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

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.

BRIEF OF APPELLANTS

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STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in its denial of the Motion for Reconsideration or Amendment of the Court's June 21, 2017 Order Pursuant to SCRCP 59(e) and/or 60 ("Motion for Reconsideration") filed by 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. (together, the "Wells Fargo Entities") where the Wells Fargo Entities' supporting affidavit attached newly discovered, material information in support of their Motion to Dismiss or Stay Pending Arbitration ("Motion to Dismiss") that conclusively established Berry's agreement to resolve his claims against the Wells Fargo Entities through mandatory FINRA arbitration?

2. Did the trial court err in its denial of the Wells Fargo Entities' Motion to Dismiss and Motion for Reconsideration where public records and publically available FINRA rules establish an unexceptionable obligation by Berry to arbitrate his claims against the Wells Fargo Entities as a condition of his admitted registration as a FINRA-regulated broker?

STATEMENT OF THE CASE

Robert F. Berry filed this action in the Lexington County Court of Common Pleas on February 2, 2017, alleging causes of action for wrongful termination in violation of public policy, breach of contract and the covenant of good faith and fair dealing, defamation, violation of the South Carolina Unfair Trade Practices Act, breach of contract accompanied by a fraudulent act, and intentional interference with prospective contractual relations. (R. at 22-49). Berry filed a first amended complaint alleging four additional claims, including new claims for false imprisonment and conversion, against the Wells Fargo Entities on February 23, 2017. (R. at 50-93). All of these claims relate to Berry's former employment with Wells Fargo Advisors, LLC ("Wells Fargo Advisors") and its predecessors and successor, his termination, or events alleged to have occurred immediately after (and directly related to) his termination. (*Id.* at 69-91 ¶¶ 69-148).

On April 12, 2017, the Wells Fargo Entities filed their Motion to Dismiss on the grounds that there was an agreement to arbitrate between the parties and further that arbitration was required under the rules of the Financial Industry Regulatory Authority ("FINRA"). (R. at 94-129). The Wells Fargo Entities also filed a Motion for Protective Order and a Motion to Stay Discovery. (*See* R. at 3).[1]

These motions were heard on June 1, 2017, at which time Berry served his Memorandum in Opposition to Defendants' Motion to Dismiss or Stay Pending Arbitration. (R. at 132-208). The Wells Fargo Entities did not have any knowledge of the contents of the Memorandum in Opposition until the hearing and thus had no opportunity to respond in writing. (*See* R at 325:19-

[1] On April 27, the Wells Fargo Entities filed an Amended Motion to Dismiss or Stay Pending Arbitration to add reference to Rules 12(b)(1) and 12(b)(3), SCRCP. (R. at 130-31). The sole issue on appeal is the denial of the Wells Fargo Entities' request that this matter be dismissed or stayed pending arbitration.

24). At the hearing, the Wells Fargo Entities argued, among other things, that Berry was obligated to arbitrate his claims pursuant to FINRA rules, which clearly applied during his employment with Wells Fargo Advisors. (R at 328:6-17; 329:4-30:16).

On June 21, 2017, while the Wells Fargo Entities were collecting evidence in response to Berry's arguments (R. at 210 n.2), the trial court denied all of the Wells Fargo Entities' motions. (R. at 3-19).[2] In that Order, the trial court found the materials submitted by the Wells Fargo Entities in support of their motion were improperly authenticated and thus inadmissible. (R. at 6-7). 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. (R. at 7-16).

The Wells Fargo Entities filed their Motion for Reconsideration on July 6, 2017, attaching additional materials showing an agreement to arbitrate between the parties and again calling the trial court's attention to the FINRA rules. (R. at 209-86). Berry filed a Response to Defendants' Motion for Reconsideration or Amendment of the Court's June 21, 2017 Order and Motion to Strike on July 17, 2017. (R. at 287-99). On July 25, 2017, the trial court denied the motion without a hearing, stating it was "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." (R. at 20-21). This appeal followed.

[2] The Wells Fargo Entities received written notice of the Order denying their motions on June 27, 2017. (R. at 210 n. 2).

SUMMARY OF ARGUMENT

Under FINRA rules, as approved and adopted by the Securities and Exchange Commission ("SEC"), Berry must arbitrate all of the claims alleged in his Amended Complaint. There is no dispute as to what those rules require. Rather, by elevating form over substance, Berry seeks to evade the mandatory obligations all brokers must undertake as part of the licensure required to sell securities in the United States. These technical arguments, however, do not serve as a basis for failing to dismiss or stay this action pending arbitration given the undisputed fact that Berry was registered with FINRA during the relevant period, and continues to be registered with FINRA to this day.

To allow Berry to avoid arbitration would undercut the self-regulatory system governing the business activities of broker-dealers. This system was devised as part of a comprehensive federal regulatory regime that provides for the swift and efficient resolution of conflicts involving or among members and their registered representatives. In addition to the mandatory use of FINRA arbitration to resolve disputes between members and registered representatives, the Federal Arbitration Act ("FAA") and South Carolina precedent establish a strong public policy in favor of the arbitration of disputes. Taken collectively, this case implicates not only the public policy favoring arbitration generally, but also the public policy embodied in U.S. securities laws as implemented by FINRA.

The trial court found there was no agreement to arbitrate, despite the invocation of the FINRA rules and the submission of Berry's mandated industry registration documents, which incorporate all of FINRA's disciplinary and dispute resolution requirements, including the unambiguous agreement to arbitrate. All of this was ignored by the trial court in an apparent effort to relieve Berry of the obligations he voluntarily undertook in exchange for pursuing a

FINRA-regulated career. The trial court's decision should be reversed, and the matter remanded with directions to dismiss or stay proceedings pending arbitration.

FACTS

Berry began working in the financial services industry in 1984.[3] (R. at 57 ¶ 27). In 1994, he joined the brokerage firm Wheat First Butcher Singer, which began a period of "nearly 20 years" he "devoted. . . to essentially one firm." (R. at 58 ¶ 28, 62-63 ¶ 45). Wheat First Butcher Singer was acquired in 1997 by First Union Corporation and continued to do business as Wheat First Union. (R. at 58 ¶ 28 n. 3). The parent company of Wheat First Union merged with Wachovia Corporation in 2001. (*Id.*). Wheat First Union's brokerage business continued on as Wachovia Securities. (*Id.*). When Wells Fargo acquired Wachovia in 2009, Berry became an employee of the brokerage firm Wells Fargo Advisors, where he continued on as a registered representative, and a broker and advisor. (R. at 59 ¶ 31, 62-64 ¶¶ 45-47). It is undisputed that during this entire period, Berry was a registered representative subject to the rules of the National Association of Securities Dealers ("NASD") and/or FINRA.

Berry's employment was terminated on or about February 3, 2014, after the branch office manager discovered several binders of customer information in the trunk of Berry's vehicle. (R. at 65 ¶ 52, 68 ¶ 60). Upon his termination, Wells Fargo Advisors filed a Form U5 termination notice, as required by FINRA rules, stating the reasons for Berry's termination. (R. at 68 ¶ 60).

Financial advisors must be registered with a firm in order to buy or sell securities, or otherwise provide financial advice to the general public. (R. at 67 ¶ 59). That registration is accomplished by a Uniform Application for Securities Industry Regulation or Transfer, which is

[3] Appellants accept as true the allegations of the Amended Complaint, as they must at the motion to dismiss stage. *See Overcash v. South Carolina Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005).

commonly called a "Form U4." (*See* R. at 109-20, 241-49, 251-64).[4] *See, e.g.*, FINRA, Registration and Qualification, Individual Registration, available at http://www.finra.org/industry/individual-registration (last visited Nov. 26, 2017) (discussing, under links for "Register a New Broker Candidate" and "Update an Individual's Registration," Form U4 requirement for registered representatives).

There is a single version of this form. *See* Uniform Application for Securities Industry Registration or Transfer, Revised Form U4 (05/2009), *available at* https://www.finra.org/sites/default/files/form-u4.pdf. In the Form U4, the applicant — every applicant — agrees:

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

Id. All individuals engaged or to be engaged in a member firm's investment or securities business must register with FINRA. *See* FINRA Manual, Rule 1031, Registration Requirements, available at http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=3584 (last visited Nov. 26, 2017). No individual can be a registered representative without having submitted a Form U4, including agreeing to the above provision requiring arbitration.

After his termination from Wells Fargo Advisors, Berry affiliated himself with LPL Financial Corporation ("LPL"). (R. at 67 ¶ 59). He remains registered as a representative of

[4] In support of their Motion to Dismiss, the Wells Fargo Entities submitted the three hand-written Forms U4 they were able to locate in their records. (R. at 109-20). Additional Forms U4 were located after the hearing and attached to the Motion for Reconsideration. (R. at 241-49, 251-64). There is no dispute that Berry was registered with either FINRA or the NASD for the entire period in question.

LPL, and thus necessarily continues to have an active Form U4 that requires arbitration between himself and any FINRA member.

STANDARD OF REVIEW

An appellate court reviewing a trial court's denial of a motion to compel arbitration is subject to *de novo* review. *Rich v. Walsh*, 357 S.C. 64, 68, 590 S.E.2d 506, 508 (Ct. App. 2003). "There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration." *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) (quoting *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir. 1997)). "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." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118–19 (2001).

In determining whether an agreement to arbitrate exists, "the court should apply 'ordinary state-law principles that govern the formation of contracts.'" *Towles*, 338 S.C. at 37, 524 S.E.2d at 844 (citations omitted). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Dean v. Heritage Healthcare of Ridgeway, L.L.C.*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (citations omitted).

ARGUMENT

I. THE TRIAL COURT ERRED BY ELEVATING TECHNICALITIES OVER THE STRONG PUBLIC POLICY IN FAVOR OF ARBITRATION.

The trial court erred by elevating form over substance when it rejected the FINRA-mandated Forms U4 submitted by the Wells Fargo Entities. (R. at 6-7).[5] The trial court similarly erred in refusing to reconsider or amend its Order on the Motion to Dismiss despite the submission of additional, newly-identified FINRA mandated Forms U4 which conclusively established Berry's obligation to arbitrate his claims. As discussed in greater detail below, there was no dispute as to the authenticity of the documents, or their required use within the securities industry. The purpose of evidentiary rules, such as those Berry and the trial court relied upon, is to ensure the evidence proffered by a party is what the party says it is. That purpose was met here. The trial court's decision to set aside the strong public policy in favor of arbitration, as well as the federal regulatory scheme implemented by FINRA to regulate securities brokers, for the sake of a hyper-technical application of procedural rules was in error.

"The policy of the United States and this State is to favor arbitration of disputes." *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995); *see also Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (reversing trial court and holding all claims, including tort claims, subject to arbitration). As the Supreme Court of the United States noted in *Volt Info. Sciences, Inc. v. Board of Trustees of Stanford Junior University*, 489 U.S. 468, 474 (1989), "[t]he FAA was designed to 'overrule the judiciary's long-

[5] Given the brevity of the trial court's Order on the Motion for Reconsideration, the Wells Fargo Entities are unsure whether the trial court also found the affidavit submitted in support of the Motion for Reconsideration attaching additional Forms U4 for Berry insufficient. In an abundance of caution, the Wells Fargo Entities assume for the sake of argument the trial court rejected the second affidavit as well.

standing refusal to enforce agreements to arbitrate.'" The courts must "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Bird*, 470 U.S. 213, 221 (1985).

"Unless the parties have otherwise contracted, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that involves interstate commerce." *Lucey v. Meyer*, 401 S.C. 122, 133, 736 S.E.2d 274, 280 (Ct. App. 2012). The FAA applies to the arbitration agreement found in the Form U4 every registered representative must complete to sell securities in the United States and compels arbitration for claims such as those raised here. *See Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 610, 571 S.E.2d 711, 713 (Ct. App. 2002) (enforcing Form U4 arbitration clause for claims raised following an agent's termination and citing *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 660 (5th Cir. 1995) (holding arbitration clause under a Form U4 registration enforceable under the FAA)).

The FAA codifies a "'liberal federal policy favoring arbitration.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Consistent with the strong policy in favor of arbitration, Section 2 of the FAA provides that agreements to arbitrate are presumptively "valid, irrevocable, and enforceable." 9 U.S.C. § 2. This policy is so strong that arbitration should be required "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 [arbitration]." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). "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." *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

Much like federal and state law, FINRA's rules and regulations also strongly favor arbitration and, in fact, mandate arbitration for all industry disputes.[6] Under FINRA Rule 13200:

> 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.

(R. at 279).[7] *See* FINRA Manual, FINRA Rules, 13200(a), *available at* http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4203 (last visited Nov. 28, 2017).

Enforcement of FINRA's, and its predecessor NASD's, mandatory arbitration provisions furthers the organization's "goals of securities industry regulation and enforcement." *See First Montauk Sec. Corp. v. Four Mile Ranch Dev. Co.*, 65 F. Supp. 2d 1371 (S.D. Fla. 1999) (discussing policy purposes underlying NASD arbitration requirements). Failure to submit a

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[6] The trial court concluded that because the Wells Fargo Entities "invoke[d their] rights as a member of" NASD and FINRA, they "stand in the role of the drafters [of the Form U4] as a member of those self-regulatory organizations," and thus Berry was entitled to the "construction benefit of a non-drafting party such that any ambiguities in the registration statements must be construed against [the Wells Fargo Entities]." (R. at 8 n.4). There are a number of errors with this finding. The doctrine of *contra proferentum* does not apply here because the Wells Fargo Entities are not the drafters of FINRA's rules or forms. Moreover, the Wells Fargo Entities and Berry are all FINRA-registered and all equally bound by FINRA rules. The Wells Fargo Entities did not "invoke" FINRA rules to trigger arbitration; the Wells Fargo Entities and Berry are all obligated by agreement and mandated by rule to arbitrate this dispute. The trial court's attempts to twist this dispute into one akin to a dispute over ambiguities in a real estate contract (*see* R. at 8 n.4 (citing *McGill v. Moore*, 381 S.C. 179, 186, 672 S.E.2d 571, 575 (2009)) are unavailing and incorrect.

[7] For example, Rule 13200(b) exempts disputes arising out of the insurance business activities of a member that is also an insurance company. There is absolutely no basis for any assertion that Berry's claims in this case are exempted under the Code from being required to be arbitrated, and Berry did not argue to the trial court that any of the limited exemptions applied to his dispute.

dispute to arbitration under the Code of Arbitration as required by that Code, "may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2110," which requires members to observe high standards of commercial honor and just and equitable principles of trade. *Id.* at 1378 (citing NASD Rule IM–10100 (Failure to Act Under Provisions of Code of Arbitration Procedure); NASD Rule 2110).

Here, the trial court brushed aside this strong public policy by simply failing to consider on authentication grounds the submitted Forms U4 which established Berry's registration as an associated person and agreement to arbitrate his disputes under Rule 13200. According to Rule 901(a), SCRE, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Here, there is no question as to the actual authenticity of the Forms U4 submitted by the Wells Fargo Entities, and Berry admits he was registered with FINRA and continues to be registered with FINRA. (*See, e.g.*, R. at 67 ¶ 59). There is also no question that Berry, as a registered representative, *must* have an active Form U4 at all times in order to sell securities. At no time did Berry claim the documents were incomplete, incorrect, or forgeries. Nonetheless, the trial court rejected the Forms U4 because the affiant "did not claim to be a custodian of records. . . nor did she make any claim that the documents. . . were true and correct copies." (R. at 6). This was an error given the evidence reflecting the authenticity of the Forms U4. The trial court's order effectively reversed the burden of proof and exonerated Berry of his obligation to show "the claims at issue are unsuitable for arbitration." *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015).

II. THE TRIAL COURT ERRED IN DENYING THE WELLS FARGO ENTITIES' MOTION FOR RECONSIDERATION BECAUSE THE SUPPORTING AFFIDAVIT ATTACHED NEWLY-DISCOVERED, MATERIAL INFORMATION CONCLUSIVELY SHOWING AN AGREEMENT TO ARBITRATE BETWEEN THE PARTIES.

The South Carolina Rules of Civil Procedure allow an aggrieved party to make a motion for reconsideration under Rule 59(e). *Elam v. S.C. DOT*, 361 S.C. 9, 21, 602 S.E.2d 772, 778-79 (2004). The purpose of a Rule 59(e) motion is to request the trial court to reconsider matters properly encompassed in a decision on the merits. *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (citations omitted).

The Wells Fargo Entities did not make new arguments in their Motion for Reconsideration, but rather submitted recently discovered Forms U4 that established an agreement to arbitrate between the parties, which were attached to the affidavit of a Wells Fargo Clearing Services, LLC employee who described, among other things, his familiarity with Forms U4, the process by which Forms U4 are prepared and submitted through FINRA's Web CRD licensing and registration system, the basis of the personal knowledge upon which employees of the registration department prepare Forms U4, and the dates upon which Berry's Forms U4 were submitted. (*See* R. at 237-39). *See* Rule 803(6), SCRE (hearsay exception for records of regularly conducted activity); Rule 901, SCRE (authentication met by evidence sufficient to support a finding that matter in question is what proponent claims). In short, the Wells Fargo Entities identified new evidence which conclusively altered — or should have altered — the trial court's prior analysis and submitted that evidence through an affidavit that provided an evidentiary basis, in the precise manner dictated by the Order on the Motion to Dismiss, to support a finding that the documents were authentic. *Id.* Tellingly, in response, there was no contention that the documents were not what they purported to be, or that Berry was not required

under FINRA rules to have an active Form U4 at all times during his employment. Nor was there any contention that such Forms U4 at all times required arbitration.

Nonetheless, the trial court concluded it was "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." (R at 20). This ruling failed to consider the scope of the trial court's power at the Rule 59(e) stage and failed to consider that the motion also invoked Rule 60, SCRCP. A motion for reconsideration is not so narrow as to limit the court to circumstances of overlooked fact or errors of law, as the trial court's Order on the Motion for Reconsideration suggests. *See Elam*, 361 S.C. at 22, 602 S.E.2d at 779 ("There is nothing inherently unfair in allowing a party one final chance . . . to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity."). This was not a case where the Wells Fargo Entities sought to raise a new argument, which would require denial of the motion. *See Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990). Instead, the Wells Fargo Entities sought to convince the trial court that it erred in failing to consider the Forms U4 and in disregarding FINRA rules. These arguments had all been raised by the Wells Fargo Entities prior to the trial court's original Order.

The trial court's conclusion — the only sentence in the seven-sentence Order on the Motion for Reconsideration to substantively address the Wells Fargo Entities' Motion for Reconsideration and Berry's Response to the Motion for Reconsideration — ignores that the submission of the Wells Fargo Form U4 renders the trial court's original Order incorrect and requires the arbitration of all of Berry's claims.[8] (R. at 20). With the filing of the Motion for

[8] The trial court noted in its Order that it was "too late" for the Wells Fargo Entities to amend "as of right" to submit supplemental or additional documentation in support of the Motion to Dismiss, and that permitting them to do so would provide them a "second bite at the apple."

Reconsideration, the following facts become apparent in contrast to the trial court's original findings: (1) the Forms U4 were properly authenticated (*compare* R. at 6-7 *with* R. at 237-39); (2) Wells Fargo Advisors is a party to the documents (*compare* R. at 7-9 *with* R. at 251); and (3) the forum specified by the Forms U4, FINRA, does exist (*compare* R. at 9-17 *with* R. at 252).[9] The trial court's inability to discover a material fact which might alter its decision was in error,

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(Order on R. at 7 n.2). The Wells Fargo Entities' Motion for Reconsideration was not a second bite or an attempt to amend the pleadings; rather, it was a continuation of its proverbial first bite. *Cf. Elam*, 361 S.C. at 21, 602 S.E.2d at 778 ("In essence, we view the use of oral or written JNOV/new trial motions, followed by an initial Rule 59(e) motion, as part and parcel of a party's "single bite at the apple" in presenting his case to the trial court."). Moments before the trial court heard argument on the Motion to Dismiss, Berry "handed to opposing counsel briefs in opposition to their motion." (R. at 325:4-19). On June 21, 2017, while the Wells Fargo Entities were collecting evidence in response to Berry's arguments (R. at 210 n.2), the trial court denied the Motion to Dismiss. (R. at 3-19). Under those circumstances, the trial court erred in denying the Motion to Dismiss with prejudice, and in not considering the documents attached to the Motion for Reconsideration.

[9] The Wells Fargo Entities acknowledge *Keller v. ING Financial Partners, Inc.*, Op. No. 2011-CP-23-0336, 2011 WL 10005145 (S.C. Cir. Ct. June 2, 2011), *aff'd* 2013 WL 8482243 (S.C. App. Jan. 9, 2013), but respectfully disagree with the courts' conclusions that NASD ceased to exist in 2007 and, in any event, do not believe *Keller* is applicable here. Unlike the defendant in *Keller*, the Wells Fargo Entities provided the trial court with a series of Forms U4, including a Form U4 from Berry's employment with Wells Fargo Advisors that specifically designates FINRA as the chosen forum. (*See* R. at 251-64).

The Wells Fargo Entities' position that NASD and FINRA are functionally the same entity is supported by, among others, the SEC, which characterizes the merger and continued operation of the combined entity as a name change. *See, e.g.*, S.E.C. Release No. 34-56615, *available at* https://www.sec.gov/rules/sro/finra/2007/34-56615.pdf (Oct. 4, 2007) ("NASD has changed its name to FINRA"); S.E.C. Release No. 34-570033, *available at* https://www.sec.gov/rules/sro/finra/2007/34-57033.pdf (Dec. 21, 2007) (describing "NASD's change in corporate name to FINRA" as a "technical amendment" to Forms U4 and U5). NASD Rules are also incorporated into the FINRA Manual, FINRA Manual, Contents, *available at* http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=1 (last visited Nov. 28, 2017), and courts in other jurisdictions have reached the same conclusion. *See Rusciano v. Oppenheimer & Co., Inc.*, No. 14 Civ. 1452(CM), 2017 WL 1677133, at *2 (S.D.N.Y. Apr. 25, 2014) ("The NASD has not ceased to exist; its name was merely changed to [FINRA]. The difference between NASD and FINRA is purely semantic.") (internal citation omitted).

particularly in light of the strong federal and state policy in favor of arbitration. *Heffner*, 321 S.C. at 537.

III. THE TRIAL COURT ERRED IN NOT TAKING JUDICIAL NOTICE OF, AND COMPELLING ARBITRATION PURSUANT TO, FINRA'S RULES.

During the hearing, the Wells Fargo Entities asked the trial court to take judicial notice of FINRA Rule 13200. (R. at 341:20-24; *see* R. at 213 (discussing BrokerCheck as matter of public record)). In its Order, the trial court "set aside the issue of whether [it] may even take judicial notice of such rule" because the Wells Fargo Entities "[had] not met their threshold burden of demonstrating the applicability of any FINRA rule to Mr. Berry." (R. at 10 n. 7). The trial court erred in both respects.

The trial court should have taken notice of FINRA's rules, as numerous other courts across the country have, as well as the Forms U4 and the BrokerCheck website which was established and is maintained by FINRA to fulfill its statutory obligations as a registered national securities association. Moreover, the allegations of Berry's Amended Complaint further show that FINRA rules apply to Berry and provide a sufficient basis to require arbitration as compelled by these rules. *See Mullins v. U.S. Bancorp Inv., Inc.*, Civil No. 1:15-CV-00126-GNS, 2016 WL 1420999, at *4 (W.D. Ky. Apr. 8, 2016) ("the absence of arbitration provisions in [the confidentiality and non-disclosure] agreements does not negate the independent basis for arbitration that exists by virtue of FINRA Rule 13200").

A. THE TRIAL COURT ERRED IN NOT TAKING JUDICIAL NOTICE OF THE FINRA RULES, FORMS U4, AND BROKERCHECK REPORT.

South Carolina courts will take judicial notice of facts: (1) generally known within the territorial jurisdiction of the trial court; or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned. Rule 201(b), SCRE; *see Matter of Harry C.*, 280 S.C. 308, 310, 313 S.E.2d 287, 288 (1984). A court may take judicial

notice of facts not subject to reasonable dispute "at any stage of the proceeding." Rule 201(f), SCRE.

As facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, the trial court should have taken judicial notice of FINRA's rules, the content and use of the Form U4, and the facts publicly available through FINRA's statutorily-mandated BrokerCheck website.

FINRA falls under the regulatory authority of the SEC pursuant to Section 15A of the Exchange Act. *See* 15 U.S.C. § 78o–3. FINRA is a self-regulatory organization which "has the authority to, *inter alia*, create and enforce rules for its members in order to provide regulatory oversight of all securities firms that do business with the public." *Wachovia Bank, Nat'l Ass'n v. VCG Special Opportunities Master Fund, Ltd.*, 661 F.3d 164, 172 (2d Cir. 2011) (internal quotation marks and citation omitted); *see UBS Fin. Servs., Inc. v. W. Va. Univ. Hosps., Inc.*, 660 F.3d 643, 648 (2d Cir. 2011) (FINRA exercises comprehensive oversight over all securities firms that do business with the public); *Sacks v. SEC*, 648 F.3d 945, 948 (9th Cir. 2011) (FINRA is "responsible for regulatory oversight of all securities firms that do business with the public; professional training, testing and licensing of registered persons; [and] arbitration and mediation") (quoting 72 Fed. Reg. 42170 (Aug. 1, 2007)).

FINRA's mission is to protect investors by regulating and monitoring securities trading, operations and records, exchange platforms, and personnel in the securities industry. *See* FINRA, *Our Mission*, https://www.finra.org/about/our-mission (last visited Nov. 26, 2017); *id.*, *What We Do*, https://www.finra.org/about/what-we-do (last visited Nov. 26, 2017). FINRA pursues that mission by "writing and enforcing rules and regulations for every single brokerage firm and broker in the United States." *See id.* All rules and regulations promulgated by FINRA, including

its Codes of Arbitration, are reviewed and, after notice and comment, approved by the SEC. *See* 15 U.S.C. § 78s(b).

As a registered securities association, FINRA is required by statute to: (A) "establish and maintain a system for collecting and retaining registration information"; and (B) "establish and maintain a . . . readily accessible electronic or other process, to receive and promptly respond to inquiries regarding — (i) registration information on its members and their associated persons." 15 U.S.C. § 78o-3(i)(1)(A), (B). The former obligation — to collect and retain registration information — is met in large part through FINRA's use of Forms U4 and U5.[10] The latter obligation — to make available to the public registration information on firms and brokers — is met in large part through FINRA's BrokerCheck website, https://brokercheck.finra.org. *See also* FINRA, *About BrokerCheck*, http://www.finra.org/investors/about-brokercheck (describing, *inter alia*, "Where BrokerCheck Information Comes From" and "What You'll Find in a BrokerCheck Report") (last visited Nov. 26, 2017). The SEC and FINRA encourage the public to review this information when considering doing business with a specific registered representative.

The trial court should have taken judicial notice of FINRA's rules, the Form U4, and Berry's BrokerCheck report because all three are capable of accurate and ready determination through publicly-available sources, the accuracy of which cannot be reasonably questioned. Though South Carolina courts do not appear to have had occasion to address judicial notice of FINRA's rules, the Form U4, or FINRA's BrokerCheck website, several courts have done so, concluding that the regulatory overlay provides the appropriate evidentiary basis to consider those documents. In *SEC v. Hansen*, for example, the court reasoned that "given FINRA's mandate to

[10] "The Form U-5 is the standard form used in the securities industry to report the termination of a registered representative's association with a broker-dealer." *Adams v. Wells Fargo Advisors, LLC*, No. 12-2130, 2014 WL 212447, at *7 n.7 (D. Md. May 21, 2014) (citation and internal quotation marks omitted).

maintain registration information for member brokers and make that information available to the public, taking judicial notice of broker registration on FINRA's website is appropriate." No. 13-CV-1403 (VSB), 2017 WL 1298022, at *6 (S.D.N.Y. Mar. 31, 2017); *see Forgione v. Gaglio*, No. 13 CIV. 9061 KPF, 2015 WL 718270, at *17 (S.D.N.Y. Feb. 13, 2015) (taking judicial notice of a BrokerCheck report and FINRA's registration requirements); *Monsefi v. TD Ameritrade, Inc.*, No. B207707, 2009 WL 1395798 (Cal. Ct. App. May 20, 2009) (granting motion to take judicial notice of FINRA's regulations and rules and compelling arbitration based on Form U4 signed with predecessor firm).

FINRA's rules and forms are easily located on FINRA's website. The ready availability of Berry's BrokerCheck report — which under federal law must be maintained in a publicly-accessible electronic form — is alleged by Berry in the Amended Complaint. (*See* R. at 75 ¶ 91 (alleging Berry's "official record is publicly available" and that the allegedly defamatory statements "also appear[] 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")). This allegation alone should be sufficient to warrant inspection of the BrokerCheck report. *See Am. Chiropractic v. Trigon Healthcare*, 367 F.3d 212, 234 (4th Cir. 2004) (court may take judicial notice of documents which are "integral to and explicitly relied on in the complaint" and authentic to determine whether plaintiff has stated a claim). Moreover, 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. For all of these reasons, the trial court erred in failing to take judicial notice of these materials.

B. BERRY'S FINRA REGISTRATION REQUIRES HIM TO ARBITRATE HIS CLAIMS AGAINST THE WELLS FARGO ENTITIES PURSUANT TO FINRA'S RULES.

In its Order, the trial court "set aside" the question of judicial notice because the Wells Fargo Entities "[had] not met their threshold burden of demonstrating the applicability of any FINRA rule to Mr. Berry." (R. at 10 n. 7). The trial court was wrong as a matter of fact and as a matter of law.

A firm must be a FINRA member to participate in a public securities business. By registering as a FINRA member, entities gain the right to participate in the business of brokering and trading securities, but must satisfy certain regulatory requirements and obligations to their customers. *See, e.g.*, FINRA Bylaws, Art. 4, § 1(a)(1), available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4609 (last visited Nov. 28, 2017). In turn, any individual actively involved in a firm's investment banking or securities business must also be registered as a representative with FINRA. *See* FINRA Manual, Rule 1031(4), Registration Requirements, available at http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=3584 (last visited Nov. 26, 2017) ("All persons engaged or to be engaged in the investment banking or securities business of a member who are to function as representatives shall be registered as such. . . ."). This registration requirement is not voluntary or negotiable. Under the federal securities laws, anyone wishing to sell securities must submit to this registration requirement.

"[T]he rules of a securities exchange are contractual in nature." *Kidder, Peabody & Co., Inc. v. Zinsmeyer Trusts P'ship*, 41 F.3d 861, 863 (2d Cir. 1994) (citation omitted). "FINRA membership constitutes an agreement to adhere to FINRA's rules and regulations, including its Code and relevant arbitration provisions contained therein." *In re Am. Express Fin. Advisors Secs. Litig.*, 672 F.3d 113, 128 (2d Cir. 2011) (citation and internal quotation marks omitted); *see*

In re Lehman Bros. Secs. and ERISA Litig., 706 F. Supp.2d 552, 559 (S.D.N.Y. 2010) ("[A]n associated person of a member . . . is bound by the FINRA arbitration rules if the dispute 'arises in connection with' [the member's] business activities."); *In the Matter of the Arbitration Between Ameriprise Advisory Servs., Inc. v. Leo Sala III*, FINRA No. 10-00469, 2010 WL 3525730, at *5 (FINRA Jan. 29, 2010) ("As Respondent was formerly registered with FINRA as an associated person of a member-firm, Respondent was and is bound by the rules of FINRA, including FINRA's Code. . . ."). Among those rules and regulations is the mandatory arbitration provision of Rule 13200 that Berry seeks to evade here.

For purposes of Rule 13200, a "member" is defined as "any broker or dealer admitted to membership in FINRA." (R. at 273-74). FINRA Manual, FINRA Rules, 13100(a), available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4196 (last visited Nov. 26, 2017). An "associated person" is "a person associated with a member," *see id.* at Rule 13100(o), and "a person associated with a member" is, *inter alia*, "[a] natural person who is registered or has applied for registration under the Rules of FINRA." *Id.* at Rule 13100(r). Thus, Rule 13200 would apply to the claims asserted here as between two FINRA members.

The enforceability of FINRA's rules mandating arbitration of disputes related to business activity is so inescapable that courts have repeatedly held that *the rule itself* is an enforceable, written agreement to arbitrate, and compelled arbitration on those grounds. Courts uniformly hold that, for purposes of the FAA, FINRA Rule 12200[11] (the Customer Code version of Rule

[11] FINRA, and NASD before it, employs two Codes of Arbitration: a Customer Code and an Industry Code. The Customer Code applies to disputes between FINRA member firms or their associated persons and customers. The Industry Code applies to disputes between or among FINRA member firms or associated persons. *See* FINRA, Code of Arbitration Procedure, available at https://www.finra.org/arbitration-and-mediation/code-arbitration-procedure (last visited Nov. 26, 2017). Customer Code Rule 12200 is the customer-side mirror of Industry Code

13200) creates an enforceable "agreement in writing." *See, e.g., Waterford Inv. Servs., Inc. v. Bosco*, 682 F.3d 348, 353 (4th Cir. 2012) (FINRA Rule 12200 constitutes an "agreement in writing" under the FAA); *MONY Secs. Corp. v. Bornstein*, 390 F.3d 1340, 1342 (11th Cir. 2004) (affirming order compelling arbitration and rejecting appellant's argument that "there was never an agreement to arbitrate . . . because the NASD Code itself constitutes the agreement"); *Washington Square Secs., Inc. v. Aune*, 385 F.3d 432, 435 (4th Cir. 2004) (NASD Code constitutes "agreement in writing" under FAA); *Kidder*, 41 F.3d at 863–64 (same); *CRT Capital Group v. SLS Capital, S.A.*, 63 F. Supp. 3d 367, 372 (S.D.N.Y. 2014) ("[M]embership in an exchange that requires arbitration constitutes an 'agreement in writing' to arbitrate under 9 U.S.C. § 2."); *cf. Williams v. Tucker*, 239 W. Va. 395, 801 S.E.2d 273, 279 (2017) ("Mr. Williams, as a FINRA member, is required to abide by FINRA's rules, including its arbitration provisions.").

Here, there is overwhelming evidence Berry voluntarily subjected himself to FINRA's rules, including Rule 13200. This evidence includes Berry's own allegations in his Amended Complaint referencing his long career in the securities industry. (*See, e.g.*, R. at 8 ¶ 27). Berry's

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Rule 13200, described above. Rule 12200 provides, "Parties must arbitrate a dispute under the Code if:

- Arbitration under the Code is either:
  (1) Required by a written agreement, or
  (2) Requested by the customer;
- The dispute is between a customer and a member or associated person of a member; and
- The dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company.

FINRA Manual, FINRA Rules, 12200, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4106 (last visited Nov. 26, 2017).

Amended Complaint acknowledges, among other things, that "[f]inancial 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'.)"[12] (R. at 67 ¶ 59). Elsewhere, Berry described himself as a "registered representative," and a "broker[] and advisor[]" for Wells Fargo, who "has worked continuously the [the financial services industry] since 1984," and "dedicated the bulk of his professional life to the brokerage firm which ultimately became the WFA Defendants." (R. at 57 ¶ 27, 59 ¶ 31, 62-63 ¶¶ 45-47). Berry's Amended Complaint even incorporates by reference his Form U5. (*See, e.g.*, R. at ¶¶ 60, 91, 93-95, R. at 68 ¶ 60, 75-77 ¶¶ 91, 93-95).

In addition and as described above, the Wells Fargo Entities presented the trial court with a long line of Berry's Forms U4, including Berry's Wells Fargo Advisors Form U4 and the Form U4 submitted by predecessor firm Everen Securities, Inc.[13] (*See* R. at 109-20, 241-49, 251-64). Completion and submission of the Form U4 required Berry to affirm he was applying for registration with the organizations identified therein (in the case of Berry's most recent Form U4, FINRA) and that he "agree[d] to comply with all provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of

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[12] Berry's current, admitted registration with a FINRA member firm is sufficient to subject him to mandatory arbitration under FINRA Rule 13200, which mandates arbitration of disputes between an associated person and any member. *See* FINRA Rule 13200.

[13] The trial court refused to take judicial notice of the "internal affairs of private corporations to find that [the Wells Fargo Entities] can invoke the rights of Wheat First," a predecessor entity to the Wells Fargo Entities with which Berry's was registered using the oldest proffered Form U4 . (R. at 8-9; *see* R. at 109-20). No judicial notice was necessary because Berry's Amended Complaint alleges the merger history of Wheat First, describing the firm's merger with First Union Corporation, a subsequent merger with Wachovia Corporation, and Wachovia Corporation's acquisition by Wells Fargo & Company in 2008. (R. at 58-59 ¶¶ 28 n.3, 29, 31). *See Overcash*, 364 S.C. at 572, 614 S.E.2d at 620 (allegations of complaint accepted as true for purposes of motion to dismiss).

[FINRA] as they are or may be adopted, or amended from time to time." (*See, e.g.*, R. at 241-29). Berry's registration history is easily confirmed by searching FINRA's public website BrokerCheck — accessible to anyone who wants to check the registration status and employment history of a securities broker or firm — shows that Robert Franklin Berry, Central Registration Depository ("CRD") number 262947, is a "Broker Regulated by FINRA" whose registration has been carried by LPL Financial LLC (CRD# 6413) since 2014, and whose registration was, before that, carried by Wells Fargo Advisors, LLC (CRD# 19616) from 1999-2014. *See* FINRA BrokerCheck, Robert Franklin Berry (CRD# 1262947), available at https://brokercheck.finra.org/individual/summary/1262947; *see also* BrokerCheck Report, *id.* ("Detailed Report" available for download). Berry's registrations list a single registering entity: FINRA. *Id.*[14]

All of the claims in Berry's Amended Complaint arise from Berry's employment and termination by the Wells Fargo Entities. (*See* R. at 50 ¶ 1, 69-91 ¶¶ 69-148 (asserting claim for damages "arising from Defendants' deliberate sabotage of," among other things, Berry's "profit formula agreement," "implied agreements with all Defendants" and "his then current employment, his future economic opportunity, and his professional reputation")). There can be no dispute that these claims fall within the parameters of FINRA Rule 13200 and the arbitration provisions of Berry's Form U4. *See, e.g.*, *Hawkins v. Questar Capital Corp.*, 2013 WL 5596897, at *3, *4 (E.D. Ky. Oct. 11, 2013) (holding intentional interference claims not outside the scope of the "broad arbitration language of Rule 13200(a)" and granting motion to dismiss); SEC

[14] BrokerCheck similarly confirms the registration status of Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC (CRD# 19616) and Wells Fargo Bank, N.A. (CRD# 159322). Wachovia Securities Financial Holdings, LLC can be found under the registration of Wells Fargo Advisors Financial Network, LLC (CRD# 11025). *See* BrokerCheck, https://brokercheck.finra.org/ (select "Firm" tab and search by name or CRD numbers).

Release No. 34-56208, 72 Fed. Reg. 45077-02, 45078 (Aug. 6, 2007) (term "business activities" encompasses dispute arising from the employment or termination of an associated person). For these reasons, the trial court erred in refusing to dismiss or stay the case pending arbitration based on FINRA's rules, Berry's Forms U4 or Berry's BrokerCheck report, any one of which provides an independent basis upon which to dismiss or stay the case pending arbitration of Berry's claims.

IV. BERRY HAS NOT ESTABLISHED A VALID DEFENSE TO ARBITRATION.

In the Order on the Motion to Dismiss, the trial court suggested, without so ruling, that it agreed with Berry's argument that the arbitration clause in his Forms U4 was unenforceable under the circumstances of this case because "its enforcement would compel Plaintiff to arbitrate allegedly outrageous conduct by Defendants that clearly was not contemplated at the inception of the arbitration agreement."[15] (R. at 19 n. 10). The "outrageous conduct" in question appears to be Berry's allegation that he was terminated because he refused to violate the law (a claim the Wells Fargo Entities deny). (R. at 147). Even assuming the continued viability of the outrageous conduct exception, *see Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 13, 791 S.E.2d 128, 134 (2016), the exception does not apply here.

Under the FAA and South Carolina law, a clause which provides for arbitration of all disputes arising out of or relating to a contract should be construed broadly, including tort claims. *Carlson v S.C. State Plastering, LLC*, 404 S.C. 250, 261, 743 S.E.2d 868, 874 (Ct. App. 2013) (compelling arbitration of plaintiffs tort claims as well as contract claims because "[a] clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is

[15] The trial court did not rule on the argument, however, and simply noted that it "need not address" the issue in light of its foregoing conclusions. The Wells Fargo Entities nonetheless address the argument for the sake of completeness.

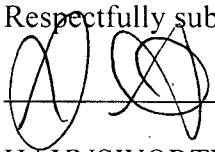
construed broadly"). The clause in Berry's Form U4, as well as the language of Rule 13200, is "precisely the kind of broad arbitration provision that justifies a presumption of arbitrability." *Oldroyd v. Elmira Savs. Bank, FSB*, 134 F.3d 72, 75 (2d Cir. 1998). As this Court has held, any ambiguity in the language of a mandatory arbitration provision should be construed in favor of arbitration. *Towles*, 338 S.C. at 41, 524 S.E.2d at 846.

Aiken v. World Finance Corp. of South Carolina, cited by Berry to the trial court, is not instructive. 373 S.C. 144, 644 S.E.2d 705 (2007). That case involved the theft of a bank customer's personal information by bank employees and use of that information to obtain "sham loans" for the bank employees' personal use. *Id.* at 147, 644 S.E.2d at 707. The court found that conduct to be "completely outside the expectations of the parties." *Id.* at 157, 644 S.E.2d at 710. In contrast, all of Berry's allegations concern his employment, his termination, and events immediately after (and related to) his termination. Arbitration of those claims, particularly under the broad language of the Form U4 and Rule 13200, is completely *within* the expectation of the parties. *See, e.g.*, *Blackwell v. Bank of Am. Corp.*, C.A. no. 7:11-2475-JMC-KFM, 2012 WL 1229673, at *2 (D.S.C. Mar. 22, 2012), *report and recommendation adopted*, 2012 WL 1229675 (Apr. 12, 2012) (dismissing claims for, *inter alia*, violation of whistleblower protections under Sarbanes-Oxley Act, "trespass to chattel," intentional infliction of emotional distress, and alleged unfair trade practice on basis of Form U4 and Rule 13200). Therefore, compelling arbitration in this case comports with the expectations of all parties as members of the securities industry. For that reason, there is no basis for applying any kind of exception in this case. Nor does it leave Berry without a remedy. It just requires that he pursue his claims in the agreed upon arbitration forum.

CONCLUSION

For all of these reasons, the Wells Fargo Entities respectfully request this Court reverse the trial court's Orders on the Motion to Dismiss and Motion for Reconsideration with directions to dismiss or stay the case pending arbitration of Berry's claims.

Respectfully submitted,



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