THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2017-001690

Robert F. Berry, ... Respondent,

v.

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

FINAL BRIEF OF RESPONDENT

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STATEMENT OF ISSUES ON APPEAL

I. Are the new rules, citations, web-linked documents and arguments derived therefrom, which were first included in Appellants' Motion for Reconsideration and later included and significantly expanded upon in Appellants' Brief, preserved for this Court's review or subject to appellate judicial notice, where those grounds were not argued to the trial court below and now for the first time presented as a new and alternative basis to meet Appellants' burden of proving that Mr. Berry had executed an agreement with any Defendant compelling him to arbitrate his claims with that particular Defendant?

II. Does the two-issue rule and law of the case doctrine preclude this Court's review of the trial court's Order, based on Appellants' failure to appeal from two of the trial court's alternative grounds for denying the Motion to Compel?

III. Did the trial court err in finding that Appellants had failed to meet their burden in demonstrating the existence of an agreement to arbitrate Mr. Berry's claims?

STATEMENT OF THE CASE

This action for damages was commenced by Mr. Berry on February 2, 2017, through the filing of Civil Action No. 2017-CP-32-00397, in the Lexington County Court of Common Pleas. **(R. pp. 22-49)** Prior to answering, 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 "Appellants") filed a Motion to Dismiss or Stay Pending Arbitration ("Motion to Compel") on April 12, 2017. **(R. pp. 94-129)** Thereafter, Appellants filed an amended Motion to Dismiss or Stay Pending Arbitration ("Amended Motion to Compel") on April 27, 2017. **(R. pp. 130-31)**

In the Motion to Compel, Appellants' arbitration demand was based solely upon what purported to be three (3) 1994 Form U4 registration statements[1] from the period when Mr. Berry was associated with Wheat, First Securities, Inc. ("Wheat First"), a now defunct firm. **(R. pp. 108-20)** Of the three Form U4s submitted in Appellants' motion, only the November 1994 Form U4 identified possible arbitration fora for settling disputes between Mr. Berry and Wheat First, which no longer exists. **(R. pp. 117-20)** This form made no reference to any Appellant in this case, although Appellant Wells Fargo Clearing Services, LLC argued, without any evidence to support the assertion, that it was a successor in interest to Wheat First and should therefore be allowed to step into its shoes. Id. Relying upon the November 1994 registration statement, Appellants sought to compel arbitration of Mr. Berry's claims before the Financial Industry Regulatory Authority, Inc.

[1] A Form U4 is a Uniform Application for Securities Industry Registration or Transfer. The forms advanced by Appellants to the trial court as being supportive of their motion were forms dated and then in use in 1994 and 1995, respectively. Only one of the U4s advanced by Appellants, the one dated November 5, 1994, designated potential arbitration fora, including the National Association of Securities Dealers ("NASD"), an entity no longer in existence.

("FINRA"), a forum that was not referenced in any of the Form U4s advanced by Appellants before the trial court; indeed, FINRA did not even exist in 1994. **(R. pp. 96-107)**

Because none of the 1994 Form U4s proposed arbitrating claims before a forum that either exists or offers arbitration services today, Appellants simply unilaterally inserted the FINRA forum as a substitute for the designated fora without informing the trial court of the switch or offering admissible proof that such a substitution was appropriate. Order at 8 ("[Appellants] disregard the actual language of the SRO section of the 1994 Form and instead simply substituted 'FINRA' without explanation or even bothering to inform the Court of this most significant change, much less openly requesting or offering proof that such a substitution is proper and permissible."). **(R. p. 10)**

A hearing on Appellants' Motion and Amended Motion to Compel was held on June 1, 2017, before the Honorable Judge G. Thomas Cooper, Jr. in Lexington County, in which Mr. Berry disputed the existence of any agreement to arbitrate his claims. **(R. pp. 322-52)** Appellants provided the Court with a memorandum opposing same ("Opposition"). **(R. pp. 132-208)** By Form-4 Order of same date, the trial court took the matter under advisement. **(R. pp. 1-2)** On June 21, 2017, the trial court entered an order denying Appellants' Motion and Amended Motion to Compel ("Order"). **(R. pp. 3-19)**

For a number of reasons detailed in the Order, the trial court determined that Appellants failed to advance admissible evidence to meet their burden to demonstrate that the submitted Form U4s established the existence of a valid arbitration agreement between Mr. Berry and any of these Appellants. Order at 5. **(R. p. 7)** The trial court first held that Appellants failed to properly authenticate any of the registration statements on which they relied, thus excluding the documents for failure to satisfy the Rules of Evidence. Order at 4. **(R. p. 6)** The trial court further held that,

even if the registration statements were properly before the court, Appellants lacked standing and could not enforce those provisions, as they were executed by a company (Wheat First) that no longer exists and the documents contain no successors or assigns language. Order at 5-7. **(R. pp. 7-9)** As an additional or alternative basis for its holding, the trial also held that the single registration statement advanced by Appellants that designated fora for arbitration could not be enforced in any event, because the specified fora no longer existed and/or provided arbitration services. Order at 7-15. **(R. pp. 9-17)** Finally, the trial court held that Appellants' conclusory references to a single FINRA rule were insufficient to compel arbitration of Mr. Berry's claims, because Appellants "have not met their threshold burden of demonstrating the applicability of any FINRA rule to Mr. Berry." Order at 8 n.7. **(R. p. 10)**

Thereafter, Appellants filed a Motion for Reconsideration of the Order on July 6, 2017. **(R. pp. 209-86)**. In the Motion for Reconsideration, Appellants advanced new documents and arguments in support of their argument to arbitrate, which Mr. Berry opposed by Response dated July 17, 2017. **(R. pp. 287-99)** By additional order dated July 25, 2017, the trial court denied Appellants' Motion for Reconsideration ("Reconsideration Order"). **(R. pp. 20-21)** Appellants filed a notice of appeal to this Court on August 10, 2017.

STATEMENT OF THE FACTS[2]

The claims underlying this appeal relate to an action for damages filed by Mr. Berry against his former employers for a deliberate breach of Mr. Berry's long-standing profit formula agreement and for other tortious actions designed to humiliate, defame, and damage Mr. Berry's professional

[2] A more fulsome explanation of the facts supporting Mr. Berry's causes of action against Appellants appears in the Amended Complaint. Am. Compl. **(R. pp. 50-93)** Mr. Berry provides the Court with the following recitation, but relies upon the complete set of facts set forth in the Amended Complaint.

reputation, his good name, and his ability to effectively compete against the Appellants in the future. **(R. pp. 50-54)** During Mr. Berry's employment, Appellants implemented a now well-publicized and fraudulent scam to illegally increase the earnings and stock price of their corporate parent, Appellant Wells Fargo & Company, by aggressively pushing the employees of all subsidiary corporations, including Mr. Berry, to cross-sell proprietary 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. *Id.* Those employees who refused to participate in Appellants' unlawful scheme were marked internally for immediate termination or targeted with pressure that would lead to resignations under duress. **(R. p. 53)**

Mr. Berry adhered to principle, rejecting Appellants' relentless pressure to make recommendations to clients which would have violated Mr. Berry's fiduciary obligations and other principles of law to make recommendations to clients on financial products based solely on the clients' best interests, rather than the bottom line of his employers. **(R. p. 53)** Mr. Berry was rewarded for his demonstration of courage and adherence to ethical and legal obligations by being ridiculed by his direct supervisor, Spang, for failing to generate sufficient commission income from the sale of Wells Fargo's proprietary products. **(R. pp. 57-69)** Mr. Berry also questioned unilateral changes made by Appellants to his profit formula employment agreement, which had been in effect since the early 2000s, beginning with Wells Fargo Advisors' predecessor, Wachovia Securities. **(R. pp. 61-62)** These changes involved the gradual, but systematic increase to costs charged to Mr. Berry by Wells Fargo Advisors for services that Mr. Berry was required to utilize, thereby reducing Mr. Berry's profit margin with no appreciable benefit to his ability to service his clients. *Id.* In response to and retribution for Mr. Berry's criticisms, Wells Fargo Clearing Services, LLC and Spang failed to support Mr. Berry's efforts to properly serve his clients. **(R. p. 62)** Wells Fargo

Clearing Services, LLC and Spang's efforts intensified over time and culminated in a February 3, 2014 meeting orchestrated and engineered by Wells Fargo Clearing Services, LLC and Spang, during which Spang humiliated and berated Mr. Berry, constructively firing him by threatening that he must either resign or be immediately fired. **(R. pp. 64-66)**

Following Mr. Berry's forced resignation, Wells Fargo Clearing Services, LLC and Spang defamed Mr. Berry's 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. **(R. pp. 68-69)** Wells Fargo Clearing Services, LLC and Spang knew that the false statement would damage Mr. Berry in his subsequent professional endeavors, but took the action specifically to promote Wells Fargo Clearing Services, LLC and Spang's own interests in poaching Mr. Berry's client base, in punishing Mr. Berry for not willingly and aggressively participating in Wells Fargo Corporation and Wells Fargo Bank, N.A.'s illegal cross-selling scheme, and in terminating a longstanding payout arrangement that Wells Fargo Clearing Services, LLC and Spang viewed as too lucrative for Mr. Berry. **(R. pp. 66-68)** As a result of Appellants' collectively illegal, false and deceptive practices, Mr. Berry, at age 62, suffered substantial losses to the book of business that he developed over 30 years in his position with Appellants and their immediate predecessors in interest. **(R. pp. 68-69)**

SUMMARY OF ARGUMENT

As the proponent of arbitration, each Appellant had the absolute burden to establish the existence of an agreement to arbitrate the claims advanced by Mr. Berry against him or it. The trial court correctly found that no Appellant had met that burden based on a number of failures of proof and evidence. What is most striking about this appeal, however, is that Appellants have all but abandoned the evidence which they unsuccessfully argued to the trial court were the sole source of

Mr. Berry's obligation to arbitrate his claims (the Form U4s), ignoring the express holdings of the trial court[3] regarding the measure and admissibility of proof advanced below, in favor of what amounts to an entirely new case on appeal. In their brief, Appellants simply skip the fundamental step of an appellant demonstrating error of the lower court, in favor of arguing the merits of matters which were expressly excluded on evidentiary grounds or offering other, entirely new (and unpreserved) grounds for compelling arbitration.

A proponent of arbitration should not be permitted to advance new grounds for compelling arbitration in each successive filing with the trial and appellate court, having been unsuccessful on the grounds previously advanced, although that is precisely what Appellants did below in their Motion to Compel and Motion for Reconsideration, and what Appellants seek to do yet again in their Brief. However, even the new grounds advanced in subsequent filings and for the first time on appeal fail to demonstrate through admissible evidence the existence of an arbitration agreement requiring Mr. Berry to arbitrate this dispute with any of the Appellants before Wells Fargo Clearing Service and Spang's substitute and preferred industry arbitral forum. Consequently, this Court should reject these unpreserved new grounds and affirm the decision of the trial court.

STANDARD OF REVIEW

In their brief, Appellants assert that the proper standard of review of the trial court's denial of its Motion to Compel is *de novo* by this Court. While this assertion would be correct under the circumstances in which all of the grounds and documents relied upon by the proponent of arbitration were properly admitted as evidence by the trial court, the *de novo* standard for evaluating a motion to compel does not supersede the more fundamental standard this Court employs to evaluate the

[3] As set forth below, Appellants fail to appeal from two of the trial court's independent grounds for denying the Motion to Compel, thus precluding this Court's review of the Order under the two-issue rule and the law of the case doctrine.

decision of a trial court to admit or exclude evidence. Instead, "[t]he admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* Thus, the trial court's determination regarding the authentication and admissibility of the U4 registration statements, as well as its finding that Appellants presented no evidence evincing their ability to enforce the U4s, is reviewed based on an abuse of discretion standard. For the remaining questions, "[d]eterminations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012).

ARGUMENT

I. The citations to and arguments applying FINRA rules to Mr. Berry are not preserved for this Court's review.[4]

The South Carolina Appellate Court Rules are clear that the briefs of the parties are limited to references to and arguments about matters which may be properly included in the Record on Appeal. *See* Rule 208(b)(4), SCACR. Correspondingly, the Record on Appeal is limited to matters that were presented to the lower tribunal. *See* Rule 210(c), SCACR ("The Record ***shall not***, however, include matter which was not presented to the lower court or tribunal.") (emphasis added).

[4] Following receipt of Appellants' Initial Brief, Mr. Berry filed on December 28, 2017 a motion to strike certain arguments and citations from the Initial Brief. That motion was denied by the Court on January 31, 2018. However, because the denial of a motion to strike, similar to denials of motions for dismissal or summary judgment, do not finally decide any issue, *e.g.*, *McFaddin v. Lohr*, 260 S.C. 242, 195 S.E.2d 385 (1973) (holding that "the refusal of [] a motion to strike is not conclusive and binding ....") and *Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995) (denial of a motion to dismiss does not establish the law of the case or finally decide any issue), Mr. Berry is not precluded from advancing these preservation issues in the Respondents Brief. In fact, in opposing the motion to strike, Appellants suggested as much. *See* Apps' Ret. to Mot. to Strike at 3 ("To the extent Berry believes any portion of these arguments is unpreserved, he is welcome to address those matters in his initial brief and the Court can then make its determination ....").

Moreover, Rule 210(h), SCACR limits this Court's appellate consideration to those matters which are included in the Record. In giving full effect to the combination of these three rules, appellate courts of this state have universally held that parties are limited to presenting, and the Court is limited to reviewing, those issues and arguments which were presented to the lower tribunal and, by consequence, the record on appeal is expressly limited to same. As explained in *South Carolina Highway Department v. Meredith*:

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

241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962) (emphasis added) (internal citations omitted); *see also Reed v. Beck*, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999) (refusing to consider documents which were not presented to the trial court); *State v. White*, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007) ("Morris' statement was not presented to the lower court and cannot be properly included in the Record on Appeal."), aff'd, 382 S.C. 265, 676 S.E.2d 684 (2009).

In contravention of the aforementioned authority, Appellants disregard the express holding of the trial court that they failed to meet their burden of advancing any evidence which proves the applicability to Mr. Berry of the very standards and rules on which Appellants now principally rely in their Initial Brief. Rather than meet their appellate burden of convincing this Court that the trial court erred in refusing to consider Appellants' assertions which were unsupported by evidence, Appellants simply skip this step in favor of arguing the merits of matters expressly excluded below, in addition to offering other new grounds for compelling arbitration. However, "[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. *Stevens & Wilkinson of S.C.,*

Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) (citation omitted). Moreover, "[a] party may not argue one ground at trial and an alternate ground on appeal." *McLeod v. Starnes*, 396 S.C. 647, 657, 723 S.E.2d 198, 204 (2012). The arguments and citations detailed below were not presented to the trial court and are therefore unpreserved for this Court's review.

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

A review of the Motion to Compel reveals that Appellants relied principally on the arbitration provision appearing in a single U4 registration statement dated November 5, 1994, which Appellants contended was the source of Mr. Berry's obligation to arbitrate his claims against all Appellants.[5] **(R. pp. 99-104)** In the alternative, Appellants cited FINRA Rule 13200 for the proposition that Mr. Berry's claims must be arbitrated. *Id.* Appellants cited no additional authority or documents, including no other FINRA rules or standards. *Id.* Importantly, Appellants simply cited FINRA Rule 13200 as quasi-legal authority for its proposition, **(R. p. 97)**, but put forward no evidence of FINRA's application to Mr. Berry generally, or FINRA Rule 13200 specifically, despite their burden to do so. Sensing a failure to meet their burden of proof as to the applicability of any FINRA rule to Mr. Berry, as the trial court notes in its order, Appellants alternatively requested the trial court to take judicial notice of similarities between NASD and FINRA, but that request was correctly rejected. *See* Order at 8, n.7 **(R. p. 10)** ("During the hearing, Defendants asked the Court to take judicial notice of FINRA Rule 13200. Setting aside the issue of whether this Court

[5] As discussed below, however, the only defendants which could arguably seek to arbitrate Mr. Berry's claims before a FINRA arbitration panel are Appellants Wells Fargo Clearing Services, LLC (f/k/a Wells Fargo Advisors, LLC), which is a member of FINRA and Appellant Spang, who is an associated person registered with FINRA. Appellants Wells Fargo & Company (the corporate holding company) and Wells Fargo Bank, N.A. (the banking entity) are neither members nor otherwise associated with FINRA and neither may invoke its rules and force an arbitration of Mr. Berry's claims.

may even take judicial notice of such rules, the Court finds that Defendants have not met their threshold burden of demonstrating the applicability of any FINRA rule to Mr. Berry."). The trial court correctly held, the application of FINRA rules and standards are subject to a more fundamental demonstration by the proponent of their applicability: "South Carolina courts put arbitration proponents to their proof and do not allow them to rely on mere assumptions as a basis for compelling arbitration. Appellants are required to prove the existence of an agreement by Mr. Berry to arbitrate claims against them not just before any [self-regulatory organization], but before the [self-regulatory organization] forum in which they seek to compel arbitration." Order at 14 **(R. p. 16)** (citing *Keller v. ING Financial Partners, Inc.*, Op. No. 2011-CP-23-0336 (S.C. Cir. Ct. filed June 2, 2011), *affirmed* 2013 WL 8482243, Op. No. 2013-UP-014 (S.C. Ct. App. filed Jan. 9, 2013) and Op. No. 2015-MO-006 (S.C. filed Feb. 11, 2015)).

The trial court's holdings form the basis of the instant preservation argument. Based on the exclusion on evidentiary grounds of Appellants' assertion regarding FINRA Rule 13200, Appellants' requirement in this appeal is to demonstrate that the trial court erred in finding that "their threshold burden" had not been met, by pointing to contrary evidence in the record to support that assignation of error. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("The losing party must first try to ... convince the appellate court that the lower court erred."). But rather than argue that the trial court's threshold holding was incorrect or in disregard of submitted evidence, Appellants simply ignore the court's holding and cite FINRA rules and documents with impunity throughout their Initial Brief. These citations and arguments are not preserved for this Court's review, as they were not presented to the trial court and are raised by Appellants for the first time on appeal. Indeed, Appellants cite to and rely upon FINRA rules as though they are binding legal authority in this state. They are not, however, as discussed below.

Accordingly, the following citations and the arguments derived therefrom are not preserved in this appeal:

Apps' Br. at 6	FINRA, Registration and Qualification, Individual Registration; http://www.finra.org/industry/individualregistration
Apps' Br. at 6	Uniform Application for Securities Industry Registration or Transfer, Revised Form U4 (05/2009); https://www.finra.org/sites/default/files/form-u4.pdf
Apps' Br. at 6, 19	FINRA Manual, FINRA Rules, 1031, Registration Requirements; http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=3584
Apps' Br. at 11	NASD Rule IM-10100
Apps' Br. at 11	NASD Rule 2110
Apps' Br. at 14	FINRA Manual, FINRA Manual contents; http://finra.complinet.com/en/display/display_main.html ?rbid=2403&element_id= 1
Apps' Br. at 14	S.E.C. Release No. 34-56615; https://www.sec.gov/rules/sro/finra/2007/34-56615.pdf[6]
Apps' Br. at 14	S.E.C. Release No. 34-570033; https://www.sec.gov/rules/sro/finra/2007/34-57033.pdf
Apps' Br. at 16	FINRA, *Our Mission*; https://www.finra.org/about/our-mission
Apps' Br. at 16	FINRA, *What We Do*; https://www.finra.org/about/what-we-do
Apps' Br. at 17, 23	BrokerCheck; https://brokercheck.finra.org/
Apps' Br. at 17	FINRA, *About BrokerCheck*; http://www.finra.org/investors/about-brokercheck
Apps' Br. at 19	FINRA Bylaws, Art. 4, § 1(a)(1); http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4609
Apps' Br. at 20	FINRA Manual, FINRA Rules, 13100; http://finra.complinet.com/en/display/display_main.html ?rbid=2403&element_id=4196
Apps' Br. at 20-21	FINRA, Code of Arbitration Procedure; https://www.finra.org/arbitration-and-mediation/code-arbitration-procedure

[6] Appellants' citation to two SEC releases for the first time on appeal was done to circumvent their failure of proof below and the express ruling of the trial court that Appellants provided no evidence of the applicability of any FINRA Rule to Mr. Berry and his claims. *See* Order at 7-15. **(R. pp. 9-17)**

Apps' Br. at 21	FINRA Manual, FINRA Rules, 12200; http://finra.complinet.com/en/display/display_main.html ?rbid=2403&element_id=4106
Apps' Br. at 23	FINRA BrokerCheck, Robert Franklin Berry; https://brokercheck.finra.org/individual/summary/1262947
Apps' Br. at 23-24	S.E.C. Release No. 34-56208

b. Judicial notice of the FINRA rules and other online documents for the first time on appeal is inappropriate.

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

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

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

Here, the rationale for taking judicial notice of documents which were not presented to the trial court has not been met, particularly in light of the fact that the trial court expressly held that Appellants did not meet their burden of demonstrating that any of the cited rules and documents apply to Mr. Berry and his claims and therefore excluded them without consideration. Were this Court to take judicial notice of rules and documents expressly excluded below, it would effectively

permit Appellants to try a new case on appeal, and in effect secure an impermissible second bite at the apple.[7] *C.f.* Order at 5, n.2 (discussing Appellants ability to amend their filings to submit supplemental or additional documentation in support of their motion to compel arbitration, as "permitting them to do so at this time would provide [Appellants] a second bite at the apple.").

Appellants assert that "[Mr.] Berry was aware the Wells Fargo Entities had asked the trial court to take notice of these public record documents and did not question the accuracy of any of the rules, forms, or reports submitted to the trial court." Apps' Br. at 18. This assertion is incorrect, however, and misrepresents the arguments and documents that Appellants actually submitted to the trial court. Appellants cited only FINRA Rule 13200 in its Motion to Compel and Mr. Berry does not dispute that fact; however, Appellants did not ask the trial court to take judicial notice of any other documents or rules in the Motion to Compel, FINRA rules or otherwise. Motion to Compel **(R. pp. 96-107)** Further, in the hearing on the Motion to Compel, Appellants only asked the trial court to take judicial notice of the fact that "in the mid 2000's the NASD turned over its responsibilities for the regulation of the financial services industry and broker dealers and brokers to a newly created entity called FINRA." June 1, 2017 Tr. at 20:9-12 **(R. p. 341)** Appellants did not request the trial court to take judicial notice of any FINRA "rules, forms, or reports" and none were submitted for consideration. Accordingly, Appellants' judicial notice argument(s) regarding the documents and links set forth in the table above is made for the first time on appeal and is unpreserved for this Court's review.[8] *See Stevens, supra.*

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[7] In truth, allowing Appellants *carte blanche* to amend their basis for compelling arbitration would be a third bite at the apple, as Appellants already filed an Amended Motion to Compel prior to the hearing below, *see* Order at 5, n.2 **(R. p. 7)**, not to mention the additional and new documents submitted by Appellants in support of their Motion for Reconsideration, which are improper for consideration on appeal as discussed herein.

[8] In their Return to the Motion to Strike, Appellants argued that judicial notice is appropriate based on the assertion that foreign jurisdictions have done so in the past. However, judicial notice

c. The application of FINRA rules to Mr. Berry requires evidentiary proof, which was not presented to the trial court; therefore, Appellants' attempt to convert those matters into legal arguments and citations is improper and designed to avoid the trial court's exclusion of the FINRA rules based on Appellants' failure to meet their evidentiary burden.

In order to avoid the traditional "raised to and ruled upon" requirement placed on arguments and documents which an appellant seeks to raise on appeal, Appellants instead seek to convert matters and arguments which are subject to a foundational demonstration of evidentiary proof into legal citations which they may freely cite as binding authority. The trial court did not consider any argument advanced by Appellants based on the applicability of FINRA or the FINRA rules to Mr. Berry, including FINRA Rule 13200. Instead, the trial court correctly held that Appellants had failed to meet their burden in demonstrating the applicability of FINRA rules to Mr. Berry. *See* Order at 8, n.7 **(R. p. 10)** ("Setting aside the issue of whether this Court may even take judicial notice of such rules, the Court finds that Defendants have not met their threshold burden of demonstrating the applicability of any FINRA rule to Mr. Berry.").

In their brief, as well as in their Return to the Motion to Strike, Appellants ignore the trial court's exclusion of the FINRA rules on evidentiary grounds and abandon any pretense of arguing that the exclusion was an error requiring reversal. Instead, Appellants now contend that their citations, web-links and derivative arguments are appropriate because they constitute binding *legal authority* on this Court, rather than matters subject to proof. *See* Ret. to Mot. to Strike at 2 ("There

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is a matter left to each court's discretion, *e.g.*, *Martin v. Bay*, 400 S.C. 140, 153, 732 S.E.2d 667, 676 (Ct. App. 2012); therefore, what a foreign jurisdiction may have decided based on the evidence before it, is irrelevant here. Moreover, even if foreign jurisdictions have taken judicial notice of FINRA's rules or documents on FINRA's website in other cases, and even if the judicial notice standards of this Court were met, which Mr. Berry disputes, consideration of those items would not accomplish the objective claimed by Appellants, as the foundational demonstration of the FINRA rules' applicability to Mr. Berry is wholly lacking on this record. *See* Order at 8, n.7 **(R. p. 10)**; *see also McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter.").

is no precedent suggesting a party is limited to the same statutory, legal, regulatory or rule citations presented to the trial court."); *id.* at 3-4 ("But a motion to strike what are, at bottom, legal arguments supported by SEC and FINRA rules is inappropriate and should be summarily rejected."). This argument is itself at odds with Appellants' argument to the trial court and to this Court on appeal that the FINRA rules are adjudicative facts which are subject to judicial notice. And, of course, FINRA rules are not statutes or other citations that might be appropriate to cite to the Court as binding legal, regulatory or rule precedent, and Appellants admit that no South Carolina court has accepted FINRA's rules, citations, and myriad releases or compilations.[9] *See* Initial Brief at 17.

This distinction is important because, if Appellants are unburdened by their obligation to prove the applicability of these rules and citations to Mr. Berry, they will be free to argue, as they do in the Initial Brief, that these FINRA rules and citations are legally binding on this Court and against Mr. Berry — which they are not. Appellants' argument presumes the very fact on which the trial court found that they failed to meet their evidentiary burden of proof: Appellants simply assert — without any factual evidence in this record — that FINRA's rules apply to Mr. Berry and that he has agreed to abide by those rules. Arguing the merits of an issue that was not considered below — and was expressly excluded by the trial court on evidentiary grounds — is improper, and Appellants citations and derivative arguments should be disregarded as unpreserved.

II. The attachments and supporting arguments advanced by Appellants for relief from the Order under Rule 59(e) and 60, SCRCP, are not preserved for this Court's review, as they were presented for the first time by Appellants in their Motion for Reconsideration.

In seeking reconsideration of the Order, Appellants presented entirely new documents and

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

arguments in support of the Motion to Compel arbitration of Mr. Berry's claims. Mot. for Recons. **(R. pp. 209-86)** Under the guise of "newly discovered evidence" and Rule 60(b), Appellants submitted additional "new" U4 registration statements and cited to new FINRA rules and other web-linked documents for the first time in the Motion for Reconsideration.[10] But such an effort does not seek reconsideration of a point overlooked or misapprehended by the trial court; rather, it seeks a second opportunity to establish facts that were Appellants' absolute burden to prove in the first instance as the party seeking to compel arbitration. The trial court therefore properly declined to consider the new documents and arguments advanced by Appellants in reconsideration and denied Appellants' motion.

"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,

[10] Just like in the Motion to Compel, however, in the Motion for Reconsideration, Appellants did not present any argument or evidence demonstrating the applicability of FINRA to either Wells Fargo and Company or Wells Fargo Bank, N.A., or an ability for either defendant to rely upon its terms and compel arbitration of Mr. Berry's claims. **(R. pp. 209-86)**

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).

Appellants' Motion for Reconsideration did not present a legally cognizable basis for reconsideration of the Order under Rule 59(e). This is particularly true in light of the holding of the trial court in the Order that "[i]t is now too late for [Appellants] 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." Order at 5 n.2 (citing *Parker v. S.C. Public Service Comm'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.")). **(R. p. 7)** The trial court's holding in that regard 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)).

Moreover, contrary to Appellants' assertion that the additional U4 registration statements and new citations were "newly discovered evidence" under Rule 60(b), SCRCP, the documents instead demonstrated that they were in Appellants' possession at the time of the Motion to Compel and were only "located" when Appellants were unsuccessful in compelling arbitration based on their original submissions. Under Rule 60(b), a judgment or order may be set aside 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)). This Court in *Lanier* 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 trial court corrected determined that none of the documents submitted by Appellants in the Motion for Reconsideration qualified under any reasonable definition of newly discovered evidence. Nor did Appellants' efforts satisfy this Court's standard of due diligence as enunciated in *Lanier*. In the Motion for Reconsideration, Appellants did not even claim that they tried — but failed — to locate the new U4 registration statements prior to filing either their Motion to Compel or their Amended Motion to Compel, or appearing at the June 1, 2017 hearing. Instead, Appellants submitted an affidavit of a Compliance Consultant Michael Zuhr, which stated that the "newly discovered evidence" was available to him at any time by simply logging into the appropriate system with his personal log-in information. *See* Mot. for Recons. Ex. 2, Affidavit of Michael Zuhr at ¶2. **(R. p. 237)** 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 did not deny that the new documents were available when Appellants submitted their Motion to Compel. In fact, as is described by Mr. Zuhr, the purported custodian of the submissions, the U4's were always available to him as Appellants' representative and thus to the Appellants at all times, *see id.* at ¶5 ("I obtained the records ... using my personal log-in information to access the system."), an action that Mr. Zuhr states that he does regularly and routinely as a part of his job duties with Appellants.

Consequently, new submissions of Appellants in their Motion for Reconsideration were available to Appellants at all times and could have been submitted to the Court with the Motion to Compel, had Appellants believed that such documents supported their arguments in favor of arbitration. In reality, however, having failed to meet their burden with their original submissions to the trial court, Appellants attempted to go back to the well to choose different documents from among those that had always been readily available, hoping to change the result. However, "[w]here 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. 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.")). Accordingly, the trial court was correct and did not abuse its discretion in rejecting the additional documents and arguments submitted by Appellants in support of their Motion for Reconsideration. *See Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 17-18, 594 S.E.2d 478, 482 (2004) (holding that the decision to grant or deny a motion under Rule 60 lies within the sound discretion of the trial judge).

III. Even if the new citations, documents, and arguments presented by Appellants for the first time in the Motion for Reconsideration and in this appeal were properly before the Court, which they are not, those additional arguments still fall short of Appellants' burden of demonstrating the existence of an agreement between Mr. Berry and these Appellants to arbitrate his claims.

Even if this Court were to consider the rules, citations, and other documents that Appellants presented for the first time in the Motion for Reconsideration and on appeal in support of their argument that Mr. Berry should be compelled to arbitrate his claims, Appellants have still failed to prove the one thing South Carolina law requires of each party seeking to compel arbitration: a clear and unmistakable agreement by Mr. Berry to arbitrate claims against any of the Appellants.

As the parties seeking to compel arbitration of Mr. Berry's claims, each Appellant had the burden to demonstrate the existence of a valid agreement between that Appellant and Mr. Berry to arbitrate the asserted claims. South Carolina law requires that this burden be met when a motion to compel arbitration is 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)). "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)).

Through the citations, documents and arguments advanced in their respective filings to the trial court in the Motion to Compel, Motion for Reconsideration, and now for the first time on appeal to this Court, none of the Appellants have produced a single agreement between Mr. Berry and an Appellant to arbitrate these claims in a FINRA forum. Instead, Appellants attempt to create such an arbitration agreement through a complex exercise of dot connections and suppositions that nevertheless still fail to provide a clear and unambiguous agreement by Mr. Berry to arbitrate his claims against the individual Appellants. To recap, two crucial facts remain that doom Appellants' efforts to compel arbitration to failure: (1) Appellants have not produced a signed agreement to arbitrate claims between any of the Appellants (or its affiliates and employees) and Mr. Berry; and (2) Appellants have not produced a signed agreement to arbitrate claims before a FINRA arbitration panel.

In support of the Motion for Reconsideration, Appellants selectively chose language from both a 1999 U4 and a 2014 U4, Mot. for Recons. Exs. 2-A and 2-B **(R. pp. 240-64)**, to define a circuitous path and reasoning upon which they attempt to cobble together an argument to suggest an agreement to arbitrate actually exists. However, these facts are indisputable: the 1999 U4 (Ex. 2-A) does not list FINRA as a designated arbitral forum (as this entity did not exist in 1999) and none of the designated fora offer arbitration services today, while the 2014 U4 (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 cobble together and create a new agreement to arbitrate.

Appellants' Motion for Reconsideration presented two primary arguments based on the "newly discovered" 1999 and 2014 U4s. Appellants first contended that the SRO organizations that are listed in the 1999 U4 may be amended from time to time. *See* Mot. for Recons. at 3-4. **(R. pp. 211-12)** However, Appellants misconstrued the language of the 1999 U4, 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. Appellants' made a strained effort below to convince the trial court that this clause supports an argument that the referenced language permits the amendment, without notice to Mr. Berry, of the list of agreed-upon arbitration fora. But such an argument is contrary to the established law of this State and other jurisdictions, as the identity of the arbitral forum is a material, integral part of an arbitration agreement and in the event that the designated forum fails for any reason, then the entire agreement to arbitrate is void.[11]

Appellants also contended in the Motion for Reconsideration that the 1999 U4 permits the unilateral substitution of subsequent employers, such that all of the Appellants may enforce against

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[11] *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 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); *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)). Appellants do not address any of this controlling case law in their brief.

Mr. Berry an agreement to arbitrate with a company that no longer exists and that, further, they may unilaterally substitute a forum that did not exist at the time of the purported agreement. Appellants do not make this substitution argument on appeal, however, and it is unpreserved for this Court's review. *See, e.g., State v. Stone*, 290 S.C. 380, 383, 290 S.E.2d 517, 518 (1986) (holding that an exception not argued in the brief is deemed abandoned on appeal). And having omitted it from the initial brief, Appellants cannot cure the omission in a reply. *See, e.g., Chet Adams Co. v. James F. Pedersen Co.*, 307 S.C. 33, 37, 413 S.E.2d 827, 829 (1992).[12]

Moreover, like the 1994 Wheat First U4, the 1999 U4 does not specify FINRA as the arbitral forum or otherwise refer to FINRA. Instead, the arbitration clause contained in the 1999 U4 designates "the organizations indicated in Item 11" of the form, which is found on the first page of each of the Form U4, and designates four (4) organizations, none of which are FINRA, including: the NASD, the NYSE, the Chicago Board Options Exchange, and the Philadelphia Stock Exchange. As the trial court has previously held, some of these organizations no longer exist, and none of them currently offer arbitration services.

Finally, Appellants' assertion that Mr. Berry is required to arbitrate his claims based on FINRA Rules is likewise deficient. The trial court correctly rejected this argument because

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[12] Appellants' arguments on this point fail in any event for the same reason that the trial court held that the original U4 registration statements were not enforceable by Appellants. The 1999 U4, *see* Mot. for Recons. Ex. 2-A **(R. pp. 240-49)**, is not between Mr. Berry and Appellants. Instead, like the 1994 U4 which named Wheat First, the 1999 U4 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 id.* (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. The trial court found that Appellants' failure to provide evidence demonstrating the legal succession of companies was a failure of proof independently fatal to Appellants' attempt to rely upon the U4s that did not name Appellants specifically. Appellants attempt to overcome this additional evidentiary shortcoming on appeal by reliance on allegations contained in Mr. Berry's Amended Complaint. But such a suggestion is patently insufficient to overcome the trial court's contrary holding.

Appellants failed in meeting 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. **(R. p. 10)** Moreover and importantly, FINRA rules may only be advanced and relied upon by members or associated persons of FINRA. Here, upon information and belief, Appellant Wells Fargo Clearing Services, LLC (f/k/a Wells Fargo Advisors, LLC) is a member of FINRA and Appellant Spang is an associated person registered with FINRA. However, Wells Fargo & Company (the corporate holding company) and Wells Fargo Bank, N.A. (the banking entity) are neither members nor otherwise associated with FINRA and neither may invoke its rules and force an arbitration of Mr. Berry's claims against them individually.[13] Therefore, even if the Court were to disagree as to the sufficiency of the evidence presented by Appellants below, they have advanced no basis for arbitrating the claims against the non-FINRA-affiliated Appellants. Similarly, Appellants' assertion that their failures in proof can be cured by reference to information contained on the BrokerCheck website, on the theory that such information should be considered an unassailable public record, is likewise inaccurate and misleading. In fact, the Terms of Use of the BrokerCheck website links provided by Appellants 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 OMMISSIONS IN ANY CONTENT; (II) TECHNICAL ERRORS AFFECTING BROKERCHECK IN ANY WAY; (III) BUGS, VIRUSES, TROJAN HORSES, OR THE LIKE WHICH MAY BE TRANSMITTED TO

[13] Wells Fargo Corporation and Wells Fargo Bank, N.A. sought dismissal below on under Rule 12(b)(6), SCRCP, on the basis that the Amended Complaint did not provide adequate notice of the allegations of wrongdoing against them. Mot. to Compel at 9-11 **(R. pp. 104-06)** The trial court summarily rejected that contention, Order at 15-17 **(R. pp. 17-19)**, finding the argument conclusory and without merit. Appellants did not appeal from those determination; therefore, this Court must presume that the allegations advanced against Wells Fargo Corporation and Wells Fargo Bank, N.A. are true and correct and asserted independent of any allegations against the other Appellants.

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.

(Capitalization emphasis in original). Appellants' assertion that these website links are "matter[s] of public record," Apps' Br. at 15, 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 Appellants have not provided. *Cf.* Rules 901 and 902, SCRE. However, even if Appellants were permitted to cure their prior evidentiary shortcomings and make these arguments for the first time on appeal, which they are not, they still do not establish an agreement by Mr. Berry to arbitrate his claims against these Appellants.

IV. The two-issue rule precludes the Court's consideration of the merits of the Order, based on Appellants failure to seek this Court's review of the trial court's independent holdings against arbitration based on Appellants' lack of standing to enforce the arbitration agreement in the 1994 U4 between Mr. Berry and Wheat First, as well as the failure of the designated fora in the 1994 U4.

In denying the Motion to Compel, the trial court made three (3) independent holdings in support of its decision that Appellants had failed to meet their burden, as the proponent of arbitration, to prove the existence of Mr. Berry's duty to arbitrate his claims: (1) the Motion to Compel fails because Appellants did not properly authenticate the U4 registration statements; (2) Appellants lacked standing to enforce the arbitration clause in the 1994 U4 with Wheat First, because they were not parties to the U4; and (3) the arbitration clause in the 1994 U4 fails because none of the designated fora offer arbitration services today. Order at 3-15. **(R. pp. 5-17)** However, while Appellants appeal the initial holding of the trial court regarding authentication, they do not

appeal, *at all*, the trial court's independent holdings regarding lack of standing and failure of the arbitral fora.[14]

Consequently, even if this Court were to agree that Appellants properly authenticated the U4 registration statements submitted as the sole basis of their argument in favor of arbitration, Appellants' failure to appeal from the trial court's additional alternative holdings on Appellants' standing to enforce the U4 and the failure of the designated fora precludes this Court from reaching the merits of Order. *Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."); *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."); *see also* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."). Significantly, the two-issue rule "is applicable under []circumstances on appeal [other than general jury verdicts], including affirmance of orders of trial courts ... if the plaintiff failed to appeal [all] grounds or if one of the grounds required affirmance." *Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 420, 472 S.E.2d 253, 255 (1996).

[14] In their Statement of the Case, Appellants acknowledge the fact that the trial court made these independent adverse holdings to their Motion to Compel. *See* Apps' Br. at 3 ("The trial court also concluded that even if the affidavits had been properly authenticated, it would still not compel arbitration because the submitted agreements referenced predecessors to Wells Fargo Advisors (not Wells Fargo Advisors itself) and because the designated arbitral forum no longer existed."). Thus, Appellants have admitted that these holdings independently sustain the trial court's denial of their Motion to Compel. However, Appellants do not address these holdings in any other portion of the brief, much less argue that the trial court erred in so-holding.

Here, the denial of Motion to Compel was based alternatively upon the independent grounds and holdings of the trial court regarding Appellants' standing and the failure of the designated fora under the 1994 U4. Appellants' failure to appeal from those holdings means that those grounds independently support the Order and this Court is precluded from addressing Appellants' challenge to the Order.[15]

V. On the merits, the trial court was correct to find that the evidence presented below did not establish the existence of a valid agreement by Mr. Berry to arbitrate his claims against these Appellants.

a. The trial court correctly determined that the documents advanced and relied upon by Appellants to support their arbitration claim were not properly authenticated.

As the proponent of arbitration, each of the Appellants had the burden to establish the existence of an agreement to arbitrate Mr. Berry's claims against the individual Appellant. "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*, 398 S.C. at 458, 730 S.E.2d at 317-18 (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.

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[15] Although not appealed, the trial court correctly ruled that (1) Appellants lacked standing to enforce the arbitration clause contained in the 1994 U4 between Mr. Berry and Wheat First, and (2) that the failure of the designated fora in the arbitration clauses renders the purported arbitration clause void. *See* Order at 5-15. **(R. pp. 7-17)** In the interest of brevity, Mr. Berry relies on his prior filings with the trial court, particularly his Opposition to the Motion to Compel, **(R. pp. 137-49)**, on those dispositive and alternately sustaining grounds. *See* Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal.").

In the Motion to Compel, Appellants asserted that Mr. Berry's obligation to arbitrate his claims arose from a series of documents attached to their supporting memorandum of law as Exhibit 1, namely the 1994 U4 of Wheat First. However, the trial court determined that, prior to Appellants' reliance on the U4, the documents must be properly advanced and authenticated to the Court, *see* Order at 4 **(R. p. 6)**, consistent with South Carolina law regarding conditions precedent to the admissibility of evidence. 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.*

Rather than properly authenticate the U4 documents which they presented to the trial court and on which they relied in support of their Motion to Compel, Appellants simply attached the U4s as an exhibit to their supporting memorandum. However, business records of this type do not qualify as self-authenticating. *Cf.* Rule 902, SCRE. Moreover, although Appellants submitted an affidavit in support of their motion from a person who described herself as a paralegal employed in the "Wells Fargo Law Department,"[16] **(R. pp. 122)**, the affiant does not claim to be a custodian of records for any of the corporate Appellants,[17] nor was any assertion made that the U4s attached to

[16] It is unclear from the Affidavit which, if any, of the named Appellant is the affiant's employer.

[17] The affiant does state that she "has access to certain personnel records of current and former employees of Wells Fargo & Company and related corporate entities," Aff. at ¶6 **(R. p.**

the memorandum were true and correct copies of business records maintained by any specific Appellant. Like the inadequate sponsoring witness in *Connelly*, the trial court was correct to find the affiant's testimony was insufficient to meet the foundational requirements imposed by Rule 901(a), SCRE. Without such testimony regarding the authenticity of the U4s proffered by Appellants, the affiant's testimony was insufficient for the trial court to admit and consider the U4s, and their exclusion under the circumstances was not an abuse of discretion. Because the U4s constituted the only purported agreement to arbitrate submitted by Appellants in support of their Motion to Compel, the motion was unsupported by admissible evidence and rightly failed for that reason alone.

b. Courts of this state have previously concluded that proof is required from the proponents of arbitration as to the relationship between NASD and FINRA.

Additionally, whereas Appellants simply assumed that all securities arbitral fora may be treated as interchangeable in their Motion to Compel, and substituted the fora that actually appeared in the U4s with "FINRA" without so much as notifying the trial court of that material alteration, at least one case has been litigated, including to this Court, and has previously reached the result that proponents of arbitration have an obligation to provide proof for such assumptions. In the absence of evidence in the record regarding the relationship between FINRA and NASD, as was the case below, 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-

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123), but does not state that she is the record custodian or that she can vouch for the authenticity of the U4s.

23-0336 (S.C. Cir. Ct. filed June 2, 2011), **(R. pp. 190-97)**, the Honorable D. Garrison Hill denied a motion to compel arbitration on those 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") ...
>
> Consequently, just as in *Grant*[*v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 132, 678 S.E.2d 435, 439 (2009)] and [*In re*] *Salomon*, [68 F.3d 554, 561 (2d. Cir. 1995)], 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.

(R. pp. 191-96)

Judge Hill's ruling was affirmed on appeal in an unpublished opinion by this Court.[18] *Keller v. ING Financial Partners, Inc.*, 2013 WL 8482243, Op. No. 2013-UP-014 (S.C. Ct. App. filed Jan. 9, 2013). **(R. pp. 202-205)** This Court 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.

[18] Mr. 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*. As similarly acknowledge by Appellants, Mr. Berry submits that this Court may take judicial notice of these facts and its files in the *Keller* case pursuant to the guidelines set forth in *Masters, supra*.

(R. pp. 203) This Court 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 Supreme Court of South Carolina. 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 this Court and the trial court remained unchanged. *Keller v. ING Financial Partners, Inc.*, Op. No. 2015-MO-006 (S.C. filed Feb. 11, 2015). **(R. pp. 207-08)**

The trial court's order in *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 which they did not agree. Mr. Berry submits that Appellants cannot simply rely upon mere assumptions as a basis for compelling arbitration, a fact that should have been well-known to Appellants. Instead, Appellants are required to prove the existence of an agreement to arbitrate not just before any forum, but before the forum in which they seek to compel arbitration. Because Appellants failed to do so below, the trial court did not err in denying the Motion to Compel for this additional reason.

CONCLUSION[19]

Based on the foregoing, the Court should decline to consider and find unpreserved the web-linked documents, citations, rules, and arguments advanced by Appellants which were alternatively

[19] Appellants also address the additional ground raised by Mr. Berry that the arbitration provisions advanced by Appellants are unenforceable, because to enforce such clauses would compel Mr. Berry to arbitrate outrageous conduct by Appellants that was outside the scope of the arbitration provision. Opp. to Mot. to Compel at 16. **(R. pp. 147)** In a footnote at the end of the Order, the trial court stated that "[w]hile [it] 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 ... where other grounds in opposition are likewise dispositive and provide the same relief." Order at 17 n.10 **(R. p. 19)** Given that there is no discussion or dispositive holding on the issue, a lengthy analysis of the issue is not warranted. To the extent required, Mr. Berry relies upon his Opposition to the Motion to

presented for the first time in Appellants' Motion for Reconsideration or in this appeal. Even if those unpreserved items were properly before the Court, however, none of them demonstrate that each of the Appellants have met their respective burdens of demonstrating the existence of a valid agreement by Mr. Berry to arbitrate his claims against each Appellant. Additionally, two of the three express grounds for the trial court's denial of the Motion to Compel were not challenged in the appeal; therefore, the Court is precluded from reaching merits of Order under the two-issue rule and the law of the case doctrine. Finally, the trial court did not abuse its discretion in finding that the documents actually relied upon by Appellants in their Motion to Compel arbitration were not properly authenticated. For all of these reasons the trial court's orders denying Appellants' Motion to Compel and Motion for Reconsideration thereof, should be affirmed.

Respectfully submitted,

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This 8th day of May 2018
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Compel on this topic and expressly incorporates that discussion here, as if stated verbatim herein. *See* Rule 220(c), SCACR

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2017-001690

Robert F. Berry, ... Respondent,

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent Robert F. Berry complies with Rule 211(b), SCACR.

[SIGNATURE PAGE FOLLOWS]

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Columbia, South Carolina
This 8th day of May 2018