2024 WL 4095841 (N.Y.Sup.) (Arbitration Award)
Supreme Court of New York.
New York County

Douglas SCHOTTENSTEIN, MD and Thompson Real Estate LLC, Claimants and Counter-Respondents,

v.

CITIBANK, N.A., Respondent and Counterclaimant.

No. 653643/2024.
July 22, 2024.

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Attorney for Petitioner: Edward D. Altabet
Attorney for Respondent: Joseph L. Buckley
Award Date: 02/28/2024
Arbitrator: Garrett E. Brown, Jr.

Final Award

Arbitrator: Garrett E. Brown, Jr.

JUDICIAL ARBITRATION AND MEDIATION SERVICES

JAMS Ref. No. 1425035175

I, THE UNDERSIGNED ARBITRATOR (the "Arbitrator"), having been duly appointed by the Parties, and having heard the Parties' proofs and allegations in this proceeding, do hereby issue the following FINAL AWARD:

I. *The Parties*

Claimants and Counter-Respondents are: Douglas Schottenstein, MD ("Dr. Schottenstein"); and Thompson Real Estate LLC ("Thompson") (collectively "Claimants").

Respondent and Counterclaimant is Citibank, N.A. ("Respondent" or "Citibank").

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IV. *Arbitrability, Procedural Rules & Substantive Law*

On May 26, 2021, the Parties executed a Stipulation in the United States District Court for the Southern District of New York that documents their agreement to arbitrate the present dispute. Appended to that Stipulation is a copy of the Parties' underlying dispute resolution agreement – entitled "Resolution of Disputes by Arbitration" – that establishes either Party: "may elect, without the other's consent, to require that any dispute between us … be resolved by binding arbitration." Pursuant to the aforementioned Stipulation and the dispute resolution agreement, neither Party has challenged the arbitrability of any affirmative claim, defense, or request for relief asserted in this proceeding.

Further, generally pursuant to the terms of the Parties' dispute resolution agreement, the Parties have not contested that: (1) the Federal Arbitration Act is applicable in conjunction with the JAMS Comprehensive Arbitration Rules and Procedures (effective June 1, 2021); and (2) the substantive laws of the State of New York are applicable.

V. *Scope of Award*

This Final Award is issued pursuant to JAMS Rule 24, entitled "Award", that states as follows at subsection (h):

> The Award shall consist of a written statement signed by the Arbitrator regarding the disposition of each claim and the relief, if any, as to each claim. Unless all Parties agree otherwise, the Award shall also contain a concise written statement of the reasons for the Award.

The Parties have requested that the Arbitrator issue a reasoned award. (*See* 6/14/22 Procedural Order No. 1 at 2). In preparing this Final Award pursuant to JAMS Rule 24(h), the Arbitrator has considered the legal arguments raised and the evidence presented in conjunction with the Arbitration Hearing, and has determined the relevance, credibility, weight and merits thereof. For efficiency and economy, this Final Award concisely recites only those facts and discusses only those legal arguments that the Arbitrator considers necessary to establish the basis for resolution of the Parties' claims and requests for relief, as well as any other determinations made herein. Thus, to the extent that any factual assertion, expert opinion, legal argument, claim or defense raised by the Parties is not specifically mentioned, the Arbitrator has decided that it is either or both not persuasive and/or not essential to establish the basis for this Final Award.

For the avoidance of doubt, this Final Award is dispositive as to all factual issues, legal and equitable arguments, and defenses raised in conjunction with the Parties' claims and requests for relief. This Final Award has also been timely issued pursuant to JAMS Rule 24(a) based upon the Parties' agreement to a March 1, 2024 due date.

Lastly, the Arbitrator recognizes and appreciates the high quality of both the oral and written presentations by all Counsel throughout these proceedings. It follows that this Final Award is based solely upon the Arbitrator's review of the evidentiary record and applicable law, and is not a reflection of the quality of the Parties' respective presentations.

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Dr. Schottenstein is a board-certified physician in neurology and pain management. He opened his medical practice, Schottenstein Pain and Neuro PLLC d/b/a NY Spine Surgery ("NY Spine") in or about 2008.

In 2016, Dr. Schottenstein sought to purchase the property located at 168 Thompson Street in New York, NY (the "Property"). To that end, he applied for and obtained a mortgage from Citibank in the amount of [Text redacted in copy] To facilitate the purchase of the Property, Dr. Schottenstein created Thompson, a personal investment company with no revenue. In order to obtain optimal mortgage terms from Citibank, Dr. Schottenstein opened two accounts with Citibank that are relevant to the present dispute: (1) [Text redacted in copy] (the "Thompson Account"); and (2) [Text redacted in copy] [1] (the "Citi Gold Account"). Both of those accounts are accessible through the CitiBusiness® Online electronic banking platform ("CitiBusiness").

Dr. Schottenstein closed on the Property in November, 2016, and made his first mortgage payment electronically via the Thompson Account on December 30, 2016. Per the mortgage terms, that payment was made to CitiMortgage, Inc. ("CitiMortgage") in the amount of [Text redacted in copy] Over approximately the next three years – *i.e.*, between December 30, 2016, and November 19, 2019 –Dr. Schottenstein made a total of nine additional mortgage payments electronically from the Thompson Account at varying times and in varying amounts. The first eight of those mortgage payments were made to CitiMortgage, while the final mortgage payment was made to CENLAR – another entity to which the mortgage had been transferred or sold.

Throughout much of this time, Dr. Schottenstein relied heavily upon his office manager at NY Spine – Pearl Chan – to oversee many aspects of his professional and personal life. As a result, Ms. Chan had access to and knowledge of personal information belonging to Dr. Schottenstein, including the CitiBusiness user identification and password needed to access the Thompson Account and the Citi Gold Account. Dr. Schottenstein also employed an individual named Derek Lee in various capacities.

Unbeknownst to Dr. Schottenstein, Ms. Chan and Mr. Lee were (or became) involved in a relationship and held themselves out (to others) as a married couple.

On February 20, 2020, a wire in the amount of [Text redacted in copy] was sent from the Thompson Account to Derek Lee. That wire was initiated through CitiBusiness by Ms. Chan and/or Mr. Lee, who used: Dr. Schottenstein's user identification and password to first gain access to the Thompson Account; and then the physical "token" that Citibank had provided to Dr. Schottenstein, which was required to generate the unique, time-sensitive codes necessary to initiate the wire. Dr. Schottenstein kept the token – which resembles a credit card – in a backpack that was typically left in an unlocked room within his office.

Citibank did not immediately execute the wire. Instead, under the circumstances – [Text redacted in copy] – Citibank's internal procedures required that the sender of the wire contact Citibank and verify certain information. After apparently receiving an email from Citibank that was prompted by the wire initiation, Mr. Lee contacted a Citibank representative by phone, impersonated Dr. Schottenstein, and successfully answered a series of challenge questions. After those challenge questions were answered successfully, Citibank executed the wire payment to Mr. Lee.

On March 20, 2020, another wire in the amount of [Text redacted in copy] was sent from the Thompson Account to Derek Lee. That wire was also initiated through CitiBusiness by Ms. Chan and/or Mr. Lee using Dr. Schottenstein's user identification, password, and the token. This time though – [Text redacted in copy] – Citibank's internal procedures required no additional steps, and Citibank executed the wire payment to Mr. Lee.

In December, 2020, approximately nine-months after the two wires totaling [Text redacted in copy] were made from the Thompson Account, Dr. Schottenstein contacted Citibank by telephone and asserted that the wires were unauthorized and/or fraudulent. Ms. Chan and Mr. Lee contend that the two wires represent amounts that Dr. Schottenstein owed them for back-pay and expense reimbursement.

VII. *Summary of Claims and Procedural History*

A. The Parties' Claims

The Parties' present dispute arose on March 25, 2021, when Claimants filed a civil complaint against Citibank in the United States District Court for the Southern District of New York (the "Complaint"). (*See generally*, S.D.N.Y. Civ. No. 21-01806). As referenced above, the Parties subsequently executed a Stipulation that documented their agreement to arbitrate. In general accordance with the Parties' Stipulation, Claimants filed a Demand for Arbitration with JAMS on June 10, 2021. Both the Demand for Arbitration and the Parties' Stipulation make clear that Claimant's underlying Complaint against Citibank in the S.D.N.Y. forms Claimant's operative pleading in this proceeding.

In the Complaint, based upon allegations that generally track the Summary of Facts recited above, Claimants lodge a single claim against Citibank for violation of New York UCC §§ 4-A-202 and 4-A-203. More specifically, Claimants assert as follows in pertinent part:

52. Pursuant to the New York UCC § 4-A-202(1), "[a] payment order received by the receiving bank is the authorized order of the person identified as sender if that person authorized the order or is otherwise bound by it under the law of agency."

53. New York UCC § 4-A-202(2) further provides, "[i]f a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (a) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (b) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer."

54. As set forth above, Citibank violated the provisions of New York UCC § 4-A-202 by accepting unauthorized payment orders (i.e., wire transfers) in connection with the Account.

55. As set forth above, Citibank failed to establish, maintain, implement and follow commercially reasonable security procedures and that it accepted the payment in good faith.

56. As set forth above, Citibank's failure to establish, maintain, implement and follow commercially reasonable security procedures directly led to the theft of [Text redacted in copy] from Plaintiff's Account by way of unauthorized wire transfers.

57. As set forth above, [Claimants] notified Citibank immediately upon discovery of the unauthorized transfers.

58. As set forth above, Citibank failed to confirm authorization for the wire transfers.

59. Nonetheless, Citibank effectuated the transfers.

60. New York UCC § 4-A-204 states that "[i]f a receiving bank accepts a payment order issued in the name of its customer as sender which is (a) not authorized and not effective as the order of the customer under Section 4-A-202, or (b) not enforceable, in whole or in part, against the customer under Section 4-A-203, the bank shall refund any payment of the payment order received from the customer to the extent the bank is not entitled to enforce payment and shall pay interest on the refundable amount calculated from the date the bank received payment to the date of the refund."

61. Given the foregoing, Citibank was required to issue a refund to Dr. Schottenstein and to pay interest on the refundable amount.

62. [Claimants] have notified Citibank regarding the unauthorized transfers and Citibank has refused to issue a refund.

63. By failing to do so, it has violated Article UCC § 4-A.

WHEREFORE, [Claimants] seek judgment in his favor against [Citibank] in the amount of [Text redacted in copy] interest calculated from the dates of the transfers, punitive damages, reasonable attorneys fees and costs and such other and further relief as may be necessary, just and proper.

(Compl. at ¶¶ 52-63).

Citibank timely filed a Response to Claimants' Complaint. Therein, Citibank denied Claimants' substantive allegations and lodged various affirmative defenses. On July 14, 2023, Citibank requested leave pursuant to JAMS Rule 10 to file an Amended Response that, *inter alia*, lodges the following counterclaim against Thompson:

1. Thompson Real Estate, LLC had a CitiBusiness® account with Citibank.

2. Thomspon Real Estate, LLC's CitiBusiness® account had the ability to use CitiBusiness® Online, an electronic banking and information service that permits "authorized Users" to access eligible bank accounts and services through the internet.

3. CitiBusiness® Online is governed by a User Agreement between Citibank and the account holder.

4. Part F of the User Agreement specifically relates to wire transfers.

5. Section 10 of Part F is entitled “Indemnity.” It provides that the account holder (in this case Thompson Real Estate, LLC) agreed:

to the fullest extent permitted by applicable law to indemnify and hold Citibank harmless from and against any and all claims, suits, judgments, executions, liabilities, losses, damages, costs, and expenses – including reasonable attorney's fees – in connection with or arising out of Citibank acting upon funds transfer instructions pursuant to this Section F. This indemnity shall not be effective to relieve and indemnify Citibank against its gross negligence, bad faith, or willful misconduct.

6. Citibank acted “upon funds transfer instructions pursuant to this Section F” when it sent the disputed wires.

7. Citibank is thus entitled to indemnity for costs and expenses, including its legal fees, arising from this arbitration.

PRAYER FOR RELIEF

WHEREFORE, Citibank prays for judgment dismissing the Demand for Arbitration on the merits, in its entirety and with prejudice, awarding Citibank costs and disbursements incurred in this proceeding, awarding Citibank the legal fees it incurred in this proceeding, and awarding such additional relief as may be just and appropriate.

(Amd. Resp. at 4-5).

The Arbitrator granted Citibank's leave to file its Amended Response, which resultantly forms Citibank's operative pleading in this proceeding. Thompson filed a Reply to Citibank's Counterclaim on August 11, 2023, and therein denies Citibank's substantive allegations and lodges various affirmative defenses.

In view of the complete evidentiary record, the Arbitrator clarifies that the monetary damages ultimately sought by Claimants in this proceeding is [Text redacted in copy] (not the [Text redacted in copy] originally plead), plus pre-judgment and post-judgment interest. (*See* Clmts.' 10/30/23 P.H. Br. at 31).

B. Procedural History

On April 11, 2022, the Arbitrator conducted a preliminary hearing with Counsel via teleconference, and issued Procedural Order No. 1 on June 14, 2022. The terms of Procedural Order No. 1 were largely stipulated by the Parties, and established an expeditious schedule for completing discovery, with the Arbitration Hearing (the “Hearing”) scheduled to be conducted in late October, 2022. However, due to various complicating factors – primarily discovery issues – the milestone dates established within Procedural Order No. 1 were adjourned at the Parties' request. (*See* 8/30/22 Procedural Order No. 2). Ultimately, in accordance with Procedural Orders No. 2-5 – that collectively reflect the Arbitrator's resolution of various discovery disputes and the alteration of certain milestone dates – the Parties completed fact and expert discovery and the Hearing was rescheduled for September 19, 20 and 21, 2023.

The Parties timely made various pre-Hearing submissions in accordance with JAMS Rule 20(a), and also submitted the reports of their respective expert witnesses. The Hearing commenced as scheduled on September 19, 2023, at the JAMS Resolution Center in New York, NY. The Hearing continued on September 20, 2023, and concluded on September 21, 2023. During the Hearing, the Arbitrator heard live testimony from: fact witness Dr. Schottenstein and expert witness Annemarie McAvoy, Esq. on behalf of Claimants; and fact witness Christopher Zavala and expert witness David Abshear on behalf of Citibank. As part of their respective presentations during the Hearing, the Parties collectively offered several hundred Exhibits into the evidentiary record, and also submitted the designated video deposition testimony of non-party fact witnesses Pearl Chan and Derek Lee. To the extent that the Parties raised objections to any Exhibit during the Hearing, the Arbitrator addressed and resolved those objections on the record.

After the Hearing concluded, the Parties jointly proposed the following schedule for Post-Hearing Briefs: Opening Briefs (limited to 30 pages) submitted by October 30, 2023; and Opposition Briefs (limited to 25 pages) submitted by November 20, 2023. The Arbitrator approved that proposal and the Parties timely made their respective submissions. After reviewing the Parties' Post-Hearing Briefs, the Arbitrator indicated that closing oral arguments would be heard at the Parties' request. The Parties so requested, and accordingly, the Arbitrator heard closing arguments from Counsel via Zoom on January 10, 2024.

Following closing oral arguments, the Arbitrator determined that the evidentiary record for this proceeding was closed. The Parties subsequently agreed that this Final Award would be due not later than March 1, 2024.

VIII. *Discussion*

As noted above, each of the Parties has lodged a single affirmative claim against the other in this proceeding. The Arbitrator will first address Claimants' affirmative claim that Citibank's conduct violated New York's enactment of the UCC, and then address Citibank's affirmative counterclaim for indemnity.

A. Claimant's UCC Claim

1. NY UCC § 4-A-202(2)

In their respective Post-Hearing Briefs, the Parties tacitly acknowledge that Claimant's affirmative claim under New York's enactment of the UCC ultimately distills down to the inquiry framed by Subsection (2) of NY UCC § 4-A-202. Specifically, that Subsection of the UCC -which falls under the aegis of "Authorized and Verified Payment Orders" - establishes as follows:

> If a bank and its customer have agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure, a payment order received by the receiving bank is effective as the order of the customer, whether or not authorized, if (a) the security procedure is a commercially reasonable method of providing security against unauthorized payment orders, and (b) the bank proves that it accepted the payment order in good faith and in compliance with the security procedure and any written agreement or instruction of the customer restricting acceptance of payment orders issued in the name of the customer.

NY UCC § 4-A-202(2).

Thus, in the present context, UCC § 4-A-202(2) fundamentally poses two questions: (1) whether Citibank's security procedure was commercially reasonable; and if so (2) whether Citibank followed its security procedure in good faith. As the language of UCC § 4-A-202(2) makes plain on its face, if both of those questions are answered in the affirmative, Citibank acted appropriately as a matter of New York law and has no liability to Claimants irrespective of whether the two wires at issue – *i.e.*, the payment orders –were actually sent or approved by Dr. Schottenstein. Indeed, as Judge Vyskocil of the S.D.N.Y recently reinforced, under UCC § 4-A, "'if [a payment] is authorized or if it is effective, there is no refund obligation.'" *Neram, Inc. v. Sterling Nat'l Bank*, 2023 WL 6394007, at *4 (S.D.N.Y. 2023) (quoting *Essilor Int'l SAS v. J.P. Morgan Chase Bank, N.A.*, 650 F.Supp.3d 62, 75 (S.D.N.Y. 2023)).

Here, considering the two aforementioned questions in light of the weight of relevant and credible evidence in the record, the Arbitrator is convinced that they must be answered in the affirmative for several of basic reasons. [2]

First, for the avoidance of any doubt, Citibank has established that UCC § 4-A-202(2) frames the present inquiry, because the CitiBusiness Online User Agreement that Dr. Schottenstein accepted through his use of the CitiBusiness platform clearly explains various "security procedures" that are in place and may be utilized, as follows in pertinent part:

> You confirm that you have investigated the security measures employed by CitiBusiness Online and that you have instituted the proper controls for access to CitiBusiness Online through your computers and terminals. You confirm that the security system and controls are commercially reasonable and appropriate for the account owner. *When you place an order for a funds transfer (including a wire transfer), Citibank may follow a security procedure established for your protection that may entail a telephone call or other required contact with or from you prior to acting upon your instructions.* In certain instances, Citibank may also decline to act upon your instructions. Citibank may employ other controls to verify the identity of an authorized User as a condition to granting access including the collection and use of data that authenticates an authorized User or an authorized User's computer. *You agree to these security procedures*.

(CX 41; RX 19 at 9 (emphasis added)). Thus, the Arbitrator concludes that Citibank has established by a preponderance of the evidence that Dr. Schottenstein and Citibank clearly "agreed that the authenticity of payment orders issued to the bank in the name of the customer as sender will be verified pursuant to a security procedure" as UCC § 4-A-202(2) requires.

Next, Citibank has established that its security procedures were "a commercially reasonable method of providing security against unauthorized payment orders". On that point, the Arbitrator credits and has accorded significant weight to the testimony of Christopher Zavala, who is the managing director of global fraud policy and prevention at Citibank. During his testimony, Mr. Zavala summarized the two-factor authentication security protocol that was in effect for the CitiBusiness platform as follows:
Mr. Lippert: You referred to what I think categories: What you know and what you have. Can you define those for us?

Mr. Zavala: Yeah. So when you think about multifactor authentication, there's really three categories to multifactor authentication. What you have which is something in your possession. It's a token, a credit card with a CVV2 imprinted on the back, something of that nature. What you know, so user ID and password, mother's maiden name, high school attended. So things you know. And then it's what you are. So you think about when you log on to your phone with your thumbprint or face ID, that's what you are. If you have voice recognition software, it's a voice biometric match into your call center.

With CitiBusiness, we don't have the what you are category. There's no biometrics associated with it. So it's what you have and what you – sorry –what you have which is the token and what you know which is the user ID and password. So you want two of those three things to be covered for FFIEC compliance – I say "compliance" – and to ensure you have, you know, a waterfall of different authentication methods for online access and online banking.

(Hr'g. Tr. at 446-447).

Mr. Zavala further explained how the two-factor authentication security protocol functioned with respect to the wires at issue as follows:
Mr. Lippert: All right. So are you – are you aware of how the wires that we're discussing in this case – February 20th, 2020, wire and the March 20th 2020, wire – were initiated?

Mr. Zavala: Yes.

Mr. Lippert: And how were they initiated?

Mr. Zavala: Yeah. So user ID – the valid user ID and password were used to gain access to the system. The hardware token was successfully used to both access the system and generate and send a wire. Both of those, as mentioned in the FFIEC document from earlier, covered two-factor authentication in terms of each wire as it was sent. Now, the first wire, because it was flagged for [Text redacted in copy] required review to ensure that the initiator received instructions verbally or face to face and was not the victim of, what we call, an email scam where they get an email requesting them to redirect or send funds to a bad actor destination. That call required a separate authentication. So there were three factors of authentication completed on that first wire in order to initiate and send that wire.

The Arbitrator: So let me ask a question. You would have to have the ID and the password and then you'd also have to have the token, and the token would provide further information?

Mr. Zavala: Correct. You have to have the user ID and password to get into the online portal, right? Separately, you have a hardwire token that looks like a credit card. That token, you have to generate another passcode in order to fully log on and gain access, more than just new access to the system. If you want to send a wire, you have to generate a separate token – again, on that card – that is linked to your account. So you've linked that card to your account. So you can't use that card on any other account. You have to use that token to initiate another code, input the code correctly for the wire to be released by the system.

The Arbitrator: So you have to physically be in possession of the token?

Mr. Zavala: Physically in possession of the token, and you have to have access to the user ID and password of the account.

(*Id.* at 434-436).

Mr. Zavala also explained his view that the wires at issue in this case present unique circumstances, and that the CitiBusiness Online security protocols are consistent with how other peer institutions would have dealt with a similar situation:
Mr. Lippert: In the course of performing your duties as managing director at Citibank, do you have visibility into the claims of fraud that result from the use of CitiBusiness Online?

Mr. Zavala: I do.

Mr. Lippert: You keep track of figures and trends and things like that?

Mr. Zavala: We do.

Mr. Lippert: Okay. How many claims of, what I'll call, impersonation through CitiBusiness Online are you aware of? In other words, someone – a claim where a customer says, someone who is not me and who I did not authorized – and who I did not authorize sent money out of my account?

Mr. Zavala: Using CitiBusiness Online?

Mr. Lippert: Correct. Using CitiBusiness Online.

Mr. Zavala: Almost none.

Mr. Lippert: Are you aware of any besides the one we're talking about today?

Mr. Zavala: I'm not.

Mr. Lippert: Okay. And in the course of performing your duties as a managing director at Citibank, do you keep informed of what Citibank's peer institutions do with respect to fraud prevention and account security?

Mr. Zavala: Yes.

Mr. Lippert: Okay. And for the period of 2017 through 2020, were Citibank's peer institutions doing anything differently with respect to business account wires than what you have explained to Mr. Altabet in his examination?

Mr. Zavala: What do you mean, "doing differently"?

Mr. Lippert: Were – was anybody using a security measure that was, in some sense, more robust than what Citibank was doing?

Mr. Zavala: No, we were all pretty consistently – many of the banks were consistently using tokens for larger business accounts, midsize business accounts in order to ensure account security and still do.

(*Id.* at 442-444). Indeed, Mr. Zavala succinctly expressed his view on Citibank's security procedures as follows:

> And I think, overall, just the – the overall indication that we do not have a commercially-reasonable fraud system of controls is invalid. We've had OCC reviews, we've had legal and compliance reviews. We're using systems and processes that are industry standard, highly secure provided the customer does not give access to inappropriately, employees or others who would misuse their funds.

(*Id.* at 471-472).

Importantly, Citibank's expert witness David Abshier – who, among other things, is a former bank regulator, bank examiner and bank executive –substantially concurred with and effectively corroborated Mr. Zavala's testimony. More specifically, throughout his testimony – including during cross-examination – Mr. Abshier persuasively explained and supported his primary expert opinion that "Citibank's policies and procedures were consistent with industry standards and regulatory requirements and also that they were followed appropriately by the bank as well with regard to these transactions." (*Id.* at 714). Conversely, Claimants' offered no persuasive fact witness testimony on the issue of commercial reasonableness, and Claimants' expert witness Annemarie McAvoy – who is a former prosecutor with experience in bank compliance focused on criminal issues such as anti-money laundering – neither analyzed Article 4A of the UCC, nor identified any action that Citibank failed to take that another peer bank would have taken under the circumstances.

Accordingly, the Arbitrator concludes that Citibank has established by a preponderance of the evidence that its security procedures were "a commercially reasonable method of providing security against unauthorized payment orders" as UCC § 4-A-202(2) requires. From that conclusion it necessarily follows that Citibank has also established by a preponderance of the evidence that it followed its security procedure in good faith as UCC § 4-A-202(2) requires. Indeed, to the extent that Claimants have even argued that Citibank failed to act in good faith at any relevant time, Claimants have adduced no persuasive evidence – either documentary or in the form of testimony – that plausibly supports that argument.

For all of these reasons, the Arbitrator concludes that because Claimants have failed to carry their burden of proving that Citibank's security procedures were either commercially unreasonable or not followed in good faith in contravention of UCC §

4-A-202(2) – to the contrary, Citibank has convincingly established their compliance therewith – Claimants' affirmative claim under New York's enactment of the UCC must be DENIED.

In so concluding, the Arbitrator clarifies that Claimants' alternate theories for Citibank's liability fail for two separate but equally straightforward reasons. First, in their Complaint, Claimants noticed a single claim against Citibank expressly based upon NY UCC § 4-A. Axiomatically, Claimants are limited to that single claim and cannot belatedly seek to establish Citibank's liability via what amount to other claims that were never noticed – *e.g.*, alleged violations of the federal Bank Secrecy Act ("BSA"), the federal Patriot Act, or federal banking regulations such as "Know Your Customer" ("KYC") and/or "Anti-Money Laundering" ("AML"). Second, as Citibank correctly argues in its November 20, 2023 Post-Hearing Opposition Brief: (1) NY UCC § 4-A does not reference or incorporate any of those authorities; (2) neither the BSA nor the Patriot Act give rise to a private cause of action; and (3) the KYC and AML obligations cannot plausibly be construed as "security procedures" under NY UCC § 4-A, because they arise out of the BSA and relate to a bank's regulatory obligation to the federal government – not a bank's obligation to its customers, which is of course the focus of NY UCC § 4-A. (11/20/23 Citi Opp'n Br. at 8-9).

Finally, to the extent that Claimants have argued that Citibank's "security procedures" are not "commercially reasonable" when considered in light of certain guidance issued by the Federal Financial Institutions Examination Council ("FFIEC") in 2005 and 2011, the Arbitrator is not persuaded that – to the extent that the cited FFIEC guidance is even applicable – Claimants have established by a preponderance of the evidence that Citibank failed to reasonably comply therewith. Very much to the contrary, the Arbitrator is clearly convinced based upon the weight of the evidence that, assuming *arguendo* the two wires at issue were not actually authorized by Dr. Schottenstein, they were nevertheless enabled though Dr. Schottenstein's ([Text redacted in copy] disregard of his contractual confidentiality obligations to Citibank. [Text redacted in copy]

B. Citibank's Counterclaim for Indemnity

Citibank's affirmative counterclaim seeks indemnity pursuant to the CitiBusiness Online User Agreement "for costs and expenses, including its legal fees, arising from this arbitration." (Amd. Resp. at 5). In support thereof, Citibank relies upon the following provision within CitiBusiness Online User Agreement:

> to the fullest extent permitted by applicable law to indemnify and hold Citibank harmless from and against any and all claims, suits, judgments, executions, liabilities, losses, damages, costs, and expenses – including reasonable attorney's fees – in connection with or arising out of Citibank acting upon funds transfer instructions pursuant to this Section F. This indemnity shall not be effective to relieve and indemnify Citibank against its gross negligence, bad faith, or willful misconduct.

(CX 41; RX 19 at 6 (emphasis added)).

However, as Claimants correctly note in their October 30, 2023 Post-Hearing Brief, the Parties' dispute resolution agreement specifically addresses the allocation of, *inter alia*, attorney's fees and costs as follows:
Costs. The party initiating the arbitration shall pay the initial filing fee. If you [Claimants] file the arbitration and an award is rendered in your favor, we [Citibank] will reimburse you for your filing fee. If there is a hearing, we will pay the fees and costs for the first day of that hearing. All other fees and costs will be allocated in accordance with the rules of the arbitration forum. However, we will advance and or reimburse filing and other fees if the arbitrator rules that you cannot afford to pay them or finds other good cause for requiring us to do so, or if you ask us and we determine there is good reason for doing so. *Each party shall bear the expense of their respective attorneys, experts, and witnesses and other expenses-regardless of who prevails, but a party may recover any or all expenses from another party if the arbitrator, applying applicable law, so determines.*

(Stip. at Ex. A: "Resolution of Disputes by Arbitration" at 12).

The Arbitrator is persuaded that because the Parties' dispute resolution agreement provides the basis for the arbitrability of the Parties' respective claims in this proceeding, it is inherently authoritative and controlling with respect to any allocation or the shifting of "Costs" arising from this proceeding. Stated differently, the Arbitrator is not persuaded that, to the extent the above-excerpted indemnity clause within the CitiBusiness Online User Agreement might provide some basis for an award of, *inter alia*, attorney's fees and costs in a different context – *e.g.*, litigation of small claims, which are not arbitrable under the Parties' dispute resolution agreement – it has no such effect in this proceeding based upon the plain terms of the Parties' dispute resolution agreement.

Indeed, pursuant to the plain terms of the Parties' dispute resolution agreement, "[e]ach party shall bear the expense of their respective attorneys, experts, and witnesses and other expenses, regardless of who prevails", unless "applying applicable law", the Arbitrator determines that some other allocation is appropriate. Here, Citibank has not identified any authority under applicable New York law – *e.g.*, a cost-shifting statute – that supports the relief that it requests. To the extent that Citibank argues that the clause "applying applicable law" can or should be understood to essentially shoehorn the indemnity clause within the CitiBusiness Online User Agreement into the Parties' dispute resolution agreement, the Arbitrator is not persuaded that result is clearly supported by any cited authority – *i.e.*, applicable New York law – and is, simply, a bridge too far. [3]

For these reasons, the Arbitrator concludes that Citibank's affirmative counterclaim for indemnity pursuant to the CitiBusiness Online User Agreement must be DENIED.

IX. *Final Award*

For the reasons explained above, the Arbitrator hereby enters the following FINAL AWARD pursuant to JAMS Rule 24(a):

- Claimants' affirmative claim that Citibank's conduct violated New York's enactment of the UCC is DENIED.
- Citibank's affirmative counterclaim for indemnity pursuant to the CitiBusiness Online User Agreement is DENIED.
- All other affirmative claims and/or requests for relief asserted by any Party are DENIED.

IT IS SO ORDERED.

I, GARRETT E. BROWN, JR., do hereby affirm that I am the Arbitrator described in, and who executed, this instrument, which is my FINAL AWARD.

<<signature>>

Hon. Garrett E. Brown, Jr. (Ret.)

Arbitrator

Footnotes

1 The factual summary in this Section is only intended to provide background for the Arbitrator's subsequent analysis of the Parties' respective claims. Many of the facts summarized in this Section are undisputed; however, to the extent that any of these facts are disputed, this Section reflects the Arbitrator's findings based upon a preponderance of the relevant and credible evidence.

2 As the discussion below reflects, although Claimants bear the burden of proving their affirmative claim under UCC § 4-A-202(2), the Arbitrator is nevertheless persuaded that Citibank has established its compliance with that statute by a preponderance of the relevant and credible evidence in the record. Thus, to the extent that the Arbitrator couches the discussion below in terms of the weight of evidence established by Citibank on a given issue, Claimants have inherently failed to persuade the Arbitrator that any countervailing evidence relevant to that issue carries more weight.

3 For completeness, the Arbitrator notes that Citibank's "surplusage" argument is incorrect for at least two reasons. (*See* Citi 11/20/23 Opp'n Br. at 24). First, the Parties' dispute resolution agreement and the CitiBusiness Online User Agreement are two separate agreements. Citibank has provided no authority that establishes New York law requires that discrete terms within *separate* contracts be construed so as not to generate surplusage, versus the requirement that discrete terms within the *same* contract be construed to avoid surplusage. Those are two materially different concepts. Second, in any event, the Arbitrator's foregoing conclusion does not render the indemnity clause within the CitiBusiness Online User Agreement surplusage because – among other reasons – the Parties' dispute resolution agreement does not mandate that all disputes be arbitrated. Thus, even assuming *arguendo* that the indemnity clause within the CitiBusiness Online User Agreement can be construed to have the effect Citibank urges, it can still have that effect if a dispute is litigated instead of arbitrated. The Arbitrator's foregoing conclusion therefore generates no conflict – and certainly generates no surplusage – between the Parties' dispute resolution agreement and the CitiBusiness Online User Agreement.

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