STATE OF MINNESOTA

COUNTY OF HENNEPIN

DISTRICT COURT

FOURTH JUDICIAL DISTRICT



Moneygram Payment Systems, Inc.,

Plaintiff,

v.

Citigroup, Inc., Citigroup Global Markets, Inc., and Citigroup Global Markets, Ltd.,

Defendants.

**ORDER**

Court File No. 27-CV-11-21348
Judge William R. Howard

On February 24, 2012, the above-entitled matter came before the Honorable William R. Howard, Judge of District Court, upon Defendant's Motion to Compel Arbitration and motion to Stay Proceedings pending resolution of the motion to Compel. Aaron Delaney and Courtney Ward-Reichert appeared for the Defendants; Jason C. Davis and Carolyn Anderson appeared for the Plaintiffs. Based upon the arguments made at the hearing and a review of the submissions of the parties, the Court now makes the following:

**FINDINGS OF FACT**

1. Moneygram Payment Systems, Inc. ("Moneygram") is a global payment services company headquartered in Minnesota. Citigroup, Inc., ("Citigroup") is a global diversified financial services corporation. Citigroup Global Markets, Inc. ("CGMI") and Citigroup Global Markets, Ltd. ("CGML") are broker-dealer subsidiaries of Citigroup.

2. Between September 9, 2005, and July 2, 2007, Moneygram purchased 18 separate securities known as Collateralized Debt Obligations ("CDOs") and Residential Mortgage Backed Securities ("RMBS").

3. The Defendant alleges that the purchases were made by Moneygram through its account with Citi Smith Barney, which, at the time of the transactions was a division of CGMI. Citi Smith Barney sold or processed certain transactions through its Citi Smith Barney website, smithbarney.com. Moneygram alleges that the securities purchases were arranged by email or phone contact.

4. On February 7, 2008, almost a year after the transactions in dispute, Moneygram executed a Client Services Agreement with CGMI/Citi Smith Barney. The Agreement reads, in

part, "This smithbarney.com Client Service Agreement…is between Citigroup Global Markets, Inc. ("Smith Barney" or "SB") and you." *Seigle Aff., Ex. B.*

5. The Agreement then reads:

> The Agreement describes the terms and conditions by which you will receive certain electronic services ("Services"), including electronic access to your securities account[s] through SB's Internet site ("Site."). This Agreement does not cover transactions that you may enter through SB's proprietary online order entry ("Online Trading") or other systems. Enrollment in such transaction service(s) are made through execution of separate applications and terms of use.

*Id.*

6. Paragraph 22 of the Agreement is entitled Agreement to Arbitrate. It provides that "This agreement contains a predispute arbitration clause. By signing an arbitration agreement the parties agree as follows:…" The Agreement then states that "All parties to this agreement are giving up the right to sue each other in court, including the right to a trial by jury, except as provided by the rules of the arbitration forum in which a claim is filed." *Id.* The agreement then lays out certain terms of any arbitration.

7. Paragraph 22 continues:

> 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."

*Id.*

8. Douglas Porter, Portfolio Risk and Compliance Analyst for Moneygram from 2003-2009, testified by affidavit to his belief none of the securities trades at issue in this lawsuit were made or settled pursuant to an account opened under the smithbarney.com Client Services Agreement. Instead, "Moneygram purchased the RMBS and DCO securities at issue in this case from Citi pursuant to a sales process," involving trade of a security and settlement of the trade. *Porter Aff. At ¶4, 5, 10.*

9. The trades were handled through communication by telephone or email between a Citi representative and a Moneygram representative. The examples provided in Porter's affidavit

show emails between Moneygram and Steven Marshall, with the email address steven.l.marshall@smithbarney.com.

10. Upon agreement to purchase, a "trade date" would be set. *Id. at ¶6(d).* Citi would then send a "trade ticket" to Moneygram, either via email or through *Bloomberg*, a private service used for that service. *Id. at ¶7(a).* Citi would then deliver trade details to Moneygram's accounts at various banks through a securities clearing company. The bank would then recognize the trade if the terms were in agreement and reflect the transaction. *Id. at ¶7 (b),(c),(d),(e).* Porter's affidavit them lists the various banks that settled the 17 different trades at issue in this case, none of which, to the best of this Court's knowledge, involve Citi entities.

11. Steven Marshall, a financial advisor at CGMI, Inc., testified by affidavit that he served as Moneygram's broker for its accounts held at CGMI through the Texas offices of Smith Barney. *Marshall Aff. at ¶1, 4.* Marshall's affidavit lists the same 17 trades[1] and affirms that Moneygram purchased the securities through Moneygram's Smith Barney accounts. *Id. at ¶6.*

12. The Defendants brought this motion to compel arbitration pursuant to that Client Services Agreement, arguing that the transactions at issue here are subject to that Agreement, and the Agreement requires that disputes concerning transactions involving Citi are to be determined by arbitration. The Plaintiffs have opposed the motion, arguing that the transactions at issue here were not conducted through the Smith Barney website, and the Agreement exempt transactions entered through other systems.

**CONCLUSIONS OF LAW**

1. Generally, public policy favors arbitration as a matter of resolving disputes. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-626 (1985). Any doubts as to whether an issue is arbitrable will be resolved in favor of arbitration. *State v. Philip Morris, Inc.*, 813 N.Y.S.2d 71, 75 (N.Y.App.Div. 2006).

2. Before a court may enforce arbitration, the court must first determine whether the parties have agreed to submit their disputes to arbitration, and then whether the disputes come with the scope of their arbitration agreement. *Id.*

3. Under New York law, the agreement to choose arbitration will not be enforced without an express agreement to that effect. *Matter of Marlene Inds. Corp. [Carnac Textiles]*, 45 N.Y.2d

[1] The Court notes that there is one trade on the lists that has a slightly different number in the name between the two affidavits, but the Security Description ID for that trade is the same in both affidavits. For the purposes of this motion, the Court assumes a clerical error, and that the securities listed in the affidavits are the same.

327, 333-334 (N.Y. 1978). The agreement must be clear direct and may not be implied or rely on subtlety. *Id.*

4. The provision in the Client Services Agreement is clear on its face, but conflicts with other provisions of the Agreement, resulting in ambiguity in the intent and scope of the arbitration clause. In the absence of clarity, the Court cannot compel a party to arbitrate its disputes.

**ORDER**

1. The Defendants' Motion to Compel Arbitration is **Denied.**
2. The following Memorandum is hereby incorporated into this Order.

DATED: 4/24/12

BY THE COURT:

William R Howard

William R. Howard
Judge of District Court

**MEMORANDUM**

The United States Supreme Court has expressed its favor of arbitration as a matter of resolving disputes, and has held that valid agreements shall be vigorously enforced. *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625-626 (1985); *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213 (1985). New York courts have reacted accordingly, and held that any doubts as to whether an issue is arbitrable will be resolved in favor of arbitration. *State v. Philip Morris, Inc.*, 813 N.Y.S.2d 71, 75 (N.Y.App.Div. 2006), *citing Matter of Smith Barney Shearson v. Sacharow*, 666 N.Y.S.2d 990 (1997).

But an arbitration agreement must be enforceable, because New York courts have also ruled that "equally important is the policy that seeks to avoid the unintentional waiver of the benefits and safeguards which a court of law may provide in resolving disputes." *TNS Holdings v. MKI Secs. Corp.*, 92 N.Y.2d 335, 339 (1998). Before a court may enforce arbitration, the court must first determine whether the parties have agreed to submit their disputes to arbitration, and then whether the disputes come with the scope of their arbitration agreement. *Philip Morris,*

813 N.Y.S.2d at 75, *citing Sisters of St. John the Baptist, Providence Rest Convent v. Geraghty Constructor*, 502 N.Y.S.2d 997(1986).

In turn, in determining whether the parties have agreed to submit their disputes to arbitration, the court looks at whether the "relationship is established between the subject matter of the dispute and the subject matter of the underlying agreement to arbitrate." *Id.* But the agreement to choose arbitration will not be enforced without an express, unequivocal agreement to that effect. *Matter of Marlene Inds. Corp. [Carnac Textiles]*, 45 N.Y.2d 327, 333-334 (N.Y. 1978). "[U]nless the parties have subscribed at an arbitration agreement it would be 'unfair to infer such a significant waiver on the basis of anything less than a clear indication of intent.'" *TNS Holdings*, 92 N.Y2d at 339, *quoting Marlene Inds. Corp*, 45 N.Y.2d 333-334. The agreement must be clear direct and may not be implied or rely on subtlety. 45 N.Y.2d 334; *see also Steigerwald v. Dean Witter Reynolds, Inc.*, 446 N.Y.S.2d 648, 649 (1981).

In this case, paragraph 22 of the Client Services Agreement addresses the agreement to arbitrate disputes between the parties. By itself, the language is broad and all encompassing, stating that all parties give up the right to sue in favor of arbitration, then laying out that the waiver includes any claims or disputes between the parties or related entities, including those prior to the execution of the agreement itself, and including any transaction involving Smith Barney or related business entities. By itself, this provision is a clear and unequivocal agreement to arbitrate disputes.

However, in deciding whether or not such an agreement is enforceable, the Court must also look the scope of the arbitration provision, and whether it includes the dispute at issue. Here, while the arbitration provision itself appears to include any possible transaction between the parties, the first paragraph of the Agreement provides that the Agreement itself only covers a much more limited scope of transactions. The first paragraph states that the entire Agreement governs electronic services from Smith Barney, and only through the Smith Barney website. The Agreement then excludes both transactions that are entered through other systems and even those that are entered through another system of Smith Barney. The two provisions are in conflict, and when that occurs, "any inconsistency is governed by the general rule that 'where there is an inconsistency between a specific provision and a general provision in a contract***the specific provision controls.'" *Rocon Mfg., Inc. v. Ferraro*, 605 N.Y.S.2d 591, 593 (1993), *quoting Muzak Corp. v. Hotel Taft Corp.*, 150 N.Y.S.2d 688, 690 (1956). Therefore, the limiting provision of

the first paragraph provides the more specific guidance as to the scope of the Agreement, and controls what transactions are governed by it.[2]

Thus, the arbitration agreement would still be enforceable if the transactions in question in this lawsuit were conducted through the SmithBarney.com website. But the evidence presented on this point for purposes of this motion is also far from clear. The affidavit of Douglas Porter posits that none of the trades were conducted pursuant to any account opened under the smithbarney.com Agreement; his affidavit does not deny that Smith Barney was used to facilitate the trades. Indeed, the example provided by Porter reveals emails from Steven Marshall, with an email at smithbarney.com. Steven Marshall's affidavit states that Moneygram's trades were conducted "through its Smith Barney accounts." His affidavit provides no examples to assist the Court in determining how those accounts operated. Marshall's email address at smithbarney.com is not conclusive evidence that the trades were covered by the website use Agreement, because the Agreement not only excludes "other systems," it also specifically excludes "transactions that you may enter through SB's proprietary online order entry ("Online Trading")…". Accordingly, Marshall's general affirmation that the securities were purchased through Moneygram's Smith Barney accounts is inconclusive evidence that the trades were conducted pursuant to the website, and thus covered by the Client Services Agreement, and its arbitration provision.

In summary, a party to a commercial transaction cannot be compelled to give up rights to litigate in court absent an express and unequivocal agreement, and that agreement cannot be implied or depend on subtlety of language. While the language of the arbitration provision itself is clear, the exclusions in the coverage provisions create a conflict in the contract. That conflict, combined with the lack of evidential clarity as to whether the transactions at issue are governed by the exclusions, prevents a finding that the parties reached an express and unequivocal agreement that constitutes a clear intent to waive their rights to litigate the disputes at issue in this case. The motion to compel arbitration is therefore denied.

WRH/ejt

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[2] In addition, the court in *Marlene Inds. Corp.* held that the existence of an arbitration agreement "should not depend solely upon the conflicting fine print of commercial forms which cross one another but never meet." 45 N.Y2d at 334. That holding is not directly applicable here, because in that case the arbitration provision was found to be a material addition to a contract; there is no evidence here that the arbitration provision was added separately. Nevertheless, this Court finds the language instructive in reviewing an arbitration provision that is in conflict with other fine print in a contract, and the Agreement to arbitrate was executed more than a year after the transactions .