TEMPORARY RELIEF REQUESTED

NO. _____

In The Supreme Court Of Texas
Austin, Texas

IN RE CITIGROUP GLOBAL MARKETS INC. (f/k/a SALOMON SMITH BARNEY, INC.), CITIGROUP INC., and STACY OELSEN

PETITION FOR WRIT OF MANDAMUS

ROBERT B. GILBREATH
State Bar No. 07904620

CHARLES A. GALL
State Bar No. 07281500

JAMES W. BOWEN
State Bar No. 02723305

JENKENS & GILCHRIST,
a Professional Corporation
1445 Ross **Avenue, Suite** 3700
Dallas, Texas 75202
(214) 855-4500
(214) 855-4300 (fax)

COUNSEL FOR RELATORS

IDENTITY OF PARTIES AND COUNSEL

Relators	Counsel
Citigroup Global Markets Inc. (f/k/a Salomon Smith Barney Inc.), Citigroup Inc., and Stacy Oelsen	Robert B. Gilbreath Charles A. Gall James W. Bowen JENKENS & *GILCHRIST,* *A Professional Corporation* 1445 Ross Avenue, Suite 3700 Dallas, Texas 75202 (214) 855-4500 (214) 855-4300 (fax)
Real Party in Interest	Counsel
Robert A. Nickell Natalie Bart Nickell	Richard A. Sayles Will S. Snyder SAYLES LIDJI & WERBNER 4400 Renaissance Tower 1201 Elm Street Dallas, Texas 75270 (214) 939-8700 **(214)** 939-8787 (fax)

Respondents

The Honorable Sally Montgomery,
County Court at Law No. **3**
Dallas County Records Bldg.
500 Main Street, Sixth Floor
Dallas County, Texas 75202

Court of Appeals for
the Fifth District of Texas
George L. Allen, Sr. Courts Bldg.
600 Commerce Street, Second Floor
Dallas, Texas 75202

TABLE OF CONTENTS

INDEX OF AUTHORITIES

FEDERAL CASES

STATE CASES

RULES AND STATUTES

SECONDARY SOURCES

STATEMENT OF THE CASE

Relators (collectively, "Citigroup") removed the underlying case to federal court, requested a transfer to an MDL court, and then agreed to a remand back to state court. Judge Sally Montgomery then ruled that Citigroup waived its right to arbitrate even though the plaintiffs did not even *attempt* to show they were prejudiced by the removal. (Apx. Tab A). Refusing to disturb Judge Montgomery's order, the Dallas Court of Appeals – without mentioning the prejudice requirement – held that Citigroup's federal court pleadings expressly waived its right to arbitrate. (Apx. Tab B). After Citigroup directed the court's attention to In re *D. Wilson Const.* Co., 196 S.W.3d 774 (Tex. 2006), the court revised its opinion to address the Texas Arbitration Act but again held that Citigroup waived its right to arbitrate without any mention of the prejudice requirement in Wilson. (Apx. Tab C).

Other Information Required By Rule 52.3(d)

Respondents:	Honorable Sally Montgomery, County Court at Law No. **3,** Dallas County, Texas; Court of Appeals for the Fifth District of Texas.
Date Mandamus Petition was filed in Fifth Court of Appeals:	December 15,2005.
Court of Appeals Panel:	Michael O'Neill (authoring justice); Joseph Morris; Amos Mazzant.
Citation for Court of Appeals' Opinion:	Orig. OD.: In re *Citigroup Global Markets, Inc.*, 2006 WL 1753076 (Tex. App.—Dallas June 28,2006); Op. on Rehearing: not yet picked up by West Publishing. (Issued Sept. 26,2006).

STATEMENT OF TURISDICTION

The Court has jurisdiction under Tex. Gov't Code **$22.002.**

ISSUES PRESENTED

1. Did the trial court abuse its discretion by holding that Citigroup waived its right to arbitrate under the Federal Arbitration Act when there was no evidence that the Nickells suffered prejudice as a result of Citigroup's federal court removal and MDL transfer activities?

2. Was the trial court's order denying Citigroup's motion to compel arbitration without proof of prejudice proper under the theory that Citigroup expressly waived its right to arbitrate such that a showing of prejudice was not required?

3. The court of appeals did not address the prejudice requirement in its opinion. Should this case be sent back for a determination of the prejudice issue in accordance with Texas Rules of Appellate Procedure 47.1 and 52.8(d), which require a court of appeals to address every issue raised and necessary to the disposition of a case?

4. To the extent the trial court's order denying arbitration is based on the notion that Relators are not entitled to claim the benefits of the arbitration agreement with respect to Mr. Nickell's claims, did the trial court abuse its discretion?

WHY THIS CASE IS IMPORTANT

Until now, no Texas appellate court has ever held that a party *expressly* waived its right to arbitrate – and particularly not through *conduct* in the course of litigation rather than explicit statements of waiver. Only one other Texas appellate court has even addressed an allegation of express waiver, and that court refused to find waiver.[1] Lacking this Court's guidance, the lower courts held that litigation-oriented statements

[1] *Bristow v. Jameson*, 1996 WL 277138 (Tex. App.—Houston [1st Dist.] 1996, no writ) **(not** designated For publication).

– made in federal court removal and MDL pleadings that make no specific reference to arbitration – are sufficient to deprive a defendant of its right to arbitrate without any proof that the plaintiff was prejudiced. A new theory for denying a party its right to arbitrate has thus been introduced into Texas jurisprudence: A party may be found to have expressly waived its right to arbitrate – even though it has never specifically and unequivocally renounced that right – and the prejudice requirement may be dispensed with altogether. The notion that express waiver does not require a showing of prejudice is the minority position in the federal courts, and this Court should not permit that theory to take root in Texas.

STATEMENT OF FACTS

1. The WorldCom bankruptcy spawns numerous lawsuits, most of which end up in a federal MDL court.

In the aftermath of WorldCom's July 2002 bankruptcy, more than 150 lawsuits were filed by plaintiffs, such as the Nickells, seeking recovery from third parties for losses they incurred in WorldCom securities. See In re *WorldCom, Inc. Sec. Litig.*, 294 F. Supp. 2d 431, 434-35 (S.D.N.Y. 2003). The federal MDL panel transferred and consolidated the federal cases in an MDL court – the U.S. District Court for the Southern District of New York. Id; *In re WorldCom, Inc. Sec. & "ERISA" Litig.*, 226 F. Supp. 2d 1352 (J.P.M.L. 2002). Most of the state court suits were removed to federal court and also transferred to the MDL court. *Id.* The transferred and consolidated cases are now pending in the MDL court.

2. The Nickells ignore their promises to arbitrate and instead sue Citigroup.

Citigroup Global Markets Inc. is a broker-dealer and a subsidiary of Relator Citigroup Inc. (R. Vol. I, p. 44). Kobert A. Nickell and Natalie Bert Nickell, plaintiffs below, were Citigroup customers. (R. Vol. I, pp. 11-13). Mr. Nickell's paperwork with Citigroup contained broad arbitration clauses. (R. Vol. I, p. 48-49). Mrs. Nickell (formerly Natalie Bert) also signed agreements containing broad arbitration clauses. (R. Vol. I, pp. 52-57). After WorldCom's bankruptcy, the Nickells ignored their promises to arbitrate and instead sued Citigroup, alleging that false and misleading research reports caused them to invest more than $4 million in WorldCom securities. (R. Vol. I, pp. 10-13).

3. Citigroup removes the Nickells' claims, obtains a transfer to the federal MDL court, and then agrees to a remand back to state court.

Citigroup removed the Nickells' claims to federal court in Dallas, stating that it was "appearing specially so as to reserve any and all defenses available under Rule 12 of the Federal Rules of Civil Procedure or otherwise. . . ." (R. Vol. II, p. 308). The Nickells moved to remand. (R. 0 1 11 p. 393). At about the same time, Citigroup notified the MDL Panel that the case was subject to transfer to the MDL court. (R. Vol. II, pp. 658-59). The following events then took place:

- Citigroup asked the Dallas federal court to stay all proceedings until the MDL Panel determined whether the MDL court would conduct pre-trial activities. (R. Vol. II, p. 533).

- Before the Dallas federal court ruled on the stay motion, the

MDL Panel conditionally transferred the case to the MDL court. (R. Vol. II, p. 572).

- The Nickells moved to vacate the transfer order. (R. Vol. III, p. 797).

- The MDL Panel overruled the Nickells' motion and issued a final transfer order. (R. Vol. III, p. 897).[2]

  The Nickells filed papers arguing that a remand was appropriate. (R. Vol. III, p. 899).

- Citigroup decided to agree to a remand, and the parties stipulated "that this action shall be and hereby is remanded to the County Court at Law No. 3, Dallas County, Texas, where the action was originally filed." (R. Vol. III, p. 928).[3]

Citigroup always intended to preserve its right to arbitrate this case and other actions brought by Citgroup customers once it was finally determined which court would conduct pre-trial activities and the Nickells' subject matter jurisdiction arguments were resolved. (R. Vol. I, pp. 137-38). Indeed, Citigroup's motion to stay in the Dallas federal court stated that it was filed without waiver of any defenses "including, but not limited to, . . . the requirement that Plaintiffs arbitrate, not litigate, their claims." (R. Vol. II, p. 539, n.1.).

4. Citigroup moves to compel arbitration.

After remand, Citigroup filed its first pleadings in the trial court: an Original

---

[2] Once the case was transferred to the MDL court, it became subject to that court's May 2003 Consolidation Order. (R. Vol. I, pp. 125-35). Under that order, Citigroup was not required to respond to the Nickells' pleadings. (R. Vol. I, p. 127). The same order also preserved all of Citigroup's defenses. (R. Vol. I, p. 127).

[3] In the stipulation and order, to which the Nickells agreed, Citigroup again specifically stated that it was "appearing specially to reserve any and all defenses . . . ." (R. Vol. III, p. 928).

Answer and Motion to Compel Arbitration and Stay Proceedings and Brief in Support. (R. Vol. I, pp. 31, 35). Citigroup moved to compel under both the Federal Arbitration Act (FAA) and the Texas Arbitration Act (TAA). (R. Vol. I, p. 35). Before filing the arbitration motion, Citigroup did not, in any court: (i) seek, obtain, respond to, or object to discovery; (ii) move for summary judgment; (iii) move for judgment on the pleadings; (iv) seek a trial setting; or (v) file any cross-claims, counter-claims, or third-party claims. (R. Vol. I, p. 137).

Moreover, with the exception of moving to dismiss in the Dallas federal court under Federal Rule 12(b)(6), as it was required to do, Citigroup never sought a ruling from any court regarding the merits of the Nickells' claims. (Id.). And immediately after filing the motion to dismiss, Citigroup told the Nickells' counsel that the Nickells need not respond to the motion at that time because Citigroup was not then seeking a ruling. (Id). The Nickells never responded to the motion, and no court ever ruled on or considered the motion. (Id).

Not only did Citigroup refrain from actively litigating the case, but Citigroup never, orally or in writing, directly or indirectly, advised any court that it was waiving its right to compel arbitration. Nevertheless, the Nickells argued: (i) that Citigroup waived arbitration by removing the case to federal court, obtaining transfer to the MDL court, and ultimately agreeing to a remand to the trial court; and (ii) that Citigroup Global Markets, as successor to Smith Barney and Salomon Smith Barney, Inc. – the parties to the arbitration agreements with Mr. Nickell – and Citigroup, Inc.,

parent of Citigroup Global Markets, are not entitled to claim the benefits of the arbitration agreement with respect to Mr. Nickell's claims. (R. Vol. I, pp. 72-92).

5. Judge Montgomery denies Citigroup's motion to compel arbitration, and the Dallas Court of Appeals refuses to issue mandamus relief.

After Citigroup replied to the Nickells' opposition (R. Vol. I, p. 94), Judge Montgomery conducted a hearing. (R. Vol. I, pp. 196-254). Judge Montgomery denied the arbitration motion in its entirety. (R. Vol. I, p. 296; App. Tab A). Citigroup perfected an interlocutory appeal under the TAA and also sought mandamus relief under the FAA. It is undisputed that the FAA applies in this case.

The court of appeals held that the FAA preempted the TAA. (Apx. Tab B). The court then held that Citigroup was not entitled to mandamus relief because it had expressly waived its right to arbitrate. (Apx. Tab B). The court found that a number of statements in Citigroup's removal and MDL transfer pleadings amounted to an express renunciation of the right to arbitrate because the focus of the statements was litigation. The statements in Citigroup's federal court pleadings that were cited by the court of appeals – all made in the context of papers directed at forum and not at the substance of the action – included these:

- There is almost complete overlap in the parties and witnesses who would be required to engage in document production and depositions during pretrial discovery.
- Consolidation of pretrial proceedings will prevent an enormous duplication of discovery, waste of judicial resources, and inconsistent rulings that would inevitably follow were each action to proceed separately.

- [G]iven the amount of discovery taken in the MDL proceeding, the parties to this case could much more rapidly prepare this case for trial in the MDL Proceeding.

  A transfer will streamline pre-trial matters, avoid duplication, conserve resources, and hurry the case towards trial.[4]

- [Citigroup] merely wish[es] to see this action adjudicated in the most efficient and logical location.

(Apx. Tab B).

As support for its holding that Citigroup's statements expressly waived its right to arbitrate, the court cited a Second Circuit case and a Seventh Circuit case.[5] (Apx. Tab B). In those cases, which involve markedly different fact situations, the courts applied the minority position: prejudice need not be shown when a party expressly waives its right to arbitration. Accordingly, the court of appeals made no mention of the prejudice requirement.

6. The court of appeals again fails to address the prejudice requirement on rehearing.

The day after the court of appeals issued its opinion, this Court decided in *In re D. Wilson Const. Co*, 196 S.W.3d 774 (Tex. 2006). There, the Court reiterated that a defendant's waiver of the right to arbitration under the FAA cannot be established without a showing that the plaintiff suffered "sufficient prejudice to overcome the

[4] Among the ways in which the MDL court was capable of streamlining the proceedings, of course, was in deciding motions to compel actions to arbitration.

[5] *Gilmore v. Shearson/American Express, Inc.*, 811 F.2d 108 (2d Cir. 1987), *overruled on other grounds by McDonnell Douglas Fin. Corp. v. Pennsylvania Power & Light Co.*, 849 F.2d 761, 765 (2d Cir. 1988); *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388 (7th Cir. 1995).

strong presumption against waiver." Id. at 783. The Court also explained that the FAA does not automatically preempt the TAA. Id. at 779-80.

Citigroup moved for rehearing, asserting that the court of appeals had erred in holding that: (i) the FAA preempts the TAA; and (ii) Citigroup waived its right to arbitration despite the lack of any proof that the Nickells were prejudiced. (Apx. Tab D). Citigroup urged the court of appeals to correct both errors. With respect to the prejudice issue, Citigroup argued:

> The Court was required to, but did not, address [Citigroup's] prejudice arguments. West *v. Robinson,* **180** S.W.3d 575, 576 (Tex. 2005) (per curiam) (reversing and remanding because court of appeals did not address every issue raised and necessary to final disposition of appeal, as required by Tex. R. App. P. 47.1); see *also* Tex. R. App. P. 52.8 (d) ("Rule 47 is applicable to an order or opinion by a court of appeals [in an original proceeding]. . . .").

(Apx. Tab D).

In their response to Citigroup's motion for rehearing, the Nickells again made no effort to establish that they had suffered prejudice from Citigroup's removal activities because they could make no such showing. (Apx. Tab E). The court of appeals withdrew its prior opinion and issued a new opinion on September 26, 2006. (Apx. Tab C). In its new opinion, the court held that: "The parties agreed New York law would govern any dispute arising from their agreements. Thus, there is no contractual or legal basis for applying the TAA to the facts of this case. Accordingly, we dismiss [Citigroup's] interlocutory appeal." (Apx. Tab C). The court' remained silent, however, on the prejudice requirement and again denied mandamus relief

under the FAA.

SUMMARY OF THE ARGUMENT

Citigroup did not expressly waive its right to arbitrate. Express waiver requires a specific, direct, and unequivocal statement that the party is giving up the right in question. Citigroup's statements in its federal court pleadings certainly do not make such a statement. Even if Citigroup's conduct could be found to be express waiver, a finding that a defendant expressly waived the right to arbitrate should not dispense with the prejudice requirement. If the defendant changes its mind before the plaintiff is prejudiced, then why should the defendant be deprived of its contractual right to arbitrate? After all, there is a strong presumption in favor of arbitration. The lower courts' hostility to arbitration is a vestige of "an era when court congestion was not a major problem as it is today, and in modern times a policy encouraging agreements to arbitrate is preferable." *L.H. Lacy Co. v. City of Lubbock*, 559 S.W.2d 348, 352 (Tex. 1977).

ARGUMENT

1. This Court has repeatedly held that a party resisting arbitration on waiver grounds must establish that it has been prejudiced by the other party's conduct.

The day after the court of appeals issued its original decision, this Court decided *In re D. Wilson Const. Co.*, 196 S.W.3d 774 (Tex. 2006). On the same day, the Court denied the motion for rehearing in *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759 (Tex. 2006). In both cases, the Court emphasized what has long been the law: a party

resisting arbitration on waiver grounds in a case governed by the Federal Arbitration Act must establish "sufficient prejudice to overcome the strong presumption against waiver." Wilson, 196 S.W.3d at 783; *Vesta*, 192 S.W.3d at 763.

Wilson reiterated what the Court said three months earlier in *Vesta:* waiver of the right to arbitrate will not be found unless the defendant has "substantially invoked the judicial process to its opponent's detriment." *Wilson,* 196 S.W.3d at 783. For example, the defendants in *Wilson* did not waive their rights to arbitrate because the plaintiff failed to demonstrate how the defendants' pursuit of litigation "worked to [the plaintiff's] detriment." Id. Likewise, the defendants in *Vesta* – who litigated in the trial court for two years and who initiated extensive discovery – did not waive their rights to arbitrate because the plaintiff did not establish sufficient prejudice to overcome the strong presumption against waiver. Vesta, 192 S.W.3d at 763.

Below, Citigroup argued that it should not be held to have waived its right to arbitrate because the Nickells produced no evidence of prejudice. (R. Vol, I at 110). In its motion for rehearing, Citigroup directed the court of appeals' attention to Wilson and Vesta, urged the court to address the prejudice issue, and reiterated that the Nickells had produced no evidence of prejudice. (Apx. Tab D). The court ignored Citigroup's plea and issued a new opinion on rehearing that makes no mention of the prejudice requirement. By doing so, the court of appeals violated Texas Rule of Appellate Procedure 47.1, which also applies in mandamus proceedings. Tex. R. App. P. 52.8(d). Rule 47.1 requires a court of appeals to address every issue raised and

necessary to final disposition of an appeal. West *v. Robinson,* 180 S.W.3d 575,576 (Tex. 2005) (per curiam).

2. The federal cases relied on by the court of appeals, holding that prejudice need not be shown, represent an untenable minority position.

The court of appeals apparently decided to remain silent on the prejudice issue based on two federal court decisions cited in its opinion: *Gilmore v. Shearson/American Express, Inc.*, 811 F.2d 108 (2d Cir. 1987), *overruled on other grounds, McDonnell Douglas Fin. Corp. v. Pennsylvania* **Power** *& Light Co.*, *849* F.2d 761, 765 (2d Cir. 1988); and *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d *388* (7th Cir. 1995). In those cases, the courts held that a finding of express waiver does not require a determination that the party resisting arbitration suffered prejudice. *Gilmore,* 811 F.2d at 112-13; *Cabinetree*, 50 F.3d at 390.

The "no prejudice" rule in *Gilmore* and *Cabinetree* has never been embraced in Texas and should be rejected because it represents an untenable minority position in the federal system. As one commentator observed, *Cabinetree*'s "focus on choice, election, and manifest intent not to arbitrate without requiring a contemporaneous finding of prejudice constitutes a significant departure from other circuits' precedent. . . ." Matthew Forsythe, *The Treatment of Arbitration Waivers Under Federal Law*, 55 Disp. Resol. J. 8, 16 (May 2000); see *also* James W. Davis, *When Does A Party Waive Its Right To Enforce Arbitration?*, *63* Ala. Law. 43, 48, n.6 (2002) ("The *Cabinetree* opinion . . . held that the party opposing arbitration did not have to prove that it suffered prejudice in

order to defeat arbitration on grounds of waiver. In this respect, *Cabinetree* is inconsistent with Alabama and Eleventh Circuit law.").

Indeed, the *Cabinetree* court itself conceded that it was in the minority. 50 F.3d at 390. Federal and state courts – including the California Supreme Court – have squarely rejected *Cabinetree's* holding that no prejudice must be shown. See, *e.g., In re* Fleming *Companies, Inc.*, 325 B.R. 687, 692 (D. Del. 2005); *LAS, Inc. v. Mini-Tankers, USA, Inc.*, 796 N.E.2d 633, 637-38 (Ill. App. 2003); *St.* Agnes *Med. Ctr. v. Pacificare & California,* 82 P.3d 727, 738 & n.6 (Cal. 2003); *cf. In re Cingular Wireless, L.L.C.,* 2003 WL 1884184, at *1 (Tex. App.—Beaumont 2003, orig. proceeding) (defendant's removal to federal court did not waive right to arbitration absent showing of prejudice). If the California Supreme Court has rejected the no-prejudice rule, then certainly it should not be the law in Texas either.

3. In any event, this case does not involve express waiver.

Even if express waiver were a viable exception to the prejudice requirement, this case would not fit within that exception. The Nickells have taken an implied waiver case and labeled it "express waiver" in an effort to avoid the requirement that they show prejudice, because they cannot do so.

Waiver generally takes one of three forms: (i) express renunciation; (iii) silence or inaction for such an unreasonable period of time as to indicate an intention to waive the right; or (iii) other conduct that misleads the opposite party into an honest belief that the waiver was intended or assented to. *Alford, Meroney & Co. v. Rowe*, 619

S.W.2d 210, 213-14 (Tex. Civ. App.—Amarillo 1981, writ ref'd n.r.e.) (cited with approval in *Tenneco Inc. v. Enterprise Prod Co.*, 925 S.W.2d 640, 643 (Tex. 1996)). The court of appeals incorrectly held that Citigroup expressly renounced its right to arbitration even though Citigroup – after the case was removed to federal court – specifically reserved its right to require "that Plaintiffs arbitrate, not litigate, their claims." (R. Vol. II, p. 539, n. 1).

"Expressly" means in "direct or unmistakable terms; explicitly; definitely; directly," and "renounce" means to "make an affirmative declaration of abandonment." *See* Black's Law Dictionary 522, 1166 (1979). Thus, "express renunciation" requires a specific, direct, and unequivocal declaration that the party is giving up the right in question. Citigroup's statements in its federal court pleadings not only do not expressly waive arbitration, but they expressly preserve the right to arbitrate. *See Gilmore*, 811 F.2d at 109 (finding express waiver based on "express withdrawal of an earlier motion to compel arbitration that waived any contractual right [defendant] might have had to compel arbitration of those claims"); *see also Walker v. Countrywide Credit Indus., Inc.*, 2004 WL 246406, at *2 (N.D. Tex. 2004) ("Countrywide's assertion that this Court may properly consider claims brought under California state laws does not constitute an express waiver of arbitration."); *Holm-Sutherland Co., Inc. v. Town of Shelby*, 982 P.2d 1053, 1056 (Mont. 1999) ("There is no evidence that Sutherland ever explicitly waived, orally ox in writing, its contractual right to demand arbitration, which would normally be the means of accomplishing an

express waiver of that right.").

Because Citigroup did not expressly renounce its right to arbitration, any finding of waiver would have to be based on the "intentional conduct inconsistent with claiming that right" prong of the waiver test. *See Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003). Waiver by conduct requires proof of prejudice. A.B.F. *Freight Sys., Inc.* v. *Austrian Import Serv., Inc.*, 798 S.W.2d 606, 610 (Tex. App.—Dallas 1990, writ denied). And in the arbitration setting, there must be evidence of sufficient prejudice to overcome the strong presumption against waiver. *Wilson,* 196 S.W.3d at 783. The Nickells produced neither evidence of express waiver nor evidence of prejudice sufficient to overcome the strong presumption against waiver.

4. **Citigroup is entitled to enforce Mr. Nickell's arbitration agreements.**

The Nickells erroneously argued below that Mr. Nickell has no arbitration agreement with Citigroup. Mr. Nickell signed two agreements containing arbitration provisions. The first, between Smith Barney and Robert Nickell, specifically states that it "shall enure to the benefit of Smith Barney's present organization, and any successor organization or assigns." (R. Vol. I, p. 48). The second, between Robert A. Nickell and SSB, likewise provides that it "shall inure to the benefit of SSB's present organization and any successor organization or assigns." (R. Vol I, p. 50). SSB and Smith Barney are predecessors of Citigroup Global Markets, which is a subsidiary of Citigroup Inc. (R. Vol. I, p. 44). In fact, the Nickells have judicially admitted that Citigroup Global Markets is the corporate successor to SSB and that Citigroup Inc. is

Citigroup Global Markets' parent company. (R. Vol. I, pp. 1-3, 9, 17).

As with any contract, a successor-in-interest can be bound to the terms of the arbitration agreement signed by a predecessor-in-interest. See In re *Kepka,* 178 S.W.3d 279, 295 (Tex. App.—Houston [1st Dist.] 2005, orig. proceeding). It follows that the same successor-in-interest may enforce the arbitration agreement. See *Lippus v. Dahlgren Mfg.* Co., *644* F. Supp. 1473, 1482 (E.D.N.Y. 1986). Thus, Citigroup may enforce the terms of arbitration agreements to which its predecessors in interest were parties. See *In re GTE Mobilnet of South Texas Ltd. Partnership, 123* S.W.3d *795,* 798 (Tex. App.—Beaumont 2003, no pet.).[6]

CONCLUSION AND PRAYER

The notion that express waiver of the right to arbitration may be established without a showing of prejudice cannot be squared with this Court's adoption of the majority position that the FAA requires a showing of prejudice. Moreover, even if "express waiver" were a viable exception to the prejudice requirement, this case would not fit within that exception. Accordingly, Relators pray that the Court grant this Petition for Writ of Mandamus, vacate the trial court's order denying Relators' motion to compel arbitration, and order the trial court to grant the motions to compel arbitration. Relators also request any other relief to which they may be justly entitled.

---

[6] Below, the Nickells relied on *Milnes v. Salomon, Smith Barney, Inc.*, 2002 WL 31940718 (N.Y. Sur. 2002). But the arbitration clause in *Milnes* limited its applicability to predecessor firms. Id at *14. Moreover, in *Milnes* there was no evidence that the accountholder received the arbitration agreement or that it was otherwise called to the accountholder's attention. Also, the case involved funds of a decedent and, under New York law, such cases must proceed in Surrogate Court. *Milnes*, 2002 WL 31940718 at *5, 7.

Respectfully submitted,

By: Robert Gilbreath

ROBERT B. GILBREATH
State Bar No. 07904620

CHARLES A. GALL
State Bar No. 07281500

JAMES W. BOWEN
State Bar No. 02723305

JENKENS & GILCHRIST,
a Professional *Corporation*
1445 Ross Avenue, Suite 3700
Dallas, Texas 75202
(214) 855-4500
(214) 855-4300 (fax)

ATTORNEYS FOR RELATORS

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF DALLAS §

Before me, the undersigned authority, on this day personally appeared James W. Bowen, known to me to be the person whose name is subscribed below and who, upon his oath and based upon personal knowledge, stated that (i) he is one of the attorneys of record for Relators in this original proceeding and in the underlying case; (ii) the facts stated in this Petition are true and correct; and (iii) the items contained in the Appendix and in the Record for this mandamus proceeding are true and correct copies of the original documents.

James W. Bowen

SUBSCRIBED AND SWORN TO BEFORE ME by James W. Bowen on this 10th day of October, 2006, to certify which, witness my hand and seal of office.

RUTHANN SKIPPER
My Commission Expires
September 4, 2009

Notary Public, State of Texas

CERTIFICATE OF SERVICE

This is to certify that on the 10th day of October 2006, a true and correct copy of this Petition for Writ of Mandamus and the Appendix and Record were forwarded to those identified below by hand delivery.

Real Parties in Interest:

Richard A. Sayles
Will S. Snyder
SAYLES LIDJI & WERBNER
4400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270

Respondents:

The Honorable Sally Montgomery,
County Court at Law No. **3**
Dallas County Records Bldg.
500 Main Street, Sixth Floor
Dallas County, Texas 75202

Court of Appeals for
the Fifth District of lexas
George L. Allen, Sr. Courts Bldg.
600 Commerce Street, Second Floor
Dallas, Texas 75202

Robert B. Gilbreath

APPENDIX

Tab A: Trial court's order denying Relators' motion to compel arbitration.

Tab B: Court of appeals' June 28,2006 opinion and judgment.

Tab C: Court of Appeals' September 26, 2006 opinion and judgment on rehearing.

Tab D: Relators' motion for rehearing in the court of appeals.

Tab E: Real Parties' response to Relators' motion for rehearing in the court of appeals.

10/03/05

CAUSE NO. 04-04729-C

ROBERT A. NICKELL and NATALIE BERT NICKELL,	§	IN THE COUNTY COURT
Plaintiffs,	§	
vs.	§	AT LAW NO. 3
CITIGROUP GLOBAL MARKETS, INC. (f/k/a SALOMON SMITH BARNEY, INC.) and CITIGROUP, INC. and STACY OELSEN,	§	
Defendants,	§	DALLAS COUNTY, TEXAS

ORDER DENYING DEFENDANTS' MOTION TO COMPEL ARBITRATION AND STAY PROCEEDINGS

CAME ON FOR CONSIDERATION the Motion of Defendants Citigroup Global Markets, Inc. (f/k/a Salomon Smith Barney, Inc.), Citigroup, Inc., and Stacy Oelsen to Compel Arbitration and Stay Proceedings (the "Motion"). The Court, having considered all relevant pleadings, submissions, and applicable authorities and, after conducting a full hearing on the Motion, is of the opinion that the Motion should be DENIED in its entirety.

SO ORDERED.

October 3, 2005

Sally L. Montgomery

THE HONORABLE SALLY MONTGOMERY
Judge Presiding

WRIT OF MANDAMUS DENIED; Opinion issued June 28,2006

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-05-01430-CV

IN RE CITIGROUP GLOBAL MARKETS, INC., CITIGROUP, INC., and STACY OELSEN, Relators

Original Proceeding from the County Court at Law No. 3
Dallas County, Texas
Trial Court Cause No. 04-04729-C

OPINION

Before Justices Morris, O'Neill, and Mazzant
Opinion By Justice O'Neill

By way ofpetition for writ of mandamus and interlocutory appeal, Citigroup Global Markets, Inc., Citigroup Inc., and Stacy Oelsen (collectively "CGM") appeal from the trial court's order denying their motion to compel arbitration. By order dated January 3,2006, the Court consolidated the two proceedings. In a single point of error, Citigroup contends the trial court abused its discretion in denying its motion to compel arbitration. We overrule Citigroup's point of error, deny its petition for writ of mandamus, and dismiss the appeal.

Factual Background

Robert A. and Natalie Bert Nickell each had accounts with CGM, formerly known as Salomon Smith Barney, Inc. In connection with their accounts, the Nickells signed agreements containing arbitration clauses. Based on research reports issued by a CGM analyst, the Nickells

invested a substantial amount of money in WorldCom Inc. in 2000 and 2001. Subsequently, WorldCom filed for bankruptcy.

On April 23,2004, the Nickells filed a lawsuit against CGM alleging claims for fraud, breach of fiduciary duty, negligence, gross negligence, negligent misrepresentation, and violations of the Texas Securities Act. At the time the Nickells filed their lawsuit, WorldCom had emerged from bankruptcy. On July 9, 2004, CGM removed the case to the United States District Court for the Northern District of Texas on the ground that it was related to the WorldCom bankruptcy proceedings. The Nickells filed a motion to remand the case back to state court on August 9,2004. CGM then moved to transfer the case to the United States District Court for the Southern District of New York to the multidistrict litigation court. CGM filed a letter with the Judicial Panel on Multidistrict Litigation (JPML) requesting that this case be treated as a "tag-along" action to the multidistrict litigation proceedings involving WorldCom. The JPML granted CGM's request and issued a final transfer order on December 6,2004.

In the MDL court, the Nickells responded to the MDL court's order to show cause why certain remand opinions do not require denying the Nickells' motion to remand for lack of subject matter jurisdiction. The MDL court requested CGM to also file a response to the remand issue. Instead of filing a response to show remand was improper, CGM filed an agreed order stipulating to a remand back to state court. On February 14, 2005, the New York federal court signed the agreed remand order.

Once back in state court, CGM filed a motion to compel arbitration under both the FAA and TAA. Following a hearing, the trial court denied the motion. CGM filed a petition for writ of mandamus and an interlocutory appeal of the denial of its motion to compel arbitration. We consolidated the two proceedings into one cause number and now consider the propriety of each

proceeding.

Procedural Background

Initially, we must decide whether this case is properly before us by way of petition for writ of mandamus or interlocutory appeal. The supreme court has instructed appellate courts that when, as here, a parallel mandamus proceeding and an interlocutory appeal are brought under the Federal Arbitration Act (FAA) and the Texas Arbitration Act (TAA), we should consolidate the two proceedings and consider them together. In re *Valero* ***Energy*** *Corp.*, 968 S.W.2d 916,916-17 (Tex. 1998) (orig. proceeding).[1] When a request to arbitrate under the FAA is denied, the appellate remedy is through **mandamus.** ***Jack*** *B. Anglin Co.* ***v.*** *Tipps*, 842 S.W.2d 266,272 (Tex. 1992). In contrast, review of denial of a motion to compel arbitration under the Texas Arbitration Act is by way of interlocutory appeal. Id. The FAA preempts all otherwise applicable state laws, including the TAA. In ***re Merrill Lynch,*** 131 S.W.3d 709, 712 (Tex. App.–Dallas 2004, orig. proceeding).

The FAA governs disputes that concern a contract evidencing a transaction involving interstate commerce. *Tipps*, 842 S.W.2d at 269-70. The contract in this case involved the sale of securities and interstate commerce. Accordingly, the FAA governs this case to the exclusion of the TAA. ***See*** In *re Merrill Lynch*, 131 S.W.3d at 712.

Standard of Review

We review a petition for writ of mandamus under a clear abuse of discretion standard. ***Walker*** **v.** ***Packer,*** 827 S.W.2d 833,839-40 (Tex.1992). **A** clear abuse of discretion occurs when the trial court errs in analyzing or applying the law to the facts or when the trial court has but one

---

[1] In *Valero*, the relator filed a petition for writ of mandamus and interlocutory appeal from the denial of its motion to compel arbitration under both the FAA and TAA. *Valero*, 968 S.W.2d at 916. The court of appeals denied the petition for writ of mandamus but stayed the trial court proceedings pending consideration of the interlocutory appeal. While the interlocutory appeal was pending in the court of appeals, the relator filed a petition for writ of mandamus in the supreme court. Recognizing that the court of appeals's resolution of the interlocutory appeal might render the mandamus petition moot, the supreme court dismissed the petition for writ of mandamus. *Id.* at 917. Instructing courts of appeals to consolidate the dual proceedings in these circumstances merely saves judicial resources. *Id.* Contrary to CGM's contention, the supreme court did not hold in *Valero* that a party is entitled to both avenues of appeal

reasonable decision and does not make that decision. *Id.* at 840. Mandamus is appropriate only when the relator has no adequate remedy on appeal. *Id.*

Waiver of Right to Arbitrate

In its sole point of error, CGM contends the trial court erred in denying its motion to compel arbitration, In their response to CGM's motion to compel, the Nickells alleged that CGM waived its right to arbitration by removing the case to federal court and then transferring it to the MDL court.

The issue of arbitrability under the FAA is a matter of federal substantive law. *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395,402-05, (1967); *Miller Brewing Co. v. Fort Worth Distributing Co.*, 781 F.2d 494, 497 n. 4 (5th Cir.1986) (rejecting the appellee's citation to Texas law on the issue of whether it had waived the right to compel arbitration). Therefore, federal law comprising generally accepted principles of contract law controls the question of arbitrability.

Waiver is the intentional relinquishment of a known right or conduct inconsistent with claiming that right. *Jernigan v. Langley*, 111 S.W.3d 153,156 (Tex. 2003) (per curiam). Like any other contract right, the right to arbitrate can be waived. *Miller Brewing Co.*, 781 F.2d at 497. Waiver may be express or implied. A party may waive its right to arbitration by expressly indicating that it wishes to resolve the case in a judicial forum. *In re Currency Conversion Fee Antitrust Litigation, 361* F.Supp. 2d 237,257 (S.D.N.Y. 2005). Alternatively, a party may waive its right to arbitrate by taking an action inconsistent with that right to the opposing party's prejudice. *Miller Brewing Co. ,781* F.2d at 497.

Delay in filing a motion to compel arbitration, without more does not ordinarily result in waiver of a party's right to arbitrate. *Gilmore v. Shearson/American Express, Inc.*, 811 F.2d 108, 112 (2nd Cir. 1987), *overruled on other grounds by McDonnell Douglas Fin. Corp. v. Pennsylvania*

Power & Light Co., 849 F.2d 761,765 (2nd Cir. 1988). However, "[a] party to arbitration does not have a right to the pre-trial discovery procedures that are used in a case at law." Miller ***Brewing*** *Co.*, 781 F.2d at 498. **An** attempt to go to the merits and still retain the right to arbitration is clearly impermissible. Id; *Graig Shipping Co.* v. *Midland Overseas Shipping Corp.* 259 F.Supp. 929, 931 (S.D. N.Y. **1966).**

The Nickells contend CGM repeatedly stated its,intention to pursue this case in a judicial forum. By making express statements of its desire for a judicial forum, the Nickells contend, CGM expressly waived its right to arbitration. We agree.

CGM sent a letter to the JPML requesting that this case be transferred to the MDL court as a "tag-along" action to the WorldCom litigation. In the letter, counsel for CGM made the following statements:

> The claims asserted in this action are also substantively identical to fraud claims asserted against the Citigroup Defendants in the Corrected First Amended Class Action complaint in *In* re *WorldCom, Inc.* Securities Litigation, in which Judge Cote has supervised thirteen months of fact discovery.
>
> As the MDL Panel has found, centralization of WorldCom-related actions in the Southern District of New York "will serve the convenience of the parties **and** witnesses and promote the just and efficient conduct of the litigation."

The focus of these statements is litigation. CGM requested the JPML to transfer the case for purposes of litigation only, not arbitration. In this letter, CGM expressed to the JPML its desire to litigate this case.

In its motion to stay proceedings pending an order on its motion to transfer to the MDL court, CGM stated "[t]here is almost complete overlap in the parties and witnesses who would be required to engage in document production and depositions during pre-trial discovery." "Consolidation of pretrial proceedings will prevent an enormous duplication of discovery, waste of

judicial resources, and inconsistent rulings that would inevitably follow were each action to proceed separately." Again, the focus was litigation. Arbitration does not involve judicial resources.

In its reply to the Nickells' response to the motion to stay proceedings pending an order on its motion to transfer to the MDL court, CGM stated, "given the amount of discovery taken in the MDL Proceeding, the parties to this case could much *more rapidly prepare this case for trial* in the *MDL* Proceeding." (emphasis added). "A transfer will streamline pre-trial matters, avoid duplication, conserve resources, and hurry the case towards trial." CGM again expressed its intent to litigate and prepare the case for trial.

CGM also **stated** in its brief in opposition to the Nickells' motion to remand that it "merely wish[es] to see this action adjudicated in the most efficient and logical location." (emphasis added.) "By proceeding in the consolidated actions in the MDL Court, Plaintiffs will have the benefit of discovery, other litigation material generated by plaintiffs who have more at stake than they do, and the fact that those proceedings are rapidly moving forward." Here again, CGM's statements emphasized litigation. "Adjudicate" means to rule upon judicially. BLACK'S LAW DICTIONARY **45** (8th ed. 2004).

Finally, CGM filed a memorandum of law in opposition to the Nickells' request to vacate the transfer order. CGM stated in the memorandum that "the judges of the Southern District of New York definitely decided that, for purposes of pretrial proceedings, WorldCom analyst research claims against the Citigroup Defendants will be litigated in the WorldCom Consolidated Proceeding before the MDL Court." This cases involves a WorldCom analyst research claim.

Where a party chooses a judicial forum, he waives his right to arbitration. In *Glimore*, the court held that the defendant expressly waived its right to arbitrate by filing a motion to compel arbitration and subsequently withdrawing the motion. *Gilmore*. 811 F.2d at 112. The defendant in

Gilmore demonstrated its desire to resolve the dispute in a judicial forum by withdrawing its motion to compel arbitration. Like the defendant in *Gilmore*, CGM also chose to resolve the dispute in a judicial forum. CGM demonstrated its choice for a judicial forum through the arguments made in its removal and transfer motions,.

In *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabintry, Inc.*, 50 F.3d 388 (7th Cir. 1995), Kraftmaid removed the case to federal court instead of moving for arbitration. "By doing so without at the same time asking the district court for an order to arbitrate, [Kraftmaid] manifested an intention to resolve the dispute through the processes of the federal court." Id. at 390. "Parties know how important it is to settle on a forum at the earliest possible opportunity, and the failure of either of them to move promptly for arbitration is powerful evidence that they made their election against arbitration." Id. at 391. Instead of promptly moving for arbitration, CGM first removed the case to federal court and then sought transfer to the MDL court for purposes of adjudicating the case.

CGM relies upon several cases to support its contention that removal alone does not waive a party's right to arbitration. While we agree with CGM's contention, we disagree that the cases relied upon are applicable to the facts of this case. CGM's cases all involve implied waiver based upon conduct. In ***Walker v. J.C. Bradford*** & Co., 938 F.2d 575 (5th Cir. 1991), J.C. Bradford & Co. filed a motion to compel arbitration after engaging in limited discovery. *Id.* at 576. The court held that such limited court activity did not constitute waiver of the defendant's right to arbitrate. Id. at 577. Unlike this case, Walker does not contain any statements by the defendant expressing its intent to pursue the case in a judicial forum. The ***Walker*** court noted that courts "do not look kindly upon parties who use federal courts to advance their causes and then seek to finish their suits in the alternate fora that they could have proceeded to immediately." *Id.* at 577

In *Williams v. Cigna Financial* Advisors, Inc., 56 F.3d 656, 661-62 (5th Cir. 1995), the

defendant removed the case to federal court, answered the complaint, filed a counterclaim, and engaged in limited discovery. Id. at 661. Cigna filed a motion to compel arbitration as soon as it discovered that the case was subject to arbitration. *Id.* at 661-62. Unlike CGM in this case, Cigna was unaware that the case was arbitrable until after it had removed the case to federal court, answered the lawsuit, and engaged in limited discovery.

In re Winter Park Const., Inc., *30* S.W.3d 576 (Tex. App.–Texarkana 2000, orig. proceeding) is also distinguishable. The plaintiff filed suit in state court. Winter Park filed amotion to abate the case to allow for arbitration. *Id.* at 578. Before the trial court ruled, Winter Park removed the case to federal court. The federal court remanded the case back to state court. Winter Park then unilaterally pursued arbitration. *Id.* The trial court issued a temporary injunction prohibiting Winter Park from proceeding with the arbitration. The supreme court held that Winter Park did not waive its right to arbitration. *Id.* at 579. Unlike CGM, however, Winter Park asserted its right to arbitration from the beginning and never stated its intent to pursue the case in a judicial forum.

CGM also relies on In ***re Koch*** *Indus.*, Inc., *49* S.W.3d 439 (Tex. App.–San Antonio 2001, orig. proceeding). In that case, Koch Industries removed the case to federal court, filed an answer and counterclaim, and participated in discovery. Koch's counterclaim related to the existence of the arbitration agreement. *Id.* at 446. The discovery was limited to the non-arbitrable issue of diversity jurisdiction. In contrast to the facts in our case, Koch did not make statements expressing a choice to pursue the litigation in a judicial forum.

Although removal related conduct alone does not constitute waiver, removal for the stated purpose ofpursuing litigation does constitute waiver. We hold that CGM expressly waived its right to arbitration by seeking to litigate the case in the MDL court, a judicial forum. In so holding, we rely not solely upon CGM's act of removing the case to federal court and then transferring it to the

MDL court, but primarily upon its written explanations for the removal and transfer. CGM expressly stated its desire to pursue the case in a judicial forum. We conclude the trial court did not abuse its discretion in denying CGM's motion to compel arbitration. We overrule CGM's sole point of error.

Conclusion

We deny CGM's petition for writ of mandamus. We dismiss CGM's interlocutory appeal.

MICHAEL J. O'NEILL
JUSTICE

051430F.P05

WRIT OF MANDAMUS DENIED; Opinion on Motion for Rehearing issued September 26,2006

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-05-01430-CV

IN RE CITIGROUP GLOBAL MARKETS, INC., CITIGROUP, INC., and STACY OELSEN, Relators

Original Proceeding from the County Court at Law No. 3
Dallas County, Texas
Trial Court Cause No. 04-04729-C

OPINION ON MOTION FOR REHEARING

Before Justices Morris, O'Neill, and Mazzant
Opinion By Justice O'Neill

We withdraw this Court's opinion dated June 28,2006 and vacate the judgment of that date. Citigroup Global Markets, Inc., Citigroup Inc., and Stacy Oelsen (collectively "CGM") filed a motion for rehearing. In its motion, CGM contends, among other things, that the Court must address whether CGM is entitled to relief under the Texas Arbitration Act (TAA). We overrule CGM's motion for rehearing. However, we write to address CGM's contention with respect to the TAA.

By way of petition for writ of mandamus and interlocutory appeal, CGM appeals from the trial court's order denying its motion to compel arbitration. By order dated January 3, 2006, the Court consolidated the two proceedings. In a single point of error, CGM contends the trial court abused its discretion in denying its motion to compel arbitration. We overrule CGM's point of error,

deny its petition for writ of mandamus, and dismiss the interlocutory appeal.

Factual Background

Robert A. and Natalie Bert Nickell each had accounts with CGM, formerly known as Salomon Smith Barney, Inc. In connection with their accounts, the Nickells signed agreements containing arbitration clauses. Based on research reports issued by a CGM analyst, the Nickells invested a substantial amount of money in WorldCom Inc. in 2000 and 2001. Subsequently, WorldCom filed for bankruptcy.

On April 23,2004, the Nickells filed a lawsuit against CGM alleging claims for fraud, breach of fiduciary duty, negligence, gross negligence, negligent misrepresentation, and violations of the Texas Securities Act. At the time the Nickells filed their lawsuit, WorldCom had emerged from bankruptcy. On July 9, 2004, CGM removed the case to the United States District Court for the Northern District of Texas on the ground that it was related to the WorldCom bankruptcy proceedings. The Nickells filed a motion to remand the case back to state court on August 9,2004. CGM then moved to transfer the case to the United States District Court for the Southern District of New York to the multidistrict litigation court. CGM filed a letter with the Judicial Panel on Multidistrict Litigation (JPML) requesting that this case be treated as a "tag-along" action to the multidistrict litigation proceedings involving WorldCom. The JPML granted CGM's request and issued a final transfer order on December 6,2004.

In the MDL court, the Nickells responded to the MDL court's order to show cause why certain remand opinions do not require denying the Nickells' motion to remand for lack of subject matter jurisdiction. The MDL court requested CGM to also file a response to the remand issue. Instead of filing a response to show remand was improper, CGM filed an agreed order stipulating to a remand back to state court. On February 14, 2005, the New York federal court signed the

agreed remand order.

Once back in state court, CGM filed a motion to compel arbitration under both the FAA and TAA. Following a hearing, the trial court denied the motion. CGM filed a petition for writ of mandamus and an interlocutory appeal of the denial of its motion to compel arbitration. We consolidated the two proceedings into one cause number and now consider the propriety of each proceeding.

Procedural Background

Initially, we must decide whether this case is properly before us by way of petition for writ of mandamus, interlocutory appeal, or both. The supreme court has instructed appellate courts that when, as here, a parallel mandamus proceeding and an interlocutory appeal are brought under the Federal Arbitration **Act** (FAA) and the Texas Arbitration Act (TAA), we should consolidate the two proceedings and consider them together. In ***re Valero Energy Corp.,968*** S.W.2d 916, 916-17 (Tex. 1998) (orig. proceeding).[1] When a request to arbitrate under the FAA is denied, the appellate remedy is through mandamus. ***Jack*** B. ***Anglin Co. v.*** *Tipps*, 842 S.W.2d 266,272 (Tex. 1992). In contrast, review of denial of a motion to compel arbitration under the TAA is by way of interlocutory appeal. ***Id.***

The FAA governs disputes that concern a contract evidencing a transaction involving interstate commerce. ***Tipps,*** 842 S.W.2d at 269-70. The contract in this case involved the sale of securities and interstate commerce. Accordingly, the FAA applies to this case. The FAA, however, does not necessarily preempt the TAA. ***See*** In ***re D. Wilson*** *Const.* ***Co.,*** 196 S.W.3d 774,779 (Tex.

---

[1] In *Valero*, the relator filed a petition for writ of mandamus and interlocutory appeal from the denial of its motion to compel arbitration under both the FAA and TAA. *Valero*, 968 S.W.2d at 916. The court of appeals denied the petition for writ of mandamus but stayed the trial court proceedings pending consideration of the interlocutory appeal. While the interlocutory appeal was pending in the court of appeals, the relator filed a petition for writ of mandamus in the supreme court. Recognizing that the court of appeals's resolution of the interlocutory appeal might render the mandamus petition moot, the supreme court dismissed the petition for writ of mandamus. *Id.* at 917, Instructing courts of appeals to consolidate the dual proceedings in these circumstances merely saves judicial resources. Id.

2006) (orig. proceeding). In the circumstances of this case, however, it is not necessary to determine whether the FAA preempts the TAA. For the following reasons, we conclude the TAA does not apply to this case.

A choice of law provision in a contract may render the TAA inapplicable, *See In re J.D. Edwards World Solutions Co.*, 87 S.W.3d 546,551 (Tex. 2002). In that case, J.D. Edwards entered into an agreement with Doskocil Manufacturing Co. Their agreement contained an arbitration clause and a choice of law provision that provided that Colorado law would govern the parties' agreement. *Id.* at 548. Doskocil filed a lawsuit and J.D. Edwards filed a motion to compel arbitration pursuant to the FAA. When the trial court denied its motion in part, J.D. Edwards sought mandamus relief. Doskocil argued that the TAA applied and that the proper remedy was by way of interlocutory appeal. The supreme court disagreed. The court held that where the parties provide in their contract that another state's substantive law will apply to their agreement, there is no contractual or legal basis to invoke the TAA. *Id.* at 551.

J.D. Edwards is applicable to the facts of this case. The agreements signed by the Nickells and CGM provided that New York law governed their agreements. CGM sought arbitration pursuant to both the FAA and TAA. CGM never sought arbitration under New York law. The parties agreed that New York law would govern any dispute arising from their agreements. Thus, there is no contractual or legal basis for applying the TAA to the facts of this case. *See J.D. Edwards, 87* S.W.3d at 551. Accordingly, we dismiss CGM's interlocutory appeal.

Standard of Review

We review a petition for writ of mandamus under a clear abuse of discretion standard. *Walker v. Packer*, 827 S.W.2d 833, 839-40 (Tex. 1992). A clear abuse of discretion occurs when the trial court errs in analyzing or applying the law to the facts or when the trial court has but one

reasonable decision and does not make that decision. Id. at ***840.*** Mandamus is appropriate only when the relator has no adequate remedy on appeal. *Id.*

Waiver of Right to Arbitrate

In its sole point of error, CGM contends the trial court erred in denying its motion to compel arbitration. In their response to CGM's motion to compel, the Nickells alleged that CGM waived its right to arbitration by removing the case to federal court and then transferring it to the MDL court.

The issue of arbitrability under the FAA is **a** matter of federal substantive law. ***Prima Paint*** Corp. ***v. Flood & Conklin Mfg.*** *Co.*, **388** ***U. S. 395, 402-05,*** (1967); *Miller Brewing* ***Co.*** v. ***Fort Worth Distributing*** *Co.*, 781 F.2d ***494, 497*** n. 4 (5th Cir.1986) (rejecting the appellee's citation to Texas law on the issue of whether it had waived the right to compel arbitration). Therefore, federal law comprising generally accepted principles of contract law controls the question of arbitrability.

Waiver is the intentional relinquishment of a known right or conduct inconsistent with claiming **that** right. ***Jernigan v. Langley,*** *111* S.W.3d 153, 156 (Tex. **2003)** (per curiam). Like any other contract right, the right to arbitrate can be waived. *Miller* ***Brewing*** Co., 781 F.2d at 497. Waiver may be express or implied. A party may waive its right to arbitration by expressly indicating that it wishes to resolve the case in **a** judicial forum. In ***re*** *Currency* ***Conversion Fee Antitrust Litigution,*** 361 F.Supp. ***2d*** 237,257 (S.D.N.Y. 2005). Alternatively, a party may waive its right to arbitrate by taking an action inconsistent with that right to the opposing party's prejudice. ***Miller*** *Brewing Co.*, 781 F.2d at 497.

Delay in filing a motion to compel arbitration, without more does not ordinarily result in waiver of a party's right to arbitrate. *Gilmore* v. *Shearson/American* ***Express,*** *Inc.*, 811 F.2d 108, 112 (2nd Cir. 1987), *overruled on other grounds* by *McDonnell* ***Douglas*** *Fin.* ***Corp. v.*** *Pennsylvania*

Power & Light Co., 849 F.2d 761, 765 (2nd Cir. 1988). However, "[a] party to arbitration does not have a right to the pre-trial discovery procedures that are used in a case at law." Miller *Brewing* Co., 781 F.2d at 498. An attempt to go to the merits and still retain the right to arbitration is clearly impermissible. Id; *Graig Shipping Co. v. Midland Overseas Shipping Corp.* 259 F.Supp. 929, 931 (S.D. N.Y. 1966).

The Nickells contend CGM repeatedly stated its intention to pursue this case in a judicial forum. By making express statements of its desire for a judicial forum, the Nickells contend, CGM expressly waived its right to arbitration. We **agree.**

CGM sent a letter to the JPML requesting that this case be transferred to the MDL court as a "tag-along" action to the WorldCom litigation. In the letter, counsel for CGM made the following statements:

> The claims asserted in this action are also substantively identical to fraud claims asserted against the Citigroup Defendants in the Corrected First Amended Class Action complaint in ***In re WorldCom, Inc. Securities Litigation,*** in which Judge Cote has supervised thirteen months of fact discovery.
>
> As the MDL Panel has found, centralization of WorldCom-related actions in the Southern District of New York "will serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation."

The focus of these statements is litigation. CGM requested the JPML to transfer the case for purposes of litigation only, not arbitration. In this letter, CGM expressed to the JPML its desire to ***litigate*** this case.

In its motion to stay proceedings pending an order on its motion to transfer to the MDL court, CGM stated "[t]here is almost complete overlap in the parties and witnesses who would be required to engage in document production and depositions during pre-trial discovery." "Consolidation of pretrial proceedings will prevent an enormous duplication of discovery, waste of

judicial resources, and inconsistent rulings that would inevitably follow were each action to proceed separately." Again, the focus was litigation. Arbitration does not involve judicial resources.

In its reply to the Nickells' response to the motion to stay proceedings pending an order on its motion to transfer to the MDL court, CGM stated, "given the amount of discovery taken in the MDL Proceeding, the parties to this case could much ***more rapidly prepare this case for trial*** in the MDL Proceeding." (emphasis added). "A transfer will streamline pre-trial matters, avoid duplication, conserve resources, and hurry the case towards trial." CGM again expressed its intent to litigate and prepare the case for trial.

CGM also stated in its brief in opposition to the Nickells' motion to remand that it "merely wish[es] to see this action ***adjudicated*** in the most efficient and logical location." (emphasis added.) "By proceeding in the consolidated actions in the MDL Court, Plaintiffs will have the benefit of discovery, other litigation material generated by plaintiffs who have more at stake than they do, and the fact that those proceedings are rapidly moving forward." Here again, CGM's statements emphasized litigation. "Adjudicate" means to rule upon judicially. BLACK'S LAW DICTIONARY 45 (8th ed. 2004).

Finally, CGM filed a memorandum of law in opposition to the Nickells' request to vacate the transfer order. CGM stated in the memorandum that "the judges of the Southern District of New York definitely decided that, for purposes of pretrial proceedings, WorldCom analyst research claims against the Citigroup Defendants will be litigated in the WorldCom Consolidated Proceeding before the MDL Court." This cases involves a WorldCom analyst research claim.

Where a party chooses a judicial forum, he waives his right to arbitration. In ***Glimore,*** the court held that the defendant expressly waived its right to arbitrate by filing a motion to compel arbitration and subsequently withdrawing the motion. *Gilmore*. 811 F.2d at 112. The defendant in

Gilmore demonstrated its desire to resolve the dispute in a judicial forum by withdrawing its motion to compel arbitration. Like the defendant in Gilmore, CGM also chose to resolve the dispute in a judicial forum. CGM demonstrated its choice for a judicial forum through the arguments made in its removal and transfer motions,.

In *Cabinetree* of Wisconsin. Inc. v. *Kraftmaid* Cabinty, *Inc.*, 50 F.3d 388 (7th Cir. 1995), Kraftmaid removed the case to federal court instead of moving for arbitration. "By doing so without at the same time asking the district court for an order to arbitrate, [Kraftmaid] manifested an intention to resolve the dispute through the processes of the federal court." Id. at 390. "Parties know how important it is to settle on a forum at the earliest possible opportunity, and the failure of either of them to move promptly for arbitration is powerful evidence that they made their election against arbitration." Id. at 391. Instead of promptly moving for arbitration, CGM first removed the case to federal court and then sought transfer to the MDL court for purposes of adjudicating the case.

CGM relies upon several cases to support its contention that removal alone does not waive a **party's** right to arbitration. While we agree with CGM's contention, we disagree that the cases relied upon are applicable to the facts of this case. CGM's cases all involve implied waiver based upon conduct. In ***Walker*** v. *J.C.* Bradford & Co., 938 F.2d 575 (5th Cir. 1991), J.C. Bradford & Co. filed a motion to compel arbitration after engaging in limited discovery. Id. at 576. The court held that such limited court activity did not constitute waiver of the defendant's right to arbitrate. Id. at 577. Unlike this case, *Walker* does not contain any statements by the defendant expressing its intent to pursue the case in a judicial forum. The Walker court noted that courts "do not look kindly upon parties who use federal courts to advance their causes and then seek to finish their suits in the alternate fora that they could have proceeded to immediately." Id. at 577

In *Williams v.* Cigna Financial *Advisors, Inc.*, 56 F.3d 656, 661-62 (5th Cir. 1995), the defendant removed the case to federal court, answered the complaint, filed a counterclaim, and engaged in limited discovery. Id. at 661. Cigna filed a motion to compel arbitration as soon as it discovered that the case was subject to arbitration. *Id.* at 661-62. Unlike CGM in this case, Cigna was unaware that tho case was arbitrable until after it had removed the case to federal court, answered the lawsuit, and engaged in limited discovery.

In *re* Winter *Park Const., Inc.*, 30 S.W.3d 576 (Tex. App.–Texarkana 2000, orig. proceeding) is also distinguishable. The plaintiff filed suit in state court. Winter Park filed a motion to abate the case to allow for arbitration. Id. at 578. Before the trial court ruled, Winter Park removed the case to federal court. The federal court remanded the case back to state court. Winter Park then unilaterally pursued arbitration, Id. The trial court issued a temporary injunction prohibiting Winter Park from proceeding with the arbitration. The supreme court held that Winter Park did not waive its right to arbitration. *Id.* at 579. Unlike CGM, however, Winter Park asserted its right to arbitration from the beginning and never stated its intent to pursue the case in a judicial forum.

CGM also relies on In *re Koch Indus., Inc.*, 49 S.W.3d 439 (Tex. App.–San Antonio 2001, orig. proceeding). In **that** case, Koch Industries removed the case to federal **court,** filed an answer and counterclaim, and participated in discovery. Koch's counterclaim related to the existence of the arbitration agreement. *Id.* at 446. The discovery was limited to the non-arbitrable issue of diversity jurisdiction. In contrast to the facts in our case, Koch did not make statements expressing a choice to pursue the litigation in a judicial forum.

Although removal related conduct alone does not constitute waiver, removal for the stated purpose of pursuing litigation does constitute waiver. We hold that CGM expressly waived its right to arbitration by seeking to litigate the case in the MDL court, a judicial forum. In so holding, we

rely not solely upon CGM's act of removing the case to federal court and then transferring it to the MDL court, but primarily upon its written explanations for the removal and transfer. CGM expressly stated its desire to pursue the case in a judicial forum. We conclude the trial court did not abuse its discretion in denying CGM's motion to compel arbitration. We overrule CGM's sole point of error.

Conclusion

We deny CGM's petition for writ of mandamus. We dismiss CGM's interlocutory appeal.

MICHAEL J. O'NEILL
JUSTICE

051430HF.P05

09-26-06

Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

CITIGROUP GLOBAL MARKETS, INC., CITIGROUP, INC., *AND* STACY OELSEN, Appellants

No. 05-05-01430-CV V.

ROBERT A. NICKELL AND NATALIE BERT NICKELL, Appellees

Appeal from the County Court at Law No. 3 of Dallas County, Texas. (Tr.Ct.No. 04-04729-C).

Opinion delivered by Justice O'Neill, Justices Morris and Mazzant, participating.

Based on the Court's opinion of this date, the appeal is DISMISSED.

It is ORDERED that appellees Robert A. Nickell and Natalie Bert Nickel1 recover their costs of this appeal from appellants Citigroup Global Markets, Inc., Citigroup, Inc., and Stacy Oelsen.

Judgment entered September 26,2006.

MICHAEL J. O'NEILL
JUSTICE

05-05-01430-CV

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS

IN RE CITIGROUP GLOBAL MARKETS, INC. (f/k/a SALOMON SMITH BARNEY, INC.), CITIGROUP INC., and STACY OELSEN

RELATORS'/APPELLANTS' MOTION FOR REHEARING

ROBERT B. GILBREATH
State Bar No. 87904620

CHARLES A. GALL
State Bar No. 07281500

JAMES W. BOWEN
State Bar No. 02723305

JENKENS & GILCHRIST,
a Professional Corporation
1445 Ross Avenue, Suite 3700
Dallas, Texas 75202
(214) 855-4500
(224) 855-4300 (fax)

COUNSEL FOR RELATORS/APPELLANTS

POINTS RELIED ON FOR REHEARING

1. The Court erred in holding that CGM waived its right to arbitration under the Federal Arbitration Act despite the absence of any evidence that the Nickells suffered sufficient prejudice to overcome the strong presumption against waiver.

2. The Court erred in holding that CGM expressly waived its right to arbitration.

3. The Federal Arbitration Act does not preempt the Texas Arbitration Act under the circumstances presented in this case. If the Court does not grant CGM's request for mandamus relief under the FAA, then it cannot dismiss CGM's interlocutory appeal and must decide whether the trial court was required to compel arbitration under the TAA.

ARGUMENT AND AUTHORITIES

I. Introduction.

The Court's holding in this case—that CGM expressly waived its right to arbitration—is incorrect and vulnerable for two reasons:

- Two days after the Court issued its opinion, the Texas Supreme Court reiterated, for the second time in three months, that a defendant's waiver of the right to arbitration under the Federal Arbitration Act cannot be established without a showing that the plaintiff suffered "sufficient prejudice to overcome the strong presumption against waiver." *In re D. Wilson Const.* Co., ___ S.W.3d _____, 49 Tex. Sup. Ct. J. 909, 2006 WL 1792021, at *6 (Tex. June 30,2006) (copy attached).

- CGM's briefing demonstrated that the Nickells did not suffer any prejudice.[1] The Court was required to, but did not, address CGM's prejudice arguments.

[1] Petition for Writ of Mandamus at pgs. 16-20; Appellants'/Relators' Reply Brief at pgs. 9-11.

West v. *Robinson,* 180 S.W.3d *575,* 576 (Tex. 2005) (per curiam) (reversing and remanding because court of appeals did not address every issue raised and necessary to final disposition of appeal, as required by Tex. R. **App.** P. 47.1); see *also* Tex. *R.* **App.** P. 52.8 (d) ("Rule 47 is applicable to an order or opinion by a court of appeals [in an original proceeding]. . . .").

2. A defendant may not be held to have waived its right to arbitration absent proof that the plaintiff suffered prejudice.

On June 30,2006, the Texas Supreme Court issued its decision in *Wilson.* On the same day, the Supreme Court denied the motion for rehearing in In ***re*** *Vesta Ins.* ***Group,*** *Inc.,* __ S.W.3d ___, 49 Tex. Sup. Ct. J. 445, 2006 WL 662335, at *2-3 (Tex. Mar. 17, 2006) (copy attached). In both cases, the Supreme Court held that a party resisting arbitration on waiver grounds in a case governed by the Federal Arbitration Act must establish "sufficient prejudice to overcome the strong presumption against waiver." ***Wilson,*** 200G WL 1792021r, at *6; *Vesta,* 2006 WL 662335, at ***3.**

Wilson reiterated what the Court said three months earlier in *Vesta:* waiver of the right to arbitrate will not be found unless the defendant has "'substantially invoked the judicial process to its opponent's detriment.'" ***Wilson,*** 2006 WL 1792021, at *6. For example, the defendants in ***Wilson*** did not waive their rights to arbitration because the plaintiff failed to demonstrate how the defendants' pursuit of litigation "worked to [the plaintiffs] detriment." *Id.* Likewise, the defendants in ***Vesta,*** who litigated in the trial court for two years and who initiated extensive discovery, did not waive their rights to arbitration because the plaintiff failed to establish sufficient prejudice to overcome the

strong presumption against waiver. *Vesta,* 2006 WL ***662335,*** at *2-3.

3. The two federal cases holding that prejudice need not be shown represent an untenable minority position.

When the Court authored its opinion in this case, it did not have the benefit of the Supreme Court's reaffirmation of the prejudice requirement in ***Wilson.*** The Court ***may*** have chosen not to address prejudice based on two federal court decisions cited in its opinion: ***Gilmore*** v. *Shearson/American* ***Express,*** *Inc.*, 811 F.2d 108 (2d Cir. 1987), ***overruled on other grounds,*** *McDonnell* ***Douglas Fin. Corp. v. Pennsylvania Power & Light Co., 849*** F.2d 761, *765* (2d Cir. 1988); and ***Cabinstree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc., 50*** F.3d 388 (7th Cir. 1995). In those cases, the courts held that a finding of express waiver does not require a determination that the party resisting arbitration suffered prejudice. ***Gilmore,*** 811 F.2d at 112-13; ***Cabinetree,*** 50 F.3d ***at*** 390.

The "no prejudice" rule in ***Gilmore*** and ***Cabinetree*** has never been embraced in Texas and represents an untenable minority position in the federal system. **As** one commentator observed, Cabinetree's "focus on choice, election, and manifest intent not to arbitrate without requiring a contemporaneous finding of prejudice constitutes a significant departure from other circuits' precedent. . . ." Matthew Forsythe, ***The Treatment of Arbitration Waivers Under Federal Law,*** 55 Disp. Resol. J. 8, 16 (May 2000).[2] Indeed, the ***Cabinetree*** court itself conceded that it was in the minority. 50 F.3d

[2] ***See also*** James ***W.*** Davis, ***When Does A Party Waive Its Right To Enforce Arbitration, 63*** Ala. ***Law.*** 43, 48, n.6 (2002) ("The *Cabinetree* opinion, in which the court held that the moving **party** had waived arbitration, also held that the **party** opposing arbitration did not have to prove that it suffered prejudice in order to defeat arbitration on grounds of waiver. In this respect, *Cabinetree* is inconsistent with Alabama and Eleventh Circuit law.").

at 390. Federal and state courts have squarely rejected *Cabinetree's* holding that no prejudice must be shown. *See, e.g., In re Fleming Companies, Inc.*, *325 B.R.* 687, 692 (D. Del. 2005); LAS, *Inc.* v. *Mini-Tankers, USA, Inc., 796* N.E.2d **633,** 637-38 (111. **App.** 2003); *St. Agnes Med. Ctr. v. Pacificare of California, 82* P.3d *727,* 738 & n.6 (Cal. 2003); *cf. In re Cingular Wireless, L.L.C.,* 2003 *WL* 1884184, at *1 (Tex. App.—Beaumont 2003, orig. proceeding) (defendant's removal to federal court did not waive right to arbitration absent showing of prejudice).

4. This case does not involve an express waiver of the right to arbitration.

Even if express waiver were a viable exception to the prejudice requirement, this case would not fit within that exception. Waiver of a known right generally takes one of three forms: (i) express renunciation; (iii) silence or inaction for such an unreasonable period of time as to indicate an intention to waive the right; or (iii) other conduct that misleads the opposite party into an honest belief that the waiver was intended or assented to. *Alford, Meroney & Co. v. Rowe*, 619 S.W.2d 210, 213-14 (Tex. Civ. App.—Amarillo 1981, writ ref d n.r.e.) (cited with approval in *Tenneco Inc.* v. *Enterprise Prod. Co., 925* S.W.2d 640, 643 (Tex. 1996)). The Court incorrectly held that CGM expressly renounced its right to arbitration even though CGM—after the case was removed to federal court—specifically resewed its right to require "that Plaintiffs arbitrate, not litigate, their claims." (R. Vol. TI, p. 539, n. 1).

"Expressly" means in "direct or unmistakable terms; explicitly; definitely; directly," and "renounce" means to "make an affirmative declaration of abandonment." ***See*** Black's Law Dictionary 522, 1166 (1979). Thus, "express renunciation" requires a

specific, direct, and unequivocal statement that the party is giving up the right in question. CGM's statements in its federal court pleadings do not rise to that level. ***See*** *Gilmore,* 811 F.2d at 109 (finding express waiver based on "express withdrawal of an earlier motion to compel arbitration that waived any contractual right [defendant] might have had to compel arbitration of those claims"); *see also Walker* ***v.*** *Countrywide Credit Indus., Inc.*, 2004 WL 246406, at *2 (N.D. Tex. 2004) ("Countrywide's assertion that this Court may properly consider claims brought under California state laws does not constitute an express waiver of arbitration."); ***Holm-Sutherland*** Co., *Inc.* ***v.*** *Town* ***of*** *Shelby, 982* P.2d 1053, 1056 (Mont. 1999) ("There is no evidence that Sutherland ever explicitly waived, orally or in writing, its contractual right to demand arbitration, which would normally be the means of accomplishing an express waiver of that right.").

Because CGM did not expressly renounce its right to arbitration, any finding of waiver would have to be based on the "intentional conduct inconsistent with claiming that right" prong of the waiver test. ***See*** *Jernigan v. Langley*, 111 S.W.3d 153, 156 (Tex. 2003). Waiver by conduct requires proof of prejudice. *A.B.F. Freight Sys., Inc. v. Austrian Import Serv., Inc.*, *798* S.W.2d 606, 610 (Tex. App.—Dallas 1990, writ denied). And in the arbitration setting, there must be evidence of sufficient prejudice to overcome the strong presumption against waiver. *Wilson,* 2006 WL 1792021, at *6; *Vesta,* 2006 WL 662335, at *3. As demonstrated in CGM's prior briefing, the Nickells did not produce sufficient evidence of prejudice to overcome the strong presumption against waiver.

To sum up, the notion that express waiver of the right to arbitration may be

established without a showing of prejudice cannot be squared with the Texas Supreme Court's adoption of the majority position that the FAA requires a showing of prejudice. Moreover, even if "express waiver" were a viable exception to the prejudice requirement, this case would not fit within that exception. Accordingly, the Court should reconsider its decision not address the prejudice issue and hold that in light of the Nickells' failure to establish any prejudice, the trial court abused its discretion in denying CGM's motion to compel arbitration.

5. The Court must address CGM's request for relief under the Texas Arbitration Act if it does not grant CGM mandamus relief under the FAA.

In *Wilson,* the Supreme Court held that the FAA does not preempt the TAA under circumstances like those presented in this case. *Wilson,* 2006 WL 1792021, at *2-3. Accordingly, if the Court does not grant CGM mandamus relief under the FAA, then the Court must decide whether CGM is entitled to relief under the TAA, as requested in its interlocutory appeal. *West v.* Robinson, 180 S.W.3d 575, 576 (Tex. 2005) (per curiam) (reversing and remanding because court of appeals did not address every issue raised and necessary to final disposition of appeal, as required by Tex. R. App. P. 47.1). For the reasons set forth in this motion and in CGM's prior briefing, the Court should hold that CGM did not waive its right to arbitration and is entitled to compel arbitration under the **TAA,**

BRAYER

CGM prays that the Court grant this motion for rehearing, vacate its opinion and judgment of June 28, 2006 and, pursuant to the Federal Arbitration Act, issue a writ of

mandamus compelling the trial court to set aside her Order of October 3, 2005 and to enter an order granting the Arbitration Motion in its entirety. Alternatively, CGM requests that the Court grant this motion for rehearing, vacate its opinion and judgment of June 28, 2006 and, pursuant to the Texas Arbitration **Act,** render judgment reversing, vacating, or setting aside the trial court's Order of October 3, 2005. CGM also requests any other relief to which it may be justly entitled.

Respectfully submitted,

Robert B. Gilbreath
State Bar No. 07904620

Charles **A.** Gall
State Bar No. 07281500

James W. Bowen
State Bar No. 02723305

JENKENS & GILCHRIST,
a *Professional* Corporation
1445 Ross Ave., Suite 3200
Dallas, Texas *75202*
(214) 855-4500
(214) 855-4300 **(fax)**

ATTORNEYS FOR
RELATORS/APPELLANTS

CERTIFICATE OF SERVICE

I hereby certify that a **true** and correct **copy** of the above and foregoing has been served by hand delivery upon the following counsel of record and Respondent on this 12th day of July, 2006:

Counsel for Real Parties in Interest:

Richard **A. Sayles**
Will S. Snyder
Sayles Lidji & Werbner
4400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270

Respondent:

The Honorable Sally L. Montgomery
Judge of the County Court at Law No. **3**
601 Records Building
Dallas, Texas 75202

Robert B. Gilbreath

05-05-01430-CV

IN THE COURT OF APPEALS
FOR THE FIFTH DISTRICT OF TEXAS
AT DALLAS

IN RE CITIGROUP GLOBAL MARKETS, INC. (f/k/a SALOMON SMITH BARNEY, IC.), CITIGROUP, INC., AND STACY OELSEN

RESPONSE TO RELATORS'/APPELLANTS' MOTION FOR REHEARING

Richard A. Sayles
State Bar No, 17697500
Will S. Snyder
State Bar No.00786250
Stacy D. Simon
State Bar No. 00788413
Sayles | Werbner
A Professional Corporation
4400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270
(214) 939-8700
(214) 939-8787 Facsimile

COUNSEL FOR REAL PARTIES IN INTEREST
ROBERT A. NICKELL AND NATALIE BERT NICKELL

TABLE OF AUTHORITIES

FEDERAL CASES

STATE CASES

In the
Court of Appeals
Fifth District of Texas at Dallas

No. 05-05-01430-CV

IN RE CITIGROUP GLOBAL MARKETS, INC. (F/K/A SALOMON SMITH BARNEY, INC.), CITIGROUP, INC., AND STACEY OELSEN, RELATORS

RESPONSE TO RELATORS'/APPELLANTS' MOTION FOR REHEARING

COME NOW, Real Parties in Interest Robert A. Nickell and Natalie Bert Nickell (the "Nickells"), and file this Response to Relators'/Appellants' Motion for Rehearing (hereafter, Relators' Motion for Rehearing").[1] In support, the Nickells respectfully would show the Court as follows:

I. INTRODUCTION AND SUMMARY OF ARGUMENTS

Relators' Motion for Rehearing maintains that this Court erred in holding that they expressly waived their alleged arbitration rights and, even if an expressed waiver occurred, erred in denying mandamus relief without a finding that the Nickells suffered prejudice. On these grounds, Relators have asked the Court to reconsider and reverse its June 28,2006 Memorandum Opinion ("June 28 Opinion") denying them mandamus relief under the Federal Arbitration Act ("FAA"). They contend that the Court's reconsideration of its waiver findings under the FAA is especially warranted in light of the Texas Supreme Court's June 30, 2006 decision in *In re D. Wilson Construction Company,* 196 S.W.3d 774 (Tex. 2006). But, as they *have* repeatedly failed to do in past pleadings and letter briefs, Relators again fail to acknowledge that Texas waiver cases are inapplicable under an FAA/mandamus analysis. Moreover, even if Texas waiver cases applied under an FAA/mandamus analysis, *Wilson* says nothing at all about waiver of arbitration

[1] For purposes of this response, Citigroup Global Markets, Inc., Citigroup, Inc., and Stacy Oelsen will be referred to collectively as "Relators".

rights that could conceivably disturb this Court's well-reasoned June 28 Opinion. Among other things, *Wilson* is an implied waiver case and is no different from the many other implied waiver cases repeatedly cited by Relators in previous briefing; the same cases that were thoroughly considered and rejected by this Court as inapplicable in view of the overwhelming evidence of Relators' express waiver.

As an additional point of error, Relators argue that the Court erred in determining that the FAA preempted the Texas Arbitration Act ("TAA"). Accordingly, they argue that if the Court again rejects their non-waiver arguments under an FAA/mandamus analysis (for the third time), it should consider those arguments *for a fourth time* under a TAA/interlocutory appeal analysis.[2] As detailed further below, *the* Nickells actually agree that the Court should consider modifying its June 28 Opinion to the extent that it suggests a finding of preemption, which is the only extent to which *Wilson* might warrant that opinion's modification. However, the Nickells strongly contest the notion that *Wilson* and the facts of this case compel the Court to reconsider the merits of Relators' non-waiver arguments under the TAA. *Wilson* does not contain such a mandate and, even if it did, Relators would still have to establish that the TAA applies, which they have not ever attempted to do and cannot do now.

[2] As the Court will recall, it has twice considered the merits of Relators' non-waiver arguments and has twice denied them, first in the November 17, 2005 Memorandum Opinion (written by Justice O'Neill while sitting on a panel with Justices Whittington and Lang), then in the June 28 Opinion (written by Justice O'Neill while sitting on the present panel).

II. ARGUMENT AND AUTHORITIES

1. The Court did not err in holding that Relators expressly *waived* their alleged arbitration rights under the FAA.

a. *The Court need not consider Wilson or any other Texas cases in its waiver analysis under the FAA.*

As the Nickells have pointed out in previous briefing, Texas courts have the unquestioned authority to determine which law applies to litigants' disputes.[3] Recognizing that authority, this Court determined that the "issue of arbitrability under the FAA is a matter of federal substantive law" and "federal law comprising generally accepted principles of contract law controls the question of arbitrability."[4] The Court even cited a Fifth Circuit case for the proposition that, when the FAA applies, "the appellee's citation to Texas law on the issue of whether it had waived the right to compel arbitration" should be rejected.[5]

After determining that federal substantive law applied to the waiver issues, this Court went on to analyze those issues under several federal cases, including but not limited *to In re Currency Conversion Fee Antitrust Litigation, Gilmore v. Shearson/American Express, Inc., Miller Brewing Co. v. Fort Worth Distributing Co.,* and *Cabintree of Wisconsin, Inc. v. Kraftmaid Cabintree, Inc.*[6] In the pleadings they filed with the trial court and this Court, the Nickells have cited all four of these cases in support of their waiver positions, including the

---

[3] See The Nickells' April 7,2006 Letter Brief at 3 (citing *Torrington v. Stutzman, 46* S.W.3d 829, 848 (Tex. 2000) (attached at Tab C to the Nickells' Motion for Rehearing tiled on July 12,2006)).

[4] June 28 Opinion at 4.

[5] *Id.* (citing *Miller Brewing Co. v. Fort Worth Distributing Co.*, 781 F.2d 494,497 a 4) (5th Cir.) 1986).

[6] See June 28 Opinion at 4-7 (citing and favorably discussing *In re Currency Conversion Fee Antitrust Litigation, 361* F.Supp.2d *237,257* (S.D.N.Y. 2005); *Gilmore v. Shearson/American Express, Inc.*, 811 F.2d 108, 112 (2d Cir. 1987), overruled on other grounds by *McDonnell Douglas Fin. Corp. v. Pennsylvania Power & Light,* 849 F.2d 761, 765 (2d. Cir. *1988); Miller Brewing Co. v. Fort Worth Distributing Co., 781* F.2d *494,497* n. 4 *(5" Cir. 1986); and Cabintree of Wisconsin, Inc. v. Kraftmaid Cabintree, Inc.*, 50 F.3d 388,390(7" Cir. 1995)).

position that no showing of prejudice is required when there is an express waiver (which Relators have called the "no prejudice" rule).[7]

Not surprisingly, despite multiple opportunities, Relators have scarcely addressed these federal express waiver cases. When they have, they've merely cited Texas cases and claimed that two of the aforementioned federal cases contravene Texas law. In fact, they argue that the trial court abused its discretion by relying on the "no prejudice" rule, yet their trial court briefing spends merely two paragraphs discussing that rule and addresses only the *Cabintree* case by asserting that it is "directly at odds with [holdings] made by both the Fifth Circuit and the Texas courts, including the Texas Supreme Court."[8] Consequently, and despite the June 28 Opinion's clear determination that Texas law does not apply to the Court's waiver analysis, Relators have persisted in their stubborn and misguided application of Texas law. Their Motion for Rehearing repeatedly cites Wilson's implied waiver discussion and declares that the "no prejudice" rule embraced in *Cabintree* and *Gilmore* has "never been embraced in Texas."[9]

Relators have also tried to marginalize Cabintree as some sort of renegade opinion. They argued this point in their trial court pleadings, abandoned it in their appellate and mandamus pleadings, then resurrected it in their recent Motion for Rehearing.[10] Notwithstanding that Relators cannot properly argue this point to this Court for the first time in their Motion for

---

[7] See, *e.g.*, January 5,2006 Brief of Appellees at iii (where the Nickells' Index of Authorities shows pages where these cases were cited in support of their waiver arguments to this Court); December 15,2005 Record in Support of Petition for Writ of Mandamus. Vol. 1 at 60 (where Table of Authorities for the Nickells' "Response to Defendants' Motion to Compel Arbitration" shows pages where these cases were cited in support of their waiver arguments to the trial court).

[8] December 15,2005 Record in Support of Petition for Writ of Mandamus, Vol. 1 at 111.

[9] Relators' Motion for Rehearing at 3.

[10] See Relators' December 15, 2005 Record in Support of Petition for Writ of Mandamus, Vol. 1 at 111 (where Relators' reply brief to the trial court argues that *Cabintree* has not been followed by some courts); Relators' December 15, 2005 mandamus petition at v (showing that *Cabintree* is mentioned nowhere in the Index of Authorities); Relators' December 16,2005 appellate brief at v (showing that *Cabintree* is mentioned nowhere m the Index of Authorities); and Relators' January 26, 2006 reply brief at iii (showing that *Cabintree* is mentioned nowhere in the Table of Authorities); Relators' Motion for Rehearing at 3-4 (criticizing *Cabintree*)).

Rehearing, *Cabintree* was just one of the federal express waiver cases relied on by the Nickells and the Court, and it remains good law. Other federal cases relied upon by the Nickells, such as *Gilmore* and *Century Indemnity v. Viacom International, Inc.*, also hold that no showing of prejudice is required when the party moving for arbitration has expressly waived its arbitration rights.[11] As such, it would be error to determine that the trial court clearly abused its discretion by relying on those cases – especially when Relators errantly relied on mostly Texas implied waiver cases and only briefly addressed one of the several federal express waiver cases cited by the Nickells. Indeed, on two previous occasions this Court has similarly determined those federal express waiver cases to be persuasive after carefully analyzing them, the federal cases cited by Relators, and the evidence of Relators' express waiver.[12] Accordingly, any finding that the trial court abused its discretion would be tantamount to a finding that this Court also abused its discretion...twice. To the contrary, the trial court and this Court carefully considered all of the issues and arguments presented and rendered well-reasoned decisions on the issues of waiver and arbitrability. Moreover, despite Relators' contention that this Court's June 28 Opinion violates TEX. R. APP. P. 47.1, that opinion thoroughly addressed all issues "raised and necessary to final disposition" of Relators' interlocutory appeal and mandamus petition.[13]

b. ***Relators erroneously contend that Wilson requires a showing of prejudice before express waiver can be found***

Even if Texas law and *Wilson* did apply to the Court's waiver analysis under the FAA, the Nickells would not shy away from *Wilson*. In fact, not knowing that Relators were preparing

---

[11] See *Gilmore*, 811 F.2d at 112-113; *Century Indemnity v. Viacom International, Inc.*, 2003 WL 402792, * 4 (S.D.N.Y. Feb. 20, 2003) (cited in January 5, 2006 Brief of Appellees at 20, 30 and stating that "a party may expressly waive its right to arbitration, and if so, prejudice need not be shown").

[12] See, *e.g.*, January 5, 2006 Appendix in Support of Appellees' Brief at 149 (Tab 6) (Court's November 16, 2005 Memorandum Opinion denying Relators' first mandamus petition); June 28 Opinion at 7-8 (distinguishing *Walker v. J.C. Bradford & Co.*, 938 F.2d 575(5th Cir. 1991), and *Williams v. Cigna Financial Advisors, Inc.*, 56 F.3d 656 (5th Cir. 1995), two federal cases relied upon by Relators).

[13] TEX. R APP. P. 47.1; see Relators' Motion for Rehearing at 1-2 (asserting that the Court's June 28 Opinion does not satisfy the requirements of TEX. R. APP. P. 47.1).

a Motion for Rehearing, the Nickells prepared and filed their own Motion for Rehearing, calling *Wilson* to the Court's attention for its proposition that the FAA does not preempt the TAA – the only proposition from *Wilson* that has any application here.[14]

Relators continue to ignore the factual context of this case, as well as the relevant jurisprudence, by arguing that "[t]he Court erred *in* holding that CGM waived its right to arbitration under the Federal Arbitration Act despite the absence of any evidence that the Nickells suffered sufficient prejudice."[15] They are now attempting to dress up *Wilson* as a white knight arriving just in time – two days after the Court's June 28 Opinion - *to* save this argument. But *Wilson,* like the many other Texas cases Relators have relied on for this proposition, is just another implied waiver case and has nothing to do with express waiver.[16]

Wilson addresses only the question of implied waiver based on inferences from the parties' pretrial conduct. Unlike this case, it did not involve a party's express declarations opting to litigate the action in a judicial forum.[17] The decision dedicates most of its attention to the trial court's finding that the arbitration contracts were ambiguous and spends only a few paragraphs addressing the waiver issues. In fact, it does not even mention its rejection of the waiver argument – which the trial court accepted – as a ground for granting mandamus relief." In short, *Wilson* is clearly not the saving case that Relators make it out to be. Similarly, *In re Vesta Insurance Group, Inc.*, 192 S.W. 3d 759 (Tex. 2006), which Relators also invoke as support,

[14] See the Nickells' July 12,2006 Motion for Rehearing, filed the same afternoon as Relators' Motion for Rehearing.

[15] Relators' Motion for Rehearing at I.

[16] *See id.;* Nickell Motion for Rehearing at 2-5.

[17] *In re D. Wilson Construction* Co., 196 S.W. 3d 774,783 (Tex. *2006).*

[18] *Wilson* at 783-84 (concluding that "the trial court abused its discretion by finding the contracts ambiguous" and mentioning nothing about its finding *of* waiver).

bears no weight here because it is not an express waiver case either.[19] It and Wilson can join the long line of implied waiver cases that this Court has considered and rejected as factually and legally inapposite.

Relators have repeatedly mischaracterized this case as one of implied waiver by consistently urging the Court to consider irrelevant cases and the existence of my prejudice suffered by the Nickells.[20] The distinction between express and implied waiver of a right to arbitrate cannot legitimately be disputed. This Court wisely recognized and embraced this distinction in its June 28 Opinion, as many others have done."[21] However, Relators conveniently ignore it and conflate the two types of waiver, urging that the Nickells' alleged failure to prove prejudice in this express waiver case fails to overcome the presumption favoring arbitration.[22]

At the most basic level, it makes no sense to require a party opposing arbitration to prove prejudice where, as here, the party seeking arbitration has expressly and deliberately communicated its intent to adjudicate the dispute in a judicial forum. When Relators affirmatively sought and obtained another forum for this dispute and repeatedly communicated their desire to litigate in numerous pleadings served on the Nickells and submitted to judicial

---

[19] Rather, the court analyzed the waiver question in light of two years of litigation in the trial court. *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 763 (Tex. 2006).

[20] See December 15,2005 Petition for Writ of Mandamus at 10-20; Brief of Appellants at 11-18,

[21] The Court made clear:

> Waiver is the intentional relinquishment of a known right or conduct inconsistent with that right. Like any other contract right, the right to arbitrate can be waived. Waiver may be express or implied. A party may wdve its right to arbitration by expressly indicating that it wishes to resolve the case in a judicial forum [express waiver). *Alternatively*, a party may waive its right to arbitrate by taking an action inconsistent with that right to the opposing party's prejudice.

June 28 Opinion *at* pp. 4-5 (emphasis added and citations omitted). Although Texas law does not apply to the waiver issues, it clearly embraces this distinction. See, *e.g.*, *Johnson v. Structured & Asset Sews., LLC*, 148 S.W.3d 711 (Tex. App.—Dallas 2004), *Spain v. Houston Oilers, Inc.*, 593 S.W.2d 746,747-48 (Tex. Civ. App.—Houston [14th Dist.] 1979) ("The right to have a dispute submitted to arbitration, like any other contractual right, may be waived either expressly or implicitly.")

[22] Relators' Motion for Rehearing at 1.

authorities, *they* voluntarily relinquished their alleged arbitration rights. Requiring the Nickells to prove they were prejudiced by Relators' express abandonment of their alleged arbitration rights defies well-established law – much of which was cited and/or discussed in the Court's June 28 Opinion – and logic. And while Relators cleverly asserted that the "no prejudice" rule has "never been embraced in Texas," they do not reveal that it has never been rejected either.[23] Indeed, even if Texas law applied to the Court's waiver analysis under the FAA (and it does not), Relators have been unable to cite a single Texas case where the court rejected the "no prejudice" rule after finding that a party had expressly waived its contractual arbitration rights.

The fallacy of Relators' position that prejudice must be shown despite an express waiver is highlighted by the following question: If Relators had announced to the trial court that they wished *to* waive any contractual arbitration rights they had and to litigate this dispute, and the Nickells did not oppose that request, would the trial court have been compelled to deny the request on the ground that no one had shown prejudice? Of course not. As with any other contractual rights, a party's express waiver of its contractual arbitration rights logically terminates its ability to re-invoke those rights, irrespective of the other party's proof of prejudice.

c. ***Based on Relators' repeated statements to the Nickells and judicial authorities, the Court correctly concluded that they expressly waived their alleged arbitration rights.***

Aside from applying the wrong law, conflating express and implied waiver, and dressing up *Wilson* as something it isn't, Relators posit that "even if express waiver were a viable exception to the prejudice requirement, this case would not fit within that exception."[24] In support, they cite yet another Texas case and unveil a new test for express waiver that they have not offered in any prior briefing, at the trial court hearing on Defendants' Motion to Compel

[23] See Motion for Rehearing at 3.

[24] Relators' Motion for Rehearing at 4.

Arbitration, or at the April 5, 2006 *oral* argument before this Court.[25] They urge that, under this new test, they did not "expressly renounce" their alleged rights to arbitrate.[26] These arguments should be rejected in their entirety because, among other things, they are based on facts not before the Court, were derived from Texas waiver cases, and were not raised by points of error in Relators' appellate or mandamus briefs.[27]

Contrary to Relators' assertions, the evidence on which this Court relied wholly supports its finding of express waiver and its sound denial of the requested mandamus relief. This Court reviewed the abundant evidence demonstrating that Relators, instead of seeking arbitration, sought and obtained the removal and transfer of this action to federal court for its inclusion in and consolidation with the federal multidistrict litigation proceedings involving WorldCom.[28] Relators consistently urged that granting such transfer and consolidation would promote judicial economy in discovery, pretrial matters, and trial.[29] In its Motion for Rehearing, Relators virtually ignore the Court's analysis of their own statements and make no attempt to dispute the evidence on which the Court based its express waiver finding. Instead, they apply their own new test and claim simply that their "statements in their federal court pleadings do not rise to [the] level [of express renunciation, or a specific, direct, and unequivocal statement that the party is giving up its right in question.]"[30]

---

[25] See *id* at 4-5 (urging for the first time the waiver standards enumerated in *Alford, Meroney & Co. v. Rowe*, 619 S.W.2d 213-14 *(Tex.* Civ. App.—Amarillo *1981,* writ ref d n.r.e.) and articulating a novel definition for "expressly" and "express renunciation").

[26] See *id.*

[27] *McGuire v. Federal Deposit Ins, Corp.*, 561 S.W.2d 213, 216 (Tex. Civ. App.—Houston [1st Dist.] 3977, no *writ)* ("The Appellees made no assertion of this proposition prior to their motion for rehearing, and the matter cannot be raised at this point in the proceedings.").

[28] See June 28 Opinion at pp. *4-9.*

[29] See *id*

[30] Relators' Motion far Rehearing *at 5.*

Relators seem to argue that only a party's explicit statement that it "hereby abandons and/or waives the right to arbitrate" would constitute express waiver; yet, as Relators must concede, no court has articulated that strict standard. Instead, as this Court correctly acknowledged, the key inquiry is whether a party's words expressly communicate its desire to resolve the case in court rather than through arbitration.[31] Despite Relators' sudden affinity for arbitration, their express statements and procedural choices overwhelmingly establish that they planned to litigate until they were unexpectedly forced to remand this case back to the Dallas County Court at Law, where it was originally filed.

2. **Contrary to Relators' contention, the Court need not separately consider and rule on their interlocutory appeal under the TAA after denying them mandamus relief under the FAA,**

   a. *Relators have repeatedly admitted that no subsequent, separate analysis is necessary under the TAA.*

In a stark reversal of position, Relators now maintain that "if the Court does not grant Relators mandamus relief under the FAA, then the Court must decide whether Relators are entitled to relief under the TAA, as requested in their interlocutory appeal."[32] Here again, Relators take a new position not articulated in any prior pleading. To the contrary, their April 17, *2006* letter brief to the Court asserts multiple times that "the interlocutory appeal under the TAA, and along with it the jurisdictional, preemption, and choice of law issues, can be rendered 'immaterial' if the Court decides the issues under the FAA."[33] Moreover, Relators "agree[d]

[31] See June28 Opinion at 5-6, 8.

[32] Relators' Motion for Rehearing at 6.

[33] Relators' April 17,2006 letter brief *at 2* (attached at Tab E to the Nickells' Motion for Rehearing). See *also id.* at 1 ("[Appellants *[sic]* . . . suggest] to the Court that, if it were to take up Appellants' mandamus petition consolidated with and into this appeal, it could avoid *all* of the procedural and jurisdictional arguments before the Court."); *id.* at 2 ("If the Court simply rules on the mandamus petition, however, it need not reach the preemption question."); *id.* at 4 ("Fortunately, the Court can avoid these issues completely if it considers the mandamus petition on its merits under the FAA."); *id.* ("Finally, by ruling on the mandamus petition, the Court may ignore the jurisdictional issues presented by Appellees. . . . When Texas courts consider FAA issues on the merits, they frequently find the parallel direct appeal under the TAA to be 'immaterial.'" (citations omitted)).

that, if the Court were to decide the issues in the mandamus petition on their merits, the interlocutory appeal would be immaterial."[34] Incredibly, this Court did exactly as Relators requested (decided the mandamus petition on the merits), yet they now claim it erroneously refused to consider their interlocutory appeal because the mandamus decision does not suit them.[35] The Court will recall Relators' similar conduct in filing a second mandamus petition when the Court's ruling on the merits of the first one did not suit them.[36]

Putting aside their own prior admissions that the Court need not analyze the merits of their interlocutory appeal under the TAA, Relators offer no compelling reason whatsoever to warrant a separate review under the TAA. Significantly, *Wilson* itself does not require it.[37] Regarding this issue, *Wilson* instructs only that, on the specific facts of that case, (1) the FAA did not preempt the TAA and (2) the court of appeals had jurisdiction under both laws and erred

---

[34] *Id.* at 4 (bold emphasis added). In fact, the Nickells agree that this Court properly dismissed the interlocutory appeal under the TAA after deciding the merits of the mandamus petition under the FAA. *See* Nickell Motion for Rehearing at 6-7.

[35] Consequently, Relators' newly-crafted position that the Court must now consider the merits of the appeal under the TAA, even after it has decided them under the FAA and denied relief, constitutes a blatant attempt by Relators to have a second bite at the apple. This harkens back to late 2005 when Relators, dissatisfied with this Court's order denying its first mandamus petition, filed a second, near-identical petition seeking the same relief.

[36] *See, e.g.,* January 5, 2006 Brief of Appellees at 1-3; January 5, 2006 Appendix in Support of Appellees' Brief at 149 (Tab 6) (Court's November 16, 2005 Memorandum Opinion denying Relators' first mandamus petition).

[37] The law review article, upon which Relators have placed so much weight, also does not call for a duplicate analysis under both the TAA and the FAA. *See* R. W. Hughes, "*Interlocutory Appeals from Orders Denying Arbitration Under the Texas Arbitration Act: Federal Law Does Not Preempt Jurisdiction,*" THE APPELLATE ADVOCATE, Vol. XVIII, No. 2 at 18 (Fall 2005) (cited in Relators' April 17, 2006 letter brief, among other places). This article highlights the policy concern underlying the scenario in which a court of appeal holds that, because the FAA applies to a contract, then relief under the TAA is preempted and an interlocutory appeal must be dismissed for want of jurisdiction:

> The upshot is that, if the appellee concedes the contract affects interstate commerce, the appellate court dismisses the TAA interlocutory appeal for want of jurisdiction and then may summarily deny the FAA mandamus without discussion or analysis. . . . The 'no jurisdiction' rule not only makes denying arbitration easier than granting it; it encourages appellees to engage in 'position-shifting' and frustrates review by the Texas Supreme Court.

Id. at 18. These policy concerns certainly are not operative in this case. Indeed, this Court considered and denied both of Relators' requests for mandamus relief, conducted oral argument, and issued a nine page opinion detailing its analysis and decision.

in dismissing the TAA-based interlocutory appeal for want of jurisdiction.[38] And even *Wilson* did not conduct separate analyses of the merits under both the TAA and the FAA; rather, the court determined the merits under the Texas Supreme Court's mandamus jurisdiction, conditionally granted the writ of mandamus, and dismissed the related interlocutory *appeal* as moot.[39] Since, as Relators have repeatedly conceded, the mandamus and interlocutory appeal analyses are virtually the same, it would be a pointless waste of judicial resources for a court to separately analyze and render a detailed opinion on an interlocutory appeal under the TAA after mandamus relief was denied on the merits.

Finally, despite Relators' reliance on *West v. Robinson*, that decision also does not compel the appellate courts to separately analyze an interlocutory appeal under the TAA after denying mandamus relief under the FAA. *In* fact, *the Robinson* decision *has* nothing to do with deciding arbitrability issues under the TAA or the FAA.[40]

b. *In addition to being unnecessary, a subsequent analysis under the TAA would be improper.*

Significantly, there has never been any contractual or legal basis for a TAA-based interlocutory appeal of the trial court's denial of Relators' Motion *to* Compel Arbitration. It is undisputed that the arbitration agreements at issue in this case expressly invoke New York law. Apart from simply moving to compel arbitration and purporting to invoke the TAA, Relators have never actually demonstrated how or why the TAA applies?' The Nickells have consistently noted that Texas law does not apply to issues related to the interpretation or waiver of terms in the arbitration agreements, yet Relators have essentially ignored *this* point and have

[38] *In re D. Wilson Construction Co.*, 196 S.W.3d 774,778-780 (Tex. 2000).

[39] *Id.* at 778-780, 783,

[40] See West *v. Robinson*, 180 S.W.3d 575,576 (Tex. 2005) (per curiam).

[41] See Nickells' Motion for Rehearing. at 6 & n.27.

never attempted to prove otherwise.[42] True to form, like all of their pleadings before it, Relators' Motion for Rehearing dodges this fundamental issue and erroneously presumes, without explanation, that Texas law and the TAG apply.

Interestingly, at one point Relators actually acknowledged that the arbitration contracts' choice of New York law eliminated the application of Texas substantive law to contractual issues.[43] But they then proceeded to argue erroneously that the TAA was procedural, so the choice of New York substantive law did not effect their rights to an interlocutory appeal under the TAA.[44] Without reiterating all of the arguments set forth in their letter briefs of April 7, 2006 and April 20,2006, the Nickells would merely direct the Court to those letter briefs and to *In re J.D. Edwards World Solutions Company*.[45] In that case, the Texas Supreme Court held that where the parties' arbitration agreement selected the substantive law of Colorado or the Uniform Arbitration Act, the FAA must apply in lieu of the TAA. Specifically, the *J.D. Edwards* Court concluded, "[t]here is no contractual or legal basis for Texas law" and the contract's "limited reference to the [Uniform Arbitration Act] is not sufficient to invoke Texas law or the TAA."[46] Accordingly, because the party attempting to invoke the TAA did not carry its burden of demonstrating how or why it should apply, the *J.D. Edwards* Court considered and ruled on the petition for mandamus submitted under the FAA.[47]

---

[42] See, *e.g.*, the Nickells' April 7, 2006 post-hearing letter brief at 1 (attached at Tab C to Nickells' Motion far Rehearing); Relators' December 15,2005 Record in Support of Petition for Writ of Mandamus. Vol. 1 at 92, n. 101.

[43] Sea Relators' April 6, 2006 letter brief at 1 (arguing that the TAA is procedural law and asserting that "[e]ven when the parties have selected the laws of another jurisdiction, Texas law still governs procedural issues").

[44] In support of this position, Relators cited&ens-Corning *Fiberglass Corp. v. Martin*, 942 S.W.2d 712,721 (Tex. App. – Dallas 1997, *no* pet.), which has absolutely nothing to do with arbitration or the TAA. See the Nickells' April 7, 2006 letter brief at 1. It bears noting that if this theory were accurate (and it isn't) and New York substantive law applied under the TAA, Relators' heavy reliance on Texas waiver cases has been misplaced and they should have been relying on New York waiver cases instead

[45] *In re J.D. Edwards World Solutions Company*, 87 S.W.3d 546 (Tex. 2002).

[46] *Id.* at 550.

[47] *Id.* at 551-552.

Relators have attempted to distinguish *J.D. Edwards* by discussing *Mastrobuono v. Shearson Lehman Hutton, Inc.*, a case where a brokerage agreement's arbitration clause indicated that any arbitration would occur under NASD rules, while a New York choice-of-law clause was set forth elsewhere in the agreement, separate from the arbitration clause.[48] The *Mastrobuono* Court appropriately reconciled these two clauses by holding that the NASD rules would govern the arbitration while any contractual claims or defenses asserted in the arbitration would be derived from substantive New York law.[49] It is difficult to see how *Mastrobuono* demonstrates in any way that the arbitration or choice-of-law clauses at issue in this case permit Relators to invoke the TAA. It is undisputed that none of those clauses says anything about Texas law and that the only law mentioned or invoked anywhere in the contracts is New York law.

In one sentence of their April 17, 2006 post-hearing letter brief, Relators also floated the notion that Texas law and the TAA should apply because "five of [the Nickells'] nine causes of action contained in their First Amended Petition are based expressly on Texas statutory and common law."[50] The brokerage agreements at issue contain New York choice-of-law clauses stating that the agreements "shall be governed and construed in accordance with the laws of the State of New York."[51] Because the Nickells have not asserted any breach of contract claims or other claims that would call on New York law for contractual interpretations, Texas law applies exclusively to all of their underlying causes of action. Conversely, their Texas causes of action have no bearing on the fact that the New York choice-of-law clauses make New York law

---

[48] *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 Y.S. 52,115 S.Ct. 1212 (1995).

[49] *Id.* at 514 U.S. 64.

[50] Relators' April 17,2006 letter brief at 3.

[51] December 15,2005 Record in Support of Petition for *Writ of* Mandamus. Vol. 1 *at* 57.

applicable when resolving disputes over the contracts' arbitration terms or whether they were waived. In *J.D. Edwards*, the Texas Supreme Court paid no homage to the fact that the plaintiff had asserted fraud and other Texas common law claims. In fact, the Court specifically determined that *the* arbitration clause, the *contract's* choice of Colorado law, and the FAA required the plaintiff to arbitrate its Texas fraud claims under the FAA, not the TAA.[52]

In conclusion, Relators have completely failed to provide any rational factual or legal basis for an application of the TAA in this case, and it was their burden to do *so*.

III. CONCLUSION AND PRAYER

For all of the reasons set forth above, the Nickells respectfully request that this Court deny Relators' Motion for Rehearing in all respects. However, for the reasons set forth in their Motion for Rehearing, also filed on July 12,2006, the Nickells request that this Court clarify its June 28,2006 Memorandum Opinion to state that the interlocutory appeal filed by Relators and consolidated with this action was not dismissed for lack of subject matter jurisdiction (or due to preemption), but was dismissed as moot because: (1) the Court has determined the merits of the waiver issues when denying Relators' mandamus relief under the FAA; and (2) Relators have failed to demonstrate how or why the TAA should apply, as they were required to do. The Nickells respectfully submit that the relief granted in the Court's June 28 Opinion and its waiver analysis were in all respects correct and should not be disturbed. The Nickells further pray for such other relief, at law and in equity, to which they may show themselves justly entitled.

[52] *In re J.D. Edwards World Solutions Company*, 87 S.W.3d at 550-551.

Respectfully submitted,

Richard A. Sayles
State Bar No. 17697500
Will S. Snyder
State Bar No. 00786250
Stacy D. Simon
State Bar No. 00788413
SAYLES | WERBNER, P.C.
4400 Renaissance Tower
1201 Elm Street
Dallas, Texas 75270
(214) 939-8700
(214) 939-8787 Facsimile

ATTORNEYS FOR REAL PARTIES IN INTEREST ROBERT A. NICKELL AND NATALIE BERT NICKELL

CERTIFICATE OF SERVICE

I herby certify that on this 8th day of September, 2006, pursuant to the Texas Rules of Civil Procedure, a true and correct copy of the foregoing document was served on counsel of record by hand delivery.

Charles A. Gall
James Bowen
Jenkens & Gilchrist
1445 Ross Avenue, Suite 3200
Dallas, Texas 75202