THE STATE OF SOUTH CAROLINA
In The Supreme Court

---

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

---

RECEIVED
JUN 10 2013
S.C. Supreme Court

Opinion No. 2013-UP-014 (S.C. Ct. App. Filed Jan. 9, 2013)

---

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.

---

# PETITION FOR A WRIT OF CERTIORARI

---

Ashley B. Abel
T. Chase Samples
JACKSON LEWIS LLP
One Liberty Square
55 Beattie Place, Suite 800
Greenville, South Carolina 29601
*Attorneys for Petitioners*

Other Counsel of Record:

H. Donald Sellers
Haynsworth Sinkler Boyd, P.A.
PO Box 2048
Greenville, SC 29602
*Counsel for Keller*

Charles F. Turner, Jr.
Turner Padget Graham and Laney
200 East Broad Street, Suite 250
Greenville, SC 29601
*Counsel for Jackson National Life Insurance Company*

## TABLE OF CONTENTS

# TABLE OF AUTHORITIES

**OTHER AUTHORITIES**:

## CERTIFICATION OF COUNSEL

Counsel for Petitioners certifies that a petition for rehearing in this matter was denied by the Court of Appeals on March 12, 2013.

## QUESTION PRESENTED

Did the Court of Appeals err by holding, contrary to every court that has considered the issue, that the 2007 assumption by the Financial Industry Regulatory Authority ("FINRA") of the arbitration program previously administered by the National Association of Securities Dealers ("NASD"), rendered the NASD "unavailable" as a forum for arbitration of securities disputes, thus nullifying the parties' arbitration agreement (and those of vast numbers of other brokers and investors in South Carolina)?

## STATEMENT OF THE CASE

This case involves a claim by an investor against a securities broker-dealer and its registered representative for allegedly recommending an unsuitable investment—the type of claim uniformly subject to arbitration before the Financial Industry Regulatory Authority ("FINRA"). But in a decision with major implications for the FINRA arbitration program, a panel of the Court of Appeals held that FINRA, which was created out of the regulatory arm of the National Association of Securities Dealers ("NASD") in 2007, did not assume jurisdiction of disputes arising out of contracts providing for arbitration under the NASD rules. In effect, this decision renders the NASD/FINRA merger a nullity in South Carolina. The Court of Appeals' decision flies in the face of every decision to address the issue and the strong policy in favor of arbitration, and threatens to flood the courts of this State with cases that in every other State would be resolved through arbitration. For these reasons, and as explained further below,

Petitioners respectfully petition the Court for certiorari to review the erroneous opinion of the lower court.

1. Petitioner ING Financial Partners, Inc., ("IFP") is a securities broker-dealer for which, during the time period at issue, Petitioner William C. Johnson (through his company, Petitioner Diversified Business Concepts, Inc.) served as a registered representative pursuant to the securities laws and FINRA rules. (Compl. ¶¶ 2, 5; R. p. 16-17.) On September 12, 2007, in consultation with Johnson, Respondent David Keller ("Keller") purchased a variable annuity issued by Jackson National Life Insurance Co. ("Jackson National"). (*Id.* ¶ 17; R. p. 19.) This transaction was governed by a standard IFP account agreement containing a mandatory arbitration clause. (Reply in Supp. of Mot. to Compel Arbitration, Ex. A; R. pp. 89-90.)

That clause provides, in relevant part:

> 18. Arbitration Clause. THIS AGREEMENT CONTAINS A PREDISPUTE ARBITRATION CLAUSE. BY SIGNING AN ARBITRATION AGREEMENT THE PARTIES AGREE AS FOLLOWS:
>
> ***
>
> (F) THE RULES OF SOME ARBITRATION FORUMS MAY IMPOSE TIME LIMITS FOR BRINGING A CLAIM IN ARBITRATION. IN SOME CASES, A CLAIM THAT IS INELIGIBLE FOR ARBITRATION MAY BE BROUGHT IN COURT.
>
> (G) THE RULES OF THE ARBITRATION FORUM IN WHICH THE CLAIM IS FILED, AND ANY AMENDMENTS THERETO, SHALL BE INCORPORATED INTO THIS AGREEMENT.
>
> I AGREE THAT ANY DISPUTE BETWEEN YOU AND ME ARISING OUT OF THIS AGREEMENT SHALL BE SUBMITTED TO ARTIBRATION CONDUCTED UNDER THE THEN APPLICABLE PROVISIONS OF THE CODE OF ARBITRATION PROCEDURE OF NASD. ARBITRATION MUST BE COMMENCED WITHIN THE APPLICABLE STATUTE OF LIMITATIONS. THE ARBITRATION AWARD SHALL BE FINAL AND JUDGMENT MAY BE ENTERED

ON THE AWARD IN ANY COURT, STATE OR FEDERAL, HAVING JURISDICTION.

***

(Mot. to Compel Arb. Ex. A; R. p. 64.)

2. After Petitioners and Respondent executed the arbitration agreement at issue here, the United States Securities and Exchange Commission designated a new self-regulatory agency, FINRA,[1] to assume control of the NASD arbitration program. *See* FINRA, About the Financial Regulatory Authority, http://www.finra.org/AboutFINRA/ (last visited June 7, 2013) (explaining FINRA history); Securities and Exchange Commission, Press Release 2007-151, July 26, 2007, "SEC Gives Regulatory Approval for NASD and NYSE Consolidation," http://www.sec.gov/news/press/2007/2007-151.htm (last visited June 4, 2013) (describing merger of NASD and NYSE Regulation, Inc.). Created in July 2007 via a consolidation of the NASD and certain enforcement and arbitration functions of the NYSE, (Trial Court's May 26, 2011 Order at 2; R. p. 4.), FINRA's arbitration program is a continuation of the former programs administered by those two self-regulatory agencies. The FINRA rules, which became effective December 15, 2008, incorporated the NASD's Code of Arbitration Procedure for Customer Disputes, which applies to all claims filed on or after April 16, 2007. *See* Order Approving FINRA Regulatory Notice 08-57, SEC Approves New Consolidated FINRA

[1] FINRA is a self-regulatory organization ("SRO") registered with the Securities and Exchange Commission ("SEC") as a national securities association. *Fiero v. Financial Indus. Regulatory Auth., Inc.*, 606 F. Supp. 2d 500, 504 (S.D.N.Y. 2009). 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 ...." *Sacks v. SEC*, 635 F.3d 1121, 1122 (9th Cir. 2011) (citation omitted). Pursuant to SEC regulations, licensed securities brokers and dealers must register with and abide by FINRA's guidelines. *See* 17 C.F.R. § 240.15b7–1 (2009). IFP is a broker-dealer member of FINRA and Johnson is a FINRA registered representative.

Rules, 2008 WL 4685588 (Oct. 16, 2008); FINRA, Code of Arbitration Procedure, http://www.finra.org/ArbitrationMediation/Rules/CodeOfArbitrationProcedure/, (last visited June 7, 2013.) FINRA administers thousands of arbitrations annually based on claims identical to those at issue in this case. (Memo in Supp. of Mot. to Compel Arbitration, pp. 9-10; R. pp. 57-58.)

3. On January 18, 2011, Keller filed suit in the Greenville County Court of Common Pleas, asserting various state law claims against Johnson, IFP, and Jackson National arising out of Keller's investment in the variable annuity. The complaint centers around the allegation that the variable annuity recommended by Johnson was not suited to Keller's investment goals. On February 18, 2011, Petitioners[2] moved to compel arbitration based on the arbitration clause contained in the IFP customer agreement.

On May 26, 2011, the trial court, Hon. D. Garrison Hill, adopted a proposed Order drafted by Keller's counsel denying the motion to compel. In the Order, Judge Hill concluded that the NASD no longer exists and that "[b]ecause the arbitration forum specifically selected by the parties to the purported arbitration agreement does not exist . . . a material term of the arbitration clause has failed, and the purported agreement to arbitrate must likewise fail." (R. at 4.)

4. Petitioners appealed the trial court's denial of the motion to compel. The Court of Appeals issued its opinion on January 9, 2013, affirming the trial court. In a summary decision, the Court of Appeals concluded that "[t]he parties' arbitration agreement designates an exclusive arbitral forum that is no longer available to arbitrate." *Keller v. ING Financial Partners, Inc.*, Unpublished Opinion No. 2013-UP-014 (S.C. Ct.

[2] Jackson National, which is not a party to the arbitration agreement, did not move to compel arbitration and is not a Petitioner here.

App. Jan. 9, 2013). The Court of Appeals concluded that it "cannot rewrite the parties' agreement to substitute FINRA for NASD." *Id.* The Court also refused to apply Section 5 of the Federal Arbitration Act to substitute an arbitrator because, according to the Court, this case did not present a "breakdown in the arbitrator process." *Id.* The Court of Appeals denied the petition for rehearing on March 12, 2013, and this Court granted an extension of the time to file this petition until June 10, 2013.

## ARGUMENT

### I. The Court of Appeals Committed Clear Error by Holding That FINRA Did Not Assume Jurisdiction of NASD Arbitrations.

The Court of Appeals erroneously held that the merger of NASD into FINRA rendered unenforceable an agreement providing for arbitration "under the then applicable provisions of the Code of Arbitration Procedure of NASD." The ruling cannot withstand scrutiny under the law governing enforceability of agreements to arbitrate, as informed by the strong public policy in favor of arbitration.

This Court has repeatedly emphasized that arbitration serves important public policy interests that should be a "driving force" behind judicial review of a motion to compel arbitration. *See Landers v. FDIC*, 739 S.E.2d 209, 217 (S.C. 2013). "Unless a court can say with positive assurance that the arbitration clause is not susceptible to any interpretation that covers the dispute, arbitration should generally be ordered." *Partain v. Upstate Automotive Group*, 386 S.C. 488, 491, 689 S.E.2d 602, 603-04 (S.C. 2010). *See also Zabinski v. Bright Acres Assocs.*, 346 S.C. 580, 596, 553 S.E.2d 110, 118 (S.C. 2001) ("The policy of the United States and South Carolina is to favor arbitration of disputes.").

Thus, when faced with a dispute over the availability of an appropriate forum to which arbitration may be compelled, courts will deny the motion to compel only upon a rigorous showing that (1) the parties chose to arbitrate in a specific forum; (2) the parties chosen forum is "unavailable"; and (3) the selection of a particular forum was "integral" to the parties' agreement to arbitrate. *Khan v. Dell Inc.*, 669 F.3d 350, 354 (3rd Cir. 2012) (citing *Reddam v. KPMG LLP*, 457 F.3d 1054, 1061 (9th Cir. 2006), abrogated on other grounds by *Atlantic Nat'l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931 (9th Cir.

2010); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000). *Not one* of these three requirements is satisfied in the present case.

### A. The Parties Did Not Choose NASD As The Forum for Arbitration, But Rather Chose to Arbitrate Under "Then Applicable" NASD Procedures, Which Today Are The FINRA Rules.

The arbitration agreement specifies no particular forum for arbitration. To the contrary, the agreement refers to potential "arbitration forums" in the plural, and refers generally to the "rules of the arbitration forum in which the claim is filed," revealing the parties' understanding that the choice of forum was not pre-ordained.

Although the agreement provides that arbitration will proceed under the "then applicable provisions of the Code of Arbitration Procedure of NASD" (R. p. 64), the selection of an organization's procedural *rules* does not render that organization the exclusive *forum* for the arbitration. Court after court has so held. *See, e.g.*, *Brown v. Delfre*, 988 N.E.2d 696, 703 (Ill. Ap. Ct. Mar. 29, 2012) ("[I]f the parties contemplated that NASD/FINRA would be the exclusive arbitration forum, there would be no need to specify that the arbitration must be conducted by NASD/FINRA's rules. . . .we conclude that the arbitration provision selected only the rules to be applied in the event of an arbitration, not the arbitral forum that would conduct the arbitration."); *Meskill v. GGNSC Stillwater Greely LLC*, 862 F. Supp. 2d 966, 973 (D. Minn. 2012) ("[B]y invoking only the Code [of the National Arbitration Forum] and not the NAF itself, the agreement suggests that the parties anticipated an entity other than the NAF might conduct the arbitration."); *Wright v. GGNSC Holdings LLC*, 808 N.W.2d 114, 121 (S.D. 2011) ("We conclude that designation of the NAF Code of Procedure did not require an NAF arbitrator.").

Thus, the arbitration agreement requires only application of the current NASD *procedures*, not that the arbitration actually take place before the NASD. By its terms, the arbitration agreement must be enforced so long as there a forum that can and will apply "then applicable" procedures of NASD.

That forum is FINRA. It is beyond dispute that FINRA is the successor to NASD's arbitration program and assumed jurisdiction over—and continued to apply—the NASD rules. *Aslin v. Fin. Indus. Regulatory Auth., Inc.*, 704 F.3d 475, 477 n.2 (7th Cir. Jan. 2, 2013) ("NASD refers to the National Association of Securities Dealers, a self-regulatory organization that was FINRA's predecessor. FINRA adopted the NASD rules as its own when it was established."); *Berthel Fisher & Co. Fin. Servs. v. Larmon*, 695 F.3d 749, 752 (8th Cir. 2012) (noting that FINRA code of arbitration procedure is successor to NASD code); *UBS Fin. Servs. v. City of Pasadena*, 2012 U.S. Dist. LEXIS 115365 at *6 n.1 (C.D. Cal. July 31, 2012) ("NASD was the predecessor to FINRA, and the former NASD rules are nearly identical to the present FINRA rules."); *Morgan Keegan & Co. v. Louise Silverman Trust*, 2012 U.S. Dist. LEXIS 3870 at *10, n.5 (D. Md. 2012) (explaining that "[t]he NASD Code of Arbitration was the predecessor to the FINRA Code and FINRA has stated that it intended no substantive change when it replaced NASD Rule 10301 with FINRA Rule 12200"); *Oppenheimerfunds Distrib. v. Liska*, 2011 U.S. Dist. LEXIS 136453 at *4-5 (S.D. Cal. Nov. 28, 2011) ("FINRA arbitrations are governed by the National Association of Securities Dealers ('NASD') Code of Arbitration Procedure."); *In re H&R Block Fin. Advisors, Inc.*, 262 S.W.3d 896, 900 (Tex. App. 2008) ("Although the NASD has changed its name, FINRA continues to apply the NASD arbitration rules and procedures."); *Morgan Stanley & Co. v. Feeley*,

2010 NY Slip Op. 30024U (N.Y. Sup. Ct. Jan. 5, 2010) ("FINRA's arbitration forum continued to follow the same rules followed by NASD and [the plaintiff] agreed to arbitrate in accordance with NASD's rules. . . . Accordingly, FINRA had jurisdiction over the parties and the dispute.").

Thus, when the parties in this case elected to arbitrate their dispute under the "then applicable code of arbitration procedure of NASD," the parties chose to arbitrate under what is now called the FINRA Code of Arbitration Procedure for Customer Disputes. *See* FINRA, Code of Arbitration Procedure, *http://www.finra.org/ArbitrationMediation/Rules/CodeOfArbitrationProcedure/*, (last visited June 4, 2013.) (containing links to versions of current and former rules). It was therefore clear error for the Court of Appeals to hold that the parties' arbitration agreement was unenforceable.

### B. Even If The Parties Had Chosen NASD As The Exclusive Forum, That Forum Remains Available at FINRA.

Where parties designate a particular forum, arbitration must be compelled to that forum unless it is "unavailable." *Khan v. Dell Inc.*, 669 F.3d at 354. Thus, even if the Court views the parties' reference to the NASD rules as selection of NASD as a forum, arbitration is required if NASD remains "available," as it plainly does (although now under the name FINRA).

Courts have recognized that FINRA is merely the new name for the organization formerly known as NASD. *Waterford Inv. Servs. v. Bosco*, 682 F.3d 348, 350 n.1 (4th Cir. 2012) ("FINRA was formerly known as the National Association of Securities Dealers, Inc. ("NASD")."); *Mathis v. United States SEC*, 671 F.3d 210, 211 n.1 (2nd Cir. 2012) ("On July 26, 2007, ...the NASD changed its corporate name to the Financial

Industry Regulatory Authority, Inc. ('FINRA')"); *Gebhart v. SEC*, 595 F.3d 1034, 1037 n.1 (9th Cir. 2010) ("The NASD is now the Financial Industry Regulatory Authority (FINRA)."); *Siegel v. SEC*, 592 F.3d 147, 149 (D.C. Cir. 2010) ("In 2007, NASD changed its name to Financial Industry Regulatory Authority, Inc. ('FINRA').").

Therefore, NASD is "unavailable" in name only. But a mere name change does not render a forum unavailable for arbitration. *See Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 128, 678 S.E.2d 435, 437 (S.C. 2009) (noting in case where arbitration agreement contained an actual forum selection clause selecting the National Health Lawyers Association as the arbitration forum that "[t]he NHLA has since become the American Health Lawyers Association and hereinafter will be referred to by that name"). For this reason, cases are legion in which courts have compelled arbitration to FINRA pursuant to arbitration clauses referring to NASD. *See, e.g., Stewart v. Laidlaw & Co. (UK)*, 2012 U.S. Dist. LEXIS 11388 (S.D. Fl. Jan. 31, 2012) (granting motion to compel arbitration before FINRA where arbitration agreement required that disputes "shall be submitted to the arbitration board of the [NASD]"); *Johannsen v. Morgan Stanley Credit Corp.*, 2012 U.S. Dist. LEXIS 5367 at *6 (E.D. CA. Jan. 11, 2012) (compelling arbitration before FINRA where arbitration clause referred to NASD as appropriate venue for arbitration); *Robinson v. Isaacs*, 2011 U.S. Dist. LEXIS 118070 at *18 (S.D. Cal. Oct. 12, 2012) (same); *Coby Townsend Hurst v. 1st Disc. Brokerage., Inc.*, 2011 U.S. Dist. LEXIS 132070 (W.D. Ark. Oct. 4, 2011) (same); *Clinton v. Oppenheimer & Co.*, 824 F. Supp. 2d 476, 488 (S.D.N.Y. 2011) (same); *Kilcher v. Dale*, 784 N.W.2d 866, 869 (Minn. Ct. App. 2010) (ordering parties to arbitration where they "agreed to arbitrate any controversy 'arising out of or relating' to the accounts in

accordance with the rules of the National Association of Security Dealers (NASD). The NASD is now known as the Financial Industry Regulatory Authority or FINRA."); *Klein v. Ameriprise Fin. Serv., Inc.*, 2009 U.S. Dist. LEXIS 27545 at *7-8 (W.D. Mo. Mar. 31, 2009) (collecting cases and holding plaintiff bound to arbitrate before FINRA where arbitration agreement mentions only NASD); *Suschil v. Ameriprise Fin. Serv., Inc.*, 2008 U.S. Dist. LEXIS 27903 at *5 (N.D. Ohio Apr. 7, 2008) (enforcing parties' arbitration agreement, compelling arbitration under FINRA even though the agreement mentions only NASD); *In re Stanford Group Co.*, 273 S.W.3d 807, 810 n.1 (Tex. App. 2008) ("Courts continue to enforce NASD arbitration clauses through FINRA arbitration"). In these opinions both the courts and the parties recognized the simple fact that NASD changed its name to FINRA and that for purposes of the arbitration commitment, there is no difference between them.

In reaching an opposite conclusion, the Court of Appeals has become the first and only court in the country to refuse to enforce an arbitration agreement on the ground that NASD no longer exists. Despite the prevalence of NASD arbitration clauses, few other courts have even been presented with the argument. And when they have, they have rejected it out of hand.

For example, in *Bauscher v. Brookstone Sec., Inc.*, 2012 U.S. Dist. LEXIS 107375 at *13 (D. Idaho July 30, 2012), the plaintiff pointed to language identical to that upon which Respondent relies in arguing that the arbitration agreement "is invalid because it requires the arbitration to be conducted 'pursuant to the code of arbitration procedure of the National Association of Securities Dealers, Inc." The court rejected this argument and compelled arbitration, reasoning:

> Though the NASD no longer exists in name, it was "succeeded" by the Financial Industry Regulatory Authority ("FINRA"). *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 474 n.2 (4th Cir. 2012). FINRA came into existence when NASD and the New York Stock Exchange's member regulation body merged to become "the self-regulatory organization for the securities industry." *Id.*; *see also Fiero v. Fin. Indus. Regulatory Auth., Inc.*, 660 F.3d 569, 571 (2d Cir. 2011) ("FINRA is the successor to the National Association of Securities Dealers . . . ."). FINRA adopted NASD's bylaws, including those concerning arbitration, with changes made "solely to reflect the proposed governance structure of the [new organization's] Board." SEC Release No. 34-56145, 72 Fed. Reg. 42169, 2007 WL 5185330, at *8 (July 26, 2007). Given that FINRA is the successor entity to NASD and serves the same function, the fact that the arbitration agreement refers to NASD does not render the contract illusory or performance impossible. *See Lewis v. UBS Fin. Servs. Inc.*, 818 F. Supp. 2d 1161, 1166 (N.D. Cal. 2011) (holding that court can compel arbitration "before FINRA where . . . the arbitration agreement specifies that arbitration will occur under the rules of NASD" and collecting similar cases).

*Id.* at *14-15. Other courts have reached the same conclusion. *See Quality Air Servs., LLC v. Dipippo*, Case No. 12-338-JFM, 2013 U.S. Dist. LEXIS 26443 at *7 (D. Md. Feb. 25, 2013) ("Plaintiff also contends that the NYLIFE Securities agreement calls for arbitration before the National Association of Securities Dealers, Inc., and the NASD no longer exists. Plaintiff's argument fails because the NASD did not simply cease to exist, but was assumed into the Financial Industrial Regulatory Authority ('FINRA'), which inherited NASD's existing rules and regulations."); *Branch v. Sickert*, No. 2:10-128, 2011 U.S. Dist. LEXIS 19392 (N.D. Ga. Feb. 28, 2011) (compelling arbitration before FINRA where agreement references rules of NASD and where plaintiff argued, like Respondent, that selection of rules is the same as exclusive selection of the forum); *Lewis v. UBS Fin. Servs.*, 818 F. Supp. 2d 1161, 1165-66 (N.D. Cal. 2011) ("[T]he fact that the other arbitration clauses do not specify FINRA is of little moment. . . . Given that FINRA is merely the successor entity to NASD, courts have compelled arbitration before FINRA

where, as in this case, the arbitration agreement specifies that arbitration will occur under the rules of NASD."); *German Am. Fin. Advisors & Trust Co. v. Reed*, 969 N.E.2d 621, 628 n.13 (Ind. Ct. App. 2012) (noting that plaintiff abandoned argument that arbitration provision was unenforceable because NASD no longer existed but regardless "other jurisdictions have 'continue[d] to enforce NASD arbitration clauses through FINRA arbitration and interpret and enforce NASD's rules as applicable to FINRA.'").

Thus, by refusing to compel arbitration in this case, the Court of Appeals reached a novel and untenable result that conflicts with every other authority on the issue. This alone warrants review by this Court.

### C. There Is No Basis for Concluding That The NASD Forum Is "Integral" to The Arbitration Agreement.

The policy in favor of arbitration is so strong that, even where parties have chosen a particular forum and that forum is unavailable—two conditions absent here—a court should compel arbitration to a substitute forum unless the chosen forum is so integral to the agreement to arbitrate that use of another forum would violate the parties' intent. *See Khan*, 669 F.3d at 354 ("[A] court will decline to appoint a substitute arbitrator, as provided in the FAA, only if the parties' choice of forum is 'so central to the arbitration agreement that the unavailability of that arbitrator [brings] the agreement to an end.'") (quoting *Reddam*, 457 F.3d at 1061); *see also* 9 U.S.C. § 5 (allowing courts to substitute arbitrator where chosen arbitrator is unavailable).

Here, for the reasons already discussed, there is no basis to conclude that arbitration before a NASD forum was an integral part of the agreement. Indeed, the parties did not even choose NASD as the exclusive forum, but merely agreed to use its procedures. "If an arbitration clause requires application of the rules of a particular

arbitral forum, but does not require that arbitration occur in any particular forum, then the arbitral forum is an ancillary logistical concern, rather than an integral part of the arbitration clause. . . ." *Clerk v. Cash Cent. of Utah, LLC*, 2011 U.S. Dist. LEXIS 95494 at *16 (E.D. Pa. 2011). What mattered to the parties here was that the "then applicable" version of NASD's procedures should apply—a concern that is effectuated by compelling arbitration under the FINRA rules. To instead read a designation of the NASD procedures as a *bar* to arbitration, as the Court of Appeals did, frustrates the parties' unambiguous intent to arbitrate their disputes.

**D. The Court of Appeals Relied upon Inapplicable Authorities.**

Ignoring the precedent on point, the Court of Appeals relied on a number of cases that did not involve whether arbitration should be compelled before FINRA where the agreement references the NASD rules. Worse, two of the cases cited in fact support Petitioners' position. In *Reddam v. KPMG LLP*, 457 F.3d 1054 (9th Cir. 2006), the parties' arbitration agreement, as in this case, called for arbitration under the rules of the NASD. The NASD was unavailable to arbitrate the dispute because no named party was a member of NASD. *Reddam*, 457 F.3d at 1057. The *Reddam* Court held that arbitration could be compelled before a different forum because there was no evidence that the parties' agreement to arbitrate before the NASD was integral to the arbitration agreement. *Id.* at 1060. Similarly, in *Brown v. ITT Consumer Financial Corp.*, 211 F.3d 1217 (11th Cir. 2000), the arbitration agreement at issue stated that arbitration should be conducted under the Code of Procedure of the National Arbitration Forum ("NAF"). The NAF was unavailable to arbitrate the dispute because it had dissolved, and so the parties arbitrated before a different entity. *Id.* at 1222. The arbitrator awarded damages and one of the

parties sought to vacate the award, contending, among other things, that the arbitration agreement was void because the selected arbitrator was unavailable. *Id* at 1221. The Eleventh Circuit rejected this argument reasoning,

> Where the chosen forum is unavailable, however, or has failed for some reason, § 5 applies and a substitute arbitrator may be named. *Astra Footwear Indus. v. Harwyn Int'l, Inc.*, 442 F. Supp. 907, 910 (S.D.N.Y.), *aff'd*, 578 F.2d 1366 (2d Cir.1978). Only 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. *See Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F. Supp. 1359, 1364 (N.D.Ill.1990) (*citing Nat'l Iranian Oil Co. v. Ashland Oil*, 817 F.2d 326 (5th Cir.1987)). Here there is no evidence that the choice of the NAF as the arbitration forum was an integral part of the agreement to arbitrate.

*Id.* at 1222. In this case, just as in *Rudman* and *Brown*, the single reference to the NASD rules does not mean that the parties selected the NASD as the exclusive forum or that this purported selection was integral to the arbitration agreement.

The remaining cases cited by the Court of Appeals to support its conclusion are easily distinguishable. In both the *Rutherford* and *Luckie* opinions, the courts actually compelled arbitration before one of three securities self-regulatory organizations (like FINRA), rejecting the plaintiff's argument that the arbitration should occur before the American Arbitration Association. *See PaineWebber, Inc. v. Rutherford*, 903 F.2d 106 (2nd Cir. 1990); *Luckie v. Smith Barney, Harris Upham & Co.*, 999 F.2d 509, 511 (11th Cir. 1993). Similarly, in *Roney*, the Sixth Circuit affirmed the trial court's order compelling arbitration before the entity named in the arbitration agreement, rather than another entity that an investor evidently preferred. *Roney & Co. v. Goren*, 875 F.2d 1218, 1223 (2d Cir. 1989); *see also In re Salomon*, 68 F.3d 554, 559-60 (2d Cir. 1995)

(declining to substitute arbitrator where parties' chosen arbitration forum declined to arbitrate dispute).

Accordingly, because the Court of Appeals' decision finds no support in precedent, review by this Court is warranted.

### E. The Importance of The Court of Appeals' Ruling Warrants Review by This Court.

In addition to the legal errors discussed above,[3] the Court of Appeals opinion warrants review by this Court because of the significant negative consequences that are likely to follow if the lower court's ruling is allowed to stand. Some of those negative consequences are enumerated below.

1. The Court of Appeals opinion casts doubt on thousands of existing arbitration agreements in this State and across the nation that refer to arbitration under the rules of the NASD. This includes not only agreements between investors and their financial advisors, but also agreements between employees and employers and agreements between businesses. The widespread impact of the lower court's ruling standing alone is a sufficient justification to grant certiorari.

---

[3] The Court of Appeals also erred by failing to address and reject the trial court's alternative holding that the arbitration agreement at issue does not apply to the Parties' dispute. The undisputed evidence in the record makes clear that the Arbitration Agreement was signed in connection with Keller's purchase of the Jackson National annuity. (Reply in Supp. Mot. to Compel Arbitration Ex. A; R. pp. 89-90.) Even if it was not, the agreement is broad enough on its face to cover this dispute. *See, e.g., Aiken v. World Fin. Corp.*, 373 S.C. 144, 149, 644 S.E.2d 705, 708 n.2 (S.C. 2007) ("Courts typically characterize arbitration agreements purporting to govern disputes 'arising out of or related to' the underlying contract between the parties as 'broad' arbitration clauses encompassing a wide range of issues."); *Landers*, 739 S.E.2d at 213 ("A clause which provides for arbitration of all disputes 'arising out of or relating to' the contract is construed broadly.").

2. The Court of Appeals ruling threatens to flood the courts of this State with cases that otherwise belong in arbitration. There are undoubtedly thousands of operative arbitration agreements between investors and financial advisors that refer to arbitration under the NASD's rules. If the Court of Appeals' decision is left unchecked, many of these disputes are likely to find their way into the otherwise already crowded courts of this State. By itself, this justifies review by the Court.

3. The Court of Appeals ruling has an institutional impact beyond the South Carolina court system. The opinion renders South Carolina an outlier in an otherwise uniform national arbitration system through FINRA. The disruptive potential of the opinion on FINRA's scheme of arbitration alone warrants review of the lower court's opinion.

4. The Court of Appeals' ruling also conflicts with the pro-arbitration policies of this Court and of the United States Supreme Court, and it reflects a judicial hostility toward arbitration that the FAA was created to guard against. *See AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745, 179 L. Ed. 2d 742, 751 (2011) (recognizing "liberal federal policy favoring arbitration"); *CompuCredit Corp. v. Greenwood*, 132 S. Ct. 665, 669 (2012) (noting that FAA was enacted "as a response to judicial hostility to arbitration."); *Landers*, 739 S.E.2d at 213 (S.C. 2013) (recognizing policy of state and federal law to favor arbitration and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."). The ruling represents a significant step back in what otherwise has been a consistent

trend in favor of arbitration. If left unchecked, the ruling will undoubtedly damage the State's pro-arbitration policy, not only with respect to agreements referring to the NASD, but also all other arbitration agreements.

## CONCLUSION

The Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

June 7, 2013

Ashley B. Abel, Esq.
T. Chase Samples, Esq.
Jackson Lewis LLP
One Liberty Square
55 Beattie Place, Suite 800
Greenville, SC 29601
(864) 232-7000

*Attorneys for Petitioners*

THE STATE OF SOUTH CAROLINA
In The Court of Appeals

---

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

---

Opinion No. 2013-UP-014 (S.C. Ct. App. Filed Jan. 9, 2013)

---

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.

---

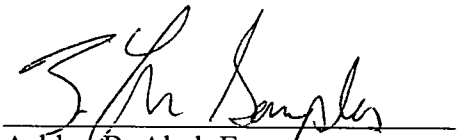
CERTIFICATE OF SERVICE

---

I certify that I have served the Petition for Writ of Certiorari this 7th day of June 2013, on counsel for Keller and counsel for Defendant/Cross-Claimant Jackson National Life Insurance Company in the underlying action by depositing the same in the United States Mail, first class postage prepaid, as follows:

H. Donald Sellers, Esq.
Haynsworth Sinkler Boyd, P.A.
P.O. Box 2048
Greenville, SC 29602
*Counsel for Keller*

Charles F. Turner, Jr., Esq.
Turner Padget Graham and Laney
200 East Broad Street, Suite 250
Greenville, SC 29601
*Counsel for Jackson National Life Insurance Company*



Ashley B. Abel, Esq.
T. Chase Samples, Esq.
Jackson Lewis LLP
One Liberty Square
55 Beatty Place, Suite 800
Greenville, SC 29601
(864) 232-7000
Attorneys for Petitioners

Dated this 7th day of June 2013.