THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2013-000651

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.

BRIEF OF PETITIONERS

Ashley B. Abel, Esq.
T. Chase Samples, Esq.
Jackson Lewis P.C.
15 South Main Street, Suite 700
Greenville, SC 29601
(864) 232-7000
Attorneys for Petitioners

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STATEMENT OF THE CASE

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

On January 18, 2011, Respondent David Keller ("Respondent" or "Keller") filed suit in the Greenville County Court of Common Pleas, asserting various state law claims against Petitioners William C. Johnson ("Johnson"), ING Financial Partners, Inc. ("IFP"), Diversified Business Concepts, Inc., ("Diversified") and Defendant Jackson National Life Insurance Co. ("Jackson National") arising out of Keller's investment in a variable annuity offered by Jackson National.[1] The Complaint centers around the allegation that the variable annuity recommended by Johnson was not suited to Keller's investment goals. On February 18, 2011, Petitioners moved to compel arbitration based on the arbitration clause contained in the IFP customer agreement. The trial court, Hon. D. Garrison Hill, heard argument on the motion on April 11, 2011.

On May 26, 2011, the trial court adopted a proposed order drafted by Keller's counsel denying the motion to compel arbitration. In the Order, Judge Hill held that the arbitration agreement's reference to arbitration under the "then applicable code of arbitration procedure of NASD" was equivalent to designating the NASD as the exclusive arbitration forum and that such selection was an "integral term" of the Parties' agreement to arbitrate. (R. at 5.) The Court concluded that "[b]ecause the arbitration forum specifically selected by the parties to the purported arbitration agreement does not exist . . . a material term of the arbitration clause has failed, and the purported agreement to arbitrate must likewise fail." (R. at 4.) On June 16, 2011, Petitioners served and filed a Notice of Appeal from this Order.

The Court of Appeals issued its opinion on January 9, 2013, affirming the trial court. In a summary, *per curiam*, decision, the Court of Appeals concluded that "[t]he

[1] Jackson National is not a party to the arbitration agreement and did not move to compel arbitration. It is not a Petitioner here.

parties' arbitration agreement designates an exclusive arbitral forum that is no longer available to arbitrate." *Keller v. ING Financial Partners, Inc.*, Unpublished Opinion No. 2013-UP-014, 2013 S.C. App. Unpub. LEXIS 5 (S.C. Ct. App. Jan. 9, 2013). The Court of Appeals concluded that it "cannot rewrite the parties' agreement to substitute FINRA for NASD." *Id.* The Court also refused to apply Section 5 of the Federal Arbitration Act ("FAA") to substitute an arbitrator because, according to the Court, this case did not present a "breakdown in the process of selecting an arbitrator." *Id.* The Court of Appeals denied the petition for rehearing on March 12, 2013, and this Court granted Petitioners' Petition for Certiorari on July 10, 2014.

FACTS

IFP is a securities broker-dealer for which, during the time period at issue, Johnson (through his company, Diversified) served as a registered representative pursuant to the securities laws and FINRA rules. (R. at 16-17.) On September 12, 2007, in consultation with Johnson, Keller purchased a variable annuity issued by Jackson National. (R. at 19.) This transaction was governed by a standard IFP account agreement containing a mandatory arbitration clause. (R. at 89-90.)

That clause provides:

> 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.

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(R. at 64.)

After Johnson and Keller executed the arbitration agreement at issue, the United States Securities and Exchange Commission ("SEC") designated a new self-regulatory organization, FINRA,[2] to assume control of the NASD arbitration program. *See* FINRA,

[2] FINRA is a self-regulatory organization ("SRO") registered with the 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

About the Financial Regulatory Authority, http://www.finra.org/AboutFINRA/ (last visited July 31, 2014) (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 July 31, 2014) (describing merger of NASD and NYSE Regulation, Inc.). Created in July 2007 via a consolidation of the NASD and certain enforcement and arbitration functions of the NYSE (Trial Court's May 26, 2011 Order at 2; R. 4.), FINRA's arbitration program is a continuation of the former programs administered by those two self-regulatory organizations. FINRA's rules, which became effective December 15, 2008, incorporated the NASD's Code of Arbitration Procedure for Customer Disputes which applies to all claims filed on or after April 16, 2007. *See* Order Approving FINRA Regulatory Notice 08-57, SEC Approves New Consolidated FINRA Rules, 2008 WL 4685588 (Oct. 16, 2008); FINRA, Code of Arbitration Procedure, http://www.finra.org/ArbitrationMediation/Rules/CodeOfArbitrationProcedure/, (last visited August 8, 2014.) FINRA administers thousands of arbitrations annually based on claims identical to those at issue in this case. (Memo in Supp. of Mot. to Compel Arbitration, pp. 9-10; R. pp. 57-58.)

ARGUMENT

This case involves the interpretation and enforceability of an arbitration agreement subject to the Federal Arbitration Act ("FAA"), which provides that arbitration agreements are enforceable "save upon such grounds as exist at law or in equity for the

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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.

revocation of any contract." 9 U.S.C. § 2. As this Court has held: "General contract principles of state law apply to arbitration clauses governed by the FAA." *Munoz v. Green Tree Fin. Corp.*, 343 S.C. 531, 539 (2001). The Court of Appeals therefore determined the enforceability of the Parties' arbitration agreement as a matter of South Carolina law.[3]

"[D]etermination whether a claim is subject to arbitration is subject to *de novo* review." *Partain v. Upstate Auto. Group*, 386 S.C. 488, 491, 689 S.E.2d 602, 603 (2010). "The party resisting arbitration bears the burden of proving that the claims at issue are unsuitable for arbitration." *Dean v. Heritage Healthcare of Ridgeway, LLC*, Op. No. 27401, 2014 S.C. LEXIS 192 at *6 (S.C. June 18, 2014) (quoting *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 91 (2000)).

I. THE COURT OF APPEALS ERRED IN CONCLUDING THAT ARBITRATION AGREEMENT DESIGNATED NASD AS THE EXCLUSIVE ARBITRATION FORUM.

The lower court rulings stand on the clearly erroneous assumption that the selection of an organization's rules for arbitration equates to the selection of that forum as the exclusive arbitration forum. The Court of Appeals held, based on a clause in the arbitration agreement referring to arbitration "conducted under the then applicable provisions of the code of arbitration procedure of NASD" that the "parties' arbitration agreement designates an exclusive arbitral forum that is no longer available to arbitrate." *Keller*, 2013 S.C. App. Unpub. LEXIS 5 at *3. In the trial court, Judge Hill similarly

[3] Although the agreement provides that it shall be governed by Iowa law, application of the law of South Carolina is appropriate here for two reasons. First, as the lower courts noted, Iowa law does not address the issues presented. *Keller*, 2013 S.C. App. Unpub. LEXIS 5 at *4. Second, to the extent that Iowa did address those issues, and was inconsistent with the law of South Carolina, as a matter of public policy the choice of law clause would be unenforceable and South Carolina law would govern. *Team IA, Inc. v. Lucas*, 395 S.C. 237, 249 (S.C. Ct. App. 2011).

found that "[t]he 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." (R. at 2.) These rulings are in direct conflict with a case decided by this Court in June, which held that an arbitration agreement calling for arbitration under the rules of a particular forum *does not* render the arbitration agreement invalid even though the named forum is unavailable to arbitrate the dispute. *Dean v. Heritage Healthcare of Ridgeway, LLC*, Op. No. 27401, 2014 S.C. LEXIS 192 (S.C. June 18, 2014). Stated simply, the foundation of both lower court rulings has crumbled following *Dean*.

Dean involved the enforceability of an arbitration agreement between a nursing home and one of its residents. *Id.* at *2. The arbitration agreement signed by Dean stated that arbitration under the agreement "*shall follow the rules of the American Arbitration Association ('AAA')*" and further provided that the "arbitration proceeding shall be conducted before one neutral arbitrator selected *in accordance with the rules of the AAA.*" *Dean*, 2014 S.C. LEXIS 192 at *3 (emphasis original.) Dean argued, just as Keller did below, that the reference in the agreement to the rules of AAA meant that the parties had agreed to arbitrate exclusively with AAA, and that since AAA no longer arbitrates personal injury disputes, the arbitration agreement was unenforceable. *Id.* at *4. The lower court agreed with this argument, reasoning that "the forum selection clause is an integral part of the agreement and cannot be remedied because the forum selected by [Appellants] will not hear this type of dispute." *Id.* at *5. This Court reversed.

This Court explained that when analyzing the enforceability of an arbitration agreement where the forum referenced in the agreement is unavailable the "primary inquiry is whether the named forum is an integral part of the arbitration agreement, or

whether it is instead an ancillary consideration." *Id.* at *11. To make this determination, the Court distinguished between arbitration agreements that refer to an arbitration proceeding "administered by" the named forum from one requiring a proceeding conducted "in accordance with" the named forum's rules:

> More specifically, we find that the named arbitral forum is not a material term to agreements in which the parties agree to arbitrate "in accordance with" the named forum's rules, absent other evidence to the contrary; however, as in *Grant*, when parties elect for a proceeding "administered by" a named forum, that forum should be viewed as integral to the arbitration agreement, absent other evidence to the contrary.

Id. at *13-14. In short, the Court held that the arbitration agreement was not rendered unenforceable merely because it referred to arbitration under the rules of a particular forum that was no longer available to arbitrate the dispute. *See also Brown v. Delfre*, 968 N.E.2d 696 (Ill. Ct. App. 2012) (applying same rationale as *Dean* in the context of arbitration agreement that referred to arbitration under NASD's rules and compelling arbitration).

Here, as in *Dean*, the Parties' arbitration agreement refers to "arbitration conducted under the then applicable provisions of the code of arbitration procedure of NASD." (R. p. 64.) This is the only reference to NASD in the entire arbitration agreement.[4] The reference to arbitration "conducted under" the then-applicable NASD rules is like the provision in *Dean* that arbitration be conducted "in accordance with" the named forum's rules. *See Dean* 2014 S.C. LEXIS 192 at *13-14. Thus, *Dean* makes clear that the reference to the NASD's rules is not the same as selecting the NASD as the

[4] This lone reference does not amount to a forum selection clause, particularly when read in the context of the entire arbitration agreement which also refers to "arbitration forums" in the plural and refers generally to "the rules of the arbitration forum in which a claim is filed." (R. at 64.)

exclusive arbitration forum. The Court of Appeals therefore erred by concluding that NASD, and only NASD, could serve as the forum for arbitrating this dispute.

The correct inquiry under *Dean* is whether a forum exists that will conduct the arbitration pursuant to the NASD rules, as the agreement requires. Here, FINRA is that forum. It is undisputed that FINRA assumed jurisdiction over—and continued to apply—the NASD rules. *Aslin v. Fin. Indus. Regulatory Auth., Inc.*, 704 F.3d 475, 477 n.2 (7th Cir. 2013) ("NASD refers to the National Association of Securities Dealers, a self-regulatory organization that was FINRA's predecessor. FINRA adopted the NASD rules as its own when it was established."); *Berthel Fisher & Co. Fin. Servs. v. Larmon*, 695 F.3d 749, 752 (8th Cir. 2012) (noting that FINRA code of arbitration procedure is successor to NASD code); *UBS Fin. Servs. v. City of Pasadena*, 2012 U.S. Dist. LEXIS 115365 at *6 n.1 (C.D. Cal. July 31, 2012) ("NASD was the predecessor to FINRA, and the former NASD rules are nearly identical to the present FINRA rules."); *Morgan Keegan & Co. v. Louise Silverman Trust*, 2012 U.S. Dist. LEXIS 3870 at *10, n.5 (D. Md. 2012) (explaining that "[t]he NASD Code of Arbitration was the predecessor to the FINRA Code and FINRA has stated that it intended no substantive change when it replaced NASD Rule 10301 with FINRA Rule 12200"); *Oppenheimerfunds Distrib. v. Liska*, 2011 U.S. Dist. LEXIS 136453 at *4-5 (S.D. Cal. Nov. 28, 2011) ("FINRA arbitrations are governed by the National Association of Securities Dealers ('NASD') Code of Arbitration Procedure."); *In re H&R Block Fin. Advisors, Inc.*, 262 S.W.3d 896, 900 (Tex. App. 2008) ("Although the NASD has changed its name, FINRA continues to apply the NASD arbitration rules and procedures."); *Morgan Stanley & Co. v. Feeley*, 2010 NY Slip Op. 30024U (N.Y. Sup. Ct. Jan. 5, 2010) ("FINRA's arbitration forum

continued to follow the same rules followed by NASD and [the plaintiff] agreed to arbitrate in accordance with NASD's rules. . . . Accordingly, FINRA had jurisdiction over the parties and the dispute.").

Thus, when the Parties in this case elected to arbitrate their dispute under the "then applicable code of arbitration procedure of NASD," the Parties chose to arbitrate under what is now called the FINRA Code of Arbitration Procedure for Customer Disputes. Keller has failed to point to any material difference between the FINRA rules and the NASD rules because there is none. *See* FINRA, Code of Arbitration Procedure, http://www.finra.org/arbitrationandmediation/arbitration/rules/codeofarbitrationprocedure / (last visited July 31, 2014) (containing links to versions of current and former rules); 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."). It was therefore clear error for the Court of Appeals to hold that the Parties' arbitration could not be enforced as written.

II. THE COURT OF APPEALS ERRED BY HOLDING, CONTRARY TO EVERY COURT THAT HAS CONSIDERED THE ISSUE, THAT THE 2007 ASSUMPTION BY FINRA OF THE ARBITRATION PROGRAM PREVIOUSLY ADMINISTERED BY THE NASD RENDERED NASD UNAVAILABLE AS A FORUM FOR ARBITRATION OF THIS DISPUTE.

a. The NASD Arbitral Forum Still Exists, Although it Is Now Called FINRA.

Even if the Court of Appeals had correctly interpreted the arbitration agreement as choosing NASD as the exclusive arbitral forum, which under *Dean* it plainly did not, the Court of Appeals would have further erred by denying the motion to compel on the ground that the chosen forum is "unavailable." The NASD forum merely changed its name to FINRA—a fact that has no bearing on the enforceability of agreements to arbitrate before NASD.

Every federal circuit court that has considered the issue has recognized that FINRA is merely the new name for the organization formerly known as NASD. *Brecek & Young Advisors v. Lloyds of London Syndicate 2003*, 715 F.3d 1231, 1235 n.2 (10th Cir. 2013) ("NASD was succeeded by the Financial Industry Regulatory Authority, Inc., in 2007."); *Aslin v. Fin. Indus. Regulatory Auth., Inc.*, 704 F.3d 475, 477 n.2 (7th Cir. 2013) (recognizing that NASD was FINRA's predecessor and that FINRA adopted NASD rules); *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')."); *Epstein v. SEC*, 416 Fed. Appx. 142, 144 n.1 (3d Cir. 2010) ("The National Association of Securities Dealers ("NASD") changed its name to FINRA in 2007.").

Therefore, NASD is "unavailable" in name only. But a mere name change does not render a forum unavailable for arbitration. *See Grant v. Magnolia Manor-Greenwood, Inc.*, 383 S.C. 125, 678 S.E.2d 435 (S.C. 2009) (noting in case where arbitration agreement contained an actual forum selection clause selecting the National Health Lawyers Association as the arbitration forum that "[t]he NHLA has since become the American Health Lawyers Association and hereinafter will be referred to by that name"). For this reason, the cases are legion in which courts have compelled arbitration

to FINRA pursuant to arbitration clauses referring to NASD. *See, e.g., Stewart v. Laidlaw & Co. (UK)*, 2012 U.S. Dist. LEXIS 11388 (S.D. Fl. Jan. 31, 2012) (granting motion to compel arbitration before FINRA where arbitration agreement required that disputes "shall be submitted to the arbitration board of the [NASD]"); *Johannsen v. Morgan Stanley Credit Corp.*, 2012 U.S. Dist. LEXIS 5367 at *6 (E.D. CA. Jan. 11, 2012) (compelling arbitration before FINRA where arbitration clause referred to NASD as appropriate venue for arbitration); *Robinson v. Isaacs*, 2011 U.S. Dist. LEXIS 118070 at *18 (S.D. Cal. Oct. 12, 2012) (same); *Coby Townsend Hurst v. 1st Disc. Brokerage., Inc.*, 2011 U.S. Dist. LEXIS 132070 (W.D. Ark. Oct. 4, 2011) (same); *Clinton v. Oppenheimer & Co.*, 824 F. Supp. 2d 476, 488 (S.D.N.Y. 2011) (same); *Kilcher v. Dale*, 784 N.W.2d 866, 869 (Minn. Ct. App. 2010) (ordering parties to arbitration where they "agreed to arbitrate any controversy 'arising out of or relating' to the accounts in accordance with the rules of the National Association of Security Dealers (NASD). The NASD is now known as the Financial Industry Regulatory Authority or FINRA."); *Klein v. Ameriprise Fin. Serv., Inc.*, 2009 U.S. Dist. LEXIS 27545 at *7-8 (W.D. Mo. Mar. 31, 2009) (collecting cases and holding plaintiff bound to arbitrate before FINRA where arbitration agreement mentions only NASD); *Suschil v. Ameriprise Fin. Serv., Inc.*, 2008 U.S. Dist. LEXIS 27903 at *5 (N.D. Ohio Apr. 7, 2008) (enforcing parties' arbitration agreement, compelling arbitration under FINRA even though the agreement mentions only NASD); *In re Stanford Group Co.*, 273 S.W.3d 807, 810 n.1 (Tex. App. 2008) ("Courts continue to enforce NASD arbitration clauses through FINRA arbitration"). In these opinions, both the courts and the parties recognized the simple fact

that NASD changed its name to FINRA and that for purposes of the arbitration commitment, there is no difference between them.[5]

In reaching an opposite conclusion, the Court of Appeals has become the first and only court in the country to refuse to enforce an arbitration agreement on the ground that NASD no longer exists. Every other court that has considered the argument made by Keller has rejected it out of hand.

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

> Though the NASD no longer exists in name, it was "succeeded" by the Financial Industry Regulatory Authority ("FINRA"). *Wachovia Sec., LLC v. Brand*, 671 F.3d 472, 474 n.2 (4th Cir. 2012). FINRA came into existence when NASD and the New York Stock Exchange's member regulation body merged to become "the self-regulatory organization for the securities industry." *Id.*; *see also Fiero v. Fin. Indus. Regulatory Auth., Inc.*, 660 F.3d 569, 571 (2d Cir. 2011) ("FINRA is the successor to the National Association of Securities Dealers . . . ."). FINRA adopted NASD's bylaws, including those concerning arbitration, with changes made "solely to reflect the proposed governance structure of the [new organization's] Board." SEC Release No. 34-56145, 72 Fed. Reg. 42169,

[5] For this reason, contrary to the ruling of the Court of Appeals, it is unnecessary to apply Section 5 of the FAA to appoint a substitute arbitrator because FINRA is an available forum that will apply the NASD's rules. Furthermore, the Court of Appeals' decision not to apply Section 5 rested on the erroneous assumption that the Parties had selected the NASD as the exclusive arbitration forum, which it characterized as "integral" to the Parties' agreement to arbitrate. *Keller*, 2013 S.C. App. Unpub. LEXIS 5 at *4-5. As discussed above, *Dean* overruled this rationale, making clear that an agreement that refers only to arbitration under an organization's rules does not equate with selecting the referenced organization as the exclusive arbitration forum. *Dean*, 2014 S.C. LEXIS 192 at *13-14.

> 2007 WL 5185330, at *8 (July 26, 2007). Given that FINRA is the successor entity to NASD and serves the same function, the fact that the arbitration agreement refers to NASD does not render the contract illusory or performance impossible. *See Lewis v. UBS Fin. Servs. Inc.*, 818 F. Supp. 2d 1161, 1166 (N.D. Cal. 2011) (holding that court can compel arbitration "before FINRA where . . . the arbitration agreement specifies that arbitration will occur under the rules of NASD" and collecting similar cases).

Id. at *14-15. Other courts have reached the same conclusion. *See Boylan v. Wells Fargo Advisors, Inc.*, 2014 U.S. Dist. LEXIS 102012 at *12-13 (S.D.N.Y. July 21, 2014) (rejecting argument that FINRA lacked jurisdiction over arbitration where agreement specified arbitration before NASD because "FINRA is the successor to the NASD"); *Rusciano v. Oppenheimer & Co., Inc.*, 2014 U.S. Dist. LEXIS 59413 (S.D.N.Y. Apr. 25, 2014) (explaining that argument that arbitration agreement is invalid because it refers to NASD rather than FINRA has been "roundly and repeatedly rejected in [the Second] Circuit and that the "difference between NASD and FINRA is purely semantic"); *Quality Air Servs., LLC v. Dipippo*, Case No. 12-338-JFM, 2013 U.S. Dist. LEXIS 26443 at *7 (D. Md. Feb. 25, 2013) ("Plaintiff also contends that the NYLIFE Securities agreement calls for arbitration before the National Association of Securities Dealers, Inc., and the NASD no longer exists. Plaintiff's argument fails because the NASD did not simply cease to exist, but was assumed into the Financial Industrial Regulatory Authority ('FINRA'), which inherited NASD's existing rules and regulations."); *Branch v. Sickert*, No. 2:10-128, 2011 U.S. Dist. LEXIS 19392 (N.D. Ga. Feb. 28, 2011) (compelling arbitration before FINRA where agreement references rules of NASD and where plaintiff argued, like Keller, that selection of rules is the same as exclusive selection of the forum); *Lewis v. UBS Fin. Servs.*, 818 F. Supp. 2d 1161, 1165-66 (N.D. Cal. 2011) ("[T]he fact that the other arbitration clauses do not specify FINRA is of little moment....

Given that FINRA is merely the successor entity to NASD, courts have compelled arbitration before FINRA where, as in this case, the arbitration agreement specifies that arbitration will occur under the rules of NASD."); *German Am. Fin. Advisors & Trust Co. v. Reed*, 969 N.E.2d 621, 628 n.13 (Ind. Ct. App. 2012) (noting that plaintiff abandoned argument that arbitration provision was unenforceable because NASD no longer existed but regardless "other jurisdictions have 'continue[d] to enforce NASD arbitration clauses through FINRA arbitration and interpret and enforce NASD's rules as applicable to FINRA.'"); *Wells Fargo Advisors, LLC v. Runnels*, 126 So. 3d 137, 144 (Miss. Ct. App. 2013) (rejecting argument that arbitration agreement was void ab initio because agreement referred to arbitration under NASD rather than FINRA because the change from NASD to FINRA was "only a name change").

b. Public Policy Supports Enforcing the Parties' Arbitration Agreement

The Court of Appeals also disregarded the strong state and federal policies which favor the 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 (2001) ("The policy of the United States and South Carolina is to favor arbitration of disputes."). The 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 arbitratability." *Moses H. Cone Mem'l Hosp. v. Mercury Construct. Corp.*, 460 U.S. 1, 24-25 (1983). The Court of Appeals disregarded this authority in striking down the Parties' arbitration agreement based on a mere technicality.

In addition to the public policy interests supporting arbitration, the Court of Appeals' ruling has an institutional impact beyond the South Carolina court system. The opinion below renders South Carolina an outlier in an otherwise uniform national arbitration system through FINRA which is available as an efficient resource for citizens like Keller to adjudicate disagreements. It also threatens to disrupt the otherwise uniform scheme of arbitration administered by FINRA. Thus, for these additional reasons, the decision of the Court of Appeals should be reversed.

III. THE TRIAL COURT'S ALTERNATIVE HOLDING THAT THE PARTIES' DISPUTE FELL OUTSIDE THE SCOPE OF THE ARBITRATION AGREEMENT WAS CLEAR ERROR.

The Court of Appeals did not address the trial court's alternative rationale for denying the motion to compel—that the arbitration agreement did not apply to Keller's claims against Johnson, his business, and his broker-dealer, IFP. (R. at 8-9.) Remand on this issue, however, is unnecessary. The scope of the arbitration agreement is an issue for

de novo consideration by this Court, and in this case does not present a difficult question. *See, e.g., Lee v. Bunch*, 373 S.C. 654, 660 (S.C. 2007) (considering and resolving issues not addressed by the Court of Appeals). The Parties' broad arbitration agreement clearly encompasses the claims at issue. Therefore, the Court should order the Parties to arbitrate without further proceedings below.

On September 12, 2007, Keller executed a new account information form, a copy of which was attached to the Motion to Compel Arbitration. (R. at 64.) The authenticity of this form is not in question. On the back of this form is an Account Agreement, containing the Arbitration Agreement. The very first line of the Account 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:* . . . ." (R. at 64 (emphasis added).) It is undisputed that one of the accounts IFP opened for Keller was the variable annuity. (R. at 18-19.) Thus, this agreement governs the relationship between Keller and IFP and Johnson as it pertains to the annuity.

In addition, 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.*

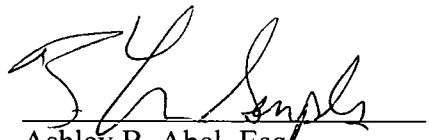
Corp., 373 S.C. 144, 149, 644 S.E.2d 705, 708 n.2 (S.C. 2007). In the instant action, Keller's purchase of the variable annuity was a "transaction" "arising out of" the Arbitration Agreement that he made with IFP. Keller has sued IFP and Johnson because he is unsatisfied with this transaction. Therefore, 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, Petitioners produced the uncontroverted Affidavit of William Johnson. (R. at 89-90.) In his Affidavit, Johnson explained that each time Keller opened a new account he executed a form containing the account agreement discussed above. (*Id.*) Attached to Johnson's Affidavit were three such account forms executed during the Parties' relationship. (R. at 97-100.) Johnson explained that on September 12, 2007, Keller executed a new 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." (R. at 90.) No allegation or evidence to the contrary was offered by Keller. Thus, there is no dispute that the Arbitration Agreement governs the purchase of the variable annuity. In light of the undisputed record evidence summarized above, the Court should reject trial court's holding to the contrary and compel arbitration.

CONCLUSION

For the reasons stated, this Court should reverse the opinion of the Court of Appeals and order the Parties to submit this dispute to arbitration before FINRA.

Respectfully submitted,



August 8, 2014

Ashley B. Abel, Esq.
T. Chase Samples, Esq.
Jackson Lewis P.C.
15 South Main Street, Suite 700
Greenville, SC 29601
(864) 232-7000
Attorneys for Petitioners

THE STATE OF SOUTH CAROLINA
In The Supreme Court

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Case No. 2013-000651

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 Brief of Petitioners this 8th day of August 2014, 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:

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

Charles F. Turner, Jr., Esq.
Wilson, Jones, Carter & Baxley, P.A.
872 S. Pleasantburg Drive
Greenville, South Carolina 29607
Counsel for Jackson National Life Insurance Company

Ashley B. Abel, Esq.
T. Chase Samples, Esq.
Jackson Lewis P.C.
15 South Main Street, Suite 700
Greenville, SC 29601
(864) 232-7000
Attorneys for Petitioners

Dated this 8th day of August 2014.