UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

CITIBANK, N.A., et al.,	:	
	:	11 Civ. 2925 (RMB)
Petitioners,	:	
	:	**DECISION & ORDER**
-against-	:	
	:	
FERNANDO FRANCO, et al.,	:	
	:	
Respondents.	:	

I. Background

On April 18, 2011, Citibank, N.A. ("Citibank"), Citigroup Global Markets, Inc. ("Citigroup Global Markets," and together with Citibank, "Petitioners"), and Rodrigo Curiel ("Curiel") filed a petition ("Petition") in New York State Supreme Court, New York County, to permanently stay an arbitration proceeding ("Arbitration"), commenced on February 4, 2010, by Fernando Franco ("Franco") and Administradora y Comercializadora del Valle y Ciudad de Mexico S.A. de C.V. ("A&C," and together with Franco, "Respondents") before the Financial Industry Regulatory Authority ("FINRA").[1] (See Notice of Removal, dated Apr. 29, 2011, at ¶¶ 1, 10.) The Petition argues that the Court should permanently stay the FINRA arbitration because (1) "there is no agreement between Citibank and [Respondents] pursuant to which Citibank is required to arbitrate the claims underlying the FINRA Arbitration"; and (2) Citigroup Global Markets "has not agreed to arbitrate the FINRA Arbitration." (Notice of Removal, Ex. 1 at ¶¶ 29, 39.) On April 29, 2011, Respondents removed the Petition to this Court pursuant to 28 U.S.C. §§ 1332 and 1441. (Notice of Removal at ¶¶ 13–16.)

[1] By Stipulation and Order, dated May 16, 2011, the parties voluntarily dismissed Curiel from the Arbitration and from this action. (See Stip. & Order, dated May 16, 2011, ¶¶ 1–2.)

On May 25, 2011, Respondents filed a motion to dismiss the Petition pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, arguing, among other things, that (1) an International Account Application and Client Agreement, entered into between Respondents and Citigroup Global Markets on April 17, 2007, "require[s] arbitration for [Citigroup Global Markets] and its affiliates, including Citibank" (the "Arbitration Agreement"); (2) even without the Arbitration Agreement, Citigroup Global Markets, "as a FINRA member, is required by FINRA [Rule 12200] to arbitrate" this dispute; and (3) Citibank is additionally "required to arbitrate under the theories of either agency or estoppel." (Resp'ts' Mem. of Law in Opp'n to Pet'rs' Pet. to Stay Arbitration, dated May 25, 2011 ("Resp. Mem."), at 1, 14, 16.)

On June 28, 2011, Petitioners filed an opposition to Respondents' motion to dismiss, arguing, among other things, that (1) neither Citigroup Global Markets nor Citibank is required to arbitrate because the transactions at issue arose out of an International Swap Dealers Association Master Agreement (the "ISDA Agreement"), entered into between Citibank and A&C on December 18, 2006, which provides that Citibank and A&C "irrevocably submit[] to the exclusive jurisdiction of the courts of the State of New York and the United States District Court in the Borough of Manhattan"; (2) Citigroup Global Markets is not required to arbitrate under FINRA Rule 12200 because "the transactions at issue were executed pursuant to the ISDA [Agreement]" with Citibank and had no relation to Citigroup Global Markets; and (3) Citibank is not required to arbitrate under an agency or estoppel theory because Curiel "acted as Respondents' private banker and not as a [Citigroup Global Markets] broker," and there was no "direct benefit flowing to Citibank under the terms of [the Arbitration Agreement] between [Citigroup Global Markets] and Respondents." (Reply Mem. of Law in Further Supp. of Petitioners' Pet., dated June 28, 2011 ("Pet. Reply"), at 4, 11, 13.)

On July 1, 2011, Respondents filed a reply. (See Resp'ts' Reply Mem. Regarding Pet'rs' Pet. to Stay Arbitration, dated July 1, 2011 ("Resp. Reply").) The parties waived oral argument. (See Tr. of Proceedings, dated May 11, 2011, at 10:1–5.)

Franco is a 73-year-old Mexican citizen, and A&C "is a Mexican corporation that exists as Mr. Franco's investment vehicle." (Statement of Claim, dated Feb. 4, 2010 ("Claim"), at 3.)

Citibank is "a wholly owned subsidiary of Citigroup Inc." and is involved in "commercial banking." (Citibank's Rule 7.1 Disclosure Statement, dated May 3, 2011; Notice of Removal, Ex. 1, ¶ 6.) Citigroup Global Markets is also "wholly owned by Citigroup, Inc." and is a FINRA-registered broker dealer. (Citigroup Global Markets's Rule 7.1 Disclosure Statement, dated May 3, 2011; see Resp. Mem. at 2.) Curiel is a "Director of Citibank . . . and a registered representative with [Citigroup Global Markets]." (Aff. of Rodrigo Curiel, dated Apr. 15, 2011 ("Curiel Aff."), ¶ 1.) Curiel was "Franco's private banker since approximately 2004." (Curiel Aff. ¶ 3.)

In the FINRA arbitration, Franco and A&C allege, among other things, that from "2007 until the end of October 2010" Curiel used Franco's and A&C's funds to enter into 1,350 foreign exchange transactions and other "private commodities and option contracts" with Citibank as the counterparty under the ISDA Agreement (collectively, the "Capital Markets Transactions"), without Respondents' "knowledge or consent," resulting in "losses [to Respondents]. . . estimated to be $50 million, and perhaps much higher." (Claim at 3.) Respondents seek to rescind the Capital Markets Transactions and to recover damages for these "losses . . . based on theories of fraud, fraudulent inducement, negligent misrepresentation, [and] breach of contract," among others. (Claim at 3, 13.)

The ISDA Agreement between A&C and Citibank, dated December 18, 2006, contains a forum selection clause, which states in relevant part that "[w]ith respect to any suit, action or proceedings relating to this Agreement, . . . each party irrevocably submits to the exclusive jurisdiction of the courts of the State of New York and the United States District Court located in the Borough of Manhattan in New York City." (Notice of Removal, Ex. 1; Ex. A, Part 5(2)(i)(b).)

The Arbitration Agreement between A&C and Citigroup Global Markets, dated April 17, 2007, states in relevant part:

> In consideration of your opening one or more accounts for me . . . and your agreeing to act as broker/dealer for me for the extension of credit and in the purchase and sale of securities, commodities, options and other property, it is agreed in respect to any and all accounts, whether upon margin or otherwise, which I now have or may at any future time have with [Citigroup Global Markets] **or its direct or indirect subsidiaries and affiliates** or their successors or assigns (hereinafter referred to as "you", "your", "SB" or "Smith Barney"), that: . . .
>
> By signing an arbitration agreement the parties agree as follows:
> • 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. . . .

(Decl. of James W. Halter, dated May 25, 2011 ("Halter Decl."), Ex. B, at 3–4 (emphasis added).) The Arbitration Agreement also states that "[y]ou may borrow against the value of eligible securities in your account for almost any purpose." (Id. at 1.)

A private bank application, entered into between Franco and Citibank on January 19, 2010, contains terms and conditions that provide in relevant part:

> This Agreement supersedes any previous agreements with respect to the accounts, products and services included in it (except credit and security agreements, in which case our rights will be cumulative) . . . .

> [F]or any related dispute you . . . irrevocably submit to the non-exclusive jurisdiction of any New York state or federal court sitting in New York City. . . .

(Decl. of Ellen Slipp, dated June 24, 2011 ("Slipp Decl."), Ex. A, at 4, 39; Ex. D.)

For the reasons set forth below, Respondents' motion to dismiss the Petition (and proceed with arbitration) is granted as to both Citigroup Global Markets and Citibank.

II. Legal Standard

The Federal Arbitration Act ("FAA") provides that an arbitration clause in any "contract evidencing a transaction involving commerce . . . shall be valid, irrevocable, and enforceable." 9 U.S.C. § 2. "Through the FAA, Congress has declared a strong federal policy favoring arbitration as an alternative means of dispute resolution." Bank Julius Baer & Co., Ltd. v. Waxfield Ltd., 424 F.3d 278, 281 (2d Cir. 2005) (internal quotation marks omitted).

"Whether or not a matter is arbitrable is a matter for judicial determination." Spear, Leeds & Kellogg v. Cent. Life Assurance Co., 85 F.3d 21, 25 (2d Cir. 1996). "The summary judgment standard is appropriate in cases where the District Court is required to determine arbitrability." General Motors Corp. v. Fiat S.p.A, 678 F. Supp. 2d 141, 145 (S.D.N.Y. 2009) (internal quotation marks omitted). In deciding whether a dispute is arbitrable, the Court must answer "(1) whether the parties agreed to arbitrate, and, if so, (2) whether the scope of that agreement encompasses the claims at issue." Bank Julius, 424 F.3d at 281. As to the first question, "arbitration is a matter of contract, and therefore a party cannot be required to submit to arbitration any dispute which it has not agreed so to submit." JLM Indus., Inc. v. Stolt-Nielsen SA, 387 F.3d 163, 171 (2d Cir. 2004). As to the second question, "[c]onsistent with the strong federal policy in favor of arbitration, any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Bank Julius, 424 F.3d at 281.

III. Analysis

(1) Agreement to Arbitrate

Respondents argue that the Arbitration Agreement "require[s] arbitration for Citigroup and its affiliates, including Citibank," and that it "supersede[s] the [prior] ISDA as the last agreement governing the appropriate forum for 'all claims and controversies' between the parties." (Resp. Mem. at 14; Resp. Reply at 4.) Petitioners argue that Citibank is "not a party" to the Arbitration Agreement and that the Arbitration Agreement does not revoke, cancel, or supersede the ISDA's forum selection clause. (Pet. Reply at 10.)

In deciding whether the parties agreed to arbitrate, courts generally apply state law principles that govern the formation of contracts. See Mehler v. Terminix Intern. Co. L.P., 205 F.3d 44, 48 (2d Cir. 2000). "Under New York law, it is well established that a subsequent contract regarding the same matter will supersede the prior contract." Applied Energetics, Inc. v. NewOak Capital Mkts., LLC, 645 F.3d 522, 526 (2d Cir. 2011) (internal quotation marks omitted).

Citigroup Global Markets and its affiliate, Citibank, are required to arbitrate under the Arbitration Agreement, which was executed by A&C and Citigroup Global Markets on April 17, 2007, and provides that "[a]ll parties to this agreement are giving up the right to sue each other in court." (Halter Decl., Ex. B, at 4.) The Arbitration Agreement defines the parties "you" and "your," among others, as Citigroup Global Markets "or its direct or indirect subsidiaries and affiliates or their successors or assigns." (Halter Decl., Ex. B, at 3.) Citigroup Global Markets and Citibank are each wholly owned subsidiaries of Citigroup, Inc. and are affiliates.[2] (See

[2] The Arbitration Agreement does not define the term "affiliate," but various New York statutes define an "affiliate" as "any company that controls, is controlled by, or is under common control with another company." N.Y. Banking Law § 6-l(1)(a); see also N.Y. Ins. Law

Citigroup Global Markets's Rule 7.1 Disclosure Statement, dated May 3, 2011; Citibank's Rule 7.1 Disclosure Statement, dated May 3, 2011.) In fact, a separate account agreement, entered into between Citigroup Global Markets and A&C on January 16, 2007, specifically states that Citibank is an affiliate of Citigroup Global Markets. (See Halter Decl., Ex. A, ¶ 14.)

The Arbitration Agreement supersedes the ISDA Agreement with respect to forum. Both agreements' forum provisions involve "the same subject matter," i.e., the forum for disputes. Thayer v. Dial Indus. Sales, Inc., 85 F. Supp. 2d 263, 268 (S.D.N.Y. 2000); see Private One of New York, LLC v. JMRL Sales & Serv., Inc., 471 F. Supp. 2d 216, 223 (E.D.N.Y. 2007). The Arbitration Agreement, being "subsequent," "supersede[s] the prior" ISDA Agreement's forum selection clause. NewOak, 645 F.3d at 526.

Petitioners point to a document referred to as a private bank application and its accompanying terms and conditions, entered into between Franco and Citibank on January 19, 2010, in which Respondents allegedly "confirmed their agreement to submit to the jurisdiction of New York courts for disputes." (Pet. Reply at 5; see Slipp Decl. Exs. A, D.) But, even assuming it were dispositive, the private bank application is by its own terms non-exclusive, i.e., it provides that "for any related dispute you . . . irrevocably submit to the **non-exclusive** jurisdiction of any New York state or federal court sitting in New York City." (Slipp Decl., Ex. A, at 39 (emphasis added).) And, the private bank application is not a novation. See Bank Julius, 424 F.3d at 283–84; Water Street Dev. Corp. v. City of New York, 220 A.D.2d 289, 290

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§ 2101(x)(1)(A). SEC Rules 405 and 12b-2 similarly define an "affiliate" as "a person that directly, or indirectly through one or more intermediaries, controls or is controlled by, or is under common control with, the person specified." Waldman ex rel. Elliott Waldman Pension Trust v. Riedinger, 423 F.3d 145 (2d Cir. 2005). Black's Law Dictionary defines an "affiliate" as "1. A corporation that is related to another corporation by shareholdings or other means of control; a subsidiary, parent, or sibling corporation. 2. *Securities*. One who controls, is controlled by, or is under common control with an issuer of a security." Black's Law Dictionary (9th ed. 2009).

(N.Y. App. Div. 1995). It provides that it "supersedes any previous agreements with respect to the accounts, products and services included in it (**except** credit and security agreements, in which case our rights will be cumulative)." (Slipp Decl., Ex. A, at 4 (emphasis added)). The Arbitration Agreement is excepted as it is a "credit or security agreement"; it specifically provides that Respondents "may borrow against the value of eligible securities in your account for almost any purpose." (Halter Decl., Ex. B, at 1.) The private bank application allows for arbitration as it does not "specifically preclude[]" it. Bank Julius, 424 F.3d at 284; see Citigroup Global Mkts Inc. v. VCG Special Opportunities Master Fund Ltd., No. 08 Civ. 5520, 2008 WL 4891229, at *6 n.6 (S.D.N.Y. Nov. 12, 2008); accord NewOak, 645 F.3d at 525.

Accordingly, because Citigroup Global Markets is a signatory to the Arbitration Agreement and Citibank, as an affiliate of Citigroup Global Markets, is a party to the Arbitration Agreement, the Court finds that both Petitioners "agreed to arbitrate." Bank Julius, 424 F.3d at 281.

(2) Scope of Arbitration Agreement

Respondents argue that their claim "includ[es] both brokerage and banking accounts" and is arbitrable. (Resp. Reply at 1.) They also contend that "the Arbitration Agreement explicitly applies to 'any and all accounts . . . with Citigroup Global Markets, Inc. or its direct or indirect subsidiaries and affiliates.'" (Resp. Reply at 3 (quoting Halter Decl., Ex. B at 3).) Petitioners argue that this dispute is outside the scope of the Arbitration Agreement because the transactions at issue were banking transactions under the ISDA Agreement, rather than "brokerage trades" under the Arbitration Agreement. (Pet. Reply at 2.)

Any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration. See Guyden v. Aetna, Inc., 544 F.3d 376 (2d Cir. 2008). "In accordance with the

strong federal policy in favor of arbitration, the existence of a broad agreement to arbitrate creates a presumption of arbitrability which is only overcome if it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute." WorldCrisa Corp. v. Armstrong, 129 F.3d 71, 74 (2d Cir. 1997) (internal quotation marks and citations omitted). "If the allegations underlying the claims touch matters covered by the parties' agreements, then those claims must be arbitrated, whatever the legal labels attached to them." Id. at 75 (internal quotation marks omitted).

The Arbitration Agreement's broad scope encompasses this dispute. The Arbitration Agreement covers "all claims or controversies" with respect to "any and all accounts, whether upon margin or otherwise, which [Respondents] now have or may at any future time have with [Citigroup Global Markets] or its direct or indirect subsidiaries and affiliates." (Halter Decl., Ex. B, at 3, 4.) Franco and A&C allege that Curiel used an undisclosed capital markets account with Citibank to perpetrate a comprehensive fraud to take full control of Mr. Franco's non-discretionary accounts, and that Curiel hid losses "through the deliberate falsification of monthly summaries of [Franco's] net worth." (Claim at 3, 4.) These claims plainly fall within "all claims or controversies" with respect to "any and all accounts" with Citigroup Global Markets and its affiliate, Citibank. (Claim at 3, 4); see WorldCrisa, 129 F.3d at 74.

Accordingly, the Court finds that the Arbitration Agreement "encompasses the claims at issue" and requires arbitration of Franco's and A&C's claims against Citigroup Global Markets and Citibank. Bank Julius, 424 F.3d at 281. Because the Arbitration Agreement compels arbitration, the Court need not consider whether FINRA Rule 12200 or the doctrines of agency or estoppel provide an independent basis for arbitration.

IV. Conclusion

For the foregoing reasons, Respondents' motion to dismiss the Petition [#14] is granted.

The Clerk of the Court is respectfully requested to close this case.

Dated: New York, New York
December 29, 2011

RMB

RICHARD M. BERMAN, U.S.D.J.