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SC Court of Appeals

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.

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Appellants Scott A. Spang, Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, Wachovia Securities Financial Holdings, LLC, Wells Fargo & Company, and Wells Fargo Bank, N.A. (together, the “Wells Fargo Entities”), petition the Court for a rehearing of the Opinion filed in this case on January 13, 2021. In its Opinion, this Court affirmed the trial court’s ruling denying the Wells Fargo Entities’ motion to dismiss Respondent Robert F. Berry’s claims or to stay the action pending arbitration. The Wells Fargo Entities respectfully submit that the Court overlooked or misapprehended the following points:

I. The Court erred in finding Berry's Forms U4 did not constitute an agreement to arbitrate claims against the Wells Fargo Entities.

In its discussion of the many Forms U4 Berry has signed during his long career as a registered investment advisor, the Court improperly concluded that none of the Forms U4 established an agreement to arbitrate between Berry and the Wells Fargo Entities. The Court found that the 1999 Uniform Application for Securities Industry Registration or Transfer) ("Form U4") designated "Everen Securities," a predecessor of Wells Fargo Advisors, as the firm name and that while the Form U4 contained an arbitration clause, it contained no language indicating the agreement was binding on successors and assigns to the named firm. (*See Op.* at 9; *R.* at 241.) The Court also stated that while the 2014 Form U4 designated Wells Fargo Advisors as the firm and FINRA as an SRO, it contained no arbitration agreement. (*See Op.* at 9.) Taken together, the Court concluded that "although [it] acknowledge[s] the 2014 form indicated Berry was registered with FINRA in 2014, [it] find[s] neither the 1999 nor the 2014 form established Berry agreed to arbitrate his claims with Appellants." (*Op.* at 9.)

As an initial matter, the Court ignores that according to both FINRA and the Securities Exchange Commission ("SEC"), FINRA is the successor to NASD, including specifically in the Form U4. *See* SEC Release No. 34-57033; File No. SR-FINRA-2007-036, available at <http://www.finra.org/sites/default/files/RuleFiling/p037701.pdf> (stating that in "technical amendments," reference to the NASD in the Form U4 were replaced with references to FINRA to reflect the "corporate name change."). Thus, the Court's determination that "there was no enforceable agreement to arbitrate" because the "indicated forum no longer existed or provided arbitration services" was erroneous. (*Op.* at 9.)

As a related, but separate, matter, the Court also misapprehends that the 2014 Form U4 was an *amendment* to the 1999 Form U4. The 2014 Form U4 identified Berry's employment date

as October 1, 1999, the same employment date identified on the 1999 Form U4. (*Compare* R251 *with* R241.) And on the 2014 Form U4, under Item 2 Fingerprint Information, Berry made the representation that, “By selecting this option, I represent that I have been employed *continuously* by the *filing firm* since the last submission of a fingerprint card to CRD and am not required to resubmit a fingerprint card at this time.” (R. at 251 (emphasis added and in original).) That is, as part of avoiding the requirement to go through a new FBI background screening, Berry specifically attested that his current and prior firms were one and the same, and also confirmed that the Form U4 was simply an amendment to his prior Form U4 filed in 1999. *See* SEC Release No. 34-49779, File No. SR-NYSE-2004-16, available at 2004 WL 1439828 (describing rule change to exempt individuals employed continuously by the same filing firm from resubmitting fingerprint card). Among other amendments made to Berry’s registration in 2014 was Berry’s selection of FINRA (as a “GS – Full registration/General Securities Representative (S7)” as one of his five SRO Registrations. (R. at 252.) This amendment to the Form U4 firmly brings FINRA under Berry’s “agreement to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person” required to be arbitrated under the rules or by-laws of his registered SROs. Berry cannot avoid the regulatory requirement of a new background screening, while at the same time arguing that the entities with which he was registered were somehow separate and distinct. His own attestation collapses the forms and entities into one. Thus, there was an agreement to arbitrate between the parties and the Federal Arbitration Act applies. *See, e.g., Kidder, Peabody & Co., Inc. v. Zinsmeyer Trusts P’ship*, 41 F.3d 861, 863 (2d Cir. 1994) (NASD provisions regarding compulsory arbitration “constitute[] an ‘agreement in writing’ under the Federal Arbitration Act, 9 U.S.C. § 2”).

II. Appellants' arguments regarding the FINRA Rules were preserved.

The Court found that in their motion to reconsider, the Wells Fargo Entities “did not argue the circuit court failed to rule on [their] request” to take judicial notice of the FINRA rules, “nor did they request that the court take judicial notice of any other matters.” (Op. at 6.) Though the Court is correct that Appellants’ did not specifically use the words “judicial notice,” the Wells Fargo Entities’ motion for reconsideration cited to and relied upon FINRA rules, SEC Releases, and publicly-available BrokerCheck reports, among other sources, as a separate argument in the motion to reconsider. (*See, e.g.*, R. at 210 n.3 & n.4; R. at 212-13 & n.9.) There is no question that this issue is preserved and to hold otherwise is to elevate form over substance. The issue was clearly before the trial court in Appellants’ initial motion to dismiss and was fairly subsumed in its Rule 59 motion for reconsideration.

III. The Court erred in finding FINRA Rule 13200 does not constitute an independent basis upon which to compel Berry to arbitrate his claims.

This Court also found that, “Even assuming Berry was registered as an associated person with FINRA, no precedent requires us to conclude FINRA Rule 13200, in and of itself, constituted an enforceable arbitration agreement between Berry and Appellants.” (Op. at 11.) The Court erred by setting aside the binding nature of FINRA rules on registered representatives in search of an agreement to arbitrate “independent of either party’s registration with FINRA,” assuming they could not be one and the same. (*See id.*) First, there is no question that Berry was registered as an associated person with FINRA. (*See, e.g.*, R. at 252 (Form U4 designating FINRA registration); R. at 67 ¶ 59 (acknowledgment in Complaint that financial advisors must be registered); R. at 57 ¶ 27 (description in Complaint of Berry’s status as a “registered representative”).) Second, as explained above, there is an agreement to arbitrate between Berry and Appellants in the form of Berry’s 1999 Form U4 and the 2014 amendment to that U4 that

identified Wells Fargo Clearing Services as the filing firm and FINRA as a selected SRO. (*See* R. at 241, R. at 2501, R. at 252.)

Third, any individual engaged in the securities business of a FINRA member firm must be registered as a representative with FINRA, and no individual can be registered with FINRA without agreeing to comply with FINRA's rules and regulations, including the mandatory arbitration provisions of FINRA Rule 13200. *See* 15 U.S.C. § 78o(a)(1); FINRA Manual, Rule 1031(a). FINRA's rules are approved by the SEC, are binding on FINRA member firms and associated persons, and have the force of federal law. *See, e.g., Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1128 (9th Cir. 2005) (holding SEC-approved NASD arbitration procedures "have preemptive force over conflicting state law"). Courts that have squarely addressed the question have concluded that "the rules of a securities exchange are contractual in nature." *See, e.g., MONY Secs. Corp. v. Bornstein*, 390 F.3d 1340, 1342 (11th Cir. 2004) ("[E]ven if 'there is no direct written agreement to arbitrate..., the [NASD] Code serves as a sufficient agreement to arbitrate, binding its members to arbitrate a variety of claims with third-party claimants.'"); *Spear, Leeds & Kellogg v. Central Life Assurance Co.*, 85 F.3d 21, 26 (2d Cir. 1996) (New York Stock Exchange compulsory arbitration rules constitute an agreement to arbitrate under FAA); *Zinsmeyer Trusts P'ship*, 41 F.3d at 863 (NASD provisions regarding compulsory arbitration "constitute[] an 'agreement in writing' under the Federal Arbitration Act, 9 U.S.C. § 2"); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286, 1288-89 (8th Cir. 1984) (finding dispute resolution procedures detailed in NYSE rules are agreement to arbitrate); *Oppenheimer & Co. Inc. v. Neidhardt*, No. 93-civ-3854, 1994 WL 176976, *1 (S.D.N.Y. May 5, 1994) (NASD rules, to which member binds itself in writing, constitutes an "agreement in writing" under the Federal Arbitration Act), *aff'd* 56 F.3d 352 (2d Cir. 1995);

Drexel Burnham Lambert, Inc. v. Pyles, 701 F. Supp. 217, 220 (N.D. Ga. 1988) (“Securities exchange members are contractually bound by the regulations of their organizations, including any arbitration provisions.”). This Court erroneously assumed that consent to be governed by an SRO’s rules cannot also constitute a contractual agreement to arbitrate under *Towles v. United HealthCare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct. App. 1999). This assumption runs counter to the language of FINRA’s rules and registered representatives’ express agreement (through the act of registration) to abide by those rules.

IV. The Court should clarify that neither it, nor the trial court, found that Berry has established any defense to arbitration.

In *dicta*, this Court disclaims any need to “consider Appellants’ argument that Berry failed to establish a valid defense to arbitration because they concede the circuit court did not rule upon this question.” (Op. at 12.) The Court should clarify that there has been no finding at either the circuit court or appellate court level that Berry has established any defense to arbitration.

CONCLUSION

For these reasons and those contained in their briefs, the Wells Fargo Entities urge the Court to grant rehearing in this matter and reverse the trial court’s determination that Respondent Robert F. Berry was not required to arbitrate his claims against the Wells Fargo Entities pursuant to either his repeated registrations as an investment advisor via his Forms U4 or under the many agreements to arbitrate signed by Berry during his many years of employment at predecessors to Wells Fargo.

Respectfully submitted,

s/ Sarah P. Spruill

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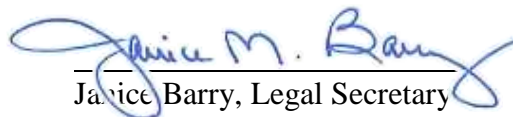
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PROOF OF SERVICE

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., do hereby certify that I have this 28th day of January, 2021, caused the forgoing *Petition for Rehearing* to be served via electronic mail only, on counsel of record at the email addresses shown below:

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SC Court of Appeals

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January 28, 2021

VIA EMAIL (ctappfilings@sccourts.org) and U.S. MAIL

The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
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Re: Robert F. Berry 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.
Appellate Case Number 2017-001690

Dear Ms. Kitchings:

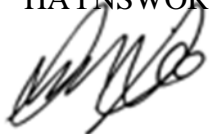
Enclosed herewith for filing, please find Appellants' *Petition for Rehearing* in the above-referenced matter, together with our Proof of Service of same. Also enclosed is our firm's \$50 check to cover the cost of the filing fee (with mailed copy).

I would appreciate your having the originals filed and returning clocked copies to me by email.

If you have any questions, please give me a call.

Sincerely yours,

HAYNSWORTH SINKLER BOYD, P.A.



Sarah P. Spruill

SPS/jmb
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