No. 06-0886

In The Supreme Court of Texas
Austin, Texas

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

RESPONSE OF REAL-PARTIES-IN-INTEREST TO RELATORS' BRIEF ON THE MERITS IN SUPPORT OF PETITION FOR WRIT OF MANDAMUS

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

I. STATEMENT OF THE CASE vi

II. ISSUE PRESENTED vii

III. SUMMARY OF THE ARGUMENT 1

IV. STATEMENT OF FACTS 3

A. **Relators' Persistent and Successful Efforts to Secure a Federal Forum** 3

B. **Relators Retreat from Their Reliance Upon Federal Jurisdiction and Abandon Efforts to Adjudicate in a Federal Forum** 5

C. **Relators' Sole Reference to Arbitration** 6

D. **Relators' Numerous Statements Advocating and Requesting a Federal Forum** 6

E. **The Court of Appeals Determined that Texas Law Does Not Govern the Arbitrability of this Dispute** 10

V. ARGUMENT AND AUTHORITIES 11

A. **Relators' Statements and Conduct Demonstrate Their Intent to Litigate and Show That Arbitration Was an Afterthought to Their Failed Litigation Strategies** 11

1. *Relators abandoned any interest in arbitration and chose not to preserve their alleged arbitration rights* 11

2. *Relators committed to litigating instead of arbitrating by repeatedly representing to the federal court and the JPML that transfer and consolidation were warranted under Section 1407* 13

3. *Relators planned to fully litigate the Nickells' claims in the MDL Court, but changed plans when things did not go well* 15

4. *Further demonstrating their original plan to litigation, Relators' explanation for reversing field is unsupported, illogical, and unconvincing* 16

B. Standard of Review 18

C. The Proper Legal Analysis 19

1. Although Federal Substantive Law Applies, Relators Argue Texas Law 19

2. Express Waiver vs. Implied Waiver: Two Distinct Legal Principles 20

3. Express Waiver Requires No Showing of Prejudice to the Nonwaiving Party 22

D. The Proper Express Waiver Analysis Results Only One Conclusion 22

1. The Record Contains Overwhelming Evidence of Express Waiver 22

2. The Court of Appeals Applied the Correct and Only Express Waiver Test 24

3. Relators inexplicably try to sidestep their statements to the federal courts 29

4. Relators misplace their reliance on inapplicable, inapposite cases 32

5. Relators wildly speculate about future waiver cases 34

E. The "No Prejudice" Rule Is The Only Correct Rule of Law in Express Waiver Cases 35

F. Alternatively, Relators Impliedly Waived Any Alleged Right to Arbitrate 41

1. Federal law varies regarding whether implied waiver cases require a showing of prejudice and, if so, the degree of prejudice that must be shown 41

2. These authorities support a conclusion of implied waiver in this case 44

G. Relators Have No Arbitration Rights Vis-à-vis Robert Nickell 45

VI. CONCLUSION AND PRAYER 47

TABLE OF AUTHORITIES

FEDERAL CASES

Allied Sanitation, Inc. v. Waste Management Holdings, Inc.,
97 F. Supp. 2d 320 (E.D.N.Y. 2000) 19

American Home Assurance Co. v. Fremont Indemnity Co.,
1992 WL 135809 (S.D.N.Y. June 1, 1992) 37

Apollo Theater Foundation, Inc. v. Western International Syndication,
2004 WL 1375557 (S.D.N.Y. June 21, 2004) 1, 20, 24, 25, 26, 27, 28, 29, 35, 36

In re Bousa, Inc.,
1993 WL 78019 (S.D.N.Y. Mar. 16, 1993) 37

COM-TECH Associates v. Computer Associates International, Inc.,
753 F. Supp. 1078 (E.D.N.Y. 1990) 37

Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.,
50 F.3d 388 (7th Cir. 1995) 35, 36, 37, 38, 42, 44, 45

Century Indemnity Co. v. Viacom International, Inc.,
2003 WL 402792 (S.D.N.Y. Feb. 20, 2003) 39, 40

In re Crysen/Montenay Energy Co.,
226 F.3d 160 (2d Cir. 2000) 20, 22

In re Currency Conversion Fee Antitrust Litigation,
361 F. Supp. 2d 237 (S.D.N.Y. 2005) 1, 20, 21, 24, 36

In re Currency Conversion Fee Antitrust Litigation,
2005 WL 1705285 (S.D.N.Y. July 22, 2005) (applying *Manos*) 13

DeGraziano v. Verizon Communications, Inc.,
325 F. Supp. 2d 238 (E.D.N.Y. 2004) 1, 20, 24, 25, 36

Doctor's Associates, Inc. v. Casarotto,
116 S. Ct. 1652 (1996) 41

Gilmore v. Shearson/American Express Inc.,
811 F.2d 108 (2d Cir. 1987) (*overruling on other grounds recognized by McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.*, 849 F.2d 761 (2d Cir. 1988) 1, 20, 22, 24, 26, 34, 36, 38, 40

Manos v. Geissler,
321 F. Supp. 2d 588 (S.D.N.Y. 2004) 12, 13

Mastrobuono v. Shearson Lehman Hutton, Inc.,
115 S. Ct. 1212 (1995) 20

McDonnell Douglas Finance Corp. v. Pennsylvania Power & Light Co.,
849 F.2d 761 (2d Cir. 1988) 12, 24, 26, 34, 36, 40

Menorah Insurance Co. v. INX Reinsurance Corp. ,
72 F.3d 218 (1st Cir. 1995) 38

Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lecopulos,
553 F.2d 842 (2d Cir. 1977) 19

Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.,
39 F.3d 1482 (10th Cir. 1994) 43

Miller Brewing Co. v. Fort Worth Distributing Co.,
781 F.2d 494 (5th Cir. 1986) 19, 44

National Foundation for Cancer Research v. A.G. Edwards & Sons, Inc.,
821 F.2d 772 (D.C. Cir. 1987) 42, 43

Rankin v. Allstate Insurance Co.,
336 F.3d 8 (1st Cir. 2003) 36, 38, 43

Republic Insurance Co. v. PAICO Receivables, LLC,
383 F.3d 341 (5th Cir. 2004) 44

S&H Contractors, Inc. v. A.J. Taft Coal Co., Inc.,
906 F.2d 1507 (11th Cir. 1990) 44

In re Salomon, Inc. Shareholder's Derivative Litigation,
1994 WL 533595 (S.D.N.Y. Sept. 30, 1994) 37

Smith v. Petrou,
705 F. Supp. 183 (S.D.N.Y. 1989) 26, 37

Southern System, Inc. v. Torrid Oven, Ltd.,
105 F. Supp. 2d 848 (W.D. Tenn. 2000) 43

St. Mary's Medical Ctr. v. Disco Aluminum Products Co., Inc.,
969 F.2d 585 (7th Cir. 1992) 41

Stevenson v. Tyco International, Inc.,
2006 WL 2827635 (S.D.N.Y. Sept. 29, 2006) 12, 13, 21, 36

Tristar Finance Insurance Agency v. Equicredit Corp. of America,
97 Fed.Appx. 462, 2004 WL 838633 (5th Cir. 2004) 44

Triton Container International, Ltd. v. Baltic Shipping Co.,
1995 WL 729329 (E.D. La. Dec. 8, 1995) 37

In re Tyco International, Ltd.,
2004 WL 1151541 (D.N.H. May 24, 2004) 37

In re Tyco International Ltd. Securities Litigation,
422 F.3d 41 (1st Cir. 2005) 43

Walker v. Countrywide Credit Industries, Inc.,
2004 WL 246406 (N.D. Tex. – Jan. 15, 2004) 32, 37

Williams v. Cigna Financial Advisors, Inc.,
56 F.3d 656 (5th Cir. 1995) 19, 33, 34

STATE CASES

Beverly Hills Development Corp. v. George Wimpey of Fla., Inc.,
661 So. 2d 969 (Fla. App. – 5th Dist. 1995) 39

Breckenridge v. Farber,
640 So. 2d 208 (Fla. App. – 4th Dist. 1994) 39

Bristow v. Jameson,
1996 WL 277138 (Tex. App. – Houston [1st Dist.] May 22, 1996, no pet.) 36, 39

Bury v. Community Hospitals of Central CA,
2003 WL 21197693 (Cal. App. – 5th Dist. May 22, 2003) 39

In re Citigroup Global Markets, Inc.,
200 S.W.3d 742 (Tex. App. – Dallas 2006), *opinion withdrawn and superseded by In re Citigroup Global Markets, Inc.*, 202 S.W.3d 477 (Tex. App. – Dallas 2006, orig. proceeding) 22, 28, 36

In re Citigroup Global Markets, Inc.,
202 S.W.3d 477 (Tex. App. – Dallas 2006, orig. proceeding) 10, 19, 22, 24, 27, 28, 32, 36, 38, 39

In re D. Wilson Construction Co.,
196 S.W.2d 774 (Tex. 2006) 33

Downer v. Aquamarine Operators, Inc.,
701 S.W.2d 238 (Tex. 1985) 18

Finn v. Prudential-Bache Securities, Inc.,
523 So. 2d 617 (Fla. App. – 4th Dist. 1988) 39

Firestone v. Oasis Telecommunications,
38 P.3d 796 (Mont. 2001) 39

Grand Homes 96, L.P. v. Loudermilk,
2006 WL 3247890 (Tex. App.—Fort Worth Nov. 9, 2006, no pet. h.) 21

Holm-Sutherland Co., Inc. v. Town of Shelby,
982 P.2d 1053 (Mont. 1999) 39

Interconex, Inc. v. Ugarov,
2006 WL 2506562 (Tex. App. – Houston [1st Dist.] Aug. 31, 2006, no pet.) 39

Johnson v. Fourth Court of Appeals,
700 S.W.2d 916 (Tex. 1985) 18

Mercedes-Benz Credit Corp. v. Rhyne,
925 S.W.2d 664 (Tex. 1996) 18

Metropolitan Life Insurance Co. v. Syntek Finance Corp.,
881 S.W.2d 319 (Tex. 1994) 18

Milnes v. Salomon, Smith Barney, Inc.,
2002 WL 31940718 (N.Y.Sur. Oct. 11, 2002) 46, 47, 48

Southwind Group, Inc. v. Landwehr,
188 S.W.3d 730 (Tex. App. – Eastland 2006, no pet.) 21

Stewart v. Covill and Basham Construction, LLC,
75 P.3d 1276 (Mont. 2003) 39

I. STATEMENT OF THE CASE

The Real-Parties-In-Interest, Robert A. Nickell and Natalie Bert Nickell ("the Nickells") dispute Relators' claim that this case "presents three issues of first impression in Texas jurisprudence" concerning the express waiver of a party's alleged arbitration right.[1] In truth, this case offers no opportunity whatsoever for this Court to promulgate, clarify, or correct any principle of Texas law because Texas law does not apply. The Dallas Court of Appeals correctly rejected Relators' repeated attempts to apply Texas law and held that federal substantive law applies exclusively to the issues of waiver and arbitrability, and Relators have not challenged that holding.

Relators' Statement of the Case also fails to inform the Court of the first mandamus petition they filed with the Dallas Court of Appeals in the underlying proceedings, which also challenged the trial court's denial of Relators' Motion to Compel Arbitration ("arbitration motion") and was unanimously denied on the merits in a memorandum opinion and order written by Justice O'Neill, while sitting on a panel with Justices Whittington and Lang.[2] Finally, Relators' Statement of the Case also fails to clarify that their second mandamus petition was considered and unanimously denied on the merits twice by the Dallas Court of Appeals, the second time on rehearing.

The Nickells file this response to Relators' Brief ("Response") showing why Relators' requested mandamus relief should be denied for a fourth time by this Court.

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[1] Relators' Brief on the Merits in Support of Petition for Writ of Mandamus (hereafter "Relators' Brief," cited as "Rel. Br.") at I.

[2] Nickells' Supplemental Record ("Nickell R.") at Tab 3 (November 16, 2005 Memorandum Opinion and Order). Hereinafter, citations to Relators' Appendix will be "Rel. Apx. __" and citations to Relators' Record will be "Rel. R. Vol. __ at __."

II. ISSUE PRESENTED

Did the trial court clearly abuse its discretion in denying Relators' arbitration motion when presented with:

a. over twenty statements in Relators' court-filed pleadings expressly and unequivocally declaring their desire to litigate this case rather than arbitrate it;

b. undisputed evidence of Relators' various acts and omissions that further demonstrated their attempts and desire to litigate rather than arbitrate; and

c. a New York case directly on point involving a virtually identical arbitration clause holding that the clause does not grant arbitration rights to Relators vis-à-vis Robert Nickell.

III. SUMMARY OF THE ARGUMENT

Relators abandoned and waived whatever interest they may have had in arbitrating this case long ago. The record contains over twenty express and unambiguous statements they made in federal court pleadings (relevant to express waiver) and evidence of their conduct (relevant to implied waiver) clearly demonstrating the abandonment of their alleged arbitration rights and efforts to adjudicate this case in federal court. Their pleadings expressly informed and represented to the federal courts that they wished to conduct discovery and pre-trial proceedings, litigate the Nickells' claims, adjudicate the Nickells' claims, and try the Nickells' claims in federal court. Through these representations, they persuaded the Judicial Panel on Multidistrict Litigation ("JPML") to transfer and consolidate this action with the WorldCom multidistrict litigation proceedings ("MDL Proceedings") in New York federal court ("MDL Court"). But when Relators realized they could not stay in federal court because they could not defend their theory of federal jurisdiction, they changed course and tried to invoke their alleged arbitration rights.

The Federal Arbitration Act ("FAA") and federal substantive law on waiver control the disposition of the issues before the Court. Under federal law, there is only one clearly defined test for express waiver: a party expressly waives its arbitration rights "by expressly indicating that it wishes to resolve its claims in court."[3] In view of this

[3] *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 257 (S.D.N.Y. 2005); *DeGraziano v. Verizon Communications, Inc.*, 325 F. Supp. 2d 238, 244 (E.D.N.Y. 2004); *Apollo Theater Found., Inc. v. Western Int'l Syndication*, 2004 WL 1375557, at *3 (S.D.N.Y. June 21, 2004) (not designation for publication) (both citing *Gilmore*); *In re Citigroup, Inc.*, 202 S.W.3d 477, 481 (Tex. App. – Dallas 2006, orig. proceeding).

test and Relators' numerous unequivocal representations to the federal courts that they wished to litigate in those courts, the lower courts reached the only logical conclusion, that Relators expressly waived their alleged arbitration rights.

For ease of reference, a chart showing various examples of Relators' renditions of the facts and law contrasted with the true state of the record and the law is attached hereto as **Exhibit "A."**

Alternatively, an implied waiver occurred. There is no uniform test for implied waiver and it is determined on case-specific facts; but many federal authorities have held that, in cases like this one, the Nickells would not need to show they suffered prejudice or, if such a showing were required, they have shown enough. Finally (and also alternatively), the lower courts could have correctly concluded that the arbitration contract between Robert Nickell and Relators' corporate predecessor did not convey arbitration rights to Relators because a New York decision analyzing the same arbitration clause held that it did not convey such rights to corporate successors.

For these reasons, the trial court did not abuse its discretion when denying Relators' arbitration motion. Moreover, on three separate occasions, the Dallas Court of Appeals — through two separate panels — wisely and unanimously denied Relators' requested mandamus relief. Relators' latest Petition, their fifth effort to convince a court that the Nickells' claims should be arbitrated, presents no basis for reaching a conclusion that differs from that reached in the four previous decisions and should be denied.

IV. STATEMENT OF FACTS

A. Relators' Persistent and Successful Efforts to Secure a Federal Forum.

The parties agree that the federal courts never had federal question or diversity of citizenship jurisdiction over this case.[4] Even so, after the Nickells commenced this action in state court in June 2004, Relators removed it to Dallas federal court on the theory that it "related to" the WorldCom bankruptcy proceedings, allegedly supporting the exercise of federal jurisdiction under 28 U.S.C. § 1334(b).[5] In support, Relators relied only on the fact that Relator Citigroup, Inc., had filed a Proof of Claim in the WorldCom bankruptcy proceedings on January 23, 2003, supposedly on behalf of itself, Relator Citigroup Global Markets, Inc., and other entities (the "Proof of Claim").[6] The Proof of Claim sought indemnification from the Worldcom bankruptcy estate if Citigroup and its related entities were found liable in various civil actions, like the Nickells', asserting claims related to the purchase of Worldcom securities.[7] Relators theorized that their Proof of Claim's possible impact on the WorldCom bankruptcy estate connected this case with those bankruptcy proceedings and created federal jurisdiction under Section 1334(b).

However, important events that had transpired before the Nickells filed this case (and which were known to Relators when they removed it) nullified the existence of any theoretical federal jurisdiction. Among other things, the WorldCom bankruptcy plan

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[4] *See* Rel. R. Vol. I at 13-25.

[5] Rel. Br. at 5.

[6] Rel. R. Vol. II at 310-11, 382-92.

[7] *Id.*

became effective on April 20, 2004, and that plan rendered Relators' Proof of Claim worthless.[8] As such, Relators' indemnification claims could not possibly have impacted the bankruptcy estate and created the necessary nexus between this case and the bankruptcy proceeding for federal jurisdiction. Thus, Relators' theoretical jurisdiction under Section 1334(b) never existed and, on these grounds, the Nickells persistently challenged their removal and efforts to transfer and consolidate this case with the MDL Proceedings.[9]

Soon after removing their case to the Dallas federal court, Relators filed two motions to dismiss the Nickells' claims. Neither of those motions mentioned Relators' claimed arbitration rights or attempted to preserve such rights in any way.

During this same time period, Relators petitioned the JPML to transfer this case to the MDL Court and to consolidate it with the MDL Proceedings under 28 U.S.C. § 1407 (the "MDL Statute"). In support, they asserted that all pretrial proceedings should be coordinated and consolidated with the MDL Proceedings because it involved near-identical facts and claims as those asserted in cases that had already been centralized there, and that doing so would "serve the convenience of the parties and witnesses and promote the just and efficient conduct of the litigation."[10] In granting Relators' requested

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[8] *See* Rel. R. Vol. III at 746-47, 755, 941, 967-69 (WorldCom objected to certain proofs of claim, including Relators' Proof of Claim); *id.* at 941, 975-77 (the bankruptcy court grants the objections and reclassifies and subordinates the Proof of Claim); *id.* at 707-86 (the bankruptcy court confirms WorldCom's reorganization plan and directs that the holders of Subordinated Claims, including the Proof of Claim, recover nothing).

[9] Rel. R. Vol. II at 399-403 (Plaintiffs' remand motion); Rel. R. Vol. III at 674-786 (seeking leave to supplement remand record with evidence showing virtual impossibility that Relators would recover any money on the Proof of Claim); Rel. R. Vol. III at 788-96 (same); Rel. R. Vol. III at 899-926 (Response to MDL Court's Order demonstrating why remand was warranted).

[10] Rel. R. Vol. III at 944-45.

transfer and consolidation over the Nickells' stringent opposition, the JPML cited this as a primary basis for its decision.[11] Relators never mentioned to the JPML or the MDL Court any alleged arbitration rights or any supposed intent to arbitrate this case.[12]

B. Relators Retreat from Their Reliance Upon Federal Jurisdiction and Abandon Efforts to Adjudicate in a Federal Forum

After this case was transferred and consolidated into the MDL Proceedings, the Nickells were required to demonstrate why the MDL Court's standing order presumptively denying all MDL remand motions did not apply to their case. Accordingly, the Nickells renewed their remand motion establishing (yet again) the absence of federal jurisdiction.[13] The Nickells' remand motion overcame the MDL Court's strong presumption against remand, and the court ordered Relators to respond to the Nickells' motion by February 11, 2005.[14] But on that very day, instead of defending their theory of federal jurisdiction, Relators telephoned the Nickells' counsel and proposed a stipulated remand.[15] Relators' counsel then drafted a proposed stipulated remand order that returned the case to Dallas state court and did not mention the possibility of arbitration.[16] The Nickells agreed that remand was proper, as they had

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[11] Rel. R. Vol. II at 572 (Conditional Transfer Order); *id.* at 573-618; Rel. R. Vol. III at 797-810, 891-95 (reflecting Plaintiffs' opposition, primarily on jurisdictional grounds); *id.* at 897-98 (JPML's Final Transfer Order).

[12] *See* Rel. R. Vol. III at 944-45; *id.* at 811-848.

[13] *See* Rel. R. Vol. III at 899-926.

[14] Rel. R. Vol. III at 927.

[15] Rel. R. Vol. III at 942-43.

[16] *Id.*

urged repeatedly. The MDL Court then signed the order and the case was remanded to the trial court.[17]

As a consequence of Relators' removal, transfer, and consolidation efforts, the Nickells' ability to prosecute the merits of their claims was delayed for over eight months. As set forth in an affidavit the Nickells submitted to the trial court, during that eight-month period they and their counsel expended substantial effort and incurred significant expense responding to Relators' attempts to adjudicate this action in federal court.[18] The Nickells therefore dispute any assertion that the record lacks evidence of prejudice to them.[19]

C. Relators' Sole Reference to Arbitration

Relators cite only one instance in which they mentioned arbitration — a passing reference in a footnote contained in the motion to stay they filed in the Dallas federal court soon after removal.[20] They did not mention arbitration in any of their subsequent filings with the Dallas federal court, and they never mentioned arbitration to the JPML or the MDL Court.

D. Relators' Numerous Statements Advocating and Requesting a Federal Forum

The record is replete with Relators' express and unequivocal statements to the federal courts and the JPML requesting a federal forum for pretrial and discovery proceedings and for the adjudication, litigation, and trial of this case:

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[17] *See id.* at 928-29, 943.

[18] Rel. R. Vol. III at 943.

[19] *See* Rel. Br. at 9.

[20] *See* Rel. Br. at 5-7.

Relators maintained repeatedly that pretrial proceedings and discovery 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-along actions – make similar allegations, name some or all of the defendants as parties, and *necessarily will involve much of the same discovery.* "[21]

- "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.*"[22]

- "[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."[23]

- "[T]he 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) ensures 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.*'"[24]

- "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."[25]

- "[C]entralization of WorldCom-related actions in the Southern District of New York 'will serve the convenience of the parties and witnesses and ***promote the just and efficient conduct of the litigation.***'"[26]

- "[J]ustice and efficiency can only be served by transfer..."[27]

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[21] Rel. R. Vol. II at 541 (emphasis added).

[22] Rel. R. Vol. II at 542 (emphasis added).

[23] Rel. R. Vol. II at 542-43 (emphasis added).

[24] Rel. R Vol. II at 543 (emphasis added and quotation omitted).

[25] Rel. R. Vol. III at 814 (emphasis added).

[26] Rel. R. Vol. III at 944-46 (emphasis added).

[27] Rel. R. Vol. III at 815.

- "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."[28]

- "[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...."[29]

- "*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 legal 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."[30]

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 in the MDL proceedings on the core factual claims asserted here.*"[31]

- "*To the extent Plaintiffs need additional, individualized discovery, Judge Cote has ample authority to permit it, upon an appropriate showing of need.*"[32]

- "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

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[28] Rel. R. Vol. III at 819 (emphasis added).

[29] Rel. R. Vol. III at 821-22.

[30] Rel. R. Vol. III at 823-24 (emphasis added).

[31] Rel. R. Vol. II at 545 (emphasis added).

[32] Rel. R. Vol. II at 545-46 (emphasis added).

may be coordinated with the other cases that have already been transferred to the Southern District of New York."[33]

- "*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 [i.e., 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."[34]

- "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.*"[35]

- "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."[36]

- "[T]he judges of the Southern District of New York definitively decided that, for purposes of pretrial proceedings, WorldCom analyst research ***claims against the Citigroup Defendants will be litigated in the WorldCom Consolidated Proceeding before the MDL Court.***"[37]

Relators averred that pretrial discovery and other activities in this action should proceed in the MDL Court, not in Dallas County Court or in arbitration:[38]

- "[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 for trial in the MDL Proceeding than they could in the Dallas County Court at Law.***"[39]

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[33] Rel. R. Vol. II at 557-58 (emphasis added). Interestingly, Relators said here that the MDL Court was best-suited to decide remand motions but said nothing about whether it was well-suited to decide arbitration motions.

[34] Rel. R. Vol. II at 569 (emphasis added).

[35] Rel. R. Vol. II at 570 (emphasis added).

[36] Rel. R. Vol. III at 816 (emphasis added).

[37] Rel. R. Vol. III at 817 (emphasis added).

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

[39] Rel. R. Vol. II at 667-68 (emphasis added).

- *"[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."*[40]

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

- *"A transfer will streamline pre-trial matters*, avoid duplication, conserve resources, ***and hurry the case towards trial.***"[41]

E. The Court of Appeals Determined that Texas Law Does Not Govern the Arbitrability of this Dispute.

Relators first challenged the denial of their arbitration motion by filing an interlocutory appeal claiming that the arbitrability dispute somehow arose under the TAA, and by filing a mandamus petition asserting that the FAA also applied. Two different panels on the Dallas Court of Appeals unanimously denied their first mandamus petition, their second mandamus petition, and their motion for rehearing, which all sought an order vacating the trial court's denial of Relators' arbitration motion. In overruling Relators' motion for rehearing (and the requested mandamus relief), the Court of Appeals also determined that Relators had failed to show how Texas law could possibly apply to the parties' waiver dispute and dismissed their interlocutory appeal.[42] Relators have not challenged that ruling, which is completely consistent with applicable law.

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[40] Rel. R. Vol. II at 668 (emphasis added).

[41] Rel. R. Vol. II at 671 (emphasis added).

[42] *In re Citigroup Global Mkts., Inc.*, 202 S.W.3d 477, 480-81 (Tex. App. – Dallas 2006, orig. proceeding).

V. ARGUMENT AND AUTHORITIES

A. Relators' Statements and Conduct Demonstrate Their Intent to Litigate and Show That Arbitration Was an Afterthought to Their Failed Litigation Strategies.

Both the Nickells' briefing and the Court of Appeals' analysis of express waiver have focused on the numerous above-quoted statements that Relators made in their federal court briefing. This Response again focuses on those statements to establish express waiver. Alternatively, the separate, implied waiver analysis examines the waiving party's actions and omissions, which, like Relators' express statements, also demonstrates their plan to litigate the Nickells' claims in lieu of arbitration.

The record demonstrates that Relators: (1) quickly abandoned any interest they may have had in arbitrating the Nickells' claims; (2) chose instead to fully litigate those claims in the federal courts; (3) reversed field and pursued arbitration only after realizing they could not substantiate federal jurisdiction; and (4) offered transparent, unpersuasive explanations for their agreed remand, further revealing their true plan to litigate.

1. *Relators abandoned any interest in arbitration and chose not to preserve their alleged arbitration rights.*

Relators claim they preserved their alleged arbitration rights as past litigants have successfully done while removing or transferring cases. To this end, they first assert, "[i]t is undisputed in the record that…all proceedings before the MDL Court occurred in the context of the express reservation of Citigroup's right to compel arbitration."[43] In truth, the record is undisputed that neither "arbitrate," "arbitration," "arbitrator," nor any

[43] Rel. Br. at 8.

other derivative of the word "arbitrate" appears in any pleading Relators submitted to the MDL Court or the JPML. Relators could not have expressly reserved their alleged arbitration rights before the JPML and MDL Court, as they claim they did, without ever mentioning such words. This is particularly true in light of their contrary, express statements to the JPML repeatedly requesting to litigate the Nickells' claims in the MDL Court pursuant to the MDL Statute — all of which should be taken at face-value.[44]

Relators next cite two instances in which they claim to have reserved "all defenses" (again, without mentioning the words "arbitrate," "arbitration," or "arbitrator") and assert that these statements preserved their alleged arbitration rights.[45] Relators not only fail to cite any authority to support this assertion, they have correctly conceded that the right to arbitrate is not a defense.[46] Therefore, their two isolated statements purporting to preserve their "defenses" do not preserve any alleged arbitration rights.

Finally, Relators emphasize their passing, footnoted reference to arbitration in the motion to stay they filed in Dallas federal court before seeking transfer and consolidation.[47] But this passing reference does not preserve their claimed arbitration rights or defeat waiver. Federal courts have held that simply asserting alleged arbitration rights in a pleading does not preserve them. For example, the federal court in *Stevenson*

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[44] *See supra*, Section IV.D, pp. 6-10.

[45] *See id.* at 5, 8.

[46] *See* Nickell R. at 23; *id.* at 117 & 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) . . ."); *Manos v. Geissler*, 321 F. Supp. 2d 588, 595 (S.D.N.Y. 2004) (applying the rule that the existence of an arbitration agreement is not a defense and instructing that "[w]hen a complaint has been filed in a judicial forum, the proper way for a defendant to assert an entitlement to arbitration is by way of motion, not by pleading it as an affirmative defense...").

[47] *See* Rel. Br. at 6 (again mischaracterizing arbitration as a defense).

v. Tyco International, Inc., observed that "merely asserting the right to arbitrate . . . is not enough, on its own, to avoid a finding of express waiver."[48] Relators, on the other hand, cite no authority to support their contention that a single footnoted reference to arbitration preserved their alleged arbitration right. In any event, Relators' intentional deletion of the footnoted mention of "arbitration" from all pleadings and filings following their motion to stay demonstrates their conscious choice to pursue litigation exclusively.

2. *Relators committed to litigating instead of arbitrating by repeatedly representing to the federal court and the JPML that transfer and consolidation were warranted under Section 1407.*

Undoubtedly, Relators had ample opportunity to request arbitration in the trial court or in the federal courts if they truly desired it – and they did not.[49] Instead, they chose to pursue the litigation of this case in a judicial forum by first seeking its transfer and consolidation under Section 1407. To obtain a transfer and consolidation under Section 1407, Relators had to demonstrate that such relief would expedite the case's litigation (not arbitration), including its pretrial/discovery phase. Under Section 1407,

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[48] *Stevenson v. Tyco Int'l, Inc.*, 2006 WL 2827635, at *12 (S.D.N.Y. Sept. 29, 2006) (holding that, unlike this case, the party seeking arbitration took "appropriate steps" to preserve its arbitration rights by repeatedly demanding arbitration in the state and federal proceedings) (citing *Cotton v. Slone*, 4 F.3d 176, 179 (2d Cir. 1993)); *see also Manos*, 321 F. Supp. 2d at 595 (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) (not designated for publication) ("Citibank's argument that it raised arbitration in its Answer and therefore did not waive its arbitral rights is unavailing") (applying *Manos*).

[49] Rel. R. Vol. I at 271 (Relators admit that they could have specially appeared in the trial court and *then* moved to compel arbitration); *id.* at 289-95 (Nickells' letter brief demonstrating complete feasibility of earlier filing of arbitration motion).

discovery and pretrial proceedings occur in the MDL court, and the case is returned to the federal transferor court for trial.[50]

To this end, Relators represented to the Dallas federal court, among other things, that "[a Section 1407] transfer will streamline pretrial matters, avoid duplication, conserve resources, and hurry the case towards trial."[51] They similarly pleaded to the JPML that a transfer would streamline pretrial discovery and effectuate their desire to litigate the Nickells' claims in the MDL Court.[52] Again, Relators' pleadings to the JPML omit any mention of arbitration. Obviously, had Relators asserted any intent to arbitrate in their JPML pleadings, it would have contradicted the very purpose for a Section 1407 transfer and consolidation and would have undermined Relators' representations and arguments, hurting their chances of obtaining a transfer and consolidation. In granting Relators' request for transfer and consolidation, the JPML cited, among other things, Relators' representations that such relief was needed to "promote the just and efficient conduct of the litigation."[53]

If Relators truly intended to seek arbitration after arriving in the MDL Court, they should have forthrightly mentioned those intentions to the JPML and the MDL Court, even if it would have hampered their chances of getting a transfer and consolidation.

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[50] Section 1407 permits transfer "for coordinated or consolidated pretrial proceedings . . . upon [the JPML's] determination that transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions." 28 U.S.C. § 1407(a). A case transferred under Section 1407 is remanded for trial to the federal transferor court upon the conclusion of the coordinated or consolidated pretrial proceedings. *Id.*

[51] Rel. R. Vol. II at 671.

[52] *See, e.g.*, Rel. R. Vol. III at 811-24.

[53] *Id.* at 897-98.

Otherwise, all of their representations concerning their desire to streamline discovery and pretrial proceedings, litigate the Nickells' claims, and hurry the case to trial become misrepresentations. In truth, Relators' pleadings to the JPML (and, indirectly, to the MDL Court) did not contain misrepresentations because by that point Relators had decided to abandon any possible arbitration option and had committed to litigate their claims. Accordingly, they decided not to try to preserve an arbitration option in their JPML pleadings so they could obtain a transfer and consolidation under Section 1407.

3. *Relators planned to fully litigate the Nickells' claims in the MDL Court, but changed plans when things did not go well*

Relators' conduct also demonstrates their intention to fully litigate the Nickells' claims in the MDL Court. After removing this case to federal court on meritless grounds, Relators filed two motions to dismiss the Nickells' claims in Dallas federal court without mentioning their claimed arbitration rights in either motion. They then agreed that the Nickells "need not respond to the pending Motions to Dismiss *until [their] Motion to Remand [had been] determined.*"[54] Because Relators wanted the MDL Court to rule on the Nickells' remand motion rather than the Dallas federal court (after all, it had a standing order presumptively denying all MDL parties' remand motions), they moved to stay all Dallas federal court proceedings pending a decision on their requested transfer and consolidation.

After staying the Dallas federal court proceedings, transferring the case to the MDL Court, and having the MDL Court deny the Nickells' remand motion under its

[54] Rel. R. Vol. III at 947 (8/16/04 Letter from Relators' Counsel to Dallas federal court) (emphasis added).

standing order, Relators hoped to have that court consider their motions to dismiss the Nickells' claims. For this reason, they did not withdraw their motions to dismiss after filing them in the Dallas federal court but only agreed that the Nickells would not need to respond unless and until their remand motion was denied, preferably by the MDL Court. In other words, if Relators truly wished to seek arbitration in the MDL Court, they would have withdrawn their motions to dismiss or, at the very least, agreed that the Nickells would not have to answer them unless and until Relators' arbitration motion was denied.

When the Nickells' remand motion convinced the MDL Court that its standing order did not apply to this case (a rare occurrence in the MDL Proceedings), the burden shifted to Relators to prove why a remand was *not* warranted. Left with no legitimate argument for federal jurisdiction, Relators realized for the first time that they would not be able to stay in the MDL Court – or any federal court – and litigate the Nickells' claims. It was only then that they decided they would try to reverse field and seek arbitration, contrary to their previous representations to the federal courts. Consequently, on the day the MDL Court had ordered Relators to file their response to the Nickells' remand motion, Relators' counsel proposed a stipulated remand to the Nickells' counsel, which was ultimately signed by all parties and the MDL Court.

4. *Further demonstrating their original plan to litigate, Relators' explanation for reversing field is unsupported, illogical, and unconvincing.*

Relators refuse to admit that they took the Nickells on a journey into the federal courts because they wanted to litigate and resolve the Nickells' claims there. Instead, they maintain they wanted the MDL Court (Judge Cote) to eventually consider an

arbitration motion.[55] But when attempting to explain why they agreed to remand this case back to state court in Dallas, Relators claim that "certain events transpired, including a tentative settlement of the WorldCom securities class action claims against Citigroup, that led" Relators to propose a stipulated remand.[56] At the hearing before the trial court on their arbitration motion, Relators' counsel similarly explained,

> after we removed it and before we agreed to remand, our client settled the big case that was the subject of the MDL proceeding. So there wasn't any reason to keep it before Judge Cote because the big case that we'd been subject to was settled in the meantime. So we agreed to a remand back to this Court.[57]

But these explanations make no sense and are inconsistent with Relators' claim that they went to the MDL Court for the sole purpose of having Judge Cote eventually consider an arbitration motion. If Relators merely wanted Judge Cote to consider such a motion rather than adjudicate the Nickells' claims, it would make no difference what was happening in the other MDL cases or the class action. Nothing that happened in those cases would have kept Judge Cote from considering an arbitration motion.

Further, in their lower court briefing, the Nickells challenged Relators to identify or provide a single arbitration motion that they had filed in the MDL Court.[58] Despite transferring and consolidating scores of cases into the MDL Court, they were unable to identify any such motion. And while they may argue that the MDL Court's stay

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[55] Rel. R. Vol. I at 212 (l. 15-18), 213 (l. 8-12, 18-25); 214 (l. 1-7, 13-16); 242 (l. 23-25), 243 (l. 1-10).

[56] Rel. Br. at 7.

[57] Rel. R. Vol. I at 206 (l. 8-13); Rel. Br. at 22 (indicating that the MDL Court would consider the arbitration motion).

[58] Rel. R. Vol. I at 84 & n. 75; Rel. R. Vol. III at 930-939; Nickell R. at 35-36 & n. 128.

precluded their filing of such motions, they could have filed them before that stay was put in place. Or they could have simply written Judge Cote and asked her to consider an arbitration motion despite the stay since the stay related to matters having nothing to do with arbitration motions — if she considered the Nickells' remand motion during the stay she seemingly would have considered an arbitration motion. Instead, it is clear that Relators never filed arbitration motions in any of their numerous MDL cases, including this one, because they wanted to litigate and resolve them in the federal courts.

B. Standard of Review

One basic question lies at the core of this Court's inquiry in this mandamus proceeding: *Did the trial court clearly abuse its discretion in denying the arbitration motion on the grounds that, under federal and New York law, Relators either waived their claimed arbitration rights or never had any (with respect to Robert Nickell) under the contract at issue?* To carry their burden of establishing a clear abuse of discretion, Relators must prove that the lower courts acted "unreasonably, arbitrarily, or without reference to any guiding rules or principles."[59] In other words, they must establish that, in view of the entire record, the facts and law mandated that the courts reach only one conclusion.[60]

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[59] *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 Fin. Corp.*, 881 S.W.2d 319, 321 (Tex. 1994).

[60] *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").

C. The Proper Legal Analysis

Relators' Petition and Brief obfuscates the key issues by applying the wrong law (Texas law), by misinterpreting the applicable law, by applying inapposite cases, and by concocting their own legal test for the waiver analysis.

1. *Although Federal Substantive Law Applies, Relators Argue Texas Law.*

This mandamus proceeding presents no issue of Texas jurisprudence for this Court's determination. While this fact has been repeatedly pointed out to Relators in previous briefing, they have stubbornly continued citing Texas cases without ever bothering to demonstrate how Texas law can possibly apply to the waiver or arbitrability issues. Their hollow claims that this case raises "issues of first impression in Texas jurisprudence" and repeated attempts to mislead this Court to apply Texas law should be rejected.

Well-established precedent dictates, and Relators have conceded, that the FAA governs this case.[61] And the Dallas Court of Appeals correctly determined that federal substantive law applies when determining waiver and arbitrability issues under the FAA and rejected Relators' efforts to apply Texas law.[62] Even if state law applied along with

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[61] Rel. Br. at 1; *Thomas James Assocs., Inc. v. Owens*, 1 SW 3d 315, 319 (Tex. App. – Dallas 1999, no pet.) (FAA governed account agreement containing arbitration provision because it involved the sale of securities and, therefore, interstate commerce); *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 659 (5th Cir. 1999 (finding that FAA applies to all arbitration agreements arising out of contracts "evidencing a transaction involving commerce," which includes the sale of securities).

[62] *See In re Citigroup Global Mkts., Inc.*, 202 S.W.3d 477, 481 (Tex. App. – Dallas 2006, orig. proceeding) (holding, "[t]he issue of arbitrability under the FAA is a matter of federal substantive law" and citing *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494 (5th Cir. 1986) for its rejection of Texas waiver law when analyzing arbitrability under the FAA); *see also Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Lecopulos*, 553 F.2d 842, 845 n.4 (2d Cir. 1977) (applying federal law to waiver issue); *Allied Sanitation, Inc. v. Waste Mgmt. Holdings, Inc.*, 97 F. Supp. 2d 320, 333-34 & n. 12 (E.D.N.Y. 2000) ("waiver of arbitration is decided under federal law since 'the

or in lieu of federal substantive law, applying Texas law here would be especially far-fetched since the arbitration contract at issue states that it "should be governed and construed in accordance with the laws of the State of New York."[63] Nevertheless, federal law exclusively governs waiver and arbitrability determinations under the FAA even in the presence of this New York choice-of-law provision,[64] although the provision creates a connection with the federal law established in the New York federal courts. In short, the correct waiver analysis begins with the application of federal substantive law, leaving Relators' suggested analysis involving Texas law fatally flawed *ab initio*.

2. *Express Waiver vs. Implied Waiver: Two Distinct Legal Principles*

In their efforts to muddle the correct method of analysis, Relators also blur the clear distinction between express and implied waiver. Federal law instructs that a party expressly waives its right to arbitrate by "expressly indicating that it wishes to resolve its claims in court," which is the very test the Dallas Court of Appeals applied correctly in its express waiver analysis.[65] *Alternatively*, when a party has not expressed such wishes, under federal law, the court must determine whether the party has impliedly waived its

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FAA creates a body of federal substantive law of arbitrability, applicable to any arbitration agreement within the coverage of the Act.'") (citations omitted).

[63] Rel. R. Vol. I at 159.

[64] *See Mastrobuono v. Shearson Lehman Hutton, Inc.*, 115 S.Ct. 1212, 1219 (1995).

[65] *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 257 (S.D.N.Y. 2005); *DeGraziano v. Verizon Communications, Inc.*, 325 F. Supp. 2d 238, 244 (E.D.N.Y. 2004); *Apollo Theater Found., Inc. v. Western Int'l Syndication*, 2004 WL 1375557, at *3 (S.D.N.Y. June 21, 2004) (not designation for publication) (both citing *Gilmore*); *In re Citigroup, Inc.*, 202 S.W.3d 477, 481 (Tex. App. – Dallas 2006, orig. proceeding).

arbitration rights through its conduct, often by engaging in substantial or protracted litigation.[66]

The distinction between express and implied waiver is well established in federal case law.[67] Indeed, the Second Circuit has recognized this distinction since at least 1987, and ***it remains valid and unanimously embraced by all federal courts.***[68] And although Texas law does not apply here, Texas courts have recognized the distinction.[69] Therefore, this Court should reject Relators' arguments that the Nickells are attempting to "creat[e] a new type of waiver," that the courts "do not distinguish between 'express' and 'implied' waiver," and that "[n]o logical reason exists to make a distinction" between express and implied waiver.[70]

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[66] *In re Crysen/Montenay Energy Co.*, 226 F.3d 160, 162 (2d Cir. 2000) (also distinguishing between express and implied waiver); *Gilmore v. Shearson/American Express Inc.*, 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 (2d Cir. 1988); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d at 257.

[67] Basic definitions also instruct that express waiver can hinge on the words a party uses to articulate its choice of forum for adjudicating the dispute. 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" and instructs that, when used as a verb, the word "express" means "to represent in words: STATE." Merriam Webster's Collegiate Dictionary (10th ed. 1994). Regarding the word "imply," Black's states: "This word is used in law in contrast to 'express;' *i.e.*, where the intention in regard to the subject matter is not manifested by explicit and direct words, but is gathered by implication or necessary deduction from... [among other things] the conduct of the parties." Black's Law Dictionary (5th ed. 1979) (emphasis added).

[68] *See Gilmore*, 811 F.2d at 112-13 (drawing a distinction between the two); *Century Indem. Co. v. Viacom Int'l, Inc.*, 2003 WL 402792, at *4 (S.D.N.Y. Feb. 20, 2003) (not designated for publication) (citing *Gilmore*); *Stevenson v. Tyco Int'l Inc.*, 2006 WL 2827635, at *11 ("A waiver of the right to arbitrate may be explicit . . . or it may be implicit, based on the conduct of the party alleged to have waived the right.") (citations omitted); *infra* at p. 36, n. 115 (listing federal cases recognizing this distinction.

[69] *See, e.g., Southwind Group, Inc. v. Landwehr*, 188 S.W.3d 730, 735 (Tex. App.–Eastland 2006, no pet.); *Grand Homes 96, L.P. v. Loudermilk*, 2006 WL 3247890, at *5 (Tex. App.–Fort Worth Nov. 9, 2006, no pet. h.) (not designated for publication).

[70] Rel. Br. at 11-12. Few federal cases analyze an express waiver of arbitration rights. Most cases addressing waiver of a party's arbitration rights involve implied waiver and, therefore, analyze a party's conduct to determine whether it intended to choose litigation instead of arbitration. Common sense and the definitions of express and implied waiver explain why there is a comparative scarcity of express waiver cases: Parties who expressly commit to litigation in lieu of arbitration almost always abide by that commitment.

3. *Express Waiver Requires No Showing of Prejudice to the Nonwaiving Party.*

Federal law directs that no showing of prejudice to the non-waiving party is necessary when a litigant has expressly waived its arbitration rights.[71] This contrasts with the showing sometimes needed to establish implied waiver, which in many federal circuits (though not all) requires some evidence of prejudice.[72] Yet Relators have erroneously asserted that most federal courts require a showing of prejudice in express waiver cases when, in fact, every single federal case applying or commenting on the express waiver analysis has said (or indicated) that it requires no such showing.[73] Accordingly, no court engaging in an express waiver analysis under federal law should consider the degree to which the nonwaiving party suffered prejudice because doing so would be arbitrary and would contravene the ***unanimous*** holdings of the federal courts.

D. The Proper Express Waiver Analysis Results in Only One Conclusion.

1. *The Record Contains Overwhelming Evidence of Express Waiver.*

The Court of Appeals carefully analyzed, under federal law, Relators' numerous, unequivocal statements and representations to the federal courts (including the JPML) requesting a judicial forum to litigate the Nickells' claims. While Relators' pleadings contain over twenty such statements, five examples are set forth below:[74]

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[71] *Gilmore*, 811 F.2d at 112.

[72] *In re Crysen/Montenay Energy Co.*, 226 F.3d at 162-63 (noting that in the context of implied waiver, prejudice 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."); *See infra* at pp, 42-45 (describing cases with varying standards required to establish implied waiver.)

[73] *See infra* at p. 36, n. 115.

[74] *In re Citigroup Global Mkts., Inc.*, 202 S.W.3d 477, 481-84 (Tex. App. – Dallas 2006, orig. proceeding); *In re Citigroup Global Mkts., Inc.*, 200 S.W.3d 742, 746-48 (Tex. App. – Dallas 2006, orig. proceeding), *opinion*

- "The judges of the Southern District of New York definitively decided that, for purposes of pretrial proceedings, ***WorldCom analyst research claims [i.e., the Nickells' claims] against the Citigroup Defendants [i.e., Relators] will be litigated...before the MDL Court.***"[75]

- "[Transfer of this case to the MDL Court] ensures 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.***"[76]

- "***Defendants [i.e., Relators], however, merely wish to see this action adjudicated*** in the most efficient and logical location [i.e., the MDL Court]."[77]

- "Moreover, given the amount of discovery taken in the MDL Proceedings, ***the parties to this case could much more rapidly prepare this case for trial in the MDL Proceeding than they could in the Dallas County Court at Law.***"[78]

- "A transfer [to the MDL Court] will streamline pretrial matters, avoid duplication, conserve resources, and ***hurry the case towards trial.***"[79]

These express statements from Relators' federal court pleadings, in addition to the many others quoted above in Section IV.D., must be taken at face value.[80] As such, they are not reasonably susceptible to the interpretation – or even the inference – that Relators intended to arbitrate this case.

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withdrawn and superseded on overruling of rehearing on other grounds by In re Citigroup Global Mkts., Inc., supra).

[75] Rel. R. Vol. III at 817 (emphasis added).

[76] Rel. R. Vol. II at 543 (emphasis added).

[77] Rel. R. Vol. II at 569 (emphasis added).

[78] Rel. R. Vol. II at 667-68 (emphasis added).

[79] Rel. R. Vol. II at 671.

[80] *See supra* at pp. 6-10.

2. *The Court of Appeals Applied the Correct and Only Express Waiver Test*

The Court of Appeals applied the express waiver test set forth in *In re Currency Conversion Fee Antitrust Litigation* to determine whether the above-quoted statements, among others, constituted express waiver.[81] There is not a single federal case setting forth a definition or test for express waiver that differs from or contravenes that test. *In re Currency*, a 2005 decision from the United States District Court for the Southern District of New York (the same district in which Relators attempted to litigate this case), applies federal express waiver law as initially announced by the Second Circuit in *Gilmore v. Shearson/American Express, Inc.* and by other New York federal courts relying on *Gilmore*.[82] The court in *In re Currency* distinguished between express and implied waiver and declared that a party expressly waives its arbitration rights by "expressly indicating that it wishes to resolve its claims in court."[83]

Additional federal case law comports with *In re Currency*'s test for express waiver. For example, in *DeGraziano v. Verizon Communications, Inc.* and *The Apollo Theater Foundation, Inc. v. Western International Syndication*, the presiding New York federal district courts both prescribed the same test for express waiver. According to those courts, express waiver, unlike implied waiver, occurs when a party "expressly

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[81] *In re Citigroup Global Mkts., Inc.*, 202 S.W.3d 477, 481 (Tex. App. – Dallas 2006, orig. proceeding) (citing two federal cases as support for its conclusion that Texas waiver law should not apply in this case and subsequently applying correct test under *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 257 (S.D.N.Y. 2005)).

[82] *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. Pennsylvania Power & Light Co.*, 849 F.2d 761 (2d Cir. 1988).

[83] *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 257 (S.D.N.Y. 2005). Because *In re Currency* did not involve statements or facts indicating express waiver, the court went on to engage in the separate, implied waiver analysis and ultimately determined that Citibank and Chase Manhattan Bank impliedly waived their arbitration rights by pushing the litigation too far and failing to timely move for arbitration. *Id.* at 258.

indicat[es] that it wishes to resolve its claims before a court."[84] The *DeGraziano* Court, like the *In re Currency* Court, proceeded to engage in the separate, implied waiver analysis rather than an express waiver analysis because the party arguing for waiver provided no evidence of an express waiver.[85] In *Apollo Theater*, however, evidence of an express waiver was provided, so the court evaluated that evidence under the above-described test (hereinafter, the "*In re Currency/Apollo Theater* test").

Ironically, the judge who authored *Apollo Theater*, the Honorable Denise Cote, is the same judge who presided over the MDL Proceedings in which Relators sought to litigate – or who Relators claim they eventually wanted to consider an arbitration motion.[86] Indeed, Judge Cote signed the Nickells' and Relators' agreed remand order after Relators determined they would have trouble convincing her that their removal position had merit.[87] In *Apollo Theater*, Western International Syndication ("Western"), the party seeking arbitration and to avoid express waiver, filed a pleading with Judge Cote "explicitly stating that it 'would gladly keep the parties' disputes before this Court.'"[88] Accordingly, Judge Cote concluded that, "Western expressly waived its right

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[84] *DeGraziano v. Verizon Communications, Inc.*, 325 F. Supp. 2d 238, 244 (E.D.N.Y. 2004); *Apollo Theater Found., Inc. v. Western Int'l Syndication*, 2004 WL 1375557, at *3 (S.D.N.Y. June 21, 2004) (not designated for publication).

[85] *See DeGraziano*, 325 F. Supp. 2d at 244 ("Based on the record submitted to the Court there is no indication that [the defendant] expressly waived its right to arbitrate.").

[86] *See Apollo Theater Found., Inc.*, 2004 WL 137557, at *1 (indicating opinion was written by "COTE, J.").

[87] Rel. R. Vol. III at 928-29.

[88] *See Apollo Theater Found., Inc.*, 2004 WL 137557, at *3.

to arbitration by explicitly representing to this Court that it wished to resolve all claims in this forum."[89]

Judge Cote also noted that after stating its preference for adjudicating the action in her court, Western made a strategic decision that arbitration would be better and attempted to undo its previously stated preference for litigation. Consequently, she reprimanded Western, proclaiming that it could not "freely adopt inconsistent positions in this action, delaying the ultimate resolution of [its opponents'] claims."[90] This is consistent with other federal cases finding express waiver when the parties seeking arbitration had taken inconsistent positions regarding their desire to litigate earlier in the same lawsuit. These decisions emphasize that a litigant may not "play fast and loose with the courts" by "freely tak[ing] inconsistent positions in a lawsuit and simply ignor[ing] the effect of a prior filed document."[91] In short, *Apollo Theater* teaches that parties representing to Judge Cote and other federal courts that they want to litigate their claims, despite alleged arbitration rights, should be prepared to honor such representations even when things don't go as planned in the litigation.

After identifying the *In re Currency/Apollo Theater* test as the correct and only express waiver test, the Dallas Court of Appeals applied it and concluded that by stating

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[89] *Id.* Judge Cote also mentioned the fact that Western initially opposed its opponent's motion to compel arbitration as further indicia that express waiver occurred. Nevertheless, her examination of the above-quoted statement, which was the only statement she examined, was clearly the primary and conclusive factor in her express waiver analysis.

[90] *Id.* at *4.

[91] *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. Pennsylvania Power & Light Co.*, 849 F.2d 761 (2d Cir. 1988) (affirming conclusion of express waiver and observing that defendant earlier withdrew motion to compel arbitration as a result of "careful evaluation of business considerations."); *Smith v. Petrou*, 705 F. Supp. 183, 185-86 (S.D.N.Y. 1989).

they "merely wish[ed] to see this action adjudicated" in the MDL Court, Relators were "expressly indicating that [they] wish[ed] to resolve [their] claims in court."[92] Because the words contained in Relators' above-quoted statement and the *In re Currency/Apollo Theater* test are virtually identical, it is impossible to see how the Dallas Court of Appeals could have concluded anything other than express waiver.

As further support for its straightforward analysis of Relators' above-quoted statement under the *In re Currency/Apollo Theater* test, the Dallas Court of Appeals consulted Black's Law Dictionary. According to Black's, "adjudicate" means, "to rule upon judicially."[93] Other Black's definitions for "adjudicate" include, "[t]o settle in the exercise of judicial authority. To determine finally."[94] Therefore, when stating that they "merely wish[ed] to see this action adjudicated" in the federal courts, Relators meant that they wished to see it "resolved" in those courts, as required under the *In re Currency/Apollo Theater* test.

While Relators had no intention of arbitrating this action until they determined they could not stay in Judge Cote's court, one can easily see what she would have done if Relators had actually filed an arbitration motion in her court – something that, again, they have not done in any of the scores of cases they have consolidated with the MDL Proceedings. In *Apollo Theater*, just one court-filed statement concerning Western's desire to litigate in her court convinced Judge Cote that Western had expressly waived its

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[92] *See In re Citigroup Global Mkts., Inc.*, 202 S.W.3d 477, 481-84 (Tex. App.—Dallas 2006, orig. proceeding) (also analyzing additional explicit statements by Relators expressing desire to litigate in a judicial forum, not arbitrate).

[93] *Id.* at 482-83 (citing Black's Law Dictionary (8th ed. 2004)).

[94] Black's Law Dictionary (5th ed. 1979).

arbitration rights – *i.e.*,Western's statement that it would "gladly keep the parties' disputes" in her court. In this case, the Nickells would have presented her with over twenty separate court-filed statements indicating Relators' desire to litigate (or adjudicate) this case in her court and try it in the Dallas federal court.

For example, aside from Relators' statement that they "merely wish[ed] to litigate" in the MDL Court, they declared that: (1) the WorldCom analyst claims (like the Nickells') should "be litigated...before the MDL Court;" (2) there should be a "judicial resolution of all actions to the overall benefit of the parties;" (3) "the parties to this case could much more rapidly prepare this case for trial in the MDL Proceeding than they could in the Dallas County Court at Law;" or (4) transfer and consolidation in the MDL Court would assist the parties to "hurry the case towards trial." In fact, the Dallas Court of Appeals discussed some of these additional statements in their two opinions concluding that express waiver had occurred.[95] Each statement, by itself, supports an express waiver finding under the *In re Currency/Apollo Theater* test because each expressly indicates Relators' wish to litigate or resolve their claims in federal court. Taken together, they compel that conclusion.

Relators have hardly anything to say about the correct test for express waiver or why the many statements in their pleadings do not meet that test. They criticize the Court of Appeals for applying the federal express waiver standard, but never bother to mention that standard, the *In re Currency/Apollo Theater* test, or explain why it is incorrect or

[95] *In re Citigroup*, 202 S.W.3d at 482-83; *In re Citigroup Global Mkts., Inc.*, 200 S.W.3d 742, 747 (Tex. App. – Dallas 2006), *opinion withdrawn and superseded on other grounds by In re Citigroup, supra.*

inappropriate.[96] Instead, they stubbornly and wrongly claim that there is no distinction between express and implied waiver and fail to analyze the facts separately under each. They repeatedly and incorrectly apply Texas implied waiver cases to the express waiver analysis without once explaining why Texas waiver law applies, superficially imploring this Court not to abandon its implied waiver precedent and not to adopt a new express waiver analysis. Instead of discussing or applying the *In re Currency/Apollo Theater* test, they also inexplicably argue that this Court should concoct a new test using Black's definitions of "expressly" and "renounce," along with a 1956 Texas case examining the doctrine of judicial estoppel.[97] In other words, they expected the lower courts to disregard federal jurisprudence on express waiver, while arbitrarily patching together a new express waiver test using selected dictionary definitions and a 50-year old case from the wrong jurisdiction analyzing judicial estoppel, a totally distinct legal doctrine.

In truth, the Nickells are not asking this Court to abandon its implied waiver precedent or to adopt a new analysis for express waiver in Texas. Rather, they merely ask this Court to acknowledge that the Dallas Court of Appeals applied the right law – federal substantive law – and correctly followed the express waiver analysis that has been unanimously embraced by all federal courts that have considered the issue.

3. *Relators inexplicably try to sidestep their statements to the federal courts*

Relators' also try to sidestep the numerous statements they made to the Dallas federal court and the JPML by claiming that they "never expressed to any court, either

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[96] *See* Rel. Br. at 17.

[97] *Id.* While the Nickells also cite Black's definition of "expressly," they do so only to show that *In re Currency, Apollo Theater,* and numerous other federal cases correctly distinguish between express and implied waiver.

orally or in writing, directly or indirectly, that [they]...chose to litigate Plaintiffs' claims in court as opposed to arbitration."[98] This claim fails the straight-face test. By it, Relators maintain that when asserting that they "merely wish[ed] to see this action adjudicated" in the MDL Court, that the Nickells' claims should "be litigated...before the MDL Court," and that the MDL Court would help the parties "hurry the case toward trial," they were not expressing a choice to litigate the Nickells' claims in court. This position does not square with logic, reason, or reality. In fact, in none of their many briefs have Relators ever analyzed the language in their statements or offered any meaning other than the plain meaning the language would be given by any reasonable person who reads those statements.

With nothing else to say about their statements, Relators criticize the Dallas Court of Appeals by claiming that it "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."[99] Yet, true to form, Relators do not discuss any particular statements, explain how they were taken out of context, or offer how they might be interpreted in their allegedly correct context. Instead, they try to globally excuse their statements because they appeared in pleadings related to jurisdiction, their requested transfer, or their requested stay.[100] So, according to Relators, saying they "merely wish to

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[98] Rel. Br. at 8-9.

[99] *Id.* at 18.

[100] *Id.* Read in the context of each pleading in which each statement appears, it becomes even more apparent that Relators' objective was to secure a federal forum to fully litigate this action. If necessary, the Nickells encourage this Court to review each quoted statement in light of the larger pleading in which each appears.

see this action adjudicated" in the MDL Court did not convey any wish to see this action adjudicated in the MDL Court because it appears in a pleading concerning the existence or non-existence of federal jurisdiction. Or perhaps Relators are proposing a rule allowing litigants to say things they don't really mean so long as they do so in a pleading concerning jurisdiction, requests for a transfer, or requests for a stay. Try as they might, Relators cannot distance themselves from their statements by offering such vague, superficial, and illogical arguments.

But the illogical arguments do not stop there. In addition, Relators oddly claim that the Nickells are

> [i]n truth...inferring waiver from Citigroup's conduct, while simply labeling that conduct – which this Court has repeatedly held does not constitute waiver – an express waiver...to escape this Court's prior holdings.[101]

This is yet another conspicuous effort to misguide the Court regarding the applicable law. But more importantly, it is ironic that Relators accuse the Nickells of "inferring waiver from [Relators'] conduct" while labeling that conduct an express waiver when the Nickells have cited over twenty separate statements where Relators expressed their wish to litigate. While Relators do not want to acknowledge or discuss any of these statements, they want to call them conduct. These are written statements material to the federal express waiver test, not conduct, as obvious as that sounds. And they leave nothing for

[101] *Id.* at 22.

the Nickells or anyone else to observe in or infer from Relators' conduct.[102] In reality, it is *Relators* who awkwardly and nonsensically label their statements as "conduct" so they can treat this as an implied waiver case, which, under Texas law, would require some showing of prejudice. Upon seeing through this argument, it becomes clear that Relators know how devastating the federal express waiver cases are to their mandamus positions.

4. *Relators misplace their reliance on inapplicable, inapposite cases.*

As in their prior briefing, virtually every waiver case on which Relators rely is an implied waiver case (most of which are inapplicable Texas cases) in which the court examined a party's conduct and declared that no waiver had occurred, but was not presented with express statements indicating a desire to litigate.[103] The Court of Appeals correctly discounted Relators' heavy reliance on these inapposite implied waiver cases.[104] Relators contend the Court of Appeals was "wrong" to distinguish these cases because the allegedly waiving parties could not possibly have engaged so substantially in the litigation without expressly asserting a desire to litigate in lieu of arbitration.[105]

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[102] While the Nickells did request that the lower courts consider Relators' conduct – aside from their written statements – and are also asking this Court to do so, such consideration is primarily for the separate implied waiver analysis (discussed below), not the express waiver analysis.

[103] *See* Rel. Br. at 18-22. Relators do rely heavily on one express waiver case, *Walker v. Countrywide Credit Indus., Inc.*, 2004 WL 246406, at *3-4 (N.D. Tex. – Jan. 15, 2004) (not designated for publication). There, the court held that a counsel's single statement in response to a judge's question in open court did not amount to express waiver. Specifically, asked whether "the Texas court [could] preside over the exclusively California state law claims if [the] case were transferred" to Texas, counsel stated, "[t]here's nothing that prevents the Texas court from litigating this action." The *Walker* court carefully analyzed this statement, in context, and concluded that it was simply a correct statement of law (*i.e.*, that the Texas court could preside over the California claims) and did not necessarily "indicate that [the allegedly waiving party] intended that this Court must hear [those] claims." *See id.* at * 3. That is, the statement did not necessarily indicate the party's wish to litigate those claims in court. The same cannot be said of the numerous statements appearing in Relators' federal court pleadings.

[104] *In re Citigroup Global Mkts., Inc.*, 202 S.W.3d 477, 483-84 (Tex. App. – Dallas 2006, orig. proceeding).

[105] Rel. Br. at 22.

But there are several reasons why so few cases discuss or involve express assertions of a desire to litigate, including: (1) the allegedly waiving party initiated suit merely to obtain immediate injunctive relief that was unavailable in arbitration (which is exactly what happened in this Court's *In re D. Wilson Construction* decision on which Relators rely so heavily);[106] (2) the allegedly waiving party's pleadings or written discovery clearly stated its preference for arbitration but, subject to the court's possible denial of its arbitration motion, it was moving to dismiss, filing counterclaims, or seeking discovery (usually because the court proceedings required them to take such action); or (3) some of the claims being litigated were not arbitrable, so the allegedly waiving party appropriately pursued discovery on and judicial resolution of the non-arbitrable claims.

Relators single out *Williams v. Cigna Financial Advisors, Inc.* as a case in which "one can only wonder" how the allegedly waiving party (Cigna) filed a motion to dismiss and counterclaims without expressly stating its desire to litigate in lieu of arbitration.[107] But if Relators would simply re-read *Williams* and the Dallas Court of Appeals' opinion discussing it, their wondering would quickly cease. There, Cigna filed its motion to dismiss ***before discovering that its claims were arbitrable*** – in fact, the motion was denied about two weeks before Cigna made that discovery.[108] Upon discovering its arbitration rights, Cigna promptly and appropriately filed an arbitration motion. Moreover, Cigna filed its counterclaims ***after filing its arbitration motion*** and only

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[106] *See In re D. Wilson Constr. Co.*, 196 S.W.2d 774, 783 (Tex. 2006) (holding, in implied waiver case, that party who sought immediate injunctive relief in court to preserve evidence had not thereby waived its arbitration rights).

[107] Rel. Br. at 22.

[108] *Williams v. Cigna Fin. Advisors, Inc.*, 56 F.3d 656, 658 (5th Cir. 1995).

because they were compulsory.[109] The Court of Appeals correctly distinguished *Williams* on these facts. Unlike Cigna, Relators have been fully aware of their claimed arbitration rights since this action began.

5. *Relators wildly speculate about future waiver cases.*

Relators contend that if their petition is denied or the Court writes an opinion adopting express waiver into Texas jurisprudence, every party opposing arbitration will "argue express waiver to avoid the stringent requirements set forth by this Court."[110] Putting aside Relators' attempt to again mislead the Court into a mistaken application of Texas law, there would be no spate of express waiver claims even if the Court formally adopted express waiver into Texas jurisprudence (which, again, would be unsuitable and unnecessary in this case). Federal law, as applied by the federal courts in New York and which the Nickells merely ask this Court to *apply*, not adopt, has had the express waiver doctrine in place since 1987 (the *Gilmore* decision).[111] In the twenty years since *Gilmore*, New York's federal courts have reported about five cases in which express waiver was an issue to be determined.[112]

It all comes down to the words a party uses to indicate a preference to litigate instead of arbitrate. And for obvious reasons, very few parties express that preference unless they intend to commit exclusively to litigation. Parties who really want to

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[109] *Id.* at 661-62.

[110] Rel. Br. at 18.

[111] *Gilmore v. Shearson/American Express Inc.*, 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 (2d Cir. 1988).

[112] *See* footnote 115, *infra* at pp. 36, listing New York's federal express waiver cases, among others. This figure, of course, excludes any federal New York express waiver opinions that were not available on Westlaw.

arbitrate but need to hedge their bets by litigating until their arbitration motion is ruled on (so they are not caught flat-footed if that motion is denied) simply plead to the court and conduct discovery by making explicitly clear that they are doing so subject to their preference for arbitration or pending a decision on their arbitration motion.

In summary, Relators' efforts to sidetrack the Court into the wrong law and wrong types of cases without ever attempting to acknowledge or tackle their own statements head on should fail. It could not be clearer that the lower courts' express waiver analysis applied the only appropriate law (federal law) and the only appropriate test (the *In re Currency/Apollo Theater* test). Considering that test and the compelling nature of Relators' numerous, unequivocal statements, any determination that the Court of Appeals' express waiver conclusions were arbitrary would itself be arbitrary.

E. The "No Prejudice" Rule Is The Correct Rule in Express Waiver Cases.

The Court of Appeals also correctly determined that it need not take the additional step of considering the prejudice suffered by the Nickells. The rule that the nonwaiving party need not prove it was prejudiced by an express waiver — what Relators call the "no prejudice" rule — has been embraced in every single federal case commenting on or engaging in an express waiver analysis.

Even so, Relators claim, "[t]he 'no prejudice' rule in *Gilmore* and *Cabinetree* has never been embraced in Texas and should be rejected because it represents an untenable minority position in the federal system."[113] This statement is dead wrong and misleading (perhaps inadvertently) in many respects. First, for the umpteenth time, it attempts to

[113] Rel. Br. at 14.

misguide this Court to apply Texas waiver law. Second, it implies that Texas courts considering express waiver arguments have rejected the "no prejudice" rule when, in fact, the only Texas opinions considering express waiver have accepted and applied that rule.[114] But most importantly, the above-quoted statement is misleading and incorrect because it commingles *Gilmore* and *Cabinetree* when *Gilmore*, unlike *Cabinetree*, is an express waiver case. And it is extremely important to draw this distinction because the "no prejudice" rule, ***when applied in express waiver cases like Gilmore and this one***, does *not* "represent an untenable minority position in the federal system." To the extreme contrary, every single federal court that has commented on or applied the express waiver analysis has proclaimed or indicated that prejudice need not be shown.[115]

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[114] The Nickells could locate three Texas state court opinions considering express waiver arguments or evidence, the two written by the Dallas Court of Appeals in this case and *Bristow v. Jameson*, 1996 WL 277138, at *6 (Tex. App. – Houston [1st Dist.] May 22, 1996, no pet.) (not designated for publication). Both Dallas Court of Appeals opinions state that aside from express waiver (or "alternatively") a party can impliedly waive its arbitration right "by taking an action inconsistent with that right *to the opposing party's prejudice*." (emphasis supplied). *In re Citigroup Global Mkts., Inc.*, 202 S.W.3d at 481-482; *In re Citigroup Global Mkts., Inc.*, 200 S.W.3d 742, 746 (Tex. App. – Dallas 2006), *opinion withdrawn and superseded on other grounds by In re Citigroup*, 202 S.W.3d 477. This suggests that no prejudice is required in express waiver cases. Also, in support of its express waiver analysis, the Court of Appeals opinions cited *In re Currency*, which affirms the "no prejudice" rule in express waiver cases. *In re Citigroup*, 202 S.W.3d at 482; *In re Citigroup*, 200 S.W.3d at 746. In *Bristow*, the Houston Court of Appeals considered an express waiver argument but dismissed it because the facts did not support it. The court then turned to its implied waiver analysis and pointed out that, with regards to implied waiver, "parties do not waive their right to arbitration by invoking the judicial process in the absence of prejudice to the opposing party," suggesting that the express waiver analysis, by comparison, did not require a showing of prejudice. *Bristow*, 1996 WL 277138, at *6.

[115] *See Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 12 (1st Cir. 2003) (asserting that, under federal substantive waiver law, which applies to cases governed by the FAA, while "components of waiver of an arbitration clause are undue delay and a modicum of prejudice," these are not components of an express or "explicit" waiver analysis); *Gilmore v. Shearson/American Express, Inc.*, 811 F.2d 108, 112-113 (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) (asserting that party claiming waiver did not need to show he suffered prejudice because opponent expressly waived its arbitration rights); *Stevenson v. Tyco Int'l., Inc.*, 2006 WL 2827635, at *11-14 (S.D.N.Y. Sept. 29, 2006) (not designated for publication) (undertaking express waiver analysis without consideration of prejudice but stating that prejudice should be considered in implied waiver analysis); *In re Currency Conversion Fee Antitrust Litig.*, 361 F. Supp. 2d 237, 257 (S.D.N.Y. 2005) (holding that implied waiver analysis and showing of prejudice should be considered "[a]lternately" to express waiver analysis, which simply required party "expressly indicating... wishes to resolve its claims in court."); *DeGraziano v. Verizon Communications, Inc.*, 325 F. Supp. 2d 238, 244 (E.D.N.Y. 2004) (stating that express waiver analysis simply requires determination of whether party expressly indicated wish to resolve claims in court where alternative, implied waiver analysis, assesses prejudice suffered); *Apollo Theater*

As Relators have correctly stated, *Cabinetree* is not an express waiver case but an implied waiver case (*i.e.*, based on conduct, not express statements) in which the Seventh Circuit determined that parties opposing arbitration need not show they suffered prejudice when their opponents waive their arbitration rights by playing fast and loose with the federal court system.[116] As discussed below, *Cabinetree* bears a striking resemblance to this case. Accordingly, the Nickells and the Court of Appeals cited *Cabinetree* primarily for the proposition that, even in implied waiver cases, federal courts have determined that parties can waive their arbitration rights regardless of any prejudice by sitting on those rights, forum shopping, and otherwise playing "heads I win,

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Found., Inc. v. Western Int'l Syndication, 2004 WL 1375557, at *3 (S.D.N.Y. June 21, 2004) (stating that "no showing of prejudice to the opposing party is necessary if a litigant has expressly waived its right to arbitration."); *In re Tyco Int'l., Ltd.*, 2004 WL 1151541, at *1 (D.N.H. May 24, 2004) (not designated for publication)("Prejudice, however, is not required when a waiver stems from an affirmative act rather than mere inaction."); *Walker v. Countrywide Credit Indus., Inc.*, 2004 WL 246406, at *3-4 (N.D. Tex., Jan. 15, 2004) (not designated for publication) (engaging in express waiver analysis without reference to a prejudice component, then considering that component in separate implied waiver analysis); *Century Indem. Co. v. Viacom Int'l, Inc.*, 2003 WL 402792, at *4 (S.D.N.Y. Feb. 20, 2003) (not designated for publication) ("a party may expressly waive its right to arbitration, and if so, prejudice need not be shown."); *Triton Container Int'l, Ltd. v. Baltic Shipping Co.*, 1995 WL 729329, at *3 (E.D. La. Dec. 8, 1995) (not designated for publication) ("waiver may also be express" and "[i]n such a case, the party opposing arbitration should not have to show prejudice because the moving party has knowingly relinquished a contractual right."); *In re Salomon Inc. Shareholder's Derivative Litig.*, 1994 WL 533595, at *11 (S.D.N.Y. Sept. 30, 1994) (not designated for publication) (undertaking express and implied waiver analyses and suggesting that a showing of prejudice was only required in the implied waiver analyses); *In re Bousa, Inc.*, 1993 WL 78019, at *4 (S.D.N.Y. Mar. 16, 1993) (not designated for publication) (stating that a party opposing arbitration should show prejudice, but only "in the absence of an express waiver."); *American Home Assur. Co. v. Fremont Indem. Co.*, 1992 WL 135809, at *1-2 (S.D.N.Y. June 1, 1992) (not designated for publication) ("prejudice need not be shown where there is an express waiver of the right to arbitrate."); *COM-TECH Assocs. v. Computer Assocs. Int'l., Inc.*, 753 F. Supp. 1078, 1085 (E.D.N.Y. 1990) (citing *Gilmore* for proposition that a determination of prejudice suffered was necessary unless the case "involve[s] the effect of executing an express waiver of the right to compel arbitration."); *Smith v. Petrou*, 705 F. Supp. 183, 185 (S.D.N.Y. 1989) (determining that no showing of prejudice was required in express waiver cases and finding that the plaintiffs expressly waived their arbitration rights without attempting to determine whether defendants suffered any prejudice).

[116] *See* Relators' Reply in Support of Petition for Writ of Mandamus at 1, n. 1 (distinguishing *Cabinetree* as an implied waiver case and not an express waiver case); *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388, 391 (7th Cir. 1995).

tails you lose."[117] The Nickells and the Court of Appeals, however, have not cited *Cabinetree* as instructive on express waiver.[118]

So while *Cabinetree* does apply the so-called "no prejudice" rule, it does so when the waiver at issue was implied, not express. And while Relators' description of *Cabinetree* as a widely criticized opinion is grossly exaggerated (the only direct criticism they cite is from two law journal articles), it is true that most other federal circuits *applying the implied waiver analysis* have either considered prejudice as one non-dispositive factor among several or have required some showing of prejudice.

If Relators wish to support their statement that *Gilmore* "represents an untenable minority position in the federal system," they are invited to find a single federal case opposing, questioning, or offering an alternative for the rule set forth in *Gilmore* and the fourteen other federal cases string-cited in footnote 115 above that courts need not consider prejudice in an express waiver analysis.[119] And even though state law does not

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[117] *See, e.g.,* Nickells' Response to Petition for Writ of Mandamus at 9, n. 34 (extensively quoting *Cabinetree*'s discussion of the waiving party's inappropriate gamesmanship); *In re Citigroup Global Mkts., Inc.*, 202 S.W.3d 477, 483 (Tex. App. – Dallas 2006, orig. proceeding) (citing *Cabinetree* for proposition that waiving party there engaged in conduct similar to Relators).

[118] The Nickells, or their undersigned counsel, may be at least partially to blame for confounding *Cabinetree*, an implied waiver case, with *Gilmore* and *In re Currency*, which are express waiver cases. Due to the 15-page limit on the Nickells' Response to Petition for Writ of Mandamus under TEX. R. APP. P. 52.6, the Response abridged its discussion of these cases by discussing them together. *See* Response at 9 (including n. 34) – 10. In doing so, it unintentionally suggests that *Cabinetree* is an express waiver case, which it is not.

[119] Relators may cite or discuss the few federal cases that distinguish between express and implied waiver, indicate they are analyzing both, then generally state that prejudice should be required for a finding of waiver without indicating whether they are referring to express waiver, implied waiver, or both. But on careful review, these cases always speak of a prejudice showing in the context of their implied waiver analysis and never in their express waiver analysis. For example, *Menorah Ins. Co. v. INX Reinsurance Corp.*, a First Circuit case, does this but a later First Circuit case better clarifies that a prejudice showing is only required in the implied waiver analysis. *See Menorah Ins. Co. v. INX Reinsurance Corp.*, 72 F.3d 218 (1st Cir. 1995) (speaking generally of prejudicial consideration in waiver cases but only applying it context of implied waiver analysis); *compare Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 12 (1st Cir. 2003) (asserting that while "components of waiver of an arbitration clause are ...a modicum of prejudice," these are not components of an "explicit waiver" analysis).

apply here, the Nickells have located ten state cases asserting the same rule and not a single one opposing it, questioning it, or offering an alternative rule.[120]

Upon closely examining Relators' Brief, it becomes clear that Relators know about the many federal cases declaring that prejudice need not be shown in an express waiver analysis but have chosen not to acknowledge or deal with those cases. For example, Relators' Brief cites *Century Indemnity Co. v. Viacom International, Inc.* as a case that rejects an express waiver argument;[121] yet Relators fail to acknowledge its treatment of express and implied waiver as separate analyses and its declaration that "a party may expressly waive its right to arbitration, and if so, prejudice need not be shown."[122] And the court in *Century Indemnity* rejected the express waiver argument because, due to the complexities of the case and related litigation, along with the presence

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[120] *In re Citigroup Global Mkts., Inc.*, 202 S.W.3d 477, 481 (Tex. App. – Dallas 2006, orig. proceeding); *Interconex, Inc. v. Ugarov*, 2006 WL 2506562, at *8 (Tex. App. – Houston [1st Dist.] Aug. 31, 2006) (not designated for publication) (stating that assessing prejudice is component of implied waiver analysis, which is applied "[a]lternatively" to express waiver analysis); *Stewart v. Covill and Basham Constr., LLC*, 75 P.3d 1276, 1278 (Mont. 2003) (where Montana Supreme Court held that prejudice factor was part of implied waiver analysis, as set forth in Montana case named, "*Downey*," but would not be necessary in any express waiver analysis); *Bury v. Community Hosps. of Central Cal.*, 2003 WL 21197693, at *7-8 (Cal. App. – 5th Dist. May 22, 2003) (not designated for publication) (determining it to be "illogical to hold that an explicit refusal to be bound by an arbitration clause is not a waiver of the rights under that clause" and that, "[u]nder these circumstances, prejudice to the [party opposing arbitration] need not be demonstrated."); *Firestone v. Oasis Telecommunications*, 38 P.3d 796, 800 (Mont. 2001) (holding that assessment of prejudice was only a requirement of an implied waiver analysis under *Downey* and would not be necessary under an express waiver analysis); *Holm-Sutherland Co., Inc. v. Town of Shelby*, 982 P.2d 1053, 1056 (Mont. 1999) (where Montana Supreme Court engaging in express waiver analysis acknowledged that no prejudice need be shown, but determined that evidence did not indicate express waiver); *Bristow v. Jameson*, 1996 WL 277138, at *4, 6 (Tex. App. – Houston [1st Dist.] May 22, 1996, no pet.) (not designated for publication) (engaging in separate express and implied waiver analyses and considering prejudice only in the implied waiver analysis); *Beverly Hills Dev. Corp. v. George Wimpey of Fla., Inc.*, 661 So. 2d 969, 971 (Fla. App. – 5th Dist. 1995) (finding express waiver and holding that "party who opposes arbitration need not demonstrate actual prejudice unless waiver is premised on delay in asserting the [arbitration] right."); *Breckenridge v. Farber*, 640 So. 2d 208, 211 (Fla. App. – 4th Dist. 1994) ("a showing of prejudice is not required if waiver is based on inconsistent acts rather than delay in asserting one's right."); *Finn v. Prudential-Bache Sec., Inc.*, 523 So. 2d 617, 619-20 (Fla. App. – 4th Dist. 1988) ("actual prejudice must be shown only where there is a finding of waiver based on delay in assertion of one's right" to arbitrate).

[121] *See* Rel. Br. at 20.

[122] *Century Indem. Co. v. Viacom Int'l, Inc.*, 2003 WL 402792, at *4 (S.D.N.Y. Feb. 20, 2003) (not designated for publication).

of nonarbitrable claims, the allegedly waiving party did not know that some of the claims were arbitrable when it supposedly waived its arbitration rights.[123]

Aside from defying the unanimous authority of the federal cases, requiring the Nickells to prove prejudice under these circumstances would defy logic. As *Gilmore* suggests, the only instance in which a requirement of prejudice would make sense is if there is some ambiguity or uncertainty concerning whether a party intended to pursue litigation in lieu of arbitration.[124] But the courts need not consider prejudice when the party has unambiguously expressed its wish to litigate, as Relators have done here.[125]

Apart from *Gilmore*'s rationale, the logic of the "no prejudice" rule in express waiver cases is exemplified by the following question: If Relators had announced to the trial court that they wished to litigate this case and to waive their claimed arbitration rights, and the Nickells did not oppose that request, would the trial court have been compelled to deny it because no one had shown prejudice? Of course not. As with any other contractual rights, a party's express waiver of arbitration rights terminates its ability to re-invoke those rights, regardless of whether prejudice was suffered by the other party.

Indeed, in *Doctor's Associates, Inc. v. Casarotto*, the United States Supreme Court held that Section 2 of the FAA requires arbitration agreements to be treated like all other contracts, leaving them vulnerable to all general contract defenses (including waiver). Therefore, requiring a showing of prejudice when express waiver occurs would be unduly

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[123] *Id.* at *6.

[124] *Gilmore v. Shearson/American Express, Inc.*, 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).

[125] *See id.*

protecting arbitration agreements and treating them much differently than other contracts, thereby contravening Section 2 and the Supreme Court's *Casarotto* holding.[126]

F. Alternatively, Relators Impliedly Waived Any Alleged Right to Arbitrate.

Even if it were determined that the Court of Appeals clearly abused its discretion by concluding that Relators expressly waived their alleged arbitration rights, additional inquiries would have to be made to determine whether mandamus relief were warranted. As demonstrated below, the lower courts could have easily concluded that an implied waiver occurred without abusing their discretion.[127]

Relators' primary argument against implied waiver contends that the Nickells have not shown sufficient prejudice. The Nickells' response to this contention is twofold: (1) federal substantive law does not uniformly require a showing of prejudice in implied waiver cases; and (2) even if the Nickells were required to show sufficient prejudice, they have done so.

1. *Federal law varies regarding whether implied waiver cases require a showing of prejudice and, if so, the degree of prejudice that must be shown.*

The federal circuits do not agree on whether prejudice must be shown in implied waiver cases and, if so, how much must be shown. For example, the Seventh Circuit has

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[126] *Doctor's Assocs., Inc. v. Casarotto,* 116 S.Ct. 1652, 1653 (1996); *see also, St. Mary's Med. Ctr. v. Disco Aluminum Prods. Co., Inc.*, 969 F.2d 585, 590 (7th Cir. 1992) (holding that FAA was enacted to put arbitration clauses on same footing as contracts, but not to give them preferential treatment; "we should treat a waiver of the right to arbitrate the same as we would treat the waiver of any other contractual right.").

[127] In their mandamus briefing, Relators have made much ado about certain statements by the Nickells' counsel during oral argument in the trial court. *See, e.g.*, Rel. Br. at 11. Despite Relators' claims, the Nickells' counsel did not relinquish the Nickells' implied waiver argument. Instead, he merely conveyed that: (a) express waiver was the Nickells' "main point" or primary waiver argument, and (b) the Texas implied waiver cases described by Relators' counsel require a showing of prejudice, as Relators' counsel had argued. *See* Rel. R. Vol. I at 226-27.

determined that a party should not be compelled to arbitrate if the opposing party's implied waiver involved impermissible forum shopping or other misuse of the federal court system, regardless of whether any prejudice was shown or suffered.[128] In *Cabinetree*, the case most often cited for this rule, Chief Judge Posner declared:

> 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 be better off there or in arbitration. It wanted to play heads I win, tails you lose.[129]

The D.C. Circuit also subscribes to the rule that prejudice need not be shown for a finding of implied waiver. In *National Foundation for Cancer Research v. A.G. Edwards & Sons, Inc.*, it held that it "has never included prejudice as a separate and independent element of the showing necessary to demonstrate waiver of the right to arbitration" and that "waiver may be found absent a showing of prejudice."[130]

Other federal circuits have been less clear on whether prejudice is a prerequisite for finding implied waiver or simply one of several nondispositive factors to consider.

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[128] *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F. 3d 388 (7th Cir. 1995).

[129] *Id.* at 391 (concluding that Kraftmaid impliedly waived its arbitration rights without considering whether prejudice was suffered).

[130] *National Found. for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 777 (D.C. Cir. 1987).

The Sixth and Tenth Circuits hold that it is merely one of several factors to consider in the implied waiver analysis and is not dispositive in and of itself.[131]

Further, many federal circuits that require prejudice for implied waiver do not require much. For example, in the First Circuit, implied waiver is established upon showing "undue delay and a modicum of prejudice" to the nonwaiving party, and the "prejudice showing required is tame at best."[132] Also, in that Circuit "[a]lthough mere delay normally will not be sufficient to establish prejudice...a party should not be allowed purposefully and unjustifiably to gain an unfair tactical advantage over the opposing party" and "[j]udicial condonation of such deliberate gamesmanship directly conflicts with the oft-cited principle that arbitration is not meant to be another weapon in the arsenal for imposing delay and costs in the dispute resolution process."[133] The Eleventh Circuit has similarly held that, "[w]hen determining whether the [nonwaiving] party has been prejudiced, we may consider the length of the delay in demanding arbitration and the expense incurred by that party from participating in the litigation process."[134] That Circuit has determined that eight months of delay was sufficient to establish prejudice.[135]

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[131] *See, e.g., Metz v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 39 F.3d 1482, 1489 (10th Cir. 1994) (listing whether delay "affected, misled, or prejudiced" the opposing party as one of six factors the courts should consider, but indicating it was not dispositive by itself); *Southern Sys., Inc. v. Torrid Oven, Ltd.*, 105 F. Supp. 2d 848, 853 (W.D. Tenn. 2000) ("In light of the Sixth Circuit's emphasis on inconsistent conduct and no mention of prejudice, this court will treat prejudice as a significant factor but not a dispositive one").

[132] *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 12, 14 (1st Cir. 2003).

[133] *In re Tyco Int'l Ltd. Sec. Litig.*, 422 F.3d 41, 46, n. 5 – 47 (1st Cir. 2005) (internal citations omitted).

[134] *S&H Contractors, Inc. v. A.J. Taft Coal Co., Inc.*, 906 F.2d 1507, 1514 (11th Cir. 1990).

[135] *See id.*

The Fifth Circuit also examines whether the nonwaiving party was forced to incur delays and costs associated the waiving party's efforts to litigate. It has held that eight months of litigation and the costs and fees associated with that litigation – which would not have been incurred in any arbitration – can amount to sufficient prejudice for an implied waiver.[136] And, like many of the other circuit courts, the Fifth Circuit is more inclined to find prejudice when the waiving party intentionally delays asserting its arbitration rights, especially if it does so to gain a tactical advantage through litigation.[137]

2. *The record establishes implied waiver.*

The record establishes implied waiver regardless of which implied waiver analysis is applied. Among other cases, the rationale of *Cabinetree* has a striking application to the facts of this case. *Cabinetree* instructs that prejudice is not required to establish waiver when the party seeking arbitration has engaged in forum shopping and impermissible gamesmanship. Here, Relators abandoned their claimed arbitration rights and went to the MDL Court to fully litigate their claims – just as they represented to the federal courts and JPML in their pleadings. They only attempted to re-invoke those claimed rights when they realized they could not defeat the Nickells' remand motion and

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[136] *See Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 497 (5th Cir. 1986) (finding prejudice and implied waiver after waiving party did not invoke its arbitration rights until eight months after suit was filed).

[137] *See, e.g., Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 347 (5th Cir. 2004) (finding implied waiver and noting that failure to assert arbitration rights "affects the burden placed on the party opposing waiver" and "bear[s] on the question of prejudice, and may, along with other considerations, require a court to conclude that waiver has occurred"); *Tristar Fin. Ins. Agency v. Equicredit Corp. of Am.*, 97 Fed.Appx. 462, 464, 2004 WL 838633, at *2–3 (5th Cir. 2004) (asserting that the court would have found implied waiver if the allegedly waiving party had "deliberately [taken] advantage of the procedures available in court [during its eight-month stint there] and then sought to compel arbitration" or if the party had "sought arbitration only after suffering a major defeat in [federal] district court").

stay in federal court. This is precisely the type of conduct for which Judge Posner reprimanded the movant in *Cabinetree*.

And even if the Nickells needed to show sufficient prejudice under a federal implied waiver analysis, they did so. First, the Nickells provided proof that Relators' removal, transfer, and consolidation activities forced them (or their counsel) to research numerous issues and write extensive briefing causing them and their counsel to needlessly expend time and thousands of dollars in fees and expenses.[138] All this occurred over eight months, during which time Relators knew about their claimed arbitration rights but decided to abandon them and litigate in court for the tactical reasons described above. Thus, in view of the federal cases discussed above, this record would lead to the conclusion that Relators caused sufficient prejudice to the Nickells and impliedly waived their arbitration rights.

G. Relators Have No Arbitration Rights Vis-à-vis Robert Nickell.

The conclusion that Relators are not entitled to arbitrate any claims asserted by the Nickells is supported by yet another reason: The pertinent contract does not confer any arbitration rights to any Relator with respect to Robert Nickell's claims. According to that contract's choice-of-law provision, this issue is governed by New York state law, and a New York state case, *Milnes v. Salomon, Smith Barney, Inc.*, is directly on point.[139] The *Milnes* court examined an arbitration clause that Shearson Lehman Hutton, a corporate predecessor of Salomon Smith Barney ("SSB") and Relator Citigroup Global

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[138] Rel. R. Vol. III at 943.

[139] *Milnes v. Salomon, Smith Barney, Inc.*, 2002 WL 31940718 (N.Y.Sur. Oct. 11, 2002) (not designated for publication).

Markets, Inc., included in its customer account agreements. That same arbitration clause is in the contract at issue here.

The arbitration clause in *Milnes* and the one at issue here both state that the parties must arbitrate claims between the customer and the brokerage firm "and/or any of its present or former officers, directors, or employees . . . or any predecessor firms by merger, acquisition or other business combination."[140] Because this clause excludes successor firms from the class of persons or entities having arbitration rights, the *Milnes* Court concluded that it did not provide a corporate successor – in that case, SSB – with arbitration rights.[141] The Nickells had no agreement or "paperwork" with any of the Relators,[142] and the record does not reflect otherwise. Rather, the agreement containing the arbitration clause at issue is between him and SSB, Citigroup Global Markets. Inc.'s predecessor.[143] Accordingly, under *Milnes*, that clause does not pass arbitration rights to any of the Relators.

In previous briefing, Relators argued that another section of the contract separate from the arbitration clause generally states that the contract's provisions "shall inure to the benefit of . . . any successor organization or assigns."[144] When SSB pointed to the

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[140] *Id.* at *2; Rel. R. Vol. I at 50.

[141] *Milnes*, 2002 WL 31940718, at *5 (holding that the SSB could not enforce the arbitration clause because, "[b]y its own terms such language clearly does not apply to 'successor' firms, which would include [SSB]").

[142] Relators' Pet. at 3.

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

[144] Relators' Pet. at 14.

same language in *Milnes* and made the identical argument, the court rejected it.[145] Further, the successor language's appearance elsewhere in the contract shows that the contract's drafters could have included such language in the arbitration clause but chose to limit its application to the persons and entities specifically listed.

Relators' Brief never cites *Milnes* or any New York cases. Instead, Relators state that, as successors, they may enforce the arbitration clause against the Nickells "[u]nder applicable law," then cite only Texas cases.[146] Their arguments are again completely blind to the New York choice-of-law clause in the relevant contract. Based on the holdings in *Milnes*, a New York case involving the very same language from the contract at issue, the relevant arbitration clause does not convey arbitration rights to Citigroup Global Markets, Inc., as SSB's successor, vis-à-vis Robert Nickell.

VI. CONCLUSION AND PRAYER

Relators' Petition and Brief on the Merits misguides this Court's mandamus analysis by misstating the facts, ignoring Relators' express statements and conduct, applying the wrong law (Texas law), applying inapposite cases, ignoring the unanimously recognized distinction between express and implied waiver (and the separate analysis for each), and concocting a new test for express waiver. In contrast, the lower courts carefully reviewed Relators' statements, applied the correct law (federal law), focused on analogous cases, and applied the express waiver analysis and test that is unanimously

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

[146] Rel. Br. at 23-24.

supported by the federal cases. The federal cases would also support any conclusion that Relators impliedly waived their arbitration rights. Finally, the *Milnes* case would support any conclusion that Relators never had any arbitration rights vis-à-vis Robert Nickell. Accordingly, the Nickells respectfully request that Relators' Petition be denied and further pray for such other relief, at law and in equity, to which they may show themselves justly entitled.

Respectfully submitted,

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ATTORNEYS FOR REAL-PARTIES-IN-INTEREST

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

VERIFICATION

STATE OF TEXAS §
COUNTY OF DALLAS §

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

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

2. I am counsel of record for Real-Parties-In-Interest Robert A. Nickell and Natalie Bert Nickell (the "Nickells") in the above-styled proceeding and in the underlying lawsuit.

3. I have reviewed the factual statements contained in the section entitled, "Statement of Facts" on pages 3–10 of the foregoing Response to Relators' Brief on the Merits in Support of Petition for Writ of Mandamus. All of the factual information contained therein is, to the best of my personal knowledge, true and correct.

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

FURTHER, AFFIANT SAYETH NOT.

William S. Snyder

Sworn and subscribed before me on this 16th day of January, 2007, to certify which witness my hand and seal of office.

Notary Public in and for the State of Texas

My Commission Expires:

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

CERTIFICATE OF SERVICE

I hereby certify that on this 16th day of January, 2007, pursuant to the Texas Rules of Civil Procedure, a true and correct copy of the foregoing Response of Real-Parties-in-Interest to Relators' Brief on the Merits in Support of Petition for Writ of Mandamus was forwarded to those identified below by U. S. Mail.

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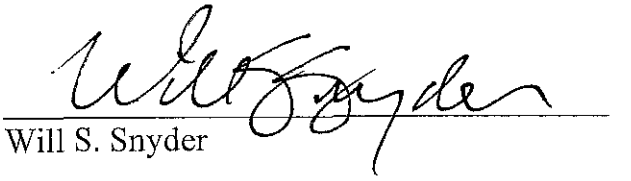

Will S. Snyder

A

RELATORS CONTEND:	THE TRUTH IS:
Texas law applies to the issue of whether Relators waived their claimed arbitration rights.	The Federal Arbitration Act governs this case (as Relators concede), so federal law alone governs the waiver issue.
There is no recognized or logical distinction between express and implied waiver.	Federal case law (and case law from other jurisdictions, including Texas) ***unanimously*** recognizes the distinction between express and implied waiver.
Relators "never expressed to any court, either orally or in writing, directly or indirectly, that [they]…chose to litigate Plaintiffs' claims in court as opposed to arbitration."[1]	Relators repeatedly and unambiguously plead to the federal courts (including the JPML) that they wanted this case "adjudicated," "litigated," judicially resolved, and tried in the federal courts.
The Court should apply a brand new test for express waiver that Relators formulated using select dictionary definitions and a 1956 Texas case related to judicial estoppel.	Federal law has a well-established express waiver test: whether a party "expressly indicat[es] that it wishes to resolve the claims in court," and the Court of Appeals cited and correctly applied this test.
Most federal cases engaging in an express waiver analysis require a showing of prejudice by the party opposing arbitration.	The federal cases ***unanimously*** proclaim or indicate that no showing of prejudice is required in an express waiver analysis.
"It is undisputed in the record that…all proceedings before the MDL Court occurred in the context of the express reservation of [Relators'] right to compel arbitration."[2]	The record establishes that ***Relators never mentioned arbitration to the JPML or MDL Court.***
Relators' preservation of all "defenses" preserved their claimed arbitration rights.	Relators concede that arbitration is not a defense, so any vague and passing attempt to preserve their "defenses" did not preserve any claimed arbitration rights.
Relators transferred this case to the MDL Court so that it could consider an arbitration motion, but agreed to remand it due to certain developments in the other MDL cases.	Relators transferred hoping to fully litigate in the MDL Court, but decided to remand and pursue arbitration only when they could not show federal jurisdiction; and what happened in other MDL cases would have had nothing to do with the MDL Court's consideration of an arbitration motion.

[1] Rel. Br. at 8-9.

[2] Rel. Br. at 8.