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**Feb 22 2021**  
SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

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APPEAL FROM LEXINGTON COUNTY  
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

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Appellate Case No. 2017-001690

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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.

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**RETURN TO PETITION FOR REHEARING**

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In its Published Opinion No. 5792, filed January 13, 2021 (“Opinion”), this Court thoughtfully and thoroughly considered and rejected the many procedural and substantive issues presented by Appellants in their appeal from the order of the circuit court denying their motion to compel Respondent Robert F. Berry to arbitrate his claims in spite of the dispositive fact that there was no informed agreement. Rehearing of the Opinion is not warranted, as the petition for rehearing of 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. (collectively “Appellants”) (“Petition”) does not comport with the Court’s standards for granting rehearing.

Pursuant to Rule 221 of the South Carolina Appellate Court Rules (“SCACR”), the Court’s February 2, 2021, letter requesting a return to the Petition, and the Court’s February 12, 2021, order granting an extension of time to file the same, Mr. Berry respectfully submits this return in opposition to the Petition. In order to prevail on a petition for rehearing, a party must state with particularity the points of its argument that the court is alleged to have overlooked or misapprehended. Rule 221(a), SCACR. Because Appellants have failed to identify anything the Court overlooked or misapprehended, and because the merits of the arguments advanced by Appellants are simply incorrect and, in any event, do not merit rehearing, the Court should deny the Petition.

#### **STANDARD FOR REHEARING**

Rule 221(a), SCACR, authorizes a party who believes the Court overlooked or misapprehended points of law or fact to petition the Court for rehearing. The petition for rehearing must state “the points supposed to have been overlooked or misapprehended by the court,” Rule 221(a), SCACR, so as “to aid the court in deciding correctly a case heard by it.” *Arnold v. Carolina Power & Light, Co.*, 168 S.C. 163, \_\_\_, 167 S.E. 234, 238 (1933). “The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.” *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) (citation omitted). In sum, the losing party may not be granted rehearing just because it disagrees with the Court’s decision; rather, the losing party must point out overlooked or misapprehended points of law or fact. The Petition does not meet this standard.

## ARGUMENT

**I. The arguments advanced by Appellants as to the Form U4s do not present a valid basis for rehearing as they merely disagree with the holdings of the Opinion by way of a recapitulation of arguments previously advanced and rejected.**

Appellants' first ground for rehearing fails to identify any issue that the Court overlooked or actually misapprehended in considering this appeal. Following a restatement of the holdings of the Opinion, Appellants first re-argue the contention raised in their primary brief on appeal that a 2007 "technical amendment" to the form utilized for the Uniform Application for Securities Industry Registration or Transfer ("U4"), used by the industry for registration purposes, applied retroactively to previously-filed U4s such that the Financial Industry Regulatory Authority, Inc. ("FINRA") could be unilaterally substituted for the National Association of Securities Dealers ("NASD") for the purposes of compelling arbitration claims. As an initial matter, this argument was raised by Appellants previously and rejected in the Opinion;<sup>1</sup> therefore, it does not constitute a valid basis for rehearing.

Setting aside that procedural infirmity, Appellants are wrong on the substance of their contention, as non-retroactive "technical amendments" do not supersede Appellants' burden of demonstrating the existence of a valid agreement between each of the Appellants and Mr. Berry to arbitrate the asserted claims. *See 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*

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<sup>1</sup> *See* Opinion at p.6 (finding Appellants' arguments that the trial court erred in declining to take judicial notice of "FINRA's rules, the content and use of the Form U4, and facts publicly available" unpreserved for appellate review); and p.12 (declining to reach the issue of whether Appellants satisfied their burden of demonstrating the application of FINRA's rules to Mr. Berry and merely "assuming" that he was registered for the purposes of ultimately rejecting Appellants' Rule 13200 argument on the merits).

*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)). Appellants essentially argue as follows: because Appellants asserted, without proof, that FINRA is the successor in interest to the NASD, and because the Securities and Exchange Commission (“SEC”) acquiesced to FINRA’s request to approve a technical amendment of the Form U4 allowing FINRA to be named in place of NASD on the approved form for *future* U4 filings, then FINRA was automatically substituted *ex post facto* into all prior U4s referencing NASD. The SEC Release cited by Appellants for that proposition, even if it were preserved for this Court’s review and binding upon it under some type of quasi-legal authority (which it is not),<sup>2</sup> does not stand for the proposition asserted by Appellants. The Release contains no discussion of retroactive application; instead, it repeatedly references the fact that the form U4 “will be” amended to reflect the change in name in registrations filed after the effective date. Thus, the weight assigned by Appellants to this change is not reflected in the document.

Appellants next attempt to manufacture a new “gotcha” moment with respect to representation made on Mr. Berry’s 2014 Form U4 regarding the need for background check screening. **(R. p.250-64)** Once again, Appellants’ argument falls flat under any scrutiny. First, while Appellants couch this new argument as something the Court has misapprehended, the Court would be excused for failing to have addressed it, as this is the first time that Appellants have made

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<sup>2</sup> Of course, Appellants’ new-found justification is itself belated. In their original *and* amended motion to compel arbitration, Appellants simply substituted FINRA without either acknowledging the substitution to the trial court or offering proof – such as the SEC Release now relied upon – that such unilateral substitution of FINRA for NASD is proper or permissible. **(R. p. 10)**, Order Denying Mot. to Compel (setting forth the unappealed finding of the trial court that “Defendants disregard the actual language of the SRL 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.”).

this argument during the course of this litigation and appeal.<sup>3</sup> The purpose of a petition for rehearing is to raise prior arguments that the Court may have overlooked or misapprehended, not devise new arguments to replace the rejected ones, as such a procedure would be nothing more than a veiled attempt to have a second bite at the apple, which is not permitted. *Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322 (“The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked or misapprehended, nor is it the purpose of the petition for rehearing to have the case tried in the appellate court a second time.”).

But here again, Appellants overplay their hand even within this new argument, which collapses on a failure of proof. Appellants argue that the selection of the option of not contemporaneously submitting a separate finger print card along with the 2014 Form U4 demonstrates that: (1) the 2014 Form U4 is an amendment of the 1999 Form U4, and (2) Appellants are entitled to “collapse the forms and entities into one,” despite the undisputed fact that the 1999 Form U4 is submitted on behalf of Everen Securities, Inc. (**R. pp.241-49**), and the 2014 Form U4 is submitted on behalf of *one* of the Appellants, Wells Fargo Advisors, LLC (n/k/a Wells Fargo Clearing Services, LLC). (**R. pp.251-64**) This is a spurious argument. In fact, the fingerprint selection language highlighted by Appellants states 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. p.251**) (italics in original, bold and underlining supplied). As demonstrated by the foregoing bolded and underlined language, the selection of the option not to submit a fingerprint card along with the 2014

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<sup>3</sup> This is not a new phenomenon. Appellants advanced new, different, and shifting grounds for compelling arbitration in each successive filing with the trial court (advancing different grounds and entirely new evidence in their motion for reconsideration than they did in their original and amended motion to compel), and have done so again before this Court. In sum, when a previously-made argument is rejected, Appellants simply advance new arguments.

Form U4 does *not* relate back to the submission of Mr. Berry's last Form U4, as suggested by Appellants;<sup>4</sup> instead, it expressly relates to whether the registered person has been employed by the filing firm since he or she last submitted a fingerprint card.

Noticeably absent from this record and Appellants' argument is any indication as to when Mr. Berry may have submitted a fingerprint card to CRD, whether it was submitted by Everen Securities in connection with the 1999 Form U4, or whether, when, or even if it was subsequently submitted either by Appellants or one of the other intervening firms. This failure of proof is Appellants' alone. What *is* clear, however, is that the significance Appellants seek to attribute to the selection of the fingerprint card option in the 2014 Form U4 is incorrect and unavailing. Moreover, in confirming that they are attempting to cobble together an agreement to arbitrate with Mr. Berry by selectively taking pieces from separate Form U4s, *see* Petition at 3 (nakedly arguing in favor of "collaps[ing] the forms and entities into one"), Appellants also lay bare the underlying truth of what Mr. Berry has argued since the outset of this litigation and which this Court expressly found: Appellants have produced no evidence to demonstrate an agreement to arbitrate between Appellants and Mr. Berry.<sup>5</sup>

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<sup>4</sup> Appellants leave the Court to presume that there was no intervening Form U4 filing for Mr. Berry between 1999 and 2014; however, the record is devoid of any demonstration of proof on that fact, and Appellants' custody affiant, Michael Zuhr, makes no such claim or representation. **(R. pp.237-39)**

<sup>5</sup> Appellants have not and cannot dispute two critical facts: (1) they 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 an agreement signed by Mr. Berry to arbitrate claims before a FINRA arbitration panel. The 1999 and 2014 Form U4s, which were only advanced by way of Appellants' motion for reconsideration and therefore should be rejected as unpreserved for this Court's review, fail to remedy Appellants' shortcomings, as the 1999 U4 **(R. pp.241-49)** does not list FINRA as a designated arbitral forum (as FINRA did not exist in 1999) and none of the designated fora offer arbitration services today, while the 2014 U4 **(R. pp.251-64)** lacks both an arbitration clause and Mr. Berry's signature.

For the forgoing reasons, rehearing is not warranted based on the first ground raised in the Petition.

**II. Rehearing is not warranted regarding the Opinion’s holdings on preservation.**

Appellants next contend the Court erred in finding its arguments regarding the FINRA Rules were unpreserved for appellate review. Here again, mere disagreement with the Court’s holding on an issue is not a valid basis for rehearing under the applicable standard of review. Even if properly made, however, this second ground for rehearing truly stands this Court’s preservation analysis on its head. In their primary briefing to the Court, Appellants’ expressly assigned error to the trial court for failing to take judicial notice of and to apply FINRA Rules against Mr. Berry. *See* Primary Br. of App. at 15 (“III. The Trial Court erred in *not taking judicial notice* of, and compelling arbitration pursuant to, FINRA’s Rules.” and “A. The Trial Court erred in *not taking judicial notice* of the FINRA Rule, Forms U4, and Brokercheck Report.”) (emphasis supplied). As a result, and under the preservation rules of the State, this Court justifiably reviewed the record with an eye towards evaluating whether Appellants’ argument was preserved for appellate review, i.e., that Appellants had actually requested the trial court to take judicial notice of the information and documents for which they now assign error on appeal. And having conducted that review, this Court correctly found that Appellants never asked the trial court to take judicial notice in the manner in which they presented in their briefing to the Court and continue to represent in the Petition.

Upon careful review of the record, Appellants’ request to the trial court was limited to orally seeking judicial notice of similarities between NASD and FINRA during the hearing on the motion to compel, (**R. p.341**), which limited request the trial court rejected as a basis to consider Appellants’ citation to FINRA Rule 13200 without any evidence as to its applicability to Mr. Berry. (**R. p. 10**) Order at 8, n.7 (“During the hearing, Defendants asked the Court to take judicial notice

of FINRA Rule 13200. Setting aside the issue of whether this Court may even take judicial notice of such rules, the Court finds that Defendants have not met their threshold burden of demonstrating the applicability of any FINRA rule to Mr. Berry.”). Notwithstanding the discrete request and limited holding, Appellants’ briefing to this Court sought to greatly expand the appearance of the scope of their underlying request for judicial notice in order to justify the pervasive citation to FINRA Rules and other non-authoritative sources, despite the lack of evidentiary foundation for doing so.<sup>6</sup>

In essence, Appellants assigned error to the trial court for failing to take judicial notice of things that they did not expressly request, while also now assigning error to this Court for pointing out that discrepancy, despite simultaneously acknowledging that they “did not specifically use the words ‘judicial notice.’” Petition at 4. Yet, Appellants argue this Court should nevertheless ignore preservation principles and consider the *very* information and documents of which they failed to request the trial court to take judicial notice, and which the Court refused to otherwise consider, merely because they included citations to the documents in their motion for reconsideration. Appellants’ derisive suggestion that *this Court* is “elevat[ing] form over substance” in these circumstances is the height of irony, given that Appellants’ argument neither follows the proper form nor advances any substance.

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<sup>6</sup> This fact is self-evident in Appellants’ request for judicial notice, both at the trial and appellate court level; had Appellants satisfied their evidentiary burden of demonstrating the applicability of these rules and procedures to Mr. Berry and whether they have any relevance in these proceedings, then a request for judicial notice would have been unnecessary. Appellants did not, and their corresponding request for judicial notice was limited. The Court correctly refused to allow Appellants to try a different case on appeal than they put forward below, and it should continue to do so here, where Appellants are attempting to shed the need to even seek judicial notice and instead proceed with making these arguments unmoored by any evidentiary or preservation constraints.

The Opinion correctly finds that Appellants' arguments, which they now acknowledge were not adequately made in the first instance, are unpreserved for appellate review; consequently, rehearing is not warranted based on the second ground raised in the Petition.

**III. The Opinion correctly found that FINRA Rule 13200 does not provide an independent basis to compel arbitration and rehearing is not warranted on that basis.**

Appellants' third basis for rehearing also does not present a valid basis under this Court's standard, as the ground is merely a repackaged argument identical to the one originally put forward by Appellants. *See* Primary Br. of App. at pp.15-24. The exception to Appellants' formulaic recapitulation, discussed in more depth below, is that Appellants now string-cite a number of cases from foreign jurisdictions which predate the rules in question, do not consider or apply South Carolina law, and which were not previously presented to the Court prior to the Opinion. *But see Kennedy*, 349 S.C. at 532, 564 S.E.2d at 322 ("The purpose of a petition for rehearing is not to present points which lawyers for the losing parties have overlooked ..."). In sum, Appellants' arguments regarding FINRA Rule 13200 were thoroughly – and correctly – addressed by the Court in the Opinion, and the do-over that Appellants seek on the issue is not a proper basis for rehearing.

In fact, Appellants' argument is founded upon a fundamental misstatement of the findings of fact and evidentiary record, which Appellants appear to make in furtherance of the false premise that they have met their burden of proof of demonstrating that the FINRA Rules apply to Mr. Berry. Appellants simply declare in a conclusory manner that "there is no question that Berry was registered as an associate person with FINRA," *see* Petition at 4, citing the 2014 Form U4 that

Appellants first advanced in their motion for reconsideration.<sup>7</sup> However, Appellants' expressed certitude is belied by the record and holdings of the trial court.

It is undisputed that all Form U4s submitted to the trial court in support of the original motion to compel predated the creation of FINRA. **(R. pp.109-120)** Following the hearing on Appellants' motion, the trial court expressly held that “[d]uring the hearing, Defendants asked the Court to take judicial notice of FINRA Rule 13200. Setting aside the issue of whether this Court may even take judicial notice of such rules, the Court finds that Defendants have not met their threshold burden of demonstrating the applicability of any FINRA rule to Mr. Berry.” **(R. p.10)** Order at 8, n.7 (emphasis supplied). The trial court further held 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 [to compel], and permitting them to do so at this time would provide [Appellants] a second bite at the apple.” **(R. p.7)** Order at 5, n.2. Appellants never attempted to cure this articulated shortcoming. Instead, Appellants merely submitted new and different Form U4s (the 1999 and 2014 Form U4s), as well as new and different web-linked citations to FINRA Rules and SEC guidance,<sup>8</sup> essentially advancing an entirely new motion to compel.

On appeal, rather than argue that the trial court's holdings were incorrect, Appellants simply cited to and relied upon the FINRA Rules as though they are binding authority in this state. As this court correctly found with respect to Rule 13200, they are not. This Court likewise did not presume

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<sup>7</sup> See discussion, *supra*, n.5 (regarding preservation of documents and arguments first advanced by Appellants in their motion for reconsideration to the trial court).

<sup>8</sup> Even if Appellants' arguments in favor of judicial notice were preserved, which they are not, the fact that these documents are “publicly-available” does not relieve Appellants of their evidentiary burden, as the public availability of documents is insufficient to authenticate the content of the information contained therein and prove their relevance to these proceedings. Such documents do not qualify as self-authenticating, and authentication as a public record is subject to documentary or testimonial evidence and illustration, which Appellants never attempted to provide. *Cf.* Rules 901 and 902, SCRE.

that FINRA Rules apply to Mr. Berry, even for the purposes of evaluating Appellants' claim regarding Rule 13200. *See* Opinion at p.12 ("Even assuming Berry was registered as an associated person with FINRA ...."). Without evidentiary proof to support Appellants' allegations regarding FINRA's application to Mr. Berry, the remainder of this argument collapses on itself.

Similarly unavailing is Appellants' string citation to a number of cases from foreign jurisdictions regarding the supposed dispositive application of FINRA Rules to compel arbitration of claims asserted by Mr. Berry. *See* Petition at pp.5-6. A close review reveals that none of the cases supports the proposition asserted by Appellants and none has application to or is controlling of the operative question before the Court. Indeed, although FINRA was first created in mid-2007 upon the merger of the NASD and New York Stock Exchange ("NYSE"), *all* of the cases cited by Appellants were published in 2005 or earlier, prior to the creation of FINRA or its rules. FINRA is neither the NASD nor the NYSE, and the creation of this new entity in 2007 required the adoption of procedural and substantive changes to the dispute resolutions processes previously utilized by those predecessor entities. Consequently, it is of no moment how other jurisdictions interpreted and applied the rules and arbitration procedures that have been discontinued and of entities that no longer exist.

This Court was again exactly correct to acknowledge that "[it has] been unable to identify any precedent extending the [FINRA Rule 12200] interpretations to FINRA Rule 13200," Op. at p.12, and Appellants' failure to cite any case involving FINRA or its rules, much less a direct interpretation and application of FINRA Rule 13200, is telling. This is particularly true where, as discussed above, the 2014 Form U4 relied upon by Appellants – the *only* Form U4 produced by Appellants which post-dates the creation of and references FINRA – does not include *either* Mr. Berry's signature *or* an arbitration clause. Appellants implore this Court to simply ignore their

failures of proof as to the application of FINRA Rules to Mr. Berry in favor of a sweeping holding that “an SRO’s rules ... constitute a contractual agreement to arbitrate under *Towles v. United Healthcare Corps.*, 338 S.C. 29, 39-40, 524 S.E.2d 839, 845-56 (Ct. App. 1999).” Pet. at p.6. The Court correctly rejected this argument as contrary to the State’s body of law regarding agreements to arbitrate, including *Towles*, where this Court was presented with actual proof of a document containing both a signature and an arbitration clause. *Id.*; *see also Chassereau v. Glob.–Sun Pools, Inc.*, 363 S.C. 628, 632, 611 S.E.2d 305, 307 (Ct. App. 2005) (“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.”); *Gissel v. Hart*, 382 S.C. 235, 241, 676 S.E.2d 320, 323 (2009) (same). Again, Appellants have not produced a signed agreement to arbitrate claims between any of the Appellants and Mr. Berry. *Contra Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009) (“In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the contract.”).

For all of these reasons, rehearing is not warranted based on the third ground raised in the Petition.

**IV. The Court is not required to clarify the Opinion’s application of error preservation rules declining to reach Appellants’ unpreserved argument regarding the establishment of a valid defense to arbitration.**

Finally, there is no basis for rehearing founded upon the Court’s application of error preservation principles to decline to reach an issue which Appellants concede was not ruled on by the trial court. Opinion at 13 n.9 (citing *Elam v. S.C. Dep’t of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) (“Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the [circuit] court.”)). As Appellants are forced to concede, the Opinion directly addressed the argument made by Appellants in their primary brief, which entreated this

Court to pre-emptively decide *in the first instance* that Mr. Berry has not established a valid defense to arbitration, despite the fact that the trial court did not rule upon the question. Even if appellate courts were permitted to make *de novo* findings of fact on appeal, which the appellate standard of review does not allow, the Court correctly declined to do so here. *See Fox v. Newberry Cty. Mem'l Hosp.*, 319 S.C. 278, 282, 461 S.E.2d 392, 395 (1995) (“[T]he merits of this issue should have never been addressed by the Circuit Court or the Court of Appeals, but instead the case should have been remanded to the Commission for findings of fact....”). Because the issue was expressly addressed, no good faith argument can be made that it was overlooked by the Opinion, and Appellants do not contend otherwise.

Nor do Appellants argue that the Court misapprehended its request and argument. Instead, Appellants paradoxically ask the Court to clarify that there has been no finding by either the trial court or this Court, while a plain reading of the Opinion’s footnote does not leave open the possibility of any other conclusion. The Opinion expressly states that the trial court did not rule on the issue, emphasizing that Appellants concede the fact as true. The Opinion then employs the Court’s error preservation principles to likewise expressly decline to address the issue for the first time on appeal. Thus, Appellants’ argument that the Court should “clarify” its ruling is both duplicative of its original request and wholly unnecessary. Indeed, the clarification that Appellants seek is a veiled attempt to have this Court make a *de novo* finding on the very issue which the Court has found to be unpreserved. *But see I’On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 419, 526 S.E.2d 716, 723 (2000) (“[A] court usually should refrain from deciding unnecessary questions.”).

Finally, Appellants’ request for clarification “that there has been no finding ... that Berry has established any defense to arbitration,” improperly seeks to flip the burden of proof regarding arbitration away from Appellants and onto Mr. Berry. *See Bradley, supra* (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, supra* (“The burden is on a party pleading a fact to prove it.”) (citation omitted). Each Appellant had the burden to demonstrate the existence of a valid agreement between that Appellant and Mr. Berry to arbitrate the asserted claims. Due to Appellants’ failure to meet its underlying burden in this case, the trial court did not need to reach the issue of a meritorious defense to arbitration, and Appellants’ request for a pre-emptive finding imputing a failure of proof against *Mr. Berry* on an unpreserved issue is inappropriate.

In sum, clarification is neither warranted nor proper under the Court’s appellate standard of review and this issue fails to provide a proper basis to grant the petition under the Court’s rehearing standard.

### **CONCLUSION**

The Petition presents no basis for rehearing or reconsideration of the Opinion. Primarily, it fails to identify any issue which this Court overlooked or misapprehended in reaching its unanimous decision, rendering the grounds advanced by Appellants inappropriate for consideration under this Court’s standard for evaluating petitions for rehearing. Beyond that obvious and controlling limitation, the Petition is habitually wrong on the merits, alternatively demonstrating a misapprehension of the import and relevancy of documents and arguments relied upon, as well as a continued willingness to simply advance new and different grounds in support of arbitration at each successive stage of this litigation as prior arguments are rejected. The end result is that the Petition actually reinforces the accuracy of the Opinion’s analysis, rather than undercuts it. Therefore, no basis exists upon which this Court should grant rehearing.

Although this case has now been pending for over four years, in actuality, it has never been permitted to leave the starting gates as a result of the delay caused by Appellants’ frivolous pursuit

of this appeal. Despite all of that time, 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 executed by Mr. Berry wherein he agrees to arbitrate claims against any of the Appellants. Mr. Berry respectfully requests this Court deny the Petition so that he may finally pursue his claims on their merits.

Respectfully submitted,

*s/Chad N. Johnston*

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This 22nd day of February 2021  
Columbia, South Carolina

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Feb 22 2021

SC Court of Appeals

THE STATE OF SOUTH CAROLINA  
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY  
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f/k/a Wells Fargo Advisors, LLC,  
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Wells Fargo & Company, and Wells Fargo Bank, N.A.,..... Appellants.

**CERTIFICATE OF SERVICE**

This is to certify that I, a shareholder with the law firm Willoughby & Hoefler, P.A., have caused to be served this day one (1) copy of Robert F. Berry’s **Return to Petition for Rehearing** by electronic mail delivery of same to the recipients listed and at their AIS provided email addresses below and via the attached E-mail:

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*s/Chad Johnston*

Chad N. Johnston

Columbia, South Carolina  
February 22, 2021

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**Subject:** Robert F. Berry v. Scott A. Spang, et al.; Case Number 2017-001690  
**Date:** Monday, February 22, 2021 5:43:00 PM  
**Attachments:** [Case No. 2017-001690 - 2021-02-22 Johnston Ltr to Kitchings \(Filing Ltr - Return to Pet for Rehearing\).pdf](#)  
[Case No. 2017-001690 - 2021-02-22 Berry Return to Petition for Rehearing \(To File\).pdf](#)

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Counsel,

As permitted by part (g)(3) of Supreme Court Order 2020-05-29-02, I am herewith serving via E-mail Respondent Robert F. Berry's Return to Appellants' Petition for Rehearing in the above-captioned appeal. Shortly, I will be filing these documents with the Court of Appeals electronically as permitted by part (c)(5) of the Order, and will attach this E-mail to the certificate of service of same.

Best regards,  
Chad



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**SC Court of Appeals**

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\*\*ALSO ADMITTED IN WASHINGTON, D.C.

\*\*\*ALSO ADMITTED IN CALIFORNIA

\*\*\*\*ALSO ADMITTED IN NORTH CAROLINA

February 22, 2021

## VIA ELECTRONIC FILING

The Honorable Jenny Abbott Kitchings  
Clerk of Court, Court of Appeals  
1220 Senate Street  
Columbia, South Carolina 29201

RECEIVED

Feb 22 2021

SC Court of Appeals

RE: *Robert F. Berry, Respondent v. Scott A. Spang, Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, Wachovia Securities Financial Holdings, LLC, Wells Fargo & Company, and Wells Fargo Bank, N.A., Appellants.*  
C/A No. 2017-CP-32-00397  
Appellate Case No. 2017-001690

Dear Ms. Kitchings:

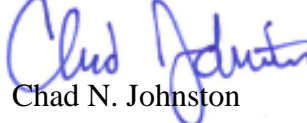
In accordance with the extension of time provided by this Court's February 12, 2021 Order, the procedures governing electronic filing under Supreme Court Order 2020-05-29-02, parts (c)(5), (d), and (g)(3), and pursuant to Rules 221 and 240, of the South Carolina Appellate Court Rules, Respondent Robert F. Berry respectfully submits his **Return to the Petition for Rehearing** of the Appellants, which Return was requested by letter of the Court dated February 2, 2021. As permitted by part (d) of Order 2020-05-29-02, no additional copies of this motion are submitted.

By copy of this letter, we are serving counsel for Respondents electronically and enclose a proof of service to that effect, with transmittal email, as provided for under Order 2020-05-29-02, part (g)(3).

If you have any questions or if you need any additional information, please do not hesitate to contact me. With best regards, I am,

Respectfully,

WILLOUGHBY & HOEFER, P.A.

  
Chad N. Johnston

cc: Sarah P. Spruill, Esquire (via Electronic Mail)  
Frederick T. Smith, Esquire (via Electronic Mail)

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The Honorable Jenny A. Kitchings

February 22, 2021

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Adam N. Yount, Esquire (via Electronic Mail)

Pierce T. MacLennan, Esquire (via Electronic Mail)