IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI
NO. 2009-CA-01275

CITIGROUP GLOBAL MARKETS, INC.
AND SCOTT JONES
Appellants

v.

RANDY BRASWELL
Appellee

BRIEF OF APPELLEE RANDY BRASWELL

ORAL ARGUMENT REQUESTED

Appeal from the Circuit Court of Pike County, Mississippi
Honorable David H. Strong, Circuit Judge

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IN THE SUPREME COURT OF THE STATE OF MISSISSIPPI

CITIGROUP GLOBAL MARKETS, INC. AND SCOTT JONES	APPELLANTS
V.	NO. 2009-CA-01275
RANDY BRASWELL	APPELLEE

CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that the justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Randy Braswell, Appellee
2. Wayne Dowdy, Counsel for Appellee
3. Angela Cockerham, Counsel for Appellee
4. Scott Jones, Appellant
5. Citigroup Global Markets, Inc., Appellant
6. Melinda Lucas Peevy, Counsel for Appellants

THIS the 9th of April, 2010.

Respectfully submitted,

RANDY BRASWELL, APPELLEE

BY: _____
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STATEMENT OF THE ISSUES

Whether the trial court erred in denying Appellants, Citigroup Global Markets, Inc. and Scott Jones's, Motion to Compel Arbitration?

STATEMENT OF THE CASE

A. Statement of the Proceedings

On June 17, 2008, Appellee, Randy Braswell (hereinafter referred to as "Braswell") filed suit against Citigroup Global Markets, Inc. (hereinafter "Citigroup"), asserting that Citigroup negligently handled Braswell's investments. (R. 2). Braswell claimed Citigroup had knowledge of Braswell's desire to be conservative with investments and to preserve Braswell's estate for future needs. (R. 2). Braswell maintains that Citigroup's mismanagement of his investments caused the decreased value of his investment principal and the loss of reasonably expected profits. (R. 3). Braswell charged Citigroup with negligence, breach of fiduciary duty; and failure/refusal to follow Braswell's explicit instructions regarding the risk Braswell was willing to undertake with his investments. (R. 3).

On August 14, 2008, Citigroup and Braswell filed a Joint Motion to Stay Pending Arbitration. (R. 4). However, on October 8, 2008, Braswell filed a Motion to Withdraw Motion to Stay Pending Arbitration based on the fact that Braswell's claims against Citigroup were not eligible for submission to arbitration pursuant to Financial Industry Regulatory Authority (FINRA) Rule 12206.[1] (R. 6). Shortly thereafter, Braswell filed an Amended Complaint against Citigroup broker Scott Jones based on similar claims as those filed against Citigroup in the initial Complaint.

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[1] Pursuant to FINA Rule 12206, "No claim shall be eligible for submission to arbitration under the Code where six years have elapsed from the occurrence or event giving rise to the claim."

(R. 34). The trial court granted Braswell's Motion to Withdraw Motion to Stay Pending Arbitration on March 3, 2009. (R. 58). Citigroup and Mr. Jones filed a Motion to Compel Arbitration and to Stay or Dismiss Pending Arbitration on February 11, 2009. (R. 59). Braswell filed a Response in Opposition to the Motion to Compel Arbitration on May 1, 2009, asserting that Braswell's claims against Citigroup and Mr. Jones were not eligible for submission to arbitration pursuant to FINRA Rule 12206. Therefore, Braswell could pursue his claims in a court of competent jurisdiction. Additionally, Braswell argued that the terms of the arbitration clause were substantively unconscionable. A hearing was held on the Motion to Compel Arbitration on May 27, 2009. At the hearing on the Motion to Compel Arbitration, Braswell made the aforementioned arguments, which were contained in the written response in opposition to the motion. During the hearing, Braswell also argued that the arbitration clause contained in the Client Agreement was not binding as to Citigroup because the language of the client agreement, while binding predecessor firms, did not bind Citigroup as Smith Barney's successor and as a party to the arbitration agreement.

The trial court denied the Motion to Compel in a written Order filed June 25, 2009. (R. 77). The trial court found that the arbitration agreement in the Client Agreement did not bind Smith Barney's successors as parties to the arbitration agreement. Furthermore, the Court found that the arbitration agreement, as written, is unconscionable.

Citigroup and Mr. Jones filed a Notice of Appeal on July 27, 2009. (R. 82).

B. Statement of the Facts

Braswell became Smith Barney's client in 1996. (R. 9). Smith Barney was later subsumed by Citigroup, an investment counseling and stock brokerage corporation. When Braswell initially opened his account with Smith Barney, and every instance since that time, Braswell instructed his

financial advisor, Scott Jones, to invest in interest bearing instruments that did not place the principal amount in jeopardy. Braswell specifically expressed to Mr. Jones that he wanted to invest in solid interest bearing accounts. (R. 9).

Contrary to Braswell's clear and unequivocal instructions, Mr. Jones invested continuously in closed end funds that did not have a maturity date. (R. 9). Mr. Jones purchased an instrument with Solomon Brothers High Income for $207, 000.00 and later purchased an instrument with Western Assets High Income Fund II. (R. 7). Because Mr. Jones made investments in closed end funds, Braswell's principal amount was at risk since the closed end funds did not have a maturity date that would pay Braswell the principal amount at maturity.

Braswell executed a Client Agreement on June 12, 1996 and August 14, 1996. (R. 20, 24). The arbitration clauses in the both Client Agreements appear to be identical.

The arbitration clause in the Smith Barney client agreement reads as follows:

> 6. Arbitration
> - Arbitration is final and binding on the parties.
> - The parties are waiving their right to seek remedies in court, including the right to jury trial.
> - Pre-arbitration discovery is generally more limited than and different from court proceedings.
> - The arbitrators' award is not required to include factual findings or legal reasoning, and any party's right to appeal or to seek modification of rulings is strictly limited.
> - The panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry.
>
> I agree that all claims or controversies, whether such claims or controversies arose prior, on or subsequent to the date hereof, between me and SB and/or any of its present or former officers, directors, or employees concerning or arising from (I) any account maintained by me with SB individually or jointly with others in any capacity; (ii) any transaction involving SB or any predecessor firms by merger, acquisition or other business combination and me, whether or not such transaction occurred in such account or accounts;

> or (iii) the construction, performance or breach of this or any agreement between us, any duty arising from the business of SB or otherwise, shall be determined by arbitration before, and only before, any self-regulatory organization or exchange of which SB is a member. I may elect which of these arbitration forums shall hear the matter by sending a registered letter or telegram addressed to Smith Barney, Inc. At 388 Greenwhich Street, New York, N.Y. 10013-2396, Attn: Law Department. If I fail to make such election before the expiration of five (5) days after receipt of a written request from SB to make such election, SB shall have the right to choose the forum.
>
> No person shall bring a putative or certified class action to arbitration, nor seek to enforce any pre-dispute arbitration agreement against any person who has initiated in court a putative class action; or who is a member of a putative class who has not opted out of the class with respect to any claims encompassed by the putative until (I) the class certification is denied; (ii) the class is decertified; or (iii) the customer is excluded from the class by the court.
>
> Such forbearance to enforce an agreement to arbitrate shall not constitute a waiver of any rights under this agreement except to the extent stated herein. (R. 21, 26).

In 2008, Braswell filed a Complaint in the Circuit Court of Pike County, Mississippi against Citigroup and Scott Jones for mismanaging Braswell's investments.

SUMMARY OF THE ARGUMENT

The trial court did not err in denying Citigroup Global Markets, Inc. and Scott Jones's Motion to Compel Arbitration.

Two subsections of the Client Agreement create ambiguity as to whether Citigroup was encompassed as a successor to Smith Barney, and therefore a party to the arbitration agreement. Furthermore, the terms of the arbitration agreement are substantively unconscionable. When considering the fact that an ambiguity exists as it relates to determining the parties to the agreement, coupled with the fact that Braswell was not the drafter of the agreement, the trial court's ruling was fitting. In so ruling, the trial court correctly considered rules governing contract construction and defenses to contracts. Braswell respectfully requests that this Court affirm the trial court's denial of the Motion to Compel Arbitration.

STANDARD OF REVIEW

An order denying a motion to compel arbitration is subject to de novo review. *Terminix International, Inc. v. Rice*, 904 So.2d 1051, 1054 (Miss. 2004).

The court's review consists of a two-prong inquiry: "The first prong has two considerations: (1) whether there is a valid arbitration agreement and (2) whether the parties' dispute is within the scope of the arbitration agreement. Under the second prong, the United States Supreme Court has stated the question is 'whether legal constraints external to the parties' agreement foreclosed arbitration of those claims.'" *East Ford, Inc.* 826 So.2d at 713 (quoting *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 626 (1985)). Applicable contract defenses available under state contract law, such as fraud, duress, and unconscionability, may be asserted under the second prong to invalidate the arbitration agreement without offending the Federal Arbitration Act. *Doctor's Assocs., Inc. v. Casarotto*, 517 U.S. 681, 686 (1996).

ARGUMENT

I. WHETHER THE TRIAL COURT ERRED IN DENYING APPELLANTS, CITIGROUP GLOBAL MARKETS, INC. AND SCOTT JONES'S, MOTION TO COMPEL ARBITRATION

Despite the policy favoring arbitration, courts are required to submit to arbitration only what the parties agree to submit to arbitration. *AT&T Technologies, Inc. v. Communications Workers of America*, 475 U.S. 643, 648 (1986). Contrary to arguments made by Citigroup and Mr. Jones, the arbitration clause contained in Client Agreement did not clearly bind Citigroup as Smith Barney's successor and a party to the arbitration agreement. The ambiguity leaves to question whether an agreement to arbitrate was ever formed between Braswell and Citigroup, Smith Barney's successor.

In denying the Motion to Compel Arbitration, the trial court ruled that, "when read as a whole, the contract is ambiguous as to which parties are bond by the contract." (R. 79). The trial court found that an ambiguity exists based on subsection 6 and subsection 7 of the Client Agreement.

The Federal Arbitration Act only confers the right to obtain an order directing that 'arbitration proceed in the manner provided for [in the parties' agreement]'; it does not bestow a right to compel arbitration of any dispute at any time. *Volt Info Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.*, 489 U.S. 468, 474-75 (1989). Citigroup has no grounds on which to compel arbitration of Braswell's claims, as the arbitration agreement in the Client Agreement does not bind Citigroup, Smith Barney's successor, as a party to the arbitration agreement.

A. The arbitration clause does not encompass Citigroup as Smith Barney's successor, therefore Citigroup cannot enforce the arbitration agreement

In subsection 6, the Client Agreement specifically states that all claims or controversies that may arise between the client and SB or any of its "*present or former* officers, directors, or

employees concerning or arising from... any transaction involving *SB or any predecessor firms by merger, acquisition or other business combination* and me, whether or not such transaction occurred in such account or accounts" will be determined by arbitration.

Upon further reading of the Client Agreement, subsection 7 of the arbitration clause states that "The provisions of this Agreement shall be continuous, shall cover individual and collectively all accounts which I may open or reopen with SB, and shall inure to the benefit of SB's present organization, and any successor organization or assigns." (R. 22, 26).

The arbitration clause in subsection 6 clearly does not bind successors or assigns, such as Citigroup, to the arbitration agreement. Therefore, pursuant to the language of the arbitration clause, Citigroup is not a party to the arbitration agreement. However, it is only in subsection 7 of the Client Agreement that the provisions of the agreement are made applicable to Smith Barney's present organization or any *successors or assigns* of Smith Barney. Citigroup can hardly argue that the Client Agreement is ambiguous, as subsection 6 fails to bind successors or assigns to the arbitration agreement while subsection 7 attempts to bind all of Smith Barney's successors or assigns to the Client Agreement.

When a contract is clear or ambiguous, uncertainties should be resolved against the drafter of the agreement. *Clark v. Carter*, 251 So.2d 1333, 1334 (Miss 1977). A similar approach was utilized in *Union Planters Bank, National Association v. Rogers*, 912 So.2d 116, 119 (Miss. 2005). In *Rogers*, the provisions in a Union Planters Bank mail-out conflicted with the provisions in the bank's arbitration agreement. *Id* at 120. The general provisions of the mail-out only required "use" of the account for the terms of the arbitration agreement to be applicable, while the arbitration clause required "use" of the account *and* signing the signature card. Id. The court in *Rogers* held that:

The basic use of contract construction rules also leads us to the conclusion that the

> Rogerses were not bound by Union Planters' arbitration provision. A cardinal rule of construction of a contract is to ascertain the mutual intention of the parties. *Miss. Transp. Comm'n v. Ronald Adams Contractor, Inc.*, 753 So.2d 1077, 1084 (Miss. 2000). Intent should first be sought in an objective reading of the words employed in the contract. Id. We find that the general provisions of the mail-outs and the specific provisions of the arbitration clause are in conflict... causing ambiguity. Ambiguities in contract are to be constructed against the party who drafted the contract. Id at 1085. And specific language controls over general inconsistent language controls over general inconsistent language in a contract, we find that the specific provisions of the arbitration clause supplant the general provisions.

Id.

Likewise, the rules of contract construction were correctly applied by the trial court in denying Citigroup and Mr. Jones's Motion to Compel Arbitration. At first glance, subsection 6 of the Client Agreement specifically binds the predecessors of Smith Barney, but fails to bind Smith Barney's successors or assigns. Therefore, subsection 6 does not give Citigroup standing to enforce the arbitration agreement against Braswell. However, subsection 7 of the Client Agreement generally binds Smith Barney's successors to the provisions of the agreement. In this instance, the trial court correctly applied the doctrine of *ejusdem generis* in resolving the ambiguity created by the Client Agreement. Upon reading subsections 6 and 7 of the Client Agreement, a conflict exists relative to whether Citigroup, a successor to Smith Barney, is a party to the arbitration agreement. "Where there is an inconsistency between general provisions and specific provisions, the specific provisions ordinarily qualify the meaning of the general provision." *Williams v. Batson*, 187 So.236, 239 (Miss. 1939) (citing Rest. of Contracts, Sec. 236; Williston, op. cit., Section 619). The trial court applied relevant case law in finding that the specific language in subsection 6 of the Client Agreement controls over the general inconsistent language in subsection 7 of the Client Agreement.

B. **The arbitration clause in Client Agreement, as written, is unconscionable**

An "agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Although the Federal Arbitration Act sets forth a federal policy favoring arbitration, legal constraints external to the parties' agreement may foreclose the arbitration of those claims. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth*, 473 U.S. 614, 628, (1985). Section 2 of the Federal Arbitration Act permits courts to grant relief where a party, who opposes arbitration, presents "well-supported claims that the agreement to arbitrate resulted from the sort of fraud or overwhelming economic power that would provide grounds 'for the revocation of any contract'". *Mitsubishi*, 473 U.S. at 627. A party may assert applicable contract defenses, such as fraud, duress, and unconscionability, to invalidate an arbitration agreement without offending the Federal Arbitration Act. *East Ford, Inc. v. Taylor*, 826 So.2d 709, 713 (Miss. 2002).

Unconscionability has been defined by the Mississippi Supreme Court as "an absence of meaningful choice on the part of one of the parties, together with contract terms which are unreasonably favorable to the other party." *East Ford, Inc.*, 826 So.2d at 715. Two types of unconscionability have been recognized by the courts, procedural and substantive. *Id.* at 714.

At issue in this matter is the arbitration clause contained in Client Agreement. Braswell asserts that the arbitration clause in the Client Agreement is substantively unconscionable. Substantive unconscionability exists when the terms of the arbitration agreement are shown to be oppressive. *East Ford, Inc.* 826 So.2d at 714. In it's Order denying the Motion to Compel Arbitration, the trial court found that "At hearing, Citigroup's attorney conceded that, since the contract was signed, all qualifying organizations had since been merged into one, effectively leaving

Braswell no choice, and that, if enforced, the arbitration agreement would require Braswell to bear the expense of the entire litigation." (R. 80).

"When reviewing a contract for substantive unconscionability, we look within the four corners of an agreement in order to discover any abuses relating to the specific terms which violate the expectations of, or cause gross disparity between contracting parties." *Vicksburg Partners, L.P. v. Stephens*, 911 So.2d 507, 521 (Miss. 2005).

The arbitration clause in the Client Agreement significantly alters Braswell's rights in that specific terms of the arbitration agreement are vague, so as to prevent Braswell from having any clear understanding of the arbitration process and so as to cause a gross disparity between the parties. In subsection 6 of the Client Agreement, the terms of the arbitration clause are unclear, in that Braswell does not know what definite legal rights he has pursuant to the arbitration clause. For example, Braswell does not know in what manner pre-arbitration discovery is limited and different from court proceedings or in what manner his rights to appeal an award or seek modifications is limited. Moreover, Braswell is not even afforded the privilege of knowing who will hear the matter, as the arbitration agreement states that a panel of arbitrators will typically include a minority of arbitrators who were or are affiliated with the securities industry. Braswell would not know details about the arbitration process by reading the arbitration clause contained in the Client Agreement.

Moreover, the costly fees that are assessed Braswell are so oppressive so as to prevent and/or deter Braswell from having his claims arbitrated. FINRA has a very detailed, intricate, and fee-oriented arbitration case flow procedure. (R. 66). In order to participate in the arbitration process, Braswell is assessed and required to pay expensive fees throughout the arbitration process. Braswell was not made aware of the arbitration case flow process when signing the Client Agreement and could not have knowledge of the arbitration case flow process from the terms of the

arbitration clause contained in the Client Agreement.

Of significance is the fact that the arbitration clause states that arbitration shall be before, and only before, any self-regulatory organization or exchange, that Braswell chooses, which Smith Barney is a member. However, as explained during the hearing, since the signing of the Client Agreement, all qualifying organizations have merged into one organization. This leaves Braswell no choice in selecting an organization to arbitrate the dispute. More importantly, this factor was not originally agreed to by Braswell in the Client Agreement.

When considering the fact that the terms of the contract are vague, afford Braswell with costly fees, and foreclose Braswell's right to select the organization to arbitrate post signing of the Client Agreement, the terms of the arbitration clause create a gross disparity between the parties. The terms of the arbitration clause are unreasonably favorable to the investment counseling and stock brokerage corporation and are oppressive to Braswell.

CONCLUSION

The trial court correctly denied Citigroup and Mr. Jones's Motion to Compel Arbitration by applying applicable rules of contract construction in finding that the arbitration clause failed to bind Citigroup as a successor of Smith Barney. Furthermore, the trial court's ruling was appropriate because state-law defenses such unconscionability may be applied to invalidate an arbitration agreement, and in the case sub judice, the terms of the contract are overwhelmingly oppressive to Braswell. Braswell respectfully requests that this Court affirm the trial court's denial of Citigroup and Scott Jones's Motion to Compel Arbitration.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Wayne Dowdy, one of the attorneys of record for the Appellee, Randy Braswell, do hereby certify that I have this day mailed, via United States mail, postage prepaid, a true and correct copy of the Appellee's Brief to the following persons:

Honorable David Strong, Judge
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This the 9th day of April, 2010.

WAYNE DOWDY