ORAL ARGUMENT REQUESTED

06-0886

In The Supreme Court Of Texas
Austin, Texas

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

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

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INTRODUCTION

The principal issue in this case is whether this Court should adopt the Second Circuit's minority view that a showing of prejudice is not required to establish "express" waiver under the FAA.[1] Plaintiffs' assertion that a showing of prejudice is unnecessary in this context is illogical. Moreover, such a holding would substantially weaken arbitration agreements by easing the burden on parties asserting waiver. Accordingly, this Court should reject Plaintiffs' argument.

If the Court decides to adopt an express waiver standard that is different than the waiver standard uniformly applied by the court to date, the second issue is what must a party show to establish express waiver. Plaintiffs' proposed standard -- whether the movant expressly has indicated that it wishes to resolve its claims in court -- is so vague that it is unworkable, and it would swallow the implied waiver analysis. Accordingly, Citigroup submits that the Court should hold that express waiver can only be shown by a specific, direct, and unequivocal declaration that a party is renouncing its arbitration rights.

ARGUMENT AND AUTHORITIES

I. Standard of Review.

Plaintiffs argue that the appropriate standard of review is an abuse of discretion standard. Plaintiffs' Brief at p. 18. This Court, however, has held repeatedly that waiver in the context of arbitration is a question of law. *In re Serv. Corp. Intern.*, 85

[1] Terms used in this brief have the same meaning as defined in Citigroup's opening brief.

S.W.3d 171, 174 (Tex. 2001); *In re Bruce Terminix Co.*, 988 S.W.2d 702, 703-04 (Tex. 1998).

Moreover, the *facts* are not in dispute. Indeed, the parties' actions, the language used in pleadings, motions, and briefs, and the proceedings below are undisputed. Accordingly, the Court's review is *de novo*. *Interconex, Inc. v. Ugarov*, 2006 WL 2506562, at *9 (Tex. App. - Houston [1st Dist.] Aug. 31, 2006, no pet. h.) (not designated for publication); *Texas Residential Mortgage, L.P. v. Portman*, 152 S.W.3d 861, 863 (Tex. App. - Dallas 2005, no pet.).

II. Prejudice is a required element of arbitration waiver.

A. This Court consistently has held that prejudice is an element.

As a starting point in any analysis of this case, it is important to understand that neither this Court nor the Fifth Circuit ever has made a distinction between express and implied waiver. Instead, this Court consistently and unequivocally has held that prejudice is always a required element of "waiver." *In re Vesta Ins. Group, Inc.*, 192 S.W.3d 759, 763 (Tex. 2006); *In re Wilson Const. Co.*, 196 S.W.3d 774, 783 (Tex. 2006). The Fifth Circuit has done the same. *Republic Ins. Co. v PAICO Receivables, LLC*, 383 F.3d 341, 344 (5th Cir. 2004).

In an effort to avoid these precedents, Plaintiffs repeatedly assert that Citigroup relies upon "inapplicable" Texas cases. All parties agree that this case is "governed by the Federal Arbitration Act." Citigroup's opening brief at p. 1; *see also* Appendix II. This Court's recent and abundant analyses of waiver of arbitration rights *under the*

FAA therefore control, and they are not "inapplicable." *See, e.g., In re Vesta*, 192 S.W.3d at 763; *In re Wilson*, 196 S.W.3d at 783.

B. Dispensing with the prejudice requirement makes no sense.

As Citigroup pointed out in its opening brief, under Texas law, waiver must be intentional. *EZ Pawn Corp. v. Mancias*, 934 S.W.2d 87, 89 (Tex. 1996); *Southwind Group, Inc. v. Landwehr*, 188 S.W.3d 730, 736 (Tex. App. - Eastland 2006, no pet.) ("Waiver may be express or implied, but it must be intentional."). Applying a different standard to express and implied waiver therefore belies logic. Given that the same state of mind is required for both, Plaintiffs offer no explanation why prejudice should be required to prove waiver against a silent party who intentionally waives arbitration by "substantially invoking the judicial process" -- taking depositions, sending written discovery, agreeing to trial settings, etc. -- but not to prove waiver against a party who reveals its intent, but engages in no litigation. The former party could litigate for years without a waiver finding, but the latter could waive on day one, even if no one had changed position.

Plaintiffs do not respond to this point. Instead, Plaintiffs, on page 40 of their Brief, only raise the question of whether the trial court would be forced to deny an unopposed motion to waive arbitration, if no prejudice had occurred. Quite logically, a court can freely grant unopposed motions, and parties can agree to litigate what they previously have agreed to arbitrate. No one suggests otherwise. The real question here, however, is whether a non-movant, who *opposes* arbitration of grounds of waiver,

has a lesser burden in the context of (intentional) express waiver than (intentional) implied waiver. As Plaintiffs concede by their silence, the distinction cannot be reconciled.[2]

C. Plaintiffs have overstated -- and in some cases misstated -- the law outside of Texas.

1. Federal cases outside of the Second Circuit do not support Plaintiffs' argument.

Only the Second Circuit Court of Appeals, and its lower courts, have embraced an interpretation of the FAA that dispenses with the prejudice requirement in express waiver cases. *See, infra*, part II.C.2. Nevertheless, with dramatic flair, Plaintiffs claim that their position is "***unanimously embraced by all federal courts.***" Plaintiffs' Brief at p. 21 (emphasis in original). This is simply untrue -- the majority of the Circuit Courts of Appeal make no distinction between express and implied waiver, and require a showing of prejudice.[3]

Apparently after a thorough, nationwide search, Plaintiffs could cite only three cases (two of which are not published) outside of the Second Circuit which they claim have dispensed with the prejudice requirement in the context of express waiver: *Rankin v. Allstate Ins. Co.*, 336 F.3d 8, 12 (1st Cir. 2003); *In re Tyco Intern., Ltd.*, 2004 WL

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[2] Similarly, Plaintiffs fail to explain why, as argued in our prior brief, equitable estoppel requires detrimental reliance when it is based *both* silence and affirmative statements, but "express" waiver would not. Citigroup's Opening Brief at p. 11.

[3] *Republic Ins.*, 383 F.3d at 344; *Creative Solutions Group, Inc. v. Pentzer Corp.*, 252 F.3d 28, 32 (1st Cir. 2001); *Wood v. Prudential Ins. Co. of Am.*, 207 F.3d 674, 680 (3d Cir. 2000); *Fraser v. Merrill Lynch Pierce, Fenner & Smith, Inc.*, 817 F.2d 250, 252 (4th Cir. 1987); *O.J. Dist., Inc. v. Hornell Brewing Co.*, 340 F.3d 345, 356 (6th Cir. 2003); *Dumont v. Saskatchewan Government Ins. (SGI)*, 258 F.3d 880, 886 (8th Cir. 2001); *Britton v. Co-op Banking Group*, 916 F.2d 1405, 1412 (9th Cir. 1990); *Adams v. Merrill Lynch Pierce Fenner & Smith*, 888 F.2d 696, 701 (10th Cir. 1989); *Brown v. ITT Consumer Fin. Corp.*, 211 F.3d 1217, 1222 (11th Cir. 2000).

1151541 (D.N.H. May 24, 2004) (not designated for publication); and *Triton Container Intern., Ltd. v. Baltic Shipping Co.*, 1995 WL 729329 (E.D.La. Dec. 8, 1995) (not designated for publication). However, a careful review of these cases reveals that Plaintiffs mischaracterize two of them and that, in the final analysis, the Second Circuit stands alone on this issue.

In *Rankin*, the First Circuit did *not* hold that prejudice is not required in the event of "explicit waiver." Instead, the court stated *in dicta* only that:

> Where we are dealing with a forfeiture by inaction (as opposed to an explicit waiver), the components of waiver of an arbitration clause are undue delay and a modicum of prejudice.

336 F.3d at 12. This says nothing about the prejudice requirement in the context of "explicit waiver," and, more importantly, the *Rankin* court in fact required, and found, prejudice. 336 F.3d at 13-14.

In *In re Tyco,* the defendant in an arbitration proceeding wrote to the plaintiff's counsel stating that he "does not consent to the AAA's administration of this matter and does not agree to participate in the arbitration filed with the AAA . . . ." *In re Tyco Intern. Ltd. Sec. Litig.*, 422 F.3d 41 (1st Cir. 2005). Thereafter, the AAA dismissed the plaintiff's arbitration for lack of consent. *Id.* at 43. When the defendant later sought to compel arbitration, the lower court, in an unpublished opinion, found "explicit" waiver, and concluded that prejudice was not required. *Id.*

However, the First Circuit -- in published subsequent history not included in Plaintiffs' citation of the lower court opinion -- affirmed (*Id.*), but only after requiring, and finding, prejudice:

> Once Tyco [plaintiff] established that Swartz [defendant] had waived the right to arbitrate, it *also was required to demonstrate a "modicum of prejudice."*

Id. at 44 (emphasis added) (*citing Rankin*, 336 F.3d at 12). The significance of this ruling is more clearly demonstrated by the fact that neither party had taken *any discovery* or otherwise litigated the issues. Indeed, no case was pending after the AAA dismissed. Thus, the waiver argument was based *solely* on the defendant's statements, but the court still required a showing of prejudice.

The last of these three cases, *Triton*, is the only non-Second Circuit case that supports Plaintiffs' position, but it is factually distinguishable, unpublished, and uncited by any court. In *Triton*, *after* the defendant had filed a motion to compel arbitration, its president sent a letter expressly stating that the defendant refused to arbitrate the dispute. *Id.* at *3-4. The court found that the plaintiff was not required to show prejudice, "because the moving party has knowingly relinquished a contractual right." *Id.* at *3. The court cited no authority for this conclusion, and no court ever has relied on this case. Moreover, the holding is at odds with subsequent Fifth Circuit authority. *See, e.g., Republic Ins.*, 383 F.3d at 344. Accordingly, this Court should not follow *Triton*.

2. The Second Circuit courts have limited their express waiver analysis to very specific facts.

Only three Second Circuit cases actually have found express waiver without requiring a showing of prejudice: (1) *Gilmore v. Shearson/American Express Inc.*, 811 F.2d 108 (2d Cir. 1987); (2) *Smith v. Petrou*, 705 F.Supp. 183 (S.D.N.Y. 1989); and (3) *The Apollo Theatre Foundation, Inc. v. Western Intern Syndication*, 2004 WL 1375557 (S.D.N.Y. June 21, 2004) (not designated for publication). The facts of those cases, however, are strikingly different from the facts of this case.

In the first of these, *Gilmore*, the movant had filed, and withdrawn, a motion to compel arbitration. Moreover, the movant conceded that it previously abandoned its arbitration rights. 811 F.2d at 112. The court found that, because the abandonment of arbitration was unambiguous, and indeed conceded, a showing of prejudice was not required. *Id.* at 112-13.

In *Smith* and *Apollo Theatre*, the movants previously, and successfully, had opposed arbitration motions, and refused to consent to arbitration. *Smith*, 705 F.Supp. at 185; *Apollo Theatre*, 2004 WL 1375557, at *3. The courts thus applied the *Gilmore* rule, and dispensed with the prejudice requirement.

The other Second Circuit cases cited by Plaintiffs are cases which merely cite the *Gilmore* rule and/or refuse to expand it beyond these limited factual situations. In

fact, many Second Circuit courts have refused to apply the *Gilmore* rule, even though an express waiver argument arguably would apply. [4]

3. Plaintiffs' state law cases are inapplicable and/or inapposite.

In footnote 120 of their brief, Plaintiffs cite ten state court cases which purport to support their argument that prejudice is not required in the context of express waiver. Of course, one is the case under review by this Court, and another is a later Texas lower court case, *Interconex, Inc. v. Ugarov,* 2006 WL 2506562, at *8 (Tex. App. - Houston [1st Dist.] Aug. 31, 2006, no pet.) (not designated for publication), that cites for support only the case under review. Even that court, however, required a showing of prejudice. *Id.* at *10.

The other cases cited in footnote 120 of Plaintiffs' brief are irrelevant because they are not FAA cases. Indeed, three of the cases cited by Plaintiffs are Florida lower court cases. The Florida Supreme Court, however, has dispensed with the

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[4] *COM-TECH Assocs. v. Computer Assoc. Intern., Inc.*, 753 F.Supp. 1078, 1085-86 (E.D.N.Y. 1990) (finding implied waiver, but specifically finding that the case does not involve "an express waiver of the right to compel arbitration," even though the movant, among other things, submitted an extensive pretrial order stating that "[t]his is a jury case" and "[t]he case will be tried in the December 1989 term."); *Stevenson v. Tyco International, Inc.*, 2006 WL 2827635, at *11-12 (S.D.N.Y. Sept. 29, 2006) (not designated for publication) (noting the limited circumstances in which express waiver had been found, and rejecting an express waiver analysis, even though the movant had sought affirmative relief from a court under the same agreement that contained the arbitration clause) (*citing Smith v. Petrou*, 705 F.Supp. 183, at 185, (S.D.N.Y. 1989)); *Century Indemnity Co. v. Viacom International, Inc.*, 2003 WL 402792, at *6 (S.D.N.Y. Feb. 20, 2003) (not designated for publication) (distinguishing the *Gilmore* express waiver analysis even though the movant previously had certified to the Court that "no arbitration was contemplated"); *In re Salomon Inc. Shareholders' Deriv. Litig.*, 1994 WL 533595, at *10-11 (S.D.N.Y. Sept. 30, 1994) (not designated for publication) (distinguishing *Gilmore* and *Smith*, and finding no express waiver, even though the movant's counsel had written the arbitrators requesting dismissal of claims covered by the arbitration agreement); *In re Bousa, Inc.*, 1993 WL 78019, at *4 (S.D.N.Y. Mar. 16, 1993) (not designated for publication) (distinguishing *Gilmore* and rejecting an express waiver finding, even though the movant, prior to seeking arbitration, sought the dismissal of the case expressing his desire for the claims to go forward in Texas state court where, according to the movant, he would be "entitled to request a jury trial . . . ."); *American Home Assurance Co. v. Fremont Indemnity Co.*, 1992 WL 135809, at *2-3 (S.D.N.Y. June 1, 1992) (not designated for publication) (declining to find express waiver even though the defendant had stipulated to a FED. R. CIV. P. 42 consolidation so that the "four lawsuits could be tried in three segments . . . ."), *aff'd.* 983 F.2d 1048 (2d. Cir. 1992).

prejudice requirement in *all* waiver analyses, clearly conflicting with this Court's (and almost all other courts') interpretation of the FAA. *Raymond James Fin. Serv., Inc. v. Saldukas*, 896 So.2d 707, 711 (Fla. 2005). Additionally, they are distinguishable or inapposite.[5] The Court therefore should disregard those cases.

III. If the Court decides to adopt a separate express waiver standard, it should require, at a minimum, a deliberate, clear, and unequivocal express waiver.

Plaintiffs' proposed express waiver standard -- "expressly indicating that it [the movant] wishes to resolve its claims in court" (Plaintiffs' Brief at p. 20) -- would swallow the implied waiver standard. In fact, in many cases where this Court and/or the Fifth Circuit have refused to find waiver, the movant had arguably indicated its desire to resolve its claims in court by engaging in discovery (*In re Vesta*, 192 S.W.3d at 763); filing a counterclaim "expressly" seeking judgment from the trial court (*In re Koch Industries,* 49 S.W.3d 439, 445-46 (Tex. App. - San Antonio 2001, pet. denied)

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[5] *Holm-Sutherland Co. v. Town of Shelby*, 982 P.2d 1053, 1056 (Mont. 1999) (*citing Downey v. Christensen*, 825 P.2d 557, 559 (Mont. 1992)) (court cited three *Downey* requirements for arbitration waiver, including prejudice. The court then stated that ***"in setting forth those three factors [in Downey], we did not distinguish between express and implied waiver."*** The court further found express waiver inapplicable, ***"because the movant did not withdraw a motion to compel arbitration.")*** (emphasis added.); *Stewart v. Covil and Bashram Constr., L.L.C.*, 75 P.3d 1276, 1278 (Mont. 2003) (court noted *in dicta* that waiver may be express or implied, but it did not hold that prejudice was not required with respect to the latter. Express waiver was not an issue.); *Firestone v. Oasis Telecommunications, Inc.*, 38 P.3d 796, 800 (Mont. 2001) (same); *Bury v. Community Hosp. of Central Ca.*, 2003 WL 21197693, at *6 (Cal. App. May 22, 2003) (not designated for publication) (over a strong dissent, the majority of the panel of the intermediate appellate court found express waiver under California state law in the absence of prejudice, where the movant had stated "I reject arbitration in favor of the more public court process . . . ."); *Beverly Hills Dev. Corp. v. George Wimpey of Fla., Inc.*, 661 So.2d 969, 971 (Fla. App. 1995) (stating that under Florida law prejudice only is required when waiver "is premised on delay in asserting the right," but not when it is based on "participation in a lawsuit . . . ." That is inconsistent with settled law under the FAA. The court cited *Gilmore* and *Smith v. Petrou*, but noted that their holdings were limited to the withdrawal of an arbitration motion and where the movant previously had opposed arbitration.); *Finn v. Prudential-Bache Sec., Inc.*, 523 So.2d 617, 619-20 (Fla. App. 1988) (applying same rule as the *Beverly Hills* case in a case under Florida state law, and finding waiver, without a showing of prejudice based solely on "inconsistent acts" in taking part in the litigation.); *Breckenridge v. Ferber*, 640 So.2d 208, 210 (Fla. App. 1994) (same); *Bristow v. Jameson*, 1996 WL 277138, at *6 (Tex. App. Houston [1st Dist.] May 22, 1996) (not designated for publication) (Finding no waiver, express or implied, and finding no prejudice. The court did *not* hold that prejudice was not required in the context of express waiver.).

(counterclaim not waiver); "expressly" seeking a trial setting (*Southwind Group, Inc. v. Lendwehr*, 188 S.W.3d 730, 736 (Tex. App. - Eastland 2006, no pet.) (seeking trial setting not a waiver); *EZ Pawn*, 934 S.W.2d at 90 (same)); or removing the case to federal court, thereby "expressing" a desire for a federal court adjudication (*In re Winter Park Constr., Inc.*, 30 S.W.3d 576, 579 (Tex. App. - Texarkana 2000 no pet.) (removal not a waiver)). A more exacting standard therefore is required.

The standard argued by Citigroup in its opening brief -- a specific, direct, and unequivocal declaration that a party is renouncing its arbitration rights -- would resolve the uncertainty inherent in Plaintiffs' express waiver analysis.[6] That standard is consistent with the meaning of "expressly" in *Black's Law Dictionary*, and it is consistent with the common law doctrine of judicial estoppel, the closest cousin to arbitration waiver. *Long v. Knox*, 155 Tex. 581, 291 S.W.2d 292, 295 (1956).

The standard also is consistent with the *Gilmore* express waiver standard as applied by its progeny. Indeed, that explains why *Gilmore* only has been applied in extremely limited circumstances, and why the Second Circuit courts apply an implied waiver analysis, and require prejudice, in the event of ambiguity. *See* part IV.A.3.

The test proposed by Citigroup would avoid the *ad hoc* application of the express waiver principle. It would encompass situations where a movant previously had withdrawn a motion to compel arbitration (*Gilmore*) and where a movant

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[6] Although that standard was fully discussed in Citigroup's opening brief at pp. 17-18, Plaintiffs inexplicably claim that Citigroup has "hardly anything to say about the correct test for express waiver . . . ." Plaintiffs' brief at 28.

previously had opposed an arbitration motion (*Appollo Theater* and *Smith*). No reason exists to extend express waiver beyond those limited circumstances. A more imprecise standard, such as that suggested by Plaintiffs, would invite a flood of cases claiming express waiver.

What Plaintiffs call the "*In re Currency/Apollo Theater* test" merely begs the question: what must a party "express" to indicate "that it wishes to resolve its claims before a court"? As shown above, the New York courts have found such an expression only when a motion to compel arbitration is withdrawn or opposed. On the other hand, they have found express waiver inapplicable when a defendant requested a "jury trial" on a certain date (*COM-TECH*, 753 F. Supp. at 1085-86); advised the court that "no arbitration was contemplated" (*In re Salomon*, 1994 WL 533595, at *10-11); sought dismissal so the claims to go forward before a jury in another court (*In re Bousa, Inc.*, 1993 WL 78019, at *4); and stipulated to consolidation with other lawsuits for trial (*American Home*, 1992 WL 135809, at *2-3). Thus, the Court should hold that the express waiver standard is a specific, direct, and unequivocal renunciation of arbitration.

IV. Express waiver is not present in this case.

Citigroup never withdrew an arbitration motion (as in *Gilmore*), or opposed an arbitration motion (*Apollo Theatre, Smith*). Additionally, Citigroup never said, either orally or in writing, words to the effect that it "waives its arbitration rights" or "chooses to litigate, not arbitrate, its claims." Thus, as the cases cited by Plaintiffs

demonstrate (*see, supra,* notes 4 and 5), Citigroup did not expressly waive its arbitration right. Instead, this case is, if anything, a case requiring an implied waiver analysis.

Nevertheless, in an effort to manufacture an express waiver, Plaintiffs rely solely on isolated, out-of-context statements in venue briefing. Those statements, however, do not establish waiver for the reasons described below. Moreover, as show below, Citigroup did not "play fast and loose with the courts," as alleged by Plaintiffs.

A. The statements quoted by Plaintiffs do not indicate that Citigroup expressly waived its arbitration rights.

Plaintiffs quote 19 short passages from Citigroup's briefing related to MDL transfer and/or a stay pending MDL transfer in support of their express waiver argument. In Appendix I attached to this brief, Citigroup puts each statement in context, and it demonstrates how those statements are not an indication of arbitration waiver. Some observations, however, are relevant to each statement.

1. None of the statements even mentions or refers to arbitration, much less expressly waives it.

A review of the statements reveals that none relate in any way to arbitration. On the other hand, in the cases cited by Plaintiffs finding express waiver, the renunciation was clear and unmistakable. Accordingly, even under the *Gilmore* rule, waiver is not present here.

2. The statements all were made after Citigroup expressly reserved its arbitration rights and defenses.

Very early in the case, prior to all of the motion practice and briefing of which Plaintiffs complain, Citigroup expressly reserved its "defenses, including, but not limited to, . . . the requirement that Plaintiffs arbitrate, not litigate, their claims." R. Vol. II, p. 539, n. 1. Plaintiffs acknowledge this fact, but they complain that this reservation was in a footnote and not repeated in subsequently filed documents. Plaintiffs' Brief at p. 6.

Certainly, Plaintiffs do not expect the Court's ruling in this case to turn on such a small detail. Plaintiffs are represented by skilled and experienced lawyers. They cannot credibly contend, nor do they, that they were not fully apprised that Citigroup planned to stand on its arbitration rights at least by the filing of that document shortly after Citigroup removed the case to federal court.

Additionally, Citigroup frequently filed documents, including the first document it filed in the case, subject to and reserving "all defenses." *See* R. Vol. II, p. 308. Thereafter, while the case was pending in the MDL court, it was subject to an order that expressly reserved all of Citigroup's defenses. R. Vol. I at p. 127. Finally, the Stipulation and Order entered by the MDL Court remanding this case to the trial court clearly stated that Citigroup "reserved any and all defenses available." R. Vol. III, p. 928.

Plaintiffs split hairs by arguing that arbitration "is not a defense." Plaintiffs' brief at 12. To the contrary, arbitration is widely considered to be a "defense" in federal court. *Apollo Theatre*, 2004 WL 1375557, at *1 ("Western's answer did not include the affirmative defense of arbitrability."); *In re Citigroup, Inc.*, 376 F.3d 23, 25 (1st Cir. 2004) ("[T]he district court granted Traveler's motion to amend their answer to assert their right to arbitrate as an affirmative defense."); *In re Salomon*, 1994 WL 533595, at *4. Accordingly, Citigroup early and frequently reserved its arbitration rights.

3. At most, Citigroup's statements are ambiguous, thus requiring an implied waiver analysis.

Even the Second Circuit recognizes that it must undertake an implied waiver analysis if express waiver is ambiguous. In *American Home Assurance Co. v. Fremont Indemnity Co.*, 1992 WL 135809, at *1 (S.D.N.Y. June 1, 1992) (not designated for publication), for example, the defendant moved to compel arbitration after it stipulated to a consolidation of actions under FED. R. CIV. P. 42(a), which expressly allows consolidation "for a joint hearing or trial . . . ." The Court stated that, whether this was an express waiver was "problematic," and because of the ambiguity, required a showing of prejudice. *Id.*; *see also Stevenson*, 2006 WL 2827635, at *13 (If express waiver is ambiguous, the court should analyze under an implied waiver standard); *Smith*, 705 F.Supp. at 185 (same).

At most, the passages cited by Plaintiffs are ambiguous as to Citigroup's intentions with respect to arbitration. Accordingly, the Court should require a finding of prejudice.

B. Citigroup has not "played fast and loose with the courts," as alleged by Plaintiffs.

In their brief, Plaintiffs essentially accuse Citigroup of frivolously removing this case to federal court and causing its transfer to the MDL Court. Thus, Plaintiffs hint that waiver is an appropriate punishment. While there is no basis for such an argument as a grounds for waiver, it is also clear that Citigroup did nothing inappropriate.

1. Citigroup's removal was based on solid authority.

Citigroup never denied that it removed the case to federal court on the basis of "related to" bankruptcy jurisdiction (28 U.S.C. § 1334) after the bankruptcy court had confirmed WorldCom's plan of reorganization. However, jurisdiction under § 1334 may exist after the confirmation of a plan of reorganization. *See, e.g., In re General Media, Inc.*, 335 B.R. 66, 73 (Bankr. S.D.N.Y. 2005).[7]

Indeed, in an almost identical WorldCom-related case that was removed post-confirmation, the court, on these same facts, decided to leave the jurisdictional issue for the MDL Court after transfer, finding "it is not obvious that removal was improper" and that the remand issues were "factually and legally difficult." *New*

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[7] A full discussion of Citigroup's arguments relating to federal court jurisdiction may be found at R. Vol. II, p. 550.

Mexico State Investment Council v. Alexander, 317 B.R. 440, 444 (D.N.M. 2004). Moreover, the MDL Court itself had rejected efforts to remand cases upon confirmation of the WorldCom plan. *In re WorldCom, Inc. Sec. Litig.*, 294 B.R. 553, 556-57 (S.D.N.Y. 2003), *aff'd*, 368 F.3d 86 (2d. Cir. 2004). Accordingly, Plaintiffs' contention that removal was groundless is without factual or legal support.

2. MDL transfer was not a matter within Citigroup's discretion.

MDL transfer is appropriate where "one or more common questions of fact . . ." exist. 28 U.S.C. § 1407(a). Plaintiffs do not dispute, nor could they, that the present case shares common questions of fact with the other WorldCom-related cases pending in the MDL Court. The JPML agreed. R. Vol. III at p. 897.

Rule 1.1 of the Rules of Procedure of the Judicial Panel on Multidistrict Litigation (the "JPML Rules") defines a "tag-along action" as "a civil action pending in a district court and involving common questions of fact with actions previously transferred under [28 U.S.C.] § 1407." Thus, the present action, when it was pending in the Dallas federal court, was a "tag-along action."

For that reason, Citigroup had no choice but to file its tag-along notice (R. Vol. III, p. 944) that led ultimately to MDL transfer:

> (e) Any party or counsel in actions previously transferred under Section 1407 . . . *shall promptly notify* the Clerk of the Panel of any potential "tag-along actions" in which that party is also named or in which that counsel appears.

JPML Rule 7.5(e)(emphasis added). Certainly, Citigroup, by complying with the JPML Rules, did not play fast and loose with the courts.

Citigroup cited to the court of appeals the many cases that hold that removal to federal court is not a waiver of arbitration.[8] The court of appeals agreed with those cases, but it still found waiver. In light of the fact that Citigroup was *required* to file a tag-along notice after removal, it is difficult to reconcile the court of appeals' holding with those of the cases cited in footnote 9.

3. Citigroup properly did not seek arbitration prior to MDL transfer.

Plaintiffs' next argue, without citation to any authority, that Citigroup should have moved to compel arbitration prior to remand, either in the Dallas federal court or in the MDL Court. That argument is without merit.

The arbitration issue was one of many questions this case had in common with other cases transferred to the MDL Court. Accordingly, delaying the arbitration motion until MDL transfer conserved judicial resources and avoiding the risk of inconsistent rulings on those motions.

In *In re Equity Funding Corp. of Am. Sec. Litig.*, 396 F.Supp. 1277, 1279 (Jud. Pan. Multi. Lit. 1975), the JPML faced a similar situation. There, the case under consideration for MDL transfer included arbitrability issues. *Id.* at 1279. The JPML

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[8] *In re Winter Park Const., Inc.*, 30 S.W.3d 576, 578-70 (Tex. App. -- Texarkana 2000, no pet.); *Williams v. Cigna Fin. Advisers, Inc.*, 56 F.3d 656, 661 (5th Cir. 1995); *In re Koch Ind., Inc.*, 49 S.W.3d 439, 446 (Tex. App. -- San Antonio 2001, no pet.).

concluded that the arbitration issue was common to other cases previously transferred, and transfer therefore was warranted:

> Moreover, we are advised that, like the Zimmerman action, a number of the broker-dealer actions currently pending in the transferee district involve the question of the propriety of arbitration proceedings. ***Thus, [MDL] transfer of Zimmerman will result in the additional benefits of conserving judicial effort and eliminating the possibility of inconsistent rulings on this particular question.***

Id. (emphasis added).

Accordingly, Citigroup correctly did not submit its arbitration motion prior to MDL transfer. Plaintiffs' contentions that Citigroup should have sought arbitration prior to MDL transfer and that the MDL panel would have refused to transfer the action if it was advised arbitration was an issue (Plaintiffs' Brief at 14), therefore, are incorrect.

4. Citigroup could not seek arbitration in the MDL.

Plaintiffs next argue that Citigroup could have sought arbitration from the MDL Court. Plaintiffs' Brief at p. 14. Plaintiffs also claim that Citigroup did not identify any other case where it sought arbitration in the MDL Court, which, according to Plaintiffs, they "challenged" Citigroup to do. *Id.* at 17.

The record is clear, however, that this case, while it was pending in the MDL Court, *and all other Individual Actions pending in the MDL Court*, were "stayed." R. Vol. I at 127. Moreover, Citigroup -- in this case and *all other Individual Actions* -- was not required to "move, answer, or otherwise respond . . . ." *Id.* At the risk of stating the

obvious, Citigroup could not file an arbitration motion in a case that is stayed, *especially* a case where subject matter jurisdiction is in question. Instead, Citigroup filed its motion to compel arbitration at its first opportunity -- with its answer when the case was remanded. Plaintiffs, in their zeal to accuse Citigroup of impropriety, have failed to recognize these basic, undisputed facts.

5. Citigroup did not change its litigation strategy with respect to arbitration.

Plaintiffs further argue, incorrectly, that Citigroup did not plan initially to seek arbitration, but "changed plans when things did not go well." Plaintiffs' Brief at p. 15. A glaring absence following that statement is *any* citation to *any* evidence in the record.[9] In fact, the *only* evidence in the record on this point belies Plaintiffs' speculation:

> 2. At no time during the course of this litigation did defendants intend to waive their arbitration rights. Instead, it was at all times defendants' intention to present their Motion to Compel Arbitration to either: (a) the United States District Court for the Southern District of New York (the "MDL Court") for its consideration after it first resolved issues regarding its subject matter jurisdiction; or (b) this Court [Dallas County Court at Law], if the MDL Court determined that it lacked jurisdiction.

[9] Plaintiffs' argument in this regard further demonstrates that this is not truly an express waiver case. Indeed, Plaintiffs merely *infer* the truth of this statement from Citigroup's procedural activities below -- there certainly is no evidence that supports that Citigroup *expressed* such a plan.

R. Vol. I at pp. 137-38.[10] Plaintiffs had the right to submit controverting evidence, and they failed to do so. Thus, Plaintiffs' contention that Citigroup acted inappropriately is without merit.

V. Citigroup did not impliedly waive arbitration.

A. Prejudice clearly is a required element of waiver.

Next, Plaintiffs argue that Citigroup impliedly waived its arbitration rights under the FAA. Demonstrating a lack of respect for this Court, Plaintiffs cite not a single opinion issued by this Court in this regard, including those as recent as last year. Instead, they cite cases from the Seventh[11] and District of Columbia Circuits[12] purportedly holding that prejudice is not required for an implied waiver. Quite clearly, under the FAA as interpreted by this Court, the Fifth Circuit, and most every other court in the nation, prejudice is a required element for a finding of waiver. *In re Wilson,* 196 S.W.3d at 783; *In re Vesta*, 192 S.W.3d at 763; *Republic Ins.,* 383 F.3d at 344.[13]

B. Plaintiffs failed to demonstrate prejudice.

The totality of Plaintiffs' prejudice evidence is as follows:

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10 Indeed, common sense would indicate that it would be unwise to seek a ruling on an arbitration motion while subject matter jurisdiction was being challenged.

11 Previously, Plaintiffs relied on *Cabinetree of Wis., Inc. v. Kraftmaid Cabinetry, Inc.*, 50 F.3d 388 (7th Cir. 1995) for their express waiver argument. Indeed, in the lower court, *Cabinetree* was Plaintiffs' principal authority, and they successfully convinced the court of appeals to rely on and cite that case for the proposition that prejudice is not required because Citigroup "manifested an intention to resolve the dispute through the processes of the federal court." *In re Citigroup Global Markets, Inc.* 202 S.W. 3d 477, 483 (Tex. App. -- Dallas 2006, no pet.) (*quoting Cabinetree*, 50 F.3d at 390). Now, however, Plaintiffs finally acknowledge that *Cabintree* represents a minority position and its inapplicability in an express waiver analysis. Plaintiffs' Brief at 37.

12 *National Foundation for Cancer Research v. A.G. Edwards*, 821 F.2d 772, 777 (D.C.Cir. 1987).

13 *See also, supra*, note 4.

> 16. As a result of having the above-captioned case transferred into the New York federal court's MDL, Plaintiffs will have unnecessarily incurred thousands of dollars in expenses, including the payment of liaison counsel fees, which have yet to be determined.

R. Vol. III at 943. That, as a matter of law, is no evidence of prejudice.

First, "prejudice" refers to delay, expense, or damage "to a party's legal position when the party's opponent forces it to litigate an issue and later seeks to arbitrate the *same issue.*" *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 346 (5th Cir. 2004) (emphasis added). The parties never litigated, nor did Citigroup ever attempt to litigate, the substantive issues presented by Plaintiffs' claims.

Second, in *In re Vesta*, this Court found prejudice lacking even though the non-movant swore it had incurred "more than $200,000 in expenses and fees . . . " in the trial court. 192 S.W.3d at 763. Here, Plaintiffs do not even provide any evidence of their costs.

Third, the expense Plaintiffs incurred in the transfer process largely is self-inflicted. Plaintiffs agreed to arbitrate their claims with Citigroup, and they alone could have avoided all motion practice and delay simply by presenting their claims first in arbitration. Moreover, once it became apparent, in July of 2004, only a few weeks after Plaintiffs filed their claims, that Citigroup intended to assert its arbitration rights, Plaintiffs could have agreed then to arbitrate, thus avoiding all expense and delay about which they now complain.

Plaintiffs then greatly exacerbated the expense and delay associated with the procedural motion practice in federal court. Pursuant to 28 U.S.C. § 1407 and the JPML's rulings in other WorldCom-related cases, the question of MDL transfer was not even close, because the commonality of the fact questions was beyond dispute. *See* R. Vol. III at 897. If Plaintiffs simply had conceded such an obvious point, much delay and presumably thousands of dollars of expenses would have been avoided before the jurisdictional issue came to a head in the MDL court. Instead, Plaintiffs opposed the MDL transfer, and opposed Citigroup's efforts to stay all proceedings in the action pending a resolution of MDL transfer, thus greatly delaying the resolution of those issues.

Finally, the eight-month delay while this case was pending in federal court is inadequate as a matter of law to establish prejudice on its own. *See, e.g., Texas Residential Mortgage*, 152 S.W.3d at 864 (ten-month delay inadequate); *Williams v. Cigna Fin. Advisers, Inc.*, 56 F.3d 656, 661 (5th Cir. 1995) (nine-month delay not a waiver); *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 577 (5th Cir. 1991) (approximate two-year delay not a waiver); and *In re Vesta*, 192 S.W.3d at 763 (approximate two-year delay not a waiver). Accordingly, prejudice is not present in this case.

C. In their brief, Plaintiffs do not even argue that Citigroup substantially invoked the litigation process.

Plaintiffs also ignore the first element of the waiver analysis -- whether Citigroup "substantially invoked the litigation process." In *In re Vesta*, 192 S.W.3d at

763. That is not surprising, given that Citigroup served no discovery, took no depositions, sought no rulings other than MDL transfer, filed no counterclaims or third-party claims, filed no answer prior to its motion to compel arbitration, and filed no motion for summary judgment.[14] Here, there was nothing more than a forum dispute, which falls far short of "substantially involving the litigation process. *Walker v. Countrywide Credit Indus., Inc.*, 2004 WL 246406, at *2 (N.D.Tex. Jan. 15, 2004) (not designated for publication) (forum dispute not a waiver, even though movant made statements in venue arguments regarding the court's power to try the case). Plaintiffs' implied waiver argument fails on this point alone.[15]

VI. Plaintiff Robert Nickell expressly agreed to arbitrate his claims.

Plaintiffs lastly claim that, because Plaintiff Robert Nickell signed his arbitration agreements with predecessors of Relator Citigroup Global Markets ("CGM"), Salomon Smith Barney ("SSB") and Smith Barney Harris & Upham ("Smith Barney"), he is not required to arbitrate his claims against CGM.

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

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[14] It also explains why Plaintiffs *conceded* implied waiver in the trial court. R. Vol. I, p. 227.

[15] Moreover, by failing to provide argument on this point, Plaintiffs have waived their implied waiver argument in this Court. *General Servs. Comm's v. Little-Tex Insulation Co.*, 39 S.W.3d 591, 598 n.1 (Tex. 2001).

shall inure to the benefit of SSB's present organization and "any successor organization or assigns." R. Vol. I, p. 50.

Citigroup established, and Plaintiffs did not dispute, that SSB and Smith Barney are predecessors of CGM. R. Vol. I, p. 45. Indeed, in their own pleadings, Plaintiffs judicially admitted that same fact. R. Vol. I, p. 1, ¶¶ 3, 4, 8, 21 and 46; *see also In re GTE Mobilnet of South Texas Ltd. Partnership*, 123 S.W.3d 795, 798 (Tex. App. - Beaumont 2003, no pet.) (holding that plaintiffs' reference in pleadings to defendant as successor-in-interest constituted a judicial omission).

After devoting pages in their brief to deriding cases from state appellate courts, Plaintiffs cite, as their sole authority for this argument, an unpublished New York trial court decision. *Milnes v. Salomon Smith Barney, Inc.*, 2002 WL 31940718 (N.Y. Sur. 2002) (not approved by the reporter of decisions for reporting in state reports). In that case, the trial court refused to enforce an arbitration agreement because, among other reasons, the arbitration clause "in the Shearson Lehman client agreement does not state that it runs in favor of 'successor' firms . . . ." The court found that the specific language in the arbitration clause stating that it applied only to predecessor, but not successor, firms overrode the general clause in the agreement stating that the agreement "inures to the benefit of . . . assigns and successors." 2002 WL 31940718, at *6.

The *Milnes* opinion is distinguishable from this case. There is no specific language in the arbitration clauses at issue that conflicts with the clear language in the arbitration agreements by which the agreements apply to successors.

More importantly, *Milnes* is wrong:

> Porzig also claims not to have known that his agreement to arbitrate with DSI would continue with Dresdner, DSI's successor-in-interest. ***The argument is nonsense.*** The law is clear that an arbitration agreement may be enforced both by and against the successors-in-interest of the original signatories. *See Lippus v. Dahlgren Mfg. Co.*, 644 F.Supp. 1473, 1482 (E.D.N.Y. 1986); *Smullyan v. SIBJET S.A.*, 607 N.Y.S.2d 316, 317 (N.Y. App. Div. 1994).

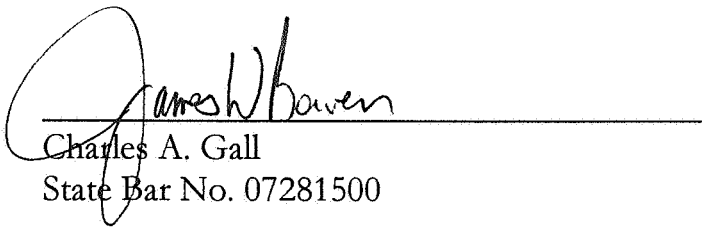
Porzig v. Dresdner Kleinwort Benson North America LLC, 1999 WL 518833, at *5, n. 5 (S.D.N.Y. July 21, 1999) (not designated for publication) (emphasis added). Like the argument in *Porzig*, Plaintiffs' argument here "is nonsense." CGM, as successor to SSB and Smith Barney, is entitled to enforce the arbitration agreement.

PRAYER

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

Dated: February 6, 2007

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the above and foregoing has been served by certified mail, return receipt requested, upon the following counsel of record and Respondent on this 6th day of February, 2007:

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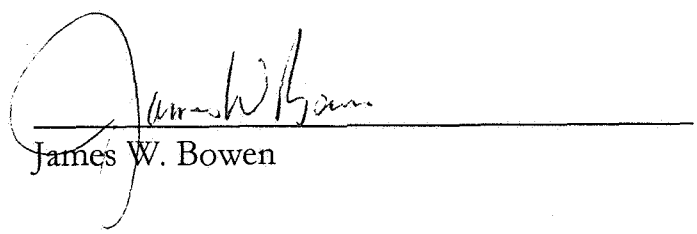


James W. Bowen

VERIFICATION

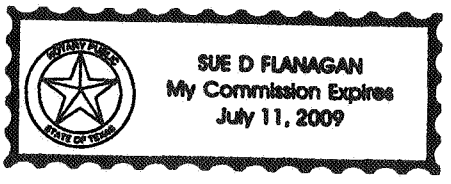
STATE OF TEXAS §
§
COUNTY OF DALLAS §

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

James W. Bowen

SUBSCRIBED AND SWORN TO BEFORE ME by James W. Bowen on this 6th day of February, 2007, to certify which, witness my hand and seal of office.

Notary Public, State of Texas



APPENDIX I

QUOTE		CONTEXT
"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."[1]		This statement is an accurate observation that has nothing to do with Citigroup's arbitration rights or a trial before the Court or jury. Whether the present case ultimately is decided by a court or an arbitration panel, this statement accurately describes the similarity of the issues in the present case to those then pending in the MDL Court. Whether this case would have stayed in the MDL Court or been sent to arbitration, discovery would have occurred, and it would have involved much of the same discovery from other cases.

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

QUOTE		CONTEXT
"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."[2]		This statement is nothing more than a recognition of the similarities between the present case and others then pending in the MDL Court. The coordination of pre-trial activities – document production, depositions, motion practice (such as arbitration motions) – would be most efficiently handled after MDL transfer regardless of whether the MDL Court kept this case (and other cases) in Court or ordered it to arbitration. *See In re Equity,* 396 F.Supp. at 1279. Moreover, the effect of Plaintiffs' argument is that discussing discovery which might occur in the future -- but never actually did occur -- is a waiver, but actually engaging in discovery does not constitute waiver. *In re Vesta*, 192 S.W.3d at 763.

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

QUOTE		CONTEXT
"[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."[3]		This statement, made in Citigroup's briefing relating to its request for a stay in the Dallas federal court pending MDL transfer, merely states the obvious. Litigation in the Dallas federal court prior to MDL transfer – such as discovery, ruling on Plaintiffs' motion to remand, or a motion to compel arbitration (if Citigroup had been forced to file such a motion prior to MDL transfer) – could destroy the efficiencies obtained by a transfer. *See In re Equity Funding Corp. of Am. Sec. Litig.*, 396 F. Supp. 1277, 1279 (Jud. Pan. Multi.Dist. 1975) (acknowledging benefits of the MDL transferee court, as opposed to numerous transferor courts, deciding arbitration motions).

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

QUOTE		CONTEXT
"[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.'"[4]		This statement merely is a quote from *In re WorldCom, Inc.*, 226 F.Supp.2d 1352, 1354 (S.D.N.Y. 2002) that was included in Citigroup's request for a stay pending MDL transfer. In that case, the court, prior to the time this case ever was filed, consolidated the pending WorldCom cases, and the quoted passage merely is the MDL Court's justification for the consolidation. One of the common issues which could have been determined was Citigroup's right to arbitrate. *In re Equity, supra.* The quote hardly can be characterized as an express waiver of Citigroup's arbitration rights as to the Nickells' claims
"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."[5]		This quote, pulled from Citigroup's opposition to Plaintiffs' Motion to Vacate Conditional Transfer Order, simply is a paraphrased restatement of 28 U.S.C. § 1407, the statute governing multidistrict litigation transfer. At the risk of stating the obvious, Citigroup certainly did not "expressly" waive its right to compel arbitration by paraphrasing the statute.

[4] Rel. R. Vol. II at 543 (emphasis added and quotation omitted).
[5] Rel. R. Vol. III at 814 (emphasis added).

QUOTE		CONTEXT
"[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.'"[6]		This quote is taken from Citigroup's "tag along" notice which Citigroup was *required to file* pursuant to R. Jud. Pan. Multi. Litig. 7.5(e), regardless of whether or not Citigroup planned to seek arbitration or whether Citigroup desired MDL transfer ("Any party or counsel in actions previously transferred . . . *shall promptly notify* the Clerk of the Panel of any potential 'tag along actions . . . .") (emphasis added). The part of the notice quoted here merely is Citigroup's quotation of the MDL Panel's opinion in *In re WorldCom*, 226 F.2d at 1354.
"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."[7]		This statement is nothing more than a recitation of the purposes of a transfer under 28 U.S.C. § 1407. The statement in no way relates to Citigroup's arbitration rights, much less does it evidence an express waiver of those rights. Moreover, the quoted text accurately describes the benefits of an MDL transfer, whether or not the case goes to arbitration.

[6] Rel. R. Vol. III at 944-46 (emphasis added).
[7] Rel. R. Vol. III at 815 (emphasis added).

QUOTE		CONTEXT
"[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 . . . ."[8]		These two accurate factual statements quite obviously lend no support to any contention that Citigroup expressly waived its arbitration rights.
"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."[9]		These factual statements lend no support to any contention that Citigroup expressly waived its arbitration rights. The statements do not discuss arbitration and are no less relevant in the event the MDL Court sent the case to arbitration.

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

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

QUOTE		CONTEXT
"[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 of factual claims asserted here."[10]		Obviously, discovery would go forward either in arbitration (if Citigroup was successful on its motion) or federal court (if it was not). *In either event*, Plaintiffs would be able to avail themselves of discovery already taken in New York, if the case were consolidated. If discovery went forward *either* in a Texas court *or* an arbitration ordered by a Texas court, the parties' ability to tap into the database of previously-taken discovery in New York was far less clear, and the taking of a duplicative discovery was more of a possibility.
"To the extent Plaintiffs need additional, individualized discovery, Judge Cote has ample authority to permit it, upon an appropriate showing of need."[11]		This quote is a continuation of the immediately previous quote. If Citigroup was unsuccessful on its motion to compel arbitration, Judge Cote obviously would control discovery. If Judge Cote granted the arbitration motion, the arbitration panel would control discovery, but not without limitation. Once again, Plaintiffs offer no explanation how discussing discovery results in a waiver, but engaging in it does not.

[10] Rel. R. Vol. III at 823-24 (emphasis added).
[11] Rel. R. Vol. III at 545 (emphasis added).

QUOTE		CONTEXT
"For nearly two years, the MDL Court has effectively and efficiently administered these matters, including establishing litigation schedules, deciding motions (including for remand), and presiding over discovery and other proceedings. Wise judicial administration counsels against abstention (or remand) and in favor of asserting jurisdiction so this action may be coordinated with the other cases that have already been transferred to the Southern District of New York."[12]		This quote, made in Citigroup's opposition to Plaintiffs' Motion to Remand or Abstain, merely is a recognition of the MDL Court's experience with the case, thus militating against abstention. Quite clearly, the statement has no bearing on the arbitration issue, much less does it expressly waive that right.

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

QUOTE		CONTEXT
"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."[13]		Plaintiffs' desperation here is amply demonstrated by their misleading and inaccurate additions to the quote taken from Citigroup's opposition to Plaintiffs' motion to remand. The "location" to which Citigroup referred was "New York, New York," which would be where the arbitration likely would be held. Indeed, almost all of the documents, witnesses, and parties are in New York. Even if Citigroup had intended to waive its arbitration rights and never file an arbitration motion, the case would not be adjudicated in "the New York federal court," as Plaintiffs suggest. Instead, 28 U.S.C. § 1407(a) states that all transferred actions "shall be remanded by the panel at or before the conclusion of such pretrial proceedings to the district from which it was transferred . . . " for trial. Finally, this language is similar to language used in a recent venue case where no waiver was found. *Walker,* 2004 WL 246406.
"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."		Whether the case remained in the MDL federal court or in an arbitration compelled by the MDL court, Plaintiffs would have benefited from that discovery and other litigation material taken in the MDL Court. In a Texas court or Texas arbitration, access to and the use of that discovery is far less certain.

[13] 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.

QUOTE		CONTEXT
"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."		The Panel's recognition in this regard is obvious and accurate, and Citigroup's statement regarding the Panel's recognition does not even remotely suggest a waiver of arbitration. Indeed, it is safe to assume that the trial of this case, whether in a court or before an arbitration panel, will involve documents and witnesses in large part from New York.
"[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 Proceedings before the MDL Court."[14]		This statement does not even suggest waiver of arbitration, much less amount to express waiver. Instead, it merely highlights the obvious fact that the Citigroup/WorldCom pretrial proceedings have been consolidated into New York federal court. Thus, a New York federal court, not a Texas federal court, should have decided all pre-trial motions, including the arbitration motion.
"[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 then they could in the Dallas County Court at Law."		If the MDL Court had denied Citigroup's arbitration motion, trial obviously would have occurred. In any event, merely using the word "trial" clearly is not an express waiver, even in the Second Circuit. *See, supra*, p. 8, n.4.

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

QUOTE		CONTEXT
"[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."		This is a true statement. One of these issues would have been whether these claims should be compelled to arbitration.
"A transfer will streamline pre-trial matters, avoid duplication, conserve resources, and hurry the case towards trial."		If the MDL Court had denied Citigroup's arbitration motion, trial obviously would have occurred. In any event, merely using the word "trial" clearly is not an express waiver, even in the Second Circuit. *See, supra*, p. 8, n.4.

RELATORS CONTEND:	THE TRUTH IS:	THE REAL 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.	Both parties agree that the FAA applies, but the Texas courts' interpretation and application of the FAA is at issue here.
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.	As demonstrated by the discussion herein, pp. 4-8, only the Second Circuit recognizes this distinction and its application has been limited to factual situations vastly different from those here. Moreover, the First Circuit requires a showing of prejudice in the context of express waiver. *In re Tyco*, 422 F.3d at 41.
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."	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.	None of the statements upon which Plaintiffs rely discuss or refer to Citigroup's right to arbitration in any manner. Instead, they were all made in connection with MDL transfer, which Citigroup was required to seek under Rule 1.1 of the JPML Rules. Moreover. transfer prior to seeking arbitration is the most efficient procedure. *See In re Equity*, 396 F.Supp. at 1729.

RELATORS CONTEND:	THE TRUTH IS:	THE REAL TRUTH IS
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 indict[es] that it wishes to resolve the claims in court," and the Court of Appeals cited and correctly applied this test.	The only circuit to adopt an express waiver/implied waiver distinction -- the Second Circuit -- has limited express waiver to circumstances to where a party has affirmatively opposed arbitration or expressly withdrew a motion to compel arbitration. See pp. 4-8.
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 wavier analysis.	The only circuit to dispense with a need to show prejudice in the context of alleged express waiver is the Second Circuit. The First Circuit requires prejudice in connection with express waiver. *In re Tyco*, 422 F.3d at 41.
"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."	The record establishes that ***Relators never mentioned arbitration to the JPML or MDL Court.***	Citigroup's pleadings prior to transfer expressly reserved its right to arbitration and other defenses. See pp. 13-14. All proceedings in the MDL Court were stayed, so Citigroup had no opportunity, let alone responsibility, to raise arbitration there. The JPML certainly would not rule on the arbitration issue. See *In re Equity, supra.*

RELATORS CONTEND:	THE TRUTH IS:	THE REAL TRUTH IS
Relators' reservation 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.	Many federal courts consider arbitration a defense. See p. 14.
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 it 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.	Arbitration is an appropriate issue for the MDL court to consider. *In re Equity, supra.* The *only* evidence in the record on this issue established that Citigroup *always* intended to pursue arbitration after the transfer and resolution of jurisdictional issues. R. Vol. I, at pp. 137-38.

RELATORS CONTEND:	THE TRUTH IS:	THE REAL 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.	Both parties agree that the FAA applies, but the Texas courts' interpretation and application of the FAA is at issue here.
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.	As demonstrated by the discussion herein, pp. 4-8, only the Second Circuit recognizes this distinction and its application has been limited to factual situations vastly different from those here. Moreover, the First Circuit requires a showing of prejudice in the context of express waiver. *In re Tyco*, 422 F.3d at 41.
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."	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.	None of the statements upon which Plaintiffs rely discuss or refer to Citigroup's right to arbitration in any manner. Instead, they were all made in connection with MDL transfer, which Citigroup was required to seek under Rule 1.1 of the JPML Rules. Moreover. transfer prior to seeking arbitration is the most efficient procedure. *See In re Equity*, 396 F.Supp. 15 at 1729.

RELATORS CONTEND:	THE TRUTH IS:	THE REAL TRUTH IS
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 indict[es] that it wishes to resolve the claims in court," and the Court of Appeals cited and correctly applied this test.	The only circuit to adopt an express waiver/implied waiver distinction -- the Second Circuit -- has limited express waiver to circumstances to where a party has affirmatively opposed arbitration or expressly withdrew a motion to compel arbitration. See pp. 4-8.
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 wavier analysis.	The only circuit to dispense with a need to show prejudice in the context of alleged express waiver is the Second Circuit. The First Circuit requires prejudice in connection with express waiver. *In re Tyco*, 422 F.3d at 41.
"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.'[1]	The record establishes that ***Relators never mentioned arbitration to the JPML or MDL Court.***	Citigroup's pleadings prior to transfer expressly reserved its right to arbitration and other defenses. See pp. 13-14. All proceedings in the MDL Court were stayed, so Citigroup had no opportunity, let alone responsibility, to raise arbitration there. The JPML certainly would not rule on the arbitration issue. See *In re Equity, supra.*

[1] Rel. Br. at 8.

RELATORS CONTEND:	THE TRUTH IS:	THE REAL TRUTH IS
Relators' reservation 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.	Many federal courts consider arbitration a defense. See p. 14.
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 it 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.	Arbitration is an appropriate issue for the MDL court to consider. *In re Equity, supra.* The *only* evidence in the record establishes that Citigroup *always* intended to pursue arbitration after the transfer and resolution of jurisdictional issues. R. Vol. I, at pp. 137-38.

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