

THE STATE OF SOUTH CAROLINA
In the Supreme Court

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Jun 14 2021

S.C. 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. 2021-000419

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.

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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INTRODUCTION

To assert, as Robert Berry does, that this matter does not involve any matter of national or state importance – and thus does not merit further consideration by this Court – completely disregards the function FINRA and its rules play in the regulation of the securities industry. The FINRA arbitration mechanism that Berry seeks to avoid here is critical to the securities industry and has been expressly approved by the United States Securities Exchange Commission as the proper mechanism for resolving securities industry disputes. This mechanism is so important that every individual associated with a FINRA-registered firm who is engaged in trading or advising customers regarding securities must agree, as a condition of the registration required to work in the industry, to arbitrate any dispute that “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.” It is this federal overlay, in coordination with state securities regulators, which allows the system to function across borders for the protection of investors in all fifty states.

The Wells Fargo Entities have argued clearly and repeatedly from the very beginning of this matter that Berry, like all other registered representatives, has agreed to arbitrate his disputes with Members and Associated Persons. The Wells Fargo Entities consistently sought reconsideration or reversal each time the trial court or the Court of Appeals declined to recognize the binding effect of FINRA’s rules on registered persons (like Berry) or declined to enforce the agreement registered persons must make as a condition of their employment in the securities industry.

In Berry’s continuing effort to avoid his obligations, he advances two primary arguments couched in inflammatory rhetoric. Neither contention has merit. First, Berry argues that the Wells Fargo Entities have failed to produce an agreement between Berry and one of the Wells Fargo Entities obligating Berry to arbitrate his claims before FINRA. The Wells Fargo Entities have, in

fact, produced a series of agreements under which Berry agreed to arbitrate his claims, dating back to the very beginning of his continuous employment with Wells Fargo Advisors and its predecessors. Moreover, the FINRA rules mandating arbitration of industry claims are themselves of a “contractual nature,” and provide an independent basis on which the trial court should have ordered the parties to arbitrate their dispute. Second, Berry argues that essentially none of the arguments the Wells Fargo Entities advance in their Petition were preserved for review. Berry asks this Court to elevate form over substance, by finding fault with the Wells Fargo Entities’ alleged failure to use specific, magic words to preserve matters for appellate review. The bar is not as high as Berry contends and, in any event, the Wells Fargo Entities have cleared it. *See Herron v. Century BMW*, 395 S.C. 461, 470, 719 S.E.2d 640, 644 (2011) (“We are mindful of the need to approach issue preservation rules with a practical eye and not in a rigid, hyper-technical manner.”).

ARGUMENT IN REPLY

I. Berry’s Many Forms U4 Are Properly Before the Court.

Berry argues at length that the 1999 and 2014 Forms U4 are unpreserved for this Court’s review because they were “entirely new documents and arguments” presented by the Wells Fargo Entities on their Motion for Reconsideration, the consideration of which would violate Rule 59(e) and grant the Wells Fargo Entities an impermissible “do-over.” (Return at 9). Berry is wrong.

The South Carolina Rules of Civil Procedure allow an aggrieved party to make a motion for reconsideration under Rule 59(e), the purpose of which is to request the trial court to reconsider matters properly encompassed in a decision on the merits. *See Elam v. S.C. DOT*, 361 S.C. 9, 21, 602 S.E.2d 772, 778-79 (2004). As this Court has said, “[t]here is nothing inherently unfair in allowing a party one final chance not only to call the court’s attention to a possible

misapprehension of an earlier argument, but also to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity.” *Elam*, 361 S.C. at 22, 602 S.E.2d at 779.

Here, the Wells Fargo Entities moved for reconsideration based, in part, on recently identified Forms U4 procured in response to Berry’s Memorandum in Opposition to Defendants’ Motion to Dismiss or Stay Pending Arbitration, which the Wells Fargo Entities were handed only moments before oral argument. (App. at 269; 462 (Tr. 4:19-24)). The trial court denied the Motion to Dismiss before the Wells Fargo Entities could submit supplemental documentation in support of the Motion to Dismiss (App. at 347 n.2) in response to Berry’s Opposition and in further support of the arguments made during oral argument. (*See, e.g.*, App. at 478-79 (Tr. at 20:23-21:15) (describing evolution of Wheat First into Wells Fargo Advisors and arguing that Berry’s Form “U4 continued with both Mr. Berry and the various firms, broker dealers that he worked with over the time until Wells Fargo Advisors.”) The Wells Fargo Entities’ Motion for Reconsideration incorporated these arguments – which were already before the trial court at the time of its decision – and provided additional Forms U4 to illustrate and clarify these points. *See Elam*, 361 S.C. at 21, 602 S.E.2d at 778 (“In essence, we view the use of oral or written JNOV/new trial motions, followed by an initial Rule 59(e) motion, as part and parcel of a party’s ‘single bite at the apple’ in presenting his case to the trial court.”).

Berry may “disagree that the record reflects the trial court’s consideration of these documents submitted for the first time in Petitioners’ motion for reconsideration” (Return at 9 n.6), but, as he concedes, the trial court’s order specifically notes that it considered “the submissions of the parties,” which on the Motion for Reconsideration included the additional Forms U4 and FINRA rules. (*See App.* at 157; 378-423 (attaching Forms U4 and FINRA Rules)). And while Berry is correct that the Court of Appeals did not address his preservation argument in its Opinion,

in omitting discussion of what Berry describes as “procedural infirmities” and instead addressing the substantive merits of the parties’ arguments, the Court of Appeals necessarily determined that the Forms U4 were, in fact, preserved at the trial court and properly before it. As this Court explained in *Atlantic Coast Builders & Contractors, LLC v. Lewis*, appellate courts “should follow our longstanding precedent and resolve the issue on preservation grounds when it clearly is unpreserved” thus ensuring that appellate courts “do not reach issues which were not ruled upon by the trial court.” 398 S.C. 323, 329-30, 730 S.E.2d 282, 285 (2012).

The 1999 and 2014 Forms U4 were properly before the trial court and the Wells Fargo Entities have preserved these arguments.¹

II. Berry’s Forms U4 Establish an Agreement to Arbitrate before FINRA.

Berry argues that the Wells Fargo Entities “attempt to cobble together bits and pieces ... in order to create an arbitration agreement out of whole cloth.” (Return at 12). Contrary to Berry’s argument, the Wells Fargo Entities are not “pick[ing] and choos[ing] beneficial clauses from an

¹ Berry suggests that to hold otherwise permits the Wells Fargo Entities an impermissible “do over” in litigation. (Return at 10). The cases cited by Berry do not support such a conclusion. *Parker v. S.C. Public Service Commission*, 288 S.C. 304, 342 S.E.2d 403 (1986), the case that sparked the trial court’s rejection of the Wells Fargo Entities’ supposed attempt at a “second bite at the apple” was overruled the day after the trial court issued its Order on the Motion for Reconsideration. (App. at 144 n.2). In *Daufuskie Island Utility Co., Inc. v. South Carolina Office of Regulatory Staff*, this Court held that remand to the Public Service Commission for a new hearing necessarily grants the parties the opportunity to present additional evidence, expressly overturning *Parker*. 420 S.C 305, 316 n.8, 803 S.E.2d 280, 286 n.8 (2017). The remaining cases Berry cites in support of this argument are similarly inapplicable or distinguishable from the facts here. In *City of Myrtle Beach v. Tourism Expenditure Review Committee*, the “call for a remand for a new hearing and presentation of additional evidence on an alternate theory” touted by Berry as “rejected,” was a “call” made by the dissent - not a party - and was “rejected” by the majority. 407 S.C. 298, 303 n.5, 755 S.E.2d 425, 427 n.5 (2014). *Porter v. South Carolina Public Service Commission*, like *City of Myrtle Beach*, was an appeal of an administrative decision. 333 S.C. 12, 32, 507 S.E. 2d 328, 338. The cited portion of the decision concluded that the agency may not consider additional evidence on remand, a holding that is likely no longer good law given the *Daufuskie* decision. Compare *id. with Daufuskie*, 420 S.C at 316 n.8, 803 S.E.2d at 286 n.8.

assortment of historical documents,” they are instead following the long history of agreements Berry entered during his decades long employment with a single entity. (Return at 12; App. at 199 ¶ 45 (admission by Berry that he “dedicated the bulk of his professional life to the brokerage firm which ultimately became the WFA Defendants”); *id.* (alleging Berry “devoted nearly 20 years to essentially one firm”). What is most striking about Berry’s arguments is the complete absence of any rebuttal to the simple fact that *every registered representative* must agree to arbitrate disputes with his or her employer as part of becoming licensed to sell securities. Berry does not dispute this simple undeniable fact, because he cannot.

As Berry himself repeatedly alleges, his FINRA-registered employer firms underwent a series of acquisitions by successor companies, at the end of which he found himself employed by Wells Fargo Advisors.² (App. at 194 ¶ 27, 195 ¶ 28 & n.3, 199-200 ¶ 45). Each of these Form U4s contain an agreement to arbitrate. Berry’s 2014 Form U4, the most recent Form U4 held by the Wells Fargo Entities and which was filed with FINRA, identifies his employment date as October 1, 1999 (*see* App. at 378), the same date as his employment date with Everen Securities, Inc. (*see id.* at 388), thus demonstrating that - consistent with Berry’s allegations in his Amended Complaint - Everen Securities was the predecessor firm of Wells Fargo Advisors.³

² Berry’s history with Wells Fargo Advisors and its predecessors pre-dates his 1999 Form U4. Berry argues that the November 1994 Form U4 “made no reference to any Petitioner in this case” and that Wells Fargo Advisors argues “without any evidence to support the assertion, that it was a successor in interest to Wheat First.” (Return at 6). But Berry has himself alleged that Wells Fargo Advisors was the successor to Wheat First, including in his Complaint and in his Amended Complaint, allegations that are taken as true on a motion to dismiss. (App. at 166 ¶ 23 & n.1, 167 ¶ 26, 195 ¶ 28 & n.3, 196 ¶ 31). *See Overcash v. South Carolina Elec. & Gas Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005).

³ Though Berry makes much of the SEC Release’s language regarding the naming of FINRA in the place of NASD for “*future* U4 filings” (*see* Return at 15-16), the name change did not invalidate previously filed Forms U4 or require the mass re-submission of every Form U4 in

Berry argues that “for the purposes of selecting an arbitration forum, FINRA is not the same thing as NASD” and criticizes what he describes as the Wells Fargo Entities “simpl[e] assump[ti]on that all securities arbitral fora may be treated as interchangeable.” (Return at 13). This intentionally oversimplified representation is not what the Wells Fargo Entities argued, but as it happens in this unique circumstance, FINRA and NASD *are* interchangeable – for all purposes, including specifically for purposes of the Form U4 and compelling arbitration under the agreement contained therein. This is not, as Berry would have the Court believe, the mere opinion of the Wells Fargo Entities; rather, this is an undisputed fact according to the SEC and numerous courts that have addressed the issue. *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”); *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); *Rusciano v. Oppenheimer & Co., Inc.*, No. 14 Civ. 1452(CM), 2014 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); *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’”).

effect at the time. It was, with respect to NASD and FINRA, made to reflect a change in “corporate name.” *See* SEC Release No. 34-57033, available at <https://www.sec.gov/rules/sro/finra/2007/34-57033.pdf> (Dec. 21, 2007).

Berry drops a footnote and asserts in passing that arguments concerning the NASD/FINRA name change were also unpreserved (Return at 15 n.11), but the record demonstrates otherwise. The Wells Fargo Entities' Motion to Dismiss did not make a distinction between FINRA and the NASD because, from a regulatory and practical perspective, there was no distinction to be made. *See infra*. After Berry raised this false distinction in his Opposition and during oral argument, the Wells Fargo Entities addressed the point first during the argument (App. at 466 (Tr. at 8:4-17), 480 (Tr. at 22:10-19)) and again in their Motion for Reconsideration (App. at 347 & n.10), thus preserving the matters for further review.

III. Arguments Regarding Berry's 2014 Forum U4 Were Preserved, Are Properly Before This Court, and Establish that Berry is Required to Arbitrate his Claims.

Consistent with Berry's employment history and his own allegation that he "devoted [his career] to essentially one firm," Berry's 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)). Berry urges the Court to reject this argument, including because the argument was purportedly unpreserved.⁴ (Return at 16).

⁴ Berry also urges the Court to reject this argument because the Wells Fargo Entities have presented no evidence that "the registered person" – *i.e.*, Berry – "has been employed by the filing firm since they last submitted a fingerprint card." (Return at 17). As discussed *infra*, that is not the case – Berry's own 2014 Form U4 directly ties his employment back to the 1999 Form U4. (App. at 388 (identifying October 1, 1999 as the employment date) and his own allegations in the Complaint and Amended Complaint establish this fact. Berry's argument that the Wells Fargo Entities have failed to prove "there was no intervening Form U4 for Mr. Berry between 1999 and 2014" is a red herring. (Return at 17 n.12).

All of these points were preserved. The Wells Fargo Entities raised Berry's employment by predecessor firms, the related requirement that he register via a Form U4, and his continuous employment by Wells Fargo Entities (or their predecessors) in their Motion to Dismiss, during the oral argument on that motion, and in their Motion for Reconsideration. (App. at 233-36, 238-39, 347 & n.10, 348-49, 466 (Tr. at 8:4-17), 480 (Tr. at 22:10-19)). The Wells Fargo Entities specifically raised Berry's October 1, 1999 employment date in their Motion for Reconsideration, which attached the 1999 Form U4, and which submissions the trial court Order specifically notes was "considered." (App. at 20 (trial court considered "the submissions of the parties")). The Wells Fargo Entities' specific reference to the fingerprint card attestation is not a new argument based on new documentation; it was further elaboration of the point that Berry has been continuously employed by Wells Fargo Advisors since at least 1999 based on documents found in the record.⁵

Berry also urges the Court to reject the 2014 Form U4 and related arguments because the Wells Fargo Entities have presented no evidence that "the registered person" – *i.e.*, Berry – "has been employed by the filing firm since they last submitted a fingerprint card." (Return at 17). As discussed *infra*, that is not the case – Berry's own 2014 Form U4 directly ties his employment back to the 1999 Form U4 (App. at 388 (identifying October 1, 1999 as the employment date)) and his own allegations in his Complaint and Amended Complaint establish this fact. Berry's argument that the Wells Fargo Entities have failed to prove "there was no intervening Form U4

⁵ Berry's reliance on *Kennedy v. South Carolina Retirement System*, 349 S.C. 531, 532, 564 S.E.2d 322, 322 (2001), is misplaced. (Return at 16). In *Kennedy*, the Court declined a petitioner's motion for rehearing not only because "[t]he argument ... was never presented to this Court" but also because "there is no evidence contained in the Record on Appeal which supports the appellants' new argument." *Id.* Neither is the case here. As discussed above, the Wells Fargo Entities have consistently argued that Berry has been continuously employed by the same FINRA-registered firm and the record provides evidentiary support for the argument.

for Mr. Berry between 1999 and 2014” (Return at 17 n.12) is a red herring because, regardless of whether he submitted an intervening fingerprint, the Forms U4 themselves confirm his continued employment.

Finally, Berry implies the Wells Fargo Entities’ citations to cases discussing the strong public policy in favor of enforcing agreement to arbitrate run contrary to this Court’s recent decision in *Palmetto Construction Group, LLC v. Restoration Specialties, LLC*, 432 S.C. 633, 856 S.E.2d 150 (2021). Berry entirely misses the critical distinction in the Court’s decision. In *Palmetto*, this Court explained that “statements that the law ‘favors’ arbitration mean simply that courts must respect and enforce a contractual provision to arbitrate as it respects and enforces all contractual provisions.” *Id.* at 639. Read in context, the Court’s statement that “[t]here is, however, no public policy – federal or state – ‘favoring’ arbitration” (Return at 18) refers to the Court’s point that “[n]either the Supreme Court nor this Court ... meant to give the law of arbitration such a special status that it would supplant state procedural law.” *Id.* at 639. The Court continued, “[r]ather, these statements must be read in the context in which the Court made them: overruling a longstanding, policy-based rule that arbitration agreements are unenforceable.” *Id.* Nothing the Wells Fargo Entities seek in their appeal – enforcement of an agreement to arbitrate – runs counter to the Court’s analysis in *Palmetto*. Critically, it is Berry, not Wells Fargo, that is seeking to avoid contractual and regulatory obligations, and certainly there is no public policy that supports Berry’s position.

IV. FINRA Rules Provide an Independent Basis on Which to Compel Arbitration.

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.”⁶ Berry makes a two-pronged attack on the applicability of FINRA Rule 13200. First, he argues the Wells Fargo Entities have failed to preserve this argument. Second, he argues that even if they have, they put forth no evidence of the applicability of FINRA rules to Berry. Both attacks fail.

The Wells Fargo Entities’ arguments concerning the applicability of FINRA rules, including Rule 13200, were expressly raised in the Motion to Dismiss. (App. at 234, 236, 237-38). There, the Wells Fargo Entities argued that “FINRA Rule 13200 specifically requires a dispute to be arbitrated under FINRA’s Code if the dispute arises out of the business activities of a member or an associated person, and [Berry’s] claims ... clearly arise out of the business activities of Wells Fargo Clearing Services..., [Berry], and Scott Spang.” (App. at 234). At no point going forward did the Wells Fargo Entities abandon this argument.

According to Berry, the “basis of the instant preservation argument” is the trial court’s finding that the Wells Fargo Entities had not met their burden of demonstrating the applicability of FINRA rules to Berry, and the Wells Fargo Entities allegedly failed to argue that the trial court’s order in this respect was incorrect or in disregard of submitted evidence. (Return at 19). Not only did the Wells Fargo Entities move the trial court for reconsideration on these very issues (App. at 349-50), they also assigned error to the trial court’s finding in their Initial Brief before the Court of Appeals and argued extensively that the trial court should have compelled arbitration pursuant to the FINRA Rule 13200.

Contrary to Berry’s argument, the Wells Fargo Entities do not “simply assert - without any factual evidence in this record - that FINRA’s rules apply to Mr. Berry and that he has agreed to

⁶ See FINRA Rule 13200, available at <https://www.finra.org/rules-guidance/rulebooks/finra-rules/13200> (last visited April 21, 2021).

abide by those rules.” (Return at 20; *see also* Return at 18). The record includes overwhelming evidence that Berry – as he must be licensed to sell securities in the State of South Carolina – voluntarily subjected himself to FINRA’s rules, including Rule 13200. Berry’s own Amended Complaint alleged his long career in the securities industry. (*See, e.g.*, App. at 194-95 ¶¶ 27-28). His Amended Complaint acknowledges 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 the Amended Complaint also admits that that, after Berry’s termination, he became an affiliated person with LPL Financial Corporation (‘LPL’).” (*Id.*). As a matter of black letter law, the allegations of a complaint are accepted as true for purposes of a motion to dismiss, and should be here as well. *See Overcash*, 364 S.C. at 572, 614 S.E.2d at 620. To accept the privilege of selling securities under the oversight of FINRA and the SEC, the individual must also accept the FINRA arbitral forum as mandated by both FINRA and the SEC. Berry’s hyper-technical arguments to avoid this obligation must be rejected.

The record includes a long line of Berry’s Forms U4. (*See, e.g.*, App. at 246-57, 263-66, 378-86, 388-401). Submission of the Form U4 required Berry to affirm he was applying for registration with the organizations identified therein (including, in the case of Berry’s 2014 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’s continued insistence that FINRA’s rules do not establish an independent basis on which the trial court should have compelled arbitration of his claims ignores that FINRA’s rules are “contractual in nature.” *Kidder, Peabody & Co., Inc. v. Zinsmeyer Trusts P’ship*, 41 F.3d 861, 863 (2nd Cir. 2005) (citation omitted). *See In re Am. Express Fin. Advisors Secs. Litig.*, 672 F.3d

113, 128 (2d Cir. 2011) (“FINRA membership constitutes an agreement to adhere to FINRA’s rules and regulations, including its Code and relevant arbitration provisions contained therein.”) (citation and internal quotation marks omitted); *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; thus, the provisions of the Code are effective and binding even after the intra-industry relationship has ended.”). The Wells Fargo Entities have advanced this argument from the very beginning of this case and the trial court and Court of Appeals have erred in refusing to enforce the agreement Berry struck as a condition of his continued employment as a registered representative.

V. The Wells Fargo Entities’ Request for Judicial Notice Was Preserved, and the Court May Independently Take Notice of Them Here.

Berry argues that “[c]iting 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.” (Return at 22). But the Wells Fargo Entities’ Motion for Reconsideration was not the first time those arguments were made or documents presented. During oral argument, the Wells Fargo Entities provided the trial court with a copy of FINRA Rule 13200 and explained that the arbitration process is set forth in the FINRA Code. (App. at 466-67 (Tr. at 8:18-9:16), 468 (Tr. at 10: 15-20)). They argued that “in order to have the privilege of working in the securities industry a broker must sign a U4, he must be licensed and registered through FINRA, and he must abide by FINRA’s rules” (App. at 467 (Tr. at 9:6-10) and directly connected registration to the FINRA rules requiring arbitration of disputes between associated persons and broker dealers or other associated persons. (App. at 480-81 (Tr. 22:21-23:8)). Berry’s argument encourages the Court to

adopt precisely the type of “rigid, hyper-technical” approach to preservation that the Court has already rejected. *See Herron*, 395 S.C. at 470, 719 S.E.2d at 644.

Berry also takes issue with the sufficiency of this presentation to the trial court, arguing that “[e]ven if properly made ... 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.” (Return at 22-23). Berry’s attempt to narrow the Wells Fargo Entities’ request for judicial notice is not supported by the record and runs contrary to the way the trial court itself described the argument. (*See App.* at 147 n.7 (“During the hearing, Defendants asked the Court to take judicial notice of FINRA Rule 13200.”)).

After the trial court declined to take judicial notice of these sources, the Wells Fargo Entities’ again raised with the court that Berry was obligated to arbitrate this dispute under FINRA Rule 13200 and asked the court to reconsider the applicability of these rules to Berry in the Motion for Reconsideration. (App. at 349-350 & n.9). Though the Wells Fargo Entities did not specifically use the words “judicial notice” in the Motion for Reconsideration, the failure to use the specific words does not mean the issue was not raised for reconsideration by the trial court or left unpreserved for appellate purposes. *See Herron*, 395 S.C. at 466, 719 S.E.2d at 642 (“Of course, a party is not required to use the exact name of a legal doctrine in order to preserve the issue.”) (citing *State v. Russell*, 345 S.C. 128, 546 S.E.2d 202 (Ct. App. 2001) (finding issue preserved though party did not use exact words “corpus delicti” in request for directed verdict)).

Finally, Berry objects to the Wells Fargo Entities’ argument that this Court may take judicial notice of the FINRA rules now, arguing that if the Court does so, it will “effectively permit [the Wells Fargo Entities] to try a new case on appeal.” (Return at 24-25). This is hardly the case, as the parties have briefed and argued about the applicability of the FINRA rules and import of the

Forms U4 from the very beginning of this dispute. In such a highly regulated industry, the idea that the overlay of FINRA requirements and rules was somehow “missed” below is simply not credible or sustainable on the record.

Berry argues that this Court has “cautioned against the liberal use of judicial notice, particularly for matters that are subject to proof and in dispute.” (Return at 24). But even in the case Berry cites in support of this argument, *Masters v. Rodgers Development Group*, 283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984), the Court acknowledges that appellate courts may take judicial notice of adjudicative facts which are “indisputable.” See Rule 201(b), SCRE (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.”). As the Wells Fargo Entities have argued at length, FINRA’s rules and Berry’s statutorily-mandated Forms U4 are indisputable, which is why 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”). Moreover, FINRA’s rules and related FINRA materials are similar to other matters of which South Carolina appellate courts have taken notice. See *Miller v. Miller*, 299 S.C. 307, 314, 384 S.C. 715, 718 (1989) (taking 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.”); *Palmetto Homes, Inc. v. Bradley*, 357 S.C. 485, 491 n.3, 593 S.E.2d 480, 483 n.3 (Ct. App. 2004) (taking notice of American Arbitration Association (“AAA”) rules even

though the rules were not within the record on appeal and 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. FINRA's rules and regulations, including its Codes of Arbitration, must be reviewed and approved by the SEC. *See* 15 U.S.C. § 78s(b). FINRA's statutorily-mandated obligations to collect and make available to the public registration information on its members and their associated representatives, *see* 15 U.S.C. § 78o-3(i)(1)(B), are fulfilled in part through the use of Forms U4 and U5 and through FINRA's BrokerCheck website, <https://brokercheck.finra.org>. This regulatory overlay provides an appropriate evidentiary basis for this Court (as well as the trial court and the Court of Appeals) to consider those documents.

CONCLUSION

The Wells Fargo Entities simply want Berry to play by the rules applicable to all FINRA-registered representatives. Their arguments have been consistent on this point from the beginning of this action. Berry's attempt to avoid his agreement to arbitrate with the Wells Fargo Entities 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,

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June 14, 2021