THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE CDOUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

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S.C. Supreme Court

Unpublished Opinion No. 2011-193026 (S.C. Ct. App. Filed January 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 Partners, Inc., William C. Johnson, and Diversified Business Concepts, Inc., are, ... Petitioners.

RESPONDENT'S RETURN TO PETITION FOR WRIT OF CERTIORARI

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STATEMENT OF ISSUES ON APPEAL

I. Did the Court of Appeals err in not forcing the parties to arbitrate an agreement because the arbitral forum selected in the contract no longer existed?

II. In the absence of any applicable precedent under Iowa law, did the Court of Appeals err in following South Carolina precedent in not rewriting an arbitration agreement where the specifically designated arbitrator is no longer available?

STATEMENT OF THE CASE

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). Petitioner, 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 Portfolio investment 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 Petitioner ING. (R. p. 21, lines 1-7). 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 Petitioners filed a Motion to Compel Arbitration and Dismiss or Stay. (R. p. 16, line 47).[1] 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 Petitioners' Motion on May 26, 2011. (R. p. 3).

Appellants filed an appeal with the Court of Appeals, which heard the matter on October 2, 2012, and affirmed Judge Hill's order in a Per Curium Opinion. See Op. No. 2013-UP-014, Appellate Case No. 2011-193026 (S.C. Ct. App. 2013). Appellants then filed a Petition for Rehearing En Banc on January 23, 2013, which was denied on March 12, 2013. Appellants Petition for a Writ of Certiorari followed on June 7, 2013.

ARGUMENT

The Contract's Arbitration Provision is Invalid and Unenforceable

The Circuit Court and Court of Appeals both rightly held that the arbitration agreement between ING and Keller was invalid and unenforceable. These lower courts correctly

[1] Jackson National Life Insurance did not file a motion to compel arbitration, did not join in ING's motion, and is not a party to this appeal. Thus, the claims against Jackson National will be litigated in court.

applied the general contract principals that control the validity of arbitration agreements in accordance with Iowa law in refusing to insert a term not included in the contract itself. Petitioners attempt to bypass this threshold issue by citing to cases that review the scope of otherwise valid arbitration agreements. However, these cases are of no effect, and the lower courts' correctly concluded that FINRA is "something new"; not a mere name change from the NASD.

Moreover, Petitioners seek this Court's discretionary review on a matter with limited application to future cases. The Financial Industry Regulatory Authority ("FINRA") supplanted the member regulation, enforcement and arbitration operations of the New York Stock Exchange and the National Association of Securities Dealers ("NASD") in 2007. FINRA is now the self-regulatory organization used to arbitrate disputes arising in the financial services industry. Thus, any opinion by this Court dissecting the interplay between NASD and FINRA will have only limited prospective guidance for future arbitration agreements.

A. The Court of Appeals Correctly Held that under South Carolina Law Designating an Arbitral Body's Rules vests authority with that Arbitral Body, and is an Integral Part of the Agreement.

The Court of Appeals correctly refrained from inserting a different exclusive arbitral forum into the arbitration agreement. By Petitioners' contract expressly requiring "arbitration conducted under the then applicable provisions of the code of arbitration procedure of NASD," (Account Agreement, ¶ 17) the NASD became the exclusive arbitral body. NASD Rule 10314(a)(1)-(2) explains that any arbitration proceeding instituted under the NASD's code of arbitration procedure must begin with 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." As a consequence,

language like that used in the contract impliedly designates the arbitral forum as the exclusive forum. Moreover, the designation of the rules of a particular forum makes that forum integral to the agreement. This construction is well-supported by courts and affirms the Court of Appeals' decision.

As a matter of law, Courts follow the reasoning that a contractual provision selecting the rules of an organization like the NASD or New York Stock Exchange implicitly selects that organization as the forum for 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. v. Goren, 875 F.2d 1218, 1219-23 (6th Cir. 1989). Petitioners' cite to a 2011 District Court case from the Eastern District of Philadelphia to argue to the contrary (Petitioners' Memo, p. 14)(citing Clerk v. Cash Cent. Of Utah, LLC, 2011 U.S. Dist. LEXIS 95494 (E.D. Pa. 2011)). Petitioners' contend that the express inclusion of NASD procedure as not an integral part of the arbitration agreement (Petitioners' Memo, p. 13), in part because there was only one reference to the NASD rules in the arbitration agreement (Id. at 15). However, the rule as applied in the Second and Eleventh Circuit cases, which constructs the specific arbitral body's rules as implicitly selecting that organization as the forum for the arbitration, is more sensible. Courts applying the implicit selection rule realize that the forum whose rules are selected would be best equipped to efficiently and knowledgeably arbitrate the case. Further, because the NASD rules make explicit reference to submission of the Complaint to the organization itself, the validity of the Second and Eleventh Circuit's doctrine is only affirmed.

South Carolina law correctly requires the same result, namely that contracting for arbitration according to the rules of an express arbitral body like the NASD is "integral" to the

arbitration decision, and its unavailability thus prevents enforcement of the arbitration agreement. The Supreme Court's recent opinion in Grant v. Magnolia Manor-Greenwood, 383 S.C. 125, 678 S.E.2d 435 (2009), controls the determination of when the designation of a named arbitrator is an integral or ancillary logistical concern. Where the named arbitrator is integral, then the body's unavailability will render the arbitration agreement unenforceable, as it is in the instant matter. Id. at 132, 678 S.E.2d at 439. In Grant, this Court laid out a process for determining when a named arbitrator is an integral part of the agreement. South Carolina courts must look to whether the specifically designated arbitral body "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 arbitration." Id. at 132, 678 S.E.2d at 439 (quoting Singleton v. Grade A Market, Inc., 607 F. Supp. 2d 333, 2009 WL 996015, *6 (D. Conn. 2009)).

In Grant, a health care industry arbitration group was found to be integral to the agreement because that arbitral body, which subsequently became unavailable, did not permit the parties to vary the terms of the arbitration rules. Grant at 132, 678 S.E.2d at 439. Thus, the designation of that specific body "had implications that may substantially affect the substantive outcome of the resolution." Id. Like the health care association arbitral body in Grant, the NASD rules controlled for the selection of arbitrators (NASD Rule 10308), rules of communication (NASD Rule 10334), service (NASD Rule 10314(b)(1)), counting of days (NASD Rule 10335(a)(4)), and administration of the dispute (NASD Rule 10100), all of which have implications substantially affecting the substantive outcome of the claim. Thus, the test announced in Grant for determining whether an arbitral body, or its rules, has substantive

implications is the correct test under South Carolina law to decide whether a term is in fact integral.

Further, in addition to being controlling precedent under South Carolina law, Grant is better reasoned than the Eastern District of Pennsylvania case referenced by Plaintiff, Clerk v. Cash Cen of Utah, LLC. Clerk relies on conclusory reasoning and determines the ancillary or integral term test merely by whether there is a reference to rules of an arbitral forum or the forum itself is designated. Grant's more probing inquiry looks to identify the "essence" of the arbitration agreement. Grant at 132, 678 S.E.2d at 439. Therefore, Grant's test is closer to determining the intentions of the parties.

B. FINRA is a New Self-Regulating Organization by Both its Own Terms and in the View of the Securities and Exchange Commission.

Petitioners make two arguments to this Court in alleging error by the Circuit Court and Court of Appeals in not concluding that FINRA is the same as NASD. Petitioners argue "that FINRA is the successor to NASD's arbitration program and assumed jurisdiction over – and continued to apply – the NASD rules." (Petitioners' Memo, p. 8). Petitioners also claim that FINRA is a "mere name change," from the NASD (Id., p. 10). Thus, according to Petitioners, when "the parties chose 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." (Id., p. 9)(quoting Account Agreement). Petitioners cite to a number of cases, most of which make the conclusory determination that either NASD "changed its name" to FINRA or that FINRA is the "successor" to NASD without examining any evidence.

Under South Carolina law, "determinations of arbitrability are subject to de novo review." Stokes v. Metropolitan Life Ins. Co., 351 S.C. 606, 609, 571 S.E.2d 711, 713 (Ct. App.

2002). "However, the circuit court's factual findings will not be overruled if there is any evidence reasonably supporting them." Grant v. Magnolia Manor-Greeenwood, Inc., 383 S.C. 125, 129, 678 S.E.2d 435, 437 (2009)(citing Liberty Builders, Inc. v. Horton, 336 S.C. 658, 664-65, 521 S.E.2d 749, 753 (Ct. App. 1999)). Here, Petitioners rely on two separate assumptions detailed above: FINRA is NASD's successor, or NASD changed its name to FINRA. The Circuit Court and Court of Appeals arrived at a different conclusion: FINRA was created subsequent to NASD, and while they may have some similar characteristics, they are not inherently the same entities. Accordingly, that finding should be accorded deference as it is supported by reasonable evidence.

Under these arguments, Petitioners are essentially resting upon the claim that this fundamental change in the regulatory oversight by the Securities and Exchange Commission ("SEC") was non-substantive and merely cosmetic. On the contrary, the creation of FINRA was observed at the time to be an important change. FINRA commenced operations on July 30, 2007, and was created through the consolidation of the NASD and the member regulation, enforcement and arbitration operations of the New York Stock Exchange. (Press Release, FINRA, NASD and NYSE Member Regulation Combine to Form the Financial Industry Regulatory Authority (July 30, 2007)(www.finra.org/Newsroom/NewsReleases/2007/p036329, last visited August 3, 2013). See also U.S. Gov't Accountability Office, GAO-12-625, Securities Regulation: Opportunities Exist to Improve SEC's Oversight of the Financial Industry Regulatory Authority 2, n. 1 (2012)). In addition, the SEC recognized that FINRA would be more than a mere name change, stating in SEC Release No. 34-56145 (July 26, 2007), which approved the transaction to create FINRA, that FINRA will be a "New [self-regulatory organization]" responsible for "arbitration and mediation," inter alia. Id. (emphasis added). Further, at the time of its creation, then FINRA

Chief Executive Officer Mary Schapiro identified the policy behind FINRA: "The creation of FINRA is the most significant modernization of the self-regulatory regime in decades[.] " (Lynn Hume, Regulation: FINRA Begins Operations Following SEC's Approval, Bond Buyer, July 31, 2007, at 3(quoting Schapiro)).

The years since FINRA's founding have confirmed this vision of change. FINRA itself has engaged in a lengthy multi-year process since its creation to promulgate a new consolidated rulebook with a new organizational framework reflecting a more logical and related subject matter plan. FINRA Information Notice, March 12, 2008, p. 2 (Rulebook Consolidation Process). Prior to the consolidation process, the FINRA rulebook consisted of both NASD rules and rules incorporated from the NYSE. Id. Thus, the governing documents of FINRA and the SEC's rulings related to FINRA's creation, show that Petitioners' argument that the NASD merely changed its name does not reflect how either FINRA itself or its federal regulators view its creation. Not surprisingly, the Circuit Court agreed with these facts, finding in this case, "coincident with this consolidation, came both procedural and substantive changes to the NASD's former dispute resolution process and rules." Order, May 26, 2011, p. 6 (citing FINRA, Archive of Arbitration Procedures for Cases Before and After April 16, 2007, http://www.finra.org/ArbitrationMediation/Rules).

Petitioners cite to a number of cases discussing the issue of FINRA/NASD succession, and note them both for the proposition that the NASD merely changed its name (Petitioners' Memo, p 8) and that FINRA is the successor organization to the NASD (Petitioners' Memo, p. 10). Most of these cases are conclusory in their reasoning, and the issue of FINRA's relationship to the NASD is not contested in most of these cases. In other cases, where arbitration before FINRA was ordered, the party seeking to avoid arbitration did not site to any authority or present

any arguments before the Court to consider on the matter. See Klein v. Ameriprise Fin. Serv., Inc., 2009 U.S. Dist. LEXIS 27545 at 7 (W.D. Mo. 2009); German Am. Fin. Advisors & Trust Co. v. Reed, 969 N.E.2d 621, 628, n. 13 (Ind. Ct. App. 2012). To the extent Petitioners seeks to assign clear error to the Circuit Court's determination that FINRA and NASD are different entities, deference should be given to that Court's findings to the contrary, which are supported by reasonable evidence. Order, May 26, 2011 (C.A. No.: 2011-CP-23-0336).

C. Recent Opinions from This Court – which ING Does Not Question – Demonstrate that Keller's Claim is Not Subject to Arbitration.

The Court of Appeals correctly held that the arbitration agreement is unenforceable because of the impossibility of performance. In evaluating arbitration agreements where an arbitrator becomes unavailable, the Federal Arbitration Act (FAA)'s Section Five permits the substitution of arbitrators in the event there is a "lapse in the naming of an arbitrator." 9 U.S.C. § 5 (2006). The contract between Respondent Keller and Petitioner ING is governed by Iowa law (Account Agreement, ¶ 14). However, the issue of the scope of FAA Section 5 has not been addressed by either the Iowa appellate courts or the Eighth Circuit Court of Appeals. A circuit split exists in other jurisdictions as to the interpretation of FAA Section 5. See e.g. Jones v. GGNSC Pierre LLC, 684 F. Supp. 2d 1161, 1166 (D.S.D. 2010) (collecting cases). The Second Circuit Court of Appeals states that FAA Section 5 applies "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." In re: Salomon, Inc., 68 F.3d 554, 560 (2d. Cir. 1995). South Carolina follows the Second Circuit's doctrine in refraining from rewriting arbitration agreements except when the selection process breaks down, not when an

arbitrator later becomes unavailable. Grant v. Magnolia Manor-Greenwood, Inc., 383 S.C. 125, 131, 678 S.E.2d 435, 438 (2009).

In Grant, the Supreme Court stated that in South Carolina, where a designated forum becomes unavailable to arbitrate, courts should apply the Second Circuit Court of Appeal's rule that FAA Section Five will not apply "in cases where a specifically designated arbitrator becomes unavailable." Id. at 131, 678 S.E.2d at 438 (approving of In re: Solomon, 68 F.3d at 560 (2d Cir. 1995)). Contracts in that circumstance become unenforceable for the lack of availability of an essential and material term of the contract, a general contract principal that South Carolina and the Second Circuit Court of Appeals have held has not been superseded by statute by the FAA in this context. Id. at 130, 678 S.E.2d at 438.

Iowa, like South Carolina, applies general contractual provisions to determine the validity of arbitration agreements. See e.g. Gen. Conf. of the Evangelical Methodist Church v. Faith Evangelical Methodist Church, 809 N.W.2d 117, 122 (2011); Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). Thus, the South Carolina Court of Appeals correctly applied Iowa law by citing to this Court's 2009 opinion in Grant v. Magnolia Manor-Greenwood, Inc. Id.. Accordingly, based on common law principles in South Carolina, the unavailability of an arbitral forum renders performance of an arbitration agreement impossible for failure of a material term of the agreement. Id. at 131, 678 S.E.2d at 438. The Account Agreement states that arbitration shall be "conducted under the then applicable provisions of the Code of Arbitration Procedure of NASD." (Account Agreement ¶ 18). Where the NASD is no longer available, having been replaced in the field by the Financial Industry Regulatory Authority ("FINRA") in 2007, South Carolina courts will not go so far as to replace the NASD

term in the arbitration agreement. Thus, the arbitration agreement in ING's contract with Keller is unenforceable on account of impossibility.

Petitioners do not claim any error by the Court of Appeals in interpreting this Court's ruling or analysis in Grant, rather they only cite to Grant for the proposition that a name change does not render a forum unavailable for arbitration. (Petitioners' Memorandum, p. 10)(citing Id. at 128, 678 S.E.2d at 437, n. 1)("The [National Health Lawyer's Association] has since become the American Health Lawyers Association (the 'AHLA') and hereinafter will be referred to by that name"). FINRA, however, is not a mere name change from the NASD, as was discussed above.[2] The substance of the Grant opinion, which essentially preserves the common law rules of impossibility of performance and failure of a material term, controls the FAA's applicability to cases where an arbitrator becomes unavailable. Therefore, the Grant opinion correctly controlled in the Court of Appeals' decision.

The Second Circuit's doctrine of restraint in not forcing parties into otherwise invalid or unenforceable arbitration agreements or rewriting the arbitration agreement is in accord with traditional South Carolina legal principles. Under South Carolina law, "the parties to an arbitration agreement are at liberty to choose the terms under which they will arbitrate." Dowling v. Home Buyers Warranty Corp., II, 311 S.C. 233, 236, 428 S.E.2d 709, 710 (1993). In order to have a valid and enforceable contract, there must be a meeting of the minds between the parties with regard to all essential and material terms of the contract. Grant at 130, 678 S.E.2d at 438. Where a designated arbitral body becomes unavailable or cannot subsequently arbitrate the dispute, then the agreement to arbitrate becomes unenforceable as impossible to perform due to a failure of a material term. V.E. Amick & Assocs., LLC v. Palmetto Envtl Grp., Inc., 394 S.C.

[2] Respondent's deny that FINRA is a "mere name change" from NASD, and address the issue in detail in Section B of this Argument.

538, 546, 716 S.E.2d 295, 299 (Ct. App. 2011); Hawkins v. Greenwood Dev. Corp., 328 S.C. 585, 593, 493 S.E.2d 875, 879 (Ct. App. 1997); Moon v. Jordan, 301 S.C. 161, 164, 390 S.E.2d 488, 490 (Ct. App. 1990); see also Crossman v. Life Care Ctrs. Of Am., Inc., 738 S.E.2d 737, 740, 201 N.C. App. LEXIS 68, *6 (N.C. Ct. App., Jan. 15, 2013). Thus, in circumstances like the instant matter, where an arbitral body is no longer available, South Carolina law is clear that the arbitration agreement is void and unenforceable. Grant at 132, 678 S.E.2d at 439.

D. ING's Attempts to Change the Law of Contract Interpretation in Arbitration Matters Run Counter to the Law of Iowa.

The contract on ING letterhead between Keller and ING states that the contract is entered into under the terms of Iowa law. (See Account Agreement, ¶ 14). Arbitration agreements are interpreted under Iowa law using a two step process whereby the court must: (1) "determine whether there is a valid agreement to arbitrate;" and (2) "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). In evaluating the first part of this two-step process – the threshold matter of the agreement's validity – courts following Iowa law must use general principles of contract law. Bullis v. Bear, Stearns & Co., 553 N.W.2d 599, 602 (Iowa 1996).

Iowa courts apply the Restatement (Second) of Contracts' rules on impossibility of performance and frustration of purpose. "Where, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made, his remaining duties to render performance are discharged, unless the language or the circumstances indicate the contrary." Mel Frank Tool & Supply v. Di-Chem Co., 580 N.W.2d 802, 806 (Iowa

1998)(quoting Restatement (Second) of Contracts § 265 (1981)). Here, where the NASD, which was expressly designated as the arbitral body in the agreement (Account Agreement ¶ 18), is no longer in existence, a basic assumption of the arbitration agreement is unavailable, and the provision is impossible to perform as a matter of Iowa law.

Iowa law follows a strong tradition of restraint when asked to incorporate new terms into express contracts. Iowa courts reject applying "judicial creativity to express contracts" where those contracts contain specific and detailed provisions. Kern v. Palmer College of Chiropractic, 757 N.W.2d 651, 669 (Iowa 2008)(Appel Conc.). Iowa jurisprudence has traditionally been doctrinal on this issue of contract:

> [T]he court may not rewrite the contract for the purpose of accomplishing that which, in its opinion, may appear proper, or, on general principles of abstract justice, or under the rule of liberal construction, make for the parties a contract which they did not make for themselves, or make for them a better contract than they chose, or saw fit to make for themselves.

Smith v. Stowell, 125 N.W.2d 795, 799 (Iowa 1964). Neither will Iowa courts assist parties who expressly agreed to indefinite terms to be determined in the future by providing judicial resolution. Air Host Cedar Rapids, Inc. v. Cedar Rapids Airport Comm'n, 464 N.W.2d 450, 453 (Iowa 1990). By not engaging in this form of judicial activism expressly disclaimed by the Iowa Courts, the Court of Appeals did not err in refusing to insert FINRA to take the place of NASD. To do so would have been acting contrary to the general policy of restraint in Iowa jurisprudence on matters of contract. Where Iowa courts will not assist parties in incorporating future terms, it does not stand that the Court of Appeals could insert new arbitrator to commence arbitration.

E. ING Relies on Cases Examining the Scope of Arbitration Agreements and Not the Viability of the Agreement Itself.

In arguing that the Court of Appeals "committed clear error," Petitioners point to no controlling South Carolina law which the Court of Appeals departed from in reaching their conclusion. (Petitioners' Memorandum, p. 6). Petitioners identify three South Carolina cases, all of which stand for the proposition that arbitration serves important public policy interests, and thus, by implication, must be ordered in this case: Landers v. FDIC, 42 S.C. 100, 739 S.E.2d 209 (Feb. 27, 2013), Partain v. Upstate Auto. Group, 386 S.C. 488, 689 S.E.2d 602 (2010), and Zabinski v. Bright Acres Assocs., 346 S.C. 580, 553 S.E.2d 110 (2001). However, all three of these cases deal, to varying degrees, with the scope of matters subject to arbitration, not the threshold issue of the agreement's validity. In Landers and Partain, the Court examined the scope of an arbitration clause included the Plaintiff's Complaint. In Zabinski, this Court found that while an arbitration provision was not valid under the South Carolina Arbitration Act, it was operative under the Federal Arbitration Act. Thus, in each circumstance, the presumptive validity of the arbitration agreement itself was never in issue.

Accordingly, these cases have no bearing on the instant matter, and cannot be read to hold that their broad policy statements regarding arbitration policy override traditional contract principals. When considering South Carolina's policy favoring arbitration, "even the most broadly-worded arbitration agreements still have limits found in general principles of contract law..." Aiken v. World Fin. Corp. of South Carolina, 373 S.C. 144, 150, 644 S.E.2d 705, 709 (2007). "Arbitration is a matter of contract, and a party cannot be required to arbitrate any dispute which he has not agreed to arbitrate." Chassereau v. Global-Sun Pools, Inc., 373 S.C. 168, 171-72, 644 S.E.2d 718, 720 (2007). Moreover, South Carolina's policy of finding certain

claims that arise in the course of performance of contracts outside the scope of valid arbitration agreements is a "fair and logical decision that 'promote[s] the procurement of arbitration in a commercially reasonable manner.'" Comment, Pigs Do Fly: A new test limiting the scope of arbitration clauses in South Carolina, 59 S.C.L.Rev. 513, 530 (2008)(quoting Aiken, at 152, 633 S.E.2d at 710). These limits on South Carolina's policies favoring arbitration again affirm the Court of Appeal's decision to not find that the state and federal policies in favor of arbitration are absolute, and demonstrate that the Court of Appeal's decision is in accord with these recently stated principals.

F. Any Concerns Regarding the Nationwide Economic Implications of the Court of Appeals Unpublished Opinion are Inapposite.

Petitioners' claim, without citing to authority, that the Court of Appeals ruling "casts doubt on thousands of existing arbitration agreements [referring to] the NASD" and "renders South Carolina an outlier" on this matter. (Petitioners' Memo, p. 17). Petitioners are effectively arguing that South Carolina law on arbitration agreements should not apply to them because a financial services product used nationwide is at issue in this arbitration agreement. However, Petitioners do not identify how courts in this State, or any other, will be burdened by the "widespread impact" from the Court of Appeals' unpublished per curium opinion in this case. Petitioners point to no clear errors in the application of South Carolina law in their Argument to this Court. Further, Petitioners' make no claim that any special or important reasons militate for a grant of certiorari on account of a novel question of law; that there is any specific conflict with prior Supreme Court decisions; any substantial constitutional issue presented for adjudication; or that there is a federal question that conflicts with a United States Supreme Court Decision. See S.C. App. R. 242(b).

To the contrary, the Court of Appeals correctly affirmed the Circuit Court's order that Respondent/Plaintiff's claims are not subject to a binding arbitration agreement under the application of general principles of contract law which control under Iowa law and in South Carolina. This interpretation correctly applies Iowa law, and its policy against re-writing contracts, and is in accord with South Carolina's similar doctrine of judicial restraint, as most recently identified in this Court's 2009 decision, Grant v. Magnolia Manor-Greenwood, Inc.

CONCLUSION

For the foregoing reasons, the Respondent respectfully submits that the Court should deny ING's Petition.

Respectfully submitted,

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August 7, 2013
Greenville, South Carolina

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY

D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2013-000651

David W. Keller.....Respondent,

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PROOF OF SERVICE

I certify that I have served **Respondent's Return to Petition for Writ of Certiorari** this 6th day of August, 2013, on counsel of record in the underlying action by depositing the same in the United States Mail, first class postage prepaid, as follows:

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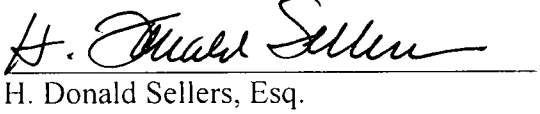

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