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

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

BRIEF OF RESPONDENT

H. Donald Sellers, SC Bar No. 5018
J.W. Matthews III, SC Bar No. 68581
Haynsworth Sinkler Boyd, P.A.
ONE North Main, 2nd Floor (29601)
Post Office Box 2048
Greenville, South Carolina 29602
Telephone: 864-240-3200
Attorneys for Respondent

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

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

BRIEF OF RESPONDENT

H. Donald Sellers, SC Bar No. 5018
J.W. Matthews III, SC Bar No. 68581
Haynsworth Sinkler Boyd, P.A.
ONE North Main, 2nd Floor (29601)
Post Office Box 2048
Greenville, South Carolina 29602
Telephone: 864-240-3200
Attorneys for Respondent

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

RULES

OTHER AUTHORITIES

STATEMENT OF ISSUES ON APPEAL

1. DID THE COURT OF APPEALS ERR IN REFUSING TO OVERTURN THE LOWER COURT'S DENIAL OF PETITONER'S MOTION TO COMPEL ARBITRATION WHERE THE NASD, THE SPECIFIC SELF REGULATORY ORGANIZATION CHOSEN BY THE PARTIES, DID NOT EXIST.

2. SHOULD THE APPEALS COURT DECISION BE AFFIRMED ON THE ADDITIONAL SUSTAINING GROUND THAT THE ARBITRATION AGREEMENT DOES NOT APPLY TO THE INVESTMENT AT ISSUE BUT RELATES INSTEAD TO A DIFFERENT INVESTMENT PRODUCT PURCHASED BY RESPONDENT AS HELD BY THE TRIAL COURT.

STATEMENT OF THE CASE

This case involves the issue of whether an arbitration agreement is enforceable when the exclusive forum selected by the parties at the time of contracting no longer exists and, in fact, did not exist at the time the agreement was executed. Petitioners and Respondent agreed to arbitrate before the NASD, a forum with a history and experience in handling complex securities disputes. As such, the use of that particular forum was tantamount to the agreement. However, prior to signing the contract, a new SRO with different rules had been created and the NASD dissolved. Both the Circuit Court and the Court of Appeals agreed that the parties' choice of the NASD as an exclusive, specific forum was an integral part of the agreement and necessary for enforcement of the agreement to arbitrate.

Respondent submits that this Court should affirm the Court of Appeals decision because:

- The parties selected NASD as the *exclusive* forum to arbitrate any dispute, and NASD no longer existed when the Motion to Compel Arbitration was filed, and in fact, did not exist when the agreement was presented to Respondent for execution;

- The selection of NASD was integral to the agreement and necessary for enforcement of the agreement to arbitrate;
- FINRA, an entirely new SRO with different procedures, is not the same as the NASD, and cannot be "substituted" as a forum; and
- The dispute giving rise to this case is outside the scope of the arbitration agreement since the form signed by Respondent applies to a different investment product.

On January 18, 2011, Plaintiff and Respondent David W. Keller (hereinafter "Keller" or "Respondent") filed the present case in the Greenville County Court of Common Pleas against Petitioners William C. Johnson ("Johnson"), Diversified Business Concepts, Inc. ("DBC"), ING Financial Partners, Inc. ("ING"), and Defendant Jackson National Life Insurance Co. ("Jackson National"). (R. p. 16). The Complaint asserts various state law claims alleging that Johnson misrepresented the benefits and characteristics of the Jackson National Annuity he sold to Keller. (R. pp. 17-28). On February 18, 2011, Petitioners filed a Motion to Compel Arbitration and Dismiss or Stay. (R. p. 47). Jackson National filed an Answer to Respondent's Complaint, but did not file a motion to compel arbitration, did not join in ING's motion, and is not a party to this appeal.

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. On May 26, 2011, Judge Hill issued an order denying the Petitioners' Motion. (R. p. 3). Judge Hill found that "[b]ecause the arbitration forum specifically selected by the parties . . . does not exist . . . a material term of the arbitration clause has failed, and the purported agreement to arbitrate must likewise fail." (R. p. 4, lines 9-12). Judge Hill also found that Petitioners "failed to satisfy their burden of proving that the arbitration clause

on the ING letterhead governs disputes arising from the Jackson National Annuity. (R. p. 9).

Petitioners filed a Notice of Appeal from Judge Hill's Order on June 16, 2011. The Court of Appeals heard the arguments on October 2, 2012 and issued its opinion on January 9, 2013. (R. p. 205). In its *Per Curiam* Unpublished Opinion, the Court of Appeals affirmed Judge Hill's Order. (R. p. 206). The Court of Appeals reasoned that the parties' agreement "designates an exclusive arbitral forum" and that the court "cannot rewrite the parties' agreement" to substitute a new forum. (R. p. 207). Petitioners then filed a Petition for Rehearing En Banc on January 23, 2013, which was denied on March 12, 2013. A Petition for Writ of Certiorari was subsequently granted on July 10, 2014.

FACTS

After thirty-seven (37) years of employment with Michelin, Respondent sought to invest a substantial portion of his life's savings into financial products suitable to his retirement objective. (R. p. 17). Johnson, through his company DBC, solicited Respondent's business. (R. p. 18). Johnson, acting both as an agent and representative of ING and Jackson National, held himself out as a skilled and knowledgeable expert in financial planning, insurance and estate planning. (R. p. 18). After meeting with Johnson, Respondent relied upon Johnson's representations, and provided Johnson with private and sensitive financial information. (R. p. 18). From May through October of 2007, Respondent and Johnson met on multiple occasions to discuss potential investments suitable to Respondent's investment needs. (R. p. 18). Respondent's particular concerns and desires, expressed to Johnson, were that he be provided a

guaranteed annual increase in value to protect him and his wife in the event of a long life span. (R. p. 18).

After multiple discussions, Johnson ultimately recommended and advised that Respondent 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). Johnson specifically represented to Respondent that the Annuity would be a conservative investment and would have a guaranteed annual increase in value. (R. p. 19). Relying upon Johnson's representations regarding his investing expertise, and upon his advice concerning the above-referenced investments, Respondent purchased the two (2) products Johnson recommended 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 through Petitioner ING.

In connection with Respondent's purchase of the investment products, the parties executed multiple documents, including an ING "Account Information Form." (R. p. 67). This form includes the arbitration agreement that is the subject of this case. The agreement provides that "any dispute . . . arising out of this agreement shall be submitted to arbitration conducted under the then applicable provisions of the code of arbitration procedure of NASD." (R. p. 64).

In mid-2007, prior to Respondent's purchase of the financial products from Johnson, the NASD and the member regulation, enforcement, and arbitration operations of the New York Stock Exchange ("NYSE") combined to create a new organization

called the Financial Industry Regulatory Authority ("FINRA"). See 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. FINRA became a new self-regulatory organization ("SRO") used to arbitrate disputes arising in the financial services industry. See id.

At the time the parties signed the ING Form designating NASD, NASD no longer existed. FINRA had already become the arbitral body for disputes in the financial services industry. Despite this information, Petitioners did not change the form to designate FINRA.

In late 2009, Respondent discovered that the Annuity he purchased 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). Respondent repeatedly sought advice from Johnson on how to mitigate the effect of the market down-turn on his Annuity. (R. pp. 20-21). After unsuccessful discussions with Johnson, Respondent filed a formal complaint with Petitioner ING. (R. p. 21, lines 1-7). Petitioner ING allegedly investigated the matter, but sought no input from Respondent, 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). This suit was filed following ING's decision.

ARGUMENT

I. THE PURPORTED ARBITRATION AGREEMENT IS VOID BECAUSE THE PARTIES' SELECTION OF THE NASD AS THE EXCLUSIVE ARBITRATOR CONSTITUTES AN INTEGRAL TERM OF THE CONTRACT, AND THE NASD DOES NOT EXIST

This case concerns the enforceability of an arbitration clause subject to the Federal Arbitration Act ("FAA"). The parties' agreement provides that it shall be governed by Iowa law. (R pp. 63-64). Iowa, like South Carolina, applies general contractual principles to determine the validity of arbitration agreements governed by the FAA. See e.g., Gen. Conf. of the Evangelical Methodist Church v. Faith Evangelical Methodist Church, 809 N.W.2d 117, 122 (Iowa Ct. App. 2011); Munoz v. Green Tree Fin. Corp., 343 S.C. 531, 538, 542 S.E.2d 360, 364 (2001). The Court of Appeals opted to apply South Carolina law because "[n]either Iowa state nor the Eighth Circuit Court of Appeals have decided whether a court may substitute an arbitral forum when a designated forum has become unavailable to arbitrate." (R. p. 207). 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-Greenwood, 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)).

Arbitration agreements are matters of contract, and general contract law governs the evaluation of the enforceability of an arbitration agreement. Grant, 383 S.C. at 130, 678 S.E.2d at 439; Smith Barney, Inc. v. Keeney, 570 N.W.2d 75, 78 (Iowa 1997). As such, a valid arbitration agreement requires the parties' "mutual assent to the terms."

Schaer v. Webster Cnty., 644 N.W.2d 327, 338 (Iowa 2002). The contract, including the agreement to arbitrate, "is to be interpreted as a whole, and it is assumed in the first instance that no part of it is superfluous." Keeney, 570 N.W.2d at 78. "Before compelling a party to arbitrate pursuant to the FAA, a court must determine that there is an agreement to arbitrate and the dispute at issue falls within the scope of the agreement." Century Indem. Co. v. Certain Underwriters at Lloyd's, 584 F.3d 513, 523 (3d Cir. 2009).

A. Enforceability of the Agreement Depends Upon NASD Overseeing the Arbitration

The Court of Appeals correctly found that the parties chose NASD as the exclusive forum to arbitrate disputes, and that the selection was a vital part of the agreement. Also, the Court of Appeals correctly refrained from inserting a different arbitral forum into the arbitration agreement. Since Petitioners' contract form expressly required "arbitration conducted under the then applicable provisions of the code of arbitration procedure of NASD," (R. p. 64), 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 [NASD's] 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 [NASD] required deposit."

This Court's opinions in Grant v. Magnolia Manor-Greenwood, 383 S.C. 125, 678 S.E.2d 435 (2009) and Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 759 S.E.2d 727 (2014) control the determination of whether a named arbitrator is an integral or ancillary logistical concern. Where a material, integral part of an arbitration agreement fails, the entire agreement to arbitrate is void. See Dean, 408 S.C. at 382, 759

S.E.2d at 733 (noting that the primary inquiry in determining the validity of such an agreement is whether the forum is an integral part of the agreement); Grant, 383 S.C. at 132, 678 S.E.2d at 439 (failure of selected arbitral forum warrants invalidation of entire arbitration clause).

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, 383 S.C. 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 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 Respondent's claim.

In Dean, this Court re-affirmed its decision in Grant while outlining some new rules for determining whether the named forum is integral to enforceability of the agreement. See Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 382-87, 759 S.E.2d 727, 733-36 (2014). Specifically, the Court noted that the decision to arbitrate according to the rules of a specific forum is fundamentally different when the chosen forum is a SRO specializing in securities disputes (such as the NASD). See id. at 386 n.12, 759 S.E.2d at 735. When parties elect to arbitrate in accordance with the rules of a specific SRO, enforceability of the agreement is *dependent* on that specific SRO overseeing the arbitration. See id. ("Unlike the SROs, arbitration 'in accordance with the

applicable rules of the AAA' is not dependent on the AAA overseeing the arbitration."). Here, the parties chosen forum, NASD, was a SRO with a history that specialized in arbitrating complex securities disputes. Thus, the enforceability of the arbitration clause rests upon NASD being able to arbitrate the dispute. Since NASD did not exist at the time of the filing of Petitioner's Motion, or for that matter, at the time of contracting, the agreement is void.

The Fourth Circuit, along with other jurisdictions, agree with South Carolina when it comes to SRO's in the securities industry. See, e.g., Smith Barney, Inc. v. Critical Health Sys. Of N.C., 212 F.3d 858, 861-62 (4th Cir. 2000) (refusing to allow arbitration in front of the AAA when the parties chose to arbitrate according to the rules of a SRO in the securities industry; In re Salomon, Inc., 68 F.3d 554, 561 (2d Cir. 1995) (refusing to substitute a new arbitral forum when parties agreed to arbitrate according to the rules of the NYSE); Roney & Co. v. Goren, 875 F.2d 1218, 1219 (6th Cir. 1989) (refusing to substitute the NASD for NYSE); Luckie v. Smith Barney, 999 F.2d 509, 514-15 (11th Cir. 1993) (refusing to allow arbitration before the AAA when the parties agreed to arbitrate according the rules of a SRO in the securities industry); Merrill Lynch v. Georgiadis, 903 F.2d 109, 112 (2d. Cir. 1990) (refusing to substitute the AAA for one of the securities SRO's).

In In re Salomon Inc., 68 F.3d 554, 561 (2d Cir. 1995), the parties agreed to arbitrate any dispute pursuant to "the arbitration procedure prescribed in the Constitution and rules then obtaining of the NYSE." Id. at 558. The Second Circuit Court of Appeals affirmed the lower court's refusal to substitute an alternate arbitrator after the NYSE's arbitration group declined to hear the dispute. Id. at 561. The court explicitly rejected the

appellants' contention that "arbitration need not take place before the NYSE...so long as the NYSE's rules govern in a proceeding brought before whichever arbitral body hears the dispute." Id. at 558. In so holding, the court held that when "it is clear that the failed [forum selection] term is not an ancillary logistical concern, but rather is as important a consideration as the agreement to arbitrate itself, a court will not sever the failed term from the rest of the agreement and the entire arbitration provision will fail." Id. at 561 (internal citations omitted). Consequently, the Second Circuit determined that the selection of the NYSE was an integral term, and affirmed the lower court's refusal to appoint substitute arbitrators. Id.

Likewise, in Roney & Co. v. Goren, 875 F.2d 1218 (6th Cir. 1989), the Sixth Circuit affirmed the district court's decision to bar the appellant from submitting her claim to arbitration before the NASD. Id. at 1219. The Court premised its decision on a pre-dispute arbitration provision executed by the parties stating that all disputes would be submitted to arbitration "under the provisions of the Constitution and Rules of the Board of Governors of the New York Stock Exchange." Id. In reaching its decision, the court opined that "[a] forum selection clause in an arbitration agreement, just like any other contract provision, is entitled to complete enforcement absent evidence that the contract was procured through fraud or excessive economic power." Id. at 1223. The parties selected the NSYE, the selection of the NYSE was an integral term of the agreement to arbitrate, and the NYSE therefore constituted the sole arbitration forum before which the parties could arbitrate. See Id.

B. Petitioner's Primary Contention that Dean Mandates Reversal is Clearly Erroneous

Petitioner's principal argument in this appeal that this Court's decision in Dean mandates overturning the Court of Appeal's decision is incorrect for at least two distinct reasons. First, the present dispute concerns a SRO and federal securities law which, as this Court was careful to point out, compels a different outcome from Dean. Second, the bright-line distinction in Dean is inapplicable here because this clause did not use the words "administered by" or "in accordance with."

In Dean, this Court distinguished agreements requiring a proceeding "administered by" a specific forum from those requiring a proceeding conducted "in accordance with" a named forum. Dean v. Heritage Healthcare of Ridgeway, LLC, 408 S.C. 371, 384, 759 S.E.2d 727, 734 (2014). But, the arbitration clause at issue here used neither phrase. The parties agreed that "any dispute between [them] arising out of this agreement shall be submitted to arbitration *conducted under the then applicable provisions of the code of arbitration procedure of NASD*." (R. p. 64). Thus, the Court should look to other evidence to determine whether the named arbitral forum is material to the agreement. Namely, as discussed herein, the Court should look to the parties' decision to select NASD, rather than focusing on the wording of the agreement. At the very least, the clause is ambiguous, and because Petitioners drafted the agreement, the contract should be construed against them. See McGill v. Moore, 381 S.C. 179, 186, 672 S.E.2d 571, 575 ("[A]ny ambiguity will be construed in favor of ... the non-drafting party."); Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents, 471 N.W.2d 859, 863 (Iowa 1991) ("[W]hen there are ambiguities in a contract, they are strictly construed against the drafter.").

Moreover, a detailed analysis of the precise language of the agreement is unnecessary because the distinction drawn in Dean does not apply to cases involving federal securities laws. The Court stated that the analysis is fundamentally different, and the outcome opposite, when a SRO specializing in securities law is involved. Dean, 408 S.C. at 386 n.12, 759 S.E.2d at 735.

The plaintiff in Dean based her argument upon Smith Barney and In Re Salomon, which involved federal securities law. Id. However, the Dean case involved personal injury. See id. If the dispute involved securities law rather than personal injury, the Court indicated the result would be different. See id. The Court stated that cases such as Smith Barney and In Re Salomon "involve federal securities law and the decision to arbitrate before a self-regulatory organization (SRO), a forum which must operate in strict compliance with the Securities and Exchange Act of 1934 (SEC)[.]" Id. The Court reasoned:

> In contrast to the SROs, which are closely governed by the Securities and Exchange Commission and have developed complex regulatory schemes for overseeing arbitration of securities disputes, the AAA simply provides a list of potential arbitrators from which the parties can choose, as well as procedural rules for conducting the arbitration, and coordinates the logistics of setting up the parties with the chosen arbitrator . . . . Unlike the SROs, arbitration 'in accordance with the applicable rules of the AAA' is not dependent on the AAA overseeing the arbitration.
>
> Id.

Like the parties in Smith Barney and In Re Salomon, the parties in this case selected a particular arbitration forum and process capable of and experienced in handling complex, industry specific disputes. The parties selected NASD. The parties selected the NASD due to its status, expertise, prior history and experience in handling the type of disputes contemplated in the arbitration clause. Thus, an analysis of the precise language

of the agreement that this Court undertook in Dean is unnecessary. The validity of the arbitration clause was dependent upon the NASD overseeing the arbitration, and the NASD cannot do that. For that reason alone, Respondent asks this Court to affirm the Court of Appeals ruling.

C. FINRA is Not the Same as NASD

Petitioners assert that FINRA "is merely the new name for the organization formerly known as NASD." (Pet'rs' Br. p. 10). Therefore, Petitioners argue that FINRA can be used as a substitute forum. Under this argument, 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. However, this position is contrary to both FINRA's own view at the time of its creation, and the changes that have taken place in the years since.

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. See 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. 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[.]") See 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 (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 consolidated rulebook with a new organizational framework reflecting a more logical and related subject matter plan. See FINRA Information Notice, March 12, 2008, p.2, http://www.finra.org/web/groups/industry/@ip/@reg/@notice/documents/notices/p038121.pdf. The current FINRA arbitration procedures note numerous amendments to the rules since 2007. See FINRA Manual, http://finra.complinet.com/en/display/display_main.html?rbid=2403&element_id=4106 (last visited Sept. 23, 2014) (noting the dates for amendments to each rule). To this day, FINRA continues to make changes to the arbitration procedures once employed by NASD. For instance, FINRA recently filed a proposed rules change to increase various arbitration fees. See FINRA, Rule Filings SR-FINRA-2014-026, http://www.finra.org/Industry/Regulation/RuleFilings/2014/P528910 (last visited Sept. 23, 2014). In June, FINRA asked the SEC to review a plan that would change the makeup of the arbitration panels. Suzanne Barlyn, *Limits on arbitrators with Wall St. ties to go to SEC*, Reuters (June 11, 2014), http://www.reuters.com/article/2014/06/11/us-finra-arbitration-idUSKBN0EM1UK20140611. Finally, in July, FINRA formed a task force to make even more changes to the arbitration procedures. *FINRA Appoints Arbitration Task Force*, ThinkAdvisor (July 17, 2014), http://www.thinkadvisor.com/2014/07/17/finra-appoints-arbitration-task-force. FINRA's

Chairman and CEO stated that the arbitration process has been undergoing "dramatic changes" over the past decade. See id.

Therefore, FINRA is not applying the NASD procedures that the Respondent thought would apply to disputes. Instead, the procedures have changed greatly since the creation of FINRA, and continue to change to this day. 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 for the proposition that the NASD merely changed its name. (Pet'rs' Br. p. 8). All seven cases that Petitioner cited merely reference the NASD/FINRA change in a footnote without further discussion of the issue. (Pet'rs' Br. p. 11). Thus, those cases have little or no relevance to the dispute before this Court. In many other cases cited by Petitioner, where arbitration before FINRA was ordered, the party seeking to avoid arbitration did not cite to any authority or present any arguments for the Court to consider on the matter. (Pet'rs' Br. p. 12). In addition, Petitioners rely heavily on ten unpublished opinions of federal and state courts from various jurisdictions. (Pet'rs' Br. p. 12-14). Rule 268(d)(2), SCACR provides that "Memorandum opinions and unpublished orders have no precedential value and should not be cited except in proceedings in which they are directly involved." For that reason, Respondent submits those cases have no precedential value and should not be considered by this Court.

Moreover, the similarity between the procedures used by FINRA and NASD is irrelevant. In Roney & Co., discussed in detail above, the Sixth Circuit noted that there was no substantive difference between the NASD's and the NYSE's arbitration procedure. Roney & Co. v. Goren, 875 F.2d 1218, 1220 (6th Cir. 1989). Despite that fact, the court held that the selection of the NYSE meant that only the NYSE could arbitrate the dispute. Id. at 1223. The fact that the NASD was capable of handling the arbitration with equal skill and efficiency, and the fact that the NYSE and the NASD "adopted [substantially] the same Uniform Code of Arbitration" had no bearing. Id. at 1220-21. The court concluded that "the customer's ability to demand arbitration before the arbitral forum of his choice dictates that he is equally free to agree to limit his recourse to a particular forum." Id. at 1223. The court further reasoned that its decision in no way conflicted with "federal policy favoring arbitration." Id.

In South Carolina, when determining the validity of an arbitration agreement, "the circuit court's factual findings will not be overruled if there is any evidence reasonably supporting them." Grant v. Magnolia Manor-Greenwood, 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)). 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. (R. p. 3).

D. Public Policy Favors Affirming the Court of Appeals

Petitioners are asking this Court to rewrite the parties' agreement because of their own mistake. Petitioners, as active industry participants, knew or should have known of

NASD's dissolution before entering into the contract with Respondent. Despite this knowledge, neither Johnson nor anyone from ING advised Respondent of the change or made the appropriate change to the Account Information Form to replace NASD with FINRA. Instead, Petitioners are asking this Court to re-write their form agreement. Petitioners had from the end of July, when FINRA became the new arbitral body for securities disputes and NASD ceased to exist, until September 12 to print a new form. Instead, Petitioners had Respondent sign a form requiring arbitration in front of a forum that no longer existed. At no time after the signing of the form did Petitioners seek to have Respondent sign a new form or notify him of a change.

Petitioners argue that the Court of Appeals "disregarded the strong state and federal policies which favor the arbitration of disputes." (Pet'rs' Br. p. 15). Petitioner is correct that courts value the arbitration process, but "a party cannot be forced to arbitrate a dispute [and thereby give up his constitutional right to a jury trial] if it has not agreed to do so." AT&T Tech., Inc. v. Commc'ns Workers, 475 U.S. 643, 648 (1986). "Before compelling a party to arbitrate pursuant to the FAA, a court must determine that there is an agreement to arbitrate . . . ." Century Indem. Co. v. Certain Underwriters at Lloyd's, 584 F.3d 513, 523 (3d Cir. 2009).

Also, Petitioners assertion that the Court of Appeals' unpublished decision has "major implications for the securities industry" is specious. The issue presented by the facts under review here is unlikely to arise in the future since current contracts undoubtedly now designate FINRA as the arbitral forum for securities disputes. It has been seven (7) years since the NASD was dissolved. The only thing Petitioners needed to do to avoid this dispute was to advise Respondent of the change and print a new form

designating FINRA, actions which those in the securities industry have surely taken by now.

Petitioners maintain the decision 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." (Pet'rs' Br. p. 16). This notion is simply incorrect. The Court of Appeals decision does not disavow FINRA as an arbitral forum. The decision has no effect on agreements that designate FINRA as the forum. The unpublished decision would apply to a rare class of case, highly unlikely to arise in the future, where the NASD was the chosen forum.

II. THE ARBITRATION AGREEMENT DOES NOT COVER THIS DISPUTE BECAUSE THE ING "ACCOUNT INFORMATION" FORM UPON WHICH PETITONERS RELY IS UNRELATED TO THE ANNUITY

In addition to the above stated grounds, Respondent asks this Court to sustain the Appeals Court decision on the additional ground that the present dispute falls outside the scope of the agreement. In deciding the enforceability of an arbitration clause, "a court must determine that there is an agreement to arbitrate and the dispute at issue falls within the scope of the agreement." Century Indem. Co. v. Certain Underwriters at Lloyd's, 584 F.3d 513, 523 (3d Cir. 2009) (emphasis added). The trial court found that "[d]efendants failed to meet their burden of demonstrating that the purported agreement controls [this dispute]." (R. pp. 8-9).

The purported arbitration agreement that Petitioners assert binds Respondent to arbitrate the present case is an ING "Account Information" form unrelated to the Jackson National Life Annuity. Thus, the agreement to arbitrate bears no relevance to Keller's claims relating to that Annuity. At the time the parties signed the "Account Information"

form, Keller and Johnson executed multiple documents relating to either the Annuity or the Portfolio purchase. (R. p. 67, lines 4-5). The "Account Information" form appears to have been executed in conjunction with Respondent's purchase of the Portfolio product, an ING product. (R. p. 67, lines 6-8). The arbitration clause was drafted by ING, on an ING form, and only references ING and Pershing accounts. (R. p. 67, lines 10-12). The Jackson National Annuity contract number appears nowhere on the form, and the name Jackson National itself is entirely absent. Moreover, the document references no agreement interdependent with the form, and, as noted above, Jackson National has filed an Answer in this case, is not a party to the Motion to Compel Arbitration, and is not a party to this appeal.

Ultimately, "arbitration is a matter of contract, and a party cannot be forced to arbitrate a dispute if it has not agreed to do so." AT&T Tech., Inc. v. Commc'ns Workers, 475 U.S. 643, 648 (1986). The arbitration clause contained in the "Account Information" form relates specifically to the Portfolio account, not the Jackson National Annuity. Consequently, the arbitration clause has no bearing on any disputes relating to the Jackson National Annuity—the subject of this present litigation. Simply put, Respondent never agreed to arbitrate any claims relating to the Jackson National Annuity. For that reason alone, Respondent submits that this Court should confirm the lower court's ruling that the present dispute falls outside the scope of the arbitration agreement.

CONCLUSION

The arbitration clause in the "Account Information" form relates to the Portfolio, not the Annuity at issue in the present litigation, and therefore has no bearing on dispute resolution of claims relating to the Annuity. Moreover, even should this Court extend the

arbitration clause to cover claims relating to the Annuity, the unavailability of the NASD constitutes a failure of a material term of the arbitration agreement which renders the arbitration agreement unenforceable. Consequently, Respondent submits that this Court should affirm the Court of Appeals decision affirming the denial of Petitioners' Motion to Compel Arbitration and Dismiss or Stay.

H. Donald Sellers, SC Bar No. 5018
J.W. Matthews III, SC Bar No. 68581
Haynsworth Sinkler Boyd, P.A.
ONE North Main, 2nd Floor (29601)
Post Office Box 2048
Greenville, South Carolina 29602
Telephone: 864-240-3200
Attorneys for Respondent

Dated this 26th day of September, 2014.

THE STATE OF SOUTH CAROLINA
IN THE SUPREME COURT

APPEAL FROM GREENVILLE COUNTY
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

Appellate Case No. 2013-000651

David W. Keller.....Respondent,

v.

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

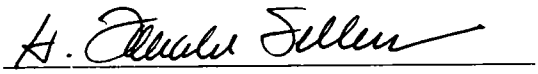
Of Whom ING Financial Partners, Inc., William C. Johnson, and Diversified Business Concepts, Inc., are.....Petitioners.

PROOF OF SERVICE

I certify that I have served **Brief of Respondent** this 26th day of September, 2014, on counsel of record in the underlying action by depositing the same in the United States Mail, first class postage prepaid, as follows:

T. Chase Samples, Esq.
Jackson Lewis LLP
15 South Main Street
Suite 700
Greenville, SC 29601
Counsel for Petitioners

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



H. Donald Sellers, Esq.
J.W. Matthews III, Esq.
Haynsworth Sinkler Boyd, P.A.
P.O. Box 2048
Greenville, South Carolina 29602
Telephone: 864-240-3200
Facsimile: 864-240-3300
Attorneys for Respondent