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.

REPLY BRIEF

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The rules of the Financial Industry Regulatory Authority ("FINRA"), as approved and adopted by the Securities and Exchange Commission ("SEC"), require Robert F. Berry to arbitrate all of the claims alleged in his Amended Complaint against 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"). Berry agreed to arbitrate any dispute he had with any National Association of Securities Dealers ("NASD")/FINRA-registered member or representative when he repeatedly registered as an investment advisor via the Uniform Application for Securities Industry Registration or Transfer ("Form U4"). Berry's own Amended Complaint admits he was a registered representative while employed by Wells Fargo Advisors and its predecessors and admits he remains a registered representative through his current employer. Through both his Forms U4 and his admitted registration with FINRA, Berry has agreed to arbitrate this dispute. The trial court willfully ignored these admissions and this evidence, and then refused to consider the additional information provided in response to Berry's arguments. This was in error and should be reversed.

Berry spends most of his brief arguing technical matters and does not even attempt to reach the merits until section V. Importantly, Berry does not deny there is an agreement to arbitrate that covers this matter. He cannot deny that fact because he has been subject to the NASD/ FINRA rules and their arbitration requirements for his entire securities career and remains subject to those rules today. (R. at 57-67 ¶¶ 27, 28, 31, 45-47, 59).[1]

[1] Berry has not retreated from the allegations in his Amended Complaint, and instead he has incorporated them into his brief before this Court. (Respondent's Brief at Statement of the Facts n. 2). This includes the recitations about his work history and registrations.

I. THE WELLS FARGO ENTITIES PRESENTED THE TRIAL COURT WITH MULTIPLE FORMS U4 REQUIRING BERRY TO ARBITRATE HIS CLAIMS.

This appeal stems from the denial of a motion to compel arbitration, and the general policies favoring arbitration must guide this Court's decision here. "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)). So ingrained was the "judiciary's longstanding refusal to enforce agreements to arbitrate" that Congress had to "overrule" that refusal via the Federal Arbitration Act. *See Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (quotation omitted). To that end, "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (citations omitted) (rejecting argument that arbitration agreement was unenforceable for unavailability of designated forum and compelling arbitration).

The trial court's refusal to consider on authentication grounds the submitted Forms U4 which established Berry's decades-long obligation to arbitrate his claims against his employer runs counter to strong public policy. *See Towles*, 338 S.C. at 37, 524 S.E.2d at 844. The trial court's refusal also served no evidentiary end because 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* Rule 901(a), SCRE ("The 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."). (*See also, e.g.*, R. at 67 ¶ 59). Berry's analogy in section V of his brief citing *Connelly v. Wometco Enters., Inc.*, 314 S.C. 188, 191, 442 S.E. 2d 204, 206 (Ct. App.

1994) and comparing his Forms U4 to an internal employment file containing warnings regarding work performance misses the mark. Unlike the internal employment files at issue in *Connelly*, Forms U4 are standard, industry-wide forms; their use is mandated by the SEC-approved rules that govern all registered member firms and their associated persons; and they are held in the central repository of an organization tasked by Congress with ensuring prompt public access to those records. (*See infra* at § III.C). The authenticity and reliability of the documents is beyond question.

The trial court's rejection of Berry's agreements to arbitrate on the alleged failure of the choice of forum was in error. According to FINRA and the SEC, FINRA is the successor to NASD. (*See* Appellants' Brief at § II & n.9). Courts around the country have consistently recognized this truth. *See Gebhart v. S.E.C.*, 595 F.3d 1034, 1036 n.1 (9th Cir. 2010) ("The NASD is now the Financial Industry Regulatory Authority (FINRA)."); *In re H&R Block Fin. Advisors, Inc.*, 262 S.W.3d 896, 900 (Tex. App. 2008) (rejecting argument that arbitration agreement unenforceable because of unavailability of NASD forum because "[a]lthough the NASD has changed its name, FINRA continues to apply the NASD arbitration rules and procedures"); *Suschil v. Ameriprise Fin. Servs., Inc.*, No. 1:07CV2655, 2008 WL 974045, at *1, *6 (N.D. Ohio Apr. 7, 2008) (compelling arbitration under FINRA even though the agreement mentions only NASD arbitration).

The Wells Fargo Entities acknowledge there is a South Carolina Circuit Court order affirmed by this Court in an unpublished opinion that reached the opposite conclusion. *Keller v. ING Fin. Partners, Inc.*, Op. No. 2011-CP-23-0336, 2011 WL 10005145 (S.C. Cir. Ct. May 26, 2011), aff'd App. Case. No. 2011-193026, 2013 WL 8482243 (S.C. Jan. 9, 2013). The Wells Fargo Entities respectfully disagree for the reasons discussed in their brief. (*See* Appellants' Brief

at § II n.9). Additionally, applying *Keller* here to foreclose arbitration disregards South Carolina's strong public policy favoring arbitration. *See Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). "'[U]nless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute[,]' arbitration must generally be ordered." *Landers v. F.D.I.C.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (quoting *Am. Recovery Corp. v. Computerized Thermal Imaging, Inc.*, 9 F.3d 88, 92 (4th Cir. 1996)). That cannot be said here.

Berry argues in section III of his brief that the path between the 1999 Form U4 and the 2014 Form U4 submitted to the trial court is a "circuitous path and reasoning" which fails to establish an agreement to arbitrate in a FINRA forum exists between the Wells Fargo Entities and Berry. (Respondent's Brief at § III). The path, however, is short and simple. Berry's 2014 Form U4 was filed with FINRA.[2] (*See* R. at 251-64 (referencing FINRA *passim*)). Berry's employment date is October 1, 1999 (*see* R. at 251), the same date as his employment date with Everen Securities, Inc. (*see* R. at 241), thus demonstrating that—consistent with the allegations of the Amended Complaint[3]—Everen Securities was the predecessor firm of Wells Fargo

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[2] These Forms U4 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 236-64). *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).

[3] Berry argues the Wells Fargo Entities have not shown they have standing to enforce the arbitration agreement in Berry's 1994 Wheat First Form U4 in part because, Berry suggests, the Wells Fargo Entities have not proven one of them is the successor to Wheat First. (Respondent's Brief at § III & n.12). The Amended Complaint, however, 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). Berry's response, that the Wells Fargo Entities' reliance

Advisors.[4] Berry objects that the 2014 Form U4 is not signed, but no handwritten signature can be applied to the electronically submitted document and, as the Form U4 itself (*see* R. at 262) and FINRA Rule 1010(b)(2) explain, Berry was not required to sign the 2014 amendment because the registered principal or corporate officer appointed to registration functions electronically signed "on behalf of the member."[5] (*See* R. at 266).

Not only does Berry's Form U4 contain an express agreement to arbitrate (*see* R. at 247), the very act of registering obligated him to comply with all FINRA rules and regulations as a condition of his continued employment in the securities industry, including FINRA Rule 13200. (*See infra* at § III.C).

II. DOCUMENTS SUBMITTED IN SUPPORT OF THE WELLS FARGO ENTITIES' MOTION FOR RECONSIDERATION ARE PROPERLY BEFORE THIS COURT.

The South Carolina Rules of Civil Procedure allow an aggrieved party to make a motion for reconsideration under Rule 59(e), the purpose of which is to request the trial court to reconsider matters properly encompassed in a decision on the merits. *Elam v. S.C. DOT*, 361 S.C. 9, 21, 602 S.E.2d 772, 778-79 (2004); *Pye v. Estate of Fox*, 369 S.C. 555, 565-66, 633

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on the allegations of the Amended Complaint is "patently insufficient to overcome the trial court's contrary holding" (*see* Respondent's Brief at § III n.12) is not responsive to the argument and contrary to well-established black letter law that holds the allegations of a complaint are accepted as true for purposes of a motion to dismiss. *See Overcash v. South Carolina Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005). The error of the trial court's findings on this point was appealed by the Wells Fargo Entities in section III.B of their brief.

[4] Though the merger of the NASD and the enforcement and arbitration operations of the New York Stock Exchange to create successor FINRA did not occur until 2007, Berry's 1999 Form U4 is held by FINRA. (*See* R. at 251-64 (identifying source of document as https://crd.firms.finra.org)).

[5] The Wells Fargo Entities also made this point in their Motion for Reconsideration, when they explained they had submitted to the court the Forms U4 they could locate that were manually signed by Berry. (*See* R. at 210). Amendments to those forms, such as the 1999 and 2014 Forms U4 submitted in support of the Motion for Reconsideration do not require manual signatures. (*See* R. at 262, 266-86).

S.E.2d 505, 510 (2006). Here, the trial court ruled before the Wells Fargo Entities had a chance to respond to the memorandum submitted by Berry at the hearing, and the Wells Fargo Entities moved for reconsideration based on recently identified Forms U4 procured in response to Berry's memorandum or on the basis of FINRA Rule 13200. The motion did not "present to the court an issue [they] could have raised prior to judgment but did not," as argued by Berry in section II of his brief (quoting *Hickman v. Hickman*, 301 S.C. 455, 456, 392 S.E.2d 481, 482 (Ct. App. 1990)).[6] The issue presented was exactly the same as was raised in briefing and the hearing on the Motion to Dismiss: was Berry obligated to arbitrate his claims?

The Motion for Reconsideration was not an impermissible "second bite at the apple," and the cases cited by Berry do not support such a conclusion. *Parker v. S.C. Public Service Commission*, the very case that sparked the trial court's rejection of the Wells Fargo Entities' supposed attempt at a "second bite at the apple" was overruled the day after the trial court issued its Order on the Motion for Reconsideration. (R. at 7 n. 2 (citing *Parker*, 288 S.C. 304, 307, 342 S.E.2d 403, 405 (1986)). In *Daufuskie Island Utility Co., Inc. v. South Carolina Office of Regulatory Staff*, the South Carolina Supreme Court held that remand to the Public Service Commission for a new hearing necessarily grants the parties the opportunity to present additional evidence, expressly overturning *Parker*. 420 S.C 305, 316 n.8, 803 S.E.2d 280, 286 n.8 (2017). In *City of Myrtle Beach v. Tourism Expenditure Review Committee*, the "call for a remand for a new hearing and presentation of additional evidence on an alternate theory" touted by Berry as "rejected," was a "call" made by the dissent—not a party—and was "rejected" by the majority.

[6] *Hickman* is factually distinguishable from this case. In *Hickman*, this Court affirmed a family court's denial of a wife's supplemental motion to alter or amend the judgment that argued the husband's civil service fund should be apportioned. *Hickman*, 301 S.C. at 456, 392 S.E.2d at 482. The fund had never before been raised to the court. *Id.* In contrast, the Wells Fargo Entities' Motion for Reconsideration raised exactly the same issues as were raised in the briefing and at the hearing on the Motion to Dismiss.

407 S.C. 298, 303 n.5, 755 S.E.2d 425, 427 n.5 (2014). *Porter v. South Carolina Public Service Commission*, like *City of Myrtle Beach*, was an appeal of an administrative decision. 333 S.C. 12, 32, 507 S.E. 2d 328, 338 (1998). The cited portion of the decision concluded that the agency may not consider additional evidence on remand, a holding that is likely no longer good law given the *Daufuskie* decision. *Compare id. with Daufuskie*, 420 S.C at 316 n.8, 803 S.E.2d at 286 n.8.

The trial court's refusal to consider the Wells Fargo Entities' Motion for Reconsideration is particularly troublesome here, where the Wells Fargo Entities were handed Berry's Opposition to the Motion to Dismiss moments before the hearing began (R. at 325:19-24), and the Order issued before the Wells Fargo Entities had an opportunity to submit supplemental documentation in support of the Motion to Dismiss.[7] (*See* R. at 210 n. 2). *See 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."). Under these circumstances, the trial court abused its discretion in refusing to even consider the recently identified Forms U4 and further articulation of the arguments the Wells Fargo Entities made at hearing, moments after receiving Berry's opposition memorandum.

As the South Carolina Supreme Court has recognized, "[t]here is nothing inherently unfair in allowing a party one final chance not only to call the court's attention to a possible misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity." *Id.*, 361 S.C. at 22, 602 S.E.2d at 779. The

[7] Berry's description of the contents of the Zuhr Affidavit significantly mischaracterizes its contents. (*See* Respondent's Brief at § II). As Berry tells it, the Zuhr Affidavit "states" the newly-discovered evidence was "available to him at any time" and "always available" to Zuhr "at all times." (*See id.*). The affidavit makes no such statements. (*See* R. at 237-39).

trial court abused its discretion in refusing to revisit the Wells Fargo Entities' arguments in the Motion for Reconsideration.

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

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 Berry." (R. at 10 n. 7). The trial court erred in both respects. The trial court should have taken notice of FINRA's rules, the Forms U4, and the BrokerCheck reports as facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201(b), SCRE. The allegations of Berry's own Amended Complaint further demonstrate that FINRA rules apply to Berry and provide a sufficient basis to require arbitration. *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) (FINRA Rule 13200 provides "independent basis for arbitration").

A. THE APPLICABILITY OF THE FINRA RULES TO BERRY WAS PRESERVED FOR REVIEW.

Berry is simply incorrect in his repeated assertions that the Wells Fargo Entities' arguments applying the FINRA rules Berry agreed to be bound by—and continues to be bound by to this day—were not presented to the trial court.[8]

At the hearing in this matter, the Wells Fargo Entities provided the trial court with a copy of FINRA Rule 13200[9] and noted the arbitration process is set forth in the FINRA Code. (R. at

[8] Section I of Berry's brief contains much discussion of what may or may not be included in the Record on Appeal. Berry, however, did not object to the Wells Fargo Entities' designation of matter to be included in the Record and there is no matter designated that was not presented to the trial court. The issues raised on appeal are all reflected in those materials. Therefore, this appeal does not present any materials that are inconsistent with Rules 208 and 210, SCACR.

329:18-30:3, 331:15-20). Just as they argue before this Court, the Wells Fargo Entities argued to the trial court that "in order to have the privilege of working in the securities industry a broker must sign a U4, he must be licensed and registered through FINRA and he must abide by FINRA's rules." (R. at 330:6-10; *see* R. at 328:6-17 (describing registration status of Berry and the Wells Fargo Entities)). Just as they argue before this Court, the Wells Fargo Entities directly connected registration to the FINRA rules requiring arbitration of disputes between associated persons and broker dealers or other associated persons: "If you want to sell securities and be a broker in this country, you must be registered with FINRA and as a condition of having the privilege of being in this industry to earn a living you must also abide by FINRA's rules and FINRA rules say disputes of this nature. . . must be arbitrated under the auspices of FINRA and pursuant to its rules." (R. at 343:21-44:8; *see* R. at 329:4-30:16 (describing Form U4, applicability of FINRA Rule 13200, FINRA status as Congressionally- and SEC-sanctioned entity designated to regulate broker dealers)). These arguments are not an "alternate ground" being presented on appeal; they were front and center during the Wells Fargo Entities' arguments to the trial court. (*See* Respondent's Brief at § I (citing *McLeod v. Starnes*, 396 S.C. 647, 723 S.E.2d 198 (2012)).[10]

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[9] FINRA Rule 13200 provides, "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).

[10] *McLeod* concerned an equal protection challenge in the context of a child support dispute. The "alternate ground" defendant attempted to argue on appeal was an entirely different definition of the suspect class, a core component of equal protection analysis and brand new argument before the Supreme Court of South Carolina. *See* 369 S.C. at 657, 723 S.E.2d at 204. *Stevens & Wilkinson of S.C., Inc. v. City of Columbia*, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) is similarly inapplicable to this case because it concerned a dramatic shift in question presented, from whether a contract *existed* to whether defendant *satisfied* its obligations under the contract. In contrast, the Wells Fargo Entities' FINRA rules-related arguments were raised before the trial court.

The Wells Fargo Entities' Motion for Reconsideration similarly argued that Berry was obligated to arbitrate this dispute under FINRA Rule 13200 and even cited the very same BrokerCheck report on Berry[11] and CRD number for Wells Fargo Clearing Services, LLC[12] as were cited in their brief, as well as the BrokerCheck report for Mr. Spang.[13] (*Compare* R. at 212-13 *with* Appellants' Brief at § III.B).

The cases cited by Berry do not support his argument that the FINRA rules-related arguments were not preserved. In *South Carolina Highway Department v. Meredith*, the Supreme Court of South Carolina reversed the trial court's refusal to supplement or revise the record. 241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962). It found the trial court's belief that it "had no authority to supplement or revise the record" under then-existing Section 7-406 of the South Carolina Code (committing to the trial court the duty of settling disputes between the parties as to what materials should be included in the record on appeal) was error and that the court should have incorporated omitted portions of the transcript at issue into the record. *Id.* at 314, 128 S.E.2d at 183. The remaining cases, *Reed v. Becka*, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999) and *State v. White*, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007), concerned criminal matters. Contrary to Berry's parenthetical description in section I of his brief, the Court concluded *in Reed* that the victim's mother's affidavit and various attachments *had* been presented to the trial court and thus *were* properly before the appellate court. 333 S.C. at 681, 511 S.E.2d at 399. In *White*, the Court of Appeals, not surprisingly, refused to consider a

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[11] *See* FINRA BrokerCheck, Robert Franklin Berry (CRD# 1262947), available at https://brokercheck.finra.org/individual/summary/1262947.

[12] *See* FINRA BrokerCheck, Wells Fargo Advisors, LLC (CRD# 19616), available at https://brokercheck.finra.org/firm/summary/19616.

[13] *See* FINRA BrokerCheck, Scott A. Spang (CRD# 2432221), available at https://brokercheck.finra.org/individual/summary/2432221.

written statement retracting trial testimony that was not issued until the case was on appeal. 372 S.C. at 387, 642 S.E.2d at 617-18. In contrast, here, the applicability of FINRA rules to Berry was raised and presented to the trial court, and therefore, this issue is preserved for this Court's review.

B. THE TRIAL COURT SHOULD HAVE—AND THIS COURT MAY—TAKE JUDICIAL NOTICE OF THE FINRA RULES, CODE, AND RELATED DOCUMENTS BECAUSE THE RULES ARE INDISPUTABLE.

Berry's argument that taking judicial notice of documents now, on appeal, that the trial court expressly "excluded . . . without consideration" would permit the Wells Fargo Entities to try a new case ignores that the Wells Fargo Entities have assigned error to that very decision by the trial court. (Respondent's Brief at §§ I.b, I.c). The trial court should have, and this Court may, take judicial notice of the FINRA Rules, FINRA Code, and related documents.

South Carolina courts will take judicial notice of facts "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, 309-10, 313 S.E.2d 287, 288 (1984). Moreover, as Berry concedes, appellate courts have also employed judicial notice for matters that are "indisputable."[14] (*See* Respondent's Brief at § I.b (quoting *Masters v. Rodgers Dev. Grp.*, 283 S.C. 251, 256, 321 S.E. 2d 194, 197 (Ct. App. 1984)).

South Carolina appellate courts have taken judicial notice of rules and guidelines where those sources are indisputable. In *Miller v. Miller*, the Supreme Court of South Carolina took judicial notice of the South Carolina Child Support Guidelines even though the guidelines "are not properly promulgated" because "their wide circulation to the bench, bar and public. . . permits the family courts to take judicial notice of them." 299 S.C. 307, 314, 384 S.C. 715, 718

[14] A court may take judicial notice of facts not subject to reasonable dispute "at any stage of the proceeding." Rule 201(f), SCRE.

(1989) (citing, *inter alia, Masters v. Rodgers Dev. Grp.*, 283 S.C. 251, 321 S.E. 2d 194 (Ct. App. 1984)); *see Jones v. Anderson Cotton Mills*, 205 S.C. 247, 254, 31 S.E.2d 447, 449 (1944) (reversing trial court decision to delete rule of Industrial Commission from record and holding the rule was "properly before the Court independently of the brief" because the "Commission has the power to make rules which are not inconsistent with" its enabling Act). In *Palmetto Homes, Inc. v. Bradley*, this Court took judicial notice of the American Arbitration Association ("AAA") rules even though the rules were not within the record on appeal. 357 S.C. 485, 491 n.3, 593 S.E.2d 480, 483 n.3 (Ct. App. 2004) (applying AAA rules to facts of case to determine plaintiffs received sufficient service of process).[15]

The FINRA rules, Forms U4, and facts publicly available through FINRA's statutorily-mandated BrokerCheck website are capable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned.[16]

All rules and regulations promulgated by FINRA, including its Codes of Arbitration (including Rule 13200), are reviewed, and, after notice and comment, approved by the SEC. *See* 15 U.S.C. § 78s(b). FINRA is required by statute to collect registration information and to establish and maintain a "readily accessible electronic or other process" to "promptly" provide the public with registration information on its members and their associated representatives. 15

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[15] Appellate courts around the country have taken judicial notice of FINRA rules and related documents. *See, e.g., Royal Alliance Assoc., Inc. v. Liebhaber*, 2 Cal. App. 5th 1092, 1096-97 (2d Dist. 2016) (taking judicial notice of "several FINRA rules and related materials" because both brokerage firm and employee "agreed to be bound by FINRA's rules, including those pertinent to dispute resolution").

[16] Berry attempts to make much of an excerpt of the terms of use of the BrokerCheck website, but actual review of the excerpted statement undermines his argument. (*See* Respondent's Brief at § III). FINRA disclaims liability for "errors or omission in any content" because the content is not FINRA-authored; rather, it is provided by member firms. The remaining disclaimers (concerning technical difficulties, malware, and the catch-all "loss or damage of any kind") are plainly inapplicable to the circumstances here.

U.S.C. § 78o-3(i)(1)(B). FINRA's collection obligations are fulfilled in part through the use of Forms U4 and U5 and its obligation to maintain these records in an accessible manner is met in large part through FINRA's BrokerCheck website, https://brokercheck.finra.org.[17] This regulatory overlay provides an appropriate evidentiary basis to consider those documents. (*See* Appellants' Brief at § III.A (collecting cases)).

These are not exotic and questionable documents (*see* Respondent's Brief at §§ I.c, III); they are a core part of the regulatory framework that governs an industry that manages tens of trillions of dollars of assets held by U.S. financial firms. These indisputable facts should have been judicially noticed by the trial court, and may also be noticed by this Court.[18]

C. THE AMENDED COMPLAINT ESTABLISHES THE APPLICABILITY OF FINRA RULES TO BERRY.

The Wells Fargo Entities do not argue FINRA rules are binding on the Court, contrary to Respondent's attempt to twist single line excerpts from Appellants' Return to the Motion to Strike to the contrary. (Respondent's Brief at § I.c). What Appellants do argue, and have argued consistently, is that FINRA rules are binding on Berry. *See Kidder, Peabody & Co., Inc. v. Zinsmeyer Trusts P'ship*, 41 F.3d 861, 863 (2d Cir. 1994) ("[T]he rules of a securities exchange are contractual in nature.") (citation omitted). Any individual engaged in the investment banking

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[17] Though Berry now disputes that FINRA's BrokerCheck is a public record (*see* Respondent's Brief at § III), the ready availability of Berry's BrokerCheck report is actually alleged in his Amended Complaint. (*See* R. at 75 ¶ 91 (alleging Berry's "official record," *i.e.*, his BrokerCheck Report, "is publicly available" and that the allegedly defamatory statements "also appear[] on Berry's BrokerCheck Report which is posted on the web site of [FINRA] and is available to the public")). This allegation alone is sufficient to warrant inspection of the BrokerCheck report. *See Am. Chiropractic Ass'n, Inc. 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).

[18] Berry notes that "no published South Carolina opinion has ever recognized FINRA or its rules." (Respondent's Brief at § I.c n.9). The converse is also true: no published South Carolina opinion has ever refused to recognize FINRA or its rules. That no South Carolina court has done it before is hardly a convincing argument for why this Court should not do it now.

or securities business of a member firm must be registered as a representative with FINRA.[19] *See* 15 U.S.C. § 78o(a)(1); FINRA Manual, Rule 1031(a). 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.[20] The logical deduction is obvious.

Berry's argument that there is no evidence of the applicability of FINRA Rule 13200 to him (*see* Respondent's Brief at §§ I, I.a, I.b n.8, I.c) asks this Court to ignore the overwhelming evidence to the contrary alleged in his own Amended Complaint.[21] *See Overcash*, 364 S.C. at 572, 614 S.E.2d at 620 (allegations of the complaint are accepted as true for purposes of a motion to dismiss). The Amended Complaint recounts Berry's long career in the securities industry from 1984 to the present (R. at 57-64 ¶¶ 27, 28, 31, 45-47). The 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" and that Berry is registered

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[19] As the Wells Fargo Entities pointed out to the trial court, if Berry maintains he is not bound by FINRA rules, "there's a serious question as to Mr. Berry's authority and registration status over the past couple of decades to do what he's done." (R. at 342:12-15). Berry's contention that "FINRA rules and citations" are not "legally binding" on him (Respondent's Brief at § I.c) may be delicate phrasing intended to sidestep the binding nature of FINRA rules on registered representatives, but the reality is that just as he admits in the Amended Complaint, Berry must be registered with FINRA to sell securities in the United States. *See* 15 U.S.C. § 78o(a)(1) (stating it shall be unlawful for a person to "effect any transaction in, or induce or attempt to induce the purchase or sale of, any security" unless such person is registered as a broker or dealer); *see also* FINRA Manual, Rule 1031(a).

[20] Berry offers no response to the Wells Fargo Entities' long line of cases that establish that the enforceability of FINRA's rules mandating arbitration of disputes is so inescapable that courts have held the rule itself is an enforceable, written agreement to arbitrate and compelled arbitration on those grounds. (*See* Respondent's Brief at § III (arguing Appellants have not shown an agreement to arbitrate) & n.11).

[21] The argument also ignores, on the basis of procedural technicalities, that the Wells Fargo Entities provided the trial court with a long line of Berry's Forms U4 (*see* R. at 109-20, 241-49, 251-64), which required him to "agree to comply with all provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rule and regulations of [FINRA] as they are or may be adopted, or amended from time to time." (*See, e.g.*, R. at 247).

with his current firm, LPL Financial Corporation "[a]fter his departure from WFA." (R. at 67 ¶ 59). This admitted current registration with a FINRA member firm is sufficient to subject Berry to mandatory arbitration under FINRA Rule 13200. *See* FINRA Manual, FINRA Rule 13200 (mandating arbitration of disputes between an associated person and *any* member); *see also* FINRA BrokerCheck, Robert Franklin Berry (CRD# 1262947), available at https://brokercheck.finra.org/individual/summary/1262947.

Berry described himself as a "registered representative," and a "broker[] and advisor[]" for Wells Fargo, who "has worked *continuously* in 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 57-64 ¶¶ 27 (emphasis added), 31, 45-47; *see* R at 337:12-13 (Berry's counsel: "He was an employee of Wells Fargo Advisors, LLC.")). Berry's Amended Complaint even incorporates by reference his Form U5, which would only have been filed with respect to a former employee who had registered with FINRA via a Form U4 in the first place. (*See, e.g.*, R at 68-77 ¶¶ 60, 91, 93-95; *see also* R. at 339:18-20 (Berry's counsel arguing Berry was "defamed" in a Form U5 filing)).

The applicability of the FINRA rules, including FINRA Rule 13200, to Berry is not a "mere assumption[]." (*See* R. at 16). Berry's own allegations, claims, and other representations demonstrate the applicability of the FINRA rules to him, and to this dispute.[22] Berry's admitted

[22] Berry's argument that the Wells Fargo Entities have not tried to convince the appellate court the trial court erred with respect to the application of FINRA Rule 13200 to Berry is nonsensical. (*See* Respondent's Brief at § I.a). The Wells Fargo Entities' second stated issue on appeal specifically raised the error and one entire section of their brief was devoted to that specific error. (*See* Appellants' Brief at Statement of Issues, § III).

status as a registered representative and the obligation imposed on all registered representatives through FINRA Rule 13200 is an agreement to arbitrate.[23] (*See* Respondent's Brief at § III).

D. WELLS FARGO & COMPANY'S REGISTRATION STATUS IS NOT DISPOSITIVE OF THE ARBITRABILITY OF BERRY'S CLAIMS.

Berry's argument that he has managed to circumvent his FINRA arbitration obligations by alleging claims against unregistered Wells Fargo & Company (a corporate holding company which had nothing to do with Berry's employment) and Wells Fargo Bank, N.A. is incorrect for a number of reasons. (*See* Respondent's Brief at §§ I.a n.5, III).

Berry is incorrect that the claims against any non-registered defendant could not be arbitrated in a FINRA forum.[24] Courts across the country have ordered arbitration of claims by or against non-signatories pursuant to arbitration agreements where the claims are inextricably intertwined with the claims by or against signatories. *See Brown v. Pacific Life Ins. Co.*, 462 F.3d 384, 398-99 (5th Cir. 2006) (affirming trial court order compelling arbitration of claims against signatories and non-signatories to arbitration agreement based on relatedness of claims); *Myrick v. GTE Main Street Inc.*, 73 F. Supp. 2d 94, 96-97 (D. Mass. 1999) (granting motion to compel arbitration of claims against non-signatory where claims against non-signatory were

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[23] For the sake of completeness, the Wells Fargo Entities note that they have also met their burden to show the claims asserted by Berry fall within the "range of issues" that can be arbitrated under the agreement. (*See* Respondent's Brief at § III). 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, 261-62, 743 S.E.2d 868, 874-75 (Ct. App. 2013) (compelling arbitration of plaintiffs tort claims as well as contract claims under broad, "all disputes" clause). All of Berry's allegations concern his employment, his termination, and events immediately after (and related to) his termination. Arbitration of these claims under the broad language of the Form U4 and FINRA Rule 13200 is within the expectation of the parties. (*See* Appellants' Brief at § IV).

[24] Berry argues in section III of his Brief that the trial court rejected the Wells Fargo Entities' argument that Berry was required to arbitrate his claims pursuant to FINRA rules because the Wells Fargo Entities "failed in meeting their threshold burden of demonstrating they had standing to require the application of any FINRA rule to" Berry. That is not what the cited passage holds, and in any event, as explained above, the argument is incorrect.

"inextricably intertwined" with claims against signatories); *Parrott v. Pasadena Capital Corp.*, No. 96 CIV. 6243 (JFK), 1998 WL 91076, at *4-5 (S.D.N.Y. Mar. 3, 1998) (allowing motion to compel arbitration where NASD member defendant and non-member defendants were "closely affiliated," claims were "inextricably intertwined," and claims against non-member defendants "so overlap with the claims against the [member defendant] as to make [the non-member defendants] sufficiently immersed in the underlying controversy").

Even if Berry's claims against any non-registered defendant could not be arbitrated, that determination would have no effect on the arbitrability of claims involving the remaining FINRA member parties. If any dispute remained at the conclusion of arbitration (doubtful since any remaining party would never have employed Berry), those claims could proceed to trial.

IV. THE WELLS FARGO ENTITIES HAVE APPEALED FROM ALL OF THE BASES OF THE TRIAL COURT'S RULING; THEREFORE, THE TWO-ISSUE RULE DOES NOT APPLY.

As an initial matter, the two-issue rule has generally been applied in the context of trials. *Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 420, 472 S.E.2d 253, 255 (1996). As set forth there,

> Under the 'two issue' rule, when the jury returns a general verdict involving two or more issues and its verdict is supported as to at least one issue, the verdict will not be reversed on appeal. The "two issue" rule may be applied by appellate courts in a few situations. In one situation, when a jury's general verdict is supportable by more than one cause of action submitted to it, the appellate court will affirm unless the appellant appeals all causes of action. Under a second application of the "two issue" rule, the appellate court will find it unnecessary to address all the grounds appealed where one requires affirmance.
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> These two applications of the "two issue" rule are illustrated in the following example: A case is submitted to the jury on the issues of defamation and invasion of privacy. The jury returns a general verdict for the plaintiff. The defendant appeals, arguing that the trial court erred by failing to direct a verdict on the defamation issue. Under one application of the "two issue" rule, an appellate court would affirm because defendant has failed to appeal the invasion of privacy issue as well. Assuming, however, that the defendant has appealed both issues, the appellate court would affirm on the basis of a second application of the "two issue" rule, if either of the two issues supported affirmance.

(citations and quotations omitted). Berry includes reference to footnote 1 of *Anderson* in section IV of his brief; however, his edits misrepresent the language of the footnote, which is as follows:

> It should be noted that although cases generally have discussed the "two issue" rule in the context of the appellate treatment of general jury verdicts, the rule is applicable under other circumstances on appeal, including affirmance of orders of trial courts. For example, if a court directs a verdict for a defendant on the basis of the defenses of statute of limitations and contributory negligence, the order would be affirmed under the "two issue" rule if the plaintiff failed to appeal both grounds or if one of the grounds required affirmance.

Given this explanation of the two-issue rule, the rule is at odds with the general policy and standard of review favoring arbitration and should not be applied in the context of this appeal from a motion to compel arbitration. As set forth again and again under South Carolina and federal law, arbitration should be compelled if there is any basis for doing so. *See, e.g., United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83, 80 S. Ct. 1347, 1353 (1960) (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]."); *Landers v. F.D.I.C.*, 402 S.C. at 108-9, 739 S.E.2d at 213 ("as a matter of policy, arbitration agreements are liberally construed in favor of arbitrability") (citing *Am. Recovery Corp.*, 9 F.3d at 94). This is a very different scenario from the reversal of a jury trial resting on multiple causes of action.

Moreover, as set forth above, the Wells Fargo Entities have appealed all bases of the trial court's order, including the history on the Forms U4, the Wells Fargo Entities' standing to compel arbitration, and the relationship between the NASD and FINRA. Thus, the two-issue rule does not bar the Wells Fargo Entities' appeal.

CONCLUSION

Berry is and has been registered with FINRA and its predecessor, NASD, for decades; he admits as much in his Amended Complaint. He has attempted here to divert the Court's attention

away from that fact in hopes of avoiding the arbitration agreement that is implicit in that registration. This Court should not take the bait. For these reasons and those presented in their Appellants' Brief, the Wells Fargo Entities respectfully request that 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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Date: May 2, 2018