ORAL ARGUMENT REQUESTED

06-0886

In The Supreme Court Of Texas
Austin, Texas

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

BRIEF ON THE MERITS IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

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The Honorable Sally L. Montgomery,
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STATEMENT OF THE CASE

Real Parties in Interest are Plaintiffs in the trial court who assert claims for fraud seeking the recovery of damages relating to their investment losses in the stock of the former WorldCom Inc. This case, governed by the Federal Arbitration Act, presents three issues of first impression in Texas jurisprudence: (1) does a different standard apply to find an "express" waiver, as opposed to "implied" waiver, of a right to compel arbitration? (2) if so, what must a non-movant prove to establish "express" waiver?; and (3) can a non-movant establish "express" waiver in the absence of any proof of prejudice?

The trial court ruled that Relators expressly waived their arbitration right by the words they used in venue-related briefing in federal court. The court of appeals, Fifth District of Dallas, agreed, and it denied Relators' Petition for Writ of Mandamus.

Other information required by TEX. R. APP. P. 55.2(d):

Respondent	Sally Montgomery, County Court at Law No. 3, Dallas County, Texas
Parties	Citigroup: Citigroup Global Markets Inc. (f/k/a Salomon Smith Barney Inc.), Citigroup Inc., and Stacey Oelsen Real Parties: Robert A. Nickell, Natalie Bert Nickell
court of appeals information:	Date Mandamus Petition Filed: December 15, 2005 Panel: Morris, O'Neill, and Mazzant Date Opinion Issued: September 26, 2006
Citation for the court of appeals opinion	*In re Citigroup Global Markets Inc.*, 202 S.W.3d 477 (Tex. App. – Dallas 2006)

STATEMENT OF JURISDICTION

This Court has jurisdiction under TEX. GOV. CODE § 22.002.

ISSUE PRESENTED

This case presents the following single issue:

Did the trial court commit error in denying Relators' Motion to Compel Arbitration and to Stay Proceedings?

STATEMENT OF FACTS

I. Introduction

Citigroup Global Markets Inc. ("CGM") is a registered broker-dealer and investment advisor, and it is an indirect, wholly owned subsidiary of Citigroup Inc. ("Citigroup"). R. Vol. I, p. 45.[1] Stacy Oelsen ("Oelsen") at all relevant times was an account executive with CGM. R. Vol. I, p. 45. Salomon Smith Barney Inc. and Smith Barney Harris Upham & Co. Inc. both were predecessors of CGM.[2] R. Vol. I, pp. 44-45. Real Parties in Interest Robert A. Nickell and Natalie Bert Nickell ("Plaintiffs") were customers of Citigroup. 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 was submitted with the Petition 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. __."

2 For the sake of simplicity, all references to Relators, collectively, will be to "Citigroup," 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. I, pp. 52-57.

III. Plaintiffs' WorldCom Investments and the Downfall of WorldCom

Plaintiffs allege that they invested more than $4 million in WorldCom Inc. ("WorldCom") securities in 2000 and 2001 in reliance on certain research reports

issued by Citigroup research analyst Jack Grubman. R. Vol. I, pp. 11-13.[3] Plaintiffs further allege the reports were false and intentionally misleading statements about Grubman's true perception about WorldCom's performance, the current condition of its business, and the value of its stock. R. Vol. I, pp. 10-13.

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

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

transferring more than 150 actions to the MDL Court. *WorldCom,* 294 F. Supp. 2d at 435; *see also* www.jpml.uscourts.gov/Statistics/Statistics.html.

In addition to class actions, numerous individual actions were filed in state courts around the country. *WorldCom*, 294 F.Supp.2d at 434-35. Most of those actions were removed to federal court as "related to" the WorldCom bankruptcy, and transferred to the MDL Court. *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"). Many of those actions allege claims against CGM's predecessor, Salomon Smith Barney, that virtually are identical to the claims asserted by Plaintiffs in this action.

IV. Removal, MDL Transfer, and Remand

On July 9, 2004, before Citigroup had appeared in the underlying proceeding, Citigroup 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. Citigroup expressly stated in the notice of removal that it was "appearing specially so as to reserve any and all defenses available under Rule 12 of the Federal Rules of Civil Procedure or otherwise . . . ." R. Vol. II, p. 308. As grounds for the removal, Citigroup 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 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, pursuant to 28 U.S.C. § 1407. R. Vol. II, pp. 658-59.

On August 25, 2004, Citigroup filed in the Dallas federal court a motion to stay 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, Citigroup argued 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. In this motion, Citigroup expressly stated that it was reserving all defenses "**including, but not limited to, . . . the requirement that Plaintiffs arbitrate, not litigate, their claims.**" R. Vol. II, p. 539, n.1 (emphasis added).

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, 811 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 MDL Court, it became subject to that court's May 28, 2003 Consolidation Order. R. Vol. I, pp. 125-36. Among other

things, the Consolidation Order provided 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. 126. That same Order also expressly preserved any and all defenses. R. Vol. I, p. 127. Thus, Citigroup did not file an arbitration motion in the MDL Court.

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 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, again contending remand was warranted. R. Vol. III, p. 899.

Thereafter, certain events transpired, including a tentative settlement of the WorldCom securities class action claims against Citigroup, that led Citigroup 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 (and possibly appealing) the jurisdictional issues. 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 Citigroup and Plaintiffs agreed, Citigroup again specifically stated that it was

"appearing specially to reserve any and all defenses . . . ." R. Vol. III, p. 928. The MDL Court approved this Stipulation and Order in the form submitted on January 14, 2005. *Id.*

It is undisputed in the record that (i) in the very first motion filed by Citigroup, it expressly reserved its right to compel arbitration of Plaintiffs' claims, (ii) any requirement that Citigroup file a Motion to Compel Arbitration was expressly stayed by order of the MDL Court, and (iii) all proceedings before the MDL Court occurred in the context of the express reservation of Citigroup's right to compel arbitration.

V. Citigroup's Motion to Compel Arbitration

On March 21, 2005, immediately after remand and the resolution of the jurisdictional and venue issues, Citigroup filed a Motion to Compel Arbitration and Stay Proceedings and Brief in Support (the "arbitration motion") at the same time it filed its Original Answer. R. Vol. I, pp. 31 and 35. Before filing the arbitration motion, Citigroup had *not*, in any court: (1) sought or obtained discovery; (2) responded or objected to discovery; (3) filed a motion for summary judgment; (4) filed a motion for judgment on the pleadings; (5) requested a trial setting; or (6) filed any cross-claims, counter-claims, or third-party claims or otherwise sought affirmative relief. R. Vol. I, p. 137.

Moreover, Citigroup never sought or obtained a ruling from any court regarding the merits of Plaintiffs' claims. *Id.* Finally, Citigroup never expressed to any court, either orally or in writing, directly or indirectly, that it was expressly renouncing

its right to compel Plaintiffs' claims to arbitration or that it chose to litigate Plaintiffs' claims in court as opposed to arbitration.

Nevertheless, Plaintiffs responded to the arbitration motion with two arguments. R. Vol. I, p. 58. First, they argued that Citigroup expressly waived its right to compel arbitration by certain statements it made during the briefing on the venue and stay related motions discussed above. 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 -- is not entitled to claim the benefits of the arbitration agreement with respect to Mr. Nickell's claims. R. Vol. I, pp. 72-92.

After Citigroup replied to Plaintiffs' opposition (R. Vol. I, p. 94), the trial court conducted a hearing on August 12, 2005. R. Vol. I, pp. 196-254. By Order dated October 3, 2005, the trial court denied the arbitration motion in its entirety. R. Vol. I, p. 296. On September 26, 2006, the court of appeals denied Citigroup's petition for writ of mandamus, and it dismissed Citigroup's interlocutory appeal. *Nickell,* 202 S.W.3d at 477.

SUMMARY OF THE ARGUMENT

Under this Court's well settled authority, Citigroup did not waive its right to compel Plaintiffs' claims to arbitration. Plaintiffs concede that they did not, indeed could not, establish prejudice, an essential element of waiver. Plaintiffs also concede

that Citigroup did not substantially invoke the judicial process, the other essential element of waiver.

The Court should decline Plaintiffs' invitation to create a new and additional waiver standard in Texas under the FAA -- what Plaintiffs call express waiver. First, it is illogical and inconsistent with the strong presumption in favor of arbitration to dispense with the prejudice requirement in express waiver arguments. Dispensing with the prejudice requirement also will increase exponentially arbitration waiver arguments in the courts below. Indeed, in the most recent cases decided by the Court rejecting waiver arguments, *In re Vesta* and *In re Wilson*, the express waiver argument, as formulated by Plaintiffs, would have been applicable.

Next, the Court should not retreat from its requirement that waiver occurs only in connection with the movant's substantial invocation of the judicial process. That is especially true when the movant does not make a clear, direct, and unequivocal renunciation of its arbitration right. No unequivocal renunciation exists in the present cases. Accordingly, the Court should enter a writ of mandamus ordering the trial court to enter an order compelling Plaintiffs to arbitrate, not litigate, their claims.

ARGUMENT

I. As a matter of law, Citigroup did not waive its right to compel arbitration.

A. The Court has established clear standards for waiver of arbitration

This Court consistently and repeatedly has held that a party does not waive its

right to enforce an arbitration clause by delay in invoking its rights or "by merely taking part in litigation, unless the party has *substantially invoked* the judicial process to the *opposing party's detriment*." *In re Wilson Constr. Co.*, 196 S.W.3d 774, 785 (Tex. 2006); *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 763 (Tex. 2006); *In re Serv. Corp. Intern.*, 85 S.W.3d 171, 174 (Tex. 2002). Indeed, in 2006 alone, the Court has twice made clear that, absent a showing of prejudice to the party seeking to establish waiver and the substantial invocation of the judicial process, there can be no waiver. *In re Wilson*, 196 S.W.3d at 783; *In re Vesta*, 192 S.W.3d at 763.

In this case, Plaintiffs have conceded that they have not, and cannot, establish any prejudice as a result of Citigroup's alleged waiver. *See, e.g.,* Supp. R. at 170-73. Strikingly, Plaintiffs also concede that, under the standards established by this Court in *In re Wilson* and *In re Vesta* -- what Plaintiffs call an "implied" waiver standard -- Citigroup did not waive its arbitration rights. R. Vol. I, p. 227 ("MR. SAYLES: The important word is implied waiver. I agree with everything he [counsel for Citigroup] said [that there was no waiver] if this is an implied waiver case."). Instead, Plaintiffs argue that Citigroup "expressly" waived its arbitration rights by certain statements made in the MDL venue and stay related briefing. Plaintiffs further argue that prejudice was not required in an "express" waiver analysis. Plaintiffs' Response to Petition for Writ of Mandamus, at p. 10.

This Court should not allow Plaintiffs to escape meeting the clearly established requirements for waiver by creating a new type of waiver. The Court's many opinions

discussing arbitration waiver issues do not distinguish between "express" waiver and "implied" waiver. Instead, they simply discuss "waiver," encompassing it in all of its forms. No logical reason exists to make a distinction.

B. The Court should decline to adopt a new theory of arbitration waiver – "express" waiver – that would allow a finding of waiver without a showing of prejudice.

1. No reason exists to require prejudice for implied waiver, but not for express waiver.

One of the reasons this Court consistently has required a showing of prejudice as an element of waiver is because "there is a strong presumption against a waiver under the FAA." *In re Wilson*, 196 S.W.3d at 783; *In re Vesta,* 192 S.W.3d at 763. Accordingly, any doubts regarding arbitration are resolved in favor of arbitration, and parties opposing arbitration bear a "heavy burden of proof." *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). Plaintiffs offer no explanation why these same principles do not require a showing of prejudice in the context of an alleged express waiver.

Waiver, including what Plaintiffs would call implied waiver, "must be intentional." *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 89 (Tex. 1996). Dispensing with the prejudice requirement in express waiver cases, therefore, would lead to an absurd result. Specifically, a defendant who *intended* to waive its arbitration rights, but who kept that intention unexpressed as litigation ensued in the trial court for upwards of two years, would only be found to have waived if the plaintiff suffered prejudice.

See, e.g., In re Vesta, 192 S.W.3d at 763. But, under Plaintiffs' theory, if that same defendant expressed his intent to waive his arbitration rights, he would have irrevocably waived his right to arbitrate so without regard to the lack of prejudice to the plaintiff, even if the parties engaged in no litigation in the trial court. Indeed, the expression of the intent to waive could never be retracted, and waiver would be instantaneous, even if it came at the outset of the case and before any activity in the case ensued. This disparate treatment makes no sense.

Dispensing with the prejudice requirement also would be inconsistent with ordinary principles of contract law. *See, e.g., Nickell,* 202 S.W.3d at 481 (ordinary principles of contract law apply). The waiver standard adopted by the Court and described above is similar to equitable estoppel. *See Schroeder v. Texas Iron Works, Inc.*, 813 S.W.2d 483, 489 (Tex. 1991). Detrimental reliance is an essential element of equitable estoppel, regardless of whether the estoppel is based on silence or affirmative statements. *Id.* (Elements of equitable estoppel include, among others, detriment reliance *and* "a false representation *or concealment of* facts . . . . ") (emphasis added). The Court never has dispensed with the detrimental reliance element in estoppel cases based on affirmative statements, and the Court should not do so with respect to arbitration waiver.

2. The court of appeals' holding is based on widely criticized and rejected minority federal court holdings.

The court of appeals apparently decided to affirm the trial court's finding of waiver based on two federal court decisions cited in its opinion: *Gilmore v. Shearson/American Express, Inc.*, 811 F.2d 108 (2d Cir. 1987), *overruled on other grounds, McDonnell Douglas Fin. Corp. v. Pennsylvania Power & Light Co.*, 849 F.2d 761, 765 (2d Cir. 1988); and *Cabinetree of Wisconsin, Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388 (7th Cir. 1995). In those cases, the courts held that a finding of express waiver does not require a determination that the party resisting arbitration suffered prejudice. *Gilmore,* 811 F.2d at 112-13; *Cabinetree*, 50 F.3d at 390. [4]

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

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[4] *Cabinetree* held that, by removal of the case and engaging in discovery before seeking to compel arbitration, the movant had elected to proceed in court, even absent a showing of prejudice. This holding is squarely in conflict with the *Willams, WinterPark, and Koch* holdings discussed in part I.C.

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

Indeed, the *Cabinetree* court itself conceded that it was in the minority. 50 F.3d at 390. Federal and state courts -- including the California Supreme Court -- have squarely rejected *Cabinetree's* holding that no prejudice must be shown. *See, e.g., In re Fleming Companies, Inc.*, 325 B.R. 687, 692 (D. Del. 2005); *LAS, Inc. v. Mini-Tankers, USA, Inc.*, 796 N.E.2d 633, 637-38 (Ill. App. 2003); *St. Agnes Med. Ctr. v. Pacificare of California,* 82 P.3d 727, 738 & n.6 (Cal. 2003). Most importantly, *Cabinetree* and *Gilmore's* no prejudice holdings are inconsistent with those of this Court.

3. The court of appeals' holding disfavors arbitration, and it will increase exponentially waiver arguments and appeals.

Finally, dispensing with the prejudice requirement would do harm to litigants' ability to compel arbitration generally. Courts, however, are directed to favor arbitration agreements, read them with a preference for arbitration, and resolve all doubts in favor or arbitration. *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). Accordingly, waiver is not to be found lightly, and the party seeking to establish waiver bears a heavy burden of proof. *In re Bruce Terminix,* 988 S.W.2d at 705.

The holding of the court of appeals does violence to these basic tenets. In fact, if the court of appeals' decision is left undisturbed, litigants opposing arbitration motions on waiver grounds likely will always claim express waiver in lieu of or in

addition to implied waiver, thus creating a plethora of new cases for the appellate courts.

For example, the non-movant in *Wilson* easily could have argued express waiver, because the movant *expressly* requested affirmative relief from the trial court. In *Vesta*, the non-movant could have argued express waiver, because the movant had served discovery, thus *expressly* indicating it was preparing its case for trial. Examples where express waiver might have been argued are present in almost every waiver case decided by this Court. This point is aptly demonstrated by the *Cabinetree* decision upon which Plaintiffs place great reliance. There, the party seeking to compel arbitration was found to have made an express election to proceed in court by removing the case to federal court and engaging in discovery. 50 F.3d at 389. That is not the law as expressed by this Court. If that standard is adopted, only a movant who seeks arbitration with its first pleading would be immune from the argument.

The damage to the public policy favoring arbitration, not to mention the potential impact on the dockets of this Court and the courts below, militate against accepting the court of appeals' holding. Instead, the Court should grant Citigroup's petition, and reaffirm the Court's long standing, uniform holding that prejudice is a necessary element of an arbitration waiver.

C. Citigroup did not expressly waive its arbitration right.

Even if the Court finds that prejudice is not required to establish express waiver, the Court should grant Citigroup's petition, because it did not expressly renounce its arbitration rights.

1. The court of appeals adopted an incorrect express waiver standard.

"Expressly" means in "direct or unmistakable terms; explicitly; definitely; directly," and "renounce" means to "make an affirmative declaration of abandonment." *See* Black's Law Dictionary 522, 1166 (1979). Similarly, the common law doctrine of judicial estoppel requires, among other things, a prior, inconsistent statement made in a judicial proceeding "which is deliberate, clear, and unequivocal." *Long v. Knox,* 155 Tex. 581, 291 S.W.2d 292, 295 (1956). Thus, express waiver requires a specific, direct, and unequivocal declaration that the party is renouncing its arbitration right. If the Court chooses to adopt a separate express waiver standard, this should be the standard. Nothing remotely resembling such an irrevocable declaration exists in this record.

A less stringent standard would invite manipulation of the type present in this case. Here, lacking an express renunciation, Plaintiffs point only to procedural motion arguments and litigation conduct in support of their waiver argument. From those statements and conduct, none of which even remotely relates to the arbitration right, Plaintiffs argue that Citigroup demonstrated its intent to litigate. That, however,

is truly an implied waiver argument that Plaintiffs have re-labeled express waiver. *See, e.g.,* Plaintiffs' Response to Petition for Writ of Mandamus, p. 5 (arguing, because Citigroup's express reservation of its arbitration rights was not in every document filed by Citigroup, that "evidences an intent to abandon arbitration . . . ."). The standard urged by Plaintiffs would lead every plaintiff seeking to avoid its arbitration agreement to argue express waiver to avoid the stringent requirements set forth by this Court. To avoid this type of manipulation, the Court should adopt an unequivocal declaration of renunciation standard to support a claim of express waiver.

2. Citigroup did not make an unequivocal renunciation of its arbitration right.

In finding express waiver, the court of appeals selectively quoted, out of context, short statements from documents filed by Citigroup in federal court on the issues of jurisdiction, MDL transfer, or stay pending MDL transfer. 202 S.W.3d at 482-83. 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; were made after Citigroup expressly and unequivocally reserved its right to seek arbitration; were unrelated to the merits of Plaintiffs' claims; were made only in an effort to have the case placed before the most appropriate court to consider pre-trial motions, *including* the arbitration motion; and were made at a time when an order by the MDL Court was in place preventing Citigroup from filing its motion to compel arbitration.

The court of appeals' error is even more clear because this Court has emphasized repeatedly that procedural acts taken before a motion to compel arbitration do not constitute a waiver. *See*, *e.g.*, *In re Vesta*, 192 S.W.3d at 763; *In re Wilson*, 196 S.W.3d at 783. "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 . . . ." *In re Winter Park Const., Inc.*, 30 S.W. 3d 576, 578-79 (Tex. App. – Texarkana 2000, no writ); *see also Republic Ins. Co. v. PAICO Receivables, LLC,* 383 F.3d 341 (5th Cir. 2004).

Moreover, all of the statements upon which Plaintiffs rely to support their express waiver argument were made *after* Citigroup expressly reserved its arbitration rights. R. Vol. II, p. 539 n.1. Expressly reserving a right is the antithesis of expressly renouncing that right. Further, none of the statements referenced by the court of appeals has anything to do with arbitration. Instead, they relate only to why transfer was appropriate under 28 U.S.C. § 1407 for pre-trial activities such as the arbitration motion and, if that motion were overruled, discovery and other motion practice.

The principal case upon which Plaintiffs rely demonstrates that conduct not present in this record should be shown before express waiver is found. In *Gilmore*, 811 F.2d at 109, 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 thereafter. The express renunciation in that case was the express and unmistakable withdrawal of the motion.

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), rejected the assertion 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 pendant 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 a distinction between express versus implied waiver, it rejected the plaintiff's waiver arguments. *Id.* at *3. In so doing, Judge Godbey recognized the strong presumption against a finding of waiver under the FAA, and he took particular note of the context in which defendant's counsel's statements were made. *Id.* at *3. *See also Century Indemnity Co. v. Viacom Intern., Inc.,* 2003 WL 402792, at *6 (S.D.N.Y. Feb. 20, 2003) (not designated for publication) (rejecting argument of express waiver because movant had not clearly and expressly renounced its arbitration rights).

It is also impossible to distinguish the conduct which the court here found to be express waiver from conduct which the courts of this state and the Fifth Circuit consistently have ruled is not an implied waiver. Texas courts and the Fifth Circuit specifically have held that removal and removal-related procedural activity do not

result in a waiver of a party's 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) (removal, motion to dismiss (which was denied), answer, counterclaims, discovery, and remand not a waiver); *In re Winter Park Constr., Inc.*, 30 S.W.3d 576 (Tex. App.–Texarkana 2000, no writ) (removal, discovery, and remand not a waiver); *In re Koch Ind., Inc.*, 49 S.W.3d 439 (Tex. App.–San Antonio 2001, no writ) (removal, discovery, and remand not a waiver).

In other cases, parties have engaged in discovery, filed motions to dismiss, participated in pre-trial conferences, and let trial settings pass without waiving the right to arbitrate the same claims. *See, e.g., In re Service Corp.*, 85 S.W.3d 175 (no waiver despite motion to dismiss); *Tenneco Resins, Inc, v. Davy Int'l. AG*, 770 F.2d 416, 420 (5th Cir. 1985) (serving interrogatories and a document request, moving for a protective order and moving for continuance did not result in waiver); *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 576 (5th Cir. 1991) (no waiver despite serving discovery, participating in a pretrial conference and agreeing to a scheduling order); *Texas Res. Mort. L.P. v. Portman*, 152 S.W.3d 861, 863 (Tex.App. – Dallas 2005, no pet.) (no waiver although discovery complete and motion to compel not filed until two months before *second* trial setting); *LJA Eng. and Surv., Inc. v. Richfield Inv. Corp.*, ____ S.W.3d _____, 2006 WL 3626929 (Tex.App. – Beaumont 2006, no pet.) (defendant asserted affirmative claims, conducted extensive discovery, asked for a trial setting, and filed a case-ending motion to dismiss with prejudice, without waiving arbitration).

Before moving to compel arbitration, Citigroup merely removed the action to federal court, sought its transfer to the MDL Court so that court could uniformly decide pre-trial activities, *including* the arbitration motion, and ultimately agreed to remand. It is simply impossible to conclude that Citigroup expressly waived its right to arbitrate by indicating a desire to litigate its claims if one who filed affirmative claims, engaged in discovery, and sought dismissal did not.

The court of appeals acknowledged and agreed with these cases, but it purported to distinguish them because, according to the court, they "all involve implied waiver based upon conduct . . ." and they do "not contain any statements by the defendant expressing its intent to pursue the case in a judicial forum." 202 S.W.3d at 483. This statement by the court simply is wrong. One can only wonder how the *Williams* defendant sought dismissal under FED. R. CIV. P. 12(b)(6) – a motion which would have terminated the case before a motion moving to compel arbitration was filed -- without asking the court to rule on the merits of the case, or how it filed a counterclaim without expressing some interest to pursue the case in a judicial forum.

Nevertheless, the court's statement further confirms that Citigroup did not waive their arbitration rights by its *conduct*, that is, Citigroup did not "substantially invoke the judicial process." *Vesta*, 192 S.W.3d at 763. In truth, however, the Plaintiffs are inferring waiver from Citigroup's conduct, while simply labeling that conduct -- which this Court has repeatedly held does not constitute a waiver -- an express waiver in an effort to escape this Court's prior holdings. Accordingly, this

Court's analysis set forth in *Wilson* and *Vesta* controls, and Citigroup did not waive its arbitration rights.

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

Plaintiffs argued in the trial court and court of appeals that the documents upon which CGM relied to compel Mr. Nickells' (not Ms. Nickells') claims to arbitration are not effective as to CGM because "they do not apply to successors . . ." of Salomon Smith Barney or Smith Barney Harris Upham & Co., Inc. R. Vol. I, p. 90. Plaintiffs' argument was incorrect.

Citigroup submitted two agreements containing arbitration provisions signed by Mr. Nickell. R. Vol. I, pp. 47 and 49. The first is between Smith Barney 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.

SSB and Smith Barney are predecessors of CGM. R. Vol. I, pp. 44-45. Indeed, in their own pleadings, Plaintiffs admitted that fact. R. Vol. I, p. 1, ¶¶ 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 732, 738 (Tex. 2005) 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, 178 S.W.3d 279, 295 (Tex. App.–Houston [1st Dist.] 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.

PRAYER

For the foregoing reasons, Citigroup respectfully requests that the Court issue a writ of mandamus directing Respondent to set aside her Order of October 3, 2005 and to enter an order granting the arbitration motion in its entirety. Finally, Citigroup respectfully requests that the Court grant it such other and further relief to which it may show itself justly entitled.

Respectfully submitted,

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ATTORNEYS FOR RELATORS

VERIFICATION

STATE OF TEXAS §
§
COUNTY OF DALLAS §

Before me, the undersigned authority, on this day personally appeared James W. Bowen, known to me to be the person whose name is subscribed below and who, upon his oath and based upon personal knowledge, stated that (1) 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 Record for this mandamus proceeding are true and correct copies of the original documents; and (3) the facts stated in this Brief on the Merits in Support of Petition for Writ of Mandamus are true and correct.

____
James W. Bowen

SUBSCRIBED AND SWORN TO BEFORE ME by James W. Bowen on this 20th day of December, 2006, to certify which, witness my hand and seal of office.

____
Notary Public, State of Texas

STATEMENT REGARDING VERIFICATION OF FACTS AND FILING OF THE RECORD

Pursuant to Tex. R. App. P. 52.3, the factual statements in this petition are supported by citations to the official reporters' record and clerks' record from the proceedings below, which are included in the Record filed with the 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 38.9, by submitting any additional verification 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 and Respondent on this 20th day of December, 2006:

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____
James W. Bowen