NO. 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

RESPONSE TO PETITION FOR WRIT OF MANDAMUS

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TABLE OF CONTENTS

I. CORRECTED STATEMENT OF THE CASE v

II. CORRECTED ISSUES PRESENTED vi

III. INTRODUCTION 1

IV. STATEMENT OF ADDITIONAL PERTINENT FACTS 2

A. *Removal, **transfer/consolidation** with MDL Proceedings, and remand* ... 2

B. ***The** mandamus and appellate proceedings* 4

V. ARGUMENT AND AUTHORITIES 4

A. ***The** trial **court** did not abuse its discretion.* 4

1. These facts substantiate the lower courts' express waiver findings. 5

2. Authority and Logic Support The Lower Courts' Express Waiver Findings. 8

B. *The Court of Appeals did not violate Rule 47.1 or Rule **52.8(d)*** 11

C. *Any conclusion that Relators cannot claim contractual **arbitration** rights against Mr. **Nickell** would **not** constitute a clear abuse of discretion.* 13

VI. CONCLUSION AND PRAYER 15

TABLE OF AUTHORITIES

FEDERAL CASES

Burton-Dixie Corp. v. Timothy McCarthy Construction Co.,
436 F.2d 405 (5th Cir. 1971j 5

Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.,
50 F.3d 388 (7th Cir. 1995) 10

In re Currency Conversion FCC Antitrust Litigation,
361 F. Supp. 2d 237 (S.D.N.Y. 2005) 9, 10

In re Currency Conversion Fee Antitrust Litigation,
2005 WL. 1705285 (S.D.N.Y. July 22, 2005) 6

Doctor's Associate, Inc. v. Casarotto,
116 S. Ct. 1652 (1996)..11

Gilmore v. Shearson/American Express, Inc.,
811 F.2d 761 (2d Cir. 1988) 9, 10, 12

Manos v. Geissler,
321 F. Supp. 2d 588 (S.D.N.Y. 2004) 6

PPG Industrial, Inc. v. Webster Automobile Parts, Inc.,
128 F.3d 103 (2d Cir. 1997) 5

STATE CASES

In re D. Wilson Construction Co.,
196 S.W.3d 774 (Tex. 2006) and *In re Vesta Ins. Group, Inc.*,
192 S.W. 759 (Tex. 2006) 10

Johnson v. Fourth Court of Appeals,
700 S.W.2d 916 (Tex. 1985) 5

Mercedes Benz Credit Corp. v. Rhyne,
925 S.W.2d 664 (Tex. 1996) 5

Milnes v. Salomon Smith Barney, Inc.,
2002 WL. 31940718 (N.Y.Sur., October 11, 2002) 14, 15

Tilton v. Marshall.
925 S.W.2d 672 (Tex. 1996) 1

Walker v. Packer.
827 S.W.2d 833 (Tex. 1992) 5

FEDERAL STATUTES

9 U.S.C. § 2 11

28 U.S.C. § 1334(b) **3**

28 U.S.C. § 1407(a) 7

28 U.S.C. § 1452(a) 2

I. CORRECTED STATEMENT OF THE CASE

In their Statement of the Case and throughout their Petition, Relators failed to inform the Court of the first mandamus petition they filed with the Dallas Court of Appeals in the underlying proceedings. That petition, which also requested that the trial court's order denying their Motion to Compel Arbitration be vacated, was filed on October 26, 2005, and was substantively identical to the subsequent mandamus petition that Relators filed on December 15, 2005 (*i.e.*, the petition Relators describe in their Statement of the Case).[1] After considering the first mandamus petition on its merits, the Dallas Court of Appeals issued a Memorandum Opinion and Order on November 16, 2005 (written by Justice O'Neill, while sitting on a panel with Justices Whittington and Lang), unanimously denying the requested relief in its entirety.[2]

Thus, to describe this case and the underlying proceedings correctly, Relators seek mandamus relief that would vacate the trial court's order denying their Motion to Compel Arbitration after being denied that relief three separate times by two different panels in the Dallas Court of Appeals: first when the Court denied Relators' October 26, 2005 mandamus petition, second when the Court denied Relators' December 15, 2005 mandamus petition, and third when the Court denied Relators' July 12, 2006 Motion for Rehearing. The Real-Parties-In-Interest, Robert A. Nickell and Natalie Bert Nickell ("the

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[1] Thus, Relators' failure to mention their first mandamus petition violates TEX. R. APP. P. 52.3(d)(5). *See* Nickells' Supplemental Record ("Nickell R") at Tabs 1 and 4. Hereafter, citations to Relators' Appendix will be "Rel. Apx. __" and Citations to Relators' Record will be "Rel. R. Vol. — at __."

[2] Nickell R. at Tab 3.

Nickells") file this response to show why Relators' requested mandamus relief should be denied for a fourth time by this Court.

II. CORRECTED ISSUES PRESENTED

The Nickells submit corrected versions of Relators' "Issues Presented" to accurately set forth certain facts and the applicable standard of review as follows:

1. Did the trial court clearly abuse its discretion in denying Relators' Motion to Compel Arbitration on the ground that Relators waived their alleged arbitration rights?

2. If the trial court denied Relators' Motion to Compel Arbitration on the ground that Relators expressly waived their alleged arbitration rights without considering whether the Nickells showed sufficient prejudice, did such a ruling constitute a clear abuse of discretion?

3. Did the Dallas Court of Appeals fail to address the prejudice requirement in its opinions denying Relators mandamus relief and, if so, did such failure amount to a violation of TEX. R. APP. P. 47.1 and 52.8(d)?

4. If the trial court denied arbitration on the ground that Relators are not entitled to claim the benefits of the arbitration agreement with respect to Mr. Nickell, did such a ruling constitute a clear abuse of discretion?

III. INTRODUCTION

To draw this Court's attention to this case, Relators have embellished it as an opportunity to create new law in Texas, where no appellate courts have "addressed an allegation of express waiver."[3] They claim the Nickells have "introduced into Texas jurisprudence" a new theory of express waiver and encourage the Court to ensure that such a theory does not "take root in Texas."[4] But, as Relators have repeatedly done in their lower court briefing, they are again ignoring the fact that Texas law has absolutely no application to the parties' arbitrability or waiver dispute. As repeatedly stated by the Court of Appeals and the Nickells, federal substantive law exclusively governs whether Relators waived their alleged arbitration rights and New York law governs the construction of the arbitration provisions at issue. Therefore, contrary to Relators' representations, this case offers no opportunity to promulgate or correct any principle of Texas jurisprudence. Thus, Relators' Petition does not merit this Court's consideration.[5]

Relators abandoned any interest in arbitrating this case long ago. Time and again, they persisted in trying to litigate and resolve it in a federal forum, despite the absence of any federal jurisdiction. Relators' Petition tries to marginalize the Nickells' waiver position as just another implied waiver argument, based primarily on Relators' removal of this case to federal court. The Nickells are fully aware that removal, in and of itself, does not constitute waiver. But here, Relators expressly and repeatedly represented to the

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[3] Relators' Petition for Writ of Mandamus ("Pet") at 1.

[4] Id. at 2.

[5] ***See Tilton v. Marshall,*** 925 S.W.2d 672,682 (Tex 1996) ("relator seeking mandamus must show that ... the petition raises important issues for the state's jurisprudence.").

presiding federal judges and the Judicial Panel on Multidistrict Litigation ("JPML") that they intended to litigate and try this case, not arbitrate it. Through such express representations, they persuaded the JPML to transfer and consolidate this action with the WorldCom multidistrict litigation proceedings pending in New York federal court ("MDL Proceedings" and "MDL Court," respectively). But Relators were eventually required to substantiate their basis for federal jurisdiction, and because they could not do so, they stipulated to a remand back to Dallas County Court, then moved to compel arbitration. By then, however, they had expressly waived their alleged arbitration rights.

The trial court did not abuse its discretion in denying Relators' Motion to Compel Arbitration. The Nickells provided the court with ample evidence and compelling authority supporting a conclusion of express waiver. Moreover, on three separate occasions, the Dallas Court of Appeals – through two separate panels – wisely and unanimously denied Relators' requested mandamus relief. The instant Petition presents no basis for deciding otherwise and should also be denied in its entirety.

IV. STATEMENT OF ADDITIONAL PERTINENT FACTS

A. *Removal, transfer/consolidation with MDL Proceedings, and remand*

Relators removed this case to Dallas federal court pursuant to 28 U.S.C. § 1452(a) on the sole claim that it was "related to" the WorldCom bankruptcy proceedings and that jurisdiction existed under 28 U.S.C. § 1334(b).[6] However, important events that transpired before the Nickells filed this case rendered Relators' claims against WorldCom's estate worthless, thereby nullifying the existence of any federal

[6] Rel. R. Vol. II at 308-11.

jurisdiction.[7] For these reasons, the Nickells consistently challenged Relators' removal and their efforts to transfer and consolidate the case with the MDL Proceedings.[8]

In their pleadings to the JPML, Relators asserted that all pretrial proceedings should be transferred to and consolidated with the MDL Proceedings because: (1) "[t]his action involves the same core facts as many cases that the [JPML] has already centralized in the Southern District of New York . . ." and (2) "centralization of WorldCom-related actions...'will serve the convenience of parties and witnesses and promote the just and efficient .conduct of the litigation.'"[9] In granting Relators' requested transfer and consolidation, the JPML cited these same two reasons as the basis for its decision.[10] Relators never mentioned to the JPML any alleged arbitration rights or their supposed intent to arbitrate this case.[11]

Once before the MDL Court, the Nickells renewed their remand motion and established (yet again) the absence of federal jurisdiction.[12] On February 11, 2005, the day that Relators were supposed to respond to the Nickells' remand arguments, they telephoned the Nickells' counsel and proposed a stipulated remand so they would not have to defend their removal positions in a response brief.[13] The Nickells agreed to a

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[7] Rel. R. Vol. III at 684-796, 941, 967-69, 975-77. *See also* Nickell *R* at 57-58 (providing a succinct *summary* of these procedural events).

[8] Rel. R. Vol. II at 573-84, 585-618 and Vol. III at 797-810,891-95.

[9] Rel. R. Vol. III at 94446.

[10] Rel. R. Vol. III at 897-98. The Order does not mention arbitration.

[11] *See* Rel. R. Vol. III at 811-25, 944-46.

[12] *See* Rel. R. Vol. III, pp. 899-926.

[13] *See* Rel. R. Vol. III, at 942-43.

stipulated remand order that returned the case back to the Dallas County Court where it was filed, and the order did not mention any possibility of arbitration.[14]

B. *The mandamus and appellate proceedings*

After the trial court denied Relators' Motion to Compel Arbitration, they challenged that ruling by filing an interlocutory appeal with the Dallas Court of Appeals, claiming that the arbitrability dispute somehow arose under the Texas Arbitration Act ("TAA"), and a mandamus petition, asserting that the Federal Arbitration Act ("FAA") also applied. The Court of Appeals subsequently denied their first mandamus petition, their second mandamus petition, and their motion for rehearing, all seeking the same relief. In denying the motion for rehearing (and the mandamus relief requested therein), the Court also 'determined that Relators had failed to show how Texas substantive law applied to the parties' waiver dispute. Consequently, the Court concluded that they had provided "no contractual or legal basis for applying the TAA to the facts of this case" and dismissed their interlocutory appeal.[15]

V. ARGUMENT AND AUTHORITIES

A. *The trial court did not abuse its discretion.*

Relators must convince this Court that they are entitled to the extraordinary relief of mandamus.. As this Court has declared, such heavy burden can only be carried by establishing that the trial court acted unreasonably, arbitrarily, or without reference to any

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[14] *See* Rel. R Vol. 111, pp. 928-29, 943, 996-99. The Nickells' ability to prosecute the merits of their claims was delayed for approximately eight months. During that time, the Nickells and their counsel expended substantial effort and incurred significant expense responding to Defendants' attempt to adjudicate this action in federal court Rel. R. Vol. III at 943.

[15] Rel. Apx. Tab C at 4.

guiding rules or principles. In other words, Relators must prove that the facts and law required the trial court to make only one decision, which they cannot do.[16]

1. <u>These facts substantiate the lower courts' express waiver findings</u>.

The question of waiver depends on the individual facts and circumstances of each case; there are no bright-lime rules.[17] The particular facts of this case lend unique and strong support to the lower courts' multiple conclusions that Relators expressly and intentionally waived their alleged arbitration rights.

To begin with, the fact that Relators omitted or removed any reservation of their alleged arbitration rights from all but one of their federal court and JPML pleadings evidences their intent to abandon arbitration and pursue a judicial forum for litigating and trying this case. The record directly contradicts their claim that they expressly preserved their alleged arbitration rights. They maintain that a handful of instances in which they reserved "all defenses" encompassed and preserved their arbitration rights, but they have already conceded that the right to arbitrate is not a defense.[18] Therefore, their isolated statements purporting to reserve any "defenses" do not relate to or protect any arbitration rights.

Relators' Motion to Stay Proceedings filed in the Dallas federal court (prior to the MDL transfer) is the <u>only</u> instance in any pleading where they even mentioned

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[16] ***Mercede- Benz Credit Corp. v. Rhyne,*** 925 S.W.2d 664,666 (Tex. 1996); ***Walker v. Packer,*** 827 S.W.2d 833, 840 (Tex. 1992); ***Johnson v. Fourth Court of Appeals,*** 700 S.W.2d 916,917 (Tex. 1985).

[17] ***PPG Indus., Inc. v. Webster Auto Parts, Inc.,*** 128 F.3d 103, 108 (2d Cir. 1997); ***Burton-Dixie Corp. v. Timothy McCarthy Constr. Co.,*** 436 F.2d 405,408 (5" Cir. 1971).

[18] ***See*** Pet. at 3-4 & n. 3; ***see*** Nickell R. at 23 & N. 11. ("Relators readily acknowledge that the right to compel arbitration is not a specific defense under TEX. R. CN. P. 94 or FED. R. CN. P. 12 (b) . . .").

arbitration." But a footnoted, generalized reference to the possibility of arbitration does not preserve arbitration rights or defeat a showing of waiver?' Importantly, Relators' federal court pleadings never again mentioned arbitration or attempted to preserve their alleged arbitration rights in any way. And because they have never provided any evidence of a motion to compel arbitration in any of the numerous cases they have transferred and consolidated into the MDL Court, it is clear that they had no intent to arbitrate after arriving there?'

To obtain transfer and consolidation under Section 1407, a party must demonstrate that such relief would expedite the case's litigation and trial because it involves facts and issues common to the other MDL cases (therefore, allowing consistent rulings on discovery issues and dispositive motions by a single presiding judge who has extensive knowledge of those facts and issues) and could benefit from streamlined discovery and pre-trial proceedings.[22] To this end, Relators argued to the Dallas federal court that "[a] transfer will streamline pretrial matters, avoid duplication, conserve resources, and hurry

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[19] Rel. R. Vol. II at 539 n.1 (again mischaracterizing arbitration as a "defense").

[20] *Manos v. Geissler*, 321 F. Supp.2d 588,595 (S.D.N.Y. 2004) (stating that "[w]hen a complaint has been filed in a judicial forum, the proper way for a defendant to assert an entitlement to arbitration is by way of motion . . ." and concluding that defendants' reference to arbitration rights in their answer did not save them from waiver); In re Currency Conversion Fee *Antitrust* Litig., 2005 WL 1705285, at *4 n.1 (S.D.N.Y. July 22, 2005) ("Citiiank's argument that it raised arbitration in its Answer and therefore did not waive its arbitral rights is unavailing").

[21] See Nickell R. at 87-88 & n. 128.

[22] Section 1407 permits transfer "for coordinated or consolidated pretrial proceedings . . . upon [the JPML's] determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). "[S]uch coordinated or consolidated pretrial proceedings shall be conducted by a judge or judges to whom such actions are assigned by the judicial panel on multidistrict litigation." 28 U.S.C. § 1407(b). A case transferred under Section 1407 is remanded for trial to the federal transferor court upon the conclusion of the coordinated or consolidated pretrial proceedings. 28 U.S.C. § 1407(a); J.P.M.L. Rule 7.6(b) (Rel. R Vol. III at 958).

the case towards trial."[23] They similarly asserted to the JPML that a Section 1407 transfer would avoid "potential duplication of pretrial effort" and "'repetitious and duplicative discovery.'"[24] Obviously, if they had asserted any intent to arbitrate in the same pleading, it probably would have destroyed their chances of obtaining the desired transfer and consolidation. Thus, if Relators truly intended to seek an arbitration after arriving in the MDL Court (and they did not), they avoided mentioning that in their pleadings and convinced the JPML to transfer and consolidate so that discovery and pretrial proceedings could be streamlined before returning the case to the Dallas federal court for trial, as contemplated by Section 1407.[25]

Undoubtedly, Relators had ample opportunity to request arbitration in the trial court or in the Dallas federal court upon removal if they truly desired it.[26] But the record clearly demonstrates that they only became interested in arbitration when, after approximately eight months of procedural maneuvers and delays, they realized they could not adjudicate this case in the MDL Court because they could not defend their removal position. Therefore, honoring their opportunistic request to arbitrate now would condone artful pleadings (if, as Relators suggest, they truly intended to arbitrate) and reward abusive forum shopping. Relators should now abide by the commitments and representations they made to the federal courts and JPML that they intended to litigate

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[23] Rel. R. Vol. II at 671; ***see also*** Rel. R. Vol. III at 811-24.

[24] Rel. R. Vol. III at 819.

[25] ***See generally*** Rel. R. Vol. II at 533118,550-71,663-73 and Vol. III at 811-25.

[26] Rel. R. Vol. I at 2.71 ("Relators admit that they could have specially appeared in [Respondent's] court and *then* ... could have moved to compel arbitration ...."); ***see also id. at 289-95*** (Nickells' letter brief to Respondent demonstrating complete feasibility of earlier filing of Motion to Compel.).

this case, including their stipulated agreement to return to the original state forum for that litigation.

2. Authority and logic support the lower courts' express waiver findings.

Since March 2005, Relators have filed over ten different petitions, appeals, motions, and/or briefs with the trial court, the Dallas Court of Appeals, and this Court concerning the parties' waiver dispute. None of those filings contests the FAA's application to the waiver or arbitrability issues and Relators' recent abandonment of their interlocutory appeal effectively concedes that Texas law and the TAA do not apply to these issues. Further, Relators have not and cannot dispute the fact that federal substantive law applies when determining whether they waived their alleged arbitration rights under the FAA.[27] Similarly, none of Relators' numerous filings challenges New York law's application to any disputes regarding the arbitration clause at issue.[28] Even so, Relators have repeatedly and arbitrarily applied Texas law to the waiver issues without once offering any basis for doing so.[29] Therefore, any of their arguments supported exclusively by Texas law, or any law other than federal substantive law or New York law, are misguided and should be rejected. In contrast, the lower courts' reliance on federal substantive law and New York law was well placed.

Relators claim *without any supporting authority* that "[e]xpress waiver requires a specific, direct, and unequivocal statement that the party is giving up the right in

[27] *See, e.g.*, Court of Appeals' September 26, 2006 Order (Rel. Apx Tab C at 5) ("The issue of arbitrability under the FAA is a matter of federal substantive law.") (Internal citations omitted).

[28] The agreement containing the arbitration clause at issue expressly states that its provisions "shall be governed and construed in accordance with the laws of the State of New York, without giving effect to principles of conflict of laws." Rel. R. Vol. I at *50.*

[29] *See, e.g.,* Pet. at 9-15.

question."[30] However, no court has held that waiver occurs only when a party states, "I abandon and/or waive my right to arbitrate." While such a statement would obviously constitute an express waiver, the key inquiry is whether a party's words communicate a desire to litigate the case in court rather than pursue it in an arbitration forum.[31] The trial court record contained <u>at least twenty examples</u> of Relators representing to the federal courts or the JPML that they sought litigation and a trial in a judicial forum without ever mentioning their alleged arbitration rights or any intent to arbitrate.[32]

The Nickells provided the trial court and the Court of Appeals ample federal substantive law to support a finding of express waiver.[33] Specifically, the Nickells showed that *Gilmore v. Shearson/American Express, Inc.*, *In re Currency Conversion FCC Antitrust Litigation,* and *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.* rendered a conclusion that express waiver occurred here and no showing of prejudice was required.[34] Relators, on the other hand, have cited and discussed mostly Texas cases,

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[30] Pet. at 9.

[31] Rel. Apx. Tab B at 4-5; Rel. Apx. Tab C at 5. Indeed, the Nickells articulated this principle clearly to the trial court. See Rel. R. Vol. I at 73-74.

[32] Rel. R. Vol. I at 74-80; *See* also Nickell R. at 70-76; Rel. Apx. Tab E.

[33] *See* Rel. R. Vol. I at 72-74; Nickell R. at 68-69, 89-90; Rel. Apx. Tab E at 3-5.

[34] *Gilmore* v. *Shearson/American* Express, *Inc.*, 811 F.2d 108, 110-11 (2d Cir. 1987) (waiver occurs when a party expresses its wishes to resolve claims in court); In re Currency Conversion FCC Antitrust Litig., 361 F. Supp. 2d 237, 257 (S.D.N.Y. 2005) (citing Gilmore and declaring that prejudice is only required in implied waiver cases); Cabinetree of Wisconsin, *Inc.* v. *Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390-91 (7th Ci. 1995) (requiring no showing of prejudice when party seeking arbitration opportunistically chose to proceed before a non-arbitral forum). Addressing analogous facts, the Gilmore court reasoned: "Ordinarily, a party may not freely take inconsistent positions and simply ignore the effect of a prior filed document. This policy against permitting a party to play 'fast and loose' with the courts seems particularly applicable here..." 811 F.2d 108, 113 (2d. Cir. 1987) (internal citations omitted). Similarly, in Cabinetree, the Seventh Circuit upheld a finding of waiver after removal and, in doing so, observed that there was

> no plausible interpretation of the reason for the delay [in seeking arbitration] except that Kraftmaid initially decided to litigate its dispute with Cabinetree in the federal district court, and that later, for reasons unknown and with no shadow of justification, Kraftmaid changed its mind and decided

none of which is an express waiver case.[35] *Gilmore, **Cabinetree,*** and ***In re Currency Conversion*** have not been overruled on any relevant ground and remain valid and compelling law.[36] Thus, there is no basis for concluding that the trial court clearly abused its discretion by failing to decide the issues without reference to any guiding rules or principles.

Aside from defying well-established federal substantive case law (which was discussed and embraced in the Court of Appeals' June *28,2006* Opinion and September *26, 2006* Opinion), requiring the Nickells to prove prejudice under these circumstances would defy logic. The fallacy and illogic of Relators' position that express waiver cases require a showing of prejudice is exemplified by the following question: If Relators had announced to the trial court that they wished to waive their alleged arbitration rights and litigate this case, and the Nickells did not oppose that request, would the trial court have been compelled to deny the request because no one had shown prejudice? Of course not. As with any other contractual rights, a party's express waiver of arbitration rights

> it would be better off in arbitration.... Kraftmaid [did not give] any reason for its delay in filing the stay besides needing time 'to weigh its options.' That is the worst possible reason for delay. It amounts to saying that Kraftmaid wanted to see how the case was going in federal district court before deciding whether it would better off there or in arbitration. It wanted to play heads I win, tails you lose.

50 F. 3d 388,391. It is as if the ***Cabinetree*** court was addressing Relators' conduct in this case.

[35] ***See*** Pet. at 9-12. The Nickells have demonstrated previously the inapplicability of ***In re*** D. ***Wilson Constr. Co.,*** 196 S.W.3d *774* (Tex. 2006) and ***In re Vesta Ins. Group, Inc.,*** 192 ***S.W.*** 759 (Tex. 2006), upon which Relators place much emphasis. ***See*** Rel. Apx. at Tab E. Relators cited the same cases in their Court of Appeals briefing and, despite finding that Texas law does not apply, the Court still analyzed those cases and determined them inapposite. ***See*** Rel. Apx. Tabs B and C. Further, Relators' continued insistence that this case is not properly analyzed as an express waiver case flatly ignores the focus of the inquiry – the statements made by Relators to the JPML and federal courts specifically arguing for a judicial forum for litigation.

[36] Relators questionably rely on two journal publications for the notion that ***Gilmore*** and ***Cabinetree*** represent "an untenable minority position in the federal system." *See* Pet. at 11. They also cite cases for the proposition that *Cabinetree* is a renegade opinion, but those cases do not involve express waiver and were decided by state courts and one bankruptcy court, none of which would undermine the Seventh Circuit's ***Cabinetree*** holding.

logically terminates its ability to re-invoke those rights, irrespective of the other party's proof of prejudice.

Indeed, in ***Doctor's Associates, Inc.*** v. ***Casarotto,*** the United States Supreme Court held that Section 2 of the FAA requires arbitration agreements to be treated like all other contracts, leaving them vulnerable to all general contract defenses (including waiver).[37] Therefore, requiring a showing of prejudice where express waiver occurs would be unduly protecting arbitration agreements and treating them much differently than other contracts, thereby contravening Section 2 and the Supreme Court's ***Casarotto*** holding.

B. ***The Court of Appeals did not violate Rule 47.1 or Rule 52.8(d).***

Relators complain that the Court of Appeals violated TEX. R. APP. P. 47.1 and 52.8(d) by not addressing whether a showing of prejudice is required in express waiver cases. Although Relators complain about these alleged rule violations, nowhere do they seek any relief or remedy for them. The Petition's "Conclusion and Prayer" says nothing about what should be done to redress them.[38] As such, Relators' complaints have no apparent purpose other than to criticize the Court of Appeals' denial of their mandamus petition and motion for rehearing.

Even if Relators sought relief under Rule 47.1 or Rule 52.8(d), they would not be entitled to it. Again, the Court of Appeals carefully considered and rejected all of

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[37] ***Doctor's Assocs., Inc. v. Casarotto,*** 116 S.Ct. 1652, 1653 (1996) (interpreting 9 U.S.C. § 2's statement that arbitration clauses should be generally enforced, "save upon such grounds as exist at law or in equity for the revocation of any contract" to require that arbitration provisions "be placed on the same footing as other contracts.")

[38] *See* Pet. at 15.

Relators' arguments, including the argument that prejudice must be shown, on three separate occasions.

On the first occasion, the Court unanimously denied Relators' first mandamus petition on the merits and issued a November 16, 2005 Opinion briefly describing that decision, even though TEX. R. APP. P. 52.8(d) did not require it to do so.[39] On the second occasion, the Court unanimously denied Relators' second mandamus petition and issued its extensive June 28, 2006 Opinion, which states that in cases involving implied waiver, "a party may waive its right to arbitrate by taking an action inconsistent with that right ***to the opposing party's prejudice***."[40] In other words, it indicates that prejudice is required *only* in implied waiver cases. The opinion also discusses and embraces ***Gilmore, In re Currency Conversion,*** and ***Cabinetree,*** the three above-described cases setting forth the "no prejudice" rule.[41] On the third occasion the Court again analyzed and unanimously rejected Relators' contention that a showing of prejudice was required. Like its June 28 Opinion, the Court's extensive September 26, 2006 Opinion denying Relators' Motion for Rehearing suggests that prejudice is required only in implied waiver cases and again embraces ***Gilmore,*** In ***re Currency*** Conversion, and ***Cabinetree.***[42]

In summary, while Rule 52.8(d) did not require the Court of Appeals to issue ***any*** opinions explaining its repeated denials of mandamus relief, it issued three; and two of

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[39] TEX. R. APP. P. 52.8(d) ("when denying relief, the court may hand down an opinion but is not required to do so.").

[40] Rel. **Apx.** Tab B at 4 (emphasis added).

[41] Id. at 4, 6-7.

[42] Rel. **Apx.** Tab C at 5, 7-8.

them reveal the that Court thoroughly considered and rejected Relators' argument that prejudice must be shown.

C. *Any conclusion that Relators cannot claim contractual arbitration rights against Mr. Nickell would not constitute an abuse of discretion.*

Relators claim that "Mr. Nickell's paperwork with Citigroup contained broad arbitration clauses" and criticize the Nickells for "ignor[ing] their promises to arbitrate."[43] However, Robert Nickell had no relevant "paperwork with Citigroup," only signed agreements with Smith Barney Harris Upham & Co. and Salomon Smith Barney, Inc. ("SSB"), not any of the Relators.

The arbitration clause in Robert Nickell's agreement with Smith Barney Harris Upham & Co., an undated margin agreement, was mooted and replaced by one appearing in a subsequent agreement, a March 9, 2000 new account application signed and submitted to SSB ("March 2000 Application").[44] That application's arbitration clause states that the parties must arbitrate any claims between Robert Nickell and "SSB and/or any of its present or former officers, directors, or employees...or any predecessor firms by merger, acquisition or other business combination..."[45] It excludes successor firms from the class of persons or entities who have arbitration obligations or rights. Even so, Relator Citigroup Global Markets, Inc. ("CGM") argues that, as SSB's successor, it is entitled to assert the arbitration rights formerly held by SSB under this clause.

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[43] Pet. at 3

[44] The undated margin agreement preceded SSB's March 2000 Application because Smith Barney Harris Upham & Co. preceded SSB. The application states that any provisions from previous agreements "shall remain effective," "[e]xcept as specifically amended" by the application Clearly, the arbitration clause in the March 2000 Application amends and replaces the clause from the previous margin agreement.

[45] *See* Rel. R. Vol. I at 50.

SSB made the identical argument to a New York court in *Milnes* **v.** *Salomon, Smith Barney, Inc.*[46] In that *2002* case, SSB argued that it should be permitted to arbitrate claims brought by a former customer based on an arbitration clause appearing in a 1983 new account application issued to the customer by Smith Barney, SSB's predecessor. That clause was virtually identical to the one at issue here, stating that the parties must arbitrate claims between the customer and Smith Barney "and/or any of its present or former officers, directors, or employees... or any predecessor firms by merger, acquisition or other business combination."[47] Evidently, SSB's March 2000 Application adopted the exact same arbitration clause that Smith Barney used in its 1983 applications.

After examining Smith Barney's arbitration clause, the *Milnes* Court concluded that, "[b]y its own terms such language clearly does not apply to 'successor' firms, which would include SSB." It also concluded that, because the new account form was a contract of adhesion, the arbitration clause "must be strictly and narrowly construed against the party who prepared it." Finally, the court held that "[s]ince the arbitration clause in the...client agreement does not state that it runs in favor of 'successor' firms it is not enforceable by [SSB]."[48]

Relators argue that the March 2000 Application generally states, in a portion of the application separate and distinct from the arbitration clause, that the application's

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[46] *Milnes v. Salomon Smith Barney, Inc.*, 2002 WL 31940718 (N.Y.Sur., October 11,2002).

[47] Id. at * 2

[48] *Id.* at *5.

provisions "shall inure to the benefit of...any successor organization or assigns."[49] When SSB pointed to the same language in ***Milnes*** and made the identical argument, the court rejected it.[50] Further, the successor language's appearance elsewhere in the March 2000 Application shows that SSB knew it could have included such language in the arbitration clause, but instead limited that clause's application to the persons and entities listed.

Based on the holdings in ***Milnes,*** the arbitration clause at issue here does not convey arbitration rights to CGM as SSB's successor, and any such determination by the trial court would not have been an abuse of discretion.

VI. CONCLUSION AND PRAYER

For the many reasons stated above, there is no basis for any conclusion that the trial court clearly abused its discretion in denying the Motion to Compel Arbitration by acting unreasonably, arbitrarily, or without reference to any guiding rules or principles. Accordingly, the Nickells respectfully request that this Court deny Relators' Petition for Writ of Mandamus in its entirety, and further grant all other relief to which Respondents and/or the Nickells may be justly entitled.

''Pet. at 14.

[50] ***See*** *Milnes,* 2002.WL 31940718 at * 6 (addressing general language in account application stating that it "inures to the benefit of [Smith Barney's] assigns and successors" and determining that such language did not "ovemde" the specific arbitration provisions.)

Respectfully submitted,

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ATTORNEYS FOR PLAINTIFFS1
REAL PARTIES IN INTEREST

INSERT 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

VERIFICATION

STATE OF TEXAS §
COUNTY OF DALLAS §

BEFORE ME, the undersigned Notary Public, on this day personally appeared William S. Snyder, and being by me duly sworn on his oath, deposed and stated as follows:

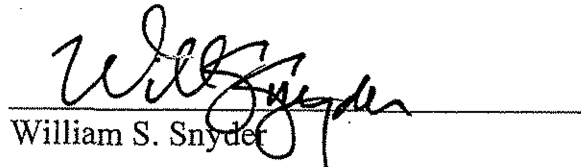
1. My name is William S. Snyder. I am over the age of 21 years. I am of sound mind. I have personal knowledge of the facts in this affidavit and I am competent and qualified to testify.

2. I am counsel of record for Plaintiffs Robert A. Nickel1 and Natalie Bert Nickel1 ("Plaintiffs") in the above-styled proceeding and in the underlying lawsuit.

3. I have reviewed the factual statements contained in the section entitled, "Statement of Additional Pertinent Facts" on pages 2 – 4 of the foregoing Response to Petition for Writ of Mandamus. All of the factual information contained therein is, to the best of my personal knowledge, true and correct.

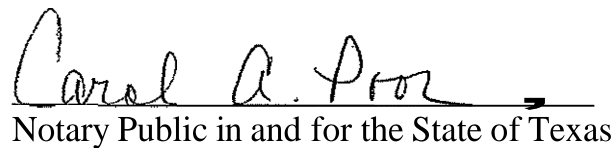
4. The items contained in the Supplemental Record filed by the Nickells in support of their Response to the Petition for Writ of Mandamus are true and correct copies of the original documents.

FURTHER, AFFIANT SAYETH NOT.



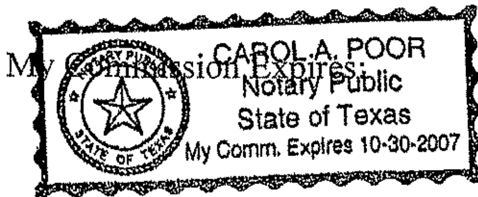
William S. Snyder

Sworn and subscribed before me on this 27" day of October, 2006, to certify which witness my hand and seal of office.



Notary Public in and for the State of Texas

My Commission Expires:



CERTIFICATE OF SERVICE

I hereby certify that on this 27 day of October, 2006, pursuant to the Texas Rules of Civil Procedure, a true and correct copy of the foregoing Response to Petition for Writ of Mandamus and the Nickells' Supplemental Record in Support of Their Response to Petition for Writ of Mandamus were forwarded to those identified below by U. S. Mail.

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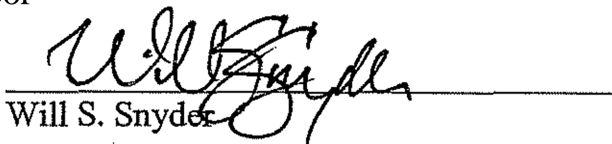

Will S. Snyder