

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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**REPLY BRIEF OF APPELLANT CINGULAR WIRELESS LLC**

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JANUARY 22, 2007

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## ARGUMENT

As we explained in our opening brief, under this Court’s precedents, it was entirely proper—indeed, preferable from the standpoint of judicial economy—for Cingular to seek an early determination of whether the parties’ “Reseller Agreements,” which contained arbitration provisions, had been superseded by the parties’ subsequent “Letter Agreement,” which contained no such provision. This Court has recognized that this sort of threshold issue goes to the very question “whether an arbitration contract exists.” *Gen. Guar. Ins. Co. v. New Orleans Gen. Agency*, 427 F.2d 924, 928 (5th Cir. 1970). Unity does not dispute that this question is one that the court, not the arbitrator, should decide. Nor does it dispute that, pursuant to court order, litigation to date has focused almost exclusively on that issue. Instead, Unity (a) argues that Cingular waived its right to arbitrate by failing to refer to arbitration in its initial pleadings, (b) misconstrues clear precedent of this Court, and (c) seeks to preempt this Court’s review through an unduly narrow standard of review. Unity fails to demonstrate, however, that including a boilerplate reference to arbitration in the initial pleadings would have made any practical difference; and Unity’s latter two arguments are simply wrong as a matter of law.

### **A. Unity Fails To Distinguish *General Guaranty*.**

As we explained in our opening brief, this Court’s decision in *General Guaranty* is controlling here. In *General Guaranty*, as here, the parties’ threshold

dispute was whether the contract sued on, which contained an arbitration provision, had been abandoned and superseded by a subsequent agreement, which did not. This Court held that a party does not waive its right to compel arbitration under the original contract by litigating the abandonment issue because “the propriety and desirability of having an initial judicial determination of whether an arbitration contract exists is well recognized.” *Gen. Guar.*, 427 F.2d at 928. Because this case had not proceeded beyond the same threshold question at the time Cingular filed its motion to bifurcate or, in the alternative, compel arbitration,<sup>1</sup> *General Guaranty* dictates the same result here.

Unity seeks to distinguish *General Guaranty* on the ground that the summary judgment motion filed in that case included a request for a stay pending arbitration as an alternative to summary judgment on the accord and satisfaction issue.<sup>2</sup>

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<sup>1</sup> See Cingular Br. 8-11 (describing procedural history of the case). As explained in greater detail in our opening brief (at 11 n.7), *after* Cingular filed its motion to bifurcate or, in the alternative, compel arbitration, it sought Unity’s consent for a stay of its obligation to answer or otherwise respond to the Complaint pending resolution of that motion. Because Unity would not consent, Cingular filed a motion to dismiss. That motion was granted in part and denied in part in October 2006, more than ten weeks after Cingular filed the instant appeal.

<sup>2</sup> Beyond seeking to distinguish *General Guaranty* and advocating a narrow reading of *Republic Insurance Co. v. PAICO Receivables, LLC*, 383 F.3d 341 (5th Cir. 2004), that is inconsistent with the Court’s opinion and the facts of the case (see Part B, *infra*), Unity’s brief simply incorporates the reasoning of the district court. Because we addressed the district court’s reasoning—and its inconsistency with this Court’s precedents—in our opening brief (at 20-25), we will not do so again here.

Unity Br. 12-14. As we explained in our opening brief, however, such an alternative request would have made no difference in how this case unfolded. *See* Cingular Br. 18. Under *General Guaranty*, a court should first determine “whether an arbitration contract exists”—*i.e.*, whether the contract containing the arbitration provision has been superseded by a subsequent agreement—*before* it addresses any motion to compel arbitration. *See* 427 F.2d at 927-30. That is precisely how this case proceeded until the district court denied Cingular’s motion to bifurcate or, in the alternative, compel arbitration. Unity speculates that the district court might have done something different had Cingular included an alternative request for arbitration in its motion for summary judgment. But speculation that the district court might have rejected the very course that this Court approved in *General Guaranty* does not satisfy the “heavy burden” that “a party alleging waiver of arbitration must carry.” *Subway Equip. Leasing Corp. v. Forte*, 169 F.3d 324, 326 (5th Cir. 1999); *see also Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 24-25 (1983) (“any doubts \* \* \* should be resolved in favor of arbitration” and against “allegation[s] of waiver”).

Unity also quotes *General Guaranty*’s statement that “[a] defendant can waive arbitration by actions which it takes during determination in the legal forum of the threshold issue of existence of an arbitration contract, if those actions are sufficiently inconsistent with the right to arbitrate.” Unity Br. 13 (quoting *Gen.*

*Guar.*, 427 F.2d at 929). Unity, however, fails to identify any actions Cingular has taken that are “inconsistent with the right to arbitrate” under that precedent. *General Guaranty* makes clear that litigating the threshold question whether the Letter Agreement supersedes the Reseller Agreement is entirely consistent with the right to arbitrate. And, at the time Cingular filed its motion to bifurcate or, in the alternative, to compel arbitration, this litigation had focused exclusively on that threshold question.

The point that the *General Guaranty* Court was making was that, in the course of (permissibly) litigating such a “threshold issue,” a party may waive its right to arbitrate *if* it goes beyond that issue and takes “actions” implicating underlying, potentially arbitrable issues. For example, in *Republic Insurance Co. v. PAICO Receivables, LLC*, 383 F.3d 341 (5th Cir. 2004), the plaintiff waived its right to arbitrate by actively opposing the defendant’s request for a protective order that would have limited discovery to the threshold issue of arbitrability and by arguing that all of the issues in the case, including potentially arbitrable issues, “were before the district court and properly the subject of discovery.” *Id.* at 343. In contrast, discovery in this case was confined by order of the district court to the threshold question whether the Letter Agreement (or another release signed by Unity) superseded the Reseller Agreement, and Cingular never sought to extend discovery beyond that limited question.

Because Cingular did not “substantially invoke[] the judicial process” (*id.* at 344) by litigating the question “whether an arbitration contract exists” (*Gen. Guar.*, 427 F.2d at 928), and because it had done nothing more when it moved to bifurcate or, in the alternative, compel arbitration, it has not waived its right to arbitrate.

**B. Unity Fails To Establish That It Has Suffered Any Cognizable Prejudice Under *General Guaranty Or Republic Insurance*.**

In *Republic Insurance*, this Court held that, “for purposes of a waiver of an arbitration agreement[,] 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*.” 383 F.3d 346 (quoting *Subway Equip.*, 169 F.3d at 327) (emphasis added; alterations, omissions, and internal quotation marks omitted). Thus, in *Republic Insurance*, prejudice was established because “discovery \* \* \* was *not* limited solely to \* \* \* nonarbitrable claims”; in fact, “[t]he parties also conducted discovery relating to the *issues* that [the plaintiff subsequently sought] to arbitrate.” *Id.* at 347 (emphases added). As the Court explained, the plaintiff there “did *not* waive its arbitration rights by asking the district court to determine” the validity of an assignment that, in turn, would determine whether the defendant was bound by an arbitration agreement; rather, it committed a waiver when it “invoked the judicial process for all of the *issues* in [the] case, including those subject to arbitration,

rather than limiting its pretrial activity to the threshold question whether there was a valid agreement to arbitrate.” *Id.* at 345 (emphases added).

Unity seeks to blur the distinction drawn in *Republic Insurance* by delving into the facts of *Subway Equipment Leasing*. Unity Br. 15-16. Indeed, Unity argues that *Republic Insurance*’s holding is limited to *Subway Equipment Leasing*’s facts because *Republic Insurance* quotes *Subway Equipment Leasing*. This reasoning is misguided. In *Republic Insurance*, this Court held that a party waives its right to arbitrate if it invokes the judicial process and engages in discovery with respect to arbitrable *issues*, but, citing *General Guaranty*, the Court clearly reaffirmed that no waiver occurs when a party’s actions are confined to seeking a threshold determination on an issue that implicates the very existence of an arbitration agreement. 383 F.3d at 345-47.

Alternatively, Unity asserts that “should this Court reverse and compel arbitration Cingular undoubtedly will raise the accord/satisfaction and release issue in arbitration, thus arbitrating precisely the *same issue* in that forum that, much to Unity’s detriment, already will have litigated for some four years.” Unity Br. 16-17 (emphasis by Unity). Of course, Cingular’s position in this appeal is that the district court should finish what it started by resolving once and for all whether the Letter Agreement superseded the Reseller Agreements (without entangling that threshold issue with the other issues in the case). If this Court agrees with us on

that score, the four years that the parties supposedly “have litigated” this issue (*but see* Cingular Br. 8-13 (describing procedural history of the case)) will not be for naught. If the jury determines that the Letter Agreement did not supersede the Reseller Agreements (thus requiring the case to be sent to arbitration), that issue would “not [be] open for redetermination through arbitration.” *Gen. Guar.*, 427 F.2d at 930. And if the jury determines that the Letter Agreement did supersede the Reseller Agreements, that determination would, at the same time, dispose of the merits of Unity’s claims.

If the Court concludes that an arbitrator should resolve this threshold issue in the first instance, Cingular could not seek a redetermination of the district court’s holding that there is a genuine issue of material fact precluding summary judgment. *Id.* By contrast, because that material factual issue has not been finally resolved, Cingular would be entitled to ask the arbitrator to do so. Unity’s argument thus boils down to the complaint that four years have passed since it filed its complaint. But the delay about which Unity complains is not a basis for finding prejudice absent some reason to believe that evidence favorable to Unity’s position has been lost in the interim.<sup>3</sup> Unity has identified none.

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<sup>3</sup> *See, 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

Finally, Unity suggests that it has been prejudiced because it “voluntarily withdrew its remaining [Telecommunications Act] claims ‘in an effort to streamline this litigation,’” with the expectation that doing so would lead to a trial on the merits of its state-law claims in court. Unity Br. 8 (quoting 4 R. Doc. No. 120, at 2 n.2). Yet Unity withdrew these claims only *after* Cingular moved to compel arbitration.<sup>4</sup> Unity cannot pretend that its voluntary dismissal of these claims was in reliance on any action taken by Cingular. Unity also cannot reasonably suggest that it was unforeseeable that Cingular would exercise its statutory right to appeal the district court’s order denying the motion to bifurcate, or in the alternative, compel arbitration. Unity offers no explanation as to how *its* unilateral action can give rise to any cognizable “prejudice.”

In sum, the parties conducted discovery as to the accord and satisfaction and release issue only (*i.e.*, “whether an arbitration contract exists”), and Cingular “invoked the judicial process” to seek a determination on that issue only. Because Cingular has taken no actions that are inconsistent with its right to arbitrate under

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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.”); *Am. Express Fin. Advisors, Inc. v. Zito*, 45 F. Supp. 2d 230, 235 (E.D.N.Y. 1999) (“the mere passage of time cannot be relied upon as a waiver of the right to arbitrate”); *Baker v. Conoco Pipeline Co.*, 280 F. Supp. 2d 1285, 1300 (N.D. Okla. 2003) (same); *Danny’s Constr. Co. v. Birdair, Inc.*, 136 F. Supp. 2d 134, 144 (W.D.N.Y. 2000) (same).

<sup>4</sup> Compare 3 R. Doc. No. 81 (Mar. 15, 2006) with 4 R. Doc. No. 120 (June 12, 2006).

*General Guaranty* and *Republic Insurance*, Unity has suffered no “prejudice” of the sort that would support its waiver argument.

**C. The District Court’s Decision Is Subject To De Novo Review.**

Recognizing the clear connection between *General Guaranty* and this case, Unity attempts to insulate the district court’s ruling from plenary review by casting its conclusory determination that a waiver had occurred as a “finding of fact” that this Court may review for “clear error” only. *See* Unity’s Br. 1, 10-11, 19. There is no dispute, however, as to any “fact,” as the only relevant fact here is the procedural history of this case. Therefore, because “the factual foundations underlying the question of waiver” are not in dispute, this Court “review[s] the waiver finding itself \* \* \* de novo.” *Walker v. J.C. Bradford & Co.*, 938 F.2d 575, 576-77 (5th Cir. 1991); *accord Republic Ins. Co.*, 383 F.3d at 344 (“We review whether a party’s conduct amounts to a waiver of arbitration de novo, but we review any factual findings underlying the district court’s waiver determination for clear error.”); *Subway Equip.*, 169 F.3d at 326 (same).

Unity also tries to insulate the district court’s ruling from review entirely by arguing that the mandate in the prior appeal in this case somehow precluded arbitration. *See* Unity’s Br. 7. The mandate rule, however, applies “only to issues that were decided” by this Court. *Conkling v. Turner*, 138 F.3d 577, 587 (5th Cir. 1998) (quoting *Terrell v. Household Goods Carriers’ Bureau*, 494 F.2d 16, 19 (5th

Cir. 1974)); *see also United Indus., Inc. v. Simon-Hartley, Ltd.*, 91 F.3d 762, 764 (5th Cir. 1996) (“a district court is not precluded from acting upon a matter neither before nor acted upon by the appeals court”). The issue of arbitration was *not* before this Court in the prior appeal, and this Court’s opinion merely stated that it was “unable to say that the district court erred in its denial of the motion for summary judgment and in permitting this case to go forward.” Unity’s contention that, by affirming the district court’s ruling “permitting this case to go forward,” this Court meant to say that the case must “go forward” in the district court only, and never in arbitration, is frivolous. Indeed, following this Court’s affirmance, Cingular agreed that the case should “go forward” in the district court via a bifurcated trial on the issue of accord and satisfaction and release. Put simply, though, because neither bifurcation nor arbitration was before the Court in the prior appeal, the Court’s mandate does not cover those issues.<sup>5</sup>

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<sup>5</sup> Similarly, Unity seems to suggest that Judge Pickering’s August 27, 2003 scheduling order, which stated that “[t]his matter is stayed until *the Court* resolves the issue of accord and satisfaction and release” (Unity’s Br. 5 (quoting 1 R. 151) (emphasis by Unity)), somehow put Cingular on notice that the case would not be bifurcated for trial. Unity places undue emphasis on Judge Pickering’s reference to “the Court,” which, of course, can mean either a judge acting alone or a judge acting in conjunction with a jury. The key word in the sentence is “resolves,” which plainly contemplates a *final* resolution of the issue rather than a preliminary determination that Cingular was not entitled to summary judgment. In certifying the issue for interlocutory appeal, Judge Duval similarly reasoned that it would “save[] everybody a lot of time and money to have this matter resolved.” 3 R. Doc. No. 86-3, at 16-17.

## CONCLUSION

As we explained in our opening brief, under *General Guaranty* and *Republic Insurance*, Cingular has not waived its right to arbitrate pursuant to the Reseller Agreement if that agreement does, in fact, remain in force. Unity's brief fails to show otherwise. Therefore, 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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JANUARY 22, 2007

## CERTIFICATE OF SERVICE

I hereby certify that on this 22<sup>nd</sup> day of January, 2007, 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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