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OCT 27 2014  
S.C. SUPREME COURT

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.

**RETURN TO FINRA'S MOTION FOR  
LEAVE TO FILE *AMICUS CURIAE* BRIEF**

Pursuant to Rule 240(e), SCACR, David W. Keller ("Keller" or "Respondent") submits this Return to FINRA's Motion for Leave to File *Amicus Curiae* Brief. In the interests of expediency and justice, Keller respectfully requests that this Court deny FINRA's Motion for the following reasons:

**I. FINRA's Participation Will Delay Resolution of a Case That Has Been Pending For Nearly Four Years**

Since late 2009, Keller and Petitioners have been engaged in the dispute before this Court. See Resp't's Br. at 2. Keller filed the present lawsuit on January 18, 2011. See id.

Therefore, Keller has been prevented from having his day in court for nearly four years. Both parties have fully briefed the issues before the Court and are ready to move forward with resolution of this case. FINRA's attempt to become involved as non-party *amicus curiae* this late in the proceedings only serves to delay this suit. In the interest of having this case resolved and allowing both parties to move forward to ultimate resolution, FINRA should not be allowed to file a brief and postpone this case at this stage of the proceedings.

## **II. The Proposed Brief Seeks to Address an Issue Not Dispositive of This Case**

FINRA's *amicus curiae* brief seeks to marginalize the difference between FINRA and the NASD.<sup>1</sup> The proposed brief's relevance is minimal at best because it does not address the two dispositive issues before the Court: (1) whether Keller can be forced to arbitrate in a forum that was not agreed to by the parties or named in the contract; and (2) whether the arbitration clause applies at all to this dispute.

The characteristics of the FINRA/NASD relationship do not determine whether the arbitration agreement is enforceable. Regardless of how similar NASD and FINRA may be, the parties chose the NASD as the exclusive forum to arbitrate their disputes, not FINRA. The NASD did not exist when the parties executed the contract, and so the entire agreement was illusory and void. See Grant v. Magnolia Manor-Greenwood, 383 S.C. 125, 132, 678 S.E.2d 435, 439 (2009) (noting that failure of selected arbitral forum warrants invalidation of entire arbitration clause).

Additionally, and importantly, FINRA's proposed brief has no relevance to the issue of whether the present dispute falls outside the scope of the arbitration agreement. The trial court

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<sup>1</sup> Interestingly, FINRA seeks to assert in its proposed brief that FINRA and NASD are the same entities. This position is hardly consistent with FINRA's view at the time of its creation. In 2007, FINRA Chief Executive Officer Mary Shapiro stated that "[t]he creation of FINRA is the most significant modernization of the self-regulatory regime in decades." See Resp't's Br. at 13-14.

found that “[d]efendants failed to meet their burden of demonstrating that the purported agreement controls [this dispute].” See Resp’t’s Br. at 18. Whether or not the arbitration clause applies to the present dispute is wholly unrelated to the enforceability of that clause, let alone the relationship between two entities that FINRA seeks to address in its *amicus curiae* brief.

### **III. Resolution of This Case Will Have no Precedential Effect on FINRA Going Forward**

The issue presented by the facts under review here is extremely unlikely to arise in the future since Petitioner’s current contracts undoubtedly now designate FINRA as the arbitral forum for securities disputes. Any decision by this Court will have no effect on agreements that designate FINRA as the arbitration forum. The Court of Appeals’ *unpublished* decision would apply to a rare class of case, highly unlikely to arise in the future, where the NASD was the chosen forum. Thus, the decision by this Court should have no impact on FINRA or their ability to arbitrate disputes in the securities industry.

### **CONCLUSION**

For the reasons discussed above, and in the interests of expediency and justice, Respondent Keller respectfully requests that this Court deny FINRA’s Motion for Leave to File *Amicus Curiae* Brief.

Respectfully submitted,



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

October 23, 2014

IN THE SUPREME COURT

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APPEAL FROM GREENVILLE COUNTY  
Court of Common Pleas

D. Garrison Hill, Circuit Court Judge

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Appellate Case No. 2013-000651

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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  
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**PROOF OF SERVICE**

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I certify that I have served **Return to FINRA's Motion for Leave to File Amicus Curiae** this 23<sup>rd</sup> day of October, 2014, on counsel of record in the underlying action by depositing the same in the United States Mail, first class postage prepaid, as follows:

Alice W. Parham Casey, Esq.  
Wyche, P.A.  
Post Office Box 12247  
Columbia, S.C. 29211  
*Counsel for Amici Curiae*

T. Chase Samples, Esq.  
Jackson Lewis LLP  
15 South Main Street, St. 700  
Greenville, S.C. 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*



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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*

ONE MAIN, 2ND FLOOR (29601-2772)  
POST OFFICE BOX 2048 (29602-2048)  
GREENVILLE, SOUTH CAROLINA  
TELEPHONE 864.240.3200  
FACSIMILE 864.240.3300  
www.hsblawfirm.com

H. DONALD SELLERS, ESQ.  
DIRECT DIAL NUMBER 864.240.3232  
dsellers@hsblawfirm.com

October 23, 2014

The Honorable Daniel E. Shearouse  
Clerk of Court  
Supreme Court of South Carolina  
P. O. Box 11330  
Columbia, SC 29211

Re: Appellate Case No. 2013-000651  
David W. Keller v. ING Financial Partners, Inc., William C. Johnson, Diversified  
Business Concepts, Inc. and Jackson National Life Insurance Company  
HSB File No. 35350.0001

Dear Mr. Shearouse:

Enclosed for filing please find the original and seven (7) copies of the Return to FINRA's Motion for Leave to File *Amicus Curiae* together with the Proof of Service in the above-referenced case. Please file the original Return to FINRA's Motion for Leave to File *Amicus Curiae* and Proof of Service and return a stamped copy to me in the enclosed, self-addressed, stamped envelope.

Thank you for your assistance.

With kind personal regards, I am

Very truly yours,

HAYNSWORTH SINKLER BOYD, P.A.

  
H. Donald Sellers

**RECEIVED**

OCT 27 2014

HDS/kwb  
Enclosures

cc: Alice W. Parham Casey, Esquire (w/enclosures)  
T. Chase Samples, Esquire (w/enclosures)  
Charles F. Turner, Jr., Esquire (w/enclosures)

**S.C. SUPREME COURT**