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**S.C. SUPREME COURT**

8 of 12 DOCUMENTS

**WELLS FARGO ADVISORS, LLC, APPELLANT, v. HUBERT L. RUNNELS, JR.,  
APPELLEE**

NO. 2012-CA-00578-COA

COURT OF APPEALS OF MISSISSIPPI

*126 So. 3d 137; 2013 Miss. App. LEXIS 781*

November 19, 2013, Decided

**SUBSEQUENT HISTORY:** As Corrected November 20, 2013.

**PRIOR HISTORY:** [\*\*1]

COURT FROM WHICH APPEALED: HINDS COUNTY CIRCUIT COURT. DATE OF JUDGMENT: 03/14/2012. TRIAL JUDGE: HON. WINSTON L. KIDD. TRIAL COURT DISPOSITION: DENIED MOTION TO CONFIRM ARBITRATION AWARD AND FOR ENTRY OF JUDGMENT.

**DISPOSITION:** REVERSED AND RENDERED.

**COUNSEL:** FOR APPELLANT: BRADLEY BARRON VANCE, JONATHAN EDWARD LEVINE.

FOR APPELLEE: DAVID NEIL MCCARTY, OLIVER E. DIAZ JR.

**JUDGES:** BEFORE GRIFFIS, P.J., MAXWELL AND FAIR, JJ. LEE, C.J., BARNES, ISHEE, ROBERTS, CARLTON, MAXWELL, FAIR AND JAMES, JJ., CONCUR. IRVING, P.J., CONCURS IN PART AND IN THE RESULT.

**OPINION BY:** GRIFFIS

**OPINION**

[\*138] NATURE OF THE CASE: CIVIL - OTHER

**GRIFFIS, P.J., FOR THE COURT:**

P1. Wells Fargo Advisors, LLC appeals the circuit court's denial of its motion to confirm an arbitration

award and for entry of a judgment against Hubert Runnels, Jr. Wells Fargo argues that the circuit court erred in the denial of the motion because Runnels's effort to vacate the arbitration award was time-barred and Runnels failed to set forth sufficient grounds to vacate [\*139] the arbitration award. Finding error, we reverse the circuit court's judgment and render judgment in favor of Wells Fargo against Runnels.

**FACTS**

P2. On May 10, 2007, Runnels began his employment with Wachovia Securities, LLC, in Ocean [\*2] Springs. During his employment, through mergers, Wachovia became Wells Fargo.

P3. At the beginning of his employment, Runnels signed a promissory note payable to Wachovia Securities, LLC, as well as its affiliates, successors, or assigns. The note provided that Runnels would repay any outstanding principal balance, including interest and all costs of collection (including attorney's fees and related costs and expenses) if his employment ended for any reason or no reason at all. The note also provided that any action instituted as a result of any controversy arising from the note was to be brought before the National Association of Securities Dealers ("NASD").<sup>1</sup> In addition, Runnels executed a Uniform Application for Securities Industry Registration or Transfer ("Form U4"), which provided:

I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated under the rules, constitutions, or by-laws

of the SROs indicated in Section 4 (SRO Registration) as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent [\*\*3] jurisdiction.

(SRO is an acronym for self-regulatory organization. Based on the Form U4, Runnels was registered with the NASD as the SRO.) Runnels also executed a Pre-Dispute Arbitration Clause where he acknowledged that he understood that he was agreeing to arbitrate any dispute, claim, or controversy that may arise between him and his firm that is required to be arbitrated under the rules of the SRO with which he was registering, including the NASD and NYSE (now FINRA).

1 In 1999, the NASD created NASD Dispute Resolution, Inc., a wholly owned subsidiary, to serve as its "arbitration facility." On July 26, 2007, the NASD and New York Stock Exchange Regulation consolidated their member regulation and enforcement operation, and the NASD changed its name to Financial Industry Regulatory Authority (FINRA). On December 21, 2007, NASD Dispute Resolution, Inc. filed its Amended and Restated Certificate of Incorporation, changing its name to FINRA Dispute Resolution, Inc.

P4. Runnels resigned from Wells Fargo on March 9, 2009. As of that date, Runnels was obligated to pay the outstanding principal balance of \$39,150. Runnels failed and refused to pay the amount owed.

P5. On August 19, 2009, Wells [\*\*4] Fargo filed its statement of claim in arbitration with FINRA. Runnels answered the statement of claim and participated in the arbitration, without objection. On July 28, 2010, the arbitrator issued an award in favor of Wells Fargo. The arbitrator determined that Runnels was to pay \$39,150 in principal, plus interest, at the annual percentage rate of 5.25% that has accrued from March 6, 2009, until July 19, 2010, and \$4,927.50 in attorney's fees.

P6. On July 13, 2011, Wells Fargo filed its motion to confirm the arbitration award and for entry of a judgment in the Circuit Court of Hinds County, Mississippi. On September 29, 2011, through counsel, Runnels filed his response in opposition to the motion. The circuit judge heard oral argument from counsel on December 12, 2011. On March 14, 2012, the circuit court entered the following order:

[\*140] This cause came on for hearing before this Court on the Plaintiff's

Motion to Confirm Arbitration Award and for Entry of Judgment. The Court, having reviewed the pleadings and other submission, having heard the argument of the parties, and being otherwise advised in the premises herein, finds that the Motion to Confirm Arbitration Award and for Entry of [\*\*5] Judgment is not well taken and should be denied.

It is therefore ordered and adjudged that the Plaintiff's Motion to Confirm Arbitration Award and for Entry of Judgment is denied.

The circuit judge neither made an oral ruling from the bench nor issued a written opinion. It is from this judgment that Wells Fargo now appeals.

#### STANDARD OF REVIEW

P7. Runnels argues that this Court should review this case for an abuse of discretion. He argues that the Federal Arbitration Act "imposes a heavy presumption in favor of confirming arbitration awards," and so "a court's confirmation of an arbitration award is usually routine or summary." *Riccard v. Prudential Ins. Co.*, 307 F.3d 1277, 1288-89 (11th Cir. 2002). However, federal law provides that a court may vacate an arbitration award "where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made." 9 U.S.C. § 10(a)(4) (2006). According to the United States Supreme Court, this is one of the "exclusive grounds for expedited vacatur and modification" of an arbitration award. *Hall Street Associates, L.L.C. v. Mattel, Inc.*, 552 U.S. 576, 584, 128 S. Ct. 1396, 170 L. Ed. 2d 254 (2008). Runnels [\*\*6] argues that the circuit judge determined that based on the unique facts of this case the award could not be confirmed, and this determination is subject to review for an abuse of discretion. *Wilson v. Greyhound Bus Lines, Inc.*, 830 So. 2d 1151, 1156 (¶15) (Miss. 2002).

P8. Wells Fargo argues that the standard of review here is a mixed standard based on whether the issue involves a question of law or question of fact. We review errors of law de novo. *Cummings v. Benderman*, 681 So. 2d 97, 100 (Miss. 1996). Further, we apply "a de novo standard of review to the statute of limitations." *Lincoln Electric Co. v. McLemore*, 54 So. 3d 833, 835 (¶10) (Miss. 2010). We review issues of fact for abuse of discretion. *Wilson*, 830 So. 2d at 1155 (¶9). This Court will not disturb the circuit judge's findings "unless they are manifestly wrong [or] clearly erroneous[,] or an erroneous legal standard was applied." *Id.* To determine

whether an arbitration award should be confirmed, "it is not legitimate . . . [for the court] to inquire into the original merits in favor of one party or the other, or to show that in the evidence the award ought to have been different or that the law of the case was misconceived [\*\*7] or misapplied, or that the decision, in view of all the facts and circumstances, was unjust." *Id.* at 1156 (¶11). "The scope of judicial review . . . is quite narrow, and every reasonable presumption will be indulged in favor of the validity of arbitration proceedings." *Id.* at 1155 (¶9) (citations omitted).

#### ANALYSIS

P9. Wells Fargo's motion invoked the jurisdiction of the circuit court pursuant to the Federal Arbitration Act, 9 U.S.C. § 1 *et seq.* ("FAA"), and the Mississippi Arbitration Act, *Miss. Code Ann. § 11-15-1 et seq.* ("MAA"). Wells Fargo asked the circuit court to confirm the arbitration award and to enter a judgment against Runnels based on the award. In his response [\*141] in opposition to the motion, Runnels made three objections: (1) the contract could not be rewritten and was therefore void; (2) the arbitration was void ab initio and therefore could not be confirmed, and (3) Wells Fargo did not have standing in the circuit court.

P10. The circuit judge, without explanation, only denied Wells Fargo's motion. The pleadings established that the circuit judge was given a decision to either: (a) confirm the arbitration award and enter a judgment (Wells Fargo wins), or (b) vacate the arbitration [\*\*8] award (Runnels wins). Instead, the circuit judge only denied the motion to confirm; he did not vacate the arbitration award.

P11. Therefore, it seems as if the circuit court did not enter a final judgment, and there may be a question as to whether this Court has jurisdiction to hear the appeal. Under *Mississippi Rule of Civil Procedure 54(b)*, a judgment that affects "one or more but fewer than all of the claims" is not final unless the circuit judge expressly determines "there is no just reason for delay" and explicitly directs "the entry of the judgment." Such is not the case here. Because of our finding under section 1 below, that Runnels is time-barred from contesting the confirmation of the award, we recognize that the circuit court's judgment was a final judgment, and we have jurisdiction to consider this appeal.

*1. Runnels was time-barred from contesting the confirmation of the award, and it was error not to grant the motion to confirm.*

P12. Wells Fargo argues that Runnels failed to challenge the enforceability of the award by filing a motion to vacate in a timely manner, and thus his claim is

barred. Said differently, Runnels's response in opposition to the motion to confirm the [\*\*9] arbitration award and for entry of a judgment was time-barred under both the FAA and the MAA.

P13. The MAA and FAA include a limitations period. *Mississippi Code Annotated section 11-15-21* (Rev. 2004) provides:

Upon presentation of the articles of submission and the award to the court designated in the submission or the court having jurisdiction of the subject matter of the award, the court shall, upon motion, confirm the award, unless the same be vacated or modified, or a decision thereon be postponed, as hereinafter provided. An award shall not be confirmed unless notice in writing of such motion shall have been served on the adverse party at least five days before the hearing, to be served as other process; but such motion shall not be made after the expiration of one year from the making and publication of the award.

The FAA also provides that a party to an arbitration may, within one year of the date of the arbitration award, apply for an order confirming the arbitration award, and the court must issue an order confirming the award unless it is vacated, modified, or corrected based on one of the statutorily enumerated grounds. 9 U.S.C. § 9 (2006).

P14. The MAA and FAA also specify [\*\*10] when a motion to vacate an arbitration award must be filed. *Mississippi Code Annotated section 11-15-27* (Rev. 2004) provides:

An application to vacate or modify an award shall be made to the court at the term next after the making and publication of the award, upon at least five days' notice, in writing, being given to the adverse party, if there be time for that purpose; and if there be not time, such court, or the judge thereof, may, upon good cause shown, order a stay of [\*142] proceedings upon the award, either absolutely or upon such terms as shall appear just, until the next succeeding term of court.

The FAA requires that the motion to vacate, modify, or correct be filed within three months from the date the

award was issued or delivered, and "[n]otice of a motion to vacate . . . an award must be served upon the adverse party or his attorney within three months after the award is filed or delivered." 9 U.S.C. § 12 (2006).

P15. In *Rigby v. Roadway Express, Inc.*, 680 F.2d 342, 343-44 (5th Cir. 1982), the Fifth Circuit found that to vacate an arbitration award beyond the time limitations set forth in the MAA was barred by *Mississippi Code Annotated section 11-15-27*.

P16. Here, the arbitration [\*\*11] award was made and filed on July 28, 2010, and was published on July 29, 2010. Runnels filed an opposition to this award on September 29, 2011. Wells Fargo argues that because Runnels sought to have the arbitration award vacated in his response in opposition to its motion to confirm the arbitration award and for entry of a judgment, then Runnels's response in opposition is considered a motion to vacate for purposes of the statutory limitations period. Thus, under the FAA, Runnels had until October 28, 2010, to seek to have the award vacated, modified, or corrected. Under the MAA, Runnels had until the term next, which ran from November 2010 to January 2011. Because he failed to bring an action to vacate the award during the limitations period, Runnels's claim is time-barred and he may not object to Wells Fargo's motion to confirm the arbitration award and for entry of a judgment.

P17. Wells Fargo is correct as a matter of law. Runnels's failure to file an action to vacate the arbitration award in a timely manner bars his opposition to Wells Fargo's motion to confirm the arbitration award and for entry of a judgment. As to this issue, we find the circuit judge committed reversible error, [\*\*12] and we render judgment in favor of Wells Fargo.

*2. Runnels failed to set forth sufficient grounds to vacate the arbitration award, and Wells Fargo was entitled to have the award confirmed.*

P18. Wells Fargo next argues that the confirmation of the arbitration award was mandatory under both the FAA and the MAA, unless Runnels could prove the statutory grounds necessary to vacate the award. Thus, Wells Fargo claims that the circuit court was in error to deny the motion to confirm the arbitration award and for entry of a judgment.

*A. Confirmation of an arbitration award is mandatory unless the award is vacated.*

P19. The FAA and MAA require the court to confirm an arbitration award unless the award is vacated, modified, or corrected. 9 U.S.C. § 9; *Miss. Code Ann. § 11-15-21*. The supreme court has held that "an arbitration award may be overturned by the reviewing trial court only if the elements of the applicable statute are present."

*Wilson*, 830 So. 2d at 1157 (¶16). In *Wilson*, the court ruled that because the record contained no evidence that would cause the award to be vacated, according to [*Mississippi Code Annotated section*] 11-15-23(a)-(d) [(Rev. 2004)], the award would not be set aside. [\*\*13] *Wilson*, 830 So. 2d at 1157 (¶16).

P20. Under the FAA, a court may vacate an arbitration award:

(1) where the award was procured by corruption, fraud, or undue means;

[\*143] (2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final and definite award upon the subject matter was not made.

9 U.S.C. § 10(a) (2006). Under the MAA, a court may vacate under an arbitration award under certain instances:

(a) That such award was procured by corruption, fraud, or undue means;

(b) That there was evident partiality or corruption on the part of the arbitrators, or any one of them;

(c) That the arbitrators were guilty of misconduct in refusing to postpone the hearing upon sufficient cause shown, or in refusing to hear evidence pertinent or material to the controversy, or other misbehavior by which the rights [\*\*14] of the party shall have been prejudiced;

(d) That the arbitrators exceeded their powers, or that they so imperfectly executed them that a mutual, final, and definite award on the subject matter was not made.

*Miss. Code Ann. § 11-15-23*.

P21. Wells Fargo argues that the award must be confirmed, because it was not vacated, modified, or corrected. Indeed, were it not for our decision in section 1 finding that the period for seeking vacation of the arbitration award had expired, we may have determined that the circuit court's decision was not a final judgment, which would have deprived this Court of jurisdiction. Such is not the case.

P22. We agree with Wells Fargo. First, the limitations period expired before Runnels sought any relief from the arbitration award. Second, the arbitration award did not fall under any of the four instances that would have allowed the award to be vacated. *9 U.S.C. § 10(a); Miss. Code Ann. § 11-15-23*. The arbitration award was not procured by corruption, fraud, or undue means; there was no evident partiality or corruption on the part of the arbitrators; there was no refusal to postpone the hearing upon sufficient cause, and no misbehavior by which the parties' rights [\*\*15] were prejudiced; and the arbitrators did not exceed nor execute their powers in a matter in which an award was imperfectly made. *9 U.S.C. § 10(a); Miss. Code Ann. § 11-15-23*.

P23. The supreme court has ruled that the trial court "is not allowed to substitute its own judgment on the merits of the controversy for that of the arbitrator but is instead constrained to determine whether the award fails [an] analysis under [section] 11-15-23." *Margerum v. Bud's Mobile Homes, Inc.*, 823 So. 2d 1167, 1173 (¶17) (Miss. 2002). Accordingly, we find it was reversible error for the circuit judge to deny the motion to confirm the arbitration award and for entry of a judgment. We hereby render judgment to confirm the arbitration award and enter a final judgment in favor of Wells Fargo for the relief requested.

*B. Runnels's sole basis to vacate the award, which is that he agreed to arbitrate before the NASD and not FINRA, is an insufficient ground to vacate the award.*

P24. Runnels's sole basis to vacate the arbitration award is that he agreed in the note to arbitrate before the NASD and not FINRA. Runnels argues [\*144] that the arbitration was void ab initio, and therefore cannot be confirmed.

P25. Void ab initio [\*\*16] means that a contract is null from the beginning if it seriously offends law or public policy, in contrast to a contract that is merely voidable at the election of one of the parties. *Hood ex rel. State v. Barbour*, 958 So. 2d 790, 815 (¶ 87) (Miss. 2007). Because of this, it is as if the contract never existed. *Id.* at 816 (¶89).

P26. Runnels's response in opposition to Wells Fargo's motion to confirm the arbitration award claimed that the arbitrator exceeded his powers because the underlying

arbitration agreement in the note was void in that it required arbitration before the NASD, not FINRA. Runnels argued that the plain language of the note set the arbitrator as NASD. Thus, because that company no longer exists, Runnels claims that the court must refuse to confirm the arbitration award on the grounds that the arbitration agreement was void ab initio.

P27. After Runnels executed the arbitration agreement, the NASD became FINRA, and NASD Dispute Resolution, Inc. became FINRA Dispute Resolution, Inc. The name change from NASD to FINRA did not create a new entity, but rather, encompassed only a name change. Runnels counters that a new entity was formed, which invalidates the language [\*\*17] of the arbitration agreement and renders the arbitration award void, because the arbitrator never had jurisdiction over the matter.

P28. *Mississippi Code Annotated section 79-4-10.09* (2000) provides:

An amendment to the articles of incorporation does not affect a cause of action existing against or in favor of the corporation, a proceeding to which the corporation is a party, or the existing rights of persons other than shareholders of the corporation. An amendment changing a corporation's name does not abate a proceeding brought by or against the corporation in its former name.

We recognize that FINRA is a Delaware corporation. Under Delaware law, a mere name change does not affect the rights and liabilities of a corporation or the people doing business with it. *Del. Code Ann. tit. 8, § 245* (2010).

P29. Based on the information before the Court, we find that NASD's name change to FINRA did not negate the validity of the arbitration agreement. FINRA was the proper arbitrator, and it had jurisdiction. Therefore, Runnels's argument that the note is void is without merit.

*C. Runnels submitted to arbitration with FINRA.*

P30. When he began his employment with Wells Fargo (the successor to Wachovia [\*\*18] Securities), Runnels executed a valid arbitration agreement when he signed a Form U4. The Form U4 provided:

I agree to arbitrate any dispute, claim or controversy that may arise between me and my firm, or a customer, or any other person, that is required to be arbitrated

under the rules, constitutions, or by-laws of the SROs indicated in Section 4 (SRO Registration) as may be amended from time to time and that any arbitration award rendered against me may be entered as a judgment in any court of competent jurisdiction.

P31. In addition, Runnels also signed a disclosure regarding the "Pre-Dispute Arbitration Clause" in the Form U4 that acknowledged that he understood he was agreeing to arbitrate any dispute, claim, or controversy that may arise between Runnels and his firm that is required to be arbitrated "under the rules of the self-regulatory [\*145] organizations with which he is registering." When he executed the Form U4, Runnels registered with the NASD and the NYSE. In doing so, he received a CRD number. When the NASD became FINRA, Runnels's CRD number remained the same.

P32. FINRA Rule 13200 (formerly NASD Rule 13200) requires arbitration of any dispute, claim, or controversy arising between [\*\*19] an "associated person" and his firm that arises from the business activities of a "member" or associated person. As an associated person of the NASD, Runnels became an associated person of FINRA, and his failure to submit to FINRA arbitration would be a violation of FINRA rules.

P33. Although Runnels argues that because the FINRA arbitrator denied the claim for overpayment of

commissions, which he asserts would have been subject to the Form U4, and thus, the Form U4 does not apply, we disagree. Runnels's execution of the Form U4 and registration with the SRO show an understanding and acknowledgment of the possibility of arbitration. Therefore, we find that Runnels was required to submit to arbitration with FINRA based on the above facts.

#### CONCLUSION

P34. We find that the circuit court committed reversible error when it denied Wells Fargo's motion to confirm the arbitration award and for entry of a judgment. Accordingly, we reverse the circuit court's judgment. We also render judgment in favor of Wells Fargo and confirm the arbitration award. Judgment is entered in favor of Wells Fargo and against Runnels in the principal amount of \$39,150, plus interest on the principal amount at the annual [\*\*20] percentage rate of 5.25% that accrued from March 6, 2009, until July 19, 2010, plus \$4,927.50 in attorney's fees.

**P35. THE JUDGMENT OF THE HINDS COUNTY CIRCUIT COURT IS REVERSED AND RENDERED. ALL COSTS OF THIS APPEAL ARE ASSESSED TO THE APPELLEE.**

**LEE, C.J., BARNES, ISHEE, ROBERTS, CARLTON, MAXWELL, FAIR AND JAMES, JJ., CONCUR. IRVING, P.J., CONCURS IN PART AND IN THE RESULT.**



**DIANA BROWN RUSCIANO, Plaintiff, -against- OPPENHEIMER & CO., INC.,  
Defendant.**

**14 Civ. 1452 (CM)**

**UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF  
NEW YORK**

*2014 U.S. Dist. LEXIS 59413*

**April 25, 2014, Decided  
April 25, 2014, Filed**

**COUNSEL:** [\*1] For Diana Brown Rusciano, Plaintiff: Jason Laurence Bernbach, Bernbach Law Firm, PLLC, White Plains, NY; Jeffrey M. Bernbach, Bernbach Law Firm, White Plains, NY.

For Oppenheimer & Co., Inc., Defendant: Angela A. Turiano, LEAD ATTORNEY, Angela Turiano, Esq., New York, NY; Jed Leigh Marcus, LEAD ATTORNEY, Bressler, Amery & Ross, P.C.(NJ), Florham Park, NJ.

**JUDGES:** Colleen McMahon, U.S.D.J.

**OPINION BY:** Colleen McMahon

**OPINION**

**MEMORANDUM DECISION AND ORDER  
GRANTING DEFENDANT'S MOTION TO COM-  
PEL ARBITRATION AND TO DISMISS THIS AC-  
TION**

McMahon, J.:

Since August 15, 2005, plaintiff Diana Brown Rusciano has been employed by defendant Oppenheimer & Co., first as a client services associate, then as an IT Administrator.

When she entered into employment, plaintiff signed a standard form Arbitration Agreement of the sort common in the securities industry.

The Agreement provides that "any dispute, controversy or claim . . . arising out of or relating to [plaintiff's] employment, including alleged violations of state or federal civil rights acts (including but not limited to all

claims of discrimination, harassment and/or retaliation under such statutes as the New York State Human Rights Law, the New York City Human Rights Law, Title [\*2] VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act of 1967, and the Older Workers Benefit Protection Act of 1991) shall be arbitrated before the National Association of Securities Dealers . . . in accordance with the NASD Model Employment Arbitration Procedures for resolving employment disputes in the form existing at the time when the arbitration is instituted."

On July 22, 2013, plaintiff filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), which issued a Notice of Right to Sue on January 30, 2014. Plaintiff commenced this lawsuit less than 90 days later, on March 4, 2014. She alleges violations of Title VII of the Civil Rights Act of 1964, the New York Human Rights Law and the New York City Human Rights Law--all statutes expressly mentioned in the Arbitration Agreement that plaintiff signed. These are the very sorts of claims plaintiff expressly agreed to arbitrate.

Plaintiff disputes none of this. She admits that she signed the arbitration agreement in question and that her claims against Oppenheimer fall within its literal terms. She does not suggest that Congress intended her employment discrimination claims to be [\*3] non-arbitrable. (For that reason, the Court accepts as valid the arguments set forth at pages 4 through 8 of Oppenheimer's moving brief without further discussion). Plaintiff does not even argue, as Oppenheimer anticipated she would, that defendant waived its right to demand

arbitration because it participated in the EEOC investigation of her charge (*See*, Moving Brief at 8-9).

Nonetheless, plaintiff contends that she is not required to arbitrate her dispute, for two reasons.

First, she contends that performance under the Agreement has become impossible, because the NASD no longer exists, and plaintiff did not specifically agree to arbitrate before any entity other than the NASD. Put otherwise, she argues that her obligation to arbitrate disappeared along with the NASD name.

Second, plaintiff argues that the rules of the Financial Industry Regulatory Authority (FINRA), the NASD's successor, "in the form existing at the time when the arbitration is instituted" (i.e., today), bar the arbitration of claims by someone who, like plaintiff, is neither registered with FINRA nor has applied to become registered with FINRA.

Plaintiff's first argument has been roundly and repeatedly rejected in this [\*4] Circuit.

The NASD has not ceased to exist; its name was merely changed to Financial Industry Regulatory Authority ("FINRA"). *See* About FINRA, <http://www.finra.org/AboutFINRA> (last visited April 23, 2014). The difference between NASD and FINRA is purely semantic. *See Std. Inv. Chtd., Inc. v. NASD*, 2008 US Dist LEXIS 4617 (S.D.N.Y. 2008) (noting that, during the pendency of the motion before the court, NASD changed its name to FINRA); *D. Weckstein & Co., Inc. v. Trinity Bui*, 2009 N.Y. Misc. LEXIS 5816 (N.Y. Sup. Ct. June 11, 2009). FINRA continues to provide the same comprehensive oversight over securities firms as it did before it changed its name. *See Singh v. Raymond James Fin. Servs., No. 13-cv-1323*, 2014 U.S. Dist. LEXIS 45616 (S.D.N.Y. Mar. 28, 2014).

Plaintiff's reliance on *Adlao v. JPMorgan Chase & Co.*, No. C 10-04508, 2011 U.S. Dist. LEXIS 30144 (N.D. Cal. Mar. 11, 2011) is misplaced since it was based solely on California law and is contrary to the settled law in the U.S. District Court for the Southern District of New York, which, applying New York law and the Federal Arbitration Act ("FAA"), has routinely held that arbitration clauses designating NASD requires arbitration before [\*5] FINRA. For example, the court in *Clinton v. Oppenheimer & Co., Inc.*, 824 F. Supp. 2d 476 (S.D.N.Y. 2011), in enforcing the identical Arbitration Agreement between Oppenheimer and a former employee, compelled arbitration before FINRA, even though the Agreement named the NASD and did not include language regarding successor entities. *See also Singh v. Raymond James Fin. Servs., No. 13-cv-1323*, 2014 U.S. Dist. LEXIS 45616 (S.D.N.Y. Mar. 28, 2014) (compelling arbitration before FINRA notwithstanding the fact that

the agreement provided for arbitration before the NASD). As the New York Supreme Court, in *GFI Brokers LLC v Bellard*, Index No. 650388/2013, 2013 NY Slip Op 31624[U], 2013 N.Y. Misc. LEXIS 3153, \*5-6 (N.Y. Sup. Ct. July 16, 2013), stated when compelling arbitration under identical circumstances:

Here, the Agreement unambiguously provides that all controversies are to be resolved through arbitration. Although FINRA is not the arbitral body named in the Agreement, the NASD and NYSE, the bodies named, are one and the same as FINRA. FINRA is the entity formed by the consolidation of the arbitration fora to which plaintiff agreed. The SEC gave final approval for the consolidation in July 2007. As the Court of [\*6] Appeals has since explained, "the member firm regulation and enforcement functions and employees from NYSE Regulation transferred to NASD, which then adopted FINRA as its new corporate name."

*GFI Brokers LLC*, 2013 N.Y. Misc. LEXIS 3153 at \*5-6 (emphasis added); *accord Financial Indus. Regulatory Auth., Inc. v Fiero*, 10 N.Y.3d 12, 14, 882 N.E.2d 879, 853 N.Y.S.2d 267 (N.Y. 2008); *see also Morgan Stanley & Co., Inc. v Feeley*, 75 A.D.3d 417, 906 N.Y.S.2d 13 (1st Dept. 2010) (arbitration clause designating NASD requires arbitration before FINRA).

The fact that Oppenheimer has recently changed the wording in its form Arbitration Agreement to specify that the employee is agreeing to arbitrate before any successor in interest to the originally-designated arbitral entity does not undercut this result. As the cases cited above indicate, Oppenheimer must have faced this very argument--"I only agreed to arbitrate before something called the NASD, not FINRA"--in dozens if not hundreds of lawsuits. The fact that defendant has prudently elected to forestall yet more litigation in the future, by specifying that the parties are agreeing to arbitration even if the identity of the designated Tribunal changes, does not alter the indisputable fact that [\*7] the only thing that has changed about the NASD is its name--the entity still exists, and is open for arbitration.

More interesting, however, is plaintiff's other argument. Plaintiff indisputably agreed to arbitrate under the Tribunal's rules as they existed at the time the arbitration commenced. She argues that FINRA's Rules do not encompass Plaintiff's dispute, so it is impossible to fulfill her obligation to arbitrate, even before the NASD's successor.

Plaintiff might well be correct if the only relevant rule were the one she cites. Unfortunately for her, there is another applicable rule.

FINRA's Rule 13200(a) mandates the arbitration of disputes involving "members" or "associated persons" of FINRA. *See* Rule 13200(a). A "member" of FINRA is any broker or dealer admitted to FINRA membership, and an "associated person" is a "natural person who is registered or has applied for registration under the Rules of FINRA," or is "A sole proprietor, partner, officer, director, or branch manager of a member, or other natural person occupying a similar status or performing similar functions, or a natural person engaged in the investment banking or securities business who is directly or indirectly [\*8] controlling or controlled by a member, whether or not any such person is registered or exempt from registration with FINRA under the By-Laws or the Rules of FINRA." *See* Rule 13100. Plaintiff is neither.

But Oppenheimer is not relying on Rule 13200(a). Even if Plaintiff is not a "registered member" or "associated person," she is still required to arbitrate before FINRA because she privately contracted With Oppenheimer to arbitrate her statutory employment discrimination claims before this forum. *See* FINRA Rule 13201(a). While FINRA does not specifically require the arbitration of statutory employment discrimination claims, it permits member organizations to enter into separate, private arbitration agreements with their employees that cover statutory employment discrimination claims with their employees. *Chanchani v. Salomon/Smith Barney, Inc.*, No. 99-cv-9219, 2001 U.S. Dist. LEXIS 2036, \*14 (S.D.N.Y. Mar. 1, 2001.) In *Chanchani*, the court, in granting the employer's motion to compel arbitration, rejected plaintiff's contention that FINRA rules' barred the arbitration of statutory employment claims, holding that, despite FINRA's rules, the parties could privately contract for arbitration [\*9] of employment claims. *Id.* Similarly, in *Cohen v. UBS Financial Services, Inc.*, No. 12-cv-2147, 2012 U.S. Dist. LEXIS 174700 (S.D.N.Y. 2012), the plaintiffs claimed that the arbitration agreements were invalid because they violated FINRA's rules insofar as the agreements included claims which could be brought collectively or by a class. *Id.* at \*8. Compel-

ling arbitration and enforcing the agreements, the court held that "enforcement of the arbitration agreements would not be inconsistent with FINRA's rules." The court stated that "Although Rule 13204 appears to prohibit arbitration of class or collective claims, the rule also expressly states that its subparagraphs 'do not otherwise affect the enforceability of any rights under the Code or any other agreement.'" *Id.* at \*9. As the court explained, FINRA's rule "(1) recognizes that parties may choose to enter into additional agreements beyond the scope of the Code; and (2) provides that the Code does not affect the enforceability of these additional agreements." *Id.* at \*9.

1 The opinion in *Chanchani* is based on the NYSE rules. As previously discussed, NYSE, like NASD, is one in the same as FINRA, *See GFI Brokers LLC*, 2013 N.Y. Misc. LEXIS 3153 at \*5-6, [\*10] so the same reasoning applies.

2 The Supreme Court's decision in *American Express Co. v. Italian Colors Restaurant*, 133 S. Ct. 2304, 186 L. Ed. 2d 417 (2013), makes clear that arbitration agreements that include class action waivers are enforceable.

Accordingly, Plaintiff is compelled to arbitrate this dispute before FINRA because she privately contracted with her employer, Oppenheimer, to use FINRA to arbitrate employment claims. Because arbitration will resolve the dispute, the motion to dismiss the complaint is granted. Should either party wish to enter judgment on an arbitral award, a new action can be filed.

## CONCLUSION

For the foregoing reasons, defendant's motion to compel arbitration and to dismiss this action is GRANTED. The Clerk of the Court is directed to remove Docket No. 8 from the Court's list of pending motions and to close the file.

Dated: April 25, 2014

/s/ Colleen McMahon

U.S.D.J.