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S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2021-000419

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., ... Petitioners.

ROBERT F. BERRY'S RETURN TO PETITION FOR WRIT OF CERTIORARI TO THE COURT OF APPEALS

Nearly four years after instituting this single-issue appeal, Petitioners Scott A. Spang, Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC ("WFA"), Wachovia Securities Financial Holdings, LLC, Wells Fargo & Company, and Wells Fargo Bank, N.A. (collectively "Petitioners"), have abandoned any pretense that this appeal comports with this Court's foundational principles of error preservation. Each of the issues raised in the petition for writ of certiorari ("Petition"), as well as all of the documentary evidence and references to "binding" precedent cited in support of those issues, was raised *at the earliest* in (1) Petitioners' motion for reconsideration of the trial court's order denying their motion to compel Respondent Robert F. Berry to arbitrate his claims against them, (2) subsequently in their appellate briefing to the Court

of Appeals, or (3) even as late as the petition for rehearing of the Court of Appeals' Published Opinion No. 5792, filed January 13, 2021 ("Opinion"). Having been unsuccessful on the grounds previously advanced at each previous stage of this litigation and appeal, and despite having the absolute burden under South Carolina law of establishing in the first instance a valid and informed agreement to arbitrate Mr. Berry's claims, Petitioners have sought a second, third, and fourth bite at the apple to satisfy this burden in each successive filing.

For that reason and those discussed herein, Mr. Berry opposes the Petition, as it does not present a proper basis for this Court to exercise its discretion under Rule 242, of the South Carolina Appellate Court Rules ("SCACR"). Relieving Petitioners of their obligation to comply with error preservation principles and their burden of proof as the proponent of arbitration does not present "special or important reasons" for granting a writ of certiorari, as even a petitioner's identification of alleged "novel questions" does not relieve it from its obligations to preserve these questions for appellate review. Nor is the Opinion in conflict with a prior decision of this Court. Quite to the contrary, despite the fact that the Opinion is precisely in line with the Court's subsequently-issued opinion in *Palmetto Construction Group, LLC v. Restoration Specialists, LLC et al.*, Op. No. 28010 (S.C. Sup. Ct. filed March 10, 2021) (Shearouse Adv. Sh. No. 8 at 34), which clarified that "[t]here is, however, no public policy—federal or state—'favoring' arbitration," *id.* at 38, Petitioners misstate the law as being the ***exact opposite*** of this Court's newly-announced precedent. Pet. at 11 (wherein Petitioners not only reject this Court's pronouncement in *Palmetto Construction Group* regarding the existence of a mere policy in favor of arbitration, but take it a step further in advocating a rule that mandates arbitration: "[c]ritically, 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.").

Nor does the Opinion include a dissent, involve a constitutional issue, or contain a question of even arguable federal import or conflict. In short, Petitioners seek this Court's sanction of a do-over from the order of the circuit court denying their motion to compel Mr. Berry to arbitrate his claims. Despite Petitioners' best—but unpreserved—efforts to distract this Court with claims of federal law and circuitous paths to compel arbitration, two critical facts are indisputable by Petitioners and should be paramount to this Court's application of South Carolina law to the question of its discretionary review of the Petition: (1) Petitioners have not produced ***any*** signed agreement to arbitrate claims between ***any*** of the Petitioners (or its affiliates and employees) and Mr. Berry; and (2) Petitioners have not produced ***any*** agreement signed by Mr. Berry to arbitrate claims before a Financial Industry Regulatory Authority, Inc. ("FINRA") arbitration panel, their desired arbitration forum. The entirety of the Petition consists of arguments conjured up by Petitioners *after* the circuit court's denial of their motion to compel arbitration for the purpose of avoiding the foregoing facts.

The Court of Appeals thoughtfully and thoroughly considered and rejected the many procedural and substantive defects presented by this appeal. Because the Opinion presents no basis for the exercise of this Court's discretion under Rule 242(b), the Petition should be denied.

STATEMENT OF THE CASE

I. Factual Background

The claims underlying this appeal relate to an action for damages filed by Mr. Berry against his former employers for a deliberate breach of Mr. Berry's long-standing profit formula agreement and for other tortious actions designed to humiliate, defame, and damage Mr. Berry's professional reputation, his good name, and his ability to effectively compete against the Petitioners in the future. **(App. pp. 187-91)** During Mr. Berry's employment, Petitioners implemented a now well-

publicized and fraudulent scam to illegally increase the earnings and stock price of their corporate parent, Petitioner Wells Fargo & Company, by aggressively pushing the employees of all subsidiary corporations, including Mr. Berry, to cross-sell proprietary financial products to their customers and clients, regardless of whether the products were wanted, needed, or in the best interests of the customers and clients. *Id.*

Mr. Berry resisted being drawn into Petitioners' scheme. He adhered to principle, rejecting Petitioners' relentless pressure to make recommendations to clients which would have violated Mr. Berry's fiduciary obligations and other principles of law to make recommendations to clients on financial products based solely on the clients' best interests. **(App. p. 190)** As a consequence of his refusal to participate in Petitioners' unlawful scheme, Mr. Berry was marked internally for termination and targeted with pressure that was designed to lead to his resignation under duress. *Id.* In particular, Mr. Berry was rewarded for his demonstration of courage and adherence to ethical and legal obligations by being ridiculed by his direct supervisor, Spang, for failing to generate sufficient commission income from the sale of Wells Fargo's proprietary products. **(App. pp. 194-206)** Mr. Berry also questioned unilateral changes made by Petitioners to his profit formula employment agreement, which had been in effect since the early 2000s, beginning with WFA's predecessor, Wachovia Securities**. (App. pp. 198-99)** These changes involved the gradual, but systematic increase to costs charged to Mr. Berry by WFA for services that Mr. Berry was required to utilize, thereby reducing Mr. Berry's profit margin with no appreciable benefit to his ability to service his clients. *Id.* In response to and retribution for Mr. Berry's criticisms, WFA and Spang failed to support Mr. Berry's efforts to properly serve his clients. **(App. p. 199)** WFA and Spang's efforts intensified over time and culminated in a February 3, 2014, meeting orchestrated and engineered by WFA and Spang, during which he humiliated and berated Mr. Berry, constructively

firing him by threatening that he must either resign or be fired. **(App. pp. 201-03)**

Following Mr. Berry's forced resignation, WFA and Spang defamed Mr. Berry's professional reputation and good name by filing a false and defamatory statement about his departure with regulatory authorities, as well as accusing him of unethical, unprofessional, and dishonest acts. **(App. pp. 205-06)** WFA and Spang knew that the false statement would damage Mr. Berry in his subsequent professional endeavors, but took the action specifically to promote WFA and Spang's own interests in poaching Mr. Berry's client base, in punishing Mr. Berry for not willingly and aggressively participating in what has since been determined to be an illegal cross-selling scheme, and in terminating a longstanding payout arrangement that WFA and Spang viewed as too lucrative for Mr. Berry. **(App. pp. 203-05)** As a result of Petitioners' collectively illegal, false and deceptive practices, Mr. Berry, at age 62, suffered substantial losses to the book of business that he developed over 30 years in his position with Petitioners and their immediate predecessors in interest. **(App. pp. 205-06)**[1]

II. Procedural History

Mr. Berry commenced this action for damages on February 2, 2017, in the Lexington County Court of Common Pleas. **(App. pp. 159-86)** Prior to answering, Petitioners filed a Motion to Dismiss or Stay Pending Arbitration ("Motion to Compel") on April 12, 2017. **(App. pp. 231-66)** Thereafter, Petitioners filed an amended Motion to Dismiss or Stay Pending Arbitration ("Amended Motion to Compel") on April 27, 2017. **(App. pp. 267-68)**

In the Motion to Compel, Petitioners' arbitration demand was based *solely* upon what purported to be three (3) 1994 Form U4 registration statements from the period when Mr. Berry

[1] The foregoing recitation is provided for brevity; however, a more fulsome explanation of the facts supporting Mr. Berry's causes of action against Petitioners appears in the Amended Complaint and his relied upon in support of this Return. **(App. pp. 187-230)**

was associated with Wheat, First Securities, Inc. ("Wheat First"), a now defunct firm.[2] **(App. pp. 245-57)** Of the three Form U4s submitted in support of the Motion to Compel and Amended Motion to Compel, only the November 1994 Form U4 identified possible arbitration fora for settling disputes between Mr. Berry and Wheat First, the National Association of Securities Dealers ("NASD"), an entity no longer in existence. **(App. pp. 254-57)** The November 1994 Form U4 made no reference to any Petitioner in this case, although Petitioner WFA argued, without any evidence to support the assertion, that it was a successor in interest to Wheat First and should therefore be allowed to step into its shoes. *Id.* Relying upon the November 1994 Form U4, Petitioners sought to compel arbitration of Mr. Berry's claims before FINRA, a forum that was not referenced in any of the Form U4s advanced by Petitioners; indeed, FINRA did not even exist in 1994. **(App. pp. 233-44)** Because none of the 1994 Form U4s proposed arbitrating claims before a forum that either exists or offers arbitration services today, Petitioners simply unilaterally inserted the FINRA forum as a substitute for the designated fora without informing the trial court of the switch or offering admissible proof that the substitution was appropriate. **(App. p. 147) (**Order at 8, "[Petitioners] disregard the actual language of the SRO 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.").

A hearing on Petitioners' Motion and Amended Motion to Compel was held on June 1, 2017, before the Honorable Judge G. Thomas Cooper, Jr. in Lexington County, in which Mr. Berry disputed the existence of any agreement to arbitrate his claims. **(App. pp. 459-89)** By Form-4 Order of same date, the trial court took the matter under advisement, **(App. pp. 138-39)**, and on June 21,

[2] A Form U4 is a Uniform Application for Securities Industry Registration or Transfer. The forms advanced by Petitioners to the trial court as being supportive of their motion were forms dated and then in use in 1994 and 1995, respectively.

2017, the trial court entered an order denying the motion to compel. **(App. pp. 140-56)** ("Order")

For a number of reasons detailed in the Order, the trial court determined that Petitioners failed to advance admissible evidence to meet their burden to demonstrate that the submitted Form U4s established the existence of a valid arbitration agreement between Mr. Berry and any of these Petitioners. Order at 5. **(App. p. 144)** The trial court first held that Petitioners failed to properly authenticate any of the registration statements on which they relied, thus excluding the documents for failure to satisfy the Rules of Evidence. Order at 4. **(App. p. 143)**[3] The trial court further held that, even if the registration statements were properly before the court, Petitioners lacked standing and could not enforce those provisions, as they were executed by a company (Wheat First) that no longer exists and the documents contain no successors or assigns language. Order at 5-7. **(App. pp. 144-46)** As an additional or alternative basis for its holding, the trial also held that the single registration statement advanced by Petitioners that designated fora for arbitration could not be enforced in any event, because the specified fora no longer existed and/or provided arbitration services. Order at 7-15. **(App. pp. 146-54)**[4] Finally, the trial court held that Petitioners' conclusory

[3] The Court of Appeals reversed the trial court on the question of authentication despite acknowledging that the custodial affidavit for the Form U4s "did not explain what a Form U4 was, identify the actual custodian of the document, or indicate that it was a true and correct copy," ultimately finding that "the burden to authenticate is low." Opinion at 7 **(App. p. 146)** Mr. Berry disagrees with the Court of Appeals' conclusion on this point, and this Court is authorized to review and rely upon the trial court's determination on this point as basis to deny this Petition. *See* Rule 220(c), SCACR; *I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 526 S.E.2d 716 (2000).

[4] Petitioners did not appeal the trial court's holdings regarding lack of standing and failure of the arbitral fora, each of which was an independent basis for the trial court's decision that Petitioners failed to meet their burden to prove the existence of an agreement to arbitrate. Both of those holdings are now the law of the case and should serve as an additional basis for this Court declining to reach the merits of the limited issues advanced by Petitioners. **(App. pp. 103-05)**; *see also Atl. Coast Builders & Contractors, LLC v. Lewis*, 398 S.C. 323, 329, 730 S.E.2d 282, 285 (2012) ("[A]n unappealed ruling, right or wrong, is the law of the case."); Rule 220(c), SCACR ("The appellate court may affirm any ruling, order, decision or judgment upon any ground(s) appearing in the Record on Appeal."); *Jones v. Lott*, 387 S.C. 339, 346, 692 S.E.2d 900, 903 (2010) ("Under the two issue rule, where a decision is based on more than one ground, the appellate court

references to a single FINRA rule were insufficient to compel arbitration of Mr. Berry's claims, because Petitioners "have not met their threshold burden of demonstrating the applicability of any FINRA rule to Mr. Berry." Order at 8 n.7. **(App. p. 147)**

Thereafter, Petitioners filed a Motion for Reconsideration of the Order on July 6, 2017. **(App. pp. 346-423)** In the Motion for Reconsideration, Petitioners advanced entirely new documents and arguments in support of their argument to arbitrate, which Mr. Berry opposed by Response dated July 17, 2017. **(App. pp. 424-36)** By additional order dated July 25, 2017, the trial court denied Petitioners' Motion for Reconsideration ("Reconsideration Order"). **(App. pp. 157-58)** On August 10, 2017, Petitioners filed a notice of appeal to the Court of Appeals. **(App. pp. 437-38)** The Court of Appeals decided the appeal without oral argument, issuing the Opinion on March 13, 2021. **(App. pp. 1-12)** Petitioners petitioned for rehearing **(App. pp. 13-19)**, which was opposed by Mr. Berry **(App. pp. 22-36)** and ultimately denied by the court on March 26, 2021. **(App. p. 37)** On April 23, 2021, Petitioners filed the Petition.

ARGUMENT

I. The Form U4s now relied upon by Petitioners are not properly before the Court, but even if they were, they do not constitute a valid agreement by Mr. Berry to arbitrate his claims against Petitioners.

a. The Form U4s relied upon by Petitioners were first advanced in its motion for reconsideration to the trial court and are unpreserved for this Court's review.

As discussed above and demonstrated by the record, *see* **(App. pp. 231-266)**, Petitioners' Motion to Compel advanced only three (3) 1994 Form U4 registration statements, dated September 28, 1995, January 16, 1995, and November 5, 1994, from the period when Mr. Berry was associated with Wheat First in support of their argument that Mr. Berry's claims should be arbitrated. **(App.**

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will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case.").

pp. 245-66) The trial court rejected Petitioners' arguments on multiple grounds. **(App. pp. 140-56)**

Thereafter, in seeking reconsideration of the Order, Petitioners presented entirely new documents and arguments in reconsideration of its demand to arbitrate Mr. Berry's claims. **(App. pp. 346-423)** Under the guise of "newly discovered evidence" and Rule 60(b), Petitioners submitted additional "new" U4 registration statements and cited to new FINRA rules and other web-linked documents for the first time in the Motion for Reconsideration,[5] including a 1999 U4 and a 2014 U4. **(App. pp. 377-401)**, Mot. for Recons. Exs. 2-A and 2-B. Neither of those documents nor the FINRA rules were attached to Petitioners' original Motion to Compel or referenced therein.

Consequently, the 1999 and 2014 Form U4s, which serve as the entire basis for Petitioners' first argument to this Court, are unpreserved for this Court's review.[6] "A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not." *Hickman v. Hickman*, 301 S.C. 455, 456–57, 392 S.E.2d 481, 482 (Ct. App. 1990) (explaining South Carolina law and citing identical federal precedent, including *Natural Resources Defense Council v. U.S. E.P.A.*, 705 F.Supp. 698, 701 (D.D.C. 1989), *vacated on other grounds*, 707 F.Supp. 3 (D.D.C. 1989) ("Rule 59(e) motions are not vehicles for bringing before the court theories or arguments that were not advanced earlier."); *Smith v. Stoner*, 594 F.Supp. 1091, 1118 (N.D.Ind.

[5] Just like in the Motion to Compel, however, in the Motion for Reconsideration, Petitioners did not present any argument or evidence demonstrating the applicability of FINRA to either Wells Fargo and Company or Wells Fargo Bank, N.A., or an ability for either defendant to rely upon its terms and compel arbitration of Mr. Berry's claims. **(App. pp. 346-423)**

[6] The Court of Appeals did not address Mr. Berry's preservation argument in the Opinion; instead, it moved beyond the procedural infirmities to address—and reject—the merits of Petitioners' claims, indicating its view that he trial court "considered the submissions of the parties." **(App. p. 6)**, Opinion at 6. Mr. Berry disagrees that the record reflects the trial court's consideration of these documents submitted for the first time in Petitioners' motion for reconsideration, but that fact does not prohibit this Court from considering the preservation issue as it weighs the relative merits of exercising its discretion to grant the Petition. *See* Rule 220(c), SCACR.

1984) ("Issues which could have been presented to the court for consideration previously, but which were not, are not the proper subject of Rule 59(e) relief; the issues are waived."); *Johnson v. City of Richmond*, 102 F.R.D. 623, 623 (E.D.Va. 1984) ("I do not conceive of Fed.R.Civ.P. 59(e) as serving the office of providing a disappointed suitor with a post-judgment opportunity to argue that which could have been argued pre-judgment.")).

Notwithstanding, Petitioners rely exclusively upon the 1999 and 2014 Form U4s to define a circuitous path and reasoning upon which they attempt to cobble together an argument to suggest an agreement to arbitrate actually exists. The trial court therefore properly declined to consider the new documents and arguments advanced by Petitioners in reconsideration and denied the motion, as these unpreserved documents and arguments did not present a legally cognizable basis for reconsideration of the trial court's Order under Rule 59(e). This is particularly true in light of the holding of the trial court in the Order that "[i]t is now too late for [Petitioners] to amend their filings "as of right" to submit supplemental or additional documentation in support of their Motion, and permitting them to do so at this time would provide Defendants a second bite at the apple." **(App. p. 144)**, Order at 5 n.2 (citing *Parker v. S.C. Public Service Comm'n*, 288 S.C. 304, 307, 342 S.E.2d 403, 405 (1986) (holding that "no party may afford itself two bites at the apple.")).

The trial court's holding in that regard applies a fundamental tenet of South Carolina law that prohibits do-overs in litigation. *See, e.g.*, *City of Myrtle Beach v. Tourism Expenditure Review Comm.*, 407 S.C. 298, 303, 755 S.E.2d 425, 428 (2014) (rejecting a call for a remand for a new hearing and the presentation of additional evidence on an alternate theory) (citing *Erickson v. Jones St. Publishers, LLC*, 368 S.C. 444, 476, 629 S.E.2d 653, 670 (2006) (holding that a party may not complain of an error his own conduct has induced); *Porter v. S.C. Pub. Serv. Comm'n*, 333 S.C. 12, 32, 507 S.E.2d 328, 338 (1998)). Because these issues were raised for the first time in Petitioners'

motion for reconsideration, they are unpreserved for this Court's review and may not serve as a basis—much less the sole basis—for this Court to exercise its discretionary review of the Opinion.[7]

b. Even if the 1999 and 2014 Form U4s were preserved for this Court's review, neither document establishes an agreement by Mr. Berry to arbitrate his claims against Petitioners in a FINRA arbitration forum.

Setting the preservation of the 1999 and 2014 Form U4s aside, a close inspection of the documents reveal that they do not serve the purpose advanced by Petitioners. "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." *Chassereau v. Glob.–Sun Pools, Inc.*, 363 S.C. 628, 632, 611 S.E.2d 305, 307 (Ct. App. 2005). "Arbitration rests on the agreement of the parties, and the range of issues that can be arbitrated is restricted by the terms of the agreement." *Id.* (quoting *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596–97, 553 S.E.2d 110, 118 (2001)). As a general commentary, rather

[7] Nor did the trial court err in rejecting Petitioners' claim that the additional U4 registration statements and new citations were "newly discovered evidence" under Rule 60(b), SCRCP, but instead were documents that were in Petitioners' possession at the time of the Motion to Compel and were only "located" when Petitioners were unsuccessful in compelling arbitration based on their original submissions. *See Lanier v. Lanier*, 364 S.C. 211, 217-20, 612 S.E.2d 456, 459-460 (Ct. App. 2005). In the Motion for Reconsideration, Petitioners did not even claim that they tried — but failed — to locate the new U4 registration statements prior to filing either their Motion to Compel or their Amended Motion to Compel, or appearing at the June 1, 2017 hearing. Instead, Petitioners submitted an affidavit of a Compliance Consultant Michael Zuhr, which stated that the "newly discovered evidence" was available to him at any time by simply logging into the appropriate system with his personal log-in information. *See* Mot. for Recons. Ex. 2, Affidavit of Michael Zuhr at ¶2. **(App. p. 374)** Mr. Zuhr states that "[a]s part of my job duties, I have access to Web CRD® [an online database maintained by FINRA] ... [and] am also authorized to obtain previous Form U4s and Form U4 amendments from Web CRD® submitted by or on behalf of current and former Wells Fargo Advisors employees." *Id.* Mr. Zuhr did not deny that the new documents were available when Petitioners submitted their Motion to Compel. In fact, as is described by Mr. Zuhr, the purported custodian of the submissions, the U4's were always available to him as Petitioners' representative and thus to the Petitioners at all times, *see id.* at ¶5 ("I obtained the records ... using my personal log-in information to access the system."), an action that Mr. Zuhr states that he does regularly and routinely as a part of his job duties with Petitioners. *But see Lanier*, 364 S.C. at 220, 612 S.E.2d at 461 ("Where a litigant could have discovered the new evidence prior to trial, he or she is not entitled to relief under Rule 60(b)(2).)" (citation omitted).

than present a single agreement between Mr. Berry and *any* of the Petitioners to arbitrate his claims in a FINRA arbitration forum, Petitioners instead attempt to cobble together bits and pieces from a number of different Form U4s, with a number of different companies, in order to create an arbitration agreement out of whole cloth. Contract law that applies to the interpretation and application of supposed arbitration agreements does not permit a party seeking to compel arbitration to pick and choose beneficial clauses from an assortment of historical documents, to which it is not a party, to merge together and create a new agreement to arbitrate.

Specifically, as for the 1999 Form U4, (Ex. 2-A to the Motion for Reconsideration), it is not between Mr. Berry and any of the Petitioners. Instead, like the 1994 Form U4 which named Wheat, First, the 1999 Form U4 names Everen Securities, Inc. ("Everen") as Mr. Berry's employer. Petitioners assign error to the Opinion for its failure to simply read successor and assigns language into the 1999 Form U4 where none exists. However, courts are not permitted to read language into a contract that does not exist. *Bruce v. Blalock*, 241 S.C. 155, 161, 127 S.E.2d 439, 442 (1962) ("The Court cannot exercise its discretion as to the content of such contract or substitute its own construction for the agreement clearly entered into between the parties."). By its own terms, the arbitration provision in the 1999 Form U4 and quoted in the Petition is limited to "any dispute, claim or controversy that may arise between ***me and my firm***," **(App. p. 384)** (emphasis added), and is devoid of any language indicating that any arbitration obligation extends to successors and/or assigns of "my firm," that is, to successors or assigns of Everen. "The parties' intention must, in the first instance, be derived from the language of the contract." *Jacobs v. Service Merchandise Co.*, 297 S.C. 123, 375 S.E.2d 1 (Ct. App. 1988) (citations omitted). This litigation does not involve any dispute, claim or controversy arising between Mr. Berry and Everen, nor does he complain of any act or omission by Everen, which, like Wheat First, no longer exists.

Moreover, like the 1994 Wheat First Form U-4, the 1999 Form U-4 does not specify FINRA as the arbitral forum, or otherwise refer to FINRA, as FINRA indisputably *did not exist in 1999*. Instead, the 1999 Forum U-4 arbitration clause designates "the organizations indicated in Item 11" of the form, which is found on the first page of each of the Form U-4, and designates four (4) SRO's,[8] none of which are FINRA and some of which no longer exist at all. Nor is there any evidence in the record that any of the organizations specified on the 1999 Form U4 currently offer arbitration services, as correctly held by the trial court.

The Opinion correctly held that, for the purposes of selecting an arbitration forum, FINRA is not the same thing as NASD. By contrast, Petitioners appear to simply assume that all securities arbitral fora may be treated as interchangeable, substituting the fora that actually appeared in the Form U4s with "FINRA" without so much as notifying the trial court of that material alteration. At least one case in South Carolina has litigated this question, including an appeal to this Court,[9] and it reached the same result as the trial court and Court of Appeals here, that proponents of arbitration have an obligation to provide proof for such assumptions. In the absence of evidence in the record regarding the relationship between FINRA and NASD, as was the case below, it cannot be

[8] NASD, the New York Stock Exchange (NYSE), the Chicago Board Options Exchange (CBOE), and the Philadelphia Stock Exchange (PHLX).

[9] *See Keller v. ING Financial Partners, Inc.*, Op. No. 2011-CP-23-0336 (S.C. Cir. Ct. filed June 2, 2011) **(App. pp. 327-34)**, *affirmed*, *Keller v. ING Financial Partners, Inc.*, 2013 WL 8482243, Op. No. 2013-UP-014 (S.C. Ct. App. filed Jan. 9, 2013) **(App. pp. 339-42)**. Mr. Berry and his counsel are conscious of Rule 268(d)(2), SCACR, regarding the reliance on unpublished opinions of the Court of Appeals and this Court in non-related proceedings. The appellate opinions in *Keller* are not cited as binding precedent but rather as an indisputable fact about the subsequent procedural appellate history of the trial court's prior order in *Keller*. Subsequent to the Court of Appeals' unpublished opinion, the *Keller* arbitration proponents then petitioned this Court for a writ of certiorari. Certiorari was granted and the matter was fully briefed and argued to the Court. Following argument, the writ of certiorari was dismissed as improvidently granted, and the opinions of the Court of Appeals and the trial court remained unchanged. *Keller v. ING Financial Partners, Inc.*, Op. No. 2015-MO-006 (S.C. filed Feb. 11, 2015). **(R. pp. 344-45)**

presumed that FINRA is either a new name for NASD or NYSE or that it is the successor to those named entities. South Carolina courts are careful to ensure that arbitration proponents are put to their proof and that parties are not compelled to arbitrate before a forum to which they did not agree. Mr. Berry submits that Petitioners cannot simply rely upon mere assumptions as a basis for compelling arbitration, a fact that should have been well-known to Petitioners.

Undeterred, Petitioners contend that the SRO organizations may be amended from time to time. However, the amendment clause "as may be amended from time to time" clearly and unambiguously modifies the earlier designation of "the rules, constitutions, or by-laws" of the designated arbitral fora, an acknowledgment that the rules, constitutions and by-laws of an arbitration forum may change regularly. Petitioners' argument that the arbitration forum can simply be changed at the whim of the employer was correctly rejected by the Court of Appeals as contrary to the established law of this State and other jurisdictions: the identity of the arbitral forum is a material, integral part of an arbitration agreement and in the event that the designated forum fails for any reason, then the entire agreement to arbitrate is void. *E.g. See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371 n.12, 759 S.E.2d 727, 730 n.12 (2014); *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 132, 678 S.E.2d 435, 439 (2009) (failure of selected arbitral forum warrants invalidation of entire arbitration clause); *see also* **(App. p. 9)**, Opinion at 9 (same).

Petitioners next argue that the Court should simply disregard their burden of proof on the basis that a 2007 "technical amendment" to the baseline Form U4 should be applied retroactively to previously-filed U4s such that FINRA should be unilaterally substituted for the NASD for the purposes of compelling arbitration claims. The Court of Appeals considered this argument and correctly found it to be unpreserved for its review. *See* **(App. p. 6)**, Opinion at 6 (finding Petitioners' 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 **(App. p. 12)**, Op. at 12 (declining to reach the issue of whether Petitioners 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 Petitioners' Rule 13200 argument on the merits). As a consequence, it does not present a valid basis for this Court to exercise its discretionary review. Setting aside that procedural infirmity, Petitioners are wrong on the substance of their contention, as non-retroactive "technical amendments" do not supersede Petitioners' burden of demonstrating the existence of a valid agreement with Mr. Berry to arbitrate the asserted claims.[10]

Petitioners essentially argue as follows: because Petitioners 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 Petitioners for that proposition, even if it were both preserved for this Court's review and binding upon it under some type of quasi-legal authority (which it is not),[11] does not stand for the proposition asserted by Petitioners. The Release contains no discussion of retroactive application; instead, it repeatedly references the fact that the form U4 "will be"

[10] *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 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)).

[11] Of course, Petitioners' new-found justification is itself belated and unpreserved. **(App. p. 147)**, 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.").

amended to reflect the change in name in registrations filed after the effective date. Thus, the weight assigned by Petitioners to this change is not reflected in the document.

c. Petitioners' argument regarding collapsing the 1999 and 2014 Form U4s by virtue of an attestation of fingerprint information in the 2014 Form U4 is an argument first advanced in Petitioners' petition for rehearing to the Court of Appeals, is unpreserved for this Court's review, and is meritless in any event.

Finally, Petitioners' argument regarding the implication of Mr. Berry declining to resubmit fingerprint information as a part of a background check in connection with his 2014 Form U4 falls flat under any scrutiny. **(App. pp. 387-401)**, (Ex. 2-B to the Motion for Reconsideration). As an initial matter, this argument is likewise unpreserved for this Court's review; it was not made at all to the trial court, and did not appear in either Petitioners' primary or reply brief to the Court of Appeals. Instead, the very first time Petitioners made this argument was in their petition for rehearing to the Court of Appeals. *Kennedy v. S.C. Retirement Sys.*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001) ("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.").

That procedural infirmity aside, Petitioners' argument collapses on a failure of proof. Petitioners argue that Mr. Berry's selection of the option of not contemporaneously submitting a separate finger print card along with his 2014 Form U4 demonstrates that: (1) the 2014 Form U4 is an amendment of the 1999 Form U4, and (2) Petitioners are entitled to collapse the forms and entities into one, despite the undisputed fact that the 1999 Form U4 was submitted on behalf of Everen **(App. pp. 377-86)**, and the 2014 Form U4 is submitted on behalf of *one* of the Petitioners, WFA. **(App. pp. 387-401)** In fact, the fingerprint selection language highlighted by Petitioners 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." **(App. p. 388)** (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 Form U4 does *not* relate back to the submission of Mr. Berry's last Form U4, as suggested by Petitioners;[12] instead, it expressly relates to whether the registered person has been employed by the filing firm since they last submitted a fingerprint card, a question on which Petitioners presented no evidence.

In sum, by confirming that they are attempting to cobble together an agreement to arbitrate with Mr. Berry by selectively taking pieces from separate Form U4s, Petitioners also lay bare the underlying truth of what Mr. Berry has argued since the outset of this litigation and which the Court of Appeals expressly found: Petitioners have produced no evidence to demonstrate an agreement to arbitrate between Petitioners and Mr. Berry. Contrary to Petitioners' definitive assertion of an "uncontested fact that Berry signed both [the 1999 and 2014 Form U4s] as he was required to do, and that the Form U4 contains a mandatory arbitration clause," Petition at 11; in fact, very little of the foregoing statement is accurate. While the 1999 Form U4 of Everen is signed by Mr. Berry, the 2014 Form U4 of WFA is not. And the 2014 Form U4—the only form produced by Petitioners to which one of the Petitioners (WFA) is a party—does not contain an arbitration clause. It is on the back of that failure of proof that Petitioners seek to simply end-run its requirement under South

[12] Petitioners 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 Petitioners' custody affiant, Michael Zuhr, makes no such claim or representation. **(App. pp. 374-76)** Noticeably absent from this record and Petitioners' 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 Petitioners or one of the other intervening firms. This failure of proof is Petitioners' alone. What *is* clear, however, is that the significance Petitioners seek to attribute to the selection of the fingerprint card option in the 2014 Form U4 is incorrect and unavailing.

Carolina law to demonstrate the existence of an agreement to arbitrate with Mr. Berry, resorting instead to an assertion that "the strong public policy in favor of arbitration [is] implicated here" and dictate that this case "must be arbitrated." Petition at p.11. But this Court rejected the existence of a public policy in favor of arbitration in *Palmetto Construction Group*, stating definitively that "[t]here is, however, no public policy—federal or state—'favoring' arbitration." Op. No. 28010 (S.C. Sup. Ct. filed March 10, 2021) (Shearouse Adv. Sh. No. 8 at 34). Petitioners' arguments are unpreserved for this Court's review, but even if they were properly made, Petitioners have not met their burden of demonstrating an agreement to arbitrate and the Petition should be denied.

II. 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.

Petitioners next argue that the FINRA Rules provide an independent basis to compel arbitration. This claim likewise suffers from preservation issues and Petitioners' failure to meet its burden of proof. As discussed above, the Motion to Compel relied principally on the arbitration provision appearing in a single 1994 Form U4 which Petitioners contended was the source of Mr. Berry's obligation to arbitrate his claims against all Petitioners.[13] **(App. pp. 236-241)** In the alternative, Petitioners cited FINRA Rule 13200 for the proposition that Mr. Berry's claims must be arbitrated. *Id.* Petitioners cited no additional authority or documents, including no other FINRA rules or standards. *Id.* Importantly, Petitioners simply cited FINRA Rule 13200 as quasi-legal authority for its proposition, **(App. p. 234)**, but put forward no evidence of FINRA's application to Mr. Berry generally, or FINRA Rule 13200 specifically, despite their burden to do so. Sensing a

[13] The only defendants which could arguably seek to arbitrate Mr. Berry's claims before a FINRA panel are Petitioners WFA, which is a member of FINRA, and Spang, who is an associated person registered with FINRA. Petitioners Wells Fargo & Company (the corporate holding company) and Wells Fargo Bank, N.A. (the banking entity) are neither members nor otherwise associated with FINRA and neither may invoke its rules or compel arbitration of Mr. Berry's claims.

failure to meet their burden of proof as to the applicability of any FINRA rule to Mr. Berry, during the hearing and as the trial court notes in its Order, Petitioners alternatively requested the trial court to take judicial notice of similarities between NASD and FINRA, but that request was rejected. **(App. p. 147)**, Order at 8, n.7 ("During the hearing, [Petitioners] 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 [Petitioners] have not met their threshold burden of demonstrating the applicability of any FINRA rule to Mr. Berry.") (emphasis supplied). The trial court correctly held the application of FINRA rules and standards are subject to a more fundamental demonstration by the proponent of their applicability. **(App. p. 153)** Order at 14

The trial court's holdings form the basis of the instant preservation argument. Based on the trial court's exclusion of Petitioners' FINRA Rule 13200 argument on evidentiary grounds, Petitioners' requirement in this appeal was to demonstrate that the trial court erred in finding that "their threshold burden" had not been met, by pointing to contrary evidence in the record to support that assignation of error. *See I'On, L.L.C. v. Town of Mt. Pleasant*, 338 S.C. 406, 422, 526 S.E.2d 716, 724 (2000) ("The losing party must first try to ... convince the appellate court that the lower court erred."). But rather than argue that the trial court's threshold holding was incorrect or in disregard of submitted evidence, Petitioners simply ignored—and continue to ignore—the court's holding and cite FINRA rules and documents with impunity throughout their Petition. These citations and arguments are not preserved for this Court's review, as they were not presented to the trial court and were raised by Petitioners for the first time on appeal. **(App. p. 89)**

Instead, Petitioners now contend that their citations, web-links and derivative arguments are appropriate because they constitute binding *legal authority* on this Court, rather than matters subject to proof. This argument is itself at odds with Petitioners' argument to the trial court, and its third

argument below to this Court, that the FINRA rules are adjudicative facts which are subject to judicial notice. And, of course, FINRA rules are not statutes or other citations that might be appropriate to cite to the Court as binding legal, regulatory or rule precedent, and Petitioners admit that no South Carolina court has accepted FINRA's rules, citations, and myriad releases or compilations.[14] Petitioners simply assert—without any factual evidence in this record—that FINRA's rules apply to Mr. Berry and that he has agreed to abide by those rules. Petition at 5 ("It is undisputed that [Mr.] Berry was a registered representative subject to the rules of … FINRA during this entire period."); 13 ("[T]he very act of registering obligated Berry to comply with all FINRA rules and regulations …."). In fact, there is no *evidence* in this record, other than Petitioners' citation to unpreserved weblinks, to support that assertion, much less make Petitioners' assertion "undisputed." Not only that, but the circuit court found the exact opposite of Petitioners' assertion based on its review of the evidence advanced by Petitioners in their original motion to compel. *See* Order at 8, n.7 **(R. p. 10)** ("[Petitioners] have not met their threshold burden of demonstrating the applicability of any FINRA rule to Mr. Berry.").

Arguing the merits of an issue that the trial court declined to reach—and expressly excluded on evidentiary grounds—is not a proper basis for certiorari, and Petitioners' citations and derivative arguments should be disregarded as unpreserved. That is particularly true where, as here, the 2014 Form U4 relied upon by Petitioners —the *only* Form U4 produced by Petitioners which post-dates the creation of and references FINRA—was not advanced until the motion for reconsideration and

[14] Petitioners' citation to Federal case law and a FINRA proceeding for the proposition that this Court must somehow disregard South Carolina law and precedent as to strictures required to compel arbitration is unavailing. So, too, are the citations to NASD Rules (which no longer exists), FINRA Rule 12200 and case law discussing same. Despite now having two opportunities, Petitioners have been unable to refute the Court of Appeals' correct observation and conclusion that "[it has] been unable to identify any precedent extending the [FINRA Rule 12200] interpretations to FINRA Rule 13200." Opinion at p.12.

does not include *either* Mr. Berry's signature *or* an arbitration clause. Citation to FINRA[15] rules with undetermined applicability to this case and situation is not a substitute for Petitioners satisfying their burden demonstrating a valid agreement to arbitrate in an agreed-upon forum. *Chassereau* 363 S.C. at 632, 611 S.E.2d at 307 ("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). To date, Petitioners have not produced a signed agreement to arbitrate claims between any of the Petitioners 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.").

Petitioners' arguments in favor of certiorari on this basis are not properly before the Court, but even if they were, the Opinion correctly rejected these arguments and they do not provide an appropriate basis for this Court exercising its discretion.

III. The Opinion correctly held that Petitioners' judicial notice request was unpreserved for appellate review and Petitioners' request that this Court do so is unavailing.

Petitioners next contend the Opinion erred in failing to take judicial notice of "FINRA Rules, Form U4s, and statutorily-mandated Broker Check []entries." Petition at 16. In the Opinion, the Court of Appeals correctly found that these arguments and citations were unpreserved based on the circuit court declining Petitioners' judicial notice request (made during the hearing) in the Order denying the motion to compel, followed by Petitioners' failure to raise the issue in its motion for

[15] Petitioners continue their conduct of simply substituting "FINRA" for the terms that actually appear in the Form U4s without acknowledging the material alteration. *See* Petition at 16 (quoting from the 1999 Form U4 appearing at page 385 of the Appendix and inserting "FINRA" in brackets for the word "SROs" that actually appears in the U4). FINRA is not one of the SROs expressly defined in the 1999 Form U4; nor could it be, as FINRA was first created in mid-2007 upon the merger of the NASD and the NYSE.

reconsideration. The Court of Appeals was correct, and this argument does not present a valid basis to grant certiorari.

Initially, Petitioners confusingly argue that, because they cited to and attached the *actual* FINRA Rules, Form U4s, and BrokerCheck entries in their motion for reconsideration, then their argument regarding judicial notice of those same materials (which was made during the hearing before the circuit court *but not* in the motion for reconsideration) is nevertheless preserved. Petition at 16 ("The records show, however, that the Wells Fargo Entities incorporated the FINRA Materials into the Motion for Reconsideration."). This argument is nonsensical and confuses the legal argument—*i.e.*, judicial notice—with the citations and documents themselves that Petitioners were seeking to present to the Court. The purpose of asking a court to take judicial notice of something necessary infers that the subject or document is not already before the Court. There would be no reason for the Court to take notice under that circumstance, as citing and attaching the actual documents obviates the need for judicial notice, not furthers it.

However, citing and attaching the actual documents in lieu of making a judicial notice argument does not mean that those documents are properly before the Court either, as doing so for the first time in a motion for reconsideration is likewise prohibited under this State's longstanding preservation rules and concepts. *See Hickman*, 301 S.C. at 456–57, 392 S.E.2d at 482 ("A party cannot use Rule 59(e) to present to the court an issue the party could have raised prior to judgment but did not."). Stated differently, citing and attaching rules and other documents for the first time in a motion for reconsideration proves the point that the arguments based on those materials are unpreserved, which is what the Court of Appeals correctly held.

Even if properly made, however, Petitioners' 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, **(App. p. 478)**, and nothing else. The trial court rejected this limited request as a basis to consider Petitioners' citation to FINRA Rule 13200 without any evidence as to its applicability to Mr. Berry. **(App. p. 147)**, Order at 8, n.7. Notwithstanding the very specific and discrete request, and the trial court's limited holding, Petitioners' briefing to the Court of Appeals and this Court seek 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.[16]

In their primary briefing to the Court of Appeals, Petitioners expressly assigned error to the trial court for failing to take judicial notice of and 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, the Court of Appeals correctly reviewed the record with an eye towards evaluating whether Petitioners' argument was preserved for appellate review, *i.e.*, that Petitioners 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, the Court of Appeals correctly found that Petitioners never asked the trial court to take judicial notice in the manner in which they presented in their appellate briefing to the Court. The trial court expressly

[16] This fact is self-evident in Petitioners' request for judicial notice, both at the trial and appellate court level; had Petitioners satisfied their evidentiary burden of relevance and a demonstration of the applicability of these rules and procedures to Mr. Berry, then a request for judicial notice would have been unnecessary. Petitioners did not, and their corresponding request for judicial notice was limited. The Court of Appeals correctly refused to allow Petitioners to try a different case on appeal than they put forward below, and this Court should do likewise, where Petitioners 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. *See* § II, *supra*.

declined to reach—and therefore did not rule on—the issue.[17] Notwithstanding, Petitioners did not ask the trial court to reconsider or rule upon the judicial notice issue in its motion for reconsideration, something Petitioners concede. **(App. p. 16**), Petition for Rehearing at 4 ("[T]he Court [of Appeals] is correct that [Petitioners] did not specifically use the words 'judicial notice' [in] the Wells Fargo Entities' motion for reconsideration.").[18] The Court of Appeals was concomitantly correct that Petitioners' judicial notice argument was unpreserved for appellate review. *Chastain v. Hiltabidle*, 381 S.C. 508, 515, 673 S.E.2d 826, 829 (Ct. App. 2009) ("When an issue is raised to but not ruled upon by the trial court, the issue is preserved for appeal only if the party raises the same issue in a Rule 59(e) motion.").

Finally, Petitioners' request that this Court grant certiorari and take initial appellate judicial notice of the very documents and citations which the Court of Appeals found to be unpreserved, and via a legal construct (judicial notice) that it also found to be unpreserved, would truly stand this Court's preservation analysis on its head. This Court has cautioned against the liberal use of judicial notice, particularly for matters that are subject to proof and in dispute. *See Masters v. Rodgers Development Group*, 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984) (holding that "original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable."). Here, not only are the citations and documents in dispute, but the both the legal

[17] **(App. p. 147)** Order at 8, n.7 ("During the hearing, [Petitioners] 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 [Petitioners] have not met their threshold burden of demonstrating the applicability of any FINRA rule to Mr. Berry.").

[18] In essence, Petitioners assigned error to the trial court for failing to take judicial notice of things that they did not expressly request, while also then assigning error to the Court of Appeals for pointing out that discrepancy. Yet, Petitioner argue that 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 attached and included citations to the documents for the very first time in their motion for reconsideration.

vehicle and materials have been found to be unpreserved. Under this circumstance, the rationale for taking judicial notice of documents which were not presented to the trial court has not been met, particularly in light of the fact that the trial court expressly held that Petitioners did not meet their burden of demonstrating that any of the cited rules and documents apply to Mr. Berry and his claims and therefore excluded them without consideration. Were this Court to take judicial notice of the citations and documents expressly excluded below, it would effectively permit Petitioners to try a new case on appeal.

CONCLUSION

This case has been pending for over four years, but it has never been permitted to leave the starting gates as a result of this appeal. Despite all of that time, and making new arguments at each successive stage and motion, Petitioners have still failed to produce or prove the one thing South Carolina law requires of each party seeking to compel arbitration: a clear and unmistakable agreement by Mr. Berry to arbitrate claims against any of the Petitioners. For all of the foregoing reasons, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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