

THE STATE OF SOUTH CAROLINA
In The Supreme Court

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JUN 10 2013

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

S.C. Supreme Court

D. Garrison Hill, Circuit Court Judge

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JUN 12 2013

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

S.C. 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.

APPENDIX

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Company*

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2011-CP-23-00336

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.

RECORD ON APPEAL

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE	)	
David W. Keller,	)	
	)	
Plaintiff,	)	
vs.	)	
ING Financial Partners, Inc.,	)	
William C. Johnson, Diversified	)	
Business Concepts, Inc., and Jackson	)	
National Life Insurance Company,	)	
Defendants.	)	

2011 JUN 12 P 2:23

CA No.: 2011-CP-23-0336

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
JUN 12 2011

ORDER

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").

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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." Schaer 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."

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. IIT 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); 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

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.

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

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).

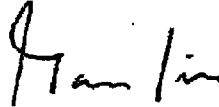
It is well settled that "arbitration is a matter of contract, and a party cannot be forced to arbitrate a dispute if it has not agreed to do so." AT&T Tech., Inc. v. Comm'ns Workers, 475 U.S. 643, 648 (1986). There is no indication in the materials submitted to this Court that Plaintiff agreed to arbitrate 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.

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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

CLERK OF COURT
GREENVILLE CO, S.C.
J. W. WICKENS

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, PA
P.O. Box 2048 Greenville, SC 29602

Charles Franklin Turner Jr. Turner, Padgett,
Graham & Laney, Pa P.O. Box 1509 Greenville, SC
29602

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 PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court
- Clerk of Court

STATE OF SOUTH CAROLINA

JUDGMENT IN A CIVIL CASE

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

2011 MAY 18 P 2:28 CASE NO: 2011CP2300336

David W. Keller, Clerk of Court
Greenville County
Paul B. Wickensimer
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), SCRPC; ☐ Rule 41(a), SCRPC (Vol. Nonsuit); ☐ Rule 43(k), SCRPC (Settled); ☐ Other: _____
- ☐ **ACTION STRICKEN (CHECK REASON):** ☐ Rule 40(j) SCRPC; ☐ 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 ghillic@sccourts.org, with a copy to opposing counsel.

Dated at Greenville, South Carolina, this May 16, 2011.

Court Reporter: Hollie Jenkins

H. Garrison Hill

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 16, 2011, to attorneys of record or to parties (when appearing pro se) as follows:

H. Donald Sellers P.O. Box 2048 Greenville, SC 29602

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 PLAINTIFF(S)

ATTORNEY(S) FOR THE DEFENDANT(S)

Paul B. Wickensimer Greenville County Clerk Of Court

000013

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STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE)
JAN 18 PM 4:20 C.A. No.: 2011-CP-23- 0334

David W. Keller

Plaintiff,

vs.

ING Financial Partners, Inc.,
William C. Johnson, Diversified
Business Concepts, Inc., and Jackson
National Life Insurance Company,

Defendants.

FILED-CLERK OF COURT
GREENVILLE, S.C.
DAVID A. KOPPELHOF

SUMMONS

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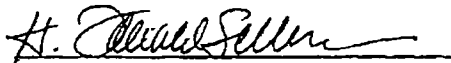
JAN 19 2011

ING FINANCIAL PARTNERS

TO THE ABOVE-NAMED DEFENDANTS:

YOU ARE HEREBY SUMMONED and required to answer the Complaint in this action, a copy of which is herewith served upon you, and to serve a copy of your Answer to this Complaint upon the subscriber herein at 75 Beattie Place, 11th Floor, (29601), P. O. Box 2048 Greenville, SC, (29602) USA, within thirty (30) days after the service hereof, exclusive of the day of such service; and if you fail to answer the Complaint within the time aforesaid, the Plaintiffs in this action will apply to the Court, and judgment by default will be rendered against you for the relief demanded in that Complaint.

HAYNSWORTH SINKLER BOYD, P.A.



H. Donald Sellers, SC Bar No. 5018

J. W. Matthews III, SC Bar No. 68581

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Attorneys for Plaintiff

January 18, 2011
Greenville, SC

STATE OF SOUTH CAROLINA) IN THE COURT OF COMMON PLEAS
COUNTY OF GREENVILLE) 2011 JAN 18 PM 4:21
C.A. No.: 2011-CP-23- 0336

David W. Keller,

Plaintiff,

vs.

ING Financial Partners, Inc.,
William C. Johnson, Diversified
Business Concepts, Inc., and Jackson
National Life Insurance Company

Defendants.

COMPLAINT

(JURY TRIAL DEMANDED)

The Plaintiff, David W. Keller ("Mr. Keller"), complaining of the Defendants ING Financial Partners, Inc., William C. Johnson, Diversified Business Concepts, Inc. and Jackson National Life Insurance Company, would respectfully show to the Court as follows:

JURISDICTION AND VENUE

1. Mr. Keller is a citizen and resident of Greenville County, South Carolina.
2. Defendant William C. Johnson is, upon information and belief, a citizen and resident of Greenville County, South Carolina.
3. Defendant Diversified Business Concepts, Inc. ("DBC"), is a corporation organized under the laws of the State of South Carolina, with its principal place of business located in Greenville, South Carolina, and doing business in South Carolina.
4. Defendant William C. Johnson does business as an agent for and a representative of Defendants ING Financial Partners, Inc., Jackson National Life Insurance Company and others, through his company, DBC. Defendants DBC and Johnson sell services to members of

the public which include retirement planning, tax management, estate planning, risk management, and investment allocation advice.

5. Defendant ING Financial Partners, Inc. ("ING") is a corporation organized and existing under the laws of a state other than South Carolina and is authorized to do business in South Carolina. Defendant ING does business in Greenville County, South Carolina and maintains a branch office at 104 Whitsett Street, Greenville, South Carolina.

6. Defendant Jackson National Life Insurance Company ("Jackson") is a corporation organized and existing under the laws of a state other than South Carolina and is licensed by the South Carolina Department of Insurance to sell insurance in the state of South Carolina.

7. The most substantial part of the facts giving rise to the causes of action described below occurred in Greenville County, South Carolina.

ALLEGATIONS COMMON TO MULTIPLE CAUSES OF ACTION

8. At all times relevant to the allegations in this Complaint, Defendant Johnson acted as a professional, with the pertinent professional duties relating to a full-service financial firm including, but not limited to, investment planning, insurance and estate planning, and also on behalf of, and as an agent of, Defendants DBC, ING and Jackson. Defendants DBC, ING and Jackson are vicariously liable for the acts and omissions of Defendant Johnson alleged herein.

9. On or about July 31, 2007, Mr. Keller retired from 37 years of employment with Michelin North America, Inc. ("Michelin"). He thereafter sought to place the retirement benefits he received from Michelin into appropriate retirement investments, suitable for his and his wife's needs.

10. Seeking advice from a professional with superior expertise and knowledge in the areas of investment planning, insurance and estate planning, Mr. Keller met with Defendant Johnson.

11. Defendant Johnson, who held himself out to Mr. Keller as a representative of Defendants ING and Jackson and an agent of Defendant DBC, solicited business from Mr. Keller and made representations to Mr. Keller that he had the skill, knowledge, expertise and credentials to advise Mr. Keller regarding investment planning, insurance and estate planning.

12. In reliance upon the representations made by Defendant Johnson as to his expertise in investment planning, insurance and estate planning, Mr. Keller provided Defendant Johnson with private and sensitive financial information.

13. Beginning in May 2007 and continuing through October 2007, Mr. Keller and his wife had numerous meetings and consultations with Defendant Johnson regarding the appropriate and suitable investment of Mr. Keller's Michelin retirement benefits and other funds he wished to invest. Mr. Keller's particular concerns and desires, expressed to Defendant Johnson, were that he be provided a guaranteed annual minimum increase in value, that he be protected in the event of a long life span and that he did not require an investment that produced immediate, guaranteed living income.

14. In response to Mr. Keller's investment concerns and goals, Defendant Johnson advised and recommended to Mr. Keller that he purchase two (2) different types of investments, one of which was a Jackson National Life Prospective L Series variable annuity with an Auto Guard 6 living benefit rider (collectively referred to as "the Annuity"), and the other was a portfolio of market based investments recommended by Defendant Johnson (referred to as "the Portfolio").

15. Defendant Johnson specifically represented to Mr. Keller and his wife that the Annuity had lifetime benefits and a guaranteed annual minimum increase in value. Defendant Johnson provided Mr. Keller with numerous prepared written materials which illustrated a guaranteed minimum rate of return for the first ten (10) years of the Annuity while no withdrawals were made from the Annuity.

16. Defendant Johnson represented, and Mr. Keller intended, that the Annuity would be a conservative investment and would provide income to Mr. Keller later in life. In contrast, Defendant Johnson represented, and Mr. Keller intended, for the Portfolio to be an investment that would provide participation in market gains without the additional protection of a guaranteed annual minimum increase in value.

17. Relying upon Defendant Johnson's representations, Mr. Keller purchased the Annuity and Portfolio recommended by Defendant Johnson. Mr. Keller withdrew his retirement benefits from Michelin and invested them, along with additional savings, totaling \$1,461,742.40, into the Annuity and Portfolio. Mr. Keller invested \$800,000 into the Annuity. Through Defendant ING, Defendant Jackson issued Annuity contract number 1003126354 to Mr. Keller.

18. At no time did Defendant Johnson inform Mr. Keller that the Annuity he purchased did not provide lifetime benefits or a guaranteed annual minimum increase in value.

19. Mr. Keller would not have purchased the Annuity solicited by Defendant Johnson but for Mr. Keller's belief, and reliance, based on Defendant Johnson's representations and recommendations, as an agent of Defendants DBC, ING and Jackson, that the Annuity was an appropriate investment vehicle which provided for lifetime benefits and a guaranteed annual minimum increase in value.

20. In late 2009 Mr. Keller discovered that the Annuity did, in fact, not provide lifetime benefits or a guaranteed annual minimum increase in value as represented by Defendant Johnson.

21. As a result of Defendant Johnson's misrepresentations to Mr. Keller regarding the Annuity, Mr. Keller and his wife are unable to receive lifetime income and their future financial security has been severely compromised. In particular, during the extended period of market downturn since Mr. Keller purchased the Annuity, Mr. Keller has not realized any growth and will not have any guaranteed annual amount to live off of when he begins withdrawals.

22. The Annuity that Defendant Johnson caused Mr. Keller to actually purchase was not a suitable investment for Mr. Keller who specifically requested an investment vehicle that provided lifetime benefits and a guaranteed annual minimum increase in value, and who specifically told Defendant Johnson that he did not intend to need or make withdrawals right away.

23. Defendant Johnson's allocation of the Annuity was 59.58% aggressive growth, 30.08% growth and 10.34% growth and income. Defendant Johnson's allocation of the Annuity was wholly unsuitable for Mr. Keller who was 62 years old and retired at the time the Annuity was purchased, absent any overriding guaranteed annual minimum increase in value in the Annuity as represented by Defendant Johnson.

24. At the beginning of the market decline in late 2007, Defendant Johnson took no action in an attempt to mitigate the market effect on Mr. Keller's Annuity or his Portfolio.

25. Mr. Keller repeatedly sought advice and recommendations from Defendant Johnson regarding how to mitigate the effect of the market down-turn on his Annuity and his Portfolio, but Defendant Johnson had no meaningful suggestions or recommendations.

26. Upon learning of the unsuitability of the Annuity recommended by Defendant Johnson, Mr. Keller immediately reported the incident to Defendant ING. Defendant ING allegedly investigated the matter and in doing so communicated with Defendant Johnson. During the course of its investigation, Defendant ING failed to communicate with Mr. Keller or obtain his input regarding Defendant Johnson's version of the facts, instead relying on Defendant Johnson's statement. Defendant ING failed and refused to take any remedial action to mitigate Mr. Keller's damages.

27. On Mr. Keller's behalf, the undersigned counsel requested a copy of his Annuity policy from Defendant Jackson. Defendant Jackson has failed and refused to provide Mr. Keller with a copy of his own Annuity policy.

FOR A FIRST CAUSE OF ACTION
(Negligence)

28. Mr. Keller re-alleges all of the foregoing allegations of the Complaint as if set forth verbatim and made a part hereof.

29. Defendant Johnson, standing in a position of superior expertise and knowledge, owed a duty of care to Mr. Keller to provide suitable and sound advice to Mr. Keller regarding the Annuity, to ensure that truthful and accurate information regarding the Annuity was communicated to Mr. Keller, and that a suitable investment, considering Mr. Keller's age, income, retirement age and investment goals, was selected, or in the alternative, to ensure that the correct investment was selected based on Defendant Johnson's consultations with Mr. Keller.

30. Defendant Johnson breached that duty by failing to exercise due care in providing sound, or any, advice concerning how to mitigate the effects of the market down-turn on Mr. Keller's Annuity, in ensuring that accurate information regarding the Annuity was provided to Mr. Keller and that a suitable investment was selected.

31. As a direct and proximate result of Defendant Johnson's negligent acts and omissions, Mr. Keller has suffered and will continue to suffer damages.

32. Furthermore, because Defendant Johnson acted as Defendants DBC's, ING's and Jackson's agent, and because Defendant Johnson's negligent acts and omissions were made while he was operating within the scope of his agency relationship, Defendants DBC, ING and Jackson are vicariously liable to Mr. Keller for the negligence of their agent.

FOR A SECOND CAUSE OF ACTION
(Negligent Misrepresentation)

33. Mr. Keller re-alleges all of the foregoing allegations of the Complaint as if set forth verbatim and made a part hereof.

34. Mr. Keller is informed, believes and alleges that at the time Defendant Johnson was advising and recommending investments to Mr. Keller, Defendant Johnson knew or should have known that the Annuity did not provide lifetime benefits and a guaranteed annual minimum increase in value, but nevertheless made the representations to Mr. Keller described herein which were false and/or misleading.

35. Defendant Johnson had a pecuniary interest in making these false and/or misleading statements regarding the Annuity to Mr. Keller.

36. Defendant Johnson, standing in a position of superior expertise and knowledge regarding the benefits of the Annuity, owed a duty to Mr. Keller to ensure that truthful and accurate information concerning the Annuity was communicated to Mr. Keller, and Defendant Johnson knew or should have known that Mr. Keller would reasonably rely upon his representations and/or statements.

37. Defendant Johnson breached that duty by failing to exercise due care in ensuring that accurate information was provided to Mr. Keller concerning the Annuity.

38. Mr. Keller justifiably relied upon Defendant Johnson's representations by investing \$800,000 into the Annuity. Had Mr. Keller known that the Annuity did not provide the represented lifetime benefits and a guaranteed annual minimum increase in value he would not have invested in the Annuity.

39. As a direct and proximate result of Mr. Keller's reliance on the representations made by Defendant Johnson, Mr. Keller has suffered and will continue to suffer damages.

40. Furthermore, because Defendant Johnson acted as Defendants DBC's, ING's and Jackson's agent, and because Defendant Johnson's negligent misrepresentations were made while he was operating within the scope of his agency relationship, Defendants DBC, ING and Jackson are vicariously liable to Mr. Keller for the negligent representations made by their agent.

FOR A THIRD CAUSE OF ACTION
(Constructive Fraud)

41. Mr. Keller re-alleges all of the foregoing allegations of the Complaint as if set forth verbatim and made a part hereof.

42. Defendant Johnson represented to Mr. Keller that the Annuity provided lifetime benefits and a guaranteed annual minimum increase in value.

43. Defendant Johnson's representations to Mr. Keller were false.

44. Defendant Johnson ought to have known the falsity of his representations to Mr. Keller.

45. Defendant Johnson's representations to Mr. Keller were material to Mr. Keller's decision to invest \$800,000 into the Annuity. Mr. Keller would not have purchased the Annuity had he known that it did not provide lifetime benefits and a guaranteed annual minimum increase in value.

46. Knowing that he was standing in a position of superior expertise and knowledge concerning the Annuity's benefits, Defendant Johnson intended for Mr. Keller to rely upon his representations regarding the Annuity.

47. Mr. Keller was ignorant of the falsity of Defendant Johnson's representations regarding the Annuity.

48. Mr. Keller reasonably relied on Defendant Johnson's representations regarding the Annuity by investing \$800,000 into the Annuity.

49. As a direct and proximate result of Mr. Keller's reasonable reliance on Defendant Johnson's representations regarding the Annuity, Mr. Keller has suffered and will continue to suffer damages.

50. Furthermore, because Defendant Johnson acted as Defendants DBC's, ING's and Jackson's agent, and because Defendant Johnson's false representations were made while he was operating within the scope of his agency relationship, Defendants DBC, ING and Jackson are vicariously liable to Mr. Keller for the constructive fraud of their agent.

FOR A FOURTH CAUSE OF ACTION
(Violation of the South Carolina Unfair Trade Practices Act)

51. Mr. Keller re-alleges all of the foregoing allegations of the Complaint as if set forth verbatim and made a part hereof.

52. The Defendants engaged in acts which constitute "unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce" in violation of S.C. Code Ann. § 39-5-20, which include, but are not limited to:

- a. Defendant Johnson's acts of falsely representing that the Annuity provided lifetime benefits and a guaranteed annual minimum increase in value, thus causing Mr. Keller to invest in the Annuity,

- b. Defendant ING's failure to properly and fully investigate Mr. Keller's complaint regarding Defendant Johnson and the unsuitability of the Annuity recommended by Defendant Johnson, and its failure to cooperate in reaching a remedy with Mr. Keller resulting from damages caused by Defendant Johnson, and
- c. Defendant Jackson's failure and refusal to provide Mr. Keller with a copy of his own Annuity policy.

53. The acts described herein violate public policy as they are capable of repetition.

54. As a direct and proximate result of Defendants Johnson's, ING's and Jackson's actions, Mr. Keller has suffered and will continue to suffer, among others, actual damages in the form of lost investment, the interest on money paid for the investment and the use of the funds, and has been forced to retain the services of attorneys and financial advisors to represent him in connection with an effort to recover these funds wrongfully obtained by Defendants.

55. Defendants Johnson's, ING's and Jackson's actions were willful and knowingly in violation of § 39-5-20. As a result, Mr. Keller is entitled to treble damages and an award of attorneys' fees.

56. Furthermore, because Defendant Johnson acted as Defendants DBC's, ING's and Jackson's agent, and because Defendant Johnson's unfair and deceptive acts were made while he was operating within the scope of his agency relationship, Defendants DBC, ING and Jackson are vicariously liable to Mr. Keller for the unlawful acts of their agent.

FOR A FIFTH CAUSE OF ACTION AS TO DEFENDANTS ING, DBC AND JACKSON
(Negligent Supervision and Training)

57. Mr. Keller re-alleges all of the foregoing allegations of the Complaint as if set forth verbatim and made a part hereof.

58. Defendant Johnson, as an agent of Defendants ING, DBC and Jackson, negligently breached the duties he owed to Mr. Keller by misrepresenting that the Annuity provided lifetime benefits and a guaranteed annual minimum increase in value, selecting an investment which was unsuitable for Mr. Keller and failing to provide sound, or any, advice concerning how to mitigate the effects of the market down-turn on Mr. Keller's Annuity and Portfolio.

59. As providers of investment policies in South Carolina, Defendants ING, DBC and Jackson assumed the duty to Mr. Keller to adequately train and supervise its agents in the appropriate methodology and procedure for advising and recommending suitable investments to clients.

60. Defendants ING, DBC and Jackson breached their duty to Mr. Keller by failing to adequately train and supervise Defendant Johnson in their procedures for advising and recommending suitable investments to clients.

61. As a direct and proximate result of Defendants ING's, DBC's and Jackson's negligent failure to train and supervise Defendant Johnson, Defendant Johnson negligently misrepresented to Mr. Keller the benefits of the Annuity, failed to place Mr. Keller with a suitable investment, and failed to provide investment advice regarding how to mitigate the effects of the market down-turn on Mr. Keller's Annuity and Portfolio. As a direct and proximate result thereof, Mr. Keller relied on the superior expertise and knowledge of Defendant Johnson and purchased an unsuitable investment, invested \$800,000 into the Annuity which he would not otherwise have done, and failed to mitigate the effects of the market down-turn on his Annuity.

62. As a direct and proximate result of Defendants ING's, DBC's and Jackson's breaches of duty in failing to adequately train and supervise its agent, Defendant Johnson, Mr. Keller has suffered and will continue to suffer damages.

FOR A SIXTH CAUSE OF ACTION
(Violation of the South Carolina Uniform Securities Act)

63. Mr. Keller re-alleges all of the foregoing allegations of the Complaint as if set forth verbatim and made a part hereof.

64. The Annuity sold to Mr. Keller had all the indicia of a security as defined under South Carolina Code of Laws § 35-1-101 *et seq.*

65. Mr. Keller is informed and believes that the misconduct alleged by the Defendants in connection with the sale of the security purchased by Mr. Keller is in violation of the South Carolina Uniform Securities Act and that the Defendants, either directly or through their authorized agents, employed a device, scheme or artifice to defraud Mr. Keller, made untrue statements of material facts and/or omitted to state material facts necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading and engaged in acts, practices and course of business which operated as a fraud or deceit upon Mr. Keller.

66. The misconduct of Defendants directly or indirectly through their agents as alleged herein constitutes violations of sections 35-1-501 and 35-1-509 of the Code of Laws of South Carolina, plus such additional laws of the State of South Carolina as may be determined during the discovery phase of this lawsuit.

67. As a result of Defendants' wrongful conduct, Mr. Keller has suffered and will continue to suffer financial injury in that he has lost his investment, the interest on money paid for the investment and the use of the funds and has been forced to retain the services of attorneys

and financial advisors to represent him in connection with an effort to recover these funds wrongfully obtained by Defendants.

68. Furthermore, because Defendant Johnson acted as Defendants DBC's, ING's and Jackson's agent, and because Defendant Johnson's violations of the South Carolina Uniform Securities Act were made while he was operating within the scope of his agency relationship, Defendants DBC, ING and Jackson are vicariously liable to Mr. Keller for the unlawful acts of their agent.

FOR A SEVENTH CAUSE OF ACTION
(Breach of Fiduciary Duty)

69. Mr. Keller re-alleges all of the foregoing allegations of the Complaint as if set forth verbatim and made a part hereof.

70. Defendant Johnson owed Mr. Keller a fiduciary duty of honesty, integrity and the utmost good faith and fair dealing. Mr. Keller reposed special trust and confidence in Defendant Johnson by entrusting his financial information to Defendant Johnson.

71. By his conduct, Defendant Johnson breached his duties to Mr. Keller.

72. As a result of Defendant Johnson's breach of his fiduciary duties to Mr. Keller, Mr. Keller has suffered financial injury as set forth herein.

73. In addition to an award of actual damages, Mr. Keller is entitled to an award of punitive damages in such amount as the trier of fact may determine.

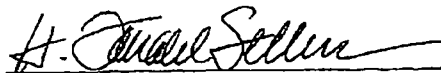
74. Furthermore, because Defendant Johnson acted as Defendants DBC's, ING's and Jackson's agent, and because Defendant Johnson's breaches of his fiduciary duties were made while he was operating within the scope of his agency relationship, Defendants DBC, ING and Jackson are vicariously liable to Mr. Keller for the actions of their agent.

WHEREFORE, Mr. Keller prays for judgment rescinding the Annuity transaction and for a judgment against Defendants in an amount to be determined at trial for all damages he has sustained, for all available statutory damages as set forth in South Carolina Code of Laws, punitive damages, pre and post-judgment interest, and for the costs and expenses of this action, including a reasonable attorneys' fee, and for such other and further relief as may be determined by the Court.

PLAINTIFF DEMANDS A JURY TRIAL

Respectfully Submitted,

HAYNSWORTH SINKLER BOYD, P.A.



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Attorneys for Plaintiff

January 18, 2011
Greenville, South Carolina

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STATE OF SOUTH CAROLINA	)	IN THE COURT OF COMMON PLEAS
	)	
COUNTY OF GREENVILLE	)	C.A. NO.: 2011-CP-23-0336
	)	
David W. Keller,	)	
	)	
Plaintiff,	)	
	)	DEFENDANT JACKSON NATIONAL LIFE'S
v.	)	ANSWER AND CROSS CLAIM AGAINST
	)	DEFENDANT ING FINANCIAL PARTNERS, INC.
ING Financial Partners, Inc.,	)	
William C. Johnson, Diversified	)	(Jury Trial Requested)
Business Concepts, Inc., and	)	
Jackson National Life Insurance	)	
Company,	)	
	)	
Defendants.	)	
	)	

FILED-CLERK OF COURT
GREENVILLE CO. S.C.

2011 FEB 15 A 11:07

This Defendant, Jackson National Life Insurance Company, answering the Complaint of the Plaintiff herein and asserting a cross-claim against Defendant ING Financial Partners, Inc., would show unto this Honorable Court that:

1. As to the allegations contained in Paragraph 1 of Plaintiff's Complaint, upon information and belief, this Defendant admits same.
2. As to the allegations contained in Paragraph 2 of Plaintiff's Complaint, upon information and belief this Defendant denies same.
3. As to the allegations contained in Paragraph 3 of Plaintiff's Complaint, upon information and belief, this Defendant admits same.
4. As to the allegations contained in Paragraph 4 of Plaintiff's Complaint, this Defendant specifically admits that William C. Johnson is an approved producer of Jackson National Life Insurance Company; further, this Defendant admits that Defendant Johnson is an approved producer for Defendant ING Financial Partners, Inc. and Defendant DBC, Inc.; further, this Defendant admits that DBC, Inc. and Johnson sell financial services to members of the

public; however, this Defendant denies the remaining allegations contained in Paragraph 4 of Plaintiff's Complaint which are in addition to or inconsistent with these admissions.

5. As to the allegations contained in Paragraph 5 of Plaintiff's Complaint, this Defendant specifically admits that ING Financial Partners is a corporation organized and existing under the laws of a state other than South Carolina and is authorized to do business in South Carolina; further, this Defendant specifically admits that Defendant ING does business in Greenville County, South Carolina through approved agents and producers located here; however, this Defendant denies the remaining allegations contained in Paragraph 5 of Plaintiff's Complaint which are in addition to or inconsistent with these admissions.

6. As to the allegations contained in Paragraph 6 of Plaintiff's Complaint, this Defendant admits same.

7. As to the allegations contained in Paragraph 7 of Plaintiff's Complaint, this Defendant admits same.

8. As to the allegations contained in Paragraph 8 of Plaintiff's Complaint, this Defendant specifically admits that Defendant Johnson gave financial investment advice and sold a Jackson National Life Insurance variable annuity policy to the Plaintiff; however, this Defendant denies the remaining allegations contained in Paragraph 8 of Plaintiff's Complaint which are in addition to or inconsistent with these admissions.

9. As to the allegations contained in Paragraph 9 of Plaintiff's Complaint, this Defendant lacks sufficient knowledge and information to form a belief; therefore, denies same.

10. As to the allegations contained in Paragraph 10 of Plaintiff's Complaint, this Defendant lacks sufficient knowledge and information to form a belief; therefore, denies same.

11. As to the allegations contained in Paragraph 11 of Plaintiff's Complaint, this Defendant lacks sufficient knowledge and information to form a belief; therefore, denies same.

12. As to the allegations contained in Paragraph 12 of Plaintiff's Complaint, this Defendant lacks sufficient knowledge and information to form a belief; therefore, denies same.

13. As to the allegations contained in Paragraph 13 of Plaintiff's Complaint, this Defendant lacks sufficient knowledge and information to form a belief; therefore, denies same.

14. As to the allegations contained in Paragraph 14 of Plaintiff's Complaint, this Defendant lacks sufficient knowledge and information to form a belief; therefore, denies same.

15. As to the allegations contained in Paragraph 15 of Plaintiff's Complaint, this Defendant lacks sufficient knowledge and information to form a belief; therefore, denies same.

16. As to the allegations contained in Paragraph 16 of Plaintiff's Complaint, this Defendant lacks sufficient knowledge and information to form a belief; therefore, denies same.

17. As to the allegations contained in Paragraph 17 of Plaintiff's Complaint, this Defendant specifically admits that the Plaintiff purchased a Jackson National Life annuity policy (annuity contract #1003126354) on September 12, 2007 in the amount of \$800,000.00; however, this Defendant lacks sufficient knowledge and information to form a belief as to the remaining allegations contained in Paragraph 17 of Plaintiff's Complaint which are in addition to or inconsistent with these admissions; therefore, denies same.

18. As to the allegations contained in Paragraph 18 of Plaintiff's Complaint, this Defendant lacks sufficient knowledge and information to form a belief; therefore, denies same.

19. As to the allegations contained in Paragraph 19 of Plaintiff's Complaint, this Defendant specifically denies that Jackson National Life is vicariously liable for the alleged actions of Defendant Johnson as alleged by the Plaintiff's Complaint; however, this Defendant lacks sufficient knowledge and information to form a belief as to the remaining allegations contained in Paragraph 19 of Plaintiff's Complaint which are in addition to or inconsistent with these admissions; therefore, denies same.

20. As to the allegations contained in Paragraph 20 of Plaintiff's Complaint, this Defendant lacks sufficient knowledge and information to form a belief; therefore, denies same.

21. As to the allegations contained in Paragraph 21 of Plaintiff's Complaint, this Defendant denies same.

22. As to the allegations contained in Paragraph 22 of Plaintiff's Complaint, this Defendant lacks sufficient knowledge and information to form a belief; therefore, denies same.

23. As to the allegations contained in Paragraph 23 of Plaintiff's Complaint, this Defendant specifically admits to the referenced allocations of the Jackson National annuity policy at issue; however, this Defendant denies the remaining allegations contained in Paragraph 23 of Plaintiff's Complaint which are in addition to or inconsistent with these admissions.

24. As to the allegations contained in Paragraph 24 of Plaintiff's Complaint, this Defendant lacks sufficient knowledge and information to form a belief; therefore, denies same.

25. As to the allegations contained in Paragraph 25 of Plaintiff's Complaint, this Defendant lacks sufficient knowledge and information to form a belief; therefore, denies same.

26. As to the allegations contained in Paragraph 26 of Plaintiff's Complaint, this Defendant lacks sufficient knowledge and information to form a belief; therefore, denies same.

27. As to the allegations contained in Paragraph 27 of Plaintiff's Complaint, this Defendant lacks sufficient knowledge and information to form a belief; therefore, denies same.

28. This Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

29. As to the allegations contained in Paragraph 29 of Plaintiff's Complaint, this Defendant denies same.

30. As to the allegations contained in Paragraph 30 of Plaintiff's Complaint, this Defendant denies same.

31. As to the allegations contained in Paragraph 31 of Plaintiff's Complaint, this Defendant denies same.

32. As to the allegations contained in Paragraph 32 of Plaintiff's Complaint, this Defendant denies same.

33. This Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

34. As to the allegations contained in Paragraph 34 of Plaintiff's Complaint, this Defendant denies same.

35. As to the allegations contained in Paragraph 35 of Plaintiff's Complaint, this Defendant denies same.

36. As to the allegations contained in Paragraph 36 of Plaintiff's Complaint, this Defendant denies same.

37. As to the allegations contained in Paragraph 37 of Plaintiff's Complaint, this Defendant denies same.

38. As to the allegations contained in Paragraph 38 of Plaintiff's Complaint, this Defendant denies same.

39. As to the allegations contained in Paragraph 39 of Plaintiff's Complaint, this Defendant denies same.

40. As to the allegations contained in Paragraph 40 of Plaintiff's Complaint, this Defendant denies same.

41. This Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

42. As to the allegations contained in Paragraph 42 of Plaintiff's Complaint, this Defendant denies same.

43. As to the allegations contained in Paragraph 43 of Plaintiff's Complaint, this Defendant denies same.

44. As to the allegations contained in Paragraph 44 of Plaintiff's Complaint, this Defendant denies same.

45. As to the allegations contained in Paragraph 45 of Plaintiff's Complaint, this Defendant denies same.

46. As to the allegations contained in Paragraph 46 of Plaintiff's Complaint, this Defendant denies same.

47. As to the allegations contained in Paragraph 47 of Plaintiff's Complaint, this Defendant denies same.

48. As to the allegations contained in Paragraph 48 of Plaintiff's Complaint, this Defendant denies same.

49. As to the allegations contained in Paragraph 49 of Plaintiff's Complaint, this Defendant denies same.

50. As to the allegations contained in Paragraph 50 of Plaintiff's Complaint, this Defendant denies same.

51. This Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

52. As to the allegations contained in Paragraph 52 of Plaintiff's Complaint, this Defendant denies same.

53. As to the allegations contained in Paragraph 53 of Plaintiff's Complaint, this Defendant denies same.

54. As to the allegations contained in Paragraph 54 of Plaintiff's Complaint, this Defendant denies same.

55. As to the allegations contained in Paragraph 55 of Plaintiff's Complaint, this Defendant denies same.

56. As to the allegations contained in Paragraph 56 of Plaintiff's Complaint, this Defendant denies same.

57. This Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

58. As to the allegations contained in Paragraph 58 of Plaintiff's Complaint, this Defendant denies same.

59. As to the allegations contained in Paragraph 59 of Plaintiff's Complaint, this Defendant denies same.

60. As to the allegations contained in Paragraph 60 of Plaintiff's Complaint, this Defendant denies same.

61. As to the allegations contained in Paragraph 61 of Plaintiff's Complaint, this Defendant denies same.

62. As to the allegations contained in Paragraph 62 of Plaintiff's Complaint, this Defendant denies same.

63. This Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

64. As to the allegations contained in Paragraph 64 of Plaintiff's Complaint, this Defendant denies same.

65. As to the allegations contained in Paragraph 65 of Plaintiff's Complaint, this Defendant denies same.

66. As to the allegations contained in Paragraph 66 of Plaintiff's Complaint, this Defendant denies same.

67. As to the allegations contained in Paragraph 67 of Plaintiff's Complaint, this Defendant denies same.

68. As to the allegations contained in Paragraph 68 of Plaintiff's Complaint, this Defendant denies same.

69. This Defendant realleges and reiterates each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

70. As to the allegations contained in Paragraph 70 of Plaintiff's Complaint, this Defendant denies same.

71. As to the allegations contained in Paragraph 71 of Plaintiff's Complaint, this Defendant denies same.

72. As to the allegations contained in Paragraph 72 of Plaintiff's Complaint, this Defendant denies same.

73. As to the allegations contained in Paragraph 73 of Plaintiff's Complaint, this Defendant denies same.

74. As to the allegations contained in Paragraph 74 of Plaintiff's Complaint, this Defendant denies same.

FOR A SECOND DEFENSE

75. This Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

76. This Defendant denies each and every allegation of the Complaint not specifically admitted, qualified or explained hereinabove.

FOR A THIRD DEFENSE

77. This Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

78. This Defendant alleges that any damages sustained by the Plaintiff, as alleged in the complaint, were due to and caused by the sole acts of negligence, recklessness and wantonness on the part of the Plaintiff and that the sole negligence, recklessness and wantonness of the Plaintiff was the proximate cause of his damages.

FOR A FOURTH DEFENSE

79. This Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

80. This Defendant alleges that if any damages were sustained by the Plaintiff, said damages were caused by the greater negligence and/or willfulness of the Plaintiff, which exceeds the negligence and/or willfulness, if any, on the part of this Defendant, without which greater negligence and/or willfulness on the part of the Plaintiff, said alleged damage would not have occurred or been sustained and for that reason, the Plaintiff is totally barred from recovery.

FOR A FIFTH DEFENSE

81. This Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

82. Alternatively, this Defendant alleges that if any damages were sustained by the Plaintiff, said damages were caused by the negligence and/or willfulness of the Plaintiff, combining, concurring, and contributing with the negligence and/or willfulness, if any, on the part of this Defendant, and for that reason the Plaintiff's recovery, if any, shall be reduced in proportion to the amount of his own negligence.

FOR A SIXTH DEFENSE

83. This Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

84. This Defendant pleads Plaintiff's Complaint fails to plead facts sufficient to form a cause of action under South Carolina law; therefore, Plaintiff's Complaint should be dismissed pursuant to Rule 12(b)(6) of the South Carolina Rules of Civil Procedure.

FOR A SEVENTH DEFENSE

85. This Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

86. This Defendant alleges that the Plaintiff knew or should have known of the dangers attendant in investing in the stock market and also knew or should have known that by engaging in this conduct, he assumed the risk of sustaining investment losses in the fashion in which he was.

This Defendant alleges that the Plaintiff, nevertheless, freely and voluntarily engaged in this conduct even though he knew or should have known of the attendant risks of doing so and that in so doing, he assumed the risk of sustaining the damages for which he is now complaining. Accordingly, his claim is barred.

FOR AN EIGHTH DEFENSE

87. This Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

88. This Defendant pleads all terms and conditions of the annuity policy and accompanying prospectus at issue in this case as an affirmative defense to the Plaintiff's allegations.

FOR A NINTH DEFENSE

89. This Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

90. This Defendant pleads any and all applicable statute of limitations for all causes of actions as affirmative defense to the Plaintiff's complaint.

FOR A TENTH DEFENSE

91. This Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

92. This Defendant pleads all defenses found in the South Carolina Unfair Trade Practices Act, (§39-5-10 et seq. of the South Carolina Code of Laws) including, but not limited to, all defenses found under §39-5-40(a); further, this Defendant alleges that the Plaintiff's Complaint addresses a private concern and is not capable of repetition; therefore, being disqualified for redress under the South Carolina Unfair Trade Practices Act.

FOR AN ELEVENTH DEFENSE

93. This Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

94. This Defendant pleads all defenses found in the South Carolina Uniform Securities Act (§35-1-101 et seq. of the South Carolina Code of Laws including, but not limited to, the applicable statute of limitations found in §35-1-1530 thereunder; therefore, Plaintiff's Complaint should be dismissed.

FOR A TWELFTH DEFENSE

95. This Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

96. This Defendant hereby alleges as an affirmative defense to Plaintiff's Complaint, that it has waived or should be estopped to assert all rights to claim investment losses; therefore, the Plaintiff's Complaint should be dismissed.

FOR A THIRTEENTH DEFENSE

97. This Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

98. This Defendant alleges that the Plaintiff has failed to mitigate his damages and, therefore, the Plaintiff's Complaint should be dismissed.

FOR A FOURTEENTH DEFENSE

99. This Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

100. This Defendant alleges that even if it was negligent or reckless in any respects which is expressly denied, and admitted solely for the purpose of this defense and no other, it is not liable to the Plaintiff for the resulting damages of the Plaintiff, if any, because of the intervening negligent, grossly negligent, reckless, willful and wanton acts of a third party, which negligent and reckless were not reasonably foreseeable and intervened and acted as a direct and proximate cause of the collision, and the resulting damages, if any, sustained by the Plaintiff.

FOR A FIFTEENTH DEFENSE

101. This Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

102. This Defendant alleges that the Complaint of the Plaintiff is barred by the equitable doctrines of laches; therefore, Plaintiff's Complaint should be dismissed.

FOR A SIXTEENTH DEFENSE

103. This Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

104. This Defendant is not a "person who offer or sells a security: under S.C. Code Ann. §35-1-1490; and therefore, Plaintiff is barred from recovery against this Defendant.

FOR A SEVENTEENTH DEFENSE

105. This Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

106. This Defendant is not a broker-dealer who materially aided in the sale of securities or employees or agents or any seller of securities. Therefore, this Defendant is not subject to derivative liability under S.C. Code Ann. §35-1-1500, and Plaintiff is barred from recovery against this Defendant.

FOR AN EIGHTEENTH DEFENSE

107. This Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

108. No private right of action exists for Plaintiff under S.C. Code Ann. §35-1-1210; and therefore, Plaintiff's Complaint is barred.

**FOR A NINETEENTH DEFENSE AND BY WAY OF A CROSS-CLAIM
AGAINST DEFENDANT ING FINANCIAL PARTNERS, INC.
(Contractual Indemnity)**

109. This Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

110. Defendant Jackson National Life Insurance Company and ING Financial Partners, Inc. (hereinafter referred to as "ING") entered into a contractual relationship in which Jackson National Life allowed a licensed ING to sell Jackson National Life Insurance Company's products.

111. The contract between Jackson National Life Insurance Company and ING is attached to this Answer and cross-claim, and is a true and accurate copy of said contract.

112. Defendant William C. Johnson, is an employee, agent, and/or representative of Diversified Business Concepts, Inc. (hereinafter referred to as "DBC") and ING who marketed and sold Jackson National Life Insurance Company's products.

113. Defendant Johnson, on behalf of DBC and ING procured on behalf of Plaintiff a variable annuity from Jackson National Life Insurance Company (Contract #1003126354).

114. Upon information and belief, the Plaintiff is alleging that Defendant Johnson misrepresented and improperly advised the Plaintiff to purchase the variable annuity policy from Jackson National Life.

115. Defendant Jackson National Life Insurance Company and ING entered into a contract in which ING contractually agreed to defend, hold harmless, indemnify Jackson National Life Insurance from any and all claims, actions, causes of action, direct or indirect liabilities, losses, damages and expenses (including, without limitation, interest penalties and reasonable attorneys fees and expenses) which Jackson National Life may incur resulting from or based upon any untrue or misleading statements by ING, its officers, employees, or producers, as well as any negligent action or inaction by ING or any negligent or wrongful action or omission by its producers or other persons employed or appointed by or associated with ING. Further the failure of ING and its producers to comply with any provision of the contract between ING and Jackson National Life Insurance Company or any applicable law; Further, any information/data/requests/instructions submitted to Jackson National Life by ING and/or its producers that is inaccurate, incomplete, misleading, or not submitted in a timely manner or not properly authorized by the client; and finally, any breach of representation, warranty, agreement, or other obligation of ING contained in its contract with Jackson National Life.

116. As Plaintiff has alleged that Defendant Johnson, through his position with DBC and/or ING, negligently represented and intentionally misrepresented the terms and conditions of the annuity policy and/or the suitability of the annuity policy to the Plaintiff, ING has agreed to hold harmless Jackson National Life for this conduct.

117. Defendant Jackson National Life requests that ING defend and indemnify it for the underlying action asserted by the Plaintiff against Defendant Jackson National Life Insurance Company as such action arises out of the actions and omissions of ING and/or its employees, agents, or producers.

118. Therefore, Jackson National Life Insurance Company is entitled to contractual indemnification against ING for all amounts which Jackson National Life Insurance Company is legally obligated to pay or may become legally obligated to pay in the future to the Plaintiff, including attorney's fees and costs in this action.

FOR A TWENTIETH DEFENSE AND BY WAY OF A CROSS-CLAIM
AGAINST DEFENDANT ING FINANCIAL PARTNERS, INC.
(Equitable Indemnity)

119. This Defendant adopts and realleges each and every allegation set forth above, and not inconsistent herewith, as if fully repeated herein.

120. At the time that the underlying wrongdoing alleged by the Plaintiff took place a special relationship existed between Defendant Jackson National Life Insurance Company and ING.

121. As alleged by the Plaintiff, Defendant Johnson via his position with ING and/or DBC negligently represented and intentionally misrepresented the terms and condition of the variable annuity policy, as well as suitability of the Plaintiff.

122. Defendant Jackson National Life Insurance Company has not breached any duty to the Plaintiff nor has it engaged in any wrongful, unethical or inequitable conduct.

123. Accordingly, Jackson National Life Insurance Company is entitled to equitable indemnification against Defendant ING for all amounts which Jackson National Life Insurance Company is legally obligated to pay or may become legally obligated to pay in the future to the Plaintiff including attorneys fees and costs in this action.

WHEREFORE, this Defendant above-named, having answered the Complaint of the Plaintiff herein, respectfully requests the court to dismiss the Plaintiff's Complaint and for:

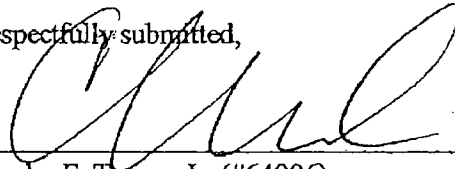
(a) costs in this action;

(b) granting judgment in favor of Jackson National Life Insurance Company on its indemnification claims against ING or for any amounts which Jackson National Life Insurance

Company may be legally obligated to pay to the Plaintiff, including reasonable costs and attorney's fees incurred in the defense of this claim; and

(d) for such other and further relief as the Court may deem just and proper.

Respectfully submitted,



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(864) 552-4600
Attorney for Defendant JNL

February 15, 2011

Greenville, SC

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE FEB 18 2011 FOR THE THIRTEENTH JUDICIAL CIRCUIT

DAVID W. KELLER,

Plaintiff,

v.

ING FINANCIAL PARTNERS, INC.,

WILLIAM C. JOHNSON,

DIVERSIFIED

BUSINESS CONCEPTS, INC. and

JACKSON NATIONAL LIFE

INSURANCE COMPANY,

Defendants.

C.A. No. 2008-CP- 11-920

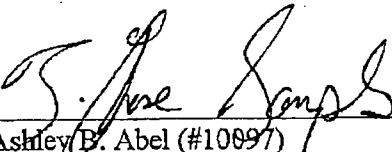
**DEFENDANTS ING FINANCIAL PARTNERS, INC., WILLIAM C. JOHNSON and
DIVERSIFIED BUSIENSS CONCEPTS, INC.'s
MOTION TO COMPEL ARBITRATION AND DISMISS OR STAY THIS CASE**

COME NOW Defendants ING Financial Partners, Inc., William C. Johnson and Diversified Business Concepts, Inc. (hereinafter "Defendants"), by and through their undersigned counsel of record, Jackson Lewis LLP, and move this Court pursuant to S.C. R. Civ. P. 12(b), S.C. Code Ann. § 15-48-20, and 9 U.S.C. § 3 for an dismissing or, alternatively, staying this action and compelling Plaintiff David W. Keller to arbitrate the claims made in his Complaint pursuant to the terms of his written agreement with Defendants.¹

¹ The present motion is the appropriate manner of moving the matter to arbitration. "Courts have traditionally entertained certain types of pre-answer motions-such as a motion to compel arbitration as a sufficient responsive pleading despite its absence from Federal Rule of Civil Procedure 12(b), which concerns responsive pleadings." *Foot 2 Foot Centre for Foot and Ankle Care, P.C. v. DavLong Business Solutions, LLC*, 631 F. Supp. 2d 754, 756 (E.D. Va. 2009), citing *Creative Tile Mktg., Inc. v. SICIS Int'l, S.r.L.*, 922 F. Supp. 1534, 1537 n.1 (S.D. Fla. 1996) and *5C Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure* § 1360 (recognizing that a motion to stay pending arbitration has been treated as a responsive pleading and can be brought under the scope of Rule 12(b)). Alternatively, Defendants are entitled to have the current motion considered as a motion to dismiss on the grounds of improper venue or lack of subject matter jurisdiction based on the agreement to arbitrate.

The grounds for this motion are set forth in detail in a memorandum of law filed concurrently herewith. Defendants respectfully request that this Court compel arbitration of Plaintiff's claims and dismiss or stay this action, and award to Defendants their reasonable costs and attorney's fees expended in preparing and submitting this Motion any other relief the Court deems just and proper.

Respectfully submitted,



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ATTORNEYS FOR DEFENDANTS
ING FINANCIAL PARTNERS, INC.,
WILLIAM C. JOHNSON and
DIVERSIFIED BUSINESS CONCEPTS, INC.

Dated this 18th day of February 2011.

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

FOR THE THIRTEENTH JUDICIAL CIRCUIT

2011 FEB 18 P 4: 47

DAVID W. KELLER,

Plaintiff,

v.

ING FINANCIAL PARTNERS, INC.,

WILLIAM C. JOHNSON,

DIVERSIFIED

BUSINESS CONCEPTS, INC. and

JACKSON NATIONAL LIFE

INSURANCE COMPANY,

Defendants.

FILED-CLERK OF COURT
GREENVILLE CO. S.C.
2011 FEB 18 P 4: 47

C.A. No. 2008-CP-11-920

**DEFENDANTS ING FINANCIAL PARTNERS, INC., WILLIAM C. JOHNSON and
DIVERSIFIED BUSIENSS CONCEPTS, INC.'s MEMORANDUM IN SUPPORT OF
THEIR MOTION TO DISMISS AND COMPEL ARBITRATION**

Defendants ING Financial Partners, Inc., William C. Johnson and Diversified Business Concepts, Inc. (hereinafter "Defendants"), by and through their undersigned counsel, file this Memorandum in Support of Their Motion to Compel Arbitration and to Stay or Dismiss the Action. Defendants have consulted with Plaintiff's counsel who have refused, after being presented with Plaintiff's signed arbitration agreement, to consent to the relief requested; however, Plaintiff's counsel did not identify the basis for refusing to consent.

BACKGROUND

As alleged in the Complaint, Defendant William C. Johnson is a financial advisor working through Defendant Diversified Business Concepts, Inc. to offer financial services out of his Greenville office. (Pl.'s Compl. ¶¶ 2, 3.) As set forth in the complaint, Defendant Johnson is a registered representative of ING Financial Partners, Inc., a securities broker-dealer (Pl.'s Compl. ¶ 5.)

In May 2007, Plaintiff, an individual with over twenty years of investment experience, met with Defendant Johnson to discuss the possibility of opening an investment account. (Pl.'s Compl. ¶¶ 9, 10, 13.) Over the next several months, Defendant Johnson saw and spoke to Plaintiff on numerous occasions during which he provided a variety of investment materials for Plaintiff to review. (Pl.'s Compl. ¶ 13.) After carefully considering his investment options, on September 12, 2007, Plaintiff decided on a number of investments, including an annuity offered by Defendant Jackson National Life ("the annuity"). (Pl.'s Compl. ¶ 17.)

On September 12, 2007, at the same time Plaintiff authorized the purchase of the annuity, he also completed and signed a New Customer Agreement containing his basic personal and financial information ("the Agreement"). A copy of this Agreement is attached as Exhibit A. Immediately above Plaintiff's signature on the Agreement is the following statement in all caps: "I understand that THIS AGREEMENT CONTAINS A PREDISPUTE ARBITRATION CLAUSE THAT IS FULLY SET FORTH IN PARAGRAPH 18 ON THE REVERSE SIDE OF THIS FORM."

That arbitration clause states in part, "ALL PARTIES TO THIS AGREEMENT ARE GIVING UP THE RIGHT TO SUE EACH OTHER IN COURT, INCLUDING THE RIGHT TO A TRIAL BY JURY EXCEPT AS PROVIDED BY THE RULES OF THE ARBITRATION FORUM IN WHICH A CLAIM IS FILED. . . I AGREE THAT 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." (Exhibit A.)

The Agreement contains a choice of law provision in which Plaintiff agreed 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.” (Exhibit A.)

APPLICABLE LAW

A. Iowa and Federal Law Govern Based on the Parties’ Choice of Law Agreement

As noted, Plaintiff agreed that any dispute between he and Defendants would be governed by Iowa and federal law. In South Carolina, “[u]nless the parties agree to a different rule, the validity and interpretation of a contract is ordinarily to be determined by the law of the state in which the contract was made.” *Unisun v. Hertz Rental Corp.*, 312 S.C. 549, 551-52, 436 S.E.2d 182, 184 (S.C. Ct. App. 1993) (emphasis added). See also *Dobyns v. South Carolina Dep’t of Parks, Recreation & Tourism*, 325 S.C. 97, 103, 480 S.E.2d 81, 84 (S.C. 1997) (“The judicial function of a court of law is to enforce contracts as made by the parties and not to re-write or distort, under the guise of judicial construction, the terms of an unambiguous contract.”) Here, because the parties indicated a preference for Iowa and federal law, Iowa and federal law apply to this dispute.¹

B. Federal Arbitration Act Preempts State Law

Ultimately, the Court need not even decide the choice of law question because the Federal Arbitration Act (“FAA”) preempts state law in situations where the agreement between the parties involves interstate commerce. See *Heaberlin Farms, Inc. v. IGF Ins. Co.*, 641 N.W.2d 816, 819 (Iowa 2002) (noting that Iowa’s arbitration act is preempted where contract

¹ Admittedly, South Carolina courts have declined to apply the parties’ choice of law where there that choice conflicts with the public policy of South Carolina. See, e.g., *Russell v. Wachovia Bank, N.A.*, 353 S.C. 208, 221, 578 S.E.2d 329, 336 (S.C. 2006) (noting parties choice of law will be honored absent strong public policy reason). Here, however, there is no conflict with the public policy of South Carolina because both South Carolina and Iowa have adopted similar versions of the Uniform Arbitration Act. But, as noted below, even if South Carolina law applied, the parties’ dispute is still subject to arbitration.

evidences a transaction involving interstate commerce); *Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 590, 553 S.E.2d 110, 115 (S.C. 2001) (“Beginning in the mid-1980’s, the United States Supreme Court, interpreting the FAA, essentially ‘federalized’ the law of arbitration by expanding the reach of the FAA to the full breadth of the Commerce Clause.”)

Under the FAA,

~~A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.~~

9 U.S.C. § 2 (2010). Furthermore, a court must stay “any suit or proceeding” pending arbitration of “any issue referable to arbitration under an agreement in writing for such arbitration.” 9 U.S.C. § 3. *See also* S.C. Code Ann. § 15-48-20 (noting that court shall order parties to arbitrate on application showing arbitration agreement and one party’s refusal to arbitrate). In so doing, a court should give due regard to both the federal and the South Carolina policies favoring arbitration and resolve any doubts in favor of arbitration. *See Zabinski*, 346 S.C. at 596 (“The policy of the United States and South Carolina is to favor arbitration of disputes.”). “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).

Thus, for purposes of this Motion, the relevant inquiry is whether, resolving all doubts in favor of arbitration, the Agreement is susceptible to any interpretation which covers the instant dispute. If it is, this Court must compel arbitration of the claims, and stay or dismiss the instant action.

LEGAL ANALYSIS

A. Agreement at Issue Involves Interstate Commerce, Triggering Application of the FAA

As a preliminary matter, the Agreement containing the arbitration clause contemplates transactions involving interstate commerce such that the FAA governs the Court's consideration of this Motion. As noted above, the FAA applies to any arbitration clause where there is a transaction "involving commerce." 9 U.S.C. § 2. "The United States Supreme Court has interpreted the words 'involving commerce' broadly. According the Supreme Court in *Dobson*, the words 'involving commerce' are the functional equivalent of 'affecting commerce,' which typically indicates Congress' intent to exercise its commerce power in full." *Zabinski*, 346 S.C. at 591 (citing *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274 (1995)). All that is required is that the transaction "turn out, in fact, to have involved interstate commerce." *Id.*

In this case, numerous sources point to the conclusion that the Agreement, which forms the basis of Plaintiff's lawsuit, involved interstate commerce. First, the Agreement itself unambiguously demonstrates an interstate connection. On the first page, Plaintiff's home address is in Greenville, South Carolina, and ING Financial Partners address is in Des Moines, Iowa. For the Agreement to even be processed, interstate commerce was required. On the reverse side of the Agreement directly above the arbitration clause, clauses four, nine, eleven, and twelve indicate that Defendants will invest Plaintiff's money from South Carolina in investments outside of South Carolina. Plaintiff does not contend that he intended to invest only in South Carolina. Therefore, the Court need only look at the Agreement to conclude that the parties contemplated transactions that would involve interstate commerce.

Second, Plaintiff's own admissions in the Complaint indicate that the parties actually engaged in transactions in interstate commerce. As noted above, all that is required to trigger the FAA is that the subsequent transaction involves interstate commerce. *Zabinski*, 346 S.C. at 591. Plaintiff's complaint centers on an interstate annuity investment, which was made possible by the new customer agreement containing the arbitration clause. Moreover, paragraphs ~~fourteen and seventeen; among others, indicate that Plaintiff desired to invest in the stock~~ market, an interstate institution. In short, because the Agreement involves interstate commerce, the FAA preempts conflicting state law and applies to this dispute.

B. The Arbitration Agreement At Issue is Valid and Enforceable

As discussed above, Plaintiff signed the Agreement on September 12, 2007, after months of talking to Defendant Johnson and considering his investment options. Immediately above his signature, in all capital letters, is a notice that the Agreement is governed by an arbitration clause. The arbitration clause appears on the reverse side of the form and, therefore, satisfies the FAA's requirement being in writing. Under Iowa law, parties to a contract are presumed to have read its terms and are bound by them. *Gouge v. McNamara*, 586 N.W.2d 710, 713 (Iowa 1998); *see also Bryant v. American Express Fin. Advisors, Inc.*, 595 N.W.2d 482, 486 (Iowa 1999) ("An agreement to arbitrate is to be treated like any other contract, *Gilmer*, 500 U.S. at 24, 111 S. Ct. at 1651, 114 L. Ed. 2d at 36, and a failure to fully read and consider the contract cannot relieve him of its provisions."). Thus, the arbitration clause in the Agreement is enforceable.

C. The Arbitration Agreement Contemplates Precisely This Type of Dispute

Not only is the arbitration clause enforceable, it is also broad enough to govern the dispute before the Court. The Supreme Court has described an arbitration clause concerning

"[a]ny controversy or claim arising out of or relating to this Agreement" to be a "broad arbitration clause." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967). As another court noted, the language of a similar arbitration provision as that at issue here "leaves nothing to the imagination and is clearly intended to be broad and inclusive in scope." *Millar v. Reliastar Life Ins. Co.*, 157 F. Supp. 2d 645, 649 (W.D.N.C. 2000). Additionally, "healthy regard" must be given to the "federal policy favoring arbitration," and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). "Contracts to arbitrate are not to be avoided by allowing one party to ignore the contract and resort to the courts." *Southland Corp. v. Keating*, 465 U.S. 1, 7 (1984). The Supreme Court has discussed the presumptions and considerations to be taken into account on the issue of arbitrability of claims pursuant to an arbitration agreement:

[A]n order to arbitrate the particular grievance should not be denied 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. . . . [Where broad arbitration provision language is at issue,] in the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.

AT&T Techs. v. Communs. Workers of Am., 475 U.S. 643, 650 (citations and quotations omitted).

In this dispute, the clause in the Agreement is broadly worded to cover "any dispute" "arising out of the agreement." Thus, applying the Supreme Court's guidance above, this dispute falls within the broad provision signed by Plaintiff. Simply stated, Plaintiff executed the Agreement containing the arbitration clause to enable Defendants to make investments on his

behalf. This lawsuit was filed because Plaintiff is unhappy with one of those investments. Therefore, the arbitration clause governs, and the Court should dismiss this case and permit the parties to arbitrate.

Plaintiff may attempt to argue that the arbitration clause does not apply to his tort claims. However, this argument fails because the tort claims arise out of the Agreement. The requirement to arbitrate in the FAA and the corresponding federal and state policies favoring arbitration apply not only breach of contract claims but also tort claims that are related to an arbitration agreement. See, e.g., *Mehler v. Terminix Int'l Co. L.P.*, 205 F.3d 44 (2d Cir. 2000) (concluding that various tort claims and state UTPA claim must be submitted to arbitration under FAA); *Wash. Square Sec., Inc. v. Aune*, 385 F.3d 432 (4th Cir. 2004) (ordering broker/dealer to arbitrate negligence, gross negligence, breach of fiduciary duty, and common law fraud claims brought by investors even where it had not agreed to arbitrate such claims). As explained by the South Carolina Supreme Court, the test is not whether the underlying claims are tort claims or contract claims but rather whether there is a "significant relationship" between the asserted claims and the underlying agreement. Compare *Aiken v. World Finance Corp. of S.C.*, 373 S.C. 144, 644 S.E.2d 705 (S.C. 2007) (refusing to apply arbitration clause to loan agreement where employees of financial company stole borrower's personal information) with *Timmons v. Starkey*, 389 S.C. 375, 698 S.E.2d 809 (S.C. 2010) (ordering arbitration arising out of investment account where investment firm failed to do anything "outrageous" or "illegal" that would take dispute outside the scope of the arbitration agreement). In this case, there is a significant relationship between Plaintiff's allegations and the Agreement because Plaintiff is complaining about Defendants' performance under that Agreement. Therefore, Plaintiff must submit his claims to arbitration.

D. Courts Routinely Order Arbitration Under Similar Circumstances

Plaintiff is not the first investor to sue his financial advisor when his investments failed to generate an anticipated return. Applying the FAA, courts in the Fourth Circuit have frequently ordered arbitration of disputes almost identical to this one. For example, in *Park v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 159 N.C. App. 120, 582 S.E.2d 375 (N.C. Ct. App. 2003), investors, like Plaintiff, sued Merrill Lynch and its financial advisors for breach of fiduciary duty and negligence after their investments lost substantial value. The financial advisors moved to compel arbitration and, construing the FAA, the court ordered the parties to submit to arbitration. *Id.* at 126-27. This same fact pattern and resulting order to submit to arbitration have been repeated numerous times. *E.g.*, *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Coe*, 313 F. Supp. 2d 603 (S.D.W. Va. 2004) (ordering arbitration of negligence and breach of fiduciary duty claims against investment advisors); *Tauber v. Prudential-Bache Secur., Inc.*, No. 88-186, 1990 U.S. Dist. LEXIS 9437 (D. Md. 1990) (ordering arbitration of state law fraud and breach of fiduciary duty claims and collecting cases for proposition that "courts in the Fourth Circuit have consistently compelled arbitration of federal securities claims"); *Pake v. Fry*, 2005 N.C. App. LEXIS 2448 (N.C. Ct. App. Nov. 15, 2005) (compelling arbitration of breach of fiduciary duty claim regarding annuity investment as between decedent's estate and investment firm); *see also Timmons*, 389 S.C. at 378 (compelling arbitration of dispute between investor and investment firm under arbitration agreement even where there were allegations of theft by employee of investment firm.)

Perhaps more telling than these cases, however, is the number of investor and financial advisor disputes submitted for arbitration each year. The Financial Industry Regulatory Authority ("FINRA") administers thousands of arbitrations annually based on claims similar to

Plaintiff's.² For example, in 2010, there were 5,680 arbitrations handled through FINRA. Of those, 3,405 involved allegations of negligence, 4,206 involved allegations of breach of fiduciary duty, 2,473 involved alleged unsuitability of the investment, and 2,691 involved allegations of failure to supervise. See *Financial Industry Regulatory Authority, Dispute Resolution Statistics*, last accessed February 17, 2011, available at <http://www.finra.org/Arbitration>

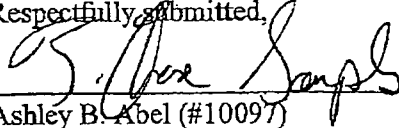
~~Mediation/AboutFINRADR/Statistics/~~ In other words, the most common types of cases arbitrated before FINRA involve the same claims that Plaintiff has alleged here. Defendants respectfully request that the Court order Plaintiff to follow the terms of the Agreement and take the path of arbitration to resolve this dispute.

CONCLUSION

WHEREFORE, Defendants respectfully request that this Court enter an Order: (i) granting this Motion; (ii) compelling arbitration of any and all disputes between Plaintiff and Defendants; (iii) dismissing or staying the instant action; (iv) awarding Defendants their reasonable attorneys' fees incurred in having to file this motion; and (v) awarding such further relief as the Court deems just and proper.

² FINRA is the successor entity to the National Association of Securities Dealers (NASD), which is the arbitration entity referred to in the arbitration clause at issue here.

Respectfully submitted,



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ATTORNEYS FOR DEFENDANTS
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WILLIAM C. JOHNSON and
DIVERSIFIED BUSINESS CONCEPTS, INC.

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Exhibit A

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ING

FINANCIAL PARTNERS

909 Locust Street
New Orleans, LA 70119 • (800) 356-2906

ACCOUNT INFORMATION

☒ NEW CUSTOMER/ACCOUNT ☐ UPDATE ONLY

☒ Direct Business ☐ Pending ☐ Pending Account		FMS SmartWorks® Ref. ID#		☐ W-9 already provided	
(1) ACCOUNT REGISTRATION TYPE (Required of all applicants) ☐ Individual ☐ JTWRDS ☐ Tenants in Common ☐ Community Property ☐ UGMA ☐ UTMA ☐ Corporation ☐ Partnership ☐ Trust ☐ 403(b) ☐ 401(k) ☐ Certified ERISA ☐ 529 Plan ☒ IRA ☐ Educational IRA ☐ Roth IRA ☐ SEP-IRA ☐ Other					
(2) ACCOUNT INFORMATION (Required of all applicants) Owner Full Name (If corporation, add name of authorized individual or custodian if UTM/UGMA) David W. Ketter					
SSN/ETIN ID (If employee, provide SSN)		Redacted-Personal Information		Date of Birth (Indicate if minor)	
SSN/ETIN ID		Redacted		Date of Birth	
Co-Owner (Minor name if UTM/UGMA)		Redacted		Date of Birth	
Mailing Address		City		State Zip	
Redacted-Personal Information		Greenville		SC 29815	
Home Address (if different than mailing - no P.O. Box)		City		State Zip	
Redacted		Redacted		Redacted	
Is each owner: ☒ U.S. citizen ☐ Resident alien ☐ Non-resident alien - specify country and obtain YEL					
(3) IDENTIFICATION INFORMATION (Required of all applicants and must comply with policy) Valid Government ID: Redacted-Personal Information Issuing Entity: SCDMV Co-Owner's ID/Issuing Entity: ☐ Other Verification Done (Explain)					
(4) EMPLOYMENT AND AFFILIATIONS (Required of all applicants) Occupation/Employment Status: Controller RETIRED Employer Name: Michael Co-Owner's Employment Status: Employer Name:					
Employment City and State		Greenville, SC		Phone Number (864) 458-6191	
Employment City and State		Redacted		Redacted	
Are you (or a member of your immediate family) a director, 10% shareholder or policy-making officer of a publicly traded company? ☐ Yes ☒ No If yes, Company Name:					
Are you a registered representative of a broker-dealer? ☐ Yes ☒ No If yes, specify Firm Name:					
Are you employed by or otherwise affiliated with any broker-dealer? ☐ Yes ☒ No If yes, specify Firm Name:					
(5) ACCOUNT PROFILE (Required - for joint accounts information may be combined) Annual Income: ☐ \$ 0 - 29,999 ☒ 30,000 - 49,999 ☐ 50,000 - 74,999 ☐ 75,000 - 99,999 ☐ 100,000 - 149,999 ☐ 150,000 - 249,999 ☐ 250,000 - 399,999 ☐ 400,000 - Over Estimated Net Worth (Exclude primary residence, automobile, furnishings): ☐ \$ 0 - 74,999 ☐ 75,000 - 99,999 ☐ 100,000 - 149,999 ☐ 150,000 - 249,999 ☐ 250,000 - 499,999 ☐ 500,000 - 999,999 ☒ 1,000,000 - 2,999,999 ☐ 3,000,000 - Over Portfolio Objectives (Check all that apply): ☒ Income ☒ Growth ☐ Total Return ☐ Tax Deferral Portfolio Time Horizon: ☐ 4 years or less ☐ 4-6 years ☒ 8 years or more Federal Tax Bracket: 25% Investment Experience? ☒ Yes ☐ No Stocks: 30 Yrs Bonds: 20 Yrs Mutual Funds: 20 Yrs Options: Yrs Partnerships: Yrs Other (Identify):					
(6) PERSHING INFORMATION (All securities will be held in street name) Pershing Money Market: ☐ FCR ☐ ING ☐ Other Money Market (Not including Pershing LLC Retirement Accts.) Proceeds: ☒ Hold ☐ Send proceeds Dividends/Interest: ☒ Credit to account ☐ Pay to client Is account DVP/RVP? ☐ No ☐ Yes (If yes, forward written instructions from institution to Brokerage Operations - El Segundo)					
(7) W-9 TAXPAYER CERTIFICATION AND AGREEMENT By signing below, I certify under penalty of perjury that: 1) the Taxpayer identification Number provided above is correct; 2) the IRS has never notified me that I am subject to backup withholding as a result of a failure to report interest or dividends, or if I have been so notified, the IRS has notified me that I am no longer subject to backup withholding; and 3) I am a U.S. person (including a U.S. resident). OR ☐ I am subject to backup withholding. (If applicable, check this box). ☐ EXEMPT (If applicable, check this box). Acknowledgment I acknowledge and agree that (1) THE INTERNAL REVENUE SERVICE DOES NOT REQUIRE THAT I CONSENT TO ANY PROVISION OTHER THAN THE CERTIFICATIONS REQUIRED TO AVOID BACKUP WITHHOLDING; (2) I have received, read, understand and agree with all of the information on both sides of this document; (3) I have received a copy of the brochure entitled "Important Information About Your ING Financial Partners, Inc. Relationship, Including ING Financial Partners' Privacy Promise"; (4) I understand that THIS AGREEMENT CONTAINS A PRE-DETERMINED ARBITRATION CLAUSE THAT IS FULLY SET FORTH IN PARAGRAPH 18 ON THE REVERSE SIDE OF THIS FORM.					
Account Signature (Signature of UTM/UGMA)		9/12/07		Date	
Redacted Representative Signature		William C. Johnson		9/21/07	
Redacted		Print Representative Name		RR number	
Trade CSI Signature		Print Trade CSI Name		Date	
Field Stamp (Put any Branch Office or field use stamp here)					

ACCOUNT AGREEMENT

In consideration of opening one or more accounts on my behalf, and with respect to any type of transaction that I may have with ING Financial Partners, Inc., I agree as follows:

1. **Meaning of Words in this Agreement.** The words, "I" and "me" refer to each of the account owners. The words "you" and "your" refer to ING Financial Partners.
2. **Authority and Ownership.** I have the required legal capacity, am authorized to enter into this agreement, and have obtained and will provide you with all necessary authorizations from third parties to open accounts and effect transactions in securities under this agreement. I will be the owner of all securities purchased, held and sold by me through you. Checks should be made payable only to the sponsor or Pershing, LLC (Pershing), Clearing Agent.
3. **Joint Accounts.** If this is a joint account, I understand that you will follow the instructions of any one of us without obtaining the consent of any other. All of us will be fully liable for any amounts due to you under this agreement. Upon the death of any one of us, you will treat the property in the account as belonging to the other(s). Unless I notify you differently and provide such legal documentation as you require.
4. **Appointment of ING Financial Partners as Agent.** I appoint you as my agent for the purpose of carrying out my directions with respect to the purchase or sale of securities. To carry out your duties, you are authorized to open or close brokerage accounts, place and withdraw orders, provide information to third parties and take such other steps as are reasonable to carry out my directions.
5. **Force Majeure.** You shall not be liable for loss or delay caused directly or indirectly by war, natural disasters, government restrictions, exchange or market rulings or other conditions beyond your control.
6. **Credit Verification.** You may request a credit report on me and, if I ask, you will tell me the name and address of the consumer reporting agency that furnished it. If you update, renew, or extend my credit, you may request a new credit report.
7. **Identification Verification.** To help the government fight the funding of terrorism and money laundering activities, Federal law requires all financial institutions to obtain, verify, and record information that identifies each person who opens an account. What this means to me: When I open an account, you will ask for my name, address, date of birth and other information that will allow you to identify me. You may also ask to see my driver's license or other identifying documents.
8. **No Advice.** I understand that you provide no tax, legal, or investment advisory services unless such services are independently contracted under an Advisory Services Agreement. All transactions will be done only on my order or the order of my authorized delegate as described in paragraphs 2 and 3.
9. **Stocks, Bonds and Options.**
 - (A) **Relationship with Clearing Agent.** I understand that you will apply to a Clearing Agent for my stock, bond, or option account. I understand and agree that Clearing Agent may refuse to accept or carry my account or to process any transaction that I may wish to effect. You may share with, remit to, or otherwise pay Clearing Agent for its services from your commissions and/or fees charged.
 - (B) **Margin Loans and Options.** I understand and agree that margin loans, if any, provided to me through you will be made by Clearing Agent and not ING Financial Partners and that I will comply with all requirements which Clearing Agent may impose with respect to such loans. I will not request that any transaction in options be effected for my account unless each request is in compliance with Clearing Agent's options compliance program.
 - (C) **Annual Fees and Other Service Charges.** I understand that annual fees and other service charges for inactive accounts, IRA, or pension accounts will be applied by Clearing Agent.
10. **Restricted Securities.** I will not buy or sell any securities of a corporation of which I am an affiliate, or sell any restricted securities except in compliance with applicable laws and regulations.
11. **Indebtedness to ING Financial Partners.** Upon the purchase or sale of any security, if you are unable to settle the transaction by reason of my failure to make payment or deliver securities in good form, I authorize you to take steps necessary to complete or cancel the transaction to minimize loss, and I agree to reimburse you for any and all costs, losses, or liabilities incurred by you, including attorneys' fees. In the event I become indebted to you in the operation of this account, I agree that I will repay such indebtedness upon demand. I agree that if, after demand, I fail to pay the indebtedness, you may close my account and/or liquidate any assets in my account, or otherwise held by you, in an amount sufficient to pay my indebtedness.
12. **Access to Information.** You may provide non-affiliated third parties with information if: (i) it is required by law or by rules or regulations relating to you or financial institutions you have contracted with to provide financial services (such as regulations that require you to provide banks, thrifts, credit unions and/or their related service corporations with customer information the institution needs to monitor compliance issues); (ii) it is necessary for you to communicate such information to process a financial transaction for me or provide a product or service that I have requested; or (iii) otherwise permitted by law or ING Financial Partners' Privacy Promise.
13. **Amendments and Termination.** You may amend this agreement at any time in any respect, effective upon notice to me. You may, at your discretion, terminate this service at any time, effective upon notice to me. I will continue to be responsible for any obligations incurred by me prior to termination.
14. **Governing Law.** This agreement and any disputes, controversies or claims arising out of or related to this agreement shall be governed by the applicable laws of the State of Iowa and applicable federal law.
15. **Review and Indemnification.** I have reviewed the terms and conditions of this agreement including all information contained on the reverse side hereof. I hereby verify that all the information provided is true and correct and may be relied upon by you for the purposes of evaluating my suitability and sophistication in relation to making securities recommendations. Further, I hereby indemnify you for any loss, claims or damages, including legal fees, which you may incur as a result of any securities recommendations or any securities related violations resulting from your reliance upon the information I have provided. I also acknowledge my responsibility to read the prospectus of any mutual fund/direct participation program, and/or public offering sold by prospectus, which contains complete information regarding investment objectives, risks and other material facts, including sales charges.
16. **NASD Public Disclosure.** To receive information concerning the licensing status and/or disciplinary record of a broker/dealer or agent, contact NASD at the following toll-free number (800) 289-9999, or the Web site address at www.nasdr.com.
17. **Other Information.** For more information concerning investments and other important disclosures about our business, please visit our Web site at www.ingfinancialpartners.com.

18. Arbitration Clause. THIS AGREEMENT CONTAINS A PREDISPUTE ARBITRATION CLAUSE. BY SIGNING AN ARBITRATION AGREEMENT, THE PARTIES AGREE AS FOLLOWS:

- (A) ALL PARTIES TO THIS AGREEMENT ARE GIVING UP THE RIGHT TO SUE EACH OTHER IN COURT, INCLUDING THE RIGHT TO A TRIAL BY JURY, EXCEPT AS PROVIDED BY THE RULES OF THE ARBITRATION FORUM IN WHICH A CLAIM IS FILED.
- (B) ARBITRATION AWARDS ARE GENERALLY FINAL AND BINDING; A PARTY'S ABILITY TO HAVE A COURT REVERSE OR MODIFY AN ARBITRATION AWARD IS VERY LIMITED.
- (C) THE ABILITY OF THE PARTIES TO OBTAIN DOCUMENTS, WITNESS STATEMENTS AND OTHER DISCOVERY IS GENERALLY MORE LIMITED IN ARBITRATION THAN IN COURT PROCEEDINGS.
- (D) THE ARBITRATORS DO NOT HAVE TO EXPLAIN THE REASON(S) FOR THEIR AWARD.
- (E) THE PANEL OF ARBITRATORS WILL TYPICALLY INCLUDE A MINORITY OF ARBITRATORS WHO WORK OR ARE AFFILIATED WITH THE SECURITIES INDUSTRY.
- (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 ARBITRATION 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.

No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated to court a putative class action or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; or (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein.

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.	)	
	)	
ING Financial Partners, Inc.,	)	
William C. Johnson, Diversified	)	
Business Concepts, Inc., and Jackson	)	
National Life Insurance Company,	)	
	)	
Defendants.	)	

**PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS ING
FINANCIAL PARTNERS, INC., WILLIAM C. JOHNSON AND DIVERSIFIED
BUSINESS CONCEPTS, INC.'S MOTION TO COMPEL AND DISMISS OR STAY
ARBITRATION**

The Plaintiff, David W. Keller ("Keller"), by and through his undersigned counsel, hereby submits this Memorandum in Opposition to Defendants' Motion to Compel Arbitration and Dismiss or Stay.

RELEVANT FACTS

After thirty-seven (37) years of employment with Michelin, Keller sought to invest a substantial portion of his life's savings into financial products suitable to his retirement needs. (Pl.'s Compl. ¶¶ 9, 13.) Defendant, William C. Johnson ("Johnson"), through his business, Diversified Business Concepts, Inc., solicited Mr. Keller's business, and held himself out as a skilled and knowledgeable expert in investment planning, insurance and estate planning. (*Id.* at ¶¶ 3, 11.) After meeting with Mr. Johnson, Mr. Keller decided to rely upon Mr. Johnson's representations, and provided Mr. Johnson with private and sensitive financial information. (*Id.* at ¶ 12.) Subsequently, from May through October of 2007, Mr. Keller and Mr. Johnson met on

multiple occasions to discuss potential investments suitable to Mr. Keller's investment needs, which included financial protection in the event of a long life span, and that he receive a guaranteed annual increase in value. (Id. at ¶ 13.)

After multiple discussions, Mr. Johnson ultimately recommended and advised that Mr. Keller purchase two quite distinct investments: 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"). (Id. at ¶ 14.) Relying upon Mr. Johnson's representations regarding his investing expertise, and upon his suggestions concerning the above-referenced investments, Mr. Keller purchased the two products in September of 2007. (Id. at ¶ 17.) Mr. Keller invested his retirement benefits from Michelin, along with additional savings, in the Annuity and Portfolio, with a total investment of \$1,461,742.40. (Id.) The Annuity itself was purchased from Jackson National Life Insurance Policy, through ING. (Id. at ¶ 17.) The Portfolio investment, on the other hand, was purchased directly from Defendant ING.

In late 2009, Mr. Keller discovered that the Annuity did not, in fact, provide the lifetime benefits or guaranteed annual increase in value as had been represented by Defendant Johnson. (Id. at ¶ 20.) In response, Mr. Keller filed a formal complaint with Defendant ING. (Id. at ¶ 26.) Defendant ING allegedly investigated the matter, but sought no input from Mr. Keller, instead relying solely upon Mr. Johnson's statements. (Id. at ¶ 26.) ING ultimately disclaimed any obligation to undertake any form of remedial action. (Id. at ¶ 26.) As a result, Plaintiff filed the present case in Greenville County, in response to which Defendants have filed this present Motion to Compel Arbitration and Dismiss or Stay.

ARGUMENT

I. There is No Binding Agreement to Arbitrate

a. *The ING "Account Information" Form Upon which Defendants' Rely is Unrelated to the Jackson National Annuity Contract.*

The purported arbitration agreement that Defendants assert binds Plaintiff to arbitrate the present case is an ING "Account Information" form unrelated to Plaintiff's Jackson National Annuity, and therefore bears no relevance to Plaintiff's claims relating to that Annuity.

At the time the parties signed the "Account Information" form, Mr. Keller and Defendant Johnson executed multiple documents relating to either the Annuity or the Portfolio purchase. The "Account Information" form, attached as Exhibit A to Defendants' Motion to Compel Arbitration, appears to have been executed in conjunction with Plaintiff's purchase of the Portfolio product, an ING product, recommended by Defendant Johnson to Plaintiff. 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. Despite the fact that the Annuity is a Jackson National product, Jackson National answered Plaintiff's Complaint, has served discovery on all parties, and has not moved to compel arbitration.

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 clause contained in the "Account Information" form relates specifically to the Portfolio account, not the Jackson National Annuity. Consequently, the arbitration clause has no bearing on any disputes relating to the Jackson National Annuity—the subject of this present litigation. Simply put, Plaintiff never agreed to arbitrate any claims

relating to the Jackson National Annuity. As result, Defendants' Motion to Compel Arbitration should be denied.

b. *The Parties' Selection of the NASD as the Arbitrator Constitutes an Integral Term of the Contract, and the NASD Does Not Exist.*

Even if the arbitration clause at issue covered disputes relating to the Jackson National Annuity, the failure of a material term of that agreement renders the arbitration agreement void. 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." (Ex. A to Defs.' Mot. To Compel Arbitration and Dismiss or Stay.) The NASD, or the National Association of Securities Dealers, Inc., does not exist, having merged with certain divisions of the New York Stock Exchange to become what is now known as the Financial Industry Regulatory Authority, or FINRA. Because the arbitral 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 should not be enforced.

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). As such, a valid arbitration agreement requires the parties' "mutual assent to the terms." Schaer 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 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 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); 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 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)). Courts have found that the chosen arbitral 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), attached hereto as **Ex. 1**. Because the selection of the NASD constituted an integral term of the agreement, and because the chosen arbitral forum selected does not 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 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 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, 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 arbitral 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 arbitral forum and process capable of and experienced in handling complex,

industry specific disputes. See “Account Information” form attached as Ex. A to Defs’ Mot. to Compel Arbitration and Dismiss or Stay. 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 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 National Association of Securities Dealers, Inc. (“NASD”) was, it appears, selected due, in part, to its expertise in the securities arena, and, in part, to 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.

In mid-2007, however, the NASD merged with 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). Coincident with the merger came both procedural and substantive changes to the NASD’s former dispute resolution process. 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, the parties to the present case are deprived of the arbitral forum that they specifically bargained for and agreed upon. Because the designated arbitrator is not available to resolve the present dispute, and because an arbitrator selection clause in the subject agreement is a material term of the agreement to arbitrate, this Court should find the arbitration agreement impossible to

perform, and deny the 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 arbitral forum of choice meant that *only* the NYSE could arbitrate a dispute between the parties).

CONCLUSION

As discussed above, Defendants' Motion to Compel Arbitration and Dismiss or Stay should be denied because the arbitration clause in the "Account Information" form relates to the Portfolio, not the Annuity, and therefore has no bearing on dispute resolution of claims relating the Annuity. Moreover, even should this Court extend the arbitration clause to cover claims relating to the Annuity, the unavailability of the NASD constitutes a failure of a material term of the arbitration clause, thereby rendering the arbitration clause unenforceable. Consequently, because there exists no binding agreement to arbitrate the claims relating to the Annuity, this Court should deny Defendants' Motion.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

April 6, 2011
Greenville, SC



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LEXSEE 2010 U.S. DIST. LEXIS 10809

THEODORE K. WILSON and TINA M. WILSON, Plaintiffs, v. DELL FINANCIAL SERVICES, L.L.C., Defendant.

CIVIL ACTION NO. 5:09-cv-00483

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF WEST VIRGINIA, BECKLEY DIVISION

2010 U.S. Dist. LEXIS 10809

February 8, 2010, Decided
February 8, 2010, Filed

PRIOR HISTORY: *Wilson v. Dell Fin. Servs., L.L.C.*, 2009 U.S. Dist. LEXIS 60933 (S.D. W. Va., July 16, 2009)

COUNSEL: [*1] For Theodore K. Wilson, and, Tina M. Wilson, his wife, Plaintiffs: Christopher B. Frost, Ralph C. Young, LEAD ATTORNEYS, HAMILTON BURGESS YOUNG & POLLARD, Fayetteville, WV.

For Dell Financial Services, L.L.C., Defendant: Bruce M. Jacobs, Nicholas P. Mooney, II, Victoria M. Kadreva Holmes, LEAD ATTORNEYS, SPILMAN THOMAS & BATTLE, Charleston, WV.

JUDGES: THOMAS E. JOHNSTON, UNITED STATES DISTRICT JUDGE.

OPINION BY: THOMAS E. JOHNSTON

OPINION

MEMORANDUM OPINION AND ORDER

Before the Court is Plaintiffs Theodore Wilson and Tina Wilson's Motion for Relief Pursuant to *FRCP Rule 60(b)* from Order of the Court Directing Arbitration of Tina Wilson's Claim and Staying Theodore Wilson's Claim Pending Arbitration [Docket 11].

I. BACKGROUND

On April 15 of 2003, Tina Wilson opened a credit account serviced by Defendant Dell Financial Services LLC (DFS). The account could be used to finance the

purchase of computer equipment from Dell, Inc. DFS mailed a Dell Preferred Account Credit Agreement (Agreement) to Tina which contained the terms and conditions of the credit account. It also contained the arbitration clause at issue here. The Agreement specified that Tina would be bound by its terms if she did not notify DFS of her rejection [*2] of them within twenty-four hours and if she thereafter accepted any goods financed with the DFS account. DFS did not receive notification from Tina rejecting the terms of the Agreement, and her account was used for a number of purchases between the date it was opened and April 2008.

DFS's alleged actions to collect debts owed on the account, including telephone calls and letters to Plaintiffs, form the factual basis for the claims in the complaint. The complaint asserts multiple claims under the West Virginia Consumer Credit and Protection Act, *W. Va. Code §§ 46A-1-1 et seq.*, the state statute prohibiting harassing telephone calls, *W. Va. Code § 61-8-16*, and common law.

By Order of July 16, 2009, the Court referred Michelle's claims to arbitration in accordance with the terms the Agreement. As Theodore was not a party to the Agreement, his claims were stayed pending the outcome of the arbitration.

Plaintiffs now seek relief from the Court's July 16, 2009, Order under *Rule 60(b)* of the *Federal Rules of Civil Procedure*. The Agreement's arbitration clause permits the party filing a claim to select among three arbitrations administrators: the National Arbitration Forum (NAF), the American [*3] Arbitration Association (AAA), or JAMS. On July 17, 2009, the NAF consented

to the entry of a judgment in a Minnesota court which required that it cease participating in consumer debt arbitrations as of July 24, 2009. On July 27, 2009, the AAA announced that it would no longer arbitrate certain consumer debt disputes initiated by debt collectors. Plaintiffs argue that the Agreement's arbitration clause has become void and unenforceable because they have been deprived of the right to select two of the three designated arbitration administrators.

This matter is fully briefed and ripe for the Court's consideration.

II. DISCUSSION

Rule 60(h) permits parties to obtain relief from final judgments, orders, or proceedings for any of six reasons. Plaintiffs do not specify under which subsection of *Rule 60(b)* they are seeking relief. Their request appears to fall within the ambit of the rule's catchall section, *Rule 60(b)(6)*, which extends to "any other reason justifying relief from the operation of the judgment." *Fed. R. Civ. P. 60(b)(6)*. This subsection "provides the court with a grand reservoir of equitable power to do justice in a particular case" and is reserved for "extraordinary circumstances." [*4] *Reid v. Angelone*, 369 F.3d 363, 374 (4th Cir. 2004) (quoting *Eberhardt v. Integrated Design & Constr., Inc.*, 167 F.3d 861, 872 (4th Cir. 1999)). The moving party bears the burden demonstrating that relief is warranted. *McLawhorn v. John Daniel & Co., Inc.* 924 F.2d 535 (4th Cir. 1991). Orders referring disputes to arbitration may be reviewed under *Rule 60(b)*. See *O.N. Equity Sales Co. v. Gibson*, 553 F. Supp. 2d 652 (S.D. W. Va. 2008) (Chambers, J.).

The question raised by Plaintiffs' motion is whether the unavailability of the NAF and AAA to administer the arbitration of Tina's claims renders the arbitration clause void and unenforceable. The existence of a valid and enforceable contract is governed by the contract formation and interpretation principles of the forum state. *Cara's Notions, Inc. v. Hallmark Cards, Inc.*, 140 F.3d 566, 569 (4th Cir. 1998). The scope and interpretation of a valid arbitration clause, however, is governed by the "federal substantive law of arbitrability." *Int'l Paper Co. v. Schwabedissen Maschinen & Anlagen GmbH*, 206 F.3d 411, 417 n.4 (4th Cir. 2000) (quoting *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983)). The Court previously has [*5] found that the arbitration clause in the Agreement is valid and enforceable under the laws of West Virginia. Thus, Plaintiffs' present challenge to the arbitrability of Tina's claims is governed by federal law.

When construing the provisions of an arbitration agreement, "due regard must be given to the federal policy favoring arbitration." *Cara's Notions, Inc.*, 140 F.3d

at 569 (citing *Volt Info. Scis., Inc. v. Bd. of Trs. of Leland Stanford Jr. Univ.*, 489 U.S. 468, 475-76, 109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)). All doubts regarding the arbitrability of claims should be resolved in favor of submitting the claims to arbitration. *Hooters of Am. v. Phillips*, 39 F. Supp. 2d 582, 609 (4th Cir. 1998). Consistent with this policy, the failure or refusal of the arbitrator named in the agreement to hear the dispute generally will not invalidate the agreement. See *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000); see also 9 U.S.C. § 5 (empowering courts to appoint a substitute if the arbitrator provided for in the agreement cannot or will not perform). The unavailability of the chosen arbitrator will invalidate the agreement "[o]nly [*6] if the choice of forum is an integral part of the agreement to arbitrate," *Reddam v. KPMG LLP*, 457 F.3d 1054, 1060 (9th Cir. 2006) (quoting *Brown*, 211 F.3d at 1222), as opposed to an "ancillary logistical concern." *Zechman v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 742 F. Supp. 1359, 1364 (N.D. Ill. 1990). The chosen arbitration forum may be integral to the agreement, for example, if the arbitrator's rules will have a substantive effect on the party's claims, e.g., *Smith Barney, Inc. v. Critical Health Sys.*, 212 F.3d 858, 862 (4th Cir. 2000); if the arbitrator possesses specialized knowledge or expertise regarding the subject of the dispute, e.g., *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435, 439 (S.C. 2009); or if the agreement otherwise evidences a "dominant intent" of the parties that claims could only be heard by the named arbitrator, e.g., *Gutfreund v. Weiner*, 68 F.3d 554, 561 (2d Cir. 1995).

In this case, Plaintiffs assert that the choice of arbitration administrator provision is integral to the Agreement, but they fail to demonstrate how this is so. The Agreement's arbitration clause provides, in pertinent part: "The party initially requesting that a Claim be [*7] settled by arbitration shall have the right to select one of the following three arbitration administrators: the National Arbitration Forum ["NAF"]; the American Arbitration Association ["AAA"]; or JAMS." (Docket 4-2.) The wording of the Agreement does not give any indication that the three administrators were named as anything but an ancillary logistical concern. Plaintiffs have not cited any rules or procedures particular to the three named arbitration administrators that would substantively affect the resolution of their dispute. The named administrators handle all manners of arbitration; they do not appear to have been named for their specialized knowledge or expertise in consumer debt disputes.

Moreover, the intent of the Agreement's arbitration selection provision has not been completely frustrated. One or two of the three administrators named in the Agreement remain available to Michelle. Thus, although

Tina may have fewer options available, she nonetheless will be submitting her claims to an arbitration administrator contemplated by the Agreement. Furthermore, Plaintiffs have not suggested that JAMS will provide a less desirable arbitrator than the NAF or AAA.

* Defendant argues [*8] that the AAA is available to administer the arbitration of this dispute because it still accepts cases filed by consumers against creditors. The Court need not decide whether the AAA is available because it would not affect the disposition of this motion.

Finally, Plaintiffs' motion states that some banks are no longer requiring consumers to arbitrate disputes. The Court does not see why this is in any way relevant to the July 16, 2009, arbitration order.

III. CONCLUSION

Plaintiffs have not met their burden of demonstrating that the relief from the Court's Order of June 23, 2009, is merited under *Rule 60(b)*. Accordingly, their motion for relief [Docket 11] is **DENIED**.

IT IS SO ORDERED.

The Court **DIRECTS** the Clerk to send a copy of this Order to counsel of record and any unrepresented party.

ENTER: February 8, 2010

/s/ Thomas E. Johnston

THOMAS E. JOHNSTON

UNITED STATES DISTRICT JUDGE

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STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

FOR THE THIRTEENTH JUDICIAL CIRCUIT

DAVID W. KELLER,

Plaintiff,

v.

ING FINANCIAL PARTNERS, INC.,
WILLIAM C. JOHNSON,
DIVERSIFIED
BUSINESS CONCEPTS, INC. and
JACKSON NATIONAL LIFE
INSURANCE COMPANY,

Defendants.

C.A. No. 2011-CP-23-0336

**DEFENDANTS ING FINANCIAL PARTNERS, INC., WILLIAM C. JOHNSON and
DIVERSIFIED BUSINESS CONCEPTS, INC.'s REPLY IN SUPPORT OF THEIR
MOTION TO DISMISS AND COMPEL ARBITRATION**

Defendants ING Financial Partners, Inc. ("IFP"), William C. Johnson and Diversified Business Concepts, Inc. (hereinafter "Defendants"), by and through their undersigned counsel, file this Reply in Support of Their Motion to Compel Arbitration and to Stay or Dismiss the Action.

BACKGROUND

Plaintiff filed this action against Defendants arising out of investment advice given to Plaintiff by Defendant Johnson. Plaintiff takes particular issue with advice in connection with the purchase of an annuity from Defendant Jackson National Life Insurance Company ("Jackson National"). At the time Plaintiff purchased the Jackson National annuity, he executed an Account Agreement (the "Agreement"), which contains a mandatory arbitration clause. On February 18, 2010, Defendants filed a Motion to Compel Arbitration pursuant to the

parties' Agreement. On April 6, 2011, Plaintiff filed a response in opposition to Defendants' motion.

Plaintiff makes two arguments in response to Defendants' motion. First, Plaintiff contends that the form containing the arbitration agreement is unrelated to the Jackson National annuity. As discussed below, this is manifestly incorrect. Second, Plaintiff argues that the parties' selection of the NASD as arbitrator constitutes an "integral term" of the contract, and because the NASD no longer exists, the contract is unenforceable. Again, as detailed below, this argument lacks merit.

ANALYSIS

A. The Agreement at Issue Is Directly Related to The Purchase of the Jackson National Annuity

Plaintiff first contends that the IFP Account Information form containing the arbitration agreement is unrelated to the Jackson National Annuity. This argument, though misplaced as explained below, misses the point. As explained in Plaintiff's Response, Plaintiff came to Defendant Johnson seeking investment advice for retirement generally. (Pl.'s Resp. at 1-2.) As the basis for their overall relationship and in connection with each separate account Plaintiff opened, Plaintiff and Defendant Johnson, as a registered representative of ING Financial Partners, Inc., executed an Account Agreement. This Agreement contained the arbitration clause at issue. The very first line of the Agreement declares, "In consideration of opening **one or more accounts** on my behalf, and **with respect to any type of transaction that I [Plaintiff] may have with ING Financial Partners, Inc. I agree as follows:**" (Exhibit B at 2 (emphasis added).) The arbitration clause covers "**any dispute between [Plaintiff] and [Defendant IFP] arising out of this Agreement.**" (*Id.* (emphasis added).) Plaintiff's purchase of the Jackson National annuity was a "transaction" "arising out of" the Agreement that Plaintiff made with

Defendant IFP. Therefore, Plaintiff's argument that the arbitration agreement was somehow not intended to apply to the Jackson National annuity is contrary to the express language of the contract between the parties. Considering the clear terms of the Agreement and the public policy of South Carolina favoring the arbitration of disputes, Plaintiff should be compelled to arbitrate. *See Zabinski v. Bright Acres Assoc.*, 346 S.C. 580, 596 (S.C. 2001) ("The policy of the United States and South Carolina is to favor arbitration of disputes.").

Furthermore, contrary to Plaintiff's argument, the Account Agreement at issue is directly related to his purchase of the Jackson National Annuity. It is standard operating procedure that whenever an IFP customer opens a new account, an account information sheet is completed for that account. (Johnson Aff., Ex. A.) This applies not only to a client's first account, but all subsequent new accounts opened in a customer's name. (*Id.*) In fact, IFP will not open an account unless it has a completed account information sheet. (*Id.*) In this case, Plaintiff executed at least three similar account information sheets, containing account agreements during his relationship with Defendant Johnson. (*Id.*) Those three forms are attached as Exhibits B and C.

The forms included in Exhibit C were signed by Plaintiff on July 12, 2007. One of these forms was executed to open an investment account with The Hartford and another was used to open Plaintiff's Portfolio account with IFP. (*Id.*) The third form and the one attached to Defendants' Motion to Compel Arbitration, was signed on September 12, 2007. This account information form was executed in connection with and at the same time as Plaintiff opened the Jackson National account. (*Id.*) The Jackson National account was the only account Plaintiff opened with Defendant Johnson on September 12, 2007. (*Id.*) A Disclosure Form, attached as Exhibit D, was also executed on September 12, 2007, along with the account information sheet.

(*Id.*) On its face, it refers to the purchase of an \$800,000 variable annuity, and specifically references "Jackson National." Therefore, Plaintiff's contention that the account information form containing the arbitration agreement is unrelated to the Jackson National account is meritless.

B. The Fact that FINRA is The Successor to The NASD Has No Impact on The Enforceability of The Arbitration Agreement

Plaintiff's argument that the arbitration agreement is unenforceable because the choice of the National Association of Securities Dealers ("NASD") as the arbitration forum was integral to the arbitration agreement rests on three faulty premises. First, that there is a significant difference between the Financial Industry Regulatory Authority ("FINRA") and its predecessor, the NASD. Second, that the parties actually selected the NASD as the forum. And, third, that the choice of forum is integral to the arbitration agreement.

First, before exploring the actual language of the arbitration agreement, it is important to note that despite Plaintiff's argument, there is no significant distinction between FINRA and the NASD. As explained by one court, "FINRA . . . for all intents and purposes, essentially succeeded [the] NASD." *Collins v. Ferrari*, No. 08-1274, 2010 U.S. Dist. LEXIS 11192 at *2 (N.D.N.Y. Feb. 9, 2010); *see also* Exchange Act Release No. 34-56146, 2007 SEC LEXIS 1641 (July 26, 2007) (explaining FIRNA was formed from the consolidation of NASD and member regulation arm of NYSE). Plaintiff admits as much in his response. (Pl.'s Resp. at 7.). Over and over again, since the creation of FINRA, courts have treated the NASD and FINRA as the same entity, and Plaintiff fails to present any reason why this Court should not continue to do so here. *Kashner Davidson Sec. Corp. v. Mscisz*, 601 F.3d 19, 21 (1st Cir. 2010) (noting FINRA is "the successor organization to the NASD"); *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')."). Thus, because FINRA is simply the successor entity to the NASD, there is no reason why Plaintiff should be excused from arbitrating this dispute.

Second, and turning now to the text of the arbitration clause, the Agreement does not specify the NASD as the exclusive arbitration forum available to the parties. The arbitration clause states, in its entirety:

18. Arbitration Clause. THIS AGREEMENT CONTAINS A PREDISPUTE ARBITRATION CLAUSE. BY SIGNING AN ARBITRATION AGREEMENT THE PARTIES AGREE AS FOLLOWS:

(A) ALL PARTIES TO THIS AGREEMENT ARE GIVING UP THE RIGHT TO SUE EACH OTHER IN COURT, INCLUDING THE RIGHT TO A TRIAL BY JURY, EXCEPT AS PROVIDED BY THE RULES OF THE ARBITRATION FORUM IN WHICH A CLAIM IS FILED.

(B) ARBITRATION AWARDS ARE GENERALLY FINAL AND BINDING; A PARTY'S ABILITY TO HAVE A COURT REVERSE OR MODIFY AN ARBITRATION AWARD IS VERY LIMITED.

(C) THE ABILITY OF THE PARTIES TO OBTAIN DOCUMENTS, WITNESS STATEMENTS AND OTHER DISCOVERY IS GENERALLY MORE LIMITED IN ARBITRATION THAN IN COURT PROCEEDINGS.

(D) THE ARBITRATORS DO NOT HAVE TO EXPLAIN THE REASON(S) FOR THEIR AWARD.

(E) THE PANEL OF ARBITRATORS WILL TYPICALLY INCLUDE A MINORITY OF ARBITRATORS WHO WERE OR ARE AFFILIATED WITH THE SECURITIES INDUSTRY.

(F) THE RULES OF SOME ARBITRATION FORUMS MAY IMPOSE TIME LIMITS FOR BRINGING A CLAIM IN ARBITRATION. IN SOME CASES, A CLAIM THAT IS NEGLIGIBLE 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.

No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action;

or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; or (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein.

(Exhibit B.)

Notably absent from this Agreement is a forum selection clause. The only reference to the NASD is the phrase "this agreement shall be submitted to arbitration conducted under the then applicable provisions of the Code of Arbitration Procedure of NASD." This clause refers to the rules of procedure and has nothing to do with the forum or venue of arbitration. In contrast, Paragraph (F) refers to "the rules of *some* arbitration forums," indicating that the parties contemplated arbitration in more than one forum. Furthermore, paragraphs (A) and (G) refer to "the rules of the arbitration forum in which a claim is filed," again failing to specify that the forum must be the NASD. What the parties' clearly agreed to is "giving up the right to sue each other in court" (paragraph (A)), binding arbitration (paragraph (B)), limited discovery (paragraph (C)), decision by an arbitrator, including some who are affiliated with the securities industry (paragraphs D and E), and possible time limits for bringing a claim in arbitration (paragraph (F)). Each of these prongs of the agreement is satisfied in arbitration before FINRA.

In his response, Plaintiff emphasizes that when the NASD became known as FINRA there were changes to the NASD's Code of Arbitration Procedure. However, Plaintiff fails to point to a single change that would be material to the parties' decision to arbitrate before FINRA. In fact, the FINRA Code of Arbitration Procedure for Customer Disputes is almost identical to the most recent version of the NASD Code of Arbitration Procedure for Customer Disputes approved in April 2007, even containing the same numbering. See FINRA, Code of Arbitration Procedure, <http://www.finra.org/ArbitrationMediation/Rules/CodeOfArbitration/Procedure>, (last visited April 7, 2011.) (containing links to versions of current and former rules); see also

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.”).

In any event, the parties clearly contemplated that there would be rule changes and that their dispute would be governed by the latest version of the rules. For example, in the language quoted above, the agreement states that the arbitration shall be “conducted under the **then-existing** applicable provisions” of the arbitration code. (Exhibit B (emphasis added).) More clearly, paragraph (G) declares that “the rules of the arbitration forum in which the claim is filed, **and any amendments thereto**, shall be incorporated into this agreement.” (Exhibit B (emphasis added).)

Third, and finally, even if the parties’ chose the NASD as the forum for arbitration, there is no indication that such choice was integral to the arbitration agreement. If it were, the parties could have specified that the NASD was the arbitration forum. As explained above, if the NASD as an arbitration forum were an integral term in the agreement, it is illogical for the parties to refer to an arbitration forum generally or to “arbitration forums” in the plural.

Judge Story, in the Northern District of Georgia, addressed the same argument made by Plaintiff in another case earlier this year. In that case, like here, the arbitration agreement stated that arbitration would be pursuant to “the rules of the Board of Governors of the National Association of Securities Dealers then in effect.” *Branch v. Sickert*, No. 2:10-128, 2011 U.S. Dist. LEXIS 19392 at *10 (N.D. Ga. Feb. 28, 2011.) Plaintiff argued that the selection of the NASD rules was the same as selecting the NASD as the forum, which was integral to the agreement. *Id.* at *11-12. In looking at the language in the remainder of the agreement, the

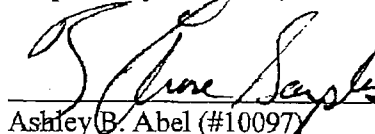
court noted, like here, that agreement referred generally to an "arbitration forum," and concluded that "by reading the entire clause . . . the parties intended that the forum could be separate and distinct from the then-recognized NASD, as the NASD was not specifically or exclusively chosen as forum." *Id.* at *16. Therefore, the court ordered the parties to arbitrate before FINRA. *Id.* at *20. For the same reasons, Plaintiff should be compelled to arbitrate his dispute with Defendants before FINRA.

To summarize, Plaintiff's argument in response to Defendants' Motion to Compel Arbitration that the arbitration agreement fails for lack of an integral term is without merit. Because Plaintiff fails to otherwise challenge the validity of the arbitration agreement or its applicability to this case, Defendants respectfully request that the Court enforce the agreement of the parties and grant Defendants' Motion to Compel Arbitration.

CONCLUSION

WHEREFORE, Defendants respectfully request that this Court enter an Order: (i) granting their Motion to Compel Arbitration; (ii) compelling arbitration of any and all disputes between Plaintiff and Defendants; (iii) dismissing or staying the instant action; (iv) awarding Defendants their reasonable attorneys' fees incurred in having to file this motion; and (v) awarding such further relief as the Court deems just and proper.

Respectfully submitted,



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ATTORNEYS FOR DEFENDANTS
ING FINANCIAL PARTNERS, INC.,
WILLIAM C. JOHNSON and
DIVERSIFIED BUSINESS CONCEPTS, INC.

This 8th day of April 2011.

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Exhibit A

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STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

IN THE COURT OF COMMON PLEAS

C.A. NO. 2011-CP-23-0336

DAVID W. KELLER,

Plaintiff,

v.

ING FINANCIAL PARTNERS, INC.,
WILLIAM C. JOHNSON, DIVERSIFIED
BUSINESS CONCEPTS, INC. and JACKSON
NATIONAL LIFE INSURANCE COMPANY,

Defendants.

AFFIDAVIT OF WILLIAM C. JOHNSON

STATE OF SOUTH CAROLINA

COUNTY OF GREENVILLE

BEFORE ME, the undersigned authority, personally appeared William C. Johnson, who was duly sworn and says:

1. I am over the age of eighteen and am a resident of Greenville, South Carolina. I am fully competent to testify as to the matters set forth in this affidavit, which are true and correct based upon my own personal knowledge.

2. I am currently employed as President of Diversified Business Concepts, Inc. and have been employed in this capacity since 1998.

3. I am also a registered representative for ING Financial Partners, Inc. ("IFP").

4. Beginning in May 2007, I met with David Keller and his wife regarding investments.

5. Mr. Keller opened several accounts with me. Each time he opened a new account he executed an account information sheet containing an account agreement with an arbitration clause. The completion of an account information sheet is standard procedure and is

required by IFP before opening any new account.

6. Plaintiff executed at least three account information sheets containing account agreements with arbitration clauses during our relationship.

7. I certify that the documents attached hereto as Exhibit C are true and accurate copies of the account information sheets executed by Plaintiff on July 12, 2007.

8. Mr. Keller executed the agreements attached as Exhibit C in connection with the opening of an account with The Hartford and a Portfolio account with IFP.

9. I further certify that the document attached hereto as Exhibit B is a true and accurate copy of the account information sheet executed by Plaintiff on September 12, 2007.

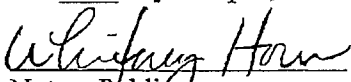
10. Plaintiff executed the account information sheet and agreement attached as Exhibit B in connection with the purchase of a variable annuity from Jackson National Life Insurance Company. This was the only new account opened by Plaintiff on September 12, 2007.

11. Along with Exhibit B, Plaintiff also executed a disclosure form, a true and accurate copy of which is attached as Exhibit D.

FURTHER AFFIANT SAYETH NOT.


William C. Johnson

Sworn to and subscribed before me
this 8th day of April, 2011


Notary Public

My Commission Expires: December 20, 2017

Exhibit B

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909 Locust Street
Des Moines, IA 50309 • (800) 356-2906

ACCOUNT INFORMATION

☒ NEW CUSTOMER/ACCOUNT ☐ UPDATE ONLY

☒ Direct Business ☐ Pershing ☐ Pershing Account		P&G SmartWorks® Ref. ID#		☐ W-9 already provided													
(1) ACCOUNT REGISTRATION TYPE (Required of all applicants) *Additional documents required ☐ Individual ☐ JTWROS ☐ Tenants in Common ☐ Community Property ☐ UGMA ☐ UTMA ☐ Corporation ☐ Partnership ☐ Trust ☐ 403(a) ☐ 401(k) ☐ Qualified ERISA ☐ 529 Plan ☒ IRA ☐ Educational IRA ☐ Roth IRA ☐ SEP-IRA ☐ Other																	
(2) ACCOUNT INFORMATION (Required of all applicants) Owner Full Name (If corporation, add name of authorized individual or custodian if UGMA/UTMA) David W. Ketter			SSN/Tax ID (If UGMA/UTMA, provide only) Redacted-Personal Information		Date of Birth (Indicate century) Redacted												
Co-Owner (Minor name if UGMA/UTMA)			SSN/Tax ID		Date of Birth												
Mailing Address Redacted-Personal Information			City Greenville		State Zip SC 29615												
Home Address (If different than mailing - no P.O. Box)			City		State Zip Home Phone Redacted												
Is each owner: ☒ U.S. citizen ☐ Resident alien ☐ Non-resident alien - specify country and obtain W-8																	
(3) IDENTIFICATION INFORMATION (Required of all applicants and must comply with policy) Valid Government ID: Redacted-Personal Information Issuing Entity: SCDMV Co-Owner's ID/Issuing Entity: ☐ Other Verification Docs (Explain)																	
(4) EMPLOYMENT AND AFFILIATIONS (Required of all applicants) <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td>Occupation/Employment Status Consultant RETIRED</td> <td>Employer Name Michelin</td> <td>Employment City and State Greenville, SC</td> <td>Phone Number (864) 458-6191</td> </tr> <tr> <td>Co-Owner's Employment Status</td> <td>Employer Name</td> <td>Employment City and State</td> <td></td> </tr> </table>						Occupation/Employment Status Consultant RETIRED	Employer Name Michelin	Employment City and State Greenville, SC	Phone Number (864) 458-6191	Co-Owner's Employment Status	Employer Name	Employment City and State					
Occupation/Employment Status Consultant RETIRED	Employer Name Michelin	Employment City and State Greenville, SC	Phone Number (864) 458-6191														
Co-Owner's Employment Status	Employer Name	Employment City and State															
Are you (or a member of your immediate family) a director, 10% shareholder or policy-making officer of a publicly traded company? ☐ Yes ☒ No If yes, Company Name:																	
Are you a registered representative of a broker-dealer? ☐ Yes ☒ No If yes, specify Firm Name:																	
Are you employed by or otherwise affiliated with any broker-dealer? ☐ Yes ☒ No If yes, specify Firm Name:																	
(5) ACCOUNT PROFILE (Required - for joint accounts information may be combined) <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td>Annual Income</td> <td>Estimated Net Worth (Exclude primary residence, automobile, furnishings)</td> <td>Portfolio Objectives (Check all that apply)</td> <td>Portfolio Time Horizon</td> <td>Federal Tax Bracket</td> </tr> <tr> <td> ☐ \$ 0 - 29,999 ☒ 100,000 - 149,999 ☐ 30,000 - 49,999 ☐ 150,000 - 249,999 ☐ 50,000 - 74,999 ☐ 250,000 - 399,999 ☐ 75,000 - 99,999 ☐ 400,000 - Over </td> <td> ☐ \$ 0 - 74,999 ☐ 250,000 - 499,999 ☐ 75,000 - 99,999 ☐ 500,000 - 999,999 ☐ 100,000 - 149,999 ☒ 1,000,000 - 2,999,999 ☐ 150,000 - 249,999 ☐ 3,000,000 - Over </td> <td> ☒ Income ☐ Growth ☐ Total Return ☐ Tax Deferral </td> <td> ☐ 4 years or less ☐ 4-6 years ☒ 8 years or more </td> <td>25 %</td> </tr> </table>						Annual Income	Estimated Net Worth (Exclude primary residence, automobile, furnishings)	Portfolio Objectives (Check all that apply)	Portfolio Time Horizon	Federal Tax Bracket	☐ \$ 0 - 29,999 ☒ 100,000 - 149,999 ☐ 30,000 - 49,999 ☐ 150,000 - 249,999 ☐ 50,000 - 74,999 ☐ 250,000 - 399,999 ☐ 75,000 - 99,999 ☐ 400,000 - Over	☐ \$ 0 - 74,999 ☐ 250,000 - 499,999 ☐ 75,000 - 99,999 ☐ 500,000 - 999,999 ☐ 100,000 - 149,999 ☒ 1,000,000 - 2,999,999 ☐ 150,000 - 249,999 ☐ 3,000,000 - Over	☒ Income ☐ Growth ☐ Total Return ☐ Tax Deferral	☐ 4 years or less ☐ 4-6 years ☒ 8 years or more	25 %		
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Investment Experience? ☒ Yes ☐ No <table border="1" style="width:100%; border-collapse: collapse;"> <tr> <td>Stocks</td> <td>Bonds</td> <td>Mutual Funds</td> <td>Options</td> <td>Partnerships</td> <td>Other (Identify)</td> </tr> <tr> <td>20 Yrs.</td> <td>20 Yrs.</td> <td>20 Yrs.</td> <td>Yrs.</td> <td>Yrs.</td> <td></td> </tr> </table>						Stocks	Bonds	Mutual Funds	Options	Partnerships	Other (Identify)	20 Yrs.	20 Yrs.	20 Yrs.	Yrs.	Yrs.	
Stocks	Bonds	Mutual Funds	Options	Partnerships	Other (Identify)												
20 Yrs.	20 Yrs.	20 Yrs.	Yrs.	Yrs.													
(6) PERSHING INFORMATION (All securities will be held in street name) Pershing Money Market: ☐ FCR ☐ ING ☐ Other Money Market (Not including Pershing LLC Retirement Accts.) Periods: ☒ Hold ☐ Send proceeds Dividends/Interest: ☒ Credit to account ☐ Pay to client Is account DNP/PPV? ☐ No ☐ Yes (If yes, forward written instructions from institution to Brokerage Operations - El Segundo)																	
(7) W-9 TAXPAYER CERTIFICATION AND AGREEMENT By signing below, I certify under penalty of perjury that: 1) the Taxpayer Identification Number provided above is correct; 2) the IRS has never notified me that I am subject to backup withholding as a result of a failure to report interest or dividends, or if I have been so notified, the IRS has notified me that I am no longer subject to backup withholding; and 3) I am a U.S. person (including a U.S. resident). OR ☐ I am subject to backup withholding. (If applicable, check this box). ☐ EXEMPT (If applicable, check this box). Acknowledgement I acknowledge and agree that (1) THE INTERNAL REVENUE SERVICE DOES NOT REQUIRE THAT I CONSENT TO ANY PROVISION OTHER THAN THE CERTIFICATIONS REQUIRED TO AVOID BACKUP WITHHOLDING; (2) I have received, read, understand and agree with all of the information on both sides of this document; (3) I have received a copy of the brochure entitled "Important Information About Your ING Financial Partners, Inc. Relationship, including ING Financial Partners' Privacy Promise"; (4) I understand that THIS AGREEMENT CONTAINS A PREDISPONED ARBITRATION CLAUSE THAT IS FULLY SET FORTH IN PARAGRAPH 18 ON THE REVERSE SIDE OF THIS FORM.																	
Account Signature (Customer/UTMA/GRAT) 		Date 9/12/07		Second Account Signature William C. Johnson 9217 Print Representative Name RR number													
Registered Representative Signature 		Date 9/12/07		Trade CSI Signature Print Trade CSI Name Date													

Field Stamps (Put any Branch Office or Field use stamp here)



ORIGINAL - CSI MANAGER

COPY - CUSTOMER

PAGE 1 OF 2

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ACCOUNT AGREEMENT

In consideration of opening one or more accounts on my behalf, and with respect to any type of transaction that I may have with ING Financial Partners, Inc., I agree as follows:

1. **Meaning of Words in this Agreement.** The words "I" and "me" refer to each of the account owners. The words "you" and "your" refer to ING Financial Partners.
2. **Authority and Ownership.** I have the required legal capacity, am authorized to enter into this agreement, and have obtained and will provide you with all necessary authorizations from third parties to open accounts and effect transactions in securities under this agreement. I will be the owner of all securities purchased, held and sold by me through you. Checks should be made payable only to the sponsor or Pershing, LLC (Pershing), Clearing Agent.
3. **Joint Accounts.** If this is a joint account, I understand that you will follow the instructions of any one of us without obtaining the consent of any other. All of us will be fully liable for any amounts due to you under this agreement. Upon the death of any one of us, you will treat the property in the account as belonging to the other(s), unless I notify you differently and provide such legal documentation as you require.
4. **Appointment of ING Financial Partners as Agent.** I appoint you as my agent for the purpose of carrying out my directions with respect to the purchase or sale of securities. To carry out your duties, you are authorized to open or close brokerage accounts, place and withdraw orders, provide information to third parties and take such other steps as are reasonable to carry out my directions.
5. **Force Majeure.** You shall not be liable for loss or delay caused directly or indirectly by war, natural disasters, government restrictions, exchange or market rulings or other conditions beyond your control.
6. **Credit Verification.** You may request a credit report on me and, if I ask, you will tell me the name and address of the consumer reporting agency that furnished it. If you update, renew, or extend my credit, you may request a new credit report.
7. **Identification Verification.** To help the government fight the funding of terrorism and money laundering activities, Federal law requires all financial institutions to obtain, verify, and record information that identifies each person who opens an account. What this means to me: When I open an account, you will ask for my name, address, date of birth and other information that will allow you to identify me. You may also ask to see my driver's license or other identifying documents.
8. **No Advice.** I understand that you provide no tax, legal, or investment advisory services unless such services are independently contracted under an Advisory Services Agreement. All transactions will be done only on my order or the order of my authorized delegate as described in paragraphs 2 and 3.
9. **Stocks, Bonds and Options.**
 - (A) **Relationship with Clearing Agent.** I understand that you will apply to a Clearing Agent for my stock, bond, or option account. I understand and agree that Clearing Agent may refuse to accept or carry my account or to process any transaction that I may wish to effect. You may share with, remit to, or otherwise pay Clearing Agent for its services from your commissions and/or fees charged.
 - (B) **Margin Loans and Options.** I understand and agree that margin loans, if any, provided to me through you will be made by Clearing Agent and not ING Financial Partners and that I will comply with all requirements which Clearing Agent may impose with respect to such loans. I will not request that any transaction in options be effected for my account unless each request is in compliance with Clearing Agent's options compliance program.
 - (C) **Annual Fees and Other Service Charges.** I understand that annual fees and other service charges for inactive accounts, IRA, or pension accounts will be applied by Clearing Agent.
10. **Restricted Securities.** I will not buy or sell any securities of a corporation of which I am an affiliate, or sell any restricted securities except in compliance with applicable laws and regulations.
11. **Indebtedness to ING Financial Partners.** Upon the purchase or sale of any security, if you are unable to settle the transaction by reason of my failure to make payment or deliver securities in good form, I authorize you to take steps necessary to complete or cancel the transaction to minimize loss, and I agree to reimburse you for any and all costs, losses, or liabilities incurred by you, including attorneys' fees. In the event I become indebted to you in the operation of this account, I agree that I will repay such indebtedness upon demand. I agree that if, after demand, I fail to pay the indebtedness, you may close my account and/or liquidate any assets in my account, or otherwise held by you, in an amount sufficient to pay my indebtedness.
12. **Access to Information.** You may provide non-affiliated third parties with information if: (i) it is required by law or by rules or regulations relating to you or financial institutions you have contracted with to provide financial services (such as regulators that require you to provide banks, thrifts, credit unions and/or their related service corporations with customer information the institution needs to monitor compliance issues); (ii) it is necessary for you to communicate such information to process a financial transaction for me or provide a product or service that I have requested; or (iii) otherwise permitted by law or ING Financial Partners' Privacy Promise.
13. **Amendments and Termination.** You may amend this agreement at any time in any respect, effective upon notice to me. You may, at your discretion, terminate this service at any time, effective upon notice to me. I will continue to be responsible for any obligations incurred by me prior to termination.
14. **Governing Law.** This agreement and any disputes, controversies or claims arising out of or related to this agreement shall be governed by the applicable laws of the State of Iowa and applicable federal law.
15. **Review and Indemnification.** I have reviewed the terms and conditions of this agreement including all information contained on the reverse side hereof. I hereby verify that all the information provided is true and correct and may be relied upon by you for the purposes of evaluating my suitability and sophistication in relation to making securities recommendations. Further, I hereby indemnify you for any loss, claims or damages, including legal fees, which you may incur as a result of any securities recommendations or any securities related violations resulting from your reliance upon the information I have provided. I also acknowledge my responsibility to read the prospectus of any mutual fund/direct participation program, and/or public offering sold by prospectus, which contains complete information regarding investment objectives, risks and other material facts, including sales charges.
16. **NASD Public Disclosure.** To receive information concerning the licensing status and/or disciplinary record of a broker/dealer or agent, contact NASD at the following toll-free number (800) 289-9999, or the Web site address at www.nasdr.com.
17. **Other Information.** For more information concerning investments and other important disclosures about our business, please visit our Web site at www.ingfinancialpartners.com.

18. Arbitration Clause. THIS AGREEMENT CONTAINS A PREDISPUTE ARBITRATION CLAUSE. BY SIGNING AN ARBITRATION AGREEMENT THE PARTIES AGREE AS FOLLOWS:

- (A) ALL PARTIES TO THIS AGREEMENT ARE GIVING UP THE RIGHT TO SUE EACH OTHER IN COURT, INCLUDING THE RIGHT TO A TRIAL BY JURY, EXCEPT AS PROVIDED BY THE RULES OF THE ARBITRATION FORUM IN WHICH A CLAIM IS FILED.
- (B) ARBITRATION AWARDS ARE GENERALLY FINAL AND BINDING; A PARTY'S ABILITY TO HAVE A COURT REVERSE OR MODIFY AN ARBITRATION AWARD IS VERY LIMITED.
- (C) THE ABILITY OF THE PARTIES TO OBTAIN DOCUMENTS, WITNESS STATEMENTS AND OTHER DISCOVERY IS GENERALLY MORE LIMITED IN ARBITRATION THAN IN COURT PROCEEDINGS.
- (D) THE ARBITRATORS DO NOT HAVE TO EXPLAIN THE REASON(S) FOR THEIR AWARD.
- (E) THE PANEL OF ARBITRATORS WILL TYPICALLY INCLUDE A MINORITY OF ARBITRATORS WHO WERE OR ARE AFFILIATED WITH THE SECURITIES INDUSTRY.
- (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 ARBITRATION 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.

No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated to court a putative class action; or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action unit; (i) the class certification is denied; or (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein.

Exhibit C

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ING
 FINANCIAL PARTNERS

 909 Locust Street
 Des Moines, IA 50309 • (800) 556-2006

 IFP
 4

ACCOUNT INFORMATION
☒ NEW CUSTOMER/ACCOUNT ☐ UPDATE ONLY

Hartford

☒ Direct Business ☐ Paraphrasing Paraphrasing Account		ING SmartWorks Ref. ID#		☐ W-9 already provided
(1) ACCOUNT REGISTRATION TYPE (Required of all applicants) ☒ Individual ☐ JTWRDS ☐ Tenants In Common ☐ Community Property ☐ UGMA ☐ UTMA ☐ Corporation ☐ Partnership ☐ Trust ☐ 403(b) ☐ 401(k) ☐ Qualified ERISA ☐ 529 Plan ☐ IRA ☐ Educational IRA ☐ Roth IRA ☐ SEP-IRA ☐ Other				
(2) ACCOUNT INFORMATION (Required of all applicants) Owner Full Name (If corporation, add name of authorized individual or custodian if UTMA/UGMA) <u>David W Keller</u>				
SSN/Tax ID (If corporation, add name of authorized individual or custodian if UTMA/UGMA)		Redacted-Personal Information		Date of Birth (If corporation, add name of authorized individual or custodian if UTMA/UGMA)
Co-Owner (If not owner if UTMA/UGMA)		SSN/Tax ID		Date of Birth
Mailing Address		City		State
Redacted-Personal Information		Greenville		SC
Home Address (If different from mailing - no P.O. Box)		City		State
Redacted-Personal Information		Greenville		SC
Is each owner: ☒ U.S. citizen ☐ Resident alien ☐ Non-resident alien - specify country and obtain VET		City		State
Redacted-Personal Information		Greenville		SC
Valid Government I.D. #		Issuing Entity		Phone Number
Redacted-Personal Information		SCDMV		864-458-6191
Co-Owner's I.D. #/Issuing Entity		Other Verification Data (Explain)		
(4) EMPLOYMENT AND AFFILIATIONS (Required of all applicants) Occupant/Employment Status: <u>Controller</u> Employer Name: <u>Michelin</u> Employed City and State: <u>Greenville, SC</u> Phone Number: <u>864-458-6191</u> Co-Owner's Employment Status: Employer Name: Employed City and State:				
Are you (or a member of your immediate family) a director, 10% shareholder or policy-making officer of a publicly traded company? ☐ Yes ☒ No If yes, Company Name:				
Are you a registered representative of a broker-dealer? ☐ Yes ☒ No If yes, specify Firm Name:				
Are you employed by or otherwise affiliated with any broker-dealer? ☐ Yes ☒ No If yes, specify Firm Name:				
(5) ACCOUNT PROFILE (Required - for joint accounts information may be combined) Annual Income: ☐ \$ 0 - 28,999 ☒ 100,000 - 149,999 ☐ 150,000 - 249,999 ☐ 250,000 - 399,999 ☐ 400,000 - Over Estimated Net Worth (Exclude primary residence, automobile, furnishings): ☐ \$ 0 - 74,999 ☐ 75,000 - 149,999 ☐ 150,000 - 249,999 ☐ 250,000 - 499,999 ☐ 500,000 - 999,999 ☐ 1,000,000 - 2,999,999 ☐ 3,000,000 - Over Portfolio Objectives (Check all that apply): ☒ Income ☒ Growth ☒ Total Return ☐ Tax Deferral Portfolio Time Horizon: ☐ 4 years or less ☐ 4-8 years ☒ 8 years or more Investment Experience: ☒ Yes ☐ No Stocks: <u>20</u> yrs Bonds: <u>10</u> yrs Mutual Funds: <u>20</u> yrs Options: <u>NA</u> yrs Partnerships: <u>NA</u> yrs Other (Identify):				
(6) PERSHING INFORMATION (All securities will be held in street name) Pershing Money Market: ☐ FCR ☐ ING ☐ Other Money Market (Not including Pershing LLC Retirement Accts.) Proceeds: ☒ Hold ☐ Send proceeds ☐ Dividend reinvestment ☒ Credit to account ☐ Pay to client Is account DVP/RVP? ☐ No ☐ Yes (If yes, forward written instructions from institution to Brokerage Operations - E/S Required)				
(7) W-9 TAXPAYER CERTIFICATION AND AGREEMENT By signing below, I certify under penalty of perjury that: 1) the Taxpayer Identification Number provided above is correct; 2) the IRS has never notified me that I am subject to backup withholding as a result of a failure to report interest or dividends, or if I have been so notified, the IRS has notified me that I am no longer subject to backup withholding; and 3) I am a U.S. person (including a U.S. resident). OR ☐ I am subject to backup withholding. (If applicable, check this box). ☐ EXEMPT (If applicable, check this box). Acknowledgement I acknowledge and agree that: (1) THE INTERNAL REVENUE SERVICE DOES NOT REQUIRE THAT I CONSENT TO ANY PROVISION OTHER THAN THE CERTIFICATIONS REQUIRED TO AVOID BACKUP WITHHOLDING; (2) I have received, read, understand and agree with all of the information on both sides of this document; (3) I have received a copy of the brochure entitled "Important Information About Your ING Financial Partners, Inc. Relationship, including ING Financial Partners Privacy Promise"; (4) I understand that THIS AGREEMENT CONTAINS A DISPUTE RESOLUTION CLAUSE THAT IS FULLY SET FORTH IN PARAGRAPH 18 ON THE REVERSE SIDE OF THIS FORM.				
Account Owner's Signature (Required if Individual)		Date		Record Account Signature
<u>David W Keller</u>		07/12/07		<u>William C. Johnson</u> 9217
Registered Representative Signature		RR number		Date
<u>William C. Johnson</u>		9217		7/12/07
Trade CSI Signature		Print Trade CSI Name		Date
<u>William C. Johnson</u>		<u>William C. Johnson</u>		<u>7/12/07</u>

ORIGINAL - CSI MANAGER

COPY - CUSTOMER

PAGE 1 OF 2

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ACCOUNT AGREEMENT

In consideration of opening one or more accounts on my behalf, and with respect to any type of transaction that I may have with ING Financial Partners, Inc., I agree as follows:

1. **Meaning of Words in this Agreement.** The words "I" and "me" refer to each of the account owners. The words "you" and "your" refer to ING Financial Partners.
2. **Authority and Ownership.** I have the required legal capacity, am authorized to enter into this agreement, and have obtained and will provide you with all necessary authorizations from third parties to open accounts and effect transactions in securities under this agreement. I will be the owner of all securities purchased, held and sold by me through you. Checks should be made payable only to the sponsor or Pershing, LLC (Pershing), Clearing Agent.
3. **Joint Accounts.** If this is a joint account, I understand that you will follow the instructions of any one of us without obtaining the consent of any other. All of us will be fully liable for any amounts due to you under this agreement. Upon the death of any one of us, you will treat the property in the account as belonging to the other(s), unless I notify you differently and provide such legal documentation as you require.
4. **Appointment of ING Financial Partners as Agent.** I appoint you as my agent for the purpose of carrying out my directions with respect to the purchase or sale of securities. To carry out your duties, you are authorized to open or close brokerage accounts, place and withdraw orders, provide information to third parties and take such other steps as are reasonable to carry out my directions.
5. **Force Majeure.** You shall not be liable for loss or delay caused directly or indirectly by war, natural disasters, government restrictions, exchange or market rulings or other conditions beyond your control.
6. **Credit Verification.** You may request a credit report on me and, if I ask, you will tell me the name and address of the consumer reporting agency that furnished it. If you update, renew, or amend my credit, you may request a new credit report.
7. **Identification Verification.** To help the government fight the funding of terrorism and money laundering activities, Federal law requires all financial institutions to obtain, verify, and record information that identifies each person who opens an account. What this means to me: When I open an account, you will ask for my name, address, date of birth and other information that will allow you to identify me. You may also ask to see my driver's license or other identifying documents.
8. **No Advice.** I understand that you provide no tax, legal, or investment advisory services unless such services are independently contracted under an Advisory Services Agreement. All transactions will be done only on my order or the order of my authorized delegate as described in paragraphs 2 and 3.
9. **Stocks, Bonds and Options.**
 - (A) **Relationship with Clearing Agent.** I understand that you will apply to a Clearing Agent for my stock, bond, or option account. I understand and agree that Clearing Agent may refuse to accept or carry my account or to process any transaction that I may wish to effect. You may share with, rent to, or otherwise pay Clearing Agent for its services from your commissions; neither less charged.
 - (B) **Margin Loans and Options.** I understand and agree that margin loans, if any, provided to me through you will be made by Clearing Agent and not ING Financial Partners and that I will comply with all requirements which Clearing Agent may impose with respect to such loans. I will not request that any transaction in options be effected for my account unless each request is in compliance with Clearing Agent's options compliance program.
 - (C) **Annual Fees and Other Service Charges.** I understand that annual fees and other service charges for inactive accounts, IRA, or pension accounts will be applied by Clearing Agent.
10. **Restricted Securities.** I will not buy or sell any securities of a corporation of which I am an affiliate, or sell any restricted securities except in compliance with applicable laws and regulations.
11. **Indebtedness to ING Financial Partners.** Upon the purchase or sale of any security, if you are unable to settle the transaction by reason of my failure to make payment or deliver securities in good form, I authorize you to take steps necessary to complete or cancel the transaction to minimize loss, and I agree to reimburse you for any and all costs, losses, or liabilities incurred by you, including attorneys' fees. In the event I become indebted to you in the operation of this account, I agree that I will repay such indebtedness upon demand. I agree that if, after demand, I fail to pay the indebtedness, you may close my account and/or liquidate any assets in my account, or otherwise held by you, in an amount sufficient to pay my indebtedness.
12. **Access to Information.** You may provide non-affiliated third parties with information if: (i) it is required by law or by rules or regulations relating to you or financial institutions you have contracted with to provide financial services (such as regulations that require you to provide banks, thrifts, credit unions, and/or their related service corporations with customer information the institution needs to monitor compliance issues); (ii) it is necessary for you to communicate such information to process a financial transaction for me or provide a product or service that I have requested; or (iii) otherwise permitted by law or ING Financial Partners' Privacy Policies.
13. **Amendments and Termination.** You may amend this agreement at any time in any respect, effective upon notice to me. You may, at your discretion, terminate this service at any time, effective upon notice to me. I will continue to be responsible for any obligations incurred by me prior to termination.
14. **Governing Law.** This agreement and any disputes, controversies or claims arising out of or related to this agreement shall be governed by the applicable laws of the State of Iowa and applicable federal law.
15. **Review and Indemnification.** I have reviewed the terms and conditions of this agreement (including all information contained on the reverse side hereof). I hereby verify that all the information provided is true and correct and may be relied upon by you for the purposes of evaluating my suitability and sophistication in relation to making securities recommendations. Further, I hereby indemnify you for any loss, claims or damages, including legal fees, which you may incur as a result of any securities recommendations or any securities related violations resulting from your reliance upon the information I have provided. I also acknowledge my responsibility to read the prospectus of any mutual fund/direct participation program and/or public offering sold by prospectus, which contains complete information regarding investment objectives, risks and other material facts, including sales charges.
16. **NASD Public Disclosure.** To receive information concerning the licensing status and/or disciplinary record of a broker/dealer or agent, contact NASD at the following toll-free number (800) 289-9999, or the Web site address at www.nasdr.com.
17. **Other Information.** For more information concerning investments and other important disclosures about our business, please visit our Web site at www.ingfinancialpartners.com.

18. Arbitration Clause. THIS AGREEMENT CONTAINS A PRE-DISPUTE ARBITRATION CLAUSE. BY SIGNING AN ARBITRATION AGREEMENT THE PARTIES AGREE AS FOLLOWS:

- (A) ALL PARTIES TO THIS AGREEMENT ARE GIVING UP THE RIGHT TO SUE EACH OTHER IN COURT, INCLUDING THE RIGHT TO A TRIAL BY JURY, EXCEPT AS PROVIDED BY THE RULES OF THE ARBITRATION FORUM IN WHICH A CLAIM IS FILED.
- (B) ARBITRATION AWARDS ARE GENERALLY FINAL AND BINDING; A PARTY'S ABILITY TO HAVE A COURT REVERSE OR MODIFY AN ARBITRATION AWARD IS VERY LIMITED.
- (C) THE ABILITY OF THE PARTIES TO OBTAIN DOCUMENTS, WITNESS STATEMENTS AND OTHER DISCOVERY IS GENERALLY MORE LIMITED IN ARBITRATION THAN IN COURT PROCEEDINGS.
- (D) THE ARBITRATORS DO NOT HAVE TO EXPLAIN THE REASON(S) FOR THEIR AWARD.
- (E) THE PANEL OF ARBITRATORS WILL TYPICALLY INCLUDE A MINORITY OF ARBITRATORS WHO WERE OR ARE AFFILIATED WITH THE SECURITIES INDUSTRY.
- (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 ARBITRATION 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.

No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action or who is a member of a putative class who has not opted out of the class with respect to any claim encompassed by the putative class action unit; (i) the class certification is denied; or (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein.

ING
 FINANCIAL PARTNERS

 905 Locust Street
 Des Moines, IA 50399 # (800) 356-2906
IFP
4

ACCOUNT INFORMATION

☒ NEW CUSTOMER/ACCOUNT ☐ UPDATE ONLY

☐ Direct Business ☒ Pershing Pershing Accounts# 35K		ING SmartVest® Ref. ID#		☐ W-8 already provided	
(1) ACCOUNT REGISTRATION TYPE (Required of all applicants)					
Individual ☐ JTWROS ☐ Testamentary ☐ Community Property ☐ UGMA ☐ UTMA ☐ Corporation ☐ Partnership ☐ Trust ☐ 403(b) ☐ 401(k)					
Qualified ERISA ☐ 529 Plan ☐ IRA ☐ Educational IRA ☐ Roth IRA ☐ SEP-IRA ☐ Other					
(2) ACCOUNT INFORMATION (Required of all applicants)					
Owner Full Name (If corporation, add name of authorized individual or custodian if UTMAL/UGMA) David W. Keller			SSN/Tax ID (If UTMAL/UGMA, add name of custodian) Redacted-Personal Information		Date of Birth Redacted
Co-Owner (Add name if UTMAL/UGMA)			SSN/Tax ID		Date of Birth
Mailing Address: Redacted-Personal Information					
Home Address (If different than mailing - no P.O. Box)					
City: Greenville State: SC Zip: 29615					
Home Phone: Redacted					
Is each owner: ☒ U.S. citizen ☐ Resident alien ☐ Non-resident alien - specify country and obtain VIE					
(3) IDENTIFICATION INFORMATION (Required of all applicants and must comply with policy)					
Valid Government I.D. #: Redacted-Personal Information					
Co-Owner's I.D. Issuing Entity: SCDMV					
☐ Other Verification Done (Explain)					
(4) EMPLOYMENT AND AFFILIATIONS (Required of all applicants)					
Occupation/Employment Status Controller		Employer Name Michelin		Employment City and State Greenville, SC	
Co-Owner's Employment Status		Employer Name		Employment City and State	
Are you (or a member of your immediate family) a director, 10% shareholder or policy-making officer of a publicly traded company? ☐ Yes ☒ No					
If yes, Company Name:					
Are you a registered representative of a broker-dealer? ☐ Yes ☒ No					
If yes, specify Firm Name:					
Are you employed by or otherwise affiliated with any broker-dealer? ☐ Yes ☒ No					
If yes, specify Firm Name:					
(5) ACCOUNT PROFILE (Required - for joint accounts information may be combined)					
Annual Income		Estimated Net Worth (Exclude primary residence, automobile, furnishings)		Portfolio Objectives (Check all that apply)	
☐ \$ 0 - 29,999 ☒ 30,000 - 49,999 ☐ 50,000 - 74,999 ☐ 75,000 - 99,999 ☐ 100,000 - 149,999 ☐ 150,000 - 249,999 ☐ 250,000 - 399,999 ☐ 400,000 - Over		☐ \$ 0 - 74,999 ☐ 75,000 - 99,999 ☐ 100,000 - 149,999 ☐ 150,000 - 249,999 ☐ 250,000 - 499,999 ☐ 500,000 - 999,999 ☐ 1,000,000 - 2,999,999 ☐ 3,000,000 - Over		☒ Income ☐ Growth ☐ Total Return ☐ Tax Deferral	
Investment Experience? ☒ Yes ☐ No		Stocks 20 Yrs. Bonds 20 Yrs. Mutual Funds 20 Yrs.		Options N/A Yrs. Partnerships N/A Yrs. Other (Identify)	
(6) PERSHING INFORMATION (All securities will be held in trust)					
Pershing Money Market ☐ FCR ☐ ING ☐ Other Money Market					
Proceeds: ☒ Hold ☐ Send proceeds ☐ Dividends/interest: ☒ Credit to account ☐ Pay to client					
Is account DVP/RVP? ☐ No ☐ Yes (If yes, forward written instructions from institution to Brokerage Operations - E Signature)					
(7) W-8 TAXPAYER CERTIFICATION AND AGREEMENT					
By signing below, I certify under penalty of perjury that: 1) the Taxpayer Identification Number provided above is correct; 2) the IRS has never notified me that I am subject to backup withholding as a result of a failure to report interest or dividends, or I have been so notified, the IRS has notified me that I am no longer subject to backup withholding; and 3) I am a U.S. person (including a U.S. resident). OR					
☐ I am subject to backup withholding. (If applicable, check this box).					
☐ EXEMPT (If applicable, check this box)					
Acknowledgments					
I acknowledge and agree that (1) THE INTERNAL REVENUE SERVICE DOES NOT REQUIRE THAT I CONSENT TO ANY PROVISION OTHER THAN THE CERTIFICATIONS REQUIRED TO AVOID BACKUP WITHHOLDING; (2) I have received, read, understand and agree with all of the information on both sides of this document; (3) I have received a copy of the brochure entitled "Important Information About Your ING Financial Partners, Inc. Relationship, including ING Financial Partners' Privacy Promise"; (4) I understand that THIS AGREEMENT CONTAINS A PRE-ARBITRATION CLAUSE THAT IS FULLY SET FORTH IN PARAGRAPH 18 ON THE REVERSE SIDE OF THIS FORM.					
Account Signature (Signature of UTMAL/UGMA)		Date 07/12/07		Second Account Signature	
Registered Representative Signature		Print Representative Name William C. Johnson		RR number 9217/E48	
Trade OGU Signature		Print Trade OGU Name		Date 7/12/07	
Field Stamps (Print Name and Field Use stamp here)					
ORIGINAL - OGU MANAGER COPY - CUSTOMER					

ORIGINAL - OGU MANAGER

COPY - CUSTOMER

PAGE 1 OF 2

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ACCOUNT AGREEMENT

In consideration of opening one or more accounts on my behalf, and with respect to any type of transaction that I may have with ING Financial Partners, Inc., I agree as follows:

- 1. Meaning of Words in this Agreement.** The words "I" and "me" refer to each of the account owners. The words "you" and "your" refer to ING Financial Partners.
- 2. Authority and Ownership.** I have the required legal capacity, am authorized to enter into this agreement, and have obtained and will provide you with all necessary authorizations from third parties to open accounts and effect transactions in securities under this agreement. I will be the owner of all securities purchased, held and sold by me through you. Checks should be made payable only to the sponsor or Pershing, LLC (Pershing), Clearing Agent.
- 3. Joint Accounts.** If this is a joint account, I understand that you will follow the instructions of any one of us without obtaining the consent of any other. All of us will be fully liable for any amounts due to you under this agreement. Upon the death of any one of us, you will treat the property in the account as belonging to the other(s), unless I notify you differently and provide such legal documentation as you require.
- 4. Appointment of ING Financial Partners as Agent.** I appoint you as my agent for the purpose of carrying out my directions with respect to the purchase or sale of securities. To carry out your duties, you are authorized to open or close brokerage accounts, place and withdraw orders, provide information to third parties and take such other steps as are reasonable to carry out my directions.
- 5. Force Majeure.** You shall not be liable for loss or delay caused directly or indirectly by war, natural disasters, government restrictions, exchange or market rulings or other conditions beyond your control.
- 6. Credit Verification.** You may request a credit report on me and, if I ask, you will tell me the name and address of the consumer reporting agency that furnished it. If you update, renew, or extend my credit, you may request a new credit report.
- 7. Identification Verification.** To help the government fight the funding of terrorism and money laundering activities, Federal law requires all financial institutions to obtain, verify, and record information that identifies each person who opens an account. What this means to me: When I open an account, you will ask for my name, address, date of birth and other information that will allow you to identify me. You may also ask to see my driver's license or other identifying documents.
- 8. No Advice.** I understand that you provide no tax, legal, or investment advisory services unless such services are independently contracted under an Advisory Services Agreement. All transactions will be done only on my order or the order of my authorized delegate as described in paragraphs 2 and 3.
- 9. Stocks, Bonds and Options.**
 - (A) Relationship with Clearing Agent.** I understand that you will apply to a Clearing Agent for my stock, bond, or option account. I understand and agree that Clearing Agent may refuse to accept or carry my account or to process any transaction that I may wish to effect. You may share with, remit to, or otherwise pay Clearing Agent for its services from your commissions and/or fees charged.
 - (B) Margin Loans and Options.** I understand and agree that margin loans, if any, provided to me through you will be made by Clearing Agent and not ING Financial Partners and that I will comply with all requirements with Clearing Agent with respect to such loans. I will not request that any transaction in options be effected for my account unless each request is in compliance with Clearing Agent's options compliance program.
 - (C) Annual Fees and Other Service Charges.** I understand that annual fees and other service charges for inactive accounts, IRA, or pension accounts will be applied by Clearing Agent.
- 10. Restricted Securities.** I will not buy or sell any securities of a corporation of which I am an affiliate, or sell any restricted securities except in compliance with applicable laws and regulations.
- 11. Indebtedness to ING Financial Partners.** Upon the purchase or sale of any security, if you are unable to settle the transaction by reason of my failure to make payment or deliver securities in good form, I authorize you to take steps necessary to complete or cancel the transaction to minimize loss, and I agree to reimburse you for any and all costs, losses, or liabilities incurred by you, including attorneys' fees. In the event I become indebted to you in the operation of this account, I agree that I will repay such indebtedness upon demand. I agree that if, after demand, I fail to pay the indebtedness, you may close my account and/or liquidate any assets in my account, or otherwise held by you, in an amount sufficient to pay my indebtedness.
- 12. Access to Information.** You may provide non-affiliated third parties with information if: (i) it is required by law or by rules or regulations relating to you or financial institutions; (ii) the institution needs to monitor compliance issues; (iii) it is necessary for you to communicate such information to process a financial transaction for me or provide a product or service that I have requested; or (iv) otherwise permitted by law or ING Financial Partners' Privacy Policies.
- 13. Amendments and Termination.** You may amend this agreement at any time in any respect, effective upon notice to me. You may, at your discretion, terminate this service at any time, effective upon notice to me. I will continue to be responsible for any obligations incurred by me prior to termination.
- 14. Governing Law.** This agreement and any disputes, controversies or claims arising out of or related to this agreement shall be governed by the applicable laws of the State of Iowa and applicable federal law.
- 15. Review and Indemnification.** I have reviewed the terms and conditions of this agreement including all information contained on the reverse side hereof. I hereby verify that all the information provided is true and correct and may be relied upon by you for the purposes of evaluating my suitability and sophistication in relation to making securities recommendations. Further, I hereby indemnify you for any loss, claims or damages, including legal fees, which you may incur as a result of any securities recommendations or any securities related violations resulting from your reliance upon the information I have provided. I also acknowledge my responsibility to read the prospectus of any mutual fund/direct participation program and/or public offering sold by prospectus, which contains complete information regarding investment objectives, risks and other material facts, including sales charges.
- 16. NASD Public Disclosure.** To receive information concerning the licensing status and/or disciplinary record of a broker/dealer or agent, contact NASD at the following toll-free number (800) 289-9999, or the Web site address at www.nasdr.com.
- 17. Other Information.** For more information concerning investments and other important disclosures about our business, please visit our Web site at www.ingfinancialpartners.com.

18. Arbitration Clause. THIS AGREEMENT CONTAINS A PREDISPUTE ARBITRATION CLAUSE. BY SIGNING AN ARBITRATION AGREEMENT THE PARTIES AGREE AS FOLLOWS:

- (A) ALL PARTIES TO THIS AGREEMENT ARE GIVING UP THE RIGHT TO SUIT EACH OTHER IN COURT, INCLUDING THE RIGHT TO A TRIAL BY JURY, EXCEPT AS PROVIDED BY THE RULES OF THE ARBITRATION FORUM IN WHICH A CLAIM IS FILED.**
- (B) ARBITRATION AWARDS ARE GENERALLY FINAL AND BINDING; A PARTY'S ABILITY TO HAVE A COURT REVERSE OR MODIFY AN ARBITRATION AWARD IS VERY LIMITED.**
- (C) THE ABILITY OF THE PARTIES TO OBTAIN DOCUMENTS, WITNESS STATEMENTS AND OTHER DISCOVERY IS GENERALLY MORE LIMITED IN ARBITRATION THAN IN COURT PROCEEDINGS.**
- (D) THE ARBITRATORS DO NOT HAVE TO EXPLAIN THE REASON(S) FOR THEIR AWARD.**
- (E) THE PANEL OF ARBITRATORS WILL TYPICALLY INCLUDE A MINORITY OF ARBITRATORS WHO WERE OR ARE AFFILIATED WITH THE SECURITIES INDUSTRY.**
- (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 ARBITRATION 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.

No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement, against any person who has initiated in court a putative class action or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; or (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein.

Exhibit D

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FINANCIAL PARTNERS

909 Locust Street
Des Moines, IA 50319 • (800) 356-2916

DISCLOSURE FORM

This form must accompany every transaction submitted to your Trade OSJ.

David W. Keller
Account Registration
Jackson National VA
Product Name

\$ 800,000
Purchase Amount

* Client just retired. Waiting to
submit transfer info when

I. SOURCE OF FUNDS (Please check all that apply)

- ☒ Transfer; 1035 exchange; liquidation of a mutual fund, CD, variable annuity/life insurance or fixed annuity/life insurance.
☐ Checking, savings, or money market account
☐ Transfer or direct rollover from an employer-sponsored qualified plan
☐ Other (specify): _____

** An Exchange Disclosure Form (#131390) is required

funds
are
released.

II. DISCLOSURES (Please check the product box and have Client(s) initial for ALL products being purchased)

☐ MUTUAL FUNDS

I understand the following: _____ (Client Initials)

1. Mutual funds are not guaranteed and subject to market risk, fluctuation, and loss of principal.
2. Purchases in share Classes, which carry back-end sales charges called Contingent Deferred Sales Charges (CDSC), have higher fees and expenses than share Classes that charge up-front sales charges. Purchases of share Classes with a CDSC in amounts over \$100,000 may also cost significantly more, therefore negatively impacting my overall return over longer holding periods.
3. If I execute a Letter of Intent (LOI) reduced sales charges (breakpoints) may be available for purchases within the same fund family in share Classes that charge up-front sales charges. With an LOI, I agree to purchase a specified dollar amount within 13 months from the date of my original purchase. If I decide to execute an LOI, but do not purchase the specified dollar amount within 13 months, I will be charged back the higher sales charge by the mutual fund company that would have applied to my original purchase.
4. I may be entitled to breakpoints under Rights of Accumulation (ROA) should I make additional purchases within the same fund family which meet the breakpoint levels for each fund as described in the prospectus.
5. Purchasing shares in two or more fund families in up-front or CDSC share Classes may prevent me from receiving breakpoints that would be available if I had purchased shares with an up-front sales charge in the same fund family. There is no guarantee that purchasing shares or diversifying into more than one fund family will increase my performance or return.

☒ VARIABLE ANNUITIES

I understand the following: _____ (Client Initials)

1. Variable annuities are intended for long-term accumulation or retirement goals and there may be significant surrender charges, fees and/or tax consequences for early withdrawals. Withdrawals made prior to age 59^{1/2} may be subject to an IRS tax penalty.
2. If I have purchased a variable annuity in a qualified plan, the tax deferral benefit of a variable annuity is already provided for in the qualified plan. Therefore, I am purchasing the variable annuity in a qualified plan for other benefits it provides such as the death benefit, lifetime income payments, long term care benefits or other riders.
3. Additional features, benefits and/or riders or share Class types may increase the cost, expenses or fees in a variable annuity impacting its overall return.
4. The values of the underlying variable sub-accounts are not guaranteed and subject to market risk, fluctuation and loss of principal.

☐ VARIABLE LIFE/VARIABLE UNIVERSAL LIFE INSURANCE

I understand the following: _____ (Client Initials)

1. The underlying values of the variable sub-accounts are subject to market risk, fluctuation, and are not guaranteed. The face amount of the death benefit or the death benefit proceeds received by the beneficiary may be affected by the value of the underlying sub-accounts.
2. The primary reason for purchasing a variable life or variable universal life insurance policy should be a need for the death benefit protection. Secondary reasons may include cash value accumulation, education funding or retirement goals.
3. Variable life or variable universal life insurance policies may have surrender charges, penalties for early withdrawal, expenses and fees. There may be tax consequences for surrendering the policy for its cash value.

☐ **DIRECT PARTICIPATION PROGRAMS (DPPs) and REAL ESTATE INVESTMENT TRUSTS (REITs)**

I understand the following: _____ (Client Initials)

1. DPPs are programs which provide for flow-through tax consequences regardless of the legal structure of the entity or vehicle for distribution including oil and gas, real estate, and agricultural programs, condominium securities and Subchapter S corporate offerings.
2. I am in a financial position appropriate to realize to a significant extent the benefits of the program being offered, including the tax benefits if they are a significant aspect of the program.
3. DPPs and REITs are intended to be long-term investment vehicles often with holding periods of 10 years or longer.
4. DPPs and REITs often have a very limited or no secondary markets. I may not be able to sell my DPP program ownership interests or REIT trust shares readily in the open market or may receive significantly less than my original investment should I need to sell or liquidate my DPP ownership interests or REIT trust shares immediately.
5. I meet the net worth and/or a liquid net worth requirements of the DPP program or REIT being purchased. I have a sufficient net worth to sustain the risks inherent in the DPP program or REIT including the lack of liquidity and the possible loss of my total investment.
6. There can be no assurance that the interest income or dividends generated from the DPP program or REIT will remain stable.

☐ **529 COLLEGE SAVINGS PLANS**

I understand the following: _____ (Client Initials)

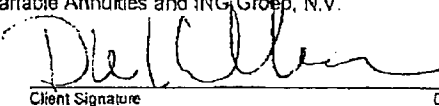
1. Depending upon the laws of my home state or the home state of the designated beneficiary, favorable state tax treatment or other benefits offered by the home state for investing in 529 college savings plans may be available only if I invest in the home state's 529 college savings plan.
2. Any state-based benefit offered with respect to a particular 529 college savings plan should be one of many approximately weighted factors to be considered in making an investment decision.
3. I should consult with my tax or other adviser to learn more about how state-based benefits (including any limitations) would apply to my specific circumstances. I may also contact my home state or any other college savings plan directly to learn more about the features, benefits and limitations of that state's 529 college savings plan.
4. I have received program disclosure documents for the 529 college savings plan in which I have decided to invest.

III. PROSPECTUS RECEIPT ACKNOWLEDGEMENT and CONTROL DISCLOSURES

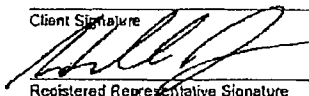
I acknowledge that I have received a current prospectus for each securities product being purchased. My registered representative has explained the risks, sales charges, fees, expenses and/or surrender charges associated with each securities product being purchased. Based on my own determination, financial situation and investment objectives, I believe that the securities product(s) is/are suitable for me.

ING Financial Partners, Inc. is under common control with the following issuers of securities: ING Funds; ING Southland Life; ING Security Life; ING Financial Advisers, LLC; ING Reliastar; ING Variable Annuities and ING Group, N.V.

David W. Keller
Print Client Name


Client Signature Date 9/12/07

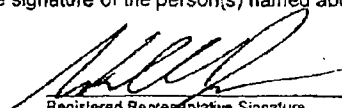
Print Client Name
William C. Johnson
Print Registered Representative Name
9217
Registered Representative Number

Client Signature

Registered Representative Signature Date 9/12/07

Signature Guarantee (Required if requesting an ING Financial Partners Medallion Signature Guarantee)

I hereby attest that the signature on the attached document(s) is the signature of the person(s) named above, and I have witnessed the execution of the signature(s).

William C. Johnson
Print Registered Representative Name
9217
Registered Representative Number


Registered Representative Signature Date 9/12/07

STATE OF SOUTH CAROLINA

IN THE COURT OF COMMON PLEAS

COUNTY OF GREENVILLE

DAVID KELLER,)
PLAINTIFF,)
VERSUS)
ING FINANCIAL PARTNERS,)
INC., ET AL.,)
DEFENDANTS.)

11-GS-23-0336

TRANSCRIPT OF RECORD

APRIL 11, 2011
GREENVILLE, SOUTH CAROLINA

B E F O R E:

THE HONORABLE D. GARRISON HILL

A P P E A R A N C E S:

H. DONALD SELLERS, Esquire
ROBERT THOMAS, Esquire
Attorneys for the Plaintiff

ASHLEY BRYAN ABEL, Esquire
Attorney for the Defendant

HOLLIE M. JENKINS
COURT REPORTER

000105

INDEX

PAGE NO.

MOTION

3

INDEX TO EXHIBITS

NO.

DESCRIPTION

ID.

EV.

(NO EXHIBITS WERE INTRODUCED INTO EVIDENCE DURING THIS HEARING)

MOTION - DAVID KELLER V. ING FINANCIAL PARTNERS, INC., ET AL.

1 **THE COURT:** OKAY. THIS IS 011-336, DAVID W. KELLER v. ING
2 FINANCIAL PARTNERS, INC., ET AL., AND THIS IS A MOTION TO COMPEL
3 ARBITRATION.

4 **MR. ABEL:** YES, YOUR HONOR, ASHLEY ABEL FOR DEFENDANTS
5 JOHNSON, ING AND DIVERSIFIED BUSINESS CONCEPTS. WITH ME IS CHASE
6 SAMPLES.

7 **MR. SAMPLES:** GOOD MORNING, YOUR HONOR.

8 **THE COURT:** GOOD MORNING.

9 **MR. ABEL:** YOUR HONOR, THIS ACTION IS IN THE NATURE OF A
10 SORT OF A FINANCIAL MALPRACTICE ACTION INVOLVING INVESTMENTS BY
11 THE PLAINTIFF PLACED WITH ING THROUGH MR. JOHNSON AND HIS
12 BUSINESS, DIVERSIFIED BUSINESS CONCEPTS. THE ACTUAL INVESTMENT
13 VEHICLE INVOLVED IS THAT WITH DEFENDANT JACKSON NATIONAL LIFE,
14 WHO IS REPRESENTED SEPARATELY BY MR. THOMPSON -- EXCUSE ME, I'M
15 SORRY, MR. TURNER. AND WE RECEIVED THE COMPLAINT AND ON BEHALF
16 OF THE THREE DEFENDANTS THAT WE REPRESENT WE FILED A MOTION TO
17 COMPEL. AN OPPOSITION BRIEF WAS FILED BY PLAINTIFF'S COUNSEL.
18 AND ON FRIDAY WE FILED A REPLY BRIEF WITH SOME EXHIBITS. THAT
19 WAS PROVIDED TO OPPOSING COUNSEL ON FRIDAY ELECTRONICALLY AND, I
20 THINK, BY FAX, BUT I'M NOT COMPLETELY SURE ABOUT THAT.

21 YOUR HONOR, WHEN THIS RELATIONSHIP BEGAN IN SEPTEMBER OF
22 2007 BETWEEN THE PLAINTIFF AND MY CLIENTS, CERTAIN ACCOUNT
23 AGREEMENTS WERE SIGNED. AS WE HAVE NOTED IN OUR REPLY BRIEF,
24 THEY INCLUDED NOT ONLY THE AGREEMENT WITH REGARD TO THE
25 RELATIONSHIP WITH MY CLIENTS BUT ALSO THE SPECIFIC INVESTMENT

MOTION - DAVID KELLER V. ING FINANCIAL PARTNERS, INC., ET AL.

1 VEHICLE SELECTED BY THE PLAINTIFF, THAT BEING WITH JACKSON
2 NATIONAL LIFE.

3 IN RESPONSE TO OUR MOTION TO COMPEL ARBITRATION IN WHICH WE
4 SUBMITTED THE AGREEMENT ITSELF, WHICH CONTAINS A VALID AND
5 BINDING, ENFORCEABLE ARBITRATION PROVISION UNDER THE LAW OF THIS
6 STATE AS WELL AS FEDERAL LAW, THE OPPOSITION BRIEF BY PLAINTIFF'S
7 COUNSEL DID NOT NOTABLY ATTACK ANY UNDERLYING PURPORTED
8 DEFICIENCY IN THE AGREEMENT ITSELF. IN OTHER WORDS, THERE IS NO
9 ALLEGATION OF DURESS OR MISREPRESENTATION OR ANYTHING LIKE THAT
10 ATTACKING THE VALIDITY OF THAT DOCUMENT. SO WHAT WE HAVE BEFORE
11 THE COURT IS AN AGREEMENT THAT IS SIGNED BY THE PARTIES AND
12 CONTAINS ON ITS FACE THE VALID AND ENFORCEABLE ARBITRATION
13 PROVISION.

14 NOW, THE BEST THE PLAINTIFFS COULD DO TO ATTACK THIS IS TO
15 MAKE A FEW ARGUMENTS, AND I'LL ADDRESS THEM BRIEFLY, BUT IT IS IN
16 OUR BRIEFING.

17 FIRST, THEY CONTEND THAT THE IFP ACCOUNT INFORMATION
18 CONCERNING THE ARBITRATION AGREEMENT IS UNRELATED TO THE JACKSON
19 NATIONAL ANNUITY. THAT'S WRONG FOR TWO REASONS ON ITS FACE AS A
20 MATTER OF LAW. THE AGREEMENT TO ARBITRATE IS NOT SPECIFIC TO ANY
21 ONE TRANSACTION, NOR SHOULD IT BE. I DON'T THINK I WOULD ADVISE
22 ANY INVESTMENT FIRM IN THE COUNTRY TO HAVE TO RE-SIGN AN
23 ARBITRATION AGREEMENT WITH EVERY SINGLE INDIVIDUAL INVESTMENT
24 THAT SOMEONE MAKES THROUGHOUT THE COURSE OF THEIR INVESTMENT
25 RELATIONSHIP. AND ACCORDINGLY, THIS DOCUMENT STARTS OUT BY

MOTION - DAVID KELLER V. ING FINANCIAL PARTNERS, INC., ET AL.

1 SAYING, "WITH RESPECT TO ANY TYPE OF TRANSACTION THAT I MAY HAVE
2 WITH ING FINANCIAL PARTNERS, INC., I AGREE AS FOLLOWS." AND WHAT
3 FOLLOWS IS AN AGREEMENT THAT SAYS "THIS AGREEMENT CONTAINS A
4 PREDISPUTE ARBITRATION CLAUSE. BY SIGNING AN ARBITRATION
5 AGREEMENT, THE PARTIES AGREE AS FOLLOWS," AND THEN THERE ARE
6 NUMEROUS SUBPARAGRAPHS. AND THEN IT SAYS, "I AGREE THAT ANY
7 DISPUTE BETWEEN YOU AND ME ARISING OUT OF THIS AGREEMENT," AND,
8 YOUR HONOR, THIS AGREEMENT IS THE ONLY CONNECTION BETWEEN
9 PLAINTIFF AND MY CLIENTS, THESE THREE DEFENDANTS. WITHOUT THAT
10 AGREEMENT, THERE IS NO RELATIONSHIP. SO ANY DISPUTE WITH REGARD
11 TO OUR RELATIONSHIP IS GOING TO BE ARBITRATED. SO THAT'S THE
12 FIRST ONE, YOUR HONOR.

13 THE SECOND POINT ON THAT ISSUE IS WHAT I MENTIONED EARLIER,
14 AND, THAT IS, THE FACT THAT ON THE SAME DAY AT THE SAME TIME THAT
15 MR. KELLER, THE PLAINTIFF, SIGNED THE ARBITRATION AGREEMENT WITH
16 MY CLIENTS, HE ALSO SIGNED PIECES OF PAPER -- THEY WERE ATTACHED
17 TO OUR REPLY BRIEF, ATTACHED TO WILLIAM JOHNSON'S AFFIDAVIT --
18 WHICH SPECIFIES JACKSON NATIONAL LIFE AS PROVIDING THE ANNUITY
19 THAT MR. KELLER HAD SELECTED BACK IN 2007. SO THE ARGUMENT THAT
20 THIS AGREEMENT WAS SOMEHOW SIGNED IN SOME AMORPHOUS STATE AND HE
21 HAD NO IDEA WHAT INVESTMENT WAS GOING TO BE INVOLVED MISSES THE
22 MARK ON BOTH OF THOSE GROUNDS.

23 SECONDLY, THE PLAINTIFFS RAISE THE CONTENTION THAT THE
24 ARBITRATION AGREEMENT TALKS ABOUT NASD AS AN ARBITRATION FORUM,
25 AND NASD NO LONGER EXISTS, AND THEREFORE THEY ARE ATTACKING,

MOTION - DAVID KELLER V. ING FINANCIAL PARTNERS, INC., ET AL.

1 SOMEHOW ATTACKING THAT PART OF THE AGREEMENT. BUT AGAIN, THAT
2 DOES NOT GO TO WHETHER THE ISSUE IS ARBITRABLE, BECAUSE THEY HAVE
3 NOT ASSIGNED ANY MATERIALITY WHATSOEVER OR ANY PREJUDICE OR HARM
4 OR ANYTHING WITH REGARD TO ARBITRATING IN FINRA AS OPPOSED TO
5 NASD.

6 BUT EVEN BEYOND THAT, IT IS CLEAR AS A MATTER OF LAW, AND WE
7 CITED CASES TO YOU THAT SAY EXACTLY THIS, BECAUSE OTHER
8 CHALLENGES LIKE THIS HAVE BEEN MADE -- THERE WAS ONE IN THE
9 NORTHERN DISTRICT OF GEORGIA, AND WE'VE CITED THAT OPINION FOR
10 YOUR HONOR -- WHERE THE EXACT SAME CHALLENGE WAS MADE. AND THE
11 JUDGE SAID, WAIT A MINUTE. LET'S LOOK AT THE ECONOMIC AND THE
12 REAL -- THE REALITIES OF THIS. FINRA IS CLEARLY THE SUCCESSOR TO
13 NASD. AND IT IS. THAT'S POINT ONE. POINT TWO, IF YOU LOOK AT
14 THE TEXT OF THIS AGREEMENT THAT'S BEFORE THE COURT, IT DOES NOT
15 SPECIFY NASD AS THE FORUM. IT DOES TALK ABOUT THE NASD RULES OF
16 PROCEDURE. AND THAT IS SIGNIFICANT, YOUR HONOR, BECAUSE IT
17 SIMPLY SAYS IN THIS AGREEMENT THAT THE PARTIES ARE GOING TO
18 ARBITRATE. IT DOESN'T SAY IT HAS TO BE NASD OR FINRA OR
19 ANYTHING; IT JUST DEFERS OVER TO THOSE RULES OF PROCEDURE. AND
20 FURTHER, IT ALSO TALKS ABOUT "AND ANY AMENDMENTS TO THAT
21 PROCEDURE THAT ARE MADE IN THE FUTURE."

22 SO IT'S CLEAR AS A MATTER OF LAW, YOUR HONOR, WE SUBMIT,
23 THAT THE PARTIES TO THIS IN THEIR CONTRACT AGREED THAT THE
24 PROCEDURE OF NASD, AND FRANKLY ANY AMENDMENTS THERETO, WOULD BE
25 FOLLOWED, BUT IT DID NOT SPECIFY THE FORUM. SO THE ARGUMENT THAT

MOTION - DAVID KELLER V. ING FINANCIAL PARTNERS, INC., ET AL.

1 NASD WAS SPECIFIED AND BECAUSE IT NO LONGER EXISTS, THERE CAN BE
2 NO GRANT OF OUR MOTION TO ARBITRATE THE CASE.

3 **THE COURT:** WELL, THAT'S A PRETTY BIG DEAL, ISN'T IT, WHO'S
4 GOING TO ARBITRATE YOUR DISPUTE? I MEAN, ISN'T THAT PART OF THE
5 ESSENTIAL TERMS YOU HAVE TO HAVE TO HAVE A MEETING OF THE MINDS?
6 I MEAN, THE FOX DOESN'T WANT TO BE ARBITRATED BY THE CHICKENS, SO
7 TO SPEAK.

8 **MR. ABEL:** YOUR HONOR, I THINK THE WAY THAT THIS AGREEMENT
9 OPERATES IS IT DOES NOT SPECIFY A PARTICULAR FORUM, AND THAT IS
10 UP TO THE PARTIES TO AGREE. AND FINRA IS THE TYPICAL FORUM IN
11 WHICH THESE THINGS ARE ARBITRATED, BUT THAT'S -- I DON'T KNOW OF
12 ANY CASES HELD THAT FAILURE TO SAY EXACTLY WHICH FORUM YOU'RE
13 GOING TO OPERATE IN MEANS THAT THE ARBITRATION AGREEMENT ITSELF
14 IS INVALID. THE PARTIES AGREED TO A CONTRACTUAL TERM OF
15 ARBITRATION. THEY AGREED TO THE PROCEDURE OF IT, THE ESSENCE OF
16 THE PROCEDURE AND ANY AMENDMENTS. BUT WE COULD HIRE ANY
17 ARBITRATOR TO DO THAT OR WE COULD GO TO FINRA OR WE COULD DO
18 THINGS LIKE THAT. IT IS TYPICAL, AS I SAID, FOR THESE TO GO TO
19 FINRA BECAUSE THEY KNOW THIS AREA OF BUSINESS.

20 **THE COURT:** WELL, HOW WOULD -- YOU SAY FINRA IS THE
21 SUCCESSOR. BUT WHAT EVIDENCE IS THERE OF THAT AND WHAT WAS THE
22 MECHANISM BY WHICH THEY SUCCEEDED TO THE INTEREST OF NASD?

23 **MR. ABEL:** YOUR HONOR, WE'VE CITED YOU TO SEVERAL THINGS,
24 AND I WILL RESTATE THEM IF IT'S OKAY WITH THE COURT. THERE IS
25 THE COLLINS CASE VERSUS FERRARI, WHICH IS OUT OF NEW YORK. BUT

1 IT SAYS, "THE HOLDING IS THAT FINRA FOR ALL INTENTS AND PURPOSES
2 ESSENTIALLY SUCCEEDED THE NASD." AND WE ALSO CITE THE COURT TO
3 EXCHANGE ACT RELEASE NO. 34-56146, WHICH IS REPORTED IN LEXIS AT
4 2007 SEC LEXIS 1641, WHICH EXPLAINS THAT FINRA WAS FORMED FROM
5 THE CONSOLIDATION OF NASD AND MEMBER REGULATION ARM OF NYSE, THE
6 NEW YORK STOCK EXCHANGE.

7 AND WE'VE ALSO CITED TO PLAINTIFF'S BRIEF AT PAGE 7, WHERE
8 THEY ESSENTIALLY ADMIT THIS TYPE OF SYMBIOTIC RELATIONSHIP
9 BETWEEN FINRA AND WHAT WAS NASD AND PART OF THE NEW YORK STOCK
10 EXCHANGE.

11 AND IN ADDITION, WE CITED THE *KASHNER VERSUS MSCISZ* CASE,
12 WHICH NOTES THAT FINRA IS THE SUCCESSOR ORGANIZATION TO THE NASD,
13 AND WE CITED TWO OTHER CASES TO THAT EFFECT.

14 SO, YOUR HONOR, THERE IS AMPLE PRECEDENT AND AUTHORITY FOR
15 THE CONCLUSION THAT FINRA IS A SUCCESSOR TO THE NASD.

16 **THE COURT:** WELL, WHAT ABOUT THE ISSUE OF THE PROCEDURES OF
17 FINRA BEING DIFFERENT FROM THAT OF NASD? IS THAT MATERIAL?

18 **MR. ABEL:** WELL, YOUR HONOR, THE PLAINTIFFS HAVE NOT BEEN
19 ABLE TO POINT TO ANYTHING MATERIAL ABOUT THE DIFFERENCE. THEY
20 SIMPLY SAID THAT THEY ARE DIFFERENT. AND WE'VE CITED YOU TWO --
21 WE'VE CITED YOU A CASE THAT SAYS, NO, THEY'RE NOT DIFFERENT.
22 WE'VE ALSO CITED YOU TO THE VERY RULES THEMSELVES AS BEST
23 EVIDENCE THAT THEY'RE NOT DIFFERENT. AND THE THIRD POINT IS THAT
24 EVEN IF THEY HAD SOME MINOR DIFFERENCES, THAT IS OBIVIATED BY THE
25 FACT THAT THE AGREEMENT BETWEEN THE PARTIES PROVIDES THAT ANY

MOTION - DAVID KELLER V. ING FINANCIAL PARTNERS, INC., ET AL.

1 AMENDMENT TO NASD'S PROCEDURES WOULD BE EFFECTIVE BETWEEN THESE
2 PARTIES. AND SINCE FINRA IS THE SUCCESSOR TO NASD, IT WOULD ALSO
3 EQUALLY APPLY TO ANY AMENDMENTS TO NASD PROCEDURES AFTER FINRA
4 BECAME THE MAIN ENTITY IN PLACE OF NASD.

5 THE COURT: SO HOW WOULD SOMEBODY WHO SIGNED THIS AGREEMENT
6 READ PARAGRAPH 18 AND COME TO THE CONCLUSION THAT SOMEONE OTHER
7 THAN NASD COULD ARBITRATE THE DISPUTE? I MEAN, YOU SAY THAT NASD
8 WASN'T FORMED, BUT I -- UNLESS I'M MISSING SOMETHING, WHICH IS
9 ENTIRELY POSSIBLE, IT DOESN'T SEEM TO PROVIDE FOR ANY ALTERNATIVE
10 FORUM.

11 MR. ABEL: WELL, WHERE IT TALKS ABOUT THE NASD, YOUR HONOR,
12 IS IN -- WHICH SUBPARAGRAPH -- OKAY IN (G) AND THEN FOLLOWING (G)
13 IT SAYS, "THE RULES OF THE ARBITRATION FORUM IN WHICH THE CLAIM
14 WAS FILED AND ANY AMENDMENTS THERETO SHALL BE INCORPORATED INTO
15 THIS AGREEMENT." SO THAT'S ONE IMPORTANT PARAGRAPH THAT WOULD
16 NOT ONLY CONFIRM THAT IT'S GOING TO BE ARBITRATED BUT THAT IT
17 COULD BE SOME FORUM OTHER THAN NASD.

18 AND THE PART THAT TALKS ABOUT NASD IS IN SUBPARAGRAPH (A),
19 AND IT SAYS, "ALL PARTIES TO THIS AGREEMENT ARE GIVING UP THE
20 RIGHT TO SUE EACH OTHER IN COURT, INCLUDING THE RIGHT TO A TRIAL
21 BY JURY, EXCEPT AS PROVIDED BY THE RULES OF THE ARBITRATION FORUM
22 IN WHICH A CLAIM IS FILED," CLEARLY INDICATING THAT THERE COULD
23 BE MORE THAN ONE FORUM.

24 THE COURT: WELL, HOW WOULD YOU HAVE -- WHAT OTHER FORUM
25 WOULD AGREE TO USE NASD RULES?

1 **MR. ABEL:** I'M SORRY, YOUR HONOR.

2 **THE COURT:** IT SEEMS TO ME THAT (G) AND THAT CONCLUDING
3 PARAGRAPH IN BOLD THAT STARTS, "I AGREE" AND ENDS WITH
4 "JURISDICTION," CAN ONLY REASONABLY BE READ TO STATE THAT NASD IS
5 GOING TO BE THE FORUM, BECAUSE ANOTHER FORUM YOU STATE, "THE
6 RULES OF THE ARBITRATION FORUM IN WHICH THE CLAIM IS FILED SHALL
7 BE INCORPORATED INTO THIS AGREEMENT." AND THEN IT STATES IN THE
8 VERY NEXT PARAGRAPH THAT ANY DISPUTE SHALL -- SHALL -- BE
9 SUBMITTED TO ARBITRATION CONDUCTED UNDER THE NASD RULES, AND, OF
10 COURSE, I'M PARAPHRASING.

11 **MR. ABEL:** YES, SUBMITTED -- THE KEY WORD WE NEED TO
12 UNDERLINE THERE IS "RULES." "SUBMITTED UNDER THE NASD RULES."
13 THAT JUST MEANS A RULE OF PROCEDURE. WE COULD REFER TO THE AAA
14 RULES FOR COMMERCIAL DISPUTE AND THAT WOULD GOVERN. THIS IS AN
15 AGREEMENT BETWEEN THE PARTIES. WE CAN PICK APPLICABLE RULES OF
16 PROCEDURE OVER HERE THAT'S DIFFERENT THAN A FORUM SELECTION
17 CLAUSE WHICH SAYS IT HAS TO BE SUBMITTED TO NASD UNDER THEIR
18 TIMEFRAMES.. SO WE THINK THAT THERE IS A HUGE DIFFERENCE BETWEEN
19 THE WORD USE OF RULES THERE AND DESIGNATED NASD.

20 IN ADDITION, UNDER SUBPARAGRAPH (F), YOUR HONOR, IT SAYS,
21 "THE RULES OF SOME ARBITRATION FORUMS MAY IMPOSE TIME LIMITS FOR
22 BRINGING A CLAIM IN ARBITRATION. IN SOME CASES A CLAIM THAT IS
23 NEGLIGIBLE FOR ARBITRATION" -- THAT SHOULD BE ELIGIBLE FOR
24 ARBITRATION - "MAY BE BROUGHT IN COURT." BUT I WOULD SUBMIT
25 THERE THAT THE FIRST PART, "THE RULES OF SOME ARBITRATION

MOTION - DAVID KELLER V. ING FINANCIAL PARTNERS, INC., ET AL.

1 FORUMS," SHOULD INDICATE TO A REASONABLE PERSON THAT IT COULD BE
2 IN MORE THAN ONE PLACE. AND SIMPLY BECAUSE YOU'RE FOLLOWING NASD
3 RULES. BUT EVEN IF THERE WAS A SPECIFICATION OF NASD, YOUR
4 HONOR, IF FINRA IS THE SUCCESSOR TO NASD, AND WE'RE GOING TO
5 FOLLOW THOSE RULES AND ANY AMENDMENTS THERETO, THEN ORDERING
6 ARBITRATION WOULD FOLLOW THE TERMS OF THIS AGREEMENT, AND THAT'S
7 WHAT WE WOULD ASK THE COURT DO, YOUR HONOR.

8 THE COURT: ALL RIGHT. THANK YOU FOR YOUR ARGUMENT.

9 MR. SELLERS: JUDGE HILL, I PROMISED MY ASSOCIATE, ROBERT
10 THOMAS, HE COULD ARGUE THIS MOTION.

11 THE COURT: YES, SIR.

12 MR. SELLERS: BUT BEFORE I LET HIM STAND UP, I WANT TO MAKE
13 A COUPLE OF POINTS.

14 THE COURT: OKAY. YES, SIR.

15 MR. SELLERS: FIRST OF ALL, I THINK MY FRIENDS ARE
16 MISREADING THE AGREEMENT. THE AGREEMENT SAYS, IN PARAGRAPH 18,
17 THAT "THIS AGREEMENT CONTAINS A PREDISPUTE ARBITRATION CLAUSE,"
18 PERIOD. OKAY. THEN IT SAYS, "BY SIGNING AN ARBITRATION
19 AGREEMENT, THE PARTIES AGREE AS FOLLOWS." WHAT ITEMS (A) THROUGH
20 (G) DO IS IN AN ATTEMPT TO EXPLAIN WHAT HAPPENS IF YOU SIGN AN
21 AGREEMENT. THE ONLY ARBITRATION AGREEMENT BEFORE THE COURT IS
22 THE ONE THAT CONTAINS -- BEGINS, "I AGREE." AND IT SAYS, "I
23 AGREE THAT ANY DISPUTE BETWEEN YOU AND ME ARISING OUT OF THIS
24 AGREEMENT SHALL BE SUBMITTED TO ARBITRATION, CONDUCTED UNDER THE
25 THEN APPLICABLE PROVISIONS OF THE CODE OF ARBITRATION PROCEDURE

1 OF NASD."

2 NOW, MY -- THE COURTS HAVE HELD EXACTLY WHAT YOU DID -- WHAT
3 YOU WERE ASKING HIM ABOUT, YOUR HONOR. WE CITED CASES. THE ONLY
4 CASE THAT'S DECIDED IN HIS BRIEF THAT DOES NOT HOLD THAT THAT IS
5 A FORUM SELECTION CLAUSE IS THE GEORGIA CASE, AND I SUBMIT THAT
6 THE GEORGIA JUDGE SIMPLY DISREGARDED THE ELEVENTH CIRCUIT. THE
7 ELEVENTH CIRCUIT AND THE FOURTH CIRCUIT BOTH HAVE HELD THAT THAT
8 IS A FORUM SELECTION CLAUSE.

9 NOW, HE SAYS, WHAT ABOUT -- SO IT'S JUST THE RULES. THIS
10 RIGHT HERE, YOUR HONOR, THIS TWO-INCH STACK OF PAPER, IS THE
11 ATTEMPT FINRA HAS MADE SINCE THE MERGER WITH NASD TO GET THEIR
12 RULES TO BE CONSISTENT WITH NASD. THIS IS A TWO-INCH STACK OF
13 RULES CHANGES THAT WE DIDN'T AGREE TO.

14 AND MORE IMPORTANTLY, THE ARBITRATION PROVISION THEY'RE
15 RELYING ON WAS DRAFTED BY THEM. THEY ASKED MY CLIENT TO SIGN IT
16 AT A POINT IN TIME WHEN NASD DIDN'T EXIST. YOU KNOW, THIS IS AN
17 ILLUSORY CLAUSE. THEY SELECTED A FORUM FOR THE ARBITRATION THAT
18 AT THE TIME IT WAS SIGNED DIDN'T EXIST. THE MERGER HAD ALREADY
19 TAKEN PLACE.

20 NOW, THEY DRAFTED THE AGREEMENT. THEY KNEW THAT. THEY KNEW
21 THAT MUCH MORE THAN MY CLIENT DID. THEY COULD HAVE CHOSEN FINRA.
22 THEY COULD HAVE CHOSEN THE AAA, AS THEY SAY NOW. BUT THEY
23 DIDN'T. THEY CHOSE NASD. AND NASD, THAT IS A FORUM SELECTION
24 CLAUSE, AND THE PARTIES SELECTED THAT FORUM AND THAT FORUM DOES
25 NOT EXIST.

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1 SO I SUBMIT TO YOUR HONOR THAT YOU ARE ABSOLUTELY CORRECT,
2 THAT THAT IS A FORUM SELECTION CLAUSE, THAT IT WAS ACCEPTED --
3 THAT WAS THE FORUM AND REPORTED BY THE PARTIES. IT DOESN'T
4 EXIST. SO THIS PROVISION HAS NO MEANING. IT'S VOID.

5 NOW, HAVING SAID THAT, I'LL LET MR. THOMAS ARGUE THE MOTION.

6 **THE COURT:** ALL RIGHT. YES, SIR.

7 **MR. ABEL:** YOUR HONOR, I DON'T MEAN TO INTERRUPT THE
8 PROGRESS OF WHAT WE'RE DOING, BUT I REALLY WOULD LIKE TO OBJECT
9 TO HAVING TWO COUNSEL ARGUE ON BEHALF OF ONE PARTY. I MEAN, HE
10 DEFERRED TO HIS ASSOCIATE AND THEN HE GOT FIRED UP ABOUT
11 SOMETHING AND HE WANTED TO HAVE HIS ARGUMENT TOO. AND I'M NOT
12 AGAINST HAVING AN ASSOCIATE ARGUE A MOTION, BUT HE SHOULD HAVE
13 BEEN ALLOWED TO ARGUE THE ENTIRE MOTION. AND SO I OBJECT TO
14 HAVING TWO COUNSEL ARGUE ON THE BEHALF OF ONE PARTY.

15 **THE COURT:** WELL, I JUST INTERPRET IT AS THE OLD SAYING OF
16 THE IRISHMAN, BEFORE HE WANTED TO SPEAK HE WANTED TO SAY
17 SOMETHING. (LAUGHTER IN THE COURTROOM) SO, I'M SURE YOU CAN
18 HANDLE IT, MR. ABEL.

19 GO AHEAD, YES, SIR.

20 **MR. THOMAS:** THANK YOU, YOUR HONOR. MAY IT PLEASE THE
21 COURT. MY NAME IS ROBERT THOMAS, AND I'M HERE WITH DON SELLERS,
22 WHO HAS ALREADY SPOKEN, AND JAY MATTHEWS ON BEHALF OF DAVID
23 KELLER, THE PLAINTIFF.

24 FIRST OF ALL, AS TO THE ACCOUNT INFORMATION FORM ITSELF,
25 WHILE IT'S APPARENT THAT IT WAS EXECUTED IN CONJUNCTION WITH THE

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1 PURCHASE OF AN ACCOUNT THROUGH ING, IT'S NOT AT ALL APPARENT ON
2 THE FACE ON THE CONTRACT THAT IT RELATES TO THE JACKSON NATIONAL
3 ANNUITY. THE ACCOUNT INFORMATION FORM WAS DRAFTED BY ING ON ING
4 LETTERHEAD. IT REFERENCES ONLY ING AND PERSHING ACCOUNTS. THE
5 JACKSON NATIONAL ANNUITY PRODUCT ITSELF IS NOT REFERENCED
6 ANYWHERE ON THE PRODUCT -- ON THE ACCOUNT INFORMATION FORM EITHER
7 IN NAME OR BY THE POLICY NUMBER. MOREOVER, ENTIRELY SEPARATE
8 FORMS ON JACKSON NATIONAL LETTERHEAD WERE EXECUTED IN CONJUNCTION
9 WITH THE PURCHASE OF THAT ANNUITY.

10 I THINK IT'S IMPORTANT ALSO TO NOTE THAT JACKSON NATIONAL IS
11 NOT A MEMBER OR A PART OF THE MOTION TO COMPEL ARBITRATION, AND,
12 IN FACT, HAS ANSWERED OUR COMPLAINT AND HAS SERVED DISCOVERY ON
13 ALL THE PARTIES. SO IT'S APPARENT THAT WE THINK THIS ARBITRATION
14 AGREEMENT DOESN'T RELATE TO THE JACKSON NATIONAL ANNUITY.
15 JACKSON NATIONAL APPARENTLY DOESN'T THINK IT RELATES TO THE
16 JACKSON NATIONAL ANNUITY. AND THEREFORE WE WOULD ASSERT THAT
17 IT'S IRRELEVANT TO THE PRESENT DISPUTE.

18 BUT EVEN IF THIS COURT DOES FIND THAT THE AGREEMENT, THE
19 ARBITRATION AGREEMENT IN THE ING ACCOUNT INFORMATION FORM, DOES
20 RELATE TO DISPUTES ARISING OUT OF THE JACKSON NATIONAL ANNUITY
21 POLICY, THE ARBITRATION AGREEMENT STILL FAILS BECAUSE THE NASD,
22 THE ARBITRATION FORUM SELECTED IN THE ACCOUNT INFORMATION FORM,
23 DIDN'T EXIST AT THE TIME THAT THE AGREEMENT WAS EXECUTED AND IT
24 DOESN'T EXIST TODAY. AS A RESULT, THERE HAS BEEN A FAILURE OF AN
25 INTEGRAL TERM TO THE CONTRACT, AND THEREFORE THE ARBITRATION

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1 AGREEMENT AS A WHOLE IS VOID.

2 THE COURT: MR. SELLERS ALLUDED TO A BRIEF, AND I DON'T
3 BELIEVE WE RECEIVED IT. SOMETIMES THEY GET HUNG UP IN THE
4 CLERK'S OFFICE. HAVE YOU GOT AN EXTRA COPY YOU CAN HAND ME?

5 MR. SELLERS: WE E-MAILED IT LAST WEDNESDAY, YOUR HONOR. IT
6 WENT TO YOU BY E-MAIL AND TO THE COURT.

7 THE COURT: OKAY. ALL RIGHT. WELL, LET'S SEE...

8 MR. SELLERS: I APOLOGIZE.

9 MR. THOMAS: I CAN GIVE YOU MY COPY, YOUR HONOR, IF YOU'D
10 LIKE.

11 MR. SELLERS: WE ACTUALLY DID IT LAST WEDNESDAY.

12 MR. THOMAS: MAY I APPROACH, YOUR HONOR?

13 THE COURT: SURE.

14 MR. THOMAS: THERE MAY BE AN UNDERLINING OR TWO IN THERE.

15 THE COURT: OKAY. ALL RIGHT. GO AHEAD, SIR.

16 MR. THOMAS: AS MR. SELLERS ALREADY POINTED OUT, THE
17 DEFENDANTS HAVE ASSERTED THAT PARTS OF -- SECTION 18 OF THE ING
18 ACCOUNT INFORMATION FORM IS TITLED "ARBITRATION CLAUSE," AND THE
19 DEFENDANTS HAVE ASSERTED THAT IN SECTIONS (A) THROUGH (G) THERE
20 ARE REFERENCES, GENERIC REFERENCES TO ARBITRATION FORUMS, AND
21 THEREFORE THAT REPRESENTS A MANIFESTATION THERE WAS NO AGREEMENT
22 TO ARBITRATE BEFORE A PARTICULAR FORUM. BUT IF YOU ACTUALLY LOOK
23 AT SECTION 18, AS MR. SELLERS STATED, IT STATES, "THIS AGREEMENT
24 CONTAINS A PREDISPUTE ARBITRATION CLAUSE. BY SIGNING AN
25 ARBITRATION AGREEMENT, THE PARTIES AGREE AS FOLLOWS." (A)

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1 THROUGH (G) ESSENTIALLY STATE WHAT IT MEANS FOR THE PARTIES TO
2 HAVE EXECUTED AN ACCOUNT -- AN ARBITRATION AGREEMENT. IT DOES
3 NOT CONSTITUTE THE ACTUAL AGREEMENT TO ARBITRATE ITSELF. THE
4 ACTUAL ARBITRATION AGREEMENT COMES AFTER THAT AND READS, "I AGREE
5 THAT ANY DISPUTE BETWEEN YOU AND ME ARISING OUT OF THIS AGREEMENT
6 SHALL BE SUBMITTED TO ARBITRATION CONDUCTED UNDER THE THEN
7 APPLICABLE PROVISIONS OF THE CODE OF ARBITRATION PROCEDURE OF
8 NASD." THAT'S THE ARBITRATION AGREEMENT. AND THE ARBITRATION
9 AGREEMENT IS CLEAR THAT NASD IS THE CHOSEN FORUM.

10 NOW, THE DEFENDANTS HAVE ASSERTED THAT IT STATES THAT ONLY
11 THE RULES AND THE PROCEDURES OF THE NASD HAVE BEEN SELECTED BY
12 THE PARTIES. THE COURTS IN THE MAJORITY OF JURISDICTIONS,
13 INCLUDING THE SECOND, FOURTH, SIXTH, NINTH AND ELEVENTH CIRCUITS,
14 HAVE ALL HELD IN CASES INVOLVING -- SECURITIES CASES INVOLVING
15 THE NASD, THE NYSE AND AMEX THAT WHERE THE PARTIES SELECT THE
16 RULES OF THE ARBITRAL FORUM THAT THE SELECTION OF THE RULES
17 CONSTITUTES THE SELECTION OF A FORUM. IN EFFECT, THEY
18 CHARACTERIZE IT AS A TWIST OF LAW PROVISION THAT OPERATES AS A
19 FORUM SELECTION CLAUSE.

20 FOR EXAMPLE, IN *SMITH BARNEY V. CRITICAL HEALTH SYSTEMS*,
21 WHICH IS A CASE ARISING OUT OF THE FOURTH CIRCUIT, THE COURT
22 DETERMINED THAT AN ARBITRATION AGREEMENT PROVIDING THAT ALL
23 CONTROVERSIES SHALL BE SETTLED, QUOTE, BY ARBITRATION IN
24 ACCORDANCE WITH THE RULES THEN IN EFFECT OF THE NASD, NYSE OR
25 AMEX, MEANT THEY AGREED TO ARBITRATE ONLY BEFORE THOSE FORUMS NOT

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1 BEFORE THE AAA. THE SAME HOLDING WAS IN *IN RE: SOLOMON BROTHERS*
2 BY THE SECOND CIRCUIT AND ALSO IN *RONEY AND CO. v. GOREN* BY THE
3 SIXTH CIRCUIT. IN THOSE CASES THE ARBITRATION AGREEMENT PROVIDED
4 THAT THE RULES AND PROCEDURES OF THE NYSE WOULD GOVERN. ONE
5 PARTY OR ANOTHER TRIED TO COMPEL ARBITRATION BEFORE THE NASD OR
6 AAA, AND THE COURTS IN THOSE CASES SAID THAT THE AGREEMENT WAS
7 BINDING, THEY HAD SPECIFICALLY SELECTED THE NYSE BECAUSE THEY HAD
8 SELECTED THE RULES OF THE NYSE, AND THEREFORE ONLY THE NYSE COULD
9 ARBITRATE THE DISPUTE.

10 ALL THIS MAKES SENSE BECAUSE A PARTY WOULD NOT WANT TO
11 CHOOSE THE NASD OR THE NYSE, WHICH WERE ORGANIZATIONS THAT WERE
12 WELL SUITED TO ARBITRATE SECURITIES DISPUTES, AND THEN HAVE THAT
13 CLAIM OR THE DISPUTE ARBITRATED PURSUANT TO THOSE RULES BUT
14 PERHAPS BY THE AMERICAN HEALTH LAWYERS ASSOCIATION OR AAA. IT
15 KIND OF VITIATES THE PURPOSE OF SELECTING AN ENTITY OR THE RULES
16 OF AN ENTITY THAT IS WELL SUITED TO ARBITRATING SECURITY
17 DISPUTES.

18 FINALLY, THE FAILURE OF AN ARBITRAL FORUM CONSTITUTES THE
19 FAILURE OF THE ENTIRE ARBITRATION AGREEMENT. AND IN A RECENT
20 CASE IN 2009, THE SOUTH CAROLINA SUPREME COURT, IN *GRANT v.*
21 *MAGNOLIA MANOR GREENWOOD, INC.*, KIND OF POSITED THE STANDARD BY
22 WHICH A COURT WILL DETERMINE WHETHER THE FAILURE OF THE FORUM
23 CONSTITUTES THE FAILURE OF THE AGREEMENT. IN THAT CASE, THE
24 SOUTH CAROLINA SUPREME COURT STATED THAT "IF THE CHOICE OF AN
25 ARBITRAL FORUM IS AN INTEGRAL PART OF THE AGREEMENT TO ARBITRATE

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1 RATHER THAN ANCILLARY LOGISTICAL CONCERN, THE FAILURE OF THE
2 CHOSEN FORUM WILL PRECLUDE ARBITRATION."

3 NOW, WHAT DOES IT MEAN TO BE INTEGRAL TO THE AGREEMENT?
4 COURTS HAVE GENERALLY HELD THAT A FORUM SELECTION CLAUSE OR AN
5 ARBITRATION FORUM SELECTION CLAUSE IS INTEGRAL TO AN AGREEMENT IN
6 THREE SITUATIONS.

7 FIRST, WHERE THE ARBITRATOR'S RULES WILL HAVE A SUBSTANTIVE
8 EFFECT ON THE PARTY'S CLAIMS, WHICH I BELIEVE THAT'S THE CASE
9 HERE. THE NASD IS SPECIFICALLY WELL SUITED TO ARBITRATE THE
10 DISPUTES. AND THE RULES OF THE NASD WOULD HAVE HAD A SUBSTANTIVE
11 EFFECT ON THE PARTIES CLAIMS.

12 SECOND, IF THE ARBITRATOR POSSESSES SPECIALIZED KNOWLEDGE OR
13 EXPERTISE ON THE SUBJECT OF THE DISPUTE. AGAIN, THE NASD WAS AN
14 SRO, A SELF-REGULATORY ORGANIZATION, THAT ARBITRATED AND
15 REGULATED SECURITIES ORGANIZATIONS. SO THEY CERTAINLY HAD
16 SPECIFIC KNOWLEDGE.

17 AND THIRD, THE AGREEMENT OTHERWISE EVIDENCES A DOMINANT
18 INTENT OF THE PARTIES THAT CLAIMS COULD ONLY BE HEARD BY THE
19 NAMED ARBITRATOR.

20 I THINK THE GRANT CASE IS A GOOD EXAMPLE OF THIS ANALYSIS
21 AND PRACTICE. IN THAT CASE, GRANT, THE PLAINTIFF, WAS ADMITTED
22 TO A NURSING HOME. COINCIDING WITH THAT ADMISSION THE PARTIES
23 EXECUTED AN ADMISSIONS AGREEMENT THAT CONTAINED AN ARBITRATION
24 AGREEMENT. THE ARBITRATION AGREEMENT PROVIDED THAT ALL DISPUTES
25 HAD TO BE ARBITRATED BEFORE THE AMERICAN HEALTH LAWYERS

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1 ASSOCIATION. SUBSEQUENT TO THE EXECUTION OF THAT AGREEMENT, THE
2 AMERICAN HEALTH LAWYERS ASSOCIATION AMENDED ITS RULES TO PROVIDE
3 THEY WOULD ONLY ARBITRATE DISPUTES THAT DID NOT HAVE TO DO WITH
4 PREDISPUTE ARBITRATION AGREEMENTS. SO EFFECTIVELY THE PARTIES
5 WERE DENIED THEIR FORUM OF CHOICE.

6 THE SOUTH CAROLINA SUPREME COURT DETERMINED THAT THE FAILURE
7 OF THE ARBITRAL FORUM, WHICH WAS AN INTEGRAL PART OF THAT
8 AGREEMENT, CONSTITUTED THE FAILURE OF THE ENTIRE ARBITRATION
9 AGREEMENT, AND THEY REFUSED TO COMPEL ARBITRATION IN ANOTHER
10 FORUM.

11 THAT SAME RATIONALE HAS BEEN APPLIED IN CASES PREMERGER
12 CASES INVOLVING THE NASD AND THE NYSE IN CASES WHERE THE PARTIES
13 AGREED TO ARBITRATE DISPUTES PURSUANT TO THE RULES AND
14 REGULATIONS OF EITHER THE NYSE OR THE NASD, AND WHERE ANOTHER
15 PARTY HAS SAID, WE WOULD LIKE TO ARBITRATE IT BEFORE ANOTHER
16 ORGANIZATION. THE COURTS HAVE CONSISTENTLY HELD, LIKE THE
17 SUPREME COURT IN *GRANT*, THAT THE SELECTION OF A FORUM SELECTION
18 CLAUSE IS AN INTEGRAL PART OF THE CONTRACT, AND THEREFORE THE
19 FAILURE OF THAT FORUM SELECTION CLAUSE CONSTITUTES A FAILURE OF
20 THE ARBITRATION AGREEMENT AS A WHOLE.

21 FINALLY, THE DEFENDANTS HAVE ASSERTED THAT WE CANNOT POINT
22 OUT ANY SUBSTANTIVE DIFFERENCES THAT MIGHT CAUSE US PREJUDICE IF
23 WE -- NOW THAT FINRA HAS -- THE NASD HAS MERGED WITH THE NYSE AND
24 NOW FINRA IS THE FORUM WHICH WILL ARBITRATE THE DISPUTE. THE
25 COURTS HAVE NOT EXAMINED WHETHER THERE ARE SUBSTANTIVE

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1 DIFFERENCES. THIS IS NOT A MATTER OF THE FAIRNESS OF THE
2 ARBITRATION AGREEMENT. THIS IS A MATTER OF CONTRACT FORMATION.
3 AND HERE THERE WAS A SPECIFIC AGREEMENT TO ARBITRATE BEFORE THE
4 NASD. THE NASD DID NOT EXIST WHEN THIS AGREEMENT WAS SIGNED; IT
5 DOESN'T EXIST TODAY. THEREFORE, THE PARTIES HAVE BEEN DENIED THE
6 FORUM THAT THEY SELECTED AND CHOSE, AND THEREFORE THE ARBITRATION
7 AGREEMENT IS VOID.

8 THANK YOU.

9 **THE COURT:** I THOUGHT ONE OF THE FACTORS, THOUGH, WAS
10 WHETHER THE RULES WOULD HAVE A SIGNIFICANT EFFECT ON THE PARTIES
11 DISPUTE; WASN'T THAT ONE OF THE FACTORS YOU MENTIONED?

12 **MR. THOMAS:** YES, YOUR HONOR.

13 **THE COURT:** SO IS THERE ANY DISCREPANCY IN THE RULES? I
14 MEAN, I SAW THE TWO-INCH STACK. BUT IS THERE SOME DISPARITY
15 BETWEEN DISCOVERY ALLOWED BY NASD VERSUS FINRA OR ANYTHING?

16 **MR. THOMAS:** I CANNOT NAME A SINGLE CHANGE IN THE RULES AS
17 THEY WERE AND THE FINRA RULES AS THEY EXIST TODAY. BUT COURTS
18 HAVE ANALYZED CASES SIMILAR TO THIS CASE. FOR EXAMPLE, IN *RONEY*
19 *AND CO. V. GOREN*, THE SIXTH CIRCUIT WAS DEALING WITH A CASE IN
20 WHICH THE PARTIES HAD AGREED TO ARBITRATE PURSUANT TO THE RULES
21 OF THE NEW YORK STOCK EXCHANGE. ONE OF THE PARTIES TRIED,
22 THOUGH, TO COMPEL ARBITRATION BEFORE THE NASD. THE COURT IN THAT
23 CASE NOTED THAT THE PARTIES COULD NOT POINT TO ANY SUBSTANTIVE
24 DIFFERENCE BETWEEN THE CODE OF ARBITRATION BETWEEN THE NYSE AND
25 THE NASD. BUT THE COURT SAID THAT DIDN'T MATTER. THEY HAD

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1 SELECTED THE NYSE. THEY HAD TO ARBITRATE BEFORE THE NYSE NOT THE
2 NASD REGARDLESS OF SUBSTANTIVE DIFFERENCES AND THEREFORE HELD
3 THAT THE NYSE WAS THE FORUM WHICH HAD TO BE -- WHICH HAD TO HEAR
4 THE DISPUTE.

5 THE COURT: ALL RIGHT. THANK YOU, SIR.

6 MR. THOMAS: THANK YOU.

7 MR. SELLERS: JUDGE, THE FIRST THING YOU DO WHEN YOU
8 ARBITRATE IS CHOOSE AN ARBITRATOR. AND YOU'RE LOOKING AT A PANEL
9 AT THE NASD, IF YOU'RE ARBITRATING BEFORE THE NASD, AND A
10 SEPARATE PANEL WITH FINRA. SO THE CHOICE ITSELF.

11 YOUR HONOR, I APOLOGIZE FOR THAT BRIEF. I DON'T KNOW WHAT
12 HAPPENED TO IT.

13 THE COURT: WELL, I DON'T KNOW EITHER. I WAS OUT OF TOWN A
14 COUPLE DAYS LAST WEEK. BUT IT'S---

15 MR. SELLERS: WE FILED IT WITH THE CLERK AND HE MAILED IT
16 TO YOU LAST WEDNESDAY BECAUSE I TRY TO COMPLY WITH YOUR---

17 THE COURT: I'M SURE WE'VE GOT IT, BUT I'VE READ IT. I --
18 AND I'LL GIVE YOU THIS COPY BACK. WE'LL TRACK IT DOWN.

19 MR. THOMAS: THANK YOU.

20 MR. TURNER: YOUR HONOR, MAY I RESPOND?

21 THE COURT: YES, SIR, MR. TURNER.

22 MR. TURNER: WE TAKE NO POSITION AS TO THE MOTION, BUT I DO
23 WANT TO CLARIFY SOMETHING. COUNSEL FOR THE PLAINTIFF INDICATES
24 THAT BECAUSE WE ARE SILENT IN TRYING TO COMPEL ARBITRATION ON
25 BEHALF OF JACKSON NATIONAL THAT SOMEHOW IS DEEMED AS THAT WE

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1 ADMIT THAT THIS FORM SIGNED BY THE PLAINTIFF DOESN'T HAVE
2 ANYTHING TO DO WITH THE JACKSON NATIONAL ANNUITY. THAT IS
3 COMPLETELY WRONG. THE REASON WE ARE NOT TAKING A POSITION ON
4 THIS OR TRYING TO COMPEL ARBITRATION IS THAT JACKSON NATIONAL
5 ISN'T A PARTY TO THAT PARTICULAR AGREEMENT. THAT PARTY WAS --
6 THAT AGREEMENT WAS DRAFTED BY ING, SIGNED BY ING'S AGENT AND THE
7 PLAINTIFF. JACKSON NATIONAL IS NOT A PARTY. WE'RE NOT GOING TO
8 WASTE THE COURT'S TIME AND STAND UP HERE TRYING TO ARGUE THAT
9 SOMEHOW JACKSON NATIONAL SHOULD GET THE BENEFITS OF THAT BECAUSE
10 JACKSON NATIONAL WASN'T A PARTY TO THAT. WHETHER IT APPLIES TO
11 THE ANNUITY OR NOT, THAT'S FOR THE COURT'S DECISION AND THAT'S
12 FOR THEIR ARGUMENT. BUT JUST BECAUSE WE'RE NOT TRYING TO COMPEL
13 ARBITRATION SHOULDN'T BE DEEMED THAT WE ADMIT THAT THIS HAS
14 NOTHING TO DO WITH THE ANNUITY.

15 THE COURT: THANK YOU.

16 YES, SIR.

17 MR. ABEL: MAY IT PLEASE THE COURT, YOUR HONOR. JUST A
18 COUPLE OF POINTS IN CONCLUSION.

19 FIRST OF ALL, IT STRIKES ME FROM HEARING THE OTHER SIDE'S
20 ARGUMENT THAT THEY ARE WILLING TO CONSENT TO ARBITRATION BEFORE
21 THE NASD AND NOW FINRA BECAUSE OF THE MERGER, BECAUSE THEY KEEP
22 REFERRING TO THE FORUM SELECTION CLAUSE -- TO THE LANGUAGE OF
23 THIS AGREEMENT AS A FORUM SELECTION CLAUSE. IF IT IS, AND THEY
24 HAVE CITED NO AUTHORITY TO CHALLENGE THE SUCCESSOR RELATIONSHIP
25 OF FINRA TO NASD, THEN WE WIN BASED UPON WHAT THEY JUST ARGUED.

1 **THE COURT:** WELL, I THINK THEY SAID, FIRST OF ALL, THEY HAD
2 NEVER SIGNED AN ARBITRATION AGREEMENT? ISN'T THAT WHAT THEY
3 SAID? (096 1B)

4 **MR. ABEL:**

5 **MR. SELLERS:** IF WE CONCEDED THAT, WE DIDN'T MEAN TO.

6 **THE COURT:** OKAY. ANYWAY...

7 **MR. ABEL:** I WROTE DOWN WHAT MR. SELLERS SAID, "THE MERGER
8 WITH NASD." AND THEN IT WAS REPEATED AGAIN BY MR. THOMAS, THAT
9 NASD IS THE CHOSEN FORUM. AND, YOU KNOW, PART OF OUR ARGUMENT
10 IS, YOUR HONOR, IF THAT IS SO, WHICH WE DON'T NECESSARILY THINK
11 THAT'S WHAT YOU GET FROM THIS AGREEMENT, BUT IF THAT'S SO AND
12 FINRA IS THE SUCCESSOR THROUGH MERGER, THEN ARBITRATION SHOULD BE
13 ORDERED IN THIS CASE. EVEN IF IT'S NOT A FORUM SELECTION CLAUSE,
14 THERE IS NOTHING THAT -- YOU KNOW, THEY KEEP TALKING ABOUT WE
15 DRAFTED THE AGREEMENT. WELL, I DON'T SEE HOW YOU CAN GET AWAY
16 FROM ANY DISPUTE BETWEEN YOU AND ME ARISING OUT OF THIS
17 AGREEMENT, AND THEY SIGN -- AND MR. KELLER SIGNS DOCUMENTS THE
18 SAME DAY AT THE SAME TIME, SEPTEMBER 2007, THAT SPECIFICALLY
19 REFERENCES THE JACKSON NATIONAL LIFE ANNUITY, HOW THEY CAN MAKE A
20 SEPARATE AND DISTINCT ARGUMENT AS IF HE HAD NO IDEA THAT THE
21 JACKSON NATIONAL LIFE PRODUCT COULD BE PART OF THIS.

22 BUT THEY ARE TRYING TO REWRITE THE LANGUAGE OF THIS
23 AGREEMENT AS TO THE FORUM SELECTION CLAUSE BECAUSE IT DOES NOT
24 SAY SUBMIT IT TO NASD. IT SAYS TO THE PROCEDURES OF THE NASD.
25 AND SECONDLY, THEY'RE TRYING TO REWRITE IT TO GET RID OF THE

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1 SPECIFIC AGREEMENT TO ARBITRATE. AND WHETHER NASD WAS OR WAS NOT
2 IN EXISTENCE AT THAT TIME, IT IS A VALID AND BINDING AND
3 ENFORCEABLE AGREEMENT TO ARBITRATE THE DISPUTE WITH REGARD TO THE
4 EXACT FACTUAL ALLEGATIONS OF THIS COMPLAINT.

5 THE COURT: WELL, LET ME ASK YOU THIS: I REMEMBER SOMETIME
6 AGO HAVING A SIMILAR MOTION REGARDING A CLAIM AGAINST A NURSING
7 HOME. AND THE NURSING HOME ADMISSION DOCUMENTS STATED THAT THE
8 FORUM -- WELL, IT STATED ESSENTIALLY THAT ANY DISPUTES RELATED TO
9 THE PATIENT'S STAY WOULD BE GOVERNED UNDER THE RULES OF THE
10 AMERICAN ARBITRATION ASSOCIATION. AND MOST ARBITRATION
11 AGREEMENTS THAT I'VE EVER SEEN DON'T NECESSARILY SAY AAA IS GOING
12 TO BE THE FORUM FOR THE ARBITRATION. THEY'LL SAY ARBITRATION
13 WILL BE CONDUCTED UNDER THE RULES AND PROCEDURES OF AAA OR WORDS
14 TO THAT EFFECT, MUCH LIKE THIS NASD LANGUAGE IN PARAGRAPH 18.

15 SO WHAT HAPPENED IN THAT CASE WAS THAT -- IS THE AMERICAN
16 HEALTH LAWYER ASSOCIATION CASE ALSO -- WHAT ALSO OCCURRED THERE
17 IS THAT AAA STOPPED DOING NURSING HOME ARBITRATION. AND SO THE
18 QUESTION WAS, IS THAT A FAILURE OF AN ESSENTIAL TERM OF THE
19 AGREEMENT BECAUSE THE PARTIES RELIED ON AAA BEING THE FORUM
20 BECAUSE THEY WERE A KNOWN QUANTITY AND THEY HAD FAIR AND
21 IMPARTIAL RULES THAT THE PARTIES AGREED TO BE BOUND BY. AND THE
22 NURSING HOME'S ARGUMENT IN RESPONSE WAS, WELL, WE'RE STILL GOING
23 TO USE AAA'S RULES. WE'LL JUST USE ANOTHER ARBITRATOR.

24 BUT WOULDN'T SOPHISTICATED BUSINESSMEN, AND PRESUMABLY BASED
25 ON THE TRANSACTION THIS WAS A SOPHISTICATED DEALING, WOULDN'T

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1 THEY REALLY BE RELYING ON THE FACT THAT NASD WAS GOING TO BE THE
2 FORUM? AND I UNDERSTAND YOUR ARGUMENT THAT IT'S NOT AN EXCLUSIVE
3 FORUM. BECAUSE WOULDN'T THAT BE RELYING ON NASD'S REPUTATION AND
4 FAIRNESS IN AGREEING TO AN ARBITRATION, IF IN FACT THEY DID AGREE
5 TO IT? SO EVEN THOUGH IT JUST SAYS UNDER THE PROCEDURES OF NASD,
6 THAT DOESN'T MEAN THAT ING CAN GO HIRE WHOEVER THEY WANT TO TO
7 ARBITRATE IT AS LONG AS THEY USE NASD'S RULES. I MEAN, NASD'S
8 RULES, PRESUMABLY, REQUIRE THE ARBITRATORS TO BE EXPERIENCED AND
9 QUALIFIED, JUST LIKE AAA'S DO. THAT'S WHY PEOPLE AGREE TO AAA,
10 BECAUSE THEY KNOW THEY'RE NOT GOING TO GET A PANEL OF CLOWNS.

11 MR. ABEL: YOUR HONOR, I GUESS I HAVE TWO RESPONSES TO
12 THAT. ONE IS, IF THE COURT WANTS TO CONCLUDE THAT THAT DOES
13 SELECT NASD, AND THE COURT ALSO CONCLUDES THAT FINRA IS THE LEGAL
14 SUCCESSOR THROUGH A MERGER WITH NASD AND THEREFORE ARBITRATION IS
15 APPROPRIATE ON THAT BASIS, THEN I DON'T THINK MY CLIENTS WOULD
16 DISPUTE THAT. BUT I ALSO THINK THAT THE ADDITIONAL LANGUAGE OF
17 THAT PARAGRAPH 18 SUGGESTS THAT THE PARTIES COULD CHOOSE A
18 DIFFERENT FORUM IF THEY AGREED, MUTUALLY AGREED TO IT.

19 AND THE GRANT CASE THAT THEY POINT TO MAKES EXACTLY OUR
20 POINT, BECAUSE IN THAT ONE THEY DID SPECIFY AN ARBITRATOR, AND BY
21 THE TIME THE ARBITRATION COMMENCED, THAT ARBITRATOR WAS NOT
22 AVAILABLE. THAT'S THE HOLDING OF THE COURT. WELL, THAT SORT OF
23 MAKES THE POINT OF WHY PARAGRAPH 18 WAS WORDED SOMEWHAT LOOSELY
24 FOR THE PARTIES TO POSSIBLY USE ANOTHER ARBITRATION FORUM,
25 BECAUSE THERE IS NO GUARANTEE THAT EVEN AAA WILL BE HERE TOMORROW

MOTION - DAVID KELLER V. ING FINANCIAL PARTNERS, INC., ET AL.

1 OR THAT NASD OR THAT FINRA WOULD. BUT NASD DIDN'T JUST DID NOT
2 GO OUT OF BUSINESS LIKE IN THE GRANT CASE; IT MERGED WITH ANOTHER
3 ENTITY AND CONTINUED DOING WHAT IT WAS DOING, JUST UNDER A
4 DIFFERENT NAME. AND WE THINK THE AUTHORITY THAT WE'VE CITED TO
5 YOU IS PRECEDENT WHERE WE WIN, FRANKLY, ON BOTH OF THOSE
6 DIRECTIONS THAT THE COURT COULD TAKE, YOUR HONOR.

7 THE COURT: OKAY.

8 MR. ABEL: THANK YOU.

9 THE COURT: THANK YOU. I UNDERSTAND THE ARGUMENTS. THANK
10 YOU FOR YOUR TIME. I'LL LOOK AT IT A LITTLE BIT MORE AND LET YOU
11 KNOW MY DECISION HOPEFULLY IN THE NEXT TEN DAYS. THANK YOU.

12 MR. ABEL: THANK YOU, YOUR HONOR.

13 MR. THOMAS: THANK YOU.

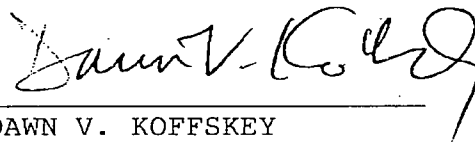
14 -----END OF REQUESTED TRANSCRIPT OF RECORD-----
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CERTIFICATE

I, THE UNDERSIGNED, DAWN V. KOFFSKEY, DO HEREBY
CERTIFY THAT THE FOREGOING IS A TRUE, ACCURATE AND
COMPLETE TRANSCRIPTION OF THE RECORD AS TAKEN BY HOLLIE
M. JENKINS, OFFICIAL COURT REPORTER FOR THE 13TH
JUDICIAL CIRCUIT OF THE STATE OF SOUTH CAROLINA,
INCLUDING ALL THE PROCEEDINGS HAD AND EVIDENCE
INTRODUCED IN THE TRIAL OF THE CAPTIONED CASE, RELATIVE
TO APPEAL, IN THE CIRCUIT COURT FOR GREENVILLE COUNTY,
SOUTH CAROLINA, ON THE 11TH DAY OF APRIL 2011.

I DO FURTHER CERTIFY THAT I AM NEITHER OF KIN,
COUNSEL, NOR INTEREST TO ANY PARTY HERETO.

August 1, 2011



DAWN V. KOFFSKEY
COURT REPORTER

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2011-CP-23-00336

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.

CERTIFICATE OF COUNSEL

The undersigned hereby certifies that the Record on Appeal contains all material proposed to be included by any of the parties and not any other material.

November 10, 2011

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT THE PARTIES' ARBITRATION AGREEMENT WAS VOID BECAUSE THE PARTIES AGREED TO ARBITRATE UNDER THE RULES OF THE NASD WHERE THE NASD HAS BEEN SUCCEEDED BY ANOTHER ENTITY, FINRA, THAT APPLIES THE SAME RULES.
2. WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT THE DISPUTE BETWEEN KELLER AND IFP WAS NOT COVERED BY THE PARTIES' CLEAR AGREEMENT TO ARBITRATE "ANY DISPUTE" ARISING OUT OF THE AGREEMENT.

STATEMENT OF THE CASE

David Keller ("Keller") brought this action on January 18, 2011, in the Greenville County Court of Common Pleas, asserting claims of negligence, negligent representation, constructive fraud, violation of the South Carolina Unfair Trade Practices Act, negligent supervision and training, violation of the South Carolina Uniform Securities Act, and breach of fiduciary duty, against William C. Johnson, a registered representative of ING Financial Partners, Inc., a broker-dealer, and others all arising from investment advice Johnson allegedly provided, which led to Keller's purchase of a variable annuity offered by Jackson National Life Insurance Company ("Jackson National"). Johnson's business is known as Diversified Business Concepts, Inc. At bottom, Keller's Complaint alleges that the variable annuity recommended by Johnson was not a suitable investment that matched Keller's needs and desires.

On February 18, 2011, ING Financial Partners, Inc., Johnson, and Diversified Business Concepts, Inc. (collectively, "Defendants-Appellants") moved to compel arbitration based on an arbitration clause in the account agreement entered into between Keller and ING Financial Partners, Inc. In that Motion, Defendants-Appellants argued

that the broadly-worded arbitration clause in the parties' agreement covered the issues raised by Keller's Complaint and that arbitration was required under both state and federal law. On April 6, 2011, Keller filed a response arguing that the account agreement containing the arbitration clause was unrelated to the purchase of the variable annuity and also that the parties' selected the National Association of Securities Dealers ("NASD") to arbitrate under the Agreement, and, because the NASD no longer exists, but is now known as FINRA, the entire Arbitration Agreement is void. Two days later, on April 8, 2011, Defendants-Appellants filed a Reply brief maintaining that the Arbitration Agreement was executed at the purchase of the variable annuity and that it is broad enough to cover any dispute between the parties. Johnson filed an Affidavit with the Reply, explaining that each time Keller opened a new account, he executed an account agreement containing the arbitration clause at issue, and that he did so concurrent with his purchase of the variable annuity. Those agreements and related documents executed at the same time as the purchase of the variable annuity were attached to the Affidavit. Defendants-Appellants also argued that to the extent the parties selected the NASD as a forum, the NASD has been succeeded by an entity that applies the same procedural rules referenced by the Arbitration Agreement.

A hearing on Defendants-Appellants' Motion to Compel Arbitration was held on April 11, 2011, before the Hon. D. Garrison Hill. Judge Hill took the Motion under advisement. On May 18, 2011, Judge Hill denied Appellants-Defendants' Motion to Compel Arbitration without explanation, and requested that Keller's counsel submit a proposed order. Thereafter, Keller submitted a proposed order, which Judge Hill issued by written Order, dated May 26, 2011. Because Defendants-Appellants' Answer

deadline was approaching and Defendants-Appellants had not received a copy of the written Order, they served a Notice of Appeal from the summary order on June 2, 2011. On June 3, 2011, Defendants-Appellants received Judge Hill's written Order, dated May 26, 2011, denying the Motion to Compel Arbitration. Thereafter, on June 16, 2011, Defendants-Appellants served and filed a Notice of Appeal from this final Order. The two Notices of Appeal are consolidated herein.

FACTS

As alleged in the Complaint, Appellant William C. Johnson is a financial advisor working through Diversified Business Concepts, Inc. who provides investment advice out of his Greenville office. (Compl. ¶¶ 2, 3; R. p. 16.) Johnson is a registered representative of ING Financial Partners, Inc., a securities broker-dealer. (*Id.* ¶ 5; R. p. 17.)

In May 2007, Keller, an individual with over twenty years of investment experience met with Johnson to discuss opening an investment account and to receive investment advice about how best to invest his retirement assets. (*Id.* ¶¶ 9, 10, 13; R. p. 17.) Over the next several months, Johnson saw and spoke to Keller on numerous occasions during which he provided a variety of investment materials for Keller to review. (*Id.* ¶ 13; R. p. 18.) After carefully considering his investment options, Keller decided on a number of investments, including a variable annuity issued by Defendant Jackson National Life ("the variable annuity"). (*Id.* ¶ 17; R. p. 19.)

Keller purchased the variable annuity on September 12, 2007. (Answer of Jackson National ¶ 17; R. p. 33.) At the same time and in connection with the purchase of the variable annuity, Keller executed an IFP account information form. (Reply in

Supp. of Mot. to Compel Arbitration Ex. A; R. pp. 89-90.) ING Financial Partners, Inc. requires that such forms be completed prior to opening any new account. (*Id.*) During his relationship with Johnson, Keller executed three different account information forms prior to opening his various accounts with ING Financial Partners, Inc. (*Id.*) The account form Keller executed on September 12, 2007, was attached to Defendants-Appellants' Motion to Compel Arbitration. (Mot. to Compel Arbitration Ex. A; R. pp. 63-64.) On the first page of the form, directly above Keller's signature, it states, in all capital letters, "I understand that this agreement contains a predispute arbitration clause that is fully set forth in paragraph 18 on the reverse side of this form." (*Id.*; R. p. 63.) The reverse side of the form sets forth the terms of the parties' agreement. (*Id.*; R. p. 64.) It provides that "with respect to any type of transaction that I may have with ING Financial Partners, Inc., I agree as follows." (*Id.*) One of the clauses that follows is an arbitration clause appearing in all caps and in its own box set apart from the rest of the agreement. (*Id.*) That clause states:

18. Arbitration Clause. THIS AGREEMENT CONTAINS A PREDISPUTE ARBITRATION CLAUSE. BY SIGNING AN ARBITRATION AGREEMENT THE PARTIES AGREE AS FOLLOWS:

(A) ALL PARTIES TO THIS AGREEMENT ARE GIVING UP THE RIGHT TO SUE EACH OTHER IN COURT, INCLUDING THE RIGHT TO A TRIAL BY JURY, EXCEPT AS PROVIDED BY THE RULES OF THE ARBITRATION FORUM IN WHICH A CLAIM IS FILED.

(B) ARBITRATION AWARDS ARE GENERALLY FINAL AND BINDING; A PARTY'S ABILITY TO HAVE A COURT REVERSE OR MODIFY AN ARBITRATION AWARD IS VERY LIMITED.

(C) THE ABILITY OF THE PARTIES TO OBTAIN DOCUMENTS, WITNESS STATEMENTS AND OTHER DISCOVERY IS GENERALLY MORE LIMITED IN ARBITRATION THAN IN COURT PROCEEDINGS.

(D) THE ARBITRATORS DO NOT HAVE TO EXPLAIN THE REASON(S) FOR THEIR AWARD.

(E) THE PANEL OF ARBITRATORS WILL TYPICALLY INCLUDE A MINORITY OF ARBITRATORS WHO WERE OR ARE AFFILIATED WITH THE SECURITIES INDUSTRY.

(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 ARBITRATION 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.

No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative class action until: (i) the class certification is denied; or (ii) the class is decertified; or (iii) the customer is excluded from the class by the court. Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein.

(*Id.*) The lower court focused on the phrase above which states: "I agree that any dispute between [Keller] and [Appellant IFP] arising out of this Agreement shall be submitted to arbitration conducted under the then applicable provisions of the Code of Arbitration of NASD." (*Id.*)

Although the Arbitration Agreement references the NASD, in July 2007, the Financial Regulatory Authority ("FINRA") was created through the 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.) *See also* FINRA, About the Financial Regulatory Authority, <http://www.finra.org/AboutFINRA/> (last visited August 31, 2011) (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 August 31, 2011) (describing merger of NASD and NYSE Regulation, Inc.). FINRA¹ is the successor to the NASD and the FINRA rules became effective December 15, 2008, and apply to all claims filed on or after April 16, 2007. *See* Order Approving FINRA Regulatory Notice 08-57, SEC Approves New Consolidated FINRA Rules, 2008 WL 4685588 (Oct. 16, 2008). Like its predecessor, FINRA continues to administer 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.)

ARGUMENTS

- I. WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT THE PARTIES' ARBITRATION AGREEMENT WAS VOID BECAUSE THE PARTIES AGREED TO ARBITRATE UNDER THE RULES OF THE NASD WHERE THE NASD HAS BEEN SUCCEEDED BY ANOTHER ENTITY, FINRA, THAT APPLIES THE SAME RULES.

As an initial matter, review of the trial court's denial of Defendants-Appellants Motion to Compel Arbitration is de novo. As recently explained by the South Carolina Supreme Court,

The question of arbitrability of a claim is an issue for judicial determination unless the parties provide otherwise. *See Zabinski v. Bright Acres Associates*, 346 S.C. 580, 596, 553 S.E.2d 110, 118

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.

(2001). The determination whether a claim is subject to arbitration is subject to de novo review. *See Gissel v. Hart*, 382 S.C. 235, 240, 676 S.E.2d 320, 323 (2009).

Partain v. Upstate Auto. Group, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (S.C. 2010).

Both state and federal law recognize the importance of arbitration and require that courts compel arbitration where, as here, the parties have agreed to arbitrate. *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”); *AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643, 650 (1986) (“Doubts should be resolved in favor of coverage. . . . in the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.”); *Partain v. Upstate Automotive Group*, 386 S.C. 488, 491, 689 S.E.2d 602, 603-04 (S.C. 2010) (“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.”); *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.”). The Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1 et seq., reflects the “liberal federal policy favoring arbitration agreements” and “establishes that, as a matter of federal law, any doubts concerning the scope of arbitratable issues should be resolved in favor of arbitration, whether the problem at hand is construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Mem’l Hosp. v. Mercury Construct. Corp.*, 460 U.S. 1, 24-25 (1983).

The trial court's decision not to enforce the Arbitration Agreement was premised on the faulty logic that there were some differences between arbitration before FINRA and arbitration before the NASD. There are none. It is undisputed that FINRA is the successor entity to the NASD. (Pl.'s Opp'n to Mot. to Compel Arbitration p. 4; R. p. 68.) Numerous courts have recognized this fact. *E.g.*, *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')."); *Raymond James Fin. Servs. v. Bishop*, 596 F.3d 183, 185 n.1 (4th Cir. 2010) ("NASD has been succeeded by FINRA"). As explained by one court,

The NASD was the primary self-regulatory organization responsible for the regulation of the securities industry in the United States, with delegated authority from the U.S. Securities and Exchange Commission. In July 2007, the NASD was consolidated with the enforcement, arbitration, and member regulation arm of the New York Stock Exchange, known as NYSE Regulation, Inc., to create the Financial Industry Regulatory Authority (FINRA).

Kashner Davidson Sec. Corp. v. Mscisz, 601 F.3d 19, 21 (1st Cir. 2010). In fact, the trial court conceded as much. (Trial Court's May 26, 2011 Order at 2; R. p. 4.) FINRA, like its predecessor the NASD, continues to be the primary choice for parties arbitrating securities disputes such as this one. (Memo in Supp. of Mot. to Compel Arbitration pp. 9-10; R. pp. 57-58.)

Though the lower court conceded that FINRA succeeded NASD it, nonetheless, erroneously concluded that there were differences between FINRA's arbitration rules and NASD's arbitration rules. (Trial Court's May 26, 2011 Order at 2, 6; R. pp. 4, 8.) As a preliminary matter, even if there are differences between the rules of the NASD and its

successor, such differences were contemplated by the parties when they entered into the Arbitration Agreement. As noted above, the parties agreed to arbitration under the “then applicable provisions of the Code of Arbitration Procedure of NASD.” (Memo in Supp. of Mot. to Compel Arbitration Ex. A; R. p. 64 (emphasis added).) Moreover, the Arbitration Agreement expressly provides that “The rules of the arbitration forum in which the claim is filed, and any amendments thereto, shall be incorporated into this Agreement.” (*Id.*) In other words, the parties anticipated changes to the rules of procedure and changes to circumstances precisely like those that occurred here when the NASD changed its name to FINRA.

Moreover, the lower court failed to point to any differences between the rules of the NASD and the rules of FINRA. This is unsurprising, given that Keller’s counsel was unable to do so during the hearing on this issue. (Transcript p. 20; R. p. 124, lines 16-17 (“I cannot name a single change in the rules as they were and the FINRA rules as they exist today.”).) In fact, the FINRA Code of Arbitration Procedure for Customer Disputes is almost identical to the most recent version of the NASD Code of Arbitration Procedure for Customer Disputes approved in April 2007 (several months prior to the signing of the Arbitration Agreement at issue), even containing the same numbering. *See* FINRA, Code of Arbitration Procedure, <http://www.finra.org/ArbitrationMediation/Rules/CodeOfArbitrationProcedure/>, (last visited August 21, 2011.) (containing links to versions of current and former rules); *see also 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.”). Simply stated, the trial court vitiated the agreement of the parties on a purported technicality that is not based in reality. See *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”). As these authorities demonstrate, whether an arbitration clause selects the NASD or its successor, FINRA, is a distinction without a difference.

In reaching its conclusion, the trial court relied on the South Carolina Supreme Court’s decision in *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (S.C. 2009). (Trial Court’s May 26, 2011 Order at 3-4; R. pp. 5-6.) Thus, this decision warrants careful examination. As an initial matter, and as argued in Defendants-Appellants’ Motion, the parties chose Iowa and federal law to govern their Agreement. (Memo in Supp. Mot. to Compel Arbitration pp. 3-5; R. pp. 51-53.) Thus, *Grant* is not binding precedent under the facts at bar. But, even if it were, it actually supports Defendants-Appellants’ argument that arbitration is appropriate. *Grant* involved a dispute between a nursing home and the surviving spouse of one of its former residents.

Grant, 383 S.C. at 127. The parties had executed an arbitration agreement that expressly provided for arbitration of any disputes by the National Health Lawyers Association. *Id.* at 128. After entering into the agreement, the NHLA changed its rules such that it no longer arbitrated the type of dispute at issue between the parties. *Id.* The nursing home sought to appoint a substitute arbitrator, but the trial court refused and instead found the entire arbitration agreement void. *Id.* at 132.

In reviewing the trial court decision in that case, the *Grant* Court highlighted policies that are equally applicable in this case:

We observe at the outset that it is the policy of this state to favor the arbitration of disputes. Accordingly, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. 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. at 129 (citations omitted). The *Grant* Court proceeded to reject the nursing home's arguments that a substitute forum was appropriate because the parties had specifically selected the NHLA, which has its own policies that could be determinative of the outcome of the dispute. Here, there is no forum selection clause like the clause in *Grant*. Moreover, even if the parties chose the NASD for its experience in arbitrating securities disputes, FINRA, as the successor to the NASD, is equally capable of arbitrating such disputes. There is no evidence that arbitration before FINRA differs from arbitration before the NASD. Additionally, this is not a case like *Grant*, where the arbitration forums no longer arbitrate the type of dispute at issue. FINRA is available to arbitrate this dispute. (Memo in Supp. of Mot. to Compel Arbitration pp. 9-10; R. pp. 57-58.) In short, *Grant*, to the extent it is even persuasive authority, is distinguishable from the facts in this case.

Moreover, a close reading of *Grant* actually highlights the error in the lower court's decision. The *Grant* Court simply noted that the NHLA is now the AHLA and moved on to other issues: "The NHLA has since become the American Health Lawyers Association (the "AHLA") and hereinafter will be referred to by that name." *Grant*, 383 S.C. at 128. Thus, without even thinking twice, the *Grant* Court assumed that the agreement to arbitrate before one entity is the agreement to arbitrate before that entity's successor. Were this common sense approach applied to the facts of this case, this appeal would have been unnecessary.

Furthermore, Keller is not the first party to try to escape arbitration by arguing that an agreement to arbitrate before the NASD is not an agreement to arbitrate before FINRA. In fact, in *Branch v. Sickert*, No. 2:10-128, 2011 U.S. Dist. LEXIS 19392 (N.D. Ga. Feb. 28, 2011), the district court rejected an almost identical argument to the one made by Keller here. In that case, like here, the arbitration agreement stated that arbitration would be pursuant to "the rules of the Board of Governors of the National Association of Securities Dealers then in effect" *Id.* at *10. The plaintiff argued that the selection of the NASD rules was the same as selecting the NASD as the forum, which was integral to the agreement. *Id.* at *11-12. In looking at the language in the remainder of the agreement, the court noted, like here, that the agreement referred generally to an "arbitration forum," and concluded that "by reading the entire clause . . . the parties intended that the forum could be separate and distinct from the then-recognized NASD, as the NASD was not specifically or exclusively chosen as forum." *Id.* at *16. Therefore, the court ordered the parties to arbitrate before FINRA. *Id.* at *20. For the same reasons, Keller should be compelled to arbitrate his dispute with Defendants-

Appellants before FINRA. *See also 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); *see also 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."); *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").

Similarly, the trial court's implication that the selection of NASD as the arbitration forum was "integral" to the parties' agreement is also erroneous. Most notably, the Arbitration Agreement fails to contain a forum selection clause. The Arbitration Agreement clearly reflects the parties' agreement to arbitrate any dispute and simply provides that the arbitration will be subject to NASD rules. If the parties had wanted to make the choice of a specific arbitration forum integral to the Arbitration Agreement, then they could have included a clause like the following stating as much: "The parties agree to arbitrate before the NASD. If the NASD is unavailable to arbitrate the parties' dispute, then this agreement is void." This is essentially the type of clause that the trial court read into the Arbitration Agreement, but it and anything similar to it are noticeably absent from the Agreement itself. Moreover, the Arbitration Agreement actually refers to "arbitration forums" in the plural. (Memo in Supp. Mot. to Compel Arbitration Ex. A; R. p. 64.)

Furthermore, the authority cited by the lower court highlights the fact that a term must actually be in an agreement to be an “integral term.” The trial court relied on *Reddam v. KPMG LLP*, 457 F.3d 1054 (9th Cir. 2006), for the proposition that the selection of an organization’s rules equates with selection of that organization as the forum. That court went on to address whether that same selection was integral to the agreement and concluded that it was not. *Reddam*, 457 F.3d at 1061, *overruled on other grounds by Atl. Nat’l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931 (9th Cir. 2010). The *Reddam* Court explained,

When a court asks whether a choice of forum is integral, it asks whether the whole arbitration agreement becomes unenforceable if the chosen arbitrator cannot or will not act. As one court of appeals put it:

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. Here there is no evidence that the choice of [a certain forum] as the arbitration forum was an integral part of the agreement to arbitrate. Brown’s argument that the arbitration agreement is void because [a certain forum] was unavailable must fail.

Brown, 211 F.3d at 1222 (citations omitted). We see no evidence that the choice was integral here--**in fact, there was not even an express statement that the NASD would be the arbitrator.**

Reddam, 457 F.3d at 1060 (emphasis added). The Court went on to note, “[t]here is no evidence that naming of the NASD was so central to the arbitration agreement that the unavailability of that arbitrator brought the agreement to an end. Something more direct is required before we, in effect, annihilate an arbitration agreement.” *Id.* at 1061 (citations omitted). Simply stated, the authority relied on by the lower court to support its conclusion that the choice of the NASD was integral to the parties’ Agreement actually undermines it.

In addition, “as a general rule, [under § 5 of the Federal Arbitration Act] where the arbitrator named in the arbitration agreement cannot or will not arbitrate the dispute, a court does not void the agreement but instead appoints a different arbitrator.” *McGuire, Cornwell & Blakey v. Grider*, 771 F. Supp. 319, 320 (D. Col. 1991) (concluding that selection of arbitrator was not integral to the agreement even where arbitration agreement contained express arbitrator-selector clause). *See also Jones v. GGNSC Pierre LLC*, 684 F. Supp. 2d 1161, 1167-68 (D.S.D. 2010) (concluding that agreement to arbitrate under a certain set of rules was not integral to agreement where language of arbitration agreement suggested primary intent was to arbitrate any dispute). Rather than simply recognize that FINRA is the successor to the NASD, the trial court erroneously struck down the parties’ Arbitration Agreement in violation of the public policy of both South Carolina and the United States. *See, e.g., Zabinski*, 346 S.C. at 596.

II. WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT THE DISPUTE BETWEEN KELLER AND IFP WAS NOT COVERED BY THE PARTIES’ CLEAR AGREEMENT TO ARBITRATE “ANY DISPUTE” ARISING OUT OF THE AGREEMENT.

As an alternative basis for denying Defendants-Appellants’ Motion to Compel Arbitration, the trial court erroneously concluded that that the Arbitration Agreement did not relate to Keller’s claims against Johnson, his business, and his broker-dealer, IFP. (Trial Court’s May 26, 2011 Order at 6-7; R. pp. 8-9.) This conclusion defies logic for without that Agreement there would have been no relationship between Keller and IFP. In any event, as explained below, it is clear from the face of the Arbitration Agreement that it governs the present dispute.

On September 12, 2007, Keller executed a new account information form, a copy of which was attached to the Motion to Compel Arbitration. (Memo in Supp. Mot. to

Compel Arbitration Ex. A; R. p. 64.) The authenticity of this form is not in question. Appellant Johnson also signed the form as registered representative of ING Financial Partners, Inc. (*Id.*) The line directly above Keller's signature states in all caps that "THIS AGREEMENT CONTAINS A PREDISPUTE ARBITRATION CLAUSE THAT IS FULLY SET FORTH IN PARAGRAPH 18 ON THE REVERSE SIDE OF THIS FORM." (*Id.*; R. p. 63.) On the back of this form is an Account Agreement, containing the Arbitration Agreement. The very first line of the Agreement declares, "In consideration of opening **one or more accounts** on my behalf, and **with respect to any type of transaction that I [Keller] may have with ING Financial Partners, Inc., I agree as follows:**" (*Id.*; R. pp. 64.) It is undisputed that one of the accounts ING Financial Partners, Inc. opened for Keller was the variable annuity. (Compl. ¶¶ 14, 17; R. pp. 18-19.) Thus, this agreement governs the relationship between Keller and Defendants-Appellants as it pertains to the annuity.

Returning to the agreement, several provisions follow the statement quoted above, the most obvious of which is the Arbitration clause. (Memo in Supp. Mot. to Compel Arbitration Ex. A; R. p. 64.) The arbitration clause itself makes clear again that it covers "**any dispute between [Keller] and [Appellant IFP] arising out of this Agreement.**" (*Id.* (emphasis added).) The Supreme Court has described an arbitration clause concerning "[a]ny controversy or claim arising out of or relating to this Agreement" to be a "broad arbitration clause." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 398 (1967). "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." *Aiken v. World Fin.*

Corp., 373 S.C. 144, 149, 644 S.E.2d 705, 708 n.2 (S.C. 2007). In this case, Keller's purchase of the Jackson National annuity was a "transaction" "arising out of" the Arbitration Agreement that he made with ING Financial Partners, Inc. Keller has sued Defendants-Appellants because he is unsatisfied with this transaction. Therefore, the trial court erred in finding that the arbitration clause on its face did not apply to claims against IFP which arise from its dealings with Keller.

In addition, the record below clearly demonstrates that the account information form was connected to the purchase of the variable annuity. Most notably, Defendants-Appellants produced the Affidavit of Appellant Johnson. (Reply in Supp. Mot. to Compel Arbitration Ex. A; R. pp. 89-90.) In his Affidavit, Appellant Johnson explained that each time Keller opened a new account he executed a form containing the account agreement discussed above. (*Id.*) He noted, "[t]he completion of an account information sheet is standard procedure and is required by IFP before opening any new account." (*Id.*) Attached to Johnson's Affidavit were three such account forms executed during the parties' relationship. (*Id.* at Ex. C; R. pp. 97-100.) One of those forms was executed on September 12, 2007. According to Johnson, Keller executed this account form "in connection with the purchase of a variable annuity from Jackson National Life Insurance Company. This was the only new account opened by [Keller] on September 12, 2007." (*Id.* at Ex. A; R. p. 90.) Moreover, Johnson also noted that at the same time Keller executed the account form, he executed a disclosure form. (*Id.*) A copy of the disclosure form was attached to Johnson's Affidavit. (*Id.* at Ex. D; R. pp. 103-104.) The disclosure form, executed by Plaintiff on September 12, 2007, lists the product name as "Jackson

National VA.” (*Id.*; R. p. 103.) Thus, there is no dispute that the Arbitration Agreement governs the purchase of the variable annuity.

In any event, even if this were a close question, which it is not, the strong state and federal policies favoring arbitration weigh heavily in Defendants-Appellants favor on this issue. *See, e.g., Moses H. Cone Mem’l Hosp.*, 460 U.S. at 24-25 (“[A]ny doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.”); *Zabinski*, 346 S.C. at 596 (“The policy of the United States and South Carolina is to favor arbitration of disputes.”). “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). In light of this authority and the record evidence summarized above, the trial court’s conclusion that the Arbitration Agreement fails to govern the purchase of the variable annuity must be reversed.

CONCLUSION

For the reasons stated, this Court should reverse the judgment of the circuit court and order the parties to submit this dispute to arbitration before FINRA.

November 29, 2011

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2011-CP-23-0336

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,

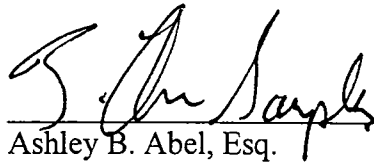
Appellants.

CERTIFICATE OF SERVICE

I certify that I have served the Brief of Appellant this 29th day of November 2011, on counsel for Keller and counsel for Defendant Jackson National Life Insurance Company in the underlying action by depositing the same in the United States Mail, first class postage prepaid, as follows:

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Dated this 29th day of November 2011.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2011-CP-23-00336

DAVID W. KELLER,

Respondent,

v.

ING FINANCIAL PARTNERS, INC., WILLIAM C. JOHNSON,
DIVERSIFIED BUSINESS CONCEPTS, INC. and
JACKSON NATIONAL LIFE INSURANCE COMPANY,

Defendants,

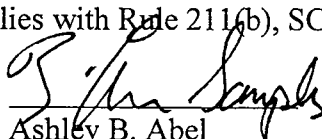
Of Whom ING FINANCIAL PARTNERS, INC.,
WILLIAM C. JOHNSON and DIVERSIFIED BUSINESS
CONCEPTS, INC., are,

Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2011-CP-23-00336

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.

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STATEMENT OF THE CASE

David Keller ("Keller") brought this action on January 18, 2011, in the Greenville County Court of Common Pleas, asserting claims of negligence, negligent representation, constructive fraud, violation of the South Carolina Unfair Trade Practices Act, negligent supervision and training, violation of the South Carolina Uniform Securities Act, and breach of fiduciary duty, against William C. Johnson, a registered representative of ING Financial Partners, Inc., a broker-dealer, and others arising from investment advice Johnson allegedly provided, which led to Keller's purchase of a variable annuity offered by Jackson National Life Insurance Company ("Jackson National"). Johnson's business is known as Diversified Business Concepts, Inc. At bottom, Keller's Complaint alleges that the variable annuity recommended by Johnson was not a suitable investment that matched Keller's needs and desires.

On February 18, 2011, ING Financial Partners, Inc., Johnson, and Diversified Business Concepts, Inc. (collectively "Appellants") moved to compel arbitration based on an arbitration clause in the account agreement entered into between Keller and ING Financial Partners, Inc. In that Motion, Appellants argued that the broadly-worded arbitration clause in the parties' agreement covered the issues raised by Keller's Complaint and that arbitration was required under both state and federal law. On April 6, 2011, Keller filed a response arguing that the account agreement containing the arbitration clause was unrelated to the purchase of the variable annuity and also that the parties' selected the National Association of Securities Dealers ("NASD") to arbitrate under the agreement, and, because the NASD is now known as FINRA, the entire Arbitration Agreement is void. Two days later, on April 8, 2011, Appellants filed a

Reply brief, maintaining that the Arbitration Agreement was executed at the purchase of the variable annuity and that it is broad enough to cover any dispute between the parties. Johnson filed an Affidavit with the Reply, explaining that each time Keller opened a new account, he executed an account agreement containing the arbitration clause at issue, and that he did so concurrent with his purchase of the variable annuity. Those agreements and related documents executed at the same time as the purchase of the variable annuity were attached to the Affidavit. Appellants also argued that to the extent the parties selected the NASD as a forum, the NASD has been succeeded by an entity that applies the same procedural rules referenced by the Arbitration Agreement.

A hearing on Appellants' Motion to Compel Arbitration was held on April 11, 2011, before the Hon. D. Garrison Hill. Judge Hill took the Motion under advisement. On May 18, 2011, Judge Hill denied Appellants' Motion to Compel Arbitration without explanation, and requested that Keller's counsel submit a proposed order. Thereafter, Keller submitted a proposed order, which Judge Hill issued by written Order, dated May 26, 2011. Because Appellants' Answer deadline was approaching, and Appellants had not received a copy of the written Order, they served a Notice of Appeal from the summary order on June 2, 2011. On June 3, 2011, Appellants received Judge Hill's written Order, dated May 26, 2011, denying the Motion to Compel Arbitration. Thereafter, on June 16, 2011, Appellants served and filed a Notice of Appeal from this final Order. The two Notices of Appeal are consolidated herein.

On August 31, 2011, Appellants filed and served their initial brief on all parties. Thereafter, on October 1, 2011, Appellants were served with a copy of Respondent's Initial Brief. This Reply follows.

ARGUMENT

I. WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT THE PARTIES' ARBITRATION AGREEMENT WAS VOID BECAUSE THE PARTIES AGREED TO ARBITRATE UNDER THE RULES OF THE NASD WHERE THE NASD HAS BEEN SUCCEEDED BY ANOTHER ENTITY, FINRA, THAT APPLIES THE SAME RULES.

A. Keller Cannot Avoid The Public Policy Favoring The Arbitration of Disputes.

Guiding this appeal and compelling arbitration in this case is the strong public policy both of the United States and of South Carolina which favors the arbitration of disputes. *See, e.g., AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740, 1745, 179 L. Ed. 2d 742, 751 (2011) (recognizing “liberal federal policy favoring arbitration”); *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.”). This policy is especially weighty here where the parties executed an arbitration agreement, the validity of which is unquestioned. In his brief, Keller attempts to side-step this strong public policy by arguing that this case is about something more “fundamental”—the terms of the agreement itself. But, this is not a distinction that South Carolina appellate courts have made. *E.g., Partain v. Upstate Automotive Group*, 386 S.C. 488, 491, 689 S.E.2d 602, 603-04 (S.C. 2010) (recognizing strong public policy and construing language of arbitration agreement). In fact, in the principal South Carolina decision relied on by Keller to support his argument, the South Carolina Supreme Court repeated the rule that “it is the policy of this state to favor the arbitration of disputes” and that “any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration.” *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 129, 678 S.E.2d

435, 437 (S.C. 2009). This strong public policy permeates the issues of this appeal and demands arbitration here.

B. FINRA Is The Successor to The NASD And Continues to Apply Its Rules.

In his brief, Keller fails to adequately respond to Appellants' argument that FINRA is the successor entity to the NASD and, as such, arbitration before FINRA should be compelled. For all intents and purposes the two self-regulatory organizations are one and the same. As explained in detail in Appellants' Brief, numerous courts have recognized this fact and have compelled arbitration before FINRA where the arbitration agreement selected the NASD as the forum. *See Branch v. Sickert*, No. 2:10-128, 2011 U.S. Dist. LEXIS 19392 (N.D. Ga. Feb. 28, 2011) (construing clause almost identical to one at issue and ordering arbitration before 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").¹ Notably absent from

¹ Keller's only response to some of these decisions is to argue that because they are unpublished they do not bind the Court. Though obviously not controlling, these opinions are persuasive authority regarding how other courts have addressed the situation facing this Court. Moreover, this Court frequently relies on unpublished decisions from other jurisdictions when there is no controlling precedent on point. *E.g.*, *Beaufort County Sch. Dist. v. United Nat'l Ins. Co.*, 392 S.C. 506, 520-22, 709 S.E.2d 85, 93-94 (S.C. Ct. App. 2011) (looking to other jurisdictions for guidance regarding the construction of language in insurance policies, including some unpublished opinions); *Bean v. S.C. Cent. R.R. Co.*, 392 S.C. 532, 709 S.E.2d 99 (S.C. Ct. App. 2011) (citing unpublished opinions

Keller's brief is the citation to a single decision that has gone the other way and denied arbitration before FINRA where the parties selected the NASD's rules. Thus, on this basis alone, the decision of the trial court should be reversed.

Not only is FINRA the successor in name to the NASD, but even Keller admits that FINRA and the former NASD operate under the same guidelines. (Resp't Br. at 12.) In fact, Keller fails to point to a single difference between arbitration before FINRA and arbitration before the NASD. Instead, Keller dodges the question by stating that "a meticulous comparison between the NASD and FINRA's current code of arbitration procedure would be irrelevant." (Resp't Br. at 11.) Though far from irrelevant, a "meticulous comparison" would reveal that there are no material differences between the current rules of FINRA and the rules of the NASD. *See* FINRA, Code of Arbitration Procedure, <http://www.finra.org/ArbitrationMediation/Rules/CodeOfArbitrationProcedure/>, (last visited October 12, 2011.) (containing links to versions of current and former rules); *see also 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.").

Keller attempts to avoid arbitration before FINRA by insisting that one of the primary reasons the parties selected the NASD was for its expertise in dealing with securities disputes. (Resp't Br. at 6, 9.) If this is true, then Keller should not hesitate to arbitrate his dispute before FINRA because, not only does FINRA operate under the same rules as the NASD, but it arbitrates thousands of securities disputes similar to Keller's

from other jurisdictions regarding validity of release under Federal Employers Liability Act).

every year. (See Defs.' Memo in Supp. of Mot. to Compel Arbitration at 9-10; R. pp. 57-58.) Keller fails to provide any persuasive reason why this dispute should not likewise be arbitrated.

Because FINRA and NASD are now one and the same, the Court need not address Keller's argument that the selection of the NASD was an integral term to the agreement. This is so because, even if it was an integral term (which Appellants do not concede), then arbitration before FINRA must still be compelled because FINRA is simply the successor to the NASD. *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')."); *Raymond James Fin. Servs. v. Bishop*, 596 F.3d 183, 185 n.1 (4th Cir. 2010) ("NASD has been succeeded by FINRA."). It applies the same rules and has the same, if not greater, expertise in arbitrating securities disputes making it the most appropriate forum for resolving this dispute.² Therefore, the lower court's decision should be reversed and arbitration before FINRA compelled.

C. A Single Reference to The Rules of Procedure of The NASD Is Not An "Integral Term" Selecting The NASD as The Only Forum.

Rather than confront the obvious issue that there are no material differences between FINRA and the NASD, Keller devotes much of his brief to a

² As explained in detail in Appellants' Brief, this dispute could have been resolved with a simple footnote, as that is how the South Carolina Supreme Court addressed a similar issue where the entity named in the arbitration agreement had been succeeded by another entity with a different name. See *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 128, n.1 678 S.E.2d 435, 437 (S.C. 2009) ("The NHLA has since become the American Health Lawyers Association (the 'AHLA') and hereinafter will be referred to by that name.").

discussion of “traditional contract principles” in arguing that the arbitration agreement is void because the reference to the applicability of “the NASD rules” was somehow integral. Even applying those “traditional contract principles,” however, Keller’s argument (and the trial court’s reasoning) fails to withstand scrutiny.

The agreement’s indication that NASD rules would apply was not integral to the parties’ agreement to arbitrate any and all disputes. According to Keller and the cases he relies on,

The chosen arbitral forum is integral to the agreement where the chosen rules may have a substantive effect on the claims, where the forum has specialized knowledge or expertise concerning the subject matter of the agreement, or where the agreement reveals the parties strongly indicated that a particular arbitrator, to the exclusion of others, was chosen.

(Resp’t Br. at 6.) None of these factors are present in this case. As to the first factor, as discussed above, there are no material differences in the rules of FINRA and the former rules of the NASD nor does Keller explain how arbitration under FINRA would have a substantive effect on his claims. As to the second factor, as already discussed, FINRA has the same, if not greater, specialized knowledge and expertise concerning securities disputes. As to the final factor, the arbitration agreement here fails to indicate that one arbitrator was chosen to the exclusion of others. In fact, there is no forum selection clause in the Arbitration Agreement. (Reply in Supp. Mot. to Compel Arbitration Ex. B; R. p. 94.) The agreement refers to “arbitration forums” in the plural and its only reference to the NASD is to the “then-applicable provisions of the Code of Arbitration Procedure of NASD.” (*Id.*) Today, the current “applicable provisions of the Code of Arbitration Procedure of NASD” is the Code of Arbitration Procedure of FINRA. Thus,

under Keller's own reasoning, the selection of NASD as arbitrator, to the extent there was even a selection, was not integral to the agreement.

Those courts that have previously examined the meaning of "integral term" as it applies to forum selection clauses in arbitration agreements make clear that the reference here to the applicable provisions of the NASD procedures is not integral. In *Reddam v. KPMG LLP*, 457 F.3d 1054 (9th Cir. 2006),³ the Ninth Circuit explained the meaning as follows:

When a court asks whether a choice of forum is integral, it asks whether the whole arbitration agreement becomes unenforceable if the chosen arbitrator cannot or will not act. As one court of appeals put it:

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. Here there is no evidence that the choice of the NAF as the arbitration forum was an integral part of the agreement to arbitrate. Brown's argument that the arbitration agreement is void because the NAF was unavailable must fail.

Brown, 211 F.3d at 1222 (citations omitted). We see no evidence that the choice was integral here--**in fact, there was not even an express statement that the NASD would be the arbitrator.**

Reddam, 457 F.3d at 1060 (emphasis added), *overruled on other grounds by Atl. Nat'l Trust LLC v. Mt. Hawley Ins. Co.*, 621 F.3d 931 (9th Cir. 2010). The court went on to note, "[t]here is no evidence that naming of the NASD was so central to the arbitration agreement that the unavailability of that arbitrator brought the agreement to an end. Something more direct is required before we, in effect, annihilate an arbitration

³ Interestingly, though *Reddam* clearly undermines the trial court's decision in this case, it was cited by the trial court in the Order denying arbitration. (Trial Court's May 26, 2011 Order at 5; R. p. 7.)

agreement.” *Id.* at 1061 (citations omitted). *See also Clerk v. Cash Cent. of Utah, LLC*, 2011 U.S. Dist. LEXIS 95494 at *16 (E.D. Pa. 2011) (“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, and the arbitration clause remains enforceable despite the unavailability of the designated arbitral forum.”); *Clerk v. First Bank*, 735 F. Supp. 2d 170, 180 (E.D. Pa. 2010) (“The question of whether an arbitration provision is unenforceable based on the unavailability of a chosen arbitrator ‘turns on whether the selection of . . . arbitrator is integral to the [a]greement.’ ‘At a minimum, for the selection of an arbitrator to be deemed integral, the arbitration clause must include an ‘express statement’ designating a specific arbitrator.’”) (internal citations omitted). Here, given that the Arbitration Agreement referred to multiple arbitration forums twice and to the NASD only once, the mention of the NASD rules was not integral to the parties’ agreement. Thus, the lower court’s decision denying Appellants’ Motion to Compel arbitration must be reversed.

As an additional basis for compelling arbitration, Appellants pointed to case law interpreting Section 5 of the Federal Arbitration Act, which provides that a court may appoint a substitute arbitrator in the event the named arbitrator is unable to serve. *See* 9 U.S.C. § 5. Keller contends that Section 5 is inapplicable here. This is true to the extent the agreement at issue in this appeal did not name a specific arbitrator but only required arbitration generally. However, even where other agreements have expressly indicated that a NASD arbitrator was a preferred arbitrator, numerous courts have used Section 5 to substitute arbitrators. For example, in *Brown v. ITT Consumer Fin. Corp.*,

the Eleventh Circuit affirmed the lower court's substitution of an arbitrator where the specified forum, the National Arbitration Forum, had dissolved. *Brown*, 211 F.3d 1217, 1222 (11th Cir. 2000) ("Where the chosen forum is unavailable, however, or has failed for some reason, § 5 applies and a substitute arbitrator may be named.") (emphasis added); see also *Carideo v. Dell, Inc.*, 2009 U.S. Dist. LEXIS 104600 (W.D. Wash. Oct. 26, 2009) (same). Though certainly not critical to Appellants' argument, Section 5 of the FAA supplies an additional basis on which to reverse the decision of the trial court.

II. WHETHER THE TRIAL COURT ERRED IN CONCLUDING THAT THE DISPUTE BETWEEN KELLER AND IFP WAS NOT COVERED BY THE PARTIES' CLEAR AGREEMENT TO ARBITRATE "ANY DISPUTE" ARISING OUT OF THE AGREEMENT.

A. Keller's Conclusory Assertion That The Account Information Form Is Unrelated to The Variable Annuity Is Unsupported by The Record.

Keller also argues, in support of the lower court's alternative holding, that the account information form containing the arbitration agreement at issue is unrelated to the variable annuity that he purchased. However, Keller fails to point to any persuasive evidence in the record to support this argument. Instead, he simply states that the form "appears to have been executed in conjunction with the Portfolio product." (Resp't Br. at 3.) Keller would have the Court assume that he purchased only two accounts through Appellants, and that because the account information form does not specifically contain the words "Jackson National variable annuity" that it must be related to the other account he purchased.⁴ By this same logic, the agreement is also unrelated to portfolio product as

⁴ Citing to paragraph 17 of the Complaint, Keller contends in his Statement of Facts that he opened both the annuity and the "portfolio" account in September 2007. (Resp't Br. at 2.) Not only is this facially inaccurate, but it is not alleged in paragraph 17 or any other paragraph in the Complaint.

that label also fails to appear on the form. Regardless, this argument is refuted conclusively by the weight of evidence in the record.

The account information form containing the arbitration agreement was executed on September 12, 2007. (Reply in Supp. Mot. to Compel Arbitration Ex. B; R. pp. 93-94.) In the only evidence on point in the record, William Johnson declared that this specific form was executed in connection with the purchase of the variable annuity at issue. (*Id.* at Ex. A ¶¶ 9-10; R. p. 90.) Moreover, he expressly stated that “[t]his was the only new account opened by Plaintiff on September 12, 2007.” (*Id.*) To support his assertion, he attached a disclosure form executed at the same time as the Arbitration Agreement, which refers specifically to the variable annuity. (*Id.* at Ex. D; R. pp. 103-104.) He also attached account information forms executed in connection with the opening of Keller’s other accounts, none of which are dated September 12, 2007. (*Id.* at Ex. C; R. pp. 97-100.) Furthermore, as argued in greater detail in Appellants’ Brief, the agreement on its face is made “with respect to any type of transaction that [Keller] may have with ING Financial Partners, Inc.” (*Id.* at Ex. B; R. p. 94.) Therefore, the parties clearly intended the agreement to govern the purchase of the variable annuity.

Keller also wrongly suggests that because Jackson National is not a party to this appeal that Jackson National agrees with Keller’s position on arbitration. This suggestion was expressly refuted by counsel for Jackson National during the hearing on the motion to compel arbitration:

Counsel for [Keller] indicates that because we are silent in trying to compel arbitration on behalf of Jackson National that somehow is deemed as that we admit that this form signed by [Keller] doesn’t have anything to do with the Jackson National Annuity. That is completely wrong. The reason we are not taking a position

on this or trying to compel arbitration is that Jackson National isn't a party to that particular agreement.

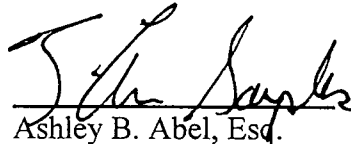
(Tr. at 21-22; R. p. 125, line 22 – p. 126, line 5.) Thus, the fact that Jackson National is not a party to this appeal is irrelevant to the enforceability of the parties' arbitration agreement. In short, for these reasons and for the reasons set forth in Appellants' Brief, the trial court erred in concluding that the arbitration agreement was unrelated to the purchase of the variable annuity.

III. CONCLUSION

For the reasons stated above and in Appellants' Brief, this Court should reverse the judgment of the circuit court and order the parties to submit this dispute to arbitration.

November 29, 2011

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2011-CP-23-0336

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,

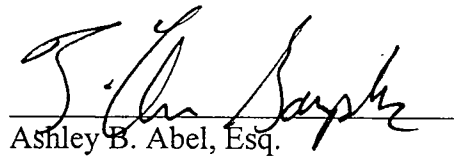
Appellants.

CERTIFICATE OF SERVICE

I certify that I have served the Reply Brief of Appellant this 29th day of November 2011, 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:

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Dated this 29th day of November 2011.

THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2011-CP-23-00336

DAVID W. KELLER,

Respondent,

v.

ING FINANCIAL PARTNERS, INC., WILLIAM C. JOHNSON,
DIVERSIFIED BUSINESS CONCEPTS, INC. and
JACKSON NATIONAL LIFE INSURANCE COMPANY,

Defendants,

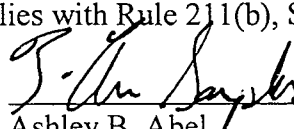
Of Whom ING FINANCIAL PARTNERS, INC.,
WILLIAM C. JOHNSON and DIVERSIFIED BUSINESS
CONCEPTS, INC., are,

Appellants.

CERTIFICATE OF COUNSEL

The undersigned certifies that this Final Brief complies with Rule 211(b), SCACR.

November 29, 2011


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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY

D. Garrison Hill, Circuit Court Judge

Case No. 2011-CP-23-00336

David W. Keller Respondent,

v.

ING Financial Business 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,

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STATEMENT OF ISSUES ON APPEAL

1. WHETHER THE LOWER COURT ERRED IN CONCLUDING THAT THE PURPORTED AGREEMENT TO ARBITRATE FOUND ON AN UNRELATED FORM DOES NOT GOVERN THIS DISPUTE.
2. WHETHER THE LOWER COURT ERRED IN CONCLUDING THAT THE FORUM SELECTION CLAUSE WAS AN INTEGRAL TERM TO THE ARBITRATION AGREEMENT, AND ITS FAILURE RENDERS THE AGREEMENT VOID.

FACTS

After thirty-seven (37) years of employment with Michelin, Plaintiff and Respondent David W. Keller (hereinafter "Keller") sought to invest a substantial portion of his life's savings into financial products suitable to his retirement needs. (R. p. 17, line 18-p. 18, line 17). Appellant, William C. Johnson ("Johnson"), through his business, Diversified Business Concepts, Inc., solicited Keller's business, and held himself out as a skilled and knowledgeable expert in investment planning, insurance and estate planning. (R. p. 16, line 8-p. 18, line 7). After meeting with Johnson, Keller relied upon Johnson's representations, and provided Johnson with private and sensitive financial information. (R. p. 18, lines 8-10). Subsequently, from May through October of 2007, Keller and Johnson met on multiple occasions to discuss potential investments suitable to Keller's investment needs, which included financial protection in the event of a long life span, and that he receive a guaranteed annual increase in value. (R. p. 18, lines 11-17).

After multiple discussions, Johnson ultimately recommended and advised that Keller purchase two (2) distinct investments: 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"). (R. p 18, lines 18-23). Relying upon Johnson's representations regarding his investing expertise, and upon his advice

concerning the above-referenced investments, Keller purchased the two (2) products in September of 2007. (R. p. 19, lines 11-15). Keller invested his retirement benefits from Michelin, along with additional savings, in the Annuity and Portfolio, with a total investment of \$1,461,742.40. (R. p. 19, lines 11-15). The Annuity itself was purchased from Jackson National Life Insurance Company. (R. p. 19, lines 11-15). The Portfolio investment, on the other hand, was purchased directly from Appellant ING.

In late 2009, Keller discovered that the Annuity did not, in fact, provide the lifetime benefits or guaranteed annual increase in value as had been represented by Johnson. (R. p. 20, lines 1-3). After unsuccessful discussions with Johnson, Keller filed a formal complaint with Appellant ING. (R. p. 21, lines 1-7). Appellant ING allegedly investigated the matter, but sought no input from Keller, instead relying solely upon Johnson's statements. (R. p. 21, lines 1-7). ING ultimately disclaimed any obligation to undertake any form of remedial action. (R. p. 21, lines 1-7). As a result, Respondent filed the present case in the Greenville County Court of Common Pleas, in response to which Appellants filed a Motion to Compel Arbitration and Dismiss or Stay. (R. p. 16, 47). The parties conducted oral arguments concerning the Motion to Compel Arbitration and Dismiss or Stay before the Honorable D. Garrison Hill on April 14, 2011, and Judge Hill subsequently issued an order denying the Appellants' Motion on May 26, 2011. (R. p. 3). Appellants filed this present appeal.

ARGUMENTS

I. There is No Binding Agreement to Arbitrate because the ING "Account Information" Form Upon which Appellants Rely is Unrelated to the Jackson National Annuity Contract.

The purported arbitration agreement that Appellants assert binds Respondent to arbitrate the present case is an ING "Account Information" form unrelated to Respondent's Jackson National Annuity, and therefore bears no relevance to Respondent's claims relating to that Annuity.

At the time the parties signed the "Account Information" form, Keller and Appellant Johnson executed multiple documents relating to either the Annuity or the Portfolio purchase. The "Account Information" form appears to have been executed in conjunction with Respondent's purchase of the Portfolio product, an ING product, recommended by Appellant Johnson to Respondent. (R. pp. 63-64). 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. Despite the fact that the Annuity, the subject of the current litigation, is a Jackson National product, Jackson National answered Respondent's Complaint, served discovery on all parties, and has not moved to compel arbitration.

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. Commc'ns Workers, 475 U.S. 643, 648 (1986). The arbitration clause contained in the "Account

Information” form relates specifically to the Portfolio account, not the Jackson National Annuity. Consequently, the arbitration clause has no bearing on any disputes relating to the Jackson National Annuity—the subject of this present litigation. Simply put, Respondent never agreed to arbitrate any claims relating to the Jackson National Annuity. For that reason alone, Respondent submits that this Court should affirm the decision of the lower court.

II. The Purported Arbitration Agreement is Invalid because the Parties’ Selection of the NASD as the Arbitrator Constitutes an Integral Term of the Contract, and the NASD Does Not Exist.

Even if the arbitration clause at issue covered disputes relating to the Jackson National Annuity, the failure of a material term of that agreement renders the arbitration agreement void. 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.” (R. p. 64). The NASD, or the National Association of Securities Dealers, Inc., does not exist, having merged 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 arbitral 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 should not be enforced.

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). As such, a valid arbitration agreement

requires the parties' "mutual assent to the terms." Schaer 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 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.

Appellants rely heavily on state and federal law favoring the liberal interpretation of the scope of an arbitration clause. (Appellants' Initial Br., p. 7). These cases, however, primarily concern how to construe the scope and breadth of an arbitration clause when determining whether a certain type of claim is subject to arbitration under the agreement. See AT&T Techs. v. Communs. Workers of Am., 475 U.S. 643, 650 (1986); Zabinski v. Bright Acres Assocs., 346 S.C. 580, 596, 553 S.E.2d 110, 118 (2001). The dispute in the present case constitutes a more fundamental question than the breadth of an arbitration clause, as it involves whether the failure of a material term of the arbitration agreement itself thereby voids the entire agreement to arbitrate. Consequently, the question involves fundamental tenets of contract law. The FAA was enacted not to elevate agreements to arbitrate beyond traditional contract principals, but to "overrule the judiciary's longstanding refusal to enforce agreements to arbitrate, and to place such agreements upon the same footing as other contracts." Volt Info. Scis. v. Bd. of Trs., 489 U.S. 468, 478 (1989). In other words, "[i]t simply requires courts to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms." Id. In the present case, an integral term of the agreement to arbitrate failed,

rendering performance as agreed to by the parties impossible, and traditional contract principles mandate voiding the entire agreement 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 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) (“Where the parties have agreed explicitly to settle their disputes before particular arbitration fora, that agreement must control.”). Courts have further determined that where “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)). The chosen arbitral forum is integral to the agreement where the chosen rules may have a substantive effect on the claims, where the forum has specialized knowledge or expertise concerning the subject matter of the agreement, or where the agreement reveals the parties strongly intended that a particular arbitrator, to the exclusion of others, was chosen. See, e.g., Smith Barney, Inc., 212 F.3d at 862; Grant, 383 S.C. 125, 678 S.E.2d at 439; In re Salomon, 68 F.3d at 561. Because the selection of the NASD constituted an

integral term of the agreement, and because the chosen arbitral forum selected does not exist, the arbitration agreement at issue in the present case is impossible to perform, and Respondent submits that this Court should affirm the Order of the lower Court.

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 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, 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 arbitral 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.

The rationale employed by the South Carolina Supreme Court in Grant has been echoed in a multitude of other cases across jurisdictions. In In re Salomon Inc., 68 F.3d 554, 561 (2d Cir. 1995), for example, the parties agreed to arbitrate any dispute pursuant to “the arbitration procedure prescribed in the Constitution and rules then obtaining of the NYSE.” Id. at 558. In that case, the Second Circuit Court of Appeals affirmed the lower court’s refusal to substitute an alternate arbitrator after the NYSE’s arbitration group declined to hear the dispute. Id. at 561. The court explicitly rejected the appellants’ contention that “arbitration need not take place before the NYSE...so long as the NYSE’s rules govern in a proceeding brought before whichever arbitral body hears the dispute.” Id. at 558. In so holding, the court held that 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). Consequently, the Second Circuit determined that the selection of the NYSE was an integral term, and affirmed the lower court’s refusal to appoint substitute arbitrators. Id.

Likewise, in Roney & Co. v. Goren, 875 F.2d 1218, 1219 (6th Cir. 1989), the Sixth Circuit affirmed the district court’s decision to bar the appellant from submitting

her claim to arbitration before the NASD. The Court premised its decision on a pre-dispute arbitration provision executed by the parties 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 reaching its decision, 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. The parties selected the NSYE, the selection of the NYSE 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, In re Salomon, and Roney & Co., 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. The parties selected the NASD due to its evident expertise in the securities arena, and due to its experience handling the type of disputes contemplated in the arbitration clause. Moreover, the selection of the NASD as the forum has a wide-ranging, substantive impact on the arbitration process. The selection of the NASD, therefore, was an integral term of the arbitration clause.

In mid-2007, however, the NASD merged with the New York Stock Exchange (a competitor in the arbitration of securities disputes), forming a new entity 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 NASD’s former dispute resolution

process. 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, therefore, is not the NASD, and the parties no longer have access to the NASD as an arbitration forum.

Appellants contend that because the parties agreed to arbitration under the “provisions of the code of arbitration procedure of the NASD,” they did not specify the forum, but merely its rules. (Appellants’ Initial Brief, pp. 12-13). Courts, however, agree that a contractual provision selecting the rules of an organization like the NYSE or NASD implicitly selects that organization as *the* forum for the arbitration. See In re Salomon, 68 F.3d at 557-58; Luckie v. Smith Barney, Harris Upham & Co., Inc., 999 F.2d 509, 510-11 (11th Cir. 1993); PaineWebber, Inc. v. Rutherford, 903 F.2d 106, 108 (2d Cir. 1990); Roney & Co., 875 F.2d at 1219-23. This conclusion makes sense, as the forum whose rules are selected would be best equipped to efficiently and knowledgeably arbitrate the case. To hold otherwise would be to permit absurd and inefficient results. The AHLA, for example, is simply not equipped to efficiently and effectively handle securities disputes, just as FINRA would be ill-equipped to handle medical disputes. In choosing the rules of the NASD, the parties chose to arbitrate before that particular forum. At the very least, the term is ambiguous, and because Appellants drafted the agreement, the contract must be construed against them. See McGill v. Moore, 381 S.C. 179, 186, 672 S.E.2d 571, 575 (“any ambiguity will be construed in favor of the non-drafting party.”); Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents, 471 N.W.2d 859, 863 (Iowa 1991) (“when there are ambiguities in a contract, they are strictly construed against the drafter.”)

Appellants further contend that because FINRA continues to employ the NASD Code of Arbitration Procedures, FINRA constitutes an acceptable forum in which to arbitrate the present case. To support this point, Appellants rely heavily on the unpublished opinions of federal and state courts from various jurisdictions, including Branch v. Sickert, No. 2:10-128, 2011 U.S. Dist. LEXIS 19392 (N.D. Ga. Feb. 28, 2011), Klein v. Ameriprise Fin. Serv., Inc., 2009 U.S. Dist. LEXIS 27545 (W.D. Mo. Mar. 31, 2009), Morgan Stanley & Co. v. Feeley, 2010 NY Slip Op. 30024U (N.Y. Sup. Ct. Jan. 5, 2010), and Suschil v. Ameriprise Fin. Serv., Inc., 2008 U.S. Dist. LEXIS 27903 (N.D. Ohio Apr. 7, 2008). Rule 268(d)(2), SCACR provides that “Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved.” For that reason, Respondent submits they should not be considered by this Court.

Moreover, as has been thoroughly discussed above, courts agree that selecting the rules of a particular forum constitutes a forum selection clause, and “[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.” Roney & Co., 875 F.2d at 1223. Furthermore, a meticulous comparison between the NASD and FINRA’s current code of arbitration procedure would be irrelevant. In Roney & Co., discussed in detail above, the Sixth Circuit noted that there was no substantive difference between the NASD’s and the NYSE’s arbitration procedure. Id. at 1220. Despite this fact, the court held that the selection of the NYSE meant that only the NYSE could arbitrate the dispute. The fact that the NASD was capable of handling the arbitration with equal skill and efficiency, and the fact that the

NYSE and the NASD “adopted [substantially] the same Uniform Code of Arbitration” had no bearing. Id. at 1220-21. The court concluded that “the customer’s ability to demand arbitration before the arbitral forum of his choice dictates that he is equally free to agree to limit his recourse to a particular forum.” Id. at 1223. The court further reasoned that its decision in no way conflicted with “federal policy favoring arbitration.” Id.

Consequently, just as in Grant, Roney & Co., and In re Salomon, the parties to the present case are deprived of the arbitral forum that they specifically bargained for and agreed upon. 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 – regardless of whether they operate pursuant to the same guidelines. Because the NASD is not available to resolve the present dispute, and because an arbitrator selection clause in the subject agreement is a material term of the agreement to arbitrate, Respondent submits that this Court should find the arbitration agreement impossible to perform, and affirm the decision of the lower court.

Finally, Appellants’ contention that Section 5 of the Federal Arbitration Act (“FAA”) permits a court to appoint an arbitrator “where the arbitration named in the arbitration agreement cannot or will not arbitrate the dispute” is misplaced. 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.

9 U.S.C. § 5 (2011) (emphasis added). Simply put, Section 5 does not permit a court “to circumvent the parties’ designation of an exclusive arbitral forum.” In re Salomon, 68 F.3d at 560.

Neither the “failure to avail” provision nor the “lapse” clause applies to the facts of the present case. Simply contesting the validity of an arbitration provision itself, as the Respondent does in the present case, does not constitute a “failure to avail” oneself of an arbitration clause. If that were the case, each and every time a party contested the scope or validity of an arbitration clause, “the court could invoke § 5 to name arbitrators without following any procedures or limitations contained in the agreement.” Id. (citing In re Utility Oil Corp., 10 F. Supp. 678, 680-81 (S.D.N.Y. 1934)). Moreover, courts have determined that a “lapse” as referred to in Section 5 “means 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.” Id. (emphasis added) (citing Marine Prods. Export Corp. v. M.T. Globe Galaxy, 977 F.2d 66, 68 (2d Cir. 1992) (arbitrator’s death left vacancy on panel); Chattanooga Mailers Union, Local No. 92 v. Chattanooga News-Free Press Co., 524 F.2d 1305, 1315 (6th Cir. 1975) (agreement’s procedure for selecting arbitrator no longer in effect); Erving v. Virginia Squires Basketball Club, 468 F.2d 1064, 1067-68 n.2 (2d Cir. 1972) (arbitrator designated in parties’ agreement had conflict of interest). Because Respondent contests the fundamental validity of the arbitration clause itself, there can be no “lapse” unless and until a court determines that the agreement is valid and binding. Obviously, that has not

happened in the present case, and the facts and circumstances of the present case therefore do not implicate Section 5.

CONCLUSION

As discussed above, the ruling of the lower court should be affirmed because the arbitration clause in the "Account Information" form relates to the Portfolio, not the Annuity at issue in the present litigation, and therefore has no bearing on dispute resolution of claims relating to the Annuity. Moreover, even should this Court extend the arbitration clause to cover claims relating to the Annuity, the unavailability of the NASD constitutes a failure of a material term of the arbitration clause, thereby rendering the arbitration clause unenforceable. Consequently, because there exists no binding agreement to arbitrate the claims relating to the Annuity, the Respondent submits that this Court should affirm the lower court's denial of Appellants' Motion to Compel Arbitration and Dismiss or Stay.

Respectfully submitted,

HAYNSWORTH SINKLER BOYD, P.A.

November 29, 2011
Greenville, SC



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THE STATE OF SOUTH CAROLINA
IN THE COURT OF APPEALS

APPEAL FROM GREENVILLE COUNTY

D. Garrison Hill, Circuit Court Judge

Case No. 2011-CP-23-00336

David W. Keller.....Respondent,

v.

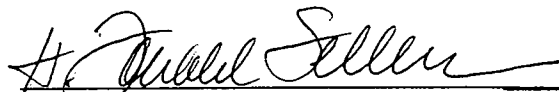
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Of Whom ING Financial Partners, Inc.,
William C. Johnson, and Diversified Business Concepts, Inc., are.....Appellants,

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The undersigned certified that this Final Brief complies with Rule 211(b), SCACR.

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Of Whom ING Financial Partners, Inc.,
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D. Garrison Hill, Circuit Court Judge

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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.

PETITION FOR REHEARING EN BANC

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PETITION FOR REHEARING

This case involves a claim against a securities broker-dealer and its registered representative for alleged misconduct in connection with investment advice—the type of claim which is 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 this Court has 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 designating NASD as the forum for arbitration. In effect, this decision renders the NASD/FINRA merger a nullity in South Carolina. The panel’s decision is unsupported in law, 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 are properly subject to arbitration. For these reasons, and as explained further below, Appellants respectfully petition for rehearing en banc.

PROCEDURAL HISTORY

David Keller (“Keller”) brought this action on January 18, 2011, in the Greenville County Court of Common Pleas, asserting various state law claims against William C. Johnson, a registered representative of ING Financial Partners, Inc., a broker-dealer, and others arising from investment advice Johnson allegedly provided, which led to Keller’s purchase of a variable annuity offered by Jackson National Life Insurance Company (“Jackson National”). Keller’s Complaint centers around the allegation that the variable annuity recommended by Johnson was not suited to Keller’s investment goals.

On February 18, 2011, ING Financial Partners, Inc., Johnson, and Diversified Business Concepts, Inc. (collectively, “Appellants”) moved to compel arbitration based on an arbitration clause in the account agreement entered into between Keller and ING Financial Partners, Inc. The trial court, Hon. D. Garrison Hill, denied Appellants’ motion without explanation, and requested that Keller’s counsel submit a proposed order. Thereafter, Keller submitted a proposed order, which Judge Hill issued by written Order, dated May 26, 2011. This appeal followed. Following briefing and oral argument, a panel of this Court issued its opinion on January 9, 2013, affirming the trial court’s decision.

BACKGROUND

William C. Johnson is a financial advisor doing business as Diversified Business Concepts, Inc., and is a registered representative of ING Financial Partners, Inc., a securities broker-dealer, pursuant to FINRA rules. (Compl. ¶¶ 2, 5; R. p. 16-17.)

Keller made a number of investments in consultation with Johnson, including a variable annuity issued by Defendant Jackson National Life (“the variable annuity”),

which Keller purchased. (*Id.* ¶ 17; R. p. 19.) On September 12, 2007, in connection with the purchase of the variable annuity, Keller executed an IFP account agreement. (Reply in Supp. of Mot. to Compel Arbitration Ex. A; R. pp. 89-90.) ING Financial Partners, Inc. requires that such forms be completed prior to opening any new account. (*Id.*) During his relationship with Johnson, Keller executed three different account information forms prior to opening his various accounts with ING Financial Partners, Inc. (*Id.*) On the first page of the form, directly above Keller's signature, it states, in all capital letters, "I understand that this agreement contains a predispute arbitration clause that is fully set forth in paragraph 18 on the reverse side of this form." (*Id.*; R. p. 63.) The reverse side of the form sets forth the terms of the parties' agreement. (*Id.*; R. p. 64.) It provides that "with respect to any type of transaction that I may have with ING Financial Partners, Inc., I agree as follows." (*Id.*) One of the clauses that follows is an arbitration clause appearing in all caps and in its own box set apart from the rest of the agreement. (*Id.*) That clause states:

18. Arbitration Clause. THIS AGREEMENT CONTAINS A PREDISPUTE ARBITRATION CLAUSE. BY SIGNING AN ARBITRATION AGREEMENT THE PARTIES AGREE AS FOLLOWS:

(A) ALL PARTIES TO THIS AGREEMENT ARE GIVING UP THE RIGHT TO SUE EACH OTHER IN COURT, INCLUDING THE RIGHT TO A TRIAL BY JURY, EXCEPT AS PROVIDED BY THE RULES OF THE ARBITRATION FORUM IN WHICH A CLAIM IS FILED.

(B) ARBITRATION AWARDS ARE GENERALLY FINAL AND BINDING; A PARTY'S ABILITY TO HAVE A COURT REVERSE OR MODIFY AN ARBITRATION AWARD IS VERY LIMITED.

(C) THE ABILITY OF THE PARTIES TO OBTAIN DOCUMENTS, WITNESS STATEMENTS AND OTHER DISCOVERY IS GENERALLY MORE LIMITED IN ARBITRATION THAN IN COURT PROCEEDINGS.

(D) THE ARBITRATORS DO NOT HAVE TO EXPLAIN THE REASON(S) FOR THEIR AWARD.

(E) THE PANEL OF ARBITRATORS WILL TYPICALLY INCLUDE A MINORITY OF ARBITRATORS WHO WERE OR ARE AFFILIATED WITH THE SECURITIES INDUSTRY.

(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 ARBITRATION 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.)

In July 2007, FINRA was created through the 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.) *See also* FINRA, About the Financial Regulatory Authority, <http://www.finra.org/AboutFINRA/> (last visited January 13, 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 January 23, 2013) (describing merger of NASD and NYSE Regulation, Inc.). FINRA¹ is the successor to

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).

the NASD and the FINRA rules became effective December 15, 2008. Those rules apply to all claims filed on or after April 16, 2007. *See* Order Approving FINRA Regulatory Notice 08-57, SEC Approves New Consolidated FINRA Rules, 2008 WL 4685588 (Oct. 16, 2008). Like its predecessor, FINRA continues to administer 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.)

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.

ARGUMENTS

I. The Panel Erred By Finding that the Arbitration Agreement Designates An Exclusive Arbitration Forum that Is No Longer Available.

The Panel's opinion rests on the faulty premise that because NASD is now called FINRA, the forum designated for arbitration in the agreement is no longer available. The creation of FINRA as the successor to NASD did not render the NASD "unavailable." Rather, that forum remains entirely available under a new name.

a. Courts Uniformly Hold that FINRA Is the Successor Forum to NASD.

It is beyond dispute that FINRA is the successor to the NASD. *Aslin v. Fin. Indus. Regulatory Auth., Inc.*, 2013 U.S. App. LEXIS 3 at *4 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."); *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')."). Stated differently, NASD is now known as FINRA.

There are no meaningful differences in the rules or procedures of FINRA and NASD arbitration. (R. p. 124, lines 16-17.) Courts have recognized that FINRA continued using NASD's rules. *See, e.g., UBS Fin. Servs. v. City of Pasadena*, 2012 U.S.

Dist. LEXIS 115365 (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.”); *UBS Fin. Servs. v. Carilion Clinic*, 2012 U.S. Dist. LEXIS 106120 (E.D. Va. July 30, 2012) (“The National Association of Securities Dealers (‘NASD’) is the predecessor to FINRA. Its Customer Code is, in all ways relevant, identical to FINRA’s.”); *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.”). Even the panel acknowledged the similarities between NASD’s and FINRA’s procedural rules. 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.² See FINRA, Code of Arbitration Procedure,

² The Parties clearly understood and acknowledged that the rules of arbitration procedure

<http://www.finra.org/ArbitrationMediation/Rules/CodeOfArbitrationProcedure/>, (last visited August 21, 2011.) (containing links to versions of current and former rules).

As successor to NASD, FINRA assumed responsibility for arbitration of disputes arising out of agreements that designated NASD as the forum. *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); *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

could change from time to time. In addition to the reference to the “then applicable” code of procedure, the arbitration agreement also states that “the rules of the arbitration forum in which the claim is filed and any amendments thereto, shall be incorporated into this Agreement.” (R. p. 64.)

changed its name to FINRA and that for purposes of the arbitration commitment, there is no difference between them.

Few courts have even been presented with the contention that the name change from NASD to FINRA had any effect on an arbitration clause identifying NASD as the forum. Other than in this case, every such court that has confronted that argument has rejected it. 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 which Respondent relies on 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. See also *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 “[O]ther jurisdictions have ‘continue[d] to enforce NASD arbitration clauses through FINRA arbitration and interpret and enforce NASD’s rules as applicable to FINRA.’”).

Indeed, the South Carolina Supreme Court has recognized that a mere name change does not render an arbitration forum “unavailable.” In *Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (S.C. 2009), an opinion actually cited by the panel, the parties had executed an arbitration agreement that provided for arbitration of any disputes by the National Health Lawyers Association. *Id.* at 128.³ Although the Court noted that “[t]he NHLA has since become the American Health Lawyers Association” it did not invalidate the arbitration clause on that basis. *Id.*

b. The Panel Misapplied the Law Governing When an Arbitration Forum Is “Unavailable.”

When parties have agreed to arbitrate, courts are reluctant to refuse to enforce that agreement on the ground that the chosen forum is unavailable. When parties have agreed

³ Thus, unlike the agreement in this case, which only provided for arbitration under the NASD’s rules, the arbitration clause in *Grant* contained an actual forum selection clause, which selected arbitration before the National Health Lawyers Association.

to arbitrate, courts are reluctant to refuse to enforce that agreement on the ground that the chosen forum is unavailable. *See, e.g., Khan v. Dell Inc.*, 669 F.3d 350, 354 (3rd Cir. 2012) (“[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). In general, courts consider whether the parties’ intent to arbitrate can be effectuated, and courts will compel arbitration unless doing so would run counter to the parties’ intent. *See, e.g., Rent-A-Center, West, Inc. v. Jackson*, 130 S. Ct. 2772, 2776, (2010); *Stolt-Nielsen S. A. v. AnimalFeeds Int’l Corp.*, 130 S. Ct. 1758, 1773, (2010); *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24 (1983).

In general, courts consider whether the parties’ intent to arbitrate can be effectuated, and courts will compel arbitration unless doing so would run counter to the parties’ intent. Here, the Panel held that the choice of NASD was “exclusive” and “integral” to the Parties’ agreement, and that therefore compelling arbitration to FINRA would violate the Parties’ intent. As noted above, even if NASD was an “exclusive” forum, FINRA *is*, for all intents and purposes, that forum. But even if it were not, the Panel would have erred by denying the motion to compel on the basis that NASD was the only forum to which the Parties could be compelled to arbitrate.

First, there is no basis for finding that NASD was the “exclusive” forum. The agreement contains no forum selection clause, and refers to potential “arbitration forums” in the plural. It also refers generally to the “rules of the arbitration forum in which the claim is filed,” suggesting that arbitration may proceed in more than one forum.

The lone reference to the NASD in the arbitration agreement is to the “then-applicable provisions of the Code of Arbitration Procedure of NASD.” (*Id.*) Numerous courts have held that the selection of an organization’s rules is not the same as selecting the organization as the exclusive forum. *See, e.g., Brown v. Delfre*, 988 N.E.2d 696, 703 (Ill. App. 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.”); *Clerk v. Cash Cent. of Utah, LLC*, 2011 U.S. Dist. LEXIS 95494 at *16 (E.D. Pa. 2011) (“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, and the arbitration clause remains enforceable despite the unavailability of the designated arbitral forum.”); *Clerk v. First Bank*, 735 F. Supp. 2d 170, 180 (E.D. Pa. 2010) (“The question of whether an arbitration provision is unenforceable based on the unavailability of a chosen arbitrator ‘turns on whether the selection of . . . arbitrator is integral to the [a]greement.’ ‘At a minimum, for the selection of an arbitrator to be deemed integral, the arbitration clause must include an ‘express statement’ designating a specific arbitrator.”); *see also 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.”). Here, the single reference to the “then applicable provisions of the Code of Arbitration Procedure of NASD” is not persuasive evidence that the Parties intended to arbitrate only before NASD or not at all. Moreover, as explained above, FINRA adopted the code of arbitration procedure of the NASD. Thus, even if the Panel was correct in finding that the selection of the rules equates with the selection of the forum, a conclusion which Appellants deny and which is unsupported by the remainder of the arbitration agreement, the “now-applicable” rules of the NASD are the FINRA rules.

Second, the Panel erred by concluding that the NASD was so “integral” to the parties’ agreement that it would be inappropriate to compel arbitration before a substitute forum. In deciding whether to appoint a substitute arbitrator, courts focus on “whether the designation of the arbitrator was “integral” to the arbitration provision or was merely an ancillary consideration.” *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. IIT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000). Plaintiffs must demonstrate “that naming of the NASD was so central to the arbitration agreement that the unavailability of that arbitrator brought the agreement to an end.” *Reddam*, 457 F.3d at 1061. “[T]he parties must have unambiguously expressed their intent not to arbitrate their disputes in the event that the designated arbitral forum is unavailable.” *Khan*, 669 F.3d at 354.

Here, the Panel erred in concluding that Respondent made this required showing. As explained above, the Parties did not even explicitly select an arbitration forum, rather

the arbitration agreement provided that any dispute was to be resolved under the then-existing rules of the NASD. (R. p. 64.) Further, the arbitration agreement refers to arbitration in multiple forums, making clear that the purported selection of NASD as the arbitral forum was not integral to the agreement. Other courts have held that the adopting the rules of a particular forum does not demonstrate that the parties “selection” of that forum is integral to the arbitration agreement. *See, e.g., Reddam*, 457 F.3d at 1060 (“We see no evidence that the choice was integral here--in fact, there was not even an express statement that the NASD would be the arbitrator.”); *Meskill*, 862 F. Supp. 2d at 976 (“At a minimum, for the selection of an arbitrator to be deemed integral, the arbitration clause must include an *express statement* designating a specific arbitrator.”) (*quoting Carideo v. Dell, Inc.*, 2009 U.S. Dist. LEXIS 104600 at *4 (W.D. Wash. Oct. 26, 2009)); *Clerk*, 2011 U.S. Dist. LEXIS 95494 at *16 (“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, and the arbitration clause remains enforceable despite the unavailability of the designated arbitral forum.”); *Clerk*, 735 F. Supp. 2d at 180 (“The question of whether an arbitration provision is unenforceable based on the unavailability of a chosen arbitrator ‘turns on whether the selection of . . . arbitrator is integral to the [a]greement.’ ‘At a minimum, for the selection of an arbitrator to be deemed integral, the arbitration clause must include an ‘express statement’ designating a specific arbitrator.’”). Furthermore, some courts have found that even clear forum selection clauses may not be integral to an arbitration agreement. *See, e.g., Khan*, 669 F.3d at 356-57 (compelling arbitration where arbitration agreement stated that disputes

“shall be resolved exclusively and finally by binding arbitration administered by the [NAF]”); *Davis v. Sprint Nextel Corporation*, No. 12-1023, 2012 U.S. Dist. LEXIS 167356 (W.D. Mo. Nov. 26, 2012) (compelling arbitration where agreement required “arbitration administered by the [NAF] under its arbitration rules” even though NAF was unavailable to arbitrate the dispute). Because the agreement at issue refers only once to the NASD and because that reference is only to the rules of the NASD, the Panel erred in failing to compel arbitration before FINRA.⁴

The Panel relied on a number of pre-2007 cases to support the proposition that “most jurisdictions’ interpretations of similar agreements support [the panel’s] construction” of the arbitration agreement. None of these cases dealt with the issue in this case—whether arbitration should be compelled before FINRA where the agreement references only the NASD. In addition, two of the cases cited support Appellants’ 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

⁴ The panel’s reliance on the Second Circuit’s opinion in *In Re Salomon* for the proposition that Section 5 of the Federal Arbitration Act may only be used if there is a breakdown in the process of selecting an arbitrator is misplaced. In *Salomon*, the trial court actually compelled arbitration only to later have the chosen arbitral forum decline to arbitrate the dispute. *In re Salomon*, 68 F.3d 554, 560 (2nd Cir. 1995). Thus, unlike in this case where the trial court initially declined to send the case to arbitration, “there was no lapse or breakdown in selecting the arbitrator.” *Id.* Further, *Salomon* represents a line of authority that has not been followed by more recent circuit court opinions on the issue of arbitrator substitution where the arbitral form is unavailable to resolve the dispute. See, e.g., *Khan*, 669 F.3d at 356 (noting that unavailability of arbitration forum is most certainly a breakdown in arbitrator selection process and “to take a narrower construction of Section 5 would be inconsistent with the “liberal federal policy in favor of arbitration.”); *Reddam*, 457 F.3d 1054, 1060 (finding that *Salomon* is “not persuasive” and relies on opinions that are “inapposite”).

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, 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. Accordingly, because two of the key opinions relied on by the Panel do not support the Panel's ultimate conclusion, the Court should grant this Petition for Rehearing.⁵

⁵ The remaining cases cited by the Panel in footnote two 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

II. The Panel's Decision Violates the Strong State and Federal Policy Favoring Arbitration And Threatens FINRA's Arbitration Program.

The Panel failed even to acknowledge the strong state and federal policies that favor arbitration of disputes. Both state and federal law recognize the importance of arbitration and require that courts compel arbitration where, as here, the parties have agreed to arbitrate. 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”); *AT&T Techs. v. Communs. Workers of Am.*, 475 U.S. 643, 650 (1986) (“Doubts should be resolved in favor of coverage. . . . in the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail.”); *Partain v. Upstate Automotive Group*, 386 S.C. 488, 491, 689 S.E.2d 602, 603-04 (S.C. 2010) (“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.”); *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.”). The Federal Arbitration Act (“FAA”), 9 U.S.C. §§ 1, et seq., reflects the “liberal federal policy favoring arbitration agreements” and “establishes that, as a matter of federal law, any doubts concerning the scope of arbitratable issues should be resolved in favor of

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

arbitration, whether the problem at hand is construction of the contract language itself or an allegation of waiver, delay, or a like defense to arbitrability.” *Moses H. Cone Mem’l Hosp. v. Mercury Construct. Corp.*, 460 U.S. 1, 24-25 (1983).⁶

As explained above, the Panel erred in finding material differences between NASD and FINRA. Nonetheless, even if the Court had doubts about arbitration, those doubts should have been resolved in favor of arbitration.⁷

Furthermore, the Panel’s opinion casts doubt on thousands of existing arbitration agreements in this state and across the nation and threatens to undermine FINRA’s system of arbitration. The Panel’s opinion negatively impacts what are likely thousands of existing arbitration agreements that refer to arbitration by NASD. This includes not only agreements between investors and their financial advisors, but also agreements between employees and employers and agreements between businesses. The disruptive potential of the Panel’s opinion on FINRA’s scheme of arbitration alone merits rehearing.

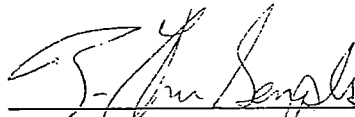
⁶ To the extent Iowa law is relevant to this issue, the public policy of Iowa also supports arbitration. *See, e.g., \$99 Down Payment, Inc. v. Garard*, 592 N.W.2d 691 (Iowa 1999) (“[Iowa] law favors arbitration as an alternative to civil litigation.”) (*citing Clinton Nat’l Bank v. Kirk Gross Co.*, 559 N.W.2d 282, 283 (Iowa 1997)).

⁷ The Panel failed to address the trial court’s alternative basis for denying the Motion to Compel Arbitration, which was that the arbitration agreement signed by Respondent did not relate to the Jackson National annuity product at issue. Appellants maintain that Respondent has failed to present any evidence to support this alternative holding. Accordingly, for purposes of preserving this issue on any future appeals and for the reasons set forth in greater detail in Appellants’ Brief and Reply Brief, Appellants maintain that the trial court’s alternative basis for denying arbitration was erroneous.

CONCLUSION

The Panel's opinion is the only opinion in the country to conclude that arbitration before FINRA cannot be compelled simply because an arbitration agreement refers to the rules of its predecessor the NASD. The NASD is now known as FINRA. With the name change, FINRA continues to arbitrate thousands of securities disputes annually such as the dispute underlying this case. As explained above, FINRA also continues to operate under the same set of rules used by the NASD. The Parties agreed to arbitrate this dispute under the rules of the NASD, now known as the FINRA rules. Appellants respectfully request that the Court apply well-established contract law principles and follow the public policy of this state and of the nation, grant this Petition for Rehearing En Banc, and compel arbitration.

Respectfully submitted,



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THE STATE OF SOUTH CAROLINA
In The Court of Appeals

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2011-CP-23-0336

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.

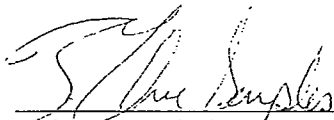
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SC Court of Appeals

CERTIFICATE OF SERVICE

I certify that I have served the Petition for Rehearing En Banc this 23rd day of January 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:

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T. Chase Samples, Esq.

Jackson Lewis LLP

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(864) 232-7000

Attorneys for Appellants

Dated this 23rd day of January 2013.

**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.

The South Carolina Court of Appeals

David W. Keller, Respondent,

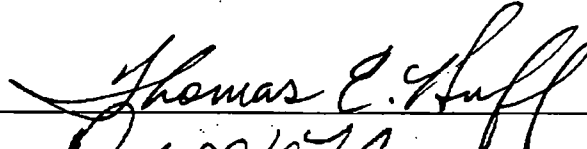
v.

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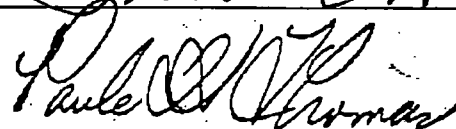
Appellate Case No. 2011-193026

ORDER

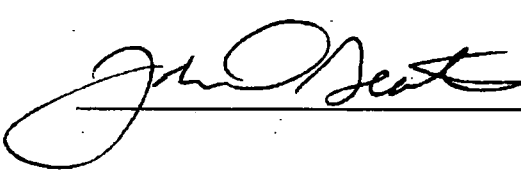
After careful consideration of the petition for rehearing, the Court is unable to discover that any material fact or principle of law has been either overlooked or disregarded, and hence, there is no basis for granting a rehearing. Accordingly, the petition for rehearing is denied.



J.



J.



J.

Columbia, South Carolina

cc:

Robert DeWitt Thomas
H. Donald Sellers
Thomas Chase Samples
J. W. Matthews, III

FILED

12 Mar 2013

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 Appendix 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:

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Attorneys for Petitioners

Dated this 7th day of June 2013.