TEMPORARY RELIEF REQUESTED

06-0886

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

REPLY IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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INTRODUCTION

This case presents two important issues which this Court has not addressed: (i) what conduct is required for a finding of "express" waiver of the right to arbitration and (ii) will Texas endorse the minority position that no prejudice need be shown in the case of such an express waiver. This court should make clear that express waiver of the right to arbitrate requires both a clear and unequivocal waiver and a showing of prejudice. Because such an express waiver does not exist in this case, and because the Relators acknowledge no prejudice was shown, the Court should issue a writ of mandamus compelling the trial court to order arbitration.

ARGUMENT

1. The Nickels cite no Texas authority for their "no prejudice" argument, and they ask this Court to follow a minority interpretation of the FAA.

In their Petition, Relators pointed out that no Texas or Fifth Circuit case supports an argument that no prejudice need be shown in "express waiver" cases. Relators also pointed out that the Seventh Circuit and New York cases relied on by the Nickells and cited by the Dallas Court are minority, widely criticized decisions, and that they are distinguishable. *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388 (7th Cir. 1995),[1] *Gilmore v. Shearson/American Express, Inc.*, 811 F.2d 108

[1] The Court should note that *Cabinetree* is not even an "express" waiver case. Instead, that case merely presented a simple waiver by conduct or by inaction issue, what the Nickells call "implied" waiver, in which the Seventh Circuit dispensed with the prejudice requirement. 50 F.3d at 390. Thus, *Cabinetree* is *directly* at odds with this Court's recent holdings *(In re Wilson Constr. Co.*, 196 S.W.3d 774, 782 (Tex. 2006) and *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 762 (Tex. 2006) (per curiam)) and, as the *Cabinetree* court itself acknowledged, the holdings of the Fifth Circuit. *Cabinetree*, 50 F.3d at 390 ***(citing*** *Miller Brewing Co. v. Fort Worth Distributing Co.*, 781 F.2d 494,497-98 (5" Cir. 1986)).

(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 *In re Currency Conversion FCC Antitrust Litig.*, 361 F.Supp.2d 237 (S.D.N.Y.2005). The Nickells responded to none of those points. Thus, it is apparent that this case presents an issue of first impression for this Court.[2] Based on this Court's repeated recogrution of the strong presumption against a waiver finding and the Court's recent decisions regarding waiver, the Court should decline to adopt the minority position that a showing of prejudice is not required in the context of express waiver.

The Nickells do not even attempt to put forth an argument that they demonstrated prejudice below or that the record supports any finding of prejudice. Given that concession, this case presents a perfect opportunity for the Court to consider the prejudice requirement in the context of "express" waiver. Indeed, the Court can decide this case in favor of arbitration *on that* basis *alone.*

2. The Dallas Court's holding would do damage to the strong presumption in favor of arbitration.

Having blessed a new method in Texas to counter arbitration motions, the Dallas Court has opened pandora's box. Every time a party seeks arbitration after

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[2] In their Response, the Nickells make the curious argument that "this case offers no opportunity to promulgate or correct any principle of Texas jurisprudence." Response at p. 1. This argument apparently is based on their argument – raised for the first time in the Dallas Court – that, because of a New York choice of law provision in the relevant agreements, the Texas Arbitration **Act** did not apply. Relators' Petition in this Court, however, is based solely on the FAA (which, the Nickells agree, governs the present dispute). This Court's ruling on that Petition will be the first time in Texas jurisprudence that the Court has been called upon to interpret the FAA in the context of **a** purported "express" waiver. Accordingly, this case presents an issue of first impression in Texas jurisprudence. Moreover, this Court's construction of the FAA quite obviously is controlling.

seeking affirmative relief from the court, the opposing party can use the Dallas Court's Opinion to claim "express waiver," and argue a showing of prejudice is not required. *But cf. Williams v. Cigna Fin. Advisers, Inc.*, 56 F.3d 656, 661 (5th Cir. 1995) (waiver argument rejected even though movant filed counterclaim seeking affirmative relief); Wilson, 196 S.W.3d. at 783 (waiver argument rejected even though movant filed a cross action). Every time a party engages in a venue dispute arguing that one forum is a more appropriate forum to litigate and try a case, the opposing party can use the Dallas Court's Opinion to claim "express waiver,', and argue that a showing of prejudice is not required. **But cf. Walker v. Countrywide Credit** *Indus., Inc.*, 2004 WL 246406, *2 (N.D. Tex. Jan. 15,2004) (waiver argument rejected even though movant successfully obtained venue transfer by arguing that court could preside over state law claims stating that "there's nothing that prevents the Texas court from litigating this action."). Every time a party requests a jury and pays the jury fee, the opposing party can use the Dallas Court's Opinion to claim "express waiver," and argue that a showing of prejudice is not required. *But cf. In re MONY Sec. Cop.*, 83 S.W.3d 279, (Tex. App. – Corpus Christi 2002, no pet.) (waiver argument rejected even though movant specifically requested a jury trial and paid the fee, finding that non-movant was not prejudiced).

In short, the Dallas Court's decision likely will increase exponentially the sheer volume of waiver arguments raised in trial courts. Obviously, that will cause a flood of appellate cases involving those same arguments.

3. No logical reason exists to apply a different standard to express and implied waiver analyses.

In the context of waiver of an arbitration right by conduct or inaction – what the Nickells would call "implied" waiver – this Court has held that the waiver must be intentional. Thus, inferring waiver from a party's actions is appropriate "only if the facts demonstrate that the party seeking to enforce arbitration intended to waive its arbitration right." *EZ Pawn Corp. v. Mancias,* 934 S.W.2d 87, 89 (Tex. 1996) (emphasis added). In this regard, as the Nickells must agree, the "intent to waive" must be coupled with a showing of prejudice before waiver can be found. Id

To subject "express" waiver to a lesser standard – one that does not require a showing of prejudice – than "implied" waiver therefore is illogical, If the Dallas Court's holding is allowed to stand, a party who intends to waive its arbitration right, but who remains silent about that intent while taking actions inconsistent with the arbitration right, could change its position months later and still enforce an arbitration provision, absent a showing of prejudice. *See, e.g., Vesta,, 192* S.W.3d at 762 (waiver argument rejected even though movant had litigated the merits of the case for two years and engaged in discovery). But, a party who intends to waive its arbitration right, but makes the mistake of announcing its intention, could not compel arbitration if it changed its position the day after the announcement and before the non-movant experienced any prejudice, No logical reason exists for that disparate treatment.

4. Even if prejudice is not required in the context of express waiver, Relators never expressly renounced their arbitration right.

"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.[3] The parties agree there was no such declaration made here. Accordingly, the Nickells simply have re-labeled a plain vanilla "waiver" argument as "express waiver" in an attempt to avoid the unanimous cases ruling that parties had not waived their arbitration rights by participating heavily in the litigation.

More specifically, the Nickells acknowledge that Relators never expressly advised them or anyone else that Relators had decided to waive their right to arbitration, or words to that effect. Instead, to manufacture an express waiver argument, the Nickells point only to Relators' statements and arguments made in connection with the briefing on motions related to the MDL transfer issues. The Nickells thus faill to recognize the basic purpose of an MDL transfer.

28 U.S.C. § 1407(a) allows a transfer of actions involving common questions of fact "to any district for coordinated or consolidate *pretrial* proceedings." (Emphasis

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[3] For example, in *Gilmore,* the only true "express" waiver case cited by the Nickells, the movant "explicitly withdrew" its motion to compel arbitration, and it acknowledged on appeal that it had earlier abandoned arbitration. 811 F.2d at 110 and 112 ("Shearson therefore does *not* argue that its withdrawal of its first motion to compel was not a waiver. Instead, Shearson argues that Gilmore's amended complaint . . . permitted it [Shearson] to assert the same motions and defenses that were initially available.") (emphasis added). The present case does not involve an express renunciation of the arbitration right of the type at issue in Gilmore.

added). The purpose of MDL transfer is to "serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation, while accordingly being necessary in order to avoid duplication of discovery, prevent inconsistent pretrial rulings, and conserve the resources of the parties, their counsel and the judiciary." In *re Wireless Tel Radio Frequency Emissions Prod Liability Litig.*, 170 F.Supp. 2d 1356, 1358 (Jud. Pan. Mult. Lit. 2001). Accordingly, any party arguing an MDL related motion necessarily will use the quoted words in their argument.

In the present case, the documents containing the arbitration agreements are uniform documents executed by countless CGM customers. Claims by purchasers of WorldCom who signed those agreements therefore would invoke substantially similar issues regarding the arbitrability of those claims. MDL transfer prior to presenting a motion to compel arbitration therefore was necessary in order to prevent the possibility of inconsistent rulings – pretrial rulings – on those motions by tens, if not hundreds, of judges from around the country. Consolidated treatment of those motions also would conserve the resources of the parties and the judiciary.

In their Response, the Nickells speculate that, if Relators had announced to the MDL panel their intent to seek arbitration, the MDL panel would have vacated its transfer order.[4] Response at p. 7. Noticeably lacking from this statement is any authority. To the contrary, the MDL panel frequently transfers actions despite the

[4] It is interesting to note that the Nickells first argue that Relators expressly renounced their arbitration right, but they then argue that Relators remained silent about that right in seeking an MDL transfer.

pendency of motions that, if granted, would obviate the need for a transfer. For example, in *In re Ivy,* 901 F.2d 7, 9 (2d Cir. 1990), the court found transfer was warranted despite questions about the jurisdiction of the federal court to hear the case:

> The jurisdictional issue in question is easily capable of arising in hundreds or even thousands of cases in district courts throughout the nation. That issue, however, involves common questions of law and fact . . . and there are real economies in transferring such cases. Once transferred, the jurisdictional objections can be heard and resolved by a single court and reviewed at the appellate level in due course. Consistency as well as economy is thus served.

901 F.2d at 9.

A motion to compel arbitration is no different from a jurisdictional or any other "pre-trial" motion in this context. Relators rightfully sought to defer a ruling on that issue until after the MDL transfer for the same reasons articulated by the Second Circuit in *Ivey.* In fact, that is precisely why Relators *expressly reserved* their arbitration right in their motion to stay all proceedings pending MDL transfer filed shortly after removal. R. Vol. II at p. 539.[5]

Moreover, as this case demonstrates, there is no guarantee that an arbitration motion will be granted. In the event such a motion is denied, MDL transfer would be

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[5] In their Response, the Nickells complain that Relators expressly reserved their arbitration right only once and in a footnote. Regardless, no question exists that, very early in the case, Relators made it clear that they were reserving -- and not waiving -- their arbitration rights until after the MDL transfer. Otherwise, Relators would never have mentioned that right in a motion to stay "Pending a Final Determination of Transfer by the . . ." MDL panel. R. Vol II at 533. That point would not be any clearer if the reservation had been in the main text, on the first page, capitalized, and bolded. At a minimum, that reservation belies any argument of ***intentional*** waiver. ***See,*** *e.g,* EZ Pawn, **934** S.W.2d at 89 (waiver must be intentional).

necessary to avoid the possibility of duplicative discovery. Accordingly, by seeking MDL transfer, and by arguing the applicable standards for MDL transfer, Relators did not express an intention to waive their arbitration rights. This Court should make clear that an express waiver of the right to arbitrate requires an unequivocal, direct statement renouncing that right, as opposed to conduct in the court or pretrial proceedings.

5. **Mr. Nickell likewise is bound by his arbitration agreement.**

The Court can make quick work of Mr. Nickell's argument that he is not bound by the arbitration agreements, Relators submitted two agreements – a Margin Agreement and a New Account Application and Option Suitability Agreement— containing arbitration provisions signed by Mr. Nickell. R. Vol. I, pp. 47 and 49. The first is between Smith Barney and Mr. Nickell, and the second is between SSB and Mr. Nickell. Both very clearly state that they inure "to the benefit of . . . *any successor organization* or *assigns.*" R. Vol. I, p. 48 ¶ 11, and p. 50 ¶ 11 (emphasis added). No question exists (and the Nickells do not dispute) that CGM is a successor of both Smith Barney and SSB. Mr. Nichol's argument in this regard is without merit.

CONCLUSION AND PRAYER

For these reasons, Relators pray that the Court grant their Petition for Writ of Mandamus.

Dated: November 3,2006

Respectfully submitted,

By: _____

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CERTIFICATE OF SERVICE

This is to certify that on the 3rd day of November 2006, a true and correct copy of this Reply in Support of Petition for Writ of Mandamus were forwarded to those identified below by hand delivery.

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