry had an existing and ongoing contractual relationship under which he intended to operate through retirement which was reasonably likely to continue with Wells Fargo Advisors, given his successful past.

117. Defendant Spang, at all times herein relevant, knew of Mr. Berry's economic relationship with Wells Fargo Advisors and the stellar results that Mr. Berry had achieved under this relationship for many years.

118. Defendant Spang intentionally disrupted Mr. Berry's economic relationship with Wells Fargo Advisors by engaging in a calculated plan to undercut Mr. Berry and force him out of the contractual profit formula agreement relationship, through deliberately unfair and deceptive actions, including but not limited to:

- A. Defendant Spang deliberately and intentionally misrepresented his true motivations and intentions with respect to Mr. Berry's status as an advisor employed under profit formula agreements;
- B. Defendant Spang imposed consistently escalating overhead costs and expenses in breach of the profit formula agreement and for the specific purpose of reducing Mr. Berry's profit margin to Defendants' benefit and in furtherance of the deceitful and deceptive cross-selling scheme;
- C. Defendant Spang imposed unnecessary and punitive compliance roadblocks and expenses on Mr. Berry for client development and retention services; and

- D. Defendant Spang employed and applied systematic pressure on Mr. Berry to forgo his contractual profit formula agreement in lieu of a "branch broker" position that would increase Defendant Spang's override compensation;
- E. Defendant Spang encouraged and pressured Mr. Berry to cross-sell products to his fiduciary clients notwithstanding the fact that those products were unsuitable and not in the best interest of most of Mr. Berry's clients, because such sales would increase Defendant Spang's compensation;
- F. Defendant Spang placed his own monetary interests ahead of the interests of Mr. Berry and his clients without care or concern for the best interest of the clients;
- G. Upon Mr. Berry's refusal to cross-sell to his fiduciary clients unsuitable Wells Fargo products not in their best interests, his complaints about directives that he nevertheless must cross-sell unsuitable products to his clients, and his refusal to forego his rights as a profit formula advisor, Defendant Spang targeted Mr. Berry for retribution and eventual termination;
- H. Defendant Spang orchestrated and engineered Mr. Berry's forced and untimely resignation by humiliating and berating him during the February 3, 2014 meeting.

119. Defendant Spang knew, or reasonably should have known, that his wrongful conduct was certain or substantially certain to result in a disruption of Mr. Berry's contractual relations with Wells Fargo Advisors and, indeed, so intended and designed his actions to disrupt the contractual relationship.

120. In addition to Defendant Spang's wrongful conduct prior to Mr. Berry's forced resignation, Defendant Spang also detained and/or failed to return Mr. Berry's personal property and business files, making it more difficult for him to restart his business, put a false and defamatory comment on Mr. Berry's official record, unfairly delayed Mr. Berry's registration with his new brokerage firm, made false, defamatory and disparaging statements about Mr. Berry and Mr. Berry's honesty, integrity and competence to Mr. Berry's clients and made false, misleading and/or incomplete statements to Mr. Berry's clients about the honesty, integrity, ethics and competence of Defendant Spang's preferred replacement broker, whom Defendant Spang knew to have a history of imprudent, excessive and speculative trading in his own accounts, all for the purpose of capitalizing on the termination of Mr. Berry's relationship with Wells Fargo Advisors and thereby enriching himself at Mr. Berry's expense.

121. Defendant Spang also used his treatment of Mr. Berry as an example for other advisors to keep them from questioning his management decisions and to not challenge any sales initiatives.

122. As a direct and proximate result of Defendant Spang's conduct, as alleged herein, Mr. Berry's relationship with Wells Fargo Advisors was terminated in a mean-spirited, illegal, and defamatory fashion, orchestrated for the specific purpose of harming Mr. Berry in his business and with his clients and to thereby retain a significant portion of Mr. Berry's client base and then assign those clients to a "branch broker" to generate increased overrides and compensation for Defendant Spang.

123. As a direct and proximate result of Defendant Spang's intentional interference with his existing and prospective contractual relations, Mr. Berry has suffered damages.

124. Defendant Spang's conduct, in intentionally interfering with Mr. Berry's existing and prospective contractual relations, as set forth above, was malicious, willful, despicable, and oppressive. Punitive damages are warranted.

125. As a direct result of the false statement placed on Mr. Berry's official record and other wrongful conduct by Defendant Spang, Mr. Berry's relationship with Wells Fargo Advisors was interrupted and terminated prematurely, and he has been unable to consummate additional business relations thereafter.

126. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, (2) consequential damages, (3) injunctive relief, including but not limited to an order requiring the correction of Mr. Berry's official record, (4) disgorgement of overrides attributable to Defendant Spang's wrongful conduct, (5) punitive damages for Defendants' intentional interference with his business relationships, in an amount to be determined by the finder of fact, (6) costs, (7) prejudgment interest, and (8) such other relief as is just, equitable, and proper.

EIGHTH CAUSE OF ACTION
INTENTIONAL INTERFERENCE WITH
PROSPECTIVE CONTRACTUAL RELATIONS
(Against all Defendants)

127. Mr. Berry refers to and incorporates for all purposes each and all of the allegations in this Complaint, as if repeated verbatim herein.

128. Mr. Berry had existing and ongoing contractual relationships which were reasonably likely to continue with numerous customers who he had developed as clients for WFA.

129. Defendants, at all times herein relevant, knew of Mr. Berry's economic relationships with the customers who he had developed as clients during his nearly 20 years with WFA and its predecessors.

130. Defendants intentionally disrupted Mr. Berry's economic relationships with the customers whom he had developed as clients during his contractual relationship with WFA by detaining and/or failing to return Mr. Berry's business files, making it more difficult for him to restart his business, putting false and defamatory comments on Mr. Berry's official record by making false, defamatory, and disparaging statements about Mr. Berry and Mr. Berry's honesty, integrity, and competence to Mr. Berry's clients, and by making false, misleading and/or incomplete statements to Mr. Berry's clients about the honesty, integrity, ethics, and competence of Defendants' preferred replacement broker, whom Defendants knew to have a history of imprudent, excessive and speculative trading in his own accounts.

131. Defendants knew, or reasonably should have known, that their wrongful conduct was certain or substantially certain to result in a disruption of Mr. Berry's contractual relations with his customers and, indeed, designed their actions to disrupt those contractual relationships.

132. As a direct and proximate result of Defendants' misconduct as alleged herein, Mr. Berry lost many clients and substantial business and revenue.

133. As a direct and proximate result of Defendants' intentional interference with his existing and prospective contractual relations, Mr. Berry has suffered damages.

134. Defendants' conduct in intentionally interfering with Mr. Berry's existing and prospective contractual relations, as set forth above, was malicious, willful, despicable, and oppressive. Punitive damages are warranted.

135. As a direct result of the false statements placed on his official record and other wrongful conduct by Defendants as alleged herein, Mr. Berry's business has been irreparable and permanently damaged and such damages, as was intended by Defendants, will continue to grow exponentially into the future.

136. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, (2) consequential damages, (3) injunctive relief, including but not limited to an order requiring the correction of Mr. Berry's official record, (4) punitive damages for Defendants' intentional interference with his business relationships, in an amount to be determined by the finder of fact, (5) costs, (6) prejudgment interest, and (7) such other relief as is just, equitable, and proper.

NINTH CAUSE OF ACTION
FALSE IMPRISONMENT

137. Mr. Berry refers to and incorporates for all purposes each and all of the allegations of this Complaint, as if repeated verbatim herein.

138. Defendant Spang, on his own behalf and as the agent and representative of the Corporate Defendants, intentionally and unlawfully restrained Mr. Berry, both in the WFA offices and at his vehicle on the day of his forced resignation and constructive termination.

139. As a result of the intentional and unlawful restraints, Mr. Berry suffered emotional distress, embarrassment, humiliation, indignities, and deprivation of his right to be free from threats and intimidation.

140. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages for emotional suffering and upset, (2) punitive damages for Defendants' intentional wrongdoing, in an amount to be determined by the finder of fact, (3) costs, and (4) such other relief as is just, equitable, and proper.

TENTH CAUSE OF ACTION
CONVERSION

141. Mr. Berry refers to and incorporates for all purposes each and all of the allegations in this Complaint, as if repeated verbatim herein.

142. Defendant Spang, on his own behalf and as the agent and representative of the Corporate Defendants, assumed and exercised ownership and control over the personal property of Mr. Berry.

143. Mr. Berry did not authorize the detention of his personal property, as he specifically requested and demanded its return to him.

144. Defendants wrongfully retained control over all of Mr. Berry's personal property in his office for a period of weeks before returning some of it. Other property was neither returned nor accounted for in any way.

145. As a result of the temporary detention of his property, Mr. Berry was not only deprived of its use but also was competitively disadvantaged, as was Defendants' specific intent, in contacting his clients and furthering his business interest.

146. Some of the never-returned property was essentially irreplaceable as it consisted of art pieces specially chosen for Mr. Berry's workplace by his wife.

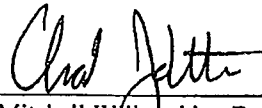
147. Some of the never-returned property was records relevant to the operation of Mr. Berry's business, including but not limited to profit and loss statements and other general business documents. Defendants' deliberate retention of these documents was designed to and did in fact adversely affect Mr. Berry's competitive ability in the financial services market.

148. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, including but not limited to the loss of use of wrongfully detained property and the value of property which was never returned, (2) punitive damages for Defendants' intentional wrongdoing, in an amount to be determined by the finder of fact, (3) costs, and (4) such other relief as is just, equitable, and proper.

WHEREFORE, having set forth his complaint, Plaintiff Robert F. Berry prays for relief as follows:

1. For compensatory damages, including, but not limited to, lost compensation now and into the future, loss of business revenue, loss of business opportunities, the loss of use of wrongfully detained property, the value of property which was never returned, all in a sum to be determined by the jury;
2. For consequential damages;
3. For disgorgement of Defendants' unjustly acquired profits generated as a result of their wrongful conduct;
4. For an order directing the expungement of the false and defamatory statements regarding his termination from WFA on his official record;
5. For damages to reputation;
6. For damages for emotional distress, embarrassment, humiliation, indignities, and deprivation of his right to be free from threats and intimidation;
7. For punitive damages in a sum sufficient to serve as an example to deter and punish Defendants for their wrongful, deceitful, deceptive, dishonest, and fraudulent conduct;
8. For reasonable attorneys' fees pursuant to South Carolina law including, but not limited to, S.C. Code Ann. § 39-5-140(a);
9. For statutory treble damages;
10. For costs incurred herein; and
11. For such other and further relief as this Court may deem just and proper.

[SIGNATURE PAGE FOLLOWS]



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Attorneys for Robert F. Berry

This 23rd day of February 2017
Columbia, South Carolina

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

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.

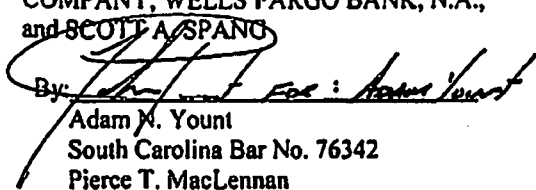
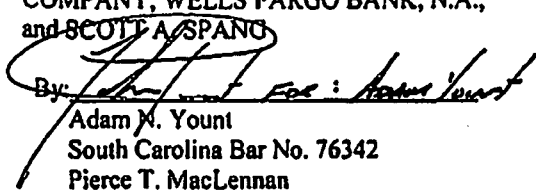
This motion is supported by applicable law, the arguments of counsel, a memorandum of law, and any other material the Court may receive.

(Signature block on following page.)

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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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Date: April 12, 2017

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

**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.

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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 (Cl. 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. Vi. 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.

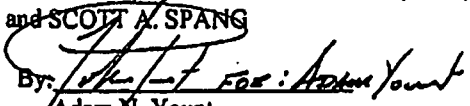
CONCLUSION

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: 

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

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: JR SR ETC FIRST NAME MIDDLE NAME
 Berry Robert Franklin

2 FIRM NAME (Do not include this employment under item 19, page 2)
 Wheat, First Securities, Inc.

3 FIRM MAIN ADDRESS STREET CITY STATE ZIP
 901 East Byrd Street, Richmond, Virginia 23219

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

5 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" has the firm(s) been contacted? ☐ Yes ☐ No

6 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 _____

7 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	
	☐ 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).

8 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 (IMR) Municipal Securities Representative
☐ S-6 (IRI) Investment Company and Variable Contracts Products Representative	☐ S-53 (MPI) 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 (ITS) Trading Supervisor (NYSE)	☐ S-65 Uniform Investment Advisor Law Examination
☐ S-8 (ISU) General Securities Sales Supervisor	☐ (AG) Agent
☐ S-8 (BMO) Branch Office Manager (NYSE)	☐ (RG) Government Securities Representative
☐ S-11 (ARI) 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 (ORI) 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 <u>FA Rep.</u>

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

9 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 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

CRO 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

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 #

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

22. DEFINITIONS		YES	NO	
- 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				
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	

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
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 addressee 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.

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 FROM	TO	HOW CONTACTED		
					Phone	Letter	Other
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

9/28/95

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

(1) INDIVIDUAL NAME LAST, FIRST, MIDDLE Berry Robert Franklin	(2) FIRM NAME (Do not include this employment under item 13, page 2) Wheat, First Securities, Inc.	(3) APPLICATION CRD # 1262947 SOC SEC # REDACTED	(4) EXPIRATION DATE 11/04/94
(5) FIRM'S HOME ADDRESS STREET CITY STATE ZIP 901 East Byrd Street, Richmond, Virginia 23219			

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

(7) 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

(8) 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 _____

(9) TO BE REGISTERED WITH THE FOLLOWING

☐ ASE	☐ BSE	☐ CBOE	☐ CSE	☐ MSE	☐ NASD	☐ NFA	☐ NYSE	☐ PHLX	☐ PSE	☐ OTHER (Specify): _____		
☐ 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).

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

☐ S-3 Commodity Futures Examination ☐ S-4 (GPI) Registered Options Principal ☐ S-5 Interest Rate Options Examination ☐ S-6 (IRI) Investment Company and Variable Contracts Products Representative ☐ S-7 (GSI) Full Registration/General Securities Representative ☐ S-7 (TRI) Securities Trader (NYSE) ☐ S-7 (TSI) Trading Supervisor (NYSE) ☐ S-8 (ISU) General Securities Sales Supervisor ☐ S-8 (BAM) Branch Office Manager (NYSE) ☐ S-11 (ARI) Assistant Representative/Order Processing ☐ S-15 (FCO) Foreign Currency Options ☐ S-16 (ISA) Supervisory Analyst ☐ S-22 (ORI) Direct Participation Program Representative ☐ S-24 (GPI) General Securities Principal ☐ S-26 (IPI) Investment Company and Variable Contracts Products Principal ☐ S-27 (FNI) Financial and Operations Principal ☐ S-28 (IFI) Introducing Broker-Dealer Financial and Operations Principal	☐ S-39 (DPI) Direct Participation Program Principal ☐ S-42 (ORI) Options Representative ☐ S-52 (MRI) Municipal Securities Representative ☐ S-53 (MP) Municipal Securities Principal ☐ S-62 (CSI) Corporate Securities Representative ☐ S-63 Uniform Securities Agent State Law Examination ☐ S-65 Uniform Investment Advisor Law Examination ☐ (AGI) Agent ☐ (IRG) Government Securities Representative ☐ (PGI) Government Securities Principal ☐ (MEI) Member Exchange (NYSE) ☐ (LEI) Securities Lending Representative (NYSE) ☐ (LSI) Securities Lending Supervisor (NYSE) ☐ (AMI) Allied Member (NYSE) ☐ (API) Approved Person (NYSE) ☐ (AI) Agent of the Issuer ☐ Reschedule Exam Series _____ ☒ Other: FA Rep

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

(11) APPLICANT'S CURRENT ADDRESS STREET CITY STATE ZIP FIRM(S) APPLICANT IS TRANSFERRING FROM _____ _____ _____	TERMINATION DATE (Mo/D/Year) _____ _____

☐ **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	ICRO 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

FIRM CRO # 20182	SOCIAL SECURITY # REDACTED	APPLICANT'S CRO # 1262947
FIRM NFA #		APPLICANT'S NFA #

PERSONAL DATA

(1) LAST NAME Berry	JR./SR., etc.	FIRST NAME Robert	MIDDLE NAME Franklin	(2) OTHER NAMES KNOWN BY Bob
(3) DATE OF BIRTH (Month, Day, Year) REDACTED	(4) SEX Male	HEIGHT 5'9"	WEIGHT 145	HAIR COLOR Brown
EYE COLOR Blue				

RESIDENTIAL HISTORY

(5) GIVE ALL ADDRESSES FOR THE PAST FIVE YEARS STARTING WITH CURRENT ADDRESS

STREET	CITY	STATE	ZIP	FROM MONTH	FROM YEAR	TO MONTH	TO YEAR
201 Silvermill Court	Columbia	SC	29210	11	90	PRESENT	
96 Muskrat Run	Irmo	SC	29603	09	88	11	90

EMPLOYMENT AND PERSONAL HISTORY

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

(7) 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 _____	

CRO USE ONLY

If there is a change in information, complete only item 21 and item 22.

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

ATTENTION: 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 PRACTICES ON ORP(S).

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 broker or bank, or savings and loan association.

- Involved - Using an act of 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 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 the 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 the 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

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

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

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

JAN 16 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 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 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 16 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		FIRST NAME ROBERT		MIDDLE NAME (SPECIFY IF NONE) FRANKLIN		APPLICANT'S CRD # 1262947
FIRM # 6124		FIRM NAME (Do not include this employment under item 13, page 2) Wheat, First Securities, Inc.				APPLICANT'S SOC SEC # REDACTED
FIRM MAIN ADDRESS 901 East Byrd Street, Richmond, Virginia 23219		STREET		CITY		STATE VA
BRANCH ID # 190		OFFICE OF EMPLOYMENT ADDRESS 1901 Main Street		CITY Columbia		STATE SC
						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 13: ☐ 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:						
Firm CRD #		Name of Firm				
Firm CRD #		Name of Firm				
Firm CRD #		Name of Firm				

TO BE REGISTERED WITH THE FOLLOWING:

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

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	
STREET		CITY		STATE	
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	FROM YEAR	TO MONTH	TO 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	CITY	STATE	FROM MONTH	FROM YEAR	TO MONTH	TO YEAR	POSITION HELD
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		STATE					
NAME							
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NAME							
CITY		STATE					

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 #

IF YOU 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.

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 being, acting, 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) member 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 pled 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 the 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?	☐	☒	1C
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 the 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?	☐	☒	1-
(6) revoked or suspended your license as an attorney, accountant or federal contractor?	☐	☒	1-
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?	☐	☒	1E
(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?	☐	☒	2C
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?	☐	☒	
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 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 # 1242947 APPLICANT'S NFA #
FIRM 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.

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

CRO 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 5, being amended.

LAST NAME BERRY		JR / SR, etc.	FIRST NAME ROBERT	MIDDLE NAME (SPECIFY IF NONE) FRANKLIN	APPLICANT'S CRD # 1262947
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		STREET 1901 Main Street			CITY Columbia
BRANCH ID # 190		OFFICE OF EMPLOYMENT ADDRESS 1901 Main Street			STATE SC
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 ☒			
If "Yes", has/have the firm(s) been contacted?		Yes ☐ No ☐			
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			

TO BE REGISTERED WITH THE FOLLOWING.

☒ ASE	☐ BSE	☐ CBOE	☐ CSE	☐ MSE	☒ NASD	☐ NFA	☒ NYSE	☒ PHLX	☐ PSE	☐ OTHER (Specify)
☐ AK	☒ AR	☐ AZ	☒ CA	☐ CO	☐ CT	☐ DE	☒ FL	☒ GA	☐ HI	☐ IA
☐ ID	☐ IL	☐ IN	☐ KS	☐ KY	☐ LA	☒ MA	☒ MD	☐ ME	☐ MI	☐ MN
☐ MT	☒ NC	☐ ND	☐ NE	☐ NH	☐ NJ	☐ NM	☒ NV	☒ NY	☐ OH	☐ OK
☐ 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 (DPI) Direct Participation Program Principal
☐ S-4 (OP) Registered Options Principal	☐ S-42 (OR) Options Representative
☐ S-5 Interest Rate Options Examination	☐ S-52 (MRI) Municipal Securities Representative
☐ S-6 (IR) Investment Company and Variable Contracts Products Representative	☐ S-53 (MPI) 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
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.

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	FROM YEAR	TO MONTH	TO 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	CITY	STATE	FROM MONTH	FROM YEAR	TO MONTH	TO YEAR	POSITION HELD
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		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					

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

FORM U-4

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

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 #

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.

- 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 to reasonably 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 pled 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?	☐	☒	1
(6) revoked or suspended your license as an attorney, accountant or federal contractor?	☐	☒	1
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 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.

FIRM CRO # **6124**

SOCIAL SECURITY #
 REDACTED

APPLICANT'S
 CRO # **1242947**
 APPLICANT'S
 UFA #

FIRM 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.

November 5, 1994

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

CRO USE ONLY

COPY

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

USA COVER
CLERK OF COURT
LEXINGTON, SC

2017 APR 27 PM 3:23

FILED

**DEFENDANTS' AMENDED 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 Rules 12(b)(1), 12(b)(3), and 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.

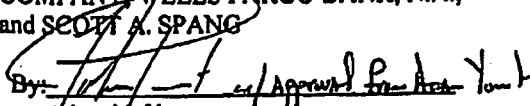
Defendants filed the original *Motion to Dismiss or Stay Pending Arbitration* in this Court on April 12, 2017. Pursuant to Rule 15(a), SCRCP, Defendants are entitled to amend this responsive pleading as a matter of course since thirty (30) days have not passed since the filing of the original.

38430219v.1
DM: 4937490 v.1

This motion is supported by applicable law, the arguments of counsel, the previously-filed *Defendants' Memorandum of Law in Support of Their Motion to Dismiss or Stay Pending Arbitration*, and any other material the Court may receive.

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:  / Approval from Adam Yount

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27
Date: April 12, 2017

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

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO
DISMISS OR STAY PENDING ARBITRATION**

Plaintiff, Robert F. Berry ("Berry"), by and through his undersigned counsel, hereby submits this Memorandum in Opposition to Defendants' Motion to Dismiss or Stay Pending Arbitration.

FACTUAL BACKGROUND

This is a claim for damages brought by Mr. Berry, formerly a Wealth Manager and Senior Vice President with Defendant Wells Fargo Advisors, LLC, which arises from 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 (all defendants are collectively referred to as "Defendants"), deliberate sabotage and breach of Mr. Berry's long-standing profit formula agreement. Defendants implemented a fraudulent scam to illegally increase the earnings and stock price of their corporate parent, Defendant 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. Refusal and/or failure to cooperate resulted in being targeted by management for retribution. (First Amended Complaint ("FAC") at ¶¶ 2-7). *See also In re Wells Fargo Bank, N.A.*, 2016-CFPB-0015 (Sept. 8, 2016) (Consent Order with the Consumer Financial Protection Bureau) (copy attached as Exh. 1).¹

Mr. Berry refused to participate in the scheme, which would have violated the securities laws and his fiduciary obligations to his clients. (FAC at ¶ 33-36). Mr. Berry also questioned changes made by Defendants to his profit formula employment agreement which had been in effect since the early 2000s, beginning with Wells Fargo Advisors' predecessor, Wachovia Securities. (FAC at ¶¶ 29, 42-43). As a result of Mr. Berry's actions, Defendants internally identified Mr. Berry as a person to be terminated for speaking up against the illegality of Defendants' cross-selling program and the injustice of the unilateral changes to his profit formula agreement. In response and retribution, Defendants failed to support Mr. Berry's efforts to properly serve his clients. (FAC at ¶¶ 38-44, 51). Defendants' efforts intensified over several months and culminated in a February 3, 2014 meeting orchestrated and engineered by Defendants, during which Defendant Spang, on behalf of all Defendants, humiliated and berated Mr. Berry, thereby forcing his resignation by threatening that he would either resign or be immediately fired. (FAC at ¶¶ 52-55).

Thereafter, to further damage Mr. Berry, Defendants defamed his professional reputation and good name by filing a false and defamatory statement about his departure with regulatory authorities, accusing him of unethical, unprofessional, and dishonest acts. Defendants knew that the false statement would damage Mr. Berry in his subsequent professional endeavors, but took

¹The Consumer Financial Protection Bureau Consent Order focuses on misconduct within Wells Fargo Bank, N.A. prompted by company policy to aggressively promote the "cross-selling" of banking products and services to existing customers.

the action specifically to promote Defendants' own interests in poaching Mr. Berry's client base, in punishing Mr. Berry for not willingly and aggressively participating in their illegal cross-selling scheme, and in terminating a longstanding payout arrangement that Defendants viewed as too lucrative for Mr. Berry. (FAC at ¶¶ 56-57). These illegal, false and deceptive practices by Defendants seriously harmed Plaintiff as was Defendants' specific and deliberate intent. (FAC at ¶¶ 64-67).

Defendants have filed this Motion to Dismiss or to Stay Pending Arbitration, as well as a separate motion for protective order and a stay to avoid and delay Defendants' obligations to comply with pending discovery requests. Defendants' arbitration demand is based upon what purports to be several 1994 Form U4 registration statements from the period when Mr. Berry was associated with Wheat, First Securities, Inc. ("Wheat First"), a now defunct firm. Although one of the forms indicates several possible arbitration fora for settling disputes between Mr. Berry and Wheat First, Defendants now rely upon these forms, seeking to compel arbitration before the Financial Industry Regulatory Authority, Inc. ("FINRA"), a forum that was not even mentioned in the documents and indeed did not even exist in 1994. Consequently, and for the reasons set forth hereinafter, Defendants' motion to compel arbitration fails as a matter of proof and law, and this Court should deny Defendants' motion, as well as its additional motion for a protective order and stay from pending discovery obligations, and order Defendants to (1) file any responsive pleadings within fifteen (15) days, (2) provide discovery responses to all outstanding discovery within ten (10) days, and otherwise (3) proceed with the litigation of this case in this Court.

ARGUMENT

I. Defendants' Motion to Compel Arbitration Must Fail.

"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 (Cl. 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 v. Bright Acres Assocs.*, 346 S.C. 580, 596–97, 553 S.E.2d 110, 118 (2001)). 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). Here, as will be discussed in detail *infra*, Defendants’ Motion to Stay Pending Arbitration is premised on obligations included in registration forms submitted to various self-regulatory organizations in which registration is being sought. Defendant Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, invokes the purported rights of a member of those organizations, thus, properly placing Defendants in the role of the drafters of the forms issued by such organizations. In contrast, Mr. Berry plainly did not draft the forms relied upon by Defendants and thus is entitled to the construction benefit of a non-drafting party. Consequently, any ambiguities in the Form U-4s must be construed against Defendants. *See McGill, supra*.

Ultimately, Defendants’ motion to compel arbitration fails because they have not met their burden to prove that the arbitration clause upon which they rely requires Mr. Berry to arbitrate these disputes with these Defendants in the forum preferred by Defendants.

A. **The documents Defendants rely upon to support their arbitration claim have not been properly authenticated and cannot be considered by this Court.**

As the proponent of arbitration, Defendants have the burden to establish the existence of an agreement to arbitrate these disputes 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.

Defendants assert that Mr. Berry's obligation to arbitrate the present case arises from a series of documents they attached as Exhibit 1 to their supporting memorandum: 1994 Uniform Application for Securities Industry Registration or Transfer ("Form U-4"). Before Defendants can rely upon these documents, they must be properly advanced and authenticated to the Court. 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). Where the proponent fails to provide a proper foundation for employment related records, they are properly excluded from evidence, even if they might have probative value and would therefore otherwise be relevant and admissible. *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.* This exclusion was upheld on appeal. *Id.*

Here, Defendants simply attached the Form U-4s as an exhibit 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 Beverly W. Jackson, who describes herself as a paralegal employed in the "Wells Fargo Law Department,"² Ms. Jackson does not claim to be a custodian of records for any of the corporate Defendants,³ nor does she

² It is unclear from Ms. Jackson's Affidavit which, if any, of the named Defendants is her employer.

³ Ms. Jackson does state that she "has access to certain personnel records of current and former employees of Wells Fargo & Company and related corporate entities," Jackson Aff. at ¶6, but does not state that she is the record custodian or that she can vouch for the authenticity of the Form U-4s.

make any claim that the Form U-4s attached as Exhibit 1 are true and correct copies of business records maintained by any specific Defendant. Like the inadequate sponsoring witness in *Connelly*, this testimony is insufficient to meet the foundation requirements imposed by Rule 901(a), SCRE. Without such testimony regarding the authenticity of the specific U-4s proffered by Defendants, Ms. Jackson's testimony is insufficient for this Court to admit and consider the U-4s. Because these regulatory statements constitute the only evidence submitted by Defendants in support of their motion to compel arbitration, their motion is unsupported by admissible evidence and therefore fails for that reason alone.

Further, since briefing on Defendants' motion to compel arbitration is closed, Defendants no longer have the opportunity to amend their filings to submit supplemental or additional documentation for the Court's consideration.

Defendants attempted to amend their motion to dismiss to add additional grounds, namely, grounds under Rule 12(b)(1) and (3), SCRCP; however, Defendants' amended motion was untimely and improper under Rule 15(a), SCRCP, as the motion to dismiss is not a "pleading" that is capable of amendment under that rule. Consequently, Defendants' assertion of a defense for improper venue under Rule 12(b)(3) has been waived under the plain language of Rule 12(h)(1), SCRCP, based on Defendants' failure to assert that defense in its original motion to dismiss.

B. Defendants are not parties to the 1994 Form U-4s and therefore lack standing to enforce the arbitration agreement contained therein.

Even if the registration statements relied upon by Defendants were properly before this Court, no Defendant has standing to enforce the arbitration clause and therefore none can benefit from their terms. Ultimately, arbitration is a matter of contract and a party cannot be forced to arbitrate a dispute if it has not agreed to do so." *AT&T Tech., Inc. v. Comm'ns Workers*, 475 U.S. 643, 648 (1986). The arbitration provision contained in the 1994 Form U-4s is limited to "any dispute, claim or controversy that may arise between *me and my firm*." Defs' Memo Ex. 1

(Emphasis added). The firm named in Item 4 of each of the 1994 Form U-4s⁴ is Wheat, First Securities, Inc. The Form U-4's 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.

This litigation does not involve any dispute, claim or controversy arising between Plaintiff and Wheat First. Mr. Berry asserts no claim against Wheat First, nor does he complain of any act or omission by Wheat First. Indeed, the Profit Formula Agreement at issue in this case was not between Mr. Berry and Wheat First, but originated with Wachovia Securities. *See* First Amended Complaint at ¶29.

Moreover, Wheat First no longer exists. Records from the South Carolina Secretary of State show that Wheat First changed its name to First Union Capital Markets Corporation on June 14, 1999. *See* Exh. 2 (Certified Copy⁵ of Application for an Amended Certificate of Authority by a Foreign Corporation to Transact Business in South Carolina, filed on June 28, 1999 with South Carolina Secretary of State). Thereafter, effective December 21, 1999, First Union Capital Markets Corporation was dissolved. Exh. 3 (Certified Copy of Application for Surrender of Authority to Do Business in the State of South Carolina, filed on December 21, 1999 with South Carolina Secretary of State). In short, the 1994 Form U-4s 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.

C. Any arbitration agreement, if any, arising from the 1994 Form U-4s 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 could enforce obligations created by those statements, if any,

⁴ Defendants' Exhibit 1 includes three Form U-4s, dated September 28, 1995, January 16, 1995, and November 5, 1994.

⁵ Certified copies of public records are self-authenticating. *See* Rule 902(2), SCRE.

the failure of a material term of that clause renders void any purported arbitration agreement. Thus, the registration statements do not support Defendants' demand that this matter be arbitrated before "FINRA," Defendants' industry created and thus preferred arbitration forum.

Although it is not apparent from Defendants' brief,⁶ *cf.* Defendants' Supporting Memorandum, *passim*, the 1994 Form U-4s offered as the only evidence of Mr. Berry's agreement to arbitrate do not specify "FINRA" as the arbitral forum. In fact, the Form U-4s do not name FINRA at all. Instead, the arbitration clause on those registration statements actually requires arbitration before "the organizations indicated in Item 10" of those forms. Item 10, which is found on the first page of each of the three Form U-4s, contains two sections, labeled SRO and Jurisdictions. In two of the three Form U-4s submitted by Defendants, no SRO is checked and therefore the attempted use by Defendants of these registration statements to force arbitration by Mr. Berry fail on account of the registration statement's failure to designate any arbitration forum, a material term of the arbitration clause advanced by Defendants.⁷

Assuming that SROs stands for Self-Regulatory Organizations (which meaning is the burden of Defendants to demonstrate to this Court), it appears that the earliest Form U-4 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 ("NYSE"), and the Philadelphia Stock Exchange ("PHLX"). The SRO section of Item 10 also includes a box labeled "Other (Specify)" which was left blank on the 1994 form signed by Mr. Berry.

⁶ Rather than notify the Court that such a material term as the forum selection was being altered, Defendants simply substituted the term "FINRA" for "NASD" without comment or explanation.

⁷ Defendants do not attempt to explain why the subsequently filed registration statements (which do not specify any SROs capable of conducting arbitration of disputes, and therefore fail to designate an arbitration venue at all) do not supersede the original registration statement.

Neither the American Stock Exchange nor the Philadelphia Stock Exchange currently exist. Moreover, and more important, Defendants offer no proof that any of the organizations specified on the 1994 Form U-4 currently offer arbitration services. This is because none of them do. Moreover, Item 10 of the Form U-4 is devoid of any language indicating that any arbitration obligation extends to successors and/or assigns of the specified entities. 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 their unavailability, Defendants do not seek to compel arbitration in any of the fora actually specified in the 1994 registration statement. Nor have Defendants made any attempt to prove the contents of the "the rules, constitutions or by-laws" of any of the SROs specified in Item 10. Rather, Defendants ignore the actual language of the 1994 arbitration clause altogether and instead simply substitute "FINRA" without 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 the absence of such proof, this Court cannot simply assume that this dispute might be "required to be arbitrated under" the absent rules, as required by the arbitration clause in the registration statement. Because none of the arbitral fora specifically selected in the 1994 registration statement still exist, a material term of the purported arbitration clause has failed and the purported agreement to arbitrate should also fail.

With regards to 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 registration statement, and because none of the chosen arbitral fora currently exist, the arbitration agreement is impossible to perform, and this Court should deny Defendants’ motion.

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 (“ARLA”) as the arbitral forum to resolve all related disputes arising from the decedent’s admission. *Id.* at 128, 678 S.E.2d at 437. Subsequent to the execution of the admissions agreement, the ARLA 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 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 Court agreed, finding that “the specific designation of the ARLA 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 South Carolina Supreme Court in *Grant* has been echoed in many other cases across jurisdictions. For example, in *In re Salomon Inc.*, the parties agreed to arbitrate any dispute pursuant to “the arbitration procedure prescribed in the Constitution and rules then obtaining of the NYSE.” 68 F.3d at 558. When the NYSE’s arbitration group declined to hear the dispute, the courts refused to substitute an alternate arbitrator. *Id.* at 561. In affirming this holding, the Second Circuit explicitly rejected the brokerage firm’s contention that the arbitration could be held in another arbitral forum, so long as the rules of the chosen forum govern the proceeding:

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

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

Likewise, the Sixth Circuit Court of Appeals in *Roney & Co. v. Goren*, 875 F.2d 1218, 1219 (6th Cir. 1989) affirmed a decision barring a customer from submitting her claim to arbitration before the NASD. 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 Form U-4s relied upon by Defendants indicate 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. 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). FINRA is not either NASD or NYSE (much less the ASE or the PHLX) and the parties no longer have access to the arbitration fora specified in the 1994 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). These specific self-regulatory organizations were selected due, in part, to their expertise in the securities arena, and, in part, to their experience handling the type of disputes contemplated in the arbitration clause.

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). In *Dean*, the Supreme Court found that a generic arbitral forum like the American Arbitration Association was essentially interchangeable, as it merely provided logistical support and procedures for arbitrator selection. In contrast, securities self-regulatory organizations 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.⁸

Consequently, just as in *Grant*, if Defendants are allowed to treat SRO arbitral fora as interchangeable, Mr. Berry will be deprived of the arbitral forum that was expressly designated in the 1994 registration statement submitted with Wheat First. Because none of the designated arbitration fora are available to resolve the present dispute, and because an arbitrator selection clause in the registration statement is a material term of the arbitration obligation, this Court should find that the arbitration clause is impossible to perform, and must deny the Defendants’ Motion to Compel Arbitration and Dismiss or Stay. *See In re Salomon Inc.*, 68 F.3d at 558 (“we cannot

⁸ Further evidence of the materiality of arbitration clause is its insertion in the section preceded by the ominous legend: “**THE APPLICANT MUST READ THE FOLLOWING VERY CAREFULLY.**” Defendants’ Exh. 1 at pp. 4, 8 & 12 (bold and capitalization in original).

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).

D. This Court has previously concluded that proof is required from the proponents of arbitration as to the relationship between NASD and FINRA.

Although Defendants simply assume that all securities arbitral fora may be treated as interchangeable, this Court has previously held that as the proponents of arbitration, it is Defendants' obligation to provide proof for their assumption. In the absence of evidence in the record before the Court as to the relationship between FINRA and NASD, it cannot be presumed that FINRA is either a new name for NASD or NYSE or that it is the successor to those named entities.

Very similar facts were presented to the South Carolina courts in an earlier case — namely, an attempt to compel arbitration before FINRA based on an arbitration clause which identified NASD as the chosen arbitral forum. In *Keller v. ING Financial Partners, Inc.*, Op. No. 2011-CP-23-0336 (S.C. Cir. Ct. filed June 2, 2011) (copy attached as Exh. 4), 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.

Exh. 4 at 2 & 6.

This ruling was affirmed on appeal in an unpublished opinion.⁹ *Keller v. ING Financial Partners, Inc.*, 2013 WL 8482243, Op. No. 2013-UP-014 (S.C. Ct. App. filed Jan. 9, 2013) (copy attached as Exh. 5). 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.

Exh. 5 at p. 1. The Court of Appeals further noted that the courts "cannot rewrite the parties' agreement to substitute FINRA for NASD." *Id.* at 2.

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 opinions of the Court of Appeals and this Court remained unchanged. *Keller v. ING Financial Partners, Inc.*, Op. No. 2015-MO-006 (S.C. filed Feb. 11, 2015) (copy attached as Exh. 6).

Keller demonstrates that South Carolina courts are careful to insure that arbitration proponents are put to their proof and that parties are not compelled to arbitrate before a forum to

⁹Mr. Berry and his counsel are conscious of Rule 268(d)(2), SCACR, regarding the reliance on unpublished opinions of the Court of Appeals and Supreme Court in non-related proceedings. The appellate opinions in *Keller* are not cited as binding precedent but rather as an indisputable fact about the subsequent procedural appellate history of the Court's prior order in *Keller*. This Court may take judicial notice of this fact and its files in the *Keller* case pursuant to Rule 201, SCRE.

which they did not agree. They cannot rely on mere assumptions as a basis for compelling arbitration. Thus, it should have been well-known to Defendants that they would be required to prove the existence of an agreement to arbitrate not just before any SRO forum, but before the SRO forum in which they seek to compel arbitration. Defendants have wholly failed to do so and their motion to compel arbitration should be denied.

E. The arbitration clause is also unenforceable because its enforcement would compel Plaintiff to arbitrate outrageous conduct by Defendants that clearly was not contemplated at the inception of the arbitration agreement.

Even if Defendants had proved the existence of an enforceable obligation requiring arbitration of ordinary contract disputes, Mr. Berry still would not be required to arbitrate this dispute, because it falls within the outrageous torts exception.

During his employment with Defendants, Mr. Berry was a fee-based broker and therefore stood in a fiduciary relationship to his clients. Accordingly, he was legally required to put his clients' interests above Defendants' interests. Nevertheless, Defendants terminated him because he refused their demands that he violate the law of South Carolina. Specifically, Plaintiff refused Defendants' demands that he "cross-sell" Wells Fargo Bank products to his clients, for whom he served as a fiduciary, products which his clients did not want or need and which were unsuitable for their investment portfolios. For example, after Plaintiff learned that his clients did not want or need home equity lines of credit and/or that these products were unsuitable for them, he declined to cross-sell such products to his clients and informed Defendants that such cross-selling would violate his duties under the securities laws and regulations, as well as the fiduciary duties he owed to his clients. As a result of Plaintiff's refusal to engage in improper cross-selling, which would have breached his fiduciary duties to his clients, as well as his obligations under the securities laws and regulations, Plaintiff was forced to resign.

The outrageous torts exception doctrine permits parties whose claims arise out of “outrageous” and unforeseeable tortious conduct by the opposing party to avoid arbitration, even where an otherwise enforceable arbitration agreement exists. *Aiken v. World Finance Corp. of South Carolina*, 373 S.C. 144, 644 S.E.2d 705 (2007), *reh’g denied*, (May 23, 2007).¹⁰ In *Aiken*, in order to apply for a loan with World Finance, the plaintiff was required to provide personal information to the company and, upon approval of such loan, he was required to enter into an arbitration agreement. *Id.* at 147, 644 S.E.2d at 706. Thereafter, several World Finance employees conspired to use the personal information the plaintiff and other clients provided to obtain sham loans and embezzle money for the employees’ personal benefit. *Id.* After discovering the misuse of his personal information, the plaintiff sued World Finance, seeking damages under various causes of action. Thereafter, World Finance moved to compel arbitration. *Id.* at 147, 644 S.E.2d at 707.

While recognizing the principle that both state and federal policy favor arbitration, the South Carolina Supreme Court noted that “arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit.” *Id.* at 149, 644 S.E.2d 708. Further, while acknowledging that there must be a “significant relationship” between a dispute between the parties to a contract and the underlying contract in order to implicate the contract’s arbitration clause, the court pronounced that it would “refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings.” *Id.* at 151, 644 S.E.2d 709. Accordingly, the court found that the theft of the plaintiff’s personal information by World Finance employees was outrageous

¹⁰ While *Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 13, 791 S.E.2d 128, 134 (2016), *reh’g denied*, (October 24, 2016) appears to question the viability of the “unforeseeable torts exception,” the court acknowledges that “the majority of this Court finds the outrageous torts exception to arbitration remains viable.”

conduct to which he could not have foreseen when he decided to conduct business with World Finance. *Id.* Therefore, the court held that “Aiken’s claims for unanticipated and unforeseeable tortious conduct by World Finance’s employees are not within the scope of the arbitration agreement with World Finance.” *Id.* at 151, 644 S.E.2d 709.

Likewise, at the time that Mr. Berry signed the Form U-4 registration with now-defunct Wheat First, he could not have anticipated or foreseen the outrageous torts Defendants would commit against him, including attempts to coerce him into breaking the law by violating his fiduciary duties to his clients, as well as other securities laws and regulations. Indeed, this is the essence of a claim for wrongful termination in violation of public policy. *See Barron v. Labor Finders of South Carolina*, 393 S.C. 609, 613, 713 S.E.2d 634, 636 (2011) (citing *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C.219, 337 S.E.2d 213 (1985) (employer cannot require employee to violate the law)). Moreover, the determination of what constitutes public policy is a question of law for the courts to decide. *Barron*, 393 S.C. at 617, 713 S.E.2d at 638 (citing *Citizens’ Bank v. Heyward*, 135 S.C. 190, 133 S.E. 709, 713 (1925)). “The primary source of the declaration of public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration.” *Id.* Such questions of public policy is too important to be delegated to private arbitrators. Accordingly, because Mr. Berry clearly could not have contemplated such outrageous tortious conduct at the time he signed the registration statement and because the public policy of the State must be decided by the Courts and not private arbitrators, his claims are not within the scope of any purported arbitration clause.

II. Defendants’ Motion to Dismiss Should Be Denied Because the Amended Complaint provides Defendants with adequate notice of their wrongdoing.

Defendants’ further assertion that the Amended Complaint should be dismissed for failure to alleged facts that would entitle Mr. Berry to relief against Defendants is without merit and should be 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. 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’ Rule 12(b)(6), SCRCP argument is conclusory and unserious in the face of Mr. Berry’s forty-four (44) page, detailed 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. Therefore, as an initial

matter, because Defendants' motion and accompanying memorandum does not meet its very low burden of asserting a violation of Rule 12(b)(6), SCRCR, the motion fails. *See, e.g., Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (finding an argument advanced through conclusory statements with no argument or supporting authority abandoned); *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 298, 519 S.E.2d 583, 600 (Ct. App. 1999) (declaring that conclusory arguments may be treated as abandoned). Viewing the asserted facts as true and in the light most favorable to Mr. Berry, as this Court is required to in considering a Rule 12(b)(6) motion, the Amended Complaint greatly exceeds the "facts sufficient" standard of a "short and plain statement" of a well-pled complaint.

Rather than argue against the facts alleged in the Amended Complaint, Defendants instead invoke federal case law for the proposition that Mr. Berry's designation or grouping of certain Defendants collectively, where the facts and circumstances demonstrate collective or similar action by multiple Defendants, is somehow improper and prevents Defendants from discerning "which defendant or defendants are alleged to have committed which wrong." Defs' Memo at 10. Defendants cite no South Carolina authority for this proposition and Mr. Berry is unaware of any such case law. But even the single unpublished United States District Court case from the Northern Division of the Eastern District of Michigan, *see Washington v. Thomas*, 2009 WL 1424193 (E.D. Mich. May 18, 2009), which deals with a *pro se* criminal civil rights complaint (consisting of a single paragraph of facts and allegations of wrongdoing and serving as the only authority cited by Defendants for this proposition), does not support the assertion that Mr. Berry's Amended Complaint fails to meet the well-pled complaint standard under the rules. Indeed, Defendants' reference to the federal pleading standard is curious, as the "notice pleading" standard in federal court is arguably lower than the "facts sufficient" standard required under the South Carolina rules.

"Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Mr. Berry's allegations are based on a common factual scenario, and the First Amended Complaint has included a short and plain statement of the legal basis for his claims under those common facts. Where the Amended Complaint refers to several or all of the Defendants collectively based on a defined term, all Defendants are thereby notified that each Defendant referred to either individually or collectively is alleged to be liable for the allegations so-alleged.¹¹ Such an accepted pleading practice and style provides notice of key facts and specific allegations to support each cause of action. Defendants' assertion that Mr. Berry should have to list each Defendant individually for each allegation of wrongdoing is absurd and is calculated to create a pleading burden not required by the SCRCF.

Moreover, Defendants' assertion that Mr. Berry failed to allege any facts pertaining to Wells Fargo & Company or Wells Fargo Bank, N.A. ("Corporation" and "Bank," respectively) is a mischaracterization of the Amended Complaint, as evidenced by simple reference to the Fifth Cause of Action (South Carolina Unfair Trade Practices Act), *see* Am. Cmplt. at ¶¶33-44, 101, and Eighth Cause of Action (Intentional Interference with Prospective Contractual Relations), *see*

¹¹ This is the case when Mr. Berry alleges misconduct of Defendants collectively, or smaller subsets thereof, like the WFA Defendants, which Defendants alternatively criticize in the memorandum, *see* Defs' Memo at 10-11. Further, contrary to Defendants' assertion, Mr. Berry is not required to put forward evidence in his pleading to support the allegation of parent-subsidary liability, which is subject to evidentiary proof at trial, but only facts supporting the claim of wrongdoing. *Stroud v. Riddle*, 260 S.C. 99, 194 S.E.2d 235 (1973) (holding that a complaint is required "to plead the ultimate facts which will be proved at trial, not the evidence which will be used to prove those facts."); *see also Carroll v. Smith-Henry, Inc.*, 281 S.C. 104, 106, 313 S.E.2d 649, 651 (Ct. App. 1984) ("While the pleadings did not expressly present the issue of a parent corporation's liability for its subsidiary, the issue was implicitly suggested by the pleadings and expressly raised by the evidence.") (citing *Baker v. Weaver*, 279 S.C. 479, 484, 309 S.E.2d 770, 773 (Ct. App. 1983) (Cureton, J., concurring)).

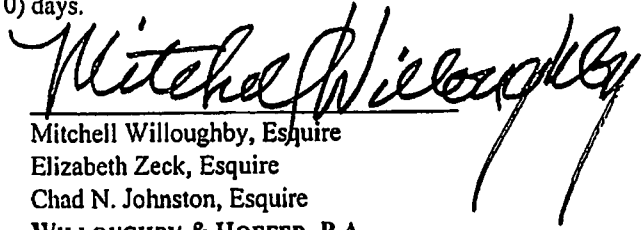
Am. Cmplt. at ¶¶59, 127-136, which are addressed to the improper conduct of all Defendants, including the Corporation and Bank. These allegations include the encouragement and pressuring by the Corporation and Bank on Mr. Berry and other employees to cross-sell Wells Fargo products to his fiduciary clients, regardless of the clients' best interests, the targeting of and desire to terminate Mr. Berry's profit formula agreement, which Defendants had concluded was favorable to Mr. Berry, and the placement of unfair, deceptive, false, and defamatory comments on Mr. Berry's official record with the intent to discredit him going forward which would benefit the Corporation and the Bank in future earnings and competition to provide services to clients.. These allegations demonstrate a coordinated top-down corporate structure that sought to deliberately influence Mr. Berry's fiduciary relationships with his clients and then targeted and punished Mr. Berry for failing to comply with the Corporation's and Bank's money-making unlawful scheme.

In short, facts sufficient were pled against all Defendants, including the Corporation and the Bank, and the Amended Complaint puts each of the Defendants on notice of the allegations of wrongdoing advanced by Mr. Berry. Defendants' motion to dismiss should therefore be denied.

CONCLUSION

Defendants' Motion to Stay Pending Arbitration must be denied as they have failed to proffer admissible evidence to the Court sufficient to prove the existence of an arbitration agreement requiring Plaintiff Berry to arbitrate this dispute with these Defendants before Defendants' preferred industry arbitral forum. Defendants' Motion to Dismiss should also be denied because the First Amended Complaint more than adequately satisfies the pleading requirements of the South Carolina Rules of Civil Procedure. Mr. Berry therefore respectfully requests this Court to deny Defendants' Motion to Stay/Compel Pending Arbitration, the alternative request for dismissal, as well as Defendants' Motion for Protective Order/Stay of Discovery. Finally, Mr. Berry respectfully requests that the Court order the Defendants to file

their responsive pleadings within fifteen (15) days as required by Rule 15, SCRPC, and to respond to all outstanding discovery requests within ten (10) days.



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Attorneys for Robert F. Berry

This 1st day of June 2017
Columbia, South Carolina

EXHIBIT 1

**UNITED STATES OF AMERICA
CONSUMER FINANCIAL PROTECTION BUREAU**

ADMINISTRATIVE PROCEEDING

2016-CFPB-0015

In the Matter of:

WELLS FARGO BANK, N.A.

CONSENT ORDER

The Consumer Financial Protection Bureau (Bureau) has reviewed the sales practices of Wells Fargo Bank, N.A. (Respondent, as defined below) and determined that it has engaged in the following acts and practices: (1) opened unauthorized deposit accounts for existing customers and transferred funds to those accounts from their owners' other accounts, all without their customers' knowledge or consent; (2) submitted applications for credit cards in consumers' names using consumers' information without their knowledge or consent; (3) enrolled consumers in online-banking services that they did not request; and (4) ordered and activated debit cards using consumers' information without their knowledge or consent. The Bureau has concluded that such acts violate §§ 1031 and 1036(a)(1)(B) of the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. §§ 5531 and 5536(a)(1)(B). Under §§ 1053 and 1055 of CFPA, 12 U.S.C. §§ 5563, 5565, the Bureau issues this Consent Order (Consent Order).

I
Jurisdiction

1. The Bureau has jurisdiction over this matter under §§ 1053 and 1055 of the CFPA, 12 U.S.C. §§ 5563, 5565.

II
Stipulation

2. Respondent has executed a "Stipulation and Consent to the Issuance of a Consent Order" (Stipulation), which is incorporated by reference and is accepted by the Bureau. By this Stipulation, Respondent has consented to the issuance of this Consent Order by the Bureau under §§ 1053 and 1055 of the CFPA, 12 U.S.C. §§ 5563, 5565, without admitting or denying the findings of facts and conclusions of law, except that Respondent admits the facts necessary to establish the Bureau's jurisdiction over Respondent and the subject matter of this action.

III
Definitions

3. The following definitions apply to this Consent Order:
- a. **"Affected Consumers"** means any consumer subjected to any of the Improper Sales Practices.
 - b. **"Board"** means Respondent's duly-elected and acting Board of Directors.
 - c. **"California Enforcement Action"** means the lawsuit styled *People v. Wells Fargo & Co., et al.*, Los Angeles Superior Court, Case No. BC580778, filed by the Office of the Los Angeles City Attorney.
 - d. **"Community Bank Regional Bank Branch Network"** means the Respondent's retail-branch operations within Respondent's Regional Bank group.

e. **"Effective Date"** means the date on which this Order is issued.

f. **"Improper Sales Practices"** means any of the following in the Community Bank Regional Bank Branch Network:

- (1) opening any account without the consumer's consent;
- (2) transferring funds between a consumer's accounts without the consumer's consent;
- (3) applying for any credit card without the consumer's consent;
- (4) issuing any debit card without the consumer's consent; and
- (5) enrolling any consumer in online-banking services without the consumer's consent.

g. **"Los Angeles City Attorney"** means the Office of the Los Angeles City Attorney.

h. **"Regional Director"** means the Regional Director for the West Region for the Office of Supervision for the Consumer Financial Protection Bureau, or his/her delegate.

i. **"Related Consumer Action"** means a private action by or on behalf of one or more consumers or an enforcement action by a governmental agency other than the California Enforcement Action, brought against Respondent based on substantially the same facts as described in Section IV of this Consent Order.

j. **"Relevant Period"** includes the period from January 1, 2011, to the Effective Date.

k. **"Respondent"** means Wells Fargo Bank, N.A. and its successors and assigns.

IV
Bureau Findings and Conclusions

The Bureau finds the following:

4. Respondent is a national bank headquartered in Sioux Falls, South Dakota. Respondent is an insured depository institution with assets greater than \$10 billion within the meaning of 12 U.S.C. § 5515(a).
5. Respondent is a “covered person” under 12 U.S.C. § 5481(6).
6. During the Relevant Period, Respondent offered a broad array of consumer financial products and services, including mortgages, savings and checking accounts, credit cards, debit and ATM cards, and online-banking services.
7. Respondent sought to distinguish itself in the marketplace as a leader in “cross-selling” banking products and services to its existing customers.
8. Respondent set sales goals and implemented sales incentives, including an incentive-compensation program, in part to increase the number of banking products and services that its employees sold to its customers.
9. Thousands of Respondent’s employees engaged in Improper Sales Practices to satisfy sales goals and earn financial rewards under Respondent’s incentive-compensation program. During the Relevant Period, Respondent terminated roughly 5,300 employees for engaging in Improper Sales Practices.
10. Respondent’s employees engaged in “simulated funding.” To qualify for incentives that rewarded bankers for opening new accounts that were funded shortly after opening, Respondent’s employees opened deposit accounts without consumers’ knowledge or consent and then transferred funds from consumers’ authorized accounts

to temporarily fund the unauthorized accounts in a manner sufficient for the employee to obtain credit under the incentive-compensation program.

11. Respondent's employees submitted applications for and obtained credit cards for consumers without the consumers' knowledge or consent.

12. Respondent's employees used email addresses not belonging to consumers to enroll consumers in online-banking services without their knowledge or consent.

13. Respondent's employees requested debit cards and created personal identification numbers (PINs) to activate them without the consumer's knowledge or consent.

14. During the Relevant Period, Respondent's employees opened hundreds of thousands of unauthorized deposit accounts and applied for tens of thousands of credit cards for consumers without consumers' knowledge or consent.

15. Respondent has performed an analysis to assess the scope of Improper Sales Practices that occurred between May 2011 and July 2015, including the number of potential instances of such practices.

**Findings and Conclusions as to
Unauthorized Deposit Accounts & Simulated Funding**

16. Respondent's analysis concluded that its employees opened 1,534,280 deposit accounts that may not have been authorized and that may have been funded through simulated funding, or transferring funds from consumers' existing accounts without their knowledge or consent. That analysis determined that roughly 85,000 of those accounts incurred about \$2 million in fees, which Respondent is in the process of refunding. The fees included overdraft fees on linked accounts the consumers already

had, monthly service fees imposed for failure to keep a minimum balance in the unauthorized account, and other fees.

17. Section 1036(a)(1)(B) of the CFPA prohibits “unfair” acts or practices. 12 U.S.C. § 5536(a)(1)(B). An act or practice is unfair if it causes or is likely to cause consumers substantial injury that is not reasonably avoidable and is not outweighed by countervailing benefits to consumers or to competition. 12 U.S.C. § 5531(c)(1).

18. By opening unauthorized deposit accounts and engaging in acts of simulated funding, Respondent caused and was likely to cause substantial injury to consumers that was not reasonably avoidable, because it occurred without consumers’ knowledge, and was not outweighed by countervailing benefits to consumers or to competition.

19. Section 1036(a)(1)(B) of the CFPA prohibits “abusive” acts or practices. 12 U.S.C. § 5536(a)(1)(B). An act or practice is abusive if it materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service. 12 U.S.C. § 5531(d)(1). Additionally, an act or practice is abusive if it takes unreasonable advantage of the inability of the consumer to protect his or her interests in selecting or using a consumer financial product or service. 12 U.S.C. § 5531(d)(2)(B).

20. Respondent’s acts of opening unauthorized deposit accounts and engaging in simulated funding materially interfered with the ability of consumers to understand a term or condition of a consumer financial product or service, as they had no or limited knowledge of those terms and conditions, including associated fees.

21. Additionally, Respondent’s acts of opening unauthorized deposit accounts and engaging in simulated funding took unreasonable advantage of consumers’ inability

to protect their interests in selecting or using consumer financial products or services, including interests in having an account opened only after affirmative agreement, protecting themselves from security and other risks, and avoiding associated fees.

22. Therefore, Respondent engaged in “unfair” and “abusive” acts or practices that violate §§ 1031(c)(1), (d)(1), (d)(2)(B), and 1036(a)(1)(B) of the CFPA. 12 U.S.C. §§ 5531(c)(1), (d)(1), (d)(2)(B), 5536(a)(1)(B).

Findings and Conclusions as to Unauthorized Credit Cards

23. Respondent’s analysis concluded that its employees submitted applications for 565,443 credit-card accounts that may not have been authorized by using consumers’ information without their knowledge or consent. That analysis determined that roughly 14,000 of those accounts incurred \$403,145 in fees, which Respondent is in the process of refunding. Fees incurred by consumers on such accounts included annual fees and overdraft-protection fees, as well as associated finance or interest charges and other late fees.

24. Section 1036(a)(1)(B) of the CFPA prohibits “unfair” acts or practices. 12 U.S.C. § 5536(a)(1)(B). An act or practice is unfair if it causes or is likely to cause consumers substantial injury that is not reasonably avoidable and is not outweighed by countervailing benefits to consumers or to competition. 12 U.S.C. § 5531(c)(1).

25. By applying for and opening credit-card accounts using consumers’ information without their knowledge or consent, Respondent caused and was likely to cause substantial injury that was not reasonably avoidable, because it occurred without consumers’ knowledge, and was not outweighed by countervailing benefits to consumers or competition.

26. Section 1036(a)(1)(B) of the CFPB prohibits “abusive” acts or practices. 12 U.S.C. § 5536(a)(1)(B). An act or practice is abusive if it materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service. 12 U.S.C. § 5531(d)(1). Additionally, an act or practice is abusive if it takes unreasonable advantage of the consumer’s inability to protect his or her interests in selecting or using a consumer financial product or service. 12 U.S.C. § 5531(d)(2)(B).

27. Respondent’s acts of opening credit-card accounts using consumers’ information without their knowledge or consent materially interfered with the ability of consumers to understand a term or condition of a consumer financial product or service, as they had no or limited knowledge of those terms and conditions, including associated fees.

28. Additionally, Respondent’s acts of opening credit-card accounts using consumers’ information without their knowledge or consent took unreasonable advantage of the consumers’ inability to protect their interests in selecting or using a consumer financial product or service.

29. Therefore, Respondent engaged in “unfair” and “abusive” acts or practices that violate §§ 1031(c)(1), (d)(1), (d)(2)(B), and 1036(a)(1)(B) of the CFPB. 12 U.S.C. §§ 5531(c)(1), (d)(1), (d)(2)(B), 5536(a)(1)(B).

**Findings and Conclusions as to
Unauthorized Enrollment into Online-Banking Services**

30. During the Relevant Period, Respondent’s employees used email addresses not belonging to consumers to enroll consumers in online-banking services without their knowledge or consent.

31. Section 1036(a)(1)(B) of the CFPA prohibits "abusive" acts or practices. 12 U.S.C. § 5536(a)(1)(B). An act or practice is abusive if it takes unreasonable advantage of the consumer's inability to protect his or her interests in selecting or using a consumer financial product or service. 12 U.S.C. § 5531(d)(2)(B).

32. Respondent's acts of enrolling consumers in online-banking services without their knowledge or consent took unreasonable advantage of consumers' inability to protect their interests in selecting or using a consumer financial product or service, including interests in having these products or services activated only after affirmative agreement and protecting themselves from security and other risks.

33. Therefore, Respondent engaged in "abusive" acts or practices that violate §§ 1031(d)(2)(B) and 1036(a)(1)(B) of the CFPA. 12 U.S.C. §§ 5531(d)(2)(B), 5536(a)(1)(B).

**Findings and Conclusions
as to Unauthorized Debit Cards**

34. During the relevant period, Respondent's employees requested debit cards and created PINs to activate them without consumers' knowledge or consent.

35. Section 1036(a)(1)(B) of the CFPA prohibits "abusive" acts or practices. 12 U.S.C. § 5536(a)(1)(B). An act or practice is abusive if it takes unreasonable advantage of the consumer's inability to protect his or her interests in selecting or using a consumer financial product or service. 12 U.S.C. § 5531(d)(2)(B).

36. Respondent's acts of issuing debit cards to consumers without their knowledge or consent took unreasonable advantage of consumers' inability to protect their interests in selecting or using a consumer financial product or service. 12 U.S.C. § 5531(d)(2)(B).

37. Therefore, Respondent engaged in “abusive” acts that violate §§ 1031(d)(2)(B) and 1036(a)(1)(B) of the CFPB, 12 U.S.C. §§ 5531(d)(2)(B), 5536(a)(1)(B).

ORDER

V

Conduct Provisions

IT IS ORDERED, under §§ 1053 and 1055 of the CFPB, that:

38. Respondent and its officers, agents, servants, employees, and attorneys who have actual notice of this Consent Order, whether acting directly or indirectly, may not violate §§ 1031 and 1036 of the CFPB, 12 U.S.C. §§ 5531, 5536, by engaging in Improper Sales Practices.

VI

Independent Consultant’s Report and Compliance Plan

IT IS FURTHER ORDERED that:

39. Within 45 days of the Effective Date, Respondent must select an independent consultant with specialized experience in consumer-finance-compliance issues to conduct an independent review of Respondent’s sales practices within the Community Bank Regional Bank Branch Network related to deposit accounts, credit-card accounts, unsecured lines of credit, and related products and services (Independent Consultant’s Review). Respondent must submit the name of the independent consultant to the Regional Director for non-objection. Upon receipt of non-objection from the Regional Director, the Bank must retain the independent consultant. The Independent Consultant’s Review must assess whether Respondent’s current policies and procedures are reasonably designed to ensure that Respondent’s sales practices comply with all applicable Federal consumer financial laws as defined in 12 U.S.C. § 5481(14), and that Respondent’s employees do not engage in Improper Sales Practices.

40. The Independent Consultant's Review must include but will not be limited to:

- a. whether Respondent's employees are required to undergo training reasonably designed to prevent Improper Sales Practices and other sales-integrity violations; whether such training is adequate, complete, and timely updated, provided when employees join Respondent, and repeated at sufficient recurring intervals during their employment to reinforce such training; whether training records are complete, accurate and adequate; and whether employees are informed of an obligation to report all sales-integrity issues internally through an "ethics hotline" or similar mechanism;
- b. whether Respondent's monitoring policies and procedures ensure that Respondent monitors employees' sales practices proactively, and that Respondent devotes sufficient personnel and resources to monitor those practices appropriately;
- c. whether Respondent has adequate policies and procedures for (i) receiving, retaining, and addressing consumer inquiries or complaints; (ii) receiving, retaining, and addressing employee allegations of Improper Sales Practices or any other allegations of sales-integrity violations; (iii) tracking and addressing indicators of potential Improper Sales Practices or any other sales-integrity violations; and (iv) identifying and remediating consumers for Improper Sales Practices or other sales-integrity violations identified after the Effective Date, as well as for correcting any related systemic issues identified after the Effective Date;
- d. whether Respondent's policies and procedures related to sales of deposit accounts, credit cards, unsecured lines of credit, and related products and services are reasonably designed to ensure consumer consent is obtained before any such product is sold or issued to a consumer. The Independent Consultant's Review

must include, but not be limited to, whether Respondent has adequate policies and procedures for capturing and retaining consumer signatures and other evidence of consent for such products and services, for providing a grace period before assessing fees on any deposit account, and for closing accounts in which there is no customer-initiated activity during the grace period without assessing fees; and

e. whether Respondent's performance-management and sales goals for its employees are consistent with the objective of preventing Improper Sales Practices and other sales-integrity violations.

41. Within 180 days of the retention of the independent consultant, the independent consultant must prepare a written report (Independent Consultant's Report) detailing the findings of the review and provide the Independent Consultant's Report to the Board or a committee thereof.

42. Within 90 days of receiving the Independent Consultant's Report, the Board or a committee thereof must:

a. In consultation with the independent consultant, develop a plan (Compliance Plan) to: (i) correct any deficiencies identified, and (ii) implement any recommendations or explain in writing why a particular recommendation is not being implemented; and

b. submit the Independent Consultant's Report and the Compliance Plan to the Regional Director.

43. The Regional Director may, in his or her discretion, make a determination of non-objection to the Compliance Plan or direct Respondent to revise it. If the Regional Director directs Respondent to revise the Compliance Plan, the Board or a committee thereof must make the requested revisions to the Compliance Plan, have the

independent consultant review the revised Compliance Plan for adequacy, accuracy, effectiveness, and completeness, and resubmit the revised Compliance Plan and the independent consultant's review of the revised Compliance Plan to the Regional Director within 60 days of the date that the Regional Director directs the Company to revise the Compliance Plan. The Regional Director may, in his or her discretion, consult with the Los Angeles City Attorney in arriving at a determination of non-objection to the Compliance Plan or direction to Respondent to revise the Compliance Plan.

44. After receiving notification that the Regional Director has made a determination of non-objection to the Compliance Plan, Respondent must implement and adhere to the steps, recommendations, deadlines, and timeframes outlined in the Compliance Plan and have the independent consultant review and assess compliance with the Compliance Plan and validate that the Compliance Plan has been properly executed; the results of such review should be submitted to the Regional Director within 30 days after completion.

VII

Role of the Board

IT IS FURTHER ORDERED that:

45. The Board or a committee thereof must review all submissions (including plans, reports, programs, policies, and procedures) required by this Consent Order before submission to the Bureau.

46. Although this Consent Order requires Respondent to submit certain documents for the review or non-objection by the Regional Director, the Board will have the ultimate responsibility for proper and sound management of Respondent and for

ensuring that Respondent complies with Federal consumer financial law and this Consent Order.

47. In each instance that this Consent Order requires the Board or a committee thereof to ensure adherence to, or perform certain obligations of Respondent, the Board or a committee thereof must:

- a. authorize whatever actions are necessary for Respondent to fully comply with the Consent Order;
- b. require timely reporting by management to the Board or a committee thereof on the status of compliance obligations; and
- c. require timely and appropriate corrective action to remedy any material non-compliance with any failures to comply with directives from the Board or a committee thereof related to this Section.

VIII Order to Pay Redress

IT IS FURTHER ORDERED that:

48. Respondent has retained the services of an independent third-party consulting firm (which is not the independent consultant referred to in Section VI) to identify consumers who have incurred fees or other charges as a result of Improper Sales Practices.

49. Within 10 days of the Effective Date, Respondent must reserve or deposit into a segregated deposit account an amount not less than \$5 million, for the purpose of providing redress to Affected Consumers as required by this Section.

50. Within 90 days of the Effective Date, Respondent must submit to the Regional Director for review and non-objection the comprehensive written plan for

providing redress consistent with this Consent Order (Redress Plan). The Regional Director may, in his or her discretion, make a determination of non-objection to the Redress Plan or direct Respondent to revise it. If the Regional Director directs Respondent to revise the Redress Plan, Respondent must make the revisions and resubmit the Redress Plan to the Regional Director within 45 days. After receiving notification that the Regional Director has made a determination of non-objection to the Redress Plan, Respondent must implement and adhere to the steps, recommendations, deadlines, and timeframes outlined in the Redress Plan.

51. The Redress Plan must:

a. identify all Affected Consumers, except insofar as it is impracticable to do so, as well as the types and amounts of any fees or charges incurred by Affected Consumers as a result of the Improper Sales Practices, and state the means by which Affected Consumers have been identified and by which the fees or charges they incurred have been calculated;

b. describe procedures by which Respondent will notify Affected Consumers who were subject to any of the Improper Sales Practices described in paragraph 3.f of this Order, including the form of the notification such consumers will receive;

c. describe the process for providing redress to Affected Consumers and identify the dollar amount of redress for each category of Affected Consumers;

d. detail how Respondent will locate Affected Consumers for payment of redress, and the steps Respondent will take with respect to consumers whose redress payments are returned as undeliverable or not cashed within a prescribed time period;

e. state the manner in which redress will be provided to each such Affected Consumer, and the form of redress; and

f. provide the form of the letter or notice that will be sent to such Affected Consumers notifying them of the redress.

52. Within 120 days after completing the Redress Plan, Respondent's Internal Audit department must review and assess compliance with the terms of the Redress Plan (Redress Plan Review) and validate that the Redress Plan has been properly executed.

53. Within 30 days after completion of the Redress Plan Review, Respondent must prepare and submit to the Regional Director a report summarizing the results of the Redress Plan Review.

54. After completing the Redress Plan, if the amount of redress provided to Affected Consumers is less than \$5 million, Respondent may recoup any remaining funds up to the amount Respondent paid to Affected Consumers before the submission of the Redress Plan as redress for fees or charges those Affected Consumers incurred as a result of the Improper Sales Practices. Respondent must, within 30 days of the completion of the Redress Plan, pay to the Bureau, by wire transfer to the Bureau or to the Bureau's agent and according to the Bureau's wiring instructions, any remaining funds not recouped by Respondent under this paragraph.

55. The Bureau may use these remaining funds to pay additional redress to Affected Consumers. Upon receiving a written request from Respondent, the Bureau may provide Respondent with information concerning additional redress. If the Bureau determines, in its sole discretion, that additional redress is wholly or partially impracticable or otherwise inappropriate, or if funds remain after the additional redress

is completed, the Bureau will deposit any remaining funds in the U.S. Treasury as disgorgement. Respondent will have no right to challenge any actions that the Bureau or its representatives may take under this Section.

56. Respondent may not condition the payment of any redress to any Affected Consumer under this Order on that Affected Consumer waiving any right.

IX
Order to Pay Civil Money Penalties

IT IS FURTHER ORDERED that:

57. Under § 1055(c) of the CFPB, 12 U.S.C. § 5565(c), by reason of the violations of law described in Section IV of this Consent Order, and taking into account the factors in 12 U.S.C. § 5565(c)(3), Respondent must pay a civil money penalty of \$100 million to the Bureau.

58. Within 10 days of the Effective Date, Respondent must pay the civil money penalty by wire transfer to the Bureau or to the Bureau's agent in compliance with the Bureau's wiring instructions.

59. The civil money penalty paid under this Consent Order will be deposited in the Civil Penalty Fund of the Bureau as required by § 1017(d) of the CFPB, 12 U.S.C. § 5497(d).

60. Respondent must treat the civil money penalty paid under this Consent Order as a penalty paid to the government for all purposes. Regardless of how the Bureau ultimately uses those funds, Respondent may not:

a. claim, assert, or apply for a tax deduction, tax credit, or any other tax benefit for any civil money penalty paid under this Consent Order; or

b. seek or accept, directly or indirectly, reimbursement or indemnification from any source, including but not limited to payment made under any insurance policy, with regard to any civil money penalty paid under this Consent Order.

61. To preserve the deterrent effect of any civil money penalty in the California Enforcement Action or any Related Consumer Action, Respondent may not argue that Respondent is entitled to, nor may Respondent benefit by, any offset or reduction of any compensatory monetary remedies imposed in the California Enforcement Action or any Related Consumer Action because of the civil money penalty paid in this action (Penalty Offset). If the court in the California Enforcement Action or any Related Consumer Action grants such a Penalty Offset, Respondent must, within 30 days after entry of a final order granting the Penalty Offset, notify the Bureau, and pay the amount of the Penalty Offset to the U.S. Treasury. Such a payment will not be considered an additional civil money penalty and will not change the amount of the civil money penalty imposed in this action.

X
Additional Monetary Provisions

IT IS FURTHER ORDERED that:

62. In the event of any default on Respondent's obligations to make payment under this Consent Order, interest, computed under 28 U.S.C. § 1961, as amended, will accrue on any outstanding amounts not paid from the date of default to the date of payment, and will immediately become due and payable.

63. Respondent must relinquish all dominion, control, and title to the funds paid to the fullest extent permitted by law and no part of the funds may be returned to Respondent.

64. Under 31 U.S.C. § 7701, Respondent, unless it already has done so, must furnish to the Bureau its taxpayer identifying numbers, which may be used for purposes of collecting and reporting on any delinquent amount arising out of this Consent Order.

65. Within 30 days of the entry of a final judgment, consent order, or settlement in the California Enforcement Action or any Related Consumer Action, Respondent must notify the Regional Director of the final judgment, consent order, or settlement in writing. That notification must indicate the amount of redress, if any, that Respondent paid or is required to pay to consumers and describe the consumers or classes of consumers to whom that redress has been or will be paid.

XI Reporting Requirements

IT IS FURTHER ORDERED that:

66. Respondent must notify the Bureau of any development that may affect compliance obligations arising under this Consent Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor company; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Consent Order; the filing of any bankruptcy or insolvency proceeding by or against Respondent; or a change in Respondent's name or address. Respondent must provide this notice, if practicable, at least 30 days before the development, but in any case no later than 14 days after the development.

67. Within 7 days of the Effective Date, Respondent must designate at least one telephone number and email, physical, and postal address as points of contact, which the Bureau may use to communicate with Respondent.

68. Respondent must report any change in the information required to be submitted under Paragraph 67 at least 30 days before the change or as soon as practicable after the learning about the change, whichever is sooner.

69. Within 90 days of the Effective Date, and again at least semi-annually until the actions under this Consent Order have been completed, Respondent must submit to the Regional Director an accurate written compliance progress report (Compliance Report) that has been approved by the Board or a committee thereof, which, at a minimum:

- a. describes in detail the manner and form in which Respondent has complied with this Order;
- b. separately lists each corrective action required by this Consent Order, the Compliance Plan, and the Redress Plan;
- c. Describes the current status of each corrective action taken and the required, actual, and anticipated completion date for each corrective action; and
- d. attaches a copy of each Order Acknowledgment obtained under Section XII, unless previously submitted to the Bureau.

XII Order Distribution and Acknowledgment

IT IS FURTHER ORDERED that,

70. Within 30 days of the Effective Date, Respondent must deliver a copy of this Consent Order to each of its board members and executive officers, as well as to any managers, employees, or other agents and representatives who have responsibilities related to the subject matter of the Consent Order.

71. For 5 years from the Effective Date, Respondent must deliver a copy of this Consent Order to any business entity resulting from any change in structure referred to in Section XI, any future board members and executive officers, as well as to any managers, employees, or other agents and representatives who will have responsibilities related to the subject matter of this Consent Order before they assume their responsibilities.

72. Respondent must secure a signed and dated statement acknowledging receipt of a copy of this Consent Order, ensuring that any electronic signatures comply with the requirements of the E-Sign Act, 15 U.S.C. § 7001 et seq., within 30 days of delivery, from all persons receiving a copy of this Consent Order under this Section.

XIII Recordkeeping

IT IS FURTHER ORDERED that

73. Respondent must create or, if already created, retain for at least 5 years from the Effective Date the following business records:

a. all documents and records necessary to demonstrate full compliance with each provision of this Consent Order, including all submissions to the Bureau.

b. all documents and records pertaining to the Redress Plan, described in Section VIII above.

74. Respondent must retain the documents identified in Paragraph 73 for the duration of the Consent Order.

75. Respondent must make the documents identified in Paragraph 73 available to the Bureau upon the Bureau's request.

**XIV
Notices**

IT IS FURTHER ORDERED that:

76. Unless otherwise directed in writing by the Bureau, Respondent must provide all submissions, requests, communications, or other documents relating to this Consent Order in writing, with the subject line, "In re Wells Fargo Bank, N.A., File No. 2016-CFPB-0015," and send them as follows:

- a. via email to WestRegion@cfpb.gov; and
- b. via overnight courier (not the U.S. Postal Service) as follows:

Regional Director, CFPB West Region, 301 Howard Street, 12th Floor, San Francisco, CA 94105.

**XV
Cooperation with the Bureau**

IT IS FURTHER ORDERED that:

77. Respondent must cooperate fully to help the Bureau determine the identity and location of, and the amount of injury sustained by, each Affected Consumer. Respondent must provide such information in its or its agents' possession or control within 14 days of receiving a written request from the Bureau.

78. Respondent must cooperate fully with the Bureau in this matter and in any investigation related to or associated with the conduct described in Section IV. Respondent must provide truthful and complete information, evidence, and testimony and Respondent must cause Respondent's officers, employees, representatives, or agents to appear for interviews, discovery, hearings, trials, and any other proceedings that the Bureau may reasonably request upon 5 days written notice, or other reasonable

notice, at such places and times as the Bureau may designate, without the service of compulsory process.

XVI
Compliance Monitoring

IT IS FURTHER ORDERED that, to monitor Respondent's compliance with this Consent Order:

79. Within 30 days of receipt of a written request from the Bureau, Respondent must submit additional Compliance Reports or other requested information, which must be made under penalty of perjury; provide sworn testimony; or produce documents.

80. Respondent must permit Bureau representatives to interview any employee or other person affiliated with Respondent who has agreed to such an interview. The person interviewed may have counsel present.

81. Nothing in this Consent Order will limit the Bureau's lawful use of civil investigative demands under 12 C.F.R. § 1080.6 or other compulsory process.

XVII
Modifications to Non-Material Requirements

IT IS FURTHER ORDERED that:

82. Respondent may seek a modification to non-material requirements of this Consent Order (e.g., reasonable extensions of time and changes to reporting requirements) by submitting a written request to the Regional Director.

83. The Regional Director may, in his or her discretion, modify any non-material requirements of this Consent Order (e.g., reasonable extensions of time and changes to reporting requirements) if he or she determines that good cause justifies the modification. Any such modification by the Regional Director must be in writing.

XVIII
Administrative Provisions

84. The provisions of this Consent Order do not bar, estop, or otherwise prevent the Bureau, or any other governmental agency, from taking any other action against Respondent, except as described in Paragraph 85.

85. The Bureau releases and discharges Respondent from all potential liability for law violations that the Bureau has or might have asserted based on the practices described in Section IV of this Consent Order, to the extent such practices occurred before the Effective Date and the Bureau knows about them as of the Effective Date. The Bureau may use the practices described in this Consent Order in future enforcement actions against Respondent and its affiliates, including, without limitation, to establish a pattern or practice of violations or the continuation of a pattern or practice of violations or to calculate the amount of any penalty. This release does not preclude or affect any right of the Bureau to determine and ensure compliance with the Consent Order, or to seek penalties for any violations of the Consent Order.

86. This Consent Order is intended to be, and will be construed as, a final Consent Order issued under § 1053 of the CFPA, 12 U.S.C. § 5563, and expressly does not form, and may not be construed to form, a contract binding the Bureau or the United States.

87. This Consent Order will terminate 5 years from the Effective Date or 5 years from the most recent date that the Bureau initiates an action alleging any violation of the Consent Order by Respondent. If such action is dismissed or the relevant adjudicative body rules that Respondent did not violate any provision of the Consent Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the

Consent Order will terminate as though the action had never been filed. The Consent Order will remain effective and enforceable until such time, except to the extent that any provisions of this Consent Order have been amended, suspended, waived, or terminated in writing by the Bureau or its designated agent.

88. Calculation of time limitations will run from the Effective Date and be based on calendar days, unless otherwise noted.

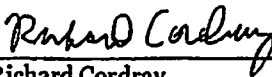
89. Should Respondent seek to transfer or assign all or part of its operations that are subject to this Consent Order, Respondent must, as a condition of sale, obtain the written agreement of the transferee or assignee to comply with all applicable provisions of this Consent Order.

90. The provisions of this Consent Order will be enforceable by the Bureau. For any violation of this Consent Order, the Bureau may seek to impose the maximum amount of civil money penalties allowed under § 1055(c) of the CFPB, 12 U.S.C. § 5565(c). In connection with any attempt by the Bureau to enforce this Consent Order in federal district court, the Bureau may serve Respondent wherever Respondent may be found and Respondent may not contest that court's personal jurisdiction over Respondent.

91. This Consent Order and the accompanying Stipulation contain the complete agreement between the parties. The parties have made no promises, representations, or warranties other than what is contained in this Consent Order and the accompanying Stipulation. This Consent Order and the accompanying Stipulation supersede any prior oral or written communications, discussions, or understandings.

92. Nothing in this Consent Order or the accompanying Stipulation may be construed as allowing Respondent, its Board, officers, or employees to violate any law, rule, or regulation.

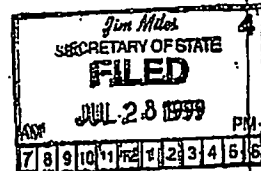
IT IS SO ORDERED, this 4th day of September, 2016.



Richard Cordray
Director
Consumer Financial Protection Bureau

EXHIBIT 2

STATE OF SOUTH CAROLINA
SECRETARY OF STATE



APPLICATION FOR AN AMENDED CERTIFICATE
OF AUTHORITY BY A FOREIGN CORPORATION
TO TRANSACT BUSINESS IN SOUTH CAROLINA

Pursuant to §33-15-104 of the 1976 South Carolina Code, as amended, the undersigned corporation hereby applies for an amended certificate of authority to transact business in the State of South Carolina and for that purpose submits the following statement:

1. The name of the corporation is Wheat First Securities, Inc.
- 1a. The above named corporation received a Certificate of Authority to transact business in South Carolina on: February 15, 1973
2. This application is filed for the following reason (complete all applicable items):
 - ☐ a. The corporation has changed its corporate name as follows First Union Capital Markets Corp.
 - ☐ b. The corporation has changed its duration to _____
 - ☐ c. The corporation has changed the state or county of its incorporation to _____
3. The name of the corporation for the purposes of transacting business in South Carolina is (See §§33-4-101 and 33-15-106) and see §33-19-500(b)(1) if the corporation is a professional corporation) Wheat First Securities, Inc.
4. It is incorporated as (check applicable item) ☒ a general business corporation, ☐ a professional corporation, the laws of the state of Virginia
5. The date of its incorporation is 4/12/1966 and the period of its duration is Perpetual
6. The address of the principal office of the corporation in the jurisdiction of its incorporation is 301 S. College Street in the city of Charlotte
(Street & Number)
and the state of North Carolina 28288-0630
Zip Code
7. The address of the registered office in the state of South Carolina is 201 Park Street in the city of Columbia, South Carolina 29201
(Street & Number)
Zip Code
8. The name of the registered agent in this state at such address is Corporation Service Company

99-028418CC

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THE OFFICE OF THE

May 25 2017
REFERENCE ID: 1705250901105
Directors, then the name and address of those persons who are exercising the statutory authority
of directors on behalf of the corporation) and principal Officers:

a)

Name of Directors
Ross M. Annable
Mark M. Gambill
Scott L. Ilario

Business Address
301 S. Tryon St. Charlotte, NC 28288
901 E. Byrd Richmond, Va 23219
301 S. Tryon St. Charlotte, NC 28288

b)

Name and Office of
Principal Officers
Ross M. Annable
James F. Powers
Scott L. Ilario

Business Address
301 S. Tryon St. Charlotte, NC 28288
301 S. College St. Charlotte, NC 28288
301 S. Tryon St. Charlotte, NC 28288

10. The aggregate number of shares which the corporation has authority to issue, itemized by classes and series, if any, within a class:

Class of Shares (and Series, if any)	Authorized No. of Each Class (and Series)
<u>Common Stock-Non-Voting</u>	<u>500,000</u>
<u>Common Stock-Voting</u>	<u>500,000</u>
<u>Preferred Stock</u>	<u>250,000</u>

11. Unless a delayed date is specified, this application shall be effective when accepted for filing by the Secretary of State (See §33-1-230): _____

12. Dated this 14th day of June 1999.

First Union Capital Markets Corp.
(Name of Corporation)
By: James F. Powers
(Signature of Officer)
James F. Powers, Sr. Vice President
(Type or Print Name and Office)

FILING INSTRUCTIONS

- Two copies of this application, the original and either a duplicate original or a conformed copy, must be filed.
- If the space in this form is insufficient, please attach additional sheets containing a reference to the appropriate paragraph in this form.
- Schedule of Fees (payable at the time of filing this document)

Fee for Filing Application (payable to the Secretary of State)	\$ 10.00
Filing Tax	100.00
- If the applicant corporation is adopting a fictitious name for use in South Carolina pursuant to Section 33-15-108(a), then a certified copy of the board of directors resolution approving the fictitious name must be attached to the application.

Form Approved by South Carolina
Secretary of State 1/89

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE

May 25 2017

REFERENCE ID: A60901105

Commonwealth of Virginia



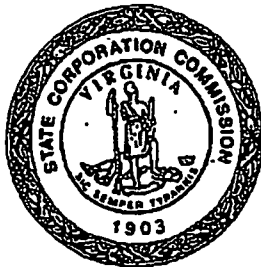
State Corporation Commission

I Certify the Following from the Records of the Commission:

FIRST UNION CAPITAL MARKETS CORP. is a corporation existing under and by virtue of the laws of Virginia, and is in good standing.

The date of incorporation is April 12, 1966.

Nothing more is hereby certified.



CIS20315

Signed and Sealed at Richmond on this Date:
July 9, 1999

Joel H. Peck

Joel H. Peck, Clerk of the Commission

EXHIBIT 3

South Carolina Secretary of State Mark Hammond

Business Entities Online

File, Search, and Retrieve Documents Electronically

FIRST UNION CAPITAL MARKETS CORP.

Corporate Information

Entity Type: Corporation

Status: Dissolved

Domestic/Foreign: Foreign

Incorporated State: Virginia

Important Dates

Effective Date: 02/15/1973

Expiration Date: N/A

Term End Date: N/A

Dissolved Date: 12/21/1999

Registered Agent

Agent: CORPORATION SERVICE CO

Address: 1301 Gervais Street
Columbia, South Carolina 29201

Official Documents On File

Filing Type	Filing Date
Dissolution	12/21/1999
Forfeiture	11/19/1999
Amendment	07/28/1999
Change of Agent or Office	06/11/1999
Change of Agent or Office	04/09/1998
Amendment	11/14/1977
Authority	02/15/1973

Former Names

Name	Filing Date
WHEAT, FIRST SECURITIES, INC.	N/A

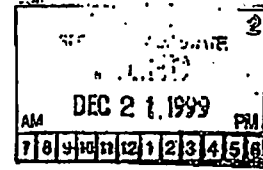
For filing questions please contact us at 803-734-2158

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May 25 2017
REFERENCE ID: 1705250901105

STATE OF SOUTH CAROLINA
SECRETARY OF STATE

APPLICATION FOR SURRENDER OF
AUTHORITY TO DO BUSINESS IN
THE STATE OF SOUTH CAROLINA



Pursuant to the provisions of the 1976 South Carolina Code, as amended, the undersigned corporation hereby applies to the Secretary of State for surrender of authority to do business in the State of South Carolina, and for that purpose submits the following statement:

1. The name of the corporation is First Union Capital Markets Corp.
2. The corporation is incorporated under the laws of the state of Virginia.
3. The corporation received a certificate of authorization to transact business in South Carolina dated 2-15-1973.
4. The corporation is no longer transacting business in South Carolina.
5. The corporation hereby surrenders its authority to transact business in the State of South Carolina.
6. The corporation revokes the authority of its registered agent in South Carolina to accept service of process, and consents that process in any action, suit or proceeding based upon any cause of action arising in this State before the effective date of this application may be served on the Secretary of State.
7. The address to which the Secretary of State may mail a copy of any process against the corporation that may be served on him is 410 First Union Corporation
301 S. College St. Charlotte, NC 28228-0630
The corporation hereby agrees to notify the Secretary of State of any change in this mailing address.
8. Unless a delayed date is specified, this application shall be effective upon acceptance for filing by the Secretary of State (See § 33-1-230(b)).

DATE 12-2-99

First Union Capital Markets Corp.
(Name of Corporation)
By [Signature]
(Signature)
James F. Powers Sr. Vice President
(Type or Print Name and Office)

FILING INSTRUCTIONS

1. Two copies of this application, the original and either a duplicate original or a conformed copy, must be filed.
2. Filing Fee (payable at the time of filing this document) \$10.00

Form Approved by South Carolina
Secretary of State 1/89

99-051097CC

EXHIBIT 4

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)
2011 JUN 22 P C.A. No.: 2011-CP-23-0336
David W. Keller,)
Plaintiff,)
vs.)
ING Financial Partners, Inc.,)
William C. Johnson, Diversified)
Business Concepts, Inc., and Jackson)
National Life Insurance Company,)
Defendants.)

ORDER

Defendants ING Financial Partners, Inc., William C. Johnson, and Diversified Business Concepts, Inc. move to Compel Arbitration and Dismiss or Stay this Case. For the reasons set forth below, Defendants' Motion to Compel Arbitration and Dismiss or Stay this Case is denied.

BACKGROUND

In October of 2007, Plaintiff David W. Keller ("Keller"), purchased two separate and distinct financial products through Defendant William C. Johnson ("Johnson") and his business Diversified Business Concepts, Inc. ("Diversified"), including a Jackson National Life Prospective L Series variable annuity with an Auto Guard 6 living benefit rider ("Annuity"), and a portfolio of market based investments ("Portfolio"). The Annuity was purchased from Defendant Jackson National Life Insurance Company ("Jackson National"), while the Portfolio was purchased from ING Financial Partners, Inc. ("ING"). In 2009, Keller discovered that the Annuity did not provide the lifetime benefits or guaranteed annual increases in value he anticipated based upon certain representations allegedly made by Johnson. Keller, after filing an unsuccessful formal complaint with ING, filed the present civil action. In response, Defendants filed their Motion to Compel Arbitration and Dismiss or Stay ("Motion").

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FINDINGS

1. *The failure of the arbitration provision's forum selection clause constitutes the failure of an integral term of the agreement, thereby rendering the entire arbitration agreement void.*

In support of their Motion, Defendants rely on an arbitration clause printed on the back of an ING "Account Information Form" that was executed by Plaintiff and Johnson in October, 2007. The arbitration clause in the Account Information Form provides that the parties "agree that any dispute between [them] arising out of this agreement shall be submitted to arbitration conducted under the then applicable provisions of the code of arbitration procedure of NASD." 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. Because the arbitration forum specifically selected by the parties to the purported arbitration agreement does not exist, and did not exist at the time the agreement was executed, a material term of the arbitration clause has failed, and the purported agreement to arbitrate must likewise fail.

Arbitration agreements are matters of contract, and general contract law governs the evaluation of the enforceability of an arbitration agreement. See Smith Barney, Inc. v. Keeney, 570 N.W.2d 75, 78 (Iowa 1997).¹ As such, a valid arbitration agreement requires the parties' "mutual assent to the terms." Schaer v. Webster Cnty., 644 N.W.2d 327, 338 (Iowa 2002). "Before compelling a party to arbitrate pursuant to the FAA, a court must determine that there is an agreement to arbitrate and the dispute at issue falls within the scope of the agreement." Century Indem. Co. v. Certain Underwriters at Lloyd's, 584 F.3d 513, 523 (3d Cir. 2009). The

¹ The Account Information Form contains a choice of law provision providing that "any disputes, controversies or claims arising out of or related to this agreement shall be governed by the applicable laws of the State of Iowa and applicable federal law."

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contract, including the agreement to arbitrate, "is to be interpreted as a whole, and it is assumed in the first instance that no part of it is superfluous." Smith Barney, Inc., 570 N.W.2d at 78.

With regards to 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 arbitration 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); Gutfreund v. Weiner, 68 F.3d 554, 561 (2d Cir. 1995) (a failed forum selection term determined to be 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 arbitration] 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)). Courts have found that the chosen arbitration forum is integral to the agreement where:

"the arbitrator's rules will have a substantive effect on the party's claims...if the arbitrator possesses specialized knowledge or expertise regarding the subject of the dispute...or if the agreement otherwise evidences a dominant intent of the parties that claims could only be heard by the named arbitrator." Wilson v. Dell Fin. Servs., L.L.C., 2010 U.S. Dist. LEXIS 10809, 5-6 (S.D. W. Va. Feb. 8, 2010).

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 the Magnolia Manor-Greenwood 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

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court, and the Defendant moved to dismiss the action and to compel arbitration pursuant to the agreement to arbitrate. Id. The arbitration clause in the agreement specifically selected the American Health Lawyers Association (the AHLA) as the arbitration 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, asserting that it would no longer 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 plaintiff asserted that the inability to arbitrate through the AHLA constituted a failure of a material term in the agreement, and therefore plaintiff was no longer bound to arbitrate the dispute. Id. at 128, 678 S.E.2d at 437. The 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 arbitration award, and the cost of the arbitration." Id. at 132, 678 S.E.2d at 439. The Court determined that these implications render 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.

Just as in Grant, the parties to the Account Information Form in the present case selected a particular arbitration forum and process capable of and experienced in handling complex, industry specific disputes. Specifically, the purported agreement to arbitrate provides that the parties "agree that any dispute between [them] arising out of this agreement shall be submitted to

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arbitration conducted under the then applicable provisions of the code of arbitration procedure of NASD." Id.

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). The United States Court of Appeals for the Second Circuit considered the issue of a failed arbitral forum provision in In re Salomon Inc. Shareholders' Derivative Litigation, 68 F.3d 554 (2d Cir. 1995). Salomon, a shareholders' derivative action against former corporate officers, concerned an arbitration clause providing for arbitration before the NYSE. The district court initially granted the Defendant's motion to compel arbitration, but the NYSE refused to hear the matter. Salomon at 556. Thereafter, the court decline to compel arbitration and set the case for trial. The court stated that when the NYSE refuses to arbitrate the matter, "there is no further promise to arbitrate in another forum." The court was concerned not with whether, but where the dispute could be arbitrated under the agreements. The court held "we cannot compel a party to arbitrate a dispute before someone other than the NYSE when that party had agreed to arbitrate only before the NYSE and the NYSE, ... has refused to use its facilities to arbitrate the dispute in question...." The court refused to appoint substitute arbitrators and compel arbitration in another forum because the arbitration agreements required that any arbitration be before the NYSE, and not any other arbitral forum. Id. at 577-561. The NASD was, it appears, selected due, in part, to its expertise in the securities arena and its experience handling the type of disputes contemplated in the arbitration clause. The selection of the NASD, therefore, was an integral term of the arbitration clause.

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. See Gutfreund, 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 & Co. v. Goren, 875 F.2d 1218 (6th Cir. 1989) (interpreting designation of NYSE as the arbitration forum of choice meant that *only* the NYSE could arbitrate a dispute between the parties).

2. *Defendants cannot meet their burden of establishing that the Account Information Form governs disputes arising out of the Jackson National Annuity.*

While, given the above ruling, this Court need not address whether the Account Information Form governs disputes arising out of the Jackson National Annuity, this Court does

find that Defendants failed to meet their burden of demonstrating that the purported agreement controls.

It is unclear from the face of the purported agreement whether the form relates to the Annuity or solely to the Portfolio account. It is clear, however, that the arbitration clause was drafted by ING, on ING letterhead, and only references ING and Pershing accounts. The Jackson National Annuity contract number appears nowhere on the form, and the name Jackson National itself is entirely absent. Moreover, the document references no agreement interdependent with the form. It is likewise important to note that Jackson National is not a party to this present Motion to Compel Arbitration. Finally, the ING Account Information Form was drafted by ING, and this Court recognizes that any ambiguities therein must be construed against ING. See Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010); McGill v. Moore, 381 S.C. 179, 186, 672 S.E.2d 571, 575 (2009) (ambiguities in contracts construed in favor of non-drafting party).

It is well settled that "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). There is no indication in the materials submitted to this Court that Plaintiff agreed to arbitrate claims relating to the Annuity in issue. Upon a review of the Memoranda submitted by the parties, therefore, this Court finds that Defendants failed to satisfy their burden of proving that the arbitration clause on the ING letterhead governs disputes arising from the Jackson National Annuity.

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CONCLUSION

THEREFORE, for the reasons set forth above, Defendants' Motion to Compel Arbitration and Dismiss or Stay This Case is DENIED.

IT IS SO ORDERED.

D. Garrison Hill

D. Garrison Hill
Circuit Judge

May 26, 2011
Greenville, South Carolina

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

JUDGMENT IN A CIVIL CASE

CASE NO: 2011CP2300336
2011 JUN -2 P 12:23

David W Keller vs. ING Financial Partners
CLERK OF COURT
GREENVILLE CO. S.C.

CHECK ONE:

- ☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.
- ☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.
- ☐ ACTION DISMISSED (CHECK REASON): ☐ Rule 12(b), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ ACTION STRICKEN (CHECK REASON): ☐ Rule 40(j) SCRPC; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____
- ☐ 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; ☐ Statement of Judgment by the Court.

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE

This judgment was entered on the 2nd day of June, 2011, and a copy mailed first class this 2nd day of June, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

H. Donald Sellers Hayasworth Slakler Boyd, P.A.
P.O. Box 2048 Greenville, SC 29602

Charles Franklin Turner Jr. Turner, Padgett,
Graham & Laney, P.A. P.O. Box 1509 Greenville, SC
29602

CPFORM4M
SOCA SCRPC Form 4 Revised 06/2008

000011

Ashley Bryan Abel Jackson Lewis LLP 55 Beattie
Place, Suite 800 Greenville, SC 29601
Thomas Chase Samples Jackson Lewis LLP 55
Beattie Place, Suite 800 Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

CPFORM44M
SOCA SCRP Form 4 Revised 05/2008

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STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

2011 MAY 18 P. 2: 28 CASE NO: 2011CP2300336

David Wickensimer Clerk of Court
GREENVILLE COUNTY
2011 5 WICKENSIMER
Financial Partners, Inc.

CHECK ONE:

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

IT IS ORDERED AND ADJUDGED:

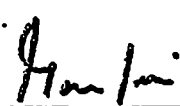
☐ See attached order;

☒ Statement of Judgment by the Court:

Motion to Compel Arbitration is respectfully denied. Mr. Sellers is requested to submit a proposed order on or before May 25, 2011 in Word format to ghillic@sccourts.org, with a copy to opposing counsel.

Dated at Greenville, South Carolina, this May 16, 2011.

Court Reporter: Hollie Jenkins


PRESIDING JUDGE - D. GARRISON HILL

This judgment was entered on the 16th day of May 2011, and a copy mailed first class this May 18, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

H. Donald Sellers P.O. Box 2048 Greenville, SC 29602

Charles Franklin Turner Jr. 200 East Broad St., Suite 250 Greenville, SC 29601
Ashley Bryan Abel 55 Beattie Place, Suite 800 Greenville, SC 29601
Thomas Chase Samples 55 Beattie Place, Suite 800 Greenville, SC 29601

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court

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EXHIBIT 5

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Court of Appeals**

David W. Keller, Respondent,

v.

ING Financial Partners, Inc., William C. Johnson,
Diversified Business Concepts, Inc., and Jackson
National Life Insurance Company, Defendants,

Of whom ING Financial Partners, Inc., William C.
Johnson, and Diversified Business Concepts, Inc., are,
Appellants.

Appellate Case No. 2011-193026

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

Unpublished Opinion No. 2013-UP-014
Heard October 2, 2012 – Filed January 9, 2013

AFFIRMED

Thomas Chase Samples, of Jackson Lewis LLP, of
Greenville, for Appellants.

Robert DeWitt Thomas, of Andersen Tate & Carr PC;
and H. Donald Sellers and J. W. Matthews III, of

Haynsworth Sinkler Boyd PA, all of Greenville, for
Respondent.

PER CURIAM: ING Financial Partners, Inc., William C. Johnson, and Diversified Business Concepts, Inc. (collectively, Appellants) appeal the circuit court's denial of their motion to compel arbitration. 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. We affirm.

Under Iowa law, the interpretation of an arbitration agreement involves two steps: (1) "to determine whether there is a valid agreement to arbitrate" and (2) "to determine whether the controversy alleged is embraced by that agreement." *Gen. Conference of Evangelical Methodist Church v. Faith Evangelical Methodist Church*, 809 N.W.2d 117, 120 (Iowa Ct. App. 2011). The court must use general principles of contract law in determining the validity of an arbitration agreement. *Bullis v. Bear, Stearns & Co.*, 553 N.W.2d 599, 602 (Iowa 1996).

The Federal Arbitration Act (FAA) does not confer an absolute right to compel arbitration; but only a right to obtain an order directing that "arbitration proceed in the manner provided for in [the parties'] agreement." *Volit Info. Scls., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 469 (1989). Section 5 of the FAA provides:

If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been

specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C.A. § 5 (2011).

The parties' arbitration agreement designates an exclusive arbitral forum that is no longer available to arbitrate. First, Appellants' motion to compel arbitration and initial brief on appeal admit FINRA is the "successor entity to the NASD." Second, the agreement states "any dispute between you and me arising out of this agreement shall be submitted to arbitration conducted under the then applicable provisions of the code of arbitration procedure of NASD." NASD's rules indicate that conducting arbitration "under the then applicable provisions of the code of arbitration procedure of NASD" mandates arbitration before the NASD itself,¹ and most jurisdictions' interpretations of similar agreements support this construction.²

Further, this court cannot rewrite the parties' agreement to substitute FINRA for NASD. Neither Iowa state nor the Eighth Circuit Court of Appeals have decided whether a court may substitute an arbitral forum when a designated forum has become unavailable to arbitrate. Among federal circuit courts, a split exists on the issue. In the absence of any controlling law, therefore, we opt to follow *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (2009). There, our supreme court saw "great merit in the Second Circuit's view that Section 5 [of the FAA] does not apply in cases where a specifically designated arbitrator becomes unavailable" to arbitrate. *Id.* at 131, 678 S.E.2d at 438 (approving of *In re Salomon Inc.*, 68 F.3d 554 (2d Cir. 1995)). In *Salomon*, the Second Circuit held

¹ See NASD Rule 10314(a)(1)-(2) (providing "an arbitration proceeding under this Code shall be instituted" by a claimant filing "with the Director of Arbitration an executed Submission Agreement, a Statement of Claim of the controversy in dispute, together with the documents in support of the Claim, and the required deposit").

² *PaineWebber, Inc. v. Rutherford*, 903 F.2d 106, 107-08 (2d Cir. 1990); *In re Salomon Inc.*, 68 F.3d 554, 559 (2d Cir. 1995); *Luckie v. Smith Barney, Harris Upham & Co., Inc.*, 999 F.2d 509, 511 (11th Cir. 1993); see also *Roney & Co. v. Goren*, 875 F.2d 1218, 1219-20, 1223 (6th Cir. 1989); *Reddam v. KPMG LLP*, 457 F.3d 1054, 1059-60 (9th Cir. 2006); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000).

Section 5 of the FAA permits substitution only "when there is a lapse in time in the naming of the arbitrator or in the filling of a vacancy on a panel of arbitrators, or some other mechanical breakdown in the arbitrator *selection process*." See *Salomon*, 68 F.3d at 560 (emphasis added). This case does not present a breakdown in *the process of selecting* an arbitrator because the arbitral forum does not exist. Regardless of any similarities between NASD's and FINRA's procedural rules, therefore, we cannot impose upon the parties the power of an arbitral forum that they did not agree to submit to. As a result, the trial court properly denied Appellants' motion to compel arbitration.

AFFIRMED.

HUFF, THOMAS, and GEATHERS, JJ., concur.

EXHIBIT 6

**THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE
CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING
EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.**

**THE STATE OF SOUTH CAROLINA
In The Supreme Court**

David W. Keller, Respondent,

v.

ING Financial Partners, Inc., William C. Johnson,
Diversified Business Concepts, Inc., and Jackson
National Life Insurance Company, Defendants,

Of Whom ING Financial Partners, Inc., William C.
Johnson, and Diversified Business Concepts, Inc., are,
Petitioners.

Appellate Case No. 2013-000651

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
D. Garrison Hill, Circuit Court Judge

Memorandum Opinion No. 2015-MO-006
Heard February 5, 2015 – Filed February 11, 2015

DISMISSED AS IMPROVIDENTLY GRANTED

Ashley Bryan Abel and Thomas Chase Samples, both of Jackson Lewis, P.C., of Greenville, for Petitioners.

Pierce Talmadge MacLennan, H. Donald Sellers and J. W. Matthews, III, all of Haynsworth Sinkler Boyd, P.A., of Greenville, for Respondent.

Alice W. Parham Casey, of Wyche, P.A. of Columbia, for *Amicus Curiae*, Financial Industry Regulatory Authority, Inc.

PER CURIAM: We granted certiorari to review the Court of Appeals' decision in *Keller v. ING Fin. Partners, Inc.*, Op. No. 2013-UP-014 (S.C. Ct. App. filed Jan. 9, 2013). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ.,
concur.

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

FILED
2017 JUL -6 PM 4:08
LISA M. CONER
CLERK OF COURT
LEXINGTON SC

**DEFENDANTS' MOTION FOR RECONSIDERATION OR AMENDMENT OF THE
COURT'S JUNE 21, 2017 ORDER PURSUANT TO SCRCP 59(e) AND/OR SCRCP 60**

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, respectfully submit this motion pursuant to South Carolina Rules of Civil Procedure 59(e) (which authorizes the Court to amend a judgment) and/or 60 (which authorizes the Court to relieve a party from a final judgment on the basis of newly discovered evidence). Defendants seek reconsideration or amendment of the Court's June 21, 2017 Order denying Defendants' Motion to Dismiss or Stay Pending Arbitration (Ex. 1).¹ Defendants recently located more current Form U4 submissions that conclusively establish: (1) the existence of an enforceable arbitration agreement between Plaintiff and his former employer, Wells Fargo Advisors, LLC (now known as Wells Fargo Clearing Services, LLC); and (2) Plaintiff's

¹ Although the Order was signed on June 16, 2017, the file-stamp indicates that it entered on June 21, 2017.

registration with FINRA, which provides an independent basis to require arbitration of his claims.

Defendants were previously able to only locate Form U4s that were manually executed by Plaintiff in 1994 and 1995.² Plaintiff argued that the older U4s were not enforceable by Defendants because they were signed when Plaintiff was associated with Wheat First Securities, Inc., and because FINRA was not in existence or mentioned in the U4s at that time. Defendants, however, recently located several more recent U4 filings that were submitted electronically to FINRA, formerly known as NASD,³ by or on Plaintiff's behalf.⁴ These U4 filings show that Wells Fargo Clearing Services is entitled to enforce Plaintiff's agreement to arbitrate his claims through FINRA and that Plaintiff was, in fact, registered with FINRA, which provides an independent basis for requiring him to arbitrate the disputes raised in his First Amended Complaint. For these reasons and those more fully explained below, Defendants respectfully request that the Court reconsider or amend its previous Order. *See TriTech Electric, Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 399 (Ct. App. 2001) (holding that trial court erred by failing to grant motion to dismiss and compel arbitration because the FAA specifically prevents state courts from requiring a judicial resolution of a conflict the parties agreed to arbitrate).

² Defendants had drafted and were in the process of finalizing and filing a notice of supplemental authority regarding the newly discovered U4 documents when their counsel received the Court's Order on June 27, 2017.

³ NASD changed its name to FINRA. *See* <https://www.sec.gov/rules/sro/finra/2007/34-56615.pdf>. In "technical amendments," references to the NASD in the Form U4 were replaced with references to FINRA to reflect the "corporate name change." SEC Release No. 34-57033; File No. SR-FINRA-2007-036, *available at* <http://www.finra.org/sites/default/files/RuleFiling/p037701.pdf>. *See id.* ("[O]n December 18, 2007, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD")) filed with the Securities and Exchange Commission the proposed rule change...").

⁴ FINRA Rule 1010(c) provides that initial, manually signed U4s must be retained as part of the member's recordkeeping requirements. However, members may electronically file amendments to the disclosure information contained in a manually signed U4 without obtaining the subject associated person's manual signature. *Id.*

1. The newly discovered evidence shows that Plaintiff agreed to arbitrate his claims via U4 Forms submitted in 1999 and 2014.

On October 7, 1999, Plaintiff submitted a U4 Form that identified his employer as Everen Securities, Inc. and contained the following arbitration agreement (Ex. A to Aff. of Michael Zuhr, attached as Ex. 2):

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 SROs⁵ indicated in Item 11 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*.

(Exhibit 2-A at 7) (emphasis added).

In the 1999 U4, Plaintiff also “authorize[d] any employer or prospective employer to file electronically on [his] behalf any information required in the U4 and any amendment thereto.” (*Id.* at 8.) He further agreed to “waive any objection to the admissibility of the electronically filed records in any criminal, civil, or administrative proceeding.” (*Id.*)

Then, on January 8, 2014, an amended U4 was submitted on Plaintiff’s behalf that identified his employer as Wells Fargo Advisors, LLC. (Ex. 2-B). The 2014 U4 indicated that his employment date was October 1, 1999. (*Id.*) (emphasis added). Section 4, SRO Registrations, of the 2014 U4 indicates that Plaintiff is registered with FINRA in the registration category of “GS- Full Registration/General Securities Representative (S7).” (*Id.*)

The identification of the date of employment with Wells Fargo Advisors as October 1, 1999 in the 2014 U4 shows that Wells Fargo assumed Everen Securities, bridging Plaintiff’s employment between the entities.⁶ Additionally, Everen Securities is identified as a predecessor

⁵ “SRO” means any self-regulatory organization within the meaning of Section 3(a)(26) of the Exchange Act. FINRA Rule 6810(jj).

⁶ See Aff. of Beverly W. Jackson, Exh. 2 to Defendants’ Motion to Dismiss or Stay Pending Arbitration, at ¶7.

to Wells Fargo Clearing Services in FINRA's public records.⁷ As such, Plaintiff cannot legitimately dispute Wells Fargo Clearing Services' right to enforce the arbitration agreement via the 1999 U4 as the legal successor of Everen Securities.

Moreover, the 1999 U4 contemplates that Item 11 (which identifies the SROs) may be amended from time to time. Such an amendment took place when Plaintiff became a registered representative with FINRA,⁸ and his attempt to now disavow his association with FINRA and his obligation to arbitrate his disputes pursuant to FINRA's rules is, at best, disingenuous.

2. **Plaintiff cannot object to the admissibility of the U4s because he explicitly waived any such objections.**

Further, Plaintiff's argument regarding the authentication of the U4s should be rejected because he explicitly agreed to waive any objection to the admissibility of such records in the 1999 U4. [Ex. 2-A.] In short, the recently discovered 1999 and 2014 U4s conclusively establish that Defendants may compel arbitration of Plaintiff's claims by virtue of the arbitration agreements.

3. **Notwithstanding the U4 Forms, Plaintiff is still required to arbitrate his claims pursuant to FINRA Rules because his dispute arises out of the business activities of a member or associated person.**

Even if Plaintiff was not bound by an enforceable arbitration agreement by virtue of the 1999 and 2014 U4s (which he is), Plaintiff is still required to arbitrate his claims. The Code of Arbitration for Industry Disputes applies to claims filed on or after April 16, 2007. *See* FINRA Rule 13000. [See Ex. 3, FINRA Rule excerpts.] Except as otherwise provided in the Code, a dispute must be arbitrated 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. *See* FINRA Rule 13200. Courts "have uniformly deemed employment-

⁷ See <https://brokercheck.finra.org/firm/summary/19616>.

⁸ See fn.2, *supra*.

related claims—including claims regarding alleged conduct occurring after the termination of employment—between brokerage firms and their agents as disputes ‘arising out of the business activities’ of FINRA members.” See *Cor Clearing, LLC v. Jarvis*, No. 8:13CV292, 2014 WL 98799, at *5 (D. Neb. Jan. 9, 2014) (holding that claims involving an attorney who did not work as a financial analyst or agent were subject to FINRA arbitration because the alleged conduct involved the parties’ business activities and had “some nexus” to the activity of the member actually regulated by FINRA); *Hawkins v. Questar Capital Corp.*, 5:12cv376, 2013 WL 5596897, at *5 (E.D. Ky. Oct. 11, 2013) (noting claims involving third parties and arising after cancellation of an employment contract fell under broad scope of FINRA arbitration rule); *P & M Corp. Fin., LLC v. Paparella*, No. 2:10cv10448, 2010 WL 4272829, at *3 (E.D. Mich. Oct. 22, 2010) (compelling arbitration pursuant to FINRA rules because the case involved whether the defendant misappropriated confidential information and solicited direct competitors of the plaintiff, which was a dispute over business activities between a member and an associated person).

The fact that Plaintiff, Wells Fargo Clearing Services, and Spang are brokers or firms regulated by FINRA is a matter of public record.⁹ Plaintiff’s allegations clearly arise out of their business activities together, in that Plaintiff claims 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. Because Plaintiff’s claims arise out of Defendants’ business activities with Plaintiff, his claims must be submitted to FINRA arbitration pursuant to FINRA Rule 13200, regardless of the enforceability of the U4 Forms.

⁹See <https://brokercheck.finra.org/individual/summary/1262947>; <https://brokercheck.finra.org/firm/summary/19616>; <https://brokercheck.finra.org/individual/summary/2432221>.

4. Conclusion

For these reasons, as well as those set forth in Defendants' Proposed Order and other submissions, Defendants respectfully request the Court to grant this motion and either reconsider or amend its previous Order to take into account the more recent U4 submissions that establish both the existence of Plaintiff's enforceable agreement to arbitrate and his registration with FINRA. Additionally, Plaintiff has agreed to extend the deadline for Defendants to respond to Plaintiff's First Sets of Interrogatories and First Sets of Requests for Production to July 17, 2017 and the deadline for Defendants to file a responsive pleading to July 27, 2017. Defendants respectfully request the Court to approve these extensions.

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

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Date: July 6, 2017

EXHIBIT 1

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
JUN 21 AM 11:05
CLERK OF COURT
JULIA A. COOPER

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

FACTUAL BACKGROUND

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



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

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

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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'ns 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), SCRCF, asserting as support for the motion Rule 15(a), SCRCF. 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

EC-9

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:

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

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

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

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



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

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

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



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

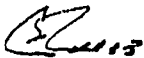
In reaching the conclusion that securities arbitral fora cannot be treated as interchangeable, this Court is mindful of the result obtained on very similar facts in *Keller v. ING Financial Partners, Inc.*, Op. No. 2011-CP-23-0336 (S.C. Cir. Ct. filed June 2, 2011). That case involved an attempt to compel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

The "NASD," or the National Association of Securities Dealers, Inc., as then constituted, no longer exists, having combined regulatory functions with certain divisions of the New York Stock Exchange ("NYSE") to become what is now known as the Financial Industry Regulatory Authority, or FINRA.

* * *

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, SCRF.



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), SCRPC.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), SCRPC, 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), SCRPC. 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); *Mulr*, 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-plcd 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., Mulhern-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); *Mulr 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

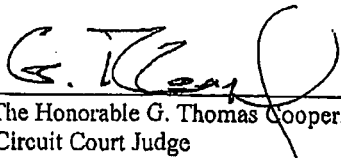
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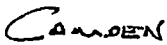
"facts sufficient" standard of a "short and plain statement" of a well-pled complaint sufficient to put each of the Defendants on notice of the allegations of wrongdoing advanced by Mr. Berry. Defendants' motion to dismiss is therefore denied.

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

2017 JUN 21 AM 11:05
CLERK OF COURT
ELEVENTH JUDICIAL CIRCUIT

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.

Circuit Court Judge

Judge Code

6/22/2017

Date

CPFORM4Cm
SCCA SCRPC Form 4C (Revised 2/17)

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 judgment 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 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 MICHAEL ZUHR

I, Michael Zuhr, being first duly sworn on oath, depose and state:

1. My name is Michael Zuhr. I am employed by Wells Fargo Clearing Services, LLC as a Compliance Consultant in its Registration Department. I have held this position since May 2013. 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 Compliance Consultant, I am familiar with the manner in which Form U4s and their amendments are submitted to the Financial Industry Regulatory Authority ("FINRA") by Wells Fargo Advisors, LLC, which changed its name to Wells Fargo Clearing Services, LLC in November 2016 (hereinafter referred to as "Wells Fargo Advisors").

3. I also am familiar with the manner in which Form U4s and their amendments for brokers and other individuals associated with or employed by Wells Fargo Advisors are submitted to FINRA through Web CRD®, which is the central licensing and registration system

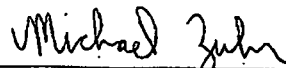
for the U.S. securities industry and its regulators. As part of my job duties, I have access to Web CRD®, and I (as well as other members of the Registration Department) regularly submit Form U4s and Form U4 amendments to Web CRD® as part of Wells Fargo Advisors' regular business activities. I am also authorized to obtain previous Form U4s and Form U4 amendments from Web CRD® submitted by or on behalf of current and former Wells Fargo Advisors employees.

4. To comply with FINRA Rule 4517, brokers must submit amendments to their Form U4s to update information provided in the disclosures that are included in that form. For Wells Fargo Advisors brokers, a member of the Registration Department submits the amendments electronically by entering the updated information into Web CRD®, which can only be accessed by individuals with proper credentials and a personalized login and password. The information submitted is based on the personal knowledge of the member of the Registration Department or on information conveyed to them by the brokers.

5. I obtained the records attached to this Affidavit from Web CRD®, which relate to Robert F. Berry, using my personal log-in information to access the system.

6. Exhibit A is a true and correct copy of a Form U4 dated October 7, 1999 that was submitted by John M. Ivan on behalf of Robert F. Berry in connection with his employment with Everen Securities, Inc., which is a legal predecessor of Wells Fargo Advisors. Mr. Ivan and Mr. Berry electronically signed the form on October 7, 1999. Exhibit B is a true and correct copy of a Form U4 amendment dated January 8, 2014 that was signed and submitted by Dinesh Udbale on behalf of Robert F. Berry in connection with his employment with Wells Fargo Advisors.

Further Affiant sayeth not.


Michael Zuh

SUBSCRIBED AND SWORN TO before me on this the 06 day of JULY, 2017
certify which witness my hand and seal of office.

City/County of ST. LOUIS
State of MISSOURI
The foregoing instrument was acknowledged before me
this 06 day of JULY, 2017
by MICHAEL LUTHE Notary Public
CHARLOTTE STAHL
My commission expires 11/26/2020

Charlotte Stahl
Notary Public in and for
The State of MISSOURI
Printed name: CHARLOTTE STAHL
My commission expires: 11/26/2020

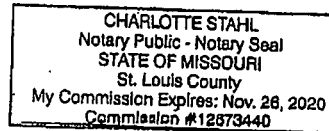


EXHIBIT 2-A

WELLS FARGO CLEARING SERVICES, LLC(19616)

Rev. Form U4 (08/1999)

Individual Name: BERRY, ROBERT FRANKLIN (1262947)

U4 Amendment - Filing ID: 5330556

Filing Date: 10/07/1999

FORM U4 UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

U4 - GENERAL INFORMATION

First Name: ROBERT	Middle Name: FRANKLIN	Last Name: BERRY	Suffix JR./SR., etc.:
Firm CRD #: 19616	Firm or Issuer Name: (Include this employment under Item 20, page 2) EVEREN SECURITIES, INC.	Employment Date (MM/DD/YYYY): 10/01/1999	CRD Branch #:
Billing Code: (optional)	Applicant's CRD #: 1262947	Applicant's SS #: xxx-xx-xxxx	
Office of Employment Address Street 1: 77 WEST WACKER DRIVE		Office of Employment Address Street 2:	
City: CHICAGO	State: Illinois	Country: UNITED STATES	Zip: 60601

DUAL REGISTRATION

- A. Will applicant maintain registration with a Broker Dealer not under common ownership or control with the firm named above? If yes, list the firm(s) in Item 20 on page 2. ☐ Yes ☒ No
- B. Will applicant maintain registration with an Investment Adviser not under common ownership or control with the firm named above? If yes, list the firm(s) in Item 20 on page 2. ☐ Yes ☒ No

U4 - AFFILIATED FIRMS

Will applicant maintain registration with firm(s) under common ownership or control with the firm named in Item 4 above?

If Yes, Please fill in the details to indicate a request for registration with additional firm(s).

☐ Yes ☒ No

No Information Filed

U4 - SRO REGISTRATIONS

To be registered with the following SROs and related registration categor(ies), check the appropriate SRO/registration request boxes.

Qualifying examinations will be automatically scheduled if needed. If you are only scheduling or re-scheduling an exam, skip this item and complete the Examination Requests section.

REGISTRATION CATEGORY	NASD	NYSE	AMEX	BSE	NSX	PCX	CBOE	CHX	PHLX	ISE
OP - Registered Options Principal (S4)	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
IR - Investment Company and Variable Contracts Products Rep. (S6)	☐	☐			☐					
GS - Full Registration/General Securities Representative (S7)	☒	☒	☐	☐	☐	☐	☒	☐	☒	☐
TR - Securities Trader (S7)		☐	☐		☐					
TS - Trading Supervisor (S7)		☐	☐		☐					
SU - General Securities Sales Supervisor (S9 and S10)	☐			☐	☐	☐	☐	☐	☐	
BM - Branch Office Manager (S9 and S10)		☐	☐							
SM - Securities Manager (S12)		☐								
REGISTRATION CATEGORY	NASD	NYSE	AMEX	BSE	NSX	PCX	CBOE	CHX	PHLX	ISE
AR - Assistant Representative/Order Processing (S11)	☐				☐			☐		☐

IE - Limited Registered Representative (S17)	☐	☐	☐	☐	☐	☐	☐
DR - Direct Participation Program Representative (S22)	☐	☐	☐	☐	☐	☐	☐
GP - General Securities Principal (S24)	☐	☐	☐	☐	☐	☐	☐
IP - Investment Company and Variable Contracts Products Principal (S26)	☐	☐	☐	☐	☐	☐	☐
FA - Foreign Associate	☐	☐	☐	☐	☐	☐	☐
FN - Financial and Operations Principal (S27)	☐	☐	☐	☐	☐	☐	☐
FI - Introducing Broker-Dealer/Financial and Operations Principal (S28)	☐	☐	☐	☐	☐	☐	☐
REGISTRATION CATEGORY							
DP - Direct Participation Program Principal (S39)	☐	☐	☐	☐	☐	☐	☐
OR - Options Representative (S42)	☐	☐	☐	☐	☐	☐	☐
MR - Municipal Securities Representative (S52)	☐	☐	☐	☐	☐	☐	☐
MP - Municipal Securities Principal (S53)	☐	☐	☐	☐	☐	☐	☐
CS - Corporate Securities Representative (S62)	☐	☐	☐	☐	☐	☐	☐
RG - Government Securities Representative (S72)	☐	☐	☐	☐	☐	☐	☐
PG - Government Securities Principal (S73)	☐	☐	☐	☐	☐	☐	☐
SA - Supervisory Analyst (S16)	☐	☐	☐	☐	☐	☐	☐
PR - Limited Representative - Private Securities Offerings (S82)	☐	☐	☐	☐	☐	☐	☐

REGISTRATION CATEGORY							
CD - Canada-Limited General Securities Registered Representative (S37)	☐	☐	☐	☐	☐	☐	☐
CN - Canada-Limited General Securities Registered Representative (S38)	☐	☐	☐	☐	☐	☐	☐
ET - Equity Trader (S55)	☐	☐	☐	☐	☐	☐	☐
AM - Allied Member	☐	☐	☐	☐	☐	☐	☐
AP - Approved Person	☐	☐	☐	☐	☐	☐	☐
LE - Securities Lending Representative	☐	☐	☐	☐	☐	☐	☐
LS - Securities Lending Supervisor	☐	☐	☐	☐	☐	☐	☐
ME - Member Exchange	☐	☐	☐	☐	☐	☐	☐
REGISTRATION CATEGORY							
FE - Floor Employee	☐	☐	☐	☐	☐	☐	☐
OF - Officer	☐	☐	☐	☐	☐	☐	☐
CO - Compliance Official (S14)	☐	☐	☐	☐	☐	☐	☐
CF - Compliance Official Specialist (S14A)	☐	☐	☐	☐	☐	☐	☐
PM - Floor Member Conducting Public Business	☐	☐	☐	☐	☐	☐	☐
PC - Floor Clerk Conducting Public Business	☐	☐	☐	☐	☐	☐	☐
SC - Front Line Specialist Clerk	☐	☐	☐	☐	☐	☐	☐
TA - Trading Assistant	☐	☐	☐	☐	☐	☐	☐

U4 - JURISDICTIONS

Mark ☒ appropriate *jurisdiction* for AG (Broker Dealer Agent) and/or IAR (Investment Adviser Representative) registration. Complete Item 12B for Agent of the Issuer designation.

JURISDICTION	AG	RA	JURISDICTION	AG	RA	JURISDICTION	AG	RA
Alabama	☒	☐	Illinois	☐	☐	Puerto Rico	☐	☐
Alaska	☐	☐	Indiana	☐	☐	Rhode Island	☐	☐
Arizona	☐	☐	Iowa	☐	☐	South Carolina	☒	☒
Arkansas	☐	☐	Kansas	☐	☐	South Dakota	☐	☐
			Montana	☐	☐			
			Nebraska	☐	☐			
			Nevada	☐	☐			
			New Hampshire	☐	☐			

6/23/2017

Web CRD - [User Name: mzuhr, OrgID: 19816]

California	☐	Kentucky	☐	New Jersey	☐	Tennessee	☒
Colorado	☐	Louisiana	☐	New Mexico	☐	Texas	☐
Connecticut	☒	Maine	☐	New York	☒	Utah	☐
Delaware	☐	Maryland	☒	North Carolina	☒	Vermont	☐
District of Columbia	☐	Massachusetts	☐	North Dakota	☐	Virginia	☒
Florida	☒	Michigan	☒	Ohio	☐	Washington	☐
Georgia	☒	Minnesota	☐	Oklahoma	☐	West Virginia	☐
Hawaii	☐	Mississippi	☐	Oregon	☐	Wisconsin	☒
Idaho	☐	Missouri	☐	Pennsylvania	☒	Wyoming	☐

AGENT OF THE ISSUER REGISTRATION CATEGORY ☐ Indicate 2 letter jurisdiction code(s): _____

U4 - EXAMINATION REQUESTS

13. Complete this item below only if you are scheduling or rescheduling an exam, or continuing education session.

☐ S3	☐ S10	☐ S16	☐ S28	☐ S38	☐ S55	☐ S73
☐ S4	☐ S11	☐ S17	☐ S30	☐ S39	☐ S62	☐ S82
☐ S5	☐ S12	☐ S22	☐ S31	☐ S42	☐ S63	☐ S101
☐ S6	☐ S14	☐ S24	☐ S32	☐ S52	☐ S65	☐ S106
☐ S7	☐ S14A	☐ S26	☐ S33	☐ S53	☐ S66	☐ S201
☐ S9	☐ S15	☐ S27	☐ S37		☐ S72	

Date Month (MM) Day (DD) Year (YYYY)

Signature of Appropriate Signatory

Type or Print Name of Appropriate Signatory

U4 - PERSONAL INFORMATION

Firm CRD # 19616	Social Security # XXX-XX-XXXX	Applicant's CRD # 1262947
First Name: ROBERT	Middle Name: FRANKLIN	Last Name: BERRY
Suffix JR./SR., etc.:	Date of Birth (MM/DD/YYYY) REDACTED	
State/Province of Birth SOUTH CAROLINA	Country of Birth	Sex ☒ Male ☐ Female
Height (ft) 5	Height (in) 9	Weight (lbs) 145
Hair Color Brown	Eye Color Blue	

U4 - OTHER NAMES

First Name	Middle Name	Last Name	Suffix
BOB		BERRY	

U4 - RESIDENTIAL HISTORY

https://crd.firms.ilnra.org/FRM/u4u5/CRD_FRM_U4U5ViewHist.aspx?Page=PH_ALL&FilingPk=5330556&RL=&RLSF=

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From	To	Street	City	State	Country	Zip
05/1996	PRESENT	513 BROOKSHIRE DRIVE	COLUMBIA	SC	UNITED STATES	29210
11/1990	05/1996	201 SILVERMILL COURT	COLUMBIA	SC	UNITED STATES	29210

U4 - EMPLOYMENT HISTORY

From	To	Name of Company or Firm	Investment-related business?	City	State	Country	Position
10/1999	PRESENT	EVEREN SECURITIES, INC.	☒ Yes ☐ No	CHICAGO	IL	UNITED STATES	MASS TRANSFER
11/1994	10/1999	FIRST UNION CAPITAL MARKETS CORP.	☒ Yes ☐ No	COLUMBIA	SC		UNKNCONV
04/1985	10/1999	#IA PRUDENTIAL SECURITIES INCORPORATED	☐ Yes ☒ No	COLUMBIA	SC		UNKNCONV
04/1985	11/1994	PRUDENTIAL SECURITIES INCORPORATED	☒ Yes ☐ No	COLUMBIA	SC		OTHER - ACCT EXEC
04/1985	11/1994	PRUDENTIAL SECURITIES INCORPORATED	☒ Yes ☐ No	COLUMBIA	SC		OTHER - ACCT EXEC
04/1985	04/1991	#IA PRUDENTIAL SECURITIES INCORPORATED	☐ Yes ☒ No	COLUMBIA	SC		UNKNCONV
04/1985	04/1991	#IA PRUDENTIAL-BACHE SECURITIES, INC.	☐ Yes ☒ No	COLUMBIA	SC		UNKNCONV
04/1985	04/1991	#IA PRUDENTIAL SECURITIES INCORPORATED	☐ Yes ☒ No	COLUMBIA	SC		UNKNCONV

U4 - OTHER BUSINESS

Are you currently engaged in any other business either as a proprietor, partner, officer, director, employee, trustee, agent or otherwise? (Please exclude non *investment-related* activity which is exclusively charitable, civic, religious or fraternal and is recognized as tax exempt.) If YES, Please provide the following details: the name of the other business, whether this business is *investment-related*, the address of the other business, the nature of the other business, your position, title, or relationship with the other business, the start and end dates of your relationship, the approximate number of hours/month devoted to the other business, the number of hours devoted to the other business during securities trading hours, and briefly describe your duties relating to the other business.

☒ Yes ☐ No

MID-ATLANTIC MARKETING, INC. CHARLOTTE, N.C. - DIRECTOR

Date Month (MM) Day (DD) Year (YYYY)

Signature of Appropriate Signatory

Type or Print Name of Appropriate Signatory

U4 - DISCLOSURE QUESTIONS

IF THE ANSWER TO ANY OF THE FOLLOWING QUESTIONS IS 'YES' AND YOU CANNOT UTILIZE THE CERTIFICATION IN ITEM 23N BELOW, COMPLETE DETAILS OF ALL EVENTS OR PROCEEDINGS ON APPROPRIATE DRP(S)

REFER TO THE EXPLANATION OF TERMS SECTION OF FORM U-4 INSTRUCTIONS FOR EXPLANATIONS OF ITALICIZED TERMS.

Criminal Disclosure

23A. (1) Have you ever:

(a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign, or military court to any felony?

YES NO

☐ ☒

https://crd.firms.finra.org/FRM/u4u5/CRD_FRM_U4U5ViewHist.aspx?Page=PH_ALL&FilingPk=5330566&RL=&RLSF=

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(b) been *charged* with any *felony*? ☐ ☐

(2) Based upon activities that occurred while you exercised *control* over it, has an organization ever:

(a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic or foreign court to any *felony*? ☐ ☐

(b) been *charged* with any *felony*? ☐ ☐

23B. (1) Have you ever:

(a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign or military court to a *misdemeanor involving*: investments or an *investment-related* business or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses? ☐ ☐

(b) been *charged* with a *misdemeanor* specified in 23B(1)(a)? ☐ ☐

(2) Based upon activities that occurred while you exercised *control* over it, has an organization ever:

(a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic or foreign court to a *misdemeanor* specified in 23B(1)(a)? ☐ ☐

(b) been *charged* with a *misdemeanor* specified in 23B(1)(a)? ☐ ☐

Regulatory Disciplinary Actions

23C. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever: YES NO

(1) *found* you to have made a false statement or omission? ☐ ☐

(2) *found* you to have been *involved* in a violation of its 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* against you in connection with *investment-related* activity? ☐ ☐

(5) Imposed a civil money penalty on you, or *ordered* you to cease and desist from any activity? ☐ ☐

23D. 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? ☐ ☐

(2) *found* you to have been *involved* in a violation of *investment-related* regulation(s) or statute(s)? ☐ ☐

(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* against you in connection with an *investment-related* activity? ☐ ☐

(5) denied, suspended, or revoked your registration or license or otherwise, by *order*, prevented you from associating with an *investment-related* business or restricted your activities? ☐ ☐

23E. Has any self-regulatory organization or commodities exchange ever:

(1) *found* you to have made a false statement or omission? ☐ ☐

(2) *found* you to have been *involved* in a violation of its rules (other than a violation designated as a "minor rule violation" under a plan approved by the U.S. Securities and Exchange Commission)? ☐ ☐

(3) *found* you to have been the cause of an *investment-related* business having its authorization to do business denied, suspended, revoked or restricted? ☐ ☐

(4) disciplined you by expelling or suspending you from membership, barring or suspending your association with its members, or restricting your activities? ☐ ☐

23F. Has your authorization to act as an attorney, accountant or federal contractor ever been revoked or suspended? ☐ ☐

23G. Have you been notified, in writing, that you are now the subject of any:

(1) regulatory complaint or *proceeding* that could result in a "yes" answer to any part of 23C, D or E? (If yes, complete the Regulatory Action Disclosure Reporting Page.) ☐ ☐

(2) *investigation* that could result in a "yes" answer to any part of 23A, B, C, D or E? (If yes, complete the Investigation Disclosure Reporting Page.) ☐ ☐

Civil Judicial Actions

- 23H. (1) Has any domestic or foreign court ever:** YES NO
- (a) *enjoined* you in connection with any *investment-related* activity? ☐ ☐
- (b) *found* that you were *involved* in a violation of any *investment-related* statute(s) or regulation(s)? ☐ ☐
- (c) dismissed, pursuant to a settlement agreement, an *investment-related* civil action brought against you by a state or foreign financial regulatory authority? ☐ ☐
- (2) Are you named in any pending *investment-related* civil action that could result in a 'yes' answer to any part of 23H(1)?** ☐ ☐

Customer Complaints

- 23I. (1) Have you ever been named as a respondent/defendant in an *investment-related*, consumer-initiated arbitration or civil litigation which alleged that you were *involved* in one or more *sales practice violations* and which:** YES NO
- (a) is still pending, or; ☐ ☐
- (b) resulted in an arbitration award or civil judgment against you, regardless of amount, or; ☐ ☐
- (c) was settled for an amount of \$10,000 or more? ☐ ☐
- (2) Have you ever been the subject of an *investment-related*, consumer-initiated complaint, not otherwise reported under question 23I(1) above, which alleged that you were *involved* in one or more *sales practice violations*, and which complaint was settled for an amount of \$10,000 or more?** ☐ ☐
- (3) Within the past twenty four (24) months, have you been the subject of an *investment-related*, consumer-initiated, written complaint, not otherwise reported under question 23I(1) or (2) above, which:**
- (a) alleged that you were *involved* in one or more *sales practice violations* and contained a claim for compensatory damages of \$5,000 or more (If no damage amount is alleged, the complaint must be reported unless the firm has made a good faith determination that the damages from the alleged conduct would be less than \$5,000), or; ☐ ☐
- (b) alleged that you were *involved* in forgery, theft, misappropriation or conversion of funds or securities? ☐ ☐

Terminations

- 23J. Have you ever voluntarily *resigned*, been discharged or permitted to *resign* after allegations were made that accused you of:** YES NO
- (1) violating *investment-related* statutes, regulations, rules, or industry standards of conduct? ☐ ☐
- (2) fraud or the wrongful taking of property? ☐ ☐
- (3) failure to supervise in connection with *investment-related* statutes, regulations, rules or industry standards of conduct? ☐ ☐

Financial

- 23K. Within the past 10 years:** YES NO
- (1) have you made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition? ☐ ☐
- (2) based upon events that occurred while you exercised *control* over it, has an organization made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition? ☐ ☐
- (3) based upon events that occurred while you exercised *control* over it, has a broker or dealer been the subject of an involuntary bankruptcy petition, or had a trustee appointed, or had a direct payment procedure initiated under the Securities Investor Protection Act? ☐ ☐

23L. Has a bonding company ever denied, paid out on, or revoked a bond for you? ☐ ☐

23M. Do you have any unsatisfied judgments or liens against you? ☐ ☐

(MM DD YYYY)

Signature of Applicant

Type or Print Name of Applicant

(MM DD YYYY)

Signature of Appropriate Signatory

Type or Print Name of Appropriate Signatory

U4 - SIGNATURE

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 *SROs* indicated in Item 11 as may be amended from time to time and, in consideration of the *jurisdictions* and *SROs* receiving and considering my application, I submit to the authority of the *jurisdictions* and *SROs* 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 *SROs* 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 *SROs*, subject to right of appeal or review as provided by law.
3. I agree that neither the *jurisdictions* or *SROs* 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 *SROs*.
4. I authorize the *jurisdictions* and *SROs* to give any information they may have concerning me to any employer or prospective employer, any federal, state or municipal agency, or any other *SRO* and I release the *jurisdictions* and *SROs* 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 *SROs* indicated in Item 11 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*.
6. For the purpose of complying with the laws relating to the offer or sale of securities or commodities, I irrevocably appoint the administrator of each *jurisdiction* indicated in Item 11 as may be amended from time to time, or such other person designated by law, and the successors in such office, my attorney upon whom may be served any notice, process, pleading, subpoena or other document 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 such *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, pleading, subpoena or other document served hereunder be mailed to my current residential address as reflected in this form or any amendment thereto.
7. I consent that the service of any process, pleading, subpoena, or other document in any *investigation* or administrative *proceeding* conducted by the SEC, CFTC or a *jurisdiction* or in any civil action in which the SEC, CFTC or a *jurisdiction* are plaintiffs, or the notice of any *investigation* or *proceeding* by any *SRO* against the applicant, may be made by personal service or by regular, registered or certified mail or confirmed telegram to me at my most recent business or home address as reflected in this Form U-4, or any amendment thereto, by leaving such documents or notice at such address, or by any other legally permissible means.

I further stipulate and agree that any civil action or administrative *proceeding* instituted by the SEC, CFTC or a *jurisdiction* may be commenced by the service of process as described herein, and that service of an administrative subpoena shall be effected by such service, and that service as aforesaid shall be taken and held in all courts and administrative tribunals to be valid and binding as if personal service thereof had been made. [System Note: Due to a form conversion error, the preceding sentence was omitted from the electronic version of this Form U-4 for filings made through Web CRD from August 16, 1999 to October 13, 2000.]

8. I authorize all my employers and any other person to furnish to any *jurisdiction*, SRO, employer, prospective employer, 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 and waive any requirement of notification with respect to any investigative consumer report ordered by any *jurisdiction*, SRO, employer, or prospective employer. I understand that I have the right to request complete and accurate disclosure by the *jurisdiction*, SRO, employer or prospective employer 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 10 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. I authorize any employer or prospective employer to file electronically on my behalf any information required in this form or any amendment thereto; I certify that I have reviewed and approved the information to be submitted to any *jurisdiction* or SRO on this Form U-4 Application; I agree that I will review and approve all disclosure information that will be filed electronically on my behalf; I further agree to waive any objection to the admissibility of the electronically filed records in any criminal, civil, or administrative proceeding.

Applicant or applicant's agent has typed applicant's name under this section to attest to the completeness and accuracy of this record. The applicant recognizes that this typed name constitutes, in every way, use or aspect, his or her legally binding signature.

(All applicants must execute this page.)

Date (MM/DD/YYYY)
10/07/1999

Signature of Applicant
ROBERT F. BERRY

Signature _____

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, constitution(s), rules and by-laws of the agency, *jurisdiction* or SRO 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 SRO which hereby is requested, I will not employ the applicant in the capacity stated herein without first receiving the approval of any authority that may be required by law.

This firm has communicated with all of the applicant's previous employers for the past three years and has documentation on file with the names of the persons contacted and the date of contact. In addition, I have taken appropriate steps to verify the accuracy and completeness of the information contained in and with this application.

I have provided the applicant an opportunity to review the information contained herein and the applicant has approved this information and signed the Form U-4.

The appropriate signatory area **must** be completed on all initial, amendment or Temporary Registration filings.

The appropriate signatory area for Page 1 or Page 2 amendments consists of the date, signature and name lines below.

The applicant and appropriate signatory areas for Page 3 amendments consist of the date, signature and name lines for the appropriate signatory below and the date, signature and name lines for the applicant above.

The applicant and appropriate signatory areas for initial or Temporary Registration filings consist of the date, signature and name lines for the appropriate signatory below, together with the attestations that precede such lines, and the date, signature and name lines for the applicant above, together with the ten (10) numbered attestations that precede such lines for the applicant. For a Temporary Registration, applicant must also execute

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the Temporary Registration Acknowledgement.

Date (MM/DD/YYYY)
10/07/1999

Signature of Appropriate Signatory
JOHN M. IVAN

Signature _____

U4 - CRIMINAL DRP

No Information Filed

U4 - REGULATORY ACTION DRP

No Information Filed

U4 - CIVIL JUDICIAL DRP

No Information Filed

U4 - CUSTOMER COMPLAINT DRP

No Information Filed

U4 - TERMINATION DRP

No Information Filed

U4 - INVESTIGATION DRP

No Information Filed

U4 - BANKRUPTCY DRP

No Information Filed

U4 - BOND DRP

No Information Filed

U4 - JUDGMENT LIEN DRP

No Information Filed

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EXHIBIT 2-B

FORM U4 UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

WELLS FARGO CLEARING SERVICES, LLC(19616)

Rev. Form U4 (05/2009)

Individual Name: BERRY, ROBERT FRANKLIN (1262947)

U4 Amendment - Filing ID: 35964323

Filing Date: 01/08/2014

1. General Information

First Name: ROBERT	Middle Name: FRANKLIN	Last Name: BERRY	Suffix:
Firm CRD #: 19616	Firm Name: WELLS FARGO ADVISORS, LLC	Employment Date (MM/DD/YYYY): 10/01/1999	
Firm Billing Code: P0051410	Individual CRD #: 1262947	Individual SSN: xxx-xx-xxxx	

Do you have an independent contractor relationship with the above named firm?:

☐ Yes ☒ No

Office of Employment Address:

CRD Branch #	NYSE Branch Code #	Firm Billing Code	Address	Private Residence	Type of Office	Start Date	End Date	Status
		0840190	1901 MAIN STREET SUITE 650 COLUMBIA, SC 29201	No	Located At	10/01/1999	05/03/2006	
190200	840190	P0051326	1901 MAIN ST STE 650 COLUMBIA, SC 29201 United States	No	Located At	10/01/1999		

2. Fingerprint InformationElectronic Filing Representation

- ☐ By selecting this option, I represent that I am submitting, have submitted, or promptly will submit to the appropriate SRO a fingerprint card as required under applicable SRO rules; or
- Fingerprint card barcode
- ☒ By selecting this option, I represent that I have been employed continuously by the filing firm since the last submission of a fingerprint card to CRD and am not required to resubmit a fingerprint card at this time; or,
- ☐ By selecting this option, I represent that I have been employed continuously by the filing firm and my fingerprints have been processed by an SRO other than FINRA. I am submitting, have submitted, or promptly will submit the processed results for posting to CRD.

Exceptions to the Fingerprint Requirement

- ☐ By selecting one or more of the following two options, I affirm that I am exempt from the federal fingerprint requirement because 1/filing firm currently satisfy(ies) the requirements of at least one of the permissive exemptions indicated below pursuant to Rule 17f-2 under the Securities Exchange Act of 1934, including any notice or application requirements specified therein:
- ☐ Rule 17f-2(a)(1)(i)
- ☐

Rule 17f-2(a)(1)(III)

Investment Adviser Representative Only Applicants

- ☒ I affirm that I am applying only as an investment adviser representative and that I am not also applying or have not also applied with this firm to become a broker-dealer representative. If this radio button/box is selected, continue below.
- ☐ I am applying for registration only in *jurisdictions* that do not have fingerprint card filing requirements, or
- ☐ I am applying for registration in *jurisdictions* that have fingerprint card filing requirements and I am submitting, have submitted, or promptly will submit the appropriate fingerprint card directly to the *jurisdictions* for processing pursuant to applicable *jurisdiction* rules.

3. Registration With Unaffiliated Firms

Some *jurisdictions* prohibit "dual registration", which occurs when an individual chooses to maintain a concurrent registration as a representative/agent with two or more firms (either BD or IA firms) that are not affiliated. *Jurisdictions* that prohibit dual registration would not, for example, permit a broker-dealer agent working with brokerage firm A to maintain a registration with brokerage firm B if firms A and B are not owned or controlled by a common parent. Before seeking a dual registration status, you should consult the applicable rules or statutes of the *jurisdictions* with which you seek registration for prohibitions on dual registrations or any liability provisions.

Please indicate whether the individual will maintain a "dual registration" status by answering the questions in this section. (Note: An individual should answer 'yes' only if the individual is currently registered and is seeking registration with a firm (either BD or IA) that is not affiliated with the individual's current employing firm. If this is an initial application, an individual must answer 'no' to these questions; a "dual registration" may be initiated only after an initial registration has been established).

Answer "yes" or "no" to the following questions:

Yes No

- A. Will applicant maintain registration with a broker-dealer that is not affiliated with the filing firm? If you answer "yes", list the firm(s) in Section 12 (Employment History). ☐ ☐
- B. Will applicant maintain registration with an investment adviser that is not affiliated with the filing firm? If you answer "yes", list the firm(s) in Section 12 (Employment History). ☐ ☐

4. SRO Registrations

Check appropriate SRO Registration requests.

Qualifying examinations will be automatically scheduled if needed. If you are only scheduling or re-scheduling an exam, skip this section and complete Section 7 (EXAMINATION REQUESTS).

REGISTRATION CATEGORY	FINRA	NYSE	NYSE-MKT	BATS-ZX	BATS-YX	BOX	BX	EDGA	EDGX	NSX	ARCA	CBOE	C2	CHX	PHLX	ISE	ISE GEMINI	NQX	MLAX Options
OP - Registered Options Principal (S4)	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
IR - Investment Company and Variable Contracts Products Rep. (S6)	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
GS - Full Registration/General Securities Representative (S7)	☒	☒	☒	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
TR - Securities Trader (S7)	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
TS - Trading	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐

Supervisor (S7)																		
SU - General Securities Sales Supervisor (S9 and S10)	☐																	
BM - Branch Office Manager (S9 and S10)	☐	☐																
SM - Securities Manager (S10)	☐	☐																
AR - Assistant Representative/Order Processing (S11)	☐																	
IE - United Kingdom - Limited General Securities Registered Representative (S17)	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐

REGISTRATION CATEGORY	FINRA	NYSE	NYSE-MKT	BATS-ZX	BATS-YX	BOX	BX	EDGA	EDGX	NSX	ARCA	CBOE	C2	CHX	PHILX	ISE	ISE GEMINI	NQX	HLAX Options
DR - Direct Participation Program Representative (S22)	☐	☐	☐							☐				☐					
GP - General Securities Principal (S24)	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐			☐	☐	☐	☐	☐	☐
IP - Investment Company and Variable Contracts Products Principal (S26)	☐	☐	☐							☐								☐	
FA - Foreign Associate	☐																		
FN - Financial and Operations Principal (S27)	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
FI - Introducing Broker-Dealer/Financial and Operations Principal (S28)	☐	☐	☐							☐				☐				☐	☐
RS - Research Analyst (S86, S87)	☐	☐	☐																
RP - Research Principal	☐																		
DP - Direct Participation Program Principal (S39)	☐	☐	☐							☐				☐					
OR - Options Representative (S42)	☐					☐	☐							☐				☐	

REGISTRATION
https://crd.firms.finra.org/FRM/PrintHis/U4/U4H_AllSections.aspx?FilingPk=35984323&RL=Y&RLSF=

3/14

6/23/2017

Web CRD - Form U4, All Sections [User Name: mzuhr, OrgID: 19616]

CATEGORY	FINRA	NYSE	NYSE-MKT	BATS-ZX	BATS-YX	BOX	BX	EDGA	EDGX	NSX	ARCA	CBOE	CHX	PHLX	ISE	ISE GEMINI	NQX	MIAX Options	
MR - Municipal Securities Representative (S52)	☐	☐	☐							☐			☐						
MP - Municipal Securities Principal (S53)	☐	☐	☐							☐			☐						
CS - Corporate Securities Representative (S62)	☐	☐	☐							☐			☐				☐		
RG - Government Securities Representative (S72)	☐																		
PG - Government Securities Principal	☐																		
SA - Supervisory Analyst (S16)	☐	☐	☐																
PR - Limited Representative - Private Securities Offerings (S82)	☐	☐	☐																
CD - Canada-Limited General Securities Registered Representative (S37)	☐	☐	☐	☐	☐	☐		☐	☐		☐	☐	☐				☐		
CN - Canada-Limited General Securities Registered Representative (S38)	☐	☐	☐	☐	☐	☐		☐	☐		☐	☐	☐				☐		
ET - Equity Trader (S55)	☐	☐	☐							☐							☐		
REGISTRATION CATEGORY	FINRA	NYSE	NYSE-MKT	BATS-ZX	BATS-YX	BOX	BX	EDGA	EDGX	NSX	ARCA	CBOE	C2	CHX	PHLX	ISE	ISE GEMINI	NQX	MIAX Options
AM - Allied Member			☐								☐								
AP - Approved Person	☐	☐	☐			☐	☐				☐	☐	☐	☐	☐	☐	☐	☐	☐
LE - Securities Lending Representative	☐	☐	☐																
LS - Securities Lending Supervisor	☐	☐	☐																
ME - Member Exchange	☐	☐	☐				☐			☐				☐	☐				☐
FE - Floor Employee	☐	☐	☐				☐			☐	☐			☐					
OF - Officer										☐									
CO - Compliance	☐	☐	☐	☐	☐									☐		☐			☐

https://crd.firms.finra.org/FRM/PrintHist/U4/U4H_AllSections.aspx?FilingPk=35964323&RL=Y&RLSF=

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Official (S14)																			
CF - Compliance	☐	☐																	
Official Specialist (S14A)																			
PM - Floor Member Conducting Public Business	☐	☐																	
REGISTRATION CATEGORY	FINRA	NYSE	NYSE-MKT	BATS-ZX	BATS-YX	BOX	BX	EDGA	EDGX	NSX	ARCA	CBOE	C2	CHX	PHLX	ISE	ISE GEMINI	NQX	MIAX Options
PC - Floor Clerk Conducting Public Business	☐	☐																	
SC - Specialist Clerk (S21)	☐	☐																	
TA - Trading Assistant (S25)	☐	☐																	
FP - Municipal Fund (S51)	☐																		
IF - In-Firm Delivery Proctor	☐	☐	☐																
MM - Market Maker Authorized Trader - Options (S57)											☐								
FB - Floor Broker (S57)											☐								
OT - Authorized Trader (S7)			☐								☐								
MT - Market Maker Authorized Trader - Equities				☐	☐			☐	☐		☐								
IB - Investment Banking Representative (S79)	☐																		
REGISTRATION CATEGORY	FINRA	NYSE	NYSE-MKT	BATS-ZX	BATS-YX	BOX	BX	EDGA	EDGX	NSX	ARCA	CBOE	C2	CHX	PHLX	ISE	ISE GEMINI	NQX	MIAX Options
OS - Operations Professional (S99)	☐																		
AF - Floor Broker - Options (S57)			☐																
AO - Market Maker - Options (S57)			☐																
AC - Floor Clerk - Options			☐																
CT - Securities Trader Compliance Officer (S14)				☐	☐							☐	☐	☐		☐	☐		☐

PT - Proprietary
Trader (S56)TP - Securities Trader
Principal (S24)

Other

(Paper Form Only)

5. Jurisdiction RegistrationCheck appropriate *jurisdiction(s)* for broker-dealer agent (AG) and/or investment adviser representative (RA) registration requests.

JURISDICTION	AG	RA	JURISDICTION	AG	RA	JURISDICTION	AG	RA	JURISDICTION	AG	RA
Alabama	☐	☐	Illinois	☐	☐	Montana	☐	☐	Puerto Rico	☐	☐
Alaska	☐	☐	Indiana	☐	☐	Nebraska	☐	☐	Rhode Island	☐	☐
Arizona	☐	☐	Iowa	☐	☐	Nevada	☐	☐	South Carolina	☒	☒
Arkansas	☐	☐	Kansas	☐	☐	New Hampshire	☐	☐	South Dakota	☐	☐
California	☐	☐	Kentucky	☒	☐	New Jersey	☒	☐	Tennessee	☒	☐
Colorado	☒	☐	Louisiana	☐	☐	New Mexico	☐	☐	Texas	☒	☒
Connecticut	☒	☐	Maine	☐	☐	New York	☐	☐	Utah	☐	☐
Delaware	☒	☐	Maryland	☒	☐	North Carolina	☒	☐	Vermont	☒	☐
District of Columbia	☐	☐	Massachusetts	☐	☐	North Dakota	☐	☐	Virgin Islands	☐	☐
Florida	☒	☐	Michigan	☐	☐	Ohio	☐	☐	Virginia	☒	☐
Georgia	☒	☐	Minnesota	☐	☐	Oklahoma	☐	☐	Washington	☒	☐
Hawaii	☐	☐	Mississippi	☒	☐	Oregon	☐	☐	West Virginia	☐	☐
Idaho	☐	☐	Missouri	☐	☐	Pennsylvania	☒	☐	Wisconsin	☐	☐
									Wyoming	☐	☐

AGENT OF THE ISSUER REGISTRATION (AI) ☐ Indicate 2 letter *jurisdiction code(s)*: _____**6. Registration Requests with Affiliated Firms**Will *applicant* maintain registration with *firm(s)* under common ownership or control with the *filing firm*?If "yes", fill in the details to indicate a request for registration with additional *firm(s)*.

Yes No

7. Examination Requests

Scheduling or Rescheduling Examinations Complete this section only if you are scheduling or rescheduling an examination or continuing education session. Do not select the Series 63 (S63) or Series 65 (S65) examinations in this section if you have completed Section 5 (JURISDICTION REGISTRATION) and have selected registration in a *jurisdiction*. If you have completed Section 5 (JURISDICTION REGISTRATION), and requested an AG registration in a *jurisdiction* that requires that you pass the S63 examination, an S63 examination will be automatically scheduled for you upon submission of this Form U4. If you have completed Section 5 (JURISDICTION REGISTRATION), and requested an RA registration in a *jurisdiction* that requires that you pass the S65 examination, an S65 examination will be automatically scheduled for you upon submission of this Form U4.

☐ S3	☐ S15	☐ S30	☐ S52	☐ S79
☐ S4	☐ S16	☐ S31	☐ S53	☐ S82
☐ S6	☐ S17	☐ S32	☐ S55	☐ S86
☐ S7	☐ S22	☐ S33	☐ S56	☐ S87
☐ S9	☐ S23	☐ S37	☐ S62	☐ S99
☐ S10	☐ S24	☐ S38	☐ S63	☐ S101
☐ S11	☐ S26	☐ S39	☐ S65	☐ S106
☐ S12	☐ S27	☐ S42	☐ S66	☐ S201
☐ S14	☐ S28	☐ S51	☐ S72	☐ S501

Other _____ (Paper Form Only)

OPTIONAL: Foreign Exam City _____

Date (MM/DD/YYYY) _____

8. Professional Designations

Select each designation you currently maintain.

- ☐ Certified Financial Planner
- ☐ Chartered Financial Consultant (ChFC)
- ☐ Personal Financial Specialist (PFS)
- ☐ Chartered Financial Analyst (CFA)
- ☐ Chartered Investment Counselor (CIC)

9. Identifying Information/Name Change

First Name:	Middle Name:	Last Name:	Suffix:
ROBERT	FRANKLIN	BERRY	
State of Birth	Province of Birth	Country of Birth	
	SOUTH CAROLINA	USA	
Date of Birth (MM/DD/YYYY)	Sex	Hair Color	Eye Color
REDACTED	☒ Male ☐ Female	Brown	Blue
Height (ft)	Height (in)	Weight (lbs)	
5	9	160	

10. Other Names

Other Names	Status
BERRY, BOB	

11. Residential History

From	To	Street Address	Status

10/2013	PRESENT	200 HAMMOCK DR LEXINGTON, SC 29072-0000 UNITED STATES	
05/2010	10/2013	141 ABLE HARMON LANE LEXINGTON, SC 29072 USA	
05/1996	05/2010	513 BROOKSHIRE DRIVE COLUMBIA, SC 29210 UNITED STATES	
11/1990	05/1996	201 SILVERMILL COURT COLUMBIA, SC 29210 United States	

12. Employment History

From	To	Name of Firm or Company	Address	Investment Related	Position Held	Status
05/2009	PRESENT	WELLS FARGO ADVISORS LLC	COLUMBIA, SC USA	Yes	REGISTERED REP	
06/2003	05/2009	WACHOVIA SECURITIES, LLC	COLUMBIA, SC UNITED STATES	Yes	FINANCIAL ADVISOR	
06/2002	05/2003	WACHOVIA SECURITIES, INC.	COLUMBIA, SC UNITED STATES	Yes	FINANCIAL ADVISOR	
10/1999	06/2002	FIRST UNION SECURITIES, INC.	COLUMBIA, SC UNITED STATES	Yes	FINANCIAL ADVISOR	
11/1994	10/1999	FIRST UNION CAPITAL MARKETS CORP.	COLUMBIA, SC	Yes	NOT PROVIDED	
04/1985	10/1999	#1A PRUDENTIAL SECURITIES INCORPORATED	COLUMBIA, SC	No	NOT PROVIDED	
04/1985	11/1994	PRUDENTIAL SECURITIES INCORPORATED	COLUMBIA, SC	Yes	OTHER - ACCT EXEC	
04/1985	04/1991	#1A PRUDENTIAL SECURITIES INCORPORATED	COLUMBIA, SC	No	NOT PROVIDED	
04/1985	04/1991	#1A PRUDENTIAL-BACHE SECURITIES, INC.	COLUMBIA, SC	No	NOT PROVIDED	

13. Other Business

Are you currently engaged in any other business either as a proprietor, partner, officer, director, employee, trustee, agent or otherwise? (Please exclude non *investment-related* activity that is exclusively charitable, civic, religious or fraternal and is recognized as tax exempt.) If YES, please provide the following details: the name of the other business, whether the business is *investment-related*, the address of the other business, the nature of the other business, your position, title, or relationship with the other business, the start date of your relationship, the approximate number of hours/month you devote to the other business, the number of hours you devote to the other business during securities trading hours, and briefly describe your duties relating to the other business.

☒ Yes ☐ No

If 'Yes', please enter details below.

CPA LICENSE STATE OF SC. MIZZELL FAMILY REUNION; NOT INVESTMENT RELATED; COLUMBIA, SC; FAMILY REUNIONS AND CEMETARY PLOT; START DATE 7/1/2010; 1 HR MONTH; 0 HRS DURING TRADING; DUTIES: MAKE ANNUAL DEPOSITS AND DISTRIBUTE MONEY TO PAY OF FAMILY CEMETARY. POWER OF ATTORNEY FOR MOTHER; INVESTMENT RELATED; COLUMBIA, SC; START DATE 11/2012; 10 HRS PER MONTH; 0 HRS DURING TRADING.

14. Disclosure Questions

IF THE ANSWER TO ANY OF THE FOLLOWING QUESTIONS IS "YES", COMPLETE DETAILS OF ALL EVENTS OR PROCEEDINGS ON APPROPRIATE DRP(S)

REFER TO THE EXPLANATION OF TERMS SECTION OF FORM U4 INSTRUCTIONS FOR EXPLANATIONS OF ITALICIZED TERMS.

Criminal Disclosure

- 14A. (1) Have you ever:** Yes No
- (a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign, or military court to any *felony*? ☐ ☒
- (b) been *charged* with any *felony*? ☐ ☒
- (2) Based upon activities that occurred while you exercised control over it, has an organization ever:**
- (a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic or foreign court to any *felony*? ☐ ☒
- (b) been *charged* with any *felony*? ☐ ☒
- 14B. (1) Have you ever:** Yes No
- (a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign or military court to a *misdemeanor involving*: Investments or an *investment-related* business or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses? ☐ ☒
- (b) been *charged* with a *misdemeanor* specified in 14B(1)(a)? ☐ ☒
- (2) Based upon activities that occurred while you exercised control over it, has an organization ever:**
- (a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic or foreign court to a *misdemeanor* specified in 14B(1)(a)? ☐ ☒
- (b) been *charged* with a *misdemeanor* specified in 14B(1)(a)? ☐ ☒

Regulatory Action Disclosure

- 14C. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:** Yes No
- (1) *found* you to have made a false statement or omission? ☐ ☒
- (2) *found* you to have been *involved* in a violation of its 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* against you in connection with *investment-related* activity? ☐ ☒
- (5) imposed a civil money penalty on you, or *ordered* you to cease and desist from any activity? ☐ ☒
- (6) *found* you to have willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board, or *found* you to have been unable to comply with any provision of such Act, rule or regulation? ☐ ☒
- (7) *found* you to have willfully aided, abetted, counseled, commanded, induced, or procured the violation by any person of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board? ☐ ☒
- (8) *found* you to have failed reasonably to supervise another person subject to your supervision, with a view to preventing the violation of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or

regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board?

14D. (1) Has any other Federal regulatory agency or any state regulatory agency or foreign financial regulatory authority ever: Yes No

- (a) found you to have made a false statement or omission or been dishonest, unfair or unethical? ☐ Yes ☒ No
- (b) found you to have been involved in a violation of investment-related regulation(s) or statute(s)? ☐ Yes ☒ No
- (c) found you to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked or restricted? ☐ Yes ☒ No
- (d) entered an order against you in connection with an investment-related activity? ☐ Yes ☒ No
- (e) denied, suspended, or revoked your registration or license or otherwise, by order, prevented you from associating with an investment-related business or restricted your activities? ☐ Yes ☒ No

(2) Have you been subject to any final order of a state securities commission (or any agency or officer performing like functions), state authority that supervises or examines banks, savings associations, or credit unions, state insurance commission (or any agency or office performing like functions), an appropriate federal banking agency, or the National Credit Union Administration, that:

- (a) bars you from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or ☐ Yes ☒ No
- (b) constitutes a final order based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct? ☐ Yes ☒ No

14E. Has any self-regulatory organization ever:

Yes No

- (1) found you to have made a false statement or omission? ☐ Yes ☒ No
- (2) found you to have been involved in a violation of its rules (other than a violation designated as a "minor rule violation" under a plan approved by the U.S. Securities and Exchange Commission)? ☐ Yes ☒ No
- (3) found you to have been the cause of an investment-related business having its authorization to do business denied, suspended, revoked or restricted? ☐ Yes ☒ No
- (4) disciplined you by expelling or suspending you from membership, barring or suspending your association with its members, or restricting your activities? ☐ Yes ☒ No
- (5) found you to have willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board, or found you to have been unable to comply with any provision of such Act, rule or regulation? ☐ Yes ☒ No
- (6) found you to have willfully aided, abetted, counseled, commanded, induced, or procured the violation by any person of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board? ☐ Yes ☒ No
- (7) found you to have failed reasonably to supervise another person subject to your supervision, with a view to preventing the violation of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board? ☐ Yes ☒ No

14F. Have you ever had an authorization to act as an attorney, accountant or federal contractor that was revoked or suspended?

☐ Yes ☒ No

- 14G. Have you been notified, in writing, that you are now the subject of any:** Yes No
- (1) regulatory complaint or *proceeding* that could result in a "yes" answer to any part of 14C, D or E? (If "yes", complete the *Regulatory Action Disclosure Reporting Page*.) ☐ ☒
- (2) *investigation* that could result in a "yes" answer to any part of 14A, B, C, D or E? (If "yes", complete the *Investigation Disclosure Reporting Page*.) ☐ ☒

Civil Judicial Disclosure

- 14H. (1) Has any domestic or foreign court ever:** Yes No
- (a) *enjoined* you in connection with any *investment-related* activity? ☐ ☒
- (b) *found* that you were *involved* in a violation of any *investment-related* statute(s) or regulation(s)? ☐ ☒
- (c) dismissed, pursuant to a settlement agreement, an *investment-related* civil action brought against you by a state or *foreign financial regulatory authority*? ☐ ☒
- (2) Are you named in any pending *investment-related* civil action that could result in a "yes" answer to any part of 14H(1)?** ☐ ☒

Customer Complaint/Arbitration/Civil Litigation Disclosure

- 14I. (1) Have you ever been named as a respondent/defendant in an *investment-related*, consumer-initiated arbitration or civil litigation which alleged that you were *involved* in one or more *sales practice violations* and which:** Yes No
- (a) is still pending, or; ☐ ☒
- (b) resulted in an arbitration award or civil judgment against you, regardless of amount, or; ☐ ☒
- (c) was settled, prior to 05/18/2009, for an amount of \$10,000 or more, or; ☐ ☒
- (d) was settled, on or after 05/18/2009, for an amount of \$15,000 or more? ☐ ☒
- (2) Have you ever been the subject of an *investment-related*, consumer-initiated (written or oral) complaint, which alleged that you were *involved* in one or more *sales practice violations*, and which:**
- (a) was settled, prior to 05/18/2009 for an amount of \$10,000 or more, or; ☐ ☒
- (b) was settled, on or after 05/18/2009, for an amount of \$15,000 or more? ☐ ☒
- (3) Within the past twenty four (24) months, have you been the subject of an *investment-related*, consumer-initiated, written complaint, not otherwise reported under question 14I(2) above, which:**
- (a) alleged that you were *involved* in one or more *sales practice violations* and contained a claim for compensatory damages of \$5,000 or more (if no damage amount is alleged, the complaint must be reported unless the *firm* has made a good faith determination that the damages from the alleged conduct would be less than \$5,000), or; ☐ ☒
- (b) alleged that you were *involved* in forgery, theft, misappropriation or conversion of funds or securities? ☐ ☒

Answer questions (4) and (5) below only for arbitration claims or civil litigation filed on or after 05/18/2009.

- (4) Have you ever been the subject of an *investment-related*, consumer-initiated arbitration claim or civil litigation which alleged that you were *involved* in one or more *sales practice violations*, and which:**
- (a) was settled for an amount of \$15,000 or more, or; ☐ ☒
- (b) resulted in an arbitration award or civil judgment against any named respondent(s)/defendant(s), regardless of any amount? ☐ ☒
- (5) Within the past twenty four (24) months, have you been the subject of an *investment-related*, consumer-initiated arbitration claim or civil litigation not otherwise reported under questions 14I(4) above, which:**
- (a) alleged that you were *involved* in one or more *sales practice violations* and contained a claim for compensatory damages of \$5,000 or more (if no damage amount is alleged, the arbitration claim or civil litigation, must be reported unless the *firm* has made a good faith

determination that the damages from the alleged conduct would be less than \$5,000), or;

- (b) alleged that you were *involved* in forgery, theft, misappropriation or conversion of funds or securities?

Termination Disclosure

- 14J. Have you ever voluntarily *resigned*, been discharged or permitted to *resign* after allegations were made that accused you of:
- | | Yes | No |
|--|-----------------------|-----------------------|
| (1) violating <i>investment-related</i> statutes, regulations, rules, or industry standards of conduct? | ☐ | ☐ |
| (2) fraud or the wrongful taking of property? | ☐ | ☐ |
| (3) failure to supervise in connection with <i>investment-related</i> statutes, regulations, rules or industry standards of conduct? | ☐ | ☐ |

Financial Disclosure

- 14K. Within the past 10 years:
- | | Yes | No |
|--|-----------------------|-----------------------|
| (1) have you made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition? | ☐ | ☐ |
| (2) based upon events that occurred while you exercised <i>control</i> over it, has an organization made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition? | ☐ | ☐ |
| (3) based upon events that occurred while you exercised <i>control</i> over it, has a broker or dealer been the subject of an involuntary bankruptcy petition, or had a trustee appointed, or had a direct payment procedure initiated under the Securities Investor Protection Act? | ☐ | ☐ |

- 14L. Has a bonding company ever denied, paid out on, or revoked a bond for you?
- ☐ Yes ☐ No

- 14M. Do you have any unsatisfied judgments or liens against you?
- ☐ Yes ☐ No

15. Signatures

Please Read Carefully

All signatures required on this Form U4 filing must be made in this section.

A "signature" includes a manual signature or an electronically transmitted equivalent. For purposes of an electronic form filing, a signature is effected by typing a name in the designated signature field. By typing a name in this field, the signatory acknowledges and represents that the entry constitutes in every way, use, or aspect, his or her legally binding signature.

15A INDIVIDUAL/APPLICANT'S ACKNOWLEDGMENT AND CONSENT

This section must be completed on all initial or Temporary Registration form filings.

15B FIRM/APPROPRIATE SIGNATORY REPRESENTATIONS

This section must be completed on all initial or Temporary Registration form filings.

15C TEMPORARY REGISTRATION ACKNOWLEDGMENT

This section must be completed on Temporary Registration form filings to be able to receive Temporary Registration.

15D INDIVIDUAL/APPLICANT'S AMENDMENT ACKNOWLEDGMENT AND CONSENT

This section must be completed on any amendment filing that amends any information in Section 14 (Disclosure Questions) or any Disclosure Reporting Page (DRP).

15E FIRM/APPROPRIATE SIGNATORY AMENDMENT REPRESENTATIONS

This section must be completed on all amendment form filings.

15F FIRM/APPROPRIATE SIGNATORY CONCURRENCE

This section must be completed to concur with a U4 filing made by another *firm* (IA/BD) on behalf of an individual that is also registered with that other *firm* (IA/BD).

15C. TEMPORARY REGISTRATION ACKNOWLEDGMENT

If an *applicant* has been registered in a *jurisdiction* or self regulatory organization (SRO) in the 30 days prior to the date an application for registration is filed with the Central Registration Depository or Investment Adviser Registration Depository, he or she may qualify for a Temporary Registration to conduct securities business in that *jurisdiction* or SRO if this acknowledgment is executed and filed with the Form U4 at the *applicant's firm*.

This acknowledgment must be signed only if the *applicant* intends to apply for a Temporary Registration while the application for registration is under review.

I request a Temporary Registration in each *jurisdiction* and/or SRO requested on this Form U4, while my registration with the *jurisdiction(s)* and/or SRO(s) requested is under review;

I am requesting a Temporary Registration with the *firm* filing on my behalf for the *jurisdiction(s)* and/or SRO(s) noted in Section 4 (SRO REGISTRATION) and/or Section 5 (JURISDICTION REGISTRATION) of this Form U4;

I understand that I may request a Temporary Registration only in those *jurisdiction(s)* and/or SRO(s) in which I have been registered with my prior *firm* within the previous 30 days;

I understand that I may not engage in any securities activities requiring registration in a *jurisdiction* and/or SRO until I have received notice from the CRD or IARD that I have been granted a Temporary Registration in that *jurisdiction* and/or SRO;

I agree that until the Temporary Registration has been replaced by a registration, any *jurisdiction* and/or SRO in which I have applied for registration may withdraw the Temporary Registration;

If a *jurisdiction* or SRO withdraws my Temporary Registration, my application will then be held pending in that *jurisdiction* and/or SRO until its review is complete and the registration is granted or denied, or the application is withdrawn;

I understand and agree that, in the event my Temporary Registration is withdrawn by a *jurisdiction* and/or SRO, I must immediately cease any securities activities requiring a registration in that *jurisdiction* and/or SRO until it grants my registration;

I understand that by executing this Acknowledgment I am agreeing not to challenge the withdrawal of a Temporary Registration; however, I do not waive any right I may have in any *jurisdiction* and/or SRO with respect to any decision by that *jurisdiction* and/or SRO to deny my application for registration.

Date (MM/DD/YYYY)

Signature of Applicant

Signature _____

15D. AMENDMENT INDIVIDUAL/APPLICANT'S ACKNOWLEDGMENT AND CONSENT

Date (MM/DD/YYYY)

Signature of Applicant

Signature _____

15E. FIRM/APPROPRIATE SIGNATORY AMENDMENT REPRESENTATIONS

Date (MM/DD/YYYY)

Signature of Appropriate Signatory

01/08/2014

DINESH UDBALE

Signature _____

Bankruptcy / SIPC / Compromise with Creditors

No Information Filed

Bond DRP

No Information Filed

Civil Judicial DRP

No Information Filed

Criminal DRP

No Information Filed

Customer Complaint DRP

No Information Filed

Investigation DRP

No Information Filed

Judgment Lien DRP

No Information Filed

Regulatory Action DRP

No Information Filed

Termination DRP

No Information Filed

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EXHIBIT 3



Print

1010. Electronic Filing Requirements for Uniform Forms

(a) Filing Requirement

Except as provided in NASD Rule 1013(a)(2), all forms required to be filed by Article IV, Sections 1, 7, and 8, and Article V, Sections 2 and 3, of the FINRA By-Laws shall be filed through an electronic process or such other process FINRA may prescribe to the Central Registration Depository.

(b) Supervisory Requirements

(1) In order to comply with the supervisory procedures requirement in Rule 3110, each member shall identify a registered principal(s) or corporate officer(s) who has a position of authority over registration functions, to be responsible for supervising the electronic filing of appropriate forms pursuant to this Rule.

(2) The registered principal(s) or corporate officer(s) who has or have the responsibility to review and approve the forms filed pursuant to this Rule shall be required to acknowledge, electronically, that he is filing this information on behalf of the member and the member's associated persons.

(c) Form U4 Filing Requirements

(1) Except as provided in paragraphs (c)(2) and (c)(3) below, every initial and transfer electronic Form U4 filing and any amendments to the disclosure information on Form U4 shall be based on a manually signed Form U4 provided to the member or applicant for membership by the person on whose behalf the Form U4 is being filed. As part of the member's recordkeeping requirements, it shall retain the person's manually signed Form U4 or amendments to the disclosure information on Form U4 in accordance with SEA Rule 17a-4(e)(1) and make them available promptly upon regulatory request. An applicant for membership also shall retain in accordance with SEA Rule 17a-4(e)(1) every manually signed Form U4 it receives during the application process and make them available promptly upon regulatory request.

(2) A member may file electronically amendments to the disclosure information on Form U4 without obtaining the subject associated person's manual signature on the form, provided that the member shall use reasonable efforts to:

(A) provide the associated person with a copy of the amended disclosure information prior to filing; and

(B) obtain the associated person's written acknowledgment (which may be electronic) prior to filing that the information has been received and reviewed. As part of the member's recordkeeping requirements, the member shall retain this acknowledgment in accordance with SEA Rule 17a-4(e)(1) and make it available promptly upon regulatory request.

(3) In the event a member is not able to obtain an associated person's manual signature or written acknowledgement of amended disclosure information on Form U4 prior to filing of such information pursuant to paragraph (c)(1) or (2), the member is obligated to file the disclosure information as to which it has knowledge in accordance with Article V, Section 2 of the FINRA By-Laws. The member shall use reasonable efforts to provide the associated person with a copy of the amended disclosure information that was filed.

(4) A member may file electronically amendments to administrative data on Form U4 without obtaining the subject associated person's signature on the form. The member shall use reasonable efforts to provide the associated person with a copy of the amended administrative information that was filed.

(d) Fingerprint Information

Upon filing an electronic Form U4 on behalf of a person applying for registration, a member shall promptly submit fingerprint information for that person. FINRA may make a registration effective pending receipt of the fingerprint information. If a member fails to submit the fingerprint information within 30 days after FINRA receives the electronic Form U4, the person's registration shall be deemed inactive. In such case, FINRA shall notify the member that the person must immediately cease all activities requiring registration and is prohibited from performing any duties and functioning in any capacity requiring registration. FINRA shall administratively terminate a registration that is inactive for a period of two years. A person whose registration is administratively terminated may reactivate the registration only by reapplying for registration.

and meeting the qualification requirements of the applicable provisions of the NASD Rule 1020 Series and the NASD Rule 1030 Series. Upon application and a showing of good cause, FINRA may extend the 30-day period.

(e) Form U5 Filing Requirements

Initial filings and amendments of Form U5 shall be submitted electronically. As part of the member's recordkeeping requirements, it shall retain such records for a period of not less than three years, the first two years in an easily accessible place, in accordance with SEA Rule 17a-4, and make such records available promptly upon regulatory request.

... Supplementary Material: -----

.01 Delegation of Electronic Filing Functions. The designated registered principal(s) or corporate officer(s) required by paragraph (b)(1) to supervise the member's electronic filings may delegate to an associated person (who need not be registered) the electronic filing of the member's appropriate forms via Web CRD. The registered principal(s) or corporate officer(s) responsible for supervising the member's electronic filings may also delegate to the associated person making the electronic filings the requirement in paragraph (b)(2) to acknowledge, electronically, that he is making the filing on behalf of the member and the member's associated persons. However, the registered principal(s) or corporate officer(s) may not delegate any of the supervision, review, and approval responsibilities mandated in paragraphs (b)(1) and (2) and shall take reasonable and appropriate action to ensure that all delegated electronic filing functions are properly executed and supervised.

.02 Third-Party Agreements. A member may enter into an agreement with a third party pursuant to which the third party agrees to file the required forms electronically on behalf of the member and the member's associated persons. Notwithstanding the existence of such an agreement, the member remains responsible for complying with the requirements of this Rule.

.03 Filing of Amendments Involving Disclosure Information. In the event a member is not able to obtain an associated person's manual signature or written acknowledgement of amended disclosure information on that person's Form U4 prior to filing of such amendment reflecting the information pursuant to paragraph (c)(3) (examples of reasons why a member may not be able to obtain the manual signature or written acknowledgement may include, but are not limited to, the associated person refuses to acknowledge such information, is on active military service or otherwise is unavailable during the period provided for filing of such amendments under Article V of the FINRA By-Laws), the member shall enter "Representative Refused to Sign/Acknowledge" or "Representative Not Available" or a substantially similar entry in the electronic Form U4 field for the associated person's signature.

.04 Filing of Amendments Involving Administrative Information. For purposes of paragraph (c)(4) of the Rule, administrative data includes such items as the addition of state or self-regulatory organization registrations, exam scheduling, and updates to residential, business and personal history.

Amended by SR-FINRA-2014-045 eff. Dec. 1, 2014.
Amended by SR-FINRA-2009-019 eff. July 27, 2009.
Amended by SR-NASD-2003-136 eff. Aug. 28, 2003.
Amended by SR-NASD-99-67 eff. Nov. 15, 2000.
Amended and Implemented by SR-NASD-99-28 eff. Aug. 18, 1999.
Adopted by SR-NASD-96-21 on July 15, 1996.

Selected Notices: 99-56, 99-63, 00-73, 09-40.

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Print

6810. Definitions

For purposes of the Rule 6800 Series:

(a) "Account Effective Date" means:

(1) with regard to those circumstances in which an Industry Member has established a trading relationship with an institution but has not established an account with that institution:

(A) when the trading relationship was established prior to November 15, 2018 for Industry Members other than Small Industry Members, or prior to November 15, 2019 for Small Industry Members, either

(i) the date the relationship identifier was established within the Industry Member;

(ii) the date when trading began (i.e., the date the first order was received) using the relevant relationship identifier; or

(iii) if both dates are available, the earlier date will be used to the extent that the dates differ; or

(B) when the trading relationship was established on or after November 15, 2018 for Industry Members other than Small Industry Members, or on or after November 15, 2019 for Small Industry Members, the date the Industry Member established the relationship identifier, which would be no later than the date the first order was received;

(2) where an Industry Member changes back office providers or clearing firms prior to November 15, 2018 for Industry Members other than Small Industry Members, or prior to November 15, 2019 for Small Industry Members, the date an account was established at the relevant Industry Member, either directly or via transfer;

(3) where an Industry Member acquires another Industry Member prior to November 15, 2018 for Industry Members other than Small Industry Members, or prior to November 15, 2019 for Small Industry Members, the date an account was established at the relevant Industry Member, either directly or via transfer;

(4) where there are multiple dates associated with an account established prior to November 15, 2018 for Industry Members other than Small Industry Members, or prior to November 15, 2019 for Small Industry Members, the earliest available date;

(5) with regard to Industry Member proprietary accounts established prior to November 15, 2018 for Industry Members other than Small Industry Members, or prior to November 15, 2019 for Small Industry Members:

(A) the date established for the account in the Industry Member or in a system of the Industry Member or

(B) the date when proprietary trading began in the account (i.e., the date on which the first orders were submitted from the account).

With regard to paragraph (a)(2) — (5), the Account Effective Date will be no later than the date trading occurs at the Industry Member or in the Industry Member's system.

(b) "Active Accounts" means an account that has had activity in Eligible Securities within the last six months.

(c) "Allocation Report" means a report made to the Central Repository by an Industry Member that identifies the Firm Designated ID for any account(s), including subaccount(s), to which executed shares are allocated and provides the security that has been allocated, the identifier of the firm reporting the allocation, the price per share of shares allocated, the side of shares allocated, the number of shares allocated to each account, and the time of the allocation; provided, for the avoidance of doubt, any such Allocation Report shall not be required to be linked to particular orders or executions.

(d) "Business Clock" means a clock used to record the date and time of any Reportable Event required to be reported under this Rule Series.

(e) "CAT" means the consolidated audit trail contemplated by Rule 613 of SEC Regulation NMS.

(f) "CAT NMS Plan" means the National Market System Plan Governing the Consolidated Audit Trail, as amended from time to time.

(g) "CAT-Order-ID" means a unique order identifier or series of unique order identifiers that allows the Central Repository to efficiently and accurately link all Reportable Events for an order, and all orders that result from the aggregation or disaggregation of such order.

(h) "CAT Reporting Agent" means a Data Submitter that is a third party that enters into an agreement with an Industry Member pursuant to which the CAT Reporting Agent agrees to fulfill such Industry Member's reporting obligations under this Rule Series.

(i) "Central Repository" means the repository responsible for the receipt, consolidation, and retention of all information reported to the CAT pursuant to Rule 613 of SEC Regulation NMS and the CAT NMS Plan.

(j) "Compliance Threshold" has the meaning set forth in Rule 6893(d).

(k) "Customer" means:

(1) the account holder(s) of the account at an Industry Member originating the order; and

(2) any person from whom the Industry Member is authorized to accept trading instructions for such account, if different from the account holder(s).

(l) "Customer Account Information" shall include, but not be limited to, account number, account type, customer type, date account opened, and large trader identifier (if applicable); except, however, that:

(1) in those circumstances in which an Industry Member has established a trading relationship with an institution but has not established an account with that institution, the Industry Member will:

(A) provide the Account Effective Date in lieu of the "date account opened";

(B) provide the relationship identifier in lieu of the "account number"; and

(C) identify the "account type" as a "relationship";

(2) in those circumstances in which the relevant account was established prior to November 15, 2018 for Industry Members other than Small Industry Members, or prior to November 15, 2019 for Small Industry Members, and no "date account opened" is available for the account, the Industry Member will provide the Account Effective Date in the following circumstances:

(A) where an Industry Member changes back office providers or clearing firms and the date account opened is changed to the date the account was opened on the new back office/clearing firm system;

(B) where an Industry Member acquires another Industry Member and the date account opened is changed to the date the account was opened on the post-merger back office/clearing firm system;

(C) where there are multiple dates associated with an account in an Industry Member's system, and the parameters of each date are determined by the individual Industry Member; and

(D) where the relevant account is an Industry Member proprietary account.

(m) "Customer Identifying Information" means information of sufficient detail to identify a Customer, including, but not limited to:

(1) with respect to individuals: name, address, date of birth, individual tax payer identification number ("ITIN")/social security number ("SSN"), individual's role in the account (e.g., primary holder, joint holder, guardian, trustee, person with the power of attorney); and

(2) with respect to legal entities: name, address, Employer Identification Number ("EIN")/Legal Entity Identifier ("LEI") or other comparable common entity identifier, if applicable; provided, however, that an Industry Member that has an LEI for a Customer must submit the Customer's LEI in addition to other information of sufficient detail to identify a Customer.

(n) "Data Submitter" means any person that reports data to the Central Repository, including national securities exchanges, national securities associations, broker-dealers, the SIPs for the CQS, CTA, UTP and Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information ("OPRA") Plans, and certain other vendors or third parties that may submit data to the Central Repository on behalf of Industry Members.

- (o) "Eligible Security" includes (1) all NMS Securities and (2) all OTC Equity Securities.
- (p) "Error Rate" means the percentage of Reportable Events collected by the Central Repository in which the data reported does not fully and accurately reflect the order event that occurred in the market.
- (q) "Firm Designated ID" means a unique identifier for each trading account designated by Industry Members for purposes of providing data to the Central Repository, where each such identifier is unique among all identifiers from any given Industry Member for each business date.
- (r) "Industry Member" means a member of a national securities exchange or a member of a national securities association that is required to record and report information pursuant to the CAT NMS Plan and this Rule 6800 Series.
- (s) "Industry Member Data" has the meaning set forth in Rule 6830(a)(2).
- (t) "Initial Plan Processor" means the first Plan Processor selected by the Operating Committee in accordance with Rule 613 of Regulation NMS and Section 6.1 of the CAT NMS Plan.
- (u) "Listed Option" or "Option" have the meaning set forth in Rule 600(b)(35) of Regulation NMS.
- (v) "Manual Order Event" means a non-electronic communication of order-related information for which Industry Members must record and report the time of the event.
- (w) "Material Terms of the Order" includes: the NMS Security or OTC Equity Security symbol; security type; price (if applicable); size (displayed and non-displayed); side (buy/sell); order type; if a sell order, whether the order is long, short, short exempt; open/close indicator (except on transactions in equities); time in force (if applicable); if the order is for a Listed Option, option type (put/call), option symbol or root symbol, underlying symbol, strike price, expiration date, and open/close (except on market maker quotations); and any special handling instructions.
- (x) "NMS Security" means any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in Listed Options.
- (y) "NMS Stock" means any NMS Security other than an option.
- (z) "Operating Committee" means the governing body of the CAT NMS, LLC designated as such and described in Article IV of the CAT NMS Plan.
- (aa) "Options Market Maker" means a broker-dealer registered with an exchange for the purpose of making markets in options contracts traded on the exchange.
- (bb) "Order" or "order", with respect to Eligible Securities, shall include:
 - (1) Any order received by an Industry Member from any person;
 - (2) Any order originated by an Industry Member; or
 - (3) Any bid or offer.
- (cc) "OTC Equity Security" means any equity security, other than an NMS Security, subject to prompt last sale reporting rules of a registered national securities association and reported to one of such association's equity trade reporting facilities.
- (dd) "Participant" means each Person identified as such in Exhibit A of the CAT NMS Plan, as amended, in such Person's capacity as a Participant in CAT NMS, LLC.
- (ee) "Person" means any individual, partnership, limited liability company, corporation, joint venture, trust, business trust, cooperative or association and any heirs, executors, administrators, legal representatives, successors and assigns of such Person where the context so permits.
- (ff) "Plan Processor" means the Initial Plan Processor or any other Person selected by the Operating Committee pursuant to Rule 613 of SEC Regulation NMS and Sections 4.3(b)(i) and 6.1 of the CAT NMS Plan to perform the CAT processing functions required by Rule 613 of SEC Regulation NMS and set forth in the CAT NMS Plan.
- (gg) "Received Industry Member Data" has the meaning set forth in Rule 6830(a)(2).
- (hh) "Recorded Industry Member Data" has the meaning set forth in Rule 6830(a)(1).
- (ii) "Reportable Event" includes, but is not limited to, the original receipt or origination, modification, cancellation, routing, execution (in whole or in part) and allocation of an order, and receipt of a routed order.

http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=12820&p... 7/5/2017

(jj) "SRO" means any self-regulatory organization within the meaning of Section 3(a)(26) of the Exchange Act.

(kk) "SRO-Assigned Market Participant Identifier" means an Identifier assigned to an Industry Member by an SRO or an Identifier used by a Participant.

(ll) "Small Industry Member" means an Industry Member that qualifies as a small broker-dealer as defined in SEA Rule 0-10(c).

(mm) "Trading Day" shall have the meaning as is determined by the Operating Committee. For the avoidance of doubt, the Operating Committee may establish different Trading Days for NMS Stocks (as defined in Rule 600(b)(47) of SEC Regulation NMS), Listed Options, OTC Equity Securities, and any other securities that are included as Eligible Securities from time to time.

Adopted by SR-FINRA-2017-003 eff. March 15, 2017.

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Text only Print

13000. CODE OF ARBITRATION PROCEDURE FOR INDUSTRY DISPUTES

The Industry Code applies to claims filed on or after April 16, 2007. In addition, the list selection provisions of the Industry Code apply to previously filed claims in which a list of arbitrators must be generated after April 16, 2007; in these cases, however, the claim will continue to be governed by the remaining provisions of the old Code unless all parties agree to proceed under the new code.

PART I INTERPRETIVE MATERIAL, DEFINITIONS, ORGANIZATION AND AUTHORITY

IM-13000. Failure to Act Under Provisions of Code of Arbitration Procedure for Industry Disputes

It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010 for a member or a person associated with a member to:

- (a) fail to submit a dispute for arbitration under the Code as required by the Code;
- (b) fail to comply with any injunctive order issued pursuant to the Code;
- (c) fail to appear or to produce any document in his possession or control as directed pursuant to provisions of the Code;
- (d) fail to honor an award, or comply with a written and executed settlement agreement, obtained in connection with an arbitration submitted for disposition pursuant to the rules applicable to the arbitration of disputes before FINRA or other dispute resolution forum selected by the parties where timely motion has not been made to vacate or modify such award pursuant to applicable law; or
- (e) fail to comply with a written and executed settlement agreement, obtained in connection with a mediation submitted for disposition pursuant to the procedures specified by FINRA.

All awards shall be honored by a cash payment to the prevailing party of the exact dollar amount stated in the award. Awards may not be honored by crediting the prevailing party's account with the dollar amount of the award, unless authorized by the express terms of the award or consented to in writing by the parties. Awards shall be honored upon receipt thereof, or within such other time period as may be prescribed by the award.

It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010 for a member to require associated persons to waive the arbitration of disputes contrary to the provisions of the Code of Arbitration Procedure.

Amended by SR-FINRA-2008-057 eff. Dec. 15, 2008.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Amended by SR-NASD-2007-026 eff. April 16, 2007.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notice: 07-07, 08-57.

13100. Definitions

Unless otherwise defined in the Code, terms used in the Code and Interpretive material, if defined in the FINRA By-Laws, shall have the meaning as defined in the FINRA By-Laws.

(a) Arbitrator and Mediator Portal

The term "Arbitrator and Mediator Portal" means the web-based system that allows invited arbitrators and mediators to access a secure section of FINRA's website to submit documents and information and view their arbitration and mediation case information and documents.

http://finra.complanet.com/en/display/display_viewall.html?rbid=2403&element_id=4193&... 7/5/2017

(b) Associated Person

The term "associated person" or "associated person of a member" means a person associated with a member, as that term is defined in paragraph (u).

(c) Award

An award is a document stating the disposition of a case.

(d) Board

The term "Board" means the Board of Directors of FINRA Regulation.

(e) Claim

The term "claim" means an allegation or request for relief.

(f) Claim Notification Letter

The term "Claim Notification Letter" means notice provided by the Director to respondent(s) that they have been named as a party in a statement of claim. The notice will provide information about accessing the Party Portal to obtain a copy of the statement of claim filed by the claimant(s) and information about the arbitration, including the hearing location selected by the Director and the deadline for filing a statement of answer.

(g) Claimant

The term "claimant" means a party that files the statement of claim that initiates an arbitration under Rule 13302.

(h) Code

The term "Code" means the Code of Arbitration Procedure for Industry Disputes. For disputes involving customers, see the FINRA Code of Arbitration Procedure for Customer Disputes.

(i) Counterclaim

The term "counterclaim" means a claim asserted against a claimant by a respondent.

(j) Cross Claim

The term "cross claim" means a claim asserted by a respondent against another already-named respondent.

(k) Customer

A customer shall not include a broker or dealer.

(l) Day

Except as otherwise provided, the term "day" means calendar day. If a deadline specified in the Code falls on a Saturday, Sunday or any FINRA holiday, the deadline is extended until the next business day. If a party receives pleadings or other documents on a Saturday, Sunday or any FINRA holiday, the date of receipt shall be the next business day.

(m) Director

The term "Director" means the Director of the Office of Dispute Resolution. Unless the Code provides that the Director may not delegate a specific function, the term includes FINRA staff to whom the Director has delegated authority.

(n) Dispute

The term "dispute" means a dispute, claim or controversy. A dispute may consist of one or more claims.

(o) Hearing

The term "hearing" means the hearing on the merits of an arbitration under Rule 13600.

(p) Hearing Session

The term "hearing session" means any meeting between the parties and arbitrator(s) of four hours or less, including a hearing or a prehearing conference.

(q) Member

For purposes of the Code, the term "member" means any broker or dealer admitted to membership in FINRA, whether or not the membership has been terminated or cancelled; and any broker or dealer admitted to membership in a self-regulatory organization that, with FINRA consent, has required its members to arbitrate pursuant to the Code and/or to be treated as members of FINRA for purposes of the Code, whether or not the membership has been terminated or cancelled.

(r) Non-Public Arbitrator

The term "non-public arbitrator" means a person who is otherwise qualified to serve as an arbitrator, and meets any of the following criteria:

(1) is, or was, associated with, including registered through, under, or with (as applicable):

(A) a broker or a dealer (including a government securities broker or dealer or a municipal securities broker or dealer); or

(B) the Commodity Exchange Act or the Commodities Future Trading Commission, or a member of the National Futures Association or the Municipal Securities Rulemaking Board; or

(C) an entity that is organized under or registered pursuant to the Securities Exchange Act of 1934, Investment Company Act of 1940, or the Investment Advisers Act of 1940; or

(D) a mutual fund or a hedge fund; or

(E) an investment adviser;

(2) is an attorney, accountant, or other professional who has, within the past five years, devoted 20 percent or more of his or her professional time, in any single calendar year, to any entities listed in paragraph (r)(1) and/or to any persons or entities associated with any of the entities listed in paragraph (r)(1); or

(3) is an attorney, accountant, expert witness or other professional who has, within the past five years, devoted 20 percent or more of his or her professional time, in any single calendar year, to representing or providing services to parties in disputes concerning investment accounts or transactions, or employment relationships within the financial industry; or

(4) is, or within the past five years was, an employee of a bank or other financial institution who effects transactions in securities, including government or municipal securities, commodities, futures, or options or supervises or monitors the compliance with the securities and commodities laws of employees who engage in such activities.

For purposes of the non-public arbitrator definition, the term "professional time" shall not include mediation services performed by mediators who are also arbitrators, provided that the mediator acts in the capacity of a mediator and does not represent a party in the mediation.

(s) Panel

The term "panel" means the arbitration panel, whether it consists of one or more arbitrators.

(t) Party Portal

The term "Party Portal" means the web-based system that is accessible by arbitration and mediation parties and their representatives. The Party Portal allows invited participants to access a secure section of FINRA's website to submit documents and view their arbitration and mediation case information and documents.

(u) Person Associated with a Member

The term "person associated with a member" means:

(1) A natural person who is registered or has applied for registration under the Rules of FINRA; or

(2) A sole proprietor, partner, officer, director, or branch manager of a member, or other natural person occupying a similar status or performing similar functions, or a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member, whether or not any such person is registered or exempt from registration with FINRA under the By-Laws or the Rules of FINRA.

For purposes of the Code, a person formerly associated with a member is a person associated with a member.

(v) Pleadings

A pleading is a statement describing a party's causes of action or defenses. Documents that are considered pleadings are: a statement of claim, an answer, a counterclaim, a cross claim, a third party claim, and any replies.

(w) Prehearing Conference

The term "prehearing conference" means any hearing session, including an Initial Prehearing Conference, that takes place before the hearing on the merits begins.

(x) Public Arbitrator

The term "public arbitrator" means a person who is otherwise qualified to serve as an arbitrator, and is not disqualified from service as an arbitrator, as enumerated by any of the criteria below.

Permanent Disqualifications Based on a Person's Own Activities

(1) A person shall not be designated as a public arbitrator who is, or was, associated with, including registered through, under, or with (as applicable):

(A) a broker or a dealer (including a government securities broker or dealer or a municipal securities broker or dealer); or

(B) the Commodity Exchange Act or the Commodities Future Trading Commission, or a member of the National Futures Association or the Municipal Securities Rulemaking Board; or

(C) an entity that is organized under or registered pursuant to the Securities Exchange Act of 1934, Investment Company Act of 1940, or the Investment Advisers Act of 1940; or

(D) a mutual fund or a hedge fund; or

(E) an investment adviser.

(2) A person shall not be designated as a public arbitrator, who was, for a total of 15 years or more, an attorney, accountant, or other professional who has devoted 20 percent or more of his or her professional time annually, to any entities listed in paragraph (x)(1) and/or to any persons or entities associated with any of the entities listed in paragraph (x)(1).

(3) A person shall not be designated as a public arbitrator, who was, for a total of 15 years or more, an attorney, accountant, expert witness or other professional who has devoted 20 percent or more of his or her professional time annually to representing or providing services to parties in disputes concerning investment accounts or transactions, or employment relationships within the financial industry.

(4) A person shall not be designated as a public arbitrator, who was, for a total of 15 years or more, an employee of a bank or other financial institution who effects transactions in securities, including government or municipal securities, commodities, futures, or options or supervises or monitors the compliance with the securities and commodities laws of employees who engage in such activities.

Temporary Disqualifications Based on a Person's Own Activities

(5) A person shall not be designated as a public arbitrator who is employed by, or is a director or officer of, an entity that directly or indirectly controls, is controlled by, or is under common control with, any partnership, corporation, or other organization that is engaged in the financial industry unless the affiliation ended more than five calendar years ago.

(6) A person shall not be designated as a public arbitrator who is an attorney, accountant, or other professional who has devoted 20 percent or more of his or her professional time, in any single calendar year, to any entities listed in paragraph (x)(1) and/or to any persons or entities associated with any of the entities listed in paragraph (x)(1) unless the calendar year ended more than five calendar years ago.

(7) A person shall not be designated as a public arbitrator who is an attorney, accountant, expert witness or other professional who has devoted 20 percent or more of his or her professional time, in any single calendar year, to representing or providing services to parties in disputes concerning investment accounts or transactions, or employment relationships within the financial industry unless the calendar year ended more than five calendar years ago.

(8) A person shall not be designated as a public arbitrator if the person is an employee of a bank or other financial institution and the person effects transactions in securities, including government or municipal securities, commodities, futures, or options or supervises or monitors the compliance with the securities and commodities laws of employees who engage in such activities unless the affiliation ended more than five calendar years ago.

Temporary Disqualifications Based on the Activities of Others at a Person's Employer

(9) A person shall not be designated as a public arbitrator who is an attorney, accountant, or other professional whose firm derived \$50,000 or more, or at least 10 percent of its annual revenue, in any single calendar year during the course of the past two calendar years, from any entities listed in paragraph (x)(1) and/or to any persons or entities associated with any of the entities listed in paragraph (x)(1), or from a bank or other financial institution where persons effect transactions in securities including government or municipal securities, commodities, futures, or options. A person whom FINRA would not designate as a public arbitrator under this subparagraph shall also not be designated as a public arbitrator for two calendar years after ending employment at the firm.

(10) A person shall not be designated as a public arbitrator, who is an attorney, accountant, or other professional whose firm derived \$50,000 or more, or at least 10 percent of its annual revenue, in any single calendar year during the course of the past two calendar years, from individual and/or institutional investors relating to securities matters. A person whom FINRA would not designate as a public arbitrator under this subparagraph shall also not be designated as a public arbitrator for two calendar years after ending employment at the firm.

Temporary Disqualification Based on the Financial Industry Affiliation of an Immediate Family Member

(11) A person shall not be designated as a public arbitrator if his or her immediate family member is an individual whom FINRA would disqualify from serving on the public arbitrator roster. If the person's immediate family member ends the disqualifying affiliation, or the person ends the relationship with the individual so that the individual is no longer the person's immediate family member, the person may, after two calendar years have passed from the end of the affiliation or relationship, be designated as a public arbitrator.

For purposes of this rule, the term immediate family member means:

- (A) a person's spouse, partner in a civil union, domestic partner, parent, stepparent, child, or stepchild;
- (B) a member of a person's household;
- (C) an individual to whom a person provides financial support of more than 50 percent of his or her annual income; or
- (D) a person who is claimed as a dependent for federal income tax purposes.

For purposes of the public arbitrator definition, the term "revenue" shall not include mediation fees received by mediators who are also arbitrators, provided that the mediator acts in the capacity of a mediator and does not represent a party in the mediation.

(y) Related Claim

For purposes of Rule 13803, the term "related claim" means any claim that arises out of the employment or termination of employment of an associated person.

(z) Respondent

The term "respondent" means a party against whom a statement of claim or third party claim has been filed. A claimant against whom a counterclaim has been filed is not a respondent for purposes of the Code.

(aa) Statement of Claim

The term "statement of claim" means the initial or amended claim filed by the party or parties initiating the arbitration.

(bb) Statutory Employment Discrimination Claim

The term "statutory employment discrimination claim" means a claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute.

(cc) Submission Agreement

The term "Submission Agreement" means the FINRA Submission Agreement. The FINRA Submission Agreement is a document that parties must sign at the outset of an arbitration in which they agree to submit to arbitration under the Code.

(dd) Temporary Injunctive Order

The term "temporary injunctive order" means a temporary restraining order, preliminary injunction or other form of initial, temporary injunctive relief.

(ee) Third Party Claim

http://finra.complinet.com/en/display/display_viewall.html?rbid=2403&element_id=4193&... 7/5/2017

The term "third party claim" means a claim asserted against a party not already named in the statement of claim or any other previous pleading.

Amended by SR-FINRA-2016-029 eff. April 3, 2017.
 Amended by SR-FINRA-2015-034 eff. Dec. 20, 2015.
 Amended by SR-FINRA-2014-028 eff. June 26, 2015.
 Amended by SR-FINRA-2013-003 eff. July 1, 2013.
 Amended by SR-FINRA-2009-041 eff. Jan. 18, 2010.
 Amended by SR-FINRA-2008-031 eff. Feb. 9, 2009.
 Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
 Amended by SR-NASD-2007-021 eff. June 9, 2008.
 Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices to Member: 07-07, 08-22, 08-57, 09-04, 09-74, 13-21, 15-18, 16-04, 17-03.

13101. Applicability of Code and Incorporation by Reference

(a) Applicability of Code

The Code applies to any dispute that is submitted to arbitration under the Code pursuant to Rules 13200, 13201, or 13202.

(b) Incorporation by Reference

When a dispute is submitted to arbitration under the Code pursuant to an arbitration agreement, the Code is incorporated by reference into the agreement.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
 Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57.

13102. National Arbitration and Mediation Committee

(a) Pursuant to Section II of the Plan of Allocation and Delegation of Functions by FINRA to FINRA Regulation, Inc. ("Delegation Plan"), the Board shall appoint a National Arbitration and Mediation Committee ("NAMC").

(1) The NAMC shall consist of no fewer than 10 and no more than 25 members. At least 50 percent of the NAMC shall be Non-Industry members.

(2) The Chairperson of the Board shall name the chairperson of the NAMC.

(b) Pursuant to the Delegation Plan, the NAMC shall have the authority to recommend rules, regulations, procedures and amendments relating to arbitration, mediation, and other dispute resolution matters to the Board. The NAMC shall also establish and maintain rosters of neutrals composed of persons from within and outside of the securities industry. All matters recommended by the NAMC to the Board must have been approved by a quorum, which shall consist of a majority of the NAMC, including at least 50 percent of the Non-Industry committee members. If at least 50 percent of the Non-Industry committee members are either (i) present at or (ii) have filed a waiver of attendance for a meeting after receiving an agenda prior to such meeting, the requirement that at least 50 percent of the Non-Industry committee members be present to constitute the quorum shall be waived. The NAMC has such other power and authority as is necessary to carry out the purposes of the Code.

(c) The NAMC may meet as frequently as necessary, but must meet at least once a year.

Amended by SR-FINRA-2015-034 eff. Dec. 20, 2015.
 Amended by SR-FINRA-2009-003 eff. Jan. 8, 2009.
 Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
 Amended by SR-NASD-2007-026 eff. April 16, 2007.
 Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notice: 07-07, 08-57, 16-04.

13103. Director of the Office of Dispute Resolution

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(a) The Board shall appoint a Director of the Office of Dispute Resolution. The Director shall perform all the administrative duties relating to arbitrations submitted under the Code. The Director may delegate his or her duties when it is appropriate, unless the Code provides otherwise.

(b) The Director shall consult with the NAMC at the NAMC's request.

(c) If the Director is unable to perform his or her duties, the President of FINRA Regulation may appoint an interim Director.

Amended by SR-FINRA-2015-034 eff. Dec. 20, 2015.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57, 16-04.

13104. Effect of Arbitration on FINRA Regulatory Activities; Arbitrator Referral During or at Conclusion of Case

(a) Submitting a dispute to arbitration under the Code does not limit or preclude any right, action or determination by FINRA that it would otherwise be authorized to adopt, administer or enforce.

(b) During the pendency of an arbitration, any arbitrator may refer to the Director any matter or conduct that has come to the arbitrator's attention during a hearing, which the arbitrator has reason to believe poses a serious threat, whether ongoing or imminent, that is likely to harm investors unless immediate action is taken. Arbitrators should not make referrals during the pendency of an arbitration based solely on allegations in the statement of claim, counterclaim, cross claim, or third party claim. If a case is nearing completion, the arbitrator should wait until the case concludes to make the referral if, in the arbitrator's judgment, investor protection will not be materially compromised by this delay.

(c) If any arbitrator refers a matter or conduct for investigation under paragraph (b) of this rule, the Director will disclose the act of making the referral to the parties. A party may request that the referring arbitrator(s) recuse themselves, as provided in the Code, no later than three days after the Director notifies the parties of the referral. If a party does not make the recusal request within the prescribed timeframe, the party forfeits the right to request recusal of the referring arbitrator(s).

(d) The Director will evaluate the arbitrator referral to determine whether to transmit it to other divisions of FINRA. Only the Director shall have the authority to act under this paragraph (d).

(e) At the conclusion of an arbitration, any arbitrator may refer to FINRA for investigation any matter or conduct that has come to the arbitrator's attention during and in connection with the arbitration, either from the record of the proceeding or from material or communications related to the arbitration, which the arbitrator has reason to believe may constitute a violation of the rules of FINRA, the federal securities laws, or other applicable rules or laws.

Amended by SR-FINRA-2015-034 eff. Dec. 20, 2015.
Amended by SR-FINRA-2014-045 eff. Dec. 1, 2014.
Amended by SR-FINRA-2014-005 eff. Oct. 27, 2014.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notice: 07-07, 08-57, 14-42, 16-04.

13105. Agreement of the Parties

(a) Except as provided in paragraph (b), if the Code provides that the parties may agree to modify a provision of the Code, or a decision of the Director or the panel, the written agreement of all named parties is required.

(b) If the Director or the panel determines that a named party is inactive in the arbitration, or has failed to respond after adequate notice has been given, the Director or the panel may determine that the written agreement of that party is not required while the party is inactive or not responsive. For purposes of this rule, an inactive party could be, but is not limited to: (1) a party that does not answer; (2) a party that answers and then fails to respond to correspondence sent by the Director; (3) a party that answers and then fails to respond to correspondence sent by the panel in cases involving direct communication under Rule 13211; or (4) a party that does not attend pre-hearing conferences.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57.

PART II GENERAL ARBITRATION RULES

13200. Required Arbitration

(a) Generally

Except as otherwise provided in the Code, 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.

(b) Insurance Activities

Disputes arising out of the insurance business activities of a member that is also an insurance company are not required to be arbitrated under the Code.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notice: 07-07, 08-57.

13201. Statutory Employment Discrimination Claims and Disputes Arising Under a Whistleblower Statute that Prohibits the Use of Predispute Arbitration Agreements

(a) Statutory Employment Discrimination Claims

A claim alleging employment discrimination, including sexual harassment, in violation of a statute, is not required to be arbitrated under the Code. Such a claim may be arbitrated only if the parties have agreed to arbitrate it, either before or after the dispute arose. If the parties agree to arbitrate such a claim, the claim will be administered under Rule 13802.

(b) Disputes Arising Under a Whistleblower Statute that Prohibits the Use of Predispute Arbitration Agreements

A dispute arising under a whistleblower statute that prohibits the use of predispute arbitration agreements is not required to be arbitrated under the Code. Such a dispute may be arbitrated only if the parties have agreed to arbitrate it after the dispute arose.

Amended by SR-FINRA-2011-067 eff. May 21, 2012.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57, 12-21.

13202. Claims Involving Registered Clearing Agencies

If a registered clearing agency has entered into an agreement to use FINRA's arbitration facilities and procedures, any dispute, claim or controversy involving that registered clearing agency, or participants, pledges or other persons using the facilities of the registered clearing agency will be arbitrated in accordance with such agreement and the rules of the registered clearing agency.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notice: 07-07, 08-57.

13203. Denial of FINRA Forum

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(a) The Director may decline to permit the use of the FINRA arbitration forum if the Director determines that, given the purposes of FINRA and the intent of the Code, the subject matter of the dispute is inappropriate, or that accepting the matter would pose a risk to the health or safety of arbitrators, staff, or parties or their representatives. Only the Director may exercise the authority under this Rule.

(b) Disputes that arise out of transactions in a readily identifiable market may be referred to the arbitration forum for that market, if the claimant agrees.

Amended by SR-FINRA-2015-034 eff. Dec. 20, 2015.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57, 16-04.

13204. Class Action and Collective Action Claims

(a) Class Actions

(1) Class action claims may not be arbitrated under the Code.

(2) Any claim that is based upon the same facts and law, and involves the same defendants as in a court-certified class action or a putative class action, or that is ordered by a court for class-wide arbitration at a forum not sponsored by a self-regulatory organization, shall not be arbitrated under the Code, unless the party bringing the claim files with FINRA one of the following:

(A) a copy of a notice filed with the court in which the class action is pending that the party will not participate in the class action or in any recovery that may result from the class action, or has withdrawn from the class according to any conditions set by the court; or

(B) a notice that the party will not participate in the class action or in any recovery that may result from the class action.

(3) The Director will refer to a panel any dispute as to whether a claim is part of a class action, unless a party asks the court hearing the class action to resolve the dispute within 10 days of receiving notice that the Director has decided to refer the dispute to a panel.

(4) A member or associated person may not enforce any arbitration agreement against a member of a certified or putative class action with respect to any claim that is the subject of the certified or putative class action until:

- The class certification is denied;
- The class is decertified;
- The member of the certified or putative class is excluded from the class by the court; or
- The member of the certified or putative class elects not to participate in the class or withdraws from the class according to conditions set by the court, if any.

(b) Collective Actions

(1) Collective action claims under the Fair Labor Standards Act, the Age Discrimination in Employment Act, or the Equal Pay Act of 1963 may not be arbitrated under the Code.

(2) Any claim that involves plaintiffs who are similarly-situated against the same defendants as in a court-certified collective action or a putative collective action, or that is ordered by a court for collective action at a forum not sponsored by a self-regulatory organization, shall not be arbitrated under the Code, if the party bringing the claim has opted-in to the collective action.

(3) The Director will refer to a panel any dispute as to whether a claim is part of a collective action, unless a party asks the court or other forum hearing the collective action to resolve the dispute within 10 days of receiving notice that the Director has decided to refer the dispute to a panel.

(4) A member or associated person may not enforce an agreement to arbitrate in this forum against a member of a certified or putative collective action with respect to any claim that is the subject of the certified or putative collective action until the collective action certification is denied or the collective action is decertified.

These subparagraphs do not otherwise affect the enforceability of any rights under the Code or any other agreement.

Amended by SR-FINRA-2012-027 eff. July 9, 2012.
Amended by SR-FINRA-2011-075 eff. July 9, 2012.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57, 12-28.

13205. Shareholder Derivative Actions

Shareholder derivative actions may not be arbitrated under the Code.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57.

13206. Time Limits

(a) Time Limitation on Submission of Claims

No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim. The panel will resolve any questions regarding the eligibility of a claim under this rule.

(b) Dismissal under Rule

Dismissal of a claim under this rule does not prohibit a party from pursuing the claim in court. By filing a motion to dismiss a claim under this rule, the moving party agrees that if the panel dismisses a claim under this rule, the non-moving party may withdraw any remaining related claims without prejudice and may pursue all of the claims in court.

(1) Motions under this rule must be made in writing, and must be filed separately from the answer, and only after the answer is filed.

(2) Unless the parties agree or the panel determines otherwise, parties must serve motions under this rule at least 90 days before a scheduled hearing, and parties have 30 days to respond to the motion. Moving parties may reply to responses to motions. Any such reply must be made within 5 days of receipt of a response.

(3) Motions under this rule will be decided by the full panel.

(4) The panel may not grant a motion under this rule unless an in-person or telephonic prehearing conference on the motion is held or waived by the parties. Prehearing conferences to consider motions under this rule will be recorded as set forth in Rule 13606.

(5) If the panel grants a motion under this rule (in whole or part), the decision must be unanimous, and must be accompanied by a written explanation.

(6) If the panel denies a motion under this rule, a party may not re-file the denied motion, unless specifically permitted by panel order.

(7) If the party moves to dismiss on multiple grounds including eligibility, the panel must decide eligibility first.

- If the panel grants the motion to dismiss the case on eligibility grounds on all claims, it shall not rule on any other grounds for the motion to dismiss.

- If the panel grants the motion to dismiss on eligibility grounds on some, but not all claims, and the party against whom the motion was granted elects to move the case to court, the panel shall not rule on any other ground for dismissal for 15 days from the date of service of the panel's decision to grant the motion to dismiss on eligibility grounds.

- If a panel dismisses any claim on eligibility grounds, the panel must record the dismissal on eligibility grounds on the face of its order and any subsequent award the panel may issue.

- If the panel denies the motion to dismiss on eligibility grounds, it shall rule on the other bases for the motion to dismiss the remaining claims in accordance with the procedures set forth in Rule 13504(a).

(8) If the panel denies a motion under this rule, the panel must assess forum fees associated with hearings on the motion against the moving party.

(9) If the panel deems frivolous a motion filed under this rule, the panel must also award reasonable costs and attorneys' fees to any party that opposed the motion.

(10) The panel also may issue other sanctions under Rule 13212 if it determines that a party filed a motion under this rule in bad faith.

(c) Effect of Rule on Time Limits for Filing Claim in Court

The rule does not extend applicable statutes of limitations; nor shall the six-year time limit on the submission of claims apply to any claim that is directed to arbitration by a court of competent jurisdiction upon request of a member or associated person. However, when a claimant files a statement of claim in arbitration, any time limits for the filing of the claim in court will be tolled while FINRA retains jurisdiction of the claim.

(d) Effect of Filing a Claim in Court on Time Limits for Filing in Arbitration

If a party submits a claim to a court of competent jurisdiction, the six-year time limitation will not run while the court retains jurisdiction of the claim matter.

Amended by SR-FINRA-2011-006 eff. June 6, 2011.
Amended by SR-FINRA-2009-013 eff. Aug. 10, 2009.
Amended by SR-FINRA-2007-021 eff. Feb. 23, 2009.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Amended by SR-NASD-2007-026 eff. April 16, 2007.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57, 09-07, 09-36, 11-23.

13207. Extension of Deadlines

(a) The parties may agree in writing to extend or modify any deadline for:

- Serving an answer;
- Returning arbitrator or chairperson lists;
- Responding to motions; or
- Exchanging documents or witness lists.

If the parties agree to extend or modify a deadline under this rule, they must notify the Director of the new deadline in writing.

(b) The panel may extend or modify any deadline listed in paragraph (a), or any other deadline set by the panel, either on its own initiative or upon motion of a party.

(c) The Director may extend or modify any deadline or time period set by the Code for good cause. The Director may also extend or modify any deadline or time period set by the panel in extraordinary circumstances.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notice: 07-07, 08-57.

13208. Representation of Parties

(a) Representation by a Party

Parties may represent themselves in an arbitration held in a United States hearing location. A member of a partnership may represent the partnership; and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association.

(b) Representation by an Attorney

At any stage of an arbitration proceeding held in a United States hearing location, all parties shall have the right to be represented by an attorney at law in good standing and admitted to practice before the Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States, unless state law prohibits such representation.

(c) Representation by Others

Parties may be represented in an arbitration by a person who is not an attorney, unless:

- state law prohibits such representation, or
- the person is currently suspended or barred from the securities industry in any capacity, or
- the person is currently suspended from the practice of law or disbarred.

(d) Qualifications of Representative

Issues regarding the qualifications of a person to represent a party in arbitration are governed by applicable law and may be determined by an appropriate court or other regulatory agency. In the absence of a court order, the arbitration proceeding shall not be stayed or otherwise delayed pending resolution of such issues.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Amended by SR-NASD-2006-109 eff. Dec. 24, 2007.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 07-57, 08-57.

13209. Legal Proceedings

During an arbitration, no party may bring any suit, legal action, or proceeding against any other party that concerns or that would resolve any of the matters raised in the arbitration.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57.

13210. Ex Parte Communications

(a) Except as provided in Rule 13211, no party, or anyone acting on behalf of a party, may communicate with any arbitrator outside of a scheduled hearing or conference regarding an arbitration unless all parties or their representatives are present.

(b) No party, or anyone acting on behalf of a party, may send or give any written motion, request, submission or other materials directly to any arbitrator, unless the arbitrators and the parties agree, or the Code provides otherwise.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57.

13211. Direct Communication Between Parties and Arbitrators

(a) This rule provides procedures under which parties and arbitrators may communicate directly.

(b) Only parties that are represented by counsel may use direct communication under this rule. If, during the proceeding, a party chooses to appear without counsel, this rule shall no longer apply.

(c) All arbitrators and all parties must agree to the use of direct communication during the Initial Prehearing Conference or a later conference or hearing before it can be used.

(d) Parties may send the arbitrators only items that are listed in an order.

(e) Parties may send items to the arbitrators by first-class mail, overnight mail service, overnight delivery service, hand delivery, email, or facsimile as specified in the Direct Communication Order. All the arbitrators and parties must have facsimile or email capability before such a delivery method may be used.

(f) Copies of all materials sent to arbitrators must also be served on all parties and filed with the Director, pursuant to Rule 13300.

(g) The parties must file with the Director, pursuant to Rule 13300, copies of any orders and decisions made as a result of direct communications among the parties and the arbitrators.

(h) Parties may not communicate orally with any of the arbitrators outside the presence of all parties.

(i) Any party or arbitrator may terminate the direct communication order at any time, after giving written notice to the other arbitrators and the parties.

Amended by SR-FINRA-2016-029 eff. April 3, 2017.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57, 17-03.

13212. Sanctions

(a) The panel may sanction a party for failure to comply with any provision in the Code, or any order of the panel or single arbitrator authorized to act on behalf of the panel. Unless prohibited by applicable law, sanctions may include, but are not limited to:

- Assessing monetary penalties payable to one or more parties;
- Precluding a party from presenting evidence;
- Making an adverse inference against a party;
- Assessing postponement and/or forum fees; and
- Assessing attorneys' fees, costs and expenses.

(b) The panel may initiate a disciplinary referral at the conclusion of an arbitration.

(c) The panel may dismiss a claim, defense or arbitration with prejudice as a sanction for material and intentional failure to comply with an order of the panel if prior warnings or sanctions have proven ineffective.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notice: 07-07, 08-57.

13213. Hearing Locations

(a) U.S. Hearing Location

(1) The Director will decide which of FINRA's hearing locations will be the hearing location for the arbitration. In cases involving an associated person, the Director will generally select the hearing location closest to where the associated person was employed at the time of the events giving rise to the dispute, unless the hearing location closest to the associated person's employment is in a different state, in which case the associated person may request a hearing location in his or her state of employment at the time of the events giving rise to the dispute. In cases involving members only or more than one associated person, the Director will consider a variety of factors, including:

- The parties' signed agreement to arbitrate, if any;
- Which party initiated the transaction or business in issue; and
- The location of essential witnesses and documents.

(2) Before arbitrator lists are sent to the parties under Rule 13403, the parties may agree in writing to a hearing location other than the one selected by the Director.

(3) The Director may change the hearing location upon motion of a party, as set forth in Rule 13503.

(4) After the panel is appointed, the panel may decide a motion relating to changing the hearing location.

(b) Foreign Hearing Location

(1) If the Director and all parties agree, parties may have their hearing in a foreign hearing location and conducted by foreign arbitrators, provided that the foreign arbitrators have:

(A) met FINRA background qualifications for arbitrators;

(B) received training on FINRA arbitration rules and procedures; and

(C) satisfied at least the same training and testing requirements as those arbitrators who serve in U. S. locations of FINRA.

(2) The parties shall pay an additional surcharge for each day of hearings held in a foreign hearing location. The amount of the surcharge will be determined by the Director and must be agreed to by the parties before the foreign hearing location may be used. This surcharge shall be specified in the agreement to use a foreign hearing location and shall be apportioned equally among the parties, unless they agree otherwise. The foreign arbitrators shall have the authority to apportion this surcharge as provided in Rule 13902(c).

Amended by SR-FINRA-2009-073 eff. May 3, 2010.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notice: 07-07, 08-57, 10-17.

13214. Payment of Arbitrators

(a) Except as provided in paragraph (b), Rule 13800, and Rule 13806(f), FINRA will pay the panel an honorarium, as follows:

- \$300 to each arbitrator for each hearing session in which he or she participates;
- an additional \$125 per day to the chairperson for each hearing on the merits;
- \$50 for travel to a hearing session that is postponed pursuant to Rule 13601; and
- \$600 for each arbitrator if a hearing session other than a prehearing conference is postponed within 10 days before a scheduled hearing session pursuant to Rules 13601(a)(2) and (b)(2).

(b) The Director may authorize a higher or additional honorarium for the use of a foreign hearing location.

(c) Payment for Deciding Discovery-Related Motions Without a Hearing Session

(1) FINRA will pay each arbitrator an honorarium of \$200 to decide a discovery-related motion without a hearing session. This paragraph does not apply to cases administered under Rule 13800 or pursuant to Rule 13806(d)(1).

(2) For purposes of paragraph (c)(1), a discovery-related motion and any replies or other correspondence relating to the motion shall be considered to be a single motion.

(3) The panel will allocate the cost of the honoraria under paragraph (c)(1) to the parties pursuant to Rule 13902(c).

(d) Payment for Deciding Contested Subpoena Requests Without a Hearing Session

(1) The honorarium for deciding one or more contested motions requesting the issuance of a subpoena without a hearing session shall be \$250. The honorarium shall be paid on a per case basis to each arbitrator who decides the contested motion(s). The parties shall not be assessed more than \$750 in fees under this paragraph in any arbitration proceeding. The honorarium shall not be paid for cases administered under Rule 13800 or pursuant to Rule 13806(d)(1).

(2) For purposes of paragraph (d)(1), a contested motion requesting the issuance of a subpoena shall include a motion requesting the issuance of a subpoena, the draft subpoena, a written objection from the party opposing the issuance of the subpoena, and any other documents supporting a party's position.

(3) The panel will allocate the cost of the honorarium under paragraph (d)(1) to the parties pursuant to Rule 13902(c).

(e) Payment for Explained Decisions

(1) The chairperson who is responsible for writing an explained decision pursuant to Rule 13904(g) will receive an additional honorarium of \$400. The panel will allocate the cost of the honorarium under Rule 13904(g) to the parties.

(2) If the panel decides on its own to write an explained decision, then no panel member will receive the additional honorarium of \$400.

Amended by SR-FINRA-2015-003 eff. July 6, 2015.
 Amended by SR-FINRA-2014-026 eff. Dec 15, 2014.
 Amended by SR-FINRA-2009-015 eff. Sep. 14, 2009.
 Amended by SR-FINRA-2008-051 eff. Apr. 13, 2009.
 Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
 Paragraph (d) Adopted by SR-NASD-2006-101 eff. April 2, 2007.
 Paragraphs (a) through (c) adopted by SR-NASD-2003-158 eff. April 16, 2007.
 Selected Notice: 07-07, 08-57, 09-16, 09-48, 14-49, 15-21.

PART III INITIATING AND RESPONDING TO CLAIMS

13300. Filing and Serving Documents

(a) Party Portal

(1) Parties must use the Party Portal to file initial statements of claim and to file and serve pleadings and any other documents on the Director or any other party except as provided in paragraph (a)(2). The Director may exercise authority to permit the use of other means of filing or service in the case of an extended Party Portal outage or in other extraordinary circumstances.

(2) Parties shall not file with FINRA or serve on any other party, through the Party Portal, documents produced during discovery pursuant to the Rule 13500 series. Available service methods for such documents are first-class mail, overnight mail service, overnight delivery service, hand delivery, email, or facsimile.

(b) Filing

(1) Except as noted in Rule 13300(a)(2), parties must file initial statements of claim and all pleadings and other documents with the Director through the Party Portal. Parties must file with the Director any written responses relating to discovery requests under Rule 13507, but shall not file any of the documents produced in response to discovery requests as provided in Rule 13300(a)(2).

(2) Parties must file arbitrator ranking lists pursuant to Rule 13404 with the Director through the Party Portal.

(3) Filing under Rule 13300(b) is accomplished on the day of submission through the Party Portal.

(c) Service

(1) The Director will serve the Claim Notification Letter on the respondent(s) pursuant to Rule 13302.

(2) Except as noted in Rule 13300(a)(2), parties must serve all pleadings and other documents through the Party Portal.

(3) Service under Rule 13300(c) is accomplished on the day of submission through the Party Portal.

(4) For documents not served through the Party Portal, parties must file proof of service with the Director through the Party Portal.

(d) General Rules for Filing and Serving Documents

(1) Redaction of Personal Confidential Information

FILED

COPY

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.)

2017 JUL 17 PM 2:49
IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT
LISA COMER
CLERK OF COURT
LEXINGTON, SC
Civil Action No. 2017-CP-32-00397

**PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR RECONSIDERATION
OR AMENDMENT OF THE COURT'S JUNE 21, 2017 ORDER AND
MOTION TO STRIKE**

Plaintiff, Robert F. Berry ("Berry"), by and through his undersigned counsel, hereby submits this Response to Defendants' Motion for Reconsideration or Amendment of the Court's June 21, 2017 Order ("Order"). In seeking reconsideration of the Order and requesting this Court to consider new documents and new arguments in support of the motion to compel arbitration of Mr. Berry's claims, 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 (all defendants are collectively referred to as "Defendants") seek not reconsideration, but a second opportunity to establish facts that were Defendants' absolute burden to prove as the party seeking to compel arbitration. Under well-settled South Carolina case law, a litigant is not permitted such a second bite at the apple. Notwithstanding Defendants'

violation of this rule, which alone mandates the denial of their requested reconsideration, these late-filed documents, even if they could be properly considered, fail to accomplish Defendants' obligation to prove the existence of a binding agreement to arbitrate Mr. Berry's claims. For the reasons set forth herein, the documents attached to Defendants' motion should be stricken from the record and the motion denied.

ARGUMENT

As the party seeking to compel arbitration of Mr. Berry's claims, Defendants had the burden to demonstrate the existence of a valid agreement between Defendants and Mr. Berry to arbitrate the asserted claims. South Carolina law requires that this burden be met when the motion to compel arbitration was filed. *See, e.g., 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); *Hammond v. Halsey*, 287 S.C. 46, 49, 336 S.E.2d 495, 497 (Ct. App. 1985) ("The burden is on a party pleading a fact to prove it.") (citing *Jackson v. Frier*, 146 S.C. 322, 144 S.E. 66, 68, (1928)). In the Order, this Court found that Defendants had not met their burden in proving the existence of a duty to arbitrate.¹ *See* Order at 3-14. Defendants' motion, which advances a new affidavit

¹ The Order found that the documents submitted in support of the motion were not admissible because Defendants had failed to authenticate the Form U-4's registration statements. The Order also found that Defendants were not a party to the registration statements, which contained no language permitting their use by successors or assigns. The Order also found that none of the fora designated in the registrations statements still offer arbitration services, and further found that Defendants failed to prove that their preferred forum — FINRA — is an appropriate successor venue to either the New York Stock Exchange ("NYSE") or the National Association of Securities Dealers ("NASD"). On this last point, Defendants attempt to cure their failure to prove the viability of FINRA as an appropriate successor to NYSE and NASD by citing Securities and Exchange Commission rules and press releases in their motion for reconsideration. However, Defendants may not use a motion for reconsideration to supply support or evidence for a proposition that was their burden to prove in the first place. "[A] party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the

and new documents as alternatives to the affidavit and documents that were previously rejected as insufficient, cannot, and do not, alter the Court's previous analysis.

I. Defendants may not submit new evidence as a part of a motion for reconsideration.

"A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." *Hickman v. Hickman*, 301 S.C. 455, 456–57, 392 S.E.2d 481, 482 (Ct. App. 1990) (explaining South Carolina law and citing identical federal precedent, including *Natural Resources Defense Council v. U.S. E.P.A.*, 705 F.Supp. 698, 701 (D.D.C. 1989), *vacated on other grounds*, 707 F.Supp. 3 (D.D.C. 1989) ("Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier."); *Smith v. Stoner*, 594 F.Supp. 1091, 1118 (N.D.Ind. 1984) ("Issues which could have been presented to the court for consideration previously, but which were not, are not the proper subject of Rule 59(e) relief; the issues are waived."); *Johnson v. City of Richmond*, 102 F.R.D. 623, 623 (E.D.Va. 1984) ("I do not conceive of Fed.R.Civ.P. 59(e) as serving the office of providing a disappointed suitor with a post-judgment opportunity to argue that which could have been argued pre-judgment.")). Instead, a Rule 59(e) motion is appropriate only in "two basic situations," when (1) a party "believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and [2] ... when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

judgment but was not." *RRR, Inc. v. Toggas*, 378 S.C. 174, 185, 662 S.E.2d 438, 443 (Ct. App. 2008) (citing *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005)). While Defendants are in clear violation of this rule such that these new arguments — similar to the new exhibits — must be rejected, even if they were considered, the submissions still fail to demonstrate that Mr. Berry agreed to arbitrate his claims against these Defendants before a FINRA arbitration panel or that FINRA is a successor to NYSE or NASD.

Defendants' motion does not present a legally cognizable basis for reconsideration of the Order under Rule 59(e). Instead, Defendants request a second opportunity to meet their burden of proof imposed upon them as the parties seeking to compel arbitration. However, this Court has already correctly held that Defendants' window of opportunity as the moving party has already closed. *See* Order at ("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.") (citing *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 Order's holding applies a fundamental tenet of South Carolina law that prohibits do-overs in litigation. *See, e.g., City of Myrtle Beach v. Tourism Expenditure Review Comm.*, 407 S.C. 298, 303, 755 S.E.2d 425, 428 (2014) (rejecting a call for a remand for a new hearing and the presentation of additional evidence on an alternate theory) (citing *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006) (holding that a party may not complain of an error his own conduct has induced); *Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 32, 507 S.E.2d 328, 338 (1998)).

Because Defendants attempt to use the motion for reconsideration for the sole purpose of presenting new arguments and evidence which were available to them and which could have been raised in the Defendants' original motion to stay and compel arbitration, the additional affidavit, documents, and rule citations submitted by Defendants should be stricken from the record and the motion denied on this ground alone.

- II. Defendants' own proffer demonstrates that the additional Form U-4 registrations were available to Defendants in advance of filing their original motion; therefore, such evidence cannot be considered under Rule 60(b) and controlling case law.

Rather than argue that the Court overlooked or misapprehended the arguments or the proof

submitted in support of their original motion, Defendants instead seek a do-over under the guise of "newly discovered evidence" and Rule 60(b). However, the new arguments and additional documents submitted by Defendants in support of their motion themselves demonstrate that they do not meet the standard for relief from the Order. A judgment or order may be set aside under Rule 60(b), of the South Carolina Rules of Civil Procedure, for newly discovered evidence, but "only if the newly discovered evidence could not have been discovered by due diligence prior to trial." *Lanier v. Lanier*, 364 S.C. 211, 217-20, 612 S.E.2d 456, 459-460 (Ct. App. 2005) (holding that in order "[t]o obtain a new trial based on newly discovered evidence, the movant must establish that the newly discovered evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching.") (citing James F. Flanagan, *South Carolina Civil Procedure* 484 (2nd ed.1996)). The *Lanier* court further defined due diligence as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. Diligence looks not to what the litigant actually discovered, but what he or she *could* have discovered." *Id.* at 220, 612 S.E.2d at 460 (emphasis in original) (quoting *Black's Law Dictionary* at 468 (7th ed.1999); 12 *Moore's Federal Practice* § 60.42[5] (Matthew Bender 3rd ed.)).

The documents submitted by Defendants do not qualify under any reasonable definition of newly discovered evidence, nor do Defendants' efforts satisfy the standard of due diligence.² In

² Defendants' additional assertion that Mr. Berry has waived any objection to the admissibility of Form U-4 registration statements submitted on his behalf is a red herring, *see* Motion at 4, as any such clause — even assuming its efficacy — does not relieve Defendants of their burden of authenticating documents they seek to advance to the Court or circumvent the Court's independent role as gatekeeper for the admission of evidence. Nor could it overcome established precedent restricting a litigant's ability to raised new issues and/or present new

fact, Defendants do not claim that they tried — but failed — to locate these new Form U-4 registration statements prior to making their motion or the hearing. Instead, the affidavit submitted by Compliance Consultant Michael Zuhr states that these documents were and are available to him at any time by simply logging into the appropriate system with his personal log-in information. *See* Motion Ex. 2, Affidavit of Michael Zuhr at ¶2. Mr. Zuhr states that “[a]s part of my job duties, I have access to Web CRD® [an online database maintained by FINRA] ... [and] am also authorized to obtain previous Form U4s and Form U4 amendments from Web CRD® submitted by or on behalf of current and former Wells Fargo Advisors employees.” *Id.* Mr. Zuhr does not deny that these documents were available when Defendants’ original motion was filed. Rather, as is described by Mr. Zuhr, who is now offered as a purported custodian of these untimely submissions, the Form U-4’s have always been available to him as Defendants’ representative and thus to the Defendants at all times, an action that Mr. Zuhr states that he does regularly and routinely as a part of his job duties with Defendants.

Consequently, the additional registration statements were patently available to Defendants at all times and could have been submitted to the Court with the motion to compel arbitration, had Defendants believed that such documents would actually support their argument that Mr. Berry had agreed to arbitrate the claims asserted in this case. In reality, however, having failed to meet their burden with their original submission, Defendants simply went back to the well to choose different documents from among those that had always been readily available, hoping to tender something that might support their arguments. “Where a litigant could have discovered the new evidence prior to trial, he or she is not entitled to relief under Rule 60(b)(2).” *Lanier*, 364 S.C.

documents in a motion for reconsideration, or documents that were readily available to the party in the exercise of reasonable due diligence under Rule 60(b), SCRCP.

at 220, 612 S.E.2d at 461 (citing *Lans v. Gateway 2000, Inc.*, 110 F.Supp.2d 1, 6 (D.D.C. 2000) (“[W]hatever actions [the appellant] took to locate the [evidence] are undermined by the plain fact that [he] knew that the [evidence] existed, regardless of whether he could actually get his hands on it. The Court is unsympathetic to arguments that [he] could not remember where [it] was.”)). In summary, and for the additional reason that the documents were always available to Defendants, the motion’s exhibits do not qualify as newly discovered evidence and should be stricken from the record.

III. Defendants’ new arguments and new documents still fail to demonstrate the existence of a valid arbitration agreement between Mr. Berry and Defendants.

Defendants’ motion and additional documentation falls well short of the one thing South Carolina law requires of a party seeking to compel arbitration: a clear and unmistakable agreement by Mr. Berry to arbitrate claims against Defendants. “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 v. Bright Acres Assocs.*, 346 S.C. 580, 596–97, 553 S.E.2d 110, 118 (2001)).

Defendants attempt to create an arbitration agreement through a complex exercise of dot connections that nevertheless still fails to provide a clear and unambiguous agreement by Mr. Berry to arbitrate his claims against Defendants. Rather, the most recent submissions do nothing to alter the two crucial facts that doom Defendants’ efforts to compel arbitration to failure: (1) Defendants have not produced a signed agreement to arbitrate claims between Wells Fargo (or its affiliates and employees) and Mr. Berry; and (2) Defendants have not produced a signed agreement

to arbitrate claims before a FINRA arbitration panel. Notwithstanding their selectively chosen language from both the 1999 and 2014 Form U-4s, and the circuitous path and reasoning upon which they attempt to cobble together an argument to suggest an agreement to arbitrate actually exists, Defendants still fail to produce a clear and unambiguous agreement to arbitrate. These facts are indisputable: the 1999 Form U-4 (Ex. 2-A) does not list FINRA as a designated arbitral fora (as this entity did not exist in 1999) and none of the designated fora offer arbitration services today, while the 2014 Form U-4 (Ex. 2-B) lacks both an arbitration clause and a signature from Mr. Berry. The law does not permit a party seeking to compel arbitration to pick and choose beneficial clauses from an assortment of historical documents to merge together and create a new agreement to arbitrate.

The motion for reconsideration makes two primary arguments based on the 1999 and 2014 Form U-4s. Defendants first contend that the SRO organizations that listed in the 1999 Form U-4 may be amended from time to time. *See* Motion at 3-4 (supplying emphasis on the amendment language quoted in the motion). However, Defendants misconstrue the language of the registration statement, as the clause "as may be amended from time to time" clearly and unambiguously modifies the earlier designation of "the rules, constitutions, or by-laws" of the designated arbitral fora, an acknowledgment that the rules, constitutions and by-laws of an arbitration forum may change regularly. Defendants' strained effort to interpret this clause to support an argument that the referenced language permits the amendment, without notice to Mr. Berry, of the list of agreed-upon arbitration fora is simply contrary to the established law of this State and other jurisdictions relied upon by this Court in its Order. The identity of the arbitral forum is a material, integral part

of an arbitration agreement; should the designated forum fail, then the entire agreement to arbitrate is void.³

The most generous interpretation of the language emphasized by Defendants is that it may create an ambiguity about whether the “as may be amended from time to time” language refers to the “rules, constitutions, or by-laws” or the “SROs indicated in Item 11” themselves. However, the creation of an ambiguity is of no help to Defendants. As the Court already held in the Order, Defendants “invoke[] rights as a member of those self-regulatory organizations” and “Defendants stand in the role of the drafters of the forms issued by such organizations ... 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.” Order at 6 n.4 (citing *McGill v. Moore*, 381 S.C. 179, 186, 672 S.E.2d 571, 575 (2009) (“Under South Carolina law, ‘any ambiguity will be construed in favor of the non-drafting party.’”)).

Defendants next contend that the 1999 Form U-4 permits the unilateral substitution of subsequent employers, such that Defendants may enforce against Mr. Berry an agreement to arbitrate with a company that no longer exists and that, further, they may unilaterally substitute a

³ See *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371 n.12, 759 S.E.2d 727, 730 n.12 (2014); *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 132, 678 S.E.2d 435, 439 (2009) (failure of selected arbitral forum warrants invalidation of entire arbitration clause); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1220 (11th Cir. 2000) (asserting that where the selection of a particular forum constitutes an integral part of the agreement to arbitrate, the failure of the chosen forum precludes arbitration); *In re Salomon Inc.*, 68 F.3d 554, 561 (2d. Cir. 1995) (a failed forum selection term is as important a consideration as the agreement to arbitrate itself); *Smith Barney, Inc. v. Critical Health Sys.*, 212 F.3d 858, 862 (4th Cir. 2000); *Roney & Co. v. Goren*, 875 F.2d 1218, 1219 (6th Cir. 1989) (refusing to treat various arbitral fora interchangeably); and *Keller v. ING Financial Partners, Inc.*, Op. No. 2011-CP-23-0336 (S.C. Cir. Ct. filed June 2, 2011). 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)). Defendants do not address any of this controlling case law in their motion.

forum that did not exist at the time of the purported agreement. However, these arguments fail for the same reason this Court held that the prior Form U-4 statements were not enforceable by Defendants. The 1999 Form U-4, *see* Motion Ex. 2-A, is not between Mr. Berry and Defendants. Instead, like the 1994 Form U-4 which named Wheat, First Securities, Inc., the 1999 Form U-4 names Everen Securities, Inc. ("Everen") as Mr. Berry's employer. The 1999 arbitration provision is limited to "any dispute, claim or controversy that may arise between *me and my firm*," *see* Motion Ex. 2-A (emphasis added), and is devoid of any language indicating that any arbitration obligation extends to successors and/or assigns of "my firm," that is, to successors or assigns of Everen. But this litigation does not involve any dispute, claim or controversy arising between Mr. Berry and Everen, nor does he complain of any act or omission by Everen, which, like Wheat First, no longer exists. The Order found that Defendants' failure to provide the Court with evidence demonstrating the legal succession of companies was a failure of proof independently fatal to Defendants' attempt to rely upon the 1994 Form U-4s filed by Wheat First. However, Defendants did not attempt to cure this shortcoming in the motion, instead relying upon the same affidavit of a paralegal in the Wells Fargo Law Department previously rejected as insufficient.⁴

Moreover, like the 1994 Wheat First Form U-4, the 1999 Form U-4 does not specify FINRA as the arbitral forum or otherwise refer to FINRA, a fact that Defendants once again fail to acknowledge in their motion. Instead, the 1999 Form U-4 arbitration clause designates "the

⁴ Instead, Defendants contend that they should be able to use the Everen 1999 Form U-4 amendment filed on Mr. Berry's behalf because the 1999 and 2014 Form U-4s use the same date of employment, October 1, 1999. Setting aside the fact that in the original motion to compel arbitration, Defendants relied upon the November 4, 1994 date of employment listed on the Wheat First Form U-4s, Defendants' use of the October 1, 1999 employment date in the 2014 Form U-4 demonstrates no relevant fact, as Mr. Berry did not become an employee of Wells Fargo until 2009, *see* First Am. Complaint at ¶31, and the Profit Formula Agreement at issue in this case was entered into between Mr. Berry and Wachovia Securities in 2001, *see* First Am. Complaint at ¶29.

organizations indicated in Item 11” of the form, which is found on the first page of each of the Form U-4, and designates four (4) SRO’s, none of which are FINRA, including: the NASD, the NYSE, the Chicago Board Options Exchange (CBOE), and the Philadelphia Stock Exchange (“PHLX”). As this Court has previously held, there is no proof that any of the organizations specified on the 1999 Form U-4 currently offer arbitration services.

Finally, Defendants assert that Mr. Berry is required to arbitrate these claims based on FINRA Rules. This argument is an expansion of an argument previously alluded to in Defendants’ original motion to compel and during the June 1, 2017 hearing, during which Defendants asked this Court to take judicial notice of FINRA Rule 13200. The Court correctly rejected this argument because Defendants had failed to meet their threshold burden of demonstrating that they had standing to require the application of any FINRA rule to Mr. Berry. *See* Order at 8 n.7. The motion for reconsideration does not attempt to cure this previously-articulated shortcoming. Instead, Defendants merely assert that this Court should take judicial notice of information contained on the BrokerCheck website, *see* Motion at 5 n.9, on the theory that it should be considered an unassailable public record. However, the Terms of Use of the BrokerCheck website links provided by Defendants very clearly states that:

FINRA MAKES NO WARRANTIES OR REPRESENTATIONS ABOUT THE QUALITY, ACCURACY OR COMPLETENESS OF BROKERCHECK AND ASSUMES NO LIABILITY OR RESPONSIBILITY FOR ANY: (I) ERRORS OR OMISSIONS IN ANY CONTENT; (II) TECHNICAL ERRORS AFFECTING BROKERCHECK IN ANY WAY; (III) BUGS, VIRUSES, TROJAN HORSES, OR THE LIKE WHICH MAY BE TRANSMITTED TO OR THROUGH BROKERCHECK BY ANY THIRD PARTY; AND/OR (IV) LOSS OR DAMAGE OF ANY KIND INCURRED AS A RESULT OF THE USE OF BROKERCHECK.

(Emphasis in original). Defendants' assertion that these website links are "matter[s] of public record" is insufficient to authenticate the content of the information contained therein, as BrokerCheck summaries do not qualify as self-authenticating, and authentication as a public record is subject to documentary or testimonial evidence and illustration, which Defendants have not provided. *Cf.* Rules 901 and 902, SCRE. Even if Defendants were permitted to cure their prior evidentiary shortcomings in a motion for reconsideration or under Rule 60(b), which they are not, Defendants have failed to do so and this Court's prior holding regarding these rules should endure.

CONCLUSION

Defendants' motion fails to articulate a proper basis for reconsideration of the Order. Litigants are not permitted to raise new arguments or submit additional documents in support of a motion for reconsideration. Moreover, the new Form U-4s advanced by Defendants in support of their motion were available to Defendants upon the exercise of reasonable due diligence; therefore, they do not qualify for submission as newly discovered evidence under Rule 60(b). Consequently, the affidavit and additional documents submitted in support of Defendants' motion are improper, may not be considered and should be stricken from the record. Even if the Court were inclined to consider these additional documents, they do not constitute an agreement by Mr. Berry to arbitrate his claims against these Defendants, as Defendants still have not produced either a signed agreement to arbitrate claims between the Defendants and Mr. Berry or a signed agreement to arbitrate claims before a FINRA arbitration panel. Mr. Berry respectfully requests this Court to strike the attachments to Defendants' motion and deny same.

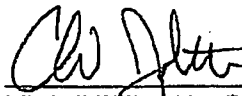
In regard to Defendants' request that the Court extend the deadlines set forth in the Order for responding to Plaintiff's First Set of Interrogatories and Requests for Production, Mr. Berry confirms that he consented to Defendants' requested extension until July 17, 2017. Since then,

Defendants contacted Mr. Berry to request a further extension to respond to these outstanding discovery requests until July 27, 2017, and Mr. Berry agreed that he would not seek to compel or otherwise interpose an objection to Defendants' further 10-day extension.

In regard to Defendants' request that the Court extend the deadlines set forth in the Order for filing a responsive pleading, Mr. Berry confirms that he consented to Defendants' requested extension until July 27, 2017. Defendants have since also requested a further extension of time to file a responsive pleading until August 11, 2017, and Mr. Berry agreed that he would not seek to compel or otherwise interpose an objection to Defendants' further 15-day extension.

In addition to denying Defendants' motion for reconsideration, Mr. Berry therefore also respectfully requests that the Court confirm its directive to Defendants to serve responses to all outstanding discovery requests and file a responsive pleading within the time periods agreed to by the parties.

Respectfully submitted,



Mitchell Willoughby, Esquire

Elizabeth Zeck, Esquire

Chad N. Johnston, Esquire

WILLOUGHBY & HOEFER, P.A.

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Attorneys for Robert F. Berry

This 17 day of July 2017
Columbia, South Carolina

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

AUG 16 2017

SC Court of Appeals

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2017-CP-32-00397

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.

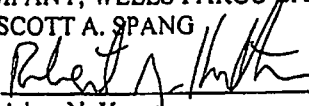
APPELLANTS.

NOTICE OF APPEAL

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 ("Appellants"), appeal the Orders of the Honorable G. Thomas Cooper, Jr. on Appellants' Motion to Dismiss or Stay Pending Arbitration dated June 16, 2017 and on Defendants' Motion for Reconsideration or Amendment dated July 24, 2017. Appellants received written notice of entry of the July 24, 2017 Order and the July 27, 2017 Judgment on July 31, 2017.

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

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ATTORNEYS FOR APPELLANTS

Date: August 10, 2017

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED

AUG 10 2017

SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Civil Action No. 2017-CP-32-00397

ROBERT F. BERRY,

RESPONDENT,

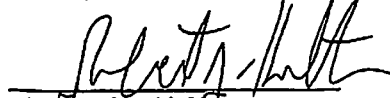
v.

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.

PROOF OF SERVICE

I certify that I served the Notice of Appeal on Robert F. Berry by hand delivering a copy of it on August 10, 2017, addressed to his attorneys of record, Mitchell Willoughby, Elizabeth Zeck, Chad N. Johnston, Willoughby & Hoefer, P.A., 930 Richland Street, Columbia, South Carolina 29201.


Adam N. Yount

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

RECEIVED

AUG 10 2017

SC Court of Appeals

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

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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. Ciloh - 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 Federal Arbitration Act." *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 *Sarno Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 121, 441 S.E.2d 835, 838 (Cl. 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 (Cl. 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 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), SCRPC, asserting as support for the motion Rule 15(a), SCRPC. However, Defendants' motion to dismiss is not a "pleading" capable of amendment under Rule 15(a); therefore, Defendants' motion was untimely and ineffective. While an assertion of a Court's lack of subject matter jurisdiction may be raised at any time during the litigation, other defenses specified in Rule 12(b) — including the defenses listed as subsections 12(b)(2), (3), (4), (5) and (8) — are waived if not asserted in the initial motion or responsive pleading, as is the case here where Defendants' motion relied solely on the defense provided by Rule 12(b)(6). *See* Rule 12(g), (h).



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

The three registration 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 form.



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*.

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

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

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

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



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

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

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

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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:

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



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

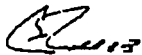
In reaching the conclusion that securities arbitral fora cannot be treated as interchangeable, this Court is mindful of the result obtained on very similar facts in *Keller v. ING Financial Partners, Inc.*, Op. No. 2011-CP-23-0336 (S.C. Cir. Ct. filed June 2, 2011). That case involved an attempt to compel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

The "NASD," or the National Association of Securities Dealers, Inc., as then constituted, no longer exists, having combined regulatory functions with certain divisions of the New York Stock Exchange ("NYSE") to become what is now known as the Financial Industry Regulatory Authority, or FINRA.

* * *

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), SCRPC.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 *Disahato 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), SCRPC, should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. *Plateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Cl. App. 2003) (citations omitted); *see also Baird v. Charleston City*, 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), SCRPC. 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 Plateau*, 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

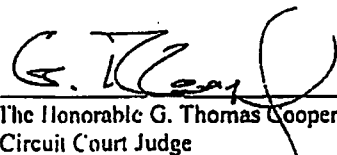
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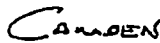
"facts sufficient" standard of a "short and plain statement" of a well-pled complaint sufficient to put each of the Defendants on notice of the allegations of wrongdoing advanced by Mr. Berry. Defendants' motion to dismiss is therefore denied.

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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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).

ORIGINAL

STATE OF SOUTH CAROLINA)

IN THE COURT OF COMMON PLEAS

COUNTY OF LEXINGTON)

ELEVENTH JUDICIAL CIRCUIT

ROBERT F. BERRY.)

Civil Action No. 2017-CP-32-00397

Plaintiff.)

vs.)

SCOTT A. SPANG, WELLS FARGO
CLEARING SERVICES, LLC, f/k/a
WELLS FARGO ADVISORS, L.L.C.
WACHOVIA SECURITIES
FINANCIAL HOLDINGS, L.L.C.
WELLS FARGO & COMPANY, and
WELLS FARGO BANK, N.A.,)

ORDER

Defendants.)

Before the Court is Defendants' Motion for Reconsideration or Amendment of this Court's Order, filed June 21, 2017, denying Defendants' Motion to Dismiss or Stay Pending Arbitration.

After careful consideration of the record in this case and the submissions of the parties, this Court is unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or facts not appropriately considered.

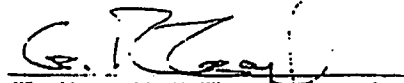
Accordingly, this Court hereby DENIES Defendant's Motion under Rule 59(e), SCRPC, to reconsider this Court's March 1, 2017, Order. Furthermore, pursuant to Rule 59(f), SCRPC, the Court is of the opinion that oral argument is not necessary.

In regard to Defendants' request for an extension of time to file a responsive pleading, which request has been extended with the consent of Plaintiff, Defendants' request is granted, and Defendants are ordered to file a responsive pleading within 10 days from receipt of this Order.



In regard to Defendants' request for an extension of time to respond to Plaintiff's outstanding discovery requests, which request has been extended with the consent of Plaintiff, Defendants' request is granted, and Defendants are ordered to provide discovery responses to all outstanding discovery requests of Plaintiff within 40 days from receipt of this Order.

AND IT IS SO ORDERED.


The Honorable G. Thomas Cooper, Jr.

July 24, 2017

Haynsworth Sinkler Boyd, P.A.

Date Rec'd 7/31/17
C/M # 31686.0261
Routing ANY
Calendared _____

1	State of South Carolina	)	In the Court
		)	Of Common Pleas
2	County of Lexington	)	Case No.: 2017-CP-32-00397
		)	
3	Robert F. Berry,	)	
		)	
4	Plaintiff,	)	Transcript of Record
	vs.	)	
5		)	
	Wells Fargo Clearing	)	
6	Services, LLC, et al.,	)	
		)	
7	Defendants.	)	
		)	
8			

9
10 June 1, 2017
11 Lexington, South Carolina

12 BEFORE:

13 The Honorable G. Thomas Cooper, Junior, Judge

14
15 APPEARANCES:

16 Mitchell Willoughby, Esquire
17 Chad N. Johnston, Esquire
18 Elizabeth Zeck, Esquire
19 Attorneys for the Plaintiff

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

23
24
25

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P.O. Box 184, Lexington, South Carolina 29071

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1 Thereupon, the following proceedings were had,

2 THE COURT: Appearances, please.

3 MR. WILLOUGHBY: Your Honor, on behalf of the
4 plaintiff my name is Mitchell Willoughby. With me is
5 Chad Johnston and Elizabeth Zeck. We practice with the
6 firm of Willoughby and Hoefer in Columbia.

7 THE COURT: You've got the whole firm here?

8 MR. WILLOUGHBY: Well, I've got part of the firm
9 here, Your Honor.

10 THE COURT: You've got the brains.

11 MR. WILLOUGHBY: Got the brains. Always need all
12 the help I can get.

13 THE COURT: All right. Yes, sir.

14 MR. TAMASITIS: Your Honor, John Tamasitis from
15 Haynsworth, Sinkler and Boyd.

16 THE COURT: Say that again.

17 MR. TAMASITIS: John Tamasitis from Haynsworth,
18 Sinkler and Boyd. And I can hand up a business card as
19 well. Your Honor, I'm here on behalf of Adam Yount who
20 is in our Charleston office. We did not bring the entire
21 Haynsworth, Sinkler, Boyd firm today.

22 THE COURT: You're at a disadvantage.

23 MR. TAMASITIS: Yes, Your Honor.

24 THE COURT: This is Deli Boi versus Queen Holdings,
25 right?

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1 MR. TAMASITIS: No, Your Honor. This is Berry
2 versus Wells Fargo Clearing.

3 THE COURT: What are you here for?

4 MR. WILLOUGHBY: Same case. Our client, Your Honor,
5 is Mr. Berry who is sitting in the courtroom so the case
6 is --

7 THE COURT: All right. Just hold on a minute. I
8 thought I called Deli Boi, III, LLC versus Queen
9 Holdings. Anybody here on that case? That's the next
10 case. You guys just jumped the gun.

11 MR. WILLOUGHBY: We're sorry, Your Honor.

12 THE COURT: Have we heard from Ian McVey or Tyler
13 Gregg?

14 THE CLERK: No.

15 THE COURT: All right. Well, that gives me great
16 pleasure in saying dismissed for lack of prosecution.
17 All right. Now we're at Robert Berry versus Wells Fargo
18 Clearing, right?

19 MR. WILLOUGHBY: Correct, Your Honor. And then
20 there's multiple defendants, Your Honor. I was gonna
21 also, I have just handed to opposing counsel briefs in
22 opposition to their motion today and I would welcome the
23 opportunity to present copies for Your Honor and your
24 clerk.

25 THE COURT: Well; when it's your turn. This is the

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1 defendant's motion?

2 MR. WILLOUGHBY: It is, Your Honor.

3 MR. TAMASITIS: Yes, Your Honor.

4 THE COURT: All right. Mr. Tamasitis.

5 MR. TAMASITIS: Tamasitis, Your Honor.

6 THE COURT: You're appearing on behalf of Adam
7 Yount?

8 MR. TAMASITIS: Yes, Your Honor. And I also have
9 here with me Mr. Frederick, Fred Smith from Seyfarth Shaw
10 in Charlotte. We submitted a motion to have him admitted
11 pro hoc viche to this Court on May 22nd and also with
12 that attached to it our application to the Supreme Court.
13 We as of this morning I had not seen that it had been
14 signed by the administrative court judge so, Your Honor,
15 I have a proposed order here for you to sign along with
16 the motion and it's my understanding that the plaintiff's
17 counsel does not object.

18 MR. WILLOUGHBY: We have no objections, Your Honor.

19 THE COURT: All right. Let's deal with that issue
20 first.

21 MR. TAMASITIS: Yes, Your Honor.

22 THE COURT: Where is the application?

23 MR. TAMASITIS: May I approach, Your Honor?

24 Attached is the motion along with the application that's
25 attached.

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1 THE COURT: Been to the Supreme Court?

2 MR. TAMASITIS: Yes, Your Honor. It was filed May
3 26th.

4 THE COURT: Let me see. Let me have a look at that.
5 The fees have been paid?

6 MR. TAMASITIS: Yes, Your Honor.

7 THE COURT: All right. Welcome, Mr. Smith.

8 MR. SMITH: Thank you very much, Your Honor.

9 THE COURT: Now, which motions? I have got a
10 protective order, a stay of discovery and a motion to
11 order arbitration.

12 MR. TAMASITIS: Yes, Your Honor. I believe to take
13 it up the motion to stay the case and/or dismiss and
14 compel arbitration I think should be taken up first. The
15 motion for protective order and motion to stay discovery
16 would only I think be applicable --

17 THE COURT: Just follow in line.

18 MR. TAMASITIS: Yes, Your Honor.

19 THE COURT: All right. Mr. Tamasitis, tell me about
20 it.

21 MR. TAMASITIS: Your Honor, I'll turn it over to
22 Mr. Smith.

23 THE COURT: You may proceed, Mr. Smith.

24 MR. SMITH: Thank you, Your Honor. I appreciate the
25 Court allowing me to appear before you today and I will

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1 keep my remarks brief.

2 Your Honor, as we have explained in our motion to
3 dismiss or stay arbitration we believe that there are two
4 proper entities that should be parties to this matter.

5 THE COURT: Tell me what this case is about.

6 MR. SMITH: In essence, Your Honor, it's an
7 employment dispute. Mr. Berry was a registered
8 representative or an associated person, a broker in
9 essence with Wells Fargo Advisors which on November 11th,
10 2016 changed its name to Wells Fargo Clearing Services,
11 LLC. And we have termination and a number of different
12 complaints that Mr. Berry has against Wells Fargo
13 Clearing Services and Scott Spank who is an individual
14 defendant in this action. Mr. Spank, too, was a
15 registered representative or associated person under
16 FINRA with Wells Fargo Advisors, Wells Fargo Clearing
17 Services.

18 This lawsuit contains ten different counts, many of
19 them similar but all arise out of an employment
20 relationship that turned sour. Mr. Berry has sued Wells
21 Fargo Clearing Services. He sued Mr. Spank. He has also
22 sued Wachovia Securities Financial Holdings, LLC, which
23 is the parent company of Wells Fargo Clearing Services.
24 He's jumped a couple levels above Wachovia Securities
25 Financial Holdings and sued the ultimate parent company

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

3 THE COURT: Called the shotgun approach?

4 MR. SMITH: We think so, Your Honor. And our
5 argument boils down to this, Your Honor. When Mr. Berry
6 first started with the predecessor entity to what is now
7 Wells Fargo Clearing Services, he completed a U4 which is
8 standard in the securities industry. That U4 contained
9 an arbitration provision in which Mr. Berry agreed to
10 arbitrate any dispute, claim or controversy that may
11 arise between me and my firm or a customer or any other
12 person that is required to be arbitrated under rules,
13 constitutions or bylaws. At the time it was the NASD.
14 It's now FINRA. As may be amended from time to time and
15 then any arbitration award rendered against me may be
16 entered a judgment in any court of competent
17 jurisdiction.

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

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1 or an associated person or - excuse me - and is between
2 or among members and associated persons or associated
3 persons.

4 Now, FINRA is a congress and SEC sanctioned entity
5 that regulates broker dealers like Wells Fargo Clearing
6 Services and brokers such as Mr. Berry, and in order to
7 have the privilege of working in the securities industry
8 a broker must sign a U4, he must be licensed and
9 registered through FINRA and he must abide by FINRA's
10 rules. We believe that the addition of all these other
11 Wells Fargo entities frankly, Your Honor, is a subterfuge
12 designed to avoid arbitration. We believe that Mr. Berry
13 should be compelled to arbitrate his claim against Wells
14 Fargo Clearing Services and Mr. Spank under the agreement
15 under FINRA rules for FINRA and that the rest of the
16 Wells Fargo defendants should be dismissed.

17 THE COURT: Where is that agreement? Is that in
18 your pleading?

19 MR. SMITH: It is, Your Honor.

20 THE COURT: I have got your memorandum.

21 MR. SMITH: It's exhibit 1, Your Honor, to our
22 memorandum of law.

23 THE COURT: I see it. That's the uniform
24 application?

25 MR. SMITH: Yes, Your Honor. What's known in the

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

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

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

8 THE COURT: I agree to arbitrate?

9 MR. SMITH: Yes, sir.

10 THE COURT: What is the requirement?

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

14 THE COURT: It doesn't state that.

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

21 THE COURT: Thank you. Mr. Willoughby.

22 MR. WILLOUGHBY: May it please the Court.

23 THE COURT: You may proceed.

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

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1 exhibits that we have attached to the brief (proffering.)

2 THE COURT: Very well.

3 MR. WILLOUGHBY: I would also hand to Your Honor a
4 copy of the only, it's a little easier to look at of the
5 U4 that you were just discussing with Mr. Smith. And,
6 Your Honor, what I would do if Your Honor has the brief
7 of Mr. Smith available to you, if you would turn to his
8 exhibit 1 you would note that he's actually attached
9 three U4's, and if you would look at the first U4 that's
10 attached, at least the order that they were provided to
11 us, the first one is dated 9/28/1995, and if you would
12 look --

13 THE COURT: Wait. The first one provided to me says
14 employment date -- All right. 9/28/95.

15 MR. WILLOUGHBY: Yes, Your Honor. There are four
16 pages to each one of these. The first one is dated
17 9/28/1995 and if Your Honor will also note then on page 1
18 of that document the name of the firm is Wheat First
19 Securities, Inc. And then if you look at the next one
20 that they provided --

21 THE COURT: Wait a minute. Let me ask you, this one
22 is signed by -- Okay. All right. I'm with you.

23 MR. WILLOUGHBY: And then the next one that's
24 provided is also with Wheat First Securities, Inc. and
25 the date of it is January, looks like January 16, 1995

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1 and neither one of those two forms have any arbitration
2 forum selected. No designation of an arbitration forum
3 at all and the language that you were just discussing
4 with Mr. Smith specifically says, Your Honor, we agree to
5 arbitrate in front of a forum that's designated in item
6 10 and item 10 has a place to check blocks, if you will
7 look on the very first page or if you look at the one
8 that I handed to Your Honor that has my highlighting on
9 it, I'm going to turn to it next --

10 THE COURT: I'm losing you. I'm moving down to item
11 10. It says if I became temporarily registered as an
12 agent.

13 MR. WILLOUGHBY: Item 10 on this form, Your Honor,
14 is to be registered with the following. Not item 10 on
15 where the arbitration clause is but on the very first
16 page.

17 THE COURT: Go back to the first page?

18 MR. WILLOUGHBY: Yes, sir. If you would look at -
19 if you will just juxtapose - if you will take the one I
20 just handed up to Your Honor and just look at it, you
21 will see on the very first page and then I'll call your
22 attention to the difference. You will see an item 10
23 there on the very first page about a third of the way
24 down and on the left hand column it's got SRO and you
25 will see there are a number of places to designate. On

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1 the one I handed up to Your Honor what has been
2 designated is ASE which is an acronym for the American
3 Stock Exchange which no longer exists and then NASD
4 stands for the National Association of Securities
5 Dealers. They no longer operate an arbitration forum.
6 Then the New York, NYSE, the New York Stock Exchange.
7 They no longer operate an arbitration forum. And then
8 PHLX which is the Philadelphia Exchange and it no longer
9 exists.

10 It is true, Your Honor, that back in 2007 there was,
11 I don't know what the right word is, there was a
12 consolidation of the arbitration forums of NASD and the
13 New York Stock Exchange and there was an amalgamation of
14 those arbitration forums but neither of them any longer,
15 neither of these two organizations operate an arbitration
16 forum. FINRA does. FINRA is an organization called the
17 Financial Industry Arbitration or Financial-Industry
18 Regulatory Authority and they operate a arbitration forum
19 but as Your Honor will note on the designation on this
20 1995 form it fails for a number of reasons.

21 If you look at the language that's on page 4 that
22 you were just reading a few minutes ago, the form says I
23 agree to arbitrate any dispute, claim or controversy
24 between me and my firm. If you turn back to page 1, the
25 firm that is designated is Wheat First Securities, Inc.

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1 It goes on to say before an arbitration forum designated
2 in item 10. So those four designations were the American
3 Stock Exchange. No longer exists. NASD no longer
4 operates an arbitration forum. New York Stock Exchange
5 no longer operates an arbitration forum. And the
6 Philadelphia Exchange no longer exists. So it fails for
7 several reasons.

8 One reason, and I'm gonna come to another very
9 important reason in just a moment, Your Honor, one reason
10 is the firm. There's no successor assigns. It says
11 Wheat First. And as you look in our brief, Your Honor,
12 if you will look to, at tab 2, we have a self
13 authenticating document from the South Carolina Secretary
14 of State which is our exhibit to the brief that shows
15 that Wheat First Securities did, in fact, change its name
16 back in June of 1999 and it changed that name to First
17 Union Capital Markets Corp. And then if you will look at
18 number 3 which is likewise self authenticating, you will
19 see that First Union Capital Markets Corp. applied for
20 surrender of authority to do business in the State of
21 South Carolina effective 12/2/1999 and the Secretary of
22 State carries a First Union Capital Markets Corp. under
23 its records as dissolved.

24 So the business entity known as Wheat First which is
25 the entity that Mr. Berry had signed a form with when he

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1 was employed by them no longer exists and so this
2 agreement to the extent it's enforceable at all would
3 have only been enforceable by Wheat First. No successor
4 assign is mentioned and it would only be permitted to be
5 arbitrated in front of one of those four arbitration
6 forums that are specifically designated. All of this
7 information is filled out by the firm in this case Wheat
8 First so any ambiguity is constructed against them.

9 But another key point, Your Honor, for the reason
10 that this potential or proposed agreement which is being
11 relied upon not by Wheat First but being relied upon by
12 Wells Fargo Corporation, the bank, they are all listed
13 there in the caption of the case, are being relied upon
14 dating all the way back to this 1995 agreement and it
15 simply, Judge, does not work.

16 Another reason why their argument fails, they have
17 tendered this form, Your Honor, without any
18 authentication. The rules of evidence are very clear.
19 They have an affidavit from a paralegal in the Wells
20 Fargo law department. She does not reference that she is
21 the record custodian. She does not in any way attempt to
22 authenticate the form so the form is just passed up to
23 Your Honor without any authentication and therefore it is
24 inadmissible as a matter of law and therefore the Court
25 can't consider it for that reason as well. And I

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1 recognize, Your Honor, that's more of a technical
2 argument but it is absolutely valid on the law. We cite
3 to the Court the Conley case where employment records
4 were not effectively authenticated in the trial of the
5 case and the judge refused to permit those records into
6 evidence and as a consequence it went up on appeal.

7 THE COURT: Who did your client work for?

8 MR. WILLOUGHBY: Say again.

9 THE COURT: Who did your client work for?

10 MR. WILLOUGHBY: So my client was an employee and
11 this is important, Your Honor, and I'm going to discuss
12 some of the facts. He was an employee of Wells Fargo
13 Advisors, LLC.

14 THE COURT: What happened to Wheat First?

15 MR. WILLOUGHBY: Wheat First ultimately, Your Honor,
16 through their businesses, through mergers and
17 Acquisitions ultimately that line of business got
18 acquired at some point in time by Wells Fargo. As Your
19 Honor will remember back there in the financial crises in
20 2008 it was Wachovia and Wachovia through becoming
21 essentially a liquid the Federal Reserve basically forced
22 the sale of Wells Fargo --

23 THE COURT: Well, does Mr. Berry, did he have an
24 agreement with whoever employed him?

25 MR. WILLOUGHBY: Well, Your Honor, we say no. But

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1 what I would say to Your Honor it is their duty. They're
2 asking to compel arbitration. It is their duty to prove
3 the agreement and we submit to Your Honor today that what
4 they have tendered to this Court is not sufficient
5 evidence in which the Court can conclude that Mr. Berry
6 has agreed to arbitrate.

7 As Your Honor is well aware arbitration is a
8 creature of contract. No one can be forced to arbitrate
9 any issue to which they have not agreed. They have
10 tendered this U4 to Your Honor for the specific purpose
11 of using it to convince Your Honor that Mr. Berry signed
12 it back in 1995, they're entitled to rely upon it today
13 and that is the evidence that they presented.

14 Now, we would argue, Judge, it's not evidence. It's
15 inadmissible. We object to it being admitted and
16 considered because it has not been authenticated. But we
17 would also say that even if Your Honor did choose to
18 consider it, the contract would fail because there is no
19 successor assigns language. When you see the firm, the
20 firm says Wheat First. When you see the arbitration
21 forums, none of those arbitration forums provide
22 arbitration forums for resolving disputes today. So
23 Mr. Berry, if he had filed a claim against Wheat First,
24 we could understand Wheat First coming in and asserting
25 this U4 as a means to argue that they should be,

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1 Mr. Berry should be compelled to arbitrate. But Wheat
2 First is not here. They're long since defunct. They're
3 no longer doing business. We don't know whether it's a
4 merger. We don't know whether it was an acquisition of
5 business assets. We don't know any of that sort of
6 stuff.

7 But I would say to Your Honor regardless it would
8 all fail because the language of the document to which
9 they have tendered to this Court is very clear that
10 Mr. Berry is not required to arbitrate. But let me give
11 Your Honor just a few facts. What we have --

12 THE COURT: Do I need more?

13 MR. WILLOUGHBY: Say again.

14 THE COURT: Do I need more?

15 MR. WILLOUGHBY: I don't know that you need more but
16 Mr. Smith has kind of indicated that it's a plain vanilla
17 sort of employment dispute. The reality is they
18 terminated Mr. Berry. Defamed Mr. Berry in a U5 that
19 they filed claiming that he had been terminated for
20 unethical dishonest conduct. They also then tried to
21 steal his business with his clients. They basically
22 terminated him, Your Honor, because he refused to do
23 improper and illegal acts that Wells Fargo has been
24 widely indicated in the financial press where they were
25 opening accounts for people who had not requested

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1 accounts be opened. Wells Fargo during this period of
2 time was placing pressure on all of their advisors, on
3 other employees to aggressively cross market and cross
4 sell products.

5 Mr. Berry said very forthrightly and honestly that
6 my clients don't need these products. It would be a
7 violation of my fiduciary responsibilities and the
8 securities laws to force them to buy these products and,
9 therefore, he refused to sell products to his clients.
10 That's part of the reason he was targeted.

11 We also allege in our complaint that he had a profit
12 formula agreement dating back to when Wachovia was in
13 charge of the business entity. They decided that that
14 contract was more lucrative, provided a greater pay out
15 to Mr. Berry than they wished to pay and therefore part
16 of the reason for terminating him was to avoid this pay
17 out arrangement.

18 So they have damaged this gentleman, fine gentleman
19 that lives right here in Lexington County. They have
20 damaged his business. They have damaged his future
21 business opportunities. He is still suffering from the
22 losses. He was making a salary on an annual basis in the
23 range of 350 to \$400,000.00 on an annual basis. Much of
24 that has been wiped out and now in his middle 60's he's
25 back to having to recreate a book of business that was

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1 basically denied.

2 THE COURT: All right. I can't try the case here.

3 MR. WILLOUGHBY: I understand. But you needed a
4 little bit of that background, Your Honor.

5 THE COURT: All right. Mr. Smith, he says -- You
6 heard him.

7 MR. SMITH: I did, Your Honor. A few quick things,
8 Your Honor. Number 1, I think the Court can take
9 judicial notice of the fact that in the mid 2000's the
10 NASD turned over its responsibilities for the regulation
11 of the financial services industry and broker dealers and
12 brokers to a newly created entity called FINRA. NASD
13 essentially morphed into FINRA, Your Honor. With respect
14 to the particular U4 at issue, I'll note the following
15 from plaintiff's first amended complaint as to the
16 corporate history of Wheat First. On page 9, your Honor,
17 footnote 3, the 1997 --

18 THE COURT: Hold on. Let me find it. The amended
19 complaint?

20 MR. SMITH: Yes, Your Honor. Filed on February 23rd
21 this year.

22 THE COURT: I got it. Go ahead.

23 MR. SMITH: I think Mr. Berry and his fine counsel
24 did a nice job laying out the transformation of Wheat
25 First to the entity that ended up being his employer

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1 Wells Fargo Advisors and alleges in 1997 Wheat First was
2 acquired by First Union Corporation and continued to do
3 business under the name of Wheat First Union. Thereafter
4 in 2001 the parent company of Wheat First Union merged
5 with Wachovia Corporation and the brokerage business
6 continued. I believe that should be continued under the
7 name Wachovia Securities.

8 In 2008 Wachovia was acquired by Wells Fargo and in
9 2009 the retail brokerage became known as Wells Fargo
10 Advisors. The U4 continued with both Mr. Berry and the
11 various firms, broker dealers that he worked with over
12 the time until Wells Fargo Advisors. If not, Your Honor,
13 there's a serious question as to Mr. Berry's authority
14 and registration status over the past couple of decades
15 to do what he's done so well and earned him a living.

16 As for the authentication issue, I don't agree with
17 Mr. Willoughby with respect to the authentication. I
18 think there's sufficient foundation and authentication in
19 Ms. Jackson's affidavit.

20 In addition, I believe that that U4 is self
21 authenticating. It's a document created by a quasi
22 governmental agency and I think it speaks for itself
23 without any kind of authentication which I believe we
24 have provided in any event.

25 The final point, Your Honor, to the extent that

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

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

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

20 THE COURT: Say that again.

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

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1 you must be registered with FINRA and as a condition of
2 having the privilege of being in this industry to earn a
3 living you must also abide by FINRA's rules and FINRA's
4 rules say that disputes of this nature between a broker
5 and his or her firm, the broker dealer and other
6 associated persons or registered representatives, in this
7 case Mr. Spank, must be arbitrated under the auspices of
8 FINRA and pursuant to its rules.

9 THE COURT: Is that in your brief?

10 MR. SMITH: Yes, it is, Your Honor.

11 MR. WILLOUGHBY: Your Honor, may I briefly respond?

12 THE COURT: Just briefly.

13 MR. WILLOUGHBY: If I could get Your Honor to turn -
14 his question has been answered by another Circuit Court
15 in South Carolina on the very same issue. If you will
16 turn to tab 4. This is the Keller case versus ING
17 Financial and it's cited, of course, in our brief but the
18 very same issue was presented in which NASD, an agreement
19 was submitted where NASD was enumerated in the agreement
20 and they were trying to come in and say, well, NASD meant
21 FINRA. The effect of that, Your Honor, if you will turn
22 to page, the bottom of page 5.

23 THE COURT: Can I rely on this as precedent?

24 MR. WILLOUGHBY: You can in this regard, Your Honor.
25 If you will note, you will note also under tab 5 as I

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1 give the Court the history of this case, it was appealed
2 to the Court of Appeals. Now, I must acknowledge to the
3 Court as I did in our brief that the opinion for the
4 Court of Appeals indicates that it's not to be cited as
5 precedent. What I cite it for is to say that you have
6 the Court of Appeals that reviewed Judge Hill's order,
7 affirmed that order and then under tab 6 you will note
8 that that case was appealed all the way to the State
9 Supreme Court, cert was granted, the Supreme Court heard
10 arguments and then dismissed the grant of cert as having
11 been improperly granted.

12 So this Circuit Court case of Judge Hill has been
13 vetted all the way to the Supreme Court and I would say
14 to Your Honor that what these courts rely upon is that
15 basic principle of law. You cannot be compelled to
16 arbitrate before a forum and with anybody that you have
17 not specifically agreed to arbitrate with and you can't
18 tender anything that's outside the scope of whatever that
19 agreement may be.

20 But you would want to look, Your Honor, at the very
21 top of page 6 of Judge Hill's order. In mid 2007 the
22 NASD combined regulatory functions with certain divisions
23 of the New York Stock Exchange and became what is now
24 known as Financial Industry Regulatory Authority of FINRA
25 and its assigns. Coincident with this consolidation came

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1 both procedural and substantive changes to the NASD's
2 former dispute resolution process and rules and then it
3 cites, consequentially just as in granting sovereign the
4 parties to the present case were deprived of the
5 arbitration forum that they specified, specifically
6 bargained for and agreed upon and therefore the court
7 went on to decline to compel arbitration.

8 And, Your Honor, I would also state in this
9 particular agreement, said this in the brief, there is
10 absolutely no proof and it's up to Mr. Smith and the
11 defendants to prove that the difference between FINRA and
12 NASD or a combination between those, they have not done
13 those things, therefore, as a matter of proof it fails.
14 But you have a court decision in which that issue has
15 been looked at at the Court of Appeals and by the Supreme
16 Court and concluded that a shift from NASD to FINRA is
17 still a material shift changing rules. There's an
18 amalgamation of the rules so you get a different
19 arbitration forum than we have experienced before and it
20 says the Court cannot rewrite the party's agreement to
21 substitute FINRA for NASD.

22 When Wells Fargo took over the businesses, they had
23 the opportunity to make those changes if they had chosen
24 to do so. They didn't do so, therefore, the agreement
25 fails. And if Your Honor will note, I still come back

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1 not withstanding our pleadings that issue was not a issue
2 to us as we were pleading. We were just tracing a series
3 of events. We talk about predecessors. The reality is
4 we have proven up to Your Honor by self authenticating
5 documents from the Secretary of State that Wheat First no
6 longer exists.

7 I don't think Your Honor should take judicial notice
8 either of the so-called FINRA rule. It's not a judicial
9 entity. It's not a lawsuit that FINRA operates. It is
10 not a judicial forum, therefore, to the extent FINRA has
11 any application in this case, we don't think they do,
12 they would have the duty and obligation to prove that up.

13 THE COURT: Let me ask you this from either party.
14 Did Mr. Berry have to -- When Wheat First Securities
15 became extinct, did Mr. Berry have to refile for
16 securities registration with any of the defendants? Does
17 he have a contract? Did he have a contract or is there
18 something that links him to these defendants and to
19 FINRA?

20 MR. WILLOUGHBY: We say no, Your Honor. He
21 continued in the business. There's no question about
22 that just as we indicated. New firms picked up business.
23 We don't know under what arrangement.

24 THE COURT: How did you know to sue these particular
25 entities if you have no idea that he even worked for them

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1 or worked with them?

2 MR. WILLOUGHBY: Well, we knew at the end that he
3 was getting a paycheck when he was terminated from Wells
4 Fargo Advisors and we knew that Wells Fargo Advisors was
5 a part of the affiliated --

6 THE COURT: You just knew he was getting a check?

7 MR. WILLOUGHBY: He was clearly getting paid all the
8 time he was working there and once Wells Fargo became --

9 THE COURT: But you don't know if he was registered
10 as being an associate of Wells Fargo Securities or
11 anything like that?

12 MR. WILLOUGHBY: It's not our duty to prove it, Your
13 Honor. But the answer is I don't know what, if anything,
14 Wells Fargo may have done once they acquired Wachovia.
15 I'm sure that they would have continued in the business.
16 They would have had to file forms from time to time.
17 But, Your Honor, I would ask the Court just like the
18 Court of Appeals case under tab 5 it says regardless of
19 any similarities between NASD and FINRA's procedural
20 rules therefor we cannot impose upon the parties the
21 power of an arbitrable forum that they did not agree to
22 submit to. So you have got to have something that our
23 guy has signed.

24 THE COURT: That's what I'm looking for.

25 MR. WILLOUGHBY: And they have not produced it, Your

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1 Honor. They have not produced it. I don't know if it
2 exists and it's not my duty to produce it. We are
3 resisting this. What they have brought to you today is
4 one document, one document, the one that I have handed up
5 to Your Honor. The other two don't even have an
6 arbitration forum designated. I presume what they did is
7 look through their files to find out where they could
8 find Mr. Berry's signature. They produced three
9 documents to the Court. There's only one that even
10 specifies an arbitration forum, the one that I handed up
11 to Your Honor and it only would say we'll arbitrate
12 before these four forums. None of them exist.

13 THE COURT: All right. I understand. Thank you.

14 MR. WILLOUGHBY: And the firm no longer exists.

15 THE COURT: All right.

16 MR. WILLOUGHBY: So their burden they haven't met.

17 THE COURT: Anything further?

18 MR. SMITH: No, Your Honor.

19 THE COURT: All right. I'll accept proposed orders
20 in ten days. Thank you very much.

21 MR. TAMASITIS: Your Honor, with respect to the
22 motion for protective order to hold discovery until you
23 make a decision on this, that was the first order that
24 was up in the application, you took this under
25 advisement.

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1 THE COURT: I don't know that -- Has there been any
2 demand for discovery?

3 MR. WILLOUGHBY: We have made demand for discovery,
4 Your Honor. We have not moved to compel awaiting the
5 Court's ruling on the --

6 THE COURT: As long as they don't move to compel
7 you're safe.

8 MR. WILLOUGHBY: And we won't move to compel until
9 -- We have asked in our brief, Your Honor, assuming you
10 agree with us that arbitration can't be compelled that
11 they would immediately thereafter respond to that. Your
12 Honor, there is one thing that they have not argued. I
13 don't know if Mr. Smith is planning to withdraw it. They
14 filed also a motion to dismiss under 12(B) arguing that
15 we failed to state claims upon which relief could be
16 granted, I believe. So I don't know if you are planning
17 to argue that motion.

18 MR. SMITH: I think it's set forth in our motion and
19 it's very clear what our position is. I don't believe we
20 need any additional oral argument on that, Your Honor.

21 THE COURT: Okay. Thank you very much, counsel.

22 MR. WILLOUGHBY: Your honor, may I say one thing?
23 They amended their motion to add some additional grounds
24 under rule 12(B) and I don't think they amended - they
25 amended that motion after the period of time to answer

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1 and as Your Honor knows if they hadn't filed that motion,
2 they would have been in default. So they filed the
3 motion. It stays their time to answer and therefore if
4 you then try to amend that motion after the time has run
5 for you to answer or otherwise plea I think you have
6 waived those arguments. We'll say that in - we have said
7 that in our brief but I wanted the Court to hear that.
8 So I think the only ground they have got that they can
9 argue, everything else is waived, is the ground of
10 failure to state facts sufficient to make out causes of
11 action.

12 THE COURT: All right. Well, in your proposed
13 orders address those issues.

14 MR. WILLOUGHBY: We'll address it.

15 THE COURT: All right. Thank you very much.

16 MR. WILLOUGHBY: Thank you, Your Honor.

17 MR. SMITH: Thank you, Your Honor.

18 MR. TAMASITIS: Thank you, Your Honor.

19 MR. WILLOUGHBY: Thank you for listening to us this
20 morning.

21 WHEREUPON, THE HEARING WAS CONCLUDED.

22

23

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25

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1 CERTIFICATE OF REPORTER

2 (STATE OF SOUTH CAROLINA)

3 (COUNTY OF LEXINGTON)

4

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

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

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

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

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