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

NICKELLS' SUPPLEMENTAL RECORD IN SUPPORT OF RESPONSE TO PETITION FOR WRIT OF MANDAMUS

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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

PETITION FOR WRIT OF MANDAMUS

From County Court at Law Number 3 of Dallas County, Texas
the Honorable Sally L. Montgomery, presiding
Cause No. 04-04729-C; *Robert A. Nickell, et al. v. Citigroup Global Markets, Inc., et al.*

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Respondent

The Honorable Sally L. Montgomery,
County Court at Law No. **3**
Dallas County, Texas

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STATEMENT OF THE CASE

Action from which Relators seek relief: Relators seek a writ of mandamus with respect to Respondent's October 3,2005 Order Denying Defendants' Motion to Compel Arbitration and Stay Proceedings (the "Order") issued in Cause No. 04-04729-C; *Robert A. Nickell, et al. v. Citigroup Global Markets, Inc., et al.* (the "underlying proceeding), pending in the County Court at Law No. 3 of Dallas County, Texas (the "trial court").[1] Relators seek an order compelling all claims in the underlying proceeding to arbitration and staying all proceedings, pursuant to the Federal Arbitration Act (the "Federal Act"), 9 U.S.C. § 2 *et seq.*, a copy of which is included in the **Appendix.**

Nature af the underlying proceeding: The underlying proceeding is a suit for damages. Real parties-in-interest Robert A. Nickell and Natalie Bert Nickell are former investment clients of Salomon Smith Barney Inc. n/k/a Citigroup Global Markets, Inc. and its employee, Stacy Oelsen. Plaintiffs filed suit against Relators claiming they were defrauded in connection with their investments in WorldCom Inc. After the underlying proceeding was remanded to the trial court from federal court, Relators immediately moved *to* compel arbitration and *to* stay proceedings based on agreements signed by Relators.

Respondent: The Respondent is the Honorable Sally L. Montgomery of the trial court.

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[1] A certified copy of the Order is included in the attached **Appendix.**

[2] Relators, on October 21,2005, also filed a Notice of Appeal of the Order (the "**Appeal**"), because Relators' Motion was based on both the Federal Act and the Texas General Arbitration Act TEX. CIV. PRAC. & REM. CODE § 171.001 *et seq.* (the "**Texas Act**"). *See, e.g., Jack B. Anglin Co. v. Tipps*, 842 S.W.2d 266, 272 (Tex. 1992) (orig. proceeding). The case number assigned to the Appeal is 05-05-01430-CV.

STATEMENT OF JURISDICTION

This Court has jurisdiction under Article V, Section 6 of the Texas Constitution, Section 22.221(b) of the Texas Government Code, and Rule 52 of the Texas Rules of Appellate Procedure. *Tipps*, 842 S.W.2d at 272.

ISSUE PRESENTED

Did the Respondent incorrectly deny Relators' Motion to Compel Arbitration and to Stay Proceedings?

STATEMENT OF FACTS

I. Introduction

Relator Citigroup Global Markets, Inc. ("CGM") is a registered broker-dealer and investment advisor, and it is an indirect, wholly owned subsidiary of Relator Citigroup Inc. ("Citigroup"). R. Vol. I, p. 44.5 Salomon Smith Barney Inc. ("SSB") and Smith Barney Harris Upham & Co. Inc. ("SBHUC") both were predecessors of CGM.[4] *Id.* Real-parties-in-interest Robert A. Nickell and Natalie Bert Nickell (collectively, "Plaintiffs" and, singularly, "Mr. Nickell" or "Ms. Nickell") were customers of CGM. R. Vol. I, pp. 11-13.

II. The Agreements to Arbitrate

In connection with his account number 104-06936-14 *at* CGM, Mr. Nickell signed, among other documents, *a* Margin Agreement. R. Vol. I, pp. 47-48, In relevant part, that Margin *Agreement* provides:

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[1] The Record submitted with this Petition *is* in three (3) volumes, indexed and separated by tabs. The pages are consecutively numbered. For the Court's convenience, cites to the Record will be "R. Vol., p. __."

[4] To avoid confusion, all references to CGM and/or its predecessors will be to CGM, unless the context requires otherwise.

> **The undersigned agrees that all controversies between the undersigned and Smith Barney and/or any of its officers, directors, or employees present or former concerning or arising from (i) any account maintained with Smith Barney by the undersigned; (ii) any transaction involving Smith Barney and the undersigned, whether or not such transaction occurred in such account or accounts; or (iii) the construction, performance or breach of this or any other agreement between us, whether such controversy arose prior, on or subsequent to the date hereof, shall be determined by arbitration before any self-regulatory organization or exchange of which Smith Barney is a member, The undersigned may elect which of these arbitration forums shall hear *the* matter by sending a registered letter or telegram addressed to Smith Barney at 333 West 34th Street, New York, N.Y. 10001, Attn: Law Department, If the undersigned fails to make such election before the expiration of five (5) days after receipt of a written request from Smith Barney to make such election, Smith Barney shall have the right to choose the forum.**

R. Vol. I, p. 48 (emphasis in original).

On or about March 9, 2000, Mr. Nickell signed a New Account Application and Option Suitability form for account number 104-06936-14 containing substantially similar language. R. Vol. I, p. 49.

Likewise, Ms. Nickell (formerly known as Natalie Bert), in connection with her accounts at CGM, signed agreements containing substantially similar arbitration provisions. R. Vol. 5, **pp. 52-57.**

III. Plaintiffs' WorldCom Investments and the Downfall of WorldCom

Plaintiffs allege that they invested more than $4 million in WorldCom Inc. n/k/a MCI, Inc. ("WorldCom") securities in 2000 and 2001 in reliance on certain research

reports issued by CGM research analyst Jack Grubman. R. Vol. I, pp. 11-13.[5] Plaintiffs allege the reports were "false and intentionally misleading statements about WorldCom's performance, the *current* condition of its business, and the valve of its stock." R. Vol. I, p. 10. In June *2002,* WorldCom disclosed that it had overstated its income on its audited financial statements by over *$9* billion from *1999 to* 2002. *In re WorldCom, Inc. Sec. Litig.*, 294 F.Supp.2d 431, **434** (S.D.N.Y. 2003). WorldCom filed a Voluntary Petition far Chapter 11 Bankruptcy in United States Bankruptcy Court for the Southern District of New York on July 21,2002. Id.

Thereafter, scores of lawsuits substantially similar to the underlying proceeding were filed across the country asserting securities fraud and common law claims against various WorldCom directors, officers, underwriters, accountants, commercial and investment banks, and research analysts **who** covered WorldCom. *Id.* **at 434-35.** On October 8, 2002, pursuant to *28* U.S.C. § 1407, the Judicial Panel on Multidistrict Litigation (the "MDL Panel") issued an order consolidating *30* WorldCom related securities and ERISA actions in the United States District Court for the Southern District of New York (the "MDL Court"). *In **re** WorldCom, Inc. Sec. & "ERISA" Litig.*, 226 F.Supp.2d 1352 (J.P.M.L. *2002).* The MDL Panel thereafter issued orders transferring and consolidating more than 80 actions to the MDL Court. *WorldCom,* **294** F.Supp.2d **at** 435.

In addition to class actions, numerous individual actions were filed in state court,

[5] The WorldCom investments were made in the **accounts** governed by the **agreements discussed above.** R. Vol. I, p. 45.

WorldCom, 294 F.Supp.2d at 434-35. The majority of those actions were removed to federal court as "related to" the WorldCom bankruptcy and transferred to the MDL **Court.**. *Id.* Many of those actions allege claims against CGM's predecessor, SSB, which virtually are identical to the claims asserted by Plaintiffs in this *action.* The transferred and consolidated WorldCom related actions are now pending in the MDL Court, before the Honorable Denise L. Cote, as *In re WorldCom, Inc. Securities & "ERISA" Litigation*, Master File Nos. 02 CIV. 3288(DLC), 02 CIV. 4816 (DLC), and **03** CIV. *6592* (collectively, the "Consolidated WorldCom Proceedings")."

HV. Removal, MDL Transfer, and Remand

On July *9,* 2004, before Relators had appeared in the underlying proceeding, Relators removed the case to the United States District Court for the Northern District *of* Texas, Dallas Division (the "'Dallas federal court"). R. Vol. II, **p.** 308. Relators expressly stated in the notice of removal that they were "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. **As** grounds for the removal, Relators alleged that removal was proper under 28 U.S.C. § 1452 because the action was "related to" the pending WorldCom bankruptcy action. *Id.*

On August 9, 2004, Plaintiffs filed a motion to remand. R. Vol. II, **p.** 393. **At** about the same time, Citigroup and CGM filed a Letter of Potential Tag Along Action (the "Tag Along Letter") with the MDL Panel notifying the panel that the case was

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[6] MDL statistics **regarding** the Consolidated WorldCom Proceedings, as of September *30,* 2004, **can** be found at www.jpml.uscourts.gov/Statistics/Statistics.html. That shows that **134 cases have** been transferred to the *MDL* Court **and** another 24 *have* been filed *in that* Court originally. *See p. 5*

subject to transfer to the MDL Court for consolidated or coordinated pre-trial proceedings. R. Vol. II, pp. 658-59.

On August 25, 2004, Relators filed in the Dallas federal court a motion to stay proceedings seeking the stay of all proceedings until the MDL Panel finally determined which court, either the Dallas federal court or the MDL Court, would conduct pre-trial activities. R. Vol. TI, p. 533. In support of its request fur a stay, Relators pointed out that a stay would conserve judicial resources and avoid the possibility of inconsistent rulings on pre-trial motions by having all motions decided by the same court. R. Vol. TI, pp. 542-543.

On September 9,2004, the MDL Panel issued Conditional Transfer Order No, 30 ("CTO-30") conditionally transferring the case, among others, to the MDL Court. R. Vol. II, p. 572, On October 11, 2004, Plaintiffs filed with the MDL Panel a motion to vacate CTO-30. R. Vol. III, p. 797. After it was fully briefed (R. Vol. III, p. 797 and p. 891), the MDL Panel, on December 6, 2004, overruled the motion to vacate, and it issued a final Transfer Order. R. Vol. III, p. 897.[7]

Once the case was transferred to the MDL Court, it became subject to the MDL Court's May 28, 2003 Consolidation Order. R. Vol. I, pp. 125-35. Among other things, the Consolidation Order ordered that, with respect to "Individual Actions" such as the underlying proceeding, the requirement that any defendant named or served "must move, answer or otherwise respond in that action is stayed." R. Vol. I, p. 127. That same Order also expressly preserved any and all defenses. R. Vol. I, p. 127

[7] The Dallas federal court never ruled on either the motion to remand or the motion to stay

The underlying proceeding also became subject to, among other things, the MDE Court's June 11, 2003 Order to Show Cause why the MDL Court's Opinion issued on March 3, 2003 denying a motion to remand and the MDL Court's Opinion on May 5, 2003 on certain individual actions did not require a summary denial of Plaintiffs' motion to remand. R. Vol. III, p. 853. On January 18,2005, Plaintiffs filed a Response to Show Cause as required by those Orders. R. Vol. III, p. 899.

Thereafter, certain events transpired which led Relators to conclude that it would be in the best interest of all parties simply to agree to remand to the trial court as opposed to fully briefing and obtaining a ruling on the jurisdictional issues. See, *infra*, Part I. D. 2. Accordingly, on February 11,2005, the parties filed a Stipulation and Order agreeing "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. In the Stipulation and Order, to which both Relators and Plaintiffs agreed, Relators ***again*** specifically stated that they were "appearing specially to reserve any and all defenses . . . ." R. Val. III, p. 928, The MDL Court approved this Stipulation and Order in the form submitted on January 14,2005. *Id.*

Relators *at* all times intended to present their Arbitration Motion once it was finally determined which court would conduct pre-trial activities and the Plaintiffs' arguments with respect to subject matter jurisdiction were resolved. R. Vol. I, pp. 137-38. Indeed, Relators' motion to stay pending MDL transfer discussed above expressly 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. If, p. 539, n.1.

V. Relators' Motion to Compel Arbitration

On March 21, 2005, after remand, Relators filed their first pleadings in the trial court by the filing of their Original Answer and their Motion to Compel Arbitration and Stay Proceedings and Brief in Support (the "Arbitration Motion"). R. Vol. I, **pp.** 31 and *35*.

Prior to filing their Arbitration Motion, Relators did *not*, in any court: (1) **seek** or obtain discovery; (2) respond or object to discovery; (3) file a motion for summary judgment; (4) file a motion for judgment on the pleadings; (5) seek a trial setting; or (6) file any cross-claims, counter-claims, or third-party claims. R. Vol. I, p. 137. Moreover, with the exception of filing a Motion to Dismiss in the Dallas federal court under Federal Rule of Civil Procedure 12(b)(6),[8] Relators never sought a ruling from any court regarding the merits of Plaintiff's' **claims.** *Id* With respect to the Motion **to** Dismiss, Relators agreed with counsel for Plaintiffs, immediately after the filing of the Motion, that Plaintiffs need not respond to the Motion at that time because Relators were not seeking a ruling on that Motion at the time. *Id.* In fact, Plaintiffs never responded to the Motion *to* Dismiss, and no court **ever** ruled on or considered the Motion. *Id*.

At **no** time did Relators **express** to any court, either orally or in writing, directly or indirectly, that they were expressly waiving their right to compel Plaintiffs' claims to arbitration or that they chose to litigate Plaintiffs' claims in court as opposed to arbitration. Nevertheless, Plaintiffs responded to the Arbitration Motion with two *(2)*

[8] Under FED. R. CIV. P. 12, Relators **were** required to file an answer or Rule 12 motion **or** risk entry of default judgment.

arguments. R. Vol. I, p. 58. First, Plaintiffs argued that Relators expressly or impliedly waived their right to compel arbitration by removing the case to Dallas federal court, successfully obtaining the transfer of the case to the MDL Court over Plaintiffs' objections, and ultimately agreeing to a remand to the trial court. Next, Plaintiffs argued that CGM, as a successor to Smith Barney and Salomon Smith Barney, Inc. -- the parties to the agreements containing arbitration clauses with Mr. Nickell -- and Citigroup, parent of CGM, are not entitled to claim the benefits of the arbitration agreement with respect to Mr. Nickell's claims. R. Vol. I, pp. 72-92.

After Relators replied to Plaintiffs' opposition (R. Vol. 1, **p.** 94), Respondent conducted a hearing on August 12, 2005. R. Vol. I, pp. 196-254. By Order dated October 3, 2005, Respondent denied the Arbitration Motion in its entirety without explaining the basis wf her ruling. R. Vol. I, p. *296.*

ARGUMENT

I. As a matter of law, Relators did not waive their right to compel arbitration.

With one exception discussed below in Part 11. C, Plaintiffs' only defense to the Arbitration Motion rested on their waiver arguments, Although Respondent did not provide any explanation for her Order, a review of the transcript from the hearing and the associated briefing makes it clear that the Order was based on waiver, Accordingly, that point is addressed first.

A. This Court and others have held that a "strong presumption" exists against waiver, and Plaintiffs bore a "heavy burden" to overcome that presumption.

"There is a strong presumption against finding a waiver of arbitration, and the party claiming that the right to arbitrate has been waived bears a heavy burden." *Republic Ins. Co. v. Paico Receivables, LLC, 383* F.3d 341, 344-47 (5th Cir. 2004); *Texas Residential Mortgage, L.P. v. Portman*, 152 S.W.3d *861, 862* (Tex. App. – Dallas 2005, no pet:). As a result, any doubts regarding waiver are resolved in favor of arbitration. *In re Bruce Terminix Co., 988* S.W.2d 702, 705 (Tex. 1998); *Walker v. J.C. Bradford & Co.*, 938 F.2d **575,** *577* (5th Cir. 1991). A waiver of an arbitration right must be intentional, so 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." *Texas Residential Mortgage*, 152 S.W.3d at 862 (emphasis added).

A party does not waive a right to arbitration merely by delay. *In re Serv. Corp. Intern.*, 85 S.W.3d 171, 174 (Tex. 2002). Moreover, a court will not find a party has waived a right to enforce an arbitration clause "by merely taking part in litigation, unless the party has substantially invoked the judicial process to the opposing party's detriment." *Texas Residential Mortgage*, 152 S.W.3d at *862; Republic Ins.*, 383 F.3d at **344.** As the Fifth Circuit Court of Appeals construing the Federal Act has emphasized, procedural acts taken before a motion to compel arbitration do not constitute a waiver. Instead, "ordinarily, courts find waiver only if the party seeking arbitration has actively tried and failed to achieve a satisfactory result in the litigation before turning to arbitration, such as moving for summary judgment or otherwise seeking a final judicial

resolution of the dispute . . . ." *Republic Ins.*, 383 F.3d at 344 ("A party only invokes the judicial process to the extent it litigates *a specific claim* it subsequently seeks to arbitrate,") (emphasis added),

B. Plaintiffs failed to meet their heavy burden to overcome the strong presumption against a waiver of arbitration.

1. Relators did not intentionally and substantially invoke the judicial process by actually litigating Plaintiffs' claims.

As Plaintiffs must concede, Relators took no action to seek a determination of the Plaintiffs' claims while the underlying proceeding was pending either in the Dallas federal court, the MDL Court, or the trial court. More specifically, Relators neither served nor responded to ***any*** discovery. Relators did not file a motion for summary judgment or a motion for judgment on the pleadings.[9] Relators did not seek a trial setting, and no trial ever was scheduled, Relators filed no counterclaims or third party claims, Indeed, Relators never even filed an answer setting forth their defenses to Plaintiffs' claims until after the case was remanded to the trial court. Moreover, when Relators filed their answer, they specifically pled that Plaintiffs were required to arbitrate, not litigate,. their claims (R. Vol. I, p. 31), and they simultaneously **filed** the Arbitration Motion. R. Vol. I, pp. 31, 35.

In light of the fact that Relators took no action that could be construed as seeking to litigate Plaintiffs' claims, Plaintiffs pointed to the following as the bases of their

[9] As noted above, Relators did file a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. However, Relators were forced to file that Motion or face *yet* another waiver argument with respect to Rule 12 defenses or a default judgment. In any event, Relators promptly after the filing of that *Motion* reached agreement with Plaintiffs that they did not need to respond, as Relators were not seeking a ruling on the Motion at that time. R. Vol. I, pp 137.

waiver argument: (1) Relators' removal of this case to federal court; (2) the transfer of that case to the MDL Court; (3) the remand of this action to this Court by agreement of the parties; and (4) certain statements, taken out of context, from Relators' briefing in connection with all of the foregoing, As a matter of law,[10] those actions and statements do not constitute waiver, as shown below.

a. As a matter of law, removal, remand and jurisdictional related activities do not constitute waiver.

Texas and Fifth Circuit courts have specifically held that removal and removal-related procedural activity do not result in a waiver of a parties' right to arbitrate, repeatedly reversing findings of waiver in circumstances similar to these **here.** ***See,*** *e.g., Williams v. Cigna Financial Advisers, Inc.*, 56 F.3d 656 (5th Cir. 1995); *Walker v. J.C. Bradford & Co.*, **938** F.2d 575 (5th Cir. 1991); *American Bankers Life* **Assurance** *Co. of Florida v. Mister:* 344 F.Supp.2d 966 (N.D. Miss 2004); *In re Winter* **Park** *Constr., Inc.*, 30 S.W.3d 576 (Tex. **App.** – Texarkana 2000, no **writ);** and *In re Koch Ind., Inc.*, **49** S.W.3d 439 (Tex. **App.** – San Antonio 2001, no writ). Those cases show, with no uncertainty, that Plaintiffs' waiver arguments are without merit.

In *Williams*, the defendant removed the action to federal court, filed a motion to dismiss that was fully briefed and denied some eight (8) months later, answered the plaintiff's complaint, asserted a counterclaim, and engaged in discovery, all before seeking arbitration. 56 F.3d at 658 and 661. Nevertheless, the Fifth Circuit reversed the district court's waiver finding. *Id.* at 661; *accord, Walker-, 938* F.2d at 576-77 (reversing

[10] "The *waiver* **determination** Is a question of law." *Texas Residential Mortgage*, **152** S.W.3d **at** *862; In re Serv Corp Intern*, 85 S.W.3d 171, 174 (Tex. 2002).

lower court's waiver finding that was based an removal and defendant's "positively invoking federal court procedures . . .").

In *American Bankers*, the Northern District of Mississippi, applying *Williams*, was more direct:

> Fifth Circuit precedent makes it plain that removal of a case to federal court and remand-related activities alone do not constitute substantial invocation of the judicial process.

344 F.Supp.2d at 969. Accordingly, the court found no waiver even though the defendant filed its motion after a year of litigation involving removal, the filing of pleadings including counterclaims, jurisdictional briefing, and remand-related discovery. The court agreed with the defendant that it necessarily had to address subject matter jurisdiction issues before it could have addressed the arbitration issues, and activities related to those issues therefore did not constitute waiver. *Id.*

Likewise, in *In re Winter Park*, the court reversed a waiver finding even though the defendant engaged in discovery, removed the case, and actively opposed a motion to remand, which ultimately was granted. 30 S.W.3d at 578:

> [The defendant here] did not actively try to achieve a satisfactory result of *the* litigation before it sought arbitration. It answered the suit, it removed the suit temporarily to the federal court, and it participated in some discovery. We find that this activity by [the defendant] does not satisfy [plaintiffs'] "heavy burden" to show a waiver.

In re Winter Park, 30 S.W.3d at 579. In *Koch*, the San Antonio court reached the same conclusion on similar facts. *Koch*, 49 S.W.3d *at* 446. Accordingly, under these unanimous authorities, Relators did not waive arbitration as a matter of law.

b. Relators consistently and expressly preserved their right to compel arbitration.

In addition *to* not invoking the judicial process, Relators went further to avoid a waiver of their arbitration right. Although unnecessary, Relators expressly preserved arbitration from the outset of this case as follows:

June 9,2004	CGM and Citigroup were initially served with citations
July 9,2004	Relators first appeared by filing a Notice of Removal "appearing specially so as to reserve any and all defenses available under Rule 12 **of** the Federal Rules of Civil Procedure or otherwise . . . ."[11] R. Vol. II, **p.** 308.
August 25,2004	Relators moved to stay all proceedings pending determination of MDL transfer "**without** waiver ***of*** any **of** their defenses, including, but not limited to, , . . the requirement that Plaintiffs arbitrate, not litigate, their claims." R. Vol. II, p. *539,* n. 1.
December 23,2004	The MDL Panel finally transferred to the MDL Court. Under the Consolidation Order entered by the MDL Court, the requirement for Relators to move, answer, or respond **was** "stayed," and all defenses were "preserved." R. Vol. I, **p.** 127.

[11] In the trial court, Plaintiffs argued, and the Court questioned, whether a right to compel arbitration is a "defense." R. Vol. I, pp. 202-03. Relators readily acknowledge that the right to compel **arbitration is not a specific** defense under TEX. R. CIV. P. 94 or FED. R. CIV. P. 12(b), **but** such a right routinely is referred to as a "defense," and it often is raised initially in a **pleading** such as an answer. See, *e g.,. Tenneco Resins, Inc. v. Davy Intern., A.G., 770* F.2d 416, **420** *(5th Cir. 1985).* *Regardless, Relators* submit that these semantics are *not* important to the waiver analysis. See *Mapeo v. Chevron U.S.A. Products Co.,* 237 F.Supp.2d **739,** 745 (S.D. Tex. 2002) ("Although the **court** commends Chile's [the non-movant's] counsel for an excellent job in his attention to the parties' pleadings, this court feels constrained not to dwell on a pleading technicality, inasmuch as to do so would inappropriately ameliorate the strong burden that Chile **must** carry for this court to find that Chevron waived its arbitration rights. *Rather,* the court ***turns*** to Chile's *substantive* ***concerns*** of whether Chevron waived its rights by **substantially** invoking the **judicial process** at Chile's expense.").

February 11,2005	The parties agreed to remand. The Stipulation and Order, signed by all parties, stared that Relators were "appearing specially to reserve any and all defenses . . . ." R. Vol. III, p. 928.
March 21,2005	Relators filed their Original Answer and Arbitration Motion.

Accordingly, Relators did *more* than was necessary to preserve their arbitration rights.

2. Plaintiffs failed to prove that they suffered any prejudice.

a. Relators did not seek *to* arbitrate the "same issues" they previously had litigated.

Even if the trial court correctly determined that Plaintiffs met their heavy burden to prove that Relators substantially invoked the judicial process, which is denied, that alone is not enough. Plaintiffs also must have established in the trial court that they were prejudiced by Relators' invocation of the judicial process. Republic *Ins., 383* F.3d at 346.

For purposes of an arbitration waiver argument, "[p]rejudice . . . refers to the inherent unfairness in terms of delay, expense, or damage to a party's legal position that occurs when the party's opponent forces it to litigate an issue and later seeks to arbitrate that *same issue*." *Id.* (emphasis added). In that regard, the courts have noted that three (3) factors are particularly relevant: (1) while discovery relating to non-arbitrable **claims** is not prejudicial, discovery relating to all ***of*** the plaintiffs claims, including those that were conceded to be arbitrable, could result in prejudice; (2) time and expense incurred in defending against a motion for summary judgment; and (3) a party's failure to assert timely its right to arbitrate a dispute. *Id.*

First, as shown above, the parties never litigated, nor did Relators attempt to litigate, the substantive issues presented by Plaintiffs' claims which Relators sought to compel arbitration. Stated another way, Relators do not now seek to **arbitrate** the "same issues" they litigated, or sought to litigate, previously. Plaintiffs agreed with Relators on this point in the trial court. *See* R. Vol. I, pp, 63, 110 ("Although this action has been pending for over a year, no court has yet considered its substance, ..."). Moreover, as stared above, *no* discovery was ever sought or obtained, R. Vol. I, p. 103. Second, Relators never filed a motion for summary judgment, a motion for judgment on the pleadings, or counterclaims, nor did they seek a trial setting, R. Vol. I, pp. 103-04. Finally, *as stated* above, Relators first asserted **their** arbitration right when they initially appeared in this case and in their first motion (R. Vol. II, p. *308)* before they answered, and they again asserted their arbitration right both in their *Original* **Answer** and *the* Arbitration Motion, which were filed together as the first documents filed by Relators after remand to the trial court.

b. Plaintiffs submitted no evidence of prejudice.

Although it was their burden, Plaintiffs failed to brief and failed to present *any* evidence on, whether, or how they were "prejudiced," as that term is defined in the *Republic Insurance* case. This, in and ***of*** itself, requires reversal,

c. The expense and delay experienced by Plaintiffs was largely self-inflicted, and the alleged delay was inconsequential.

Plaintiffs did generally complain in the trial court of the expense incurred in the procedural motion practice in federal court and the approximate seven (7) month delay

while the case was in federal court. This "prejudice" was caused, in large part, by Plaintiffs themselves.

Plaintiffs agreed to arbitrate claims with the Relators. They alone could have avoided ail motion practice, delay, and expense, including that associated with this mandamus proceeding, if they had simply asserted their claims in arbitration in the first instance as they agreed.

Moreover, once it became apparent, only a few weeks after Relators were served, that Relators intended *to* stand on their arbitration right, Plaintiffs could have agreed then to arbitrate, thus avoiding all expense and delay about which they now complain. Indeed, because Relators never filed an answer or a motion for summary judgment in federal court, Plaintiffs, prior to transfer to the MDL Court, could have dismissed their claims, without prejudice, simply by filing a notice of dismissal, and then instituted arbitration proceedings. FED. R. CIV. P. 41(a)(1).

Additionally, Plaintiffs greatly exacerbated the expense and delay associated with the procedural motion practice in federal court. First, Plaintiffs opposed MDL transfer, even though the outcome in the MDL Panel was a foregone conclusion, as the MYL Panel had ruled previously on numerous similar motions. Although the question was not even close *(see* R. Vol. III, p. 897), Plaintiffs filed a motion to vacate CTO-30. R. Vol. III, pp. 797, 891. The MDL Panel, *however,* summarily rejected Plaintiffs' arguments. R. Vol. III, p. *897.* If Plaintiffs simply had conceded such an obvious point, thousands of dollars would have been saved, and approximately 3 months *of* delay would have been

avoided."

Next, Plaintiffs *opposed* Relators' efforts to stay all proceedings after removal pending a resolution of the MDL transfer issue – a motion *specifically* designed to avoid unnecessary expense – even though those motions have been customarily and routinely granted in recent years by courts all over the nation, including courts considering WorldCom related claims like those asserted by the Plaintiffs. *See, e.g., New Mexico State Investment Council v. Alexander*, 317 B.R. 440 (D.N.M 2004) (Staying a WorldCom-related case under the same circumstances).

Although Plaintiffs now cast themselves as innocent victims of expensive and "fraudulent" removal, Plaintiffs opposed the motion to stay and motion to transfer for one reason: Plaintiffs desperately wanted the Dallas federal court to rule on the jurisdictional issue ***before*** the **case** could be transferred to the MDL Court. The MDL Court had overruled many similar motions to remand on many prior occasions, and it had **even put *in*** place *a* show cause procedure to deal with those motions summarily and **quickly.** *See, e.g., In re WorldCom, Inc. Sec. Litig.*, **293** B.R. 308 (S.D.N.Y. 2003). Plaintiffs sought to delay the transfer and avoid a stay solely because Plaintiffs liked their chances on the remand issue in the Dallas federal court better than in the MDL Court. Having themselves created much of the delay and expense, Plaintiffs should not be allowed to claim Relators waived arbitration as a result of that same expense and delay.

Finally, the *Texas Residential Mortgage* **case** firmly puts *to* rest any argument

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12 If the **Plaintiffs** had not opposed CTO-30, it would **have** become **final** on September 24, 2004. Plaintiffs' **opposition,** however, delayed **that finality** until December *23,* 2004. This **is significant** considering **that** the underlying proceeding **was in federal** court for **a total *of* approximately seven** (7) months.

regarding the delay asserted by Plaintiffs establishing prejudice. Plaintiffs in the present case suffered, at most, an approximate seven (7) month delay while this case was pending in federal court.

In Texas Residential Mortgage, the plaintiff suffered a ten (10) month delay and incurred attorneys' fees engaging in discovery and preparing its case for trial. This Court flatly stated that "our review of the record uncovers absolutely no evidence that [the plaintiff] suffered prejudice as a result of Texas Residential's ten (10) month delay in moving *to* compel arbitration," 152 S.W.3d at *864; see also Williams*, *56* F.3d *at* 661 (9 month delay not a waiver); *American Bankers*, 344 F.Supp.2d at 969 (one year delay not a waiver); and *Walker*, *938* F.2d at 577 (approximately two year delay not a waiver), Because Plaintiffs have likewise failed to present any evidence of prejudice, they too failed to meet their heavy burden of **proving** waiver.

C. Relators did not expressly abandon their right to compel arbitration.

1. Relators made no clear, overt act that would amount to express waiver.

Plaintiffs attempted to distance themselves from the authorities cited above by arguing that Relators "expressly" waived arbitration by making "express statements and procedural choices attempting to invoke federal jurisdiction that expose, time and again, their clear and *unwavering* choice of litigating this action in a federal forum." R. Vol. I, **p.** 74. Of course, because Relators never expressed an intent to waive **their** right to **compel** arbitration -- indeed, they specifically preserved their arbitration right from the outset of this case as described above – the record is remarkably devoid of any such

express waiver, *Plaintiffs did not in the trial court -- and cannot in this Court -- cite to any part of the record where Relator-s affirmatively or expressly stated that they waived or abandoned their right to compel Plaintiffs' claims to arbitration.*

Instead, Plaintiffs selectively quoted, out of context, short statements from documents filed by Relators in federal court on the issues of jurisdiction, MDL transfer, or a stay pending MDL transfer. R. Vol. I, pp. 15-19. Those short quotes, when considered in the context in which they were made, provide no evidence of express waiver. Instead, those statements were made in the context of purely procedural motions, unrelated to the merits of Plaintiffs' claims, in an effort to have the case placed before the mast appropriate court to consider pre-trial motions, *including* the Arbitration Motion. Moreover, if the removal, filing of counterclaims, engaging in limited discovery, and obtaining a ruling on a motion to dismiss do not amount to waiver as established by the cases cited above, Relators' actions below clearly do not.

No Texas or Fifth Circuit court has discussed the distinction, if any, between express and implied waiver in the context of an arbitration motion. In other contexts, however, this Court has held that an "express waiver is shown by clear, overt acts evidencing an intent to waive . . . ." *Mooney Aircraft, Inc. v. Adams*, 377 S.W.2d 123, 126 (Tex. Civ. App. - Dallas 1964, no writ) (considering the distinction between express and implied waiver in the context of a plea of privilege). Implied waiver, on the other hand, ""occurs when a party, often inadvertently, takes some action inconsistent with his position" *Id.*

This distinction was applied in *Gilmore v. Shearson/American Express*, 811 F.2d

108, I09 (2nd Cir. 1987) (overruling an other grounds recognized by *McDonnell Douglas Fin. Corp. v. Pennsylvania Power & Light Co.*, 849 F.2d 761, 765 (2nd Cir. 1988)). In that case, the court found express waiver of an arbitration motion when the defendant *affirmatively withdrew* its arbitration motion and actively engaged in litigation on the merits. The "overt act" in that case was the express withdrawal of the motion, *See, e.g.*, *Century Indemnity Co. v. Viacom Intern., Inc.*, 2003 WL 402792, at *6 (S.D.N.Y. Feb. 20, 2003) (not designated for publication) (applying the "overt act" versus "inconsistent actions" distinction to reject a claim of express waiver of arbitration.).

Closer*to home, Judge Godbey, in *Walker v. Countrywide Credit Industries, Inc.*, 2004 WL 246406, *2 (N.D. Tex. Jan. 15, 2004) (not designated for publication), considered an argument similar to that raised by Plaintiffs. In that case, the plaintiffs argued that defendant's counsel's statements to the court on a motion to transfer venue constituted an express waiver. In arguing the transfer motion, defendant's counsel stated that "upon transfer to the Northern District of Texas, the court could preside over pending California state law claims . . ." and that "there's nothing that prevents the Texas court from litigating this action." Id.

Although the court did not discuss specifically the express versus implied waiver distinction, it rejected the plaintiffs' waives arguments. *Id.* at *3. In so doing, Judge Godbey recognized the strong presumption against a finding of waiver under the Federal Act, and he took particular note of the context in which defendant's counsel's statements were made. *Id.* at *3.

in the underlying proceeding, Relators never took any overt act indicating an

intent to waive their arbitration right. And, when considered in their proper context, Relators' arguments below on the procedural issues do not indicate otherwise.

2. Although Plaintiffs label their argument "express waiver," they are in fact trying to avoid their heavy burden by using semantics.

Lacking any evidence of "overt acts" to support their express waiver argument, Plaintiffs argued that the selected quotes Indicated that, if the case had remained in federal court, Relators would not have sought to compel the Plaintiffs' claims to arbitration. See, *e.g.*, R. Vol. I, p. 78. Stated another way, Plaintiffs did *not* argue that Relators overtly waived *their* rights. Instead, they argued that, from Relators' conduct, the trial court could *infer* Relators' intent to litigate, as opposed to arbitrate.

Plaintiffs engaged in a game of semantics. They in fact argued implied waiver, but they labeled it "express waiver" in an attempt to avoid the numerous cases cited above. Moreover, Plaintiffs' counsel. conceded to the trial court that, under the implied waiver standard discussed above in Part I. A., Plaintiffs' waiver argument failed. *See* R. Vol. I, pp. *226-27* ("Mr. Sayles [counsel for Plaintiffs]: . . . . Our main point is there is an express waiver. Express waiver. Some of the cases cited by Mr. Gall [counsel for Relators] involve an implied waiver . . . . *I agree with everything he [counsel for Relators] said if this is an implied waiver case.") (emphasis added).* The simple fact is that, under controlling law, Relators did not waive their arbitration right: (1) they did not substantially invoke the judicial process to Plaintiffs' detriment; and (2) they did not affirmatively or expressly waive arbitration.

D. Relators' removal to federal court and subsequent transfer to the MDL Court were proper and supported by numerous authorities.

1. Relators proceeded in goad faith and in reliance an well supported legal arguments.

In connection with their waiver arguments, Plaintiffs essentially argued that a finding of waiver was warranted as a sanction. Throughout Plaintiffs' Opposition to the Arbitration Motion in the trial court, Plaintiffs referred to Relators' removal of this case to the Dallas federal court and ultimate transfer to the MDL Court as "specious," "frivolous," "fraudulent," and as "blatant forum shopping," and they argued that, if Relators had been successful in keeping this case in the MDL Court, Relators would not have sought arbitration. R. Vol. I, pp. 65, *66,* 70, 84, and **86.** First, with respect to the latter point, Plaintiffs' argument is flatly wrong. Relators submitted uncontroverted evidence in the trial court (R. Vol. I, p. 137) that established unequivocally Relators' intentions. Relators believed that the MDL Court was the proper court to resolve pre-trial motions, *including the Arbitration Motion.* Relators intended to compel Plaintiffs' claims to arbitration in the MDL Court, after that Court had determined issues with respect to subject matter jurisdiction.[13] **A** federal court without subject matter jurisdiction cannot properly compel a case to arbitration, and the jurisdiction issue therefore had to be resolved first, *CIGNA Health Care of St. Louis, Inc. v. Kaiser,* 181 F.Supp.2d 914, 919 (N.D. Ill. *2002).*

Although their motives are irrelevant, Relators' removal and transfer efforts were not frivolous or in bad faith, Relators will not re-argue those paints here, but the

[13] Indeed, that is why they specifically reserved the defense when they first **appeared** in this case.

authorities are in the Record. *See, e.g.*, R. Vol. 11, pp, 533, 550, 663, and 811. Relators, however, will point the Court. to *New Mexico State Investment Council v. Alexander, Jr.*, 317 B.R. 440 (D.N.M. 2004) that was issued just after Relators removed the underlying proceeding to the Dallas federal court on almost identical facts.

Alexander also arose out of the accounting fraud allegedly perpetrated by WorldCom. The plaintiffs were investors in WorldCom common stocks and bonds who, on April 20,2004, instituted suit against a number of investment and commercial banks, including CGM, asserting claims for violation of the New Mexico Securities Act and common law claims for negligent representation.

As here, the bank defendants removed the Alexander case to federal court on the grounds that it was "related to" WorldCom's bankruptcy, and they thereafter sought the transfer of the case to the MDL Court, *Alexander*, 317 B.R. at *442*, Vol. II. The plaintiffs filed a motion to remand, arguing that the removal of the case to federal court was improper because "WorldCom emerged from bankruptcy prior to the removal of this action . . . ." Id. at 444. The defendants filed a motion to stay the case to allow the MDL Panel to consider the transfer motion. *Id.*

The *Alexander* court stayed the case, and deferred any ruling on the plaintiffs' motion to remand, so the jurisdictional issues could be resolved by the MDL Court. 317 B.R. at 446, Far from finding the Relators' jurisdictional argument "frivolous" as labeled by Plaintiffs, the Court found that "[i]t is not obvious that the removal was improper. What is obvious, however, is that the 'related to' jurisdiction question raised in plaintiffs' motion to remand is both factually and legally difficult." *Id.* at 444.

Additionally, the *Alexander* court noted that the issues before it, like the issues that were present in this case, were "similar or identical to those in other bondholder cases that had been, or will be, transfer-red to the MDL Court." ***Id.*** at 446. The court stated that, "having one court decide the complex jurisdictional issues raised in the numerous bondholder actions obviously saves judicial resources and reduces the risk of inconsistent rulings." *Id.* Finally, the court held that, although a stay would delay the action, such a delay would not be substantial. *Id.* The court further noted that the plaintiffs in the *New Mexico* action, like the Plaintiffs in the present action, "waited nearly two *(2)* years after WorldCom filed for bankruptcy to file this action, and have not demonstrated that a brief delay would substantially affect their rights." *Id.*

As the *Alexander* court held, and as more fully explained in the Relators' briefing on the various jurisdictional and procedural issues contained in the Record, the jurisdictional issues present in **this** case were complex, and Relators' arguments clearly **were** not frivolous. Relators merely sought to have those issues addressed **by** one court to save expense and avoid the possibility of inconsistent results that could result by having different courts consider the same issues. Once those jurisdictional issues were addressed, Plaintiffs' predictions notwithstanding, Relators at all times planned to formally assert their previously expressed right to compel Plaintiffs' claims to arbitration **in** the MDL Court, if it found that it had jurisdiction, or in the trial court, if the MDL Court found that it lacked jurisdiction,

2. Relators' subsequent decision to agree to remand also was reached in good faith.

It was not until after late January 2005, when the MDL Court requested a response from Relators on the arguments raised by Plaintiffs regarding the Court's subject matter jurisdiction in light of WorldCom's emergence from bankruptcy (R. Vol. III, **p.** *927)* that Relators determined to no longer pursue federal court jurisdiction. Plaintiffs make much of Relators' decision in February *of* 2005 *to* agree *to* a remand. Proving that "no good deed goes unpunished," Plaintiffs asserted that the agreed remand *itself* is evidence of Relators' bad motive. R. Vol. I, pp. 75-76. Plaintiffs' arguments are not supported by the Record.

The Record does support, however, that a number of factors went into Relators' decision to agree to remand. First, the MDL Court had ruled on many previous remand motions without requesting responsive briefing from those who **opposed** remand. *In re WorldCom, Inc. Sec. Litig.*, **293** B.R. 308 (S.D.N.Y. *2003); In re WorldCom, Inc. Sec. Litig.*, 294 B.R. *553* (S.D.N.Y. *2003); In re WorldCom, Inc. Sec. Litig.*, **2003** WL 21031974, at * *2-3* (S.D.N.Y. May *5*, 2003); *In re WorldCom, Inc. Sec. Litig.*, 2003 WL 21702284 (S.D.N.Y. July 23, 2003). In the present case, the MDL Court requested that Relators brief the issue, thus indicating that a deviation in the MDL Court's prior analyses *of its* subject *matter* jurisdiction may have been under consideration. At the very least, the Court's request for briefing indicated that several months could pass before the issue was decided by the MDL Court, and that *a* series of appeals from many affected cases likely would follow.

Moreover. in 2004, Citigroup and its related entities entered into an agreement to settle the consolidated WorldCom class action securities case. In light of that settlement, the relatively few cases that had been, or could be, filed after WorldCom emerged from bankruptcy, and the further expense and delay that would have been incurred in deciding the Plaintiffs' and other plaintiffs' remand motions and the appeals thereof, Relators agreed simply to remand this action so that it could get the arbitration issue resolved *more* quickly and with *less* expense,

Indeed, although the Plaintiffs complain of the relatively short delay that occurred from the initial removal of this case until the agreed remand, Relators could have delayed consideration of the merits of the underlying proceeding for many years, *if* delay had been their motive, by filing a responsive brief and, if unsuccessful, seeking appellate review. The simple fact is that Relators' motives were never based in delay, and Relators have at all times proceeded in good faith, without evil motive, and *on* the basis *of* well supported legal arguments to address the issues, procedural and otherwise, presented by the underlying proceeding. Relators therefore respectfully submit that Plaintiffs' name calling and accusations below were **not** only irrelevant to the arbitration issue, but also they were unfounded.

For these reasons, Relators respectfully submit that, as a matter of law, the trial court incorrectly ruled that Relators **waived** their right to compel Plaintiffs' claims to arbitration.

II. The Federal Act required the trial court to enforce the arbitration agreements.

A. As Plaintiffs did not dispute, the agreements evidenced transactions involving commerce; they contained valid, written arbitration provisions; and Plaintiffs' claims were within the scope of the arbitration provisions.

The Federal Act requires judicial enforcement of a wide range of arbitration agreements in written contracts "involving commerce," 9 U.S.C. § 2. Section 2 of the Federal Act provides:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, *shall be valid, irrevocable, and enforceable* . . . ,

9 U.S.C. § 2 (emphasis added). Courts have broadly interpreted the "involving commerce" requirement, and found it satisfied even by the most remote involvement with interstate commerce. *See Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265 (1995). This judicial interpretation comports with the liberal policy favoring arbitration, which is unequivocally endorsed by the United States Supreme Court. *See Southland Corp. V. Keating*, 465 U.S. 1, 10 (1984); *Moses H. Cone Mem'l. Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983). More specifically, the Court has stated that "any doubts concerning the scope of the arbitrable issues should be resolved in favor of arbitration." *Id.*

Plaintiffs' account agreements relate to investment accounts through which

Plaintiffs made investments in national securities markets. Because the account agreements, including the explicit agreements to arbitrate, are in writing and indisputably involve commerce, the provisions of the Federal Act are applicable and mandatory. ***See*** *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Wilson*, 805 S.W.2d 38, 39 (Tex. App.—El Paso 3991, no writ) (a securities account agreement is a contract for the purpose of trading securities and thereby clearly involves commerce for purposes of the Federal Act).

According to Section 4 of the Federal Act, **a** party who finds himself in court over a matter that is designated for arbitration by contract may petition the court for an order directing the adverse party to participate in arbitration. 9 U.S.C. § 4. The Supreme Court has affirmed that, "[b]y its terms, the [Federal **Act]** leaves no place for the exercise of discretion by a district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration on issues as to which an arbitration agreement has been signed." *Dean Witter Reynolds, Inc. v. Byrd*, 470 U.S. 213, 218 (1985).

In the present case, Relators introduced authenticated copies of numerous account agreements containing arbitration provisions. The arbitration clauses at issue are broad and sweeping in their scope, and they clearly evidence the parties' agreement to arbitrate **"all controversies"** concerning "any account" and "any transaction involving Smith Barney and the undersigned whether or not such transaction occurred in such account," R. Vol. I, pp. 39, 44-57 (emphasis in original). Moreover, the agreements expressly apply to CGM, its "successor organizations," and its "employees, present or farmer . . . ," such as Oelsen. *Id.*

Importantly, *Plaintiffs offered no evidence or argument in the trial court that*: (1) the agreements did not involve commerce; (2) Plaintiffs' claims were outside the scope of the arbitration provisions; or (3) the arbitration provisions were invalid or unenforceable for any reason. *See In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005) (Under the Federal Act, a party must establish (1) a valid arbitration agreement and (2) that the claims fall within the scope of the agreement). Accordingly, the trial court had no discretion under the Federal Act to refuse to compel Plaintiffs' claims to arbitration and to stay the litigation.

. **Citigroup also was entitled *to* compel arbitration.**

A non-signatory may compel a signatories' claims to arbitration:

> When the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent: and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. Otherwise the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.

Grigson v. Creative Artists Agency, 230 F.3d 524, 527 (5th Cis. 2000) *(quoting MS Dealer Serv. Corp. v. Franklin,* 177 F.3d 942, 947 (11th Cir. 1999)). Texas courts also have embraced the reasoning in *Grigson,* and they have applied that rule to compel claims against non-signatories to arbitration on many occasions. *McMillan* v. *Computer Translation Systems & Support, Inc.*, 66 S.W.3d 477, 481 (Tex. App.-Dallas, 2001, no writ); *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2002 WL 31165172 (Tex. App.–Dallas 2002, orig. proceeding) (not designated for publication); *In re Koch Indus., Inc.*, 49 S.W.3d 439, 447 (Tex. App.–San Antonio 2001, orig. proceeding); *Merrill Lynch,*

Pierce, Fenner & Smith, Inc. v. Eddings, 838 S.W.2d 874, 878-89 (Tex. App.—Waco 1992, writ denied); *Brown* v. *Anderson*, 102 S.W.3d 245, 249 (Tex. App.–Beaumont 2003, pet. denied); *Valero Energy Corp. v. Teco Pipeline Co.*, 2 S.W.3d 576, 591-93 (Tex. App.–Houston [14th Dist.] 1999, no writ).

Plaintiffs raise allegations of substantially interdependent and concerted misconduct by **CGM** and Citigroup. See *Grigson*, 210 F.3d at 527. Plaintiffs allege that "CGM, acting through Grubman and other CGM employees, engaged and participated in acts, practices, and courses of business that defrauded and deceived the Plaintiffs (among others) in connection with the purchase of WorldCom stock." R. Vol. I, **pp.** 13-14. Plaintiffs' allegations against Citigroup are limited to its indirect ownership of CGM. Plaintiffs allege that "Citigroup had the power to control or influence the transactions, **events,** and circumstances giving rise to CGM's and Grubman's violations of the T[exas] S[ecurities] A[ct]." R. Vol. I, p. 17.

Those allegations of substantially interdependent and concerted misconduct are further demonstrated by Plaintiffs' claim of common law fraud by CGM and Citigroup:

> Citigroup, as CGM's controlling corporation with supervisory responsibilities, knew about **the** fraudulent reports being issued by Grubman and other CGM employees, encouraged, perpetuated, and/or participated in that fraud, and benefited **from** it.

R. Vol. I, pp. 18-19. The arbitration provisions signed by Plaintiffs therefore applied to Plaintiffs' claims against Citigroup.

C. Under applicable law and the terms of the agreements, CGM, as successor to SSB and SBHUC, may enforce the arbitration provision.

Plaintiffs argued in the trial court that the documents upon which CGM relied to compel Mr. Nickell's (not Ms. Nickell's) claims to arbitration are not effective as to CGM because "they do not **apply** to successors . . ." of SSB or SBHUC. R. Vol. I, p. 90. Simply stated, Plaintiffs' argument was incorrect.

Relators submitted two (2) agreements containing arbitration provisions signed by Mr. Nickell. R. Vol. I, pp. 47 and 49. The first is between SBHUC and Mr. Nickell, and it specifically states that it "shall inure to the benefit of Smith Barney's present organization, and any successor organization or assigns." R. Vol. I, **p.** 48. The second is between Mr. Nickell and SSB, and it 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.

Through the Affidavit of Dan N. Wilhite, Relators established, and Plaintiffs did not dispute or controvert, that SSB and SBHUC are predecessors of CGM. R. Vol. I, p. 45, Indeed, in their own pleadings, Plaintiffs judicially admitted that fact. R. Vol. I, p. I, ¶¶ 3, 4, 8, 21 and 46; see *In re GTE Mobilnet of South Texas Ltd. Partnership,* 123 SW.3d **795,** 798 (Tex. App—Beaumont 2003, no pet.)(holding that plaintiffs reference in pleadings to defendant as successor-in-interest constituted a judicial admission).

Because ordinary principles of contract law are used in determining a parties' right to compel arbitration (*American Realty Trust, Inc. v. JDN Real Estate-McKinney, L.P.*, 74 S.W.3d 527, 53**1-32** (Tex. **App. –** Dallas 2002, writ denied); *In re Kellogg Brown &*

Root, 166 S.W.3d at 738 ("Under the FAA, ordinary principles of state contract law determine whether there is a valid agreement to arbitrate,"), it is clear that successors in interest may enforce the terms of arbitration agreements to which their predecessors are parties, when the contract so provides:

> An arbitration agreement may recognize that certain non-parties who have the appropriate sort of privity with one of the signatories – those such as assignees, agents, subrogated insurers, representatives, trustees, third party beneficiaries, etc. – are bound by the agreement because those types of non-parties 'stand in the shoes' of one of the signatories . . . .

In re Kepka, --- S.W.3d ---, 2005 WL 1777996, at *12 (Tex. App. – Houston [1st Dist.] July 28, 2005, no pet.) (not released for publication); ***see*** *also Capitan Enters., Inc. v. Jackson*, **903** S.W.2d *772, 775* (Tex. **App.** – El Paso 1994, writ denied), As with any contract, an assignee such as a successor-in-interesi can be bound to the terms of **the** arbitration agreement signed by a predecessor-in-interest.

D. Alternatively, Plaintiffs are estopped from avoiding their agreements to arbitrate.

Additionally and alternatively, even *if* the Court concludes that CG'M, as SSB's and SBHUC's successor, is not entitled to enforce the arbitration provisions as a successor to a signatory, equitable estoppel nevertheless dictates that the Court should compel the Plaintiffs' claims to arbitration. "Several courts of appeals have recognized an estoppel theory whereby nonsignatories to an arbitration agreement have standing to compel arbitration against a signatory, and the signatory is estopped from avoiding arbitration with a nonsignatory when the issues which the nonsignatory wants to resolve are intertwined with the agreement that the signatory signed," *Grigson v. Creative Artists*

Agency, L.L.C., 210 F.3d 524 (5th Cir. 2000); *McBro Planning and Dev. Co. v. Triangle Elec. Const. Co., Inc.*, 741 F.2d 342 (11th Cir. 2984). This theory applies when a signatory to the written agreement must rely on the terms of the agreement to assert its claims against the nonsignatory such that the signatory's claims make reference to or presume the existence of the written agreement, or the signatory's claims arise out of and relate directly to the written agreement. *See MS Dealer Serv. Corp. v. Franklin*, 177 F.3d 942, *947* (11th Cir. 1999); **Men-ill** *Lynch, Pierce, Fenner & Smith, Inc. v. Eddings*, 838 S.W.2d 874, 878-89 (Tex. **App. –** Waco 1992, writ denied).

The agreements Plaintiffs signed, and which contain the arbitration provisions, allowed Plaintiffs to open and maintain their accounts at CGM and its predecessors in which they purchased WorldCom securities. Thus, Plaintiffs' claims arise out of or relate directly to those agreements. Plaintiffs should not be allowed, on the one hand, to avail themselves of the benefits **of** the agreements by trading securities though, and by maintaining accounts with, CGM and its predecessors, but, an the other hand, avoid the parks of the agreements such as the arbitration provisions. *In re Kellogg Brawn & Root*, 166 S.W.3d at 740-41. Accordingly, Relators are entitled to arbitrate Plaintiffs' claims on the basis of equitable estoppel.

PRAYER

For the foregoing reasons, Relators respectfully request that the Court issue a writ of mandamus to Respondent directing her to set aside her Order of October 3, 2005 and to enter an order granting the Arbitration Motion in its entirety. Finally, Relators respectfully request that the Court grant them such other and further relief to which they

may show themselves justly entitled.

Dated: October 26, 2005

Respectfully submitted,

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ATTORNEYS FOR RELATORS

VERIFICATION OF APPENDIX AND RECORD

STATE OF TEXAS §
§
COUNTY OF DALLAS §

Before me, the undersigned authority, on this day personally appeared James W. Bowen to be the person whose name is subscribed below and who, upon his oath and based upon personal knowledge, stated that (1) he is one of the attorneys of record for Relators in this original proceeding and in the underlying case; and (2) 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

Given under my hand and official seal of office this 26th day of October, 2005.

Notary Public, State of Texas

BEVERLY A. TOMASSI
Notary Public, State of Texas
Comm. Expires 06-10-2007

STATEMENT REGARDING VERIFICATION OF PACTS AND FILING OF THE RECORD

Pursuant to Rule 52.3, the factual statements in this petition are supported by citations to sworn affidavits and exhibits that were (i) filed with the trial court in support of the motion giving rise to this original proceeding, and (ii) are included in the appendix attached to this petition and in the record submitted with this petition. Should the Court determine Relators have not fully complied with Rule 52.3, Relators request that the Court permit Relators to amend the petition, pursuant to Rules 38.7 and 35.9, by submitting any additional verification as the Court may deem necessary,

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served by certified mail, return receipt requested upon the following counsel of record on this 26th day of October, 2005:

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

James W. Bowen

TAB 2

NO. 05-05-01459-CV

IN THE COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

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 AND SUPPORTING BRIEF

From *County* Court at Law No. 3 of Dallas County, Texas
The Honorable Sally L. Montgomery, presiding

Cause No. 04-04729-C
Robert A, Nickell, et al. v. Citigroup Global Markets, Inc., et al

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TABLE OF AUTHORITIES

CASES

STATUTES

NO. 05-05-01459-CV

IN THE COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

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 AND SUPPORTING BRIEF

TO THE HONORABLE JUSTICES OF THE FIFTH COURT OF APPEALS:

The real parties in interest, Robert A. Nickell ("Mr. Nickell") and Natalie Bert Nickell ("Mrs. Nickell"), plaintiffs in the underlying case (collectively, the "real parties in interest" or the "Nickells"), respectfully submit this Response to Relators' Petition for Writ of Mandamus and Supporting Brief and would show that the Honorable Sally L. Montgomery, Presiding Judge for the County Court at Law No. 3 of Dallas County, Texas, properly exercised her discretion in denying Relators' Motion. to Compel. Arbitration and Stay Proceedings (the "Motion to Compel"). For the reasons stated herein, this Court should deny Relators' Petition for Writ of Mandamus and affirm Respondents' Order Denying the Motion to Compel in its entirety.

I. GROUNDS FOR DISMISSAL OF MANDAMUS PETITION

Relators bear the burden of establishing their entitlement *to* mandamus relief.[1] Based on the record presented, Relators have not demonstrated their entitlement to mandamus relief because they have failed to verify the factual statements in the Petition

[1] *Hansen v. Sullivan*, 886 S.W.2d 467,469 (Tex. App.–Houston [1st Dist.] 1994, orig. proceeding).

fur Writ of Mandamus (the "Petition'" ') required by Texas Rule of Appellate Procedure 52.3 and, therefore, the Petition should be denied.'

If the Court proceeds to consider the merits of the Petition, the Nickells submit the following in response:

II. ISSUE PRESENTED

The "Issue Presented" section of the Petition does not correctly reflect the applicable standard of review in this mandamus proceeding. The "Issue Presented" is correctly stated as: "Whether the trial court *clearly* abused its discretion in denying Relators' Motion to Compel Arbitration and Stay Proceedings,"

III. STATEMENT OF FACTS

A. *Corrections and Clarifications to Petition's Statement of Facts*

The real parties in interest concur with most af the Petition's Statement of Facts, but dispute a few of the assertions in that section. First, the Nickells dispute the general characterization that they "'were customers of CGM"[3] to the extent that it implies or connotes that Mr. Nickell agreed to arbitrate any claim with Relator Citigroup, Inc. ("Citigroup") or Relator Citigroup Global Markets, Inc. ("CGM"). The Nickells also dispute that Mr. Nickell signed a Margin Agreement "[i]n connection with his account number 104-06936-14 at CGM."[4] In fact, neither Citigroup nor CGM was a signatory

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[2] *See* Pet. at 36; *In re Aguirre*, 161 S.W.3d 8 (Tex. App.–Houston [14th Dist.] 2004, no *pet,)* (denying relators' petition for writ of mandamus due to his failure to include an affidavit swearing *to* the truth of all factual statements in the petition in accordance with TRAP 52.3).

[3] Petition for Writ of Mandamus and Supporting Brief ("Pet.") *at* 2.

[4] *Id.*

to the Margin Agreement executed by Mr. Nickell, and the Margin *Agreement* expressly relates to account number *028-609730,* not to account number 104-06936-14.[5]

The Nickells wish to clarify that neither Citigroup nor CGM was a signatory to the New Account Application and Option Suitability form executed by Mr. Nickell with respect to account number 104-06936-14.[6] And they dispute Relators' characterization that the "New Account Application and Option Suitability form for account number 104-16936-14 contain[ed] substantially similar language" as that quoted by Relators from the Margin Agreement executed by Mr. Nickell.[7] In fact, the arbitration clause contained in the New Account Application and Option Suitability form for account number 104-16936-24 is different and states:

> I agree that all claims or controversies, whether such claims or controversies arose prior, on or subsequent to the date hereof, between me and SSB and/or my of its present or former officers, directors, or employees concerning or arising from (i) any account maintained by my with SSB individually or jointly with others in any capacity; (ii) any transaction involving SSB or any predecessor firms by merger, acquisition or other business combination and *me,* whether or not such transaction occurred in such account or accounts; or (iii) the construction, performance or breach of this or *any* other agreement between us, *any* duty arising from the business of SSB or otherwise, shall be determined by arbitration before, and *only* before, my self-regulatory organization or exchange of which SSB is a member.[8]

Relators' Record in Support of Petition for Writ of Mandamus, Volume 1, pp. 4748 (agreement was between Mr. Nickell and Smith Barney Harris Upham & Co.).

Hereafter, citations to the Relators' Record will be "Rel. App. Vol. __, p. __." Citations to the Appendix of Plaintiffs/Real Parties In Interest in Support of their Response to Petition for Writ of Mandamus and Supporting Brief (filed simultaneously herewith) will be "Nickell App. p. __"

[6] *See* Pet. at *3;* Rel. App. Vol. I, pp. 49-50 (agreement was between Mr. Nickell and Salomon Smith Barney, Inc.).

[7] Pet. *at* 3.

[8] Rel. App. Vol. I, pp. 49-50.

The Nickells also wish to clarify that neither CGM nor Citigroup was a signatory to t o of the three agreements executed by Mrs. Nickell and dispute that she executed "substantially similar arbitration provisions".[9]

Finally, the Nickells note, as do Relators, that "Respondent denied the Arbitration Motion in its entirety without explaining the basis of her ruling"[10] and dispute any assumption that the Order Denying the Motion to Compel was based on any specific ground.[11]

B. *Additional Facts Pertinent To The Denial Of Relators' Motion To Compel*

1. Facts relating to federal subject matter jurisdiction

In the underlying suit, the Nickells have at all times asserted only state law causes of action.[12] The parties do not dispute that, at all times, no federal question or diversity of citizenship has existed. As Relators note, they removed this case to the United States District Court for the Northern District of Texas, Dallas Division (the "Dallas federal court") pursuant to 28 U.S.C. § 1452(a) on the purported basis that it "related to" the WorldCom bankruptcy proceedings.[13] To support their contentions of "related to" jurisdiction under 28 U.S.C. § 1334(b), Relators pointed solely to the fact that Citigroup

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[9] Pet. at 3; Rel. App. Vol. I, pp. 52-57.

[10] Pet at 9,

[11] See Pet. at 9 ("Although Respondent did not provide any explanation for her Order, a review of the transcript and the associated briefing makes it clear that the Order was based on waiver").

[12] Rel. App. Vol. I, pp. 13-25.

[13] Pet. at 5.

had filed a Proof of Claim in the WorldCom bankruptcy *action* on January 23, 2003, supposedly on behalf of itself and the other Defendants (the "Proof of Claim").[14]

Relators' removal pleadings omit several key facts relating to the Proof of Claim that occurred well before the Nickells filed the underlying lawsuit:

1. On or about June 12, 2003, WorldCom filed objections to certain proofs of claim in the WorldCom bankruptcy proceedings "[t]o reduce the number of claims, and to avoid possible double recovery or improper recovery by claimants . . ." WorldCom urged that certain claims, including the Proof *of* Claim underlying Defendants' removal, arose "from the purchase or sale of equity securities" and, thus, were "not entitled to the classification of secured, priority, or unsecured as asserted in the [Proof of Claim]." WorldCom asked the bankruptcy court to reclassify and statutorily subordinate the Proof of Claim pursuant to section 510(b) *of* the Bankruptcy Code.[15]

2. *On* or about July *31,* 2003, the bankruptcy court entered *an* Order Granting Debtors' Fourteenth Omnibus Objection to Proofs of Claim (Reclassification, Subordination *And,* As Applicable, Late Claims). The Proof of Claim was reclassified as a Class 7 claim and subordinated to all claims and interests that were senior to or equal to it under the Bankruptcy Code.[16]

3, In October *2003,* the bankruptcy court confirmed WorldCom's reorganization plan.[17] It dictates the following treatment of "Class 7 – WORLDCOM SUBORDINATED CLAIMS" (including the Proof of Claim): "The holders of WorldCom Subordinated Claims

[14] Rel. App. Vol. II, pp. 314,382-92.

[15] Sea Rel. App. Vol. III, pp. 941, 967-69; Plaintiffs' Motion for Leave to Supplement Plaintiffs' Motion to Remand or to Abstain and Brief in Support (Rel. App. Vol. III, pp. 674-786) (seeking leave to supplement the remand record with evidence that demonstrates the virtual impossibility that Relators would recover any money on the Proof of Claim and, thus, the absence *of* federal subject matter jurisdiction); Plaintiffs' Reply Supporting Motion for Leave to Supplement Their Motion for Remand and Plaintiffs' Response to Defendants' Motion for Leave to Supplement Response in Opposition to Motion to Remand (Rel. App. Vol. III, pp. 788-96) (same).

[16] *See* Rel. App. Vol. III, pp. 941,975-77.

[17] Rel. App. Vol. III, pp. 707-86.

shall not receive *any* distributions, on account of such Claims and shall not retain any property under the Plan."[18]

On April 20,2004, about two months before the Nickells filed suit and served *the* Relators with process, the Plan became **effective** and WorldCom formally emerged from bankruptcy as MCI. Relators have not disputed that *these* facts relating *to* the WorldCom bankruptcy proceedings occurred before the Nickells initiated this lawsuit, and were known to Relators when they removed *this* case." Plaintiffs swiftly moved to remand this case on the ground there was no "related to" jurisdiction under Section 1334(b) because, under applicable law, a claim with no value cannot possibly impact the bankruptcy estate."

2. Facts relating to the transfer of the underlying lawsuit: to the United States District Court. for the Southern District of New York for consolidation and/or coordination with the WorldCom Multidistrict Litigation. Proceedings

a. Relators' successful efforts to transfer the underlying action

On August 10,2004, Relators sought to transfer the underlying case to the United States District Court for the Southern District of New York (the "New York federal court") under 28 U.S.C. § 1407, the federal multidistrict litigation statute ("Section 1407").[21] In particular, Relators Citigroup and CGM filed a letter with the Judicial Panel on Multidistrict Litigation (the "JPML") in Washington, D.C., asking it to treat this case as a "tag-along" action to the multidistrict litigation proceedings involving WorldCom

[18] Rel. App. Vol. III, p. 755 (emphasis added); *id.* at pp. 746-47 (defining a "'Securities Litigation Claim"); *id.* at p. 748 (defining "WorldCom Subordinated *Claims"* as "all Securities Litigation Claims").

[19] *See* Rel. App. Vol. I, pp. 94-139,

[20] Rel. App. Vol. II, pp. 399-403; Rel. App. Vol. III, pp. 829-926.

[21] *See* Pet. *at 5-6;* Rel. App. Vol. III, pp. 944-46. Just prior, Relators sought the dismissal *of* the underlying suit pursuant to Federal Rule of Civil Procedure 12(b). Rel. App. Vol. I, pp. *68,* 109.

that were and are pending in the United States District Court for the Southern District of New York (the "Now York federal court") (hereafter, the "MDL Proceedings").[22] In their tag-dung request, Relators asserted that all pretrial proceedings in this case should be coordinated and consolidated with the MDL Proceedings because: (1) "[t]his action involves the same core facts as many cases that the MDL Panel has already centralized in *the* Southern District of New York: namely, allegations that SSB published fraudulent research reports concerning WorldCom . . . which allegedly caused damage to WorldCom shareholders once WorldCom's fraud was detected and the Company collapsed; and (2) [a]s the MDL Panel has found, centralization of WorldCom-related actions in the Southern District *of* New York 'will serve the convenience of parties and witnesses and promote the just and efficient conduct of the litigation.'"[23] Relators' request to treat the underlying case as a "tag-dong" action and to include it in the MDL Proceedings was completely silent on any intent by Relators to arbitrate, the existence of any claimed arbitration rights, and my specific claim that the New York federal court presiding over the MDL Proceedings was best suited to resolve a motion to arbitrate.[24]

On September *9,* 2004, the JPML granted Relators' tag-along request and issued an *order* conditionally transferring this case under Section 1407 to the New York federal court.[25] The Nickells filed various pleadings opposing Relators' Motion to Stay Proceedings in the Dallas federal court and the JPML's conditional transfer of this action,

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[22] *Id.* JPML Rule 1.1 defines a "tag-dong action" as "a civil action pending in *a* district court and involving common questions *of* fact with actions previously transferred under Section 1407," Rel. App. Vol. III, p. 949.

[23] Rel. App. Vol. III, pp. 944-46.

[24] *See id.*

[25] Rel. App. Vol. II, p. 572.

primarily on the grounds that federal subject matter jurisdiction was absent.[26] Nevertheless, over the Nickells' opposition, the JPML ultimately awarded Relators all of the relief they sought under Section 1407 and issued a final Transfer Order on December 6, 2004.[27] Without mentioning arbitration or the possibility that Relators might seek *it*, the Transfer Order declared that this action "involve[s] common questions of fact with actions in this litigation previously transferred to the Southern District of New York, and that transfer of the actions to that district for inclusion in the coordinated or consolidated pretrial proceedings occurring there will serve the convenience of the parties and witnesses and efficient conduct of the litigation."[28]

As with their tag-along request, none of the filings that Relators submitted to the JPML mentioned their alleged intent to arbitrate the underlying action, the existence of any claimed arbitration rights, or any specific claim that the New York federal court was best suited to resolve any demand for arbitration.[29]

b. *Facts relating to 28 U.S.C. § 1407*

28 U.S.C. § 1407 permits transfer "for coordinated or consolidated pretrial proceedings . . . upon [the JPML's] determination that transfers far such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient

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[26] **Plaintiffs'** Response to the Motion to Stay (Rel. App. Vol. II, pp. 573-84); **Plaintiffs' Appendix** in Support of Their **Response** to the Motion to Stay (Rel. App. Vol. II, pp. 585-618); Motion to **Vacate** Conditional Transfer **Order** (CTO-30) or, Alternatively, *to* Extend **Order** *Staying* **CTO-30** Pending the **District Court's** Determination of Remand and/or **Abstention and Brief in Support (Rel. App. Vol. III, pp.** 797-810); **Plaintiffs' Reply in Support of their Motion to Vacate, filed on November** 8, 2004 (Rel. App. Vol. III, pp. **891-95).**

[27] *See* Rel. **App.** Vol. III, pp. *897-98.*

[28] *See id.* (emphasis **added).**

[29] *See* Rel. App. Vol. III, **pp.** 944-46, 811-825.

conduct of such actions."[30] The statute also states: "[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."[31] Multidistrict litigation procedure further dictates that a case transferred under Section 1407 is remanded for trial to the federal transferor court (in this case, the Dallas federal court) upon the conclusion of the coordinated or consolidated pretrial proceedings.[32]

3. Facts relating to the Nickells' Show Cause Filing in the New York federal court demonstrating the absence of federal subject matter jurisdiction and that remand was warranted

After this case was transferred to the New York federal court, the Nickells were required to respond to a Show Cause Order previously issued by the New York federal court in order to obtain any consideration of their Remand Motion.[33] Plaintiffs responded to the Show Cause Order on January 18, 2005, establishing (yet again) the absence of subject matter jurisdiction and showing that remand was proper.[34]

The New York federal court ordered that Relators' response to Plaintiffs' Show Cause filing was due on February 11, 2005.[35] On that very day, instead of filing a

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[30] 28 U.S.C. § 1407(a) (emphasis added).

[31] 28 U.S.C. § 1407(b).

[32] 28 U.S.C. § 1407(a) ("Each action so transferred shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred unless it shall have been previously terminated."); J.P.M.L. Rule 7.6(b) ("Each action transferred only for coordinated or consolidated pretrial proceedings that has not been terminated in the transferee district court shall be remanded by the Panel to the transferor district court for trial.") (Rel. App. Vol. III, p. 958).

[33] Pet at 7.

[34] See Rel. App. Vol. III, pp. 899-926, Specifically, Plaintiffs established that, under applicable law, federal jurisdiction under Section 1334(b) was absent because (a) WorldCom was not in bankruptcy at the time of removal; (b) this case was not "related to" the WorldCom bankruptcy because, at the time of removal, there was no estate upon which this action could have any effect; and (c) the Proof of Claim is worthless because it was discharged by the Plan and the Bankruptcy Code. Rel. App. Vol. III, pp. 907-12.

[35] Rel. App. Vol. III, p. 927.

response demonstrating that they had correctly removed *the* case, Relators contacted Plaintiffs through counsel to announce that they would agree to remand this case to Respondent's court.[36] Relators' counsel drafted and emailed to Plaintiffs' counsel a proposed order stipulating to a remand (the "Remand Order").[37] *After* the parties signed the Remand Order, Relators' counsel transmitted it to the New York federal court for its

On February 14, 2005, the New York federal court entered the agreed Remand Order, making no substantive change to the language drafted by Relators.[39] The Remand Order states: "IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto through their undersigned counsel. 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."[40] Consequently, this case was remanded to this Court pursuant to the parties' agreement and the order of the New York federal court.

Plaintiffs' ability to prosecute the merits of their claims was delayed *for* approximately eight months, During that time, Plaintiffs and their counsel expended substantial effort and incurred significant expense responding to Defendants' attempt to adjudicate this action in federal court.[41]

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[36] See Rel. App. Vol. III, pp. 942-43.

[37] Rel. App. Vol. III, p. 943.

[38] Rel. App. Vol. III, pp. 942-43, 990-95.

[39] Rel. App. Vol. III, pp. 928-29, 943, 996-99.

[40] Rel. App. Vol. III, pp. 928-29.

[41] Rel. App. Vol. III, p. 943.

4. Facts relating to Relators Citigroup and CGM's agreement to settle the consolidated WorldCom class action securities case

On May 10,2004, Citigroup, CGM, and related entities announced that they had settled class action litigation brought on behalf of purchasers of WorldCom securities which was pending in the consolidated class action in New York federal court.[42] The New York federal court granted final approval of the settlement in November 2004.[43]

IV. ARGUMENT AND AUTHORITIES

A. *Summary of Argument*

Respondent correctly denied Relators' Motion to Compel for one or both of two reasons: (1) Relators waived their alleged arbitration rights by attempting to secure federal forums, the New York federal court (and the MDL Proceedings therein) and the Dallas federal court, to *litigate* their claims and obtain resolution through a jury trial; and/or (2) Relators never had any arbitration rights with respect to the claims asserted by Mr. Nickell because the arbitration provisions in the contracts signed by Plaintiffs did not confer those rights on the Citigroup and CGM Relators as non-signatories and successor corporations.

In attempting to justify their removal of this case to Dallas federal court based upon a specious and untenable jurisdictional theory, their petitioning for a transfer order from the Washington-based JPML, and their transfer of the case to New York federal court for consolidation with the MDL Proceedings, Relators state that they merely wanted to present their Motion to Compel Arbitration to the most "appropriate" court.

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[42] See Pet. at 27; Nickell App., pp. 1-3,

[43] See Nickell App., pp. 4-62. The documents contained in the Nickells' Appendix are responsive to the points raised on pages 7 and 27 of the Petition.

They cannot explain – and have not attempted to explain - why the New York federal court was somehow more appropriate. They cannot explain why Respondent's court or the Dallas federal court was not perfectly capable of deciding their rudimentary Motion to Compel last year, long before Plaintiffs were taken on a protracted and tortuous procedural goose chase.

Contrary to their inexplicable and illogical position that they removed the case and dragged Plaintiffs into the MDL Proceedings so that the New York federal court could decide their Motion to Compel, Relators decided, not long after this case was filed, that they would rather defend Plaintiffs' claims in *the* New York and Dallas federal courts than before an NASD arbitration panel. To achieve *a* transfer to the MDL Proceedings, Relators knew they would have to meet the criteria for transfer under Section 1407, primarily by showing that the case's factual similarities with other cases in the MDL Proceedings made it ripe for transfer and consolidation to maximize efficiencies in pre-trial discovery. And they realized 'they could not meet this criteria and effectively argue to the JPML that a Section 1407 transfer was appropriate while, at the same time, informing the JPML that they were maintaining their alleged arbitration rights. Accordingly, at that point, Relators made a conscious and strategic choice to abandon their alleged arbitration rights in favor of the MDL Proceedings. They made a calculated decision to omit my mention of arbitration rights or intentions from their transfer pleadings, committed fully to litigating this case in the federal courts, and expressed that commitment to the JPML and federal courts.

But when the MDL Proceedings did not go Relators' way and they were unexpectedly called upon to explain and defend their frivolous removal position, they

were forced and chose to stipulate to a remand, thereby committing to defend Plaintiffs' claims in Respondent's court. Nevertheless, upon landing back in Respondent's court, Relators attempted to invoke the alleged arbitration rights they had abandoned. Consequently, upon considering the above-described facts, which are distinct from the facts underlying any published case deciding whether arbitration rights were waived, Judge Montgomery correctly precluded Relators from invoking those alleged rights.

B. Standard of Review

Relators must convince this Court that they are entitled to the extraordinary remedy of mandamus.[44] They bear the heavy burden of proving that Judge Montgomery clearly abused her discretion in denying their Motion to Compel, and that they have no adequate appellate remedy.[45] Relators can only prove a clear abuse of discretion by showing that Judge Montgomery acted unreasonably, arbitrarily, or without reference to *any* guiding rules or principles.[46] Stated differently, they must establish that, in view of the entire record, the facts and law required Judge Montgomery to make only one decision.[47] Relators cannot prove an abuse of discretion if some evidence reasonably

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[44] *See Canadian Helicopters, Ltd. v. Wittig*, 876 S.W.2d 304,305 (Tex. 1994) (holding that mandamus is an "extraordinary remedy" and is only available in "limited circumstances"); *Walker* v. *Packer*, 827 S.W.2d 833, 840 (Tex. 1992) (same).

[45] See *Jack B. Anglin Co., Inc. v. Tipps*, 842 S.W.2d *266*, 271 (Tex. 1992) (providing that the court of appeals reviews an order compelling or denying arbitration under the Federal Arbitration Act under an abuse of discretion standard); *Canadian Helicopters*, 876 S.W.2d at 305 (declaring that the burden of proving a clear abuse of discretion and the inadequacy of a remedy by appeal is "a heavy one"),

[46] *Downer v. Aquamarine Operators, Inc.*, 701 S.W.2d 238,241-42 (Tex. 1985); *Mercedes-Benz Credit Corp. v. Rhyne*, 925 S.W.2d *664,666* (Tex. 1996); *Metropolitan Life Ins. Co. v. Syntek Finance Corp.*, 881 S.W.2d 319,321 (Tex. 1994).

[47] *See Mercedes-Benz Credit Corp.*, *925* S.W.2d *at 666* (asserting that the reviewing court must examine the entire record to determine whether the trial court abused its discretion); *Johnson v. Fourth Court of Appeals*, 700 S.W.2d 916, 917 (Tex. 1985) (holding that the relator in a mandamus proceeding "must establish ... that the facts and law permit the trial court to make but one decision").

supports Judge Montgomery's decision *or* shows that she **followed** guiding **rules or** principles.[48] When reviewing matters committed to a **trial court's** discretion, **an appellate** court may **not** substitute its own judgment for that of **the** trial court.[49]

C. Analysis

1. Relators did not expressly preserve their alleged right to arbitrate

To **resist** a finding of waiver, Relators claim that they "expressly preserved arbitration from the outset of this case."[50] However, the record flatly belies this contention. Relators note **a** handful of instances in **which** they reserved "all defenses" and maintain that such statements encompassed and preserved their alleged **right to** arbitrate.[51] However, these statements do **not** have this claimed effect because they do not encompass the right to arbitrate, As Relators concede, the right **to arbitrate** is not a defense.[52] Therefore, **any** of their isolated statements that purport to preserve any "defenses" do not relate to or encompass any arbitration right.

On **August 25, 2004,** Relators filed in the Dallas federal court a Motion to Stay Proceedings Pending a Final Determination of Transfer by the JPML.[53] In **a** passing

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[48] See *Walker v. Packer*, 827 S.W.2d at 840 (providing that appellate court **may** not set aside the trial **court's** determination unless **it** *is* clear from the record that the trial court could only **reach** one decision); *Morrow v. H.E.B., Inc.*, **714** S.W.2d **297, 298** (Tex. 1986) (finding that there **was** no abuse of discretion because some evidence **showed** that **the trial** court **followed** guiding rules or **principles); *Davis v. Huey*, 571** S.W.2d ***859,*** 862 (Tex. *1978)* (declaring **that** there is **no abuse of discretion if** some evidence, albeit **controverted** evidence, **supports** the trial court's decision),

[49] *Walker v. Packer*, **827** S.W.2d at 839.

[50] Pet. at 14, 19.

[51] See ***id*** **at 14 {Relators'** July 9,2004 Notice of Removal and the February 11,2005 Remand Order both reference **"all defenses").**

[52] *See id.* ***at*** **14** & n. 11. ("Relators **readily** acknowledge **that** the right **to compel arbitration** *is* **not a** specific **defense under** TEX. R. CIV. P. *94* ***or*** FED. R. CIV. P. 12 (b) . . .").

[53] ***Id.*** at 6.

footnote on page two of that pleading, Relators claimed that their motion was filed "without waiver of *any* of their defenses, including, but nut limited *to,* . . . the requirement that Plaintiffs arbitrate, not litigate, their claims."[54] As Relators' own evidence shows, this lone statement is the only instance in which Relators mentioned their alleged right to arbitrate, despite having filed numerous pleadings in the Dallas federal court and *the* JPML before agreeing to remand this case to County Court.[55] Therefore, contrary to Relators' illusory arguments, they have not repeatedly and expressly preserved their alleged arbitration rights.[56]

Moreover, a generalized reference to *the* possibility of arbitration should be considered ineffectual to preserve that right or to defeat a showing of waiver. As other courts have acknowledged soundly, "[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 . . .."[57] Indeed, this is in accord with the express language of the Federal Arbitration Act, which specifically contemplates that a party invokes its right to arbitrate by way of a formal motion.[58] A random, footnoted reference does not meet this standard.

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[54] Rel. App. Vol. II, p. 539 n.1.

[55] Pet. at 14-15.

[56] See Pet at 14.

[57] *Manos v. Geissler*, 321 F. Supp.2d 588, 595 (S.D.N.Y. 2004) (concluding that defendants' reference to the right *to* arbitrate in their answer did not defeat plaintiffs' showing of waiver); *In re Currency Conversion Fee Antitrust Litig.*, 2005 WL 1705285, at *4 n.1 (S.D.N.Y. July 22, 2005) ("Citibank's argument that it raised arbitration in its Answer and therefore did not waive its arbitral rights is unavailing") (applying *Manos*); see *also Smile Inc. v. BriteSmile Management, Inc.*, 2005 WL 2173821, at *6 & n.1 (Utah App. 2005) (declining to conclude that merely raising arbitration as an affirmative defense alone is sufficient to preserve that right and listing cases with similar dings).

[58] *See* 9 U.S.C. § 3 (providing that a court shall stay the trial of the action pending arbitration "on application of one of the parties") (emphasis added); *id.* at. § 4 (providing that a party *may* seek to compel

2. Relators expressly waived their alleged right to arbitrate the claims asserted in *the* underlying proceeding

a. *Legal Standards* ***Regarding*** *Waiver*

Arbitration clauses are contractual provisions and, as such, may be waived.[59] The **question** of waiver depends on the individual **facts** and circumstances ***of*** each case; there **are no** bright-line rules.[60] There are **two ways in** which waiver **of** *the* right *to* arbitrate can occur: express waiver and implied waiver.[61]

(i) Express waiver

No Texas or Fifth Circuit Court applying the Federal Arbitration **Act appears** *to* have articulated **a** specific test **to** evaluate **express** waiver of the **right** to arbitrate. Nonetheless, sound governing principles do exist **and** were applied by the trial **court**.[62] **Express** waiver has been **described** generally **as** the intentional relinquishment **of** a known right.[63] The Second Circuit has announced, while considering the asserted **waiver** of the **right** to arbitrate, that express waiver may occur when **a** party expressly indicates that **it**

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arbitration by petitioning the court "for an order directing that **such** arbitration proceed in the manner provided for in [the] agreement") (emphasis added).

[59] *See Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d **494**, 497 (5th Cir. **1986**); *Sedillo v.* ***Campbell,*** 5 S.W.3d **824,826** (Tex. **App.** – Houston [14th Dist.] 1999, **no** writ).

[60] *Burton-Dixie Carp. v. Timothy McCarthy Constr. Co.*, **436** F.2d **405**, 408 (5th Cir. **1971**); *First* ***Community Ins.*** *Co. v. F-Con Contractors, Inc.*, 2000 WL 274001, **at** * 2 (Tex. App.--Dallas 2000) (not designated for **publication).**

[61] *E.g., Sedillo*, **5** S.W.3d *at* **826** ("A **party can expressly** or impliedly **waive** *a* contractual **right** *to* arbitrate."); ***First*** *Community Ins. Co.*, **2000** WL 274001, *at* * I ("In **the absence of** an *express* **waiver, waiver** may be implied when the party seeking **to** compel arbitration **has acted** inconsistently **with** its right **to** arbitrate.").

[62] See Rel. App. Vol. I, pp. 73-74.

[63] ***United*** *States Fidelity & Guar. Co. v. Bimco Iron & Metal Corp.*, 464 S.W.2d *353*, **357** (Tex. 1971) (defining waiver generally as the intentional relinquishment ***of*** *a* **known right or conduct inconsistent** with claiming that right).

wishes to resolve its claims in court.[64] This standard is resolute and logical. Basic definitions, combined with common sense, dictate that express waiver of the right to arbitrate will necessarily hinge on the words a party uses to articulate the appropriate forum for the adjudication of the dispute.[65] Also, no showing of prejudice is *necessary* if a litigant has expressly waived its right to arbitrate.[66]

For the first time, Relators urge the creation of *a* test for express waiver in the arbitration context that would require an "overt act" evidencing intent to waive.[67] As demonstrated herein, this Court should disregard this newfound test on several grounds.[68] However, even *if* this Court were to apply this test, the record still supports a conclusion of express waiver.[69]

(ii) Implied Waiver

Several Texas and Fifth Circuit courts have analyzed the circumstances under which a pasty impliedly waives its right to arbitrate, It is apparent that the implied waiver

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[64] *Gilmore v. Shearson/American Express Inc.*, 811 F.2d 108, 112 (2d Cir. 1987) (*overruling on other grounds recognized by McDonnell Douglas Fin. Corp. v. Pa.* Power *& Light Co.*, 849 F.2d 761, 763-64 (2d Cir. 1988)); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237,257 [S.D.N.Y. 2005) (citing *Gilmore*); see Rel. App. Vol. I, pp. 73-74.

[65] *Cf. Dallas Morning News Co. v. Board of Trustees of Dallas Indep. Sch. Dist.*, 861 S.W.2d *532,* 540 (Tex. App.—Dallas 1993, no pet.) (a term left undefined by statute should be given its "ordinary meaning" by employing dictionary definitions and common sense).

Black's Law Dictionary defines "express" as: "Clearly and unmistakably communicated; directly stated" Black's Law Dictionary (8th ed. 2004). The dictionary also defines "'*express*" as "directly, firmly, and explicitly stated." Merriam Webster's Collegiate Dictionary (10th ed. 1994); *see also id.* (when used as a verb, the word "*express*" is defined as "to represent in words. STATE").

[66] *Gilmore*, 811 F.2d at 112; *Century Indemnity Co. v. Viacom Intern., Inc.*, 2003 WL 402792, at *6 (S.D.N.Y. Feb 20,2003) (not designated for publication) (cited by Relators, Pet. at 21).

[67] *See* Pet at 19 - 22.

[68] See *infra* at 26-27.

[69] See *infra* at 27.

analysis centers on a party's actions (as opposed to words) and requires the court to *infer* whether a party, *by its conduct*, intended to waive its right to arbitrate.[70] The court must evaluate whether a party's conduct substantially invokes the judicial process to the opponent's detriment.[71] "To substantially invoke the judicial process a party must make a specific and deliberate act after suit has been filed that is inconsistent with its right to arbitrate."[72] Moreover, "any conduct of the parties inconsistent with the notion that they treated the arbitration provision in effect or any conduct; that might be reasonably construed as showing that they did not intend to avail themselves of *the* arbitration provision may amount to a waiver."[73]

b. *Relators' **Explicit** Statements Demonstrating **Express** Waiver*

The record before the trial court demonstrated clearly that Relators *intentionally* relinquished long ago any real interest, effort, or right *to* pursue arbitration.[74] Indeed, the record is replete with Relators' express statements and procedural choices attempting *to*

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[70] *In re Bruce Terminex Co., 988* S.W.2d 702, 704 (Tex. 1998) ("Courts will not find that a party has waived its right to enforce an arbitration clause merely by taking part in litigation unless it has substantially invoked the judicial process to its opponent's detriment") (emphasis added).

The fact *that* the implied waiver analysis clearly examines a party's conduct only underscores the conclusion that the express waiver analysis centers on a party's words, not its actions.

[71] *Sedillo v. Campbell,* 5 S.W.3d 824, 827-28 (Tex. App.–Houston [14th Dist.] *1999,* no pet) (affirming finding of waiver when movant acted inconsistently with right to arbitrate by initially seeking bankruptcy protection in bad faith *to* avoid claims he later asserted were arbitrable, among other factors).

[72] *Id.;* see *also Miller Brewing Co. v. Fort Worth Distrib. Co., Inc.,* 781 F.2d 494,497 (5th Cir. 1986) ("A party waives his right to arbitrate when he actively participates *in* a lawsuit or takes other action inconsistent with that right")

[73] *Burton-Dixie Corp. v. Timothy McCarthy Constr. Co.,* 436 F.2d 405, 408 (5th *Cir.* 1971).

[74] Only Relators' Motion to Stay, which was filed in August 2004, even mentioned their claimed right to arbitrate this case. All of the other pleadings that Relators filed before the Dallas federal court, the JPML, *and* the New York federal court, did not expressly mention, much less invoke, this supposed and newly-asserted right Moreover, Relators initially sought the dismissal *of* this case under FED. R CIV. P. 12(b), and then pursued transfer and consolidation with the MDL Proceedings under Section 1407. Clearly, arbitration now is an afterthought.

invoke federal jurisdiction which expose, time and again, their clear and unwavering choice of litigating this action in a federal forum. As such, it fully supports the trial court's denial of Relators' Motion to Compel.

(i) The Remand Order

The Remand Order clearly manifests Relators' express waiver of any alleged right to arbitrate. This pleading, drafted solely by Relators' counsel, is silent on any intent to compel arbitration and is devoid of any language that attempts to preserve any alleged right to arbitrate.[75] In fact, the Remand Order states unequivocally: "IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto through their undersigned counsel 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."[76] Thus, this Order manifests the parties' agreement and understanding that this case be remanded to Respondents' court and adjudicated there. In the face of this unambiguous language, Relators cannot now complain about litigating this action in Respondent's court, the exact venue that Relators proposed and to which the parties judicially stipulated, as stated in the Remand Order.

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[75] The fact that the Remand Order states that Relators "appear specially so as to reserve any defenses" is wholly ineffectual to preserve any claimed right to arbitrate for the reasons stated previously. *See supra* at 14-15; Rel. App. Vol. III, pp. 928-29.

[76] Rel. App. Vol. III, pp. 928-29 (emphasis added); see *also* Rel. App. Vol. III, pp. 996-97 (letter from Relators' counsel to New York federal court transmitting proposed Remand Order and confirming to the New York federal court that the parties "have stipulated and agreed, subject to the Court's approval, to remand of the action to the County Court at Law No. 3, Dallas County, Texas, where [this case] was originally filed").

(ii) Multiple Additional Statements By Relators Constituting Express Waiver

The plain language of the Remand Order proposed and drafted by Relators itself supports a conclusion of express waiver. But an abundance of other express statements by Relators found within their pleadings submitted to the Dallas federal court and the JPML make such a conclusion inescapable.

> **Relators maintained repeatedly that the pretrial proceedings in this case should be consolidated with the MDL Proceedings to prevent duplication, inefficiencies, and the risk of inconsistent rulings:**
>
> - "The numerous WorldCom related actions -- including both ***those*** that **have** been consolidated in the Southern District of New York and those that have been designated as tag-dong actions -- make similar allegations, name some or all of the defendants **as parties,** and necessarily will involve much of the same discovery. Indeed, the present action specifically involves allegations that CGM over-stated WorldCom's financial condition and failed *to* disclose **its** business dealings with WorldCom."[77]
> - "There is almost complete *overlap* in *the* parties; and witnesses who would be required to engage in document production and depositions during pre-trial discovery. The efficiencies inherent in coordinating pretrial proceedings are evident."[78]
> - "Accordingly, a **stay** followed by coordination **or** 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."[79]
> - "Further, **the** MDL Panel **explained** that 'transfer of all related actions to ***a*** single judge has the streamlining **effect** of fostering a pretrial program that: (1) allows pretrial proceedings with respect to any non-common issues to proceed concurrently with pretrial proceedings on common issues . . .; **and** (2) ensues that pretrial proceedings will be conducted in **a** manner leading to the just and **expeditious** judicial resolution ***of*** all actions ***to*** the overall benefit of the parties.'"[80]

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[77] Rel. App. Vol. II, p. 541.

[78] Rel. App. Vol. II, p. 542 (emphasis **added).**

[79] Rel. App. Vol. II, pp. 542-43 **(emphasis** added).

[80] Rel. App. Vol. II, p. 543 (emphasis added **and** quotation **omitted).**

- "Under Section 1407, civil actions involving one or more common questions of fact are to be transferred if transfer will promote the just and efficient conduct of the litigation and serve the convenience of the parties and witnesses."[81]
- "[J]ustice and efficiency *can* only be served by transfer . . .."[82]
- "Transfer under Section 1407 was designed to avoid potential duplication of pretrial effort, serve the convenience *of* the parties and witnesses, and advance the just and efficient conduct of the actions."[83]
- "Indisputably, [this case] shares common questions of fact with no fewer than 25 cases asserting claims based on alleged fraudulent analyst research in the *WorldCom* Consolidated Proceeding; . . . This Panel repeatedly has recognized the prudence of transferring cases with common questions *of* fact, like *Nickell*, *to* the WorldCom Consolidated Proceeding . . .."[84]
- "Section 1407 further supports transfer when the convenience of the parties and witnesses are best served. As this Panel held in its original Transfer Order establishing the *WorldCom* Consolidated Proceeding: '[T]he New York area is one of several locations likely to be a source of documents and witnesses relevant to this litigation,' and 'the Southern District of New York is also the venue for other important WorldCom proceedings.' The Citigroup Defendants are headquartered in New York; CGM's Equity Research and Investment Banking operations are based in New York; and the vast majority of CGM's analysts reports were prepared in and generated from New York."[85]

Relators also asserted that, upon transfer; pretrial proceedings and discovery in this case would go forward in the New York federal court, *not* in arbitration:

- "[A] stay pending transfer will actually *benefit* the Plaintiffs, because, if the transfer order is entered, Plaintiffs will be able to avail themselves of *the* voluminous discovery presently **available**

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[81] Rel. App. Vol. III, p. 814.

[82] Rel. App. Vol. III, p. 815.

[83] Rel. App. Vol. III, p. 819.

[84] Rel. App. Vol. III, pp. 821-22.

[85] Rel. App. Vol. III, pp. 823-24 (emphasis added).

in the MDL proceedings on the core factual claims asserted here."[86]

- "To the extent Plaintiffs need additional, individualized discovery, Judge Cote has ample authority to permit it, upon an appropriate showing of need.""

- "For nearly two years, the MDL Court has effectively and efficiently administered these matters, including establishing litigation schedules, deciding motions (including for remand), and presiding over discovery and other proceedings. Wise judicial administration counsels against abstention (or remand) and in favor of asserting jurisdiction so this action may be coordinated with the other cases that have already been transferred to the Southern District of New York."[88]

- "Plaintiffs suggest that Defendants have engaged in impermissible forum shopping. **Defendants, however, merely wish to see this action adjudicated in the most efficient and logical location [the New York federal court]**. Defendants have an interest in obtaining consistent pre-trial rulings in this and other cases brought against them throughout the country which will be provided by consolidated proceedings."[89]

- "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."[90]

- "In creating *WorldCom* Consolidated Proceeding, the Panel recognized the Southern District of New York as the appropriate transferee forum in part because it was a likely source of documents and witnesses as well as the existing venue for other important *WorldCom* legal proceedings, including the "analyst" actions involving SSB."[91]

- "[T]he judges of the Southern District of New York definitively decided that, for purposes of pretrial proceedings, *WorldCom*

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[86] Rel. App, Vol. II, p. 545 **(emphasis added).**

[87] **Rel. App.** Vol. II, pp. 545-46 (emphasis **added).**

[88] Rel. App. Vol. II, pp. 557-58 (emphasis added).

[89] Rel. App. Vol. II, p. **569 (emphasis added).**

[90] Rel. App. Vol. II, p. **570** *(emphasis* **added).**

[91] Rel. App. Vol. III, p. 816 (emphasis **added).**

analyst research claims against the Citigroup Defendants will be litigated in the *WorldCom* Consolidated Proceeding before the MDL Court."[92]

Relators averred that pretrial discovery and other activities in this action should proceed in the New York federal court, not in Respondent's court or in arbitration:[93]

- "[T]he MDL Court has been managing the litigation, substantively and procedurally, for years. Moreover, given the amount of discovery taken in the MDL Proceeding, the parties to this case could much more rapidly prepare this case fur trial in the MDL Proceeding than they could in the Dallas County Court at Law."[94]
- "[T]he issues presented by this case undoubtedly are complex, and the MDL Court is much more prepared to deal with those issues than the Dallas County Court at Law."[95]

Relators urged that this case ultimately would be tried in a court:

- "A transfer will streamline pretrial matters, avoid duplication, conserve resources, and hurry the case towards trial."[96]

These statements confirm Relators' unequivocal and express choice of a federal judicial forum, not arbitration.[97] Relators clearly contemplated and explicitly urged that this case be adjudicated in federal court after transfer. They also stated that a "trial", not an arbitration hearing, would ultimately resolve the Nickells' claims. Indeed, none of these pleadings *makes* any mention of Relators' claim that they at all times intended to

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[92] Rel. App. Vol. III, p. 817 (emphasis added).

[93] Relators also disputed Plaintiffs' showing that this case could be adjudicated timely in Respondent's Court. See Rel. App. Vol. II, pp. *666-78* ("Although the Dallas County Court at Law may routinely provide early trial settings in a typical case, clearly that would not result here (unless Defendants simply were denied an opportunity to defend themselves).").

[94] Rel. App. Vol. II, pp. 667-68 (emphasis added).

[95] Rel. App. Vol. II, p. *668* (emphasis added).

[96] Rel. App. Vol. II, p. *671* (emphasis added).

[97] Indeed, this conclusion is bolstered by Relators' act of removal itself, See *In re Currency Conversion Fee Antitrust Litig.*, *2005* WL 1427400, at * 4 (S.D.N.Y. June 20, 2005) (finding waiver and observing that "Defendant elected to proceed in a federal forum when it removed this case from state court . . .").

present their arbitration motion to the New York federal court. Such reservations of alleged arbitration rights were intentionally omitted from all pleadings following the Motion to Stay Relators filed in Dallas federal court. Relators' repeated statements to the JPML and New York federal court in support of a judicial forum nullify their present demand to arbitrate.

c. Relators' Feeble Effort to Disprove Express Waiver Falls Flat

As demonstrated below, Relators' attempt to disprove the Nickells' showing of express waiver falls far short of accomplishing that goal.

(i) Relators make no substantive attempt to negate the Nickells' showing of express waiver

Relators make no effort to directly refute or discount the numerous express statements they made demonstrating their express waiver. They claim simply that "Plaintiffs selectively quoted, out of context, short statements from documents filed by Relators on the issues of jurisdiction, MDL transfer, or a stay pending MDL transfer" and contend that "those statements were made in the context of purely procedural motions . . . in an effort to have the case placed before the most appropriate court to consider pre-trial motions, including the Arbitration Motion."[98]

Relators simply rely on this conclusory statement and make no effort to explain how the quotations cited by the Nickells were taken "out of context." In truth, Relators made the numerous above-quoted statements in the context of their efforts to secure federal forums for the full adjudication of this case, specifically in the New York federal court's MDL Proceedings and, later, in the Dallas federal court. As an example, Relators told the JPML that "the parties to this case could much more rapidly prepare this case for

[98] Pet. at 20.

trial in the MDL Proceeding than they could in the Dallas *County* Court at Law"[99] and that a transfer would "streamline pretrial matters, avoid duplication, conserve resources, and hurry the case towards trial."[100] These statements, which were clearly made in the context of securing a forum other than arbitration, are absolutely antithetical to any notion that Relators intended to arbitrate the underlying case after it was transferred and consolidated with the MDL Proceedings. Yet Relators offer no explanation for such statements and apparently hope that they will be overlooked or forgotten.

(ii) Contrary to Relators' implication, no magic words are required to support a conclusion of express waiver

Relators claim that a determination of express waiver cannot lie because there is no evidence that they "affirmatively or expressly stated that they waived or abandoned their right to compel arbitration."[101] As Relators must concede, however, no court has held that waiver can only occur when a party explicitly states, "I abandon and/or waive my right to arbitrate." While such an utterance would obviously constitute an express waiver, the key inquiry is whether a party's words expressly communicate its desire to resolve the case in court rather than through arbitration.'[102] Relators' numerous filings seeking federal judicial forums, and the numerous statements contained therein, clearly satisfy this standard.

[99] Rel. App. Vol. II, pp. 667-68 (emphasis added),

[100] Rel. App. Vol. II, p. 671 (emphasis added).

[101] *See Pet.* at 20 (emphasis omitted).

[102] *See supra* at 16-17.

(iii) Relators' purported test is unconvincing and unfounded

In an effort to distance themselves from their own explicit statements constituting waiver, Relators urge the application of a new test for express waiver which would require an "overt act" demonstrating a party's *intent to* waive its right to arbitrate.[103] This effort fails for several reasons.

First and foremost, the record shows that Relators never raised this argument or urged the application of this test in Respondent's court. Consequently, Judge Montgomery was never given the opportunity to assess or apply it and, thus, it cannot provide the basis for mandamus now.[104] Second, adopting an "overt act" requirement for express waiver would essentially conflate the two tests for waiver of the right to arbitrate (express waiver and implied waiver) and render the existing standard for express waiver, which necessarily examines a party's words, meaningless.[105] Third, Relators' reliance on *Mooney Aircraft, Inc. v. Adams*, 377 S.W.2d 123 (Tex. Civ. App. – Dallas 1964, no writ), is misplaced and unpersuasive. This opinion was rendered over 40 years ago and does not remotely involve any arbitration issue. In fact, the *Mooney* court determined that appellant's filing of a motion. to consolidate waived its venue objection because it invoked the court's general jurisdiction, required the judge to consider' questions of law and fact, and invoked the judicial power of the court.[106] The plea of venue privilege was one that must be heard in advance of a hearing on the merits and the appellant, in filing its motion to consolidate, made no initial effort to limit the court's consideration to the

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[103] Pet. at 20.

[104] *See In re Steger Energy Corp.*, 2002 WL 663645, at * 4 (Tex.–San Antonio Apr. 24,2002, no pet.).

[105] *See supra* at 16-18.

[106] *See Mooney Aircraft, Inc. v. Adams*, 377 S.W.2d 123, 125-28 (Tex. Civ. App. – Dallas 1964, no writ).

venue objection.[107] *Mooney Aircraft*, which does not involve any arbitration issue, hardly compels the application of a new express waiver test here.

However, even if this Court decides to apply Relators' newly-fashioned test, the record evidences numerous "overt acts" by Relators that support a conclusion of express waiver. Relators in this case clearly communicated their desire not to arbitrate by (a) affirmatively and successfully seeking the adjudication of this action in federal court in accordance with MDL procedure on the *express* ground that coordination and/or consolidation with the MDL Proceedings would enhance pretrial efficiency in litigation and streamline the case toward trial; (b) failing to disclose to the JPML or the transferee New York federal court any alleged intent to arbitrate; and/or (c) later expressly agreeing and stipulating to remand *this* case to Respondent's court.

(iv) None of the cases cited by Relators defeats the Nickells' showing of express waiver

The cases cited by Relators do nothing to erode the strength of the Nickells' showing of express waiver. Contrary to Relators' assertion, the court in *Gilmore v. Shearson/American Express*, 811 F.2d 108 (2d Cir. 1987) (*overruling on other grounds recognized* by *McDonnell Douglas Fin. Corp. v. Pennsylvania Power & Light Co.*, 849 F.2d 761, 765 (2d Cir. 1988)), did not require an overt act *to* support express waiver.[108]

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[107] *Id.* at 127. This holds *true* with respect to Relators in this case, who made no effort to invoke arbitration or to limit the litigation activity to the arbitration question until after agreeing to remand this case approximately eight months after it was filed

[108] Similarly, the court in *Century Indemnity Co. v. Viacom Intn'l, Inc.*, 2003 WL 402792, at *6 (S.D.N.Y. Feb. 20,2003) (not designated for publication) did *not* "apply[] an *'overt* act' versus 'inconsistent actions* distinction to reject a claim of express waiver of arbitration" as Relators contend. Pet. at 21. In fact, the court did not spell out any requirement for express waiver and said that implied *waiver* m y be found when a party "engages in protracted litigation that prejudices the opposing party." Id. at *4 – 7. This case provides no support for Relators' position.

Instead, Shearson clearly and unmistakably communicated its desire to litigate in a judicial forum by withdrawing its motion to compel arbitration, which it had filed in response to plaintiffs' original complaint, and by conceding that it waived its right to arbitrate with respect to that pleading.[109]

Moreover, *Gilmore* actually supports the conclusion that Relators cannot arbitrate this case. The *Gilmore* court rejected defendant Shearson's effort to revive its motion to compel arbitration after an amended complaint was filed.[110] The amended complaint did not nullify Shearson's earlier waiver.[111] The court reasoned:

> Ordinarily, a party may not freely take inconsistent positions and 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, where Gilmore makes the far from frivolous charge that Shearson's change in position is not merely the product of honest error, but is a tactic in a war of attrition designed to make the litigation too expensive for plaintiff. . . to continue.[112]

As in *Gilmore*, allowing Relators to invoke their alleged right to arbitrate at this juncture would permit them to "freely take inconsistent positions and ignore the affect of [many of their] prior filed document[s]." Relators, too, should not be permitted to play "fast and loose" with the courts.

Walker v. Countrywide Credit Industries, Inc., 2004 WL 246406 (N.D. Tex. Jan. 15, 2004), another case Relators rely on, does not affect the Nickells' showing of express waiver. There, the court held only that "Countrywide's assertion that this Court may

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[109] *Gilmore v. Shearson/American Express*, 811 F.2d 108, 112-13 (2d Cir. 1987) (*overruling on other grounds recognized by McDonnell Douglas Fin. Corp. v. Pennsylvania Power & Light Co.*, 849 F.2d 761, 765 (2d Cir. 1988)).

[110] *Id.* at 113.

[111] *Id.*

[112] *Id.* (internal citations omitted).

properly consider claims brought under California state laws does not constitute an express waiver of arbitration."[113] Countrywide averred that the Texas court "could," if necessary, preside over the case and so stated in response to the court's inquiry. These facts are clearly distinguishable from the underlying case, where Relators affirmatively sought pretrial adjudication in the MDL Proceedings and expressly contemplated the ultimate trial of this action in Dallas federal court.

d. ***Any Conclusion Other Than Express Waiver Is Illogical And Unsupported***

The following facts further demonstrate that Relators, by their statements and decision to transfer and consolidate with the MDL Proceedings, expressly waived my alleged right to arbitrate Plaintiffs' claims.

(i) **Relators** Could Have Moved To Compel Arbitration Soon After The Underlying Action Commenced **But** Chose Otherwise

Relators do not dispute that they could have sought arbitration in the Respondent's court in June 2004 immediately after Plaintiffs filed the underlying action. Indeed, the Motion to Compel does not rely in any respect on the procedural or factual history of this case and has no connection to the MDL Proceedings. Relators could have filed the identical motion in Respondent's court over a year ago. The Dallas federal court also was fully capable of considering and resolving the identical motion and could bavs done *so* well before Relators pursued the stay, transfer, and consolidation issues that unnecessarily consumed this case *for* so many months.[114]

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[113] *Walker v. Countrywide Credit Indus., Inc.*, 2004 WL 246406 at * 3 (N.D. Tex. Jan. 15,2004).

[114] Rel. App. Vol. I, p. 271 ("Although Citigroup could have specially appeared in [Respondent's] court and *then* ... could have moved to compel arbitration...."); *see also* Ref. App. Vol. I, pp. *289-95* (Plaintiffs' letter brief to Respondent demonstrating complete feasibility of earlier filing of Motion to Compel.)

Relators forewent these opportunities for an early and efficient decision on the arbitrability of Plaintiffs' claims and instead opted to remove this action, stay proceedings in the Dallas federal court, and seek transfer and consolidation under Section 1407. These facts warrant a conclusion of waiver.[115]

(ii) The Language And Policy Of Section 1407

The fact that Relators initiated and obtained the transfer and consolidation with the MDL Proceedings pursuant to Section 1407 also solidifies a finding of express waiver. 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."[116] Section 1407 also dictates that the pretrial proceedings will be conducted by *the* judge to whom the JPML assigns the action.[117] Thus, as Relators have been well aware, Section 1407 specifically contemplates streamlined pretrial proceedings in the MDL forum. This aligns with the express purpose of Section 1407 and the rationale that supported the initial consolidation and centralization of the cases against WorldCom into the MDL Proceedings.[118]

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[115] *R. W. Roberts Constr. Co., Inc. v. Masters & Co., Inc.*, 403 So.2d 1114, 1115 (Fla. App. 5th Dist. 1981) (upholding determination of waiver because "[m]ovant's motion to dismiss and transfer this action is a contention that the proceeding is in the court of the wrong *county*, not that it doesn't belong in court at all. This position seems totally inconsistent with [movant's] later assertion that no court was the proper forum, because arbitration was appropriate.").

[116] 28 U.S.C. § 1407(a).

[117] 28 U.S.C. § 1407(b).

[118] *See* 28 U.S.C. § 1407; *In re WorldCom, Inc. Sec. & "ERISA" Litig.*, 226 F. Supp.2d 1352 (J.P.M.L. 2002) (Rel. App. Vol. III, pp. 849-52). There, the court stated:

> [c]entralization under Section 1407 *is* necessary in order *to* eliminate duplicative discovery, prevent inconsistent pretrial rulings . . ., and conserve the resources *of* the

Further, as Relators also knew, multidistrict litigation procedure specifically dictates that a case transferred under Section 1407 is remanded for trial to the federal transferor court (in this case, the Dallas federal court) upon the conclusion. of the coordinated or consolidated pretrial proceedings.[119] Therefore, by invoking Section 1407, Relators explicitly requested the resolution of this case by trial in a federal forum, not by arbitration.

(iii) Relators Never Informed The JPML That They Intended To Compel Arbitration

Relators' express waiver of their claimed arbitration rights is additionally confirmed by the fact that they never informed the JPML of their supposed *intent to* arbitrate this case if and after the JPML ordered a transfer.[120] A thorough review of the correspondence and pleadings *they* filed with the JPML reveals their total silence on this issue. In fact, each and every argument that Relators made to the Dallas and New York federal courts and the JPML advocating a stay of proceedings and transfer under Section 1407 expressly aligns with the statute's enumerated purpose *of* streamlining pretrial proceedings and then returning the case to its original federal venue for trial.[121] Relators?

> parties, their counsel, and the judiciary. . . .[T]ransfer of all related actions to a single judge has the streamlining effect of fostering a pretrial program that: i) allows pretrial proceedings with respect to any non-common issues to proceed concurrently with pretrial proceedings on common issues, ... and ii) ensures that pretrial proceedings will be conducted in a manner leading to the just and expeditious resolution. of all actions to the overall benefit of the parties.

Rel. App. Vol. III, p. 850.

[119] *See supra* at 9 & n. 32.

[120] The Motion to Stay, which contains the only clear reference to any right to arbitrate in its footnote on page two, was never before the JPML.

[121] See *generally* Motion to Stay (Rel. App. Vol. II, pp. 53348); Defendants' Brief in Opposition to Remand Motion (Rel. App. Vol. II, pp. 550-71); Defendants' Reply in Support of Motion to *Stay* (Rel. App. Vol. II, pp. 663-73); Defendants' Memorandum of Law in Opposition to Plaintiffs' Motion to Vacate Conditional Transfer Order (CTO-30) (Rel. App. Vol. III, pp. 811-25).

federal court and JPML pleadings lack any contention *that* arbitration is the appropriate forum, that they ultimately intended to arbitrate, or that the New York federal court was best suited *to* determine whether arbitration was proper.[122]

In fact, it is doubtful that the JPML would have ordered the transfer and consolidation under Section 1407 if Relators had informed it that they intended to quickly abandon the consolidated pretrial proceedings they were purportedly seeking and move to compel arbitration. There was simply no need whatsoever for the JPML ever to consider the issues that Relators presented to it — specifically, whether the facts and claims at issue in this case were substantially similar to those at issue in the MDL Proceedings or whether judicial economy would be enhanced by coordinating and consolidating the pretrial proceedings under Section 1407 — if, in the end, Relators' real intentions were to abandon the MDL Proceedings in favor of arbitration. In fact, having the JPML expend the time and effort *to* transfer and consolidate this case with *the* MDL Proceedings when Relators actually intended *to* compel arbitration *(as* they now claim) would significantly hinder, not promote, judicial economy.

Had Relators truly intended to arbitrate the underlying lawsuit after obtaining a Section 1407 transfer, they should have informed the JPML of this alleged fact, But again, such a disclosure may have caused the JPML to deny their requested transfer on the basis that the case should not be transferred and consolidated if, contrary to their pleadings, they had no real intention *of* participating in the consolidated pretrial proceedings and discovery. If Relators truly intended to seek arbitration after *a* transfer, then the intentional omission of these intentions from their transfer pleadings and

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[122] *See id.*

affirmative representations regarding their desire to participate in consolidated pretrial discovery and "hurry the case towards trial" *amounted to* fraud on the JPML. Accordingly, *if* this *Court* were *to* award Relators the requested mandamus relief, it would effectively condone and reward the misleading arguments made *to* the JPML by Relators.

Similarly, this Court should discount Relators' claim "that the MDL Court was the proper court to resolve pre-trial motions, including the Arbitration Motion."[123] Relators cannot point to a single compelling reason why the MDL Court (as opposed to Respondent's court or the Dallas federal court) was uniquely suited to resolve their Motion to Compel Arbitration. Indeed, as this Court can now see, the resolution of such a motion would have been very straightforward (especially without the waiver issues) and would not have required any particular expertise or insight from the MDL Court.

4. Strong Policies Support Affirming Judge Montgomery's Order Denying The Motion To Compel

a. Relators' Current Interest In Arbitration Is Disingenuous and Arose Only After They Retreated From Their Removal and Transfer

After removal and transfer, Plaintiffs were required to respond *to* the Show Cause Order to preserve their remand positions. They responded by demonstrating the absence of federal subject matter jurisdiction and that the relevant prior opinions of the New York federal court did not require the denial of their Remand Motion because they were decided an entirely distinct facts.[124] Had Relators attempted to oppose Plaintiffs' response to the Show Cause Order, they presumably would have Cried *to* explain how

[123] Pet at 23 (emphasis in original).

[124] *See* Rel. App. Vol. III, pp. 899-926.

they appropriately removed on the basis that federal subject matter jurisdiction existed. However, on the day their response was due, they retreated from their removal positions, capitulated on their opposition to the Remand Motion, and actually consented to remanding this *case* to Respondent's court.

Several key and valid deductions can be made here. First, it is obvious that, absent Plaintiffs' challenge to subject matter jurisdiction and the propriety of federal court adjudication, this action would have been fully litigated, short of trial, in the New York federal court. Trial would have then occurred in the Dallas federal court, as dictated by multidistrict litigation procedure under Section 1407. Relators conveniently dispute this fact now, relying on the conclusory, eleventh-how:testimony of their counsel that was filed in August 2005 in their Reply supporting their Motion to Compel.[125] Clearly, this was a last-ditch effort to provide some evidence (albeit negligible and incompetent) of an intent to arbitrate. But the record that existed prior *to* the filing of Relators' counsel's affidavit speaks for itself and lacks *my* such evidence.

Also, *as* Relators readily admit, *they* only stipulated to a remand because they were unexpectedly called upon to respond to Plaintiffs' show cause filing, which would have required them finally to brief, explain, and defend their meritless removal position.[126] Accordingly, if the New York federal court had not requested such briefing from them, this case would remain stuck in the MDL Proceedings, where Relators

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[125] *Pet.* at 23 (citing Rel. App. Vol. I, p. 137).

[126] Pet at 26 ("In the present case, the MDL Court requested that Relators brief the issue, thus indicating that a deviation in the MDL Court's prior analyses of its subject matter jurisdiction may have been under consideration."); Rel. App. Vol III, p. 942 (undisputed evidence *that Relators'* New York counsel informed Nickells' counsel that Defendants had drafted a reply to Plaintiffs' show cause response but indicated Defendants would rather stipulate to a remand than file a reply since they were not confident in their removal position that "related to" bankruptcy jurisdiction existed).

wanted it. In view of these facts, Relators cannot legitimately claim that their decision to stipulate to a remand was reached in good faith, for purposes of expediting a resolution of Plaintiffs' claims, or that it was some sort of "good deed" that is now being punished. [127]

Further, Relators' assertion that Citigroup's settlement of the class action securities case prompted their decision to agree to a remand cannot be taken seriously. First, there is no evidence to support this point. Second, Citigroup announced its settlement of the class action litigation on May 10, 2004, and the court granted final approval of the settlement on November 12, 2004. Thus, these events occurred before the transfer of this case to the MDL Court became final, before the Nickells filed their Show Cause pleading, and well before February 2005 when Relators proposed a remand.

In short, Relators' supposed interest in agreeing to a remand to expedite the resolution of Plaintiffs' claims, after months of procedural games and unnecessary delays, is a ruse. Again, the truth of the matter is that 'Relators intentionally and expressly abandoned their alleged arbitration rights and selected the MDL Proceedings in lieu of arbitration.[128] They staked this forum-selection strategy on a meritless removal

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[127] Notably, Relators Citigroup and CGM had been fully informed and apparently conceded that their removal arguments were baseless well before they stipulated to a remand in this case. The plaintiff in *W. Wood Babcock, III v. Citigroup, Inc., et al.*, Case No 1:04-cv-07758, in the United States District Court for the Southern District of New York, also disputed Relators' assertion of "related to" bankruptcy jurisdiction when the case arose after WorldCom's Reorganization Plan had been confirmed and the Proof of Claim had been deemed worthless. Rel. App. Vol. III, pp, 1000-1008. In November 2004, approximately three months before they stipulated to a remand in this case, Citigroup and CGM agreed to a Stipulation and Order of remand that is virtually identical to that entered in this case, Rel. App. Vol. III, pp. 1009-1010. Thus, despite abandoning their removal position in *Babcock* in November 2004, Relators persisted in making the Nickells complete the New York federal court's requirement of responding to the Show Cause Order.

The Nickells highlighted the foregoing events in response to the Motion to Compel, Rel. App. Vol. I, pp. 75-76. Relators did not dispute or even address them. See Rel. App. Vol. I, pp. 94-124.

[128] As the Nickells noted to the trial court, there is no evidence that Relators have ever attempted to compel arbitration of any case once they successfully transferred and consolidated it within the MDL Proceedings.

position that they did not think Plaintiffs would or could effectively challenge once the case was transferred and consolidated into the MDL Proceedings. When Plaintiffs challenged this removal position and the New York federal court required Relators to answer the challenge, they opted to *go* back to Respondent's court rather than filing a frivolous pleading that would have likely been sanctionable. But rather than stay in Respondent's court pursuant to their stipulated remand, they asked her to invoke the alleged arbitration rights they had clearly waived and abandoned.

b. *Compelling Arbitration on These Facts Would Reward Abusive Forum Shopping*

As illustrated above, Relators' real interest in arbitration surfaced only when it became apparent, after approximately eight months of procedural controversy and delay, that their effort to adjudicate this action in federal court would not stick. To honor Relators' opportunistic request to arbitrate now would reward abusive forum shopping and would deprive Plaintiffs of their legitimate choice of a state forum for no valid reason.

5. Alternatively, Relators Have Impliedly Waived Any Alleged Right To Arbitrate Plaintiffs' Claims

Plaintiffs have demonstrated conclusively that Relators expressed their clear choice of adjudicating this case in a federal forum and thereby waived any alleged right to arbitrate. Additionally and/or alternatively, the above facts and analysis equally support the conclusion that Relators have impliedly waived their alleged arbitration rights

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Rel. App. Vol. I, pp. 84; Rel. App. Vol. III, pp. 930-939. Relators did not contest this evidence. *See* Rel. App. Vol. I, pp. 94-124.

based on *the* **abundance** of evidence **of** "specific and deliberate act[s] . . . after the suit [was] filed that [are] inconsistent with **[a] right** to arbitrate."[129]

Relators' failure *to* ***assert*** *their* alleged **right** ***to*** arbitrate in a timely fashion supports a conclusion of **implied** waiver in this **case.** The Fifth Circuit recently affirmed the denial of a motion to compel arbitration and to stay proceedings on the basis of **waiver** and observed that the movant "did not assert its **right** to arbitrate **in a** timely fashion, which prevented the district court from limiting the judicial proceedings to the threshold question of whether **a** valid agreement to arbitrate exists."[130] Relators in this case similarly failed to restrict the judicial proceedings to this **initial** question, instead forcing **the** courts, the JPML, and the Nickells to **waste** resources addressing the **propriety of** removal, jurisdiction, and Section 1407 transfer.[131]

Relators' impermissible forum shopping also supports **a** conclusion of implied waiver. In *Cabinetree* ***of*** *Wisconsin Inc. v. Kraftmaid Cabinetry, Inc.*, **50** F.3d **388** (7th Cir. 1995), the Seventh Circuit upheld *a* finding of waiver where the defendant had **removed** the action **to** federal court.[132] The **court** held that "an election to proceed before a nonarbitral tribunal for the resolution of **a** contractual dispute is presumptive waiver **of the right to** arbitrate."[133] The court emphasized:

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[129] *Sedillo v. Campbell*, **5** S.W.3d **824,827** (Tex. App. – Houston [14th Dist.] **1999, no pet**); *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d **494, 497** (5th Cir. **1986**) ("A party **waives his right** *to* arbitrate **when he** actively **participates** in a lawsuit or **takes** other action inconsistent with *that* right.").

[130] *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, **345** (5th Cir. *2004).*

[131] See *also Sedillo*, **5** S.W.3d at **827 (noting** that the failure to timely request arbitration raises "the specter **of waiver").**

[132] *Cabinetree of Wisconsin Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 390-91 (7th Cir. 1995).

[133] *Id.* at 390.

> There is 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 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.[134]

It is as if the *Cabinetree* court was addressing Relators' conduct in this case.[135]

Moreover, courts look to the motive underlying removal to assess whether the removal evidenced an intent to waive arbitration.[136] In this case, Relators removed this action on specious jurisdictional grounds, tabled any consideration of remand while trying to effectuate adjudication in the MDL forum, and ultimately consented to state court adjudication when they could not defend their removal positions. Now, they claim belatedly that arbitration is their favored and proper forum. This forum gamesmanship cannot stand and supports a conclusion of waiver.

Moreover, the record demonstrates that Plaintiffs expended significant effort and experienced substantial delay and expense resisting the removal, *stay,* and Section 1407

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[134] *Id.* at 391.

[135] *Accord Wilson Sporting Goods Co. v. Penn Partners*, 2004 WL 2033063 (N.D. Ill. Aug. 31, 2004) (finding waiver where movant took action inconsistent with its right to arbitrate and failed to make its decision regarding whether to litigate or arbitrate its grievances at the earliest possible point.). While the facts on which this determination in *Wilson* differ from those before this Court (the movant in *Wilson* engaged in discovery for five months after receiving the arbitrable counterclaim), "there [was] no apparent explanation for this delay other than that [the movant] wished to see how the litigation process would proceed before it decided to arbitrate. Courts in the Seventh Circuit frown against such attempts at forum shopping." *Id.* at * 4.

[136] *See, e.g., In re Cingular Wireless, LLC,* 2003 WL 1884184, at * 1 (Tex. App. – Beaumont April 14, 2003, no writ) (finding no intent to waive arbitration when removal had a valid basis and was for the determination of whether the Federal *Communications* Act preempted the cause in state court); *Shales v. Discover Card Sews., Inc.*, 2002 WL 2022596 at *1, n.1 (E.D. La. August 30, 2002) ("The court recognizes that in an egregious forum shopping case, motive can factor into the waiver issue.") (citing *Cabinetree).*

transfer of this action, all of which would have been obviated had Relators appropriately invoked their alleged right to arbitrate in state court over one year ago.[137] This substantial and needless delay is a "material factor to consider" in evaluating prejudice, and "[t]ime and expense in defending an action may, in certain circumstances, establish prejudice."[138] None of these efforts would have been required in arbitration, and none will be of any use or value to Plaintiffs if this case is arbitrated.

Finally, the implied waiver cases cited by Relators do not compel the issuance of mandamus relief.[139] None involve express statements invoking a federal judicial forum for the adjudication of the dispute. This key fact distinguishes Relators' authorities and renders them wholly unpersuasive.

C. *Alternatively, Relators Have No Basis lo Arbitrate Robert Nickell's Claims Because The Relevant Arbitration Clauses Do Not Bind CGM or Citigroup*

1. Relators May Not Enforce the Arbitration Clauses As Successors to the Agreement

CGM relies on *two* documents to assert its alleged right to arbitrate the claims asserted against it by Mr. Nickell in this suit.[140] However, these documents do not support this claimed right. Neither CGM nor Citigroup is a signatory to these agreements.[141] The Margin Agreement is between Mr. Nickell and Smith Barney, Harris,

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[137] Rel. App. Vol. III, p. 943.

[138] *Sedillo v. Campbell*, 5 S.W.3d 824, *829* (Tex. App.--Houston [14th Dist.] *1999,* no pet) (upholding waiver where there was newly a year delay between the filing of the lawsuit and the request for arbitration, among other factors)

[139] *See* Pet. at 12-13,

[140] *See* Pet at 2-3, Rel. App. Vol. I, pp. 45, 47-50.

[141] *See id.*

Upham & Co.[142] The other agreement is between Mr. Nickell and Salomon Smith Barney, Inc.[143] Neither agreement is between Mr. Nickell and CGM or its parent.

In their Petition, Relators state that CGM could seek arbitration because it is the successor to SSB and the agreement applies to successors. This is not the case. The arbitration agreements do not apply to successor entities. The arbitration *clause* in the Margin Agreement binds *only* Smith Barney and does not speak to successors.[144] The explicit language in the other agreement states that it applies to "SSB and/or any of its present or former officers, directors, or employees concerning or arising from (i) any account maintained by me with SSB individually or jointly with others in any capacity, (ii) any transaction involving ***SSB or any predecessor firms*** by merger, acquisition or *other* business combination and me ..."[145] It applies to SSB and its predecessors, but clearly omits successors. Thus, by their own terms, the arbitration agreements may not be enforced by CGM (or its parent, Citigroup).[146]

SSB has previously sought to compel arbitration as the successor to Shearson Lehman Hutton and lost. The court in *Milnes v. Salomon, Smith Barney, Inc.* considered a 1988 Client Agreement to which SSB's predecessor, Shearson Lehman Hutton ("Shearson"), was the signatory.[147] Shearson was merged into and, after several name

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[142] Rel. App. Vol. I, pp. 47-48.

[143] Rel. App. Vol. I, pp. 49-50.

[144] Rel. App. Vol. I, pp. 47-48.

[145] Rel. App. Vol. 1, p. 50 (emphasis added).

[146] *See Milnes v. Salomon, Smith Barney, Inc.*, 2002 WL 31940718, *at* * 5-6 (N.Y. Sur. Oct. 11,2002) (finding that successor could not enforce arbitration on nearly identical agreement).

[147] The clause in *Milnes* read: "Any controversy arising out of or relating *to* any *of* my accounts, *to* transactions with you, your officers, directors, agents and/or employees *for* me, *or to* this agreement, or the breach thereof, or relating to transactions *or* accounts maintained by me with any of your predecessor firms

changes, the successor firm became SSB.[148] A second agreement was executed in 1996 with SSB.[149] The arbitration clause in this 1996 agreement is virtually identical to that contained in the Record.[150] The court denied SSB's request to compel arbitration, in part, because the arbitration clauses by their terms did not apply to 'successor' firms, which would have included SSB, and, thus, were *not* enforceable by SSB.[151] The court reasoned that the arbitration agreements are "contract[s] of adhesion which must be strictly and narrowly construed against the party who prepared [them]."[152]

Relators assert their "successor rights" to enforce the arbitration agreement exist based on a general clause found outside the arbitration agreement that states that the application form "shall inure to the benefit of SSB's present organization, and any successor organizations."[153] However, the law is clear that general contractual language cannot override the specific terms of the arbitration agreement, which does not include successors.[154] The *Milnes* court agreed and ignored virtually identical language.[155] Thus,

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by merger, acquisition. or other 'business combination from the inception *of* such accounts, shall be settled by arbitration . . .." *Id.* at *2.

[148] *Id.* at *2.

[149] *Id.*

[150] Rel. App. Vol. I, p. 50. Although there was a question in *Milnes* whether the client received this document, the facts relating to this issue are not relevant here. See *Milnes*, 2002 WL 31940718, at *6.

[151] See *id.* at *5-6.

[152] *Id.* at *5 (citations omitted).

[153] Pet at 32.

[154] *Pratt-Shaw v. Prilgrim's Pride Corp.*, 122 S.W.3d 825, 829 (Tex.App.—Dallas 2503, pet. denied) (holding that specific terms "are given greater weight than general language"); *McCreary v. Bay Area Bank & Trust*, 68 S.W.3d 727, 731-732 (Tex.App.—Houston [14th Dist.] 2001, pet. dism'd) (holding that a specific provision controls over a general provision).

based on its own terms, Relators may not enforce these arbitration agreements with respect to the claims asserted by Mr. Nickell. Relators also cite *In re Kepka,* 2005 WL 1777996, at *12 (Tex.App.—Houston [1st Dist.] 2005, no pet. h.) for the proposition that "an arbitration agreement may recognize" that successors may enforce an arbitration clause signed by their predecessor. Here, however, the arbitration agreement itself contains no such recognition. In *Kepka,* unlike this case, the arbitration agreement quite clearly included successors by its own terms,

2. Relators Mav Not Enforce the Arbitration Agreement Under the Law Applicable to Nonsignatories

Relators argue in the alternative that they may compel arbitration as nonsignatories to the agreement. However, this Court, in *McMillan v. Computer Translation Systems & Support, Inc.* 66 S.W.3d 477, 481 (Tex.App.—Dallas 2001, no pet.), has identified the narrow circumstances where a nonsignatory may compel arbitration, and Relators cannot meet these requirements. To establish Citigroup's right to arbitrate, Relators rely on the first prong of *McMillan:* when the petition alleges "substantially interdependent and concerted misconduct by both a anon-signatory and one or more of the signatories to the contract."[156] This argument relies on proving that the other defendant, CGM, is a signatory to the contract. As explained above, CGM Is a nonsignatory. Therefore, Citigroup cannot compel arbitration here.

To establish CGM's right to arbitrate, Relators rely on the other prong of *McMillan,* which allows a nonsignatory to compel arbitration when "the nature of the

[155] *Milnes,* 2002 WL 32940718, at *6 ("Where there is inconsistency between a specific provision of a *contract* and a general provision of a *contract* . . . the specific provision controls,") (citations and quotations omitted).

[156] *McMillan v. Computer Translation Systems & Support, Inc.* 66 S.W.3d 477, 482 (Tex. App.–Dallas 2001, no pet.),

underlying claims requires the signatory to rely on the terms of the written agreement containing the arbitration provision."[157] However, in this case, m e of Plaintiffs' claims rely on the written agreement – they are based wholly in tort. Therefore, this prong does not apply either. As a result, neither Citigroup nor CGM may compel the arbitration of Mr. Nickell's claims as nonsignatories.

D. Contrary to Relators' Assertions, the Federal Arbitration Act Did Not Require Respondent to Enforce' the Arbitration Agreements

Relators selectively quote the Federal Arbitration Act to state erroneously that fudge Montgomery was required to compel arbitration.[158] In fact, Section 2 of the Federal Arbitration Act actually states that an arbitration agreement "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."[159] The Nickells provided the trial court with ample evidence of waiver and the non-applicability of the arbitration clauses to Mr. Nickell's claims which Judge Montgomery had clear authority to consider.[160]

IV. CONCLUSION

The legal and factual record presented to Judge Montgomery fully supports the conclusion that Relators expressly and/or impliedly waived their alleged right to arbitrate the claims asserted in the underlying lawsuit. The record also supports the conclusion that Relators Citigroup and CGM ate not entitled to enforce any alleged arbitration right with respect to the claims asserted by Mr. Nickell. Judge Montgomery appropriately

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[157] *Id.*

[158] Pet at 28.

[159] 9 U.S.C. § 2.

[160] *See In re Koch Indus., Inc.*, 49 S.W.3d 439, 444 (Tex. App.–San Antonio 2001, no pet.) (describing burden-shifting scheme for enforceability of arbitration provision and expressly permitting proof of defenses to arbitration) (cited in Petition at 12-13).

considered the unique facts in this case – which are significantly different from the facts underlying any other published cases considering waiver of arbitration rights – and correctly applied the guiding principles set forth in the relevant case law. Accordingly, there is no basis for this Court to conclude that Judge Montgomery clearly abused her discretion in denying the Motion to Compel by acting unreasonably, arbitrarily, or without reference to any guiding rules or principles.

V. PRAYER

Therefore, for the reasons set forth above, Robert A. Nickell and Natalie Bert Nickell, real parties in interest, request that this Court:

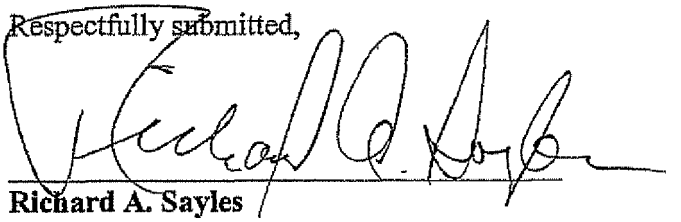
(1) Deny Relators' Request for Oral Argument;

(2) Deny Relators' Petition for Writ of Mandamus and affirm the Honorable Sally L. Montgomery's Order Denying Relators' Motion to Compel Arbitration and Stay Proceedings; and

(3) Grant all other relief to which Respondent Judge Sally L. Montgomery or Robert A. Nickell and Natalie Bert Nickell, as real parties in interest, may be justly entitled.

Further, if this Court grants Relators' request far oral argument, the Real Parties In Interest respectfully request oral argument, as well.

Respectfully submitted,



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ATTORNEYS FOR PLAINTIFFS/
REAL PARTIES IN INTEREST

NO. 05-05-01459-CV

IN THE COURT OF APPEALS
FIFTH DISTRICT OF TEXAS AT DALLAS

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

AFFIDAVIT VERIFYING PACTUAL STATEMENTS IN THE FOREGOING RESPONSE TO PETITION FOR WRIT OF MANDAMUS AND SUPPORTING BRIEF

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:

I. 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. Nickell and Natalie Bert Nickell ("Plaintiffs") in the above-styled proceeding and in the underlying lawsuit.

3. I have reviewed the factual statements contained on pages 2 – 11 of the foregoing Response to Petition for Writ of Mandamus and Supporting Brief. All of the factual information contained therein is, to the best of my personal knowledge, true and correct.

FURTHER, AFFIANT SAYETH NOT.

William S. Snyder

Sworn and subscribed before me on this 7th day of November 2005 to certify which witness my hand and seal of office.

Carol A. Poor
Notary Public in and for the State of Texas

CAROL A. POOR
Notary Public
State of Texas
My Comm. Expires 10-30-2007

CERTIFICATE OF SERVICE

I hereby certify that on this 7th day of November, 2005, pursuant to the Texas Rules of Civil Procedure, a true and correct copy of the foregoing document was served on all counsel of record.

James Bowen
JENKENS & GILCHRIST
1445 Ross Avenue
Suite 3200
Dallas, Texas 75202

Will S. Snyder

TAB 3

Writ of Mandamus Denied, Opinion issued November 16,2005

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-05-01459-CV

IN RE CITIGROUP GLOBAL MARKETS, INC. (F/K/A SALOMON SMITH BARNEY, INC.), CITIGROUP INC. AND STACY QELSEN, Relators

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

MEMORANDUM OPINION

Before Justices Whittington, O'Neill, and Lang
Opinion by Justice O'Neill

Relators contend the trial judge abused her discretion in denying their motion to compel arbitration and stay the proceedings, The facts and issues are well known to the parties, so we need not recount them herein. Based on the record before us, we conclude relators have not shown they are entitled to the relief requested. *See* TEX. R APP. P. 52.8(a); *Walker v. Packer,* 827 S.W.2d 833, 839-44 (Tex. 1992) (orig. proceeding). Accordingly, we DENY relators' petition far writ of mandamus.

MICHAEL J. O'NEILL
JUSTICE

051459f.p05

Order issued November 16,2005

In The
Court af. Appeals
Fifth District of Texas at Dallas

No. 05-05-01459-CV

IN RE CITIGROUP GLOBAL MARKETS, INC. (F/K/A SALOMON SMITH BARNEY, 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

ORDER

Before Justices Whittington, O'Neill, and Lang

Based *on* the Court's opinion **of** this date, we **DENY relators' petition for writ of mandamus,**

We **ORDER that relators** Citigroup Global Markets, Inc. (f/k/a Salomon Smith **Barney,** Inc.), Citigroup Inc., and *Stacy* Oelsen **bear** the **casts** of this original **proceeding.**

MICHAEL J. O'NEILL
JUSTICE

TAB 4

ORAL ARGUMENT REQUESTED

NO. 05-05-01655I-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

PETITION FOR WRIT OF MANDAMUS

From County Court at Law Number 3 of Dallas County, Texas
the Honorable Sally L. Montgomery, presiding

Robert B. Gilbreath
State Bar No, 07904620

Charles A. Gall
State Bar No. 07281500

James W. Bowen
***State* Bar No. 02723305**

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ATTORNEYS FOR RELATORS

STATEMENT OF THE CASE

Action from which Relators seek relief: Relators seek a writ of mandamus ordering Respondent, Judge Sally Montgomery, to: (i) vacate her **October** 3, 2005 Order Denying Defendants' Motion **to** Compel Arbitration and Stay Proceedings **(Appendix** tab **I;** R. Vol. I, P. *296)* **in** the underlying case, Cause No. 04-04729-C; *Robert A. Nickell, et al. v. Citigroup Global Markets, Inc., et al.,* pending in County Court at **Law** No. 3 **of** Dallas County, Texas; **and** (ii) grant Relators' motion to compel arbitration of all claims in the underlying proceeding to arbitration and stay all trial court' proceedings in accordance with the Federal Arbitration **Act** (FAA), *9* U.S.C. *$ 2 et seq.* **Appendix** tab *2.*

Nature of the underlying proceeding: The underlying case is a **suit** for damages. Real Parties in Interest Robert A. Nickell and Natalie Bert Nickell are former investment clients of Salomon Smith Barney Inc. n/k/a Citigroup Global Markets, Tnc. and its employee, Stacy Oelsen. The Nickells sued Relators claiming they were defrauded in connection with their investments in WorldCom Inc. After the **underlying** proceeding was remanded to the trial court from federal **court, Relators** immediately moved to compel arbitration and to stay proceedings.

Related Appeal: Relators' motion to **compel** arbitration also invoked the Texas General Arbitration **Act,** TEX. CIV. PRAC. & REM. CODE § 171.001 *et seq.* Accordingly, Relators also filed *a* notice of appeal from Judge Montgomery's denial of the motion to compel arbitration. *See Jack B. Anglin Co. v. Tipps*, 842 S.W.2d **266,** *272* **(Tex.** *1992).* The **appeal** is pending in **this** Court under Cause No. 05-05-01430-CV, and Relators have filed a separate motion **in** *Cause* No. 05-05-01430-CV to consolidate this mandamus

proceeding with the related appeal pursuant to In re *Valero Energy Corp.*, **968** S.W.2d **916** *(Tex.* **2998).**

STATEMENT REGARDING PRIOR MANDAMUS PETITION

On October 26, 2005, Relators filed a nearly identical petition for writ of mandamus in this Court seeking the same relief from **the** same trial court order. That original proceeding was assigned ***cause*** number 05-05-01459-CV. **The** Nickells filed a response *that* included an assertion Chat the verification in Relators' mandamus petition was defective, On November 16, 2005, this Court denied Relators' petition for *writ* of mandamus in **an** order stating:

> Relators contend **the trial** judge abused her discretion in denying **their** motion *to* compel arbitration *and stay the* proceedings. **The** facts and issues are well known to the parties, so we need not recount them herein. Based on *the* record before us, we conclude relators have not shown they are entitled to the relief requested. ***See*** Tex.R.App. P. 52.8(a); *Walker v.* ***Packer,*** *827* S.W.2d 833, 839-44 (Tex.1992) (orig. proceeding). Accordingly, *we* **DENY** relators' **petition for writ of** mandamus.

(Appendix tab 3).

It appears **that** the Court agreed with the Nickells' assertion that the verification in Relators' **prior petition** *fox* writ of mandamus was defective, Otherwise, the Court would have consolidated the mandamus proceeding with the related appeal, which is this Court's usual practice in accordance with the Texas **Supreme** Court's admonition that: "the better course of action ***for*** *a court* of appeals confronted with an interlocutory appeal and *a* mandamus proceeding seeking to compel arbitration would be to consolidate **the** two proceedings and render a decision disposing of both simultaneously . . . ." *In* ***Re:*** *Valero Energy Corp.*, 968 S.W.2d 91*6* (Tex. **1998).**

The verifications in this petition for writ of mandamus satisfy the requirements of Texas Rule of Appellate Procedure 52. Accordingly, this original proceeding should be consolidated with the related appeal so that the Court may render a decision disposing of both matters simultaneously.

STATEMENT OF JURISDICTION

This Court has jurisdiction under Article V, Section 6 of the Texas Constitution, Section 22.221(b) of the Texas Government Code, and Rule 52 of the Texas Rules of Appellate Procedure. *Tipps*, 842 S.W.2d at 272.

ISSUE PRESENTED

Did the trial court abuse it discretion in denying deny Relators' Motion to Compel Arbitration and to Stay Proceedings?

STATEMENT OF FACTS

I. Introduction

Relator Citigroup Global Markets, Inc. ("CGM") is a registered broker-dealer and investment advisor, and it is an indirect, wholly owned subsidiary of Relator Citigroup Inc. {"Citigroup"'). R. Vol. I, p. 44.[1] Salomon Smith Barney Inc. and Smith Barney Harris Upham & Co. Inc. both were predecessors of CGM. *Id.* To avoid confusion, all references to CGM and/or its predecessors will be to CGM, unless the context: requires otherwise. Real-parties-in-interest Robert A. Nickell and Natalie Bert Nickell, plaintiffs below, were customers of CGM. R. Vol. I, pp. 11-13.

[1] The Record submitted with this Petition is in three volumes, indexed and separated by tabs. The pages are consecutively numbered. For the Court's convenience, cites to the Record will be "R. Vol. __, p. __."

II. The Agreements to Arbitrate

In connection with his account number **104-06936-14** *at* **CGM,** Mr. Nickell signed, among other documents, *a* Margin Agreement. R. **Val.** I, pp. 47-48. In relevant part, that Margin **Agreement provides:**

> **The undersigned agrees that all controversies between the undersigned and Smith Barney and/or any of its officers, directors, or employees present or former concerning or arising from (i) any account maintained with Smith Barney by the undersigned; (ii) any transaction involving Smith Barney and the undersigned, whether or not such transaction occurred in such account or accounts; or (iii) the construction, performance or breach of this or any other agreement between us, whether such controversy arose prior, on or subsequent** to **the date hereof, shall be determined by arbitration before any self-regulatory organization or exchange of which Smith Barney is a member. The undersigned may elect which of these arbitration forums shall hear the matter by sending a registered letter or telegram addressed to Smith Barney at 333 West 34th Street, New York, N.Y. 10001, Attn: Law Department, If the undersigned fails to make such election before the expiration of five (5) days after receipt of a written request from Smith Barney to make such election, Smith Barney shall have the right to choase the forum.**

R. Vol. **I, p.** 48 (emphasis in original).

On ***or*** about March 9, 2000, Mr. Nickell signed a **New** Account Application and Option Suitability form for account number 104-06936-14 containing substantially similar language. R. Vol. I, p. 49. Likewise, Ms. Nickell (formerly known as Natalie Bert), in connection with her **accounts** at CGM, signed agreements containing substantially similar arbitration provisions. R. Vol. I, **pp.** 52-57.

III. Plaintiffs' WorldCom Investments and the Downfall of WorldCom

The Nickells allege that they invested more than $4 million in WorldCom Inc. n/k/a MCI, Inc. ("WorldCom") securities in 2000 and 2001 in reliance on certain research reports issued by CGM research analyst Jack Grubman. R. Vol. I, pp. 11-13.[2] The Nickells allege the reports were "false and intentionally misleading statements about WorldCom's performance, the current condition of its business, and the value of its stock." R. Vol. 1, p. 10. In June 2002, WorldCom disclosed that it had overstated its income on its audited financial statements by over $9 billion from 1999 to 2002. *In re WorldCom, Inc. Sec. Litig., 294* F.Supp.2d 431,434 (S.D.N.Y. 2003). WorldCom filed a Voluntary Petition for Chapter 11 Bankruptcy in United States Bankruptcy Court for the Southern District of New York on July 21, *2002. Id.*

Thereafter, scores of lawsuits substantially similar to the underlying proceeding were filed across the country asserting securities fraud and common law claims against various WorldCom directors, officers, underwriters, accountants, commercial and investment banks, and research analysts who covered WorldCom. Id. at 434-35. On October 8, *2002,* pursuant to *28* U.S.C. § 1407, the Judicial. Panel on Multidistrict Litigation (the "MDL Panel") issued an order consolidating 30 WorldCom related securities and ERISA actions in the United States District Court for the Southern District of New York (the "MDL Court"). *In re WorldCom, Inc. Sec. & "ERISA" Litig., 226* F.Supp.2d 1352 (J.P.M.L. 2002). The MDL Panel thereafter issued orders transferring

[2] The WorldCom investments were made in the accounts governed by the agreements discussed above. R. Vol. I, p. 45.

and consolidating more than 80 actions to the MDL Court. *WorldCom,* 294 F.Supp.2d at 435.

In addition to class actions, numerous individual actions were filed in state court. *WorldCom, 294* F.Supp.2d at 434-35, The majority of those actions were removed to federal court as "related to" the WorldCom bankruptcy and transferred to the MDL Court. *Id.* Many of those actions allege claims against CGM's predecessor, Salomon Smith Barney,.which virtually are identical to the claims asserted by the Nickells in this action. The transferred and consolidated WorldCom related actions are now pending in the MDL Court, before the Honorable Denise L. Cote, as *In re WorldCom, lac. Securities & "ERISA" Litigation*, Master File Nos. 02 CIV. 3288(DLC), *02* CIV. 4816 (DLC), and 03 CIV. 6592 (collectively, the "Consolidated WorldCom Proceedings").[3]

IV. Removal, MDL Transfer, and Remand

On July 9, 2004, before Relators had appeared in the underlying proceeding, Relators removed the case to the United States District Court for the Northern District of Texas, Dallas Division (the "Dallas federal court"). R. Vol. II, p. 308. Relators expressly stated in the notice of removal that they were "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. As grounds for the removal, Relators alleged that removal was proper under 28 U.S.C. § 1452 because the action was "related to" the pending WorldCom bankruptcy action. ***Id.***

[3] MDL statistics regarding the Consolidated WorldCom Proceedings, as of September 30, 2004, can be found at www.jpml.uscourts.gov/Statistics/Statistics.html. That shows that 134 cases *have* been transferred to the MDL Court and another 24 have been filed in that Court originally. *See* p. 5

On August 9, 2004, the Nickells filed a motion to remand. R. Vol. 11, p. 393. At about the same time, Citigroup and CGM filed a Letter of Potential Tag Along Action with the MDL Panel notifying the panel that the case was subject to transfer to the MDL Court for consolidated or coordinated pre-trial proceedings. R. Vol. 11, pp. 658-59. On August 25, 2004, Relators filed in the Dallas federal court a motion to stay proceedings seeking the stay of all proceedings until the MDL Panel finally determined which court, either the Dallas federal court or the MDL Court, would conduct pre-trial activities. R. Vol. II, p. 533. In support of its request for a stay, Relators pointed out that a stay would conserve judicial resources and avoid the possibility of inconsistent rulings on pre-trial motions by having all motions decided by the same court. R. Vol. II, pp. 542-543.

On September 9, 2004, the MDL Panel issued Conditional Transfer Order No. 30 ("CTO-30") conditionally transferring the case, among others, to the MDL Court. R. Vol. II, p. 572. On October 11, 2004, the Nickells filed with the MDL Panel a motion to vacate CTO-30. R. Vof. III, p. 797. After it was fully briefed (R. Vol. 111, p. 797 and p. 891), the MDL Panel, on December 6, 2004, overruled the motion to vacate, and it issued a final Transfer Order. R. Vol. III, p. 897. The Dallas federal court never ruled on either the motion to remand or the motion to stay.

Once the case was transferred to the MDE Court, it became subject to the MDL Court's May 28,2003 Consolidation Order. R. Vol. I, pp. 125-35. Among other things, the Consolidation Order ordered that, with respect to "Individual Actions" such as the underlying proceeding, the requirement that any defendant named or served "must move, answer or otherwise respond in that action is stayed." R. Vol. I, p. 127. That same Order

also expressly preserved any and all defenses. R. Vol. I, p. 127,

The underlying proceeding also became subject to, among other things, the MDL Court's June 11, 2003 Order to Show Cause why the MDL Court's Opinion issued an March 3, 2003 denying a motion to remand and the MDL Court's Opinion on May 5, 2003 on certain individual actions did not require a summary denial of the Nickells motion to remand. R. Vol. III, p. 853. On January 18, 2005, the Nickells filed a Response to Show Cause as required by those Orders. R. Vol. III, p. 899.

Thereafter, certain events transpired that led Relators to conclude that it would be in the best interest of all parties simply to agree to remand to the trial court as opposed to fully briefing and obtaining a ruling an the jurisdictional issues. *See infra* Part I. D. 2. Accordingly, on February 11, 2005, the parties filed a Stipulation and Order agreeing "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. In the Stipulation and Order, to which both Relators and the Nickells agreed, Relators *again* specifically stated that they were ""appearing specially to reserve any and ail defenses . . . ." R. Vol. III, p. 928. The MDL Court approved this Stipulation and Order in the form submitted on January 24,2005. *Id.*

Relators at all times intended to present their Arbitration Motion once it was finally determined which court would conduct pre-trial activities and the Nickells' arguments with respect to subject matter jurisdiction were resolved. R. Vol. I, pp. 137-38. Indeed, Relators' motion *to* stay pending MDL transfer discussed above expressly 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.

V. Relators' Motion to Compel Arbitration

On March 21, 2005, after remand, Relators filed their first pleadings in the trial court hy the filing of their Original Answer and their Motion to Compel Arbitration and Stay Proceedings and Brief in Support (the "Arbitration Motion"). R. Vol. I, pp. 31 and 35. Before filing their Arbitration Motion, Relators did *not,* in any court: (1) seek or obtain discovery; (2) respond or abject to discovery; (3) file a motion for summary judgment; (4) file a motion for judgment on the pleadings; (5) seek a trial setting; or (6) file any cross-claims, counter-claims, or third-party claims. R. Vol. I, p. 137.

Moreover, with the exception of filing a Motion to Dismiss in the Dallas federal court under Federal Rule of Civil Procedure 12(b)(6),[4] Relators never sought a ruling from any court regarding the merits of the Nickells' claims. *Id.* With respect to the Motion to Dismiss, Relators agreed with counsel for the Nickells, immediately after the filing of the Motion, that the Nickells need *not* respond to the Motion at that time because Relators were not seeking a ruling on that Motion at the time. *Id.* In fact, the Nickells never responded to the Motion to Dismiss, and no court ever ruled on or considered the Motion. *Id.*

At no time did Relators express to any court, either orally or in writing, directly or indirectly, that they were expressly waiving their right to compel the Nickells' claims to arbitration or that they chose to litigate the Nickells' claims in court as opposed to

[4] Under *FED.* R. CIV. P. 12, Relators were required to file an answer or Rule 12 motion or risk entry of default judgment.

arbitration. Nevertheless, the Nickells responded to the Arbitration Motion with two arguments. R. Vol. I, p. 58. First, they argued that Relators expressly or impliedly waived their right to compel arbitration by removing the case to Dallas federal court, successfully obtaining the transfer of the case *to* the MDL Court over the Nickells' objections, and ultimately agreeing to a remand to the trial court. Next, the Nickells argued that CGM, as a successor to Smith Barney and Salomon Smith Barney, Inc. — the parties to the' agreements containing arbitration clauses with Mr. Nickell — and Citigroup, parent of CGM, are not entitled to claim the benefits of the arbitration agreement with respect to Mr. Nickell's claims. R. Vol. I, pp. 72-92.

After Relators replied to the Nickells' opposition (R. Vol. I, p. 94), Judge Montgomery conducted a hearing on August 12,2005. R. Vol. I, pp. 196-254. By Order dated October 3, 2005, Judge Montgomery denied the Arbitration Motion in its entirety. R. Vol. I, p. 296.

ARGUMENT

I. As a matter of law, Relators did not waive their right to compel arbitration.

With one exception discussed below in Part II. C, the Nickells' only defense to the Arbitration Motion rested on waiver arguments. Although Judge Montgomery did not provide any explanation for her Order, a review of the transcript from the hearing and the associated briefing makes it clear that the Order was based on waiver. Accordingly, that point is addressed first.

A. This Court and others have held that a "strong presumption" exists against waiver, and the Nickells bore a "heavy burden" to overcome: that presumption.

"There is a strong presumption against finding a waiver of arbitration, and the party claiming that the right to arbitrate has been waived bears a heavy burden." *Republic Ins. Co. v. Paico Receivables, LLC*, 383 F.3d 341, 344-47 (5th Cir. 2004); *Texas Residential Mortgage, L.P. v. Portman*, 152 S.W.3d 861, *862* (Tex. App. – Dallas 2005, no pet.). As a result, any doubts regarding waiver are resolved in favor of arbitration. *In re Bruce Terminix Co.*, 988 S.W.2d 702, 705 (Tex. 1998); *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, *577* (5th Cir. 1991). A waiver of an arbitration right must be intentional, so 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." Texas *Residential Mortgage*, 152 S.W.3d at *862* (emphasis added),

A party does not waive a right to arbitration merely by delay. *In re Serv. Corp. Intern.*, 85 S.W.3d 171, 174 (Tex. 2002). Moreover, a court will not find a party bas waived a right to enforce an arbitration clause "by merely taking part in litigation, unless the party has substantially invoked the judicial process to the opposing party's detriment." *Texas Residential Mortgage*, 152 S.W.3d at *862; Republic Ins.*, 383 F.3d at 344.

As the Fifth Circuit, construing the FAA, has emphasized, procedural acts taken before a motion to compel arbitration do not constitute a waiver. Instead, "ordinarily, courts find waiver only if the party seeking arbitration has actively tried and failed to achieve a satisfactory result in the litigation before turning to arbitration, such as moving

for summary judgment or otherwise seeking a final judicial resolution of the dispute . . . ." *Republic Ins.*, 383 F.3d at 344 ("'A party only invokes the judicial process to the extent it litigates *a specific claim* it subsequently seeks to arbitrate.") (emphasis added).

B. The Nickells failed *to* meet their heavy burden to overcome the strong presumption against a waiver of arbitration.

1. Relators did not intentionally and substantially invoke the Judicial process by actually litigating the Nickells' claims.

Relators took no action tu seek a determination of the Nickells' claims while the underlying proceeding was pending either in the Dallas federal court, the MDL Court, or the trial court. More specifically, Relators neither served nor responded to any discovery. Relators did not file *a* motion for summary judgment or a motion for judgment on the pleadings.[5] Relators did *not* seek a trial setting, and no trial ever was scheduled. Relators filed no counterclaims or third party claims, Indeed, Relators never even filed an answer setting forth their defenses to the Nickells' claims until after the case was remanded to the trial court. Moreover, when Relators filed their answer, they specifically pled that the Nickells were required to arbitrate, not litigate, their claims (R. Vol. I, p. 31), and they simultaneously filed the Arbitration Motion. R. Vol. I, pp. 31, 35.

In light of the fact that Relators took no action that could *be* construed as seeking to litigate the Nickells' claims, the Nickells pointed to the following as the bases of their waiver argument: (1) Relators' removal of this case to federal court; (2) the transfer of

[5] As noted above, Relators did fife a Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. However, Relators were forced to file that Motion or face yet another waiver argument with respect to Rule 12 defenses or *a* default judgment. In any event, Relators promptly after the filing of that Motion reached agreement with the Nickells that they did not need to respond, as Relators were not seeking a ruling an the Motion at that time. R. Vol. I, pp. 137.

that case to the MDL Court; (3) the remand of this action to this Court by agreement of the parties; and (4) certain statements, taken out of context, from Relators' briefing in connection with all of the foregoing. As a matter of law,[6] those actions and statements do not constitute waiver, as shown below.

a. As a matter of law, removal, remand and jurisdictional related activities do not constitute waiver.

Texas courts and the Fifth Circuit have specifically held that removal and removal-related procedural activity do not result in a waiver of a parties' right to arbitrate, repeatedly reversing findings of waiver in circumstances similar to these here, *See, e.g., William v. Cigna Financial Advisers, Inc.*, 56 F.3d 656 (5th Cir. 1995); *Walker v. J.C. Bradford & Co.*, 938 F.2d 575 (5th Cir. 1991); *American Bankers Life Assurance Co. of Florida v. Mister*, 344 F.Supp.2d 966 (N.D. Miss 2004); *In re Winter Park Constr., Inc.*, 30 S.W.3d 576 (Tex. App.–Texarkana 2000, no writ.); *In re Koch Ind., Inc.*, 49 S.W.3d 439 (Tex. App.–San Antonio 2001, no writ). Those cases show, with no uncertainty, that the Nickells' waiver arguments are without merit.

In *Williams*, the defendant removed the action to federal court, filed a motion to dismiss that was fully briefed and denied some eight months later, answered the plaintiff's complaint, asserted a counterclaim, and engaged in discovery, all before seeking arbitration. 56 F.3d at 658, 661. Nevertheless, the Fifth Circuit reversed the district court's waiver finding. *Id.* at 661; *accord Walker, 938 F.2d at 576-77* (reversing lower court's waiver finding that was based on removal and defendant's "positively

[6] "The waiver determination is a question of law." *Texas Residential Mortgage*, 152 S.W.3d at 862; *In re Serv. Corp. Intern.*, 85 S.W.3d 171, 174 (Tex. 2002).

invoking federal court procedures . . ."). In *American Bankers*, the Northern District of Mississippi, applying *Williams*, was more direct:

> Fifth Circuit precedent makes it plain that removal of a case to federal court and remand-related activities alone do not constitute substantial invocation of the judicial process.

344 F.Supp.2d at 969.

Accordingly, the court found no waiver even though the defendant filed its motion after a year of litigation involving removal, the filing of pleadings including counterclaims, jurisdictional briefing, and remand-related discovery. The court agreed with the defendant that it necessarily had to address subject matter jurisdiction issues before it could have addressed the arbitration issues, and activities related to those issues therefore did not constitute waiver. *Id.*

Likewise, in *In Re Winter Park*, the court reversed a waiver finding even though the defendant engaged in discovery, removed the case, and actively opposed a motion to remand, which ultimately was granted. 30 S.W.3d at 578:

> [The defendant here] did not actively try to achieve a satisfactory result of the litigation before it sought arbitration. It answered the suit, it removed the suit temporarily to the federal court, and it participated in some discovery. We find that this activity by [the defendant] does not satisfy [plaintiffs'] "heavy burden" to show a waiver.

In re Winter Park, 30 S.W.3d at 579.

In *Koch*, the San Antonio court reached the same conclusion on similar facts, *Koch*, 49 S.W.3d at 446. Accordingly, under these unanimous authorities, Relators did not waive arbitration as a matter of law.

b. Relators consistently and expressly preserved their right to compel arbitration.

In addition to not invoking the judicial **process,** Relators went further to avoid a waiver of **their** arbitration right. Although unnecessary, Relators expressly preserved arbitration from the outset of this case as follows:

June *9,2004*	CGM and Citigroup were initially served with citations
July 9,2004	Relators first appeared by filing a Notice of Removal "**appearing** specially so as to reserve any and all defenses available under Rule 12 ***of*** the Federal Rules of Civil Procedure or otherwise . . . ."[7] R. Vol. II, p. 308,
August 25,2004	Relators moved to stay all proceedings pending determination of MDL transfer "without waiver ***of*** **any of** their defenses, including, but not limited to, . . . the requirement that Plaintiffs arbitrate, not litigate, their claims," **R.** Vol. II, **p.** 539, n. 1.
December *23,2004*	The MDL Panel finally transferred ***to*** the MDL Court. Under the Consolidation Order entered by the MDL Court, the requirement: for Relators **to** move, answer, or respond

[7] In **the** trial court, **the** Nickells **argued, and** the **Court** questioned, **whether a** right **to compel** arbitration *is* a "defense." R. Vol. I, pp. 202-03. Relators readily acknowledge that the right *to* compel **arbitration** is **not a specific** defense under TEX. **R.** CIV. **P.** *94* or **FED.** R. CIV. **P.** 12(b), but **such a** right *routinely* is referred to as a **"defense," and it** often is raised initially in a pleading **such** as **an answer.** *See, e.g., Tenneco Resins, Inc. v. Davy Intern., A.G.,* 770 F.2d 416, 420 **(5th** Cir. 1985). **Regardless, Relators** submit that these semantics **are** not **important** to **the** waiver analysis. *See Mapeo v. Chevron U.S.A. Products Co.,* **237** F.Supp.2d 739, 745 (S.D. Tex. 2002) ("Although the court commends **Chile's** [the non-movant's] counsel for an excellent job in **his attention *to the* parties' pleadings, this** court feels constrained not to dwell **on a pleading** technicality, inasmuch **as to** do so would **inappropriately ameliorate the** strong burden **that Chile** must **carry** for **this court to** find **that** Chevron waived ***its*** arbitration **rights.** Rather, **the court** turns to Chile's substantive concerns of whether Chevron **waived** its rights by substantially invoking the judicial process at Chile's **expense.").**

	was "stayed," and all defenses were "preserved." R. Vol. I, p. 127.
February 11,2005	The parties agreed to remand. The **Stipulation** and Order, signed by all parties, stated that Relators were "appearing specially to reserve any and all defenses . . . ." R. Vol. III, p. 928.
March 21,2005	Relators filed their Original **Answer** and Arbitration Motion.

Accordingly, Relators did *mare* than was necessary to **preserve** their arbitration rights.

2. The Nickells failed to prove that they suffered any prejudice.

a. **Relators did not seek to arbitrate the "same issues" they previously had litigated.**

Even if the trial court correctly determined that the Nickells **met** their heavy burden **to** prove that Relators substantially invoked the judicial process, that alone is not enough. The Nickells **also** must have established **in** the trial court that they were prejudiced by Relators' invocation of the **judicial process.** *Republic Ins.*, 383 F.3d at **346.**

For **purposes** of an arbitration waiver argument, "[p]rejudice . . . refers to the inherent unfairness in terms of delay, expense, or damage *to* a party's legal position that occurs when the party's opponent **forces** it to litigate an issue and later **seeks** to arbitrate that *same issue."* *Id.* (emphasis added). In that regard, the courts have noted that three factors are particularly relevant: (1) while discovery relating to non-arbitrable claims is not prejudicial, discovery relating to all of the plaintiff's claims, **including** those that were conceded to be arbitrable, could result in prejudice; *(2)* time and expense incurred **in** defending against a motion for summary judgment; and (3) a party's failure to assert

procedural motion practice in federal court and the approximate seven month delay while the case was in federal court. This "**prejudice,**" however, was ***caused, in*** large part, by the Nickells themselves. The Nickells promised to arbitrate claims with the Relators. They alone could have avoided all motion practice, delay, and expense, including that associated with this mandamus proceeding, if they had simply asserted their claims in arbitration in the first instance as they agreed.

Moreover, once it became apparent, only a few weeks after Relators were served, that Relators intended **to** stand on their arbitration right, the Nickells could have agreed then to arbitrate, thus avoiding **all** expense and delay about which they now complain. Indeed, because Relators never filed an answer or a motion for summary judgment in federal court, the Nickells, before transfer to the MDL Court, could have dismissed their claims, without **prejudice,** simply by filing a notice of dismissal, and then instituted arbitration proceedings. FED. R. CIV. P. 41(a)(1).

Additionally, the Nickells greatly exacerbated the expense and delay associated with the procedural motion practice in federal court. First, they opposed MDL transfer, even though the outcome in the MDL Panel was a foregone conclusion, as the MDL **Panel had** ruled **previously** on numerous similar motions. Although the question was not even close **(see** R. Vol. III, **p.** 897), the Nickells filed a motion to vacate CTO-30. **R.** Vol. III, **pp.** 797, 891. The MDL Panel, however, summarily rejected the Nickells' arguments. R. Val. III, p. **897, If** the Nickells simply had conceded such an obvious **point,** thousands of dollars would have **been** saved, and approximately three months of

delay would have been avoided.[8]

Next, the Nickells ***opposed*** Relators' efforts to stay all proceedings after removal pending a resolution of the MDL transfer issue – **a** motion *specifically* ***designed*** to avoid unnecessary **expense** – even though those motions have been customarily and **routinely** granted in recent years by courts all over the nation, including courts considering WorldCom related claims like those asserted by the Nickells. ***See,*** *e.g., New Mexico State Investment Council v. Alexander,* 317 B.R. 440 (D.N.M 2004) (Staying a WorldCom-related case under the same circumstances).

Although the Nickells now cast themselves as innocent victims of expensive and "fraudulent" removal, they opposed the motion to stay and motion to transfer for one reason: the Nickells desperately wanted the Dallas federal court **to** rule on the jurisdictional issue before the **case** could be transferred to the MDL Court. The MDL **Court** had overruled many similar motions to remand on many prior occasions, and **it** had **even** put in place a show cause procedure *to* deal **with** those motions summarily and quickly. *See, e.g., In re WorldCom, Inc. Sec. Litig., 293* B.R. 308 (S.D.N.Y. 2003). The Nickells sought to delay the transfer and avoid a stay solely because they liked their chances on the remand issue in the Dallas federal **court** better than in the MDL Court. Having themselves created much of the delay and expense, the Nickells should not be allowed to claim Relators waived arbitration as a **result of** that same expense and delay.

Finally, the *Texas Residential Mortgage* case firmly puts to rest any argument

[8] **if** the Nickells **had** not **opposed** CTQ-30, **it** would **have** become final on September **24,** 2004. The Nickells' **opposition,** however, delayed **that** finality **until** December **23,** 2004. This is **significant** considering that the underlying **proceeding** *was in* **federal** court **for** a **total** of **approximately** seven **months.**

regarding the delay asserted by the Nickells establishing prejudice. The Nickells in the present case suffered, at most, an approximate seven month delay **while** this *case* was **pending** in federal court.

In *Texas Residential Mortgage*, the **plaintiff** suffered a ten month delay and incurred attorneys' fees engaging in discovery **and preparing** its case **for** trial. This Court flatly **stated** that "our review of **the record** uncovers absolutely no **evidence** that [the plaintiff] suffered prejudice as a **result** *of* Texas Residential's ten month delay in moving *to* compel arbitration." 152 S.W.3d at **864;** ***see*** *also Williams*, 56 F.3d at 661 (9 month delay not a waiver); ***American*** *Bankers*, 344 F.Supp.2d **at** 969 (one **year** delay not a waiver); and *Walker*, **938** F.2d at 577 (approximately two **year delay** not a waiver). Because the Nickells have likewise failed to present any evidence ***of*** **prejudice,** they too failed to meet their heavy burden of proving waiver.

C. Relators did not expressly abandon their right to compel arbitration.

I. Relators made no clear, overt act that would amount to express waiver.

The Nickells attempted to distance themselves from the **authorities cited** above by arguing that Relators "expressly" waived arbitration by making "**express** statements and procedural choices attempting **to** invoke federal jurisdiction that expose, time and again, their clear and unwavering choice of litigating this action in *a* federal **forum.**" R. Val. I, p. 74. Of course, because Relators never expressed an intent to waive their right to compel arbitration – **indeed,** they **specifically** preserved their arbitration right from **the** outset of this case **as** described above – **the** record is remarkably devoid of any such

express waiver. *The Nickells did not in the trial court — and cannot in this Court — cite to any part of the record where Relators affirmatively or expressly stated that they waived or abandoned their right to compel the Nickells' claims to arbitration.*

Instead, the Nickells selectively quoted, out of context, short statements from documents filed by Relators in federal court on the issues of jurisdiction, MDL transfer, or a stay pending MDL transfer, R. Vol. I, pp. 15-19. Those short quotes, when considered in the **context** in which they were made, provide **no evidence** of express waiver. Instead, those statements were made in the context of purely procedural motions, unrelated to the merits of the Nickells' claims, in an effort to have the case placed before the most appropriate court to consider pre-trial motions, *including* the Arbitration Motion. Moreover, if the removal, filing of counterclaims, engaging in limited discovery, and obtaining a ruling on a motion to dismiss do not amount to waiver as established by the cases cited above, Relators' actions below clearly do *not.*

No Texas or Fifth Circuit court has **discussed** the distinction, if any, between express and implied waiver in the context of an arbitration motion. In other contexts, however, this Court has held that an ""express waiver is shown by clear, overt *acts* evidencing an **intent** to waive . . . ." *Mooney Aircraft, Inc. v. Adams,* 377 S.W.2d 123, 126 (Tex. Civ. App.—Dallas **1964,** no writ) (considering the distinction **between** express and implied waiver **in** the context of **a plea** of privilege). Implied waiver, an the **other** hand, "occurs when a party, often inadvertently, takes some action inconsistent with his position" *Id.*

This distinction was applied in *Gilmore* v. *Shearson/American* ***Express,*** 811 F.2d

108, 109 **(2nd** Cir. 1987) (overruling on other grounds recognized by *McDonnell Douglas Fin. Corp. v. Pennsylvania Power & Light Co.*, 849 F.2d 761, *765* (2nd Cir. 1988)). In that **case,** the court found express waiver of an arbitration motion when the **defendant** *affirmatively* ***withdrew*** its arbitration motion and actively engaged in litigation on the merits. The "overt act" in that *case* was **the express** withdrawal of the motion. *See, e.g., Century Indemnity* Co. *v. Viacom Intern., Inc., 2003* WL 402792, at *6 (S.D.N.Y. Feb. *20,* 2003) (not designated for publication) (applying the "overt act" versus "inconsistent actions" distinction to reject a claim of express waiver of arbitration.).

Closer to home, Judge Godbey, in *Walker v. Countrywide* ***Credit*** *Industries, Inc.*, 2004 WL 246406, *2 (N.D. Tex. Jan, 15, 2004) (not designated for publication), considered an argument similar *to* that raised by the Nickells. In that case, the plaintiffs argued that defendant's counsel's statements *to* the court on a motion to transfer venue constituted an **express** waiver. In arguing the transfer motion, defendant's counsel stated that "upon transfer to the Northern District of Texas, the court could preside over pending California state law claims . . ." and that "there's nothing that prevents the Texas court from litigating this action." id.

Although the court did not discuss specifically the express versus implied waiver distinction, it rejected the plaintiffs' waiver arguments. *Id.* at *3. In so doing, Judge Godbey recognized the strong presumption against a finding of waiver under the Federal **Act, and** he took particular note of the context in which defendant's counsel's statements were made. *Id.* at *3.

In the underlying proceeding, Relators **never** took any *overt act* indicating an

intent to waive their arbitration right. **And,** when considered in their proper **context,** Relators' arguments below on the procedural issues do not indicate otherwise.

2. Although the Nickells label their argument "express waiver," they are in fact trying to avoid their heavy burden by using semantics.

Lacking any evidence **of** "overt acts" to support their express waiver argument, the Nickells **argued** that **the** selected quotes indicated that, if the case had remained in **federal** court, Relators would not **have** sought to compel the Nickells' claims to arbitration. *See, e.g.*, R. Vol. **I,** p. 78. Stated another way, **the** Nickells did *not* argue that Relators overtly waived their rights. Instead, they argued **that,** from Relators' conduct, the trial court could *infer* Relators' intent ***to*** litigate, **as** opposed to arbitrate.

The Nickells engaged in a game of semantics. They in fact argued implied waiver, but they labeled it "express waiver" in an attempt to avoid the numerous cases cited above. **Moreover, the** Nickells' counsel **conceded** to the trial court that, under the implied waiver standard discussed above in Part I. **A.,** their waiver **argument failed.** ***See*** R. Vol. I, pp, 226-27 ("Mr. Sayles [counsel for Plaintiffs]: . . . . Our main **paint** is there is an express waiver. Express waiver. Some of the cases cited by Mr. Gall [counsel for Relators] involve an implied waiver . . . . *I agree with everything he* ***[counsel for*** *Relators] said if this* ***is*** *an implied waiver case.") (emphasis added).* The **simple** fact is that, under controlling law, Relators did not waive their arbitration **right:** (1) they did not substantially invoke the judicial process to the Nickells' detriment; and *(2)* they did not affirmatively **or** expressly **waive** arbitration.

D. Relators' removal to federal court and subsequent transfer to the MDL Court were proper and supported by numerous authorities.

1. Relators proceeded in good faith. and in reliance on well supported legal arguments.

In connection with their waiver arguments, the Nickells essentially argued that a finding of waiver was warranted as a sanction. Throughout the Nickells' Opposition to the Arbitration Motion in the trial court, they referred to Relators' removal of this case to the Dallas federal court and ultimate transfer to the MDL Court as "specious," "frivolous," "fraudulent," and as "blatant forum shopping," and they argued that, if Relators had been successful in keeping this case in the MDL Court, Relators would not have sought arbitration. R. Vol. I, pp. 65, 66, 70, 84, and 86.

First, with respect to the latter point, the Nickells' argument is flatly wrong. Relators submitted uncontroverted evidence in the trial court (R. Vol. I, p. 137) that established unequivocally Relators' intentions. Relators believed that the MDL Court was the proper court to resolve pre-trial motions, *including the Arbitration Motion.* Relators intended to compel the Nickells' claims to arbitration in the MDL Court, after that Court had determined issues with respect.ta subject matter jurisdiction. (Indeed, that is why they specifically reserved the defense when they first appeared in this case.) A federal court without subject matter jurisdiction cannot properly compel a case to arbitration, and the jurisdiction issue therefore had to be resolved first. *CIGNA Health Care of St. Louis, Inc. v. Kaiser,* 181 F.Supp.2d 914, 919 (N.D. 111.2002).

Although their motives are irrelevant, Relators' removal and transfer efforts were not frivolous or in bad faith. Relators will not re-argue those points here, but the

authorities are in the Record. *See, e.g.,* R. Vol. II, pp. 533, 550, 663, 811. Relators, however, will point the Court to *New Mexico State Investment Council v. Alexander, Jr.,* 317 B.R. 440 (D.N.M. 2004) that was issued just after Relators removed the underlying proceeding to the Dallas federal, court an almost identical facts.

Alexander also arose out of the accounting fraud allegedly perpetrated by WorldCom. The plaintiffs were investors *in* WorldCom common stocks and bonds who, on April 20, 2004, instituted suit against a number of investment and commercial banks, including CGM, asserting claims for violation of the New Mexico Securities Act and common law claims for negligent representation.

As here, the bank defendants removed the *Alexander* case to federal court an the grounds that it was "related to" WorldCom's bankruptcy, and they thereafter sought the transfer of the case to the MDL Court. *Alexander,* 317 B.R. at 442, Vol. II. The plaintiffs filed a motion to remand, arguing that the removal of the *case* to federal court was improper because "WorldCom emerged from bankruptcy prior to the removal of this action . . . ." *Id.* at 444. The defendants filed a motion *to stay* the case to allow the MDL Panel to consider the transfer motion. *Id.*

The *Alexander* court stayed the case, and deferred any ruling on the plaintiffs' motion *to* remand, so the jurisdictional issues could be resolved by the MDL Court. 317 B.R. *at* 446. Far from finding the Relators' jurisdictional argument "frivolous" as labeled by the Nickells, the Court found that "[i]t is not obvious that the removal was improper. What is obvious, however, is that the 'related to' jurisdiction question raised in plaintiffs' motion to remand is both factually and legally difficult." *Id.* at 444.

Additionally, the *Alexander* court noted that the issues before it, like the issues that were present in this case, were "similar or identical to those in other bondholder cases that had been, or will be, transferred to the MDL Court." *Id.* at 446. The court stated that, "having one court decide the complex jurisdictional issues raised in the numerous bondholder actions obviously saves judicial resources and reduces the risk of inconsistent rulings." *Id.* Finally, the court held that, although a stay would delay the action, such a delay would not be substantial. *Id.* The court further noted that the plaintiffs in the *New Mexico* action, like the Nickells in the present action, "waited nearly two years after WorldCom filed for bankruptcy to file this action, and have *not* demonstrated that a brief delay would substantially affect their rights." *Id.*

As the *Alexander* court held, and as more fully explained in the Relators' briefing on the various jurisdictional and procedural issues contained in the Record, the jurisdictional issues present in this *case* were complex, and Relators' arguments clearly were not frivolous. Relators merely sought to have those issues addressed by one court *to* save expense and avoid the possibility of inconsistent results that could result by having different courts consider the same issues, Once those jurisdictional issues were addressed, the Nickells' predictions notwithstanding, Relators *at* all times planned to formally assert their previously expressed right to compel the Nickells' claims to arbitration in the MDL Court, if it found that it had jurisdiction, or in the trial court, if the MDL Court found that it lacked jurisdiction.

2. Relators' subsequent decision to agree *to* remand also was reached in good faith.

It was not **until** after **Late** January ***2005,*** when the MDL Court requested a response from Relators on the arguments **raised** by the Nickells regarding the Court's subject matter jurisdiction in light of WorldCom's emergence from bankruptcy (R. Vol. III, **p.** 927) that Relators determined to no longer pursue federal court jurisdiction. The Nickells make much of Relators' decision in February of 2005 **to** agree **to** a remand. Proving that no good deed **goes** unpunished, Nickells asserted **that** the **agreed** remand *itself* is **evidence** of Relators' bad motive. R. Vol. I, pp. 75-76. The Nickells' arguments are not supported by **the** Record.

The Record does support, however, that a number of factors went into Relators' decision to *agree* to remand. First, the MDL Court had ruled an many previous remand motions without requesting responsive briefing from those who **opposed** remand. *In re WorldCom, Inc. Sec. Litig.*, ***293*** B.R. **308** (S.D.N.Y. 2003); *In* **re** *WorldCom, Inc. Sec. Litig.*, 294 B.R. 553 (S.D.N.Y. 2003); *In re WorldCom, Inc. Sec. Litig.*, 2003 WL ***2***1031974, at * **2-3** (S.D.N.Y. May 5,2003); *In* **re** *WorldCom, lac. Sec. Litig.*, *2003* WL 21702284 (S.D.N.Y. July *23,* **2003).** In the present case, the MDL Court requested that Relators brief the issue, thus indicating thar a deviation in the MDL Court's **prior** analyses **of** its subject matter jurisdiction may have been under consideration. **At the very** least, the Court's request for briefing indicated that several months could pass before the issue was decided by the MDL Court, and that a series **of appeals** from many affected cases likely would follow.

Moreover, in 2004, Citigroup and its related entities entered into an agreement to settle the consolidated WorldCom class action securities case. In light of that settlement, the relatively few cases that had been, or could be, filed after WorldCom emerged from bankruptcy, and the further expense and delay that would have been incurred in deciding the Nickeils' and other plaintiffs' remand motions and the appeals thereof, Relators agreed simply to remand this action so that it could get the arbitration issue resolved *more* quickly and with less expense.

Indeed, although the Nickells complain of the relatively short delay that occurred from the initial removal of this case until the agreed remand, Relators could have delayed consideration of the merits of the underlying proceeding for many years, *if* delay had been their motive, by filing a responsive brief and, if unsuccessful, seeking appellate review. The simple fact is that Relators' motives were never based in delay, and Relators have at all times proceeded in *good* faith, without evil motive, and on the basis of well supported legal arguments to address the issues, procedural and otherwise, presented by the underlying proceeding. Relators therefore respectfully submit that the Nickells' name calling and accusations below were not only *irrelevant to the* arbitration issue, but also they were unfounded.

For these reasons, Relators respectfully submit that, as a matter of law, the trial court abused its discretion when it ruled *that Relators* waived *their* right *to* compel the Nickells' claims to arbitration.

II. *The* FAA required the trial court to enforce the arbitration agreements.

A. The agreements evidenced transactions involving commerce, contaiaed valid, written arbitration provisions, and the Nickells' claims are within the scope of the arbitration provisions.

The Federal Arbitration Act requires judicial enforcement of *a* wide range of arbitration agreements in written contracts "involving commerce." 9 U.S.C. *$2*. Section *2* of the FAA provides:

> A written provision in any . . . contract evidencing a transaction involving commerce to settle ,by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, *shall be valid, irrevocable, and enforceable* . . . .

9 U.S.C. § 2 (emphasis added).

Courts have broadly interpreted the "involving commerce" requirement and found it satisfied even by the most remote involvement with interstate commerce. ***See Allied.. Bruce*** *Terminix Cos., Inc. v. Dobson, 513 U.S. 265* (1995). This judicial interpretation comports with the liberal policy favoring arbitration, which is unequivocally endorsed by the United States Supreme Court. ***See*** *Southland Corp. v. Keating, 465* U.S. 1, 10 (1984); *Moses H. Cons Mem'l. Hosp. v. Mercury Constr. Corp., 460* U.S. 1, 24-25 **(1983).** Mare specifically, the Court has stated that "any doubts concerning the scope of the arbitrable issues should be resolved in favor of arbitration." Id.

The Nickells' account agreements relate to investment accounts through which they made investments in national securities markets. Because the *account* agreements,

including the explicit agreements to arbitrate, are in writing and indisputably involve commerce, the **provisions of** the **FAA** are applicable and mandatory. ***See*** *Merrill Lynch,* ***Pierce,*** *Fenner & Smith, Inc. v. Wilson,* 805 S.W.2d 38, 39 (Tex. App.—El Paso **1991,** no writ) **(a** securities account agreement is a contract for the purpose of trading securities and thereby clearly involves commerce for **purposes of the** Federal ***Act).***

According **to** Section 4 ***of*** the Federal Act, a party who finds himself in court over a matter that is designated for arbitration by contract may **petition** the court for an order directing the adverse party to participate in arbitration. ***9*** U.S.C. § 4. The Supreme Court has affirmed that, "[b]y its terms, the [FAA] leaves no place for the exercise of discretion by *a* district court, but instead mandates that district courts *shall* direct the parties to proceed to arbitration an issues as to which an arbitration agreement has been signed." *Dean Witter Reynold's, Inc. v. Byrd,* 470 U.S. 213, 218 (1985).

In the present case, Relators introduced authenticated copies of numerous account agreements containing arbitration provisions. The arbitration clauses at **issue are** broad and **sweeping** in **their scope,** and they clearly evidence the parties' agreement **to** arbitrate "**all controversies**" concerning "any account" and "any transaction involving Smith Barney arid the undersigned whether or not such transaction occurred in **such** account." R. Vol. I, **pp. 39,** 44-57 (emphasis in original). Moreover, the agreements expressly apply to CGM, its "successor organizations," and its "employees, **present** or former . . . ," **such** as Oelsen. *Id.*

Importantly, *the Nickells offered no* ***evidence or*** *argument in the trial court that*: (1) **the** agreements **did** not involve commerce; (2) Plaintiffs' claims were outside the

scope of the arbitration provisions; or (3) the arbitration provisions were invalid or unenforceable for any reason. See *In re Kellogg Brown & Root, Inc.*, 166 S.W.3d 732, 737 (Tex. 2005) (Under the FAA, a party must establish (1) a valid arbitration agreement and (2) that the claims fall within the scope of the agreement). Accordingly, the trial court had no discretion under the Federal Act to refuse to compel the Nickells' claims to arbitration and to stay the litigation.

B. Citigroup also was entitled to compel arbitration.

A non-signatory may compel a signatories' claims to arbitration:

> When the signatory to the contract containing an arbitration clause raises allegations of substantially interdependent and concerted misconduct by both the nonsignatory and one or more of the signatories to the contract. Otherwise the arbitration proceedings between the two signatories would be rendered meaningless and the federal policy in favor of arbitration effectively thwarted.

Grigson v. Creative Artists Agency, 210 F.3d 524, 527 (5th Cir. 2000) *(quoting MS Dealer Serv. Corp. v. Franklin,* 177 F.3d 942, 947 (11th Cir. 1999)). Texas courts also have embraced the reasoning in *Grigson,* and they have applied that rule to compel claims against non-signatories to arbitration on many occasions. *McMillan v. Computer Translation Systems & Support, Inc.*, 66 S.W.3d 477, 481 (Tex. App.-Dallas, 2001, no writ); *In re Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 2002 WL 31165172 (Tex. App.–Dallas 2002, orig. proceeding) (not designated for publication); In re *Koch Indus., Inc.*, 49 S.W.3d 439, 447 (Tex. App.–San Antonio 2001, orig. proceeding); *Merrill* Lynch, *Pierce, Fenner & Smith, Inc. v. Eddings,* 838 S.W.2d 874, 878-89 (Tex. App.—Waco 1992, writ denied); *Brown v. Anderson,* 102 S.W.3d 245, 249 (Tex. App.–Beaumont

2003, **pet.** denied); *Valero Energy Corp. v. Teco **Pipeline** Co.*, 2 S.W.3d *576,* 591-93 (Tex. App.–Houston [14th Dist.] 1999, no writ).

The Nickells raise allegations of substantially interdependent **and concerted** misconduct ***by*** CGM and Citigroup. ***See*** *Grigson*, 210 F.3d at *527.* They allege that "CGM, acting through Grubman and other CGM employees, engaged and participated in acts, practices, and courses of business that **defrauded** and deceived the Plaintiffs (among others) in connection with the purchase of WorldCom stock." R. Vol. I, pp. **13-14.** The Nickells' allegations against Citigroup are limited **to** its indirect ownership of CGM. They allege that "Citigroup had **the** power to control **or** influence the transactions, events, and circumstances giving rise to CGM's and Grubman's violations of **the** T[exas] S[ecurities] A[ct]." R. Vol. I, p. 17.

Those allegations of substantially interdependent and concerted misconduct *are* **further demonstrated** by **the** Nickells' claim of common law fraud by **CGM** and Citigroup:

> Citigroup, as CGM's controlling corporation with supervisory responsibilities, **knew** about **the** fraudulent reports **being** issued by Grubman **and** other CGM employees, encouraged, perpetuated, and/or participated in that fraud, and benefited from it.

R. Vol. I, **pp.** 18-19. The arbitration provisions signed by the Nickells **therefore** applied **to** their claims against Citigroup.

C. Under applicable law and the terms of the agreements, CGM, as successor to Smith Barney, may enforce the arbitration provision.

The Nickells argued in the trial court that the documents upon which CGM relied

to compel Mr. Nickell's (not Ms. Nickell's) claims to arbitration **are** not effective as to CGM because "they do not apply to successors . . ." **of** Salomon Smith Barney (SSB) or Smith. Barney Harris Upham & Co., Inc. (SBHUC). R. Vol. 1, **p. 90.** The Nickells' argument was incorrect.

Relators submitted two agreements containing arbitration provisions signed by Mr. Nickell. R. Vol. I, pp. 47 and 49. The first is between SBHUC and *Mr*. Nickell, and it specifically' states that it "shall inure *to* the benefit of Smith Barney's present organization, and any **successor** organization or assigns." R. Vol. I, p. 48. The second is between Mr. Nickell and SSB, and it 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.

Through the Affidavit ***of*** Dan N. Wilhite, Relators established, and the Nickells did not dispute or controvert, that SSB and SBHUC are predecessors of CGM. R. Vol. **I, p.** 45, **Indeed,** in their own pleadings, the Nickells judicially admitted that fact. R. Vol. **I,** p. I, ¶¶ 3, 4, **8,** 21 and 46; **see** *In re GTE Mobilnet* ***of South Texas*** *Ltd. Partnership*, 123 SW.3d 795, *798* (Tex. App—Beaumont 2003, no pet.)(holding that plaintiff's reference in pleadings to defendant as successor-in-interest constituted a judicial admission).

Because ordinary principles of contract law **are** used in determining a parties' right to compel arbitration, ***American*** *Realty Trust, Inc. v. JDN Real Estate-McKinney, L.P.*, 74 S.W.3d *527,* **531-32** (Tex. App.–Dallas 2002, writ denied); In ***re*** *Kellogg Brown & Root,* 166 S.W.3d at 738, it is clear that successors in interest may enforce the terms of arbitration agreements to which their predecessors are parties, when the contract so

provides:

> An arbitration agreement may recognize that certain non-parties who have the appropriate sort of privity with one of the signatories – those such as assignees, agents, subrogated insurers, representatives, trustees, third party beneficiaries, etc. – are bound by the agreement because those types of non-parties 'stand in the shoes' of one of the signatories . . . .

In re Kepka, ___ S.W.3d ___, 2005 WL 1777996, at *12 (Tex. App.–Houston [1st Dist.] July 28, 2005, no pet.); *see also Capitan Enters., Inc. v. Jackson*, 903 S.W.2d 772, 775 (Tex. App.–El Paso 1994, writ denied).. As with any contract, an assignee such as a successor-in-interest can be bound to the terms of the arbitration agreement signed by a predecessor-in-interest.

D. Alternatively, the Nickells are estopped from avoiding their agreemeats to arbitrate.

Additionally and alternatively, even *if* the Court concludes that CGM, as SSB's and SBHUC's successor, is not entitled to enforce the arbitration provisions as a successor to a signatory, equitable estoppel nevertheless dictates that the Court should compel the Nickells' claims to arbitration. "Several courts of appeals have recognized an estoppel theory whereby nonsignatories to an arbitration agreement have standing to compel arbitration against a signatory, and the signatory is estopped from avoiding arbitration with a nonsignatory when the issues which the nonsignatory wants to resolve are intertwined with the agreement that the signatory signed," *Grigson v. Creative Artists Agency, L.L.C.*, 210 F.3d 524 (5th Cir. 2000); *McBro Planning and Dev. Co. v. Triangle Elec. Const. Co., Inc.*, 741 F.2d 342 (11th Cir. 1984). This theory applies when a signatory to the written agreement must rely on the terms of the agreement to assert its

claims against the nonsignatory such that the signatory's claims make reference to or presume the existence of the written agreement, or the signatory's claims arise out of and relate directly to the written agreement, See *MS Dealer Serv. Corp. v. Franklin,* 177 F.3d 942, *947* (11th Cir. **1999);** *Merrill Lynch, **Pierce,** Fenner & Smith, Inc. v. Eddings*, 838 S.W.2d **874,** 878-89 (Tex. App.–Waco 1992, writ denied).

The agreements **that** the Nickells signed, **and** which contain the arbitration provisions, allowed them to open and maintain their accounts at CGM and its predecessors in which they purchased WorldCom securities. Thus, the Nickells' claims arise out of or relate directly **to** those agreements. They should not be allowed, **on the** one hand, **to** avail themselves of the benefits of the agreements **by** trading securities through, and by maintaining accounts with, CGM and its predecessors, but, on the other hand, avoid the parts of the agreements such as the arbitration provisions. In *re Kellogg Brown & Root,* 166 S.W.3d **at** 740-41. Accordingly, Relators are entitled to arbitrate the Nickells' **claims** on the basis of equitable **estoppel.**

PRAYER

For the foregoing reasons, Relators respectfully request that the Court issue a writ of mandamus to Respondent directing her to set aside her **Order of** October 3, *2005* and to enter an order granting the Arbitration Motion in its entirety. Finally, Relators respectfully request **that** the Court grant them such other and further relief to **which** they may show themselves justly entitled.

Respectfully submitted,

Robert B. Gilbreath
State Bar No. 07904620

Charles A. Gall
State Bar No. *0728***1500**

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ATTORNEYS FOR RELATORS

VERIFICATION OF APPENDIX, RECORD, AND PACTS

STATE OF TEXAS §
§
COUNTY OF DALLAS §

Before me, the undersigned authority, on **this** day personally **appeared James** W. Bowen, 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; *(2)* the items contained in the **Appendix** and **in** the Record far *this* mandamus **proceeding** are true and **correct** copies of the original documents; and **(3)** all facts stated in **this Petition,** other than those facts separately verified by Mr. Dan N. Wilhite, are true and correct.

James W. Bowen

Given under **my** hand and official seal of office this 14 day of December, 2005.

Notary Public, State of Texas

BEVERLY A. TOMASSI
Notary Public, State of Texas
Comm. Expires 06-10-2007

VERIFICATION OF FACTS

STATE OF TEXAS §
§
COUNTY OF DALLAS §

Before me, the undersigned authority, **on** this day personally **appeared** Dan N. Wilhite, **the person** whose name **is subscribed bdow and who, upon** his oath, ***states as*** follows: (1) he is Senior Vice-President/Branch Manager of Smith Barney, a division of Citigroup Global Markets, Inc. ("CGM"); **(2)** he has **personal knowledge of the** facts contained in Parts I and **11 in the** Statement of **Facts in this Petition; and** (3) such facts are true **and** correct:

Dan N. Wilhite

Given under my hand and official seal **of** office this 13 day of December, 2005.

Notary Public, State of Texas

LISA ARMSTRONG
NOTARY PUBLIC
STATE OF TEXAS
My Comm Expires 11-13-2007

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 **15th** day of December, 2005:

Counsel for Real Parties in Interest:

Richard **A.** Sayles
Will **S.** Snyder
Sayles Lidji & Werbner
4400 Renaissance Tower
1201 Elm **Street**
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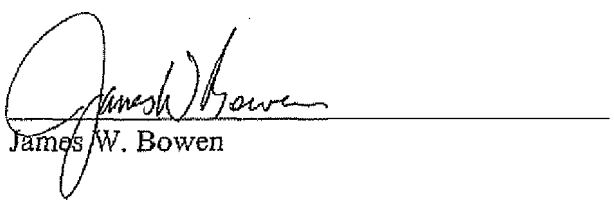
Respondent:

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



James W. Bowen

TAB *5*

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April 6, 2006

Via Hand Delivery

Ms. Lisa Matz, Clerk
Fifth Court of Appeals
George L. *Allen*, Sr. Courts Building
600 Commerce Street, 2nd Floor
Dallas, Texas 75202-4658

Re: **Court of Appeals Number: 05-05-01430-CV**
Citigroup Global Markets, Inc. (f/k/a Salomon Smith Barney, Inc.), Citigroup Inc. and Stacy Oelsen v. Robert A. Nickell and Natalie Bert Nickell

Dear Ms. Matz:

Please present this post-submission letter brief to the panel assigned to this case, Justices O'Neill, Morris, and Mazzant.

During oral argument, counsel for Appellees asserted that Appellants are not entitled to bring an appeal under Section 171.098(a)(1) of the Texas Civil Practice and Remedies Code because the parties' agreement contains a choice-of-law clause selecting New York law. For three reasons, that argument is without merit.

First, section 171.098(a)(1), which provides for a right of appeal from an order denying a motion to compel arbitration, is procedural. Even when the parties have selected the laws of another jurisdiction, Texas law still governs procedural issues. *Owens-Corning Fiberglas Corp. v. Martin*, 942 S.W.2d 712,721 (Tex. App.—Dallas 1997, no pet.).

Second, New York law also provides a right of appeal from an order denying a motion to compel arbitration. *Flanagan v. Prudential-Bache Sec., Inc.*, 495 N.E.2d 345, 347 fn.* (N.Y. 1986). Thus, because there is no conflict between Texas law and New York law on this issue, Appellants are entitled to bring this appeal under Section 171.098(a)(1). *In re AdvancePCS Health L.P.*, 172 S.W.3d 603, 606 (Tex. 2005).

Third, oral argument was the first time Appellees raised any argument about the New York choice of law provision in the agreements at issue. Appellees did not present that argument to the trial court, and they neither briefed that issue on appeal nor raised it in their motion to dismiss filed in this case. Accordingly, Appellees have waived that argument. *See* TEX. R. APP. P. 38.1(h) and 38.2(a)(1).

Finally, counsel for Appellees repeatedly informed the Court at oral argument that Texas cases routinely hold that the Federal Arbitration Act (the "FAA") preempts the Texas General Arbitration Act (the "TAA"), and that we have cited no authority otherwise. To the contrary, in addition to the *Valero* case discussed at oral argument, we cited the Court previously to *In re Nexion Health at Humble, Inc.*, 173 S.W.3d 67 (Tex. 2005) for the proposition that the FAA only preempts the TAA to the extent they are inconsistent.[1] *See* Appellants' Response to Appellees' Motion to Dismiss Appeal filed on December 22, 2005. In *Nexion*, the Supreme Court found preemption "in this case," because the TAA *imposes* additional signature requirements *in personal injury cases* not required under the FAA. *Nexion*, 173 S.W.3d at 70. Importantly, the Supreme Court did *not* hold that *the* FAA, when it applies, *always* preempts the TAA. Instead, it set forth a four part test to *make* the preemption determination, one part of which is whether "(4) state law affects the enforceability of the *agreement* [to arbitrate]." *Id.* at 69.

In the present case, the T M does nut "affect the enforceability" of the agreements to arbitrate. As Appellees do not dispute, the agreements at issue are just as enforceable under the TAA as they are under the FAA. Accordingly, under *the* test recently announced by the Supreme Court in the FAA does not preempt the TAA in the present case.

Very truly yours,

James W. Bowen

JWB:bt
Enclosures

cc: Richard A. Sayles *(via CMRRR No. 7003 1680 0000 3092 6533)*
Will Snyder *(via email)*
Charles A. Gall
Rob Gilbreath

[1] All of *the* preemption cases cited by Appellees are lower court opinions that pre-date *Nexion*.

TAB 6

SAYLES | WERBNER

April 7,2006

VIA HAND DELIVERY
Lisa Matz, Clerk of the Court
Fifth Court of Appeals
600 Commerce Street, 2nd Floor
Dallas, Texas 75202

Re: *Citigroup Global Markets, Inc. (f/k/a Salomon Smith Barney, Inc.), et al., Appellants. v. Robert A. Nickell and Natalie Bert Nickell, Appellees;* Cause No. 05-05-01430-CV

Dear Ms. Matz:

Please submit this post-submission letter brief to Justices Mazzant, O'Neill, and Morris, who heard oral argument in this case this past Wednesday, April 5,2006, This brief responds to the post-submission letter brief Appellants sent yesterday.

The post-submission letter brief Appellants submitted on April 6,2006 ("Appellants' Letter Brief") attempts to advance four positions, three of which Appellants took during the April 5 oral argument in this case. Appellants first attempt to support the notion that the Texas Arbitration Act ("Texas Act"), specifically Section 171.098(a)(1), permits them to pursue an interlocutory appeal of the trial court's denial of their motion to compel arbitration, even though the arbitration agreements at issue expressly invoke New York law and exclude the laws of any other states, including Texas. Appellants base this argument on the incorrect proposition that the Texas Act is procedural, not substantive, and, therefore, may be invoked despite the contracts' choice of law clauses. In support of this faulty proposition, Appellants cite a single case, ***hens-Corning*** Fiberglass *Corp. v. Martin, 942* S.W.2d *712,721* (Tex.App.–Dallas 1997, no pet.).

Remarkably, the *Martin* case has nothing to do with arbitration or the Texas Act – which explains why Appellants do not discuss it or provide a parenthetical description of it. Equally remarkable is the fact that Appellants do not address or attempt to distinguish (because they cannot) a 2002 Texas Supreme Court case ***directly on point***, which Appellees included in their April 3, 2006 letter to the Court, a letter listing seven additional cases for the Court to consider and copying Appellants' counsel, That case, *In re J.D. Edwards World Solutions Company*, 87 S.W.3d 546, involved a dispute over whether the Texas Act, the Federal Arbitration Act ("Federal ***Act"),*** or the equivalent Colorado act applied, The party seeking arbitration maintained that the Federal Act applied and, therefore, pursued only mandamus relief to reverse the trial court's denial of the motion to compel arbitration. While the arbitration contract included a Colorado choice of law clause, the party resisting arbitration claimed the Texas Act applied because the contract referred to the Uniform Arbitration Act, from which the Texas Act was derived. The Texas Supreme Court rejected this argument and concluded, "[t]here is no contractual or legal basis for applying Texas law to the issues in this case in light of the express contractual references *to* Colorado law arid the UAA." Id. at 549. Explaining its decision, the Supreme Court stated that the

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> limited reference to the UAA is not sufficient to invoke Texas law or the TAA [i.e., the Texas Act] as the law governing the arbitration agreement. Although there remains a question about whether federal. law, Colorado law or the UAA controls the resolution of the disputed issues in this case, we need not decide which applies, or to what extent, because the result is the same under all three. Id. at 550.

The Supreme Court then proceeded to conditionally grant the requested writ of mandamus, further acknowledging that the Federal Act or Colorado act applied, not the Texas Act. *Id.* at 551-552.

Undoubtedly, *J.D. Edwards* demonstrates that because arbitration acts amount to substantive law, not procedural, a party wishing to invoke the Texas Act must demonstrate that it applies. While Appellants have correctly demonstrated that the Federal Act applies because the contract at issue affects interstate commerce (and in fact, they expressly conceded that the Federal Act applies at the outset of the April 5 oral argument), they have not even attempted to explain how or why the Texas Act applies. Instead, they have incorrectly presumed that it applies without any allegations or argument and despite clear New York choice of law provisions that affirmatively exclude Texas law.

At least three other Texas Supreme Court cases establish that although the Federal Act, like the Texas Act, contains provisions prescribing procedural vehicles for relief, it is substantive law, not procedural. In *In re L&L Kempwood Assoc.*, 9 S.W.3d 125, 127-28 (Tex. 1999), the parties disagreed on whether an arbitration contract choosing the "law of the place where the [construction] Project is located" invoked the Federal Act or the Texas Act. Recognizing that both acts cannot simultaneously apply (as Appellants erroneously advocate in this case), the Texas Supreme Court reasoned that because the Federal Act "is part of the substantive law of Texas," it should apply to the exclusion of the Texas Act. The Court granted the Federal-Act-based mandamus relief and dismissed the Texas-Act-based interlocutory appeal as moot.[1] Accordingly, because the Federal Act is substantive law and completely displaces the Texas Act whenever it applies, the Texas Act must also be substantive, although both depend on and must coordinate with the Texas Rules of Civil Procedure and the Texas Rules of Appellate Procedure.

Finally, pure logic dictates that if the Texas Act were really procedural, it would always apply, even in lieu of the Federal Act, since Texas courts are governed exclusively by Texas procedural rules and laws. Clearly, that is not the case.

Turning to the second argument in Appellants' Letter Brief, Appellants assert that New York law, like Texas law, provides a right of appeal from an order denying a motion to compel arbitration. Citing *In re Advance PCS Health L.P.*, 172 S.W.3d 603, 606 (Tex.

[1] *See also Capital Income Properties v. Blackmon*, 843 S.W.2d 22, 23 (Tex. 1992) (considering Federal-Act-based mandamus petition and declaring that the Federal Act "is part of the substantive law of Texas"); *Jack B. Anglin*, 842 S.W.2d 266, 271 (Tex. 1992) (also finding that the Federal Act was substantive law).

2005) for support, **Appellants** contend that, because both acts permit an appeal, Section 171.098(a)(1) of the Texas **Act** allows them to pursue an interlocutory appeal under New York's arbitration act (the "New York Act"). But ***Advance PCS Health*** has nothing to do with a party's rights to pursue the interlocutory appeals prescribed under Section 171.098(a)(1) (indeed, the parties there agreed that the Federal Act applied and, appropriately, only mandamus relief was pursued). It merely stands for the uncontroversial proposition that when there are no conflicts in the relevant, substantive provisions of two states' arbitration acts, it doesn't matter which act applies. *See* id. at 606. As Appellants well know, Section 171.098(a)(1) permits ***an*** interlocutory appeal only when the motion to compel arbitration is properly ***bused*** on *the* ***Texas Act,*** not the New York Act, the Federal Act, or any other arbitration act.[2] Knowing this, Appellants have also filed two mandamus petitions because their motion to compel arbitration was based on the Federal Act, even though. the Federal Act also provides a right of appeal and there are no conflicts between the relevant, substantive provisions of the Texas Act and the Federal Act. Therefore, for the same reasons, they would have had ***to*** pursue mandamus relief, not an interlocutory appeal, on any motion to compel arbitration based on the New York **Act.**

As their third point of contention, Appellants incorrectly claim that "oral argument was the first time Appellees raised ***my*** argument about the New York choice of law provisions in the agreements at issue." Nothing could be farther from the truth. In fact, Appellees noted the application of these provisions in their Response to Defendants' Motion to Compel Arbitration and Stay Proceedings. There, Appellees pointed out that the arbitration agreements at issue "contain New York choice-of-law provisions supporting the applicability of " New York law. ***See*** Relators' Record in support of their December 15, 2005 Mandamus Petition (i.e., their second **mandamus** petition) at 92, n. 101. Appellants have never contested this point. Moreover, the determination of which states' law applies is a question of law for the court to decide. *Torrington Co.* v. *Stutzman,* **46** S.W.3d **829, 848** (Tex. 2000). It is undisputed that the parties have selected New York law to apply to the contracts at issue; accordingly, that choice should be **given** full effect, See ***Duncan*** *v. Cessna Aircraft* Co., *665* S.W.2d 414, 421 (Tex. 1984). Otherwise, as Appellants would have it, the Court should ignore the contract at issue and intentionally apply the wrong law.

As a final point of contention, Appellants' Letter Brief asserts that, despite Appellees' oral arguments, Appellants have cited *authority* for the proposition that the Federal Act does not always preempt the Texas ***Act*** when both apply.. Appellants **claim** that *In* ***re*** *Valero* ***Energy*** *Corp.*, 968 S.W.2d 916 (Tex. ***2998)*** and *In* ***re*** *Nexion Health* ***at*** Humble, *Inc.*, 173 S.W.3d 67 (Tex. 2005) **support** this proposition. **At** Wednesday's hearing, Appellants argued that *Valero* substantiated their position because, in that case, the Supreme Court refused to bear a Federal-Act-based mandamus petition until the appellate court concluded its consideration of the corollary Texas-Act-based interlocutory appeal. Justice O'Neill questioned whether it was clear from the opinion whether the Federal **Act** or Texas

[2] *See, e.g.,* ***Jack B.*** *Anglin,* **842** S.W.2d **at 266,272** (Tex. ***1992)*** (finding that the **Texas Act does not permit** interlocutory appeals **of** orders **on** motions made under **the Federal Act and** urging the **Texas Legislature** to amend the **Texas Act** to permit **such appeals).**

Act applied. And, as Appellee's counsel argued, it was not at all clear which act applied In fact, a careful review of the case indicates that the Federal Act did not apply because the appellate court refused to consider the mandamus petition, having denied the motion for leave to file it. Therefore, the Supreme Court's decision to hold off on considering the mandamus petition was perfectly well-reasoned because, if the appellate court gave the mandamus petitioner the relief it sought through its Texas-Act-based interlocutory appeal, the mandamus petition would be moot.

In re Nexion lends no more support to Appellants' position than *Valero*. There, the Supreme Court simply noted that there was a direct conflict between the relevant, substantive provisions of the Texas Act and the Federal Act, which amounted to an obvious case of preemption. But the Court did not say that such a direct statutory conflict was required for preemption to occur. Doing so would have overruled several previous Texas Supreme Court decisions and scores of appellate court decisions throughout the state where the courts determined that the Texas Act was preempted simply because the contract at issue affected interstate commerce and/or the parties agreed that the Federal Act applied, and not because of any determination that a direct statutory conflict existed.

In a footnote of Appellants' Letter Brief, they erroneously contend that "[a]ll of the preemption cases cited by Appellees are lower court opinions that pre-date *Nexion*." In truth, the Reply in Support of Appellees' Motion to Dismiss Appeal cites three post-*Nexion* appellate court decisions dismissing Texas-Act-based interlocutory appeals for want of jurisdiction and/or under preemption principles.[3] And none of these cases required a direct conflict between relevant, substantive statutory provisions (i.e., a *Nexion*-type preemption) to find that the Texas Act was preempted.

Also, Appellees' April 3 letter to the Court (which, again, copies Appellants' counsel) lists a Texas Supreme Court case and an appellate case that post-dates *Nexion*, both of which concluded that the Federal Act preempted the Texas Act without finding a statutory conflict. In *EZ* Pawn *Corp. v. Mancias*, 934 S.W.2d 87, *91* (Tex. 1996), the Supreme Court, faced with an arbitration contract invoking both the Texas Act and the Federal Act, correctly determined that it could not apply both and must choose one. The *EZ* Pawn decision concludes that the Federal Act "prevails" over the Texas Act without looking for or finding a direct conflict in statutory provisions (i.e., a *Nexion*-type preemption). And every other Texas Supreme Court decision in the history of Texas jurisprudence involving a situation where, as here, the Federal Act indisputably applies has applied it *instead* of the Texas Act, without requiring a *Nexion*-type preemption.[4] Again, while *Nexion* notes the

[3] *See* Reply Brief at 3, n. 7 (citing *Tankinetics, Inc. v. Texas Workforce Comm'n, 2005* WL 3489805 *1 (Tex. App.—Houston [14th Dist.] Dec. 21, *2005,* no pet. h.); *Kroupa v. Casey*, 2005 WL 3315279 * 14 (Tex. App.—Houston [1st Dist.] Dec. 8, 2005, no pet. h.); *Cappadonna Electr. Mgmt. v. Cameron County*, ___ S.W.3d ___, 2005 WL 3211453 * 1-2 (Tex. App.—Corpus Christi Dec. 1,2005, no pet. h.).

[4] *See,* e.g., *In re L&L Kempwood Assoc.*, 9 S.W.3d 125, 127-28 (Tex. 1999) (applying Federal *Act* instead of Texas Act even though the contract provided for both); *Prudential Sec. Inc. v. Marshall, 909* S.W.2d *896,* 899 (Tex. 1995) ("When a party *asserts* a right *to* arbitration under the [FAA], the question of whether a dispute is subject *to* arbitration is determined under federal *law"); Capital Income Properties v. Blackmon*, 843 S.W.2d

existence of a direct conflict between statutory provisions, it does not, as Appellants suggest, require such a conflict for preemption to occur.

Further, as Appellees argued at Wednesday's hearing, there are also no **appellate cases** in **Texas** jurisprudential history determining that, although the Federal Act applied, the Texas Act should apply in lieu of or in addition to it.[5]

The post-*Nexion* appellate court case cited in Appellees' April 3 letter to the Court bears mentioning. In *Banc of America Agency of Texas, Inc. v. Pickard*, 2206 WL 20001 (Tex. App. – Fort Worth Jan. 5, *2006*, no pet.) (not designated for publication), the appellant/relator, represented by Robert Gilbreath (who appears as lead appellate counsel on Appellants' pleadings), pursued mandamus relief and an interlocutory appeal despite the parties' agreement that the Federal **Act** applied. The Fort Worth Court of Appeals applied the four-part *Nexion* test touted in Appellants' Letter Brief. **And** even though there was no conflict between relevant, substantive statutory provisions (*i.e.*, no *Nexion*-type preemption), the court effectively concluded that the Federal **Act** preempted the Texas Act. Specifically, the court held:

> **All** parties agree that the ... case involves interstate commerce through **a** sale of securities. We agree and hold that the dispute between the parties involves arbitration under the FAA; therefore, the defendants' interlocutory appeals under the TAA are immaterial and are dismissed. *Id.* **at** *1.

The court went on to deny the requested **mandamus** relief; affirming the trial court's denial of appellant/relator's motion to compel arbitration. *Id.* at *2.[6]

22, n. 1 **(Tex.** 1992) (noting that Corpus Christi Court of Appeals dismissed ***corollary*** interlocutory appeal for want of jurisdiction, denying application for writ of error (by separate order), and granting writ of mandamus).

[5] Only one case, *Mony Sec. Corp. v. Padilla*, 132 S.W.3d 201 (Tex. App. – Corpus Christi ***2004,*** pet. ***dismissed)*** (cited in **Appellees'** briefing), even discusses this possibility. In *Padilla*, the lone dissenting justice proposed that "refusal to grant mandamus relief under the FAA, does not preclude the exercise of our jurisdiction to review and consider [the] interlocutory appeaf under the [TAA]." Id. at 203. But the well-reasoned majority opinion points out that, if this proposal were true, there would rarely be any need to pursue mandamus relief and engage in the jurisdictional gap-filling prescribed by the **Texas Supreme** Court in ***the Anglin case. Id. at*** 203, n. 4. Accordingly, the *Padilla* Court ***dismissed the*** corollary interlocutory **appeal** for want of jurisdiction. For additional Dallas Court, of Appeals decisions **finding** that the Federal **Act preempts** the **Texas** Act or renders it moot without requiring **a** *Nexion*-type **preemption,** *see In re Merrill Lynch Pierce Fenner & Smith, Inc.*, 131 S.W.3d *709* (Tex. App. – Dallas 2004, no pet.); *In* re ***Merrill Lynch Pierce Fenner & Smith, Inc.***, *2002* WL 31165172 (Tex. App. – Dallas Oct. 1, ***2002, no*** pet.)(not designated for publication); ***Crow v. Wellness Int'l Network, Ltd., 2002*** WL ***1917664*** **(Tex.** App. – Dallas Aug. 21, 2002, pet. denied)(not designated for publication); ***American Realty Trust, Inc. v. JDN Real Estate-McKinney, L.P., 74*** S.W.3d 527 ***(Tex.*** App. – Dallas 2002, **pet. *denied); McMillan v. Computer Translation Sys. & Support, Inc., 66*** S.W.3d 477 (Tex. App. – Dallas ***2001, no pet.); Thomas James Associates, Inc. v.*** Owens, 1 S.W.3d 315 (Tex. App. – Dallas 1999, no pet.); *In* re *Smith* ***Barney, 1998*** WL **394944** (Tex. App. – **Dallas** Jul. 16, 1998, pet, denied)(not designated for publication); **and** *Phillips v. ACS Municipal Brokers, Inc., 888* S.W.2d 872 (Tex. App. – **Dallas 1994, no** wit).

Moreover, as pointed out by Appellees at Wednesday's hearing, mandamus will not issue where there is "a clear and adequate remedy at law, such as a normal appeal." *Walker* v. *Packer*, 827 S.W.2d 833, 840 (Tex. *1992).* Therefore, if, as **Appellants** contend, the courts could simultaneously consider a Texas-Act-based interlocutory appeal and a Federal-Act-based mandamus petition, then the numerous Texas Supreme Court and appellate court decisions granting mandamus relief where both *acts* seemingly **applied** would have been wrongly decided. Interestingly, if this Court **had** granted **Appellants'** requested mandamus relief instead of denying it, Appellants' current arguments, if persuasive, would vitiate that relief, Of course, for obvious reasons, **Appellants** would not be making **such** arguments had they been granted their requested mandamus relief.

In conclusion, **Appellants** have conceded that the Federal Act applies and cannot demonstrate that the Texas **Act** applies along with the Federal **Act** or New York **Act.** Additionally, they cannot overcome the fact that no case in the history of Texas procedural jurisprudence supports their position that the Federal **Act** and Texas **Act** can apply simultaneously. Therefore, Appellees respectfully request that the Court grant their Motion to Dismiss Appellants' interlocutory appeal. Appellees further request that the Court deny Appellants' Second Mandamus Petition **without** need for a response brief from Appellees under TEX. R. APP. P. 52.4.

Sincerely,

Will S. Snyder
wsnyder@swtriallaw.com
(214) 939-8714
Counsel for Appellees/Real-Parties-in-Interest

/WSS
cc: **James** Bowen
Counsel for Appellants/Relators

[6] Interestingly, Mr. Gilbreath apparently pursued the **very** same strategy in a 2004 Dallas Court of **Appeals** case, In re *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Fox*, **131 S.W.3d 709 (Tex.App. – Dallas** 2004, no **writ).** Despite the arbitration contract's obvious affect on interstate commerce, Mr. Gilbreath's client, Merrill Lynch, pursued both an interlocutory appeal **and** mandamus relief. The **court,** citing the Supremacy Clause of the United States **Constitution,** applied the **Federal Act simply because** the contract involved the sale of securities and interstate **commerce,** not because of any Mexion-type preemption. *Id.* at 712. Accordingly, the court **dismissed** the interlocutory **appeal as** moot, **determined** that mandamus **was** the **only available** remedy, **and denied** the mandamus petition requesting that the trial court's order denying a motion to compel arbitration be vacated. *Id.*

TAB 7

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April 17, 2006

VIA HAND DELIVERY

Ms. Lisa Matz, Clerk
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Dallas, Texas 75202-4658

Re: Court of Appeals Number: 05-05-01430-CV
Citigroup Global Markets, Inc. (f/k/a Salomon Smith Barney, Inc.), Citigroup Inc. and Stacy Oelsen v. Robert A. Nickell and Natalie Bert Nickell

Dear Ms. Matz:

Please submit this letter, which is a post-submission reply to Appellees' letter dated April 7, 2006, to the Panel who heard this case on April 5, 2006, Justices Morris, O'Neil, and Mazzant. We apologize for the flurry of post-submission letters, but it was necessitated by arguments Appellees raised after the briefing in this case closed.

At oral argument and in the post-submission letters provided by the parties on April 5 and April 7, the *real* question at issue in this case – whether the trial court correctly ruled that Appellants waived their right to compel Appellees' claims to arbitration by removing the case to federal court and having the case transferred by the Judicial Panel for Multidistrict Litigation to the New York federal court – has been obscured by procedural and jurisdictional arguments. To some extent, Appellants are guilty of having taken Appellees' "bait" in this regard, because, on the facts and the law, Appellants Should no doubt win this case, and Appellees' non-merits arguments implicitly recognize that fact. Indeed, at oral argument, Appellees essentially chose not to argue the merits of this case.

Appellees submit this letter in an attempt to re-focus this case on the merits by suggesting 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.

This letter also briefly replies to Appellees' arguments briefed *for the first time* in their April 7 letter.

Appellees' April 7 letter only reinforces the need for the Court to rule an the substantive issues presented in the mandamus petition, because 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. Clearly, mandamus is an appropriate vehicle to consider Appellants' complaints under the FAA, while the direct appeal under the TAG is the appropriate vehicle to review the ruling under state law. *Jack B. Anglin Co. v. Tipps*, 842 S.W. 2d 266, 272 (Tex. 1992) (discussing the need for a parallel mandamus proceeding under the FAA and an interlocutory appeal under the TAA). Here the mandamus and the appeal should have been consolidated originally. Now, ruling on the current mandamus petition in the present case will allow the Court to ignore the following:

(1) Appellees' argument that the FAA, when it applies, always preempts the TAA, even if there is no conflict with the TAA. Appellees' argument in this regard is plainly wrong. Preemption only exists to the extent the TAA limits the right to arbitrate in a manner inconsistent with the FAA, which does not occur under *the* facts *of* the present case. *Tipps*, 842 S.W. 2d at 271 ("To this end, the Federal Act preempts state statutes to the extent they are *inconsistent with* that *Act.)* (emphasis added)*(citing Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford University*, 489 U.S. 468,478,109 S. Ct. 1248, 103 L. Ed. 2d 488 (1989)); *In re Nexion Humble Health at Humble, Inc.*, 173 S.W.3d 67, 69 (Tex. 2005) (setting forth a four past test to determine when the FAA preempts the TAA).[1] If the Court simply rules on the mandamus petition, however, it need not reach the preemption question.

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[1] If the FAA, when it applies, always preempts the TAA as argued by Appellees, one can only guess why the Supreme Court would devise a four part test for preemption, If a United States Supreme Court decision and two Texas Supreme Court decisions are not enough to show Appellees' argument in this regard is incorrect, many other cases make the point very directly, *Prescott v. Northlake Christian School*, 369 F.3d 491,496 (5th Cir. 2004) ("The FAA does not, however, . . . preempt all state laws regarding arbitration."); *Specialty Healthcare Management, Inc. v. St. Mary Palish Hospital*, 220 F.3d 650,654 (5th Cir 2000) ("The FAA, however, does not preempt all state law related to arbitration agreements. It 'contains no express preemptive provision, nor does it reflect a congressional intent to occupy *the* entire field of arbitration.' Thus, the question is whether Louisiana's anti seizure provision 'would undermine the goals and policies of the FAA.'3 *(quoting Volt*, 489 U.S. at 477); *New England Energy, Inc. v. Keystone Shipping Co.*, 855 F.2d 1, 4 (1st Cir. 1988) ("We note that, even when federal law applies to an arbitration agreement, the Federal Arbitration *Act* has never been construed to preempt all state law on arbitration. . . . At best, the Supreme Court's decisions support a conclusion that all state laws seeking to *limit* the use of the arbitration process are superseded by federal law. . . .") (emphasis in original); *Marley v. Drexel Burnham Lambert, Inc.*, 566 F.Supp. 333 (N.D. Tex. 1983) (finding FAA preemption of an arbitration provision in the Texas DTPA because the FAA "directly conflicts with the non-waiver provision of *the* Texas DTPA. . . ."). Many other cases reach the same conclusion. Suffice it to say that Appellees, in their desperation to avoid the merits of this case, are inviting *this* Court to commit error.

(2) Appellees' eleventh hour choice of law argument. Appellees never argued in the trial court, their brief on appeal, their Motion to Dismiss, or their Reply on that motion that the choice of New York law in the agreements at issue supplanted the TAA, nor did they present any New York law to the trial court. *Daughety v. National Ass'n of Homebuilders, Inc.*, 970 S.W. 2d 178, 182 (Tex. App. – Dallas 1998, no pet.) (Appellate court can only consider issues that have been actually presented to and considered by the trial court); *Corning v. Thompson*, 2000 WL 764930, *2 (Tex. App.—Dallas 2000, no pet.) (not designated for publication) (rejecting appellant's argument for application of Washington law because appellant did not make a proper request in the trial court or furnish the court with sufficient information regarding Washington law under TEX. R. EVID. 202). Indeed, five of Appellees' nine causes of action contained in their First Amended Petition are based expressly on Texas statutory and common law. R. Vol. I at 1.

In footnote 101 on page 31 of their Response to the Motion to Compel Arbitration, Appellees did note the New York choice of law provision in support of their argument that, as a matter of contract construction, the agreements at issue do not apply to "successors" of SSB. Appellees, however, never argued – prior to oral argument – that the TAA did not apply because of the New York choice of law provision. If they had, Appellants could have responded, and, if necessary, presented to the trial court New York law that is not, in relevant part, different from Texas law,

If provided an opportunity to respond in the trial court, Appellants would have pointed out the case of *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 115 S. Ct. 1212, 131 L. Ed. 2d 76 (1995). That case, like the present case, involved a general choice of New York law provision in a securities Client Agreement that separately also contained an arbitration clause. The issue before the Court was whether the choice of New York law – which prohibited arbitrators from awarding punitive damages – controlled over an arbitration clause that called for arbitration under the rules of the NASD, which arguably allowed the award of punitive damages. 514 U.S. at 53-54.

The Supreme Court resolved the apparent conflict by reading:

> "the laws of the State of New York" to encompass substantive principles that New York courts would apply. . . , Thus, the choice-of-law provision covers the rights and duties of the parties, while the arbitration clause covered arbitration; neither sentence intrudes on the other. . . .

514 U.S. at 64. *In re J.D. Edwards World Solutions Co.*, 87 S.W.3d 546 (Tex. 2002), cited by Appellees, is distinguishable. The agreement at issue in that case did not contain a general choice of law provision separate from the arbitration clause like the provisions at issue in this case and in *Mastrobuono*. Instead, the *arbitration provision* contained bath a reference to Colorado law and the Uniform Arbitration Act, thus indicating a contractual intent to exclude the

TAA. *J. D. Edwards*, 87 S.W.3d at 548.. The contracts at issue in this case are more similar to that in *Mastrobuono*. Accordingly, in this case, the choice-of-law provision and the arbitration agreement should be read not to "intrude on the other." 514 U.S. at 64.

These issues obviously are complex, especially since they were first raised by Appellees at oral argument. However, Appellants' mandamus petition presents only issues of federal substantive law. *See, e.g., Moses H. Cone Mem. Hosp. v. Mercury Const. Corp.*, 460 U.S. 1, 24, 103 S. Ct. 927, 74 L. Ed. 2d 765 (1983) (FAA presents "a body of federal substantive law of arbitrability," enforceable in both state and federal courts and preempting any state laws or policies to the contrary). Moreover, the choice-of-law provision does not affect the application of the FAA. *In re L & L Kempwood Assoc. L.P.*, 9 S.W. 3d 125, 127-28 (Tex. 1999) (Where an agreement specifies state law but does not exclude the FAA, the FAA applies as part of the substantive law of the state). Fortunately, the Court can avoid these issues completely if it considers the mandamus petition on its merits under the F M .

(3) Finally, by ruling on the mandamus petition, the Court may ignore the jurisdictional issues presented by Appellees. Appellants agree that, if the Court were to decide the issues in the mandamus petition *on their merits*, the interlocutory appeal would be ""immaterial.?' *See, e.g., Bank of America Agency of Texas, Inc. v. Pickard*, 2006 WL 20001 (Tex. App – Fort Worth, Jan. 5, 2006, no pet.) (not designated for publication). When Texas courts consider FAA issues on the merits, they frequently find the parallel direct appeal under the TAA to be "immaterial." *See Nexion*, 173 S.W.3d at 70; *see also 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) (attached). That, however, is by no means a finding of lack of jurisdiction. In *Pickard*, for example, the Court of Appeals decided the substantive issues under the FAA, and therefore dismissed the appeal as immaterial, because there was no need to address the same substantive issues twice.

Here, Appellants moved to compel arbitration under *both* the FAA and the TAA. R. Vol. I at 35. The trial court denied the motion. R. Vol. I at 296. Thus, quite simply, TEX. CIV. PRAC. & REM. CODE § 171.098 allows an interlocutory appeal of the trial court's denial of the motion, at least to the extent it was based on the TAA.[2] *See, e.g., In re Valero Energy Corp.*, 968 S.W.2d 916 (Tex. 1998) (Dismissing without prejudice a mandamus petition under the FAA to allow the court of appeals to consider a direct appeal under the TAA from the same case, and holding court of appeals had jurisdiction to consider interlocutory appeal under the TAA). Moreover, as shown above, the FAA does not preempt the TAA, and the New York choice of

[2] It also has been suggested *that* certain post *Tipps* amendments to the TAA allows a direct appeal under § 171.098 of the FAA argument. See Elizabeth G. (Heidi) Block, STOP THE MADNESS: THERE'S NO NEED FOR DUAL PROCEEDINGS IN ARBITRATION APPEALS, The Appellate Advocate, Vol. XVI, No. 1 at 9 (Spring 2003).

law provision (even if Appellees did not waive that argument) does not intrude on the arbitration provision. For these reasons, the Court has jurisdiction to hear the direct appeal. Again, however, if the Court were to rule on Appellants' mandamus petition on its merits, the Court need not even consider the jurisdictional issues.

For these reasons, the Court clearly can rule on the 'issuespresented in this case under the TAA, because it has jurisdiction, the TAA applies, and the FAA does not preempt the TAA in this case. More simply, however, the Court can take up Appellants' mandamus petition on its merits, and enter an Order compelling Appellees' claims to arbitration, without even addressing Appellees' procedural arguments.

Very truly yours,

James W. Bowen

JWB:rs
Enclosures

cc: Will Snyder (w/encl.) (via email and regular mail)
Charles A. Gall (w/o encl.)
Rob Gilbreath (w/o encl.)

Interlocutory Appeals from Orders Denying Arbitration Under the Texas Arbitration Act: Federal Law Does Not Preempt Jurisdiction

Roger W. Hughes, Adams & Graham, LLP, Harlingen

A party that files an interlocutory appeal aver the denial of arbitration under Texas law now faces the argument that federal law deprives Texas appellate courts of jurisdiction. Often, a contract containing an arbitration clause arguably affects interstate commerce. In that case, a party may seek to enforce arbitration under both the federal and state laws: the Federal Arbitration Act ("FAA") and the Texas Arbitration Act ("TAA"). 9 U.S.C. §1, *et seq.*; TEX. CIV. PRAC. & REM. CODE ANN. §171.001, *et seq.* (Vernon 2005). The TAA provides an interlocutory appeal from an order denying relief under the TAA; however, review of a denial of relief under the FAA must be by mandamus. TEX. CIV. PRAC. & REM. CODE ANN. §171.098 (Vernon 2005); *Jack B. Anglin Co., Inc. v. Tipps,* 842 S.W.2d *266,* 271-72 (Tex. 1992). In short, the unsuccessful movant must pursue both mandamus and interlocutory appeal in order to obtain the "quick and inexpensive" resolution by arbitration. *See* Elizabeth Bloch, Stop the Madness: There's No Need for Dual Proceedings in Arbitration Appeals, THE APPELLATE ADVOCATE, p. *9* (Spring 2003). In most cases, the *two* proceedings are consolidated; *if* the appellate court orders arbitration under the FAA, the TAA claim is deemed moot because full relief was granted under the FAA. *In re Valero Energy Corp.*, 968 S.W.2d *916, 917* (Tex. 1998); *In re L & L Kempwood Assoc.*, L.P., *9* S.W.3d 125,128 (Tex. 1999).

However, three courts of appeal have held that if ?heFAA applies to the contract, then relief under the TAA is preempted and an interlocutory appeal must be dismissed for want of jurisdiction. *in re Mony Securities Corp.*, 83 S.W.3d 279, 283 (Tex. App.—Corpus Christi 2002, orig. proc.); *Pennzoil Co. v. Arnold Oil Co., Inc.*, 30 S.W.3d 494, 498 (Tex. App.—San Antonio 2000, no pet.); *Verlander Partnership v. Verlander*, 2003 WL 304098, *3 (Tex. App.—El Paso 2003, no pet.) [unpublished]. However, in *Texas Commerce Bank v. Univ. Tech. Inst. of Tex., Inc.*, *985* S.W.2d 678 (Tex. App.—Houston [1st Dist.] 1999) the Houston court appears to have rejected the preemption argument. *Id.* at *679-80*. Under this "no jurisdiction" rule, *the* appellate court then may summarily dismiss the mandamus petition over the FAA without opinion.

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. *See e.g. Peterson Constr. Co. v. Sungate Dev., L.L.C.*, 2003 WL 22480613 (Tex. App.—Corpus Christi-Edinburg 2003, pet. denied) (memorandum opinion). Given that trial courts often do not make findings when denying arbitration, the party demanding arbitration now faces summary, unexplained denial in both the trial and appellate courts.

This "no jurisdiction" rule cannot be justified under federal or Texas law, Texas law creates jurisdiction to review *the* denial of relief under the TAA, whether or not the contract affects interstate commerce. The FAA does not preempt granting arbitration under the TAA or appellate review of a denial of TAA relief. 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.

A. TAA provides for interlocutory appellate review of denial of TAA relief regardless of whether the contract affects interstate commerce.

The court *of* appeals has jurisdiction of an order (1) denying a motion to compel arbitration under *the* TAA, or (2) staying a pending arbitration

proceeding, TEX. CIV. PRAC. & REM. CODE ANN. §171.098(a) (Vernon 2005). No part of the TAA provides it does not apply to contracts affecting interstate commerce. The vacation of an FAA award can be appealed under the TAA section 171.098. *See J.D. Edwards World Solutions Co. v. Estes, Inc.*, 91 S.W.3d 836, 839 (Tex. App.—Fort Worth 2002, pet. denied). Therefore, there is no express reason under section 171.098(a) why the court of appeals cannot review an order denying relief under the TAA simply because the FAA might *also* apply.

B. The FAA does not preempt enforcement of an arbitration clause under state law or appellate review of orders denying relief under state laws that permit arbitration.

1. Federal preemption of state jurisdiction requires proof Congress intended to totally displace state courts as well as state law.

There are two types of federal preemption. There is "ordinary preemption" in which the state law conflicts with federal law and is preempted *Mills v. Warner Lambert Co.*, 157 S.W.3d 424, 426-427 (Tex. *2005).* This can occur in three ways. *Id.* at 426 citing *Great Dane Trailers, Inc. v. Estate of Wells*, *52* S.W.3d 737, 743 (Tex. 2001). First, the federal act expressly preempts state law, *Id.* Second, implied preemption can occur when the statute's scope indicates a Congressional intent that federal law preempt the field exclusively. *Id.* Third, implied preemption occurs when there is an actual conflict such that the party cannot comply with both federal and state law or the state law obstructs the Congressional purposes. *Id,* at 427. However, ordinary preemption simply creates an affirmative defense; it does not oust the state court of jurisdiction to consider the dispute. *Id.* citing *Metro. Life Ins. Co. v. Taylor*, 481 U.S. *58,* 63 (1987).

"Preemption of jurisdiction" occurs only when the federal law establishes not only that federal law controls, but that Congress intended the claims be heard exclusively in a federal forum. *Id.* This kind of preemption rests on the creation of an exclusive federal forum rather the mere existence of a preemption defense. *Id.* The presumption of concurrent jurisdiction with state courts can be rebutted by express statutory language, unmistakable legislative history, or a clear incompatibility between state court jurisdiction and federal interests. *Id.* at 428.

2. The FAA does not preempt either state court jurisdiction or state laws that permit arbitration.

In light of the Texas Supreme Cow's exhaustive review of preemption in Mills, it is clear that the FAA (1) does not create "preemption of jurisdiction" to review the denial of relief under the TAA, and (2) does not create "ordinary preemption" against those parts of the TAA that would compel arbitration.

The Congressional purpose of the FAA was to foreclose state legislative attempts to undercut enforcement of arbitration agreements. *Southland Corp. v. Keating*, 465 U.S. 1, 16 (1984). It preempts state laws that withdraw the power to enforce arbitration agreements or that are unfavorable to arbitration. *Id.* at 16 n.10; *Great West. Mort. Corp. v. Peacock*, 110 F.3d 222,230 (3rd Cir. 1997), cert. denied, 522 U.S. *915* (1997); *New England Energy, Inc. v. Keystone Shipping Co.*, *855* F.2d 1, 4-5 (1st Cir. 1988).

The FAA preempts only laws frustrating arbitration. *Southland Corp.*, 465 U.S. at 16; *Specialty Healthcare Management, Inc. v. St. Mary Parish Hosp.*, 220 F.3d 650, 654 (5th Cir. 2000); *New England Energy*, *855* F.2d at 4-5. The FAA does not contain any express preemptive provision, "nor does it reflect a congressional intent to occupy the entire field of arbitration." *Volt Information Sciences, Inc. v. Board of Trustees of Leland Stanford Jr. Univ.*, 489 U.S. 468, 477 (1989). The FAA does preempt state law but only to the extent *that* it stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. *Hines v. Davidowitz*, 312 U.S. *52,* 67

(1941); *Volt Information Sciences, Inc.*, 489 U.S. at 477. State arbitration laws may apply when they do not undermine the goals of the FAA. *Specialty Healthcare Management, Inc.*, 220 F.3d at 654; *ASW Allstate Painting & Const. Co., Inc. v. Lexington Ins. Co.*, 188 F.3d 307, 310 (5th Cir. 1999). The Texas Supreme Court has held that the procedural sections of the TAA apply to determining a motion to enforce under the FAA. *Jack B. Anglin Co.*, 842 S.W.2d at 268-69; *Trico Marine Services, Inc. v. Stewart & Stevenson Tech. Serv., Inc.*, 73 S.W.3d 545, 548 (Tex. App.—Houston [1st Dist.] 2002, no pet.).

It does not undermine the FAA *to* allow state appellate courts *to* review the denial of relief under the TAA simply because the contract also affects , interstate commerce. States may ordinarily establish their own procedural rules for the arbitration process. *Volt Information Sciences, Inc.*, 489 U.S. at 476 ("[t]here is no federal policy favoring arbitration under a certain set of procedural rules; the federal policy is simply to ensure the enforceability, according to their terms, of private agreements to arbitrate"). The FAA does not pre-empt *state* court rules of appellate jurisdiction. *State ex rel. Dunlap v. Berger*, 567 S.E.2d 254, 271 (W.Va. 2002), cert. denied, 537 U.S. 1087 (2002); *Bush v. Paragon Prop., Inc.*, 997 P.2d 882, 887-88 (Wash. App. 2000). Therefore, the FAA does not pre-empt *state* procedure concerning whether orders granting or denying arbitration can be appealed. *Wells v. Chevy Chase Bank FSB*, 768 A.2d 620, 626 (Md. 2001); *Toler's Cove Homeowners Ass'n, Inc. v. Trident Const. Co., Inc.*, 586 S.E.2d 581, 584 (S.C. 2003); *Stein v. Geonesco, Inc.*, 17 P.3d 1266, 1269-70 (Wash. App. 2001); *Simmons Co. v. Deutsche Finan. Serv. Corp.*, 532 S.E.2d 436, 439-40 (Ga. App. 2000); *Weston Sec. Corp. v. Aykanian*, 703 N.E.2d 1185, 1188-89 (Mass. App. 1998, rev. denied), See *also* Annotation Pre-emption by Federal Arbitration Act *of* State Laws Prohibiting or Restricting Formation or Enforcement of Arbitration Agreements, 108 A.L.R. FED. 179, §§18, 18.5 (1992).

The Texas Supreme Court has stated that that the FAA will pre-empt TAA restrictions on wh. agreements to arbitrate are enforceable. *In r. Nexion Health at Humble, Inc.*, S.W.3d 2005 WL 1252271, *2 (Tex. May 27, 2005). There the issue was whether the FAA pre-empted TAA section 171.002(c)'s requirement that a personal injury claimant's attorney sign the agreement. *Id.* at *2. The factors that determine whether the FAA preempts the TAA are whether (1) the agreement is in writing, (2) it involves interstate commerce, (3) it can withstand scrutiny under traditional contract defenses, and (4) state law affects the enforceability of the agreement. *Id.* Because TAA section 171.002(c) added an additional requirement (counsel's signature), it interfered with enforceability under the FAA and was pre-empted. *Id.* The broad statement about pre-empting *the* TAA must be read as applying only to enforceability of the agreement itself. It should not be read as applying to a court's jurisdiction to grant relief under *the* TAA.

Two cases indicate the Texas Supreme Court has not accepted the argument that the FAA preempts state appellate court jurisdiction. *See In re L & I. Kempwood Assoc., L.P.*, 9 S.W.3d at 125; *EZ Pawn Corp.*, 934 S.W.2d at 87. In *Kempwood*, when the Texas Supreme Court determined the FAA controlled, it dismissed the companion appeal as moot. *Id.*, 9 S.W.3d at 128. If the FAA preempted *the* TAA totally, then the Texas Supreme Court would have dismissed the appeal for want of jurisdiction. Likewise, in EZ Pawn, after this Court determined the contract selected the FAA, it denied the writ of error an the companion TAA appeal, *EZ Pawn*, 934 S.W.2d at 88; *see EZ Pawn Corp. v. Rodriguez*, Case No. 96-0469, 40 Tex. S. Ct. J. 85 (Tex. 1996). The companion appeal was not "dismissed for want *of* jurisdiction." *Id.*

Some quote *Jack B. Anglin Co.*, 842 S.W.2d at 271, as support for the "no jurisdiction" rule. There, the Texas Supreme Court said that orders denying a motion to compel under the FAA are not reviewed by interlocutory appeal under section 171.098(a). *Id.* at 272. However, Anglin

did not hold that any appeal under the TAA must be dismissed if the FAA applied; that was not an issue because Anglin did nut pursue an appeal. *Id.* at 268. The entire passage makes it clear that the FAA preempts only state laws that prevent arbitration.

However, under the supremacy clause of the United States Constitution, U.S. Const. art. VI, cl. 2, the Federal Act preempts all otherwise applicable state laws. *Perry [v. Thomas]*, 482 U.S. [483,] 489 107 S.Ct. [2520], 2525 [(1987)]; *Southland Corp.*, 465 U.S. at 14-16, 104 S.Ct. at 860-61 (Federal Act creates substantive rules applicable in state and federal courts to prevent states from limiting the enforceability of arbitration agreements); *see also Batton [v. Green]*, 801 S.W.2d [923,] 927 [(Tex. Civ. App.—Dallas 1990, no writ)] (the Federal Act is substantive and is the law of Texas).

The primary purpose of the Federal *Act* is to require the courts to compel arbitration when the parties have so provided in their contract, despite any state legislative attempts to limit the enforceability of arbitration agreements: [citations omitted]. To this end, the Federal Act preempts state statutes to the extent they are inconsistent with that Act. [citations omitted].

Jack B. Anglin Co., 842 S.W.2d at 271 [emphasis added]. The entire passage, including the citation to Southland Corp., makes it clear that preemption is limited to state laws that are inconsistent with enforcement of arbitration agreements.

C. Public policy should favor hearing appeals over denial of state law remedy even if the contract affects interstate commerce.

The "no jurisdiction rule" is a judge-made rule that is not commanded by either the FAA or the TAA. Therefore, the courts can and should abrogate it.

The "no jurisdiction" rule poses a hidden procedural roadblock to compelling arbitration. A TAA appeal requires reviewing briefs and writing a dispositive opinion; a mandamus petition challenging the denial of FAA relief can be summarily denied without an opinion. TEX. R. APP. P. 47.1, 47.4, 52.8(a). The judicial bias against entertaining mandamus petitions is well known; mandamus power is to be exercised "sparingly and deliberately," *Deloitte & Touche LLP v. Fourteenth Court of Appeals*, 951 S.W.2d 394, 396 (Tex. 1997); Elaine Carlson, MCDONALD & CARLSON TEXAS CIVIL PRACTICE 2D §35:1 (1998). Moreover, appellate jurisdiction is mandatory; mandamus power is a matter of privilege. Carlson at §35:10. Because the rule requires automatic dismissal of the TAA appeal, the appellant is left with only the disfavored, discretionary remedy of mandamus.

Thus, the "no jurisdiction" rule poses a subtle pressure to find the FAA applies and invoke preemption. This rule hinders only appeals over the denial of arbitration because section 171.098(a) does not apply to orders compelling arbitration.

Second, the "no jurisdiction" rule encourages position-shifting by the party opposing arbitration. The TAA contains provisions barring enforcement of certain arbitration agreements, ag., personal injury claims, workers compensation benefits, the consideration exceeds $50,000.00, etc. TEX. CIV. PRAC. & REM. CODE ANN. §171.002(a) (Vernon 2005). Precisely because the FAA would preempt those restrictions, the appellee will often argue to the trial court that the contract does not affect interstate commerce and the TAA restrictions bar enforcement. If trial court agrees and denies arbitration, the appellee is free to do an "about face" in the court of appeals, concede the FAA applies, and the TAA appeal is dismissed for lack of jurisdiction. Again, this leaves the appellant with only the disfavored remedy of mandamus.

Third, if the FAA mandamus is summarily denied, effective Supreme Court review is hindered. Because the lower courts have not analyzed or sharpened the issues, the petitions to the Supreme Court must address every issue

raised in the trial court. Given the Supreme Court's fifteen page limitation on the petitions for review and for mandamus, petitioner must waste valuable pages addressing frivolous issues rather than focusing on the critical ones. The result is the Supreme Court is deprived of a focused analysis that would enable the Court to determine whether *the* case presents an error worthy af its attention.

Texas public policy strongly favors arbitration. *Jack B. Anglin Co.*, 842 S.W.2d at *268.* The Legislature has given the courts of appeal jurisdiction to hear interlocutory appeals from an order denying arbitration under the TAA. TEX. CIV. PRAC. & REM. CODE ANN. §171.098(a) (Vernon 2005). Section 171.098(a) does not exclude contracts affecting interstate commerce. The "no jurisdiction" rule obstructs Texas' policy favoring arbitration by relegating interlocutory enforcement of arbitration under all contracts that affect interstate commerce solely to the disfavored remedy of mandamus. Therefore, the judge-made "no jurisdiction" should be ended in order to implement Texas' strong public policy and the jurisdiction the Legislature gave the courts of appeal to hear TAA appeals.

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THE DALLAS BAR ASSOCIATION'S APPELLATE LAW SECTION PRESENTS ITS FALL CLE EVENT—

Judges and Juries:

Perspectives on the Jury System and Appellate Review presented by Texas Supreme Court Justice Scott Brister and United States District Judge Sam Sparks (1 hr.)

and

Perspectives on Judicial Independence presented by Former Texas Supreme Court Justice James Baker and UT Law Professor Lino Graglia (1 hr.)

November 1,2005 at the Belo Mansion
3:00 p.m. to 5:15 p.m. (registration begins at 2:45 p.m.)
CLE credit application pending
Reception (with refreshments provided) to follow

Please forward your registration information (name, law firm, and address) and $40 registration fee (with checks made payable to the DBA Appellate Law Section) to Michael Northrup as indicated below. Checks mailed after October 21, 2005 must be for *$50* [space permitting).

c/o Michael Northrup
Treasurer, DBA Appellate Law Section
Cowles & Thompson
901 Main Street, Suite 4000
Dallas, TX 75202

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TAB 8

SAYLES | WERBNER

April 20, 2006

VIA HAND DELIVERY
Lisa Matz, Clerk of the Court
Fifth Court of Appeals
600 Commerce Street, 2nd Floor
Dallas, Texas 75202

Re: *Citigroup Global Markets, Inc. (f/k/a Salomon Smith Barney, Inc.), et al., Appellants, v. Robert A. Nickell and Natalie Bert Nickell, Appellees*; Cause No. 05-05-01430-CV

Dear Ms. Matz:

Please submit this post-submission letter brief to Justices Mazzant, O'Neill, and Morris, who heard oral argument in this case on Wednesday, April 5, 2006. It responds to the second post-submission letter brief Appellants submitted on April 17, 2006 ("April 17 Letter Brief").

Appellants' first post-submission letter brief, dated April 6, 2006 ("April 6 Letter Brief") focused exclusively on the faulty proposition that the Court could consider Appellants' interlocutory appeal under the Texas Act despite a New York choice-of-law clause and Appellants' admission that the Federal Act applies. As exposed by Appellees' April 7 Letter Brief, Appellants tried to support this proposition with multiple erroneous statements and cases that had nothing to do with arbitration or interlocutory appeals under the Texas Act. Further, Appellants' April 6 Letter Brief conveniently ignores In *re J.D. Edwards World Solutions Co.*, a *2002* Texas Supreme Court case directly on point, and two other recent cases where Appellants' same counsel unsuccessfully argued the same faulty proposition to this Court and the Fort Worth Court of Appeals.[1] Subsequently, Appellants' April 17 Letter Brief unpersuasively attempts to distinguish *In re J.D. Edwards* and again fails to address or distinguish the two previous appellate cases involving Appellants' current counsel. Appellants have similarly brushed aside numerous other decisions rendered by this Court and courts around the state expressly rejecting their proposition.[2] In Paragraph "(I)" and the first footnote of Appellants' April 17 Letter Brief, they cite various cases purportedly substantiating the above-described proposition. But Appellees are confident that comparing those cases with the anes cited by Appellees will lead the Court to conclude that Appellants' interlocutory appeal should be dismissed.

Indeed, once again, the only on-paint "authority" Appellants can cite is a law journal article petitioning for the abandonment of overwhelming case authority or "judge-made rules."[3] And even that article does not *suggest* that courts should consider *both* an interlocutory appeal

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[1] *See In re J.D. Edwards World Solutions Company*, 87 *S.W.3d 546* (Tex. 2002); *Banc of America Agency of Texas, Inc. v. Pickard, 2006* WL 20001 (Tex. App. – Fort Worth Jan. 5, 2006, no pet.) (not designated for publication); and *In re Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Fox,* 131 S.W.3d *709* (Tex.App. – Dallas 2004, no writ).

[2] See Appellees' April 7, 2006 Letter Brief at pp. 4 – 6 & nn. 4 – 6 (demonstrating with ample authority that when the Federal Act applies, it provides the only path for appellate review, preempting *the* Texas Act or rendering it moot).

[3] 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 21 (Fall 2005).

under *the* ***Texas Act*** and a mandamus petition under the Federal **Act** so they can render conflicting opinions, as Appellants ask this Court to do. Moreover, despite Justice O'Neill's **inquiry** during the **April 5** hearing and the question being raised in **Appellees' April** 7 Letter Brief, Appellants still cannot answer this simple question: How can they logically maintain that the Court can consider and decide both ***a*** mandamus petition and an interlocutory appeal making identical arguments when mandamus cannot issue if there is "a clear and adequate remedy at law, such as a normal appeal"? ***Walker v.*** *Pucker,* 827 S.W.2d **833,** 840 (Tex. 1992). Ironically, Appellants assert that Appellees "are inviting this Court to **commit** error" while they ask this Court to ignore logic, multiple Texas Supreme Court cases, and numerous appellate court cases, and do what no Texas court has ever done.[4]

Implicitly conceding that the above-described proposition hasn't a leg to stand on, Appellants encourage the Court to ignore the fact that their interlocutory appeal should be preempted, rendered moot, and/or dismissed for want of jurisdiction and, instead, to simply consider the merits of their Second Mandamus petition.[5] Once again, Appellants want to pretend that the Court did not consider the merits of that petition when it considered the identical arguments, rejected them, and denied Appellants' First Mandamus Petition in its November 16, 2005 Memorandum Opinion and Order. **As** *argued* at the April 5 **hearing,** the November 16, 2005 Memorandum Opinion and Order explain that "relators have not shown they are entitled to the relief requested," citing TEX. R. APP. P. **52.8** and *Walker v.* ***Packer,*** 827 S.W.2d 833, 839-44 (Tex. **1992)** (orig. proceeding) in support. Moreover, the Memorandum Opinion indicates that this Court considered **and** reviewed the substantive record in this case by ***stating:*** "The facts and issues **are** well known to the **parties, so** we need **not** recount them herein."[6] Also, the specific portion of the Walker opinion on which this Court relied discusses the abuse of discretion standard that **a** relator must meet to obtain mandamus relief and whether there is **an** adequate remedy by appeal.[7]

If asked to file **a** brief responding to Appellants' Second Mandamus Petition pursuant to TEX. R. APP. P. 52.4, Appellees can provide additional evidence that the Court considered **and** rejected the First Mandamus Petition's merits and additional reasons for which **Appellants** should be prohibited from re-urging the same arguments a second and third time, But again, Justice O'Neill is obviously best-suited to determine whether the First Mandamus Petition **was** decided on the merits. Quite **simply,** there is **no basis** for inferring that the Court decided that petition on any ground other than those described in its November 16, 2005 Memorandum Opinion **and** Order.[8] And the Second Mandamus Petition, which Appellants now press the **Court**

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[4] April **17** Letter **Brief at 2, n. 1.**

[5] As another example of this implicit concession, Appellants' **April** 17 Letter clearly **retreats from Appellants'** prior claim **(at the** April 5 hearing and in their April **6** Letter Brief) that the Texas Act is procedural, not substantive, and **abandons any** *effort* to demonstrate **the** Texas ***Act's*** applicability in **this** case. Appellees abide by their **position** that Appellants have wholly failed to demonstrate how or why **the** Texas **Act applies** to **the** contracts **at issue,** which **contain clauses** invoking **New** York **law for** purposes of construing their provisions.

[6] **Appellees'** App. at **p.** 149.

[7] *Walker v. Packer,* **827** S.W.2d **833,** 839-844 (Tex. 1992) (orig. **proceeding).**

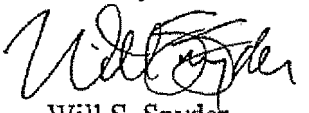
[8] In contrast, when this **Court has** determined that dismissal of a **mandamus** petition is **warranted due *to*** **a** failure to comply with TEX. R APP. P. 52.3 **(as Appellants suggest was** the case here), it has said so explicitly. **For** example, ***in*** *In re Larrew,* **No.** 05-06-00240-CV, **slip. op. *at*** 1, 2006 WL 540333, at *1 (Tex. App.—Dallas March 7, 2006, no

to consider, is a carbon copy of the First Mandamus Petition and offers no new or substantive ground to warrant its consideration.

Further, Appellees contest **Appellants'** contrived claim that Appellees desperately hope to avoid the merits of **Appellants*** Second Mandamus Petition and interlocutory **appeal.** To the contrary, Appellees have thoroughly and repeatedly addressed those merits in the response to the motion to compel arbitration they filed with the trial court, during oral argument before the trial **court,** in their response to the First Mandamus Petition filed with this *Court,* in their response to the interlocutory **appeal,** and at the April 5 oral argument.[9] Therefore, Appellees have now **addressed** the merits of **Appellants'** same arguments ***five*** *separate times*. Moreover, when Appellees first addressed the merits before this Court; **they** did so to the Court's satisfaction, resulting in the Court's denial of the First Mandamus Petition. The fact that Appellants want a mulligan on their *First* Mandamus Petition and want to re-argue the merits again and again until their repeated efforts become almost sanctionable[10] should not obscure the **fact** that Appellees have repeatedly and convincingly addressed those merits. Again, if requested to do so under TEX. R. APP. P. 52.4, Appellees will happily respond to the Second Mandamus Petition and re-address the merits for a fourth time before this Court.

In conclusion, Appellees respectfully ask the Court to grant their Motion to Dismiss Appellants' interlocutory appeal and to deny Appellants' Second Mandamus Petition without need for a response brief from Appellees under TEX. R. APP. P. **52.4.**

Sincerely,



Will S. Snyder
Counsel for Appellees/Real-Parties-in-Interest

cc: James Bowen, Counsel for Appellants/Relators (via U.S. mail and e-mail)

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pet. h.) (not designated for publication), an opinion also authored by Justice O'Neill, this Court denied a relator's petition far writ of mandamus on two grounds, stating that "[t]he **petition** [was] deficient **and** relator [did] not **show** that he [was] entitled to relief!" There, *this* Court cited **TEX.** R. APP. P. **5, 52.3, and** 52.8(a), as well as *Walker v.* ***Packer,*** **in support.** Similarly, this Court also denied mandamus relief in In re *Ducote*, No. 05-06-00242-CV, slip op. at **1,2006** WL 476082, at *I (Tex. App.—Dallas March **1, 2006, no** pet h.) (not designated for publication), a proceeding also before Justice O'Neill, on **these dual** grounds, **And, in** In re Howell, No. **05-00-00225-CV,** slip. op. at I, 2000 WL 150848, at *1 (Tex. App.—Dallas February 14, 2000, no pet,) (not designated for publication), this Court's ruling denies ***mandamus*** relief **because** "the petition and record filed **by** relators **are** deficient." **These** decisions, which **Appellees'** counsel **cited at** the April 5 hearing, are different from the instant **case,** where **this Court's** rulings reference the facts and **standard *of* review,** do not **cite Rule 52.3,** and **do** not indicate that the First Mandamus Petition or record **was** deficient in *any* **way,**

[9] **See,** *e.g.*, **Brief of** Appellees **at 14 – 47; and** Appellants' Response **to** First **Mandamus** Petition **at** 11-43 **(establishing that the** trial court correctly **ruled** h a t Appellees should not be compelled to arbitrate their claims.).

[10] **At** the April 5 hearing, Appellants' counsel admitted that *at* some point **such** repeated efforts would become sanctionable.

TAB 9

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

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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.

As the **Court** will **recall,** it has twice considered the merits of **Relators'** nun-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

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[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 filed 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 n. 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 (7th 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

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[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 III (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 in 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

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[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 ease 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.[18] 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,**

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[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 1.

[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 any 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

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[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).

" *See* December 15,2005 Petition for Writ of Mandamus at 10-20; Brief of Appellants at 11-18.

[21] The Court made dear:

> **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 **waive** its tight 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 Servs., LLC,* 148 S.W.3d 711 (Tex. App.—Dallas 2004), ***Spain*** *v. Houston Oilers, Inc.*, 593 S.W.2d 746,74748 (Tex. Civ. App.—Houston [14th Dist.] 2979) ("The right **to** have a dispute submitted ***to*** arbitration, like ***my*** 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

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[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 o m 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]

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[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.] 1977, 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 **for** 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]

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[31] *See* June 28 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, (I) the **FAA** did not preempt the TAA and *(2)* the court of appeals had jurisdiction under both laws and erred

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[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 349 (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 Nor 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 FAR 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 analysts 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.[41] 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

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[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 TAA **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 bow or why it should apply, the ***J.D.*** *Edwards* Court considered and ruled on the petition for mandamus submitted under the FAA.[47]

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

[43] ***See*** 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 Owem-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

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[48] *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.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 T M 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.

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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.

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TAB 10

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' REPLY TO
APPELLEES' RESPONSE TO MOTION FOR REHEARING

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Introduction

In an unusual twist of fate, the Texas Supreme Court issued an important new decision relevant to the issues in this case almost at the same time the Court was issuing its initial opinion. *In re Wilson Constr. Co.*, 196 S.W.3d 774 (Tex. 2006). *Wilson* reiterates the need to show prejudice before a finding of waiver can be made. Appellees concede they cannot show prejudice, so based on *Wilson*, the Court should withdraw its opinion and judgment and render judgment for Relators/Appellants.

Argument and Authorities

I. Appellees have conceded that they failed to prove prejudice.

In their 15 page Response, Appellees not once argue that they established or submitted any evidence on prejudice, despite the fact that the need for prejudice was one of the primary points in the motion for rehearing. Instead, recognizing this deficiency, they invite this Court to be the first in Texas to hold that prejudice is unnecessary. Accordingly, the Court's analysis should begin with the undisputed fact that prejudice is lacking here.

II. Based on the Texas Supreme Court's interpretation of the FAA and TAA, prejudice is a required element for waiver of an arbitration right.

Appellees concede that no Texas or Fifth Circuit case *ever* has held that prejudice need not be shown for a waiver of arbitration *under any set of circumstances.* Response at p. 8. Quite the contrary, in *Wilson*, the Supreme Court held the right to arbitration was not *waived* because the plaintiffs did not establish prejudice even though the defendants: (i) filed a cross-action; and (ii) filed a separate *lawsuit* seeking injunctive relief. 196

S.W.3d at 783. Given the Supreme Court's consistent and unanimous holdings that prejudice must be shown, the Court should decline Appellees' invitation to create a new rule of law that dispenses with the Supreme Court's prejudice requirement. To do so would ignore the presumption against waiver and the Supreme Court's mandate that all doubts be resolved in favor of arbitration. *Id.*

Not only do Appellees seek this new and novel holding, but they also concede that Relators never said, either orally or in writing, "we waive our right to arbitration" or words to that effect. Instead, Appellees point to Relators' arguments in connection with the removal and venue related briefing, none of which expressly addressed arbitration and all of which were made *after* Relators *expressly reserved* their arbitration right. One can only wonder how Relators "expressly" waived their arbitration right in procedural motion briefing, if the defendants in *Wilson* did *not* waive their rights by formally requesting affirmative relief *on the merits* from the trial court.

In any event, no Texas court ever has distinguished between express waiver or implied waiver when assessing the need to establish prejudice. Indeed, the Supreme Court, in *Wilson* and countless cases before *Wilson*, has spoken of "waiver," not "implied waiver" or "express waiver." Most importantly, what is clear is that the Supreme Court abhors a finding of waiver.

Recognizing that the ruling they request conflicts with *Wilson* and countless cases before it, Appellees suggest that the Court should ignore the Supreme Court's interpretation of the FAA because "Texas waiver cases are inapplicable under an FAA/mandamus analysis." Response at p.1. No doubt exists that *Wilson* exemplifies the

Supreme Court's waiver analysis under the FAA. No doubt also exists that this Court is obligated to follow Supreme Court precedent. *Swilley v. McCain*, 374 S.W. 2d 871, 875 (Tex. 1964) (court of Appeals is bound to follow the law as declared by Supreme Court). Thus, the Court should decline Appellees' invitation to ignore and depart from the Supreme Court's holdings.

III. Not only do Appellees ask this Court to create a new rule of law at odds with the Texas Supreme Court's holdings, but also they ask the Court *to* rely on non-Texas, non-Fifth Circuit authority that is suspect at best.

Appellees point to four cases in support of their position that prejudice is not required: *Gilmore v. Shearson/American Express, Inc.*, SIX F.2d 108, 112 (2d Cir. 1987), *overruled by McDonnell Douglas Fin. Carp, v. Pennsylvania Power & Light*, 849 F.2d 761,765 (26 Cir. 1988); *In re Currency Conversion Fee Antitrust Litig.*, 361 F.Supp.2d 237 (S.D.N.Y. 2005); *Miller Brewing Co. v. Fort Worth Dist. Co.*, 781 F.2d 494, 437 (5th Cir. 1986); and *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetree, Inc.*, 50 F.3d 3.88, 390 (7th Cir. 1995). Those cases, however, are unavailing.

First, *Miller Brewing* does not distinguish between "express" and "implied" waiver, .In fact, the court specifically found, in its waiver finding, that the party opposing arbitration had suffered ""substangal detriment and prejudice . . . ." *Miller Brewing*, 781 F.2d at 497.

Second, *Cabinetree* itself acknowledged that its "no prejudice" holding is a minority view that conflicts with the majority of federal courts that have considered the issue. 50 F.3d at 390.. In the 11 years since it was issued, many courts have rejected and/or criticized its holding. *See LAS Inc. v. Mini-Tankers, USA, Inc.*, 79.6 N.E.2d 633,

637 (Ill. App. 2003); *In* re *Fleming Companies, Inc.*, 325 B.R. 687, 692 (D. Del. Bankr. 2005); *Saint Agnes Medical Ctr. v. PacifiCare of Ca.*, 82 P.3d 727, 738 (Cal. 2003).

Third, *Gilmore* involved strikingly different facts. There, the movant "explicitly waived" its motion to compel arbitration, and on appeal acknowledged the express renunciation. 811 F.2d at 112. More specifically, the movant *withdrew* and abandoned its arbitration motion. *Id.* However, the *Gilmore* court also acknowledged that, "in an ambiguous situation," prejudice would be required. *Id.* (*citing Rush v. Oppenheimer & Co.*, 779 F. 2d 885 (2d. Cir. 1985)).[1]

Fourth, *in re Currency Conversion* is not an express waiver case. The court merely acknowledged the *Gilmore* holding and then found prejudice because the case had been litigated for 2 years, no arbitration motion was filed until after the court ruled on a motion to dismiss directed to the merits, and "nearly one hundred depositions and the review of tens of thousands of pages *of* documents [had] been conducted." 361 F.Supp.2d at 257-58. That hardly approximates the facts in the present case.

Interestingly, Appellees also cite *Century Indem. v. Viacom Intern., Inc.*, 2003 WL 402792, *4 (S.D.N.Y. Feb. 20, 2003). That case, however, makes Relators' point. Although the court did acknowledge the *Gilmore* holding, it distinguished *Gilmore* on the basis that the case involved a clear and express renunciation of the arbitration right. The

[1] Under the FAA and TAA as interpreted by the Texas Supreme Court a s opposed to the Second Circuit Court of Appeals), even express renunciation, if later withdrawn, would require a showing of prejudice. That is where Appellees' hypothetical on page 8 of their Response misses the point. Of course a trial court can find try a case when both parties to an arbitration agreement consent, as Appellees' hypothetical suggests. Here, Relators *in fact* never "announced to the trial court [or any other court] that *they* wished to waive any contractual arbitration rights they had , , , ." Response at p. 8. Even if they had, however, arbitration would be required, under *Wilson* and other cases, if Relators later withdrew that announcement, assuming *no* prejudice to Appellees had resulted.

movant in *Century* did not explicitly renounce its arbitration right, even though it did not seek arbitration until after more than 2 1/2 years of litigation. 2003 WL 402192, *4. Thus, the *Century* court found that *Gilmore's* express waiver rule did not apply. 2003 WL 402792, *6.

Quite simply, Appellees' authorities, at best, represent a minority position and do not warrant the creation of a new doctrine never before recognized in Texas, especially in light of the Supreme Court's recent holding on these issues.

IV. Because the FAA does not preempt the TAA, the Court must consider a matter of first impression under the TAA.

As Appellees concede, it is now clear that the FAA does not preempt the TAA. Appellees misconstrue Relators' arguments in this regard. Response at p. 10. Obviously, if the Court orders arbitration under the FAA, Relators' interlocutory appeal under the TAA is moot or "immaterial." Relators would not expect the Court to send the case to arbitration twice.

On the other hand, a denial of arbitration under the FAA presented in Relators' mandamus petition does not moot Relators' interlocutory appeal under the TAA, If Appellees are *correct* that a denial of arbitration under the FAA moots an interlocutory appeal under the TAA, one can only wonder why the TAA was at issue in *Wilson*, in light of the court of appeals' ruling under the FAG.

Because the TAA is not preempted, an analysis under the TAA is required. More specifically, the minority position cases cited by Appellees are federal cases construing the FAA. No court has eve? addressed whether *under the TAA* express waiver is different

than implied waiver and/or whether a finding sf "express waiver" dispenses with the need to show prejudice. Accordingly, the Court should to take up this issue of first impression in connection with Relators' interlocutory appeal. The Court should decide whether it is appropriate to incorporate the *Cabinetree* and *Gilmore* minority holdings under the FAA into the TAA. In light of the Supreme Court's prior waiver holdings, Relators suggest that the Supreme Court would not accept that minority position as an interpretation of the TAA. In any event, an analysis under the TAA is necessary.

Next, Appellees claim that they have "consistently noted that Texas law does not apply to issues related to the interpretation or waiver of terms in the arbitration agreements." Response at pp. 12-13. The *only* citations for that statement are Appellees' *post-submission* letter brief and a passing reference, in footnote 101 of a brief filed in the trial court, to the choice of law provision. Response at p. 13, n.42. Relators *never* argued, before oral argument in this Court, that the TAA did not apply because of the choice of law provision. Relators *never* submitted any New York law to the Court, much less explain how it differs, if at all, from the TAA. *See* Mckinney's C.P.L.R. § 7501 *et seq.* (New York's arbitration act upholding enforcement of arbitration agreements). Appellees argument in this regard therefore is a red-herring.

V. The Court's ruling means that arbitration issues in multi-district litigation cases can *never* be decided by a single transferee judge.

The practical effect of the Court's ruling should be considered. If the Court's opinion stands, no litigant in multidistrict litigation can afford to await MDL transfer before presenting its motion to compel arbitration. Such a litigant, to avoid a waiver

argument, will be required to submit the arbitration issue before transfer. Accordingly, in MDL securities and other proceedings, hundreds, perhaps thousands, of judges will hear and rule on motions to compel arbitration based on the same or similar arbitration agreements, claims and facts. Thus, the primary purposes behind 28 U.S.C. § 1407 – to avoid a waste of judicial resources and inconsistent rulings — will be thwarted.

Appellees likely would argue that a defendant in that situation could avoid waiver by carefully choosing its words in its transfer-related briefing. A defendant seeking MDL transfer over a plaintiff's objections, however, cannot avoid reference to "pre-trial activities" and "duplicative discovery." Indeed, those are some of the factors to be considered for MDL transfer under 28 U.S.C. § 1407. *See, e.g., In re Medical Waste Services AntiTrust Litig.*, 277 F.Supp.2d 1382, 1383 (J.P.M.L. 2003).

Thus, MDL litigants will be put to a Hobson's choice: either seek arbitration before MDL transfer in the many and disparate forums (and file all necessary appeals in many and disparate forums), or seek MDL transfer without proving or arguing the efficiencies of consolidated "pre-trial" proceedings and "discovery." This Court's opinion will be the primary source of that dilemma. Relators suggest that the Court should reconsider its opinion for this reason.

Prayer

Relators request that the Court grant Relators' motion for rehearing, reverse or vacate the trial court's order denying Relators' Motion to Compel Arbitration, and grant Relators any other relief to which they may be entitled.

Respectfully submitted,

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I hereby certify that a true and correct copy of the above and foregoing has been served by certified mail, return receipt requested upon the following counsel of record on this 14 day of September 2006:

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TAB 11

RECEIVED
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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

ROBERT A, NICKELL AND NATALIE BERT NICKELL'S SUR-REPLY TO RELATORS' MOTION FOR REHEARING

Real Parties in Interest Robert A. Nickell and Natalie Bert Nickell (the "Nickells") respectfully submit this, their Sur-Reply to Relators' Motion for Rehearing as follows':

For the most part, Relators' "Reply to Appellees' Response to Motion for Rehearing" ("Reply Brief') argues nothing that has not been argued exhaustively in the parties' previous briefing. All but one of its arguments are déjà vu all over again, Among other things, Relators again ignore the distinction between express and implied waiver and errantly argue that, even if there is distinction, a showing of prejudice is still required for express waiver. Further, they again neglect the Texas Supreme Court's ruling in *In re: J.D. Edwards* and offer no explanation for how the TAA could possibly apply here.[2] While *In re: Wilson* held that the FAA does not pre-empt the TAA, it does

[1] While the Nickells recognize that the Court does not usually condone sur-replies such as this, they are only submitting this one because Relators have introduced a brand new argument in their reply brief. Therefore, the Nickells respectfully request the Court's indulgence for this brief sur-reply.

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

not undermine *In re; J.D. Edwards'* holding that a party must demonstrate how the TAA applies in the first place.[3]

Aside from rehashing the same arguments, after rounds and rounds and hundreds of pages of briefing in the trial court and this Court, Relators' Reply Brief introduces a brand new argument. Relators now argue that the Court should consider that its ruling might force parties in Relators' circumstances into a "Hobson's choice" where they must either: (1) waste judicial resources by filing numerous motions to compel arbitration in the various state courts where similar actions are pending against them; or (2) save judicial resources by removing the case to federal court, then seeking to transfer and consolidate it into a federal multidistrict litigation at the risk of expressly waiving their alleged arbitration rights. But Relators forgot *to* remind the Court that the second option was never a legitimate one for them because ***this case could not be properly removed to federal court or transferred and consolidated into the multidistrict litigation.***

Again, ***when*** the Nickells persistently challenged Relators' removal position, Relators ultimately conceded that they could not defend it and stipulated to a remand![4] So, in truth, Relators' "Hobson's choice" was: (I) move to compel arbitration in state court; or *(2)* groundlessly remove the ***case*** and persuade the multidistrict litigation panel to transfer and consolidate it with statements that amount to express waiver. While the obvious and only viable option was the first one, Relators chose the second.

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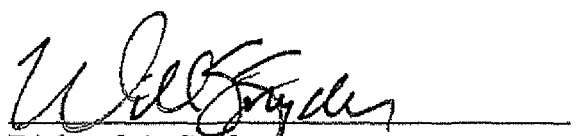
[3] *In re D. Wilson Construction Company*, 196 S.W.3d 774 (Tex. *2006).*

[4] *See* Vol. III of Record in Support of Petition for Writ of Mandamus filed December 15, 2005 at Tab M, pp. 928-29.

Relators' "Hobson's choice" argument also implies that they always intended *to* seek arbitration, but felt it would be more efficient if they did so once the case *got* consolidated and situated in the MDL. Nevertheless, they have conceded that they never informed the multidistrict litigation panel. or the MDL court of their supposed intent to arbitrate. And, despite the numerous cases they have consolidated Into the MDL, they have failed *to* cite a single MDL case where they have moved to compel arbitration. Relators clearly had no intention of arbitrating this case if they could keep it in the MDL, which they could not do.

For the reasons set forth above and in their Response, the Nickells respectfully request that the Court deny Relators' Motion for Rehearing in its entirety.

Respectfully submitted,



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