IN THE MISSISSIPPI COURT OF APPEALS

NO. 2009-CA-01275

CITIGROUP GLOBAL MARKETS, INC.
AND SCOTT JONES

Appellants

v.

RANDY BRASWELL

Appellee

APPEALED FROM THE CIRCUIT COURT
OF PIKE COUNTY, MISSISSIPPI

REPLY BRIEF OF APPELLANTS CITIGROUP GLOBAL MARKETS, INC. AND SCOTT JONES

ORAL ARGUMENT NOT REQUESTED

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ARGUMENT IN REPLY

I. Plaintiff's Brief Fails To Refute That The Trial Court Erred When It Denied Defendants' Motion to Compel Arbitration.

Plaintiff's Brief attempts unsuccessfully to demonstrate that the trial court correctly denied the Motion to Compel Arbitration filed on behalf of Citigroup and Scott Jones. Plaintiff argues that arbitration was properly denied because his arbitration clause (1) does not adequately identify Citigroup as a party that can enforce arbitration and (2) is unconscionable as written. As demonstrated in the initial brief of Citigroup and Mr. Jones, however, these arguments are supported by neither the law nor the facts.

First, the Client Agreement definitively encompasses Citigroup as a party that may contractually compel Plaintiff to arbitration. The opening paragraph of the Client Agreement identifies the categories of entities who are entitled to arbitrate claims asserted by the Plaintiff through the defined terms "SB," "you," or "your." Those terms are expressly defined to refer for the entire Client Agreement to "Smith Barney Inc. or its direct or indirect subsidiaries and affiliates or their successors or assigns." As explained in Defendants' initial Brief, Citigroup is the successor or assign of Smith Barney. Plaintiff's Brief utterly fails to address the significance of the "SB" definition, even though it was a primary focus of Defendant's initial Brief.

Second, Plaintiff has failed to carry his burden of demonstrating that the terms of the his arbitration clause are unconscionable as written. He has demonstrated no valid factual or legal basis why this Court should treat this standard securities industry arbitration clause any differently than virtually identical agreements it has consistently enforced in the past. Plaintiff offers no competent proof that his arbitration clause is unfair. Instead, he advances only arguments that have already been rejected by this Court and by courts nationwide.

A. Plaintiff Fails To Demonstrate That His Arbitration Clause Does Not Encompass Citigroup as Smith Barney's Successor or Affiliate.

Plaintiff's Brief completely ignores a primary factual point that is critical to this appeal: Citigroup – as a successor or affiliate of Smith Barney – is included within the Client Agreement's collective definition of entities authorized to enforce the agreement. Like virtually every written commercial agreement, Plaintiff's Client Agreement sets forth contractual undertakings and protections that apply to various categories of parties connected with Plaintiff's brokerage account. Rather than repeatedly listing or describing these categories of parties throughout the document, the Client Agreement establishes defined terms – "SB" and "you" – as a shorthand method of identifying them for the remainder of the agreement. The practice of using a single, defined term in a contract to identify a number of parties who will incur obligations or receive protections under the contract is a hallmark practice of American contract law.

Plaintiff's brief completely fails to address the effect of the "SB" definition in his Client Agreement. Instead, Plaintiff retreats to an argument, based on canons of contract construction, that the Client Agreement is to be construed against Citigroup because it drafted the document. The trial court erroneously accepted this argument and concluded that there was a disparity in wording between Paragraphs 6 and 7 of the Client Agreement that created an ambiguity. In order to reach this conclusion, however, the trial court ignored two paramount factors. First, the trial court ignored the strong policy of the Federal Arbitration Act and this Court favoring the arbitration of disputes. Second, the trial court failed to acknowledge or give effect to the clear meaning of the defined term "SB." *See, e.g., Corban v. United Services Auto. Ass'n,* 20 So. 3d 601, 609 (Miss. 2009) (principles of contract construction do not apply to unambiguous contract).

Plaintiff argues that the trial court correctly invoked the doctrine of *ejusdem generis* to support the conclusion that the arbitration clause's failure to specifically include corporate successors and assigns has controlling effect over provision of the Client Agreement that does expressly refer to successors and assigns. This "inconsistency,' according to Plaintiff, allowed the trial court to conclude that the more specific provision, *i.e.*, the one that deals directly with arbitration, does not mention successors and therefore successors are not authorized to enforce the arbitration agreement.

The Plaintiff's and trial court's reliance on the concept of *ejusdem generis* fails for at least three reasons. First and foremost, the Client Agreement's most direct and specific provision about the rights and obligations of successor entities is found in the definition of "SB." By utilizing that defined term in the opening paragraph of the Client Agreement, the parties specifically agree that "SB" will include successors and assigns *throughout* the contract. Accordingly, when the arbitration clause states that Plaintiff will arbitrate all claims asserted against "SB," that definition specifically and directly means that he agrees to arbitrate claims against Smith Barney's successors and assigns, which unquestionably includes Citigroup.

Second, the trial court should not have elevated any common law canon of construction above the plain mandate of the United States Supreme Court in applying the Federal Arbitration Act. "The standard rule of contract construction ... dictates that contracts are to be construed against the drafter. ... However, this general principle relating to contracts is superseded by the federal policy which requires that construction of contract language is to be resolved in favor of arbitration where there are doubts as to the parties' intentions." *Collins v. International Dairy Queen, Inc.*, 2 F. Supp. 2d, 1473, 1478 (M.D. Ga. 1998). *See also Johnson Controls, Inc. v. City*

of Cedar Rapids, 713 F.2d 370, 373 (1983) ("any doubts about the construction or breach of the putative arbitration provision are to be resolved in favor of ordering arbitration").

Third, Plaintiff's reliance on the wording in Paragraph 7 of the Client Agreement hurts, rather than helps, his argument that the document does not encompass Citigroup. Paragraph 7 states in relevant part: "**The provisions of this Agreement** shall be continuous, shall cover individually 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 assignee.**" Client Agreement ¶ 7(emphasis added). This sentence reinforces the fact that Citigroup, as a successor organization or assignee, was intended to be a beneficiary of the provisions of the entire Client Agreement, including the arbitration clause.

In its principal brief, Defendants cited to a case holding that the identical contractual definition of "SB" bound a plaintiff to arbitrate a dispute with Citigroup arising out of an account that had been initially opened with Smith Barney. *See Patnik v. Citicorp Bank Trust FSB*, 412 F.Supp.2d 753, 760-761 (N.D. Ohio 2005). Plaintiff has failed to submit any legal authority in response to Defendants' citation of the *Patnik* case, and advances no viable reason why a brokerage client agreement that has routinely been enforced nationwide should not be enforced in this case.

The canons of contract construction repeatedly relied on by Plaintiff – the principle of *ejusdem generis* and the interpretation of contracts against their drafters – are not even applicable in this case because the parties' intent is clear from the "four corners" of the contract. *See Belager-Price v. Lingle*, 28 So.3d 706, 711 (Miss. App. 2010) (holding that discretionary canons of contract construction should not be utilized when the parties' intent is clear from a review of the language contained in the actual agreement). When one examines the Client Agreement "as a

whole", it is clear that the defined term "SB" encompasses Citigroup. *See id.* (stating that the "four corners" approach involves examining a contract "as a whole" and not by examining "particular words and phrases" in isolation); *see also Lewis v. Progressive Gulf Ins. Co., Inc.*, 7 So.3d 955 (Miss. App. 2009) (holding that if a term in a contract is not subject to interpretation, it will be enforced as written without attempting to surmise some possible but unexpressed intent of the parties). Therefore, there is no need to subject the Client Agreement to the principles of contract construction urged by Plaintiff.

Plaintiff's attempt to construe the Client Agreement against Citigroup as the "drafter of the agreement" is internally inconsistent. On one hand, Plaintiff argues that Citigroup is not sufficiently identified in the document to enforce it. One the other hand, Plaintiff argues that Citigroup was the drafter of the document. Plaintiff can not have it both ways. If Citigroup truly is a stranger to the Client Agreement, no presumption should apply. If Citigroup is in fact the drafter of the Client Agreement, it surely is encompassed within the category of entities that may enforce the agreement. Plaintiff asks this Court to endorse the nonsensical conclusion that Citigroup drafted Plaintiff's arbitration agreement but is powerless to enforce it. This convoluted argument's lack of logic reveals its fallacy.

To summarize, there is no legitimate question that Plaintiff's Client Agreement expressly describes Citigroup as a successor or assign of Smith Barney. Plaintiff's arguments regarding Citigroup's standing to enforce the arbitration clause in his Client Agreement should be rejected. The arbitration clause applies fully to Citigroup and should be enforced.

B. Plaintiff Fails To Demonstrate That Scott Jones Cannot Enforce The Arbitration Clause.

Plaintiff's brief completely ignores the issue of Scott Jones' right to enforce the arbitration clause in the Client Agreement. Mr. Jones is the broker who serviced Plaintiff's brokerage account at Smith Barney/Citigroup. The arbitration agreement states in relevant part: **"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 ...."** (emphasis in original). Plaintiff's claims against Mr. Jones fall squarely within the operation of this clause and therefore Plaintiff is required to pursue his claims against Mr. Jones in arbitration.

The trial court erroneously refused or failed to distinguish between Citigroup and Scott Jones's positions in this appeal. As to Mr. Jones, there is absolutely no legitimate basis for Plaintiff even to argue (and he has not) that he is not contractually obligated to arbitrate his claims.

C. Plaintiff Fails To Establish That The Arbitration Clause Is Unconscionable.

Plaintiff's argument as to the alleged unconscionability of the arbitration clause suffers from the same symptoms as his ambiguity argument: (1) it fails to proffer any valid proof in support of Plaintiff's position and (2) it ignores rather than addresses Defendants' arguments on this issue. Defendants' principal brief noted that Plaintiff failed to cite to the trial court a single decision of any Mississippi court where a securities brokerage agreement was found to be unconscionable as written. *See* Defendants' Brief, p. 14. Despite this challenge, Plaintiff's brief to this Court remains tellingly silent on this critical issue. Defendants' principal brief (pp. 13-16)

provided ample legal authority rejecting Plaintiff's arguments that his Client Agreement creates a gross disparity of bargaining power, imposes costly fees, and forecloses Plaintiff's right to select the arbitral forum. Plaintiffs' brief offers nothing to refute those authorities.

The implications of Plaintiff's unconscionability argument are both far-reaching and prohibitive. Plaintiff argues that his agreement to arbitrate claims before FINRA is unconscionable because of the fees involved and the absence of forum choice. The practical result of Plaintiff's position, however, is that *every* arbitration agreement in America created prior to the merger of the NASD and NYSE is now unconscionable per se. Plaintiff's argument – if it were accepted by courts– would create chaos in the dispute resolution system of the securities brokerage industry. Plaintiff has not demonstrated a reason for this Court to reach such a drastic result. Plaintiff bears the burden of demonstrating through competent evidence that FINRA arbitration would be prohibitively expensive[1] or substantively unfair.[2] He has completely failed to prove either proposition.

This Court should reverse and remand the case to the trial court for entry of an appropriate order compelling Plaintiff to arbitrate his claims against Defendants in accordance with the Client Agreement.

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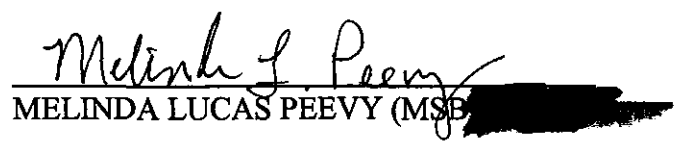
[1] *See, e.g., Bess v. DirecTV, Inc.*, 885 N.E.2d 488 (Ill. 5th DCA 2008) ("party [challenging arbitration] must provide some individualized evidence to show that she is likely to face prohibitive costs in the arbitration and that she is financially incapable of meeting those costs... [A]n arbitration provision is not rendered inherently unconscionable because some of the arbitration costs will be imposed on the customer.").

[2] In *Millas v. Morgan Stanley & Co., Inc.*, 2008 WL 5095917 (S.D. Ill. Dec. 1. 2008), a party echoed Plaintiff's generic claims of bias related to FINRA arbitrations. The court noted that "there is no support in the record for these bare bones assertions, and the Court need not give credence to them... it is sufficient to note that [the party] has utterly failed to present anything from which the Court could conclude that the FINRA's arbitration procedures are biased against the claimant to the extent that each and every provision requiring arbitration under the FINRA's rules is substantively unconscionable." *Id* at *5; *see also Braintree Laboratories, Inc. v. Citigroup Global Markets, Inc.*, 671 F.Supp.2d 202 (D. Mass. 2009) (holding plaintiffs' argument that FINRA will provide a "biased panel" should be dismissed and noting that Citigroup was "correct" to label as "absurd" plaintiffs' contention that FINRA would not adequately protect their rights).

CONCLUSION

For the foregoing reasons, Appellants Citigroup Global Markets, Inc. and Scott Jones respectfully request that this Honorable Court enter an Order (1) reversing the trial court's June 25, 2009 Order and instructing the trial court to compel Plaintiff Randy Braswell to arbitrate his claims and (2) ordering the trial court to enter an appropriate order allowing Defendants to recover their reasonable fees and costs incurred since November 28, 2008 in enforcing the arbitration agreement.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Appellants Citigroup Global Markets, Inc. and Scott Jones has been served upon:

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by U.S. Mail, postage prepaid to the above address on this 27th day of May, 2010.

Melinda L. Perry
OF COUNSEL

CERTIFICATE OF FILING

I, Melinda Lucas Peevy, certify that I have by U.S. Mail, postage prepaid, sent one original and three copies of the Reply Brief of Appellants Citigroup Global Markets, Inc. and Scott Jones and an electronic diskette containing same on the 26th of April, 2010, addressed to Ms. Betty W. Sephton, Clerk, Supreme Court of Mississippi, 450 High Street, P.O. Box 249, Jackson, Mississippi 39201.

MELINDA LUCAS PEEVY