RECEIVED
APR 26 2021
S.C. SUPREME COURT

THE STATE OF SOUTH CAROLINA
In the Supreme Court

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas for the Eleventh Circuit

G. Thomas Cooper, Jr., Circuit Court Judge

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

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

---

APPENDIX

HAYNSWORTH SINKLER BOYD, P.A.
Sarah P. Spruill (SC Bar No. 68337)
ONE North Main St., Second Floor
Greenville, SC 29601
Phone: (864) 240-3200

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

SEYFARTH SHAW LLP
Frederick T. Smith (NC Bar No. 45229)
6000 Fairview Road, Suite 1200
Charlotte, North Carolina 28210
Telephone: (404) 888-1021

Attorneys for Petitioners

WILLOUGHBY & HOEFER, P.A.
Mitchell Willoughby (SC Bar No. 6161)
Elizabeth Zeck (SC Bar No. 9006)
Chad N. Johnston (SC Bar No. 73752)
Post Office Box 8416
Columbia, SC 29202
Telephone: (803) 252-3300

Attorneys for Respondent

INDEX TO APPENDIX

Court of Appeals Opinion No. 5792 (filed January 13, 2021).....1

Petition for Rehearing.....13

Return to Petition for Rehearing.....22

Order of Court of Appeals Denying Petition for Rehearing.....37

Brief of Appellants.....39

Brief of Respondent.....70

Reply Brief.....113

Record on Appeal.....136

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

Robert F. Berry, Respondent,

v.

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

Appellate Case No. 2017-001690

Appeal from Lexington County
G. Thomas Cooper, Jr., Circuit Court Judge

Opinion No. 5792
Submitted June 1, 2020 – Filed January 13, 2021

AFFIRMED

Sarah Patrick Spruill, of Haynsworth Sinkler Boyd, PA, of Greenville; Adam Noah Yount and Pierce Talmadge MacLennan, both of Haynsworth Sinkler Boyd, PA, of Charleston; and Frederick T. Smith, of Charlotte, North Carolina, for Appellants.

Mitchell Willoughby, Elizabeth Ann Zeck, and Chad Nicholas Johnston, all of Willoughby & Hoefer, PA, of Columbia, for Respondent.

LOCKEMY, C.J.: Scott A. Spang, Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, Wachovia Securities Financial Holdings, LLC, Wells

Fargo & Company, and Wells Fargo Bank, N.A. (collectively, Appellants) appeal the circuit court's denial of their motion to dismiss and compel arbitration of Robert F. Berry's claims. Appellants argue the circuit court erred by (1) denying their motion to reconsider or amend when they provided supporting documentation to establish Berry's agreement to resolve his claims through mandatory FINRA[1] arbitration and (2) denying their motions to dismiss and reconsider when public records and publicly available FINRA rules established Berry was obligated to arbitrate his claims against Appellants as a condition of his admitted registration as a FINRA-regulated broker. We affirm.[2]

FACTS/PROCEDURAL HISTORY

Berry commenced this action against Appellants in 2017, asserting various causes of action including wrongful termination, breach of contract, and defamation. Berry alleged that, in 2014, Appellants forced him to resign from his position as a Wealth Manager and Senior Vice President with Wells Fargo Advisors.[3] He claimed this was in retaliation for his challenges to changes in his compensation arrangement and his refusal to participate in an allegedly illegal cross-selling program. In addition, Berry alleged that in 2016, he learned Wells Fargo Advisors had filed a Form U5 termination notice, which appeared on his official record. The Form U5 stated Wells Fargo Advisors had permitted him to resign, and it noted that his branch office manager had discovered several binders of customer information in the trunk of Berry's vehicle.

Appellants filed a motion to dismiss or stay the action pending arbitration, which the parties and the court treated as a motion to compel arbitration. They attached a supporting memorandum, three Forms U4, and the affidavit of Beverly W. Jackson. The three Forms U4 were dated November 5, 1994, January 16, 1995,

---

[1] "FINRA" is the abbreviation for Financial Industry Regulatory Authority, Inc.

[2] We decide this case without oral argument pursuant to Rule 215, SCACR.

[3] Berry stated he joined the brokerage firm of "Wheat Butcher Singer" in 1994; in 1997, First Union Corporation acquired Wheat Butcher Singer, and the firm became "Wheat First Union"; in 2001, the firm's parent company merged with Wachovia Corporation, and its name changed to "Wachovia Securities"; finally, in 2008, "Wells Fargo" acquired "Wachovia," and the retail brokerage changed to "Wells Fargo Advisors" in 2009. Berry asserted that due to the 2009 acquisition, he became an employee of Wells Fargo Clearing Services, LLC, formerly known as Wells Fargo Advisors, LLC, and its parent company, Wachovia Securities Financial Holdings, LLC (collectively, Wells Fargo Advisors).

and September 28, 1995, respectively. Each form included the following language:

> 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 organizations indicated in Item 10 as may be amended from time to time . . . .

Item 10 included the abbreviation "SRO"[4] and the heading "to be registered with," and a list of ten SROs appeared with a box above each that the registrant could select. All three forms listed Wheat First Securities, Inc. as the firm name. On the 1994 form, the boxes next to the following SROs were selected in Item 10: ASE (the American Stock Exchange), NASD (National Association of Securities Dealers), NYSE (the New York Stock Exchange), and PHLX (the Philadelphia Stock Exchange). Only the November 1994 form designated any SROs.

The circuit court held a hearing on Appellants' motion. Appellants argued brokers wishing to work in the securities industry must sign a Form U4, register with and be licensed through FINRA, and abide by FINRA's rules. They asserted Berry completed a Form U4 in 1994 when he began working for the predecessor entity and the arbitration provision contained within the form was binding upon Berry and Wells Fargo Advisors. In addition, Appellants argued Berry was a registered representative or associated person under FINRA and that FINRA Rule 13200(A)[5] bound the parties to arbitration.

Berry neither admitted nor denied that he was registered with FINRA or that he was a registered associate of Wells Fargo Advisors. He argued Appellants, as the parties seeking to compel arbitration, failed to satisfy their burden to prove that

---

[4] SRO refers to a "self-regulatory organization." *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 386 n.12, 759 S.E.2d 727, 735 n.12 (2014) (noting a self-regulatory organization (SRO) is a forum that "must operate in strict compliance with the Securities and Exchange Act of 1934").

[5] FINRA Rule 13200(A) provides that "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 and Associated Persons." According to the FINRA rules, "the Code," as referenced in Rule 13200, "means the Code of Arbitration Procedure for Industry Disputes." FINRA Rule 13100(h).

FINRA rules applied, that Berry was registered with FINRA, or that an agreement to arbitrate existed. Berry argued Jackson's affidavit was insufficient to authenticate the Forms U4 and Appellants were not parties to any of the forms. In addition, Berry asserted the form designated SROs that no longer operated arbitration forums. He agreed that there was a "consolidation" of the NASD and NYSE arbitration forums in 2007, and he conceded the new entity became FINRA. However, Berry contended neither NASD nor NYSE continued to operate a separate arbitration forum and the court could not substitute FINRA for NASD in the agreement. He acknowledged FINRA operated an arbitration forum but asserted the arbitration clause in the Form U4 failed because Item 10 did not include FINRA as a possible forum.

In response, Appellants suggested the court take judicial notice that, in the mid-2000s, NASD turned over its responsibilities for the regulation of the financial services industry, broker-dealers, and brokers to, and "essentially morphed" into, a newly created entity called FINRA. In addition, Appellants argued it was routine in the financial industry for disputes of this nature to proceed to arbitration and that they were entitled to enforce the arbitration agreement contained in the Forms U4 because Berry laid out the "transformation" of Wheat First Securities into Wells Fargo Advisors.

The circuit court took the matter under advisement and instructed the parties to provide proposed orders. Thereafter, the circuit court issued an order denying Appellants' motion to stay and compel arbitration. The court concluded (1) Appellants did not properly authenticate the forms; (2) the three Forms U4 did not satisfy Appellants' burden to prove the existence of an agreement by Berry to arbitrate his dispute with Appellants; and (3) even assuming an arbitration agreement arose between the parties by virtue of the 1994 Form U4, the agreement was void because the arbitration forums specified in the agreement no longer existed. Specifically, the circuit court concluded the 1994 and 1995 Forms U4 did not establish an agreement to arbitrate because Appellants were not parties to the forms. The court reasoned that the predecessor, Wheat First, was the named firm on the forms, and the forms contained no language stating that an arbitration obligation would extend to successors or assigns of that firm. The court noted that even if it were appropriate to take judicial notice of FINRA Rule 13200, Appellants failed to show it applied to Berry such that it would bind him to its arbitration procedure. The court concluded the selection of the designated forums constituted an integral term of the arbitration clause in the 1994 form. It found that because none of the identified forums existed and Appellants failed to show the

court could simply substitute FINRA as a forum, the arbitration agreement was impossible to perform and void.

Appellants then moved the court to reconsider or amend its order pursuant to Rules 59(e) and 60, SCRCP, asserting they obtained more recent Forms U4 that established (1) an enforceable arbitration agreement between Berry and Wells Fargo Advisors existed and (2) Berry was registered with FINRA, which provided an independent basis to compel arbitration of his claims. Appellants attached the additional forms and an affidavit of Michael Zuhr. The circuit court summarily denied the motion but noted it considered the submissions of the parties. This appeal followed.

ISSUES ON APPEAL

1. Did the circuit court err by refusing to reconsider its order denying the motion to compel arbitration when Appellants submitted an affidavit and newly discovered evidence showing Berry agreed to arbitrate his claims?

2. Did the circuit court err by denying the motion to compel arbitration when public records and FINRA rules established Berry was obligated to arbitrate his claims against Appellants as a condition of his admitted registration with FINRA?

STANDARD OF REVIEW

"Appeal from the denial of a motion to compel arbitration is subject to de novo review." *New Hope Missionary Baptist Church v. Paragon Builders*, 379 S.C. 620, 625, 667 S.E.2d 1, 3 (Ct. App. 2008). "Nevertheless, a circuit court's factual findings will not be reversed on appeal if any evidence reasonably supports the findings." *Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009).

"The admission of evidence is within the discretion of the [circuit] court and will not be reversed absent an abuse of discretion. An abuse of discretion occurs when the conclusions of the [circuit] court either lack evidentiary support or are controlled by an error of law." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006) (citation omitted).

LAW/ANALYSIS

I. Evidentiary Issues

Additional Evidence

Appellants first argue the circuit court erred by refusing to consider the additional Forms U4 they submitted with their motion to reconsider filed pursuant to Rules 59(e) and 60(b), SCRCP. We find this argument is without merit. The circuit court's order denying the motion to reconsider indicated it considered the submissions of the parties.

Judicial Notice

Appellants argue that pursuant to Rule 201, SCRE, the circuit court erred by declining to take judicial notice of FINRA's rules, the content and use of the Form U4, and facts publicly available through FINRA's "statutorily-mandated 'BrokerCheck' website." We find this argument is unpreserved. *See Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 23, 602 S.E.2d 772, 779-80 (2004) ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the [circuit] court."). In denying the motion to compel, the circuit court declined to rule upon Appellants' request that it take judicial notice of FINRA Rule 13200. In their motion to reconsider, they did not argue the circuit court failed to rule on this request, nor did they request that the court take judicial notice of any other matters. Therefore, we find Appellants' arguments that the circuit court failed to take judicial notice of the foregoing facts are unpreserved. *See Elam*, 361 S.C. at 24, 602 S.E.2d at 780 (noting a party must file a Rule 59(e), SCRCP, motion when "an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review").

Authentication

Appellants argue the circuit court erred by failing to consider on authentication grounds the Forms U4 dated 1994 and 1995 that it submitted at the hearing. We agree.

"A party offering evidence must meet '[t]he requirement of authentication . . . as a condition precedent to admissibility.'" *Deep Keel, LLC v. Atl. Private Equity Grp., LLC*, 413 S.C. 58, 64, 773 S.E.2d 607, 610 (Ct. App. 2015) (alteration and omission in original) (quoting Rule 901(a), SCRE ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims.")). "'[T]he burden to authenticate . . . is not high' and requires only that the proponent 'offer[ ] a satisfactory foundation from which the jury could

reasonably find that the evidence is authentic.'" *Id.* (alterations and omissions in original) (quoting *United States v. Hassan*, 742 F.3d 104, 133 (4th Cir. 2014)).

We conclude the circuit court abused its discretion by excluding the 1994 and 1995 Forms U4 submitted with the motion to compel based on Rule 901(a), SCRE.[6] Jackson attested that, as a paralegal of Wells Fargo & Company, she had "access to certain personnel records of current and former employees . . . and related corporate entities." In addition, she stated "[t]he [attached] Form U4 for Mr. Berry show[ed] that he was employed by Wheat First Securities Inc. at the time of its filing." We acknowledge Jackson's affidavit 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. However, because the burden to authenticate is low, we find the foregoing was sufficient to satisfy Rule 901, SCRE, and the circuit court erred by excluding these documents. We now turn to the question of whether these forms established an agreement to arbitrate between the parties.

II. Denial of the Motion to Compel Arbitration

A. Agreement to Arbitrate

Forms U4

In their reply brief, Appellants argue the circuit court erred by rejecting Berry's agreements to arbitrate based on the alleged failure of the choice of forum. In addition, they argue the circuit court erred by finding no agreement between Wells Fargo Advisors and Berry existed because Wells Fargo Advisors was not listed as the firm on the 1994 and 1995 Forms U4. We disagree.

"The policies of the United States and this State favor arbitration of disputes." *New Hope Missionary Baptist Church*, 379 S.C. at 630, 667 S.E.2d at 6. "However, arbitration is a matter of contract[,] and a party cannot be required to submit to arbitration any dispute [that] he has not agreed to submit." *Gissel*, 382 S.C. at 241, 676 S.E.2d at 323. "Arbitration is available only when the parties involved contractually agree to arbitrate." *Towles v. United HealthCare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct. App. 1999). "The initial inquiry to be made by the [circuit] court is whether an arbitration agreement exists between the

---

[6] The circuit court made no finding as to authentication of the records Appellants submitted with their post-hearing motion. Therefore, its ruling as to authentication did not extend to those documents.

parties." *Hous. Auth. of City of Columbia v. Cornerstone Hous., LLC*, 356 S.C. 328, 334, 588 S.E.2d 617, 620 (Ct. App. 2003). "The determination of whether an arbitration agreement exists is 'a matter to be forthwith and summarily tried by the [c]ourt.'" *Id.* at 335, 588 S.E.2d at 620 (quoting *Jackson Mills, Inc. v. BT Capital Corp.*, 312 S.C. 400, 404, 440 S.E.2d 877, 879 (1994)).

"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." *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 130, 678 S.E.2d 435, 438 (2009). "[O]nly if the choice of forum is an integral part of the agreement to arbitrate, rather than an 'ancillary logistical concern[,]' will the failure of the chosen forum preclude arbitration." *Id.* at 131, 678 S.E.2d at 438 (quoting *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000)). "Whe[n] designation of a specific arbitral forum has implications that may substantially affect the substantive outcome of the resolution, . . . it is neither 'logistical' nor 'ancillary.'" *Id.* at 132, 678 S.E.2d at 439 (holding when the parties' agreement stated disputes arising between the parties "shall be resolved by binding arbitration administered by the National Health Lawyers Association," the specific designation of that organization as an arbitrator was an "integral term of th[e] arbitration agreement" and the organization's unavailability to arbitrate the parties' dispute rendered the agreement unenforceable).

In *Dean v. Heritage Healthcare of Ridgeway, LLC*, our supreme court found that a "named arbitral forum is not a material term to agreements in which the parties agree to arbitrate 'in accordance with' the named forum's rules, absent other evidence to the contrary" but opined that "when parties elect for a proceeding [to be] 'administered by' a named forum, that forum should be viewed as integral to the arbitration agreement, absent other evidence to the contrary." 408 S.C. 371, 384, 759 S.E.2d 727, 734 (2014). However, the *Dean* court distinguished cases in which the parties agreed to arbitrate "in accordance with" the rules of an SRO. *See id.* at 386 n.12, 759 S.E.2d 727, 735 n.12 (distinguishing two cases in which the parties agreed to arbitrate "'in accordance with' a named forum's rules" because those "cases involve[d] federal securities law and the decision to arbitrate before a[n SRO]," which is a forum that "must operate in strict compliance with the Securities and Exchange Act" (quoting *Deeds v. Regence Blueshield of Idaho*, 141 P.3d 1079, 1082 (Idaho 2006))); *id.* ("In contrast to the SROs, which are closely governed by the Securities and Exchange Commission and have developed complex regulatory schemes for overseeing arbitration of securities disputes, the AAA simply provides a list of potential arbitrators from which the parties can choose, as well as procedural rules for conducting the arbitration, and coordinates

the logistics of setting up the parties with the chosen arbitrator. . . . Unlike the SROs, arbitration 'in accordance with the applicable rules of the AAA' is not dependent on the AAA overseeing the arbitration." (quoting *Deeds*, 141 P.3d at 1082)).

We find the failure of the choice of forum invalidated the agreements contained in the 1994 and 1995 Forms U4. Here, all three of the Forms U4 Appellants submitted with their motion to compel arbitration listed "Wheat First Securities, Inc." as the firm name, and the only SROs selected were the ASE, NASD, NYSE, and PHLX. Even if any of these SROs still existed, the parties did not dispute they no longer provided arbitration services. We find the arbitration forum was a material and integral term of the agreement, and because the indicated organizations no longer existed or provided arbitration services, there was no enforceable agreement to arbitrate.

Further, we find none of the Forms U4 established an agreement to arbitrate between Berry and Appellants. First, the agreements contained in the 1994 and 1995 Forms U4 were between Berry and a firm that no longer existed, and they contained no language binding successors or assigns to the named firm. Appellants, therefore, could not enforce any purported agreement to arbitrate contained therein. Second, the 1999 and 2014 Forms U4 that Appellants submitted with their motion to reconsider likewise failed to establish an enforceable agreement to arbitrate between Berry and Appellants. Jackson's affidavit stated "Wachovia Securities Financial Holdings, Inc." was the parent company of Wells Fargo Clearing Services, LLC, formerly known as Wells Fargo Advisors, LLC, and an "indirect subsidiary of Wells Fargo & Company." She attested "Wheat First Securities, Inc." was "the predecessor in interest to Wells Fargo Advisors, LLC" and gave the history of the mergers and acquisitions that resulted in the creation of this entity. The 1999 Form U4 designated "Everen Securities" as the firm name[7] and contained the same arbitration clause that was included on the 1994 and 1995 Forms U4. However, this form contained no language indicating it bound successors and assigns to the named firm. Further, FINRA was not yet in existence and therefore was not included as an SRO on the 1999 Form U4. Finally, the 2014 Form U4 designated Wells Fargo Advisors as the firm and FINRA as an SRO, but it contained no arbitration agreement. Therefore, although we acknowledge the 2014 form indicated Berry was registered with FINRA in 2014, we find neither the 1999 nor the 2014 form established Berry agreed to arbitrate his claims against Appellants. *See Towles*, 338 S.C. at 37, 524 S.E.2d at

[7] Zuhr attested Everen Securities was a predecessor of Wells Fargo Advisors.

843-44 ("Arbitration is available only when the parties involved contractually agree to arbitrate."); *Cornerstone Hous., LLC*, 356 S.C. at 334, 588 S.E.2d at 620 ("The initial inquiry to be made by the [circuit] court is whether an arbitration agreement exists between the parties.").

FAA

Appellants contend the Federal Arbitration Act (the FAA)[8] applies to "the arbitration agreement found in the Form U4 [that] every registered representative must complete to sell securities in the United States and compels arbitration for claims such as those raised here." We disagree.

Even if a contested arbitration agreement complies with the FAA, the parties "must still have agreed, as a matter of general state contract law, to arbitrate." *See York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 80, 749 S.E.2d 139, 145 (Ct. App. 2013).

Appellants rely upon *Stokes v. Metropolitan Life Insurance Co.*, 351 S.C. 606, 610, 571 S.E.2d 711, 713 (Ct. App. 2002) to support their argument. We acknowledge that if an enforceable arbitration agreement in fact existed between the parties, the FAA would apply, and *Stokes* supports this conclusion. *See id.* at 610, 571 S.E.2d at 713. However, the parties in *Stokes* did not dispute the continued existence of the named forum or that an agreement between the parties to arbitrate in fact existed. *See id.* Further, the parties in *Stokes* did not raise the question of whether the party seeking to compel arbitration was a party to the Form U4. Here, as we stated, none of the Forms U4 contain an agreement between the parties to arbitrate their disputes. Therefore, the FAA does not apply.

Based on the foregoing, we find the Forms U4 did not create an enforceable agreement between the parties to arbitrate, and we affirm the circuit court's denial of the motion to compel arbitration.

---

[8] *See, e.g.*, 9 U.S.C. § 2 (providing "an agreement in writing to submit to arbitration an existing controversy arising out of such a contract . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract").

B. FINRA Rules as Independent Basis to Compel Arbitration

Appellants argue that regardless of whether the Forms U4 established an enforceable agreement to arbitrate, FINRA Rule 13200 nevertheless required Berry to arbitrate this dispute. They contend that to sell securities, Berry was required to have an active Form U4 at all times, and FINRA Rule 13200 mandated arbitration of all industry disputes. Appellants assert the enforceability of FINRA's rules mandating arbitration is "so inescapable that courts have repeatedly held that *the rule itself* is an enforceable, written agreement to arbitrate," and compelled arbitration on those grounds. We disagree.

"Arbitration is available only when the parties involved contractually agree to arbitrate." *Towles*, 338 S.C. at 37, 524 S.E.2d at 843-44. FINRA Rule 13200(a) provides,

> Except as otherwise provided in the Code, a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among:
>
> - Members;
> - Members and Associated Persons; or
> - Associated Persons.

"The term 'Code' means the Code of Arbitration Procedure for Industry Disputes." *See* FINRA Rule 13100(h).

Even 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 arbitration agreement between Berry and Appellants. Although Appellants assert courts have uniformly interpreted a similar FINRA rule—Rule 12200—as an enforceable agreement to arbitrate, Rule 12200 pertains to disputes between members and customers. *See Waterford Inv. Servs., Inc. v. Bosco*, 682 F.3d 348, 353 (4th Cir. 2012) ("The FINRA Code provides that a customer can compel arbitration of a dispute 'between a customer and a member or associated person of a member' when the dispute 'arises in connection with the business activities of the member or the associated person.'" (quoting FINRA Rule 12200)); *Id.* ("This provision 'constitutes an "agreement in writing" under the F[AA,] . . . which binds . . . [a FINRA] member, to submit an eligible dispute to

arbitration upon a customer's demand.'" (second alteration in original) (quoting *Wash. Square Secs., Inc. v. Aune*, 385 F.3d 432, 435 (4th Cir. 2004))). We have been unable to identify any precedent extending the foregoing interpretations to FINRA Rule 13200. Notwithstanding the language of FINRA Rule 13200, we conclude the record must demonstrate the parties agreed to arbitrate their disputes, independent of either party's registration with FINRA. *See Towles*, 338 S.C. at 37, 524 S.E.2d at 843-44 ("Arbitration is available only when the parties involved contractually agree to arbitrate."). As we stated, the Forms U4 Appellants included with their motion to compel arbitration did not demonstrate an agreement to arbitrate existed between Appellants and Berry. We conclude that without such an agreement, FINRA Rule 13200 does not bind an associated person to arbitrate his disputes with a member. Accordingly, even assuming Berry was registered as an associated person with FINRA, we conclude FINRA Rule 13200 did not constitute an independent basis upon which to compel him to arbitrate his claims.[9] We therefore affirm the circuit court's denial of the motion to compel arbitration.

CONCLUSION

For the foregoing reasons, the circuit court's ruling denying Appellants' motion to compel arbitration is

AFFIRMED.

GEATHERS and MCDONALD, JJ., concur.

---

[9] We need not consider Appellants' argument that Berry failed to establish a valid defense to arbitration because they concede the circuit court did not rule upon this question. *See, e.g.*, *Elam*, 361 S.C. at 23, 602 S.E.2d at 779-80 ("Issues and arguments are preserved for appellate review only when they are raised to and ruled on by the [circuit] court.").

RECEIVED
Jan 28 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2017-CP-32-00397

Robert F. Berry.....Respondent

vs.

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

PETITION FOR REHEARING

Pursuant to Rule 221, SCACR, Appellants Scott A. Spang, Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, Wachovia Securities Financial Holdings, LLC, Wells Fargo & Company, and Wells Fargo Bank, N.A. (together, the "Wells Fargo Entities"), petition the Court for a rehearing of the Opinion filed in this case on January 13, 2021. In its Opinion, this Court affirmed the trial court's ruling denying the Wells Fargo Entities' motion to dismiss Respondent Robert F. Berry's claims or to stay the action pending arbitration. The Wells Fargo Entities respectfully submit that the Court overlooked or misapprehended the following points:

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

In its discussion of the many Forms U4 Berry has signed during his long career as a registered investment advisor, the Court improperly concluded that none of the Forms U4 established an agreement to arbitrate between Berry and the Wells Fargo Entities. The Court found that the 1999 Uniform Application for Securities Industry Registration or Transfer) ("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. (*See* Op. at 9; R. at 241.) The Court also stated that while the 2014 Form U4 designated Wells Fargo Advisors as the firm and FINRA as an SRO, it contained no arbitration agreement. (*See* Op. at 9.) Taken together, the Court concluded that "although [it] acknowledge[s] the 2014 form indicated Berry was registered with FINRA in 2014, [it] find[s] neither the 1999 nor the 2014 form established Berry agreed to arbitrate his claims with Appellants." (Op. at 9.)

As an initial matter, the Court ignores that according to both FINRA and the Securities Exchange Commission ("SEC"), FINRA is the successor to NASD, including specifically in the Form U4. *See* SEC Release No. 34-57033; File No. SR-FINRA-2007-036, available at http://www.finra.ora/sites/default/files/RuleFiling/p037701.pdf (stating that in "technical amendments," reference to the NASD in the Form U4 were replaced with references to FINRA to reflect the "corporate name change."). Thus, the Court's determination that "there was no enforceable agreement to arbitrate" because the "indicated forum no longer existed or provided arbitration services" was erroneous. (Op. at 9.)

As a related, but separate, matter, the Court also misapprehends that the 2014 Form U4 was an *amendment* to the 1999 Form U4. The 2014 Form U4 identified Berry's employment date

as October 1, 1999, the same employment date identified on the 1999 Form U4. (*Compare* R251 *with* R241.) And on the 2014 Form U4, under Item 2 Fingerprint Information, Berry made the representation that, "By selecting this option, I represent that I have been employed *continuously* by the *filing firm* since the last submission of a fingerprint card to CRD and am not required to resubmit a fingerprint card at this time." (R. at 251 (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. *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). 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. (R. at 252.) This amendment to the Form U4 firmly brings FINRA under Berry's "agreement to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person" required to be arbitrated under the rules or by-laws of his registered SROs. Berry cannot avoid the regulatory requirement of a new background screening, while at the same time arguing that the entities with which he was registered were somehow separate and distinct. His own attestation collapses the forms and entities into one. Thus, there was an agreement to arbitrate between the parties and the Federal Arbitration Act applies. *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").

II. Appellants' arguments regarding the FINRA Rules were preserved.

The Court found that in their motion to reconsider, the Wells Fargo Entities "did not argue the circuit court failed to rule on [their] request" to take judicial notice of the FINRA rules, "nor did they request that the court take judicial notice of any other matters." (Op. at 6.) Though the Court is correct that Appellants' did not specifically use the words "judicial notice," the Wells Fargo Entities' motion for reconsideration cited to and relied upon FINRA rules, SEC Releases, and publicly-available BrokerCheck reports, among other sources, as a separate argument in the motion to reconsider. (*See, e.g.*, R. at 210 n.3 & n.4; R. at 212-13 & n.9.) There is no question that this issue is preserved and to hold otherwise is to elevate form over substance. The issue was clearly before the trial court in Appellants' initial motion to dismiss and was fairly subsumed in its Rule 59 motion for reconsideration.

III. The Court erred in finding FINRA Rule 13200 does not constitute an independent basis upon which to compel Berry to arbitrate his claims.

This Court also found that, "Even 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 arbitration agreement between Berry and Appellants." (Op. at 11.) 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. (*See id.*) First, there is no question that Berry was registered as an associated person with FINRA. (*See, e.g.*, R. at 252 (Form U4 designating FINRA registration); R. at 67 ¶ 59 (acknowledgment in Complaint that financial advisors must be registered); R. at 57 ¶ 27 (description in Complaint of Berry's status as a "registered representative").) Second, as explained above, there is an agreement to arbitrate between Berry and Appellants in the form of Berry's 1999 Form U4 and the 2014 amendment to that U4 that

identified Wells Fargo Clearing Services as the filing firm and FINRA as a selected SRO. (*See* R. at 241, R. at 2501, R. at 252.)

Third, any individual engaged in the securities business of a FINRA member firm must be registered as a representative with FINRA, and no individual can be registered with FINRA without agreeing to comply with FINRA's rules and regulations, including the mandatory arbitration provisions of FINRA Rule 13200. *See* 15 U.S.C. § 78o(a)(1); FINRA Manual, Rule 1031(a). 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., Credit Suisse First Boston Corp. v. Grunwald*, 400 F.3d 1119, 1128 (9th Cir. 2005) (holding SEC-approved NASD arbitration procedures "have preemptive force over conflicting state law"). Courts that have squarely addressed the question have concluded that "the rules of a securities exchange are contractual in nature." *See, e.g., MONY Secs. Corp. v. Bornstein*, 390 F.3d 1340, 1342 (11th Cir. 2004) ("[E]ven if 'there is no direct written agreement to arbitrate..., the [NASD] Code serves as a sufficient agreement to arbitrate, binding its members to arbitrate a variety of claims with third-party claimants.'"); *Spear, Leeds & Kellogg v. Central Life Assurance Co.*, 85 F.3d 21, 26 (2d Cir. 1996) (New York Stock Exchange compulsory arbitration rules constitute an agreement to arbitrate under FAA); *Zinsmeyer Trusts P'ship*, 41 F.3d at 863 (NASD provisions regarding compulsory arbitration "constitute[] an 'agreement in writing' under the Federal Arbitration Act, 9 U.S.C. § 2"); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Hovey*, 726 F.2d 1286, 1288-89 (8th Cir. 1984) (finding dispute resolution procedures detailed in NYSE rules are agreement to arbitrate); *Oppenheimer & Co. Inc. v. Neidhardt*, No. 93-civ-3854, 1994 WL 176976, *1 (S.D.N.Y. May 5, 1994) (NASD rules, to which member binds itself in writing, constitutes an "agreement in writing" under the Federal Arbitration Act), *aff'd* 56 F.3d 352 (2d Cir. 1995);

Drexel Burnham Lambert, Inc. v. Pyles, 701 F. Supp. 217, 220 (N.D. Ga. 1988) ("Securities exchange members are contractually bound by the regulations of their organizations, including any arbitration provisions."). This Court erroneously assumed that consent to be governed by an SRO's rules cannot also constitute a contractual agreement to arbitrate under *Towles v. United HealthCare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 843-44 (Ct. App. 1999). This assumption runs counter to the language of FINRA's rules and registered representatives' express agreement (through the act of registration) to abide by those rules.

IV. The Court should clarify that neither it, nor the trial court, found that Berry has established any defense to arbitration.

In *dicta*, this Court disclaims any need to "consider Appellants' argument that Berry failed to establish a valid defense to arbitration because they concede the circuit court did not rule upon this question." (Op. at 12.) The Court should clarify that there has been no finding at either the circuit court or appellate court level that Berry has established any defense to arbitration.

CONCLUSION

For these reasons and those contained in their briefs, the Wells Fargo Entities urge the Court to grant rehearing in this matter and reverse the trial court's determination that Respondent Robert F. Berry was not required to arbitrate his claims against the Wells Fargo Entities pursuant to either his repeated registrations as an investment advisor via his Forms U4 or under the many agreements to arbitrate signed by Berry during his many years of employment at predecessors to Wells Fargo.

Respectfully submitted,

s/ Sarah P. Spruill

HAYNSWORTH SINKLER BOYD, P.A.
Sarah P. Spruill (SC Bar No. 68337)
1 North Main Street, 2nd Floor
Greenville, South Carolina 29601
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)
HAYNSWORTH SINKLER BOYD, P.A.
134 Meeting Street, Suite 300
Charleston, South Carolina 29401
Telephone: (843) 720-4484
Facsimile: (843) 722-2266
ayount@hsblawfirm.com

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

Attorneys for Appellants WELLS FARGO CLEARING SERVICES, LLC F/K/A WELLS FARGO ADVISORS, WACHOVIA SECURITIES FINANCIAL HOLDINGS, LLC, WELLS FARGO & COMPANY, WELLS FARGO BANK, N.A., and SCOTT A. SPANG

Date: January 28, 2021

RECEIVED
Jan 28 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2017-CP-32-00397

Robert F. Berry.....Respondent

vs.

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

PROOF OF SERVICE

I, the undersigned employee of Haynsworth Sinkler Boyd, P.A., do hereby certify that I have this 28th day of January, 2021, caused the forgoing *Petition for Rehearing* to be served via electronic mail only, on counsel of record at the email addresses shown below:

Chad N. Johnston (via email only cjohnston@willoughbyhoefer.com)
Mitchell Willoughby (via email only mwilloughby@willoughbyhoefer.com)
Elizabeth Zeck (via email only ezeck@willoughbyhoefer.com
Willoughby & Hoeffer, P.A.
P.O. Box 8416
Columbia, SC 29202-8416

Janice Barry, Legal Secretary
Haynsworth Sinkler Boyd, P.A.

RECEIVED
Jan 28 2021
SC Court of Appeals

HAYNSWORTH
SINKLER BOYD

HAYNSWORTH SINKLER BOYD, P.A.
ONE NORTH MAIN STREET, 2ND FLOOR
P.O. BOX 2048 (29602)
GREENVILLE, SOUTH CAROLINA 29601
MAIN 864.240.3200
FAX 864.240.3300
www.hsblawfirm.com

SARAH P. SPRUILL
DIRECT 864.240.3220
sspruill@hsblawfirm.com

January 28, 2021

VIA EMAIL (ctappfilings@sccourts.org) and U.S. MAIL
The Honorable Jenny Abbott Kitchings
Clerk, South Carolina Court of Appeals
P.O. Box 11629
Columbia, SC 29211

Re: Robert F. Berry 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.
Appellate Case Number 2017-001690

Dear Ms. Kitchings:

Enclosed herewith for filing, please find Appellants' *Petition for Rehearing* in the above-referenced matter, together with our Proof of Service of same. Also enclosed is our firm's $50 check to cover the cost of the filing fee (with mailed copy).

I would appreciate your having the originals filed and returning clocked copies to me by email.

If you have any questions, please give me a call.

Sincerely yours,

HAYNSWORTH SINKLER BOYD, P.A.

Sarah P. Spruill

SPS/jmb
Enclosures

cc: Chad N. Johnston (via email only cjohnston@willoughbyhoefer.com)
Mitchell Willoughby (via email only mwilloughby@willoughbyhoefer.com)
Elizabeth Zeck (via email only ezeck@willoughbyhoefer.com)
Adam Yount (via email only ayount@hsblawfirm.com)

RECEIVED
Feb 22 2021
SC Court of Appeals

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2017-001690

Robert F. Berry, ... Respondent,

v.

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

RETURN TO PETITION FOR REHEARING

In its Published Opinion No. 5792, filed January 13, 2021 ("Opinion"), this Court thoughtfully and thoroughly considered and rejected the many procedural and substantive issues presented by Appellants in their appeal from the order of the circuit court denying their motion to compel Respondent Robert F. Berry to arbitrate his claims in spite of the dispositive fact that there was no informed agreement. Rehearing of the Opinion is not warranted, as the petition for rehearing of Appellants Scott A. Spang, Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, Wachovia Securities Financial Holdings, LLC, Wells Fargo & Company, and Wells Fargo

Bank, N.A. (collectively "Appellants") ("Petition") does not comport with the Court's standards for granting rehearing.

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

STANDARD FOR REHEARING

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

ARGUMENT

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

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

Setting aside that procedural infirmity, Appellants are wrong on the substance of their contention, as non-retroactive "technical amendments" do not supersede Appellants' burden of demonstrating the existence of a valid agreement between each of the Appellants and Mr. Berry to arbitrate the asserted claims. *See Bradley v. Brentwood Homes, Inc.*, 398 S.C. 447, 458, 730 S.E.2d 312, 317-18 (2012) (holding that the burden of proof as to the existence of an arbitration agreement and the facts attendant to its enforcement is on the party seeking to compel arbitration); *Hammond*

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

v. Halsey, 287 S.C. 46, 49, 336 S.E.2d 495, 497 (Ct. App. 1985) ("The burden is on a party pleading a fact to prove it.") (citing *Jackson v. Frier*, 146 S.C. 322, 144 S.E. 66, 68, (1928)). Appellants essentially argue as follows: because Appellants asserted, without proof, that FINRA is the successor in interest to the NASD, and because the Securities and Exchange Commission ("SEC") acquiesced to FINRA's request to approve a technical amendment of the Form U4 allowing FINRA to be named in place of NASD on the approved form for *future* U4 filings, then FINRA was automatically substituted *ex post facto* into all prior U4s referencing NASD. The SEC Release cited by Appellants for that proposition, even if it were preserved for this Court's review and binding upon it under some type of quasi-legal authority (which it is not),[2] does not stand for the proposition asserted by Appellants. The Release contains no discussion of retroactive application; instead, it repeatedly references the fact that the form U4 "will be" amended to reflect the change in name in registrations filed after the effective date. Thus, the weight assigned by Appellants to this change is not reflected in the document.

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

[2] Of course, Appellants' new-found justification is itself belated. In their original *and* amended motion to compel arbitration, Appellants simply substituted FINRA without either acknowledging the substitution to the trial court or offering proof – such as the SEC Release now relied upon – that such unilateral substitution of FINRA for NASD is proper or permissible. **(R. p. 10)**, Order Denying Mot. to Compel (setting forth the unappealed finding of the trial court that "Defendants disregard the actual language of the SRL section of the 1994 Form and instead simply substituted "FINRA" without explanation or even bothering to inform the Court of this most significant change, much less openly requesting or offering proof that such a substitution is proper and permissible.").

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

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

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

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

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

---

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

[5] Appellants have not and cannot dispute two critical facts: (1) they have not produced a signed agreement to arbitrate claims between any of the Appellants (or its affiliates and employees) and Mr. Berry; and (2) Appellants have not produced an agreement signed by Mr. Berry to arbitrate claims before a FINRA arbitration panel. The 1999 and 2014 Form U4s, which were only advanced by way of Appellants' motion for reconsideration and therefore should be rejected as unpreserved for this Court's review, fail to remedy Appellants' shortcomings, as the 1999 U4 **(R. pp.241-49)** does not list FINRA as a designated arbitral forum (as FINRA did not exist in 1999) and none of the designated fora offer arbitration services today, while the 2014 U4 **(R. pp.251-64)** lacks both an arbitration clause and Mr. Berry's signature.

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

Finally, Appellants' request for clarification "that there has been no finding ... that Berry has established any defense to arbitration," improperly seeks to flip the burden of proof regarding arbitration away from Appellants and onto Mr. Berry. *See Bradley*, *supra* (burden of proof as to

the existence of an arbitration agreement and the facts attendant to its enforcement is on the party seeking to compel arbitration); *Hammond, supra* ("The burden is on a party pleading a fact to prove it.") (citation omitted). Each Appellant had the burden to demonstrate the existence of a valid agreement between that Appellant and Mr. Berry to arbitrate the asserted claims. Due to Appellants' failure to meet its underlying burden in this case, the trial court did not need to reach the issue of a meritorious defense to arbitration, and Appellants' request for a pre-emptive finding imputing a failure of proof against *Mr. Berry* on an unpreserved issue is inappropriate.

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

CONCLUSION

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

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

of this appeal. Despite all of that time, Appellants have still failed to prove the one thing South Carolina law requires of each party seeking to compel arbitration: a clear and unmistakable agreement executed by Mr. Berry wherein he agrees to arbitrate claims against any of the Appellants. Mr. Berry respectfully requests this Court deny the Petition so that he may finally pursue his claims on their merits.

Respectfully submitted,

s/Chad N. Johnston
Mitchell Willoughby, Esquire, S.C. Bar No. 6161
Chad N. Johnston, Esquire, S.C. Bar No. 73752
Elizabeth Zeck, Esquire, S.C. Bar No. 9006
Willoughby & Hoefer, P.A.
Post Office Box 8416
Columbia, South Carolina 29202
Telephone Number: 803-252-3300
mwilloughby@willoughbyhoefer.com
cjohnston@willoughbyhoefer.com
ezeck@willoughbyhoefer.com

Attorneys for Robert F. Berry

This 22nd day of Fcbruary 2021
Columbia, South Carolina

The South Carolina Court of Appeals

Robert F. Berry, Respondent,

v.

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

Appellate Case No. 2017-001690

ORDER

After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.

James E. Lockemy C.J.

J.

J.

Columbia, South Carolina

FILED
Mar 26 2021

cc:
Adam Noah Yount, Esquire
Sarah Patrick Spruill, Esquire

Pierce Talmadge MacLennan, Esquire
Chad Nicholas Johnston, Esquire
Mitchell Willoughby, Esquire
Elizabeth Ann Zeck, Esquire
Frederick T. Smith, Esquire
The Honorable G. Thomas Cooper, Jr.

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2017-CP-32-00397

RECEIVED
MAY 04 2018
SC Court of Appeals

Robert F. Berry.....Respondent

vs.

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

---

BRIEF OF APPELLANTS

HAYNSWORTH SINKLER BOYD, P.A.

Sarah P. Spruill (SC Bar No. 68337)
ONE North Main St., Second Floor (29601)
P. O. Box 2048
Greenville, SC 29602
Phone: (864) 240-3200
Fax: (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
6000 Fairview Road, Suite 1200
Charlotte, North Carolina 28210
Telephone: (404) 888-1021
Facsimile: (404) 724-1521
fsmith@seyfarth.com

ATTORNEYS FOR THE APPELLANTS

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
STATEMENT OF ISSUES ON APPEAL 1
STATEMENT OF THE CASE 2
SUMMARY OF ARGUMENT 4
FACTS 5
STANDARD OF REVIEW 7
ARGUMENT 8
I. THE TRIAL COURT ERRED BY ELEVATING TECHNICALITIES OVER THE STRONG PUBLIC POLICY IN FAVOR OF ARBITRATION. 8
II. THE TRIAL COURT ERRED IN DENYING THE WELLS FARGO ENTITIES' MOTION FOR RECONSIDERATION BECAUSE THE SUPPORTING AFFIDAVIT ATTACHED NEWLY-DISCOVERED, MATERIAL INFORMATION CONCLUSIVELY SHOWING AN AGREEMENT TO ARBITRATE BETWEEN THE PARTIES 12
III. THE TRIAL COURT ERRED IN NOT TAKING JUDICIAL NOTICE OF, AND COMPELLING ARBITRATION PURSUANT TO, FINRA'S RULES 15
A. THE TRIAL COURT ERRED IN NOT TAKING JUDICIAL NOTICE OF THE FINRA RULES, FORMS U4, AND BROKERCHECK REPORT. 15
B. BERRY'S FINRA REGISTRATION REQUIRES HIM TO ARBITRATE HIS CLAIMS AGAINST THE WELLS FARGO ENTITIES PURSUANT TO FINRA'S RULES. 19
IV. BERRY HAS NOT ESTABLISHED A VALID DEFENSE TO ARBITRATION. 24
CONCLUSION 26

TABLE OF AUTHORITIES

CASES

Aiken v. World Finance Corp. of South Carolina, 373 S.C. 144, 644 S.E.2d 705 (2007) 25
Am. Chiropractic v. Trigon Healthcare, 367 F.3d 212 (4th Cir. 2004) 18
Arnold v. State, 309 S.C. 157, 420 S.E.2d 834 (1992) 12
Blackwell v. Bank of Am. Corp., C.A. no. 7:11-2475-JMC-KFM, 2012 WL 1229673 (D.S.C. Mar. 22, 2012), *report and recommendation adopted*, 2012 WL 1229675 (Apr. 12, 2012) ... 25
Carlson v S.C. State Plastering, LLC, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013) 24
CRT Capital Group v. SLS Capital, S.A., 63 F. Supp. 3d 367 (S.D.N.Y. 2014) 21
Dean v. Heritage Healthcare of Ridgeway, L.L.C., 408 S.C. 371, 759 S.E.2d 727 (2014) 7
Dean Witter Reynolds, Inc. v. Bird, 470 U.S. 213 (1985) 9
Elam v. S.C. DOT, 361 S.C. 9, 602 S.E.2d 772 (2004) 12, 13, 14
First Montauk Sec. Corp. v. Four Mile Ranch Dev. Co., 65 F. Supp. 2d 1371 (S.D. Fla. 1999) . 10
Forgione v. Gaglio, No. 13 CIV. 9061 KPF, 2015 WL 718270 (S.D.N.Y. Feb. 13, 2015) 18
Hall v. Green Tree Servicing, LLC, 413 S.C. 267, 776 S.E.2d 91 (Ct. App. 2015) 11
Hawkins v. Questar Capital Corp., 2013 WL 5596897, (E.D. Ky. Oct. 11, 2013) 23
Heffner v. Destiny, Inc., 321 S.C. 536, 471 S.E.2d 135 (1995) 8, 15
Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990) 13
In re Am. Express Fin. Advisors Secs. Litig., 672 F.3d 113 (2d Cir. 2011) 19
In re Lehman Bros. Secs. and ERISA Litig., 706 F. Supp.2d 552 (S.D.N.Y. 2010) 20
In the Matter of the Arbitration Between Ameriprise Advisory Servs., Inc. v. Leo Sala III, FINRA No. 10-00469, 2010 WL 3525730 (FINRA Jan. 29, 2010) 20
Keller v. ING Financial Partners, Inc., Op. No. 2011-CP-23-0336, 2011 WL 10005145 (S.C. Cir. Ct. June 2, 2011), *aff'd* 2013 WL 8482243 (S.C. App. Jan. 9, 2013) 14
Kidder, Peabody & Co., Inc. v. Zinsmeyer Trusts P'ship, 41 F.3d 861 (2d Cir. 1994) 19, 21
Landers v. Fed. Deposit Ins. Corp., 402 S.C. 100, 739 S.E.2d 209 (2013) 8
Lucey v. Meyer, 401 S.C. 122, 736 S.E.2d 274 (Ct. App. 2012) 9
Matter of Harry C., 280 S.C. 308, 313 S.E.2d 287 (1984) 15
McGill v. Moore, 381 S.C. 179, 672 S.E.2d 571 (2009) 10
Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc., 473 U.S. 614 (1985) 9
Monsefi v. TD Ameritrade, Inc., No. B207707, 2009 WL 1395798 (Cal. Ct. App. May 20, 2009) 18
MONY Secs. Corp. v. Bornstein, 390 F.3d 1340 (11th Cir. 2004) 21
Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1 (1983) 9
Mullins v. U.S. Bancorp Inv., Inc., Civil No. 1:15-CV-00126-GNS, 2016 WL 1420999 (W.D. Ky. Apr. 8, 2016) 15
O'Neil v. Hilton Head Hosp., 115 F.3d 272 (4th Cir. 1997) 7
Oldroyd v. Elmira Savs. Bank, FSB, 134 F.3d 72 (2d Cir. 1998) 25
Overcash v. South Carolina Elec. & Gas Co., 364 S.C. 569, 614 S.E.2d 619 (2005) 5, 22
Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc., 418 S.C. 1, 791 S.E.2d 128 (2016) 24
Rich v. Walsh, 357 S.C. 64, 590 S.E.2d 506 (Ct. App. 2003) 7
Rusciano v. Oppenheimer & Co., Inc., No. 14 Civ. 1452(CM), 2017 WL 1677133 (S.D.N.Y. Apr. 25, 2014) 14
Sacks v. SEC, 648 F.3d 945 (9th Cir. 2011) 16

SEC v. Hansen, No. 13-CV-1403 (VSB), 2017 WL 1298022 (S.D.N.Y. Mar. 31, 2017) 17
Stokes v. Metro. Life Ins. Co., 351 S.C. 606, 571 S.E.2d 711 (Ct. App. 2002) 9
Towles v. United Healthcare Corp., 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999) 7, 25
UBS Fin. Servs., Inc. v. W. Va. Univ. Hosps., Inc., 660 F.3d 643 (2d Cir. 2011) 16
United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574 (1960) 9
Volt Info. Sciences, Inc. v. Board of Trustees of Stanford Junior University, 489 U.S. 468, (1989) 8
Wachovia Bank, Nat'l Ass'n v. VCG Special Opportunities Master Fund, Ltd., 661 F.3d 164, (2d Cir. 2011) 16
Washington Square Secs., Inc. v. Aune, 385 F.3d 432 (4th Cir. 2004) 21
Waterford Inv. Servs., Inc. v. Bosco, 682 F.3d 348 (4th Cir. 2012) 21
Williams v. Cigna Fin. Advisors, Inc., 56 F.3d 656 (5th Cir. 1995) 9
Williams v. Tucker, 239 W. Va. 395, 801 S.E.2d 273 (2017) 21
Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001) 7, 9

STATUTES

9 U.S.C. § 2 9
15 U.S.C. § 78o–3 ..... 16, 17
15 U.S.C. § 78s(b) 17

OTHER AUTHORITIES

BrokerCheck, https://brokercheck.finra.org/ 17, 23
FINRA Bylaws, Art. 4, § 1(a)(1) 19
FINRA Manual, FINRA Manual, Contents, ... 14
FINRA, *About BrokerCheck*, ... 17
FINRA, Code of Arbitration Procedure, ... 21
FINRA, *Our Mission*, ... 16
FINRA, Registration and Qualification, Individual Registration, ... 6
S.E.C. Release No. 34-56615, ... 14
S.E.C. Release No. 34-570033, ... 14
Uniform Application for Securities Industry Registration or Transfer, Revised Form U4 (05/2009), ... 6

RULES

Rule 59, SCRCP 12, 13
Rule 60, SCRCP 13
Rule 201, SCRE 15
Rule 803, SCRE 12
Rule 901, SCRE 11, 12
FINRA Manual, FINRA Rules, 1031 ..... 6, 19
FINRA Manual, FINRA Rules, 12200 21
FINRA Manual, FINRA Rules, 13100 20
FINRA Manual, FINRA Rules, 13200 ..... passim
NASD Rule IM–10100 11
NASD Rule 2110 11

REGULATIONS

72 Fed. Reg. 42170 (Aug. 1, 2007) 16
72 Fed. Reg. 45077-02, 45078 (Aug. 6, 2007) 24

STATEMENT OF ISSUES ON APPEAL

1. Did the trial court err in its denial of the Motion for Reconsideration or Amendment of the Court's June 21, 2017 Order Pursuant to SCRCP 59(e) and/or 60 ("Motion for Reconsideration") filed by Scott A. Spang, Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, Wachovia Securities Financial Holdings, LLC, Wells Fargo & Company, and Wells Fargo Bank, N.A. (together, the "Wells Fargo Entities") where the Wells Fargo Entities' supporting affidavit attached newly discovered, material information in support of their Motion to Dismiss or Stay Pending Arbitration ("Motion to Dismiss") that conclusively established Berry's agreement to resolve his claims against the Wells Fargo Entities through mandatory FINRA arbitration?

2. Did the trial court err in its denial of the Wells Fargo Entities' Motion to Dismiss and Motion for Reconsideration where public records and publically available FINRA rules establish an unexceptionable obligation by Berry to arbitrate his claims against the Wells Fargo Entities as a condition of his admitted registration as a FINRA-regulated broker?

STATEMENT OF THE CASE

Robert F. Berry filed this action in the Lexington County Court of Common Pleas on February 2, 2017, alleging causes of action for wrongful termination in violation of public policy, 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. (R. at 22-49). Berry filed a first amended complaint alleging four additional claims, including new claims for false imprisonment and conversion, against the Wells Fargo Entities on February 23, 2017. (R. at 50-93). All of these claims relate to Berry's former employment with Wells Fargo Advisors, LLC ("Wells Fargo Advisors") and its predecessors and successor, his termination, or events alleged to have occurred immediately after (and directly related to) his termination. (*Id.* at 69-91 ¶¶ 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 further that arbitration was required under the rules of the Financial Industry Regulatory Authority ("FINRA"). (R. at 94-129). The Wells Fargo Entities also filed a Motion for Protective Order and a Motion to Stay Discovery. (*See* R. at 3).[1]

These motions were heard on June 1, 2017, at which time Berry served his Memorandum in Opposition to Defendants' Motion to Dismiss or Stay Pending Arbitration. (R. at 132-208). 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* R at 325:19-

[1] On April 27, the Wells Fargo Entities filed an Amended Motion to Dismiss or Stay Pending Arbitration to add reference to Rules 12(b)(1) and 12(b)(3), SCRCP. (R. at 130-31). The sole issue on appeal is the denial of the Wells Fargo Entities' request that this matter be dismissed or stayed pending arbitration.

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. (R at 328:6-17; 329:4-30:16).

On June 21, 2017, while the Wells Fargo Entities were collecting evidence in response to Berry's arguments (R. at 210 n.2), the trial court denied all of the Wells Fargo Entities' motions. (R. at 3-19).[2] In that Order, the trial court found the materials submitted by the Wells Fargo Entities in support of their motion were improperly authenticated and thus inadmissible. (R. at 6-7). The trial court also concluded that even if the affidavits had been properly authenticated, it would still not compel arbitration because the submitted agreements referenced predecessors to Wells Fargo Advisors (not Wells Fargo Advisors itself) and because the designated arbitral forum no longer existed. (R. at 7-16).

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 trial court's attention to the FINRA rules. (R. at 209-86). 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. (R. at 287-99). On July 25, 2017, the trial 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." (R. at 20-21). This appeal followed.

[2] The Wells Fargo Entities received written notice of the Order denying their motions on June 27, 2017. (R. at 210 n. 2).

SUMMARY OF ARGUMENT

Under FINRA rules, as approved and adopted by the Securities and Exchange Commission ("SEC"), Berry must arbitrate all of the claims alleged in his Amended Complaint. There is no dispute as to what those rules require. Rather, by elevating form over substance, Berry seeks to evade the mandatory obligations all brokers must undertake as part of the licensure required to sell securities in the United States. These technical arguments, however, do not serve as a basis for failing to dismiss or stay this action pending arbitration given the undisputed fact that Berry was registered with FINRA during the relevant period, and continues to be registered with FINRA to this day.

To allow Berry to avoid arbitration would undercut the self-regulatory system governing the business activities of broker-dealers. This system was devised as part of a comprehensive federal regulatory regime that provides for the swift and efficient resolution of conflicts involving or among members and their registered representatives. In addition to the mandatory use of FINRA arbitration to resolve disputes between members and registered representatives, the Federal Arbitration Act ("FAA") and South Carolina precedent establish a strong public policy in favor of the arbitration of disputes. Taken collectively, this case implicates not only the public policy favoring arbitration generally, but also the public policy embodied in U.S. securities laws as implemented by FINRA.

The trial court found there was no agreement to arbitrate, despite the invocation of the FINRA rules and the submission of Berry's mandated industry registration documents, which incorporate all of FINRA's disciplinary and dispute resolution requirements, including the unambiguous agreement to arbitrate. All of this was ignored by the trial court in an apparent effort to relieve Berry of the obligations he voluntarily undertook in exchange for pursuing a

FINRA-regulated career. The trial court's decision should be reversed, and the matter remanded with directions to dismiss or stay proceedings pending arbitration.

FACTS

Berry began working in the financial services industry in 1984.[3] (R. at 57 ¶ 27). In 1994, he joined the brokerage firm Wheat First Butcher Singer, which began a period of "nearly 20 years" he "devoted. . . to essentially one firm." (R. at 58 ¶ 28, 62-63 ¶ 45). Wheat First Butcher Singer was acquired in 1997 by First Union Corporation and continued to do business as Wheat First Union. (R. at 58 ¶ 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.*). When Wells Fargo acquired Wachovia in 2009, Berry became an employee of the brokerage firm Wells Fargo Advisors, where he continued on as a registered representative, and a broker and advisor. (R. at 59 ¶ 31, 62-64 ¶¶ 45-47). It is undisputed that during this entire period, Berry was a registered representative subject to the rules of the National Association of Securities Dealers ("NASD") and/or FINRA.

Berry's employment was terminated on or about February 3, 2014, after the branch office manager discovered several binders of customer information in the trunk of Berry's vehicle. (R. at 65 ¶ 52, 68 ¶ 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. (R. at 68 ¶ 60).

Financial advisors must be registered with a firm in order to buy or sell securities, or otherwise provide financial advice to the general public. (R. at 67 ¶ 59). That registration is accomplished by a Uniform Application for Securities Industry Regulation or Transfer, which is

[3] Appellants accept as true the allegations of the Amended Complaint, as they must at the motion to dismiss stage. *See Overcash v. South Carolina Elec. & Gas. Co.*, 364 S.C. 569, 572, 614 S.E.2d 619, 620 (2005).

commonly called a "Form U4." (*See* R. at 109-20, 241-49, 251-64).[4] *See, e.g.*, FINRA, Registration and Qualification, Individual Registration, available at http://www.finra.org/industry/individual-registration (last visited Nov. 26, 2017) (discussing, under links for "Register a New Broker Candidate" and "Update an Individual's Registration," Form U4 requirement for registered representatives).

There is a single version of this form. *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. 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.

Id. All individuals engaged or to be engaged in a member firm's investment or securities business must register with FINRA. *See* FINRA Manual, Rule 1031, Registration Requirements, available at http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=3584 (last visited Nov. 26, 2017). No individual can be a registered representative without having submitted a Form U4, including agreeing to the above provision requiring arbitration.

After his termination from Wells Fargo Advisors, Berry affiliated himself with LPL Financial Corporation ("LPL"). (R. at 67 ¶ 59). He remains registered as a representative of

[4] In support of their Motion to Dismiss, the Wells Fargo Entities submitted the three hand-written Forms U4 they were able to locate in their records. (R. at 109-20). Additional Forms U4 were located after the hearing and attached to the Motion for Reconsideration. (R. at 241-49, 251-64). There is no dispute that Berry was registered with either FINRA or the NASD for the entire period in question.

LPL, and thus necessarily continues to have an active Form U4 that requires arbitration between himself and any FINRA member.

STANDARD OF REVIEW

An appellate court reviewing a trial court's denial of a motion to compel arbitration is subject to *de novo* review. *Rich v. Walsh*, 357 S.C. 64, 68, 590 S.E.2d 506, 508 (Ct. App. 2003). "There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration." *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) (quoting *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir. 1997)). "A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute." *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118–19 (2001).

In determining whether an agreement to arbitrate exists, "the court should apply 'ordinary state-law principles that govern the formation of contracts.'" *Towles*, 338 S.C. at 37, 524 S.E.2d at 844 (citations omitted). "[T]he party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Dean v. Heritage Healthcare of Ridgeway, L.L.C.*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (citations omitted).

ARGUMENT

I. THE TRIAL COURT ERRED BY ELEVATING TECHNICALITIES OVER THE STRONG PUBLIC POLICY IN FAVOR OF ARBITRATION.

The trial court erred by elevating form over substance when it rejected the FINRA-mandated Forms U4 submitted by the Wells Fargo Entities. (R. at 6-7).[5] The trial court similarly erred in refusing to reconsider or amend its Order on the Motion to Dismiss despite the submission of additional, newly-identified FINRA mandated Forms U4 which conclusively established Berry's obligation to arbitrate his claims. As discussed in greater detail below, there was no dispute as to the authenticity of the documents, or their required use within the securities industry. The purpose of evidentiary rules, such as those Berry and the trial court relied upon, is to ensure the evidence proffered by a party is what the party says it is. That purpose was met here. The trial court's decision to set aside the strong public policy in favor of arbitration, as well as the federal regulatory scheme implemented by FINRA to regulate securities brokers, for the sake of a hyper-technical application of procedural rules was in error.

"The policy of the United States and this State is to favor arbitration of disputes." *Heffner v. Destiny, Inc.*, 321 S.C. 536, 537, 471 S.E.2d 135, 136 (1995); *see also Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) (reversing trial court and holding all claims, including tort claims, subject to arbitration). As the Supreme Court of the United States noted in *Volt Info. Sciences, Inc. v. Board of Trustees of Stanford Junior University*, 489 U.S. 468, 474 (1989), "[t]he FAA was designed to 'overrule the judiciary's long-

[5] Given the brevity of the trial court's Order on the Motion for Reconsideration, the Wells Fargo Entities are unsure whether the trial court also found the affidavit submitted in support of the Motion for Reconsideration attaching additional Forms U4 for Berry insufficient. In an abundance of caution, the Wells Fargo Entities assume for the sake of argument the trial court rejected the second affidavit as well.

standing refusal to enforce agreements to arbitrate.'" The courts must "rigorously enforce agreements to arbitrate." *Dean Witter Reynolds, Inc. v. Bird*, 470 U.S. 213, 221 (1985).

"Unless the parties have otherwise contracted, the FAA applies in federal or state court to any arbitration agreement regarding a transaction that involves interstate commerce." *Lucey v. Meyer*, 401 S.C. 122, 133, 736 S.E.2d 274, 280 (Ct. App. 2012). The FAA applies to the arbitration agreement found in the Form U4 every registered representative must complete to sell securities in the United States and compels arbitration for claims such as those raised here. *See Stokes v. Metro. Life Ins. Co.*, 351 S.C. 606, 610, 571 S.E.2d 711, 713 (Ct. App. 2002) (enforcing Form U4 arbitration clause for claims raised following an agent's termination and citing *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 660 (5th Cir. 1995) (holding arbitration clause under a Form U4 registration enforceable under the FAA)).

The FAA codifies a "'liberal federal policy favoring arbitration.'" *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). Consistent with the strong policy in favor of arbitration, Section 2 of the FAA provides that agreements to arbitrate are presumptively "valid, irrevocable, and enforceable." 9 U.S.C. § 2. This policy is so strong that arbitration should be required "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of [arbitration]." *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, 582-83 (1960). "A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute." *Zabinski*, 346 S.C. at 597, 553 S.E.2d at 118.

Much like federal and state law, FINRA's rules and regulations also strongly favor arbitration and, in fact, mandate arbitration for all industry disputes.[6] Under FINRA Rule 13200:

> Except as otherwise provided in the Code, a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among:
>
> - Members;
> - Members and Associated Persons; or
> - Associated Persons.

(R. at 279).[7] *See* FINRA Manual, FINRA Rules, 13200(a), *available at* http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4203 (last visited Nov. 28, 2017).

Enforcement of FINRA's, and its predecessor NASD's, mandatory arbitration provisions furthers the organization's "goals of securities industry regulation and enforcement." *See First Montauk Sec. Corp. v. Four Mile Ranch Dev. Co.*, 65 F. Supp. 2d 1371 (S.D. Fla. 1999) (discussing policy purposes underlying NASD arbitration requirements). Failure to submit a

[6] The trial court concluded that because the Wells Fargo Entities "invoke[d their] rights as a member of" NASD and FINRA, they "stand in the role of the drafters [of the Form U4] as a member of those self-regulatory organizations," and thus Berry was entitled to the "construction benefit of a non-drafting party such that any ambiguities in the registration statements must be construed against [the Wells Fargo Entities]." (R. at 8 n.4). There are a number of errors with this finding. The doctrine of *contra proferentum* does not apply here because the Wells Fargo Entities are not the drafters of FINRA's rules or forms. Moreover, the Wells Fargo Entities and Berry are all FINRA-registered and all equally bound by FINRA rules. The Wells Fargo Entities did not "invoke" FINRA rules to trigger arbitration; the Wells Fargo Entities and Berry are all obligated by agreement and mandated by rule to arbitrate this dispute. The trial court's attempts to twist this dispute into one akin to a dispute over ambiguities in a real estate contract (*see* R. at 8 n.4 (citing *McGill v. Moore*, 381 S.C. 179, 186, 672 S.E.2d 571, 575 (2009)) are unavailing and incorrect.

[7] For example, Rule 13200(b) exempts disputes arising out of the insurance business activities of a member that is also an insurance company. There is absolutely no basis for any assertion that Berry's claims in this case are exempted under the Code from being required to be arbitrated, and Berry did not argue to the trial court that any of the limited exemptions applied to his dispute.

dispute to arbitration under the Code of Arbitration as required by that Code, "may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2110," which requires members to observe high standards of commercial honor and just and equitable principles of trade. *Id.* at 1378 (citing NASD Rule IM–10100 (Failure to Act Under Provisions of Code of Arbitration Procedure); NASD Rule 2110).

Here, the trial court brushed aside this strong public policy by simply failing to consider on authentication grounds the submitted Forms U4 which established Berry's registration as an associated person and agreement to arbitrate his disputes under Rule 13200. According to Rule 901(a), SCRE, "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims." Here, there is no question as to the actual authenticity of the Forms U4 submitted by the Wells Fargo Entities, and Berry admits he was registered with FINRA and continues to be registered with FINRA. (*See, e.g.*, R. at 67 ¶ 59). There is also no question that Berry, as a registered representative, *must* have an active Form U4 at all times in order to sell securities. At no time did Berry claim the documents were incomplete, incorrect, or forgeries. Nonetheless, the trial court rejected the Forms U4 because the affiant "did not claim to be a custodian of records. . . nor did she make any claim that the documents. . . were true and correct copies." (R. at 6). This was an error given the evidence reflecting the authenticity of the Forms U4. The trial court's order effectively reversed the burden of proof and exonerated Berry of his obligation to show "the claims at issue are unsuitable for arbitration." *Hall v. Green Tree Servicing, LLC*, 413 S.C. 267, 271, 776 S.E.2d 91, 94 (Ct. App. 2015).

II. THE TRIAL COURT ERRED IN DENYING THE WELLS FARGO ENTITIES' MOTION FOR RECONSIDERATION BECAUSE THE SUPPORTING AFFIDAVIT ATTACHED NEWLY-DISCOVERED, MATERIAL INFORMATION CONCLUSIVELY SHOWING AN AGREEMENT TO ARBITRATE BETWEEN THE PARTIES.

The South Carolina Rules of Civil Procedure allow an aggrieved party to make a motion for reconsideration under Rule 59(e). *Elam v. S.C. DOT*, 361 S.C. 9, 21, 602 S.E.2d 772, 778-79 (2004). The purpose of a Rule 59(e) motion is to request the trial court to reconsider matters properly encompassed in a decision on the merits. *Arnold v. State*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (citations omitted).

The Wells Fargo Entities did not make new arguments in their Motion for Reconsideration, but rather submitted recently discovered Forms U4 that established an agreement to arbitrate between the parties, which were attached to the affidavit of a Wells Fargo Clearing Services, LLC employee who described, among other things, his familiarity with Forms U4, the process by which Forms U4 are prepared and submitted through FINRA's Web CRD licensing and registration system, the basis of the personal knowledge upon which employees of the registration department prepare Forms U4, and the dates upon which Berry's Forms U4 were submitted. (*See* R. at 237-39). *See* Rule 803(6), SCRE (hearsay exception for records of regularly conducted activity); Rule 901, SCRE (authentication met by evidence sufficient to support a finding that matter in question is what proponent claims). In short, the Wells Fargo Entities identified new evidence which conclusively altered — or should have altered — the trial court's prior analysis and submitted that evidence through an affidavit that provided an evidentiary basis, in the precise manner dictated by the Order on the Motion to Dismiss, to support a finding that the documents were authentic. *Id.* Tellingly, in response, there was no contention that the documents were not what they purported to be, or that Berry was not required

under FINRA rules to have an active Form U4 at all times during his employment. Nor was there any contention that such Forms U4 at all times required arbitration.

Nonetheless, the trial court concluded 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." (R at 20). This ruling failed to consider the scope of the trial court's power at the Rule 59(e) stage and failed to consider that the motion also invoked Rule 60, SCRCP. A motion for reconsideration is not so narrow as to limit the court to circumstances of overlooked fact or errors of law, as the trial court's Order on the Motion for Reconsideration suggests. *See Elam*, 361 S.C. at 22, 602 S.E.2d at 779 ("There is nothing inherently unfair in allowing a party one final chance . . . to revisit a previously raised argument. It is inherently unfair to disallow such an opportunity."). This was not a case where the Wells Fargo Entities sought to raise a new argument, which would require denial of the motion. *See Hickman v. Hickman*, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990). Instead, the Wells Fargo Entities sought to convince the trial court that it erred in failing to consider the Forms U4 and in disregarding FINRA rules. These arguments had all been raised by the Wells Fargo Entities prior to the trial court's original Order.

The trial court's conclusion — the only sentence in the seven-sentence Order on the Motion for Reconsideration to substantively address the Wells Fargo Entities' Motion for Reconsideration and Berry's Response to the Motion for Reconsideration — ignores that the submission of the Wells Fargo Form U4 renders the trial court's original Order incorrect and requires the arbitration of all of Berry's claims.[8] (R. at 20). With the filing of the Motion for

[8] The trial court noted in its Order that it was "too late" for the Wells Fargo Entities to amend "as of right" to submit supplemental or additional documentation in support of the Motion to Dismiss, and that permitting them to do so would provide them a "second bite at the apple."

Reconsideration, the following facts become apparent in contrast to the trial court's original findings: (1) the Forms U4 were properly authenticated (*compare* R. at 6-7 *with* R. at 237-39); (2) Wells Fargo Advisors is a party to the documents (*compare* R. at 7-9 *with* R. at 251); and (3) the forum specified by the Forms U4, FINRA, does exist (*compare* R. at 9-17 *with* R. at 252).[9] The trial court's inability to discover a material fact which might alter its decision was in error,

---

(Order on R. at 7 n.2). The Wells Fargo Entities' Motion for Reconsideration was not a second bite or an attempt to amend the pleadings; rather, it was a continuation of its proverbial first bite. *Cf. 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."). Moments before the trial court heard argument on the Motion to Dismiss, Berry "handed to opposing counsel briefs in opposition to their motion." (R. at 325:4-19). On June 21, 2017, while the Wells Fargo Entities were collecting evidence in response to Berry's arguments (R. at 210 n.2), the trial court denied the Motion to Dismiss. (R. at 3-19). Under those circumstances, the trial court erred in denying the Motion to Dismiss with prejudice, and in not considering the documents attached to the Motion for Reconsideration.

[9] The Wells Fargo Entities acknowledge *Keller v. ING Financial Partners, Inc.*, Op. No. 2011-CP-23-0336, 2011 WL 10005145 (S.C. Cir. Ct. June 2, 2011), *aff'd* 2013 WL 8482243 (S.C. App. Jan. 9, 2013), but respectfully disagree with the courts' conclusions that NASD ceased to exist in 2007 and, in any event, do not believe *Keller* is applicable here. Unlike the defendant in *Keller*, the Wells Fargo Entities provided the trial court with a series of Forms U4, including a Form U4 from Berry's employment with Wells Fargo Advisors that specifically designates FINRA as the chosen forum. (*See* R. at 251-64).

The Wells Fargo Entities' position that NASD and FINRA are functionally the same entity is supported by, among others, the SEC, which characterizes the merger and continued operation of the combined entity as a name change. *See, e.g.*, S.E.C. 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"); S.E.C. Release No. 34-570033, *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). NASD Rules are also incorporated into the FINRA Manual, FINRA Manual, Contents, *available at* http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=1 (last visited Nov. 28, 2017), and courts in other jurisdictions have reached the same conclusion. *See 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).

particularly in light of the strong federal and state policy in favor of arbitration. *Heffner*, 321 S.C. at 537.

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

During the hearing, the Wells Fargo Entities asked the trial court to take judicial notice of FINRA Rule 13200. (R. at 341:20-24; *see* R. at 213 (discussing BrokerCheck as matter of public record)). In its Order, the trial court "set aside the issue of whether [it] may even take judicial notice of such rule" because the Wells Fargo Entities "[had] not met their threshold burden of demonstrating the applicability of any FINRA rule to Mr. Berry." (R. at 10 n. 7). The trial court erred in both respects.

The trial court should have taken notice of FINRA's rules, as numerous other courts across the country have, as well as the Forms U4 and the BrokerCheck website which was established and is maintained by FINRA to fulfill its statutory obligations as a registered national securities association. Moreover, the allegations of Berry's Amended Complaint further show that FINRA rules apply to Berry and provide a sufficient basis to require arbitration as compelled by these rules. *See Mullins v. U.S. Bancorp Inv., Inc.*, Civil No. 1:15-CV-00126-GNS, 2016 WL 1420999, at *4 (W.D. Ky. Apr. 8, 2016) ("the absence of arbitration provisions in [the confidentiality and non-disclosure] agreements does not negate the independent basis for arbitration that exists by virtue of FINRA Rule 13200").

A. THE TRIAL COURT ERRED IN NOT TAKING JUDICIAL NOTICE OF THE FINRA RULES, FORMS U4, AND BROKERCHECK REPORT.

South Carolina courts will take judicial notice of facts: (1) generally known within the territorial jurisdiction of the trial court; or (2) 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, 310, 313 S.E.2d 287, 288 (1984). A court may take judicial

notice of facts not subject to reasonable dispute "at any stage of the proceeding." Rule 201(f), SCRE.

As facts capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned, the trial court should have taken judicial notice of FINRA's rules, the content and use of the Form U4, and the facts publicly available through FINRA's statutorily-mandated BrokerCheck website.

FINRA falls under the regulatory authority of the SEC pursuant to Section 15A of the Exchange Act. *See* 15 U.S.C. § 78o–3. FINRA is a self-regulatory organization which "has the authority to, *inter alia*, create and enforce rules for its members in order to provide regulatory oversight of all securities firms that do business with the public." *Wachovia Bank, Nat'l Ass'n v. VCG Special Opportunities Master Fund, Ltd.*, 661 F.3d 164, 172 (2d Cir. 2011) (internal quotation marks and citation omitted); *see UBS Fin. Servs., Inc. v. W. Va. Univ. Hosps., Inc.*, 660 F.3d 643, 648 (2d Cir. 2011) (FINRA exercises comprehensive oversight over all securities firms that do business with the public); *Sacks v. SEC*, 648 F.3d 945, 948 (9th Cir. 2011) (FINRA is "responsible for regulatory oversight of all securities firms that do business with the public; professional training, testing and licensing of registered persons; [and] arbitration and mediation") (quoting 72 Fed. Reg. 42170 (Aug. 1, 2007)).

FINRA's mission is to protect investors by regulating and monitoring securities trading, operations and records, exchange platforms, and personnel in the securities industry. *See* FINRA, *Our Mission*, https://www.finra.org/about/our-mission (last visited Nov. 26, 2017); *id.*, *What We Do*, https://www.finra.org/about/what-we-do (last visited Nov. 26, 2017). FINRA pursues that mission by "writing and enforcing rules and regulations for every single brokerage firm and broker in the United States." *See id.* All rules and regulations promulgated by FINRA, including

its Codes of Arbitration, are reviewed and, after notice and comment, approved by the SEC. *See* 15 U.S.C. § 78s(b).

As a registered securities association, FINRA is required by statute to: (A) "establish and maintain a system for collecting and retaining registration information"; and (B) "establish and maintain a . . . readily accessible electronic or other process, to receive and promptly respond to inquiries regarding — (i) registration information on its members and their associated persons." 15 U.S.C. § 78o-3(i)(1)(A), (B). The former obligation — to collect and retain registration information — is met in large part through FINRA's use of Forms U4 and U5.[10] The latter obligation — to make available to the public registration information on firms and brokers — is met in large part through FINRA's BrokerCheck website, https://brokercheck.finra.org. *See also* FINRA, *About BrokerCheck*, http://www.finra.org/investors/about-brokercheck (describing, *inter alia*, "Where BrokerCheck Information Comes From" and "What You'll Find in a BrokerCheck Report") (last visited Nov. 26, 2017). The SEC and FINRA encourage the public to review this information when considering doing business with a specific registered representative.

The trial court should have taken judicial notice of FINRA's rules, the Form U4, and Berry's BrokerCheck report because all three are capable of accurate and ready determination through publicly-available sources, the accuracy of which cannot be reasonably questioned. Though South Carolina courts do not appear to have had occasion to address judicial notice of FINRA's rules, the Form U4, or FINRA's BrokerCheck website, several courts have done so, concluding that the regulatory overlay provides the appropriate evidentiary basis to consider those documents. In *SEC v. Hansen*, for example, the court reasoned that "given FINRA's mandate to

[10] "The Form U-5 is the standard form used in the securities industry to report the termination of a registered representative's association with a broker-dealer." *Adams v. Wells Fargo Advisors, LLC*, No. 12-2130, 2014 WL 212447, at *7 n.7 (D. Md. May 21, 2014) (citation and internal quotation marks omitted).

maintain registration information for member brokers and make that information available to the public, taking judicial notice of broker registration on FINRA's website is appropriate." No. 13-CV-1403 (VSB), 2017 WL 1298022, at *6 (S.D.N.Y. Mar. 31, 2017); *see Forgione v. Gaglio*, No. 13 CIV. 9061 KPF, 2015 WL 718270, at *17 (S.D.N.Y. Feb. 13, 2015) (taking judicial notice of a BrokerCheck report and FINRA's registration requirements); *Monsefi v. TD Ameritrade, Inc.*, No. B207707, 2009 WL 1395798 (Cal. Ct. App. May 20, 2009) (granting motion to take judicial notice of FINRA's regulations and rules and compelling arbitration based on Form U4 signed with predecessor firm).

FINRA's rules and forms are easily located on FINRA's website. The ready availability of Berry's BrokerCheck report — which under federal law must be maintained in a publicly-accessible electronic form — is alleged by Berry in the Amended Complaint. (*See* R. at 75 ¶ 91 (alleging Berry's "official record is publicly available" and that the allegedly defamatory statements "also appear[] on Mr. Berry's BrokerCheck Report which is posted on the web site of the Financial Industry Regulatory Authority ('FINRA') and is available to the public")). This allegation alone should be sufficient to warrant inspection of the BrokerCheck report. *See Am. Chiropractic v. Trigon Healthcare*, 367 F.3d 212, 234 (4th Cir. 2004) (court may take judicial notice of documents which are "integral to and explicitly relied on in the complaint" and authentic to determine whether plaintiff has stated a claim). Moreover, Berry was aware the Wells Fargo Entities had asked the trial court to take notice of these public record documents and did not question the accuracy of any of the rules, forms, or reports submitted to the trial court. For all of these reasons, the trial court erred in failing to take judicial notice of these materials.

B. BERRY'S FINRA REGISTRATION REQUIRES HIM TO ARBITRATE HIS CLAIMS AGAINST THE WELLS FARGO ENTITIES PURSUANT TO FINRA'S RULES.

In its Order, the trial court "set aside" the question of judicial notice because the Wells Fargo Entities "[had] not met their threshold burden of demonstrating the applicability of any FINRA rule to Mr. Berry." (R. at 10 n. 7). The trial court was wrong as a matter of fact and as a matter of law.

A firm must be a FINRA member to participate in a public securities business. By registering as a FINRA member, entities gain the right to participate in the business of brokering and trading securities, but must satisfy certain regulatory requirements and obligations to their customers. *See, e.g.*, FINRA Bylaws, Art. 4, § 1(a)(1), available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4609 (last visited Nov. 28, 2017). In turn, any individual actively involved in a firm's investment banking or securities business must also be registered as a representative with FINRA. *See* FINRA Manual, Rule 1031(4), Registration Requirements, available at http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=3584 (last visited Nov. 26, 2017) ("All persons engaged or to be engaged in the investment banking or securities business of a member who are to function as representatives shall be registered as such. . . ."). This registration requirement is not voluntary or negotiable. Under the federal securities laws, anyone wishing to sell securities must submit to this registration requirement.

"[T]he rules of a securities exchange are contractual in nature." *Kidder, Peabody & Co., Inc. v. Zinsmeyer Trusts P'ship*, 41 F.3d 861, 863 (2d Cir. 1994) (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 re Lehman Bros. Secs. and ERISA Litig., 706 F. Supp.2d 552, 559 (S.D.N.Y. 2010) ("[A]n associated person of a member . . . is bound by the FINRA arbitration rules if the dispute 'arises in connection with' [the member's] business activities."); *In the Matter of the Arbitration Between Ameriprise Advisory Servs., Inc. v. Leo Sala III*, FINRA No. 10-00469, 2010 WL 3525730, at *5 (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.

For purposes of Rule 13200, a "member" is defined as "any broker or dealer admitted to membership in FINRA." (R. at 273-74). FINRA Manual, FINRA Rules, 13100(a), available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4196 (last visited Nov. 26, 2017). An "associated person" is "a person associated with a member," *see id.* at Rule 13100(o), and "a person associated with a member" is, *inter alia*, "[a] natural person who is registered or has applied for registration under the Rules of FINRA." *Id.* at Rule 13100(r). Thus, Rule 13200 would apply to the claims asserted here as between two FINRA members.

The enforceability of FINRA's rules mandating arbitration of disputes related to business activity is so inescapable that courts have repeatedly held that *the rule itself* is an enforceable, written agreement to arbitrate, and compelled arbitration on those grounds. Courts uniformly hold that, for purposes of the FAA, FINRA Rule 12200[11] (the Customer Code version of Rule

[11] FINRA, and NASD before it, employs two Codes of Arbitration: a Customer Code and an Industry Code. The Customer Code applies to disputes between FINRA member firms or their associated persons and customers. The Industry Code applies to disputes between or among FINRA member firms or associated persons. *See* FINRA, Code of Arbitration Procedure, available at https://www.finra.org/arbitration-and-mediation/code-arbitration-procedure (last visited Nov. 26, 2017). Customer Code Rule 12200 is the customer-side mirror of Industry Code

13200) creates an enforceable "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 863–64 (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."); *cf. Williams v. Tucker*, 239 W. Va. 395, 801 S.E.2d 273, 279 (2017) ("Mr. Williams, as a FINRA member, is required to abide by FINRA's rules, including its arbitration provisions.").

Here, there is overwhelming evidence Berry voluntarily subjected himself to FINRA's rules, including Rule 13200. This evidence includes Berry's own allegations in his Amended Complaint referencing his long career in the securities industry. (*See, e.g.*, R. at 8 ¶ 27). Berry's

---

Rule 13200, described above. Rule 12200 provides, "Parties must arbitrate a dispute under the Code if:

- Arbitration under the Code is either:
  (1) Required by a written agreement, or
  (2) Requested by the customer;
- The dispute is between a customer and a member or associated person of a member; and
- The dispute arises in connection with the business activities of the member or the associated person, except disputes involving the insurance business activities of a member that is also an insurance company.

FINRA Manual, FINRA Rules, 12200, available at http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4106 (last visited Nov. 26, 2017).

Amended Complaint acknowledges, among other things, that "[f]inancial advisors are required to be registered with a firm to sell or buy securities or otherwise provide financial advice. After his departure from WFA, Mr. Berry chose to affiliate himself with LPL Financial Corporation ('LPL'.)"[12] (R. at 67 ¶ 59). Elsewhere, Berry described himself as a "registered representative," and a "broker[] and advisor[]" for Wells Fargo, who "has worked continuously the [the financial services industry] since 1984," and "dedicated the bulk of his professional life to the brokerage firm which ultimately became the WFA Defendants." (R. at 57 ¶ 27, 59 ¶ 31, 62-63 ¶¶ 45-47). Berry's Amended Complaint even incorporates by reference his Form U5. (*See, e.g.*, R. at ¶¶ 60, 91, 93-95, R. at 68 ¶ 60, 75-77 ¶¶ 91, 93-95).

In addition and as described above, the Wells Fargo Entities presented the trial court with a long line of Berry's Forms U4, including Berry's Wells Fargo Advisors Form U4 and the Form U4 submitted by predecessor firm Everen Securities, Inc.[13] (*See* R. at 109-20, 241-49, 251-64). Completion and submission of the Form U4 required Berry to affirm he was applying for registration with the organizations identified therein (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 rules and regulations of

[12] 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.

[13] The trial court refused to take judicial notice of the "internal affairs of private corporations to find that [the Wells Fargo Entities] can invoke the rights of Wheat First," a predecessor entity to the Wells Fargo Entities with which Berry's was registered using the oldest proffered Form U4. (R. at 8-9; *see* R. at 109-20). No judicial notice was necessary because Berry's Amended Complaint alleges the merger history of Wheat First, describing the firm's merger with First Union Corporation, a subsequent merger with Wachovia Corporation, and Wachovia Corporation's acquisition by Wells Fargo & Company in 2008. (R. at 58-59 ¶¶ 28 n.3, 29, 31). *See Overcash*, 364 S.C. at 572, 614 S.E.2d at 620 (allegations of complaint accepted as true for purposes of motion to dismiss).

[FINRA] as they are or may be adopted, or amended from time to time." (*See, e.g.*, R. at 241-29). Berry's registration history is easily confirmed by searching 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) from 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 registrations list a single registering entity: FINRA. *Id.*[14]

All of the claims in Berry's Amended Complaint arise from Berry's employment and termination by the Wells Fargo Entities. (*See* R. at 50 ¶ 1, 69-91 ¶¶ 69-148 (asserting claim for damages "arising from Defendants' deliberate sabotage of," among other things, Berry's "profit formula agreement," "implied agreements with all Defendants" and "his then current employment, his future economic opportunity, and his professional reputation")). There can be no dispute that these claims fall within the parameters of FINRA Rule 13200 and the arbitration provisions of Berry's Form U4. *See, e.g.*, *Hawkins v. Questar Capital Corp.*, 2013 WL 5596897, at *3, *4 (E.D. Ky. Oct. 11, 2013) (holding intentional interference claims not outside the scope of the "broad arbitration language of Rule 13200(a)" and granting motion to dismiss); SEC

[14] BrokerCheck similarly confirms the registration status of Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC (CRD# 19616) and Wells Fargo Bank, N.A. (CRD# 159322). Wachovia Securities Financial Holdings, LLC can be found under the registration of Wells Fargo Advisors Financial Network, LLC (CRD# 11025). *See* BrokerCheck, https://brokercheck.finra.org/ (select "Firm" tab and search by name or CRD numbers).

Release No. 34-56208, 72 Fed. Reg. 45077-02, 45078 (Aug. 6, 2007) (term "business activities" encompasses dispute arising from the employment or termination of an associated person). For these reasons, the trial court erred in refusing to dismiss or stay the case pending arbitration based on FINRA's rules, Berry's Forms U4 or Berry's BrokerCheck report, any one of which provides an independent basis upon which to dismiss or stay the case pending arbitration of Berry's claims.

IV. BERRY HAS NOT ESTABLISHED A VALID DEFENSE TO ARBITRATION.

In the Order on the Motion to Dismiss, the trial court suggested, without so ruling, that it agreed with Berry's argument that the arbitration clause in his Forms U4 was unenforceable under the circumstances of this case because "its enforcement would compel Plaintiff to arbitrate allegedly outrageous conduct by Defendants that clearly was not contemplated at the inception of the arbitration agreement."[15] (R. at 19 n. 10). The "outrageous conduct" in question appears to be Berry's allegation that he was terminated because he refused to violate the law (a claim the Wells Fargo Entities deny). (R. at 147). Even assuming the continued viability of the outrageous conduct exception, *see Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 13, 791 S.E.2d 128, 134 (2016), the exception does not apply here.

Under the FAA and South Carolina law, a clause which provides for arbitration of all disputes arising out of or relating to a contract should be construed broadly, including tort claims. *Carlson v S.C. State Plastering, LLC*, 404 S.C. 250, 261, 743 S.E.2d 868, 874 (Ct. App. 2013) (compelling arbitration of plaintiffs tort claims as well as contract claims because "[a] clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is

[15] The trial court did not rule on the argument, however, and simply noted that it "need not address" the issue in light of its foregoing conclusions. The Wells Fargo Entities nonetheless address the argument for the sake of completeness.

construed broadly"). The clause in Berry's Form U4, as well as the language of Rule 13200, is "precisely the kind of broad arbitration provision that justifies a presumption of arbitrability." *Oldroyd v. Elmira Savs. Bank, FSB*, 134 F.3d 72, 75 (2d Cir. 1998). As this Court has held, any ambiguity in the language of a mandatory arbitration provision should be construed in favor of arbitration. *Towles*, 338 S.C. at 41, 524 S.E.2d at 846.

Aiken v. World Finance Corp. of South Carolina, cited by Berry to the trial court, is not instructive. 373 S.C. 144, 644 S.E.2d 705 (2007). That case involved the theft of a bank customer's personal information by bank employees and use of that information to obtain "sham loans" for the bank employees' personal use. *Id.* at 147, 644 S.E.2d at 707. The court found that conduct to be "completely outside the expectations of the parties." *Id.* at 157, 644 S.E.2d at 710. In contrast, all of Berry's allegations concern his employment, his termination, and events immediately after (and related to) his termination. Arbitration of those claims, particularly under the broad language of the Form U4 and Rule 13200, is completely *within* the expectation of the parties. *See, e.g., Blackwell v. Bank of Am. Corp.*, C.A. no. 7:11-2475-JMC-KFM, 2012 WL 1229673, at *2 (D.S.C. Mar. 22, 2012), *report and recommendation adopted*, 2012 WL 1229675 (Apr. 12, 2012) (dismissing claims for, *inter alia*, violation of whistleblower protections under Sarbanes-Oxley Act, "trespass to chattel," intentional infliction of emotional distress, and alleged unfair trade practice on basis of Form U4 and Rule 13200). Therefore, compelling arbitration in this case comports with the expectations of all parties as members of the securities industry. For that reason, there is no basis for applying any kind of exception in this case. Nor does it leave Berry without a remedy. It just requires that he pursue his claims in the agreed upon arbitration forum.

CONCLUSION

For all of these reasons, the Wells Fargo Entities respectfully request this Court reverse the trial court's Orders on the Motion to Dismiss and Motion for Reconsideration with directions to dismiss or stay the case pending arbitration of Berry's claims.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.
Sarah P. Spruill, SC Bar No. 68337
1 North Main Street, 2nd Floor
Greenville, SC 29601
Telephone: (864) 240-3200
sspruill@hsblawfirm.com

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

Frederick T. Smith
North Carolina Bar No. 45229
SEYFARTH SHAW LLP
6000 Fairview Road, Suite 1200
Charlotte, North Carolina 28210
Telephone: (404) 888-1021
Facsimile: (404) 724-1521
fsmith@seyfarth.com

Attorneys for Appellants WELLS FARGO CLEARING SERVICES, LLC F/K/A WELLS FARGO ADVISORS, WACHOVIA SECURITIES FINANCIAL HOLDINGS, LLC, WELLS FARGO & COMPANY, WELLS FARGO BANK, N.A., and SCOTT A. SPANG

Date: May 2, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
MAY 08 2018
SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2017-001690

Robert F. Berry, ... Respondent,

v.

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

FINAL BRIEF OF RESPONDENT

Mitchell Willoughby, Esquire
Chad N. Johnston, Esquire
Elizabeth Zeck, Esquire
WILLOUGHBY & HOEFER, P.A.
Post Office Box 8416
Columbia, South Carolina 29202
Telephone Number: 803-252-3300

Attorneys for Respondent Robert F. Berry

TABLE OF CONTENTS

TABLE OF AUTHORITIES iii

STATEMENT OF ISSUES ON APPEAL 1

STATEMENT OF THE CASE 2

STATEMENT OF FACTS 4

SUMMARY OF ARGUMENT 6

STANDARD OF REVIEW 7

ARGUMENT 12

I. The citations to and arguments applying FINRA rules to Mr. Berry are not preserved for this Court's review 8

a. Appellants' citation to FINRA rules below was limited to a single citation and the trial court expressly held that Appellants did not meet their burden of proving FINRA's applicability to Mr. Berry, much less the existence of any agreement to arbitrate Mr. Berry's claims against Appellants before FINRA 10

b. Judicial notice of the FINRA rules and other online documents for the first time on appeal is inappropriate 13

c. The application of FINRA rules to Mr. Berry requires evidentiary proof, which was not presented to the trial court; therefore, Appellants' attempt to convert those matters into legal arguments and citations is improper and designed to avoid the trial court's exclusion of the FINRA rules based on Appellants' failure to meet their evidentiary burden 15

II. The attachments and supporting arguments advanced by Appellants for relief from the Order under Rule 59(e) and 60, SCRCP, are not preserved for this Court's review, as they were presented for the first time by Appellants in their Motion for Reconsideration 16

III. Even if the new citations, documents, and arguments presented by Appellants for the first time in the Motion for Reconsideration and in this appeal were properly before the Court, which they are not, those additional arguments still fall short of Appellants' burden of demonstrating the existence of an agreement between Mr. Berry and these Appellants to arbitrate his claims 21

IV. The two-issue rule precludes the Court's consideration of the merits of the Order, based on Appellants failure to seek this Court's review of the trial court's independent holdings against arbitration based on Appellants' lack of standing to

enforce the arbitration agreement in the 1994 U4 between Mr. Berry and Wheat First, as well as the failure of the designated fora in the 1994 U4 26

V. The trial court was correct to find that the evidence presented below did not establish the existence of a valid agreement by Mr. Berry to arbitrate his claims against these Appellants 28

a. The trial court correctly determined that the documents advanced and relied upon by Appellants to support their arbitration claim were not properly authenticated 28

b. Courts of this state have previously concluded that proof is required from the proponents of arbitration as to the relationship between NASD and FINRA 30

CONCLUSION 32

TABLE OF AUTHORITIES

Page(s)

Federal Cases

Brown v. ITT Consumer Vin. Corp.,
211 .F.3d 1217, 1220 (11th Cir. 2000) 23

Johnson v. City of Richmond,
102 F.R.D. 623, 623 (E.D.Va. 1984) 18

Lans v. Gateway 2000, Inc.,
110 F.Supp.2d 1 (D.D.C. 2000) 20

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) 17

Roney & Co. v. Goren,
875 F.2d 1218 (6th Cir. 1989) 23

In re Salomon Inc.,
68 F.3d 554 (2d. Cir. 1995) 23, 31

Singleton v. Grade A Market, Inc.,
607 F. Supp. 2d 333 (D. Conn. 2009) 23

Smith Barney, Inc. v. Critical Health Sys.,
212 F.3d 858 (4th Cir. 2000) 23

Smith v. Stoner,
594 F.Supp. 1091, 1118 (N.D.Ind. 1984) 18

State Cases

Anderson v. S.C. Dep't of Highways & Pub. Transp.,
322 S.C. 417, 472 S.E.2d 253 (1996) 27

Atl. Coast Builders & Contractors, LLC v. Lewis,
398 S.C. 323, 730 S.E.2d 282 (2012) 27

Bradley v. Brentwood Homes, Inc.,
398 S.C. 447, 730 S.E.2d 312 (2012) 21-22, 28

Chassereau v. Glob.–Sun Pools, Inc.,
363 S.C. 628, 611 S.E.2d 305 (Ct. App. 2005) 21-22

Chet Adams Co. v. James F. Pedersen Co.,
307 S.C. 33, 413 S.E.2d 827 (1992) 24

City of Myrtle Beach v. Tourism Expenditure Review Comm.,
407 S.C. 298, 755 S.E.2d 425 (2014) 18

Connelly v. Wometco Enterprises, Inc.,
314 S.C. 188, 442 S.E.2d 204 (Ct. App. 1994) 29, 30

Dean v. Heritage Healthcare of Ridgeway, LLC,
408 S.C. 371, 759 S.E.2d 727 (2014) 23

Elam v. S.C. Dep't of Transp.,
361 S.C. 9, 602 S.E.2d 772 (2004) 18

Erickson v. Jones St. Publishers, LLC,
368 S.C. 444, 629 S.E.2d 653 (2006) 18

Grant v. Magnolia Manor-Greenwood, Inc.,
383 S.C. 125, 678 S.E.2d 435 (2009) 23, 24, 31

Hammond v. Halsey,
287 S.C. 46, 336 S.E.2d 495 (Ct. App. 1985) 21

Hickman v. Hickman,
301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990) 17

Huntley v. Young,
319 S.C. 559, 462 S.E.2d 860 (1995) 8

I'On, L.L.C. v. Town of Mt. Pleasant,
338 S.C. 406, 526 S.E.2d 716 (2000) 11

Jackson v. Frier,
146 S.C. 322, 144 S.E. 66, 68, (1928) 21

Jones v. Lott,
387 S.C. 339, 692 S.E.2d 900 (2010) 27

Keller v. ING Financial Partners, Inc.,
2013 WL 8482243, Op. No. 2013-UP-014 (S.C. Ct. App. filed Jan. 9, 2013) 11, 23, 30, 31

Keller v. ING Financial Partners, Inc.,
Op. No. 2011-CP-23-0336 (S.C. Cir. Ct. filed June 2, 2011) 11, 24, 31

Keller v. ING Financial Partners, Inc.,
Op. No. 2015-MO-006 (S.C. filed Feb. 11, 2015) 11, 32

Lanier v. Lanier,
364 S.C. 211, 612 S.E.2d 456 (Ct. App. 2005) 19-21

Martin v. Bay,
400 S.C. 140, 732 S.E.2d 667 (Ct. App. 2012) 15

Masters v. Rodgers Development Group
283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984) 13, 31

McCall v. Finley,
294 S.C. 1, 362 S.E.2d 26 (Ct. App. 1987) 15

McFaddin v. Lohr,
260 S.C. 242, 195 S.E.2d 385 (1973) 8

McLeod v. Starnes,
396 S.C. 647, 723 S.E.2d 198 (2012) 10

Munoz v. Green Tree Financial Corp.,
343 S.C. 531, 542 S.E.2d 360 (2001) 28

Parker v. S.C. Public Service Comm'n,
288 S.C. 304, 342 S.E.2d 403 (1986) 18

Pearson v. Hilton Head Hosp.,
400 S.C. 281, 733 S.E.2d 597 (Ct. App. 2012) 8

Porter v. S.C. Pub. Serv. Comm'n,
333 S.C. 12, 507 S.E.2d 328 (1998) 18

Raby Constr., L.L.P. v. Orr,
358 S.C. 10, 594 S.E.2d 478 (2004) 20

Reed v. Beck,
333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999) 9

South Carolina Highway Department v. Meredith
241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962) 9

State v. Pagan,
369 S.C. 201, 631 S.E.2d 262 (2006) 8

State v. Rich,
293 S.C. 172, 359 S.E.2d 281 (1987) 29

State v. Stone,
290 S.C. 380, 290 S.E.2d 517 (1986) 24

State v. White;
372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007), aff'd, 382 S.C. 265, 676 S.E.2d 684 (2009) 9

Stevens & Wilkinson of S.C., Inc. v. City of Columbia,
409 S.C. 563, 762 S.E.2d 693 (2014) 9, 10, 15

Zabinski v. Bright Acres Assocs.,
346 S.C. 580, 553 S.E.2d 110 (2001) 22

Rules

FINRA Rule 13200 ..... 10, 11, 14, 15

Rule 12(b)(6) 25

SCACR, Rule 208(b)(4) 8

SCACR, Rule 210(c) 8

SCACR, Rule 210(h) 9, 13

SCACR, Rule 220(c) 27, 28, 33

SCACR, Rule 268(d)(2) 31

SCRCP, Rule 59(e) 18

SCRCP, Rule 59(e) and 60 16

SCRCP, Rule 60(b) 17, 18

SCRE, Rule 901(a) 29, 30

SCRE, Rules 901 and 902 26

SCRE, Rule 902 29

Other

Black's Law Dictionary at 468 (7th ed.1999) 19

James F. Flanagan, *South Carolina Civil Procedure* 484 (2nd ed.1996) 19

Matthew Bender, 12 *Moore's Federal Practice* § 60.42 (3rd ed.) 19

Unpreserved Citations Advanced by Appellants

FINRA, *About BrokerCheck* 12

FINRA Bylaws, Art. 4, § 1(a)(1) 12

FINRA, *Our Mission* 12

FINRA Rules, 1031 12

FINRA Rules, 12200 13

FINRA Rules, 13100 12

FINRA, *What We Do* 12

http://finra.complinet.com/ 12

http://finra.complinet.com/en/display/ display.html?rbid=2403 12

http://finra.complinet.com/en/display/display_main.html ?rbid=2403 ..... 12, 13

http://www.finra.org/industry/individualregistration 12

http://www.finra.org/investors/about-brokercheck 12

https://brokercheck.finra.org/ 12

https://brokercheck.finra.org/individual/summary/1262947 13

https://www.finra.org/about/our-mission 12

https://www.finra.org/about/what-we-do 12

https://www.finra.org/arbitration-and-mediation/code-arbitration-procedure 12

https://www.finra.org/sites/default/files/form-u4.pdf 12

https://www.sec.gov/rules/sro/finra/2007/34-56615.pdf 12

https://www.sec.gov/rules/sro/finra/2007/34-57033.pdf 12

NASD Rule 2110 12

NASD Rule IM-10100 12

STATEMENT OF ISSUES ON APPEAL

I. Are the new rules, citations, web-linked documents and arguments derived therefrom, which were first included in Appellants' Motion for Reconsideration and later included and significantly expanded upon in Appellants' Brief, preserved for this Court's review or subject to appellate judicial notice, where those grounds were not argued to the trial court below and now for the first time presented as a new and alternative basis to meet Appellants' burden of proving that Mr. Berry had executed an agreement with any Defendant compelling him to arbitrate his claims with that particular Defendant?

II. Does the two-issue rule and law of the case doctrine preclude this Court's review of the trial court's Order, based on Appellants' failure to appeal from two of the trial court's alternative grounds for denying the Motion to Compel?

III. Did the trial court err in finding that Appellants had failed to meet their burden in demonstrating the existence of an agreement to arbitrate Mr. Berry's claims?

STATEMENT OF THE CASE

This action for damages was commenced by Mr. Berry on February 2, 2017, through the filing of Civil Action No. 2017-CP-32-00397, in the Lexington County Court of Common Pleas. **(R. pp. 22-49)** Prior to answering, Defendants 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.'s (all defendants are collectively referred to as "Appellants") filed a Motion to Dismiss or Stay Pending Arbitration ("Motion to Compel") on April 12, 2017. **(R. pp. 94-129)** Thereafter, Appellants filed an amended Motion to Dismiss or Stay Pending Arbitration ("Amended Motion to Compel") on April 27, 2017. **(R. pp. 130-31)**

In the Motion to Compel, Appellants' arbitration demand was based solely upon what purported to be three (3) 1994 Form U4 registration statements[1] from the period when Mr. Berry was associated with Wheat, First Securities, Inc. ("Wheat First"), a now defunct firm. **(R. pp. 108-20)** Of the three Form U4s submitted in Appellants' motion, only the November 1994 Form U4 identified possible arbitration fora for settling disputes between Mr. Berry and Wheat First, which no longer exists. **(R. pp. 117-20)** This form made no reference to any Appellant in this case, although Appellant Wells Fargo Clearing Services, LLC 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 registration statement, Appellants sought to compel arbitration of Mr. Berry's claims before the Financial Industry Regulatory Authority, Inc.

[1] A Form U4 is a Uniform Application for Securities Industry Registration or Transfer. The forms advanced by Appellants to the trial court as being supportive of their motion were forms dated and then in use in 1994 and 1995, respectively. Only one of the U4s advanced by Appellants, the one dated November 5, 1994, designated potential arbitration fora, including the National Association of Securities Dealers ("NASD"), an entity no longer in existence.

("FINRA"), a forum that was not referenced in any of the Form U4s advanced by Appellants before the trial court; indeed, FINRA did not even exist in 1994. **(R. pp. 96-107)**

Because none of the 1994 Form U4s proposed arbitrating claims before a forum that either exists or offers arbitration services today, Appellants 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 such a substitution was appropriate. Order at 8 ("[Appellants] 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."). **(R. p. 10)**

A hearing on Appellants' 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. **(R. pp. 322-52)** Appellants provided the Court with a memorandum opposing same ("Opposition"). **(R. pp. 132-208)** By Form-4 Order of same date, the trial court took the matter under advisement. **(R. pp. 1-2)** On June 21, 2017, the trial court entered an order denying Appellants' Motion and Amended Motion to Compel ("Order"). **(R. pp. 3-19)**

For a number of reasons detailed in the Order, the trial court determined that Appellants 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 Appellants. Order at 5. **(R. p. 7)** The trial court first held that Appellants 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. **(R. p. 6)** The trial court further held that,

even if the registration statements were properly before the court, Appellants 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. **(R. pp. 7-9)** As an additional or alternative basis for its holding, the trial also held that the single registration statement advanced by Appellants 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. **(R. pp. 9-17)** Finally, the trial court held that Appellants' conclusory references to a single FINRA rule were insufficient to compel arbitration of Mr. Berry's claims, because Appellants "have not met their threshold burden of demonstrating the applicability of any FINRA rule to Mr. Berry." Order at 8 n.7. **(R. p. 10)**

Thereafter, Appellants filed a Motion for Reconsideration of the Order on July 6, 2017. **(R. pp. 209-86)**. In the Motion for Reconsideration, Appellants advanced new documents and arguments in support of their argument to arbitrate, which Mr. Berry opposed by Response dated July 17, 2017. **(R. pp. 287-99)** By additional order dated July 25, 2017, the trial court denied Appellants' Motion for Reconsideration ("Reconsideration Order"). **(R. pp. 20-21)** Appellants filed a notice of appeal to this Court on August 10, 2017.

STATEMENT OF THE FACTS[2]

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

[2] A more fulsome explanation of the facts supporting Mr. Berry's causes of action against Appellants appears in the Amended Complaint. Am. Compl. **(R. pp. 50-93)** Mr. Berry provides the Court with the following recitation, but relies upon the complete set of facts set forth in the Amended Complaint.

reputation, his good name, and his ability to effectively compete against the Appellants in the future. **(R. pp. 50-54)** During Mr. Berry's employment, Appellants implemented a now well-publicized and fraudulent scam to illegally increase the earnings and stock price of their corporate parent, Appellant 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.* Those employees who refused to participate in Appellants' unlawful scheme were marked internally for immediate termination or targeted with pressure that would lead to resignations under duress. **(R. p. 53)**

Mr. Berry adhered to principle, rejecting Appellants' 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, rather than the bottom line of his employers. **(R. p. 53)** 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. **(R. pp. 57-69)** Mr. Berry also questioned unilateral changes made by Appellants to his profit formula employment agreement, which had been in effect since the early 2000s, beginning with Wells Fargo Advisors' predecessor, Wachovia Securities. **(R. pp. 61-62)** These changes involved the gradual, but systematic increase to costs charged to Mr. Berry by Wells Fargo Advisors 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, Wells Fargo Clearing Services, LLC and Spang failed to support Mr. Berry's efforts to properly serve his clients. **(R. p. 62)** Wells Fargo

Clearing Services, LLC and Spang's efforts intensified over time and culminated in a February 3, 2014 meeting orchestrated and engineered by Wells Fargo Clearing Services, LLC and Spang, during which Spang humiliated and berated Mr. Berry, constructively firing him by threatening that he must either resign or be immediately fired. **(R. pp. 64-66)**

Following Mr. Berry's forced resignation, Wells Fargo Clearing Services, LLC and Spang defamed Mr. Berry's professional reputation and good name by filing a false and defamatory statement about his departure with regulatory authorities, accusing him of unethical, unprofessional, and dishonest acts. **(R. pp. 68-69)** Wells Fargo Clearing Services, LLC and Spang knew that the false statement would damage Mr. Berry in his subsequent professional endeavors, but took the action specifically to promote Wells Fargo Clearing Services, LLC and Spang's own interests in poaching Mr. Berry's client base, in punishing Mr. Berry for not willingly and aggressively participating in Wells Fargo Corporation and Wells Fargo Bank, N.A.'s illegal cross-selling scheme, and in terminating a longstanding payout arrangement that Wells Fargo Clearing Services, LLC and Spang viewed as too lucrative for Mr. Berry. **(R. pp. 66-68)** As a result of Appellants' 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 Appellants and their immediate predecessors in interest. **(R. pp. 68-69)**

SUMMARY OF ARGUMENT

As the proponent of arbitration, each Appellant had the absolute burden to establish the existence of an agreement to arbitrate the claims advanced by Mr. Berry against him or it. The trial court correctly found that no Appellant had met that burden based on a number of failures of proof and evidence. What is most striking about this appeal, however, is that Appellants have all but abandoned the evidence which they unsuccessfully argued to the trial court were the sole source of

Mr. Berry's obligation to arbitrate his claims (the Form U4s), ignoring the express holdings of the trial court[3] regarding the measure and admissibility of proof advanced below, in favor of what amounts to an entirely new case on appeal. In their brief, Appellants simply skip the fundamental step of an appellant demonstrating error of the lower court, in favor of arguing the merits of matters which were expressly excluded on evidentiary grounds or offering other, entirely new (and unpreserved) grounds for compelling arbitration.

A proponent of arbitration should not be permitted to advance new grounds for compelling arbitration in each successive filing with the trial and appellate court, having been unsuccessful on the grounds previously advanced, although that is precisely what Appellants did below in their Motion to Compel and Motion for Reconsideration, and what Appellants seek to do yet again in their Brief. However, even the new grounds advanced in subsequent filings and for the first time on appeal fail to demonstrate through admissible evidence the existence of an arbitration agreement requiring Mr. Berry to arbitrate this dispute with any of the Appellants before Wells Fargo Clearing Service and Spang's substitute and preferred industry arbitral forum. Consequently, this Court should reject these unpreserved new grounds and affirm the decision of the trial court.

STANDARD OF REVIEW

In their brief, Appellants assert that the proper standard of review of the trial court's denial of its Motion to Compel is *de novo* by this Court. While this assertion would be correct under the circumstances in which all of the grounds and documents relied upon by the proponent of arbitration were properly admitted as evidence by the trial court, the *de novo* standard for evaluating a motion to compel does not supersede the more fundamental standard this Court employs to evaluate the

[3] As set forth below, Appellants fail to appeal from two of the trial court's independent grounds for denying the Motion to Compel, thus precluding this Court's review of the Order under the two-issue rule and the law of the case doctrine.

decision of a trial court to admit or exclude evidence. Instead, "[t]he admission of evidence is within the discretion of the trial court and will not be reversed absent an abuse of discretion." *State v. Pagan*, 369 S.C. 201, 208, 631 S.E.2d 262, 265 (2006). "An abuse of discretion occurs when the conclusions of the trial court either lack evidentiary support or are controlled by an error of law." *Id.* Thus, the trial court's determination regarding the authentication and admissibility of the U4 registration statements, as well as its finding that Appellants presented no evidence evincing their ability to enforce the U4s, is reviewed based on an abuse of discretion standard. For the remaining questions, "[d]eterminations of arbitrability are subject to de novo review, but if any evidence reasonably supports the circuit court's factual findings, this court will not overrule those findings." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 286, 733 S.E.2d 597, 599 (Ct. App. 2012).

ARGUMENT

I. The citations to and arguments applying FINRA rules to Mr. Berry are not preserved for this Court's review.[4]

The South Carolina Appellate Court Rules are clear that the briefs of the parties are limited to references to and arguments about matters which may be properly included in the Record on Appeal. *See* Rule 208(b)(4), SCACR. Correspondingly, the Record on Appeal is limited to matters that were presented to the lower tribunal. *See* Rule 210(c), SCACR ("The Record ***shall not***, however, include matter which was not presented to the lower court or tribunal.") (emphasis added).

[4] Following receipt of Appellants' Initial Brief, Mr. Berry filed on December 28, 2017 a motion to strike certain arguments and citations from the Initial Brief. That motion was denied by the Court on January 31, 2018. However, because the denial of a motion to strike, similar to denials of motions for dismissal or summary judgment, do not finally decide any issue, *e.g.*, *McFaddin v. Lohr*, 260 S.C. 242, 195 S.E.2d 385 (1973) (holding that "the refusal of [] a motion to strike is not conclusive and binding ....") and *Huntley v. Young*, 319 S.C. 559, 462 S.E.2d 860 (1995) (denial of a motion to dismiss does not establish the law of the case or finally decide any issue), Mr. Berry is not precluded from advancing these preservation issues in the Respondents Brief. In fact, in opposing the motion to strike, Appellants suggested as much. *See* Apps' Ret. to Mot. to Strike at 3 ("To the extent Berry believes any portion of these arguments is unpreserved, he is welcome to address those matters in his initial brief and the Court can then make its determination ....").

Moreover, Rule 210(h), SCACR limits this Court's appellate consideration to those matters which are included in the Record. In giving full effect to the combination of these three rules, appellate courts of this state have universally held that parties are limited to presenting, and the Court is limited to reviewing, those issues and arguments which were presented to the lower tribunal and, by consequence, the record on appeal is expressly limited to same. As explained in *South Carolina Highway Department v. Meredith*:

> This Court will not consider any fact which does not appear in the transcript of record nor will any fact stated in an exception be considered unless it appears from the record that it is true. Likewise, counsel is prohibited from **embodying in their briefs any fact which does not appear in the record**.

241 S.C. 306, 311, 128 S.E.2d 179, 182 (1962) (emphasis added) (internal citations omitted); *see also Reed v. Beck*, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999) (refusing to consider documents which were not presented to the trial court); *State v. White*, 372 S.C. 364, 387, 642 S.E.2d 607, 619 (Ct. App. 2007) ("Morris' statement was not presented to the lower court and cannot be properly included in the Record on Appeal."), aff'd, 382 S.C. 265, 676 S.E.2d 684 (2009).

In contravention of the aforementioned authority, Appellants disregard the express holding of the trial court that they failed to meet their burden of advancing any evidence which proves the applicability to Mr. Berry of the very standards and rules on which Appellants now principally rely in their Initial Brief. Rather than meet their appellate burden of convincing this Court that the trial court erred in refusing to consider Appellants' assertions which were unsupported by evidence, Appellants simply skip this step in favor of arguing the merits of matters expressly excluded below, in addition to offering other new grounds for compelling arbitration. However, "[i]t is axiomatic that an issue cannot be raised for the first time on appeal, but must have been raised to and ruled upon by the trial judge to be preserved for appellate review. *Stevens & Wilkinson of S.C.,*

Inc. v. City of Columbia, 409 S.C. 563, 567, 762 S.E.2d 693, 695 (2014) (citation omitted). Moreover, "[a] party may not argue one ground at trial and an alternate ground on appeal." *McLeod v. Starnes*, 396 S.C. 647, 657, 723 S.E.2d 198, 204 (2012). The arguments and citations detailed below were not presented to the trial court and are therefore unpreserved for this Court's review.

a. Appellants' citation to FINRA rules below was limited to a single citation and the trial court expressly held that Appellants did not meet their burden of proving FINRA's applicability to Mr. Berry, much less the existence of any agreement to arbitrate Mr. Berry's claims against Appellants before FINRA.

A review of the Motion to Compel reveals that Appellants relied principally on the arbitration provision appearing in a single U4 registration statement dated November 5, 1994, which Appellants contended was the source of Mr. Berry's obligation to arbitrate his claims against all Appellants.[5] **(R. pp. 99-104)** In the alternative, Appellants cited FINRA Rule 13200 for the proposition that Mr. Berry's claims must be arbitrated. *Id.* Appellants cited no additional authority or documents, including no other FINRA rules or standards. *Id.* Importantly, Appellants simply cited FINRA Rule 13200 as quasi-legal authority for its proposition, **(R. p. 97)**, 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 failure to meet their burden of proof as to the applicability of any FINRA rule to Mr. Berry, as the trial court notes in its order, Appellants alternatively requested the trial court to take judicial notice of similarities between NASD and FINRA, but that request was correctly rejected. *See* Order at 8, n.7 **(R. p. 10)** ("During the hearing, Defendants asked the Court to take judicial notice of FINRA Rule 13200. Setting aside the issue of whether this Court

[5] As discussed below, however, the only defendants which could arguably seek to arbitrate Mr. Berry's claims before a FINRA arbitration panel are Appellants Wells Fargo Clearing Services, LLC (f/k/a Wells Fargo Advisors, LLC), which is a member of FINRA and Appellant Spang, who is an associated person registered with FINRA. Appellants 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 and force an arbitration of Mr. Berry's claims.

may even take judicial notice of such rules, the Court finds that Defendants have not met their threshold burden of demonstrating the applicability of any FINRA rule to Mr. Berry."). 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: "South Carolina courts put arbitration proponents to their proof and do not allow them to rely on mere assumptions as a basis for compelling arbitration. Appellants are required to prove the existence of an agreement by Mr. Berry to arbitrate claims against them not just before any [self-regulatory organization], but before the [self-regulatory organization] forum in which they seek to compel arbitration." Order at 14 **(R. p. 16)** (citing *Keller v. ING Financial Partners, Inc.*, Op. No. 2011-CP-23-0336 (S.C. Cir. Ct. filed June 2, 2011), *affirmed* 2013 WL 8482243, Op. No. 2013-UP-014 (S.C. Ct. App. filed Jan. 9, 2013) and Op. No. 2015-MO-006 (S.C. filed Feb. 11, 2015)).

The trial court's holdings form the basis of the instant preservation argument. Based on the exclusion on evidentiary grounds of Appellants' assertion regarding FINRA Rule 13200, Appellants' requirement in this appeal is 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, Appellants simply ignore the court's holding and cite FINRA rules and documents with impunity throughout their Initial Brief. These citations and arguments are not preserved for this Court's review, as they were not presented to the trial court and are raised by Appellants for the first time on appeal. Indeed, Appellants cite to and rely upon FINRA rules as though they are binding legal authority in this state. They are not, however, as discussed below.

Accordingly, the following citations and the arguments derived therefrom are not preserved in this appeal:.

Apps' Br. at 6	FINRA, Registration and Qualification, Individual Registration; http://www.finra.org/industry/individualregistration
Apps' Br. at 6	Uniform Application for Securities Industry Registration or Transfer, Revised Form U4 (05/2009); https://www.finra.org/sites/default/files/form-u4.pdf
Apps' Br. at 6, 19	FINRA Manual, FINRA Rules, 1031, Registration Requirements; http://finra.complinet.com/en/display/display.html?rbid=2403&element_id=3584
Apps' Br. at 11	NASD Rule IM-10100
Apps' Br. at 11	NASD Rule 2110
Apps' Br. at 14	FINRA Manual, FINRA Manual contents; http://finra.complinet.com/en/display/display_main.html ?rbid=2403&element_id= 1
Apps' Br. at 14	S.E.C. Release No. 34-56615; https://www.sec.gov/rules/sro/finra/2007/34-56615.pdf[6]
Apps' Br. at 14	S.E.C. Release No. 34-570033; https://www.sec.gov/rules/sro/finra/2007/34-57033.pdf
Apps' Br. at 16	FINRA, *Our Mission*; https://www.finra.org/about/our-mission
Apps' Br. at 16	FINRA, *What We Do*; https://www.finra.org/about/what-we-do
Apps' Br. at 17, 23	BrokerCheck; https://brokercheck.finra.org/
Apps' Br. at 17	FINRA, *About BrokerCheck*; http://www.finra.org/investors/about-brokercheck
Apps' Br. at 19	FINRA Bylaws, Art. 4, § 1(a)(1); http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4609
Apps' Br. at 20	FINRA Manual, FINRA Rules, 13100; http://finra.complinet.com/en/display/display_main.html ?rbid=2403&element_id=4196
Apps' Br. at 20-21	FINRA, Code of Arbitration Procedure; https://www.finra.org/arbitration-and-mediation/code-arbitration-procedure

[6] Appellants' citation to two SEC releases for the first time on appeal was done to circumvent their failure of proof below and the express ruling of the trial court that Appellants provided no evidence of the applicability of any FINRA Rule to Mr. Berry and his claims. *See* Order at 7-15. **(R. pp. 9-17)**

Apps' Br. at 21	FINRA Manual, FINRA Rules, 12200; http://finra.complinet.com/en/display/display_main.html ?rbid=2403&element_id=4106
Apps' Br. at 23	FINRA BrokerCheck, Robert Franklin Berry; https://brokercheck.finra.org/individual/summary/1262947
Apps' Br. at 23-24	S.E.C. Release No. 34-56208

b. Judicial notice of the FINRA rules and other online documents for the first time on appeal is inappropriate.

Ordinarily, under Rule 210(h), SCACR, an appellate court will not consider any fact which does not appear in the Record on Appeal. Notwithstanding that general rule, appellate courts have employed the concept of appellate judicial notice in a discrete number of cases in the past where matters are indisputable. However, this Court has cautioned against the liberal use of judicial notice, particularly for matters that are subject to proof and in dispute. In *Masters v. Rodgers Development Group*, the Court explained the rationale behind a limited use of appellate judicial notice:

> Appellate courts are generally reluctant to notice adjudicative facts even when those facts may be absolutely reliable. Notice of "facts" for the first time on appeal may deny the adverse party the opportunity to contest the matters noticed; it may also violate the general principle that appellate review should be limited to the record. Finally, appellate courts, limited to the "cold" record, cannot be as sensitive to the appropriateness of judicial notice as the trial judge. For the foregoing reasons we hold that original judicial notice of adjudicative facts at the appellate level should be limited to matters which are indisputable.

283 S.C. 251, 256, 321 S.E.2d 194, 197 (Ct. App. 1984).

Here, 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 Appellants 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 rules and documents expressly excluded below, it would effectively

permit Appellants to try a new case on appeal, and in effect secure an impermissible second bite at the apple.[7] *C.f.* Order at 5, n.2 (discussing Appellants ability to amend their filings to submit supplemental or additional documentation in support of their motion to compel arbitration, as "permitting them to do so at this time would provide [Appellants] a second bite at the apple.").

Appellants assert that "[Mr.] Berry was aware the Wells Fargo Entities had asked the trial court to take notice of these public record documents and did not question the accuracy of any of the rules, forms, or reports submitted to the trial court." Apps' Br. at 18. This assertion is incorrect, however, and misrepresents the arguments and documents that Appellants actually submitted to the trial court. Appellants cited only FINRA Rule 13200 in its Motion to Compel and Mr. Berry does not dispute that fact; however, Appellants did not ask the trial court to take judicial notice of any other documents or rules in the Motion to Compel, FINRA rules or otherwise. Motion to Compel **(R. pp. 96-107)** Further, in the hearing on the Motion to Compel, Appellants only asked the trial court to take judicial notice of the fact that "in the mid 2000's the NASD turned over its responsibilities for the regulation of the financial services industry and broker dealers and brokers to a newly created entity called FINRA." June 1, 2017 Tr. at 20:9-12 **(R. p. 341)** Appellants did not request the trial court to take judicial notice of any FINRA "rules, forms, or reports" and none were submitted for consideration. Accordingly, Appellants' judicial notice argument(s) regarding the documents and links set forth in the table above is made for the first time on appeal and is unpreserved for this Court's review.[8] *See Stevens, supra.*

---

[7] In truth, allowing Appellants *carte blanche* to amend their basis for compelling arbitration would be a third bite at the apple, as Appellants already filed an Amended Motion to Compel prior to the hearing below, *see* Order at 5, n.2 **(R. p. 7)**, not to mention the additional and new documents submitted by Appellants in support of their Motion for Reconsideration, which are improper for consideration on appeal as discussed herein.

[8] In their Return to the Motion to Strike, Appellants argued that judicial notice is appropriate based on the assertion that foreign jurisdictions have done so in the past. However, judicial notice

c. The application of FINRA rules to Mr. Berry requires evidentiary proof, which was not presented to the trial court; therefore, Appellants' attempt to convert those matters into legal arguments and citations is improper and designed to avoid the trial court's exclusion of the FINRA rules based on Appellants' failure to meet their evidentiary burden.

In order to avoid the traditional "raised to and ruled upon" requirement placed on arguments and documents which an appellant seeks to raise on appeal, Appellants instead seek to convert matters and arguments which are subject to a foundational demonstration of evidentiary proof into legal citations which they may freely cite as binding authority. The trial court did not consider any argument advanced by Appellants based on the applicability of FINRA or the FINRA rules to Mr. Berry, including FINRA Rule 13200. Instead, the trial court correctly held that Appellants had failed to meet their burden in demonstrating the applicability of FINRA rules to Mr. Berry. *See* Order at 8, n.7 **(R. p. 10)** ("Setting aside the issue of whether this Court may even take judicial notice of such rules, the Court finds that Defendants have not met their threshold burden of demonstrating the applicability of any FINRA rule to Mr. Berry.").

In their brief, as well as in their Return to the Motion to Strike, Appellants ignore the trial court's exclusion of the FINRA rules on evidentiary grounds and abandon any pretense of arguing that the exclusion was an error requiring reversal. Instead, Appellants 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. *See* Ret. to Mot. to Strike at 2 ("There

---

is a matter left to each court's discretion, *e.g.*, *Martin v. Bay*, 400 S.C. 140, 153, 732 S.E.2d 667, 676 (Ct. App. 2012); therefore, what a foreign jurisdiction may have decided based on the evidence before it, is irrelevant here. Moreover, even if foreign jurisdictions have taken judicial notice of FINRA's rules or documents on FINRA's website in other cases, and even if the judicial notice standards of this Court were met, which Mr. Berry disputes, consideration of those items would not accomplish the objective claimed by Appellants, as the foundational demonstration of the FINRA rules' applicability to Mr. Berry is wholly lacking on this record. *See* Order at 8, n.7 **(R. p. 10)**; *see also McCall v. Finley*, 294 S.C. 1, 4, 362 S.E.2d 26, 28 (Ct. App. 1987) ("[W]hatever doesn't make any difference, doesn't matter.").

is no precedent suggesting a party is limited to the same statutory, legal, regulatory or rule citations presented to the trial court."); *id.* at 3-4 ("But a motion to strike what are, at bottom, legal arguments supported by SEC and FINRA rules is inappropriate and should be summarily rejected."). This argument is itself at odds with Appellants' argument to the trial court and to this Court on appeal 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 Appellants admit that no South Carolina court has accepted FINRA's rules, citations, and myriad releases or compilations.[9] *See* Initial Brief at 17.

This distinction is important because, if Appellants are unburdened by their obligation to prove the applicability of these rules and citations to Mr. Berry, they will be free to argue, as they do in the Initial Brief, that these FINRA rules and citations are legally binding on this Court and against Mr. Berry — which they are not. Appellants' argument presumes the very fact on which the trial court found that they failed to meet their evidentiary burden of proof: Appellants 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. Arguing the merits of an issue that was not considered below — and was expressly excluded by the trial court on evidentiary grounds — is improper, and Appellants citations and derivative arguments should be disregarded as unpreserved.

II. The attachments and supporting arguments advanced by Appellants for relief from the Order under Rule 59(e) and 60, SCRCP, are not preserved for this Court's review, as they were presented for the first time by Appellants in their Motion for Reconsideration.

In seeking reconsideration of the Order, Appellants presented entirely new documents and

[9] In fact, no published South Carolina opinion has ever recognized FINRA or its rules, while the only unpublished South Carolina opinion (*Keller v. ING Financial Partners, Inc.*, Op. No. 2013-UP-014 (S.C. Ct. App. filed Jan. 9, 2013)) — an opinion of this Court — reached the same result advanced by Mr. Berry on the precise question presented in this appeal.

arguments in support of the Motion to Compel arbitration of Mr. Berry's claims. Mot. for Recons. **(R. pp. 209-86)** Under the guise of "newly discovered evidence" and Rule 60(b), Appellants 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.[10] But such an effort does not seek reconsideration of a point overlooked or misapprehended by the trial court; rather, it seeks a second opportunity to establish facts that were Appellants' absolute burden to prove in the first instance as the party seeking to compel arbitration. The trial court therefore properly declined to consider the new documents and arguments advanced by Appellants in reconsideration and denied Appellants' motion.

"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. 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.")). Instead,

[10] Just like in the Motion to Compel, however, in the Motion for Reconsideration, Appellants 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. **(R. pp. 209-86)**

a Rule 59(e) motion is appropriate only in "two basic situations," when (1) a party "believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and [2] ... when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

Appellants' Motion for Reconsideration did not present a legally cognizable basis for reconsideration of the 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 [Appellants] 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." 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.")). **(R. p. 7)** 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)).

Moreover, contrary to Appellants' assertion that the additional U4 registration statements and new citations were "newly discovered evidence" under Rule 60(b), SCRCP, the documents instead demonstrated that they were in Appellants' possession at the time of the Motion to Compel and were only "located" when Appellants were unsuccessful in compelling arbitration based on their original submissions. Under Rule 60(b), a judgment or order may be set aside for newly discovered evidence, but "only if the newly discovered evidence could not have been discovered

by due diligence prior to trial." *Lanier v. Lanier*, 364 S.C. 211, 217-20, 612 S.E.2d 456, 459-460 (Ct. App. 2005) (holding that in order "[t]o obtain a new trial based on newly discovered evidence, the movant must establish that the newly discovered evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching.") (citing James F. Flanagan, *South Carolina Civil Procedure* 484 (2nd ed.1996)). This Court in *Lanier* further defined due diligence as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. Diligence looks not to what the litigant actually discovered, but what he or she *could* have discovered." *Id.* at 220, 612 S.E.2d at 460 (emphasis in original) (quoting *Black's Law Dictionary* at 468 (7th ed.1999); 12 *Moore's Federal Practice* § 60.42[5] (Matthew Bender 3rd ed.)).

The trial court corrected determined that none of the documents submitted by Appellants in the Motion for Reconsideration qualified under any reasonable definition of newly discovered evidence. Nor did Appellants' efforts satisfy this Court's standard of due diligence as enunciated in *Lanier*. In the Motion for Reconsideration, Appellants 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, Appellants 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. **(R. p. 237)** 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 Appellants 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 Appellants' representative and thus to the Appellants 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 Appellants.

Consequently, new submissions of Appellants in their Motion for Reconsideration were available to Appellants at all times and could have been submitted to the Court with the Motion to Compel, had Appellants believed that such documents supported their arguments in favor of arbitration. In reality, however, having failed to meet their burden with their original submissions to the trial court, Appellants attempted to go back to the well to choose different documents from among those that had always been readily available, hoping to change the result. However, "[w]here a litigant could have discovered the new evidence prior to trial, he or she is not entitled to relief under Rule 60(b)(2)." *Lanier*, 364 S.C. at 220, 612 S.E.2d at 461 (citing *Lans v. Gateway 2000, Inc.*, 110 F.Supp.2d 1, 6 (D.D.C. 2000) ("[W]hatever actions [the appellant] took to locate the [evidence] are undermined by the plain fact that [he] knew that the [evidence] existed, regardless of whether he could actually get his hands on it. The Court is unsympathetic to arguments that [he] could not remember where [it] was.")). Accordingly, the trial court was correct and did not abuse its discretion in rejecting the additional documents and arguments submitted by Appellants in support of their Motion for Reconsideration. *See Raby Constr., L.L.P. v. Orr*, 358 S.C. 10, 17-18, 594 S.E.2d 478, 482 (2004) (holding that the decision to grant or deny a motion under Rule 60 lies within the sound discretion of the trial judge).

III. Even if the new citations, documents, and arguments presented by Appellants for the first time in the Motion for Reconsideration and in this appeal were properly before the Court, which they are not, those additional arguments still fall short of Appellants' burden of demonstrating the existence of an agreement between Mr. Berry and these Appellants to arbitrate his claims.

Even if this Court were to consider the rules, citations, and other documents that Appellants presented for the first time in the Motion for Reconsideration and on appeal in support of their argument that Mr. Berry should be compelled to arbitrate his claims, Appellants have still failed to prove the one thing South Carolina law requires of each party seeking to compel arbitration: a clear and unmistakable agreement by Mr. Berry to arbitrate claims against any of the Appellants.

As the parties seeking to compel arbitration of Mr. Berry's claims, each Appellant had the burden to demonstrate the existence of a valid agreement between that Appellant and Mr. Berry to arbitrate the asserted claims. South Carolina law requires that this burden be met when a motion to compel arbitration is filed. *See, e.g., 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)). "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."

Chassereau, 363 S.C. at 632, 611 S.E.2d at 307 (quoting *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596–97, 553 S.E.2d 110, 118 (2001)).

Through the citations, documents and arguments advanced in their respective filings to the trial court in the Motion to Compel, Motion for Reconsideration, and now for the first time on appeal to this Court, none of the Appellants have produced a single agreement between Mr. Berry and an Appellant to arbitrate these claims in a FINRA forum. Instead, Appellants attempt to create such an arbitration agreement through a complex exercise of dot connections and suppositions that nevertheless still fail to provide a clear and unambiguous agreement by Mr. Berry to arbitrate his claims against the individual Appellants. To recap, two crucial facts remain that doom Appellants' efforts to compel arbitration to failure: (1) Appellants have not produced a signed agreement to arbitrate claims between any of the Appellants (or its affiliates and employees) and Mr. Berry; and (2) Appellants have not produced a signed agreement to arbitrate claims before a FINRA arbitration panel.

In support of the Motion for Reconsideration, Appellants selectively chose language from both a 1999 U4 and a 2014 U4, Mot. for Recons. Exs. 2-A and 2-B **(R. pp. 240-64)**, to define a circuitous path and reasoning upon which they attempt to cobble together an argument to suggest an agreement to arbitrate actually exists. However, these facts are indisputable: the 1999 U4 (Ex. 2-A) does not list FINRA as a designated arbitral forum (as this entity did not exist in 1999) and none of the designated fora offer arbitration services today, while the 2014 U4 (Ex. 2-B) lacks both an arbitration clause and a signature from Mr. Berry. The law does not permit a party seeking to compel arbitration to pick and choose beneficial clauses from an assortment of historical documents to cobble together and create a new agreement to arbitrate.

Appellants' Motion for Reconsideration presented two primary arguments based on the "newly discovered" 1999 and 2014 U4s. Appellants first contended that the SRO organizations that are listed in the 1999 U4 may be amended from time to time. *See* Mot. for Recons. at 3-4. **(R. pp. 211-12)** However, Appellants misconstrued the language of the 1999 U4, as the 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. Appellants' made a strained effort below to convince the trial court that this clause supports an argument that the referenced language permits the amendment, without notice to Mr. Berry, of the list of agreed-upon arbitration fora. But such an argument is contrary to the established law of this State and other jurisdictions, as 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.[11]

Appellants also contended in the Motion for Reconsideration that the 1999 U4 permits the unilateral substitution of subsequent employers, such that all of the Appellants may enforce against

---

[11] *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); *Brown v. ITT Consumer Vin. Corp.*, 211 .F.3d 1217, 1220 (11th Cir. 2000) (asserting that where the selection of a particular forum constitutes an integral part of the agreement to arbitrate, the failure of the chosen forum precludes arbitration); *In re Salomon Inc.*, 68 F.3d 554, 561 (2d. Cir. 1995) (a failed forum selection term is as important a consideration as the agreement to arbitrate itself); *Smith Barney, Inc. v. Critical Health Sys.*, 212 F.3d 858, 862 (4th Cir. 2000); *Roney & Co. v. Goren*, 875 F.2d 1218, 1219 (6th Cir. 1989) (refusing to treat various arbitral fora interchangeably); and *Keller v. ING Financial Partners, Inc.*, Op. No. 2011-CP-23-0336 (S.C. Cir. Ct. filed June 2, 2011). Specifically, "if the choice of [an arbitral] forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern ... the failure of the chosen forum [will] preclude arbitration." *Grant*, 383 S.C. at 131, 678 S.E.2d at 438 (citing *Singleton v. Grade A Market, Inc.*, 607 F. Supp. 2d 333, 341 (D. Conn. 2009)). Appellants do not address any of this controlling case law in their brief.

Mr. Berry an agreement to arbitrate with a company that no longer exists and that, further, they may unilaterally substitute a forum that did not exist at the time of the purported agreement. Appellants do not make this substitution argument on appeal, however, and it is unpreserved for this Court's review. *See, e.g., State v. Stone*, 290 S.C. 380, 383, 290 S.E.2d 517, 518 (1986) (holding that an exception not argued in the brief is deemed abandoned on appeal). And having omitted it from the initial brief, Appellants cannot cure the omission in a reply. *See, e.g., Chet Adams Co. v. James F. Pedersen Co.*, 307 S.C. 33, 37, 413 S.E.2d 827, 829 (1992).[12]

Moreover, like the 1994 Wheat First U4, the 1999 U4 does not specify FINRA as the arbitral forum or otherwise refer to FINRA. Instead, the arbitration clause contained in the 1999 U4 designates "the organizations indicated in Item 11" of the form, which is found on the first page of each of the Form U4, and designates four (4) organizations, none of which are FINRA, including: the NASD, the NYSE, the Chicago Board Options Exchange, and the Philadelphia Stock Exchange. As the trial court has previously held, some of these organizations no longer exist, and none of them currently offer arbitration services.

Finally, Appellants' assertion that Mr. Berry is required to arbitrate his claims based on FINRA Rules is likewise deficient. The trial court correctly rejected this argument because

---

[12] Appellants' arguments on this point fail in any event for the same reason that the trial court held that the original U4 registration statements were not enforceable by Appellants. The 1999 U4, *see* Mot. for Recons. Ex. 2-A **(R. pp. 240-49)**, is not between Mr. Berry and Appellants. Instead, like the 1994 U4 which named Wheat First, the 1999 U4 names Everen Securities, Inc. ("Everen") as Mr. Berry's employer. The 1999 arbitration provision is limited to "any dispute, claim or controversy that may arise between ***me and my firm***," *see id.* (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 trial court found that Appellants' failure to provide evidence demonstrating the legal succession of companies was a failure of proof independently fatal to Appellants' attempt to rely upon the U4s that did not name Appellants specifically. Appellants attempt to overcome this additional evidentiary shortcoming on appeal by reliance on allegations contained in Mr. Berry's Amended Complaint. But such a suggestion is patently insufficient to overcome the trial court's contrary holding.

Appellants failed in meeting their threshold burden of demonstrating that they had standing to require the application of any FINRA rule to Mr. Berry. *See* Order at 8 n.7. **(R. p. 10)** Moreover and importantly, FINRA rules may only be advanced and relied upon by members or associated persons of FINRA. Here, upon information and belief, Appellant Wells Fargo Clearing Services, LLC (f/k/a Wells Fargo Advisors, LLC) is a member of FINRA and Appellant Spang is an associated person registered with FINRA. However, 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 and force an arbitration of Mr. Berry's claims against them individually.[13] Therefore, even if the Court were to disagree as to the sufficiency of the evidence presented by Appellants below, they have advanced no basis for arbitrating the claims against the non-FINRA-affiliated Appellants. Similarly, Appellants' assertion that their failures in proof can be cured by reference to information contained on the BrokerCheck website, on the theory that such information should be considered an unassailable public record, is likewise inaccurate and misleading. In fact, the Terms of Use of the BrokerCheck website links provided by Appellants very clearly states that:

> FINRA MAKES NO WARRANTIES OR REPRESENTATIONS ABOUT THE QUALITY, ACCURACY OR COMPLETENESS OF BROKERCHECK AND ASSUMES NO LIABILITY OR RESPONSIBILITY FOR ANY: (I) ERRORS OR OMMISSIONS IN ANY CONTENT; (II) TECHNICAL ERRORS AFFECTING BROKERCHECK IN ANY WAY; (III) BUGS, VIRUSES, TROJAN HORSES, OR THE LIKE WHICH MAY BE TRANSMITTED TO

[13] Wells Fargo Corporation and Wells Fargo Bank, N.A. sought dismissal below on under Rule 12(b)(6), SCRCP, on the basis that the Amended Complaint did not provide adequate notice of the allegations of wrongdoing against them. Mot. to Compel at 9-11 **(R. pp. 104-06)** The trial court summarily rejected that contention, Order at 15-17 **(R. pp. 17-19)**, finding the argument conclusory and without merit. Appellants did not appeal from those determination; therefore, this Court must presume that the allegations advanced against Wells Fargo Corporation and Wells Fargo Bank, N.A. are true and correct and asserted independent of any allegations against the other Appellants.

OR THROUGH BROKERCHECK BY ANY THIRD PARTY; AND/OR (IV) LOSS OR DAMAGE OF ANY KIND INCURRED AS A RESULT OF THE USE OF BROKERCHECK.

(Capitalization emphasis in original). Appellants' assertion that these website links are "matter[s] of public record," Apps' Br. at 15, is insufficient to authenticate the content of the information contained therein, as BrokerCheck summaries do not qualify as self-authenticating, and authentication as a public record is subject to documentary or testimonial evidence and illustration, which Appellants have not provided. *Cf.* Rules 901 and 902, SCRE. However, even if Appellants were permitted to cure their prior evidentiary shortcomings and make these arguments for the first time on appeal, which they are not, they still do not establish an agreement by Mr. Berry to arbitrate his claims against these Appellants.

IV. The two-issue rule precludes the Court's consideration of the merits of the Order, based on Appellants failure to seek this Court's review of the trial court's independent holdings against arbitration based on Appellants' lack of standing to enforce the arbitration agreement in the 1994 U4 between Mr. Berry and Wheat First, as well as the failure of the designated fora in the 1994 U4.

In denying the Motion to Compel, the trial court made three (3) independent holdings in support of its decision that Appellants had failed to meet their burden, as the proponent of arbitration, to prove the existence of Mr. Berry's duty to arbitrate his claims: (1) the Motion to Compel fails because Appellants did not properly authenticate the U4 registration statements; (2) Appellants lacked standing to enforce the arbitration clause in the 1994 U4 with Wheat First, because they were not parties to the U4; and (3) the arbitration clause in the 1994 U4 fails because none of the designated fora offer arbitration services today. Order at 3-15. **(R. pp. 5-17)** However, while Appellants appeal the initial holding of the trial court regarding authentication, they do not

appeal, *at all*, the trial court's independent holdings regarding lack of standing and failure of the arbitral fora.[14]

Consequently, even if this Court were to agree that Appellants properly authenticated the U4 registration statements submitted as the sole basis of their argument in favor of arbitration, Appellants' failure to appeal from the trial court's additional alternative holdings on Appellants' standing to enforce the U4 and the failure of the designated fora precludes this Court from reaching the merits of Order. *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."); *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 will affirm unless the appellant appeals all grounds because the unappealed ground will become the law of the case."); *see also* 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."). Significantly, the two-issue rule "is applicable under []circumstances on appeal [other than general jury verdicts], including affirmance of orders of trial courts ... if the plaintiff failed to appeal [all] grounds or if one of the grounds required affirmance." *Anderson v. S.C. Dep't of Highways & Pub. Transp.*, 322 S.C. 417, 420, 472 S.E.2d 253, 255 (1996).

[14] In their Statement of the Case, Appellants acknowledge the fact that the trial court made these independent adverse holdings to their Motion to Compel. *See* Apps' Br. at 3 ("The trial court also concluded that even if the affidavits had been properly authenticated, it would still not compel arbitration because the submitted agreements referenced predecessors to Wells Fargo Advisors (not Wells Fargo Advisors itself) and because the designated arbitral forum no longer existed."). Thus, Appellants have admitted that these holdings independently sustain the trial court's denial of their Motion to Compel. However, Appellants do not address these holdings in any other portion of the brief, much less argue that the trial court erred in so-holding.

Here, the denial of Motion to Compel was based alternatively upon the independent grounds and holdings of the trial court regarding Appellants' standing and the failure of the designated fora under the 1994 U4. Appellants' failure to appeal from those holdings means that those grounds independently support the Order and this Court is precluded from addressing Appellants' challenge to the Order.[15]

V. On the merits, the trial court was correct to find that the evidence presented below did not establish the existence of a valid agreement by Mr. Berry to arbitrate his claims against these Appellants.

a. The trial court correctly determined that the documents advanced and relied upon by Appellants to support their arbitration claim were not properly authenticated.

As the proponent of arbitration, each of the Appellants had the burden to establish the existence of an agreement to arbitrate Mr. Berry's claims against the individual Appellant. "General contract principles of state law apply to arbitration clauses governed by the F[ederal] A[rbitration] A[ct]." *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001); *see also Bradley*, 398 S.C. at 458, 730 S.E.2d at 317-18 (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). State law remains applicable if that law, whether legislative or judicial, arose to govern issues concerning the validity, revocability, and enforceability of all contracts generally. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364.

---

[15] Although not appealed, the trial court correctly ruled that (1) Appellants lacked standing to enforce the arbitration clause contained in the 1994 U4 between Mr. Berry and Wheat First, and (2) that the failure of the designated fora in the arbitration clauses renders the purported arbitration clause void. *See* Order at 5-15. **(R. pp. 7-17)** In the interest of brevity, Mr. Berry relies on his prior filings with the trial court, particularly his Opposition to the Motion to Compel, **(R. pp. 137-49)**, on those dispositive and alternately sustaining grounds. *See* 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.").

In the Motion to Compel, Appellants asserted that Mr. Berry's obligation to arbitrate his claims arose from a series of documents attached to their supporting memorandum of law as Exhibit 1, namely the 1994 U4 of Wheat First. However, the trial court determined that, prior to Appellants' reliance on the U4, the documents must be properly advanced and authenticated to the Court, *see* Order at 4 **(R. p. 6)**, consistent with South Carolina law regarding conditions precedent to the admissibility of evidence. Rule 901(a), SCRE; *see also State v. Rich*, 293 S.C. 172, 359 S.E.2d 281 (1987). Where the proponent fails to provide a proper foundation for employment related records, they are properly excluded from evidence, even if they might have probative value and would therefore otherwise be relevant and admissible. *Connelly v. Wometco Enterprises, Inc.*, 314 S.C. 188, 191, 442 S.E.2d 204, 206 (Ct. App. 1994). In *Connelly*, a wrongful termination case, the employee's personnel file was properly excluded from evidence, as the employer failed to offer the excluded records through a custodian or other properly qualified witness. *Id.* This exclusion was upheld on appeal. *Id.*

Rather than properly authenticate the U4 documents which they presented to the trial court and on which they relied in support of their Motion to Compel, Appellants simply attached the U4s as an exhibit to their supporting memorandum. However, business records of this type do not qualify as self-authenticating. *Cf.* Rule 902, SCRE. Moreover, although Appellants submitted an affidavit in support of their motion from a person who described herself as a paralegal employed in the "Wells Fargo Law Department,"[16] **(R. pp. 122)**, the affiant does not claim to be a custodian of records for any of the corporate Appellants,[17] nor was any assertion made that the U4s attached to

[16] It is unclear from the Affidavit which, if any, of the named Appellant is the affiant's employer.

[17] The affiant does state that she "has access to certain personnel records of current and former employees of Wells Fargo & Company and related corporate entities," Aff. at ¶6 **(R. p.**

the memorandum were true and correct copies of business records maintained by any specific Appellant. Like the inadequate sponsoring witness in *Connelly*, the trial court was correct to find the affiant's testimony was insufficient to meet the foundational requirements imposed by Rule 901(a), SCRE. Without such testimony regarding the authenticity of the U4s proffered by Appellants, the affiant's testimony was insufficient for the trial court to admit and consider the U4s, and their exclusion under the circumstances was not an abuse of discretion. Because the U4s constituted the only purported agreement to arbitrate submitted by Appellants in support of their Motion to Compel, the motion was unsupported by admissible evidence and rightly failed for that reason alone.

b. Courts of this state have previously concluded that proof is required from the proponents of arbitration as to the relationship between NASD and FINRA.

Additionally, whereas Appellants simply assumed that all securities arbitral fora may be treated as interchangeable in their Motion to Compel, and substituted the fora that actually appeared in the U4s with "FINRA" without so much as notifying the trial court of that material alteration, at least one case has been litigated, including to this Court, and has previously reached the result 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 presumed that FINRA is either a new name for NASD or NYSE or that it is the successor to those named entities.

Very similar facts were presented to the South Carolina courts in an earlier case — namely, an attempt to compel arbitration before FINRA based on an arbitration clause which identified NASD as the chosen arbitral forum. In *Keller v. ING Financial Partners, Inc.*, Op. No. 2011-CP-

---

123), but does not state that she is the record custodian or that she can vouch for the authenticity of the U4s.

23-0336 (S.C. Cir. Ct. filed June 2, 2011), **(R. pp. 190-97)**, the Honorable D. Garrison Hill denied a motion to compel arbitration on those facts, finding that:

> The "NASD," or the National Association 'of Securities Dealers, Inc., as then constituted, no longer exists, having combined regulatory functions with certain divisions of the New York Stock Exchange ("'NYSE") ...
>
> Consequently, just as in *Grant*[*v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 132, 678 S.E.2d 435, 439 (2009)] and [*In re*] *Salomon*, [68 F.3d 554, 561 (2d. Cir. 1995)], the parties in the present case are deprived of the arbitration forum that they specifically bargained for and agreed upon.
>
> Because the designated arbitrator is not available to resolve the present dispute, and because the arbitrator selection clause in the subject agreement constitutes a material and integral term of the agreement to arbitrate, this Court finds the arbitration agreement impossible to perform, and denies Defendants' Motion to Compel Arbitration· and Dismiss or Stay.

(R. pp. 191-96)

Judge Hill's ruling was affirmed on appeal in an unpublished opinion by this Court.[18] *Keller v. ING Financial Partners, Inc.*, 2013 WL 8482243, Op. No. 2013-UP-014 (S.C. Ct. App. filed Jan. 9, 2013). **(R. pp. 202-205)** This Court characterized the trial court ruling as follows:

> The circuit court found the arbitration agreement between the parties designated the National Association of Securities Dealers (NASD) as an exclusive arbitral forum, the NASD was unavailable to arbitrate because it no longer existed, and the court could not substitute the Financial Industry Regulatory Authority (FINRA) for NASD.

---

[18] 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 Supreme 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 Court's prior order in *Keller*. As similarly acknowledge by Appellants, Mr. Berry submits that this Court may take judicial notice of these facts and its files in the *Keller* case pursuant to the guidelines set forth in *Masters, supra.*

(R. pp. 203) This Court further noted that the courts "cannot rewrite the parties' agreement to substitute FINRA for NASD." *Id.* at 2.

The *Keller* arbitration proponents then petitioned for a writ of certiorari to the Supreme Court of South Carolina. 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 this Court 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. 207-08)**

The trial court's order in *Keller* demonstrates that South Carolina courts are careful to insure 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 Appellants cannot simply rely upon mere assumptions as a basis for compelling arbitration, a fact that should have been well-known to Appellants. Instead, Appellants are required to prove the existence of an agreement to arbitrate not just before any forum, but before the forum in which they seek to compel arbitration. Because Appellants failed to do so below, the trial court did not err in denying the Motion to Compel for this additional reason.

CONCLUSION[19]

Based on the foregoing, the Court should decline to consider and find unpreserved the web-linked documents, citations, rules, and arguments advanced by Appellants which were alternatively

[19] Appellants also address the additional ground raised by Mr. Berry that the arbitration provisions advanced by Appellants are unenforceable, because to enforce such clauses would compel Mr. Berry to arbitrate outrageous conduct by Appellants that was outside the scope of the arbitration provision. Opp. to Mot. to Compel at 16. **(R. pp. 147)** In a footnote at the end of the Order, the trial court stated that "[w]hile [it] agrees with the analysis and case law advanced by Mr. Berry on this topic, the Court need not address, in light of the rulings above ... where other grounds in opposition are likewise dispositive and provide the same relief." Order at 17 n.10 **(R. p. 19)** Given that there is no discussion or dispositive holding on the issue, a lengthy analysis of the issue is not warranted. To the extent required, Mr. Berry relies upon his Opposition to the Motion to

presented for the first time in Appellants' Motion for Reconsideration or in this appeal. Even if those unpreserved items were properly before the Court, however, none of them demonstrate that each of the Appellants have met their respective burdens of demonstrating the existence of a valid agreement by Mr. Berry to arbitrate his claims against each Appellant. Additionally, two of the three express grounds for the trial court's denial of the Motion to Compel were not challenged in the appeal; therefore, the Court is precluded from reaching merits of Order under the two-issue rule and the law of the case doctrine. Finally, the trial court did not abuse its discretion in finding that the documents actually relied upon by Appellants in their Motion to Compel arbitration were not properly authenticated. For all of these reasons the trial court's orders denying Appellants' Motion to Compel and Motion for Reconsideration thereof, should be affirmed.

Respectfully submitted,

Mitchell Willoughby, Esquire
Chad N. Johnston, Esquire
Elizabeth Zeck, Esquire
Willoughby & Hoefer, P.A.
Post Office Box 8416
Columbia, South Carolina 29202
Telephone Number: 803-252-3300
mwilloughby@willoughbyhoefer.com
ezeck@willoughbyhoefer.com
cjohnston@willoughbyhoefer.com

Attorneys for Robert F. Berry

This 8th day of May 2018
Columbia, South Carolina

Compel on this topic and expressly incorporates that discussion here, as if stated verbatim herein. *See* Rule 220(c), SCACR

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
MAY 08 2018
SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Appellate Case No. 2017-001690

Robert F. Berry, ... Respondent,

v.

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

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Final Brief of Respondent Robert F. Berry complies with Rule 211(b), SCACR.

[SIGNATURE PAGE FOLLOWS]

Mitchell Willoughby, Esquire
Chad N. Johnston, Esquire
Elizabeth Zeck, Esquire
Willoughby & Hoefer, P.A.
Post Office Box 8416
Columbia, South Carolina 29202
Telephone Number: 803-252-3300
mwilloughby@willoughbyhoefer.com
ezeck@willoughbyhoefer.com
cjohnston@willoughbyhoefer.com

Attorneys for Robert F. Berry

Columbia, South Carolina
This 8th day of May 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2017-CP-32-00397

RECEIVED
MAY 04 2018
SC Court of Appeals

Robert F. Berry.....Respondent

vs.

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

REPLY BRIEF

HAYNSWORTH SINKLER BOYD, P.A.

Sarah P. Spruill (SC Bar No. 68337)
ONE North Main St., Second Floor (29601)
P. O. Box 2048
Greenville, SC 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
6000 Fairview Road, Suite 1200
Charlotte, North Carolina 28210
Telephone: (404) 888-1021
Facsimile: (404) 724-1521
fsmith@seyfarth.com

ATTORNEYS FOR THE APPELLANTS

TABLE OF CONTENTS

TABLE OF CONTENTS i
TABLE OF AUTHORITIES ii
ARGUMENTS IN REPLY 1
I. THE WELLS FARGO ENTITIES PRESENTED THE TRIAL COURT WITH MULTIPLE FORMS U4 REQUIRING BERRY TO ARBITRATE HIS CLAIMS. 2
II. DOCUMENTS SUBMITTED IN SUPPORT OF THE WELLS FARGO ENTITIES' MOTION FOR RECONSIDERATION ARE PROPERLY BEFORE THIS COURT. 5
III. THE TRIAL COURT ERRED IN NOT TAKING JUDICIAL NOTICE OF, AND COMPELLING ARBITRATION PURSUANT TO, FINRA'S RULES 8
A. THE APPLICABILITY OF THE FINRA RULES TO BERRY WAS PRESERVED FOR REVIEW. 8
B. THE TRIAL COURT SHOULD HAVE—AND THIS COURT MAY—TAKE JUDICIAL NOTICE OF THE FINRA RULES, CODE, AND RELATED DOCUMENTS BECAUSE THE RULES ARE INDISPUTABLE. 11
C. THE AMENDED COMPLAINT ESTABLISHES THE APPLICABILITY OF FINRA RULES TO BERRY. 13
D. WELLS FARGO & COMPANY'S REGISTRATION STATUS IS NOT DISPOSITIVE OF THE ARBITRABILITY OF BERRY'S CLAIMS. 16
IV. THE WELLS FARGO ENTITIES HAVE APPEALED FROM ALL OF THE BASES OF THE TRIAL COURT'S RULING; THEREFORE, THE TWO-ISSUE RULE DOES NOT APPLY. 17
CONCLUSION 18

TABLE OF AUTHORITIES

CASES

Am. Chiropractic Ass'n, Inc. v. Trigon Healthcare, 367 F.3d 212 (4th Cir. 2004) 13
Am. Recovery Corp. v. Computerized Thermal Imaging, Inc., 9 F.3d 88 (4th Cir. 1996) 4, 18
Anderson v. S.C. Dep't of Highways & Pub. Transp., 322 S.C. 417, 472 S.E.2d 253 (1996) 17, 18
Brown v. Pacific Life Ins. Co., 462 F.3d 384 (5th Cir. 2006) 16
Carlson v S.C. State Plastering, LLC, 404 S.C. 250, 743 S.E.2d 868 (Ct. App. 2013) 16
City of Myrtle Beach v. Tourism Expenditure Review Committee, 407 S.C. 298, 755 S.E.2d 425, (2014) 6
Connelly v. Wometco Enters., Inc., 314 S.C. 188, 442 S.E. 2d 204 (Ct. App. 1994) 2, 3
Daufuskie Island Utility Co., Inc. v. South Carolina Office of Regulatory Staff, 420 S.C 305, , 803 S.E.2d 280 (2017) 6, 7
Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014) 2
Elam v. S.C. DOT, 361 S.C. 9, 602 S.E.2d 772 (2004) 5, 7
Gebhart v. S.E.C., 595 F.3d 1034 (9th Cir. 2010) 3
Hickman v. Hickman, 301 S.C. 455, 392 S.E.2d 481 (Ct. App. 1990) 6
In re H&R Block Fin. Advisors, Inc., 262 S.W.3d 896 (Tex. App. 2008) 3
Jones v. Anderson Cotton Mills, 205 S.C. 247, 31 S.E.2d 447 (1944) 12
Keller v. ING Fin. Partners, Inc., Op. No. 2011-CP-23-0336, 2011 WL 10005145 (S.C. Cir. Ct. May 26, 2011), aff'd App. Case. No. 2011-193026, 2013 WL 8482243 (S.C. Jan. 9, 2013). 3, 4
Kidder, Peabody & Co., Inc. v. Zinsmeyer Trusts P'ship, 41 F.3d 861 (2d Cir. 1994) 13
Landers v. F.D.I.C., 402 S.C. 100, 739 S.E.2d 209 (2013) 4, 18
Masters v. Rodgers Dev. Grp., 283 S.C. 251, 321 S.E. 2d 194 (Ct. App. 1984) 11, 12
Matter of Harry C., 280 S.C. 308, 313 S.E.2d 287 (1984) 11
McLeod v. Starnes, 396 S.C. 647, 723 S.E.2d 198 (2012) 9
Miller v. Miller, 299 S.C. 307, 314, 384 S.C. 715 (1989) 11
Mullins v. U.S. Bancorp Inv., Inc., Civil No. 1:15-CV-00126-GNS, 2016 WL 1420999 (W.D. Ky. Apr. 8, 2016) 8
Myrick v. GTE Main Street Inc., 73 F. Supp. 2d 94 (D. Mass. 1999) 16
O'Neil v. Hilton Head Hosp., 115 F.3d 272 (4th Cir. 1997) 2
Overcash v. South Carolina Elec. & Gas Co., 364 S.C. 569, 614 S.E.2d 619 (2005) 5, 14
Palmetto Homes, Inc. v. Bradley, 357 S.C. 485, 593 S.E.2d 480 (Ct. App. 2004) 12
Parker v. S.C. Public Service Commission, 288 S.C. 304, 342 S.E.2d 403 (1986) 6
Parrott v. Pasadena Capital Corp., No. 96 CIV. 6243 (JFK), 1998 WL 91076 (S.D.N.Y. Mar. 3, 1998) 17
Porter v. South Carolina Public Service Commission, 333 S.C. 12, 507 S.E. 2d 328 (1998) 7
Pye v. Estate of Fox, 369 S.C. 555, 633 S.E.2d 505 (2006) 5
Reed v. Becka, 333 S.C. 676, 511 S.E.2d 396 (Ct. App. 1999) 10
Royal Alliance Assoc., Inc. v. Liebhaber, 2 Cal. App. 5th 1092 (2d Dist. 2016) 12
South Carolina Highway Department v. Meredith, 241 S.C. 306, 128 S.E.2d 179 (1962) 10
State v. White, 372 S.C. 364, 642 S.E.2d 607 (Ct. App. 2007) 10
Stevens & Wilkinson of S.C., Inc. v. City of Columbia, 409 S.C. 563, 762 S.E.2d 693 (2014) 9
Suschil v. Ameriprise Fin. Servs., Inc., No. 1:07CV2655, 2008 WL 974045 (N.D. Ohio Apr. 7, 2008) 3
Towles v. United Healthcare Corp., 338 S.C. 29, 524 S.E.2d 839 (Ct. App. 1999) 2

United Steelworkers of Am. v. Warrior & Gulf Navigation Co., 363 U.S. 574, 80 S. Ct. 1347 (1960) 18
Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ., 489 U.S. 468 (1989) 2
Zabinski v. Bright Acres Assoc., 346 S.C. 580, 553 S.E.2d 110 (2001) 4

STATUTES

15 U.S.C. § 78o(a)(1) 14
15 U.S.C. § 78o-3(i)(1)(B) 13
15 U.S.C. § 78s(b) 12

OTHER AUTHORITIES

BrokerCheck, https://brokercheck.finra.org 13

RULES

Rules 208 and 210, SCACR 8
Rule 59(e), SCRCP 5
Rule 201(b), SCRE 8, 11
Rule 803(6), SCRE 4
Rule 901(a), SCRE 2, 4
FINRA Manual, Rule 1031(a) 14
FINRA Manual, Rule 1010(b)(2) 5
FINRA Manual, Rule 13200 ..... passim

ARGUMENTS IN REPLY

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

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

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

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

This appeal stems from the denial of a motion to compel arbitration, and the general policies favoring arbitration must guide this Court's decision here. "There is a strong presumption in favor of the validity of arbitration agreements because of the strong policy favoring arbitration." *Towles v. United Healthcare Corp.*, 338 S.C. 29, 37, 524 S.E.2d 839, 844 (Ct. App. 1999) (quoting *O'Neil v. Hilton Head Hosp.*, 115 F.3d 272, 273 (4th Cir. 1997)). So ingrained was the "judiciary's longstanding refusal to enforce agreements to arbitrate" that Congress had to "overrule" that refusal via the Federal Arbitration Act. *See Volt Info. Sci., Inc. v. Bd. of Tr. of Leland Stanford Junior Univ.*, 489 U.S. 468, 474 (1989) (quotation omitted). To that end, "the party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 379, 759 S.E.2d 727, 731 (2014) (citations omitted) (rejecting argument that arbitration agreement was unenforceable for unavailability of designated forum and compelling arbitration).

The trial court's refusal to consider on authentication grounds the submitted Forms U4 which established Berry's decades-long obligation to arbitrate his claims against his employer runs counter to strong public policy. *See Towles*, 338 S.C. at 37, 524 S.E.2d at 844. The trial court's refusal also served no evidentiary end because there is no question as to the actual authenticity of the Forms U4 submitted by the Wells Fargo Entities, and Berry admits he was registered with FINRA and continues to be registered with FINRA. *See* Rule 901(a), SCRE ("The requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence sufficient to support a finding that the matter in question is what its proponent claims."). (*See also, e.g.*, R. at 67 ¶ 59). Berry's analogy in section V of his brief citing *Connelly v. Wometco Enters., Inc.*, 314 S.C. 188, 191, 442 S.E. 2d 204, 206 (Ct. App.

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

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

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

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

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

[2] These Forms U4 were attached to the affidavit of a Wells Fargo Clearing Services, LLC employee who described, among other things, his familiarity with Forms U4, the process by which Forms U4 are prepared and submitted through FINRA's Web CRD licensing and registration system, the basis of the personal knowledge upon which employees of the registration department prepare Forms U4, and the dates upon which Berry's Forms U4 were submitted. (*See* R. at 236-64). *See* Rule 803(6), SCRE (hearsay exception for records of regularly conducted activity); Rule 901, SCRE (authentication met by evidence sufficient to support a finding that matter in question is what proponent claims).

[3] Berry argues the Wells Fargo Entities have not shown they have standing to enforce the arbitration agreement in Berry's 1994 Wheat First Form U4 in part because, Berry suggests, the Wells Fargo Entities have not proven one of them is the successor to Wheat First. (Respondent's Brief at § III & n.12). The Amended Complaint, however, alleges the merger history of Wheat First, describing the firm's merger with First Union Corporation, a subsequent merger with Wachovia Corporation, and Wachovia Corporation's acquisition by Wells Fargo & Company in 2008. (R. at 58-59 ¶¶ 28 n.3, 29, 31). Berry's response, that the Wells Fargo Entities' reliance

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

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

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

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

---

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

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

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

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

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

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

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

The trial court's refusal to consider the Wells Fargo Entities' Motion for Reconsideration is particularly troublesome here, where the Wells Fargo Entities were handed Berry's Opposition to the Motion to Dismiss moments before the hearing began (R. at 325:19-24), and the Order issued before the Wells Fargo Entities had an opportunity to submit supplemental documentation in support of the Motion to Dismiss.[7] (*See* R. at 210 n. 2). *See Elam*, 361 S.C. at 21, 602 S.E.2d at 778 ("In essence, we view the use of oral or written JNOV/new trial motions, followed by an initial Rule 59(e) motion, as part and parcel of a party's 'single bite at the apple' in presenting his case to the trial court."). Under these circumstances, the trial court abused its discretion in refusing to even consider the recently identified Forms U4 and further articulation of the arguments the Wells Fargo Entities made at hearing, moments after receiving Berry's opposition memorandum.

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

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

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

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

In its Order, the trial court "set aside the issue of whether [it] may even take judicial notice of such rule" because the Wells Fargo Entities "[had] not met their threshold burden of demonstrating the applicability of any FINRA rule to Berry." (R. at 10 n. 7). The trial court erred in both respects. The trial court should have taken notice of FINRA's rules, the Forms U4, and the BrokerCheck reports as facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201(b), SCRE. The allegations of Berry's own Amended Complaint further demonstrate that FINRA rules apply to Berry and provide a sufficient basis to require arbitration. *See Mullins v. U.S. Bancorp Inv., Inc.*, Civil No. 1:15-CV-00126-GNS, 2016 WL 1420999, at *4 (W.D. Ky. Apr. 8, 2016) (FINRA Rule 13200 provides "independent basis for arbitration").

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

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

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

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

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

---

[9] FINRA Rule 13200 provides, "Except as otherwise provided in the Code, a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among: • Members; • Members and Associated Persons; or • Associated Persons." (R. at 279).

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

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

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

---

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

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

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

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

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

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

South Carolina courts will take judicial notice of facts "capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned." Rule 201(b), SCRE; *see Matter of Harry C.*, 280 S.C. 308, 309-10, 313 S.E.2d 287, 288 (1984). Moreover, as Berry concedes, appellate courts have also employed judicial notice for matters that are "indisputable."[14] (*See* Respondent's Brief at § I.b (quoting *Masters v. Rodgers Dev. Grp.*, 283 S.C. 251, 256, 321 S.E. 2d 194, 197 (Ct. App. 1984)).

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

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

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

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

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

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

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

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

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

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

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

[17] Though Berry now disputes that FINRA's BrokerCheck is a public record (*see* Respondent's Brief at § III), the ready availability of Berry's BrokerCheck report is actually alleged in his Amended Complaint. (*See* R. at 75 ¶ 91 (alleging Berry's "official record," *i.e.*, his BrokerCheck Report, "is publicly available" and that the allegedly defamatory statements "also appear[] on Berry's BrokerCheck Report which is posted on the web site of [FINRA] and is available to the public")). This allegation alone is sufficient to warrant inspection of the BrokerCheck report. *See Am. Chiropractic Ass'n, Inc. v. Trigon Healthcare*, 367 F.3d 212, 234 (4th Cir. 2004) (court may take judicial notice of documents which are "integral to and explicitly relied on in the complaint" and authentic to determine whether plaintiff has stated a claim).

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

or securities business of a member firm must be registered as a representative with FINRA.[19] *See* 15 U.S.C. § 78o(a)(1); FINRA Manual, Rule 1031(a). And no individual can be registered with FINRA without agreeing to comply with FINRA's rules and regulations, including the mandatory arbitration provisions of FINRA Rule 13200.[20] The logical deduction is obvious.

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

---

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

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

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

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

Berry described himself as a "registered representative," and a "broker[] and advisor[]" for Wells Fargo, who "has worked *continuously* in the [the financial services industry] since 1984," and "dedicated the bulk of his professional life to the brokerage firm which ultimately became the WFA Defendants." (R. at 57-64 ¶¶ 27 (emphasis added), 31, 45-47; *see* R at 337:12-13 (Berry's counsel: "He was an employee of Wells Fargo Advisors, LLC.")). Berry's Amended Complaint even incorporates by reference his Form U5, which would only have been filed with respect to a former employee who had registered with FINRA via a Form U4 in the first place. (*See, e.g.,* R at 68-77 ¶¶ 60, 91, 93-95; *see also* R. at 339:18-20 (Berry's counsel arguing Berry was "defamed" in a Form U5 filing)).

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

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

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

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

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

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

[23] For the sake of completeness, the Wells Fargo Entities note that they have also met their burden to show the claims asserted by Berry fall within the "range of issues" that can be arbitrated under the agreement. (*See* Respondent's Brief at § III). A clause which provides for arbitration of all disputes arising out of or relating to a contract should be construed broadly, including tort claims. *Carlson v S.C. State Plastering, LLC*, 404 S.C. 250, 261-62, 743 S.E.2d 868, 874-75 (Ct. App. 2013) (compelling arbitration of plaintiffs tort claims as well as contract claims under broad, "all disputes" clause). All of Berry's allegations concern his employment, his termination, and events immediately after (and related to) his termination. Arbitration of these claims under the broad language of the Form U4 and FINRA Rule 13200 is within the expectation of the parties. (*See* Appellants' Brief at § IV).

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

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

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

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

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

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

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

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

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

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

CONCLUSION

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

away from that fact in hopes of avoiding the arbitration agreement that is implicit in that registration. This Court should not take the bait. For these reasons and those presented in their Appellants' Brief, the Wells Fargo Entities respectfully request that this Court reverse the trial court's Orders on the Motion to Dismiss and Motion for Reconsideration with directions to dismiss or stay the case pending arbitration of Berry's claims.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.
Sarah P. Spruill, SC Bar No. 68337
1 North Main Street, 2nd Floor
Greenville, SC 29601
Telephone: (864) 240-3200
sspruill@hsblawfirm.com

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

Frederick T. Smith
North Carolina Bar No. 45229
SEYFARTH SHAW LLP
6000 Fairview Road, Suite 1200
Charlotte, North Carolina 28210
Telephone: (404) 888-1021
Facsimile: (404) 724-1521
fsmith@seyfarth.com

Attorneys for Appellants WELLS FARGO CLEARING SERVICES, LLC F/K/A WELLS FARGO ADVISORS, WACHOVIA SECURITIES FINANCIAL HOLDINGS, LLC, WELLS FARGO & COMPANY, WELLS FARGO BANK, N.A., and SCOTT A. SPANG

Date: May 2, 2018

THE STATE OF SOUTH CAROLINA
In the Court of Appeals

RECEIVED
APR 18 2018
SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2017-CP-32-00397

Robert F. Berry.....Respondent

vs.

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

RECORD ON APPEAL

HAYNSWORTH SINKLER BOYD, P.A.
Adam N. Yount
Pierce T. MacLennan
134 Meeting Street, 3rd Floor
Charleston, SC 29401
Telephone: (843) 720-4484

Sarah P. Spruill
1 North Main Street, 2nd Floor
Greenville, SC 29601
Telephone: (864) 240-3200

SEYFARTH SHAW, L.L.P.
Frederick T. Smith
6000 Fairview Road, Ste. 1200
Charlotte, NC 28210
Telephone: (404) 888-1021

Attorneys for Appellants

WILLOUGHBY & HOEFER, P.A.
Mitchell Willoughby
Elizabeth Zeck
Chad N. Johnston
Post Office Box 8416
Columbia, SC 29202
Telephone: (803) 252-3300

Attorneys for Respondent

INDEX

Orders

Order of June 1, 2017 1

Order of June 21, 2017 3

Order of July 25, 2017 20

Pleadings

Summons and Complaint 22

Amended Complaint 50

Appellants' Motion to Dismiss or Stay Pending Arbitration 94

Appellants' Memorandum in Support of Motion to Dismiss or Stay Pending Arbitration with Exhibits 1 and 2 96

Appellants' Amended Motion to Dismiss or Stay Pending Arbitration 130

Respondent's Memorandum in Opposition to Appellants' Motion to Dismiss or Stay Pending Arbitration with Exhibits 1-6 132

Appellants' Motion for Reconsideration or Amendment of the Court's June 21, 2017 Order pursuant to SCR 59(e) and/or SCRP 60 with Exhibits 1-3 209

Respondent's Response to Appellants' Motion for Reconsideration or Amendment of the Court's June 21, 2017 Order and Motion to Strike 287

Notice of Appeal and Proof of Service, filed August 25, 2017 300

Transcripts

Transcript of Hearing on Motion to Dismiss held June 1, 2017 322

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO. 2017-CP-32-0397

Robert F Berry

PLAINTIFF(S)

Wells Fargo Clearing Services, LLC, et al

DEFENDANT(S)

ORIGINAL

Submitted by:	Attorney for : ☐ Plaintiff ☐ Defendant or ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☒ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j), SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other

☐ **STAYED DUE TO BANKRUPTCY**

☐ **DISPOSITION OF APPEAL TO THE CIRCUIT COURT** (*CHECK APPLICABLE BOX*): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

2017 JUN 5 PM 4:50

IT IS ORDERED AND ADJUDGED: ☐ See attached order (formal order to follow) ☐ Statement of Judgment by the Court:

DEFENDANT WELLS FARGO CLEARING'S MOTION FOR PROTECTIVE ORDER AND MOTION TO STAY DISCOVERY IS UNDER ADVISEMENT
DEFENDANT WELLS FARGO CLEARING'S MOTION TO DISMISS OR STAY PENDING ARBITRATION IS UNDER ADVISEMENT
DEFENDANT WELLS FARGO CLEARING'S AMENDED MOTION TO DISMISS OR STAY PENDING ARBITRATION IS UNDER ADVISEMENT

This order ☐ ends ☒ does not end the case.

Additional Information for the Clerk :

Proposed Orders in 10 days

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)
		$
		$
		$

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest

SCRCP Form 4C (02/2017)

or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk. Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge | 2126 Judge Code | 6/1/17 Date

For Clerk of Court Office Use Only

This judgment was entered on the ____ day of ____, 20____ and a copy mailed first class or placed in the appropriate attorney's box on this 7 day of June 2017 to attorneys of record or to parties (when appearing pro se) as follows:

Chad Nicholas Johnston
ATTORNEY(S) FOR THE PLAINTIFF(S)

Adam Noah Yount
ATTORNEY(S) FOR THE DEFENDANT(S)

Susan Tromer/mh
CLERK OF COURT

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

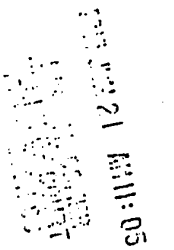
Haynsworth Sinkler Boyd, P.A.

Date Rec'd 6/16/17
C/M # 31686.0261
Routing ANY
Calendared

ORIGINAL

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	ELEVENTH JUDICIAL CIRCUIT
ROBERT F. BERRY, Plaintiff, vs. 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., Defendants.	Civil Action No. 2017-CP-32-00397

ORDER



This matter came before the Court on June 1, 2017, for a hearing on the Defendant's Motion to Dismiss or Stay Pending Arbitration. Also before the Court was Defendants' Motion for a Protective Order and Motion to Stay Discovery. Present at the hearing were Frederick T. Smith of Seyfarth Shaw LLP, appearing *pro hac vice*, and John G. Tamasitis of Haynsworth Sinkler Boyd, P.A., representing Defendants, and Mitchell Willoughby, Chad Johnston and Elizabeth Zeck of Willoughby & Hoefer, P.A., representing Plaintiff. For the reasons set forth below, Defendants' Motion to Dismiss or Stay Pending Arbitration is denied, with prejudice. Further, Defendants' Motion for a Protective Order and Stay of Discovery pending arbitration is rendered moot by the effect of this Order.

FACTUAL BACKGROUND

This is a claim for damages brought by Plaintiff Robert F. Berry, formerly a Wealth Manager and Senior Vice President with Defendant Wells Fargo Advisors, LLC. Among other

allegations, Mr. Berry alleges that Defendants 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.'s (collectively referred to as "Defendants") deliberately breached his long-standing profit formula agreement. Mr. Berry also alleges that to illegally increase the earnings and stock price of the corporate parent, Wells Fargo & Company, Defendants aggressively pushed employees of all subsidiary corporations, including Mr. Berry, to sell financial products, regardless of whether the products were wanted, needed, or in the best interests of the customers and clients, and targeted for retribution those employees who refused and/or failed to cooperate.

Mr. Berry alleges that he refused to participate in the scheme because it would have violated the securities laws and his fiduciary obligations to his clients. (First Amended Complaint ("FAC") at ¶ 33-36). Based on his refusal, Mr. Berry alleges that Defendants internally identified him as a person to be terminated for speaking up against the improper cross-selling program. Mr. Berry alleges he was also targeted for retribution based on the complaints he lodged with Defendants regarding the changes they unilaterally made to his profit formula employment agreement, which had been in effect since the early 2000s. (FAC at ¶¶ 29, 42-43). Defendants' efforts culminated in a February 3, 2014 meeting during which Mr. Berry alleges he was humiliated, unlawfully detained, and forced to resign. (FAC at ¶¶ 38-44, 51-55). Mr. Berry filed this action seeking damages. Rather than answer Mr. Berry's complaint, Defendants filed their Motion to Dismiss or to Stay Pending Arbitration under Rule 12(b)(6), SCRCP, as well as a separate motion for protective order and a stay of discovery.

FINDINGS and ANALYSIS

I. Defendants failed to meet their burden, as the proponents of arbitration, to prove the existence of a duty to arbitrate.

Whether a claim is subject to arbitration is an issue for judicial determination. It is the duty of this Court to ascertain the existence, if any, of an enforceable arbitration agreement. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 78, 749 S.E.2d 139, 144-45 (Ct. App. 2013). That duty is fulfilled by applying the principles of state contract law, according to the ordinary procedural and evidentiary rules applicable to all contract disputes. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001).

"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." *Chassereau*, 363 S.C. at 632, 611 S.E.2d at 307 (quoting *Zabinski*, 346 S.C. at 596–97, 553 S.E.2d at 118).

As the proponents of arbitration, Defendants bear the burden of establishing the existence of an agreement to arbitrate the dispute between themselves and Mr. Berry. "General contract principles of state law apply to arbitration clauses governed by the F[ederal] A[rbitration] A[ct]." *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001); *see also 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). State law remains applicable if that law, whether legislative or judicial, arose to govern issues concerning the validity, revocability, and enforceability of all contracts generally. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364.

A. **Defendants' Motion to Stay fails because they did not properly authenticate the registration statements upon which they rely to create the duty to arbitrate.**

A threshold question is the admissibility of the documents upon which Defendants rely to support their demand for arbitration. South Carolina law has always required authentication as a condition precedent to admissibility. Rule 901(a), SCRE; see also *State v. Rich*, 293 S.C. 172, 359 S.E.2d 281 (1987). This rule applies to evidence submitted in support of motions. *See Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 121, 441 S.E.2d 835, 838 (Ct. App. 1994). That is, before this Court can rely upon any document, its proponent must provide a proper foundation. This requirement applies to employment records of the type proffered here. *Connelly v. Wometco Enterprises, Inc.*, 314 S.C. 188, 191, 442 S.E.2d 204, 206 (Ct. App. 1994). In *Connelly*, a wrongful termination case, the employee's personnel file was properly excluded from evidence, as the employer failed to offer the excluded records through a custodian or other properly qualified witness. *Id.* The proffered documents were properly excluded from evidence, even though they might have had probative value and would therefore otherwise have been relevant and admissible. *Id.*

In support of their Motion, Defendants rely upon three registration statements which were simply attached as Exhibit 1 to their supporting memorandum. However, business records of this type do not qualify as self-authenticating. *Cf.* Rule 902, SCRE. Although Defendants provided an affidavit from a paralegal employed in the "Wells Fargo Law Department,"[1] the paralegal did not claim to be a custodian of records for any of the corporate Defendants, nor did she make any claim that the documents attached to Defendants' memorandum were true and correct copies of business records maintained by any specific Defendant. Like the inadequate sponsoring witness

[1] Defendants' affiant fails to even assert that she is employed by any of the four corporate Defendants or, assuming she is, to identify which one.

in *Connelly*, this testimony is insufficient to meet the foundation requirements imposed by Rule 901(a), SCRE. In the absence of such authentication testimony, Defendants have failed to lay a proper foundation for the admission of these three registration statements and this Court therefore determines that they are inadmissible for substantive consideration in support of Defendants' Motion. Because the three unauthenticated registration statements constitute the only evidence submitted in support of their Motion, Defendants have failed to meet their burden[2] to prove the existence of an enforceable agreement to arbitrate and the motion to stay these proceedings and compel arbitration is denied.

B. Defendants' Motion also fails because they are not parties to the documents upon which they rely and therefore lack standing to enforce any arbitration agreement contained therein.

Even if the three registration statements relied upon by Defendants were properly before this Court, Defendants have failed to prove that they have standing to enforce the arbitration clause contained therein such that they may benefit from their terms. "Ultimately, arbitration is a matter of contract and a party cannot be forced to arbitrate a dispute if it has not agreed to do so." *AT&T Tech., Inc. v. Comm'ns Workers*, 475 U.S. 643, 648 (1986).

---

[2] It is now too late for Defendants 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. *See, e.g., Parker v. S.C. Public Service Com'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 Court notes that Defendants have already attempted to amend their motion to dismiss, namely, to add grounds under Rule 12(b)(1) and (3), SCRCP, asserting as support for the motion Rule 15(a), SCRCP. However, Defendants' motion to dismiss is not a "pleading" capable of amendment under Rule 15(a); therefore, Defendants' motion was untimely and ineffective. While an assertion of a Court's lack of subject matter jurisdiction may be raised at any time during the litigation, other defenses specified in Rule 12(b) — including the defenses listed as subsections 12(b)(2), (3), (4), (5) and (8) — are waived if not asserted in the initial motion or responsive pleading, as is the case here where Defendants' motion relied solely on the defense provided by Rule 12(b)(6). *See* Rule 12(g), (h).

Defendants' Motion is based on a clause included in three Form U-4 registration statements that were apparently submitted on behalf of Wheat, First Securities, Inc. ("Wheat First"), a firm that no longer exists,[3] during Mr. Berry's association with that firm. However, this litigation does not involve any dispute, claim or controversy arising between Plaintiff and Wheat First.[4] Mr. Berry asserts no claim against Wheat First, nor does he complain of any act or omission by Wheat First. Rather Mr. Berry alleges that the Profit Formula Agreement at issue in this case was not between him and Wheat First, but originated with Wachovia Securities. (FAC at ¶29).

The three registration statements[5] relied upon by Defendants each contain an identical arbitration clause, which reads as follows:

> 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 organizations indicated in Item 10 as may be amended from time to time . . . .

The firm named in each of the registration statements is Wheat First. The arbitration clause is devoid of any language indicating that any arbitration obligation extends to successors and/or assigns of "my firm," that is, Wheat First. Nor can this Court take judicial notice of the internal

---

[3] In support of his opposition to Defendants' motions, Mr. Berry submitted self-authenticating, certified copies of records kept by the South Carolina Secretary of State, which demonstrated that Wheat First changed its name to First Union Capital Markets Corporation in 1999, which subsequent business was later dissolved and surrendered its authority to do business in South Carolina. *See* Exhs. 2 and 3, Plaintiff's Opp. to Mot. to Stay.

[4] In their Motion, Defendant Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, invokes rights as a member of those self-regulatory organizations. Thus, Defendants stand in the role of the drafters of the forms issued by such organizations. Under South Carolina law, "any ambiguity will be construed in favor of the non-drafting party." *McGill v. Moore*, 381 S.C. 179, 186, 672 S.E.2d 571, 575 (2009). Thus, Mr. Berry is entitled to the construction benefit of a non-drafting party such that any ambiguities in the registration statements must be construed against Defendants.

[5] Defendants proffered three registration statements, dated September 28, 1995, January 16, 1995, and November 5, 1994. Only the November 1994 registration statement designates any SRO and Item 10 fora.

affairs of private corporations to find that Defendants can invoke the rights of Wheat First. *Moss v. Aetna Life Ins. Co.*, 267 S.C. 370, 377, 228 S.E.2d 108, 112 (1976). In short, the three registration statements relied upon by Defendants simply do not satisfy Defendants' burden to prove the existence of an agreement by Mr. Berry to arbitrate his dispute in this case with these Defendants. Moreover, even if these registration statements were admissible, Defendants lack standing to rely upon a registration statement of a dissolved corporate entity to compel Mr. Berry to arbitrate claims he asserts against them.

C. **If an arbitration agreement arises from the 1994 registration statement, it fails because the fora specified in that clause no longer exist.**

Even if the arbitration clause contained in the registration statements were properly before this Court, and even if Defendants had standing to enforce clauses contained within those statements, any purported agreement to arbitrate is rendered void by the failure of the statement's forum selection clause, which constitutes an integral and material term of the arbitration clause. The clause relied upon by Defendants requires arbitration "under the rules, constitutions, or by-laws of the organizations indicated in Item 10." *See supra* at 6. Item 10 of the registration statements contains two sections, labeled SRO and Jurisdictions. In the securities context, SRO stands for Self-Regulatory Organization. *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 386 n. 12, 759 S.E.2d 727, 735 (2014). The SRO box is checked on only the earliest Form U-4 relied upon by Defendants, dated November 1994 ("1994 Form").[6] The 1994 Form designated the following entities as potential arbitral fora: the American Stock Exchange ("ASE"), the National Association of Securities Dealers ("NASD"), the New York Stock Exchange

[6] The other two registration statements do not designate any SRO arbitration forum, and, thus, the arbitration clause is void *ab initio*.

("NYSE"), and the Philadelphia Stock Exchange ("PHLX"). The SRO section box labeled "Other (Specify)" was left blank on the 1994 Form.

Defendants have offered no proof of the continued existence of either the ASE or the PHLX. Moreover, and more important, Defendants offer no proof that any of the organizations specified on the 1994 Form currently provide arbitration services. Defendants are unable to point to any language indicating that any arbitration obligation extends to successors and/or assigns of the specified entities; in fact, no such obligation appears in the 1994 Form. Item 10 includes a box labeled "Other" box in the SRO category, but no "successors or assigns" language was specified there, either.

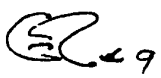
In tacit recognition of the unavailability of the arbitral fora actually specified in the documents upon which they rely, Defendants do not seek to compel arbitration before NASD, NYSE or any of the other fora listed in the 1994 Form. Rather, Defendants disregard the actual language of the SRO section 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. In purporting to quote from the arbitration clause contained in the 1994 Form, Defendants' brief replaced the term "NASD" with "FINRA" without comment or explanation, thereby failing in their duty to bring to the Court's attention the alteration of a material term in the document. In the absence of such proof,[7] this Court cannot simply assume that this dispute might be "required to be arbitrated under"

[7] During the hearing, Defendants asked the Court to take judicial notice of FINRA Rule 13200. Setting aside the issue of whether this Court may even take judicial notice of such rules, the Court finds that Defendants have not met their threshold burden of demonstrating the applicability of any FINRA rule to Mr. Berry.

the absent rules of these non-existent arbitral fora, as required by the arbitration clause in the 1994 Form.

However, in interpreting agreements to arbitrate, courts agree that where a material, integral part of an arbitration agreement fails, the entire agreement to arbitrate is void. *See 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); *Brown v. ITT Consumer Vin. Corp.*, 211 .F.3d 1217, 1220 (11th Cir. 2000) (asserting that where the selection of a particular forum constitutes an integral part of the agreement to arbitrate, the failure of the chosen forum precludes arbitration); *In re Salomon Inc.*, 68 F.3d 554, 561 (2d. Cir. 1995) (a failed forum selection term is as important a consideration as the agreement to arbitrate itself); *Smith Barney, Inc. v. Critical Health Sys.*, 212 F.3d 858, 862 (4th Cir. 2000). Specifically, "if the choice of [an arbitral] forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern ... the failure of the chosen forum [will] preclude arbitration." *Grant*, 383 S.C. at 131, 678 S.E.2d at 438 (citing *Singleton v. Grade A Market, Inc.*, 607 F. Supp. 2d 333, 341 (D. Conn. 2009)). Because the selection of the designated fora constituted an integral term of the arbitration clause in the 1994 Form, and because none of the chosen arbitral fora currently exist, the arbitration agreement is impossible to perform and thus void.

In *Grant*, for example, the plaintiff executed an admissions contract containing an agreement to arbitrate on behalf of her deceased husband concurrent with his admission into a nursing home. *Id.* at 127, 678 S.E.2d at 436. Shortly after admission, the plaintiff's decedent was injured at the facility. *Id.* Plaintiff filed suit in state court, and the Defendant moved to dismiss the action and to compel arbitration pursuant to the admissions contract. *Id.* The arbitration clause in the agreement specifically selected the American Health Lawyers Association ("AHLA") as the



arbitral forum to resolve all related disputes arising from the decedent's admission. *Id.* at 128, 678 S.E.2d at 437. Subsequent to the execution of the admissions agreement, the AHLA amended its rules, declining to arbitrate disputes arising from arbitration agreements executed prior to the injury. *Id.* Consequently, the AHLA would not hear the dispute between the parties, and the parties were effectively denied their forum choice. *Id.*

The *Grant* plaintiff asserted that the inability to arbitrate through the AHLA constituted a failure of a material term in the agreement, and therefore she was no longer bound to arbitrate the dispute. *Id.* at 128, 678 S.E.2d at 437. The Supreme Court agreed, finding that "the specific designation of the AHLA as arbitrator [was] an integral term of this arbitration agreement." *Id.* at 131, 678 S.E.2d at 438-439. The court reasoned that "the designation of a forum such as the AHLA has wide-ranging substantive implications that may affect, *inter alia*, the arbitrator-selection process, the law, procedures, and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration." *Id.* at 132; 678 S.E.2d at 439. The court determined that these implications rendered the selection of a specific forum an integral term of the agreement. *Id.* Consequently, the court held that the arbitration agreement between the parties was unenforceable, and dismissed the defendant's motion to compel arbitration.

The rationale employed by the Supreme Court in *Grant* has been echoed in many other cases across jurisdictions. For example, in *In re Salomon Inc.*, the parties agreed to arbitrate any dispute pursuant to "the arbitration procedure prescribed in the Constitution and rules then obtaining of the NYSE." 68 F.3d at 558. When the NYSE's arbitration group declined to hear the dispute, the courts refused to substitute an alternate arbitrator. *Id.* at 561. In affirming this holding, the Second Circuit explicitly rejected the brokerage firm's contention that the arbitration could be held in another arbitral forum, so long as the rules of the chosen forum govern the proceeding:

> [When] it is clear that the failed [forum selection] term is not an ancillary logistical concern, but rather is as important a consideration as the agreement to arbitrate itself, a court will not sever the failed term from the rest of the agreement and the entire arbitration provision will fail.

Id. at 561 (internal citations omitted). The choice of a specialty forum is an integral term in the arbitration clause precluding the appointment of substitute arbitrators.

Likewise, the Sixth Circuit Court of Appeals affirmed a decision barring a customer from submitting her claim to arbitration before the NASD in *Roney & Co. v. Goren*, 875 F.2d 1218, 1219 (6th Cir. 1989). This result was premised on a pre-dispute provision stating that all disputes would be submitted to arbitration "under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange." *Id.* In refusing to treat the various arbitral fora as interchangeable, the court opined that "[a] forum selection clause in an arbitration agreement, just like any other contract provision, is entitled to complete enforcement absent evidence that the contract was procured through fraud or excessive economic power." *Id.* at 1223. This was true even though the court found that there was purportedly no substantive difference between the NASD's and the NYSE's arbitration procedure. *Id.* at 1220. The parties selected the NYSE, which selection was an integral term of the agreement to arbitrate, and the NYSE therefore constituted the sole arbitration forum before which the parties could arbitrate. *Id.*

Just as in *Grant*, *Saloman* and *Roney*, the 1994 Form relied upon by Defendants indicates the selection of specific arbitral fora. As noted *supra*, the provision relied upon by Defendants identifies the ASE, the NASD, the NYSE, and the PHLX as approved arbitral fora. In mid-2007, however, the NASD joined with the New York Stock Exchange (a competitor in the arbitration of securities disputes and another authorized arbitral forum specified in the 1994 Form U-4s) to create a new entity, which is now known as the Financial Industry Regulatory Authority, or "FINRA." *See* SEC Release No. 34-56145, 2007 SEC LEXIS 1640 (July 26, 2007). Concurrent with the

creation of the new entity came both procedural and substantive changes to the dispute resolution processes previously utilized by NASD and the NYSE. FINRA is neither NASD nor NYSE (much less the ASE or the PHLX) and the parties no longer have access to the arbitration fora specified in the 1994 Form registration statement. Just as a contract for the purchase of brand-name pharmaceuticals cannot be satisfied by the provision of generics, an agreement to arbitrate before the NASD cannot be satisfied by arbitration before any other forum. Courts have determined that "a clause which adopts the rules of an organization like the NASD implicitly chooses that organization as the, or a, forum." *Reddam v. KPMG LLP*, 457 F.3d 1054, 1060 (9th Cir. 2006) (collecting cases), *overruled on other grounds by Atl. Nat'l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931 (9th Cir. 2010).

Our Supreme Court has recognized that the choice of an arbitral fora maintained by securities self-regulatory organizations is entitled to special deference and recognition. *See Dean*, 408 S.C. 371 n. 12, 759 S.E.2d 727 (2014). The Supreme Court reasoned that securities self-regulatory organizations — or SROs — are considered to have "special expertise" as they are "closely governed by the Securities and Exchange Commission and have developed complex regulatory schemes for overseeing arbitration of securities disputes." *Id.* Therefore, the selection of one of these organizations as the fora for dispute resolution has a wide-ranging, substantive impact on the arbitration process. The selection of a specific SRO forum, therefore, is an integral term of the arbitration clause.

Consequently, just as in *Grant*, if Defendants are allowed to treat SRO arbitral fora as interchangeable, Mr. Berry will be deprived of the arbitral forum that was expressly designated in the 1994 registration statement submitted with Wheat First. Because none of the designated arbitration fora are available to resolve the present dispute, and because an arbitrator selection

clause in the 1994 Form is an integral and material term of the arbitration obligation, the arbitration clause relied upon by Defendants is impossible to perform and is therefore void and unenforceable. *See In re Salomon Inc.*, 68 F.3d at 558 ("we cannot compel a party to arbitrate a dispute before someone other than the NYSE when the party had agreed to arbitrate disputes only before the NYSE"); *Roney*, 875 F.2d 1218 (interpreting designation of NYSE as the arbitral forum of choice meant that *only* the NYSE could arbitrate a dispute between the parties).

In reaching the conclusion that securities arbitral fora cannot be treated as interchangeable, this Court is mindful of the result obtained on very similar facts in *Keller v. ING Financial Partners, Inc.*, Op. No. 2011-CP-23-0336 (S.C. Cir. Ct. filed June 2, 2011). That case involved an attempt to compel arbitration before FINRA based on an arbitration clause which identified NASD as the chosen arbitral forum. The Honorable D. Garrison Hill denied a motion to compel arbitration on such facts, finding that:

> The "NASD," or the National Association of Securities Dealers, Inc., as then constituted, no longer exists, having combined regulatory functions with certain divisions of the New York Stock Exchange ("NYSE") to become what is now known as the Financial Industry Regulatory Authority, or FINRA.
>
> * * *
>
> In mid-2007, the NASD combined regulatory functions with certain divisions of the New York Stock Exchange (a competitor in the arbitration of securities disputes), and became what is now known as the Financial Industry Regulatory Authority, or FINRA See SEC Release No. 34-56145, 2007 SEC LEXIS 1640. (July 26, 2007). Moreover, coincident with this consolidation, came both procedural and substantive changes to the NASD's former dispute resolution process and rules. See FINRA. Archive of Arbitration Procedures for Cases Before and After April 16, 2007, http://www.finra.org/ArbitrationMediation/Rules (last visited Apr. 4, 2011). Consequently, just as in *Grant* and *Salomon*, the parties in the present case are deprived of the arbitration forum that they specifically bargained for and agreed upon.
>
> Because the designated arbitrator is not available to resolve the present dispute, and because the arbitrator selection clause in the subject agreement constitutes a material and integral term of the agreement to arbitrate, this Court finds the arbitration agreement impossible to perform, and denies Defendants' Motion to Compel Arbitration and Dismiss or Stay.

This ruling was affirmed on appeal in an unpublished opinion.[8] *Keller v. ING Financial Partners, Inc.*, 2013 WL 8482243, Op. No. 2013-UP-014 (S.C. Ct. App. filed Jan. 9, 2013). The Court of Appeals characterized the trial court ruling as follows:

> The circuit court found the arbitration agreement between the parties designated the National Association of Securities Dealers (NASD) as an exclusive arbitral forum, the NASD was unavailable to arbitrate because it no longer existed, and the court could not substitute the Financial Industry Regulatory Authority (FINRA) for NASD.

The Court of Appeals further noted that the courts "cannot rewrite the parties' agreement to substitute FINRA for NASD." *Id.* at 2.

According to the South Carolina Appellate Court Case Management Public Index, the *Keller* arbitration proponents then petitioned for a writ of certiorari to the South Carolina Supreme Court. 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 opinion of the Court of Appeals and Judge Hill's order remained unchanged. *Keller v. ING Financial Partners, Inc.*, Op. No. 2015-MO-006 (S.C. filed Feb. 11, 2015).

Keller provides an example of the importance of requiring proof of each material term in an arbitral agreement so that parties are not compelled to arbitrate before a forum to which they did not agree. South Carolina courts put arbitration proponents to their proof and do not allow them to rely on mere assumptions as a basis for compelling arbitration. Defendants are required to prove the existence of an agreement by Mr. Berry to arbitrate claims against them not just before any SRO forum, but before the SRO forum in which they seek to compel arbitration. Because

[8] This Court recognizes Rule 268(d)(2), SCACR, regarding the reliance on unpublished opinions of the Court of Appeals and Supreme Court in non-related proceedings. Mr. Berry cited the appellate opinions in *Keller*, not as binding precedent, but rather as an indisputable fact about the subsequent procedural appellate history of Judge Hill's prior order in *Keller*. The Court takes judicial notice of these facts and the court's files in the *Keller* case pursuant to Rule 201, SCRE.

Defendants have offered no proof that any of the arbitral fora specifically selected in the 1994 Form still exist or offer arbitration services, an integral and material term of the purported arbitration clause is impossible to perform, rendering the entire arbitration agreement void. For this additional reason, Defendants' motion to compel arbitration is therefore denied.

II. Defendants' motion to dismiss is denied because the Amended Complaint provides Defendants with adequate notice of their alleged wrongdoing.

In the alternative to compelling arbitration of these claims, Defendants sought dismissal of the Amended Complaint under Rule 12(b)(6), SCRCP.[9] Defendants' motion lacks merit and is denied. "A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true." *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014) (quoting *Disabato v. S.C. Ass'n of Sch. Adm'rs.* 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013)). A motion to dismiss under Rule 12(b)(6), SCRCP, should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003) (citations omitted); *see also Baird v. Charleston Cty*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) (if the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper); *McCormick v.*

[9] As was noted *supra* at p.5 n.2, Defendants did not timely raise their Rule 12(b)(3) objections to venue as this ground was not included in its initial motion. *See* Rule 12(g), (h), SCRCP. Although a Rule 12(b)(1) objection to the Court's subject matter jurisdiction can be raised at any time, Defendants have made no arguments in support of either this ground or their untimely raised venue objection. Thus, Defendants' failure to articulate any argument in support of any venue or subject matter objection dooms those objections as conclusory. This Court therefore treats them as abandoned and denies then accordingly. *See Mulherin-Howell*, 362 S.C. at 600, 608 S.E.2d at 593-94 (finding an argument advanced through conclusory statements with no argument or supporting authority abandoned); *Muir*, 336 S.C. at 298, 519 S.E.2d at 600 (declaring that conclusory arguments may be treated as abandoned).

England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997)(motion to dismiss cannot be sustained if facts alleged in complaint and inferences reasonably deducible therefrom would entitle plaintiff to relief on any theory of the case). In deciding whether to grant a motion to dismiss, this Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *See Flateau*, 355 S.C. at 202, 584 S.E.2d at 415 (citation omitted); *see also Cowart v. Poore*, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999) (looking at facts in light most favorable to plaintiff, and with all doubts resolved in his behalf, the court must consider whether the pleadings articulate any valid claim for relief). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987).

Defendants' two page Rule 12(b)(6), SCRCP argument is conclusory and unserious in the face of Mr. Berry's forty-four (44) page Amended Complaint that provides explicit detail on his assertions of wrongdoing supporting the causes of action alleged against Defendants. In fact, the motion to dismiss does not assert that *any* of the ten (10) specifically-pled causes of action are unsupported by sufficiently stated facts to support those causes of action. Consequently, Defendants' motion and accompanying memorandum does not meet its burden of showing a violation of Rule 12(b)(6), SCRCP and therefore the motion fails. *See, e.g., Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (finding an argument advanced through conclusory statements with no argument or supporting authority abandoned); *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 298, 519 S.E.2d 583, 600 (Ct. App. 1999) (declaring that conclusory arguments may be treated as abandoned).

Viewing the asserted facts as true and in the light most favorable to Mr. Berry, as this Court is required to in considering a Rule 12(b)(6) motion, the Amended Complaint greatly exceeds the

"facts sufficient" standard of a "short and plain statement" of a well-pled complaint sufficient to put each of the Defendants on notice of the allegations of wrongdoing advanced by Mr. Berry. Defendants' motion to dismiss is therefore denied.

CONCLUSION[10]

THEREFORE, for the reasons set forth above, Defendants' Motion to Stay or to Dismiss is DENIED. Defendants' Motion for a Protective Order and Stay of Discovery pending arbitration is rendered moot by the effect of this Order and is therefore DENIED. Defendants are ordered to file any responsive pleadings within fifteen (15) days of this Order and provide discovery responses to all outstanding discovery requests of Plaintiff within ten (10) days of this Order.

IT IS SO ORDERED.

G. Thomas Cooper

The Honorable G. Thomas Cooper, Jr.
Circuit Court Judge
Eleventh Judicial Circuit

Camden
~~Lexington~~, South Carolina
This 16 day of June, 2017

2017 JUN 21 AM 11:05

[10] In opposition to Defendants' motions, Mr. Berry also asserted that the purported arbitration clause relied upon by Defendants is unenforceable under these circumstances because its enforcement would compel Plaintiff to arbitrate outrageous conduct by Defendants that clearly was not contemplated at the inception of the arbitration agreement. While the Court agrees with the analysis and case law advanced by Mr. Berry on this topic, the Court need not address, in light of the rulings above, all issues at length where other grounds in opposition are likewise dispositive and provide the same relief. *See, e.g., Futch v. McAllister Towing of Georgetown Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999).

ORIGINAL

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
ROBERT F. BERRY,	)	Civil Action No. 2017-CP-32-00397
Plaintiff,	)	
vs.	)	
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.,	)	**ORDER**
Defendants.	)	

FILED
2017 JUN 29 P 1:05
CLERK OF COURT
LEXINGTON

Before the Court is Defendants' Motion for Reconsideration or Amendment of this Court's Order, filed June 21, 2017, denying Defendants' Motion to Dismiss or Stay Pending Arbitration.

After careful consideration of the record in this case and the submissions of the parties, this Court is 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.

Accordingly, this Court hereby **DENIES** Defendant's Motion under Rule 59(e), SCRCP, to reconsider this Court's March 1, 2017, Order. Furthermore, pursuant to Rule 59(f), SCRCP, the Court is of the opinion that oral argument is not necessary.

In regard to Defendants' request to for an extension of time to file a responsive pleading, which request has been extended with the consent of Plaintiff, Defendants' request is granted, and Defendants are ordered to file a responsive pleading within 10 days from receipt of this Order.

1

In regard to Defendants' request for an extension of time to respond to Plaintiff's outstanding discovery requests, which request has been extended with the consent of Plaintiff, Defendants' request is granted, and Defendants are ordered to provide discovery responses to all outstanding discovery requests of Plaintiff within 40 days from receipt of this Order.

AND IT IS SO ORDERED.

The Honorable G. Thomas Cooper, Jr.

July 24, 2017

Haynsworth Sinkler Boyd, P.A.

Date Rec'd 7/31/17
C/M # 31686.0261
Routing ANY
Calendared

COPY

FILED
2017 FEB 22 PM 4:27
LISA COMER
CLERK OF COURT
LEXINGTON, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
Robert F. Berry,	)	Civil Action No. 2017-CP-___-_____
Plaintiff,	)	
vs.	)	**SUMMONS**
Wells Fargo Clearing Services, LLC, Wells Fargo Advisors, LLC, Wachovia Securities Financial Holdings, Inc., Wells Fargo & Company, Wells Fargo Bank, N.A. and Scott A. Spang,	)	2017CP3200397
Defendants.	)	

TO THE DEFENDANTS ABOVE NAMED:

YOU ARE HEREBY SUMMONED and required to answer the Complaint herein, a copy of which is herewith served upon you, and to serve a copy of your answer to this Complaint upon the subscriber, at their office, 930 Richland Street, P.O. Box 8416, Columbia, South Carolina 29202-8416, within thirty (30) days after service hereof, exclusive of the day of such service, and if you fail to answer the Complaint within the time aforesaid, or otherwise appear and defend, judgment by default will be rendered against you for the relief demanded in the Complaint.

SIGNATURE PAGE FOLLOWS

Mitchell Willoughby, Esquire, Esquire
Elizabeth Zeck, Esquire
Chad N. Johnston, Esquire
WILLOUGHBY & HOEFER, P.A.
Post Office Box 8416
Columbia, South Carolina 29202
Telephone Number: 803-252-3300
mwilloughby@willoughbyhoefer.com
ezeck@willoughbyhoefer.com
cjohnston@willoughbyhoefer.com

Attorneys for Robert F. Berry

This 2nd day February 2017
Columbia, South Carolina

COPY

FILED
2017 FEB -2 PM 4:27
LISA COMER
CLERK OF COURT
LEXINGTON, SC

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
ROBERT F. BERRY,	)	Civil Action No. 2017-CP-32-
Plaintiff,	)	
vs.	)	**PLAINTIFF'S ORIGINAL COMPLAINT (Jury Trial Demanded)**
WELLS FARGO CLEARING SERVICES, LLC, WELLS FARGO ADVISORS, LLC, WACHOVIA SECURITIES FINANCIAL HOLDINGS, INC., WELLS FARGO & COMPANY, WELLS FARGO BANK, N.A. and SCOTT A. SPANG,	)	2017CP3200397
Defendants.	)	

Plaintiff Robert F. Berry ("Mr. Berry") complains of Defendants Wells Fargo Clearing Services, LLC, Wells Fargo Advisors, LLC, Wachovia Securities Financial Holdings, LLC, (collectively "the WFA Defendants"), Wells Fargo & Company and Wells Fargo Bank, N.A. (collectively "the Wells Fargo Bank Defendants"), and Scott A. Spang, and respectfully alleges as follows:

PM 4:16:46 FEB 02

SUMMARY OF CASE

1. This is a claim for damages brought by Mr. Berry, formerly a Wealth Manager and Senior Vice President with Defendant Wells Fargo Advisors, LLC, arising from the defendants' deliberate sabotage and breach of Mr. Berry's long-standing compensation agreement with the WFA Defendants and their predecessors.

2. Mr. Berry was chastised by Defendants for resisting their demands that he "cross-sell" Wells Fargo Bank products to his clients for whom he served as their fiduciary, products which the clients did not want, did not need and which were unsuitable for them. He also expressed concern and attempted to seek information about the reasons for the inexplicable changes in his compensation arrangement.

3. As a result of Mr. Berry's actions, Defendants internally identified Mr. Berry as a malcontent to be punished for having the courage and temerity to speak up against the illegality of Defendants' cross-selling program and the injustice of the unilateral compensation changes, as well as other failures by Defendants to support Mr. Berry's efforts to properly serve his clients. Defendants' efforts intensified over several months and culminated in a February 3, 2014 meeting orchestrated and engineered by Defendants, during which Defendant Spang, on behalf of all Defendants, humiliated and berated Mr. Berry, thereby forcing his resignation by threatening that he would either resign or be immediately fired.

4. Then, to further damage Mr. Berry, Defendants defamed his professional reputation and good name by filing a false and defamatory statement about his departure with regulatory authorities, accusing him of unethical and dishonest acts. Defendants knew that the false statement would damage Mr. Berry in his subsequent professional endeavors, but took the action specifically to promote Defendants' own interests in retaining Mr. Berry's client base, while achieving their real goal of punishing Mr. Berry for refusing to participate in their improper cross-selling scheme and terminating a longstanding payout arrangement that Defendants viewed as too lucrative in favor of Mr. Berry. These illegal, false and deceptive practices by Defendants seriously harmed Plaintiff as was Defendants' specific and deliberate intent.

5. This complaint seeks damages and injunctive relief in compensation for those wrongful acts.

PARTIES

6. Plaintiff Robert F. Berry is, and at all times herein relevant was, an individual residing in the County of Lexington, South Carolina.

7. Upon information and belief, defendant Wells Fargo Clearing Services, LLC is, and at all times relevant was, a Delaware limited liability company with its principal place of business in St. Louis, Missouri, and is a successor-in-interest to defendants Wells Fargo Advisors, LLC, which is, and at all times relevant was also, a Delaware limited liability company with its principal place of business in St. Louis, Missouri.

8. Upon information and belief, defendant Wachovia Securities Financial Holdings, Inc. is, and at all times relevant was, a Delaware limited liability company with its principal place of business in Richmond, Virginia, and at all times relevant was the parent company of defendant Wells Fargo Clearing Services, LLC, and Wells Fargo Advisors, LLC.

9. Upon information and belief, Wells Fargo Clearing Services, LLC, and Wells Fargo Advisors, LLC are registered to do business in South Carolina and are in good standing with the South Carolina Secretary of State.

10. Defendants Wells Fargo Clearing Services, LLC, Wells Fargo Advisors, LLC, and Wachovia Securities Financial Holdings, Inc. are collectively referred to in this Complaint as "the WFA Defendants."

11. The WFA Defendants engage in continuous and systematic activities within the State of South Carolina, including the use of the courts of this State to enforce contractual and other rights against citizens of South Carolina. The WFA Defendants presently conduct business

and, at all relevant times, conducted business and performed acts in Lexington County, South Carolina and have sufficient contacts and business within Lexington County, South Carolina so as to be subject to the *in personam* jurisdiction of this Court pursuant to the laws of South Carolina.

12. Upon information and belief, Wells Fargo & Company is a financial holding corporation organized under the laws of the State of Delaware with its principal place of business in San Francisco, California. Wells Fargo & Company is a citizen and resident of the States of Delaware and California.

13. Upon information and belief, Defendant Wells Fargo Bank, N.A. is a national bank subsidiary of Defendant Wells Fargo & Company and is organized under the laws of the State of Delaware with its principal place of business in Sioux Falls, South Dakota. Wells Fargo Bank is a citizen and resident of the States of Delaware and South Dakota.

14. Upon information and belief, Defendants Wells Fargo & Company and Wells Fargo Bank, N.A., are registered to do business in South Carolina and are in good standing with the South Carolina Secretary of State.

15. Defendants Wells Fargo & Company and Wells Fargo Bank, N.A. are collectively referred to in this Complaint as "the Wells Fargo Bank Defendants."

16. The Wells Fargo Bank Defendants engage in continuous and systematic activities within the State of South Carolina, including the use of the courts of this State to enforce contractual and other rights against citizens of South Carolina. The Wells Fargo Bank Defendants presently conduct business and, at all relevant times, conducted business and performed acts in Lexington County, South Carolina and have sufficient contacts and business within Lexington County, South Carolina so as to be subject to the *in personam* jurisdiction of this Court pursuant to the laws of South Carolina.

17. Defendants Wells Fargo Clearing Services, LLC, Wells Fargo Advisors, LLC, and Wachovia Securities Financial Holdings, Inc., Wells Fargo & Company and Wells Fargo Bank, N.A. are collectively referred to in this Complaint as "the Corporate Defendants."

18. On information and belief, Defendant Scott A. Spang is a citizen and resident of the County of Fairfield in the State of South Carolina. At the times relevant to the claims herein, Scott was an agent, employee, servant and/or representative of the WFA Defendants assigned to their South Carolina headquarters based in the Main Street office in Columbia, South Carolina. Spang was the Senior Vice President and/or Managing Director and/or South Carolina Complex Manager in charge of all WFA brokerage and wealth management functions and business in South Carolina.

19. At all times relevant to this case, Spang was an agent, representative, servant and/or employee of the WFA Defendants and an agent, representative and servant of the Wells Fargo Bank Defendants. All of his actions, inactions, omissions and wrongdoing were performed for and on behalf of the Corporate Defendants in the course and scope of his agency and/or employment with the Corporate Defendants. Therefore, in addition to Spang's personal liability for his own actions, inactions and omissions, the Corporate Defendants are directly liable and also jointly, severally, fully accountable, and totally liable for the mismanagement, misconduct, wrongdoing, actions and/or omissions of Spang under agency law and common law principles of *respondeat superior*.

20. All claims arising under this Complaint are governed by the laws of the state of South Carolina. Venue is proper in Lexington County, South Carolina because the Corporate Defendants have locations in and hold themselves out as doing business in that South Carolina county.

STATEMENT OF FACTS

21. Mr. Berry was born in Columbia, South Carolina. He is a 1974 graduate of the University of South Carolina, where he received a degree in accounting. Mr. Berry trained as an accountant and in 1983 became licensed as a certified public accountant.

22. After running his own accounting firm for several years, Mr. Berry decided to enter the financial services industry. He has worked continuously in that profession since 1984.

23. In 1994, Mr. Berry joined the brokerage firm then known as Wheat First Butcher Singer. He opened that firm's office in Columbia, South Carolina, which was located in the office tower at 1901 Main Street. Over the years, Mr. Berry continued to provide financial services to clients from that building, although the name on the office suites changed as a result of numerous mergers and acquisitions in the securities industry.[1]

24. In 2001, when the brokerage firm was known as Wachovia Securities, Mr. Berry entered into a profit formula agreement with his employer. Under this arrangement, profit formula agreement brokers essentially ran their own financial services business under the Wachovia Securities umbrella. Profit formula agreement brokers reported to a separate management and compliance structure within Wachovia Securities. Mr. Berry's profit formula agreement business was called "Berry & Boan[2] Wealth Management." It received 75% of all fees generated by its advising activities, out of which the partnership covered all overhead expenses. Wachovia Securities calculated the costs of all support services provided by the firm and deducted these costs

[1]In 1997 Wheat First Butcher Singer was acquired by First Union Corporation and continued to do business under the name Wheat First Union. Thereafter, in 2001 the parent company of Wheat First Union merged with Wachovia Corporation with the brokerage business continuing under the name Wachovia Securities. In 2008, Wachovia was acquired by Wells Fargo and in 2009 the retail brokerage became known as Wells Fargo Advisors.

[2]Mr. Berry's partner from 2001 to 2013 was Reggie L. Boan.

from the Berry & Boan payout. The partnership also paid all employment related expenses for its registered sales assistants from its 75% portion of generated fees.

25. The Berry & Boan partnership was very successful and was among the biggest producers upon profit formula agreement brokers in South Carolina.

26. In 2009, as a result of the acquisition of Wachovia by Wells Fargo, Mr. Berry became an employee of the WFA Defendants. No changes were made to the profit formula agreement governing Mr. Berry's compensation.

27. After the Wells Fargo takeover, changes were made to the management structure. The specialized management and compliance team dedicated to profit formula agreement brokers was eliminated and their management transferred to general brokerage services. Spang was elevated from Regional Manager to State Manager. On information and belief, this promotion resulted in a salary increase from $400,000 to $1 million per year, which significantly increased cost was to be borne by brokers under his management, including Mr. Berry.

28. Under Wells Fargo, brokers, including profit formula agreement brokers like Mr. Berry, were pressured to cross-sell bank products to their securities clients. As a fee-based broker, Mr. Berry stood in a fiduciary relationship to his client and was legally required to put their interests above his own and above those of Defendants.

29. For example, Mr. Berry had a large number of wealthy clients who owned expensive homes free and clear of any mortgage debt. The bank products pushed by management included home equity lines of credit.

30. Mr. Berry came to believe that his clients did not want or need home equity lines of credit and that these products and other bank products pushed by Defendants were unsuitable for his clients, for whom he was acting as a fiduciary financial advisor. He therefore declined to

cross-sell such products to his clients and told Defendants that he would be violating his duties under the securities laws and regulations and as a fiduciary if he urged clients to purchase such unneeded, unwanted and unsuitable products. During each subsequent performance review Mr. Berry was chastised for his refusal to cross-sell these and other bank products to his clients.

31. On information and belief, the WFA Defendants had an undisclosed policy to undercut brokers with profit formula agreements, which was designed to force them either to become "branch brokers" or to leave WFA without their client base. Both of these outcomes would increase profits for the Defendants. This scheme included gradual increases to the overhead expenses and imposing other roadblocks and expenses upon employees like Mr. Berry, as they attempted to serve their clients, all of which were designed to make the profit formula agreements more costly and less remunerative and to drive brokers like Mr. Berry out of the arrangement.

32. Periodically, Mr. Berry utilized his accounting skills to analyze profit and loss statements for his compensation under the profit formula agreement with the WFA Defendants. In or around 2013, he noticed that the expenses charged by the WFA Defendants had drastically increased, doubling and trebling in some categories.

33. Mr. Berry expressed concern to and sought information from the WFA Defendants about the reasons for these inexplicable changes. Spang, on behalf of the WFA Defendants, told Mr. Berry in essence that the increased expenses were non-negotiable and could not be questioned. Sprang further pressured Mr. Berry to forego the profit formula agreement and become a "branch broker."

34. Mr. Berry also experienced difficulties in obtaining support services from the WFA Defendants needed to provide services to existing clients and to grow his client base.

35. Unbeknowst to Mr. Berry, as a result of his refusal to engage in improper cross-selling in violation of his duties under the securities laws and his expression of concerns about increased expenses under the profit formula agreements, Defendants marked Mr. Berry as a malcontent and a prime target for their scheme to eliminate profit formula agreement brokers.

36. Mr. Berry had dedicated his professional life to the brokerage firm which ultimately became the WFA Defendants. He was looking forward to his twenty year anniversary with the firm in 2014, a degree of success and loyalty which the WFA Defendants customarily rewarded with a gold watch. Despite this past commitment, Mr. Berry grew concerned by Defendants' insistence on improper and illegal cross-selling and their increasing attempts to undercut or destroy his status as a profit formula agreement broker. These concerns caused Mr. Berry to begin to take steps to devise a back-up plan to protect his interests and those of his clients if Defendants continued to demonstrate a willingness to sacrifice the rights of both brokers and clients to promote their corporate agenda.

37. WFA and its predecessor firms have been members of the Protocol for Broker Recruiting ("the Protocol") since January 2006. The Protocol recognizes that registered representatives, like Mr. Berry, sometimes wish to make a change in employment and sets forth guidelines under which they may do so without liability.

38. The Protocol expressly permits registered representatives, like Mr. Berry, to explore employment options with other brokerage firms, so long as the representative does not reveal client identities to any prospective employer.

39. In late 2013 and early 2014, Mr. Berry engaged in activities permitted by the Protocol and South Carolina law as a backstop to protect his interests and those of his clients.

None of these activities were inconsistent with nor interfered with the service of his clients who then held accounts with the WFA Defendants.

40. In January 2014, Mr. Berry was in the process of personally delivering to his clients leather-bound volumes of their financial planning information, including wills and insurance policies, as well as accounts with the WFA Defendants. These documents had been approved by compliance officials of the WFA Defendants and had been assembled in the WFA offices. Because of the size and geographic scope of Mr. Berry's client base, this was a multi-week project.

41. As of Monday, February 3, 2014, Mr. Berry had no plans to immediately terminate his relationship with WFA. His financial planning information delivery project was on-going; consequently, the WFA-compliance approved volumes for his next week of client appointments were already in his car. Mr. Berry's schedule for the following week, which included the client meetings for which he was in possession of the materials, was known to the WFA Defendants and Spang.

42. Unbeknownst to Mr. Berry, part of Defendants' scheme to eliminate profit formula agreement brokers was to force resignations at a time convenient to WFA and use the circumstances of the resignations to discredit the departing broker, so that the WFA Defendants could retain his or her client base.

43. On Monday, February 3, 2014, Mr. Berry was called into the office by Spang. When he entered the office, Mr. Berry had no immediate intention of leaving WFA.

44. Immediately upon Mr. Berry's entry into the office, Spang began browbeating and mistreating Mr. Berry, accusing him of wrongdoing. Mr. Berry denied that he had any present intent to leave WFA, but was planning to continue his previously WFA-approved efforts to deliver client financial information volumes. Spang continued to berate Mr. Berry and told him that his

options were immediate resignation or being fired. As a consequence, Mr. Berry felt that he had no choice but to immediately resign, not realized that he had been being baited into this course of conduct.

45. Continuing Defendants' scheme to use forced resignations to discredit profit formula agreement brokers like Mr. Berry, Spang refused to allow Mr. Berry to voluntarily retrieve the client financial information volumes from his vehicle and instead insisted on taking them back himself.

46. Mr. Berry was not even allowed to remove his own personal belongings from the WFA offices.

47. In the months that followed Mr. Berry's departure from WFA, Mr. Berry began to hear from former co-workers and former and current clients that Spang and the WFA Defendants had contacted most, if not all, of Mr. Berry's former and/or current clients and made false and slanderous statements to those clients about Mr. Berry and the circumstances and reasons for Mr. Berry's departure from WFA.

48. The plain implication of comments by Spang and the WFA Defendants was that Mr. Berry had engaged in seriously illegal and/or criminal behavior, and that Mr. Berry is unethical, dishonest and/or incompetent.

49. Mr. Berry is further informed and believes that Spang and the WFA Defendants promoted Mr. Berry's former partner at WFA[3] as preferred alternative for Mr. Berry's clients, touting that individual as being an honest, trustworthy and competent financial advisor. Mr. Berry is informed and believes that WFA did not disclose to these clients that Wall conducted speculative

[3]In furtherance of the scheme to eliminate profit formula agreement brokers, Mr. Berry's former partner under the profit formula became a "branch broker" upon Mr. Berry's departure from WFA.

and excessive trading in his own accounts or that WFA had considered terminating Wall for these activities.

50. Securities regulations require financial advisors to be registered with a firm to sell or buy securities or otherwise provide financial advice. After his departure from WFA, Mr. Berry chose to affiliate himself with LPL Financial Corporation ("LPL"), which is also a signatory to the Protocol on Broker Recruitment. Although he began the registration process with LPL immediately after his departure from WFA, Mr. Berry's registration was not accepted by regulatory authorities until several weeks later. Thus, for several weeks following his departure from WFA, Mr. Berry was prevented from contacting clients or providing financial advice. The WFA Defendants used this period while Mr. Berry was essentially frozen out of the financial service business to approach his clients. Mr. Berry alleges on information and belief that WFA failed to promptly cooperate with standard regulatory inquiries associated with the transfer of his registration for the purpose of delaying that transfer and interfering with Mr. Berry's rights under the Protocol to solicit clients following his departure from WFA.

51. In or around March 2016, Mr. Berry applied for an insurance licensure with Prudential Select Brokerage. At that time, Mr. Berry realized that the WFA Defendants had filed a Form U-5 which stated that Mr. Berry had been "permitted to resign" with the official WFA Termination Comment of "Branch office manager discovered several binders of customer information in the trunk of Mr. Perry's [sic] automobile," thus falsely implying that the reason for Mr. Berry's resignation was the wrongful possession of client information

52. Mr. Berry was shocked to learn of the language that the WFA Defendants had put on his Form U-5. Mr. Berry was rightfully in possession of the client information, as his intent

was to advance WFA's interests by providing service to those WFA clients, until it became obvious that he could not effectively do so, given the hostile work environment created by Spang.

53. During Mr. Berry's employment with WFA and each of its predecessor firms, he had never been disciplined for violation of any securities law, rule or regulation by either WFA or any regulatory body. Moreover, neither WFA nor any of its predecessor firms had ever indicated to Mr. Berry that he had violated any securities rules or regulations.

54. Mr. Berry had never been the subject of any customer complaints during the nearly two decades of his work for the WFA Defendants and their predecessor firms.

55. Although Mr. Berry was ultimately able to obtain an appointment with Prudential Select Brokerage, despite the false and defamatory information placed on his Form U-5 by the WFA Defendants, this license was delayed. As a result of this delay, Mr. Berry lost business opportunities.

56. As a result of the false and defamatory comment that the WFA Defendants put onto Mr. Berry's Form U-5, Mr. Berry has also experienced difficulties in obtaining licensure in Colorado, where his application has been pending since October 2016. As a result of this delay, Mr. Berry has lost and continues to lose business opportunities.

57. The false and defamatory statements that Spang and the WFA Defendants and their agents have made about Mr. Berry to his former clients and the false and defamatory comment that the WFA Defendants put onto Mr. Berry's Form U-5 have caused severe damage to Mr. Berry. Mr. Berry was unable to move a substantial portion of his client base to his new firm, which Mr. Berry estimates that Defendants' wrongful conduct has cost him hundreds of thousands of dollars yearly in lost revenue.

58. Further, the Form U-5 comment has caused and continues to cause ongoing damage to Mr. Berry's reputation with clients and ithin the industry. The Form U-5 comment also essentially prevents Mr. Berry from ever being able to find other employment within the securities industry, as most firms will not hire advisors who have adverse termination comments on their Form U-5.

59. The conduct complained of was done willfully, oppressively, and maliciously, and in conscious disregard of Mr. Berry's rights. Punitive damages are warranted.

FIRST CAUSE OF ACTION
WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY

60. Mr. Berry refers to and incorporates for all purposes each and all of the preceding allegations, as if set forth at length herein.

61. While Mr. Berry was an employee of the WFA Defendants, Defendants pressured him to cross-sell bank products to clients for whom he was acting in a fiduciary capacity. Mr. Berry came to believe that these bank products were not wanted or needed by his clients and that these products were unsuitable and not in the bests interests of his clients. He therefore declined to cross-sell such products and told Defendants that he would be violating his duties as a fiduciary and under the securities laws and regulations if he urged clients to purchase such unneeded, unwanted and unsuitable products.

62. Placing their own monetary interests above those of clients to whom they and Mr. Berry owed fiduciary duties, Defendants continued to pressure Mr. Berry to cross-sell such unsuitable products and criticized his refusals to sell them during his employment reviews.

63. Clear public policy mandates require fiduciaries like Mr. Berry and Defendants to put the interests of their clients before their own monetary objections and thus prohibit licensed

securities brokers like Mr. Berry and the WFA Defendants and also Defendant Spang from selling unsuitable products to clients and particularly to those to whom they owe fiduciary obligations.

64. Upon Mr. Berry's refusal to cross-sell unsuitable bank products to his fiduciary clients and his complaints to management about Defendants' internal policy and directive that he do so, Defendants targeted Mr. Berry for retribution and eventual termination;

65. Defendants, by and through Defendant Spang, in retribution for Mr. Berry's refusal to violate his fiduciary duties to his clients, employed and applied systematic pressure on Mr. Berry, including unreasonable conduct by Spang in the February 3, 2014 meeting, to force his resignation.

66. Defendants' wrongful acts and practices described above constituted a wrongful termination of Mr. Berry in violation of the public policy of this State.

67. Mr. Berry has suffered damages as a result of the aforementioned wrongful termination.

68. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, (2) consequential damages, (3) injunctive relief, including but not limited to an order requiring the correction of Mr. Berry's Form U-5 and CRD entries (4) punitive damages for in an amount to be determined by the finder of fact, (5) costs, (6) prejudgment interest, (7) and such other relief as is just, equitable, and proper

SECOND CAUSE OF ACTION
BREACH OF CONTRACT AND
COVENANT OF GOOD FAITH AND FAITH DEALING

69. Mr. Berry refers to and incorporates for all purposes each and all of the preceding allegations, as if set forth at length herein.

70. In or around 2001, the predecessors-in-interest of the WFA Defendants entered into both express agreements and implied agreements with Mr. Berry, as formalized in the profit formula agreement, which agreements were ratified and continued by the WFA Defendants. These agreements constituted contracts between the Mr. Berry and the WFA Defendants (hereinafter "the Agreements").

71. South Carolina law further implies a duty of good faith and fair dealing into every contract, including the profit formula agreement.

72. The WFA Defendants breached their Agreements with Mr. Berry in one or more of the following particulars:

A. Defendants engaged in a calculated plan to undercut Mr. Berry and force him out of the contractual profit formula agreement relationship, through deliberately unfair and deceptive actions, including but not limited to:

i. Defendants deliberately and intentionally misrepresented their true motivations and intentions with respect to brokers employed under profit formula agreements;

ii. Defendants imposed consistently escalating overhead costs and expenses that were not tied to actual costs and expenses but were instead designed to shrink Mr. Berry's profit margin to Defendants' benefit;

iii. Defendants imposed unnecessary and punitive compliance roadblocks and expenses on Mr. Berry for routine client development and retention services; and

iv. Defendants, by and through Defendant Spang, employed and applied systematic pressure on Mr. Berry to forgo his contractual profit formula agreement in lieu of a "branch broker" position that would decrease Mr. Berry's salary to Defendants' benefit.

B. Defendants encouraged and pressured Mr. Berry to cross-sell unsuitable bank products to his fiduciary clients notwithstanding the fact that those products were unsuitable and not in the clients' best interest;

C. Defendants placed their respective monetary interests ahead of the interests of Mr. Berry and the clients;

D. Upon Mr. Berry's refusal to cross-sell unsuitable bank products to his fiduciary clients, and his complaints to management about Defendants' internal policy and directive that he do so, Defendants targeted Mr. Berry for retribution and eventual termination;

73. The WFA Defendants' acts and omissions constitute failures to abide by the terms of the Agreements and constitute breaches of the Agreements entered into with Mr. Berry. Mr. Berry has been directly and proximately damaged as a result of these breaches.

74. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, (2) consequential damages, (3) attorneys' fees, (4) costs, (5) prejudgment interest at the highest legal rate, and (6) such other relief as is just, equitable, and proper.

THIRD CAUSE OF ACTION
DEFAMATION

75. Mr. Berry refers to and incorporates for all purposes as if set forth at length herein, each and all of the preceding allegations.

76. The WFA Defendants made a written publication on Mr. Berry's Form U-5 which stated that he been "permitted to resign" because "Branch Office Manager discovered several binders of customer information in the trunk of Mr. Perry's [sic] automobile." This Form U-5 is a publicly available document. Further, the statement above also appears on Mr. Berry's BrokerCheck Report which is posted on the web-site of the Financial Industry Regulatory Authority ("FINRA") and is available to the public.

77. Spang and the WFA Defendants also made false and slanderous statements about Mr. Berry and the circumstances and reasons for Mr. Berry's departure from WFA to Mr. Berry's former and/or current clients.

78. The foregoing statements made by Spang and/or the WFA Defendants on Mr. Berry's Form U-5 and to Mr. Berry's current and former clients were false. Mr. Berry's departure from WFA had nothing to do with the client files, which were properly in his possession. Mr. Berry did not, at any time, wrongfully possess any client information. Instead, Defendants had targeted Mr. Berry for retribution and eventual termination as a result of his refusal to improperly cross-sell unsuitable bank products to his fiduciary clients, his complaints to management about Defendants' internal policy and directive that he do so, and as part of Defendants' calculated plan to undercut Mr. Berry and force him out of the contractual profit formula agreement relationship.

79. Defendants' statements on Mr. Berry's Form U-5 and to Mr. Berry's current and former clients were defamatory. The plain meaning of the Form U-5 statement is that Mr. Berry was wrongfully in possession of client information to which he was not entitled. Essentially, it charges Mr. Berry with having appropriated client information or attempted to have appropriated WFA client information. This is a highly damaging charge of egregious misconduct that negatively reflects on Mr. Berry's integrity and honesty. It indicates that Mr. Berry is an untrustworthy individual who engaged in serious violation of the Protocol against WFA. Similarly, statements to Mr. Berry's current and former clients also plainly implied that Mr. Berry had engaged in seriously illegal and/or criminal behavior, and that Mr. Berry is unethical, dishonest and/or incompetent.

80. The false and defamatory statement made on Mr. Berry's Form U-5 has been particularly injurious to Mr. Berry. It indicates that Mr. Berry is a dishonest person who stole or

tried to wrongfully appropriate client information from WFA. WFA's false and defamatory statement on Mr. Berry's Form U-5 has damaged Mr. Berry. He has suffered a substantial decrease in income as a result. The statement on the Form U-5 has also continues to deprive Mr. Berry of other opportunities.

81. Defendants' defamatory statements to Mr. Berry's current and former clients have also damaged Mr. Berry's reputation and his ability to keep former clients and identify new ones.

82. The conduct complained of was done willfully, oppressively, and maliciously, and in conscious disregard of Mr. Berry's rights. Punitive damages are warranted.

83. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, (2) consequential damages, (3) injunctive relief, including but not limited to an order requiring the correction of Mr. Berry's Form U-5 and CRD entries (4) punitive damages for Defendants' defamation of his character in an amount to be determined by the finder of fact, (5) costs, (6) prejudgment interest, (7) and such other relief as is just, equitable, and proper

FOURTH CAUSE OF ACTION
VIOLATION OF SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT
(S.C. CODE ANN. § 39-5-10 *et seq.*)

84. Mr. Berry refers to and incorporates for all purposes each and all of the preceding allegations, as if set forth at length herein.

85. Defendants engaged in an unfair method of competition and/or an unfair or deceptive act or practice in the conduct of trade or commerce.

86. Defendants engaged in a calculated plan to undercut Mr. Berry and force him out of the contractual profit formula agreement relationship, through deliberately unfair and deceptive actions, including but not limited to:

A. Defendants deliberately and intentionally misrepresented their true motivations and intentions with respect to brokers employed under profit formula agreements;

B. Defendants imposed consistently escalating overhead costs and expenses that were not tied to actual costs and expenses but were instead designed to shrink Mr. Berry's profit margin to Defendants' benefit;

C. Defendants imposed unnecessary and punitive compliance roadblocks and expenses on Mr. Berry for routine client development and retention services; and

D. Defendants, by and through Defendant Spang, employed and applied systematic pressure on Mr. Berry to forgo his contractual profit formula agreement in lieu of a "branch broker" position that would decrease Mr. Berry's salary to Defendants' benefit.

87. Defendants encouraged and pressured Mr. Berry to cross-sell unsuitable bank products to his fiduciary clients notwithstanding the fact that those products were unsuitable and not in the clients' best interest.

88. Defendants placed their respective monetary interests ahead of the interests of Mr. Berry and the clients;

89. Upon Mr. Berry's refusal to cross-sell unsuitable bank products to his fiduciary clients, and his complaints to management about Defendants' internal policy and directive that he do so, Defendants targeted Mr. Berry for retribution and eventual termination;

90. Defendants violated provisions of the Protocol by discouraging and ultimately punishing Mr. Berry for taking precautionary pre-termination actions in both his and his clients' best interests;

91. Upon Mr. Berry's forced resignation, Defendants unfairly and deceptively

A. Placed false and defamatory information on Mr. Berry's Form U-5, which *inter alia* violated FINRA Regulatory Notice 10-39 by including inaccurate and misleading details when responding to the Form U-5 questions regarding Mr. Berry's voluntary resignation from WFA thus preventing reasonable persons from understand the true circumstances of the termination of his employment;

B. Made false and defamatory statements about Mr. Berry to his current and former clients regarding his professional reputation and good name; and

C. Unfairly delayed Mr. Berry's registration with his new brokerage firm,

92. Defendants falsely promoted another broker to Mr. Berry's clients, touting its preferred alternative as being an honest, trustworthy and competent alternative to Mr. Berry, despite Defendants' direct knowledge of a history of improper, excessive and speculative trading by its preferred replacement.

93. The unfair and deceptive acts and practices committed by Defendants in the conduct of its trade and commerce had an impact upon the public interest, in that they resulted in inclusion of false, misleading, slanderous, and disparaging statements in publicly available documents, including but not limited the BrokerCheck Report on Mr. Berry and in the dissemination of such statements to many of Mr. Berry's former clients.

94. Such unfair acts and practices constitute a violation of the Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 et seq. (1976) (as amended).

95. Defendants' unfair acts and practices described above constituted willful, intentional, and knowing violations of the Unfair Trade Practices Act.

96. Mr. Berry has suffered damages as a result of the aforementioned unfair and deceptive acts and practices of Defendants in that he has suffered loss of business opportunities.

97. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, (2) consequential damages, (3) injunctive relief, including but not limited to an order requiring the correction of Mr. Berry's Form U-5 and CRD entries (4) treble damages as a result of Defendants' intentional conduct, in an amount to be determined by the finder of fact, (5) costs, (6) attorneys fees, (7) prejudgment interest, and (8) such other relief as is just, equitable, and proper.

FIFTH CAUSE OF ACTION
BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACT

98. Mr. Berry refers to and incorporates for all purposes each and all of the preceding allegations, as if set forth at length herein.

99. As an employee of WFA and pursuant to the profit formula agreement with the WFA Defendants, the WFA Defendants owed him a duty of good faith and fair dealing.

100. The WFA Defendants' wrongful and defamatory misconduct, actions and inactions, as alleged herein, including but not limited to the allegations contained in ¶72 *supra*, constitute a failure to abide by the terms of the WFA Defendants' contracts with Mr. Berry and constitute a breach of these agreements entered into with Mr. Berry. Mr. Berry has been directly and proximately damaged as a result of these breaches.

101. Moreover, in breaching the Agreements with Mr. Berry, the WFA Defendants exhibited a fraudulent intent relating to those breaches.

102. Defendant's breaches of the Agreements were accompanied by fraudulent acts and/or omissions on the part of WFA in one or more of the following particulars:

A. Upon Mr. Berry's forced resignation, Defendants unfairly and deceptively placed false and defamatory information on Mr. Berry's Form U-5;

B. Upon Mr. Berry's forced resignation, Defendants and their agents, including but not limited to Defendant Spang, unfairly and deceptively made false and defamatory statements to Mr. Berry current and former clients regarding his professional reputation and good name;

C. Upon Mr. Berry's forced resignation, Defendants and their agents, including but not limited to Defendant Spang, unfairly delayed Mr. Berry's registration with his new brokerage firm,

D. Defendants falsely promoted remaining employees as being an honest, trustworthy and competent alternative to Mr. Berry, despite its direct knowledge of a history of improper, excessive and speculative trading by its preferred replacement..

103. As a direct, consequent and proximate result of WFA's breaches of contract accompanied by fraudulent acts, Mr. Berry has suffered injury all in direct violation of the laws of the State of South Carolina.

104. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, (2) consequential damages, (3) punitive damages for the fraudulent acts accompanying the breaches of the Agreements, in an amount to be determined by the finder of fact, (4) costs, (5) prejudgment interest, (6) and such other relief as is just, equitable, and proper.

SIXTH CAUSE OF ACTION
INTENTIONAL INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATIONS

105. Mr. Berry refers to and incorporates for all purposes each and all of the preceding allegations, as if set forth at length herein.

106. Mr. Berry had existing and ongoing contractual relationships which were reasonably likely to continue with numerous customers who he had developed as clients for WFA.

107. Defendants, at all times herein relevant, knew of Mr. Berry's economic relationships with the customers who he had developed as clients for WFA.

108. Defendants intentionally disrupted Mr. Berry's economic relationships with the customers who he had developed as clients for WFA by putting a false and defamatory comment on the Form U-5 which it filed for Mr. Berry, by making false, defamatory and disparaging statements about Mr. Berry and Mr. Berry's honesty, integrity and competence to Mr. Berry's current and former customers and by making false, misleading and/or incomplete statements to Mr. Berry's former customers and clients about the honesty, integrity, ethics and competence of their preferred replacement broker, whom WFA knew to have a history of imprudent, excessive and speculative trading in his own accounts.

109. Defendants knew, or reasonably should have known, that their wrongful conduct was certain or substantially certain to result in a disruption of Mr. Berry's contractual relations with his customers and indeed, were designed to do so.

110. As a direct and proximate result of Defendants' conduct, as alleged herein, many of Mr. Berry's customers ceased to do business with Mr. Berry. Mr. Berry was unable to retain a significant portion of his client base after departing from WFA.

111. As a direct and proximate result of Defendants' intentional interference with his existing and prospective contractual relations, Mr. Berry has suffered damages.

112. WFA's conduct of WFA, in intentionally interfering with Mr. Berry's existing and prospective contractual relations, as set forth above, was malicious, willful, despicable and oppressive. Punitive damages are warranted.

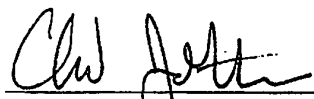
113. As a direct result of the false statement placed on the Form U-5 and other wrongful conduct by Defendants, Mr. Berry has been unable to consummate additional business relations since his departure from WFA.

114. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, (2) consequential damages, (3) injunctive relief, including but not limited to an order requiring the correction of Mr. Berry's Form U-5 and CRD entries (4) punitive damages for Defendants' intentional interference with his business relationships, in an amount to be determined by the finder of fact, (5) costs, (6) prejudgment interest, (7) and such other relief as is just, equitable, and proper

WHEREFORE, Plaintiff Robert F. Berry prays for relief as follows:

1. For compensatory damages, including, but not limited to, back pay and front pay, in a sum according to proof;
2. For disgorgement of WFA's unjustly acquired profits generated as a result of its wrongful conduct;
3. For an order directing the expungement of the false and defamatory statements regarding his termination from WFA on his Form U-5;
4. For punitive damages in a sum sufficient to serve as an example to deter and punish WFA for its wrongful conduct;
5. For reasonable attorneys' fees pursuant to S.C. Code Ann. § 39-5-140(a);
6. For statutory treble damages;
7. For costs incurred herein; and
8. For such other and further relief as this panel may deem just and proper.

[SIGNATURE PAGE FOLLOWS]



Mitchell Willoughby, Esquire, Esquire
Elizabeth Zeck, Esquire
Chad N. Johnston, Esquire
WILLOUGHBY & HOEFER, P.A.
Post Office Box 8416
Columbia, South Carolina 29202
Telephone Number: 803-252-3300
mwilloughby@willoughbyhoefer.com
ezeck@willoughbyhoefer.com
cjohnston@willoughbyhoefer.com

Attorneys for Robert F. Berry

This 2nd day February 2017
Columbia, South Carolina

COPY

FILED
2017 FEB 23 PM 4:35
LISA COMER
CLERK OF COURT
LEXINGTON, SC

STATE OF SOUTH CAROLINA)	IN THE COURT OF COMMON PLEAS
)	
COUNTY OF LEXINGTON)	ELEVENTH JUDICIAL CIRCUIT
)	
ROBERT F. BERRY,)	Civil Action No. 2017-CP-32-00397
Plaintiff,)	
)	
vs.)	**PLAINTIFF'S FIRST AMENDED COMPLAINT (Jury Trial Demanded)**
)	
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.,)	
)	
Defendants.)	

Plaintiff Robert F. Berry ("Mr. Berry") complains of Defendants Scott A. Spang ("Defendant Spang"), Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, and Wachovia Securities Financial Holdings, LLC, (collectively "the WFA Defendants"), Wells Fargo & Company, and Wells Fargo Bank, N.A. (collectively "the Wells Fargo Bank Defendants"[1], and defendants are collectively referred to as "Defendants"), and respectfully alleges as follows:

SUMMARY OF CASE

1. This is a claim for damages brought by Mr. Berry, formerly a Wealth Manager and Senior Vice President with Defendant Wells Fargo Advisors, LLC, arising from Defendants' deliberate sabotage and breach of Mr. Berry's long-standing profit formula agreement with the WFA Defendants and their predecessors, their sabotage and breach of his implied agreements with

[1]The WFA Defendants and the Wells Fargo Bank Defendants are collectively referred to as "the Corporate Defendants."

all Defendants, and their collective, coordinated, and conspiratorial tortious, deliberate, unfair, deceptive, deceitful, and fraudulent conduct towards Mr. Berry to sabotage his economic well-being, his then current employment, his future economic opportunity, and his professional reputation within the wealth advisory community, with regulators, with other providers of financial services, and with his current clients and potential clients.

2. The Wells Fargo Defendants implemented a fraudulent scam to illegally increase the earnings and stock price of their corporate parent, Defendant Wells Fargo & Company, by aggressively pushing the employees of all subsidiary corporations, including Mr. Berry, to sell Wells Fargo products and thereby increase their cross-selling numbers. The scheme was orchestrated by the leadership of all Corporate Defendants and was actively participated in and aggressively supported, advanced, and implemented by Defendant Spang. The scam included selling Wells Fargo customers an average of eight accounts/products per person regardless of whether the products were wanted, needed, or in the best interests of the customers. This fraudulent scam was perpetrated among all subsidiaries and pushed to Wells Fargo employees, who, in many cases, then cross-sold Wells Fargo products to unsuspecting clients.

3. The fraudulent scheme was founded on unadulterated greed and unlawful conduct and was designed to fraudulently increase Wells Fargo's stock price and earnings, support massive salaries and leadership overrides, and generate massive bonuses. Employees and wealth advisors including Mr. Berry were directed to aggressively cross-sell products to their customers even when not needed or otherwise in the best interests of customers. Refusal and/or failure to cooperate resulted in being targeted by management for retribution. Mr. Berry and his productive career of nearly 20 years with Wells Fargo and its predecessors, as well as his intended future career with Wells Fargo Advisors for an additional 15 years or more, were targeted by the Corporate

Defendants and Defendant Spang for retribution and to set an example for all other employees of the ruthless treatment that would be meted out to anyone who dared not embrace this deceptive, deceitful, and illegal scam being perpetrated upon unsuspecting clients. In sum, Mr. Berry was a casualty of this illegal scam and was belittled, derided, mistreated, defamed, and seriously damaged in furtherance of the scam.

4. Wells Fargo was famous for cross-selling, which is pushing existing customers to open more accounts and buy more products. Cross-selling is one of the main reasons that Wells Fargo has become one of the most valuable banks in the world. Wells Fargo measures cross-selling by the number of different accounts and/or products a customer has with Wells Fargo. In multiple conference calls, Wells Fargo's corporate leadership cited the company's cross-selling success as a principal reason undergirding its earnings and share price.

5. Wells Fargo customers already held an average of six financial products, which Wells Fargo calls "solutions." This was more than the average bank, whose customers only owned three. However, Wells Fargo set a goal of eight accounts/products per customer, which was referred to internally as the "Gr-eight" initiative. To reach this goal, Wells Fargo placed knowingly unrealistic and impossible cross-selling initiatives on their employees.

6. Wells Fargo's fraudulent scam was established at the highest levels of management and directed toward employees with direct customer contact. By squeezing employees to the breaking point with unrealistic, improper, and illegal cross-selling and related strategies, management of Wells Fargo, including Defendant Spang, intended through their scam to deceitfully and deceptively increase earnings, drive up the price of the company's stock, and then skim off hundreds of millions of dollars into the pockets of upper management as payment for their devising, implementing, and running this deceitful and illegal enterprise.

7. In furtherance of their fraudulent, deceitful, and deceptive scam, Wells Fargo fired or forced resignations of employees who did not meet their impossible quotas or did not willingly participate in the scam. Adverse actions against employees who refused to participate were an essential part of the scam, as Wells Fargo pointed to their hapless fates to "motivate" remaining employees to continue to cross-sell.

8. Mr. Berry, a conscientious employee was a victim of this scheme because he refused to cross-sell Wells Fargo products when doing so violated his fiduciary obligation to his clients. In doing so, Mr. Berry was chastised by Defendants for resisting their demands that he "cross-sell" Wells Fargo products to his clients for whom he served as their fiduciary, products which the clients mostly did not want, did not need, and which were not in their best interests. He also expressed concern and attempted to seek information about the reasons for the inexplicable, unilateral changes in the fulfillment of his profit formula agreement, which had been in effect and implemented, applied, and administered through a course and pattern of dealings since 2001.

9. As a result of Mr. Berry's actions, Defendants internally identified Mr. Berry as a person to be terminated for having the courage and temerity to speak up against the illegality of Defendants' cross-selling program and the injustice of the unilateral changes to his profit formula agreement, as well as other failures by Defendants to support Mr. Berry's efforts to properly serve his clients. Defendants' efforts intensified over several months and culminated in a February 3, 2014 meeting orchestrated and engineered by Defendants, during which Defendant Spang, on behalf of all Defendants, humiliated and berated Mr. Berry, thereby forcing his resignation by threatening that he would either resign or be immediately fired.

10. Thereafter, to further damage Mr. Berry, Defendants defamed his professional reputation and good name by filing a false and defamatory statement about his departure with

regulatory authorities, accusing him of unethical, unprofessional, and dishonest acts. Defendants knew that the false statement would damage Mr. Berry in his subsequent professional endeavors, but took the action specifically to promote Defendants' own interests in retaining Mr. Berry's client base, while achieving their real goals, namely, to punish Mr. Berry for not willingly and aggressively participating in their illegal cross-selling scheme and to terminate a longstanding payout arrangement that Defendants viewed as too lucrative in favor of Mr. Berry. These illegal, false and deceptive practices by Defendants seriously harmed Plaintiff as was Defendants' specific and deliberate intent.

11. This complaint seeks actual damages, attorneys' fees, costs, treble damages, punitive damages, and injunctive relief in compensation for those wrongful acts.

PARTIES

12. Plaintiff Robert F. Berry is, and at all times herein relevant was, an individual residing in the County of Lexington, South Carolina.

13. Upon information and belief, defendant Wells Fargo Clearing Services, LLC is, and at all times relevant was, a Delaware limited liability company with its principal place of business in St. Louis, Missouri, and is a successor-in-interest to defendants Wells Fargo Advisors, LLC, which is, and at all times relevant was also, a Delaware limited liability company with its principal place of business in St. Louis, Missouri.

14. Upon information and belief, defendant Wachovia Securities Financial Holdings, LLC is, and at all times relevant was, a Delaware limited liability company with its principal place of business in Richmond, Virginia, and at all times relevant was the parent company of defendant Wells Fargo Clearing Services, LLC, and Wells Fargo Advisors, LLC.

15. Upon information and belief, Wells Fargo Clearing Services, LLC, and Wells Fargo Advisors, LLC, are registered to do business in South Carolina and are in good standing with the South Carolina Secretary of State.

16. Defendants Wells Fargo Clearing Services, LLC, Wells Fargo Advisors, LLC, and Wachovia Securities Financial Holdings, LLC are collectively referred to in this Complaint as "the WFA Defendants."

17. The WFA Defendants engage in continuous and systematic activities within the State of South Carolina, including the use of the courts of this State to enforce contractual and other rights against citizens of South Carolina. The WFA Defendants presently conduct business and, at all relevant times, conducted business and performed acts in Lexington County, South Carolina and have sufficient contacts and business within Lexington County, South Carolina so as to be subject to the *in personam* jurisdiction of this Court pursuant to the laws of South Carolina.

18. Upon information and belief, Wells Fargo & Company is a financial holding corporation organized under the laws of the State of Delaware with its principal place of business in San Francisco, California. Wells Fargo & Company is a citizen and resident of the States of Delaware and California. Wells Fargo & Company has nearly $1.9 trillion in assets, and through its subsidiaries, provides banking, insurance, investment, mortgage, and consumer and commercial finance services through more than 9,000 locations. It is ranked 27th on Fortune Magazine's 2016 rankings of America's 500 largest corporations. It regularly transacts business throughout South Carolina and in Lexington County through, among other ways, the sale of its stock.

19. Upon information and belief, Defendant Wells Fargo Bank, N.A. is a national bank subsidiary of Defendant Wells Fargo & Company and is organized under the laws of the State of Delaware with its principal place of business in Sioux Falls, South Dakota. Wells Fargo Bank is

a citizen and resident of the States of Delaware and South Dakota. It is currently the world's second largest bank by market capitalization[2] and the third largest bank in the United States by assets. Upon information and belief, Defendants Wells Fargo & Company and Wells Fargo Bank, N.A., are registered to do business in South Carolina and are in good standing with the South Carolina Secretary of State.

20. Defendants Wells Fargo & Company and Wells Fargo Bank, N.A. are collectively referred to in this Complaint as "the Wells Fargo Bank Defendants."

21. The Wells Fargo Bank Defendants engage in continuous and systematic activities within the State of South Carolina, including the use of the courts of this State to enforce contractual and other rights against citizens of South Carolina. The Wells Fargo Bank Defendants presently conduct business and, at all relevant times, conducted business and performed acts in Lexington County, South Carolina and have sufficient contacts and business within Lexington County, South Carolina so as to be subject to the *in personam* jurisdiction of this Court pursuant to the laws of South Carolina.

22. Defendants Wells Fargo Clearing Services, LLC, Wells Fargo Advisors, LLC, and Wachovia Securities Financial Holdings, LLC, Wells Fargo & Company and Wells Fargo Bank, N.A. are collectively referred to in this Complaint as "the Corporate Defendants."

23. On information and belief, Defendant Scott A. Spang is a citizen and resident of the County of Fairfield in the State of South Carolina. At the times relevant to the claims herein, Scott was an agent, employee, servant and/or representative of the WFA Defendants assigned to their South Carolina headquarters based in the Main Street office in Columbia, South Carolina.

[2]In July 2015 Wells Fargo became the world's largest bank by market capitalization; however, it fell to second in September 2016 in the wake of the cross-selling and related deceptive and deceitful actions complained of herein.

Defendant Spang was the Senior Vice President and/or Managing Director and/or South Carolina Complex Manager in charge of all WFA brokerage and wealth management functions and business in South Carolina.

24. At all times relevant to this case, Defendant Spang was an agent, representative, servant and/or employee of the WFA Defendants and an agent, representative and servant of the Wells Fargo Bank Defendants. All of his actions, inactions, omissions and wrongdoing were performed for and on behalf of the Corporate Defendants in the course and scope of his agency and/or employment with the Corporate Defendants. Therefore, in addition to Defendant Spang's personal liability for his own actions, inactions and omissions, the Corporate Defendants are directly liable and also jointly, severally, fully accountable, and totally liable for the mismanagement, misconduct, wrongdoing, fraud, deceit, deception, and the illegal and tortious actions and/or omissions of Defendant Spang under agency law and common law principles of *respondeat superior*.

25. All claims arising under this Complaint are governed by the laws of the state of South Carolina. Venue is proper in Lexington County, South Carolina, because the Corporate Defendants have locations in and hold themselves out as doing business in that South Carolina county.

STATEMENT OF FACTS

26. Mr. Berry was born in Columbia, South Carolina. He is a 1974 graduate of the University of South Carolina, where he received a degree in accounting. Mr. Berry trained as an accountant and in 1983 became licensed as a certified public accountant.

27. After running his own accounting firm for several years, Mr. Berry decided to enter the financial services industry. He has worked continuously in that profession since 1984.

28. In 1994, Mr. Berry joined the brokerage firm then known as Wheat First Butcher Singer. He opened that firm's office in Columbia, South Carolina, which was located in the office tower at 1901 Main Street. Over the years, Mr. Berry continued to provide financial services to clients from that building, although the name on the office suites changed as a result of numerous mergers and acquisitions in the securities industry.[3]

29. In 2001, when the brokerage firm was known as Wachovia Securities, Mr. Berry entered into a profit formula agreement with his employer. Under this arrangement, profit formula agreement advisors essentially ran their own financial services business under the Wachovia Securities umbrella. Profit formula agreement advisors reported to a separate management and compliance structure within Wachovia Securities. Mr. Berry's profit formula agreement business was called "Berry & Boan[4] Wealth Management." Berry & Boan received 75% of all fees generated by its advising activities, out of which the partnership covered certain overhead expenses. Wachovia Securities calculated and accounted for the recoverable costs of certain services provided by the firm and deducted these costs from the Berry & Boan payout. The course of dealings during the period of 2001 through 2008 established and defined the payout arrangement that was agreed to under the profit formula agreement Mr. Berry had with Wachovia Securities.

30. The Berry & Boan partnership was very successful and was among the biggest producers among profit formula agreement advisors in South Carolina.

[3]In 1997 Wheat First Butcher Singer was acquired by First Union Corporation and continued to do business under the name Wheat First Union. Thereafter, in 2001 the parent company of Wheat First Union merged with Wachovia Corporation with the brokerage business continuing under the name Wachovia Securities. In 2008, Wachovia was acquired by Wells Fargo and in 2009 the retail brokerage became known as Wells Fargo Advisors.

[4]Mr. Berry's partner from 2001 to 2013 was Reggie L. Boan.

31. In 2009, as a result of the acquisition of Wachovia by Wells Fargo, Mr. Berry became an employee of the WFA Defendants. No changes were made to the profit formula agreement governing Mr. Berry's compensation, and the WFA Defendants were obligated in good faith to abide by the agreement. Likewise, Defendant Spang, in his management role for the Corporate Defendants and as Mr. Berry's direct supervisor, was obligated to implement, carryout, and fairly administer the terms of the profit formula agreement that Mr. Berry had with the WFA Defendants in accordance with its terms and consistent with the prior course of dealings under the agreement.

32. After the Wells Fargo takeover, changes were made to the management structure. The specialized management and compliance team dedicated to profit formula agreement advisors was eliminated and their management transferred to general brokerage services. Defendant Spang was elevated from Regional Manager to State Manager. On information and belief, this promotion resulted in a salary increase from $400,000 to $1 million per year as well as certain overrides and bank's incentive. Defendant Spang's salary increase was part and parcel of the overall scam as it incentivized Defendant Spang to force the cross-selling program onto his subordinates. In furtherance of the scam, it also significantly increased costs, all of which were to be borne by advisors under Defendant Spang's management, including Mr. Berry. This action was taken unilaterally by the Corporate Defendants and Defendant Spang, without input from or consent by Mr. Berry. He was expected to pay up and shut up, or else.

33. Under Wells Fargo, brokers and advisors, including profit formula agreement advisors like Mr. Berry, were pressured to cross-sell Wells Fargo products to their clients. These products included, but were not limited to, credit cards, certificates of deposit, checking and

savings accounts, home equity loans, business loans, insurance products, and/or proprietary mutual funds.

34. As a fee-based advisor, Mr. Berry and Defendants stood in a fiduciary relationship to his clients. As such, Mr. Berry and Defendants were legally required to put the clients' interests above the interest of Mr. Berry and Defendants.

35. Mr. Berry came to believe that the Wells Fargo products he was directed to cross-sell were not needed or wanted by most of his clients. Moreover, in his role as a fiduciary advisor, Mr. Berry should not, nor should Defendants require or permit Mr. Berry to, recommend products to his clients which were not the best and/or least expensive or otherwise in the best interest of the clients. In most cases, the Wells Fargo products (including, but not limited to, credit cards, savings accounts, home equity lines of credit, business loans, and proprietary mutual funds) were not in the best interests of his clients for a variety of reasons including cost, need, preference, and suitability.

36. Mr. Berry therefore declined to cross-sell such products to all of his clients and told Defendants that he would be violating his duties under the governing laws and regulations and under his duties as a fiduciary if he urged clients to purchase unneeded and unwanted products not in their best interests.

37. On information and belief, Defendant Spang received overrides or a percentage of fees paid to brokers and advisors under his management, including profit formula advisors like Mr. Berry, for the sale of Wells Fargo products, and thus, he had a personal incentive to push and direct Mr. Berry to sell Wells Fargo products regardless of whether such products were needed or wanted by or were suitable for, much less in the best interests of, Mr. Berry's clients or whether

their sale was otherwise consistent with Mr. Berry's and Defendants' fiduciary obligations to those clients.

38. During each subsequent performance review, Defendant Spang, on his own behalf as well as on behalf of the Wells Fargo Defendants, repeatedly chastised Mr. Berry for his refusal to cross-sell Wells Fargo products to his clients and refusal to voluntarily terminate his profit formula agreement. Defendant Spang specifically criticized Mr. Berry for running the "cheapest" business of any of the profit formula advisors under his (Defendant Spang's) management. Defendant Spang complained that he (Defendant Spang) made the least amount of money from Mr. Berry, even though Mr. Berry was one of the largest, if not the largest, producers in South Carolina. In fact, Mr. Berry's business was efficient and designed to provide excellent services to clients while providing them with products that were in their best interest. Defendant Spang, on his own behalf and on behalf of the Corporate Defendants, was displeased with Mr. Berry's responsible fiduciary approach; rather than Defendant Spang fulfilling his own fiduciary duties and that of the Corporate Defendants, he continued to demand Mr. Berry's participation in the ongoing scam regardless of Mr. Berry's clients' needs or best interest. In sum, the only interest for which Defendant Spang and the other Defendants expressed care and concern was their own.

39. On information and belief, Defendants had an undisclosed policy to undercut advisors with profit formula agreements, which was designed to force them either to become "branch brokers" or to leave WFA without their client base. Both of these outcomes would increase profits for Defendants. This scheme included gradual unilateral increases to the overhead expenses as well as imposing other roadblocks and expenses upon employees like Mr. Berry, as they attempted to serve their clients, all of which were designed to make the profit formula

agreements more costly and difficult, as well as less remunerative and to drive advisors like Mr. Berry out of the arrangement.

40. On information and belief, Defendant Spang received a larger override on fees generated by "branch brokers" under his management than he received for those generated by profit formula advisors like Mr. Berry. He thus had a personal incentive to push Mr. Berry to abandon his rights under the profit formula agreement with the Wells Fargo Defendants.

41. In or around 2013, Mr. Berry noticed that the expenses charged against his earnings by the WFA Defendants had drastically increased, doubling and trebling in some categories.

42. Mr. Berry expressed concern to and sought information from Defendant Spang and the WFA Defendants about the reasons for these inexplicable changes. Defendant Spang, on behalf of the WFA Defendants, told Mr. Berry in essence that the increased expenses were non-negotiable and could not be questioned. Defendant Spang again pressured Mr. Berry to forego the profit formula agreement and become a "branch broker," in a continued effort by Defendant Spang to further the deceit and deception being perpetrated upon Mr. Berry by all Defendants.

43. Mr. Berry also experienced difficulties in obtaining support services from the WFA Defendants needed to provide services to existing clients and to grow his client base.

44. Unbeknownst to Mr. Berry, as a result of his refusal to engage in improper cross-selling in violation of his duties to his clients and his expression of concerns about increased expenses under the profit formula agreement, Defendants targeted Mr. Berry for elimination in furtherance of their fraudulent, deceptive, and deceitful scheme to eliminate profit formula agreement advisors, including, and particularly, Mr. Berry.

45. Mr. Berry had dedicated the bulk of his professional life to the brokerage firm which ultimately became the WFA Defendants. He was looking forward to his twenty-year

anniversary with the firm in 2014, a degree of success and loyalty which the WFA Defendants customarily rewarded with a gold watch. Moreover, having successfully devoted nearly 20 years to essentially one firm, he was looking forward to continued success for himself and Defendants for the remainder of his working life. Despite this past commitment and future expectations, Mr. Berry grew concerned by Defendants' continued insistence on improper and illegal cross-selling and their increasing attempts to undercut or destroy his status as a profit formula agreement advisor. These concerns caused Mr. Berry to begin to take steps to devise a back-up plan to protect his interests and those of his clients if Defendants continued to demonstrate a willingness to sacrifice the rights of both advisors and clients to promote their corporate agenda.

46. WFA and its predecessor firms have been members of the Protocol for Broker Recruiting ("the Protocol") since January 2006. The Protocol recognizes that registered representatives, like Mr. Berry, are often recruited by competing firms and sometimes may change employment for a variety of reasons, including, as in Mr. Berry's case, a hostile and non-supportive work environment. Mr. Berry hoped that his work environment would improve, that Defendants would stop improperly shifting costs onto his business, and that the unreasonable demands and pressures to illegally "cross-sell" would be removed. However, as the inordinate pressure to either cross-sell or lose his livelihood continued – known at Wells Fargo as the "coach them up or coach them out" management strategy – he grew increasingly concerned that this situation was not going to change. He therefore felt forced to explore options to protect his business, his clients, his future opportunities to grow his business, and his need for income into the future and through retirement.

47. While the Protocol is designed to largely protect the interest of the member firms like the Corporate Defendants, it nevertheless expressly permits registered representatives, like Mr. Berry, to explore employment options with other brokerage firms, so long as the representative

does not reveal certain client information to any prospective employer. This exploration may be undertaken by the representative without liability or retribution if the guidelines are followed.

48. Even though Mr. Berry is not a party to the Protocol and is not bound to its terms, in late 2013 and early 2014, Mr. Berry nevertheless engaged in activities which he had been instructed by the Defendant were permitted by the Protocol. More importantly, his activities were sanctioned by South Carolina law. Those activities were undertaken by Mr. Berry not by preference but purely as a backstop to protect his interests and those of his clients. None of these activities were inconsistent with or interfered with the service of his clients who then held accounts with the WFA Defendants.

49. In January 2014, as part of his ongoing provision of wealth advisory services to his clients, Mr. Berry was in the process of personally delivering to his clients leather-bound volumes of their financial planning information, including wills, trusts and insurance policies, as well as information relating to their accounts with the WFA Defendants. These documents had been approved by compliance officials of the WFA Defendants and had been assembled in the WFA offices. Because of the size and geographic scope of Mr. Berry's client base, this was a multi-week project.

50. As of Monday, February 3, 2014, Mr. Berry had no plans to terminate his relationship with WFA. He remained hopeful that his concerns would be alleviated and his plan to work with WFA through retirement could be realized. His financial planning information delivery project was on-going; consequently, the WFA-compliance approved volumes for his next week of client appointments were already in his car. Mr. Berry's schedule for the following week, including the five client meetings for which he was in possession of client materials, was known to the WFA Defendants and Defendant Spang.

51. Unbeknownst to Mr. Berry, part of Defendants' deceptive and deceitful scheme to eliminate profit formula agreement advisors was to force resignations at a time convenient to Defendants and to use the circumstances of the resignations to discredit the departing broker, so that the WFA Defendants could retain his or her client base. Retention of Mr. Berry's client base and reassignment of those clients to a "branch broker" would also further Defendant Spang's personal interest in receiving the greater overrides payable from "branch broker" fees, thus improving Defendant Spang's own profits, as well as those of the Corporate Defendants.

52. On Monday, February 3, 2014, immediately upon Mr. Berry's entry into his office, Defendant Spang began browbeating and mistreating Mr. Berry, accusing him of wrongdoing. Mr. Berry denied that he had done anything wrong, indicated that he intended to continue his advisory work with Defendants, including his plan for the week to continue his previously WFA-approved efforts to deliver client financial information volumes and providing advisory services to those clients during the meetings. Defendant Spang continued to berate and belittle Mr. Berry and told him that he had two options: to immediately resign or be fired. As a consequence of the belittling, the berating, and the indignities and insults, Mr. Berry felt that he had no choice but to immediately resign, not then realizing that he was being baited into resigning as part of the ongoing deceptive and deceitful scam carried out by Defendants over many months.

53. In addition to the verbal assaults by Defendant Spang, on his own behalf and on behalf of the Corporate Defendants, he restrained, denied Mr. Berry freedom of movement, and otherwise prevented Mr. Berry from collecting his personal belongings (including several expensive art pieces) from his office as well as his files and even his office copy of the profit formula agreement.

54. Continuing Defendants' scheme to use forced resignations to discredit profit formula agreement advisors like Mr. Berry, Defendant Spang further restrained Mr. Berry from voluntarily retrieving the client financial information volumes from his vehicle. Instead, Defendant Spang used verbal force and physical intimidation to direct Mr. Berry out of his office to his personal vehicle in a nearby parking garage. Defendant Spang forced Mr. Berry to unlock the vehicle and by verbal force and physical intimidation detained and prevented him from entering it or from leaving the area until after Defendant Spang searched the vehicle and removed Mr. Berry's clients' records that he was scheduled to deliver to those clients.

55. Further, as part of the scheme to discredit Mr. Berry and eliminate him as a business competitor, Defendants initially retained all of Mr. Berry's personal belongings maintained in the WFA offices. Although some of his possessions were returned weeks later, some, including personal financial records and expensive art pieces, were permanently confiscated and either converted to the use of Defendants or discarded and destroyed, all to Mr. Berry's damage.

56. However, the personal indignities, insults, false imprisonment, and theft of his personal property were only part of the scheme to damage Mr. Berry. In the months that followed Mr. Berry's departure from WFA, Mr. Berry began to hear from former co-workers and former and current clients that Defendant Spang and the WFA Defendants had contacted most, if not all, of Mr. Berry's former and/or current clients and made false and slanderous statements to those clients about Mr. Berry and the circumstances and reasons for Mr. Berry's departure from WFA.

57. The plain implication of comments by Defendant Spang and the WFA Defendants was that Mr. Berry had engaged in seriously illegal and/or criminal behavior, and that Mr. Berry was unethical, dishonest and/or incompetent in his profession.

58. Mr. Berry is further informed and believes that Defendant Spang and the WFA Defendants promoted Mr. Berry's former partner at WFA[5] as the preferred alternative for Mr. Berry's clients, touting that individual as being an honest, trustworthy, and competent financial advisor. Mr. Berry is informed and believes that neither Defendant Spang nor WFA disclosed to these clients that their preferred alternative broker conducted speculative and excessive trading in his own accounts or that WFA had considered terminating that broker for these activities.

59. Financial advisors are required to be registered with a firm to sell or buy securities or otherwise provide financial advice. After his departure from WFA, Mr. Berry chose to affiliate himself with LPL Financial Corporation ("LPL"), which is also a signatory to the Protocol on Broker Recruitment. Mr. Berry alleges on information and belief that Defendant Spang and the other WFA Defendants failed to promptly cooperate with standard regulatory inquiries associated with the transfer of his registration for the purpose of delaying that transfer and interfering with Mr. Berry's rights under the Protocol to solicit clients following his departure from WFA. Although he began the registration process with LPL immediately after his departure from WFA, Mr. Berry's registration was delayed for several weeks. Thus, for several weeks following his departure from WFA, Mr. Berry was prevented from contacting clients or providing financial advice. Defendant Spang and the other WFA Defendants used this period while Mr. Berry was essentially frozen out of the financial services business to approach his clients. This wrongful delay was intended to harm and damage Mr. Berry and it did so.

[5]In furtherance of the scheme to eliminate profit formula agreement brokers and to allow Defendant Spang to collect the increased overrides payable from "branch broker," Mr. Berry's former partner under the profit formula became a "branch broker" upon Mr. Berry's departure from WFA.

60. In or around March 2016, Mr. Berry applied for an insurance licensure with Prudential Select Brokerage. At that time, Mr. Berry learned for the first time that the WFA Defendants had filed a Form U-5 termination notice stating that Mr. Berry had been "permitted to resign" with the official WFA Termination Comment of "Branch office manager discovered several binders of customer information in the trunk of Mr. Perry's [sic] automobile," thus falsely implying that the reason for Mr. Berry's resignation was the wrongful possession of client information.

61. Mr. Berry was shocked to learn of the language that the WFA Defendants had put on his official record. Mr. Berry was rightfully in possession of the client information, as his intent was to prudently service his clients who all maintained accounts with the WFA Defendants until it became obvious that he could not effectively do so, given the hostile work environment created by Defendant Spang and the Corporate Defendants.

62. During Mr. Berry's employment with WFA and each of its predecessor firms, he had never been disciplined for violation of any law, rule or regulation by either WFA or any regulatory body. Moreover, neither WFA nor any of its predecessor firms had ever indicated to Mr. Berry that he had violated any rules or regulations.

63. Mr. Berry had never been the subject of any customer complaints during the nearly two decades of his work for the WFA Defendants and their predecessor firms.

64. Although Mr. Berry was ultimately able to obtain an appointment with Prudential Select Brokerage, despite the false and defamatory information placed on his official record by the WFA Defendants, this license was delayed. As a result of this delay, Mr. Berry was damaged.

65. As a result of the false and defamatory comment that the WFA Defendants put onto Mr. Berry's official record, Mr. Berry has also experienced difficulties in obtaining licensure in

Colorado, where his application has been pending since October 2016. As a result of this delay, Mr. Berry has been damaged.

66. The false and defamatory statements that Defendant Spang and the WFA Defendants and their agents have made about Mr. Berry to his former clients and the false and defamatory comment that the WFA Defendants put onto Mr. Berry's official record have caused severe damage to Mr. Berry. Mr. Berry was unable to move a substantial portion of his client base to his new firm. Defendants' wrongful conduct has cost and continues to cost Mr. Berry hundreds of thousands of dollars yearly in lost revenue.

67. Further, the defamatory comments on his official record have caused and continues to cause ongoing damage to Mr. Berry's reputation with clients and within the industry. The defamatory comments also essentially prevent Mr. Berry from ever being able to find other employment within his profession, as most firms will not hire advisors who have adverse termination comments on their official record.

68. The conduct complained of was done willfully, oppressively, and maliciously, and in conscious disregard of Mr. Berry's rights. Punitive damages are warranted.

FIRST CAUSE OF ACTION
WRONGFUL TERMINATION IN VIOLATION OF PUBLIC POLICY

69. Mr. Berry refers to and incorporates for all purposes each and all of the allegations in this Complaint, as if repeated verbatim herein.

70. While Mr. Berry was an employee of the WFA Defendants, Defendants pressured him to cross-sell Wells Fargo products to clients for whom he was acting in a fiduciary capacity. Mr. Berry came to believe that these products were not wanted or needed by most of his clients and that these products were unsuitable and not in the bests interests of his clients. He therefore declined to cross-sell such products when appropriate and told Defendants that he would be

violating his duties as a fiduciary and under the certain laws and regulations if he urged clients to purchase unneeded, unwanted, and unsuitable products which were not in their best interests.

71. Placing their own monetary interests above those of clients to whom they and Mr. Berry owed fiduciary duties as well as other common law and statutory duties, Defendants continued to pressure Mr. Berry to cross-sell unsuitable products which were not in the best interests of his clients and criticized his refusals to sell them during his employment reviews.

72. Clear public policy mandates require fiduciaries like Mr. Berry and Defendants to put the interests of their clients before their own monetary interests and thus prohibit licensed financial advisors like Mr. Berry and the WFA Defendants and also Defendant Spang from selling to clients unsuitable products not in their best interests, despite fiduciary obligations owed to these clients.

73. Upon Mr. Berry's refusal to cross-sell to his fiduciary clients unsuitable products not in their best interests and his complaints to management about Defendants' internal policy and directive that he do so, Defendants targeted Mr. Berry for retribution and eventual termination;

74. Defendants, by and through Defendant Spang, in retribution for Mr. Berry's refusal to violate his fiduciary duties to his clients, employed and applied systematic pressure on Mr. Berry, culminating in the humiliating and unreasonable conduct by Defendant Spang in the February 3, 2014 meeting, to constructively fire Mr. Berry by forcing his resignation.

75. Defendants' wrongful acts and practices described above constituted a wrongful termination of Mr. Berry in violation of the public policy of this State.

76. Mr. Berry has suffered damages as a result of the aforementioned wrongful termination.

77. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, (2) consequential damages, (3) injunctive relief, including but not limited to an order requiring the correction of Mr. Berry's official record (4) punitive damages in an amount to be determined by the finder of fact, (5) costs, (6) prejudgment interest, (7) the reasonable attorneys' fees incurred to vindicate this egregious violation of state law and public policy, and (8) such other relief as is just, equitable, and proper.

SECOND CAUSE OF ACTION
BREACH OF CONTRACT AND COVENANT OF GOOD FAITH AND FAITH DEALING

78. Mr. Berry refers to and incorporates for all purposes each and all of the allegations in this Complaint, as if repeated verbatim herein.

79. In or around 2001, the predecessors-in-interest of the WFA Defendants entered into both express agreements and implied agreements with Mr. Berry, as formalized in the profit formula agreement, which agreements were ratified and continued by the WFA Defendants. These agreements constituted contracts between Mr. Berry and the WFA Defendants (hereinafter "the Agreements").

80. South Carolina law further implies a duty of good faith and fair dealing into every contract, including the profit formula agreement.

81. The WFA Defendants breached their Agreements with Mr. Berry in one or more of the following particulars, each and every one of which violate South Carolina's public policy and/or common and statutory law:

A. Defendants encouraged and pressured Mr. Berry to cross-sell Wells Fargo products to his fiduciary clients notwithstanding the fact that those products were unsuitable and not in the best interest of most of Mr. Berry's clients;

B. Defendants placed their respective monetary interests ahead of the interests of Mr. Berry and his clients;

C. Upon Mr. Berry's refusal to cross-sell to his fiduciary clients unsuitable products not in their best interests, and his complaints to management about Defendants' internal policy and directive that he do so, Defendants targeted Mr. Berry for retribution and eventual termination;

D. Defendants engaged in a calculated, deceitful, and deceptive scheme to undercut Mr. Berry and force him out of the contractual profit formula agreement relationship, through deliberately unfair and deceptive actions, including but not limited to:

i. Defendants deliberately and intentionally misrepresented their true motivations and intentions with respect to advisors employed under profit formula agreements;

ii. Defendants imposed consistently escalating overhead costs and expenses in breach of the profit formula agreement and for the specific purpose of reducing Mr. Berry's profit margin to Defendants' benefit and in furtherance of their deceitful and deceptive cross-selling scheme;

iii. Defendants imposed unnecessary and punitive compliance roadblocks and expenses on Mr. Berry for routine client development and retention services; and

iv. Defendants, by and through Defendant Spang, employed and applied systematic pressure on Mr. Berry to forgo his contractual profit formula

agreement in lieu of a "branch broker" position that would decrease Mr. Berry's salary to Defendants' benefit.

82. The WFA Defendants' acts and omissions constitute failures to abide by the terms of the Agreements and constitute breaches of the Agreements entered into with Mr. Berry. Mr. Berry has been directly and proximately damaged as a result of these breaches.

83. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, (2) consequential damages, (3) attorneys' fees, (4) costs, (5) prejudgment interest at the highest legal rate, and (6) such other relief as is just, equitable, and proper.

THIRD CAUSE OF ACTION
BREACH OF IMPLIED CONTRACT AND COVENANT OF GOOD FAITH AND FAITH DEALING

84. Mr. Berry refers to and incorporates for all purposes each and all of the allegations of this Complaint, as if repeated verbatim herein.

85. As part of the Agreements described *supra*, Defendants, including Defendant Spang, assumed and agreed to undertake the implied duties of faithful, fair, and accurate contract administration, implementation, and execution. These duties include obligations to fairly and impartially administer, implement, and execute the Agreements between Defendants and Mr. Berry, and to do so without deceitful, deceptive, fraudulent, unlawful, and dishonest purposes.

86. South Carolina law further implies a duty of good faith and fair dealing into every contract, including these implied agreements.

87. The WFA Defendants breached their duties under the implied agreements with Mr. Berry in one or more of the following particulars, each and every one of which violates South Carolina's public policy and/or common and statutory law:

A. Defendants encouraged and pressured Mr. Berry to cross-sell Wells Fargo products to his fiduciary clients notwithstanding the fact that those products were unsuitable and not in the best interest of most of Mr. Berry's clients;

B. Defendants placed their respective monetary interests ahead of the interests of Mr. Berry and his clients;

C. Upon Mr. Berry's refusal to cross-sell to his fiduciary clients unsuitable products not in their best interests, and his complaints to management about Defendants' internal policy and directive that he do so, Defendants targeted Mr. Berry for retribution and eventual termination;

D. Defendants engaged in a calculated, deceitful, and deceptive scheme to undercut Mr. Berry and force him out of the contractual profit formula agreement relationship, through deliberately unfair and deceptive actions, including but not limited to:

i. Defendants deliberately and intentionally misrepresented their true motivations and intentions with respect to advisors employed under profit formula agreements;

ii. Defendants imposed consistently escalating overhead costs and expenses in breach of the profit formula agreement and for the specific purpose of reducing Mr. Berry's profit margin to Defendants' benefit and in furtherance of their deceitful and deceptive cross-selling scheme;

iii. Defendants imposed unnecessary and punitive compliance roadblocks and expenses on Mr. Berry for routine client development and retention services; and

iv. Defendants, by and through Defendant Spang, employed and applied systematic pressure on Mr. Berry to forgo his contractual profit formula agreement in lieu of a "branch broker" position that would decrease Mr. Berry's salary to Defendants' benefit.

88. The WFA Defendants' acts and omissions constitute failures to abide by the implied agreements to fairly, faithfully, honestly, and impartially execute, implement, and administer the profit formula agreement and constitute breaches of the implied agreements entered into with Mr. Berry. Mr. Berry has been directly and proximately damaged as a result of these breaches.

89. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, (2) consequential damages, (3) attorneys' fees, (4) costs, (5) prejudgment interest at the highest legal rate, and (6) such other relief as is just, equitable, and proper.

FOURTH CAUSE OF ACTION
DEFAMATION

90. Mr. Berry refers to and incorporates for all purposes each and all of the allegations in this Complaint, as if repeated verbatim herein.

91. Defendant Spang, for his own purposes and on behalf of the other WFA Defendants made a written publication on Mr. Berry's official record which stated that he had been "permitted to resign" because "Branch Office Manager discovered several binders of customer information in the trunk of Mr. Perry's [sic] automobile." This official record is publicly available. Further, the statement above also appears on Mr. Berry's Broker Check Report which is posted on the web site of the Financial Industry Regulatory Authority ("FINRA") and is available to the public.

92. Defendant Spang and the WFA Defendants also made false and slanderous statements about Mr. Berry and the circumstances and reasons for Mr. Berry's departure from WFA to Mr. Berry's former and/or current clients.

93. The foregoing statements made by Defendant Spang and/or the WFA Defendants on Mr. Berry's official record and to Mr. Berry's current and former clients were false. Mr. Berry's constructive termination and forced resignation from WFA had nothing to do with the client files, which were properly in his possession. Mr. Berry did not, at any time, wrongfully possess any client information. Instead, Defendants had targeted Mr. Berry for retribution and eventual termination as a result of his refusal to improperly cross-sell to his fiduciary clients unsuitable Wells Fargo products not in their best interests, his complaints to management about Defendants' unlawful internal policy and their demand that he nevertheless cross-sell Wells Fargo products regardless of his concerns, and as part of Defendants' calculated deceptive and deceitful scheme to undercut Mr. Berry and force him out of the contractual profit formula agreement relationship.

94. Defendants' statements on Mr. Berry's official record, to Mr. Berry's current and former clients, and other advisors in the industry were defamatory. The plain meaning of the official record statement is that Mr. Berry was wrongfully in possession of client information to which he was not entitled. Essentially, it charges Mr. Berry with having appropriated client information or attempted to have appropriated client information. This is a highly damaging charge of egregious misconduct that Defendants crafted for the specific purpose of casting aspersion on Mr. Berry's integrity, honesty, and professional standing. Similarly, statements to Mr. Berry's current and former clients by Defendants also plainly implied that Mr. Berry had engaged in seriously illegal and/or criminal behavior, and that Mr. Berry was unethical, dishonest and/or incompetent.

95. The false and defamatory statement made on Mr. Berry's official record has been particularly injurious to Mr. Berry. Defendants' statement was designed to portray Mr. Berry as a dishonest person who stole or tried to wrongfully appropriate client information. WFA's false and defamatory statement on Mr. Berry's official record has damaged Mr. Berry. The statement on the official record also continues to deprive Mr. Berry of other business opportunities.

96. Defendants' defamatory statements to Mr. Berry's current and former clients have also damaged Mr. Berry's reputation, his professional standing, and his business.

97. The conduct complained of was done willfully, oppressively, and maliciously, and in conscious disregard of Mr. Berry's rights and in furtherance of the deceitful and deceptive scheme to discredit and damage Mr. Berry. Punitive damages are warranted.

98. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, including damages to his reputation, (2) consequential damages, (3) injunctive relief, including but not limited to an order requiring the correction of Mr. Berry's official record (4) punitive damages for Defendants' defamation of his character in an amount to be determined by the finder of fact, (5) costs, (6) prejudgment interest, (7) and such other relief as is just, equitable, and proper

FIFTH CAUSE OF ACTION
VIOLATION OF SOUTH CAROLINA UNFAIR TRADE PRACTICES ACT
(S.C. CODE ANN. § 39-5-10 *et seq.*)

99. Mr. Berry refers to and incorporates for all purposes each and all of the allegations in this Complaint, as if repeated verbatim herein.

100. Defendants engaged in an unfair method of competition and/or an unfair or deceptive act or practice in the conduct of trade or commerce in violation of South Carolina law.

101. Defendants engaged in a calculated plan to undercut Mr. Berry and force him out of the contractual profit formula agreement relationship, through deliberately unfair and deceptive actions, including but not limited to:

A. Defendants encouraged and pressured Mr. Berry to cross-sell Wells Fargo products to his fiduciary clients notwithstanding the fact that those products were unsuitable and not in the best interest of most of Mr. Berry's clients;

B. Defendants placed their respective monetary interests ahead of the interests of Mr. Berry and his clients;

C. Upon Mr. Berry's refusal to cross-sell to his fiduciary clients unsuitable products not in their best interests, and his complaints to management about Defendants' internal policy and directive that he do so, Defendants targeted Mr. Berry for retribution and eventual termination;

D. Defendants engaged in a calculated, deceitful, and deceptive scheme to undercut Mr. Berry and force him out of the contractual profit formula agreement relationship, through deliberately unfair and deceptive actions, including but not limited to:

i. Defendants deliberately and intentionally misrepresented their true motivations and intentions with respect to advisors employed under profit formula agreements;

ii. Defendants imposed consistently escalating overhead costs and expenses in breach of the profit formula agreement and for the specific purpose of reducing Mr. Berry's profit margin to Defendants' benefit and in furtherance of their deceitful and deceptive cross-selling scheme;

iii. Defendants imposed unnecessary and punitive compliance roadblocks and expenses on Mr. Berry for routine client development and retention services; and

iv. Defendants, by and through Defendant Spang, employed and applied systematic pressure on Mr. Berry to forgo his contractual profit formula agreement in lieu of a "branch broker" position that would decrease Mr. Berry's salary to Defendants' benefit.

E. Defendants instructed its advisors, including Mr. Berry, to follow the Protocol in pre-termination activities; then, in violation of industry standards, unfairly and deceptively in the conduct and practice of its trade or commerce, nevertheless targeted Mr. Berry for termination for, among other deceptive reasons, taking precautionary pre-termination actions. Defendants' unfair and deceptive act or practice in the conduct of its trade or commerce and in violation of industry standards, harmed clients, the public at large by engaging in deceptive and unfair principles of trade, and seriously damaged Mr. Berry as Defendants deliberately and maliciously intended;

F. Upon Mr. Berry's constructive termination and forced resignation, Defendants unfairly and deceptively in the conduct of its trade or commerce:

i. Placed false and defamatory information on Mr. Berry's official record with the specific intent to damage Mr. Berry in his profession and trade, and damage and discredit him as a competitor, in clear violation of fair and just principles of trade or commerce;

ii. In further violation of fair and just principles of trade or commerce, made false and defamatory statements about Mr. Berry to his current and former clients regarding his professional reputation and good name for the specific purpose of harming and discrediting Mr. Berry as a competitor and thereby improve Defendants opportunity for either taking clients or denying Mr. Berry the opportunity to retain his clients;

iii. In further violation of fair and just principles of trade or commerce, specifically converted to its own use and/or failed to return Mr. Berry's personal property and business files, for the specific purpose of gaining a competitive advantage in the conduct of its trade or commerce by making it more difficult for him to restart his business; and

iv. In further violation of fair and just principle of trade or commerce, unfairly delayed Mr. Berry's registration with his new brokerage firm for the specific purposes of gaining a competitive advantage in its trade or commerce by limiting Mr. Berry's ability to compete and by providing Defendants with the competitive time advantage of talking with clients first without Mr. Berry being able to respond and thereby give Defendants the unfair opportunity to malign Mr. Berry's professional standing to his clients, colleagues, peers and regulators and in so doing diminish Mr. Berry to the clients and others within the industry with whom he interacts for the conduct of his business.

102. Defendants falsely promoted another broker to Mr. Berry's clients, touting their preferred alternative as being an honest, trustworthy and competent alternative to Mr. Berry,

despite Defendants' direct knowledge of a history of improper, excessive and speculative trading by their preferred replacement.

103. Defendant Spang's involvement in the acts and omissions detailed in the preceding paragraphs were undertaken to advance his own personal interests to bring Mr. Berry's clients under the control of a "branch broker" thus allowing Defendant Spang to receive a larger override, bonus, and compensation either by forcing Mr. Berry to forego his rights under the profit formula agreement or by forcing Mr. Berry out entirely while retaining control over his clients.

104. The unfair and deceptive acts and practices committed by Defendants in the conduct of its trade or commerce were specifically designed to gain an unfair competitive advantage by (1) destroying of Mr. Berry's professional reputation, (2) damaging his business and his ability to compete because he was unwilling to cross-sell Wells Fargo products that were not in his clients best interests to buy, and (3) punishing him for refusing to allow Defendants to terminate and unilaterally alter his profit formula agreement and transfer his business to one of a branch broker, all for the unlawful and deceitful purpose of furthering Defendants' fraudulent profit generating scheme. These unfair and deceptive acts and practices committed by the Defendants in its trade or commerce had an impact upon the public interest in that they violated industry standards of just and fair principles of trade or commerce as they denied wealth management clients the investing public accurate and truthful information from which to make decisions, resulted in the inclusion of false, misleading, slanderous, and disparaging statements in publicly available documents, including but not limited to, the Broker Check Report on Mr. Berry, and disseminated and published such statements to many of Mr. Berry's former clients as well as to regulators, other financial institutions, and the public at large, all for the purpose of unfairly and deceptively gaining a competitive advantage and damaging Mr. Berry.

105. Such unfair and deceptive acts and practices constitute a violation of the Unfair Trade Practices Act, S.C. Code Ann. § 39-5-10 et seq. (1976) (as amended). Defendants' unfair and deceptive acts and practices described above constituted willful, intentional, and knowing violations of the Unfair Trade Practices Act.

106. Mr. Berry has suffered damages as a result of the aforementioned unfair and deceptive acts and practices of Defendants in that he has suffered loss of income, business opportunities, future income, and professional standing, among other losses and damages.

107. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, including damages to his reputation, (2) consequential damages, (3) injunctive relief, including but not limited to an order requiring the correction of Mr. Berry's official record (4) treble damages as a result of Defendants' intentional conduct, in an amount to be determined by the finder of fact, (5) costs, (6) attorneys' fees, (7) prejudgment interest, and (8) such other relief as is just, equitable, and proper.

SIXTH CAUSE OF ACTION
BREACH OF CONTRACT ACCOMPANIED BY FRAUDULENT ACT

108. Mr. Berry refers to and incorporates for all purposes each and all of the allegations in this Complaint, as if repeated verbatim herein.

109. As an employee of WFA and pursuant to the profit formula agreement with the WFA Defendants, the WFA Defendants owed him a duty of good faith and fair dealing.

110. The WFA Defendants' wrongful and defamatory misconduct, actions and inactions, as alleged herein, including but not limited to the allegations contained in ¶81 *supra*, constitute a failure to abide by the terms of the WFA Defendants' contracts with Mr. Berry and constitute a breach of these agreements entered into with Mr. Berry. Mr. Berry has been directly and proximately damaged as a result of these breaches.

111. Moreover, in breaching the Agreements with Mr. Berry, the WFA Defendants exhibited a fraudulent intent relating to those breaches.

112. Defendant's breaches of the Agreements were accompanied by fraudulent acts and/or omissions on the part of WFA, all acts being committed with dishonesty, fraud, and deceit as their essential purpose, in one or more of the following particulars:

A. Placed false and defamatory information on Mr. Berry's official record with the specific intent to damage Mr. Berry in his profession and trade, in clear violation of fair and just principles of trade or commerce and for the specific purpose to damage him as a competitor;

B. Made false and defamatory statements about Mr. Berry to his current and former clients regarding his professional reputation and good name for the specific purpose of harming and discrediting Mr. Berry as a competitor and thereby improving Defendants opportunity for either taking Mr. Berry's clients for their own financial benefit or denying Mr. Berry the opportunity to retain his clients to weaken him as an ongoing competitor;

C. Intentionally detained and/or failed to return Mr. Berry's personal property and business files, for the specific purpose of gaining a competitive advantage in the conduct of its trade or commerce by making it more difficult for him to restart his business; and

D. In violation of fair and just principles of trade or commerce, unfairly delayed Mr. Berry's registration with his new brokerage firm, for the specific purposes of gaining a competitive advantage in its trade or commerce by damaging Mr. Berry's ability to compete and by providing Defendants with the competitive

time advantage of talking with clients first without Mr. Berry being able to respond and thereby give Defendants the unfair opportunity to malign Mr. Berry's professional standing to his clients, colleagues, peers and regulators and in so doing diminish Mr. Berry to the clients and others within the industry with whom he interacts for the conduct of his business.

E. Mr. Berry is further informed and believes that Defendant Spang and the WFA Defendants promoted Mr. Berry's former partner at WFA as a preferred alternative for Mr. Berry's clients, touting that individual as being an honest, trustworthy, and competent financial advisor. Mr. Berry is informed and believes that neither Defendant Spang nor WFA disclosed to these clients that their preferred alternative broker conducted speculative and excessive trading in his own accounts or that WFA had considered terminating that broker for these activities.

113. As a direct, consequent and proximate result of WFA's breaches of contract accompanied by fraudulent acts, Mr. Berry has suffered injury all in direct violation of the laws of the State of South Carolina.

114. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, (2) consequential damages, (3) punitive damages for the fraudulent acts accompanying the breaches of the Agreements, in an amount to be determined by the finder of fact, (4) costs, (5) prejudgment interest, (6) and such other relief as is just, equitable, and proper.

SEVENTH CAUSE OF ACTION
INTENTIONAL INTERFERENCE WITH
PROSPECTIVE CONTRACTUAL RELATIONS
(Against Defendant Spang)

115. Mr. Berry refers to and incorporates for all purposes each and all of the allegations in this Complaint, as if repeated verbatim herein.

116. Mr. Berry had an existing and ongoing contractual relationship under which he intended to operate through retirement which was reasonably likely to continue with Wells Fargo Advisors, given his successful past.

117. Defendant Spang, at all times herein relevant, knew of Mr. Berry's economic relationship with Wells Fargo Advisors and the stellar results that Mr. Berry had achieved under this relationship for many years.

118. Defendant Spang intentionally disrupted Mr. Berry's economic relationship with Wells Fargo Advisors by engaging in a calculated plan to undercut Mr. Berry and force him out of the contractual profit formula agreement relationship, through deliberately unfair and deceptive actions, including but not limited to:

A. Defendant Spang deliberately and intentionally misrepresented his true motivations and intentions with respect to Mr. Berry's status as an advisor employed under profit formula agreements;

B. Defendant Spang imposed consistently escalating overhead costs and expenses in breach of the profit formula agreement and for the specific purpose of reducing Mr. Berry's profit margin to Defendants' benefit and in furtherance of the deceitful and deceptive cross-selling scheme;

C. Defendant Spang imposed unnecessary and punitive compliance roadblocks and expenses on Mr. Berry for client development and retention services; and

D. Defendant Spang employed and applied systematic pressure on Mr. Berry to forgo his contractual profit formula agreement in lieu of a "branch broker" position that would increase Defendant Spang's override compensation;

E. Defendant Spang encouraged and pressured Mr. Berry to cross-sell products to his fiduciary clients notwithstanding the fact that those products were unsuitable and not in the best interest of most of Mr. Berry's clients, because such sales would increase Defendant Spang's compensation;

F. Defendant Spang placed his own monetary interests ahead of the interests of Mr. Berry and his clients without care or concern for the best interest of the clients;

G. Upon Mr. Berry's refusal to cross-sell to his fiduciary clients unsuitable Wells Fargo products not in their best interests, his complaints about directives that he nevertheless must cross-sell unsuitable products to his clients, and his refusal to forego his rights as a profit formula advisor, Defendant Spang targeted Mr. Berry for retribution and eventual termination;

H. Defendant Spang orchestrated and engineered Mr. Berry's forced and untimely resignation by humiliating and berating him during the February 3, 2014 meeting.

119. Defendant Spang knew, or reasonably should have known, that his wrongful conduct was certain or substantially certain to result in a disruption of Mr. Berry's contractual relations with Wells Fargo Advisors and, indeed, so intended and designed his actions to disrupt the contractual relationship.

120. In addition to Defendant Spang's wrongful conduct prior to Mr. Berry's forced resignation, Defendant Spang also detained and/or failed to return Mr. Berry's personal property and business files, making it more difficult for him to restart his business, put a false and defamatory comment on Mr. Berry's official record, unfairly delayed Mr. Berry's registration with his new brokerage firm, made false, defamatory and disparaging statements about Mr. Berry and Mr. Berry's honesty, integrity and competence to Mr. Berry's clients and made false, misleading and/or incomplete statements to Mr. Berry's clients about the honesty, integrity, ethics and competence of Defendant Spang's preferred replacement broker, whom Defendant Spang knew to have a history of imprudent, excessive and speculative trading in his own accounts, all for the purpose of capitalizing on the termination of Mr. Berry's relationship with Wells Fargo Advisors and thereby enriching himself at Mr. Berry's expense.

121. Defendant Spang also used his treatment of Mr. Berry as an example for other advisors to keep them from questioning his management decisions and to not challenge any sales initiatives.

122. As a direct and proximate result of Defendant Spang's conduct, as alleged herein, Mr. Berry's relationship with Wells Fargo Advisors was terminated in a mean-spirited, illegal, and defamatory fashion, orchestrated for the specific purpose of harming Mr. Berry in his business and with his clients and to thereby retain a significant portion of Mr. Berry's client base and then assign those clients to a "branch broker" to generate increased overrides and compensation for Defendant Spang.

123. As a direct and proximate result of Defendant Spang's intentional interference with his existing and prospective contractual relations, Mr. Berry has suffered damages.

124. Defendant Spang's conduct, in intentionally interfering with Mr. Berry's existing and prospective contractual relations, as set forth above, was malicious, willful, despicable, and oppressive. Punitive damages are warranted.

125. As a direct result of the false statement placed on Mr. Berry's official record and other wrongful conduct by Defendant Spang, Mr. Berry's relationship with Wells Fargo Advisors was interrupted and terminated prematurely, and he has been unable to consummate additional business relations thereafter.

126. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, (2) consequential damages, (3) injunctive relief, including but not limited to an order requiring the correction of Mr. Berry's official record, (4) disgorgement of overrides attributable to Defendant Spang's wrongful conduct, (5) punitive damages for Defendants' intentional interference with his business relationships, in an amount to be determined by the finder of fact, (6) costs, (7) prejudgment interest, and (8) such other relief as is just, equitable, and proper.

EIGHTH CAUSE OF ACTION
INTENTIONAL INTERFERENCE WITH PROSPECTIVE CONTRACTUAL RELATIONS
(Against all Defendants)

127. Mr. Berry refers to and incorporates for all purposes each and all of the allegations in this Complaint, as if repeated verbatim herein.

128. Mr. Berry had existing and ongoing contractual relationships which were reasonably likely to continue with numerous customers who he had developed as clients for WFA.

129. Defendants, at all times herein relevant, knew of Mr. Berry's economic relationships with the customers who he had developed as clients during his nearly 20 years with WFA and its predecessors.

130. Defendants intentionally disrupted Mr. Berry's economic relationships with the customers whom he had developed as clients during his contractual relationship with WFA by detaining and/or failing to return Mr. Berry's business files, making it more difficult for him to restart his business, putting false and defamatory comments on Mr. Berry's official record by making false, defamatory, and disparaging statements about Mr. Berry and Mr. Berry's honesty, integrity, and competence to Mr. Berry's clients, and by making false, misleading and/or incomplete statements to Mr. Berry's clients about the honesty, integrity, ethics, and competence of Defendants' preferred replacement broker, whom Defendants knew to have a history of imprudent, excessive and speculative trading in his own accounts.

131. Defendants knew, or reasonably should have known, that their wrongful conduct was certain or substantially certain to result in a disruption of Mr. Berry's contractual relations with his customers and, indeed, designed their actions to disrupt those contractual relationships.

132. As a direct and proximate result of Defendants' misconduct as alleged herein, Mr. Berry lost many clients and substantial business and revenue.

133. As a direct and proximate result of Defendants' intentional interference with his existing and prospective contractual relations, Mr. Berry has suffered damages.

134. Defendants' conduct in intentionally interfering with Mr. Berry's existing and prospective contractual relations, as set forth above, was malicious, willful, despicable, and oppressive. Punitive damages are warranted.

135. As a direct result of the false statements placed on his official record and other wrongful conduct by Defendants as alleged herein, Mr. Berry's business has been irreparable and permanently damaged and such damages, as was intended by Defendants, will continue to grow exponentially into the future.

136. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, (2) consequential damages, (3) injunctive relief, including but not limited to an order requiring the correction of Mr. Berry's official record, (4) punitive damages for Defendants' intentional interference with his business relationships, in an amount to be determined by the finder of fact, (5) costs, (6) prejudgment interest, and (7) such other relief as is just, equitable, and proper.

NINTH CAUSE OF ACTION
FALSE IMPRISONMENT

137. Mr. Berry refers to and incorporates for all purposes each and all of the allegations of this Complaint, as if repeated verbatim herein.

138. Defendant Spang, on his own behalf and as the agent and representative of the Corporate Defendants, intentionally and unlawfully restrained Mr. Berry, both in the WFA offices and at his vehicle on the day of his forced resignation and constructive termination.

139. As a result of the intentional and unlawful restraints, Mr. Berry suffered emotional distress, embarrassment, humiliation, indignities, and deprivation of his right to be free from threats and intimidation.

140. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages for emotional suffering and upset, (2) punitive damages for Defendants' intentional wrongdoing, in an amount to be determined by the finder of fact, (3) costs, and (4) such other relief as is just, equitable, and proper.

TENTH CAUSE OF ACTION
CONVERSION

141. Mr. Berry refers to and incorporates for all purposes each and all of the allegations in this Complaint, as if repeated verbatim herein.

142. Defendant Spang, on his own behalf and as the agent and representative of the Corporate Defendants, assumed and exercised ownership and control over the personal property of Mr. Berry.

143. Mr. Berry did not authorize the detention of his personal property, as he specifically requested and demanded its return to him.

144. Defendants wrongfully retained control over all of Mr. Berry's personal property in his office for a period of weeks before returning some of it. Other property was neither returned nor accounted for in any way.

145. As a result of the temporary detention of his property, Mr. Berry was not only deprived of its use but also was competitively disadvantaged, as was Defendants' specific intent, in contacting his clients and furthering his business interest.

146. Some of the never-returned property was essentially irreplaceable as it consisted of art pieces specially chosen for Mr. Berry's workplace by his wife.

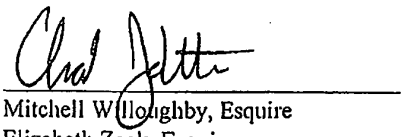
147. Some of the never-returned property was records relevant to the operation of Mr. Berry's business, including but not limited to profit and loss statements and other general business documents. Defendants' deliberate retention of these documents was designed to and did in fact adversely affect Mr. Berry's competitive ability in the financial services market.

148. Mr. Berry is therefore informed and believes that he is entitled to (1) actual damages, including but not limited to the loss of use of wrongfully detained property and the value of property which was never returned, (2) punitive damages for Defendants' intentional wrongdoing, in an amount to be determined by the finder of fact, (3) costs, and (4) such other relief as is just, equitable, and proper.

WHEREFORE, having set forth his complaint, Plaintiff Robert F. Berry prays for relief as follows:

1. For compensatory damages, including, but not limited to, lost compensation now and into the future, loss of business revenue, loss of business opportunities, the loss of use of wrongfully detained property, the value of property which was never returned, all in a sum to be determined by the jury;
2. For consequential damages;
3. For disgorgement of Defendants' unjustly acquired profits generated as a result of their wrongful conduct;
4. For an order directing the expungement of the false and defamatory statements regarding his termination from WFA on his official record;
5. For damages to reputation;
6. For damages for emotional distress, embarrassment, humiliation, indignities, and deprivation of his right to be free from threats and intimidation;
7. For punitive damages in a sum sufficient to serve as an example to deter and punish Defendants for their wrongful, deceitful, deceptive, dishonest, and fraudulent conduct;
8. For reasonable attorneys' fees pursuant to South Carolina law including, but not limited to, S.C. Code Ann. § 39-5-140(a);
9. For statutory treble damages;
10. For costs incurred herein; and
11. For such other and further relief as this Court may deem just and proper.

[SIGNATURE PAGE FOLLOWS]



Mitchell Willoughby, Esquire
Elizabeth Zeck, Esquire
Chad N. Johnston, Esquire
WILLOUGHBY & HOEFER, P.A.
Post Office Box 8416
Columbia, South Carolina 29202
Telephone Number: 803-252-3300
mwilloughby@willoughbyhoefer.com
ezeck@willoughbyhoefer.com
cjohnston@willoughbyhoefer.com

Attorneys for Robert F. Berry

This 23rd day of February 2017
Columbia, South Carolina

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS ELEVENTH JUDICIAL CIRCUIT
Robert F. Berry, Plaintiff, 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., Defendants.	Case No. 2017-CP-32-00397

DEFENDANTS' MOTION TO DISMISS OR STAY PENDING ARBITRATION

Defendants Wells Fargo Clearing Services, LLC f/k/a Wells Fargo Advisors, Wachovia Securities Financial Holdings, LLC, Wells Fargo & Company, Wells Fargo Bank, N.A., and Scott A. Spang, by their attorneys and pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, respectfully move for dismissal of this action, or alternatively for a stay pending arbitration before the Financial Industry Regulatory Authority in accordance with the provisions of the Form U4 signed by Plaintiff.

This motion is supported by applicable law, the arguments of counsel, a memorandum of law, and any other material the Court may receive.

(Signature block on following page.)

38430219v.1

Respectfully submitted,

WELLS FARGO CLEARING SERVICES, LLC F/K/A WELLS FARGO ADVISORS, WACHOVIA SECURITIES FINANCIAL HOLDINGS, LLC, WELLS FARGO & COMPANY, WELLS FARGO BANK, N.A., and SCOTT A. SPANO

By: [signature] For: Adam Yount

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

Frederick T. Smith
North Carolina Bar No. 45229
SEYFARTH SHAW LLP
6000 Fairview Road, Suite 1200
Charlotte, North Carolina 28210
Telephone: (404) 888-1021
Facsimile: (404) 724-1521
fsmith@seyfarth.com

Date: April 12, 2017

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS ELEVENTH JUDICIAL CIRCUIT
Robert F. Berry, Plaintiff, v. Scott A. Spang, Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, Wachovia Securities Financial Holdings, Inc., Wells Fargo & Company, and Wells Fargo Bank, N.A., Defendants.	Case No. 2017-CP-32-00397

DEFENDANTS' MEMORANDUM OF LAW IN SUPPORT OF THEIR MOTION TO DISMISS OR STAY PENDING ARBITRATION

Defendants Wells Fargo Clearing Services, LLC f/k/a Wells Fargo Advisors, LLC, Wachovia Securities Financial Holdings, LLC, Wells Fargo & Company, Wells Fargo Bank, N.A., and Scott A. Spang, by their attorneys and pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), respectfully move for dismissal of this action, or alternatively for a stay pending arbitration pursuant to the Code of Arbitration Procedure for Industry Disputes of the Financial Industry Regulatory Authority ("FINRA").

INTRODUCTION

In enacting the FAA, Congress codified a strong public policy in favor of arbitration of disputes. Thus, where there is a written agreement between two or more parties that contains an arbitration provision, and that provision provides that all disputes "arising between" the parties must be arbitrated, there is a presumption of arbitrability. All questions concerning the scope or breadth of the arbitration provision must be resolved in favor of arbitration.

All of Plaintiff's claims against all Defendants[1] are subject to Plaintiff's U4 agreement executed with Wells Fargo Clearing Services' predecessor in interest and filed with FINRA, signed and dated November 5, 1994 (the "U4") (attached as Exhibit 1).[2] The U4 contains a comprehensive arbitration provision, which provides that all disputes, claims or controversies that arise between Plaintiff and his employer, his customers or other persons must be arbitrated with FINRA. Plaintiff's claims against Defendants are based upon events that occurred during his employment, as well as his termination. This action, therefore, falls within the scope of the arbitration provision agreed to by Plaintiff in the U4.

Moreover, 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 Plaintiff's claims regarding the end of his employment and breach of his compensation agreement certainly arise out of the business activities of Wells Fargo Clearing Services (formerly Wells Fargo Advisors), Plaintiff, and Scott Spang. Finally, and in the alternative, Plaintiff's First Amended Complaint must be dismissed for failure to state a claim because it is impossible to tell from the face of his complaint which Defendants are accused of

---

[1] Plaintiff's Complaint names various corporate entities as defendants. His actual employer was the broker-dealer entity Defendant Wells Fargo Advisors, LLC. Effective November 2016, Wells Fargo Advisors, LLC changed its name to Wells Fargo Clearing Services, LLC. Defendant Wachovia Securities Financial Holdings, LLC, incorrectly named in this action as "Wachovia Securities Financial Holdings, Inc.," is the parent company of Wells Fargo Clearing Services, LLC. Wachovia Securities Financial Holdings, LLC is an indirect subsidiary of Wells Fargo & Company. Defendant Wells Fargo Bank, N.A. is a subsidiary of Wells Fargo & Company. Defendant Scott A. Spang is employed by Defendant Wells Fargo Clearing Services, LLC and is a registered representative or associated person under FINRA By-Laws and the Code of Arbitration Procedure of Industry Disputes. (*See* Affidavit of Beverly Jackson, attached hereto as Exhibit 2.)

[2] Plaintiff signed several amended versions of the U4, but the firm/employer of Wheat First Securities remained the same. (*See* Exhibit 1.) Wheat First Securities is a predecessor in interest to both Wells Fargo Advisors, LLC and Wells Fargo Clearing Services, LLC (*See* Exhibit 2.)

which actions. For all these reasons and as explained in more detail below, Plaintiff's claims should be dismissed because they must be arbitrated before FINRA and/or because Plaintiff fails to state a claim upon which relief may be granted.[3]

FACTUAL BACKGROUND

Almost three years to the day after his employment with Wells Fargo Advisors ended, Plaintiff filed this action, asserting a litany of claims against five Wells Fargo corporate entities and one individual Defendant that relate to alleged events during his employment as well as the termination of his employment. Plaintiff alleges that Defendants pressured him to cross-sell various bank products to his clients, and that when he refused to do so, Defendants unilaterally changed his compensation agreement, forced him to resign, and reported that Plaintiff's employment ended due to misconduct. (Am. Compl. ¶¶ 2-4.) Despite the fact that Plaintiff was employed only by Wells Fargo Advisors, in his First Amended Complaint, Plaintiff routinely references all six Defendants together as if they are one entity without specifying which entity did what or when. Plaintiff's First Amended Complaint, however, makes no mention of Plaintiff's agreement to arbitrate all of his claims against the predecessor in interest to Wells Fargo Advisors, LLC, before FINRA.

When he was hired by Wells Fargo Advisors' predecessor in interest, Plaintiff was required to complete and sign a U4, which is a FINRA requirement for all registered representatives as a condition of employment and as a condition of maintaining the ability to conduct securities business under both federal and state law. The U4 signed by Plaintiff on November 5, 1994, and each subsequent amended U4 signed by Plaintiff, states:

[3] *Choice Hotels Int'l, Inc. v. BSR Tropicana Resort, Inc.*, 252 F.3d 707, 709-10 (4th Cir. 2001) ("dismissal is a proper remedy when all of the issues presented in a lawsuit are arbitrable."); *Seus v. John Nuveen & Co., Inc.*, 146 F.3d 175, 179 (3d Cir. 1998) ("If all the claims in an action are arbitrable, a court may dismiss the action instead of staying it.")

> 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 [FINRA] 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.

(*See* Exhibit 1.)

FINRA rules, in turn, specifically provide that "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." FINRA Rule 13200(a). Notwithstanding the clear arbitration provisions contained in the U4 and FINRA Rule 13200(a), which are well known in the industry and require arbitration of employment disputes, Plaintiff deliberately chose to disregard his agreement and the rules and improperly brought his claims against Defendants in this Court.

ARGUMENT

I. Plaintiff's Claims Against All Defendants Must Be Arbitrated Pursuant to the U4 Arbitration Provision And FINRA Rule 13200.

Pursuant to federal and state law, all of Plaintiff's claims against Defendants must be arbitrated pursuant to the U4 arbitration provision and FINRA Rule 13200. Section 2 of the FAA provides that arbitration provisions contained in written contracts "shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. The FAA manifests a liberal federal policy favoring arbitration agreements. *Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 109, 739 S.E.2d 209, 213 (2013) ("It is the policy of this state and federal law to favor arbitration and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration"); *Adkins v. Labor Ready, Inc.*, 303 F.3d 496, 500 (4th Cir. 2002) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983)). The FAA was enacted with the purpose "to reverse the longstanding judicial hostility to arbitration agreements that had existed at

English common law" and had been adopted by American courts, and to place arbitration agreements on the same footing as other contracts. *Adkins*, 303 F.3d at 502 (quoting *Gilmer v. Interstate/Johnson Lane Corp.*, 500 U.S. 20, 24 (1991)).

Consequently, arbitration agreements should be enforced according to their terms, and "any doubt concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem. Hosp.*, 460 U.S. at 24-25. This presumption in favor of arbitration persists, "'unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage.'" *AT&T Tech., Inc. v. Comm. Workers of Am.*, 475 U.S. 643, 650 (1986) (quoting *Steelworkers of Am. v. Warrior & Gulf Nav. Co.*, 363 U.S. 574, 582-83 (1960)); *accord Peabody Holding Co., LLC v. United Mine Workers of Am., Int'l Union*, 665 F.3d 96, 104 (4th Cir. 2012).

"To decide whether an arbitration agreement encompasses a dispute, a court must determine whether the factual allegations underlying the claim are within the scope of the broad arbitration clause, regardless of the label assigned to the claim." *Pearson v. Hilton Head Hosp.*, 400 S.C. 281, 287, 733 S.E.2d 597, 600 (Ct. App. 2012). "A motion to compel arbitration made pursuant to an arbitration clause in a written contract should only be denied where the clause is not susceptible to any interpretation which would cover the asserted dispute." *Id.*

In this action, the factual allegations underlying Plaintiff's claims are unquestionably within the scope of the broad arbitration clause contained in the U4. The U4's broad arbitration provision provides that Plaintiff agreed to arbitrate "any dispute, claim or controversy" arising between Plaintiff and his employer that is required to be arbitrated by FINRA rules. FINRA Rule 13200(a), in turn, states that a dispute must be arbitrated if it "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. Thus, the clause contained in the U4 is "precisely the kind of broad arbitration provision that justifies a presumption of arbitrability." *Oldroyd v. Elmira Sav. Bank*, 134 F.3d 72, 75 (2d Cir. 1998); *accord Carlson v. S.C. State Plastering, LLC*, 404 S.C. 250, 261, 743 S.E.2d 868, 874 (Ct. App. 2013) (compelling arbitration of plaintiff's tort claims as well as contract claims and noting that "[a] clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly"); *Cornett Mgmt. Co., LLC v. Fireman's Fund Ins. Co.*, 332 F. App'x 146, 149 (4th Cir. 2009) (noting that term "arising out of" must be broadly construed, thereby requiring court to apply a broad construction). Plaintiff's allegations that Defendants breached his compensation agreement, forced his resignation, and falsely reported that he was terminated for cause certainly arise out of Plaintiff's and his employer's business activities.

Plaintiff cannot dispute that he was required to, and did, in fact, execute a Form U4 agreement at the time he commenced his employment with the predecessor in interest to Wells Fargo Advisors in 1994. Numerous courts have repeatedly confirmed that claims by a registered representative, such as those asserted by Plaintiff, fall within the arbitration provision contained in the Form U4. *See, e.g., Troutman v. SunTrust Bank*, No. CA 3:13-1690-MBS, 2013 WL 5657681, at *4 (D.S.C. Oct. 16, 2013) (dispute regarding repayment of signing bonus is a "dispute, claim or controversy" arising between plaintiff and member firm that is required to be submitted to arbitration pursuant to FINRA Rule 13200); *PFS Invs., Inc. v. Imhoff*, No 11-10142, 2011 WL 1135538, at *6 (E.D. Mich. Mar. 25, 2011) (admission by plaintiff that he executed U4 and was registered with FINRA confirmed obligation to arbitrate disputes with former employer); *Hawkins v. Toussaint Capital Partners, LLC*, No. 08 Civ. 6866, 2010 WL 2158332, at *2 (S.D.N.Y. May 27, 2010) (employee required to arbitrate dispute with employer based

upon arbitration provision in U4); *Gunby v. The Equitable Life Assurance Soc'y*, 971 S.W.2d 7, 9-10 (Tenn. App. 1997) (Form U4 is an enforceable agreement to arbitrate employment disputes between a registered representative and his or her firm). The U4 signed by Plaintiff is an enforceable agreement to arbitrate the very claims that Plaintiff has brought. *See Blackwell v. Bank of Am. Corp.*, No. CIV.A. 7:11-2475-JMC, 2012 WL 1229673, at *2 (D.S.C. Mar. 22, 2012), *report and recommendation adopted*, No. 7:11-CV-02475-JMC, 2012 WL 1229675 (D.S.C. Apr. 12, 2012) (compelling plaintiff, who signed a U4 Registration Form, to arbitrate his claims against a FINRA member firm).

Plaintiff's claims in his First Amended Complaint alleging that Defendants breached his compensation agreement, forced him to resign, and reported false and negative information regarding the end of his employment are the exact type of dispute concerning business activities contemplated by the U4 and FINRA rules as being subject to arbitration. As recently confirmed by one federal district court, "[t]he term 'business activities' [within FINRA Rule 13200(a)] encompasses a dispute arising from the employment or termination of an associated person." *French v. Wells Fargo Advisors, LLC*, No 5:11-cv-246, 2012 WL 479961, at *5 (D. Vt. Feb. 14, 2012) (emphasis added) (citations omitted); *see also Landers v. Fed. Deposit Ins. Corp.*, 402 S.C. 100, 111, 739 S.E.2d 209, 214–15 (2013) (alleged defamatory statements made by employer concerning reasons for plaintiff's termination were covered by arbitration agreement); *Blackwell*, 2012 WL 1229673, at *2 (granting motion to compel arbitration, pursuant to Form U4, for plaintiff's employment claims against his employer); *Hawkins*, 2010 WL 2158332, at *4-5 (plaintiff's claims for failure to pay commission, breach of employment contract, and retaliatory discharge subject to FINRA arbitration in parties' U4 because claims "clearly fall within the scope of the parties' 'business activities' because they directly implicate some of the most

fundamental aspects of [plaintiff's] business relationship with [his employer]"); *Thaning v. UBS/Paine Webber*, No. C 07–5528 PJH, 2008 WL 2024884, at *3 (N.D. Cal. May 8, 2008) (same); *McCafferty v. A.G. Edwards & Sons, Inc.*, No. 2:11-cv-00517 (WJM), 2011 WL 3515909, at *4 (D.N.J. Aug. 11, 2011) (wrongful termination claim based on violation of state whistleblower statute subject to FINRA arbitration). All of Plaintiff's claims - wrongful termination, breach of contracts and covenants of good faith and fair dealing, defamation, violation of the South Carolina Unfair Trade Practices Act, intentional interference with prospective contractual relations, false imprisonment, and conversion - are therefore covered by the arbitration provision that Plaintiff agreed to and signed.

Finally, and quite importantly, not only is Plaintiff compelled to arbitrate his claims against his former employer, Defendant Wells Fargo Advisors, and Spang, a fellow registered representative and associated person, but Plaintiff is also required to pursue claims against *any and all* of the Defendants via FINRA arbitration. South Carolina has recognized "a party should not be allowed to avoid an arbitration agreement by naming nonsignatory parties in his complaint ... because this would nullify the rule requiring arbitration." *Pearson*, 400 S.C. at 288, 733 S.E.2d at 600 (noting that because claims against nonsignatory parent company were "intimately founded in and intertwined with" a contract containing an arbitration clause, signatory was estopped from refusing to arbitrate those claims) (citing *Sunkist Soft Drinks, Inc. v. Sunkist Growers, Inc.*, 10 F.3d 753, 757 (11th Cir. 1993)). Further, where a plaintiff "makes no distinction between the [signatory] and [nonsignatory] in his complaint and "lumps them together as defendants and states they are jointly and severally liable," as Plaintiff repeatedly does in his First Amended Complaint, the lawsuit against all parties "ar[ises] from the same set

of facts," and the claims against all the defendants must be arbitrated pursuant to the arbitration provision in the U4. *Id.* at 297, 733 S.E.2d at 605.

In his First Amended Complaint, Plaintiff alleges that he was pressured to cross-sell bank products and forced to resign when he did not comply, that his compensation agreement was breached, and that Defendants defamed him by making false statements regarding the reason for his termination; these allegations form the basis for Plaintiff's claims against all Defendants. And, like the plaintiff in *Pearson*, who was not permitted to avoid arbitration by "mak[ing] no distinction between" the defendants, the Court should, likewise, reject Plaintiff's attempt to "lump[] them together as defendants." *Pearson*, 400 S.C. at 297. Because all of Plaintiff's claims "arise out of the business activities" of a member or an associated person and the dispute is between an associated person and a member and another associated person, such claims must all be arbitrated pursuant to FINRA Rules. Accordingly, this action should be dismissed outright or, at least stayed, and Plaintiff should be ordered to pursue his claims in accordance with the FINRA Code.

II. In the Alternative, Plaintiff's First Amended Complaint Should Be Dismissed For Failure To State A Claim.

As explained above, all of Plaintiff's claims are subject to dismissal and should be compelled to arbitration. In the alternative, however, Plaintiff's claims must also be dismissed because he fails to allege any facts that would entitle him to relief against Defendants. Rule 8(a) of the South Carolina Rules of Civil Procedure requires that a complaint contain "a short and plain statement of the facts showing that the pleader is entitled to relief." A motion to dismiss should be granted where, even when viewed in the light most favorable to the nonmoving party, the "facts alleged and inferences reasonably deducible" from those facts do not entitle the claimant to relief. *Gentry v. Yonce*, 337 S.C. 1, 5, 522 S.E.2d 137, 139 (1999) (internal quotes

omitted). When a complaint involves multiple parties and multiple claims, each claim should make it clear which defendant or defendants are alleged to have committed which wrong. *Washington v. Thomas*, No. 09-11302, 2009 WL 1424193, at *2 (E.D. Mich. May 18, 2009); *see also Unisun Ins. v. Hawkins*, 342 S.C. 537, 542, 537 S.E.2d 559, 562 (Ct. App. 2000) (noting that where a state rule is similar to the federal rule, federal cases interpreting the federal rule are persuasive). If it is "impossible to tell from the face of the complaint which defendants were accused of which violations, what specific acts constituted violations, or when alleged violations occurred," such a complaint fails to state a claim upon which relief can be granted. *Id.*

Plaintiff's First Amended Complaint should be dismissed as it fails to clearly delineate which Defendant is alleged to have committed which wrong. To that end, Plaintiff names five corporate defendants and one individual defendant, but the complaint is riddled with vague and sweeping allegations against "Defendants," "the WFA Defendants," and "the Wells Fargo Bank Defendants," without specifying which entity did what or when. For example, Plaintiff fails to allege any facts at all pertaining to Wells Fargo & Company or Wells Fargo Bank, N.A., which Plaintiff collectively and generically refers to as "the Wells Fargo Bank Defendants." Plaintiff does not allege that either of "the Wells Fargo Bank Defendants" was his employer (because he cannot) nor does the complaint explain how or why they are even named as defendants at all. In discussing Plaintiff's alleged forced resignation and breach of his compensation agreement, for example, Plaintiff never mentions "the Wells Fargo Bank Defendants" in any capacity.

Likewise, Plaintiff does not specify in his First Amended Complaint which of the "WFA Defendants" took what actions that would subject them to liability. Plaintiff repeatedly lumps the brokerage firm defendants together as the "WFA Defendants." Plaintiff fails throughout his complaint to specify any alleged wrongdoing attributable to Wells Fargo Advisors, LLC, Wells

Fargo Clearing Services, LLC, and Wachovia Securities Financial Holdings, LLC (the parent company of Wells Fargo Clearing Services). Plaintiff also fails to allege any facts to support a theory that the parent company could or should be liable for the acts of its subsidiary. "[U]nadorned conclusory allegations" like these are akin to no allegations at all. *Vitol, S.A. v. Primerose Shipping Co.*, 708 F.3d 527, 543 (4th Cir. 2013).

Plaintiff cannot pursue claims against defendants who are not alleged to have done anything at all. Because Plaintiff's First Amended Complaint fails to put each Defendant on notice as to what allegations are directed at it, Plaintiff fails to allege facts that would entitle him to relief as to any Defendant.

CONCLUSION

For all the foregoing reasons, Plaintiff's claims against Defendants must be dismissed or stayed pending arbitration of those claims in accordance with the provisions of the Form U4 signed by Plaintiff. In the alternative, Plaintiff's First Amended Complaint should be dismissed in its entirety for failure to state a claim upon which relief can be granted.

(Signature block on following page.)

Respectfully submitted,

WELLS FARGO CLEARING SERVICES, LLC F/K/A WELLS FARGO ADVISORS, LLC, WACHOVIA SECURITIES FINANCIAL HOLDINGS, LLC, WELLS FARGO & COMPANY, WELLS FARGO BANK, N.A., and SCOTT A. SPANG

By: /s/ FOR: Adam Yount

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

Frederick T. Smith
North Carolina Bar No. 45229
SEYFARTH SHAW LLP
6000 Fairview Road, Suite 1200
Charlotte, North Carolina 28210
Telephone: (404) 888-1021
Facsimile: (404) 724-1521
fsmith@seyfarth.com

Date: April 12, 2017

EXHIBIT 1

FORM U-4

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

If there is an amendment to this page, complete only Items 1, 2, 3, 4 and Items being amended

(1) LAST NAME	JR SR etc	FIRST NAME	MIDDLE NAME (SPECIFY IF NONE)	(2) APPLICANT'S CRD #
Berry		Robert	Franklin	1262947

SOC SEC # REDACTED

(3) FIRM CRD #	(4) FIRM NAME (Do not include this employment under Item 13 page 2)	APPLICANT'S MSA #
20182	Wheat, First Securities, Inc.	(5) EMPLOYMENT DATE 11/04/94

(6) FIRM MAIN ADDRESS — STREET — CITY — STATE — ZIP

901 East Byrd Street, Richmond, Virginia 23219

(7) BRANCH I.D. # — OFFICE OF EMPLOYMENT ADDRESS — STREET — CITY — STATE — ZIP

190 Nations Bank Plaza, Suite 1570, 1901 Main Street, Columbia, SC 29202

(8) Will applicant maintain registration with another Broker-Dealer not under common ownership or control with the firm named in Item 4 above? ☐ Yes ☒ No
If "Yes" list in Item 19.
If "Yes" has/have the firm(s) been contacted? ☐ Yes ☐ No

(9) Will applicant maintain multiple registrations with Broker-Dealers under common ownership or control with the firm named in Item 4 above? ☐ Yes ☒ No
If "Yes" fill in information below

Firm CRD # _____ Name of Firm _____
Firm CRD # _____ Name of Firm _____
Firm CRD # _____ Name of Firm _____

(10) TO BE REGISTERED WITH THE FOLLOWING

SRO

☐ ASE ☐ BSE ☐ CBOE ☐ CSE ☐ MSE ☐ NASD ☐ NFA ☐ NYSE ☐ PHLX ☐ PSE ☐ OTHER (Specify) _____

JURISDICTION

☐ AK ☐ AL ☐ AR ☐ AZ ☐ CA ☐ CO ☐ CT ☐ DC ☐ DE ☐ FL ☐ GA ☐ HI ☐ IA
☐ ID ☐ IL ☐ IN ☐ KS ☐ KY ☐ LA ☐ MA ☐ MD ☐ ME ☐ MI ☐ MN ☐ MO ☐ MS
☐ MT ☒ NC ☐ ND ☐ NE ☐ NH ☐ NJ ☐ NM ☐ NV ☐ NY ☐ OH ☐ OK ☐ OR ☐ PA
☐ RI ☐ SC ☐ SD ☐ TN ☐ TX ☐ UT ☐ VA ☐ VT ☐ WA ☐ WI ☐ WV ☐ WY ☐ PR

☐ *All Jurisdictions. (Check In Lieu Of Each Individual Box).*

(11) TYPE OF EXAMINATION/REGISTRATION REQUESTED (check all applicable categories)

☐	S-3 Commodity Futures Examination	☐	S-39 (DP) Direct Participation Program Principal
☐	S-4 (OP) Registered Options Principal	☐	S-42 (OR) Options Representative
☐	S-5 Interest Rate Options Examination	☐	S-52 (MR) Municipal Securities Representative
☐	S-6 (IR) Investment Company and Variable Contracts Products Representative	☐	S-53 (MP) Municipal Securities Principal
☐	S-7 (GS) Full Registration/General Securities Representative	☐	S-62 (CS) Corporate Securities Representative
☐	S-7 (TR) Securities Trader (NYSE)	☐	S-63 Uniform Securities Agent State Law Examination
☐	S-7 (TS) Trading Supervisor (NYSE)	☐	S-65 Uniform Investment Advisor Law Examination
☐	S-8 (SU) General Securities Sales Supervisor	☐	(AG) Agent
☐	S-8 (BM) Branch Office Manager (NYSE)	☐	(RG) Government Securities Representative
☐	S-11 (AR) Assistant Representative/Order Processing	☐	(PG) Government Securities Principal
☐	S-15 (FC) Foreign Currency Options	☐	(ME) Member Exchange (NYSE)
☐	S-16 (SA) Supervisory Analyst	☐	(LE) Securities Lending Representative (NYSE)
☐	S-22 (OR) Direct Participation Program Representative	☐	(LS) Securities Lending Supervisor (NYSE)
☐	S-24 (GP) General Securities Principal	☐	(AM) Allied Member (NYSE)
☐	S-28 (IP) Investment Company and Variable Contracts Products Principal	☐	(AP) Approved Person (NYSE)
☐	S-27 (FN) Financial and Operations Principal	☐	(AI) Agent of the Issuer
☐	S-28 (FI) Introducing Broker-Dealer/Financial and Operations Principal	☐	Reschedule Exam Series _____
		☒	Other FA Rep.

THIS PORTION MUST BE COMPLETED FOR ALL PARTIAL (TRANSFER OR RE-REGISTRATION) FILINGS

(12) APPLICANT'S CURRENT ADDRESS _____ FROM MONTH YEAR
STREET — CITY — STATE — ZIP

FIRM(S) APPLICANT IS TRANFERRING FROM: — TERMINATION DATE: (Mo/Day/Yr)

☐ ◄ *CHECK IF THIS U-4 IS BEING FILED TO MAKE PERMANENT A TEMPORARY REGISTRATION (TAT).*

The appropriate signature area *DOES NOT* have to be completed *UNLESS* this page is being submitted as an amendment

MONTH DAY YEAR — SIGNATURE OF APPROPRIATE SIGNATORY

TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY — CRD USE ONLY

Rev. Form U-4 (11/94)

FORM U-4

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

If there is an amendment to this page, complete only Items 13, 14 and the items being amended

(13) FIRM CRD #	SOCIAL SECURITY #	APPLICANT'S CRD #
20182	REDACTED	1262947
FIRM NFA #		APPLICANT'S NFA #

PERSONAL DATA

(14) LAST NAME	JR/SR, etc	FIRST NAME	MIDDLE NAME	(15) OTHER NAMES KNOWN BY
Berry		Robert	Franklin	Bob

(16) DATE OF BIRTH (Month, Day, Year)	(17) SEX	HEIGHT	WEIGHT	HAIR COLOR	EYE COLOR
REDACTED	Male	5'9"	145	Brown	Blue

RESIDENTIAL HISTORY

(18) GIVE ALL ADDRESSES FOR THE PAST FIVE YEARS, STARTING WITH CURRENT ADDRESS

STREET	CITY	STATE	ZIP	FROM MONTH	FROM YEAR	TO MONTH	TO YEAR
201 Silvermill Court	Columbia	SC	29210	11	90	PRESENT	
96 Muskrat Run	Irmo	SC	29603	09	88	11	90

EMPLOYMENT AND PERSONAL HISTORY

(19) ACCOUNT FOR ALL TIME FOR THE PAST TEN YEARS. Give all employment experience starting with your previous employer and working back ten years. Include full and part-time work, self-employment, military service, unemployment and full-time education. (If this page is being filed as part of a Form BD, start with your present employer instead.)

			FROM MONTH	FROM YEAR	TO MONTH	TO YEAR	POSITION HELD
NAME	Prudential Securities, Inc.		04	85	11	94	Vice President/
CITY	Columbia	STATE SC					Investments
NAME	Dean Witter Reynolds, Inc.		02	84	04	85	Financial Advisor
CITY	Columbia	STATE SC					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					

(20) Are you currently engaged in any other business (not shown above) either as a proprietor, partner, officer, director, trustee, employee, agent or otherwise?
☒ YES ☐ NO If "YES", please explain below

Mid-Atlantic Marketing, Inc.; Charlotte, NC; Director

The appropriate signatory area *DOES NOT* have to be completed *UNLESS* this page is being submitted as an amendment

MONTH DAY YEAR _____ SIGNATURE OF APPROPRIATE SIGNATORY

_____ TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

Rev. Form U-4 (11/91)

PAGE 2

FORM U-4 — UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

If there is an amendment to this page, complete only item 21 and items being amended

(21) FIRM CRD #	FIRM NFA #	SOCIAL SECURITY #	APPLICANT'S CRD #	APPLICANT'S NFA #
20182		REDACTED	1262947	

IF THE ANSWER TO ANY OF THE FOLLOWING QUESTIONS IS "YES" AND YOU CANNOT UTILIZE THE CERTIFICATION IN ITEM 22G BELOW, ATTACH COMPLETE DETAILS OF ALL EVENTS OR PROCEEDINGS ON DRP(S).

(22) ***DEFINITIONS***

- Charged – Accused of a crime in a formal complaint, information, or indictment
- Investment or Investment-Related – Pertaining to securities, commodities, banking, insurance, or real estate (including, but not limited to acting as or being associated with a broker-dealer, investment company, investment adviser, futures sponsor, bank or savings and loan association)
- Involved – Doing an act or aiding, abetting, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act
- Foreign Financial Regulatory Authority – includes (A) a foreign securities authority; (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of investment or investment-related activities; or (C) membership organization, a function of which is to regulate the participation of its members in the activities listed above.

	YES	NO	
22A. Have you been convicted of or pleaded guilty or nolo contendere ("no contest") in a domestic or foreign court to			
(1) a felony or misdemeanor involving: investments or an investment-related business, fraud, false statements or omissions, wrongful taking of property, or bribery, forgery, counterfeiting or extortion?	☐	☒	1
(2) gambling?	☐	☒	2
(3) any other felony?	☐	☒	3
B. Have you, or an organization over which you exercised management or policy control, ever been charged with any felony or charged with a misdemeanor specified in question A(1) or (2) in a domestic or foreign court?	☐	☒	4
C. Has any domestic or foreign court ever,			
(1) enjoined you in connection with any investment-related activity?	☐	☒	5
(2) found that you were involved in a violation of investment-related statutes or regulations?	☐	☒	6
D. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:			
(1) found you to have made a false statement or omission?	☐	☒	7
(2) found you to have been involved in a violation of investment-related regulations or statutes?	☐	☒	8
(3) found you to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☒	9
(4) entered an order denying, suspending or revoking your registration or disciplined you by restricting your activities?	☐	☒	10
(5) imposed a civil money penalty on you, or ordered you to cease and desist from any activity?	☐	☒	10A
E. Has any other Federal regulatory agency or any state regulatory agency or foreign financial regulatory authority ever			
(1) found you to have made a false statement or omission or been dishonest, unfair or unethical?	☐	☒	11
(2) found you to have been involved in a violation of investment regulations or statutes?	☐	☒	12
(3) found you to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☒	13
(4) entered an order against you in connection with investment-related activity?	☐	☒	14
(5) denied, suspended, or revoked your registration or license or otherwise prevented you from associating with an investment-related business, or disciplined you by restricting your activities?	☐	☒	15
(6) revoked or suspended your license as an attorney, accountant or federal contractor?	☐	☒	16
F. Has any self-regulatory organization or commodities exchange:			
(1) found you to have made a false statement or omission?	☐	☒	17
(2) found you to have been involved in a violation of its rules?	☐	☒	18
(3) found you to have been the cause of an investment-related business having its authorization to do business denied, suspended, revoked or restricted?	☐	☒	19
(4) disciplined you by expelling or suspending you from membership, barring or suspending your association with its members, or restricting your activities?	☐	☒	20
G. Has any foreign government ever entered an order against you related to investments or fraud, other than as reported in items 22A, B, C or E?	☐	☒	21
H. Have you ever been the subject of an investment-related, consumer-initiated complaint or proceeding that:			
(1) alleged compensatory damages of $10,000 or more, fraud, or wrongful taking of property?	☒	☐	22
(2) was settled or decided against you for $5,000 or more, or found fraud or the wrongful taking of property?	☐	☒	23
I. Are you now the subject of any complaint, investigation, or proceeding that could result in a "yes" answer to parts A-H of this item?	☐	☒	24
J. Has a bonding company denied, paid out on, or revoked a bond for you?	☐	☒	25
K. Do you have any unsatisfied judgments or liens against you?	☒	☐	26
L. Have you or a firm that you exercised management or policy control over, or owned 10% or more of the securities of, failed in business, made a compromise with creditors, filed a bankruptcy petition or been declared bankrupt?	☐	☒	27
M. Has a broker or dealer firm that you exercised management or policy control over, or owned 10% or more of the securities of, been declared bankrupt, had a trustee appointed under the Securities Investor Protection Act, or had a direct payment procedure initiated?	☐	☒	28
N. Have you been discharged or permitted to resign because you were accused of:			
(1) violating investment-related statutes, regulations, rules, or industry standards of conduct?	☐	☒	29
(2) fraud or the wrongful taking of property?	☐	☒	30
(3) failure to supervise in connection with investment-related statutes, regulations, rules or industry standards of conduct?	☐	☒	31

DISCLOSURE CERTIFICATION (OPTIONAL)

You may only certify to the accuracy and completeness of the disclosure information in your file if it has been fully provided in DRP format. If DRP(s) are not on file, do not answer these certification boxes. Provide full details of all matters on DRP(s). All appropriate questions in Item 22 must be answered, regardless of whether the certification is being utilized. Refer to the instructions on the inside cover of the Form U-4 for additional information on the utilization of the certification language.

O. I have reviewed a copy of my disclosure file taken from the CRD system. I acknowledge that all information contained therein is fully disclosed, accurate and in DRP format. I further certify the following:

1. I have no new information to add to my disclosure file. ☐ 32
2. I have new information to add to my disclosure file which is reported on the attached DRP(s). ☐ 33
3. I have updated information, reported on the attached DRP(s), which was previously reported and contained in Occurrence _____ ☐ 34

This applicant and appropriate signatory has *DOES NOT* has completed *UNLESS* this page is being submitted as an amendment

X

MONTH DAY YEAR / SIGNATURE OF APPLICANT

TYPE OR PRINT NAME OF APPLICANT:

MONTH DAY YEAR / SIGNATURE OF APPROPRIATE SIGNATORY

TYPE OR PRINT NAME OF

CRD USE ONLY

FORM U-4

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

If there is an amendment to this page, complete only Item 23 and Items being amended

(23) FIRM CRD # 20182	SOCIAL SECURITY # REDACTED	APPLICANT'S CRD # 1262947
FIRM NFA #		APPLICANT'S INDIV #

THE APPLICANT MUST READ THE FOLLOWING VERY CAREFULLY

1. I swear or affirm that I have read and understand the items and instructions on this form and that my answers (including attachments) are true and complete to the best of my knowledge. I understand that I am subject to administrative, civil or criminal penalties if I give false or misleading answers.
2. I apply for registration with the jurisdictions and organizations indicated in Item 10 as may be amended from time to time and, in consideration of the jurisdictions and organizations receiving and considering my application, I submit to the authority of the jurisdictions and organizations and agree to comply with all provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the jurisdictions and organizations as they are or may be adopted, or amended from time to time. I further agree to be subject to and comply with all requirements, rulings, orders, directives and decisions of, and penalties, prohibitions and limitations imposed by the jurisdictions and organizations, subject to right of appeal or review as provided by law.
3. I agree that neither the jurisdictions or organizations nor any person acting on their behalf shall be liable to me for action taken or omitted to be taken in official capacity or in the scope of employment, except as otherwise provided in the statutes, constitutions, certificates of incorporation, by-laws or the rules and regulations of the jurisdictions and organizations.
4. I authorize the jurisdictions and organizations to give any information they may have concerning me to any employer or prospective employer, any federal, state or municipal agency, or any other organization and I release the jurisdictions and organizations and any person acting on their behalf from any and all liability of whatever nature by reason of furnishing such information.
5. 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 organizations indicated in Item 10 as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgement in any court of competent jurisdiction.
6. For the purpose of complying with the laws relating to the offer or sale of securities or commodities in the jurisdictions indicated in Item 10 as may be amended from time to time, I irrevocably appoint the administrator of each of those jurisdictions, or such other person designated by law, and the successors in such office, my attorney upon whom may be served any notice, process or pleading in any action or proceeding against me arising out of or in connection with the offer or sale of securities or commodities, or out of the violation or alleged violation of the laws of the jurisdictions. I consent that any such action or proceeding against me may be commenced in any court of competent jurisdiction and proper venue by service of process upon the appointee as if I were a resident of, and had been lawfully served with process in, the jurisdiction. I request that a copy of any notice, process or pleading served hereunder be mailed to my current residential address as reflected in this form or any amendment thereto.
7. I consent that notice of any investigation or proceeding by any self-regulatory organization against applicant may be given by personal service or by regular, registered or certified mail or confirmed telegram to applicant at his/her most recent business or home address as reflected in this Form U-4, or any amendment thereto, or by leaving notice of the investigation or proceeding at such address.
8. I authorize all of my employers and any other person to furnish to any jurisdiction or organization or any agent acting on its behalf, any information they have, including my creditworthiness, character, ability, business activities, educational background, general reputation, history of my employment and, in the case of former employers, complete reasons for my termination. Moreover, I release each employer, former employer and each other person from any and all liability, of whatever nature, by reason of furnishing any of the above information, including that information reported on the Uniform Termination Notice for Securities Industry Registration (Form U-5). I recognize that I may be the subject of an investigative consumer report ordered by the jurisdictions, or organizations with which this application is being filed, and waive any requirement of notification with respect to any investigative consumer report ordered by any such jurisdiction or organization. I understand that I have the right to request complete and accurate disclosure by the jurisdiction or organization of the nature and scope of the requested investigative consumer report.
9. I understand and certify that the representations in this form apply to all employers with whom I seek registration as indicated in Items 4 and 9 of this form. I agree to update this form by causing an amendment to be filed on a timely basis whenever changes occur to answers previously reported. Further, I represent that, to the extent any information previously submitted is not amended, the information provided in this form is currently accurate and complete.
10. If I have become temporarily registered as an agent, I acknowledge that this application for registration with the jurisdictions and organizations indicated in Item 10 is separate and distinct from any temporary registration already obtained with the jurisdictions and organizations. I further understand that my registration may be denied, suspended or revoked under the laws, regulations or rules of the jurisdictions and organizations.

9/28/95
Month Day Year

Robert F Berry
SIGNATURE OF APPLICANT

Robert F. Berry
TYPE OR PRINT NAME OF APPLICANT

THE FIRM MUST COMPLETE THE FOLLOWING

To the best of my knowledge and belief, the applicant is currently bonded where required, and, at the time of approval, will be familiar with the statute(s), constitution(s), rules and by-laws of the agency, jurisdiction or self-regulatory organization with which this application is being filed, and the rules governing registered persons, and will be fully qualified for the position for which application is being made herein. I agree that, notwithstanding the approval of such agency, jurisdiction or organization which hereby is requested, I will not employ the applicant in the capacity stated herein without first receiving the approval of any authority which may be required by law. This firm has communicated with all of the applicant's previous employers for the past three years.

EMPLOYER	NAME OF PERSON CONTACTED	POSITION OF PERSON CONTACTED	EMPLOYED FROM	EMPLOYED TO	HOW CONTACTED PHONE	HOW CONTACTED LETTER	HOW CONTACTED WITNESS
PRudential Sec. , Inc.			4/85	11/94		xx	

IN ADDITION, I HAVE TAKEN APPROPRIATE STEPS TO VERIFY THE ACCURACY AND COMPLETENESS OF THE INFORMATION CONTAINED IN AND WITH THIS APPLICATION.

THE APPROPRIATE SIGNATORY AREA *MUST BE* COMPLETED ON ALL INITIAL, TRANSFER OR AMENDMENT FILINGS.

9/28/95
MONTH DAY YEAR

William L Short, Jr.
SIGNATURE OF APPROPRIATE SIGNATORY

William L. Short, Jr.
TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

FORM U-4

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

If there is an amendment to this page, complete only Items 1, 2, 3, 4 and Items being amended

(1) LAST NAME	(2) SR, JR, etc.	FIRST NAME	MIDDLE NAME (MIDDLE INITIAL)	(3) APPLICANT CRD # / SOC SEC #
Berry		Robert	Franklin	1262947 REDACTED

(4) FEE PAID	(5) FIRM NAME (Do not include this employment under Item 13, page 2)	(6) EMPLOYMENT DATE
20182	Wheat, First Securities, Inc.	11/04/94

(7) FIRM MAIL ADDRESS — STREET: 901 East Byrd Street — CITY: Richmond — STATE: Virginia — ZIP: 23219

(8) BRANCH ID # — OFFICE OF EMPLOYMENT ADDRESS — STREET: 190 Nations Bank Plaza, Suite 1570 — CITY: 1901 Main Street — STATE: Columbia — ZIP: SC 29202

(9) Will applicant maintain registration with another Broker Dealer not under common ownership or control with the firm named in Item 4 above? ☐ Yes ☒ No
If "Yes" list in Item 19.
If "Yes" has the firm(s) been contacted? ☐ Yes ☐ No

(10) Will applicant maintain multiple registrations with Broker Dealers under common ownership or control with the firm named in Item 4 above? ☐ Yes ☒ No
If "Yes" fill in information below

Firm CRD # _____ Name of Firm _____

Firm CRD # _____ Name of Firm _____

Firm CRD # _____ Name of Firm _____

(11) TO BE REGISTERED WITH THE FOLLOWING

SRO

☐ ASE	☐ BSE	☐ CBOE	☐ CSE	☐ MSE	☐ NASD	☐ NFA	☐ NYSE	☐ PHLX	☐ PSE	☐ OTHER (Specify)

JURISDICTION

☐ AK	☐ AL	☐ AR	☐ AZ	☐ CA	☐ CO	☐ CT	☐ DC	☐ DE	☐ FL	☐ GA	☐ HI	☐ IA
☐ ID	☐ IL	☐ IN	☐ KS	☐ KY	☐ LA	☐ MA	☐ MD	☐ ME	☐ MI	☐ MN	☐ MO	☐ MS
☐ MT	☐ NC	☐ ND	☐ NE	☐ NH	☐ NJ	☐ NM	☐ NV	☐ NY	☐ OH	☐ OK	☐ OR	☐ PA
☐ RI	☒ SC	☐ SD	☐ TN	☐ TX	☐ UT	☐ VA	☐ VT	☐ WA	☐ WI	☐ WV	☐ WY	☐ PR

☐ *All Jurisdictions (Check In Lieu Of Each Individual Box).*

(12) TYPE OF EXAMINATION/REGISTRATION REQUESTED (check all applicable categories)

- ☐ S 3 Commodity Futures Examination
- ☐ S-4 (OP) Registered Options Principal
- ☐ S 5 Interest Rate Options Examination
- ☐ S-6 (IR) Investment Company and Variable Contracts Products Representative
- ☐ S 7 (GS) Full Registration/General Securities Representative
- ☐ S 7 (TR) Securities Trader (NYSE)
- ☐ S 7 (TS) Trading Supervisor (NYSE)
- ☐ S 8 (SU) General Securities Sales Supervisor
- ☐ S 8 (BM) Branch Office Manager (NYSE)
- ☐ S 11 (AR) Assistant Representative/Order Processing
- ☐ S 15 (FC) Foreign Currency Options
- ☐ S 16 (SA) Supervisory Analyst
- ☐ S-22 (OR) Direct Participation Program Representative
- ☐ S 24 (GP) General Securities Principal
- ☐ S 26 (IP) Investment Company and Variable Contracts Products Principal
- ☐ S 27 (FN) Financial and Operations Principal
- ☐ S-28 (FI) Introducing Broker-Dealer Financial and Operations Principal
- ☐ S-39 (DP) Direct Participation Program Principal
- ☐ S-42 (OR) Options Representative
- ☐ S-52 (MR) Municipal Securities Representative
- ☐ S-53 (MP) Municipal Securities Principal
- ☐ S-62 (CS) Corporate Securities Representative
- ☐ S 63 Uniform Securities Agent State Law Examination
- ☐ S 65 Uniform Investment Advisor Law Examination
- ☐ (AG) Agent
- ☐ (RG) Government Securities Representative
- ☐ (PG) Government Securities Principal
- ☐ (ME) Member Exchange (NYSE)
- ☐ (LE) Securities Lending Representative (NYSE)
- ☐ (LS) Securities Lending Supervisor (NYSE)
- ☐ (AM) Allied Member (NYSE)
- ☐ (AP) Approved Person (NYSE)
- ☐ (AI) Agent of the Issuer
- ☐ Reschedule Exam Series _____
- ☒ Other IA Rep.

THIS PORTION MUST BE COMPLETED FOR ALL PARTIAL (TRANSFER OR RE-REGISTRATION) FILINGS

(13) APPLICANT'S CURRENT ADDRESS _____ STREET _____ CITY _____ STATE _____ ZIP _____ FROM MONTH / YEAR

FIRM(S) APPLICANT IS TRANSFERRING FROM — TERMINATION DATE (Mo/Day/Yr)

_____ _____

_____ _____

☐ ◀ *CHECK IF THIS U-4 IS BEING FILED TO MAKE PERMANENT A TEMPORARY REGISTRATION (TAT).*

The appropriate signature area *DOES NOT* have to be completed *UNLESS* this page is being submitted as an amendment

MONTH DAY YEAR _____ SIGNATURE OF APPROPRIATE SIGNATORY

_____ TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

Rev. Form U-4 (11/94) PAGE 1

FORM U-4

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

If there is an amendment to this page, complete only Items 13, 14 and the items being amended

(3) FIRM CRD #	SOCIAL SECURITY #	APPLICANT'S CRD #
20182	REDACTED	1262947
FIRM NFA #		APPLICANT'S NFA #

PERSONAL DATA

(11) LAST NAME	JR./SR., etc.	FIRST NAME	MIDDLE NAME	(12) OTHER NAMES KNOWN BY
Berry		Robert	Franklin	Bob

(16) DATE OF BIRTH (Month, Day, Year)	(17) SEX	HEIGHT	WEIGHT	HAIR COLOR	EYE COLOR
REDACTED	Male	5'9"	145	Brown	Blue

RESIDENTIAL HISTORY

(18) GIVE ALL ADDRESSES FOR THE PAST FIVE YEARS STARTING WITH CURRENT ADDRESS

STREET	CITY	STATE	ZIP	FROM MONTH	FROM YEAR	TO MONTH	TO YEAR
201 Silvermill Court	Columbia	SC	29210	11	90	PRESENT	
96 Muskrat Run	Irmo	SC	29603	09	88	11	90

EMPLOYMENT AND PERSONAL HISTORY

(19) ACCOUNT FOR ALL TIME FOR THE PAST TEN YEARS. Give all employment experience starting with your previous employer and working back ten years. Include full and part-time work, self-employment, military service, unemployment and full-time education. (If this page is being filed as part of a Form BD, start with your present employer instead.)

			FROM MONTH	FROM YEAR	TO MONTH	TO YEAR	POSITION HELD
NAME	Prudential Securities, Inc.		04	85	11	94	Vice President/ Investments
CITY	Columbia	STATE SC					
NAME	Dean Witter Reynolds, Inc.		02	84	04	85	Financial Advisor
CITY	Columbia	STATE SC					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					
NAME							
CITY		STATE					

(20) Are you currently engaged in any other business (not shown above) either as a proprietor, partner, officer, director, trustee, employee, agent or otherwise?
☒ YES ☐ NO If "YES", please explain below

Mid-Atlantic Marketing, Inc.; Charlotte, NC; Director

The appropriate signatory area *DOES NOT* have to be completed *UNLESS* this page is being submitted as an amendment

MONTH DAY YEAR — SIGNATURE OF APPROPRIATE SIGNATORY

TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

Rev. Form U-4 (11/91)

PAGE 2

FORM U-4 UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

If there is [illegible] ment to this page, complete only item 21 and item [illegible] mended

(21) FIRM CRD #	FIRM NFA #	SOCIAL SECURITY #	APPLICANT CRD #	APPLICANT'S NFA #
20182		REDACTED	1262947	

IF THE ANSWER TO ANY OF THE FOLLOWING QUESTIONS IS 'YES' AND YOU CANNOT UTILIZE THE CERTIFICATION IN ITEM 22D BELOW, ATTACH COMPLETE DETAILS OF ALL EVENTS OR PROCEEDINGS ON DRP(S).

(22) *DEFINITIONS*

- **Charged** – Accused of a crime in a formal complaint, information, or indictment
- **Investment or Investment-Related** – Pertaining to securities, commodities, banking, insurance or real estate (including, but not limited to, acting as or being associated with a broker-dealer, investment company, investment adviser, futures sponsor, bank or savings and loan association)
- **Involved** – Doing an act or aiding, abetting, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act
- ***Foreign Financial Regulatory Authority*** – Includes (A) a foreign securities authority; (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of investment or investment related activities; or (C) membership organization, a function of which is to regulate the participation of its members in the activities listed above.

	YES	NO	
22A. Have you been convicted of or pleaded guilty or nolo contendere ("no contest") in a domestic or foreign court to			
(1) a felony or misdemeanor involving: investments or an investment-related business, fraud, false statements or omissions, wrongful taking of property, or bribery, forgery, counterfeiting or extortion?	☐	☒	1
(2) gambling?	☐	☒	2
(3) any other felony?	☐	☒	3
B. Have you, or an organization over which you exercised management or policy control, ever been charged with any felony or charged with a misdemeanor specified in question A(1) or (2) in a domestic or foreign court?	☐	☒	4
C. Has any domestic or foreign court ever			
(1) enjoined you in connection with any investment-related activity?	☐	☒	5
(2) found that you were involved in a violation of investment-related statutes or regulations?	☐	☒	6
D. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever			
(1) found you to have made a false statement or omission?	☐	☒	7
(2) found you to have been involved in a violation of investment-related regulations or statutes?	☐	☒	8
(3) found you to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☒	9
(4) entered an order denying, suspending or revoking your registration or disciplined you by restricting your activities?	☐	☒	10
(5) imposed a civil money penalty on you, or ordered you to cease and desist from any activity?	☐	☒	10A
E. Has any other Federal regulatory agency or any state regulatory agency or foreign financial regulatory authority ever			
(1) found you to have made a false statement or omission or been dishonest, unfair or unethical?	☐	☒	11
(2) found you to have been involved in a violation of investment regulations or statutes?	☐	☒	12
(3) found you to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☒	13
(4) entered an order against you in connection with investment-related activity?	☐	☒	14
(5) denied, suspended, or revoked your registration or license or otherwise prevented you from associating with an investment-related business, or disciplined you by restricting your activities?	☐	☒	15
(6) revoked or suspended your license as an attorney, accountant or federal contractor?	☐	☒	16
F. Has any self-regulatory organization or commodities exchange			
(1) found you to have made a false statement or omission?	☐	☒	17
(2) found you to have been involved in a violation of its rules?	☐	☒	18
(3) found you to have been the cause of an investment-related business having its authorization to do business denied, suspended, revoked or restricted?	☐	☒	19
(4) disciplined you by expelling or suspending you from membership, barring or suspending your association with its members, or restricting your activities?	☐	☒	20
G. Has any foreign government ever entered an order against you related to investments or fraud, other than as reported in items 22A, B, C or E?	☐	☒	21
H. *Have you ever* been the subject of an investment-related, consumer-initiated complaint or proceeding that:			
(1) alleged compensatory damages of $10,000 or more, fraud, or wrongful taking of property?	☒	☐	22
(2) was settled or decided against you for $5,000 or more, or found fraud or the wrongful taking of property?	☐	☒	23
I. Are you now the subject of any complaint, investigation, or proceeding that could result in a "yes" answer to parts A-H of this item?	☐	☒	24
J. Has a bonding company denied, paid out on, or revoked a bond for you?	☐	☒	25
K. Do you have any unsatisfied judgments or liens against you?	☒	☐	26
L. Have you or a firm that you exercised management or policy control over, or owned 10% or more of the securities of, failed in business, made a compromise with creditors, filed a bankruptcy petition or been declared bankrupt?	☐	☒	27
M. Has a broker or dealer firm that you exercised management or policy control over, or owned 10% or more of the securities of, been declared bankrupt, had a trustee appointed under the Securities Investor Protection Act, or had a direct payment procedure initiated?	☐	☒	28
N. Have you been discharged or permitted to resign because you were accused of:			
(1) violating investment-related statutes, regulations, rules, or industry standards of conduct?	☐	☒	29
(2) fraud or the wrongful taking of property?	☐	☒	30
(3) failure to supervise in connection with investment-related statutes, regulations, rules or industry standards of conduct?	☐	☒	31

DISCLOSURE CERTIFICATION (OPTIONAL)

You may only certify to the accuracy and completeness of the disclosure information in your file if it has been fully provided in DRP format. If DRP(s) are not on file, do not answer these certification boxes. Provide full details of all matters on DRP(s). All appropriate questions in Item 22 must be answered, regardless of whether the certification is being utilized. Refer to the instructions on the inside cover of the Form U-4 for additional information on the utilization of the certification language.

O I have reviewed a copy of my disclosure file taken from the CRD system. I *acknowledge that* all information contained therein is fully disclosed, accurate and in DRP format. I further certify the following

1. I have no new information to add to my disclosure file. 1. ☐ 32
2. I have new information to add to my *disclosure file which is reported* on the attached DRP(s). 2. ☐ 33
3. I have updated information, reported on the attached DRP(s), which was previously reported and contained in Occurrence _____ 3. ☐ 34

The applicant and appropriate signatory are DOES NOT have to [illegible] completed *UNLESS* this page is being submitted by [illegible]

MONTH DAY YEAR SIGNATURE OF APPLICANT

TYPE OR PRINT NAME OF APPLICANT

MONTH DAY YEAR SIGNATURE OF APPROPRIATE SIGNATORY

TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

FORM U-4

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

If there is an amendment to this page, complete only Item 23 and Items being amended

FIRM CRD #	SOCIAL SECURITY #	APPLICANT'S CRD #
20182	REDACTED	1262947
FIRM NFA #		APPLICANT'S NFA #

THE APPLICANT MUST READ THE FOLLOWING VERY CAREFULLY

1. I swear or affirm that I have read and understand the items and instructions on this form and that my answers (including attachments) are true and complete to the best of my knowledge. I understand that I am subject to administrative, civil or criminal penalties if I give false or misleading answers.
2. I apply for registration with the jurisdictions and organizations indicated in Item 10 as may be amended from time to time and, in consideration of the jurisdictions and organizations receiving and considering my application, I submit to the authority of the jurisdictions and organizations and agree to comply with all provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the jurisdictions and organizations as they are or may be adopted or amended from time to time. I further agree to be subject to and comply with all requirements, rulings, orders, directives and decisions of, and penalties, prohibitions and limitations imposed by the jurisdictions and organizations, subject to right of appeal or review as provided by law.
3. I agree that neither the jurisdictions or organizations nor any person acting on their behalf shall be liable to me for action taken or omitted to be taken in official capacity or in the scope of employment, except as otherwise provided in the statutes, constitutions, certificates of incorporation, by-laws or the rules and regulations of the jurisdictions and organizations.
4. I authorize the jurisdictions and organizations to give any information they may have concerning me to any employer or prospective employer, any federal, state or municipal agency, or any other organization and I release the jurisdictions and organizations and any person acting on their behalf from any and all liability of whatever nature by reason of furnishing such information.
5. 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 organizations indicated in Item 10 as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgement in any court of competent jurisdiction.
6. For the purpose of complying with the laws relating to the offer or sale of securities or commodities in the jurisdictions indicated in Item 10 as may be amended from time to time, I irrevocably appoint the administrator of each of those jurisdictions, or such other person designated by law, and the successors in such office, my attorney upon whom may be served any notice, process or pleading in any action or proceeding against me arising out of or in connection with the offer or sale of securities or commodities, or out of the violation or alleged violation of the laws of the jurisdictions. I consent that any such action or proceeding against me may be commenced in any court of competent jurisdiction and proper venue by service of process upon the appointee as if I were a resident of, and had been lawfully served with process in, the jurisdiction. I request that a copy of any notice, process or pleading served hereunder be mailed to my current residential address as reflected in this form or any amendment thereto.
7. I consent that notice of any investigation or proceeding by any self-regulatory organization against applicant may be given by personal service or by regular, registered or certified mail or confirmed telegram to applicant at his/her most recent business or home address as reflected in this Form U-4, or any amendment thereto, or by leaving notice of the investigation or proceeding at such address.
8. I authorize all of my employers and any other person to furnish to any jurisdiction or organization or any agent acting on its behalf, any information they have, including my creditworthiness, character, ability, business activities, educational background, general reputation, history of my employment and, in the case of former employers, complete reasons for my termination. Moreover, I release each employer, former employer and each other person from any and all liability, of whatever nature, by reason of furnishing any of the above information, including that information reported on the Uniform Termination Notice for Securities Industry Registration (Form U-5). I recognize that I may be the subject of an investigative consumer report ordered by the jurisdictions, or organizations with which this application is being filed, and waive any requirement of notification with respect to any investigative consumer report ordered by any such jurisdiction or organization. I understand that I have the right to request complete and accurate disclosure by the jurisdiction or organization of the nature and scope of the requested investigative consumer report.
9. I understand and certify that the representations in this form apply to all employers with whom I seek registration as indicated in Items 4 and 9 of this form. I agree to update this form by causing an amendment to be filed on a timely basis whenever changes occur to answers previously reported. Further, I represent that, to the extent any information previously submitted is not amended, the information provided in this form is currently accurate and complete.
10. If I have become temporarily registered as an agent, I acknowledge that this application for registration with the jurisdictions and organizations indicated in Item 10 is separate and distinct from any temporary registration already obtained with the jurisdictions and organizations. I further understand that my registration may be denied, suspended or revoked under the laws, regulations or rules of the jurisdictions and organizations.

JAN 16 1995
Month Day Year

/s/ Robert F Berry
SIGNATURE OF APPLICANT

Robert F. Berry
TYPE OR PRINT NAME OF APPLICANT

THE FIRM MUST COMPLETE THE FOLLOWING

To the best of my knowledge and belief, the applicant is currently bonded where required, and, at the time of approval, will be familiar with the statute(s), constitution(s), rules and by-laws of the agency, jurisdiction or self-regulatory organization with which this application is being filed, and the rules governing registered persons, and will be fully qualified for the position for which application is being made herein. I agree that, notwithstanding the approval of such agency, jurisdiction or organization which hereby is requested, I will not employ the applicant in the capacity stated herein without first receiving the approval of any authority which may be required by law. This firm has communicated with all of the applicant's previous employers for the past three years.

EMPLOYER	NAME OF PERSON CONTACTED	POSITION OF PERSON CONTACTED	EMPLOYED FROM	EMPLOYED TO	HOW CONTACTED PHONE	HOW CONTACTED LETTER	HOW CONTACTED OTHER
Prudential Securities, Inc.			4/85	11/94		XX	

IN ADDITION, I HAVE TAKEN APPROPRIATE STEPS TO VERIFY THE ACCURACY AND COMPLETENESS OF THE INFORMATION CONTAINED IN AND WITH THIS APPLICATION.

THE APPROPRIATE SIGNATORY AREA *MUST BE* COMPLETED ON ALL INITIAL, TRANSFER OR AMENDMENT FILINGS.

Jan 2[illegible]
MONTH DAY YEAR

/s/ William L. Short
SIGNATURE OF APPROPRIATE SIGNATORY

William L. Short, Jr.
TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

FORM U-4

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

If there is an amendment to this page, complete only Items 1, 2, 3, 4 and items being amended.

(1) LAST NAME	JR/SR etc.	FIRST NAME	MIDDLE NAME (SPECIFY IF NONE)	(1) APPLICANT'S CRD #	1262947
BERRY		ROBERT	FRANKLIN	SOC SEC #	REDACTED

(3) FIRM CRD #	6124	(4) FIRM NAME (Do not include this employment under item 13, page 2)	APPLICANT'S NFA #	
FIRM NFA #		Wheat, First Securities, Inc.	(5) EMPLOYMENT DATE	11-4-94

(6) FIRM MAIN ADDRESS — STREET: 901 East Byrd Street — CITY: Richmond — STATE: Virginia — ZIP: 23219

(7) BRANCH ID #	OFFICE OF EMPLOYMENT ADDRESS	STREET	CITY	STATE	ZIP
190		1901 Main Street	Columbia	SC	29202

(8) Will applicant maintain registration with another Broker-Dealer not under common ownership or control with the firm named in Item 4 above? ☐ Yes ☒ No
If "Yes", list in item 13)
If "Yes", has/have the firm(s) been contacted? ☐ Yes ☐ No

(9) Will applicant maintain multiple registrations with Broker-Dealers under common ownership or control with the firm named in Item 4 above? ☐ Yes ☒ No
If "Yes", fill in information below:

Firm CRD # _____ Name of Firm _____

Firm CRD # _____ Name of Firm _____

Firm CRD # _____ Name of Firm _____

(10) TO BE REGISTERED WITH THE FOLLOWING.

SRO

ASE	BSE	CBOE	CSE	MSE	NASD	NFA	NYSE	PHLX	PSE	OTHER (Specify)
☒	☐	☐	☐	☐	☒	☐	☒	☒	☐	☐

JURISDICTION

AK	AL	AR	AZ	CA	CO	CT	DC	DE	FL	GA	HI	IA
☐	☐	☐	☐	☐	☐	☐	☐	☐	☒	☒	☐	☐
ID	IL	IN	KS	KY	LA	MA	MD	ME	MI	MN	MO	MS
☐	☐	☐	☐	☐	☐	☐	☒	☐	☐	☐	☐	☐
MT	NC	ND	NE	NH	NJ	NM	NV	NY	OH	OK	OR	PA
☐	☒	☐	☐	☐	☐	☐	☐	☒	☐	☐	☐	☐
RI	SC	SD	TN	TX	UT	VA	VT	WA	WI	WV	WY	PR
☐	☒	☐	☒	☒	☐	☒	☐	☐	☒	☐	☐	☐

☐ *All Jurisdictions. (Check In Lieu Of Each Individual Box).*

(11) TYPE OF EXAMINATION/REGISTRATION REQUESTED (check all applicable categories)

☐	S-3	Commodity Futures Examination	
☐	S-4 (OP)	Registered Options Principal	
☐	S-5	Interest Rate Options Examination	
☐	S-6 (IR)	Investment Company and Variable Contracts Products Representative	
☒	S-7 (GS)	Full Registration/General Securities Representative	
☐	S-7 (TR)	Securities Trader (NYSE)	
☐	S-7 (TS)	Trading Supervisor (NYSE)	
☐	S-8 (SU)	General Securities Sales Supervisor	
☐	S-8 (BM)	Branch Office Manager (NYSE)	
☐	S-11 (AR)	Assistant Representative/Order Processing	
☐	S-15 (FC)	Foreign Currency Options	
☐	S-16 (SA)	Supervisory Analyst	
☐	S-22 (DR)	Direct Participation Program Representative	
☐	S-24 (GP)	General Securities Principal	
☐	S-26 (IP)	Investment Company and Variable Contracts Products Principal	
☐	S-27 (FN)	Financial and Operations Principal	
☐	S-28 (FI)	Introducing Broker-Dealer/Financial and Operations Principal	
☐	S-39 (DP)	Direct Participation Program Principal	
☐	S-42 (OR)	Options Representative	
☐	S-52 (MR)	Municipal Securities Representative	
☐	S-53 (MP)	Municipal Securities Principal	
☐	S-62 (CS)	Corporate Securities Representative	
☐	S-63	Uniform Securities Agent State Law Examination	
☐	S-65	Uniform Investment Advisor Law Examination	
☐	(AG)	Agent	
☐	(RG)	Government Securities Representative	
☐	(PG)	Government Securities Principal	
☐	(ME)	Member Exchange (NYSE)	
☐	(LE)	Securities Lending Representative (NYSE)	
☐	(LS)	Securities Lending Supervisor (NYSE)	
☐	(AM)	Allied Member (NYSE)	
☐	(AP)	Approved Person (NYSE)	
☐	(AI)	Agent of the Issuer	
☐		Reschedule Exam Series _____	
☐		Other _____	

THIS PORTION MUST BE COMPLETED FOR ALL PARTIAL TRANSFER OR RE-REGISTRATION FILINGS

FROM MONTH YEAR

(12) APPLICANT'S CURRENT ADDRESS. STREET _____ CITY _____ STATE _____ ZIP _____

FIRM(S) APPLICANT IS TRANFERRING FROM: TERMINATION DATE: (Mo/Day/Yr.)

☐ ◀ *CHECK IF THIS U-4 IS BEING FILED TO MAKE PERMANENT A TEMPORARY REGISTRATION (TAT).*

The appropriate signatory area *DOES NOT* have to be completed *UNLESS* this page is being submitted as an amendment.

MONTH DAY YEAR _____ SIGNATURE OF APPROPRIATE SIGNATORY

_____ TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

FORM U-4

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

If there is an amendment to this page, complete only Items 13, 14 and the items being amended.

(13) FIRM CRD #	SOCIAL SECURITY #	APPLICANT'S CRD #
6124	REDACTED	
FIRM NFA #		APPLICANT'S NFA #

PERSONAL DATA

(14) LAST NAME	JR./SR., etc.	FIRST NAME	MIDDLE NAME	(15) OTHER NAMES KNOWN BY
BERRY		ROBERT	FRANKLIN	BOB

(16) DATE OF BIRTH (Month, Day, Year)	(17) SEX	HEIGHT	WEIGHT	HAIR COLOR	EYE COLOR
REDACTED	M	5'9"	145	Brown	Blue

RESIDENTIAL HISTORY

(18) GIVE ALL ADDRESSES FOR THE PAST FIVE YEARS. STARTING WITH CURRENT ADDRESS.

STREET	CITY	STATE	ZIP	FROM MONTH	FROM YEAR	TO MONTH	TO YEAR
201 Silvermill Court	Columbia	SC	29210	11	90	PRESENT	
96 Muskrat Run	Irmo	SC	29063	09	88	11	90

EMPLOYMENT AND PERSONAL HISTORY

(19) **ACCOUNT FOR ALL TIME FOR THE PAST TEN YEARS.** Give all employment experience starting with your previous employer and working back ten years. Include full and part-time work, self-employment, military service, unemployment and full-time education. (If this page is being filed as part of a Form BD, start with your present employer instead.)

		FROM MONTH	FROM YEAR	TO MONTH	TO YEAR	POSITION HELD
NAME	Prudential Securities, Inc.	04	85	11	94	Vice President/
CITY	Columbia STATE SC					Investments
NAME	Dean Witter Reynolds, Inc.	02	84	04	85	Financial Advisor
CITY	Columbia STATE SC					
NAME						
CITY	STATE					
NAME						
CITY	STATE					
NAME						
CITY	STATE					
NAME						
CITY	STATE					
NAME						
CITY	STATE					
NAME						
CITY	STATE					
NAME						
CITY	STATE					
NAME						
CITY	STATE					
NAME						
CITY	STATE					
NAME						
CITY	STATE					
NAME						
CITY	STATE					

(20) ARE you currently engaged in any other business (not shown above) either as a proprietor, partner, officer, director, trustee, employee, agent or otherwise?
☒ YES ☐ NO If "YES", please explain below:

Mid-Atlantic Marketing, Inc., Charlotte, N.C. - Director

The appropriate signatory area *DOES NOT* have to be completed *UNLESS* this page is being submitted as an amendment.

MONTH DAY YEAR — SIGNATURE OF APPROPRIATE SIGNATORY

TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

FORM U-4 — UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

If there is an amendment to this page, complete only Item 21 and items being amended

FIRM CRD #	FIRM NFA #	SOCIAL SECURITY #	APPLICANT #	APPLICANT'S NFA #
6124		REDACTED		

IF "YES" ANSWER TO ANY OF THE FOLLOWING QUESTIONS IS "YES" AND YOU CANNOT UTILIZE THE CERTIFICATION IN ITEM 22O BELOW, ATTACH COMPLETE DETAILS OF ALL EVENTS OR PROCEEDINGS ON DRP.

DEFINITIONS

- Charged – Accused of a crime in a formal complaint, information or indictment
- Investment or Investment-Related – Pertaining to securities, commodities, banking, insurance, or real estate (including, but not limited to acting as or being associated with a broker-dealer, investment company, investment adviser, futures sponsor, bank, or savings and loan association)
- Involved – Doing an act or aiding, abetting, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act.
- Foreign Financial Regulatory Authority – includes (A) a foreign securities authority; (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of investment or investment-related activities; or (C) membership organization, a function of which is to regulate the participation of its members in the activities listed above.

	YES	NO	
22A Have you been convicted of or pleaded guilty or nolo contendere ("no contest") in a domestic or foreign court to:			
(1) a felony or misdemeanor involving: investments or an investment-related business, fraud, false statements or omissions, wrongful taking of property, or bribery, forgery, counterfeiting or extortion?	☐	☒	
(2) gambling?	☐	☒	
(3) any other felony?	☐	☒	
B. Have you, or an organization over which you exercised management or policy control, ever been charged with any felony or charged with a misdemeanor specified in question A(1) or (2) in a domestic or foreign court?	☐	☒	
C Has any domestic or foreign court ever:			
(1) enjoined you in connection with any investment-related activity?	☐	☒	
(2) found that you were involved in a violation of investment-related statutes or regulations?	☐	☒	
D. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:			
(1) found you to have made a false statement or omission?	☐	☒	
(2) found you to have been involved in a violation of investment-related regulations or statutes?	☐	☒	
(3) found you to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☒	
(4) entered an order denying, suspending or revoking your registration or disciplined you by restricting your activities?	☐	☒	1.
(5) imposed a civil money penalty on you, or ordered you to cease and desist from any activity?	☐	☒	1C
E Has any other Federal regulatory agency or any state regulatory agency or foreign financial regulatory authority ever:			
(1) found you to have made a false statement or omission or been dishonest, unfair or unethical?	☐	☒	1
(2) found you to have been involved in a violation of investment regulations or statutes?	☐	☒	1
(3) found you to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☒	1
(4) entered an order against you in connection with investment-related activity?	☐	☒	1
(5) denied, suspended, or revoked your registration or license or otherwise prevented you from associating with an investment-related business, or disciplined you by restricting your activities?	☐	☒	1
(6) revoked or suspended your license as an attorney, accountant or federal contractor?	☐	☒	1
F. Has any self-regulatory organization or commodities exchange:			
(1) found you to have made a false statement or omission?	☐	☒	17
(2) found you to have been involved in a violation of its rules?	☐	☒	18
(3) found you to have been the cause of an investment-related business having its authorization to do business denied, suspended, revoked or restricted?	☐	☒	19
(4) disciplined you by expelling or suspending you from membership, barring or suspending your association with its members, or restricting your activities?	☐	☒	20
G. Has any foreign government ever entered an order against you related to investments or fraud, other than as reported in Items 22A, B, C or E?	☐	☒	21
H Have you ever been the subject of an investment-related, consumer-initiated complaint or proceeding that:			
(1) alleged compensatory damages of $10,000 or more, fraud, or wrongful taking of property?	☒	☐	22
(2) was settled or decided against you for $5,000 or more, or found fraud or the wrongful taking of property?	☐	☒	22
I Are you now the subject of any complaint, investigation, or proceeding that could result in a "yes" answer to parts A-H of this item?	☐	☒	24
J. Has a bonding company denied, paid out on, or revoked a bond for you?	☐	☒	25
K Do you have any unsatisfied judgments or liens against you?	☒	☐	26
L. Have you or a firm that you exercised management or policy control over, or owned 10% or more of the securities of, failed in business, made a compromise with creditors, filed a bankruptcy petition or been declared bankrupt?	☐	☒	27
M. Has a broker or dealer firm that you exercised management or policy control over, or owned 10% or more of the securities of, been declared bankrupt, had a trustee appointed under the Securities Investor Protection Act, or had a direct payment procedure initiated?	☐	☒	28
N Have you been discharged or permitted to resign because you were accused of:			
(1) violating investment-related statutes, regulations, rules, or industry standards of conduct?	☐	☒	29
(2) fraud or the wrongful taking of property?	☐	☒	30
(3) failure to supervise in connection with investment-related statutes, regulations, rules or industry standards of conduct?	☐	☒	31

DISCLOSURE CERTIFICATION (OPTIONAL)

You may only certify to the accuracy and completeness of the disclosure information in your file if it has been fully provided in DRP format. If DRP(s) are not on file, do not answer these certification boxes. Provide full details of all matters on DRP(s). All appropriate questions in item 22 *must be answered, regardless* of whether the certification is being utilized. Refer to the instructions on the inside cover of the Form U-4 for additional information on the utilization of the certification language.

O. I have reviewed a copy of my disclosure file taken from the CRD system. I acknowledge that all information contained therein is fully disclosed, accurate and in DRP format. I further certify the following:

1. I have no new information to add to my disclosure file. ☐ 32
2. I have new information to add to my disclosure file which is reported on the attached DRP(s). ☐ 33
3. I have updated information, reported on the attached DRP(s), which was previously reported and contained in Occurrence _____ ☐ 34

The applicant and appropriate signatory area *DOES NOT* have to be completed *UNLESS* this page is being submitted as an amendment.

MONTH DAY YEAR SIGNATURE OF APPLICANT

TYPE OR PRINT NAME OF APPLICANT

MONTH DAY YEAR SIGNATURE OF APPROPRIATE SIGNATORY

TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

FORM U-4

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

If there is an amendment to this page, complete only Item 23 and Items being amended.

(1) FIRM CRD # 6124	SOCIAL SECURITY # REDACTED	APPLICANT'S CRD # 1262947
FIRM NFA #		APPLICANT'S NFA #

THE APPLICANT MUST READ THE FOLLOWING VERY CAREFULLY

1. I swear or affirm that I have read and understand the items and instructions on this form and that my answers (including attachments) are true and complete to the best of my knowledge. I understand that I am subject to administrative, civil or criminal penalties if I give false or misleading answers.
2. I apply for registration with the jurisdictions and organizations indicated in Item 10 as may be amended from time to time and, in consideration of the jurisdictions and organizations receiving and considering my application, I submit to the authority of the jurisdictions and organizations and agree to comply with all provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the jurisdictions and organizations as they are or may be accepted, or amended from time to time. I further agree to be subject to and comply with all requirements, rulings, orders, directives and decisions of, and penalties, prohibitions and limitations imposed by the jurisdictions and organizations, subject to right of appeal or review as provided by law.
3. I agree that neither the jurisdictions or organizations nor any person acting on their behalf shall be liable to me for action taken or omitted to be taken in official capacity or in the scope of employment, except as otherwise provided in the statutes, constitutions, certificates of incorporation, by-laws or the rules and regulations of the jurisdictions and organizations.
4. I authorize the jurisdictions and organizations to give any information they may have concerning me to any employer or prospective employer, any federal, state or municipal agency, or any other organization and I release the jurisdictions and organizations and any person acting on their behalf from any and all liability of whatever nature by reason of furnishing such information.
5. 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 organizations indicated in Item 10 as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgement in any court of competent jurisdiction.
6. For the purpose of complying with the laws relating to the offer or sale of securities or commodities in the jurisdictions indicated in Item 10 as may be amended from time to time, I irrevocably appoint the administrator of each of those jurisdictions, or such other person designated by law, and the successors in such office, my attorney upon whom may be served any notice, process or pleading in any action or proceeding against me arising out of or in connection with the offer or sale of securities or commodities, or out of the violation or alleged violation of the laws of the jurisdictions. I consent that any such action or proceeding against me may be commenced in any court of competent jurisdiction and proper venue by service of process upon the appointee as if I were a resident of, and had been lawfully served with process in, the jurisdiction. I request that a copy of any notice, process or pleading served hereunder be mailed to my current residential address as reflected in this form or any amendment thereto.
7. I consent that notice of any investigation or proceeding by any self-regulatory organization against applicant may be given by personal service or by regular, registered or certified mail or confirmed telegram to applicant at his/her most recent business or home address as reflected in this Form U-4, or any amendment thereto, or by leaving notice of the investigation or proceeding at such address.
8. I authorize all of my employers and any other person to furnish to any jurisdiction or organization or any agent acting on its behalf, any information they have, including my creditworthiness, character, ability, business activities, educational background, general reputation, history of my employment and, in the case of former employers, complete reasons for my termination. Moreover, I release each employer, former employer and each other person from any and all liability, of whatever nature, by reason of furnishing any of the above information, including that information reported on the Uniform Termination Notice for Securities Industry Registration (Form U-5). I recognize that I may be the subject of an investigative consumer report ordered by the jurisdictions, or organizations with which this application is being filed, and waive any requirement of notification with respect to any investigative consumer report ordered by any such jurisdiction or organization. I understand that I have the right to request complete and accurate disclosure by the jurisdiction or organization of the nature and scope of the requested investigative consumer report.
9. I understand and certify that the representations in this form apply to all employers with whom I seek registration as indicated in Items 4 and 9 of this form. I agree to update this form by causing an amendment to be filed on a timely basis whenever changes occur to answers previously reported. Further, I represent that, to the extent any information previously submitted is not amended, the information provided in this form is currently accurate and complete.
10. If I have become temporarily registered as an agent, I acknowledge that this application for registration with the jurisdictions and organizations indicated in Item 10 is separate and distinct from any temporary registration already obtained with the jurisdictions and organizations. I further understand that my registration may be denied, suspended or revoked under the laws, regulations or rules of the jurisdictions and organizations.

November 5, 1994
Month Day Year

Robert F Berry
SIGNATURE OF APPLICANT

Robert F. Berry
TYPE OR PRINT NAME OF APPLICANT

THE FIRM MUST COMPLETE THE FOLLOWING

To the best of my knowledge and belief, the applicant is currently bonded where required, and, at the time of approval, will be familiar with the statute(s), constitution(s), rules and by-laws of the agency, jurisdiction or self-regulatory organization with which this application is being filed, and the rules governing registered persons, and will be fully qualified for the position for which application is being made herein. I agree that, notwithstanding the approval of such agency, jurisdiction or organization which hereby is requested, I will not employ the applicant in the capacity stated herein without first receiving the approval of any authority which may be required by law. This firm has communicated with all of the applicant's previous employers for the past three years.

EMPLOYER	NAME OF PERSON CONTACTED	POSITION OF PERSON CONTACTED	EMPLOYED FROM	EMPLOYED TO	HOW CONTACTED: PHONE	HOW CONTACTED: LETTER	HOW CONTACTED: INTERVIEW
Prudential Sec., Inc.			4/85	11/94		xx	

IN ADDITION, I HAVE TAKEN APPROPRIATE STEPS TO VERIFY THE ACCURACY AND COMPLETENESS OF THE INFORMATION CONTAINED IN AND WITH THIS APPLICATION.

THE APPROPRIATE SIGNATORY AREA *MUST BE* COMPLETED ON ALL INITIAL, TRANSFER OR AMENDMENT FILINGS.

11/7/94
MONTH DAY YEAR

Joseph L Turner Jr.
SIGNATURE OF APPROPRIATE SIGNATORY

Joseph L. Turner, Jr.
TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

EXHIBIT 2

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS ELEVENTH JUDICIAL CIRCUIT
Robert F. Berry, Plaintiff, 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., Defendants.	Case No. 2017-CP-32-00397

AFFIDAVIT OF BEVERLY W. JACKSON

On this day, personally appeared before me, the undersigned authority, Beverly W. Jackson, who upon her oath, deposes and states:

1. My name is Beverly W. Jackson. I am employed in the Wells Fargo Law Department as a Paralegal. I am over the age of 21, competent to make this Affidavit, and have personal knowledge that everything stated herein is true and correct.

2. In my capacity as a member of the Law Department, I am familiar with the corporate structure of Wells Fargo & Company and its related corporate entities.

3. Effective November 11, 2016, Wells Fargo Advisors, LLC changed its name to Wells Fargo Clearing Services, LLC.

4. Wachovia Securities Financial Holdings, LLC, which is incorrectly named in Robert F. Berry's action as "Wachovia Securities Financial Holdings, Inc.," is the parent company of Wells Fargo Clearing Services, LLC. Wachovia Securities Financial Holdings, LLC

is an indirect subsidiary of Wells Fargo & Company. Wells Fargo Investment Group, Inc. owns thirty-one percent (31%) of Wachovia Securities Financial Holdings, LLC, and EVEREN Capital Corporation owns sixty-nine percent (69%) of Wachovia Securities Financial Holdings, LLC. Wells Fargo Investment Group, Inc. and EVEREN Capital Corporation are 100% owned by Wells Fargo & Company.

5. Wells Fargo Bank, N.A. is a subsidiary of Wells Fargo & Company.

6. In my capacity as a member of the Wells Fargo Law Department, I have access to certain personnel records of current and former employees of Wells Fargo & Company and related corporate entities. Scott A. Spang, a defendant in this action, is employed by Wells Fargo Clearing Services, LLC and is a registered representative or associated person under FINRA By-Laws and the Code of Arbitration Procedure of Industry Disputes. Mr. Berry was formerly employed by Wells Fargo Advisors, LLC, and his employment was terminated in February 2014.

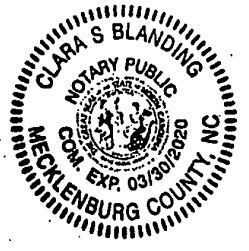
7. The Form U4 for Mr. Berry shows that he was employed by Wheat First Securities Inc. at the time of its filing (*See* Form U4 attached as Exhibit 1.) Wheat First Securities Inc., part of Wheat First Butcher Singer, was the predecessor in interest to Wells Fargo Advisors, LLC. Wheat First Butcher Singer was acquired by First Union Corporation. First Union then acquired EVEREN Capital Corporation, and separately Wachovia Corporation acquired Interstate Johnson Lane. First Union and Wachovia Corporation merged, and their brokerage firms merged to form Wachovia Securities, LLC. Wells Fargo & Company acquired Wachovia Corporation, including Wachovia Securities, in 2008. In 2009, Wachovia Securities became Wells Fargo Advisors, LLC.

Further Affiant sayeth not.

Beverly W. Jackson

Beverly W. Jackson

SUBSCRIBED AND SWORN TO before me on this the 12 day of April, 2017 certify which witness my hand and seal of office.



Clara S. Blanding

Notary Public in and for
The State of North Carolina
Printed name: Clara S. Blanding
My commission expires: 3/30/2020

EXHIBIT 1

FORM U-4

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

If there is an amendment to this page, complete only Items 1, 2, 3, 4 and items being amended.

(1) LAST NAME	JR/SR etc.	FIRST NAME	MIDDLE NAME (SPECIFY IF NONE)	(2) APPLICANT'S CRD # / SOC SEC #
BERRY		ROBERT	FRANKLIN	1216947 REDACTED

(3) FIRM CRD # / BD NFA #	(4) FIRM NAME (Do not include this employment under item 19, page 2)	APPLICANT'S NFA # / (5) EMPLOYMENT DATE
6124	Wheat, First Securities, Inc.	11-4-94

(6) FIRM MAIN ADDRESS: 901 East Byrd Street, Richmond, Virginia 23219 (STREET / CITY / STATE / ZIP)

(7) BRANCH I.D. #	OFFICE OF EMPLOYMENT ADDRESS	STREET	CITY	STATE	ZIP
190		1901 Main Street	Columbia	SC	29202

(8) Will applicant maintain registration with another Broker-Dealer not under common ownership or control with the firm named in Item 4 above? ☐ Yes ☒ No
(If "Yes", list in Item 19)
If "Yes", has/have the firm(s) been contacted? ☐ Yes ☐ No

(9) Will applicant maintain multiple registrations with Broker-Dealers under common ownership or control with the firm named in Item 4 above? ☐ Yes ☒ No
If "Yes", fill in information below:
Firm CRD # _____ Name of Firm _____
Firm CRD # _____ Name of Firm _____
Firm CRD # _____ Name of Firm _____

(10) TO BE REGISTERED WITH THE FOLLOWING.

SRO

☒ NYSE	☐ ASE	☐ BSE	☐ CBOE	☐ CSE	☐ MSE	☒ NASD	☐ NFA	☒ PHLX	☐ PSE	☐ OTHER (Specify)

JURISDICTION

☐ AK	☒ AL	☐ AR	☐ AZ	☒ CA	☐ CO	☐ CT	☐ DC	☐ DE	☒ FL	☒ GA	☐ HI	☐ IA	
☐ ID	☐ IL	☐ IN	☐ KS	☐ KY	☐ LA	☐ MA	☒ MD	☐ ME	☐ MI	☐ MN	☐ MO	☐ MS	
☐ MT	☒ NC	☐ ND	☐ NE	☐ NH	☐ NJ	☐ NM	☐ NV	☒ NY	☐ OH	☐ OK	☐ OR	☐ PA	
☐ RI	☒ SC	☐ SD	☒ TN	☒ TX	☐ UT	☒ VA	☐ VT	☐ WA	☒ WI	☐ WV	☐ WY	☐ PR	

☐ *All Jurisdictions. (Check In Lieu Of Each Individual Box).*

(11) TYPE OF EXAMINATION/REGISTRATION REQUESTED (check all applicable categories)

- ☐ S-3 Commodity Futures Examination
- ☐ S-4 (OP) Registered Options Principal
- ☐ S-5 Interest Rate Options Examination
- ☐ S-6 (IR) Investment Company and Variable Contracts Products Representative
- ☒ S-7 (GS) Full Registration/General Securities Representative
- ☐ S-7 (TR) Securities Trader (NYSE)
- ☐ S-7 (TS) Trading Supervisor (NYSE)
- ☐ S-8 (SU) General Securities Sales Supervisor
- ☐ S-8 (BM) Branch Office Manager (NYSE)
- ☐ S-11 (AR) Assistant Representative/Order Processing
- ☐ S-15 (FC) Foreign Currency Options
- ☐ S-16 (SA) Supervisory Analyst
- ☐ S-22 (DR) Direct Participation Program Representative
- ☐ S-24 (GP) General Securities Principal
- ☐ S-26 (IP) Investment Company and Variable Contracts Products Principal
- ☐ S-27 (FN) Financial and Operations Principal
- ☐ S-28 (FI) Introducing Broker-Dealer/Financial and Operations Principal
- ☐ S-39 (DP) Direct Participation Program Principal
- ☐ S-42 (OR) Options Representative
- ☐ S-52 (MR) Municipal Securities Representative
- ☐ S-53 (MP) Municipal Securities Principal
- ☐ S-62 (CS) Corporate Securities Representative
- ☐ S-63 Uniform Securities Agent State Law Examination
- ☐ S-65 Uniform Investment Advisor Law Examination
- ☐ (AG) Agent
- ☐ (RG) Government Securities Representative
- ☐ (PG) Government Securities Principal
- ☐ (ME) Member Exchange (NYSE)
- ☐ (LE) Securities Lending Representative (NYSE)
- ☐ (LS) Securities Lending Supervisor (NYSE)
- ☐ (AM) Allied Member (NYSE)
- ☐ (AP) Approved Person (NYSE)
- ☐ (AI) Agent of the Issuer
- ☐ Reschedule Exam Series _____
- ☐ Other _____

THIS PORTION MUST BE COMPLETED FOR ALL PARTIAL/TRANSFER OR RE-REGISTRATION FILINGS

FROM MONTH / YEAR

(12) APPLICANT'S CURRENT ADDRESS. _____ (STREET / CITY / STATE / ZIP)

FIRM(S) APPLICANT IS TRANFERRING FROM: TERMINATION DATE: (Mo/Day/Yr.)

☐ ◄ *CHECK IF THIS U-4 IS BEING FILED TO MAKE PERMANENT A TEMPORARY REGISTRATION (TAT).*

The appropriate signatory area *DOES NOT* have to be completed *UNLESS* this page is being submitted as an amendment.

MONTH DAY YEAR _____ SIGNATURE OF APPROPRIATE SIGNATORY

_____ TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

Rev. Form U-4 (11/91) PAGE 1

FORM U-4

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

If there is an amendment to this page, complete only Items 13, 14 and the items being amended.

(13) FIRM CRD #	SOCIAL SECURITY #	APPLICANT'S CRD #
6124	REDACTED	
FIRM NFA #		APPLICANT'S NFA #

PERSONAL DATA

(14) LAST NAME JR./SR., etc.	FIRST NAME	MIDDLE NAME	(15) OTHER NAMES KNOWN BY
BERRY	ROBERT	FRANKLIN	BOB

(16) DATE OF BIRTH (Month, Day, Year)	(17) SEX	HEIGHT	WEIGHT	HAIR COLOR	EYE COLOR
REDACTED	M	5'9"	145	Brown	Blue

RESIDENTIAL HISTORY

(18) GIVE ALL ADDRESSES FOR THE PAST FIVE YEARS, STARTING WITH CURRENT ADDRESS.

STREET	CITY	STATE	ZIP	FROM MONTH	FROM YEAR	TO MONTH	TO YEAR
201 Silvermill Court	Columbia	SC	29210	11	90	PRESENT	
96 Muskrat Run	Irmo	SC	29063	09	88	11	90

EMPLOYMENT AND PERSONAL HISTORY

(19) ACCOUNT FOR ALL TIME FOR THE PAST TEN YEARS. Give all employment experience starting with your previous employer and working back ten years. Include full and part-time work, self-employment, military service, unemployment and full-time education. (If this page is being filed as part of a Form BD, start with your present employer instead.)

		FROM MONTH	FROM YEAR	TO MONTH	TO YEAR	POSITION HELD
NAME Prudential Securities, Inc.		04	85	11	94	Vice President/
CITY Columbia	STATE SC					Investments
NAME Dean Witter Reynolds, Inc.		02	84	04	85	Financial Advisor
CITY Columbia	STATE SC					
NAME						
CITY	STATE					
NAME						
CITY	STATE					
NAME						
CITY	STATE					
NAME						
CITY	STATE					
NAME						
CITY	STATE					
NAME						
CITY	STATE					
NAME						
CITY	STATE					
NAME						
CITY	STATE					
NAME						
CITY	STATE					
NAME						
CITY	STATE					

(20) Are you currently engaged in any other business (not shown above) either as a proprietor, partner, officer, director, trustee, employee, agent or otherwise?
☒ YES ☐ NO If "YES", please explain below:
Mid-Atlantic Marketing, Inc., Charlotte, N.C. - Director

The appropriate signatory area *DOES NOT* have to be completed *UNLESS* this page is being submitted as an amendment.

MONTH DAY YEAR SIGNATURE OF APPROPRIATE SIGNATORY

TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

FORM U-4 — UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

If there is an amendment to this page, complete only item 21 and items being amended

FIRM CRD #	FIRM NFA #	SOCIAL SECURITY #	APPLICANT #	APPLICANT'S NFA #
6124		REDACTED		

IF "YES" ANSWER TO ANY OF THE FOLLOWING QUESTIONS IS A "YES" AND YOU CANNOT UTILIZE THE CERTIFICATION IN ITEM 22O BELOW, ATTACH COMPLETE DETAILS OF ALL EVENTS OR PROCEEDINGS ON DRP.

DEFINITIONS

- Charged – Accused of a crime in a formal complaint, information or indictment
- Investment or Investment-Related – Pertaining to securities, commodities, banking, insurance, or real estate (including, but not limited to acting as or being associated with a broker-dealer, investment company, investment adviser, futures sponsor, bank, or savings and loan association)
- Involved – Doing an act or aiding, abetting, counseling, commanding, inducing, conspiring with or failing reasonably to supervise another in doing an act.
- Foreign Financial Regulatory Authority – includes (A) a foreign securities authority; (B) other governmental body or foreign equivalent of a self-regulatory organization empowered by a foreign government to administer or enforce its laws relating to the regulation of investment or investment-related activities; or (C) membership organization, a function of which is to regulate the participation of its members in the activities listed above.

	YES	NO	
22A. Have you been convicted of or pleaded guilty or nolo contendere ("no contest") in a domestic or foreign court to:			
(1) a felony or misdemeanor involving: investments or an investment-related business, fraud, false statements or omissions, wrongful taking of property, or bribery, forgery, counterfeiting or extortion?	☐	☒	
(2) gambling?	☐	☒	
(3) any other felony?	☐	☒	
B. Have you, or an organization over which you exercised management or policy control, ever been charged with any felony or charged with a misdemeanor specified in question A(1) or (2) in a domestic or foreign court?	☐	☒	
C. Has any domestic or foreign court ever:			
(1) enjoined you in connection with any investment-related activity?	☐	☒	
(2) found that you were involved in a violation of investment-related statutes or regulations?	☐	☒	
D. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:			
(1) found you to have made a false statement or omission?	☐	☒	
(2) found you to have been involved in a violation of investment-related regulations or statutes?	☐	☒	
(3) found you to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☒	
(4) entered an order denying, suspending or revoking your registration or disciplined you by restricting your activities?	☐	☒	1.
(5) imposed a civil money penalty on you, or ordered you to cease and desist from any activity?	☐	☒	1C
E. Has any other Federal regulatory agency or any state regulatory agency or foreign financial regulatory authority ever:			
(1) found you to have made a false statement or omission or been dishonest, unfair or unethical?	☐	☒	1
(2) found you to have been involved in a violation of investment regulations or statutes?	☐	☒	1
(3) found you to have been a cause of an investment-related business having its authorization to do business denied, suspended, revoked, or restricted?	☐	☒	1
(4) entered an order against you in connection with investment-related activity?	☐	☒	1
(5) denied, suspended, or revoked your registration or license or otherwise prevented you from associating with an investment-related business, or disciplined you by restricting your activities?	☐	☒	1
(6) revoked or suspended your license as an attorney, accountant or federal contractor?	☐	☒	1
F. Has any self-regulatory organization or commodities exchange:			
(1) found you to have made a false statement or omission?	☐	☒	1
(2) found you to have been involved in a violation of its rules?	☐	☒	1
(3) found you to have been the cause of an investment-related business having its authorization to do business denied, suspended, revoked or restricted?	☐	☒	1
(4) disciplined you by expelling or suspending you from membership, barring or suspending your association with its members, or restricting your activities?	☐	☒	2
G. Has any foreign government ever entered an order against you related to investments or fraud, other than as reported in items 22A, B, C or E?	☐	☒	21
H. Have you ever been the subject of an investment-related, consumer-initiated complaint or proceeding that:			
(1) alleged compensatory damages of $10,000 or more, fraud, or wrongful taking of property?	☒	☐	22
(2) was settled or decided against you for $5,000 or more, or found fraud or the wrongful taking of property?	☐	☒	23
I. Are you now the subject of any complaint, investigation, or proceeding that could result in a "yes" answer to parts A-H of this item?	☐	☒	24
J. Has a bonding company denied, paid out on, or revoked a bond for you?	☐	☒	25
K. Do you have any unsatisfied judgments or liens against you?	☒	☐	26
L. Have you or a firm that you exercised management or policy control over, or owned 10% or more of the securities of, failed in business, made a compromise with creditors, filed a bankruptcy petition or been declared bankrupt?	☐	☒	27
M. Has a broker or dealer firm that you exercised management or policy control over, or owned 10% or more of the securities of, been declared bankrupt, had a trustee appointed under the Securities Investor Protection Act, or had a direct payment procedure initiated?	☐	☒	28
N. Have you been discharged or permitted to resign because you were accused of:			
(1) violating investment-related statutes, regulations, rules, or industry standards of conduct?	☐	☒	29
(2) fraud or the wrongful taking of property?	☐	☒	30
(3) failure to supervise in connection with investment-related statutes, regulations, rules or industry standards of conduct?	☐	☒	31

DISCLOSURE CERTIFICATION (OPTIONAL)

You may only certify to the accuracy and completeness of the disclosure information in your file if it has been fully provided in DRP format. If DRP(s) are not on file, do not answer these certification boxes. Provide full details of all matters on DRP(s). All appropriate questions in item 22 *must be answered, regardless* of whether the certification is being utilized. Refer to the instructions on the inside cover of the Form U-4 for additional information on the utilization of the certification language.

O. I have reviewed a copy of my disclosure file taken from the CRD system. I acknowledge that all information contained therein is fully disclosed, accurate and in DRP format. I further certify the following:

1. I have no new information to add to my disclosure file. ☐ 32
2. I have new information to add to my disclosure file which is reported on the attached DRP(s). ☐ 33
3. I have updated information, reported on the attached DRP(s), which was previously reported and contained in Occurrence _____ ☐ 34

The applicant and appropriate signatory area *DOES NOT* have to be completed *UNLESS* this page is being submitted as an amendment.

MONTH DAY YEAR SIGNATURE OF APPLICANT

TYPE OR PRINT NAME OF APPLICANT

MONTH DAY YEAR SIGNATURE OF APPROPRIATE SIGNATORY

TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

FORM U-4

UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

If there is an amendment to this page, complete only Item 23 and Items being amended.

(1) FIRM CRD # 6124	SOCIAL SECURITY # REDACTED	APPLICANT'S CRD # 1242947
FIRM NFA #		APPLICANT'S NFA #

THE APPLICANT MUST READ THE FOLLOWING VERY CAREFULLY

1. I swear or affirm that I have read and understand the items and instructions on this form and that my answers (including attachments) are true and complete to the best of my knowledge. I understand that I am subject to administrative, civil or criminal penalties if I give false or misleading answers.
2. I apply for registration with the jurisdictions and organizations indicated in Item 10 as may be amended from time to time and, in consideration of the jurisdictions and organizations receiving and considering my application, I submit to the authority of the jurisdictions and organizations and agree to comply with all provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the jurisdictions and organizations as they are or may be adopted, or amended from time to time. I further agree to be subject to and comply with all requirements, rulings, orders, directives and decisions of, and penalties, prohibitions and limitations imposed by the jurisdictions and organizations, subject to right of appeal or review as provided by law.
3. I agree that neither the jurisdictions or organizations nor any person acting on their behalf shall be liable to me for action taken or omitted to be taken in official capacity or in the scope of employment, except as otherwise provided in the statutes, constitutions, certificates of incorporation, by-laws or the rules and regulations of the jurisdictions and organizations.
4. I authorize the jurisdictions and organizations to give any information they may have concerning me to any employer or prospective employer, any federal, state or municipal agency, or any other organization and I release the jurisdictions and organizations and any person acting on their behalf from any and all liability of whatever nature by reason of furnishing such information.
5. 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 organizations indicated in Item 10 as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgement in any court of competent jurisdiction.
6. For the purpose of complying with the laws relating to the offer or sale of securities or commodities in the jurisdictions indicated in Item 10 as may be amended from time to time, I irrevocably appoint the administrator of each of those jurisdictions, or such other person designated by law, and the successors in such office, my attorney upon whom may be served any notice, process or pleading in any action or proceeding against me arising out of or in connection with the offer or sale of securities or commodities, or out of the violation or alleged violation of the laws of the jurisdictions. I consent that any such action or proceeding against me may be commenced in any court of competent jurisdiction and proper venue by service of process upon the appointee as if I were a resident of, and had been lawfully served with process in, the jurisdiction. I request that a copy of any notice, process or pleading served hereunder be mailed to my current residential address as reflected in this form or any amendment thereto.
7. I consent that notice of any investigation or proceeding by any self-regulatory organization against applicant may be given by personal service or by regular, registered or certified mail or confirmed telegram to applicant at his/her most recent business or home address as reflected in this Form U-4, or any amendment thereto, or by leaving notice of the investigation or proceeding at such address.
8. I authorize all of my employers and any other person to furnish to any jurisdiction or organization or any agent acting on its behalf, any information they have, including my creditworthiness, character, ability, business activities, educational background, general reputation, history of my employment and, in the case of former employers, complete reasons for my termination. Moreover, I release each employer, former employer and each other person from any and all liability, of whatever nature, by reason of furnishing any of the above information, including that information reported on the Uniform Termination Notice for Securities Industry Registration (Form U-5). I recognize that I may be the subject of an investigative consumer report ordered by the jurisdictions, or organizations with which this application is being filed, and waive any requirement of notification with respect to any investigative consumer report ordered by any such jurisdiction or organization. I understand that I have the right to request complete and accurate disclosure by the jurisdiction or organization of the nature and scope of the requested investigative consumer report.
9. I understand and certify that the representations in this form apply to all employers with whom I seek registration as indicated in Items 4 and 9 of this form. I agree to update this form by causing an amendment to be filed on a timely basis whenever changes occur to answers previously reported. Further, I represent that, to the extent any information previously submitted is not amended, the information provided in this form is currently accurate and complete.
10. If I have become temporarily registered as an agent, I acknowledge that this application for registration with the jurisdictions and organizations indicated in Item 10 is separate and distinct from any temporary registration already obtained with the jurisdictions and organizations. I further understand that my registration may be denied, suspended or revoked under the laws, regulations or rules of the jurisdictions and organizations.

November 5 1994
Month Day Year

Robert F Berry
SIGNATURE OF APPLICANT

Robert F. Berry
TYPE OR PRINT NAME OF APPLICANT

THE FIRM MUST COMPLETE THE FOLLOWING

To the best of my knowledge and belief, the applicant is currently bonded where required, and, at the time of approval, will be familiar with the statute(s), constitution(s), rules and by-laws of the agency, jurisdiction or self-regulatory organization with which this application is being filed, and the rules governing registered persons, and will be fully qualified for the position for which application is being made herein. I agree that, notwithstanding the approval of such agency, jurisdiction or organization which hereby is requested, I will not employ the applicant in the capacity stated herein without first receiving the approval of any authority which may be required by law. This firm has communicated with all of the applicant's previous employers for the past three years.

EMPLOYER	NAME OF PERSON CONTACTED	POSITION OF PERSON CONTACTED	EMPLOYED FROM	EMPLOYED TO	HOW CONTACTED PHONE	HOW CONTACTED LETTER	HOW CONTACTED INTERVIEW
Prudential Sec., Inc.			4/85	11/94		xx	

IN ADDITION, I HAVE TAKEN APPROPRIATE STEPS TO VERIFY THE ACCURACY AND COMPLETENESS OF THE INFORMATION CONTAINED IN AND WITH THIS APPLICATION.

THE APPROPRIATE SIGNATORY AREA *MUST BE* COMPLETED ON ALL INITIAL, TRANSFER OR AMENDMENT FILINGS.

11/7/94
MONTH DAY YEAR

Joseph L Turner Jr.
SIGNATURE OF APPROPRIATE SIGNATORY

Joseph L. Turner, Jr.
TYPE OR PRINT NAME OF APPROPRIATE SIGNATORY

CRD USE ONLY

Rev. Form U-4 (11/91)

PAGE 4

COPY

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS
ELEVENTH JUDICIAL CIRCUIT

Robert F. Berry,

Plaintiff,

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.,

Defendants.

Case No. 2017-CP-32-00397

FILED
2017 APR 27 PM 3:23
LISA COMER
CLERK OF COURT
LEXINGTON, SC

DEFENDANTS' AMENDED MOTION TO DISMISS OR STAY PENDING ARBITRATION

Defendants Wells Fargo Clearing Services, LLC f/k/a Wells Fargo Advisors, Wachovia Securities Financial Holdings, LLC, Wells Fargo & Company, Wells Fargo Bank, N.A., and Scott A. Spang, by their attorneys and pursuant to Rules 12(b)(1), 12(b)(3), and 12(b)(6) of the South Carolina Rules of Civil Procedure and the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.*, respectfully move for dismissal of this action, or alternatively for a stay pending arbitration before the Financial Industry Regulatory Authority in accordance with the provisions of the Form U4 signed by Plaintiff.

Defendants filed the original *Motion to Dismiss or Stay Pending Arbitration* in this Court on April 12, 2017. Pursuant to Rule 15(a), SCRCP, Defendants are entitled to amend this responsive pleading as a matter of course since thirty (30) days have not passed since the filing of the original.

38430219v.1
DM: 4937490 v.1

This motion is supported by applicable law, the arguments of counsel, the previously-filed *Defendants' Memorandum of Law in Support of Their Motion to Dismiss or Stay Pending Arbitration*, and any other material the Court may receive.

Respectfully submitted,

WELLS FARGO CLEARING SERVICES, LLC F/K/A WELLS FARGO ADVISORS, WACHOVIA SECURITIES FINANCIAL HOLDINGS, LLC, WELLS FARGO & COMPANY, WELLS FARGO BANK, N.A., and SCOTT A. SPANG

By: /s/ Approved for Filing

Adam N. Yount
South Carolina Bar No. 76342
HAYNSWORTH SINKLER BOYD, P.A.
134 Meeting Street
Suite 300
Charleston, South Carolina 29401
Telephone: (843) 720-4484
Facsimile: (843) 722-2266
ayount@hsblawfirm.com

Frederick T. Smith
North Carolina Bar No. 45229
SEYFARTH SHAW LLP
6000 Fairview Road, Suite 1200
Charlotte, North Carolina 28210
Telephone: (404) 888-1021
Facsimile: (404) 724-1521
fsmith@seyfarth.com

Date: April 27, 2017

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
ROBERT F. BERRY, Plaintiff, vs.	)	Civil Action No. 2017-CP-32-00397
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., Defendants.	)	

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR STAY PENDING ARBITRATION

Plaintiff, Robert F. Berry ("Berry"), by and through his undersigned counsel, hereby submits this Memorandum in Opposition to Defendants' Motion to Dismiss or Stay Pending Arbitration.

FACTUAL BACKGROUND

This is a claim for damages brought by Mr. Berry, formerly a Wealth Manager and Senior Vice President with Defendant Wells Fargo Advisors, LLC, which arises from Defendants 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.'s (all defendants are collectively referred to as "Defendants"), deliberate sabotage and breach of Mr. Berry's long-standing profit formula agreement. Defendants implemented a fraudulent scam to illegally increase the earnings and stock price of their corporate parent, Defendant Wells Fargo &

Company, by aggressively pushing the employees of all subsidiary corporations, including Mr. Berry, to sell 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. Refusal and/or failure to cooperate resulted in being targeted by management for retribution. (First Amended Complaint ("FAC") at ¶¶ 2-7). *See also In re Wells Fargo Bank, N.A.*, 2016-CFPB-0015 (Sept. 8, 2016) (Consent Order with the Consumer Financial Protection Bureau) (copy attached as Exh. 1).[1]

Mr. Berry refused to participate in the scheme, which would have violated the securities laws and his fiduciary obligations to his clients. (FAC at ¶ 33-36). Mr. Berry also questioned changes made by Defendants to his profit formula employment agreement which had been in effect since the early 2000s, beginning with Wells Fargo Advisors' predecessor, Wachovia Securities. (FAC at ¶¶ 29, 42-43). As a result of Mr. Berry's actions, Defendants internally identified Mr. Berry as a person to be terminated for speaking up against the illegality of Defendants' cross-selling program and the injustice of the unilateral changes to his profit formula agreement. In response and retribution, Defendants failed to support Mr. Berry's efforts to properly serve his clients. (FAC at ¶¶ 38-44, 51). Defendants' efforts intensified over several months and culminated in a February 3, 2014 meeting orchestrated and engineered by Defendants, during which Defendant Spang, on behalf of all Defendants, humiliated and berated Mr. Berry, thereby forcing his resignation by threatening that he would either resign or be immediately fired. (FAC at ¶¶ 52-55).

Thereafter, to further damage Mr. Berry, Defendants defamed his professional reputation and good name by filing a false and defamatory statement about his departure with regulatory authorities, accusing him of unethical, unprofessional, and dishonest acts. Defendants knew that the false statement would damage Mr. Berry in his subsequent professional endeavors, but took

[1]The Consumer Financial Protection Bureau Consent Order focuses on misconduct within Wells Fargo Bank, N.A. prompted by company policy to aggressively promote the "cross-selling" of banking products and services to existing customers.

the action specifically to promote Defendants' own interests in poaching Mr. Berry's client base, in punishing Mr. Berry for not willingly and aggressively participating in their illegal cross-selling scheme, and in terminating a longstanding payout arrangement that Defendants viewed as too lucrative for Mr. Berry. (FAC at ¶¶ 56-57). These illegal, false and deceptive practices by Defendants seriously harmed Plaintiff as was Defendants' specific and deliberate intent. (FAC at ¶¶ 64-67).

Defendants have filed this Motion to Dismiss or to Stay Pending Arbitration, as well as a separate motion for protective order and a stay to avoid and delay Defendants' obligations to comply with pending discovery requests. Defendants' arbitration demand is based upon what purports to be several 1994 Form U4 registration statements from the period when Mr. Berry was associated with Wheat, First Securities, Inc. ("Wheat First"), a now defunct firm. Although one of the forms indicates several possible arbitration fora for settling disputes between Mr. Berry and Wheat First, Defendants now rely upon these forms, seeking to compel arbitration before the Financial Industry Regulatory Authority, Inc. ("FINRA"), a forum that was not even mentioned in the documents and indeed did not even exist in 1994. Consequently, and for the reasons set forth hereinafter, Defendants' motion to compel arbitration fails as a matter of proof and law, and this Court should deny Defendants' motion, as well as its additional motion for a protective order and stay from pending discovery obligations, and order Defendants to (1) file any responsive pleadings within fifteen (15) days, (2) provide discovery responses to all outstanding discovery within ten (10) days, and otherwise (3) proceed with the litigation of this case in this Court.

ARGUMENT

I. Defendants' Motion to Compel Arbitration Must Fail.

"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." *Chassereau*, 363 S.C. at 632, 611 S.E.2d at 307 (quoting *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596–97, 553 S.E.2d 110, 118 (2001)). Under South Carolina law, "any ambiguity will be construed in favor of the non-drafting party." *McGill v. Moore*, 381 S.C. 179, 186, 672 S.E.2d 571, 575 (2009). Here, as will be discussed in detail *infra*, Defendants' Motion to Stay Pending Arbitration is premised on obligations included in registration forms submitted to various self-regulatory organizations in which registration is being sought. Defendant Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, invokes the purported rights of a member of those organizations, thus, properly placing Defendants in the role of the drafters of the forms issued by such organizations. In contrast, Mr. Berry plainly did not draft the forms relied upon by Defendants and thus is entitled to the construction benefit of a non-drafting party. Consequently, any ambiguities in the Form U-4s must be construed against Defendants. *See McGill, supra.*

Ultimately, Defendants' motion to compel arbitration fails because they have not met their burden to prove that the arbitration clause upon which they rely requires Mr. Berry to arbitrate these disputes with these Defendants in the forum preferred by Defendants.

A. The documents Defendants rely upon to support their arbitration claim have not been properly authenticated and cannot be considered by this Court.

As the proponent of arbitration, Defendants have the burden to establish the existence of an agreement to arbitrate these disputes between themselves and Mr. Berry. "General contract principles of state law apply to arbitration clauses governed by the F[ederal] A[rbitration] A[ct]." *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001); *see also 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). State law remains applicable if that law, whether legislative or judicial, arose to govern issues concerning the validity, revocability, and enforceability of all contracts generally. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364.

Defendants assert that Mr. Berry's obligation to arbitrate the present case arises from a series of documents they attached as Exhibit 1 to their supporting memorandum: 1994 Uniform Application for Securities Industry Registration or Transfer ("Form U-4"). Before Defendants can rely upon these documents, they must be properly advanced and authenticated to the Court. South Carolina law has always required authentication as a condition precedent to admissibility. Rule 901(a), SCRE; *see also State v. Rich*, 293 S.C. 172, 359 S.E.2d 281 (1987). Where the proponent fails to provide a proper foundation for employment related records, they are properly excluded from evidence, even if they might have probative value and would therefore otherwise be relevant and admissible. *Connelly v. Wometco Enterprises, Inc.*, 314 S.C. 188, 191, 442 S.E.2d 204, 206 (Ct. App. 1994). In *Connelly*, a wrongful termination case, the employee's personnel file was properly excluded from evidence, as the employer failed to offer the excluded records through a custodian or other properly qualified witness. *Id.* This exclusion was upheld on appeal. *Id.*

Here, Defendants simply attached the Form U-4s as an exhibit to their supporting memorandum. However, business records of this type do not qualify as self-authenticating. *Cf.* Rule 902, SCRE. Although Defendants provided an affidavit from a Beverly W. Jackson, who describes herself as a paralegal employed in the "Wells Fargo Law Department,"[2] Ms. Jackson does not claim to be a custodian of records for any of the corporate Defendants,[3] nor does she

[2] It is unclear from Ms. Jackson's Affidavit which, if any, of the named Defendants is her employer.

[3] Ms. Jackson does state that she "has access to certain personnel records of current and former employees of Wells Fargo & Company and related corporate entities," Jackson Aff. at ¶6, but does not state that she is the record custodian or that she can vouch for the authenticity of the Form U-4s.

make any claim that the Form U-4s attached as Exhibit 1 are true and correct copies of business records maintained by any specific Defendant. Like the inadequate sponsoring witness in *Connelly*, this testimony is insufficient to meet the foundation requirements imposed by Rule 901(a), SCRE. Without such testimony regarding the authenticity of the specific U-4s proffered by Defendants, Ms. Jackson's testimony is insufficient for this Court to admit and consider the U-4s. Because these regulatory statements constitute the only evidence submitted by Defendants in support of their motion to compel arbitration, their motion is unsupported by admissible evidence and therefore fails for that reason alone.

Further, since briefing on Defendants' motion to compel arbitration is closed, Defendants no longer have the opportunity to amend their filings to submit supplemental or additional documentation for the Court's consideration.

Defendants attempted to amend their motion to dismiss to add additional grounds, namely, grounds under Rule 12(b)(1) and (3), SCRCP; however, Defendants' amended motion was untimely and improper under Rule 15(a), SCRCP, as the motion to dismiss is not a "pleading" that is capable of amendment under that rule. Consequently, Defendants' assertion of a defense for improper venue under Rule 12(b)(3) has been waived under the plain language of Rule 12(h)(1), SCRCP, based on Defendants' failure to assert that defense in its original motion to dismiss.

B. **Defendants are not parties to the 1994 Form U-4s and therefore lack standing to enforce the arbitration agreement contained therein.**

Even if the registration statements relied upon by Defendants were properly before this Court, no Defendant has standing to enforce the arbitration clause and therefore none can benefit from their terms. Ultimately, arbitration is a matter of contract and a party cannot be forced to arbitrate a dispute if it has not agreed to do so." *AT&T Tech., Inc. v. Comm'ns Workers*, 475 U.S. 643, 648 (1986). The arbitration provision contained in the 1994 Form U-4s is limited to "any dispute, claim or controversy that may arise between *me and my firm*." Defs' Memo Ex. 1

(Emphasis added). The firm named in Item 4 of each of the 1994 Form U-4s[4] is Wheat, First Securities, Inc. The Form U-4's arbitration clause is devoid of any language indicating that any arbitration obligation extends to successors and/or assigns of "my firm," that is, Wheat First.

This litigation does not involve any dispute, claim or controversy arising between Plaintiff and Wheat First. Mr. Berry asserts no claim against Wheat First, nor does he complain of any act or omission by Wheat First. Indeed, the Profit Formula Agreement at issue in this case was not between Mr. Berry and Wheat First, but originated with Wachovia Securities. *See* First Amended Complaint at ¶29.

Moreover, Wheat First no longer exists. Records from the South Carolina Secretary of State show that Wheat First changed its name to First Union Capital Markets Corporation on June 14, 1999. *See* Exh. 2 (Certified Copy[5] of Application for an Amended Certificate of Authority by a Foreign Corporation to Transact Business in South Carolina, filed on June 28, 1999 with South Carolina Secretary of State). Thereafter, effective December 21, 1999, First Union Capital Markets Corporation was dissolved. Exh. 3 (Certified Copy of Application for Surrender of Authority to Do Business in the State of South Carolina, filed on December 21, 1999 with South Carolina Secretary of State). In short, the 1994 Form U-4s relied upon by Defendants simply do not satisfy Defendants' burden to prove the existence of an agreement by Mr. Berry to arbitrate his dispute in this case with these Defendants.

C. **Any arbitration agreement, if any, arising from the 1994 Form U-4s fails because the fora specified in that clause no longer exist.**

Even if the arbitration clause contained in the registration statements were properly before this Court, and even if Defendants could enforce obligations created by those statements, if any,

[4] Defendants' Exhibit 1 includes three Form U-4s, dated September 28, 1995, January 16, 1995, and November 5, 1994.

[5] Certified copies of public records are self-authenticating. *See* Rule 902(2), SCRE.

the failure of a material term of that clause renders void any purported arbitration agreement. Thus, the registration statements do not support Defendants' demand that this matter be arbitrated before "FINRA," Defendants' industry created and thus preferred arbitration forum.

Although it is not apparent from Defendants' brief,[6] *cf.* Defendants' Supporting Memorandum, *passim*, the 1994 Form U-4s offered as the only evidence of Mr. Berry's agreement to arbitrate do not specify "FINRA" as the arbitral forum. In fact, the Form U-4s do not name FINRA at all. Instead, the arbitration clause on those registration statements actually requires arbitration before "the organizations indicated in Item 10" of those forms. Item 10, which is found on the first page of each of the three Form U-4s, contains two sections, labeled SRO and Jurisdictions. In two of the three Form U-4s submitted by Defendants, no SRO is checked and therefore the attempted use by Defendants of these registration statements to force arbitration by Mr. Berry fail on account of the registration statement's failure to designate any arbitration forum, a material term of the arbitration clause advanced by Defendants.[7]

Assuming that SROs stands for Self-Regulatory Organizations (which meaning is the burden of Defendants to demonstrate to this Court), it appears that the earliest Form U-4 designated the following entities as potential arbitral fora: the American Stock Exchange ("ASE"), the National Association of Securities Dealers ("NASD"), the New York Stock Exchange ("NYSE"), and the Philadelphia Stock Exchange ("PHLX"). The SRO section of Item 10 also includes a box labeled "Other (Specify)" which was left blank on the 1994 form signed by Mr. Berry.

---

[6] Rather than notify the Court that such a material term as the forum selection was being altered, Defendants simply substituted the term "FINRA" for "NASD" without comment or explanation.

[7] Defendants do not attempt to explain why the subsequently filed registration statements (which do not specify any SROs capable of conducting arbitration of disputes, and therefore fail to designate an arbitration venue at all) do not supersede the original registration statement.

Neither the American Stock Exchange nor the Philadelphia Stock Exchange currently exist. Moreover, and more important, Defendants offer no proof that any of the organizations specified on the 1994 Form U-4 currently offer arbitration services. This is because none of them do. Moreover, Item 10 of the Form U-4 is devoid of any language indicating that any arbitration obligation extends to successors and/or assigns of the specified entities. Item 10 includes a box labeled "Other" box in the SRO category, but no "successors or assigns" language was specified there, either.

In tacit recognition of their unavailability, Defendants do not seek to compel arbitration in any of the fora actually specified in the 1994 registration statement. Nor have Defendants made any attempt to prove the contents of the "the rules, constitutions or by-laws" of any of the SROs specified in Item 10. Rather, Defendants ignore the actual language of the 1994 arbitration clause altogether and instead simply substitute "FINRA" without 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. In the absence of such proof, this Court cannot simply assume that this dispute might be "required to be arbitrated under" the absent rules, as required by the arbitration clause in the registration statement. Because none of the arbitral fora specifically selected in the 1994 registration statement still exist, a material term of the purported arbitration clause has failed and the purported agreement to arbitrate should also fail.

With regards to agreements to arbitrate, courts agree that where a material, integral part of an arbitration agreement fails, the entire agreement to arbitrate is void. *See 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); *Brown v. ITT Consumer Vin. Corp.*, 211 .F.3d 1217, 1220 (11th Cir. 2000) (asserting that where the selection of a particular forum constitutes an integral part of the agreement to arbitrate, the failure of the chosen forum

precludes arbitration); *In re Salomon Inc.*, 68 F.3d 554, 561 (2d. Cir. 1995) (a failed forum selection term is as important a consideration as the agreement to arbitrate itself); *Smith Barney, Inc. v. Critical Health Sys.*, 212 F.3d 858, 862 (4th Cir. 2000). Specifically, "if the choice of [an arbitral] forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern ... the failure of the chosen forum [will] preclude arbitration." *Grant*, 383 S.C. at 131, 678 S.E.2d at 438 (citing *Singleton v. Grade A Market, Inc.*, 607 F. Supp. 2d 333, 341 (D. Conn. 2009)). Because the selection of the designated fora constituted an integral term of the arbitration clause in the registration statement, and because none of the chosen arbitral fora currently exist, the arbitration agreement is impossible to perform, and this Court should deny Defendants' motion.

In *Grant*, for example, the plaintiff executed an admissions contract containing an agreement to arbitrate on behalf of her deceased husband concurrent with his admission into a nursing home. *Id.* at 127, 678 S.E.2d at 436. Shortly after admission, the plaintiff's decedent was injured at the facility. *Id.* Plaintiff filed suit in state court, and the Defendant moved to dismiss the action and to compel arbitration pursuant to the admissions contract. *Id.* The arbitration clause in the agreement specifically selected the American Health Lawyers Association ("ARLA") as the arbitral forum to resolve all related disputes arising from the decedent's admission. *Id.* at 128, 678 S.E.2d at 437. Subsequent to the execution of the admissions agreement, the ARLA amended its rules, declining to arbitrate disputes arising from arbitration agreements executed prior to the injury. *Id.* Consequently, the AHLA would not hear the dispute between the parties, and the parties were effectively denied their forum choice. *Id.*

The plaintiff asserted that the inability to arbitrate through the AHLA constituted a failure of a material term in the agreement, and therefore she was no longer bound to arbitrate the dispute. *Id.* at 128, 678 S.E.2d at 437. The Court agreed, finding that "the specific designation of the ARLA as arbitrator [was] an integral term of this arbitration agreement." *Id.* at 131, 678 S.E.2d at 438-

439. The Court reasoned that "the designation of a forum such as the AHLA has wide-ranging substantive implications that may affect, *inter alia*, the arbitrator-selection process, the law, procedures, and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration." *Id.* at 132; 678 S.E.2d at 439. The Court determined that these implications rendered the selection of a specific forum an integral term of the agreement. *Id.* Consequently, the court held that the arbitration agreement between the parties was unenforceable, and dismissed the defendant's motion to compel arbitration.

The rationale employed by the South Carolina Supreme Court in *Grant* has been echoed in many other cases across jurisdictions. For example, in *In re Salomon Inc.*, the parties agreed to arbitrate any dispute pursuant to "the arbitration procedure prescribed in the Constitution and rules then obtaining of the NYSE." 68 F.3d at 558. When the NYSE's arbitration group declined to hear the dispute, the courts refused to substitute an alternate arbitrator. *Id.* at 561. In affirming this holding, the Second Circuit explicitly rejected the brokerage firm's contention that the arbitration could be held in another arbitral forum, so long as the rules of the chosen forum govern the proceeding:

> [When] it is clear that the failed [forum selection] term is not an ancillary logistical concern, but rather is as important a consideration as the agreement to arbitrate itself, a court will not sever the failed term from the rest of the agreement and the entire arbitration provision will fail.

Id. at 561 (internal citations omitted). The choice of a specialty forum is an integral term in the arbitration clause precluding the appointment of substitute arbitrators.

Likewise, the Sixth Circuit Court of Appeals in *Roney & Co. v. Goren*, 875 F.2d 1218, 1219 (6th Cir. 1989) affirmed a decision barring a customer from submitting her claim to arbitration before the NASD. This result was premised on a pre-dispute provision stating that all disputes would be submitted to arbitration "under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange." *Id.* In refusing to treat the various

arbitral fora as interchangeable, the court opined that "[a] forum selection clause in an arbitration agreement, just like any other contract provision, is entitled to complete enforcement absent evidence that the contract was procured through fraud or excessive economic power." *Id.* at 1223. This was true even though the court found that there was purportedly no substantive difference between the NASD's and the NYSE's arbitration procedure. *Id.* at 1220. The parties selected the NYSE, which selection was an integral term of the agreement to arbitrate, and the NYSE therefore constituted the sole arbitration forum before which the parties could arbitrate. *Id.*

Just as in *Grant*, *Saloman* and *Roney*, the Form U-4s relied upon by Defendants indicate the selection of specific arbitral fora. As noted *supra*, the provision relied upon by Defendants identifies the ASE, the NASD, the NYSE, and the PHLX as approved arbitral fora.

In mid-2007, however, the NASD joined with the New York Stock Exchange (a competitor in the arbitration of securities disputes and another authorized arbitral forum specified in the 1994 Form U-4s) to create a new entity, which is now known as the Financial Industry Regulatory Authority, or FINRA. *See* SEC Release No. 34-56145, 2007 SEC LEXIS 1640 (July 26, 2007). Concurrent with the creation of the new entity came both procedural and substantive changes to the dispute resolution processes previously utilized by NASD and the NYSE. *See* FINRA, Archive of Arbitration Procedures for Cases Before and After April. 16, 2007 http://www.finra.org/ArbitrationMediation/Rules (last visited Apr. 4, 2011). FINRA is not either NASD or NYSE (much less the ASE or the PHLX) and the parties no longer have access to the arbitration fora specified in the 1994 registration statement. Just as a contract for the purchase of brand-name pharmaceuticals cannot be satisfied by the provision of generics, an agreement to arbitrate before the NASD cannot be satisfied by arbitration before any other forum.

Courts have determined that "a clause which adopts the rules of an organization like the NASD implicitly chooses that organization as the, or a, forum." *Reddam v. KPMG LLP*, 457 F.3d

1054, 1060 (9th Cir. 2006) (collecting cases), *overruled on other grounds by Atl. Nat'l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931 (9th Cir. 2010). These specific self-regulatory organizations were selected due, in part, to their expertise in the securities arena, and, in part, to their experience handling the type of disputes contemplated in the arbitration clause.

Our Supreme Court has recognized that the choice of an arbitral fora maintained by securities self-regulatory organizations is entitled to special deference and recognition. *See Dean*, 408 S.C. 371 n. 12, 759 S.E.2d 727 (2014). In *Dean*, the Supreme Court found that a generic arbitral forum like the American Arbitration Association was essentially interchangeable, as it merely provided logistical support and procedures for arbitrator selection. In contrast, securities self-regulatory organizations have "special expertise" as they are "closely governed by the Securities and Exchange Commission and have developed complex regulatory schemes for overseeing arbitration of securities disputes." *Id.* Therefore, the selection of one of these organizations as the fora for dispute resolution has a wide-ranging, substantive impact on the arbitration process. The selection of a specific SRO forum, therefore, is an integral term of the arbitration clause.[8]

Consequently, just as in *Grant*, if Defendants are allowed to treat SRO arbitral fora as interchangeable, Mr. Berry will be deprived of the arbitral forum that was expressly designated in the 1994 registration statement submitted with Wheat First. Because none of the designated arbitration fora are available to resolve the present dispute, and because an arbitrator selection clause in the registration statement is a material term of the arbitration obligation, this Court should find that the arbitration clause is impossible to perform, and must deny the Defendants' Motion to Compel Arbitration and Dismiss or Stay. *See In re Salomon Inc.*, 68 F.3d at 558 ("we cannot

[8] Further evidence of the materiality of arbitration clause is its insertion in the section preceded by the ominous legend: **"THE APPLICANT MUST READ THE FOLLOWING VERY CAREFULLY."** Defendants' Exh. 1 at pp. 4, 8 & 12 (bold and capitalization in original).

compel a party to arbitrate a dispute before someone other than the NYSE when the party had agreed to arbitrate disputes only before the NYSE"); *Roney*, 875 F.2d 1218 (interpreting designation of NYSE as the arbitral forum of choice meant that *only* the NYSE could arbitrate a dispute between the parties).

D. **This Court has previously concluded that proof is required from the proponents of arbitration as to the relationship between NASD and FINRA.**

Although Defendants simply assume that all securities arbitral fora may be treated as interchangeable, this Court has previously held that as the proponents of arbitration, it is Defendants' obligation to provide proof for their assumption. In the absence of evidence in the record before the Court as to the relationship between FINRA and NASD, it cannot be presumed that FINRA is either a new name for NASD or NYSE or that it is the successor to those named entities.

Very similar facts were presented to the South Carolina courts in an earlier case — namely, an attempt to compel arbitration before FINRA based on an arbitration clause which identified NASD as the chosen arbitral forum. In *Keller v. ING Financial Partners, Inc.*, Op. No. 2011-CP-23-0336 (S.C. Cir. Ct. filed June 2, 2011) (copy attached as Exh. 4), the Honorable D. Garrison Hill denied a motion to compel arbitration on such facts, finding that:

> The "NASD," or the National Association 'of Securities Dealers, Inc., as then constituted, no longer exists, having combined regulatory functions with certain divisions of the New York Stock Exchange ("'NYSE") to become what is now known as the Financial Industry Regulatory Authority, or FINRA.
>
> * * *
>
> In mid-2007, the NASD combined regulatory functions with certain divisions of the New York Stock Exchange (a competitor in the .arbitration of securities disputes), and became what is now known as the Financial Industry Regulatory Authority, or FINRA See SEC Release No. 34-56145, 2007 SEC LEXIS 1640. (July 26, 2007). Moreover, coincident with this consolidation, came both procedural and substantive changes to the NASD's former dispute resolution process and rules. See FINRA. Archive of Arbitration Procedures for Cases Before and After April16, 2007, http://www.finra.org/ArbitrationMediation/Rules (last

visited Apr. 4, 2011). Consequently, just as in *Grant* and *Salomon*, the parties in the present case are deprived of the arbitration forum that they specifically bargained for and agreed upon.

Because the designated arbitrator is not available to resolve the present dispute, and because the arbitrator selection clause in the subject agreement constitutes a material and integral term of the agreement to arbitrate, this Court finds the arbitration agreement impossible to perform, and denies Defendants' Motion to Compel Arbitration and Dismiss or Stay.

Exh. 4 at 2 & 6.

This ruling was affirmed on appeal in an unpublished opinion.[9] *Keller v. ING Financial Partners, Inc.*, 2013 WL 8482243, Op. No. 2013-UP-014 (S.C. Ct. App. filed Jan. 9, 2013) (copy attached as Exh. 5). The Court of Appeals characterized the trial court ruling as follows:

The circuit court found the arbitration agreement between the parties designated the National Association of Securities Dealers (NASD) as an exclusive arbitral forum, the NASD was unavailable to arbitrate because it no longer existed, and the court could not substitute the Financial Industry Regulatory Authority (FINRA) for NASD.

Exh. 5 at p. 1. The Court of Appeals further noted that the courts "cannot rewrite the parties' agreement to substitute FINRA for NASD." *Id.* at 2.

The *Keller* arbitration proponents then petitioned for a writ of certiorari to the South Carolina Supreme Court. 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 this Court remained unchanged. *Keller v. ING Financial Partners, Inc.*, Op. No. 2015-MO-006 (S.C. filed Feb. 11, 2015) (copy attached as Exh. 6).

Keller demonstrates that South Carolina courts are careful to insure that arbitration proponents are put to their proof and that parties are not compelled to arbitrate before a forum to

[9]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 Supreme 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 Court's prior order in *Keller*. This Court may take judicial notice of this fact and its files in the *Keller* case pursuant to Rule 201, SCRE.

which they did not agree. They cannot rely on mere assumptions as a basis for compelling arbitration. Thus, it should have been well-known to Defendants that they would be required to prove the existence of an agreement to arbitrate not just before any SRO forum, but before the SRO forum in which they seek to compel arbitration. Defendants have wholly failed to do so and their motion to compel arbitration should be denied.

E. <u>The arbitration clause is also unenforceable because its enforcement would compel Plaintiff to arbitrate outrageous conduct by Defendants that clearly was not contemplated at the inception of the arbitration agreement</u>.

Even if Defendants had proved the existence of an enforceable obligation requiring arbitration of ordinary contract disputes, Mr. Berry still would not be required to arbitrate this dispute, because it falls within the outrageous torts exception.

During his employment with Defendants, Mr. Berry was a fee-based broker and therefore stood in a fiduciary relationship to his clients. Accordingly, he was legally required to put his clients' interests above Defendants' interests. Nevertheless, Defendants terminated him because he refused their demands that he violate the law of South Carolina. Specifically, Plaintiff refused Defendants' demands that he "cross-sell" Wells Fargo Bank products to his clients, for whom he served as a fiduciary, products which his clients did not want or need and which were unsuitable for their investment portfolios. For example, after Plaintiff learned that his clients did not want or need home equity lines of credit and/or that these products were unsuitable for them, he declined to cross-sell such products to his clients and informed Defendants that such cross-selling would violate his duties under the securities laws and regulations, as well as the fiduciary duties he owed to his clients. As a result of Plaintiff's refusal to engage in improper cross-selling, which would have breached his fiduciary duties to his clients, as well as his obligations under the securities laws and regulations, Plaintiff was forced to resign.

The outrageous torts exception doctrine permits parties whose claims arise out of "outrageous" and unforeseeable tortious conduct by the opposing party to avoid arbitration, even where an otherwise enforceable arbitration agreement exists. *Aiken v. World Finance Corp. of South Carolina*, 373 S.C. 144, 644 S.E.2d 705 (2007), *reh'g denied*, (May 23, 2007).[10] In *Aiken*, in order to apply for a loan with World Finance, the plaintiff was required to provide personal information to the company and, upon approval of such loan, he was required to enter into an arbitration agreement. *Id.* at 147, 644 S.E.2d at 706. Thereafter, several World Finance employees conspired to use the personal information the plaintiff and other clients provided to obtain sham loans and embezzle money for the employees' personal benefit. *Id.* After discovering the misuse of his personal information, the plaintiff sued World Finance, seeking damages under various causes of action. Thereafter, World Finance moved to compel arbitration. *Id.* at 147, 644 S.E.2d at 707.

While recognizing the principle that both state and federal policy favor arbitration, the South Carolina Supreme Court noted that "arbitration is a matter of contract and a party cannot be required to submit to arbitration any dispute which he has not agreed to submit." *Id.* at 149, 644 S.E.2d 708. Further, while acknowledging that there must be a "significant relationship" between a dispute between the parties to a contract and the underlying contract in order to implicate the contract's arbitration clause, the court pronounced that it would "refuse to interpret any arbitration agreement as applying to outrageous torts that are unforeseeable to a reasonable consumer in the context of normal business dealings." *Id.* at 151, 644 S.E.2d 709. Accordingly, the court found that the theft of the plaintiff's personal information by World Finance employees was outrageous

[10] While *Parsons v. John Wieland Homes and Neighborhoods of the Carolinas, Inc.*, 418 S.C. 1, 13, 791 S.E.2d 128, 134 (2016), *reh'g denied*, (October 24, 2016) appears to question the viability of the "unforeseeable torts exception," the court acknowledges that "the majority of this Court finds the outrageous torts exception to arbitration remains viable."

conduct to which he could not have foreseen when he decided to conduct business with World Finance. *Id.* Therefore, the court held that "Aiken's claims for unanticipated and unforeseeable tortious conduct by World Finance's employees are not within the scope of the arbitration agreement with World Finance." *Id.* at 151, 644 S.E.2d 709.

Likewise, at the time that Mr. Berry signed the Form U-4 registration with now-defunct Wheat First, he could not have anticipated or foreseen the outrageous torts Defendants would commit against him, including attempts to coerce him into breaking the law by violating his fiduciary duties to his clients, as well as other securities laws and regulations. Indeed, this is the essence of a claim for wrongful termination in violation of public policy. *See Barron v. Labor Finders of South Carolina*, 393 S.C. 609, 613, 713 S.E.2d 634, 636 (2011) (citing *Ludwick v. This Minute of Carolina, Inc.*, 287 S.C.219, 337 S.E.2d 213 (1985) (employer cannot require employee to violate the law)). Moreover, the determination of what constitutes public policy is a question of law for the courts to decide. *Barron*, 393 S.C. at 617, 713 S.E.2d at 638 (*citing Citizens' Bank v. Heyward*, 135 S.C. 190, 133 S.E. 709, 713 (1925)). "The primary source of the declaration of public policy of the state is the General Assembly; the courts assume this prerogative only in the absence of legislative declaration." *Id.* Such questions of public policy is too important to be delegated to private arbitrators. Accordingly, because Mr. Berry clearly could not have contemplated such outrageous tortious conduct at the time he signed the registration statement and because the public policy of the State must be decided by the Courts and not private arbitrators, his claims are not within the scope of any purported arbitration clause.

II. Defendants' Motion to Dismiss Should Be Denied Because the Amended Complaint provides Defendants with adequate notice of their wrongdoing.

Defendants' further assertion that the Amended Complaint should be dismissed for failure to alleged facts that would entitle Mr. Berry to relief against Defendants is without merit and should be denied. "A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely

on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true." *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014) (quoting *Disabato v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013)). A motion to dismiss under Rule 12(b)(6), SCRCP, should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003) (citations omitted); *see also Baird v. Charleston Cty*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) (if the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper); *McCormick v. England*, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997)(motion to dismiss cannot be sustained if facts alleged in complaint and inferences reasonably deducible therefrom would entitle plaintiff to relief on any theory of the case). In deciding whether to grant a motion to dismiss, this Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *See Flateau*, 355 S.C. at 202, 584 S.E.2d at 415 (citation omitted); *see also Cowart v. Poore*, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999) (looking at facts in light most favorable to plaintiff, and with all doubts resolved in his behalf, the court must consider whether the pleadings articulate any valid claim for relief). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987).

Defendants' Rule 12(b)(6), SCRCP argument is conclusory and unserious in the face of Mr. Berry's forty-four (44) page, detailed Amended Complaint that provides explicit detail on his assertions of wrongdoing supporting the causes of action alleged against Defendants. In fact, the motion to dismiss does not assert that *any* of the ten (10) specifically-pled causes of action are unsupported by sufficiently stated facts to support those causes of action. Therefore, as an initial

matter, because Defendants' motion and accompanying memorandum does not meet its very low burden of asserting a violation of Rule 12(b)(6), SCRCP, the motion fails. *See, e.g., Mulherin-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (finding an argument advanced through conclusory statements with no argument or supporting authority abandoned); *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 298, 519 S.E.2d 583, 600 (Ct. App. 1999) (declaring that conclusory arguments may be treated as abandoned). Viewing the asserted facts as true and in the light most favorable to Mr. Berry, as this Court is required to in considering a Rule 12(b)(6) motion, the Amended Complaint greatly exceeds the "facts sufficient" standard of a "short and plain statement" of a well-pled complaint.

Rather than argue against the facts alleged in the Amended Complaint, Defendants instead invoke federal case law for the proposition that Mr. Berry's designation or grouping of certain Defendants collectively, where the facts and circumstances demonstrate collective or similar action by multiple Defendants, is somehow improper and prevents Defendants from discerning "which defendant or defendants are alleged to have committed which wrong." Defs' Memo at 10. Defendants cite no South Carolina authority for this proposition and Mr. Berry is unaware of any such case law. But even the single unpublished United States District Court case from the Northern Division of the Eastern District of Michigan, *see Washington v. Thomas*, 2009 WL 1424193 (E.D. Mich. May 18, 2009), which deals with a *pro se* criminal civil rights complaint (consisting of a single paragraph of facts and allegations of wrongdoing and serving as the only authority cited by Defendants for this proposition), does not support the assertion that Mr. Berry's Amended Complaint fails to meet the well-pled complaint standard under the rules. Indeed, Defendants' reference to the federal pleading standard is curious, as the "notice pleading" standard in federal court is arguably lower than the "facts sufficient" standard required under the South Carolina rules.

"Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ... claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)). Mr. Berry's allegations are based on a common factual scenario, and the First Amended Complaint has included a short and plain statement of the legal basis for his claims under those common facts. Where the Amended Complaint refers to several or all of the Defendants collectively based on a defined term, all Defendants are thereby notified that each Defendant referred to either individually or collectively is alleged to be liable for the allegations so-alleged.[11] Such an accepted pleading practice and style provides notice of key facts and specific allegations to support each cause of action. Defendants' assertion that Mr. Berry should have to list each Defendant individually for each allegation of wrongdoing is absurd and is calculated to create a pleading burden not required by the SCRCP.

Moreover, Defendants' assertion that Mr. Berry failed to allege any facts pertaining to Wells Fargo & Company or Wells Fargo Bank, N.A. ("Corporation" and "Bank," respectively) is a mischaracterization of the Amended Complaint, as evidenced by simple reference to the Fifth Cause of Action (South Carolina Unfair Trade Practices Act), *see* Am. Cmplt. at ¶¶33-44, 101, and Eighth Cause of Action (Intentional Interference with Prospective Contractual Relations), *see*

[11] This is the case when Mr. Berry alleges misconduct of Defendants collectively, or smaller subsets thereof, like the WFA Defendants, which Defendants alternatively criticize in the memorandum, *see* Defs' Memo at 10-11. Further, contrary to Defendants' assertion, Mr. Berry is not required to put forward evidence in his pleading to support the allegation of parent-subsidiary liability, which is subject to evidentiary proof at trial, but only facts supporting the claim of wrongdoing. *Stroud v. Riddle*, 260 S.C. 99, 194 S.E.2d 235 (1973) (holding that a complaint is required "to plead the ultimate facts which will be proved at trial, not the evidence which will be used to prove those facts."); *see also Carroll v. Smith-Henry, Inc.*, 281 S.C. 104, 106, 313 S.E.2d 649, 651 (Ct. App. 1984) ("While the pleadings did not expressly present the issue of a parent corporation's liability for its subsidiary, the issue was implicitly suggested by the pleadings and expressly raised by the evidence.") (citing *Baker v. Weaver*, 279 S.C. 479, 484, 309 S.E.2d 770, 773 (Ct. App. 1983) (Cureton, J., concurring).

Am. Cmplt. at ¶¶59, 127-136, which are addressed to the improper conduct of all Defendants, including the Corporation and Bank. These allegations include the encouragement and pressuring by the Corporation and Bank on Mr. Berry and other employees to cross-sell Wells Fargo products to his fiduciary clients, regardless of the clients' best interests, the targeting of and desire to terminate Mr. Berry's profit formula agreement, which Defendants had concluded was favorable to Mr. Berry, and the placement of unfair, deceptive, false, and defamatory comments on Mr. Berry's official record with the intent to discredit him going forward which would benefit the Corporation and the Bank in future earnings and competition to provide services to clients.. These allegations demonstrate a coordinated top-down corporate structure that sought to deliberately influence Mr. Berry's fiduciary relationships with his clients and then targeted and punished Mr. Berry for failing to comply with the Corporation's and Bank's money-making unlawful scheme.

In short, facts sufficient were pled against all Defendants, including the Corporation and the Bank, and the Amended Complaint puts each of the Defendants on notice of the allegations of wrongdoing advanced by Mr. Berry. Defendants' motion to dismiss should therefore be denied.

CONCLUSION

Defendants' Motion to Stay Pending Arbitration must be denied as they have failed to proffer admissible evidence to the Court sufficient to prove the existence of an arbitration agreement requiring Plaintiff Berry to arbitrate this dispute with these Defendants before Defendants' preferred industry arbitral forum. Defendants' Motion to Dismiss should also be denied because the First Amended Complaint more than adequately satisfies the pleading requirements of the South Carolina Rules of Civil Procedure. Mr. Berry therefore respectfully requests this Court to deny Defendants' Motion to Stay/Compel Pending Arbitration, the alternative request for dismissal, as well as Defendants' Motion for Protective Order/Stay of Discovery. Finally, Mr. Berry respectfully requests that the Court order the Defendants to file

their responsive pleadings within fifteen (15) days as required by Rule 15, SCRCP, and to respond to all outstanding discovery requests within ten (10) days.

Mitchell Willoughby, Esquire
Elizabeth Zeck, Esquire
Chad N. Johnston, Esquire
WILLOUGHBY & HOEFER, P.A.
Post Office Box 8416
Columbia, South Carolina 29202
Telephone Number: 803-252-3300
mwilloughby@willoughbyhoefer.com
ezeck@willoughbyhoefer.com
cjohnston@willoughbyhoefer.com

Attorneys for Robert F. Berry

This 1st day of June 2017
Columbia, South Carolina

EXHIBIT 1

UNITED STATES OF AMERICA
CONSUMER FINANCIAL PROTECTION BUREAU

ADMINISTRATIVE PROCEEDING
2016-CFPB-0015

In the Matter of: WELLS FARGO BANK, N.A.	CONSENT ORDER

The Consumer Financial Protection Bureau (Bureau) has reviewed the sales practices of Wells Fargo Bank, N.A. (Respondent, as defined below) and determined that it has engaged in the following acts and practices: (1) opened unauthorized deposit accounts for existing customers and transferred funds to those accounts from their owners' other accounts, all without their customers' knowledge or consent; (2) submitted applications for credit cards in consumers' names using consumers' information without their knowledge or consent; (3) enrolled consumers in online-banking services that they did not request; and (4) ordered and activated debit cards using consumers' information without their knowledge or consent. The Bureau has concluded that such acts violate §§ 1031 and 1036(a)(1)(B) of the Consumer Financial Protection Act of 2010 (CFPA), 12 U.S.C. §§ 5531 and 5536(a)(1)(B). Under §§ 1053 and 1055 of CFPA, 12 U.S.C. §§ 5563, 5565, the Bureau issues this Consent Order (Consent Order).

I
Jurisdiction

1. The Bureau has jurisdiction over this matter under §§ 1053 and 1055 of the CFPA, 12 U.S.C. §§ 5563, 5565.

II
Stipulation

2. Respondent has executed a "Stipulation and Consent to the Issuance of a Consent Order" (Stipulation), which is incorporated by reference and is accepted by the Bureau. By this Stipulation, Respondent has consented to the issuance of this Consent Order by the Bureau under §§ 1053 and 1055 of the CFPA, 12 U.S.C. §§ 5563, 5565, without admitting or denying the findings of facts and conclusions of law, except that Respondent admits the facts necessary to establish the Bureau's jurisdiction over Respondent and the subject matter of this action.

III
Definitions

3. The following definitions apply to this Consent Order:

a. **"Affected Consumers"** means any consumer subjected to any of the Improper Sales Practices.

b. **"Board"** means Respondent's duly-elected and acting Board of Directors.

c. **"California Enforcement Action"** means the lawsuit styled *People v. Wells Fargo & Co., et al.*, Los Angeles Superior Court, Case No. BC580778, filed by the Office of the Los Angeles City Attorney.

d. **"Community Bank Regional Bank Branch Network"** means the Respondent's retail-branch operations within Respondent's Regional Bank group.

e. **"Effective Date"** means the date on which this Order is issued.

f. **"Improper Sales Practices"** means any of the following in the Community Bank Regional Bank Branch Network:

(1) opening any account without the consumer's consent;

(2) transferring funds between a consumer's accounts without the consumer's consent;

(3) applying for any credit card without the consumer's consent;

(4) issuing any debit card without the consumer's consent; and

(5) enrolling any consumer in online-banking services without the consumer's consent.

g. **"Los Angeles City Attorney"** means the Office of the Los Angeles City Attorney.

h. **"Regional Director"** means the Regional Director for the West Region for the Office of Supervision for the Consumer Financial Protection Bureau, or his/her delegate.

i. **"Related Consumer Action"** means a private action by or on behalf of one or more consumers or an enforcement action by a governmental agency other than the California Enforcement Action, brought against Respondent based on substantially the same facts as described in Section IV of this Consent Order.

j. **"Relevant Period"** includes the period from January 1, 2011, to the Effective Date.

k. **"Respondent"** means Wells Fargo Bank, N.A. and its successors and assigns.

IV
Bureau Findings and Conclusions

The Bureau finds the following:

4. Respondent is a national bank headquartered in Sioux Falls, South Dakota. Respondent is an insured depository institution with assets greater than $10 billion within the meaning of 12 U.S.C. § 5515(a).

5. Respondent is a "covered person" under 12 U.S.C. § 5481(6).

6. During the Relevant Period, Respondent offered a broad array of consumer financial products and services, including mortgages, savings and checking accounts, credit cards, debit and ATM cards, and online-banking services.

7. Respondent sought to distinguish itself in the marketplace as a leader in "cross-selling" banking products and services to its existing customers.

8. Respondent set sales goals and implemented sales incentives, including an incentive-compensation program, in part to increase the number of banking products and services that its employees sold to its customers.

9. Thousands of Respondent's employees engaged in Improper Sales Practices to satisfy sales goals and earn financial rewards under Respondent's incentive-compensation program. During the Relevant Period, Respondent terminated roughly 5,300 employees for engaging in Improper Sales Practices.

10. Respondent's employees engaged in "simulated funding." To qualify for incentives that rewarded bankers for opening new accounts that were funded shortly after opening, Respondent's employees opened deposit accounts without consumers' knowledge or consent and then transferred funds from consumers' authorized accounts

to temporarily fund the unauthorized accounts in a manner sufficient for the employee to obtain credit under the incentive-compensation program.

11. Respondent's employees submitted applications for and obtained credit cards for consumers without the consumers' knowledge or consent.

12. Respondent's employees used email addresses not belonging to consumers to enroll consumers in online-banking services without their knowledge or consent.

13. Respondent's employees requested debit cards and created personal identification numbers (PINs) to activate them without the consumer's knowledge or consent.

14. During the Relevant Period, Respondent's employees opened hundreds of thousands of unauthorized deposit accounts and applied for tens of thousands of credit cards for consumers without consumers' knowledge or consent.

15. Respondent has performed an analysis to assess the scope of Improper Sales Practices that occurred between May 2011 and July 2015, including the number of potential instances of such practices.

Findings and Conclusions as to Unauthorized Deposit Accounts & Simulated Funding

16. Respondent's analysis concluded that its employees opened 1,534,280 deposit accounts that may not have been authorized and that may have been funded through simulated funding, or transferring funds from consumers' existing accounts without their knowledge or consent. That analysis determined that roughly 85,000 of those accounts incurred about $2 million in fees, which Respondent is in the process of refunding. The fees included overdraft fees on linked accounts the consumers already

had, monthly service fees imposed for failure to keep a minimum balance in the unauthorized account, and other fees.

17. Section 1036(a)(1)(B) of the CFPA prohibits "unfair" acts or practices. 12 U.S.C. § 5536(a)(1)(B). An act or practice is unfair if it causes or is likely to cause consumers substantial injury that is not reasonably avoidable and is not outweighed by countervailing benefits to consumers or to competition. 12 U.S.C. § 5531(c)(1).

18. By opening unauthorized deposit accounts and engaging in acts of simulated funding, Respondent caused and was likely to cause substantial injury to consumers that was not reasonably avoidable, because it occurred without consumers' knowledge, and was not outweighed by countervailing benefits to consumers or to competition.

19. Section 1036(a)(1)(B) of the CFPA prohibits "abusive" acts or practices. 12 U.S.C. § 5536(a)(1)(B). An act or practice is abusive if it materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service. 12 U.S.C. § 5531(d)(1). Additionally, an act or practice is abusive if it takes unreasonable advantage of the inability of the consumer to protect his or her interests in selecting or using a consumer financial product or service. 12 U.S.C. § 5531(d)(2)(B).

20. Respondent's acts of opening unauthorized deposit accounts and engaging in simulated funding materially interfered with the ability of consumers to understand a term or condition of a consumer financial product or service, as they had no or limited knowledge of those terms and conditions, including associated fees.

21. Additionally, Respondent's acts of opening unauthorized deposit accounts and engaging in simulated funding took unreasonable advantage of consumers' inability

to protect their interests in selecting or using consumer financial products or services, including interests in having an account opened only after affirmative agreement, protecting themselves from security and other risks, and avoiding associated fees.

22. Therefore, Respondent engaged in "unfair" and "abusive" acts or practices that violate §§ 1031(c)(1), (d)(1), (d)(2)(B), and 1036(a)(1)(B) of the CFPA. 12 U.S.C. §§ 5531(c)(1), (d)(1), (d)(2)(B), 5536(a)(1)(B).

Findings and Conclusions as to Unauthorized Credit Cards

23. Respondent's analysis concluded that its employees submitted applications for 565,443 credit-card accounts that may not have been authorized by using consumers' information without their knowledge or consent. That analysis determined that roughly 14,000 of those accounts incurred $403,145 in fees, which Respondent is in the process of refunding. Fees incurred by consumers on such accounts included annual fees and overdraft-protection fees, as well as associated finance or interest charges and other late fees.

24. Section 1036(a)(1)(B) of the CFPA prohibits "unfair" acts or practices. 12 U.S.C. § 5536(a)(1)(B). An act or practice is unfair if it causes or is likely to cause consumers substantial injury that is not reasonably avoidable and is not outweighed by countervailing benefits to consumers or to competition. 12 U.S.C. § 5531(c)(1).

25. By applying for and opening credit-card accounts using consumers' information without their knowledge or consent, Respondent caused and was likely to cause substantial injury that was not reasonably avoidable, because it occurred without consumers' knowledge, and was not outweighed by countervailing benefits to consumers or competition.

26. Section 1036(a)(1)(B) of the CFPA prohibits "abusive" acts or practices. 12 U.S.C. § 5536(a)(1)(B). An act or practice is abusive if it materially interferes with the ability of a consumer to understand a term or condition of a consumer financial product or service. 12 U.S.C. § 5531(d)(1). Additionally, an act or practice is abusive if it takes unreasonable advantage of the consumer's inability to protect his or her interests in selecting or using a consumer financial product or service. 12 U.S.C. § 5531(d)(2)(B).

27. Respondent's acts of opening credit-card accounts using consumers' information without their knowledge or consent materially interfered with the ability of consumers to understand a term or condition of a consumer financial product or service, as they had no or limited knowledge of those terms and conditions, including associated fees.

28. Additionally, Respondent's acts of opening credit-card accounts using consumers' information without their knowledge or consent took unreasonable advantage of the consumers' inability to protect their interests in selecting or using a consumer financial product or service.

29. Therefore, Respondent engaged in "unfair" and "abusive" acts or practices that violate §§ 1031(c)(1), (d)(1), (d)(2)(B), and 1036(a)(1)(B) of the CFPA. 12 U.S.C. §§ 5531(c)(1), (d)(1), (d)(2)(B), 5536(a)(1)(B).

Findings and Conclusions as to Unauthorized Enrollment into Online-Banking Services

30. During the Relevant Period, Respondent's employees used email addresses not belonging to consumers to enroll consumers in online-banking services without their knowledge or consent.

31. Section 1036(a)(1)(B) of the CFPA prohibits "abusive" acts or practices. 12 U.S.C. § 5536(a)(1)(B). An act or practice is abusive if it takes unreasonable advantage of the consumer's inability to protect his or her interests in selecting or using a consumer financial product or service. 12 U.S.C. § 5531(d)(2)(B).

32. Respondent's acts of enrolling consumers in online-banking services without their knowledge or consent took unreasonable advantage of consumers' inability to protect their interests in selecting or using a consumer financial product or service, including interests in having these products or services activated only after affirmative agreement and protecting themselves from security and other risks.

33. Therefore, Respondent engaged in "abusive" acts or practices that violate §§ 1031(d)(2)(B) and 1036(a)(1)(B) of the CFPA. 12 U.S.C. §§ 5531(d)(2)(B), 5536(a)(1)(B).

Findings and Conclusions as to Unauthorized Debit Cards

34. During the relevant period, Respondent's employees requested debit cards and created PINs to activate them without consumers' knowledge or consent.

35. Section 1036(a)(1)(B) of the CFPA prohibits "abusive" acts or practices. 12 U.S.C. § 5536(a)(1)(B). An act or practice is abusive if it takes unreasonable advantage of the consumer's inability to protect his or her interests in selecting or using a consumer financial product or service. 12 U.S.C. § 5531(d)(2)(B).

36. Respondent's acts of issuing debit cards to consumers without their knowledge or consent took unreasonable advantage of consumers' inability to protect their interests in selecting or using a consumer financial product or service. 12 U.S.C. § 5531(d)(2)(B).

37. Therefore, Respondent engaged in "abusive" acts that violate §§ 1031(d)(2)(B) and 1036(a)(1)(B) of the CFPA. 12 U.S.C. §§ 5531(d)(2)(B), 5536(a)(1)(B).

ORDER

V
Conduct Provisions

IT IS ORDERED, under §§ 1053 and 1055 of the CFPA, that:

38. Respondent and its officers, agents, servants, employees, and attorneys who have actual notice of this Consent Order, whether acting directly or indirectly, may not violate §§ 1031 and 1036 of the CFPA, 12 U.S.C. §§ 5531, 5536, by engaging in Improper Sales Practices.

VI
Independent Consultant's Report and Compliance Plan

IT IS FURTHER ORDERED that:

39. Within 45 days of the Effective Date, Respondent must select an independent consultant with specialized experience in consumer-finance-compliance issues to conduct an independent review of Respondent's sales practices within the Community Bank Regional Bank Branch Network related to deposit accounts, credit-card accounts, unsecured lines of credit, and related products and services (Independent Consultant's Review). Respondent must submit the name of the independent consultant to the Regional Director for non-objection. Upon receipt of non-objection from the Regional Director, the Bank must retain the independent consultant. The Independent Consultant's Review must assess whether Respondent's current policies and procedures are reasonably designed to ensure that Respondent's sales practices comply with all applicable Federal consumer financial laws as defined in 12 U.S.C. § 5481(14), and that Respondent's employees do not engage in Improper Sales Practices.

40. The Independent Consultant's Review must include but will not be limited to:

a. whether Respondent's employees are required to undergo training reasonably designed to prevent Improper Sales Practices and other sales-integrity violations; whether such training is adequate, complete, and timely updated, provided when employees join Respondent, and repeated at sufficient recurring intervals during their employment to reinforce such training; whether training records are complete, accurate and adequate; and whether employees are informed of an obligation to report all sales-integrity issues internally through an "ethics hotline" or similar mechanism;

b. whether Respondent's monitoring policies and procedures ensure that Respondent monitors employees' sales practices proactively, and that Respondent devotes sufficient personnel and resources to monitor those practices appropriately;

c. whether Respondent has adequate policies and procedures for (i) receiving, retaining, and addressing consumer inquiries or complaints; (ii) receiving, retaining, and addressing employee allegations of Improper Sales Practices or any other allegations of sales-integrity violations; (iii) tracking and addressing indicators of potential Improper Sales Practices or any other sales-integrity violations; and (iv) identifying and remediating consumers for Improper Sales Practices or other sales-integrity violations identified after the Effective Date, as well as for correcting any related systemic issues identified after the Effective Date;

d. whether Respondent's policies and procedures related to sales of deposit accounts, credit cards, unsecured lines of credit, and related products and services are reasonably designed to ensure consumer consent is obtained before any such product is sold or issued to a consumer. The Independent Consultant's Review

must include, but not be limited to, whether Respondent has adequate policies and procedures for capturing and retaining consumer signatures and other evidence of consent for such products and services, for providing a grace period before assessing fees on any deposit account, and for closing accounts in which there is no customer-initiated activity during the grace period without assessing fees; and

e. whether Respondent's performance-management and sales goals for its employees are consistent with the objective of preventing Improper Sales Practices and other sales-integrity violations.

41. Within 180 days of the retention of the independent consultant, the independent consultant must prepare a written report (Independent Consultant's Report) detailing the findings of the review and provide the Independent Consultant's Report to the Board or a committee thereof.

42. Within 90 days of receiving the Independent Consultant's Report, the Board or a committee thereof must:

a. In consultation with the independent consultant, develop a plan (Compliance Plan) to: (i) correct any deficiencies identified, and (ii) implement any recommendations or explain in writing why a particular recommendation is not being implemented; and

b. submit the Independent Consultant's Report and the Compliance Plan to the Regional Director.

43. The Regional Director may, in his or her discretion, make a determination of non-objection to the Compliance Plan or direct Respondent to revise it. If the Regional Director directs Respondent to revise the Compliance Plan, the Board or a committee thereof must make the requested revisions to the Compliance Plan, have the

independent consultant review the revised Compliance Plan for adequacy, accuracy, effectiveness, and completeness, and resubmit the revised Compliance Plan and the independent consultant's review of the revised Compliance Plan to the Regional Director within 60 days of the date that the Regional Director directs the Company to revise the Compliance Plan. The Regional Director may, in his or her discretion, consult with the Los Angeles City Attorney in arriving at a determination of non-objection to the Compliance Plan or direction to Respondent to revise the Compliance Plan.

44. After receiving notification that the Regional Director has made a determination of non-objection to the Compliance Plan, Respondent must implement and adhere to the steps, recommendations, deadlines, and timeframes outlined in the Compliance Plan and have the independent consultant review and assess compliance with the Compliance Plan and validate that the Compliance Plan has been properly executed; the results of such review should be submitted to the Regional Director within 30 days after completion.

VII
Role of the Board

IT IS FURTHER ORDERED that:

45. The Board or a committee thereof must review all submissions (including plans, reports, programs, policies, and procedures) required by this Consent Order before submission to the Bureau.

46. Although this Consent Order requires Respondent to submit certain documents for the review or non-objection by the Regional Director, the Board will have the ultimate responsibility for proper and sound management of Respondent and for

ensuring that Respondent complies with Federal consumer financial law and this Consent Order.

47. In each instance that this Consent Order requires the Board or a committee thereof to ensure adherence to, or perform certain obligations of Respondent, the Board or a committee thereof must:

a. authorize whatever actions are necessary for Respondent to fully comply with the Consent Order;

b. require timely reporting by management to the Board or a committee thereof on the status of compliance obligations; and

c. require timely and appropriate corrective action to remedy any material non-compliance with any failures to comply with directives from the Board or a committee thereof related to this Section.

VIII
Order to Pay Redress

IT IS FURTHER ORDERED that:

48. Respondent has retained the services of an independent third-party consulting firm (which is not the independent consultant referred to in Section VI) to identify consumers who have incurred fees or other charges as a result of Improper Sales Practices.

49. Within 10 days of the Effective Date, Respondent must reserve or deposit into a segregated deposit account an amount not less than $5 million, for the purpose of providing redress to Affected Consumers as required by this Section.

50. Within 90 days of the Effective Date, Respondent must submit to the Regional Director for review and non-objection the comprehensive written plan for

providing redress consistent with this Consent Order (Redress Plan). The Regional Director may, in his or her discretion, make a determination of non-objection to the Redress Plan or direct Respondent to revise it. If the Regional Director directs Respondent to revise the Redress Plan, Respondent must make the revisions and resubmit the Redress Plan to the Regional Director within 45 days. After receiving notification that the Regional Director has made a determination of non-objection to the Redress Plan, Respondent must implement and adhere to the steps, recommendations, deadlines, and timeframes outlined in the Redress Plan.

51. The Redress Plan must:

a. identify all Affected Consumers, except insofar as it is impracticable to do so, as well as the types and amounts of any fees or charges incurred by Affected Consumers as a result of the Improper Sales Practices, and state the means by which Affected Consumers have been identified and by which the fees or charges they incurred have been calculated;

b. describe procedures by which Respondent will notify Affected Consumers who were subject to any of the Improper Sales Practices described in paragraph 3.f of this Order, including the form of the notification such consumers will receive;

c. describe the process for providing redress to Affected Consumers and identify the dollar amount of redress for each category of Affected Consumers;

d. detail how Respondent will locate Affected Consumers for payment of redress, and the steps Respondent will take with respect to consumers whose redress payments are returned as undeliverable or not cashed within a prescribed time period;

e. state the manner in which redress will be provided to each such Affected Consumer, and the form of redress; and

f. provide the form of the letter or notice that will be sent to such Affected Consumers notifying them of the redress.

52. Within 120 days after completing the Redress Plan, Respondent's Internal Audit department must review and assess compliance with the terms of the Redress Plan (Redress Plan Review) and validate that the Redress Plan has been properly executed.

53. Within 30 days after completion of the Redress Plan Review, Respondent must prepare and submit to the Regional Director a report summarizing the results of the Redress Plan Review.

54. After completing the Redress Plan, if the amount of redress provided to Affected Consumers is less than $5 million, Respondent may recoup any remaining funds up to the amount Respondent paid to Affected Consumers before the submission of the Redress Plan as redress for fees or charges those Affected Consumers incurred as a result of the Improper Sales Practices. Respondent must, within 30 days of the completion of the Redress Plan, pay to the Bureau, by wire transfer to the Bureau or to the Bureau's agent and according to the Bureau's wiring instructions, any remaining funds not recouped by Respondent under this paragraph.

55. The Bureau may use these remaining funds to pay additional redress to Affected Consumers. Upon receiving a written request from Respondent, the Bureau may provide Respondent with information concerning additional redress. If the Bureau determines, in its sole discretion, that additional redress is wholly or partially impracticable or otherwise inappropriate, or if funds remain after the additional redress

is completed, the Bureau will deposit any remaining funds in the U.S. Treasury as disgorgement. Respondent will have no right to challenge any actions that the Bureau or its representatives may take under this Section.

56. Respondent may not condition the payment of any redress to any Affected Consumer under this Order on that Affected Consumer waiving any right.

IX
Order to Pay Civil Money Penalties

IT IS FURTHER ORDERED that:

57. Under § 1055(c) of the CFPA, 12 U.S.C. § 5565(c), by reason of the violations of law described in Section IV of this Consent Order, and taking into account the factors in 12 U.S.C. § 5565(c)(3), Respondent must pay a civil money penalty of $100 million to the Bureau.

58. Within 10 days of the Effective Date, Respondent must pay the civil money penalty by wire transfer to the Bureau or to the Bureau's agent in compliance with the Bureau's wiring instructions.

59. The civil money penalty paid under this Consent Order will be deposited in the Civil Penalty Fund of the Bureau as required by § 1017(d) of the CFPA, 12 U.S.C. § 5497(d).

60. Respondent must treat the civil money penalty paid under this Consent Order as a penalty paid to the government for all purposes. Regardless of how the Bureau ultimately uses those funds, Respondent may not:

a. claim, assert, or apply for a tax deduction, tax credit, or any other tax benefit for any civil money penalty paid under this Consent Order; or

b. seek or accept, directly or indirectly, reimbursement or indemnification from any source, including but not limited to payment made under any insurance policy, with regard to any civil money penalty paid under this Consent Order.

61. To preserve the deterrent effect of any civil money penalty in the California Enforcement Action or any Related Consumer Action, Respondent may not argue that Respondent is entitled to, nor may Respondent benefit by, any offset or reduction of any compensatory monetary remedies imposed in the California Enforcement Action or any Related Consumer Action because of the civil money penalty paid in this action (Penalty Offset). If the court in the California Enforcement Action or any Related Consumer Action grants such a Penalty Offset, Respondent must, within 30 days after entry of a final order granting the Penalty Offset, notify the Bureau, and pay the amount of the Penalty Offset to the U.S. Treasury. Such a payment will not be considered an additional civil money penalty and will not change the amount of the civil money penalty imposed in this action.

X
Additional Monetary Provisions

IT IS FURTHER ORDERED that:

62. In the event of any default on Respondent's obligations to make payment under this Consent Order, interest, computed under 28 U.S.C. § 1961, as amended, will accrue on any outstanding amounts not paid from the date of default to the date of payment, and will immediately become due and payable.

63. Respondent must relinquish all dominion, control, and title to the funds paid to the fullest extent permitted by law and no part of the funds may be returned to Respondent.

64. Under 31 U.S.C. § 7701, Respondent, unless it already has done so, must furnish to the Bureau its taxpayer identifying numbers, which may be used for purposes of collecting and reporting on any delinquent amount arising out of this Consent Order.

65. Within 30 days of the entry of a final judgment, consent order, or settlement in the California Enforcement Action or any Related Consumer Action, Respondent must notify the Regional Director of the final judgment, consent order, or settlement in writing. That notification must indicate the amount of redress, if any, that Respondent paid or is required to pay to consumers and describe the consumers or classes of consumers to whom that redress has been or will be paid.

XI
Reporting Requirements

IT IS FURTHER ORDERED that:

66. Respondent must notify the Bureau of any development that may affect compliance obligations arising under this Consent Order, including but not limited to a dissolution, assignment, sale, merger, or other action that would result in the emergence of a successor company; the creation or dissolution of a subsidiary, parent, or affiliate that engages in any acts or practices subject to this Consent Order; the filing of any bankruptcy or insolvency proceeding by or against Respondent; or a change in Respondent's name or address. Respondent must provide this notice, if practicable, at least 30 days before the development, but in any case no later than 14 days after the development.

67. Within 7 days of the Effective Date, Respondent must designate at least one telephone number and email, physical, and postal address as points of contact, which the Bureau may use to communicate with Respondent.

68. Respondent must report any change in the information required to be submitted under Paragraph 67 at least 30 days before the change or as soon as practicable after the learning about the change, whichever is sooner.

69. Within 90 days of the Effective Date, and again at least semi-annually until the actions under this Consent Order have been completed, Respondent must submit to the Regional Director an accurate written compliance progress report (Compliance Report) that has been approved by the Board or a committee thereof, which, at a minimum:

a. describes in detail the manner and form in which Respondent has complied with this Order;

b. separately lists each corrective action required by this Consent Order, the Compliance Plan, and the Redress Plan;

c. Describes the current status of each corrective action taken and the required, actual, and anticipated completion date for each corrective action; and

d. attaches a copy of each Order Acknowledgment obtained under Section XII, unless previously submitted to the Bureau.

XII
Order Distribution and Acknowledgment

IT IS FURTHER ORDERED that,

70. Within 30 days of the Effective Date, Respondent must deliver a copy of this Consent Order to each of its board members and executive officers, as well as to any managers, employees, or other agents and representatives who have responsibilities related to the subject matter of the Consent Order.

71. For 5 years from the Effective Date, Respondent must deliver a copy of this Consent Order to any business entity resulting from any change in structure referred to in Section XI, any future board members and executive officers, as well as to any managers, employees, or other agents and representatives who will have responsibilities related to the subject matter of this Consent Order before they assume their responsibilities.

72. Respondent must secure a signed and dated statement acknowledging receipt of a copy of this Consent Order, ensuring that any electronic signatures comply with the requirements of the E-Sign Act, 15 U.S.C. § 7001 et seq., within 30 days of delivery, from all persons receiving a copy of this Consent Order under this Section.

XIII
Recordkeeping

IT IS FURTHER ORDERED that

73. Respondent must create or, if already created, retain for at least 5 years from the Effective Date the following business records:

a. all documents and records necessary to demonstrate full compliance with each provision of this Consent Order, including all submissions to the Bureau.

b. all documents and records pertaining to the Redress Plan, described in Section VIII above.

74. Respondent must retain the documents identified in Paragraph 73 for the duration of the Consent Order.

75. Respondent must make the documents identified in Paragraph 73 available to the Bureau upon the Bureau's request.

XIV
Notices

IT IS FURTHER ORDERED that:

76. Unless otherwise directed in writing by the Bureau, Respondent must provide all submissions, requests, communications, or other documents relating to this Consent Order in writing, with the subject line, "In re Wells Fargo Bank, N.A., File No. 2016-CFPB-0015," and send them as follows:

a. via email to WestRegion@cfpb.gov; and

b. via overnight courier (not the U.S. Postal Service) as follows:

Regional Director, CFPB West Region, 301 Howard Street, 12th Floor, San Francisco, CA 94105.

XV
Cooperation with the Bureau

IT IS FURTHER ORDERED that:

77. Respondent must cooperate fully to help the Bureau determine the identity and location of, and the amount of injury sustained by, each Affected Consumer. Respondent must provide such information in its or its agents' possession or control within 14 days of receiving a written request from the Bureau.

78. Respondent must cooperate fully with the Bureau in this matter and in any investigation related to or associated with the conduct described in Section IV. Respondent must provide truthful and complete information, evidence, and testimony and Respondent must cause Respondent's officers, employees, representatives, or agents to appear for interviews, discovery, hearings, trials, and any other proceedings that the Bureau may reasonably request upon 5 days written notice, or other reasonable

notice, at such places and times as the Bureau may designate, without the service of compulsory process.

XVI
Compliance Monitoring

IT IS FURTHER ORDERED that, to monitor Respondent's compliance with this Consent Order:

79. Within 30 days of receipt of a written request from the Bureau, Respondent must submit additional Compliance Reports or other requested information, which must be made under penalty of perjury; provide sworn testimony; or produce documents.

80. Respondent must permit Bureau representatives to interview any employee or other person affiliated with Respondent who has agreed to such an interview. The person interviewed may have counsel present.

81. Nothing in this Consent Order will limit the Bureau's lawful use of civil investigative demands under 12 C.F.R. § 1080.6 or other compulsory process.

XVII
Modifications to Non-Material Requirements

IT IS FURTHER ORDERED that:

82. Respondent may seek a modification to non-material requirements of this Consent Order (e.g., reasonable extensions of time and changes to reporting requirements) by submitting a written request to the Regional Director.

83. The Regional Director may, in his or her discretion, modify any non-material requirements of this Consent Order (e.g., reasonable extensions of time and changes to reporting requirements) if he or she determines that good cause justifies the modification. Any such modification by the Regional Director must be in writing.

XVIII
Administrative Provisions

84. The provisions of this Consent Order do not bar, estop, or otherwise prevent the Bureau, or any other governmental agency, from taking any other action against Respondent, except as described in Paragraph 85.

85. The Bureau releases and discharges Respondent from all potential liability for law violations that the Bureau has or might have asserted based on the practices described in Section IV of this Consent Order, to the extent such practices occurred before the Effective Date and the Bureau knows about them as of the Effective Date. The Bureau may use the practices described in this Consent Order in future enforcement actions against Respondent and its affiliates, including, without limitation, to establish a pattern or practice of violations or the continuation of a pattern or practice of violations or to calculate the amount of any penalty. This release does not preclude or affect any right of the Bureau to determine and ensure compliance with the Consent Order, or to seek penalties for any violations of the Consent Order.

86. This Consent Order is intended to be, and will be construed as, a final Consent Order issued under § 1053 of the CFPA, 12 U.S.C. § 5563, and expressly does not form, and may not be construed to form, a contract binding the Bureau or the United States.

87. This Consent Order will terminate 5 years from the Effective Date or 5 years from the most recent date that the Bureau initiates an action alleging any violation of the Consent Order by Respondent. If such action is dismissed or the relevant adjudicative body rules that Respondent did not violate any provision of the Consent Order, and the dismissal or ruling is either not appealed or upheld on appeal, then the

Consent Order will terminate as though the action had never been filed. The Consent Order will remain effective and enforceable until such time, except to the extent that any provisions of this Consent Order have been amended, suspended, waived, or terminated in writing by the Bureau or its designated agent.

88. Calculation of time limitations will run from the Effective Date and be based on calendar days, unless otherwise noted.

89. Should Respondent seek to transfer or assign all or part of its operations that are subject to this Consent Order, Respondent must, as a condition of sale, obtain the written agreement of the transferee or assignee to comply with all applicable provisions of this Consent Order.

90. The provisions of this Consent Order will be enforceable by the Bureau. For any violation of this Consent Order, the Bureau may seek to impose the maximum amount of civil money penalties allowed under § 1055(c) of the CFPA, 12 U.S.C. § 5565(c). In connection with any attempt by the Bureau to enforce this Consent Order in federal district court, the Bureau may serve Respondent wherever Respondent may be found and Respondent may not contest that court's personal jurisdiction over Respondent.

91. This Consent Order and the accompanying Stipulation contain the complete agreement between the parties. The parties have made no promises, representations, or warranties other than what is contained in this Consent Order and the accompanying Stipulation. This Consent Order and the accompanying Stipulation supersede any prior oral or written communications, discussions, or understandings.

92. Nothing in this Consent Order or the accompanying Stipulation may be construed as allowing Respondent, its Board, officers, or employees to violate any law, rule, or regulation.

IT IS SO ORDERED, this 4th day of September, 2016.

Richard Cordray
Director
Consumer Financial Protection Bureau

EXHIBIT 2

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE
May 25 2017
REFERENCE ID: 1705250901105

STATE OF SOUTH CAROLINA
SECRETARY OF STATE

Jim Miles
SECRETARY OF STATE
FILED
JUL 28 1999
AM PM
7 8 9 10 11 12 1 2 3 4 5 6

APPLICATION FOR AN AMENDED CERTIFICATE OF AUTHORITY BY A FOREIGN CORPORATION TO TRANSACT BUSINESS IN SOUTH CAROLINA

Pursuant to §33-15-104 of the 1976 South Carolina Code, as amended, the undersigned corporation hereby applies for an amended certificate of authority to transact business in the State of South Carolina and for that purpose submits the following statement:

1. The name of the corporation is Wheat First Securities, Inc.

1a. The above named corporation received a Certificate of Authority to transact business in South Carolina on: February 15, 1973.

2. This application is filed for the following reason (complete all applicable items):

☐ a. The corporation has changed its corporate name as follows First Union Capital Markets Corp.

☐ b. The corporation has changed its duration to _____

☐ c. The corporation has changed the state or county of its incorporation to _____

3. The name of the corporation for the purposes of transacting business in South Carolina is (See §§33-4-101 and 33-15-106) and see §33-19-500(b)(1) if the corporation is a professional corporation) Wheat First Securities, Inc.

4. It is incorporated as (check applicable item) ☒ a general business corporation, ☐ a professional corporation, the laws of the state of Virginia

5. The date of its incorporation is 4/12/1966 and the period of its duration is Perpetual.

6. The address of the principal office of the corporation in the jurisdiction of its incorporation is 301 S. College Street (Street & Number) in the city of Charlotte and the state of North Carolina 28288-0630 Zip Code

7. The address of the registered office in the state of South Carolina is 201 Penk Street (Street & Number) in the city of Columbia, South Carolina 29201 Zip Code.

8. The name of the registered agent in this state at such address is Corporation Service Company.

99-028418CC

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE
May 25 2017
REFERENCE ID: 1705250901105

9. The name and usual business address of the corporation's directors (if the corporation has no directors, then the name and address of those persons who are exercising the statutory authority of directors on behalf of the corporation) and principal Officers:

a)

Name of Directors	Business Address
Ross M. Annable	301 S. Tryon St. Charlotte, NC 28288
Mark M. Gambill	901 E. Byrd Richmond, Va 23219
Scott L. Ilario	301 S. Tryon St. Charlotte, NC 28288

b)

Name and Office of Principal Officers	Business Address
Ross M. Annable	301 S. Tryon St. Charlotte, NC 28288
James F. Powers	301 S. College St. Charlotte, NC 28288
Scott L. Ilario	301 S. Tryon St. Charlotte, NC 28288

10. The aggregate number of shares which the corporation has authority to issue, itemized by classes and series, if any, within a class:

Class of Shares (and Series, if any)	Authorized No. of Each Class (and Series)
Common Stock-Non-Voting	500,000
Common Stock-Voting	500,000
Preferred Stock	250,000

11. Unless a delayed date is specified, this application shall be effective when accepted for filing by the Secretary of State (See §33-1-230): _____.

12. Dated this 14th day of June 1999.

First Union Capital Markets Corp.
(Name of Corporation)

By: _____
(Signature of Officer)

James F. Powers, Sr. Vice President
(Type or Print Name and Office)

FILING INSTRUCTIONS

1. Two copies of this application, the original and either a duplicate original or a conformed copy, must be filed.
2. If the space in this form is insufficient, please attach additional sheets containing a reference to the appropriate paragraph in this form.
3. Schedule of Fees (payable at the time of filing this document)

Fee for filing Application (payable to the Secretary of State)	$ 10.00
Filing Tax	100.00

4. If the applicant corporation is adopting a fictitious name for use in South Carolina pursuant to Section 33-15-108(a), then a certified copy of the board of directors resolution approving the fictitious name must be attached to the application.

Form Approved by South Carolina Secretary of State 1/89

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE
May 25 2017
REFERENCE ID: [illegible]090110S

The Commonwealth of Virginia

State Corporation Commission

I Certify the Following from the Records of the Commission:

FIRST UNION CAPITAL MARKETS CORP. is a corporation existing under and by virtue of the laws of Virginia, and is in good standing.

The date of incorporation is April 12, 1966.

Nothing more is hereby certified.

Signed and Sealed at Richmond on this Date:
July 9, 1999

Joel H. Peck, Clerk of the Commission

CIS20315

EXHIBIT 3

South Carolina Secretary of State Mark Hammond

Business Entities Online

File, Search, and Retrieve Documents Electronically

FIRST UNION CAPITAL MARKETS CORP.

Corporate Information

Entity Type: Corporation

Status: Dissolved

Domestic/Foreign: Foreign

Incorporated State: Virginia

Important Dates

Effective Date: 02/15/1973

Expiration Date: N/A

Term End Date: N/A

Dissolved Date: 12/21/1999

Registered Agent

Agent: CORPORATION SERVICE CO

Address: 1301 Gervais Street
Columbia, South Carolina 29201

Official Documents On File

Filing Type	Filing Date
Dissolution	12/21/1999
Forfeiture	11/19/1999
Amendment	07/28/1999
Change of Agent or Office	06/11/1999
Change of Agent or Office	04/09/1998
Amendment	11/14/1977
Authority	02/15/1973

Former Names

Name	Filing Date
WHEAT, FIRST SECURITIES, INC.	N/A

For filing questions please contact us at 803-734-2158

Copyright © 2017 State of South Carolina

CERTIFIED TO BE A TRUE AND CORRECT COPY
AS TAKEN FROM AND COMPARED WITH THE
ORIGINAL ON FILE IN THIS OFFICE
May 25 2017
REFERENCE ID: 1705250901105

STATE OF SOUTH CAROLINA
SECRETARY OF STATE

APPLICATION FOR SURRENDER OF AUTHORITY TO DO BUSINESS IN THE STATE OF SOUTH CAROLINA

DEC 21 1999
AM 7 8 9 10 11 12 1 2 3 4 5 6 PM

Pursuant to the provisions of the 1976 South Carolina Code, as amended, the undersigned corporation hereby applies to the Secretary of State for surrender of authority to do business in the State of South Carolina, and for that purpose submits the following statement:

1. The name of the corporation is First Union Capital Markets Corp.
2. The corporation is incorporated under the laws of the state of Virginia.
3. The corporation received a certificate of authorization to transact business in South Carolina dated 2-15-1973.
4. The corporation is no longer transacting business in South Carolina.
5. The corporation hereby surrenders its authority to transact business in the State of South Carolina.
6. The corporation revokes the authority of its registered agent in South Carolina to accept service of process, and consents that process in any action, suit or proceeding based upon any cause of action arising in this State before the effective date of this application may be served on the Secretary of State.
7. The address to which the Secretary of State may mail a copy of any process against the corporation that may be served on him is c/o First Union Corporation 301 S. College St. Charlotte, NC. 28288-0630
The corporation hereby agrees to notify the Secretary of State of any change in this mailing address.
8. Unless a delayed date is specified, this application shall be effective upon acceptance for filing by the Secretary of State (See §§33-1-230(b):

DATE 12-2-99

First Union Capital Markets Corp.
(Name of Corporation)

By _____
(Signature)

James F. Powers Sr. Vice President
(Type or Print Name and Office)

FILING INSTRUCTIONS

1. Two copies of this application, the original and either a duplicate original or a conformed copy, must be filed.
2. Filing Fee (payable at the time of filing this document) $10.00

Form Approved by South Carolina Secretary of State 1/89

99-051097CC

EXHIBIT 4

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. No.: 2011-CP-23-0336
	)	
David W. Keller,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	ORDER
ING Financial Partners, Inc., William C. Johnson, Diversified Business Concepts, Inc., and Jackson National Life Insurance Company,	)	
	)	
Defendants.	)	

2011 JUN 22 P 2:23

FILED-CLERK OF COURT
GREENVILLE CO. S.C.

Defendants ING Financial Partners, Inc., William C. Johnson, and Diversified Business Concepts, Inc. move to Compel Arbitration and Dismiss or Stay this Case. For the reasons set forth below, Defendants' Motion to Compel Arbitration and Dismiss or Stay this Case is denied.

BACKGROUND

In October of 2007, Plaintiff David W. Keller ("Keller"), purchased two separate and distinct financial products through Defendant William C. Johnson ("Johnson") and his business Diversified Business Concepts, Inc. ("Diversified"), including a Jackson National Life Prospective L Series variable annuity with an Auto Guard 6 living benefit rider ("Annuity"), and a portfolio of market based investments ("Portfolio"). The Annuity was purchased from Defendant Jackson National Life Insurance Company ("Jackson National"), while the Portfolio was purchased from ING Financial Partners, Inc. ("ING"). In 2009, Keller discovered that the Annuity did not provide the lifetime benefits or guaranteed annual increases in value he anticipated based upon certain representations allegedly made by Johnson. Keller, after filing an unsuccessful formal complaint with ING, filed the present civil action. In response, Defendants filed their Motion to Compel Arbitration and Dismiss or Stay ("Motion").

MH

.000003

FINDINGS

1. ***The failure of the arbitration provision's forum selection clause constitutes the failure of an integral term of the agreement, thereby rendering the entire arbitration agreement void.***

In support of their Motion, Defendants rely on an arbitration clause printed on the back of an ING "Account Information Form" that was executed by Plaintiff and Johnson in October, 2007. The arbitration clause in the Account Information Form provides that the parties "agree that any dispute between [them] arising out of this agreement shall be submitted to arbitration conducted under the then applicable provisions of the code of arbitration procedure of NASD." The "NASD," or the National Association of Securities Dealers, Inc., as then constituted, no longer exists, having combined regulatory functions with certain divisions of the New York Stock Exchange ("NYSE") to become what is now known as the Financial Industry Regulatory Authority, or FINRA. Because the arbitration forum specifically selected by the parties to the purported arbitration agreement does not exist, and did not exist at the time the agreement was executed, a material term of the arbitration clause has failed, and the purported agreement to arbitrate must likewise fail.

Arbitration agreements are matters of contract, and general contract law governs the evaluation of the enforceability of an arbitration agreement. See Smith Barney, Inc. v. Keeney, 570 N.W.2d 75, 78 (Iowa 1997).[1] As such, a valid arbitration agreement requires the parties' "mutual assent to the terms." Scheer v. Webster Cnty., 644 N.W.2d 327, 338 (Iowa 2002). "Before compelling a party to arbitrate pursuant to the FAA, a court must determine that there is an agreement to arbitrate and the dispute at issue falls within the scope of the agreement." Century Indem. Co. v. Certain Underwriters at Lloyd's, 584 F.3d 513, 523 (3d Cir. 2009). The

[1] The Account Information Form contains a choice of law provision providing that "any disputes, controversies or claim arising out of or related to this agreement shall be governed by the applicable laws of the State of Iowa and applicable federal law."

000004

contract, including the agreement to arbitrate, "is to be interpreted as a whole, and it is assumed in the first instance that no part of it is superfluous." Smith Barney, Inc., 570 N.W.2d at 78.

With regards to agreements to arbitrate, courts agree that where a material, integral part of an arbitration agreement fails, the entire agreement to arbitrate is void. See Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 132, 678 S.E.2d 435, 439 (2009) (failure of selected arbitration forum warrants invalidation of entire arbitration clause); Brown v. ITT Consumer Fin. Corp., 211 F.3d 1217, 1220 (11th Cir. 2000) (asserting that where the selection of a particular forum constitutes an integral part of the agreement to arbitrate, the failure of the chosen forum precludes arbitration); Gutfreund v. Weiner, 68 F.3d 554, 561 (2d Cir. 1995) (a failed forum selection term determined to be as important a consideration as the agreement to arbitrate itself); Smith Barney, Inc. v. Critical Health Sys., 212 F.3d 858, 862 (4th Cir. 2000). Specifically, "if the choice of [an arbitration] forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern...the failure of the chosen forum [will] preclude arbitration." Grant, 383 S.C. at 131, 678 S.E.2d at 438 (citing Singleton v. Grade A Market, Inc., 607 F. Supp. 2d 333, 341 (D. Conn. 2009)). Courts have found that the chosen arbitration forum is integral to the agreement where;

> "the arbitrator's rules will have a substantive effect on the party's claims...if the arbitrator possesses specialized knowledge or expertise regarding the subject of the dispute...or if the agreement otherwise evidences a dominant intent of the parties that claims could only be heard by the named arbitrator." Wilson v. Dell Fin. Servs., L.L.C., 2010 U.S. Dist. LEXIS 10809, 5-6 (S.D. W. Va. Feb. 8, 2010).

In Grant, for example, the plaintiff executed an admissions contract containing an agreement to arbitrate on behalf of her deceased husband concurrent with his admission into the Magnolia Manor-Greenwood nursing home. Id. at 127, 678 S.E.2d at 436. Shortly after admission, the plaintiff's decedent was injured at the facility. Id. Plaintiff filed suit in state

court, and the Defendant moved to dismiss the action and to compel arbitration pursuant to the agreement to arbitrate. Id. The arbitration clause in the agreement specifically selected the American Health Lawyers Association (the AHLA) as the arbitration forum to resolve all related disputes arising from the decedent's admission. Id. at 128, 678 S.E.2d at 437. Subsequent to the execution of the admissions agreement, the AHLA amended its rules, asserting that it would no longer arbitrate disputes arising from arbitration agreements executed prior to the injury. Id. Consequently, the AHLA would not hear the dispute between the parties, and the parties were effectively denied their forum choice. Id.

The plaintiff asserted that the inability to arbitrate through the AHLA constituted a failure of a material term in the agreement, and therefore plaintiff was no longer bound to arbitrate the dispute. Id. at 128, 678 S.E.2d at 437. The Court agreed, finding that "the specific designation of the AHLA as arbitrator [was] an integral term of this arbitration agreement." Id. at 131, 678 S.E.2d at 438-439. The Court reasoned that "the designation of a forum such as the AHLA has wide-ranging substantive implications that may affect, *inter alia*, the arbitrator-selection process, the law, procedures, and rules that govern the arbitration, the enforcement of the arbitration award, and the cost of the arbitration." Id. at 132, 678 S.E.2d at 439. The Court determined that these implications render the selection of a specific forum an integral term of the agreement. Id. Consequently, the court held that the arbitration agreement between the parties was unenforceable, and dismissed the defendant's motion to compel arbitration.

Just as in Grant, the parties to the Account Information Form in the present case selected a particular arbitration forum and process capable of and experienced in handling complex, industry specific disputes. Specifically, the purported agreement to arbitrate provides that the parties "agree that any dispute between [them] arising out of this agreement shall be submitted to

000006

arbitration conducted under the then applicable provisions of the code of arbitration procedure of NASD." Id.

Courts have determined that "a clause which adopts the rules of an organization like the NASD implicitly chooses that organization as the, or a, forum." Reddam v. KPMG LLP, 457 F.3d 1054, 1060 (9th Cir. 2006) (collecting cases), overruled on other grounds by, Atl. Nat'l Trust LLC v. Mt. Hawley Ins. Co., 621 F.3d 931 (9th Cir. 2010). The United States Court of Appeals for the Second Circuit considered the issue of a failed arbitral forum provision in In re Salomon Inc. Shareholders' Derivative Litigation, 68 F.3d 554 (2d Cir. 1995). Salomon, a shareholders' derivative action against former corporate officers, concerned an arbitration clause providing for arbitration before the NYSE. The district court initially granted the Defendant's motion to compel arbitration, but the NYSE refused to hear the matter. Salomon at 556. Thereafter, the court decline to compel arbitration and set the case for trial. The court stated that when the NYSE refuses to arbitrate the matter, "there is no further promise to arbitrate in another forum." The court was concerned not with whether, but where the dispute could be arbitrated under the agreements. The court held "we cannot compel a party to arbitrate a dispute before someone other than the NYSE when that party had agreed to arbitrate only before the NYSE and the NYSE, ... has refused to use its facilities to arbitrate the dispute in question...." The court refused to appoint substitute arbitrators and compel arbitration in another forum because the arbitration agreements required that any arbitration be before the NYSE, and not any other arbitral forum. Id. at 577-561. The NASD was, it appears, selected due, in part, to its expertise in the securities arena and its experience handling the type of disputes contemplated in the arbitration clause. The selection of the NASD, therefore, was an integral term of the arbitration clause.

5

000007

In mid-2007, the NASD combined regulatory functions with certain divisions of the New York Stock Exchange (a competitor in the arbitration of securities disputes), and became what is now known as the Financial Industry Regulatory Authority, or FINRA. See SEC Release No. 34-56145, 2007 SEC LEXIS 1640 (July 26, 2007). Moreover, coincident with this consolidation, came both procedural and substantive changes to the NASD's former dispute resolution process and rules. See FINRA, Archive of Arbitration Procedures for Cases Before and After April 16, 2007, http://www.finra.org/ArbitrationMediation/Rules (last visited Apr. 4, 2011). Consequently, just as in Grant and Salomon, the parties in the present case are deprived of the arbitration forum that they specifically bargained for and agreed upon.

Because the designated arbitrator is not available to resolve the present dispute, and because the arbitrator selection clause in the subject agreement constitutes a material and integral term of the agreement to arbitrate, this Court finds the arbitration agreement impossible to perform, and denies Defendants' Motion to Compel Arbitration and Dismiss or Stay. See Gutfreund, 68 F.3d at 558 ("we cannot compel a party to arbitrate a dispute before someone other than the NYSE when the party had agreed to arbitrate disputes only before the NYSE"); Roney & Co. v. Goren, 875 F.2d 1218 (6th Cir. 1989) (interpreting designation of NYSE as the arbitration forum of choice meant that *only* the NYSE could arbitrate a dispute between the parties).

2. ***Defendants cannot meet their burden of establishing that the Account Information Form governs disputes arising out of the Jackson National Annuity.***

While, given the above ruling, this Court need not address whether the Account Information Form governs disputes arising out of the Jackson National Annuity, this Court does

GH

find that Defendants failed to meet their burden of demonstrating that the purported agreement controls.

It is unclear from the face of the purported agreement whether the form relates to the Annuity or solely to the Portfolio account. It is clear, however, that the arbitration clause was drafted by ING, on ING letterhead, and only references ING and Pershing accounts. The Jackson National Annuity contract number appears nowhere on the form, and the name Jackson National itself is entirely absent. Moreover, the document references no agreement interdependent with the form. It is likewise important to note that Jackson National is not a party to this present Motion to Compel Arbitration. Finally, the ING Account Information Form was drafted by ING, and this Court recognizes that any ambiguities therein must be construed against ING. See Mathis v. Brown & Brown of S.C., Inc., 389 S.C. 299, 309, 698 S.E.2d 773, 778 (2010); McGill v. Moore, 381 S.C. 179, 186, 672 S.E.2d 571, 575 (2009) (ambiguities in contracts construed in favor of non-drafting party).

It is well settled that "arbitration is a matter of contract, and a party cannot be forced to arbitrate a dispute if it has not agreed to do so." AT&T Tech., Inc. v. Comm'ns Workers, 475 U.S. 643, 648 (1986). There is no indication in the materials submitted to this Court that Plaintiff agreed to arbitrate claims relating to the Annuity in issue. Upon a review of the Memoranda submitted by the parties, therefore, this Court finds that Defendants failed to satisfy their burden of proving that the arbitration clause on the ING letterhead governs disputes arising from the Jackson National Annuity.

Grt

000009

CONCLUSION

THEREFORE, for the reasons set forth above, Defendants' Motion to Compel Arbitration and Dismiss or Stay This Case is DENIED.

IT IS SO ORDERED.

D. Garrison Hill
Circuit Judge

May 26, 2011
Greenville, South Carolina

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

CASE NO: 2011CP2300336

2011 JUN -2 P 12:23

David W Keller *vs.* ING Financial Partners Inc

FILED CLERK OF COURT
GREENVILLE CO. S.C.

CHECK ONE:

☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ ACTION DISMISSED (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX): ☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other: _____

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☒ See attached order; ☐ Statement of Judgment by the Court:

Dated at Greenville, South Carolina, this .

Court Reporter:

PRESIDING JUDGE

☐ This judgment was entered on the 2nd day of June, 2011, and a copy mailed first class this 2nd day of June, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

H. Donald Sellers Haynsworth Sinkler Boyd, P.A. P.O. Box 2048 Greenville, SC 29602

Charles Franklin Turner Jr. Turner, Padget, Graham & Laney, P.A. P.O. Box 1509 Greenville, SC 29602

CPFORM4M
SCCA SCRCP Form 4 Revised 05/2008

000011

ATTORNEY(S) FOR THE PLAINTIFF(S)

Ashley Bryan Abel Jackson Lewis LLP 55 Beattie Place, Suite 800 Greenville, SC 29601
Thomas Chase Samples Jackson Lewis Llp 55 Beattie Place, Suite 800 Greenville, SC 29601

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court - Clerk of Court

CPFORM4M
SCCA SCRCP Form 4 Revised 05/2008

000012

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE

2011 MAY 18 P 2:28 CASE NO: 2011CP2300336

CLERK OF COURT
GREENVILLE SC
PAUL B WICKENSIMER

David W. Keller, LLC and ING Financial Partners, Inc.

CHECK ONE:

☐ **JURY VERDICT.** This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ **DECISION BY THE COURT.** This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

☐ **ACTION DISMISSED** (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ **ACTION STRICKEN** (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy:

☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award;
☐ Other: _____

IT IS ORDERED AND ADJUDGED: ☐ See attached order; ☒ Statement of Judgment by the Court:

Motion to Compel Arbitration is respectfully denied. Mr. Sellers is requested to submit a proposed order on or before May 25, 2011 in Word format to ghillc@sccourts.org, with a copy to opposing counsel.

Dated at Greenville, South Carolina, this May 16, 2011.

Court Reporter: Hollie Jenkins

PRESIDING JUDGE - D. GARRISON HILL

This judgment was entered on the 18th day of May 2011, and a copy mailed first class this May 18, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

H. Donald Sellers P.O. Box 2048 Greenville, SC 29602

ATTORNEY(S) FOR THE PLAINTIFF(S)

Charles Franklin Turner Jr. 200 East Broad St., Suite 250 Greenville, SC 29601
Ashley Bryan Abel 55 Beattie Place, Suite 800 Greenville, SC 29601
Thomas Chase Samples 55 Beattie Place, Suite 800 Greenville, SC 29601

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court

000013

EXHIBIT 5

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

David W. Keller, Respondent,

v.

ING Financial Partners, Inc., William C. Johnson, Diversified Business Concepts, Inc., and Jackson National Life Insurance Company, Defendants,

Of whom ING Financial Partners, Inc., William C. Johnson, and Diversified Business Concepts, Inc., are, Appellants.

Appellate Case No. 2011-193026

Appeal From Greenville County
D. Garrison Hill, Circuit Court Judge

Unpublished Opinion No. 2013-UP-014
Heard October 2, 2012 – Filed January 9, 2013

AFFIRMED

Thomas Chase Samples, of Jackson Lewis LLP, of Greenville, for Appellants.

Robert DeWitt Thomas, of Andersen Tate & Carr PC; and H. Donald Sellers and J. W. Matthews III, of

Haynsworth Sinkler Boyd PA, all of Greenville, for Respondent.

PER CURIAM: ING Financial Partners, Inc., William C. Johnson, and Diversified Business Concepts, Inc. (collectively, Appellants) appeal the circuit court's denial of their motion to compel arbitration. The circuit court found the arbitration agreement between the parties designated the National Association of Securities Dealers (NASD) as an exclusive arbitral forum, the NASD was unavailable to arbitrate because it no longer existed, and the court could not substitute the Financial Industry Regulatory Authority (FINRA) for NASD. We affirm.

Under Iowa law, the interpretation of an arbitration agreement involves two steps: (1) "to determine whether there is a valid agreement to arbitrate" and (2) "to determine whether the controversy alleged is embraced by that agreement." *Gen. Conference of Evangelical Methodist Church v. Faith Evangelical Methodist Church*, 809 N.W.2d 117, 120 (Iowa Ct. App. 2011). The court must use general principles of contract law in determining the validity of an arbitration agreement. *Bullis v. Bear, Stearns & Co.*, 553 N.W.2d 599, 602 (Iowa 1996).

The Federal Arbitration Act (FAA) does not confer an absolute right to compel arbitration; but only a right to obtain an order directing that "arbitration proceed in the manner provided for in [the parties'] agreement." *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 469 (1989). Section 5 of the FAA provides:

> If in the agreement provision be made for a method of naming or appointing an arbitrator or arbitrators or an umpire, such method shall be followed; but if no method be provided therein, or if a method be provided and any party thereto shall fail to avail himself of such method, or if for any other reason there shall be a lapse in the naming of an arbitrator or arbitrators or umpire, or in filling a vacancy, then upon the application of either party to the controversy the court shall designate and appoint an arbitrator or arbitrators or umpire, as the case may require, who shall act under the said agreement with the same force and effect as if he or they had been

> specifically named therein; and unless otherwise provided in the agreement the arbitration shall be by a single arbitrator.

9 U.S.C.A. § 5 (2011).

The parties' arbitration agreement designates an exclusive arbitral forum that is no longer available to arbitrate. First, Appellants' motion to compel arbitration and initial brief on appeal admit FINRA is the "successor entity to the NASD." Second, the agreement states "any dispute between you and me arising out of this agreement shall be submitted to arbitration conducted under the then applicable provisions of the code of arbitration procedure of NASD." NASD's rules indicate that conducting arbitration "under the then applicable provisions of the code of arbitration procedure of NASD" mandates arbitration before the NASD itself,[1] and most jurisdictions' interpretations of similar agreements support this construction.[2]

Further, this court cannot rewrite the parties' agreement to substitute FINRA for NASD. Neither Iowa state nor the Eighth Circuit Court of Appeals have decided whether a court may substitute an arbitral forum when a designated forum has become unavailable to arbitrate. Among federal circuit courts, a split exists on the issue. In the absence of any controlling law, therefore, we opt to follow *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (2009). There, our supreme court saw "great merit in the Second Circuit's view that Section 5 [of the FAA] does not apply in cases where a specifically designated arbitrator becomes unavailable" to arbitrate. *Id.* at 131, 678 S.E.2d at 438 (approving of *In re Salomon Inc.*, 68 F.3d 554 (2d Cir. 1995)). In *Salomon*, the Second Circuit held

---

[1] *See* NASD Rule 10314(a)(1)-(2) (providing "an arbitration proceeding under this Code shall be instituted" by a claimant filing "with the Director of Arbitration an executed Submission Agreement, a Statement of Claim of the controversy in dispute, together with the documents in support of the Claim, and the required deposit").

[2] *PaineWebber, Inc. v. Rutherford*, 903 F.2d 106, 107-08 (2d Cir. 1990); *In re Salomon Inc.*, 68 F.3d 554, 559 (2d Cir. 1995); *Luckie v. Smith Barney, Harris Upham & Co., Inc.*, 999 F.2d 509, 511 (11th Cir. 1993); *see also Roney & Co. v. Goren*, 875 F.2d 1218, 1219-20, 1223 (6th Cir. 1989); *Reddam v. KPMG LLP*, 457 F.3d 1054, 1059-60 (9th Cir. 2006); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000).

Section 5 of the FAA permits substitution only "when there is 'a lapse in time in the naming of the' arbitrator or in the filling of a vacancy on a panel of arbitrators, or some other mechanical breakdown in the arbitrator *selection process*." *See Salomon*, 68 F.3d at 560 (emphasis added). This case does not present a breakdown in *the process of selecting* an arbitrator because the arbitral forum does not exist. Regardless of any similarities between NASD's and FINRA's procedural rules, therefore, we cannot impose upon the parties the power of an arbitral forum that they did not agree to submit to. As a result, the trial court properly denied Appellants' motion to compel arbitration.

AFFIRMED.

HUFF, THOMAS, and GEATHERS, JJ., concur.

EXHIBIT 6

THIS OPINION HAS NO PRECEDENTIAL VALUE. IT SHOULD NOT BE CITED OR RELIED ON AS PRECEDENT IN ANY PROCEEDING EXCEPT AS PROVIDED BY RULE 268(d)(2), SCACR.

THE STATE OF SOUTH CAROLINA
In The Supreme Court

David W. Keller, Respondent,

v.

ING Financial Partners, Inc., William C. Johnson, Diversified Business Concepts, Inc., and Jackson National Life Insurance Company, Defendants,

Of Whom ING Financial Partners, Inc., William C. Johnson, and Diversified Business Concepts, Inc., are, Petitioners.

Appellate Case No. 2013-000651

ON WRIT OF CERTIORARI TO THE COURT OF APPEALS

Appeal from Greenville County
D. Garrison Hill, Circuit Court Judge

Memorandum Opinion No. 2015-MO-006
Heard February 5, 2015 – Filed February 11, 2015

DISMISSED AS IMPROVIDENTLY GRANTED

Ashley Bryan Abel and Thomas Chase Samples, both of Jackson Lewis, P.C., of Greenville, for Petitioners.

Pierce Talmadge MacLennan, H. Donald Sellers and J. W. Matthews, III, all of Haynsworth Sinkler Boyd, P.A., of Greenville, for Respondent.

Alice W. Parham Casey, of Wyche, P.A. of Columbia, for *Amicus Curiae,* Financial Industry Regulatory Authority, Inc.

PER CURIAM: We granted certiorari to review the Court of Appeals' decision in *Keller v. ING Fin. Partners, Inc.*, Op. No. 2013-UP-014 (S.C. Ct. App. filed Jan. 9, 2013). We now dismiss the writ as improvidently granted.

DISMISSED AS IMPROVIDENTLY GRANTED.

TOAL, C.J., PLEICONES, BEATTY, KITTREDGE and HEARN, JJ., concur.

STATE OF SOUTH CAROLINA

COUNTY OF LEXINGTON

IN THE COURT OF COMMON PLEAS

ELEVENTH JUDICIAL CIRCUIT

Robert F. Berry,

Plaintiff,

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.,

Defendants.

Case No. 2017-CP-32-00397

FILED
2017 JUL -6 PM 4:08
LISA M. COMER
CLERK OF COURT
LEXINGTON SC

DEFENDANTS' MOTION FOR RECONSIDERATION OR AMENDMENT OF THE COURT'S JUNE 21, 2017 ORDER PURSUANT TO SCRCP 59(e) AND/OR SCRCP 60

Defendants Wells Fargo Clearing Services, LLC f/k/a Wells Fargo Advisors, Wachovia Securities Financial Holdings, LLC, Wells Fargo & Company, Wells Fargo Bank, N.A., and Scott A. Spang, respectfully submit this motion pursuant to South Carolina Rules of Civil Procedure 59(e) (which authorizes the Court to amend a judgment) and/or 60 (which authorizes the Court to relieve a party from a final judgment on the basis of newly discovered evidence). Defendants seek reconsideration or amendment of the Court's June 21, 2017 Order denying Defendants' Motion to Dismiss or Stay Pending Arbitration (Ex. 1).[1] Defendants recently located more current Form U4 submissions that conclusively establish: (1) the existence of an enforceable arbitration agreement between Plaintiff and his former employer, Wells Fargo Advisors, LLC (now known as Wells Fargo Clearing Services, LLC); and (2) Plaintiff's

[1] Although the Order was signed on June 16, 2017, the file-stamp indicates that it entered on June 21, 2017.

registration with FINRA, which provides an independent basis to require arbitration of his claims.

Defendants were previously able to only locate Form U4s that were manually executed by Plaintiff in 1994 and 1995.[2] Plaintiff argued that the older U4s were not enforceable by Defendants because they were signed when Plaintiff was associated with Wheat First Securities, Inc., and because FINRA was not in existence or mentioned in the U4s at that time. Defendants, however, recently located several more recent U4 filings that were submitted electronically to FINRA, formerly known as NASD,[3] by or on Plaintiff's behalf.[4] These U4 filings show that Wells Fargo Clearing Services is entitled to enforce Plaintiff's agreement to arbitrate his claims through FINRA and that Plaintiff was, in fact, registered with FINRA, which provides an independent basis for requiring him to arbitrate the disputes raised in his First Amended Complaint. For these reasons and those more fully explained below, Defendants respectfully request that the Court reconsider or amend its previous Order. *See TriTech Electric, Inc. v. Frank M. Hall & Co.*, 343 S.C. 396, 399 (Ct. App. 2001) (holding that trial court erred by failing to grant motion to dismiss and compel arbitration because the FAA specifically prevents state courts from requiring a judicial resolution of a conflict the parties agreed to arbitrate).

[2] Defendants had drafted and were in the process of finalizing and filing a notice of supplemental authority regarding the newly discovered U4 documents when their counsel received the Court's Order on June 27, 2017.

[3] NASD changed its name to FINRA. *See* https://www.sec.gov/rules/sro/finra/2007/34-56615.pdf. In "technical amendments," references to the NASD in the Form U4 were replaced with references to FINRA to reflect the "corporate name change." SEC Release No. 34-57033; File No. SR-FINRA-2007-036, *available at* http://www.finra.org/sites/default/files/RuleFiling/p037701.pdf. *See id.* ("[O]n December 18, 2007, Financial Industry Regulatory Authority, Inc. ("FINRA") (f/k/a National Association of Securities Dealers, Inc. ("NASD") filed with the Securities and Exchange Commission the proposed rule change...").

[4] FINRA Rule 1010(c) provides that initial, manually signed U4s must be retained as part of the member's recordkeeping requirements. However, members may electronically file amendments to the disclosure information contained in a manually signed U4 without obtaining the subject associated person's manual signature. *Id.*

1. **The newly discovered evidence shows that Plaintiff agreed to arbitrate his claims via U4 Forms submitted in 1999 and 2014.**

On October 7, 1999, Plaintiff submitted a U4 Form that identified his employer as Everen Securities, Inc. and contained the following arbitration agreement (Ex. A to Aff. of Michael Zuhr, attached as Ex. 2):

> 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*[5] 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.*

(Exhibit 2-A at 7) (emphasis added).

In the 1999 U4, Plaintiff also "authorize[d] any employer or prospective employer to file electronically on [his] behalf any information required in the U4 and any amendment thereto." (*Id.* at 8.) He further agreed to "waive any objection to the admissibility of the electronically filed records in any criminal, civil, or administrative proceeding." (*Id.*)

Then, on January 8, 2014, an amended U4 was submitted on Plaintiff's behalf that identified his employer as Wells Fargo Advisors, LLC. (Ex. 2-B). The 2014 U4 indicated that his employment date was October 1, 1999. (*Id.*) (emphasis added). Section 4, SRO Registrations, of the 2014 U4 indicates that Plaintiff is registered with FINRA in the registration category of "GS- Full Registration/General Securities Representative (S7)." (*Id.*)

The identification of the date of employment with Wells Fargo Advisors as October 1, 1999 in the 2014 U4 shows that Wells Fargo assumed Everen Securities, bridging Plaintiff's employment between the entities.[6] Additionally, Everen Securities is identified as a predecessor

[5] "SRO" means any self-regulatory organization within the meaning of Section 3(a)(26) of the Exchange Act. FINRA Rule 6810(jj).

[6] *See* Aff. of Beverly W. Jackson, Exh. 2 to Defendants' Motion to Dismiss or Stay Pending Arbitration, at ¶7.

to Wells Fargo Clearing Services in FINRA's public records.[7] As such, Plaintiff cannot legitimately dispute Wells Fargo Clearing Services' right to enforce the arbitration agreement via the 1999 U4 as the legal successor of Everen Securities.

Moreover, the 1999 U4 contemplates that Item 11 (which identifies the SROs) may be amended from time to time. Such an amendment took place when Plaintiff became a registered representative with FINRA,[8] and his attempt to now disavow his association with FINRA and his obligation to arbitrate his disputes pursuant to FINRA's rules is, at best, disingenuous.

2. Plaintiff cannot object to the admissibility of the U4s because he explicitly waived any such objections.

Further, Plaintiff's argument regarding the authentication of the U4s should be rejected because he explicitly agreed to waive any objection to the admissibility of such records in the 1999 U4. [Ex. 2-A.] In short, the recently discovered 1999 and 2014 U4s conclusively establish that Defendants may compel arbitration of Plaintiff's claims by virtue of the arbitration agreements.

3. Nothwithstanding the U4 Forms, Plaintiff is still required to arbitrate his claims pursuant to FINRA Rules because his dispute arises out of the business activities of a member or associated person.

Even if Plaintiff was not bound by an enforceable arbitration agreement by virtue of the 1999 and 2014 U4s (which he is), Plaintiff is still required to arbitrate his claims. The Code of Arbitration for Industry Disputes applies to claims filed on or after April 16, 2007. *See* FINRA Rule 13000. [*See* Ex. 3, FINRA Rule excerpts.] Except as otherwise provided in the Code, a dispute must be arbitrated 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. *See* FINRA Rule 13200. Courts "have uniformly deemed employment-

[7] *See* https://brokercheck.finra.org/firm/summary/19616.
[8] *See* fn.2, *supra*.

related claims—including claims regarding alleged conduct occurring after the termination of employment—between brokerage firms and their agents as disputes 'arising out of the business activities' of FINRA members.'" *See Cor Clearing, LLC v. Jarvis*, No. 8:13CV292, 2014 WL 98799, at *5 (D. Neb. Jan. 9, 2014) (holding that claims involving an attorney who did not work as a financial analyst or agent were subject to FINRA arbitration because the alleged conduct involved the parties' business activities and had "some nexus" to the activity of the member actually regulated by FINRA); *Hawkins v. Questar Capital Corp.*, 5:12cv376, 2013 WL 5596897, at *5 (E.D. Ky. Oct. 11, 2013) (noting claims involving third parties and arising after cancellation of an employment contract fell under broad scope of FINRA arbitration rule); *P & M Corp. Fin., LLC v. Paparella*, No. 2:10cv10448, 2010 WL 4272829, at *3 (E.D. Mich. Oct. 22, 2010) (compelling arbitration pursuant to FINRA rules because the case involved whether the defendant misappropriated confidential information and solicited direct competitors of the plaintiff, which was a dispute over business activities between a member and an associated person).

The fact that Plaintiff, Wells Fargo Clearing Services, and Spang are brokers or firms regulated by FINRA is a matter of public record.[9] Plaintiff's allegations clearly arise out of their business activities together, in that Plaintiff claims that Defendants pressured him to cross-sell various bank products to his clients, and that when he refused to do so, Defendants unilaterally changed his compensation agreement, forced him to resign, and reported that Plaintiff's employment ended due to misconduct. Because Plaintiff's claims arise out of Defendants' business activities with Plaintiff, his claims must be submitted to FINRA arbitration pursuant to FINRA Rule 13200, regardless of the enforceability of the U4 Forms.

[9] *See* https://brokercheck.finra.org/individual/summary/1262947; https://brokercheck.finra.org/firm/summary/19616; https://brokercheck.finra.org/individual/summary/2432221.

4. Conclusion

For these reasons, as well as those set forth in Defendants' Proposed Order and other submissions, Defendants respectfully request the Court to grant this motion and either reconsider or amend its previous Order to take into account the more recent U4 submissions that establish both the existence of Plaintiff's enforceable agreement to arbitrate and his registration with FINRA. Additionally, Plaintiff has agreed to extend the deadline for Defendants to respond to Plaintiff's First Sets of Interrogatories and First Sets of Requests for Production to July 17, 2017 and the deadline for Defendants to file a responsive pleading to July 27, 2017. Defendants respectfully request the Court to approve these extensions.

Respectfully submitted,

WELLS FARGO CLEARING SERVICES, LLC F/K/A WELLS FARGO ADVISORS, WACHOVIA SECURITIES FINANCIAL HOLDINGS, LLC, WELLS FARGO & COMPANY, WELLS FARGO BANK, N.A., and SCOTT A. SPANG

By: Adam Yount with express permission Ray Mary Cashen

Adam N. Yount
South Carolina Bar No. 76342
HAYNSWORTH SINKLER BOYD, P.A.
134 Meeting Street
Suite 300
Charleston, South Carolina 29401
Telephone: (843) 720-4484
Facsimile: (843) 722-2266
ayount@hsblawfirm.com

Frederick T. Smith
North Carolina Bar No. 45229
SEYFARTH SHAW LLP
6000 Fairview Road, Suite 1200
Charlotte, North Carolina 28210
Telephone: (404) 888-1021
Facsimile: (404) 724-1521
fsmith@seyfarth.com

Date: July 6, 2017

EXHIBIT 1

ORIGINAL

STATE OF SOUTH CAROLINA COUNTY OF LEXINGTON	IN THE COURT OF COMMON PLEAS ELEVENTH JUDICIAL CIRCUIT
ROBERT F. BERRY, Plaintiff, vs. 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., Defendants.	Civil Action No. 2017-CP-32-00397 **ORDER**

2017 JUN 21 AM 11:05
CLERK OF COURT
LEXINGTON, S.C.

This matter came before the Court on June 1, 2017, for a hearing on the Defendant's Motion to Dismiss or Stay Pending Arbitration. Also before the Court was Defendants' Motion for a Protective Order and Motion to Stay Discovery. Present at the hearing were Frederick T. Smith of Seyfarth Shaw LLP, appearing *pro hac vice*, and John G. Tamasitis of Haynsworth Sinkler Boyd, P.A., representing Defendants, and Mitchell Willoughby, Chad Johnston and Elizabeth Zeck of Willoughby & Hoefer, P.A., representing Plaintiff. For the reasons set forth below, Defendants' Motion to Dismiss or Stay Pending Arbitration is denied, with prejudice. Further, Defendants' Motion for a Protective Order and Stay of Discovery pending arbitration is rendered moot by the effect of this Order.

FACTUAL BACKGROUND

This is a claim for damages brought by Plaintiff Robert F. Berry, formerly a Wealth Manager and Senior Vice President with Defendant Wells Fargo Advisors, LLC. Among other

allegations, Mr. Berry alleges that Defendants 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.'s (collectively referred to as "Defendants") deliberately breached his long-standing profit formula agreement. Mr. Berry also alleges that to illegally increase the earnings and stock price of the corporate parent, Wells Fargo & Company, Defendants aggressively pushed employees of all subsidiary corporations, including Mr. Berry, to sell financial products, regardless of whether the products were wanted, needed, or in the best interests of the customers and clients, and targeted for retribution those employees who refused and/or failed to cooperate.

Mr. Berry alleges that he refused to participate in the scheme because it would have violated the securities laws and his fiduciary obligations to his clients. (First Amended Complaint ("FAC") at ¶ 33-36). Based on his refusal, Mr. Berry alleges that Defendants internally identified him as a person to be terminated for speaking up against the improper cross-selling program. Mr. Berry alleges he was also targeted for retribution based on the complaints he lodged with Defendants regarding the changes they unilaterally made to his profit formula employment agreement, which had been in effect since the early 2000s. (FAC at ¶¶ 29, 42-43). Defendants' efforts culminated in a February 3, 2014 meeting during which Mr. Berry alleges he was humiliated, unlawfully detained, and forced to resign. (FAC at ¶¶ 38-44, 51-55). Mr. Berry filed this action seeking damages. Rather than answer Mr. Berry's complaint, Defendants filed their Motion to Dismiss or to Stay Pending Arbitration under Rule 12(b)(6), SCRCP, as well as a separate motion for protective order and a stay of discovery.

FINDINGS and ANALYSIS

I. **Defendants failed to meet their burden, as the proponents of arbitration, to prove the existence of a duty to arbitrate.**

Whether a claim is subject to arbitration is an issue for judicial determination. It is the duty of this Court to ascertain the existence, if any, of an enforceable arbitration agreement. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 78, 749 S.E.2d 139, 144-45 (Ct. App. 2013). That duty is fulfilled by applying the principles of state contract law, according to the ordinary procedural and evidentiary rules applicable to all contract disputes. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001).

"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." *Chassereau*, 363 S.C. at 632, 611 S.E.2d at 307 (quoting *Zabinski*, 346 S.C. at 596–97, 553 S.E.2d at 118).

As the proponents of arbitration, Defendants bear the burden of establishing the existence of an agreement to arbitrate the dispute between themselves and Mr. Berry. "General contract principles of state law apply to arbitration clauses governed by the F[ederal] A[rbitration] A[ct]." *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001); *see also 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). State law remains applicable if that law, whether legislative or judicial, arose to govern issues concerning the validity, revocability, and enforceability of all contracts generally. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364.

A. Defendants' Motion to Stay fails because they did not properly authenticate the registration statements upon which they rely to create the duty to arbitrate.

A threshold question is the admissibility of the documents upon which Defendants rely to support their demand for arbitration. South Carolina law has always required authentication as a condition precedent to admissibility. Rule 901(a), SCRE; see also *State v. Rich*, 293 S.C. 172, 359 S.E.2d 281 (1987). This rule applies to evidence submitted in support of motions. *See Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 121, 441 S.E.2d 835, 838 (Ct. App. 1994). That is, before this Court can rely upon any document, its proponent must provide a proper foundation. This requirement applies to employment records of the type proffered here. *Connelly v. Wometco Enterprises, Inc.*, 314 S.C. 188, 191, 442 S.E.2d 204, 206 (Ct. App. 1994). In *Connelly*, a wrongful termination case, the employee's personnel file was properly excluded from evidence, as the employer failed to offer the excluded records through a custodian or other properly qualified witness. *Id.* The proffered documents were properly excluded from evidence, even though they might have had probative value and would therefore otherwise have been relevant and admissible. *Id.*

In support of their Motion, Defendants rely upon three registration statements which were simply attached as Exhibit 1 to their supporting memorandum. However, business records of this type do not qualify as self-authenticating. *Cf.* Rule 902, SCRE. Although Defendants provided an affidavit from a paralegal employed in the "Wells Fargo Law Department,"[1] the paralegal did not claim to be a custodian of records for any of the corporate Defendants, nor did she make any claim that the documents attached to Defendants' memorandum were true and correct copies of business records maintained by any specific Defendant. Like the inadequate sponsoring witness

[1] Defendants' affiant fails to even assert that she is employed by any of the four corporate Defendants or, assuming she is, to identify which one.

in *Connelly*, this testimony is insufficient to meet the foundation requirements imposed by Rule 901(a), SCRE. In the absence of such authentication testimony, Defendants have failed to lay a proper foundation for the admission of these three registration statements and this Court therefore determines that they are inadmissible for substantive consideration in support of Defendants' Motion. Because the three unauthenticated registration statements constitute the only evidence submitted in support of their Motion, Defendants have failed to meet their burden[2] to prove the existence of an enforceable agreement to arbitrate and the motion to stay these proceedings and compel arbitration is denied.

B. Defendants' Motion also fails because they are not parties to the documents upon which they rely and therefore lack standing to enforce any arbitration agreement contained therein.

Even if the three registration statements relied upon by Defendants were properly before this Court, Defendants have failed to prove that they have standing to enforce the arbitration clause contained therein such that they may benefit from their terms. "Ultimately, arbitration is a matter of contract and a party cannot be forced to arbitrate a dispute if it has not agreed to do so." *AT&T Tech., Inc. v. Comm'ns Workers*, 475 U.S. 643, 648 (1986).

[2] It is now too late for Defendants 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. *See, e.g., Parker v. S.C. Public Service Com'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 Court notes that Defendants have already attempted to amend their motion to dismiss, namely, to add grounds under Rule 12(b)(1) and (3), SCRCP, asserting as support for the motion Rule 15(a), SCRCP. However, Defendants' motion to dismiss is not a "pleading" capable of amendment under Rule 15(a); therefore, Defendants' motion was untimely and ineffective. While an assertion of a Court's lack of subject matter jurisdiction may be raised at any time during the litigation, other defenses specified in Rule 12(b) — including the defenses listed as subsections 12(b)(2), (3), (4), (5) and (8) — are waived if not asserted in the initial motion or responsive pleading, as is the case here where Defendants' motion relied solely on the defense provided by Rule 12(b)(6). *See* Rule 12(g), (h).

Defendants' Motion is based on a clause included in three Form U-4 registration statements that were apparently submitted on behalf of Wheat, First Securities, Inc. ("Wheat First"), a firm that no longer exists,[3] during Mr. Berry's association with that firm. However, this litigation does not involve any dispute, claim or controversy arising between Plaintiff and Wheat First.[4] Mr. Berry asserts no claim against Wheat First, nor does he complain of any act or omission by Wheat First. Rather Mr. Berry alleges that the Profit Formula Agreement at issue in this case was not between him and Wheat First, but originated with Wachovia Securities. (FAC at ¶29).

The three registration statements[5] relied upon by Defendants each contain an identical arbitration clause, which reads as follows:

> 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 organizations indicated in Item 10 as may be amended from time to time . . . .

The firm named in each of the registration statements is Wheat First. The arbitration clause is devoid of any language indicating that any arbitration obligation extends to successors and/or assigns of "my firm," that is, Wheat First. Nor can this Court take judicial notice of the internal

---

[3] In support of his opposition to Defendants' motions, Mr. Berry submitted self-authenticating, certified copies of records kept by the South Carolina Secretary of State, which demonstrated that Wheat First changed its name to First Union Capital Markets Corporation in 1999, which subsequent business was later dissolved and surrendered its authority to do business in South Carolina. *See* Exhs. 2 and 3, Plaintiff's Opp. to Mot. to Stay.

[4] In their Motion, Defendant Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, invokes rights as a member of those self-regulatory organizations. Thus, Defendants stand in the role of the drafters of the forms issued by such organizations. Under South Carolina law, "any ambiguity will be construed in favor of the non-drafting party." *McGill v. Moore*, 381 S.C. 179, 186, 672 S.E.2d 571, 575 (2009). Thus, Mr. Berry is entitled to the construction benefit of a non-drafting party such that any ambiguities in the registration statements must be construed against Defendants.

[5] Defendants proffered three registration statements, dated September 28, 1995, January 16, 1995, and November 5, 1994. Only the November 1994 registration statement designates any SRO and Item 10 fora.

affairs of private corporations to find that Defendants can invoke the rights of Wheat First. *Moss v. Aetna Life Ins. Co.*, 267 S.C. 370, 377, 228 S.E.2d 108, 112 (1976). In short, the three registration statements relied upon by Defendants simply do not satisfy Defendants' burden to prove the existence of an agreement by Mr. Berry to arbitrate his dispute in this case with these Defendants. Moreover, even if these registration statements were admissible, Defendants lack standing to rely upon a registration statement of a dissolved corporate entity to compel Mr. Berry to arbitrate claims he asserts against them.

C. **If an arbitration agreement arises from the 1994 registration statement, it fails because the fora specified in that clause no longer exist.**

Even if the arbitration clause contained in the registration statements were properly before this Court, and even if Defendants had standing to enforce clauses contained within those statements, any purported agreement to arbitrate is rendered void by the failure of the statement's forum selection clause, which constitutes an integral and material term of the arbitration clause. The clause relied upon by Defendants requires arbitration "under the rules, constitutions, or by-laws of the organizations indicated in Item 10." *See supra* at 6. Item 10 of the registration statements contains two sections, labeled SRO and Jurisdictions. In the securities context, SRO stands for Self-Regulatory Organization. *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 386 n. 12, 759 S.E.2d 727, 735 (2014). The SRO box is checked on only the earliest Form U-4 relied upon by Defendants, dated November 1994 ("1994 Form").[6] The 1994 Form designated the following entities as potential arbitral fora: the American Stock Exchange ("ASE"), the National Association of Securities Dealers ("NASD"), the New York Stock Exchange

[6] The other two registration statements do not designate any SRO arbitration forum, and, thus, the arbitration clause is void *ab initio*.

("NYSE"), and the Philadelphia Stock Exchange ("PHLX"). The SRO section box labeled "Other (Specify)" was left blank on the 1994 Form.

Defendants have offered no proof of the continued existence of either the ASE or the PHLX. Moreover, and more important, Defendants offer no proof that any of the organizations specified on the 1994 Form currently provide arbitration services. Defendants are unable to point to any language indicating that any arbitration obligation extends to successors and/or assigns of the specified entities; in fact, no such obligation appears in the 1994 Form. Item 10 includes a box labeled "Other" box in the SRO category, but no "successors or assigns" language was specified there, either.

In tacit recognition of the unavailability of the arbitral fora actually specified in the documents upon which they rely, Defendants do not seek to compel arbitration before NASD, NYSE or any of the other fora listed in the 1994 Form. Rather, Defendants 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. In purporting to quote from the arbitration clause contained in the 1994 Form, Defendants' brief replaced the term "NASD" with "FINRA" without comment or explanation, thereby failing in their duty to bring to the Court's attention the alteration of a material term in the document. In the absence of such proof,[7] this Court cannot simply assume that this dispute might be "required to be arbitrated under"

[7] During the hearing, Defendants asked the Court to take judicial notice of FINRA Rule 13200. Setting aside the issue of whether this Court may even take judicial notice of such rules, the Court finds that Defendants have not met their threshold burden of demonstrating the applicability of any FINRA rule to Mr. Berry.

the absent rules of these non-existent arbitral fora, as required by the arbitration clause in the 1994 Form.

However, in interpreting agreements to arbitrate, courts agree that where a material, integral part of an arbitration agreement fails, the entire agreement to arbitrate is void. *See 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); *Brown v. ITT Consumer Fin. Corp.*, 211 .F.3d 1217, 1220 (11th Cir. 2000) (asserting that where the selection of a particular forum constitutes an integral part of the agreement to arbitrate, the failure of the chosen forum precludes arbitration); *In re Salomon Inc.*, 68 F.3d 554, 561 (2d. Cir. 1995) (a failed forum selection term is as important a consideration as the agreement to arbitrate itself); *Smith Barney, Inc. v. Critical Health Sys.*, 212 F.3d 858, 862 (4th Cir. 2000). Specifically, "if the choice of [an arbitral] forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern ... the failure of the chosen forum [will] preclude arbitration." *Grant*, 383 S.C. at 131, 678 S.E.2d at 438 (citing *Singleton v. Grade A Market, Inc.*, 607 F. Supp. 2d 333, 341 (D. Conn. 2009)). Because the selection of the designated fora constituted an integral term of the arbitration clause in the 1994 Form, and because none of the chosen arbitral fora currently exist, the arbitration agreement is impossible to perform and thus void.

In *Grant*, for example, the plaintiff executed an admissions contract containing an agreement to arbitrate on behalf of her deceased husband concurrent with his admission into a nursing home. *Id.* at 127, 678 S.E.2d at 436. Shortly after admission, the plaintiff's decedent was injured at the facility. *Id.* Plaintiff filed suit in state court, and the Defendant moved to dismiss the action and to compel arbitration pursuant to the admissions contract. *Id.* The arbitration clause in the agreement specifically selected the American Health Lawyers Association ("AHLA") as the

arbitral forum to resolve all related disputes arising from the decedent's admission. *Id.* at 128, 678 S.E.2d at 437. Subsequent to the execution of the admissions agreement, the AHLA amended its rules, declining to arbitrate disputes arising from arbitration agreements executed prior to the injury. *Id.* Consequently, the AHLA would not hear the dispute between the parties, and the parties were effectively denied their forum choice. *Id.*

The *Grant* plaintiff asserted that the inability to arbitrate through the AHLA constituted a failure of a material term in the agreement, and therefore she was no longer bound to arbitrate the dispute. *Id.* at 128, 678 S.E.2d at 437. The Supreme Court agreed, finding that "the specific designation of the AHLA as arbitrator [was] an integral term of this arbitration agreement." *Id.* at 131, 678 S.E.2d at 438-439. The court reasoned that "the designation of a forum such as the AHLA has wide-ranging substantive implications that may affect, *inter alia*, the arbitrator-selection process, the law, procedures, and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration." *Id.* at 132; 678 S.E.2d at 439. The court determined that these implications rendered the selection of a specific forum an integral term of the agreement. *Id.* Consequently, the court held that the arbitration agreement between the parties was unenforceable, and dismissed the defendant's motion to compel arbitration.

The rationale employed by the Supreme Court in *Grant* has been echoed in many other cases across jurisdictions. For example, in *In re Salomon Inc.*, the parties agreed to arbitrate any dispute pursuant to "the arbitration procedure prescribed in the Constitution and rules then obtaining of the NYSE." 68 F.3d at 558. When the NYSE's arbitration group declined to hear the dispute, the courts refused to substitute an alternate arbitrator. *Id.* at 561. In affirming this holding, the Second Circuit explicitly rejected the brokerage firm's contention that the arbitration could be held in another arbitral forum, so long as the rules of the chosen forum govern the proceeding:

> [When] it is clear that the failed [forum selection] term is not an ancillary logistical concern, but rather is as important a consideration as the agreement to arbitrate itself, a court will not sever the failed term from the rest of the agreement and the entire arbitration provision will fail.

Id. at 561 (internal citations omitted). The choice of a specialty forum is an integral term in the arbitration clause precluding the appointment of substitute arbitrators.

Likewise, the Sixth Circuit Court of Appeals affirmed a decision barring a customer from submitting her claim to arbitration before the NASD in *Roney & Co. v. Goren*, 875 F.2d 1218, 1219 (6th Cir. 1989). This result was premised on a pre-dispute provision stating that all disputes would be submitted to arbitration "under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange." *Id.* In refusing to treat the various arbitral fora as interchangeable, the court opined that "[a] forum selection clause in an arbitration agreement, just like any other contract provision, is entitled to complete enforcement absent evidence that the contract was procured through fraud or excessive economic power." *Id.* at 1223. This was true even though the court found that there was purportedly no substantive difference between the NASD's and the NYSE's arbitration procedure. *Id.* at 1220. The parties selected the NYSE, which selection was an integral term of the agreement to arbitrate, and the NYSE therefore constituted the sole arbitration forum before which the parties could arbitrate. *Id.*

Just as in *Grant*, *Saloman* and *Roney*, the 1994 Form relied upon by Defendants indicates the selection of specific arbitral fora. As noted *supra*, the provision relied upon by Defendants identifies the ASE, the NASD, the NYSE, and the PHLX as approved arbitral fora. In mid-2007, however, the NASD joined with the New York Stock Exchange (a competitor in the arbitration of securities disputes and another authorized arbitral forum specified in the 1994 Form U-4s) to create a new entity, which is now known as the Financial Industry Regulatory Authority, or "FINRA." *See* SEC Release No. 34-56145, 2007 SEC LEXIS 1640 (July 26, 2007). Concurrent with the

creation of the new entity came both procedural and substantive changes to the dispute resolution processes previously utilized by NASD and the NYSE. FINRA is neither NASD nor NYSE (much less the ASE or the PHLX) and the parties no longer have access to the arbitration fora specified in the 1994 Form registration statement. Just as a contract for the purchase of brand-name pharmaceuticals cannot be satisfied by the provision of generics, an agreement to arbitrate before the NASD cannot be satisfied by arbitration before any other forum. Courts have determined that "a clause which adopts the rules of an organization like the NASD implicitly chooses that organization as the, or a, forum." *Reddam v. KPMG LLP*, 457 F.3d 1054, 1060 (9th Cir. 2006) (collecting cases), *overruled on other grounds by Atl. Nat'l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931 (9th Cir. 2010).

Our Supreme Court has recognized that the choice of an arbitral fora maintained by securities self-regulatory organizations is entitled to special deference and recognition. *See Dean*, 408 S.C. 371 n. 12, 759 S.E.2d 727 (2014). The Supreme Court reasoned that securities self-regulatory organizations — or SROs — are considered to have "special expertise" as they are "closely governed by the Securities and Exchange Commission and have developed complex regulatory schemes for overseeing arbitration of securities disputes." *Id.* Therefore, the selection of one of these organizations as the fora for dispute resolution has a wide-ranging, substantive impact on the arbitration process. The selection of a specific SRO forum, therefore, is an integral term of the arbitration clause.

Consequently, just as in *Grant*, if Defendants are allowed to treat SRO arbitral fora as interchangeable, Mr. Berry will be deprived of the arbitral forum that was expressly designated in the 1994 registration statement submitted with Wheat First. Because none of the designated arbitration fora are available to resolve the present dispute, and because an arbitrator selection

clause in the 1994 Form is an integral and material term of the arbitration obligation, the arbitration clause relied upon by Defendants is impossible to perform and is therefore void and unenforceable. *See In re Salomon Inc.*, 68 F.3d at 558 ("we cannot compel a party to arbitrate a dispute before someone other than the NYSE when the party had agreed to arbitrate disputes only before the NYSE"); *Roney*, 875 F.2d 1218 (interpreting designation of NYSE as the arbitral forum of choice meant that *only* the NYSE could arbitrate a dispute between the parties).

In reaching the conclusion that securities arbitral fora cannot be treated as interchangeable, this Court is mindful of the result obtained on very similar facts in *Keller v. ING Financial Partners, Inc.*, Op. No. 2011-CP-23-0336 (S.C. Cir. Ct. filed June 2, 2011). That case involved an attempt to compel arbitration before FINRA based on an arbitration clause which identified NASD as the chosen arbitral forum. The Honorable D. Garrison Hill denied a motion to compel arbitration on such facts, finding that:

> The "NASD," or the National Association of Securities Dealers, Inc., as then constituted, no longer exists, having combined regulatory functions with certain divisions of the New York Stock Exchange ("NYSE") to become what is now known as the Financial Industry Regulatory Authority, or FINRA.
>
> * * *
>
> In mid-2007, the NASD combined regulatory functions with certain divisions of the New York Stock Exchange (a competitor in the arbitration of securities disputes), and became what is now known as the Financial Industry Regulatory Authority, or FINRA See SEC Release No. 34-56145, 2007 SEC LEXIS 1640. (July 26, 2007). Moreover, coincident with this consolidation, came both procedural and substantive changes to the NASD's former dispute resolution process and rules. See FINRA. Archive of Arbitration Procedures for Cases Before and After April 16, 2007, http://www.finra.org/ArbitrationMediation/Rules (last visited Apr. 4, 2011). Consequently, just as in *Grant* and *Salomon*, the parties in the present case are deprived of the arbitration forum that they specifically bargained for and agreed upon.
>
> Because the designated arbitrator is not available to resolve the present dispute, and because the arbitrator selection clause in the subject agreement constitutes a material and integral term of the agreement to arbitrate, this Court finds the arbitration agreement impossible to perform, and denies Defendants' Motion to Compel Arbitration and Dismiss or Stay.

This ruling was affirmed on appeal in an unpublished opinion.[8] *Keller v. ING Financial Partners, Inc.*, 2013 WL 8482243, Op. No. 2013-UP-014 (S.C. Ct. App. filed Jan. 9, 2013). The Court of Appeals characterized the trial court ruling as follows:

> The circuit court found the arbitration agreement between the parties designated the National Association of Securities Dealers (NASD) as an exclusive arbitral forum, the NASD was unavailable to arbitrate because it no longer existed, and the court could not substitute the Financial Industry Regulatory Authority (FINRA) for NASD.

The Court of Appeals further noted that the courts "cannot rewrite the parties' agreement to substitute FINRA for NASD." *Id.* at 2.

According to the South Carolina Appellate Court Case Management Public Index, the *Keller* arbitration proponents then petitioned for a writ of certiorari to the South Carolina Supreme Court. 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 opinion of the Court of Appeals and Judge Hill's order remained unchanged. *Keller v. ING Financial Partners, Inc.*, Op. No. 2015-MO-006 (S.C. filed Feb. 11, 2015).

Keller provides an example of the importance of requiring proof of each material term in an arbitral agreement so that parties are not compelled to arbitrate before a forum to which they did not agree. South Carolina courts put arbitration proponents to their proof and do not allow them to rely on mere assumptions as a basis for compelling arbitration. Defendants are required to prove the existence of an agreement by Mr. Berry to arbitrate claims against them not just before any SRO forum, but before the SRO forum in which they seek to compel arbitration. Because

[8] This Court recognizes Rule 268(d)(2), SCACR, regarding the reliance on unpublished opinions of the Court of Appeals and Supreme Court in non-related proceedings. Mr. Berry cited the appellate opinions in *Keller*, not as binding precedent, but rather as an indisputable fact about the subsequent procedural appellate history of Judge Hill's prior order in *Keller*. The Court takes judicial notice of these facts and the court's files in the *Keller* case pursuant to Rule 201, SCRE.

Defendants have offered no proof that any of the arbitral fora specifically selected in the 1994 Form still exist or offer arbitration services, an integral and material term of the purported arbitration clause is impossible to perform, rendering the entire arbitration agreement void. For this additional reason, Defendants' motion to compel arbitration is therefore denied.

II. Defendants' motion to dismiss is denied because the Amended Complaint provides Defendants with adequate notice of their alleged wrongdoing.

In the alternative to compelling arbitration of these claims, Defendants sought dismissal of the Amended Complaint under Rule 12(b)(6), SCRCP.[9] Defendants' motion lacks merit and is denied. "A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true." *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014) (quoting *Disabato v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013)). A motion to dismiss under Rule 12(b)(6), SCRCP, should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. *Flateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003) (citations omitted); *see also Baird v. Charleston Cty*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) (if the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper); *McCormick v.*

[9] As was noted *supra* at p.5 n.2, Defendants did not timely raise their Rule 12(b)(3) objections to venue as this ground was not included in its initial motion. *See* Rule 12(g), (h), SCRCP. Although a Rule 12(b)(1) objection to the Court's subject matter jurisdiction can be raised at any time, Defendants have made no arguments in support of either this ground or their untimely raised venue objection. Thus, Defendants' failure to articulate any argument in support of any venue or subject matter objection dooms those objections as conclusory. This Court therefore treats them as abandoned and denies then accordingly. *See Mulherin-Howell*, 362 S.C. at 600, 608 S.E.2d at 593-94 (finding an argument advanced through conclusory statements with no argument or supporting authority abandoned); *Muir*, 336 S.C. at 298, 519 S.E.2d at 600 (declaring that conclusory arguments may be treated as abandoned).

England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997)(motion to dismiss cannot be sustained if facts alleged in complaint and inferences reasonably deducible therefrom would entitle plaintiff to relief on any theory of the case). In deciding whether to grant a motion to dismiss, this Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *See Flateau*, 355 S.C. at 202, 584 S.E.2d at 415 (citation omitted); *see also Cowart v. Poore*, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999) (looking at facts in light most favorable to plaintiff, and with all doubts resolved in his behalf, the court must consider whether the pleadings articulate any valid claim for relief). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987).

Defendants' two page Rule 12(b)(6), SCRCP argument is conclusory and unserious in the face of Mr. Berry's forty-four (44) page Amended Complaint that provides explicit detail on his assertions of wrongdoing supporting the causes of action alleged against Defendants. In fact, the motion to dismiss does not assert that *any* of the ten (10) specifically-pled causes of action are unsupported by sufficiently stated facts to support those causes of action. Consequently, Defendants' motion and accompanying memorandum does not meet its burden of showing a violation of Rule 12(b)(6), SCRCP and therefore the motion fails. *See, e.g., Mulhertn-Howell v. Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (finding an argument advanced through conclusory statements with no argument or supporting authority abandoned); *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 298, 519 S.E.2d 583, 600 (Ct. App. 1999) (declaring that conclusory arguments may be treated as abandoned).

Viewing the asserted facts as true and in the light most favorable to Mr. Berry, as this Court is required to in considering a Rule 12(b)(6) motion, the Amended Complaint greatly exceeds the

"facts sufficient" standard of a "short and plain statement" of a well-pled complaint sufficient to put each of the Defendants on notice of the allegations of wrongdoing advanced by Mr. Berry. Defendants' motion to dismiss is therefore denied.

CONCLUSION[10]

THEREFORE, for the reasons set forth above, Defendants' Motion to Stay or to Dismiss is DENIED. Defendants' Motion for a Protective Order and Stay of Discovery pending arbitration is rendered moot by the effect of this Order and is therefore DENIED. Defendants are ordered to file any responsive pleadings within fifteen (15) days of this Order and provide discovery responses to all outstanding discovery requests of Plaintiff within ten (10) days of this Order.

IT IS SO ORDERED.

G. Thomas Cooper

The Honorable G. Thomas Cooper, Jr.
Circuit Court Judge
Eleventh Judicial Circuit

Camden
~~Lexington~~, South Carolina
This 16 day of June, 2017

2017 JUN 21 AM 11:05
LISA M. COBER
CLERK OF COURT

[10] In opposition to Defendants' motions, Mr. Berry also asserted that the purported arbitration clause relied upon by Defendants is unenforceable under these circumstances because its enforcement would compel Plaintiff to arbitrate outrageous conduct by Defendants that clearly was not contemplated at the inception of the arbitration agreement. While the Court agrees with the analysis and case law advanced by Mr. Berry on this topic, the Court need not address, in light of the rulings above, all issues at length where other grounds in opposition are likewise dispositive and provide the same relief. *See, e.g., Futch v. McAllister Towing of Georgetown Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999).

FORM 4

STATE OF SOUTH CAROLINA
COUNTY OF LEXINGTON
IN THE COURT OF COMMON PLEAS

JUDGMENT IN A CIVIL CASE
CASE NUMBER 2017CP3200397

Robert F Berry		Wells Fargo Clearing Services LLC Wells Fargo & Company Scott A Spang	Wells Fargo Advisors LLC Wells Fargo Bank NA Wachovia Securities Financial Holdings LLC

PLAINTIFF(S) DEFENDANT(S)

Submitted by: Attorney for: ☐ Plaintiff ☐ Defendant ☐ Self-Represented Litigant

DISPOSITION TYPE (CHECK ONE)

☐ JURY VERDICT. This action came before the court for a trial by jury. The issues have been tried and a verdict rendered.

☐ DECISION BY THE COURT. This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered. ☐ See Page 2 for additional information.

☐ ACTION DISMISSED (*CHECK REASON*): ☐ Rule 12(b), SCRCP; ☐ Rule 41(a), SCRCP (Vol. Nonsuit); ☐ Rule 43(k), SCRCP (Settled); ☐ Other: _____

☐ ACTION STRICKEN (*CHECK REASON*): ☐ Rule 40(j) SCRCP; ☐ Bankruptcy; ☐ Binding arbitration, subject to right to restore to confirm, vacate or modify arbitration award; ☐ Other: _____

☐ STAYED DUE TO BANKRUPTCY

☐ DISPOSITION OF APPEAL TO THE CIRCUIT COURT (CHECK APPLICABLE BOX):

☐ Affirmed; ☐ Reversed; ☐ Remanded; ☐ Other:

NOTE: ATTORNEYS ARE RESPONSIBLE FOR NOTIFYING LOWER COURT, TRIBUNAL, OR ADMINISTRATIVE AGENCY OF THE CIRCUIT COURT RULING IN THIS APPEAL.

IT IS ORDERED AND ADJUDGED: ☐ See attached order; (formal order to follow) ☐ Statement of Judgment by the Court:

ORDER INFORMATION

This order ☐ ends ☐ does not end the case.
Additional Information for the Clerk: _____

INFORMATION FOR THE JUDGMENT INDEX

Complete this section below when the judgment affects title to real or personal property or if any amount should be enrolled. If there is no judgment information, indicate "N/A" in one of the boxes below.

Judgment in Favor of (List name(s) below)	Judgment Against (List name(s) below)	Judgment Amount To be Enrolled (List amount(s) below)

If applicable, describe the property, including tax map information and address, referenced in the order:

The judgment information above has been provided by the submitting party. Disputes concerning the amounts contained in this form may be addressed by way of motion pursuant to the SC Rules of Civil Procedure. Amounts to be computed such as interest or additional taxable costs not available at the time the form and final order are submitted to the judge may be provided to the clerk.
Note: Title abstractors and researchers should refer to the official court order for judgment details.
E-Filing Note: In E-Filing counties, the Court will electronically sign this form using a separate electronic signature page.

Circuit Court Judge Judge Code 6/22/2017 Date

CPFORM4Cm
SCCA SCRCP Form 4C (Revised 2/17)

For Clerk of Court Office Use Only

This judgment was entered on 21st June 2017, and a copy mailed first class or placed in the appropriate attorney's box or 22nd June 2017, to attorneys of record or to parties (when appearing pro se) as follows:

Chad Nicholas Johnston
PO Box 8416 Columbia, SC 29202-8416

Adam Noah Yount
PO Box 340 Charleston, SC 29402-0340
Frederick T Smith
6000 Fairview Road Suite 1200 Charlotte, NC 28210

ATTORNEY(S) FOR THE PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Lisa M. Comer/jp

Court Reporter

Lisa M. Comer - Clerk of Court

Court Reporter:

E-Filing Note: In E-Filing counties, the date of Entry of Judgment is the same date as reflected on the Electronic File Stamp and the clerk's entering of the date of judgment above is not required in those counties. The clerk will mail a copy of the judgement to parties who are not E-Filers or who are appearing pro se. See Rule 77(d), SCRCP.

ADDITIONAL INFORMATION REGARDING DECISION BY THE COURT AS REFERENCED ON PAGE 1.

This action came to trial or hearing before the court. The issues have been tried or heard and a decision rendered.

CPFORM4Cln
SCCA SCRCP Form 4C (Revised 2/17)

EXHIBIT 2

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	ELEVENTH JUDICIAL CIRCUIT
Robert F. Berry, Plaintiff, 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., Defendants.	Case No. 2017-CP-32-00397

AFFIDAVIT OF MICHAEL ZUHR

I , Michael Zuhr, being first duly sworn on oath, depose and state:

1. My name is Michael Zuhr. I am employed by Wells Fargo Clearing Services, LLC as a Compliance Consultant in its Registration Department. I have held this position since May 2013. I am over the age of 21, competent to make this Affidavit, and have personal knowledge that everything stated herein is true and correct.

2. In my capacity as a Compliance Consultant, I am familiar with the manner in which Form U4s and their amendments are submitted to the Financial Industry Regulatory Authority ("FINRA") by Wells Fargo Advisors, LLC, which changed its name to Wells Fargo Clearing Services, LLC in November 2016 (hereinafter referred to as "Wells Fargo Advisors").

3. I also am familiar with the manner in which Form U4s and their amendments for brokers and other individuals associated with or employed by Wells Fargo Advisors are submitted to FINRA through Web CRD®, which is the central licensing and registration system

for the U.S. securities industry and its regulators. As part of my job duties, I have access to Web CRD®, and I (as well as other members of the Registration Department) regularly submit Form U4s and Form U4 amendments to Web CRD® as part of Wells Fargo Advisors' regular business activities. I 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.

4. To comply with FINRA Rule 4517, brokers must submit amendments to their Form U4s to update information provided in the disclosures that are included in that form. For Wells Fargo Advisors brokers, a member of the Registration Department submits the amendments electronically by entering the updated information into Web CRD®, which can only be accessed by individuals with proper credentials and a personalized login and password. The information submitted is based on the personal knowledge of the member of the Registration Department or on information conveyed to them by the brokers.

5. I obtained the records attached to this Affidavit from Web CRD®, which relate to Robert F. Berry, using my personal log-in information to access the system.

6. Exhibit A is a true and correct copy of a Form U4 dated October 7, 1999 that was submitted by John M. Ivan on behalf of Robert F. Berry in connection with his employment with Everen Securities, Inc., which is a legal predecessor of Wells Fargo Advisors. Mr. Ivan and Mr. Berry electronically signed the form on October 7, 1999. Exhibit B is a true and correct copy of a Form U4 amendment dated January 8, 2014 that was signed and submitted by Dinesh Udbale on behalf of Robert F. Berry in connection with his employment with Wells Fargo Advisors.

Further Affiant sayeth not.

Michael Zuhr

Michael Zuhr

SUBSCRIBED AND SWORN TO before me on this the 06 day of JULY, 2017 certify which witness my hand and seal of office.

City/County of ST. LOUIS
State of MISSOURI
The foregoing instrument was acknowledged before me this 06 day of JULY 2017 by MICHAEL SUTTER Notary Public
My commission expires 11/26/2020

Notary Public in and for
The State of MISSOURI
Printed name: CHARLOTTE STAHL
My commission expires: 11/26/2020

CHARLOTTE STAHL
Notary Public - Notary Seal
STATE OF MISSOURI
St. Louis County
My Commission Expires: Nov. 26, 2020
Commission #12573440

EXHIBIT 2-A

WELLS FARGO CLEARING SERVICES, LLC(19616) Rev. Form U4 (08/1999)

Individual Name: BERRY, ROBERT FRANKLIN (1262947) U4 Amendment - Filing ID: 5330556

Filing Date: 10/07/1999

FORM U4
UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

U4 - GENERAL INFORMATION

First Name:	Middle Name:	Last Name:	Suffix JR./SR., etc.:
ROBERT	FRANKLIN	BERRY	
Firm CRD #:	**Firm or Issuer Name: (Include this employment under Item 20, page 2)**	**Employment Date (MM/DD/YYYY):**	**CRD Branch #:**
19616	EVEREN SECURITIES, INC.	10/01/1999	
Billing Code: (optional)	**Applicant's CRD #:**		**Applicant's SS #:**
	1262947		xxx-xx-xxxx

Office of Employment Address Street 1:		Office of Employment Address Street 2:	
77 WEST WACKER DRIVE			
City:	**State:**	**Country:**	**Zip:**
CHICAGO	Illinois	UNITED STATES	60601

DUAL REGISTRATION

A. Will applicant maintain registration with a Broker Dealer not under common ownership or control with the firm named above? If yes, list the firm(s) in Item 20 on page 2. (●) Yes ( ) No

B. Will applicant maintain registration with an Investment Adviser not under common ownership or control with the firm named above? If yes, list the firm(s) in Item 20 on page 2. ( ) Yes ( ) No

U4 - AFFILIATED FIRMS

Will applicant maintain registration with firm(s) under common ownership or control with the firm named in Item 4 above?

If Yes, Please fill in the details to indicate a request for registration with additional firm(s).

( ) Yes (●) No

No Information Filed

U4 - SRO REGISTRATIONS

To be registered with the following *SROs* and related registration categor(ies), check the appropriate *SRO*/registration request boxes.

Qualifying examinations will be automatically scheduled if needed. If you are only scheduling or re-scheduling an exam, skip this item and complete the Examination Requests section.

REGISTRATION CATEGORY	NASD	NYSE	AMEX	BSE	NSX	PCX	CBOE	CHX	PHLX	ISE
OP - Registered Options Principal (S4)	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
IR - Investment Company and Variable Contracts Products Rep. (S6)	☐	☐			☐					
GS - Full Registration/General Securities Representative (S7)	☑	☑	☐	☐	☐	☐	☑	☐	☑	☐
TR - Securities Trader (S7)		☐	☐		☐					
TS - Trading Supervisor (S7)		☐	☐		☐					
SU - General Securities Sales Supervisor (S9 and S10)	☐			☐	☐	☐	☐	☐	☐	
BM - Branch Office Manager (S9 and S10)		☐	☐							
SM - Securities Manager (S12)		☐								

REGISTRATION CATEGORY	NASD	NYSE	AMEX	BSE	NSX	PCX	CBOE	CHX	PHLX	ISE
AR - Assistant Representative/Order Processing (S11)	☐				☐			☐		

REGISTRATION CATEGORY	NASD	NYSE	AMEX	BSE	NSX	PCX	CBOE	CHX	PHLX	ISE
IE - Limited Registered Representative (S17)	☐	☐	☐			☐	☐		☐	
DR - Direct Participation Program Representative (S22)	☐	☐			☐			☐		
GP - General Securities Principal (S24)	☐			☐	☐			☐		
IP - Investment Company and Variable Contracts Products Principal (S26)	☐				☐					
FA - Foreign Associate	☐									
FN - Financial and Operations Principal (S27)	☐			☐	☐		☐	☐		
FI - Introducing Broker-Dealer/Financial and Operations Principal (S28)	☐				☐			☐		

REGISTRATION CATEGORY	NASD	NYSE	AMEX	BSE	NSX	PCX	CBOE	CHX	PHLX	ISE
DP - Direct Participation Program Principal (S39)	☐				I			I		
OR - Options Representative (S42)	☐			☐				I		
MR - Municipal Securities Representative (S52)	☐	☐			☐			☐		
MP - Municipal Securities Principal (S53)	☐				☐			☐		
CS - Corporate Securities Representative (S62)	I				☐			☐		
RG - Government Securities Representative (S72)	☐									
PG - Government Securities Principal (S73)	☐									
SA - Supervisory Analyst (S16)		☐								
PR - Limited Representative - Private Securities Offerings (S82)	☐									

REGISTRATION CATEGORY	NASD	NYSE	AMEX	BSE	NSX	PCX	CBOE	CHX	PHLX	ISE
CD - Canada-Limited General Securities Registered Representative (S37)	☐	☐					☐			
CN - Canada-Limited General Securities Registered Representative (S38)	☐	☐					☐			
ET - Equity Trader (S55)	☐				☐					
AM - Allied Member		☐	☐							
AP - Approved Person		☐	☐							
LE - Securities Lending Representative		☐								
LS - Securities Lending Supervisor		☐								
ME - Member Exchange		☐	☐	☐	☐					

REGISTRATION CATEGORY	NASD	NYSE	AMEX	BSE	NSX	PCX	CBOE	CHX	PHLX	ISE
FE - Floor Employee		☐	☐	☐	☐					
OF - Officer		☐			☐					
CO - Compliance Official (S14)		☐								
CF - Compliance Official Specialist (S14A)		☐								
PM - Floor Member Conducting Public Business		☐	☐							
PC - Floor Clerk Conducting Public Business		☐	☐							
SC - Front Line Specialist Clerk		☐								
TA - Trading Assistant		☐								

U4 - JURISDICTIONS

Mark ☑ appropriate *jurisdiction* for AG (Broker Dealer Agent) and/or IAR (Investment Adviser Representative) registration. Complete Item 12B for Agent of the Issuer designation.

JURISDICTION	AG	RA	JURISDICTION	AG	RA	JURISDICTION	AG	RA	JURISDICTION	AG	RA
Alabama	☑	☐	Illinois	☐	☐	Montana	☐	☐	Puerto Rico	☐	☐
Alaska	☐	☐	Indiana	☐	☐	Nebraska	☐	☐	Rhode Island	☐	☐
Arizona	☐	☐	Iowa	☐	☐	Nevada	☑	☐	South Carolina	☑	☐
Arkansas	☐	☐	Kansas	☐	☐	New Hampshire	☐	☐	South Dakota	☐	☐

California	☐	Kentucky	☐	New Jersey	☐	Tennessee	☑
Colorado	☐	Louisiana	☐	New Mexico	☐	Texas	☐
Connecticut	☑	Maine	☐	New York	☑	Utah	☐
Delaware	☐	Maryland	☑	North Carolina	☑	Vermont	☐
District of Columbia	☐	Massachusetts	☐	North Dakota	☐	Virginia	☑
Florida	☑	Michigan	☑	Ohio	☐	Washington	☐
Georgia	☑	Minnesota	☐	Oklahoma	☐	West Virginia	☐
Hawaii	☐	Mississippi	☐	Oregon	☐	Wisconsin	☑
Idaho	☐	Missouri	☐	Pennsylvania	☑	Wyoming	☐

AGENT OF THE ISSUER REGISTRATION CATEGORY ☐ **Indicate 2 letter *jurisdiction* code(s):**_____

U4 - EXAMINATION REQUESTS

13. Complete this item below only if you are scheduling or rescheduling an exam, or continuing education session.

☐ S3	☐ S10	☐ S16	☐ S28	☐ S38	☐ S55	☐ S73
☐ S4	☐ S11	☐ S17	☐ S30	☐ S39	☐ S62	☐ S82
☐ S5	☐ S12	☐ S22	☐ S31	☐ S42	☐ S63	☐ S101
☐ S6	☐ S14	☐ S24	☐ S32	☐ S52	☐ S65	☐ S106
☐ S7	☐ S14A	☐ S26	☐ S33	☐ S53	☐ S66	☐ S201
☐ S9	☐ S15	☐ S27	☐ S37		☐ S72	

_____
Date Month (MM) Day (DD) Year (YYYY)

_____
Signature of *Appropriate Signatory*

_____
Type or Print Name of *Appropriate Signatory*

U4 - PERSONAL INFORMATION

Firm CRD # 19616	**Social Security #** XXX-XX-XXXX	**Applicant's CRD#** 1262947
First Name: ROBERT	**Middle Name:** FRANKLIN	**Last Name:** BERRY
Suffix JR./SR., etc.:	**Date of Birth (MM/DD/YYYY)** REDACTED	
State/Province of Birth SOUTH CAROLINA	**Country of Birth**	**Sex** ◉ Male ○ Female
Height (ft) 5	**Height (in)** 9	**Weight (lbs)** 145
Hair Color Brown	**Eye Color** Blue	

U4 - OTHER NAMES

First Name	Middle Name	Last Name	Suffix
BOB		BERRY	

U4 - RESIDENTIAL HISTORY

From	To	Street	City	State	Country	Zip
05/1996	PRESENT	513 BROOKSHIRE DRIVE	COLUMBIA	SC	UNITED STATES	29210
11/1990	05/1996	201 SILVERMILL COURT	COLUMBIA	SC	UNITED STATES	29210

U4 - EMPLOYMENT HISTORY

From	To	Name of Company or Firm	Investment-related business?	City	State	Country	Position
10/1999	PRESENT	EVEREN SECURITIES, INC.	(•) Yes ( ) No	CHICAGO	IL	UNITED STATES	MASS TRANSFER
11/1994	10/1999	FIRST UNION CAPITAL MARKETS CORP.	(•) Yes ( ) No	COLUMBIA	SC		UNKNCONV
04/1985	10/1999	#IA PRUDENTIAL SECURITIES INCORPORATED	( ) Yes (•) No	COLUMBIA	SC		UNKNCONV
04/1985	11/1994	PRUDENTIAL SECURITIES INCORPORATED	(•) Yes ( ) No	COLUMBIA	SC		OTHER - ACCT EXEC
04/1985	11/1994	PRUDENTIAL SECURITIES INCORPORATED	(•) Yes ( ) No	COLUMBIA	SC		OTHER - ACCT EXEC
04/1985	04/1991	#IA PRUDENTIAL SECURITIES INCORPORATED	( ) Yes (•) No	COLUMBIA	SC		UNKNCONV
04/1985	04/1991	#IA PRUDENTIAL-BACHE SECURITIES, INC.	( ) Yes (•) No	COLUMBIA	SC		UNKNCONV
04/1985	04/1991	#IA PRUDENTIAL SECURITIES INCORPORATED	( ) Yes (•) No	COLUMBIA	SC		UNKNCONV

U4 - OTHER BUSINESS

Are you currently engaged in any other business either as a proprietor, partner, officer, director, employee, trustee, agent or otherwise? (Please exclude non *investment-related* activity which is exclusively charitable, civic, religious or fraternal and is recognized as tax exempt.) If YES, Please provide the following details: the name of the other business, whether this business is *investment-related*, the address of the other business, the nature of the other business, your position, title, or relationship with the other business, the start and end dates of your relationship, the approximate number of hours/month devoted to the other business, the number of hours devoted to the other business during securities trading hours, and briefly describe your duties relating to the other business.

(•) Yes ( ) No

MID-ATLANTIC MARKETING, INC. CHARLOTTE, N.C. - DIRECTOR

Date Month (MM) Day (DD) Year (YYYY)

Signature of *Appropriate Signatory*

Type or Print Name of *Appropriate Signatory*

U4 - DISCLOSURE QUESTIONS

IF THE ANSWER TO ANY OF THE FOLLOWING QUESTIONS IS 'YES' AND YOU CANNOT UTILIZE THE CERTIFICATION IN ITEM 23N BELOW, COMPLETE DETAILS OF ALL EVENTS OR PROCEEDINGS ON APPROPRIATE DRP(S)

REFER TO THE EXPLANATION OF TERMS SECTION OF FORM U-4 INSTRUCTIONS FOR EXPLANATIONS OF ITALICIZED TERMS.

Criminal Disclosure

23A. (1) Have you ever: **YES NO**

(a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign, or military court to any *felony*? ( ) (•)

(b) been *charged* with any *felony?*

(2) Based upon activities that occurred while you exercised *control* over it, has an organization ever:

(a) been convicted of or pled guilty or nolo contendere ('no contest') in a domestic or foreign court to any *felony*?

(b) been *charged* with any *felony?*

23B. (1) Have you ever:

(a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign or military court to a *misdemeanor involving:* investments or an *investment-related* business or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?

(b) been *charged* with a *misdemeanor* specified in 23B(1)(a)?

(2) Based upon activities that occurred while you exercised *control* over it, has an organization ever:

(a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic or foreign court to a *misdemeanor* specified in 23B(1)(a)?

(b) been *charged* with a *misdemeanor* specified in 23B(1)(a)?

Regulatory Disciplinary Actions

23C. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:	**YES**	**NO**
(1) *found* you to have made a false statement or omission?	○	●
(2) *found* you to have been *involved* in a violation of its regulations or statutes?	○	●
(3) *found* you to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked, or restricted?	○	●
(4) entered an *order* against you in connection with *investment-related* activity?	○	●
(5) imposed a civil money penalty on you, or *ordered* you to cease and desist from any activity?	○	●

23D. Has any other Federal regulatory agency or any state regulatory agency or *foreign financial regulatory authority* ever:

(1) *found* you to have made a false statement or omission or been dishonest, unfair or unethical?

(2) *found* you to have been *involved* in a violation of *investment-related* regulation(s) or statute(s)?

(3) *found* you to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked or restricted?

(4) entered an *order* against you in connection with an *investment-related* activity?

(5) denied, suspended, or revoked your registration or license or otherwise, by *order*, prevented you from associating with an *investment-related* business or restricted your activities?

23E. Has any *self-regulatory organization* or commodities exchange ever:

(1) *found* you to have made a false statement or omission?

(2) *found* you to have been *involved* in a violation of its rules (other than a violation designated as a *"minor rule violation"* under a plan approved by the U.S. Securities and Exchange Commission)?

(3) *found* you to have been the cause of an *investment-related* business having its authorization to do business denied, suspended, revoked or restricted?

(4) disciplined you by expelling or suspending you from membership, barring or suspending your association with its members, or restricting your activities?

23F. Has your authorization to act as an attorney, accountant or federal contractor ever been revoked or suspended?

23G. Have you been notified, in writing, that you are now the subject of any:

(1) regulatory complaint or *proceeding* that could result in a "yes" answer to any part of 23C, D or E? *(If yes, complete the Regulatory Action Disclosure Reporting Page.)*

(2) *investigation* that could result in a "yes" answer to any part of 23A, B, C, D or E? *(If yes, complete the Investigation Disclosure Reporting Page.)*

Civil Judicial Actions

	YES	NO
23H. (1) Has any domestic or foreign court ever:		
(a) *enjoined* you in connection with any *investment-related* activity?	○	○
(b) *found* that you were *involved* in a violation of any *investment-related* statute(s) or regulation(s)?	○	○
(c) dismissed, pursuant to a settlement agreement, an *investment-related* civil action brought against you by a state or *foreign financial regulatory authority*?	○	○
(2) Are you named in any pending *investment-related* civil action that could result in a 'yes' answer to any part of 23H(1)?	○	○

Customer Complaints

	YES	NO
23I. (1) Have you ever been named as a respondent/defendant in an *investment-related*, consumer-initiated arbitration or civil litigation which alleged that you were *involved* in one or more *sales practice violations* and which:		
(a) is still pending, or;	○	○
(b) resulted in an arbitration award or civil judgment against you, regardless of amount, or;	○	○
(c) was settled for an amount of $10,000 or more?	○	○
(2) Have you ever been the subject of an *investment-related*, consumer-initiated complaint, not otherwise reported under question 23I(1) above, which alleged that you were *involved* in one or more *sales practice violations*, and which complaint was settled for an amount of $10,000 or more?	○	○
(3) Within the past twenty four (24) months, have you been the subject of an *investment-related*, consumer-initiated, written complaint, not otherwise reported under question 23I(1) or (2) above, which:		
(a) alleged that you were *involved* in one or more *sales practice violations* and contained a claim for compensatory damages of $5,000 or more (If no damage amount is alleged, the complaint must be reported unless the firm has made a good faith determination that the damages from the alleged conduct would be less than $5,000), or;	○	○
(b) alleged that you were *involved* in forgery, theft, misappropriation or conversion of funds or securities?	○	○

Terminations

	YES	NO
23J. Have you ever voluntarily *resigned*, been discharged or permitted to *resign* after allegations were made that accused you of:		
(1) violating *investment-related* statutes, regulations, rules, or industry standards of conduct?	○	○
(2) fraud or the wrongful taking of property?	○	○
(3) failure to supervise in connection with *investment-related* statutes, regulations, rules or industry standards of conduct?	○	○

Financial

	YES	NO
23K. Within the past 10 years:		
(1) have you made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition?	○	○
(2) based upon events that occurred while you exercised *control* over it, has an organization made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition?	○	○
(3) based upon events that occurred while you exercised *control* over it, has a broker or dealer been the subject of an involuntary bankruptcy petition, or had a trustee appointed, or had a direct payment procedure initiated under the Securities Investor Protection Act?	○	○
23L. Has a bonding company ever denied, paid out on, or revoked a bond for you?	○	○
23M. Do you have any unsatisfied judgments or liens against you?	○	○

(MM DD YYYY)

Signature of Applicant

Type or Print Name of Applicant

(MM DD YYYY)

Signature of *Appropriate Signatory*

Type or Print Name of *Appropriate Signatory*

U4 - SIGNATURE

1. I swear or affirm that I have read and understand the items and instructions on this form and that my answers (including attachments) are true and complete to the best of my knowledge. I understand that I am subject to administrative, civil or criminal penalties if I give false or misleading answers.

2. I apply for registration with the *jurisdictions* and *SROs* indicated in Item 11 as may be amended from time to time and, in consideration of the *jurisdictions* and *SROs* receiving and considering my application, I submit to the authority of the *jurisdictions* and *SROs* and agree to comply with all provisions, conditions and covenants of the statutes, constitutions, certificates of incorporation, by-laws and rules and regulations of the *jurisdictions* and *SROs* as they are or may be adopted, or amended from time to time. I further agree to be subject to and comply with all requirements, rulings, orders, directives and decisions of, and penalties, prohibitions and limitations imposed by the *jurisdictions* and *SROs*, subject to right of appeal or review as provided by law.

3. I agree that neither the *jurisdictions* or *SROs* nor any person acting on their behalf shall be liable to me for action taken or omitted to be taken in official capacity or in the scope of employment, except as otherwise provided in the statutes, constitutions, certificates of incorporation, by-laws or the rules and regulations of the *jurisdictions* and *SROs*.

4. I authorize the *jurisdictions* and *SROs* to give any information they may have concerning me to any employer or prospective employer, any federal, state or municipal agency, or any other *SRO* and I release the *jurisdictions* and *SROs* and any person acting on their behalf from any and all liability of whatever nature by reason of furnishing such information.

5. 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* 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*.

6. For the purpose of complying with the laws relating to the offer or sale of securities or commodities, I irrevocably appoint the administrator of each *jurisdiction* indicated in Item 11 as may be amended from time to time, or such other person designated by law, and the successors in such office, my attorney upon whom may be served any notice, process, pleading, subpoena or other document in any action or *proceeding* against me arising out of or in connection with the offer or sale of securities or commodities, or out of the violation or alleged violation of the laws of such *jurisdictions*. I consent that any such action or *proceeding* against me may be commenced in any court of competent *jurisdiction* and proper venue by service of process upon the appointee as if I were a resident of, and had been lawfully served with process in, the *jurisdiction*. I request that a copy of any notice, process, pleading, subpoena or other document served hereunder be mailed to my current residential address as reflected in this form or any amendment thereto.

7. I consent that the service of any process, pleading, subpoena, or other document in any *investigation* or administrative *proceeding* conducted by the SEC, CFTC or a *jurisdiction* or in any civil action in which the SEC, CFTC or a *jurisdiction* are plaintiffs, or the notice of any *investigation* or *proceeding* by any *SRO* against the applicant, may be made by personal service or by regular, registered or certified mail or confirmed telegram to me at my most recent business or home address as reflected in this Form U-4, or any amendment thereto, by leaving such documents or notice at such address, or by any other legally permissible means.

   I further stipulate and agree that any civil action or administrative *proceeding* instituted by the SEC, CFTC or a *jurisdiction* may be commenced by the service of process as described herein, and that service of an administrative subpoena shall be effected by such service, and that service as aforesaid shall be taken and held in all courts and administrative tribunals to be valid and binding as if personal service thereof had been made. *[System Note: Due to a form conversion error, the preceding sentence was omitted from the electronic version of this Form U-4 for filings made through Web CRD from August 16, 1999 to October 13, 2000.]*

8. I authorize all my employers and any other person to furnish to any *jurisdiction,* SRO, employer, prospective employer, or any agent acting on its behalf, any information they have, including my creditworthiness, character, ability, business activities, educational background, general reputation, history of my employment and, in the case of former employers, complete reasons for my termination. Moreover, I release each employer, former employer and each other person from any and all liability, of whatever nature, by reason of furnishing any of the above information, including that information reported on the Uniform Termination Notice for Securities Industry Registration (Form U-5). I recognize that I may be the subject of an investigative consumer report and waive any requirement of notification with respect to any investigative consumer report ordered by any *jurisdiction, SRO,* employer, or prospective employer. I understand that I have the right to request complete and accurate disclosure by the *jurisdiction, SRO,* employer or prospective employer of the nature and scope of the requested investigative consumer report.

9. I understand and certify that the representations in this form apply to all employers with whom I seek registration as indicated in Items 4 and 10 of this form. I agree to update this form by causing an amendment to be filed on a timely basis whenever changes occur to answers previously reported. Further, I represent that, to the extent any information previously submitted is not amended, the information provided in this form is currently accurate and complete.

10. I authorize any employer or prospective employer to file electronically on my behalf any information required in this form or any amendment thereto; I certify that I have reviewed and approved the information to be submitted to any *jurisdiction* or *SRO* on this Form U-4 Application; I agree that I will review and approve all disclosure information that will be filed electronically on my behalf; I further agree to waive any objection to the admissibility of the electronically filed records in any criminal, civil, or administrative *proceeding.*

Applicant or applicant's agent has typed applicant's name under this section to attest to the completeness and accuracy of this record. The applicant recognizes that this typed name constitutes, in every way, use or aspect, his or her legally binding signature.

(All applicants must execute this page.)

Date (MM/DD/YYYY)	**Signature of Applicant**
10/07/1999	ROBERT F. BERRY

Signature _____

THE FIRM MUST COMPLETE THE FOLLOWING:

To the best of my knowledge and belief, the applicant is currently bonded where required, and, at the time of approval, will be familiar with the statutes, constitution(s), rules and by-laws of the agency, *jurisdiction* or *SRO* with which this application is being filed, and the rules governing registered persons, and will be fully qualified for the position for which application is being made herein. I agree that, notwithstanding the approval of such agency, *jurisdiction* or *SRO* which hereby is requested, I will not employ the applicant in the capacity stated herein without first receiving the approval of any authority that may be required by law.

This firm has communicated with all of the applicant's previous employers for the past three years and has documentation on file with the names of the persons contacted and the date of contact. In addition, I have taken appropriate steps to verify the accuracy and completeness of the information contained in and with this application.

I have provided the applicant an opportunity to review the information contained herein and the applicant has approved this information and signed the Form U-4.

The appropriate signatory area ***must*** *be completed on all Initial, amendment or Temporary Registration filings.*

The *appropriate signatory* area for Page 1 or Page 2 amendments consists of the date, signature and name lines below.

The *applicant* and *appropriate signatory* areas for Page 3 amendments consist of the date, signature and name lines for the *appropriate signatory* below and the date, signature and name lines for the *applicant* above.

The *applicant* and *appropriate signatory* areas for Initial or Temporary Registration filings consist of the date, signature and name lines for the *appropriate signatory* below, together with the attestations that precede such lines, and the date, signature and name lines for the *applicant* above, together with the ten (10) numbered attestations that precede such lines for the *applicant.* For a Temporary Registration, *applicant* must also execute

the Temporary Registration Acknowledgement.

Date (MM/DD/YYYY)
10/07/1999

Signature of Appropriate Signatory
JOHN M. IVAN

Signature _____

U4 - CRIMINAL DRP
No Information Filed
U4 - REGULATORY ACTION DRP
No Information Filed
U4 - CIVIL JUDICIAL DRP
No Information Filed
U4 - CUSTOMER COMPLAINT DRP
No Information Filed
U4 - TERMINATION DRP
No Information Filed
U4 - INVESTIGATION DRP
No Information Filed
U4 - BANKRUPTCY DRP
No Information Filed
U4 - BOND DRP
No Information Filed
U4 - JUDGMENT LIEN DRP
No Information Filed

© 2017 FINRA. All rights reserved. FINRA is a registered trademark of the Financial Industry Regulatory Authority, Inc.
Privacy | Legal | Terms & Conditions

EXHIBIT 2-B

FORM U4
UNIFORM APPLICATION FOR SECURITIES INDUSTRY REGISTRATION OR TRANSFER

WELLS FARGO CLEARING SERVICES, LLC(19616) **Rev. Form U4 (05/2009)**

Individual Name: BERRY, ROBERT FRANKLIN (1262947) **U4 Amendment - Filing ID: 35964323**

Filing Date: 01/08/2014

1. General Information

First Name:	Middle Name:	Last Name:	Suffix:
ROBERT	FRANKLIN	BERRY	
Firm CRD #:	*Firm* Name:	Employment Date (MM/DD/YYYY):	
19616	WELLS FARGO ADVISORS, LLC	10/01/1999	
Firm Billing Code:	*Individual CRD #*:	Individual SSN:	
P0051410	1262947	xxx-xx-xxxx	

Do you have an independent contractor relationship with the above named *firm*?:

○ Yes ◉ No

Office of Employment Address:

CRD Branch #	NYSE Branch Code #	Firm Billing Code	Address	Private Residence	Type of Office	Start Date	End Date	Status
		0840190	1901 MAIN STREET SUITE 650 COLUMBIA, SC 29201	No	Located At	10/01/1999	05/03/2006	
190200	840190	P0051326	1901 MAIN ST STE 650 COLUMBIA, SC 29201 United States	No	Located At	10/01/1999		

2. Fingerprint Information

Electronic Filing Representation

○ By selecting this option, I represent that I am submitting, have submitted, or promptly will submit to the appropriate *SRO* a fingerprint card as required under applicable *SRO* rules; or

Fingerprint card barcode

◉ 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; or,

○ By selecting this option, I represent that I have been employed continuously by the *filing firm* and my fingerprints have been processed by an *SRO* other than FINRA. I am submitting, have submitted, or promptly will submit the processed results for posting to CRD.

Exceptions to the Fingerprint Requirement

○ By selecting one or more of the following two options, I affirm that I am exempt from the federal fingerprint requirement because I/*filing firm* currently satisfy(ies) the requirements of at least one of the permissive exemptions indicated below pursuant to Rule 17f-2 under the Securities Exchange Act of 1934, including any notice or application requirements specified therein:

☐ Rule 17f-2(a)(1)(I)

☐

Rule 17f-2(a)(1)(iii)

Investment Adviser Representative Only Applicants

- I affirm that I am applying only as an investment adviser representative and that I am not also applying or have not also applied with this *firm* to become a broker-dealer representative. If this radio button/box is selected, continue below.
  - I am applying for registration only in *jurisdictions* that do not have fingerprint card filing requirements, or
  - I am applying for registration in *jurisdictions* that have fingerprint card filing requirements and I am submitting, have submitted, or promptly will submit the appropriate fingerprint card directly to the *jurisdictions* for processing pursuant to applicable *jurisdiction* rules.

3. Registration With Unaffiliated Firms

Some *jurisdictions* prohibit "dual registration", which occurs when an individual chooses to maintain a concurrent registration as a representative/agent with two or more *firms* (either BD or IA *firms*) that are not affiliated. *Jurisdictions* that prohibit dual registration would not, for example, permit a broker-dealer agent working with brokerage *firm* A to maintain a registration with brokerage *firm* B if *firms* A and B are not owned or controlled by a common parent. Before seeking a dual registration status, you should consult the applicable rules or statutes of the *jurisdictions* with which you seek registration for prohibitions on dual registrations or any liability provisions.

Please indicate whether the individual will maintain a "dual registration" status by answering the questions in this section. (Note: An individual should answer 'yes' only if the individual is currently registered and is seeking registration with a *firm* (either BD or IA) that is not affiliated with the individual's current employing *firm*. If this is an initial application, an individual must answer 'no' to these questions; a "dual registration" may be initiated only after an initial registration has been established).

Answer "yes" or "no" to the following questions:	Yes	No
A. Will *applicant* maintain registration with a broker-dealer that is not *affiliated* with the *filing firm*? If you answer "yes", list the *firm*(s) in Section 12 (Employment History).	○	◉
B. Will *applicant* maintain registration with an investment adviser that is not *affiliated* with the *filing firm*? If you answer "yes", list the *firm*(s) in Section 12 (Employment History).	○	◉

4. SRO Registrations

Check appropriate *SRO* Registration requests.

Qualifying examinations will be automatically scheduled if needed. If you are only scheduling or re-scheduling an exam, skip this section and complete Section 7 (EXAMINATION REQUESTS).

REGISTRATION CATEGORY	FINRA	NYSE	NYSE-MKT	BATS-ZX	BATS-YX	BOX	BX	EDGA	EDGX	NSX	ARCA	CBOE	C2	CHX	PHLX	ISE	ISE GEMINI	NQX	MIAX Options
OP - Registered Options Principal (S4)	☐	☐	☐	☐		☐	☐			☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
IR - Investment Company and Variable Contracts Products Rep. (S6)	☐	☐	☐							☐								☐	
GS - Full Registration/General Securities Representative (S7)	☑	☑	☑	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☑	☐	☐	☑	☐
TR - Securities Trader (S7)										☐									
TS - Trading										☐									

REGISTRATION CATEGORY	FINRA	NYSE	NYSE-MKT	BATS-ZX	BATS-YX	BOX	BX	EDGA	EDGX	NSX	ARCA	CBOE	C2	CHX	PHLX	ISE	ISE GEMINI	NQX	MIAX Options
Supervisor (S7)																			
SU - General Securities Sales Supervisor (S9 and S10)	☐					☐	☐	☐	☐	☐	☐	☐	☐	☐	☐			☐	☐
BM - Branch Office Manager (S9 and S10)		☐	☐													☐	☐		
SM - Securities Manager (S10)		☐	☐																
AR - Assistant Representative/Order Processing (S11)	☐									☐				☐				☐	
IE - United Kingdom - Limited General Securities Registered Representative (S17)	☐	☐	☐	☐	☐	☐	☐	☐	☐		☐	☐	☐		☐			☐	
DR - Direct Participation Program Representative (S22)	☐	☐	☐							☐				☐					
GP - General Securities Principal (S24)	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐			☐	☐	☐	☐	☐	☐
IP - Investment Company and Variable Contracts Products Principal (S26)	☐	☐	☐							☐								☐	
FA - Foreign Associate	☐																		
FN - Financial and Operations Principal (S27)	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐	☐
FI - Introducing Broker-Dealer/Financial and Operations Principal (S28)	☐	☐	☐							☐				☐				☐	☐
RS - Research Analyst (S86, S87)	☐	☐	☐																
RP - Research Principal	☐																		
DP - Direct Participation Program Principal (S39)	☐	☐	☐							☐				☐					
OR - Options Representative (S42)	☐					☐	☐							☐				☐	
REGISTRATION													☑						

CATEGORY	FINRA	NYSE	NYSE-MKT	BATS-ZX	BATS-YX	BOX	BX	EDGA	EDGX	NSX	ARCA	CBOE	CHX	PHLX	ISE	ISE GEMINI	NQX	MIAX Options
MR - Municipal Securities Representative (S52)	☐	☐	☐							☐			☐					
MP - Municipal Securities Principal (S53)	☐	☐	☐							☐			☐					
CS - Corporate Securities Representative (S62)	☐	☐	☐							☐			☐				☐	
RG - Government Securities Representative (S72)	☐																	
PG - Government Securities Principal	☐																	
SA - Supervisory Analyst (S16)	☐	☐	☐															
PR - Limited Representative - Private Securities Offerings (S82)	☐	☐	☐															
CD - Canada-Limited General Securities Registered Representative (S37)	☐	☐	☐	☐	☐	☐		☐	☐		☐	☐	☐				☐	
CN - Canada-Limited General Securities Registered Representative (S38)	☐	☐	☐	☐	☐	☐		☐	☐		☐	☐	☐				☐	
ET - Equity Trader (S55)	☐	☐	☐							☐							☐	

REGISTRATION CATEGORY	FINRA	NYSE	NYSE-MKT	BATS-ZX	BATS-YX	BOX	BX	EDGA	EDGX	NSX	ARCA	CBOE	C2	CHX	PHLX	ISE	ISE GEMINI	NQX	MIAX Options
AM - Allied Member			☐								☐								
AP - Approved Person		☐	☐			☐	☐				☐	☐	☐		☐	☐	☐	☐	☐
LE - Securities Lending Representative		☐	☐																
LS - Securities Lending Supervisor		☐	☐																
ME - Member Exchange		☐	☐				☐			☐				☐	☐				☐
FE - Floor Employee		☐	☐				☐			☐	☐				☐				
OF - Officer										☐									
CO - Compliance		☐	☐	☐	☐									☐		☐	☐		☐

REGISTRATION CATEGORY	FINRA	NYSE	NYSE-MKT	BATS-ZX	BATS-YX	BOX	BX	EDGA	EDGX	NSX	ARCA	CBOE	C2	CHX	PHLX	ISE	ISE GEMINI	NQX	MIAX Options
Official (S14)																			
CF - Compliance Official Specialist (S14A)		☐	☐																
PM - Floor Member Conducting Public Business		☐	☐																
PC - Floor Clerk Conducting Public Business		☐	☐																
SC - Specialist Clerk (S21)		☐	☐																
TA - Trading Assistant (S25)		☐	☐																
FP - Municipal Fund (S51)	☐																		
IF - In-Firm Delivery Proctor	☐	☐	☐																
MM - Market Maker Authorized Trader - Options (S57)											☐								
FB - Floor Broker (S57)											☐								
OT - Authorized Trader (S7)			☐								☐								
MT - Market Maker Authorized Trader-Equities				☐	☐			☐	☐		☐								
IB - Investment Banking Representative (S79)	☐																		

REGISTRATION CATEGORY	FINRA	NYSE	NYSE-MKT	BATS-ZX	BATS-YX	BOX	BX	EDGA	EDGX	NSX	ARCA	CBOE	C2	CHX	PHLX	ISE	ISE GEMINI	NQX	MIAX Options
OS - Operations Professional (S99)	☐																		
AF - Floor Broker - Options (S57)			☐																
AO - Market Maker - Options (S57)			☐																
AC - Floor Clerk - Options			☐																
CT - Securities Trader Compliance Officer (S14)				☐	☐							☐	☐	☐		☐	☐		☐

PT - Proprietary Trader (S56) ☐

TP - Securities Trader Principal (S24) ☐

Other _____

(Paper Form Only) ☐

5. Jurisdiction Registration

Check appropriate *jurisdiction(s)* for broker-dealer agent (AG) and/or investment adviser representative (RA) registration requests.

JURISDICTION	AG	RA	JURISDICTION	AG	RA	JURISDICTION	AG	RA	JURISDICTION	AG	RA
Alabama	☐	☐	Illinois	☐	☐	Montana	☐	☐	Puerto Rico	☐	☐
Alaska	☐	☐	Indiana	☐	☐	Nebraska	☐	☐	Rhode Island	☐	☐
Arizona	☐	☐	Iowa	☐	☐	Nevada	☐	☐	South Carolina	☑	☑
Arkansas	☐	☐	Kansas	☐	☐	New Hampshire	☐	☐	South Dakota	☐	☐
California	☐	☐	Kentucky	☑	☐	New Jersey	☑	☐	Tennessee	☑	☐
Colorado	☑	☐	Louisiana	☐	☐	New Mexico	☐	☐	Texas	☑	☑
Connecticut	☑	☐	Maine	☐	☐	New York	☐	☐	Utah	☐	☐
Delaware	☑	☐	Maryland	☑	☐	North Carolina	☑	☐	Vermont	☑	☐
District of Columbia	☐	☐	Massachusetts	☐	☐	North Dakota	☐	☐	Virgin Islands	☐	☐
Florida	☑	☐	Michigan	☐	☐	Ohio	☐	☐	Virginia	☑	☐
Georgia	☑	☐	Minnesota	☐	☐	Oklahoma	☐	☐	Washington	☑	☐
Hawaii	☐	☐	Mississippi	☑	☐	Oregon	☐	☐	West Virginia	☐	☐
Idaho	☐	☐	Missouri	☐	☐	Pennsylvania	☑	☐	Wisconsin	☐	☐
									Wyoming	☐	☐

AGENT OF THE ISSUER REGISTRATION (AI) ☐ **Indicate 2 letter *jurisdiction* code(s):**_____

6. Registration Requests with Affiliated Firms

Will *applicant* maintain registration with *firm*(s) under common ownership or control with the *filing firm*? ○ Yes ○ No

If "yes", fill in the details to indicate a request for registration with additional *firm*(s).

7. Examination Requests

Scheduling or Rescheduling Examinations Complete this section only if you are scheduling or rescheduling an examination or continuing education session. Do not select the Series 63 (S63) or Series 65 (S65) examinations in this section if you have completed Section 5 (JURISDICTION REGISTRATION) and have selected registration in a *jurisdiction*. If you have completed Section 5 (JURISDICTION REGISTRATION), and requested an AG registration in a *jurisdiction* that requires that you pass the S63 examination, an S63 examination will be automatically scheduled for you upon submission of this Form U4. If you have completed Section 5 (JURISDICTION REGISTRATION), and requested an RA registration in a *jurisdiction* that requires that you pass the S65 examination, an S65 examination will be automatically scheduled for you upon submission of this Form U4.

☐ S3	☐ S15	☐ S30	☐ S52	☐ S79
☐ S4	☐ S16	☐ S31	☐ S53	☐ S82
☐ S6	☐ S17	☐ S32	☐ S55	☐ S86
☐ S7	☐ S22	☐ S33	☐ S56	☐ S87
☐ S9	☐ S23	☐ S37	☐ S62	☐ S99
☐ S10	☐ S24	☐ S38	☐ S63	☐ S101
☐ S11	☐ S26	☐ S39	☐ S65	☐ S106
☐ S12	☐ S27	☐ S42	☐ S66	☐ S201
☐ S14	☐ S28	☐ S51	☐ S72	☐ S501

Other _____ (Paper Form Only)

OPTIONAL: Foreign Exam City _____ Date (MM/DD/YYYY) _____

8. Professional Designations

Select each designation you currently maintain.

☐ **Certified Financial Planner**

☐ **Chartered Financial Consultant (ChFC)**

☐ **Personal Financial Specialist (PFS)**

☐ **Chartered Financial Analyst (CFA)**

☐ **Chartered Investment Counselor (CIC)**

9. Identifying Information/Name Change

First Name:	Middle Name:	Last Name:	Suffix:
ROBERT	FRANKLIN	BERRY	

State of Birth	Province of Birth	Country of Birth
	SOUTH CAROLINA	USA

Date of Birth(MM/DD/YYYY)	Sex	Hair Color	Eye Color
REDACTED	◉ Male ○ Female	Brown	Blue

Height (ft)	Height (in)	Weight (lbs)
5	9	160

10. Other Names

Other Names	Status
BERRY, BOB	

11. Residential History

From	To	Street Address	Status

10/2013	PRESENT	200 HAMMOCK DR LEXINGTON, SC 29072-0000 UNITED STATES	
05/2010	10/2013	141 ABLE HARMON LANE LEXINGTON, SC 29072 USA	
05/1996	05/2010	513 BROOKSHIRE DRIVE COLUMBIA, SC 29210 UNITED STATES	
11/1990	05/1996	201 SILVERMILL COURT COLUMBIA, SC 29210 United States	

12. Employment History

From	To	Name of Firm or Company	Address	Investment Related	Position Held	Status
05/2009	PRESENT	WELLS FARGO ADVISORS LLC	COLUMBIA, SC USA	Yes	REGISTERED REP	
06/2003	05/2009	WACHOVIA SECURITIES, LLC	COLUMBIA, SC UNITED STATES	Yes	FINANCIAL ADVISOR	
06/2002	05/2003	WACHOVIA SECURITIES, INC.	COLUMBIA, SC UNITED STATES	Yes	FINANCIAL ADVISOR	
10/1999	06/2002	FIRST UNION SECURITIES, INC.	COLUMBIA, SC UNITED STATES	Yes	FINANCIAL ADVISOR	
11/1994	10/1999	FIRST UNION CAPITAL MARKETS CORP.	COLUMBIA, SC	Yes	NOT PROVIDED	
04/1985	10/1999	#IA PRUDENTIAL SECURITIES INCORPORATED	COLUMBIA, SC	No	NOT PROVIDED	
04/1985	11/1994	PRUDENTIAL SECURITIES INCORPORATED	COLUMBIA, SC	Yes	OTHER - ACCT EXEC	
04/1985	04/1991	#IA PRUDENTIAL SECURITIES INCORPORATED	COLUMBIA, SC	No	NOT PROVIDED	
04/1985	04/1991	#IA PRUDENTIAL-BACHE SECURITIES, INC.	COLUMBIA, SC	No	NOT PROVIDED	

13. Other Business

Are you currently engaged in any other business either as a proprietor, partner, officer, director, employee, trustee, agent or otherwise? (Please exclude non *investment-related* activity that is exclusively charitable, civic, religious or fraternal and is recognized as tax exempt.) If YES, please provide the following details: the name of the other business, whether the business is *investment-related*, the address of the other business, the nature of the other business, your position, title, or relationship with the other business, the start date of your relationship, the approximate number of hours/month you devote to the other business, the number of hours you devote to the other business during securities trading hours, and briefly describe your duties relating to the other business.

(•) Yes ( ) No

If 'Yes', please enter details below.

CPA LICENSE STATE OF SC. MIZZELL FAMILY REUNION; NOT INVESTMENT RELATED; COLUMBIA, SC; FAMILY REUNIONS AND CEMETARY PLOT; START DATE 7/1/2010; 1 HR MONTH; 0 HRS DURING TRADING; DUTIES: MAKE ANNUAL DEPOSITS AND DISTRIBUTE MONEY TO PAY OF FAMILY CEMETARY. POWER OF ATTORNEY FOR MOTHER; INVESTMENT RELATED; COLUMBIA, SC; START DATE 11/2012; 10 HRS PER MONTH; 0 HRS DURING TRADING.

14. Disclosure Questions

IF THE ANSWER TO ANY OF THE FOLLOWING QUESTIONS IS 'YES', COMPLETE DETAILS OF ALL EVENTS OR PROCEEDINGS ON APPROPRIATE DRP(S)

REFER TO THE EXPLANATION OF TERMS SECTION OF FORM U4 INSTRUCTIONS FOR EXPLANATIONS OF ITALICIZED TERMS.

Criminal Disclosure

	Yes	No
14A. (1) Have you ever:		
(a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign, or military court to any *felony*?	○	◉
(b) been *charged* with any *felony*?	○	◉
(2) Based upon activities that occurred while you exercised *control* over it, has an organization ever:		
(a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic or foreign court to any *felony*?	○	◉
(b) been *charged* with any *felony*?	○	◉
14B. (1) Have you ever:	**Yes**	**No**
(a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic, foreign or military court to a *misdemeanor involving*: investments or an *investment-related* business or any fraud, false statements or omissions, wrongful taking of property, bribery, perjury, forgery, counterfeiting, extortion, or a conspiracy to commit any of these offenses?	○	◉
(b) been *charged* with a *misdemeanor* specified in 14B(1)(a)?	○	◉
(2) Based upon activities that occurred while you exercised *control* over it, has an organization ever:		
(a) been convicted of or pled guilty or nolo contendere ("no contest") in a domestic or foreign court to a *misdemeanor* specified in 14B(1)(a)?	○	◉
(b) been *charged* with a *misdemeanor* specified in 14B(1)(a)?	○	◉

Regulatory Action Disclosure

	Yes	No
14C. Has the U.S. Securities and Exchange Commission or the Commodity Futures Trading Commission ever:		
(1) *found* you to have made a false statement or omission?	○	◉
(2) *found* you to have been *involved* in a violation of its regulations or statutes?	○	◉
(3) *found* you to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked, or restricted?	○	◉
(4) entered an *order* against you in connection with *investment-related* activity?	○	◉
(5) imposed a civil money penalty on you, or *ordered* you to cease and desist from any activity?	○	◉
(6) *found* you to have willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board, or *found* you to have been unable to comply with any provision of such Act, rule or regulation?	○	◉
(7) *found* you to have willfully aided, abetted, counseled, commanded, induced, or procured the violation by any person of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board?	○	◉
(8) *found* you to have failed reasonably to supervise another person subject to your supervision, with a view to preventing the violation of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or	○	◉

regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board?

	Yes	No
14D. (1) Has any other Federal regulatory agency or any state regulatory agency or *foreign financial regulatory authority* ever:		
(a) *found* you to have made a false statement or omission or been dishonest, unfair or unethical?	○	○
(b) *found* you to have been *involved* in a violation of *investment-related* regulation(s) or statute(s)?	○	○
(c) *found* you to have been a cause of an *investment-related* business having its authorization to do business denied, suspended, revoked or restricted?	○	○
(d) entered an *order* against you in connection with an *investment-related* activity?	○	○
(e) denied, suspended, or revoked your registration or license or otherwise, by *order*, prevented you from associating with an *investment-related* business or restricted your activities?	○	○
(2) Have you been subject to any *final order* of a state securities commission (or any agency or officer performing like functions), state authority that supervises or examines banks, savings associations, or credit unions, state insurance commission (or any agency or office performing like functions), an appropriate *federal banking agency*, or the National Credit Union Administration, that:		
(a) bars you from association with an entity regulated by such commission, authority, agency, or officer, or from engaging in the business of securities, insurance, banking, savings association activities, or credit union activities; or	○	○
(b) constitutes a *final order* based on violations of any laws or regulations that prohibit fraudulent, manipulative, or deceptive conduct?	○	○

	Yes	No
14E. Has any *self-regulatory organization* ever:		
(1) *found* you to have made a false statement or omission?	○	○
(2) *found* you to have been *involved* in a violation of its rules (other than a violation designated as a "*minor rule violation*" under a plan approved by the U.S. Securities and Exchange Commission)?	○	○
(3) *found* you to have been the cause of an *investment-related* business having its authorization to do business denied, suspended, revoked or restricted?	○	○
(4) disciplined you by expelling or suspending you from membership, barring or suspending your association with its members, or restricting your activities?	○	○
(5) *found* you to have willfully violated any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board, or *found* you to have been unable to comply with any provision of such Act, rule or regulation?	○	○
(6) *found* you to have willfully aided, abetted, counseled, commanded, induced, or procured the violation by any person of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board?	○	○
(7) *found* you to have failed reasonably to supervise another person subject to your supervision, with a view to preventing the violation of any provision of the Securities Act of 1933, the Securities Exchange Act of 1934, the Investment Advisers Act of 1940, the Investment Company Act of 1940, the Commodity Exchange Act, or any rule or regulation under any of such Acts, or any of the rules of the Municipal Securities Rulemaking Board?	○	○

14F. Have you ever had an authorization to act as an attorney, accountant or federal contractor that was revoked or suspended?	○	○

	Yes	No
14G. Have you been notified, in writing, that you are now the subject of any:		
(1) regulatory complaint or *proceeding* that could result in a "yes" answer to any part of 14C, D or E? (If "yes", complete the *Regulatory Action* Disclosure Reporting Page.)	○	○
(2) *investigation* that could result in a "yes" answer to any part of 14A, B, C, D or E? (If "yes", complete the *Investigation* Disclosure Reporting Page.)	○	○

Civil Judicial Disclosure

	Yes	No
14H. (1) Has any domestic or foreign court ever:		
(a) *enjoined* you in connection with any *investment-related* activity?	○	○
(b) *found* that you were *involved* in a violation of any *investment-related* statute(s) or regulation(s)?	○	○
(c) dismissed, pursuant to a settlement agreement, an *investment-related* civil action brought against you by a state or *foreign financial regulatory authority*?	○	○
(2) Are you named in any pending *investment-related* civil action that could result in a "yes" answer to any part of 14H(1)?	○	○

Customer Complaint/Arbitration/Civil Litigation Disclosure

	Yes	No
14I. (1) Have you ever been named as a respondent/defendant in an *investment-related*, consumer-initiated arbitration or civil litigation which alleged that you were *involved* in one or more *sales practice violations* and which:		
(a) is still pending, or;	○	○
(b) resulted in an arbitration award or civil judgment against you, regardless of amount, or;	○	○
(c) was settled, prior to 05/18/2009, for an amount of $10,000 or more, or;	○	○
(d) was settled, on or after 05/18/2009, for an amount of $15,000 or more?	○	○
(2) Have you ever been the subject of an *investment-related*, consumer-initiated (written or oral) complaint, which alleged that you were *involved* in one or more *sales practice violations*, and which:		
(a) was settled, prior to 05/18/2009 for an amount of $10,000 or more, or;	○	○
(b) was settled, on or after 05/18/2009, for an amount of $15,000 or more?	○	○
(3) Within the past twenty four (24) months, have you been the subject of an *investment-related*, consumer-initiated, written complaint, not otherwise reported under question 14I(2) above, which:		
(a) alleged that you were *involved* in one or more *sales practice violations* and contained a claim for compensatory damages of $5,000 or more (If no damage amount is alleged, the complaint must be reported unless the *firm* has made a good faith determination that the damages from the alleged conduct would be less than $5,000), or;	○	○
(b) alleged that you were *involved* in forgery, theft, misappropriation or conversion of funds or securities?	○	○
Answer questions (4) and (5) below only for arbitration claims or civil litigation filed on or after 05/18/2009.		
(4) Have you ever been the subject of an *investment-related*, consumer-initiated arbitration claim or civil litigation which alleged that you were *involved* in one or more *sales practice violations*, and which:		
(a) was settled for an amount of $15,000 or more, or;	○	○
(b) resulted in an arbitration award or civil judgment against any named respondent(s)/defendant(s), regardless of any amount?	○	○
(5) Within the past twenty four (24) months, have you been the subject of an *investment-related*, consumer-initiated arbitration claim or civil litigation not otherwise reported under questions 14I(4) above, which:		
(a) alleged that you were *involved* in one or more *sales practice violations* and contained a claim for compensatory damages of $5,000 or more (If no damage amount is alleged, the arbitration claim or civil litigation, must be reported unless the *firm* has made a good faith	○	○

determination that the damages from the alleged conduct would be less than $5,000), or;

(b) alleged that you were *involved* in forgery, theft, misappropriation or conversion of funds or securities? ○ ○

Termination Disclosure

14J. **Have you ever voluntarily *resigned*, been discharged or permitted to *resign* after allegations were made that accused you of:**	Yes	No
(1) violating *investment-related* statutes, regulations, rules, or industry standards of conduct?	○	○
(2) fraud or the wrongful taking of property?	○	○
(3) failure to supervise in connection with *investment-related* statutes, regulations, rules or industry standards of conduct?	○	○

Financial Disclosure

14K. **Within the past 10 years:**	Yes	No
(1) have you made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition?	○	○
(2) based upon events that occurred while you exercised *control* over it, has an organization made a compromise with creditors, filed a bankruptcy petition or been the subject of an involuntary bankruptcy petition?	○	○
(3) based upon events that occurred while you exercised *control* over it, has a broker or dealer been the subject of an involuntary bankruptcy petition, or had a trustee appointed, or had a direct payment procedure initiated under the Securities Investor Protection Act?	○	○

14L. Has a bonding company ever denied, paid out on, or revoked a bond for you? ○ ○

14M. Do you have any unsatisfied judgments or liens against you? ○ ○

15. Signatures

Please Read Carefully

All signatures required on this Form U4 filing must be made in this section.

A "signature" includes a manual signature or an electronically transmitted equivalent. For purposes of an electronic form filing, a signature is effected by typing a name in the designated signature field. By typing a name in this field, the signatory acknowledges and represents that the entry constitutes in every way, use, or aspect, his or her legally binding signature.

15A INDIVIDUAL/APPLICANT'S ACKNOWLEDGMENT AND CONSENT

This section must be completed on all initial or Temporary Registration form filings.

15B FIRM/APPROPRIATE SIGNATORY REPRESENTATIONS

This section must be completed on all initial or Temporary Registration form filings.

15C TEMPORARY REGISTRATION ACKNOWLEDGMENT

This section must be completed on Temporary Registration form filings to be able to receive Temporary Registration.

15D INDIVIDUAL/APPLICANT'S AMENDMENT ACKNOWLEDGMENT AND CONSENT

This section must be completed on any amendment filing that amends any information in Section 14 (Disclosure Questions) or any Disclosure Reporting Page (DRP).

15E FIRM/APPROPRIATE SIGNATORY AMENDMENT REPRESENTATIONS

This section must be completed on all amendment form filings.

15F FIRM/APPROPRIATE SIGNATORY CONCURRENCE

This section must be completed to concur with a U4 filing made by another *firm* (IA/BD) on behalf of an individual that is also registered with that other *firm* (IA/BD).

15C. TEMPORARY REGISTRATION ACKNOWLEDGMENT

If an *applicant* has been registered in a *jurisdiction* or self regulatory organization (SRO) in the 30 days prior to the date an application for registration is filed with the Central Registration Depository or Investment Adviser Registration Depository, he or she may qualify for a Temporary Registration to conduct securities business in that *jurisdiction* or SRO if this acknowledgment is executed and filed with the Form U4 at the *applicant's firm*.

This acknowledgment must be signed only if the *applicant* intends to apply for a Temporary Registration while the application for registration is under review.

I request a Temporary Registration in each *jurisdiction* and/or SRO requested on this Form U4, while my registration with the *jurisdiction*(s) and/or SRO(s) requested is under review;

I am requesting a Temporary Registration with the *firm* filing on my behalf for the *jurisdiction*(s) and/or SRO(s) noted in Section 4 (SRO REGISTRATION) and/or Section 5 (JURISDICTION REGISTRATION) of this Form U4;

I understand that I may request a Temporary Registration only in those *jurisdiction*(s) and/or SRO(s) in which I have been registered with my prior *firm* within the previous 30 days;

I understand that I may not engage in any securities activities requiring registration in a *jurisdiction* and/or SRO until I have received notice from the CRD or IARD that I have been granted a Temporary Registration in that *jurisdiction* and/or SRO;

I agree that until the Temporary Registration has been replaced by a registration, any *jurisdiction* and/or SRO in which I have applied for registration may withdraw the Temporary Registration;

If a *jurisdiction* or SRO withdraws my Temporary Registration, my application will then be held pending in that *jurisdiction* and/or SRO until its review is complete and the registration is granted or denied, or the application is withdrawn;

I understand and agree that, in the event my Temporary Registration is withdrawn by a *jurisdiction* and/or SRO, I must immediately cease any securities activities requiring a registration in that *jurisdiction* and/or SRO until it grants my registration;

I understand that by executing this Acknowledgment I am agreeing not to challenge the withdrawal of a Temporary Registration; however, I do not waive any right I may have in any *jurisdiction* and/or SRO with respect to any decision by that *jurisdiction* and/or SRO to deny my application for registration.

Date (MM/DD/YYYY) **Signature of *Applicant***

Signature _____

15D. AMENDMENT INDIVIDUAL/*APPLICANT*'S ACKNOWLEDGMENT AND CONSENT

Date (MM/DD/YYYY) **Signature of *Applicant***

Signature _____

15E. *FIRM/APPROPRIATE SIGNATORY* AMENDMENT REPRESENTATIONS

Date (MM/DD/YYYY) **Signature of *Appropriate Signatory***

01/08/2014 DINESH UDBALE

Signature _____

Bankruptcy / SIPC / Compromise with Creditors

No Information Filed

Bond DRP

No Information Filed

Civil Judicial DRP

No Information Filed

Criminal DRP

No Information Filed

Customer Complaint DRP

No Information Filed

Investigation DRP

No Information Filed

Judgment Lien DRP

No Information Filed

Regulatory Action DRP

No Information Filed

Termination DRP

No Information Filed

© 2017 FINRA. All rights reserved. FINRA is a registered trademark of the Financial Industry Regulatory Authority, Inc.
Privacy | Legal | Terms & Conditions

EXHIBIT 3

FINRA

Print

1010. Electronic Filing Requirements for Uniform Forms

(a) Filing Requirement

Except as provided in NASD Rule 1013(a)(2), all forms required to be filed by Article IV, Sections 1, 7, and 8, and Article V, Sections 2 and 3, of the FINRA By-Laws shall be filed through an electronic process or such other process FINRA may prescribe to the Central Registration Depository.

(b) Supervisory Requirements

(1) In order to comply with the supervisory procedures requirement in Rule 3110, each member shall identify a registered principal(s) or corporate officer(s) who has a position of authority over registration functions, to be responsible for supervising the electronic filing of appropriate forms pursuant to this Rule.

(2) The registered principal(s) or corporate officer(s) who has or have the responsibility to review and approve the forms filed pursuant to this Rule shall be required to acknowledge, electronically, that he is filing this information on behalf of the member and the member's associated persons.

(c) Form U4 Filing Requirements

(1) Except as provided in paragraphs (c)(2) and (c)(3) below, every initial and transfer electronic Form U4 filing and any amendments to the disclosure information on Form U4 shall be based on a manually signed Form U4 provided to the member or applicant for membership by the person on whose behalf the Form U4 is being filed. As part of the member's recordkeeping requirements, it shall retain the person's manually signed Form U4 or amendments to the disclosure information on Form U4 in accordance with SEA Rule 17a-4(e)(1) and make them available promptly upon regulatory request. An applicant for membership also shall retain in accordance with SEA Rule 17a-4(e)(1) every manually signed Form U4 it receives during the application process and make them available promptly upon regulatory request.

(2) A member may file electronically amendments to the disclosure information on Form U4 without obtaining the subject associated person's manual signature on the form, provided that the member shall use reasonable efforts to:

(A) provide the associated person with a copy of the amended disclosure information prior to filing; and

(B) obtain the associated person's written acknowledgment (which may be electronic) prior to filing that the information has been received and reviewed. As part of the member's recordkeeping requirements, the member shall retain this acknowledgment in accordance with SEA Rule 17a-4(e)(1) and make it available promptly upon regulatory request.

(3) In the event a member is not able to obtain an associated person's manual signature or written acknowledgement of amended disclosure information on Form U4 prior to filing of such information pursuant to paragraph (c)(1) or (2), the member is obligated to file the disclosure information as to which it has knowledge in accordance with Article V, Section 2 of the FINRA By-Laws. The member shall use reasonable efforts to provide the associated person with a copy of the amended disclosure information that was filed.

(4) A member may file electronically amendments to administrative data on Form U4 without obtaining the subject associated person's signature on the form. The member shall use reasonable efforts to provide the associated person with a copy of the amended administrative information that was filed.

(d) Fingerprint Information

Upon filing an electronic Form U4 on behalf of a person applying for registration, a member shall promptly submit fingerprint information for that person. FINRA may make a registration effective pending receipt of the fingerprint information. If a member fails to submit the fingerprint information within 30 days after FINRA receives the electronic Form U4, the person's registration shall be deemed inactive. In such case, FINRA shall notify the member that the person must immediately cease all activities requiring registration and is prohibited from performing any duties and functioning in any capacity requiring registration. FINRA shall administratively terminate a registration that is inactive for a period of two years. A person whose registration is administratively terminated may reactivate the registration only by reapplying for registration

and meeting the qualification requirements of the applicable provisions of the NASD Rule 1020 Series and the NASD Rule 1030 Series. Upon application and a showing of good cause, FINRA may extend the 30-day period.

(e) Form U5 Filing Requirements

Initial filings and amendments of Form U5 shall be submitted electronically. As part of the member's recordkeeping requirements, it shall retain such records for a period of not less than three years, the first two years in an easily accessible place, in accordance with SEA Rule 17a-4, and make such records available promptly upon regulatory request.

• • • Supplementary Material: ----------

.01 Delegation of Electronic Filing Functions. The designated registered principal(s) or corporate officer(s) required by paragraph (b)(1) to supervise the member's electronic filings may delegate to an associated person (who need not be registered) the electronic filing of the member's appropriate forms via Web CRD. The registered principal(s) or corporate officer(s) responsible for supervising the member's electronic filings may also delegate to the associated person making the electronic filings the requirement in paragraph (b)(2) to acknowledge, electronically, that he is making the filing on behalf of the member and the member's associated persons. However, the registered principal(s) or corporate officer(s) may not delegate any of the supervision, review, and approval responsibilities mandated in paragraphs (b)(1) and (2) and shall take reasonable and appropriate action to ensure that all delegated electronic filing functions are properly executed and supervised.

.02 Third-Party Agreements. A member may enter into an agreement with a third party pursuant to which the third party agrees to file the required forms electronically on behalf of the member and the member's associated persons. Notwithstanding the existence of such an agreement, the member remains responsible for complying with the requirements of this Rule.

.03 Filing of Amendments Involving Disclosure Information. In the event a member is not able to obtain an associated person's manual signature or written acknowledgement of amended disclosure information on that person's Form U4 prior to filing of such amendment reflecting the information pursuant to paragraph (c)(3) (examples of reasons why a member may not be able to obtain the manual signature or written acknowledgement may include, but are not limited to, the associated person refuses to acknowledge such information, is on active military service or otherwise is unavailable during the period provided for filing of such amendments under Article V of the FINRA By-Laws), the member shall enter "Representative Refused to Sign/Acknowledge" or "Representative Not Available" or a substantially similar entry in the electronic Form U4 field for the associated person's signature.

.04 Filing of Amendments Involving Administrative Information. For purposes of paragraph (c)(4) of the Rule, administrative data includes such items as the addition of state or self-regulatory organization registrations, exam scheduling, and updates to residential, business and personal history.

Amended by SR-FINRA-2014-045 eff. Dec. 1, 2014.
Amended by SR-FINRA-2009-019 eff. July 27, 2009.
Amended by SR-NASD-2003-136 eff. Aug. 28, 2003.
Amended by SR-NASD-99-67 eff. Nov. 15, 2000.
Amended and implemented by SR-NASD-99-28 eff. Aug. 16, 1999.
Adopted by SR-NASD-96-21 on July 15, 1996.

Selected Notices: 99-56, 99-63, 00-73, 09-40.

© FINRA. All rights reserved.

FINRA

Print

6810. Definitions

For purposes of the Rule 6800 Series:

(a) "Account Effective Date" means:

(1) with regard to those circumstances in which an Industry Member has established a trading relationship with an institution but has not established an account with that institution:

(A) when the trading relationship was established prior to November 15, 2018 for Industry Members other than Small Industry Members, or prior to November 15, 2019 for Small Industry Members, either

(i) the date the relationship identifier was established within the Industry Member;

(ii) the date when trading began (i.e., the date the first order was received) using the relevant relationship identifier; or

(iii) if both dates are available, the earlier date will be used to the extent that the dates differ; or

(B) when the trading relationship was established on or after November 15, 2018 for Industry Members other than Small Industry Members, or on or after November 15, 2019 for Small Industry Members, the date the Industry Member established the relationship identifier, which would be no later than the date the first order was received;

(2) where an Industry Member changes back office providers or clearing firms prior to November 15, 2018 for Industry Members other than Small Industry Members, or prior to November 15, 2019 for Small Industry Members, the date an account was established at the relevant Industry Member, either directly or via transfer;

(3) where an Industry Member acquires another Industry Member prior to November 15, 2018 for Industry Members other than Small Industry Members, or prior to November 15, 2019 for Small Industry Members, the date an account was established at the relevant Industry Member, either directly or via transfer;

(4) where there are multiple dates associated with an account established prior to November 15, 2018 for Industry Members other than Small Industry Members, or prior to November 15, 2019 for Small Industry Members, the earliest available date;

(5) with regard to Industry Member proprietary accounts established prior to November 15, 2018 for Industry Members other than Small Industry Members, or prior to November 15, 2019 for Small Industry Members:

(A) the date established for the account in the Industry Member or in a system of the Industry Member or

(B) the date when proprietary trading began in the account (i.e., the date on which the first orders were submitted from the account).

With regard to paragraph (a)(2) — (5), the Account Effective Date will be no later than the date trading occurs at the Industry Member or in the Industry Member's system.

(b) "Active Accounts" means an account that has had activity in Eligible Securities within the last six months.

(c) "Allocation Report" means a report made to the Central Repository by an Industry Member that identifies the Firm Designated ID for any account(s), including subaccount(s), to which executed shares are allocated and provides the security that has been allocated, the identifier of the firm reporting the allocation, the price per share of shares allocated, the side of shares allocated, the number of shares allocated to each account, and the time of the allocation; provided, for the avoidance of doubt, any such Allocation Report shall not be required to be linked to particular orders or executions.

(d) "Business Clock" means a clock used to record the date and time of any Reportable Event required to be reported under this Rule Series.

(e) "CAT" means the consolidated audit trail contemplated by Rule 613 of SEC Regulation NMS.

(f) "CAT NMS Plan" means the National Market System Plan Governing the Consolidated Audit Trail, as amended from time to time.

(g) "CAT-Order-ID" means a unique order identifier or series of unique order identifiers that allows the Central Repository to efficiently and accurately link all Reportable Events for an order, and all orders that result from the aggregation or disaggregation of such order.

(h) "CAT Reporting Agent" means a Data Submitter that is a third party that enters into an agreement with an Industry Member pursuant to which the CAT Reporting Agent agrees to fulfill such Industry Member's reporting obligations under this Rule Series.

(i) "Central Repository" means the repository responsible for the receipt, consolidation, and retention of all information reported to the CAT pursuant to Rule 613 of SEC Regulation NMS and the CAT NMS Plan.

(j) "Compliance Threshold" has the meaning set forth in Rule 6893(d).

(k) "Customer" means:

(1) the account holder(s) of the account at an Industry Member originating the order; and

(2) any person from whom the Industry Member is authorized to accept trading instructions for such account, if different from the account holder(s).

(l) "Customer Account Information" shall include, but not be limited to, account number, account type, customer type, date account opened, and large trader identifier (if applicable); except, however, that:

(1) in those circumstances in which an Industry Member has established a trading relationship with an institution but has not established an account with that institution, the Industry Member will:

(A) provide the Account Effective Date in lieu of the "date account opened";

(B) provide the relationship identifier in lieu of the "account number"; and

(C) identify the "account type" as a "relationship";

(2) in those circumstances in which the relevant account was established prior to November 15, 2018 for Industry Members other than Small Industry Members, or prior to November 15, 2019 for Small Industry Members, and no "date account opened" is available for the account, the Industry Member will provide the Account Effective Date in the following circumstances:

(A) where an Industry Member changes back office providers or clearing firms and the date account opened is changed to the date the account was opened on the new back office/clearing firm system;

(B) where an Industry Member acquires another Industry Member and the date account opened is changed to the date the account was opened on the post-merger back office/clearing firm system;

(C) where there are multiple dates associated with an account in an Industry Member's system, and the parameters of each date are determined by the individual Industry Member; and

(D) where the relevant account is an Industry Member proprietary account.

(m) "Customer Identifying Information" means information of sufficient detail to identify a Customer, including, but not limited to:

(1) with respect to individuals: name, address, date of birth, individual tax payer identification number ("ITIN")/social security number ("SSN"), individual's role in the account (*e.g.*, primary holder, joint holder, guardian, trustee, person with the power of attorney); and

(2) with respect to legal entities: name, address, Employer Identification Number ("EIN")/Legal Entity Identifier ("LEI") or other comparable common entity identifier, if applicable; provided, however, that an Industry Member that has an LEI for a Customer must submit the Customer's LEI in addition to other information of sufficient detail to identify a Customer.

(n) "Data Submitter" means any person that reports data to the Central Repository, including national securities exchanges, national securities associations, broker-dealers, the SIPs for the CQS, CTA, UTP and Plan for Reporting of Consolidated Options Last Sale Reports and Quotation Information ("OPRA") Plans, and certain other vendors or third parties that may submit data to the Central Repository on behalf of Industry Members.

(o) "Eligible Security" includes (1) all NMS Securities and (2) all OTC Equity Securities.

(p) "Error Rate" means the percentage of Reportable Events collected by the Central Repository in which the data reported does not fully and accurately reflect the order event that occurred in the market.

(q) "Firm Designated ID" means a unique identifier for each trading account designated by Industry Members for purposes of providing data to the Central Repository, where each such identifier is unique among all identifiers from any given Industry Member for each business date.

(r) "Industry Member" means a member of a national securities exchange or a member of a national securities association that is required to record and report information pursuant to the CAT NMS Plan and this Rule 6800 Series.

(s) "Industry Member Data" has the meaning set forth in Rule 6830(a)(2).

(t) "Initial Plan Processor" means the first Plan Processor selected by the Operating Committee in accordance with Rule 613 of Regulation NMS and Section 6.1 of the CAT NMS Plan.

(u) "Listed Option" or "Option" have the meaning set forth in Rule 600(b)(35) of Regulation NMS.

(v) "Manual Order Event" means a non-electronic communication of orderrelated information for which Industry Members must record and report the time of the event.

(w) "Material Terms of the Order" includes: the NMS Security or OTC Equity Security symbol; security type; price (if applicable); size (displayed and non-displayed); side (buy/sell); order type; if a sell order, whether the order is long, short, short exempt; open/close indicator (except on transactions in equities); time in force (if applicable); if the order is for a Listed Option, option type (put/call), option symbol or root symbol, underlying symbol, strike price, expiration date, and open/close (except on market maker quotations); and any special handling instructions.

(x) "NMS Security" means any security or class of securities for which transaction reports are collected, processed, and made available pursuant to an effective transaction reporting plan, or an effective national market system plan for reporting transactions in Listed Options.

(y) "NMS Stock" means any NMS Security other than an option.

(z) "Operating Committee" means the governing body of the CAT NMS, LLC designated as such and described in Article IV of the CAT NMS Plan.

(aa) "Options Market Maker" means a broker-dealer registered with an exchange for the purpose of making markets in options contracts traded on the exchange.

(bb) "Order" or "order", with respect to Eligible Securities, shall include:

(1) Any order received by an Industry Member from any person;

(2) Any order originated by an Industry Member; or

(3) Any bid or offer.

(cc) "OTC Equity Security" means any equity security, other than an NMS Security, subject to prompt last sale reporting rules of a registered national securities association and reported to one of such association's equity trade reporting facilities.

(dd) "Participant" means each Person identified as such in Exhibit A of the CAT NMS Plan, as amended, in such Person's capacity as a Participant in CAT NMS, LLC.

(ee) "Person" means any individual, partnership, limited liability company, corporation, joint venture, trust, business trust, cooperative or association and any heirs, executors, administrators, legal representatives, successors and assigns of such Person where the context so permits.

(ff) "Plan Processor" means the Initial Plan Processor or any other Person selected by the Operating Committee pursuant to Rule 613 of SEC Regulation NMS and Sections 4.3(b)(i) and 6.1 of the CAT NMS Plan to perform the CAT processing functions required by Rule 613 of SEC Regulation NMS and set forth in the CAT NMS Plan.

(gg) "Received Industry Member Data" has the meaning set forth in Rule 6830(a)(2).

(hh) "Recorded Industry Member Data" has the meaning set forth in Rule 6830(a)(1).

(ii) "Reportable Event" includes, but is not limited to, the original receipt or origination, modification, cancellation, routing, execution (in whole or in part) and allocation of an order, and receipt of a routed order.

(jj) "SRO" means any self-regulatory organization within the meaning of Section 3(a)(26) of the Exchange Act.

(kk) "SRO-Assigned Market Participant Identifier" means an identifier assigned to an Industry Member by an SRO or an identifier used by a Participant.

(ll) "Small Industry Member" means an Industry Member that qualifies as a small broker-dealer as defined in SEA Rule 0-10(c).

(mm) "Trading Day" shall have the meaning as is determined by the Operating Committee. For the avoidance of doubt, the Operating Committee may establish different Trading Days for NMS Stocks (as defined in Rule 600(b)(47) of SEC Regulation NMS), Listed Options, OTC Equity Securities, and any other securities that are included as Eligible Securities from time to time.

Adopted by SR-FINRA-2017-003 eff. March 15, 2017.

© FINRA. All rights reserved.

FINRA

Text only | Print

13000. CODE OF ARBITRATION PROCEDURE FOR INDUSTRY DISPUTES

The Industry Code applies to claims filed on or after April 16, 2007. In addition, the list selection provisions of the Industry Code apply to previously filed claims in which a list of arbitrators must be generated after April 16, 2007; in these cases, however, the claim will continue to be governed by the remaining provisions of the old Code unless all parties agree to proceed under the new code.

PART I INTERPRETIVE MATERIAL, DEFINITIONS, ORGANIZATION AND AUTHORITY

IM-13000. Failure to Act Under Provisions of Code of Arbitration Procedure for Industry Disputes

It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010 for a member or a person associated with a member to:

(a) fail to submit a dispute for arbitration under the Code as required by the Code;

(b) fail to comply with any injunctive order issued pursuant to the Code;

(c) fail to appear or to produce any document in his possession or control as directed pursuant to provisions of the Code;

(d) fail to honor an award, or comply with a written and executed settlement agreement, obtained in connection with an arbitration submitted for disposition pursuant to the rules applicable to the arbitration of disputes before FINRA or other dispute resolution forum selected by the parties where timely motion has not been made to vacate or modify such award pursuant to applicable law; or

(e) fail to comply with a written and executed settlement agreement, obtained in connection with a mediation submitted for disposition pursuant to the procedures specified by FINRA.

All awards shall be honored by a cash payment to the prevailing party of the exact dollar amount stated in the award. Awards may not be honored by crediting the prevailing party's account with the dollar amount of the award, unless authorized by the express terms of the award or consented to in writing by the parties. Awards shall be honored upon receipt thereof, or within such other time period as may be prescribed by the award.

It may be deemed conduct inconsistent with just and equitable principles of trade and a violation of Rule 2010 for a member to require associated persons to waive the arbitration of disputes contrary to the provisions of the Code of Arbitration Procedure.

Amended by SR-FINRA-2008-057 eff. Dec. 15, 2008.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Amended by SR-NASD-2007-026 eff. April 16, 2007.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notice: 07-07, 08-57.

13100. Definitions

Unless otherwise defined in the Code, terms used in the Code and interpretive material, if defined in the FINRA By-Laws, shall have the meaning as defined in the FINRA By-Laws.

(a) Arbitrator and Mediator Portal

The term "Arbitrator and Mediator Portal" means the web-based system that allows invited arbitrators and mediators to access a secure section of FINRA's website to submit documents and information and view their arbitration and mediation case information and documents.

(b) Associated Person

The term "associated person" or "associated person of a member" means a person associated with a member, as that term is defined in paragraph (u).

(c) Award

An award is a document stating the disposition of a case.

(d) Board

The term "Board" means the Board of Directors of FINRA Regulation.

(e) Claim

The term "claim" means an allegation or request for relief.

(f) Claim Notification Letter

The term "Claim Notification Letter" means notice provided by the Director to respondent(s) that they have been named as a party in a statement of claim. The notice will provide information about accessing the Party Portal to obtain a copy of the statement of claim filed by the claimant(s) and information about the arbitration, including the hearing location selected by the Director and the deadline for filing a statement of answer.

(g) Claimant

The term "claimant" means a party that files the statement of claim that initiates an arbitration under Rule 13302.

(h) Code

The term "Code" means the Code of Arbitration Procedure for Industry Disputes. For disputes involving customers, see the FINRA Code of Arbitration Procedure for Customer Disputes.

(i) Counterclaim

The term "counterclaim" means a claim asserted against a claimant by a respondent.

(j) Cross Claim

The term "cross claim" means a claim asserted by a respondent against another already-named respondent.

(k) Customer

A customer shall not include a broker or dealer.

(l) Day

Except as otherwise provided, the term "day" means calendar day. If a deadline specified in the Code falls on a Saturday, Sunday or any FINRA holiday, the deadline is extended until the next business day. If a party receives pleadings or other documents on a Saturday, Sunday or any FINRA holiday, the date of receipt shall be the next business day.

(m) Director

The term "Director" means the Director of the Office of Dispute Resolution. Unless the Code provides that the Director may not delegate a specific function, the term includes FINRA staff to whom the Director has delegated authority.

(n) Dispute

The term "dispute" means a dispute, claim or controversy. A dispute may consist of one or more claims.

(o) Hearing

The term "hearing" means the hearing on the merits of an arbitration under Rule 13600.

(p) Hearing Session

The term "hearing session" means any meeting between the parties and arbitrator(s) of four hours or less, including a hearing or a prehearing conference.

(q) Member

For purposes of the Code, the term "member" means any broker or dealer admitted to membership in FINRA, whether or not the membership has been terminated or cancelled; and any broker or dealer admitted to membership in a self-regulatory organization that, with FINRA consent, has required its members to arbitrate pursuant to the Code and/or to be treated as members of FINRA for purposes of the Code, whether or not the membership has been terminated or cancelled.

(r) Non-Public Arbitrator

The term "non-public arbitrator" means a person who is otherwise qualified to serve as an arbitrator, and meets any of the following criteria:

(1) is, or was, associated with, including registered through, under, or with (as applicable):

(A) a broker or a dealer (including a government securities broker or dealer or a municipal securities broker or dealer); or

(B) the Commodity Exchange Act or the Commodities Future Trading Commission, or a member of the National Futures Association or the Municipal Securities Rulemaking Board; or

(C) an entity that is organized under or registered pursuant to the Securities Exchange Act of 1934, Investment Company Act of 1940, or the Investment Advisers Act of 1940; or

(D) a mutual fund or a hedge fund; or

(E) an investment adviser;

(2) is an attorney, accountant, or other professional who has, within the past five years, devoted 20 percent or more of his or her professional time, in any single calendar year, to any entities listed in paragraph (r)(1) and/or to any persons or entities associated with any of the entities listed in paragraph (r)(1); or

(3) is an attorney, accountant, expert witness or other professional who has, within the past five years, devoted 20 percent or more of his or her professional time, in any single calendar year, to representing or providing services to parties in disputes concerning investment accounts or transactions, or employment relationships within the financial industry; or

(4) is, or within the past five years was, an employee of a bank or other financial institution who effects transactions in securities, including government or municipal securities, commodities, futures, or options or supervises or monitors the compliance with the securities and commodities laws of employees who engage in such activities.

For purposes of the non-public arbitrator definition, the term "professional time" shall not include mediation services performed by mediators who are also arbitrators, provided that the mediator acts in the capacity of a mediator and does not represent a party in the mediation.

(s) Panel

The term "panel" means the arbitration panel, whether it consists of one or more arbitrators.

(t) Party Portal

The term "Party Portal" means the web-based system that is accessible by arbitration and mediation parties and their representatives. The Party Portal allows invited participants to access a secure section of FINRA's website to submit documents and view their arbitration and mediation case information and documents.

(u) Person Associated with a Member

The term "person associated with a member" means:

(1) A natural person who is registered or has applied for registration under the Rules of FINRA; or

(2) A sole proprietor, partner, officer, director, or branch manager of a member, or other natural person occupying a similar status or performing similar functions, or a natural person engaged in the investment banking or securities business who is directly or indirectly controlling or controlled by a member, whether or not any such person is registered or exempt from registration with FINRA under the By-Laws or the Rules of FINRA.

For purposes of the Code, a person formerly associated with a member is a person associated with a member.

(v) Pleadings

A pleading is a statement describing a party's causes of action or defenses. Documents that are considered pleadings are: a statement of claim, an answer, a counterclaim, a cross claim, a third party claim, and any replies.

(w) Prehearing Conference

The term "prehearing conference" means any hearing session, including an Initial Prehearing Conference, that takes place before the hearing on the merits begins.

(x) Public Arbitrator

The term "public arbitrator" means a person who is otherwise qualified to serve as an arbitrator, and is not disqualified from service as an arbitrator, as enumerated by any of the criteria below.

Permanent Disqualifications Based on a Person's Own Activities

(1) A person shall not be designated as a public arbitrator who is, or was, associated with, including registered through, under, or with (as applicable):

(A) a broker or a dealer (including a government securities broker or dealer or a municipal securities broker or dealer); or

(B) the Commodity Exchange Act or the Commodities Future Trading Commission, or a member of the National Futures Association or the Municipal Securities Rulemaking Board; or

(C) an entity that is organized under or registered pursuant to the Securities Exchange Act of 1934, Investment Company Act of 1940, or the Investment Advisers Act of 1940; or

(D) a mutual fund or a hedge fund; or

(E) an investment adviser.

(2) A person shall not be designated as a public arbitrator, who was, for a total of 15 years or more, an attorney, accountant, or other professional who has devoted 20 percent or more of his or her professional time annually, to any entities listed in paragraph (x)(1) and/or to any persons or entities associated with any of the entities listed in paragraph (x)(1).

(3) A person shall not be designated as a public arbitrator, who was, for a total of 15 years or more, an attorney, accountant, expert witness or other professional who has devoted 20 percent or more of his or her professional time annually to representing or providing services to parties in disputes concerning investment accounts or transactions, or employment relationships within the financial industry.

(4) A person shall not be designated as a public arbitrator, who was, for a total of 15 years or more, an employee of a bank or other financial institution who effects transactions in securities, including government or municipal securities, commodities, futures, or options or supervises or monitors the compliance with the securities and commodities laws of employees who engage in such activities.

Temporary Disqualifications Based on a Person's Own Activities

(5) A person shall not be designated as a public arbitrator who is employed by, or is a director or officer of, an entity that directly or indirectly controls, is controlled by, or is under common control with, any partnership, corporation, or other organization that is engaged in the financial industry unless the affiliation ended more than five calendar years ago.

(6) A person shall not be designated as a public arbitrator who is an attorney, accountant, or other professional who has devoted 20 percent or more of his or her professional time, in any single calendar year, to any entities listed in paragraph (x)(1) and/or to any persons or entities associated with any of the entities listed in paragraph (x)(1) unless the calendar year ended more than five calendar years ago.

(7) A person shall not be designated as a public arbitrator who is an attorney, accountant, expert witness or other professional who has devoted 20 percent or more of his or her professional time, in any single calendar year, to representing or providing services to parties in disputes concerning investment accounts or transactions, or employment relationships within the financial industry unless the calendar year ended more than five calendar years ago.

(8) A person shall not be designated as a public arbitrator if the person is an employee of a bank or other financial institution and the person effects transactions in securities, including government or municipal securities, commodities, futures, or options or supervises or monitors the compliance with the securities and commodities laws of employees who engage in such activities unless the affiliation ended more than five calendar years ago.

Temporary Disqualifications Based on the Activities of Others at a Person's Employer

(9) A person shall not be designated as a public arbitrator who is an attorney, accountant, or other professional whose firm derived $50,000 or more, or at least 10 percent of its annual revenue, in any single calendar year during the course of the past two calendar years, from any entities listed in paragraph (x)(1) and/or to any persons or entities associated with any of the entities listed in paragraph (x)(1), or from a bank or other financial institution where persons effect transactions in securities including government or municipal securities, commodities, futures, or options. A person whom FINRA would not designate as a public arbitrator under this subparagraph shall also not be designated as a public arbitrator for two calendar years after ending employment at the firm.

(10) A person shall not be designated as a public arbitrator, who is an attorney, accountant, or other professional whose firm derived $50,000 or more, or at least 10 percent of its annual revenue, in any single calendar year during the course of the past two calendar years, from individual and/or institutional investors relating to securities matters. A person whom FINRA would not designate as a public arbitrator under this subparagraph shall also not be designated as a public arbitrator for two calendar years after ending employment at the firm.

Temporary Disqualification Based on the Financial Industry Affiliation of an Immediate Family Member

(11) A person shall not be designated as a public arbitrator if his or her immediate family member is an individual whom FINRA would disqualify from serving on the public arbitrator roster. If the person's immediate family member ends the disqualifying affiliation, or the person ends the relationship with the individual so that the individual is no longer the person's immediate family member, the person may, after two calendar years have passed from the end of the affiliation or relationship, be designated as a public arbitrator.

For purposes of this rule, the term immediate family member means:

(A) a person's spouse, partner in a civil union, domestic partner, parent, stepparent, child, or stepchild;

(B) a member of a person's household;

(C) an individual to whom a person provides financial support of more than 50 percent of his or her annual income; or

(D) a person who is claimed as a dependent for federal income tax purposes.

For purposes of the public arbitrator definition, the term "revenue" shall not include mediation fees received by mediators who are also arbitrators, provided that the mediator acts in the capacity of a mediator and does not represent a party in the mediation.

(y) Related Claim

For purposes of Rule 13803, the term "related claim" means any claim that arises out of the employment or termination of employment of an associated person.

(z) Respondent

The term "respondent" means a party against whom a statement of claim or third party claim has been filed. A claimant against whom a counterclaim has been filed is not a respondent for purposes of the Code.

(aa) Statement of Claim

The term "statement of claim" means the initial or amended claim filed by the party or parties initiating the arbitration.

(bb) Statutory Employment Discrimination Claim

The term "statutory employment discrimination claim" means a claim alleging employment discrimination, including a sexual harassment claim, in violation of a statute.

(cc) Submission Agreement

The term "Submission Agreement" means the FINRA Submission Agreement. The FINRA Submission Agreement is a document that parties must sign at the outset of an arbitration in which they agree to submit to arbitration under the Code.

(dd) Temporary Injunctive Order

The term "temporary injunctive order" means a temporary restraining order, preliminary injunction or other form of initial, temporary injunctive relief.

(ee) Third Party Claim

The term "third party claim" means a claim asserted against a party not already named in the statement of claim or any other previous pleading.

Amended by SR-FINRA-2016-029 eff. April 3, 2017.
Amended by SR-FINRA-2015-034 eff. Dec. 20, 2015.
Amended by SR-FINRA-2014-028 eff. June 26, 2015.
Amended by SR-FINRA-2013-003 eff. July 1, 2013.
Amended by SR-FINRA-2009-041 eff. Jan. 18, 2010.
Amended by SR-FINRA-2008-031 eff. Feb. 9, 2009.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Amended by SR-NASD-2007-021 eff. June 9, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices to Member: 07-07, 08-22, 08-57, 09-04, 09-74, 13-21, 15-18, 16-04, 17-03.

13101. Applicability of Code and Incorporation by Reference

(a) Applicability of Code

The Code applies to any dispute that is submitted to arbitration under the Code pursuant to Rules 13200, 13201, or 13202.

(b) Incorporation by Reference

When a dispute is submitted to arbitration under the Code pursuant to an arbitration agreement, the Code is incorporated by reference into the agreement.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57.

13102. National Arbitration and Mediation Committee

(a) Pursuant to Section II of the Plan of Allocation and Delegation of Functions by FINRA to FINRA Regulation, Inc. ("Delegation Plan"), the Board shall appoint a National Arbitration and Mediation Committee ("NAMC").

(1) The NAMC shall consist of no fewer than 10 and no more than 25 members. At least 50 percent of the NAMC shall be Non-Industry members.

(2) The Chairperson of the Board shall name the chairperson of the NAMC.

(b) Pursuant to the Delegation Plan, the NAMC shall have the authority to recommend rules, regulations, procedures and amendments relating to arbitration, mediation, and other dispute resolution matters to the Board. The NAMC shall also establish and maintain rosters of neutrals composed of persons from within and outside of the securities industry. All matters recommended by the NAMC to the Board must have been approved by a quorum, which shall consist of a majority of the NAMC, including at least 50 percent of the Non-Industry committee members. If at least 50 percent of the Non-Industry committee members are either (i) present at or (ii) have filed a waiver of attendance for a meeting after receiving an agenda prior to such meeting, the requirement that at least 50 percent of the Non-Industry committee members be present to constitute the quorum shall be waived. The NAMC has such other power and authority as is necessary to carry out the purposes of the Code.

(c) The NAMC may meet as frequently as necessary, but must meet at least once a year.

Amended by SR-FINRA-2015-034 eff. Dec. 20, 2015.
Amended by SR-FINRA-2009-003 eff. Jan. 8, 2009.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Amended by SR-NASD-2007-026 eff. April 16, 2007.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notice: 07-07, 08-57, 16-04.

13103. Director of the Office of Dispute Resolution

(a) The Board shall appoint a Director of the Office of Dispute Resolution. The Director shall perform all the administrative duties relating to arbitrations submitted under the Code. The Director may delegate his or her duties when it is appropriate, unless the Code provides otherwise.

(b) The Director shall consult with the NAMC at the NAMC's request.

(c) If the Director is unable to perform his or her duties, the President of FINRA Regulation may appoint an interim Director.

Amended by SR-FINRA-2015-034 eff. Dec. 20, 2015.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57, 16-04.

13104. Effect of Arbitration on FINRA Regulatory Activities; Arbitrator Referral During or at Conclusion of Case

(a) Submitting a dispute to arbitration under the Code does not limit or preclude any right, action or determination by FINRA that it would otherwise be authorized to adopt, administer or enforce.

(b) During the pendency of an arbitration, any arbitrator may refer to the Director any matter or conduct that has come to the arbitrator's attention during a hearing, which the arbitrator has reason to believe poses a serious threat, whether ongoing or imminent, that is likely to harm investors unless immediate action is taken. Arbitrators should not make referrals during the pendency of an arbitration based solely on allegations in the statement of claim, counterclaim, cross claim, or third party claim. If a case is nearing completion, the arbitrator should wait until the case concludes to make the referral if, in the arbitrator's judgment, investor protection will not be materially compromised by this delay.

(c) If any arbitrator refers a matter or conduct for investigation under paragraph (b) of this rule, the Director will disclose the act of making the referral to the parties. A party may request that the referring arbitrator(s) recuse themselves, as provided in the Code, no later than three days after the Director notifies the parties of the referral. If a party does not make the recusal request within the prescribed timeframe, the party forfeits the right to request recusal of the referring arbitrator(s).

(d) The Director will evaluate the arbitrator referral to determine whether to transmit it to other divisions of FINRA. Only the Director shall have the authority to act under this paragraph (d).

(e) At the conclusion of an arbitration, any arbitrator may refer to FINRA for investigation any matter or conduct that has come to the arbitrator's attention during and in connection with the arbitration, either from the record of the proceeding or from material or communications related to the arbitration, which the arbitrator has reason to believe may constitute a violation of the rules of FINRA, the federal securities laws, or other applicable rules or laws.

Amended by SR-FINRA-2015-034 eff. Dec. 20, 2015.
Amended by SR-FINRA-2014-045 eff. Dec. 1, 2014.
Amended by SR-FINRA-2014-005 eff. Oct. 27, 2014.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notice: 07-07, 08-57, 14-42, 16-04.

13105. Agreement of the Parties

(a) Except as provided in paragraph (b), if the Code provides that the parties may agree to modify a provision of the Code, or a decision of the Director or the panel, the written agreement of all named parties is required.

(b) If the Director or the panel determines that a named party is inactive in the arbitration, or has failed to respond after adequate notice has been given, the Director or the panel may determine that the written agreement of that party is not required while the party is inactive or not responsive. For purposes of this rule, an inactive party could be, but is not limited to: (1) a party that does not answer; (2) a party that answers and then fails to respond to correspondence sent by the Director; (3) a party that answers and then fails to respond to correspondence sent by the panel in cases involving direct communication under Rule 13211; or (4) a party that does not attend pre-hearing conferences.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57.

PART II GENERAL ARBITRATION RULES

13200. Required Arbitration

(a) Generally

Except as otherwise provided in the Code, a dispute must be arbitrated under the Code if the dispute arises out of the business activities of a member or an associated person and is between or among:

- Members;
- Members and Associated Persons; or
- Associated Persons.

(b) Insurance Activities

Disputes arising out of the insurance business activities of a member that is also an insurance company are not required to be arbitrated under the Code.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notice: 07-07, 08-57.

13201. Statutory Employment Discrimination Claims and Disputes Arising Under a Whistleblower Statute that Prohibits the Use of Predispute Arbitration Agreements

(a) Statutory Employment Discrimination Claims

A claim alleging employment discrimination, including sexual harassment, in violation of a statute, is not required to be arbitrated under the Code. Such a claim may be arbitrated only if the parties have agreed to arbitrate it, either before or after the dispute arose. If the parties agree to arbitrate such a claim, the claim will be administered under Rule 13802.

(b) Disputes Arising Under a Whistleblower Statute that Prohibits the Use of Predispute Arbitration Agreements

A dispute arising under a whistleblower statute that prohibits the use of predispute arbitration agreements is not required to be arbitrated under the Code. Such a dispute may be arbitrated only if the parties have agreed to arbitrate it after the dispute arose.

Amended by SR-FINRA-2011-067 eff. May 21, 2012.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57, 12-21.

13202. Claims Involving Registered Clearing Agencies

If a registered clearing agency has entered into an agreement to use FINRA's arbitration facilities and procedures, any dispute, claim or controversy involving that registered clearing agency, or participants, pledges or other persons using the facilities of the registered clearing agency will be arbitrated in accordance with such agreement and the rules of the registered clearing agency.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notice: 07-07, 08-57.

13203. Denial of FINRA Forum

(a) The Director may decline to permit the use of the FINRA arbitration forum if the Director determines that, given the purposes of FINRA and the intent of the Code, the subject matter of the dispute is inappropriate, or that accepting the matter would pose a risk to the health or safety of arbitrators, staff, or parties or their representatives. Only the Director may exercise the authority under this Rule.

(b) Disputes that arise out of transactions in a readily identifiable market may be referred to the arbitration forum for that market, if the claimant agrees.

Amended by SR-FINRA-2015-034 eff. Dec. 20, 2015.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57, 16-04.

13204. Class Action and Collective Action Claims

(a) Class Actions

(1) Class action claims may not be arbitrated under the Code.

(2) Any claim that is based upon the same facts and law, and involves the same defendants as in a court-certified class action or a putative class action, or that is ordered by a court for class-wide arbitration at a forum not sponsored by a self-regulatory organization, shall not be arbitrated under the Code, unless the party bringing the claim files with FINRA one of the following:

(A) a copy of a notice filed with the court in which the class action is pending that the party will not participate in the class action or in any recovery that may result from the class action, or has withdrawn from the class according to any conditions set by the court; or

(B) a notice that the party will not participate in the class action or in any recovery that may result from the class action.

(3) The Director will refer to a panel any dispute as to whether a claim is part of a class action, unless a party asks the court hearing the class action to resolve the dispute within 10 days of receiving notice that the Director has decided to refer the dispute to a panel.

(4) A member or associated person may not enforce any arbitration agreement against a member of a certified or putative class action with respect to any claim that is the subject of the certified or putative class action until:

- The class certification is denied;
- The class is decertified;
- The member of the certified or putative class is excluded from the class by the court; or
- The member of the certified or putative class elects not to participate in the class or withdraws from the class according to conditions set by the court, if any.

(b) Collective Actions

(1) Collective action claims under the Fair Labor Standards Act, the Age Discrimination in Employment Act, or the Equal Pay Act of 1963 may not be arbitrated under the Code.

(2) Any claim that involves plaintiffs who are similarly-situated against the same defendants as in a court-certified collective action or a putative collective action, or that is ordered by a court for collective action at a forum not sponsored by a self-regulatory organization, shall not be arbitrated under the Code, if the party bringing the claim has opted-in to the collective action.

(3) The Director will refer to a panel any dispute as to whether a claim is part of a collective action, unless a party asks the court or other forum hearing the collective action to resolve the dispute within 10 days of receiving notice that the Director has decided to refer the dispute to a panel.

(4) A member or associated person may not enforce an agreement to arbitrate in this forum against a member of a certified or putative collective action with respect to any claim that is the subject of the certified or putative collective action until the collective action certification is denied or the collective action is decertified.

These subparagraphs do not otherwise affect the enforceability of any rights under the Code or any other agreement.

Amended by SR-FINRA-2012-027 eff. July 9, 2012.
Amended by SR-FINRA-2011-075 eff. July 9, 2012.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57, 12-28.

13205. Shareholder Derivative Actions

Shareholder derivative actions may not be arbitrated under the Code.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57.

13206. Time Limits

(a) Time Limitation on Submission of Claims

No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim. The panel will resolve any questions regarding the eligibility of a claim under this rule.

(b) Dismissal under Rule

Dismissal of a claim under this rule does not prohibit a party from pursuing the claim in court. By filing a motion to dismiss a claim under this rule, the moving party agrees that if the panel dismisses a claim under this rule, the non-moving party may withdraw any remaining related claims without prejudice and may pursue all of the claims in court.

(1) Motions under this rule must be made in writing, and must be filed separately from the answer, and only after the answer is filed.

(2) Unless the parties agree or the panel determines otherwise, parties must serve motions under this rule at least 90 days before a scheduled hearing, and parties have 30 days to respond to the motion. Moving parties may reply to responses to motions. Any such reply must be made within 5 days of receipt of a response.

(3) Motions under this rule will be decided by the full panel.

(4) The panel may not grant a motion under this rule unless an in-person or telephonic prehearing conference on the motion is held or waived by the parties. Prehearing conferences to consider motions under this rule will be recorded as set forth in Rule 13606.

(5) If the panel grants a motion under this rule (in whole or part), the decision must be unanimous, and must be accompanied by a written explanation.

(6) If the panel denies a motion under this rule, a party may not re-file the denied motion, unless specifically permitted by panel order.

(7) If the party moves to dismiss on multiple grounds including eligibility, the panel must decide eligibility first.

- If the panel grants the motion to dismiss the case on eligibility grounds on all claims, it shall not rule on any other grounds for the motion to dismiss.

- If the panel grants the motion to dismiss on eligibility grounds on some, but not all claims, and the party against whom the motion was granted elects to move the case to court, the panel shall not rule on any other ground for dismissal for 15 days from the date of service of the panel's decision to grant the motion to dismiss on eligibility grounds.

- If a panel dismisses any claim on eligibility grounds, the panel must record the dismissal on eligibility grounds on the face of its order and any subsequent award the panel may issue.

- If the panel denies the motion to dismiss on eligibility grounds, it shall rule on the other bases for the motion to dismiss the remaining claims in accordance with the procedures set forth in Rule 13504(a).

(8) If the panel denies a motion under this rule, the panel must assess forum fees associated with hearings on the motion against the moving party.

(9) If the panel deems frivolous a motion filed under this rule, the panel must also award reasonable costs and attorneys' fees to any party that opposed the motion.

(10) The panel also may issue other sanctions under Rule 13212 if it determines that a party filed a motion under this rule in bad faith.

(c) Effect of Rule on Time Limits for Filing Claim in Court

The rule does not extend applicable statutes of limitations; nor shall the six-year time limit on the submission of claims apply to any claim that is directed to arbitration by a court of competent jurisdiction upon request of a member or associated person. However, when a claimant files a statement of claim in arbitration, any time limits for the filing of the claim in court will be tolled while FINRA retains jurisdiction of the claim.

(d) Effect of Filing a Claim in Court on Time Limits for Filing in Arbitration

If a party submits a claim to a court of competent jurisdiction, the six-year time limitation will not run while the court retains jurisdiction of the claim matter.

Amended by SR-FINRA-2011-006 eff. June 6, 2011.
Amended by SR-FINRA-2009-013 eff. Aug. 10, 2009.
Amended by SR-FINRA-2007-021 eff. Feb. 23, 2009.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Amended by SR-NASD-2007-026 eff. April 16, 2007.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57, 09-07, 09-36, 11-23.

13207. Extension of Deadlines

(a) The parties may agree in writing to extend or modify any deadline for:

- Serving an answer;
- Returning arbitrator or chairperson lists;
- Responding to motions; or
- Exchanging documents or witness lists.

If the parties agree to extend or modify a deadline under this rule, they must notify the Director of the new deadline in writing.

(b) The panel may extend or modify any deadline listed in paragraph (a), or any other deadline set by the panel, either on its own initiative or upon motion of a party.

(c) The Director may extend or modify any deadline or time period set by the Code for good cause. The Director may also extend or modify any deadline or time period set by the panel in extraordinary circumstances.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notice: 07-07, 08-57.

13208. Representation of Parties

(a) Representation by a Party

Parties may represent themselves in an arbitration held in a United States hearing location. A member of a partnership may represent the partnership; and a bona fide officer of a corporation, trust, or association may represent the corporation, trust, or association.

(b) Representation by an Attorney

At any stage of an arbitration proceeding held in a United States hearing location, all parties shall have the right to be represented by an attorney at law in good standing and admitted to practice before the Supreme Court of the United States or the highest court of any state of the United States, the District of Columbia, or any commonwealth, territory, or possession of the United States, unless state law prohibits such representation.

(c) Representation by Others

Parties may be represented in an arbitration by a person who is not an attorney, unless:

- state law prohibits such representation, or
- the person is currently suspended or barred from the securities industry in any capacity, or
- the person is currently suspended from the practice of law or disbarred.

(d) Qualifications of Representative

Issues regarding the qualifications of a person to represent a party in arbitration are governed by applicable law and may be determined by an appropriate court or other regulatory agency. In the absence of a court order, the arbitration proceeding shall not be stayed or otherwise delayed pending resolution of such issues.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Amended by SR-NASD-2006-109 eff. Dec. 24, 2007.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 07-57, 08-57.

13209. Legal Proceedings

During an arbitration, no party may bring any suit, legal action, or proceeding against any other party that concerns or that would resolve any of the matters raised in the arbitration.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57.

13210. Ex Parte Communications

(a) Except as provided in Rule 13211, no party, or anyone acting on behalf of a party, may communicate with any arbitrator outside of a scheduled hearing or conference regarding an arbitration unless all parties or their representatives are present.

(b) No party, or anyone acting on behalf of a party, may send or give any written motion, request, submission or other materials directly to any arbitrator, unless the arbitrators and the parties agree, or the Code provides otherwise.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57.

13211. Direct Communication Between Parties and Arbitrators

(a) This rule provides procedures under which parties and arbitrators may communicate directly.

(b) Only parties that are represented by counsel may use direct communication under this rule. If, during the proceeding, a party chooses to appear without counsel, this rule shall no longer apply.

(c) All arbitrators and all parties must agree to the use of direct communication during the Initial Prehearing Conference or a later conference or hearing before it can be used.

(d) Parties may send the arbitrators only items that are listed in an order.

(e) Parties may send items to the arbitrators by first-class mail, overnight mail service, overnight delivery service, hand delivery, email, or facsimile as specified in the Direct Communication Order. All the arbitrators and parties must have facsimile or email capability before such a delivery method may be used.

(f) Copies of all materials sent to arbitrators must also be served on all parties and filed with the Director, pursuant to Rule 13300.

(g) The parties must file with the Director, pursuant to Rule 13300, copies of any orders and decisions made as a result of direct communications among the parties and the arbitrators.

(h) Parties may not communicate orally with any of the arbitrators outside the presence of all parties.

(i) Any party or arbitrator may terminate the direct communication order at any time, after giving written notice to the other arbitrators and the parties.

Amended by SR-FINRA-2016-029 eff. April 3, 2017.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notices: 07-07, 08-57, 17-03.

13212. Sanctions

(a) The panel may sanction a party for failure to comply with any provision in the Code, or any order of the panel or single arbitrator authorized to act on behalf of the panel. Unless prohibited by applicable law, sanctions may include, but are not limited to:

- Assessing monetary penalties payable to one or more parties;
- Precluding a party from presenting evidence;
- Making an adverse inference against a party;
- Assessing postponement and/or forum fees; and
- Assessing attorneys' fees, costs and expenses.

(b) The panel may initiate a disciplinary referral at the conclusion of an arbitration.

(c) The panel may dismiss a claim, defense or arbitration with prejudice as a sanction for material and intentional failure to comply with an order of the panel if prior warnings or sanctions have proven ineffective.

Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notice: 07-07, 08-57.

13213. Hearing Locations

(a) U.S. Hearing Location

(1) The Director will decide which of FINRA's hearing locations will be the hearing location for the arbitration. In cases involving an associated person, the Director will generally select the hearing location closest to where the associated person was employed at the time of the events giving rise to the dispute, unless the hearing location closest to the associated person's employment is in a different state, in which case the associated person may request a hearing location in his or her state of employment at the time of the events giving rise to the dispute. In cases involving members only or more than one associated person, the Director will consider a variety of factors, including:

- The parties' signed agreement to arbitrate, if any;
- Which party initiated the transaction or business in issue; and
- The location of essential witnesses and documents.

(2) Before arbitrator lists are sent to the parties under Rule 13403, the parties may agree in writing to a hearing location other than the one selected by the Director.

(3) The Director may change the hearing location upon motion of a party, as set forth in Rule 13503.

(4) After the panel is appointed, the panel may decide a motion relating to changing the hearing location.

(b) Foreign Hearing Location

(1) If the Director and all parties agree, parties may have their hearing in a foreign hearing location and conducted by foreign arbitrators, provided that the foreign arbitrators have:

(A) met FINRA background qualifications for arbitrators;

(B) received training on FINRA arbitration rules and procedures; and

(C) satisfied at least the same training and testing requirements as those arbitrators who serve in U. S. locations of FINRA.

(2) The parties shall pay an additional surcharge for each day of hearings held in a foreign hearing location. The amount of the surcharge will be determined by the Director and must be agreed to by the parties before the foreign hearing location may be used. This surcharge shall be specified in the agreement to use a foreign hearing location and shall be apportioned equally among the parties, unless they agree otherwise. The foreign arbitrators shall have the authority to apportion this surcharge as provided in Rule 13902(c).

Amended by SR-FINRA-2009-073 eff. May 3, 2010.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Adopted by SR-NASD-2004-011 eff. April 16, 2007.

Selected Notice: 07-07, 08-57, 10-17.

13214. Payment of Arbitrators

(a) Except as provided in paragraph (b), Rule 13800, and Rule 13806(f), FINRA will pay the panel an honorarium, as follows:

- $300 to each arbitrator for each hearing session in which he or she participates;
- an additional $125 per day to the chairperson for each hearing on the merits;
- $50 for travel to a hearing session that is postponed pursuant to Rule 13601; and
- $600 for each arbitrator if a hearing session other than a prehearing conference is postponed within 10 days before a scheduled hearing session pursuant to Rules 13601(a)(2) and (b)(2).

(b) The Director may authorize a higher or additional honorarium for the use of a foreign hearing location.

(c) Payment for Deciding Discovery-Related Motions Without a Hearing Session

(1) FINRA will pay each arbitrator an honorarium of $200 to decide a discovery-related motion without a hearing session. This paragraph does not apply to cases administered under Rule 13800 or pursuant to Rule 13806(d)(1).

(2) For purposes of paragraph (c)(1), a discovery-related motion and any replies or other correspondence relating to the motion shall be considered to be a single motion.

(3) The panel will allocate the cost of the honoraria under paragraph (c)(1) to the parties pursuant to Rule 13902 (c).

(d) Payment for Deciding Contested Subpoena Requests Without a Hearing Session

(1) The honorarium for deciding one or more contested motions requesting the issuance of a subpoena without a hearing session shall be $250. The honorarium shall be paid on a per case basis to each arbitrator who decides the contested motion(s). The parties shall not be assessed more than $750 in fees under this paragraph in any arbitration proceeding. The honorarium shall not be paid for cases administered under Rule 13800 or pursuant to Rule 13806(d)(1).

(2) For purposes of paragraph (d)(1), a contested motion requesting the issuance of a subpoena shall include a motion requesting the issuance of a subpoena, the draft subpoena, a written objection from the party opposing the issuance of the subpoena, and any other documents supporting a party's position.

(3) The panel will allocate the cost of the honorarium under paragraph (d)(1) to the parties pursuant to Rule 13902(c).

(e) Payment for Explained Decisions

(1) The chairperson who is responsible for writing an explained decision pursuant to Rule 13904(g) will receive an additional honorarium of $400. The panel will allocate the cost of the honorarium under Rule 13904(g) to the parties.

(2) If the panel decides on its own to write an explained decision, then no panel member will receive the additional honorarium of $400.

Amended by SR-FINRA-2015-003 eff. July 6, 2015.
Amended by SR-FINRA-2014-026 eff. Dec 15, 2014.
Amended by SR-FINRA-2009-015 eff. Sep. 14, 2009.
Amended by SR-FINRA-2008-051 eff. Apr. 13, 2009.
Amended by SR-FINRA-2008-021 eff. Dec. 15, 2008.
Paragraph (d) Adopted by SR-NASD-2006-101 eff. April 2, 2007.
Paragraphs (a) through (c) adopted by SR-NASD-2003-158 eff. April 16, 2007.

Selected Notice: 07-07, 08-57, 09-16, 09-48, 14-49, 15-21.

PART III INITIATING AND RESPONDING TO CLAIMS

13300. Filing and Serving Documents

(a) Party Portal

(1) Parties must use the Party Portal to file initial statements of claim and to file and serve pleadings and any other documents on the Director or any other party except as provided in paragraph (a)(2). The Director may exercise authority to permit the use of other means of filing or service in the case of an extended Party Portal outage or in other extraordinary circumstances.

(2) Parties shall not file with FINRA or serve on any other party, through the Party Portal, documents produced during discovery pursuant to the Rule 13500 series. Available service methods for such documents are first-class mail, overnight mail service, overnight delivery service, hand delivery, email, or facsimile.

(b) Filing

(1) Except as noted in Rule 13300(a)(2), parties must file initial statements of claim and all pleadings and other documents with the Director through the Party Portal. Parties must file with the Director any written responses relating to discovery requests under Rule 13507, but shall not file any of the documents produced in response to discovery requests as provided in Rule 13300(a)(2).

(2) Parties must file arbitrator ranking lists pursuant to Rule 13404 with the Director through the Party Portal.

(3) Filing under Rule 13300(b) is accomplished on the day of submission through the Party Portal.

(c) Service

(1) The Director will serve the Claim Notification Letter on the respondent(s) pursuant to Rule 13302.

(2) Except as noted in Rule 13300(a)(2), parties must serve all pleadings and other documents through the Party Portal.

(3) Service under Rule 13300(c) is accomplished on the day of submission through the Party Portal.

(4) For documents not served through the Party Portal, parties must file proof of service with the Director through the Party Portal.

(d) General Rules for Filing and Serving Documents

(1) Redaction of Personal Confidential Information

FILED
2017 JUL 17 PM 2:49
LISA COMER
CLERK OF COURT
LEXINGTON, SC

COPY

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	ELEVENTH JUDICIAL CIRCUIT
ROBERT F. BERRY, Plaintiff, vs. 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., Defendants.	Civil Action No. 2017-CP-32-00397

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION FOR RECONSDIERATION OR AMENDMENT OF THE COURT'S JUNE 21, 2017 ORDER AND MOTION TO STRIKE

Plaintiff, Robert F. Berry ("Berry"), by and through his undersigned counsel, hereby submits this Response to Defendants' Motion for Reconsideration or Amendment of the Court's June 21, 2017 Order ("Order"). In seeking reconsideration of the Order and requesting this Court to consider new documents and new arguments in support of the motion to compel arbitration of Mr. Berry's claims, Defendants 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.'s (all defendants are collectively referred to as "Defendants") seek not reconsideration, but a second opportunity to establish facts that were Defendants' absolute burden to prove as the party seeking to compel arbitration. Under well-settled South Carolina case law, a litigant is not permitted such a second bite at the apple. Notwithstanding Defendants'

violation of this rule, which alone mandates the denial of their requested reconsideration, these late-filed documents, even if they could be properly considered, fail to accomplish Defendants' obligation to prove the existence of a binding agreement to arbitrate Mr. Berry's claims. For the reasons set forth herein, the documents attached to Defendants' motion should be stricken from the record and the motion denied.

ARGUMENT

As the party seeking to compel arbitration of Mr. Berry's claims, Defendants had the burden to demonstrate the existence of a valid agreement between Defendants and Mr. Berry to arbitrate the asserted claims. South Carolina law requires that this burden be met when the motion to compel arbitration was filed. *See, e.g., 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)). In the Order, this Court found that Defendants had not met their burden in proving the existence of a duty to arbitrate.[1] *See* Order at 3-14. Defendants' motion, which advances a new affidavit

[1] The Order found that the documents submitted in support of the motion were not admissible because Defendants had failed to authenticate the Form U-4's registrations statements. The Order also found that Defendants were not a party to the registration statements, which contained no language permitting their use by successors or assigns. The Order also found that none of the fora designated in the registrations statements still offer arbitration services, and further found that Defendants failed to prove that their preferred forum — FINRA — is an appropriate successor venue to either the New York Stock Exchange ("NYSE") or the National Association of Securities Dealers ("NASD"). On this last point, Defendants attempt to cure their failure to prove the viability of FINRA as an appropriate successor to NYSE and NASD by citing Securities and Exchange Commission rules and press releases in their motion for reconsideration. However, Defendants may not use a motion for reconsideration to supply support or evidence for a proposition that was their burden to prove in the first place. "[A] party cannot use a motion to reconsider, alter or amend a judgment to present an issue that could have been raised prior to the

and new documents as alternatives to the affidavit and documents that were previously rejected as insufficient, cannot, and do not, alter the Court's previous analysis.

I. Defendants may not submit new evidence as a part of a motion for reconsideration.

"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. 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.")). Instead, a Rule 59(e) motion is appropriate only in "two basic situations," when (1) a party "believes the court has misunderstood, failed to fully consider, or perhaps failed to rule on an argument or issue, and [2] ... when an issue or argument has been raised, but not ruled on, in order to preserve it for appellate review." *Elam v. S.C. Dep't of Transp.*, 361 S.C. 9, 24, 602 S.E.2d 772, 780 (2004).

---

judgment but was not." *RRR, Inc. v. Toggas*, 378 S.C. 174, 185, 662 S.E.2d 438, 443 (Ct. App. 2008) (citing *Dixon v. Dixon*, 362 S.C. 388, 399, 608 S.E.2d 849, 854 (2005)). While Defendants are in clear violation of this rule such that these new arguments — similar to the new exhibits — must be rejected, even if they were considered, the submissions still fail to demonstrate that Mr. Berry agreed to arbitrate his claims against these Defendants before a FINRA arbitration panel or that FINRA is a successor to NYSE or NASD.

Defendants' motion does not present a legally cognizable basis for reconsideration of the Order under Rule 59(e). Instead, Defendants request a second opportunity to meet their burden of proof imposed upon them as the parties seeking to compel arbitration. However, this Court has already correctly held that Defendants' window of opportunity as the moving party has already closed. *See* Order at ("It is now too late for Defendants 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.") (citing *Parker v. S.C. Public Service Com'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 Order's holding 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 Defendants attempt to use the motion for reconsideration for the sole purpose of presenting new arguments and evidence which were available to them and which could have been raised in the Defendants' original motion to stay and compel arbitration, the additional affidavit, documents, and rule citations submitted by Defendants should be stricken from the record and the motion denied on this ground alone.

II. Defendants' own proffer demonstrates that the additional Form U-4 registrations were available to Defendants in advance of filing their original motion; therefore, such evidence cannot be considered under Rule 60(b) and controlling case law.

Rather than argue that the Court overlooked or misapprehended the arguments or the proof

submitted in support of their original motion, Defendants instead seek a do-over under the guise of "newly discovered evidence" and Rule 60(b). However, the new arguments and additional documents submitted by Defendants in support of their motion themselves demonstrate that they do not meet the standard for relief from the Order. A judgment or order may be set aside under Rule 60(b), of the South Carolina Rules of Civil Procedure, for newly discovered evidence, but "only if the newly discovered evidence could not have been discovered by due diligence prior to trial." *Lanier v. Lanier*, 364 S.C. 211, 217-20, 612 S.E.2d 456, 459-460 (Ct. App. 2005) (holding that in order "[t]o obtain a new trial based on newly discovered evidence, the movant must establish that the newly discovered evidence: (1) will probably change the result if a new trial is granted; (2) has been discovered since the trial; (3) could not have been discovered before the trial; (4) is material to the issue; and (5) is not merely cumulative or impeaching.") (citing James F. Flanagan, *South Carolina Civil Procedure* 484 (2nd ed.1996)). The *Lanier* court further defined due diligence as "[t]he diligence reasonably expected from, and ordinarily exercised by, a person who seeks to satisfy a legal requirement or to discharge an obligation. Diligence looks not to what the litigant actually discovered, but what he or she *could* have discovered." *Id.* at 220, 612 S.E.2d at 460 (emphasis in original) (quoting *Black's Law Dictionary* at 468 (7th ed.1999); 12 *Moore's Federal Practice* § 60.42[5] (Matthew Bender 3rd ed.)).

The documents submitted by Defendants do not qualify under any reasonable definition of newly discovered evidence, nor do Defendants' efforts satisfy the standard of due diligence.[2] In

[2] Defendants' additional assertion that Mr. Berry has waived any objection to the admissibility of Form U-4 registration statements submitted on his behalf is a red herring, *see* Motion at 4, as any such clause — even assuming its efficacy — does not relieve Defendants of their burden of authenticating documents they seek to advance to the Court or circumvent the Court's independent role as gatekeeper for the admission of evidence. Nor could it overcome established precedent restricting a litigant's ability to raised new issues and/or present new

fact, Defendants do not claim that they tried — but failed — to locate these new Form U-4 registration statements prior to making their motion or the hearing. Instead, the affidavit submitted by Compliance Consultant Michael Zuhr states that these documents were and are available to him at any time by simply logging into the appropriate system with his personal log-in information. *See* Motion Ex. 2, Affidavit of Michael Zuhr at ¶2. 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 does not deny that these documents were available when Defendants' original motion was filed. Rather, as is described by Mr. Zuhr, who is now offered as a purported custodian of these untimely submissions, the Form U-4's have always been available to him as Defendants' representative and thus to the Defendants at all times, an action that Mr. Zuhr states that he does regularly and routinely as a part of his job duties with Defendants.

Consequently, the additional registration statements were patently available to Defendants at all times and could have been submitted to the Court with the motion to compel arbitration, had Defendants believed that such documents would actually support their argument that Mr. Berry had agreed to arbitrate the claims asserted in this case. In reality, however, having failed to meet their burden with their original submission, Defendants simply went back to the well to choose different documents from among those that had always been readily available, hoping to tender something that might support their arguments. "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)." *Lanier*, 364 S.C.

---

documents in a motion for reconsideration, or documents that were readily available to the party in the exercise of reasonable due diligence under Rule 60(b), SCRCP.

at 220, 612 S.E.2d at 461 (citing *Lans v. Gateway 2000, Inc.*, 110 F.Supp.2d 1, 6 (D.D.C. 2000) ("[W]hatever actions [the appellant] took to locate the [evidence] are undermined by the plain fact that [he] knew that the [evidence] existed, regardless of whether he could actually get his hands on it. The Court is unsympathetic to arguments that [he] could not remember where [it] was.")). In summary, and for the additional reason that the documents were always available to Defendants, the motion's exhibits do not qualify as newly discovered evidence and should be stricken from the record.

III. Defendants' new arguments and new documents still fail to demonstrate the existence of a valid arbitration agreement between Mr. Berry and Defendants.

Defendants' motion and additional documentation falls well short of the one thing South Carolina law requires of a party seeking to compel arbitration: a clear and unmistakable agreement by Mr. Berry to arbitrate claims against Defendants. "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." *Chassereau*, 363 S.C. at 632, 611 S.E.2d at 307 (quoting *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596–97, 553 S.E.2d 110, 118 (2001)).

Defendants attempt to create an arbitration agreement through a complex exercise of dot connections that nevertheless still fails to provide a clear and unambiguous agreement by Mr. Berry to arbitrate his claims against Defendants. Rather, the most recent submissions do nothing to alter the two crucial facts that doom Defendants' efforts to compel arbitration to failure: (1) Defendants have not produced a signed agreement to arbitrate claims between Wells Fargo (or its affiliates and employees) and Mr. Berry; and (2) Defendants have not produced a signed agreement

to arbitrate claims before a FINRA arbitration panel. Notwithstanding their selectively chosen language from both the 1999 and 2014 Form U-4s, and the circuitous path and reasoning upon which they attempt to cobble together an argument to suggest an agreement to arbitrate actually exists, Defendants still fail to produce a clear and unambiguous agreement to arbitrate. These facts are indisputable: the 1999 Form U-4 (Ex. 2-A) does not list FINRA as a designated arbitral fora (as this entity did not exist in 1999) and none of the designated fora offer arbitration services today, while the 2014 Form U-4 (Ex. 2-B) lacks both an arbitration clause and a signature from Mr. Berry. The law does not permit a party seeking to compel arbitration to pick and choose beneficial clauses from an assortment of historical documents to merge together and create a new agreement to arbitrate.

The motion for reconsideration makes two primary arguments based on the 1999 and 2014 Form U-4s. Defendants first contend that the SRO organizations that listed in the 1999 Form U-4 may be amended from time to time. *See* Motion at 3-4 (supplying emphasis on the amendment language quoted in the motion). However, Defendants misconstrue the language of the registration statement, as the 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. Defendants' strained effort to interpret this clause to support an argument that the referenced language permits the amendment, without notice to Mr. Berry, of the list of agreed-upon arbitration fora is simply contrary to the established law of this State and other jurisdictions relied upon by this Court in its Order. The identity of the arbitral forum is a material, integral part

of an arbitration agreement; should the designated forum fail, then the entire agreement to arbitrate is void.[3]

The most generous interpretation of the language emphasized by Defendants is that it may create an ambiguity about whether the "as may be amended from time to time" language refers to the "rules, constitutions, or by-laws" or the "SROs indicated in Item 11" themselves. However, the creation of an ambiguity is of no help to Defendants. As the Court already held in the Order, Defendants "invoke[] rights as a member of those self-regulatory organizations" and "Defendants stand in the role of the drafters of the forms issued by such organizations ... Thus, Mr. Berry is entitled to the construction benefit of a non-drafting party such that any ambiguities in the registration statements must be construed against Defendants." Order at 6 n.4 (citing *McGill v. Moore*, 381 S.C. 179, 186, 672 S.E.2d 571, 575 (2009) ("Under South Carolina law, 'any ambiguity will be construed in favor of the non-drafting party.'")).

Defendants next contend that the 1999 Form U-4 permits the unilateral substitution of subsequent employers, such that Defendants may enforce against Mr. Berry an agreement to arbitrate with a company that no longer exists and that, further, they may unilaterally substitute a

[3] *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); *Brown v. ITT Consumer Fin. Corp.*, 211 .F.3d 1217, 1220 (11th Cir. 2000) (asserting that where the selection of a particular forum constitutes an integral part of the agreement to arbitrate, the failure of the chosen forum precludes arbitration); *In re Salomon Inc.*, 68 F.3d 554, 561 (2d. Cir. 1995) (a failed forum selection term is as important a consideration as the agreement to arbitrate itself); *Smith Barney, Inc. v. Critical Health Sys.*, 212 F.3d 858, 862 (4th Cir. 2000); *Roney & Co. v. Goren*, 875 F.2d 1218, 1219 (6th Cir. 1989) (refusing to treat various arbitral fora interchangeably); and *Keller v. ING Financial Partners, Inc.*, Op. No. 2011-CP-23-0336 (S.C. Cir. Ct. filed June 2, 2011). Specifically, "if the choice of [an arbitral] forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern ... the failure of the chosen forum [will] preclude arbitration." *Grant*, 383 S.C. at 131, 678 S.E.2d at 438 (citing *Singleton v. Grade A Market, Inc.*, 607 F. Supp. 2d 333, 341 (D. Conn. 2009)). Defendants do not address any of this controlling case law in their motion.

forum that did not exist at the time of the purported agreement. However, these arguments fail for the same reason this Court held that the prior Form U-4 statements were not enforceable by Defendants. The 1999 Form U-4, *see* Motion Ex. 2-A, is not between Mr. Berry and Defendants. Instead, like the 1994 Form U-4 which named Wheat, First Securities, Inc., the 1999 Form U-4 names Everen Securities, Inc. ("Everen") as Mr. Berry's employer. The 1999 arbitration provision is limited to "any dispute, claim or controversy that may arise between *me and my firm*," *see* Motion Ex. 2-A (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. But 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. The Order found that Defendants' failure to provide the Court with evidence demonstrating the legal succession of companies was a failure of proof independently fatal to Defendants' attempt to rely upon the 1994 Form U-4s filed by Wheat First. However, Defendants did not attempt to cure this shortcoming in the motion, instead relying upon the same affidavit of a paralegal in the Wells Fargo Law Department previously rejected as insufficient.[4]

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, a fact that Defendants once again fail to acknowledge in their motion. Instead, the 1999 Forum U-4 arbitration clause designates "the

[4] Instead, Defendants contend that they should be able to use the Everen 1999 Form U-4 amendment filed on Mr. Berry's behalf because the 1999 and 2014 Form U-4s use the same date of employment, October 1, 1999. Setting aside the fact that in the original motion to compel arbitration, Defendants relied upon the November 4, 1994 date of employment listed on the Wheat First Form U-4s, Defendants' use of the October 1, 1999 employment date in the 2014 Form U-4 demonstrates no relevant fact, as Mr. Berry did not become an employee of Wells Fargo until 2009, *see* First Am. Complaint at ¶31, and the Profit Formula Agreement at issue in this case was entered into between Mr. Berry and Wachovia Securities in 2001, *see* First Am. Complaint at ¶29.

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, none of which are FINRA, including: the NASD, the NYSE, the Chicago Board Options Exchange (CBOE), and the Philadelphia Stock Exchange ("PHLX"). As this Court has previously held, there is no proof that any of the organizations specified on the 1999 Form U-4 currently offer arbitration services.

Finally, Defendants assert that Mr. Berry is required to arbitrate these claims based on FINRA Rules. This argument is an expansion of an argument previously alluded to in Defendants' original motion to compel and during the June 1, 2017 hearing, during which Defendants asked this Court to take judicial notice of FINRA Rule 13200. The Court correctly rejected this argument because Defendants had failed to meet their threshold burden of demonstrating that they had standing to require the application of any FINRA rule to Mr. Berry. *See* Order at 8 n.7. The motion for reconsideration does not attempt to cure this previously-articulated shortcoming. Instead, Defendants merely assert that this Court should take judicial notice of information contained on the BrokerCheck website, *see* Motion at 5 n.9, on the theory that it should be considered an unassailable public record. However, the Terms of Use of the BrokerCheck website links provided by Defendants very clearly states that:

> FINRA MAKES NO WARRANTIES OR REPRESENTATIONS ABOUT THE QUALITY, ACCURACY OR COMPLETENESS OF BROKERCHECK AND ASSUMES NO LIABILITY OR RESPONSIBILITY FOR ANY: (I) ERRORS OR OMMISSIONS IN ANY CONTENT; (II) TECHNICAL ERRORS AFFECTING BROKERCHECK IN ANY WAY; (III) BUGS, VIRUSES, TROJAN HORSES, OR THE LIKE WHICH MAY BE TRANSMITTED TO OR THROUGH BROKERCHECK BY ANY THIRD PARTY; AND/OR (IV) LOSS OR DAMAGE OF ANY KIND INCURRED AS A RESULT OF THE USE OF BROKERCHECK.

(Emphasis in original). Defendants' assertion that these website links are "matter[s] of public record" is insufficient to authenticate the content of the information contained therein, as BrokerCheck summaries do not qualify as self-authenticating, and authentication as a public record is subject to documentary or testimonial evidence and illustration, which Defendants have not provided. *Cf.* Rules 901 and 902, SCRE. Even if Defendants were permitted to cure their prior evidentiary shortcomings in a motion for reconsideration or under Rule 60(b), which they are not, Defendants have failed to do so and this Court's prior holding regarding these rules should endure.

CONCLUSION

Defendants' motion fails to articulate a proper basis for reconsideration of the Order. Litigants are not permitted to raise new arguments or submit additional documents in support of a motion for reconsideration. Moreover, the new Form U-4s advanced by Defendants in support of their motion were available to Defendants upon the exercise of reasonable due diligence; therefore, they do not qualify for submission as newly discovered evidence under Rule 60(b). Consequently, the affidavit and additional documents submitted in support of Defendants' motion are improper, may not be considered and should be stricken from the record. Even if the Court were inclined to consider these additional documents, they do not constitute an agreement by Mr. Berry to arbitrate his claims against these Defendants, as Defendants still have not produced either a signed agreement to arbitrate claims between the Defendants and Mr. Berry or a signed agreement to arbitrate claims before a FINRA arbitration panel. Mr. Berry respectfully requests this Court to strike the attachments to Defendants' motion and deny same.

In regard to Defendants' request that the Court extend the deadlines set forth in the Order for responding to Plaintiff's First Set of Interrogatories and Requests for Production, Mr. Berry confirms that he consented to Defendants' requested extension until July 17, 2017. Since then,

Defendants contacted Mr. Berry to request a further extension to respond to these outstanding discovery requests until July 27, 2017, and Mr. Berry agreed that he would not seek to compel or otherwise interpose an objection to Defendants' further 10-day extension.

In regard to Defendants' request that the Court extend the deadlines set forth in the Order for filing a responsive pleading, Mr. Berry confirms that he consented to Defendants' requested extension until July 27, 2017. Defendants have since also requested a further extension of time to file a responsive pleading until August 11, 2017, and Mr. Berry agreed that he would not seek to compel or otherwise interpose an objection to Defendants' further 15-day extension.

In addition to denying Defendants' motion for reconsideration, Mr. Berry therefore also respectfully requests that the Court confirm its directive to Defendants to serve responses to all outstanding discovery requests and file a responsive pleading within the time periods agreed to by the parties.

Respectfully submitted,

Mitchell Willoughby, Esquire
Elizabeth Zeck, Esquire
Chad N. Johnston, Esquire
WILLOUGHBY & HOEFER, P.A.
Post Office Box 8416
Columbia, South Carolina 29202
Telephone Number: 803-252-3300
mwilloughby@willoughbyhoefer.com
ezeck@willoughbyhoefer.com
cjohnston@willoughbyhoefer.com

Attorneys for Robert F. Berry

This 17 day of July 2017
Columbia, South Carolina

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
AUG 10 2017
SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Case No. 2017-CP-32-00397

ROBERT F. BERRY, RESPONDENT,

v.

SCOTT A. SPANG, WELLS FARGO CLEARING SERVICES, LLC, f/k/a WELLS FARGO ADVISORS, LLC, WACHOVIA SECURITIES FINANCIAL HOLDINGS, LLC, WELLS FARGO & COMPANY, and WELLS FARGO BANK, N.A. APPELLANTS.

NOTICE OF APPEAL

Defendants Wells Fargo Clearing Services, LLC f/k/a Wells Fargo Advisors, Wachovia Securities Financial Holdings, LLC, Wells Fargo & Company, Wells Fargo Bank, N.A., and Scott A. Spang ("Appellants"), appeal the Orders of the Honorable G. Thomas Cooper, Jr. on Appellants' Motion to Dismiss or Stay Pending Arbitration dated June 16, 2017 and on Defendants' Motion for Reconsideration or Amendment dated July 24, 2017. Appellants received written notice of entry of the July 24, 2017 Order and the July 27, 2017 Judgment on July 31, 2017.

Respectfully submitted,

WELLS FARGO CLEARING SERVICES, LLC F/K/A WELLS FARGO ADVISORS, WACHOVIA SECURITIES FINANCIAL HOLDINGS, LLC, WELLS FARGO & COMPANY, WELLS FARGO BANK, N.A., and SCOTT A. SPANG

By: _____

Adam N. Yount
South Carolina Bar No. 76342
Sarah P. Spruill
South Carolina Bar No. 68337
Pierce T. MacLennan
South Carolina Bar No. 101797
HAYNSWORTH SINKLER BOYD, P.A.
134 Meeting Street
Suite 300
Charleston, South Carolina 29401
Telephone: (843) 720-4484
Facsimile: (843) 722-2266
ayount@hsblawfirm.com

Frederick T. Smith
North Carolina Bar No. 45229
SEYFARTH SHAW LLP
6000 Fairview Road, Suite 1200
Charlotte, North Carolina 28210
Telephone: (404) 888-1021
Facsimile: (404) 724-1521
fsmith@seyfarth.com

ATTORNEYS FOR APPELLANTS

Date: August 10, 2017

NOTICE OF APPEAL IN A CIVIL CASE

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

RECEIVED
AUG 10 2017
SC Court of Appeals

APPEAL FROM LEXINGTON COUNTY
Court of Common Pleas

G. Thomas Cooper, Jr., Circuit Court Judge

Civil Action No. 2017-CP-32-00397

ROBERT F. BERRY, RESPONDENT,

v.

SCOTT A. SPANG, WELLS FARGO CLEARING SERVICES, LLC, f/k/a WELLS FARGO ADVISORS, LLC, WACHOVIA SECURITIES FINANCIAL HOLDINGS, LLC, WELLS FARGO & COMPANY, and WELLS FARGO BANK, N.A. APPELLANTS.

PROOF OF SERVICE

I certify that I served the Notice of Appeal on Robert F. Berry by hand delivering a copy of it on August 10, 2017, addressed to his attorneys of record, Mitchell Willoughby, Elizabeth Zeck, Chad N. Johnston, Willoughby & Hoefer, P.A., 930 Richland Street, Columbia, South Carolina 29201.

Adam N. Yount

ORIGINAL

STATE OF SOUTH CAROLINA	IN THE COURT OF COMMON PLEAS
COUNTY OF LEXINGTON	ELEVENTH JUDICIAL CIRCUIT
ROBERT F. BERRY, Plaintiff, vs. 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., Defendants.	Civil Action No. 2017-CP-32-00397
	ORDER

RECEIVED
JUN 10 2017
SC Court of Appeals

This matter came before the Court on June 1, 2017, for a hearing on the Defendant's Motion to Dismiss or Stay Pending Arbitration. Also before the Court was Defendants' Motion for a Protective Order and Motion to Stay Discovery. Present at the hearing were Frederick T. Smith of Seyfarth Shaw LLP, appearing *pro hac vice*, and John G. Tamasitis of Haynsworth Sinkler Boyd, P.A., representing Defendants, and Mitchell Willoughby, Chad Johnston and Elizabeth Zeck of Willoughby & Hoefer, P.A., representing Plaintiff. For the reasons set forth below, Defendants' Motion to Dismiss or Stay Pending Arbitration is denied, with prejudice. Further, Defendants' Motion for a Protective Order and Stay of Discovery pending arbitration is rendered moot by the effect of this Order.

FACTUAL BACKGROUND

This is a claim for damages brought by Plaintiff Robert F. Berry, formerly a Wealth Manager and Senior Vice President with Defendant Wells Fargo Advisors, LLC. Among other

allegations. Mr. Berry alleges that Defendants 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.'s (collectively referred to as "Defendants") deliberately breached his long-standing profit formula agreement. Mr. Berry also alleges that to illegally increase the earnings and stock price of the corporate parent, Wells Fargo & Company, Defendants aggressively pushed employees of all subsidiary corporations, including Mr. Berry, to sell financial products, regardless of whether the products were wanted, needed, or in the best interests of the customers and clients, and targeted for retribution those employees who refused and/or failed to cooperate.

Mr. Berry alleges that he refused to participate in the scheme because it would have violated the securities laws and his fiduciary obligations to his clients. (First Amended Complaint ("FAC") at ¶ 33-36). Based on his refusal, Mr. Berry alleges that Defendants internally identified him as a person to be terminated for speaking up against the improper cross-selling program. Mr. Berry alleges he was also targeted for retribution based on the complaints he lodged with Defendants regarding the changes they unilaterally made to his profit formula employment agreement, which had been in effect since the early 2000s. (FAC at ¶¶ 29, 42-43). Defendants' efforts culminated in a February 3, 2014 meeting during which Mr. Berry alleges he was humiliated, unlawfully detained, and forced to resign. (FAC at ¶¶ 38-44, 51-55). Mr. Berry filed this action seeking damages. Rather than answer Mr. Berry's complaint, Defendants filed their Motion to Dismiss or to Stay Pending Arbitration under Rule 12(b)(6), SCRCP, as well as a separate motion for protective order and a stay of discovery.

FINDINGS and ANALYSIS

I. Defendants failed to meet their burden, as the proponents of arbitration, to prove the existence of a duty to arbitrate.

Whether a claim is subject to arbitration is an issue for judicial determination. It is the duty of this Court to ascertain the existence, if any, of an enforceable arbitration agreement. *York v. Dodgeland of Columbia, Inc.*, 406 S.C. 67, 78, 749 S.E.2d 139, 144-45 (Ct. App. 2013). That duty is fulfilled by applying the principles of state contract law, according to the ordinary procedural and evidentiary rules applicable to all contract disputes. *Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 593, 553 S.E.2d 110, 116 (2001).

"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." *Chassereau*, 363 S.C. at 632, 611 S.E.2d at 307 (quoting *Zabinski*, 346 S.C. at 596–97, 553 S.E.2d at 118).

As the proponents of arbitration, Defendants bear the burden of establishing the existence of an agreement to arbitrate the dispute between themselves and Mr. Berry. "General contract principles of state law apply to arbitration clauses governed by the F[ederal] A[rbitration] A[ct]." *Munoz v. Green Tree Financial Corp.*, 343 S.C. 531, 539, 542 S.E.2d 360, 364 (2001); *see also 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). State law remains applicable if that law, whether legislative or judicial, arose to govern issues concerning the validity, revocability, and enforceability of all contracts generally. *Munoz*, 343 S.C. at 539, 542 S.E.2d at 364.

A. **Defendants' Motion to Stay fails because they did not properly authenticate the registration statements upon which they rely to create the duty to arbitrate.**

A threshold question is the admissibility of the documents upon which Defendants rely to support their demand for arbitration. South Carolina law has always required authentication as a condition precedent to admissibility. Rule 901(a), SCRE; see also *State v. Rich*, 293 S.C. 172, 359 S.E.2d 281 (1987). This rule applies to evidence submitted in support of motions. *See Saro Investments v. Ocean Holiday Partnership*, 314 S.C. 116, 121, 441 S.E.2d 835, 838 (Ct. App. 1994). That is, before this Court can rely upon any document, its proponent must provide a proper foundation. This requirement applies to employment records of the type proffered here. *Connelly v. Wometco Enterprises, Inc.*, 314 S.C. 188, 191, 442 S.E.2d 204, 206 (Ct. App. 1994). In *Connelly*, a wrongful termination case, the employee's personnel file was properly excluded from evidence, as the employer failed to offer the excluded records through a custodian or other properly qualified witness. *Id.* The proffered documents were properly excluded from evidence, even though they might have had probative value and would therefore otherwise have been relevant and admissible. *Id.*

In support of their Motion, Defendants rely upon three registration statements which were simply attached as Exhibit 1 to their supporting memorandum. However, business records of this type do not qualify as self-authenticating. *Cf.* Rule 902, SCRE. Although Defendants provided an affidavit from a paralegal employed in the "Wells Fargo Law Department,"[1] the paralegal did not claim to be a custodian of records for any of the corporate Defendants, nor did she make any claim that the documents attached to Defendants' memorandum were true and correct copies of business records maintained by any specific Defendant. Like the inadequate sponsoring witness

[1] Defendants' affiant fails to even assert that she is employed by any of the four corporate Defendants or, assuming she is, to identify which one.

in *Connelly*, this testimony is insufficient to meet the foundation requirements imposed by Rule 901(a), SCRE. In the absence of such authentication testimony, Defendants have failed to lay a proper foundation for the admission of these three registration statements and this Court therefore determines that they are inadmissible for substantive consideration in support of Defendants' Motion. Because the three unauthenticated registration statements constitute the only evidence submitted in support of their Motion, Defendants have failed to meet their burden[2] to prove the existence of an enforceable agreement to arbitrate and the motion to stay these proceedings and compel arbitration is denied.

B. Defendants' Motion also fails because they are not parties to the documents upon which they rely and therefore lack standing to enforce any arbitration agreement contained therein.

Even if the three registration statements relied upon by Defendants were properly before this Court, Defendants have failed to prove that they have standing to enforce the arbitration clause contained therein such that they may benefit from their terms. "Ultimately, arbitration is a matter of contract and a party cannot be forced to arbitrate a dispute if it has not agreed to do so." *AT&T Tech., Inc. v. Comm'ns Workers*, 475 U.S. 643, 648 (1986).

---

[2] It is now too late for Defendants 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. *See, e.g., Parker v. S.C. Public Service Com'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 Court notes that Defendants have already attempted to amend their motion to dismiss, namely, to add grounds under Rule 12(b)(1) and (3), SCRCP, asserting as support for the motion Rule 15(a), SCRCP. However, Defendants' motion to dismiss is not a "pleading" capable of amendment under Rule 15(a); therefore, Defendants' motion was untimely and ineffective. While an assertion of a Court's lack of subject matter jurisdiction may be raised at any time during the litigation, other defenses specified in Rule 12(b) — including the defenses listed as subsections 12(b)(2), (3), (4), (5) and (8) — are waived if not asserted in the initial motion or responsive pleading, as is the case here where Defendants' motion relied solely on the defense provided by Rule 12(b)(6). *See* Rule 12(g), (h).

Defendants' Motion is based on a clause included in three Form U-4 registration statements that were apparently submitted on behalf of Wheat, First Securities, Inc. ("Wheat First"), a firm that no longer exists,[3] during Mr. Berry's association with that firm. However, this litigation does not involve any dispute, claim or controversy arising between Plaintiff and Wheat First.[4] Mr. Berry asserts no claim against Wheat First, nor does he complain of any act or omission by Wheat First. Rather Mr. Berry alleges that the Profit Formula Agreement at issue in this case was not between him and Wheat First, but originated with Wachovia Securities. (FAC at ¶29).

The three registration statements[5] relied upon by Defendants each contain an identical arbitration clause, which reads as follows:

> 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 organizations indicated in Item 10 as may be amended from time to time . . . .

The firm named in each of the registration statements is Wheat First. The arbitration clause is devoid of any language indicating that any arbitration obligation extends to successors and/or assigns of "my firm," that is, Wheat First. Nor can this Court take judicial notice of the internal

---

[3] In support of his opposition to Defendants' motions, Mr. Berry submitted self-authenticating, certified copies of records kept by the South Carolina Secretary of State, which demonstrated that Wheat First changed its name to First Union Capital Markets Corporation in 1999, which subsequent business was later dissolved and surrendered its authority to do business in South Carolina. *See* Exhs. 2 and 3, Plaintiff's Opp. to Mot. to Stay.

[4] In their Motion, Defendant Wells Fargo Clearing Services, LLC, f/k/a Wells Fargo Advisors, LLC, invokes rights as a member of those self-regulatory organizations. Thus, Defendants stand in the role of the drafters of the forms issued by such organizations. Under South Carolina law, "any ambiguity will be construed in favor of the non-drafting party." *McGill v. Moore*, 381 S.C. 179, 186, 672 S.E.2d 571, 575 (2009). Thus, Mr. Berry is entitled to the construction benefit of a non-drafting party such that any ambiguities in the registration statements must be construed against Defendants.

[5] Defendants proffered three registration statements, dated September 28, 1995, January 16, 1995, and November 5, 1994. Only the November 1994 registration statement designates any SRO and Item 10 for a.

affairs of private corporations to find that Defendants can invoke the rights of Wheat First. *Moss v. Aetna Life Ins. Co.*, 267 S.C. 370, 377, 228 S.E.2d 108, 112 (1976). In short, the three registration statements relied upon by Defendants simply do not satisfy Defendants' burden to prove the existence of an agreement by Mr. Berry to arbitrate his dispute in this case with these Defendants. Moreover, even if these registration statements were admissible, Defendants lack standing to rely upon a registration statement of a dissolved corporate entity to compel Mr. Berry to arbitrate claims he asserts against them.

C. <u>If an arbitration agreement arises from the 1994 registration statement, it fails because the fora specified in that clause no longer exist.</u>

Even if the arbitration clause contained in the registration statements were properly before this Court, and even if Defendants had standing to enforce clauses contained within those statements, any purported agreement to arbitrate is rendered void by the failure of the statement's forum selection clause, which constitutes an integral and material term of the arbitration clause. The clause relied upon by Defendants requires arbitration "under the rules, constitutions, or by-laws of the organizations indicated in Item 10." *See supra* at 6. Item 10 of the registration statements contains two sections, labeled SRO and Jurisdictions. In the securities context, SRO stands for Self-Regulatory Organization. *See Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 386 n. 12, 759 S.E.2d 727, 735 (2014). The SRO box is checked on only the earliest Form U-4 relied upon by Defendants, dated November 1994 ("1994 Form").[6] The 1994 Form designated the following entities as potential arbitral fora: the American Stock Exchange ("ASE"), the National Association of Securities Dealers ("NASD"), the New York Stock Exchange

[6] The other two registration statements do not designate any SRO arbitration forum, and, thus, the arbitration clause is void *ab initio*.

("NYSE"), and the Philadelphia Stock Exchange ("PHLX"). The SRO section box labeled "Other (Specify)" was left blank on the 1994 Form.

Defendants have offered no proof of the continued existence of either the ASE or the PHLX. Moreover, and more important, Defendants offer no proof that any of the organizations specified on the 1994 Form currently provide arbitration services. Defendants are unable to point to any language indicating that any arbitration obligation extends to successors and/or assigns of the specified entities; in fact, no such obligation appears in the 1994 Form. Item 10 includes a box labeled "Other" box in the SRO category, but no "successors or assigns" language was specified there, either.

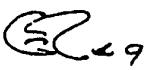
In tacit recognition of the unavailability of the arbitral fora actually specified in the documents upon which they rely, Defendants do not seek to compel arbitration before NASD, NYSE or any of the other fora listed in the 1994 Form. Rather, Defendants disregard the actual language of the SRO section 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. In purporting to quote from the arbitration clause contained in the 1994 Form, Defendants' brief replaced the term "NASD" with "FINRA" without comment or explanation, thereby failing in their duty to bring to the Court's attention the alteration of a material term in the document. In the absence of such proof,[7] this Court cannot simply assume that this dispute might be "required to be arbitrated under"

[7] During the hearing, Defendants asked the Court to take judicial notice of FINRA Rule 13200. Setting aside the issue of whether this Court may even take judicial notice of such rules, the Court finds that Defendants have not met their threshold burden of demonstrating the applicability of any FINRA rule to Mr. Berry.

the absent rules of these non-existent arbitral fora, as required by the arbitration clause in the 1994 Form.

However, in interpreting agreements to arbitrate, courts agree that where a material, integral part of an arbitration agreement fails, the entire agreement to arbitrate is void. *See 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); *Brown v. ITT Consumer Fin. Corp.*, 211 .F.3d 1217, 1220 (11th Cir. 2000) (asserting that where the selection of a particular forum constitutes an integral part of the agreement to arbitrate, the failure of the chosen forum precludes arbitration); *In re Salomon Inc.*, 68 F.3d 554, 561 (2d. Cir. 1995) (a failed forum selection term is as important a consideration as the agreement to arbitrate itself); *Smith Barney, Inc. v. Critical Health Sys.*, 212 F.3d 858, 862 (4th Cir. 2000). Specifically, "if the choice of [an arbitral] forum is an integral part of the agreement to arbitrate, rather than an ancillary logistical concern ... the failure of the chosen forum [will] preclude arbitration." *Grant*, 383 S.C. at 131, 678 S.E.2d at 438 (citing *Singleton v. Grade A Market, Inc.*, 607 F. Supp. 2d 333, 341 (D. Conn. 2009)). Because the selection of the designated fora constituted an integral term of the arbitration clause in the 1994 Form, and because none of the chosen arbitral fora currently exist, the arbitration agreement is impossible to perform and thus void.

In *Grant*, for example, the plaintiff executed an admissions contract containing an agreement to arbitrate on behalf of her deceased husband concurrent with his admission into a nursing home. *Id.* at 127, 678 S.E.2d at 436. Shortly after admission, the plaintiff's decedent was injured at the facility. *Id.* Plaintiff filed suit in state court, and the Defendant moved to dismiss the action and to compel arbitration pursuant to the admissions contract. *Id.* The arbitration clause in the agreement specifically selected the American Health Lawyers Association ("AHLA") as the



arbitral forum to resolve all related disputes arising from the decedent's admission. *Id.* at 128, 678 S.E.2d at 437. Subsequent to the execution of the admissions agreement, the AHLA amended its rules, declining to arbitrate disputes arising from arbitration agreements executed prior to the injury. *Id.* Consequently, the AHLA would not hear the dispute between the parties, and the parties were effectively denied their forum choice. *Id.*

The *Grant* plaintiff asserted that the inability to arbitrate through the AHLA constituted a failure of a material term in the agreement, and therefore she was no longer bound to arbitrate the dispute. *Id.* at 128, 678 S.E.2d at 437. The Supreme Court agreed, finding that "the specific designation of the AHLA as arbitrator [was] an integral term of this arbitration agreement." *Id.* at 131, 678 S.E.2d at 438-439. The court reasoned that "the designation of a forum such as the AHLA has wide-ranging substantive implications that may affect, *inter alia*, the arbitrator-selection process, the law, procedures, and rules that govern the arbitration, the enforcement of the arbitral award, and the cost of the arbitration." *Id.* at 132; 678 S.E.2d at 439. The court determined that these implications rendered the selection of a specific forum an integral term of the agreement. *Id.* Consequently, the court held that the arbitration agreement between the parties was unenforceable, and dismissed the defendant's motion to compel arbitration.

The rationale employed by the Supreme Court in *Grant* has been echoed in many other cases across jurisdictions. For example, in *In re Salomon Inc.*, the parties agreed to arbitrate any dispute pursuant to "the arbitration procedure prescribed in the Constitution and rules then obtaining of the NYSE." 68 F.3d at 558. When the NYSE's arbitration group declined to hear the dispute, the courts refused to substitute an alternate arbitrator. *Id.* at 561. In affirming this holding, the Second Circuit explicitly rejected the brokerage firm's contention that the arbitration could be held in another arbitral forum, so long as the rules of the chosen forum govern the proceeding:

> [When] it is clear that the failed [forum selection] term is not an ancillary logistical concern, but rather is as important a consideration as the agreement to arbitrate itself, a court will not sever the failed term from the rest of the agreement and the entire arbitration provision will fail.

Id. at 561 (internal citations omitted). The choice of a specialty forum is an integral term in the arbitration clause precluding the appointment of substitute arbitrators.

Likewise, the Sixth Circuit Court of Appeals affirmed a decision barring a customer from submitting her claim to arbitration before the NASD in *Roney & Co. v. Goren*, 875 F.2d 1218, 1219 (6th Cir. 1989). This result was premised on a pre-dispute provision stating that all disputes would be submitted to arbitration "under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange." *Id.* In refusing to treat the various arbitral fora as interchangeable, the court opined that "[a] forum selection clause in an arbitration agreement, just like any other contract provision, is entitled to complete enforcement absent evidence that the contract was procured through fraud or excessive economic power." *Id.* at 1223. This was true even though the court found that there was purportedly no substantive difference between the NASD's and the NYSE's arbitration procedure. *Id.* at 1220. The parties selected the NYSE, which selection was an integral term of the agreement to arbitrate, and the NYSE therefore constituted the sole arbitration forum before which the parties could arbitrate. *Id.*

Just as in *Grant*, *Saloman* and *Roney*, the 1994 Form relied upon by Defendants indicates the selection of specific arbitral fora. As noted *supra*, the provision relied upon by Defendants identifies the ASE, the NASD, the NYSE, and the PHLX as approved arbitral fora. In mid-2007, however, the NASD joined with the New York Stock Exchange (a competitor in the arbitration of securities disputes and another authorized arbitral forum specified in the 1994 Form U-4s) to create a new entity, which is now known as the Financial Industry Regulatory Authority, or "FINRA." *See* SEC Release No. 34-56145, 2007 SEC LEXIS 1640 (July 26, 2007). Concurrent with the

creation of the new entity came both procedural and substantive changes to the dispute resolution processes previously utilized by NASD and the NYSE. FINRA is neither NASD nor NYSE (much less the ASE or the PHLX) and the parties no longer have access to the arbitration fora specified in the 1994 Form registration statement. Just as a contract for the purchase of brand-name pharmaceuticals cannot be satisfied by the provision of generics, an agreement to arbitrate before the NASD cannot be satisfied by arbitration before any other forum. Courts have determined that "a clause which adopts the rules of an organization like the NASD implicitly chooses that organization as the, or a, forum." *Reddam v. KPMG LLP*, 457 F.3d 1054, 1060 (9th Cir. 2006) (collecting cases), *overruled on other grounds by Atl. Nat'l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931 (9th Cir. 2010).

Our Supreme Court has recognized that the choice of an arbitral fora maintained by securities self-regulatory organizations is entitled to special deference and recognition. *See Dean*, 408 S.C. 371 n. 12, 759 S.E.2d 727 (2014). The Supreme Court reasoned that securities self-regulatory organizations — or SROs — are considered to have "special expertise" as they are "closely governed by the Securities and Exchange Commission and have developed complex regulatory schemes for overseeing arbitration of securities disputes." *Id.* Therefore, the selection of one of these organizations as the fora for dispute resolution has a wide-ranging, substantive impact on the arbitration process. The selection of a specific SRO forum, therefore, is an integral term of the arbitration clause.

Consequently, just as in *Grant*, if Defendants are allowed to treat SRO arbitral fora as interchangeable, Mr. Berry will be deprived of the arbitral forum that was expressly designated in the 1994 registration statement submitted with Wheat First. Because none of the designated arbitration fora are available to resolve the present dispute, and because an arbitrator selection

clause in the 1994 Form is an integral and material term of the arbitration obligation, the arbitration clause relied upon by Defendants is impossible to perform and is therefore void and unenforceable. *See In re Salomon Inc.*, 68 F.3d at 558 ("we cannot compel a party to arbitrate a dispute before someone other than the NYSE when the party had agreed to arbitrate disputes only before the NYSE"); *Roney*, 875 F.2d 1218 (interpreting designation of NYSE as the arbitral forum of choice meant that *only* the NYSE could arbitrate a dispute between the parties).

In reaching the conclusion that securities arbitral fora cannot be treated as interchangeable, this Court is mindful of the result obtained on very similar facts in *Keller v. ING Financial Partners, Inc.*, Op. No. 2011-CP-23-0336 (S.C. Cir. Ct. filed June 2, 2011). That case involved an attempt to compel arbitration before FINRA based on an arbitration clause which identified NASD as the chosen arbitral forum. The Honorable D. Garrison Hill denied a motion to compel arbitration on such facts, finding that:

> The "NASD," or the National Association of Securities Dealers, Inc., as then constituted, no longer exists, having combined regulatory functions with certain divisions of the New York Stock Exchange ("NYSE") to become what is now known as the Financial Industry Regulatory Authority, or FINRA.
>
> * * *
>
> In mid-2007, the NASD combined regulatory functions with certain divisions of the New York Stock Exchange (a competitor in the arbitration of securities disputes), and became what is now known as the Financial Industry Regulatory Authority, or FINRA See SEC Release No. 34-56145, 2007 SEC LEXIS 1640, (July 26, 2007). Moreover, coincident with this consolidation, came both procedural and substantive changes to the NASD's former dispute resolution process and rules. See FINRA, Archive of Arbitration Procedures for Cases Before and After April 16, 2007, http://www.finra.org/ArbitrationMediation/Rules (last visited Apr. 4, 2011). Consequently, just as in *Grant* and *Salomon*, the parties in the present case are deprived of the arbitration forum that they specifically bargained for and agreed upon.
>
> Because the designated arbitrator is not available to resolve the present dispute, and because the arbitrator selection clause in the subject agreement constitutes a material and integral term of the agreement to arbitrate, this Court finds the arbitration agreement impossible to perform, and denies Defendants' Motion to Compel Arbitration and Dismiss or Stay.

This ruling was affirmed on appeal in an unpublished opinion.[8] *Keller v. ING Financial Partners, Inc.*, 2013 WL 8482243, Op. No. 2013-UP-014 (S.C. Ct. App. filed Jan. 9, 2013). The Court of Appeals characterized the trial court ruling as follows:

> The circuit court found the arbitration agreement between the parties designated the National Association of Securities Dealers (NASD) as an exclusive arbitral forum, the NASD was unavailable to arbitrate because it no longer existed, and the court could not substitute the Financial Industry Regulatory Authority (FINRA) for NASD.

The Court of Appeals further noted that the courts "cannot rewrite the parties' agreement to substitute FINRA for NASD." *Id.* at 2.

According to the South Carolina Appellate Court Case Management Public Index, the *Keller* arbitration proponents then petitioned for a writ of certiorari to the South Carolina Supreme Court. 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 opinion of the Court of Appeals and Judge Hill's order remained unchanged. *Keller v. ING Financial Partners, Inc.*, Op. No. 2015-MO-006 (S.C. filed Feb. 11, 2015).

Keller provides an example of the importance of requiring proof of each material term in an arbitral agreement so that parties are not compelled to arbitrate before a forum to which they did not agree. South Carolina courts put arbitration proponents to their proof and do not allow them to rely on mere assumptions as a basis for compelling arbitration. Defendants are required to prove the existence of an agreement by Mr. Berry to arbitrate claims against them not just before any SRO forum, but before the SRO forum in which they seek to compel arbitration. Because

[8] This Court recognizes Rule 268(d)(2), SCACR, regarding the reliance on unpublished opinions of the Court of Appeals and Supreme Court in non-related proceedings. Mr. Berry cited the appellate opinions in *Keller*, not as binding precedent, but rather as an indisputable fact about the subsequent procedural appellate history of Judge Hill's prior order in *Keller*. The Court takes judicial notice of these facts and the court's files in the *Keller* case pursuant to Rule 201, SCRE.

Defendants have offered no proof that any of the arbitral fora specifically selected in the 1994 Form still exist or offer arbitration services, an integral and material term of the purported arbitration clause is impossible to perform, rendering the entire arbitration agreement void. For this additional reason, Defendants' motion to compel arbitration is therefore denied.

II. **Defendants' motion to dismiss is denied because the Amended Complaint provides Defendants with adequate notice of their alleged wrongdoing.**

In the alternative to compelling arbitration of these claims, Defendants sought dismissal of the Amended Complaint under Rule 12(b)(6), SCRCP.[9] Defendants' motion lacks merit and is denied. "A ruling on a motion to dismiss pursuant to Rule 12(b)(6) must be based solely on the factual allegations set forth in the complaint, and the court must consider all well-pled allegations as true." *Fabian v. Lindsay*, 410 S.C. 475, 481, 765 S.E.2d 132, 136 (2014) (quoting *Disabato v. S.C. Ass'n of Sch. Adm'rs*, 404 S.C. 433, 441, 746 S.E.2d 329, 333 (2013)). A motion to dismiss under Rule 12(b)(6), SCRCP, should not be granted if facts alleged and inferences reasonably deducible therefrom would entitle the plaintiff to relief on any theory of the case. *Plateau v. Harrelson*, 355 S.C. 197, 202, 584 S.E.2d 413, 415 (Ct. App. 2003) (citations omitted); *see also Baird v. Charleston Cty.*, 333 S.C. 519, 527, 511 S.E.2d 69, 73 (1999) (if the facts and inferences drawn from the facts alleged on the complaint would entitle the plaintiff to relief on any theory, then the grant of a motion to dismiss for failure to state a claim is improper); *McCormick v.*

[9] As was noted *supra* at p.5 n.2, Defendants did not timely raise their Rule 12(b)(3) objections to venue as this ground was not included in its initial motion. *See* Rule 12(g), (h), SCRCP. Although a Rule 12(b)(1) objection to the Court's subject matter jurisdiction can be raised at any time, Defendants have made no arguments in support of either this ground or their untimely raised venue objection. Thus, Defendants' failure to articulate any argument in support of any venue or subject matter objection dooms those objections as conclusory. This Court therefore treats them as abandoned and denies them accordingly. *See Mulherin-Howell*, 362 S.C. at 600, 608 S.E.2d at 593-94 (finding an argument advanced through conclusory statements with no argument or supporting authority abandoned); *Muir*, 336 S.C. at 298, 519 S.E.2d at 600 (declaring that conclusory arguments may be treated as abandoned).

England, 328 S.C. 627, 494 S.E.2d 431 (Ct. App. 1997)(motion to dismiss cannot be sustained if facts alleged in complaint and inferences reasonably deducible therefrom would entitle plaintiff to relief on any theory of the case). In deciding whether to grant a motion to dismiss, this Court must consider whether the complaint, viewed in the light most favorable to the plaintiff, states any valid claim for relief. *See Plateau*, 355 S.C. at 202, 584 S.E.2d at 415 (citation omitted); *see also Cowart v. Poore*, 337 S.C. 359, 523 S.E.2d 182 (Ct. App. 1999) (looking at facts in light most favorable to plaintiff, and with all doubts resolved in his behalf, the court must consider whether the pleadings articulate any valid claim for relief). The complaint should not be dismissed merely because the court doubts the plaintiff will prevail in the action. *Toussaint v. Ham*, 292 S.C. 415, 357 S.E.2d 8 (1987).

Defendants' two page Rule 12(b)(6), SCRCP argument is conclusory and unserious in the face of Mr. Berry's forty-four (44) page Amended Complaint that provides explicit detail on his assertions of wrongdoing supporting the causes of action alleged against Defendants. In fact, the motion to dismiss does not assert that *any* of the ten (10) specifically-pled causes of action are unsupported by sufficiently stated facts to support those causes of action. Consequently, Defendants' motion and accompanying memorandum does not meet its burden of showing a violation of Rule 12(b)(6). SCRCP and therefore the motion fails. *See, e.g., Mulherin-Howell v Cobb*, 362 S.C. 588, 600, 608 S.E.2d 587, 593-94 (Ct. App. 2005) (finding an argument advanced through conclusory statements with no argument or supporting authority abandoned); *Muir v. C.R. Bard, Inc.*, 336 S.C. 266, 298, 519 S.E.2d 583, 600 (Ct. App. 1999) (declaring that conclusory arguments may be treated as abandoned).

Viewing the asserted facts as true and in the light most favorable to Mr. Berry, as this Court is required to in considering a Rule 12(b)(6) motion, the Amended Complaint greatly exceeds the

"facts sufficient" standard of a "short and plain statement" of a well-pled complaint sufficient to put each of the Defendants on notice of the allegations of wrongdoing advanced by Mr. Berry. Defendants' motion to dismiss is therefore denied.

CONCLUSION[10]

THEREFORE, for the reasons set forth above, Defendants' Motion to Stay or to Dismiss is DENIED. Defendants' Motion for a Protective Order and Stay of Discovery pending arbitration is rendered moot by the effect of this Order and is therefore DENIED. Defendants are ordered to file any responsive pleadings within fifteen (15) days of this Order and provide discovery responses to all outstanding discovery requests of Plaintiff within ten (10) days of this Order.

IT IS SO ORDERED.

G. Thomas Cooper

The Honorable G. Thomas Cooper, Jr.
Circuit Court Judge
Eleventh Judicial Circuit

Camden
~~Lexington~~, South Carolina
This 16 day of June, 2017

FILED
12 JUN 21 AM 11:03

[10] In opposition to Defendants' motions, Mr. Berry also asserted that the purported arbitration clause relied upon by Defendants is unenforceable under these circumstances because its enforcement would compel Plaintiff to arbitrate outrageous conduct by Defendants that clearly was not contemplated at the inception of the arbitration agreement. While the Court agrees with the analysis and case law advanced by Mr. Berry on this topic, the Court need not address, in light of the rulings above, all issues at length where other grounds in opposition are likewise dispositive and provide the same relief. *See, e.g., Futch v. McAllister Towing of Georgetown Inc.*, 335 S.C. 598, 518 S.E.2d 591 (1999).

ORIGINAL

STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF LEXINGTON	)	ELEVENTH JUDICIAL CIRCUIT
	)	
ROBERT F. BERRY,	)	Civil Action No. 2017-CP-32-00397
	)	
Plaintiff,	)	
	)	
vs.	)	
	)	
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.,	)	ORDER
	)	
Defendants.	)	

Before the Court is Defendants' Motion for Reconsideration or Amendment of this Court's Order, filed June 21, 2017, denying Defendants' Motion to Dismiss or Stay Pending Arbitration.

After careful consideration of the record in this case and the submissions of the parties, this Court is 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.

Accordingly, this Court hereby DENIES Defendant's Motion under Rule 59(e), SCRCP, to reconsider this Court's March 1, 2017, Order. Furthermore, pursuant to Rule 59(f), SCRCP, the Court is of the opinion that oral argument is not necessary.

In regard to Defendants' request to for an extension of time to file a responsive pleading, which request has been extended with the consent of Plaintiff, Defendants' request is granted, and Defendants are ordered to file a responsive pleading within 10 days from receipt of this Order.

1

In regard to Defendants' request for an extension of time to respond to Plaintiff's outstanding discovery requests, which request has been extended with the consent of Plaintiff, Defendants' request is granted, and Defendants are ordered to provide discovery responses to all outstanding discovery requests of Plaintiff within 40 days from receipt of this Order.

AND IT IS SO ORDERED.

The Honorable G. Thomas Cooper, Jr.

July 24, 2017

Haynsworth Sinkler Boyd, P.A.

Date Rec'd 7/31/17
C/M # 31686.0261
Routing ANY
Calendared

State of South Carolina County of Lexington Robert F. Berry, Plaintiff, vs. Wells Fargo Clearing Services, LLC, et al., Defendants.	In the Court Of Common Pleas Case No.: 2017-CP-32-00397 Transcript of Record

June 1, 2017

Lexington, South Carolina

BEFORE:

The Honorable G. Thomas Cooper, Junior, Judge

APPEARANCES:

Mitchell Willoughby, Esquire
Chad N. Johnston, Esquire
Elizabeth Zeck, Esquire
Attorneys for the Plaintiff

John G. Tamasitis, Esquire
Frederick T. Smith, Esquire
Attorneys for the Defendants

Steven E. LeBlanc, R.P.R., Circuit Court Reporter
P.O. Box 184, Lexington, South Carolina 29071

INDEX

	PAGE
MOTIONS	3
Certificate of Reporter	31

EXHIBITS

NO.	DESCRIPTION	ID	EVDS.
NONE			

Thereupon, the following proceedings were had,

THE COURT: Appearances, please.

MR. WILLOUGHBY: Your Honor, on behalf of the plaintiff my name is Mitchell Willoughby. With me is Chad Johnston and Elizabeth Zeck. We practice with the firm of Willoughby and Hoefer in Columbia.

THE COURT: You've got the whole firm here?

MR. WILLOUGHBY: Well, I've got part of the firm here, Your Honor.

THE COURT: You've got the brains.

MR. WILLOUGHBY: Got the brains. Always need all the help I can get.

THE COURT: All right. Yes, sir.

MR. TAMASITIS: Your Honor, John Tamasitis from Haynsworth, Sinkler and Boyd.

THE COURT: Say that again.

MR. TAMASITIS: John Tamasitis from Haynsworth, Sinkler and Boyd. And I can hand up a business card as well. Your Honor, I'm here on behalf of Adam Yount who is in our Charleston office. We did not bring the entire Haynsworth, Sinkler, Boyd firm today.

THE COURT: You're at a disadvantage.

MR. TAMASITIS: Yes, Your Honor.

THE COURT: This is Deli Boi versus Queen Holdings, right?

MR. TAMASITIS: No, Your Honor. This is Berry versus Wells Fargo Clearing.

THE COURT: What are you here for?

MR. WILLOUGHBY: Same case. Our client, Your Honor, is Mr. Berry who is sitting in the courtroom so the case is --

THE COURT: All right. Just hold on a minute. I thought I called Deli Boi, III, LLC versus Queen Holdings. Anybody here on that case? That's the next case. You guys just jumped the gun.

MR. WILLOUGHBY: We're sorry, Your Honor.

THE COURT: Have we heard from Ian McVey or Tyler Gregg?

THE CLERK: No.

THE COURT: All right. Well, that gives me great pleasure in saying dismissed for lack of prosecution. All right. Now we're at Robert Berry versus Wells Fargo Clearing, right?

MR. WILLOUGHBY: Correct, Your Honor. And then there's multiple defendants, Your Honor. I was gonna also, I have just handed to opposing counsel briefs in opposition to their motion today and I would welcome the opportunity to present copies for Your Honor and your clerk.

THE COURT: Well, when it's your turn. This is the

defendant's motion?

MR. WILLOUGHBY: It is, Your Honor.

MR. TAMASITIS: Yes, Your Honor.

THE COURT: All right. Mr. Tamasitis.

MR. TAMASITIS: Tamasitis, Your Honor.

THE COURT: You're appearing on behalf of Adam Yount?

MR. TAMASITIS: Yes, Your Honor. And I also have here with me Mr. Frederick, Fred Smith from Seyfarth Shaw in Charlotte. We submitted a motion to have him admitted pro hoc viche to this Court on May 22nd and also with that attached to it our application to the Supreme Court. We as of this morning I had not seen that it had been signed by the administrative court judge so, Your Honor, I have a proposed order here for you to sign along with the motion and it's my understanding that the plaintiff's counsel does not object.

MR. WILLOUGHBY: We have no objections, Your Honor.

THE COURT: All right. Let's deal with that issue first.

MR. TAMASITIS: Yes, Your Honor.

THE COURT: Where is the application?

MR. TAMASITIS: May I approach, Your Honor? Attached is the motion along with the application that's attached.

THE COURT: Been to the Supreme Court?

MR. TAMASITIS: Yes, Your Honor. It was filed May 26th.

THE COURT: Let me see. Let me have a look at that. The fees have been paid?

MR. TAMASITIS: Yes, Your Honor.

THE COURT: All right. Welcome, Mr. Smith.

MR. SMITH: Thank you very much, Your Honor.

THE COURT: Now, which motions? I have got a protective order, a stay of discovery and a motion to order arbitration.

MR. TAMASITIS: Yes, Your Honor. I believe to take it up the motion to stay the case and/or dismiss and compel arbitration I think should be taken up first. The motion for protective order and motion to stay discovery would only I think be applicable --

THE COURT: Just follow in line.

MR. TAMASITIS: Yes, Your Honor.

THE COURT: All right. Mr. Tamasitis, tell me about it.

MR. TAMASITIS: Your Honor, I'll turn it over to Mr. Smith.

THE COURT: You may proceed, Mr. Smith.

MR. SMITH: Thank you, Your Honor. I appreciate the Court allowing me to appear before you today and I will

keep my remarks brief.

Your Honor, as we have explained in our motion to dismiss or stay arbitration we believe that there are two proper entities that should be parties to this matter.

THE COURT: Tell me what this case is about.

MR. SMITH: In essence, Your Honor, it's an employment dispute. Mr. Berry was a registered representative or an associated person, a broker in essence with Wells Fargo Advisors which on November 11th, 2016 changed its name to Wells Fargo Clearing Services, LLC. And we have termination and a number of different complaints that Mr. Berry has against Wells Fargo Clearing Services and Scott Spank who is an individual defendant in this action. Mr. Spank, too, was a registered representative or associated person under FINRA with Wells Fargo Advisors, Wells Fargo Clearing Services.

This lawsuit contains ten different counts, many of them similar but all arise out of an employment relationship that turned sour. Mr. Berry has sued Wells Fargo Clearing Services. He sued Mr. Spank. He has also sued Wachovia Securities Financial Holdings, LLC, which is the parent company of Wells Fargo Clearing Services. He's jumped a couple levels above Wachovia Securities Financial Holdings and sued the ultimate parent company

Wells Fargo Company and he's also named the retail bank Wells Fargo Bank NA.

THE COURT: Called the shotgun approach?

MR. SMITH: We think so, Your Honor. And our argument boils down to this, Your Honor. When Mr. Berry first started with the predecessor entity to what is now Wells Fargo Clearing Services, he completed a U4 which is standard in the securities industry. That U4 contained an arbitration provision in which Mr. Berry agreed 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 rules, constitutions or bylaws. At the time it was the NASD. It's now FINRA. As may be amended from time to time and then any arbitration award rendered against me may be entered a judgment in any court of competent jurisdiction.

It's well established under both federal law and South Carolina state law that there's a heavy presumption in favor of arbitrability, Your Honor. In addition to the arbitration agreement which we believe is binding to this day, Finra has a rule. It's rule 13-200(A) and that rule specifically states, quote, that a dispute must be arbitrated under the code, that's the FINRA code, if the dispute arises out of the business activities of a member

or an associated person or - excuse me - and is between or among members and associated persons or associated persons.

Now, FINRA is a congress and SEC sanctioned entity that regulates broker dealers like Wells Fargo Clearing Services and brokers such as Mr. Berry, and 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. We believe that the addition of all these other Wells Fargo entities frankly, Your Honor, is a subterfuge designed to avoid arbitration. We believe that Mr. Berry should be compelled to arbitrate his claim against Wells Fargo Clearing Services and Mr. Spank under the agreement under FINRA rules for FINRA and that the rest of the Wells Fargo defendants should be dismissed.

THE COURT: Where is that agreement? Is that in your pleading?

MR. SMITH: It is, Your Honor.

THE COURT: I have got your memorandum.

MR. SMITH: It's exhibit 1, Your Honor, to our memorandum of law.

THE COURT: I see it. That's the uniform application?

MR. SMITH: Yes, Your Honor. What's known in the

industry as a U4. I have not had a chance to read plaintiff's memorandum in opposition that was just provided to us. Even if plaintiff would argue that that agreement isn't binding --

THE COURT: Well, just point out the arbitration clause.

MR. SMITH: It's number 5, Your Honor.

THE COURT: I agree to arbitrate?

MR. SMITH: Yes, sir.

THE COURT: What is the requirement?

MR. SMITH: Under FINRA, Your Honor, a three person arbitration panel would decide the party's disputes unless they agree to a single arbitrator.

THE COURT: It doesn't state that.

MR. SMITH: The details of the arbitration process are set forth in the FINRA code, Your Honor. Your Honor, if I my approach the bench? I have a copy of the FINRA rule, too, if Your Honor would like that. We cited it in our memorandum of law. I have a copy for the Court (proffering.)

THE COURT: Thank you. Mr. Willoughby.

MR. WILLOUGHBY: May it please the Court.

THE COURT: You may proceed.

MR. WILLOUGHBY: Your Honor, I would hand up to the Court and your law clerk copies of our brief and the

exhibits that we have attached to the brief (proffering.)

THE COURT: Very well.

MR. WILLOUGHBY: I would also hand to Your Honor a copy of the only, it's a little easier to look at of the U4 that you were just discussing with Mr. Smith. And, Your Honor, what I would do if Your Honor has the brief of Mr. Smith available to you, if you would turn to his exhibit 1 you would note that he's actually attached three U4's, and if you would look at the first U4 that's attached, at least the order that they were provided to us, the first one is dated 9/28/1995, and if you would look --

THE COURT: Wait. The first one provided to me says employment date -- All right. 9/28/95.

MR. WILLOUGHBY: Yes, Your Honor. There are four pages to each one of these. The first one is dated 9/28/1995 and if Your Honor will also note then on page 1 of that document the name of the firm is Wheat First Securities, Inc. And then if you look at the next one that they provided --

THE COURT: Wait a minute. Let me ask you, this one is signed by -- Okay. All right. I'm with you.

MR. WILLOUGHBY: And then the next one that's provided is also with Wheat First Securities, Inc. and the date of it is January, looks like January 16, 1995

and neither one of those two forms have any arbitration forum selected. No designation of an arbitration forum at all and the language that you were just discussing with Mr. Smith specifically says, Your Honor, we agree to arbitrate in front of a forum that's designated in item 10 and item 10 has a place to check blocks, if you will look on the very first page or if you look at the one that I handed to Your Honor that has my highlighting on it, I'm going to turn to it next --

THE COURT: I'm losing you. I'm moving down to item 10. It says if I became temporarily registered as an agent.

MR. WILLOUGHBY: Item 10 on this form, Your Honor, is to be registered with the following. Not item 10 on where the arbitration clause is but on the very first page.

THE COURT: Go back to the first page?

MR. WILLOUGHBY: Yes, sir. If you would look at - if you will just juxtapose - if you will take the one I just handed up to Your Honor and just look at it, you will see on the very first page and then I'll call your attention to the difference. You will see an item 10 there on the very first page about a third of the way down and on the left hand column it's got SRO and you will see there are a number of places to designate. On

the one I handed up to Your Honor what has been designated is ASE which is an acronym for the American Stock Exchange which no longer exists and then NASD stands for the National Association of Securities Dealers. They no longer operate an arbitration forum. Then the New York, NYSE, the New York Stock Exchange. They no longer operate an arbitration forum. And then PHLX which is the Philadelphia Exchange and it no longer exists.

It is true, Your Honor, that back in 2007 there was, I don't know what the right word is, there was a consolidation of the arbitration forums of NASD and the New York Stock Exchange and there was an amalgamation of those arbitration forums but neither of them any longer, neither of these two organizations operate an arbitration forum. FINRA does. FINRA is an organization called the Financial Industry Arbitration or Financial Industry Regulatory Authority and they operate a arbitration forum but as Your Honor will note on the designation on this 1995 form it fails for a number of reasons.

If you look at the language that's on page 4 that you were just reading a few minutes ago, the form says I agree to arbitrate any dispute, claim or controversy between me and my firm. If you turn back to page 1, the firm that is designated is Wheat First Securities, Inc.

It goes on to say before an arbitration forum designated in item 10. So those four designations were the American Stock Exchange. No longer exists. NASD no longer operates an arbitration forum. New York Stock Exchange no longer operates an arbitration forum. And the Philadelphia Exchange no longer exists. So it fails for several reasons.

One reason, and I'm gonna come to another very important reason in just a moment, Your Honor, one reason is the firm. There's no successor assigns. It says Wheat First. And as you look in our brief, Your Honor, if you will look to, at tab 2, we have a self authenticating document from the South Carolina Secretary of State which is our exhibit to the brief that shows that Wheat First Securities did, in fact, change its name back in June of 1999 and it changed that name to First Union Capital Markets Corp. And then if you will look at number 3 which is likewise self authenticating, you will see that First Union Capital Markets Corp. applied for surrender of authority to do business in the State of South Carolina effective 12/2/1999 and the Secretary of State carries a First Union Capital Markets Corp. under its records as dissolved.

So the business entity known as Wheat First which is the entity that Mr. Berry had signed a form with when he

was employed by them no longer exists and so this agreement to the extent it's enforceable at all would have only been enforceable by Wheat First. No successor assign is mentioned and it would only be permitted to be arbitrated in front of one of those four arbitration forums that are specifically designated. All of this information is filled out by the firm in this case Wheat First so any ambiguity is constructed against them.

But another key point, Your Honor, for the reason that this potential or proposed agreement which is being relied upon not by Wheat First but being relied upon by Wells Fargo Corporation, the bank, they are all listed there in the caption of the case, are being relied upon dating all the way back to this 1995 agreement and it simply, Judge, does not work.

Another reason why their argument fails, they have tendered this form, Your Honor, without any authentication. The rules of evidence are very clear. They have an affidavit from a paralegal in the Wells Fargo law department. She does not reference that she is the record custodian. She does not in any way attempt to authenticate the form so the form is just passed up to Your Honor without any authentication and therefore it is inadmissible as a matter of law and therefore the Court can't consider it for that reason as well. And I

recognize, Your Honor, that's more of a technical argument but it is absolutely valid on the law. We cite to the Court the Conley case where employment records were not effectively authenticated in the trial of the case and the judge refused to permit those records into evidence and as a consequence it went up on appeal.

THE COURT: Who did your client work for?

MR. WILLOUGHBY: Say again.

THE COURT: Who did your client work for?

MR. WILLOUGHBY: So my client was an employee and this is important, Your Honor, and I'm going to discuss some of the facts. He was an employee of Wells Fargo Advisors, LLC.

THE COURT: What happened to Wheat First?

MR. WILLOUGHBY: Wheat First ultimately, Your Honor, through their businesses, through mergers and Acquisitions ultimately that line of business got acquired at some point in time by Wells Fargo. As Your Honor will remember back there in the financial crises in 2008 it was Wachovia and Wachovia through becoming essentially a liquid the Federal Reserve basically forced the sale of Wells Fargo --

THE COURT: Well, does Mr. Berry, did he have an agreement with whoever employed him?

MR. WILLOUGHBY: Well, Your Honor, we say no. But

what I would say to Your Honor it is their duty. They're asking to compel arbitration. It is their duty to prove the agreement and we submit to Your Honor today that what they have tendered to this Court is not sufficient evidence in which the Court can conclude that Mr. Berry has agreed to arbitrate.

As Your Honor is well aware arbitration is a creature of contract. No one can be forced to arbitrate any issue to which they have not agreed. They have tendered this U4 to Your Honor for the specific purpose of using it to convince Your Honor that Mr. Berry signed it back in 1995, they're entitled to rely upon it today and that is the evidence that they presented.

Now, we would argue, Judge, it's not evidence. It's inadmissible. We object to it being admitted and considered because it has not been authenticated. But we would also say that even if Your Honor did choose to consider it, the contract would fail because there is no successor assigns language. When you see the firm, the firm says Wheat First. When you see the arbitration forums, none of those arbitration forums provide arbitration forums for resolving disputes today. So Mr. Berry, if he had filed a claim against Wheat First, we could understand Wheat First coming in and asserting this U4 as a means to argue that they should be,

Mr. Berry should be compelled to arbitrate. But Wheat First is not here. They're long since defunct. They're no longer doing business. We don't know whether it's a merger. We don't know whether it was an acquisition of business assets. We don't know any of that sort of stuff.

But I would say to Your Honor regardless it would all fail because the language of the document to which they have tendered to this Court is very clear that Mr. Berry is not required to arbitrate. But let me give Your Honor just a few facts. What we have --

THE COURT: Do I need more?

MR. WILLOUGHBY: Say again.

THE COURT: Do I need more?

MR. WILLOUGHBY: I don't know that you need more but Mr. Smith has kind of indicated that it's a plain vanilla sort of employment dispute. The reality is they terminated Mr. Berry. Defamed Mr. Berry in a U5 that they filed claiming that he had been terminated for unethical dishonest conduct. They also then tried to steal his business with his clients. They basically terminated him, Your Honor, because he refused to do improper and illegal acts that Wells Fargo has been widely indicated in the financial press where they were opening accounts for people who had not requested

accounts be opened. Wells Fargo during this period of time was placing pressure on all of their advisors, on other employees to aggressively cross market and cross sell products.

Mr. Berry said very forthrightly and honestly that my clients don't need these products. It would be a violation of my fiduciary responsibilities and the securities laws to force them to buy these products and, therefore, he refused to sell products to his clients. That's part of the reason he was targeted.

We also allege in our complaint that he had a profit formula agreement dating back to when Wachovia was in charge of the business entity. They decided that that contract was more lucrative, provided a greater pay out to Mr. Berry than they wished to pay and therefore part of the reason for terminating him was to avoid this pay out arrangement.

So they have damaged this gentleman, fine gentleman that lives right here in Lexington County. They have damaged his business. They have damaged his future business opportunities. He is still suffering from the losses. He was making a salary on an annual basis in the range of 350 to $400,000.00 on an annual basis. Much of that has been wiped out and now in his middle 60's he's back to having to recreate a book of business that was

basically denied.

THE COURT: All right. I can't try the case here.

MR. WILLOUGHBY: I understand. But you needed a little bit of that background, Your Honor.

THE COURT: All right. Mr. Smith, he says -- You heard him.

MR. SMITH: I did, Your Honor. A few quick things, Your Honor. Number 1, I think the Court can take judicial notice of the fact that in the mid 2000's the NASD turned over its responsibilities for the regulation of the financial services industry and broker dealers and brokers to a newly created entity called FINRA. NASD essentially morphed into FINRA, Your Honor. With respect to the particular U4 at issue, I'll note the following from plaintiff's first amended complaint as to the corporate history of Wheat First. On page 9, your Honor, footnote 3, the 1997 --

THE COURT: Hold on. Let me find it. The amended complaint?

MR. SMITH: Yes, Your Honor. Filed on February 23rd this year.

THE COURT: I got it. Go ahead.

MR. SMITH: I think Mr. Berry and his fine counsel did a nice job laying out the transformation of Wheat First to the entity that ended up being his employer

Wells Fargo Advisors and alleges in 1997 Wheat First was acquired by First Union Corporation and continued to do business under the name of Wheat First Union. Thereafter in 2001 the parent company of Wheat First Union merged with Wachovia Corporation and the brokerage business continued. I believe that should be continued under the name Wachovia Securities.

In 2008 Wachovia was acquired by Wells Fargo and in 2009 the retail brokerage became known as Wells Fargo Advisors. The U4 continued with both Mr. Berry and the various firms, broker dealers that he worked with over the time until Wells Fargo Advisors. If not, Your Honor, there's a serious question as to Mr. Berry's authority and registration status over the past couple of decades to do what he's done so well and earned him a living.

As for the authentication issue, I don't agree with Mr. Willoughby with respect to the authentication. I think there's sufficient foundation and authentication in Ms. Jackson's affidavit.

In addition, I believe that that U4 is self authenticating. It's a document created by a quasi governmental agency and I think it speaks for itself without any kind of authentication which I believe we have provided in any event.

The final point, Your Honor, to the extent that

there are any true material disputes here, the law is real clear that any doubts must be discarded and that a presumption of arbitration has hold and we think that that maxim applies here.

THE COURT: What about form selection? Most arbitration agreements that I have seen, I have seen many, carry a form selection provision but this one is sort of bare of that other than this reference to paragraph 10.

MR. SMITH: Right. And my response to that, Your Honor, is that NASD has morphed into FINRA. If you're part of this industry which Mr. Berry has been for decades, Your Honor, he knows as does every broker and the entities that employ them that if there are disputes of this nature, they end up being arbitrated before FINRA and prior to that the NASD. There is no doubt or confusion about that. And I'll note, too, Your Honor, that even if the Court were to find that this agreement hasn't continued forth and doesn't bind --

THE COURT: Say that again.

MR. SMITH: Yes. I apologize. Even if the Court were to find that there is no agreement which we don't think it should hold, Your Honor, that rule that I placed in front of you binds the parties to arbitration. If you want to sell securities and be a broker in this country,

you must be registered with FINRA and as a condition of having the privilege of being in this industry to earn a living you must also abide by FINRA's rules and FINRA's rules say that disputes of this nature between a broker and his or her firm, the broker dealer and other associated persons or registered representatives, in this case Mr. Spank, must be arbitrated under the auspices of FINRA and pursuant to its rules.

THE COURT: Is that in your brief?

MR. SMITH: Yes, it is, Your Honor.

MR. WILLOUGHBY: Your Honor, may I briefly respond?

THE COURT: Just briefly.

MR. WILLOUGHBY: If I could get Your Honor to turn - his question has been answered by another Circuit Court in South Carolina on the very same issue. If you will turn to tab 4. This is the Keller case versus ING Financial and it's cited, of course, in our brief but the very same issue was presented in which NASD, an agreement was submitted where NASD was enumerated in the agreement and they were trying to come in and say, well, NASD meant FINRA. The effect of that, Your Honor, if you will turn to page, the bottom of page 5.

THE COURT: Can I rely on this as precedent?

MR. WILLOUGHBY: You can in this regard, Your Honor. If you will note, you will note also under tab 5 as I

give the Court the history of this case, it was appealed to the Court of Appeals. Now, I must acknowledge to the Court as I did in our brief that the opinion for the Court of Appeals indicates that it's not to be cited as precedent. What I cite it for is to say that you have the Court of Appeals that reviewed Judge Hill's order, affirmed that order and then under tab 6 you will note that that case was appealed all the way to the State Supreme Court, cert was granted, the Supreme Court heard arguments and then dismissed the grant of cert as having been improperly granted.

So this Circuit Court case of Judge Hill has been vetted all the way to the Supreme Court and I would say to Your Honor that what these courts rely upon is that basic principle of law. You cannot be compelled to arbitrate before a forum and with anybody that you have not specifically agreed to arbitrate with and you can't tender anything that's outside the scope of whatever that agreement may be.

But you would want to look, Your Honor, at the very top of page 6 of Judge Hill's order. In mid 2007 the NASD combined regulatory functions with certain divisions of the New York Stock Exchange and became what is now known as Financial Industry Regulatory Authority of FINRA and its assigns. Coincident with this consolidation came

both procedural and substantive changes to the NASD's former dispute resolution process and rules and then it cites, consequentially just as in granting sovereign the parties to the present case were deprived of the arbitration forum that they specified, specifically bargained for and agreed upon and therefore the court went on to decline to compel arbitration.

And, Your Honor, I would also state in this particular agreement, said this in the brief, there is absolutely no proof and it's up to Mr. Smith and the defendants to prove that the difference between FINRA and NASD or a combination between those, they have not done those things, therefore, as a matter of proof it fails. But you have a court decision in which that issue has been looked at at the Court of Appeals and by the Supreme Court and concluded that a shift from NASD to FINRA is still a material shift changing rules. There's an amalgamation of the rules so you get a different arbitration forum than we have experienced before and it says the Court cannot rewrite the party's agreement to substitute FINRA for NASD.

When Wells Fargo took over the businesses, they had the opportunity to make those changes if they had chosen to do so. They didn't do so, therefore, the agreement fails. And if Your Honor will note, I still come back

not withstanding our pleadings that issue was not a issue to us as we were pleading. We were just tracing a series of events. We talk about predecessors. The reality is we have proven up to Your Honor by self authenticating documents from the Secretary of State that Wheat First no longer exists.

I don't think Your Honor should take judicial notice either of the so-called FINRA rule. It's not a judicial entity. It's not a lawsuit that FINRA operates. It is not a judicial forum, therefore, to the extent FINRA has any application in this case, we don't think they do, they would have the duty and obligation to prove that up.

THE COURT: Let me ask you this from either party. Did Mr. Berry have to -- When Wheat First Securities became extinct, did Mr. Berry have to refile for securities registration with any of the defendants? Does he have a contract? Did he have a contract or is there something that links him to these defendants and to FINRA?

MR. WILLOUGHBY: We say no, Your Honor. He continued in the business. There's no question about that just as we indicated. New firms picked up business. We don't know under what arrangement.

THE COURT: How did you know to sue these particular entities if you have no idea that he even worked for them

or worked with them?

MR. WILLOUGHBY: Well, we knew at the end that he was getting a paycheck when he was terminated from Wells Fargo Advisors and we knew that Wells Fargo Advisors was a part of the affiliated --

THE COURT: You just knew he was getting a check?

MR. WILLOUGHBY: He was clearly getting paid all the time he was working there and once Wells Fargo became --

THE COURT: But you don't know if he was registered as being an associate of Wells Fargo Securities or anything like that?

MR. WILLOUGHBY: It's not our duty to prove it, Your Honor. But the answer is I don't know what, if anything, Wells Fargo may have done once they acquired Wachovia. I'm sure that they would have continued in the business. They would have had to file forms from time to time. But, Your Honor, I would ask the Court just like the Court of Appeals case under tab 5 it says regardless of any similarities between NASD and FINRA's procedural rules therefor we cannot impose upon the parties the power of an arbitrable forum that they did not agree to submit to. So you have got to have something that our guy has signed.

THE COURT: That's what I'm looking for.

MR. WILLOUGHBY: And they have not produced it, Your

Honor. They have not produced it. I don't know if it exists and it's not my duty to produce it. We are resisting this. What they have brought to you today is one document, one document, the one that I have handed up to Your Honor. The other two don't even have an arbitration forum designated. I presume what they did is look through their files to find out where they could find Mr. Berry's signature. They produced three documents to the Court. There's only one that even specifies an arbitration forum, the one that I handed up to Your Honor and it only would say we'll arbitrate before these four forums. None of them exist.

THE COURT: All right. I understand. Thank you.

MR. WILLOUGHBY: And the firm no longer exists.

THE COURT: All right.

MR. WILLOUGHBY: So their burden they haven't met.

THE COURT: Anything further?

MR. SMITH: No, Your Honor.

THE COURT: All right. I'll accept proposed orders in ten days. Thank you very much.

MR. TAMASITIS: Your Honor, with respect to the motion for protective order to hold discovery until you make a decision on this, that was the first order that was up in the application, you took this under advisement.

THE COURT: I don't know that -- Has there been any demand for discovery?

MR. WILLOUGHBY: We have made demand for discovery, Your Honor. We have not moved to compel awaiting the Court's ruling on the --

THE COURT: As long as they don't move to compel you're safe.

MR. WILLOUGHBY: And we won't move to compel until -- We have asked in our brief, Your Honor, assuming you agree with us that arbitration can't be compelled that they would immediately thereafter respond to that. Your Honor, there is one thing that they have not argued. I don't know if Mr. Smith is planning to withdraw it. They filed also a motion to dismiss under 12(B) arguing that we failed to state claims upon which relief could be granted, I believe. So I don't know if you are planning to argue that motion.

MR. SMITH: I think it's set forth in our motion and it's very clear what our position is. I don't believe we need any additional oral argument on that, Your Honor.

THE COURT: Okay. Thank you very much, counsel.

MR. WILLOUGHBY: Your honor, may I say one thing? They amended their motion to add some additional grounds under rule 12(B) and I don't think they amended - they amended that motion after the period of time to answer

and as Your Honor knows if they hadn't filed that motion, they would have been in default. So they filed the motion. It stays their time to answer and therefore if you then try to amend that motion after the time has run for you to answer or otherwise plea I think you have waived those arguments. We'll say that in - we have said that in our brief but I wanted the Court to hear that. So I think the only ground they have got that they can argue, everything else is waived, is the ground of failure to state facts sufficient to make out causes of action.

THE COURT: All right. Well, in your proposed orders address those issues.

MR. WILLOUGHBY: We'll address it.

THE COURT: All right. Thank you very much.

MR. WILLOUGHBY: Thank you, Your Honor.

MR. SMITH: Thank you, Your Honor.

MR. TAMASITIS: Thank you, Your Honor.

MR. WILLOUGHBY: Thank you for listening to us this morning.

WHEREUPON, THE HEARING WAS CONCLUDED.

CERTIFICATE OF REPORTER

(STATE OF SOUTH CAROLINA)

(COUNTY OF LEXINGTON)

I, THE UNDERSIGNED, Steven E. LeBlanc, Sr., R.P.R., and Official Circuit Court Reporter for the Eleventh Judicial Circuit in and for the State of South Carolina, do hereby certify that I reported the proceedings in the before captioned case in the Court of Common Pleas in and for the State of South Carolina on the 1st day of June, 2017.

I FURTHER CERTIFY that the forgoing 30 pages constitute a true and accurate record of said proceedings.

I FURTHER CERTIFY that I am neither related, counsel to, nor of interest to any party hereto.

IN WITNESS WHEREOF, I have hereunto set my hand at Lexington County, this 30th day of September, 2017.

Steven E. LeBlanc, Sr., R.P.R.
Eleventh Circuit Court Reporter
State of South Carolina.