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.

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

In their opening brief, Petitioners demonstrated that the lower court committed reversible error by holding that the Parties' arbitration agreement designated the NASD as the exclusive arbitration forum and that FINRA's assumption of the NASD's arbitration program rendered the Parties' chosen forum "unavailable" for arbitration of this dispute. In opposition, Keller clings to both of these erroneous premises and argues, in the alternative, that the present case is outside the scope of the arbitration agreement. But Keller offers no persuasive rebuttal of Petitioners' arguments and authorities. The law is clear that this dispute, like most between an investor and a securities broker-dealer, should be arbitrated before FINRA. Keller fails to cite any court opinion that has refused to compel arbitration before FINRA because the agreement referred to arbitration before NASD, apart from the outlier lower court rulings in the instant action. South Carolina should not be only state which obstructs an otherwise uniform national arbitration program for securities investor disputes.

REPLY ARGUMENT

I. Reference in the Parties' Arbitration Agreement to the NASD's Rules Did Not Designate the NASD as the Exclusive Forum for Arbitration of Disputes.

A. The Court's Recent Ruling in *Dean* Requires Arbitration of This Dispute.

Keller's argument that the reference to arbitration conducted under the NASD's rules equates to the selection of the NASD as the exclusive arbitral forum is inconsistent with this Court's recent ruling in *Dean v. Heritage Healthcare of Ridgeway, LLC*, 408 S.C. 371, 759 S.E.2d 727 (2014). The Plaintiff in *Dean*, just like Keller, sought to avoid

arbitration by arguing that the reference to arbitration under the rules of AAA in the arbitration agreement meant that AAA was the exclusive arbitration forum and that because AAA no longer arbitrated personal injury cases, like the one brought by Dean, the entire arbitration agreement was unenforceable. *Dean*, 408 S.C. at 377-78. As stated by the Court, the issue in *Dean* was "whether the unavailability of the AAA to serve as arbitrator dooms the Agreement as a whole." *Id.* at 382. The Court explained that "a majority of jurisdictions distinguish agreements requiring a proceeding 'administered by' the named forum from those requiring a proceeding conducted 'in accordance with' the named forum's rules." *Id.* at 382-83. The Court followed the majority and concluded 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 . . . ." *Id.* at 384. In the instant matter, the only reference to the NASD in the entire arbitration agreement is the statement that any dispute between the Parties "shall be submitted to arbitration conducted under the then applicable provisions of the Code of Arbitration Procedure of NASD." (R. at 64.) This is a clear reference to arbitration conducted in accordance with the NASD's rules and not a mandate that arbitration be "administered by" the NASD. Thus, just as in *Dean*, the arbitration agreement is enforceable if there is an available forum that will apply the NASD's rules. Here, that forum is FINRA.

B. Keller's Attempt to Distinguish *Dean* Fails.

Recognizing that *Dean* controls the issue in this case, Keller devotes a significant portion of his brief to attempting to distinguish that decision. First, Keller argues that *Dean* is inapplicable because the arbitration agreement here did not use the magic words "administered by" a particular forum or "in accordance with" a particular forum's rules.

(Resp't's Br. at 11.) Instead, the agreement between the Parties used the phrase "conducted under the then applicable provisions of the Code of Arbitration Procedure of NASD." (R. at 64.) There is no meaningful distinction between an arbitration conducted "under" the rules of the NASD and one conducted "in accordance with" the rules of the NASD. The arbitration agreement unambiguously refers to arbitration under the NASD's rules and not arbitration "administered by" the NASD. Thus, just as it did in *Dean*, the Court should find that the reference to arbitration under the NASD's rules was not equivalent to selection of an exclusive forum and should compel arbitration to FINRA, a forum that will apply the current version of the NASD's rules.

Second, Keller argues that *Dean* is inapplicable to cases involving arbitration before a securities self-regulatory organization ("SRO"). (R. at 12-13.) Keller argues that, given the nature of the NASD as a SRO, arbitration before any other forum would be inappropriate. The basis for this argument is footnote 12 in the *Dean* opinion, which states in its entirety:

> We note that Respondent relied primarily on *Smith Barney, Inc. v. Critical Health Systems of North Carolina, Inc.*, 212 F.3d 858 (4th Cir. 2000), and *In re Salomon Inc. Shareholders' Derivative Litigation*, 68 F.3d 554 (2d Cir. 1995), in support of her reading of the Agreement. Both of these cases involve arbitration agreements requiring a proceeding "in accordance with" a named forum's rules; however, both are also distinguishable from the present action:
>
> > These cases 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)[.]
> >
> > . . .
> >
> > 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. Here, no one has argued the dominant intent of the parties was that only an AAA arbitrator could handle the dispute or that an AAA arbitrator, or the AAA as an organization, has some type of special expertise. Unlike the SROs, arbitration "in accordance with the applicable rules of the AAA" is not dependent on the AAA overseeing the arbitration.
>
> *Deeds*, 141 P.3d at 1082.

Dean, 408 S.C. at 386. Keller reads too much into this footnote, which makes the point that when parties choose to arbitrate under the rules of an SRO, they are also choosing the protection that comes from the regulatory scheme developed by the Securities and Exchange Commission, as compared to an organization such as AAA that does not have such oversight. This footnote might help Keller if Petitioners were trying to compel arbitration to AAA or some other non-SRO, but that is not the case. Here, Petitioners are asking the Court to compel arbitration to FINRA, NASD's successor, which is an SRO regulated by the Securities and Exchange Commission. *See Fiero v. Financial Indus. Regulatory Auth., Inc.*, 606 F. Supp. 2d 500, 504 (S.D.N.Y. 2009). Stated simply, the distinction made by the *Dean* Court (between an SRO and AAA) does not apply in this case because FINRA is an SRO and continues to apply the NASD's rules. It is disingenuous for Keller to argue that the Arbitration Agreement should not be enforced because NASD was chosen for its "status, expertise, prior history and experience in handling the type of dispute contemplated in the arbitration clause" when FINRA has the same status, expertise, and experience. (Resp't's Br. at 12.)

In addition to relying on footnote 12 in *Dean*, Respondent cites a number of cases from other jurisdictions to support the argument that a court should not substitute another arbitral forum where the arbitration agreement refers to a SRO. None of these cases involve the issue before the Court—one party trying to compel arbitration before FINRA based on an agreement that refers to the NASD's rules. Three of the five cases cited by Keller involved situations where one of the parties wanted to arbitrate before AAA where the arbitration agreement referred to NASD. *See, e.g., Smith Barney, Inc. v. Critical Health Systems of North Carolina, Inc.*, 212 F.3d 858, 859 (4th Cir. 2000) (declining to compel arbitration before AAA where agreement referred to arbitration by NASD, NYSE, or AMEX); *Luckie v. Smith Barney, Harris Upham & Co.*, 999 F.2d 509, 510 (11th Cir. 1993) (same); *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Georgiadis*, 903 F.2d 109, 110 (2d Cir. 1990) (same). These cases are inapplicable for the reasons just discussed because FINRA, unlike AAA, is an SRO.[1]

The other two cases Keller cites are also inapplicable. *In Roney & Co. v. Goren*, 875 F.2d 1218 (6th Cir. 1989), the Sixth Circuit did not consider the issue facing the Court—whether an arbitration agreement that refers to arbitration under the NASD's

[1] The cases cited by Keller are also distinguishable on other grounds. In *Smith Barney*, the court was reluctant to compel arbitration to the plaintiff's chosen forum—AAA—because AAA had no limitations period, whereas the named arbitral forums had a six-year limitations period that would foreclose the plaintiff's claims. *Smith Barney*, 212 F.3d at 860. Thus, contrary to this case, arbitration before a different entity would have been substantively different from arbitration with the entity named in the agreement. The arbitration agreement in *Luckie*, unlike the Agreement here, stated that controversies between the parties "shall be determined by *arbitration before* the National Association of Securities Dealers, Inc., the New York Stock Exchange, the American Stock Exchange . . . ." *Luckie*, 999 F.2d at 510 (emphasis added). Similarly, in *Georgiadis*, the arbitration agreement provided that controversies "shall be settled by *arbitration only before* the National Association of Securities Dealers, Incorporated, or the New York Stock Exchange, or an Exchange located in the United States upon which listed options transactions are executed." *Georgiadis*, 903 F.2d at 111 (emphasis added).

rules requires arbitration before FINRA, NASD's successor. Rather, the Court considered whether a party could be compelled to arbitrate before NASD where the agreement referred to arbitration with NYSE. In *In re Salomon, Inc.*, 68 F.3d 554, (2d Cir. 1995), the parties' chosen arbitrator—the NYSE—refused to arbitrate the dispute, and the court declined to appoint a different arbitrator because the parties had chosen the NYSE. Neither *Roney* nor *In re Salomon* address whether arbitration before FINRA, NASD's successor, should be compelled where the arbitration agreement references the rules of NASD.[2]

C. The Arbitration Agreement Contemplates Arbitration in More Than One Forum.

Finally, as further evidence that that Parties did not intend to arbitrate exclusively before NASD, the Arbitration Agreement itself refers to "arbitration forums" in the plural and to the "rules of the arbitration forum in which the claim is filed." (R. at 64.) It is a well-established principle of contract construction that a contract should not be construed based on an isolated phrase, but should be interpreted in the context of the entire contract. *See, e.g., Duvall v. S.C. Budget & Control Bd.*, 377 S.C. 36, 43 (2008) (construing term in context of entire statutory definition); *South Carolina State Ports Auth. v. Jasper County*, 368 S.C. 388, 398 (2006) (a statute should not be construed by focusing on an isolated phrase). Applying this rule of construction to the Arbitration Agreement provides additional support to the conclusion that the Agreement's single reference to the NASD was not tantamount to an exclusive forum designation.

[2] In *Reddam v. KPMG LLP*, 457 F.3d 1054, 1060 (9th Cir. 2006), a case this Court cited with approval in *Dean*, 408 S.C. at 383, the Ninth Circuit declined to follow *In re Salomon* because that case "presented little reasoning to support" its conclusion, and relied on cases that were "inapposite," which the court found to be "unpersuasive."

II. FINRA Is NASD's Successor.

Even if the Court were to determine that the Parties had chosen NASD as the exclusive forum, the motion to compel arbitration should have been granted because, for purposes of the arbitration of securities disputes, NASD and FINRA are one and the same. Court after court has so recognized. *See* Pet'rs' Br. at 11-12. Keller argues that NASD and FINRA are different, but Keller fails to cite a single authority or substantive difference between the two forums, and the argument falls flat.

As set forth in detail in Petitioners' Brief, except for the lower court opinions in this case, every court in every jurisdiction that has considered the argument made by Keller has rejected it. (Pet'rs' Br. at 13-15.) Keller does not even attempt to distinguish these cases except to argue that ten of the cases cited are unpublished and have no precedential value. (Resp't's Br. at 15.) Though obviously not controlling, these opinions provide persuasive reasoning and authority regarding how other courts have uniformly adjudicated the exact situation facing this Court. Moreover, this Court frequently considers unpublished decisions from other jurisdictions when there is no controlling precedent from South Carolina. In fact, one of the unpublished opinions cited by Petitioners in earlier briefing was cited with approval by the *Dean* Court to support the Court's conclusion that the selection of an organization's rules is not the same as selecting the organization as the exclusive arbitral forum. *Compare Dean*, 408 S.C. 371, 383 ("*Carideo [v. Dell, Inc.]*, 2009 U.S. Dist. LEXIS 104600, 2009 WL 3485933, at *4: "Where the arbitration clause selects merely the rules of a specific arbitral forum, as opposed to the forum itself, and another arbitral forum could apply those rules, the

unavailability of the implicitly intended arbitral forum will not require the court to condemn the arbitration clause.") *with* Pet'rs' Pet. for Reh'g at 14, App. at 228.

Even if the Court were to disregard the unpublished opinions of sister states and jurisdictions, which it should not, Keller cannot escape the fact that at least three published and reported decisions have rejected the same arguments he is making in this case. For example, the Court of Appeals of Mississippi recently rejected the argument that an arbitration award should be vacated because FINRA was the arbitrator and the agreement referenced the NASD: "The name change from NASD to FINRA did not create a new entity, but rather, encompassed only a name change." *Wells Fargo Advisors, LLC v. Runnels*, 126 So. 3d 137, 144 (Miss. Ct. App. 2013). *See also 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.'"). In short, as set forth in detail in Petitioners' Brief, except for the lower court decisions in this case, every court that has considered the argument (that an arbitration agreement that references the NASD is not enforceable through FINRA) has rejected it. This Court should do the same.

Rather than cite cases to support his argument that NASD and FINRA are not the same, Keller cites a number of FINRA press releases and regulatory filings for the proposition that FINRA has made changes to the NASD's rules (now the FINRA rules) in the seven years since the organization became known as FINRA. (Resp't's Br. at 13-14.) Keller fails to explain how any of these changes would materially impact his decision to arbitrate his dispute with Petitioners. Rather, he argues simply that "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." (Resp't's Br. at 15.) Unfortunately for Keller, the Arbitration Agreement contemplated the reality that arbitration rules change from time to time and dealt with those changes by incorporating them into the arbitration agreement: "the rules of the arbitration forum in which the claim is filed, and any amendments therefore, shall be incorporated into this agreement." (R. at 64.) In addition, the Arbitration Agreement states that arbitration shall be conducted "under the *then applicable* provisions of the Code of Arbitration Procedure of NASD." (*Id.* (emphasis added).) The now applicable provisions of the Code of Arbitration Procedure of NASD are the Code of Arbitration Procedure for FINRA. *See, e.g., 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."). In short, Keller fails to present any persuasive authority to support his claim that NASD and FINRA are materially different entities for purposes of the arbitration of this dispute.[3] Thus, the Court should find, as so many courts already have, that NASD is now known as FINRA and compel arbitration to FINRA.

III. Respondent Fails to Cite Any Evidence to Support His Claim That the Account Information Form Containing the Arbitration Agreement Was Not Related to the Jackson National Life Annuity at Issue.

In the initial order denying Petitioners' motion to compel arbitration, the trial court alternatively held (in an order drafted by Respondent's counsel) that the arbitration agreement was inapplicable because it did not relate to the Jackson National Life

[3] Keller cites a number of specific NASD rules, which he contends "have implications substantially affecting the substantive outcome of the Respondent's claim." (Resp't's Br. at 8.) As noted in prior briefing, however, these rules are now part of the FINRA rules: NASD Rule 10100 is the exact same as FINRA Rule 12000; NASD Rule 10334 is the same as FINRA Rule 12211; NASD Rule 10314(b)(1) is substantially the same as FINRA Rule 12303; NASD Rule 1335(a)(4) is substantially the same as FINRA Rule 12100(j); and NASD Rule 10308, which is lengthy, is now a part of FINRA Rules 12100, 12401, 12402, 12403, 12407, and 12408.

Insurance Company ("JNL") annuity, which is at the heart of the underlying dispute between the Parties. (App. at 10-11.) In his brief, Keller argues that there is no evidence that the account information form containing the arbitration agreement was executed in connection with the JNL annuity. However, the only support cited for this proposition is page 67 of the record, which is Respondent's own response brief to the lower court. There is no evidence cited to support these conclusory arguments on page 67 or anywhere else in the Record. In contrast, 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, which contains the Arbitration Agreement. (*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.) Because Keller failed to offer any evidence to refute Johnson's affidavit, the only evidence in the record on this issue supports Petitioners. In light of this evidence, the Court should reject the 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,

October 6, 2014

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PROOF OF SERVICE

I certify that I have served the Reply Brief of Petitioners this 6th day of October 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, addressed as follows:

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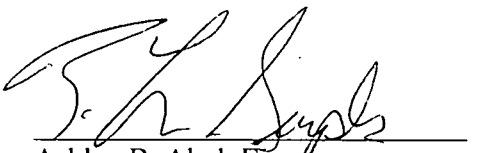

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Dated this 6th day of October 2014.