IN THE SUPREME COURT OF MISSISSIPPI

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

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

ORAL ARGUMENT NOT REQUESTED

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CERTIFICATE OF INTERESTED PERSONS

Pursuant to M.R.A.P. 28(a)(1), 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 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. Honorable David H. Strong, Circuit Court of Pike County, Judge.

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Smith Barney v. Henry,
775 So.2d 722 (Miss. 2001) 9, 10, 13, 14

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OTHER AUTHORITIES

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STATEMENT OF THE ISSUE

Whether the trial court erred in refusing to enforce an arbitration agreement set forth in a securities brokerage account agreement, on the grounds that the agreement is not enforceable because it is unconscionable and does not bind all of the parties involved in this lawsuit?

STATEMENT OF THE CASE

The underlying case was filed against Citigroup Global Markets, Inc. ("Citigroup") on June 17, 2008 by Appellee/Plaintiff Randy Braswell ("Plaintiff" or "Appellee") in the Circuit Court of Pike County. (R.2-3). Plaintiff alleged that Citigroup failed to follow his instructions regarding his investment accounts, negligently handled his investments, and breached fiduciary duties owed to him. (R.2-3). Plaintiff alleged that Citigroup's conduct caused him to suffer $71,326 in investment losses. (R.3).

On August 14, 2008, Plaintiff and Citigroup filed a Joint Motion to Stay Pending Arbitration. (R.4-5). In the Joint Motion to Stay, counsel for Plaintiff and Citigroup represented to the trial court that "[a]ll of the claims asserted against Citigroup in this action are subject to the arbitration clause contained in Plaintiff's Client Agreement." (R.4).

More than two months later, Plaintiff filed a Motion to Withdraw the Joint Motion to Stay. (R.6-10). The only ground Plaintiff cited for his Motion to Withdraw was that his claims were not eligible for arbitration before the Financial Industry Regulatory Authority ("FINRA"), the entity created by the merger of the National Association of Securities Delalers and the New York Stock Exchange. According to Plaintiff, his claims were not eligible for FINRA arbitration because of that organization's rule stating that claims existing for more than six years are not eligible for arbitration. (R.7-8). Citigroup informed Plaintiff that his claims are eligible for

FINRA arbitration because the six-year eligibility rule does not apply. Plaintiff, however, refused to withdraw his Motion To Withdraw Joint Motion to Stay Pending Arbitration.

On December 19, 2008, Citigroup filed a Motion to Compel Arbitration and to Stay or Dismiss Pending Appeal. (R.11-33). In that motion, Citigroup demonstrated that all of Plaintiff's allegations fall squarely within the scope of his investment account arbitration agreement and that Plaintiff's claims are eligible for FINRA arbitration. (R.14-16).

On December 23, 2008, Plaintiff filed an Amended Complaint for Damages. (R.34-36). The Amended Complaint restated the same causes of action, added Citigroup broker Scott Jones as a defendant, and increased the claimed damages to $223,000.00. (R.35).

On February 4, 2009, the trial court granted Plaintiff's Motion to Withdraw the Joint Motion to Stay Pending Arbitration. (R.58). On February 11, 2009, Citigroup and Mr. Jones filed a Motion to Compel Arbitration and to Stay or Dismiss Pending Arbitration. (R.37-57). In this Motion, Defendants jointly asserted the same grounds for compelling arbitration as stated in the previous motion filed solely by Citigroup. In addition, the motion requested that Plaintiff be directed to reimburse Citigroup for the costs associated with the filing of the Motion to Compel Arbitration. (R.42).

On May 1, 2009, Plaintiff filed his Response to Defendants' Motion to Compel Arbitration. (R.59-70). In his Response, Plaintiff contended for the first time that he was not required to arbitrate his claims against Defendants because the arbitration clause in the Client Agreement was vague and unconscionable. (R.60-64). Plaintiff's Response contained no argument that his arbitration agreement did not sufficiently or clearly identify Citigroup as a party entitled to enforce the arbitration agreement.

On June 25, 2009, the trial court issued its Order denying Defendants' Motion to Compel. (R.77-81). The trial court refused to compel arbitration on the grounds that the arbitration agreement is unconscionable and the agreement is ambiguous as to whether Citigroup was sufficiently identified as a party capable of enforcing the agreement. (R.77-81). On July 27, 2009, Defendants filed its Notice of Appeal.

STATEMENT OF FACTS

Citigroup Global Markets, Inc. is an investment and stock brokerage company with its headquarters in New York and offices in Mississippi. (R.1) Smith Barney, Inc. is a division of Citigroup. (R. 20). Since at least 1996, a stock brokerage office under the Smith Barney name has operated in Magnolia, Mississippi. (R.9-10)

On June 12, 1996, Plaintiff executed a Client Agreement in connection with opening a brokerage account at Smith Barney. (R.19-22). The Client Agreement signed by Plaintiff contains a pre-dispute arbitration clause that mandates the arbitration of all disputes and controversies which may arise out of the Client Agreement and/or Plaintiff's account with Citigroup. (R.20). Plaintiff signed the Client Agreement directly below an acknowledgement which states in bold print: **"I acknowledge that I have received the Client Agreement, which contains a pre-dispute arbitration clause on page 3, section 6."** (R.20) (emphasis in original).

Plaintiff's Client Agreement defines the term "SB" as "Smith Barney Inc. or its direct or indirect subsidiaries and affiliates or their successors or assigns." (R. 21). The arbitration agreement in Plaintiff's Client Agreement is set out in bold text and states:

> **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 arbitrator's award is not required to include factual findings or legal reasoning, and any party's right to appeal or to seek modification of rulings by the arbitrators 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 other 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 at 388 Greenwich 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 initialed 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 class action 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.21-22)(bold emphasis in original).

On or about August 12, 1996, Plaintiff executed another Client Agreement in connection with the opening of a second brokerage account. (R.24-26). The arbitration clause quoted above also appears in this Client Agreement. (R.26). Plaintiff admits that he executed the Client Agreements containing the arbitration clause at issue. (R. 59).

In June 2008, Plaintiff filed a Complaint naming Citigroup – not Smith Barney – as the sole defendant and seeking damages for the actions of Scott Jones, who Plaintiff describes in a sworn affidavit as his "Smith Barney financial advisor." (R.2-3).

SUMMARY OF ARGUMENT

The trial court erred when it denied Defendants' Motion to Compel Arbitration. Contrary to the trial court's June 25, 2009 Order, the parties should be compelled to arbitrate their dispute because (1) the arbitration clause clearly encompasses Plaintiff's claims against both Defendants, and (2) the arbitration clause is not unconscionable.

First, the arbitration clause at issue requires the Plaintiff to submit to arbitration "all claims and controversies" relating to his securities investment accounts at Smith Barney/Citigroup. This broad language clearly encompasses Plaintiff's claims arising out of Defendants' alleged mismanagement of the investments in his accounts. The trial court erroneously accepted Plaintiff's argument that Citigroup – the direct corporate affiliate of Smith Barney - was not sufficiently identified in the Client Agreement to enforce arbitration. The trial court concluded that the Client Agreement was ambiguously worded and failed to "bind any successor of Smith Barney." However, the Client Agreement expressly states that it may be enforced by either a successor entity to Smith Barney or by any direct or indirect affiliate of Smith Barney, which is a division of Citigroup. In reaching its conclusion, the trial court disregarded controlling precedent enforcing arbitration agreements with virtually identical language.

Second, the trial court's finding that the arbitration agreement signed by Plaintiff is unconscionable is not supported by the factual record or by federal or state law. The trial court

concluded that the Client Agreement was unconscionable because (1) it did not permit Plaintiff to choose between arbitration forums and (2) it would require Plaintiff "to bear the expense of the entire arbitration." The Court's first finding runs counter to established Mississippi and federal law enforcing precisely the kind of arbitration agreement that is at issue in this case. As for the Court's conclusion regarding arbitration expenses, the court had no evidence that the Plaintiff's arbitration expense would be any greater than those costs he would incur while pursuing his claims in court, nor was there any evidence that Plaintiff would bear all of that expense. In short, the trial court's finding that the Client Agreement is unconscionable is fatally flawed on both a factual and legal basis.

When Plaintiff executed Client Agreements containing an arbitration clause, he agreed to arbitrate any and all disputes which arose with respect to his Smith Barney/Citigroup investment accounts. Plaintiff initially joined in a Motion to Stay Pending Arbitration and admitted therein that all of the claims asserted against Defendants in this action are subject to the arbitration clause contained in the Client Agreement. Despite Plaintiff's change of heart and belated arguments of ambiguity and unconscionability, the fact remains that he is contractually bound to arbitrate his claims.

Because the trial court erred in denying Defendants' Motion to Compel Arbitration, Defendants respectfully request that this Honorable Court reverse the trial court's June 25, 2009 Order and instruct the trial court to compel the arbitration of Plaintiff's claims and to require reimbursement of the costs incurred by Defendants in compelling arbitration in this matter.

ARGUMENT

Standard of Review

"The grant or denial of a motion to compel arbitration is reviewed de novo." *East Ford, Inc. v. Taylor*, 826 So. 2d 709, 713 (Miss. 2002). "In determining the validity of a motion to compel arbitration under the Federal Arbitration Act, courts generally conduct a two-pronged 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." *Id.* "Under the second prong, applicable contract defenses available under state contract law such as fraud, duress, and unconscionability may be asserted to invalidate the arbitration agreement without offending the Federal Arbitration Act." *Id.* "Doubts as to the availability of arbitration must be resolved in favor of arbitration. **Unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue, then a stay pending arbitration should be granted.**" *See IP Timberlands Operating Co., Ltd. v. Denmiss Corp.*, 726 So. 2d 96, 107 (Miss. 1998) (internal citations omitted)(bold emphasis added).

I. The Trial Court Erred When It Denied Defendants' Motion to Compel Arbitration.

The trial court's June 25, 2009 Order erroneously concluded that the Plaintiff may not be compelled to arbitrate his claims against Defendants. For the reasons discussed below, the record in this matter demonstrates that enforcement of the arbitration agreement signed by the Plaintiff is appropriate and required.

The overall validity of the Client Agreements signed by the Plaintiff cannot be seriously disputed. Plaintiff does not dispute that he signed the arbitration agreements or deny that those agreements have governed his dealings since 1996 with the Smith Barney/Citigroup branch

office in Magnolia, Mississippi. Plaintiff's written submissions to the trial court make no argument that the arbitration agreement is invalid and the trial court made no such finding. Instead, the trial court held that the Plaintiff's claims are not within the scope of the agreement due to a purported ambiguity concerning whether successors of Smith Barney are bound by the agreement. The trial court *sua sponte* invoked the principle of *ejusdem generis* to hold that the general provisions of the Client Agreement binding successors and assigns did not apply to the more specific arbitration clause. As an alternative basis for its ruling, the trial court held that the arbitration clause in Plaintiff's Client Agreements is unconscionable and unenforceable because it did not allow Plaintiff to choose his arbitral forum and because Plaintiff would have to incur expenses to arbitrate his claims.

Both of the trial court's bases for denying Defendants' Motion to Compel Arbitration are due to be reversed.

A. The Arbitration Clause Clearly Encompasses All Claims and Parties Involved In This Lawsuit.

The Client Agreement signed by Plaintiff is a contract evidencing transactions involving interstate commerce, which is subject to the provisions of the Federal Arbitration Act, 9 U.S.C. Sections 1, et seq. *See, e.g., Smith Barney v. Henry*, 775 So.2d 722, 725 (Miss. 2001) (securities industry meets the minimum threshold of affecting or bearing upon interstate commerce, and thus initiates the FAA"). Federal and state courts have consistently complied with the FAA's strong federal policy favoring the arbitration of disputes by enforcing arbitration agreements between brokerage firms and their customers. *See, e.g., Dean Witter Reynolds v. Byrd*, 470 U.S. 213, 218 (1985) (noting that the FAA "leaves no place for the exercise of discretion by a district court, but instead mandates that district courts shall direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed"); *see also Shearson/American Exp.,*

Inc. v. McMahon, 482 U.S. 220 (1987); *Adrian v. Smith Barney, Harris, Upham & Co.*, 841 F.2d 1059 (11th Cir. 1988).

This Court has also echoed the FAA's presumption in favor of arbitration by stating that "[a]rticles of agreement to arbitrate, and awards thereon are to be liberally construed so as to encourage the settlement of disputes and the prevention of litigation, and every reasonable presumption will be indulged in favor of the validity of arbitration proceedings." *Smith Barney, Inc. v. Henry*, 775 So. 2d 722, 724 (Miss. 2001) (holding "the case law in Mississippi regarding arbitration and the Federal Arbitration Act are consistent with one another"). In fact, this Court has even held that "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue, then a stay pending arbitration should be granted." *Id.* at 725 (quoting *Wick v. Atlantic Marine, Inc.*, 605 F.2d 166, 168 (5th Cir. 1979)); *see also Becker Autoradio v. Becker Autoradiowerk Gnbh*, 585 F.2d 39, 44 (3rd Cir. 1978) (holding that "any doubts" regarding the propriety of arbitration "should be resolved in favor of arbitration unless a court can state with positive assurance that this dispute was not meant to be arbitrated.")

Notwithstanding the overwhelming mandate to interpret arbitration agreements broadly, the trial court ignored the strong presumption in favor of arbitration. The trial court found ambiguity in the arbitration clause where none exists, and ignored the rulings of other courts that have enforced arbitration clauses with similar language. *See Levine v. Merrill Lynch, Pierce, Fenner & Smith Inc.*, 639 F. Supp. 1391 (S.D.N.Y. 1986) (enforcing a similar agreement, noting that "[i]t is difficult to imagine language broader" than the phrase "any controversy"); *see also MS Credit Center, Inc. v. Horton*, 926 So. 2d 167 (Miss. 2006) (holding that when the language

in an arbitration agreement is broad, it is necessary only for the dispute to "touch" matters covered by the contract for them to be arbitrable).

1. The Arbitration Agreement Clearly And Expressly Encompasses Citigroup, Either As Smith Barney's Successor Or Affiliate.

The trial court concluded that Citigroup was not bound by the arbitration clause and was therefore not authorized to enforce it against the Plaintiff. To reach this result, the trial court focused on one part of the Client Agreement and entirely ignored another. In order to correctly read and understand the Plaintiff's Client Agreement, the trial court should have acknowledged the definition of the abbreviated term "SB." The preamble paragraph of the Client Agreement defines "SB" as "Smith Barney Inc. or its direct or indirect subsidiaries and affiliates or their successors or assigns..." (R.21). Consequently, the defined meaning of "SB" applies every time the term is used throughout the Client Agreement.

The heart of Plaintiff's arbitration clause states: **"I agree that all claims or controversies ... between me and SB ... shall be determined by arbitration."** Applying the incorporated definition for "SB," this text effectively states: **I agree that all claims or controversies between me and Smith Barney, Inc., or its direct or indirect subsidiaries and affiliates of their successors or assigns, shall be determined by arbitration.** This language leaves no room for doubt that Citigroup is encompassed within the Smith Barney corporate affiliates that are bound by, and therefore entitled to enforce, the arbitration agreement contained in Plaintiff's Client Agreements.[1]

In order to avoid this result, the trial court's June 25, 2009 Order seized on the fact that the Plaintiff's arbitration clause "states that it binds SB and its predecessor firms, but fails to

[1] The arbitration clause also expressly covers "present or former officers, directors, or employees" of the entity defined as "SB." Accordingly, there can be no real dispute that Scott Jones is entitled to compel arbitration of Plaintiff's claims. The trial court's order does not discuss Mr. Jones' contractual right to arbitration but rather denies the Motion to Compel Arbitration as to all defendants.

bind successors or assigns." (R.79). The trial court concluded that the arbitration clause was ambiguous because another paragraph of the Client Agreement states that all of the provisions of the Client Agreement would inure to the benefit of SB's "present organization or any successor organization..." (R.79-80). This strained interpretation is undermined by the fact that the term "SB" already had been defined in the Client Agreement to include corporate affiliates and successors. Because of that definition, any further reference to successors in the arbitration clause would have been superfluous.

When the Client Agreement and arbitration clause are correctly read in light of the definition of "SB," there is no legitimate question that the arbitration clause encompasses both Defendants. *See Patnik v. Citicorp Bank Trust FSB*, 412 F.Supp.2d 753, 760-761 (N.D. Ohio 2005) (holding that the **exact same** 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). The trial court's conclusion that Citigroup is not encompassed within the Plaintiff's arbitration agreement constitutes reversible error.

2. Rules Of Construction Are Not Necessary And Do Not Justify The Trial Court's Ruling That Citigroup Is Not Covered By The Arbitration Agreement.

The trial court *sua sponte* and incorrectly applied two principles of contract construction to exclude Citigroup from the operation of the Plaintiff's arbitration agreement. The trial court held that the principle of *ejusdem generis* –which holds that a specific contract provision prevails over a general one – supported the conclusion that corporate successors are not encompassed by the arbitration agreement. Similarly, the trial court held that the Client Agreement and the arbitration clause must be interpreted against Citigroup/Smith Barney because it drafted the document. Neither of these principles of construction were properly employed. As

demonstrated above, when the arbitration clause is read correctly to include the stated definition for "SB," the arbitration clause is just as specific as the other paragraph referenced by the trial court, so that the principle of *ejusdem generis* has no application. Furthermore, no presumption against the drafter applies when the contract is unambiguous. *See Corban v. United Services Auto. Ass'n*, 20 So. 3d 601, 609 (Miss. 2009). As explained above, the arbitration agreement is not ambiguous when the definition for "SB" is given its plain meaning and effect.

To summarize, there should be no legitimate question that Citigroup is either a successor entity or a direct or indirect affiliate of Smith Barney. In either capacity, Citigroup is expressly identified by definition as an entity that may enforce arbitration of any dispute with the Plaintiff. This Court has emphasized that arbitration must be enforced "unless it can be said with positive assurance that an arbitration clause is not susceptible of an interpretation which would cover the dispute at issue." *Smith Barney, Inc. v. Henry*, 775 So. 2d 722, 725 (Miss. 2001) As demonstrated above, Plaintiff's arbitration agreement is susceptible of two alternative interpretations that lead inexorably to Citigroup – either as a successor or affiliate - having the right to compel arbitration.

B. The Arbitration Clause Is Not Unconscionable.

For at least two reasons, Plaintiff bears the burden of demonstrating that his arbitration agreement is substantively unconscionable. First, unconscionability is an affirmative defense which must be established by the party asserting it. *See MS Credit Center, Inc. v. Horton*, 926 So. 2d 167 (Miss. 2006). Second, the caselaw interpreting the FAA emphasizes the overwhelming presumption in favor of arbitration. *See, e.g., See Qualcomm Inc. v. American Wireless License Group, LLC*, 980 So. 2d 261 (Miss. 2007). Plaintiff has failed to meet his double burden to establish that his arbitration agreement is unenforceable because it is

substantively unconscionable. Plaintiff failed to cite to a single decision of any Mississippi court where a securities brokerage agreement was found to be unconscionable. This omission is understandable: courts have consistently enforced securities arbitration agreements in situations closely similar to the one presented in this case.[2] *See, e.g., Smith Barney v. Henry,* 775 So. 2d 722, 723 (Miss. 2001) (construing a Smith Barney arbitration clause); *Ex parte Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 494 So. 2d 1, 3-4 (Ala. 1986) (rejecting a plaintiff's argument that arbitrating before the NASD or NYSE was inherently unfair to plaintiff).

Plaintiff proffers no competent evidence that the FINRA arbitration process is inherently unfair to investors. Plaintiff can muster only two arguments for unconscionability and neither is convincing. Plaintiff first argues that his lack of choice of an arbitral forum is unfair. This situation, however, is not sufficient to find the agreement unconscionable. In *Cleveland v. Mann*, 942 So. 2d 108, 116-117 (Miss. 2006), a plaintiff argued that an arbitration agreement was unconscionable because it allowed the defendant to unilaterally choose the arbitration association that would be used to settle all disputes between the parties. This Court rejected the plaintiff's argument, finding that the lack of choice of forum was not important so long as the plaintiff is provided with "a fair opportunity and a proper forum in which to dispute his claims." *See id.* at 117.

Neither Plaintiff nor the trial court advances any reason why the merger of the NASD and NYSE into a single regulatory body creates unfairness to Plaintiff. Furthermore, there is no evidentiary basis for any finding that FINRA arbitration is procedurally or substantively unfair to

[2] Unconscionability is rarely invoked by courts as grounds for invalidating a contract because it can only be proven "by oppressive contract terms such that there is a one-sided agreement whereby one party is deprived of all the benefits of the agreement or left without a remedy for another party's nonperformance or breach.... One example of a one-sided agreement is one that allows one party to go to court, but restricts the other to arbitration." *Covenant Health & Rehabilitation of Picayune, LP v. Moulds*, 14 So. 3d 695, 700 (Miss. 2009) (internal citations omitted).

plaintiff investors. The mere fact that Citigroup is a FINRA member does not support a finding that FINRA arbitration is inherently unfair. There is no evidence that Citigroup could somehow manipulate FINRA arbitration proceedings to its own benefit. Plaintiff's Response to Defendants' Motion to Compel Arbitration even acknowledged that a majority (two out of three) of the arbitrators on a FINRA panel are not affiliated with the securities industry. (R.63). Therefore, there is no basis for the trial court to conclude that the arbitrators who would hear this case would be biased against Plaintiff simply because he is not a FINRA member. In the absence of competent evidence of bias, this ground for unconscionability must fail.

Plaintiff also argued and the trial court found that FINRA arbitration is unconscionable because Plaintiff would be required to bear the expense of the entire arbitration. This finding is not supported by any facts. Arbitration claimants pay a filing fee to initiate an action and bear their own expenses throughout the arbitration – just as any other litigant would. Furthermore, the arbitration procedure rules of FINRA provide that the forum may waive filing fees and/or deposits of claimants upon a showing that they cannot afford to pay such fees. *See, e.g.*, FINRA Code of Arbitration § 10205(a).[3]

Plaintiff produced no evidence demonstrating that arbitration is more expensive than proceeding with an action in court. Plaintiff's Response to Defendants' Motion to Compel Arbitration makes a conclusory reference to "expensive fees" in arbitration with no supporting evidence. This unsupported characterization ignores the fact that arbitration is an efficient forum that was formulated to save parties both money and time. (R.63). For instance, the absence of

[3] The trial court's order states that Defendants' counsel "conceded" at hearing that the arbitration agreement would require Braswell to bear the expense of the entire arbitration. No transcript of the hearing is a part of the record on appeal and Defendants' counsel represents that no such concession was made. In fact, Defendants specifically refuted this argument in their Reply Brief by demonstrating the FINRA provision allowing the arbitrators to shift or waive hearing fees if appropriate. (R.71-76).

depositions and the greatly reduced motion practice in arbitration reduce litigation costs significantly. Neither Plaintiff nor the trial court made any effort to compare overall litigation costs – from initial filing to final resolution – and therefore nothing was ever proved on the cost issue before the trial court.[4] In sum, Plaintiff's argument that FINRA arbitration is prohibitively expensive and therefore unconscionable is unsubstantiated by the record before this Court. The trial court's finding that Plaintiff would bear the entire expense of arbitration is likewise unfounded.

CONCLUSION

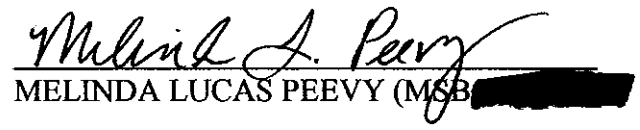
Mississippi courts are required to liberally construe arbitration agreements with a presumption in favor of arbitration. However, the trial court in this case seemed to go out of its way – even adopting arguments that Plaintiff never proffered –to determine that the subject dispute should not be submitted to arbitration. Plaintiff signed documents agreeing to arbitrate his claims against these Defendants. This Court should enforce the arbitration agreement and require Plaintiff to do what he contracted to do.

For the reasons discussed herein, Appellants Citigroup Global Markets, Inc. and Scott Jones respectfully request that this Honorable Court enter an Order reversing the trial court's June 25, 2009 Order and instructing the trial court to compel Plaintiff Randy Braswell to arbitrate his claims. Defendants further request that the Plaintiff be directed to reimburse

[4] Plaintiff – on the other hand – has caused Defendants to incur enormous costs in pursing enforcement of arbitration. After first joining as a movant in a Joint Motion to Stay Pending Arbitration, Plaintiff has conducted an extended campaign of obstruction based on shifting theories. Plaintiff's refusal to abide by the clear language of the Client Agreement has forced Defendants to incur costs associated with the proceedings to compel arbitration in the trial court as well as the fees required to invoke the intervention of this Court. Consequently, this Court should order 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.

Defendants for their reasonable attorneys' fees and costs incurred in this action since the Plaintiff moved to withdraw the Joint Motion To Stay Pending Arbitration.

Respectfully submitted,



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CERTIFICATE OF SERVICE

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

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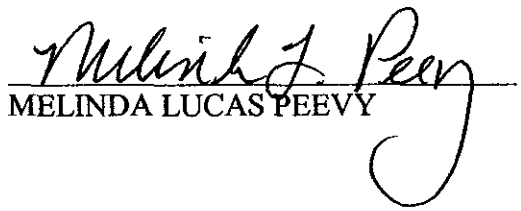
Honorable David H. Strong
Circuit Court of Pike County Judge
c/o Roger Graves, Clerk of Court
Post Office Box 31
Magnolia, MS 39652

by U.S. Mail, postage prepaid to the above address on this 6th day of January, 2010.

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 Brief of Appellants Citigroup Global Markets, Inc. and Scott Jones and an electronic diskette containing same on the 6th of January, 2010, addressed to Ms. Kathy Gillis, Clerk, Supreme Court of Mississippi, 450 High Street, P.O. Box 249, Jackson, Mississippi 39201.



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