

No. 06-60692

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IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT

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UNITY COMMUNICATIONS, INC.,

*Plaintiff-Appellee,*

v.

BELLSOUTH CELLULAR CORP., *et al.*,

*Defendants-Appellants.*

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On Appeal From the United States District Court  
for the Southern District of Mississippi, No. 2:03-cv-00115-SRD-KWR

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**BRIEF OF APPELLANT CINGULAR WIRELESS LLC**

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OCTOBER 20, 2006

## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following list of persons have an interest in the outcome of this case. These representations are made in order that the Judges of this Court may evaluate possible disqualification or recusal.

1. **Cingular Wireless LLC**, defendant/appellant;
2. **BellSouth Corporation**, part owner of Cingular Wireless LLC;
3. **AT&T, Inc.**, part owner of Cingular Wireless LLC;
4. **John C. Henegan, Erin P. Lane, and the law firm of Butler, Snow, O'Mara, Stevens & Cannada, PLLC; and Evan M. Tager, Jack L. Wilson, and the law firm of Mayer, Brown, Rowe & Maw LLP**, attorneys for Cingular Wireless LLC;
5. **Unity Communications, Inc.**, plaintiff/appellee; and
6. **Richard T. Tomar and the law firm of Karp, Frosh, Lapidus, Wigodsky & Norwind, P.A.; and Jay Max Kilpatrick and the law firm of Young Williams, P.A.**, attorneys for Unity Communications, Inc.

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## **STATEMENT REGARDING ORAL ARGUMENT**

Pursuant to Fifth Circuit Rule 28.2.4, Defendant-Appellant Cingular Wireless LLC requests that the Court hear oral argument in this case. We submit that oral argument may assist the Court in understanding the complicated procedural history of this case, which is critical to reviewing the district court's holding that Cingular waived its right to arbitrate under the arbitration provision in the "Reseller Agreement."

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## JURISDICTIONAL STATEMENT

Because the Amended Complaint raised claims under the Sherman Antitrust Act, 15 U.S.C. §§ 1-2, and the Communications Act of 1934 and Telecommunications Act of 1996, 47 U.S.C. § 151 *et seq.*, the district court had federal question jurisdiction, 28 U.S.C. § 1331, and supplemental jurisdiction over related state-law claims, 28 U.S.C. § 1367. *See* 1 R. 58.<sup>1</sup> Although Plaintiff Unity Communications, Inc. (“Unity”) voluntarily dismissed the last of its federal claims after the district court entered the order at issue here, the district court retains supplemental jurisdiction over the case. *E.g., Baker v. Farmers Elec. Coop.*, 34 F.3d 274, 283 (5th Cir. 1994) (“pendent jurisdiction may continue even after the federal claims upon which jurisdiction is based have been dismissed”).

Cingular Wireless LLC (“Cingular”) timely appealed from the Order of the District Court denying Cingular’s Motion to Bifurcate Trial Or, In The Alternative, To Compel Arbitration. *See* R.E. tabs 2-3. This Court has jurisdiction under 9 U.S.C. § 16(a)(1)(A).

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<sup>1</sup> We cite to items in the Record as “\_\_ R. \_\_,” with “R.” preceded by the volume number and followed by the page number, and, where applicable, exhibits and exhibit page numbers, viz., “\_\_ R. \_\_, Ex. \_\_ at \_\_.” We cite to items in the Record Excerpts as “R.E. tab \_\_.” In 2005, the district court converted to its present electronic filing system. From that point on, we cite to items in the Record as “\_\_ R. Doc. No. \_\_,” which corresponds to the volume number and the electronic case file document number printed at the top of each document included in volumes 3-6 of the Record.

## STATEMENT OF THE ISSUE PRESENTED

A “Reseller Agreement” between BellSouth Cellular Corporation (“BSCC”) and Unity contains an arbitration provision that states: “Any dispute arising out of or related to this Agreement which cannot be resolved by negotiation shall be settled by binding arbitration[.]” A subsequent “Letter Agreement” between Cingular (as successor in interest to BSCC) and Unity contains no arbitration provision. The question presented is whether Cingular waived its right to arbitrate under the Reseller Agreement by seeking a judicial resolution of whether the Letter Agreement superseded the Reseller Agreement—an issue that, as this Court has recognized, goes to the very question “whether [the] arbitration contract exists.” *Gen. Guar. Ins. Co. v. New Orleans Gen. Agency*, 427 F.2d 924, 928 (5th Cir. 1970).

## STATEMENT OF THE CASE

This appeal arises out of a dispute between Unity, a company that purchased telecommunications services at wholesale and resold them at retail, and two companies that supplied it with those services—BSCC and Cingular. The relationship between the parties was set forth in successive “Reseller Agreements” signed in October 1997 and October 1999. *See* 1 R. 58, Ex. A; R.E. tab 9; *see also* R.E. tab 3, at 1-2. Each of these contracts contained a provision requiring arbitration of any disputes between the parties. After a dispute arose, the parties entered into a “Letter Agreement” that did not contain an arbitration provision. *See* R.E. tab 7.

In February 2003, Unity filed a seventeen-count Complaint in the Southern District of Mississippi against Cingular, BSCC, and BellSouth Corporation,<sup>2</sup> alleging violations of the Sherman Antitrust Act, the Telecommunications Act of 1996, and the Communications Act of 1934, breach of contract, and various torts. 1 R. 1. In July 2003, Unity filed an Amended Complaint, which included the same claims as its original complaint and set forth more detailed allegations relating to its anti-trust claims. 1 R. 58.

Because Cingular's position was that the Letter Agreement had resolved the claims between the parties and superseded the Reseller Agreement, the district court (Judge Pickering) bifurcated the case, directed Cingular to file a motion for summary judgment relating solely to the issues of accord and satisfaction and release, and permitted the parties to take discovery limited to those issues. *See* 1 R. 150; 4 R. Doc. No. 86-2, at 6-7. Cingular filed its motion for summary judgment in November 2003. 2 R. 190. In July 2004, following Judge Pickering's appointment to this Court, the case was reassigned to Judge Duval of the Eastern District of Louisiana. 2 R. 287. In November 2004, Judge Duval denied Cingular's motion for summary judgment. 2 R. 315. Acknowledging, however, that the motion raised "close \* \* \* and controlling questions of law," he also sua sponte certified

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<sup>2</sup> BSCC and BellSouth have since been dismissed from the case. *See* 1 R. 150; 3 R. Doc. No. 78.

the case for interlocutory appeal pursuant to 28 U.S.C. § 1292(b). 4 R. Doc. No. 86-3, at 16. This Court granted leave to appeal (No. 04-00067 (Dec. 10, 2004)) and affirmed in a brief per curiam opinion in March 2006 (No. 04-61132 (Mar. 1, 2006)).

On remand, Judge Duval sua sponte withdrew Judge Pickering's order bifurcating the case and directed Cingular to file a new motion to bifurcate if it desired a two-day trial limited to the defenses of accord and satisfaction and release. *See* 3 R. Docs. Nos. 76-77. Cingular promptly filed a Motion to Bifurcate Trial Or, In The Alternative, To Compel Arbitration pursuant to the Reseller Agreement. 3 R. Doc. No. 81. The district court denied Cingular's motion in full. R.E. tab 3. On July 19, 2006, Cingular timely filed a Notice of Appeal under 9 U.S.C. § 16(a)(1)(A).<sup>3</sup> R.E. tab 2.

## STATEMENT OF FACTS

### **A. Unity's Relationship With BSCC And Cingular**

In 1997, Unity signed a Reseller Agreement with BSCC to purchase wireless services for resale. *See* 1 R. 58, Ex. A. Unity's business plan was to purchase a variety of telecommunications services, including the wireless services of BSCC and other wireless providers, and package and resell the services to small and me-

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<sup>3</sup> Given the importance of the procedural history to the issue on appeal, a more detailed recitation of the prior proceedings is set out in part B of the Statement of Facts.

dium-sized businesses in the Southeastern United States and, later, California. *See* 1 R. 62, 64-65, 76. Unity and BSCC signed a second Reseller Agreement in late 1999. *See* R.E. tab 9. Each Reseller Agreement included an arbitration provision that stated that “[a]ny dispute arising out of or related to this Agreement which cannot be resolved by negotiation shall be settled by binding arbitration.” 1 R. 58, Ex. A, at 16; R.E. tab 9, at 15. Cingular acquired BSCC’s interest in the Reseller Agreement in October 2000.<sup>4</sup> *See* 2 R. 190, at ¶ 3.

By January 2001, Unity had fallen substantially behind in its obligations and owed Cingular approximately \$700,000. *See* 2 R. 190, at ¶ 10. Unity, however, disputed the size of its debt, claiming that Cingular was in violation of its contractual and regulatory obligations. In a January 24, 2001 letter to Cingular officials, Unity’s President and CEO Glynn Ingram alleged that, among other things:

- Cingular’s “resell program [did] not provide sufficient margins to produce a successful reseller in Mississippi”;
- “[t]he billing of Mississippi Traveler (statewide roaming) as a discreet item to resellers and not to retail customers create[d] overwhelming discrimination in cost structure”;
- Cingular offered retail rates below Unity’s cost;

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<sup>4</sup> BSCC, a wholly owned subsidiary of BellSouth Corporation, assigned the Reseller Agreement and all related assets and liabilities to BellSouth Mobility, Inc. in September 2000 and subsequently was merged out of existence. BellSouth Mobility, in turn, contributed all of its assets and liabilities to Cingular. *See* 2 R. 190, at ¶ 10.

- Cingular had not fulfilled the “legal requirement” that it “provide [service on] the same basis for similarly situated customers,” resulting in “discrimination in rate structure” against Unity vis-à-vis “accounts of much smaller sizes”; and
- Unity was being billed for items not listed in its contract.

R.E. tab 4, at 1. Based on these claims, Ingram asserted that Unity was not obligated to pay for “Mississippi Traveler” and certain other charges and owed Cingular only \$232,420. *Id.* at 1-2. Ingram proposed that Unity make ten monthly payments of \$23,242 in satisfaction of the debt. *Id.* at 2.

Cingular responded by informing Unity that its position was “neither acceptable [n]or consistent with [its] contractual obligations.” R.E. tab 5, at 1. In response to Ingram’s allegations, Cingular advised:

Your letter \* \* \* called into question the issue of reseller margins and, more specifically, the lack of a statewide roaming rate for reseller. You further noted that such a statewide roaming rate is available to Cingular’s retail subscribers. While such a retail rate is available to Cingular’s subscribers, there is no regulatory or contractual requirement that Cingular absorb such roaming costs for resellers, as your letter implies. Our resale agreement clearly states that roaming costs will be passed through to the reseller.

\* \* \* \*

As a result, your proposal that Unity not pay such roaming charges is \* \* \* unacceptable.

*Id.* at 2. Cingular’s letter closed by outlining the steps Unity would have to take to bring its account current and maintain its relationship with Cingular. *See id.* at 2-3.

In a subsequent e-mail to Cingular officials, Ingram stated that “Unity continued to dispute the charges from Cingular related to Mississippi Traveler and

Unlimited Nights and Weekends” because these charges were “discriminatory,” and he again complained that “Cingular [would not] allow Unity to fairly compete in the marketplace.” R.E. tab 6. Ingram threatened that “*Unity ha[d] no choice but to arbitrate its disagreement with Cingular as provided in the Reseller Contract*” and advised that Unity would be discontinuing service to its customers and exiting the market. *Id.* (emphasis added). Ingram also requested that Cingular contact him to discuss “transition[ing] [Unity’s] customer base and trad[ing] customer value for some of the *disputed* balances being claimed by Cingular.” *Id.* (emphasis added).

Cingular thereafter responded with a proposal (the “Letter Agreement”) under which Cingular would accept the transfer of Unity’s customer base in exchange for a credit to Unity’s account balance in the amount of \$289,275, provided that, among other things, Unity would (i) sign a promissory note for its remaining balance and (ii) “release any and all claims it may have for any additional offsets, credits, or further adjustments to its account.” R.E. tab 7, at 2-3. Cingular advised Unity that, “[a]s an alternative to this proposal, Unity and Cingular [could] resolve [their] payment dispute through arbitration as provided for in the Reseller Agreement.” *Id.* at 3. Cingular also advised that, if Unity chose to pursue arbitration but still “desire[d] its customers to avoid disconnection, it [could] provide Cingular with [its] customer information \* \* \* and Cingular [would] act promptly and dili-

gently to recruit all Unity customers to Cingular service.” *Id.* “Of course,” the letter made clear, “no per customer credits [would] be issued to Unity under [that] scenario”—*i.e.*, if Unity chose to pursue arbitration. *Id.*

Four days later, Ingram signed the Letter Agreement on behalf of Unity without alteration or modification. *Id.* He also signed and returned the promissory note required by the Letter Agreement. R.E. tab 8. Unity provided Cingular with the customer information required by the Letter Agreement and made several payments under the promissory note. *See* 2 R. 198, Ex. A, at 53. Eventually, however, it defaulted on the note (*see* 2. R. 198, Ex. D, at 51) and later filed this lawsuit against Cingular.

## **B. Prior Proceedings**

In February 2003, Unity filed a seventeen-count Complaint in the Southern District of Mississippi against Cingular, BSCC, and BellSouth Corporation, alleging violations of the Telecommunications Act of 1996, the Communications Act of 1934, and the Sherman Antitrust Act, breach of contract, and various torts. 1 R. 1-28. In July 2003, Unity filed an Amended Complaint, which included the same seventeen claims and set forth additional allegations relating to its antitrust claims.<sup>5</sup> 1 R. 58-98. The Amended Complaint reflects essentially the same grievances that

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<sup>5</sup> Unity withdrew five of its claims, including two of its claims under the Telecommunications Act, after the August 2003 case status conference. 1 R. 150-51.

Unity had raised in the discussions leading up to the Letter Agreement. For example, Unity alleges that Cingular “impeded Unity’s ability to compete” and engaged in “anti-competitive conduct” (¶ 10); offered “digital plans that \* \* \* were less costly than Unity’s wholesale costs and severely damaged Unity’s margins” (¶ 40); offered “free roaming and long distance” to its own customers “without making the same available to Unity” (¶ 41); “acted in a predatory manner with the intention of destroying Unity’s business” (¶ 48); offered Unity rates that “were unjustly and unreasonably discriminatory” (¶ 83); engaged in extensive “anticompetitive” conduct “directed against Unity” (¶ 109); and violated the Reseller Agreement (¶¶ 128-32).

At a status conference held shortly after Unity filed its Amended Complaint, the district court (Judge Pickering) bifurcated the case, directed the parties to take limited discovery, and ordered Cingular to file a motion for summary judgment relating solely to the questions whether the Letter Agreement was an accord and satisfaction of the Reseller Agreement and/or a release of Unity’s claims.<sup>6</sup> *See* 4 R. Doc. No. 86-2, at 6-7; 1 R. 150. The court stayed the remainder of the case pending resolution of those threshold questions. *See* 4 R. Doc. No. 86-2, at 6-7, 10, 14;

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<sup>6</sup> A March 2001 agreement between Unity and Pacific Bell Wireless (“PBW”) included a broad release of any claims Unity might have against PBW or any of its “affiliates.” At the time Unity executed this release, Cingular was an affiliate of PBW. Discovery and the motion for summary judgment also addressed the Unity-PBW agreement. *See* 4 R. Doc. No. 86-3, at 12-14.

1 R. 150-51. Cingular filed its motion for summary judgment in November 2003. *See* 2 R. 190-98, Exs. A-E.

In July 2004, as a result of Judge Pickering's appointment to this Court, the case was reassigned to Judge Duval of the Eastern District of Louisiana. 2 R. 287-94. Judge Duval heard argument on Cingular's motion for summary judgment in October 2004. He denied Cingular's motion for summary judgment but, acknowledging that the motion raised "close \* \* \* and controlling questions of law," certified an interlocutory appeal pursuant to 28 U.S.C. § 1292(b). 3 R. Doc. No. 86-3, at 16. He reasoned that, "[i]f the claims [were] released, the case is over" and that it would therefore "save[] everybody a lot of time and money to have this matter resolved." *Id.* at 16-17. This Court subsequently granted leave to appeal. No. 04-00067 (Dec. 10, 2004). In a brief per curiam opinion in March 2006, it affirmed Judge Duval's finding that a genuine issue of material fact existed as to the scope of the accord and release. No. 04-61132 (Mar. 1, 2006).

On remand, Judge Duval sua sponte withdrew Judge Pickering's order bifurcating the case during a conference call with counsel for the parties and instructed Cingular to file a new motion requesting bifurcation if it still desired a two-day trial limited to the issues of accord and satisfaction and release. *See* 3 R. Doc. No. 76. Pursuant to Judge Duval's instructions, Cingular filed a new motion to bifurcate the trial and, in the alternative, to compel arbitration. 3 R. Doc. No. 81. Cin-

gular submitted that bifurcation was appropriate because discovery was complete as to the threshold issues of accord and satisfaction and release (whereas the parties had conducted no discovery on the merits of Unity's claims) and because a verdict in Cingular's favor would resolve the entire case, while a verdict in Unity's favor would mean that the Reseller Agreement remained in effect and that the parties would then be bound to arbitrate their dispute pursuant to the arbitration provision in that Agreement. *See* 3 R. Doc. No. 82, at 8-11. Cingular further contended that, if the district court would not determine whether the Reseller Agreement remained in effect *before* permitting full discovery and a trial on the merits of Unity's claims, then the Reseller Agreement's arbitration provision should be enforced. *See id.* at 11-15.<sup>7</sup>

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<sup>7</sup> Cingular sought Unity's consent to an extension of time in which to answer or otherwise respond to the Amended Complaint pending resolution of this motion, but Unity insisted that Cingular file a response. Left with no other choice, Cingular filed a motion to dismiss Unity's Amended Complaint while at the same time expressly reserving its right to the relief it sought under the Motion To Bifurcate Or, In The Alternative To Compel Arbitration. *See* 3 R. Doc. No. 98. After Cingular did so, Unity sought to stay its obligation to respond pending resolution of the motion to compel arbitration and, in fact, argued that the motion to dismiss was evidence that Cingular had waived the right to arbitrate. *See* 4 R. Doc. Nos. 105, 109. The district court declined to stay briefing, however, and the parties completed briefing of the motion and argued it at the end of June 2006. *See* 4 R. Doc. Nos. 117, 122, 123. On October 2, the district court granted Cingular's motion in part and denied it in part. *See* 6 R. Doc. No. 136. On October 16, Cingular filed its Answer and Counterclaim in which it again made clear that it continued to believe that the case should be bifurcated or arbitrated and that the pleading was be-

Unity opposed bifurcation, claiming that it would cause prejudice and would be impractical because the issues of accord and satisfaction and release were “inextricably intertwined” with the underlying merits of the case. *See* 3 R. Doc. No. 86, at 7-9. Unity also opposed arbitration, arguing that Cingular had waived its right to arbitrate.<sup>8</sup> *See id.* at 9-11.

Judge Duval denied Cingular’s motion in full. R.E. tab 3. He declined to bifurcate the trial because he concluded that “the complexity and interconnectedness of the myriad of claims in this case” would make it “difficult to conduct a jury trial *solely* on the issues of accord and satisfaction and the validity of the releases and without delving into the other claims” and that a single trial on all issues would, therefore, “reduce potential juror confusion” and promote “efficiency.” *Id.* at 13 (emphasis by the court).

Judge Duval denied Cingular’s alternative request for arbitration because he concluded that Cingular had waived its right to arbitrate. *Id.* Judge Duval gave four reasons for his ruling. First, he reasoned that “Cingular ha[d] substantially in-

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ing filed solely to comply with the Federal Rules of Civil Procedure and was without waiver or prejudice to its positions in this appeal. *See* 6 R. Doc. No. 139.

<sup>8</sup> In its opposition, Unity did not deny that the Reseller Agreement contained a written arbitration provision, that the transactions subject to the arbitration provision involved interstate commerce, or that the dispute between the parties is within the scope of the arbitration provision. Nor did it contend that the arbitration provision is unenforceable on the basis of a state-law ground for the revocation of any contract. *See* 9 U.S.C. § 2.

voked the litigation machinery” because its “motion for summary judgment was related to all of the parties’ claims, including those that it now attempts to arbitrate.” *Id.* at 14. Second, he found that “the time and expense incurred in defending against the \* \* \* motion for summary judgment was substantial, give [sic] the appeal to the Fifth Circuit.” *Id.* Third, he noted that “it ha[d] been over three years since these proceedings commenced” and reasoned that “it was incumbent upon Cingular to invoke any right to arbitration before engaging in the last three years of litigation.” *Id.* Finally, Judge Duval stated that he would “not enforce an arbitration provision of a Reseller Agreement which one party argues is itself invalid” and held that Cingular’s position that “the Reseller Agreement has been supplanted *entirely* by the [Letter Agreement]” was “sufficiently inconsistent with the right to arbitrate such that waiver has occurred.” *Id.* at 14-15 (emphasis by the court).

### STANDARD OF REVIEW

This Court “review[s] whether a party’s conduct amounts to a waiver of arbitration *de novo*” and “review[s] any factual findings underlying the district court’s waiver determination for clear error.” *Republic Ins. Co. v. PAICO Receivables, LLC*, 383 F.3d 341, 344 (5th Cir. 2004).

### ARGUMENT

“The [FAA] establishes that, as a matter of federal law, *any doubts* concerning the scope of arbitrable issues should be resolved in favor of arbitration,

whether the problem at hand is the construction of the contract language itself or an allegation of *waiver*, delay, or a like defense to arbitrability.” *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (emphasis added). Therefore, “[t]here is a strong presumption against waiver of arbitration,” and “a party alleging waiver of arbitration must carry a heavy burden.” *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 326 (5th Cir. 1999); accord, e.g., *Gulf Guar. Life Ins. Co. v. Conn. Gen. Life Ins. Co.*, 304 F.3d 476, 484 (5th Cir. 2002) (“[E]ven where a party takes substantial steps toward litigation of the arbitral dispute, or participates substantially in litigation procedures, it ordinarily will not waive the right to arbitrate.”); *Steel Warehouse Co. v. Abalone Shipping Ltd.*, 141 F.3d 234, 238 (5th Cir.1998) (“There is a well-settled rule in this circuit that waiver of arbitration is not a favored finding, and there is a presumption against it.”). To carry this heavy burden, the party resisting arbitration must establish **both** that “the party seeking arbitration substantially invoke[d] the judicial process” **and** that it has suffered “prejudice” as a result. *Miller Brewing Co. v. Fort Worth Distrib. Co.*, 781 F.2d 494, 497 (5th Cir. 1986).

Even putting aside this heavy presumption, however, this Court has already held that a party does not waive its right to arbitrate by litigating the threshold question whether an agreement, including its arbitration provision, has been superseded by a subsequent agreement. *Gen. Guar. Ins. Co. v. New Orleans Gen.*

*Agency*, 427 F.2d 924, 928 (5th Cir. 1970). Indeed, in this context, the Court stated that “[t]he propriety and desirability of having an initial judicial determination of whether an arbitration contract exists is well recognized.” *Id.* Because the present case has been strictly confined (by court order) to this threshold question, *General Guaranty* is controlling, and Unity cannot carry its heavy burden of establishing a waiver of arbitration. Therefore, the district court’s ruling should be reversed, and the case should be remanded for a final determination of whether the Letter Agreement superseded the Reseller Agreement (or, alternatively, with instructions that the parties proceed directly to arbitration). If the Letter Agreement did supplant the Reseller Agreement, the case is over. If it did not, the parties’ agreement to arbitrate remains operative and should be enforced.

**A. *General Guaranty* Squarely Holds That A Defendant Does Not Waive Its Right To Arbitrate By Litigating The Threshold Question Whether An Agreement, Including Its Arbitration Provision, Has Been Superseded By A Subsequent Agreement.**

*General Guaranty* is controlling here. Like Cingular, the defendant in *General Guaranty* filed a motion for summary judgment on the ground “that the contract sued on had been abandoned by mutual consent and superseded by another contract.” *Id.* at 926. The defendant suggested that, in the alternative, the court should stay the proceedings pending arbitration if it determined that the original contract had not been superseded because that contract contained an arbitration

provision. *Id.* at 926-27. In its initial ruling on the defendant’s motion, the district court reasoned:

The question is then presented—should the parties be directed to arbitrate? We think not. There is a possibility that the contract has been abandoned. If this were the case, it would be because of some subsequent agreement over which it is agreed the arbitrator has no jurisdiction. That issue must be determined by the Court, and to avoid a useless arbitration, should be, we believe, determined now. It appears that the situation facing the Court at this time is one ideally suited for the application of Rule 42(b) of the Federal Rules of Civil Procedure. Accordingly, \* \* \* a separate trial of the issue of whether the contract was abandoned \* \* \* [will] be held.

*Id.* at 927.

After a two-day trial on the issue of abandonment, the district court concluded that the contract had not been abandoned. *Id.* It also ruled, however, that the defendant had waived its right to arbitration because it failed to request arbitration prior to the filing of the lawsuit, allowed the plaintiff to take depositions without indicating that it would seek arbitration, asked for a stay pending arbitration only as an alternative to a ruling on the merits, filed a counterclaim, and attempted to implead third parties who were not subject to the agreement to arbitrate. *Id.* at 927-28.

This Court reversed, holding that the defendant had not waived its right to arbitrate because “[t]he propriety and desirability of an initial judicial determination of whether an arbitration contract exists is well recognized.” *Id.* at 928; *see also id.* at 930 (emphasizing “the usefulness of determining in court if there is an

arbitration contract before sending the parties to arbitration”). In so holding, the Court rejected the plaintiff’s suggestion that the defendant had waived its right to arbitration by arguing that the agreement containing the arbitration provision had been abandoned. It explained:

While never put so boldly, [the plaintiff’s] implicit position is this: because the issue of abandonment would determine not only the existence of an arbitration agreement but also effectually determine a defense of [the defendant] on the merits, [the defendant] had to make an election—it could admit the contract was in effect and call for arbitration, or deny the viability of the contract and defend in court. No such election was required.

*Id.* at 929. The Court went on to explain that the defendant’s “actions [were not] sufficiently inconsistent with the right to arbitrate” to constitute a waiver. *Id.* Rather, in the context of litigating the threshold issue of “abandonment,” the Court deemed filing an answer, asserting a counterclaim, seeking to implead a third party, and submitting to depositions to be fully “consistent with orderly participation in the lawsuit.” *Id.*

As in *General Guaranty*, litigation in this case has been confined to the threshold question whether the Letter Agreement supplanted the Reseller Agreement, including its arbitration provision, in its entirety. In other words, Cingular has “limit[ed] its pretrial activity to the threshold question of whether there [is] a valid agreement to arbitrate.” *Republic Ins. Co.*, 383 F.3d at 345 (discussing *General Guaranty*). Indeed, all other aspects of the case were stayed by court order

pending resolution of the issues of accord and satisfaction and release. *See* 1 R. 150-51.

Ultimately, the only difference between this case and *General Guaranty* is that Cingular did not state in its motion for summary judgment that the court should compel arbitration if the bifurcated proceedings were to result in a final determination that the Letter Agreement did not supersede the Reseller Agreement. In light of *General Guaranty*, however, such a statement was unnecessary and would have made no difference in how this case unfolded. Under *General Guaranty*, the proper procedure in a case such as this is clear: the district court should first determine whether an arbitration agreement exists or has instead been superseded. Thus, even if Cingular had raised arbitration, under this Court's precedent, the district court still should have addressed the question whether the Letter Agreement superseded the Reseller Agreement before considering the arbitration issue. Moreover, neither Unity nor the district court has ever suggested that Unity was prejudiced in any way by the failure to include in the summary judgment motion an alternative request for arbitration.

To be sure, a subsequent panel of this Court suggested that “*General Guaranty* turned on the fact that the defendant included an alternative pleading asserting its right to arbitrate under the disputed contract in its initial response to the lawsuit.” *Republic Ins. Co.*, 383 F.3d at 345. In the very next sentence, however, it

explained that the significance of such an “alternative pleading” is that it “allow[s] the district court to dispose of the matters before it in an orderly fashion, preserving the time and effort of the court and the parties.” *Id.* Here, raising arbitration at the outset of the litigation would not have altered the order in which the court “dispose[d] of the matters before it” because, under *General Guaranty*, the district court still would have been obliged to determine whether the Reseller Agreement had been superseded before addressing arbitration. By contrast, in *Republic Insurance* the party guilty of waiver (the plaintiff) did not simply fail to mention arbitration; rather, it vigorously litigated the merits of the underlying dispute. *Id.* at 345. Indeed, it “oppose[d] actively [a] motion for a protective order” in which the defendant “asked the district court to determine the narrow issue [concerning arbitrability] before full-fledged discovery regarding the other issues in the case was conducted.” *Id.* In opposition, the plaintiff “argued that a protective order was unnecessary because all of the issues, including [the defendant’s] counterclaims, were properly before the district court.” *Id.* at 345-46. Thus, whereas the plaintiff in *Republic Insurance* waived its right to arbitrate by actively preventing the district court from resolving issues “in an orderly fashion” (*id.* at 345), Cingular has done nothing to interfere with the “prop[er] and desirab[le]” course of this case (*Gen. Guar.*, 427 F.2d at 928).

**B. The District Court's Grounds For Finding Waiver Are Impossible To Square With *General Guaranty* And Other Precedents Of This Court.**

As noted above, the district court offered four reasons for finding that Cingular waived its right to arbitrate. *See* page 13, *supra*. Each of these rationales, however, is contrary to *General Guaranty* and, therefore, does not support the district court's decision.

First, the district court reasoned that Cingular waived its right to arbitrate because its "motion for summary judgment was related to all of the parties' claims, including those that it now attempts to arbitrate." R.E. tab 3, at 14. That rationale ignores *General Guaranty*'s holding that a waiver does *not* occur simply because "the issue [addressed by the motion for summary judgment] would determine not only the existence of an arbitration agreement but also effectually determine a defense \* \* \* on the merits." 427 F.2d at 929. Rather, it is "well recognized" that a party may seek an "initial judicial determination of whether an arbitration contract exists" even if that initial determination may have the further consequence of resolving the merits of the case itself. *Id.* at 928. Put another way, the mere happenstance that a particular issue implicates both arbitrability and the merits of the case does not change the fact that the existence of an arbitration agreement should be determined by the court, not the arbitrator.

Second, although the district court emphasized that when Cingular filed its motion “it ha[d] been over three years since these proceedings commenced” (R.E. tab 3, at 14), it is well-settled that “the mere passage of time cannot be relied upon as a waiver of the right to arbitrate.”<sup>9</sup> In this case, “the mere passage of time” is a particularly unhelpful consideration because much of the delay has been beyond Cingular’s (indeed, anyone’s) control. More importantly, the district court still has not resolved the threshold question whether an arbitration agreement exists.

There are essentially three reasons why this case was pending for three years before Cingular moved to compel arbitration as an alternative to a bifurcated trial: (1) although the original complaint was filed in February 2003, Unity did not file its Amended Complaint until July 2003;<sup>10</sup> (2) although Cingular’s motion for summary judgment—which the district court directed it to file in an effort to streamline

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<sup>9</sup> *Am. Express Fin. Advisors, Inc. v. Zito*, 45 F. Supp. 2d 230, 235 (E.D.N.Y. 1998); accord, e.g., Stephen K. Huber, *The Arbitration Jurisprudence of the Fifth Circuit: Round III*, 38 TEX. TECH L. REV. 535, 547 (2006) (“Delay alone is insufficient for waiver; there must also be a showing of prejudice to the moving party.”) (citing *Republic Ins. Co.*, 383 F.3d at 346); *Thyssen, Inc. v. Calypso Shipping Corp.*, 310 F.3d 102, 105 (2d Cir. 2002) (“Absent [a showing of prejudice], the presumption in favor of arbitration cannot be overcome merely on the basis of the length of the delay.”); see also *Baker v. Conoco Pipeline Co.*, 280 F. Supp. 2d 1285, 1300 (N.D. Okla. 2003) (quoting *Zito, supra*); *Danny’s Constr. Co., v. Birdair, Inc.*, 136 F. Supp. 2d 134, 144 (W.D.N.Y. 2000) (same).

<sup>10</sup> In the interim, Unity consented to three orders granting Defendants additional time within which to answer or otherwise respond to the Complaint. See 1 R. 31-32, 42-43, 50.

the case and avoid unnecessary litigation and discovery on the underlying merits— was filed in November 2003, there was no hearing on that motion until October 20, 2004 as a result of Judge Pickering’s appointment to this Court and the case’s reassignment several months later; and (3) due in part to the disruption Hurricane Katrina caused, almost 16 months elapsed between the district court’s order denying summary judgment and this Court’s affirmance on interlocutory appeal—an appeal that the district court had previously certified was likely to “materially advance the ultimate termination of the litigation” (28 U.S.C. § 1292(b); *see* 3 R. Doc. No. 86-3, at 17 (noting that it would “save[] everybody a lot of time and money to have [the issues of accord and satisfaction and release] resolved”). Even after the case was remanded to the district court, Cingular moved to compel arbitration only as an alternative to urging the court to proceed *directly* to a two-day trial to determine whether the Reseller Agreement had been superseded—which Cingular continues to believe is the “prop[er] and desirab[le]” procedure in light of the parties’ contentions and the lack of a final determination concerning the existence of an arbitration agreement. *Gen. Guar.*, 427 F.2d at 928. Thus, far from evidencing any intent to delay the proceedings, “[a]ll of [Cingular’s] actions were consistent with orderly participation in the lawsuit.” *Id.* at 929. Indeed, Cingular’s motion for summary judgment and its petition for interlocutory appeal were

both filed at the *district court's* suggestion that they might lead to a more efficient resolution of the case.

Third, the district court's reliance on the "time and expense [Unity] incurred" in litigating this issue (*see* R.E. tab 3, at 14) is also contrary to this Court's precedent. Time and expense incurred litigating the existence of the arbitration agreement itself are not "prejudice" that will support a claim of waiver—even when, as in this case, the decision as to arbitrability may also resolve the underlying dispute. *Gen. Guar.*, 427 F.2d at 929. This Court has also held that "a party may participate in the discovery process [without waiving its right to arbitrate] so long as it does not '*show the opposing party with interrogatories and discovery requests.*'" *Keytrade USA, Inc. v. AIN TEMOUCHENT M/V*, 404 F.3d 891, 898 (5th Cir. 2005) (quoting *Steel Warehouse*, 141 F.3d at 238) (emphasis added; alternations omitted). There has been no "shower" of discovery requests in this case. Notably, the only discovery that has taken place could not possibly have prejudiced Unity because it was reciprocal and strictly limited (by court order) to the issues of accord and satisfaction and release.

Put simply, "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.*" *Republic Ins. Co.*, 383 F.3d at 346 (quoting *Subway Equip. Leasing Corp.*, 169

F.3d at 327) (emphasis added); accord Larry E. Edmondson, 1 DOMKE ON COMMERCIAL ARBITRATION § 23:4 (3d ed. 2005) (“Only prior litigation of the *same legal and factual issues* as those the party now wants to arbitrate results in waiver of the right to arbitrate.”) (emphasis added). Far from seeking to arbitrate an issue it has previously litigated, Cingular consistently has sought a final determination in court that the parties’ Letter Agreement and promissory note supersede the Reseller Agreement. If Cingular is correct, the case is over; and if Cingular is wrong, then an arbitrator should decide the *remaining issues* in the case. Accordingly, the “time and expense” required to litigate the very existence of an agreement to arbitrate cannot properly be counted as “prejudice” to Unity.

The district court’s final rationale was that Cingular’s position that “the Reseller Agreement has been supplanted *entirely* by the [Letter Agreement]” was “sufficiently inconsistent with the right to arbitrate such that waiver has occurred.” R.E. tab 3, at 15 (emphasis by the court); see also *id.* at 14-15 (“[T]he Court will not enforce an arbitration provision of a Reseller Agreement which one party argues is itself invalid.”). This conclusion is facially irreconcilable with *General Guaranty*. Indeed, in *General Guaranty*, this Court noted that this was only the plaintiff’s “implicit position” because the plaintiff dared not “put [the argument] so boldly.” 427 F.2d at 929. It then specifically rejected the notion, embraced by the district court here, that a party must either admit that a contract remains in effect

and seek arbitration pursuant to it or else deny that it is in effect and defend the entire controversy in court. *Id.* Rather, the Court held that it is entirely permissible for a party to argue both that the entire contract has been superseded and that, if it has not been superseded, the contract's arbitration provision should be enforced. Because the district court's last remaining rationale for its finding of waiver was directly contrary to this clear principle, its determination that Cingular waived the right to arbitrate must be reversed.

In sum, the district court reached a conclusion that is irreconcilable with *General Guaranty*. Indeed, the district court did not even address that precedent. Because “[t]he propriety and desirability of having an initial judicial determination of whether an arbitration contract exists is well recognized,” Cingular did not waive its right to arbitrate by seeking one, and the time and expense required to resolve the issue do not constitute prejudice to Unity. *Id.* at 928. In addition, in placing undue emphasis on the time that elapsed between the commencement of this action and Cingular's motion, the district court held Cingular accountable for delays that were beyond Cingular's control and failed to recognize that Cingular's motion for summary judgment and subsequent appeal were pursued at the district court's direction in an effort to resolve the case more efficiently. Accordingly, there is no basis for concluding that Cingular has waived its right to arbitrate.

## CONCLUSION

This Court should reverse the district court's order and remand with instructions to (i) hold a trial limited to the question whether the Letter Agreement superseded the Reseller Agreement and (ii) compel arbitration pursuant to the terms of the Reseller Agreement in the event that the trial results in a finding that the Reseller Agreement remains in force. Alternatively, the Court should remand with instructions that the parties proceed directly to arbitration pursuant to the terms of the Reseller Agreement.

Respectfully submitted.

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## CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of October, 2006, I caused to be served two copies of the foregoing brief and a 3.5 inch diskette containing a PDF copy of the same by UPS Next-Day Air on the parties herein, at the following addresses:

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