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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

CARLOS RODRIGUEZ et al., Plaintiffs and Respondents, v. CITIGROUP GLOBAL MARKETS, INC., Defendant and Appellant.	B230310 (Los Angeles County Super. Ct. No. BC440886)

APPEAL from an order of the Superior Court of Los Angeles County, Rolf M. Treu, Judge. Reversed.

Greenberg Traurig, Paul J. Schumacher, Scott E. Rahn, Karin L. Bohmholdt and Denise M. Mayo for Defendant and Appellant.

Iverson, Yoakum, Papiano & Hatch, Neil Papiano and Tamara Schneiter for Plaintiffs and Respondents.

In the court below, respondents sued appellant for intentional and negligent misrepresentation, conversion, and unjust enrichment. Appellant filed a petition to compel arbitration of the lawsuit. The trial court denied the petition, finding that appellant did not prove, by a preponderance of the evidence, an agreement to arbitrate. This appeal followed.[1]

On this de novo review, we find that appellant did prove, by a preponderance of the evidence, an agreement to arbitrate between the parties. As a result, we reverse.

FACTUAL HISTORY

Appellant Citigroup Global Markets, Inc. (Citigroup) and Citicorp Investment Services are affiliated companies under the common control of Citigroup, Inc. Citigroup is the brokerage and securities arm of Citigroup, Inc.

On January 24, 2006, respondents Carlos and Theodora Rodriguez opened a brokerage account by completing and signing a two-page printed document entitled "Citicorp Investment Services Account Application" (Account Application). James V. Hayes was the bank employee who assisted respondents in opening the account.[2] The final section of the Account Application, which is preceded by the enlarged and bolded heading "Read Carefully Before You Sign," contains six paragraphs, followed by the signature lines. The fourth paragraph of this final section provides:

> "In consideration of Citicorp Investment Services ('CIS') accepting a brokerage account for me/us, I/we ('I') acknowledge and affirm that I have the authority to open a brokerage account at CIS, and that I have read, understand and agree to the terms in Section [*sic*] 1 through 25, pages 2-26 of the Client Agreement. I also acknowledge and affirm that I have received a copy of the CIS Important Account Agreements booklet. . . . If I

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[1] In their opposition to arbitration below, respondents argued alternatively that (1) the parties did not agree to arbitrate or (2) if they did, the agreement was unenforceable because unconscionable. Because it did not find an agreement to arbitrate, the trial court did not address whether any agreement was unconscionable. Likewise, we express no opinion on the issue of unconscionability because it is not before us.

[2] Hayes is a codefendant in the court below and is represented by the same counsel as Citigroup. He was a party to the petition to compel but is not a formal party to this appeal.

have requested or if I ever request margin credit privileges, I agree to the terms of the Margin Account Agreement."

The sixth paragraph, immediately above the signature lines, provides:

> "I acknowledge that I have received the Client Agreement which contains a pre-dispute arbitration clause in Section 19, Page 23. If this is or ever becomes a margin account I acknowledge that I have received the Margin Account Agreement which contain [*sic*] a pre-dispute arbitration clause in Section 15, Page 32."

Both respondents signed and dated the Account Application at the signature lines.

In support of its petition to compel arbitration, Citigroup submitted a multipage document entitled "Citicorp Investment Services Important Account Agreements," which appears to be in booklet form (Account Booklet). The Account Booklet, at page 1, divides itself into two parts: Part I is entitled "Citicorp Investment Services Client Agreement" (Client Agreement) and Part II is entitled "Margin Account Agreement." To establish a foundation for this document, Citigroup also submitted the declaration of Citigroup Assistant Vice President Michael C. Cuddihy. In his declaration, Cuddihy states that he is familiar with Citigroup document retention policies and that the Account Booklet, "is a true and correct copy of the Client Agreement" referenced in the Account Application.

Section 19, page 23 of the Client Agreement (or Part I of the Account Booklet) is entitled "Choice of Law/Arbitration." It provides, in pertinent part:

> "This agreement contains a predispute [*sic*] arbitration clause. By signing an arbitration agreement the parties agree as follows: [¶] (i) 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. [¶] . . . [¶] CIS, the Clearing Broker and you agree that all controversies which may arise concerning any order or transaction, or the construction, performance or breach of this Agreement, whether entered into prior to, on or subsequent to the date hereof, and including any margin transaction, shall be submitted to and determined by arbitration conducted pursuant to the then current Code of Arbitration Procedure of the National Association of Securities Dealers, Inc. Judgment upon any award rendered by the arbitrators may be entered in any court having jurisdiction."

Section 15, page 32 of the Margin Account Agreement (or Part II of the Account Booklet) contains similar language and provisions related to the arbitration of disputes arising from margin accounts.

After opening the account, respondents invested $350,000 in a variable annuity with the Hartford Life Insurance Company that they purchased through their brokerage account. According to the complaint, Hayes encouraged the purchase and assured them that the principal in their annuity would never decrease, regardless of market fluctuations. By July 2007, however, their principal had decreased substantially. Respondents later closed the account, with losses in excess of $100,000. They were also charged an early withdrawl penalty in the amount of $19,874.83.

Thereafter, respondents filed the instant lawsuit against Citigroup and Hayes.

DISCUSSION

For the reasons explained below, we find that Citigroup did meet its burden of proving, by a preponderance of the evidence, an agreement to arbitrate. We reverse the trial court's denial of the petition to compel arbitration.

1. Appealability

An order denying a petition to compel arbitration is appealable. (Code Civ. Proc., § 1294, subd. (a).)

2. Applicable Law and Standard of Review

Code of Civil Procedure section 1281.2 governs petitions to compel arbitration. As pertinent here, it provides:

> "On petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy, the court shall order the petitioner and the respondent to arbitrate the controversy if it determines that an agreement to arbitrate the controversy exists, unless it determines that: [¶] (a) The right to compel arbitration has been waived by the petitioner; or [¶] (b) Grounds exist for the revocation of the agreement."

As is evident from the statute above, contractual arbitration applies only when the parties have agreed to arbitrate a controversy. (*Herman Feil, Inc. v. Design Center of Los Angeles* (1988) 204 Cal.App.3d 1406, 1414 [arbitration "only comes into play when the parties to the dispute have agreed to submit to it"].) "'Absent a clear agreement to submit

disputes to arbitration, courts will not infer that the right to a jury trial has been waived.' [Citation.]" (*Adajar v. RWR Homes, Inc.* (2008) 160 Cal.App.4th 563, 569.)

"[W]hen a petition to compel arbitration is filed and accompanied by prima facie evidence of a written agreement to arbitrate the controversy, the court itself must determine whether the agreement exists and, if any defense to its enforcement is raised, whether it is enforceable." (*Rosenthal v. Great Western Financial Securities Corp.* (1996) 14 Cal.4th 394, 413.) The proponent of arbitration must prove, by a preponderance of the evidence, the existence of an agreement to arbitrate while the opponent of arbitration must prove, to the same standard, any defense to enforcement of the arbitration agreement. (*Ibid*.; *Mission Viejo Emergency Medical Associates v. Beta Healthcare Group* (2011) 197 Cal.App.4th 1146, 1154 (*Mission Viejo*).) "'"Prima facie evidence is that degree of evidence which suffices for proof of a particular fact until contradicted and overcome, as it may be, by other evidence, direct or indirect."' [Citation.]" (*Mission Viejo*, *supra*, at p. 1153.)

In determining whether an enforceable agreement to arbitrate exists, we apply principles of California contract law. (*Wolschlager v. Fidelity National Title Ins. Co.* (2003) 111 Cal.App.4th 784, 789 (*Wolschlager*).) The plain language of a contract governs its interpretation. (Civ. Code, § 1638; *Amtower v. Photon Dynamics, Inc.* (2008) 158 Cal.App.4th 1582, 1605.) Where language is clear and unambiguous, interpretation is unnecessary. (See *Dore v. Arnold Worldwide, Inc.* (2006) 39 Cal.4th 384, 392.) California follows the objective theory of contracts: it is the objective intent of the parties, as evidenced by the words of the contract, that controls, not the parties' subjective intent. (*Founding Members of the Newport Beach Country Club v. Newport Beach Country Club, Inc.* (2003) 109 Cal.App.4th 944, 956.) Ordinarily one who signs an instrument which on its face is a contract is deemed therefore to assent to all of its terms. He cannot defend on the ground that he failed to read it before signing. (*Marin Storage & Trucking, Inc. v. Benco Contracting & Engineering, Inc.* (2001) 89 Cal.App.4th 1042, 1049.)

Whether the parties to a contract have agreed to arbitration is ultimately a legal question subject to de novo review. (*Arista Films, Inc. v. Gilford Securities, Inc*. (1996)

43 Cal.App.4th 495, 501.) "An appellate court is not bound by a trial court's construction of a written instrument where such construction is based solely on the instrument without extrinsic evidence." (*Slaught v. Bencomo Roofing Co.* (1994) 25 Cal.App.4th 744, 748 (*Slaught*).) Even where extrinsic evidence is offered, construction of the contract is still subject to de novo review where such evidence consists only of written declarations. (*Marcus & Millichap Real Estate Investment Brokerage Co. v. Hock Investment Co.* (1998) 68 Cal.App.4th 83, 89 (*Marcus*); see *Mayhew v. Benninghoff* (1997) 53 Cal.App.4th 1365, 1369.)

3. Relevant Conclusions from the Record

The trial court based its decision primarily on the two documents submitted by Citigroup: the Account Application and the Account Booklet. To the extent the court relied on extrinsic evidence in addition to or to interpret these documents, such evidence was by way of written declaration only. Accordingly, we review the trial court's entire decision de novo. (*Slaught*, *supra*, 25 Cal.App.4th at p. 748; see also *Marcus*, *supra*, 68 Cal.App.4th at p. 89.)

Citigroup asserted below, and the trial court determined, that the Account Booklet was the "Client Agreement" referenced in the Account Application. Respondents do not challenge either Citigroup's assertion or the trial court's conclusion. Nevertheless, based upon our de novo review of the record, we reach slightly different conclusions.

As mentioned above, the Account Booklet is formally titled "Citicorp Investment Services Important Account Agreements." Based upon its title, as well as its apparent booklet form, we conclude that the Account Booklet is the "CIS Important Account Agreements booklet" referenced in the Account Application. Further, as mentioned above, Part I of the Account Booklet is entitled "Citicorp Investment Services Client Agreement" and Part II is entitled "Margin Account Agreement." Based upon the record before us, we further conclude that Part I is in fact the "Client Agreement" referenced in the Account Application while Part II is the Margin Account Agreement referenced in the Account Application.

4. Citigroup's Prima Facie Proof of an Agreement to Arbitrate

In support of its petition to compel arbitration, Citigroup submitted a copy of the Account Application and the Account Booklet. The Account Booklet, as discussed above, contains the Client Agreement referenced in the Account Application. Based upon the discussion that follows, we conclude that the Account Application incorporates the Client Agreement by reference and together they are prima facie proof of an agreement to arbitrate.

"An agreement need not expressly provide for arbitration, but may do so in a secondary document which is incorporated by reference." (*Boys Club of San Fernando Valley, Inc. v. Fidelity & Deposit Co.* (1992) 6 Cal.App.4th 1266, 1271; see also *Slaught, supra,* 25 Cal.App.4th at p. 748; *King v. Larsen Realty, Inc.* (1981) 121 Cal.App.3d 349, 357.) "'"For the terms of another document to be incorporated into the document executed by the parties the reference must be clear and unequivocal, the reference must be called to the attention of the other party and he must consent thereto, and the terms of the incorporated document must be known or easily available to the contracting parties."' [Citation.]" (*Chan v. Drexel Burnham Lambert, Inc*. (1986) 178 Cal.App.3d 632, 641, italics omitted; see also *Wolschlager, supra*, 111 Cal.App.4th at p. 790.)

The documents submitted by Citigroup meet the requirements of incorporation by reference. The first reference to the Client Agreement is in the fourth paragraph of the Account Application's final section, which, as mentioned earlier, bears the enlarged and bolded heading "Read Carefully Before You Sign." That paragraph expressly states that any signatories to the Account Application "have read, understand, and agree to" sections 1 through 25 of the Client Agreement. The same paragraph also contains an express acknowledgment of receipt of the Account Booklet, which, as discussed above, contains the Client Agreement. Two paragraphs later, in the same section of the Account Application and directly above the signature lines, is an express acknowledgement that the Client Agreement contains an arbitration provision. Although there is no specific assent to the arbitration provisions in this latter paragraph, it is unnecessary because two paragraphs earlier any signatories have already expressly assented to *all* the terms of the Client Agreement. These paragraphs, considered together, expressly reference and

manifest assent to the entirety of the Client Agreement, and specifically call attention to the existence of its arbitration provisions. And, most importantly, respondents do not dispute that the signatures directly below these paragraphs are theirs.

The third requirement of incorporation is also satisfied. The Client Agreement is contained in the Account Booklet, which respondents, by their signatures, acknowledged receiving. The terms of the Client Agreement, including the arbitration provisions, are described in fairly plain terms and do not contain overly legal vocabulary, especially given the subject matter of the Account Application and Client Agreement. Moreover, the arbitration provisions are exactly at the section and page number referenced in the Account Application. Thus, despite the relative length of the Client Agreement, the Account Application accurately directs any signatories to the precise page and section number that contain the arbitration provisions.

We conclude, therefore, that Citigroup established that the Account Application incorporates by reference the Client Agreement generally and the arbitration provisions of the Client Agreement specifically. Thus, Citigroup did present prima facie proof of an agreement to arbitrate. (See *Mission Viejo*, *supra*, 197 Cal.App.4th at p. 1154 [arbitration proponent satisfied burden by offering insurance policy containing arbitration clause and showing opponent's acceptance of policy benefits]; *Hotels Nevada v. L.A. Pacific Center, Inc.* (2006) 144 Cal.App.4th 754, 764-765 [arbitration proponent satisfied burden by attaching contract with arbitration clause and referencing arbitration clause in its petition]; *Condee v. Longwood Management Corp.* (2001) 88 Cal.App.4th 215, 218-219 [even unauthenticated copy of arbitration agreement sufficient to establish prima facie case].)

5. Respondents' Opposition to the Prima Facie Showing

In opposition to Citigroup's prima facie showing, respondents make a number of contentions: (1) the references to arbitration in the Account Application were unreadable because of their font size; (2) Mr. Rodriguez never received the Client Agreement; (3) the arbitration provisions contained in the Client Agreement are not signed; and (4) the Client Agreement is confusing because it describes arbitration agreements for both

ordinary accounts and margin accounts.[3] These arguments are insufficient to negate Citigroup's prima facie case.

Respondents contend that the arbitration references in the Account Application were unreadable by Mr. Rodriguez because of their small print and inconspicuous placement. Below, respondents also argued that Mr. Rodriguez's vision disability, which had not been entirely corrected by earlier cataract surgery, hindered his ability to read. These points, if valid, are primarily relevant to respondents' defense of unconscionability, an issue we do not address because not relevant to the issue of whether a facially valid agreement to arbitrate exists. To the extent these arguments bear at all on the issue of mutual assent, they may be disposed of summarily: based upon the objective theory of contracts, a party is bound by the provisions of an agreement which he signs, even if he does not read them or signs unaware of their existence. (*Chan v. Drexel Burnham Lambert, supra,* 178 Cal.App.3d at p. 641; *Windsor Mills, Inc. v. Collins & Aikman Corp.* (1972) 25 Cal.App.3d 987, 992 (*Windsor Mills*).)

Respondents next contend that Mr. Rodriguez never received the Client Agreement because he (1) does not remember receiving the Client Agreement and (2) currently does not have a copy of it in his otherwise – it is implied – complete file of Citigroup documents. When evaluating these two contentions, it is important to remember that Citigroup's burden of proof is by a preponderance of the evidence. It is also important to remember that its prima facie proof is a contract signed by both respondents which contains express acknowledgments that (1) both read, understood, and assented to the terms of the Client Agreement, (2) the Client Agreement contains an arbitration provision, and (3) both received a copy of the Account Booklet, which the proof shows contains the Client Agreement. Under the circumstances, inferences to be drawn from statements of nonrecollection and nonpossession are simply insufficient to offset express, signed acknowledgments that contradict them.

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[3] Respondents' attempt to invalidate the arbitration agreement is based largely on evidence related to Mr. Rodriguez and his understanding of the contract. Respondents submit no proof specifically related to Mrs. Rodriguez which undercuts the assent manifested by her signature on the Account Application.

Next, respondents point out that the actual arbitration provisions are not part of the signed Account Application but only part of the referenced, but unsigned, Client Agreement. Respondents argue that without a separate signed arbitration agreement, there is no agreement to arbitrate. This argument overlooks the doctrine of incorporation by reference, discussed earlier in this opinion: where a secondary document is properly incorporated by reference, it "becomes part of a [primary] contract as though recited verbatim." (*King v. Larsen Realty, Inc.*, *supra*, 121 Cal.App.3d at p. 357.) As discussed above, the Account Application properly incorporates the Client Agreement and its arbitration provisions. Since the executed Account Application properly incorporates the Client Agreement, there was no need to execute a separate arbitration agreement.

Finally, respondents argue that because the Account Application and Account Booklet reference two different types of accounts and because the arbitration provisions pertaining to each are in the middle of the multipage Account Booklet, the arbitration provisions are confusing and thereby prevented assent. We do not find this argument persuasive.

Both the Account Application and the Account Booklet reference two types of possible accounts: ordinary brokerage accounts and margin accounts. The Account Booklet itself is divided into two sections: one pertaining to ordinary brokerage accounts and one pertaining to margin accounts. The Account Application correctly directed respondents, by section and page number, to the parts of the Account Booklet containing the arbitration provisions applicable to the two different accounts. In short, there is nothing *objectively* confusing about the various documents in this regard. Together they reference two types of accounts and the arbitration provisions applicable to each. That respondents now claim to have been *subjectively* confused is not pertinent, given the objective theory of contract formation, to the issue of whether Citigroup has met its burden of demonstrating a facially valid agreement to arbitrate.

6. *Windsor Mills* Is Distinguishable

In its ruling, the trial court relied largely on *Windsor Mills*, *supra.* In *Windsor Mills*, plaintiff, a carpet manufacturer, purchased several orders of yarn from defendant. As each order was received, defendant completed a printed form entitled

"Acknowledgment of Order," which documented the sale, and sent a copy to the plaintiff. (*Windsor Mills, supra,* 25 Cal.App.3d at p. 989.) At the bottom of the form was fine print which read, in part, "this order is given subject to all of the terms and conditions on the face and reverse sides hereof including the provisions for arbitration and the exclusion of warranties." (*Id*. at p. 990.) Beneath the fine print was a place for the parties to sign, though none of the orders were signed. (*Ibid*.) On the reverse side of the form were provisions compelling the arbitration of "[a]ny controversy arising out of or relating to this contract." (*Ibid.*)

The Court of Appeal upheld the trial court's refusal to compel arbitration. The court held that plaintiff's acceptance of the yarn and retention of the forms, without objection, did not manifest assent to the forms' printed arbitration provisions. In so holding the court noted that "an offeree, regardless of apparent manifestation of his consent, is not bound by inconspicuous contractual provisions of which he was unaware, contained in a document whose contractual nature is not obvious." (*Windsor Mills, supra,* 25 Cal.App.3d at p. 993.)

We find *Windsor Mills* not applicable to the facts of the immediate case. In *Windsor Mills*, the party opposing arbitration had not signed the operative document while in the immediate case, both respondents signed the Account Application. Most importantly, though, the Account Application contains three express acknowledgments: (1) an acknowledgment of (as well as an assent to) all of the terms of the incorporated Client Agreement; (2) an acknowledgment that the Client Agreement contains arbitration provisions; and (3) an acknowledgment of receipt of the Account Booklet, which in turn contains the entire Client Agreement. This is not, therefore, a situation where the proponent of arbitration seeks to bind a party with "inconspicuous" language that "is contained in a document whose contractual nature is not obvious." (*Windsor Mills, supra,* 25 Cal.App.3d at p. 993; see also *Rodriguez v. American Technologies, Inc.* (2006) 136 Cal.App.4th 1110, 1123-1124 [finding *Windsor Mills* inapplicable where the writing involved was contractual on its face].)

DISPOSITION

The order denying appellant's petition to compel arbitration is reversed. The case is remanded for further proceedings consistent with this opinion. Appellant is awarded costs on appeal.

SORTINO, J.*

We concur:

BIGELOW, P. J.

RUBIN, J.

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* Judge of the Los Angeles Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.