

United States District Court  
For the Northern District of California

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IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

GEORGE PUTNAM,  
Plaintiff,  
v.  
CITIGROUP GLOBAL MARKETS, INC.,  
Defendant.

No. 09-02230 CW  
ORDER GRANTING  
DEFENDANT'S  
MOTION TO COMPEL  
ARBITRATION

Defendant Citigroup Global Markets, Inc. (CGMI) moves to compel Plaintiff George Putnam to submit his claims against it to binding arbitration before the Financial Industry Regulatory Authority (FINRA). Putnam opposes the motion. Having considered all of the papers filed by the parties, the Court grants CGMI's motion.

BACKGROUND

Before retiring, Putnam worked as the Chief Financial Officer of a small Canadian mining company, QGX. In September, 2008, QGX was bought by a larger corporation and, as part of the transaction, Putnam exercised \$1,376,800 (Canadian) in stock options. Putnam maintained brokerage accounts with the entity currently known as Morgan Stanley Smith Barney and he sought to deposit this check into one of those accounts. On September 18, 2009, Putnam met with

1 Norm Bahramipour, a Vice President of the Wealth Management  
2 division of Morgan Stanley Smith Barney in Walnut Creek to discuss  
3 the best way to cash the options check as soon as possible. At the  
4 end of the meeting, "Mr. Bahramipour confirmed that Smith Barney  
5 would use its affiliated bank, Citibank, to process the check."  
6 Comp. ¶ 14. When Putnam left Bahramipour's office, Putnam "had  
7 made abundantly clear his instructions to have the check converted  
8 to U.S. dollars at the earliest possible moment." Id. at ¶ 16.  
9 The funds were not converted until November 4, 2008, and on that  
10 date, the conversation rate from Canadian to United States dollars  
11 had changed enough to devalue Putnam's options by over \$300,000  
12 (United States).

13 Putnam brings this action seeking damages for: (1) breach of  
14 contract, (2) breach of the covenant of good faith and fair  
15 dealing, (3) professional negligence, (4) fraud, (5) negligent  
16 misrepresentation and (6) "common count -- money had and received."  
17 CGMI claims that Putnam must submit these claims to arbitration.  
18 Putnam asserts that (1) CGMI waived its right to arbitration and  
19 (2) his claims do not fall within the scope of the arbitration  
20 agreements.

21 DISCUSSION

22 I. Waiver

23 The right to arbitration, like any other contractual right,  
24 may be waived. United States v. Park Place Associates, Ltd., 563  
25 F.3d 907, 921 (9th Cir. 2009). However, the Ninth Circuit  
26 emphasizes that finding a "waiver of the right to arbitration is  
27 disfavored because it is a contractual right, and thus 'any party

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1 arguing waiver of arbitration bears a heavy burden of proof.'" Van  
2 Ness Townhouses v. Mar Indus. Corp., 862 F.2d 754, 758 (9th  
3 Cir.1988) (quoting Belke v. Merrill Lynch, Pierce, Fenner & Smith,  
4 693 F.2d 1023, 1025 (11th Cir. 1982)). "Any examination of whether  
5 the right to compel arbitration has been waived must be conducted  
6 in light of the strong federal policy favoring enforcement."  
7 Fisher v. A.G. Becker Paribas Inc., 791 F.3d 691, 694 (9th Cir.  
8 1986). The party seeking to prove waiver of the right to compel  
9 arbitration must demonstrate: "(1) knowledge of an existing right  
10 to compel arbitration; (2) acts inconsistent with that existing  
11 right; and (3) prejudice to the party opposing arbitration  
12 resulting from such inconsistent acts." Id. Putnam has failed to  
13 carry his burden.

14 Putnam claims that, in February, 2009,<sup>1</sup> Jan Russo, Vice  
15 President and Operations Manager of the Morgan Stanley Smith Barney  
16 office in Walnut Creek, told him that he did not need to arbitrate  
17 his claims. Russo allegedly made this statement after she provided  
18 Putnam with a one-page client agreement from 1996. Russo allegedly  
19 noted that "the agreement was very old, and stated that it did not  
20 appear to include an arbitration agreement." Putnam Decl. ¶ 6.  
21 Russo admits that she provided Putnam with a "copy of a portion of  
22 one signed agreement" but denies telling him that the agreement did  
23 not contain an arbitration clause. Russo Supp. Decl. ¶ 8. The

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25 <sup>1</sup>Putnam notes that, in his moving papers and declaration, he  
26 incorrectly pre-dated the year of the events in question by one year.  
27 Thus, Putnam's motion and declaration state that Ms. Russo made these  
28 comments to him in February, 2008, but he later acknowledged that this  
occurred in February, 2009.

1 Court finds it unlikely that Ms. Russo, an employee of CGMI for  
2 over twenty years, would tell a client that he did not have to  
3 arbitrate claims against her company. ("In my over-20-years of  
4 working with CGMI and its predecessors, new clients have always  
5 needed to sign a Client Agreement containing a pre-dispute  
6 arbitration clause. I have never told any client that he or she  
7 did not need to arbitrate claims against CGMI."). Id. at ¶ 9.

8 However, even if Russo told Putnam he didn't need to arbitrate  
9 his claims, he has not shown that he has suffered prejudice.

10 Putnam filed the lawsuit three months after his discussion with  
11 Russo. Less than a month after Putnam filed the lawsuit, and  
12 before he served the complaint on CGMI, CGMI demanded that he  
13 submit his claims to FINRA arbitration. Stecher Decl. ¶¶ 3-6,  
14 Exhs. B, D. Putnam refused these demands. Id., Exh. C. However,  
15 in his opposition to this motion, Putnam states, "[H]ad I known of  
16 the option to send this case immediately to a FINRA arbitration, I  
17 would have taken that option." Putnam Decl. ¶ 8. Putnam has  
18 presented no evidence that CGMI obstructed his effort to arbitrate  
19 this matter.

20 Putnam claims prejudice because he has incurred "hundreds of  
21 dollars in costs" while pursuing this litigation. However, Putnam  
22 does not state what these costs are or whether he would have  
23 incurred these costs if this claim were arbitrated. Moreover,  
24 these costs were incurred after Putnam refused CGMI's demand to  
25 submit to arbitration. Thus, even if these costs constitute  
26 prejudice, they are the result of Putnam's choice to continue this  
27 litigation in the face of arbitration agreements and CGMI's demands

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1 that he abide by the terms stated therein. The self-imposed burden  
2 of participating in pre-trial civil litigation is not, in and of  
3 itself, sufficient evidence of prejudice. See Fisher, 791 F.2d at  
4 698 (rejecting plaintiffs' "surprising contention" that they were  
5 prejudiced because they "willingly incurred the substantial expense  
6 involved in their litigation in order to benefit from a full jury  
7 trial" because that "wound was self-inflicted"); Lake Comm., Inc.  
8 v. ICC Corp., 738 F.2d 1473, 1477 (9th Cir. 1984) (holding that  
9 plaintiff suffered no prejudice from being required to respond to  
10 defendant's motion to dismiss and limited discovery). In sum,  
11 Putnam has not carried his burden to establish waiver of CGMI's  
12 right to arbitrate his claims.

### 13 II. Scope of Arbitration Agreement

14 Over the years, Putnam opened or upgraded many security  
15 brokerage accounts with CGMI. Each time he opened or upgraded an  
16 account, he signed a Client Agreement. The first page of the  
17 agreements bears the heading, "Salomon Smith Barney: A Member of  
18 Citigroup." These agreements contain a pre-dispute arbitration  
19 clause, set forth in bold type, which provides, in relevant part:

20 Arbitration is final and binding on the parties.

21 The parties are waiving their right to seek remedies in  
22 court, including the right to jury trial.

23 I agree that all claims or controversies, whether such  
24 claims or controversies arose prior, on or subsequent to the  
25 date hereof between me and SSB<sup>2</sup> and/or any of its present or  
former officers, directors, or employees concerning or  
arising from (i) any account maintained by me with SSB

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26 <sup>2</sup>SSB is defined in the introductory paragraph of the client  
27 agreement as "Salomon Smith Barney Inc., its subsidiaries, divisions,  
or other entities."

1 individually or jointly with others in any capacity;  
2 (ii) any transaction involving SSB or any predecessor firms  
3 by merger, acquisition or other business combination and me,  
4 whether or not such transaction occurred in such account or  
5 accounts; or (iii) the construction, performance or breach  
of this or any other agreement between us, any duty arising  
from the business of SSB or otherwise, shall be determined  
by arbitration before, and only before, any self-regulatory  
organization or exchange of which SSB is a member.

6 Russo Decl., Exhs. B and D.

7 Putnam argues that his claims lie outside the scope of the  
8 arbitration agreements he signed because those agreements were made  
9 with Salomon Smith Barney and, in the present lawsuit, he is suing  
10 CGMI for the acts committed by Citibank. Putnam argues that his  
11 complaint states that Citibank, a separate division of CGMI, was  
12 primarily responsible for his losses. He claims that his  
13 agreements with Salomon Smith Barney do not compel arbitration with  
14 CGMI in this case.

15 The Supreme Court has held that "any doubts concerning the  
16 scope of arbitration should be resolved in favor of arbitration  
17 . . . ." Moses H. Cone Mem'l Hosp. v. Mercury Construction Corp.,  
18 460 U.S. 1, 24 (1983). "An order to arbitrate the particular  
19 grievance should not be denied unless it may be said with positive  
20 assurance that the arbitration clause is not susceptible of an  
21 interpretation that covers the asserted dispute. Doubts should be  
22 resolved in favor of coverage." United Steelworkers of America v.  
23 Gulf Navigation Co., 363 U.S. 574, 582 (1960). With this guidance  
24 in mind, the arbitration agreements that Putnam signed can be  
25 broadly read to include Putnam's lawsuit against CGMI.

26 The arbitration agreements contain broad language that they  
27 apply to "all claims and controversies" between Putnam and SSB, and  
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1 SSB is defined as "Salomon Smith Barney Inc., its subsidiaries,  
2 divisions, or other entities." CGMI has presented evidence that  
3 "Salomon Smith Barney and CGMI are one and the same." Russo Suppl.  
4 Decl., ¶ 4. Specifically, Salomon Smith Barney is a division and  
5 service mark of CGMI. Further, CGMI and Citibank are affiliate  
6 entities, both of which are indirect wholly-owned subsidiaries of  
7 Citigroup, Inc. Id. at ¶ 3. Moreover, the headings on all client  
8 agreements bear both names Salomon Smith Barney and Citigroup.

9 The Court also notes that, although Putnam mentions Citibank  
10 in the complaint, his causes of action are specifically alleged  
11 against CGMI. See Comp. ¶¶ 23-27 (alleging CGMI breached  
12 contract); ¶¶ 28-31 (alleging CGMI breached covenant of good faith  
13 and fair dealing); ¶¶ 32-35 (alleging CGMI committed professional  
14 negligence); ¶¶ 36-44 (alleging CGMI committed fraud); ¶¶ 45-54  
15 (alleging CGMI made negligent representations; ¶¶ 55-58 (alleging  
16 CGMI became indebted to Putnam for "money had and received"). In  
17 sum, it is reasonable to conclude that the language in the  
18 arbitration agreements includes Putnam's claims against CGMI.

19 CONCLUSION

20 For the foregoing reasons, the Court GRANTS CGMI's motion to  
21 compel arbitration. Docket No. 24. The case is stayed pending  
22 arbitration, which must be diligently pursued.<sup>3</sup> Nothing contained  
23 in this Order shall be considered a dismissal or disposition of  
24 this action, and, should further proceedings in this litigation

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26 <sup>3</sup>There appears to be no further reason at this time to maintain  
27 the file as an open one for statistical purposes, and the Clerk is  
28 instructed to submit a JS-6 Form to the Administrative Office.

1 become necessary or desirable, any party may move to restore the  
2 case to the Court's calendar. The Court vacates the case  
3 management conference scheduled for April 27, 2010.

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5 IT IS SO ORDERED.

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7 Dated: 04/07/10

*Claudia Wilken*

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CLAUDIA WILKEN  
United States District Judge

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