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SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2017-CP-32-00397
Appellate Case No. 2017-001690

Robert F. Berry……Respondent

vs.

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

PETITION FOR A WRIT OF CERTIORARI

HAYNSWORTH SINKLER BOYD, P.A.

Sarah P. Spruill (SC Bar No. 68337)
One North Main Street, Second Floor (29601)
P. O. Box 2048
Greenville, South Carolina 29602
Telephone: (864) 240-3200
Facsimile: (864) 240-3300
sspruill@hsblawfirm.com

Adam N. Yount (SC Bar No. 76342)
Pierce T. MacLennan (SC Bar No. 101797)
134 Meeting Street, Suite 300
Charleston, South Carolina 29401
Telephone: (843) 720-4484
Facsimile: (843) 722-2266
ayount@hsblawfirm.com

SEYFARTH SHAW LLP

Frederick T. Smith
North Carolina Bar No. 45229
121 West Trade Street, Suite 2020
Charlotte, North Carolina 28202
Telephone: (704) 925-6023
Facsimile: (704) 559-2425
fsmith@seyfarth.com

ATTORNEYS FOR PETITIONERS

Other Counsel of Record:

Mitchell Willoughby
Elizabeth Ann Zeck
Chad Nicholas Johnston
Willoughby & Hoefer, P.A.
P.O. Box 8416
Columbia, South Carolina 29202
Telephone: (803) 252-3300
mwilloughby@willoughbyhoefer.com
ezeck@willoughbyhoefer.com
cjohnston@willoughbyhoefer.com

Attorneys for Respondent

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CERTIFICATE OF COUNSEL

Counsel for 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. (the "Wells Fargo Entities") certifies that a petition for rehearing was made on January 28, 2021 and finally denied by the Court of Appeals on March 26, 2021.

QUESTIONS PRESENTED

1. Did the Court of Appeals err in finding that, although Respondent's 2014 amended Form U4 established Respondent's continuous employment with a FINRA-registered firm as a FINRA-registered employee, Respondent did not agree to arbitrate his claims with the Wells Fargo Entities through mandatory FINRA arbitration?

2. Did the Court of Appeals err in finding Respondent had not agreed to arbitrate his claims against the Wells Fargo Entities where Respondent's own allegations, public records, and publicly-available FINRA rules establish an obligation by Respondent to arbitrate his claims against any FINRA-registered member as a condition of his admitted registration as a FINRA-regulated investment advisor?

3. Did the Court of Appeals err in finding the Wells Fargo Entities' arguments that the circuit court failed to take judicial notice of FINRA Rules, Form U4s, and statutorily-mandated BrokerCheck entries were unpreserved in the Motion for Reconsideration where the circuit court did not rule on the request in its Order on the Motion to Dismiss, and where the FINRA Rules, Forms U4, and BrokerCheck entries were incorporated into the Motion for Reconsideration?

INTRODUCTION

This Petition arises from a published opinion in the Court of Appeals. (App. at 1). It presents novel questions as to the binding nature of a Financial Industry Regulatory Authority ("FINRA") registered representative's obligations under rules mandating arbitration of disputes arising from the registered representative's employment with a FINRA member firm, as well as FINRA's position vis-à-vis the National Association of Securities Dealers ("NASD"). In addition, the Court of Appeals misanalysed the effect of an amendment to the registered representative's mandated registration form with FINRA. This error will give rise to confusion regarding the binding nature of a registered representative's obligations under mandatory regulatory filings and the FINRA rules in South Carolina. These issues meet the criteria of Rule 242, SCACR, and warrant a grant of discretionary review by this Court.

STATEMENT OF THE CASE AND FACTS

Robert F. Berry began working in the financial services industry in 1984. (App. at 194 ¶ 27). In 1994, he joined the brokerage firm Wheat First Butcher Singer, which began a period of nearly two decades which by Berry's own admission he "dedicated the bulk of his professional life to the brokerage firm which ultimately became the WFA Defendants." (App. at 195 ¶ 28, 199-200 ¶ 45 (also alleging Berry "devoted nearly 20 years to essentially one firm"). Wheat First Butcher Singer was acquired in 1997 by First Union Corporation and continued to do business as Wheat First Union. (App. at 195 ¶ 28 n.3). The parent company of Wheat First Union merged with Wachovia Corporation in 2001. (*Id.*). Wheat First Union's brokerage business continued on as Wachovia Securities. (*Id.*). After Wells Fargo acquired Wachovia in 2008, Berry became an employee of the brokerage firm Wells Fargo Advisors, where he continued on as a registered representative, and a broker and advisor. (*Id.*; App. at 196 ¶ 31, 199-200 ¶¶ 45-47).

Any individual engaged in the investment banking or securities business of a member firm must be registered with the self-regulatory organization of which their employer is a member (here, FINRA). *See* 17 C.F.R. § 240.15b7-1 (prohibiting associated persons from effecting or inducing a securities transactions unless such person is "registered and approved in accordance with the standards" of an SRO); FINRA Manual, Rule 1210, Registration Requirements, available at https://www.finra.org/rules-guidance/rulebooks/finra-rules/1210 (last visited April 21, 2017); App. at 204 ¶ 59 (alleging that "[f]inancial advisors are required to be registered with a firm to sell or buy securities or otherwise provide financial advice").

That mandatory registration is accomplished by a Uniform Application for Securities Industry Regulation or Transfer, which is commonly called a "Form U4."[1] (*See, e.g.,* App. at 246-257, 263-266, 378-386, 388-401). There is a single version of this form. In the Form U4, the applicant — every applicant — agrees:

> [T]o arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the SROs . . . as may be amended from time to time and that any arbitration award rendered against me may be entered as judgment in any court of competent jurisdiction.

(App. at 384).[2] No individual can be a registered representative without having submitted a Form U4, including agreeing to the above provision requiring arbitration.[3]

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[1] *See* Uniform Application for Securities Industry Registration or Transfer, Revised Form U4 (05/2009), available at https://www.finra.org/sites/default/files/form-u4.pdf (last visited April 21, 2021).

[2] Berry's 2014 Form U4 (ver. 05/2009) includes, under Item 15 "Signatures," an "INDIVIDUAL/APPLICANT'S ACKNOWLEDGMENT AND CONSENT," which incorporates by reference into Berry's 2014 Form U4 the same language agreeing to arbitrate his disputes with his firm, a customer, or any other person. *See* Form U4 (ver. 05/2009), https://www.finra.org/sites/default/files/form-u4.pdf (last visited April 21, 2021); App. at 399.

[3] *See, e.g.*, FINRA, Registration and Qualification, Individual Registration, available at http://www.finra.org/industry/individual-registration (last visited April 21, 2021) (discussing,

It is undisputed that Berry was a registered representative subject to the rules of the NASD and/or FINRA during this entire period. (App. at 194 ¶ 27, 195 ¶ 28 & n.3, App. at 196 ¶ 33, 199-200 ¶¶ 45-47, 204 ¶ 59).

Berry's long period of employment by the entity now known as Wells Fargo Advisors was terminated on or about February 3, 2014, after the branch office manager discovered several binders' worth of customer information in the trunk of Berry's vehicle. (App. at 202 ¶ 52, 205 ¶ 60). Upon his termination, Wells Fargo Advisors filed a Form U5 termination notice, as required by FINRA rules, stating the reasons for Berry's termination. (App. at 205 ¶ 60).

After his termination from Wells Fargo Advisors, Berry affiliated himself with LPL Financial Corporation ("LPL") (App. at 204 ¶ 59), where he remains registered as a representative of LPL (and thus necessarily continues to have an active Form U4 that requires arbitration between himself and any FINRA member).

Three years after Berry's termination by Wells Fargo Advisors, on February 2, 2017, Berry filed this action in the Lexington County Court of Common Pleas alleging causes of action for wrongful termination, breach of contract and the covenant of good faith and fair dealing, defamation, violation of the South Carolina Unfair Trade Practices Act, breach of contract accompanied by a fraudulent act, and intentional interference with prospective contractual relations. (App. at 159-186). An amended complaint filed on February 23, 2017 added four additional causes of action, including one for false imprisonment. (App. at 187-230). All nine claims arose from Berry's former employment by Wells Fargo Advisors, LLC (or its predecessors and successor),

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under links for "Register a New Broker Candidate" and "Update an Individual's Registration," Form U4 requirement for registered representatives).

Berry's termination, or events immediately following (and directly related to) Berry's termination. (App. at 206-228 ¶¶ 69-148).

On April 12, 2017, the Wells Fargo Entities filed their Motion to Dismiss on the grounds that there was an agreement to arbitrate between the parties and that arbitration was required under the rules of FINRA. (App. at 231, 233). The Wells Fargo Entities also filed a Motion for Protective Order and a Motion to Stay Discovery. These motions were heard on June 1, 2017, on which day Berry served his Memorandum in Opposition to Defendants' Motion to Dismiss or Stay Pending Arbitration. (App. at 269, 459). The Wells Fargo Entities did not have any knowledge of the contents of the Memorandum in Opposition until the hearing and thus had no opportunity to respond in writing. (*See* App. at 462 (Tr. 4:19-24)). At the hearing, the Wells Fargo Entities argued, among other things, that Berry was obligated to arbitrate his claims pursuant to FINRA rules, which clearly applied during his employment with Wells Fargo Advisors. (App. at 465-467 (Tr. at 7:6-17; 8:4-9:16)). On June 21, 2017, while the Wells Fargo Entities were collecting evidence in response to Berry's arguments (App. at 347 n.2), the circuit court denied all of the Wells Fargo Entities' motions. (App. at 140). In that Order, the circuit court found the materials submitted by the Wells Fargo Entities in support of their motion were improperly authenticated and thus inadmissible. (*Id.* at 143-144). The circuit court also concluded that even if the affidavits had been properly authenticated, it would still not grant the Wells Fargo Entities' motion because the agreements referenced predecessors to Wells Fargo Advisors (not Wells Fargo Advisors itself) and because the designated arbitral forum (NASD) no longer existed. (*Id.* at 144-146, 146-154).

The Wells Fargo Entities filed their Motion for Reconsideration on July 6, 2017, attaching additional materials showing an agreement to arbitrate between the parties and again calling the circuit court's attention to the FINRA rules. (App. at 346). Berry filed a Response to Defendants'

Motion for Reconsideration or Amendment of the Court's June 21, 2017 Order and Motion to Strike on July 17, 2017. (App. at 424). On July 25, 2017, the circuit court denied the motion without a hearing, stating it was "unable to discover any material fact or principle of law that has either been overlooked or disregarded and further finds no error of law or facts not appropriately considered." (App. at 157).

The Wells Fargo Entities appealed. (App. at 437-439). The Court of Appeals affirmed the circuit court's decision on the basis that, among other things, because the forum designated in the last Form U4 which Berry signed – the NASD (FINRA's predecessor) – no longer existed, there was no enforceable agreement to arbitrate. (App. at 9). The Court of Appeals further found that no precedent required the court to find that FINRA's rules constituted an enforceable arbitration agreement between Berry and the Wells Fargo Entities. (App. 11-12). The Wells Fargo Entities sought rehearing on several grounds, including that the court misapprehended the nature of Form U4 amendments and that the court erred in finding FINRA rules do not constitute an independent basis upon which to compel Berry to arbitrate his claims. (App. at 13-19). The Court of Appeals denied the petition for rehearing without discussion on March 26, 2021. (App. at 37).

ARGUMENT

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

In its discussion of the mandatory Forms U4 Berry has signed during his long career as a registered investment advisor with "essentially one firm", the Court of Appeals improperly concluded that none of the Forms U4 established an agreement to arbitrate between Berry and the Wells Fargo Entities. (*See* App. at 7-10). The Court of Appeals found that the 1999 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. (App. at 9, 378). The Court of Appeals also found that because the designated arbitration forum indicated in Item 11 – the NASD – no longer existed, the agreement to arbitrate was unenforceable. (App. at 9). With respect to the 2014 Form U4, the Court of Appeals found that while that form designated Wells Fargo Advisors as the firm and FINRA as a designated SRO, the Form U4 itself contained no arbitration agreement. (*Id.*). The Wells Fargo Entities respectfully disagree.

On October 7, 1999, Respondent submitted a Form U4 (the "1999 Form U4") that identified his employer as Everen Securities, Inc. and contained the following arbitration agreement:

> I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws of the SROs[4] indicated in Item 11 as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent jurisdiction.

(App. 378). The Employment Date listed on the 1999 Form U4 was October 1, 1999. (*Id.*) Under Item 11, "SRO Registrations," Berry selected the NASD, the New York Stock Exchange ("NYSE"), and others. (*Id.*)

As Berry alleged, over the next 15 years, through a series of acquisitions by successor companies, Berry was employed by FINRA-registered entities including, ultimately, Wells Fargo Advisors. (App. at 194 ¶ 27, 195 ¶ 28 & n.3, App. at 196 ¶ 33, 199-200 ¶¶ 45-47, 204 ¶ 59).

During this period, the NASD and certain operations of the NYSE themselves underwent a merger. In 2007, NASD merged with the enforcement and arbitration operations of the NYSE

[4] "SRO" means any self-regulatory organization within the meaning of 15 U.S.C § 78c(a)(26) of the Exchange Act. The Securities Exchange Commission ("SEC") has responsibility for registration and oversight of SROs under Exchange Act § 19. 15 U.S.C. § 78s.

and was renamed FINRA.[5] At the time of the merger, the SEC, which is vested with the power to regulate SROs by Congress, characterized the merger and continued operation of the combined entity as a name change[6] and described "NASD's change in corporate name to FINRA" as a mere "technical amendment" to Forms U4 and U5.[7]

Here, the Court of Appeals erred in ignoring that according to the SEC (and numerous courts across the country), FINRA is the NASD, including specifically for purposes of the Form U4.[8] *See, e.g., In re H&R Block Fin. Advisors, Inc.*, 262 S.W.3d 896, 900 (Tex. App. 2008) (rejecting argument that arbitration agreement is 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") (collecting cases); *Suschil v. Ameriprise Fin. Servs., Inc.*, No. 1:07CV2655, 2008 WL 974045, at *1-2, *6 (N.D. Ohio Apr. 7, 2008) (compelling arbitration under FINRA even though the agreement mentions only NASD arbitration and describing FINRA as "fka 'NASD'").

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[5] This consolidation followed final regulatory approval by the SEC on July 26, 2007. The terms of the consolidation called for the NYSE to transfer its member regulatory services to the NASD, which then changed its name to the FINRA. *See* Allocation of Regulatory Responsibilities, Exchange Act Release No. 34–56148, 72 Fed. Reg. 42146–01, 2007 WL 2186049 (July 26, 2007).

[6] *See, e.g.*, SEC Release No. 34-56615, available at https://www.sec.gov/rules/sro/finra/2007/34-56615.pdf (Oct. 4, 2007) ("NASD has changed its name to FINRA"); *Rusciano v. Oppenheimer & Co., Inc.*, No. 14 Civ. 1452(CM), 2017 WL 1677133, at *2 (S.D.N.Y. Apr. 25, 2014) ("The NASD has not ceased to exist; its name was merely changed to [FINRA]. The difference between NASD and FINRA is purely semantic.") (internal citation omitted).

[7] SEC Release No. 34-57033, available at https://www.sec.gov/rules/sro/finra/2007/34-57033.pdf (Dec. 21, 2007) (describing "NASD's change in corporate name to FINRA" as a "technical amendment" to Forms U4 and U5).

[8] *See id.* Further illustrating the point, Berry's 1999 Form U4 designating NASD is currently held by FINRA. (*See* SEC Release No. 34-56613, *supra* n. 7 ("NASD has changed its name to FINRA and changed its internet domain from www.nasd.com to www.finra.org."); App. at 378-386 (identifying source of document as https://crd.firms.finra.org)).

The Court of Appeals also erred in finding the 1999 Form U4 was not binding as to successors and assigns, as demonstrated by Berry's continued employment as a FINRA-registered representative with the Everen Securities successors with no update to his Form U4, a circumstance that could not have taken place under FINRA Rules were each of the successor entities that acquired Everen Securities wholly separate from their acquirees. This error is further demonstrated in conjunction with the Court of Appeals' third error in misapprehending the nature and effect of the 2014 Form U4.

On January 8, 2014, an amended U4 was submitted on Berry's behalf (the "2014 Form U4") that identified his employer as FINRA-registered Wells Fargo Advisors, LLC. (App. at 388). Consistent with Berry's employment history, and his allegation that he "devoted [his career] to essentially one firm," the 2014 Form U4 indicated that his employment date was October 1, 1999, the same employment date identified on the 1999 Form U4. (*Compare* App. at 378 *with* App. at 388). Under Item 2, "Fingerprint Information," Berry made the representation that he "[had] 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." (App. at 388 (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.[9] (*Id.*). 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. (App. at 389).

[9] *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).

Under South Carolina law, "'unless 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)). Critically, not only is the strong general public policy in favor of arbitration implicated here, but so too are decades-long SEC and FINRA requirements that disputes between registered representatives and their firms must be arbitrated. The Court of Appeals should have reversed the circuit court order and compelled arbitration of Berry's claims pursuant to his agreements to arbitrate. *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").

The Court of Appeals concluded that neither the 1999 Form U4 nor the 2014 Form U4 compelled arbitration, despite the uncontested fact that Berry signed both of these forms as he was required to do, and that the Form U4 contains a mandatory arbitration clause. (App. at 7-10). The Wells Fargo Entities respectfully submit that the Court of Appeals erred and that this error could result in unwarranted confusion with respect to the proper forum to resolve any claims between long-time FINRA registered professionals and their FINRA member firms.

II. The Court of Appeals erred in rejecting the FINRA Rules as an independent basis on which to compel arbitration.

The Court of Appeals further erred in concluding that the FINRA Rules cannot serve as an independent basis on which to compel arbitration of Berry's claims because, under South Carolina law, "[a]rbitration is available only when the parties involved contractually agree to arbitrate." (App. at 11). FINRA Rule 13200(a) requires, "[e]xcept 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."[10]

The Court of Appeals reasoned that "[e]ven 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 agreement between Berry and the [Wells Fargo Entities]." (App. at 11). The Court of Appeals reached this conclusion only by ignoring that every FINRA registered representative must affirmatively accept and adopt FINRA rules in order to engage in brokerage activities. (*Id.*). Taken together, 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. (*Id*. at 12).

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.*, 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); 17 C.F.R. § 240.15b7-1 (prohibiting associated persons from effecting or inducing a securities transactions unless such person is "registered and approved in accordance with the standards" of an SRO); *Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1132 (9th Cir. 2005) (holding SEC-approved NASD arbitration procedures "have preemptive force over conflicting state law").

A firm must be registered with an SEC-approved SRO to participate in a public securities business. By registering as a FINRA member, as Wells Fargo Advisors did here, entities gain the right to participate in the business of brokering and trading securities, but must satisfy certain

[10] *See* FINRA Rule 13200, available at https://www.finra.org/rules-guidance/rulebooks/finra-rules/13200 (last visited April 21, 2021).

regulatory requirements and obligations to their customers.[11] In turn, any individual actively involved in a firm's investment banking or securities business – as Berry was – must also be registered as a representative with FINRA.[12] 17 C.F.R. § 240.15b7-1. (*See* App. at 381 (1999 Form U4 identifying Everen Securities and First Union Capital Markets Corp. under "Employment History" as "Investment-related business"); App. at 395 (2014 Form U4 identifying, among others, First Union Securities, Inc., Wachovia Securities, Inc., Wachovia Securities, LLC, and Wells Fargo Advisors LLC under "Employment History" as "Investment-related business"). This registration requirement is not voluntary or negotiable. Under the federal securities laws, anyone wishing to sell securities must submit to this registration requirement. Thus, not only does Berry's Form U4 contain an express agreement to arbitrate (*see infra* at § I), the very act of registering obligated Berry to comply with all FINRA rules and regulations as a condition of his continued employment in the securities industry, including the mandatory arbitration of disputes as set forth in FINRA Rule 13200.[13]

[11] *See, e.g.*, FINRA Bylaws, Art. 4, § 1(a)(1), available at https://www.finra.org/rules-guidance/rulebooks/corporate-organization/application-membership (last visited April 21, 2021).

[12] *See* FINRA Manual, Rule 1210, Registration Requirements, available at https://www.finra.org/rules-guidance/rulebooks/finra-rules/1210 (last visited April 21, 2021) ("Each person engaged in the investment banking or securities business of a member shall be registered with FINRA as a representative or principal in each category of registration appropriate to his or her functions and responsibilities. . . .").

[13] A search on FINRA's public website BrokerCheck — accessible to anyone who wants to check the registration status and employment history of a securities broker or firm — shows that Robert Franklin Berry, Central Registration Depository ("CRD") number 262947, is a "Broker Regulated by FINRA" whose registration has been carried by LPL Financial LLC (CRD# 6413) since 2014, and whose registration was, before that, carried by Wells Fargo Advisors, LLC (CRD# 19616) for the period 1999-2014. *See* FINRA BrokerCheck, Robert Franklin Berry (CRD# 1262947), available at https://brokercheck.finra.org/individual/summary/1262947; *see also* BrokerCheck Report, *id*. ("Detailed Report" available for download). Berry's SRO Registrations lists a single entity: FINRA. *Id.*

Although South Carolina courts have not addressed the question, other courts have held that "the rules of a securities exchange are contractual in nature." *Kidder, Peabody & Co., Inc.*, 41 F.3d at 863 (citation omitted). "FINRA membership constitutes an agreement to adhere to FINRA's rules and regulations, including its Code and relevant arbitration provisions contained therein." *In re Am. Express Fin. Advisors Secs. Litig.*, 672 F.3d 113, 128 (2d Cir. 2011) (citation and internal quotation marks omitted); *see In the Matter of the Arbitration Between Ameriprise Advisory Servs., Inc. v. Leo Sala III*, FINRA No. 10-00469, 2010 WL 3525730, at *1 (FINRA Jan. 29, 2010) ("As Respondent was formerly registered with FINRA as an associated person of a member-firm, Respondent was and is bound by the rules of FINRA, including FINRA's Code. . . ."). Among those rules and regulations is the mandatory arbitration provision of Rule 13200 that Berry seeks to evade here.[14]

Courts have repeatedly held that the FINRA rule mandating arbitration of disputes related to business activity is itself an enforceable, written agreement to arbitrate, and compelled arbitration on those grounds. While courts have not had the opportunity to apply these holdings in the context of FINRA Rule 13200, courts have uniformly held that, for purposes of the FAA, FINRA Rule 12200[15] — the Customer Code version of Rule 13200 — creates an enforceable

[14] The ready availability of Berry's BrokerCheck report is actually alleged in his Amended Complaint. (*See* App. at 212 ¶ 91 (alleging Berry's "official record," *i.e.*, the Form U5, "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.

[14] The Court of Appeals notes that "no precedent requires [it] to conclude FINRA Rule 13200, in and of itself, constituted an enforceable arbitration agreement." (App. at 11). The converse is also true: no published South Carolina opinion has refused to recognize that FINRA Rule 13200 constitutes an enforceable arbitration agreement.

[15] Customer Code Rule 12200 is the customer-side mirror of Industry Code Rule 13200. Rule 12200 provides that parties must arbitrate a dispute if, among other reasons, arbitration under the Code is required by written agreement or the dispute arises in connection with the business

"agreement in writing." *See, e.g., Waterford Inv. Servs., Inc. v. Bosco*, 682 F.3d 348, 353 (4th Cir. 2012) (FINRA Rule 12200 constitutes an "agreement in writing" under the FAA); *MONY Secs. Corp. v. Bornstein*, 390 F.3d 1340, 1342 (11th Cir. 2004) (affirming order compelling arbitration and rejecting appellant's argument that "there was never an agreement to arbitrate . . . because the NASD Code itself constitutes the agreement"); *Washington Square Secs., Inc. v. Aune*, 385 F.3d 432, 435 (4th Cir. 2004) (NASD Code constitutes "agreement in writing" under FAA); *Kidder*, 41 F.3d at 863 (same); *CRT Capital Group v. SLS Capital, S.A.*, 63 F. Supp. 3d 367, 372 (S.D.N.Y. 2014) ("[M]embership in an exchange that requires arbitration constitutes an 'agreement in writing' to arbitrate under 9 U.S.C. § 2.").

The record on appeal includes overwhelming evidence Berry voluntarily subjected himself to FINRA's rules, including Rule 13200. This evidence includes Berry's own allegations referencing his long career in the securities industry (*see, e.g.*, App. at 194 ¶ 27), Berry's acknowledgment that "[f]inancial advisors are required to be registered with a firm to sell or buy securities or otherwise provide financial advice" (App. at 204 ¶ 59), and Berry's admission that after his termination he became an affiliated person with LPL Financial Corporation ('LPL'.)"[16] (*Id.*). Berry's Amended Complaint even incorporates by reference his Form U5. (*See, e.g.*, App. at 205 ¶ 60, 212 ¶ 91, 213-214 ¶¶ 93-95).

In addition and as described above, the record also includes a long line of Berry's Forms U4. (*See, e.g.*, App. at 246-257, 263-266, 378-386, 388-401). Completion and submission of the

activities of the member or the associated person. FINRA Manual, FINRA Rules, 12200, available at https://www.finra.org/rules-guidance/rulebooks/finra-rules/12200 (last visited April 21, 2021).

[16] Berry's current, admitted registration with a FINRA member firm is sufficient to subject him to mandatory arbitration under FINRA Rule 13200, which mandates arbitration of disputes between an associated person and any member. *See* FINRA Rule 13200, available at https://www.finra.org/rules-guidance/rulebooks/finra-rules/13200 (last visited April 21, 2021).

Form U4 required Berry to affirm he was applying for registration with the organizations identified therein (including, in the case of Berry's most recent Form U4, FINRA) and that he "agree[d] to comply with all provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rule and regulations of [FINRA] as they are or may be adopted, or amended from time to time." (*See, e.g.*, App. at 384). Berry cannot accept the benefits of those FINRA rules that suit him and allow him to participate for decades in a highly regulated industry, while at the same time rejecting those FINRA rules and the concomitant obligations imposed on him that do not please him, including the well-established rule governing the proper forum for his dispute with his former firm.

The Court of Appeals erred in rejecting the FINRA Rules as an independent basis on which to compel arbitration. This Court should grant this Petition to address the significance of the FINRA Rules under these circumstances.

III. The Court of Appeals erred in finding the question of judicial notice of FINRA Rules, Forms U4, and BrokerCheck entries was not preserved and in not taking judicial notice of the records itself.

The Court of Appeals found that the error assigned to the circuit court's failure to take judicial notice of FINRA Rules, Form U4s, and statutorily-mandated BrokerCheck (the "FINRA Materials") entries was unpreserved in the Motion for Reconsideration submitted to the circuit court. The record shows, however, that the Wells Fargo Entities incorporated the FINRA Materials into the Motion for Reconsideration. The Wells Fargo Entities' Motion for Reconsideration argued that Berry was obligated to arbitrate this dispute under FINRA Rule 13200, cited the very same BrokerCheck report on Berry and CRD number for Wells Fargo Clearing Services, LLC as were cited in their brief, as well as the BrokerCheck report for Mr. Spang, and discussed the Forms U4 at length. (App. at 349-350 & n.9). The Wells Fargo Entities specifically requested that the

circuit court grant the Motion for Reconsideration and "either reconsider or amend its previous Order to take into account the more recent U4 submissions." (App. at 351).

As the Court of Appeals points out, the circuit court did not rule upon the Wells Fargo Entities' request that it take judicial notice of the FINRA Materials. That is, the circuit court did not expressly take judicial notice of the FINRA Materials or expressly reject the request. Instead, the circuit court rejected three of the offered Forms U4 on authentication grounds, a decision the Court of Appeals ultimately overturned. (App. at 143-144, 6-7). Despite the lack of an express ruling on the request to take judicial notice of the FINRA Materials, those materials were discussed at length in the circuit court's June 21, 2017 Order. (*See, e.g.*, App. at 144-148). The July 25, 2017 Order included no discussion of specific materials considered, or rejected, by the circuit court. (App. at 157-158 ("after careful consideration of the record in this case and the submissions of the parties. . . .")).

Nor is this Court precluded from taking judicial notice of the FINRA Materials. 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) (courts may take judicial notice of facts from indisputable sources).

A court may take judicial notice of facts not subject to reasonable dispute "at any stage of the proceeding." Rule 201(f), SCRE. 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 (1989)); *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). Indeed, in *Palmetto Homes, Inc. v. Bradley*, the Court of Appeals 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).

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.[17] 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 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. This regulatory overlay provides an appropriate evidentiary basis for this Court (as well as the circuit court and the Court of Appeals) to consider those documents.

[17] 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").

The FINRA Materials 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. The adoption of FINRA's rules is part of the comprehensive regulatory oversight mandated by Congress and the SEC. These indisputable facts may be noticed by this Court. The Court should grant the Petition to further clarify the application of judicial notice in this case and to address the role of judicial notice in determining whether arbitration is required by operation of the FINRA Rules.

CONCLUSION

Berry is and has been registered with NASD and FINRA for decades. As a condition of his long employment as a registered representative, Berry agreed to arbitrate his disputes under NASD Rules and, later, under FINRA rules, a fact readily discernable from both his Forms U4 and the regulatory framework governing the securities industry in the United States. Berry's attempt to avoid his agreement with the Wells Fargo Entities and escape the obligations that come with the privilege of working as a financial advisor should be rejected by this Court. For these reasons, the Wells Fargo Entities respectfully request that this Court grant review on each of the questions presented.

Respectfully submitted,

s/ Sarah P. Spruill
HAYNSWORTH SINKLER BOYD, P.A.
Sarah P. Spruill (SC Bar No. 68337)
One North Main Street, Second Floor (29601)
P. O. Box 2048
Greenville, South Carolina 29602
Telephone: (864) 240-3200
Facsimile: (864) 240-3300
sspruill@hsblawfirm.com

Adam N. Yount (SC Bar No. 76342)
Pierce T. MacLennan (SC Bar No. 101797)
134 Meeting Street
Suite 300
Charleston, South Carolina 29401
Telephone: (843) 720-4484
Facsimile: (843) 722-2266
ayount@hsblawfirm.com

SEYFARTH SHAW LLP
Frederick T. Smith
North Carolina Bar No. 45229
121 West Trade Street, Suite 2020
Charlotte, North Carolina 28202
Telephone: (704) 925-6023
Facsimile: (704) 559-2425
fsmith@seyfarth.com

ATTORNEYS FOR PETITIONERS

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